Digitized by the Internet Archive
in 2023

https://archive.org/details/corpus-juris-1914_1921_24

IMPORTANT

For later Cases, Developments and Changes in the Law see Cumulative Annual Annotations, same title, page, and note number.

READY REFERENCE TABLES

1. **TABLE OF TITLES,** page v
2. **TABLE OF WORDS AND PHRASES,** page v
3. **TABLE OF MAXIMS,** page v
4. **TABLE OF TITLES IN CYC-CORPUS JURIS SYSTEM, 16 C. J., page vii**
5. **TABLE OF ABBREVIATIONS, 16 C. J., page x**
6. **CYC-CORPUS JURIS PARALLEL REFERENCE TABLE,** page ix

[The last table shows where every proposition in CYC (if still the law) is located in CORPUS JURIS. This table translates CYC citations into CORPUS JURIS citations. No matter where you get a CYC citation, whether in an opinion, a brief, an annotated statute, a textbook, or any other source, this table will give the corresponding CORPUS JURIS citation. The CYC INDEX AND CONCORDANCE, by means of this table, becomes a Key to CORPUS JURIS equally as well as to CYC.]

THE LAW UP TO THE LAST MINUTE, BY LETTER OR BY WIRE

FREE CITATIONS FROM EVERY JURISDICTION

Photographic Service to CYC-CORPUS JURIS Subscribers

By applying by letter or wire to the ANNUAL ANNOTATIONS BUREAU, 272 Flatbush Ave., Extension, Brooklyn, N. Y., giving volume, page, and note number of CYC or CORPUS JURIS, you will receive:

1. All citations of cases subsequent to the last volume of ANNUAL ANNOTATIONS FREE, by mail or wire according to request.
2. Photographic copies of decisions by mail at prices set out below.

There are about 30,000 decisions, containing about 100,000 points of law, being handed down annually. These cases are analyzed and annotated daily to specific rules of law in CYC and CORPUS JURIS from the advance sheets of the reporters and are kept in readiness for instant use. These late cases may win a case for you. They are given to our CYC and CORPUS JURIS subscribers FREE, except that answers by wire will be sent Collect. Subscribers to CYC and the ANNUAL ANNOTATIONS and CORPUS JURIS thus get the law up to the last minute without additional cost.

This is the only service in existence which gives you access AT ONCE, and without cost, to ALL cases subsequent to the ANNUAL ANNOTATIONS or CORPUS JURIS and without loss of time or labor.

SPECIAL PHOTOGRAPHIC SERVICE

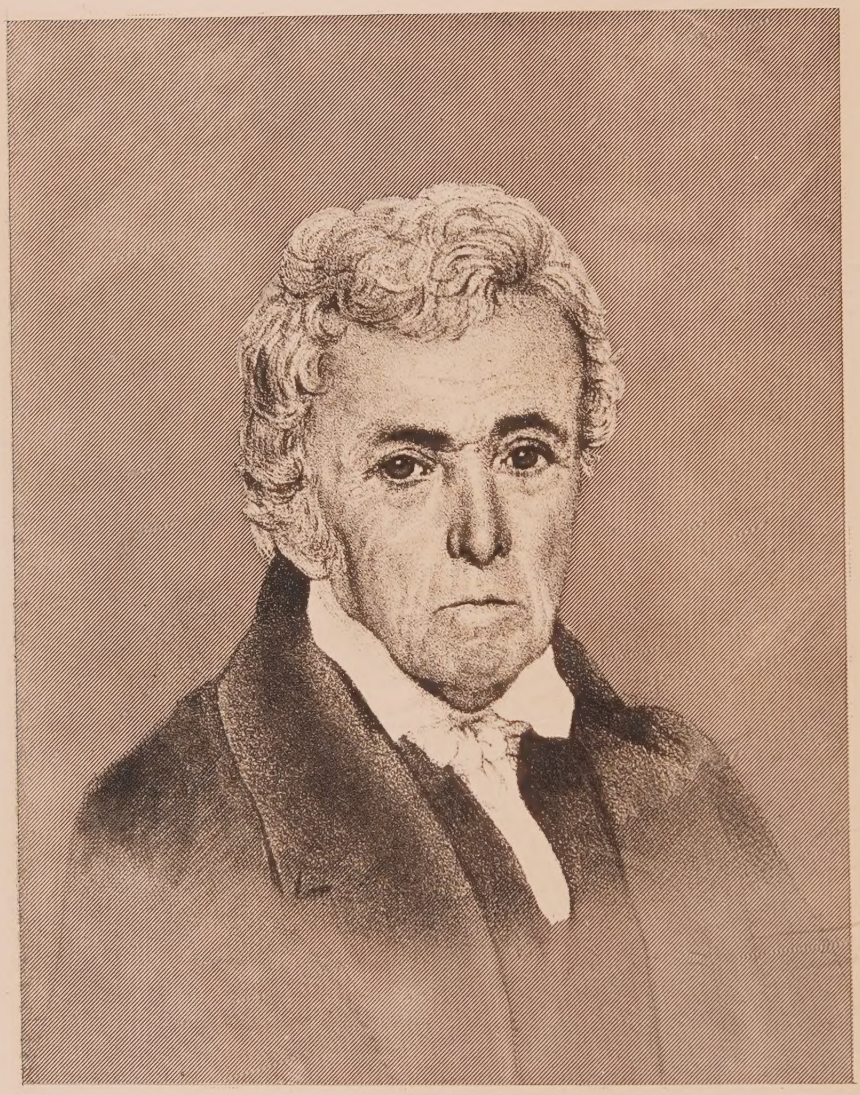
We are prepared to furnish our subscribers Photographic Copies from the original reports of cases cited in CYC, CORPUS JURIS, or ANNOTATIONS, or of cases subsequent thereto, for a merely nominal cost per printed page. MINIMUM charge for any one case is 50 cents (stamps will do), which should accompany your order if sent by mail.

F. E. BRIGHTMAN
ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

TABLE OF ABBREVIATIONS SEE VOLUME 16 CORPUS JURIS PAGE X

CITE THIS VOLUME

24 C. J.



D. Martin

JUDGE AND PRESIDING JUDGE OF LOUISIANA. 1815 - 1846

CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT

OF

THE WHOLE BODY OF THE LAW

KF
154
C6
Vol. 24
n/c

AS EMBODIED IN AND
DEVELOPED BY

ALL REPORTED DECISIONS

EDITED BY

WILLIAM MACK, LL.D.
Editor-in-Chief of the Cyclopedia of Law and Procedure

WILLIAM BENJAMIN HALE, LL.B.
Contributing Editor of the American and English Encyclopædia of Law
and the Encyclopædia of Pleading and Practice

The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.
GREENE, C.J., in *1 R. I. 356.*

VOLUME XXIV

New York
THE AMERICAN LAW BOOK CO.
London: Butterworth & Co., Bell Yard
1921

Copyright, 1921
By The American Law Book Company

Printed For A. L. B. Co.

TO

CHARLES WALTER DUMONT, LL.D.

the author of the plan of the Cyclopedia of Law and Procedure, the inspiration of the organization which brought that work to completion, and whose creative genius has evolved the plan of Corpus Juris, these volumes are dedicated.

TABLES OF TITLES, WORDS AND PHRASES, AND MAXIMS IN THIS VOLUME

TITLES

	PAGE
Executors and Administrators	1

WORDS AND PHRASES*

	PAGE
Executorship expenses	1224
Executory	1224
Executory process	1224
Executrix	1224
Exedos or Exidos	1224
Exemplary	1224
Exemplification	1224
Exempli gratia	1224
Exempt	1224

MAXIMS

	PAGE
Exempla illustrant, non restringunt legem	1224
Exempla non restringunt regulam, sed loguntur de casibus crebrioribus	1224

* The Spanish words and phrases and other Civil Law matter in this volume were prepared by CHARLES SUMNER LOBINGIER, PH.D., D.C.L.; Judge of the United States Court for China; Professorial Lecturer in Law, University of the Philippines. Sometime Judge of the Court of First Instance, Philippines; Member Nebraska Supreme Court Commission; Professor of Law in the University of Nebraska. Author of "The People's Law" (the Macmillan Co. 1909), "Philippine Practice" (1907), "The Evolution of the Civil Law" (1913), "Territories" 38 Cyc 191, "Contratos" 13 C. J. p 802, and other articles in legal encyclopedias. Other Words and Phrases in this volume were prepared by WILLIAM MORTIMER CROWTHER.

TABLE OF TITLES IN CYC-CORPUS JURIS SYSTEM

See Volume 16 Corpus Juris Page vii

TABLE OF ABBREVIATIONS

See Volume 16 Corpus Juris Page x

CYC–CORPUS JURIS PARALLEL REFERENCE TABLE

The following tables show where every proposition in CYC (if still the law) is located in CORPUS JURIS. This table translates CYC citations into CORPUS JURIS citations. No matter where you get a CYC citation, whether in an opinion, a brief, an annotated statute, a textbook, or elsewhere, this table gives the corresponding CORPUS JURIS citation. The CYC Index and Concordance, by means of this table, becomes a Key to CORPUS JURIS, equally as well as to CYC. **This table makes Cyc Citations available in Corpus Juris.**

EXECUTORS AND ADMINISTRATORS

18 Cyc Page	Note	23 C. J. Sec.
55	1	1
55	2	1
55	3	1
55	4	2
56	5	3
56	6	3
56	7	4
57	8	4
57	9	5
57	10	5
57	11	6
57	12	6
57	13	7
58	14	7
58	15	7
58	16	7
58	17	7
58	18	7
58	19	8
58	20	8
58	21	8
58	22	8
58	23	9
59	24	10
59	25	10
59	26	10
60	27	10
60	28	25
60	29	25
60	30	18
60	31	18
60	32	11
61	33	11
61	34	12
61	35	13
62	36	14
62	37	14
62	38	14
62	39	15
63	40	15
63	41	15
63	42	15
63	43	16
63	45	19
63	46	19
63	47	20
63	48	20
64	49	22
64	50	22
64	51	23
64	52	24
64	53	24
64	54	26
64	55	26
65	56	27
65	57	27
65	58	28
65	59	28
65	60	29
65	61	29
65	62	30
66	63	30
66	64	30
66	65	30
67	66	30
67	67	31
67	68	31
67	69	31
67	70	33
67	71	34
69	72	34
69	73	34
69	74	34
69	75	36
69	76	36
69	77	37
70	78	38
70	79	51
70	80	327
70	81	51
71	82	39
71	83	40
71	84	40
71	85	40
71	86	41
72	87	41
72	88	42
72	89	45
73	90	45
73	91	46
73	92	47
73	93	47
73	94	47
73	95	44
73	96	44
73	97	49
73	98	49
73	99	52
74	1	53
74	2	54
74	3	54
74	4	56
74	5	64
74	6	55
75	7	60
75	8	59
75	9	58
75	10	63
75	11	63
75	12	63
75	13	58
76	14	58
76	15	58
76	16	58
76	17	58
76	18	62
77	20	65
77	21	65
77	22	65
77	23	59
77	24	66
77	25	66
77	26	66
78	27	67
78	28	68
78	29	68
78	30	70
78	31	69
78	32	72
78	33	74
78	34	74
79	35	74
79	36	74
79	37	74
79	38	75
79	39	75
79	40	75
80	41	78
80	42	78
80	43	78
80	44	78
80	45	81
80	46	84
80	47	81
81	48	82
81	49	79
81	50	82
81	51	83
81	52	86
81	53	86
82	54	86
82	55	86
82	56	87
82	57	87
82	58	87
82	59	168
82	60	87
82	61	87
83	62	87
83	63	87
83	64	88
83	65	92
84	66	92
84	67	92
84	68	92
84	69	93, 97
85	70	94, 95
85	71	98
86	72	99, 100
86	73	102
87	75	103
87	76	103
87	77	103
87	78	103
88	79	103
88	80	103
88	81	103
88	82	103
88	83	103
88	84	103
88	85	104
88	86	104
88	87	104
89	88	108,110
90	89	108
90	90	108
90	91	109
90	92	109
90	93	108
90	94	108
91	95	108
91	96	111
91	97	91
92	98	113
92	99	113
93	1	113
93	2	113
93	3	113
93	4	113
93	5	115
93	6	115
93	7	116
93	8	116
94	9	117
94	10	117
94	11	117
94	12	118
94	13	119
94	14	133
94	15	127
94	16	127
94	17	134
95	18	133
95	19	134
95	20	133
95	21	133
95	22	126
95	23	129
95	24	125
95	25	124
95	26	128
95	27	131
95	28	133
95	29	132
95	30	136
95	31	121
96	32	121
96	33	121
96	34	122
96	35	122
96	36	122
96	37	123
96	38	123
97	39	123
97	40	137
97	41	137
97	42	138
97	43	138
97	44	138
97	45	138
97	46	138
98	47	138
98	48	138
98	49	141
98	50	141
98	51	141
98	52	141
98	53	141
98	55	24 C.J. 2757
99	56	" 2757
99	57	" 2757
99	58	" 2757
99	59	" 2757
99	60	" 2758
100	61	" 2758
100	62	" 2760
100	63	" 2760
100	64	" 2760
100	65	" 2761
101	66	" 2762
101	67	" 2762
101	68	" 2763
101	69	" 2764
101	70	" 2765
102	71	" 2766
102	72	" 2766
102	73	" 2766
102	74	" 2766
102	75	" 2766
102	76	" 2767
102	77	" 2767
102	78	" 2768
102	79	" 2771
102	80	" 2771
103	81	" 2771
103	82	" 2773
103	83	" 2773
103	84	" 2775
103	85	" 2775
103	86	" 2774
103	87	" 2774
103	89	" 2732
104	90	" 2732
104	91	" 2732
104	92	" 2734
104	93	" 2736
105	94	" 2736
105	95	" 2736
106	96	" 2736
106	97	" 2736
106	98	" 2736
106	99	2736
106	1	2736
106	2	2736
106	3	2736
106	4	2736
106	5	2736
106	6	2736
106	7	2737
107	8	2737
107	9	2737
107	10	2737
107	11	2738
107	12	2739
108	13	2740
108	14	2740
108	15	2740
108	17	2780
109	18	2781
109	19	2781
109	20	2782
109	21	2783
110	22	2799
111	23	2784
111	24	2785
111	25	2786
112	26	2786
112	27	2786
112	28	2786
112	29	2787
112	30	2893
112	31	2788
112	32	2788
113	33	2788
113	34	2788
113	35	2788
113	36	2788
113	37	2789
113	38	2789
113	39	2791
113	40	2793
113	41	2796
113	42	2798
113	43	23 C.J. 142
114	44	" 142
114	45	" 142
114	46	" 142
114	47	" 142
114	48	" 142
114	50	2814
114	51	2814
115	53	2872
115	54	2878
115	55	2878
115	56	2878
115	57	2878
115	58	2877
116	59	2878
116	60	2878
116	61	2878
116	62	2879
116	63	2879
116	64	2879
117	65	2879
117	66	2879
117	67	2879
117	68	2880
117	69	2881
117	70	2881
117	71	2881
117	72	2884
117	73	2885
117	74	24 C.J. 2882
118	75	" 2876
118	76	" 2883
118	77	" 2891
118	78	" 2891
118	79	" 2891
118	80	" 2892
119	81	145
119	82	145
119	83	145
119	84	146
119	85	146
119	86	146
120	87	146
120	88	146
120	89	147
120	90	147
120	91	147
120	92	148
121	93	148
121	94	148
121	95	148
121	96	148
121	97	148
121	98	148
121	99	149
121	1	149
121	2	150
122	3	150
122	4	150
122	5	153
122	6	153
122	7	153
122	8	154
122	9	154
122	10	154
122	11	154
122	12	154
122	13	154
123	14	154
123	15	154
123	16	154
123	17	154
123	18	156
123	19	159
123	20	160
123	21	161
124	22	163
124	23	164
124	24	172
124	25	172
124	26	173
124	27	167
124	28	167
124	29	168
124	30	168
124	31	169
125	32	169
125	33	169
125	34	169
125	35	174
125	36	174
125	37	174
125	38	174
125	39	174
125	40	174
125	41	176
126	42	186
127	43	186
127	44	185
127	45	178
127	46	183
127	47	187
127	48	187
127	49	188
128	50	188
128	51	188
128	52	188
128	53	189
128	54	190
129	55	190
129	56	193
129	57	193
129	58	193
129	59	193
129	60	193
129	61	193
130	62	191
130	63	192
130	64	192
131	65	194
131	66	24 C.J. 2742
131	67	" 2776
131	68	" 2797
131	69	" 2890
131	70	" 2890
131	71	212
131	72	195
132	73	197
132	74	197
132	75	197
132	76	24 C. J. 2742
132	77	197
132	78	197
132	79	197
132	80	199
132	81	195
133	82	200
133	83	200
133	84	200
133	85	201
133	86	201
133	87	201
133	88	201
133	89	210
133	90	202
134	91	200
134	92	206
134	93	208
134	94	208
134	95	209
134	96	206
135	97	206
135	98	206
136	99	206
136	1	213
137	2	213
137	3	215
137	4	220
137	5	220
138	6	229
138	7	221
138	8	221
138	9	227
138	10	228
138	11	231
139	12	231
139	13	231
139	14	231
139	15	232
139	16	240
140	17	240
140	18	400
140	20	238
140	21	238
140	22	243
140	23	243
140	24	243
140	25	243
140	26	243
141	27	243
141	28	246
141	29	246
141	30	247
142	31	247
142	32	247
143	33	247
143	34	247
143	35	247
143	36	247
143	37	247
143	38	247
144	39	247
144	40	247
144	41	247
144	42	247
144	43	247
144	44	248
144	45	248
144	46	248
144	47	250
144	48	250
145	49	250
145	50	250
145	51	251
145	52	252
145	53	252
145	54	253
145	55	253
146	56	260
147	57	261
147	58	261
147	59	261
147	60	261
147	61	24 C.J. 2799
148	62	" 2799
148	63	" 2799
148	64	263
148	65	263
148	66	263
148	67	263
148	68	263
148	69	264
148	70	264
148	71	265
149	72	266
149	73	266
150	74	266
150	75	269
150	76	269
150	77	269
150	78	269
150	79	269
150	80	269
150	81	269
150	82	269
150	83	270
151	84	270
151	85	271
151	86	272
151	87	273
151	88	273
151	89	273
151	90	274
151	91	275

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc 23 C. J.			18 Cyc 23 C. J.			18 Cyc 23 C. J.			18 Cyc 23 C.J.			18 Cyc 23 C.J.			18 Cyc 23 C.J.			18 Cyc 24 C. J.			18 Cyc 24 C.J.		
Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.
151–92		275	164–92		297	178–92		324	198–91		376	213–90		399	226–92		450	246–88		482	266–88		517
151–93		275	164–93		297	178–93		324	198–92		376	213–91		398	226–93		450	246–89		482	266–89		518
152–94		275	164–94		297	178–94		324	198–93		377	213–92		398	226–94		450	246–90		482	266–90		518
152–95		277	165–95		297	179–95		324	199–94		377	214–93		400	226–95		451	246–91		482	266–91		518
152–96		276	165–96		297	179–96		324	199–95		377	214–94		400	226–96		451	247–92		482	266–92		518
152–97		277	165–97		301	179–97		324	199–96		377	214–95		401	227–97		451	247–93		488	267–93		519
152–98		277	165–98		301	180–98		325	199–97		378	215–96		401	227–98		451	248–94		483	267–94		520
152–99		277	166–99		299	180–99		325	199–98		378	215–97		401	227–99		451	248–95		483	267–95		520
152– 1		277	166– 1		298	181– 1		327	199–99		378	215–99		403	227– 1		451	248–96		483	267–96		521
152– 2		277	166– 2		298	181– 2		327	199– 1		378	215– 1		403	227– 2		451	248–97		483	267–97		521
152– 3		277	166– 3		298	181– 3		327	199– 2		378	215– 2		404	228– 3		451	248–98		483	267–98		521
152– 4		277	166– 4		298	182– 4		329	199– 3		378	216– 3		404	228– 4		451	249–99		483	267– 1		522
153– 5		277	166– 5		298	182– 5		329	199– 4		378	216– 4		404	228– 5		452	249– 1		483	267– 2		522
153– 6		277	166– 6		298	182– 6		330	199– 5		378	216– 5		407	228– 6		452	249– 2		483	267– 3		522
153– 7		277	166– 7		298	183– 7		330	200– 6		378	216– 6		407	228– 7		452	249– 3		483	267– 4		522
153– 8		277	166– 8		298	184– 8		330	200– 7		378	216– 7		406	229– 8		452	249– 4		484	267– 6		523
153– 9		277	166– 9		298	184– 9		330	200– 8		378	216– 8		408	229– 9		454	249– 5		484	268– 7		523
153–10		277	167–10		298	184–10		325	200– 9		378	216– 9		408	229–10		455	249– 6		485	268– 8		524
153–11		277	167–11		300	184–11		334	200–10		378	216–10		408	229–11		457	250– 7		485	268– 9		525
153–12		277	167–12		303	184–12		334	200–11		378	216–11		408	229–12		457	250– 8		485	268–10		525
153–13		277	167–13		305	184–13		338	200–12		379	216–12		408	229–13		457	250– 9		486	268–11		525
153–14		277	167–14		305	184–14		338	200–13		379	216–13		409	229–14		457	250–10		486	268–12		525
153–15		277	167–15		305	185–15		338	200–14		379	216–14		409	229–15		457	251–11		486	269–13		525
154–16		277	167–16		305	185–16		338	200–15		380	216–15		409	229–16		458	251–12		486	270–14		526
154–17		277	168–17		305	185–17		337	200–16		380	216–16		409	230–17		459	251–13		487	270–15		526
154–18		277	168–18		305	185–18		340	200–17		380	216–17		409	230–18		459	251–14		487	270–16		526
154–19		277	168–19		305	185–19		341	201–18		380	217–18		409	230–19		459	251–15		487	270–17		526
154–20		280	168–20		304	185–20		342	201–19		380	217–19		410	230–20		459	251–16		487	270–18		526
155–21		280	168–21		308	186–21		342	201–20		380	217–20		410	230–21		459	251–17		488	270–19		527
155–22		280	168–22		308	186–22		343	201–21		380	217–21		411	231–22		460	252–18		488	271–20		527
155–23		280	168–23		308	186–23		343	201–22		381	217–22		412	231–23		460	252–19		488	271–21		527
155–24		280	168–24		308	186–24		344	201–23		381	217–23		413	231–24		461	252–20		488	271–22		527
155–25		279	168–25		308	186–25		344	201–24		381	217–24		413	233–25		461	252–21		488	271–23		528
155–26		279	168–26		308	187–26		344	201–25		381	217–25		413	233–26		462	252–22		489	271–24		528
155–27		279	169–27		309	187–27		345	201–26		381	217–27		403	233–27		462	253–23		489	271–25		528
155–28		278	169–28		307	187–28		345	201–27		381	217–28		404	233–28		462	253–24		489	271–26		528
155–29		278	169–29		307	187–29		346	202–28		381	217–29		416				253–25		489	271–27		528
155–30		278	169–30		309	188–30		346	202–29		382	217–30		416				253–26		490	272–28		528
155–31		278	169–31		309	188–31		346	202–30		382	217–31		409				253–27		490	272–29		528
155–32		278	169–32		310	188–32		346	202–31		382	217–32		416				253–28		491	272–30		528
156–33		278	170–33		310	188–33		346	202–32		382	217–33		416				254–29		492	272–31		529
156–34		278	170–34		310	188–34		346	202–33		383	218–34		417				254–30		492	272–32		529
156–35		278	170–35		310	188–35		347	203–34		383	218–35		417				254–31		492	273–33		529
156–36		281	170–36		310	188–36		347	203–35		383	218–36		421				254–32		492	273–34		529
156–37		282	170–37		310	188–37		347	204–36		383	218–37		405				254–33		492	273–35		530
156–38		282	170–38		310	188–38		347	204–37		383	218–38		423				254–34		493	273–36		530
156–39		282	170–39		310	189–39		348	204–38		383	219–39		423				254–35		493	273–37		530
157–40		283	170–40		310	189–40		348	204–39		383	219–40		423				254–36		494	273–38		530
157–41		284	170–41		310	189–41		350	204–40		383	219–41		423				254–37		494	273–39		530
157–42		284	170–42		311	189–42		24 C.J. 1991	204–41		383	219–42		423				255–38		495	274–40		530
157–43		287	170–43		311				204–42		383	219–43		423				257–39		495	274–41		530
157–44		285	170–44		311	189–43		351	204–43		383	219–44		423				257–40		495	274–42		530
157–45		285	171–45		314	189–44		352	205–44		383	220–45		423				257–41		496	274–43		530
157–46		285	171–46		314	189–45		352	205–45		383	220–46		423				257–42		504	274–44		530
157–47		286	171–47		315	189–46		352	205–46		383	220–47		423				257–43		496	274–45		530
157–48		286	172–48		317	189–47		354	205–47		384	220–48		424				257–44		496	275–46		530
157–49		289	172–49		318	189–48		354	205–48		384	220–49		424				258–45		496	275–47		531
158–50		289	172–50		318	190–49		354	205–49		384	220–50		424				258–46		496	275–48		531
158–51		290	172–51		318	190–50		355	205–50		384	220–51		424				258–47		497	275–49		532
158–52		290	172–52		319	190–51		355	205–51		384	220–52		424				259–48		497	275–50		532
158–53		290	173–53		319	190–52		355	205–52		384	221–53		424				260–49		497	275–51		533
158–54		290	173–54		320	190–53		355	205–53		384	221–54		424				260–50		502	275–52		533
158–55		290	173–55		320	191–54		355	205–54		384	221–55		425				260–51		502	275–53		534
159–56		290	173–56		320	191–55		355	205–55		385	221–56		425				261–52		502	275–54		535
159–57		291	173–57		320	191–56		355	205–56		385	221–57		425				261–53		503	275–55		535
159–58		292	173–58		320	191–57		356	206–58		385	222–58		425				261–54		503	275–56		536
159–59		293	173–59		320	191–58		357	206–57		385	222–59		425				261–55		506	276–57		536
159–60		293	173–60		320	191–59		357	206–59		387	222–60		435				261–56		506	276–58		536
159–61		293	173–61		320	191–60		357	206–60		387	222–61		435				261–57		496	276–59		537
159–62		294	173–62		320	191–61		358	206–61		387	222–62		436				262–58		506	276–60		537
159–63		294	173–63		320	192–62		358	206–62		388	222–63		438				262–59		506	277–61		540
160–64		296	173–64		320	192–63		358	206–63		389	222–64		438				262–60		506	277–62		538
160–65		296	173–65		320	192–64		371	206–64		389	223–65		439				262–61		506	277–63		539
160–66		297	173–66		320	192–65		365	206–65		390	223–66		439				262–62		508	277–64		539
160–67		297	173–67		320	193–66		366	207–66		390	223–67		440				262–63		508	277–65		541
160–68		297	174–68		320	193–67		366	207–67		390	223–68		440				263–64		508	277–66		541
161–69		297	174–69		320	193–68		365	207–68		391	223–69		440				263–65		509	277–67		541
161–70		297	174–70		320	193–69		369	207–69		391	223–70		441				263–66		509	277–68		541
161–71		297	174–71		320	193–70		359	207–70		392	223–71		441				263–67		510	277–69		541
161–72		297	174–72		320	194–71		359	208–71		392	223–72		442				263–68		509	277–70		541
161–73		297	174–73		320	194–72		359	208–72		393	224–73		442				263–69		510	277–71		541
161–74		297	174–74		321	194–73		360	209–73		393	224–74		443				263–70		510	277–72		541
162–75		297	174–75		322	194–74		361	209–74		393	224–75		443				264–71		510	277–73		541
162–76		297	175–76		322	194–75		364	210–75		393	224–76		443				264–72		511	278–74		541
162–77		297	175–77		322	195–76		364	210–76		394	224–77		443				265–73		511	278–75		541
162–78		297	175–78		323	195–77		367	210–77		395	224–78		444				265–74		511	278–76		541
162–79		297	175–79		323	195–78		367	211–78		395	224–79		444				265–75		511	278–77		541
162–80		297	176–80		323	195–79		367	211–79		24 C.J. 1090	225–80		445				265–76		512	278–78		541
162–81		297	176–81		323	195–80		367				225–81		446				265–77		513	278–79		541
163–82		297	176–82		323	196–81		367	211–80		" 1090	225–82		446				265–78		513	278–80		541
163–83		297	176–83		323	196–82		367	211–81		" 1089	225–83		447				266–79		514	278–81		541
163–84		297	176–84		326	196–83		367	211–82		396	225–84		447				266–80		515	278–82		541
163–85		297	176–85		326	196–84		368	211–83		396	225–85		447				266–81		515	278–83		541
164–86		297	176–86		323	197–85		368	212–84		397	225–86		447				266–82		515	278–84		541
164–87		297	177–87		324	197–86		373	212–85		397	226–87		448				266–83		516	278–85		541
164–88		297	177–88		324	197–87		373	212–86		397	226–88		448				266–84		516	278–86		541
164–89		297	177–89		324	198–88		373	212–87		397	226–89		449				266–85		517	278–87		541
164–90		297	177–90		324	198–89		374	212–88		398	226–90		450				266–86		517	278–88		541
164–91		297	177–91		324	198–90		376	213–89		398	226–91		450				266–87		517	278–89		541

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc 24 C. J. Page	Note	Sec.
278–90		536
278–91		542
279–92		542
279–93		543
279–94		543
279–95		543
279–96		543
279–97		543
279–98		543
280–99		543
280– 1		534
280– 2		543
280– 3		543
280– 4		543
280– 5		542
280– 6		543
280– 7		544
280– 8		545
281– 9		546
281–10		546
281–11		546
281–12		546
281–13		547
282–14		547
282–15		547
282–16		548
283–17		549
283–18		549
283–19		549
283–20		549
283–21		549
283–22		550
284–23		550
284–24		550
284–25		550
284–26		551
284–27		551
284–28		551
284–29		551
284–30		551
284–31		552
284–32		552
284–33		553
285–34		553
285–35		553
285–36		553
285–37		554
285–38		554
285–39		555
285–40		555
286–41		556
286–42		556
286–43		557
286–44		557
286–45		557
286–46		557
286–47		557
286–48		557
286–49		557
286–50		557
286–51		557
286–52		557
286–53		557
286–54		557
286–55		557
286–56		557
286–57		557
286–58		557
287–59		557
287–60		557
287–61		557
287–62		557
287–63		557
287–64		557
287–65		557
287–66		558
287–67		558
287–68		559
288–69		559
288–70		559
288–71		559
288–72		559
288–73		559
288–74		559
288–75		559
288–76		559
288–77		559
288–78		559
289–79		559
289–80		559
289–81		559
289–82		559
289–83		559
289–84		559
289–85		559
289–86		561
289–87		561
290–88		562
290–89		562
290–90		562
290–91		562
290–92		562
290–93		562
290–94		571
290–95		567
290–97		563
290–98		563
290–99		565
291– 1		563
291– 2		563
291– 3		563
291– 4		570
291– 6		570
291– 7		572
291– 8		572
291– 9		572
291–10		572
292–11		572
292–12		568
292–13		574
292–14		575
292–15		575
292–16		569
292–17		569
292–18		576
293–19		576
294–20		577
294–21		579
294–22		580
294–23		582
294–24		582
295–25		584
295–26		584
295–27		585
295–28		586
295–29		586
296–30		586
296–31		586
296–32		589
296–33		592
296–34		592
296–35		592
297–36		593
297–37		593
297–38		593
297–39		593
297–40		593
297–41		594
299–42		595
299–43		596
299–44		596
299–45		596
299–46		596
299–47		595
299–48		596
299–49		598
300–50		598
300–51		599
300–52		599
300–53		601
300–54		602
301–55		603
301–56		602
301–57		602
302–58		607
302–59		607
302–60		608
303–61		608
302–62		609
302–63		609
302–64		609
303–65		610
304–66		610
304–67		610
304–68		610
304–69		610
304–70		610
305–71		611
305–72		611
305–73		612
305–74		612
305–75		612
305–76		612
305–77		612
305–78		612
305–79		613
306–80		614
306–81		613
306–82		614
306–83		614
307–84		614
307–85		614
307–86		614
308–87		614
308–88		614
308–89		615
308–90		615
308–91		615
309–92		615
309–93		615
309–94		616
309–95		616
309–96		616
309–97		616
309–98		617
309–99		618
309– 1		618
309– 2		618
309– 3		619
309– 4		619
310– 5		619
310– 6		619
310– 7		619
310– 8		619
310– 9		619
310–10		619
310–11		619
310–12		620
311–13		620
311–14		621
311–15		620
311–16		620
311–17		620
312–18		620
312–19		622
312–20		623
312–21		623
312–22		623
312–23		623
312–24		623
312–25		625
312–26		625
312–27		624
312–28		624
313–29		624
313–30		624
313–31		624
313–32		626
313–33		626
313–34		626
314–35		627
314–36		627
314–37		627
315–38		627
315–39		627
315–40		627
315–41		627
315–42		627
315–43		627
316–44		627
316–45		627
316–46		628
316–47		628
316–48		628
316–49		628
316–50		629
317–51		629
317–52		629
317–53		629
317–55		630
317–56		631
318–57		635
318–58		635
318–59		635
318–60		635
318–61		633
318–62		636
319–63		641
319–64		636
320–65		636
320–66		637
320–67		637
321–68		637
321–69		639
321–70		639
321–71		639
322–72		638
322–73		643
322–74		643
322–75		644
322–76		640
322–77		640
322–78		647
322–79		647
323–80		647
323–81		647
322–82		647
323–83		647
323–84		647
323–85		648
323–86		648
323–87		649
323–88		649
324–89		649
324–90		649
324–91		649
324–92		640
324–93		651
324–94		651
325–95		651
325–96		651
325–97		651
325–98		652
325–99		652
325– 1		652
325– 2		652
325– 3		652
325– 4		652
325– 5		653
325– 6		653
325– 7		653
326– 8		653
326– 9		653
326–10		654
326–11		654
326–12		655
326–13		655
327–15		656
327–16		656
327–17		656
327–18		656
328–20		657
328–21		657
328–22		657
328–23		657
328–24		657
328–25		657
328–26		657
328–27		657
328–29		658
328–30		658
329–32		659
329–33		659
329–34		659
329–37		660
329–39		661
329–40		661
329–42		662
329–43		662
329–44		662
330–45		662
330–47		663
330–48		663
330–50		664
330–51		664
330–53		665
330–54		665
330–55		665
330–56		665
330–57		666
330–58		666
330–59		666
330–60		666
330–61		666
330–62		666
331–63		666
331–64		667
331–66		668
331–67		668
331–68		668
331–69		668
331–70		668
331–71		668
331–72		668
331–73		668
331–74		669
331–75		669
332–76		669
332–77		669
332–79		670
332–80		670
332–82		671
332–83		671
332–85		672
332–86		672
332–87		672
332–88		672
333–89		672
333–90		672
333–92		673
333–93		673
333–94		674
333–95		674
333–96		674
333–97		674
333–99		675
334– 2		676
334– 3		676
334– 4		676
334– 5		676
334– 7		677
335– 9		678
335–10		678
335–11		679
335–12		679
335–13		679
335–14		679
335–15		679
336–16		679
336–17		679
336–18		679
336–19		679
336–20		679
336–21		679
336–22		679
336–23		679
336–24		680
336–25		680
336–26		680
337–27		680
337–28		680
337–30		681
337–31		681
337–32		681
337–34		682
337–35		682
337–36		682
337–37		682
337–38		682
337–39		682
337–40		682
338–41		682
338–42		683
338–43		683
338–44		683
338–45		683
338–46		683
338–48		684
338–49		684
338–50		684
338–51		684
338–52		684
338–53		684
338–54		684
339–55		684
339–57		685
339–58		685
339–59		685
339–60		685
339–61		685
339–62		685
339–63		685
339–64		685
339–65		685
340–66		685
340–68		686
340–69		686
340–70		686
340–71		686
340–72		686
340–73		686
340–74		686
340–75		686
340–76		686
341–77		686
341–78		686
341–79		687
341–80		687
341–81		687
341–82		687
341–83		687
341–84		687
341–85		687
341–86		687
341–87		687
341–88		687
341–89		687
342–90		687
342–91		688
342–92		688
342–93		688
342–94		688
342–95		688
342–96		667
343–97		688
343–98		688
343–99		688
343– 1		689
343– 2		689
343– 3		689
344– 4		689
344– 5		689
344– 6		690
344– 7		690
344– 8		691
344– 9		691
344–10		691
344–11		691
344–12		693
344–13		693
344–14		694
344–15		694
344–16		695
345–17		695
345–18		695
345–19		695
345–20		696
345–21		696
345–22		696
346–23		696
346–24		696
346–25		697
346–26		697
347–27		698
347–28		699
347–29		699
347–30		699
347–31		700
347–32		700
347–33		701
347–34		703
347–35		703
348–36		703
348–37		703
348–38		703
348–39		703
349–40		704
349–41		704
349–42		704
349–43		704
349–45		705
350–46		705
350–47		705
350–49		706
351–50		706
351–51		706
351–52		706
351–53		706
351–54		707
351–55		707
351–56		707
351–57		707
352–58		708
352–59		709
352–60		709
352–61		709
352–62		709
353–63		710
353–64		710
353–65		711
354–66		711
354–67		710
354–68		713
354–69		713
354–70		713
354–71		713
355–72		713
355–73		714
355–74		715
355–75		715
355–76		715
356–77		716
357–78		716
358–79		719
357–80		720
357–81		720
357–82		720
357–83		721
358–84		721
358–85		721
358–86		721
358–87		721
358–88		722
358–89		722
358–90		725
358–91		725
359–92		725
359–93		725
359–94		725
359–95		725
359–96		725
359–97		725
359–98		725
359–99		727
359– 1		727
359– 2		725
359– 3		728
360– 4		728
360– 5		730
360– 6		730
360– 7		730
360– 8		730
360– 9		731
360–10		731
360–11		731
360–12		731
361–13		731
361–14		732
361–15		733
361–16		734
361–17		734
361–18		734
361–19		734
361–20		734
362–22		736
362–23		737
363–24		737
363–25		739
363–26		741
363–27		741
363–28		741
363–29		741
363–31		742
363–32		742
363–33		743
363–34		743
363–35		743
364–36		744
364–37		744
364–38		744
364–39		745
364–40		745
364–41		745
364–42		745
364–43		745
364–44		745
364–45		745
364–46		745
364–47		745
364–48		745
365–49		745
365–50		745
365–51		745
365–52		746
365–53		746
365–54		746
365–55		746
365–56		747
365–57		747
365–58		747
365–59		747
365–60		747
365–61		747
366–62		747
366–63		747
366–64		747
366–65		747
366–66		747
366–67		748
366–68		748
366–69		748
366–70		748
366–71		749
366–72		749
366–73		749
366–74		749
366–75		749
367–76		749
367–77		749
367–78		749
367–79		749
367–80		749
368–81		749
368–82		749
368–83		749
368–84		749
368–85		749
368–86		749
368–87		749
368–88		749
368–89		749
368–90		749
368–91		749
368–92		750
368–93		751
369–94		751
369–95		751
369–96		750
369–97		750
369–98		750
369–99		750
369– 1		750
369– 2		752
369– 3		752
369– 4		752
370– 5		752
370– 6		752
370– 7		752
370– 8		752
370– 9		752
370–10		752
370–11		752
370–12		752
370–13		752
370–14		752
370–15		752
370–16		752
371–17		753
371–18		753
371–19		753
371–20		753
371–21		753
371–22		754
371–23		754
372–24		754
372–25		754
372–26		754
372–27		754
372–28		756
372–29		756
373–30		756
373–31		756
373–32		756
373–34		757
373–35		757
373–36		759
373–37		759
373–38		759
373–39		759
374–40		759
374–41		759
374–42		759
374–43		759
374–44		760
374–45		761
374–46		761
374–47		762
374–48		762
375–49		764
375–50		764
375–51		764
375–52		770
375–53		764
375–54		765
376–55		765
376–56		765
376–57		765
376–58		770
376–59		770
376–60		770
376–61		770
376–62		765
376–63		765
376–64		766
377–65		766
377–66		764
377–67		766
377–68		766
377–69		767
377–70		767
377–71		767
377–72		767
378–73		768
378–74		768
378–75		768
378–76		768
378–77		768
378–78		769
378–79		769
378–80		769
378–81		771
379–82		771
379–83		772
379–84		772
379–85		772
379–86		773
379–87		773
379–88		773
379–89		774
379–90		774
380–91		777
380–92		775
380–93		775
380–94		775
380–95		775
380–96		776
381–97		777
381–98		777
381–99		777
381– 1		777
381– 2		778
381– 3		779
381– 4		778
381– 5		778
382– 6		779
382– 7		779
382– 8		780
382– 9		780
382–10		780
383–11		780
383–12		780
383–13		781
383–14		781
384–15		781
384–16		781
384–17		781
384–18		782
384–19		782
384–20		782
384–21		783
384–22		783

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc 24 C.J.			18 Cyc 24 C.J.			18 Cyc 24 C. J.			18 Cyc 24 C.J.			18 Cyc 24 C. J.			18 Cyc 24 C.J.			18 Cyc 24 C.J.			18 Cyc 24 C.J.		
Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.	Page	Note	Sec.
384–23		784	397–23		827	407–25		876	426–26		908	443–26		932	464–27		954	476–27		973	488–29		1001
384–24		784	397–24		828	408–26		875	426–27		908	443–27		932	464–28		955	476–28		973	488–30		1001
384–25		784	397–25		828	408–27		875	426–28		909	443–28		933	466–29		955	476–29		973	488–31		1001
385–26		784	397–26		829	408–28		875	427–29		909	443–29		933	466–30		955	476–30		973	488–32		1001
385–27		784	397–27		829	408–29		875	427–30		912	445–30		933	466–31		955	476–31		973	488–33		1001
385–28		787	397–28		829	408–30		875	427–31		912	445–31		933	467–32		956	476–32		973	488–34		1001
385–29		785	397–29		829	408–31		875	427–32		912	445–32		933	467–33		956	476–33		973	488–35		1001
385–30		786	397–30		830	408–32		875	427–33		912	445–33		934	467–34		946	476–34		973	488–36		1001
385–31		787	398–31		831	408–33		875	427–34		913	446–34		934	467–35		957	476–35		973	488–37		1001
385–32		787	398–32		836	408–34		875	428–35		913	446–35		935	468–36		957	476–36		973	488–38		1001
385–33		788	398–33		838	408–35		875	428–36		913	447–36		935	468–37		957	476–37		973	488–39		1001
385–34		790	398–34		838	408–36		875	428–37		913	447–37		935	468–38		957	477–38		974	489–40		1001
385–35		791	398–35		838	408–37		875	428–38		913	447–38		935	468–39		957	477–39		974	489–42		1002
385–36		792	398–36		838	408–38		875	428–39		913	447–39		935	468–40		957	477–40		974	489–43		1002
386–37		792	398–37		842	408–39		875	429–40		913	447–40		936	468–41		957	477–41		974	489–45		1002
386–38		792	399–38		845	408–40		875	429–41		913	448–41		936	468–42		945	477–42		974	489–46		1002
386–39		792	399–39		845	408–41		875	429–42		913	448–42		936	468–43		945	477–43		974	489–47		1004
386–40		794	399–40		847	408–42		875	429–43		913	448–43		936	468–44		944	477–44		974	489–48		994
386–41		794	399–41		847	409–43		875	429–44		914	448–44		936	468–45		944	477–45		975	489–49		1007
386–42		794	399–42		847	409–44		875	429–45		914	448–45		937	468–46		958	478–46		975	489–50		1007
386–43		796	399–43		847	409–45		880	429–46		914	448–46		937	468–47		958	478–47		975	489–51		1004
386–44		795	400–44		847	409–46		877	429–47		914	449–47		937	469–48		958	478–48		975	490–52		1005
386–45		801	400–45		851	409–47		877	430–48		914	450–48		937	469–49		958	478–49		976	490–53		1004
387–46		801	400–46		851	409–48		877	430–49		914	450–49		937	469–50		958	478–50		977	491–54		1004
387–47		804	400–48		851	409–49		877	430–50		914	450–50		937	469–51		958	478–51		978	491–55		1004
387–48		804	400–49		851	409–50		877	430–51		914	450–51		937	469–52		958	478–52		978	491–56		1004
387–49		804	400–50		853	409–51		878	430–52		914	450–52		937	469–53		958	478–53		978	491–57		1006
387–50		804	400–51		853	410–52		879	430–53		915	450–53		937	469–54		958	478–54		978	491–58		1006
387–51		804	400–52		853	411–53		879	430–54		915	450–54		937	469–55		958	478–55		978	491–59		1006
388–52		804	400–53		853	411–54		878	431–55		915	450–55		937	469–56		959	478–56		978	491–60		1006
388–53		804	400–54		852	411–55		878	431–56		915	450–56		937	470–57		959	478–57		978	491–61		1006
388–54		804	401–55		852	411–56		878	431–57		915	450–57		937	470–58		959	479–58		978	491–62		1006
388–55		804	401–56		852	411–57		880	431–58		915	450–58		937	470–59		959	479–59		978	491–63		1006
388–56		804	401–57		852	411–58		880	431–59		916	450–59		937	470–60		959	479–60		978	491–64		1008
388–57		805	401–58		852	412–59		880	431–60		916	451–60		937	470–61		959	479–61		978	491–65		1008
388–58		805	401–59		852	412–60		881	431–61		916	451–61		937	470–62		959	479–62		981	491–66		1010
388–59		805	401–60		852	413–61		881	432–62		916	451–62		937	470–63		959	479–63		981	491–67		1011
388–60		805	401–61		854	413–62		882	432–63		916	451–63		937	470–64		959	479–64		981	491–68		1011
388–61		805	401–62		854	414–63		882	432–64		916	451–64		937	471–65		959	479–65		981	492–69		1011
388–62		806	401–63		855	414–64		882	432–65		916	451–65		937	471–66		959	479–66		982	492–70		1011
389–63		807	401–64		856	414–65		885	432–66		916	451–66		937	471–67		959	479–67		982	492–71		1011
389–64		807	401–65		855	415–66		885	432–67		916	451–67		937	471–68		959	479–68		982	492–72		1011
389–65		807	401–66		855	415–67		886	432–68		916	451–68		938	471–69		960	479–69		983	492–73		1015
389–66		807	401–67		856	415–68		886	432–69		917	452–69		939	471–70		961	480–71		985	492–74		1016
389–67		808	401–68		856	416–69		886	432–70		917	452–70		939	471–71		961	480–72		985	492–75		1016
389–68		808	401–69		856	416–70		887	432–71		917	453–71		939	471–72		961	480–73		985	492–76		1016
389–69		808	401–70		857	416–71		887	433–72		917	453–72		939	471–73		962	480–74		986	492–77		1017
389–70		809	401–71		857	416–72		887	433–73		918	453–73		940	472–74		962	482–75		986	493–78		1017
389–71		809	401–72		857	416–73		888	433–74		918	453–74		939	472–75		962	482–76		986	493–79		1017
389–72		809	401–73		857	417–74		888	433–75		918	453–75		939	472–76		962	483–77		986	493–80		1020
389–73		809	401–74		857	417–75		888	433–76		918	454–76		941	472–77		962	483–78		986	493–81		1020
390–74		809	401–75		859	417–76		889	433–77		918	454–77		942	472–78		962	483–79		986	493–82		1020
390–75		810	402–76		859	417–77		889	433–78		918	454–78		942	472–79		963	483–80		984	493–83		1020
390–76		810	402–77		859	417–78		889	433–79		919	454–79		942	472–80		965	483–81		987	493–84		1020
390–77		810	402–78		859	417–79		893	434–80		919	454–80		943	472–81		966	483–82		987	493–85		1020
390–78		810	402–79		859	417–80		894	434–81		919	454–81		943	472–82		965	483–83		987	493–86		1020
390–79		810	402–80		860	418–81		894	434–82		919	454–82		943	472–83		967	484–84		987	493–87		1020
390–80		811	402–81		861	418–82		895	434–83		919	455–83		943	472–84		967	484–85		987	493–88		1020
390–81		811	402–82		861	418–83		895	434–84		919	455–84		943	472–85		967	484–86		987	494–89		1020
391–82		812	402–83		864	418–84		896	435–85		919	455–85		943	472–86		967	484–87		987	494–90		1020
391–83		814	402–85		866	418–85		897	435–86		919	455–86		943	472–87		968	484–88		988	494–91		1020
391–84		814	402–86		865	418–86		898	435–87		919	455–87		943	473–88		968	484–89		988	494–92		1022
391–85		814	402–87		865	419–87		899	435–88		920	455–88		943	473–89		970	484–90		988	494–93		1023
392–86		815	403–88		865	419–88		900	435–89		921	455–89		943	473–90		970	484–91		989	494–94		1023
392–87		813	403–89		865	419–89		900	435–90		921	455–90		943	473–91		970	484–92		989	495–95		1023
392–88		816	403–90		865	419–90		900	435–91		921	455–91		943	473–92		970	484–93		989	495–96		1032
392–89		817	403–91		865	419–91		900	435–92		921	455–92		943	473–93		970	484–94		989	495–97		1028
392–90		817	403–92		865	420–92		901	435–93		921	455–93		943	473–94		971	484–95		989	495–98		1027
392–91		819	403–93		865	420–93		901	436–94		921	455–94		943	473–95		971	485–96		991	495–99		1027
393–92		819	403–94		865	420–94		902	436–95		922	455–95		943	473–96		971	485–97		991	495– 1		1025
393–93		819	403–95		865	420–95		902	436–96		922	455–96		943	473–97		971	485–98		991	496– 2		1027
393–94		820	403–96		867	420–96		902	436–97		922	455–97		952	473–98		971	485–99		1019	496– 3		1027
393–95		820	403–97		867	421–97		902	436–98		922	455–98		943	473–99		971	485– 1		1019	496– 4		1027
393–96		820	403–98		867	421–98		902	437–99		923	455–99		943	473– 1		971	485– 2		992	496– 5		1027
393–97		821	403–99		868	421–99		902	437– 1		924	455– 1		950	474– 2		971	485– 3		994	496– 6		1031
393–98		821	403– 1		868	422– 1		902	437– 2		924	456– 2		951	474– 3		971	485– 4		994	496– 7		1030
393–99		821	404– 2		869	422– 2		903	437– 3		925	456– 3		943	474– 4		971	486– 5		994	496– 8		1023
393– 1		821	404– 3		870	422– 3		905	438– 4		926	456– 4		943	474– 5		971	486– 6		994	496– 9		1023
393– 2		822	404– 4		870	422– 4		905	438– 5		927	456– 6		947	474– 6		971	486– 7		994	497–10		1027
394– 3		822	404– 5		870	422– 5		906	439– 6		928	457– 7		948	474– 7		971	486– 8		994	497–11		1023
394– 4		823	404– 6		871	423– 6		906	439– 7		928	457– 8		948	474– 8		971	486– 9		994	497–12		1023
394– 5		823	405– 7		871	423– 7		906	439– 8		929	458– 9		948	474– 9		971	486–10		994	497–13		1023
394– 6		823	405– 8		871	423– 8		906	439– 9		929	458–10		948	474–10		971	486–11		994	497–14		1023
395– 7		823	405– 9		871	423– 9		906	439–10		929	459–11		948	474–11		972	487–12		994	498–15		1029
395– 8		823	405–10		872	423–10		906	439–11		929	459–12		948	474–12		972	487–14		995	498–16		1030
395– 9		824	405–11		872	423–11		906	440–12		929	460–13		948	474–13		972	487–15		995	499–17		1033
395–10		824	405–12		872	424–12		907	440–13		929	460–14		948	474–14		972	487–16		995	499–18		1033
395–11		824	405–13		872	425–13		907	440–14		930	460–15		948	475–15		972	487–17		996	499–19		1033
395–12		825	405–14		873	425–14		907	440–15		930	460–16		948	475–16		972	487–18		996	499–20		1033
396–13		825	405–15		873	425–15		907	440–16		930	461–17		949	475–17		972	487–19		996	500–21		1033
396–14		825	405–16		873	425–16		907	440–17		930	461–18		949	475–18		973	487–20		996	500–22		1034
396–15		826	405–17		874	425–17		907	440–18		931	462–19		949	475–19		973	487–21		996	500–23		1035
396–16		826	405–18		875	426–18		907	440–19		931	462–20		952	475–20		973	487–22		998	500–24		1035
396–17		826	405–19		875	426–20		910	441–20		931	462–21		952	475–21		973	487–23		998	500–25		1035
396–18		826	405–20		875	426–21		907	441–21		931	462–22		952	475–22		973	487–24		998	500–26		1035
396–19		827	406–21		875	426–22		911	442–22		931	462–23		953	475–23		973	487–25		999	501–27		1035
396–20		827	406–22		875	426–23		908	442–23		931	463–24		953	475–24		973	488–26		999	501–28		1035
397–21		827	407–23		875	426–24		908	442–24		931	463–25		953	476–25		973	488–27		1000	501–29		1035
397–22		827	407–24		876	426–25		908	442–25		931	463–26		954	476–26		973	488–28		1001	501–30		1035

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	Note	24 C.J. Sec.
501–31		1035
501–32		1035
502–33		1035
502–34		1035
502–35		1035
502–36		1036
502–37		1036
502–38		1041
503–39		1041
503–40		1041
503–41		1041
503–42		1042
503–43		1041
503–44		1040
503–45		1040
503–46		1039
504–47		1037
504–48		1037
504–49		1038
504–50		1043
504–51		1044
505–52		1044
505–53		1044
505–54		1045
505–55		1045
505–56		1045
505–57		1045
505–58		1045
505–59		1047
505–60		1049
505–61		1047
505–62		1047
506–63		1047
506–64		1051
506–65		1051
506–66		981
506–67		1054
506–68		1054
507–69		1054
507–70		1054
507–71		1054
507–72		1054
507–73		1057
507–74		1057
507–75		1058
508–76		1058
508–77		1058
508–78		1058
508–79		1058
508–80		1059
508–81		1059
508–82		1059
508–83		1060
508–84		1060
508–85		1061
508–86		1061
508–87		1061
508–88		1061
509–89		1061
509–90		1061
509–91		1061
509–92		1061
509–93		1062
509–94		1062
509–95		1062
509–96		1062
510–98		1063
510–99		1068
510– 1		1064
510– 2		1064
510– 3		1064
510– 4		1066
511– 5		1066
511– 6		1066
511– 7		1066
511– 8		1069
512– 9		1069
512–10		1069
512–11		1069
512–12		1069
512–13		1070
512–14		1071
512–15		1071
512–16		1071
513–17		1072
513–18		1073
513–19		1073
513–20		1073
513–21		1075
513–22		1076
514–23		1076
514–24		1076
514–25		1076
514–26		1076
514–27		1076
514–28		1077
514–29		1077
514–30		1077
514– 1		1079
515– 2		1079
515– 3		1079
515– 4		1079
515– 5		1079
515– 6		1079
515– 7		1079
515– 8		1080
515– 9		1080
515–10		1080
515–11		1080
515–12		1081
515–13		1081
515–14		1081
515–15		1081
515–16		1081
516–17		1082
516–18		1082
516–19		1082
516–20		1082
516–21		1082
516–22		1082
516–23		1084
516–24		1084
516–25		1084
516–26		1084
516–27		1084
516–28		1084
516–29		1084
516–30		1085
516–31		1085
516–32		1085
516–33		1085
517–34		1085
517–35		1086
517–36		1086
517–37		1087
517–38		1087
517–39		1087
517–40		1088
517–41		1088
517–43		1090
517–44		1090
517–45		1090
517–46		1090
517–47		1090
517–48		1090
517–49		1090
517–50		1090
517–51		1090
517–52		1090
518–53		1090
518–54		1090
518–56		1092
518–57		1092
518–58		1092
518–59		1092
518–60		1092
518–61		1097
518–62		1097
518–63		1097
518–64		1093
518–65		1093
518–66		1093
519–67		1093
519–68		1093
519–69		1093
519–71		1094
519–72		1094
519–73		1094
519–74		1094
519–75		1095
519–76		1095
519–77		1095
519–78		1095
519–79		1095
519–80		1095
519–81		1096
519–82		1096
520–83		1096
520–84		1096
520–85		1098
520–86		1098
520–87		1098
520–88		1099
520–89		1099
520–90		1099
520–91		1099
520–92		1099
520–93		1099
520–94		1099
520–95		1099
520–96		1099
520–97		1100
521–98		1101
521–99		1103
521– 1		1103
521– 2		1103
521– 3		1103
521– 4		1103
521– 5		1103
521– 6		1103
521– 7		1103
521– 8		1102
521– 9		1103
521–10		1103
521–11		1104
521–12		1104
522–13		1104
522–14		1104
522–15		1105
522–16		1105
522–17		1105
522–18		1105
522–19		1105
522–20		1105
520–21		1105
522–22		1105
522–23		1105
522–24		1106
522–25		1106
523–26		1108
523–27		1108
523–28		1108
523–29		1108
523–31		1108
523–32		1108
523–33		1108
523–34		1108
523–35		1108
523–36		1108
523–37		1108
523–38		1108
523–39		1108
523–40		1109
524–41		1109
524–42		1109
524–43		1109
524–44		1109
524–45		1109
524–46		1109
524–47		1109
524–48		1109
525–49		1110
525–50		1110
525–51		1110
525–52		1110
525–53		1110
525–54		1111
525–55		1111
526–56		1111
526–57		1112
526–58		1112
526–59		1112
526–60		1112
526–61		1113
526–62		1113
526–63		1113
527–64		1113
527–65		1116
527–66		1116
527–67		1116
527–68		1116
527–69		1118
527–70		1118
527–71		1118
527–72		1118
527–73		1118
527–74		1118
528–75		1118
528–76		1118
528–77		1118
528–78		1118
528–79		1114
528–80		1114
528–81		1114
528–82		1114
528 84		1120
528–85		1120
528–86		1120
528–87		1120
528–88		1120
529–89		1120
529–90		1120
529–91		1120
529–92		1120
529–93		1120
529–94		1120
529–95		1120
529–96		1121
529–97		1121
529–98		1121
529–99		1121
529– 1		1121
529– 2		1121
529– 3		1121
529– 4		1121
529– 5		1121
530– 6		1121
530– 7		1121
530– 8		1121
530– 9		1121
530–10		1121
530–11		1122
530–12		1122
530–13		1122
531–14		1122
531–15		1122
532–16		1122
532–17		1122
532–18		1122
532–19		1122
532–20		1122
532–21		1122
532–22		1123
533–23		1123
533–24		1123
533–25		1123
533–26		1123
533–27		1123
533–28		1123
533–29		1123
533–30		1123
533–31		1123
533–32		1123
533–33		1123
534–34		1123
534–35		1123
534–36		1123
534–37		1117
534–38		1124
534–39		1124
534–40		1124
534–41		1126
534–42		1126
534–43		1126
534–44		1127
534–45		1127
534–46		1127
535–47		1127
535–48		1127
535–49		1127
535–50		1127
535–51		1127
535–52		1126
535–53		1128
535–54		1128
535–56		1129
535–57		1129
535–58		1129
535–59		1129
536–60		1130
536–61		1130
536–62		1130
536–63		1130
536–64		1130
536–65		1130
536–66		1130
536–67		1130
536–68		1130
536–69		1130
536–70		1130
536–71		1130
536–72		1132
537–73		1132
537–74		1132
537–75		1137
537–76		1137
537–77		1137
537–78		1137
537–79		1138
537–80		1136
537–81		1139
537–82		1139
537–83		1139
537–84		1139
537–85		1140
537–86		1140
537–87		1140
538–88		1140
538–89		1135
538–90		1135
538–91		1135
538–92		1142
538–93		1142
538–94		1142
538–95		1142
538–96		1142
538–97		1142
538–98		1142
538–99		1141
539– 1		1144
539– 2		1143
539– 3		1145
539– 4		1145
539– 5		1145
539– 6		1146
539–10		1146
539–11		1146
540–12		1146
540–13		1146
540–14		1146
540–15		1146
540–16		1146
540–17		1148
540–18		1148
540–19		1148
540–20		1149
540–21		1149
540–22		1149
540–23		1149
541–24		1149
541–25		1149
541–26		1149
541–27		1149
541–29		1150
541–30		1150
541–31		1151
542–32		1151
542–33		1151
542–35		1152
542–36		1152
542–38		1153
542–39		1153
543–40		1153
543–41		1153
543–42		1153
543–43		1153
543–44		1153
543–45		1153
544–46		1153
544–47		1154
544–48		1154
544–49		1154
544–50		1154
544–51		1154
544–52		1154
545–53		1154
545–54		1154
545–55		1154
545–56		1155
545–57		1155
545–58		1155
545–59		1155
545–60		1155
545–61		1155
545–62		1155
545–63		1155
546–64		1155
546–65		1156
546–66		1156
546–67		1156
546–68		1156
546–69		1156
547–70		1157
547–71		1158
548–72		1158
548–73		1158
548–74		1156
548–75		1156
548–76		1156
548–77		1156
548–78		1159
549–79		1159
549–80		1160
549–81		1161
550–82		1162
550–83		1162
550–84		1162
550–85		1162
550–86		1162
550–87		1163
550–88		1163
550–89		1163
551–90		1163
551–91		1163
551–92		1164
551–93		1164
551–94		1165
551–95		1165
551–96		1166
551–97		1166
552–98		1167
552–99		1168
553– 1		1169
553– 2		1170
554– 3		1170
554– 4		1170
554– 5		1170
554– 6		1171
554– 7		1171
554– 8		1171
555– 9		1172
555–10		1172
555–11		1175
555–12		1176
555–13		1176
555–14		1177
555–15		1177
555–16		1177
555–17		1178
555–18		1178
555–19		1179
555–20		1179
555–21		1179
556–22		1180
556–23		1180
556–24		1181
557–25		1181
557–26		1182
557–27		1182
557–28		1184
557–29		1184
557–30		1184
557–31		1184
558–32		1184
558–33		1184
558–34		1184
558–35		1184
558–36		1185
558–37		1186
559–38		1186
559–39		1186
559–40		1187
559–41		1187
559–42		1187
559–43		1188
559–44		1188
559–45		1188
560–46		1189
560–47		1189
561–48		1189
561–49		1189
561–50		1189
561–51		1189
561–52		1189
561–53		1189
561–54		1189
561–55		1189
561–56		1189
561–57		1189
561–58		1189
562–59		1189
562–60		1190
562–61		1190
562–62		1191
562–63		1191
562–64		1191
562–65		1191
562–66		1191
562–67		1191
562–68		1191
562–69		1191
562–70		1191
562–71		1191
562–72		1191
562–73		1191
562–74		1191
562–75		1191
562–76		1191
563–77		1192
563–78		1192
563–79		1192
563–80		1192
568–81		1192
563–82		1192
563–83		1193
563–84		1194
564–85		1194
564–86		1194
564–87		1194
564–88		1194
564–89		1194
564–90		1194
564–91		1194
564–92		1194
564–93		1194
564–94		1195
565–95		1195
565–96		1195
565–97		1195
565–98		1195
565–99		1195
565– 1		1195
565– 2		1195
566– 3		1195
566– 5		1197
566– 6		1197
566– 7		1197
566– 8		1196
567– 9		1196
567–10		1199
567–11		1199
567–12		1199
567–13		1197
568–14		1197
568–15		1197
568–16		1201
568–17		1201
569–18		1201
569–19		1202
569–20		1202
569–21		1202
570–22		1202
570–23		1202
570–24		1202
570–25		1202
570–26		1202
570–27		1202
570–28		1202
570–29		1203
570–30		1204
570–31		1205
571–32		1205
572–33		1205
572–34		1205
572–35		1205
572–36		1206
572–37		1206
572–38		1206
572–39		1206
573–40		1207
573–41		1207
573–42		1207
573–43		1208
573–44		1208
573–45		1209
574–46		1210
574–47		1210
574–48		1210
574–49		1210
574–50		1211
574–51		1211
574–52		1211
574–53		1211
574–54		1211
575–55		1211
575–56		1213
576–57		1214
576–58		1215
576–59		1215
576–60		1215
576–61		1215
576–62		1216
577–63		1216
577–64		1216
577–65		1217
577–66		1218
577–67		1219
577–68		1219
577–69		1219
577–70		1219
577–71		1219
577–72		907
578–73		1219
578–75		1221
578–76		1221
578–77		1221
578–78		1221
578–79		1221
578–80		1221
578–81		1222
578–82		1222
578–83		1223
579–84		1223
579–85		1223
579–86		1224
579–87		1224
579–88		1225
579–89		1225
579–91		1226
579–92		1226
579–93		1226
579–94		1226
580–95		1226
580–96		1226
580–97		1227
580–98		1227
580–99		1228
580– 1		1229
580– 2		1229
581– 3		1229
581– 4		1229
581– 5		1230
582– 6		1230
582– 7		1231
582– 8		1231
583– 9		1231
583–10		1231
583–11		1231
583–12		1231
584–13		1232
584–14		1233
584–15		1233
584–16		1233
584–17		1233
584–18		1233
584–19		1233
584–20		1233
585–21		1233
585–22		1236
585–23		1237
585–24		1237
585–25		1238
585–26		1239
586–27		1240
586–28		1240
586–29		1240
586–30		1240
586–31		1255
586–32		1255
587–33		1255
587–34		1256
587–35		1256
587–36		1256
587–37		1253
588–38		1253
588–39		1257
588–40		1257
588–41		1258
588–42		1258
588–43		1258
589–44		1258
589–45		1258
589–46		1258
589–47		1258
589–48		1259
589–49		1259
590–50		1259
590–51		1259
590–52		1260
590–53		1260
590–54		1260
590–55		1260
591–56		1260
591–58		1261
592–59		1262
593–60		1262
593–61		1265
593–62		1265
594–63		1261
594–64		1261
594–65		1263
594–66		1263
594–67		1263
594–68		1263
594–69		1264
595– 1		1266
595– 2		1266
595– 3		1266
595– 4		1266
595– 5		1266
595– 6		1266
595– 7		1266
595– 8		1266
596– 9		1266
596–10		1267
596–11		1267
596–13		1268
596–14		1268
596–15		1269
596–16		1269
596–17		1270
596–18		1270
596–19		1270
596–20		1271
596–21		1271
597–22		1271
597–23		1271
597–24		1272
597–25		1273
597–26		1273
597–27		1273
598–28		1273
598–29		1273
598–30		1273
598–31		1273
598–32		1274
598–33		1274
599–34		1274
599–35		1274
599–36		1274
599–37		1274
599–38		1275
599–39		1275
600–40		1275
600–41		1275
600–42		1275
600–43		1278
601–44		1278
601–45		1278
601–46		1278
601–47		1276
601–48		1276

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	Note	24 C.J. Sec.
601–49		1276
601–50		1276
601–51		1276
601–52		1277
602–53		1277
602–54		1277
602–55		1277
602–56		1277
602–57		1277
603–58		1279
603–59		1279
603–60		1279
603–61		1279
603–62		1279
603–63		1279
603–64		1279
603–65		1280
603–66		1280
604–67		1280
604–68		1280
604–69		1281
604–70		1281
604–72		1281
604–73		1281
604–74		1281
605–75		1345
605–76		1345
605–78		1282
605–79		1282
606–80		1282
606–81		1284
606–82		1284
606–83		1285
607–84		1285
607–85		1285
607–86		1287
607–87		1287
607–88		1287
607–89		1287
607–90		1287
607–91		1287
607–92		1289
608–93		1289
608–94		1289
608–95		1288
608–96		1288
608–97		1359
609–98		1290
609–99		1290
609– 1		1291
609– 2		1291
609– 3		1292
609– 4		1292
609– 5		1293
609– 6		1293
610– 7		1293
610– 8		1293
610– 9		1293
610–10		1293
610–11		1293
611–12		1293
611–13		1293
611–14		1294
611–15		1295
612–16		1295
612–17		1295
612–18		1295
613–19		1295
613–20		1295
613–21		1295
613–22		1295
613–23		1296
613–24		1296
614–25		1298
614–26		1298
614–27		1299
614–28		1299
614–29		1300
614–30		1300
614–31		1301
614–32		1301
614–33		1304
614–34		1304
614–35		1304
614–36		1304
614–37		1297
615–38		1297
615–39		1297
615–40		1297
615–41		1305
616–42		1305
616–43		1305
616–44		1305
617–45		1307
617–46		1308
617–47		1308
617–48		1308
617–49		1309
617–50		1309
617–51		1309
618–52		1310
618–53		1310
618–54		1311
618–55		1311
618–56		1311
618–57		1312
618–58		1312
618–59		1312
618–60		1312
619–61		1312
619–62		1312
619–63		1312
619–64		1312
619–65		1312
619–66		1313
619–67		1313
620–68		1314
620–69		1314
620–70		1314
620–71		1314
620–74		1315
621–75		1315
621–76		1315
621–77		1316
621–78		1317
622–79		1317
622–80		1317
622–81		1317
622–82		1317
622–83		1318
622–84		1318
623–85		1318
623–86		1318
623–87		1319
623–88		1319
623–89		1319
623–90		1320
623–91		1320
623–92		1320
623–93		1320
623–94		1321
623–95		1321
623–96		1321
623–97		1321
623–98		1322
624–99		1322
624– 1		1322
624– 2		1322
624– 3		1322
624– 4		1323
624– 5		1323
624– 6		1324
625– 7		1324
625– 8		1324
625– 9		1324
625–10		1325
626–11		1325
626–12		1325
626–13		1325
626–14		1325
626–15		1327
626–16		1327
627–17		1327
627–18		1329
627–19		1329
627–20		1329
627–21		1329
627–22		1329
627–23		1329
627–24		1329
627–25		1330
627–26		1330
627–27		1330
627–28		1331
628–29		1331
628–30		1331
628–31		1331
628–32		1331
628–33		1331
628–34		1331
628–35		1331
628–36		1331
628–37		1331
628–38		1331
628–39		1332
628–40		1332
629–41		1332
629–42		1332
629–43		1332
629–44		1333
629–45		1333
629–46		1333
629–47		1334
630–48		1334
630–49		1335
630–50		1342
631–51		1342
631–52		1342
631–53		1334
631–54		1342
631–55		1336
631–56		1336
631–57		1336
631–58		1336
631–59		1339
632–60		1339
632–61		1339
632–62		1340
632–63		1340
632–64		1340
632–65		1340
632–66		1340
632–67		1340
632–68		1340
632–69		1340
632–70		1341
633–71		1341
634–72		1341
634–73		1341
634–74		1341
634–75		1341
634–76		1341
634–77		1343
635–78		1343
635–79		1343
635–80		1343
635–81		1343
635–82		1343
636–83		1343
636–84		1343
636–85		1343
636–86		1344
636–87		1344
636–89		1346
636–90		1346
637–91		1346
637–92		1346
637–93		1346
637–94		1346
637–95		1346
637–96		1347
637–97		1347
637–98		1347
637–99		1348
638– 1		1348
638– 2		1348
639– 3		1348
639– 4		1348
639– 5		1348
639– 6		1348
639– 7		1348
639– 8		1349
639– 9		1349
639–10		1350
640–11		1351
640–12		1351
640–14		1362
641–15		1362
642–16		1362
642–17		1362
642–18		1362
642–19		1362
642–20		1355
643–21		1356
643–22		1356
643–23		1356
643–24		1352
643–25		1352
643–26		1354
644–27		1354
644–28		1354
644–29		1354
644–30		1365
644–31		1354
644–32		1363
644–33		1363
644–34		1363
645–35		1363
646–36		1363
646–38		1364
646–39		1364
646–40		1364
646–41		1364
647–42		1364
647–43		1364
647–44		1365
647–45		1365
647–46		1368
647–47		1368
647–48		1368
647–49		1368
648–50		1368
648–51		1376
648–52		1377
649–53		1379
649–54		1379
649–55		1379
649–56		1379
649–57		1380
649–58		1380
649–59		1380
649–60		1380
649–61		1380
649–62		1380
649–63		1380
649–64		1380
649–65		1380
650–66		1380
650–67		1380
650–68		1381
650–69		1382
650–70		1382
650–71		1382
650–72		1383
651–73		1383
651–74		1383
652–75		1383
652–76		1383
652–77		1383
653–78		1383
653–79		1383
653–80		1388
653–81		1384
654–82		1384
654–83		1384
654–84		1384
654–85		1385
654–86		1385
654–87		1385
654–88		1385
654–89		1408
655–90		1408
655–91		1409
656–92		1409
653–93		1410
656–94		1410
656–95		1410
656–96		1410
657–97		1408
657–98		1408
657–99		1411
657– 2		1416
657– 3		1414
657– 4		1414
657– 5		1414
657– 6		1420
658– 7		1420
658– 8		1420
658– 9		1420
658–10		1422
658–11		1422
659–12		1422
659–13		1422
659–14		1389
660–15		1389
660–16		1389
660–17		1389
660–18		1389
661–19		1389
661–20		1391
661–21		1390
661–22		1392
661–23		1392
661–24		1392
661–25		1392
661–26		1392
662–27		1392
662–28		1392
663–29		1392
663–30		1392
663–31		1392
663–32		1394
663–33		1394
664–34		1400
664–35		1400
665–36		1404
665–37		1400
665–38		1400
665–39		1400
666–40		1400
666–41		1400
666–42		1400
666–43		1400
666–44		1400
667–45		1401
667–46		1405
667–47		1405
667–48		1405
668–49		1406
668–50		1406
668–51		1407
668–52		1407
668–53		1407
668–54		1407
669–55		1407
669–56		1407
669–57		1407
669–58		1423
669–59		1423
669–60		1423
669–61		1423
670–62		1423
670–63		1424
670–64		1424
670–65		1424
670–66		1424
670–67		1424
671–68		1424
671–69		1424
671–70		1424
672–71		1424
672–72		1424
672–73		1424
672–74		1431
673–75		1431
673–76		1431
673–77		1434
673–78		1434
673–79		1432
673–80		1432
673–81		1435
673–82		1433
674–84		1436
674–85		1436
674–86		1438
674–87		1438
674–88		1438
674–89		1438
675–90		1438
675–91		1438
675–92		1438
675–93		1439
675–94		1439
676–95		1439
676–96		1439
676–97		1440
678–98		1440
678–99		1443
678– 1		1444
679– 2		1444
679– 3		1447
680– 4		1440
680– 5		1441
680– 6		1448
680– 7		1441
680– 8		1441
680– 9		1441
680–10		1442
681–11		1442
681–12		1449
682–13		1449
682–14		1449
682–15		1452
682–16		1452
683–17		1450
683–18		1450
683–19		1450
684–20		1454
684–21		1455
684–22		1457
684–23		1457
685–24		1458
685–25		1458
685–26		1459
686–27		1459
686–28		1459
686–29		1459
686–30		1459
686–32		1459
686–33		1460
687–34		1461
687–35		1461
688–36		1462
689–37		1462
689–38		1463
689–39		1463
689–40		1463
690–41		1463
690–42		1463
690–43		1463
690–44		1464
690–45		1464
690–46		1477
690–47		1465
690–48		1472
691–49		1466
691–50		1466
691–51		1466
691–52		1474
691–53		1469
691–55		1470
691–56		1473
691–57		1476
691–58		1476
692–60		1476
692–61		1475
693–62		1475
693–63		1467
693–64		1467
693–65		1468
694–66		1478
694–67		1478
694–68		1478
694–69		1478
694–70		1478
694–71		1478
694–72		1479
694–73		1479
695–74		1479
695–75		1480
695–76		1480
696–77		1481
696–78		1481
696–79		1481
696–80		1482
697–81		1483
697–82		1483
697–83		1483
698–84		1484
698–85		1485
698–86		1485
698–87		1485
699–88		1485
699–89		1486
700–90		1487
700–91		1487
700–92		1487
700–93		1487
700–94		1542
700–95		1488
700–96		1492
701–97		1492
702–98		1492
702–99		1492
703– 1		1492
703– 2		1492
704– 3		1492
704– 4		1492
704– 5		1492
704– 6		1492
704– 7		1492
704– 8		1489
704– 9		1489
704–10		1452
704–11		1452
704–12		1489
704–13		1489
705–14		1489
705–15		1490
705–16		1490
705–17		1490
705–18		1490
706–19		1490
707–20		1490
707–21		1491
707–22		1491
708–23		1491
708–24		1493
708–25		1493
708–26		1493
708–27		1493
709–28		1493
710–29		1493
710–30		1493
710–31		1493
710–32		1493
711–33		1493
711–34		1493
711–35		1493
711–36		1493
711–37		1493
711–38		1493
711–39		1493
711–40		1493
711–41		1493
711–42		1494
712–43		1494
712–44		1495
713–45		1495
713–46		1496
713–47		1496
714–48		1497
714–49		1497
714–50		1497
714–51		1497
714–52		1497
715–53		1497
715–54		1497
715–55		1497
715–56		1497
715–57		1497
715–58		1497
715–59		1497
715–60		1497
715–61		1497
715–62		1497
715–63		1497
715–64		1497
715–65		1497
715–66		1497
716–67		1497
716–68		1497
716–69		1498
716–70		1498
717–71		1498
717–72		1499
717–73		1499
717–74		1499
718–75		1499
718–76		1499
718–77		1499
719–78		1499
719–79		1499
720–80		1499
720–81		1499
720–82		1499
720–83		1499
721–84		1500
721–85		1500
721–86		1500
722–87		1500
722–88		1500
722–89		1500
722–90		1500
722–91		1500
722–92		1500
722–93		1500
722–94		1500
722–95		1500
723–96		1500
723–97		1500
723–98		1501
723–99		1501
723– 1		1502
723– 2		1502
723– 3		1503
724– 4		1503
724– 5		1503
724– 6		1503
722– 7		1504
724– 8		1504
724– 9		1505
724–10		1506
726–11		1506
726–12		1506
726–13		1506
726–14		1506
726–15		1506
726–16		1506
727–17		1506
728–18		1507
728–19		1507
728–20		1507
728–21		1507
728–22		1507
728–23		1507
729–24		1507
729–25		1507
729–26		1507
729–27		1508
729–28		1508
729–29		1508
729–30		1508
729–31		1508
730–32		1508
730–33		1508
730–34		1509
730–35		1509
730–36		1509
730–37		1509
730–38		1509
730–39		1509
730–40		1509
731–41		1510
731–42		1510
731–43		1510
731–44		1510
731–45		1510
731–46		1510
731–47		1510
731–48		1510
731–49		1510
732–50		1510
732–51		1510
732–52		1510
732–53		1510
732–54		1510
732–55		1512
732–56		1512
733–57		1512
733–58		1512
733–59		1512
733–60		1513
733–61		1513
733–62		1513
733–63		1513
733–64		1513
733–65		1513
733–66		1513
734–67		1514
734–68		1514
734–69		1514
734–70		1514
734–71		1514
734–72		1514
734–73		1514
734–74		1514
735–75		1514
735–76		1514
735–78		1515
735–79		1515
735–80		1515
735–81		1515
736–82		1515
736–83		1515
736–84		1515
736–85		1515
736–86		1515
736–87		1515
737–88		1515
737–89		1515
737–90		1516
737–91		1516
737–92		1516
737–93		1516
737–94		1516
737–95		1518
738–96		1518
738–97		1518
738–98		1518
738–99		1518
738– 1		1518
738– 2		1518
738– 3		1518
738– 4		1518
738– 5		1518
738– 6		1518
738– 7		1518
738– 8		1518
739– 9		1518
739–10		1518
739–11		1530
739–12		1530
739–13		1530
739–14		1530
739–15		1530
739–16		1517
739–17		1517
739–18		1517
739–19		1518
739–20		1518
739–22		1519
740–23		1519
740–24		1519
740–25		1519
740–26		1520
741–27		1520
741–28		1520
741–29		1520
741–30		1520
741–31		1521
741–32		1521
741–33		1521
741–34		1521
741–35		1521
742–36		1523
742–37		1523
742–38		1523
742–39		1523
742–41		1524
743–42		1524
743–43		1525
743–44		1525
743–47		1525
744–49		1525
744–50		1526
744–51		1526
744–52		1526
745–53		1527
745–54		1528
745–55		1528
745–56		1528
745–57		1528
746–58		1529
746–59		1529
746–61		1532
747–62		1534
747–63		1534
747–64		1534
747–65		1534
747–66		1534
747–67		1534

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	24 C.J. Note	Sec.
747–68		1534
747–69		1534
747–70		1534
747–71		1534
747–72		1534
747–73		1534
748–74		1534
748–75		1534
748–76		1534
748–77		1534
748–78		1534
748–79		1534
748–80		1534
748–81		1536
748–82		1537
748–83		1537
748–84		1534
748–85		1534
749–86		1534
749–87		1535
749–88		1535
749–89		1535
749–90		1535
749–91		1535
749–92		1535
749–93		1535
749–94		1535
749–95		1535
750–96		1538
750–97		1538
750–98		1538
750–99		1538
750– 1		1538
750– 2		1538
750– 3		1538
750– 4		1538
750– 5		1538
751– 6		1538
751– 7		1538
751– 8		1538
751– 9		1538
751–10		1538
751–11		1538
751–12		1538
751–13		1538
751–14		1538
751–15		1538
752–16		1538
752–17		1538
752–18		1538
752–19		1538
752–20		1538
752–21		1538
752–22		1539
752–23		1539
752–24		1539
752–25		1539
753–26		1539
753–27		1539
753–28		1539
753–29		1542
753–30		1542
753–31		1542
753–32		1542
753–33		1542
753–34		1542
753–35		1542
753–36		1542
753–37		1543
754–38		1543
754–39		1544
754–40		1544
755–41		1544
755–42		1544
755–43		1544
755–44		1544
755–45		1544
755–46		1544
755–47		1544
755–48		1544
755–49		1545
755–50		1545
755–51		1545
755–52		1545
755–53		1548
755–54		1548
755–55		1548
755–56		1548
756–57		1549
756–58		1553
756–59		1554
756–60		1554
756–61		1551
756–62		1551
756–63		1556
756–64		1557
756–65		1557
757–66		1557
757–67		1557
757–68		1557
757–69		1558
757–70		1558
757–71		1558
757–72		1558
757–74		1558
758–75		1558
758–76		1558
758–77		1559
758–78		1559
758–79		1559
758–80		1560
758–81		1560
758–82		1560
758–83		1560
758–84		1561
758–85		1561
759–86		1562
759–87		1562
759–88		1569
759–89		1569
760–90		1570
760–91		1570
760–92		1570
760–93		1573
760–94		1573
760–95		1573
760–96		1573
760–97		1573
761–98		1573
761–99		1573
761– 1		1573
761– 2		1577
761– 3		1574
761– 4		1574
761– 5		1574
761– 6		1574
761– 7		1574
761– 8		1574
762– 9		1577
762–10		1577
762–11		1575
762–12		1575
762–13		1575
762–14		1575
762–15		1576
762–16		1576
762–17		1576
762–18		1576
762–19		1576
762–20		1576
763–21		1576
763–22		1576
763–23		1576
763–24		1578
763–25		1578
763–26		1578
763–27		1578
763–28		1578
763–29		1578
763–30		1578
763–31		1578
763–32		1579
764–33		1579
764–34		1579
764–35		1579
764–36		1579
764–37		1579
764–38		1579
764–39		1579
764–40		1580
764–41		1580
765–42		1580
765–43		1581
765–44		1581
765–45		1581
765–46		1581
765–47		1581
765–48		1581
765–49		1582
765–50		1582
765–51		1582
765–52		1582
766–53		1582
766–54		1583
766–55		1583
766–56		1583
766–57		1583
766–58		1583
766–59		1583
766–60		1584
766–61		1584
767–62		1584
767–63		1584
767–65		1585
767–66		1585
767–67		1585
767–68		1585
767–69		1585
767–70		1585
767–71		1585
767–72		1585
767–73		1585
768–74		1585
768–75		1585
768–76		1585
768–78		1586
768–79		1586
768–80		1586
768–81		1586
768–82		1586
768–83		1586
768–84		1587
768–85		1587
769–86		1587
769–87		1588
769–88		1588
769–89		1589
769–90		1589
769–92		1590
770–93		1590
770–94		1590
770–95		1590
770–96		1590
770–98		1591
770–99		1591
771– 1		1591
771– 2		1591
771– 4		1592
771– 5		1592
772– 6		1592
772– 8		1594
772– 9		1594
772–10		1595
772–11		1596
773–13		1597
773–14		1597
773–16		1598
773–17		1599
773–18		1599
773–19		1599
773–20		1599
773–21		1600
773–22		1600
773–23		1600
774–24		1600
774–25		1600
774–26		1601
774–27		1602
774–28		1602
774–29		1603
774–30		1603
774–31		1603
774–32		1603
775–33		1603
775–34		1603
775–35		1603
775–36		1603
775–37		1605
775–40		1606
775–41		1607
775–42		1607
775–43		1607
775–44		1607
776–45		1608
776–46		1608
776–47		1608
776–48		1609
776–49		1609
776–50		1609
777–51		1609
777–52		1609
777–53		1609
777–54		1609
777–55		1609
777–56		1609
777–57		1609
777–58		1609
777–59		1609
778–60		1610
778–61		1610
778–62		1610
778–63		1610
778–64		1610
778–65		1610
778–66		1610
778–67		1610
778–68		1611
778–69		1611
778–70		1611
778–71		1611
778–72		1611
778–73		1611
779–74		1611
779–75		1611
779–76		1611
779–77		1611
779–78		1611
779–79		1611
779–80		1611
779–81		1612
779–82		1612
779–83		1612
779–84		1612
780–85		1612
780–86		1612
780–87		1612
780–88		1612
780–89		1612
780–91		1613
780–92		1615
780–93		1613
781–94		1616
781–95		1616
781–96		1616
781–97		1616
781–99		1614
781– 1		1614
781– 2		1614
781– 3		1614
781– 4		1614
781– 5		1614
782– 6		1614
782– 7		1614
782– 8		1614
782– 9		1617
782–10		1617
782–11		1617
782–12		1617
782–13		1617
782–14		1617
782–15		1617
782–16		1617
782–17		1617
782–18		1618
783–19		1618
783–20		1618
783–21		1618
783–22		1618
783–23		1618
783–24		1618
783–25		1619
783–26		1619
783–27		1621
783–29		1622
783–30		1622
784–31		1622
784–32		1622
784–33		1622
784–34		1622
784–35		1622
784–36		1622
784–37		1622
784–38		1622
785–39		1622
785–40		1622
785–41		1622
785–42		1622
785–43		1622
785–44		1622
785–45		1622
785–46		1622
785–47		1622
785–48		1623
785–49		1623
785–50		1623
785–51		1623
785–52		1623
785–53		1623
786–54		1623
786–55		1624
786–56		1624
786–57		1626
786–58		1626
786–59		1626
786–60		1626
786–61		1626
786–62		1626
786–63		1626
786–64		1626
786–65		1626
786–66		1627
787–67		1628
787–68		1628
787–69		1628
787–70		1628
787–71		1628
787–72		1628
787–73		1628
787–74		1625
787–75		1631
787–76		1631
788–77		1631
788–78		1631
788–79		1631
788–80		1631
788–81		1631
788–82		1639
788–83		1633
788–84		1639
788–85		1639
788–86		1639
788–87		1639
788–88		1639
789–89		1639
789–90		1639
789–91		1639
789–92		1633
789–93		1633
789–94		1638
789–95		1634
789–96		1636
789–97		1636
789–98		1636
790–99		1636
790– 1		1636
790– 2		1636
790– 3		1636
790– 4		1636
790– 5		1637
790– 6		1637
790– 7		1637
791– 8		1637
791– 9		1637
791–10		1638
791–11		1638
791–12		1640
791–13		1640
791–14		1640
791–15		1640
791–16		1640
792–17		1640
792–18		1640
792–19		1640
792–20		1640
792–21		1640
792–22		1640
792–23		1641
792–24		1641
792–25		1641
792–26		1641
792–27		1641
792–28		1641
792–29		1641
792–30		1641
793–31		1642
793–32		1642
793–33		1642
793–34		1642
793–35		1642
793–36		1642
793–37		1642
793–38		1642
793–39		1642
793–40		1642
794–41		1642
794–42		1642
794–43		1643
794–44		1643
794–45		1643
794–46		1643
794–47		1644
794–48		1644
794–49		1644
794–50		1644
794–51		1644
794–52		1644
794–53		1644
794–54		1644
794–55		1644
794–56		1644
794–57		1644
795–58		1644
795–59		1645
795–60		1645
795–61		1645
795–62		1645
795–63		1646
795–64		1646
796–65		1647
796–66		1647
796–67		1648
796–68		1648
796–69		1648
796–70		1648
796–71		1648
796–72		1648
797–74		1649
797–75		1643
797–76		1643
797–77		1643
797–78		1643
797–79		1643
797–80		1643
797–81		1643
797–82		1643
798–83		1643
798–84		1654
798–85		1654
798–86		1654
799–87		1654
799–88		1654
799–89		1654
799–90		1654
799–91		1654
799–92		1651
799–93		1652
799–94		1652
799–95		1652
799–96		1653
800–97		1653
800–98		1653
800–99		1653
800– 1		1653
801– 2		1653
801– 3		1653
801– 4		1653
801– 5		1653
801– 6		1653
801– 7		1653
801– 8		1653
801– 9		1654
801–10		1654
801–11		1654
801–12		1654
801–13		1654
802–14		1655
802–15		1655
802–16		1655
803–17		1655
803–18		1655
803–19		1655
804–20		1655
804–21		1655
804–22		1656
804–23		1656
804–24		1657
804–25		1658
804–26		1658
805–27		1658
805–28		1658
805–29		1658
805–30		1658
805–31		1659
805–32		1659
805–33		1659
805–34		1660
806–35		1660
806–36		1662
806–37		1662
806–38		1662
806–39		1662
807–40		1496
807–41		1505
807–42		1663
807–43		1663
807–44		1664
807–45		1664
807–46		1664
808–47		1664
808–48		1664
808–49		1664
808–50		1664
808–51		1664
809–52		1665
809–53		1666
809–54		1666
809–55		1667
809–56		1667
809–57		1668
809–58		1669
810–59		1668
810–60		1668
810–61		1668
810–62		1670
810–63		1670
810–64		1670
810–65		1670
810–67		1671
810–68		1671
811–69		1671
811–70		1671
811–71		1671
811–72		1671
811–73		1671
811–74		1671
811–75		1671
811–76		1671
811–77		1671
812–78		1672
812–79		1672
812–80		1672
812–81		1673
812–82		1673
812–83		1673
813–84		1673
813–85		1673
813–86		1673
813–87		1673
813–88		1673
813–89		1673
813–90		1673
813–91		1674
813–92		1674
813–93		1674
813–94		1674
813–95		1674
813–96		1674
813–97		1674
813–98		1676
813–99		1676
814– 1		1676
814– 2		1676
814– 3		1676
814– 4		1676
814– 5		1676
814– 6		1677
814– 7		1677
814– 8		1677
815– 9		1677
815–10		1677
815–11		1677
815–12		1677
815–13		1678
816–14		1678
816–15		1678
816–16		1678
816–17		1678
816–18		1678
816–19		1679
816–20		1679
816–21		1679
816–22		1679
816–23		1679
816–24		1680
817–25		1680
817–26		1682
817–27		1682
817–28		1682
817–29		1682
817–30		1682
817–31		1682
818–32		1683
818–33		1684
818–34		1683
818–35		1683
818–36		1685
818–37		1685
818–38		1685
819–39		1683
819–40		1683
819–41		1683
819–42		1683
819–43		1683
819–44		1686
819–45		1686
820–46		1686
820–47		1686
820–48		1687
820–49		1689
820–50		1689
820–51		1690
821–52		1690
821–53		1690
821–54		1690
821–55		1690
821–56		1691
821–57		1691
821–58		1691
822–59		1691
822–60		1691
822–61		1691
822–62		1691
822–63		1692
822–64		1692
823–65		1692
823–66		1692
823–67		1692
823–68		1692
823–69		1692
823–70		1692
824–71		1692
824–72		1692
824–73		1694
824–74		1694
824–75		1694
824–76		1696
824–77		1696
825–78		1696
825–79		1696
825–80		1696
825–81		1696
825–82		1696
825–83		1696
825–84		1696
826–86		1697
826–87		1697
826–88		1697
826–89		1697
827–90		1698
827–91		1698
827–93		1699
828–94		1699
828–95		1700
828–96		1701
828–97		1701
828–98		1701
828–99		1701
828– 1		1701
828– 2		1701
828– 3		1701
828– 4		1702
828– 5		1702
829– 6		1702
829– 7		1702
829– 8		1703
829– 9		1703
829–10		1703
829–11		1703
829–12		1703
830–13		1703
830–14		1703
830–15		1704
830–16		1704
830–17		1704
830–18		1705
830–19		1705
831–20		1705
831–21		1705
831–22		1709
831–23		1709
831–24		1709
831–25		1709
831–26		1709
831–27		1710
832–28		1710
832–29		1710
832–30		1711
832–31		1711
832–32		1711
832–33		1711
832–34		1712
832–35		1712
832–36		1712
832–37		1712
832–38		1714
832–39		1714
833–40		1714
833–41		1714
834–42		1715
834–43		1715
834–44		1715
834–45		1715
834–46		1716
834–47		1716
834–48		1716
834–49		1717
835–50		1717
835–51		1717
835–52		1717
835–53		1718
835–54		1718
835–55		1718
835–56		1719
835–57		1719
835–58		1719
835–59		1719
835–61		1720
835–62		1720
836–63		1720
836–64		1720
836–65		1720
836–66		1720
836–67		1720
836–68		1720
836–69		1720
836–70		1720
836–71		1720
836–72		1720
836–73		1720
836–74		1721
836–75		1721
837–76		1721
837–77		1724
837–78		1724
837–79		1724
837–80		1725
837–82		1727
837–83		1727
838–84		1728
838–85		1728
838–86		1728
838–87		1728

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	24 C.J. Note	Sec.
838–88		1728
838–89		1728
838–90		1729
838–91		1729
839–92		1729
839–93		1729
839–94		1730
839–95		1730
840–96		1730
840–97		1730
840–98		1730
841– 1		1731
841– 2		1731
841– 3		1732
841– 4		1732
841– 5		1733
842– 6		1734
842– 7		1734
842– 8		1734
842– 9		1734
843–11		1735
843–12		1736
843–13		1736
843–14		1737
844–15		1737
844–16		1737
844–17		1737
844–18		1738
844–19		1738
844–20		1738
844–21		1738
845–22		1741
845–23		1739
845–24		1739
845–25		1739
845–26		1739
845–27		1739
846–28		1740
846–29		1740
846–30		1740
846–31		1740
846–32		1740
846–33		1740
846–34		1740
846–35		1740
846–36		1740
847– 1		1742
847– 2		1742
847– 3		1742
847– 4		1743
847– 5		1744
847– 6		1744
847– 7		1744
847– 8		1744
847– 9		1745
847–10		1746
847–11		1746
848–12		1746
848–13		1746
848–14		1747
848–15		1747
848–16		1747
848–17		1747
848–18		1747
848–19		1747
848–20		1748
848–21		1748
848–22		1748
848–23		1751
848–24		1751
848–25		1751
849–26		1751
849–27		1751
849–28		1752
849–29		1752
849–30		1752
849–31		1752
849–32		1752
849–33		1755
849–34		1755
849–35		1753
849–36		1753
849–37		1753
849–38		1753
849–39		1755
849–40		1755
850–41		1755
850–42		1755
850–43		1755
850–44		1756
850–45		1756
850–46		1756
850–47		1756
850–48		1756
850–49		1756
850–50		1757
851–51		1757
851–52		1757
851–53		1758
851–54		1758
851–55		1758
851–56		1758
851–57		1758
851–58		1758
851–59		1758
851–60		1759
851–61		1759
851–62		1759
852–63		1759
852–64		1760
852–65		1760
852–66		1761
852–67		1761
852–68		1765
852–69		1765
852–70		1765
853–71		1765
853–72		1765
853–73		1765
853–74		1766
853–75		1766
853–76		1767
853–77		1767
853–78		1767
854–79		1767
854–80		1767
854–81		1767
854–82		1767
854–83		1767
854–84		1767
854–85		1768
854–86		1768
855–87		1768
855–88		1768
855–89		1768
855–90		1768
855–91		1768
855–92		1768
855–93		1769
856–94		1769
856–96		1770
856–97		1770
856–98		1770
856– 1		1771
856– 2		1771
857– 3		1771
857– 5		1772
857– 6		1772
857– 7		1772
857– 9		1772
857–10		1772
857–12		1773
857–13		1773
857–14		1773
858–15		1773
858–17		1774
858–18		1774
858–20		1775
858–21		1775
858–22		1775
858–23		1775
859–24		1775
859–25		1775
859–26		1775
859–27		1775
859–28		1775
859–29		1775
859–31		1776
859–32		1776
859–33		1776
859–34		1776
859–35		1776
859–36		1776
860–37		1776
860–38		1776
860–39		1776
860–40		1776
860–41		1777
861–42		1777
861–43		1777
861–44		1777
861–45		1777
861–46		1777
861–47		1777
861–48		1777
861–49		1777
861–50		1777
861–52		1778
861–53		1778
861–54		1778
862–55		1778
862–57		1779
862–58		1779
862–59		1779
862–60		1779
862–61		1779
862–62		1779
862–63		1779
862–65		1780
863–66		1780
863–67		1780
863–68		1780
863–69		1780
863–70		1780
863–71		1780
863–73		1781
863–74		1781
863–75		1781
863–76		1781
863–77		1781
863–78		1781
863–79		1781
864–80		1781
864–81		1782
864–82		1782
864–83		1782
864–84		1782
864–85		1783
864–86		1783
865–87		1783
865–88		1783
865–89		1783
865–90		1783
865–91		1783
865–92		1783
865–93		1783
865–94		1783
865–95		1783
865–96		1783
865–97		1783
865–98		1783
865–99		1784
865– 1		1784
865– 2		1784
865– 3		1784
865– 4		1784
866– 5		1784
866– 6		1784
866– 8		1785
866– 9		1785
866–10		1785
866–11		1785
866–13		1787
866–14		1787
866–16		1788
866–17		1788
866–18		1788
866–20		1789
866–21		1789
867–22		1789
867–24		1786
867–25		1786
867–26		1786
867–28		1790
867–29		1790
867–30		1790
867–31		1790
867–32		1790
867–33		1790
867–34		1791
868–35		1791
868–36		1796
868–37		1791
868–38		1791
868–39		1791
868–40		1792
868–41		1792
868–42		1792
868–43		1793
868–44		1793
869–45		1793
869–46		1793
869–47		1793
869–48		1793
869–49		1793
869–50		1793
869–51		1793
869–52		1794
869–53		1794
869–54		1794
869–55		1795
869–56		1795
869–57		1795
870–58		1795
870–59		1795
870–60		1795
870–61		1797
870–62		1797
870–63		1258
871–64		1258
871–65		1798
871–66		1798
871–67		1798
871–68		1798
871–69		1798
871–70		1798
871–71		1798
871–72		1791
872–73		1798
872–74		1798
872–75		1799
872–76		1799
872–77		1799
872–78		1799
872–79		1799
872–80		1799
872–81		1800
872–82		1800
872–83		1800
872–84		1800
872–85		1800
872–86		1800
872–87		1800
872–88		1800
873–89		1800
873–90		1800
873–91		1801
873–92		1801
873–93		1803
873–94		1803
873–95		1802
873–96		1802
873–97		1804
873–98		1804
873–99		1800
873– 1		1800
873– 2		1805
873– 3		1805
873– 4		1805
873– 5		1805
874– 6		1805
874– 7		1805
874– 8		1805
874– 9		1805
874–10		1087
874–11		1809
874–12		1808
874–13		1808
874–14		1808
875–15		1808
875–16		1808
875–17		1808
875–18		1808
875–19		1808
875–20		1809
875–21		1809
876–22		1809
876–23		1809
876–24		1809
876–25		1809
876–26		1809
876–27		1809
876–28		1809
876–29		1809
877–30		1809
877–31		1809
877–32		1810
877–33		1810
877–34		1810
877–35		1810
877–36		1810
877–37		1810
877–38		1811
877–39		1811
877–40		1811
877–41		1811
877–42		1812
878–44		1812
878–45		1812
878–46		1814
878–47		1814
878–48		1815
878–49		1815
878–50		1816
878–51		1816
878–52		1816
878–53		1816
878–54		1816
878–55		1816
878–56		1816
878–57		1816
878–58		1817
879–59		1817
879–60		1817
879–61		1817
879–62		1817
879–63		1817
879–64		1817
879–65		1834
879–66		1834
879–67		1834
879–68		1817
880–69		1813
880–70		1813
880–71		1813
880–72		1818
880–73		1818
880–74		1818
880–75		1820
880–76		1820
880–77		1820
881–78		1820
881–79		1821
881–80		1822
881–81		1822
882–82		1822
882–83		1822
882–84		1822
882–85		1822
882–86		1822
882–87		1822
882–88		1822
882–89		1822
882–90		1822
882–91		1822
882–92		1822
883–93		1822
883–94		1822
883–95		1822
883–96		1824
883–97		1824
883–98		1824
883–99		1825
883– 1		1826
884– 2		1826
884– 3		1827
884– 4		1827
884– 5		1827
885– 6		1828
885– 7		1835
885– 8		1835
885– 9		1835
885–10		1836
885–12		1836
885–13		1836
886–14		1836
886–15		1836
886–16		1836
886–17		1836
886–18		1836
886–19		1836
886–20		1837
887–21		1837
887–22		1837
887–23		1837
887–24		1837
887–25		1837
887–26		1837
887–27		1837
887–28		1837
887–29		1837
887–30		1840
887–31		1840
887–32		1840
888–33		1840
888–34		1840
888–35		1840
888–36		1840
888–37		1840
888–38		1840
888–39		1840
888–40		1839
888–41		1841
888–42		1841
888–43		1841
888–44		1842
888–45		1842
889–46		1842
889–47		1845
889–48		1845
889–49		1845
889–50		1845
889–51		1845
889–52		1847
890–53		1849
890–54		1849
890–55		1849
890–56		1849
890–57		1849
890–58		1849
890–59		1849
890–60		1849
890–61		1849
890–62		1849
890–63		1849
890–64		1849
890–65		1849
890–66		1850
890–67		1850
890–68		1850
891–69		1850
891–70		1855
891–71		1855
891–72		1855
891–73		1855
891–74		1855
891–75		1855
891–76		1855
891–77		1855
891–78		1855
891–79		1855
891–80		1855
891–81		1855
891–82		1856
892–83		1856
892–84		1856
892–85		1856
892–86		1856
892–87		1856
892–88		1858
892–89		1858
892–90		1858
892–91		1858
892–92		1858
892–93		1858
892–94		1865
892–95		1859
893–96		1859
893–97		1859
893–98		1859
893–99		1860
893– 1		1860
893– 2		1860
893– 3		1860
893– 4		1860
893– 5		1861
893– 6		1861
893– 7		1864
893– 8		1864
893– 9		1864
893–10		1864
893–11		1862
893–12		1862
893–13		1862
893–14		1864
893–15		1864
894–16		1864
894–17		1864
894–18		1864
894–19		1864
894–20		1864
894–21		1865
894–22		1863
894–23		1863
894–24		1865
894–25		1865
894–26		1865
894–27		1865
894–28		1865
894–29		1865
894–30		1865
894–31		1865
894–32		1867
895–33		1868
895–34		1868
895–35		1868
895–36		1868
895–37		1868
895–38		1868
895–39		1868
895–40		1869
895–41		1871
896–42		1872
896–44		1873
896–45		1873
896–46		1873
896–47		1874
896–48		1875
899–49		1875
899–50		1875
899–51		1875
899–52		1876
899–53		1876
899–54		1876
900–55		1877
900–56		1878
900–57		1879
900–58		1880
900–59		1880
900–60		1880
900–61		1880
900–62		1880
900–63		1880
900–64		1880
900–65		1880
901–66		1880
901–67		1880
901–68		1880
901–69		1881
901–70		1881
901–71		1881
901–72		1881
901–73		1881
901–74		1881
901–75		1881
902–76		1881
902–77		1881
902–78		1881
902–79		1881
903–80		1881
903–81		1882
903–82		1882
903–83		1882
903–85		1883
903–86		1883
903–87		1884
904–88		1884
904–89		1884
904–90		1884
905–91		1884
905–92		1884
905–93		1884
905–94		1884
905–95		1885
905–96		1885
905–97		1885
905–98		1886
905–99		1886
905– 1		1886
905– 2		1886
905– 3		1886
906– 4		1886
906– 5		1886
906– 6		1887
906– 7		1887
906– 8		1887
906– 9		1888
906–10		1888
906–11		1888
906–12		1888
906–13		1888
907–14		1888
907–15		1888
907–16		1888
907–17		1888
907–18		1888
907–19		1888
907–20		1888
907–21		1888
907–22		1889
907–23		1889
907–24		1889
907–25		1889
908–26		1889
908–27		1889
908–28		1891
908–29		1891
908–30		1891
908–31		1891
908–32		1891
908–33		1891
908–34		1892
908–35		1892
908–36		1892
908–37		1892
909–38		1892
909–39		1892
909–40		1893
909–41		1893
909–42		1893
909–43		1893
909–44		1893
909–45		1894
909–46		1894
910–47		1894
910–48		1895
910–49		1895
910–50		1895
910–51		1895
910–52		1896
910–53		1896
910–54		1897
910–55		1897
910–56		1897
910–57		1900
910–58		1900
911–59		1900
911–60		1900
911–61		1900
911–62		1900
911–63		1901
911–64		1901
911–65		1901
911–66		1901
911–67		1901
911–68		1902
911–69		1903
911–70		1903
911–71		1903
911–72		1903
911–73		1903
912–74		1903
912–75		1903
912–76		1903
912–77		1903
912–78		1903
912–79		1903
912–80		1903
912–81		1903
912–82		1903
912–83		1903
912–84		1903
912–85		1903
912–86		1904
912–87		1904
913–88		1905
913–89		1905
913–90		1905
913–91		1906
913–92		1907
913–93		1909
913–94		1909
913–95		1908
913–96		1908
913–97		1909
913–98		1909
913–99		1909
913– 1		1909
913– 2		1909
913– 3		1909
913– 4		1909
913– 5		1909
913– 6		1909
913– 7		1909
914– 8		1909
914– 9		1909
914–10		1909
914–11		1909
914–12		1909
915–13		1906
915–14		1910
915–15		1910
914–16		1910
915–17		1911
915–18		1913
915–19		1913
915–20		1912
915–21		1913
915–23		1914
915–24		1914
915–25		1914
916–26		1915
916–27		1915
916–28		1915
917–29		1915
917–31		1916
917–32		1916
917–33		1916
917–34		1916
917–35		1917
917–36		1917
917–37		1917
917–38		1917
918–39		1918
918–41		1919
918–42		1919
918–43		1920
918–44		1920
918–45		1920
918–46		1920
918–47		1920
918–48		1920
919–49		1921
919–50		1921
919–51		1921
919–52		1921
919–53		1921
919–54		1921
920–55		1921
920–56		1921
920–57		1922
920–58		1922
920–59		1922
920–60		1922
920–61		1922
920–62		1923
920–63		1923
920–64		1923
921–66		1926
921–67		1927
921–68		1927
921–69		1927
921–70		1927
921–71		1927
921–72		1927
921–73		1927
921–74		1928
922–75		1928
922–76		1929
922–77		1929
922–78		1929

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	Note	24 C.J. Sec.
922-79		1929
922-80		1929
922-81		1929
922-82		1929
922-83		1930
922-84		1930
922-85		1930
922-86		1930
923-87		1930
923-88		1930
923-89		1930
923-90		1930
923-91		1930
923-92		1930
923-93		1930
923-94		1930
923-95		1930
923-96		1930
923-97		1930
923-98		1930
923-99		1930
923- 1		1930
923- 2		1930
923- 3		1930
923- 4		1931
923- 5		1931
924- 6		1931
924- 7		1931
924- 8		1931
924- 9		1931
924-10		1953
924-11		1953
925-12		1953
925-13		1953
925-14		1953
925-15		1953
925-16		1953
925-17		1953
925-18		1953
925-20		1953
925-21		1953
925-22		1932
926-23		1932
926-24		1932
926-25		1932
926-26		1932
926-27		1932
926-28		1933
926-29		1934
926-30		1933
926-31		1933
927-32		1933
927-33		1933
927-34		1936
927-35		1936
927-36		1936
927-37		1936
927-38		1936
928-39		1936
928-40		1936
928-41		1936
928-42		1941
929-43		1941
929-44		1944
929-45		1944
929-46		1944
929-47		1941
929-48		1944
929-49		1946
929-50		1939
929-51		1951
930-53		1954
930-54		1954
930-55		1954
930-56		1954
931-57		1955
931-58		1955
931-59		1956
931-60		1955
931-61		1956
932-62		1957
932-63		1957
932-64		1957
932-65		1957
932-66		1957
932-67		1957
932-68		1957
932-69		1957
932-70		1957
932-71		1957
932-72		1957
932-73		1957
932-74		1957
933-75		1957
933-76		1958
933-77		1958
933-78		1958
933-79		1958
934-80		1958
934-81		1909
934-82		1958
934-83		1958
934-84		1960
934-85		1960
934-86		1960
934-87		1960
934-88		1960
934-89		1960
934-90		1960
935-91		1960
935-92		1960
935-93		1960
935-94		1961
935-95		1961
935-96		1961
935-97		1961
935-98		1961
935-99		1961
936- 1		1964
936- 2		1963
936- 3		1963
936- 4		1965
936- 5		1965
936- 6		1965
936- 7		1966
936- 8		1966
937- 9		1966
937-10		1966
937-11		1966
937-12		1966
937-13		1966
937-14		1966
937-15		1966
937-16		1966
937-17		1966
937-18		1967
937-19		1968
937-20		1968
937-21		1968
938-22		1968
938-23		1968
938-24		1969
938-25		1969
938-26		1969
938-27		1969
938-28		1969
938-29		1969
938-30		1969
939-31		1970
939-32		1970
939-33		1970
939-34		1970
939-35		1970
939-36		1970
939-37		1970
939-38		1970
939-39		1970
939-40		1970
939-41		1971
939-42		1971
939-43		1971
939-44		1971
940-45		1972
940-46		1972
941-47		1972
941-48		1972
941-49		1972
941-50		1972
941-51		1972
941-52		1972
942-53		1972
942-54		1978
942-55		1978
942-56		1978
942-57		1978
942-58		1978
942-59		1978
942-60		1978
942-61		1973
943-62		1973
943-63		1973
943-64		1973
943-65		1973
943-66		1973
943-67		1973
943-68		1973
943-69		1977
943-70		1973
943-71		1973
944-72		1974
944-73		1975
944-74		1975
944-75		1980
944-76		1980
944-77		1980
944-78		1980
944-79		1980
944-80		1980
944-81		1980
945-82		1980
945-83		1980
945-84		1980
945-85		1980
945-86		1980
945-87		1980
945-88		1980
945-89		1980
945-90		1983
945-91		1983
945-92		1983
946-93		1983
946-94		1983
946-95		1983
946-96		1983
946-97		1983
946-98		1983
946-99		1983
946- 1		1983
946- 2		1983
946- 3		1984
946- 4		1984
946- 5		1984
946- 6		1982
946- 7		1985
947- 8		1987
947- 9		1987
947-10		1987
947-11		1987
947-12		1987
947-13		1987
947-14		1987
947-15		1987
947-16		1988
948-17		1988
948-18		1988
948-19		1988
948-20		1988
948-21		1988
948-22		1988
948-23		1988
948-24		1988
948-25		1988
948-26		1988
948-27		1991
948-29		1989
948-30		1989
949-31		1989
949-32		1989
949-33		1989
949-34		1989
949-35		1989
949-36		1989
950-37		1990
950-38		1990
950-39		1991
950-40		1992
950-41		1992
950-42		1992
950-43		1992
950-44		1992
950-45		1992
950-46		1992
951-47		1992
951-48		1993
951-49		1993
951-50		1993
951-51		1993
951-52		1999
951-53		1993
951-54		1993
951-55		1993
952-56		1993
952-57		1999
952-58		1996
952-59		1996
942-60		1996
952-61		1996
952-62		1996
952-63		1996
952-64		1997
953-65		1997
953-66		1997
953-67		1996
953-68		1996
953-69		1998
953-70		1998
953-71		1998
953-72		1998
953-73		1998
953-74		2000
953-75		2000
954-76		2000
954-77		2000
954-78		2000
954-79		2000
955-80		2000
955-81		2002
955-82		2003
955-83		2005
955-84		2006
955-85		2007
955-86		2008
955-87		2013
955-88		2013
955-89		2014
955-90		2014
956-91		2014
956-92		2014
956-93		2014
956-94		2014
956-95		2014
956-96		2014
956-97		2014
956-98		2014
956-99		2014
956- 1		2014
956- 2		2014
957- 3		2015
957- 4		2015
957- 5		2015
957- 6		2015
958- 7		2015
958- 8		2015
958- 9		2015
958-10		2015
958-11		2015
958-12		2015
958-13		2015
958-14		2015
958-15		2015
958-16		2015
958-17		2015
958-18		2015
959-19		2015
959-20		2015
959-21		2015
959-22		2015
959-23		2015
959-24		2015
959-25		2015
959-26		2017
959-27		2018
960-28		2019
960-29		2021
960-30		2021
960-31		2025
960-32		2026
960-33		2026
960-34		2026
960-35		2027
960-36		2027
961-37		2027
961-38		2027
961-40		2027
961-41		2027
962-42		2027
962-43		2028
962-44		2029
962-45		2029
962-46		2029
962-47		2029
962-48		2029
963-49		2029
963-50		2029
963-51		2029
963-52		2030
963-53		2030
963-54		2030
963-55		2030
963-56		2032
963-57		2032
964-58		2032
964-59		2032
964-60		2032
964-61		2032
964-62		2032
964-63		2032
964-64		2033
964-65		2034
964-66		2034
965-67		2034
965-68		2034
965-69		2034
965-70		2036
965-71		2036
965-72		2036
965-73		2036
965-74		2036
965-75		2036
965-76		2038
965-77		2038
965-78		2038
965-79		2038
965-80		2038
966-81		2038
966-82		2038
966-83		2038
966-84		2039
966-85		2039
966-86		2039
966-87		2039
966-88		2040
966-89		2040
967-90		2041
967-91		2041
967-92		2043
967-93		2043
967-94		2043
967-95		2044
967-96		2044
967-97		2044
967-98		2044
967-99		2044
967- 1		2044
967- 2		2044
968- 3		2044
968- 4		2046
968- 5		2046
968- 6		2046
968- 7		2046
968- 8		2046
968- 9		2046
968-10		2046
969-11		2047
969-12		2047
969-13		2047
969-14		2047
969-15		2047
969-16		2047
969-17		2047
969-18		2047
969-19		2047
969-20		2047
969-21		2047
969-22		2048
969-23		2048
970-24		2048
970-25		2048
970-26		2049
970-27		2049
970-28		2049
970-29		2049
970-30		2049
971-31		2050
971-32		2050
971-33		2050
971-34		2050
971-35		2050
971-36		2050
971-37		2050
971-38		2050
971-39		2050
971-40		2050
971-41		2050
971-42		2050
971-43		2050
972-44		2050
972-45		2051
972-46		2051
972-47		2051
972-48		2051
972-49		2052
972-50		2052
972-51		2052
972-52		2052
972-53		2052
972-54		2052
972-55		2053
973-56		2053
973-57		2053
973-58		2054
973-59		2054
973-60		2054
973-61		2054
973-62		2054
973-63		2054
973-64		2054
973-65		2054
973-66		1830
973-67		1830
973-68		1830
973-69		1830
973-70		1830
973-71		1830
973-72		1830
973-73		1830
973-74		1830
973-75		1830
973-76		1830
974-77		1830
974-78		1830
974-79		2055
974-80		2055
974-81		2055
974-82		2056
974-83		2056
974-84		2057
974-85		2057
975-86		2057
975-87		2058
975-88		2059
975-89		2059
975-90		2059
975-91		2060
976-92		2060
977-93		2060
977-94		2060
977-95		2060
977-96		2061
977-97		2061
977-98		2063
977-99		2063
978- 1		2064
978- 2		2064
978- 3		2064
978- 4		2064
978- 5		2064
978- 6		2064
978- 7		2065
978- 8		2065
978- 9		2065
979-10		2065
979-11		2065
979-12		2065
979-13		2065
979-14		2065
980-15		2065
980-16		2065
980-17		2065
980-18		2065
980-19		2065
980-20		2065
980-21		2066
981-22		2066
981-23		2066
981-24		2066
981-25		2066
981-26		2067
982-27		2069
982-28		2069
982-29		2069
982-30		2069
982-31		2069
982-32		2069
982-33		2070
983-34		2070
983-35		2070
983-36		2070
983-37		2071
983-38		2071
983-39		2071
983-41		2073
983-42		2073
983-43		2073
984-44		2073
984-45		2073
984-46		2074
984-47		2074
984-48		2074
985-49		2075
985-50		2075
985-51		2075
985-52		2075
985-53		2075
985-54		2075
985-55		2075
986-56		2075
986-57		2075
986-58		2075
986-59		2075
986-60		2075
986-61		2075
986-62		2076
986-63		2076
986-64		2076
986-65		2077
987-66		2077
987-67		2077
987-68		2077
987-69		2077
987-70		2077
987-71		2077
987-72		2077
987-73		2077
987-74		2077
987-75		2077
987-76		2078
987-77		2078
988-78		2078
988-79		2078
988-80		2078
988-81		2079
988-82		2079
988-83		2079
988-84		2079
988-85		2079
988-86		2079
988-87		2079
988-88		2080
988-89		2080
938-90		2080
989-92		2081
989-93		2081
989-94		2080
989-95		2081
989-96		2082
989-97		2082
989-98		2882
989-99		2882
989- 1		2082
989- 2		2082
989- 3		2082
989- 4		2082
989- 5		2083
990- 6		2083
990- 7		2083
990- 8		2083
990- 9		2083
990-10		2083
990-11		2083
990-12		2083
990-13		2083
990-14		2083
990-15		2083
990-16		2083
990-17		2083
990-18		2083
991-19		2083
991-20		2083
991-21		2083
991-22		2121
991-23		2121
991-24		2121
991-25		2121
991-26		2121
991-27		2121
992-28		2122
992-29		2122
992-30		2122
992-31		2122
992-32		2122
992-33		2122
992-34		2084
992-35		2084
992-36		2085
992-37		2085
992-38		2085
992-39		2169
993-40		2169
993-41		2169
993-42		2169
993-43		2169
993-44		2169
993-45		2169
993-46		2169
993-47		2169
993-48		2169
993-49		2169
993-50		2169
993-51		2169
993-52		2169
993-53		2169
994-54		2086
994-55		2086
994-56		2086
994-57		2086
994-58		2086
994-59		2086
994-60		2086
994-61		2086
995-62		2093
995-63		2093
995-64		2093
996-65		2093
996-66		2093
996-67		2093
996-68		2093
996-69		2087
996-70		2087
997-71		2087
997-72		2087
997-73		2088
997-74		2088
997-75		2088
997-76		2088
997-77		2089
997-78		2089
997-79		2165
997-80		2165
997-81		2938
997-82		2938
997-83		2090
998-84		2091
998-85		2091
998-86		2091
998-87		2091
998-88		2091
998-89		2091
998-90		2091
998-91		2091
998-92		2094
998-93		2094
998-95		2094
999-96		2094
999-97		2938
999-98		2094
999-99		2094
999- 1		2094
999- 2		2094
999- 3		2094
999- 4		2094
999- 5		2094
1000- 6		2095
1000- 7		2095
1000- 8		2095
1000- 9		2095
1000-10		2096
1000-11		2096
1000-12		2096
1000-13		2096
1000-14		2097
1000-15		2097
1001-16		2097
1001-17		2097
1001-18		2097
1001-19		2097
1001-20		2097
1001-21		2097
1001-22		2097
1001-23		2097
1001-24		2097
1001-25		2098
1001-26		2098
1002-27		2098
1002-28		2098
1002-29		2098
1002-30		2098
1002-31		2098
1002-32		2099
1002-33		2099
1002-34		2099
1002-35		2100
1002-36		2101
1002-37		2101
1002-38		2101
1002-39		2166
1002-40		2166
1002-41		2166
1002-42		2166
1003-43		2166
1003-44		2166
1003-45		2166
1003-46		2166
1003-47		2166
1003-48		2166
1003-49		2166
1003-50		2103
1003-51		2103
1003-52		2103
1003-53		2103
1003-54		2103
1003-55		2103
1004-56		2103
1004-57		2104
1004-58		2104
1004-59		2104
1004-60		2104
1004-61		2104
1004-62		2104
1004-63		2104
1004-64		2138
1005-65		2138
1005-66		2138
1005-67		2106
1005-68		2106
1005-69		2106
1005-70		2106
1005-71		2107
1005-72		2107
1005-73		2107
1005-74		2107
1005-75		2108
1005-76		2108
1006-77		2108
1006-78		2108
1006-79		2108
1006-80		2108
1006-81		2108
1006-82		2108
1006-83		2108
1006-84		2108
1006-85		2108

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	Note	24 C.J. Sec.
1006-86		2108
1006-87		2109
1006-88		2109
1007-89		2109
1007-90		2109
1007-91		2109
1007-92		2109
1007-93		2109
1007-94		2110
1007-95		2110
1007-96		2110
1007-97		2111
1008-98		2111
1008-99		2111
1008- 1		2111
1008- 2		2166
1008- 3		2164
1008- 4		2112
1008- 5		2112
1008- 6		2112
1008- 7		2115
1008- 8		2115
1008- 9		2115
1008-10		2115
1009-11		2115
1009-12		2115
1009-13		2115
1009-14		2115
1009-15		2115
1009-16		2115
1009-17		2115
1009-18		2116
1009-19		2116
1009-20		2116
1009-21		2116
1009-22		2116
1009-23		2116
1010-24		2116
1010-25		2116
1010-26		2119
1010-27		2167
1010-28		2167
1010-29		2167
1010-30		2167
1010-31		2167
1010-32		2167
1010-33		2130
1010-34		2130
1010-35		2131
1010-36		2115
1010-37		2132
1011-38		2168
1011-39		2120
1011-40		2120
1011-41		2120
1011-42		2133
1011-43		2133
1011-44		2120
1011-45		2120
1011-46		2120
1011-47		2137
1012-48		2162
1012-49		2162
1012-50		2137
1012-51		2137
1012-52		2137
1012-53		2137
1012-54		2137
1012-55		2137
1012-56		2137
1012-57		2168
1012-58		2168
1012-59		2168
1012-60		2168
1012-61		2168
1013-62		2168
1013-63		2144
1013-64		2144
1013-65		2144
1013-66		2144
1013-67		2144
1013-68		2144
1013-69		2144
1013-70		2144
1013-71		2144
1013-72		2144
1014-73		2145
1014-74		2147
1014-75		2147
1014-76		2149
1014-77		2149
1014-78		2149
1014-79		2149
1014-80		2149
1014-81		2151
1014-82		2151
1014-83		2152
1015-84		2152
1015-86		2153
1015-87		2153
1015-88		2153
1015-89		2153
1015-90		2153
1015-91		2153
1015-92		2153
1015-93		2153
1015-94		2153
1015-95		2153
1016-96		2153
1016-97		2153
1016-98		2153
1016-99		2153
1016- 1		2154
1016- 2		2154
1016- 3		2154
1016- 4		2154
1016- 5		2154
1016- 6		2154
1016- 7		2154
1016- 8		2154
1016- 9		2154
1016-10		2155
1017-11		2155
1017-12		2155
1017-13		2155
1017-14		2155
1017-15		2156
1017-16		2156
1017-17		2156
1017-18		2156
1017-19		2156
1017-20		2156
1017-21		2156
1017-22		2156
1017-23		2156
1017-24		2156
1017-25		2156
1017-26		2156
1017-27		2156
1018-28		2156
1018-29		2157
1018-30		2157
1018-31		1368
1018-32		1368
1018-33		1368
1018-34		2159
1018-35		2159
1018-36		2159
1018-37		2159
1018-38		1499
1018-39		2160
1019-40		2160
1019-42		2160
1019-43		2161
1019-44		2161
1019-45		2161
1019-46		2161
1019-47		2170
1019-48		2170
1019-49		2170
1020-50		2170
1020-51		2170
1020-52		2170
1020-53		2170
1020-54		2170
1020-55		2170
1020-56		2170
1020-57		2170
1020-58		2170
1020-59		2170
1020-60		2171
1021-61		2171
1021-62		2172
1021-63		2172
1021-64		2172
1022-65		2172
1022-66		2172
1022-67		2172
1022-68		2173
1022-69		2173
1022-70		2175
1023-71		2175
1023-72		2176
1023-73		2176
1023-74		2176
1023-76		2176
1023-77		2176
1023-78		2177
1024-79		2177
1024-80		2177
1024-81		2178
1024-82		2178
1025-83		2178
1025-84		2178
1025-85		2178
1025-86		2178
1025-87		2179
1026-88		2179
1026-89		2179
1026-90		2179
1026-91		2179
1026-92		2179
1026-93		2179
1026-94		2179
1026-95		2179
1027-96		2179
1027-97		2179
1027-98		2179
1027-99		2179
1027- 1		2180
1027- 2		2180
1027- 3		2180
1027- 4		2180
1027- 5		2180
1027- 6		2180
1027- 7		2180
1027- 8		2180
1028- 9		2180
1028-10		2181
1028-11		2181
1028-12		2181
1028-13		2181
1028-14		2181
1029-15		2181
1029-16		2181
1029-17		2182
1029-18		2182
1029-19		2182
1029-20		2183
1029-21		2183
1030-22		2183
1030-23		2183
1030-24		2183
1031-25		2183
1031-26		2183
1031-27		2183
1031-28		2183
1031-29		2184
1031-30		2184
1031-31		2184
1032-32		2184
1032-33		2184
1032-34		2184
1032-35		2184
1032-36		2184
1032-37		2184
1032-38		2184
1032-39		2185
1032-40		2185
1032-41		2185
1033-42		2185
1034-43		2185
1034-44		2185
1034-45		2185
1034-46		2185
1034-47		2185
1034-48		2186
1034-49		2186
1034-50		2186
1034-51		2186
1034-52		2186
1034-53		2186
1034-54		2187
1034-55		2187
1034-56		2188
1035-57		2188
1035-58		2188
1035-59		2188
1035-60		2189
1035-61		2189
1035-62		2189
1035-63		2189
1036-64		2189
1036-65		2189
1036-66		2189
1036-67		2189
1036-68		2189
1036-69		2189
1036-70		2189
1036-71		2189
1036-72		2190
1036-73		2190
1036-74		2190
1036-75		2191
1036-76		2191
1036-77		2191
1036-78		2191
1036-79		2191
1036-80		2191
1037-81		2191
1037-82		2191
1037-83		2191
1037-84		2192
1037-85		2192
1037-86		2192
1038-87		2192
1038-88		2192
1038-89		2192
1038-90		2192
1038-91		2192
1038-92		2192
1038-93		2193
1038-94		2193
1039-95		2193
1039-96		2194
1039-97		2195
1039-98		2195
1039-99		2195
1039- 1		2195
1040- 2		2195
1040- 3		2195
1040- 4		2195
1040- 5		2195
1040- 6		2196
1040- 7		2197
1040- 8		2197
1040- 9		2197
1040-10		2197
1040-11		2195
1040-12		2197
1040-13		2197
1041-14		2197
1041-15		2197
1041-16		2197
1041-17		2197
1041-18		2197
1042-19		2197
1042-20		2198
1042-21		2199
1042-22		2199
1042-23		2199
1042-24		2200
1043-25		2200
1043-26		2201
1044-27		2201
1045-28		2202
1045-29		2202
1045-30		2202
1045-31		2202
1045-32		2203
1046-33		2203
1046-34		2203
1046-35		2203
1046-36		2203
1047-37		2203
1047-38		2204
1047-39		2204
1047-40		2204
1047-41		2205
1047-42		2209
1047-43		2209
1047-44		2209
1047-45		2209
1047-46		2209
1048-47		2209
1048-48		2209
1048-49		2209
1048-50		2209
1048-51		2209
1048-52		2210
1049-53		2211
1049-54		2211
1049-55		2211
1049-56		2211
1050-57		2211
1050-58		2214
1050-59		2214
1050-60		2214
1050-61		2215
1051-62		2215
1051-63		2215
1051-64		2215
1051-65		2215
1051-66		2215
1051-67		2215
1051-68		2215
1051-69		2215
1051-70		2215
1051-71		2215
1051-72		2215
1051-73		2215
1052-74		2216
1052-75		2216
1052-76		2216
1052-77		2217
1052-78		2217
1052-79		2217
1052-80		2217
1052-81		2217
1053-82		2217
1053-83		2217
1053-84		2217
1053-85		2217
1053-86		2217
1053-87		2217
1053-88		2217
1054-89		2217
1054-90		2217
1054-93		2218
1055-94		2218
1055 95		2218
1055-96		2218
1055-97		2218
1055-98		2219
1055-99		2219
1056- 1		2219
1057- 2		2020
1057- 3		2221
1057- 4		2222
1058- 5		2222
1058- 6		2222
1058- 7		2222
1059- 8		2222
1059- 9		2222
1059-10		2223
1059-11		2224
1060-12		2224
1060-13		2224
1060-16		2225
1060-17		2225
1060-18		2225
1061-19		2225
1061-20		2225
1061-22		2226
1061-23		2226
1061-24		2226
1061-25		2226
1061-26		2226
1061-27		2226
1061-28		2226
1061-29		2227
1061-30		2227
1062-31		2227
1062-32		2227
1062-33		2227
1062-34		2230
1062-35		2230
1062-36		2230
1062-37		2230
1063-38		2230
1063-39		2230
1063-40		2230
1063-41		2231
1063-42		2231
1064-43		2231
1064-45		2232
1064-46		2232
1064-47		2232
1064-48		2232
1064-49		2232
1064-50		2232
1064-51		2232
1064-52		2232
1064-53		2232
1064-54		2232
1065-55		2233
1065-56		2233
1065-57		2233
1065-58		2233
1066-59		2233
1066-60		2234
1066-61		2234
1066-62		2234
1066-63		2234
1066-64		2237
1066-65		2237
1066-66		2237
1066-67		2237
1066-68		2237
1066-69		2238
1066-70		2238
1066-71		2235
1067-72		2236
1067-73		2236
1067-74		2239
1067-75		2239
1067-76		2239
1067-77		2240
1067-78		2240
1067-79		2240
1068-80		2240
1068-81		2240
1068-82		2241
1069-83		2241
1069-84		2241
1069-85		2241
1069-86		2241
1069-87		2241
1070-88		2241
1070-89		2241
1070-90		2242
1070-91		2242
1070-92		2243
1070-93		2243
1070-94		2243
1070-95		2243
1070-96		2243
1070-97		2243
1070-98		2243
1070-99		2244
1070- 1		2244
1071- 2		2245
1071- 3		2245
1071- 4		2245
1071- 5		2245
1071- 6		2245
1171- 7		2245
1071- 8		2245
1071- 9		2246
1072-10		2246
1072-11		2246
1072-12		2246
1072-13		2246
1072-14		2246
1072-15		2246
1072-16		2246
1072-17		2246
1072-18		2246
1072-19		2246
1072-20		2246
1073-21		2246
1073-22		2246
1073-23		2247
1074-24		2247
1074-25		2247
1074-26		2247
1074-27		2247
1074-28		2257
1074-29		2247
1074-30		2247
1074-31		2247
1074-32		2247
1074-33		2247
1074-34		2248
1075-35		2249
1075-36		2249
1075-37		2249
1075-38		2249
1075-39		2249
1075-40		2250
1076 41		2250
1077-42		2251
1077-43	Executions	17
1077-44		2252
1077-45		2252
1078-46		2252
1078-47		2253
1078-48		2253
1078-49		2254
1078-50		2254
1078-51		2254
1078-52		2254
1078-53		2254
1078-54		2255
1078-55		2255
1078-56		2255
1078-57		2255
1079-58		2255
1079-59		2255
1079-60		2255
1079-61		2255
1079-62		2255
1080-63		2255
1080-64		2255
1080-65		2255
1080-66		2256
1080-67		2256
1080-68		2256
1080-69		2256
1080-70		2256
1080-71		705
1080-72		705
1081-73		2257
1081-74		2257
1081-75		2257
1181-76		2257
1081-77		2257
1181-78		2258
1081-79		2258
1081-80		2259
1082-81		2259
1082-82		2259
1082-83		2259
1082-84		2260
1082-85		2260
1082-86		2261
1083-87		2261
1083-88		2261
1083-89		2264
1083-90		2262
1083-91		2264
1083-92		2264
1083-93		2265
1083-94		2265
1084-95		2265
1084-96		2265
1084-97		2265
1084-98	Appeal & Error	2380
1084-99		2266
1084- 1		2266
1084- 2		2266
1084- 3		2266
1084- 4		2267
1085- 5		2267
1085- 6		2267
1085- 7		2267
1085- 8		2267
1085- 9		2267
1085-10		2267
1085-11		2267
1085-12		2267
1085-13		2267
1085-14		2267
1085-15		2267
1085-16		2268
1086-17		2268
1086-18		2268
1086-19		2268
1086-20		2268
1086-21		2269
1086-22		2269
1086-23		2269
1086-24		2269
1087-25		2269
1087-26		2269
1087-27		2269
1087-28		2269
1087-29		2269
1087-30		2269
1087-31		2269
1087-32		2269
1087-33		2269
1087-34		2269
1087-35		2269
1087-36		2269
1087-37		2269
1087-38		2270
1088-39		2270
1088-40		2270
1088-41		2270
1088-42		2270
1088-43		2270
1088-44		2270
1088-45		2271
1088-46		2271
1089-47		2271
1089-48		2271
1089-49		2271
1089-50		2271
1089-51		2271
1089-52		2271
1089-53		2271
1089-54		2272
1089-55		2272
1090-56		2272
1090-57		2272
1090-58		2272
1090-59		2272
1090-60		2273
1090-62		2273
1090-63		2274
1090-64		2274
1090-65		2274
1090-66		2274
1091-67		2273
1091-68		2274
1091-69		2275
1091-70		2275
1091-71		2275
1091-72		2275
1091-73		2279
1091-74		2276
1091-75		2276
1091-76		2276
1092-77		2276
1092-78		2276
1092-79		2276
1092-80		2276
1092-81		2276
1092-82		2276
1092-83		2276
1092-84		2276
1092-85		2277
1092-86		2277
1092-87		2277
1092-88		2277
1092-89		2277
1092-90		2277
1093-91		2277
1093-92		2277
1093-93		2277
1093-94		2278
1093-95		2278
1093-96		2278
1093-97		2279
1093-98		2279
1093-99		2279
1093- 1		2279
1092- 2		2280
1093- 3		2280
1093- 4		2280
1094- 5		2281
1094- 6		2281
1094- 7		2281
1094- 8		2282
1094- 9		2282
1094-10		2282
1094-11		2282
1094-12		2282
1094-13		2282
1094-14		2282
1094-15		2282
1094-16		2282
1095-17		2282
1095-18		2282
1095-19		2282
1095-20		2282
1095-21		2282
1095-22		2283
1095-23		2283
1096-24		2284
1096-25		2284
1096-26		2285
1096-27		2286
1096-28		2286
1096-29		2286
1096-30		2286
1096-31		2287
1096-32		2287
1096-33		2287
1096-34		2287
1097-35		2287
1097-36		2287
1097-37		2288
1097-38		2289
1097-39		2289
1097-40		2289
1097-41		2289
1097-42		2289
1098-43		2289
1098-44		2289
1098-45		2289
1098-46		2296
1098-47		2296
1098-48		2296
1098-49		2296
1098-50		2296
1098-51		2296
1098-52		2296
1098-53		2296
1098-54		2291
1098-55		2291
1098-56		2291
1098-57		2291
1099-58		2291
1099-59		2291
1099-60		2291
1099-61		2291
1099-62		2291
1099-63		2291
1099-64		2292
1099-65		2292
1099-66		2293
1099-67		2293
1099-68		2293
1099-69		2293
1099-70		2293
1100-71		2293
1100-72		2293
1100-73		2294
1100-74		2294
1100-75		2294
1100-76		2294
1100-77		2294
1100-78		2294
1100-79		2294
1100-80		2294
1100-81		2295
1100-82		2295
1100-83		2295
1101-84		2295
1101-85		2295
1101-86		2295
1101-87		2297
1101-88		2297
1101-89		2297
1101-90		2297
1101-91		2297

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc 24 C.J.	
Page	Note Sec.
1102-92	2297
1102-93	2297
1102-94	2297
1102-95	2297
1102-96	2297
1102-97	2297
1102-98	2297
1102-99	2297
1102- 1	2298
1102- 2	2298
1102- 3	2298
1103- 4	2298
1103- 5	2298
1103- 6	2298
1103- 7	2298
1103- 8	2298
1103- 9	2298
1103-10	2298
1103-11	2298
1103-12	2298
1104- 2	2300
1104- 3	2300
1104- 4	2300
1105- 5	2300
1105- 6	2300
1105- 7	2301
1105- 8	2303
1106- 9	2303
1106-10	2303
1106-11	2303
1106-12	2303
1106 13	2303
1106-14	2304
1107-15	2305
1108-16	2306
1108-17	2308
1108-18	2307
1109-19	2309
1109-21	2311
1109-22	2311
1109-23	2311
1110-24	2312
1110-25	2312
1110-26	2313
1100-27	2314
1110-28	2314
1110-29	2314
1110-30	2314
1111-31	2315
1111-32	2315
1111-34	2315
1112-35	2316
1112-36	2316
1112-37	2316
1112-38	2317
1112-39	2318
1112-40	2318
1112-41	2319
1112-42	2319
1113-43	2319
1113-44	2319
1113-45	2319
1113-46	2320
1113-47	2320
1113-48	2320
1113-49	2320
1114-51	2321
1114-52	2321
1114-53	2321
1114-54	2321
1114-55	2321
1114-56	2321
1114-57	2321
1114-59	2323
1115-60	2324
1110-61	2325
1115-62	2325
1115-63	2325
1115-64	2325
1115-65	2325
1115-66	2326
1115-67	2326
1115-68	2326
1115-69	2328
1115-70	2329
1117-72	2329
1118-73	2330
1118-75	2331
1118-76	2331
1118-77	2331
1119-78	2331
1119-79	2332
1119-80	2332
1119-81	2332
1119-82	2333
1119-83	2334
1119-84	2334
1119-85	2335
1119-86	2335
1119-87	2335
1119-88	2335
1119-89	2335
1119-90	2335
1119-91	2335
1120-92	2335
1120-93	2335
1120-94	2335
1120-95	2336
1120-96	2336
1121-97	2336
1122-98	2336
1122-99	2337
1123- 1	2337
1123- 2	2338
1123- 3	2339
1124- 4	2341
1124- 5	2342
1124- 6	2343
1125- 7	2346
1125- 8	2347
1125- 9	2344
1125-10	2344
1126-11	2345
1126-12	2345
1126-13	2345
1126-14	2353
1126-16	2354
1126-17	2355
1127-18	2355
1127-19	2355
1127-20	2355
1127-21	2355
1127-22	2355
1127-23	2355
1127-24	2356
1128-25	2356
1128-26	2356
1128-27	2356
1128-28	2357
1128-29	2357
1128-30	2357
1128-31	2357
1128-32	2362
1128-33	2362
1128-34	2362
1128-35	2389
1128-36	2363
1128-37	2363
1128-38	2365
1129-39	2365
1129-40	2885
1129-41	2365
1129-42	2365
1129-44	2365
1129-45	2368
1129-46	2368
1129-47	2368
1129-48	2368
1130-49	2369
1130-50	2369
1130-51	2370
1130-52	2370
1130-53	2370
1130-54	2371
1130-55	2370
1130-56	2370
1130-57	2371
1130-58	2371
1130 59	2371
1131-60	2371
1131-61	2371
1131-62	2371
1131-63	2371
1131-64	2371
1131-65	2371
1131-66	2372
1131-67	2373
1131-68	2373
1131-69	2373
1131-70	2373
1131-71	2387
1132-72	2374
1132-73	2375
1132-74	2375
1132-75	2375
1132-76	2375
1132-77	2375
1132-78	2377
1132-79	2377
1132-80	2377
1132-81	2377
1133-82	2377
1133-83	2377
1133-84	2377
1133-85	2378
1133-86	2378
1133-87	2378
1133-88	2378
1133-89	2378
1133 90	2378
1133 91	2378
1133-92	2378
1133-93	2378
1133-94	2378
1134-95	2378
1134-96	2379
1134-97	2379
1134-98	2382
1134-99	2382
1134- 1	2382
1134- 2	2382
1134- 3	2382
1134- 4	2382
1134- 5	2382
1134- 6	2380
1134- 7	2380
1134- 8	2383
1134- 9	2383
1135-10	2381
1135-11	2381
1135-12	2381
1135-13	2381
1135-14	2381
1135-15	2386
1135-16	2386
1135-17	2386
1135-18	2388
1135-19	2388
1135-20	2388
1135-21	2388
1135-22	2388
1135-23	2388
1135-24	2388
1135-25	2388
1135-26	2388
1135-27	2388
1135-28	2389
1136-29	2389
1136-30	2389
1136-31	2389
1136-32	2390
1136-33	2391
1136-34	2391
1136-35	2391
1136-36	2392
1136-37	2392
1136-38	2392
1136-39	2392
1137-40	2392
1137-41	2392
1137-42	2392
1137-43	2392
1137-44	2392
1137-45	2392
1137-46	2392
1137-47	2392
1137-48	2392
1137-49	2392
1137-50	2392
1137-51	2392
1137 52	2392
1137-53	2392
1138-54	2392
1138-55	2392
1138-56	2392
1138-57	2392
1138-58	2392
1138-59	2392
1138-60	2392
1138-61	2392
1138-62	2392
1138-63	2392
1138-64	2392
1139-65	2392
1139-66	2393
1139-67	2393
1139-68	2393
1140-69	2393
1140-70	2393
1140-71	2393
1140-72	2393
1140-73	2393
1140-74	2393
1140-75	2393
1140-76	2393
1140-77	2393
1140-78	2393
1140-79	2393
1140-80	2393
1140-81	2393
1140-82	2393
1141-83	2393
1141-84	2393
1141-85	2393
1141-86	2394
1141-87	2394
1142-88	2395
1142-89	2395
1142-90	2396
1142-91	2396
1142-92	2396
1142-93	2396
1142-94	2396
1142-95	2396
1142-96	2396
1143-97	2397
1143-98	2397
1143-99	2424
1143- 1	2424
1144- 2	2424
1144- 3	2398
1144- 4	2398
1144- 5	2398
1144- 6	2424
1144- 7	2399
1144- 8	2399
1145- 9	2399
1145-10	2400
1145-11	2400
1145-12	2400
1145-13	2401
1145-14	2401
1146-15	2401
1146-16	2401
1146-17	2401
1146-18	2401
1146-19	2402
1146-20	2403
1147-21	2404
1147-22	2404
1147-23	2405
1147-24	2406
1148-25	2406
1148-26	2407
1148-27	2407
1148-28	2408
1148-29	2408
1149-30	2408
1149-31	2408
1149-32	2409
1150-33	2410
1150-34	2410
1150-35	2411
1151-36	2412
1151-37	2412
1151-38	2413
1151-39	2413
1151-40	2413
1152-41	2414
1152-42	2414
1152-43	2414
1152-44	2416
1153-45	2417
1153-46	2417
1153-47	2418
1153-48	2418
1153-49	2418
1153-50	2420
1154-51	2422
1155-52	2422
1155-53	2422
1155-54	2422
1156-55	2422
1156-56	2422
1156-58	2423
1156-59	2423
1156-60	2423
1157-61	2423
1157-62	2423
1157-63	2425
1157-64	2425
1157-65	2425
1158-66	2426
1158-67	2427
1158-68	2427
1158-69	2427
1158-70	2427
1158-71	2427
1159-72	2427
1159-73	2427
1159-74	2428
1159-75	2428
1159-76	2428
1159-77	2428
1159-78	2428
1159-79	2428
1160-80	2428
1160-81	2429
1160-82	2429
1160-83	2429
1161-84	2429
1161-85	2429
1161-86	2429
1161-87	2429
1161-88	2429
1161-89	2430
1162-90	2430
1162-91	2431
1162-92	2431
1162-93	2431
1162-94	2432
1163-95	2432
1163-96	2433
1164-97	2433
1164-98	2433
1164-99	2434
1165- 1	2434
1165- 2	2435
1165- 3	2436
1165- 4	2436
1165- 5	2436
1165- 6	2436
1165- 7	2437
1165- 8	2437
1166- 9	2437
1166-10	2437
1166-11	2439
1166-12	2439
1166-13	2442
1166-14	2439
1166-15	2439
1166-16	2441
1166-17	2438
1166-18	2438
1167-19	2438
1167-20	2438
1167-21	2440
1167-22	2440
1167-23	2440
1167-24	2440
1167-25	2440
1167-26	2441
1167-27	2440
1167-28	2443
1168-29	2443
1168-30	2443
1168-31	2443
1168-32	2443
1168-33	2443
1168-34	2442
1168-35	2442
1168-36	2442
1168-37	2442
1169-38	2445
1169-39	2445
1169-40	2445
1169-41	2445
1170-42	2445
1170-43	2445
1170-44	2445
1170-45	2445
1170-46	2445
1170-47	2445
1170-48	2446
1170-49	2446
1170-50	2446
1170-51	2446
1170-52	2446
1170-53	2446
1170-54	2446
1170-55	2446
1171-56	2447
1171-57	2448
1171-58	2448
1171-59	2441
1171-60	2452
1171-61	2452
1172-62	2452
1172-63	2452
1172-64	2450
1172-65	2449
1173-66	2449
1173-67	2449
1173-68	2449
1173-69	2449
1173-70	2449
1173-71	2455
1174-72	2455
1174-73	2455
1174-74	2456
1174-75	2456
1174-76	2456
1174-77	2457
1174-78	2457
1174-79	2457
1174-80	2457
1174-81	2457
1174-82	2457
1174-83	2457
1175-84	2457
1175-85	2457
1175-86	2458
1175-87	2458
1175-88	2458
1175-89	2459
1175-90	2459
1175-91	2459
1175-92	2459
1176-93	2459
1176-94	2459
1176-95	2459
1176-96	2459
1176-98	2459
1176-99	2459
1176- 1	2459
1176- 2	2459
1177- 3	2459
1177- 4	2459
1177- 5	2459
1177- 6	2459
1177- 7	2459
1177- 8	2459
1177- 9	2459
1177-10	2459
1177-11	2459
1177-12	2459
1177-13	2459
1177-15	2460
1178-16	2464
1179-17	2467
1179-18	2466
1179-19	2466
1179-20	2466
1179-21	2467
1179-22	2467
1179-23	2467
1179-24	2467
1179-25	2467
1179-26	2467
1180-27	2467
1180-29	2469
1180-30	2469
1180-31	2469
1180-32	2469
1180-33	2469
1180-34	2469
1180-35	2469
1180-36	2469
1180-37	2469
1181-38	2470
1181-39	2470
1181-40	2471
1181-41	2471
1181-42	2471
1181-43	2472
1182-44	2472
1182-45	2472
1182-46	2473
1183-47	2473
1183-48	2473
1183-49	2474
1184-50	2474
1184-51	2474
1184-52	2475
1184-53	2475
1184-54	2475
1184-55	2475
1185-56	2475
1185-57	2475
1185-58	2475
1185-59	2476
1185-60	2476
1186-61	2476
1186-62	2477
1186-63	2481
1186-64	2481
1186-65	2481
1187-66	2481
1187-67	2481
1187-68	2481
1187-69	2481
1187-70	2481
1187-71	2481
1187-72	2481
1187-73	2481
1187-74	2481
1188-76	2482
1189-77	2483
1189-78	2483
1190-79	2483
1190-80	2484
1191-81	2484
1191-82	2484
1192-83	2485
1192-84	2486
1192-85	2487
1193-86	2488
1193-87	2488
1194-89	2489
1194-90	2489
1195-91	2489
1195-92	2490
1195-93	2490
1195-94	2490
1196-95	2490
1196-96	2490
1196-97	2490
1196-98	2490
1196-99	2491
1196- 1	2492
1197- 2	2492
1197- 3	2492
1197- 4	2493
1198- 5	2502
1198- 6	2502
1198- 7	2493
1198- 8	2493
1198- 9	2493
1198-10	2493
1199-11	2494
1202 12	2496
1202-13	2497
1203-14	2499
1203-15	2499
1203-16	2499
1203-17	2499
1203-18	2499
1203-19	2500
1203-20	2500
1204-21	2500
1204-22	2495
1204-23	2495
1204-24	2495
1205-25	2504
1205-26	2504
1205-27	2504
1205-28	2504
1205-29	2504
1206-30	2505
1206 31	2507
1206 32	2507
1207-33	2508
1207 34	2508
1207 35	2509
1208-36	2509
1208-37	2509
1208-38	2509
1208-39	2509
1209-40	2509
1209-41	2509
1209-42	2510
1209-43	2510
1209-44	2510
1209-45	2511
1210-46	2511
1210-48	2512
1210-49	2512
1210-50	2512
1210-51	2512
1210 52	2513
1211-53	2514
1211-54	2514
1211-55	2514
1211-56	2515
1212-57	2515
1212-58	2516
1212-59	2516
1212-60	2517
1212-61	2517
1213-62	2518
1213-63	2518
1213-64	2524
1213 65	2518
1213-66	2519
1213-68	2520
1214 70	2521
1214-71	2522
1214-73	2525
1214-74	2525
1214-75	2525
1214-76	2525
1215-77	2525
1215-78	2524
1215-79	2524
1215-80	2526
1215-81	2526
1215-82	2527
1215-83	2527
1215-84	2527
1215-85	2527
1216-86	2527
1216-87	2527
1216-88	2527
1216 89	2527
1216 90	2527
1216-91	2527
1216-92	2527
1217-93	2528
1217-94	2528
1217-95	2529
1217-96	2529
1218-97	2529
1218-98	2529
1219-99	2530
1219- 1	2530
1219- 2	2530
1219- 3	2530
1219- 4	2530
1219- 5	2530
1219- 6	2531
1220- 7	2531
1220- 8	2531
1220- 9	2532
1220-10	2532
1220-11	2532
1220-12	2532
1220-13	2532
1220-14	2532
1220-15	2532
1221-16	2670
1221-17	2670
1221-18	2671
1221-19	2671
1221-20	2671
1222-21	2671
1222-22	2671
1222-23	2671
1222-24	2671
1222-25	2671
1222-26	2708
1222-27	2722
1222-28	2672
1222-29	2672
1222-30	2673
1222-31	2673
1222-32	2673
1222-33	2673
1223-34	2673
1223-35	2673
1223-36	2673
1223-37	2674
1223-38	2674
1223-39	2674
1223-40	2674
1223-41	2674
1223-42	2671
1223-43	2702
1223-44	2674
1223-46	2675
1223-47	2675
1223-48	2675
1223-49	2675
1224-50	2675
1224-51	2675
1224-52	2675
1224-53	2675
1224-54	2676
1224-55	2676
1224-56	2676
1224-57	2677
1224-58	2677
1225-59	2677
1225-60	2677
1225-61	2677
1225-62	2677
1225-63	2677
1225-64	2677
1225-65	2677
1225-66	2678
1225-67	2678
1225-68	2678
1225-69	2679
1225-70	2679
1225-71	2679
1225-72	2679
1225-73	2679
1225-74	2679
1226-75	2679
1226-76	2679
1226-77	2680
1226-78	2686
1226-79	2682
1226-80	2682
1226-81	2682
1226-82	2682
1226-83	2682
1226-84	2682
1226-85	2682
1226-86	2682
1226-87	2683
1227-88	2683
1227-89	2683
1227-90	2683
1227-91	2683
1227-92	2683
1227-93	2684
1227-94	2685
1227-95	2685
1227-96	2685
1228-97	2685
1228-98	2684
1228-99	2685

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc Page	Note	24 C.J. Sec.
1228- 1		2685
1228- 2		2685
1228- 3		2685
1228- 4		2685
1228- 5		2685
1228- 6		2685
1228- 7		2685
1228- 8		2685
1228- 9		2685
1228-10		2686
1228-11		2686
1228-12		2686
1229-13		2686
1229-14		2686
1229-15		2686
1229-16		2686
1229-17		2686
1229-18		2686
1229-19		2687
1229-20		2687
1229-21		2685
1229-22		2687
1229-23		2687
1229-24		2687
1230-25		2687
1230-26		2687
1230-27		2687
1230-28		2688
1230-29		2688
1230-30		2688
1230-31		2688
1230-32		2690
1230-33		2690
1230-34		2690
1231-35		2690
1231-36		2702
1231-37		2689
1231-38		2689
1231-39		2689
1231-40		2691
1231-41		2691
1231-42		2692
1231-43		2692
1232-44		2692
1232-45		2692
1232-46		2692
1232-47		2692
1232-48		2692
1232-49		2692
1232-50		2692
1232-51		2693
1232-52		2693
1232-53		2693
1232-54		2693
1232-55		2693
1232-56		2693
1233-57		2693
1233-58		2693
1233-59		2694
1233-60		2694
1233-61		2694
1233-62		2694
1233-63		2694
1233-64		2694
1233-66		2694
1233-67		2694
1233-68		2697
1233-69		2697
1233-70		2697
1233-71		2698
1234-72		2698
1234-73		2698
1234-74		2698
1234-75		2698
1234-76		2698
1234-77		2698
1234-78		2695
1234-79		2695
1234-80		2695
1234-81		2696
1234-82		2696
1234-83		2696
1234-84		2699
1235-85		2699
1235-86		2699
1235-87		2699
1235-88		2700
1235-89		2700
1236-90		2700
1236-91		Desc. & Distrib. 8
1236-92		2700
1236-93		2700
1236-94		2700
1236-95		2700
1236-96		2700
1236-97		2701
1236-98		2701
1237-99		Desc. & Distrib. 8
1237- 1		2701
1237- 2		2702
1238- 3		2702
1238- 4		2702
1238- 5		2702
1238- 6		2702
1238- 7		2702
1238- 8		2702
1238- 9		2702
1238-10		2702
1239-11		2702
1239-12		2703
1239-13		2703
1239-14		2705
1239-15		2706
1239-16		2706
1239-17		2706
1239-18		2706
1239-19		2706
1239-20		2706
1239-21		2706
1240-22		Death 117
1240-23		" 117
1240-24		" 117
1240-25		" 117
1240-26		" 117
1240-27		" 117
1240-28		2704
1241-29		2704
1241-30		2704
1241-31		2708
1241-32		2708
1241-33		2708
1241-34		2708
1241-35		2708
1241-36		2708
1241-37		2708
1241-38		2708
1241-39		2708
1241-40		2708
1242-41		2708
1242-42		2708
1242-43		2708
1242-44		2709
1242-45		2709
1242-46		2709
1242-47		2709
1242-48		2709
1242-49		2711
1242-50		2710
1242-51		2710
1243-52		2710
1243-53		2711
1243-55		2712
1243-56		2712
1243-57		2714
1243-58		2714
1243-59		2715
1243-60		2715
1243-61		2715
1243-62		2715
1243-63		2716
1243-64		2716
1243-65		2716
1243-66		2716
1243-67		2716
1244-68		2716
1244-69		2716
1244-70		2716
1244-71		2717
1244-72		2717
1244-73		2717
1244-74		2717
1244-75		2717
1244-76		2713
1244-77		2720
1245-78		2720
1245-79		2720
1245-80		2720
1245-81		2720
1245-82		2721
1245-83		2721
1245-84		2721
1245-85		2721
1245-86		2721
1246-87		2721
1246-88		2721
1246-89		2721
1246-90		2721
1246-91		2721
1246-92		2721
1246-93		2721
1246-94		2721
1246-95		2721
1246-96		2721
1246-97		2723
1246-98		2723
1246-99		2723
1246- 1		2723
1247- 2		2722
1247- 3		2722
1247- 4		2722
1247- 5		2724
1247- 6		2724
1247- 7		2724
1247- 8		2728
1247- 9		2728
1247-10		2728
1247-11		2728
1247-12		2728
1247-13		2729
1248-14		2729
1248-15		2730
1248-16		2730
1248-17		2730
1248-18		2730
1248-19		2730
1248-20		2728
1248-21		2731
1248-22		2731
1248-23		2731
1248-24		2730
1248- 1	p.	1058 n. 7
1248- 2		2533
1249- 3		2533
1249- 4		2533
1249- 5		2533
1249- 6		2533
1249- 7		2533
1249- 8		2533
1249- 9		2534
1249-10		2534
1250-11		2534
1250-12		2535
1250-13		2536
1250-14		2537
1250-15		2537
1250-16		2538
1251-17		2538
1251-18		2538
1251-19		2539
1251-20		2539
1251-21		2540
1251-22		2540
1251-23		2540
1251-24		2540
1252-25		2540
1252-26		2541
1252-27		2541
1252-28		2541
1252-29		2542
1252-30		2542
1252-31		2542
1252-32		2542
1253-33		2542
1253-34		2543
1253-35		2543
1253-36		2543
1253-37		2543
1253-38		2544
1253-39		2545
1253-40		2545
1254-41		2545
1254-42		2545
1254-43		2545
1254-44		2545
1254-45		2546
1254-46		2546
1254-47		2546
1255-48		2547
1255-49		2548
1255-50		2548
1255-51		2548
1255-52		2549
1255-53		2549
1255-54		2549
1255-55		2549
1255-56		2550
1255-57		2550
1256-58		2550
1256-59		2550
1256-60		2550
1256-61		2551
1256-62		2551
1256-63		2551
1257-64		2551
1257-65		2554
1257-66		2554
1257-67		2556
1257-68		2556
1257-69		2556
1257-70		2556
1257-71		2556
1257-72		2556
1257-73		2556
1258-74		2556
1258-75		2557
1258-76		2557
1258-77		2557
1258-78		2571
1258-79		2571
1258-80		2571
1258-81		2558
1259-82		2558
1259-83		2558
1259-84		2558
1259-85		2559
1259-86		2559
1259-87		2560
1259-88		2561
1259-89		2561
1259-90		2561
1260-91		2561
1260-92		2562
1260-93		2562
1260-94		2562
1260-95		2562
1260-96		2562
1261-97		2562
1261-98		2562
1261-99		2563
1261- 1		2563
1261- 2		2572
1261- 3		2563
1261- 4		2563
1262- 5		2564
1262- 6		2564
1262- 7		2565
1262- 8		2565
1262- 9		2565
1262-10		2567
1263-11		2567
1263-12		2568
1263-13		2568
1263-14		2568
1263-15		2568
1263-16		2568
1263-17		2568
1263 18		2569
1263 19		2569
1264 20		2569
1264 21		2569
1264 22		2569
1264-23		2570
1264-24		2570
1264-25		2557
1264-26		2571
1265-27		2571
1265-28		2571
1265-29		2571
1265-30		2573
1266-31		2573
1266 32		2573
1266-33		2573
1266-34		2573
1266-35		2573
1266-36		2573
1266-37		2574
1267 38		2574
1267-39		2574
1267 40		2575
1267 41		2575
1267-42		2575
1267-43		2576
1267-44		2576
1267-45		2576
1267-46		2576
1268-47		2577
1268-48		2577
1268-49		2577
1268-50		2578
1268-51		2578
1268-52		2579
1268-53		2579
1268-54		2579
1269-55		2579
1269-56		2580
1269-57		2580
1269-58		2581
1269-59		2581
1269-60		2581
1269-61		2581
1269-62		2582
1269-63		2582
1270-64		2582
1270-65		2583
1270-66		2583
1270-67		2583
1270-68		2584
1270-69		2584
1270-70		2584
1270-71		2584
1270-72		2585
1270-73		2585
1271-74		2585
1271-75		2585
1271-76		2585
1271-77		2586
1271-78		2587
1272-79		2587
1272-80		2587
1272-81		2588
1272-82		2589
1273-83		2589
1273-84		2589
1274-85		2589
1274-86		2589
1274-87		2589
1274-88		2589
1274-89		2589
1275-90		2589
1275-91		2589
1275-92		2589
1275-93		2589
1275-94		2589
1275-95		2589
1275-96		2589
1275-97		2589
1275-98		2589
1275-99		2589
1275- 1		2590
1275- 2		2590
1276- 3		2591
1276- 4		2591
1276- 5		2591
1276- 6		2591
1276- 7		2592
1277- 8		2593
1277- 9		2593
1277-10		2594
1277-11		2594
1277-12		2594
1277-13		2594
1278-14		2594
1278-15		2595
1278-16		2596
1278-17		2596
1278-18		2596
1278-19		2596
1278-20		2596
1278-21		2597
1278-22		2597
1279-23		2598
1279-24		2598
1279-25		2598
1279-26		2599
1279-27		2599
1279-28		2599
1279-29		2599
1279-30		2599
1279-31		2599
1279-32		2599
1280-33		2600
1280-34		2600
1280-35		2601
1280-36		2601
1280-37		2601
1281-38		2601
1281-39		2602
1281-40		2602
1281-41		2603
1281-42		2603
1281-43		2603
1282-44		2604
1282-45		2605
1282-46		2605
1282-47		2606
1282-48		2606
1283-49		2606
1283-50		2607
1283-51		2607
1284-52		2608
1284-53		2608
1284-54		2608
1284-55		2608
1285-56		2610
1285-57		2610
1285-58		2610
1285-59		2610
1285-60		2610
1285-61		2610
1286-62		2611
1286-63		2611
1286-64		2611
1286-65		2611
1286-66		2612
1286-67		2614
1286-68		2614
1287-69		2614
1287-70		2615
1287-71		2615
1287-72		2615
1287-73		2615
1287-74		2615
1287-75		2615
1287-76		2615
1287-77		2615
1287-78		2615
1287-79		2615
1287-80		2616
1287-81		2616
1287-82		2616
1288-83		2617
1288-84		2617
1288-85		2617
1288-86		2617
1288-87		2617
1288-88		2618
1288-89		2618
1288-90		2619
1288-91		2619
1288-92		2619
1288-93		2619
1289-94		2619
1289-95		2619
1289-96		2619
1289-97		2619
1289-98		2619
1289-99		2619
1289- 1		2619
1289- 2		2619
1289- 3		2619
1289- 4		2627
1289- 5		2627
1289- 6		2627
1289- 7		2627
1290- 8		2627
1290- 9		2628
1290-10		2628
1290-11		2628
1290-12		2629
1290-13		2629
1290-14		2629
1290-15		2629
1290-16		2627
1291-17		2630
1291-18		2630
1291-19		2621
1291-20		2621
1291-21		2621
1291-22		2621
1291-23		2621
1291-24		2621
1291-25		2621
1291-26		2621
1291-27		2621
1291-28		2621
1291-29		2621
1291-30		2621
1291-31		2621
1291-32		2622
1291-33		2622
1292-34		2622
1292-35		2622
1292-36		2623
1292-37		2623
1292-38		2623
1292-39		2623
1292-40		2623
1292-41		2623
1292-42		2624
1292-43		2624
1292-44		2625
1292-45		2625
1292-46		2625
1292-47		2625
1292-48		2625
1292-49		2625
1292-50		2620
1292-51		2620
1293-52		2620
1293-53		2626
1293-54		2626
1293-55		2626
1293-56		2626
1293-57		2626
1293-58		2631
1293-59		2631
1293-60		2631
1293-61		2631
1293-62		2631
1293-63		2631
1293-64		2631
1294-65		2631
1294-66		2631
1294-67		2631
1294-68		2631
1294-69		2631
1294-70		2631
1294-71		2631
1294-72		2631
1294-73		2631
1294-74		2631
1294-75		2631
1295-76		2631
1295-77		2631
1295-78		2631
1295-79		2632
1295-80		2632
1295-81		2632
1295-82		2632
1295-83		2632
1295-84		2632
1295-85		2632
1295-86		2632
1295-87		2632
1295-88		2632
1295-89		2632
1295-90		2632
1296-91		2632
1296-92		2632
1296-93		2632
1296-94		2632
1296-95		2634
1296-96		2634
1296-97		2634
1296-98		2634
1296-99		2635
1296- 1		2635
1297- 2		2635
1297- 3		2635
1297- 4		2635
1297- 5		2635
1297- 6		2635
1297- 7		2635
1297- 8		2635
1297- 9		2635
1297-10		2635
1297-11		2636
1297-12		2637
1297-13		2637
1297-14		2637
1297-15		2638
1298-16		2638
1298-17		2638
1298-18		2638
1298-19		2638
1298-20		2638
1298-21		2638
1298-22		2638
1298-23		2638
1299-24		2638
1299-25		2638
1299-26		2638
1299-27		2638
1299-28		2638
1299-29		2639
1299-30		2639
1299-31		2639
1299-32		2639
1299-33		2639
1299-34		2640
1299-35		2640
1300-36		2640
1300 37		2640
1300-38		2640
1300 39		2640
1300-40		2641
1300-41		2641
1300-42		2643
1300-43		2643
1300-44		2643
1300-45		2643
1300-46		2643
1300-47		2643
1300-48		2643
1300-49		2643
1300-50		2645
1301-51		2645
1301-52		2645
1301-53		2646
1301-54		2646
1301-55		2646
1301-56		2647
1301-57		2647
1301-58		2647
1301-59		2648
1301-60		2650
1301-61		2650
1301-62		2650
1301-63		2650
1301-64		2650
1301-65		2651
1301-66		2651
1301-67		2651
1302-68		2652
1302-69		2652
1392-70		2652
1302-71		2652
1302-72		2653
1302-73		2653
1302-74		2653
1302-75		2653
1302-76		2653
1302-77		2653
1302-78		2653
1302-79		2653
1302-80		2654
1302-81		2654
1302-82		2654
1302-83		2654
1302-84		2654
1302-85		2654
1302-86		2654
1302-87		2654
1302-88		2655
1303-89		2655
1303-90		2655
1303-91		2655
1303-92		2655
1303-93		2655
1303-94		2655
1303-95		2656
1303-96		2656
1303-97		2656
1303-98		2656
1303-99		2656
1303- 1		2656
1304- 2		2656
1304- 3		2656
1304- 4		2656
1304- 5		2656
1304- 6		2656
1304- 7		2656
1304- 8		2656
1304- 9		2656
1304-10		23 C.J. 383
1304-11		" 383
1305-12		2657
1305-13		2657
1305-14		2657
1305-15		2657
1305-16		2657
1305-17		2657
1305-18		2657
1305-19		2657
1305-20		2657
1305-21		2589
1305-23		2657
1305-24		2657
1305-25		2657
1305-26		2657
1305-27		2657
1305-28		2658
1305-29		2658
1305-30		2658
1306-31		2659
1306-32		2660
1306-33		2660
1306-34		2661
1306-35		2661
1306-36		2662
1306-37		2662
1306-38		2662
1306-39		2662
1306-40		2662
1306-41		2662
1306-42		2662
1307-43		2662
1307-44		2662
1307-45		2662
1307-46		2662
1307-47		2662
1307-48		2664
1307-49		2664
1307-50		2664
1307-51		2664
1307-52		2664
1307-53		2664
1307-54		2664
1307-55		2664
1307-56		2663
1307-57		2664
1307-58		2663
1307-59		2665
1307-60		2665
1308-61		2665
1308-62		2665
1308-63		2665
1308-64		2665
1308-65		2665
1308-66		2665
1308-67		2665
1308-68		2666
1308-69		2666
1308-70		2666
1309-71		2666
1309-72		2667

EXECUTORS AND ADMINISTRATORS—*Continued*

18 Cyc 24 C.J.		18 Cyc 24 C.J.		18 Cyc 24 C.J.		18 Cyc 24 C.J.		18 Cyc 24 C.J.		18 Cyc 24 C.J.		18 Cyc 24 C.J.	
Page	Note Sec.	Page	Note Sec.	Page	Note Sec.	Page	Note Sec.	Page	Note Sec.	Page	Note Sec.	Page	Note Sec.
1309–73	2667	1320–31	2754	1328–88	2811	1333–55	2828	1340–16	2844	1348–82	2866	1356–41	2905	1364–96	2933
1309–74	2667	1320–32	2754	1328–89	2811	1333–56	2828	1341–17	2844	1348–83	2867	1356–42	2906	1364–97	2935
1309–75	2668	1320–33	2754	1328–90	2811	1333–57	2828	1341–19	2845	1348–84	2867	1357–43	2906	1364–98	2932
1309–76	2668	1320–34	2754	1328–91	2811	1334–58	2827	1341–21	2846	1348–85	2867	1357–44	2906	1364–99	2932
1309–77	2668	1320–35	2754	1328–92	2805	1334–59	2828	1341–23	2747	1348–87	2868	1357–45	2907	1364– 1	2932
1309–78	2668	1320–36	2755	1328–93	2812	1334–61	2829	1341–25	2848	1348–88	2868	1357–46	2907	1364– 2	2928
1309–79	2668	1320–37	2755	1328–94	2808	1334–63	2830	1341–26	2848	1348–89	2868	1357–47	2908	1364– 3	2928
1309–80	2668	1321–38	2755	1329–95	2808	1334–64	2830	1341–27	2848	1349–90	2868	1358–48	2908	1364– 4	2928
1309–81	2668	1321–39	2755	1329–96	2808	1334–66	2831	1341–29	2849	1349–91	2869	1358–49	2912	1364– 5	2928
1309–82	2668	1321–40	2755	1329–97	2808	1334–67	2831	1342–31	2850	1349–92	2869	1358–50	2913	1364– 6	2928
1309–83	2668	1321–41	2755	1329–98	2804	1334–68	2831	1342–33	2851	1350–93	2869	1358–51	2913	1364– 7	2929
1309–84	2669	1321–42	2755	1329–99	2806	1334–69	2831	1342–34	2851	1350–94	2869	1358–52	2914	1364– 8	2929
1309–86	2743	1321–43	2756	1329– 1	2799	1335–70	2831	1342–35	2851	1350–95	2869	1359–53	2914	1364– 9	2929
1310–87	2743	1321–44	2756	1329– 2	2813	1335–71	2831	1342–37	2852	1350–96	2869	1359–54	2915	1364–10	2929
1310–88	2744	1322–46	2777	1329– 3	2813	1335–72	2831	1342–38	2852	1350–97	2870	1359–55	2915	1365–11	2930
1311–89	2745	1322–47	2777	1329– 4	2813	1335–73	2831	1342–39	2852	1350–98	2870	1359–56	2916	1365–12	2936
1311–90	2745	1232–48	2777	1329– 5	2805	1335–74	2831	1342–40	2852	1350–99	2871	1359–57	2917	1365–13	2936
1311–91	2745	1322–49	2777	1329– 6	2893	1335–75	2831	1342–41	2852	1351– 1	2871	1359–58	2917	1365–14	2936
1312–92	2746	1322–50	2777	1329– 7	2893	1336–77	2832	1342–44	2853	1351– 2	2871	1359–59	2917	1365–15	2936
1312–93	2746	1322–51	2778	1329– 8	2893	1336–78	2832	1343–45	2853	1351– 3	2871	1359–60	2918	1365–16	2936
1313–94	2746	1323–52	2778	1329– 9	2893	1336–79	2832	1343–46	2853	1351– 5	2895	1360–61	2918	1365–17	2936
1314–95	2746	1323–53	2778	1330–10	2894	1336–81	2833	1343–47	2854	1351– 6	2895	1360–62	2918	1365–18	2937
1314–96	2746	1323–54	2779	1330–11	2894	1336–82	2833	1343–48	2854	1351– 7	2895	1360–63	2918	1365–19	2937
1314–97	2747	1324–55	2779	1330–12	2894	1336–84	2834	1343–49	2855	1351– 8	2895	1360–64	2918	1365–20	2937
1314–98	2747	1324–56	2779	1330–13	2815	1336–85	2834	1343–50	2855	1352– 9	2895	1360–65	2918	1365–21	2937
1314–99	2747	1325–58	2800	1330–14	2815	1336–86	2836	1343–51	2855	1352–10	2895	1360–66	2918	1365–22	2937
1315– 1	2747	1325–59	2800	1330–15	2815	1337–87	2836	1343–52	2856	1352–11	2895	1360–67	2919	1365–23	2937
1315– 2	2747	1325–60	2800	1330–16	2815	1337–88	2836	1343–53	2856	1352–12	2896	1360–68	2919	1365–24	2937
1315– 3	2748	1325–61	2800	1330–17	2815	1337–89	2836	1344–54	2856	1352–13	2896	1360–70	2920	1366–25	2938
1316– 4	2748	1325–62	2800	1330–18	2815	1337–90	2836	1344–55	2857	1352–14	2896	1361–71	2920	1366–26	2938
1316– 5	2748	1325–63	2800	1331–19	2816	1337–91	2837	1344–56	2857	1352–16	2897	1361–72	2920	1366–27	2938
1316– 6	2749	1325–64	2800	1331–20	2816	1338–92	2837	1344–59	2858	1353–17	2897	1361–73	2920	1366–28	2938
1317– 7	2749	1325–65	2801	1331–22	2817	1338–93	2837	1344–60	2859	1353–18	2897	1361–74	2922	1366–29	2938
1317– 8	2749	1326–66	2801	1331–23	2817	1338–94	2838	1344–61	2859	1353–19	2897	1361–75	2922	1366–30	2938
1317– 9	2749	1326–67	2801	1331–24	2817	1338–95	2838	1345–62	2859	1353–20	2897	1361–76	2923	1366–31	2938
1317–10	2749	1326–69	2802	1331–26	2818	1338–96	2839	1345–63	2859	1353–21	2898	1362–77	2923	1366–32	2938
1317–11	2749	1326–70	2802	1331–27	2818	1339–97	2839	1345–64	2859	1353–22	2898	1362–78	2923	1366–33	2939
1317–12	2750	1326–71	2802	1331–28	2818	1339–98	2839	1345–65	2859	1353–23	2899	1362–79	2924	1366–34	2939
1317–13	2750	1326–72	2802	1332–29	2818	1339–99	2839	1345–66	2860	1354–24	2899	1362–80	2924	1366–35	2939
1317–14	2751	1326–73	2802	1332–30	2818	1339– 1	2839	1345–67	2860	1354–25	2899	1362–81	2924	1366–36	2939
1317–15	2751	1326–74	2802	1332–31	2818	1339– 2	2839	1345–68	2860	1354–26	2901	1362–82	2924	1366–37	2939
1318–18	2751	1326–75	2802	1332–33	2819	1339– 3	2839	1346–69	2860	1354–27	2901	1362–83	2924	1366–38	2940
1318–19	2751	1326–76	2802	1332–34	2819	1339– 4	2840	1346–70	2861	1354–29	2903	1362–84	2924	1366–39	2940
1318–20	2751	1326–77	2802	1332–36	2820	1339– 5	2840	1346–71	2862	1354–30	2903	1362–85	2924	1366–40	2940
1318–21	2752	1326–78	2802	1332–37	2820	1339– 6	2840	1346–72	2862	1354–31	2903	1362–86	2903	1367–41	2941
1319–22	2752	1326–79	2802	1332–38	2821	1340– 7	2840	1346–73	2862	1354–32	2903	1362–87	2925	1367–42	2942
1319–23	2752	1326–80	2802	1332–39	2821	1340– 8	2840	1346–74	2863	1355–33	2904	1363–88	2934	1367–43	2942
1319–24	2753	1326–81	2802	1332–41	2821	1340– 9	2841	1346–75	2864	1355–34	2904	1363–89	2926	1367–44	2942
1319–25	2754	1326–82	2802	1332–42	2821	1340–10	2841	1346–76	2864	1355–35	2904	1363–90	2931	1367–45	2942
1320–26	2754	1326–83	2802	1333–45	2823	1340–11	2842	1347–77	2864	1356–36	2904	1363–91	2933	1367–46	2943
1320–27	2754	1327–84	2805	1333–46	2823	1340–12	2842	1347–78	2865	1356–37	2904	1363–92	2934	1367–47	2943
1320–28	2754	1327–85	2812	1333–47	2823	1340–13	2842	1347–79	2866	1356–38	2905	1363–93	2934	1367–48	2943
1320–29	2754	1328–86	2812	1333–50	2824	1340–14	2843	1347–80	2866	1356–39	2905	1363–94	2934	1367–49	2943
1320–30	2754	1328–87	2811	1333–52	2825	1340–15	2843	1347–81	2866	1356–40	2905	1364–95	2933		

CORPUS JURIS

VOLUME TWENTY-FOUR

EXECUTORS AND ADMINISTRATORS

By Joseph Walker Magrauth

(Continued from 23 C. J.)

[Matters not in this Title, treated elsewhere in this Work, see Cross References 23 C. J. p 993]

ANALYSIS

I. ADMINISTRATION IN GENERAL [sub-analysis 23 C. J. p 984]
II. APPOINTMENT, QUALIFICATION, AND TENURE [sub-analysis 23 C. J. p 985]
III. ASSETS [sub-analysis 23 C. J. p 990]
IV. INVENTORY AND APPRAISAL [sub-analysis 23 C. J. p 991]
V. AUTHORITY AND DUTIES IN GENERAL [sub-analysis 23 C. J. p 991]
VI. DISCOVERY OF ASSETS [sub-analysis 23 C. J. p 991]
VII. COLLECTION OF ASSETS [sub-analysis 23 C. J. p 992]
VIII. CUSTODY AND MANAGEMENT OF ESTATE [sub-analysis p 2]
IX. ALLOWANCE TO SURVIVING SPOUSE OR CHILDREN [sub-analysis p 7]
X. ALLOWANCE AND PAYMENT OF CLAIMS [sub-analysis p 9]
XI. DISTRIBUTION OF ESTATE [sub-analysis p 16]
XII. SALES UNDER ORDER OF COURT [sub-analysis p 19]
XIII. INSOLVENT ESTATES [sub-analysis p 25]
XIV. ACTIONS [sub-analysis p 26]
XV. ACCOUNTING AND SETTLEMENT [sub-analysis p 36]
XVI. LIABILITY ON ADMINISTRATION BONDS [sub-analysis p 40]
XVII. FOREIGN AND ANCILLARY ADMINISTRATION [sub-analysis p 42]
XVIII. ADMINISTRATORS DE BONIS NON [sub-analysis p 44]
XIX. ADMINISTRATORS WITH THE WILL ANNEXED [sub-analysis p 44]
XX. TEMPORARY OR SPECIAL ADMINISTRATORS [sub-analysis p 44]
XXI. COEXECUTORS AND COADMINISTRATORS [sub-analysis p 45]
XXII. REPRESENTATIVES OF DECEASED EXECUTORS OR ADMINISTRATORS [sub-analysis p 46]
XXIII. PUBLIC ADMINISTRATORS [sub-analysis p 46]
XXIV. COLLECTORS AND RECEIVERS [sub-analysis p 47]
XXV. INDEPENDENT EXECUTORS [sub-analysis p 47]
XXVI. EXECUTORS DE SON TORT [sub-analysis p 47]

SUB-ANALYSIS

VIII. CUSTODY AND MANAGEMENT OF ESTATE [§§ 463–757] p 48
A. *In General* [§§ 463–471] p 48
1. *Fundamental Rule* [§ 463] p 48
2. *Custody of Assets* [§ 464] p 49
3. *Custody of Books and Papers* [§ 465] p 49
4. *Keeping Accounts* [§ 466] p 50
5. *Deposits* [§ 467] p 50
6. *Disposing of Property* [§ 468] p 51
7. *Liability for Assets Received* [§ 469] p 51
8. *Persons Acting in Different Capacities* [§ 470] p 52
9. *Rights of Creditors* [§ 471] p 52
B. *Performance of Decedent's Obligations* [§ 472] p 53
C. *Exoneration of Estate from Liability* [§ 473] p 55
D. *Engaging in Business* [§§ 474–482] p 55
1. *General Rule* [§ 474] p 55
2. *Limitations of Rule* [§§ 475–477] p 57
a. *In General* [§ 475] p 57
b. *Authority from Court* [§ 476] p 58
c. *Testamentary Directions* [§ 477] p 58
3. *Liability for Debts* [§§ 478–481] p 59
a. *Where Continuance of Business Authorized* [§§ 478–479] p 59
(1) *In General* [§ 478] p 59
(2) *What Assets Liable* [§ 479] p 60
b. *Where Continuance of Business Unauthorized* [§ 480] p 61
c. *Where Business Carried on by Legatee* [§ 481] p 61
4. *Partnership* [§ 482] p 62
E. *Contracts* [§§ 483–491] p 63
1. *General Rule* [§ 483] p 63
2. *Services* [§§ 484–485] p 65
a. *In General* [§ 484] p 65
b. *Services of Attorney* [§ 485] p 66
3. *Funeral Expenses, Tombstones, Etc.* [§ 486] p 68
4. *Payment of Decedent's Debts* [§ 487] p 68
5. *Borrowing Money* [§ 488] p 69
6. *Bills and Notes* [§ 489] p 69
7. *Guaranty or Suretyship* [§ 490] p 71
8. *Subrogation of Contracting Party* [§ 491] p 71
F. *Investments* [§§ 492–494] p 71
1. *Right or Duty to Invest* [§ 492] p 71
2. *Duties and Liabilities with Respect to Investments* [§ 493] p 72
3. *Liability for Investing without Authority* [§ 494] p 72
G. *Interest on Funds of Estate* [§§ 495–510] p 73
1. *In General* [§ 495] p 73
2. *Propriety of Charge as Affected by Particular Circumstances* [§§ 496–505] p 75
a. *Failure to Invest or Deposit* [§ 496] p 75
b. *Improper Use of Funds* [§ 497] p 77
c. *Indebtedness to Estate* [§ 498] p 79
d. *Failure to Collect Interest* [§ 499] p 79
e. *Loss of Funds of Estate* [§ 500] p 79
f. *Premature Withdrawal of Commissions* [§ 501] p 79
g. *Delay in Settling Estate* [§ 502] p 80
h. *Reservation for Contingencies* [§ 503] p 82
i. *Other Circumstances* [§§ 504–505] p 83
(1) *Under Which Interest Properly Charged* [§ 504] p 83
(2) *Under Which Interest Should Not Be Charged* [§ 505] p 83
3. *Time from Which Interest Runs* [§ 506] p 84
4. *Time to Which Interest Computed* [§ 507] p 85
5. *Rate of Interest* [§ 508] p 85
6. *Computation* [§ 509] p 87
7. *Compound Interest* [§ 510] p 87
H. *Loans* [§ 511] p 89
I. Gifts [§ 512] p 90
J. *Expenditures* [§§ 513–558] p 90
1. *In General* [§ 513] p 90
2. *Allowance a Question for Court* [§ 514] p 90
3. *Sanction of Court* [§ 515] p 91
4. *Necessity of Actual Payment* [§ 516] p 91
5. *Improper or Unnecessary Expenditures* [§ 517] p 91

6. *Expenses Caused by Misconduct or Unauthorized Acts* [§ 518] p 91
7. *Representative Improperly Appointed* [§ 519] p 92
8. *Particular Expenditures Considered* [§§ 520–557] p 92
a. *Expenses of Last Illness* [§ 520] p 92
b. *Funeral Expenses, Tombstones, Etc.* [§§ 521–525] p 92
(1) *Funeral Expenses* [§ 521] p 92
(2) *Tombstones and Monuments* [§ 522] p 93
(3) *Burial Lots* [§ 523] p 93
(4) *Mourning Apparel for Family* [§ 524] p 93
(5) *Amount of Expenditure* [§ 525] p 93
c. *Expenditures for Benefit of Particular Legatees or Distributees* [§ 526] p 94
d. *Payment of Decedent's Debts* [§ 527] p 95
e. *Repairs and Improvements* [§ 528] p 95
f. *Services* [§ 529] p 96
g. *Counsel Fees and Costs* [§§ 530–549] p 97
(1) *General Rule* [§ 530] p 97
(2) *Personal Liability of Representative* [§ 531] p 99
(3) *Showing Necessary for Allowance* [§ 532] p 99
(4) *Approval of Court* [§ 533] p 100
(5) *Consent of Persons Beneficially Interested* [§ 534] p 100
(6) *Employment by Cofiduciaries* [§ 535] p 100
(7) *Charges in Particular Matters* [§§ 536–541] p 100
(a) *Probate or Contest of Will* [§ 536] p 100
(b) *Procuring Appointment or Qualification* [§ 537] p 102
(c) *Collection and Protection of Assets* [§ 538] p 102
(d) *Resisting Claims against Estate* [§ 539] p 102
(e) *Procuring Direction of Court* [§ 540] p 103
(f) *Miscellaneous Matters* [§ 541] p 103
(8) *Amount of Allowance* [§ 542] p 103
(9) *When Allowance Refused* [§§ 543–548] p 105
(a) *In General* [§ 543] p 105
(b) *Litigation Caused by Representative's Fault or Misconduct* [§ 544] p 106
(c) *Litigation for Benefit of Particular Persons* [§ 545] p 106
(d) *Personal Benefit of Representative* [§ 546] p 107
(e) *Services of Representative as Attorney* [§ 547] p 108
(f) *Services Which Representative Should Perform* [§ 548] p 109
(10) *Fund Out of Which Allowance Made* [§ 549] p 109
h. *Taxes and Assessments* [§ 550] p 109
i. *Insurance Premiums* [§ 551] p 111
j. *Judgments against Representative* [§ 552] p 111
k. *Interest Paid* [§ 553] p 111
l. *Traveling Expenses* [§ 554] p 112
m. *Procuring Bond* [§ 555] p 112
n. *Redemption of Property* [§ 556] p 112
o. *Miscellaneous Expenditures* [§ 557] p 113
9. *Interest on Expenditures* [§ 558] p 114
K. *Individual Interest in Transactions* [§§ 559–561] p 114
1. *In General* [§ 559] p 114
2. *Transactions with Heirs, Etc.* [§ 560] p 117
3. *Rights of Person Dealing with Representative* [§ 561] p 117
L. *Waste, Conversion, or Embezzlement of Assets* [§§ 562–575] p 117
1. *In General* [§ 562] p 118
2. *Waste* [§§ 563–569] p 118
a. *What Constitutes* [§ 563] p 118
b. *Nature of Liability* [§ 564] p 120
c. *Liability for Acts of Other Persons* [§ 565] p 120
d. *Evidence* [§ 566] p 120
e. *Effect of Consent or Concurrence* [§ 567] p 120
f. *Rank of Claims for Waste* [§ 568] p 120
g. *Restraining Waste* [§ 569] p 120
3. *Conversion* [§§ 570–571] p 121
a. *What Constitutes* [§ 570] p 121
b. *Election of Remedies* [§ 571] p 121
4. *Mingling Trust and Personal Funds or Property* [§ 572] p 121
5. *Extent of Liability* [§ 573] p 122
6. *Lien on Property of Representative* [§ 574] p 123
7. *Discharge from Liability* [§ 575] p 123
M. *Loss or Depreciation of Assets* [§§ 576–591] p 123
1. *In General* [§ 576] p 123

2. *Real Property* [§ 577] p 125
3. *Property Never in Possession of Representative* [§ 578] p 125
4. *Depreciation of Currency* [§ 579] p 125
5. *Loss Through War or Public Authority* [§ 580] p 125
6. *Destruction of Property* [§ 581] p 125
7. *Theft* [§ 582] p 125
8. *Death of Live Stock* [§ 583] p 125
9. *Negligence or Fault of Agents or Servants* [§ 584] p 126
10. *Failure to Deposit or Safeguard* [§ 585] p 126
11. *Failure to Sell or Delay in Selling* [§ 586] p 126
12. *Acts Prior to Issuance of Letters* [§ 587] p 127
13. *Losses Incurred as Life Tenant* [§ 588] p 127
14. *Assent of Heirs or Distributees* [§ 589] p 127
15. *Acting under Advice of Counsel* [§ 590] p 128
16. *Extent of Liability* [§ 591] p 128

N. *Torts* [§§ 592–593] p 128
1. *In General* [§ 592] p 128
2. *Fraud* [§ 593] p 129

O. *Real Property and Interests Therein* [§§ 594–709] p 130
1. *Title and Authority in General* [§§ 594–596] p 130
a. *General Rule* [§ 594] p 130
b. *Effect of Testamentary Provisions* [§ 595] p 131
c. *Statutory Modifications of Rule* [§ 596] p 133
2. *Actions Relating to Realty* [§§ 597–600] p 133
a. *In General* [§ 597] p 133
b. *Actions for Trespass and Waste* [§ 598] p 134
c. *Actions to Quiet Title* [§ 599] p 134
d. *Actions for Injuries during Decedent's Lifetime* [§ 600] p 135
3. *Possession and Use* [§§ 601–609] p 135
a. *In General* [§ 601] p 135
b. *Effect of Testamentary Provisions* [§ 602] p 135
c. *Statutory Right of Possession* [§§ 603–606] p 135
(1) *In General* [§ 603] p 135
(2) *To What Lands Statute Applicable* [§ 604] p 137
(3) *Nature of Right of Possession* [§ 605] p 137
(4) *Relation Back of Possession* [§ 606] p 137
d. *Actions to Recover or Protect Possession* [§§ 607–609] p 137
(1) *In General* [§ 607] p 137
(2) *Ejectment or Writ of Entry* [§ 608] p 138
(3) *Forcible Entry and Detainer* [§ 609] p 138
4. *Rents and Profits* [§§ 610–615] p 139
a. *In General* [§ 610] p 139
b. *Actions to Recover* [§ 611] p 140
c. *Disposition* [§ 612] p 140
d. *Liability of Representative* [§§ 613–615] p 140
(1) *In General* [§ 613] p 140
(2) *In What Capacity Liable* [§ 614] p 141
(3) *Extent of Liability* [§ 615] p 142
5. *Repairs and Improvements* [§ 616] p 143
6. *Taxes and Insurance* [§ 617] p 144
7. *Mortgaged and Encumbered Property* [§§ 618–622] p 144
a. *Purchase of Encumbrance by Representative* [§ 618] p 144
b. *Discharge of Encumbrance* [§§ 619–621] p 144
(1) *In Interest of Estate Generally* [§ 619] p 144
(2) *In Interest of Heir or Devisee* [§ 620] p 145
(3) *Effect of Testamentary Directions* [§ 621] p 147
c. *Mortgagee as Administrator* [§ 622] p 147
8. *Leaseholds* [§§ 623–625] p 147
a. *In General* [§ 623] p 147
b. *Liability for Rent* [§ 624] p 147
c. *Sale or Surrender of Lease* [§ 625] p 148
9. *Contracts of Decedent* [§§ 626–629] p 148
a. *In General* [§ 626] p 148
b. *Actions* [§ 627] p 149
c. *Conveyance* [§ 628] p 151
d. *Rescission or Revival* [§ 629] p 152
10. *Sale* [§§ 630–688] p 153
a. *In General* [§§ 630–634] p 153
(1) *Rule Stated* [§ 630] p 153

(2) *Contract of Sale* [§ 631] p 154
(3) *Status of Purchaser* [§ 632] p 154
(4) *Liability of Representative for Unauthorized Sale* [§ 633] p 154
(5) *Ratification of Unauthorized Sales* [§ 634] p 155
b. *Statutes Authorizing or Confirming Sales* [§ 635] p 155
c. *Sale under Testamentary Authority* [§§ 636–688] p 155
(1) *Power to Sell* [§§ 636–646] p 155
(a) *In General* [§ 636] p 155
(b) *Implied Power* [§ 637] p 156
(c) *Construction of Power* [§ 638] p 160
(d) *Extent of Power; Purpose of Sale* [§ 639] p 160
(e) *Discretionary or Mandatory Power; Compelling Exercise* [§ 640] p 162
(f) *Control of Courts* [§ 641] p 163
(g) *Powers Incidental to Power of Sale* [§§ 642–644] p 163
aa. *In General* [§ 642] p 163
bb. *Contracts of Sale; Options* [§ 643] p 164
cc. *Exchanges* [§ 644] p 164
(h) *Revocation or Termination of Power* [§ 645] p 164
(i) *Effect of Partial Invalidity of Devise in Trust to Sell* [§ 646] p 165
(2) *Who May Exercise Power* [§§ 647–648] p 165
(a) *In General* [§ 647] p 165
(b) *Delegation of Power* [§ 648] p 166
(3) *What Property May Be Sold* [§ 649] p 167
(4) *Notice to Heirs* [§ 650] p 168
(5) *Time for Selling* [§ 651] p 168
(6) *Manner and Conduct of Sale* [§ 652] p 171
(7) *Terms and Conditions* [§ 653] p 172
(8) *Confirmation* [§ 654] p 172
(9) *Who May Purchase* [§§ 655–665] p 174
(a) *In General* [§ 655] p 174
(b) *Executor or Administrator* [§§ 656–662] p 174
aa. *General Rule* [§ 656] p 174
bb. *Limitations of Rule* [§ 657] p 175
cc. *Whether Sale Void or Voidable* [§ 658] p 175
dd. *Ratification* [§ 659] p 175
ee. *Representative Not Bona Fide Purchaser* [§ 660] p 176
ff. *Bona Fide Purchaser from Representative* [§ 661] p 176
gg. *Liability of Representative Who Has Purchased* [§ 662] p 176
(c) *Relative of Representative* [§ 663] p 176
(d) *Agent or Partner of Representative* [§ 664] p 176
(e) *Attorney of Representative* [§ 665] p 176
(10) *Conveyance* [§§ 666–668] p 177
(a) *Form and Contents in General* [§ 666] p 177
(b) *Warranties or Covenants* [§ 667] p 177
(c) *Construction and Effect* [§ 668] p 178
(11) *Payment and Recovery of Purchase Money* [§§ 669–673] p 179
(a) *In General* [§ 669] p 179
(b) *Payment in Confederate Money* [§ 670] p 179
(c) *Actions to Recover* [§§ 671–672] p 179
aa. *In General* [§ 671] p 179
bb. *Defenses* [§ 672] p 179
(d) *Resale and Recovery of Difference in Price* [§ 673] p 180
(12) *Proceeds* [§§ 674–678] p 180
(a) *Liability of Representative* [§ 674] p 180
(b) *How Far Regarded as Personalty* [§ 675] p 181
(c) *Disposition of Proceeds* [§ 676] p 181
(d) *Liability of Purchaser as to Application of Proceeds* [§ 677] p 181
(e) *Proceedings for Distribution* [§ 678] p 182
(13) *Nature, Validity, and Effect of Sale* [§ 679] p 182
(14) *Title and Rights of Purchaser* [§§ 680–682] p 183
(a) *In General* [§ 680] p 183
(b) *Rule of Caveat Emptor* [§ 681] p 184
(c) *Protection as Bona Fide Purchaser* [§ 682] p 185
(15) *Setting Aside Sale* [§§ 683–686] p 186
(a) *Jurisdiction* [§ 683] p 186
(b) *Grounds* [§ 684] p 186
(c) *Who May Attack Sale* [§ 685] p 187
(d) *Proceedings* [§ 686] p 188
(16) *Divested Purchaser's Rights, Remedies, and Liabilities* [§ 687] p 189

(17) *Liabilities of Executor or Administrator* [§ 688] p 190
11. *Lease* [§§ 689–695] p 190
a. *Power to Lease* [§ 689] p 190
b. *Term* [§ 690] p 192
c. *Recovery of Rent* [§ 691] p 192
d. *Recovery of Possession* [§ 692] p 192
e. *Actions for Waste* [§ 693] p 192
f. *Rights of Lessee* [§ 694] p 192
g. *Liability of Representative* [§ 695] p 192
12. *Mortgage* [§§ 696–702] p 193
a. *Authority in General* [§ 696] p 193
b. *Stipulations and Provisions of Mortgage* [§ 697] p 195
c. *Construction of Mortgage* [§ 698] p 196
d. *Title, Rights, and Liabilities of Mortgagee* [§ 699] p 196
e. *Right to Attack Mortgage* [§ 700] p 196
f. *Personal Liability of Representative* [§ 701] p 196
g. *Effect of Unauthorized Mortgage* [§ 702] p 196
13. *Acquisition by Representative* [§§ 703–709] p 197
a. *In His Individual Capacity* [§§ 703–705] p 197
(1) *In General* [§ 703] p 197
(2) *Purchase from Widow, Heir, or Devisee* [§ 704] p 198
(3) *Purchase of Decedent's Realty at Judicial or Execution Sale* [§ 705] p 199
b. *In His Representative Capacity* [§§ 706–709] p 200
(1) *In General* [§ 706] p 200
(2) *Purchase at Judicial or Execution Sale* [§ 707] p 200
(3) *Property Taken in Payment of Debts* [§ 708] p 201
(4) *Sale or Mortgage of Property Acquired* [§ 709] p 201
P. *Personal Property* [§§ 710–757] p 201
1. *Title and Authority* [§§ 710–712] p 201
a. *In General* [§ 710] p 201
b. *Nature of Title* [§ 711] p 203
c. *Where Title Vests; Relation Back* [§ 712] p 204
2. *Possession and Use* [§ 713] p 204
3. *Rights of Action* [§ 714] p 206
4. *Pledged or Mortgaged Property* [§ 715] p 206
5. *Sale* [§§ 716–752] p 207
a. *Power to Sell and Transfer Title* [§§ 716–728] p 207
(1) *Personalty in General* [§§ 716–720] p 207
(a) *At Common Law* [§§ 716–718] p 207
aa. *In General* [§ 716] p 207
bb. *Power Can Be Exercised Only While in Office* [§ 717] p 208
cc. *Sale in Satisfaction of Debts of Representative* [§ 718] p 208
(b) *Under Statute* [§ 719] p 209
(c) *Effect of Testamentary Provisions* [§ 720] p 210
(2) *Perishable Property and Annual Crops* [§ 721] p 210
(3) *Choses in Action* [§§ 722–726] p 210
(a) *In General* [§ 722] p 210
(b) *Foreign Debts* [§ 723] p 211
(c) *Cause of Action for Death* [§ 724] p 212
(d) *Commercial Paper* [§ 725] p 212
(e) *Effect of Assignment* [§ 726] p 213
(4) *Stocks and Bonds* [§ 727] p 213
(5) *Mortgages* [§ 728] p 213
b. *Duty to Sell* [§ 729] p 213
c. *Time for Sale* [§ 730] p 213
d. *Manner and Conduct of Sale* [§ 731] p 214
e. *By Whom Sale Made* [§ 732] p 215
f. *Price* [§ 733] p 215
g. *Terms and Conditions* [§ 734] p 216
h. *Who May Purchase* [§§ 735–743] p 217
(1) *In General* [§ 735] p 217
(2) *Personal Representative* [§§ 736–741] p 217
(a) *General Rule* [§ 736] p 217
(b) *Effect of Sale* [§ 737] p 218
(c) *Exceptions to Rule* [§ 738] p 219
(d) *Ratification* [§ 739] p 219
(e) *Purchase from Original Purchaser* [§ 740] p 219
(f) *Liability of Representative* [§ 741] p 219
(3) *Relative of Representative* [§ 742] p 220

(4) *Surviving Partner of Decedent* [§ 743] p 220
i. *Conveyance and Transfer* [§ 744] p 220
j. *Payment or Recovery of Price* [§ 745] p 221
k. *Application of Proceeds* [§ 746] p 222
l. *Validity and Effect of Sale* [§ 747] p 222
m. *Ratification of Sale; Laches* [§ 748] p 223
n. *Title and Rights of Purchaser* [§ 749] p 223
o. *Setting Aside Sale* [§§ 750–751] p 225
(1) *Grounds* [§ 750] p 225
(2) *Proceedings* [§ 751] p 225
p. *Liability of Representative* [§ 752] p 226
6. *Pledge or Mortgage* [§ 753] p 227
7. *Acquisition by Representative* [§§ 754–757] p 228
a. *In Representative Capacity* [§ 754] p 228
b. *In Individual Capacity* [§§ 755–757] p 229
(1) *In General* [§ 755] p 229
(2) *Purchase of Interest of Heir or Legatee* [§ 756] p 229
(3) *Purchase at Judicial or Execution Sale* [§ 757] p 230

IX. ALLOWANCE TO SURVIVING SPOUSE OR CHILDREN [§§ 758–874] p 230
A. *In General* [§§ 758–762] p 230
1. *Origin* [§ 758] p 230
2. *Nature and Purpose* [§ 759] p 230
3. *Necessitous Circumstances* [§ 760] p 232
4. *What Law Governs* [§ 761] p 232
5. *Construction of Statutes* [§ 762] p 233
B. *Homestead and Exemption Rights* [§ 763] p 233
C. *Quarantine or Other Occupation or Use* [§§ 764–770] p 233
1. *Widow's Right in General* [§ 764] p 233
2. *Nature of Right* [§ 765] p 234
3. *Property Subject to Quarantine* [§ 766] p 234
4. *Right to Rents and Profits* [§ 767] p 235
5. *Liabilities Incident to Occupancy* [§ 768] p 235
6. *Enforcement or Defense of Right* [§ 769] p 236
7. *Forfeiture of Right* [§ 770] p 236
D. *Maintenance and Support* [§§ 771–776] p 236
1. *Liability of Estate in General* [§ 771] p 236
2. *Estate of Mother* [§ 772] p 237
3. *Period of Allowance* [§ 773] p 237
4. *Maintenance Prior to Allowance* [§ 774] p 237
5. *Education and Support of Children* [§ 775] p 237
6. *Maintenance during Quarantine* [§ 776] p 238
E. *Amount or Value* [§§ 777–781] p 238
1. *In General* [§ 777] p 238
2. *Matters to Be Considered in Fixing Amount* [§§ 778–779] p 239
a. *In General* [§ 778] p 239
b. *Effect of Dower and Other Interests* [§ 779] p 240
3. *Specific Articles* [§ 780] p 240
4. *When Whole Estate Set Apart* [§ 781] p 241
F. *Persons Entitled* [§§ 782–792] p 242
1. *In General* [§ 782] p 242
2. *Widow* [§ 783] p 242
3. *Children* [§§ 784–789] p 243
a. *In General* [§ 784] p 243
b. *Posthumous Children* [§ 785] p 244
c. *Illegitimate Children* [§ 786] p 244
d. *Children of Successive Marriages* [§ 787] p 244
e. *Stepchildren* [§ 788] p 244
f. *Effect of Adoption* [§ 789] p 244
4. *Grandchildren* [§ 790] p 244
5. *Husband* [§ 791] p 244
6. *Nonresidents* [§ 792] p 245
G. *Property Subject to Allowance* [§§ 793–803] p 245
1. *In General* [§ 793] p 245
2. *Personalty Generally* [§ 794] p 245
3. *Undivided Interests* [§ 795] p 246
4. *Partnership Property* [§ 796] p 246
5. *Community Property* [§ 797] p 246
6. *Growing Crops* [§ 798] p 246

7. *Proceeds of Life Insurance* [§ 799] p 246
8. *Amount Recovered for Wrongful Death* [§ 800] p 246
9. *Realty Generally* [§ 801] p 246
10. *Homestead* [§ 802] p 247
11. *Income of Real Estate* [§ 803] p 247

H. *Priority over Other Claims* [§§ 804–808] p 247
1. *In General* [§ 804] p 247
2. *Mortgages and Pledges* [§ 805] p 249
3. *Mechanic's Liens* [§ 806] p 249
4. *Judgments* [§ 807] p 249
5. *Attachments and Executions* [§ 808] p 249

I. *How Allowance Paid* [§ 809] p 250

J. *Bar, Waiver, or Relinquishment* [§§ 810–824] p 250
1. *In General* [§ 810] p 250
2. *Antenuptial Agreement* [§ 811] p 251
3. *Postnuptial Agreement* [§ 812] p 252
4. *Testamentary Provisions and Election* [§§ 813–815] p 253
a. *In General* [§ 813] p 253
b. *Election to Take under Will* [§ 814] p 253
c. *Dissent from Will* [§ 815] p 254
5. *Separate Estate or Homestead* [§ 816] p 254
6. *Misconduct* [§ 817] p 254
7. *Felonious Killing of Husband* [§ 818] p 255
8. *Separation* [§ 819] p 255
9. *Divorce* [§ 820] p 256
10. *Relinquishment after Death of Decedent* [§ 821] p 256
11. *Remarriage* [§ 822] p 256
12. *Delay in Applying* [§ 823] p 257
13. *Death of Beneficiary* [§ 824] p 258

K. *Selection or Setting Apart* [§§ 825–846] p 258
1. *By Persons Entitled* [§ 825] p 258
2. *By Executors, Administrators, Commissioners, or Appraisers* [§§ 826–828] p 259
a. *In General* [§ 826] p 259
b. *Liability of Representative for Refusing to Act or Abusing Power* [§ 827] p 259
c. *Credit for Allowance in Accounts* [§ 828] p 260
3. *Appraisement* [§§ 829–846] p 260
a. *Necessity* [§ 829] p 260
b. *Demand* [§ 830] p 260
c. *Appraisers* [§ 831] p 260
d. *Oath of Appraisers* [§ 832] p 260
e. *Time for Appraisement* [§ 833] p 260
f. *Necessity for Compliance with Statutory Requirements* [§ 834] p 260
g. *Notice of Proceedings* [§ 835] p 260
h. *Powers and Duties of Appraisers* [§ 836] p 261
i. *Certificates as to Feasibility of Division* [§ 837] p 261
j. *Report or Return* [§§ 838–841] p 261
(1) *In General* [§ 838] p 261
(2) *Objections and Hearing Thereon* [§ 839] p 262
(3) *Collateral Attack* [§ 840] p 262
(4) *Record* [§ 841] p 262
k. *Confirmation* [§ 842] p 262
l. *Effect of Setting Apart* [§ 843] p 262
m. *Setting Aside Appraisement or Allotment* [§ 844] p 263
n. *Review* [§ 845] p 263
o. *Marshaling Assets and Interpleader* [§ 846] p 263

L. *Allowance by Court* [§§ 847–866] p 263
1. *In General* [§ 847] p 263
2. *Form of Proceedings* [§ 848] p 264
3. *Time for Application or Allowance* [§ 849] p 264
4. *Counterclaim* [§ 850] p 264
5. *Jurisdiction* [§ 851] p 264
6. *Parties* [§ 852] p 264
7. *Notice* [§ 853] p 265
8. *Application or Petition* [§ 854] p 265
9. *Objections and Exceptions* [§ 855] p 266
10. *Evidence* [§ 856] p 266
11. *Trial or Hearing* [§ 857] p 266
12. *New Trial* [§ 858] p 267
13. *Judgment or Order* [§§ 859–864] p 267

a. *In General* [§ 859] p 267
b. *Nunc Pro Tunc Order* [§ 860] p 267
c. *Operation and Effect* [§ 861] p 267
d. *Enforcement* [§ 862] p 268
e. *Setting Aside* [§ 863] p 268
f. *Collateral Attack* [§ 864] p 268
14. *Review* [§ 865] p 268
15. *Costs* [§ 866] p 269
M. *Effect of Allowance* [§§ 867–869] p 270
1. *In General* [§ 867] p 270
2. *Right of Disposal* [§ 868] p 270
3. *Lien* [§ 869] p 271
N. *Increase or Further Allowance* [§ 870] p 271
O. *Decrease or Revocation of Allowance* [§ 871] p 272
P. *Rights of Creditors* [§§ 872–873] p 272
1. *In General* [§ 872] p 272
2. *Limitations and Laches* [§ 873] p 273
Q. *Rights of Heirs, Distributees, or Legatees* [§ 874] p 273

X. ALLOWANCE AND PAYMENT OF CLAIMS [§§ 875–1265] p 273
A. *Liabilities of Estate* [§§ 875–936] p 273
1. *Obligations of Decedent in General* [§ 875] p 273
2. *Secured Claims* [§ 876] p 276
3. *Joint Obligations* [§ 877] p 277
4. *Services Rendered to Decedent* [§§ 878–886] p 277
a. *In General* [§§ 878–880] p 277
(1) *Where Payment Promised or Expected* [§ 878] p 277
(2) *Voluntary Services* [§ 879] p 279
(3) *Where Services Compensated for* [§ 880] p 280
b. *Persons in Family Relation* [§§ 881–882] p 280
(1) *Presumption That Services Were Gratuitous* [§§ 881] p 281
(2) *When Payment Allowed* [§ 882] p 284
c. *In Whose Favor Claim Exists* [§ 883] p 286
d. *Nature of Claim* [§ 884] p 286
e. *Amount of Allowance* [§ 885] p 287
f. *Agreement to Compensate by Will* [§ 886] p 287
5. *Loans or Advances to Decedent* [§ 887] p 289
6. *Covenants of Decedent* [§ 888] p 289
7. *Contracts of Guaranty or Suretyship* [§§ 889–893] p 290
a. *In General* [§ 889] p 290
b. *Divisible Contracts* [§ 890] p 291
c. *Joint Contracts* [§§ 891–892] p 291
(1) *In General* [§ 891] p 291
(2) *Contribution between Cosureties* [§ 892] p 291
d. *Indemnity to Surety* [§ 893] p 291
8. *Claims for Trust Funds* [§ 894] p 291
9. *Contracts of Purchase* [§ 895] p 292
10. *Alimony to Illegitimate Child* [§ 896] p 292
11. *Claims Invalid as against Decedent* [§ 897] p 292
12. *Unmatured Claims* [§ 898] p 292
13. *Debts Payable after Death* [§ 899] p 293
14. *Contingent Claims* [§ 900] p 293
15. *Claims Founded in Tort* [§ 901] p 293
16. *Taxes and Assessments* [§ 902] p 294
17. *Continuing Obligations* [§ 903] p 295
18. *Discharged Claims* [§ 904] p 295
19. *Agreement of Representative to Pay* [§ 905] p 295
20. *Claims Barred by Limitation* [§§ 906–921] p 296
a. *In General* [§ 906] p 296
b. *Power of Representative to Waive Bar* [§§ 907–911] p 297
(1) *In General* [§ 907] p 297
(2) *As to Representative's Own Claim* [§ 908] p 298
(3) *Waiver by One of Several Representatives* [§ 909] p 298
(4) *Bar Accruing after Death of Decedent* [§ 910] p 299
(5) *Where Personal Representative Entitled to Entire Estate* [§ 911] p 299
c. *Power of Heirs or Devisees to Waive Bar* [§ 912] p 299
d. *Acts Constituting Waiver* [§§ 913–915] p 299
(1) *Acknowledgment of Promise to Pay* [§§ 913–914] p 299
(a) *In General* [§ 913] p 299

(b) *Insufficiency of Acknowledgment or Promise* [§ 914] p 301
(2) *Partial Payment* [§ 915] p 301
e. *Effect of Testamentary Provisions* [§ 916] p 302
f. *Who May Interpose Statute When Waived by Representative* [§§ 917–931] p 303
(1) *Creditors* [§ 917] p 303
(2) *Legatees and Distributees* [§ 918] p 303
(3) *Heirs and Devisees* [§ 919] p 303
(4) *State Holding by Escheat* [§ 920] p 304
(5) *Estoppel to Plead Statute* [§ 921] p 304
21. *Claims Arising after Death of Decedent* [§§ 922–934] p 305
a. *In General* [§ 922] p 305
b. *Claims Arising Out of Performance of Contract with Decedent* [§ 923] p 305
c. *Funeral Expenses* [§§ 924–928] p 306
(1) *Liability of Estate Generally* [§ 924] p 306
(2) *Reliance on Credit of Third Person* [§ 925] p 307
(3) *Reimbursement from Estate* [§ 926] p 307
(4) *Items and Amount of Expenditure* [§ 927] p 307
(5) *Funeral Expenses of Decedent's Wife and Family* [§ 928] p 308
d. *Tombstones and Monuments* [§ 929] p 308
e. *Burial Lots* [§ 930] p 309
f. *Services Rendered to Estate* [§ 931] p 309
g. *Loans or Advances to Estate* [§ 932] p 312
h. *Expenses of Administration* [§ 933] p 313
i. *Support, Etc., Furnished to Decedent's Family* [§ 934] p 315
22. *Claims of Executors or Administrators* [§ 935] p 315
23. *Purchase of Claims against Estate* [§ 936] p 316
B. *Presentation and Allowance* [§§ 937–1078] p 317
1. *Necessity for Presentation* [§§ 937–942] p 317
a. *In General* [§ 937] p 317
b. *Effect of Representative's Knowledge of Existence of Debt* [§ 938] p 319
c. *Effect of Suit on Claim* [§§ 939–940] p 320
(1) *In General* [§ 939] p 320
(2) *Claims in Suit at Decedent's Death* [§ 940] p 321
d. *Effect of Insolvency of Estate* [§ 941] p 321
e. *Effect of Testamentary Provisions* [§ 942] p 322
2. *What Claims Should Be Presented* [§§ 943–956] p 322
a. *In General* [§ 943] p 322
b. *Public Debts* [§§ 944–946] p 325
(1) *Debts Due to United States* [§ 944] p 325
(2) *Debts Due to State, County, Etc.* [§§ 945–946] p 325
(a) *In General* [§ 945] p 325
(b) *Taxes and Assessments* [§ 946] p 325
c. *Contingent Claims* [§§ 947–948] p 325
(1) *What Claims Are Contingent* [§ 947] p 325
(2) *Necessity for Presentation* [§ 948] p 327
d. *Claims Not Due* [§ 949] p 329
e. *Unliquidated Claims* [§ 950] p 330
f. *Claims Based on Tort* [§ 951] p 330
g. *Claims Arising after Death of Decedent* [§ 952] p 330
h. *Claims of Representative* [§ 953] p 331
i. *Judgments* [§ 954] p 332
j. *Secured Claims* [§ 955] p 333
k. *Claims for Trust Funds and Enforcement of Trusts* [§ 956] p 334
3. *Against Whom Statutes of Nonclaim Run* [§ 957] p 335
4. *Time for Presentation* [§§ 958–969] p 336
a. *In General* [§ 958] p 336
b. *Computation of Time* [§ 959] p 338
c. *Postponement and Interruption of Statute* [§§ 960–967] p 339
(1) *In General* [§ 960] p 339
(2) *Fraudulent Concealment of Claim or Cause of Action* [§ 961] p 339
(3) *Absence of Representative from State* [§ 962] p 340
(4) *Vacancy in Office of Representative* [§ 963] p 340
(5) *Premature Discharge of Representative* [§ 964] p 340
(6) *Death of Creditor* [§ 965] p 340
(7) *Appeal from Probate* [§ 966] p 340
(8) *War* [§ 967] p 340
d. *Extension by Agreement with Representative* [§ 968] p 340
e. *Presentation before Appointment of Representative* [§ 969] p 341
5. *Place of Presentation* [§ 970] p 341

6. *By and to Whom Presentation Made* [§§ 971–972] p 341
   a. *By Whom Made* [§ 971] p 341
   b. *To Whom Made* [§ 972] p 343
7. *Notice to Creditors* [§§ 973–979] p 343
   a. *Necessity for Notice* [§ 973] p 343
   b. *Sufficiency of Notice and Publication* [§§ 974–976] p 344
      (1) *In General* [§ 974] p 344
      (2) *Statement of Time for Presenting Claims* [§ 975] p 345
      (3) *Statement of Place for Presenting Claims* [§ 976] p 345
   c. *Waiver of Irregularities* [§ 977] p 345
   d. *Proof of Notice* [§ 978] p 345
   e. *Effect of Notice as to Legatees* [§ 979] p 346
8. *Notice of Intention to Present Claims* [§ 980] p 346
9. *Notice of Presentation or Filing* [§ 981] p 346
10. *Sufficiency of Presentation* [§§ 982–1009] p 347
   a. *In General* [§ 982] p 347
   b. *To Representative* [§ 983] p 347
   c. *To Court* [§ 984] p 348
   d. *Statement and Verification of Claims* [§§ 985–1009] p 348
      (1) *Statement* [§§ 985–993] p 348
         (a) *Necessity for Writing* [§ 985] p 348
         (b) *Form and Requisites* [§ 986] p 348
         (c) *Production of Original Instrument or Copy* [§ 987] p 352
         (d) *Production of Vouchers* [§ 988] p 353
         (e) *Secured Claims* [§ 989] p 353
         (f) *Signature* [§ 990] p 353
         (g) *Amendment* [§§ 991–993] p 354
            aa. *In General* [§ 991] p 354
            bb. *Time for Amendment* [§ 992] p 354
            cc. *Effect of Amendment* [§ 993] p 355
      (2) *Verification* [§§ 994–1009] p 355
         (a) *Necessity* [§§ 994–1000] p 355
            aa. *In General* [§ 994] p 355
            bb. *What Claims Must Be Verified* [§§ 995–1000] p 356
               (aa) *In General* [§ 995] p 356
               (bb) *Claims Reduced to Judgment* [§ 996] p 356
               (cc) *Claims Secured by Mortgage* [§ 997] p 357
               (dd) *Claims of State or Municipality* [§ 998] p 357
               (ee) *Claims of Personal Representative* [§ 999] p 357
               (ff) *Amended Claims* [§ 1000] p 357
         (b) *By Whom Affidavit Made* [§ 1001] p 357
         (c) *Who May Take Affidavit* [§§ 1002–1003] p 358
            aa. *In General* [§ 1002] p 358
            bb. *Necessity for Showing Officer's Authority* [§ 1003] p 358
         (d) *Form and Sufficiency of Affidavit* [§§ 1004–1008] p 358
            aa. *In General* [§ 1004] p 358
            bb. *Showing Knowledge of Affidavit* [§ 1005] p 360
            cc. *Affidavit by Person Other than Claimant* [§ 1006] p 360
            dd. *Signature* [§ 1007] p 360
            ee. *Amendment* [§ 1008] p 360
         (e) *Effect of Verification* [§ 1009] p 361
11. *Evidence as to Presentation* [§§ 1010–1016] p 361
   a. *Presumptions and Burden of Proof* [§ 1010] p 361
   b. *Admissions or Part Payment by Representative* [§ 1011] p 361
   c. *Request for Indulgence* [§ 1012] p 361
   d. *Rejection of Claim* [§ 1013] p 361
   e. *Judgment against Representative* [§ 1014] p 361
   f. *Best and Secondary Evidence* [§ 1015] p 361
   g. *Weight and Sufficiency of Evidence* [§ 1016] p 361
12. *Withdrawal of Claim* [§ 1017] p 361
13. *Effect of Presentation* [§§ 1018–1019] p 362
   a. *In General* [§ 1018] p 362
   b. *Defective Presentation* [§ 1019] p 363
14. *Effect of Failure to Make Due Presentation* [§§ 1020–1034] p 363
   a. *In General* [§ 1020] p 363
   b. *Who May Take Advantage of Failure to Present* [§ 1021] p 364
   c. *Excuses and Relief* [§§ 1022–1023] p 364
      (1) *In General* [§ 1022] p 364
      (2) *Relief under Statutes* [§§ 1023–1032] p 365

(a) *In General* [§ 1023] p 365
(b) *Who May Seek Relief* [§ 1024] p 366
(c) *Time for Seeking Relief* [§ 1025] p 366.
(c) *Payment of Costs as Condition of Relief* [§ 1026] p 366
(e) *Proceedings* [§§ 1027–1029] p 367
aa. *In General* [§ 1027] p 367
bb. *Discretion of Court* [§ 1028] p 368
cc. *Review* [§ 1029] p 368
(f) *Vacating Acceptance of Commissioner's Report* [§ 1030] p 368
(g) *Effect of Failure of Revived Commission to Act* [§ 1031] p 368
(h) *Effect of Extension* [§ 1032] p 369
d. *Rights as to Subsequently Discovered Assets* [§ 1033] p 369
e. *Rights as to Assets Remaining Unadministered* [§ 1034] p 370
15. *Waiver of Due Presentation* [§ 1035] p 370
16. *Allowance or Rejection* [§§ 1036–1077] p 372
a. *By Personal Representative* [§§ 1036–1042] p 372
(1) *In General* [§ 1036] p 372
(2) *Effect of Conflict of Interests* [§ 1037] p 372
(3) *Action by One of Several Representatives* [§ 1038] p 373
(4) *Time for Action on Claim* [§ 1039] p 373
(5) *Effect of Failure to Act on Claim* [§ 1040] p 373
(6) *Form and Sufficiency of Allowance or Rejection* [§ 1041] p 374
(7) *Notice of Rejection* [§ 1042] p 374
b. *By Commissioners* [§§ 1043–1050] p 375
(1) *In General* [§ 1043] p 375
(2) *Appointment and Qualification* [§ 1044] p 375
(3) *Powers and Duties* [§ 1045] p 375
(4) *Notice of Hearing* [§ 1046] p 375
(5) *Report* [§ 1047] p 375
(6) *Recommittment of Claim or Report* [§ 1048] p 376
(7) *Effect of Failure to Act* [§ 1049] p 376
(8) *Compensation of Commissioners* [§ 1050] p 376
c. *By Court* [§§ 1051–1056] p 376
(1) *In General* [§ 1051] p 376
(2) *Notice of Hearing* [§ 1052] p 377
(3) *Hearing and Determination* [§ 1053] p 377
(4) *Order or Decree and Record* [§ 1054] p 377
(5) *Effect of Failure of Court to Act* [§ 1055] p 378
(6) *Approval after Rejection* [§ 1056] p 378
d. *Set-Off* [§ 1057] p 378
e. *Setting Aside Allowance* [§§ 1058–1062] p 379
(1) *In General* [§ 1058] p 379
(2) *Who May Attack Allowance* [§ 1059] p 379
(3) *Time for Application* [§ 1060] p 380
(4) *Grounds* [§ 1061] p 380
(5) *Proceedings* [§ 1062] p 381
f. *Effect of Allowance or Rejection* [§§ 1063–1067] p 382
(1) *By Probate Court* [§§ 1063–1067] p 382
(a) *Upon Claimant and Personal Representative* [§ 1063] p 382
(b) *Upon Heirs, Distributees, Etc.* [§ 1064] p 383
(2) *By Commissioners* [§ 1065] p 383
(3) *By Personal Representative* [§ 1066] p 383
(4) *Allowance of Portion of Claim* [§ 1067] p 384
g. *Collateral Attack* [§ 1068] p 384
h. *Appeal and Review* [§§ 1069–1076] p 385
(1) *In General* [§ 1069] p 385
(2) *Objections and Exceptions* [§ 1070] p 385
(3) *Who May Appeal* [§ 1071] p 385
(4) *Time for Appealing* [§ 1072] p 386
(5) *Application, Bond, and Notice* [§ 1073] p 386
(6) *Pleading on Appeal* [§ 1074] p 386
(7) *Effect of Appeal* [§ 1075] p 386
(8) *Proceedings in Appellate Court* [§ 1076] p 387
i. *Costs and Allowances* [§ 1077] p 387
17. *Proof of Claim at Second Audit* [§ 1078] p 388
C. *Disputed Claims* [§§ 1079–1150] p 388
1. *Contest of Claims in General* [§§ 1079–1084] p 388
a. *Who May Contest or Object to Claims* [§ 1079] p 388
b. *Duty of Representative to Contest Claims* [§ 1080] p 389

c. *Grounds of Objection* [§ 1081] p 389
d. *Time for Making Objection* [§ 1082] p 389
e. *Mode of Making Objection* [§ 1083] p 389
f. *Waiver of Objections and Estoppel* [§ 1084] p 390
2. *Proceedings for Determination as to Disputed Claims* [§§ 1085–1150] p 390
a. *Arbitration* [§§ 1085–1091] p 390
(1) *Right to Submit* [§ 1085] p 390
(2) *Submission* [§§ 1086–1087] p 391
(a) *Form* [§ 1086] p 391
(b) *Effect* [§ 1087] p 391
(3) *Powers of Arbitrators* [§ 1088] p 391
(4) *Award* [§§ 1089–1090] p 391
(a) *Form* [§ 1089] p 391
(b) *Operation and Effect* [§ 1090] p 391
(5) *Revocation of Submission* [§ 1091] p 392
b. *Reference* [§§ 1092–1107] p 392
(1) *Authority to Refer* [§ 1092] p 392
(2) *What Claims May Be Referred* [§ 1093] p 392
(3) *Refusal to Refer* [§ 1094] p 392
(4) *Agreement to Refer* [§§ 1095–1096] p 393
(a) *Form and Requisites* [§ 1095] p 393
(b) *Effect* [§ 1096] p 393
(5) *Nature of Proceeding* [§ 1097] p 393
(6) *Waiver of Defects* [§ 1098] p 393
(7) *Selection and Appointment of Referees* [§ 1099] p 393
(8) *Powers of Referees* [§ 1100] p 393
(9) *Revocation of Order of Reference* [§§ 1101] p 393
(10) *Bringing in of New Parties and Intervention* [§ 1102] p 394
(11) *Proceedings before Referee* [§ 1103] p 394
(12) *Finding, Award, or Report* [§ 1104] p 394
(13) *Return and Approval of Report* [§ 1105] p 394
(14) *Effect of Award* [§ 1106] p 395
(15) *Second Reference* [§ 1107] p 395
c. *Hearing before Commissioners* [§ 1108] p 395
d. *Proceedings in Probate Court* [§§ 1109–1128] p 396
(1) *Probate Jurisdiction as to Disputed Claims* [§§ 1109–1112] p 396
(a) *Rule in Absence of Statute* [§ 1109] p 396
(b) *Equitable Jurisdiction* [§ 1110] p 396
(c) *Statutory Jurisdiction* [§ 1111] p 397
(d) *Claims of Representative* [§ 1112] p 398
(2) *Nature of Proceeding* [§ 1113] p 398
(3) *Defenses* [§ 1114] p 398
(4) *Parties* [§ 1115] p 398
(5) *Citation, Notice, and Appearance* [§ 1116] p 398
(6) *Docketing Claims* [§ 1117] p 399
(7) *Pleadings* [§ 1118] p 399
(8) *Issues, Proof, and Variance* [§ 1119] p 400
(9) *Evidence* [§§ 1120–1123] p 400
(a) *Presumptions and Burden of Proof* [§ 1120] p 400
(b) *Admissibility* [§ 1121] p 402
(c) *Weight and Sufficiency* [§§ 1122–1123] p 404
aa. *In General* [§ 1122] p 404
bb. *Claims for Services* [§ 1123] p 406
(10) *Hearing* [§ 1124] p 408
(11) *Findings and Decision* [§ 1125] p 409
(12) *Judgment* [§§ 1126–1128] p 409
(a) *In General* [§ 1126] p 409
(b) *Effect and Conclusiveness* [§ 1127] p 409
(c) *Vacating or Setting Aside* [§ 1128] p 410
e. *Appeal* [§§ 1129–1144] p 410
(1) *Right to Appeal* [§ 1129] p 410
(2) *Who May Appeal* [§ 1130] p 411
(3) *From What Action Appeal May Be Taken* [§ 1131] p 411
(4) *Time for Taking Appeal* [§ 1132] p 412
(5) *Jurisdiction on Appeal* [§ 1133] p 412
(6) *Allowance of Appeal* [§ 1134] p 412
(7) *Parties* [§ 1135] p 412
(8) *Notice of Appeal* [§ 1136] p 412
(9) *Proceedings for Appeal* [§§ 1137–1139] p 412

(a) *In General* [§ 1137] p 412
(b) *Record* [§ 1138] p 413
(c) *Bond* [§ 1139] p 413
(10) *Objections and Exceptions* [§ 1140] p 413
(11) *Amendment on Appeal* [§ 1141] p 414
(12) *Hearing and Determination* [§ 1142] p 414
(13) *Order or Judgment* [§ 1143] p 415
(14) *Dismissal of Appeal* [§ 1144] p 416
f. *Costs* [§§ 1145–1150] p 416
(1) *On Trial in Probate Court* [§ 1145] p 416
(2) *On Reference* [§ 1146] p 416
(3) *Effect of Refusal to Refer* [§ 1147] p 417
(4) *Effect of Refusal to Consent to Determination on Accounting* [§ 1148] p 417
(5) *Effect of Unreasonable Resistance to Claim* [§ 1149] p 417
(6) *Costs on Appeal* [§ 1150] p 417
D. *Priorities and Payment* [§§ 1151–1265] p 418
1. *Authority and Duty to Pay* [§ 1151] p 418
2. *Classification and Priorities of Debts* [§§ 1152–1192] p 418
a. *What Law Governs* [§ 1152] p 418
b. *At Common Law* [§§ 1153–1155] p 419
(1) *Classification* [§ 1153] p 419
(2) *Preference among Debts of Same Class* [§§ 1154–1155] p 419
(a) *Right of Representative to Give Preference* [§ 1154] p 419
(b) *Right of Creditor to Obtain Preference* [§ 1155] p 420
c. *Under Modern Statutes* [§§ 1156–1192] p 420
(1) *In General* [§ 1156] p 420
(2) *Preference among Debts of Same Class* [§§ 1157–1158] p 422
(a) *Right of Representative to Give Preference* [§ 1157] p 422
(b) *Right of Creditors to Obtain Preference* [§ 1158] p 422
(3) *Preferred Claims* [§§ 1159–1183] p 422
(a) *In General* [§ 1159] p 422
(b) *As to General Assets* [§§ 1160–1181] p 423
aa. *Funeral Expenses* [§ 1160] p 423
bb. *Expenses of Administration* [§ 1161] p 423
cc. *Debts Due to Public or Sovereignty* [§§ 1162–1166] p 424
(aa) *To United States* [§ 1162] p 424
(bb) *To State, County, Etc.* [§§ 1163–1165] p 424
aaa. *In General* [§ 1163] p 424
bbb. *What Debts Included* [§§ 1164–1165] p 425
(aaa) *In General* [§ 1164] p 425
(bbb) *Debts to Corporation Owned by State* [§§ 1165] p 425
(cc) *Taxes and Assessments* [§ 1166] p 425
dd. *Expenses of Last Illness* [§ 1167] p 425
ee. *Wages of Servants, Etc.* [§ 1168] p 426
ff. *Rent* [§ 1169] p 427
gg. *Claims Founded on Fiduciary Relations* [§§ 1170–1174] p 427
(aa) *In General* [§ 1170] p 427
(bb) *Statutes Giving Preference* [§§ 1171–1172] p 428
aaa. *In General* [§ 1171] p 428
bbb. *Claims against Foreign Fiduciaries* [§ 1172] p 429
(cc) *Subrogation to Preference* [§ 1173] p 429
(dd) *Waiver of Preference* [§ 1174] p 429
hh. *Claims for Provisions Furnished* [§ 1175] p 429
ii. *Liquidated Demands* [§ 1176] p 429
jj. *Debts Incurred by Representative* [§§ 1177–1178] p 429
(aa) *In Performing Decedent's Contracts* [§ 1177] p 429
(bb) *In Carrying on Decedent's Business* [§ 1178] p 429
kk. *Unmatured and Contingent Claims* [§ 1179] p 430
ll. *Resident and Nonresident Creditors* [§ 1180] p 430
mm. *Time of Filing or Proving Claim* [§ 1181] p 430
(c) *As to Encumbered Property* [§ 1182] p 431
(d) *As to Equitable Assets* [§ 1183] p 431
(4) *Liens* [§§ 1184–1190] p 431
(a) *Judgments and Decrees* [§§ 1184–1187] p 431
aa. *Priority as to General Assets* [§§ 1184–1185] p 431
(aa) *In General* [§ 1184] p 431
(bb) *Foreign Judgments* [§ 1185] p 432
bb. *Priority as to Property Subject to Lien* [§ 1186] p 432

cc. *Priority Inter Sese* [§ 1187] p 433
(b) *Specific Liens* [§§ 1188–1190] p 433
aa. *Priority as to General Assets* [§ 1188] p 433
bb. *Priority as to Encumbered Property* [§ 1189] p 433
cc. *Priority Inter Sese* [§ 1190] p 435
(5) *Proceedings for Classification* [§ 1191] p 435
(6) *Loss of Priority* [§ 1192] p 436
3. *Claims of Executor or Administrator* [§§ 1193–1204] p 436
a. *Right to Retain Assets in Payment* [§§ 1193–1201] p 436
(1) *At Common Law* [§§ 1193–1200] p 436
(a) *In General* [§ 1193] p 436
(b) *Who May Exercise Right* [§ 1194] p 436
(c) *As to What Claims Right Exists* [§ 1195] p 437
(d) *As against What Claims Right Exists* [§ 1196] p 438
(e) *What Assets May Be Retained* [§ 1197] p 439
(f) *Time for Exercise of Right* [§ 1198] p 439
(g) *Loss of Right* [§ 1199] p 439
(h) *Review by Court of Exercise of Right* [§ 1200] p 439
(2) *Under Modern Statutes* [§ 1201] p 440
b. *Presumption of Payment from Receipt of Assets* [§ 1202] p 440
c. *Secured Claims* [§ 1203] p 441
d. *Set-Off and Counterclaim* [§ 1204] p 441
4. *Advances to Pay Claims* [§§ 1205–1210] p 441
a. *Advances by Executor or Administrator* [§§ 1205–1209] p 441
(1) *In General* [§ 1205] p 441
(2) *Retainer of Assets in Satisfaction* [§ 1206] p 442
(3) *Interest on Advances* [§ 1207] p 442
(4) *Effect of Limitations* [§ 1208] p 443
(5) *Set-Off or Advances against Debts* [§ 1209] p 443
b. *Advances by Third Persons* [§ 1210] p 443
5. *Interest on Claims* [§§ 1211–1218] p 443
a. *When Allowed* [§§ 1211–1214] p 443
(1) *In General* [§ 1211] p 443
(2) *Necessity and Effect of Demand* [§ 1212] p 444
(3) *Effect of Presentation or Allowance* [§ 1213] p 444
(4) *Agreement by Representative to Pay Interest* [§ 1214] p 444
b. *Computation of Interest* [§§ 1215–1217] p 444
(1) *Period of Computation* [§ 1215] p 444
(2) *Rate* [§ 1216] p 445
(3) *Compound Interest* [§ 1217] p 445
c. *Preference of Interest on Preferred Claims* [§ 1218] p 445
6. *Time of Payment* [§ 1219] p 446
7. *Mode and Sufficiency of Payment* [§§ 1220–1227] p 446
a. *In General* [§ 1220] p 446
b. *Medium of Payment* [§ 1221] p 446
c. *Giving of Note by Personal Representative* [§ 1222] p 447
d. *Assignment of Note Due Decedent* [§ 1223] p 447
e. *Transfer of Assets* [§§ 1224–1225] p 447
(1) *In General* [§ 1224] p 447
(2) *Rights of Creditors When Assets Improperly Transferred* [§ 1225] p 447
f. *Set-Off* [§ 1226] p 447
g. *Compromise* [§ 1227] p 448
8. *Application of Payments* [§ 1228] p 448
9. *Payment before Allowance or Order* [§ 1229] p 448
10. *Improper Payments* [§§ 1230–1235] p 449
a. *In General* [§ 1230] p 449
b. *Payment Out of Order of Priority* [§§ 1231–1232] p 450
(1) *In General* [§ 1231] p 450
(2) *Preferring One Creditor of Class* [§ 1232] p 451
c. *Payment Out of Funds Not Belonging to Estate* [§ 1233] p 452
d. *Payment under Authority of Court* [§ 1234] p 452
e. *Recovery Back of Payment Made through Mistake or Improperly* [§ 1235] p 452
11. *Liability for Failure to Pay Claims* [§§ 1236–1238] p 452
a. *In General* [§ 1236] p 452
b. *Interest or Costs* [§ 1237] p 453
c. *Penalty for Failure to Pay* [§ 1238] p 453
12. *Proceedings to Enforce Payment* [§§ 1239–1256] p 453
a. *Proceedings in Probate Court* [§§ 1239–1253] p 453
(1) *Jurisdiction* [§ 1239] p 453

(2) *Nature and Form of Proceedings* [§ 1240] p 453
(3) *Conditions Precedent* [§ 1241] p 454
(4) *Set-Off* [§ 1242] p 454
(5) *Who May Proceed for Payment* [§ 1243] p 454
(6) *Notice* [§ 1244] p 454
(7) *Issues and Proof* [§ 1245] p 454
(8) *Hearing and Determination* [§ 1246] p 454
(9) *Judgment, Decree, or Order* [§§ 1247–1252] p 454
(a) *In General* [§ 1247] p 454
(b) *Time for Making* [§ 1248] p 454
(c) *Entry* [§ 1249] p 454
(d) *Effect* [§ 1250] p 454
(e) *Enforcement* [§ 1251] p 454
(f) *Setting Aside* [§ 1252] p 455
(10) *Review* [§ 1253] p 455
b. *Proceedings in Equity* [§§ 1254–1255] p 455
(1) *In General* [§ 1254] p 455
(2) *Creditors' Suits* [§ 1255] p 455
c. *Execution* [§ 1256] p 455
13. *Reservation of Assets* [§ 1257] p 455
14. *Liability of Creditor to Refund* [§ 1258] p 456
15. *Release by Creditors* [§ 1259] p 458
16. *Property Available for Payment* [§§ 1260–1265] p 458
a. *In General* [§ 1260] p 458
b. *Real and Personal Property* [§§ 1261–1262] p 459
(1) *In General* [§ 1261] p 459
(2) *Primary Liability of Personality* [§ 1262] p 460
c. *Rents of Realty* [§ 1263] p 462
d. *Marshaling Assets* [§ 1264] p 462
e. *Effect of Testamentary Provisions* [§ 1265] p 463

XI. DISTRIBUTION OF ESTATE [§§ 1266–1437] p 463
A. *Authority and Duty to Make* [§§ 1266–1272] p 463
1. *In General* [§ 1266] p 463
2. *Termination of Authority* [§ 1267] p 464
3. *Administrator Pendente Lite* [§ 1268] p 465
4. *Distribution of Money Recovered on Representative's Bond* [§ 1269] p 465
5. *Security for Payment of Legacy, or Payment into Court* [§ 1270] p 465
6. *Request for Directions* [§ 1271] p 465
7. *Admission of, or Charging with, Assets* [§ 1272] p 465
B. *Priority of Debts over Legacies, Devises,and Distributive Shares* [§ 1273] p 466
C. *Assent to Legacy or Devise* [§§ 1274–1278] p 467
1. *In General* [§ 1274] p 467
2. *Acts of Assent and Presumptions* [§ 1275] p 468
3. *Time for Assent* [§ 1276] p 469
4. *Operation and Effect* [§§ 1277–1278] p 469
a. *In General* [§ 1277] p 469
b. *Where Gift Is of Particular Estate with Remainder Over* [§ 1278] p 470
D. *Executor or Administrator as Legatee or Distributee* [§§ 1279–1280] p 471
1. *Title, Rights, and Liabilities in General* [§ 1279] p 471
2. *Residuary or Sole Legatee Acting as Executor* [§ 1280] p 472
E. *Time for Distribution* [§§ 1281–1288] p 472
1. *In General* [§ 1281] p 472
2. *Partial Distribution* [§ 1282] p 473
3. *Paying over Rents* [§ 1283] p 474
4. *Before Probate of Will* [§ 1284] p 474
5. *Before Decree of Distribution* [§ 1285] p 474
6. *Allowing Time for Conversion of Assets into Money* [§ 1286] p 475
7. *Suspending or Withholding Distribution* [§ 1287] p 475
8. *Effect of Representative's Death before Distribution* [§ 1288] p 475
F. *Presumption as to Distribution* [§ 1289] p 476
G. *Receipt or Release* [§§ 1290–1294] p 476
1. *Right to Require* [§ 1290] p 476
2. *Requisites to Validity* [§§ 1291–1292] p 476
a. *In General* [§ 1291] p 476
b. *Receipt or Release by Married Woman* [§ 1292] p 477
3. *Construction, Operation, and Effect* [§ 1293] p 477
4. *Representative as Legatee or Distributee* [§ 1294] p 477
H. *Security and Refunding Bond* [§§ 1295–1304] p 477

1. *Necessity of Refunding Bond or Other Indemnity* [§ 1295] p 477
2. *From Whom Bond May Be Required* [§§ 1296–1297] p 480
a. *In General* [§ 1296] p 480
b. *Donee of Particular Estate* [§ 1297] p 480
3. *Waiver of Right to Require Bond* [§ 1298] p 480
4. *Amount of Bond* [§ 1299] p 480
5. *Approval of Bond* [§ 1300] p 481
6. *Effect of Giving Bond* [§ 1301] p 481
7. *Death of Distributee after Execution of Bond but before Payment* [§ 1302] p 481
8. *Effect of Failure to Require Bond in Order of Distribution* [§ 1303] p 481
9. *Effect of Failure to Give Bond* [§ 1304] p 481
I. *Advances and Disbursements by Representative* [§§ 1305–1311] p 482
1. *In General* [§ 1305] p 482
2. *Advances Pursuant to Testamentary Directions* [§ 1306] p 482
3. *Amount of Advances* [§ 1307] p 482
4. *Interest on Advances* [§ 1308] p 483
5. *Advances by Executor or Administrator Individually* [§ 1309] p 483
6. *Lien for Advances* [§ 1310] p 483
7. *Expenses Incurred by Representative* [§ 1311] p 483
J. *Mode and Sufficiency of Payment or Distribution* [§§ 1312–1328] p 484
1. *In General* [§ 1312] p 484
2. *Distribution in Kind* [§§ 1313–1315] p 485
a. *In General* [§ 1313] p 485
b. *Stocks, Bonds, Notes, and Other Securities* [§ 1314] p 486
c. *Specific Legacy* [§ 1315] p 486
3. *Note or Bond of Executor or Administrator* [§ 1316] p 487
4. *Retaining Indebtedness Due by Legatee or Distributee* [§§ 1317–1319] p 487
a. *In General* [§ 1317] p 487
b. *Debt Due to Executor or Administrator Individually* [§ 1318] p 489
c. *Retainer from Specific Personal Property* [§ 1319] p 490
5. *Application of Payments* [§ 1320] p 490
6. *Notice and Tender* [§ 1321] p 490
7. *To Whom Payment Should Be Made* [§§ 1322–1327] p 490
a. *In General* [§ 1322] p 490
b. *Where Persons Entitled Deceased* [§ 1323] p 491
c. *Where Persons Entitled Unknown or Absent* [§ 1324] p 491
d. *Where Persons Entitled under Disability* [§§ 1325–1327] p 492
(1) *Infants* [§ 1325] p 492
(2) *Insane Persons* [§ 1326] p 493
(3) *Married Women* [§ 1327] p 493
8. *Equalization of Payments* [§ 1328] p 493
K. *Payment of Annuities* [§§ 1329–1330] p 493
1. *Duties of Executors in General* [§ 1329] p 493
2. *Increase or Reduction of Annuity* [§ 1330] p 494
L. *Effect of Payment or Distribution in General* [§§ 1331–1333] p 494
1. *Conclusiveness and Effect in General* [§ 1331] p 494
2. *Rights and Liabilities of Representative after Payment or Distribution* [§§ 1332–1333] p 495
a. *In General* [§ 1332] p 495
b. *Delivery to Life Tenant or Remainderman* [§ 1333] p 496
M. *Improper, Erroneous, or Premature Payment or Distribution* [§§ 1334–1345] p 496
1. *In General* [§ 1334] p 496
2. *Payment to Wrong Person* [§ 1335] p 497
3. *Payment under Will Subsequently Declared Invalid* [§ 1336] p 498
4. *Payment of Legacy Subsequently Invalidated by Legatee's Contest of Will* [§ 1337] p 498
5. *Distribution Prior to Discovery of Will* [§ 1338] p 498
6. *Payment before Order or Decree for Distribution* [§ 1339] p 498
7. *Payment under Order of Court* [§ 1340] p 499
8. *Payment or Distribution before Debts Are Paid* [§ 1341] p 500
9. *Overpayment* [§ 1342] p 501
10. *Liability of Legatee or Distributee to Refund* [§§ 1343–1344] p 502
a. *In General* [§ 1343] p 502
b. *Restitution on Reversal of Decree* [§ 1344] p 503
11. *Waiver, Estoppel, or Ratification* [§ 1345] p 503
N. *Delay in or Failure to Make Payment or Distribution* [§§ 1346–1347] p 503
1. *Liability of Representative in General* [§ 1346] p 503
2. *Effect of Death of Representative* [§ 1347] p 504
O. *Liability for Interest on Legacies or Distributive Shares* [§§ 1348–1351] p 504
1. *Failure to Pay or Delay in Paying Over* [§ 1348] p 504

2. *After Tender of Payment* [§ 1349] p 506
3. *Failure to Invest Share* [§ 1350] p 506
4. *Erroneous or Improper Payments* [§ 1351] p 507
P. *Proceedings for Payment or Distribution* [§§ 1352–1422] p 507
1. *Who May Institute Proceedings* [§§ 1352–1354] p 507
a. *Persons Beneficially Interested* [§ 1352] p 507
b. *Assignees of Persons Beneficially Interested* [§ 1353] p 507
c. *Personal Representative* [§ 1354] p 507
2. *Nature of Proceeding* [§ 1355] p 508
3. *Mode or Form of Proceeding* [§ 1356] p 508
4. *Conditions Precedent* [§ 1357] p 508
5. *Time for Proceeding* [§§ 1358–1360] p 508
a. *Premature Proceedings* [§ 1358] p 508
b. *Limitations* [§ 1359] p 509
c. *Laches* [§ 1360] p 509
6. *Defenses* [§ 1361] p 509
7. *Jurisdiction* [§ 1362] p 510
8. *Process or Notice* [§ 1363] p 512
9. *Parties* [§§ 1364–1365] p 513
a. *In General* [§ 1364] p 513
b. *Intervention* [§ 1365] p 514
10. *Appearance* [§ 1366] p 515
11. *Right to Object to Distribution* [§ 1367] p 515
12. *Pleadings* [§§ 1368–1377] p 515
a. *Application or Petition* [§§ 1368–1373] p 515
(1) *In General* [§ 1368] p 515
(2) *Description of Parties* [§ 1369] p 516
(3) *Joinder of Claims with Respect to Different Estates* [§ 1370] p 516
(4) *Filing of Petition* [§ 1371] p 516
(5) *Filing Refunding Bond with Petition* [§ 1372] p 516
(6) *Effect of Petition as Transfer of Interest* [§ 1373] p 516
b. *Demurrer* [§ 1374] p 516
c. *Waiver of Formal Objections to Petition* [§ 1375] p 517
d. *Plea or Answer* [§ 1376] p 517
e. *Reply* [§ 1377] p 517
13. *Issues* [§ 1378] p 517
14. *Evidence* [§ 1379] p 517
15. *Proceedings of Auditor or Commissioner* [§ 1380] p 518
16. *Examination and Settlement of Accounts* [§ 1381] p 519
17. *Appraisal of Estate* [§ 1382] p 519
18. *Hearing and Determination* [§§ 1383–1387] p 519
a. *In General* [§ 1383] p 519
b. *Advancements to, and Indebtedness of, Legatee or Distributee* [§ 1384] p 522
c. *Power to Decree Distribution to Assignee* [§ 1385] p 522
d. *Findings* [§ 1386] p 522
e. *Dismissal* [§ 1387] p 522
19. *New Trial* [§ 1388] p 523
20. *Order or Decree for Distribution* [§§ 1389–1407] p 523
a. *In General* [§ 1389] p 523
b. *Decree Based on Presumption of Death* [§ 1390] p 524
c. *Entry of Decree* [§ 1391] p 524
d. *Setting Aside, Correcting, and Modifying* [§§ 1392–1399] p 525
(1) *Power of Court* [§§ 1392–1393] p 525
(a) *In General* [§ 1392] p 525
(b) *Upon Discovery of New Assets* [§ 1393] p 527
(2) *Time for Application* [§ 1394] p 527
(3) *Parties to Application* [§ 1395] p 527
(4) *Mode and Form of Application* [§ 1396] p 527
(5) *Effect of Setting Aside* [§ 1397] p 527
(6) *Amended Decree* [§ 1398] p 527
(7) *Rights of Third Persons* [§ 1399] p 527
e. *Operation and Effect* [§§ 1400–1402] p 528
(1) *In General* [§ 1400] p 528
(2) *Lien* [§ 1401] p 531
(3) *Presumption in Favor of Decree* [§ 1402] p 531
f. *Construction of Decree* [§ 1403] p 531
g. *Collateral Attack on Decree* [§ 1404] p 532
h. *Enforcement of Decree* [§ 1405] p 532
i. *Restraining Enforcement of Decree* [§ 1406] p 533

j. *Order for Partial Distribution* [§ 1407] p 533
21. *Review* [§§ 1408–1421] p 534
a. *In General* [§ 1408] p 534
b. *Who May Appeal* [§§ 1409–1410] p 534
(1) *In General* [§ 1409] p 534
(2) *Personal Representative* [§ 1410] p 535
c. *Taking and Perfecting Appeal* [§§ 1411–1415] p 535
(1) *Time for Taking* [§ 1411] p 535
(2) *Notice of Appeal* [§ 1412] p 536
(3) *Petition for Review* [§ 1413] p 536
(4) *Appeal Bond* [§ 1414] p 536
(5) *Bill of Exceptions* [§ 1415] p 536
d. *Parties to Appeal* [§ 1416] p 536
e. *Joinder or Consolidation of Appeals* [§ 1417] p 536
f. *Effect of Appeal* [§ 1418] p 536
g. *Abandonment of Appeal* [§ 1419] p 536
h. *Review and Disposition of Cause* [§ 1420] p 537
i. *Liability for Frivolous Appeal* [§ 1421] p 538
22. *Costs and Attorneys' Fees* [§ 1422] p 538
Q. *Reservation of Assets* [§ 1423] p 539
R. *Liability to Refund on Deficiency of Assets* [§§ 1424–1437] p 540
1. *In Absence of Refunding Bond or Other Indemnity* [§§ 1424–1430] p 540
a. *In General* [§ 1424] p 540
b. *Proceedings to Enforce Liability* [§§ 1425–1430] p 542
(1) *Joint or Several Proceedings* [§ 1425] p 542
(2) *Time to Sue and Limitations* [§ 1426] p 542
(3) *Defenses* [§ 1427] p 542
(4) *Parties* [§ 1428] p 542
(5) *Evidence* [§ 1429] p 542
(6) *Judgment or Decree* [§ 1430] p 542
2. *Liability on Refunding Bond or Other Indemnity* [§§ 1431–1437] p 542
a. *In General* [§ 1431] p 542
b. *Enforcement of Liability* [§§ 1432–1437] p 543
(1) *Right of Action* [§ 1432] p 543
(2) *Summary Remedy by Scire Facias* [§ 1433] p 543
(3) *Conditions Precedent* [§ 1434] p 543
(4) *Time to Sue and Limitations* [§ 1435] p 543
(5) *Pleading* [§ 1436] p 543
(6) *Evidence* [§ 1437] p 543

XII. SALES UNDER ORDER OF COURT [§§ 1438–1741] p 544
A. *In General; Statutory Provisions* [§ 1438–1741] p 544
B. *When Authorized* [§§ 1439–1459] p 545
1. *In General* [§ 1439] p 545
2. *For Payment of Debts* [§§ 1440–1456] p 546
a. *In General* [§ 1440] p 546
b. *Existence and Validity of Debts* [§§ 1441–1442] p 547
(1) *In General* [§ 1441] p 547
(2) *Debts Barred by Limitations or Nonclaim* [§ 1442] p 548
c. *Debts Created after Death of Decedent* [§§ 1443–1446] p 549
(1) *In General* [§ 1443] p 549
(2) *Expenses of Administration* [§ 1444] p 549
(3) *Funeral Expenses* [§ 1445] p 550
(4) *Inheritance Taxes* [§ 1446] p 550
d. *Secured Debts* [§ 1447] p 550
e. *Maturity of Debts* [§ 1448] p 551
f. *Insufficiency of Personalty* [§§ 1449–1453] p 551
(1) *In General* [§ 1449] p 551
(2) *Insufficiency Due to Fault of Representative* [§ 1450] p 552
(3) *Insufficiency Due to Depreciation and Losses* [§ 1451] p 553
(4) *Necessity for Actual Application of Personalty* [§ 1452] p 553
(5) *Existence of Sufficient Personalty in Another State* [§ 1453] p 554
g. *Sufficiency of Rents and Profits* [§ 1454] p 554
h. *Account of Administration* [§ 1455] p 554
i. *Effect of Promise to Pay Out of Personalty* [§ 1456] p 554
3. *For Payment of Legacies* [§ 1457] p 554
4. *For Distribution* [§ 1458] p 555
5. *Effect of Testamentary Provisions* [§ 1459] p 555
C. *Who May Apply for Sale* [§§ 1460–1463] p 557

1. *Executor or Administrator* [§§ 1460–1461] p 557
a. *In General* [§ 1460] p 557
b. *Compelling Application* [§ 1461] p 558
2. *Creditors* [§ 1462] p 558
3. *Other Persons Interested in Estate* [§ 1463] p 559
D. *Property or Interests Subject to Sale* [§§ 1464–1482] p 560
1. *In General* [§ 1464] p 560
2. *Reversions or Remainders* [§ 1465] p 561
3. *Interest as Cotenant* [§ 1466] p 561
4. *Inchoate or Equitable Titles or Interests* [§§ 1467–1468] p 561
a. *In General* [§ 1467] p 561
b. *Interests in Public Lands* [§ 1468] p 562
5. *Leased Property and Leasehold Estates* [§ 1469] p 562
6. *Vendor's Liens* [§ 1470] p 563
7. *Franchises* [§ 1471] p 563
8. *Crops and Products of Realty* [§ 1472] p 563
9. *Fixtures* [§ 1473] p 563
10. *Lands Devised by Decedent* [§ 1474] p 563
11. *Lands Conveyed by Heir or Devisee* [§ 1475] p 563
12. *Property Not Owned by Decedent at Time of Death* [§ 1476] p 563
13. *Land Held by Decedent in Trust* [§ 1477] p 565
14. *Property Held or Claimed Adversely to Decedent* [§ 1478] p 565
15. *Homestead* [§ 1479] p 566
16. *Encumbered Property* [§ 1480] p 567
17. *Lands Subject to Interest of Surviving Spouse* [§ 1481] p 568
18. *Marshaling* [§ 1482] p 568
E. *Amount to Be Sold* [§§ 1483–1484] p 568
1. *In General* [§ 1483] p 568
2. *Entire Interest of Decedent* [§ 1484] p 570
F. *Payment or Security to Prevent Sale* [§ 1485] p 570
G. *Proceedings for Sale* [§§ 1486–1556] p 571
1. *In General* [§ 1486] p 571
2. *Nature and Form of Proceedings* [§ 1487] p 572
3. *Joinder of Proceedings* [§ 1488] p 572
4. *Time for Proceeding* [§§ 1489–1491] p 572
a. *In General* [§ 1489] p 572
b. *Statutes of Limitation* [§ 1490] p 573
c. *Reasonable Time and Laches* [§ 1491] p 575
5. *Jurisdiction* [§ 1492] p 576
6. *Parties* [§§ 1493–1495] p 579
a. *In General* [§ 1493] p 579
b. *Guardian of Infant* [§ 1494] p 581
c. *Effect of Failure to Join Necessary Parties* [§ 1495] p 582
7. *Petition or Other Application* [§§ 1496–1505] p 582
a. *Necessity* [§ 1496] p 582
b. *Requirements* [§§ 1497–1501] p 583
(1) *In General* [§ 1497] p 583
(2) *Averments as to Heirs or Devisees* [§ 1498] p 584
(3) *Averments as to Necessity and Purpose of Sale* [§ 1499] p 585
(4) *Averments as to Realty* [§ 1500] p 588
(5) *Signing and Verification* [§ 1501] p 590
c. *Filing* [§ 1502] p 590
d. *Amendment* [§ 1503] p 590
e. *Curing of Defects* [§ 1504] p 590
f. *Collateral Attack on Sufficiency* [§ 1505] p 591
8. *Citation or Notice* [§§ 1506–1514] p 591
a. *Necessity* [§ 1506] p 591
b. *Persons Entitled to Notice* [§ 1507] p 593
c. *Form and Requisites* [§ 1508] p 594
d. *Personal Service* [§ 1509] p 595
e. *Publication* [§ 1510] p 595
f. *Posting* [§ 1511] p 596
g. *Return* [§ 1512] p 597
h. *Waiver and Curing of Errors* [§ 1513] p 597
i. *Presumptions; Collateral Attack* [§ 1514] p 597
9. *Objections and Exceptions* [§ 1515] p 598
10. *Interference of Other Proceedings Involving Land* [§ 1516] p 600
11. *Evidence* [§ 1517] p 601
12. *Hearing and Determination in General* [§ 1518] p 601

13. *Proof and Contest of Claims* [§§ 1519–1525] p 602
a. *In General* [§ 1519] p 602
b. *Who May Contest Claims* [§ 1520] p 603
c. *Defenses* [§ 1521] p 604
d. *Reference and Report* [§ 1522] p 604
e. *Effect of Allowance or Rejection of Claim* [§ 1523] p 604
f. *Effect of Judgment against Representative* [§ 1524] p 605
g. *Evidence* [§ 1525] p 605
14. *Determination as to Sufficiency of Personalty* [§§ 1526–1528] p 605
a. *In General* [§ 1526] p 605
b. *Inventory, Appraisal, or Account* [§ 1527] p 606
c. *Evidence* [§ 1528] p 606
15. *Trial of Title of Decedent and Adverse Claims to Property* [§ 1529] p 607
16. *Dismissal or Discontinuance* [§ 1530] p 608
17. *Relief Granted* [§ 1531] p 608
18. *Order or Decree of Sale* [§§ 1532–1541] p 608
a. *Necessity* [§ 1532] p 608
b. *Time of Making* [§ 1533] p 609
c. *Form and Requisites* [§§ 1534–1536] p 609
(1) *In General* [§ 1534] p 609
(2) *Description of Property* [§ 1535] p 611
(3) *Signature* [§ 1536] p 611
d. *Second Order of Sale* [§ 1537] p 611
e. *Operation and Effect* [§ 1538] p 612
f. *Amendment or Vacation* [§ 1539] p 615
g. *Staying Execution of Order* [§ 1540] p 616
h. *Collateral Attack* [§ 1541] p 616
19. *Essentials to Be Shown of Record* [§ 1542] p 616
20. *Appraisal of Property to Be Sold* [§ 1543] p 617
21. *Review* [§§ 1544–1556] p 617
a. *In General* [§ 1544] p 617
b. *Persons Entitled to Review* [§ 1545] p 618
c. *Time for Taking Appeal* [§ 1546] p 619
d. *Notice of Appeal* [§ 1547] p 619
e. *Parties* [§ 1548] p 619
f. *Reservation and Presentation of Grounds of Review* [§ 1549] p 619
g. *Record* [§ 1550] p 619
h. *Effect of Appeal* [§ 1551] p 619
i. *Abandonment of Appeal* [§ 1552] p 619
j. *Presumptions* [§ 1553] p 619
k. *Scope of Review* [§ 1554] p 619
l. *Disposition of Cause* [§§ 1555–1556] p 620
(1) *In General* [§ 1555] p 620
(2) *Effect of Sale on Decision of Appellate Court* [§ 1556] p 620
H. *Enjoining Sale* [§ 1557] p 620
I. *Authority to Sell* [§§ 1558–1572] p 621
1. *In General* [§ 1558] p 621
2. *Administrator De Bonis Non or Special Administrator* [§ 1559] p 622
3. *Agent, Sheriff, or Other Officer* [§ 1560] p 622
4. *Oath* [§ 1561] p 622
5. *Special Bond for Sale* [§§ 1562–1572] p 622
a. *Requirement of* [§ 1562] p 622
b. *Time for Giving* [§ 1563] p 623
c. *Amount* [§ 1564] p 623
d. *Obligee* [§ 1565] p 623
e. *Form and Requisites* [§ 1566] p 623
f. *Approval* [§ 1567] p 623
g. *Presumption as to Giving of Bond* [§ 1568] p 623
h. *Effect of Failure to Give Bond* [§ 1569] p 623
i. *Liability on Bond* [§§ 1570–1572] p 624
(1) *In General* [§ 1570] p 624
(2) *Release of Sureties* [§ 1571] p 624
(3) *Enforcement of Liability* [§ 1572] p 624
J. *Notice of Sale* [§§ 1573–1577] p 625
1. *In General* [§ 1573] p 625
2. *Publication* [§ 1574] p 625
3. *Posting* [§ 1575] p 626
4. *Form and Contents of Notice* [§ 1576] p 626
5. *Proof of Publication or Posting* [§ 1577] p 627

K. *Manner and Conduct of Sale* [§§ 1578–1583] p 627
1. *In General* [§ 1578] p 627
2. *Time of Sale* [§ 1579] p 628
3. *Place of Sale* [§ 1580] p 629
4. *Sale in Bulk or in Parcels* [§ 1581] p 629
5. *Public or Private Sale* [§ 1582] p 630
6. *Adjournment* [§ 1583] p 631

L. *Terms and Conditions* [§§ 1584–1586] p 631
1. *In General* [§ 1584] p 631
2. *Cash or Credit* [§ 1585] p 632
3. *When Property Mortgaged* [§ 1586] p 632

M. *Who May Purchase* [§§ 1587–1599] p 633
1. *In General* [§ 1587] p 633
2. *Widow or Heirs of Decedent* [§ 1588] p 633
3. *Guardian of Decedent's Children* [§ 1589] p 633
4. *Executor or Administrator* [§§ 1590–1596] p 633
a. *General Rule* [§ 1590] p 633
b. *Limitations of Rule* [§ 1591] p 635
c. *Effect of Unauthorized Purchase* [§§ 1592–1593] p 636
(1) *In General* [§ 1592] p 636
(2) *Title Held by Representative* [§ 1593] p 637
d. *Ratification* [§ 1594] p 637
e. *Leave of Court to Bid* [§ 1595] p 638
f. *Refunding of Purchase Money* [§ 1596] p 639
5. *Relative of Representative* [§ 1597] p 639
6. *Attorney of Representative* [§ 1598] p 639
7. *Judge, Appraiser, or Commissioner* [§ 1599] p 639

N. *Bids and Offers* [§§ 1600–1602] p 639
1. *In General* [§ 1600] p 639
2. *Chilling Bidding* [§ 1601] p 640
3. *Puffing* [§ 1602] p 640

O. *Payment or Recovery of Purchase Money* [§§ 1603–1623] p 640
1. *In General* [§ 1603] p 640
2. *To Whom Payment Made* [§ 1604] 640
3. *Time for Payment* [§ 1605] p 641
4. *Medium of Payment* [§ 1606] p 641
5. *When Property Sold Is Encumbered* [§ 1607] p 641
6. *Purchase by Heir, Distributee, Etc.* [§ 1608] p 641
7. *Purchase by Person Holding Claim against Estate or Representative* [§ 1609] p 641
8. *Security for Purchase Money* [§§ 1610–1611] p 643
a. *In General* [§ 1610] p 643
b. *Vendor's Lien* [§ 1611] p 643
9. *Rights and Liabilities on Failure or Refusal of Bidder to Complete Purchase* [§ 1612] p 643
10. *Proceedings to Recover Purchase Money* [§§ 1613–1621] p 645
a. *Right of Action* [§ 613] p 645
b. *Defenses* [§ 1614] p 645
c. *Time for Bringing Action* [§ 1615] p 646
d. *Jurisdiction* [§ 1616] p 646
e. *Parties* [§ 1617] p 646
f. *Pleadings* [§ 1618] p 646
g. *Evidence* [§ 1619] p 647
h. *Trial* [§ 1620] p 647
i. *Judgment and Enforcement Thereof* [§ 1621] p 647
11. *Resale and Recovery of Difference in Price* [§ 1622] p 647
12. *Equitable Relief of Purchaser* [§ 1623] p 649

P. *Report or Return* [§§ 1624–1630] p 649
1. *Necessity* [§ 1624] p 649
2. *Time for Making* [§ 1625] p 650
3. *Form and Contents* [§ 1626] p 650
4. *Verification* [§ 1627] p 650
5. *Amendment* [§ 1628] p 650
6. *Report as Notice* [§ 1629] p 650
7. *Report as Evidence* [§ 1630] p 650

Q. *Confirmation* [§§ 1631–1644] p 651
1. *Necessity* [§ 1631] p 651
2. *Jurisdiction to Confirm* [§ 1632] p 652
3. *Time for Confirmation* [§ 1633] p 652
4. *Notice of Application* [§ 1634] p 652
5. *Parties* [§ 1635] p 652

6. *Objections to Confirmation* [§§ 1636–1637] p 652
a. *In General* [§ 1636] p 652
b. *Inadequacy of Price* [§ 1637] p 653
7. *Evidence* [§ 1638] p 654
8. *Hearing and Determination* [§ 1639] p 654
9. *Reopening Sale on Advance Bid* [§ 1640] p 655
10. *Form and Requisites of Confirmation* [§ 1641] p 656
11. *Effect of Confirmation or Refusal to Confirm* [§ 1642] p 656
12. *Entry upon Record or Registration of Confirmation* [§ 1643] p 657
13. *Review* [§ 1644] p 658
R. *Second Sale* [§§ 1645–1646] p 658
1. *In General* [§ 1645] p 658
2. *New Proceedings* [§ 1646] p 659
S. *Annulling Sales after Confirmation* [§§ 1647–1688] p 659
1. *In General* [§ 1647] p 659
2. *Right to Attack Sale* [§§ 1648–1652] p 659
a. *In General* [§ 1648] p 659
b. *Estoppel* [§§ 1649–1652] p 661
(1) *In General* [§ 1649] p 661
(2) *Acceptance and Retention of Proceeds of Property* [§ 1650] p 662
(3) *Retention of Property Purchased* [§ 1651] p 663
(4) *Ratification* [§ 1652] p 663
3. *Time within Which Sale May Be Annulled* [§§ 1653–1654] p 663
a. *Statutes of Limitations* [§ 1653] p 663
b. *Effect of Laches* [§ 1654] p 664
4. *Collateral Attack* [§§ 1655–1656] p 665
a. *In General* [§ 1655] p 665
b. *What Attacks Are Collateral* [§ 1656] p 667
5. *Grounds for Annulling Sales* [§§ 1657–1672] p 668
a. *In General* [§ 1657] p 668
b. *Want of Authority of Executor or Administrator* [§§ 1658–1659] p 668
(1) *Defective Appointment* [§ 1658] p 668
(2) *Termination of Authority* [§ 1659] p 668
c. *Defects in Proceedings Prior to Order* [§§ 1660–1663] p 669
(1) *As to Jurisdiction* [§ 1660] p 669
(2) *As to Parties* [§ 1661] p 669
(3) *As to Notice of Application* [§ 1662] p 669
(4) *As to Petition* [§ 1663] p 670
d. *Improper Order* [§§ 1664–1665] p 670
(1) *Want of Sufficient Cause* [§ 1664] p 670
(2) *Errors or Irregularities* [§ 1665] p 671
e. *Defects in Proceedings after Order* [§§ 1666–1668] p 671
(1) *Representative's Oath and Bond* [§ 1666] p 671
(2) *Notice of Sale* [§ 1667] p 671
(3) *Sale and Report* [§ 1668] p 672
f. *Default of Purchaser* [§ 1669] p 672
g. *Inadequacy of Price* [§ 1670] p 672
h. *Fraud* [§ 1671] p 673
i. *Mistake* [§ 1672] p 674
6. *Proceedings* [§§ 1673–1682] p 674
a. *Forum and Form of Remedy* [§ 1673] p 674
b. *Parties* [§ 1674] p 676
c. *Notice* [§ 1675] p 676
d. *Pleadings* [§ 1676] p 676
e. *Evidence* [§§ 1677–1680] p 677
(1) *Presumptions and Burden of Proof* [§§ 1677–1678] p 677
(a) *As to Jurisdiction, Etc.* [§ 1677] p 677
(b) *As to Regularity of Proceedings* [§ 1678] p 677
(2) *Admissibility* [§ 1679] p 678
(3) *Weight and Sufficiency* [§ 1680] p 678
f. *Trial or Hearing* [§ 1681] p 679
g. *Decree; Relief Granted* [§ 1682] p 679
7. *Settlement with Purchaser When Sale Avoided* [§§ 1683–1688] p 680
a. *Reimbursement for Purchase Money* [§§ 1683–1685] p 680
(1) *Right of Purchaser* [§ 1683] p 680
(2) *Necessity of Offer or Tender by Plaintiff* [§ 1684] p 680
(3) *Method and Extent of Reimbursement* [§ 1685] p 681
b. *Reimbursement for Improvements* [§ 1686] p 682
c. *Liability for Rents and Profits* [§ 1687] p 682

d. *Liability of Purchaser Who Assumes Mortgage* [§ 1688] p 683
T. *Operation and Effect of Sale* [§§ 1689–1713] p 683
1. *Sale Judicial* [§ 1689] p 683
2. *Divesting of Titles and Liens* [§§ 1690–1694] p 683
a. *Title of Heirs or Devisees* [§ 1690] p 683
b. *Dower or Curtesy Rights* [§ 1691] p 684
c. *Encumbrances* [§ 1692] p 685
d. *Leasehold Interest* [§ 1693] p 686
e. *Rights of Purchasers from and Creditors of Heirs and Devisees* [§ 1694] p 686
3. *Effect of Recognizing Lien* [§ 1695] p 687
4. *Title and Rights of Purchaser* [§§ 1696–1708] p 687
a. *In General* [§ 1696] p 687
b. *Rule Caveat Emptor* [§ 1697] p 689
c. *Warranty* [§§ 1698–1699] p 690
(1) *None as against Estate* [§ 1698] p 690
(2) *Personal Liability of Representative* [§ 1699] p 690
d. *Protection of Bona Fide Purchasers* [§§ 1700–1705] p 691
(1) *In General* [§ 1700] p 691
(2) *Fraud on Purchaser* [§ 1701] p 691
(3) *Fraud on Others* [§ 1702] p 692
(4) *Defective Proceedings* [§ 1703] p 692
(5) *Defects in Decedent's Title* [§ 1704] p 693
(6) *Curative Statutes* [§ 1705] p 694
e. *Estoppel to Dispute Title* [§ 1706] p 694
f. *Effect of Lien for Inheritance Tax* [§ 1707] p 695
g. *Retention by Representative of Possession of Personalty Sold* [§ 1708] p 695
5. *When Title Passes* [§§ 1709–1710] p 695
a. *In General* [§ 1709] p 695
b. *As to Rents and Profits* [§ 1710] p 695
6. *Proceedings to Perfect Rights of Purchaser* [§§ 1711–1712] p 696
a. *To Obtain Deed* [§ 1711] p 696
b. *To Obtain Possession* [§ 1712] p 696
7. *Redemption* [§ 1713] p 696
U. *Conveyance* [§§ 1714–1729] p 696
1. *Necessity* [§ 1714] p 696
2. *Authority to Convey* [§§ 1715–1718] p 697
a. *In General* [§ 1715] p 697
b. *Who Has Authority* [§ 1716] p 698
c. *Duration of Authority* [§ 1717] p 698
d. *Extent of Authority* [§ 1718] p 698
3. *To Whom Conveyance Made* [§ 1719] p 698
4. *Form, Contents, and Execution* [§§ 1720–1721] p 699
a. *In General* [§ 1720] p 699
b. *Description of Property* [§ 1721] p 700
5. *Presumption as to Execution and Delivery* [§ 1722] p 701
6. *Approval* [§ 1723] p 701
7. *Acknowledgment* [§ 1724] p 701
8. *Recording* [§ 1725] p 701
9. *Construction, Operation, and Effect* [§§ 1726–1728] p 701
a. *In General* [§ 1726] p 701
b. *Effect of Convenants* [§ 1727] p 701
c. *Conveyance as Evidence* [§ 1728] p 702
10. *Mortgage* [§ 1729] p 703
V. *Disposition of Proceeds* [§§ 1730–1735] p 703
1. *In General* [§ 1730] p 703
2. *Satisfaction of Mortgages and Other Liens* [§ 1731] p 704
3. *Payment of Costs and Expenses of Sale* [§ 1732] p 705
4. *Disposition of Surplus* [§ 1733] p 706
5. *By Whom Proceeds Received and Distributed* [§ 1734] p 706
6. *Duty of Purchaser as to Application of Proceeds* [§ 1735] p 707
W. *Liability of Representative* [§§ 1736–1741] p 707
1. *In General* [§ 1736] p 707
2. *For Purchase Money* [§§ 1737–1738] p 707
a. *In General* [§ 1737] p 707
b. *Failure to Collect* [§ 1738] p 708
3. *For Negligence or Misconduct in Selling* [§ 1739] p 708
4. *For Purchasing at His Own Sale* [§ 1740] p 709
5. *Estoppel* [§ 1741] p 710

XIII. INSOLVENT ESTATES [§§ 1742–1805] p 710
A. *In General* [§ 1742] p 710
B. *What Law Governs* [§ 1743] p 710
C. *Insolvency Proceedings* [§§ 1744–1753] p 710
1. *Jurisdiction* [§§ 1744–1745] p 710
a. *Probate Court* [§ 1744] p 710
b. *Courts of Equity* [§ 1745] p 710
2. *Grounds for Declaration of Insolvency* [§ 1746] p 710
3. *Representation of Insolvency* [§§ 1747–1748] p 711
a. *In General* [§ 1747] p 711
b. *Time of Making* [§ 1748] p 711
4. *Notice* [§ 1749] p 711
5. *Right to Oppose Representation* [§ 1750] p 711
6. *Hearing and Determination* [§ 1751] p 711
7. *Decree* [§ 1752] p 711
8. *Review* [§ 1753] p 712
D. *Estoppel to Assert Insolvency* [§ 1754] p 712
E. *Effect of Representation or Declaration of Insolvency* [§§ 1755–1758] p 712
1. *In General* [§ 1755] p 712
2. *On Pending Actions* [§ 1756] p 712
3. *On Judgments and Executions* [§ 1757] p 713
4. *On Prior Payment of Claims* [§ 1758] p 713
F. *Commissioners or Auditors* [§§ 1759–1760] p 714
1. *Appointment* [§ 1759] p 714
2. *Powers* [§ 1760] p 714
G. *Collection and Management of Estate* [§§ 1761–1764] p 714
1. *In General* [§ 1761] p 714
2. *Redemption of Property* [§ 1762] p 714
3. *Rights of Heirs* [§ 1763] p 714
4. *Avoiding Preferences* [§ 1764] p 714
H. *Actions* [§§ 1765–1766] p 714
1. *In General* [§ 1765] p 714
2. *Respecting Realty* [§ 1766] p 715
I. *Sales and Conveyances under Order of Court* [§§ 1767] p 715
J. *Presentation and Allowance of Claims* [§§ 1768–1781] p 716
1. *Presentation* [§§ 1768–1773] p 716
a. *Necessity of Presentation* [§ 1768] p 716
b. *Right to Present* [§ 1769] p 717
c. *Claims Presentable* [§ 1770] p 717
d. *Time for Presentation* [§ 1771] p 718
e. *Statement and Verification* [§ 1772] p 718
f. *Sufficiency of Presentation or Filing* [§ 1773] p 718
2. *Proof of Claims* [§ 1774] p 718
3. *Objections and Proceedings Thereon* [§ 1775] p 719
4. *Allowance or Rejection* [§ 1776] p 719
5. *Report of Commissioners* [§ 1777] p 720
6. *Reference of Disputed Claims* [§ 1778] p 721
7. *Review* [§§ 1779–1781] p 721
a. *In General* [§ 1779] p 721
b. *Proceedings for Appeal* [§ 1780] p 722
c. *Hearing and Determination* [§ 1781] p 722
K. *Rights and Remedies of Creditors* [§§ 1782–1790] p 722
1. *In General* [§ 1782] p 722
2. *Actions* [§§ 1783–1790] p 723
a. *In General* [§ 1783] p 723
b. *Suits in Equity* [§ 1784] p 724
c. *Time to Sue and Limitations* [§ 1785] p 724
d. *Defenses* [§ 1786] p 724
e. *Parties* [§ 1787] p 724
f. *Pleading* [§ 1788] p 724
g. *Evidence* [§ 1789] p 725
h. *Judgment and Relief* [§ 1790] p 725
L. *Payment of Claims and Distribution* [§§ 1791–1805] p 725
1. *In General* [§ 1791] p 725
2. *New or Increased Assets* [§ 1792] p 726
3. *Preferred Claims* [§ 1793] p 726
4. *Secured Claims* [§§ 1794–1795] p 727
a. *Preference Out of Security* [§ 1794] p 727
b. *Rights as to General Assets* [§ 1795] p 727

5. *Rights of Heirs or Distributees* [§ 1796] p 728
6. *Improper Payments* [§ 1797] p 728
7. *Proceedings and Decree for Distribution* [§§ 1798–1799] p 728
   a. *In General* [§ 1798] p 728
   b. *Computation of Dividends* [§ 1799] p 729
8. *Accounting and Settlement* [§§ 1800–1805] p 729
   a. *In General* [§ 1800] p 729
   b. *Proceedings* [§§ 1801–1805] p 730
      (1) *Time for Institution* [§ 1801] p 730
      (2) *Parties* [§ 1802] p 730
      (3) *Pleading and Proof* [§ 1803] p 730
      (4) *Judgment* [§ 1804] p 730
      (5) *Appeal* [§ 1805] p 730

XIV. ACTIONS [§§ 1806–2298] p 730
A. *Capacity of Personal Representatives to Sue and Be Sued Generally* [§ 1806] p 730
B. *Capacity in Which Representative Sues or Is Sued* [§§ 1807–1829] p 732
   1. *Actions by Representatives* [§§ 1807–1819] p 732
      a. *General Rules* [§§ 1807–1808] p 732
         (1) *Causes of Action Accruing in Decedent's Lifetime* [§ 1807] p 732
         (2) *Causes of Action Accruing after Decedent's Death* [§ 1808] p 732
      b. *Particular Actions* [§§ 1809–1817] p 734
         (1) *On Notes* [§ 1809] p 734
         (2) *On Bonds* [§ 1810] p 735
         (3) *On Judgments* [§ 1811] p 735
         (4) *On Contracts Made by Representative* [§§ 1812–1813] p 736
            (a) *In General* [§ 1812] p 736
            (b) *Contracts Involving Unauthorized Use of Assets* [§ 1813] p 736
         (5) *To Recover Money Paid* [§ 1814] p 736
         (6) *On Right of Surety to Indemnity* [§ 1815] p 736
         (7) *To Recover Land or for Injuries Thereto* [§ 1816] p 736
         (8) *For Injury to or Conversion of Personalty* [§ 1817] p 737
      c. *Where Representative Has Been Charged with or Has Accounted for Proceeds of Contract* [§ 1818] p 737
      d. *Where Representative Is Sole Beneficiary* [§ 1819] p 737
   2. *Actions against Representatives* [§§ 1820–1829] p 737
      a. *General Rules* [§ 1820] p 737
      b. *Actions on Contracts* [§§ 1821–1825] p 739
         (1) *Of Decedent* [§ 1821] p 739
         (2) *Of Representative* [§§ 1822–1825] p 739
            (a) *Consideration Arising during Decedent's Lifetime* [§ 1822] p 739
            (b) *New and Independent Consideration* [§ 1823] p 739
            (c) *Promise in Consideration of Assets* [§ 1824] p 741
            (d) *Testamentary Authority to Make Contracts* [§ 1825] p 741
      c. *Actions Based on Tort* [§§ 1826–1827] p 741
         (1) *In General* [§ 1826] p 741
         (2) *Conversion or Detention of Property* [§ 1827] p 742
      d. *Action for Accounting of Income from Property Held in Trust by Decedent* [§ 1828] p 743
      e. *Ejectment* [§ 1829] p 743
C. *Form of Action* [§ 1830] p 743
D. *Conditions Precedent* [§§ 1831–1854] p 744
   1. *Actions by Representative* [§§ 1831–1834] p 744
      a. *In General* [§ 1831] p 744
      b. *On Securities Deposited with Depositary* [§ 1832] p 744
      c. *To Set Aside Fraudulent Conveyance* [§ 1833] p 744
      d. *For Injury to or Conversion of Personalty* [§ 1834] p 744
   2. *Actions against Representative* [§§ 1835–1854] p 744
      a. *For Debts of Decedent* [§§ 1835–1848] p 744
         (1) *Leave of Court to Sue* [§ 1835] p 744
         (2) *Presentation of Claim* [§§ 1836–1841] p 744
            (a) *Necessity for Presentation* [§§ 1836–1837] p 744
               aa. *In General* [§ 1836] p 744
               bb. *Applications of Rule* [§ 1837] p 746
            (b) *Effect of Knowledge of Representative* [§ 1838] p 747
            (c) *By Whom Claim Presented* [§ 1839] p 747
            (d) *Sufficiency of Presentation* [§ 1840] p 747
            (e) *Cure or Waiver of Nonpresentation* [§ 1841] p 748
         (3) *Verification of Claims* [§§ 1842–1845] p 749

(a) *Necessity* [§ 1842] p 749
(b) *Time for Verification* [§ 1843] p 749
(c) *Sufficiency* [§ 1844] p 749
(d) *Waiver of Verification or Defects in Verification* [§ 1845] p 749
(4) *Action on Claim by Probate Court* [§ 1846] p 750
(5) *Rejection or Disallowance of Claim* [§ 1847] p 750
(6) *Inability to Recover against Coöbligor* [§ 1848] p 750
b. *To Recover Legacies* [§ 1849] p 750
c. *To Recover Distributive Shares* [§ 1850] p 750
d. *To Have Deed Declared a Mortgage and Redeem* [§ 1851] p 751
e. *To Recover Money Paid on Unfulfilled Contract of Sale* [§ 1852] p 751
f. *To Recover from Estate of Husband for Debts of Wife* [§ 1853] p 751
g. *To Recover Trust Funds Converted by Decedent* [§ 1854] p 751
E. *Defenses* [§§ 1855–1865] p 751
1. *Actions by Personal Representatives* [§§ 1855–1856] p 751
a. *In General* [§ 1855] p 751
b. *Want of Representative Capacity* [§ 1856] p 752
2. *Actions against Personal Representative* [§§ 1857–1865] p 752
a. *Duty to Interpose* [§ 1857] p 752
b. *Want of Representative Capacity* [§ 1858] p 752
c. *Disability of Decedent* [§ 1859] p 753
d. *Fraud Participated in by Decedent* [§ 1860] p 753
e. *Insolvency of Estate* [§ 1861] p 753
f. *Plene Administravit* [§ 1862] p 753
g. *Defenses in Individual and Representative Capacity* [§ 1863] p 753
h. *Actions for Legacies or Distributive Shares* [§ 1864] p 753
i. *Miscellaneous* [§ 1865] p 754
F. *Set-Off or Counterclaim* [§§ 1866–1884] p 754
1. *Actions by Personal Representatives* [§§ 1866–1883] p 754
a. *In General* [§ 1866] p 754
b. *Mutuality of Demands* [§ 1867] p 755
c. *Particular Demands* [§§ 1868–1876] p 755
(1) *Debts Due in Decedent's Lifetime against Causes of Action Accruing after His Death* [§ 1868] p 755
(2) *Claim Accruing after Decedent's Death against Causes of Action Arising in His Lifetime* [§§ 1869–1870] p 756
(a) *General Rule* [§ 1869] p 756
(b) *Limitations of and Exceptions to Rule* [§ 1870] p 756
(3) *Debts Due in Decedent's Lifetime against Causes of Action Accruing in His Lifetime* [§ 1871] p 757
(4) *Claims Accruing after Decedent's Death against Causes of Action Accruing after His Death* [§ 1872] p 757
(5) *Claims in Favor of One Party against Another Party and Others Jointly* [§ 1873] p 757
(6) *Claims Growing Out of Partnership Dealings between Defendant and Decedent* [§ 1874] p 758
(7) *Legacies or Distributive Shares* [§ 1875] p 758
(8) *Claims against Estate Purchased after Decedent's Death* [§ 1876] p 758
d. *Actions by Representative for Commissions* [§ 1877] p 759
e. *Actions between Representatives of Different Estates* [§ 1878] p 759
f. *Actions Brought by Representative While Exempt from Suit* [§ 1879] p 759
g. *Effect of Insolvency of Estate* [§ 1880] p 759
h. *Necessity for Presentment or Demand* [§§ 1881–1882] p 760
(1) *In General* [§ 1881] p 760
(2) *Where Estate Insolvent* [§ 1882] p 761
i. *Necessity of Pleading Set-Offs* [§ 1883] p 761
2. *Actions against Personal Representatives* [§ 1884] p 761
G. *Jurisdiction* [§§ 1885–1902] p 762
1. *Action on Claims in Favor of or against Estate* [§§ 1885–1886] p 762
a. *In General* [§ 1885] p 762
b. *Courts of Equity* [§ 1886] p 763
2. *Actions on Joint or Joint and Several Obligations* [§ 1887] p 764
3. *Actions for Legacies or Distributive Shares* [§§ 1888–1889] p 764
a. *Legacies* [§ 1888] p 764
b. *Distributive Shares* [§ 1889] p 765
4. *Suits to Determine Rights of Devisees* [§ 1890] p 765
5. *Actions Based on Malfeasance or Misfeasance of Personal Representative* [§ 1891] p 765
6. *Suits for Specific Performance* [§ 1892] p 766
7. *Suits to Enforce Liens* [§ 1893] p 766

8. *Actions or Suits to Set Aside Fraudulent Conveyances* [§ 1894] p 766
9. *Actions on Contracts of Personal Representatives* [§ 1895] p 766
10. *Actions on Claims of Personal Representative against Estate* [§ 1896] p 767
11. *Actions to Charge Personal Represesentative Individually* [§ 1897] p 767
12. *Suits between Personal Representatives* [§ 1898] p 767
13. *Interpleader* [§ 1899] p 767
14. *Set-Off or Counterclaim* [§ 1900] p 767
15. *Miscellaneous* [§ 1901] p 767
16. *Estoppel to Object to Jurisdiction* [§ 1902] p 768

H. *Venue* [§§ 1903–1905] p 768
1. *Actions against Personal Representative* [§ 1903] p 768
2. *Actions by Personal Representative* [§ 1904] p 769
3. *Change of Venue* [§ 1905] p 769

I. *Time to Sue* [§§ 1906–1978] p 769
1. *Premature Commencement of Action* [§§ 1906–1913] p 769
a. *In Absence of Statute* [§ 1906] p 769
b. *Under Statutes* [§§ 1907–1913] p 770
(1) *In General* [§ 1907] p 770
(2) *Persons Protected by Statute* [§ 1908] p 770
(3) *Actions to Which Statutes Applicable* [§ 1909] p 770
(4) *Removal, Resignation, or Death of Original Representative* [§ 1910] p 771
(5) *Revival of Action against Decedent* [§ 1911] p 771
(6) *Mode of Objection* [§ 1912] p 771
(7) *Waiver of Objection* [§ 1913] p 771
2. *Statutes of Limitations* [§§ 1914–1976] p 772
a. *Actions by Personal Representatives* [§§ 1914–1922] p 772
(1) *General Statutes* [§§ 1914–1920] p 772
(a) *Actions Generally* [§§ 1914–1915] p 772
aa. *Causes of Action Arising in Decedent's Lifetime* [§ 1914] p 772
bb. *Causes of Action Arising after Decedent's Death* [§ 1915] p 772
(b) *Actions by Administrator De Bonis Non* [§ 1916] p 773
(c) *Actions to Recover Overpayments to Creditors or Legatees* [§ 1917] p 773
(d) *Claims of Personal Representatives* [§ 1918] p 773
(e) *Effect of Failure to Prosecute Suit* [§ 1919] p 773
(f) *Circumstances Suspending Running of Statute* [§ 1920] p 773
(2) *Statutes Specially Applicable to Personal Representatives* [§ 1921] p 774
(3) *Miscellaneous* [§ 1922] p 775
b. *Actions against Personal Representatives* [§§ 1923–1976] p 775
(1) *Actions on Claims against Estate* [§§ 1923–1971] p 775
(a) *General Statutes* [§§ 1923–1924] p 775
aa. *In General* [§ 1923] p 775
bb. *Accrual of Cause of Action* [§ 1924] p 775
(b) *Special Statutes* [§§ 1925–1953] p 775
aa. *In General* [§ 1925] p 775
bb. *Statutes Requiring Suit within Prescribed Time* [§§ 1926–1952] p 776
(aa) *In General* [§ 1926] p 776
(bb) *After Death of Decedent* [§ 1927] p 776
(cc) *After Grant of Letters* [§ 1928] p 777
(dd) *After Qualification of Representative* [§ 1929] p 777
(ee) *After Qualification or Giving Bond and Notice of Appointment* [§ 1930] p 778
(ff) *After Probate or Grant of Administration and Notice of Appointment* [§ 1931] p 779
(gg) *After Rejection of Claim* [§§ 1932–1951] p 779
aaa. *In General* [§ 1932] p 779
bbb. *Claims to Which Statutes Applicable* [§§ 1933–1935] p 780
(aaa) *In General* [§ 1933] p 780
(bbb) *Secured Claims* [§ 1934] p 780
(ccc) *Claim of Guarantor for Contribution from Estate of Coguarantor* [§ 1935] p 780
ccc. *Steps Necessary to Make Statute Available* [§§ 1936–1945] p 780
(aaa) *Presentation and Rejection of Claim* [§§ 1936–1940] p 780
aaaa. *In General* [§ 1936] p 780

bbbb. *Failure of Representative to Act* [§ 1937] p 781
cccc. *Partial Rejection* [§ 1938] p 782
dddd. *Rejection after Allowance* [§ 1939] p 782
eeee. *Ground of Rejection* [§ 1940] p 782
(bbb) *Notice of Rejection* [§§ 1941–1943] p 782
aaaa. *Necessity* [§ 1941] p 782
bbbb. *Sufficiency* [§ 1942] p 782
cccc. *Service by Mail* [§ 1943] p 782
(ccc) *Notice to Present Claims* [§ 1944] p 782
(ddd) *Rule to Limit Creditors* [§ 1945] p 783
ddd. *Computation of Time* [§ 1946] p 783
eee. *Mode of Asserting Claim* [§ 1947] p 783
fff. *What Constitutes Commencement of Action* [§ 1948] p 783
ggg. *Consent to Determination by Surrogate* [§ 1949] p 783
hhh. *Negotiations after Notice of Rejection* [§ 1950] p 783
iii. *Absence of Representative from State* [§ 1951] p 783
(hh) *After Final Settlement* [§ 1952] p 783
cc. *Extension Statutes* [§ 1953] p 783
(c) *Suspension of Operation of Statutes of Limitations* [§§ 1954–1966] p 784
aa. *Death of Decedent* [§ 1954] p 784
bb. *Presentation of Claim* [§ 1955] p 785
cc. *Allowance of Claim* [§ 1956] p 785
dd. *Commencement of Action* [§ 1957] p 786
ee. *Statutes Exempting Representatives from Suit* [§ 1958] p 787
ff. *Statutes Fixing Time for Presentation of Claims* [§ 1959] p 787
gg. *Acknowledgment, Promise, or Part Payment* [§ 1960] p 787
hh. *Absence of Representative from State* [§ 1961] p 788
ii. *Absence of Decedent from State at Time of Death* [§ 1962] p 789
jj. *Absence of Claimant from State* [§ 1963] p 789
kk. *Disability of Claimant* [§ 1964] p 789
ll. *Vacancy in Office of Representative* [§ 1965] p 789
mm. *Miscellaneous* [§ 1966] p 789
(d) *Waiver of Bar of Limitations* [§§ 1967–1969] p 790
aa. *General Statutes* [§ 1967] p 790
bb. *Special Statutes* [§§ 1968–1969] p 790
(aa) *General Rule* [§ 1968] p 790
(bb) *Statutory Exceptions to Rule* [§ 1969] p 790
(e) *Statutes Saving Claims Barred by Limitations* [§§ 1970–1971] p 791
aa. *In General* [§ 1970] p 791
bb. *Receipt of New Assets by Personal Representative* [§ 1971] p 791
(2) *Actions for Legacies or Distributive Shares* [§ 1972] p 792
(3) *Actions Based on Misconduct of Representative* [§ 1973] p 793
(4) *Actions to Set Aside Settlement for Mistake or Fraud* [§ 1974] p 794
(5) *Actions against Representative and Coöbligor of Decedent* [§ 1975] p 794
(6) *Assertion of Claim in Suit in Which Estate is Being Administered* [§ 1976] p 794
3 *Laches* [§§ 1977–1978] p 794
a. *Claims of Creditors* [§ 1977] p 794
b. *Claims of Legatees or Distributees* [§ 1978] p 795
J. *Parties* [§§ 1979–2050] p 795
1. *In General* [§ 1979] p 795
2. *Actions Relating to Personalty* [§ 1980] p 795
3. *Joining Representative as Party Defendant on Refusal to Sue* [§ 1981] p 797
4. *Actions by Creditors of Estate* [§§ 1982–1986] p 797
a. *Plaintiffs* [§ 1982] p 797
b. *Defendants* [§§ 1983–1986] p 797
(1) *In General* [§ 1983] p 797
(2) *Creditor's Bills* [§ 1984] p 798
(3) *Suits to Establish Rejected Claims* [§ 1985] p 798
(4) *Proceedings to Subject Property in Hands of Distributees* [§ 1986] p 798

5. *Actions Relating to Land* [§§ 1987–2011] p 798
a. *In General* [§ 1987] p 798
b. *Foreclosure of Mortgages* [§§ 1988–1991] p 799
(1) *After Death of Mortgagee* [§ 1988] p 799
(2) *After Death of Mortgagor* [§§ 1989–1991] p 800
(a) *Personal Representative* [§§ 1989–1990] p 800
aa. *As Necessary Party* [§ 1989] p 800
bb. *As Proper Party* [§ 1990] p 800
(b) *Heirs* [§ 1991] p 801
c. *Redemption from Mortgage* [§ 1992] p 801
d. *Enforcement of Vendor's Lien* [§ 1993] p 801
e. *Release of Vendor's Lien* [§ 1994] p 802
f. *Enforcement of Mechanic's Lien* [§ 1995] p 802
g. *Specific Performance of Contract of Sale* [§§ 1996–1997] p 802
(1) *After Death of Vendor* [§ 1996] p 802
(2) *After Death of Purchaser* [§ 1997] p 802
h. *Rescission of Decedent's Contract* [§ 1998] p 803
i. *Recovery of Purchase Price of Property Sold* [§ 1999] p 803
j. *Suits to Set Aside Fraudulent Conveyances of Decedent* [§ 2000] p 803
k. *Suits to Set Aside Conveyances for Fraud* [§ 2001] p 803
l. *Suits to Quiet Title* [§ 2002] p 803
m. *Suits to Subject Land to Payment of Debts* [§ 2003] p 803
n. *Vacation of Condemnation Proceedings* [§ 2004] p 803
o. *Establishment of Right of Way* [§ 2005] p 803
p. *Enforcement of Trust* [§ 2006] p 803
q. *Reformation of Instrument* [§ 2007] p 803
r. *Enjoining Sale by Representative* [§ 2008] p 804
s. *Action for Cutting and Carrying Away Timber* [§ 2009] p 804
t. *Actions on Covenants* [§ 2010] p 804
u. *Action to Restrain Paving Contract by City* [§ 2011] p 804
6. *Suit for Specific Performance of Contract of Adoption* [§ 2012] p 804
7. *Actions or Suits for Legacies or Distributive Shares* [§§ 2013–2019] p 804
a. *Actions at Law* [§ 2013] p 804
b. *Suits in Equity* [§§ 2014–2019] p 804
(1) *By General or Specific Legatee* [§ 2014] p 804
(2) *By Residuary Legatee or Distributee* [§ 2015] p 805
(3) *By Representative of Legatee or Distributee* [§ 2016] p 806
(4) *By Purchaser from or Assignee of Legatee or Distributee* [§ 2017] p 806
(5) *By Attaching Creditor of Legatee* [§ 2018] p 806
(6) *By Person Claiming as Devisee or Legatee and Next of Kin of Decedent* [§ 2019] p 806
8. *Action by Widow to Enforce Statutory Rights in Estate* [§ 2020] p 807
9. *Suits for Marshaling Assets* [§ 2021] p 807
10. *Actions for Settlement of Partnership Affairs* [§ 2022] p 807
11. *Proceedings for Revival of Judgment* [§ 2023] p 807
12. *Actions for Insurance Premiums Paid by Decedent in Fraud of Creditors* [§ 2024] p 807
13. *Suits to Enforce Contribution for Overpayment on Distribution* [§ 2025] p 807
14. *Actions on Joint Rights of Action in Favor of Decedent and Others* [§ 2026] p 807
15. *Actions or Suits on Joint or Joint and Several Obligations of Decedent and Others* [§ 2027] p 807
16. *Actions for Torts Committed by Decedent and Others* [§ 2028] p 808
17. *Actions Based on Wrongful Acts of Personal Representative* [§ 2029] p 808
18. *Suits for General Administration of Estate* [§ 2030] p 809
19. *Suit to Remove Administration into Chancery Court* [§ 2031] p 809
20. *Joinder of Coexecutors or Coadministrators* [§§ 2032–2040] p 809
a. *Actions at Law* [§§ 2032–2038] p 809
(1) *By Executors* [§§ 2032–2035] p 809
(a) *Common-Law Rule* [§ 2032] p 809
(b) *Rule Under Statute* [§ 2033] p 810
(c) *Objection for Nonjoinder* [§ 2034] p 810
(d) *Joining Coexecutors as Defendants* [§ 2035] p 810
(2) *By Administrators* [§§ 2036–2037] p 810
(a) *General Rule* [§ 2036] p 810
(b) *Where One Refuses to Prosecute* [§ 2037] p 810
(3) *Against Executors or Administrators* [§ 2038] p 810
b. *Suits in Equity* [§§ 2039–2040] p 811
(1) *By Executors or Administrators* [§ 2039] p 811
(2) *Against Executors or Administrators* [§ 2040] p 811
21. *Joinder of Representatives of Different Estates* [§ 2041] p 811

22. *Personal Representative as Party in Both Individual and Representative Capacity* [§ 2042] p 812
23. *Personal Representative as Plaintiff and Defendant in Same Action* [§ 2043] p 812
24. *Intervention* [§ 2044] p 812
25. *Joinder of Personal Representatives in Actions by Legatees or Distributees* [§ 2045] p 813
26. *Effect of Death of Personal Representative* [§§ 2046–2048] p 813
a. *Actions by Personal Representative* [§ 2046] p 813
b. *Actions against Personal Representative* [§ 2047] p 814
c. *Death of One of Several Personal Representatives* [§ 2048] p 814
27. *Effect of Resignation, Removal or Discharge of Personal Representative* [§ 2049] p 815
28. *Effect of Marriage of Executrix or Administratrix* [§ 2050] p 815
K. *Process* [§§ 2051–2053] p 816
1. *In General* [§ 2051] p 816
2. *Coexecutors or Coadministrators* [§ 2052] p 817
3. *Defects, Objections, and Amendments* [§ 2053] p 817
L. *Appearance* [§ 2054] p 817
M. *Joinder of Causes of Action* [§§ 2055–2064] p 818
1. *Actions by Personal Representatives* [§§ 2055–2059] p 818
a. *Causes of Action in Individual and in Representative Capacity* [§§ 2055–2056] p 818
(1) *In General* [§ 2055] p 818
(2) *How Misjoinder Availed of* [§ 2056] p 818
b. *Causes of Action Accruing to Decedent and to Representative in Representative Capacity* [§ 2057] p 818
c. *Counts for Goods of Representative and for Goods of Decedent* [§ 2058] p 819
d. *Miscellaneous* [§ 2059] p 819
2. *Actions against Personal Representatives* [§§ 2060–2064] p 819
a. *Causes of Action in Individual and in Representative Capacity* [§§ 2060–2062] p 819
(1) *In General* [§ 2060] p 819
(2) *How Misjoinder Availed of* [§ 2061] p 820
(3) *Effect of Misjoinder* [§ 2062] p 820
b. *Counts on Promise of Decedent and Promise of Representative on Consideration Connected with Estate* [§ 2063] p 820
c. *Miscellaneous* [§ 2064] p 820
N. *Pleading* [§§ 2065–2161] p 821
1. *Rules Applicable to Actions Generally* [§§ 2065–2114] p 821
a. *Declaration, Petition, Complaint, or Bill* [§§ 2065–2085] p 821
(1) *Allegations of Representative Capacity and Authority to Sue or Be Sued* [§§ 2065–2078] p 821
(a) *Actions at Law* [§§ 2065–2076] p 821
aa. *Allegations of Representative Capacity* [§§ 2065–2073] p 821
(aa) *Actions by Personal Representatives* [§§ 2065–2068] p 821
aaa. *Necessity and Sufficiency of Allegations* [§ 2065] p 821
bbb. *Rejection of Descriptive Words as Surplusage* [§ 2036] p 822
ccc. *Amendments* [§ 2067] p 823
ddd. *Effect of Allegations* [§ 2068] p 824
(bb) *Actions Against Personal Representative* [§§ 2069–2072] p 824
aaa. *Necessity and Sufficiency of Allegations* [§ 2069] p 824
bbb. *Rejection of Descriptive Words as Surplusage* [§ 2070] p 825
ccc. *Amendments* [§ 2071] p 825
ddd. *Effect of Allegations* [§ 2072] p 826
(cc) *Mode of Objection* [§ 2073] p 826
bb. *Allegations Showing Authority to Sue as Personal Representative* [§§ 2074–2075] p 826
(aa) *Necessity* [§ 2074] p 826
(bb) *Sufficiency* [§ 2075] p 827
cc. *Allegations Showing Defendant's Authority to Act as Personal Representative* [§ 2076] p 828
(b) *Suits in Equity* [§§ 2077–2078] p 828
aa. *By Personal Representative* [§ 2077] p 828
bb. *Against Personal Representative* [§ 2078] p 828
(2) *Profert and Oyer* [§§ 2079–2083] p 828
(a) *Profert* [§§ 2079–2082] p 828
aa. *Necessity* [§ 2079] p 828
bb. *Object and Effect* [§ 2080] p 829

cc. *Form and Requisites* [§ 2081] p 829
dd. *Effect of Failure to Make Profert Reaching or Curing Defect* [§ 2082] p 829
(b) *Oyer* [§ 2083] p 830
(3) *Allegations Negativing Premature Commencement of Suit* [§ 2084] p 830
(4) *Variance between Process and Declaration* [§ 2085] p 830
b. *Plea or Answer* [§§ 2086–2107] p 831
(1) *Denial of Representative Capacity* [§§ 2086–2093] p 831
(a) *Plea of Ne Unques Executor or Ne Unques Administrator* [§§ 2086–2089] p 831
aa. *Propriety or Necessity of Plea* [§ 2086] p 831
bb. *Nature of Plea* [§ 2087] p 831
cc. *Requisites and Sufficiency of Plea* [§ 2088] p 832
dd. *Time of Interposing Plea* [§ 2089] p 832
(b) *Plea That Defendant Is Administrator and Not Executor* [§ 2090] p 832
(c) *Plea of Termination of Authority pending Suit* [§ 2091] p 832
(d) *Demurrer, Answer, or Supplemental Pleading* [§ 2092] p 833
(e) *Effect of Pleading to Merits* [§ 2093] p 833
(2) *Plene Administravit* [§§ 2094–2102] p 834
(a) *Propriety and Necessity of Plea* [§§ 2094–2096] p 834
aa. *General Plea* [§§ 2094–2095] p 834
(aa) *At Common Law* [§ 2094] p 834
(bb) *Effect of Statutes* [§ 2095] p 835
bb. *Special Plea* [§ 2096] p 835
(b) *Requisites and Sufficiency of Plea* [§ 2097] p 835
(c) *Time of Pleading* [§ 2098] p 836
(d) *Time to Which Plea Relates* [§ 2099] p 836
(e) *Joinder of Several Defendants in Plea* [§ 2100] p 836
(f) *Amendments* [§ 2101] p 836
(g) *Withdrawal of Plea* [§ 2102] p 837
(3) *Statutes of Limitations* [§§ 2103–2105] p 837
(a) *Necessity of Pleading* [§ 2103] p 837
(b) *Requisites and Sufficiency of Plea* [§ 2104] p 837
(c) *Effect of Plea* [§ 2105] p 837
(4) *Premature Commencement of Action* [§ 2106] p 838
(5) *Filing and Withdrawal of Pleas* [§ 2107] p 838
c. *Replication* [§§ 2108–2111] p 838
(1) *To Plea of Limitations* [§ 2108] p 838
(2) *To Plea of Plene Administravit* [§ 2109] p 839
(3) *To Plea Denying Representative Capacity* [§ 2110] p 839
(4) *To Other Pleas* [§ 2111] p 839
d. *Rejoinder* [§ 2112] p 839
e. *Demurrer* [§ 2113] p 840
f. *Amendment* [§ 2114] p 840
2. *Pleadings in Particular Classes of Actions* [§§ 2115–2161] p 840
a. *On Claims in Favor of Estate* [§§ 2115–2119] p 840
(1) *Declaration or Complaint* [§ 2115] p 840
(2) *Plea or Answer* [§ 2116] p 841
(3) *Affidavit or Defense* [§ 2117] p 841
(4) *Reply* [§ 2118] p 841
(5) *Demurrer* [§ 2119] p 842
b. *On Claims against Estate* [§§ 2120–2143] p 842
(1) *Declaration or Complaint* [§§ 2120–2136] p 842
(a) *In General* [§ 2120] p 842
(b) *Allegations as to Presentation, Verification, and Rejection of Claims* [§§ 2121–2122] p 843
aa. *Necessity* [§ 2121] p 843
bb. *Sufficiency* [§ 2122] p 843
(c) *Showing Set-Offs, Payments, and Credits* [§ 2123] p 844
(d) *Attaching Affidavit in Support of Claim* [§ 2124] p 844
(e) *Allegations of Breach of Contract* [§ 2125] p 844
(f) *Allegations of Solvency of Estate* [§ 2126] p 844
(g) *Particular Actions or Claims* [§§ 2127–2136] p 844
aa. *Actions to Establish Unmatured Claims* [§ 2127] p 844
bb. *Actions Based on Fraud* [§ 2128] p 845
cc. *Claims for Money Lent* [§ 2129] p 845
dd. *Claims for Money Paid* [§ 2130] p 845
ee. *Claims for Money Received* [§ 2131] p 845
ff. *Claims for Services* [§ 2132] p 845

gg. *Claims on Joint Obligations of Decedent and Others* [§ 2133] p 845
hh. *Claims on Joint and Several Obligations of Decedent and Others* [§ 2134] p 845
ii. *Claims for Funeral Expenses* [§ 2135] p 845
jj. *Claims Barred by Limitations* [§ 2136] p 845
(2) *Plea or Answer* [§§ 2137–2141] p 846
(a) *In General* [§ 2137] p 846
(b) *Allegations as to Failure to Give Notice of or Present Claim* [§ 2138] p 846
(c) *Payment or Settlement* [§ 2139] p 846
(d) *Set-Off* [§ 2140] p 846
(e) *Right to Delay Answer* [§ 2141] p 847
(3) *Affidavit of Defense* [§ 2142] p 847
(4) *Demurrer* [§ 2143] p 847
c. *To Set Aside Fraudulent Conveyances* [§ 2144] p 847
d. *To Set Aside Gifts* [§ 2145] p 847
e. *To Avoid Sales or Transfers for Fraud on Decedent* [§ 2146] p 847
f. *To Recover Real Estate* [§ 2147] p 847
g. *To Quiet Title* [§ 2148] p 848
h. *To Foreclose Mortgages* [§ 2149] p 848
i. *To Foreclose Mechanics' Liens* [§ 2150] p 848
j. *For Injuries to Land* [§ 2151] p 848
k. *For Specific Performance* [§ 2152] p 848
l. *Based on Misfeasance or Malfeasance of Representative* [§ 2153] p 848
m. *Based on Conversion of or Injuries to Personal Property* [§ 2154] p 849
n. *On Covenants* [§ 2155] p 850
o. *For Legacies or Distributive Shares* [§ 2156] p 850
p. *To Charge Representative Individually* [§ 2157] p 851
q. *Between Personal Representatives* [§ 2158] p 851
r. *By Administrator De Bonis Non against Predecessor* [§ 2159] p 851
s. *Miscellaneous* [§ 2160] p 851
t. *Answers in Actions against Several Personal Representatives* [§ 2161] p 852
O. *Issues, Proof, and Variance* [§§ 2162–2169] p 852
1. *Issues* [§ 2162] p 852
2. *What Must Be Proved* [§ 2163] p 853
3. *Evidence Admissible under Pleadings* [§§ 2164–2168] p 853
a. *In General* [§ 2164] p 853
b. *Denial of Representative Capacity* [§ 2165] p 853
c. *Plea of Plene Administravit* [§ 2166] p 853
d. *Actions on Claims in Favor of Estate* [§ 2167] p 853
e. *Actions on Claims against Estate* [§ 2168] p 854
4. *Variance* [§ 2169] p 854
P. *Evidence* [§§ 2170–2188] p 855
1. *Presumptions* [§§ 2170–2171] p 855
a. *In General* [§ 2170] p 855
b. *As to Settlement of Estate and Payment of Claims* [§ 2171] p 856
2. *Burden of Proof* [§§ 2172–2178] p 857
a. *In General* [§ 2172] p 857
b. *As to Presentation and Rejection of Claim* [§ 2173] p 859
c. *As to Value of Services* [§ 2174] p 859
d. *As to Payment* [§ 2175] p 859
e. *In Actions on Written Instruments* [§ 2176] p 859
f. *On Plea of Plene Administravit* [§ 2177] p 860
g. *As to Representative Capacity* [§ 2178] p 860
3. *Admissibility* [§§ 2179–2182] p 861
a. *In General* [§ 2179] p 861
b. *Writings Generally* [§ 2180] p 863
c. *Letters Testamentary or of Administration* [§ 2181] p 864
d. *Inventory and Appraisal* [§ 2182] p 864
4. *Weight and Sufficiency* [§§ 2183–2188] p 865
a. *In General* [§ 2183] p 865
b. *As to Existence of Indebtedness* [§ 2184] p 866
c. *As to Representative Capacity* [§ 2185] p 870
d. *As to Assets* [§ 2186] p 871
e. *As to Allowance or Rejection of Claim* [§ 2187] p 871
f. *Effect of Admissions* [§ 2188] p 871
Q. *Trial* [§§ 2189–2194] p 871

1. *Course and Conduct Generally* [§ 2189] p 871
2. *Reception of Evidence* [§ 2190] p 872
3. *Questions of Law and Fact* [§ 2191] p 872
4. *Instructions* [§ 2192] p 872
5. *Verdict or Findings* [§§ 2193–2194] p 875
   a. *In General* [§ 2193] p 875
   b. *On Issue of Plene Administravit or No Assets* [§ 2194] p 875

R. *Dismissal and Nonsuit* [§ 2195] p 876
S. *New Trial* [§ 2196] p 876
T. *Judgment* [§§ 2197–2239] p 877
1. *Rendition, Form, and Requisites* [§§ 2197–2213] p 877
   a. *In General* [§ 2197] p 877
   b. *Judgment by Confession or Consent* [§ 2198] p 878
   c. *Judgment by Default* [§ 2199] p 878
   d. *Judgment for Payment in Due Course of Administration* [§ 2200] p 878
   e. *Judgment De Bonis Testatoris or Intestati* [§ 2201] p 879
   f. *Judgment Quando Acciderint* [§§ 2202] p 880
   g. *Judgment De Bonis Propriis* [§ 2203] p 881
   h. *Alternative Judgment* [§ 2204] p 883
   i. *Judgment against Personal Representative and Heirs Jointly* [§ 2205] p 883
   j. *Action to Set Aside Fraudulent Conveyance* [§ 2206] p 883
   k. *Action for Rescission of Contract* [§ 2207] p 883
   l. *Action Revived by Representative* [§ 2208] p 883
   m. *Parties* [§ 2209] p 883
   n. *Conformity to Pleadings, Proof, Verdict, Findings, and Report* [§§ 2210–2211] p 884
      (1) *In General* [§ 2210] p 884
      (2) *Capacity in Which Representative Allowed to Recover or Held Bound* [§ 2211] p 885
   o. *Award of Execution* [§ 2212] p 886
   p. *Withholding Judgment for Lack of Parties* [§ 2213] p 886
2. *Entry and Transcript* [§ 2214] p 886
3. *Amendment and Correction* [§ 2215] p 886
4. *Opening or Vacating* [§ 2216] p 887
5. *Equitable Relief* [§ 2217] p 888
6. *Operation and Effect* [§§ 2218–2230] p 889
   a. *In General* [§ 2218] p 889
   b. *Estoppel by Judgment* [§§ 2219–2228] p 889
      (1) *Merger and Bar of Causes of Action and Defenses* [§ 2219] p 889
      (2) *Judgment as Establishing Particular Facts* [§§ 2220–2223] p 890
         (a) *General Rule* [§ 2220] p 890
         (b) *Representative Capacity* [§ 2221] p 891
         (c) *Existence of Assets* [§ 2222] p 891
         (d) *Indebtedness of Estate* [§ 2223] p 892
      (3) *Requisites of Judgment* [§ 2224] p 892
      (4) *Persons Estopped and Entitled to Urge Estoppel* [§§ 2225–2228] p 893
         (a) *In General* [§ 2225] p 893
         (b) *Executors and Administrators* [§ 2226] p 893
         (c) *Heirs, Devisees, Distributees, and Legatees* [§ 2227] p 893
         (d) *Creditors* [§ 2228] p 894
   c. *Persons Entitled to Share in Recovery* [§ 2229] p 894
   d. *Lien* [§ 2230] p 894
7. *Satisfaction and Set-off* [§ 2231] p 895
8. *Revival of Judgment* [§§ 2232–2233] p 895
   a. *Against Decedent* [§ 2232] p 895
   b. *In Favor of or against Representative* [§ 2233] p 896
9. *Actions on Judgments* [§§ 2234–2239] p 896
   a. *Right of Action* [§ 2234] p 896
   b. *Time to Sue and Limitations* [§ 2235] p 897
   c. *Defenses* [§ 2236] p 897
   d. *Parties* [§ 2237] p 897
   e. *Pleading* [§ 2238] p 897
   f. *Evidence* [§ 2239] p 897

U. *Execution and Enforcement of Judgment* [§§ 2240–2257] p 897
1. *Enforcement against Representative as Such* [§§ 2240–2243] p 897
   a. *In General* [§ 2240] p 897
   b. *Practice in New York* [§ 2241] p 898
   c. *Against Administrator De Bonis Non* [§ 2242] p 899
   d. *Enforcement in Equity* [§ 2243] p 899
2. *Enforcement by or against Representative after Removal or Resignation* [§ 2244] p 900

3. *Enforcement against Representative Individually* [§§ 2245–2247] p 900
a. *In General* [§ 2245] p 900
b. *By Scire Facias* [§ 2246] p 900
c. *By Action of Debt Suggesting Devastavit* [§ 2247] p 901
4. *Judgment for Representative's Personal Debts* [§ 2248] p 902
5. *Property Subject to Execution* [§§ 2249–2251] p 902
a. *In General* [§ 2249] p 902
b. *Lands of Decedent* [§ 2250] p 903
c. *Under Judgment Quando Acciderint* [§ 2251] p 904
6. *Issuance, Form, and Requisites of Execution* [§§ 2252–2253] p 904
a. *In General* [§ 2252] p 904
b. *Time for Issuance* [§ 2253] p 904
7. *Lien, Levy, or Extent and Custody of Property* [§ 2254] p 904
8. *Stay, Quashing, Vacating, and Relief against Execution* [§ 2255] p 905
9. *Sale* [§§ 2256–2257] p 906
a. *In General* [§ 2256] p 906
b. *Disposition of Proceeds* [§ 2257] p 906
V. *Review* [§§ 2258–2267] p 907
1. *In General* [§ 2258] p 907
2. *Right and Duty to Appeal* [§ 2259] p 907
3. *Time for Appeal* [§ 2260] p 907
4. *Bond* [§ 2261] p 908
5. *Notice of Appeal* [§ 2262] p 908
6. *Transcript and Filing Thereof* [§ 2263] p 908
7. *Parties* [§ 2264] p 908
8. *Presentation and Reservation of Grounds of Review* [§ 2265] p 908
9. *Dismissal or Withdrawal* [§ 2266] p 909
10. *Determination and Disposition of Cause* [§ 2267] p 910
W. *Costs* [§§ 2268–2295] p 910
1. *Personal Liability of Representative* [§§ 2268–2282] p 910
a. *Actions at Law* [§§ 2268–2281] p 910
(1) *By Personal Representative* [§§ 2268–2271] p 910
(a) *In Absence of Special Statute* [§§ 2268–2270] p 910
aa. *Actions Necessarily Brought in Representative Capacity* [§§ 2268–2269] p 910
(aa) *General Rule* [§ 2268] p 910
(bb) *Extent and Limits of Rule* [§ 2269] p 911
bb. *Actions Which May Be Brought in Individual Capacity* [§ 2270] p 912
(b) *Under Special Statutes* [§ 2271] p 912
(2) *Actions against Personal Representative* [§§ 2272–2280] p 913
(a) *In Absence of Special Statute* [§ 2272] p 913
(b) *Under Special Statutes* [§§ 2273–2280] p 913
aa. *In General* [§ 2273] p 913
bb. *Actions or Proceedings to Which Statutes Applicable* [§ 2274] p 914
cc. *Grounds of Allowance* [§§ 2275–2276] p 914
(aa) *In General* [§ 2275] p 914
(bb) *Unreasonable Resistance of Claim* [§ 2276] p 914
dd. *Prerequisites to Allowance* [§§ 2277–2280] p 915
(aa) *Presentation of Claim* [§§ 2277–2278] p 915
aaa. *In General* [§ 2277] p 915
bbb. *Effect of Failure to Advertise for Claims* [§ 2278] p 915
(bb) *Certificate of Judge or Referee* [§ 2279] p 915
(cc) *Time of Commencing Suit* [§ 2280] p 916
(3) *Where Representative Personally Interested in Litigation* [§ 2281] p 916
b. *Suits in Equity* [§ 2282] p 916
2. *Liability of Estate* [§§ 2283–2288] p 917
a. *Actions at Law* [§§ 2283–2287] p 917
(1) *By Personal Representatives* [§ 2283] p 917
(2) *Actions against Personal Representatives* [§§ 2284–2287] p 917
(a) *General Rule* [§ 2284] p 917
(b) *Special Statutory Provisions* [§§ 2285–2287] p 918
aa. *As to Time of Commencing Action* [§ 2285] p 918
bb. *As to Amount of Recovery* [§§ 2286] p 918
cc. *As to Presentation of Claim* [§ 2287] p 918
b. *Suits in Equity* [§ 2288] p 918
3. *When Personal Representative Entitled to Costs* [§ 2289] p 919

4. *Extra Allowance* [§ 2290] p 919
5. *Security for Costs* [§ 2291] p 919
6. *Suits in Forma Pauperis* [§ 2292] p 920
7. *Award of Costs* [§ 2293] p 920
8. *Judgment* [§ 2294] p 920
9. *Execution* [§ 2295] p 921

X. *Attorneys' Fees and Other Expenses of Litigation* [§ 2296] p 921
Y. *Liabilities in Respect to Conduct of Action or Defense* [§ 2297] p 921
Z. *Actions or Suits between Personal Representatives* [§ 2298] p 923

XV. ACCOUNTING AND SETTLEMENT [§§ 2299–2532] p 924
A. *Definitions* [§ 2299] p 924
B. *Duty to Account* [§§ 2300–2325] p 924
1. *In General* [§ 2300] p 924
2. *Periodical Accounting* [§ 2301] p 925
3. *Supplemental Accounting* [§ 2302] p 925
4. *Time for Accounting* [§ 2303] p 925
5. *Who Entitled to Require Accounting* [§§ 2304–2313] p 927
a. *In General* [§ 2304] p 927
b. *Creditors* [§ 2305] p 928
c. *Heirs and Distributees* [§ 2306] p 929
d. *Legatees and Devisees* [§ 2307] p 929
e. *Assignees or Representatives of Legatees or Distributees* [§ 2308] p 930
f. *Remaindermen* [§ 2309] p 930
g. *Coexecutors and Coadministrators* [§ 2310] p 931
h. *Successors and Representatives* [§ 2311] p 931
i. *Sureties of Personal Representative* [§ 2312] p 931
j. *Probate Court* [§ 2313] p 931
6. *Who May Be Required to Account* [§§ 2314–2316] p 932
a. *In General* [§ 2314] p 932
b. *Coexecutors and Coadministrators* [§ 2315] p 933
c. *Representative of Deceased Executor or Administrator* [§ 2316] p 933
7. *Person Acting in Different Capacities* [§§ 2317–2319] p 934
a. *As Representative of Different Estates* [§ 2317] p 934
b. *As Representative and Guardian* [§ 2318] p 934
c. *As Representative and Trustee* [§ 2319] p 935
8. *Scope of Liability and Property to Be Included* [§ 2320] p 935
9. *Relief from Duty* [§§ 2321–2324] p 937
a. *In General* [§ 2321] p 937
b. *Lack of Assets* [§ 2322] p 938
c. *Bond to Pay Debts and Legacies* [§ 2323] p 938
d. *Pendency of Other Proceedings* [§ 2324] p 939
10. *Consequences of Failure to Account* [§ 2325] p 939
C. *Proceedings for Accounting* [§§ 2326–2391] p 939
1. *In General* [§ 2326] p 939
2. *Nature of Proceeding* [§ 2327] p 939
3. *Jurisdiction* [§§ 2328–2335] p 940
a. *In General* [§ 2328] p 940
b. *Probate Courts* [§§ 2329–2334] p 940
(1) *In General* [§ 2329] p 940
(2) *Matters Incidental to Accounting and Settlement* [§ 2330] p 941
(3) *Where Trust Created by Will* [§ 2331] p 943
(4) *Accounting after Removal, Resignation, or Death* [§ 2332] p 943
(5) *Accounting after Final Settlement* [§ 2333] p 943
(6) *Enforcement of Orders or Judgments* [§ 2334] p 943
c. *Territorial Jurisdiction* [§ 2335] p 943
4. *Limitations and Laches* [§§ 2336–2338] p 944
a. *Statutes of Limitations* [§ 2336] p 944
b. *Presumption from Lapse of Time* [§ 2337] p 944
c. *Laches* [§ 2338] p 946
5. *Audit or Approval before Settlement* [§ 2339] p 947
6. *Stay of Proceedings* [§ 2340] p 947
7. *Voluntary Accounting* [§§ 2341–2352] p 947
a. *In General* [§ 2341] p 947
b. *Parties* [§ 2342] p 948
c. *Citation or Notice* [§§ 2343–2347] p 949
(1) *In General* [§ 2343] p 949
(2) *Mode of Giving Notice* [§ 2344] p 950
(3) *Proof of Service or Publication* [§ 2345] p 950

(4) *Effect of Lack of Notice* [§ 2346] p 950
(5) *Waiver of Notice* [§ 2347] p 950
d. *Appearance* [§ 2348] p 950
e. *Pleadings* [§ 2349] p 951
f. *Evidence* [§ 2350] p 951
g. *Judgment and Relief Awarded* [§ 2351] p 951
h. *Proceedings in Equity* [§ 2352] p 951
8. *Compulsory Accounting* [§§ 2353–2391] p 951
a. *By Probate Proceedings* [§§ 2353–2363] p 951
(1) *In General* [§ 2353] p 951
(2) *Parties* [§ 2354] p 951
(3) *Petition* [§ 2355] p 952
(4) *Citation or Notice* [§ 2356] p 952
(5) *Answer or Defense* [§ 2357] p 953
(6) *Replication* [§ 2358] p 953
(7) *Issues* [§ 2359] p 953
(8) *Evidence* [§ 2360] p 953
(9) *Hearing and Determination* [§ 2361] p 953
(10) *Judgment* [§ 2362] p 954
(11) *Appeal* [§ 2363] p 954
b. *By Action* [§§ 2364–2391] p 954
(1) *In General* [§ 2364] p 954
(2) *Mode and Form of Procedure* [§ 2365] p 954
(3) *Time for Bringing Action* [§ 2366] p 955
(4) *Parties* [§§ 2367–2376] p 955
(a) *In General* [§ 2367] p 955
(b) *Personal Representatives* [§ 2368] p 955
(c) *Sureties* [§ 2369] p 955
(d) *Heirs and Devisees* [§ 2370] p 955
(e) *Legatees and Distributees* [§ 2371] p 956
(f) *Debtors* [§ 2372] p 956
(g) *Creditors* [§ 2373] p 956
(h) *Persons with Contingent Interests* [§ 2374] p 957
(i) *Personal Representatives and Assignees of Necessary Parties* [§ 2375] p 957
(j) *Intervention* [§ 2376] p 957
(5) *Bill, Petition, or Complaint* [§ 2377] p 957
(6) *Plea or Answer, and Defenses* [§ 2378] p 959
(7) *Issues, Proof, and Variance* [§ 2379] p 960
(8) *Evidence* [§§ 2380–2383] p 960
(a) *Presumptions* [§ 2380] p 960
(b) *Burden of Proof* [§ 2381] p 960
(c) *Admissibility* [§ 2382] p 961
(d) *Weight and Sufficiency* [§ 2383] p 961
(9) *Trial, Hearing, and Determination* [§ 2384] p 962
(10) *Dismissal* [§ 2385] p 962
(11) *Judgment or Decree* [§ 2386] p 962
(12) *Appeal* [§ 2387] p 963
(13) *Stay of Other Actions or Proceedings pending Accounting* [§ 2388] p 963
(14) *Execution* [§ 2389] p 963
(15) *Costs* [§ 2390] p 964
(16) *Counsel Fees* [§ 2391] p 964
D. *Charges* [§ 2392] p 964
E. *Credits* [§ 2393] p 968
F. *Compensation* [§§ 2394–2444] p 973
1. *Right to Compensation* [§§ 2394–2399] p 973
a. *In General* [§ 2394] p 973
b. *What Law Governs* [§ 2395] p 974
c. *Void or Irregular Appointment* [§ 2396] p 975
d. *Necessity for Judicial Allowance* [§ 2397] p 975
e. *Effect of Testamentary Provisions* [§ 2398] p 975
f. *Priority of Claim* [§ 2399] p 976
2. *For What Services Allowed* [§ 2400] p 976
3. *From What Fund Payable* [§ 2401] p 977
4. *Commissions* [§§ 2402–2421] p 977
a. *In General* [§ 2402] p 977
b. *On What Allowed* [§§ 2403–2421] p 977
(1) *In General* [§ 2403] p 977

(2) *Inventoried Property* [§ 2404] p 978
(3) *Legacies and Distributive Shares* [§§ 2405–2407] p 979
(a) *In General* [§ 2405] p 979
(b) *Specific Legacies* [§ 2406] p 979
(c) *Property Delivered in Kind* [§ 2407] p 979
(4) *Investments and Income* [§ 2408] p 979
(5) *Receipts and Disbursements* [§§ 2409–2410] p 980
(a) *In General* [§ 2409] p 980
(b) *Resulting from Continuance of Decedent's Business* [§ 2410] p 981
(6) *Surcharges* [§ 2411] p 981
(7) *Indebtedness between Representative and Estate* [§ 2412] p 982
(8) *Real Property and Its Usufruct* [§§ 2413–2416] p 982
(a) *In General* [§ 2413] p 982
(b) *Proceeds of Authorized Sales* [§ 2414] p 982
(c) *Where Collection of Rents Authorized* [§ 2415] p 983
(d) *Realty Subject to Encumbrances* [§ 2416] p 983
(9) *Property Not Assets of Estate* [§ 2417] p 984
(10) *Worthless or Uncollected Assets* [§ 2418] p 984
(11) *Lost or Perished Assets* [§ 2419] p 984
(12) *Assets Not in Possession or Unadministered* [§ 2420] p 984
(13) *Foreign Assets* [§ 2421] p 985
5. *Amount of Compensation* [§§ 2422–2425] p 985
a. *In General* [§ 2422] p 985
b. *Extra Allowance* [§ 2423] p 987
c. *Effect of Testamentary Provisions* [§ 2424] p 989
d. *Effect of Agreement* [§ 2425] p 991
6. *Temporary or Special Administrators* [§ 2426] p 991
7. *Coexecutors and Coadministrators* [§ 2427] p 992
8. *Successive Administrations* [§ 2428] p 993
9. *Where Representative also Trustee or Guardian* [§ 2429] p 994
10. *Waiver or Renunciation of Compensation* [§ 2430] p 995
11. *Forfeiture or Deprivation of Compensation* [§§ 2431–2435] p 996
a. *In General* [§ 2431] p 996
b. *Mismanagement* [§ 2432] p 997
c. *Conversion, Misappropriation, or Commingling of Funds* [§ 2433] p 998
d. *Failure to File Inventory or Accounts* [§ 2434] p 999
e. *Resignation or Removal* [§ 2435] p 999
12. *Jurisdiction, Proceedings, and Review* [§§ 2436–2444] p 1000
a. *Jurisdiction* [§§ 2436–2437] p 1000
(1) *In General* [§ 2436] p 1000
(2) *Apportionment of Commissions* [§ 2437] p 1000
b. *Time for Allowance* [§ 2438] p 1000
c. *Proceedings for Allowance* [§ 2439] p 1001
d. *Objections and Exceptions* [§ 2440] p 1001
e. *Hearing and Determination* [§ 2441] p 1002
f. *Order or Decree of Allowance* [§ 2442] p 1002
g. *Review* [§ 2443] p 1003
h. *Costs* [§ 2444] p 1004
G. *Stating and Settling Accounts* [§§ 2445–2481] p 1004
1. *Form and Requisites* [§§ 2245–2447] p 1004
a. *In General* [§ 2445] p 1004
b. *Blending or Separating Accounts* [§ 2446] p 1006
c. *Verification* [§ 2447] p 1006
2. *Objections and Exceptions* [§§ 2448–2456] p 1006
a. *Necessity* [§ 2448] p 1006
b. *Persons Entitled to Object* [§ 2449] p 1007
c. *Time for Making and Filing* [§ 2450] p 1008
d. *Grounds* [§ 2451] p 1008
e. *Form and Sufficiency* [§ 2452] p 1009
f. *Additional or Further Exceptions* [§ 2453] p 1010
g. *Effect of Filing Exceptions* [§ 2454] p 1010
h. *Waiver and Estoppel* [§ 2455] p 1010
i. *Exceptions to Partial Accounts* [§ 2456] p 1011
3. *Hearing and Reference* [§§ 2457–2468] p 1011
a. *In General* [§ 2457] p 1011
b. *Submission of Issues to Jury* [§ 2458] p 1011
c. *Matters to Be Determined* [§ 2459] p 1012
d. *Reference* [§§ 2460–2468] p 1014

(1) *In General* [§ 2460] p 1014
(2) *Eligibility for Appointment as Referees, Auditors, or Commissioners* [§ 2461] p 1014
(3) *Qualification of Referees, Auditors, or Commissioners* [§ 2462] p 1014
(4) *Powers of Referee, Auditor, or Commissioner* [§ 2463] p 1014
(5) *Scope of Inquiry* [§ 2464] p 1014
(6) *Report* [§ 2465] p 1015
(7) *Exceptions to Report* [§ 2466] p 1015
(8) *Action of Court on Report* [§ 2467] p 1015
(9) *Rehearing or Second Reference* [§ 2468] p 1016
4. *Evidence* [§§ 2469–2479] p 1017
a. *Presumptions* [§ 2469] p 1017
b. *Burden of Proof* [§§ 2470–2472] p 1017
(1) *In General* [§ 2470] p 1017
(2) *As to Assets* [§ 2471] p 1018
(3) *As to Disbursements* [§ 2472] p 1018
c. *Admissibility* [§ 2473] p 1019
d. *Weight and Sufficiency* [§ 2474] p 1020
e. *Vouchers and Proof of Payment* [§§ 2475–2476] p 1020
(1) *In General* [§ 2475] p 1020
(2) *Weight as Evidence* [§ 2476] p 1021
f. *Examination of Representative* [§ 2477] p 1022
g. *Production of Books* [§ 2478] p 1022
h. *Examination of Legatees* [§ 2479] p 1022
5. *Findings and Conclusions* [§ 2480] p 1022
6. *Order or Decree* [§ 2481] p 1023
H. *Operation and Effect* [§§ 2482–2490] p 1025
1. *Final Settlement* [§§ 2482–2487] p 1025
a. *In General* [§ 2482] p 1025
b. *Persons Concluded* [§ 2483] p 1028
c. *Matters Concluded* [§ 2484] p 1029
d. *Effect on Pending Actions* [§ 2485] p 1030
e. *Effect on Jurisdiction of Probate Court* [§ 2486] p 1030
f. *Collateral Attack* [§ 2487] p 1031
2. *Ex Parte Settlements* [§ 2488] p 1031
3. *Annual or Partial Settlements* [§ 2489] p 1032
4. *Settlement on Resignation, Removal, or Death* [§ 2490] p 1034
I. *Opening, Vacating, or Setting Aside Settlements* [§§ 2491–2507] p 1034
1. *Jurisdiction* [§§ 2491–2492] p 1034
a. *Courts of Equity* [§ 2491] p 1034
b. *Probate Courts* [§ 2492] p 1035
2. *Grounds for Relief* [§§ 2493–2494] p 1035
a. *In General* [§ 2493] p 1035
b. *Statutory Grounds* [§ 2494] p 1037
3. *Time for Application* [§ 2495] p 1038
4. *Who May Attack Settlement* [§ 2496] p 1039
5. *Parties* [§ 2497] p 1040
6. *Process* [§ 2498] p 1040
7. *Pleadings* [§§ 2499–2501] p 1040
a. *In General* [§ 2499] p 1040
b. *Certainty and Particularity in Allegations* [§ 2500] p 1041
c. *Amendment* [§ 2501] p 1042
8. *Evidence* [§ 2502] p 1042
9. *Hearing and Determination* [§ 2503] p 1042
10. *Effect of Opening or Setting Aside* [§§ 2504–2505] p 1042
a. *In General* [§ 2504] p 1042
b. *Distinction between Opening, and Surcharging and Falsifying* [§ 2505] p 1043
11. *Effect of Refusal to Open Accounting* [§ 2506] p 1043
12. *Annual or Partial Settlements* [§ 2507] p 1043
J. *Review* [§§ 2508–2526] p 1044
1. *In General* [§ 2508] p 1044
2. *Orders and Decrees Reviewable* [§ 2509] p 1044
3. *Persons Entitled to Review* [§§ 2510–2512] p 1045
a. *In General* [§ 2510] p 1045
b. *Legatees, Distributees, and Creditors* [§ 2511] p 1046
c. *Personal Representatives* [§ 2512] p 1046
4. *Presentation and Reservation in Lower Court of Grounds of Review* [§ 2513] p 1046
5. *Time for Instituting Proceeding* [§ 2514] p 1047

6. *Requisites for Review* [§ 2515] p 1048
7. *Parties* [§ 2516] p 1048
8. *Record* [§ 2517] p 1048
9. *Scope and Extent of Review* [§§ 2518–2522] p 1049
a. *In General* [§ 2518] p 1049
b. *Presumptions in Support of Order or Decree* [§ 2519] p 1050
c. *Discretion of Lower Court* [§ 2520] p 1050
d. *Findings of Fact* [§ 2521] p 1050
e. *Former Accounts* [§ 2522] p 1051
10. *Consolidation of Appeals* [§ 2523] p 1051
11. *Hearing* [§ 2524] p 1051
12. *Determination and Disposition* [§ 2525] p 1051
13. *Operation and Effect of Decree* [§ 2526] p 1052
K. *Private Accounting and Settlement* [§ 2527] p 1052
L. *Costs and Expenses* [§§ 2528–2532] p 1054
1. *In General* [§ 2528] p 1054
2. *Counsel Fees and Expenses of Settlement* [§ 2529] p 1054
3. *Allowance or Assessment to Contestants* [§ 2530] p 1056
4. *Personal Liability of Executor or Administrator* [§ 2531] p 1057
5. *Costs of Appeal from Accounting* [§ 2532] p 1058

XVI. LIABILITY ON ADMINISTRATION BONDS [§§ 2533–2669] p 1058
A. *Nature and Extent of Liability* [§§ 2533–2542] p 1058
1. *In General* [§ 2533] p 1058
2. *Liability as Affected by Sufficiency of Assets* [§ 2534] p 1059
3. *Effect of Statutory Penalty* [§ 2535] p 1059
4. *Effect of Irregular or Invalid Issuance of Letters* [§ 2536] p 1059
5. *Execution Induced by Fraud or Misrepresentation* [§ 2537] p 1059
6. *Bonds of Corepresentatives* [§ 2538] p 1060
7. *Successive or Additional Bonds* [§ 2539] p 1060
8. *Public Officer's Bond* [§ 2540] p 1061
9. *Estoppel* [§ 2541] p 1061
10. *Indemnity to Sureties* [§ 2542] p 1061
B. *Property Covered* [§§ 2543–2561] p 1062
1. *In General* [§ 2543] p 1062
2. *Property Received or Converted before Execution of Bond* [§ 2544] p 1062
3. *Debts of Representative to Estate* [§ 2545] p 1062
4. *Property of Estate Purchased by Representative* [§ 2546] p 1063
5. *Property Not Assets of Estate* [§ 2547] p 1063
6. *Foreign Assets* [§ 2548] p 1064
7. *Equitable Assets* [§ 2549] p 1064
8. *Proceeds of Sale of Realty* [§§ 2550–2551] p 1064
a. *Under Order of Court* [§ 2550] p 1064
b. *Under Testamentary Authority* [§ 2551] p 1064
9. *Money Paid to Prevent Sale of Realty* [§ 2552] p 1065
10. *Money Received on Appropriation of Property for Public Use* [§ 2553] p 1065
11. *Proceeds of Insurance* [§ 2554] p 1065
12. *Allowance to Decedent's Family* [§ 2555] p 1065
13. *Income, Interest, Rents, and Profits* [§ 2556] p 1065
14. *Property Held in Capacity Other than as Executor or Administrator* [§§ 2557–2561] p 1066
a. *In General* [§ 2557] p 1066
b. *As Guardian* [§ 2558] p 1066
c. *As Trustee* [§ 2559] p 1066
d. *As Devisee Charged with Payment of Legacy* [§ 2560] p 1067
e. *As Surviving Partner* [§ 2561] p 1067
C. *Functions and Acts Covered* [§ 2562] p 1067
D. *Discharge of Sureties from Liability* [§§ 2563–2574] p 1068
1. *In General* [§ 2563] p 1068
2. *Settlement and Discharge of Principal* [§ 2564] p 1069
3. *Death of Principal or Surety* [§ 2565] p 1069
4. *Release of Cosurety* [§ 2566] p 1070
5. *Revocation of Letters; Resignation or Removal of Principal* [§ 2567] p 1070
6. *Expiration of Term of Office or Time Limited for Administration* [§ 2568] p 1070
7. *Giving New Bond* [§ 2569] p 1071
8. *Giving Special Obligation for Payment of Distributive Share* [§ 2570] p 1071
9. *Retention of Property by Principal in Another Capacity* [§ 2571] p 1071
10. *Acts or Omissions of Persons Beneficially Interested in Estate* [§ 2572] p 1072
11. *Discharge by Order of Court* [§§ 2573–2574] p 1073

a. *Power to Grant Discharge* [§ 2573] p 1073
b. *Proceedings* [§ 2574] p 1074
E. *Breach of Bond* [§§ 2575–2588] p 1074
1. *In General* [§ 2575] p 1074
2. *Failure to Make and File Inventory* [§ 2576] p 1075
3. *Failure to Collect Assets* [§ 2577] p 1075
4. *Failure to Pay Allowance to Surviving Wife, Etc.* [§ 2578] p 1075
5. *Failure or Refusal to Pay Claims* [§§ 2579–2580] p 1076
a. *In General* [§ 2579] p 1076
b. *Claims Barred by Limitations or Failure to Present* [§ 2580] p 1076
6. *Wrongful Payment of Claims* [§ 2581] p 1076
7. *Failure to Sell Land for Payment of Debts* [§ 2582] p 1077
8. *Wrongful Sale of Land* [§ 2583] p 1077
9. *Failure or Refusal to Pay Legacies* [§ 2584] p 1077
10. *Failure or Refusal to Make Distribution* [§ 2585] p 1077
11. *Conversion or Waste of Estate* [§ 2586] p 1078
12. *Failure to Account* [§ 2587] p 1078
13. *Failure to Turn Over Assets to Successor* [§ 2588] p 1079
F. *Conclusiveness of Adjudications against Principal* [§ 2589] p 1079
G. *Who May Enforce Liability on Bond* [§§ 2590–2597] p 1082
1. *In General* [§ 2590] p 1082
2. *Heirs and Distributees* [§ 2591] p 1082
3. *Legatees and Devisees* [§ 2592] p 1082
4. *Creditors* [§ 2593] p 1083
5. *Administrator De Bonis Non* [§ 2594] p 1083
6. *Probate Court or Judge* [§ 2595] p 1083
7. *Corepresentative* [§ 2596] p 1084
8. *Right of Principal to Enforce Liability of Sureties* [§ 2597] p 1084
H. *Nature and Form of Remedy* [§§ 2598–2599] p 1084
1. *In General* [§ 2598] p 1084
2. *Summary Proceedings* [§ 2599] p 1084
I. *Actions on Administration Bond* [§§ 2600–2669] p 1084
1. *Right of Action* [§§ 2600–2616] p 1084
a. *Actual Injury Necessary* [§ 2600] p 1084
b. *Conditions Precedent* [§§ 2601–2616] p 1085
(1) *Establishing Liability of Estate* [§ 2601] p 1085
(2) *Final Settlement and Accounting* [§§ 2602–2604] p 1086
(a) *Action by Legatee or Distributee* [§ 2602] p 1086
(b) *Action by Creditor* [§ 2603] p 1086
(c) *Action by Successor in Office* [§ 2604] p 1086
(3) *Citation to Account* [§ 2605] p 1086
(4) *Prior Judgment against Principal* [§ 2606] p 1086
(5) *Return of Execution against Principal* [§ 2607] p 1087
(6) *Establishing Devastavit in Separate Suit against Principal* [§ 2608] p 1088
(7) *Removal of Unfaithful Representative* [§ 2609] p 1088
(8) *Order for Payment* [§ 2610] p 1089
(9) *Demand* [§ 2611] p 1089
(10) *Tender of Refunding Bond* [§ 2612] p 1090
(11) *Reformation of Bond from Which Amount of Penalty Omitted* [§ 2613] p 1090
(12) *Leave to Sue* [§§ 2614–2616] p 1090
(a) *Necessity* [§ 2614] p 1090
(b) *Application and Proceedings* [§ 2615] p 1090
(c) *Form and Effect of Order* [§ 2616] p 1090
2. *Time to Sue* [§§ 2617–2620] p 1091
a. *Premature Actions* [§ 2617] p 1091
b. *Limitations* [§§ 2618–2619] p 1091
(1) *Period of Limitation* [§ 2618] p 1091
(2) *When Statute Begins to Run* [§ 2619] p 1091
c. *Laches* [§ 2620] p 1092
3. *Defenses* [§§ 2621–2625] p 1092
a. *In General* [§ 2621] p 1092
b. *Want of Assets* [§ 2622] p 1093
c. *Invalidity of Principal's Appointment* [§ 2623] p 1093
d. *Performance of Conditions after Suit Commenced* [§ 2624] p 1093
e. *Limitations* [§ 2625] p 1094
4. *Set-Off and Counterclaim* [§ 2626] p 1094
5. *Jurisdiction* [§§ 2627–2629] p 1094
a. *In General* [§ 2627] p 1094

b. *Probate Courts* [§ 2628] p 1094
c. *Equity Jurisdiction* [§ 2629] p 1095
6. *Venue* [§ 2630] p 1095
7. *Parties* [§§ 2631–2632] p 1095
a. *Plaintiff* [§ 2631] p 1095
b. *Defendant* [§ 2632] p 1097
8. *Pleading* [§§ 2633–2652] p 1097
a. *Declaration or Complaint* [§§ 2633–2639] p 1097
(1) *In General* [§ 2633] p 1097
(2) *Allegations as to Particular Matters* [§§ 2634–2638] p 1098
(a) *Plaintiff's Right to Sue* [§ 2634] p 1098
(b) *Conditions Precedent* [§ 2635] p 1098
(c) *Execution of Bond* [§ 2636] p 1099
(d) *Conditions of Bond* [§ 2637] p 1099
(e) *Breach of Conditions* [§ 2638] p 1099
(3) *Exhibits* [§ 2639] p 1100
b. *Plea or Answer* [§§ 2640–2648] p 1100
(1) *In General* [§ 2640] p 1100
(2) *Particular Pleas* [§§ 2641–2647] p 1101
(a) *Performance* [§ 2641] p 1101
(b) *Release* [§ 2642] p 1101
(c) *Plene Administravit* [§ 2643] p 1101
(d) *Want of Assets* [§ 2644] p 1101
(e) *Nil Debet* [§ 2645] p 1101
(f) *Non Est Factum* [§ 2646] p 1101
(g) *Pleas in Abatement* [§ 2647] p 1101
(3) *Severance in Pleading* [§ 2648] p 1102
c. *Affidavit of Defense* [§ 2649] p 1102
d. *Replication or Reply* [§ 2650] p 1102
e. *Rejoinder and Surrejoinder* [§ 2651] p 1102
f. *Amendments* [§ 2652] p 1102
9. *Issues, Proof, and Variance* [§ 2653] p 1102
10. *Evidence* [§§ 2654–2657] p 1103
a. *Presumptions* [§ 2654] p 1103
b. *Burden of Proof* [§ 2655] p 1103
c. *Admissibility* [§ 2656] p 1103
d. *Weight and Sufficiency* [§ 2657] p 1105
11. *Trial* [§§ 2658–2661] p 1106
a. *Questions for Jury* [§ 2658] p 1106
b. *Instructions* [§ 2659] p 1106
c. *Verdict and Findings* [§ 2660] p 1106
d. *Reference or Arbitration* [§ 2661] p 1106
12. *Judgment* [§ 2662] p 1106
13. *Execution and Enforcement of Judgment* [§§ 2663–2664] p 1107
a. *In General* [§ 2663] p 1107
b. *Judgment for Full Penalty of Bond* [§ 2664] p 1107
14. *Damages* [§§ 2665–2666] p 1107
a. *In General* [§ 2665] p 1107
b. *Interest* [§ 2666] p 1108
15. *Costs* [§ 2667] p 1109
16. *Appeal and Error* [§ 2668] p 1109
17. *Equitable Relief against Judgment* [§ 2669] p 1109

XVII. FOREIGN AND ANCILLARY ADMINISTRATION [§§ 2670–2731] p 1109
A. *Appointment* [§§ 2670–2683] p 1109
1. *Foreign Appointment* [§§ 2670–2672] p 1109
a. *In General* [§ 2670] p 1109
b. *Extent of Authority Conferred* [§ 2671] p 1109
c. *Statutory Provisions* [§ 2672] p 1110
2. *Ancillary Appointment* [§§ 2673–2682] p 1110
a. *Ancillary and Domiciliary Appointment Distinguished* [§ 2673] p 1110
b. *When Ancillary Appointment Proper* [§§ 2674–2676] p 1111
(1) *In General* [§ 2674] p 1111
(2) *Situs of Assets* [§ 2675] p 1112
(3) *Dependence on Domiciliary Appointment* [§ 2676] p 1114
c. *Persons Entitled to Appointment* [§ 2677] p 1114
d. *Time for Appointment* [§ 2678] p 1115
e. *Proceedings for Appointment* [§ 2679] p 1115

f. *Bond* [§ 2680] p 1116
g. *Operation and Effect of Appointment* [§ 2681] p 1116
h. *Revocation of Letters; Removal* [§ 2682] p 1116
3. *Relation between Ancillary and Domiciliary Representatives* [§ 2683] p 1117
B. *Title to Assets* [§§ 2684–2685] p 1118
1. *Ancillary Representative* [§ 2684] p 1118
2. *Domiciliary Representative* [§ 2685] p 1118
C. *Collection of Assets* [§§ 2686–2687] p 1119
1. *Ancillary Representative* [§ 2686] p 1119
2. *Domiciliary Representative* [§ 2687] p 1120
D. *Disposition of Property* [§§ 2688–2692] p 1121
1. *Personal Property* [§§ 2688–2692] p 1121
a. *In General* [§ 2688] p 1121
b. *Choses in Action* [§§ 2689–2690] p 1121
(1) *In General* [§ 2689] p 1121
(2) *Bills and Notes* [§ 2690] p 1122
c. *Corporate Stock* [§ 2691] p 1122
d. *Real Property* [§ 2692] p 1122
E. *Sales under Order of Court* [§§ 2693–2694] p 1123
1. *When Authorized* [§ 2693] p 1123
2. *Application and Proceedings* [§ 2694] p 1124
F. *Presentation and Allowance of Claims* [§§ 2695–2696] p 1124
1. *Presentation* [§ 2695] p 1124
2. *Effect of Allowance or Disallowance* [§ 2696] p 1124
G. *Payment of Claims* [§§ 2697–2699] p 1125
1. *In General* [§ 2697] p 1125
2. *Local Creditors* [§ 2698] p 1125
3. *Foreign Creditors* [§ 2699] p 1125
H. *Transmission of Residue to Domicile* [§ 2700] p 1126
I. *Distribution in Ancillary Jurisdiction* [§ 2701] p 1128
J. *Actions by Foreign Representatives* [§§ 2702–2719] p 1129
1. *Right of Action* [§§ 2702–2710] p 1129
a. *General Rule as to Actions in Representative Capacity* [§ 2702] p 1129
b. *Actions on Claims Not Subjects of Local Administration* [§ 2703] p 1130
c. *Actions in Personal Capacity Generally* [§ 2704] p 1131
d. *Actions on Judgments* [§ 2705] p 1131
e. *Actions on Bills and Notes* [§ 2706] p 1132
f. *Actions for Death* [§ 2707] p 1132
g. *Statutory Authority to Sue in Representative Capacity* [§§ 2708–2710] p 1132
(1) *In General* [§ 2708] p 1132
(2) *Conditions of Exercise of Right* [§§ 2709–2710] p 1134
(a) *Filing Letters Testamentary or of Administration* [§ 2709] p 1134
(b) *Bond* [§ 2710] p 1134
2. *Waiver of Objection as to Incapacity* [§ 2711] p 1135
3. *Limitations* [§ 2712] p 1135
4. *Defenses* [§ 2713] p 1135
5. *Parties* [§ 2714] p 1135
6. *Pleading* [§§ 2715–2716] p 1135
a. *Declaration or Complaint* [§ 2715] p 1135
b. *Plea or Answer* [§ 2716] p 1136
7. *Proof of Representative Capacity* [§ 2717] p 1136
8. *Judgment* [§ 2718] p 1136
9. *Review* [§ 2719] p 1136
K. *Actions against Foreign Representatives* [§§ 2720–2727] p 1136
1. *Liability to Suit* [§§ 2720–2723] p 1136
a. *In Representative Capacity* [§§ 2720–2722] p 1136
(1) *General Rule* [§ 2720] p 1136
(2) *Exceptions to Rule* [§ 2721] p 1138
(3) *Statutory Liability* [§ 2722] p 1139
b. *In Other Capacities* [§ 2723] p 1139
2. *Parties* [§ 2724] p 1139
3. *Process* [§ 2725] p 1139
4. *Appearance* [§ 2726] p 1139
5. *Pleading* [§ 2727] p 1139
L. *Accounting* [§§ 2728–2731] p 1140
1. *In General* [§ 2728] p 1140
2. *By Ancillary Representative* [§ 2729] p 1141
3. *Where Same Person Is Ancillary and Domiciliary Representative* [§§ 2730–2731] p 1141

a. *How Accounts Rendered* [§ 2730] p 1141
b. *Conclusiveness of Different Accountings* [§ 2731] p 1141

XVIII. ADMINISTRATORS DE BONIS NON [§§ 2732–2756] p 1141
A. *Appointment and Qualification* [§§ 2732–2742] p 1141
1. *In General* [§ 2732] p 1141
2. *Nature of Office and Source of Title* [§ 2733] p 1142
3. *Elements Bearing on Necessity or Propriety of Appointment* [§§ 2734–2736] p 1142
a. *Previous Grant of Letters* [§ 2734] p 1142
b. *Vacancy in Office* [§ 2735] p 1142
c. *Incomplete Administration* [§ 2736] p 1143
4. *Right to Appointment* [§ 2737] p 1146
5. *Jurisdiction* [§ 2738] p 1147
6. *Time for Application* [§ 2739] p 1147
7. *Proceedings for Appointment* [§ 2740] p 1148
8. *Operation and Effect of Appointment* [§ 2741] p 1149
9. *Bond* [§ 2742] p 1149
B. *Assets to Be Administered* [§§ 2743–2749] p 1149
1. *In General* [§ 2743] p 1149
2. *What Constitutes Unadministered Assets* [§ 2744] p 1150
3. *Particular Classes of Assets* [§§ 2745–2749] p 1151
a. *Notes and Bonds* [§ 2745] p 1151
b. *Money and Balances Due from Predecessor* [§ 2746] p 1152
c. *Property Illegally or Fraudulently Sold or Transferred* [§ 2747] p 1153
d. *Liability of Former Representative for Waste or Conversion* [§ 2748] p 1154
e. *Realty* [§ 2749] p 1155
C. *Powers and Duties* [§§ 2750–2753] p 1156
1. *In General* [§ 2750] p 1156
2. *Collection of Assets* [§§ 2751–2752] p 1156
a. *In General* [§ 2751] p 1156
b. *Judgments in Favor of Predecessor* [§ 2752] p 1157
3. *Distribution* [§ 2753] p 1157
D. *Liabilities* [§ 2754] p 1157
E. *Effect of Contracts and Transactions of Predecessor* [§ 2755] p 1158
F. *Administrators De Bonis Non with the Will Annexed* [§ 2756] p 1159

XIX. ADMINISTRATORS WITH THE WILL ANNEXED [§§ 2757–2779] p 1159
A. *Appointment* [§§ 2757–2776] p 1159
1. *When Necessary or Proper* [§ 2757] p 1159
2. *Persons Entitled to Appointment* [§§ 2758–2772] p 1161
a. *Statutory Regulation* [§ 2758] p 1161
b. *Right of Particular Persons or Classes of Persons* [§§ 2759–2771] p 1161
(1) *Legatees* [§§ 2759–2761] p 1161
(a) *In General* [§ 2759] p 1161
(b) *Residuary Legatee* [§ 2760] p 1161
(c) *Principal or Specified Legatee* [§ 2761] p 1162
(2) *Surviving Spouse* [§ 2762] p 1162
(3) *Next of Kin* [§ 2763] p 1162
(4) *Creditors* [§ 2764] p 1163
(5) *Strangers* [§ 2765] p 1163
(6) *Representative of Person Entitled* [§ 2766] p 1163
(7) *Nominee of Person Entitled* [§ 2767] p 1164
(8) *Person Named in Will as Executor* [§ 2768] p 1164
(9) *Nominee of Executor* [§ 2769] p 1164
(10) *Effect of Opposing Probate or Contesting Construction of Will* [§ 2770] p 1164
(11) *Preferences* [§ 2771] p 1164
c. *Effect of Appointment of Wrong Person* [§ 2772] p 1164
3. *Competency* [§ 2773] p 1164
4. *Renunciation* [§ 2774] p 1165
5. *Proceedings for Appointment* [§ 2775] p 1165
6. *Bond* [§ 2776] p 1165
B. *Powers and Duties* [§§ 2777–2779] p 1166
1. *In General* [§ 2777] p 1166
2. *Exercise of Discretionary Powers Generally* [§ 2778] p 1167
3. *Exercise of Testamentary Power of Sale* [§ 2779] p 1167

XX. TEMPORARY OR SPECIAL ADMINISTRATORS [§§ 2780–2813] p 1169
A. *In General* [§ 2780] p 1169
B. *Classes* [§§ 2781–2787] p 1170

1. *Durante Minoritate* [§ 2781] p 1170
2. *Durante Absentia* [§ 2782] p 1170
3. *Pendente Lite* [§ 2783] p 1170
4. *Ad Litem* [§ 2784] p 1172
5. *Ad Colligendum* [§ 2785] p 1173
6. *Other Temporary or Special Appointments* [§ 2786] p 1173
7. *Special Administration under Statutes* [§ 2787] p 1174

C. *Selection* [§ 2788] p 1174
D. *Proceedings for Appointment* [§§ 2789–2796] p 1175
1. *Jurisdiction* [§ 2789] p 1175
2. *Who May Move for Appointment* [§ 2790] p 1175
3. *Time for Application* [§ 2791] p 1176
4. *Notice* [§ 2792] p 1176
5. *Petition* [§ 2793] p 1176
6. *Evidence* [§ 2794] p 1176
7. *Order and Entry or Filing Thereof* [§ 2795] p 1176
8. *Appeal* [§ 2796] p 1176

E. *Bond* [§ 2797] p 1177
F. *Setting Aside Appointment* [§ 2798] p 1177
G. *Duration and Termination of Authority* [§ 2799] p 1177
H. *Powers, Duties, and Liabilities* [§§ 2800–2813] p 1178
1. *Administrators Durante Minoritate* [§ 2800] p 1178
2. *Administrators Durante Absentia* [§ 2801] p 1178
3. *Administrators Pendente Lite* [§ 2802] p 1179
4. *Administrators Ad Litem* [§ 2803] p 1180
5. *Administrators Ad Colligendum* [§ 2804] p 1180
6. *Special Administrators under Modern Practice* [§§ 2805–2813] p 1180
a. *In General* [§ 2805] p 1180
b. *Rights and Powers as to Realty* [§ 2806] p 1180
c. *Compromise of Claims* [§ 2807] p 1181
d. *Investments and Deposits* [§ 2808] p 1181
e. *Expenditures* [§ 2809] p 1181
f. *Payment of Family Allowance* [§ 2810] p 1181
g. *Claims against Estate; Sales to Pay Debts* [§ 2811] p 1181
h. *Actions* [§ 2812] p 1182
i. *Effect of Appointment of General Representative* [§ 2813] p 1183

XXI. COEXECUTORS AND COADMINISTRATORS [§§ 2814–2867] p 1183
A. *In General* [§ 2814] p 1183
B. *Authority* [§§ 2815–2835] p 1184
1. *In General* [§ 2815] p 1184
2. *Executors Acting as Trustees* [§ 2816] p 1185
3. *Collection of Assets* [§ 2817] p 1185
4. *Custody of Assets* [§ 2818] p 1185
5. *Custody of Books and Papers* [§ 2819] p 1185
6. *Sale and Transfer or Assignment of Assets* [§§ 2820–2821] p 1186
a. *In General* [§ 2820] p 1186
b. *Indorsement and Transfer of Negotiable Instruments* [§ 2821] p 1186
7. *Allowance and Payment of Claims* [§ 2822] p 1186
8. *Contracts* [§ 2823] p 1186
9. *Deposits* [§ 2824] p 1187
10. *Investments* [§ 2825] p 1187
11. *Admissions* [§ 2826] p 1187
12. *Compositions and Compromises* [§ 2827] p 1187
13. *Releases* [§ 2828] p 1187
14. *Submission to Arbitration* [§ 2829] p 1187
15. *Confession of Judgment* [§ 2830] p 1187
16. *Sale and Conveyance of Real Property* [§ 2831] p 1187
17. *Leases* [§ 2832] p 1188
18. *Mortgage or Pledge* [§§ 2833–2834] p 1189
a. *Personal Property* [§ 2833] p 1189
b. *Real Property* [§ 2834] p 1189
19. *Assent to Legacies* [§ 2835] p 1189

C. *Liabilities* [§§ 2836–2860] p 1189
1. *In General* [§ 2836] p 1189
2. *As Dependent on Nature of Bond* [§ 2837] p 1190
3. *Putting Associate in Possession of Assets* [§ 2838] p 1191

4. *Permitting Possession of Assets by Associate* [§ 2839] p 1192
5. *Permitting Breach of Trust by Associate* [§ 2840] p 1192
6. *Insolvency of Corepresentative* [§ 2841] p 1192
7. *Effect of Joint Receipt* [§ 2842] p 1193
8. *Effect of Joint Inventory* [§ 2843] p 1193
9. *Effect of Release of Corepresentative* [§ 2844] p 1193
10. *Contracts* [§§ 2845–2846] p 1193
    a. *In General* [§ 2845] p 1193
    b. *Services* [§ 2846] p 1193
11. *Deposits* [§ 2847] p 1193
12. *Investments* [§ 2848] p 1193
13. *Loans* [§ 2849] p 1193
14. *Fraud* [§ 2850] p 1193
15. *Interest on Funds of Estate* [§ 2851] p 1194
16. *Individual Interest in Transactions* [§ 2852] p 1194
17. *Collection of Assets* [§ 2853] p 1194
18. *Negligence of Bad Faith* [§ 2854] p 1194
19. *Debts Due from Associate to Estate* [§ 2855] p 1195
20. *Liabilities Inter Sese and Contribution* [§ 2856] p 1195
21. *Subrogation* [§ 2857] p 1195
22. *Accounting and Liability Thereon* [§§ 2858–2860] p 1195
    a. *Accounting by Corepresentatives* [§ 2858] p 1195
    b. *Accounting as between Corepresentatives* [§ 2859] p 1196
    c. *Liability on Joint or Several Settlement of Account* [§ 2860] p 1196

D. *Acting Executor or Administrator* [§§ 2861–2864] p 1196
1. *In General* [§ 2861] p 1196
2. *Mutual Agreements or Arrangements* [§ 2862] p 1196
3. *Failure or Refusal to Qualify* [§ 2863] p 1197
4. *Resignation, Removal, Discharge, Etc.* [§ 2864] p 1197

E. *Surviving Executor or Administrator* [§§ 2865-2867] p 1197
1. *In General* [§ 2865] p 1197
2. *Collection of Assets* [§ 2866] p 1197
3. *Debts Due from Deceased Representative* [§ 2867] p 1198

XXII. REPRESENTATIVES OF DECEASED EXECUTORS OR ADMINISTRATORS [§§ 2868–2871] p 1998

A. *In General* [§ 2868] p 1198
B. *Duties and Liabilities* [§§ 2869–2871] p 1199
1. *In General* [§ 2869] p 1199
2. *Lien on, and Retention of, Assets for Settlement* [§ 2870] p 1200
3. *Participation in Administration* [§ 2871] p 1200

XXIII. PUBLIC ADMINISTRATORS [§§ 2872–2892] p 1201

A. *In General* [§ 2872] p 1201
B. *Appointment or Election and Tenure* [§ 2873] p 1201
C. *Eligibility* [§ 2874] p 1202
D. *Source of Authority* [§ 2875] p 1202
E. *Status* [§ 2876] p 1202
F. *Temporary or Permanent Appointment* [§ 2877] p 1202
G. *Right to Administer* [§§ 2878–2879] p 1202
1. *In General* [§ 2878] p 1202
2. *Order of Preference* [§ 2879] p 1203

H. *Duty to Administer* [§ 2880] p 1204
I. *Appointment to Take Charge of Particular Estates* [§§ 2881–2887] p 1205
1. *Necessity for* [§ 2881] p 1205
2. *Jurisdiction* [§ 2882] p 1205
3. *Time for Appointment* [§ 2883] p 1205
4. *Petition or Application* [§ 2884] p 1205
5. *Notice* [§ 2885] p 1205
6. *Order* [§ 2886] p 1206
7. *Effect of Appointment* [§ 2887] p 1206

J. *Proof of Authority* [§ 2888] p 1206
K. *Official Oath* [§ 2889] p 1206
L. *Official Bond* [§ 2890] p 1206
M. *Effect of Termination of Office* [§ 2891] p 1206
N. *Administration by Other Public Officials* [§ 2892] p 1207

XXIV. COLLECTORS AND RECEIVERS [§§ 2893–2894] p 1207
A. *Appointment* [§ 2893] p 1207
B. *Powers, Duties, and Liabilities* [§ 2894] p 1207

XXV. INDEPENDENT EXECUTORS [§§ 2895–2902] p 1208
A. *Administration Independent of Control of Courts* [§ 2895] p 1208
B. *Powers and Liabilities in General* [§ 2896] p 1208
C. *Sale of Property* [§ 2897] p 1209
D. *Presentation of Claims* [§ 2898] p 1209
E. *Actions* [§ 2899] p 1209
F. *Compensation* [§ 2900] p 1210
G. *Protection of Estate in Case of Misconduct* [§ 2901] p 1210
H. *Abandonment of Office* [§ 2902] p 1210

XXVI. EXECUTORS DE SON TORT [§§ 2903–2943] p 1211
A. *Definition and Nature of Office* [§ 2903] p 1211
B. *How Office or Liability Assumed* [§§ 2904–2917] p 1211
1. *Intermeddling in General* [§ 2904] p 1211
2. *Acts Done in Good Faith or under Color of Right* [§ 2905] p 1213
3. *Acts of Kindness and Charity* [§ 2906] p 1213
4. *Possession of Property Transferred to Holder by Decedent* [§ 2907] p 1214
5. *Act of Foreign Executor or Administrator* [§ 2908] p 1214
6. *Acts Done as Agent or Servant of Another* [§§ 2909–2912] p 1214
a. *Of Decedent* [§ 2909] p 1214
b. *Of Rightful Executor* [§ 2910] p 1214
c. *Of Distributees* [§ 2911] p 1214
d. *Of Executor De Son Tort* [§ 2912] p 1214
7. *Acts of Surviving Spouse, Heirs, or Devisees* [§ 2913] p 1215
8. *Dealings with Executor De Son Tort* [§ 2914] p 1215
9. *Administration on Estate of Executor De Son Tort* [§ 2915] p 1215
10. *Intermeddling with Partnership Assets* [§ 2916] p 1215
11. *Effect of Existence of Rightful Representative* [§ 2917] p 1215
C. *Rights and Liabilities* [§§ 2918–2921] p 1216
1. *In General* [§ 2918] p 1216
2. *Extent of Liability* [§ 2919] p 1217
3. *Who May Enforce Liability* [§ 2920] p 1217
4. *Effect of Delivery of Assets to Rightful Representative* [§ 2921] p 1218
D. *Effect of Acts* [§§ 2922–2924] p 1218
1. *How Far Binding on Lawful Representative* [§ 2922] p 1218
2. *Sales* [§ 2923] p 1218
3. *Effect of Subsequent Issue of Letters to Executor De Son Tort* [§ 2924] p 1219
E. *Actions and Remedies* [§§ 2925–2943] p 1219
1. *Right of Action* [§§ 2925–2926] p 1219
a. *By Executor De Son Tort* [§ 2925] p 1219
b. *Against Executor De Son Tort* [§ 2926] p 1220
2. *Nature and Form of Action* [§§ 2927–2930] p 1220
a. *In General* [§ 2927] p 1220
b. *Action at Law* [§ 2928] p 1220
c. *Suit in Equity* [§ 2929] p 1220
d. *Probate Proceedings* [§ 2930] p 1220
3. *Conditions Precedent* [§ 2931] p 1220
4. *Time to Sue and Limitations* [§ 2932] p 1220
5. *Defenses* [§ 2933] p 1220
6. *Set-Off* [§ 2934] p 1221
7. *Venue* [§ 2935] p 1221
8. *Parties* [§ 2936] p 1221
9. *Pleading* [§§ 2937–2938] p 1222
a. *Complaint, Declaration, or Petition* [§ 2937] p 1222
b. *Plea or Answer* [§ 2938] p 1222
10. *Evidence* [§ 2939] p 1223
11. *Trial* [§ 2940] p 1223
12. *Verdict* [§ 2941] p 1223
13. *Judgment* [§ 2942] p 1223
14. *Execution* [§ 2943] p 1223

CROSS REFERENCES

[See 23 C. J. pp 993–995]

VIII. CUSTODY AND MANAGEMENT OF ESTATE

[§ 463] **A. In General—1. Fundamental Rule.** An executor or administrator occupies a position of the highest trust and confidence [89] and is required to use reasonable diligence and act in entire good faith in performing the duties of his trust.[90] He is not a guarantor or insurer of the safety of the estate, nor is he expected to be infallible,[91] but the prudence, care, and judgment which one of fair average capacity and ability exercises in the transaction of his own business or, as sometimes stated, the prudence, care, and judgment of fiduciaries ordinarily capable under like circumstances furnish the standard by which his conduct is to be judged.[92] The acts of the representative must be judged ac-

89. Gorham v. Gorham, 54 Ind. A. 164, 103 NE 16.

90. Ala. — Clark v. Eubank, 80 Ala. 584, 3 S 49.

Cal.—Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

Ill.—Larsh v. McClelland, 194 Ill. A. 38; Huddleston v. Henderson, 181 Ill. A. 176; Caruthers v. Caruthers, 99 Ill. A. 402.

Ind.—Walling v. Lewis, 119 Ind. 496, 21 NE 1108.

Iowa.—In re Bagnola, 154 NW 461 [cit Cyc].

La.—Stafford v. McIntosh, 39 La. Ann. 836, 2 S 596; Triche's Succ., 39 La. Ann. 289, 2 S 52; Connolly's Succ., 6 La. Ann. 795.

Mich. — McCulley v. Rivers, 202 Mich. 417, 170 NW 24.

Mo.—Young v. Ray, (A.) 193 SW 608.

N. H.—Lane v. Thompson, 43 N. H. 320; Moulton v. Wendell, 37 N. H. 406; Davis v. Lane, 11 N. H. 512.

N. J.—Smith v. Jones, 104 A 380; Stark v. Hunton, 3 N. J. Eq. 300.

N. Y.—Hollister v. Burritt, 14 Hun 291; Matter of Donohue, 88 Misc. 359, 151 NYS 1094; In re Watson, 86 Misc. 588, 148 NYS 902 [aff 165 App. Div. 252, 150 NYS 776].

Okl.—In re Spann, 51 Okl. 309, 152 P 68.

Or.—In re Roach, 50 Or. 179, 92 P 118 [cit Cyc].

Pa.—King v. Morrison, 1 Penr. & W. 188; Pittock's Est., 9 Pa. Co. 457.

R. I.—Duffy v. McHale, 35 R. I. 16, 85 A 36.

S. C.—Rainsford v. Rainsford, 13 S. C. Eq. 57.

Tenn.—Forsey v. Luton, 2 Head 183.

Tex.—Cock v. Carson, 38 Tex. 284.

Utah.—Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

Va. — Statham v. Ferguson, 25 Gratt. (66 Va.) 28; McCall v. Peachy, 3 Munf. (17 Va.) 288.

Eng.—Re Barker, 77 L. T. Rep. N. S. 712.

"The duties of an executor or administrator are active, and not passive. He cannot be permitted to neglect to do those things which are plainly required at his hands by law or the order of the court, and, when complaint is made of such neglect, excuse himself by alleging that such delay or omission was for the benefit of the estate." In re Holladay, 18 Or. 168, 172, 22 P 750.

[a] **Allowing debt to remain for investment.**—If the personal representative allows a debt due the estate to remain for the purposes of investment, he should give due heed to the character of the security afforded. Lacy v. Stamper, 27 Gratt. (68 Va.) 42.

[b] **A worthless conveyance by an executor in his individual capacity** which does not transfer any interest belonging to the estate is not a violation of the executor's duty as such. Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

[c] **The administrator of an intestate who was security** for the payment of a debt has authority to consent to the creditors granting to the principal debtor an extension of the time of payment if it be for the interest of the estate. Smarr v. McMaster, 35 Mo. 349.

[d] **Taking security.**—It is proper for an administrator whose intestate had signed certain notes as surety to take from the principal debtor, without an order of court therefor, a chattel mortgage to indemnify the estate against loss on account of such notes. Walling v. Lewis, 119 Ind. 496, 21 NE 1108.

[e] **Effect of testamentary direction.**—An executor is not relieved from liability for mismanagement by a direction in the will that he shall not be personally liable. Richardson's Est., 12 Phila. (Pa.) 32.

[f] **It is the policy of the courts to sustain, if possible, irregular acts** of executors or administrators, where done in good faith and without detriment to the estate. Duffy v. McHale, 35 R. I. 16, 85 A 36.

[g] **What might be reasonable for a man to do with his own property** might not be a proper dealing with trust property. Re Barker, 77 L. T. Rep. N. S. 712.

91. Ala.—Nunn v. Nunn, 66 Ala. 35.

Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

Nev.—In re Millenovich, 5 Nev. 161.

N. C.—Moore v. Eure, 101 N. C. 11, 7 SE 471, 9 AmSR 17; Nelson v. Hall, 58 N. C. 32; Deberry v. Ivey, 55 N. C. 370.

Pa.—Matter of Bosio, 2 Ashm. 437.

S. C.—Mikell v. Mikell, 26 S. C. Eq. 220.

92. Ala.—Moore v. Randolph, 70 Ala. 575; Lyon v. Foscue, 60 Ala. 468; Hutchinson v. Owen, 59 Ala. 326; Baldwin v. Hatchett, 56 Ala. 461; Searcy v. Holmes, 45 Ala. 225; Henderson v. Simmons, 33 Ala. 291, 70 AmD 590; Gould v. Hayes, 19 Ala. 438.

Alaska.—In re McIntire, 1 Alaska 73.

Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Cal.—In re Robl, 163 Cal. 801, 127 P 55, AnnCas1914A 319; Moore's Est., 96 Cal. 522, 31 P 584; In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; In re Chadbourne, 15 Cal. A. 363, 114 P 1012; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

Colo.—Hake v. Stotts, 5 Colo. 140.

Conn.—Potter's App., 56 Conn. 1, 12 A 513, 7 AmSR 272.

D. C.—Moore v. Moore, 47 App. 23.

Ill.—Christy v. Christy, 225 Ill. 547, 80 NE 242; Whitney v. Peddicord, 63 Ill. 249.

Ind.—Cooper v. Williams, 109 Ind. 270, 9 NE 917; Scott v. Smith, (A.) 82 NE 556.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710; In re Fisher, 128 Iowa 626, 104 NW 1023; Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365.

Ky.—Henderson Trust Co. v. Stuart, 108 Ky. 167, 55 SW 1082, 48 LRA 49; Germania Safety Vault, etc., Co. v. Driskell, 66 SW 610, 23 KyL 2050; Messmore v. Stone, 6 KyL 596.

La.—Stafford v. McIntosh, 39 La. Ann. 836, 2 S 596.

Mich.—Parks v. Brooks, 188 Mich. 645, 155 NW 450; Owen v. Potter, 115 Mich. 556, 73 NW 977; Loomis v. Armstrong, 63 Mich. 355, 29 NW 867.

Minn. — Harding v. Canfield, 73 Minn. 244, 75 NW 1112.

Miss.—O'Brien v. Wilson, 82 Miss. 93, 33 S 946; Bailey v. Dilworth, 18 Miss. 404, 48 AmD 760; Berry v. Parkes, 11 Miss. 625.

Mo.—Merritt v. Merritt, 62 Mo. 150; Gamble v. Gibson, 59 Mo. 585; Fudge v. Durn, 51 Mo. 264; Clyce v. Anderson, 49 Mo. 37; Foster v. Davis, 46 Mo. 268; State v. Meagher, 44 Mo. 356, 100 AmD 298; In re Branch, 123 Mo. A. 573, 100 SW 516; Hill v. Evans, 114 Mo. A. 715, 91 SW 1022; Powell v. Hurt, 31 Mo. A. 632; Atterberry v. McDuffee, 31 Mo. A. 603.

Nebr.—In re Bush, 89 Nebr. 334, 131 NW 602; Dundas v. Chrisman, 25 Nebr. 495, 41 NW 449.

Nev.—Royce v. Hampton, 16 Nev. 25.

N. H.—Bean v. Bean, 74 N. H. 404, 68 A 409, 124 AmSR 978.

N. J.—In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; In re Ramsey, 66 A 410; Vanderpool v. Davenport, 3 N. J. Eq. 120; Voorhees v. Stoothoff, 11 N. J. L. 145; Smith v. Jones, 89 N. J. Eq. 502, 104 A 380.

N. Y.—McCabe v. Fowler, 84 N. Y. 314; King v. Talbot, 40 N. Y. 76; Matter of People's Trust Co., 169 App. Div. 699, 155 NYS 639; Hollister v. Burritt, 14 Hun 291; Cornwell v. Deck, 8 Hun 122 [aff 2 Redf. Surr. 87]; Matter of Donohue, 88 Misc. 359, 151 NYS 1094; Matter of Martin, 82 Misc. 574, 144 NYS 174; Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem, and aff 87 App. Div. 609 mem, 83 NYS 1117 mem]; Matter of Fidelity Loan, etc., Co., 28 Misc. 211, 54 NYS 1124; Matter of Saunders, 4 Misc. 28, 23 NYS 829; Schultz v. Pulver, 11 Wend. 361; Thompson v. Brown, 4 Johns. Ch. 619; Sheerin v. Public Admr., 2 Redf. Surr. 421; McRae v. McRae, 3 Bradf. Surr. 199.

N. C.—Womble v. George, 64 N. C. 759; White v. Robinson, 64 N. C. 698; Ramsay v. Hanner, 64 N. C. 668; Fike v. Green, 64 N. C. 665; Cobb v. Taylor, 64 N. C. 193; Kerns v. Wallace, 64 N. C. 187; Finger v. Finger, 64 N. C. 183; Fisher v. Ritchey, 64 N. C. 172; Holderness v. Palmer, 57 N. C. 107; Deberry v. Ivey, 55 N. C. 370; Williams v. Harrell, 43 N. C. 123, 55 AmD 442; Williams v. Maitland, 36 N. C. 92; Whitted v. Webb, 22 N. C. 442; Perry v. Maxwell, 17 N. C. 488.

Oh.—Guthrie v. Cincinnati Gas, etc., Co., 15 OhS&CP 23.

Or.—In re Roach, 50 Or. 179, 92 P 118 [cit Cyc].

Pa.—In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; In re Derbyshire, 81 Pa. 18; McNair's App., 4 Rawle 148; Greiner's Est., 14 Pa. Dist. 348; Schilskey's Est., 12 Pa. Dist. 181, 28 Pa. Co. 241; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287]; Thomas' Est., 5 Kulp 213; Curren's Est., 11 Phila. 59; Getz's Est., 12 Phila. 143.

S. C.—Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878; Mikell v. Mikell, 26 S. C. Eq. 220; Taveau v. Ball, 6 S. C. Eq. 456; Doud v. Sanders, 5 S. C. Eq. 277; Webb v. Bellinger, 2 S. C. Eq. 482.

Tex.—Noble v. Jones, 35 Tex. 692.

Va. — Douglass v. Stephenson, 75 Va. 747; Lingle v. Cook, 32 Gratt. (73 Va.) 262; Williams v. Skinker, 25 Gratt. (66 Va.) 507; Hale v. Wall, 22 Gratt. (63 Va.) 424; Pidgeon v. Williams, 21 Gratt. (62 Va.) 251; Davis v. Harman, 21 Gratt. (62 Va.) 194; Elliott v. Carter, 9 Gratt. (50 Va.) 541; Kee v. Kee, 2 Gratt. (43 Va.) 116.

cording to the circumstances which existed at the time,[93] and the trust confided to him is defined by the letters testamentary or of administration constituting the commission under which he acts, the mode in which his trust is to be performed being prescribed by the court in accordance with the local statute.[94] Mere negligence in performance of his duties subjects the representative to no liability when no loss to the estate has resulted.[95]

[§ 464] **2. Custody of Assets.** The personal representative is of course entitled to the custody of the assets of the decedent,[96] and he should not be required to surrender the estate committed to him before a distribution is ordered, unless for grave reasons.[97]

[§ 465] **3. Custody of Books and Papers.** The representative is entitled to the custody of the books and papers of the estate,[98] but he must allow persons interested to inspect the deeds and other documents relating to lands devised, for which purpose the court may require him to produce them.[99]

[§ 466] **4. Keeping Accounts.**[1] Executors and

Wash. — Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

W. Va.—Harris v. Orr, 46 W. Va. 261, 33 SE 257, 76 AmSR 815.

Eng.—Tebbs v. Carpenter, 1 Madd. 290, 56 Reprint 107; Raphael v. Boehm, 13 Ves. Jr. 407, 33 Reprint 347; Caffrey v. Darby, 6 Ves. Jr. 494, 31 Reprint 1159; Powell v. Evans, 5 Ves. Jr. 839, 31 Reprint 886.

[a] **Executors and administrators are liable like bailees** for the management of their trusts and must answer for actual or constructive neglect or willful misconduct only. Frazier v. Cavanaugh, 4 KyL 711.

[b] **In resisting claims** against the estate the administrator is bound to the same degree of diligence as in the prosecution of the causes of action accruing to him in his representative capacity. Teague v. Corbitt, 57 Ala. 529.

[c] **A corporate executor** is liable no further than an individual executor, except as provided by statute. Matter of People's Trust Co., 169 App. Div. 699, 155 NYS 639.

93. Hall's Est., 8 Pa. Dist. 8.

94. U. S.—Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Taney 310.

Ga.—White v. Wayne, T. U. P. Charlt. 94.

La.—Morgan v. Locke, 28 La. Ann. 806.

Md.—Gibbons v. Riley, 7 Gill 81.

N. Y.—Gabryszak v. Gabryszak, 136 NYS 270.

[a] **The personal representative cannot change the nature of his obligations,** or increase or diminish the legal responsibilities of the trust. Morgan v. Locke, 28 La. Ann. 806; State Bank v. Dejean, 12 Rob. (La.) 16.

[b] **Knowledge chargeable to persons dealing with representative.**—Those who deal with such fiduciaries are chargeable with all the knowledge that one would have acquired by reading the will, if any, and the decree of appointment as expressed on the probate records. Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.

95. Matter of Wagner, 132 App. Div. 306, 117 NYS 53.

[a] **Illustration.**—Executors who hold real estate mortgages as a part of the estate are not liable for permitting the mortgagors to make default in the taxes on the mortgaged premises, when the property, on a foreclosure, brings more than the indebtedness and accumulated taxes, so that no loss to the estate occurs. Matter of Wagner, 132 App. Div. 306, 117 NYS 53.

Liability for loss or depreciation of assets see infra §§ 576–591.

96. U. S.—Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478.

Ala.—Hutton v. Williams, 60 Ala. 107.

Ariz.—In re Tamer, 179 P 643.

Ark.—Lambert v. Tucker, 83 Ark. 416, 104 SW 131.

Cal.—Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

D. C.—U. S. Trust Co. v. National Sav., etc., Co., 37 App. 296.

Ga.—Echols v. Barrett, 6 Ga. 443.

Ky.—Miller v. Smythe, 122 Ky. 699, 92 SW 964, 29 KyL 242.

La.—Gragard v. Metropolitan, 106 La. 298, 30 S 885.

Mass.—Hines v. Levers, 226 Mass. 214, 115 NE 252.

Miss.—King v. Cooper, Walk. 359.

Mont.—Murphy v. Nett, 51 Mont. 82, 149 P 713, LRA1915E 797.

Or.—Thorsen v. Hooper, 57 Or. 75, 109 P 388.

Philippine. — Perfecto v. Guinobatan, 13 Philippine 245.

S. C.—Crawford v. Elliott, 17 S. C. L. 206.

Tex.—Huth v. Huth, (Civ. A.) 187 SW 523.

Vt.—In re Church, 80 Vt. 228, 67 A 549.

Wash.—Bishop v. Locke, 92 Wash. 90, 158 P 997.

Que.—Normandeau v. McDonnell, 4 Montr. Q. B. 319, 30 LCJur 120.

[a] **Where a guardian is appointed administrator of his deceased ward** and continues to hold the assets of his estate, such continued holding is as administrator and not as guardian, and his right and duty to account as guardian do not affect the title to the property on the death of the ward. Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478. To same effect Hutton v. Williams, 60 Ala. 107.

[b] **The probate court cannot as a rule restrain** or control the representative's right to assets; but, where occasion for interference arises, the bond of the representative and his liability to removal furnish a recourse. Crawford v. Elliott, 22 S. C. L. 206.

[c] **The administrator of a bailee** is entitled to continue the possession of his decedent, and has an action to revendicate this possession as against a mere trespasser. Gragard's Succ., 106 La. 298, 30 S 885.

[d] **Custody before appointment made.**—Until an appointment of a personal representative is duly made, one in due possession of assets of the decedent remains rightfully in charge of them on a principle analogous to that of a finder or other bailee, and is accountable correspondingly. Crum v. Williams, 29 Ala. 446.

[e] **Where a testator directs that his widow shall remain in possession** and enjoyment of all his estate, she is entitled to the possession of the moneys and securities for moneys, and the executors are not answerable for her unjust and improvident conduct unless they can be implicated in a fraudulent or collusive management with her in the disposition which she has made of the funds. Van Pelt v. Veghte, 14 N. J. L. 207.

[f] **A receiver appointed before decedent's death** (1) is entitled to possession of his property and to collect the rents thereof as against the administrator. Lauraine v. Dickson Car Wheel Co., (Tex. Civ. A.) 198 SW 1103. (2) Where, before the death of an intestate, a receiver of his property has been appointed and qualified, it is the duty of the administratrix to disclose to the receiver the fact of the existence of assets which have come to her possession as administratrix. Reynolds v. Ætna L. Ins. Co., 28 App. Div. 591, 51 NYS 446 [aff 160 N. Y. 635, 55 NE 305].

[g] **Restraining removal of property.**—An action on a bond for an injunction restraining defendant therein from removing timber from land was not properly brought after his death by his heirs, but should have been brought by his personal representative or, if he refused to bring or join in the suit, he should have been made a defendant. Miller v. Smythe, 122 Ky. 699, 92 SW 964, 29 KyL 242.

97. Irwin v. Sample, 213 Ill. 160, 72 NE 687; Reed v. Reed, 74 SW 207, 24 KyL 2438.

[a] **Illustrations.**—(1) Where one of defendants was appointed administrator of complainant's deceased wife, and as such was in possession of her personal estate at the time complainant sued to set aside a deed to certain lands made by him after his wife's death to defendants, who were his brothers-in-law, and to recover such personal property, it was error for the court, on setting aside the conveyance, to also require the administrator to surrender the personal property to complainant, the administrator being required to account for such personal property only in the course of administration. Irwin v. Sample, 213 Ill. 160, 72 NE 687. (2) Where an executor had distributed an estate of some eighty thousand dollars, and was abundantly solvent, an order requiring him to pay into court before distribution a sum of about twenty-one hundred dollars in his hands, on the ground that he was going for a trip out of the state and that it was feared he might not pay over the money promptly if not ordered to do so before his return was erroneous. Reed v. Reed, 74 SW 207, 24 KyL 2438.

[b] **Assets subject to seizure on execution.**—Weeks v. Gibbs, 9 Mass. 74.

98. In re Tompkin, 6 Kulp (Pa.) 99; Neece v. Neece, 104 Va. 343, 51 SE 739; Papineau v. Papineau, 10 Que. Super. 205.

[a] **Right of representative of deceased coexecutor to retain papers as vouchers.**—Where one of the executors of a decedent has died, the court will not interfere with the possession by his personal representative of satisfied mortgages, insurance policies, and receipts which remained in the possession and custody of that executor at the time of his death, for the reason that such papers may be necessary to enable the representative of the deceased executor to file the executor's account should this be required, and in settlement of such an account the papers may be required as vouchers for payments made by him. Thomas' Est., 8 Pa. Dist. 400, 22 Pa. Co. 518.

[b] **Ordering deposit of documents not safely kept.**—Where it is established on the petition of one of the executors that the documents and papers connected with the estate are not kept by the coexecutor in a safe place, the court will order that they be deposited in a place sufficiently secure, subject to the joint control of the executors. Papineau v. Papineau, 10 Que. Super. 205.

99. In re Tompkin, 6 Kulp (Pa.) 99.

1. Accounting and settlement generally see infra §§ 2299–2532.

administrators should keep separate books of accounts of the estate,[2] and if they fail to keep their accounts properly they will be held to a strict liability.[3]

[§ 467] **5. Deposits.** It is proper for the executor or administrator, for the purpose of safely keeping the funds of the estate during administration, to deposit the same in a bank,[4] and indeed under some statutes the representative is required[5] or the court is empowered to order him[6] to do so. If the funds are so deposited and due care is used in selecting the depositary, the representative is not necessarily responsible for a loss resulting from the subsequent failure of the bank,[7] the test being whether he has exercised such care as men of common prudence ordinarily exercise in their own affairs;[8] but he is liable where the bank was reputed of doubtful solvency, and by the exercise of

2. Mandeville v. Arnoult, 9 Rob. (La.) 447.

[a] **Separate accounts for each beneficiary are unnecessary,** where it appears by the will that a testator intended that his family should be kept together and his children educated and supported out of the same fund. Wood v. Lee, 5 T. B. Mon. (Ky.) 50.

3. Kee v. Kee, 2 Gratt. (43 Va.) 116.

4. Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365; Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Holcomb v. Coryell, 11 N. J. Eq. 476; Matter of Scudder, 21 Misc. 179, 47 NYS 101 [cit King v. Talbot, 40 N. Y. 76; McCabe v. Fowler, 84 N. Y. 318].

[a] **A deposit so as to draw interest** (1) in a savings bank or other bank or trust company is sometimes justifiable as by way of temporary investment. Matter of Maxwell, 3 NYS 422, 1 Conn. Surr. 230. (2) And if the representative can readily deposit temporarily in a good bank at a fair rate of interest, he ought to do this at least within a reasonable time. Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Holcomb v. Coryell, 11 N. J. Eq. 476.

[b] **Withdrawal by donee.**—Where an administrator, who is also sole heir, has agreed with the surety on his bond to deposit the funds of the estate in a certain manner, and not withdraw them except with the surety's consent, the administrator's donee cannot withdraw the funds without consent of the surety. Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909.

5. Arnemann's Succ., 123 La. 430, 49 S 10; Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135; Mt. Carmel Church v. Farrelly, 34 La. Ann. 533; Pasquier's Succ., 11 La. Ann. 279; D'Aquin's Succ., 10 La. Ann. 780; Peytavin's Succ., 7 Rob. (La.) 477.

[a] **Claim of retaining amount of legacy.** — An administrator cannot keep in his hands the funds which according to law he is bound to deposit in bank on the plea of retaining only the amount of a legacy to him, when according to the will such legacy is to be paid out of a particular fund of which he has not the seizin. Caballero's Succ., 25 La. Ann. 646.

[b] **Right to interest.** — Where funds are deposited in bank by the public administrator to the credit of himself and the controller of the city of New York as required by statute, the interest allowed on such deposit up to the time of settlement and distribution belongs to the estate and not to the city. Sullivan v. Herrera, 7 Hun (N. Y.) 309.

6. Ex p. Shipley, 4 Md. 493; Livermore v. Wortman, 25 Hun (N. Y.) 341; Harrington v. Libby, 6 Daly (N. Y.) 259; Matter of Philp, 29 Misc. 263, 61 NYS 241; In re O'Connor, 1 NYS 110; Matter of Gilman, 3 NYSt 340 [app dism 104 N. Y. 666 mem]; Haskin v. Teller, 3 Redf. Surr. (N. Y.) 316; Lockhart v. Public Admr., 4 Bradf. Surr. (N. Y.) 21.

[a] **Where executors disagree** (1) as to the custody of the estate, the surrogate may make an order directing the property to be deposited in a safe place in the joint custody of the executors or subject to their joint order, and the money to be deposited in a specified bank or trust company to their joint credit and to be drawn out upon their joint order. Matter of Hoagland, 51 App. Div. 347, 64 NYS 920 [aff 164 N. Y. 573, 58 NE 1088]; Matter of Delaplaine, 19 Abb NCas (N. Y.) 413. (2) The executors may be enjoined from disposing of property in the meantime. Hassey v. Keller, 1 Dem. Surr. (N. Y.) 577.

[b] **Discretion of court.** — (1) Whether or not such deposit shall be directed is within the discretion of the surrogate. Matter of Hoagland, 51 App. Div. 347, 64 NYS 920 [aff 164 N. Y. 573 mem, 58 NE 1088 mem]; Matter of Delaplaine, 19 AbbNCas 413, 8 NYSt 776. (2) The most satisfactory test by which to determine whether the deposit should or should not be ordered is whether the circumstances are such that a joint custody pursuant to an agreement of the executors themselves would commend itself to the surrogate as suitable and wise. Matter of Delaplaine, 19 AbbNCas 413, 8 NYSt 776.

[c] **Except as empowered by statute,** the surrogate has no power to order the deposits of money of an estate with the trust company. Guion v. Underhill, 1 Dem. Surr. (N. Y.) 302.

[d] **Suggestions for removal.** — Where funds received by an administrator have been deposited or invested by order of the orphans' court under the Maryland statute, it is the duty of the court to hear suggestions from those interested for the purpose of having the money removed if in danger of being lost to the estate. Ex p. Shipley, 4 Md. 493.

7. U. S.—Barney v. Saunders, 16 How. 535, 14 L. ed. 1047; Ex p. Jones, 13 F. Cas. No. 7,443, 4 Cranch C. C. 185.

Colo.—State v. Walsen, 17 Colo. 170, 28 P 1119, 15 LRA 456.

Conn. — Guthrie v. Wheeler, 51 Conn. 207.

Ill.—Caruthers v. Caruthers, 99 Ill. A. 402.

Ind.—Norwood v. Harness, 98 Ind. 134, 49 AmR 739.

Iowa.—Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365.

Ky.—Dockins v. Vass, 124 SW 290.

La.—Bertrand's Succ., 127 La. 857, 54 S 127.

Mich.—In re Curtis, 162 Mich. 47, 127 NW 36 [cit Cyc].

Minn. — Harding v. Canfield, 73 Minn. 244, 75 NW 1112.

Mo. — Atterberry v. McDuffee, 31 Mo. A. 603.

N. J.—Cox v. Roome, 38 N. J. Eq. 259; Jacobus v. Jacobus, 37 N. J. Eq. 17 [aff 38 N. J. Eq. 259].

N. Y.—Peo. v. Faulkner, 107 N. Y. 477, 14 NE 415; Sheerin v. Public Admr., 2 Redf. Surr. 421.

N. C.—Moore v. Eure, 101 N. C. 11, 7 SE 471, 9 AmSR 17.

Pa.—In re Law, 144 Pa. 499, 22 A 831, 14 LRA 103; In re Hanbest, 92 Pa. 482; Robinson's App., 2 Walk. 544; In re Seaman, 2 LackLegN 271; Seymour's Est., 18 Phila. 663; Seidler's Est., 5 Phila. 85.

S. C.—Twitty v. Houser, 7 S. C. 153; Fitzsimons v. Fitzsimons, 1 S. C. 400; Morton v. Smith, 1 S. C. Eq. 123.

Wash.—In re Kohler, 15 Wash. 613, 47 P 30, 55 AmSR 904.

Eng.—Swinfen v. Swinfen, 29 Beav. 211, 54 Reprint 608; Johnson v. Newton, 11 Hare 160, 45 EngCh 160, 68 Reprint 1230.

[a] **Executor continuing deposit made by testator not liable for loss.**—Norwood v. Harness, 98 Ind. 134, 49 AmR 739; Cook v. Barnes, 43 SW 682, 19 KyL 1533; Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617; McCabe v. Fowler, 84 N. Y. 314; In re Hanbest, 92 Pa. 482; Seidler's Est., 5 Phila. (Pa.) 85; Swinfen v. Swinfen, 29 Beav. 211, 54 Reprint 608; Churchill v. Hobson, 1 P. Wms. 241, 24 Reprint 370; Rowth v. Howell, 3 Ves. Jr. 565, 30 Reprint 1157.

[b] **A deposit in a bank in another state** (1) is not necessarily culpable waste or negligence. Moore v. Eure, 101 N. C. 11, 7 SE 471, 9 AmSR 17. (2) A personal representative may allow funds to remain on deposit in a foreign bank where they were placed by decedent. Denegre v. Denegre, 33 La. Ann. 694; Woodley v. Holley, 111 N. C. 380, 16 SE 419.

[c] **The representative is not liable for interest** on a fund lost through the failure of a bank in which it was properly deposited any more than for the fund itself. Fitzsimons v. Fitzsimons, 1 S. C. 400. Loss of assets generally see infra § 576.

[d] **Deposits** (1) may be made in savings banks as well as in ordinary banks of deposit. Guthrie v. Wheeler, 51 Conn. 207. (2) Where an executor without leave of court deposited funds of the estate in the state treasury, and loss was sustained in consequence of the depreciation of the certificates issued by the state for the moneys so deposited, the executor should not be charged with the loss. Morton v. Smith, 1 S. C. Eq. 123.

8. Germania Safety Vault, etc., Co. v. Driskill, 66 SW 610, 23 KyL 2050; Harding v. Canfield, 73 Minn. 244, 75 NW 1112; Matter of Scudder, 21 Misc. 179, 47 NYS 101; In re Seaman, 2 LackLegN (Pa.) 271.

[a] **Circumstances under which representative held liable for loss.**—Matter of Scudder, 21 Misc. 179, 47 NYS 101.

[b] **Circumstances under which representative held not liable for loss.**—Harding v. Canfield, 73 Minn. 244, 75 NW 1112; In re Seaman, 2 LackLegN (Pa.) 271.

[c] **Estoppel.**—The fact that one of the distributees agreed to the appointment of the administrator, and was to receive a part of the administrator's commission for special services rendered by him, does not estop him from questioning the act of the administrator in selecting a bank in which to deposit the funds of the estate, where he had no knowledge of or control over deposits. Germania Safety Vault, etc., Co. v. Driskill, 66 SW 610, 23 KyL 2050.

[d] **Effect of settlement in court.**—The fact that an ex parte settlement made by the administrator with the county court included as a part of the administrator's receipts the amount the estate had on deposit when the bank closed, as evidenced by a certificate of the receiver of the bank, does not preclude the distributees from claiming from the administrator any balance resulting from the loss of the deposit, after

reasonable diligence the personal representative might have known it.[9] The representative should make the deposit with a designation of his fiduciary capacity,[10] and if the deposit is made in his individual name, without any designation of the trust, he is liable for any loss which results from such disposition of the funds,[11] regardless of any question of negligence or intention in making the deposit in such form,[12] and it is not material that he had at the time no money of his own deposited in the bank,[13] or that he informed the bank, at the time of the deposit, that the funds belonged to the estate.[14] There are circumstances under which deposits may be needlessly made or be left too long for a prudent course of administration; and in such a case, or where the representative lends for a fixed time to a bank, instead of making a deposit subject to withdrawal at pleasure or lending as payable on demand, he may incur liability for loss in case of the bank's failure.[15] So also if an executor or administrator deposits money of the estate in a bank and allows it to remain on deposit after the time when it should have been distributed, and the money is lost by the failure of the bank, he is liable for the loss.[16]

The consent of the beneficiaries to a deposit will relieve the personal representative from liability to them for a loss resulting therefrom.[17]

[§ 468] **6. Disposing of Property.**[18] The personal representative can dispose of personal property belonging to the estate, being responsible for the faithful execution of the trust.[19]

[§ 469] **7. Liability for Assets Received.** A personal representative is of course liable and accrediting dividends received, where it does not appear that the certificate was ever accepted otherwise than as a memorandum entitling the holder to dividends in the distribution of the assets of the bank. Germania Safety Vault, etc., Co. v. Driskill, 66 SW 610, 23 KyL 2050.

9. Norwood v. Harness, 98 Ind. 143, 49 AmR 739; Germania Safety Vault, etc., Co. v. Driskell, 66 SW 610, 23 KyL 2050; Matter of Scudder, 21 Misc. 179, 47 NYS 101.

[a] **Administrator as officer of bank.**—An administrator was liable where funds of the estate were lost by the failure of the bank in which he deposited them, where he was an officer of the bank and had the active management of it, and knew when he made the deposit that the bank must eventually fail. Matter of Scudder, 21 Misc. 179, 47 NYS 101.

[b] **Trust company as administrator.**—While it was the duty of a trust company acting as administrator to deposit the funds of the estate in a bank, it was guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge at the time of the insolvent condition of the bank, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which if made would have revealed to them the true condition of the bank. And in view of these facts the fact that the clerk of the trust company having immediate charge of the deposits acted in good faith, believing the bank to be solvent, did not exonerate the company; nor was the trust company authorized to rely on the general reputation of the bank, where its president was also president of the bank, and thus had the means at hand, coupled with the duty, to acquaint himself with its condition. Germania Safety Vault, etc., Co. v. Driskill, 66 SW 610, 23 KyL 2050.

10. Gatewood v. Furlow, (Ga. A.) 90 SE 973; Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365; In re Curtis, 162 Mich. 47, 127 NW 36 [cit Cyc].

11. Ala.—Chancellor v. Chancellor, 177 Ala. 44, 58 S 423, 45 LRANS 1, AnnCas1915C 47; Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55; Ditmar v. Boyle, 53 Ala. 169.

Cal.—Arguello's Est., 97 Cal. 196, 31 P 937.

Del.—Allen v. Leach, 7 Del. Ch. 83, 29 A 1050.

Ga.—Gatewood v. Furlow, (A.) 90 SE 973.

Ill.—Harward v. Robinson, 14 Ill. A. 560.

Ind.—Corya v. Corya, 119 Ind. 593, 22 NE 3.

Iowa.—Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365.

La.—Milmo's Succ., 47 La. Ann. 126, 16 S 772; Lagarde's Succ., 20 La. Ann. 148.

Mich.—In re Curtis, 162 Mich. 47, 51, 127 NW 36 [cit Cyc].

Mo.—In re Horner, 66 Mo. A. 531.

N. C.—Summers v. Reynolds, 95 N. C. 404.

Pa.—McAllister v. Com., 30 Pa. 536; Com. v. McAlister, 28 Pa. 480.

Va. — Vaiden v. Stubblefield, 28 Gratt. (69 Va.) 153.

Wis.—Williams v. Williams, 55 Wis. 300, 12 NW 465, 13 NW 274, 42 AmR 708.

Eng.—Robinson v. Ward, R. & M. 274, 21 ECL 751, 2 C. & P. 59, 12 ECL 449.

[a] **Purchase of draft as deposit in individual name.**—Where an administrator purchased a draft in his own name to pay a sum to the sole heir due from the estate and indorsed it to the heir, and the bank on which the draft was drawn closed its doors the following day, and the draft when presented for payment was not paid, and subsequently the administrator filed his proof of claim against the bankrupt bank, and averred that the consideration of the draft was money due to him from the bank, which money was deposited with the bank, although the purchase of the draft was a deposit, it was a deposit in the individual name of the administrator, and he was liable to the heir for the loss sustained. In re Curtis, 162 Mich. 47, 127 NW 36.

[b] **Mingling funds of estate with individual funds.**—If an executor or administrator pays the money of the estate into a banker's, not on any distinct account, but mixing it with his own money, he is answerable for the loss sustained by the failure of the banker. Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365; Massey v. Banner, 1 Jac. & W. 241, 37 Reprint 367 [aff 4 Madd. 413, 56 Reprint 757]; Fletcher v. Walker, 3 Madd. 73, 56 Reprint 436; Robinson v. Ward, R. & M. 274, 21 ECL 751, 2 C. & P. 59, 12 ECL 449; Wren v. Kirton, 11 Ves. Jr. 377, 32 Reprint 1133.

12. Ditmar v. Boyle, 53 Ala. 169; Arguello's Est., 97 Cal. 196, 31 P 937; Com. v. McAlister, 28 Pa. 480.

[a] **The representative is not relieved from liability** by the fact that it was his intention to use such deposit for the fiduciary account alone. Ditmar v. Boyle, 53 Ala. 169.

13. Arguello's Est., 97 Cal. 196, 31 P 937; Summers v. Reynolds, 95 N. C. 404.

14. In re Horner, 66 Mo. A. 531.

15. Conn.—Guthrie v. Wheeler, 51 Conn. 207.

La.—Mandeville v. Arnoult, 9 Rob. 447.

Minn.—Wood v. Myrick, 17 Minn. 408.

Nev.—McNabb v. Wixom, 7 Nev. 163.

N. Y.—Harlow v. Mills, 128 N. Y. 650, 29 NE 148 [aff 58 Hun 391, 12 NYS 197]; Baskin v. Baskin, 4 Lans. 90.

N. C.—Woodley v. Holley, 111 N. C. 380, 16 SE 419.

Pa.—Baer's App., 127 Pa. 360, 18 A 1, 4 LRA 609.

Eng.—Darke v. Martyn, 1 Beav. 525, 17 EngCh 526, 48 Reprint 1044.

[a] **Illustration.**—Where, instead of using cash on hand of the estate to pay debts, the personal representative deposits the cash in bank and uses his own money to pay the debts, he incurs the risk of the bank's failure, as for imprudence on his part. Guthrie v. Wheeler, 51 Conn. 207.

16. Ill.—Caruthers v. Caruthers, 99 Ill. A. 402.

La.—Mandeville v. Arnoult, 9 Rob. 447.

Minn.—Pope v. Waugh, 94 Minn. 502, 103 NW 500; Wood v. Myrick, 17 Minn. 408.

Mo.—Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025.

Nev.—McNabb v. Wixom, 7 Nev. 163.

N. Y.—Matter of Knight, 4 NYS 412, 21 AbbNCas 388.

N. C.—Woodley v. Holley, 111 N. C. 380, 16 SE 419.

[a] **Where funds are deposited awaiting opportunity for investment** as directed by the will, the personal representative is not liable for loss by the failure of the bank before withdrawal. Matter of Maxwell, 3 NYS 422, 1 Conn. Surr. 230.

[b] **Where funds are deposited to await the termination of litigation** regarding them, the personal representative is not liable for their loss. Twitty v. Houser, 7 S. C. 153.

17. Matter of Maxwell, 3 NYS 422, 23 AbbNCas 23, 1 Conn. Surr. 230; Wilks v. Groom, 3 Drew 584, 61 Reprint 1026, 2 ERC 175.

18. Sale of:

Personalty see infra § 716 et seq.

Realty under order of court see infra § 1438 et seq.

Realty without order of court see infra § 636 et seq.

19. Conn. — Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580.

Kan.—Lappin v. Mumford, 14 Kan. 9.

Md.—Neale v. Hagthorp, 3 Bland 551.

Or. — Olston v. Oregon Water Power, etc., Co., 52 Or. 343, 96 P 1095, 97 P 538, 20 LRANS 915.

Tex.—McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718.

[a] **Sale, mortgage, or pledge for individual debt.**—In equity an executor or administrator can make no valid sale, mortgage, or pledge of the assets in payment of or as a security for his own debts, because the transaction itself gives the purchaser, mortgagee, or pledgee notice of the misapplication and necessarily involves his participation in the breach of duty. Williamson v. Morton, 2 Md. Ch. 94.

countable to the estate for all assets which have come into his hands,[20] and where there are two executors one who has received debts due to the estate cannot discharge himself from liability to the estate by a payment of the sums received to his coexecutor.[21] An executor has been held authorized, upon the verbal order of the county judge, to pay over to him any moneys in his hands belonging to the estate or legatees thereof, after which the judge will be liable on his bond for the proper disbursement thereof, such payment discharging the executor from all further liability for the moneys so paid over.[22]

[§ 470] **8. Persons Acting in Different Capacities.** One who is executor or administrator may also act in another capacity concerning the estate, in which case the due sequence of the trusts varies with his present status.[23] Thus if an executor is also a devisee or residuary legatee, or an administrator is next of kin to the decedent, and he enters generally into possession of the property, he is usually held to do so in his representative capacity.[24] If one is executor or administrator and also guardian of a beneficiary he holds the estate first of all as executor or administrator, and does not hold anything as guardian which is not separated from the assets of the estate or placed properly to his account as guardian.[25] So too if an executor is also the designated trustee under a will he comes into possession as executor, and his election afterward to hold as trustee must be manifested by some plain and unequivocal act.[26] Of course, when the functions of the executor or administrator as such have ceased, he holds whatever balance there may be in his hands in his other capacity, whether as trustee, guardian, legatee, distributee, or otherwise.[27] In case of the representative's misappropriation or default the loss should be sustained in what was then his true character.[28]

[§ 471] **9. Rights of Creditors.** Creditors may resort to a court of equity to preserve the property and assets of the estate and subject the same

20. Thomason v. Thomason, 1 Metc. (Ky.) 51; Bauernschmidt v. Bauernschmidt, 101 Md. 148, 60 A 437.

[a] **For the proceeds of an estate converted into money** the personal representative remains accountable as before and his control continues. Thomason v. Thomason, 1 Metc. (Ky.) 51.

Charges generally see infra § 2392.

21. Edmonds v. Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402.

Liabilities of coexecutors and coadministrators generally see infra § 2039 et seq.

22. Doogan v. Elliott, 43 Iowa 342.

23. See cases infra notes 24–28.

[a] **Where the administrator receives funds as trustee** and not as administrator, he is not chargeable as administrator and cannot as such settle an account with the cestui que trust. In re Aston, 5 Whart. (Pa.) 228.

24. U. S.—Hanson v. Cox, 11 F. Cas. No. 6,040, 1 Hayw. & H. 167; Labitut v. Prewett, 14 F. Cas. No. 7,962, 1 Woods 144.

Cal.—Abila v. Burnett, 33 Cal. 658.

Ky.—Palmer v. Kemp, 2 A. K. Marsh. 355.

Mich.—Proctor v. Robinson, 35 Mich. 284.

Pa.—Guier v. Kelly, 2 Binn. 294.

S. C.—Tinklea v. Jordan, 35 S. C. Eq. 160.

Va.—Blakey v. Newby, 6 Munf. (20 Va.) 64.

[a] **A representative who is the husband of one of the legatees or distributees** holds in his representative capacity. Guier v. Kelly, 2 Binn. (Pa.) 294; Blakey v. Newby, 6 Munf. (20 Va.) 64.

[b] **An election to take as legatee or distributee may be implied** (1) where the executor has exclusive possession of the goods and exercises acts of ownership over them. Palmer v. Kemp, 2 A. K. March. (Ky.) 355. (2) Where there has been a lapse of time sufficient for the settlement of the estate. Gardner v. Simmes, 1 Gill (Md.) 425. (3) Where he brings a suit for partition. Poindexter v. Jeffries, 15 Gratt. (55 Va.) 363.

[c] **The terms of a bequest** to a widow and executrix may be such as vest the interest in her individually and not as executrix. Camp v. Coleman, 36 Ala. 163.

25. Ala.—Davis v. Davis, 10 Ala. 299.

Del.—Burton v. Tunnell, 4 Del. 424.

Ill.—Wadsworth v. Connell, 104 Ill. 369.

Ind.—Burtch v. Thorn, 7 Ind. 508.

Ky.—McCracken v. McCracken, 6 T. B. Mon. 342.

La.—In re Scarborough, 44 La. Ann. 288, 10 S 858; Sample v. Scarborough, 43 La. Ann. 315, 8 S. 940; Goux v. Moucla, 30 La. Ann. 743.

Mass.—Conkey v. Dickinson, 13 Metc. 51.

N. M.—Perea v. Harrison, 7 N. M. 666, 41 P 529.

Tenn.—Drane v. Bayliss, 1 Humphr. 174.

W. Va.—Hedrick v. Tuckwiller, 20 W. Va. 489.

[a] **Where money is payable to a ward on reaching majority,** the executor has no right to transfer the fund to his account as guardian before it becomes payable. Livermore v. Bemis, 2 Allen (Mass.) 394.

[b] **An order of court is not necessary** to entitle an executor or administrator, who is also the guardian of a person interested in the estate, to charge himself in the capacity of guardian with the ward's share or interest. In re Scott, 36 Vt. 297.

[c] **A guardian of infant beneficiaries who marries the executrix** while she has property of the estate in her possession holds the same as guardian and not as executor in right of his wife. Clancy v. Dickey, 9 N. C. 497.

26. Ala.—Perkins v. Moore, 16 Ala. 9.

Ga.—Mastin v. Barnard, 33 Ga. 520.

Ky.—Lasley v. Lasley, 1 Duv. 117.

Me.—Briggs v. East Auburn Baptist Church, 8 A 257.

Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.

N. H.—Felton v. Sawyer, 41 N. H. 202.

N. Y.—In re Hobson, 131 N. Y. 575, 30 NE 63; Dupre v. Thompson, 8 Barb. 537; Chiff's Est., 7 NYSt 751.

Pa.—Wheatly v. Badger, 7 Pa. 459.

S. C.—Anderson v. Earle, 9 S. C. 460.

Va.—Rixey v. Com., 99 SE 573.

[a] **A bequest to one in trust as "executor and trustee"** keeps the two trusts distinct and in due sequence. Wheatly v. Badger, 7 Pa. 459.

[b] **How change of capacity shown.**—An appointment or qualification as trustee or guardian after that as executor or administrator, together with the rendering of accounts and setting apart a fund for the specific purpose, usually shows the change of capacity. Crocker v. Dillon, 133 Mass. 91; Fisher v. Fisher, 1 Bradf. Surr. (N. Y.) 335; Anderson v. Earle, 9 S. C. 460.

[c] **Testamentary direction devolving duties as trustee.**—(1) Where an executor was directed by will to manage and control the estate, after collection, for the benefit of the testator's children, this duty devolved on him as trustee and not as executor. Stamp v. Parrish, 15 KyL 55. (2) Where a testator charges his devisees of land with the payment of certain annual sums to his executors for a number of years, to be paid by his executors to certain persons named, the fund arising from such charge is not subject to the general executorial power of the executor. Jackson v. Updegraffe, 1 Rob. (40 Va.) 107.

27. U. S.—Taylor v. Deblois, 23 F. Cas. No. 13,790, 4 Mason 131.

Ala.—Sankey v. Sankey, 8 Ala. 601.

Conn.—State v. Whitehouse, 75 Conn. 410, 53 A 897.

D. C.—U. S. v. May, 15 D. C. 4.

Ill.—Bell v. Peo., 94 Ill. 230.

Ky.—Karr v. Karr, 6 Dana 3.

Md.—State v. Cheston, 51 Md. 352; Seegar v. State, 6 Harr. & J. 162, 14 AmD 265; In re Williams, 1 Md. Ch. 25.

Mo.—Walker v. Walker, 25 Mo. 367; State v. Hearst, 12 Mo. 365, 51 AmD 167.

N. C.—Ruffin v. Harrison, 81 N. C. 208.

S. C.—Johnson v. Johnson, 19 S. C. Eq. 277, 29 AmD 72.

[a] **Expiration of time limited for settlement of estate.**—Where the same person sustains the twofold character of executor and guardian, the law will adjudge the ward's proportion of the property in such person's hands after the time limited by law for the settlement of the estate, to be in his hands in his capacity of guardian, whether a final account has been passed by the orphans' court or not. Watkins v. State, 2 Gill & J. (Md.) 220; Karr v. Karr, 6 Dana (Ky.) 3; State v. Jordan, 3 Harr. & M. (Md.) 179; Lark v. Linstead, 2 Md. Ch. 162; In re Williams, 1 Md. Ch. 25.

[b] **Agreement not changing capacity.**—The capacity as executors is not changed to that of agents for distributees by agreement with legatees relieving them from accounting to the court unless requested by three legatees, authorizing them to retain and to invest in securities not approved by the court or authorized by law and to convert the assets into money, and providing that they shall proceed with the discharge of their duties as executors and make partial and final distributions. Matter of Phelps, 181 App. Div. 82, 168 NYS 536.

28. Ill.—Stillman v. Young, 16 Ill. 318.

Ky.—Banton v. Campbell, 9 B. Mon. 587.

Mass.—Crocker v. Dillon, 133 Mass. 91.

to the payment of debts against it when the personal representative fails to perform his duty in the premises.[29]

[§ 472] **B. Performance of Decedent's Obligations.** Executors or administrators are in general bound by all the covenant or contract obligations of their decedents,[30] except such as are personal in their nature and of which personal performance

Miss.—Buckingham v. Walker, 48 Miss. 609.

N. Y.—In re Blauvelt, 131 N. Y. 249, 30 NE 194.

N. C.—Muse v. Sawyer, 4 N. C. 637.

Va.—Dillard v. Dillard, 77 Va. 820.

Wis.—Cameron v. Cameron, 15 Wis. 1, 82 AmD 652.

Ont.—Cumming v. Landed Banking, etc., Co., 20 Ont. 382 [dism app 19 Ont. 426; and rev 19 Ont. A. 447 (rev on other grounds 22 Can. S. C. 246)].

29. Buskirk Bros. v. Peck, 57 W. Va. 360, 50 SE 432.

Allowance and payment of claims generally see infra §§ 875–1265.

30. U. S.—Scott v. Lunt, 7 Pet. 596, 8 L. ed. 797 [rev 21 F. Cas. No. 12,540, 3 Cranch C. C. 285]; In re Mossler Co., 239 Fed. 262, 152 CCA 250.

Ala.—Jones v. Peebles, 133 Ala. 290, 32 S 60.

Cal.—McCann v. Pennie, 100 Cal. 547, 35 P 158; Janin v. Browne, 59 Cal. 37.

Ga.—Allen v. Confederate Pub. Co., 121 Ga. 773, 49 SE 782; Parker v. Barlow, 93 Ga. 700, 21 SE 213.

Ill.—Kadish v. Lyon, 229 Ill. 35, 82 NE 194; Smith v. Wilmington Coal Min., etc., Co., 83 Ill. 498; Jenkins v. Brittin, 185 Ill. A. 67; Mecartney v. Carbine, 108 Ill. A. 282.

Ind.—Cummins v. Peed, 109 Ind. 71, 9 NE 603; Miller v. Ready, 59 Ind. A. 195, 108 NE 605.

Kan.—Exchange Nat. Bank v. Betts, 103 Kan. 807, 179 P 660.

Ky.—Roach v. Ames, 3 KyL 498.

Me.—How v. How, 48 Me. 428.

Mass.—Citizens Loan Assoc. v. Boston, etc., R. Co., 196 Mass. 528, 82 NE 696, 124 AmSR 584, 14 LRANS 1025, 13 AnnCas 365.

Mich.—Michigan Iron, etc., Co. v. Nester, 147 Mich. 599, 111 NW 177; McKeown v. Harvey, 40 Mich. 226.

Miss.—Woods v. Ridley, 27 Miss. 119.

Mo.—State v. Taylor, 100 Mo. A. 481, 74 SW 1032.

N. J.—Chapman v. Holmes, 10 N. J. L. 20; Corle v Monkhouse, 50 N. J. Eq. 537, 25 A 157; Petrie v. Voorhees, 18 N. J. Eq. 285.

N. Y.—Denton v. Sanford, 103 N. Y. 607, 9 NE 490; Fischer v Schram, 173 App. Div. 147, 159 NYS 496; Klein v. Runk, 130 App. Div. 474, 114 NYS 1062; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Matter of Davis, 43 App. Div. 331, 60 NYS 315; Duff v. Gardner, 7 Lans. 165; Baldwin v. Kohler, 94 Misc. 142, 158 NYS 278; Gick v. Stumpf, 53 Misc. 83, 103 NYS 1109; Kline v. Low, 11 Johns. 74.

N. C.—Wiggins v. Pender, 132 N. C. 628, 44 SE 362, 61 LRA 772; Pugh v. Baker, 127 N. C. 2, 37 SE 82; Earle v. Dickson, 12 N. C. 16.

Oh.—Jackson v. O'Brannin, 14 Oh. St. 177.

Pa.—In re Orne, 192 Pa. 626, 44 A. 287; In re Derbyshire, 81 Pa. 18; Quain's App., 22 Pa. 510; Gravenstine's Est., 4 Pa. Co. 388; Walsh's Est., 35 PittsbLegJNS 280.

R. I.—Newton v. Newton, 11 R. I. 390, 23 AmR 476.

S. C.—Brisbane v. McCrady, 10 S. C. L. 104, 9 AmD 676.

Tenn.—Oliver v. Morgan, 10 Heisk. 322.

Va.—Harrison v. Sampson, 2 Wash. (2 Va.) 155; Lee v. Cooke, 1 Wash. (1 Va.) 306.

Wash.—Macdonald v. O'Shea, 58 Wash. 169, 171, 108 P 436, AnnCas 1912A 417.

Wis.—Volk v. Stowell, 98 Wis. 385, 74 NW 118.

Eng.—Wentworth v. Cock, 10 A. & E. 42, 37 ECL 47, 113 Reprint 17; Siboni v. Kirkman, 1 M. & W. 418, 150 Reprint 497.

See also Abatement and Revival § 326.

"The general rule governing the survival of contractual obligations as against the personal representative and the estates of deceased persons is stated in 2 Parson's Contr. (9th Ed.) 685, as follows: 'It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And, if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract, as where the things to be done required the personal skill of the testator himself.' 18 Cyc. 239. This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. The Supreme Court of Pennsylvania in Billing's Appeal, 106 Pa. 558, 560, said: 'Where a party agrees to do that which does not necessarily require him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of Dickinson v. Calahan, 19 Pa. 227, to have intended its dissolution at death. The whole question in such case is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general.'" Macdonald v. O'Shea, supra.

[a] **An executor need not wait to be sued** before performing the testator's obligations. He may act voluntarily, and where he does so in good faith, and with reasonable care and prudence, he incurs no liability. Denton v. Sanford, 103 N. Y. 607, 9 NE 490.

[b] **Contracts for repairs or improvements.**—(1) A contract made by decedent during his lifetime for the making of repairs and improvements on his real estate binds his personal representative (Burton's Est., 16 Pa. Co. 246; Halyburton v. Kershaw, 3 S. C. Eq. 105), (2) even though nothing has been done during the decedent's liftime (Pringle v. McPherson, 2 S. C. Eq. 524). (3) But special facts and circumstances will be considered as justifying a discontinuance of such work, where enforcement of specific performance is sought against the executor or administrator and the estate is injuriously affected (Gray v. Hawkins, 8 Oh. St. 449, 72 AmD 600), or (4) where other arrangements manifestly beneficial to the estate are made (Moore v. O'Brannin, 14 Oh. St. 177). (5) The representative cannot bind the estate regardless of its interests by a new contract for completing a building, the erection of which the deceased had contracted for. Chicago Lumber Co. v. Tomlinson, 54 Kan. 770, 39 P 694.

[c] **Building contracts** (1) made by a decedent in his lifetime are binding on and may be completed by his personal representative. Janin v. Browne, 59 Cal. 37; Kadish v. Lyons, 229 Ill. 35, 82 NE 194; Exchange Nat. Bank v. Betts, 103 Kan. 807, 179 P 660; Bambrick v. Webster Groves Presb. Church Assoc., 53 Mo. A. 225; Russell v. Buckhout, 87 Hun 46, 34 NYS 271; Riblet v. Wallis, 1 Daly (N. Y.) 360; In re Allam, 199 Pa. 573, 49 A 252; Pringle v. McPherson, 2 S. C. Eq. 524; In re Day [1898] 2 Ch. 510; Cooper v. Jarman, L. R. 3 Eq. 98, 2 ERC 243; Quick v. Ludborrow, 3 Bulstr. 29, 81 Reprint 25. (2) The liabilities of the original contract attach to the work done by administrators in completing it so as to render money due under it subject to the claim of a subcontractor for work done for the intestate. Reicke v. Saunders, 3 Mo. A. 566; Horton v Carlisle, 2 Disn. 184, 13 Oh. Dec. (Reprint) 113. (3) An executor does not bind the estate for the price of materials purchased to complete an unfinished contract of the testator, if he used such materials in his (the executor's) own business. Oram's Est., 9 Phila. (Pa.) 358. (4) "Judge Woerner in his American Law of Administration (2d Ed.) § 328, says: 'If one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a subcontractor is entitled to his lien for materials furnished the intestate.' See also, 3 Williams on Executors (7th Am. Ed.) 224. Both of these eminent textwriters cite in support of their text among other authorities the early English case of Quick v. Ludburrow, reported in 3 Bulstrode's Reports, 30, in the year 1865, in which Coke, Chief Justice, said: 'If a man be bound to build a house for another before such a time, and he which he bound dies before the time, his executors are bound to perform this.'" MacDonald v. O'Shea, 58 Wash. 169, 173, 108 P 436, AnnCas1912A 417.

[d] **Contracts for services.**—An administrator may retain an employee hired by the decedent, where the services of the employee are necessary for the protection of the estate. In re Miner, 46 Cal. 564.

[e] **Redemption of pledge.**—Where one to whom shares of stock were given for life only pledges them as security for his debt, his property is rightly used by his executor in payment of the debt and releasing the stock. In re Orne, 192 Pa. 626, 44 A 287.

[f] **A grant of an exclusive right to use a patent** for a term of years which required the grantee to pay a stipulated royalty and contained a covenant by him that the royalty would amount to a certain sum per year, but did not provide for his personal services in using the patented process, the obligation to pay royalty did not terminate at the death of the grantee, but was enforceable against his estate. Empire Pav., etc., Co. v. Prather, 58 Mo. A. 487.

[g] **Order expiring with death of testator.**—An order given by a testator for the delivery of certificates to a third person expires with the death of the testator. McKee v. Myers, Add. (Pa.) 31.

[h] **Entire contract binding.**—Where, after the death of the pur-

by the decedent is of the essence;[31] or such as are terminated by decedent's death,[32] even though performance is detrimental to the estate;[33] and where the personal representative neglects or refuses to carry out the contract of his decedent, the other party has the usual remedies, as in electing to treat it as rescinded and claiming damages.[34] Conversely, the executor or administrator has the right to carry out the contracts of his decedent,[35] even though they are of a personal nature,[36] and enforce the fulfillment of obligations to his decedent where likely to prove beneficial to the estate.[37] If a con-

chaser of certain timber, his administrator and heirs continued to perform the contract by cutting and manufacturing the timber at a large profit, they were equally bound to perform a condition of the contract requiring the purchaser to pay taxes assessed on the land pending performance of the contract. Michigan Iron, etc., Co. v. Nester, 147 Mich. 599, 111 NW 177.

[i] **Order of court not necessary.**—An administrator may perform a contract of his intestate for the estate's benefit without an order therefor from the county court, where the contract is not of a strictly personal nature, assuming the risk of being required to make good any loss that may ensue, and if he acts in good faith without such order to comply with intestate's contract his acts as to the other party to the contract are binding upon the estate. Kadish v. Lyon, 229 Ill. 35, 82 NE 194.

[j] **Assent to contract.**—Where testator employed plaintiffs to defend his brother, and testator's executors notified plaintiff that no liability for further outlay would be recognized unless specifically authorized, but plaintiff asserted his intention to proceed under the contract and was told that the agreement would be performed, this was an assent to conform to its terms. Barrett v. Towne, 196 Mass. 487, 82 NE 698, 13 LRANS 643.

[k] **Contractual right to settle dissolved partnership.**—A contractual right and duty of one of the members of a dissolved partnership to collect outstanding assets and distribute the proceeds in a certain way passes on his death to his representative. McDowell v. North, 24 Ind. A. 435, 55 NE 789.

[l] **A covenant running with the land** conveyed gives no remedy for a breach against the personal representative of the vendor. Carr v. Lowry, 27 Pa. 257; Bland v. Umstead, 23 Pa. 316.

[m] **Right to terminate contract.**—If an administrator continues a contract of employment of his decedent under the mistaken belief that it is binding after the death of one of the parties to it, he has a right to terminate it without liability thereafter. Zinnel v. Bergdoll, 9 Pa. Super. 522, 44 WklyNC 54, 7 Del. Co. (Pa.) 369.

31. Ariz.—Dumont v. Heighton, 14 Ariz. 25, 123 P 306, 39 LRANS 1187.

Hawaii.—Paris v. Greig, 12 Hawaii 274.

Ill.—Smith v. Wilmington Coal Min., etc., Co., 83 Ill. 498; Mecartney v. Carbine, 108 Ill. A. 282; Caruthers v. Caruthers, 99 Ill. A. 402.

Ky.—McGill v. McGill, 2 Metc. 258; Shulz v. Johnson, 5 B. Mon. 497.

Mass.—Marvel v. Phillips, 162 Mass. 399, 38 NE 1117, 44 AmSR 370, 26 LRA 416.

Mo.—Sturgeon v. Schaumburg, 40 Mo. 482, 93 AmD 311.

N. M.—Summers v. Sandoval County, 15 N. M. 376, 110 P 509.

N. Y.—Matter of Benedict, 13 Abb NCas 67, sub nom. Gilman v. Wilber, 1 Dem. Surr. 547.

N. C.—Siler v. Gray, 86 N. C. 566.

Pa.—White v. Com., 39 Pa. 167; Patton v. Patton, 2 Pennyp. 394; Cooper v. Eyrich, 41 WklyNC 370.

Eng.—Marshall v. Broadhurst, 1 Cromp. & J. 403, 148 Reprint 1480; Siboni v. Kirkman, 1 M. & W. 418, 150 Reprint 497; Baxter v. Burfield, Str. 1266, 93 Reprint 1172.

[a] **Personal contract to convey on contingency.**—Where one covenants for himself without naming his heirs to convey land on the happening of a certain event, and dies before that event happens, his administrators are not liable. Earle v. Dickson, 12 N. C. 16.

[b] **Even though decedent has in terms bound his personal representatives** they are released by his death where the covenant was for the performance of an act personal to himself growing out of his skilled labor in any business. Jaquett's Est., 13 LancBar (Pa.) 13.

[c] **Completing work of public official.**—Where, upon the formation of a new county, the probate clerk partially completed the transcript of the property records of the old county for use of the new county, pursuant to a statute, making it the duty of the probate clerk of the old county to transcribe the records pertaining to real or personal property transferred to the new county, and providing that he shall be paid therefor at the rate allowed by law for making copies of such records, but died before the work was completed, his administrator cannot recover on behalf of his estate for work done by such administrator in connection with such transcripts after the death of the clerk. Summers v. Sandoval County, 15 N. M. 376, 110 P 509.

[d] **A contract with a heating company** for a supply for one's residence is personal. Howell v. City Gas, etc., Co., 159 Ill. A. 311.

[e] **Contract held not personal.**—A contract entered into between the grantee and grantor of land who, reserving a life estate to himself, had conveyed a fee to the grantee, whereby the grantee was given immediate possession of the land on the payment of a reserved rent, is not a personal contract which is abrogated by the death of the grantee, the contract providing that the grantee, his heirs, and executors were to have possession. Husheon v. Kelley, 162 Cal. 656, 124 P 231.

32. In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899.

33. Cooper v. Jarman, L. R. 3 Eq. 98, 2 ERC 243.

34. Ark.—Miller v. Thompson, 22 Ark. 258.

Ga.—Parker v. Barlow, 93 Ga. 700, 21 SE 213; Merchants' Bank v. Taylor, 21 Ga. 334.

Mass.—Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865.

N. J.—Chapman v. Holmes, 10 N. J. L. 20.

N. Y.—Townsend v. Morris, 6 Cow. 123.

Pa.—McClure v. Gamble, 27 Pa. 288 (covenant for vendor and his heirs).

See also cases supra note 30.

[a] **Covenant of warranty.**—An evicted purchaser has a remedy against the personal representative of the vendor on a covenant of warranty. Chapman v. Holmes, 10 N. J. L. 20; Townsend v. Morris, 6 Cow. (N. Y.) 123; McClure v. Gamble, 27 Pa. 288 (covenant for vendor and his heirs).

[b] **Circumstances amounting to breach.**—By the terms of a written contract, the second party was to have entire charge of the lands of the first party, and the sole right to sell them, and it was agreed that it should be binding on the first party's executors, and that he should make a codicil to his will to such effect. It was held that the neglect of testator to make such a codicil, and the assertion by the first party's executor and beneficiaries under the will of the right to have the estate administered, irrespective of the contract, amounted to a breach thereof, subjecting the executors to an action for damages. Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865.

[c] **An executor's refusal to convey** property pursuant to decedent's contract does not create a cause of action for money paid. Coughlin v. Lemp, (Ida.) 180 P 990.

35. Ill.—Kadish v. Lyons, 229 Ill. 35, 82 NE 194; Jessup v. Jessup, 102 Ill. 480; Smith v. Wilmington Coal Min., etc., Co., 83 Ill. 498.

Mo.—Bambrick v. Webster Groves Presb. Church Assoc., 53 Mo. A. 225.

N. Y.—Schermerhorn v. Gardenier, 46 Misc. 280, 94 NYS 253 [rev on other grounds 107 App. Div. 564, 95 NYS 494 (aff 184 N. Y. 612 mem, 77 NE 1196 mem)].

Oh.—Gray v. Hawkins, 8 Oh. St. 449, 72 AmD 600.

Tenn.—Oliver v. Morgan, 10 Heisk. 322.

Eng.—Marshall v. Broadhurst, 1 Cromp. & J. 403, 148 Reprint 1480; Garrett v. Noble, 6 Sim. 504, 9 Eng Ch 504, 58 Reprint 683.

[a] **An ordinary building contract,** near completion and not at that stage calling for services personal to the contractor, does not abate by his death, and his executor, even before the issue of letters, has the power to complete it and so realize for the estate the money to become due on its completion, and save it the penalty which would otherwise accrue on the bond. Bambrick v. Webster Groves Presb. Church Assoc., 53 Mo. A. 225.

[b] **Approval of court.**—Where the executor or administrator proposes performing some executory contract made by his decedent on which the representative was not necessarily bound, or where in some onerous or difficult obligation of the decedent which bound the estate some practical adjustment becomes available which it is desirable to carry out, the approval or direction of the court may be properly sought in advance; and under some statutes this course must be taken by a representative who would avoid a personal responsibility in the transaction. Jessup v. Jessup, 102 Ill. 480; Gray v. Hawkins, 8 Oh. St. 449, 72 AmD 600.

[c] **When performance improper.**—An executory contract of decedent should not be performed where the performance will result in giving some of the creditors of the decedent's estate an advantage over others. Jessup v. Jessup, 102 Ill. 480.

36. Mecartney v. Carbine, 108 Ill. A. 282 (where a contract made prior to decedent's death is of a personal nature, the administrator may be directed by the probate court to perform it, or he may on his own responsibility and risk undertake to do so for the benefit of the estate).

37. Jefford v. Ringgold, 6 Ala. 544; Catland v. Hoyt, 78 Me. 355, 5 A 775; Duff v. Gardner, 7 Lans. (N. Y.) 165.

[a] **The personal representative may ratify** a contract of his decedent made during infancy, although the death occurred before the decedent reached majority. Jefford v. Ringgold, 6 Ala. 544.

[b] **Failure to renew lease.**—The executors are not chargeable with

tract of decedent carries with it an option to accept or reject, the exercise of such option passes properly to the personal representative,[38] but the representative is not empowered to make anew or enlarge a contract for his decedent, to ratify his void transactions, or to waive defenses to which he is entitled by law.[39] The personal representative may avoid his decedent's contract or covenant on the usual grounds of incapacity or fraud,[40] or suspend performance where the other party is bound to proceed first;[41] and in some instances an executory contract inequitable in its consequences to the estate may be avoided or compromised,[42] or an onerous obligation may by its own terms admit sometimes of a legal or equitable rescission to which the personal representative is a party.[43]

As between the representative and the beneficiaries of the estate the former may in his discretion, as a general rule, perform or rescind any personal contract of decedent as may be for the best interests of the estate,[44] unless the matter is regulated by statute.[45]

Where the personal representative performs the contract or covenant of his decedent and completes the transaction, the estate will be held bound for any loss sustained thereby, and will be entitled to any profit realized in consequence.[46]

[§ 473] **C. Exoneration of Estate from Liability.** An executor or administrator may take steps to exonerate the estate from a liability to which it might otherwise be subject.[47]

[§ 474] **D. Engaging in Business—1. General Rule.** The general rule is that an executor or administrator is not justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys and trading lies outside the scope of administrative functions.[48] This is true, even though the property is of such a character

loss from a failure to renew a lease of the testator, where the latter had during his lifetime failed to perform certain covenants of the lease in consequence of which the lessor was not bound to renew. Fisher v. Fisher, 1 Bradf. Surr. (N. Y.) 335.

38. Oakes v. Gillilan, (Nebr.) 95 NW 511; Farley v. Secor, 167 App. Div. 80, 152 NYS 787; Adams Radiator, etc., Works v. Schnader, 155 Pa. 394, 26 A 745, 35 AmSR 893; Newton v. Newton, 11 R. I. 390, 23 AmR 476.

[a] **Illustration.** — The right to reject a heater placed in the house of a decedent under a contract that he might reject it if it did not prove satisfactory may be exercised by his personal representative, where the decedent died before he had an opportunity of testing the heater. Adams Radiator, etc., Works v. Schnader, 155 Pa. 394, 26 A 745, 35 AmSR 893.

[b] **Election to declare contract forfeited.**—Where the administratrix of the vendor in a contract for the sale of land elects, on default of the purchaser, to declare the contract forfeited, and the purchaser acquiesces in her election, her act is binding on the estate and a subsequent administrator cannot revoke it except for fraud. Oakes v. Gillilan, (Nebr.) 95 NW 511.

39. Jenkins v. Brittin, 185 Ill. A. 67; Chicago Lumber Co. v. Tomlinson, 54 Kan. 770, 39 P 694; Smith v. Brennan, 62 Mich. 349, 28 NW 892, 4 AmSR 867; Woods v. Ridley, 27 Miss. 119.

40. Ark.—Vaughan v. Parr, 20 Ark. 600; Eubanks v. Dobbs, 4 Ark. 173.

Ind.—Wilson v. Fahnestock, 44 Ind. A. 35, 86 NE 1037.

Ky.—Bedford v. Clay, 3 Dana 226.

Minn.— Wheeler v. McKeon, 162 NW 1070.

N. Y.—Hangen v. Hachmeister, 49 N. Y. Super. 34, 16 NYWklyDig 552.

[a] **The contracts of infants** (1) are generally binding on their personal representatives to the same extent that the infants themselves were bound, and the personal representative may affirm or disaffirm such a contract as the interest of the estate may require. Bedford v. Clay, 3 Dana (Ky.) 226. (2) But the right of an administrator to disaffirm, on the ground of infancy, contracts made by his intestate is coextensive with, but no greater than, the right which the intestate would have if living. Hangen v. Hachmeister, 49 N. Y. Super. 34, 16 NYWklyDig 552. (3) Accordingly, where decedent, after reaching majority, has affirmed a contract made by him during infancy, it is binding on his executor or administrator. Ferguson v. Bell, 17 Mo. 347. (4) The sale by an administrator of goods purchased by his intestate, an infant, is not an affirmance of the purchase so as to render the administrator liable for the value of the goods, but he may, notwithstanding such sale by him, plead infancy in an action on a note given by the infant to the seller. Counts v. Bates, 16 S. C. L. 464.

41. Shultz v. Johnson, 5 B. Mon. (Ky.) 497.

42. Jessup v. Jessup, 102 Ill. 480; Billings v. Billings, 42 LegInt (Pa.) 132.

43. Maher v. Garry, 15 Misc. 359, 37 NYS 605 [aff 3 App. Div. 480, 38 NYS 436]; Dougherty v. Stephenson, 20 Pa. 210.

44. Roach v. Ames, 80 Ky. 6; Gray v. Hawkins, 8 Oh. St. 449, 72 AmD 600; Walker's Est., 6 Pa. Co. 515.

[a] **An ordinary contract of lease of a farm** may be completed by the administrator of the lessee, or he may give up the contract and let the estate respond in damages, at his election; but if the lease is valuable, he should realize on it. Walker's Est., 6 Pa. Co. 515.

45. Smith v. Wilmington Coal Min., etc., Co., 83 Ill. 498 (under the statute all contracts made by a decedent may be performed by his executor or administrator, when so directed by an order of the court).

46. Ill.—Smith v. Wilmington Coal Min., etc., Co., 83 Ill. 498.

Ky.—Roach v. Ames, 80 Ky. 6.

N. J.—Meeker v. Vanderveer, 15 N. J. L. 392.

N. Y.—Matter of Benedict, 13 Abb NCas 67, sub nom. Gilman v. Wilber, 1 Dem. Surr. 547.

Pa.—Getz's Est., 12 Phila. 143.

Tenn.—Harris v. Nashville Trust Co., 5 Tenn. Civ. A. 678 [cit Cyc].

Wis.—Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

[a] **Keeping up price of stock.**— Where a decline in the market price of the stock of a corporation in which testator was a stockholder, and on which stock he had borrowed large sums of money, would be injurious to the estate, the executors were entitled to credit on their account for money used in keeping up the market price under a contract of testator with another person to keep the price up in their joint interest, where such other person performed the agreement on his part. Matter of Corbin, 101 App. Div. 25, 91 NYS 797.

47. Browne v. Bixby, 190 Mass. 69, 76 NE 454, 5 AnnCas 642.

[a] **Illustration.** — Where a wife signed as surety a note of her husband given to secure his debt, together with a mortgage on her real estate as security for the note, her administrator was entitled to maintain a suit against the husband's estate for exoneration of the wife's estate. Browne v. Bixby, 190 Mass. 69, 76 NE 454, 5 AnnCas 642.

48. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449; Maryland Fidelity, etc., Co. v. Mosher, 151 Fed. 806; Smith v. Harvey, 13 Fed. 16; Gum v. Frost, 4 Fed. 745.

Ala.—Pearce v. Pearce, 74 S 952; Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 S 258; Griffin v. Bland, 43 Ala. 542; Steel v. Knox, 10 Ala. 608.

Ark.—Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 SW 505.

Cal.—In re De Rome, 175 Cal. 399, 165 P 919; In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; Tompkins v. Weeks, 26 Cal. 50.

Colo.—Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717; Fleming v. Kelly, 18 Colo. A. 23, 69 P 272.

Conn.—Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

Ill.—Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300; Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [rev 138 Ill. A. 361]; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108]; Field v. Colton, 7 Ill. A. 379.

Kan.—Campbell v. Faxon, 73 Kan. 675, 85 P 760, 5 LRANS 1002 [quot Cyc].

La.—Hawkins' Succ., 139 La. 228, 71 S 492; Sparrow's Succ., 39 La. Ann. 696, 2 S 501; Florsheim v. Holt, 32 La. Ann. 133.

Md.—Willinger v. German Bank, 132 Md. 237, 103 A 433.

Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.

Mich.—Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420 [quot Cyc]; Alexander v. Herring, 99 Miss. 427, 55 S 360.

Mo.—Silsby v. Wickersham, 171 Mo. A. 128, 155 SW 1094.

N. J.—Shipman v. Lord, 58 N. J. Eq. 380, 44 A 215 [aff 60 N. J. Eq. 484, 46 A 1101].

N. Y.—Stedman v. Feidler, 20 N. Y. 437; Matter of Popp, 123 App. Div. 2, 107 NYS 277; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Matter of McCullum, 80 App. Div. 362, 80 NYS 755; Matter of Archer, 77 Misc. 288, 137 NYS 770.

Oh.—Lucht v. Behrens, 28 Oh. St. 231, 22 AmR 378; Rembold v. White, 28 Oh. Cir. Ct. 427.

Okl.—Western Newspaper Union v. Thurmond, 27 Okl. 261, 111 P 204, AnnCas1912B 727 [quot Cyc].

Or.—In re Marks, 66 Or. 340, 133 P 777; In re Osburn, 36 Or. 8, 58 P 521.

Pa.—In re Moran, 261 Pa. 269, 104 A 585; Hibbard v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Corr's Est., 8 Pa. Dist. 209; In re Dillenkofer, 34 PittsbLegJNS 303, 17 York LegRec 177; Kaibfell's Est., 27 Pittsb LegJNS 280.

S. D.—Martin Bros. Co. v. Peterson, 38 S. D. 494, 162 NW 154.

that it can be used to better advantage in that way.[49] So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits which he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or at their election take all the profits which the representative has made by such unauthorized use of the funds of the estate.[50] And this rule has been carried out to the extent of holding executors who carried on the business of testator, and, without an order of court, sold goods on time without security, responsible for a loss therefrom, although the total profits from their sales exceeded the losses on such unsecured debts.[51] Beneficiaries under a will are also entitled to offset their claim to a fair rental value of premises connected with a business continued by the executor without authority against payments made by him for the benefit of the estate by continuing the business.[52]

The accountability of the representative with respect to profits extends only to the actual net profits made during the period in which he carried on the business,[53] and it has been held that in esti-

Wash.—In re Ennis, 96 Wash. 352, 165 P 119.

W. Va.—Hooper v. Hooper, 29 W. Va. 276, 1 SE 280.

Eng.—Collison v. Lister, 20 Beav. 356, 52 Reprint 639; Kirkman v. Booth, 11 Beav. 273, 50 Reprint 821, 12 ERC 29; Barker v. Parker, 1 T. R. 287, 99 Reprint 1098.

Sask.—In re Caswell, 5 Sask. L. 213.

[a] **Necessity for testamentary authority.**—It is "a rule without exception that, to authorize executors to carry on a trade, or to permit it to be carried on, with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose." Kirkman v. Booth, 11 Beav. 273, 50 Reprint 821, 12 ERC 29.

[b] **Agreement to continue business illegal.**—An agreement between administrators and others by which they are to continue the business of a decedent, who is indebted, not for the benefit of the estate or its creditors, but of others, is one to violate the law and to do an illegal act. Maryland Fidelity, etc., Co. v. Moshier, 151 Fed. 806.

[c] **Corporate business.** — Where testator had invested money in a corporation to the extent that he owned nearly all of its stock and bonds, and he conferred on his executors power to manage, control, invest, and reinvest the residuary estate and the income thereof, and sell or convey all or any part thereof, with or without covenants, in their discretion, they were not warranted in carrying on the corporate business, especially in view of a codicil commanding them to incur no debts except in liquidation of debts outstanding at testator's decease. Matter of Corbin, 101 App. Div. 25, 91 NYS 797.

[d] **Decedent's parol direction** that his son carry on his business, and that, on settlement of the estate, the son be paid one thousand dollars over and above his distributive share, was not a legally sufficient justification for the personal representative to continue the business under the son's management for the benefit of the family or estate. In re Ennis, 96 Wash. 352, 165 P 119.

49. Ala.—Steele v. Knox, 10 Ala. 608.

Conn.—Hallock v. Smith, 50 Conn. 127.

La.—Sparrow's Succ., 39 La. Ann. 696, 2 S 501.

N. Y.—Matter of Archer, 77 Misc. 288, 137 NYS 770.

Pa.—Casner's Est., 2 Kulp 474.

[a] **Completing crops.** — (1) All the rules applicable to carrying on a trade by a personal representative apply with full force to the continuance of a plantation, and it is not ordinarily the duty of the personal representative to carry on a farm or plantation. Steele v. Knox, 10 Ala. 608; Hallock v. Smith, 50 Conn. 127; Sparrow's Succ., 39 La. Ann. 696, 2 S 501. (2) An administrator should sell immature crops on the ground, and not continue the farming. Casner's Est., 2 Kulp (Pa.) 474. (3) But on the other hand it has been held that an executor was entitled to be reimbursed for expenses incurred in carrying on the plantation, where he acted with the knowledge of the creditors and legatees. Wederstrandt's Succ., 19 La. Ann. 494.

50. U. S.—Nivens v. Nivens, 133 Fed. 39, 66 CCA 145 [rev on other grounds 4 Ind. T. 574, 76 SW 114, 4 Ind. T. 30, 64 SW 604].

Ala.—McAllister v. McAllister, 37 Ala. 484; McCreeliss v. Hinkle, 17 Ala. 459; Steele v. Knox, 10 Ala. 608.

Ark.—Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 SW 505.

Cal.—In re Smith, 118 Cal. 462, 50 P 701; Rose's Est., 80 Cal. 166, 22 P 86.

Colo.—Fleming v. Kelly, 18 Colo. A. 23, 69 P 272.

Conn.—Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

Ga.—Poullian v. Brown, 82 Ga. 412, 9 SE 1131.

Ill.—Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [rev 138 Ill. A. 361]; Roberts v. Weimer, 227 Ill. 138, 81 NE 40; Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108.

La.—Hawkins' Succ., 139 La. 228, 71 S 492.

Me.—Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314 [cit Cyc].

Mass.—Hines v. Levers, 226 Mass. 214, 115 NE 252.

Mich.—Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420 [quot Cyc]; French v. Davis, 38 Miss. 167.

N. J.—Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994; Merchant v. Comback, 41 N. J. Eq. 349, 7 A 633.

N. Y.—Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem]; In re Suess, 37 Misc. 459, 75 NYS 938; Matter of Munzor, 4 Misc. 374, 25 NYS 818; In re McGovern, 118 NYS 378.

Okl.—Western Newspaper Union v. Thurmond, 26 Okl. 261, 111 P 204, AnnCas1912B 727 [quot Cyc].

Pa.—In re Moran, 261 Pa. 269, 104 A 585; In re Allam, 199 Pa. 573, 49 A 252; Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656; Robinett's App., 36 Pa. 174; Flannigan's Est., 28 Pa. Super. 487; Greiner's Est., 14 Pa. Dist. 348; Matter of Wood, 1 Ashm. 314; In re Dillenkofer, 34 PittsbLegJNS 303, 17 YorkLegRec 177.

Eng.—Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322.

[a] **Where assets of decedent were embarked in a stock speculation** and the representative by carrying the account realized at length a profit, such profit belongs to the estate. Breckenridge's App., 127 Pa. 81, 17 A 874.

[b] **Where an administrator continues the farming,** instead of selling the immature crops on the land, the burden is on him to show that the estate was benefited by his management. Casner's Est., 2 Kulp (Pa.) 474.

[c] **An additional expense in settling the accounts** of an executor or administrator due to his improperly engaging the assets of the estate in business is in the nature of a loss with which he is chargeable. Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

[d] **Sale of business.**—Where a business continued without authority by an executor after testator's death, although mortgaged, had a substantial value when taken over by him, but was afterward sold by him for a nominal price, the executor would be chargeable for any future claim on the mortgage debt if the purchaser did not assume it. Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

[e] **Election by heirs.**—When an executor continues the testator's business without authority the heirs may elect to take the profits, if any, or they may insist on a return of the capital and interest. Steele v. Knox, 10 Ala. 608; McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498]; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322.

[f] **Extent of liability under special circumstances.**—Complainant, the oldest of nine children, was under age at his father's death. He conducted his father's business, that of an undertaker, for the benefit of the family. After he attained his majority, his mother who was sole acting executrix agreed with him that the profits of the business remaining after the support and maintenance of herself and the infant children should belong to the complainant in payment for his services. When the mother died in 1900 complainant was made administrator de bonis non of his father's estate. The youngest child was then eight years old. The complainant continued to support the minor children. It was held that he was not chargeable as administrator with the profits of the business during the minority of his brothers and sisters, and that the business became his at the termination of that period from the necessity of the case, especially in view of the statute prohibiting the conduct of the business of undertaking by any unlicensed person, but that he was chargeable with the value of the tangible assets of the estate used in the business. Mullin v. Mullin, 85 N. J. Eq. 531, 96 A 996.

[g] **Where the executor permits an heir to carry on** the business conducted by decedent, the rule is the same. Martin Bros. Co. v. Peterson, 38 S. D. 494, 162 NW 154.

51. Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

52. Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

53. Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem]; In re Suess, 37 Misc. 459, 75 NYS 938.

[a] **Expenses paid by the representative** for salaries, etc., cannot be reviewed by the surrogate on an ac-

mating the net profits only profits resulting from the employment of testator's estate should be considered, making allowance for the business skill and credit of the executor in conducting the business.[54] But as the representative cannot deal with the property to his own advantage, he is not entitled to a salary for his own services to be deducted from the gross receipts.[55]

Speculative accounts of the decedent should be settled by the personal representative in a reasonable time,[56] and the latter is not excused from liability by the fact that he acted in good faith and with ordinary prudence in carrying the account.[57]

[§ 475] **2. Limitations of Rule—a. In General.** Good discretion may require some latitude in closing out decedent's business, and this a probate court will duly consider when passing upon the representative's accounts,[58] and statutes are sometimes found authorizing an executor or administrator to carry on the business if it is not necessary that it should be sold at once for the payment of debts.[59] Thus the personal representative may be justified in continuing the business so far as is necessary for the purpose of winding up the same and converting the assets into money[60] or carrying out existing contracts of decedent.[61] So also in agricultural states a temporary management of a plantation by the personal representative of the deceased owner, under judicial supervision for the benefit of all concerned, is sometimes permitted,[62] in order that crops commenced by decedent may be completed for the benefit of the estate;[63] and a personal representative who finds a

counting. Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem].

54. Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

55. Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem].

56. Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017 (in this case the administrator carried in the name of the estate speculative stock accounts on margin, as they had been carried by the intestate, except that no stocks were purchased. The administrator advanced no money either for margin or interest, but whatever the brokers required was obtained by sales or transfers of stock. For about six months after his appointment the stocks had a current market value that varied but little, and with reasonable effort he could have sold the same at any time during that period with advantage to the estate, but with the consent of the heirs he held them for better prices or for distribution. It was held that the administrator failed to settle the accounts within a reasonable time, as he was required to do).

57. Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

58. Cal.—In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407.

Conn.—Martin v. New York, etc., R. Co., 62 Conn. 331, 25 A 239.

Ga.—Lawton v. Fish, 51 Ga. 647.

Mass.—Smith v. Faulkner, 12 Gray 251.

Miss.—Tell City Furniture Co. v. Stiles, 60 Miss. 849.

Mo.—Merritt v. Merritt, 62 Mo. 150.

N. J.—Laible v. Ferry, 32 N. J. Eq. 791 [rev 31 N. J. Eq. 566].

N. Y.—Brennan v. Lane, 4 Dem. Surr. 322; Gilman v. Wilber, 1 Dem. Surr. 547.

Pa.—Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656; Clayton's Est., 20 Pa. Dist. 407; Orne's Est., 7 Pa. Dist. 337; Clayton's Est., 38 Pa. Co. 577.

Wash.—In re Ennis, 96 Wash. 352, 165 P 119 [quot Cyc].

Eng.—Garrett v. Noble, 6 Sim. 504, 9 EngCh 504, 58 Reprint 683.

Alta.—Wright v. Beatty, 2 Alta. L. 89.

59. Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 SW 6 [rev (Civ. A.) 79 SW 582]; Altgelt v. Oliver, (Civ. A.) 86 SW 28.

[a] **Nature of business.**—A statute authorizing the executor to carry on the "plantation, manufactory, or business" of the testator includes a mercantile business. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

[b] **Partnership business.** — (1) The statute confers no authority on the personal representative of a deceased partner to carry on the partnership business or administer the partnership estate. The business must be such as employs property which is a part of the estate to be administered by the executor or administrator, whereas a partnership estate, on the death of one of the partners, is to be administered by the survivor or survivors. Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 SW 6 [rev (Civ. A.) 79 SW 582]. (2) But if at the time of his death the testator had become the sole owner of the business in which he had formerly been a partner only, the statute confers authority to continue it. Altgelt v. Sullivan, (Tex. Civ. A.) 79 SW 333.

[c] **Lien on stock.**—While the representative is authorized to use the live stock on the estate in the business, such a statute cannot be construed as postponing the enforcement of a line upon such stock held by a creditor. Stafford v. Dunovant, (Tex. Civ. A.) 81 SW 65.

60. Ala.—Harding v. Evans, 3 Port. 221, 29 AmD 255.

Cal.—In re Fernandez, 119 Cal. 579, 51 P 851.

Colo.—Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717.

Hawaii.—Matter of Vida, 1 Hawaii 152.

La.—Wiemar.n's Succ., 112 La. 293, 36 S 354.

Mich.—Gaskill v. Weeks, 154 Mich. 223, 117 NW 647.

N. Y.—Matter of McCollum, 80 App. Div. 362, 80 NYS 755; Matter of Kenpf, 53 Misc. 200, 104 NYS 585 [mod on other grounds 123 App. Div. 2, 107 NYS 277]; Matter of Sharp, 5 Dem. Surr. 516; Matter of Benedict, 13 AbbNCas 67, sub nom. Gilman v. Wilber, 1 Dem. Surr. 547.

Pa.—In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; Greiner's Est., 14 Pa. Dist. 348; Bowker's Est., 12 Phila. 88.

S. C.—McKee v. Mobley, 3 S. C. 242.

Va.—Newton v. Poole, 12 Leigh (39 Va.) 112.

Wash.—In re Ennis, 96 Wash. 352, 165 P 119 [quot Cyc].

Eng.—Collinson v. Lister, 20 Beav. 356, 52 Reprint 639; Marshall v. Broadhurst, 1 Cromp. & J. 403, 148 Reprint 1480; Edwards v. Grace, 2 M. & W. 190, 150 Reprint 723; Dakin v. Cope, 2 Russ. 170, 3 EngCh 170, 38 Reprint 299; Garrett v. Noble, 6 Sim. 504; 9 EngCh 505, 58 Reprint 683.

Alta.—Wright v. Beatty, 2 Alta. L. 89.

Ont.—Re Brain, 9 Ont. L. 1, 4 Ont WR 263.

[a] **Sale of goods at retail.**—It may be prudent and advantageous to the estate to sell out a stock of goods at retail, keeping up the store and a clerk, instead of making a forced sale. Cornwell v. Deck, 2 Redf. Surr. (N. Y.) 87 [aff 8 Hun 122]; Bowker's Est., 12 Phila. (Pa.) 88; McKee v. Mobley, 3 S. C. 242.

[b] **Completing manufacture of unfinished articles.**—The administrator of a manufacturer may complete the manufacture of articles left unfinished by the decedent at his death. Pitts v. Jameson, 15 Barb. (N. Y.) 310; Newton v. Poole, 12 Leigh (39 Va.) 112.

[c] **When continuance not incidental to winding up.**—The continuance of the business could not be regarded as merely incidental to the winding up, where the executor testified that he continued the business in accordance with the decedent's oral request that he should do so. Matter of McCollum, 80 App. Div. 362, 80 NYS 755.

61. Matter of Benedict, 13 AbbN Cas (N. Y.) 67, sub nom. Gilman v. Wilber, 1 Dem. Surr. 547; In re Allam, 199 Pa. 573, 49 A 252; In re Ennis, 96 Wash. 352, 165 P 119 [quot Cyc].

[a] **Winding up a school.**—Where decedent, who carried on a school, died in the middle of the school year for which contracts had been made with teachers and pupils, the executor was held not to be chargeable with the loss resulting from continuing the school until the close of the year. Matter of Benedict, 13 AbbN Cas. (N. Y.) 67, sub nom. Gilman v. Wilber, 1 Dem. Surr. 547.

Duty to complete contracts of decedent see supra § 472.

62. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Ga.—Stephens v. James, 77 Ga. 139, 3 SE 160.

La.—Myrick's Succ., 38 La. Ann. 611.

S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032; Patterson v. Jones, 99 S. C. 128, 82 SE 1008; Herbemont v. Percival, 26 S. C. L. 59; Huson v. Wallace, 18 S. C. Eq. 1.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Tex.—Reinstein v. Smith, 65 Tex. 247.

[a] **Incurring indebtedness.**—Executors authorized to carry on a plantation have power to incur indebtedness for supplies for the tenants to enable them to make crops. Primm v. Mensing, 14 Tex. Civ. A. 395, 38 SW 382 [foll Reinstein v. Smith, 65 Tex. 247].

[b] **Method of settlement with croppers.**—Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

63. Tayloe v. Bush, 75 Ala. 432; Loeb v. Richardson, 74 Ala. 311; Lawton v. Fish, 51 Ga. 647; Farley v. Hord, 45 Miss. 96; Percival v. Herbemont, 26 S. C. L. 59.

[a] **Loss of crops.**—An administrator is entitled to credit for his expenses in the performance of his duty to complete such crops, although the crops were destroyed by natural causes, so that the expenditures actually exceeded the proceeds. Tayloe v. Bush, 75 Ala. 432.

[b] **Acting without leave of court.**—Credit was properly allowed for money lost in running a plantation for the balance of the year, where decedent died in February, after he had employed hands and made all necessary arrangements, although the executor acted without an order from the court of ordinary. Lawton v. Fish, 51 Ga. 647.

commodity on hand may lawfully, acting in good faith, put it in a condition in which it is usual to sell it, or in which under the circumstances it can best be sold.[64] The rule is also subject to some limitations where the executor is also the residuary legatee[65] or the business has been specifically bequeathed to him;[66] and the consent of all persons interested may authorize the personal representative to carry on the business in good faith so as fairly to be allowed for all assets so consumed.[67]

[§ 476] **b. Authority from Court.** While it has been held that the court of probate jurisdiction has no inherent authority to order the personal representative to continue decedent's business,[68] it is sometimes provided by statute that the probate court may authorize the personal representative, when good cause therefor is shown, to carry on such business for a limited time.[69] As incidental to such authority, a personal representative may employ the ordinary means which are necessary and proper to effectuate the express power,[70] but he has no authority to keep up the family establishment and support the family at the expense of the estate.[71] An order made on the consent of all the heirs authorizing the administrator to sell a stock of goods at private sale does not authorize the continuance of decedent's business to the extent of replenishing the stock of goods on hand.[72]

[§ 477] **c. Testamentary Directions.** Where authority to carry on decedent's business is plainly[73] conferred upon by an executor by the

64. Ark.—McLeod v. Griffis, 45 Ark. 505.

Cal.—In re Fernandez, 119 Cal. 579, 51 P 851.

Colo.—Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717.

N. C.—Whitney v. Alexander, 73 N. C. 444.

Wis.—Beggs Co. v. Behrend, 156 Wis. 34, 145 NW 207.

[a] **Caring for live stock.**—The expense of caring for live stock in a good and businesslike manner until they can be advantageously sold is not such a carrying on of the business as will render the administrator liable for loss and expense to the estate incurred on account thereof. In re Fernandez, 119 Cal. 579, 51 P 851.

[b] **The representative may purchase merchandise** (1) which is necessary to make the property more salable. Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717 (in such case the seller of merchandise may present the indebtedness so incurred to the estate as a claim of the second class, incurred in the settlement of the estate, but where the court only ordered the administrator of a decedent, engaged in mercantile business, to continue the business and replenish the stock so as to make it more salable, the administrator was not authorized to borrow money on notes in an amount greater than the inventory value of the stock, for the purpose of continuing the business, and a claim for money so loaned could not be asserted against the estate). (2) Where the administratrix, in order to continue a drug business, bought a bill of goods, which were necessary for the preservation of the estate, she was entitled on her final settlement to reimbursement from the estate for the amount thereof. Beggs Co. v. Behrend, 156 Wis. 34, 145 NW 207.

65. In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683]; In re Ennis, 96 Wash. 352, 165 P 119 [quot Cyc].

[a] **Illustration.**—Where an executor who is also residuary legatee, after having paid all claims under the will and all claims presented in usual course, pursuant to notice, applies to his own use the assets remaining, he can be held accountable only for the actual value of such assets, and cannot be charged with the profits of a business into which he put such assets. In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683].

[b] **Expending estate moneys on improvements.**—Where an executor was made a residuary legatee after the payment of all legacies and the death of testator's widow, and was given a power to sell the real estate, but no authority to continue a mill business in which testator was interested, he had no right to expend money of the estate in permanent improvements on the mill, and was properly charged in his accounting with the amount of those expenditures. Matter of Tisdale, 110 App. Div. 857, 97 NYS 494.

66. Matter of Van Houten, 18 App. Div. 301, 46 NYS 190 (where such an executor takes possession thereof and conducts the business as his own, he will, on the assets proving insufficient to pay the testator's debts, be charged only with the value of the property as appraised and the goodwill of the business and not with the profits of the business conducted by him).

67. Conn.—Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

Ga.—Daniel v. West Point Bank, 147 Ga. 695, 95 SE 255.

La.—Arnemann's Succ., 123 La. 430, 49 S 10.

Mass.—Poole v. Munday, 103 Mass. 174.

Mich.—Swaine v. Hemphill, 165 Mich. 561, 131 NW 68, 40 LRANS 201 [cit Cyc].

Miss.—French v. Davis, 38 Miss. 167.

Pa.—In re Whitman, 195 Pa. 144, 45 A 673; In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; Fitzgerald's Est., 26 Pa. Dist. 796; Hibbard v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287]; Smith's Est., 30 PittsbLeg JNS 188.

Wash.—In re Ennis, 96 Wash. 352, 165 P 119 [quot Cyc].

Eng.—Dowse v. Gorton, [1891] A. C. 190; In re Brooke, [1894] 2 Ch. 600; In re Hodges, [1899] 1 Ir. 480.

Alta.—Wright v. Beatty, 2 Alta. L. 89.

[a] **Evidence insufficient to show consent.**—Skelley v. Skelley, 88 Vt. 254, 92 A 234.

[b] **Minor heirs or distributees** cannot give a consent which will protect the representative. Weimann v. Mainegra, 112 La. 305, 36 S 358; Weimann's Succ., 112 La. 293, 36 S 354; Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

[c] **On the other hand** in a case where, immediately after decedent's death, his relatives determined that his sister should become administratrix and should continue decedent's saloon business, and after four months she was appointed administratrix, she was held responsible to the estate for all losses incurred in continuing the business either before or after the letters issued and was chargeable with the assets of the business left by the decedent. In re McGovern, 118 NYS 378.

68. Alexander v. Herring, 99 Miss. 427, 55 S 360; In re Marks, 60 Or. 340, 133 P 777; Jones' Est., 23 Pa. Co. 513; Re Brain, 9 Ont. L. 1, 2, 4 OntWR 263.

"In the absence of any provision authorizing the carrying on of the testator's business by his personal representatives no order can be made sanctioning that course." Re Brain, supra.

[a] **If the heirs or devisees wish to carry on such business** they should first have the estate closed and take over the business individually. In re Marks, 60 Or. 340, 133 P 777.

[b] **Where creditors opposed.**—The court has no jurisdiction to authorize the continuation of the business of a decedent by his personal representative, where a majority of the creditors of the estate in interest and amount are opposed thereto. Jones' Est., 23 Pa. Co. 513.

[c] **Where there are infants interested,** the court has no jurisdiction to authorize an administrator to carry on the trade of the intestate in a suit for administration instituted by the beneficiaries. Land v. Land, 43 L. J. Ch. 311, 12 ERC 42.

[d] **Contrary view.**—The court has jurisdiction in an administration suit to direct a trade or business in which minors are interested to be continued, and will so direct if it is clearly for their benefit. Perry v. Perry, Ir. R. 3 Eq. 452.

69. Ala.—Hinson v. Williamson, 74 Ala. 180; Glenn v. Glenn, 41 Ala. 571; Harrison v. Harrison, 39 Ala. 489; Pickens v. Pickens, 35 Ala. 442; Stewart v. Stewart, 31 Ala. 207; Gerald v. Bunkley, 17 Ala. 170; Craig v. McGehee, 16 Ala. 41; Steele v. Knox, 10 Ala. 608.

Ga.—Poullain v. Brown, 82 Ga. 412, 9 SE 1131; Stephens v. James, 77 Ga. 139, 3 SE 160.

Ill.—Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300.

S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032.

Tex.—Reinstein v. Smith, 65 Tex. 247; McMahan v. Harbert, 35 Tex. 451; Altgelt v. Oliver, (Civ. A.) 86 SW 28; McMillan v. Hendricks, (Civ. A.) 46 SW 859; Rice v. Conwill, 35 Tex. Civ. A. 341, 80 SW 393.

Wash.—In re Ennis, 96 Wash. 352, 165 P 119.

[a] **Construction of order.**—An order authorizing an executrix to conduct decedent's retail business for sixty days is not extended by a subsequent order directing the executrix to "proceed to sell that part of personal property consisting of merchandise." Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300.

70. Loeb v. Richardson, 74 Ala. 311; Hinson v. Williamson, 74 Ala. 180; Altgelt v. Oliver, (Tex. Civ. A.) 86 SW 28.

71. Hinson v. Williamson, 74 Ala. 180.

72. In re Ennis, 96 Wash. 352, 165 P 119.

73. Pearce v. Pearce, (Ala.) 74 S 952; Kirkman v. Booth, 11 Beav. 273, 50 Reprint 821, 12 ERC 29.

[a] **General authority to sell or to exchange lands** or to sell any

will,[74] he may lawfully exercise the power so conferred,[75] although perhaps less as an executor than as one specially empowered and so honored or burdened by his testator's personal confidence;[76] and executors who have carried on a testator's business in obedience to the direction of the will, and have acted in good faith and with ordinary prudence in conducting the same, are not accountable for losses.[77]

[§ 478] **3. Liability for Debts—a. Where Continuance of Business Authorized—(1) In General.** While it has been laid down in some cases that, where the personal representative is authorized to carry on the business, the debts incurred in so doing are chargeable against the estate and not against the representative individually,[78] the more

property coming into his hands gives the executor no authority to carry on the business. Pearce v. Pearce, (Ala.) 74 S 952.

[b] **A direction that the executor have ample time** to pay debts and wind up the estate before division and partition among the legatees confers no authority to continue the business. Altgelt v. Sullivan, (Tex. Civ. A.) 79 SW 333.

[c] **Suit for construction as to authority to continue business.**—Where executors have carried on the business for a considerable time, under a will authorizing them to settle up and dispose of it "as speedily as the same can be judicially done," a court of equity will not pass on the propriety of such a construction of the provision or direct as to future continuance. Tierney v. Tierney, (N. J.) 38 A 971.

74. See cases infra this note and note 75.

[a] **An oral request of a decedent** that his executors continue his business after his death does not confer on them authority to do so. Malone v. Kelly, 54 Ala. 532; Matter of McCollum, 80 App. Div. 362, 80 NYS 755; In re Ennis, 96 Wash. 352, 165 P 119.

[b] **A wish expressed by a testatrix** that her husband, whom the will appoints sole executor, shall continue the business, does not authorize him to carry it on in his representative capacity. Saperstein v. Ullman, 49 App. Div. 446, 63 NYS 626 [aff 168 N. Y. 636 mem, 61 NE 553 (reargden 168 N. Y. 678 mem, 61 NE 1134 mem)].

75. Ala.—Hollingsworth v. Hollingsworth, 65 Ala. 321.

Conn.—Hallock v. Smith, 50 Conn. 127.

Ga.—Wiggs v. Hendricks, 147 Ga. 444, 94 SE 556; Brannon v. Ober, etc., Co., 106 Ga. 168, 32 SE 16; Stephens v. James, 77 Ga. 139, 3 SE 160; Johnson v. Parnell, 60 Ga. 661.

Ill.—Moore v. McFall, 263 Ill. 596, 105 NE 723, AnnCas1915C 364 [aff 183 Ill. A. 628].

Iowa.—Roberts v. Hale, 124 Iowa 296, 99 NW 1075, 1 AnnCas 940.

Ky.—Crooke v. Hume, 109 SW 364, 33 KyL 162; Burgess v. Green, 7 Bush 263.

Md.—Bennett v. Rhodes, 58 Md. 78.

Mass.—Mason v. Pomeroy, 151 Mass. 164, 24 NE 202, 7 LRA 771.

Mich.—Packard v. Kingman, 109 Mich. 497, 67 NW 551.

Miss.—Gordon v. McDougall, 84 Miss. 715, 37 S 298, 5 LRANS 355.

Nebr.—In re Patrick, 100 NW 939.

N. J.—Wild v. Davenport, 48 N. J. L. 129, 7 A 295, 57 AmR 552.

N. Y.—Willis v. Sharp, 113 N. Y. 586, 21 NE 705, 4 LRA 493; Matter of Friedlander, 189 App. Div. 90, 178 NYS 50; Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [aff 192 N. Y. 566 mem, 85 NE 1110 mem]; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Matter of Fitter, 92 Misc. 706, 157 NYS 488; Matter of Hickey, 34 Misc. 360, 69 NYS 844; In re Rumsey, 18 NYS 402.

N. C.—Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

Pa.—Furst v. Armstrong, 202 Pa. 348, 51 A 996, 90 AmSR 653; Cline's App., 106 Pa. 617; Best's Est., 14 Pa. Dist. 307; Theis' Case, 6 Pa. Co. 396.

R. I.—Egan v. Wirth, 26 R. I. 363, 58 A 987.

S. C.—Brabham v. Crosland, 25 S. C. 525, 1 SE 33.

Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

Wash.—In re Ennis, 96 Wash. 352, 165 P 119; Nash v. Wakefield, 30 Wash. 556, 71 P 35.

W. Va.—Hooper v. Hooper, 29 W. Va. 276, 1 SE 280.

Eng.—Kirkman v. Booth, 11 Beav. 273, 50 Reprint 821, 12 ERC 29; Re Kidd, 70 L. T. Rep. N. S. 648.

Man.—Braun v. Braun, 14 Man. 346.

Ont.—Smith v. Smith, 13 Grant Ch. (U. C.) 81.

[a] **A testator may leave it to the judgment** (1) of his executors. In re Rumsey, 18 NYS 402. (2) And such discretion will not be interfered with by the court in the absence of misconduct, mismanagement, or improper motives. Noble's Est., 20 WklyNC (Pa.) 576.

[b] **Corporate business.** — Where one engaged in business as a member of a corporation, practically all the stock of which he owned, executed a will whereby he authorized his executor to carry on the business, with full power to exercise his judgment, and to sell all or any of the estate, and to do anything concerning the estate which the testator could do if living, the executor had power to manage the business and to borrow money if necessary, and to bind the estate as principal or surety therefor. Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264.

[c] **Limits of authority generally.**—When the will gives authority to the executor to carry on the business, his authority is limited by the terms of the will, and persons dealing with him are chargeable with notice of such limitation. Farrelly v. Schaettler, 121 App. Div. 678, 106 NYS 445; Allegheny First Nat. Bank's App., 4 Pa. Cas. 325, 7 A 207; Brabham v. Crosland, 25 S. C. 525, 1 SE 33.

[d] **Period of authority.** — (1) Where testatrix provided that his wife as executrix should conduct and continue testator's business until his youngest daughter arrived at the age of eighteen, at which time executrix was required to dispose of testator's assets and settle his estate, such provision was not operative as a trust for the continuance of the business; and hence after the daughter arrived at the age specified testatrix had no further right to continue to operate the business, or to pledge the assets thereof for that purpose. Crooke v. Hume, 109 SW 364, 33 KyL 162. (2) Where a will provided that testator's business might be continued for two years after his death, if it was conducted at a profit, and that at the end of that time, or sooner, if conducted at a loss, it should be closed, and the business was conducted at a profit for eighteen months after testator's death, and for a further six months at a loss so small that a substantial profit for the entire two years was shown, the executors should not be charged in their account with the loss of the six months, where it did not appear that the business was not stopped as soon as practicable after discovery of the loss. Matter of Moore, 69 Misc. 535, 127 NYS 884 [aff 145 App. Div. 938 mem, 130 NYS 1122 mem]. (3) A direction that the executors should continue publishing two newspapers for ten years and employ testator's sons in their management had no application to their rights after the estate was settled and the ten years expired. Haldeman v. Haldeman, 176 Ky. 635, 197 SW 376.

[e] **What property may be employed in business.**—Where a testator gave his estate in trust for his son, after payment of debts and testamentary expenses, and directed the executor to carry on some legitimate business for the benefit of the son, the executor was not authorized to employ the entire estate in continuing the executor's business, but only the residue after the payment of debts and testamentary expenses. Matter of Sharp, 5 Dem. Surr. (N. Y.) 516.

[f] **Executors are not absolved from liability to account** by a direction in the will to continue the testator's business. In re Jones, 103 N. Y. 621, 9 NE 493, 57 AmR 775 [aff 37 Hun 430 (aff 2 Dem. Surr. 602)].

[g] **Duty in connection with business.**—Where a will gave the executors power to continue testator's business on leased premises on which he had erected buildings, it was their duty to renew the lease, not only as an incident to the exercise of such power, but to retain the interest of the estate in the buildings. Matter of Fitter, 92 Misc. 706, 157 NYS 488.

76. See cases supra note 75.

77. Matter of Moore, 69 Misc. 535, 127 NYS 884; Boulle v. Tompkins, 5 Redf. Surr. (N. Y.) 472; In re Waddell, 196 Pa. 294, 46 A 304; In re Whitman, 195 Pa. 144, 45 A 673; Smith's Est., 30 PittsbLegJNS (Pa.) 188; Bowker's Est., 5 WklyNC (Pa.) 493; Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Eisenstadt Mfg. Co. v. Copeland, (Tex. Civ. A.) 149 SW 713.

78. Colo.—Fleming v. Kelly, 18 Colo. A. 23, 69 P 272.

Ky.—Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264.

La.—Miltenberger v. Taylor, 23 La. Ann. 188.

Pa.—Hibbard v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Reakirt v. Flanagan, 6 Pa. Dist. 402, 40 WklyNC 375. But see infra note 79.

S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032.

Tex.—McMillan v. Hendricks, (Civ. A.) 46 SW 859.

Alta.—Wright v. Beatty, 2 Alta. L. 89.

[a] **Liability of widow's share.**—Where the widow has not elected to take against the will, but has accepted profits accruing from the management of the estate by the executrix under power given in the will to carry on testator's business, her interest, declared by the will to be what she would be entitled to under the intestate laws, is subject to debts contracted by the executrix in carrying on the business. Furst v. Armstrong, 202 Pa. 348, 51 A 996, 90 AmSR 653.

[b] **Authority must be shown.**—The authority of the executor to carry on a plantation, furnish it with supplies, etc., must be shown, otherwise the estate is not liable for supplies furnished under his direction. Miltenberger v. Taylor, 23 La. Ann. 188.

[c] **Estoppel to object to payment of claims.**—Where testator directed that his sons should continue his business after the death of his wife, and one of his sons, who was sole executor, carried on the business with the acquiescence of the widow and testator's children, his legatees, and the widow received her living ex-

general rule is that even under such circumstances the representative is personally liable for all debts contracted in carrying on the business,[79] unless he exacts an agreement from the person with whom he deals to look to the funds of the estate exclusively,[80] although he has a right to be indemnified out of the estate.[81] In a proper case the creditors may be subrogated to the representative's right of indemnity,[82] and it has also been held that they may maintain a suit in equity to charge the estate where the executor is insolvent.[83] Where executors under the will of a testator, who had been conducting a mercantile and manufacturing business on borrowed capital, not being authorized by the will to carry on the business, but carrying it on by agreement of all parties interested for the purpose of preserving the business as a going concern, in good faith borrowed money from the mother of one of the executors to use in the business, the son under authority from the other executors signing the note in the name under which the testator conducted the business by himself "as executor," and the money was used in discharging debts of the business and later the executors sold the business to a purchaser who agreed to assume and pay all debts incurred by the executors in carrying on the business, it was held that the lender could maintain a suit in equity to recover the amount of the loan from the purchaser.[84]

[§ 479] **(2) What Assets Liable.** Where the representative is authorized to carry on the business, only such assets of the estate as are invested in the business at the time of decedent's death can be considered as trade assets, and in the absence of some clear authority in the will the other property of the estate cannot be subjected to the risks of trade, or be made liable for debts contracted by the representative in carrying on the

penses from the profits of the business, neither she nor the children could object to payment of claims of creditors based on transactions with the executor while continuing the business. In re Levi, 224 Pa. 233, 73 A 334.

79. U. S.—In re Neasmith, 147 Fed. 160, 77 CCA 402.

Ala.—Foxworth v. White, 72 Ala. 224; Wade v. Pope, 44 Ala. 690; Colvin v. Owens, 22 Ala. 782.

Cal.—In re De Rome, 175 Cal. 399, 165 P 919; Rose's Est., 80 Cal. 166, 22 P 86.

Conn.—Taylor v. Mygatt, 26 Conn. 184.

Ga.—Stephens v. James, 77 Ga. 139, 3 SE 160; McFarlin v. Stinson, 56 Ga. 396.

Ill.—Miller v. Didishiem, 95 Ill. A. 321 [quot Smith v. Williams, 178 Ill. 420, 53 NE 358].

Kan.—Campbell v. Faxon, 73 Kan. 675, 85 P 760, 5 LRANS 1002.

Me.—Davis v. French, 20 Me. 21, 37 AmD 36.

Mass.—Howe v. Richardson, 186 Mass. 259, 71 NE 543; Sumner v. Williams, 8 Mass. 162, 5 AmD 83.

Miss.—Clopton v. Gholson, 53 Miss. 466.

Mo.—Exchange Bank v. Tracy, 77 Mo. 594; Silsby v. Wickersham, 171 Mo. A. 128, 155 SW 1094; Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Yeakle v. Priest, 61 Mo. A. 47.

N. J.—Wild v. Davenport, 48 N. J. L. 129, 57 AmR 552; Laible v. Ferry, 32 N. J. Eq. 791; Krueger v. Ferry, 3 N. J. L. J. 280.

N. Y.—Willis v. Sharp, 113 N. Y. 586, 21 NE 705, 4 LRA 493 [aff 43 Hun 434]; Delaware, etc., R. Co. v. Gilbert, 112 N. Y. 673, 20 NE 416; Austin v. Munroe, 47 N. Y. 360; Stedman v. Feidler, 20 N. Y. 437; Farrelly v. Schaettler, 121 App. Div. 678, 106 NYS 445; Matter of Haniman, 50 Misc. 245, 100 NYS 481; Blum v. Dabritz, 39 Misc. 800, 81 NYS 315 [aff 78 NYS 207]; Matter of Munzor, 4 Misc. 374, 25 NYS 818; Kenyon v. Olney, 15 NYS 416; Boulle v. Tompkins, 5 Redf. Surr. 472.

N. C.—McKay v. Royal, 52 N. C. 426.

Pa.—Corr's Est., 8 Pa. Dist. 209; Fleming v. Fleming, 33 PittsbLeg JNS 25; Kalbfell's Est., 27 PittsbLeg JNS 280. But see supra note 78.

Tenn.—Morrow v. Morrow, 2 Tenn. Ch. 549.

Vt.—Lovell v. Field, 5 Vt. 218.

Va.—Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653.

Eng.—Abbott v. Parfitt, L. R. 6 Q. B. 346; In re Morgan, 18 Ch. D. 93; In re Johnson, 15 Ch. D. 548; Owen v. Delamere, L. R. 15 Eq. 134; Fairland v. Percy, L. R. 3 P. & D. 217; Lucas v. Williams, 3 Giffard 150, 66 Reprint 361; Re Kidd, 70 L. T. Rep. N. S. 648; Lumsden v. Buchanan, 4 Macq. 950; Labouchere v. Tupper, 11 Moore P. C. 198, 14 Reprint 670; Wightman v. Townroe, 1 M. & S. 412, 105 Reprint 154; Barker v. Parker, 1 T. R. 287, 99 Reprint 1098; Ex p. Garland, 10 Ves. Jr. 110, 32 Reprint 786.

Man.—Braun v. Braun, 14 Man. 346.

[a] **Fraudulent misrepresentations.**—A claim that an executor, carrying on the business under the will, made fraudulent representations as to the value of the estate to obtain credit gives no right of action against the estate, but only against the executor personally. Matter of Hickey, 34 Misc. 360, 69 NYS 844. Torts of representative generally see infra § 592.

[b] **Use of profits.**—An executor who carries on business under authority of a will, and uses the profits in payment of rightful charges, is not individually liable to a creditor of the business for misappropriation. Eisenstadt Mfg. Co. v. Copeland, (Civ. A.) 149 SW 713.

[c] **Liability of coexecutors.**—In an action against executors for the price of goods sold, where the jury found that the son of decedent, one of the executors, or some of the heirs, notified plaintiff after the testator's death that the business would be conducted by them, and that the son alone managed the estate by authority of the will, and that the business was closed out, and that the profits went to the support of the testator's children, the other executors who did not participate in the conduct of such business were not individually liable for any debt not incurred by the testator. Eisenstadt Mfg. Co. v. Copeland, (Civ. A.) 149 SW 713.

[d] **Debts contracted by decedent's partner.**—Executors of a deceased partner who permit the surviving partners to carry on the business do not thereby become liable as copartners as to transactions after the testator's death. Richter v. Poppenhausen, 42 N. Y. 373, 9 AbbPrNS 263 [aff 57 Barb. 309, 39 HowPr 82].

80. Miller v. Didshiem, 95 Ill. A. 321.

81. Ala.—Foxworth v. White, 72 Ala. 224.

Ga.—Poullain v. Brown, 82 Ga. 412, 9 SE 1131.

N. J.—Laible v. Ferry, 32 N. J. Eq. 791.

N. Y.—Matter of Jones, 103 N. Y. 621, 9 NE 493, 57 AmR 775.

Pa.—In re Moran, 261 Pa. 269, 104 A 585.

Tex.—Altgelt v. Oliver, (Civ. A.) 86 SW 28; McMillan v. Hendricks, (Civ. A.) 46 SW 859.

Eng.—Dowse v. Gorton, [1891] A. C. 190 [foll In re Brooke, [1894] 2 Ch. 600]; In re Johnson, 15 Ch. D. 548.

See also cases supra note 79.

[a] **The right to indemnity is subject to all equities** (1) between the executors and the estate, and therefore if the executor makes default he must, before he can claim his indemnity, make good his default to the estate. In re Evans, 34 Ch. D. 597; Strickland v. Symons, 22 Ch. D. 666, 26 Ch. D. 245; In re Johnson, 15 Ch. D. 548. (2) But in order to deprive an executor of his indemnity there must be a default in the payment of money, and not merely a default in the rendering of accounts. Re Kidd, 70 L. T. Rep. N. S. 648.

82. M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co., 72 Mo. A. 514; In re Frith, [1902] 1 Ch. 342; In re Johnson, 15 Ch. D. 548; Re Shorey, 79 L. T. Rep. N. S. 349; Re Kidd, 70 L. T. Rep. N. S. 648; Wright v. Beatty, 2 Alta. L. 89; Braun v. Braun, 14 Man. 346.

[a] **Where the executor is in default** to the specific trust estate devoted to the trade the rule does not apply. In such case, the defaulting executor not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good. In re Johnson, 15 Ch. D. 548.

[b] **The executor's inability to account** does not result in a loss of his right to indemnity from the estate for debts incurred in the business, and consequently creditors do not lose their right of claiming through that indemnity against the estate. Re Kidd, 70 L. T. Rep. N. S. 648.

83. Willis v. Sharp, 43 Hun 434 [aff 113 N. Y. 586, 21 NE 705, 4 LRA 493]; Wright v. Beatty, 2 Alta. L. 89.

[a] **Rights of decedent's creditors.**—Unless the creditors existing at the death of the decedent in some way consented to the carrying on of the business by the executor, they have the right to insist that the estate, as it existed at decedent's death, shall be used for the payment of their debts and the expenses of administration to the exclusion of debts subsequently created by the executor. But if the business was carried on by the executor with the consent of the original creditors, the creditors of the business must either share pro rata with the other creditors in the whole estate, which is probably the correct rule, or be first paid out of the portion of the estate used in the business. Willis v. Sharp, 115 N. Y. 396, 22 NE 149, 5 LRA 636 [rev 46 Hun 540].

84. Howe v. Richardson, 186 Mass. 259, 71 NE 543.

business,[85] although where adequate authority is given by the will, a representative may bind the general assets by a purchase of goods on credit for the business.[86] So where an executor is given "full power" to conduct the business in which testator was engaged, he may carry on all of testator's business interests, and in so doing is not limited to capital invested in the business.[87] Where heirs and general creditors consent to the continuance of the business, the estoppel resulting therefrom relates only to the liability of trade assets, and there is no estoppel to deny the liability of general assets for debts incurred in carrying on such business.[88] Bad debts and losses, and the expense of replacing old articles with new, are properly charged against the profits and not against the capital.[89]

[§ 480] **b. Where Continuance of Business Unauthorized.** Where an executor or administrator acts without authority in employing the assets of the estate in business, all debts contracted in the course of such business are the personal debts of the representative, and the creditor cannot hold the estate, nor can the representative look to the estate for reimbursement.[90] Where the business has been carried on without any authorization of law, heirs who joined therein, although acting in the best of faith, will be charged with knowledge of the want of capacity of the administrator, and cannot thereafter assert their claims for contributions of money or services, either against the general assets of the estate, in preference to the claims of original creditors, or against the assets thus embarked in the business, in the absence of a showing that the business was conducted at a profit and that the services rendered and the money advanced inured to the benefit of that part of the estate so embarked in the business.[91] But where an administrator continues the business in good faith, at a profit, a subsequent administrator de bonis non will not be permitted to deny the validity of claims presented by sons and heirs of the decedent on account of services rendered and money advanced in connection with the business, and which resulted in increasing that part of the estate.[92]

[§ 481] **c. Where Business Carried on by Legatee.** Where testator bequeathes his business to a third person, who carries it on for his own benefit, the executor is not personally liable on contracts made in the course of the business, in the absence

85. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.
Fla.—Wilson v. Fridenberg, 21 Fla. 386; Fridenburg v. Wilson, 20 Fla. 359.
Ill.—Moore v. McFall, 263 Ill. 596, 105 NE 723, AnnCas1915C 364 [aff 183 Ill. A. 628].
Iowa.—Roberts v. Hale, 124 Iowa 296, 99 NW 1075, 1 AnnCas 940.
Mass.—Mason v. Pomeroy, 151 Mass. 164, 24 NE 202, 7 LRA 771.
Mich.—Frey v. Eisenhardt, 116 Mich. 160, 774 NW 501; Packard v. Kingman, 109 Mich. 497, 67 NW 551.
Miss.—Brasfield v. French, 59 Miss. 632; Hardee v. Cheatham, 52 Miss. 41; Farley v. Hord, 45 Miss. 96; Hagan v. Barksdale, 44 Miss. 186.
Mo.—Merritt v. Merritt, 62 Mo. 150; M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co., 72 Mo. A. 514.
N. J.—Wild v. Davenport, 48 N. J. L. 129, 7 A 295, 57 AmR 552; Laible v. Ferry, 32 N. J. Eq. 791; Ferry v. Laible, 27 N. J. Eq. 146; Krueger v. Ferry, 3 N. J. L. J. 280.
N. Y.—Willis v. Sharp, 113 N. Y. 586, 21 NE 705, 4 LRA 493; Matter of Hickey, 34 Misc. 360, 69 NYS 844; Boulle v. Tompkins, 5 Redf. Surr. 472.
Oh.—Lucht v. Behrens, 28 Oh. St. 231, 22 AmR 378.
Pa.—In re Allam, 199 Pa. 573, 49 A 252; McArdle v. West Philadelphia Title, etc., Co., 7 Pa. Super. 328, 42 WklyNC 236.
Wash.—In re Ennis, 96 Wash. 352, 165 P 119, 122 [quot Cyc].
Eng.—Owen v. Delamere, L. R. 15 Eq. 134; McNeillie v. Acton, 4 De G. M. & G. 744, 53 EngCh 583, 43 Reprint 699; Ex p. Richardson, 3 Madd. 138, 56 Reprint 461; Thompson v. Andrews, 1 Myl. & K. 116, 7 Eng Ch. 116, 39 Reprint 625; Ex p. Garland, 10 Ves. Jr. 110, 32 Reprint 786.
Alta.—Wright v. Beatty, 2 Alta. L. 89.
Ont.—Lovell v. Gibson, 19 Grant Ch. (U. C.) 280; Smith v. Smith, 13 Grant Ch. (U. C.) 81.
"A testator may provide in his will for the establishment of a business or for the continuation of one already established, and may devote a part or the whole of his estate for the purpose of carrying on such business after his death. . . . That portion of the estate, whether all or a part, which is by the will devoted to such purpose will be liable for debts contracted in the prosecution of such business." Moore v. McFall, 263 Ill. 596, 600, 105 NE 723, AnnCas 1915C 364.
[a] **Where the will directed a limited sum,** beside the property actually employed in the business at the testator's death, to be paid by the executors for the purpose of carrying on his trade, the general assets beyond that fund were not liable. Ex p. Garland, 10 Ves. Jr. 110, 32 Reprint 786.
[b] **Whether the property "embarked in trade" is real or personal** can make no difference. The test is whether it was a part of the capital devoted by the testator to the prosecution of his business. If so, it is answerable for the debts incurred by the executor in continuing the enterprise in accordance with the directions of the will. Roberts v. Hale, 124 Iowa 296, 99 NW 1075, 1 AnnCas 940.
[c] **Money cannot be raised by pledging or mortgaging general assets.**—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.
[d] **Where the representative exceeds his powers** by carrying on the business, trade debts incurred after decedent's death can reach only trade assets. Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.
86. Burwell v. Cawood, 2 How. (U. S.) 560, 1 L. ed. 378 [quot with appr Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955]; Moore v. McFall, 263 Ill. 596, 105 NE 723, AnnCas1915C 364 [aff 183 Ill. A. 628]; Willis v. Sharp, 113 N. Y. 586, 21 NE 705, 4 LRA 493 [aff 43 Hun 434]; In re Cameron, 26 Ch. D. 19.
[a] **Power to mortgage property for purposes of business.**—Where a will directs that the business shall be carried on by the executor, the property, freehold or leasehold, which was used by the testator himself in the business may be mortgaged by the executor for the purpose of the business, but his power in this respect is limited to such property. In re Cameron, 26 Ch. D. 19; Travis v. Milne, 9 Hare 141, 41 EngCh 141, 68 Reprint 449; Devitt v. Kearney, L. R. 13 Ir. 45; Dimmock v. Dimmock, 52 L. T. Rep. N. S. 494.
[b] **"Nothing but the most clear and unambiguous language,** demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may all be recalled if the trade should become unsuccessful or ruinous." Burwell v. Cawood, 2 How. (U. S.) 560, 577, 11 L. ed. 378 [quot with appr Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955].
[c] **Direction not giving power to bind general assets.**—A direction in a will that executors should continue the testator's trade or business of a coal proprietor during his then present interest in the mines, and should not be responsible for any loss to his estate by carrying on the trade or business, unless such loss should happen by or through their willful neglect or default, did not authorize the employment in the trade of more of the testator's property than was employed in it at his decease. McNeillie v. Acton, 4 De G. M. & G. 744, 53 EngCh 583, 43 Reprint 699.
87. Furst v. Armstrong, 202 Pa. 348, 356, 51 A 996, 90 AmSR 653 ("The testator conferred the power to carry on the business and that implied, in the absence of anything in the will to the contrary, the right to appropriate sufficient assets of the estate to accomplish the object").
88. In re Ennis, 96 Wash. 352, 165 P 119.
89. In re Jones, 37 Hun 430 [aff 103 N. Y. 621, 9 NE 493, 57 AmR 775].
90. Kan.—Campbell v. Faxon, 73 Kan. 675, 85 P 760, 5 LRANS 1002.
La.—Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 S 48.
Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.
Pa.—In re Moran, 261 Pa. 269, 104 A 585; Corr's Est., 8 Pa. Dist. 209.
Wash.—In re Ennis, 96 Wash. 352, 165 P 119.
[a] **Partnership business.**—An executor who is also the son of the testator cannot be held personally liable as a partner in a banking business in which the testator was a partner, merely because he permits, as executor, the testator's capital to remain in the business, and permits credits to be entered in his passbook as executor for a share of the profits of the business. Tisch v. Rockafellow, 209 Pa. 419, 58 A 805.
91. Rembold v. White, 28 Oh. Cir. Ct. 427.
92. Rembold v. White, 28 Oh. Cir. Ct. 427.

of any acts on his part raising an estoppel.[93]

[§ 482] **4. Partnership.** Ordinarily the death of a partner terminates the partnership,[94] and the personal representative of decedent has as a rule no more right to continue in a business in which decedent was a partner than he has to continue a business of which decedent was the sole proprietor.[95] The executor of a deceased copartner may, however, continue in the business where the will directs him to do so;[96] or the liability of a deceased copartner, as well as his interest in the profits of the concern, may by the copartnership contract be continued beyond his death.[97] The effect of such a contract must naturally be to bind the estate of the deceased partner in the hands of his executor or administrator without compelling such representative to become a partner personally.[98] Where there are no valid provisions by will or contract for further continuing a partnership, either the surviving partner or partners, or else, if necessary the personal representative of the decedent, should see that the business is duly wound up and adjusted.[99] A settlement of partnership affairs made with the surviving partners by the personal representative of a deceased partner is binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the representative presumably liable.[1] The rules which have already been stated with reference to the result of the personal representative engaging in business or continuing the decedent's business[2] apply where the personal

93. American Tube Works v. Tucker, 185 Mass. 236, 70 NE 59; Fleming v. Fleming, 204 Pa. 648, 54 A 473.

94. See Partnership [30 Cyc 620, 636, 653].

95. Michels Co. v. Young, 150 Ill. A. 442; Brown v. Farnham, 55 Minn. 27, 56 NW 352; Hibbard v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 SW 6 [rev (Civ. A.) 79 SW 582]; Altgelt v. Sullivan, (Civ. A.) 79 SW 333.

[a] **The executors of a special partner** in a limited partnership, which is indebted to such partner for money loaned for the partnership business, represent him in his individual claim for money loaned and also represent him in any interest the estate may have in carrying on the partnership; and it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent to continue the partnership or urge their claim for money loaned. Walkenshaw v. Perzel, 30 N. Y. Super. 606, 32 HowPr 233.

[b] **The fact that an ancillary administrator never assumed any active relations** toward the business conducted by the surviving partner is sufficient to show that the ancillary administrator and the surviving partner are not partners. Egan v. Wirth, 26 R. I. 363, 58 A 987.

96. Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Laughlin v. Lorenz, 48 Pa. 275, 86 AmD 592; Hibbard v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911].

[a] **Will not giving authority to enter into partnership on account of estate.**—Fulton's Est., 12 Pa. Dist. 725.

97. See Partnership [30 Cyc 636, 653, 654].

[a] **Where the surviving partner is also executor** of his deceased copartner, he cannot as executor agree with himself as copartner as to the matters referred to in partnership articles, providing that in case of the death of either partner the business should be continued or sold as might be agreed by the survivor and the legal representatives of the deceased partner. Leavitt's Est., 20 NYS 58, 28 AbbNCas 457, 1 Pow. Surr. 74.

98. Hart v. Anker, 38 La. Ann. 341; McArdle v. West Philadelphia Title, etc., Co., 7 Pa. Super. 328, 42 WklyNC 238.

[a] **Construction of statute.**—A statute authorizing partners to stipulate that, in case of the death of one, the firm should continue as between "the heir of the deceased and the surviving partners" cannot be construed to authorize a stipulation binding an executor of a deceased partner to continue the firm along with the surviving partners. Hart v. Anger, 38 La. Ann. 341.

99. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Wickliffe v. Eve, 17 How. 468, 15 L. ed. 163.

Ala.—Costley v. Wilkerson, 49 Ala. 210.

Cal.—Smith v. Walker, 38 Cal. 285, 99 AmD 415.

Ind.—Brandon v. Judah, 7 Ind. 545.

Kan.—Teney v. Laing, 47 Kan. 297, 27 P 976; Boston, etc., Glass Co. v. Ludlum, 8 Kan. 40.

Me.—Hamlin v. Mansfield, 88 Me. 131, 33 A 788; Cook v. Lewis, 36 Me. 340.

Mass.—Walker v. Maxwell, 1 Mass. 104.

Mich.—Merritt v. Dickey, 38 Mich. 41.

Miss.—Citizens' Mut. Ins. Co. v. Lyon, 59 Miss. 305.

Mo.—In re Ames, 52 Mo. 290.

N. J.—Wild v. Davenport, 48 N. J. L. 129, 7 A 295, 57 AmR 552; Shipman v. Lord, 58 N. J. Eq. 380, 44 A 215 [aff 60 N. J. Eq. 484, 46 A 1101].

N. Y.—Montgomery v. Dunning, 2 Bradf. Surr. 220.

Pa.—Stern's App., 95 Pa. 504; Laughlin v. Lorenz, 48 Pa. 275, 86 AmD 592.

Eng.—Downs v. Collins, 6 Hare 418, 31 EngCh 418, 67 Reprint 1228.

[a] **Surviving partner should usually wind up affairs of firm.**—Wickliffe v. Eve, 17 How. (U. S.) 468, 15 L. ed. 163.

[b] **Administrator must keep individual and partnership accounts separate.**—Boston, etc., Co. v. Ludlum, 8 Kan. 40.

[c] **Remedies of personal representative.**—(1) The executor or administrator may maintain a bill against the surviving partner for an account of profits. Freeman v. Freeman, 136 Mass. 260. (2) But a remedy in the probate court does not usually lie. Searles v. Scott, 14 Miss. 246; Scott v. Searles, 13 Miss. 25; Bennett v. Crain, 41 Hun (N. Y.) 183.

[d] **Surviving partner deals with personal representative.** — While a surviving partner is usually entitled to control the partnership debts after the death of his copartner, yet his dealings and liability for a settlement should be with the latter's personal representative alone, and not with heirs, distributees, or a surviving widow; and partner or representative must use due diligence and good faith. Gardner v. Cummings, Ga. Dec. 1; Skillen v. Jones, 44 Ind. 136; Alline v. Franz, 91 Iowa 746, 60 NW 646; Hosmer v. Burke, 26 Iowa 353; Robertshaw v. Hanway, 52 Miss. 713.

[e] **Compensation paid to the surviving partner** for winding up the business is not to be allowed to the representative. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505; Brown v. McFarland, 41 Pa. 129, 80 AmD 598.

[f] **Arbitration.** — The personal representative may submit to arbitration the question as to the value of decedent's interest in the partnership. Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585. Submission to arbitration generally see supra § 395.

[g] **Terms of settlement.**—The executor or administrator may settle with the surviving partner on such terms as in the exercise of good faith and reasonable diligence he may choose to accept. Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585.

[h] **Circumstances authorizing assent to continuance of partnership and payments pursuant thereto.**—Testator was a member of a partnership, the articles of which provided that, in case of testator's death before the expiration of five years, his portion of the capital should not be withdrawn, and that his son should have a right to become a member of the firm. Testator died, his son's demand to be admitted as a partner was refused by the surviving partners, and, on suit by the son and executors to enforce the partnership agreement in this respect, it was held that specific performance of the agreement could not be decreed, but that the action of the surviving partners was a breach of the agreement, entitling the executors and son to a decree of dissolution. The firm was realizing large profits, and its continued existence was desirable to the estate, and the son's continued demand that he be admitted as a partner was finally compromised by an agreement by the surviving partners to pay him three thousands dollars per year, and by the executors on behalf of the estate to pay another person eighty-five hundred dollars per year in consideration of the son's refraining from enforcing a dissolution. Such other person turned over practically all of the money paid to him to the son. This arrangement was not presented to the surrogate's court for approval, but the profits to the estate from the continuance of the business after testator's death amounted to more than the amount testator had invested in the business. It was held that the executors were justified in making the agreement with the son, and were not personally liable for the amount paid him from the estate. Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff 181 N. Y. 562 mem, 74 NE 1120 mem].

1. Mo.—Buckham v. Singleton, 10 Mo. 405.

N. Y.—Palmer v. Kingsford, 112 N. Y. 337, 19 NE 815; Sage v. Woodin, 66 N. Y. 578; Montgomery v. Dunning, 2 Bradf. Surr. 220.

N. C.—Ralston v. Telfair, 22 N. C. 414.

Oh.—Ludlow v. Cooper, 4 Oh. St. 1.

Pa.—Holmes' App., 79 Pa. 279.

Va.—Shackelford v. Shackelford, 32 Gratt. (73 Va.) 481.

Wis.—Roys v. Vilas, 18 Wis. 169.

2. See supra §§ 474–482.

representative has participated in the business of a partnership of which decedent was a member during his lifetime, whether he has been duly empowered to do so,[3] or has done so in violation of the general rule forbidding an executor or administrator to engage in business with the funds of the estate.[4] Where the executor of a deceased partner in a banking business allowed testator's capital to remain in the business, and permitted credits to be entered in his pass book as executor for a share of the profits of the business, this was held not to render him personally liable as a partner.[5]

[§ 483] **E. Contracts—1. General Rule.** It is well settled[6] as a general rule that the contracts of an executor or administrator, although made in the interest and for the benefit of the estate he represents, are, if made upon a new and independent consideration moving between the promisee and the representative as promisor, the personal contracts of the executor or administrator and do not bind the estate.[7] Hence the executor or administrator cannot make any agreement enlarging the

3. U. S.—Burwell v. Cawood, 2 How. 560, 11 L. ed. 378.
Ky.—Walker v. Walker, 88 Ky. 615, 11 SW 718, 11 KyL 80.
N. J.—Wild v. Davenport, 48 N. J. L. 129, 7 A 295, 57 AmR 552.
N. Y.—Palmer v. Kingsford, 112 N. Y. 337, 19 NE 815; Browne v. Bedford, 4 Dem. Surr. 304; Luers v. Brunjes, 5 Redf. Surr. 32.
Pa.—In re Mustin, 188 Pa. 544, 41 A 618.
Eng.—In re Leeds Banking Co., L. R. 1 Ch. 231; Labouchere v. Tupper, 11 Moore P. C. 198, 14 Reprint 670.

[a] **Advancing money under order of court to protect business.**—Where the probate court in the due exercise of its statutory jurisdiction authorizes an executor or administrator to advance or borrow money to preserve a bankrupt business in which the estate is interested, such decree is a protection to the representative and those dealing with him. In re Mustin, 188 Pa. 544, 41 A 618.

4. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.
Conn.—Alsop v. Mather, 8 Conn. 584, 21 AmD 703.
Ill.—Michels Co. v. Young, 150 Ill. A. 442.
Miss.—Avery v. Myers, 60 Miss. 367; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305.
N. J.—Wild v. Davenport, 48 N. J. L. 129, 7 A 295, 57 AmR 552.
Pa.—In re Maloney, 233 Pa. 614, 82 A 958.
Eng.—In re Morgan, 18 Ch. D. 93; Ex p. Garland, 10 Ves. Jr. 110, 32 Reprint 786.

[a] **Extent of liability.**—Where an executor who was in partnership with his testator in business carried on under a single contract had the testator's interest appraised and continued the business until the contract expired, and then sold the testator's interest to his own son, with whom he then formed a new partnership to carry on business under a new contract, and none of the money of the estate was used in the new venture, it was held that the executor was chargeable with a share of the profits under the old contract, but not under the new one. In re Maloney, 233 Pa. 614, 82 A 958.

5. Tisch v. Rockafellow, 209 Pa. 419, 58 A 805.

6. Austin v. Munroe, 47 N. Y. 360, 366 ("The rule is too well established in this state to be questioned or disregarded, and any departure from it would be mischievous").

7. U. S.—Griggs v. Nadeau, 221 Fed. 381, 137 CCA 189; Kelley v. Kelley, 84 Fed. 420; Thompson v. Canterbury, 12 Fed. 485, 2 McCrary 332.
Ala.—Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 S 258; Hinson v. Williamson, 74 Ala. 180; Foxworth v. White, 72 Ala. 224; Vann v. Vann, 71 Ala. 154; Daily v. Daily, 66 Ala. 266; Vanderveer v. Ware, 65 Ala. 606; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Wilburn v. McCalley, 63 Ala. 436; Matthews v. Matthews, 56 Ala. 292; Christian v. Morris, 50 Ala. 585; Wade v. Pope, 44 Ala. 690; Lyon v. Hays, 30 Ala. 430; Sanford v. Howard, 29 Ala. 684, 68 AmD 101; Kirkman v. Benham, 28 Ala. 501; Colvin v. Owens, 22 Ala. 782; Johnson v. Gaines, 8 Ala. 791; Greening v. Sheffield, Minor 276; Harding v. Evans, 3 Port. 221, 29 AmD 255; McEldery v. McKenzie, 2 Port. 33, 27 AmD 643.
Ark.—Blanton v. Forrest City Mfg. Co., 212 SW 330; Pike v. Thomas, 65 Ark. 437, 47 SW 110; Pike v. Thomas, 62 Ark. 223, 35 SW 212, 54 AmSR 292; Underwood v. Milligan, 10 Ark. 254.
Cal.—Maxon v. Jones, 128 Cal. 77, 60 P 516; Sterrett v. Barker, 119 Cal. 492, 51 P 695; In re Page, 57 Cal. 238; Dwinelle v. Henriquez, 1 Cal. 387; Hammond v. U. S. Fidelity, etc., Co., 29 Cal. A. 464, 155 P 1023; Renwick v. Garland, 1 Cal. A. 237, 82 P 89.
Conn.—Taylor v. Mygatt, 26 Conn. 184; Coe v. Talcott, 5 Day 88.
Del.—Baird v. Harper, 51 A 141.
D. C.—MacKie v. Howland, 3 App. 461.
Fla.—May v. May, 7 Fla. 207, 68 AmD 431.
Ga.—Walton v. Reid, 148 Ga. 176, 96 SE 214; Hughes v. Treadway, 116 Ga. 663, 42 SE 1035; Rhodes v. Harrison, 60 Ga. 428; McFarlin v. Stinson, 56 Ga. 396.
Ill.—Bauerle v. Long, 187 Ill. 475, 58 NE 458, 52 LRA 643 [aff 88 Ill. A. 177]; Welch v. Hoyt, 24 Ill. 117; Vincent v. Morrison, 1 Ill. 227; Jahp v. Bradley, 185 Ill. A. 215; McAuley v. O'Connor, 92 Ill. A. 592.
Ind.—Moody v. Shaw, 85 Ind. 88; Holderbaugh v. Turpin, 75 Ind. 84, 39 AmR 124; De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.
Iowa.—Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383.
Kan.—Exchange Nat. Bank v. Betts, 103 Kan. 807, 176 P 660; Shrigley v. Black, 59 Kan. 487, 53 P 477; Brown v. Evans, 15 Kan. 88.
Ky.—Rice v. Strange, 72 SW 756, 24 KyL 1945; Bland v. Gaither, 11 SW 423, 10 KyL 1033; Bland v. Wintersmith, 11 KyL 52.
La.—Espinola v. Blasco, 15 La Ann. 426.
Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328; Baker v. Fuller, 69 Me. 152; Baker v. Moor, 63 Me. 443; Davis v. French, 20 Me. 21, 37 AmD 36.
Mass.—Rosenthal v. Schwartz, 214 Mass. 371, 101 NE 1070; Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452; Durkin v. Langley, 167 Mass. 577, 46 NE 119; Phillips v. Blatchford, 137 Mass. 510; Kingman v. Soule, 132 Mass. 285; Luscomb v. Ballard, 5 Gray 403, 66 AmD 374; Sumner v. Williams, 8 Mass. 162, 5 AmD 83.
Mich.—Roscoe v. McDonald, 91 Mich. 270, 51 NW 939; Smith v. Brennan, 62 Mich. 349, 28 NW 892, 4 AmSR 867.
Minn.—Brown v. Farnham, 55 Minn. 27, 56 NW 352; Ness v. Wood, 42 Minn. 427, 44 NW 313; Farley v. Hord, 45 Miss. 96; Woods v. Ridley, 27 Miss. 119; Sims v. Stilwell, 4 Miss. 176. But compare Steele v. McDowell, 17 Miss. 193, 199 ("It seems to be now settled, that an executor may be used as such, on a promise made by him as executor").
Mo.—Stirling v. Winter, 80 Mo. 141; Smarr v. McMaster, 35 Mo. 349.
Mont.—Lawson v. Cobban, 38 Mont. 138, 99 P 128.
Nebr.—Burleigh v. Palmer, 74 Nebr. 122, 103 NW 1068, 12 AnnCas 777; Craig v. Anderson, 92 NW 640.
Nev.—Esden v. Kaiser, 27 Nev. 432, 76 P 1134; Painter v. Kaiser, 27 Nev. 421, 76 P 747, 103 AmSR 772, 65 LRA 672, 1 AnnCas 765.
N. H.—Thomson v. Smith, 64 N. H. 412, 13 A 639.
N. J.—Doolittle v. Willet, 57 N. J. L. 398, 31 A 385; Johnston v. Morrow, 28 N. J. Eq. 327.
N. M.—Carpenter v. Lindauer, 12 N. M. 396, 78 P 57.
N. Y.—Thompson v. Thompson, 180 N. Y. 311, 73 NE 43 [rev 88 App. Div. 618, 84 NYS 1148]; O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238 [rev 42 App. Div. 171, 58 NYS 1044]; Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 33 NYS 676 (rev 9 Misc. 298, 30 NYS 267)]; Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737; Barry v. Lambert, 98 N. Y. 300, 50 AmR 677; Wetmore v. Porter, 92 N. Y. 76; Seaman v. Whitehead, 78 N. Y. 306; Austin v. Munroe, 47 N. Y. 360; Ferrin v. Myrick, 41 N. Y. 315; Chouteau v. Suydam, 21 N. Y. 179; Stedman v. Feidler, 20 N. Y. 437; Hillman v. Stephens, 16 N. Y. 278; Matter of Doscher, 165 App. Div. 193, 151 NYS 76; Le Baron v. Barker, 143 App. Div. 492, 127 NYS 979; Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 194 N. Y. 575 mem, 88 NE 1115 mem]; Farrelly v. Schaettler, 121 App. Div. 678, 106 NYS 445; Matter of Smith, 111 App. Div. 23, 97 NYS 171, 35 NYCivProc 314, 19 NY AnnCas 55; Carideo v. Austin, 88 App. Div. 35, 84 NYS 777; Chisolm v. Toplitz, 82 App. Div. 346, 82 NYS 1081 [aff 178 N. Y. 599 mem, 70 NE 1096 mem]; Metropolitan Trust Co. v. McDonald, 52 App. Div. 424, 65 NYS 260; Weeks v. O'Brien, 25 App. Div. 206, 49 NYS 1150, 27 NYCivProc 86; Clapp v. Clapp, 44 Hun 451; Delaware, etc., R. Co. v. Gilbert, 44 Hun 201 [aff 112 N. Y. 673, 20 NE 416]; Murphy v. Hall, 38 Hun 528; Bull v. Bull, 31 Hun 69; Stanton v. King, 8 Hun 4 [aff 69 N. Y. 609 mem]; Bloodgood v. Sears, 64 Barb. 71; Bloodgood v. Gregory, 38 N. Y. Super. 132; Cary v. Gregory, 38 N. Y. Super. 127; Rosenberg v. Jefferson, 98 Misc. 616, 163 NYS 157; Dwane v. Miller, 89 Misc. 297, 152 NYS 1060; Miles v. Weisbecker, 78 Misc. 369, 138 NYS 424; Olcott v. De Jorrin, 36 Misc. 735, 74 NYS 393; Olin v. Arendt, 27 Misc. 270, 58 NYS 429; Matter of Kirkpatrick, 9 Misc. 228, 30 NYS 283; Rosenberg v. Jefferson, 163 NYS 157; Chambers v. Greenwald, 94 NYS 504; Morgan v. Stevens, 6 AbbNCas 356; Hertzfield v. Parkes, 19 NYWklyDig 238; Van Zandt v. Myers, 7 NYWkly Dig 390; Pinney v. Johnson, 8 Wend. 500; Reynolds v. Reynolds, 3 Wend. 244; Demott v. Field, 7 Cow. 58; Myer v. Cole, 12 Johns. 349; Matter of Sharp, 5 Dem. Surr. 516; Thompson's Est., Tuck. Surr. 13.
N. C.—Lindsay v. Darden, 124 N. C. 307, 32 SE 678; Morehead Banking Co. v. Morehead, 122 N. C. 318, 30 SE 331; Morehead Banking Co. v. Morehead, 116 N. C. 410, 21 SE 190; McLean v. McLean, 88 N. C. 394; Tyson v. Walston, 83 N. C. 90; Kerchner v. McRae, 80 N. C. 219; Beaty v. Gingles, 53 N. C. 302; McKay v. Royal, 52 N. C. 426; Hailey v. Wheeler, 49 N. C. 159.
Oh.—Thomas v. Moore, 52 Oh. St. 200, 39 NE 803; Lucht v. Behrens, 28 Oh. St. 231, 22 AmR 378; West v. Dean, 15 Oh. Cir. Ct. 261, 8 Oh. Cir. Dec. 797.
Okl.—Drinker v. Kepley, 43 Okl.

liability of the estate in his hands, or creating against it a debt, charge, or lien enforceable at the suit of the person with whom he contracts, since the immediate liability incurred is a personal one on his part.[8] If the contract was one which he had no right to make, all the more is it he who must respond for it and not the estate;[9] nor will the fact that his promise is expressed to be "as executor" or "as administrator" change his individual liability in regard to it or amount to more than surplusage.[10] An express stipulation in a contract made by an executor or administrator that

686, 688, 144 P 350 [cit Cyc].

Pa.—Fehlinger v. Wood, 134 Pa. 517, 19 A 746; Williamson's App., 94 Pa. 231; Dougherty v. Stephenson, 20 Pa. 210; Seip v. Drach, 14 Pa. 352; Beeson v. McNabb, 2 Pa. 422; Masterson v. Masterson, 5 Rawle 137; Grier v. Huston, 8 Serg. & R. 402, 11 AmD 627; Auer's Est., 14 Pa. Dist. 114; Corr's Est., 8 Pa. Dist. 209; Eiermann v. People's Trust, etc., Co., 21 LancLRev 170; Orne v. Ritchie, 12 Phila. 231; Oram's Est., 9 Phila. 358.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113; Elmore v. Elmore, 58 S. C. 289, 36 SE 656, 51 LRA 261; Hudgens v. Sullivan, 34 S. C. 99, 12 SE 934; Cook v. Cook, 24 S. C. 204; Pinckney v. Singleton, 20 S. C. L. 343; O'Neall v. Abney, 18 S. C. L. 317; Herrell v. Witherspoon, 14 S. C. L. 486; Jones v. Jenkins, 13 S. C. L. 494; Nehbe v. Price, 11 S. C. L. 328; McBeth v. Smith, 7 S. C. L. 676.

Tenn.—Patterson v. Craig, 1 Baxt. 291.

Tex.—Mullins v. Yarborough, 44 Tex. 14; McMahan v. Harbert, 35 Tex. 451; Price v. McIver, 25 Tex. 769, 78 AmD 558; McKinney v. Peters, Dall. 545; Lovenskiold v. Nueces Hotel Co. (Civ. A.) 208 SW 759; Rice v. Conwill, 35 Tex. Civ. A. 341, 80 SW 393.

Vt.—Reynolds-McGinness Co. v. Green, 78 Vt. 28, 61 A 556; Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850; Lovell v. Field, 5 Vt. 218.

Va.—Daingerfield v. Smith, 83 Va. 81, 1 SE 599; Childress v. Morris, 23 Gratt. (64 Va.) 802; Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653.

W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094; Wick v. Dawson, 48 W. Va. 469, 37 SE 639.

Wis.—McLaughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273; Williams v. Troop, 17 Wis. 463.

Eng.—Farhall v. Farhall, L. R. 7 Ch. 123; Brice v. Wilson, 8 A. & E. 349 note, 35 ECL 626, 112 Reprint 870; Wigley v. Ashton, 3 B. & Ald. 101, 5 ECL 67, 106 Reprint 600; Brigden v. Parkes, 2 B. & P. 424, 126 Reprint 1363; Hawkes v. Saunders, Cowp. 289, 98 Reprint 1091; Jennings v. Newman, 4 T. R. 347, 100 Reprint 1056; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

Ont.—Campbell v. Bell, 16 Grant Ch. (U. C.) 115.

"It is a general rule of law, subject to few exceptions, that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate, and that for such contracts and claims the remedy is against the executor or administrator in his private capacity." Thompson v. Mann, 65 W. Va. 648, 650, 64 SE 920, 921, 131 AmSR 987, 22 LRANS 1094.

"An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt." Haskell v. Manson, 200 Mass. 599, 602, 86 NE 937, 128 AmSR 452.

[a] **"The reason of the rule** (1) is clearly explained by Hunt, C. J., in the earliest of the cases cited. [Ferrin v. Myrick, 41 N. Y. 315]. While, as between the executor and the person with whom he contracts, the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting of the executor. In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard." O'Brien v. Jackson, 167 N. Y. 31, 33, 60 NE 238. (2) "An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal." Duvall v. Craig, 2 Wheat. (U. S.) 45, 56, 4 L. ed. 180.

[b] **This rule has been applied** to: (1) A contract giving the other party the right to file a mechanic's lien on property of the estate. San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 P 255. (2) A renewal of a lease. Chisolm v. Toplitz, 82 App. Div. 346, 82 NYS 1081 [aff 178 N. Y. 599 mem, 70 NE 1096 mem]. (3) A warranty. Sumner v. Williams, 8 Mass. 162, 5 AmD 83. (4) A promise that the estate shall continue liable to indemnify a surety on a note given by the decedent's partner and signed by the surety on decedent's promise to indemnify him. Kingman v. Soule, 132 Mass. 285. (5) A contract for necessaries for infant devisees. Roscoe v. McDonald, 91 Mich. 270, 51 NW 939. (6) An agreement to purchase the property of a firm indebted to the testator, in order to collect the debt. Barlow v. Myers, 24 Hun (N. Y.) 286. (7) An agreement to allow a set-off. Bishop v. Dillard, 49 Ark. 285, 5 SW 341. (8) An agreement to pay usurious interest in order to prevent a sale of property on foreclosure. Williams v. Troop, 17 Wis. 463. (9) A forthcoming bond for property levied on under an execution against the testator issued during the testator's lifetime. Thompson v. Ross, 26 Miss. 198. (10) A refunding bond executed by the representative in order to procure a distributive share belonging to the decedent. Maxwell v. Craft, 32 Miss. 307.

[c] **Supersedeas bond.**—An executor, on appeal from a judgment of the circuit court denying the probate of the will under which he acted, cannot by signing an application for a supersedeas bond necessary to retain possession of the property, bind the estate so as to render the estate liable to sureties on the bond on affirmance. U. S. Fidelity, etc., Co. v. Levering, 156 Ky. 110, 160 SW 790.

[d] **A judgment by bond and warrant** executed by an administrator does not bind the estate, because it is not a confession of judgment alone, but the bond is a personal obligation. Pinney v. Johnson, 8 Wend. (N. Y.) 500.

[e] **Purchase of property for estate.**—An executor cannot bind the estate of the testator for the price of property which is not absolutely necessary for its preservation. Harding v. Evans, 3 Port. (Ala.) 221, 29 AmD 255; Van Zandt v. Myers, 7 NY WklyDig 390; Harrell v. Witherspoon, 14 S. C. L. 486; Lovell v. Field, 5 Vt. 218.

[f] **The public administrator** of the county of San Francisco is personally liable on contracts made in relation to estates on which he administers, unless the idea of such liability is excluded by the contract. Dwinelle v. Henriquez, 1 Cal. 387.

[g] **The estate is not liable in damages for a breach** of a contract entered into by the executrix. Sterrett v. Barker, 119 Cal. 492, 51 P 695.

[h] **Contract held to be in capacity of legatee.**—Where an executrix who was also sole legatee contracted with an attorney to prosecute a suit for land devised to her, and not needed for the payment of the testator's debts, the attorney to receive a certain proportion of the amount recovered, the contract was considered to be that of the legatee and not of the executrix, and hence not voidable by a succeeding administrator de bonis non with the will annexed, as made by an executrix without direction of court. Bell v. Welch, 38 Ark. 139.

[i] **Contract of agent.**—Where a contract of an agent of an administrator does not relate to a subject matter about which, as administrator, he is authorized to negotiate, he is personally responsible; or, if the agent exceeded his authority, the agent might be liable. Lewis v. Reed, 11 Ind. 239.

8. U. S.—Griggs v. Nadeau, 221 Fed. 381, 137 CCA 189.

Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15.

Ark.—Underwood v. Milligan, 10 Ark. 254.

Ga.—Walton v. Reid, 148 Ga. 176, 96 SE 214.

Ky.—U. S. Fidelity, etc., Co. v. Levering, 156 Ky. 110, 160 SW 790 [quot Cyc].

Me.—Davis v. French, 20 Me. 21, 37 AmD 36.

Miss.—Hagan v. Barksdale, 44 Miss. 186; Trueman v. Tilden, 6 N. H. 201.

N. M.—Carpenter v. Lindauer, 12 N. M. 388, 78 P 57.

Pa.—Corr's Est., 8 Pa. Dist. 209.

S. C.—Johnson v. Henagan, 11 S. C. 93; Guerry v. Capers, 8 S. C. Eq. 159.

Tenn.—Hoss v. Crouch, (Ch. A.) 48 SW 724.

Tex.—McMahan v. Harbert, 35 Tex. 451.

Utah.—Dunn v. Wallingford, 47 Utah 491, 155 P 347.

Vt.—Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

Va.—Staples v. Staples, 85 Va. 76, 7 SE 199.

[a] **Promise without consideration.**—For an executor's or administrator's promise without consideration touching the estate he is not liable. McElwee v. Story, 30 S. C. L. 9.

[b] **Admission of personal liability.**—Where an administrator charged the price of a coffin in his administration account, and had it allowed to him by the judge of probate, it was an admission by him that he was personally liable for the price. Trueman v. Tilden, 6 N. H. 201.

9. Ala.—Colvin v. Owens, 22 Ala. 782.

Conn.—Lynch v. Coogan, 89 Conn. 331, 94 A 353.

Ill.—Mason v. Caldwell, 10 Ill. 196, 48 AmD 330.

Ind.—Hayes v. Shirk, 167 Ind. 569, 78 NE 653.

Ky.—Proctor v. Terrill, 8 B. Mon. 451.

La.—Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 S 48.

Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.

Miss.—Weathersby v. Sinclair, 43 Miss. 189.

Mo.—Millard v. Smith, 119 Mo. A. 701, 95 SW 940.

R. I.—Brown v. Lewis, 9 R. I. 497.

Utah.—Cain v. Young, 1 Utah 361.

Va.—Staples v. Staples, 85 Va. 76, 7 SE 199; Childress v. Morris, 23 Gratt. (64 Va.) 802.

10. Ind.—De Coudres v. Union

he shall not be personally liable thereon will, however, be given effect,[11] and any contract which the personal representative makes relating to the estate will at all events inure to the advantage of its beneficiaries, subject to the due payment of creditors of the estate.[12]

The general rule is subject to exceptions,[13] and the estate may be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty without a promise to do just what he has promised to do.[14] So debts incurred for the incidental charges of the due course of administration have been held obligatory upon the estate,[15] and an executor may sometimes create debts against the estate for expenses incurred in complying with the directions of the will,[16] and the necessities of the case may sometimes be such as to permit of the representative binding the estate by his contract made for its benefit,[17] or he may sometimes bind the estate by his contract made with the sanction of the probate court.[18] Power may also be given to an executor by the will to bind the estate by contract,[19] and statutes sometimes give to the representative certain powers in this respect.[20]

[§ 484] **2. Services—a. In General.** The personal representative and not the estate is as a rule directly liable to one whom he employs incidentally in the discharge of his trust, as for selling, custody of, or suitable work upon the assets, or clerical or other services in managing the property and the

Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.

Iowa.—Dunne v. Deery, 40 Iowa 251.

Ky.—Ellis v. Merriman, 5 B. Mon. 296.

La.—Dean v. Wade, 8 La. Ann. 85.

Mass.—Forster v. Fuller, 6 Mass. 58, 4 AmD 87.

Miss.—Woods v. Ridley, 27 Miss. 119; Steele v. McDowell, 17 Miss. 193; Sims v. Stilwell, 4 Miss. 176.

Mo.—Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215; Millard v. Smith, 119 Mo. A. 701, 95 SW 940.

N. Y.—Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737; Chouteau v. Suydam, 21 N. Y. 179; Genet v. De Graaf, 27 App. Div. 238, 50 NYS 442; Darling v Powell, 20 Misc. 240, 45 NYS 794.

Pa.—Tassey v. Church, 4 Watts & S. 346; Gebler v. Culin, 6 Phila. 130.

Tenn.—Boyd v. Johnston, 89 Tenn. 284, 14 SW 804; Patterson v. Craig, 1 Baxt. 291.

Tex.—Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [rev on other grounds 26 Tex. Civ. A. 449, 64 SW 815]; Lovenskiold v. Nueces Hotel Co., (Civ. A.) 208 SW 759.

Vt.—Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

Va.—Carr v. Branch, 85 Va. 597, 8 SE 476.

W. Va.—Thompson v. Mann, 53 W. Va. 432, 44 SE 246; Wick v. Dawson, 48 W. Va., 469, 37 SE 639.

Eng.—King v. Thom, 1 T. R. 487, 99 Reprint 1212; Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044.

11. Cal.—Maxon v. Jones, 128 Cal. 77, 60 P 516.

Ind.—De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.

N. H.—Livermore v. Rand, 26 N. H. 85.

N. Y.—Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 194 N. Y. 575 mem, 88 NE 1115 mem]; Foland v. Dayton, 40 Hun 563.

N. C.—Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 SE 191.

S. C.—Beattie v. Latimer, 42 S. C. 313, 20 SE 53.

[a] **Illustration.**—Where the executors of one of the makers of a note, by agreement under seal with the other maker, assume as executors all liability on the note, but it is expressly stipulated that they shall not be held liable individually, a judgment on such agreement against the executors individually is erroneous. Beattie v. Latimer, 42 S. C. 313, 20 SE 53.

12. Stewart v. Chadwick, 8 Iowa 463; Shearon v. Henderson, 38 Tex. 245.

13. O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238; Thompson v. Mann, 65 W. Va. 648, 94 SE 920, 131 AmSR 987, 22 LRANS 1094.

"To the general rule there are exceptions, and an equitable action can be maintained against the estate on behalf of a creditor in case of the fraud or insolvency of the executor, or when he is authorized to make an expenditure for the protection of the trust estate, and he has no trust fund for the purpose. In the latter case, if unwilling to make himself personally liable he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose. To that action the beneficiaries and cestuis que trust are necessary parties. The trust estate cannot be depleted or swept away except in an action which they may defend." O'Brien v. Jackson, 167 N. Y. 31, 33, 60 NE 238 [rev 42 App. Div. 171, 58 NYS 1044].

14. Brown v. Evans, 15 Kan. 88.

15. Farley v. Hord, 45 Miss. 96; Matter of Smith, 111 App. Div. 23, 97 NYS 171, 35 NYCivProc 314, 18 NY AnnCas 55; Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem].

16. Pennebaker v. Williams, 136 Ky. 120, 123 SW 672, 120 SW 321; Ward v. Harrington, 29 Miss. 238; Little v. Bennett, 58 N. C. 156.

[a] **Will held not to give power to create debts.**—Ward v. Harrington, 29 Miss. 238.

17. Brannon v. Ober, etc., Co., 106 Ga. 168, 32 SE 16; Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff 181 N. Y. 562 mem, 74 NE 1120 mem]; Van Zandt v. Myers, 7 NY WklyDig 390; Murrell v. Wright, 78 Tex. 519, 15 SW 156; Gates v. Herr, 102 Wash. 131, 172 P 912.

[a] **Illustration.** — An executor might employ another person to locate a land certificate belonging to the estate and bind the heirs by his agreement to allow the locator a share in the land so secured. Murrell v. Wright, 78 Tex. 519, 15 SW 156.

18. Colo.—Fleming v. Kelly, 18 Colo. A. 23, 69 P 272.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 123 SW 672, 120 SW 321.

Mich.—Roscoe v. McDonald, 91 Mich. 270, 51 NW 939.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983.

Tex.—Mullins v. Yarborough, 44 Tex. 14; McMahan v. Harbert, 35 Tex. 451; Price v. McIver, 25 Tex. 769, 78 AmD 558; McKinney v. Peters, Dall. 545; Halbert v. De Bode, (Civ. A.) 28 SW 58.

But compare Alexander v. Herring, 99 Miss. 427, 55 S 360 (under a statute authorizing an administrator to deal with growing crops and cultivate or rent farm land, an administrator is not authorized to buy timber and operate a mill, nor does a contract to do so derive any sanctity from a decree of the chancery court).

[a] **An order of the judge on an ex parte hearing,** in the absence of any statute, adds nothing to the powers of the administrator. Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383.

19. Ala.—Vann v. Vann, 71 Ala. 154; Wade v. Pope, 44 Ala. 690.

Colo.—Ingham v. Ryan, 18 Colo. A. 347, 71 P 899.

Ga.—Ferris v. Van Ingen, 110 Ga. 102, 35 SE 347; Brannon v. Ober, etc., Co., 106 Ga. 168, 32 SE 16.

N. Y.—Strauss v. Bendheim, 162 N. Y. 469, 56 NE 1007 [rev 44 App. Div. 82, 60 NYS 398].

Pa.—Yerkes v. Richards, 153 Pa. 646, 26 A 221, 34 AmSR 721 [rev 11 LancLRev 308].

[a] **Terms of will.**—(1) A direction in a will that the executor shall manage the estate as the testator had been "in the habit of doing" does not authorize him to bind the estate for the services of an overseer or the purchase of work animals. Wade v. Pope, 44 Ala. 690. (2) A provision in a will that "it is my wish that my husband [whom the will appointed sole executor] continue the clothing business as now conducted" does not show any intention to charge the estate with any debt which he might contract in the course of such business. Saperstein v. Ullman, 49 App. Div. 446, 63 NYS 626 (McLennan & Spring, JJ. dis.) [aff 168 N. Y. 636 mem, 61 NE 553 (Vann, Parker & Landon, JJ. dis.)].

[b] **Power to sell,** (1) especially where the broadest discretion as to terms and conditions is vested in the executors, gives of necessity the power to contract, and with that the power to enforce the contract. Strauss v. Bendheim, 162 N. Y. 469, 56 NE 1007 [rev 44 App. Div. 82, 60 NYS 398]. (2) Such a power authorizes the employment of an agent on commission to aid in making the sale. Ingham v. Ryan, 18 Colo. A. 347, 71 P 899. (3) But a naked power of sale of real estate confers no authority upon executors to contract to charge the estate with the expenses of repairs or improvements. Ashby v. Ashby, 59 N. J. Eq. 547, 46 A 522.

[c] **The estate is liable for a breach** of contract on the part of the executor or administrator on a sale of real estate which he had purchased on foreclosure of a mortgage taken by him under a power to invest on mortgage and bond. Yerkes v. Richards, 153 Pa. 646, 26 A 221, 34 AmSR 721 [rev 11 LancLRev 308].

[d] **Authority to incur expense** is not alone sufficient to empower the executor to create obligations against the estate for the funds used. O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238 [rev 42 App. Div. 171, 58 NYS 1044].

20. Wilburn v. McCalley, 63 Ala. 436; Brown v. Eggleston, 53 Conn. 110, 2 A 321; Bowen v. Bonner, 45 Miss. 10; Ward v. Harrington, 29 Miss. 238; Emanuel v. Norcum, 5 Miss. 150; Reinstein v. Smith, 65 Tex. 247.

[a] **Plantation supplies.**—(1) The

like.[21] Where, however, services are rendered under an employment or agreement by which the person rendering them has confined himself to the estate or the personal representative administering it as his debtor, he will not be at liberty afterward to resort to the personal representative individually;[22] and it has been held that under a statute authorizing an administrator to carry on the business, and under an order expressly authorizing a temporary administrator to conduct a hardware business by buying and selling merchandise so that the stock should not deteriorate, the administrator had authority to employ an agent to purchase goods for the business, and to bind the estate for compensation for the agent.[23] Where services have been performed without the executor's assent, before his appointment, and under a contract with another executor named in the will, or with a special administrator, the executor is not liable either personally or in his representative capacity.[24] Where the will imposed a legal obligation on executors to employ a named person in their conduct of testator's business, it was not requisite to liability of the estate that the executors should make a new contract of employment with such person.[25]

[§ 485] **b. Services of Attorney.** The rule that debts contracted by the personal representative are obligatory upon him as individual obligations and do not primarily bind the estate applies to the fees of attorneys and counsel employed by him in the course of administration. The executor or administrator makes himself personally liable to such attorney or counsel and reimburses himself in his accounts subject to the court's allowance.[26] But

authority conferred by statute on executors and administrators to carry on the plantation of the decedent authorizes them to incur debts for supplies advanced for that purpose. Reinstein v. Smith, 65 Tex. 247; Primm v. Mensing, 14 Tex. Civ. A. 395, 38 SW 382. (2) But statutory authority to carry on the decedent's plantation and keep the buildings in tenantable repair confers no authority to contract to pay for permanent improvements placed on the land. Rice v. Conwill, 35 Tex. Civ. A. 341, 80 SW 393.

21. U. S.—Griggs v. Nadeau, 221 Fed. 381, 137 CCA 189.

Ala.—Vann v. Vann, 71 Ala. 154; Daily v. Daily, 66 Ala. 266; Matthews v. Matthews, 56 Ala. 292; Wade v. Pope, 44 Ala. 690; Lyon v. Hayes, 30 Ala. 430.

Ark.—McDaniel v. Parks, 19 Ark. 671; Belfour v. Raney, 8 Ark. 479.

Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; In re Willard, 139 Cal. 501, 73 P 240, 64 LRA 554; Maxon v. Jones, 128 Cal. 77, 60 P 516; In re Page, 57 Cal. 238; Hickman-Coleman Co. v. Leggett, 10 Cal. A. 29, 100 P 1072; Renwick v. Garland, 1 Cal. A. 237, 82 P 89.

Conn.—Brown v. Eggleston, 53 Conn. 110, 2 A 321; Burke v. Terry, 28 Conn. 414; Taylor v. Mygatt, 26 Conn. 184.

Ga.—Walton v. Reid, 148 Ga. 176, 96 SE 214.

Ind.—Bott v. Barr, 95 Ind. 243.

Iowa.—McFarland v. Howell, 162 Iowa 110, 143 NW 860; Clark v. Sayre, 122 Iowa 591, 98 NW 484; Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383.

La.—Pons' Succ., 142 La. 721, 77 S 515; McWilliams v. Elder, 52 La. Ann. 995, 27 S 352; Schmidt's Succ., 16 La. Ann. 256.

Me.—Baker v. Fuller, 69 Me. 152.

Md.—Lee v. Lee, 6 Gill & J. 316; Gwynn v. Dorsey, 4 Gill & J. 453.

Mass.—Rosenthal v. Schwartz, 214 Mass. 371, 101 NE 1070.

Mich.—Byrne v. Hume, 73 Mich. 392, 41 NW 331.

Miss.—Howell v. Myer, 105 Miss. 771, 63 S 233; Hardee v. Cheatham, 52 Miss. 41.

Mo.—Yeakle v. Priest, 61 Mo. A. 47; Tyler v. Priest, 31 Mo. A. 272.

Nebr.—Homan v. Redick, 97 Nebr. 299, 149 NW 782, LRA1915C 601.

N. H.—Livermore v. Rand, 26 N. H. 85.

N. Y.—Smith v. Peyrot, 201 N. Y. 210, 94 NE 662 [rev 134 App. Div. 954, 118 NYS 1143 (aff 116 NYS 543)]; Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 33 NYS 676]; Platt v. Platt, 105 N. Y. 488, 12 NE 22; Decillis v. Mascelli, 152 App. Div. 304, 136 NYS 573; Martin v. Platt, 51 Hun 429, 4 NYS 359; Foland v. Dayton, 40 Hun 563; Ross v. Harden, 44 N. Y. Super. 26; McMahon v. Allen, 4 E. D. Smith 519; Matter of Bensel, 68 Misc. 70, 124 NYS 726; Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46; Balz v. Underhill, 19 Misc. 215, 44 NYS 419 [aff 16 App. Div. 635 mem, 46 NYS 1089 mem]; Douglass v. Leonard, 17 NYS 591; Matter of Halsey, 13 AbbNCas 353, 2 Dem. Surr. 577 [aff 28 Hun 643 mem (aff 93 N. Y. 48, 17 NYWkly Dig 241)]: Lunt v. Lunt, 8 AbbNCas 83.

N. C.—Lindsay v. Darden, 124 N. C. 307, 32 SE 678.

Oh.—Thomas v. Moore, 52 Oh. St. 200, 39 NE 803; Sherman v. Millard, 27 Oh. Cir. Ct. 175.

Okl.—Drinker v. Kepley, 43 Okl. 686, 144 P 350.

Pa.—Barrett v. King, 64 Pa. Super. 601; Maffet's Est., 7 Kulp 153; Wilson v. Hiestand, 21 LancLRev 329.

S. C.—Ex p. Simmons, 69 S. C. 385, 48 SE 279.

Tex.—Halton v. Simmell, 43 Tex. 585; Jones v. Gilliam, (Civ. A.) 199 SW 694.

Vt.—Reynolds-McGinness Co. v. Green, 78 Vt. 28, 31, 61 A 556; Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850; Gordon v. Clapp, 5 Vt. 129.

Va.—Daingerfield v. Smith, 83 Va. 81, 1 SE 599.

Eng.—Farhall v. Farhall, L. R. 7 Ch. 123.

Man.—Dean v. Lehberg, 17 Man. 64.

"When an executor contracts for the performance of services which are for the benefit of the estate which he represents, without limiting his liability, his contract is personal, and he is liable to the same extent, and may be sued in his individual capacity, the same as he would or could be for services rendered for his personal benefit." Reynolds-McGinness Co. v. Green, supra.

[a] **Mere intention does not govern.**—The question whether an administrator is personally liable for services rendered by another person does not depend on such person's intention merely. Foland v. Dayton, 40 Hun (N. Y.) 563.

[b] **Persons dealing with representative chargeable with notice.**—Under a statute authorizing the administrator to procure indispensable labor to care for live stock, crops, etc., left by decedent, "until the meeting of the court," and providing that the court may authorize the employment of further labor, all persons dealing with such administrator are chargeable with notice of the fact that he can exercise such power only in vacation. Powell v. Powell, 23 Mo. A. 365.

[c] **An agreement to allow a broker all over a certain amount** which he may obtain for property of the estate is invalid and cannot be enforced. Danielwitz v. Sheppard, 62 Cal. 339; In re Ballentine, Myr. Prob. (Cal.) 86.

[d] **A lien on the estate** cannot be created by the executor or administrator for services rendered by a third person to the estate. McMahon v. Allen, 4 E. D. Smith (N. Y.) 519.

[e] **Where an executor employs a broker to sell** land of the estate he acts in his individual capacity, and is individually liable for the broker's services, as he has no capacity to create a liability against the estate, being only entitled to credit in his accounts for expenditures made in good faith and for proper purposes. Hickman-Coleman Co. v. Leggett, 10 Cal. A. 29, 100 P 1072 (holding also that the court could not fix compensation without his request, as the allowance must be made to him and not to the broker). To same effect McFarland v. Howell, 162 Iowa 110, 143 NW 860; Rosenthal v. Schwartz, 214 Mass. 371, 101 NE 1070.

[f] **Employment of broker to negotiate loan.**—An executor is not liable in his representative capacity for broker's commissions in procuring a loan, which was refused, for a sum in excess of the amount the executor was authorized to borrow. McMahon v. Smith, 136 App. Div. 839, 121 NYS 736 [app dism 202 N. Y. 587 mem, 96 NE 1121 mem].

[g] **Estoppel of heirs.** — Auctioneers relying upon invalid contract with executors and upon confirmation of their conduct by other heirs are entitled to a just allowance for expenditures made in reliance on the contract. Barbee v. Penny, 174 N. C. 571, 94 SE 295.

Reimbursement of representative see infra § 529.

22. Jessup v. Smith, 223 N. Y. 203, 119 NE 403; Collins v. McWilliams, 185 App. Div. 712, 173 NYS 850; Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779; Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 194 N. Y. 575 mem, 88 NE 1115 mem]; Martin v. Platt, 51 Hun 429, 4 NYS 359; Foland v. Dayton, 40 Hun (N. Y.) 563; Dwane v. Miller, 89 Misc. 297, 152 NYS 1060.

23. Altgelt v. Oliver, (Tex. Civ. A.) 86 SW 28.

24. Luscomb v. Bullard, 5 Gray (Mass.) 403, 66 AmD 374.

25. Hughes v. Hiscox, 105 Misc. 521, 174 NYS 564.

26. Ala.—Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.

Ark.—Carpenter v. Hazel, 128 Ark. 416, 194 SW 225; Parker v. Mayo, 72 Ark. 513, 83 SW 324; Paget v. Brogan, 67 Ark. 522, 55 SW 938; Bry v. Craig, 64 Ark. 438, 44 SW 348; Pike v. Thomas, 62 Ark. 223, 35 SW 212, 54 AmSR 292; Tucker v. Grace, 61 Ark. 410, 33 SW 530; Yarborough v. Ward, 34 Ark. 204; Bomford v. Grimes, 17 Ark. 567; Underwood v. Milligan, 10 Ark. 254.

Cal.—In re Friedman, 176 Cal. 226,

statutes or local practice come sometimes in aid of an attorney's recovery of recompense or costs by way of allowance out of a particular fund collected, where the suit itself was duly authorized, although this may not necessarily give an attorney the full recompense to which the representative had bound himself personally;[27] and it seems that the representative may also make a special agreement

168 P 21; Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; In re Dillon, 149 Cal. 683, 87 P 379; In re Kruger, 143 Cal. 141, 76 P 891; McKee v. Soher, 138 Cal. 367, 71 P 438, 649; In re Brignole, 133 Cal. 162, 65 P 294; Briggs v. Breen, 123 Cal. 657, 56 P 633, 886; In re Page, 57 Cal. 238; Gurnee v. Maloney, 38 Cal. 85, 99 AmD 352; Sullivan v. Lusk, 7 Cal. A. 186, 94 P 91; In re Scott, 1 Cal. A. 740, 83 P 85.

Colo.—Lusk v. Patterson, 2 Colo. A. 306, 30 P 253.

Conn.—Brown v. Eggleston, 53 Conn. 110, 2 A 321.

D. C.—MacKie v. Howland, 3 App. 461.

Fla.—McHardy v. McHardy, 7 Fla. 301.

Ga.—Lester v. Mathews, 56 Ga. 655; Williams v. Walker, 31 Ga. 195.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289; Johnson v. Leman, 131 Ill. 609, 23 NE 435, 19 AmSR 63, 7 LRA 656; Sprinkle v. Forrester, 162 Ill. A. 45; McAuley v. O'Connor, 92 Ill. A. 592; Barker v. Kunkel, 10 Ill. A. 407.

Ind.—Long v. Rodman, 58 Ind. 58.

Iowa.—In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 213; In re Sawyer, 124 Iowa 485, 100 NW 484; Clark v. Sayre, 122 Iowa 591, 98 NW 484; In re Bruning, 122 Iowa 8, 96 NW 780; Rickel v. Chicago, etc., R. Co., 112 Iowa 148, 83 NW 957; Argo v. Blondel, 100 Iowa 353, 69 NW 534.

Kan.—Brown v. Quinton, 80 Kan. 44, 47, 102 P 242, 25 LRANS 71, 18 AnnCas 290 [cit Cyc].

Ky.—Lusk v. Anderson, 1 Metc. 426.

La.—Sparrow's Succ., 40 La. Ann. 484, 4 S 513; Anderson's Succ., 28 La. Ann. 335.

Miss.—Clopton v. Gholson, 53 Miss. 466.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Garnett v. Carson, 11 Mo. A. 290. But compare Nichols v. Reyburn, 55 Mo. A. 1, 5 [quot Dooley v. Welch, 172 Mo. A. 528, 534, 158 SW 454] ("We hold that an attorney in contracting for professional services with an administrator, prima facie contracts on the credit of both the agent and principal. The agent becomes responsible to him to the extent of the contract which he makes, without regard as to whether it is reasonable or not, or for the benefit of the estate or not; the estate becomes responsible to him for his reasonable charges for services rendered which are for its benefit").

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 54 Mont. 172, 168 P 522; State v. Jefferson County Fifth Judicial Dist. Ct., 53 Mont. 210, 162 P 1053.

Nebr.—In re Thiede, 102 Nebr. 747, 169 NW 435; Rapp v. Elgutter, 77 Nebr. 674, 110 NW 661; Burleigh v. Palmer, 74 Nebr. 122, 103 NW 1068, 12 AnnCas 777.

N. H.—Wait v. Holt, 58 N. H. 467; Livermore v. Rand, 26 N. H. 85.

N. Y.—Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 33 NYS 676 (rev 9 Misc. 298, 30 NYS 267)]; Platt v. Platt, 105 N. Y. 488, 12 NE 22; Austin v. Munroe, 47 N. Y. 360; Mygatt v. Wilcox, 45 N. Y. 306, 6 AmR 90; Ferrin v. Myrick, 41 N. Y. 315; Matter of McDonough, 132 App. Div. 614, 117 NYS 258; In re Blair, 67 App. Div. 116, 73 NYS 675 [aff 34 Misc. 444, 69 NYS 1013]; Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem]; Genet v. De Graaf, 27 App. Div. 238, 50 NYS 442; Mygatt v. Willcox, 1 Lans. 55 [aff 45 N. Y. 306, 6 AmR 90]; Willcox v. Smith, 26 Barb. 316; Bowman v. Tallman, 25 N. Y. Super. 385, 27 How Pr 212 [aff 2 Abb. Dec. 182, 40 How Pr 1]; Matter of Heinze, 99 Misc. 226, 165 NYS 712; Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46; Olcott v. De Jorrin, 36 Misc. 735, 74 NYS 393; Matter of Blair, 34 Misc. 444, 69 NYS 1013 [aff 67 App. Div. 116, 73 NYS 675]; Matter of O'Brien, 5 Misc. 136, 25 NYS 704; In re Vena, 170 NYS 291; In re Nocton, 162 NYS 215; Matter of Halsey, 13 AbbNCas 353, 2 Dem. Surr. 577 [aff 28 Hun 643 mem (aff 93 N. Y. 48, 17 NY WklyDig 241)]; Budlong v. Clemens, 3 Dem. Surr. 145.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953; Lindsay v. Darden, 124 N. C. 307, 32 SE 678; Kessler v. Hall, 64 N. C. 60; McKay v. Royal, 52 N. C. 426.

N. D.—Besancon v. Wegner, 16 N. D. 240, 112 NW 965.

Oh.—Trumpler v. Royer, 95 Oh. St. 194, 115 NE 1018; Thomas v. Moore, 52 Oh. St. 200, 39 NE 803; Mellen v. West, 5 Oh. Cir. Ct. 89, 3 Oh. Cir. Dec. 46; McBride v. Brucker, 5 Oh. Cir. Ct. 12, 3 Oh. Cir. Dec. 7; Hurd v. Wheeling, etc., R. Co., 6 OhS&CP 545, 4 OhNP 404.

Or.—In re Pickett, 49 Or. 127, 89 P 377; Waite v. Willis, 42 Or. 288, 70 P 1034; In re McCullough, 31 Or. 86, 49 P 886.

Pa.—Kalbfell's Est., 17 Pa. Super. 255 [aff 30 PittsbLegJNS 325]; Christian's Est., 12 Pa. Dist. 368.

Tex.—McGloin v. Vanderlip, 27 Tex. 366.

Wash.—In re Sullivan, 36 Wash. 217, 78 P 945; Nash v. Wakefield, 30 Wash. 556, 71 P 35.

W. Va.—Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

Wis.—Vaughn v. Walsh, 122 Wis. 486, 100 NW 840; Wiesmann v. Daniels, 114 Wis. 240, 90 NW 162.

[a] **Payment made at representative's peril.**—Since an administrator's attorney sustains no relation to the estate, money paid by the administrator to the attorney for services from the funds of the estate are paid at the administrator's peril, until the court has duly adjudicated the administrator's claim for its allowance, after hearing on notice to all persons interested. In re Sullivan, 36 Wash. 217, 78 P 945.

[b] **The attorney has no lien** on the property of the estate for his services. Rickel v. Chicago, etc., R. Co., 112 Iowa 148, 83 NW 957; Waite v. Willis, 42 Or. 288, 70 P 1034.

[c] **Administrator cannot agree to give attorney an interest in land of estate for services.**—Bryan v. Craig, 64 Ark. 438, 44 SW 348; Teal v. Terrell, 48 Tex. 491.

[d] **The probate court has no jurisdiction** (1) to render judgment against an administrator as such for services rendered by an attorney employed by such administrator to prosecute a claim on behalf of the estate, because the liability of the administrator is personal and not in his representative capacity. Pike v. Thomas, 62 Ark. 223, 35 SW 212, 54 AmSR 292. To same effect State v. Second Judicial Dist. Ct., 25 Mont. 33, 63 P 717. (2) Nor can its sanction sustain a conveyance of land of the estate in payment for professional services rendered. Teal v. Terrell, 48 Tex. 491.

[e] **An attorney will not be directed to refund** money paid to him by the administrator pursuant to an order improperly obtained. In re Sullivan, 36 Wash. 217, 228, 78 P 945, 948 ("As we have hereinbefore seen, the attorney sustains no relation to the estate, and is not a party thereto. The administrator is the party before the court who must account for the funds of the estate. The adjustment of the amount of attorney's fees that shall be paid is a matter between him and his attorney. But if paid from funds of the estate, he must know that he cannot be protected in its disbursement until the court has ordered it paid after a hearing, with interested parties before the court, either by notice or otherwise. We therefore decline to make any order directed to Mr. McCafferty, but leave him and the administrator to adjust their own affairs. It is, however, now ordered, that Mr. O'Brien, the administrator, shall return to the funds of the estate all moneys paid out by him under said so-called orders").

[f] **Any allowance made should be to the representative** and not directly to the attorney. In re Kruger, 143 Cal. 141, 76 P 891; Matter of Welling, 51 App. Div. 355, 64 NYS 1025.

[g] **Effect of allowance.** — (1) Credit to the representative in his account for an attorney's fee does not constitute a judgment or adjudication in favor of the attorney against either the estate or the representative, and cannot be made the foundation of an action by him against either. The decree only fixes the allowance of the fee as expense to the administrator. McKee v. Soher, 138 Cal. 367, 71 P 438, 649. (2) On the other hand the amount when allowed becomes a demand against the estate in favor of the attorney and can be pursued as such if not paid by the legal representative. Smith v. Rhodes, 68 Oh. St. 500, 68 NE 7; In re Mills, 40 Or. 424, 67 P 107.

[h] **When not liable.**—One expecting to be appointed an executor was not personally liable on his contract with an attorney for services to the succession and interested parties, made before his qualification as executor in fact, where the attorney knew that he had no authority, and circumstances were equally known to them, and where there was no misrepresentation or concealment. Aiken's Succ., 144 La. 64, 80 S 200 (neither was the estate liable).

27. Ark.—Tucker v. Grace, 61 Ark. 410, 33 SW 530; Wassell v. Armstrong, 35 Ark. 247.

Cal.—In re Page, 57 Cal. 238.

Ill.—Greene v. Grimshaw, 11 Ill. 389.

Mich.—Jackson v. Leech, 113 Mich. 391, 71 NW 846.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Nichols v. Reyburn, 55 Mo. A. 1.

Nev.—Torreyson v. Bowman, 26 Nev. 369, 68 P 472.

N. Y.—Matter of Reisfeld, 227 N. Y. 137, 124 NE 725 [mod 187 App. Div. 223, 175 NYS 365]; Matter of Weber, 102 Misc. 635, 170 NYS 293.

Pa.—In re Lafferty, 23 PittsbLegJ 157.

Tex.—Jones v. Lewis, 11 Tex. 359; Portis v. Cole, 11 Tex. 157.

[a] **An administratrix of a community estate** owned by herself and decedent may bind the estate by a contract to pay an attorney a contingent fee for collecting a doubtful claim in favor of the estate, because the powers of the survivor of the community are much greater than those of ordinary administrators. James v. Turner, 78 Tex. 241, 14 SW 574; Portis v. Cole, 11 Tex. 157.

that the attorney employed to render services beneficial to the estate shall look to the estate alone for recompense.[28] So also an attorney employed by a personal representative is sometimes allowed compensation directly from the estate where the personal representative is insolvent,[29] and the statutes sometime authorize an executor to bind the estate for the payment to attorneys of a reasonable compensation for services which are necessary in the course of administration.[30] It has also been held that an executor may bind the estate by the employment of counsel to defend the will when this is contested.[31]

[§ 486] **3. Funeral Expenses, Tombstones, Etc.** While the general rule denying the power of the representative to bind the estate by his contracts[32] has been applied so as to hold the executor or administrator who has ordered the funeral of, or a tombstone for, his decedent liable only personally and not in his representative capacity,[33] although with a right of reimbursement for his expenditure against the estate,[34] the better view is that such expenses are charges against the estate, which the representative must pay out of the assets and for which he is liable in his representative capacity.[35]

[§ 487] **4. Payment of Decedent's Debts.**[36] An executor or administrator may bind the estate by a promise to pay the debt which is a just and clear liability of the estate,[37] and a promise to pay a debt of decedent in consideration of assets is a promise in his representative capacity and will support a judgment de bonis testatoris or de bonis decedentis.[38] His authority in this respect is limited, however, to the amount of assets in his hands, and he can in no case bind the heir or devisee;[39] while with respect to himself, as he is not bound to pay the debts beyond the assets which he receives, he is not presumed to intend binding himself for payments in a more extensive sense, and hence even his unequivocal promise, written or oral, to pay a debt of his decedent, does not make him personally liable therefor unless it is founded on some sufficient consideration other than the existence of the debt.[40] Nevertheless, in various instances, such as extension, forbearance by the creditor, or a substitution of securities, the executor or administrator may make himself personally liable by his direct promise to pay, as for a new and sufficient consideration,[41] and it has been considered that his direct promise may bind him absolutely if the debt

28. Cal.—Briggs v. Breen, 123 Cal. 657, 56 P 633, 886.
Ind.—Long v. Rodman, 58 Ind. 58.
N. Y.—Clapp v. Clapp, 44 Hun 451.
Pa.—Wilson's App., 3 Walk. 216.
W. Va.—Hoke v. Hoke, 12 W. Va. 427.
[a] **Contract releasing executor from liability.**—A contract between an executor and his attorney that the latter's fee shall be fixed by the court is a release of the executor from any liability therefor. In re Kasson, 119 Cal. 489, 51 P 706.

29. Ala.—Leahart v. Deedmeyer, 158 Ala. 295, 48 S 371; Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.
Ark.—Pike v. Thomas, 65 Ark. 437, 47 SW 110.
Iowa.—Gates v. McClenahan, 124 Iowa 593, 100 NW 479.
N. Y.—Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46.
W. Va.—Thompson v. Nowlin, 51 W. Va. 346, 41 SE 178.
[a] **Recovery against successor.**—Where attorneys have rendered necessary services under a contract with an administrator who is or has become insolvent without making payment and has not charged the estate with and obtained credit therefor, the attorneys may recover for their services in proceedings against the successor of the administrator, without alleging that the successor and the other defendants are insolvent. Leahart v. Deedmeyer, 158 Ala. 295, 48 S 371.

30. Jackson v. Leech, 113 Mich. 391, 71 NW 846.

31. Fenner v. McCan, 49 La. Ann. 600, 21 S 768.

32. See supra § 483.

33. Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653. See also Brice v. Wilson, 8 A. & E. 349 note, 35 ECL 626, 112 Reprint 870 (ratification of orders given by another).

34. See infra § 926.

35. See infra §§ 924–930.

36. Allowance or payment of claims generally see infra § 875 et seq.

37. Kan.—Brown v. Evans, 15 Kan. 88.
Ky.—Rucker v. Wadlington, 5 J. J. Marsh. 238.
Mass.—Hapgood v. Houghton, 10 Pick. 154, 19 AmD 238.
Miss.—Steele v. McDowell, 17 Miss. 193.
N. Y.—Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737; Jenkins v. Phillips, 41 App. Div. 389, 58 NYS 788.
N. C.—Gregory v. Hooker, 8 N. C. 394, 9 AmD 646.
Pa.—Allen v. Graffius, 8 Watts 397.
Vt.—Willard v. Brewster, Brayt. 104.
Eng.—Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789; Dowse v. Coxe, 3 Bing. 20, 11 ECL 20, 130 Reprint 420; Powell v. Graham, 7 Taunt. 580, 2 ECL 501, 129 Reprint 232.
"We know of no good reason why an estate should not be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty, without a promise, to do just what he has promised to do." Brown v. Evans, 15 Kan. 88, 92.
[a] **Illustration.**—An agreement by an administrator to sell property of the estate and pay a stipulated sum to the widow, who by an antenuptial contract was entitled to receive from the decedent's estate sufficient to enable her to resume housekeeping, is enforceable in the absence of fraud. Grider v. Rodes, 5 Bush (Ky.) 277.
[b] **Account stated.**—Within this rule, an executor or administrator may be sued in his representative capacity on an account stated, since the original liability is that of decedent, and the effect of the account stated was merely to reduce the amount of the indebtedness to a certainty. Kingman v. Soule, 132 Mass. 285; Hapgood v. Houghton, 10 Pick. (Mass.) 154, 19 AmD 238; Schutz v. Morette, 146 N. Y. 137, 40 NE 780; Gregory v. Hooker, 8 N. C. 394, 9 AmD 646; Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789.

38. Adams v. Whiting, 1 F. Cas. No. 69, 2 Cranch C. C. 132; Courtney v. Hunter, 6 F. Cas. No. 3,285, 1 Cranch C. C. 265; Dixon v. Ramsay, 7 F. Cas. No. 3,932, 1 Cranch C. C. 472; Faxon v. Dyson, 8 F. Cas. No. 4,705, 1 Cranch C. C. 441. But compare Carter v. Thomas, 3 Ind. 213, 214 ("It seems that 'if an executor or administrator promises, in writing, that in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on his promise in his individual capacity, and the judgment against him will be de bonis propriis.' 2 Williams on Ex. 1267").

39. Grotenkemper v. Bryson, 79 Ky. 353; Jenkins v. Phillips, 41 App. Div. 389, 58 NYS 788.

40. Ala.—Russell v. Wright, 98 Ala. 652, 13 S 594; Martin v. Black, 20 Ala. 309; Hester v. Wesson, 6 Ala. 415.
Conn.—Pratt v. Humphrey, 22 Conn. 317.
Ind.—Vogel v. O'Toole, 2 Ind. A. 196, 28 NE 209.
Ky.—Crews v. Williams, 2 Bibb 262, 4 AmD 701.
La.—Talmage v. Patterson, 6 Mart. N. S. 604.
Minn.—Germania Bank v. Michaud, 62 Minn. 459, 65 NW 70, 54 AmSR 653, 30 LRA 286.
Miss.—Waul v. Kirkman, 21 Miss. 599; Byrd v. Holloway, 14 Miss. 199.
N. Y.—Troy Bank v. Topping, 9 Wend. 273; Ten Eyck v. Vanderpoel, 8 Johns. 120.
N. C.—Williams v. Chaffin, 13 N. C. 333.
Pa.—Hollenback v. Clapp, 103 Pa. 60.
Tenn.—Bedford v. Ingram, 5 Hayw. 155.
Va.—Taliaferro v. Robb, 2 Call (6 Va.) 258.

41. Ga.—Harrison v. McClelland, 57 Ga. 531; Poole v. Hines, 52 Ga. 500.
Ind.—Cornthwaite v. Rockville First Nat. Bank, 57 Ind. 268.
Iowa.—Thompson v. Maugh, 3 Greene 342.
Ky.—Mosely v. Taylor, 4 Dana 542.
La.—Beatty v. Tete, 9 La. Ann. 129.
Md.—Steuart v. Carr, 6 Gill 430.
Mass.—Wilton v. Eaton, 127 Mass. 174.
Miss.—Robinson v. Lane, 22 Miss. 161.
Mo.—Webster v. Switzer, 15 Mo. A. 346.
N. J.—Rusling v. Rusling, 47 N. J. L. 1.
N. Y.—Hall v. Richardson, 22 Hun 444 [aff 89 N. Y. 636].
N. C.—Ball v. Felton, 51 N. C. 202; Noblet v. Green, 13 N. C. 517, 21 AmD 347; Sleighter v. Harrington, 4 N. C. 679, 7 AmD 715.
Pa.—In re Claghorn, 181 Pa. 600, 37 A 918.
Vt.—Moar v. Wright, 1 Vt. 57.
[a] **Promise on which decedent**

of the decedent was already barred by limitations.[42]

[§ 488] **5. Borrowing Money.**[43] An executor or administrator, as such, has no inherent authority to borrow money, and loans to the representative do not constitute valid claims against the estate or entitle the lender to interest thereon, although the representative may make himself personally liable;[44] and the rule in this respect is not changed by the fact that the money was borrowed for the benefit of the estate,[45] although under such circumstances there may be a right of subrogation.[46] Power to borrow money on lien security may, however, be given by will,[47] and statutes are sometimes found which sanction borrowing with the creation of a lien, although usually upon due investigation and a previous order from the court.[48] Where a loan was made under circumstances rendering the estate liable therefor, the lender is not required, as a condition of preserving his rights against the estate, to see to the application of the money lent.[49] Where the personal representative may borrow money for the benefit of the estate, it has been held that he may procure such money beyond the border of the state in which his letters were granted.[50]

[§ 489] **6. Bills and Notes.** An executor or

could not be sued.—Although a husband could not be sued at law on his promise to repay to his wife money received by him for her during her coverture, his executors might be sued on their promise to repay such money. Rusling v. Rusling, 47 N. J. L. 1.

[b] **Sufficiency of consideration.**—The surrender to an administrator of a promissory note made by his intestate, whether the note at the time of the surrender is capable or incapable of being enforced at law, is a sufficient consideration for the giving of a new note by the administrator, and he is personally liable thereon, although when the new note is given, his final account has been allowed, and no new assets have since come into his hands. Wilton v. Eaton, 127 Mass. 174.

[c] **A covenant releasing the representative** from personal liability on notes given by him to take up notes of the decedent will be given effect. McNairy v. Thompson, 1 Sneed (Tenn.) 141.

42. Baker v. Fuller, 69 Me. 152; Oates v. Lilly, 84 N. C. 643; Matter of Miller, 5 PaLJ 265; McGrath v. Barnes, 13 S. C. 328, 36 AmR 687. But compare Perry v. Booth, 7 Tex. 493 (representative not bound individually because he did not contract in that capacity and because his individual promise to pay the barred debt of another would be without consideration).

43. Mortgage of realty see infra §§ 696–701.

Pledge or mortgage of personalty see infra § 753.

44. Cal.—Sterrett v. Barker, 119 Cal. 492, 51 P 695.

Conn.—Guthrie v. Wheeler, 51 Conn. 207.

Ga.—Wiggs v. Hendricks, 147 Ga. 444, 94 SE 556; Putney v. Bryan, 142 Ga. 118, 82 SE 519; O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197; McMillan v. Cox, 109 Ga. 42, 34 SE 341.

Ind.—De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.

Ky.—Rice v. Strange, 72 SW 756, 24 KyL 1945.

Mass.—Howe v. Richardson, 186 Mass. 259, 71 NE 543; Lyman v. National Bank of Republic, 181 Mass. 437, 63 NE 923.

Miss.—Luckett v. Brickell, 115 Miss. 457, 76 S 502; Farley v. Hood, 45 Miss. 96; Ford v. Russell, Freem. 42.

Nev.—In re Millenovich, 5 Nev. 189.

N. Y.—Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Glenn v. Burrows, 4 Silv. Sup. 148, 7 NYS 180 [aff 119 N. Y. 660 mem, 23 NE 1151 mem].

N. C.—Morehead Banking Co. v. Morehead, 116 N. C. 410, 21 SE 190, 122 N. C. 318, 30 SE 331.

Oh.—Smith v. Hayward, 5 OhS&CP 462, 5 OhNP 501.

Pa.—Frick v. Shimer, 26 Pa. Super. 563.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Vt.—Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 AmR 661.

Va.—Whitten v. Fincastle Bank, 100 Va. 546, 42 SE 309; Robertson v. Breckinridge, 98 Va. 569, 37 SE 8; Breckinridge v. Breckinridge, 98 Va. 561, 31 SE 892.

Eng.—Farhall v. Farhall, L. R. 7 Ch. 123.

Can.—La Banque Jacques-Cartier v. Gratton, 30 Can. S. C. 317.

[a] **Especially where the money borrowed was misapplied** the estate is not liable. Croft v. Williams, 88 N. Y. 384; Frick v. Shimer, 26 Pa. Super. 563.

[b] **The insolvency of the representative** does not make the estate the more liable for the borrowing. Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 AmR 661.

[c] **Where legatees agreed that the executors might renew** a certain note of the testator, barred during his lifetime, and the executors gave a note in renewal, they had no further authority to borrow money from another to pay the renewal note. O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197.

[d] **Purchasing security to evade taxation.**—It was not lawful or proper for a personal representative to borrow money on the credit of the estate for the sole purpose of purchasing securities exempt from taxation, in order to hold them until the time for assessing property for taxation had passed, thereby to evade taxation. Wheelwright v. Rhoades, 28 Hun (N. Y.) 57, 11 Abb NCas 382.

[e] **Acknowledgment as distinguished from creation of debt.**—Where a father having died largely in debt, the representative of his succession, in order to pay off his indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness, and notes were given upon this loan, this was not the creation of a debt, but was the acknowledgment of one, and providing means to pay it, all of which was done in the interest of the heirs; and the liability of a son therefore was fixed by his interest in his father's succession. Stevenson v. Edwards, 27 La. Ann. 302.

45. O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197.

46. See infra § 491.

47. Ga.—Wiggs v. Hendricks, 147 Ga. 444, 94 SE 556; Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164.

Ky.—Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264.

Tex.—Prieto v. Leonards, (Civ. A.) 74 SW 41.

Va.—Robertson v. Breckinridge, 98 Va. 569, 37 SE 8.

W. Va.—Jameson v. Myles, 7 W. Va. 311.

Testamentary power to mortgage land see infra § 696.

[a] **Illustrations.**—(1) Where a will authorized and empowered the executor "to do any and all things concerning my estate that I could do if living, leaving it to his judgment and discretion as to how he shall manage the same or carry on my business and giving to him full power and authority to sell and convey any or all of my real estate when in his judgment it may be desirable to do so," the executor had power to borrow money to carry on the business of the estate. Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 272, 275, 129 SW 823, 29 LRANS 264 ("We are of opinion that the executor, Pieper, was authorized, under the power given him by the fifth clause of the will, to borrow money to carry on the business of the packing company, and that the entire estate of decedent was bound therefor; and it is immaterial whether he signed these notes as principal or as surety, so long as it was to enable the company to raise money necessary to properly carry on its business, or rather, to carry on the business in a way which he deemed to be proper. The estate, in either event was bound therefor"). (2) A will expressing entire confidence in the person named as executor and giving to him the entire management, control, and disposition of the assets of the estate confers power on the executor to borrow money to pay debts on his note as executor. Prieto v. Leonards, 32 Tex. Civ. A. 205.

[b] **Borrowing more than necessary.**—Where a will authorizes an executor to raise, in such way as seems best to him, sufficient money to pay testator's debts, and he borrows a short time after testator's death more money than is necessary to pay the debts, the estate is liable to the lender for the full amount, if there is no fraud or collusion between the executor and the lender, and the latter had no notice of the amount of the debts, since he is not bound to ascertain whether there are debts of the testator or not. Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164.

[c] **Will not giving authority to borrow.**—McMillan v. Cox, 109 Ga. 42, 34 SE 341.

[d] **A testamentary provision authorizing the executor to make advances** to certain legatees does not authorize him to negotiate a loan for that purpose. La Banque Jacques-Cartier v. Gratton, 30 Can. S. C. 317.

48. La.—Stevenson v. Edwards, 27 La. Ann. 302.

Mich.—In re Lambie, 94 Mich. 489, 54 NW 173.

Mont.—White Sulphur Springs First Nat. Bank v. Collins, 17 Mont. 433, 43 P 499, 52 AmSR 695.

Nev.—In re Millenovich, 5 Nev. 189; Lucich v. Medin, 3 Nev. 93, 93 AmD 376.

N. Y.—Glenn v. Burrows, 37 Hun 602, 4 Silv. Sup. 148, 7 NYS 180 [aff 119 N. Y. 660 mem, 23 NE 1151 mem].

N. C.—Morehead Banking Co. v. Morehead, 116 N. C. 410, 21 SE 190.

Statutory power to mortgage land see infra § 696.

49. Goodell v. Munroe, 86 N. J. Eq. 18, 97 A 152.

50. Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226.

administrator has no inherent authority to render the estate liable by giving or indorsing a promissory note or accepting a bill of exchange,[51] nor is such authority deducible from an express power to sell and reinvest the assets;[52] but the executor or administrator is personally liable on such an instrument, as maker, indorser, or acceptor, as the case may be,[53] unless it is expressly stipulated that he shall not be individually liable,[54] or he is able to show that, as his individual contract, the note was without consideration, and the payee agreed to look only to the estate for payment.[55] It is

51. U. S.—Boggs v. Wann, 58 Fed. 681.

Ala.—Christian v. Morris, 50 Ala. 585; Kirkman v. Benham, 28 Ala. 501.

Ark.—Perry v. Cunningham, 40 Ark. 185.

Ga.—O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197 [cit Cyc]; Harris v. Woodard, 133 Ga. 104, 65 SE 250; Glisson v. Weil, 117 Ga. 842, 45 SE 221; Lynch v. Kirby, 65 Ga. 279.

Ill.—Wisdom v. Becker, 52 Ill. 342.

Ind.—Cornthwaite v. Rockville First Nat. Bank, 57 Ind. 268; De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.

Iowa.—Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383; Dunne v. Deery, 40 Iowa 251; Winter v. Hite, 3 Iowa 142; Thompson v. Maugh, 3 Greene 342; Tryon v. Oxley, 3 Greene 289.

Kan.—Exchange Nat. Bank v. Betts, 103 Kan. 807, 176 P 660.

Ky.—Ellis v. Merriman, 5 B. Mon. 296.

La.—Louisiana Mut. Ins. Co. v. Walters, 25 La. Ann. 560; Carroll v. Davidson, 23 La. Ann. 428; Livingston v. Gaussen, 21 La. Ann. 286, 99 AmD 731; Beatty v. Tete, 9 La. Ann. 129; Winthrop v. Jarvis, 8 La. Ann. 434; Gillet v. Rachal, 9 Rob. 276; Hestres v. Patrovic, 1 Rob. 119; Russell v. Cash, 2 La. 185; Flower v. Swift, 5 Mart. N. S. 529.

Me.—White v. Thompson, 79 Me. 207, 9 A 118; Walker v. Patterson, 36 Me. 273; Davis v. French, 20 Me. 21, 37 AmD 36.

Mass.—Browne v. Fairhall, 213 Mass. 290, 100 NE 556, 45 LRANS 349.

Minn.—Germania Bank v. Michaud, 62 Minn. 459, 65 NW 70, 54 AmSR 653, 30 LRA 286.

Miss.—Yerger v. Foote, 48 Miss. 62; Woods v. Ridley, 27 Miss. 119; Sims v. Stilwell, 4 Miss. 176.

Mo.—Stirling v. Winter, 80 Mo. 141; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215.

Mont.—White Sulphur Springs First Nat. Bank v. Collins, 17 Mont. 433, 43 P 499, 52 AmSR 695.

N. J.—Hellier v. Lord, 55 N. J. L. 367, 26 A 986; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

N. Y.—Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737; Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Packard v. Dunfee, 119 App. Div. 599, 104 NYS 140; Matter of Callister, 88 Hun 87, 34 NYS 628 [mod on other grounds 153 N. Y. 294, 47 NE 268, 60 AmSR 620]; Delaware, etc., R. Co. v. Gilbert, 44 Hun 201 [aff 112 N. Y. 673, 20 NE 416]; Bingham v. Marine Nat. Bank, 41 Hun 377 [aff 2 Silv. A. 137, 19 NE 416]; Buckland v. Gallup, 40 Hun 61 [aff 105 N. Y. 453, 11 NE 843]; Darling v. Powell, 20 Misc. 240, 45 NYS 794; Elisberg v. Simpson, 173 NYS 128 [mod on other grounds 176 NYS 897 mem]; Boyer v. Marshall, 5 NYSt 431; Troy Bank v. Topping, 9 Wend. 273, 13 Wend. 557; Hills v. Bannister, 8 Cow. 31; Taft v. Brewster, 9 Johns. 334, 6 AmD 280.

N. C.—Morehead Banking Co. v. Morehead, 122 N. C. 318, 30 SE 331; McLean v. McLean, 88 N. C. 394; Kerchner v. McRae, 80 N. C. 219; Hall v. Craige, 65 N. C. 51; Kessler v. Hall, 64 N. C. 60; Latham v. Moore, 59 N. C. 167; Sleigheter v. Harrington, 6 N. C. 332.

Oh.—Curtis v. National Bank, 39 Oh. St. 579.

Pa.—Eierman v. People's Trust, etc., Co., 21 LancLRev 170; Farmers' Nat. Bank v. Griel, 12 LancLRev 28.

S. C.—Johnson v. Clarke, 15 S. C. 72; McGrath v. Barnes, 13 S. C. 328, 36 AmR 687.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Boyd v. Johnston, 89 Tenn. 284, 14 SW 804; East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

Tex.—Gregory v. Leigh, 33 Tex. 813; Caldwell v. Young, 21 Tex. 800.

Vt.—Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 AmR 661.

Va.—Whitten v. Fincastle Bank, 100 Va. 546, 42 SE 309; Snead v. Coleman, 7 Gratt. (48 Va.) 300, 56 AmD 112.

Wash.—Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482.

Eng.—Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044; Aspinall v. Wake, 10 Bing. 51, 25 ECL 33, 131 Reprint 824; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

Can.—Lionais v. Bank, 10 Can. S. C. 526.

Ont.—Evans v. Rolls, 4 OntWR 125.

[a] **The rule applies to** an acceptance by an executor of a draft drawn by a distributee against his distributive share. Wisdom v. Becker, 52 Ill. 342; Mills v. Kuykendall, 2 Blackf. (Ind.) 47; Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737 [rev 25 Hun 76].

[b] **Discounting.** — An executor cannot bind the estate by indorsing and discounting promissory notes. Farmers' Nat. Bank v. Griel, 12 Lanc LRev (Pa.) 28.

[c] **Notes as new promise to pay debts of estate.**—Notes executed by an executor, payable to the cashier of a bank, cannot be treated as constituting a new promise to pay notes held by the bank against the estate, where each purports to be an original undertaking by the executor, and in none of them is there an acknowledgment by him that the bank held any valid claim against the estate, and the notes held by the bank against the estate are not surrendered. Hughes v. Treadaway, 116 Ga. 663, 42 SE 1035.

[d] **A guaranty by an executor** of a note transferred by him in payment of a debt due from the estate to the transferee is not binding on the estate. Johnston v. Union Bank, 37 Miss. 526.

[e] **A complaint alleging consideration to and liability of the estate is demurrable** where the note was signed by the representative in his individual name. Lynch v. Kirby, 65 Ga. 279.

52. Boggs v. Wann, 58 Fed. 681.

53. U. S.—Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Ala.—Christian v. Morris, 50 Ala. 585; Greening v. Sheffield, Minor 276.

Ga.—Hopson v. Johnson, 110 Ga. 283, 34 SE 848; Harrison v. McClelland, 57 Ga. 531.

Ind.—Cornthwaite v. Rockville First Nat. Bank, 57 Ind. 268.

Iowa.—Tryon v. Oxley, 3 Greene 289.

Kan.—Hostetter v. Hoke, 17 Kan. 81.

La.—Livingston v. Gaussen, 21 La. Ann. 286, 99 AmD 731; Gillet v. Rachal, 9 Rob. 276; Russell v. Cash, 2 La. 185.

Me.—White v. Thompson, 79 Me. 207, 9 A 118; Walker v. Patterson, 36 Me. 273.

Mass.—Plimpton v. Goodell, 126 Mass. 119.

Minn.—Germania Bank v. Michaud, 62 Minn. 459, 65 NW 70, 54 AmSR 653, 30 LRA 286.

Miss.—Yerger v. Foote, 48 Miss. 62.

Mo.—Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215.

N. Y.—Jenkins v. Phillips, 41 App. Div. 389, 58 NYS 788; Darling v. Powell, 20 Misc. 240, 45 NYS 794.

N. C.—Morehead Banking Co. v. Morehead, 122 N. C. 318, 30 SE 331; Kessler v. Hall, 64 N. C. 60.

Pa.—Tassey v. Church, 4 Watts & S. 346.

S. C.—McGrath v. Barnes, 13 S. C. 328, 36 AmR 687.

Tenn.—Boyd v. Johnston, 89 Tenn. 284, 14 SW 804; East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

Tex.—Gregory v. Leigh, 33 Tex. 813. But compare Ellis v. Littlefield, 41 Tex. Civ. A. 318, 93 SW 171 (where a note was in fact executed by an executrix for the benefit of the estate, although it did not disclose the fact on its face, and the money secured by the execution of the note was used in the interest of the estate, the executrix was liable thereon in her representative capacity).

Vt.—Merchants' Nat. Bank. v. Weeks, 53 Vt. 115, 38 AmR 661.

Eng.—Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044; Aspinall v. Wake, 10 Bing. 51, 25 ECL 33, 131 Reprint 824; Gibson v. Minet, 2 Bro. P. C. 48, 1 Reprint 784, 1 H. Bl. 569, 126 Reprint 326, 3 T. R. 481, 100 Reprint 689; Ridout v. Bristow, 1 Cromp. & J. 231, 148 Reprint 1404; Liverpool Borough Bank v. Walker, 4 De G. & J. 24, 61 EngCh 19, 45 Reprint 10; Nelson v. Serle, 4 M. & W. 795, 150 Reprint 1643; Serle v. Waterworth, 4 M. & W. 9, 150 Reprint 1321; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

[a] **Consideration.** — Under the law merchant, a negotiable note made by a fiduciary in his official capacity imports sufficient consideration to bind him personally to the holder of the instrument. Germania Bank v. Michaud, 62 Minn. 459, 65 NW 70, 54 AmSR 653, 30 LRA 286.

[b] **The insolvency of the executor or administrator** who gives his note does not affect the rule. Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 AmR 661.

[c] **Form of indorsement not binding executor.** — An indorsement of negotiable paper, "Estate of Wheeler, Wing Executor," does not bind the executor individually, although the estate may not be bound. Grafton Nat. Bank v. Wing, 172 Mass. 513, 52 NE 1067, 70 AmSR 303, 43 LRA 831.

[d] **Where the representative is incapable of becoming liable on his contracts,** by reason of some disability, the rule is otherwise. Kirkman v. Benham, 28 Ala. 501; Poole v. Hines, 52 Ga. 500; Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215; Erwin v. Carroll, 1 Yerg. (Tenn.) 145; Snead v. Coleman, 7 Gratt. (48 Va.) 300, 56 AmD 112; Bradley v. Heath, 3 Sim. 543, 6 EngCh 543, 57 Reprint 1101.

54. Grafton Nat. Bank. v. Wing, 172 Mass. 513, 52 NE 1067, 70 AmSR 303, 43 LRA 831; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Schmittler v. Simon, 25 Hun 76 [aff 101 N. Y. 554, 5 NE 452, 54 AmR 737]; Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 SE 191.

55. Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215.

usually considered that the rule is not affected by the fact that the note or acceptance is given for a debt of decedent,[56] or that the representative signs as "executor" or "administrator"[57] and designates by name the estate which he represents,[58] that the promise in the body of the note is made as executor or administrator,[59] or that the note is given as a renewal of a note executed by decedent.[60] But although the executor or administrator is bound out of his own property in the first instance, he may reimburse himself out of the assets where the consideration was just and beneficial to the estate and the obligation was honestly incurred,[61] although not otherwise.[62] Statutes sometimes permit of borrowing upon note, usually with the assent of the probate court,[63] and upon a note executed under such circumstances the representative is not personally liable.[64] So also power to bind the estate by giving a note may be conferred by the terms of the will.[65]

Executors cannot waive notice of protest upon a note made by their testatrix, or by any act create a liability against the estate which does not already exist.[66]

[§ 490] **7. Guaranty or Suretyship.** The usual rights and liabilities of guaranty or suretyship are protected and enforced in the case of a decedent's assets;[67] but the executor or administrator cannot directly bind the estate by his own new promise by way of guaranty or suretyship, although the transaction be one affecting decedent's own promise and liability, but charges himself primarily and personally by his undertaking.[68] So also where an estate was not liable upon a guaranty agreement executed by decedent, the administratrix could not, by acquiescence and recognition, create such liability.[69]

[§ 491] **8. Subrogation of Contracting Party.** While a person who lends or advances money to an executor or administrator upon a promise by note or other contract acquires no right at law or in equity against the estate, unless the money has in fact been applied to pay debts or otherwise to benefit the estate, he will in such case be permitted to take the representative's place and be subrogated to his right of reimbursement from the estate.[70]

[§ 492] **F. Investments—1. Right or Duty to**

56. Browne v. Fairhall, 213 Mass. 290, 100 NE 556, 45 LRANS 349.

[a] **Defeating liability by showing no assets.**—An administratrix who gives a note for the debt of her intestate may defeat her personal liability by showing that she had no assets of intestate, when it was executed, sufficient to pay it. Jenkins v. Phillips, 41 App. Div. 389, 58 NYS 788. See also Boyd v. Johnston, 89 Tenn. 284, 14 SW 804 (holding that the representative may show that the assets received were less than the indebtedness of the decedent, and his liability on the note proportionately reduced unless some other consideration is shown).

57. Fla.—Higgins v. Driggs, 21 Fla. 103.

Ga.—Harrison v. McClelland, 57 Ga. 531; McFarlin v. Stinson, 56 Ga. 396; Stubbs v. Macon Fourth Nat. Bank, 12 Ga. A. 539, 77 SE 893. But compare Jordan v. Brown, 72 Ga. 495 (the signature of an administrator, as such, to a note given in payment for corn furnished an estate to sustain live stock belonging thereto is sufficient to indicate that it was for the debt of the estate).

Iowa.—Tryon v. Oxley, 3 Greene 289.

Kan.—Exchange Nat. Bank v. Betts, 103 Kan. 807, 176 P 660.

Mo.—Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101.

Mont.—White Sulphur Springs First Nat. Bank v. Collins, 17 Mont. 433, 43 P 499, 52 AmSR 695.

N. Y.—Schmittler v. Simon, 101 N. Y. 554, 5 NE 452, 54 AmR 737; Jenkins v. Phillips, 41 App. Div. 389, 58 NYS 788; Darling v. Powell, 20 Misc. 240, 45 NYS 794; Elisberg v. Simpson, 173 NYS 128 [mod on other grounds 176 NYS 897 mem]; Boyer v. Marshal, 5 NYSt 431.

N. C.—Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 SE 191.

Tenn.—Boyd v. Johnston, 89 Tenn. 284, 14 SW 804.

[a] **A fortiori where no descriptive words are added** a decedent's estate is not bound by a note signed by the executor without any words indicating his representative character. Martin v. Fitch, 65 Ind. 216.

58. Ala.—Christian v. Morris, 50 Ala. 585.

Fla.—Higgins v. Driggs, 21 Fla. 103.

Ga.—McFarlin v. Stinson, 56 Ga. 396; Lovelace v. Smith, 39 Ga. 130.

Iowa.—Winter v. Hite, 3 Iowa 142.

Kan.—Hostetter v. Hoke, 17 Kan. 81.

Md.—Curtis v. Somerset Bank, 7 Harr. & J. 25.

Tenn.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

Eng.—Liverpool Borough Bank v. Walker, 4 De G. & J. 24, 61 EngCh 19, 45 Reprint 10.

59. Mo.—Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101.

Tenn.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

Tex.—Gregory v. Leigh, 33 Tex. 813.

Eng.—Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044; Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789.

Ont.—Kerr v. Parsons, 11 U. C. C. P. 513.

Contra Davis v. French, 20 Me. 21, 37 AmD 36; Steele v. McDowell, 17 Miss. 193.

60. Yerger v. Foote, 48 Miss. 62.

61. Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522; Grimes v. Blake, 16 Ind. 160; Dunne v. Deery, 40 Iowa 251.

[a] **In Louisiana** in such a case the executor may exonerate himself and charge the estate. Livingston v. Gaussen, 21 La. Ann, 286, 99 AmD 731.

62. Steele v. McDowell, 17 Miss. 193.

63. McCally v. Wilburn, 77 Ala. 549; Wilburn v. McCalley, 63 Ala. 436; O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197; Brightwell v. Jordan, 74 Ga. 486.

64. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

[a] **Illustration.**—Where the personal property of a decedent being insufficient to pay his debts, his administrator applied to the county court for permission to mortgage decedent's real estate for that purpose, and submitted the conditions of a proposed loan, together with the kind of notes, their amount, interest, time of maturity, etc., to the court, which approved the same, and directed the loan to be made, the notes executed reciting that they were given by the maker, acting under an order of the court, the administrator, having no title or interest in the real estate except such as he acquired under the court's orders, was not personally liable on the notes. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032 (as the notes showed on their face that they were made by the administrator in his representative capacity, purchasers of such notes could not claim that they relied on the personal liability of the administrator).

65. Prieto v. Leonards, 32 Tex. Civ. A. 205, 74 SW 41 (where, by the terms of her will testatrix expressed "full confidence in the integrity and honesty," of the executor therein named, whom she denominated "my friend," and to whom she gave full power to "handle, manage, and control" her estate, and to "sell, release, and convey, by deed or other conveyance," any and all her property, which property, or the proceeds of the sale thereof, were to be held by him in trust for her daughter during the latter's life, the executor had power to bind the estate by giving his note for money borrowed to pay debts of the estate, and to secure such note by hypothecating a note given by the purchaser of land belonging to the estate and sold by such executor).

66. Matter of Mandelbaum, 80 Misc. 475, 141 NYS 319 [aff 159 App. Div. 909, 144 NYS 1128].

67. Stewart v. Davis, 18 Ind. 74; Shiff v. Shiff, 20 La. Ann. 269; Kingman v. Soule, 132 Mass. 285; Johnston v. Union Bank, 37 Miss. 526; Robinson v. Lane, 22 Miss. 161.

68. La.—Shiff v. Shiff, 20 La. Ann. 269.

Miss.—Johnston v. Union Bank, 37 Miss. 526.

N. Y.—Brill v. Friedhoff, 102 Misc. 565, 169 NYS 193 [rev on other grounds 184 App. Div. 673, 172 NYS 544].

Tenn.—Hoss v. Crouch, (Ch.) 48 SW 724.

Can.—Union Bank v. Clark, 43 Can. S. C. 299.

[a] **Renewal of undertaking.**—An executor of a surety for rent under a lease could not bind the estate by renewal of the suretyship contract, where such contract was independent of the original contract and the executor was in possession in his private capacity. Brill v. Friedhoff, 102 Misc. 565, 169 NYS 193 [rev on other grounds 148 App. Div. 673, 172 NYS 544].

[b] **Taking security.**—Where an administration of a surety who has been released erroneously supposes his intestate still liable, he does not, by taking security against the liability, bind the estate to the extent of the security. Hoss v. Crouch, (Tenn. Ch. A.) 48 SW 724.

69. Metropolitan Trust Co. v. Truax, 154 App. Div. 442, 139 NYS 181 [app den 207 N. Y. 750 mem, 101 NE 1110 mem].

70. U. S.—Thomas v. Provident Life, etc., Co., 138 Fed. 348, 70 CCA 488.

Invest. As a general rule the duty of an executor or administrator is confined to collecting and paying out or distributing the assets of the estate,[71] and it is no part of his duty to invest funds belonging to the estate.[72] This duty may, however, be imposed upon him by will [73] or by statute,[74] or a duty to invest may sometimes arise from the necessities of the case, where there is considerable and unavoidable delay in settling up the estate and making final distribution.[75]

[§ 493] **2. Duties and Liabilities with Respect to Investments.** In making investments of the funds of the estate, the representative acts as trustee rather than as executor or administrator,[76] and his duties and liabilities in respect to such investments are governed by the same rules as apply to other trustees. If the will contains directions as to the investments to be made these must be followed. The representative is entitled, although not obliged, to apply to the court for advice and directions, and the sanction of the court for any investment, procured before the investment is made, will, in the absence of fraud in procuring such sanction, protect the representative. Where he acts upon his own judgment he is held to absolute good faith and is required to exercise such prudence and good judgment as ordinarily prudent persons exercise in making investments of their own funds, and if he has done this he is not responsible for a resulting loss. But he is liable for all losses resulting from unauthorized or improper investments, or from his lack of good faith, prudence, or diligence; while on the other hand, if any unauthorized or improper investment or use of the funds of the estate results in a profit, such profit belongs, at the election of those interested, to the estate.[77]

[§ 494] **3. Liability for Investing without Authority.** Where the executor or administrator lends or invests assets without authority of law or some power conferred by the will, the beneficiaries may elect to charge him with the fund thus used or to accept the investment with all its accretions of value.[78] Where the investment is repudiated and the representative charged personally, the fund

Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15.
Ark.—Nathan v. Lehman, 39 Ark. 256.
Iowa.—Deery v. Hamilton, 41 Iowa 16.
Miss.—Woods v. Ridley, 27 Miss. 119.
N. Y.—Johnson v. Kellog, 8 NYSt 413.
Pa.—In re Donnelly, 246 Pa. 308, 92 A 306; Williamson's App., 94 Pa. 231.
S. C.—Henshaw v. Robertson, 8 S. C. Eq. 311.

[a] **Where the personal representative becomes insolvent,** subrogation is proper. Steele v. Steele, 64 Ala. 438, 38 AmR 15.

[b] **A person who has rendered services** to the estate under a contract with the executor may, in case the executor is insolvent, be subrogated to the rights of the executor and demand payment out of the estate, if the executor would be entitled to do so on paying the debt himself. Henshaw v. Robertson, 8 S. C. Eq. 311.

71. Brenham v. Story, 39 Cal. 179; Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev on other grounds 178 App. Div. 243, 164 NYS 1024].

Allowance and payment of claims see infra §§ 875–1265.

Collection of assets see supra § 423–462.

Distribution of estate see infra §§ 1266–1437.

72. Cal.—Brenham v. Story, 39 Cal. 179.
Hawaii.—Matter of Enos, 18 Hawaii 542.
N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388 [rev on other grounds 72 N. J. Eq. 880, 67 A 32].
N. Y.—Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev on other grounds 178 App. Div. 243, 164 NYS 1024].
Pa.—Lafferty's Est., 14 Pa. Dist. 424; Miller's Est., 14 Pa. Dist. 163; Spellier's Est., 4 Pa. Dist. 678, 17 Pa. Co. 286; Bishop's Est., 1 LancL Rev 115.
Tex.—Lovenskiold v. Nueces Hotel Co., (Civ. A.) 208 SW 759.

73. D. C.—Mitchell v. Thomson, 18 D. C. 130.
Md.—Murphy v. Coale, 107 Md. 198, 68 A 615.
Mich.—Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.
N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145.
N. Y.—Calkins v. Calkins, 1 Redf. Surr. 337.
Pa.—Barker's Est., 2 Pa. Dist. 571.
Va.—Rixey v. Com., 99 SE 573.
B. C.—In re McCormick, 22 B. C. 327.

[a] **Discharge of duty.**—Where an executor is directed to invest a trust fund for the benefit of the estate, his duty is not discharged by returning the principal invested, without accounting for his failure to realize a profit on the investment. Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.

[b] **Duration of power.**—A will directed the executors to sell testator's property, and divide the residue among his sons and daughters, leaving to the executors' discretion, subject to certain provisions, as to the time and mode of closing testator's business and realizing his estate, the investing and reinvesting of the moneys of the children, and directed that when the estate should be finally settled the children's shares should be invested in fee simple ground rents or stock in their respective names, and be managed by their guardians until their majority, the sons' shares to be given to them absolutely at their majority. It was held that the power given the executors to invest and reinvest refers to the period while they were settling the estate, and was not intended to apply to the children's shares after the shares were ascertained and invested as directed. Murphy v. Cole, 107 Md. 198, 68 A 615.

[c] **Course not authorized by will.**—Where testator provided that, after the payment of his debts, four thousand dollars should be set apart and the income paid to the widow, and that his son should have the use of the balance of his property for six years, etc., the widow and son being named as executors, an arrangement between the son and the widow by which it was agreed that three thousand dollars of the personal estate were to remain in the note of the son, which he owed the estate, and that he should pay her the income of one thousand dollars worth of real estate, which should remain invested therein, there being an insufficiency of personal property to set aside the four thousand dollars, was unauthorized by the will and unsustainable. Matter of Hawley, 108 App. Div. 185, 96 NYS 61 [aff 185 N. Y. 566 mem, 77 NE 1188 mem].

[d] **Testamentary provision not giving power to invest.**—Ballantyne v. Turner, 59 N. C. 224.

Duty to execute provisions of will see supra § 391.

74. Moore v. Felkel, 7 Fla. 44; In re Thornton, 5 OhS&CP 151, 7 OhNP 335.

75. Hawaii.—Matter of Gill, 2 Hawaii 699.
Md.—Wootter v. Burch, 2 Md. Ch. 190.
N. Y.—Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027].
N. C.—Dortch v. Dortch, 71 N. C. 224.
Pa.—Miles' Est., 12 Pa. Co. 383; McGonnigle's Est., 31 PittsbLegJ 27.

[a] **In case of inability to invest** a considerable fund to advantage, or other special circumstances of delay, the personal representative should apply to the court for directions and abide by the result. Ex p. Walsh, 26 Md. 495; Worthington v. Owings, 9 Gill (Md.) 195; Hetfield v. Debaud, 54 N. J. Eq. 371, 34 A 882; Bruner's App., 57 Pa. 46.

76. Ill.—Golden v. Cervenka, 278 Ill. 409, 116 NE 273.
Ky.—Stamp v. Parrish, 15 KyL 55.
N. Y.—Matter of Horwitz, 90 Misc. 249, 154 NYS 316. But compare Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518 mem, 94 NE 1099 mem] (where an executor was also charged with the duties of a trustee, in that he was to pay over the income of the estate to sole legatees, but before he had made an accounting, and before the time for presentation of claims had expired, and less than two months after the grant of letters of administration, he gave a portion of the estate to a stockbroker to deal in stocks, thus constituting an unlawful investment, and it was held that the cause of action to recover the amount deposited with the broker was in the executor and those deriving their authority from that relation, and not in the executor as a trustee under the will).
R. I.—Grinnell v. Baker, 17 R. I. 41, 20 A 8, 23 A 911.
Ont.—Cumming v. Landed Banking, etc., Co., 20 Ont. 382 [dism app 19 Ont. 426, and rev 19 Ont. A. 447 (rev 22 Can. S. C. 246)].
Newfoundl.—Matter of McGrath, 1 Newfoundl. 243.

77. See generally Trusts [39 Cyc 389–420].

78. U. S.—Norman v. Storer, 18 F. Cas. No. 10,301, 1 Blatchf. 593.
Ala.—Waring v. Lewis, 53 Ala. 615.
Fla.—Moore v. Felkel, 7 Fla. 44; Moore v. Hamilton, 4 Fla. 112.
Ill.—Roberts v. Weimer, 227 Ill. 138, 81 NE 40.
Ind.—Gilbert v. Welsch, 75 Ind. 557.
Me.—Hanscon v. Marston, 82 Me. 288, 19 A 460.
Md.—McCoy v. Horwitz, 62 Md. 183.

invested, as an offset to such a charge, will virtually belong to him.[79]

[§ 495] **G. Interest on Funds of Estate—1. In General.** Originally executors and administrators were not chargeable in any event with interest on the funds of the estate in their hands,[80] but this rule has long since been abrogated, and it is now well settled that such charge may be made.[81] Upon general principles the personal representative is bound to render account of all interest or profit actually received by him out of the assets of the estate,[82] but where no interest was actually received, the representative is not chargeable with interest unless there are special circumstances to warrant such a charge, as where the representative makes some misuse of the funds for intended profit, or unreasonably detains them, or fails duly to invest and make the funds productive, or is guilty of negligence in collecting or in accounting for them.[83] In some states, however, the latter rule has been

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Mo.—Garesche v. Priest, 78 Mo. 126.

N. J.—Woodruff v. Lounsberry, 42 N. J. Eq. 699, 11 A 113; Ward v. Kitchen, 30 N. J. Eq. 31; Gray v. Fox, 1 N. J. Eq. 259, 22 AmD 508; In re Voorhees, 3 N. J. L. J. 211; In re Mundy, 3 N. J. L. J. 185.

N. Y.—Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027]; Matter of Horwitz, 90 Misc. 249, 154 NYS 316.

Pa.—In re Strong, 160 Pa. 13, 28 A 480; In re Nyce, 5 Watts & S. 254, 40 AmD 498; Spellier's Est., 4 Pa. Dist. 678, 17 Pa. Co. 286.

S. C.—Watson v. Whitten, 37 S. C. L. 224.

[a] **Illustrations.**—(1) Where administrators, instead of selling bonds for cash, exchanged them for stock of a corporation, which proves worthless, they are properly surcharged with the loss. In re Locher, 219 Pa. 46, 67 A 954. (2) Where an administrator sold decedent's business to the widow for fifty-five hundred dollars, and was ordered to distribute forty-five hundred dollars to the heirs, and about the same time he organized a corporation with fifteen thousand dollars capital stock, and the widow conveyed the business to it, and he delivered forty-five hundred dollars in stock at par value to the heirs, and credited himself with that amount, it was held that the heirs, on discovering the stock to be substantially worthless, could return it to him and require him to account for the money he was ordered to pay to them, and charge himself with the amount for which he had taken credit. Roberts v. Weimer, 227 Ill. 138, 81 NE 40.

[b] **The beneficiaries reap all the benefits** of an unlawful or unauthorized investment. Norman v. Storer, 18 F. Cas. No. 10,301, 1 Blatchf. 593; Norris' App., 71 Pa. 106; Watson v. Whitten, 37 S. C. L. 224.

[c] **Election must be made on final settlement of administration.**—Waring v. Lewis, 53 Ala. 615.

[d] **Assent to accounts.**—Where executors in their reports to the probate court represented that some thousands of dollars had been received by them from the sale of city lots belonging to the estate, and that the interest on the purchase-money mortgages had been paid, and no money had in fact been paid, and all the mortgages were in default and foreclosures were going on, it was held that, owing to the misrepresentations, the fact that beneficiaries under the will had assented to the accounts of the executors did not exonerate them from liability for their unwarranted investment in making advances to purchasers for building purposes, etc. Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

79. Harwood v. Harper, 54 Ala. 659; Waring v. Lewis, 53 Ala. 615; Tompkins v. Weeks, 26 Cal. 50.; Bickley's Est., 31 Pa. Co. 465; Re Nicholls, 29 Ont. L. 206, 4 OntWN 930, 24 OntWR 216, 4 OntWN 1511, 14 DomLR 244.

80. Darrel v. Eden, 3 S. C. Eq. 241, 242, 4 AmD 613; Child v. Gibson, 2 Atk. 603, 26 Reprint 761; Adams v. Gale, 2 Atk. 106, 26 Reprint 466; Bromfield v. Wytherley, Prec. Ch. 505, 24 Reprint 227; Ratcliffe v. Graves, 1 Vern. Ch. 196, 23 Reprint 409.

"The old cases did not allow interest against executors where they had moneys of the estate in their hands." Darrel v. Eden, supra.

81. Matter of Collyer, 124 App. Div. 16, 108 NYS 600; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 624, 7 AmD 507; Lowson v. Copeland, 2 Bro. Ch. 156, 29 Reprint 89; Newton v. Bennet, 1 Bro. Ch. 359, 28 Reprint 1177; Tebbs v. Carpenter, 1 Madd. 290, 56 Reprint 107; Hill v. Simpson, 7 Ves. Jr. 152, 32 Reprint 63; Powell v. Evans, 5 Ves. Jr. 839, 31 Reprint 886.

82. Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—Haines v. Hay, 169 Ill. 93, 48 NE 218 [rev 67 Ill. A. 445].

Ky.—Carrol v. Connet, 2 J. J. Marsh. 195; Quinn v. Stockton, 2 Litt. 343.

La.—Soldini v. Hyams, 15 La. Ann. 551.

Md.—Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Bentley v. Shreve, 2 Md. Ch. 215.

Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302; Williams v. American Bank, 4 Metc. 317.

Mich.—Hall v. Grovier, 25 Mich. 428.

Mo.—Smiley v. Smiley, 80 Mo. 44.

Mont.—In re Davis, 35 Mont. 273, 88 P 957.

N. H.—Lund v. Lund, 41 N. H. 355; Griswold v. Chandler, 5 N. H. 492.

N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145; State v. Mayhew, 9 N. J. L. 70; Lutjen v. Lutjen, 63 N. J. Eq. 391, 51 A 790 [rev on other grounds 64 N. J. Eq. 773, 53 A 625].

N. Y.—Matter of Collyer, 124 App. Div. 16, 108 NYS 600, 120 App. Div. 894 mem, 105 NYS 1111 mem; Matter of Woodbury, 40 Misc. 143, 81 NYS 503.

N. C.—Pickens v. Miller, 83 N. C. 543; Finch v. Ragland, 17 N. C. 137; Arnett v. Linney, 16 N. C. 369.

Pa.—Gable's App., 40 Pa. 231; Oswald's App., 3 Grant 300; In re Dyott, 2 Watts & S. 557; English v. Harvey, 2 Rawle 305; Bollinger's Est., 10 Pa. Dist. 223; Mutchmore's Est., 9 Pa. Dist. 293, 24 Pa. Co. 257.

S. C.—McClendon v. Gomillon, 23 S. C. L. 48.

Tenn.—Turney v. Williams, 7 Yerg. 172.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288.

Eng.—In re Stevens, [1897] 1 Ch. 422; Foster v. Foster, 2 Bro. Ch. 616, 29 Reprint 340; Newton v. Bennet, 1 Bro. Ch. 359, 28 Reprint 1177; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737.

Can.—Darling v. Brown, 2 Can. S. C. 26.

Ont.—Re McIntyre, 7 Ont. L. 548, 3 OntWR 258.

[a] **Presumption as to receipt of interest; sale of securities.**—Where overdue coupon bonds are sold by executors they are chargeable with the last installment of interest, unless it is shown that they sold the bonds with the overdue coupons attached. Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64.

[b] **Interest received after final settlement.**—Although the decree of the ordinary settling the accounts of an administrator did not charge him with interest, by reason of the unproductiveness of the funds in his hands, yet if he actually receives it afterward he may be compelled to account. Oswald's App., 3 Grant (Pa.) 300; Pollock's Est., 4 WklyNC (Pa.) 182; McClendon v. Gomillon, 23 S. C. L. 48.

[c] **An exception to the general rule** is where a balance has been generally due the administrator, on his account, larger than the balance in his hands as administrator. In such case interest received by the administrator should not be charged against him. Mathes v. Bennett, 21 N. H. 188.

[d] **Where the administrator is also a distributee** he need not account for interest which he has received on his proportion of the fund lent out after he was ready to settle the estate. Spruill v. Cannon, 22 N. C. 400.

[e] **Usury.**—If an executor or administrator exacts usurious interest from a debtor of the estate he is not chargeable with such amount, because the exaction of usurious interest subjects one to a penalty, and since the beneficiaries are not liable to the penalty they should not have the usurious interest. Gordon v. West, 8 N. H. 444.

83. U. S.—Barney v. Saunders, 16 How. 535, 14 L. ed. 1047; Pulliam v. Pulliam, 10 Fed. 53; Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284.

Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955; Siniard v. Green, 123 Ala. 527, 26 S 661; Johnson v. Holifield, 82 Ala. 123, 2 S 753; Eubank v. Clark, 78 Ala. 73; May v. Green, 75 Ala. 162; Clark v. Knox, 70 Ala. 607, 45 AmR 93.

Ark.—Howard v. Manning, 65 Ark. 122, 44 SW 1126.

Cal.—In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899; In re Marre, 127 Cal. 128, 59 P 385; In re Sarment, 123 Cal. 331, 55 P 1015; Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

Colo.—Fogg v. Quackenbush, 27 Colo. A. 480, 150 P 726.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35; Truett v. Williams, 101 Ga. 311, 27 SE 851.

Ill.—Whitney v. Peddicord, 63 Ill. 249; Rowan v. Kirkpatrick, 14 Ill. 1; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108].

Iowa.—Dorris v. Miller, 105 Iowa 564, 75 NW 482.

Ky.—Howe v. Winn, 150 Ky. 667, 150 SW 842; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Briggs v. Walker, 102 Ky. 359, 43 SW 479, 19 KyL 1490; Karr v. Karr, 6 Dana 3; Johnson v. Beauchamp, 5 Dana 70; Overstreet v. Potts, 4 Dana 138; Prewett v. Prewett, 4 Bibb 266; Trible v. Ellison, 1 Ky. Op. 59.

La.—Featherstone v. Robinson, 7 La. 596.

Md.—Smithers v. Hooper, 23 Md. 273; Mickle v. Cross, 10 Md. 352.

Mass.—McIntire v. Mower, 204 Mass. 233, 90 NE 567; Boynton v. Dyer, 18 Pick. 1; Stearns v. Brown, 1 Pick. 530; Wyman v. Hubbard, 13 Mass. 232.

Mich.—Stevens v. Ottawa Prob.

to some extent modified by statute.[84] The question of allowing interest should be determined by the

Judge, 156 Mich. 526, 121 NW 477; Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149; Williams v. Campbell, 46 Miss. 57; Cason v. Cason, 31 Miss. 578; Satterwhite v. Littlefield, 21 Miss. 302; Smith v. Hurd, 16 Miss. 682.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068; Scudder v. Ames, 142 Mo. 187, 43 SW 659; Wolfort v. Reilly, 133 Mo. 463, 34 SW 847; Myers v. Myers, 98 Mo. 262, 11 SW 617; Scott v. Crews, 72 Mo. 261; In re Davis, 62 Mo. 450; Madden v. Madden, 27 Mo. 544; James v. Withinton, 7 Mo. A. 575.

Mont.—In re Davis, 33 Mont. 539, 88 P 957.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; In re Bush, 89 Nebr. 334, 131 NW 602.

N. H.—Lund v. Lund, 41 N. H. 355; Mathes v. Bennett, 21 N. H. 188; Wendell v. French, 19 N. H. 205; Griswold v. Chandler, 5 N. H. 492.

N. J.—Mathis v. Mathis, 18 N. J. L. 59; Johnson v. Eicke, 12 N. J. L. 316; Voorhees v. Stoothoff, 11 N. J. L. 145; State v. Mayhew, 9 N. J. L. 70; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; McKnight v. Walsh, 24 N. J. Eq. 498, 23 N. J. Eq. 136; Lathrop v. Smalley, 23 N. J. Eq. 192; Craig v. Manning, 8 N. J. Eq. 806.

N. Y.—Shuttleworth v. Winter, 55 N. Y. 624; Matter of McMonagle, 139 App. Div. 398, 124 NYS 258; Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Matter of Collyer, 124 App. Div. 16, 108 NYS 600; Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem]; Livermore v. Wortman, 25 Hun 341; Greeno v. Greeno, 23 Hun 478; Harrington v. Libby, 6 Daly 259; Matter of Weber, 102 Misc. 635, 170 NYS 293; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of Fry, 79 Misc. 180, 140 NYS 592; Matter of Krisfeldt, 49 Misc. 26, 97 NYS 877; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 AmD 504; Garniss v. Gardiner, 1 Edw. 128; Shepard v. Patterson, 3 Dem. Surr. 183.

N. C.—Coggins v. Flythe, 113 N. C. 102, 18 SE 96; Smith v. Smith, 101 N. C. 461, 8 SE 128, 131, 133; Chambers v. Kerns, 59 N. C. 280.

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156.

Pa.—In re Skeer, 253 Pa. 497, 98 A 703; In re Dick, 183 Pa. 647, 39 A 2, 41 WklyNC 367; Wither's App., 16 Pa. 151; In re Dyott, 2 Watts & S. 557; In re Billington, 3 Rawle 48; Fox v. Wilcox, 1 Binn. 194, 2 AmD 433; Betz's Est., 15 Pa. Super. 563, 18 LancLRev 97; Bear's Est., 9 Pa. Super. 492, 43 WklyNC 469; Pratt's Est., 3 LancLRev 203; Pyle's Est., 3 LancLRev 55; Steele's App., 16 PittsbLegJNS 20.

S. C.—Gee v. Humphries, 49 S. C. 253, 27 SE 101; Ex p. Glenn, 20 S. C. 64; Chestnut v. Strong, 10 S. C. Eq. 122; McCaw v. Blewitt, 8 S. C. Eq. 98; Wright v. Wright, 7 S. C. Eq. 185; Walker v. Bynun, 4 S. C. Eq. 555; Darrell v. Eden, 3 S. C. Eq. 241, 4 AmD 613.

Tenn.—Cannon v. Apperson, 14 Lea 553; Turney v. Williams, 7 Yerg. 172.

Tex.—Stonebreaker v. Friar, 70 Tex. 202, 7 SW 799; Davis v. Thorn, 6 Tex. 482.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

Vt.—In re Hall, 70 Vt. 458, 41 A 508; Morse v. Slason, 16 Vt. 319; Phelps v. Slade, 10 Vt. 192.

Va.—Wood v. Garnett, 6 Leigh (33 Va.) 271; Cavendish v. Fleming, 3 Munf. (17 Va.) 198; Dilliard v. Tomlinson, 1 Munf. (15 Va.) 183; Granberry v. Granberry, 1 Wash. (1 Va.) 246, 1 AmD 455.

Eng.—Dawson v. Massey, 1 Ball & B. 234; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737; Ashburnham v. Thompson, 13 Ves. Jr. 402, 33 Reprint 345; Rocke v. Hart, 11 Ves. Jr. 58, 32 Reprint 1009.

Ont.—In re Honsberger, 10 Ont. 521; Re Crowther, 10 Ont. 159.

"The general rule has been, not to charge executors with interest when their accounts are settled in ordinary course; and the reason is, that they are not at liberty to risk the money belonging to the estate which they represent, and are to be always ready to pay it over, according to the directions of the will, or the decree of the Probate Court. They ought not to be presumed to have made a profitable use of it; because it would be contrary to their duty to use it at all. This rule admits of an exception, when it shall appear that the executors have actually made use of the money; and this fact may be proved by direct testimony, or may be inferred from a long delay in settling their accounts, or in paying over balances in their hands after they have been demanded, and perhaps from other circumstances." Wyman v. Hubbard, 13 Mass. 232.

[a] **Grounds of liability for interest.**—(1) The idea seems formerly to have been entertained that the court, in the exercise of a quasi criminal jurisdiction, would compel executors and administrators to pay interest as a penalty for a direct breach of trust. Saltmarsh v. Barrett, 29 Beav. 474, 54 Reprint 711; Pearse v. Green, 1 Jac. & W. 137, 37 Reprint 327. (2) But this has been disavowed by the more recent decisions, the result of which is to leave the practice of charging interest on the ground that the executor or administrator either has made or must be taken to have made interest by his use of the trust moneys. Matter of Collyer, 124 App. Div. 16, 108 NYS 600; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620, 7 AmD 507; Turney v. Williams, 7 Yerg. (Tenn.) 172; Vyse v. Foster, L. R. 8 Ch. 309; Burdick v. Garrick, L. R. 5 Ch. 233, 5 ERC 565; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737. (3) The principle upon which the court acts in charging executors with interest is not that of punishment, but of compensating the cestui que trust and depriving the trustee of the advantage he has wrongfully obtained. Inglis v. Beaty, 2 Ont. A. 453.

[b] **An oath or affidavit that he has not used the funds** is sometimes required to relieve the representative from liability for interest. Smyley v. Reese, 53 Ala. 89, 25 AmR 598; Bendall v. Bendall, 24 Ala. 295, 60 AmD 469; Hollis v. Caughman, 22 Ala. 478; McCreeliss v. Hinkle, 17 Ala. 459; Parker v. McGaha, 11 Ala. 521.

[c] **Interim between successive administrations.**—Where an administrator died with funds of the estate in his hands, and administration was not granted again for three years, the estate of the first administrator was not liable for interest during the time the estate of his intestate was unrepresented. Davis v. Wright, 20 S. C. L. 560.

[d] **Reasonableness of charge.**—It was error arbitrarily to charge an administrator, in auditing his account, with interest at ten per cent on all moneys received by him from ten days after receipt thereof, without any investigation as to whether it was reasonable to do so. Howard v. Manning, 65 Ark. 122, 44 SW 1126.

[e] **Executor indebted to and holding claim against estate.**—Where, on an accounting by an executor, it was found that he was indebted to the estate, and that he had a valid claim against the estate for an amount in excess of his indebtedness, it was error to charge him with interest on his debt without allowing him interest on his claim. In re Sutton, 200 Pa. 158, 49 A 775.

[f] **The probate court** has the same powers that courts of equity possess in relation to the interest to be charged against executors and administrators in favor of the estate. Cruce v. Cruce, 81 Mo. 676.

[g] **Burden of proof.**—(1) Where an executor is excused from making interest on the funds in his hands, the burden is upon those who would charge him with interest to show that he has received it. Chestnut v. Strong, 11 S. C. Eq. 146. (2) The burden is on the representative to show that he kept the funds unemployed and received no interest. Graham v. Davidson, 22 N. C. 155; Burnside v. Robertson, 28 S. C. 583, 6 SE 843. (3) The burden rests on those who seek to charge the representative to show that he kept the funds an unreasonable length of time, or used them in his private business, or derived profit therefrom. In re Sylvar, 1 Cal. A. 35, 81 P 663; In re Sarment, 123 Cal. 331, 55 P 1015; Walis v. Walker, 37 Cal. 424, 99 AmD 290; Collier's Est., 30 Pa. Co. 607. (4) The burden of proof shifts after two years from the qualification of the representative. Howe v. Winn, 150 Ky. 667, 670, 150 SW 842 ("It is the duty of a personal representative to use ordinary care to make the trust funds in his hands productive of interest; that is, he should use such care in handling the trust funds as a man of ordinary prudence would use in handling his own money to make it productive of interest. The duty rests upon him from the time he qualifies. Until the expiration of two years he is chargeable with such interest as he realizes, or should realize, where under the circumstances, by ordinary care, interest should be realized. But the presumption is in his favor during this period, and he is only to be charged with interest that he did not realize, where he is affirmatively shown to have been remiss in his duty. On the other hand, after the expiration of two years, he is prima facie chargeable with interest on the surplus in his hands, and the burden is on him to show that by reason of circumstances beyond his control he was unable, in the exercise of ordinary care, to earn interest on the fund"). To the same effect Trible v. Ellison, 1 Ky. Op. 59.

[h] **Waiver of claim to interest.**—Where an administrator's final report accurately indicated the amount of money held by him at different periods during the five years of his administration, such report was sufficient to put persons interested in the estate on inquiry with respect to the administrator's use of the funds and his liability for interest, and their consent to his discharge constituted a waiver of their claim thereto. Tucker v. Stewart, 121 Iowa 714, 97 NW 148 [withdrawing op 86 NW 371].

84. Ala.—King v. Cabiness, 12 Ala. 598.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—In re Schofield, 99 Ill. 513.

La.—Thomas v. Bourgeat, 1 Rob. 403.

Mo.—In re Davis, 62 Mo. 450.

N. Y.—In re Myers, 131 N. Y. 409, 30 NE 135.

N. C.—Peyton v. Smith, 22 N. C. 325.

court of last domicile of decedent.[85]

[§ 496] **2. Propriety of Charge as Affected by Particular Circumstances—a. Failure to Invest or Deposit.** It is the duty of an executor or administrator to use ordinary care to make the trust funds in his hands productive from the time he qualifies,[86] and if he fails to invest or deposit funds as he might or should have done in the exercise of ordinary care and diligence, he is chargeable with interest thereon, especially if he has been wanting in good faith.[87] A reasonable period may be allowed him for exercising his duty in this respect, at

[a] **Illustrations.**—(1) The statute renders an executor or administrator prima facie chargeable with interest, although with the utmost diligence he may proceed in the administration of the estate, unless he denies on oath that he has used the funds of the estate. If such oath is made and is not controverted, it is the mandate of the statute that he shall not be charged with interest. The court has no discretion, and all inquiry into his liability is foreclosed. Clark v. Knox, 70 Ala. 607, 45 AmR 93; Ivey v. Coleman, 42 Ala. 409; King v. Cabiness, 12 Ala. 598. (2) But even if the exculpatory oath is made and not controverted, the executor or administrator is chargeable with interest if the circumstances of the case show that he has been guilty of any unreasonable or unnecessary delay in settling or distributing the estate (Eubank v. Clark, 78 Ala. 73; May v. Green, 75 Ala. 162; Mims v. Mims, 39 Ala. 716), or (3) if it is shown that he either appropriated the funds to his own private use, or to some other illegal purpose, or kept them in his hands unemployed while outstanding debts against the estate were drawing interest (Pearson v. Darrington, 32 Ala. 227).

85. Stevens v. Gaylord, 11 Mass. 256.

86. Howe v. Winn, 150 Ky. 667, 150 SW 842; Saunders' Succ., 37 La. Ann. 769.

[a] **Estoppel to deny performance of duty to invest.**—Saunders' Succ., 37 La. Ann. 769.

87. U. S.—Hook v. Payne, 14 Wall. 252, 20 L. ed. 887; Barney v. Saunders, 16 How. 535, 14 L. ed. 1047.

Ala.—Nunn v. Nunn, 66 Ala. 35; Pearson v. Darrington, 32 Ala. 227.

Cal.—In re McQueen, 44 Cal. 584.

Fla.—Eppinger v. Canepa, 20 Fla. 262.

Ga.—Doster v. Arnold, 60 Ga. 316.

Hawaii.—Matter of Lazarus, 13 Hawaii 242.

Ill.—Hough v. Harvey, 71 Ill. 72.

Iowa.—In re Lackie, 171 NW 679.

Ky.—Jennings v. Davis, 5 Dana 127; Johnson v. Beauchamp, 5 Dana 70.

La.—Saunders' Succ., 37 La. Ann. 769.

Md.—Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Smithers v. Hooper, 23 Md. 273; Ing v. Baltimore Poor Impr. Assoc., 21 Md. 425; Mickle v. Cross, 10 Md. 352; Worthington v. Owings, 9 Gill 195; Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277; Thomas v. Frederick County School, 9 Gill & J. 115; Lyles v. Hatton, 6 Gill & J. 122; Gwynn v. Dorsey, 4 Gill & J. 453.

Mass.—Gaff v. Cornwallis, 219 Mass. 226, 106 NE 860; Eliott v. Sparrell, 114 Mass. 404.

Mich.—In re Zimmer, 158 Mich. 170, 122 NW 563.

Miss.—Brandon v. Hoggatt, 32 Miss. 335; Cason v. Cason, 31 Miss. 578; Cole v. Leake, 27 Miss. 767.

Mo.—Reilly v. Reilly, 133 Mo. 463, 34 SW 847; In re Davis, 62 Mo. 450; State v. Babb, 77 Mo. A. 277.

N. H.—Bartlett v. Fitz, 59 N. H. 502.

N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; Frost v. Denman, 41 N. J. Eq. 47, 2 A 926; Fowler v. Colt, 25 N. J. Eq. 202 [aff 27 N. J. Eq. 492]; Lathrop v. Smalley, 23 N. J. Eq. 192; McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498]; Frey v. Frey, 17 N. J. Eq. 71; Craig v. Manning, 8 N. J. Eq. 806; King v. Berry, 3 N. J. Eq. 261; Jackson v. Jackson, 3 N. J. Eq. 96.

N. Y.—Shuttleworth v. Winter, 55 N. Y. 624; Blauvelt v. De Noyelles, 25 Hun 590; Livermore v. Wortman, 25 Hun 341; Harrington v. Libby, 6 Daly 259; Matter of Clark, 69 Misc. 527, 127 NYS 888; Matter of Stanton, 41 Misc. 278, 84 NYS 46; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; Matter of Philp, 29 Misc. 263, 61 NYS 241; Matter of Babcock, 9 NYS 554, 2 Conn. Surr. 82; Matter v. Black, 19 NYSt 260, 6 Dem. Surr. 331; Matter of Woodworth, 3 NYSt 227, 5 Dem. Surr. 156; De Peyster v. Clarkson, 2 Wend. 77; Williamson v. Williamson, 6 Paige 298; Minuse v. Cox, 5 Johns. Ch. 441, 9 AmD 313; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 AmD 507; Manning v. Manning, 1 Johns. Ch. 527; Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 AmD 504; Cogswell v. Bogswell, 2 Edw. 231; Matter of Mapes, 5 Dem. Surr. 446; Shepard v. Patterson, 3 Dem. Surr. 183; Ogilvie v. Ogilvie, 1 Bradf. Surr. 356.

N. C.—Pickens v. Miller, 83 N. C. 543.

Pa.—In re Dick, 183 Pa. 647, 39 A 2; In re Lloyd, 82 Pa. 143; Bruner's App., 57 Pa. 46; Mayberry's App., 33 Pa. 258; Light's App., 24 Pa. 180; In re Verner, 6 Watts 250; Fox v. Wilcocks, 1 Binn. 194, 2 AmD 433; Spellier's Est., 4 Pa. Dist. 678, 17 Pa. Co. 286; Evans's Est., 11 Phila. 113, 2 WklyNC 337; Robinson's Est., 2 Phila. 340; McGonnigle's Est., 31 PittsbLegJNS 28.

S. C.—Burnside v. Robertson, 28 S. C. 583, 6 SE 843; Ex p. Glenn, 20 S. C. 64; Dixon v. Hunter, 21 S. C. L. 204; Jones v. West, 20 S. C. L. 561 note b; Davis v. Wright, 20 S. C. L. 560; Duncan v. Dent, 26 S. C. Eq. 7; Chestnut v. Strong, 11 S. C. Eq. 146; Brown v. Vinyard, 8 S. C. Eq. 460; Wright v Wright, 7 S. C. Eq. 185; Walker v. Bynum, 4 S. C. Eq. 555; Jenkins v Fickling, 4 S. C. Eq. 369; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597; Darrel v. Eden, 3 S. C. Eq. 241, 4 AmD 613; Stock v. Stock, 1 S. C. Eq. 191.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720; Turney v. Williams, 7 Yerg. 172.

Vt.—Riley v. McInlear, 61 Vt. 254, 17 A 729, 19 A 996; Perkins v. Hollister, 59 Vt. 348, 7 A 605.

Va.—Leake v. Leake, 75 Va. 792; Handly v. Snodgrass, 9 Leigh (36 Va.) 484; Garrett v. Carr, 3 Leigh (30 Va.) 407; Carter v. Cutting, 5 Munf. (19 Va.) 223.

Eng.—In re Barclay, [1899] 1 Ch. 674; Johnson v. Prendergast, 28 Beav. 480, 54 Reprint 450; Stafford v. Fiddon, 23 Beav. 386, 53 Reprint 151; Hughes v. Empson, 22 Beav. 181, 52 Reprint 1077; Franklin v. Frith, 3 Bro. Ch. 433, 29 Reprint 627; Browne v. Southouse, 3 Bro. Ch. 107, 29 Reprint 437; Littlehales v. Gascoyne, 3 Bro. Ch. 73, 29 Reprint 416, 2 ERC 172; Forbes v. Ross, 2 Bro. Ch. 430, 29 Reprint 240; Perkins v. Bayntun, 1 Bro. Ch. 375, 28 Reprint 1187; Newton v. Bennet, 1 Bro. Ch. 359, 28 Reprint 1177; Gresley v. Heathcote, 3 L. J. Ch. O. S. 107; Brychall v. Bradford, 6 Madd. 13, 56 Reprint 993; Flanagan v. Nolan, 1 Molloy 84; Moyle v. Moyle, 2 Russ. & M. 710, 11 EngCh 710; Lowry v. Fulton, 9 Sim. 104, 16 Eng Ch 104, 59 Reprint 298; Ashburnham v. Thompson, 13 Ves. Jr. 402, 33 Reprint 345; Longmore v. Broom, 7 Ves. Jr. 124, 32 Reprint 51; Piety v. Stace, 4 Ves. Jr. 620, 31 Reprint 319; Younge v. Combe, 4 Ves. Jr. 101, 31 Reprint 52; Hillard's Case, 1 Ves. Jr. 89, 30 Reprint 244.

Ont.—Spratt v. Wilson, 19 Ont. 28.

[a] **The representative should be charged with interest:** (1) Where he suffers funds to lie idle, while outstanding demands draw interest. Pearson v. Darrington, 32 Ala. 227. (2) Where he neglects unreasonably long to invest or deposit, after being directed or authorized to do so by a court (Nunn v. Nunn, 66 Ala. 35; Monk v. Pinckney, 30 S. C. Eq. 279), or (3) by the decedent's will (Benson v. Bruce, 4 S. C. Eq. 463; Jenkins v. Fickling, 4 S. C. Eq. 369; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597; Handly v. Snodgrass, 9 Leigh (36 Va.) 484; Garrett v. Carr, 3 Leigh (30 Va.) 407). (4) Where he keeps funds of the estate unproductive, when they ought reasonably to have been made productive. Hook v. Payne, 14 Wall. (U. S.) 252, 20 L. ed. 887; Blake v. Pegram, 100 Mass. 541; Darrel v. Eden, 3 S. C. Eq. 241, 4 AmD 613; Riley v. McInlear, 61 Vt. 254, 17 A 729, 19 A 996. (5) Where he knows that balances will be long in his hands before he pays over. Sunday's App., 131 Pa. 584, 18 A 931; Woods v. Creditors, 4 Vt. 256. (6) Where his excuse is trivial and not pertinent to the issue. Duncan v. Dent, 26 S. C. Eq. 7.

[b] **Where an executor sells land under a power of sale given in the will,** depositing the proceeds to his own credit in banks, and the balances in the banks at his death are a part of such deposit, his executors must account to the legal representatives of the estate of which he was the executor for the amount of such balances with the interest which they might have received if they had deposited the funds with a trust company. Matter of Clark, 69 Misc. 527, 127 NYS 888.

[c] **Where the current receipts exceed the necessary expenses,** and there appears to be no necessity for keeping a large balance on hand, the executor must invest the excess, otherwise he will be chargeable with the interest it might have earned. Tebbs v. Carpenter, 1 Madd. 290, 56 Reprint 107.

[d] **Where the representative unnecessarily collects money** (1) which was drawing interest, and allows it to remain idle, he is chargeable, according to some authorities, with interest on the sum collected. Matter of Lazarus, 13 Hawaii 242; Shakespeare v. Markham, 10 Hun 311 [aff 72 N. Y. 400]; Matter of Bradley, 2 NYS 751, 1 Conn. Surr. 106; Lyendecker v. Eisemann, 3 Dem. Surr. (N. Y.) 72; Matter of Brown, 65 HowPr (N. Y.) 461, 1 Dem. Surr. 317; In re Dick, 183 Pa. 647, 39 A 2; Copely's App., 82 Pa. 143; In re Verner, 6 Watts (Pa.) 250; Taylor v. Gerst, Moseley 98, 25 Reprint 293. (2) But other authorities hold that since the executor or administrator is charged with the duty of collecting the assets of the estate and is made liable for losses caused by his neglect of that duty, it is largely for him to determine the propriety of retaining any investments. In re McQueen, 44 Cal. 584; Lund v. Lund, 41 N. H. 355. (3) Certainly where money is withdrawn under the order and direction of the court, the representative is not liable for interest. Dorris v. Miller, 105 Iowa 564, 75 NW 482.

[e] **Distant legatees.**—The mere fact that the legatees were at a distance and might call for their money when it was not in hand does not excuse an executor from invest-

the expiration of which his liability becomes fixed [88] unless he shows good reason or excuse for the further delay.[89] In cases where the executor or administrator has not actually received interest or used the funds of the estate for his own purposes, but has permitted them to lie idle when they might have been productively employed for the benefit of the estate, it is a matter of discretion with the court, on consideration of all the circumstances of the case, whether interest shall be charged,[90] the question being as to the exercise of good faith and due diligence on his part as custodian of the particular fund;[91] and in the absence of any governing statute, the courts are not inclined to charge the personal representative where his conduct was honest and not unreasonable, if he has made no personal use of the fund, where circumstances justify him in not actively investing or placing it at interest, and even where he was merely inert in failing to do so.[92]

ing the fund in hand, if there was no reason for expecting them to demand payment soon after the testator's death. King v. Berry, 3 N. J. Eq. 261.

[f] **Unknown distributees.** — An executor who retains in his hands the share of a distributee whose residence is unknown is liable for interest thereon after the expiration of one year, if he neglects to invest it. Lana v. Kech, 11 LegInt (Pa.) 31.

[g] **Even if the beneficiaries are infants** and no guardian has been appointed, the executor or administrator may be chargeable with interest on the funds kept idle in his hands. Sanderson v. Sanderson, 20 Fla. 292; Bitzer v. Hahn, 14 Serg. & R. (Pa.) 232; Flintham's App., 11 Serg. & R. (Pa.) 16; Wilvert's Est., 11 Pa. Dist. 660, 26 Pa. Co. 644, 5 Dauph. Co. (Pa.) 161.

[h] **Failure of the beneficiaries to apply for an order compelling** investment of the fund does not affect the liability of the representative. In re Lackie, (Iowa) 171 NW 679.

[i] **Where questions of doubt prevent** an executor from lending out the funds, he is not chargeable with interest until the expiration of a year after his qualification. Brooks v. Brooks, 12 S. C. 422.

88. U. S.—Barney v. Saunders, 16 How. 535, 14 L. ed. 1047.
Ala.—Nunn v. Nunn, 66 Ala. 35.
Fla.—Moore v. Felkel, 7 Fla. 44.
Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35; Allen v. Hardee, 30 Ga. 463.
Ill.—In re Schofield, 99 Ill. 513.
Ky.—Weir v. Weir, 3 B. Mon. 645, 39 AmD 487.
La.—Christy's Succ., 6 La. Ann. 427.
Md.—Smithers v. Hooper, 23 Md. 273.
Miss.—Brandon v. Hoggatt, 32 Miss. 335.
N. J.—Frey v. Frey, 17 N. J. Eq. 71; Mulford v. Mulford, (Ch.) 53 A 79.
N. Y.—Gilman v. Gilman, 2 Lans. 1; Matter of Donohue, 88 Misc. 359, 151 NYS 1094; Matter of Mapes. 5 Dem. Surr. 446.
Pa.—Fox v. Wilcocks, 1 Binn. 194, 2 AmD 433; Vogdes' Est., 6 Pa. Co. 441; Matter of Merrick, 1 Ashm. 305.
S. C.—Brooks v. Brooks, 12 S. C. 422; Davis v. Wright, 20 S. C. L. 560; Taveau v. Ball, 6 S. C. Eq. 456.
Va.—Rosser v. Depriest, 5 Gratt. (46 Va.) 6, 50 AmD 94.

[a] **What is a reasonable time:** (1) More than a year. Chase v. Lockerman, 11 Gill & J. (Md.) 185, 35 AmD 277. (2) One year. Cogswell v. Cogswell, 2 Edw. (N. Y.) 231. (3) Ten months. Tippin v. Perry, 122 Ga. 120, 50 SE 35. (4) Six months. Nunn v. Nunn, 66 Ala. 35; Ringgold v. Ringgold, 1 Harr. & G. (Md.) 11, 18 AmD 250; Matter of Childs, 5 Misc. 560, 26 NYS 721; Matter of McKay, 5 Misc. 123, 25 NYS 725; De Peyster v. Clarkson, 2 Wend. (N. Y.) 77; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 AmD 504; Worrell's App., 23 Pa. 44; Matter of Merrick, 1 Ashm. (Pa.) 305; Carter v. Cutting, 5 Munf. (19 Va.) 223; Dilliard v. Tomlinson, 1 Munf. (15 Va.) 183. (5) Three months. Barney v. Saunders, 16 How. (U. S.) 535, 14 L. ed. 1047.

[b] **Statutes applicable to such cases.**—Moore v. Felkel, 7 Fla. 44; Clifford v. Davis, 22 Ill. A. 316; Christy's Succ., 6 La. Ann. 427.

89. Lent v. Howard, 89 N. Y. 169; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 AmD 504.

90. U. S.—Pulliam v. Pulliam, 10 Fed. 53.
Cal.—In re Marre, 127 Cal. 128, 59 P 385; In re Sarment, 123 Cal. 331, 55 P 1015; Clary's Est., 112 Cal. 292, 44 P 569; Wheeler v. Bolton, 92 Cal. 159, 28 P 558.
Iowa.—Dorris v. Miller, 105 Iowa 564, 75 NW 482; In re Gloyd, 93 Iowa 303, 61 NW 975.
Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068; Clyce v. Anderson, 49 Mo. 37; In re Danforth, 66 Mo. A. 586.
Mont.—In re Davis, 35 Mont. 273, 88 P 957.
S. C.—Tucker v. Richards, 58 S. C. 22, 36 SE 3; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 421.
Tenn.—Jones v. Ward, 10 Yerg. 160.
Wash.—In re Hagerty, 178 P 644.
Eng.—Litton v. Litton, 1 P. Wms. 543, 24 Reprint 508; Morris v. Dillingham, 2 Ves. 170, 28 Reprint 110; Tew v. Winterton, 1 Ves. Jr. 451, 30 Reprint 432.

91. Thompson v. Sanders, 6 J. J. Marsh. (Ky.) 94; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620, 7 AmD 507; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 AmD 504; Griffin v. Bonham, 30 S. C. Eq. 71; Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

[a] **As to a balance on hand for distribution,** the representative is not chargeable with interest until after a demand for distribution has been made. Thompson v. Sanders, 6 J. J. Marsh. (Ky.) 94; Hall v. Sims, 2 J. J. Marsh. (Ky.) 509.

92. Ala.—Clark v. Knox, 70 Ala. 607, 45 AmR 93.
Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35; Springer v. Oliver, 21 Ga. 517.
Ky.—Webb v. Conn, Litt. Sel. Cas. 475.
Md.—Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277.
Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525.
Mont.—In re Williams, 173 P 790.
N. H.—Lund v. Lund, 41 N. H. 355.
N. J.—Mulford v. Mulford, 53 A 79; King v. Berry, 3 N. J. Eq. 261.
N. Y.—Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem]; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612, 77 NYS 413]; Matter of Clark, 16 Misc. 405, 39 NYS 722; Matter of Black, 19 NYSt 260, 6 Dem. Surr. 331; Burtis v. Dodge, 1 Barb. Ch. 77.
Pa.—Johnston's App., 8 Pa. 205, 11 A 78.
S. C.—Tucker v. Richards, 58 S. C. 22, 36 SE 3; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.
Vt.—Woods v. Creditors, 4 Vt. 256.
Va.—Carter v. Cutting, 5 Munf. (19 Va.) 223.
Wash.—In re Hagerty, 178 P 644.
Eng.—Bruere v. Pemberton, 12 Ves. Jr. 386, 33 Reprint 146.

"Whenever an administrator manifestly intends fairly to do his duty, the rule should be not to hold him liable upon slight grounds." Gwynn v. Dorsey, 4 Gill & J. (Md.) 453, 460.

[a] **A distinction exists** (1) in this particular between an executor or administrator and other fiduciaries in that it is the duty of such other fiduciaries to make interest, and they are therefore prima facie charged with it, while an executor or administrator is not charged with that duty, and has not, ordinarily, powers which will enable him to make interest. Clark v. Knox, 70 Aa. 607, 45 AmR 93. (2) "Courts are more reluctant to charge executors and administrators than to charge trustees for suffering funds committed to them to remain unproductive." Matter of Mapes, 5 Dem. Surr. (N. Y.) 446, 447.

[b] **Where the representative may have to pay over funds very soon,** he is not required to invest them and is not liable for interest. Sunday's App., 131 Pa. 584, 18 A 931; Woods v. Creditors, 4 Vt. 256.

[c] **Where an executor's final accounting was delayed by litigation,** and he derived no benefit from the retention of money held for the payment of a legacy subsequently declared invalid, meanwhile making all requested advances to exceptant, he is not chargeable with interest for failure to invest such money pending final settlement. In re Corle, 61 N. J. Eq. 409, 48 A 1027.

[d] **Deposit with counsel.** — An executor or administrator who deposits the funds of the estate with his counsel, but derives no profit from them, is not chargeable with interest. Pratt's Est., 3 LancLRev (Pa.) 203.

[e] **Where an application for an order to lend has been refused** by the court the representative cannot thereafter be charged with interest on the money. Ex p. Walsh, 26 Md. 495.

[f] **Where an administrator appeals from an order of settlement and distribution,** and it is not shown that he did or could have invested the funds in his hands profitably in the meantime, or that he failed to prosecute the appeal with diligence, he is not chargeable personally with interest upon the funds in his hands for the time occupied in the prosecution and determination of the appeal. In re Davis, 33 Mont. 539, 88 P 957.

[g] **Money received from time to time in varying sums.**—An executor should not be charged with interest on moneys in his hands previous to the accounting, where it appears that he received such moneys, not in bulk, but in varying sums as from time to time the amounts due on the different securities were paid, and where he settled his account promptly, he being under no obligation to make temporary investments of it. Wyckoff v. O'Neill, 71 N. J. Eq. 729, 71 A 388 [rev on other grounds 72 N. J. Eq. 880, 67 A 32].

[h] **Difficulty in proper security.** —The representative should not be

[§ 497] **b. Improper Use of Funds.** An executor or administrator who appropriates money of the estate to his own use is properly charged with interest thereon;[93] and mingling trust moneys with those which the fiduciary owns as an individual is usually regarded as so reprehensible that the executor or administrator who blends the funds of the estate with his own or uses the same in his business is chargeable with interest during the whole time of such mingling and indiscriminate use,[94] even though it is not shown that he was

charged with interest for a period of delay in making investments which was caused by difficulty in finding proper security. In re Herrick, 14 NYS 947, 12 NYS 105.

93. Ala.—Pearson v. Darrington, 32 Ala. 227.

Cal.—In re Pease, 149 Cal. 167, 85 P 149; In re Richmond, 9 Cal. A. 402, 99 P 554.

D. C.—Mades v. Miller, 2 App. 455.

Ill.—Huddleston v. Henderson, 181 Ill. A. 176.

Iowa.—In re Brown, 113 Iowa 351, 85 NW 617.

Ky.—Caldwell v. Kinkead, 1 B. Mon. 228; Trible v. Ellison, 1 Ky. Op. 59.

Mass.—McIntire v. Mower, 204 Mass. 233, 90 NE 567.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316.

N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388 [rev on other grounds 72 N. J. Eq. 880, 67 A 32]; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643.

N. Y.—Matter of Adams, 51 App. Div. 619, 64 NYS 591 [mod 30 Misc. 184, 61 NYS 751, and aff 166 N. Y. 623 mem, 59 NE 1118 mem]; Matter of Clark, 69 Misc. 527, 127 NYS 888.

Pa.—Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Hart's Est., 25 Pa. Co. 401; Vogdes' Est., 6 Pa. Co. 441; Heck's Est., 31 PittsbLegJ 347.

Tenn.—Turney v. Williams, 7 Yerg. 172.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Ont.—In re Honsberger, 10 Ont. 521; Smith v. Roe, 11 Grant Ch. (U. C.) 311.

[a] **Executors who lend estate money to themselves** are chargeable with interest. Smith v. Roe, 11 Grant Ch. (U. C.) 311.

[b] **Interest on dividends on stock transferred to administrator individually.**—Interest on dividends received on stock belonging to the estate which the administrator has had transferred to himself individually, will be charged from the time of their receipt by him. Walworth v. Bartholomew, 76 Vt. 1, 56 A 980.

[c] **Debt due by representative.**—The penalty imposed on an executor for improper use of the funds of an estate cannot be imposed on the amount of a debt due by him individually to himself officially, which is not shown to have been actually paid. In re Dimmick, 111 La. 655, 33 S 801.

94. U. S.—Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478; Hook v. Payne, 14 Wall. 252, 20 L. ed. 887; Union Bank v. Smith, 24 F. Cas. No. 14,352, 4 Cranch C. C. 509; McKenzie v. Anderson, 16 F. Cas. No. 8,855, 2 Woods 357.

Ala.—Collins v. Clements, 75 S 165 [cit Cyc]; Ditmar v. Bogle, 53 Ala. 169; Billingslea v. Glenn, 45 Ala. 540; Ivey v. Coleman, 42 Ala. 409; Powell v. Powell, 10 Ala. 900.

Ark.—Howard v. Manning, 65 Ark. 122, 44 SW 1126; Ringgold v. Stone, 20 Ark. 526.

Cal.—In re Pease, 149 Cal. 167, 85 P 149; Miller v. Lux, 100 Cal. 609, 35 P 345; Moore's Est., 95 Cal. 34, 30 P 106; In re Hilliard, 83 Cal. 423, 23 P 393; Herteman's Est., 73 Cal. 545, 15 P 121; In re Clark, 53 Cal. 355; In re Scott, 52 Cal. 403; In re Gasq, 42 Cal. 288; In re Holbert, 39 Cal. 597; Walls v. Walker, 37 Cal. 424, 99 AmD 290; In re Stott, Myr. Prob. 168; In re Scott, 1 Cal. A. 740, 83 P 85. But see infra this note.

Conn.—Rowland v. Isaacs, 15 Conn. 115.

D. C.—Mades v. Miller, 2 App. 455.

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35.

Ill.—Whitney v. Peddicord, 63 Ill. 249. But see infra this note.

Ind.—Johnson v. Hedrick, 33 Ind. 129, 5 AmR 191.

Iowa.—In re Brown, 113 Iowa 351, 85 NW 617; In re Young, 97 Iowa 218, 66 NW 163.

Ky.—Grigsby v. Wilkinson, 9 Bush 91; Weir v. Weir, 3 B. Mon. 645, 39 AmD 487; Webb v. Conn, Litt. Sel. Cas. 475.

Me.—Paine v. Paulk, 39 Me. 15.

Md.—Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277; Gwynn v. Dorsey, 4 Gill & J. 453.

Mass.—Stearns v. Brown, 1 Pick. 530.

Mich.—In re Zimmer, 158 Mich. 170, 122 NW 563; Porter v. Long, 136 Mich. 150, 98 NW 990, 4 AnnCas 177; Perrin v. Lepper, 72 Mich. 454, 40 NW 859.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149; Troup v. Rice, 55 Miss. 278; Rogers v. Tullos, 51 Miss. 685; Anderson v. Gregg, 44 Miss. 170; Powell v. Cooper, 42 Miss. 221.

Mo.—Wolfort v. Reilly, 133 Mo. 463, 34 SW 847; Myers v. Myers, 98 Mo. 262, 11 SW 617; Cruce v. Cruce, 81 Mo. 676; In re Davis, 62 Mo. 450; In re Burke, 96 Mo. A. 295, 70 SW 156; Ulrici v. Boeckeler, 72 Mo. A. 661.

Nebr.—In re Bush, 89 Nebr. 334, 131 NW 602; Westover v. Carman, 49 Nebr. 397, 68 NW 501.

N. H.—Wendell v. French, 19 N. H. 205; Griswold v. Chandler, 5 N. H. 492.

N. J.—Mathis v. Mathis, 18 N. J. L. 59; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; Hetfield v. Debaud, 54 N. J. Eq. 371, 34 A 882; Male v. Williams, 48 N. J. Eq. 33, 21 A 854; Frost v. Denman, 41 N. J. Eq. 47, 2 A 926; Aldridge v. McClelland, 36 N. J. Eq. 288 [aff 38 N. J. Eq. 279]; Frey v. Demarest, 17 N. J. Eq. 71; King v. Berry, 3 N. J. Eq. 261. But see infra this note.

N. Y.—Myers v. Bolton, 157 N. Y. 393, 52 NE 114 [mod on other grounds 89 Hun 342, 35 NYS 577, and reh den 158 N. Y. 665 mem, 52 NE 1125 mem]; In re Myers, 131 N. Y. 409, 30 NE 135; Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem]; Matter of Baker, 57 App. Div. 44, 68 NYS 44; Livermore v. Wortman, 25 Hun 341; Shakespeare v. Markham, 10 Hun 311 [aff 72 N. Y. 400]; Matter of Stanton, 41 Misc. 278, 84 NYS 46; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; In re Essex, 20 NYS 62, Pow. Surr. 28; Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58; Orser's Est., 4 NYCivProc 129; Spear v. Tinkham, 2 Barb. Ch. 211; Utica Ins. Co. v. Lynch, 11 Paige 520; Jacot v. Emmett, 11 Paige 142; Kellett v. Rathbun, 4 Paige 102; Brown v. Rickets, 4 Johns. Ch. 303, 8 AmD 567; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 AmD 507; Manning v. Manning, 1 Johns. Ch. 527; Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 AmD 504; Garniss v. Gardiner, 1 Edw. 128; U. S. Trust Co. v. Bixby, 2 Dem. Surr. 494; Matter of Mairs, 4 Redf. Surr. 160; Ogilvie v. Ogilvie, 1 Bradf. Surr. 356; Hood's Est., Tuck. Surr. 396.

N. C.—Peyton v. Smith, 22 N. C. 325.

Oh.—Cooch v. Irwin, 7 Oh. St. 22.

Pa.—In re Clauser, 84 Pa. 51; Gilbert's App., 78 Pa. 266; Robinett's App., 36 Pa. 174; In re Dyott, 2 Watts & S. 557; Patterson v. Nichol, 6 Watts 379, 31 AmD 473; In re Verner, 6 Watts 250; Fox v. Wilcocks, 1 Binn. 194, 2 AmD 433; Johnston's App., 8 Pa. Cas. 205, 11 A 78; Flynn's Est., 21 Pa. Super. 126; Myers' Est., 13 Pa. Super. 476; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Miles' Est., 12 Pa. Co. 383; Hensler's Est., 18 LancL Rev 317; Kline's Est., 8 LancLRev 356; Sourin's Est., 11 Phila. 14; Heck's Est., 31 PittsbLegJNS 347; McGeary's Est., 16 PittsbLegJNS 404; Hoffman's Est., 15 YorkLegRec 114.

S. C.—Lowman v. Lowman, 69 S. C. 543, 48 SE 536; Myers v. Myers, 7 S. C. Eq. 214, 16 AmD 648.

Tenn.—Cannon v. Apperson, 14 Lea 553; Jameson v. Shelby, 2 Humphr. 198; Turney v. Williams, 7 Yerg. 172.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101; Davis v. Eastman, 68 Vt. 225, 35 A 73; McCloskey v. Gleason, 56 Vt. 264, 48 AmR 770.

Eng.—Holgate v. Haworth, 17 Beav. 259, 51 Reprint 1033; Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Forbes v. Ross, 2 Bro. Ch. 430, 29 Reprint 240, 2 Cox Ch. 113, 30 Reprint 52; Lowson v. Copeland, 2 Bro. Ch. 156, 29 Reprint 89; Perkins v. Baynton, 1 Bro. Ch. 375, 28 Reprint 1187; Newton v. Bennet, 1 Bro. Ch. 359, 28 Reprint 1177; Melland v. Gray, 2 Coll. 295, 33 EngCh 295, 63 Reprint 741; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322; Ratcliffe v. Graves, 1 Vern. Ch. 196, 23 Reprint 409; Rocke v. Hart, 11 Ves. Jr. 58, 32 Reprint 1009; Hill v. Simpson, 7 Ves. Jr. 152, 32 Reprint 63; Powell v. Evans, 5 Ves. Jr. 839, 31 Reprint 886; Goodchild v. Fenton, 3 Y. & J. 481, 148 Reprint 1269.

Ont.—McLennan v. Heward, 9 Grant. Ch. (U. C.) 178.

[a] **Reason for rule.**—"The mixing of the trust moneys with the trustee's own funds, and using them himself, or lending them to his friends temporarily, and under the expectation that the money would be promptly replaced, before it was wanted for the purposes of the trust, is one of the most common causes of the loss of trust funds, in the hands of executors, receivers and guardians, and other trustees. And the safety of those whose property is necessarily placed in the hands of trustees, makes it the imperative duty of the court to restrain and discourage such breaches of trust, by charging those who thus deal with the funds intrusted to their care, with interest." Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520, 525.

[b] **The principle on which the rule is founded** (1) is that equity will not permit a person holding a position of trust to use the trust property for his own advantage. Davis v. Wright, 20 S. C. L. 560; Lowson v. Copeland, 2 Bro. Ch. 156, 29 Reprint 89; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322; Hill v. Simpson, 7 Ves. Jr. 152, 32 Reprint 63; Powell v. Evans, 5 Ves. Jr. 839, 31 Reprint 886. (2) "It is a favorite doctrine of the courts that a trustee shall not be permitted to make profit out of the trust funds." Anderson v. Gregg, 44 Miss. 170, 182.

[c] **A trust company** (1) which, as executor of a will, deposits with itself funds of the estate, and issues to itself as such executor certificates of deposit, will be considered as having used the funds in its business, and will be charged with interest accordingly. St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74. (2) But

actuated by any wrongful intent,[95] or the distributees are unknown,[96] or the will postponed the time of distribution of the estate and did not direct an investment of the funds meanwhile,[97] or the use was during a protracted litigation as to the right to the funds.[98] It is not essential to the representative's liability for interest that he should have derived any benefit from the use of the funds,[99] nor is his liability affected by the fact that he was at all times able [1] and ready [2] to pay over the money if it should be demanded.

Proof of use of funds. A mere suspicion that the representative has used funds of the estate is not sufficient to justify a charge of interest against him;[3] but it is sufficient if there is strong presumptive evidence of such use,[4] if such use can reasonably be inferred from the facts,[5] or if an allegation that the money was so used is not denied.[6]

Option as to interest or profits. The distributees or other beneficiaries of the estate may elect either to charge the personal representative with interest during the whole period, or with the profits actually accruing from his misapplication if these can be ascertained.[7] The option must, however, be exercised

where a trust company was one of three executors of an estate, the funds of which were deposited with the trust company, which allowed the usual two per cent interest thereon, the company could not be surcharged with interest in excess of that rate on the theory that it was bound to account for all the profits made out of the estate. In re Moore, 211 Pa. 348, 60 A 991.

[d] **Deposit in bank in which representative interested.**—(1) The representative has been held not liable for interest merely because he deposited money of the estate in a bank of which he was president (Matter of Johnson, 57 App. Div. 494, 67 NYS 100) [mod on other grounds 170 N. Y. 139, 63 NE 63]; or (2) cashier (Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612 mem, 77 NYS 413]). (3) But otherwise where the executor deposited funds of the estate in a bank of which he was president and a stockholder, and permitted such funds to remain on deposit for a long time without attempting to secure interest thereon, and the bank used the money as part of its working capital. Matter of McKay, 5 Misc. 123, 25 NYS 725. (4) The representative has been held liable where the deposit was in his own private bank (Johnson v. Pulver, 1 Nebr. [Unoff.] 290, 95 NW 697; Matter of Thorp, 31 Misc. 581, 65 NYS 575; Dolan's Est., 15 Pa. Super. 20), or (5) with a banking firm of which he was a member (In re Brewster, 113 Mich. 561, 71 NW 1085). (6) Nevertheless in a case where the administrator, who was a private banker, paying no interest on deposits, kept in his own bank the funds of the estate, which was small and difficult to settle, he should not be charged with interest, when he acted in good faith and his compensation was small compared with his services as administrator. Walker v. Dow, 3 NYS 132, 6 Dem. Surr. 265.

[e] **Lending to one's own firm or corporation is a misapplication.**—In re Stott, 52 Cal. 403; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74; In re Myers, 131 N. Y. 409, 30 NE 135; Clock v. Chadeagne, 10 Hun (N. Y.) 97; Matter of Brown, 65 HowPr (N. Y.) 461, 1 Dem. Surr. 317; Matter of Mairs, 4 Redf. Surr. (N. Y.) 160; Prescott's Est., Tuck. Surr. (N. Y.) 430; Cannon v. Apperson, 14 Lea (Tenn.) 553.

[f] **Paying mortgage on property in which representative interested.**—Where an administrator converted dividend-paying stock of the estate into money, and paid off a mortgage on real estate in which he was interested as heir, and the payment was disallowed, he was charged with interest on the amount from the day of payment, including the period of litigation. Mount v. Van Ness, 35 N. J. Eq. 113.

[g] **Mingling with funds of strangers.**—An administrator who mingles the funds of the estate with those of strangers in his possession and under his control may be charged with interest thereon, although he receives no individual benefit therefrom. Westover v. Carman, 49 Nebr. 397, 68 NW 501.

[h] **Periodical settlements** made by an administrator showing that he did not have the funds of the estate invested do not relieve him of liability to account for interest on money used by him, where the settlements do not also show that he was using the money. In re Young, 97 Iowa 218, 66 NW 163.

[i] **When interest not chargeable.**—(1) Where an executor was garnished, and during the four years for which he held the funds occasionally mingled them with his own for a short time and in no certain amount, but had the amount always at hand and ready to be taken, and the money in his hands had never earned any interest, and the time when the money might be payable under the garnishment was uncertain, it was error to charge him with interest. Candee v. Skinner, 40 Conn. 464. (2) Where an executor took goods from his own store and added to the stock of his intestate in order to make the intestate's stock bring more, and the goods so furnished were not kept separate from the others, and the proceeds of the sale of both were deposited alike in his own name, but it was not charged that he received interest on the trust funds, or unreasonably detained them, he was not chargeable with interest thereon. Field v. Colton, 7 Ill. A. 379. (3) An administrator will not be charged with interest where it is not certain that he used the money of the estate, there being only a suspicion that he did. Grant v. Edwards, 93 N. C. 488.

[j] **Funds to which executor is himself entitled.**—Where the only party who could claim the interest is the accountant himself, who has acquired the fund by assignment, a formal surcharge for interest is useless. Lakey's Est., 13 Pa. Dist. 533.

[k] **Mere commingling not sufficient.**—"The mere fact that an administrator mingles the trust funds with his own by depositing the money belonging to the estate in his own name, as he does his individual money, can not be held a sufficient ground to charge the administrator with interest. We are aware of no law which requires an administrator to keep the funds belonging to the estate separate and distinct from his own funds, and in the absence of a legal requirement no liability can be incurred. It might, perhaps, be a good practice for an administrator to keep the trust funds entirely separate from his own funds, and where he deposits in a bank, open the account in his name, as administrator; but so long as the administrator has the money belonging to the estate at his command, ready to answer the order of the court, this is all that the law requires." In re Schofield, 99 Ill. 513, 517. To same effect In re Sarment, 123 Cal. 331, 55 P 1015; Mayer v. McCracken, 245 Ill. 551, 92 NE 355; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

95. In re Stott, 52 Cal. 403; Wolfort v. Reilly, 133 Mo. 463, 34 SW 847.

96. McLennan v. Heward, 9 Grant Ch. (U. C.) 178.

97. In re Young, 97 Iowa 218, 66 NW 163.

98. Grigsby v. Wilkinson, 9 Bush (Ky.) 91.

99. In re Hilliard, 83 Cal. 423, 23 P 393; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1.

1. In re Clark, 53 Cal. 355.

2. Kerr v. Laird, 27 Miss. 544.

3. Grant v. Edwards, 93 N. C. 488.

4. Ala.—Ivey v. Coleman, 42 Ala. 409.

Cal.—In re Beideman, Myr. Prob. 66.

Ky.—Caldwell v. Kinkead, 1 B. Mon. 228.

N. Y.—Hasler v. Hasler, 1 Bradf. Surr. 248.

Pa.—Armstrong v. Walker, 150 Pa. 585, 25 A 53.

[a] **When use presumed.**—(1) The use of the money by the executor or administrator will be presumed where he keeps it for a long time. Ivey v. Coleman, 42 Ala. 409; Hasler v. Hasler, 1 Bradf. Surr. (N. Y.) 248; Armstrong v. Walker, 150 Pa. 585, 25 A 53. (2) A presumption arises that an administrator used the funds where he purchased the decedent's land at a sheriff's sale and occupied it, giving a receipt for the purchase money. Com. v. Mateer, 16 Serg. & R. (Pa.) 416.

[b] **Presumption of use for profit.**—A presumption arises from the representative's so using the funds of the estate that he intended to use them for his own profit, but this presumption may be repelled by the evidence. In re Beideman, Myr. Prob. (Cal.) 66.

5. Caldwell v. Kinkead, 1 B. Mon. (Ky.) 228; Camp v. Camp, 74 Mo. 192; Lake v. Park, 19 N. J. L. 108.

[a] **Failure to account** for the funds raises a presumption of private use and misapplication by the fiduciary. Camp v. Camp, 74 Mo. 192.

6. White v. Clarke, 7 T. B. Mon. (Ky.) 640.

[a] **Affidavit not denying use.**—Where an administrator, wishing to avoid the payment of interest on the funds in his hands, makes affidavit "that he always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator," but does not deny that he used the trust funds, he is chargeable with interest. Farmer v. Farmer, 26 Ala. 671.

7. Ala.—Harrison v. Harrison, 39 Ala. 489.

Ark.—Ringgold v. Stone, 20 Ark. 526.

Cal.—In re Holbert, 39 Cal. 597.

Ill.—Whitney v. Peddicord, 63 Ill. 249.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74.

Miss.—Anderson v. Gregg, 44 Miss. 170; Crowder v. Shackelford, 35 Miss. 321.

Mo.—Julian v. Wrightsman, 73 Mo. 569.

N. J.—King v. Berry, 3 N. J. Eq. 261; Boulton v. Scott, 3 N. J. Eq. 231.

N. Y.—Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem]; Matter of Rainforth, 40 Misc. 609, 83 NYS 57;

with respect to the whole period. That is to say the beneficiaries must elect to take either the interest for the whole period, or the profits for the whole period, and cannot demand interest for one part of the time and profits realized during another part.[8]

[§ 498] **c. Indebtedness to Estate.** An executor or administrator who is indebted to the estate is chargeable with interest on his indebtedness.[9]

[§ 499] **d. Failure to Collect Interest.** An executor or administrator is chargeable with interest accruing to the estate which should have been collected by him, but which he failed to collect,[10] unless it is made to appear that the interest could not have been collected by the use of reasonable diligence.[11]

[§ 500] **e. Loss of Funds of Estate.** The question whether an executor or administrator is liable for interest on funds which have been lost to the estate by his acts or omissions, as well as for the principal amount so lost, is the subject of considerable diversity of opinion. It has generally been held in England and Canada that if a loss has occurred by reason of neglect to make collections or payments to the wrong person by mistake, the executor or administrator is not chargeable with interest, because his liability in this respect attaches only as to money which he has actually retained.[12] In the United States, on the other hand, it is generally held that if funds of the estate are lost through the fault of the executor or administrator, either by failure to collect debts or by improper disbursements or investments, he is chargeable with interest on the amount lost, as well as on the principal sum;[13] but the rule is not absolute, and in a number of cases it has been held that interest was not chargeable on funds which had been lost by the executor or administrator.[14]

[§ 501] **f. Premature Withdrawal of Commissions.** It has been held that, where the representative withdraws money from the estate for his commissions before settlement or the due allowance of

In re Suess, 37 Misc. 459, 75 NYS 938; Brown v. Rickets, 4 Johns. Ch. 303, 8 AmD 567.

Pa.—Robinett's App., 36 Pa. 174; Hughes' Est., 19 Pa. Super. 534; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; McGeary's App., 5 Cent. Rep. 852 [aff 16 PittsbLegJNS 405].

Eng.—Flockton v. Bunning, L. R. 8 Ch. 323 note; Wedderburn v. Wedderburn, 22 Beav. 84, 52 Reprint 1039; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322.

8. Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322.

9. Ill.—Phillips v. Duckett, 112 Ill. A. 587.

Ky.—Com. v. Bracken, 32 SW 609, 17 KyL 785; Calvert v. Holland, 9 B. Mon. 458.

La.—In re Dimmick, 111 La. 655, 35 S 801.

Mass.—Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

N. J.—Ackerman's Case, 40 N. J. Eq. 533, 5 A 91.

N. Y.—Matter of Brintnall, 40 Misc. 67, 81 NYS 250; In re Davis, 37 Misc. 326, 75 NYS 493.

Pa.—Yost's Est., 23 Pa. Super. 223; Bard's Est., 13 Pa. Dist. 552, 21 Lanc LRev 81; Miller's Est., 22 LancLRev 49; McGonnigle's Est., 31 PittsbLeg JNS 27; Brenneman's Est., 14 York LegRec 14.

Tenn.—Hill v. Fly, (Ch.) 52 SW 731.

[a] **Where an executor delays for several years paying a judgment** against himself in favor of the estate, he will be surcharged with interest thereon. In re Groff, 215 Pa. 586, 64 A 783.

[b] **Money collected as agent of decedent.**—Where the representative collected money during the lifetime of decedent as his agent, and fails to account for it, he is properly charged with interest from the date of the collection. Hill v. Fly, (Tenn. Ch.) 52 SW 731.

[c] **Suit on bond.**—An executor or administrator who fails to account for his indebtedness to the estate is chargeable with interest, at least from the date of the writ, in a suit on his bond to recover the amount. Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

[d] **The mere fact that an executor has paid claims** against the testator's estate does not stop the running of interest on his indebtedness to the estate, unless he shows that he paid such claim with his own money to the amount of his indebtedness. Ackerman's Case, 40 N. J. Eq. 533, 5 A 91.

10. D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

N. Y.—Matter of Collyer, 124 App. Div. 16, 108 NYS 600, 120 App. Div. 894 mem, 105 NYS 1111 mem; In re Stephens, 2 NYS 36.

Eng.—In re Barclay, [1899] 1 Ch. 674.

[a] **Where usury was stipulated for** on a loan, the extra interest should not be charged where the representative has not collected it. White v. White, 3 Dana (Ky.) 374.

[b] **The mere fact that a bank formerly credited interest** on funds of the estate deposited with it does not raise such a clear presumption of liability for interest after that time, when the credits ceased, as to warrant a surcharge of the administrator. Stair's Est., 11 Pa. Super. 447.

11. Moore's Est., 72 Cal. 335, 13 P 880; McIntire v. McIntire, 14 App. (D. C.) 337; Mathis v. Mathis, 18 N. J. L. 59.

12. Saltmarsh v. Barrett, 29 Beav. 474, 54 Reprint 711; Lowson v. Copeland, 2 Bro. Ch. 156, 29 Reprint 89; Re Barker, 77 L. T. Rep. N. S. 712; Tebbs v. Carpenter, 1 Madd. 290, 56 Reprint 107; Bruere v. Pemberton, 12 Ves. Jr. 386, 33 Reprint 146; Vanston v. Thompson, 10 Grant Ch. (U. C.) 542, 543.

"The general rule seems to be that the court contents itself with charging trustees with the principal only of what they might have received, but have not received, and does not, in addition, charge them with interest." Vanston v. Thompson, supra.

[a] **Contrary view.**—In re Hulkes, 33 Ch. D. 552; Stiels v. Guy, 1 Macn. & G. 422, 47 EngCh 339, 41 Reprint 1328 [aff 16 Sim. 230, 39 EngCh 230, 60 Reprint 861]; Sovereign v. Sovereign, 15 Grant Ch. (U. C.) 559 (executors may be charged with interest as well as principal in respect of sums lost through their misconduct, although the principal never reached their hands).

13. Ala.—Moody v. Hemphill, 71 Ala. 169; Smyley v. Reese, 53 Ala. 89, 25 AmR 598.

Cal.—Miller v. Lux, 100 Cal. 609, 35 P 345; In re Hilliard, 83 Cal. 423, 23 P 393.

Conn.—Clement's App., 49 Conn. 519.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41].

Ind.—Lindley v. State, 116 Ind. 235, 18 NE 45.

Ky.—Amos v. Heatherby, 7 Dana 45.

La.—Bass v. Chambliss, 9 La. Ann. 376.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149; Banks v. Machen, 40 Miss. 256; Crowder v. Shackelford, 35 Miss. 321; Cole v. Leake, 27 Miss. 767.

Mo.—Julian v. Wrightsman, 73 Mo. 569; Garesché v. Priest, 9 Mo. A. 270 [aff 78 Mo. 126].

Nebr.—Westover v. Carman, 49 Nebr. 397, 68 NW 501.

N. J.—Mount v. Van Ness, 35 N. J. Eq. 113; Van Houten v. Post, 32 N. J. Eq. 709 [rev on other grounds 33 N. J. Eq. 344].

N. Y.—Matter of Adams, 51 App. Div. 619, 64 NYS 591 [mod on other grounds 30 Misc. 184, 61 NYS 751, and aff 166 N. Y. 623 mem, 59 NE 1118 mem]; Matter of Krisfeldt, 49 Misc. 26, 97 NYS 877; In re Suess, 37 Misc. 459, 75 NYS 938; Matter of Scudder, 21 Misc. 179, 47 NYS 101.

Pa.—Donnelly's Est., 11 Pa. Dist. 279.

Tenn.—Hill v. Ely, (Ch.) 52 SW 731; Lowry v. McGee, 3 Head 269; Governor v. McEwen, 5 Humphr. 241; Torbet v. McReynolds, 4 Humphr. 215; Jameson v. Shelby, 2 Humphr. 198; Deaderick v. Cantrell, 10 Yerg. 263, 31 AmD 576; Jones v. Ward, 10 Yerg, 160.

[a] **Shifting an investment resulting in loss of assets.**—Where a personal representative shifts an investment of money, there being no necessity therefor, which results in its loss, a charge of interest at the rate that the fund would have earned had the investment not been changed, is proper. Matter of Scudder, 21 Misc. 179, 47 NYS 101.

[b] **Joint executors.**—An executor who is liable for his coexecutor's devastavit, although not a party to it, will be charged with interest only from the date of his discovery of the misconduct. Matter of Dougherty, 43 Misc. 468, 89 NYS 549.

[c] **If the funds of the estate are mingled with individual funds** by the executor or administrator and are lost, he is chargeable with interest. Westover v. Carman, 49 Nebr. 397, 68 NW 501.

14. U. S.—Pulliam v. Pulliam, 10 Fed. 53.

Ark.—Brinkley v. Willis, 22 Ark. 1.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

N. Y.—Wyckoff v. Van Siclen, 3 Dem. Surr. 75.

Pa.—In re Clauser, 84 Pa. 51.

Tenn.—Morris v. Morris, 9 Heisk. 814; Fulton v. Davidson, 3 Heisk. 614; German v. German, 7 Coldw. 180.

"All men are sometimes more or less negligent in their own as well as other people's affairs, and to visit these penalties upon them is calculated to drive the administration of estates into the hands of irre-

commissions, he is chargeable with interest thereon,[15] although he acted in good faith and under advice of counsel;[16] but there is also authority for the view that interest should not be charged on commissions prematurely withdrawn,[17] at least where the action of the representative in this respect was authorized or consented to by the persons beneficially interested in the estate.[18]

[§ 502] **g. Delay in Settling Estate.** Where there has been long and culpable delay by the representative in accounting or in settling the estate and distributing the residue, interest is chargeable after a reasonable time has elapsed,[19] as under such circumstances it is presumed that he had made use

sponsible men. I find this principle running through the cases, and it does seem to me enough to hold this executor liable for the principal sum lost by his negligence, without charging him with interest which it is obvious he has not made, as a fact, nor could have made under the circumstances." Pulliam v. Pulliam, 10 Fed. 53, 67.

[a] **Where the executor acted in good faith** his liability may be limited to the amount lost without interest. Wyckoff v. Van Siclen, 3 Dem. Surr. (N. Y.) 75.

[b] **Sale on credit.**—Where executors, who carried on the business of testator, sold goods on time without taking security without an order of court, and a loss ensued, they were not chargeable with interest on such losses. Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

[c] **On improper payments disallowed** in the accounts, one is not readily charged with interest. In re Clauser, 84 Pa. 51. But see infra § 504 as to payment of the representative's own claims.

[d] **Where the neglect has been merely technical,** and not wanton or willful, or productive of profit to the executor, he is not chargeable with interest on losses. Brinkley v. Willis, 22 Ark. 1; Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

15. Kenan v. Graham, 135 Ala. 585, 33 S 699; Davidson v. Story, 106 Ga. 799, 32 SE 867; Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388 [rev on other grounds 72 N. J. Eq. 880, 67 A 32]; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Matter of Franklin, 26 Misc. 107, 56 NYS 858; In re Herrick, 12 NYS 105 [aff 131 N. Y. 239, 30 NE 130, and aff 14 NYS 947]; Matter of Peyser, 5 Dem. Surr. (N. Y.) 244; Freeman v. Freeman, 4 Redf. Surr. (N. Y.) 211; Whitney v. Phœnix, 4 Redf. Surr. (N. Y.) 180.

16. Wheelwright v. Rhoades, 28 Hun (N. Y.) 57, 11 AbbNCas 382; Matter of Peyser, 5 Dem. Surr. (N. Y.) 244; Lacey v. Davis, 4 Redf. Surr. (N. Y.) 402.

17. In re Carter, 132 Cal. 113, 64 P 123, 64 P 484; In re Parker, 64 Pa. 307.

18. Noble v. Jackson, 124 Ala. 311, 26 S 955, 132 Ala. 230, 31 S 450; Matter of Ross, 33 Misc. 163, 68 NYS 373; Matter of Franklin, 26 Misc. 107, 56 NYS 858.

19. U. S.—McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134].

Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955; Eubank v. Clark, 78 Ala. 73; May v. Green, 75 Ala. 162; Clark v. Hughes, 71 Ala. 163; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Mims v. Mims, 39 Ala. 716; Harrison v. Harrison, 39 Ala. 489.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12; Dyer v. Jacoway, 50 Ark. 217, 6 SW 902.

Cal.—In re Armstrong, 125 Cal. 603, 58 P 183; In re Hilliard, 83 Cal. 423, 23 P 393; Sanderson's Est., 74 Cal. 199, 15 P 753.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Hawaii.—Matter of Akana, 13 Hawaii 388, 11 Hawaii 420; Matter of Espinda, 9 Hawaii 342.

Ida.—Harris v. Coates, 8 Ida. 491, 69 P 475.

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609; Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Haskins v. Martin, 103 Ill. A. 115.

Iowa.—Lommen v. Tobiason, 52 Iowa 665, 3 NW 715.

Ky.—Crawford v. Thomas, 54 SW 197, 21 KyL 1100; Clark v. Newman, 1 SW 880, 8 KyL 515; Grigsby v. Wilkinson, 9 Bush 91; Nixon v. Nixon, 8 Dana 5; Blakey v. Blakey, 3 J. J. Marsh. 674.

Md.—Smithers v. Hooper, 23 Md. 273; Ing v. Baltimore Assoc., etc., 21 Md. 426; Mickle v. Cross, 10 Md. 352; Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277; Comegys v. State, 10 Gill & J. 175; Thomas v. Frederick County School, 9 Gill & J. 115; Lyles v. Hatton, 6 Gill & J. 122.

Mich.—Hall v. Grovier, 25 Mich. 428.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149; Anderson v. Gregg, 44 Miss. 170; Banks v. Machen, 40 Miss. 256; Brandon v. Hoggatt, 32 Miss. 335; Satterwhite v. Littlefield, 21 Miss. 302; Smith v. Hurd, 16 Miss. 682.

Mo.—In re Pound, 166 Mo. 419, 66 SW 273; In re Davis, 62 Mo. 450; Henry v. State, 9 Mo. 778; Berkmeir v. Peters, 111 Mo. A. 717, 86 SW 598; State v. Babb, 77 Mo. A. 277; In re Danforth, 66 Mo. A. 586.

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

Nebr.—In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350; Johnson v. Pulver, 95 NW 697.

Nev.—In re Delaney, 171 P 383, LRA1918D 1022.

N. H.—Lund v. Lund, 41 N. H. 355; Wendell v. French, 19 N. H. 205; Griswold v. Chandler, 5 N. H. 492.

N. J.—German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 63 A 835 [aff 72 N. J. Eq. 954, 67 A 23].

N. Y.—Dunford v. Weaver, 84 N. Y. 445; Matter of Lyons, 186 App. Div. 161, 173 NYS 590 [aff 227 N. Y. 564, 124 NE 899]; Matter of Driskel, 100 App. Div. 171, 91 NYS 273; Willcox v. Smith, 26 Barb. 316; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; Matter of Childs, 5 Misc. 560, 26 NYS 721; Hasler v. Hasler, 1 Bradf. Surr. 248.

N. C.—Overman v. Lanier, 159 N. C. 437, 74 SE 630.

Oh.—Cooch v. Irwin, 7 Oh. St. 22; In re Thornton, 5 OhS&CP 151, 7 Oh NP 335.

Pa.—Merkel's Est., 131 Pa. 584, 18 A 931; Walker's App., 116 Pa. 419, 9 A 654; Wilson's App., 8 Pa. Cas. 579, 11 A 678; Reed's Est., 22 Pa. Super. 635; Crouse's Est., 16 Pa. Super. 212; Fow's Est., 3 Pa. Dist. 316, 14 Pa. Co. 648; Bracken's Est., 32 Pa. Co. 215; Matter of Merrick, 1 Ashm. 305; In re Fendrick, 20 LancLRev 69.

S. C.—Lowman v. Lowman, 69 S. C. 543, 48 SE 536; Tucker v. Richards, 58 S. C. 22, 36 SE 3; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412; Nettles v. McCown, 5 S. C. 43; Taveau v. Ball, 6 S. C. Eq. 456.

Tenn.—Turney v. Williams, 7 Yerg. 172; Davis v. Jackson, (Ch. A.) 39 SW 1067.

Tex.—McKinney v. Nunn, 82 Tex. 44, 17 SW 516.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Va.—Preston v. Davis, 102 Va. 178, 45 SE 865.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Eng.—Blogg v. Johnson, L. R. 2 Ch. 225; Holgate v. Haworth, 17 Beav. 259, 51 Reprint 1033; Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Franklin v. Frith, 3 Bro. Ch. 433, 29 Reprint 627; Littlehales v. Gascoyne, 3 Bro. Ch. 73, 29 Reprint 416, 2 ERC 172; Kildare v. Hopson, 4 Bro. P. C. 550, 2 Reprint 374; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737; Stacpoole v. Stacpoole, 4 Dow 209, 3 Reprint 1140; Gilroy v. Stevens, 51 L. J. Ch. 834; Re Jones, 49 L. T. Rep. N. S. 91; Longmore v. Broom, 7 Ves. Jr. 124, 32 Reprint 51.

[a] **Illustration.**—Where an administrator filed his final report, but did not pay the balance on hand shown thereby into the clerk's office, as required by statute, and on a hearing it was found that a greater amount than that shown in the report was due the distributees, the administrator should be charged with interest on the whole amount found due from the date of filing the report. Overman v. Lanier, 159 N. C. 437, 74 SE 630.

[b] **If an executor is not ready with his accounts** when they are called for, it is a ground for charging him with interest. Pearse v. Green, 1 Jac. & W. 135, 37 Reprint 327.

[c] **If an administrator neglects to pay the debts** of the estate (1) he is chargeable with interest on the annual balances. Walker's App., 116 Pa. 419, 9 A 654. (2) Where an administrator appointed Aug. 31, 1895, had a considerable amount of money and cotton belonging to the estate on hand on Jan. 21, 1896, and knew that the principal part of the money in his hands would be credited on a bond which he held against the estate bearing a high rate of interest, he should be charged with interest on the amount in his hands on Jan. 1, 1896, after deducting all expenditures made by him prior to Aug. 31, 1896. Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

[d] **An executor who illegally withholds the distributive share of a widow,** or a portion thereof, is properly chargeable with interest. Leischner v. Kaiser, 156 Ill. A. 123.

[e] **Failure to bring into court.**—When the assets of an estate are ordered to be brought into court, and are subsequently intrusted to receivers, by consent of all parties, to be invested pending a contest over the validity of the will, an administrator with the will annexed is chargeable with interest on money retained by him, where it is not shown that it was used or kept for the necessary benefit of the estate. McIntire v. McIntire, 14 App. (D. C.) 337.

[f] **"What will constitute unreasonable delay** in making a settlement, rendering the executor or administrator liable for interest, must depend upon the particular facts and circumstances of each case. The inquiry is whether, in view of these facts and circumstances, a prudent man, dealing with his own funds, for his own interest, would have retained the money unproductive, or would have appropriated it as it was prima facie to be appropriated. The pendency or the just anticipation of suits which, if the event of them was unfavorable, would seriously diminish the assets, complicating the accounts if there was a distribution, may be a good reason for delaying the settlement, and, during

of the funds of the estate;[20] and a demand for settlement is not essential to render him liable.[21] But the representative should not be charged with interest not actually received where the delay was not unreasonable under the circumstances of the case,[22] or was not due to any culpable neglect or misconduct on his part, but was otherwise occasioned, as by some needful judicial preliminaries, the sickness or absence of the judge, litigation, or interference among rival claimants to the fund, the nonascertainment of those actually entitled, the fact that the person entitled could not be found, or similar causes, and he has not used or made any profit on the funds in his hands.[23] And the representative is not chargeable with interest on money retained to pay the distributees if they failed to call for it,[24] although he is liable if he has had the money in his hands for a long time and has not kept it ready for distribution.[25]

A definite time, varying in the different jurisdictions, is generally allowed for the settlement of estates,[26] and within this time an executor or administrator is not generally chargeable with interest, unless he has actually made it, or has used the money for his own purposes.[27] But after the lapse of such period he is prima facie liable for

the period of reasonable delay, may justify keeping the moneys without a liability for interest; or, if the amounts involved in such suits are not large, compared with the assets, the keeping without a charge for interest of a sum sufficient to answer the judgments which may be rendered in them. Or, it may be that a part only of the assets has been reduced to money, leaving, without fault of the personal representative, a part uncollected, and it would not be prudent to subject the estate to the costs of a partial settlement and distribution. These and other causes developed by the particular facts of the case may excuse a delay in making settlement and relieve from liability for interest. But when no circumstances exist justifying the retention of the money unproductive, the personal representative must answer for interest. Diligence in making settlements and accounting to those entitled to receive it for the money received is as high a duty, as imperatively demanded by law, as diligence in the collection, or in reducing to money by appropriate proceedings, when a legal necessity exists for the reduction of the property, real or personal, subject to administration." Clark v. Knox, 70 Ala. 607, 620, 45 AmR 93.

[g] **Death of representative.**— Where delay in settling an administrator's account after his death is not due to his method of handling the estate, or chargeable to his estate, it will be considered settled as of the date of his death, and his estate will be charged with simple interest only on the balance in his hands at the time. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

[h] **Damages beyond interest** cannot be charged where the delay in the settlement of the estate resulted in no loss to the heirs. In re Armstrong, 125 Cal. 603, 58 P 183.

[i] **Penalties for failure to account, etc.,** are sometimes provided by statute. In re Dimmick, 111 La. 655, 35 S 801; Conery's Succ., 111 La. 113, 35 S 479.

20. Wyman v. Hubbard, 13 Mass. 232.

21. Haskins v. Martin, 103 Ill. A. 115.

22. Ala.—Siniard v. Green, 123 Ala. 527, 26 S 661.
Ill.—In re Dyer, 201 Ill. A. 183.
Ind.—Dufour v. Dufour, 28 Ind. 421.
Mass.—Boynton v. Dyer, 18 Pick. 1; Wyman v. Hubbard, 13 Mass. 232.
Tenn.—Morris v. Morris, 9 Heisk. 814.
Va.—Brent v. Clevinger, 78 Va. 12.
"Brief delay in accounting is not enough of itself to warrant charging him with interest which he did not receive and which he was under no duty to obtain." McIntire v. Mower, 204 Mass. 233, 236, 90 NE 567.

23. Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Johnson v. Holifield, 82 Ala. 123, 2 S 753.
Cal.—In re Seligman, Myr. Prob. 8.
Conn.—Colt v. Colt, 33 Conn. 270.
Ga.—Rogers v. Bottsford, 44 Ga. 652; Binion v. Miller, 27 Ga. 78.
Ill.—White v. Lewis, 201 Ill. A. 105.
Ind.—Dufour v. Dufour, 28 Ind. 421.
Iowa.—Tucker v. Stewart, 121 Iowa 714, 97 NW 148.
Ky.—McRoberts v. Carneal, 44 SW 442; Miller v. Simpson, 2 SW 171, 8 KyL 518.
Md.—Ex p. Walsh, 26 Md. 495.
Mass.—Forward v. Forward, 6 Allen 494; Lamb v. Lamb, 11 Pick. 371.
Mo.—In re Davis, 62 Mo. 450.
N. J.—In re Corle, 61 N. J. Eq. 409, 48 A 1027.
N. Y.—Matter of Schweibert, 25 Misc. 464, 55 NYS 649.
N. C.—Roper v. Burton, 107 N. C. 526, 12 SE 334; Smith v. Smith, 101 N. C. 461, 8 SE 128, 131, 133.
Pa.—In re Skeer, 253 Pa. 497, 98 A 703; Reed's Est., 22 Pa. Super. 635; Lieber's Est., 17 Pa. Co. 557; Breeswine's Est., 11 YorkLegRec 141.
S. C.—Bulows v. O'Neal, 4 S. C. Eq. 394.
Va.—Dromgoole v. Smith, 78 Va. 665; Fitzgerald v. Jones, 1 Munf. (15 Va.) 150.

[a] **Illustrations.**—(1) Where, on the hearing of an application to settle an administrator's third account, it appeared that the administrator had paid a dividend to creditors, as ordered by the court, and had obeyed all of the court's orders in the estate, that every item of the account was correct, and that there was still undisposed of at the hearing property of the appraised value of two thousand seven hundred and fifty dollars, the fact that the estate had been pending several years, during which there had been litigation which was appealed to the supreme court, did not establish that the administrator had willfully or negligently caused the delay. In re Sylvar, 1 Cal. A. 35, 81 P 663. (2) Where an administratrix who was decedent's widow waived the allowance to which she was entitled out of the estate, and partly supported her son, who was two months old when his father died, until the son became of age, his share of the estate being insufficient for his support, and thereby expended more than any amount of interest that could be charged against her, it was held that as between herself and him she should not be charged with interest, although she filed no account until cited nearly twenty-nine years after her appointment. Birkholm v. Wardell, 42 N. J. Eq. 337.

[b] **If the beneficiaries are equally guilty of laches** in protracting the settlement, they cannot require interest to be charged against the executor or administrator. Tucker v. Stewart, 121 Iowa 714, 97 NW 148; Forward v. Forward, 6 Allen (Mass.) 494; Riddle v. Riddle, 26 S. C. Eq. 31.

[c] **If the distributees are of age,** and the administrator gives them notice that he is ready to pay over their shares, and is in fact so ready at all times, he is not chargeable with interest on the fund if he does not use it. McAllister v. Brice, 16 S. C. Eq. 275.

[d] **If there is no one legally qualified to receive** the balance in an administrator's hands, and it is not incumbent on him to invest it, he is not chargeable with interest if he did not convert the money to his own use. Rowland v. Isaacs, 15 Conn. 115; Matter of Schweibert, 25 Misc. 464, 55 NYS 649.

24. Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77; Jacot v. Emmett, 11 Paige (N. Y.) 142; Hasler v. Hasler, 1 Bradf. Surr. (N. Y.) 248.

25. Salisbury v. Colt, 27 N. J. Eq. 492; Kline's Est., 8 LancLRev (Pa.) 356.

[a] **An offer of payment** to legatees, refused by them, will not relieve the representative of liability for interest, where the amount offered is not thereafter kept ready to meet a demand for payment, either by special deposit or payment into court. Godwin's Est., 22 Pa. Super. 469.

26. Time: For:
Accounting see infra § 2303.
Distribution of estate see infra §§ 1281–1288.
Payment of claim see infra § 1219.

27. Ala.—Clark v. Knox, 70 Ala. 607, 45 AmR 93; Harrison v. Harrison, 39 Ala. 489.
Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35.
Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41]; Haskins v. Martin, 103 Ill. A. 115; Clifford v. Davis, 22 Ill. A. 316.
Iowa.—Dorris v. Miller, 105 Iowa 564, 75 NW 482.
Ky.—Clark v. Newman, 1 SW 880, 8 KyL 515; Thrasher v. Lewis, 13 KyL 926.
Md.—Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277; Thomas v. Frederick County School, 9 Gill & J. 115; Lyles v. Hatton, 6 Gill & J. 122; Gwynn v. Dorsey, 4 Gill & J. 453.
Mass.—Boynton v. Dyer, 18 Pick. 1.
Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149; Anderson v. Gregg, 44 Miss. 170; Brandon v. Hoggatt, 32 Miss. 335.
N. J.—In re Mott, 26 N. J. Eq. 509.
Pa.—In re Verner, 6 Watts 250; Fox v. Wilcocks, 1 Binn. 194, 2 AmD 433; Miller's Est., 14 Pa. Dist. 163; Wilson's Est., 1 Del. Co. 85.
S. C.—Tucker v. Richards, 58 S. C. 22, 36 SE 3; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412; Brooks v. Brooks, 12 S. C. 422; DeSaussure v. McClenaghan, 6 S. C. 83.
Tenn.—Morris v. Morris, 9 Heisk. 814.
Va.—Burwell v. Anderson, 3 Leigh (30 Va.) 348.

[a] **If there was no necessity** for retaining the fund during such period, interest should be charged; and the petition of the executor or administrator to the probate court, in which he alleges that all the debts are paid, and asks permission to make distribution of a certain amount in his hands, which is granted, is sufficient proof to charge him with interest on the sum so ordered to be distributed, in case he fails to make distribution as ordered. Banks v. Machen, 40 Miss.

interest on all money coming into his hands,[28] and can relieve himself only by showing an application of the money to the exigencies of the estate.[29]

[§ 503] **h. Reservation for Contingencies.** An executor or administrator is not necessarily liable to pay interest on a reasonable sum retained in his hands or on deposit to meet expenses and pay judgments recovered against the estate, or so as to abide the contingencies of some litigation concerning assets and the title of parties claimant;[30] but it must appear that the funds were actually kept in hand for the purposes in question.[31] In case the representative finds himself with funds not needed for the purposes mentioned, it is his duty to report that fact to the court and to apply to the court for an order of distribution or for leave to pay the money into court, or for instructions in the premises,[32] and circumstances may arise where, not having procured the protection of the probate court, he may make himself chargeable for interest which the fund would fairly have earned had he dealt prudently with the assets.[33] So an executor retaining funds of the estate to indemnify him for a possible future loss is chargeable with the legal rate of interest from the date of the final settlement of the estate, if he uses the funds in his private business;[34] and if the representative keeps on hand more than is reasonably sufficient for current pur-

256; Brandon v. Hoggatt, 32 Miss. 335.

[b] **Where an executor occupied the testator's real estate** at a certain rent under an agreement with his coexecutor, but did not account for the rent, he should be charged with interest thereon from the time when it became due. Tichenor v. Tichenor, 43 N. J. Eq. 163, 10 A 867 [aff 45 N. J. Eq. 303, 17 A 631.

28. Ala.—Eubank v. Clark, 78 Ala. 73; May v. Green, 75 Ala. 162; Clark v. Hughes, 71 Ala. 163.

Ill.—Haskins v. Martin, 103 Ill. A. 115.

Ky.—Clark v. Newman, 1 SW 880, 8 KyL 515.

Md.—Smithers v. Hooper, 23 Md. 273; Ing v. Baltimore Assoc., etc., 21 Md. 426; Chase v. Lockerman, 11 Gill & J. 185, 35 AmD 277; Gwynn v. Dorsey, 4 Gill & J. 453.

Mass.—White v. Ditson, 140 Mass. 351, 4 NE 606, 54 AmR 473; Boynton v. Dyer, 18 Pick. 1.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

Nebr.—Johnson v. Pulver, 95 NW 697.

N. Y.—Gilman v. Gilman, 2 Lans. 1.

N. C.—Pickens v. Miller, 83 N. C. 543.

Pa.—Matter of McCall, 1 Ashm. 357.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024.

[a] **Reasonable time allowed after expiration of time for settlement.**—On moneys not used by the executor or administrator for his private purposes, nor expended in the payment of debts, he is only chargeable with interest, in the absence of special circumstances, from the expiration of a reasonable time (in this case six months) after the lapse of the time within which it was his duty to dispose of the funds. Harrison v. Harrison, 39 Ala. 489.

29. Wilson v. Wilson, 3 Gill & J. (Md.) 20; Lamb v. Lamb, 11 Pick. (Mass.) 371; Anderson v. Gregg, 44 Miss. 170; Satterwhite v. Littlefield, 21 Miss. 302; Pace v. Burton, 6 S. C. Eq. 247.

30. U. S.—Wade v. Wade, 28 F. Cas. No. 17,030, 1 Wash. 477.

Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955.

Cal.—In re Marre, 127 Cal. 128, 59 P 385.

Ga.—Truett v. Williams, 101 Ga. 311, 28 SE 851; Doster v. Arnold, 60 Ga. 316.

Ky.—Howe v. Winn, 150 Ky. 667, 150 SW 842; Briggs v. Walker, 102 Ky. 359, 43 SW 479, 19 KyL 1490 [aff 171 U. S. 466, 19 SCt 1, 43 L. ed. 243]; Taylor v. Minor, 90 Ky. 544, 14 SW 544, 12 KyL 479.

Md.—Mickle v. Cross, 10 Md. 352; Wilson v. Wilson, 3 Gill & J. 20.

Mass.—Phelps v. Fitch, 178 Mass. 442, 59 NE 1031.

Mo.—Booker v. Armstrong, 93 Mo. 49, 4 SW 727.

Mont.—In re Davis, 35 Mont. 273, 88 P 957.

N. H.—Lund v. Lund, 41 N. H. 355.

N. J.—In re Corle, 61 N. J. Eq. 409, 48 A 1027; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156; In re Doremus, 33 N. J. Eq. 234.

N. Y.—In re Selleck, 111 N. Y. 284, 19 NE 66; Matter of Johnson, 57 App. Div. 494, 67 NYS 1004 [aff 170 N. Y. 139, 63 NE 63]; Clock v. Chadeagne, 10 Hun 97; Matter of Howard, 3 Misc. 170, 23 NYS 836; Matter of Black, 19 NYSt 260, 6 Dem. Surr. 331; Burtis v. Dodge, 1 Barb. Ch. 77; Jacot v. Emmett, 11 Paige 142; Minuse v. Cox, 5 Johns. Ch. 441, 9 AmD 313.

N. C.—Hester v. Hester, 38 N. C. 9; Downey v. Smith, 17 N. C. 535.

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156.

Pa.—Davis's App., 23 Pa. 206; Dietrich's App., 2 Watts 332; Johnston's App., 8 Pa. Cas. 205, 11 A 78; Reed's Est., 22 Pa. Super. 635; Betz's Est., 15 Pa. Super. 563, 18 LancLRev 97; Bear's Est., 9 Pa. Super. 492, 43 Wkly NC 469.

S. C.—Burnside v. Robertson, 28 S. C. 583, 6 SE 843; Ex p. Glenn, 20 S. C. 64; LaFont v. Ricard, 8 S. C. Eq. 487; McCaw v. Blewitt, 8 S. C. Eq. 98; Taveau v. Ball, 6 S. C. Eq. 456; Pace v. Burton, 6 S. C. Eq. 247; Darrel v. Eden, 3 S. C. Eq. 241, 4 AmD 613.

Tenn.—Cannon v. Apperson, 14 Lea 553.

Vt.—In re Hall, 70 Vt. 458, 41 A 508.

Va.—Miller v. Beverleys, 4 Hen. & M. (14 Va.) 415.

[a] **Illustration.**—In a final settlement between the estate of an administrator and the estate upon which he had administrated, he was entitled to credit for the amount of the interest on an unclaimed fund which he had held for many years, which had accrued when he received it, and which he had paid to those who had established their legal right to the fund and the interest thereon. Tippin v. Perry, 122 Ga. 120, 50 SE 35.

[b] **Where an executor is liable to be called on at any time** for the payment of a legacy, and there are no directions in the will to put it out at interest, he is not chargeable with interest thereon, unless it is made to appear that he has used the money in trade, or by loan, or has mingled it with his own or used it in common therewith. Lake v. Park, 19 N. J. L. 108.

[c] **Funds retained under erroneous construction of will.**—An executor is not chargeable with interest on funds retained by him under an erroneous conception of the effect of the will, where part of it has been rightfully used to pay a debt against the estate and the balance has been invested and the income paid to the beneficiary. Matter of Chapman, 32 Misc. 187, 66 NYS 235 [aff on op. below 59 App. Div. 624 mem, 69 NYS 1131 mem, 167 N. Y. 619 mem, 60 NE 1108 mem].

[d] **Fund held pending appointment of trustee.**—An executor is not chargeable with interest on a fund in his hands held by him until a suitable person is appointed as trustee to take charge of it. Bishop's Est., 1 LancLRev (Pa.) 115.

[e] **Liability limited to interest actually received.**—Where an administrator of an estate in litigation could not know when the litigation would end, or how soon he would be required to make distribution, and was therefore not warranted in loaning the money of the estate, except on call as he did, he was only chargeable with such interest as he received in the exercise of due diligence, and not for interest at the legal rate. Pennebaker v. Williams, 136 Ky. 120, 123 SW 672, 120 SW 321.

31. McIntire v. McIntire, 14 App. (D. C.) 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369]; LaFont v. Ricard, 8 S. C. Eq. 487; Brown v. Vinyard, 8 S. C. Eq. 460; McCaw v. Blewitt, 8 S. C. Eq. 98.

32. Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955.

Cal.—Walls v. Walker, 37 Cal. 424, 99 AmD 290.

Ky.—Moore v. Beauchamp, 4 B. Mon. 71.

N. Y.—Hosack v. Rogers, 9 Paige 461.

S. C.—Howard v. Schmidt, 9 S. C. Eq. 452.

[a] **Conflicting claims to the balance of the estate** remaining after payment of debts do not warrant the administrator in keeping the funds on hand, or relieve him from liability for interest. "The obvious duty of the [administrator], under such circumstances, was to file a bill of interpleader against all the adverse claimants, and to pay the money into court." Duncan v. Dent, 26 S. C. Eq. 7, 13.

33. Ga.—Doster v. Arnold, 60 Ga. 316.

Md.—Monteith v. Baltimore Poor Impr. Assoc., 21 Md. 426; Lyles v. Hatton, 6 Gill & J. 122.

N. Y.—Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 AmD 504.

Pa.—In re Lloyd, 82 Pa. 143; Foster v. Harris, 10 Pa. 457.

S. C.—Oswald v. Givens, 9 S. C. Eq. 326.

Vt.—Spaulding v. Wakefield, 53 Vt. 660, 38 AmR 709.

[a] **Illustrations.**—(1) Allowing money to remain unproductive for five years, the only reason for such action being the contingency of a recovery in a suit against the estate, the amount of which was, however, small as compared with the size of the estate, was held to be such negligence as would render the executor chargeable with interest. In re Lloyd, 82 Pa. 143. (2) If the claim was a doubtful one, and the executor might have had leave of court to invest the money until the decision of the claim, which was likely to be long pending, he is chargeable with the interest on the money actually in his hands and unemployed. Oswald v. Givens, 9 S. C. Eq. 326.

34. Ulrici v. Boeckeler, 72 Mo. A. 661.

poses, he is chargeable with interest on the excess.[35]

The necessity for keeping funds on hand must in any case be determined on consideration of the particular facts involved,[36] and the burden of proving the necessity of so retaining them is on the representative.[37]

During settlement of accounts. If no negligence or improper conduct is imputable to the executor or administrator, interest will not be charged for the time that the account is before the accounting officer in process of settlement,[38] or while exceptions to the account are pending.[39] But if the exceptions are pending for a long time, and the executor or administrator allows the funds to remain unproductive without asking the advice of the court, he should be charged with interest during such time.[40]

[§ 504] **i. Other Circumstances—(1) Under Which Interest Properly Charged.** Misconduct of a representative may warrant charging him with interest.[41] It has been held proper to charge a personal representative with interest on the amount of a claim improperly paid to himself,[42] on the balance found to be due the estate upon a settlement,[43] on money improperly withdrawn from the estate,[44] on money negligently left in the hands of a debtor,[45] on overpayments to creditors of the estate,[46] on sums in his hands while exceptions to his accounts are pending,[47] on a sum which stands on the record charged to him with his consent as money which he should have put into his account and held as an identified fund,[48] and on sums wrongly paid in an erroneous distribution of the assets.[49] Where a legatee has charged an administrator with the receipt of certain cash, which he has omitted from his inventory of the estate, and after the passage of a consent decree referring the controversy to arbitrators, and providing that, if their finding is against the administrator, he shall be charged with interest on the money, he admits its receipt, and shows that it was disbursed to certain other and special legatees, on his final accounting the administrator should be charged with interest on the money while it was in his possession.[50] Interest is also properly charged where a widow or heir takes profitable possession long before receiving letters of appointment,[51] or, it has been held, where the representative sets up a claim to funds in his hands, which is decided against him.[52] Where money has been kept on deposit, the representative is chargeable with interest which he might have obtained on such deposit,[53] and the same is true of an improper investment which yielded no interest.[54] Where an executor, without order of court, took in his own name new notes and mortgages for the amount of old ones with accrued interest, he was liable as for a loan of the entire sum and was chargeable with interest thereon.[55] Where a surviving executor had possession of the bonds of a certain corporation, and accounted for interest thereon up to a certain date, and the corporation paid the interest on the bonds for six years more, and thereafter the bonds were sold to a reorganization committee, a charge of six years' interest is proper, whether the executor received it or by ordinary diligence could have received it.[56]

[§ 505] **(2) Under Which Interest Should Not Be Charged.** Interest should not be charged against a representative who manages the estate honestly and well for mere neglect to render an account;[57] neither should he be charged absolutely for interest

35. Frost v. Denman, 41 N. J. Eq. 47, 2 A 926.

36. Iowa.—In re Gloyd, 93 Iowa 303, 61 NW 975.

N. J.—Buckingham v. Ludlum, 29 N. J. Eq. 345.

N. Y.—Johnson v. Hartshorne, 52 N. Y. 173; Beacham v. Eckford, 2 Sandf. Ch. 116.

Pa.—Gyger's App., 62 Pa. 73, 1 AmR 382.

S. C.—Gee v. Humphries, 49 S. C. 253, 27 SE 101.

Vt.—Phelps v. Slade, 10 Vt. 192.

37. McIntire v. McIntire, 14 App. (D. C.) 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369]; Burnside v. Robertson, 28 S. C. 583, 6 SE 843; McCaw v. Blewitt, 8 S. C. Eq. 98; Darrel v. Eden, 3 S. C. Eq. 241, 4 AmD 613; Morris v. Morris, 9 Heisk. (Tenn.) 814; Jones v. Ward, 10 Yerg. (Tenn.) 160.

38. Merkel's Est., 131 Pa. 584, 18 A 931.

39. Hoopes v. Brinton, 8 Watts (Pa.) 73.

40. Merkel's Est., 131 Pa. 584, 18 A 931; Bruner's App., 57 Pa. 46; Biles' App., 24 Pa. 335; Yundt's App., 13 Pa. 575, 53 AmD 496; Evans' Est., 11 Phila. 113, 2 WklyNC 337.

41. Ringgold v. Stone, 20 Ark. 526; Nixon v. Nixon, 8 Dana (Ky.) 5; Singleton v. Singleton, 5 Dana (Ky.) 87; Walker's App., 116 Pa. 419, 9 A 654; Miller's Est., 22 LancLRev (Pa.) 49; Sovereign v. Sovereign, 15 Grant Ch. (U. C.) 559.

[a] **Illustrations.** — (1) Interest should be charged for a premature conversion of assets into cash before paying claims or distributees. In re Verner, 6 Watts (Pa.) 250. (2) Where an administrator improperly obtains a credit for money as paid out for the estate, he may be charged with interest on such sum. In re Wilson, 77 Nebr. 780, 151 NW 316.

[b] **Concealment, delays, or false claims.**—(1) An executor who conceals his indebtedness to the estate, makes false claims, and institutes delays, will be charged with interest on his indebtedness from the time it matured until it is paid. Miller's Est., 22 LancLRev (Pa.) 49. (2) Where an administrator has been negligent in the collection of a judgment and guilty of unusual and culpable delay in filing his account. Crouse's Est., 16 Pa. Super. 212.

42. Clement's App., 49 Conn. 519; Cole v. Leake, 27 Miss. 767; Hensler's Est., 18 LancLRev (Pa.) 317.

[a] **Where the personal representative has appropriated the entire estate** to his own use for claims which were subsequently held to be invalid, he should be charged with interest during the period in which he had use of the funds. Hensler's Est., 18 LancLRev (Pa.) 317.

[b] **An executor who pays a legacy to himself** before discharging the debts of the estate is chargeable with interest thereon. Walker's App., 116 Pa. 419, 9 A 654.

43. Pettit v. Pettit, 32 Ala. 288; Smith v. Hurd, 16 Miss. 682; In re Brinton, 10 Pa. 408; Burwell v. Anderson, 3 Leigh (30 Va.) 348.

44. In re Scott, 1 Cal. A. 740, 83 P 85 (where executors improperly withdrew money belonging to the estate and paid the same to a bookkeeper, they were properly chargeable with interest thereon at the legal rate from the time when the money was drawn until it was repaid to the estate).

45. Owens v. Owens, 84 Miss. 673, 37 S 149 (where executors, without excuse, left a sum due the estate in the hands of the debtor for nearly fifteen years, not collecting it until compelled to do so in a proceeding for an accounting, they were chargeable with interest on the amount).

46. Matter of Philp, 29 Misc. 263, 61 NYS 241 (where a temporary administrator has paid a creditor more than a pro rata share of the available assets of the estate, he is chargeable with the amount paid above such pro rata share, and interest thereon at such rate as would have been earned if the money had been deposited in a trust company).

47. Galloway v. McPherson, 76 Mich. 318, 43 NW 449; Yundt's App., 13 Pa. 575, 53 AmD 496.

[a] **Where the report of auditors is excepted to,** the representatives are not chargeable with interest on funds in their hands during the pendency of such exceptions. Hoopes v. Brinton, 8 Watts (Pa.) 73.

48. McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134].

49. In re Hulkes, 33 Ch. D. 552 [disappr Saltmarsh v. Barrett, 31 Beav. 349, 54 Reprint 1173]; Atty.-Gen. v. Kohler, 9 H. L. Cas. 654, 11 Reprint 885.

50. McIntire v. McIntire, 14 App. (D. C.) 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

51. Wilkes v. Rogers, 6 Johns. (N. Y.) 566.

52. Howard v. Schmidt, 9 S. C. Eq. 452.

[a] **On the other hand** it has been held that an executor should not be charged with interest on a balance in his hands which he retained under a fair misapprehension of his right to it. Bruere v. Pemberton, 12 Ves. Jr. 386, 33 Reprint 146.

53. Van Dyke's App., 183 Pa. 647, 39 A 2; In re Wirt, 11 YorkLegRec (Pa.) 145.

54. Lockhart v. Horn, 15 F. Cas. No. 8,446, 3 Woods 542.

55. In re Richmond, 9 Cal. A. 402, 99 P 554.

56. Matter of Fry, 79 Misc. 180, 140 NYS 592.

57. Binion v. Miller, 27 Ga. 78;

on money in his hands, if it is in dispute to whom he should pay it, and no negligence or bad faith is to be imputed to him;[58] nor should unearned interest be charged on a distribution earlier than the regular time.[59] Interest is not chargeable on money deposited in bank by order of court,[60] on collections of trifling amount as compared with anticipated outlay,[61] on small balances where neither default in payment nor misconduct appears,[62] or on a sum improperly paid by the executor as counsel fees, for which he is refused credit in his account.[63] Where the representative lived during war in the midst of active hostilities where nearly all business was suspended, he is not readily chargeable for interest not actually received by him.[64] Where the executor had no money of the estate, and was compelled to borrow at times to meet the expenses of administration, he should not be held to pay interest on amounts charged to him by reason of his neglecting to collect assets, if he acted honestly and in good faith, and it is not shown that the assets would have realized any interest had he collected them.[65] Where testator's will gave his wife the income of his property for life, and the executor invested moneys earned by the estate, the income therefrom being paid to the widow, she was not entitled to charge the executor with interest on the sum invested.[66] Interest should not be charged on the value of chattels retained in specie, where they were not of a perishable nature and a sale thereof was not required by the terms of the will or necessary for the payment of debts and legacies;[67] and an executor has been held not chargeable with interest on the value of personal property which he delivered to the legatee, although he borrowed money with which to pay debts.[68] Where estate funds deposited in a national bank of which the executor was chief owner brought no revenue to the bank or to the executor, and were always on hand for payment to those entitled thereto, the executor and trustee would not be charged with interest thereon.[69] Under a will giving testator's widow the net income of the estate until his son reached his majority, after which the income should be divided equally between them, the executors are not chargeable with interest on the amount of the principal paid over to the widow before the majority of the son; but after the son's majority they must pay one half of the interest to him.[70] If executors collect rent under the belief that they are entitled to do so, and do not use it for their own benefit, they are not chargeable with interest for a failure to turn it over to the devisee entitled thereto, where the latter did not object to their collection of such rent.[71] A retention of funds under a fair claim of right to them will not render a personal representative liable for interest;[72] and where executors, through inadvertence and under an order of court, are overpaid as legatees, without fraud or misconduct on their part, they are not chargeable with interest on the amount of the overpayment.[73]

[§ 506] **3. Time from Which Interest Runs.** The time from which an executor or administrator will be charged with interest must depend to a large extent upon the circumstances of the particular case.[74] A reasonable time to collect and apply money or to render accounts should be allowed before interest is charged,[75] and interest ought not, as a rule, to be required from him before he actually receives the fund,[76] unless interest comes to his hands.[77] In the absence of any showing that interest was actually received, or that the representative was guilty of any improprieties, interest on the funds of the estate ordinarily begins to run from the time when the estate should have been settled,[78] or, in case there was a duty to invest or make an interest bearing deposit, from the time when such action should have been taken.[79] Where a representative improperly withdraws funds from the estate, interest begins to run from the time of such withdrawal.[80] Where a representative has applied funds of the estate to his own use and profit, he may be charged with interest from the

Blogg v. Johnson, L. R. 2 Ch. 225.

58. Dilliard v. Tomlinson, 1 Munf. (15 Va.) 183.

59. Thrasher v. Lewis, 13 KyL 926.

60. Springer v. Oliver, 21 Ga. 517.

61. Eubank v. Clark, 78 Ala. 73; Petty v. Taylor, 5 Dana (Ky.) 598.

62. Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58; Wood v. Garnett, 6 Leigh (33 Va.) 271.

63. In re Clauser, 84 Pa. 51.

64. Brent v. Clevinger, 78 Va. 12.

65. In re Hall, 70 Vt. 458, 41 A 508.

66. Matter of Chapman, 32 Misc. 187, 66 NYS 235.

67. Greeno v. Greeno, 23 Hun (N. Y.) 478.

68. Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179 (because he was not entitled to credit for interest paid on the money borrowed).

69. Matter of Sexton, 61 Misc. 569, 115 NYS 973.

70. Matter of Wagner, 132 App. Div. 306, 117 NYS 53.

71. Cusick v. Langan, 157 Ill. A. 472.

72. Hall v. Grovier, 25 Mich. 428; Bruere v. Pemberton, 12 Ves. Jr. 386, 33 Reprint 146.

73. Boys' Home v. Lewis, 3 Ont. L. 208.

74. U. S.—Pulliam v. Pulliam, 10 Fed. 53; Norman v. Storer, 18 F. Cas. No. 10,301, 1 Blatchf. 593.

Cal.—In re Marre, 127 Cal. 128, 59 P 385; In re Scott, 1 Cal. A. 740, 83 P 85.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

Ky.—Wood v. Nelson, 10 B. Mon. 229; Moore v. Beauchamp, 4 B. Mon. 71.

Mass.—Gaff v. Cornwallis, 219 Mass. 226, 106 NE 860.

N. Y.—Sherwood v. Wooster, 11 Paige 441.

Pa.—Gable's App., 40 Pa. 231; Flintham's App., 11 Serg. & R. 16; Reed's Est., 22 Pa. Super. 635; Kline's Est., 8 LancLRev 356.

S. C.—Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

Va.—Peale v. Hickle, 9 Gratt. (50 Va.) 437.

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[a] **Interest from date of ex parte settlement.**—It is proper to charge interest on a fund in the hands of an administrator from the date of his ex parte settlement more than two years after his appointment showing the greater part of the fund to have been in his hands within a few days after his appointment, although the report of the commissioner states that he received the fund as of the date of the ex parte settlement. Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[b] **Where executors allowed one of their number a sum for services** rendered in carrying on the business of the testator, without an order of court, they were properly charged with interest thereon from a date two years and six months after the date of the letters testamentary. Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

75. U. S.—Pulliam v. Pulliam, 10 Fed. 53.

Md.—Gwynn v. Dorsey, 4 Gill & J. 453.

N. J.—Wyckoff v. O'Neill, 72 N. J. Eq. 880, 67 A 32.

Pa.—Bitzer v. Hahn, 14 Serg. & R. 232.

S. C.—Taveau v. Ball, 6 S. C. Eq. 456.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

Va.—Dilliard v. Tomlinson, 1 Munf. (15 Va.) 183.

[a] **One year.**—An executor will not ordinarily be chargeable with interest on moneys in his hands uninvested during the year allowed him within which to settle the estate. Wyckoff v. O'Neill, 72 N. J. Eq. 880, 67 A 32.

76. Davis v. Wright, 20 S. C. L. 560; Hooper v. Hooper, 32 W. Va. 326, 9 SE 937; Reitz v. Bennett, 6 W. Va. 417.

[a] **Interest on a sale bill** is not chargeable until the end of the year in which it becomes due. Davis v. Wright, 20 S. C. L. 560.

77. McCall v. Peachy, 3 Munf. (17 Va.) 288.

78. See supra § 502.

79. See supra § 496.

80. In re Scott, 1 Cal. A. 740, 83 P 85.

time he received the same,[81] or even from the time of decedent's death,[82] and a charge of interest from the time of the receipt of the fund may be proper in other cases of neglect or misconduct.[83]

When a suit for an accounting has been brought and a balance against the executor or administrator is found by the master, interest should be charged on such balance only from the date of the master's report, where it appears that the executor or administrator acted in good faith, but had misapprehended his duty as to the matters in respect to which he was found chargeable.[84]

Where a will is set aside and a bill is thereafter filed against the person who was acting as executor, for an accounting as to the funds in his hands, he is liable for interest, at least from the time when the bill for the accounting was filed.[85]

Where the representative collected money during the lifetime of decedent as his agent and fails to account for it, he is properly charged with interest from the date of the collection.[86]

[§ 507] **4. Time to Which Interest Computed.** An executor who keeps money of the estate in his hands uninvested is chargeable with interest up to the filing of his report,[87] while if the assets were invested at interest, interest is chargeable to the date of the final decree, although the executors charge themselves with the principal in their account.[88] Where a representative improperly withdraws funds from the estate, interest runs until repayment of the funds.[89] On the settlement of the accounts of an administrator after his death, he was properly charged with the face of a mortgage which he collected, and interest only to the time of the appraisal of the assets of the estate, the presumption being, in the absence of proof, that past-due debts of the estate were promptly collected, so that interest was not chargeable against him after the appraisal.[90]

Debt of representative. If the executor or administrator is indebted to the decedent, the rule that such debt is to be considered assets in his hands does not operate to stop the running of interest, but he is chargeable with interest until actual payment to the estate.[91] But where an administrator who is also a distributee satisfies a judgment against himself, he is not chargeable thereafter with interest on the amount of such judgment.[92]

[§ 508] **5. Rate of Interest.** In general the personal representative, if liable for interest, is liable simply for the current interest that may be fairly obtained, or else for the interest he has actually made;[93] but the circumstances of each case should be considered in determining the rate to be

81. Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Matter of Clark, 69 Misc. 527, 127 NYS 888.

[a] **Oath that funds not used.**—(1) An early statute made an administrator chargeable with interest from the time money of the estate came to his hands, unless he made oath that he had not used the funds. Hollis v. Caughman, 22 Ala. 478; Parker v. McGaha, 11 Ala. 521; Brazeale v. Brazeale, 9 Ala. 491. (2) But if he made such oath and it was not controverted he was not chargeable with interest. McCreeliss v. Hinkle, 17 Ala. 459.

82. Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552; In re Myers, 131 N. Y. 409, 30 NE 135, 508 [mod 58 Hun 173, 11 NYS 543, 14 NYS 535].

83. Dyer v. Jacoway, 50 Ark. 217, 6 SW 902; Jackson v. Shields, 87 N. C. 437; Crawford's Est., 10 Pa. Super. 587, 14 Pa. Super. 85.

[a] **Illustration.**—Where an executor neglects to render proper accounts, and to swear that he has not made a profit on the funds in his hands, he will be charged with interest on receipts from the time they came in. Arnett v. Linney, 16 N. C. 369.

84. Norman v. Storer, 18 F. Cas. No. 10,301, 1 Blatchf. 593.

85. Wood v. Nelson, 10 B. Mon. (Ky.) 229.

86. Hill v. Fly, (Tenn. Ch.) 52 SW 731.

87. Mayberry's App., 33 Pa. 258 [aff sub nom. Robinson's Est., 2 Phila. 340].

88. Gable's App., 36 Pa. 395, 40 Pa. 231; Pyle's Est., 2 Chest. Co. (Pa.) 569.

89. In re Scott, 1 Cal. A. 740, 83 P 85.

90. Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

91. Ill.—Phillips v. Duckett, 112 Ill. A. 587.

La.—In re Dimmick, 111 La. 655, 35 S 801.

Mass.—Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

N. Y.—Matter of Clark, 58 Hun 606, 11 NE 911; Matter of Brintnall, 40 Misc. 67, 81 NYS 250; In re Davis, 37 Misc. 326, 75 NYS 493.

Pa.—Rodenbach's App., 102 Pa. 572; Clark's App., 2 Watts 405; Yost's Est., 23 Pa. Super. 223; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81; Miller's Est., 22 LancLRev 49; McGonnigle's Est., 31 PittsbLegJNS 27; Brenneman's Est., 14 YorkLegRec 14.

92. Palmer's Est., 2 Del. Co. (Pa.) 180.

93. U. S.—Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378.

Cal.—In re Eschrich, 85 Cal. 98, 24 P 634; Merrifield v. Longmire, 66 Cal. 180, 4 P 1176; In re Clark, 53 Cal. 355.

Fla.—Moore v. Felkel, 7 Fla. 44.

Hawaii.—Matter of Lazarus, 13 Hawaii 242.

Ill.—In re Schofield, 99 Ill. 513; Hough v. Harvey, 71 Ill. 72; Clifford v. Davis, 22 Ill. A. 316.

Iowa.—Fitzgerald v. Paisley, 110 Iowa 98, 81 NW 181.

Ky.—Offutt v. Divine, 53 SW 816; Clay v. Hart, 7 Dana 1; Karr v. Karr, 6 Dana 3.

Md.—Dalrymple v. Gamble, 68 Md. 156, 11 A 718.

Mich.—In re Brewster, 113 Mich. 561, 71 NW 1085.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525; Williams v. Petticrew, 62 Mo. 460; State v. Babb, 77 Mo. A. 277.

N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145; Lutjen v. Lutjen, 63 N. J. Eq. 391, 51 A 790 [rev on other grounds 64 N. J. Eq. 773, 53 A 625].

N. Y.—In re Myers, 131 N. Y. 409, 30 NE 135; Young v. Brush, 28 N. Y. 667; Matter of People's Trust Co., 169 App. Div. 699, 155 NYS 639; Livermore v. Wortman, 25 Hun 341; Matter of Wotherspoon, 45 Misc. 81, 91 NYS 695; Matter of Woodbury, 40 Misc. 143, 81 NYS 503; Matter of Downs, 39 Misc. 621, 80 NYS 659; Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612, 77 NYS 413]; Matter of Philp, 29 Misc. 263, 61 NYS 241; Matter of Scudder, 21 Misc. 179, 47 NYS 101; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 AmD 507; Matter of Babcock, 9 NYS 554, 2 Conn. Surr. 82; Matter of Mapes, 5 Dem. Surr. 446; Warner v. Knower, 3 Dem. Surr. 208; Matter of Mairs, 4 Redf. Surr. 160; Haskin v. Teller, 3 Redf. Surr. 316.

N. C.—Grant v. Edwards, 92 N. C. 442.

Pa.—English v. Harvey, 2 Rawle 305; Com. v. Mateer, 16 Serg. & R. 416; Bollinger's Est., 10 Pa. Dist. 223; Mutchmore's Est., 9 Pa. Dist. 294, 24 Pa. Co. 257.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

Va.—Wills v. Dunn, 5 Gratt. (46 Va.) 384.

Eng.—In re Barclay, [1899] 1 Ch. 674.

Can.—Darling v. Brown, 2 Can. S. C. 26.

Ont.—Re McIntyre, 7 Ont. L. 548, 3 OntWR 258.

[a] **Sum too small for investment.**—Where the sum held by an executor in trust is too small to allow an advantageous investment on mortgage, he is not chargeable with any more than the interest paid to him on the fund by a savings bank. Collyer v. Collyer, 6 NYS 693.

[b] **What law governs.**—The rate of interest to be charged on a balance found to be in the hands of an executor or administrator is the rate existing by law at the time when such balance is struck. Moore v. Felkel, 7 Fla. 44.

[c] **If an administrator fails to obey an order of court** as to the investment of the funds, he should be charged with such interest as he might have received if the order had been complied with. Williams v. Petticrew, 62 Mo. 460.

[d] **If the representative** calls in money which was bearing interest and keeps it dead in his hands, he is chargeable at the rate of interest which such money was yielding. Matter of Lazarus, 13 Hawaii 242; Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Matter of Scudder, 21 Misc. 179, 47 NYS 101; In re Dick, 183 Pa. 647, 39 A 2.

[e] **On notes** belonging to the estate interest is chargeable at the rate they bear. Cason v. Cason, 31 Miss. 578; Williams v. Petticrew, 62 Mo. 460; Strong v. Wilkson, 14 Mo. 116.

[f] **Money deposited on call.**—Where an administrator deposited money on call in a trust company so as to be ready to pay it over, as he might be ordered to do at any time, he should be charged with interest only at the rate allowed by the trust company on such loans. Haskin v. Teller, 3 Redf. Surr. (N. Y.) 316.

[g] **Where a trust company was executor,** (1) and deposited money of the estate with itself, crediting interest at the rate of three per cent, a larger rate than corporate executors were required by statute to allow, and it was not claimed that any bank of deposit paid a greater

charged,[94] the matter being one resting in the discretion of the court,[95] although the legal rate of interest is frequently regarded as proper.[96] Where the representative has merely neglected to make the fund productive, the court may not visit him with a heavy penalty, while if he has used the money for his own purposes, or has otherwise misconducted himself in the use of it, a higher rate of interest may be imposed.[97] Indeed in some states the rate in case of misconduct is fixed so high as to amount

rate of interest on funds deposited with it, the action of the executor was approved and the court refused to charge the legal rate of six per cent against the executor. Matter of People's Trust Co., 169 App. Div. 699, 155 NYS 639. (2) Joint executors depositing money from time to time with a trust company for convenience and safekeeping, and receiving the usual interest on daily balances, are only chargeable with the amount received, although the trust company is itself one of the executors. In re Moore, 211 Pa. 348, 60 A 991 [aff 13 Pa. Dist. 137].

94. Ark.—Howard v. Manning, 65 Ark. 122, 44 SW 1126.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610] (ten per cent); Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41].

Mo.—Ulrici v. Boeckeler, 72 Mo. A. 661; James v. Withinton, 7 Mo. A. 575.

N. Y.—King v. Talbot, 40 N. Y. 76; Matter of Clark, 69 Misc. 527, 127 NYS 888; Matter of Krisfeldt, 49 Misc. 26, 97 NYS 877; Matter of Stanton, 41 Misc. 278, 84 NYS 46; Matter of Downs, 39 Misc. 621, 80 NYS 659; Matter of Scudder, 21 Misc. 179, 47 NYS 101; Matter of Knower, 1 NYSt 482.

Pa.—Bollinger's Est., 10 Pa. Dist. 223; In re Fendrick, 30 LancLRev 69.

R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

Eng.—Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322; Gresley v. Heathcote, 3 L. J. Ch. O. S. 107; Re Jones, 49 L. T. Rep. N. S. 91; Piety v. Stace, 4 Ves. Jr. 620, 31 Reprint 319; Williams v. Williams, 1 Wkly. Rep. 237.

Ont.—Re McIntyre, 7 Ont. L. 548, 3 OntWR 258 [dism app 3 Ont. L. 212, 1 OntWR 56], 3 OntWR 258; Fielder v. O'Hara, 14 Grant Ch. (U. C.) 223; Smith v. Roe, 11 Grant Ch. (U. C.) 311.

"There is no hard and fast rule fixing the liability of executors for interest. The rate is to be determined from an examination of all the circumstances in each case, the most important of which is good or bad faith, as the case may be." Matter of Downs, 39 Misc. 621, 626, 80 NYS 659.

[a] **Where the court exercises equitable control** in making executors and administrators accountable for interest, it is improper to charge them at the highest rate without inquiring whether that rate is reasonable under the circumstances. Howard v. Manning, 65 Ark. 122, 44 SW 1126.

[b] **In England,** (1) the rate of interest chargeable in cases of mere neglect was fixed in earlier cases at four per cent. In re Hulkes, 33 Ch. D. 552; Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Jones v. Foxall, 15 Beav. 388, 51 Reprint 588; Melland v. Gray, 2 Coll. 295, 33 EngCh 295, 63 Reprint 741; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737; Tebbs v. Carpenter, 1 Madd. 290, 56 Reprint 107; Sutton v. Sharp, 1 Russ. 146, 46 EngCh 128, 38 Reprint 57; Ashburnham v. Thompson, 13 Ves. Jr. 402, 33 Reprint 345; Dornford v. Dornford, 12 Ves. Jr. 127, 33 Reprint 49; Mosley v. Ward, 11 Ves. Jr. 581, 32 Reprint 1214; Rocke v. Hart, 11 Ves. Jr. 58, 32 Reprint 1009. (2) But the later practice is to charge only three per cent in such cases. In re Barclay, [1899] 1 Ch. 674. (3) A higher rate, usually five per cent, is, however, charged where the representative has used the funds in his own trade or business (In re Barclay, supra; Mouslay v. Carr, 4 Beav. 49, 49 Reprint 256; Treves v. Townshend, 1 Bro. Ch. 384, 28 Reprint 1191; Robinson v. Robinson, 1 De G. M. & G. 247, 50 EngCh 190, 42 Reprint 547; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322; Rocke v. Hart, 11 Ves. Jr. 58, 32 Reprint 1009), or (4) has committed any other direct breach of trust (Forbes v. Ross, 2 Bro. Ch. 430, 29 Reprint 240, 2 Cox Ch. 113, 30 Reprint 52; Hall v. Hallet, 1 Cox Ch. 134, 29 Reprint 1096; Bate v. Scales, 12 Ves. Jr. 402, 33 Reprint 152; Mosley v. Ward, 11 Ves. Jr. 581, 32 Reprint 1214; Pocock v. Reddington, 5 Ves. Jr. 794, 31 Reprint 862). (5) In two early cases, however, the charge was limited to four per cent although the executor had not only failed to loan out the money, but was supposed to have derived advantage from it himself. Browne v. Southouse, 3 Bro. Ch. 107, 29 Reprint 437; Perkins v. Bayntun, 1 Bro. Ch. 375, 28 Reprint 1187.

95. Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478; Bass v. Chambliss, 9 La. Ann. 376; Miller's Est., 14 Pa. Dist. 163; Cuffe v. Cuffe, 3 Ir. Eq. 469; Flanagan v. Nolan, 1 Molloy 84.

[a] **Allowance of rate prayed for.**—In an action for an account against an executor, although he has grossly abused his trust and is liable under the statute for ten per cent interest, a less rate, if prayed for, may be allowed. Bass v. Chambliss, 9 La. Ann. 376.

[b] **In view of the limited range of investments permitted** to a fiduciary, and the low rate of interest derivable from authorized investments, it must be a very extreme case of gross negligence that would justify the surcharge of a trustee who had failed to invest when he could, with a higher rate of interest than three or, at the highest, four per cent. Miller's Est., 14 Pa. Dist. 163.

96. Cal.—In re Scott, 1 Cal. A. 740, 83 P 85.

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35.

Ky.—White v. White, 3 Dana 374.

La.—Bass v. Chambliss, 9 La. Ann. 376.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

N. J.—Frey v. Demarest, 17 N. J. Eq. 71.

N. Y.—Matter of Meikle, 20 NYS 88, 2 Conn. Surr. 97.

N. C.—Grant v. Edwards, 92 N. C. 442.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Ont.—In re Honsberger, 10 Ont. 521.

[a] **Different rates of interest** cannot be applied to different degrees of negligence or misconduct in the United States, but the rate established by law governs in the absence of special arrangements. In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

[b] **If money is lost** under such circumstances as to render the executor or administrator liable therefor to the estate, he is chargeable, if at all, only at the legal rate, and not at the rate prescribed by statute for failure to account. Bass v. Chambers, 9 La. Ann. 370.

[c] **Difficulty in investing.**—An administrator is not entitled to a diminution in the legal rate of interest upon funds retained in his hands uninvested on the ground that it would have been difficult to invest in his neighborhood small sums except at less than the legal rate. Frey v. Demarest, 17 N. J. Eq. 71.

[d] **More than the legal rate is not chargeable** (1) although the administrator has realized the greater rate on money of his own. Grant v. Edwards, 92 N. C. 442. (2) Nor can he be charged with more than the legal rate on money loaned by him, although the borrower agreed to pay more, unless the excess was paid. White v. White, 3 Dana (Ky.) 374.

[e] **Agreement to pay interest.**—Where it is agreed by executors and an objectant to their account "that the executors shall be charged with interest on all unexpended balances," the interest is chargeable at the legal rate although the executors may have the money deposited at a lower rate. In re Meikle, 20 NYS 88, 2 Conn. Surr. 97.

[f] **Refusal of beneficiaries to accept investment.**—Where minor heirs have the right on coming of age to refuse to accept investments of trust funds for their benefit made by the executors, and to require the executors to pay the amount of such funds, the rate of interest with which the executors should be charged is six per cent, with annual rests. King v. Talbot, 40 N. Y. 76.

[g] **In Canada,** (1) prior to the repeal of the usury laws, it was held that when interest was chargeable against an executor or administrator, it should be at the rate of six per cent. In re Honsberger, 10 Ont. 521; Wiard v. Gable, 8 Grant Ch. (U. C.) 458. (2) But since the repeal of the usury laws he is chargeable at such rate as he could have realized, except that not less than six per cent will be charged if he uses the money himself. Smith v. Roe, 11 Grant Ch. (U. C.) 311.

97. U. S.—Hook v. Payne, 14 Wall. 252, 20 L. ed. 887.

Cal.—Clary's Est., 112 Cal. 292, 44 P 569.

Iowa.—In re Young, 97 Iowa 218, 66 NW 163; Lommen v. Tobiason, 52 Iowa 665, 3 NW 715.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74.

Miss.—Powell v. Cooper, 42 Miss. 221.

Mo.—In re Davis, 62 Mo. 450; James v. Withinton, 7 Mo. A. 575.

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

N. J.—Salisbury v. Colt, 27 N. J. Eq. 492.

N. Y.—King v. Talbot, 40 N. Y. 76, 95 [quot Matter of Downs, 39 Misc. 621, 627, 80 NYS 659].

Pa.—Flynn's Est., 21 Pa. Super. 126.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Vt.—Spaulding v. Wakefield, 53 Vt. 660, 38 AmR 709.

Eng.—Woodhead v. Marriott, C. P. Coop. 62; Heathcote v. Hulme, 1 Jac. & W. 122, 37 Reprint 322; Rocke v. Hart, 11 Ves. Jr. 58, 32 Reprint 1009.

Ont.—Fielder v. O'Hara, 14 Grant Ch. (U. C.) 223; Smith v. Roe, 11 Grant Ch. (U. C.) 311.

"Where the failure of a trustee in his duty is wilful, or characterized by bad faith, the highest rate of interest should be imposed. But where good faith and honest mistake concur, the rate of interest rests in a discretion, and permits the consideration of all the circumstances, which

practically to a penalty.[98]

[§ 509] **6. Computation.**[99] In charging an executor or administrator with interest on funds in his hands at a final settlement, his commission or recompense, or if he is a distributee his distributive share, should be deducted before a balance is struck and the interest is finally computed against him.[1] Where no account is rendered as to funds which should have been placed at interest, either as to their disposition or as to what was actually received, the representative ought to be charged, as nearly as the sum can be ascertained, with all he might have made or received in the honest exercise of due diligence and exertion, periodical computation being made less the proper deductions.[2] In taking the account, the usual practice is to treat funds received during the current year as unproductive until its close, and to regard all expenditures, including compensation and commissions in the course of the year, as made before the balance is struck, and on the balance so struck to calculate the interest in such way as to avoid compounding it.[3] Where the administrator at the time of his discharge was allowed by the ordinary to retain at four per cent interest a fund belonging to the estate which no person claimed, and he so held that fund until his death, many years thereafter, without adding to it the interest which had accrued, his own administrator was not entitled, before being charged with the interest on funds received by him, to have the total amount of such fund reduced by subtracting therefrom the principal of this unclaimed fund and the interest which had accrued thereon.[4] Where the personal representative has paid interest on the funds used by him, he will be allowed credit to the extent of the amount paid against the interest charged.[5]

The appraisement is presumed to be correct in determining the amount on which interest should be charged.[6]

Balance too small to invest. Where the annual balances are too small to have been put at interest, and the executor has received no credit or profit from them, interest will be charged only on the accumulated balances.[7]

Deductions after computing interest are sometimes made. Thus, where an executor's account showed that for more than thirty years there was in his hands a balance for which he should account to the legatees, less the expense of accounting, it was held that such expense should be deducted after and not before computing interest on the balance.[8]

[§ 510] **7. Compound Interest.** If compound interest has been received by the representative, he must of course account for it;[9] but otherwise compound interest is rarely charged against an executor or administrator by way of penalty, unless something more appears than ordinary neglect of duty.[10] Where, however, there has been a willful

show that substantial justice can be done to the cestui que trust, by allowing a less rate." King v. Talbot, supra [quot Matter of Downs, supra].

[a] **The highest rate of interest allowed by law** should be charged against an executor or administrator, who uses the funds of the estate for his own benefit. McKenzie v. Anderson, 16 F. Cas. No. 8,855, 2 Woods 357; Clary's Est., 112 Cal. 292, 44 P 569; Merrifield v. Longmire, 66 Cal. 180, 4 P 1176; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74; Powell v. Cooper, 42 Miss. 221; Cruce v. Cruce, 81 Mo. 676; Camp v. Camp, 74 Mo. 192, 6 Mo. A. 563; Williams v. Petticrew, 62 Mo. 460; In re Davis, 62 Mo. 450; In re Myers, 131 N. Y. 409, 30 NE 135; King v. Talbot, 40 N. Y. 76; Matter of Downs, 39 Misc. 621, 80 NYS 659; Matter of Mairs, 4 Redf. Surr. (N. Y.) 160; Flynn's Est., 21 Pa. Super. 126; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129; Walworth v. Bartholomew, 76 Vt. 1, 56 A 980; Perkins v. Hollister, 59 Vt. 348, 7 A 605.

98. Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41]; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108]; In re Dimmick, 111 La. 655, 35 S 801; Conery's Succ., 111 La. 113, 35 S 479; Bass v. Chambliss, 9 La. Ann. 376.

99. Compound interest see infra § 510.

1. Miller v. Simpson, 2 SW 171, 8 KyL 518; Mathis v. Mathis, 18 N. J. L. 59; Callaghan v. Hall, 1 Serg. & R. (Pa.) 241.

2. Tippin v. Perry, 122 Ga. 120, 50 SE 35; Voorhees v. Stoothoff, 11 N. J. L. 145; Spear v. Tinkham, 2 Barb. Ch. (N. Y.) 211; Richardson v. Richardson, 9 Pa. 428; Heister's App., 7 Pa. 455.

[a] **Illustration.**—Where an administrator made only five returns during nineteen years, and the auditor, under a citation against the administrator for a final settlement, calculated interest on each separate receipt and interest in favor of the administrator on each separate disbursement, it was not error to overrule an exception to the auditor's report alleging that he erred in not making the calculations of interest on the balance as they appeared in the several returns of the administrator. Tippin v. Perry, 122 Ga. 120, 50 SE 35.

3. Ala.—Powell v. Powell, 10 Ala. 900.

Ky.—Campbell v. Williams, 3 T. B. Mon. 122.

Mass.—Boynton v. Dyer, 18 Pick. 1.

Miss.—Crump v. Gerock, 40 Miss. 765; Roach v. Jelks, 40 Miss. 754; Reynolds v. Walker, 29 Miss. 250.

N. Y.—De Peyster v. Clarkson, 2 Wend. 77; Vanderheyden v. Vanderheyden, 2 Paige 287, 21 AmD 86.

Pa.—Lukens' App., 47 Pa. 356; Callaghan v. Hall, 1 Serg. & R. 241.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; Tucker v. Richards, 58 S. C. 22, 36 SE 3; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412; Tompkins v. Tompkins, 18 S. C. 1; Koon v. Munro, 11 S. C. 139; Pettus v. Clawson, 25 S. C. Eq. 92; Jordan v. Hunt, 11 S. C. Eq. 145; Rowland v. Best, 7 S. C. Eq. 317; Walker v. Bynum, 4 S. C. Eq. 555.

Tenn.—Jones v. Ward, 10 Yerg. 160.

Va.—Burwell v. Anderson, 3 Leigh (30 Va.) 348.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[a] **Mode of treating interest.**—When the personal representative is not in default, although there is a balance against him in favor of the estate, the interest on the balance is not carried into the account, but stands over until final settlement or until sufficient disbursements have been made to discharge it, after the balance of principal against him has been extinguished. But in restating the account, where the representative should have separated from his general account the accounts of payments to legatees and distributees, long before he made his settlement, he ought to settle under the rule of debtor and creditor, charging interest on money due, and applying payments to the liquidation of the interest first, and then of principal. If a balance should appear at any time in favor of the representative, the same rule is to be applied. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[b] **Balance composed partly of interest.**—Interest is chargeable on the balance of a settled account, although such balance is composed in part of items of interest. In re Brinton, 10 Pa. 408.

[c] **Where disbursements exceed receipts** in a particular year the amount on which the administrator is to be charged interest is to be determined by adding to the annual balance in his hands on January 1 the receipts for that year and deducting from the result the amount of the disbursements during the year. Tucker v. Richards, 58 S. C. 22, 36 SE 3.

4. Tippin v. Perry, 122 Ga. 120, 50 SE 35.

5. Owens v. Owens, 84 Miss. 673, 37 S 149.

6. Matter of Myers, 58 Hun 173, 11 NYS 543.

7. Ala.—Brand v. Abbott, 42 Ala. 499.

Mass.—Fay v. Howe, 1 Pick. 527.

N. Y.—Gilman v. Gilman, 2 Lans. 1; Rapalje v. Hall, 1 Sandf. Ch. 399.

Pa.—Graver's App., 50 Pa. 189; Lukens' App., 47 Pa. 356.

Va.—Wood v. Garnett, 6 Leigh (33 Va.) 271.

8. In re Barcalow, 36 N. J. Eq. 611.

9. Hester v. Hester, 38 N. C. 9; Ryan v. Blount, 16 N. C. 382; Edmonds v. Crenshaw, 5 S. C. Eq. 224.

10. Ala.—Smith v. Kennard, 38 Ala. 695; Powell v. Powell, 10 Ala. 900.

Cal.—In re Sarment, 123 Cal. 331, 55 P 1015; Wheeler v. Bolton, 92 Cal. 159, 28 P 558; In re Casner, 1 Cal. A. 145, 81 P 991.

Fla.—Anderson v. Northrop, 44 Fla. 472, 33 S 419.

Ga.—Fall v. Simmons, 6 Ga. 265.

Ky.—Offutt v. Divine, 53 SW 816; Johnson v. Beauchamp, 5 Dana 70.

Md.—Darne v. Catlett, 6 Harr. & J. 475.

Mass.—Forbes v. Allen, 166 Mass. 569, 44 NE 1065; Chapin v. Waters, 116 Mass. 140.

breach of trust or gross delinquency, or where the representative has mingled the trust funds with his own or used the same for his own benefit, in order to derive profit therefrom, a charge of compound interest may be proper,[11] even though the representative was always ready to respond for the funds

Miss.—Crowder v. Shackelford, 35 Miss. 321.

Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525.

N. J.—Frost v. Denman, 41 N. J. Eq. 47, 2 A 926; King v. Berry, 3 N. J. Eq. 261.

N. Y.—Thorn v. Garner, 42 Hun 507; Lansing v. Lansing, 45 Barb. 182; Ackerman v. Emott, 4 Barb. 626; In re Kennedy, 9 NYS 552, 2 Conn. Surr. 216; Garniss v. Gardiner, 1 Edw. 128; Freeman v. Freeman, 4 Redf. Surr. 211.

N. C.—Mitchell v. Robards, 17 N. C. 478.

Pa.—English v. Harvey, 2 Rawle 305; Matter of McCall, 1 Ashm. 357; Fink's Est., 4 Phila. 191.

S. C.—Wright v. Wright, 7 S. C. Eq. 185; Black v. Blakely, 7 S. C. Eq. 1.

Vt.—Perkins v. Hollister, 59 Vt. 348, 7 A 605.

Va.—Lovett v. Thomas, 81 Va. 245; Kelly v. Love, 20 Gratt. (61 Va.) 124; Carter v. Cutting, 5 Munf. (19 Va.) 223; Cavendish v. Fleming, 3 Munf. (17 Va.) 198; Sheppard v. Starke, 3 Munf. (17 Va.) 29.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Wis.—In re Hemphill, 157 Wis. 331, 147 NW 1089.

Eng.—In re Barclay, [1899] 1 Ch. 674.

Ont.—Inglis v. Beaty, 2 Ont. A. 453; In re Honsberger, 10 Ont. 521.

"Liability to pay simple interest is the rule; compounding is the exception." Fall v. Simmons, 6 Ga. 265, 272 [quot McKenzie v. Anderson, 16 F. Cas. No. 8,855, 2 Woods 357].

"We can see no just ground for charging the executor with compound interest, in the absence of any showing that he received compound interest on any of the moneys of the estate, or was guilty of some misappropriation of the funds or other property of the estate." In re Casner, 1 Cal. A. 145, 147, 81 P 991, 992.

[a] **Only in case of gross delinquency** can an executor be charged with compound interest. Thorn v. Garner, 42 Hun 507 [mod on other grounds 113 N. Y. 198, 21 NE 149].

[b] **Mingling with individual funds.**—(1) If an executor or administrator mingles the funds of the estate with his individual moneys, but does not apply them to his own use, he is chargeable with only simple interest. Berwick v. Halsey, 4 Redf. Surr. (N. Y.) 18, 1 NYMonth LBul 8. (2) So also an executor has been held chargeable only with simple interest, although he mingled and loaned the funds of the estate with his own, where he did so in good faith, disclosing all the profits, and without fault or want of prudence, suffered some losses but claimed no deduction therefor and nothing for his services, when such interest exceeded what he actually received on the funds, and the funds had not been used in business, trade, or speculation. Perkins v. Hollister, 59 Vt. 348, 7 A 605. To same effect Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

[c] **Mere neglect to invest** is not a sufficient ground for charging an administrator with compound interest. Lovett v. Thomas, 81 Va. 245.

[d] **Production of new principal.**—An administrator will be charged with compound interest only where a new principal has been produced by the settlement of the accounts, by a judgment, or by express agreement. In re Wilson, 1 Pa. Co. 509.

[e] **Funds retained pursuant to testamentary directions.**—Where an executor held property of the estate for fifteen years, and did not obtain interest thereon, but used the funds in his own business, the retention having been made in pursuance to an instruction in the will that distribution should not be made until all the heirs attained their majority, he was not chargeable with compound interest on the funds so retained. Cruce v. Cruce, 81 Mo. 676.

[f] **Keeping on deposit.**—The fact that an administrator kept the funds of the estate on deposit in a bank managed by his brother, who was surety on his bond, and that such funds were used by the bank as the funds of other depositors, does not show that he embezzled the funds, so as to justify charging him with compound interest. In re Sarment, 123 Cal. 331, 55 P 1015.

[g] **Good faith and acquiescence.**—Where the representative acted in good faith and the next of kin acquiesced in his acts for many years, he will not be charged compound interest. Matter of Kennedy, 9 NYS 552, 2 Conn. Surr. 216.

[h] **Where a personal representative is entitled to the income** of property of the estate for life, he is not chargeable with interest during the existence of the life estate, and only simple interest from the date of his death can be recovered against his estate. In such case the rule computing interest with annual rests has no application. Anderson v. Northrop, 44 Fla. 472, 33 S 419.

[i] **Rents and profits of real estate.**—The rule computing interest with annual rests has no application to an accounting by the representative to the heirs or devisees for the rents and profits of real estate, which belong to them and not to the estate. In such case he is liable only for simple interest. Anderson v. Northrop, 44 Fla. 472, 33 S 419.

11. U. S.—Canfield v. Canfield, 118 Fed. 1, 55 CCA 169; McKenzie v. Anderson, 16 F. Cas. No. 8,855, 2 Woods 357.

Ala.—Smith v. Kennard, 38 Ala. 695.

Cal.—In re Piercy, 168 Cal. 750, 145 P 88; In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899 [app den 154 Cal. 385, 97 P 878]; Bemmerly v. Woodward, 124 Cal. 568, 57 P 561; In re Sarment, 123 Cal. 331, 55 P 1015; Clary's Est., 112 Cal. 292, 44 P 569; Miller v. Lux, 100 Cal. 609, 35 P 345; Wheeler v. Bolton, 92 Cal. 159, 28 P 558; In re Hilliard, 83 Cal. 423, 23 P 393; Merrifield v. Longmire, 66 Cal. 180, 4 P 1176; In re Clark, 53 Cal. 355.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35; Fall v. Simmons, 6 Ga. 265.

Ind.—Johnson v. Hedrick, 33 Ind. 129, 5 AmR 191.

Iowa.—In re Young, 97 Iowa 218, 66 NW 163.

Ky.—Clemens v. Caldwell, 7 B. Mon. 171.

Mass.—Fay v. Howe, 1 Pick. 527.

Mich.—Porter v. Long, 136 Mich. 150, 98 NW 990, 4 AnnCas 177.

Miss.—Troup v. Rice, 55 Miss. 278; Anderson v. Gregg, 44 Miss. 170; Crowder v. Shackelford, 35 Miss. 321.

Mo.—Camp v. Camp, 74 Mo. 192; Williams v. Petticrew, 62 Mo. 460; In re Davis, 62 Mo. 450; State v. Babb, 77 Mo. A. 277.

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

N. J.—Male v. Williams, 48 N. J. Eq. 33, 21 A 854; McKnight v. Walsh, 24 N. J. Eq. 498 [aff 23 N. J. Eq. 136]; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Frey v. Demarest, 17 N. J. Eq. 71.

N. Y.—Myers v. Bolton, 157 N. Y. 393, 52 NE 114 [mod 89 Hun 342, 35 NYS 577, and reh den 158 N. Y. 665 mem, 52 NE 1125 mem]; Gilman v. Gilman, 2 Lans. 1; Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 AmD 507; Berwick v. Halsey, 4 Redf. Surr. 18; Black's Est., Tuck. Surr. 145.

N. C.—Swindall v. Swindall, 43 N. C. 285.

Tenn.—Torbet v. McReynolds, 4 Humphr. 215; Turney v. Williams, 7 Yerg. 172.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 980; Foster v. Stone, 67 Vt. 336, 31 A 841; McCloskey v. Gleason, 56 Vt. 264, 48 AmR 770.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Eng.—Burdick v. Garrick, L. R. 5 Ch. 233, 14 ERC 565; Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Raphael v. Boehm, 11 Ves. Jr. 92, 32 Reprint 1023.

Ont.—Inglis v. Beaty, 2 Ont. A. 453; In re Honsberger, 10 Ont. 521; Smith v. Roe, 11 Grant Ch. (U. C.) 311; Wiard v. Gable, 8 Grant Ch. (U. C.) 458.

"When a trust to invest has been grossly and wilfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of them." Barney v. Saunders, 16 How. (U. S.) 535, 542, 14 L. ed. 1047.

[a] **The theory on which compound interest is charged** (1) is that, in the absence of evidence to the contrary, the executor or administrator will be presumed to have received profits to the amount from the use of the money, and not to punish him for the misconduct. Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737; Wightman v. Helliwell, 13 Grant Ch. (U. C.) 330. (2) The remedy of compounding interest is "a convenient and potent remedy to draw from delinquent trustees the actual or presumed profits derived from the use of trust funds." In re Ricker, 14 Mont. 153, 188, 35 P 960, 29 LRA 622. (3) "Interest is compounded as a punishment or as a measure of damage for undisclosed profits." Barney v. Saunders, 16 How. (U. S.) 535, 542, 14 L. ed. 1047. (4) "It is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the court, that no profit, gain, or advantage shall be derived to the trustee from his use of the trust funds. All the gain must go to the cestui que trust. This is the true equity doctrine. It secures fidelity and removes temptation; and it is the ground of this allowance of annual rests, in the taking of the account, where the executor has used the property and does not disclose the proceeds." Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620, 625, 7 AmD 507. (5) "The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him in his own business is not adopted for the purpose of punishing him for any intentional wrongdoing in the use of such fund, but rather to carry into effect the principle enforced by courts of equity that the trustee shall not be permitted to make any profit from the unauthorized use of such funds. . . . The rule is intended to secure fidelity in the management

on demand.[12] Delay in accounting for such a period as to amount to gross neglect of duty has been held to justify such a charge against the delinquent executor or administrator,[13] and a failure to invest in accordance with the directions of the will for the purpose of accumulation may also authorize a charge of compound interest against the executor.[14] In settling the account of a deceased personal representative compound interest will be charged only to the date of his death and simple interest thereafter, irrespective of the length of time during which the account was in process of settlement, if the delay was not due to his management of the estate.[15]

In computing compound interest it has been held proper to add to the principal interest which accrued during the time when simple interest only was chargeable, thus forming a new principal on which to start the calculation of compound interest.[16] Ordinarily the computation is made with annual rests,[17] but this is a matter to be determined according to the circumstances of each case,[18] and if the method of making annual rests is not adequate in any case, as where the amounts are large and easy of investment, rests will be made semiannually.[19]

[§ 511] **H. Loans.** Aside from a loan made under due authority as an investment,[20] an executor or administrator who lends to other persons the money or assets in his hands does so at his own individual risk and may be held personally liable as for conversion or to make good a resulting loss.[21]

of trust estates, and where, as in this state, the conventional rate of interest exceeds the statutory rate, the executor should in such cases be charged with legal interest, compounded annually, in order to fully reach the profit realized by him from the use of the trust fund." Miller v. Lux, 100 Cal. 609, 616, 35 P 345.

[b] **"This rule is of modern growth** and is applied more frequently in this country than in England." Wheeler v. Bolton, 92 Cal. 159, 172, 28 P 558.

[c] **Compound interest not necessarily chargeable for mingling.**—Perkins v. Hollister, 59 Vt. 348, 7 A 605.

[d] **An administrator delaying the settlement of the estate for many years without excuse,** and converting money of the estate to his own use, is properly charged with compound interest after the expiration of one year from his appointment, and is also liable for simple interest during the first year for the use of the money of the estate, although the widow's consent to his use authorized him to use it. In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899 [den app 154 Cal. 385, 97 P 878].

[e] **It is only on money received** by the executor or administrator, and not on money for which he is liable to the estate, that he can be charged with compound interest. Sanderson v. Sanderson, 20 Fla. 292.

[f] **It is proper to compute interest on installments of interest** upon sums fraudulently or wrongfully taken from the funds of the estate. Porter v. Long, 136 Mich. 150, 98 NW 990, 4 AnnCas 177.

[g] **Failure to account for securities.**—Where an administrator failed properly to account for notes which came into his hands, and furnished no data for reaching a strictly accurate result, he should be charged with compound interest. Lommen v. Tobiason, 52 Iowa 665, 3 NW 715.

[h] **On the other hand,** in some jurisdictions, it has been doubted and even denied that compound interest is chargeable under any circumstances. (1) Thus in Pennsylvania it has been held that an executor or administrator cannot be charged with compound interest. Norris' App., 71 Pa. 106; Light's App., 24 Pa. 180; English v. Harvey, 2 Rawle (Pa.) 305; Matter of McCall, 1 Ashm. (Pa.) 357. In South Carolina there has been considerable diversity of opinion as to charging compound interest. (2) In Black v. Blakely, 7 S. C. Eq. 1, the court refused to charge compound interest. (3) In Myers v. Myers, 7 S. C. Eq. 214, 16 AmD 648, Chancellor Thompson said that he never did allow compound interest and never would under any circumstances; (4) but this doctrine was disapproved on appeal in the same case and also in the case of Wright v. Wright, 7 S. C. Eq. 185, by Nott, J., who said that the rule in South Carolina was against allowing compound interest, but at the same time he declared that compound interest should be charged only in very special cases. (5) In Bowles v. Drayton, 1 S. C. Eq. 489, 1 AmD 689, Chancellor Rutledge allowed compound interest; (6) but this decision, as was afterward remarked by Judge Nott in Wright v. Wright, supra, was based on the express provision of the will. From the foregoing it will be observed that, while it has been said in some cases that compound interest should never be charged, the principle that such charge may be made under special circumstances is distinctly recognized.

12. In re Clark, 53 Cal. 355.

[a] **Laches of beneficiaries of estate.**—When there has been great lapse of time and neglect by the persons interested to assert their claims promptly, only simple interest will be charged. In re Suess, 37 Misc. 459, 75 NYS 938.

13. In re Hilliard, 83 Cal. 423, 23 P 393; Sanderson's Est., 74 Cal. 199, 15 P 753; Kenan v. Hall, 8 Ga. 417; Fall v. Simmons, 6 Ga. 265; Johnson v. Hedrick, 33 Ind. 129, 5 AmR 191; Owens v. Owens, 84 Miss. 673, 37 S 149.

14. Cal.—Bemmerly v. Woodward, 124 Cal. 568, 57 P 561.

N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145.

S. C.—Edmonds v. Crenshaw, 5 S. C. Eq. 224.

Va.—Garrett v. Carr, 1 Rob. (40 Va.) 196.

Eng.—Raphael v. Boehm, 11 Ves. Jr. 92, 32 Reprint 1023.

"Where there is an express trust to make improvement of the money, if he will not honestly endeavor to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." Raphael v. Boehm, supra.

[a] **No duty to invest is imposed on the executor,** so as to render him chargeable with compound interest, by a provision in the will giving him full power and authority to dispose, as he might think best, of any part or all of the property devised and bequeathed, and to make distribution from time to time among the testator's wife and children. Peyton v. Smith, 22 N. C. 325.

15. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

16. Tippin v. Perry, 122 Ga. 120, 50 SE 35 (construing Civ. Code [1895] § 3498); Kenan v. Hall, 8 Ga. 417; Fall v. Simmons, 6 Ga. 265.

17. Fla.—Young v. McKinnie, 5 Fla. 542.

Ga.—Fall v. Simmons, 6 Ga. 265.

Iowa.—In re Brown, 113 Iowa 351, 85 NW 617.

Ky.—Clemens v. Caldwell, 7 B. Mon. 171.

N. J.—Voorhees v. Stoothoff, 11 N. J. L. 145; McKnight v. Walsh, 24 N. J. Eq. 498.

N. Y.—Adair v. Brimmer, 74 N. Y. 539; Matter of Stanton, 41 Misc. 278, 84 NYS 46.

S. C.—Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64; Dixon v. Hunter, 21 S. C. L. 204; Oswald v. Givens, 12 S. C. L. 38; Black v. Blakely, 7 S. C. Eq. 1.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 980.

Va.—Burwell v. Anderson, 3 Leigh (30 Va.) 348.

Eng.—Burdick v. Garrick, L. R. 5 Ch. 233, 14 ERC 565; In re Barclay, [1899] 1 Ch. 674.

18. Fall v. Simmons, 6 Ga. 265; Johnson v. Beauchamp, 5 Dana (Ky.) 70.

19. Barney v. Saunders, 16 How. (U. S.) 535, 14 L. ed. 1047; Fall v. Simmons, 6 Ga. 265.

20. See supra § 492.

21. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Ala.—Walls v. Grigsby, 42 Ala. 473; Gerald v. Bunkley, 17 Ala. 170; Tomkies v. Reynolds, 17 Ala. 109.

Cal.—In re Fretwell, 154 Cal. 638, 98 P 1058; Tomkins v. Weeks, 26 Cal. 50; In re Lacoste, Myr. Prob. 67.

Conn.—Abbott v. Kensett, 33 Conn. 509.

Ill.—Wadsworth v. Connell, 104 Ill. 369; Neubrecht v. Santmeyer, 50 Ill. 74; Caruthers v. Caruthers, 99 Ill. A. 402.

Ind.—State v. Johnson, 7 Blackf. 529.

Miss.—Cason v. Cason, 31 Miss. 573.

Mo.—Garesche v. Priest, 78 Mo. 126.

N. J.—Vreeland v. Vreeland, 16 N. J. Eq. 512.

N. Y.—Matter of Vandevort, 8 App. Div. 341, 40 NYS 791.

Or.—In re Roach, 50 Or. 179, 92 P 118.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288.

[a] **Deposit amounting to loan.**—Where an administrator deposits estate funds in a bank, and receives a certificate payable to his order at a specified time after its date, with interest, such a deposit is evidence of a loan by him of such funds, and if the bank subsequently becomes insolvent he will be responsible for any loss resulting therefrom. Caruthers v. Caruthers, 99 Ill. A. 402.

[b] **Adoption of contract by administrator de bonis non.**—Where an administrator in chief makes an unauthorized loan of money belonging to the estate, if the administrator de bonis non accepts such loan, and seeks to hold the borrower as a trustee in invitum, he thereby elects to adopt the contract, and cannot subsequently treat the loan as a devastavit. Wilson v. Stevens, 129 Ala. 630, 29 S 678, 87 AmSR 86.

[c] **The representative may be**

But it has been held that the executor or administrator may in a proper case lend or advance to a distributee upon the security of his interest,[22] or in the exercise of due prudence lend to a failing debtor of the estate for the sake of getting security which could not be otherwise obtained.[23] Any impropriety in the making of a loan by an executor or administrator cannot, of course, relieve the borrower of his obligations to the lender with respect to the loan,[24] and for whatever the representative may receive from the borrower he is duly accountable to the estate,[25] and entitled to credit accordingly.[26] Where a testator before his death was a special partner of a certain person and by his will directed his executors to allow such person to retain as a loan to him the amount contributed by testator to the capital of the firm, such person could not be compelled to give security for the loan.[27]

[§ 512] **I. Gifts.** The executor or administrator has no right to give away any assets even though of trifling value, nor will the law give effect to such transfer.[28]

[§ 513] **J. Expenditures—1. In General.** An executor or administrator is authorized to use the funds of the estate for expenditures necessary to its proper administration,[29] and is entitled to credit in his accounts for expenses necessarily and properly incurred by him in good faith, in transacting with reasonable care and diligence the business of his trust, upon due proof of the particular items of expense claimed.[30] The practical situation is usually that the executor or administrator makes himself liable de bonis propriis to others by incurring expense, but that he may reimburse himself under appropriate circumstances out of the assets of the estate.[31]

[§ 514] **2. Allowance a Question for Court.** The allowance or disallowance of expenditures is a ques-

liable for interest to the beneficiaries. Cason v. Cason, 31 Miss. 578; Matter of Vandevort, 8 App. Div. 341, 40 NYS 791. But compare Moore's Est., 72 Cal. 335, 13 P 880 (the representative should not be charged with interest agreed to be paid on such loan unless he has collected or could have collected the same). Interest on funds of estate generally see supra §§ 495–510.

[d] **Indemnity against loss sufficient.**—Where the executor in good faith, and in the belief that the security was adequate, loaned money thereon to the proctor of the estate, he should be charged only by requiring an indemnity against loss, and should not be personally charged with the deficiency in the security. In re Slater, 88 N. J. Eq. 296, 102 A 384.

22. Peo. v. Atkins, 7 Ill. A. 105; Delafield v. Schuchardt, 2 Dem. Surr. (N. Y.) 435; Moye v. Petway, 76 N. C. 327.

[a] **Fraud in such transaction not presumed as matter of law.**—Moye v. Petway, 76 N. C. 327.

Advances and disbursements by representative generally see infra §§ 1305–1311.

23. Torrence v. Davidson, 92 N. C. 437, 53 AmR 419.

24. Melvain v. Tomes, 14 Hun 31 [foll Arnold v. Nichols, 64 N. Y. 117]; Abbott v. Reeves, 49 Pa. 494, 88 AmD 510.

[a] **Returning specific assets lent.**—Where a firm borrowed of an executor as part of the estate of his testator shares of the stock and evidences of the loan of a public corporation, under an express agreement to restore to the executor, or his successor in the trust of executing the will, the assets and securities borrowed, the borrowers are compellable in equity to restore to the executor the loan and stock, with the interest and dividends thereon not already received by the executor. Abbott v. Reeves, 49 Pa. 494, 88 AmD 510.

[b] **The heirs have no privity in the promise of the borrower** to the representative, but their remedy is against the latter. Abbott v. Kensett, 33 Conn. 509; Neubrecht v. Santmeyer, 50 Ill. 74.

25. Savage v. Gould, 60 HowPr (N. Y.) 217; Kalckhoff v Zœhrlaut, 40 Wis. 427.

[a] **Note for money lent inures to benefit of estate.**—Kalckhoff v. Zœhrlaut, 40 Wis. 427.

26. In re Donnelly, 246 Pa. 308, 92 A 306.

27. Denike v. Harris, 84 N. Y. 89 [rev 23 Hun 213].

28. Cal.—Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

N. Y.—Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909; Powers v. Powers, 48 HowPr 389.

N. C.—Caviness v. Fidelity, etc., Co., 140 N. C. 58, 52 SE 265.

Tex.—Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441.

But compare Washington v. Emery, 57 N. C. 32 (small gratuities to slaves as encouragement to good conduct, sanctioned, where such had been the usage of deceased owner).

[a] **Donation in aid of railroad.**—An executor should not be allowed credit for a payment to a railway company to assist it to rebuild a portion of its tract where there was no provision in the will authorizing such payment. Judson v. Bennett, 233 Mo. 607, 136 SW 681.

[b] **An administrator, who is also sole heir,** cannot make a gift of the fund of which he is administrator, before final decree, which will entitle the donee to possession, since as administrator a gift is in violation of his trust, and as heir he is not then entitled to possession of the fund. Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909.

29. In re Ring, 132 Iowa 216, 109 NW 710; Arnemann's Succ., 123 La. 430, 49 S 10; Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem].

[a] **The executrix may keep for current expenses** twenty-five dollars of the estate of her deceased husband on hand at his death. Arnemann's Succ., 123 La. 430, 49 S 10.

[b] **Expenses of management after rejection of offer to purchase.**—The administrator of a deceased tenant, occupying a farm from year to year, obtained an order to sell the personal property of the estate. One of the heirs offered to pay one thousand two hundred dollars for the personalty of the intestate. The widow, owning a part of the estate and entitled to a half of what was left after the payment of debts, objected to the sale. The administrator did not sell, and continued to manage the property, and incurred necessary expenses for so doing. He subsequently sold the estate to the widow for one thousand two hundred dollars. Where the administrator and the widow acted in good faith, the administrator was entitled to an allowance for the necessary expenses incurred in the management of the estate subsequent to the rejection of the offer of the heir to buy the property. In re Ring, 132 Iowa 216, 109 NW 710.

30. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242; Pearson v. Darrington, 32 Ala. 227.

Ark.—Adamson v. Parker, 74 Ark. 168, 85 SW 239.

Cal.—In re Ross, 182 P 303; In re Smith, 118 Cal. 462, 50 P 701.

Colo.—Tuckerman v. Currier, 54 Colo. 25, 129 P 210, AnnCas1914C 599; U. S. Fidelity Guaranty Co. v. Peo., 44 Colo. 557, 98 P 828.

La.—Milne's Succ., 1 Rob. 400; Young v. Chaney, 3 La. 462.

Md.—Bantz v. Bantz, 52 Md. 686.

Mass.—Hampden Trust Co. v. Leary, 186 Mass. 577, 72 NE 88.

Nebr.—In re Hentges, 86 Nebr. 75, 124 NW 929, 26 LRANS 757.

Nev.—In re Delaney, 171 P 383, LRA1918D 1022.

N. H.—Wendell v. French, 19 N. H. 205.

N. J.—Bechtold v. Read, 28 A 264.

N. Y.—Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem]; Matter of Saunder, 77 Misc. 54, 137 NYS 438 [aff 156 App. Div. 891 mem, 141 NYS 1145 mem]; In re Public Parks, 14 NYS 347.

N. C.—Clarke v. Cotton, 17 N. C. 51.

Pa.—Hoopes' Est., 1 Brewst. 462.

R. I.—Hall v. Burgess, 40 R. I. 314, 100 A 1013.

S. C.—Wright v. Wright, 7 S. C. Eq. 185.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

W. Va.—Fields v. Lawyer, 97 SE 597.

Wis.—Beggs v. Behrend, 156 Wis. 34, 145 NW 207.

[a] **Medium in which disbursements made.**—Upon an administrator's accounting as to transactions from 1862 to 1865, he cannot receive credit in good and lawful money for disbursements made then, without proof that his payments were not in the depreciated money then current. Stokes v. Wallace, 16 S. C. 619.

[b] **While there is a balance due by the representative** individually as for waste, he cannot claim to be reimbursed for his payments. Moore v. Davidson, 22 S. C. 92.

[c] **Relief where disbursements exceed receipts.**—Aside from local probate authority, chancery may give relief out of the assets to a representative whose cash disbursements exceed his cash receipts. Bailey v. Mundin, 58 Ala. 104; Reaves v. Garrett, 34 Ala. 558; Wright v. Wright, 7 S. C. Eq. 185.

31. Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215; Matter of Smith, 111 App. Div. 23, 29, 97 NYS 171, 35 NYCivProc 314, 18 NYAnn Cas 55; Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem]; Vazquez v. Sosa, 16 Porto Rico 465.

"Primarily, an executor, personally, and not the estate, is liable for all contracts made by him in the execution of his trust. Notwith-

tion of law for the court and not a question of fact for the jury.[32] Where the statute provides for a determination by the probate court of the amount of expenditures, the court cannot dismiss a petition to pay a certain sum without fixing a reasonable amount which may be paid.[33]

Review of discretion. It is doubtful whether the action of the court of probate jurisdiction in refusing to give an administrator authority to expend money of the estate which the law and his duties do not require him to expend is reviewable at all in an appellate court, and certainly it cannot be reviewed except for an abuse of discretion.[34]

[§ 515] **3. Sanction of Court.** The representative is always entitled to credit for expenditures made by the order of or with the approval and sanction of the court,[35] even though the court was indiscreet in making the order pursuant to which he acted;[36] but the fact that the representative has expended money upon the faith of an order of the court making an allowance for certain expenses does not preclude the court from annulling such order upon evidence that the petition upon which it was made did not fully and truly state the facts.[37]

Previous sanction of the court is not necessary, however, and expenses properly incurred without such sanction may be allowed.[38]

[§ 516] **4. Necessity of Actual Payment.** Credit for an administration expense should not as a rule be allowed to the executor or administrator on his accounting in court, until or unless the amount has been actually paid,[39] and where partial payment only has been made, credit will be allowed as to that part only.[40] There are, however, a few cases in which a contrary opinion has been asserted,[41] and it has been held that an administrator is entitled to have the amount of his attorney's fee determined before he has paid him anything.[42]

[§ 517] **5. Improper or Unnecessary Expenditures.** As a general rule the representative will not be allowed credit for improper or unnecessary payments or expenditures made by him,[43] especially in the case of needless and extravagant outlays over a small and simple estate,[44] and although disbursements which ultimately prove to have been unnecessary may be sometimes allowed if made in good faith and under a reasonable belief of their necessity,[45] the representative must show some just explanation before he can legally claim their allowance.[46]

[§ 518] **6. Expenses Caused by Misconduct or Unauthorized Acts.**[47] Positive misconduct on the part of the representative bars any claim by him against the estate for reimbursement of his expenses caused thereby,[48] nor will he be allowed credit for expenditures which became necessary by reason of his own negligence[49] or were made in the course of or resulted from acts done by him

standing this rule, the necessary expenses of administering an estate may be regarded as a charge upon, although not a debt against the estate, and when the expenses incurred by an executor are by the court found to be necessary and proper in the administration of the estate, they are payable from the estate." Matter of Smith, supra.

32. Hapke v. Peo., 29 Ill. A. 546.

33. Hall v. Burgess, 40 R. I. 314, 100 A 1013.

34. Jaqua v. Gray, 46 Ind. A. 24, 91 NE 745. See also Appeal and Error § 406.

35. In re Millenovich, 5 Nev. 161; Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956.

[a] **If an executor acts reasonably and in good faith** in the disbursement of money pursuant to an order of the supervising court within its jurisdiction, he is protected from personal liability. Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956.

36. In re Vasek, 97 Nebr. 617, 150 NW 1004; In re Millenovich, 5 Nev. 161; Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956.

37. Watkins v. Romine, 106 Ind. 378, 7 NE 193.

38. Johnson v. Porterfield, 150 Ala. 532, 43 S 228; In re Bottoms, 156 Cal. 129, 133, 103 P 849.

"The fact that she made the payment without permission of the court did not render the expenditure improper, but only left its propriety open to question her action to be approved or rejected as the court found it a proper or an improper expense. This was a question primarily for the court to settle, and its order of settlement in that respect will not be reviewed, unless there is in the record, no ground upon which it can be supported. It cannot be said that that appears here. The court found that the payment was made in good faith, under circumstances which made it advantageous and beneficial for the estate to have made the payment, and has approved it, and, we think, under the circumstances shown, the action was right." In re Bottoms, supra.

39. Ala.—Modawell v. Holmes, 40 Ala. 391. But see infra note 41.

La.—Gayles v. Gray, 6 Mart. N. S. 693.

Mass.—Thacher v. Dunham, 5 Gray 26; Jennison v. Hapgood, 14 Pick. 345.

N. Y.—Matter of Spooner, 86 Hun 9, 33 NYS 136; In re Bailey, 47 Hun 477; Matter of Woods, 55 Misc. 181, 106 NYS 471; Matter of Van Nostrand, 3 Misc. 396, 24 NYS 850, Pow. Surr. 495; In re Ingersoll, 20 NYSt 356, 6 Dem. Surr. 184.

Pa.—Benner's Est., 3 Brewst. 398.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

S. C.—Terry v. Hopkins, 10 S. C. Eq. 1.

Vt.—Pelton v. Johnson, 52 Vt. 138.

40. Matter of White, 15 NYSt 729, 6 Dem. Surr. 375.

41. John v. Sharpe, 148 Ala. 665, 41 S 635, 636; Cairns v. Murray, 37 Can. S. C. 163.

[a] **Illustration.**—Where an administrator, who was an attorney, finding it necessary to institute a suit in behalf of the estate, associated another attorney with him, and they jointly rendered professional services to the estate, the administrator was entitled to credit to the extent of the reasonable value of such services. "As the administrator has the money of the estate out of which the allowance of counsel fees is to be paid in his own hands, it is not necessary for him to have actually paid the fee to himself and his associate, or to procure a receipt for himself and his associate, or from either, evidencing that the fee, or even the associate's part of it has been paid. After the allowance of the fee to the administrator on his settlement, the assistant counsel must look only to the administrator individually for his share of the fee." John v. Sharpe, 148 Ala. 665, 41 S 635.

42. Dudley's Est., 123 Cal. 256, 55 P 897.

43. Cal.—In re Pease, 149 Cal. 167, 85 P 149.

Mich.—Clifton v. Keeler, 158 Mich. 615, 123 NW 22.

Nev.—In re Delaney, 171 P 383, LRA1918D 1022.

N. J.—Wyckoff v. O'Neill, 71 N. J. Eq. 729, 71 A 388 [rev on other grounds 72 N. J. Eq. 880, 67 A 32].

N. Y.—Matter of Bielby, 91 Misc. 353, 155 NYS 133.

Pa.—In re Donnelly, 246 Pa. 308, 92 A 306; Bare's Est., 5 LancLRev 36.

S. C.—Johnson v. Henagan, 11 S. C. 93.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

Wis.—Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

[a] **Speculative mining venture.**—Where an estate had few debts and consisted largely of cash and four mining claims, and the administrator, without any order of court, paid out one thousand six hundred dollars for assessment work on the claims, when adjoining claims gave promise of profit, and later abandoned the claims, the venture was regarded as so speculative that the administrator should be surcharged with the amount so expended. In re Delaney's Est., (Nev.) 171 P 383, LRA1918D 1022.

44. Matter of Bielby, 91 Misc. 353, 155 NYS 133; In re Barber, 12 NYS 538; Bradley's Est., 11 Phila. (Pa.) 87; Villard v. Roberts, 21 S. C. Eq. 40, 49 AmD 654.

45. Robbins v. Wolcott, 27 Conn. 234.

46. Robbins v. Wolcott, 27 Conn. 234.

47. Litigation caused by representative's fault or misconduct see infra § 544.

48. Robbins v. Wolcott, 27 Conn. 234; In re Fletcher, 83 Nebr. 156, 119 NW 232; Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

[a] **Expenditure for personal advantage.**—An executrix will not be given credit in her account for money expended for her personal advantage concerning the estate. In re Fletcher, 83 Nebr. 156, 119 NW 232.

[b] **Expense of improper investment.**—Stock in a joint-stock trading company not being, ordinarily, a suitable investment for an executor or trustee, expense in making such an investment should be disallowed in an executrix's account. Reed v. Reed, 80 Conn. 401, 68 A 849.

49. Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Brackett v. Tillotson, 4 N. H. 208; Smith v. Smith, 3 Dem. Surr. (N. Y.) 556; Mackin v. Hobbs, 126 Wis. 216, 227, 105 NW 305.

"In face of the facts found that bad faith and inexcusable improv-

without authority.[50] Nevertheless those interested in the estate cannot accept the profits of an improper investment without assuming the incidental outlays.[51]

[§ 519] **7. Representative Improperly Appointed.** An executor or administrator is entitled to credit or reimbursement for expenditures properly made in connection with the administration, although his appointment was irregular or erroneous;[52] but where the appontment was procured by a fraud on the court, an allowance for expenses resulting therefrom has been denied.[53]

[§ 520] **8. Particular Expenditures Considered —a. Expenses of Last Illness.** The representative is entitled to credit for payment of the expenses of the last illness of the decedent,[54] but an allowance on this account which is clearly excessive in view of the circumstances of the case will be reduced.[55]

[§ 521] **b. Funeral Expenses, Tombstones, Etc.[56] —(1) Funeral Expenses.** Reasonable[57] and proper[58] funeral expenses of the decedent should be allowed,[59] even though the estate is insolvent.[60] But where a beneficial association of which decedent was a member pays or contributes to the payment of the funeral expenses, the executor or administrator is not entitled to credit in his account for the amount so paid or contributed.[61]

idence and laches characterized the litigation,—that it was started without adequate cause and conducted in such a way as in the end to render it entirely useless, we cannot see that any of the expenses thereof, can be by the exercise of judicial discretion properly allowed. Expenses dependent upon judicial discretion should always be rejected where they are the result of bad faith or inexcusable negligence. The allowance of such expenses is not authorized by statute nor independently thereof." Mackin v. Hobbs, supra.

[a] **Judgment against representative due to negligence.**—Where an executor was named as trustee, but the purpose of the trust terminated before the death of the testatrix so that no estate vested in him as trustee, he is not entitled to credit for the payment of a judgment obtained against him on account of his personal negligence in failing to maintain a building in proper condition. Matter of Murray, 124 App. Div. 548, 108 NYS 1047

50. Ala.—Pierce v Fulmer, 165 Ala. 344, 51 S 728; Pearson v. Darrington, 32 Ala. 227.

Mo.—Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

Nev.—In re Delaney, 171 P 383, LRA1918D 1022.

N. Y.—Matter of Tisdale, 110 App. Div. 857, 97 NYS 494.

Pa.—In re Holman, 34 PittsbLeg JNS 111.

[a] **Allowance has been refused** for expenditures incurred in: (1) The unauthorized management of real estate and care of infant children. Benford v. Daniels, 13 Ala. 667; Hennessy's Est., Tuck. Surr. (N. Y.) 335. Contra Henning v. Conner, 2 Bibb (Ky.) 188 (support of infant children allowed). (2) Protecting investments by the representative which should not have been made. Lacey v. Davis, 4 Redf. Surr. (N. Y.) 402. (3) Surveying a line between the property of decedent and that of an adjoining proprietor where the administrator had not been ordered to take charge of the decedent's real estate. Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477. (4) Conducting leased premises after the decedent's death where the lease terminated upon his death. Jaquette's Est., 1 Chest. Co. (Pa.) 197. (5) Keep of a horse belonging to the decedent and retained by his widow and executrix for her personal use. Matter of Johnson, 50 Misc. 99, 100 NYS 373.

51. Wheelwright v. Rhoades, 28 Hun (N. Y.) 57.

52. Edwards v. Ela, 5 Allen (Mass.) 87; Read v. Franklin, (Tenn. Ch. A.) 60 SW 215; In re Owen, 32 Utah 469, 91 P 283; Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **This rule has been applied** in case of: (1) An administrator appointed under an erroneous supposition of intestacy. Edwards v. Ela, 5 Allen (Mass.) 87. (2) An executor qualified under a will subsequently decided to be invalid. Read v. Franklin, (Tenn. Ch. A.) 60 SW 215.

53. Morere's Succ., 3 La. A. (Orleans) 155.

54. McNeely v. McNeely, 50 La. Ann. 823, 24 S 338; Parker v. Leighton, 131 Md. 407, 102 A 552; In re Millenovich, 5 Nev. 161; Scott's Est., 15 Pa. Co. 316.

[a] **Apparently extravagant charges will be allowed** an executor where they are no more than the usual charges for like services at the time. In re Millenovich, 5 Nev. 161.

55. Matter of Ogden, 41 Misc. 158, 80 NYS 977.

56. **As obligation of estate** see infra §§ 924–930.

57. **Amount of expenditure** see infra § 525.

58. See cases infra this note.

[a] **Traveling expenses of clergyman.**—Where no clergyman of the denomination to which decedent belonged lived in the immediate neighborhood, and one is brought from another place, the traveling expenses of such clergyman paid by the administrator will be properly allowed as a credit in the administrator's account. Nolde's Est., 27 Pa. Super. 413 [aff 21 LancLRev 59].

[b] **Transportation of the body** (1) of decedent from the place of death to a proper place of burial is an expense which should be allowed. Harding's Est., 7 Pa. Dist. 679, 21 Pa. Co. 641 ("There does not, however, seem to be any question but that the expense of transporting the body and the friends who accompany it to the place of interment comes under this head [funeral expenses], whether the same is by carriage to some convenient cemetery or by railroad or boat to one some distance away"). (2) This is true although the transportation is for a long distance. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411 (from Texas to New Jersey); In re Parry, 188 Pa. 38, 40, 41 A 384, 68 AmSR 850 ("Where the estate is ample, as here, there is as much reason for subjecting it to reasonable charges for the embalming and transportation of a body from India to the cemetery at Philadelphia as from a dwelling on Walnut street to the same place"); Carpenter's Est., 16 Phila. (Pa.) 290 (from Florida to Connecticut).

[c] **The expenses of a wake,** if not unreasonable, have been held to constitute a proper item of funeral charges. Johnson's Est., 8 Pa. Co. 1. Contra White's Est., 13 Phila. (Pa.) 287.

[d] **Parade.**—A donation of two hundred and fifty dollars, made by an executor to his testator's commandery for parading at the funeral, is not a proper charge against the estate, where it does not appear that the commandery required the payment of that sum or any other as a condition of their participation in the funeral. In re Reynolds, 124 N. Y. 388, 26 NE 954.

[e] **Flowers on grave.**—The administrator is not entitled to credit for sums expended for flowers to place upon the grave of decedent. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[f] **Carfare; time; services.**—An administrator will not be allowed, on the settlement of his account, for money paid out for car or coach fare for himself and wife, or for a sister and her husband, to attend the funeral of a brother; nor will the administrator be allowed pay for his time or services in attending such funeral. Lund v. Lund, 41 N. H. 355.

[g] **Changing place of burial.**—An allowance to an administratrix, who was the second wife of decedent, for expenses incurred in removing the body of decedent from one cemetery to another has been set aside, where it was shown that the place where decedent was first interred was a suitable one, selected by him prior to his death, was the place where his children desired that he should be interred, was in the same cemetery in which his first wife was buried, and was nearer to his home than the place chosen by the second wife. Watkins v. Romine, 106 Ind. 378, 7 NE 193.

59. Ala.—Pierce v. Fulmer, 165 Ala. 344, 51 S 728.

Cal.—Galland's Est., 92 Cal. 293, 28 P 287.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 49 L. ed. 339].

La.—McNeely v. McNeely, 50 La. Ann. 823, 24 S 338.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

Mass.—Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708.

Mich.—Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

Nev.—In re Millenovich, 5 Nev. 161.

N. Y.—Matter of McDonough, 132 App. Div. 614, 117 NYS 258; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Matter of Ogden, 41 Misc. 158, 83 NYS 977; Matter of Very, 24 Misc 139, 53 NYS 389, 28 NYCivProc 163; Matter of Hildebrand, 1 Misc. 245, 23 NYS 148.

Pa.—In re Malony, 11 Serg. & R. 204; Byham v. Schrubb, 24 Pa. Dist. 170; Neill's Est., 20 Pa. Dist. 590; Cullen's Est., 7 Pa. Dist. 394 [aff 8 Pa. Super. 494]; Kraan's Est., 31 Pa. Co. 93; Meyer's Est., 18 Phila. 42; Bradley's Est., 11 Phila. 87.

Tenn.—Wilies v. Wynne, 139 Tenn. 397, 201 SW 515; Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

Eng.—Edwards v. Edwards, 2 Cromp. & M. 612, 149 Reprint 905; Pitchford v. Hulme, 3 L. J. Ch. O. S. 223.

[a] **A husband acting as executor of his deceased wife** may be allowed funeral expenditures made by him from her separate estate. Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63].

60. Pitchford v. Hulme, 3 L. J. Ch. O. S. 223.

61. Haas's Est., 3 Pa. Co. 345; In re Martin's Est., 2 Chest. Co. (Pa.) 47; Nixon's App., 6 WklyNC (Pa.) 496; Sharp's Est., 2 WklyNC (Pa.) 631; Hyneman's Est., 2 WklyNC (Pa.) 571.

[§ 522] **(2) Tombstones and Monuments.** Credit should be allowed for a reasonable expenditure[62] for a tombstone or monument for decedent,[63] and this notwithstanding the objection of some of the legatees and next of kin, where the expenditure has been approved by the majority of those beneficially interested.[64] A moderate expenditure for a tombstone is sometimes allowed, even though the estate is insolvent,[65] although there is also authority for the view that an allowance is improper under such circumstances.[66] Even though the statute authorizes the probate court to allow an administrator any reasonable sum for a tombstone for decedent, the court is without jurisdiction, in advance of the settlement of the estate, to entertain an application to fix a sum for that purpose and order the administrator, if the monument is not procured by the widow or next of kin, to erect such monument and charge the expense to the estate.[67]

Family mausoleum. It is proper to deny the petition of an administrator for leave to expend funds of the estate in the erection of a mausoleum in honor of the family of which decedent was a member, on the family burial plot, far removed from decedent's grave.[68]

[§ 523] **(3) Burial Lots.** The cost of a suitable burial lot in which to inter the decedent should be allowed,[69] and it has been held that an administratrix should be allowed the sum paid for a grave for decedent even though the lot was taken in her own name personally.[70]

The cost of improving and enclosing a burial lot should not, it has been held, be allowed where objection thereto is made.[71] But it has also been held that, where the will directs the executors to erect and maintain a fence around a cemetery and charges all expenses directed by it upon lands devised, the executors can maintain a suit in equity against the devisees of the land or their assigns for the expenses of erecting such fence.[72]

A payment for perpetual care of the burial lot is sometimes authorized by statute.[73]

Provision by decedent in his lifetime. An executrix cannot be allowed the expense of procuring a burial lot and monument, where testator in his lifetime provided one himself.[74]

[§ 524] **(4) Mourning Apparel for Family.** It has been held that the executor or administrator is entitled to a moderate allowance for moneys which he has properly expended in obtaining suitable mourning apparel for the widow and children of decedent,[75] even though the estate is insolvent,[76] but in other cases this has been denied.[77]

[§ 525] **(5) Amount of Expenditure.** The expenditure for funeral expenses, tombstones, and the like must be reasonable in amount, taking into consideration the value of the estate left by the decedent, his solvency or insolvency, and his station in life;[78] and as there is more time for circumspection and prudence in selecting a tombstone or

62. Amount of expenditure see infra § 525.

63. Ala.—Pierce v. Fulmer, 165 Ala. 344, 51 S 728; Hatchett v. Curbow, 59 Ala. 516; Bendall v. Bendall, 24 Ala. 295.

Cal.—Van Emon v. Tulare County Super. Ct., 76 Cal. 589, 18 P 877, 9 AmSR 258; In re Koppikus, 1 Cal. A. 84, 81 P 732.

Conn.—Fairman's App., 30 Conn. 205.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ill.—Phillips v. Duckett, 112 Ill. A. 587; Spire v. Lovell, 17 Ill. A. 559.

Iowa.—Lutz v. Gates, 62 Iowa 513, 17 NW 747; Crapo v. Armstrong, 61 Iowa 697, 17 NW 41.

Ky.—Hespen v. Hespen, 105 SW 99, 31 KyL 1328.

Md.—Crothers v. Crothers, 123 Md. 693, 91 A 691.

Mass.—Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.

Mich.—Pistorius' App., 53 Mich. 350, 19 NW 31.

Minn.—State v. St. Louis County Prob. Court, 164 NW 365.

Miss.—Donald v. McWhorter, 44 Miss. 124.

N. H.—Bell v. Briggs, 63 N. H. 592, 4 A 702.

N. J.—Griggs v. Veghte, 47 N. J. Eq. 179, 19 A 867.

N. Y.—Owens v. Bloomer, 14 Hun 296; Matter of Young, 92 Misc. 633, 157 NYS 494; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Matter of Howard, 3 Misc. 170, 23 NYS 836; Matter of Beach, 1 Misc. 27, 22 NYS 1079; Campbell v. Purdy, 5 Redf. Surr. 434.

Pa.—Webb's App., 165 Pa. 330, 30 A 827; In re Porter, 77 Pa. 43; Conway's Est., 10 Pa. Dist. 509; Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; Miles' Est., 30 Pa. Co. 80; Barclay's Est., 11 Phila. 123; Connelly's Est., 28 PittsbLegJ 352; Sheetz's Est., 2 Woodw. 407; Ehrhart's Est., 17 York LegRec 137.

S. C.—Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363; Patterson v. Jones, 99 S. C. 128, 82 SE 1008.

Tenn.—Gooch v. Beasley, 137 Tenn. 407, 193 SW 132; Cannon v. Apperson, 14 Lea 553.

Ont.—Archer v. Severn, 13 Ont. 316.

[a] **The widow is not entitled to an injunction** to prevent the executor from putting up a tombstone, although she is sole devisee and legatee and is willing to put up a tombstone herself, and to give bond to the court that she will do so. Duffy's Est., 9 Kulp (Pa.) 409.

[b] **Keeping tomb in repair.**—A statute allowing an executor of a solvent estate to erect a monument at the testator's grave at the expense of the estate includes a power of making reasonably necessary repairs on the tomb of the deceased during the time of the administration, although the cost thereof exceeds the sum set apart by decedent's will for the maintenance of the monument. Bell v. Briggs, 63 N. H. 592, 4 A 702.

[c] **Place of erecting monument.**—Where an administratrix, the widow of the intestate, obtained leave of the court to spend a certain sum for the erection of a monument "on the burial lot of said intestate," but afterward, preferring that her husband should be buried elsewhere, bought another lot with her own money, moved her husband's body there, and put up the monument there, she was allowed the amount expended. Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.

[d] **Construction and maintenance of vault.**—An allowance to an administrator of four hundred and fifty dollars for the construction of a vault, and of a reasonable amount to keep the vault in repair, was a proper charge against the estate of decedent. Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

[e] **Liability of husband of decedent.**—Under a statute providing against relief of the husband from liability for necessaries of the wife, a husband, acting as administrator, is liable for a tombstone erected by him over his deceased wife. Stonesifer v. Shriver, 100 Md. 24, 59 A 139.

64. Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; Barclay's Est., 11 Phila. (Pa.) 123.

65. Burbridge v. Rogers, 7 KyL 42; Owens v. Bloomer, 14 Hun (N. Y.) 296; Cornwell v. Deck, 2 Redf. Surr. (N. Y.) 87.

66. Lund v. Lund, 41 N. H. 355; Moyer's Est., 5 Kulp (Pa.) 167; Villee's Est., 9 LancLRev (Pa.) 353; In re Carley, 4 Sask. L. 280.

67. In re Ferguson, 81 Oh. St. 58, 89 NE 1070.

68. Jaqua v. Gray, 46 Ind. A. 24, 91 NE 745.

69. Sinnott v. Kenaday, 14 App. (D. C.) 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339]; Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708; In re Frazer, 92 N. Y. 239; Chalker v. Chalker, 5 Redf. Surr. (N. Y.) 480; Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265; Matter of Erlacher, 3 Redf. Surr. (N. Y.) 8.

70. Birkholm v. Wardwell, 42 N. J. Eq. 337, 7 A 569.

71. Tuttle v. Robinson, 33 N. H. 104; Barclay's Est., 11 Phila. (Pa.) 123.

72. Cool v. Higgins, 23 N. J. Eq. 308.

73. Hall v. Burgess, 40 R. I. 314, 100 A 1013.

74. Matter of Woodbury, 40 Misc. 143, 81 NYS 503.

75. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem]; Allen v. Allen, 3 Dem. Surr. (N. Y.) 524; Matter of Wood, 1 Ashm. (Pa.) 314; Paige v. Canterbury, 14 Ves. Jr. 364, 33 Reprint 560.

76. Matter of Wood, 1 Ashm. (Pa.) 314.

77. Griswold v. Chandler, 5 N. H. 492; Johnson v. Baker, 2 C. & P. 207, 12 ECL 530. See also Badillo v. Tio, 7 La. Ann. 487 (mourning dresses for slaves).

78. Ala.—Pierce v. Fulmer, 165 Ala. 344, 51 S 728.

Cal.—Galland's Est., 92 Cal. 293, 28 P 287.

Colo.—Clemes v. Fox, 6 Colo. A. 377, 40 P 843.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108].

Ky.—Burbridge v. Rogers, 7 KyL 42.

even perhaps a permanent burial lot than with reference to the immediate funeral or interment, consultation in regard to such matters with the family of decedent, in addition to a consideration of the actual condition of the estate, is prudent and desirable.[79] An executor is of course to be allowed expenditures for the funeral, a monument, or similar expenses which are expressly authorized by the will.[80] A testamentary direction authorizing the executors to expend not more than a fixed sum has the effect of prohibiting the expenditure of a greater sum,[81] but the executor's duty does not require him to expend the entire sum mentioned.[82] Where the testator sets apart a specified sum for funeral expenses and proper interment of his remains and a suitable monument to his memory, etc., he gives to the executors discretion in the selection of the monument, its form and style, with reference to the amount set apart for the purpose, and the full amount of the fund, or such part as the executors deem fit, may be expended in the erection of a monument.[83]

[§ 526] **c. Expenditures for Benefit of Particular Legatees or Distributees.** The representative has been held not entitled to credit in his general account of the administration for disbursements made or expenses incurred for the benefit of particular legatees or distributees,[84] or payments or advances to them,[85] beyond the statutory allowance

La.—McNeely v. McNeely, 50 La. Ann. 823, 24 S 338.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Crothers v. Crothers, 123 Md. 603, 91 A 691.

Mass.—Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708.

Mich.—Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

Nev.—In re Millenovich, 5 Nev. 161.

N. H.—Reynolds v. Jones, 78 N. H. 84, 97 A 557; Lund v. Lund, 41 N. H. 355.

N. Y.—Matter of Shipman, 82 Hun 108, 31 NYS 571; Owens v. Bloomer, 14 Hun 296; Matter of Young, 92 Misc. 633, 157 NYS 494; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Matter of Ogden, 41 Misc. 158, 83 NYS 977; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163; Matter of Hildebrand, 1 Misc. 245, 23 NYS 148; Burnett v. Noble, 5 Redf. Surr. 69; Matter of Luckey, 4 Redf. Surr. 95.

Oh.—Kroll v. Close, 82 Oh. St. 190, 92 NE 29, 28 LRANS 571.

Pa.—In re Malony, 11 Serg. & R. 204; Byham v. Schrubb, 24 Pa. Dist. 170; Neill's Est., 20 Pa. Dist. 590; Kiefer's Est., 19 Pa. Dist. 608; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; In re Howard, 11 Pa. Dist. 175, 27 Pa. Co. 608; Cullen's Est., 7 Pa. Dist. 394 [aff 8 Pa. Super. 494]; Kraan's Est., 31 Pa. Co. 93; McKenna's Est., 1 LegGaz 12; Meyer's Est., 18 Phila. 42; Bradley's Est., 11 Phila. 87; Connolly's Est., 28 Pittsb LegJ 352.

R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

S. C.—Patterson v. Jones, 99 S. C. 128, 82 SE 1008.

Tenn.—Wilies v. Wynne, 139 Tenn. 397, 201 SW 515; Gooch v. Beasley, 137 Tenn. 407, 193 SW 132; Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

Eng.—Hancock v. Podmore, 1 B. & Ad. 260, 20 ECL 477, 109 Reprint 783; Edwards v. Edwards, 2 Cromp. & M. 612, 149 Reprint 905.

[a] **Amount largely in discretion of executor.**—Gooch v. Beasley, 137 Tenn. 407, 193 SW 132.

[b] **Allowance limited by law and to be made by court.**—Scott v. Dorsey, 1 Harr. & J. (Md.) 227.

[c] **Effect of direction of court.**—Under a statute providing that the direction of the probate court shall be conclusive where an administrator must obtain its direction, and permitting an administrator with the permission of the probate court to erect a monument for decedent and to pay for the care of decedent's burial lot, the decision of the probate court on an application for leave to erect a monument for decedent and for an allowance for the care of his burial lot is conclusive, and additional payments therefor, made by the administrator, may not be allowed him. Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

[d] **Statute limiting funeral expenses.**—Expenses incurred for a cemetery lot and monument for decedent are not funeral expenses within the meaning of a statute limiting funeral expenses to three hundred dollars. Sinnott v. Kenaday, 14 App. (D. C.) 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

[e] **The usual allowance from an insolvent estate** for funeral expenses has been stated in England to be twenty pounds. Yardley v. Arnold, C. & M. 434, 41 ECL 239.

[f] **Expenditures held reasonable.**—Bendall v. Bendall, 24 Ala. 295; Matter of Ogden, 41 Misc. 158, 83 NYS 977; Matter of Howard, 3 Misc. 170, 23 NYS 836; Hildebrand's Est., 1 Misc. 245, 23 NYS 148; Matter of Beach, 1 Misc. 27, 22 NYS 1079; Chalker v. Chalker, 5 Redf. Surr. (N. Y.) 480; Campbell v. Purdy, 5 Redf. Surr. (N. Y.) 434; Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265; Houston's Est., 21 Pa. Dist. 395; Conway's Est., 18 LancLRev (Pa.) 129; Geiger's Est., 12 WklyNC (Pa.) 439.

[g] **Expenditures held reasonable.**—Gooch v. Beasley, 137 Tenn. 407, 193 SW 132; Cannon v. Apperson, 14 Lea (Tenn.) 553; Reeves v. Ward, 2 Bing. N. Cas. 235, 29 ECL 516, 132 Reprint 93.

[h] **Expenditures held excessive.**—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108]; Burbridge v. Rogers, 7 KyL 42; Rogers v. Burbridge, 13 Ky. Op. 517; Matter of Smith, 75 App. Div. 339, 78 NYS 130, 11 NYAnnCas 427; Matter of Shipman, 82 Hun 108, 31 NYS 571; Matter of Luckey, 4 Redf. Surr. (N. Y.) 95; Matter of Mount, 3 Redf. Surr. (N. Y.) 9 note; Matter of Erlacher, 3 Redf. Surr. (N. Y.) 8; Kroll v. Close, 82 Oh. St. 190, 92 NE 29, 28 LRANS 571; Bradley's Est., 11 Phila. (Pa.) 87; Hancock v. Podmore, 1 B. & Ad. 260, 20 ECL 477, 109 Reprint 783; Bissett v. Antrobus, 4 Sim. 512, 6 EngCh 512, 58 Reprint 192; Bridge v. Brown, 2 Y. & Coll. 181, 21 EngCh 181, 63 Reprint 79.

79. Little v. Williams, 7 Ill. A. 67; Hisem v. Lemel, 19 La. 425; Lund v. Lund, 41 N. H. 355; Brackett v. Tillotson, 4 N. H. 208.

80. In re Frazer, 92 N. Y. 239; Bainbridge's App., 97 Pa. 482.

[a] **Discretion of executor.**—Bainbridge's App., 97 Pa. 482.

81. Canfield v. Canfield, 62 N. J. Eq. 578, 50 A 471.

[a] **Will not received until after expenditure made.**—Where a will directed that the testator's funeral expenses should not exceed a certain amount, but the will was not received by the executor until after the funeral, it was error to refuse reasonable and proper charges, in excess of the sum named. Galland's Est., 92 Cal. 293, 28 P 287.

82. Canfield v. Canfield, 62 N. J. Eq. 578, 50 A 471; In re Frazer, 92 N. Y. 239; Bainbridge's App., 97 Pa. 482.

83. Fancher v. Fancher, 156 Cal. 13, 103 P 206, 23 LRANS 944, 19 Ann Cas 1157.

84. Ala.—Martin v. Foster, 38 Ala. 688; Willis v. Willis, 9 Ala. 330.

Cal.—Rose's Est., 80 Cal. 166, 22 P 86.

Mo.—Judson v. Bennett, 223 Mo. 607, 136 SW 681.

Pa.—In re Frauenfelt, 3 Whart. 415; Wadsworth's Est., 64 Pa. Super. 604; In re Acor, 29 LegInt 398. But see infra note 87.

Tenn.—Read v. Franklin, (Ch. A.) 60 SW 215.

Wash.—In re Murphy, 30 Wash. 9, 70 P 109.

[a] **Support of infant.**—Where a widow acted as executrix of her husband's will, which was afterward set aside, expenditures made by her for the education and support of her minor son were matters wholly between her and the son, and not items in the accounting between her and the administrator. Read v. Franklin, (Tenn. Ch. A.) 60 SW 215.

[b] **Care and burial of adult child.**—An administrator paying doctors' bills and funeral expenses of an adult child of intestate cannot have an allowance therefor out of the estate, but only a charge on the distributive share of the child, although the child was an invalid and lived with intestate's family. In re Murphy, 30 Wash. 9, 70 P 109.

[c] **Funeral expenses.**—An allowance to executors of credit for the funeral expenses of one of the devisees under the will was improper, where there was no provision in the will authorizing such payment. Judson v. Bennett, 233 Mo. 607, 136 SW 681.

[d] **Where there is protracted litigation** between the next of kin living outside the state and a widow appointed administratrix, during which the widow, although confined by a marriage settlement to a cash provision in lieu of widow's rights, occupied the homestead, expenditures for minor housekeeping expenses may be allowed. Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas 1918B 1125.

85. Ala.—Dickie v. Dickie, 80 Ala. 57; Parker v. McGaha, 11 Ala. 521.

Ga.—Williams v. Adams, 94 Ga. 270, 21 SE 526.

Me.—Hanscom v. Marston, 82 Me. 288, 19 A 460.

Mass. — Granger v. Bassett, 98 Mass. 462.

N. Y.—Atlantic Trust Co. v. Powell, 23 Misc. 289, 50 NYS 866; Matter of Smith, 1 Misc. 269, 22 NYS 1067. But see infra note 87.

Pa.—Rittenhouse v. Levering, 6 Watts & S. 190. But see infra note 87.

[a] **Illustration.** — Payments of cash to a minor legatee for whose support there is ample provision, the purpose of which is not explained, and for which no receipts are shown, are not allowable to the executor; but he is entitled to credit for a payment made to a minor legatee to

to the widow and children.[86] There is, however, on the other hand, considerable authority for the view that the personal representative is entitled to credit for expenditures for the support, maintenance, and education of persons beneficially interested in the estate,[87] and it is obvious that credit should be allowed for such expenditures where they are made under order of court or pursuant to statute or directions in the will.[88] Whatever may be the right of the representative in his general account, he is unquestionably entitled to have expenditures properly made by him for the benefit of a particular legatee or distributee allowed as credits on the share of such beneficiary when a settlement with him is made.[89]

[§ 527] **d. Payment of Decedent's Debts.**[90] An executor or administrator is of course entitled to credit for debts of the decedent which he has paid,[91] or for the amount paid out in settling a bona fide claim against the estate, whereby a saving has been effected,[92] but he cannot be allowed for an illegal claim which he paid to avoid family disgrace;[93] and where the assets are insufficient to pay all the demands of one class, and such demands must, under the statute, be paid proportionately, a representative who pays on any one claim more than its just proportion, without an order of court, must make good to the estate the excessive payment.[94]

[§ 528] **e. Repairs and Improvements.** With regard to personal property, an executor or administrator may be properly credited with amounts necessarily expended for repairs while it was in his custody.[95] With respect to real estate, however, the personal representative is not, as a rule, entitled to the immediate possession and control thereof,[96] and hence he is not usually entitled to credit for amounts expended in repairs or improvements of such property.[97] Where, however, he is duly invested with the control or management of such property, he may be allowed credit for what he has

provide her a wedding outfit which it does not appear she was able to provide otherwise, where she long acquiesced in such payment and does not claim that it was not for necessaries. Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58.

86. Watts v. Watts, 38 Oh. St. 480; In re Acor, 29 Legint (Pa.) 298.

Allowance to surviving wife, husband, or children see infra §§ 758–874.

87. Sparrow's Succ., 42 La. Ann. 500, 7 S 611, 44 La. Ann. 475, 10 S 882; Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336; Matter of Higginbotham, 51 Misc. 158, 100 NYS 414; Matter of Gearns, 27 Misc. 76, 58 NYS 200; Pettit's App., 39 Pa. 324.

[a] **Burial expenses of a minor legatee** should be allowed. Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58.

[b] **Support of minor child.** — A widow, as administratrix of her husband's estate, is entitled to reimbursement for the support of a minor child pending administration. In re Lyons, 137 NYS 171.

[c] **The surrogate has power to allow** an administrator for payments made by him in good faith for the support of infant beneficiaries who have no guardian, if at the time of such payments they were substantially without means for support except from the estate. Hyland v. Baxter, 42 Hun (N. Y.) 9.

88. Cal.—In re Lux, 100 Cal. 606, 35 P 345.

Ind.—Powell v. North, 3 Ind. 392, 56 AmD 513.

Ky.—Finley v. Pearson, 76 SW 374, 25 KyL 766; Trigg v. Daniel, 2 Bibb 301.

Md.—Scott v. Dorsey, 1 Harr. & J. 227.

N. Y. — Matter of Lancaster, 28 Misc. 595, 59 NYS 1022; Matter of Scherrer, 24 Misc. 58, 53 NYS 392.

Pa.—In re Semple, 189 Pa. 385, 42 A 28; In re Yundt, 6 Pa. 35; Bourguignon's Est., 28 WklyNC (Pa.) 315.

[a] **Power of court to order advance.**—Dubois v. Sands, 43 Barb. (N. Y.) 412; Hoyt v. Jackson, 1 Dem. Surr. (N. Y.) 553; Lockwood v. Lockwood, 3 Redf. Surr. (N. Y.) 330.

[b] **Manner of crediting payments to distributees.** — Adair v. Brimmer, 74 N. Y. 539.

[c] **Payment to widow before order for family allowance.**—When the court grants an order for family allowance for a past period pending administration, payable in twenty days, the executors, having without an order paid the widow more than the sum allowed, are entitled to a present credit for the sum allowed. In re Lux, 100 Cal. 606, 35 P 345.

[d] **Where an administrator has received an allowance** out of the estate for the maintenance of his minor child, the sum thus expended is a proper subject of credit in his administrator's account. Groome's Est., 14 Phila. (Pa.) 246.

[e] **Payment to mother of beneficiaries.** — Where an administrator paid a portion of a trust fund due to infant beneficiaries to their mother, he was not entitled to credit for the same unless it appeared that such moneys were devoted to the support, maintenance, and education of such infants. It was not enough that it appeared that they were devoted to the support of the mother and children. Matter of Hobson, 61 Hun 504, 16 NYS 371 [aff 131 N. Y. 575, 30 NE 63].

89. Billman's Est., 24 Pa. Co. 423; In re Murphy, 30 Wash. 9, 70 P 109.

Retaining indebtedness due to representative by legatee or distributee see infra §§ 1317–1319.

90. Allowance and payment of claims generally see infra §§ 875–1265.

91. In re Vasek, 97 Nebr. 617, 150 NW 1004; Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[a] **Payment by surety who waives claim for reimbursement.**— Where one who is a surety on a debt due by the estate of a decedent, and also surety on the bond of the administrator of that estate, after paying off the debt waives all claim for reimbursement, either from the estate or the administrator, the latter is not, in a settlement with the heirs, entitled to credit for the amount paid by such surety in satisfaction of that debt. Ross v. Battle, 113 Ga. 742, 39 SE 287.

[b] **Clothing and mourning apparel of wife.**—In an accounting by a widow as administratrix of her deceased husband, money expended by the administratrix in paying a current account for articles of clothing, part of which were furnished before her husband's death and part of which consisted of mourning garments, was properly allowed as a credit. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[c] **Household necessities ordered before decedent's death.**—In an accounting by a widow as administratrix of her deceased husband, she is properly allowed credit for groceries and other household necessities ordered before her husband's death. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[d] **Jewelry ordered by wife before marriage.**—A wife, as administratrix of her husband, was not entitled to credit for a sum paid in settlement of an account for jewelry which she ordered before she was married, and which it did not appear the husband had ever promised to pay. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

Advances by representative to pay claims see infra §§ 1205–1209.

92. Matter of Wagner, 40 Misc. 490, 42 NYS 797.

93. Jones v. Ward, 10 Yerg. (Tenn.) 160.

94. Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

Insolvent estates see infra § 1742 et seq.

95. Pearson v. Darrington, 32 Ala. 227; Pinckard v. Pinckard, 24 Ala. 250.

96. See infra § 601.

97. Ala.—Cannon v. Copeland, 43 Ala. 252.

Iowa.—In re Dalton, 168 NW 333.

Mass.—Cobb v. Muzzey, 13 Gray 57.

Mo.—Langston v. Canterbury, 173 Mo. 122, 73 SW 151.

N. H.—Lucy v. Lucy, 55 N. H. 9; Brackett v. Tillotson, 4 N. H. 208.

N. J.—Aldridge v. McClelland, 36 N. J. Eq. 228.

N. Y.—Matter of Burr, 48 Misc. 56, 96 NYS 225 [rev on other grounds 118 App. Div. 482, 107 NYS 29]; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163.

Or.—Johnson v. Savage, 50 Or. 294, 91 P 1082.

Pa.—Walker's App., 116 Pa. 419, 9 A 654; McKinney v. Watson, 8 Serg. & R. 347; Benner's Est., 3 Brewst. 398; O'Donnell's Est., 9 Kulp 123; Dunkle's Est., 17 LancLRev 61; Montier's Est., 7 Phila. 491.

S. C.—Trimmier v. Darden, 61 S. C. 220, 39 SE 373.

Tenn.—Wilson v. Whitman, 3 Tenn. Ch. 37.

Utah.—Rolfson v. Cannon, 3 Utah 232, 2 P 205.

[a] **Where the estate is insolvent** the administrator must not repair the real estate, but can only sell it as it stands for payment of debts. Brackett v. Tillotson, 4 N. H. 208.

[b] **An executor who is also life tenant** of decedent's real estate has no right to pay insurance, taxes, and cost of repairs thereon out of decedent's personal estate. Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163.

[c] **Expenditures for repairs credited out of rents collected.**—Taylor v. Roulstone, 60 SW 867, 61 SW 354, 22 KyL 1515.

[d] **Under exceptional circumstances** a widow and administratrix who acted in perfect good faith in applying the personalty for repairs to and other expenditures for the benefit of the realty, in order to protect it for herself and her children, of whom she was guardian and who

expended in good faith in necessary repairs,[98] unless he has personally received benefits from such control and possession commensurate with the amounts expended,[99] although expenditures and outlays in improvements are less favored, especially where the corresponding enhancement in value seems remote and uncertain, or the personal property is sacrificed for the benefit of the realty.[1] However, an executor is of course protected in carrying out the provisions of the will with reference to the improvement of the testator's real estate,[2] and, without considering whether an administrator had authority to collect rents, it has been held that administrators who have charged themselves with the rents are entitled to a credit for repairs.[3] So also an executor may be allowed for improvements which the court would have ordered him to make, although they were actually made without an order of court,[4] and the concurrence of heirs may justify expenditures for improvements.[5] It has been held that an administrator who is also a tenant in common as a distributee will be allowed credit not for the cost of improvements put by him on the land, but for the value of such improvements to the premises,[6] and where an administrator who has undertaken the management of realty is charged with rents, he is entitled to offset against such charge the cost of necessary improvements.[7]

Where the decedent made contracts in his lifetime for repairs or improvements, the personal representative is entitled to credit for payments made thereon.[8]

[§ 529] **f. Services.**[9] An executor or administrator should be allowed credit for amounts paid for the services of agents, clerks, assistants, bookkeepers, and other persons employed by him to assist him in the performance of his duties, where the employment of such persons is reasonably necessary and the employment is bona fide for the benefit of the estate;[10] but the estate cannot be charged for services which the representative should have performed himself and for which his general recompense ought to be ample remuneration, and which he procured to be performed by others for his own

lived with her on the property, has been allowed credit therefor. Matter of Rolph, 9 NYS 293, 2 Conn. Surr. 191.

98. Ala.—Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.
Cal.—In re Clos, 110 Cal. 494, 42 P 971.
Conn.—Atwater v. Barnes, 21 Conn. 237.
La.—Sparrow's Succ., 40 La. Ann. 484, 4 S 513; Henderson's Succ., 24 La. Ann. 435.
Me.—Webber v. Webber, 6 Me. 127.
Md.—Sewell v. Slingluff, 62 Md. 592.
Mich.—In re Norton, 169 Mich. 531, 135 NW 253.
Nev.—In re Millenovich, 5 Nev. 161.
N. J.—In re Ramsey, 66 A 410; Dey v. Codman, 39 N. J. Eq. 258.
N. Y. — Matter of Thomson, 14 NYSt 615.
Oh.—In re Turpin, 5 OhS&CP 410, 7OhNP 569.
Pa.—Schrack's Est., 9 Pa. Dist. 149; Villee's Est., 2 Pa. Dist. 74.
R. I.—Almy v. Newport Prob. Ct., 18 R. I. 612, 30 A 458.
S. C.—Ex p. Palmer, 11 S. C. Eq. 215; Myers v. Myers, 8 S. C. Eq. 23.
Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.
Ont.—Hill v. Hill, 6 Ont. 244.
[a] **This is true, although** under the will the real estate repaired was to become the property of the administrator as an heir. Rice v. Tilton, 14 Wyo. 101, 82 P 577.
[b] **A previous order from the probate court** will strengthen the representative's position in a doubtful case, although this may not be essential. Gerald v. Bunkley, 17 Ala. 170; In re Clos, 110 Cal. 494, 42 P 971; In re Millenovich, 5 Nev. 161.
[c] **When erection of new buildings considered as repairs.**—In re Clos, 110 Cal. 494, 42 P 971.
[d] **An executor who is life tenant** has been held entitled to the cost of repairs where the will is set aside. Hill v. Hill, 6 Ont. 244.

99. Lufkin v. Jakeman, 188 Mass. 528, 74 NE 933; In re Graff, 123 Mich. 456, 82 NW 248; Clough v. Clough, 71 N. H. 412, 52 A 449; Villee's Est., 9 LancLRev. (Pa.) 353.
[a] **No allowance without accounting for rents.**—Matter of Bussman, 182 App. Div. 335, 170 NYS 420.

1. Ala.—Cannon v. Copeland, 43 Ala. 252.
Cal.—In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899 [app den 154 Cal. 385, 97 P 878]; Moore's Est., 72 Cal. 335, 13 P 880; In re Knight, 12 Cal. 200, 73 AmD 531.
Iowa.—Foteaux v. Lepage, 6 Iowa 123.
Ky.—Daniels v. Charles, 154 Ky. 232, 157 SW 32.
Me.—Stevens v. Burgess, 61 Me. 89.
Mass.—Cobb v. Muzzey, 13 Gray 57.
Mo.—Clark v. Bettelheim, 144 Mo. 258, 46 SW 135.
Oh.—In re Ullman, 31 Oh. Cir. Ct. 370.
Pa.—Burton's Est., 15 Pa. Co. 367.
Va.—Hudson v. Hudson, 5 Munf. (19 Va.) 180.
Wash.—In re Alfstad, 27 Wash. 175, 67 P 593.
[a] **Assessment upon permanent beneficiaries.**—In the permanent improvement of real estate, the cost may be equitably assessed upon the permanent beneficiaries rather than charged generally to the estate. Englehardt v. Yung, 76 Ala. 534; Foteaux v. Lapage, 6 Iowa 123; Stevens v. Burgess, 61 Me. 89; Hudson v. Hudson, 5 Munf (19 Va.) 180.
[b] **Work on road.**—Where a contract for the construction of a road across an owner's land was substantially completed at the time of the owner's death, subsequent work done on the road for another purpose was without authority, and charges for money paid by the administrator for such work were properly disallowed. In re McPhee, 156 Cal. 335, 104 P 455, AnnCas1913E 899.
[c] **Land assigned to administratrix as dower.**—An administratrix is not entitled to an allowance for improvements on land assigned to her as dower. Daniels v. Charles, 154 Ky. 232, 157 SW 32.
[d] **Division fence.**—An administrator is not personally liable for a portion of the cost of a division fence bordering the land of his intestate. Cummings v. Brock, 56 Vt. 308.

2. Matter of Hincheon, 159 Cal. 755, 762, 116 P 47, 36 LRANS 303 [cit Cyc]; Finley v. Pearson, 76 SW 374, 25 KyL 766.

3. Matter of Turpin, Oh. Prob. 124.

4. Palmer v. Miller, 15 S. C. Eq. 62, 34 AmD 602.

5. Hall v. Anthony, 13 R. I. 221; In re Alfstad, 27 Wash. 175, 67 P 593.

6. Lewis v. Price, 24 S. C. Eq. 172.

7. Henderson's Succ., 24 La. Ann. 435.

8. Burton's Est., 16 Pa. Co. 246.
Performance of decedent's obligations generally see supra § 472.

9. **As obligations of estate** see infra § 931.
Counsel fees see infra §§ 530–549.

10. Ala. — Eubank v. Clark, 78 Ala. 73; Pinckard v. Pinckard, 24 Ala. 250.
Ark.—Pike v. Thomas, 62 Ark. 223, 35 SW 212, 54 AmSR 292; Yarborough v. Ward, 34 Ark. 204.
Cal.—In re Ross, 182 P 303; In re Kruger, 143 Cal. 141, 76 P 891; Moore's Est., 72 Cal. 335, 13 P 880.
Fla.—Sherrell v. Shepard, 19 Fla. 300.
Hawaii.—Matter of Enos, 18 Hawaii 542.
Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108].
Iowa.—Clark v. Sayre, 122 Iowa 591, 38 NW 484.
Kan.—Brown v. Quinton, 80 Kan. 44, 102 P 242, 25 LRANS 71, 18 Ann Cas 290.
La.—Hautau's Succ., 32 La. Ann. 54; Dorville's Succ., 30 La. Ann. 133; Schmidt's Succ., 16 La. Ann. 256.
Miss.—Byrd v. Wells, 40 Miss. 711.
Mo.—In re Lutz, 175 Mo. A. 427, 162 SW 679; Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089; Ansley v. Richardson, 95 Mo. A. 332, 68 SW 609.
N. H.—Wendell v. French, 19 N. H. 205.
N. J.—Dey v. Codman, 39 N. J. Eq. 258; Howard v. Francis, 30 N. J. Eq. 444.
N. Y.—Matter of Welling, 53 App. Div. 639, 65 NYS 1060, 51 App. Div. 355, 64 NYS 1025; Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Matter of Harbeck, 81 Hun 26, 30 NYS 521, 1 NYAnnCas 51 [aff 145 N. Y. 648 mem, 41 NE 89 mem]; Willcox v. Smith, 26 Barb. 316; Matter of Rook, 98 Misc. 544, 164 NYS 742; Matter of Hammer, 94 Misc. 547, 160 NYS 191; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff sub nom. In re Hoffman, 165 App. Div. 252, 150 NYS 776]; Matter of Wagner, 40 Misc. 490, 82 NYS 797; Balz v. Underhill, 19 Misc. 215, 44 NYS 419 [aff 16 App. Div. 635 mem, 46 NYS 1089 mem]; Bronson v. Bronson, 48 HowPr 481; McWhorter v. Benson, Hopk. 32; Meeker v. Crawford, 5 Redf. Surr. 450; Glover v. Holley, 2 Bradf. Surr. 291.
N. C.—Edwards v. Love, 94 N. C. 365; Clarke v. Cotton, 17 N. C. 51.
Or.—In re Murray, 56 Or. 132, 107 P 19; Waite v. Willis, 42 Or. 288, 70 P 1034; In re McCullough, 31 Or. 86, 49 P 886.
Pa.—Nolde's Est., 27 Pa. Super. 413.

benefit or convenience.[11] With respect to the amount to be allowed, it must be reasonable and such as is usually or customarily paid for such services.[12]

[§ 530] **g. Counsel Fees and Costs**[13]**—(1) General Rule.** Subject to the general requirements of good faith and reasonable prudence,[14] an executor or administrator is entitled to employ and pay an attorney for advice in reference to the management of the estate,[15] the performance of legal services

Philippine.—Escueta v. Sy-Juilliong, 5 Philippine 405.

S. C.—Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412; Garrett v. Garrett, 21 S. C. Eq. 272.

Tex.—Armstrong v. O'Brien, 83 Tex. 635, 19 SW 268.

Vt.—Sowles v. Hall, 73 Vt. 55, 50 A 550.

Va.—Crouch v. Davis, 23 Gratt. (64 Va.) 62; Hipkins v. Bernard, 4 Munf. (18 Va.) 83.

Eng. — Henderson v. McIver, 3 Madd. 275, 56 Reprint 510.

[a] **"The test** on the question of compensating the agent out of the estate is, was it necessary or was it to the best interest of the estate? If it was, the expenses thus incurred are allowed; if not, they will be disallowed." In re Hill, 79 N. J. Eq. 521, 547, 82 A 338. To same effect Journault v. Ferris, 2 Dem. Surr. (N. Y.) 320.

[b] **Illustrations.** — (1) Where there were several thousand dollars of open accounts, machinery, and merchandise belonging to the estate, the employment of a clerk by the executors of the estate to look after such assets, keep the books, and attend to the correspondence was proper, and credit for the salary paid to such clerk should be allowed to such executors on their final accounting. U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108]. (2) Where, in stating the account of an executor, he was charged with all rents collected by the one who, under the will, was entitled to them, the executor should have been credited with the amount the collector retained. Matter of Dutcher, 102 App. Div. 410, 92 NYS 418. (3) Where testatrix died seized of a large amount of personal property and real estate, an allowance to the executrix's husband of three hundred dollars for protecting the property for six months, until a temporary administrator was appointed, during a contest of the will, was proper. Matter of Ogden, 41 Misc. 158, 83 NYS 977. (4) A credit of one dollar to an administrator for a copy of the inventory is proper. Nolde's Est., 27 Pa. Super. 413. (5) Where an administratrix employed a society to obtain money from intestate's debtor in Germany, and received one half of the proceeds, the balance being remitted to intestate's father, she was entitled to credit for money paid the society for obtaining the money and taking proceedings to require the father to pay over to her the money irregularly remitted to him. In re Frey, 73 N. J. Eq. 346, 67 A 192.

[c] **Bookkeeper.**—If a testamentary scheme of distribution involves the keeping of numerous complicated accounts, extending over a considerable period, the administrator may be allowed the expense of a bookkeeper. Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Overman v. Lanier, 157 N. C. 544, 75 SE 192.

[d] **Stenographer.** — On proceedings for the settlement of an executor's account, it was proper to allow compensation to a stenographer. Matter of Arnton, 106 App. Div. 326, 94 NYS 471.

[e] **Broker's commissions** (1) for negotiating sales of property of the estate are usually allowed. Brown v. Brown, 72 N. J. Eq. 667, 65 A 739; Matter of Saunders, 77 Misc. 54, 137 NYS 438 [aff 156 App. Div. 891 mem, 141 NYS 1145 mem]. (2) The allowance must be made to the executor and not to the broker, and hence the court cannot fix such compensation without a request by the executor. Hickman-Coleman Co. v. Leggett, 10 Cal. A. 29, 100 P 1072. (3) It is within the discretion of the court to refuse such an allowance. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

[f] **Executor may employ his own son to collect rents.**—Matter of Wagner, 40 Misc. 490, 82 NYS 797.

[g] **Where the employment of an accountant was suggested by testator** in his will on an accounting by the executor, it was not error to allow an amount paid to an accountant employed by the executor. Matter of Arnton, 106 App. Div. 326, 94 NYS 471.

[h] **The allowance of such charges is the exception and not the rule,** and when they are brought forward it is the duty of the court to scrutinize them with a jealous and watchful eye. O'Neill v. Donnell, 9 Ala. 734. See also Overman v. Lanier, 157 N. C. 544, 73 SE 192, 194; Weiss v. Dill, 3 Myl. & K. 26, 10 EngCh 26, 40 Reprint 10 (allowance made only under very special circumstances).

[i] **Estoppel to object.** — Where services not obviously alien to the administration have been rendered at the special request and advice of a person interested in the estate, such person is estopped from objecting to the allowance of a just compensation for them in the settlement of the administrator's account. Wendell v. French, 19 N. H. 205.

[j] **Discretion of court.** — The question whether an administrator is entitled to employ a bookkeeper depends on the circumstances of the estate and should be left to the discretion of the court. In re More, 121 Cal. 609, 54 P 97.

11. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450; Pearson v. Darrington, 32 Ala. 227; O'Neill v. Donnell, 9 Ala. 734.

Cal.—Moore's Est., 72 Cal. 335, 13 P 880.

Ga.—Miles v. Peabody, 64 Ga. 729.

La.—Kernan's Succ., 105 La. 592, 30 S 239.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

N. J.—Runkle v. Smith, 106 A 474.

N. Y.—In re Harbeck, 145 N. Y. 648, 41 NE 89; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev on other grounds 178 App. Div. 243, 164 NYS 1024]; Matter of Ogden, 41 Misc. 158, 83 NYS 977; Matter of Beach, 1 Misc. 27, 22 NYS 1079; In re Kissick, 170 NYS 636; Matter of Ingersoll, 20 NYSt 356, 6 Dem. Surr. 184; In re Brown, 16 Abb PrNS 457; Fowler v. Lockwood, 3 Redf. Surr. 465; Larrour v. Larrour, 2 Redf. Surr. 69.

N. C.—Overman v. Lanier, 157 N. C. 544, 73 SE 192.

S. C.—McGougan v. Hall, 21 S. C. 600; Jenkins v. Hanahan, 15 S. C. Eq. 129.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

[a] **The fact that the executors are busy men** and have not as much time to give to the management of the estate as other individuals cannot be permitted to affect the rule that executors must perform within reasonable limits the actual manual labor requisite to the due execution of the trust, nor can such rule be affected by the fact that the executors in employing a bookkeeper and fixing his compensation acted precisely as they would have done in the management of their own affairs. Matter of Harbeck, 81 Hun 26, 30 NYS 521, 1 NYAnnCas 51 [aff 145 N. Y. 648, 41 NE 89].

[b] **A claim of the husband of the executrix** for services in caring for real estate of testatrix, and for services as to testatrix's personalty, which the executrix should have performed herself, could not be allowed to the executrix on the settlement of her account. Matter of Ogden, 41 Misc. 158, 83 NYS 977.

12. Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457; Matter of Wagner, 40 Misc. 490, 32 NYS 797; Kennedy's App., 4 Pa. 149.

[a] **Compensation held proper.**— Matter of Ogden, 41 Misc. 158, 83 NYS 977; Meeker v. Crawford, 5 Redf. Surr. (N. Y.) 450; Kennedy's App., 4 Pa. 149.

13. On accounting and settlement see infra § 2529.

14. See supra § 463.

15. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30; Smyley v. Reese, 53 Ala. 89, 25 AmR 598; Pickens v. Pickens, 35 Ala. 442.

Cal.—In re Riviere, 7 Cal. A 755, 96 P 16.

Fla.—Eppinger v. Canepa, 20 Fla. 262.

Hawaii.—Matter of Enos, 18 Hawaii 542.

Ill.—Sprinkle v. Forrester, 162 Ill. A. 45.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Trible v. Ellison, 1 Ky. Op. 59.

Md.—Fletcher v. Elosser, 126 Md. 244, 94 A 776.

Mo.—In re Whitlow, 184 Mo. A. 229, 167 SW 463; Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

Mont.—In re Williams, 173 P 790; State v. Jefferson County Fifth Judicial Dist. Ct., 53 Mont. 210, 162 P 1053.

N. J.—In re Wiley, (Prerog.) 65 A 212; King v. Berry, 3 N. J. Eq. 261.

N. Y.—Matter of Arnton, 106 App. Div. 326, 94 NYS 471; Matter of Heinze, 99 Misc. 226, 165 NYS 712; Matter of Daly, 99 Misc. 203, 165 NYS 792; In re Nocton, 162 NYS 215; In re Babbitt, 148 NYS 621.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953.

Oh.—In re McAlpin, 8 OhS&CP 654.

Okl.—In re McGannon, 50 Okl. 288, 150 P 1109.

Pa.—McGregor's Est., 131 Pa. 359, 18 A 902; Sterrett's App., 2 Penr. & W. 419.

S. C.—Ketchin v. Rion, 72 S. C. 153, 51 SE 557.

Tex.—Jarvis v. Drew, (Civ. A.) 215 SW 970.

Wash.—In re Witt, 74 Wash. 172, 132 P 1012.

Ont.—Beatty v. Haldan, 10 Ont. 278.

[a] **Illustration.**—The services of an attorney for an administratrix, consisting of giving her advice, drawing leases and other legal instruments, ejecting nonpaying tenants, collecting doubtful demands due the estate, discovering assets, and investigating and adjusting disputed claims, are such as the estate is liable for, under Rev. St. (1899) § 223, providing for allowances for legal advice and services. Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

[b] **The fact that an executor is a man of affairs with business experi-**

which the representative cannot himself perform,[16] and the prosecution or defense of actions or suits on behalf of or against the estate,[17] and is entitled to credit in his account or indemnity from the estate for the reasonable charges of counsel and the costs and other expenses of litigation.[18] It is not necessary to entitle the representative to this allowance that he should have been successful in the litigation

ence and ability does not afford ground for denying to him the aid of the counsel in the settlement of the estate. In re Ullman, 31 Oh. Cir. Ct. 370.

[c] **Only one attorney authorized.**—The fact that an administratrix lives some distance from the county in which the estate is probated will not justify her burdening it with the fees of two attorneys. In re Byrne, 122 Cal. 260, 54 P 957.

16. Murphy v. Harris, 93 Miss. 286, 48 S 232; Browning v. Richardson, 186 Mo. 361, 85 SW 518; Langston v. Canterbury, 173 Mo. 122, 73 SW 151; Ansley v. Richardson, 95 Mo. A. 332, 68 SW 609; Matter of Heinze, 99 Misc. 226, 165 NYS 712; Matter of Ingraham, 60 Misc. 44, 112 NYS 763; In re McAlpin, 8 OhS&CP 654.

Services which representative should perform see infra § 548.

17. Ala.—John v. Sharp, 148 Ala. 665, 41 S 635.

Hawaii.—Matter of Vida, 1 Hawaii 152.

Ill.—Springle v. Forrester, 162 Ill. A. 45.

Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917; Crutcher v. Methodist Episcopal Church Board of Missions, 62 SW 895, 23 KyL 257.

Miss.—Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Scudder v. Ames, 142 Mo. 187, 43 SW 659; In re Jamison, 190 Mo. A. 638, 176 SW 271; Dooley v. Welch, 172 Mo. A. 528, 158 SW 454.

N. Y.—In re Ordway, 196 N. Y. 95, 89 NE 474.

Pa.—Evans' Est., 24 Pa. Super. 151; In re Wyckoff, 31 PittsbLegJNS 330.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

Tex.—Ackermann v. Ackermann, (Civ. A.) 99 SW 889.

[a] **Duty to employ counsel.**—Where an administratrix is sued in her representative capacity, it is her duty, even if only served with summons, to employ counsel to ascertain the nature of the suit and advise her what course to pursue. In re Ordway, 196 N. Y. 95, 89 NE 474 [rev 131 App. Div. 339, 115 NYS 817.

18. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242; Howard v. Rutherford, 149 Ala. 661, 43 S 30; John v. Sharp, 148 Ala. 665, 41 S 635; Noble v. Jackson, 124 Ala. 311, 26 S 955; Clark v. Eubank, 80 Ala. 584, 3 S 49; Moore v. Randolph, 70 Ala. 575; Smyley v. Reese, 53 Ala. 89, 25 AmR 598; Holman v. Sims, 39 Ala. 709; Pickens v. Pickens, 35 Ala. 442; Pearson v. Darrington, 32 Ala. 227; Pinckard v. Pinckard, 24 Ala. 250; Hutchinson v. Gamble, 12 Ala. 36; Bettis v. Taylor, 8 Port. 564.

Cal.—In re Simmons, 43 Cal. 543; Hicox v. Graham, 6 Cal. 167; In re Riviere, 8 Cal. A. 773, 98 P 46; In re Scott, 1 Cal. A. 740, 83 P 85.

Colo.—Tuckerman v. Currier, 54 Colo. 25, 129 P 210, AnnCas1914C 599; U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828; Filbeck v. Davies, 8 Colo. A. 320, 46 P 214.

Fla.—Eppinger v. Canepa, 20 Fla. 262; Sherrell v. Shepard, 19 Fla. 300.

Ga.—Davison v. Sibley, 140 Ga. 707, 79 SE 855.

Ill.—Mayer v. Schneider, 122 Ill. A. 48.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657; Mackey v. Ballou, 112 Ind. 198, 13 NE 715.

Iowa.—In re Blackman, 143 Iowa 553, 120 NW 664.

Kan.—Nelson v. Schoonover, 89 Kan. 779, 132 P 1183, AnnCas1915A 147 [den reh 89 Kan. 388, 131 P 147]; Sill v. Sill, 31 Kan. 248, 1 P 556; Whitford v. Horn, 18 Kan. 455.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Floyd v. Floyd, 7 B. Mon. 290; Cox v. Doty, 45 SW 1044, 20 KyL 287.

La.—McNeely v. McNeely, 50 La. Ann. 823, 24 S 338.

Me.—Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793; Healey v. Cole, 95 Me. 272, 49 A 1065; Crofton v. Ilsley, 6 Me. 48.

Md.—Edelen v. Edelen, 11 Md. 415.

Mich.—In re Bender, 154 Mich. 44, 117 NW 557; Shouldice v. McLeod, 145 Mich. 708, 108 NW 1083; Porter v. Long, 124 Mich. 584, 83 NW 601.

Miss.—Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Scudder v. Ames, 142 Mo. 187, 43 SW 659; In re Soulard, 141 Mo. 642, 43 SW 617; In re Handfield, 16 Mo. A. 332; Garnett v. Carson, 11 Mo. A. 290.

Mont.—In re Davis, 33 Mont. 539, 89 P 1133.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350; Burleigh v. Palmer, 74 Nebr. 122, 103 NW 1068, 12 AnnCas 777.

Nev.—In re Nicholson, 1 Nev. 518.

N. H.—Tuttle v. Robinson, 33 N. H. 104; Wendell v. French, 19 N. H. 205.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; In re Flaacke's Est., 72 N. J. Eq. 944, 73 A 1117 [aff (Prerog.) 64 A 1020]; Dey v. Codman, 39 N. J. Eq. 258; Kingsland v. Scudder, 36 N. J. Eq. 284; Keeler v. Keeler, 18 N. J. Eq. 267; King v. Berry, 3 N. J. Eq. 261.

N. Y.—In re Ordway, 196 N. Y. 95, 89 NE 474; Gilman v. Gilman, 63 N. Y. 41; Matter of Fraser, 165 App. Div. 441, 150 NYS 774; Matter of Hoffman, 136 App. Div. 516, 121 NYS 184; Matter of Welling, 51 App. Div. 355, 64 NYS 1025, 53 App. Div. 639, 65 NYS 1060; Wilcox v. Smith, 26 Barb. 316; Matter of Heinze, 99 Misc. 226, 165 NYS 712; Matter of Hoffman, 62 Misc. 600, 115 NYS 984; Matter of Miller, 4 Redf. Surr. 302.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953; Young v. Kennedy, 95 N. C. 265; Poindexter v. Gibson, 54 N. C. 44; Clarke v. Cotton, 17 N. C. 51.

Oh.—In re Ullman, 31 Oh. Cir. Ct. 370; In re McAlpin, 8 OhS&CP 654.

Okl.—In re McGannon, 50 Okl. 288, 150 P 1109.

Pa.—Sunday's App., 131 Pa. 584, 18 A 931; McGregor's Est., 131 Pa. 359, 18 A 902; Sterrett's App., 2 Penr. & W. 419; McNeile's Est., 20 Pa. Dist. 791; Glanding's Est., 16 Pa. Dist. 546; Yeakel's Est., 13 Pa. Dist. 402, 30 Pa. Co. 282; Christian's Est., 29 Pa. Co. 4; Neal's Est., 17 Phila. 486.

Philippine.—Escueta v. Sy-Juilliong, 5 Philippine 405.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; McKnight v. Wright, 33 S. C. Eq. 229; Capehart v. Huey, 10 S. C. Eq. 405.

Tex.—Gammage v. Rather, 46 Tex. 105; Rowe v. Dyess, (Commn. A.) 213 SW 234; Ackermann v. Ackermann, (Civ. A.) 99 SW 889.

Vt.—Foster v. Stone, 67 Vt. 336, 31 A 841; Wilson v. Bates, 28 Vt. 765; Woods v. Creditors, 4 Vt. 256.

Va.—Lake v. Pattie, 116 Va. 130, 81 SE 78.

Wash.—Snook v. Kennedy, 103 Wash. 390, 174 P 643; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

W. Va.—Turk v. Hevener, 49 W. Va. 204, 38 SE 476; Hoke v. Hoke, 12 W. Va. 427.

Wis.—Opitz v. Karel, 118 Wis. 527, 95 NW 945, 99 AmSR 1004, 62 LRA 582.

Eng.—Macnamara v. Jones, Dick. 587, 21 Reprint 399.

Ont.—Re Dingman, 35 Ont. L. 51, 9 OntWN 272; Wilson v. Beatty, 9 Ont. A. 149; Wilson v. Bedson, 8 Ont WR 446; Story v. Dunlop, 13 Grant Ch. (U. C.) 375.

"Nor should it require argument that attorney's fees in proper cases are legitimate expenses of administration. . . . It was proper that the expenses thus incurred, including the reasonable fees of the attorneys for the estate, should be paid, even though it results in a reduction of the dividend apportioned among the creditors." In re Blackman, 143 Iowa 553, 558, 120 NW 664.

[a] **Rule applies to public administrator.**—Harris' Succ., 29 La. Ann. 743.

[b] **An administrator who was removed** on account of his infancy at the time of appointment, after the commencement of a suit against him, has been allowed his costs out of the estate. Carow v. Mowatt, 2 Edw. (N. Y.) 57.

[c] **Witness' fees** paid by the administratrix in connection with a hearing had before the court of probate to determine a matter of heirship should be allowed to her in her final accounting, especially where the payment antedated the application for allowance by about four years and no effort had been made by the objecting parties to fix its status. Mayer v. Schneider, 122 Ill. A. 48.

[d] **Where heirs and distributees sue the administrator without just cause** in the federal court, he is justified in defending the same and is entitled to credit for reasonable attorney's fees and expenses. In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350.

[e] **Where an executor defends an ejectment suit,** and thereby saves property for the creditors and legatees of the estate, he will be entitled to counsel fees not only for services of counsel in settling the estate, but also for services in the ejectment suit. Evans' Est., 24 Pa. Super. 151.

[f] **Where suits at law were threatened** against an executor growing out of certain assignment proceedings in which testator, as assignee, had continued the business in another state without judicial authority, and had advanced considerable of his own money to the furtherance of such business, it was the executor's duty to employ counsel to restrict such liability to the lowest point, for which service the executor was entitled to an allowance for fees. In re Wiley, (N. J. Prerog.) 65 A 212.

[g] **In what account allowance to be made.**—Where an executor under a will, the probate of which was reversed, became liable for fees of counsel engaged to prosecute an appeal, and afterward, on being appointed administrator, actually paid such counsel fees, he was not entitled to include the fees in his account as administrator, and receive reimbursement from the estate, without first having the item of the fees allowed in his account as executor. Matter of Blair, 67 App. Div. 116, 73 NYS 675 [aff 34 Misc. 444, 69 NYS 1013].

[h] **Judgment for costs not directing payment from estate.**—Under the statute providing that an administrator shall have allowed all judgments for costs rendered against him which the court shall direct to be paid out of the estate, unless the action in which the costs were taxed was prosecuted or resisted without just cause, where in proceedings for

which he undertook, but he is entitled thereto regardless of whether he succeeds or fails,[19] provided the litigation relates to property of, or claims in favor of or against, the estate,[20] was undertaken and conducted in good faith,[21] and with reasonable prudence,[22] for the benefit of the estate,[23] and was reasonably necessary,[24] either because the rights concerned were complicated and conflicting,[25] or because the questions involved in the dispute were such that there might reasonably be an honest and sincere difference of opinion as to the proper solution thereof.[26]

The circumstances of each particular case govern in determining whether or not an allowance should be made.[27]

[§ 531] **(2) Personal Liability of Representative.** As has been seen the estate is not primarily liable for legal services rendered for the benefit of the estate at the request of the personal representative, but the representative is personally liable with the right of reimbursement for reasonable expenditures.[28] The fact that attorneys representing the personal representative also represented certain creditors and agreed to release the personal representative from all liability for their services, except as to such sum as the court might thereafter allow against the estate on their account does not, however, constitute a reason for disallowing the claim for such services.[29] So also executors or administrators, as a rule, are individually responsible for costs recovered against them, but are allowed to be reimbursed from the estate;[30] but they are sometimes relieved by statute from individual liability for costs.[31]

[§ 532] **(3) Showing Necessary for Allowance.** In order that a representative may be allowed for attorney's fees he must show that services were actually rendered[32] and what such services

the settlement of the account of an administrator, it appeared that two judgments for costs were rendered in his favor and two against him, but it did not appear that they were directed to be paid out of the estate, none of the judgments for costs could be allowed to the administrator. Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

19. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242; Noble v. Jackson, 124 Ala. 311, 26 S 955.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657; Mackey v. Ballou, 112 Ind. 198, 13 NE 715.

Md.—Ward v. Koenig, 106 Md. 433, 67 A 236.

Mo.—Dooley v. Welch, 172 Mo. A. 528, 158 SW 454.

Nebr.—McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615.

Pa.—Smith's Est., 11 Pa. Co. 448.

S. C.—Capehart v. Huey, 10 S. C. Eq. 405.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

Vt.—Woods v. Creditors, 4 Vt. 256.

Ont.—Re Dingman, 35 Ont. L. 51, 9 OntWN 272.

But compare Bertrand's Succ., 127 La. 857, 54 S 127 (compensation should not be allowed an attorney for the administrator when his services as a whole have been detrimental to the succession).

"To hold otherwise would be to place the estates of deceased persons at a great and unnecessary disadvantage, since reputable lawyers would not care to accept employment that would put them in the position of an insurer of their client's lawsuits." Dooley v. Welch, 172 Mo. A. 528, 536, 158 SW 457.

[a] **Where an administrator is substituted as a party defendant** in a suit pending against decedent at his death, and the administrator employs competent counsel and acts on their advice, and seeks to preserve the estate for the benefit of all the creditors, he cannot be charged with the costs and expenses of defending the suit, although it may have ultimately gone against him. Nolde's Est., 27 Pa. Super. 413.

[b] **Where effect is to throw expense on successful party.**—On the final account of a special administrator of a testator, he claimed credits for fees in a suit brought by him against an heir for a partnership accounting, in which suit the administrator was defeated. The heir in question had obtained a decree enforcing a lien on all real estate descending to the only other heir; and he contended that the items of the account should not be allowed, because the amount of the lien being greater than the property devised to the other heir, an allowance of the items would in effect compel him to pay the whole of the items. It was held, however, that this contention was of no merit. Bruning v. Golden, 159 Ind. 199, 64 NE 657.

20. In re Riviere, 8 Cal. A. 173, 98 P 46; Cullen v. State, 28 Ind. A. 335, 62 NE 759; Porter v. Long, 124 Mich. 584, 83 NW 601; Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

21. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242; Alexander v. Bates, 127 Ala. 328, 28 S 415; Pickens v. Pickens, 35 Ala. 442.

Fla.—Eppinger v. Canepa, 20 Fla. 262.

Kan.—Whitford v. Horn, 18 Kan. 455.

Md.—Ward v. Koenig, 106 Md. 433, 67 A 236.

Nebr.—McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615.

N. J.—King v. Barry, 3 N. J. Eq. 261.

N. Y.—Matter of Hoffman, 136 App. Div. 516, 121 NYS 184 [rev 62 Misc. 600, 115 NYS 984]; Wilcox v. Smith, 26 Barb. 316.

Pa.—In re Groff, 215 Pa. 586, 64 A 783; Sterrett's App., 2 Penr. & W. 49.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

W. Va.—Turk v. Hevener, 49 W. Va. 204, 38 SE 476.

22. Matter of Hoffman, 136 App. Div. 516, 121 NYS 184 [rev 62 Misc. 600, 115 NYS 984]; In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350.

[a] **Where there was no meritorious defense** to a suit, the administrator is not entitled to credit for attorney's fees and other expenses of defending. In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350.

23. Sherrell v. Shepard, 19 Fla. 300; Nolde's Est., 27 Pa. Super. 413; O'Sullivan v. Harty, 11 Can. S. C. 322; In re Anning, 34 N. B. 308.

[a] **Effect of further employment to present claim against estate.**—An attorney employed by an administrator does not forfeit his right to compensation for services rendered merely because he represents the administrator and his wife in presenting a claim in their favor against decedent's estate. Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

24. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242.

Cal.—In re Higgins, 158 Cal. 355, 111 P 8.

Ky.—Cox v. Doty, 45 SW 1044, 20 KyL 287.

Me.—Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793.

Md.—Beachley v. Bollinger, 119 Md. 151, 86 A 135.

N. Y.—In re Suydam, 160 NYS 219.

Ont.—Re Dingman, 35 Ont. L. 51, 9 OntWN 272.

"A litigation can be treated as necessary when it has been prosecuted not only in good faith, but also in the exercise of a reasonable judgment." Matter of Hoffman, 62 Misc. 600, 601, 115 NYS 984, 989 (an administrator, after a judgment in his favor had been reversed, should have taken his defeat at the third trial as final, in view of the practice of appellate courts not to keep on ordering new trials against repeated verdicts, and hence the administrator was not entitled to the costs of litigation after the third trial).

[a] **Necessity for probable grounds for resisting claim.**—Under a statute, entitling an administratrix to costs in actions defended, if the court certifies that there were probable grounds for defending the action, an administratrix against whom judgment absolute was rendered on a claim against the estate was not entitled to an allowance in her accounts for costs and counsel fees where the court trying her appeal did not certify that there were probable grounds for resisting the claim. Beachley v. Bollinger, 119 Md. 151, 86 A 135.

25. Scudder v. Ames, 142 Mo. 187, 43 SW 659; Smith's Est., 11 Pa. Co. 448.

26. Porter v. Long, 124 Mich. 584, 83 NW 601; Matter of Hoffman, 136 App. Div. 516, 121 NYS 184.

[a] **An appeal from a decision of a divided court** is proper and the representative is protected with respect to the cost of the expense thereof. Matter of Hoffman, 136 App. Div. 516, 121 NYS 184.

[b] **Erroneous advice of attorney.**—Reasonable compensation for the services of an eminent attorney engaged by a special administrator in good faith to interplead in a suit against the executors, in which the special administrator was summoned as trustee, was properly allowed the administrator, although the expense was unnecessary, and the bill of interpleader would not have been advised if the attorney had not been afflicted with a mental disability of which the administrator was unaware. Powell v. Foster, 71 Vt. 160, 44 A 96.

27. Weir v. Weir, 28 Oh. Cir. Ct. 199.

28. See supra § 485.

29. In re Blackman, 143 Iowa 553, 558, 120 NW 664 ("The effect was not to release the estate from its proper burden on this account, but to assure the administratrix against any personal liability therefor").

30. Cal.—Briggs v. Brun, 123 Cal. 657, 56 P 633, 886; Hicox v. Graham, 6 Cal. 167.

Ky.—Frazier v. Cavanaugh, 4 KyL 711.

La.—Rolland's Succ., 1 La. Ann. 224.

Miss.—Williamson v. Childress, 26 Miss. 328.

N. Y.—Seaman v. Whitehead, 78 N. Y. 306.

31. Bruning v. Golden, 159 Ind. 199, 64 NE 657.

32. Whittemore v. Coleman, 144

F. E. BRIGHTMAN
ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

were[33] that the services were necessary,[34] and that the fees or charges have been actually paid.[35]

[§ 533] **(4) Approval of Court.** It is not necessary that attorney's fees paid by an executor or administrator should have been fixed or approved by the court before payment in order to entitle him to credit therefor;[36] but aside from a sanction previously given, the probate court may, in its just discretion, allow a credit for professional services reasonably and honestly employed.[37] Indeed it has been held that a disbursement made by the representative to an attorney to protect the estate in litigation pursuant to authority granted by the court of probate, should, on final accounting, be allowed, although the reviewing tribunal might not have authorized the disbursement had its judgment been invoked in the first instance.[38] Nevertheless an administrator who pays attorney's fees without an order of court does so at his own risk,[39] and in a case where an executor did not apply to the county court for advice in the management of the estate, and for more than eight years made no report of his dealings, although required by statute to account semi-annually, it was held that the court properly denied him any attorney's fees.[40]

[§ 534] **(5) Consent of Persons Beneficially Interested.** The consent or instance of the heirs, distributees, or others beneficially interested in the estate may be adduced to justify expenses incurred by the personal representative in engaging counsel or pursuing a litigation.[41]

[§ 535] **(6) Employment by Cofiduciaries.** For coexecutors or coadministrators separate counsel are not usually allowed;[42] but circumstances may arise to justify a separate employment, if the cost to the estate is not duplicated thereby.[43] An attorney for one of two executors, who collected money belonging to the estate, is entitled thereto, as against the coexecutor, where he had performed services for the estate, on the request of one of the executors, in excess of the amount collected, and had claimed a lien on the sum collected, and thereafter the executor at whose request he had rendered his services agreed that he should retain it and apply it on account of such services.[44]

[§ 536] **(7) Charges in Particular Matters—(a) Probate or Contest of Will.** Although the cases are not all in accord, the weight of authority supports the view that executors are entitled to be allowed for the services of an attorney to assist in obtaining the probate of the will,[45] that an allowance for such expenses may also be made to the

Ill. A. 109 [aff 239 Ill. 450, 88 NE 228].

33. Cal.—In re Murphy, 171 Cal. 697, 154 P 839.

Ill.—Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228].

N. Y.—Matter of O'Hara, 50 Misc. 495, 100 NYS 635; Matter of Baker, 27 Misc. 126, 57 NYS 398.

S. C.—In re Coleman, 106 S. C. 534, 91 SE 861.

Va.—Lake v. Pattie, 116 Va. 130, 81 SE 78.

34. Mobile First Nat. Bank v. Watters, (Ala.) 79 S 242; Sonneborn v. Hutzler, (Md.) 107 A 251; In re Coleman, 106 S. C. 534, 91 SE 861.

35. State v. Silver Bow County Second Judicial Dist. Ct., (Mont.) 168 P 522; Matter of Blair, 67 App. Div. 116, 73 NYS 675 [aff 34 Misc. 444, 69 NYS 1013]; In re Blair, 49 App. Div. 417, 63 NYS 678 [mod and aff 28 Misc. 611, 59 NYS 1090]; Matter of Woods, 55 Misc. 181, 106 NYS 471; Matter of Baker, 27 Misc. 126, 57 NYS 398. And see supra § 516.

[a] **Note not operating as payment.**—Where an executor of a will, who was unsuccessful in procuring its admission to probate, employed additional counsel to prosecute the case in the court of appeals, and gave his note for such services, which was not delivered until after the letters were revoked, such note did not constitute an actual payment, and was properly disallowed by the referee in passing on the allowance of payments made by such executor. Matter of Blair, 28 Misc. 611, 59 NYS 1090.

36. Filbeck v. Davies, 8 Colo. A. 320, 46 P 214; Ward v. Koenig, 106 Md. 433, 67 A 236; Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 P 593, LRA1917E 966.

[a] **The propriety of incurring unusual expenses** should be submitted to the court in advance. Crowe v. Morrison, 147 Ill. A. 107.

37. Ala.—Mobile First Nat. Bank v. Watters, 79 S 242.

Ark.—Kenyon v. Gregory, 127 Ark. 525, 192 SW 887; Reynolds v. Canal, etc., Co., 30 Ark. 520; Turner v. Tapscott, 30 Ark. 312.

N. Y.—Matter of Meng, 96 Misc. 126, 159 NYS 535; In re Nocton, 162 NYS 215.

Pa.—In re Meyers, 253 Pa. 537, 98 A 694.

S. C.—Brooks v. Brooks, 12 S. C. 422.

[a] **The judge who passes finally upon the account** has ample discretion and is not bound by the refusal of another judge, not appellate, in an earlier stage of the cause. Brooks v. Brooks, 12 S. C. 422.

[b] **Interested parties may object** to such allowance when the account is rendered. Tell City Furniture Co. v. Stiles, 60 Miss. 849.

38. Mayer v. Schneider, 122 Ill. A. 48.

39. Bertrand's Succ., 127 La. 857, 54 S 127; In re Sullivan, 36 Wash. 217, 78 P 945.

40. In re Roach, 50 Or. 179, 92 P 118.

41. Moore v. Moore, 8 KyL 57; Matter of Hauxhurst, 76 Hun 36, 27 NYS 613; In re Butler, 9 NYS 641, 1 Conn. Surr. 58.

42. Sonneborn v. Hutzler, (Md.) 107 A 251; In re Fraser, 165 App. Div. 441, 150 NYS 774; McDaniel's Est., 9 Pa. Co. 232.

[a] **Accordingly,** one executor cannot employ an attorney and have his fees charged against the estate after the others have employed a different attorney who performs all necessary services. In re Dunlop, 142 NYS 286 (where an executrix employs counsel after the employment of another attorney by her coexecutors, it will be presumed that her counsel is to protect her individual interests under the will).

43. In re Scott, 1 Cal. A. 740, 83 P 85; Matter of Delaplaine, 3 NYS 202, 1 Conn. Surr. 1.

[a] **Illustration.**—A statute providing that, where there are more than two executors, the act of a majority is valid, did not preclude one of three executors, who honestly differed from the others, from employing counsel of his own selection and being entitled to an allowance for attorney's fees. In re Scott, 1 Cal. A. 740, 83 P 85.

44. Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 NYS 612.

45. Cal.—In re Hite, 155 Cal. 448, 101 P 448; In re Riviere, 8 Cal. A. 773, 98 P 46.

D. C.—Tuohy v. Hanlon, 18 App. 225.

Ga.—Gairdner v. Tate, 110 Ga. 456, 35 SE 697.

Kan.—Nelson v. Schoonover, 89 Kan. 779, 782, 132 P 1183, AnnCas 1915A 147 [cit Cyc].

Ky.—Reed v. Reed, 74 SW 207, 24 KyL 2438.

La.—Aiken's Succ., 144 La. 64, 80 S 200.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552. But compare Pleasants v. McKenney, 109 Md. 277, 71 A 955 (while an executor is a proper party to a will contest, he must defend the will at his own expense, where the contest occurs before the issuance of letters); Koenig v. Ward, 104 Md. 564, 65 A 345 (where a caveat is filed before a will has been admitted to probate, and the services of counsel are rendered to parties interested as heirs, distributees, or devisees, the orphans' court has no jurisdiction to allow compensation for such services out of the estate).

Nebr.—In re Hentges, 86 Nebr. 75, 124 NW 929, 26 LRANS 757.

N. J.—In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

N. Y.—Young v. Brush, 28 N. Y. 667; Matter of Hutchison, 84 Hun 563, 32 NYS 869; Douglass v. Yost, 64 Hun 155, 18 NYS 830.

But compare Leavenworth v. Marshall, 19 Conn. 408 (where an appeal from a decree of probate respects rights and claims contested between heirs, devisees, and legatees, the expense is to be defrayed by the parties in interest).

[a] **Illustration.**—A caveat having been filed to a will, the executor retained counsel to defend it. Verdict was rendered for the caveatees, and on an appeal the rulings were affirmed, and judgment in the orphans' court was entered accordingly. Thereafter a petition was filed in the orphans' court for new issues to be sent to a court of law for trial. The issues were refused, and on appeal the issues were substantially the same as on the prior appeal, and the order refusing them was affirmed. Letters, however, were not granted until after the second appeal was decided. It was held that for the purpose of defending the will its admission to probate without the grant of letters was sufficient, and hence the executor was entitled to an allowance for counsel fees in the litigation growing out of the second set of issues prayed by the caveators. Decker v. Fahrenholtz, 107 Md. 515, 68 A 1048, 72 A 339.

[b] **Where probate in another**

executors named in a will which is denied probate,[46] that executors are entitled to charge the estate with counsel fees and costs prudently and honestly incurred or paid by them in attempting to sustain the will against attacks on its validity,[47] even though the result of the litigation is a decision that

state becomes essential, the counsel fees, costs, and expenses of such probate follow the general rule. Young v. Brush, 28 N. Y. 667.

[c] **Pending the trial of issues on** a caveat to a will charging that its execution was procured by the exercise of undue influence and fraud on the testator by the executor named therein, the probate court has no power, on the application of the executor, to allow fees to be paid from the estate to counsel employed by him to defend the will. Kengla v. Randall, 22 App. (D. C.) 463.

[d] **Where devisees notified the executor that they would employ their own counsel** in a pending contest of the will, it was, nevertheless, the duty of the executor to employ counsel to procure the probate of the will, and he was entitled to an allowance for their fees. Reed v. Reed, 74 SW 207, 24 KyL 2438.

[e] **Service of citations.**—An executor will not be allowed compensation for services in serving citations in the proceeding for the probate of a will. In re Wick, 53 Misc. (N. Y.) 211, 104 NYS 717.

[f] **A claim for services rendered by a detective** employed by the counsel of the principal legatee, such services being valuable in establishing the will, may be paid out of the estate. In re Lewis, 35 N. J. Eq. 99.

[g] **Where an executor is a lawyer and attends to the proceeding** for the probate of a will, an allowance will not be made to his brother-in-law, also a lawyer, for services, where he went to the surrogate's office at the executor's request and stayed until the will was probated, the executor thinking there might be some opposition. In re Wick, 53 Misc. 211, 104 NYS 717.

[h] **Appeal.**—(1) The executor is entitled to his necessary counsel fees and costs in the appellate court as well as in the trial court. Gardner v. Moss, 123 Ky. 334, 96 SW 461, 29 KyL 759. (2) Where, on admission of a will to probate, no appeal was taken until within a few days of the time when the right to appeal would have expired, and in the meantime the executor had qualified, and entered on his duties, and made partial distribution, he was entitled to attorney's fees on the appeal. In re Alexander, 211 Pa. 124, 60 A 511.

[i] **Bad faith and fraud of executor.**—Where an executor in bad faith and in fraud of the rights of the heirs attempts to probate a will, he is not entitled to reimbursement from the estate for expenses thereby incurred, although the counsel employed act in good faith and are ignorant of the executor's fraudulent intent. Davison v. Sibley, 140 Ga. 707, 79 SE 855.

46. Davison v. Sibley, 140 Ga. 707, 79 SE 855; Phillips v. Phillips, 81 Ky. 328; Lassiter v. Travis, 98 Tenn. 330, 39 SW 226.

[a] **Reason for rule.**—It is the duty of the executor to have the will probated. See Wills [40 Cyc 1226].

[b] **Attempt to probate in solemn form.**—Where an executor under a will probated in common form is called upon by heirs to probate it in solemn form, he is entitled to an allowance from the estate for reasonable attorney's fees, although the will may be refused probate. Davison v. Sibley, 140 Ga. 707, 79 SE 855.

[c] **Executrix beneficially interested under will.**—A person named as executrix in a will which she in good faith propounds for probate, but which is declared invalid, may recover from the estate her costs and reasonable attorney's fees, although she was the only person to be benefited by establishing the will. Lassiter v. Travis, 98 Tenn. 330, 39 SW 226.

[d] **Contrary view.**—In re Hite, 155 Cal. 448, 101 P 448 [foll In re Olmstead, 120 Cal. 447, 52 P 804]; Doan v. Herod, 56 Ind. A. 663, 104 NE 385; Dodd v. Anderson, 197 N. Y. 466, 90 NE 1137, 27 LRANS 336, 18 AnnCas 738 [rev 131 App. Div. 224, 115 NYS 688 (aff 112 NYS 414)].

47. D. C.—Tuohy v. Hanlon, 18 App. 225.

Ga.—Gairdner v. Tate, 110 Ga. 456, 35 SE 697.

Ill.—Godfrey v. Phillips, 209 Ill. 84, 71 NE 19; Butler v. Bocock, 160 Ill. A. 501, 504; Methodist Episcopal Church Missionary Soc. v. Goheen, 84 Ill. A. 474; Shaw v. Camp, 56 Ill. A. 23 [foll Pingree v. Jones, 80 Ill. 177, and refusing to follow Moyer v. Swygart, 125 Ill. 262, 17 SE 450, and Shaw v. Moderwell, 104 Ill. 64, further than to concede that the rule that an executor cannot be held individually liable for costs is not an inflexible one, but may in any particular case be departed from if the peculiar circumstances warrant such a course, as if the executor acts in bad faith, or is personally interested in the result or makes the defense for his own protection or advantage or other like reason].

Ky.—Phillips v. Phillips, 81 Ky. 328.

La.—Filhiol's Succ., 123 La. 497, 49 S 138; McNeely v. McNeely, 50 La. Ann. 823, 24 S 338; Heffner's Succ., 49 La. Ann. 407, 21 S 905.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Decker v. Fahrenholtz, 107 Md. 515, 68 A 1048, 72 A 339; Tilghman v. France, 99 Md. 611, 59 A 277; Glass v. Ramsey, 9 Gill 456; Compton v. Barnes, 4 Gill 55, 45 AmD 115.

Mo.—In re Jamison, 190 Mo. A. 638, 176 SW 271. But see infra this note.

Nebr.—St. James Orphan Asylum v. McDonald, 76 Nebr. 625, 107 NW 979, 110 NW 626.

N. Y.—Young v. Brush, 28 N. Y. 667; Douglas v. Yost, 64 Hun 155, 18 NYS 830; Frith v. Campbell, 53 Barb. 325; Matter of Waldron, 74 Misc. 310, 133 NYS 1104; In re Blair, 28 Misc. 611, 59 NYS 1090 [mod 49 App. Div. 417, 63 NYS 678]. But see infra this note.

N. C.—Mariner v. Bateman, 4 N. C. 350.

Oh.—In re Ullman, 31 Oh. Cir. Ct. 370; Weir v. Weir, 28 Oh. Cir. Ct. 199; Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317. But see infra this note.

Pa.—In re Scott, 9 Watts & S. 98; Geddis' App., 9 Watts 284; Alexander's Est., 13 Pa. Dist. 459. But see infra this note.

R. I.—Hazard v. Engs, 14 R. I. 5.

S. C.—Butler v. Jennings, 29 S. C. Eq. 87.

Tenn.—Bowden v. Higgs, 9 Lea 343; Walker v. Verble, 5 Tenn. Civ. A. 651.

Wis.—In re Bowman, 133 Wis. 494, 113 NW 956.

Eng.—In re Prince [1898] 2 Ch. 225.

Ont.—Hill v. Hill, 6 Ont. 244.

But compare In re Hite, 155 Cal. 448, 101 P 448 (where petitioners applied for compensation from the estate for their services as attorneys in opposing a contest of two codicils, altering legacies given by the will, and giving some additional ones, and it was held that, while counsel fees incurred in opposing a contest may be charged against the estate, if it goes to the parties benefited by the litigation, under the circumstances the estate had no interest therein, and the application was properly denied, such expenses being chargeable to those legatees having a direct interest in supporting the codicils).

[a] **Illustration.**—An executor seeking in good faith to uphold a will disposing of an estate worth several millions of dollars as against an attack by a beneficiary, asserting that a provision of the will is invalid, is entitled to be reimbursed from the estate the amount legitimately expended by him in the litigation, although the same resulted in a judgment adjudging the provision attacked invalid. Matter of Title Guarantee, etc., Co. 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542, 80 NE 1121].

[b] **Rule applies to administrator with will annexed.**—McIntire v. McIntire, 14 App. (D. C.) 337.

[c] **Rule applies although executor personally interested in result.**—Matter of Blair, 28 Misc. 611, 59 NYS 1090, 1 Mills Surr. 238 [mod on other grounds 49 App. Div. 417, 63 NYS 678].

[d] **Where the will directs payment** by the executors of "testamentary charges and expenses," charges incurred for legal services rendered the executors in proceedings for the revocation of probate are chargeable to the corpus of the estate. Wolfe v. Wolfe, 2 Dem. Surr. (N. Y.) 305.

[e] **The test of the right** (1) of the executor to allowance is not so much his good or bad faith as whether or not the litigation was for the benefit of those entitled to the estate. Sheetz's App., 100 Pa. 197. To same effect Yerkes' App., 99 Pa. 401. (2) Where the result of a contest to sustain a will has greatly enhanced the value of the estate by having outlawed debts of certain of testator's children treated as advancements, and as assets for purposes of distribution, the executor will be allowed counsel fees. In re Alexander, 211 Pa. 124, 60 A 511.

[f] **While an executor is not bound to assume the defense** of a contest of a will he may do so, and where this is done in a disinterested effort to maintain it and preserve the trust therein created and to effectuate the intention of the testator, a court of chancery may allow the executor credit in his account for his expenses incurred in the successful defense of such will. Weir v. Weir, 28 Oh. Cir. Ct. 199.

[g] **Such an allowance has been refused** in a number of cases. Gayle v. Johnson, 80 Ala. 388; Kelly v. Kennedy, 133 Minn. 278, 158 NW 395, LRA1917A 448, AnnCas1918D 164; Kelly v. Davis, 37 Miss. 76; In re Soulard, 141 Mo. 642, 43 SW 617; In re Fry, 96 Mo. A. 208, 70 SW 172; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Andrews v. Andrews, 7 Oh. St. 143; Mumper's App., 3 Watts & S. (Pa.) 441; Brown v. Vinyard, 8 S. C. Eq. 460.

[h] **Defense not undertaken in fiduciary capacity.**—Where a deputy register of wills took the affidavit of the subscribing witness to the will, but nothing more was done in the matter, and no order adjudging the writing to be the last will of the testatrix was ever filed, and no letters testamentary were ever granted, and after the affidavits had been taken a caveat was interposed, the residuary legatee, who was also named as executrix, and who was made defendant in caveat proceedings, was not defending the will in her capacity as executrix, and had no claim to be reimbursed out of the estate for the attorney's fee she may have con-

the will or the particular provision attacked is invalid,[48] and that a person named as executor in a will which has been admitted to probate is entitled to be reimbursed his counsel fees and expenses in opposing the probate of another paper subsequently propounded as a will,[49] even though the latter paper is established as the will and admitted to probate.[50] Expenses incurred by an executor in unsuccessfully assailing the will by raising an issue of ademption are not a proper expenditure by him as executor, and in the absence of evidence of an express agreement on the part of the legatees to reimburse him for the costs, the estate is not liable therefor.[51] It has been held that an administrator who opposes the probate of a paper offered as the last will of the decedent cannot, although contesting honestly, be allowed reimbursement for the costs, expenses, and counsel fees for which he has made himself liable, in case the will becomes established,[52] but there is also authority for the contrary view,[53] and an administrator has been held entitled to reimbursement for expenses incurred in setting aside an alleged will.[54]

[§ 537] **(b) Procuring Appointment or Qualification.** While it has been held that an executor or administrator is entitled to reimbursement for the just and reasonable expenses incurred in procuring his appointment or qualification in the probate court,[55] there is also considerable authority for the view that such an allowance should not be made,[56] and a denial of such an allowance is unquestionably proper where the appointment was improperly procured by falsely representing that the appointee was entitled to administer.[57]

[§ 538] **(c) Collection and Protection of Assets.** The representative is entitled to attorney's fees paid in an action necessary to collect debts or assets of the estate,[58] and counsel fees and costs incurred in asserting or defending title to assets are properly allowed.[59]

[§ 539] **(d) Resisting Claims against Estate.** An executor or administrator is entitled to an allowance of counsel fees and other expenses incurred in resisting claims against the estate,[60] and in any particular case his right is determined by whether or not he acted in good faith and with reasonable prudence, rather than by his success or failure in the litigation.[61]

tracted. Tilghman v. France, 99 Md. 611, 59 A 277.

[i] **Proceedings between legatees.**—An executor is not entitled to credit, in his final settlement, for costs and expenses incurred in a successful defense of a proceeding by one legatee against other legatees to contest the validity of the will. In re Fry, 96 Mo. A. 208, 70 SW 172.

48. Bratney v. Curry, 33 Ind. 399; Parker v. Leighton, 131 Md. 407, 102 A 552; Matter of Title, etc., Co., 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542 mem, 80 NE 1121 mem]. But compare Royer's App., 13 Pa. 569 (an executor is not entitled to charge his account with the costs incurred in an unsuccessful attempt to uphold a will, the validity of which is contested, unless the litigation is for the benefit of the estate, or for the interests of those eventually found to be entitled to the fund).

[a] **Case settled before trial.**—The attorney's fees of an executor in a contested will case, which was amicably settled without trial, are not a proper subject of charge against the estate, when the settlement did not distribute the testator's property in accordance with the provisions of the will. Matter of Sceger, 1 OhS&CP 113, 7 OhNP 207.

[b] **Contrary view.**—An executor is not entitled to charge the estate for the expense of conducting a defense of the will where it is adjudged invalid, notwithstanding the executor is a necessary party. Thurston v. Ludwig, 4 Oh. A. 486.

49. Mariner v. Bateman, 4 N. C. 350; In re Bowman, 133 Wis. 494, 113 NW 956.

50. Mariner v. Bateman, 4 N. C. 350; In re Bowman, 133 Wis. 494, 113 NW 956.

[a] **Costs and disbursements on appeal.**—Since an executor and executrix were called upon to present the will for probate on testatrix's death, and that necessarily resulted in contesting a subsequent will offered for probate, they are entitled to costs and disbursements in the supreme court on their appeal, on the affirmance of a judgment allowing probate of the subsequent will. In re Bowman, 133 Wis. 494, 113 NW 596.

51. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

52. Cal.—Parsons' Est., 65 Cal. 240, 3 P 817.

Ga.—Lester v. Mathews, 56 Ga. 655.

Md.—Edelen v. Edelen, 11 Md. 415.

Mass.—Edwards v. Ela, 5 Allen 87.

N. Y.—Matter of Black, 19 NYSt 260, 6 Dem. Surr. 331.

[a] **The mere fact that the statute authorizes an administrator to resist** opposition to probate does not, of itself, entitle him to reimbursement from the estate for attorney's fees. In re Hite, 155 Cal. 448, 101 P 448.

[b] **Expenses incurred in defending a suit to establish a lost will** should not be allowed to the administrator. In re Dalton, 183 Iowa 1013, 168 NW 332.

53. Bradley v. Andress, 30 Ala. 80.

54. Huston v. King, 7 Oh. Dec. (Reprint) 575, 3 CincLBul 1142.

55. Ex p. Young, 8 Gill (Md.) 285; Matter of Fraser, 165 App. Div. 441, 150 NYS 774; Matter of Wallach, 164 App. Div. 600, 150 NYS 302 [aff 215 N. Y. 622 mem, 109 NE 1094 mem]; Matter of Pond, 42 Misc. 165, 85 NYS 1080; Matter of Van Nostrand, 3 Misc. 396, 24 NYS 850, Pow. Surr. 495; Huston v. King, 7 Oh. Dec. (Reprint) 575, 3 CincLBul 1142; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

[a] **Allowance cannot be made in order of appointment.**—In re Bankard, 19 NYWklyDig 452.

56. Cal.—In re Byrne, 122 Cal. 260, 54 P 957; In re Barton, 55 Cal. 87. See also In re Simmons, 43 Cal. 543, 548 ("Where a bona fide contest as to the right to administer has arisen and been determined, in which the employment of counsel was necessary, it may be in the discretion of the Court to allow the necessary expenses of all the parties concerned, including a reasonable counsel fee; but this has no reference to the mere ordinary proceedings to obtain letters of administration").

La.—Gourjon's Succ., 10 Rob. 541.

Nev.—In re Nicholson, 1 Nev. 518.

Tenn.—Cate v. Cate, (Ch. A.) 43 SW 365.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

Wash. — Wilbur v. Wilbur, 17 Wash. 683, 50 P 589.

[a] **This rule is criticised,** although reluctantly adhered to in Bowman v. Bowman, 27 Nev. 413, 76 P 634 ("the reasoning of the cases does not give complete satisfaction").

57. Hall v. Santangelo, (Ala.) 60 S 168.

58. Ala.—Chandler v. Chandler, 87 Ala. 300, 6 S 153.

Colo.—Filbeck v. Davies, 8 Colo. A. 320, 46 P 214.

Fla.—Sherrell v. Shepard, 19 Fla. 300.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672.

Md.—Fletcher v. Elosser, 126 Md. 244, 94 A 776.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

Mich.—In re Bender, 154 Mich. 44, 117 NW 557.

N. J.—In re Frey, 73 N. J. Eq. 346, 67 A 192.

S. C.—Watson v. Mayrant, 18 S. C. Eq. 449.

59. Branham v. Com., 7 J. J. Marsh. (Ky.) 190; Drysdale's App., 14 Pa. 531; Hapgood v. Jennison, 2 Vt. 294.

60. Walker v. Walker's Devisees, 19 SW 183, 13 KyL 962; Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793; Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; Turk v. Hevener, 49 W. Va. 204, 38 SE 476.

[a] **Illustration.** — An executor who employs attorneys to defend a suit brought by a third person on an alleged contract of the testator is entitled to credit for the necessary traveling expenses of his attorneys, printing briefs on appeal, and witness' fees. Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

[b] **Services of detectives not allowed for.**—An administrator should not be allowed as "necessary expenses" the charges of detectives for collecting testimony for the defense of an action against the estate, where the administrator has been allowed the fees of attorneys in such action, and was himself a lawyer, and the testimony collected was never used. Matter of Van Buren, 19 Misc. 373, 44 NYS 357.

61. Ala.—Clark v. Guard, 73 Ala. 456; Henderson v. Simmons, 33 Ala. 291, 70 AmD 590; Green v. Fagan, 15 Ala. 335.

Conn.—Clement's App., 49 Conn. 519.

Del.—Davis v. Rawlins, 2 Del. 346.

Me.—Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793.

Mich.—Shouldice v. McLeod, 145 Mich. 708, 108 NW 1083.

N. J.—Polhemus v. Middleton, 37 N. J. Eq. 240.

N. Y.—Grout v. Carver, 15 Hun 361; McKee v. Lavery, 58 NYS 990.

Pa.—Ammon's App., 31 Pa. 311; In re Armstrong, 6 Watts 236; Donnelly's Est., 3 Phila. 18.

Ont. — Griffith v. Paterson, 20 Grant Ch. (U. C.) 615.

[§ 540] **(e) Procuring Direction of Court.** Executors and administrators may take the opinion of the court or procure its advice, aid, protection, or sanction at the expense of the estate, in cases where their rights and duties are left in reasonable doubt; and in similar proceedings commenced by others to which they are made parties their reasonable counsel fees and expenses will be allowed.[62] Nevertheless full reimbursement may be denied where a judicial direction is sought needlessly or in bad faith or with needless accumulation of expense.[63]

[§ 541] **(f) Miscellaneous Matters.** An executor or administrator is not entitled to credit in his account for counsel fees paid by him for services rendered in contesting a proper charge against him;[64] but he is entitled to credit for reasonable counsel fees and other expenses incurred in resisting improper charges,[65] opposition to his proper official acts,[66] attacks upon his accounts,[67] or, it has been held, an attempt to remove him.[68] The representative may be allowed for his counsel fees and costs in probate proceedings in the line of his duty,[69] an appeal justly taken,[70] continuing in good faith a suit begun by his decedent,[71] foreclosing a mortgage,[72] or enforcing notes or contracts running to himself for the benefit of the estate,[73] or in a suit properly brought by an administrator de bonis non for a settlement of the estate,[74] or criminal proceedings against an impostor or one personating an heir, when proper for the protection of the estate.[75] Expenses incurred in preparation for expected litigation will be allowed, although the dispute results in a compromise,[76] as will also the costs of setting aside a sale of decedent's real estate where a subsequent sale realizes more than the first.[77] Where an executrix's contention that the will gave her, as life tenant, the right to dispose of the principal as far as she deemed necessary for her support, has been sustained after litigation, she may charge her reasonable cost of the litigation against the principal.[78] Where the nominated executor in good faith appeals from an order of the court rejecting the will, it is proper for him to bring a suit in equity to prevent a threatened distribution of the estate by the administrator, and he is entitled to be reimbursed for the costs thereof, although he does not succeed on his appeal.[79] Reasonable and necessary traveling expenses of the attorney have also been allowed.[80] The representative should not be allowed for counsel fees and costs in proceedings undertaken merely to vindicate the good name of the decedent,[81] litigation with reference to real estate not in his charge,[82] resisting payment of a bill for reasonable funeral expenses,[83] or attempting to enforce a contract by which the widow agrees to take a child's share in lieu of dower, the contract having been set aside as fraudulent.[84] No allowance should be made for a payment merely as a retainer,[85] for attendance of counsel at sales of land by the executor when no necessity therefor is shown,[86] or for the services of an attorney in the management of the estate while the representative was enjoined from transacting the business of the estate,[87] or in procuring evidence in actions brought against the estate.[88] The expense incurred in a controversy between executors, one opposing the qualification of the others, is not a proper charge against the estate,[89] nor will a bill for attorney's services in endeavoring unsuccessfully to remove a coexecutor be allowed out of the estate.[90] Where an executor appeals from an order of the probate court making an allowance for the support of a widow, and brings error to an order dismissing the appeal, he is liable personally for the costs in both courts.[91] The counsel fees and expenses of an executor in attending a reference for distribution when there was a contest with the legatees have been disallowed.[92] An executor has been allowed credit for money expended in procuring the arrest, and conducting the prosecution, of a person who killed decedent,[93] although the weight of authority is against such an allowance.[94]

[§ 542] **(8) Amount of Allowance.** In order to entitle an executor or administrator to credit for counsel fees and other expenses of litigation, his

62. Ill.—Giger v. Bishop, 135 Ill. A. 448 [rev on other grounds 231 Ill. 472, 83 NE 289].
Mass. — Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.
N. J.—Baxter v. Baxter, 43 N. J. Eq. 82, 10 A 814 [aff 44 N. J. Eq. 298, 18 A 80].
N. Y.—Matter of Hutchinson, 84 Hun 563, 32 NYS 869; In re Washbon, 14 NYS 672; Irving v. De Kay, 9 Paige 521; Decker v. Miller, 2 Paige 142; Rogers v. Ross, 4 Johns. Ch. 608.
S. C.—De Leon v. Barrett, 22 S. C. 412; Bryson v. Nickols, 11 S. C. Eq. 113.
Wis.—Heiss v. Murphey, 43 Wis. 45.
[a] **Construction of will.**—Attorney's fees for services in obtaining a construction of the will may be allowed. Giger v. Bishop, 135 Ill. A. 448 [rev on other grounds 231 Ill. 472, 83 NE 289].

63. Baxter v. Baxter, 43 N. J. Eq. 82, 10 A 814 [aff 44 N. J. Eq. 298 mem, 18 A 80 mem]; Colson v. Martin, 62 N. C. 125.

64. Anderson v. Anderson, 37 Ala. 683; Jacoway v. Hall, 67 Ark. 340, 55 SW 12; Crawford v. Thomas, 54 SW 197, 21 KyL 1100.

65. Harris v. Parker, 41 Ala. 604; Leigh v. Lockwood, 15 N. C. 577; Atcheson v. Robertson, 25 S. C. Eq. 39.

66. Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Miller v. Simpson, 2 SW 171, 8 KyL 518.

67. Reed v. Reed, 80 Conn. 401, 68 A 849.

68. Noble v. Jackson, 124 Ala. 311, 26 S 955; Matter of Higgins, 80 Misc. 609, 142 NYS 1029; Matter of Boyer, 54 Misc. 182, 105 NYS 857; In re Jones, 24 NYWklyDig 333; Yeakel's Est., 13 Pa. Dist. 402, 30 Pa. Co. 282; In re Watkins, 2 Lack LegN (Pa.) 255.
[a] **Contrary view.**—In re Byrne, 122 Cal. 260, 54 P 957; Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

69. Williamson v. Mason, 23 Ala. 488; Warden v. Burts, 7 S. C. Eq. 73.
[a] **Matters not constituting ordinary probate proceedings** within meaning of statute allowing attorney's fees in such proceeding. In re Murphy, 171 Cal. 697, 154 P 839.

70. Ala.—Pearson v. Darrington, 32 Ala. 227.
Cal.—In re Snowball, 156 Cal. 235, 104 P 446.
Ill.—Leischner v. Kaiser, 156 Ill. A. 123.
Mont.—In re Davis, 33 Mont. 539, 89 P 1133.
N. H.—Marston v. Marston, 21 N. H. 491.

71. Clapp v. Coble, 21 N. C. 177.

72. In re Miner, 46 Cal. 564.

73. Brown v. Dortch, 12 Heisk. (Tenn.) 740; Abingdon v. Tyler, 6 Coldw. (Tenn.) 502.

74. Seibert v. Bloomfield, 63 SW 584, 23 KyL 646.

75. Gerald v. Bunkley, 17 Ala. 170.

76. In re Semple, 28 PittsbLegJ (Pa.) 431.

77. Ennis' Estate, 2 Del. Co. (Pa.) 498.

78. Reed v. Reed, 80 Conn. 401, 68 A 849.

79. Phillips v. Phillips, 7 KyL 679.

80. Moore's Est., 72 Cal. 335, 13 P 880.
Traveling expenses of representative see infra § 554.

81. Woodard v. Woodard, 36 S. C. 118, 15 SE 355, 16 LRA 743.

82. Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Reeves v. McMillan, 101 N. C. 479, 7 SE 906.

83. Matter of Huntley, 13 Misc. 375, 35 NYS 113, 25 NYCivProc 78.

84. Corbett v. Johnson, 6 KyL 596.

85. Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546; Pate v. Maples, (Tenn. Ch. A.) 43 SW 740.

86. McGregor's Est., 131 Pa. 359, 18 A 902.

87. Matter of O'Brien, 5 Misc. 136, 25 NYS 704 [aff 29 NYS 1147 (aff 145 N. Y. 379, 40 NE 18)].

88. Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546.

89. In re Millenovich, 5 Nev. 161.

90. Matter of Archer, 51 Misc. 260, 100 NYS 1095.

91. Koch v. Koch, 121 Mich. 667, 80 NW 641.

92. Heister's App., 7 Pa. 455.

93. Killebrew v. Murphy, 3 Heisk. (Tenn.) 546.

94. Lusk v. Anderson, 1 Metc. (Ky.) 426; Sparrow's Succ., 40 La. Ann. 484, 4 S 515; Anderson's Succ., 28 La. Ann. 335.

expenditures must be reasonable,[95] and what is a reasonable amount in any particular case is a matter resting within the discretion of the court,[96] which should not be governed absolutely by the opinion of professional men, the charge made by the counsel, or the contract of employment, but should exercise its own fair judgment and fix the amount allowable with reference to the labor, skill, and care required, the value of the estate, the advantages gained or sought by the services or litigation, and the good faith and reasonable prudence shown by the representative who claims the allowance.[97] Beyond this no general rule can be laid down, but reference is made in the notes to a number of illustrative cases in which particular amounts have been held reasonable,[98] inadequate,[99] or excessive.[1]

Where services are rendered for a contingent

95. Ala.—Holman v. Sims, 39 Ala. 709.

Cal.—In re Brignole, 133 Cal. 162, 65 P 294; Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479.

Colo.—Filbeck v. Davies, 8 Colo. A. 320, 46 P 214.

Ga.—Gairdner v. Tate, 110 Ga. 456, 35 SE 697.

Hawaii.—Long v. Holt, 18 Hawaii 290.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289; Dyer v. Hall, 201 Ill. A. 183.

Ind.—Scott v. Smith, 171 Ind. 453, 85 NE 774; Richey v. Cleet, 46 Ind. A. 326, 92 NE 175; Lupton v. Taylor, 39 Ind. A. 412, 78 NE 689, 79 NE 523.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332; In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 230; In re Sawyer, 124 Iowa 485, 100 NW 484.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Callender v. Callender, 82 SW 372, 26 KyL 705.

La.—Pons Succ., 142 La. 721, 77 S 515, AnnCas1918D 939; Porche v. Banks, 8 La. Ann. 65.

Mich.—In re McNamara, 154 Mich. 671, 118 NW 598.

Mo.—Langston v. Canterbury, 173 Mo. 122, 73 SW 151.

Mont.—State v. Jefferson County Fifth Judicial Dist. Ct., 53 Mont. 210, 162 P 1053.

N. Y.—Matter of Heinze, 99 Misc. 226, 165 NYS 712; Matter of Meng, 96 Misc. 126, 159 NYS 535; In re Nocton, 162 NYS 215; In re Lester, 158 NYS 763; In re Dunlop, 142 NYS 286; Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546.

Pa.—Holt's Est., 12 Pa. Dist. 205, 28 Pa. Co. 268; Sunderland's Est., 10 Pa. Dist. 358, 25 Pa. Co. 538; Mutchmore's Est., 9 Pa. Dist. 293, 24 Pa. Co. 257.

Porto Rico.—Vazquez v. Sosa, 16 Porto Rico 465.

Tex.—Jarvis v. Drew, (Civ. A.) 215 SW 970; Thompson v. Dodge, (Civ. A.) 210 SW 586.

Wash.—Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

Wis.—Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

[a] **The burden of proof** is upon the representative to show that the sum paid for the services and advice of counsel is reasonable and proper under all the circumstances of the case. In re Dalton, 183 Iowa 1013, 168 NW 332; Mutchmore's Est., 9 Pa. Dist. 293, 24 Pa. Co. 257.

[b] **Where an executor incurred unnecessary expenses** in the defense of a small claim, his allowance therefor will be limited to the taxable costs and disbursements. In re Wick, 53 Misc. 211, 104 NYS 717.

96. Cal.—In re Richmond, 9 Cal. A. 413, 99 P 558.

Ind.—Richey v. Cleet, 46 Ind. A. 326, 92 NE 175.

Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917.

Mich.—In re McNamara, 154 Mich. 671, 118 NW 598.

Mont.—In re Davis, 39 Mont. 433, 104 P 521.

[a] **The probate court has power to fix the amount** to be allowed an executor from the estate for attorney's fees. In re Kasson, 119 Cal. 489, 51 P 706.

[b] **The probate court is not bound by any contract** made between the administrator and his attorneys, unless it has been specifically authorized by the court, and before an administrator or his attorney can claim to be allowed for such services, under a contract, it must be shown that the contract was reasonable and just to the estate. Richey v. Cleet, 46 Ind. A. 326, 92 NE 175.

[c] **Discretion not disturbed on appeal unless abused.**—In re Davis, 39 Mont. 433, 104 P 521.

[d] **Extent of jurisdiction of probate court.**—The court of probate has sole and exclusive jurisdiction of the amount that shall be allowed to the executor or administrator for legal expenses from the funds of the estate, but has no jurisdiction of the question as to what the attorney shall receive from the executor or administrator for his services, but that depends solely on the agreement between the parties. In re Kruger, 143 Cal. 141, 76 P 891.

[e] **Where certain heirs had stipulated** that the expenses of an executor in attempting to probate decedent's will should be allowed out of the estate, whether the fees charged by the executor's attorneys were reasonable was a question for the court. In re McNamara, 154 Mich. 671, 118 NW 598.

[f] **Time for fixing amount.**—The amount to be allowed an executor for attorney's fees may be fixed by the court during the progress of the administration before settlement of the executor's account. In re Kasson, 119 Cal. 489, 51 P 706.

97. Ala.—Bendall v. Bendall, 24 Ala. 295.

Cal.—In re Kasson, 119 Cal. 489, 51 P 706; Freese v. Pennie, 110 Cal. 467, 42 P 978; Painter v. Painter, 78 Cal. 625, 21 P 433; In re Richmond, 9 Cal. A. 413, 99 P 558.

Ill.—In re Colton, 187 Ill. A. 558.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332; In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 230.

Ky.—Harding v. Harding, 132 Ky. 133, 116 SW 305.

La.—Percival's Succ., 138 La. 543, 70 S 505; Filhiol's Succ., 123 La. 497, 49 S 138; Henry's Succ., 45 La. Ann. 156, 12 S 365; Osborn's Succ., 40 La. Ann. 615, 4 S 580; Linton's Succ., 31 La. Ann. 130; Harris' Succ., 29 La. Ann. 743; Mager's Succ., 12 Rob. 413; Labatut v. Rogers, 6 Mart. 416; Morel v. Misotiere, 3 Mart. 363.

Miss.—Noel v. Harvey, 29 Miss. 72.

Mont.—In re Davis, 31 Mont. 421, 78 P 704.

N. Y.—Matter of Fraser, 165 App. Div. 441, 150 NYS 774; Matter of Hutchinson, 84 Hun 563, 32 NYS 869; Frith v. Campbell, 53 Barb. 325; Matter of Meng, 96 Misc. 126, 159 NYS 535; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of O'Neill, 28 Misc. 599, 59 NYS 1020; In re Meng, 188 App. Div. 69, 176 NYS 290 [rev on other grounds 227 N. Y. 264, 125 NE 508]; In re Babbitt, 148 NYS 621; Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546; Matter of White, 15 NYSt 729, 6 Dem. Surr. 375.

N. C.—Fairbairn v. Fisher, 58 N. C. 385.

Or.—Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—McGregor's Est., 131 Pa. 359, 18 A 902; St. Clair's App., 15 A 914; Walters' Est., 19 Pa. Dist. 293.

S. C.—In re Coleman, 106 S. C. 534, 91 SE 861.

Va.—Baker v. Baker, 87 Va. 180, 12 SE 346; Lindsay v. Howerton, 2 Hen. & M. (12 Va.) 9.

Wash.—Snook v. Kennedy, 103 Wash. 390, 174 P 643; In re Lichtenberg, 58 Wash. 585, 109 P 48; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

Eng.—Johnson v. Telford, 3 Russ. 477, 3 EngCh 477, 38 Reprint 654.

[a] **The value of the services is the sole test** without reference to the size of the estate. Becher's Est., 5 Pa. Co. 115.

[b] **Court fees.** — No allowance can be made to an administrator for court fees by way of expenses for the judges beyond the items fixed by statute. Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

98. Ark.—Pike v. Thomas, 65 Ark. 437, 47 SW 110.

D. C.—Howard v. Howard, 38 App. 575.

Ky.—Miller v. Keown, 176 Ky. 117, 195 SW 430; Evans v. McVey, 172 Ky. 1, 188 SW 1075; Baldwin v. Barber, 148 Ky. 370, 146 SW 1124; Harding v. Harding, 132 Ky. 133, 116 SW 305; Clarke v. Garrison, 79 SW 240, 25 KyL 1999; Clark v. Young, 74 SW 245, 24 KyL 2395.

La.—Delano's Succ., 125 La. 869, 51 S 1019.

Mo.—Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

Nebr.—In re Thiede, 102 Nebr. 747, 169 NW 435.

N. J.—In re Wiley, (Prerog.) 65 A 212; In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117]; Runkle v. Smith, (Ch.) 106 A 474.

N. Y.—Matter of Hosford, 62 App. Div. 626, 71 NYS 163; Gross v. Moore, 14 App. Div. 353, 43 NYS 945; In re Bielby, 91 Misc. 353, 155 NYS 133; Matter of Ogden, 41 Misc. 158, 83 NYS 977; Matter of O'Neill, 28 Misc. 599, 59 NYS 1020, 1 Mills Surr. 218; In re Babbitt, 148 NYS 621; In re Dunlop, 142 NYS 286.

Oh.—In re Wolfe, 7 OhS&CP 220, 4 OhNP 336.

Or.—Kirchoff v. Bernstein, 181 P 746; In re Osburn, 36 Or. 8, 58 P 521; Muldrick v. Galbraith, 31 Or. 86, 49 P 886.

Pa.—In re Eisenlohr, 258 Pa. 431, 102 A 115.

Wash.—In re Johnston, 181 P 209; In re Witt, 74 Wash. 172, 132 P 1012; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

99. Callender v. Callender, 82 SW 372, 26 KyL 705; Root v. Green, 81 SW 243, 26 KyL 315; Marx v. McMorran, 136 Mich. 406, 99 NW 396; In re Babbitt, 148 NYS 621.

1. U. S.—Wellman v. Bethea, 243 Fed. 222.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289.

Iowa.—In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 230; In re Sawyer, 124 Iowa 485, 100 NW 484.

Ky.—Miller v. Keown, 176 Ky. 117, 195 SW 430; Evans v. McVey, 172 Ky. 1, 188 SW 1075; Clarke v. Garrison, 79 SW 240, 25 KyL 1999; Clark v. Young, 74 SW 245, 24 KyL 2395.

Miss.—McLaughlin v. O'Byrne, 113 Miss. 335, 74 S 274.

Nebr.—In re Thiede, 102 Nebr. 747, 169 NW 435.

N. J.—In re Wiley, (Prerog.) 65 A 212.

N. Y.—Matter of Lester, 172 App.

fee, the allowance will be made more liberal because of that fact.[2]

The number of attorneys employed is not a determining factor in fixing the fee to be allowed,[3] and where more counsel than were necessary have been employed, the court may properly refuse to allow all the fees paid.[4]

A statute fixing the amount to be allowed merely fixes the maximum, and the representative is not entitled to the full amount permitted by the statute where the actual fees incurred and paid are less.[5]

Apportionment of fees. On an issue as to the amount allowable to an administrator out of trust funds for the payment of attorney's fees, the court was not required to pass on the merits of the respective claims of the attorneys for services, nor to apportion the amount awarded.[6]

Fees retained by attorney from amount collected by him. In a case where an executor employed a firm of attorneys in another state to procure funds of the decedent on deposit in that state, and the attorneys, after securing the funds, remitted the same to the executor less an excessive charge for their services, and the executor sought to recover a part of such charge from the attorneys, but was unsuccessful, mainly because of the pecuniary irresponsibility of the attorneys, it was held that the executor was entitled to credit for the entire fee.[7]

[§ 543] **(9) When Allowance Refused—(a) In General.** The representative will not be allowed credit where the services were not for the benefit of the estate,[8] where the advice of counsel was taken and inexcusably disregarded,[9] where the representative exceeded his powers in acting in reference to the matter as to which the fees are claimed,[10] or where the charges paid or incurred by the personal representative were illegal or grossly excessive.[11] So also an allowance of credit may properly be refused where the litigation was improper,[12] unnecessary,[13] or unnecessarily protracted,[14] where a proceeding instituted by the representative has been allowed to fail for lack of reasonable diligence in prosecuting it[15] or has been

Div. 509, 158 NYS 763; Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538, 69 NE 1129]; Frith v. Campbell, 53 Barb. 325; Matter of O'Neill, 28 Misc. 599, 59 NYS 1020, 1 Mills Surr. 218; Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546.

N. C.—Fairbairn v. Fisher, 58 N. C. 385.

Pa.—In re Eisenlohr, 258 Pa. 431, 102 A 115; McGregor's Est., 131 Pa. 359, 18 A 902; Kline's Est., 49 Pa. Super. 122; Powell's Est., 16 Pa. Dist. 544; Becher's Est., 5 Pa. Co. 115.

Wash.—In re Johnston, 181 P 209.

Wis. — Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

2. In re Ullman, 31 Oh. Cir. Ct. 370; In re Shoenberger, 211 Pa. 99, 60 A 502.

[a] **Illustration.**—A decree of the orphans' court awarding half of the fund raised by the sale of real estate to an attorney, where the real estate was recovered by the efforts of the attorney under a contract with the administrator for half the proceeds as a contingent fee, will not be disturbed. In re Shoenberger, 211 Pa. 99, 60 A 502.

3. Miller v. Keown, 176 Ky. 117, 195 SW 430.

4. Cal.—In re Byrne, 122 Cal. 260, 54 P 957.

La.—Gayle's Succ., 27 La. Ann. 547; Porche v. Banks' Creditors, 8 La. Ann. 65.

Md.—Ward v. Koenig, 106 Md. 433, 67 A 236.

Miss.—Crowder v. Shackelford, 35 Miss. 321.

Mont.—In re Davis, 33 Mont. 539, 89 P 1133.

N. Y.—Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546.

Or.—Muldrick v. Galbraith, 31 Or. 86, 49 P 886.

Pa.—In re Kalbfell, 30 PittsbLegJ 325.

[a] **Where an administrator had been allowed a retainer** for counsel to protect the estate and the exigency presented was not such as to require additional counsel it was error to allow anything further in this behalf. In re Davis, 33 Mont. 539, 89 P 1133.

5. In re Goodrich, 6 Cal. A. 730, 93 P 121.

6. In re Davis, 39 Mont. 433, 104 P 521.

7. In re Slater, 88 N. J. Eq. 296, 302, 102 A 384 ("As those attorneys deducted their fees and thus rendered the payment by the executor involuntary, this surcharge by the orphans' court was necessarily based on the negligence of the executor. That negligence, if it existed, consisted in the want of care on the part of the executor in the selection of the Baltimore attorneys and the failure to contract in advance touching their charges. . . . They were licensed attorneys regularly engaged in the practice of law in Baltimore and as such were represented to the public as worthy of its confidence, and as practicing attorneys they were necessarily amenable to the courts of Maryland for their professional conduct. There is no evidence of bad faith in their employment, nor was their fee shared or agreed to be shared with either the executor or his New Jersey proctor. The failure of the executor to make inquiries touching their integrity or responsibility was an honest error of judgment in so far as it was error. Nor is it doubted that an honest effort has since been made by the executor to recover from these attorneys the amount of their excessive charge. In these circumstances I am unable to believe that the loss can be properly charged to the executor").

8. Cal.—In re Higgins, 158 Cal. 355, 111 P 8.

Hawaii.—Matter of Kamaipiialii, 19 Hawaii 163.

Ill.—Felsenthal v. Kline, 214 Ill. 121, 73 NE 428.

Ind.—Cullen v. State, 28 Ind. A. 335, 62 NE 759.

La.—Renshaw v. Stafford, 34 La. Ann. 1138.

Mo.—In re Whitelow, 184 Mo. A. 229, 167 SW 463.

Mont.—In re Davis, 31 Mont. 421, 78 P 704.

Nev.—McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615.

N. J.—In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

N. Y.—Northup v. Northup, 92 App. Div. 5, 87 NYS 318; Matter of Welling, 51 App. Div. 355, 64 NYS 1025, 53 App. Div. 639, 65 NYS 1060; Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546; Hasler v. Hasler, 1 Bradf. Sur. 248.

Pa.—Stout's Est., 16 Montg. Co. 193.

Can.—O'Sullivan v. Harty, 11 Can. S. C. 322.

[a] **Illustration.**—Where the validity of a codicil to testator's will, which seriously altered the estate the widow would take under the will, was the subject of litigation, the estate was not interested in resisting an application by the widow in another state for an extension of time within which she might elect between the acceptance of the devise under the will in lieu of dower in lands located in such state, so as to entitle the executor to attorney's fees in resisting the application. In re Flaacke, (N. J. Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

9. Munden v. Bailey, 70 Ala. 63.

10. In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613].

11. Fla.—Sherrell v. Shepard, 19 Fla. 300.

Ill.—Sprinkle v. Forrester, 162 Ill. A. 45.

Iowa.—In re Sawyer, 124 Iowa 485, 100 NW 484.

N. Y.—Matter of Gates, 2 Redf. Surr. 144.

Pa.—Ehrhart's Est., 17 YorkLegRec 137.

[a] **Ordering attorney to refund.**—The probate court, on a hearing in the matter of an estate and guardianship, has no jurisdiction to peremptorily order an attorney to refund money received from the executrix and guardian in payment of attorney's fees in excess of what the court considers reasonable for the services performed, since the attorney has a right to be heard with reference thereto. Tomsky v. San Francisco Super. Ct., 131 Cal. 620, 63 P 1020.

Amount of allowance see supra § 542.

12. Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440.

Ga.—Davison v. Sibley, 140 Ga. 707, 79 SE 855.

Mich.—Clifton v. Keeler, 158 Mich. 615, 123 NW 22.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953.

Pa.—In re Bergdoll, 11 Pa. Dist. 702.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

13. Cal.—In re Higgins, 158 Cal. 355, 111 P 8; In re Snowball, 156 Cal. 235, 104 P 446.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672.

Md.—Sonneborn v. Hutzler, 107 A 251.

Mich.—In re Koch, 121 Mich. 667, 80 NW 641.

Mont.—State v. Jefferson County Fifth Judicial Dist. Ct., 53 Mont. 210, 162 P 1053.

N. J.—In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

N. Y.—In re Stevens, 3 Silv. Sup. 305, 6 NYS 638; Matter of Gillroy, 53 Misc. 243, 104 NYS 716; In re Dunlop, 142 NYS 286.

Pa.—McGregor's Est., 131 Pa. 359, 18 A 902.

Tenn.—Sutton v. Sutton, (Ch. A.) 58 SW 891.

14. Phillips v. Phillips, 7 KyL 679.

15. Clark v. Guard, 73 Ala. 456.

abandoned without good reason,[16] where the action should not have been brought by the representative in his fiduciary capacity,[17] where the representative's contentions were groundless,[18] or where it was understood that the fees and costs would be paid elsewhere and not by the estate.[19] A charge for an attorney's services in attempting to rectify his own neglect in failing to interpose a proper plea has been disallowed.[20] A claim by an administrator for expenses incurred in collecting a claim due the estate must be rejected, in the absence of a showing that the services were extraordinary,[21] and an administrator cannot charge the estate with expenses incurred in advising with counsel with respect to interests and demands antagonistic to the claims of the heirs, when he knows that such counsel is representing the antagonistic interests.[22] Where an executor made no effort to open an assessment of collateral inheritance taxes in another state until the time for appealing therefrom had elapsed, when he made such application in order to discharge himself from liability, the estate was not chargeable with his attorney's fees in that behalf.[23] Where an administratrix so conducted the estate as to justify disallowing any claim by her for commissions, it was improper to allow her counsel fees.[24]

[§ 544] **(b) Litigation Caused by Representative's Fault or Misconduct.** An executor or administrator is not entitled to any allowance or credit for his fees, costs, or other expenses in a litigation made necessary by his own negligence, misconduct, or maladministration,[25] but negligence which did not cause the litigation will not prevent the allowance of sums paid as counsel fees.[26]

[§ 545] **(c) Litigation for Benefit of Particular Persons.** The costs, fees, and expenses attending a litigation for the benefit of particular heirs, legatees, next of kin, or other persons, should be allowed, if at all, as against their own particular funds or interests, proportionately or wholly, as the case may be, rather than out of the general estate;[27] and a fortiori an executor or administrator who expends money for attorney's fees or costs for

16. In re Pease, 149 Cal. 167, 85 P 149.

17. Thompson v. Thompson, 65 SW 457, 23 KyL 1535.

18. Ala.—Bendall v. Bendall, 24 Ala. 295.

Kan.—Whitford v. Horn, 18 Kan. 455.

Miss.—Williamson v. Childress, 26 Miss. 328.

N. Y.—Hosack v. Rogers, 9 Paige 461.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

[a] **Advice of counsel.**—Where an executor conducts fruitless suits, he will not be allowed the expense thereof, although they were brought under advice of counsel. Matter of Stanton, 41 Misc. 278, 84 NYS 46, 4 Mills Surr. 31.

19. In re Stephens, 2 NYS 36 [rev on other grounds 113 N. Y. 547, 21 NE 687].

20. In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117]; Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546.

21. Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672.

22. In re Davis, 31 Mont. 421, 78 P 704.

23. In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

24. In re Frey, 73 N. J. Eq. 346, 67 A 192.

25. Ala.—Morrow v. Allison, 39 Ala. 70; Pearson v. Darrington, 32 Ala. 227; Green v. Fagan, 15 Ala. 335.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

Cal.—Stuttmeister's Est., 75 Cal. 346, 17 P 223; In re Holbert, 48 Cal. 627.

Ga.—Ross v. Battle, 113 Ga. 742, 39 SE 287; Lilly v. Griffin, 71 Ga. 535.

Ill.—Switzer v. Kee, 69 Ill. A. 499.

Mo.—Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406.

N. J.—Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; Post v. Stevens, 13 N. J. Eq. 293.

N. Y.—Matter of Van de Veer, 63 App. Div. 495, 71 NYS 849; Matter of Swart, 2 Silv. Sup. 585, 6 NYS 608; Matter of Baker, 27 Misc. 126, 57 NYS 398; Matter of O'Brien, 5 Misc. 136, 25 NYS 704.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953; Stonestreet v. Frost, 123 N. C. 640, 31 SE 836; Johnson v. Marcom, 121 N. C. 83, 28 SE 58.

Pa.—Sterrett's App., 2 Penr. & W. 419; Koehler's Est., 8 Kulp 529; McNeile's Est., 20 Pa. Dist. 791; Johnston's Est., 29 Pa. Co. 430; Hoffman's Est., 21 Pa. Co. 203; In re Shuck, 13 PittsbLegJNS 431; In re Brenneman, 14 YorkLegRec 14.

S. C.—Thomson v. Palmer, 24 S. C. Eq. 139.

W. Va.—Cranmer v. McSwords, 26 W. Va. 412.

Wis.—Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

Can.—O'Sullivan v. Harty, 11 Can. S. C. 322.

Ont.—Kennedy v. Pingle, 27 Grant Ch. (U. C.) 305; McGill v. Courtice, 17 Grant Ch. (U. C.) 271; Ashbough v. Ashbough, 10 Grant Ch. (U. C.) 433.

"But while such an allowance will be made, it must be remembered that it is always based upon the prudence and good faith of the trustee. Therefore, the credit will not be given if litigation has been improperly instituted by him or was the result or consequence of his neglect or improper conduct, benefit to the estate being generally necessary to charge the estate with an expenditure of this character." Kelly v. Odum, 139 N. C. 278, 280, 51 SE 953.

[a] **Illustrations.**—(1) When an administrator makes use of moneys belonging to the estate for his own purposes, and keeps meager and inaccurate accounts, thereby involving the estate in litigation, the estate will not be charged with payment of his counsel fees incurred in such litigation. Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643. (2) Neither is an administrator entitled to an allowance for attorney's fees expended by him in resisting proper charges against him (Jacoway v. Hall, 67 Ark. 340, 55 SW 12), or (3) defending an action by the distributees against him to recover what belonged to them (Stonestreet v. Frost, 123 N. C. 640, 31 SE 836), or (4) for money paid for legal advice as to restoration of money improperly lent by him (Matter of Moore, 69 Misc. 535, 127 NYS 884). (5) So also an administrator will not be allowed attorney's fees incurred in a suit to charge his decedent's land with the payment of a judgment obtained in favor of the administrator's father against the estate, where the administrator had made no defense to the suit in which the judgment was obtained, and such judgment was attacked and defeated on the ground of collusion or connivance in the suit in which the attorney's services were rendered. Kelly v. Odum, 139 N. C. 278, 51 SE 953. (6) Where an administrator presented an account against the estate, seventy-five per cent of the amount of which was dishonest, and he, with knowledge of the facts, insisted on its allowance and caused expensive litigation, which would have been avoided had he acted with reasonable prudence and in good faith, the court, in its discretion, should not allow him for the expenses incurred in the litigation. Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

26. Forward v. Forward, 6 Allen (Mass.) 494.

27. Ala.—Johnson v. Holifield, 82 Ala. 123, 2 S 753; Hicks v. Barrett, 40 Ala. 291.

Cal.—In re Ross, 182 P 303; In re Friedman, 176 Cal. 226, 168 P 21; Jessup's Est., 80 Cal. 625, 22 P 260.

Ill.—Shaw v. Moderwell, 104 Ill. 64.

Ind.—Nation v. Green, 123 NE 163.

Iowa.—In re Colburn, 173 NW 35.

Ky.—Hart v. Hart, 2 Bibb 609.

Mo.—In re Whitlow, 184 Mo. A. 229, 167 SW 463.

N. J.—Runkle v. Smith, (Ch.) 106 A 474; Kingsland v. Scudder, 36 N. J. Eq. 284.

N. Y.—Northup v. Northup, 92 App. Div. 5, 87 NYS 318; Platt v. Moore, 1 Dem. Surr. 191.

N. C.—Harrell v. Davenport, 58 N. C. 4.

Pa.—In re Arnold, 252 Pa. 298, 97 A 415; McGregor's Est., 131 Pa. 359, 18 A 902.

[a] **Illustration.**—An executor is not entitled to credit for expenditures for attorney's fees or costs in a suit to set aside a deed of testator, prosecuted, not in behalf of the estate, but by, and in behalf of, testator's heirs, for their personal benefit. Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406.

[b] **Where heirs of an intestate joined in a suit to remove a cloud** from the title to their property, expenses incurred in such litigation, although it was successful, did not constitute a proper charge against the estate. In re Heeney, 3 Cal. A. 548, 86 P 842.

[c] **Action by surviving partners.**—Where the judgment, in an action by the surviving partners of a firm of which decedent was a member, made the costs payable out of partnership assets left in the hands of the surviving partners, after deducting therefrom sums payable to decedent's estate, a payment by decedent's executors of a part of the costs will be disallowed on a judicial settlement of their accounts, since such costs were to be borne by those who had the legal ownership of such assets, and the executors had but the right to an account from the surviving partners and to a payment of such sums as should appear due the

the benefit of persons whose interests are antagonistic to the estate is not entitled to recover against the estate for such advances.[28]

[§ 546] **(d) Personal Benefit of Representative.** An executor or administrator cannot be allowed, as against the estate, the costs and expenses of litigation or the employment of counsel for his own individual benefit.[29] Such is the rule where the fiduciary has a special interest as legatee, devisee, heir, or distributee, to protect which he contests against others,[30] and to some extent the same rule applies to the asserting of his personal claims in the probate court for allowance against the estate, where he was reasonably opposed by others and failed of success.[31] So also the expense incurred by an executor in a suit against him for the recovery of real estate in his possession in his capacity as an individual is not an expenditure required by him as executor, and the estate is not liable therefor,[32] and where an administrator paid claims against his intestate's estate and took assignments thereof in the name of another for his benefit, but it did not appear that the administrator's private funds were used for such purpose, the estate was not interested in the classification of such claims, and hence the cost of litigation carried on by the administrator with reference to such classification, apparently in his individual interest, should be paid by him personally, and not from the funds of the estate.[33] Neither can a decedent's estate be charged with the expenses of the executor in the employment of counsel to oppose a motion by the executrix to compel him to deliver to her personal property of the estate in his hands on which he claimed commissions.[34] But the mere fact that an executor or administrator is beneficially interested in the estate is not sufficient to defeat his right to an allowance for expenses incurred in defending against claims asserted against the estate.[35] Apportionment of such costs and expenses as between representative

estate on such account. Matter of Harris, 61 Misc. 563, 116 NYS 270.

28. McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615.

29. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450.

Conn.—Reed v. Reed, 80 Conn. 401, 68 A 849.

Ill.—Felsenthal v. Kline, 214 Ill. 121, 73 NE 428.

Iowa.—Dorris v. Miller, 105 Iowa 564, 75 NW 482.

Ky.—Trible v. Ellison, 1 Ky. Op. 59.

Mo.—In re Whitlow, 184 Mo. A. 229, 167 SW 463.

Mont.—In re Williams, 173 P 790.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615.

N. J.—In re Walsh, 74 A 563; In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

N. Y.—Matter of Whitney, 75 Misc. 610, 136 NYS 633; In re Dunlop, 142 NYS 286.

Oh.—In re McAlpin, 8 OhS&CP 654.

Pa.—In re Eisenlohr, 258 Pa. 431, 102 A 115; In re Arnold, 252 Pa. 298, 97 A 415; Johnson's Est., 13 Pa. Dist. 29, 29 Pa. Co. 430.

Philippine.—Sy Chung-Quiong v. Sy-Tiong Tay Cuansi, 10 Philippine 141.

R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

Tenn.—Cate v. Cate, (Ch. A.) 43 SW 365.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234; Dyess v. Rowe, (Civ. A.) 177 SW 523.

N. B.—In re Anning, 34 N. B. 308.

[a] **The representative is not entitled to an allowance** (1) from the estate for the services of an attorney in advising him as to his charges for administering (In re McAlpin, 8 OhS&CP 654), (2) in litigation with respect to his compensation (Bell v. Goss, (Tex. Civ. A.) 76 SW 315), or (3) in an unsuccessful attempt to retain ancillary administration, where false statements were made in the application therefor (Dorris v. Miller, 105 Iowa 564, 75 NW 482), (4) An allowance has also been refused for the costs of a suit by him to determine the right to administer (Cate v. Cate, (Tenn. Ch. A.) 43 SW 365), or (5) for the expense of a suit brought, not against the estate, but against him individually (Ex p. Allen, 89 Ill. 474). (6) So also an administrator is not entitled to an allowance for attorney's fees expended by him in resisting proper charges against him. Crawford v. Thomas, 114 Ky. 197, 484, 54 SW 197, 55 SW 12, 21 KyL 1100, 1178, 1382. (7) In so far as the fees of attorneys employed by an administrator were for services rendered in resisting the surcharging of a settlement made by him, and in resisting an effort made to charge him, as heir, with a certain sum as an advancement, the estate cannot be charged therewith, the services being for the administrator's benefit. Caldwell v. Hampton, 53 SW 14, 21 KyL 793.

30. Ala.—Mims v. Mims, 39 Ala. 716; Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.

Cal.—Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; Marrey's Est., 65 Cal. 287, 3 P 896; In re Stott, Myr. Prob. 168; In re Chinmark, Myr. Prob. 128.

Ill.—Wilkinson v. Ward, 42 Ill. A. 541.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.

Ky.—Caldwell v. Hampton, 53 SW 14, 21 KyL 793; Wakefield v. Gilliland, 18 SW 768, 13 KyL 845; Wood v. Goff, 7 Bush 59.

Minn.—In re Glynn, 57 Minn. 21, 58 NW 684.

Mo.—Hughes v. Hughes, 8 Mo. 38.

N. Y.—Matter of Ordway, 131 App. Div. 339, 115 NYS 817 [mod on other grounds 196 N. Y. 95, 89 NE 474]; Gross v. Moore, 14 App. Div. 353, 43 NYS 945; Matter of Pond, 42 Misc. 165, 85 NYS 1080.

N. C.—Ralston v. Telfair, 22 N. C. 414.

Oh.—Weir v. Weir, 28 Oh. Cir. Ct. 199.

Pa.—Wither's App., 13 Pa. 582.

S. C.—Pell v. Ball, 17 S. C. Eq. 48; Wham v. Love, 14 S. C. Eq. 51.

Tenn.—German v. German, 7 Coldw. 180.

Wash.—In re Lotzgesell, 62 Wash. 352, 113 P 1105; Wilbur v. Wilbur, 17 Wash. 683, 50 P 589.

"To hold otherwise would simply be to enable him by reason of his position as executor to subject the whole estate to such expenses as were incurred by him in litigation defended by him for his own sole benefit as a devisee and legatee under the assailed will. It cannot properly be held, that it was necessary for him as executor to defend such litigation. While he undoubtedly had the legal right under our statute to defend the will in his capacity as executor (Code Civ. Proc. §§ 1299, 1312; In re Hite, 155 Cal. 448, 101 P 448), if such defense was solely for his own benefit as a devisee and legatee and could not operate beneficially as to any other person interested in the estate, he must bear the costs and charges of maintaining it. The general reasoning in support of our conclusion has been so recently stated in Hite's Est., supra, that it is unnecessary to discuss the question further. If there be anything in In re Riviere, 8 Cal. A. 773, 98 P 46, that is in conflict with what is said in Hite's Est., supra, the latter case must of course control. But, as we understand Estate of Riviere, supra, the point decided by the learned District Court of Appeal was simply that an attorney's fee may, under some circumstances, be allowed an executor for service rendered by attorneys employed by him in resisting a contest before probate, where the contest is unsuccessful, and the will is finally admitted to probate. This we are not disposed to dispute. The circumstances may well be such as to make such an allowance entirely equitable as to all persons interested in the estate. But if expressions in that case can reasonably be construed as going further than this, they cannot be considered as authority." In re Higgins, 158 Cal. 355, 358, 111 P 8.

[a] **Illustration.**—The court will not allow an executor his expenses incurred in defending a will where it appears that he is a legatee thereunder and that the special bequest to him is the one inviting the attack. Weir v. Weir, 28 Oh. Cir. Ct. 199.

31. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450.

Conn.—Clement's App., 49 Conn. 519.

Md.—Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Billingslea v. Henry, 20 Md. 282.

N. J.—In re Walsh, 74 A 563.

N. Y.—Shakespeare v. Markham, 72 N. Y. 400.

Pa.—Fox's App., 125 Pa. 518, 17 A 451; Geiger's App., 16 A 851; Stephens' App., 56 Pa. 409.

S. C.—Garrett v. Garrett, 21 S. C. Eq. 272; Villard v. Robert, 21 S. C. Eq. 40, 49 AmD 654.

Tenn.—German v. German, 7 Coldw. 180.

[a] **Illustration.**—While a fair allowance should be made for services rendered to an executrix by a proctor, she would not be entitled to compensation for such services rendered in a suit against her to set aside transfers of property by her which she unsuccessfully defended, on the ground that testatrix had transferred such property to her for a sufficient consideration, or for such services rendered upon her final accounting to procure for her an allowance for the proceeds of such property. In re Walsh, (N. J.) 74 A 563.

32. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

33. Felsenthal v. Kline, 214 Ill. 121, 73 NE 428.

34. Matter of Whitney, 75 Misc. 610, 136 NYS 633.

35. In re Groff, 215 Pa. 586, 64 A 783; Rowe v. Dyess, (Tex. Commn. A.) 213 SW 234; Opitz v. Karel, 118 Wis. 527, 95 NW 948, 99 AmSR 1004, 62 LRA 982.

[a] **Illustrations**—(1) Where ex-

and estate may, however, be sometimes proper,[36] as where a matter in litigation concerns the representative both personally and officially.[37]

[§ 547] **(e) Services of Representative as Attorney.** In many jurisdictions the view prevails that an executor or administrator cannot be allowed credit for his services to the estate as an attorney,[38] or even for attorney's fees incurred by him and paid to a firm of lawyers of which he is a member where his membership entitles him to a share in such fees;[39] but in other jurisdictions an executor or administrator who performs legal services for the estate is held entitled to an allowance therefor by way of extra compensation.[40]

ecutors resist litigation against the estate, and have reasonable grounds for believing the litigation unjust, they will be allowed counsel fees and costs, although they may be entitled to a remainder in the estate after the termination of a life interest. In re Groff, 215 Pa. 586, 64 A 783. (2) In an action by the alleged donee of a life insurance policy against the administrator of the assured, who was named as beneficiary in the policy, in which there was nothing to show that defendant was guilty of any misconduct in claiming the benefits of the policy and defending the action, he was not chargeable with the costs and disbursements personally, but they should be paid out of the estate. Opitz v. Karel, 118 Wis. 527, 95 NW 948, 99 AmSR 1004, 62 LRA 982.

36. Conn.—Clement's App., 49 Conn. 519.

Ill.—Phillips v. Duckett, 112 Ill. A. 587.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.

Ky.—Nelson v. Bush, 9 Dana 104.

N. Y.—In re Ordway, 196 N. Y. 95, 89 NE 474 [rev 131 App. Div. 339, 115 NYS 817].

Pa.—Reeser's App., 100 Pa. 79.

Tex.—Rowe v. Dyess, (Commn. A.) 213 SW 234.

[a] **Illustration.**—Where a suit was defended by an administratrix, individually and as administratrix, and the funds of the estate would not be affected by the outcome of the suit, which would only determine whether the estate would go to plaintiff in the suit or to the administratrix, or what proportion of it should go to each, the expenses incurred by the administratrix in the suit in employing counsel to defend the suit was a charge against the estate up to the time when by due diligence it was, or should have been, ascertained that the interest of the estate called for no further protection, but all liability incurred after that is against her personally, and not as administratrix. In re Ordway, 196 N. Y. 95, 89 NE 474 [rev 131 App. Div. 339, 115 NYS 817].

[b] **Where litigation largely results from personal claims** advanced by an executor which are not sustained, it is proper to require such executor personally to pay a portion of the costs of such litigation. Phillips v. Duckett, 112 Ill. A. 587.

[c] **Attempt to uphold will.**—Where an executor who is also a beneficiary under the will employs counsel to uphold the will against a contest in which the will is set aside, it is proper for the court to apportion such counsel fees as between such person in his individual capacity and as executor. Bruning v. Golden, 159 Ind. 199, 64 NE 657; Roll v. Mason, 9 Ind. A. 651, 37 NE 298.

37. Roll v. Mason, 9 Ind. A. 651, 37 NE 298; McClellen v. Hetherington, 31 S. C. Eq. 202, 73 AmD 89.

[a] **Establishing will under which executor beneficiary.**—An executor who was both devisee and legatee under the will, who incurred counsel fees in establishing the will, which was contested, is not entitled to exoneration for payment to his counsel of that part of the fee which is proportionate to the value of the estate devised and bequeathed to him, but the burden should fall upon all the legatees rateably to the value of their shares. McClellen v. Hetherington, 31 S. C. Eq. 202, 73 AmD 89.

38. Cal.—In re Carr, 175 Cal. 387, 165 P 958; In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965.

Colo.—Doss v. Stevens, 13 Colo. A. 535, 59 P 67.

Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; Hough v. Harvey, 71 Ill. 72; Willard v. Bassett, 27 Ill. 37, 79 AmD 393; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228].

Ind.—Taylor v. Wright, 93 Ind. 121.

Ky.—Slusher v. Weller, 151 Ky. 203, 151 SW 684; Sims v. Birdsong, 59 SW 749, 22 KyL 1049.

N. J.—Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577; In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

Utah.—In re Evans, 22 Utah 366, 62 P 913, 93 AmSR 794, 53 LRA 952.

Wash.—Noble v. Whitten, 38 Wash. 262, 80 P 451; In re Young, 4 Wash. 534, 30 P 643.

Eng.—Burge v. Brutton, 2 Hare 373, 24 EngCh 373, 67 Reprint 153.

[a] **Costs not payable out of estate.**—The rule does not apply to costs which are not payable out of the estate. Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577. To same effect Campbell v. Purdy, 5 Redf. Surr. (N. Y.) 434.

39. Taylor v. Wright, 93 Ind. 121; Burge v. Brutton, 2 Hare 373, 24 EngCh 373, 67 Reprint 153. See also Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 33 NYS 676, and aff 9 Misc. 298, 30 NYS 267] (so holding prior to statute authorizing allowance).

[a] **Employment of copartner as individual.**—An executor may employ his partner as an individual to do work for him in matters relating to the estate, and services rendered pursuant to such employment give the partner a right to payment, and render the executor liable, with the right of reimbursement from the estate, if he is excluded from all participation in the compensation. Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 33 NYS 676, and aff 9 Misc. 298, 30 NYS 267].

40. Ala.—John v. Pickett, 148 Ala. 665, 41 S 638; John v. Sharp, 148 Ala. 665, 41 S 635; Alexander v. Bates, 127 Ala. 328, 28 S 415; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Munden v. Bailey, 70 Ala. 63; Teague v. Corbitt, 57 Ala. 529; Ditmar v. Bogle, 53 Ala. 169; Morgan v. Nelson, 43 Ala. 586; Harris v. Martin, 9 Ala. 895.

Kan.—Nelson v. Schoonover, 89 Kan. 779, 132 P 1183, AnnCas1915A 147.

La.—Pizzati's Succ., 141 La. 645, 75 S 498. Contra Lile's Succ., 24 La. Ann. 490; Key's Succ., 5 La. Ann. 567; Baldwin v. Carleton, 15 La. 394.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

Mich.—Wisner v. Mapley, 74 Mich. 143, 41 NW 835.

Nebr.—In re Wilson, 83 Nebr. 252, 119 NW 522.

Oh.—Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

Pa.—Winsel's Est., 19 Pa. Dist. 659.

Tenn.—Fulton v. Davidson, 3 Heisk. 614 [foll Lovewill v. Schoolfield, 217 Fed. 689, 133 CCA 449; crit and lim State v. Butler, 15 Lea 104].

Wis.—Sloan v. Duffy, 117 Wis. 480, 94 NW 342.

"It is the opinion of a majority of the members of the court that where an administrator, being an attorney at law, finding it necessary to institute a suit in behalf of the estate, associates another attorney with him, and they—himself and such other attorney—jointly render professional services to the estate in the institution and prosecution of such suit, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services." John v. Sharp, 148 Ala. 665, 41 S 635, 636.

[a] **Where the court has a discretion in fixing the compensation** of an executor or administrator "the fact that he has saved the estate the expense of the employment of an attorney is one of the matters fairly to be taken into consideration." Nelson v. Schoonover, 89 Kan. 779, 782, 783, 132 P 1183, AnnCas1915A 147 (where the court said, however: "An executor cannot in effect employ himself as a lawyer and as a matter of right recover the value of the legal services rendered").

[b] **In New York** (1) it was formerly held that personal representatives were not entitled to compensations for legal services in connection with the administration of the estate. Lent v. Howard, 89 N. Y. 169; Collier v. Munn, 41 N. Y. 143, 7 AbbPrNS 193 [aff Tuck. Surr. 136]; Matter of Wallach, 164 App. Div. 600, 150 NYS 203 [aff 215 N. Y. 622 mem, 109 NE 1094 mem]; Bushby v. Berkeley, 153 App. Div. 742, 138 NYS 831; In re Merrill, 151 App. Div. 785, 136 NYS 884; Young v. Barker, 141 App. Div. 801, 127 NYS 211; Matter of Gilroy, 53 Misc. 243, 104 NYS 716; Matter of Howard, 3 Misc. 170, 23 NYS 836; Matter of Reed, 12 NYSt 139; Valentine's Est., 9 AbbNCas 313; Campbell v. Mackie, 1 Dem. Surr. 185; Campbell v. Purdy, 5 Redf. Surr. 434. (2) But under the statute now in force (Code Civ. Pro. § 2753, as amended by L. [1914] c 443) the surrogate is required to allow executors, who are attorneys, reasonable fees for legal services. Matter of Daly, 180 App. Div. 307, 167 NYS 229 [mod 99 Misc. 203, 165 NYS 792]. (3) This statute is not retroactive and does not allow compensation for services rendered prior to the time when they took effect. Matter of Daly, supra. (4) Where an administrator contracted with decedent's widow to render services as an attorney in resisting claims against an estate, but performed no service, except as administrator, and he employed other attorneys to conduct the litigation, and they were allowed fees from the estate, he is not entitled to compensation as attorney. In re Lyons, 173 NYS 590.

[c] **Distinction between acting as counsel and conducting litigation.**—If an executor prefers to act as his own counsel, he cannot charge the estate therefor and receive compensation for professional services in the nature of advice; but if an executor, who is an attorney, institutes or defends suits or other legal proceedings for the protection and benefit of the estate, these services, not being required of him as executor or administrator, or within the line of his duty as such, he is entitled to compensation therefor. McCloskey's Est., 11 Phila. (Pa.) 95. To like effect In re Mumma, 6 AmLReg (Pa.) 489.

[d] **Amount of allowance.**—The representative should be deemed entitled, not to the usual professional charges as a specific sum, but to a fair and reasonable allowance for his own services. Clark v. Knox, 70 Ala.

[§ 548] **(f) Services Which Representative Should Perform.** An executor or administrator is not entitled to devolve his own fiduciary duties upon an attorney engaged at the cost of the estate; or to claim allowance from the estate for extravagant counsel hire, or for his payments made to others for doing work of the estate which did not require professional or expert skill, but was within his own general province as personal representative, and might fairly be compensated for by the usual allowance to a fiduciary.[41] But on the other hand the fact that the representative is himself a lawyer does not obligate him to attend in person to the law business of the estate, but he may employ another attorney for such services.[42]

[§ 549] **(10) Fund Out of Which Allowance Made.** Allowances to an administrator for attorney's fees and costs are made for the protection of the estate[43] and can be allowed only out of money belonging thereto.[44] Where an executor brought a suit to test the validity of a bequest and the bequest was upheld, he was not entitled to costs and counsel fees out of the proceeds of the sale of the property bequeathed.[45] Where an action by an executor to determine the rights of defendants to share in a certain fund in his hands was determined in favor of defendants, the executor was not entitled to deduct counsel fees from the fund before distribution, where there was a sufficient estate left in his hands for that purpose.[46] Where a will was admitted to probate, and one of the heirs was appointed executor, and by undue means an election by the widow to take under the will was procured, but on suit brought by her was afterward set aside, the costs and attorney's fees incurred by the executor in defending the action could not be paid out of the estate until after the widow obtained her share.[47] Where, on partition of realty for purposes of distribution, the court ordered one portion thereof sold, the executor who made the sale had no authority to pay attorney's fees, except so far as the court might order them to be paid out of the proceeds of the sale.[48] In a case where a substituted trustee, accounting for the acts of a prior deceased trustee, was also executor to that trustee, the court divided between the estates a bill of his attorneys for services which were beneficial to both estates.[49] Where a will contest was conducted by the executor mainly in the interest of a particular beneficiary under the will, it has been regarded as proper to allow the attorneys' fees incurred and paid by the executor as a charge on the share of such beneficiary rather than as a charge on the general estate.[50] Testamentary directions in respect to such expenses must be given their legal effect.[51]

[§ 550] **h. Taxes and Assessments.** An execu-

607, 45 AmR 93.

[e] **Extra fees.**—Where an executor, in accepting the trust, is compelled to abandon his general practice at law, such fact is not a ground for the allowance of extra fees, unless his time has been occupied in performing extraordinary services. Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

[f] **Where the representative claims no compensation** as counsel on filing his account, none will be allowed him. Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401.

[g] **A public administrator** ought attorney in addition to his commission. Loague v. Brennan, 86 Tenn. not to be allowed compensation as 634, 9 SW 693.

41. Cal.—In re Brignole, 133 Cal. 162, 65 P 294.

Ill.—In re Colton, 187 Ill. A. 558.

La.—Macarty's Succ., 3 La. Ann. 517.

Miss.—Satterwhite v. Littlefield, 21 Miss. 302.

Nev.—Lucich v. Medin, 3 Nev. 93, 93 AmD 376.

N. J.—In re Steelman, 87 N. J. Eq. 270, 99 A 612; In re Wiley, (Prerog.) 65 A 212; Hurlbut v. Hutton, 44 N. J. Eq. 302, 15 A 417; Kingsland v. Scudder, 36 N. J. Eq. 284; Runkle v. Smith, (Ch.) 106 A 474; In re Ramsey, (Prerog.) 66 A 410.

N. Y.—Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Archer, 51 Misc. 260, 100 NYS 1095; Matter of Murray, 40 Misc. 433, 82 NYS 394; Matter of Arkenbaugh, 13 Misc. 744, 35 NYS 251; Matter of Van Nostrand, 3 Misc. 396, 24 NYS 850, Pow. Surr. 495; Matter of Knapp, 59 HowPr 367; Raymond v. Dayton, 4 Dem. Surr. 333; O'Reilly v. Meyer, 4 Dem. Surr. 161.

Oh.—In re McAlpin, 8 OhS&CP 654.

Pa.—Kalbfell's Est., 30 PittsbLegJ 325.

S. C.—Edmonds v. Crenshaw, 5 S. C. Eq. 224.

Tex.—Trammel v. Philleo, 33 Tex. 395.

Eng.—Harbin v. Darby, 28 Beav. 325, 54 Reprint 391.

"The executor is paid a commission for certain services. If he employs an attorney to do such work instead of doing it himself, the court ought not to make an allowance for it. Such services should be paid for by the executor himself. Otherwise the estate is made to pay twice for the same services." In re Brignole, 133 Cal. 162, 164, 65 P 294.

[a] **Allowance has been denied for** (1) ordinary legal services in preparing an inventory (Matter of Collyer, 9 NYS 297, 1 Conn. Surr. 546; Pullman v. Willets, 4 Dem. Surr. (N. Y.) 536), (2) or making up his account (In re Ramsey, (N. J. Prerog.) 66 A 410), (3) in the matter of the execution of the bond (Matter of Collyer, supra), or (4) for depositing mortgages in the recorder's office for record (McGregor's Est., 131 Pa. 359, 18 A 902). (5) Where an estate was composed of bank stock and mortgages of such a class that they were realized on without any special difficulty, and no particular services by counsel were shown or the necessity therefor, and the business of collecting the estate and reducing it to money was such that any man of ordinary business ability could readily conduct it without the aid of counsel, an allowance of three hundred dollars for counsel fees paid by the executor cannot be sustained. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388.

[b] **A transfer of securities** held by decedent as trustee, to which no claim was made by the heirs, when all that the administrator was required to do was to require identification of the securities in trust, is not a matter requiring the services of an attorney. In re McAlpin, 8 Oh S&CP 654.

[c] **Effect of testamentary provision.**—Where a solicitor who is authorized by the will to charge for his professional services, he is only entitled to charge for what are strictly professional services, and not for work or services which ought to be done or rendered by an executor in a lay capacity. Harbin v. Darby, 28 Beav. 325, 54 Reprint 391.

42. Pizzati's Succ., 141 La. 645, 75 S 498 [foll Hutchinson's Succ., 112 La. 656, 36 S 639; Richard's Succ., 49 La. Ann. 1115, 22 S 317; Fenner v. McCan, 49 La. Ann. 600, 21 S 768]; Powell v. Foster, 71 Vt. 160, 44 A 96.

43. Young v. Roach, 105 Miss. 6, 61 SW 984.

44. Young v. Roach, 105 Miss. 6, 61 S 984 (where money due on an insurance policy on the life of decedent was expressly payable to a daughter, it never became a part of the estate, and the court was not justified in taking a part thereof to pay counsel fees and court costs incurred in contesting her claim to the proceeds).

45. Stevens v. Stevens, 37 N. J. Eq. 3.

46. Briggs v. Walker, 102 Ky. 359, 43 SW 479, 19 KyL 1490.

47. Sill v. Sill, 31 Kan. 248, 1 P 556.

48. Snyder's App., 54 Pa. 67.

49. Matter of Rowe, 42 Misc. 172, 86 NYS 253, 4 Mills Surr. 131.

50. In re Smith, 165 Iowa 614, 146 NW 836.

51. Hampden Trust Co. v. Leary, 186 Mass. 577, 72 NE 88.

[a] **"May" in trust deed referred to in will.**—On the same day that a testator executed his will he made a deed to a trust company, executor under the will, conveying all of his real estate on certain trusts. The deed provided that after the testator's death the trustee "may" use as much of the income from the property, or the proceeds of its sale, as may be necessary in defending any proceedings brought to invalidate the trust. The will was made subject to the provision of the deed, with a scheme for the disposition of the property conveyed by the deed if it should be set aside. Testator had a substantial amount of personal property which was disposed of by the will. No proceedings were brought to set aside the deed, except so far as its validity was involved in the controversy as to the validity of the will. It was held that a contention that items in the executor's account for payments made by the executor for expenses of defending the estate from claims which were deemed unjust, of proving the will, and resisting an attack on it should not be allowed out of the personalty, because the word "may" in the ninth clause of the deed means "must," requiring such expenses to be paid from the trust estate, was untenable, in view of other clauses of the deed, in which the grantor drew distinctions between "may" and "shall." Hampden Trust Co. v. Leary, 186 Mass. 577, 72 NE 88.

tor or administrator is entitled to credit for taxes and assessments properly paid by him in the exercise of his duties as such,[52] and this notwithstanding the fact that there is some technical defect in the assessment,[53] or the law under which the assessment was paid is afterward declared unconstitutional;[54] and conversely executors who have paid all the funds belonging to the estate to legatees are not thereby excused from paying taxes on the estate which they had neglected to pay while they had funds of the estate in their possession.[55] Even where the personal representative has paid out taxes not strictly in the line of his official duty, an adjustment of taxes among the persons in interest may properly reimburse him, and the land may be subjected to his lien or a set-off allowed.[56] But where an administratrix held a claim secured by mortgage against the estate, and failed to list her mortgage interest, which exceeded the value of the property mortgaged, for taxation, but permitted the land to be taxed as though no mortgage existed thereon, she was not entitled to a credit for taxes paid by her as administratrix on the real estate described in the mortgage.[57]

Working out highway tax. Where an executor works out a highway tax personally instead of paying the money or hiring another person to do the work, he should be allowed therefor in his account.[58]

Where testator did not die seized of all the property on which taxes were paid, the executor is not entitled to credit for the payment of taxes, where it is not shown what portion was on the testator's property.[59]

Property out of the state. Payment of taxes by an executor on lands in a state where he had not taken out administration, being voluntary and without authority, is like the payment of a debt by any stranger, and furnishes no foundation of a legal claim by him.[60]

Testamentary direction. Where a testatrix, by her will, directed the executor to pay the collateral inheritance tax on her whole estate, including that on any bequest or legacies made by the will, out of the corpus of the estate, so that legatees should receive their legacies free of all tax, a revenue tax on legacies, imposed by an act of congress passed after the execution of the will, was not payable out of the corpus of the estate.[61]

Penalty. A claim by a personal representative for money paid as a penalty on taxes should be disallowed where the penalty accrued by reason of the representative's neglect.[62]

An executor who pays taxes in his private capacity on notes claimed by him under an incomplete gift from testator, and who subsequently accounts for the notes in his capacity as executor, is entitled to an allowance for the amount paid as taxes,[63] but an executor whose wife is the residuary legatee under the will is not entitled to credit for sums paid for taxes on his wife's land.[64]

A reasonable fee of a transfer tax appraiser,

52. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30.
Ark. — Armstrong v. Cashion, 16 SW 666.
Hawaii.—Matter of Enos, 18 Hawaii 542.
Ky.—Kelley v. Kelley, 141 Ky. 414, 132 SW 1031; Howle v. Anderson, 44 SW 437, 19 KyL 1748.
Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.
Mass.—Jennison v. Hapgood, 10 Pick. 77.
Minn.—Winters v. Ellefson, 128 Minn. 3, 150 NW 171.
Miss.—Davis v. Blumenberg, 107 Miss. 432, 65 S 503; Bowers v. Williams, 34 Miss. 324.
N. J.—Brown v. Brown, 72 N. J. Eq. 667, 65 A 739.
N. Y.—Matter of Brown, 60 Misc. 35, 112 NYS 599; Matter of Woods, 55 Misc. 181, 106 NYS 471; Matter of Higginbotham, 51 Misc. 158, 100 NYS 414; Atlantic Trust Co. v. Powell, 23 Misc. 289, 50 NYS 866.
Oh.—Warner v. York, 16 Oh. Cir. Ct. N. S. 369 [aff 75 Oh. St. 595 mem, 80 NE 1135 mem].
Pa.—Hensler's Est., 18 LancLRev 317.
R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798 [foll Hall v. Anthony, 13 R. I. 221].
Tenn.—Read v. Franklin, (Ch. A.) 60 SW 215.
Utah.—In re Hansen, 184 P 197.
Va.—Kincheloe v. Gibson, 115 Va. 119, 78 SE 603; Breckinridge v. Breckinridge, 98 Va. 561, 31 SE 892.
"The administrator had the right to pay these taxes in order to protect himself and the creditors of the decedent in their right to subject the land to the payment of the decedent's debts; and in addition the payment of these taxes inured equally to the benefit of all of the heirs of decedent, and therefore none of them are in position to complain." Davis v. Blumenberg, 107 Miss. 432, 438, 65 S 503.

[a] **The duty of the representative to pay taxes at his peril** depends upon whether he has or ought to have the money with which to do so. Thompson v. Thompson, 77 Ga. 692, 3 SE 261.

[b] **The fact that an executor retained** in his hands during his administration funds that he might have distributed among the legatees was not ground for charging him with taxes paid by him on such funds, since it is presumed the funds would have been assessed to the legatees if in their hands. Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612, 77 NYS 413].

[c] **Taxes accruing after commencement of action to settle estate.**—In an action by a legatee to settle testator's estate, the personal representative was entitled to credit for taxes paid by her which accrued after the action was instituted. Hood v. Maxwell, 66 SW 276, 23 KyL 1791.

[d] **Taxes on real estate.**—An administratrix has been allowed credit for amounts paid by her from her individual funds for taxes levied upon real estate owned by decedent. Matter of Brown, 60 Misc. 35, 112 NYS 599.

[e] **Where title proves defective.**—Where an executor had in good faith paid taxes upon lands supposed to belong to the testator, and purchased by himself, but the testator's title proved defective, he was allowed such taxes in his account upon his conveying all his interest in the lands to the parties interested in the estate, with warranty against encumbrances created by himself. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

[f] **Time for payment of transfer tax.**—Matter of Sudds, 32 Misc. 182, 66 NYS 231, 1 Mills Surr. 574 [aff dism 77 NYS 413].

[g] **Payment by executor under will afterward set aside.**—Where a widow, claiming under an alleged will of her husband, held the estate as life tenant and executrix, and the will was thereafter declared invalid, on an accounting with the heir and an administrator, it was proper to allow her taxes paid out of her separate estate. Read v. Franklin, (Tenn.) 60 SW 215.

Taxes which representative should pay see infra § 902.

53. Sanderson v. Sanderson, 20 Fla. 292; Adams v. Monroe County, 154 N. Y. 619, 49 NE 144.

54. Dey v. Chapman, 39 N. J. Eq. 258.

55. In re McMahon, 67 HowPr (N. Y.) 152.

56. Ark.—Armstrong v. Cashion, 16 SW 666.
Cal.—In re Mogan, Myr. Prob. 80.
Fla.—Merritt v. Jenkins, 17 Fla. 593.
N. Y.—Matter of Sworthout, 38 Misc. 56, 76 NYS 961, 3 Mills Surr. 85.
Vt.—Hapgood v. Jennison, 2 Vt. 294.

[a] **Reimbursement out of proceeds of partition sale.**—An executor who has paid general land taxes on testator's property to prevent a tax sale may be reimbursed out of the proceeds of a partition sale thereof. Krueger v. Schlinger, 19 Misc. 221, 43 NYS 305.

57. McDougald v. Boggs, 146 Cal. 196, 79 P 875.

58. Lansing v. Lansing, 45 Barb. (N. Y.) 182, 1 AbbPrNS 280, 31 How Pr 55.

59. In re Selleck, 111 N. Y. 284, 19 NE 66.

60. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

61. Baker's Est., 21 Pa. Super. 536.

62. Matter of Enos, 18 Hawaii 542; Williams v. Petticrew, 62 Mo. 460; Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388; Tickel v. Quinn, 1 Dem. Surr. (N. Y.) 425.

63. Kelley v. Kelley, 141 Ky. 414, 132 SW 1031.

64. Bean v. Bean, 135 N. C. 92, 94, 47 SE 232 ("as executor he was not charged with the duty of paying the taxes on his wife's land, and this and the other item could in no way enter into or form a part of his transactions as the representative of his testator").

which has been paid by the representative, should be allowed as a proper expenditure.[65]

Amounts improperly paid as taxes by the representative cannot, it has been held, be allowed,[66] but it has also been held that an executrix who has paid an inheritance tax to the federal government should not be surcharged to the amount thereof, on it subsequently appearing that the tax was not a proper one, it being conceded that the sum paid may be recovered.[67]

[§ 551] **i. Insurance Premiums.** The personal representative is not entitled to credit for the payment of assessments on a policy of insurance in which his decedent had no interest and in which his estate has none;[68] but where, in the exercise of good faith and reasonable prudence, he insures personal property, as assets of the estate, against fire, he is entitled to reimbursement for the premium paid,[69] and while he is usually not concerned in insurance upon the real property, since that belongs rather to the heirs or devisees,[70] yet where he has direction and control of the property, or reasonably expects that an insufficiency of the personal assets to pay the debts of the estate may render a sale of the real estate necessary, the insurance by him of the buildings may be prudent and an allowance therefor justified.[71] The court may, however, refuse to allow credit for money paid for insurance where the amount paid is so greatly out of proportion to the amount realized by a sale of the property as to indicate that the payment was imprudent and reckless.[72]

Life insurance. An administratrix is not entitled to credit for payments during decedent's lifetime of premiums on life insurance policies of the decedent in which she was the beneficiary.[73] But an administrator who has acted in good faith and with reasonable prudence may be allowed credit for amounts paid as premiums on a life insurance policy held as collateral to a note given to decedent, although there was ultimately a loss to the estate.[74]

[§ 552] **j. Judgments against Representative.** Where a creditor of the estate has recovered and collected a judgment against the executor or administrator, the representative will be allowed credit in his accounts for the amount thereof, including costs, when it appears that he acted within the rule of reasonable prudence and discretion and was not guilty of negligence, bad faith, or other improper conduct;[75] but it is otherwise where the circumstances indicate bad faith or culpable remissness on the part of the representative.[76]

[§ 553] **k. Interest Paid.** Where it is not shown that the personal representative had moneys in hand sufficient to take up notes of decedent, he is entitled to credit for interest paid to procure the extension of such notes;[77] and where, under the terms of a will, the executor had large discretionary powers, the court has allowed him to charge the estate with usurious interest paid in order to prevent the sacrifice of the property.[78] But where a special administrator has been ordered not to pay out money without an order of court, he is not entitled to credit for money paid without an order, as interest on notes held against the estate.[79] Where an executor received moneys and paid them out on debts of the estate and legacies, he cannot be allowed interest on a preferred claim which remains unpaid in consequence.[80] It has been held that credit may be allowed for interest paid on a debt secured by a mortgage of real estate;[81] but there is also authority for the view that the representative should not after the death of decedent pay interest on mortgages or other encumbrances on the land, accruing after decedent's death,[82] and cannot be al-

65. Matter of Rook, 98 Misc. 544, 164 NYS 742.

66. Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.

Minn.—Nordlund v. Dahlgren, 130 Minn. 462, 153 NW 876, AnnCas1917B 941.

Mo.—Graham v. Wilson, (A.) 185 SW 1160.

N. Y.—In re Babbitt, 148 NYS 621; In re Beinstein, 58 Misc. 115, 110 NYS 473.

Pa.—In re Schoenberger, 221 Pa. 112, 70 A 579, 128 AmSR 737, 19 LRANS 290.

[a] **Illustration.** — A nonresident testator appointed an executor in the state of his domicile, and executors in Pennsylvania as to his estate there provided for sale of all his real estate, except certain lands specifically devised, and directed the executor of his domicile, after paying legacies, to pay any balance over to the Pennsylvania executors, who, without objections by the residuary legatees, paid to the state a collateral tax on real estate in Pennsylvania. After several accounts had been filed, and distribution made without deduction for a collateral tax, and there remained only one legacy to be paid, and the residuary estate to be distributed, five per cent could not be deducted from such legacy as its proportion of the collateral tax paid to the state, such collateral tax having been paid improperly by the executors without any hearing granted to the legatee. In re Shoenberger, 221 Pa. 112, 70 A 579, 128 AmSR 737, 19 LRANS 290.

67. Matter of Marx, 117 App. Div. 890, 103 NYS 446 [rev 49 Misc. 280, 99 NYS 334].

68. Pryor v. Davis, 109 Ala. 117, 19 S 440.

[a] **Property which is security for debt to estate.**—An executor having insured property which was the security for his debt to the estate, pursuant to an order requiring him to do so at his own expense or file a bond, the estate is not chargeable with the cost thereof. Good's Est., 150 Pa. 307, 24 A 623.

69. Holland v. Doke, 135 Ark. 372, 205 SW 648; Matter of Woods, 55 Misc. 181, 106 NYS 471; Cornwell v. Deck, 2 Redf. Surr. (N. Y.) 87 [aff 8 Hun 122]; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

70. Me.—Kimball v. Sumner, 62 Me. 305.

Mo.—Langston v. Canterbury, 173 Mo. 122, 73 SW 151.

N. Y.—Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163, 2 Gibb. Surr. 506; In re Barthel, 177 NYS 565; Cornwell v. Deck, 2 Redf. Surr. 87.

N. C.—Hahn v. Mosely, 119 N. C. 73, 25 SE 713.

Pa.—In re Dunkle, 17 LancLRev 61.

Eng.—Fry v. Fry, 27 Beav. 144, 54 Reprint 56; Bailey v. Gould, 4 Y. & C. Exch. 221, 160 Reprint 987.

71. Ark.—Holland v. Doke, 135 Ark. 372, 205 SW 648.

Ky.—May v. Walter, 149 Ky. 749, 149 SW 1014.

La.—Sparrow's Succ., 40 La. Ann. 484, 4 S 513.

Mass.—Wiggin v. Swett, 6 Metc. 194, 39 AmD 716.

N. H.—Tuttle v. Robinson, 33 N. H. 104.

N. J.—Howard v. Francis, 30 N. J. Eq. 444.

N. Y.—Matter of Woods, 55 Misc. 181, 106 NYS 471; Matter of Fould, 35 Misc. 171, 71 NYS 473, 2 Mills Surr. 252; Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 30, 46 NYS 190]; Rolph's Est., 9 NYS 293, 2 Conn. Surr. 191; Cornwell v. Deck, 2 Redf. Surr. 87.

Pa.—Ketran's Est., 24 Pa. Dist. 1087.

[a] **Where assessments for fire insurance constitute a lien upon the property** insured, but the value of the property exceeds the amount of the lien, it is the duty of the administrator of the insured to remove the lien by paying the assessments if there are sufficient assets. Tuttle v. Robinson, 33 N. H. 104.

72. In re Nicholson, 1 Nev. 518.

73. Matter of Brown, 60 Misc. 35, 112 NYS 599.

74. Overman v. Lanier, 157 N. C. 544, 73 SE 192.

75. Pearson v. Darrington, 32 Ala. 227; White v. White, 3 Dana (Ky.) 374; Scott v. Dorsey, 1 Harr. & J. (Md.) 227; Lambert v. Hobson, 56 N. C. 424.

76. Ala.—Pearson v. Darrington, 32 Ala. 227.

Kan.—Sarbach v. Fidelity, etc., Co., 99 Kan. 29, 160 P 990, LRA1917 B 1043.

Miss.—George v. Bean, 30 Miss. 147.

N. J.—Hurlbut v. Hutton, 44 N. J. Eq. 302, 15 A 417; Tucker v. Tucker, 29 N. J. Eq. 286.

Pa.—Moulson's Est., 1 Brewst. 296.

77. Hale's Succ., 26 La. Ann. 195.

78. Coffee v. Ruffin, 4 Coldw. (Tenn.) 487.

79. James v. Craighead, (Tex. Civ. A.) 69 SW 241.

80. Matter of Woods, 55 Miss. 181, 106 NYS 471 (undertaker's bill).

81. In re Dalton, 183 Iowa 1013, 168 NW 332; Darrah's Est., 19 Pa. Co. 287.

82. Springfield Grocer Co. v. Wal-

lowed credit for such payments;[83] although he is entitled to be reimbursed by the heirs out of the realty.[84]

[§ 554] **l. Traveling Expenses.** In the settlement of an executor's or administrator's account, reasonable and necessary traveling expenses incurred in performing the duties of his trust should be allowed;[85] but it is otherwise where the expenses were needlessly or unreasonably incurred, or the representative was put to no actual cost, or journeyed rather upon his own business, or that of the heirs.[86] It has also been held that expenses incurred by a special administrator in traveling from another state, in which he resided, for the purpose of procuring his appointment are not allowable in his account.[87]

[§ 555] **m. Procuring Bond.** In some states the statutes allow the expense of procuring a bond for the representative to be charged against the estate;[88] but in the absence of such a statute it is well settled as a general rule that the amount paid by the personal representative to a guaranty or indemnity company or to individual bondsmen, in order to procure sureties on his official bond is not chargeable against the estate, in addition to his usual recompense,[89] although a contrary view has been expressed.[90] The representative is, however, properly allowed the expense of a bond given to supersede a judgment rendered against the estate,[91] or a special bond which is necessary in order to collect assets,[92] and it has been held that where, at the instance of legatees, an executrix was ordered by the court to give a bond on pain of discharge, she should be allowed the expense thereof, since, if she had failed to furnish the bond and had been discharged, the substituted administrator would have been obliged to furnish one incurring in all probability the same expense.[93] But where an executor was authorized to carry on testator's business as a cabinet maker and builder, but not to become a member of a building trades employers' association, or to pledge the estate's assets for such purpose, and the executor's agent in managing the business, being a member of such association, obtained a bond to qualify as such member, applying for the bond in the name under which the business was carried on, and agreeing to indemnify the surety against liability, the estate cannot be compelled to indemnify the surety, it not appearing that the estate derived advantage from the agent's membership in the association.[94]

Revenue stamp for bond. An allowance of the amount expended in procuring a revenue stamp for the bond has been both granted[95] and refused.[96]

[§ 556] **n. Redemption of Property.** Where the personal representative honestly and in the exercise of due prudence and diligence redeems mortgaged or otherwise encumbered property, the

ton, 95 Mo. A. 526, 69 SW 477; Matter of Roberts, 72 Misc. 625, 132 NYS 396.

83. Matter of Bernstein, 58 Misc. 115, 110 NYS 473.

84. Matter of Sworthout, 38 Misc. 56, 76 NYS 961.

85. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Ark.—Holland v. Doke, 135 Ark. 372, 205 SW 648.

Cal.—In re Byrne, 122 Cal. 260, 54 P 957; Rose's Est., 80 Cal. 166, 22 P 86.

Ga.—Thomas v. Payne, 88 Ga. 246, 14 SE 573.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Quaintance v. Darnell, 14 KyL 238, 322.

Mo.—Ladd v. Stephens, 147 Mo. 319, 48 SW 915; Williams v. Petticrew, 62 Mo. 460.

N. H.—Wendell v. French, 19 N. H. 205.

N. J.—Dey v. Codman, 39 N. J. Eq. 258. But compare King v. Berry, 3 N. J. Eq. 261, 266 ("expenses of that kind must be taken out of the commissions").

N. Y.—Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev on other grounds 178 App. Div. 243, 164 NYS 1024]; Everts v. Everts, 62 Barb. 577; Elliott v. Lewis, 3 Edw. 40.

N. C.—Clarke v. Cotton, 17 N. C. 51.

Or.—Muldrick v. Galbraith, 31 Or. 86, 49 P 886.

Philippine.—De Viademonte v. Gavieres, 12 Philippine 155.

S. C.—Roberts v. Johns, 24 S. C. 580.

Tenn.—Bowman v. Carr, 5 Lea 571.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **Expenses of messenger.**—Where part of the assets of an estate consist of a note made by a resident of another state, the executor is entitled to be allowed the expenses incurred by a messenger sent to the residence of the maker in an attempt to collect. Bowman v. Carr, 5 Lea (Tenn.) 571.

86. Cal.—In re Emerson, 175 Cal. 724, 167 P 149.

Ky.—Purdy v. Purdy, 42 SW 89, 19 KyL 823.

La.—Lafon v. His Creditors, 3 Mart. N. S. 707.

N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388.

N. Y.—Matter of Biggars, 39 Misc. 426, 80 NYS 214; Matter of Ingersoll, 20 NYSt 356, 6 Dem. Surr. 184; Pullman v. Willets, 4 Dem. Surr. 536; Marsh v. Gilbert, 2 Redf. Surr. 465.

Pa.—Berryhill's App., 35 Pa. 245; In re Belcher, 17 PittsbLegJNS 174.

"These items should not be allowed; they were expenditures made by the respondent in the carrying on of his private affairs and ought not to be cast upon the estate." Wyckoff v. O'Neil, 71 N. J. Eq. 729, 733, 71 A 388.

87. In re Emerson, 175 Cal. 724, 167 P 149.

88. Ark.—Adamson v. Parker, 74 Ark. 168, 85 SW 239.

Cal.—In re Richmond, 9 Cal. A. 402, 99 P 554.

Ga.—Floyd v. Thomason, 148 Ga. 208, 96 SE 175.

Hawaii.—Matter of Enos, 18 Hawaii 542.

Ky.—May v. Walter, 149 Ky. 749, 149 SW 1014; Avey v. Stearman, 145 Ky. 574, 140 SW 1055; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Hays v. Johnson, 99 SW 332, 30 KyL 614.

La.—Rabasse's Succ., 51 La. Ann. 590, 25 S 326 [foll Kernan's Succ., 105 La. 592, 30 S 239].

Miss.—Davis v. Blumenberg, 107 Miss. 432, 65 S 503.

Mo.—In re Whitlow, 184 Mo. A. 229, 167 SW 463.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316.

N. J.—In re Atkinson, 85 N. J. Eq. 485, 96 A 89.

N. Y.—Jenkins v. Shaffer, 19 NYSt 900, 6 Dem. Surr. 59.

Pa.—In re Crawford, 256 Pa. 504, 100 A 974 [aff 62 Pa. Super. 329]; In re Eby, 164 Pa. 249, 30 A 124; Pickering's Est., 4 Pa. Dist. 263; Miller's Est., 13 Pa. Co. 137; Wilson's Est., 1 Pa. Co. 509, 18 WklyNC 483.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **Statute not retroactive.**—In re Richmond, 9 Cal. A. 402, 99 P 554.

[b] **A surety company which is administrator** is not entitled to the cost of an administration bond where it gives its own bond. Miles' Est., 17 Pa. Dist. 824.

89. Cal.—In re Richmond, 9 Cal. A. 402, 99 P 554.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316.

N. J.—In re Atkinson, 85 N. J. Eq. 485, 96 A 89.

Pa.—Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 827]; Clark's Est., 7 Pa. Dist. 9, 20 Pa. Co. 439; Pickering's Est., 4 Pa. Dist. 263, 16 Pa. Co. 359; Miller's Est., 2 Pa. Dist. 410; Eby's Est., 2 Pa. Dist. 326, 12 Pa. Co. 601; Mutchmore's Est., 31 Pa. Co. 353.

Tex.—Jarvis v. Drew, (Civ. A.) 215 SW 970.

[a] **Reason for rule.**—"It is incumbent upon the administrator to furnish his own bondsmen." Adamson v. Parker, 74 Ark. 168, 171, 85 SW 239, 240. To same effect May v. Walter, 149 Ky. 749, 149 SW 1014.

[b] **Testamentary provision dispensing with bond.**—A nonresident executor nominated by the will "without bond," will, on being appointed ancillary executor, be allowed the fee expended in obtaining security which is required of nonresidents who are appointed as ancillary executors, provided such allowance has not already been made by the domiciliary court. Yerkes' Est., 8 Pa. Dist. 36.

90. In re Lucas, [1900] 1 Ir. 292, 294 ("In cases where reliable security cannot otherwise be procured, I consider it to be for the interest of all parties entitled to the assets, whether as creditors or beneficiaries, that the security of an insurance company, or some equally solvent surety, should be procured at the expense of the estate").

91. Hays v. Johnson, 99 SW 332, 30 KyL 614.

92. Davis v. Blumenberg, 107 Miss. 432, 65 S 503.

93. In re Walsh, (N. J.) 74 A 563.

94. Farrelly v. Schaettler, 121 App. Div. 678, 106 NYS 445.

95. Edelen v. Edelen, 11 Md. 415.

96. In re Ford, 29 Mont. 283, 74 P 735.

value of which is fairly in excess of the mortgage debt, he may be allowed credit for the outlay in his accounts,[97] but outlays because of his own bad judgment or remissness of duty and without benefit to the estate are not thus favored.[98]

[§ 557] **o. Miscellaneous Expenditures.** The personal representative has been allowed credit for advertising and printing done in the course of official duty,[99] money paid for newspapers to perpetuate the evidence of notice on the sale of real estate,[1] the cost of a copy of the inventory,[2] special transactions which were prudent in protecting assets or settling debts of the estate,[3] the expense of detaining a valuable witness as to a claim asserted against the estate,[4] the expenses of the journey of decedent's wife or near relative for whom decedent sent during his last illness,[5] the rent of an office used exclusively for the business of the estate,[6] the rent of a box in a safe deposit vault where necessary,[7] the rent of pasture for cattle, which resulted in a benefit to the estate,[8] the charges of reasonable storage and custody,[9] tools, machinery, and hardware purchased for decedent's farm with the approval of the county judge,[10] buying out the interest of tenants of decedent where necessary,[11] dues paid on building and loan stock belonging to the estate and pledged to a bank as security,[12] payments made for the preservation of the real property of the estate,[13] rent paid on an outstanding lease,[14] the expenses of acquiring title to land which the executor was obliged to purchase at judicial sale in collecting a debt to the estate,[15] sums advanced for taxes, water rents, expenses of foreclosure, and insurance, on property foreclosed by him for the benefit of the estate,[16] expenses incurred in good faith in taking steps to recover foreign assets,[17] and expenses incurred in good faith, with the knowledge of, and without objection from, the heirs at law in securing growing fruit and crops and taking care of stock on decedent's farm.[18] Where an administrator is allowed by the probate court to keep the estate together, he should be allowed credit for the expense which he has necessarily incurred in cultivating the plantation and disposing of the crops,[19] and where an executor is required to account for the acts of his decedent

97. Ala.—Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Cummings v. Bradley, 57 Ala. 224.
Mass.—Horton v. Robinson, 212 Mass. 248, 98 NE 681.
Mich.—Russell v. Wheeler, 129 Mich. 41, 88 NW 73.
Mo.—Meeker v. Straat, 38 Mo. A. 239.
Nebr.—In re Vasek, 97 Nebr. 617, 150 NW 1004.
Pa.—In re Donnelly, 246 Pa. 308, 92 A 306.
[a] **Illustration.**—Where a mortgage from husband to wife was a subsequent lien, which on the wife's death passed to her administrator, the latter was entitled to protect such security and enforce the same by redeeming from a foreclosure of the first mortgage. Sharpe v. Miller, 157 Ala. 299, 47 S 701.

98. In re Heeney, 3 Cal. A. 548, 86 P 842; Brackett v. Tillotson, 4 N. H. 208; In re Gill, 199 N. Y. 155, 92 NE 390.
[a] **Payment to obviate necessity for probate proceedings.**—Where certain heirs, including the administrator subsequently appointed, paid two hundred and fifty dollars on debts secured by a mortgage on intestate's family residence for the express purpose of obviating the necessity of probate proceedings, which all the heirs were seeking to avoid, he was not entitled to credit, in his account as administrator subsequently appointed, for the amount of such payment. In re Heeney, 3 Cal. A. 548, 86 P 842.
[b] **Rights of creditors.**—Although an executrix was not justified in paying out of an insolvent estate over fifteen thousand dollars to redeem property worth ten thousand dollars, and the creditors could repudiate the transaction, they cannot claim the benefit of the transaction and insist that she shall account for the property she recovered for the estate solely by virtue of the contract they repudiate. In re Gill, 199 N. Y. 155, 92 NE 390.

99. Reynolds v. Reynolds, 11 Ala. 1023; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

1. Jennison v. Hapgood, 10 Pick. (Mass.) 77
2. Nolde's Est., 27 Pa. Super. 413.
3. Ala.—Walker v. Walker, 26 Ala. 262.
Ill.—Wingate v. Pool, 25 Ill. 102.
Ky.—Branham v. Com., 7 J. J. Marsh. 190.
Mass.—Ripley v. Sampson, 10 Pick. 371.
N. Y.—Adair v. Brimmer, 74 N. Y. 539; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Matter of Bielby, 91 Misc. 353, 155 NYS 133.

4. Melville's Est., 25 Pa. Dist. 5.
5. Jennison v. Hapgood, 10 Pick. (Mass.) 77.
6. In re Ross, (Cal.) 182 P 303; Newell v. West, 149 Mass. 520, 21 NE 954; Bronson v. Bronson, 48 HowPr (N. Y.) 481; In re Semple, 189 Pa. 385, 42 A 28.
[a] **Illustration.** — An executor, who has the management of an estate, involving transactions amounting to over two million dollars, consisting of the payment and frequent renewal of notes, mortgages, and accounts, is entitled to a credit for the expense of maintaining an office in which to transact the business. In re Semple, 189 Pa. 385, 42 A 28.
[b] **Where an executor did not apply to the county court for advice** in the management of the estate, and for more than eight years made no report of his dealings, although required by B. & C. Comp. § 1199 to account semiannually, the court properly denied him any office rent. In re Roach, 50 Or. 179, 92 P 118.
[c] **Credit will not be allowed for rent of the decedent's law office** which was retained after the expiration of a year from his death in order to facilitate the care of real estate. Wilson's Est., 21 LancLRev (Pa.) 393, 394 ("It is urged that this expense was incurred at the request of the testator. The accountant testified: 'My father told me he wished Harry to keep up the office and collect the rents. He requested it of me before he died.' His reason for this is apparent. The testator was a lawyer in active practice at the time of his death, and he recognized the importance of having a convenient place from which papers in his custody could be distributed. Being a lawyer, and an able one, he also knew that the law contemplates the settlement of a decedent's estate within a year. In requesting that his office be kept, he evidently did not mean indefinitely, but for the year pending the settlement of his estate").

7. Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.
[a] **When expenditure unnecessary.**—An item of credit in an executor's account for rent of a safe deposit box is properly rejected on his testimony that he kept in the box only some papers which he could have kept safely at home. In re Pease, 149 Cal. 167, 85 P 149.
[b] **Contrary view.**—The expenses incident to the safekeeping of the securities of the estate are compensated by the commission allowed the administrator. Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

8. Huston v. Roe, 79 N. J. Eq. 220, 81 A 848 [mod 78 N. J. Eq. 215, 78 A 162].

9. Matter of Murray, 40 Misc. 433, 82 NYS 394; Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412; Foster v. Stone, 67 Vt. 336, 31 A 841.
[a] **Storage in warehouse of which representative part owner.**—An allowance for storage and insurance of cotton should not be refused because it was stored in a warehouse of which the administrator was part owner, in the absence of bad faith. Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.
[b] **Rent of apartments where goods are at decedent's death.**—Where, on the contest of a will, the contestant alleged that the main provision of the will was void, and that the executor was an unfit person, the account of the latter should not be surcharged with the difference between the rent of a warehouse to store the goods of the decedent and the rent of the apartment in which she died and in which he allowed her goods to remain. Matter of Murray, 40 Misc. 433, 82 NYS 394, 3 Mills Surr. 504.

10. James v. Craighead, (Tex. Civ. A.) 69 SW 241.

11. Lambertson v. Vann, 134 N. C. 108, 40 SE 10.

12. State v. Taylor, 100 Mo. A. 481, 74 SW 1032 (payment without any order of court proper).

13. In re Watson, 148 NYS 902; Hall's Est., 10 Pa. Dist. 215.
[a] **Searching title.**—An executor who necessarily incurs expense in searching the title of land belonging to his testator's estate for the purpose of paying off and obtaining an assignment of a mortgage thereon should be allowed the sum so paid. In re Bettels, 4 NYS 393.

14. Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem].

15. Bowler's Est., 8 Pa. Co. 522.

16. Atlantic Trust Co. v. Powell, 23 Misc. 289, 50 NYS 866.

17. Bowman v. Carr, 5 Lea (Tenn.) 571.

18. Edwards v. Ela, 5 Allen (Mass.) 87; Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 P 593, LRA1917E 966.

19. Hinson v. Williamson, 74 Ala. 180; Walker's Est., 6 Pa. Co. 515.
[a] **Expenditures exceeding proceeds of sale.**—Where an intestate had planted and at the time of his death was engaged in cultivating crops, the administrator might be compelled to continue the cultivation of the crops and gather them for

as administratrix of the estate of her deceased husband, such executor is entitled to an allowance for payments made by his decedent to a contestant, who claimed as heir of such deceased husband.[20] An administratrix has also been held entitled to credit in her accounts for amounts paid by her during decedent's lifetime for the support of decedent and his family.[21]

Courts have refused to allow the representative credit for money paid out at the mere verbal request of the decedent on his deathbed,[22] or for pew rent[23] or publishing in a county other than that provided by statute a notice of sale of real estate,[24] expenses incurred upon property while in another jurisdiction,[25] liquors used at an auction sale of assets,[26] money expended in carrying out a void trust,[27] the expense of surveying a line between the property of deceased and that of an adjoining proprietor,[28] the administrator's expenses preliminary to applying for letters,[29] or his time and money expended while endeavoring to effect a private settlement with the heirs.[30] It has been held that an executor has no right to buy off contestants of the will and charge the expense against the estate,[31] but there is also authority for the view that an amount paid to contestants of the will as a compromise in settlement of the will contest is chargeable as part of the expenses of administration.[32] Where a widow had only a life estate in certain lands of her husband, his administrator de bonis non with the will annexed had no authority to apply the rents accruing after the termination of the life estate or the proceeds of the sale of the land to the widow's debts, her funeral expenses, or a tombstone for her, and such use of the money constituted a misappropriation.[33] A special administrator whose duty is to preserve the estate is not entitled to an allowance for expenditures in having an examination of a mine, in which the estate held stock, for the purpose of ascertaining its value,[34] or for a detective to watch the executors, who have been removed at his suit, because they have not turned over all the papers and he believes them dishonest, where they have never refused to produce any paper when asked.[35]

[§ 558] **9. Interest on Expenditures.** Under due circumstances the advance of money to the estate by an executor or administrator will not only be justified but commended, so as to entitle him to a fair allowance of interest thereon;[36] but such a charge will be viewed with caution and the circumstances scrutinized, and where no necessity existed justifying such advance, or where the advantage claimed did not actually exist, interest may be disallowed.[37]

[§ 559] **K. Individual Interest in Transactions[38]—1. In General.** An executor or administrator cannot be allowed to acquire individual interests inconsistent with the representative capacity he sustains for the benefit of the estate, or to make a personal profit out of his dealings with the property of the estate,[39] and transactions in which the

the market, and was entitled to credit on settlement for his reasonable expenses, although on account of natural causes the expenditure largely exceeded the proceeds of the sale of the crops. Taylor v. Bush, 75 Ala. 432.

20. Matter of Hull, 97 App. Div. 258, 89 NYS 939.

21. Matter of Brown, 60 Misc. 35, 112 NYS 599.

22. Matter of Teyn, 2 Redf. Surr. (N. Y.) 306; Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; Kerr v. Hill, 2 S. C. Eq. 279.

23. Milmo's Succ., 47 La. Ann. 126, 16 S 772.

24. In re Pease, 149 Cal. 167, 85 P 149.

25. Roberts v. Rogers, 28 Miss. 152, 61 AmD 542.

26. Griswold v. Chandler, 5 N. H. 492.

27. O'Connor v. Gifford, 3 NYS 207, 6 Dem. Surr. 71 [rev on other grounds 3 NYS 337 (aff 117 N. Y. 275, 22 NE 1036)].

28. Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

29. In re Byrne, 122 Cal. 260, 54 P 957.

30. Clarke v. Clay, 31 N. H. 393.

31. In re Graves, 242 Ill. 212, 89 NE 978; Bolles v. Bacon, 3 Dem. Surr. (N. Y.) 43.

32. In re Cook, 30 R. I. 494, 76 A 356. See also In re Hull, 97 App. Div. 258, 89 NYS 939; supra note 20.

33. Pierce v. Fulmer, 165 Ala. 344, 51 S 728.

34. In re Bell, 145 Cal. 646, 79 P 358.

35. In re Bell, 145 Cal. 646, 79 P 358.

36. Ala.—Pearson v. Darrington, 32 Ala. 227.

Ark.—Trimble v. James, 40 Ark. 393.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—Mann v. Lawrence, 3 Bradf. Surr. 424.

Pa.—Callaghan v. Hall, 1 Serg. & R. 241.

Va.—Jackson v. Jackson, 1 Gratt. (42 Va.) 143.

[a] **Simple interest only** can be allowed. Trimble v. James, 40 Ark. 393.

37. Ky.—McCracken v. McCracken, 6 T. B. Mon. 542.

Mo.—Booker v. Armstrong, 93 Mo. 49, 4 SW 727.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—Matter of Woods, 55 Misc. 181, 106 NYS 471.

N. C.—Arnett v. Linney, 16 N. C. 369.

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899.

Eng.—Gordon v. Trail, 8 Price 416, 146 Reprint 1248.

38. Purchase by representative of property of estate see infra §§ 656–662, 703–705, 736–741, 754–757.

Purchase of claims at discount see infra § 936.

39. U. S.—In re Mitchell, 250 Fed. 1003.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

Cal.—Matter of McDougald, 146 Cal. 196, 79 P 875; In re Gianelli, 146 Cal. 139, 79 P 841; Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; In re Richmond, 9 Cal. A. 402, 89 P 554.

Conn.—Johnson v. Blackman, 11 Conn. 342.

Fla.—Keathley v. Sewell, 62 Fla. 510, 56 S 414.

Ga.—Jones v. Ragan, 136 Ga. 653, 71 SE 1098.

Ill.—Miller v. Rich, 204 Ill. 444, 68 NE 488; Haines v. Hay, 169 Ill. 93, 48 NE 218 [rev on other grounds 67 Ill. A. 445].

Iowa.—Fitzmaurice v. Merchants' Nat. Bank, 172 Iowa 554, 154 NW 895.

Ky.—Handlin v. Davis, 81 Ky. 34; Faucett v. Faucett, 1 Bush 511, 89 AmD 639; Keller v. Bellor, 5 T. B. Mon. 573.

La.—Thomas v. Bienvenu, 35 La. Ann. 936.

Md.—Hall v. Griffith, 2 Harr. & J. 483.

Mass.—Horton v. Robinson, 212 Mass. 248, 98 NE 681.

Mich.—Parks v. Brooks, 188 Mich. 645, 155 NW 450; Ward v. Tinkham, 65 Mich. 695, 32 NW 901; Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Miss.—Deanes v. Whitfield, 107 Miss. 273, 65 S 246; Meyer v. Meyer, 64 S 420; Glenn v. Thistle, 23 Miss. 42; Williams v. Stratton, 18 Miss. 418.

Mo.—Baldwin v. Dalton, 168 Mo. 20, 67 SW 599; Gamble v. Gibson, 59 Mo. 585.

N. J.—McKnight v. Walsh, 24 N. J. Eq. 498.

N. Y.—Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027]; Parker v. Day, 155 N. Y. 383, 49 NE 1046 [rev 12 Misc. 510, 38 NYS 676]; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Slater v. Slater, 114 App. Div. 160, 99 NYS 564; Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 NYS 537 mem, 78 NE 1112 mem]; Reynolds v. Ætna L. Ins. Co., 28 App. Div. 591, 51 NYS 446 [aff 160 N. Y. 635; 55 NE 305]; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Kelly v. Pratt, 41 Misc. 31, 83 NYS 636; Matter of Rainforth, 40 Misc. 609, 83 NYS 57; In re Davis, 37 Misc. 326, 75 NYS 493; In re Bussman, 176 NYS 505.

N. D.—Macfadden v. Jenkins, 169 NW 151.

Oh.—Cox v. John, 32 Oh. St. 532.

Pa.—Buck's Est., 185 Pa. 57, 39 A 821, 64 AmSR 816; Wilson's Est., 59 Pa. Super. 358; Slifer's Est., 18 Pa. Dist. 954; Miller's Est., 14 Pa. Dist. 163; Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; Low's Est. 3 Pa. Dist. 316; Cope's Est. 27 Pa. Co., 366, 4 LackJur 45.

R. I.—Egan v. Wirth, 26 R. I. 363, 58 A 987.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113 [cit Cyc]; Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

S. D.—In re Ketcham, 171 NW 764.

Tenn.—Johnson v. Kay, 8 Humphr. 142; Bland v. Gollaher, (Ch. A.) 48 SW 320.

Utah.—In re Evans, 22 Utah 366, 62 P 913, 83 AmSR 794, 53 LRA 952.

representative as an individual deals with himself in his representative capacity are always regarded with suspicion and will be set aside if inequitable.[40]

Rule applied. Thus while his general right to dispose of assets is conceded, the executor or administrator should not purchase or speculate with property of the estate for his individual benefit,[41] divert the funds of the estate into business or investment for his own private gain,[42] or sell his own property to the estate.[43] The representative cannot settle his own debts to the estate at undue personal advantage to himself,[44] take secret fees, commissions, or discounts, from creditors or others with whom he deals as representative, at the cost of the estate,[45] use money of the estate for his individual benefit,[46] purchase for his personal profit an outstanding life estate in real property held by him in trust,[47] sell or pledge assets as special security for or payment of his individual debt or for some individual advantage,[48] or in general take for his own benefit a position regarding the estate in which his interest will conflict with his duty.[49] The rep-

Va.—Roller v. Paul, 106 Va. 214, 55 SE 558; Cross v. Cross, 4 Gratt. (45 Va.) 257.

Eng.—Ex p. James, 8 Ves. Jr. 337, 32 Reprint 385.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 5 OntWN 255, 24 OntWR 630, 15 DomLR 475; In re Sinclair, 2 Ont. L. 349.

"The fundamental principle, dictated no less by morality and practical honesty than by the law in regard to a trustee, whether executor or administrator or guardian, or in cases of an ordinary nature, is that he shall derive to himself no gain, benefit, or advantage by the use of the trust funds. Whatever of profit may be made, or may accrue, shall belong to and become parcel of the estate." Voorhees v. Stoothoff, 11 N. J. L. 145, 148.

[a] **The representative is presumed to act for the benefit of the estate** (1) and not for his individual benefit when acting in reference to the subject of his trust. Johnson v. Blackman, 11 Conn. 342. (2) Thus where the owner of a possessory right in Indian lands of the Cherokee nation operated a ferry therein, which, although conducted under a periodical license, by the usages and customs of the nation, was recognized as appurtenant to the land, its operation by his widow and administratrix after his death, although under licenses granted in her own name, must be regarded as having been for the benefit of the estate, and she is chargeable with the income therefrom. Nivens v. Nivens, 133 Fed. 39, 66 CCA 145 [rev 4 Ind. T. 574, 76 SW 114]. See generally Trusts [39 Cyc 1].

[b] **Surviving partner executor of deceased partner.**—The equitable principle that a trustee cannot deal with himself with respect to trust property applies to a surviving partner who is also executor of the estate of the deceased partner. Egan v. Wirth, 26 R. I. 363, 58 A 987.

40. Bryan v. Kales, 134 U. S. 126, 10 SCt 435, 33 L. ed. 829; Mettler v. Warner, 156 Ill. A. 31 [aff 249 Ill. 341, 94 NE 522]; Roberts v. Weimer, 130 Ill. A. 297 [aff 227 Ill. 138, 81 NE 40]; Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; Hyland v. Baxter, 42 Hun (N. Y.) 9.

[a] **Illustration.**—One who holds a claim as an individual cannot assign it to himself as executor. Schreyer v. Holborrow, 26 Hun (N. Y.) 468.

[b] **Dealing with coexecutors.**—An executor contracted to sell certain shares of stock. The executor owned some of the stock at the time of the contract, and purchased some of it afterward from other persons. He also purchased from his coexecutors stock belonging to the estate, paying therefor the same price which he had paid to other persons for similar stock, which, however, was one hundred dollars a share less than he had contracted to sell it for. The sale was consummated under the contract which also provided that the executor should not engage in a certain business for a prescribed period of time. As payment for the stock obtained from the estate, the executor obtained the consent of his coexecutors to invest the funds of the estate in certain bonds and turned over to the estate a sufficient quantity of these bonds which were owned by him, to pay for the stock. It was held that the executor was chargeable with the amount which he received for stock purchased for the estate. Matter of Sandrock, 49 Misc. 371, 99 NYS 497 [aff 120 App. Div. 898 mem, 105 NYS 1141 mem].

41. Ark.—Holloway v. Eagle, 113 Ark. 206, 205 SW 113.

Del.—In re Pennewell, 105 A 377.

Ky.—Kellar v. Beelor, 5 T. B. Mon. 573.

Md.—Scott v. Burch, 6 Harr. & J. 67.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74.

N. J.—Arrowsmith v. Van Harlingen, 1 N. J. L. 29; In re Frey, 73 N. J. Eq. 346, 67 A 192; King v. Berry, 3 N. J. Eq. 261.

N. Y.—Ackerman v. Emott, 4 Barb. 626; Matter of Sandrock, 49 Misc. 371, 99 NYS 497; In re Bussman, 176 NYS 505.

Pa.—Haberman's App., 101 Pa. 329; Slifer's Est., 18 Pa. Dist. 954.

Tenn.—Jameson v. Shelby, 2 Humphr. 198.

[a] **Transfer of corporate stock.**—Where an executor holding shares in bank stock as such transfers them to himself, he will be liable for the value of the stock as of the time of such transfer, and interest thereon afterward. Jameson v. Shelby, 2 Humphr. (Tenn.) 198.

[b] **Premium on gold coin.**—Premiums on gold coin sold by the executor belong to the estate, and cannot be appropriated by him to his own use. Gephart v. Strong, 20 Md. 522.

[c] **Purchase voidable only.**—Where, after condemnation of land and the making of an award, the executors of the owner foreclosed the lien of the award, it not having been paid, and individually bought in the property on foreclosure sale, their purchase was not void, but at most voidable by the beneficiaries of the deceased owners' estate. New York Cent., etc., Co. v. Cottle, 102 Misc. 30, 168 NYS 463.

42. Malone v. Kelley, 54 Ala. 532; Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617; Field v. Colton, 7 Ill. A. 379; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74; Wiley's App., 8 Watts & S. (Pa.) 244.

[a] **Continuing decedent's business and supporting family.**—Where decedent's minor son conducted his father's business as an undertaker for the benefit of the family until he became of age, and thereafter agreed with the mother, the sole acting executrix, that he should support her and the infant children, the son, as administrator de bonis non on his mother's death was not chargeable with the profits during minority of the other children, but was chargeable with the value of tangible assets used in the business. Mullin v. Mullin, 85 N. J. Eq. 531, 96 A 996.

43. Baldwin v. Carleton, 15 La. 394.

44. Grant v. Reese, 94 N. C. 720.

[a] **Settlement of claim against executor's wife.**—Where a testatrix herself had invested one thousand dollars on mortgage, and there was no reason to suppose that she was unaware that the terre-tenant was the wife of her executor, and a legatee who was ignorant of the ownership joined in a written request to the executors to accept five hundred dollars in full settlement rather than incur the expense incident to foreclosure, the validity of the agreement was not affected by such ignorance, after it had been acted on by the executors, especially when on a sale of the property the amount realized was only about nine dollars in excess of what was received under the settlement. Edenborn's Est., 10 Pa. Dist. 184.

45. Meyer v. Meyer, (Miss.) 64 S 420; Reeside v. Reeside, 6 Phila. (Pa.) 507; In re Evans, 22 Utah 366, 62 P 913, 83 AmSR 794, 53 LRA 952; Chapman v. Comings, 43 Vt. 16.

[a] **Thus** where executors kept moneys belonging to the estate deposited with a bank, and in consideration for such deposits the bank lent them a smaller sum without interest, they are accountable for the profits made by the use of such money. Meyer v. Meyer, (Miss.) 64 S 420.

[b] **Contract to share fees of attorneys for estate.**—A contract by an administrator with his attorneys by which he is to receive a portion of their fees in consideration of services to be rendered by him in the litigation to conduct which they were employed is against public policy and void. In re Evans, 22 Utah 366, 62 P 913, 83 AmSR 794, 53 LRA 952.

46. Matter of Meagley, 39 App. Div. 83, 56 NYS 503.

47. In re Robbins, 94 Minn. 433, 103 NW 217, 110 AmSR 375 (neither the administrator nor his attorney may make such purchase).

48. Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226; Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617.

Mo.—State v. Berning, 74 Mo. 87.

Pa.—Miller v. Ege, 8 Pa. 352.

S. C.—Simons v. Bryce, 10 S. C. 354.

Va.—Dodson v. Simpson, 2 Rand (23 Va.) 294.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntNW 1369, 5 OntWN 255, 24 OntWR 630, 15 DomLR 475.

[a] **Who may attack mortgage.**—Where a legatee, who was also the executor of an estate, gave to a stranger a mortgage on personal property of the estate to secure his individual debt, it could not be questioned by the mortgagee for want of title in the mortgagor, for being legatee in possession he had an inchoate title, and none but persons interested in the estate could dispute his right as executor to give the mortgage. Boeger v. Langenberg, 42 Mo. A. 7.

[b] **Transaction held not void as mortgage for individual debt.**—Roarty v. McDermott, 146 N. Y. 296, 41 NE 30 [rev 84 Hun 527, 32 NYS 853].

49. Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Cal.—In re Adams, 131 Cal. 415, 63 P 838.

Ga.—Jones v. Ragan, 136 Ga. 653, 71 SE 1098.

Iowa.—Fitzmaurice v. Merchants' Nat. Bank, 172 Iowa 554, 154 NW 895.

Ky.—Floyd v. Massie, 4 Bibb 427.

Mass.—Horton v. Robinson, 212 Mass. 248, 98 NE 681.

resentative cannot, of course, acquire title by adverse holding to any of the assets.[50] An administrator who holds a judgment in his own name, and an assigned judgment in the name of his estate against the same land is in duty bound on selling the land under the judgments to see that it brings the highest price obtainable, and is precluded, by virtue of his relation to the estate of his decedent, from becoming a purchaser at the sale.[51]

Extent and limits of rule. Where it is shown that the transaction was in good faith and promotive of the interests of the estate, the general rule may not be applied with the usual strictness.[52] An executor may transfer at par, in settlement of a legacy, stock that is worth less than par, and at the same time agree to repurchase the stock later at an advanced price on his personal account.[53] The representative may properly apply the assets of the estate to the payment of a debt of his decedent in its due order, although he is individually liable as the decedent's surety,[54] or even, it has been held, where he is in his individual capacity the principal debtor, and the decedent the surety.[55] An executor who without authority sells corporate stock belonging to the estate is liable only for the loss then resulting to the estate, and legatees cannot hold him to account as trustee for profits made by him some years subsequently in the repurchase and sale of such stock.[56] While a representative cannot take an assignment of a mortgage on his decedent's land and exercise the power of sale therein to foreclose to the injury of the heirs,[57] he may, with his own funds, purchase and take an assignment of a note outstanding against his decedent,

Mich.—Sheldon v. Rice, 30 Mich. 296, 18 AmR 136.

Mo.—Stitt v. Stitt, 205 Mo. 155, 103 SW 547.

N. Y.—Kyle v. Kyle, 67 N. Y. 400.

N. D.—Macfadden v. Jenkins, 169 NW 151.

Pa.—Mueller's Est., 8 Pa. Dist. 70.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

Ont.—In re Sinclair, 2 Ont L. 349.

[a] **Illustrations.**—(1) A debtor delivered possession of lands to a creditor, who was to rent it and apply the rents to the payment of his debt and a debt owing to another creditor. The creditors agreed to apportion between themselves any sums realized from the lands. Afterward the first creditor sued the debtor, attached the lands, and recovered judgment, whereupon the second creditor did the like. The former agreed that the attachment liens should be equal in priority. The latter assigned his judgment in payment of a claim against him in favor of an estate of which the former was administrator, and it was again agreed that the judgments should be equal in priority. It was held that the first creditor could not cut off the rights of the estate of which he was administrator by selling the property under his own judgment, but was bound to divide the proceeds of the sale pro rata between the estate and himself. Montgomery v. Black, 75 Ark. 184, 86 SW 1006. (2) Where complainant, as testator's widow, was entitled under his will to the whole income of his estate, as her own, and one of the executors refused to consent to the formation of a corporation to take over a business in which testator was interested until complainant signed a contract transferring to defendant and his sister twenty-nine per cent each of her income from the estate, exclusive of the family residence, such contract was obtained by defendant by an abuse of his position as executor, and was therefore voidable. Slater v. Slater, 114 App. Div. 160, 99 NYS 564 [aff 46 Misc. 332, 94 NYS 900, and aff 188 N. Y. 633 mem, 81 NE 1176 mem]. (3) Where executrix, with her own funds, redeemed land from the mortgage debt of the testatrix, she held it for the benefit of creditors, regardless of the form of the conveyance to her, or of the fact that she had sold it to a third party. Horton v. Robinson, 212 Mass. 248, 98 NE 681. (4) Where a purchaser of land under an executory contract, by making permanent improvements, increased the value of the land, he had an equitable interest in it, and his administrator could not deprive his creditors of their right by paying the purchase money and taking a deed to himself from the vendor. Whiddon v. Williams, 98 Ga. 310, 24 SE 437. (5) After the death of a purchaser of land, prior to the maturity of the purchase-money note, her administrator was not authorized, merely by virtue of his office, to make a private contract with the vendor whereby a contract between the purchaser and vendor for sale of timber on the land to the vendor was rescinded, and the bond for title and possession of the land surrendered to the administrator, and indebtedness of the purchaser to the vendor and a debt of the administrator to the vendor were canceled. Jones v. Ragan, 136 Ga. 653, 71 SE 1098. (6) Where executrix, to whom an order of sale of a tract of land of the estate to pay debts was granted, under which the land might have been sold for enough to pay the mortgage debt thereon with the debts at large of the estate and costs of administration, and who purposely delayed making a sale until the land was sold under a trust deed, with the intent of becoming the purchaser, did become such purchaser for a sum sufficient to pay only the mortgage debt and costs, which was paid from her own funds, she will be devested of the title so acquired, and the same will be revested in the estate subject to subrogation in her favor to the rights of the cestui que trust under the trust deed. Stitt v. Stitt, 205 Mo. 155, 103 SW 547.

[b] **Where an administrator organized a corporation to take over** decedent's business, there was a direct conflict between his trust relation and his interest in the corporation. Macfadden v. Jenkins, (N. D.) 169 NW 151.

[c] **A syndicate formed to take over the property** of an estate and adjust claims, cannot include the administrator as a member, or take over his claim against the estate. Fitzmaurice v. Merchants' Nat. Bank, 172 Iowa 554, 154 NW 895.

[d] **Subscription to additional corporate stock in individual capacity.**—An executor of a deceased stockholder of a corporation which has increased its stock has no right to make a profit for himself by taking additional shares which the estate is entitled to subscribe for in his own name, and he must surrender such shares, with the dividends earned thereon; but he is entitled to credit his accounts for the amount paid on the stock from his own funds. Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; In re Sinclair, 2 Ont. L. 349 (entitled to lien on shares for amount paid).

50. Dozier v. McWhorter, 117 Ga. 786, 45 SE 61.

51. Montgomery v. Black, 75 Ark. 184, 86 SW 1006 (persons interested in the estate may avoid a sale of land to the administrator, under a judgment owned by the estate notwithstanding the adequacy of the price paid by the administrator for the land).

52. Smith v. Goethe, 147 Cal. 725, 82 P 384; Pinneo v. Goodspeed, 120 Ill. 524, 12 NE 196; Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

[a] **Illustrations.**—(1) Where a part of the assets of an estate consisted of stock in a corporation which had a plant which was an unpromising investment, and the executor induced another corporation to buy the plant, he was guilty of no wrong in personally taking stock in the purchasing corporation to the amount necessary to buy the plant, and selling it at figures realizing him a reasonable interest on the investment, the transaction being in good faith and promotive of the interests of the estate. Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759 (the action of an executor and his associates in purchasing stock in a corporation in which the estate was interested, and in giving a bond in which the corporation was principal and they sureties, conditioned to save the seller harmless from liability under the laws of the domicile of the corporation, was not subject to criticism on the part of the estate which the executor represented, or any other stockholder). (2) Where an administrator having mortgaged certain property jointly with his intestate to secure their joint debt, thereafter negotiated alone on a mortgage of the same property and other property belonging to the estate for the purpose of paying his individual indebtedness and also that of the estate, he was entitled to use such mortgage for the purpose of fixing the lien of the mortgage debt as a claim against the estate, and to secure him against subsequent liens on the property of the estate, if any, and to hold it as a mortgage on the property of the estate to the extent of the moneys advanced by him on behalf of the estate in making the purchase. Smith v. Goethe, 147 Cal. 725, 82 P 384.

[b] **Purchase of mortgage at discount in belief that property belongs to estate.**—Where an executor in the belief that mortgaged property belongs to the estate purchases the mortgage at a discount with his own individual money but makes no profit out of the transaction the mortgagor will not be entitled to a rebate of the discount. Pinneo v. Goodspeed, 120 Ill. 524, 12 NE 196 [aff 22 Ill. A. 50].

53. Weymouth v. Goodwin, 105 Me. 510, 75 A 61 (the estate loses nothing in such a transaction).

54. Rowland v. Cocke, 2 J. J. Marsh. (Ky.) 79.

55. Shelton v. Carpenter, 60 Ala. 201.

56. Hiller v. Ladd, 85 Fed. 703, 29 CCA 394.

57. Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551.

and avail himself of any securities held by the creditors, without using them to the prejudice of other creditors or the heirs.[58] While a representative is not entitled to retain assets of the estate at their inventoried value[59] he may retain assets at a fair rate of valuation of which the appraisement is prima facie proof,[60] although he cannot make a profit by retaining them at a price lower than what others have offered and he has refused.[61]

Salary from corporation in which estate interested. There can be no objection to the payment to an executor of a salary as an officer of a corporation in which the estate is interested merely as a stockholder.[62]

[§ 560] **2. Transactions with Heirs, Etc.**[63] An administrator stands in a trust relation toward those interested in the estate of the intestate, including the widow and heirs, as far as contracts between himself and them are concerned,[64] and equity will not permit a person who is, or is about to become, an administrator to contract with the heirs to the prejudice of the latter.[65]

[§ 561] **3. Rights of Person Dealing with Representative.** The representative's sale or pledge of assets or other transactions made for purposes other than the due discharge of his duty as fiduciary will not be sustained against the interests of the estate, where the person with whom he dealt had notice of his bad faith or breach of trust, and in such case the transaction may be set aside and restitution enforced;[66] but a third person who in dealing with the representative acted in good faith and without notice of the representative's bad faith, and parted with consideration, will be protected in the transaction.[67]

[§ 562] **L. Waste, Conversion, or Embezzle-**

58. Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551.

59. U. S.—Wilson v. Taylor, 30 F. Cas. No. 17,840a, 2 Hayw. & H. 334.

Ky.—Meridith v. Nichols, 1 A. K. Marsh. 595.

Md.—Dennis v. Dennis, 15 Md. 73.

Pa.—Hampton's Case, 17 Serg. & R. 144.

S. C.—Lindsay v. Lindsay, 1 S. C. Eq. 150.

Tex.—Chifflet v. Willis, 74 Tex. 245, 11 SW 1105.

[a] **Payment of debts to inventoried value.**—An executor or administrator will not be permitted to pay the decedent's debts with his own funds to the amount of the appraisement and take the property of the estate as his own, but it is his duty to sell and account for the amount realized on the sale. Wilson v. Taylor, 30 F. Cas. No. 17,840a, 2 Hayw. & H. 334; Dennis v. Dennis, 15 Md. 73; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Hampton's Case, 17 Serg. & R. (Pa.) 144; Lindsay v. Lindsay, 1 S. C. Eq. 150.

60. Ky.—Ely v. Com., 5 Dana 398; Miller v. Towles, 4 J. J. Marsh. 255.

N. Y.—Matter of Haug, 55 Misc. 481, 106 NYS 850.

Pa.—Keenan's Est., 6 Kulp 73.

S. C.—Benson v. Bruce, 4 S. C. Eq. 463.

Wash.—In re Goss, 73 Wash. 330, 132 P 409.

[a] **Where the representative appropriates** or makes use of personalty of the estate as his own, he will be charged with such property at its appraised value. Keenan's Est., 6 Kulp (Pa.) 73 (with interest); Benson v. Bruce, 4 S. C. Eq. 463.

[b] **Purchase of corporate stock.**—Where testator owned forty-five shares of stock in a corporation, which, with other stock held by the executor and a partner of the latter, would give the executor absolute control of a majority of the stock, and the executor, in order to obtain the stock of the estate, sold it with an evident intention to prevent interested parties from getting it and to obtain it for his own benefit, it was held that, such interested parties having elected to treat the transaction as a sale, the executor would be surcharged with the fair value of the stock, to be determined by evidence as to what persons were willing to pay for it, it not being generally dealt in. Matter of Haug, 55 Misc. 481, 106 NYS 850.

61. Wiley's App., 8 Watts & S. (Pa.) 244.

62. Matter of Brown, 78 Misc. 342, 139 NYS 459. See also Matter of Schaefer, 65 App. Div. 378, 73 NYS 57 [mod 34 Misc. 34, 69 NYS 489, and aff 171 N. Y. 686 mem, 64 NE 1125 mem] (extra compensation for extra work actually done).

[a] **The reason** for this is that the salary was not paid for services rendered as an executor. Matter of Brown, 78 Misc. 342, 139 NYS 459.

[b] **Salary to one of several executors.**—Where the majority of the stock and bonds of a corporation belonged to an estate, and the executors elected one of their number president at the same salary as was paid the president during the lifetime of deceased, they were entitled to allowance for their proportion of the amount paid for such salary. Matter of Fidelity Loan, etc., Co., 23 Misc. 211, 51 NYS 1124.

63. Purchase of interest of heir or legatee in personalty see infra § 756.

Purchase of realty from widow, heir, or devisee see infra § 704.

64. Flowers v. Flowers, 84 Ark. 557, 106 SW 949, 120 AmSR 84.

65. Mallalieu's Est., 42 Pa. Super. 101.

66. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Central Nat. Bank v. Fitzgerald, 94 Fed. 16.

Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226; Shelton v. Carpenter, 60 Ala. 201; Van Hoose v. Bush, 54 Ala. 342; Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190.

Ga.—Rogers v. Fort, 19 Ga. 94; Carnes v. Jones, Ga. Dec. 170.

Ind.—Nugent v. Laduke, 87 Ind. 482; Rogers v. Zook, 86 Ind. 237; Krutz v. Stewart, 76 Ind. 9; Thomasson v. Brown, 43 Ind. 203; Austin v. Willson, 21 Ind. 252.

Md.—Miller v. Williamson, 5 Md. 219; Williamson v. Morton, 2 Md. Ch. 94.

Miss.—Booyer v. Hodges, 45 Miss. 78; Miller v. Helm, 10 Miss. 687; Prosser v. Leatherman, 4 Miss. 237, 34 AmD 121.

Nebr.—McGlave v. Fitzgerald, 67 Nebr. 417, 93 NW 692, 2 AnnCas 867; Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303, 59 Nebr. 94, 80 NW 263.

N. J.—In re Frey, 73 N. J. Eq. 346, 67 A 192.

N. Y.—Buffalo Loan, etc., Co. v. Leonard, 154 N. Y. 141, 47 NE 966 [aff 9 App. Div. 384, 41 NYS 294]; Moore v. American L. & T. Co., 115 N. Y. 65, 21 NE 681; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Washburn v. Benedict, 46 App. Div. 484, 61 NYS 387; Mertens v. Roche, 39 App. Div. 398, 57 NYS 349; Shaffer v. Bacon, 35 App. Div. 248, 54 NYS 796 [aff 161 N. Y. 635 mem, 57 NE 1124 mem]; Colt v. Lasnier, 9 Cow. 320.

N. C.—Grant v. Bell, 87 N. C. 34; Latham v. Moore, 59 N. C. 167; Smith v. Fortescue, 45 N. C. 127, 57 AmD 593; Wilson v. Doster, 42 N. C. 231; Huson v. McKenzie, 16 N. C. 463.

Pa.—Hibberd v. Hubbard, 211 Pa. 331, 60 A 911 [rev 13 Pa. Dist. 12, 29 Pa. Co. 422]; Petrie v. Clark, 11 Serg. & R. 377, 14 AmD 636; Beishlag's Est., 7 Pa. Dist. 127, 20 Pa. Co. 583; Parrish v. Brooks, 4 Brewst. 154; Oram's Est., 9 Phila. 358; Ellis' App., 8 WklyNC 538.

S. C.—Rhame v. Lewis, 34 S. C. Eq. 269; Thomas v. Gage, 5 S. C. Eq. 197.

Tenn.—Smartt v. Watterhouse, 6 Humphr. 158.

Tex.—Williams v. Verne, 68 Tex. 414, 4 SW 548; Bledsoe v. White, 42 Tex. 130.

Va.—Dodson v. Simpson, 2 Rand. (23 Va.) 294.

W. Va.—Brewer v. Hutton, 45 W. Va. 106, 30 SE 81, 72 AmSR 804.

Eng.—Scott v. Tyler, Dick. 712, 21 Reprint 448.

Ont.—Uffner v. Lewis, 27 Ont. A. 242.

[a] **If the transferee had reasonable ground for suspecting** that there was a conversion, he is answerable for the assets. Gottberg v. U. S. National Bank, 131 N. Y. 595, 30 NE 41; Randel v. Dyett, 38 Hun (N. Y.) 347.

[b] **In what bad faith may consist.**—The bad faith of an executor or administrator, such as may charge the person with whom he deals, may consist (1) in bad faith toward his coexecutor or coadministrator (Johnson v. Mangum, 65 N. C. 146), or (2) in some wrongful transaction whereby the debt one owes to the estate is set off against a private debt of the representative (Thomas v. Gage, 5 S. C. Eq. 197).

[c] **A collusive sale** of assets "cannot clothe the collusive purchaser with any right as against persons interested in the estate;" and hence where decedent's grocery stock was sold to one who transferred his right to the administratrix individually, the latter was bound to account for the stock as administratrix. In re Frey, 73 N. J. Eq. 346, 348, 67 A 192.

[d] **Estoppel.**—Where a stockbroker dealt with an executor as such, whereby an unlawful investment was made with the funds of the estate, the broker was estopped to say that the cause of action to recover the funds turned over to the broker was not in the executor, or those claiming their authority from that relation, but in the executor as trustee. Steel v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518 mem, 94 NE 1099 mem].

67. U. S.—Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.

Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226.

Ky.—Ward v. Lewis, 3 J. J. Marsh. 505.

Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 357, 86 A 328 [quot Cyc].

Mass.—Lyman v. National Bank of Republic, 181 Mass. 437, 63 NE 923.

N. Y.—Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383.

S. C.—Thackum v. Longworth, 11 S. C. Eq. 267.

Va.—Brockenbrough v. Turner, 78 Va. 438.

Wis.—Hemmy v. Hawkins, 102 Wis.

ment of Assets—1. In General. An executor or administrator is personally liable to those who are interested in the estate as heirs, distributees, creditors, or otherwise,[68] for waste [69] or for conversion,[70] misapplication,[71] or embezzlement [72] of the assets of the estate, and in modern practice a convenient remedy is found by action upon his official bond,[73] although statute penalties are also prescribed for conversion, embezzlement, and kindred offenses committed by the representative.[74]

[§ 563] **2. Waste—a. What Constitutes.** A waste of assets, or devastavit, is any mismanagement of the estate and effects of a decedent, or any squandering or misapplication of the assets, contrary to the duty imposed on the executor or administrator,[75] and consists of any act, omission, or mismanagement by reason of which the estate suffers loss.[76] Waste may consist in cutting timber

56, 78 NW 177, 72 AmSR 863.

[a] **Where equities equal law must prevail.**—Thackum v. Longworth, 11 S. C. Eq. 267. See also Equity § 208.

[b] **Money borrowed on security.**—Where an executor borrows money of a bank for the estate, and pledges stocks and bonds as security therefor, such securities cannot be recovered back by an administrator de bonis non without payment of the loan, although the executor drew out the money on a check payable to his own order, and appropriated it to his own use. Lyman v. National Bank of Republic, 181 Mass. 437, 63 NE 923.

68. Braswell v. Brown, 112 Ga. 740, 38 SE 51; Parker v. Stevens, 61 N. J. Eq. 163, 47 A 573; Macfadden v. Jenkins, (N. D.) 169 NW 151; Evans v. Oakley, 2 Tex. 182.

[a] **Where the estate is insolvent,** the injury is to the estate and to creditors, and the heirs have no right of action. Herbert v. Harbert, (Tex. Civ. A.) 59 SW 594.

69. Ala.—Thomson v. Searcy, 6 Port. 393.

Ill.—Greenup v. Woodworth, 1 Ill. 254.

Kan.—Calman v. Savidge, 68 Kan. 620, 75 P 1010.

Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858; McCracken v. McCracken, 6 T. B. Mon. 342; Finley v. Pearson, 76 SW 374, 25 KyL 766; Harpending v. Daniel, 11 KyL 858.

Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121.

N. H.—Peaslee v. Kelley, 38 N. H. 372; Gordon v. West, 8 N. H. 444.

N. Y.—Matter of Feierabend, 38 Misc. 524, 77 NYS 1106; In re McGovern, 118 NYS 378.

Pa.—Montier's Est., 7 Phila. 491; Zweidinger's Est., 29 PittsbLegJ 63.

S. C.—Parker v. Latimer, 59 S. C. 330, 37 SE 918.

Eng.—Leonard v. Simpson, 2 Bing. N. Cas. 176, 29 ECL 489, 132 Reprint 489; Dunne v. Doran, 13 Ir. Eq. 545; Palmer v. Waller, 1 M. & W. 689, 150 Reprint 611; Blackmor v. Mercer, 2 Saund. 402, 85 Reprint 1214; Merchant v. Driver, 1 Saund. 307, 85 Reprint 422.

Ont.—Sovereign v. Sovereign, 15 Grant Ch. (U. C.) 559.

[a] **Nature of liability.**—A devastavit by an administrator only creates a simple contract debt to the next of kin. Dunne v. Doran, 13 Ir. Eq. 545.

[b] **The time of a devastavit** of an administrator is properly ascertained from the return of nulla bona on an execution issued against him in his representative character. Greenup v. Woodworth, 1 Ill. 254.

[c] **Equitable assets.**—An executor or administrator is not liable at law as for a devastavit in relation to equitable assets unless by force of some statute. Green v. Collins, 28 N. C. 139.

[d] **Remedy of creditors.**—Where an executor wastes personal property of the proceeds of real estate sold under a testamentary power of sale, so that there is not enough left to pay debts, the remedy of the creditors is to enforce the personal responsibility of the executor. Personeni v. Goodale, 199 N. Y. 323, 92 NE 754.

[e] **An infant executor** is not so chargeable. Young v. Purvis, 11 Ont. 597.

70. Ala.—Collins v. Clements, 75 S 165.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

Iowa.—Garretson v. Kinkead, 118 Iowa 383, 92 NW 55.

Md.—Miller v. Miller, 73 Md. 442, 21 A 321.

Miss.—Meyer v. Meyer, 64 S 420.

N. J.—Goodell v. Monroe, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152].

N. Y.—Matter of Feierabend, 38 Misc. 524, 77 NYS 1106.

Pa.—In re Buck, 185 Pa. 57, 39 A 821, 64 AmSR 816.

[a] **Rights on recovery of converted assets.**—Where an administrator wrongfully withholds from his accounts certain funds belonging to the estate, and the court orders a distribution of the funds thereby shown to be on hand to the creditors of a certain class, pursuant to which the administrator pays a dividend on the basis shown by the account, and takes a receipt in full settlement of the creditors' claims, he is not, on subsequently being compelled to account for the funds, entitled to the difference between the amount paid and what he should have paid had the account pursuant to which the dividend was declared been correct, as such profit accrues to the estate. Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

[b] **Effect of offer of settlement.**—The fact that executors of an estate who used the money of the estate for their own purposes offered a settlement to those excepting to their final accounting, which was refused, is no defense. Meyer v. Meyer, (Miss.) 64 S 420.

[c] **In an action by a special administrator** against the administrator for conversion of property of the decedent, no recovery can be had for any conversion after the death of decedent, but any such conversion must be reached by proceedings under the statute, relative to accounts of administrators. Garretson v. Kinkead, 118 Iowa 383, 92 NW 55.

[d] **A conversion does not operate as a partial partition** among the executor and other legatees so as to avoid the liability incurred by the executor in consequence of his wrongful act, where the will required payment of all the debts as a condition precedent to partition, and the appropriation by the executor was not in furtherance of an intent to make partition. Drake v. Paige, 127 N. Y. 562, 28 NE 407.

71. Peo. v. Rardin, 171 Ill. A. 226; Matter of Meagley, 39 App. Div. 83, 56 NYS 503; In re Spann, 51 Okl. 309, 152 P 68.

[a] **An agreement of distributees to indemnify** against loss in defending an action does not save the executor from the consequences of a misapplication of the funds by himself or his attorney. Reilly v. Porcher, 46 App. Div. 290, 61 NYS 662.

[b] **Application of profits of business to rightful charges.**—An executor who carries on a testator's business under authority of the will and uses the profits in payment of rightful charges is not personally liable to a creditor of the business for misappropriation. Eisenstadt Mfg. Co. v. Copeland, (Tex. Civ. A.) 149 SW 713.

72. Connor v. Akin, 34 Ill. A. 431; Low v. Gemley, 18 Can. S. C. 685.

73. Colo.—Liddicoat v. Treglown, 6 Colo. 47.

Del.—Allen v. Leach, 7 Del. Ch. 232, 44 A 800.

Ill.—In re Richart, 58 Ill. A. 91.

Md.—Hagthorp v. Hook, 1 Gill & J. 270.

N. H.—Smith v. Jewett, 40 N. H. 513.

[a] **The remedy on the bond is cumulative,** and not substitutional. A decree finding a devastavit may be enforced directly against the representative's property. Allen v. Leach, 7 Del. Ch. 232, 44 A 800.

[b] **Proceeds of sale not belonging to estate.**—Where an administrator sells realty of the estate under order of court directing that one third of the proceeds be paid to the widow of the intestate, and pays out for the estate a sum exceeding two thirds of the total proceeds of the sale, but fails to account to the widow for the balance, he is not liable to the estate on his bond for a devastavit, as the sum for which he failed to account belongs to the widow, and not to the estate. Cullen v. State, 28 Ind. A. 335, 62 NE 759.

Liability on administration bonds generally see infra § 2533 et seq.

74. Connor v. Akin, 34 Ill. A. 431; Phelps v. Martin, 74 Ind. 339; State v. Pannell, (Miss.) 34 S 388; Spaulding v. Cook, 48 Vt. 145; Roys v. Roys, 13 Vt. 543.

[a] **Construction of statute.**—The statute making it a felony for any executor unlawfully to convert to his own use money or other property of the estate, or to fail immediately to pay such money or deliver such thing over according to his legal obligation when lawfully required to do so, does not apply to a refusal by an executor to pay a debt due from the estate on its reduction to judgment. State v. Pannell, (Miss.) 34 S 388.

75. Colo.—Howe v. Peo., 7 Colo. A. 535, 44 P 512.

Ind.—Beardsley v. Marsteller, 120 Ind. 319, 22 NE 315.

Ky.—Rothschild v. Wald, 12 KyL 685.

Mo.—Ridgway v. Kerfoot, 22 Mo. A. 661.

N. Y.—Ayers v. Lawrence, 59 N. Y. 192; Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179.

Or.—Steel v. Holladay, 20 Or. 70, 25 P 69, 10 LRA 670.

76. Ind.—Beardsley v. Marsteller, 120 Ind. 319, 22 NE 315.

Ky.—Rothschild v. Wald, 12 KyL 685.

Mo.—Ridgway v. Kerfoot, 22 Mo. A. 661.

N. Y.—Clift v. White, 12 N. Y. 519; Matter of Oosterhaudt, 15 Misc. 566, 38 NYS 179.

Or.—Steel v. Holladay, 20 Or. 70, 25 P 69, 10 LRA 670.

W. Va.—McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 SE 378.

[a] **A devastavit is a mismanagement and waste** by an executor, administrator, or other trustee of the estate trusted to him as such, whereby loss occurs. Rothschild v. Wald, 12 KyL 685.

from the lands without authority;[77] using fallen timber for individual purposes;[78] lending money of the estate without authority;[79] transferring assets of the estate without consideration;[80] collusively selling goods of the decedent for less than their value, when a better price might have been obtained;[81] selling property for less than is offered by others at the time;[82] permitting property to be sold under execution for less than the representative might have sold it for at a previous time;[83] selling property of the estate on credit;[84] failure to collect assets [85] and apply the same to debts in consequence of which the land in the hands of an heir or devisee is subjected to the debts;[86] negligently permitting real estate to be sacrificed for the satisfaction of liens which there is sufficient personal estate to discharge;[87] using assets for the individual purpose of the representative;[88] purchasing property of the estate for himself;[89] paying debts of an inferior degree with notice that there are outstanding debts entitled to priority,[90] unless sufficient assets are retained to pay the latter;[91] paying in full a debt which has no lien or priority to the exclusion of others, when the estate is insolvent;[92] paying claims which, by the exercise of proper diligence, the representative might have ascertained to be unjust and illegal;[93] failure to make a payment according to an order of the court;[94] failure to plead the statute of frauds when available;[95] paying a debt to redeem collateral known to be worthless when the estate is insolvent;[96] the application of assets to the payment of mortgages without authority;[97] voluntarily paying or assenting to legacies when there are outstanding debts, although the representative is ignorant of them, where the estate proves insufficient to pay creditors in full;[98] paying legacies or distributive shares without requiring refunding bonds to the prejudice of creditors;[99] permitting an execution to be levied upon shares of the testator in a corporation, and the shares to be sold at an amount greatly less than their value at a former time when the executor might have sold them;[1] or wrongfully using one's power as administrator to get control of the intestate's business at less than its full value and failure to account for some of the assets of the estate.[2] A person who is at the same time administrator and guardian commits waste by applying funds of the estate to the interests of the guardianship.[3] A judgment against an administrator for money to be paid out of speci-

77. Finley v. Pearson, 76 SW 374, 25 KyL 766; McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342; Gordon v. West, 8 N. H. 444; Casto v. Kintzel, 27 W. Va. 750.

[a] **Where timber on a decedent's estate was such as to require cutting** and the proceeds were used for the benefit of a trust estate created by the will, the executor is not chargeable with waste. Dockins v. Vass, (Ky.) 124 SW 290.

[b] **Cutting timber from wild lands** in a careful and prudent manner is not waste. McNichol v. Eaton, 77 Me. 246.

78. McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342.

79. Caruthers v. Caruthers, 99 Ill. A. 402.

80. Krutz v. Stewart, 76 Ind. 9.

81. Skrine v. Simmons, 11 Ga. 401; Clift v. White, 12 N. Y. 519.

82. Johnson v. Johnson, 72 Mo. A. 386.

83. Dawes v. Winship, 5 Pick. (Mass.) 97 note.

84. Foster v. Thomas, 21 Conn. 285.

85. Sanderson's Est., 74 Cal. 199, 15 P 753; Mitchel v. Lunt, 4 Mass. 654.

86. Mitchel v. Lunt, 4 Mass. 654.

87. Patrick v. Patrick, 72 Nebr. 454, 100 NW 939.

88. U. S.—Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478.

Del.—Allen v. Leach, 7 Del. Ch. 232, 44 A 800.

Ga.—Braswell v. Brown, 112 Ga. 740, 38 SE 51; Porter v. Rountree, 111 Ga. 369, 36 SE 761.

Ind.—Latta v. Miller, 109 Ind. 302, 10 NE 100; Rogers v. Zook, 86 Ind. 237; Fleece v. Jones, 71 Ind. 340.

Mass. — Minot v. Norcorss, 143 Mass. 326, 9 NE 662.

Miss.—Scott v. Searles, 15 Miss. 498, 45 AmD 317; Miller v. Helm, 10 Miss. 687; Prosser v. Leatherman, 5 Miss. 237, 34 AmD 121.

Mo.—State v. Berning, 74 Mo. 87.

N. Y.—Matter of Feierabend, 38 Misc. 524, 77 NYS 1106.

Pa.—Beishlag's Est., 7 Pa. Dist. 127, 20 Pa. Co. 583.

Tex.—Morton v. Morris, (Civ. A.) 56 SW 559.

[a] **Proceeds of real estate.**—An executor or administrator is chargeable with waste if he appropriates to his own use the proceeds of real estate. Austin v. Willson, 21 Ind. 252; Minot v. Norcorss, 143 Mass. 326, 9 NE 662.

[b] **Indebtedness of estate to executor or administrator.**—Where an executor is charged with having wrongfully transferred a note belonging to the estate, an inquiry must be made into the state of the assets, because if a balance equal to the amount of the note was due to the executor, the appropriation was not wrongful. Ward v. Turner, 42 N. C. 73.

[c] **The use of assets by the decedent's widow for the support of the family** is not a devastavit. Brown v. Walter, 58 Ala. 310.

89. Dawes v. Boylston, 9 Mass. 337, 6 AmD 72.

90. Ky.—Place v. Oldham, 10 B. Mon. 400; Stephens v. Barnett, 7 Dana 257; Logan v. Troutman, 3 A. K. Marsh. 66.

Mass.—Cobb v. Muzzey, 13 Gray 57.

N. Y.—Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179.

N. C.—Coggins v. Flythe, 113 N. C. 102, 18 SE 96; Moye v. Albritton, 42 N. C. 62; McNair v. Ragland, 16 N. C. 516.

S. C.—Swift v. Miles, 19 S. C. Eq. 147.

[a] **If the representative did not have notice** (1) that there were other debts of superior dignity, such payment is not a devastavit (Pope v. Wickliffe, 7 T. B. Mon. (Ky.) 412), (2) even though the debt paid was that due to the representative himself (In re Fludyer, [1898] 2 Ch. 562).

91. Braxton v. Winslow, 4 Call (8 Va.) 308.

92. Gay v. Lemle, 32 Miss. 309; Wulbern v. Timmons, 55 S. C. 456, 33 SE 568.

93. Teague v. Corbitt, 57 Ala. 529, 539; Beardsley v. Marsteller, 120 Ind. 319, 22 NE 315; Scott v. Smith, (Ind. A.) 82 NE 556; Parsons v. Mills, 2 Mass. 80; Van Voorhis's App., (Pa.) 10 CentR 412; Hibbard v. Hubbard, 211 Pa. 331, 60 A 911 [rev 13 Pa. Dist. 12, 29 Pa. Co. 422].

"The application of the assets to the payment of claims which do not of themselves afford prima facie evidence of their validity, or, if affording such evidence, which he knows, or has good reason to believe, or the means of ascertaining by proper diligence, to be unjust or illegal, is a devastavit." Teague v. Corbitt, supra.

94. Rahe v. Jobusch, 197 Ill. A. 200.

95. Haskell v. Manson, 200 Mass. 593, 86 NE 937, 128 AmSR 452.

96. In re Locher, (Pa.) 67 A 954.

97. Matter of Schulz, 26 Misc. 688, 57 NYS 952.

93. Ala.—Whetstone v. McQueen, 137 Ala. 301, 34 S 229.

D. C.—Sinnott v. Kenaday, 12 App. 115.

Ky.—Johnson v. Fuguay, 1 Dana 514.

Md.—Yakel v. Yakel, 96 Md. 240, 53 A 914.

N. Y.—Mertens v. Roche, 39 App. Div. 398, 57 NYS 349.

Pa.—Mustin's Est., 8 Pa. Dist. 180; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466.

Tenn.—Boring v. Jobe, (Ch. A.) 53 SW 763.

Va.—Cookus v. Peyton, 1 Gratt. (42 Va.) 431.

W. Va.—Turk v. Hevener, 49 W. Va. 204, 38 SE 476.

Ont.—Stewart v. Snyder, 27 Ont. A. 423 [aff 30 Ont. 110].

"The assent to, or payment of legacies, leaving debts of the testator outstanding, inverts the order in which the law appropriates the assets. It gives priority to the rights and claims of legatees, which are by law secondary, and subordinates to the rights of creditors. At common law, if an executor voluntarily, in ignorance of outstanding debts, assented to, or paid legacies, he was guilty of a maladministration, and was liable to creditors as for a devastavit. It was esteemed his own folly to make such payments, or yield assent to legacies, without the protection of the decree of a court of equity, or without demanding the indemnity of a refunding bond." Whitfield v. Woolf, 51 Ala. 202, 206.

[a] **Mere ignorance of the claim is no defense,** unless where distribution was made by order of the court. Stewart v. Snyder, 27 Ont. A. 423 [aff 30 Ont. 110].

[b] **Distribution before notice to creditors.**—Distribution made before the expiration of the six months' notice provided for by statute is at the risk of the representative and his sureties. Yakel v. Yakel, 96 Md. 240, 53 A 914; Jones v. Harbaugh, 93 Md. 269, 48 A 827.

99. Whitfield v. Woolf, 51 Ala. 202; Swearinger v. Pendleton, 4 Serg. & R. (Pa.) 389.

1. Dawes v. Winship, 5 Pick. (Mass.) 97 note.

2. Matter of Feierabend, 38 Misc. 524, 77 NYS 1106.

3. Stillman v. Young, 16 Ill. 318.

fied assets is conclusive as to the application of such assets,[4] and it is waste for him to make any other application of them.[5] Where a husband was indebted to an estate in which his wife was interested as a legatee, and the executor, who was also the residuary legatee and on the verge of insolvency, delivered to the husband securities for the debt, such act constituted a devastavit as to the testator's legatees and creditors.[6]

Acts not constituting waste. The payment of interest on obligations of decedent, although it might have been avoided, is not necessarily waste;[7] nor is the mere fact that an administrator expends money in a reasonable effort to save property of his intestate situated in another state sufficient to convict him of a devastavit.[8] Where the administrator permitted a caretaker to use furniture belonging to decedent and the furniture was damaged in an amount less than the costs of properly caring for the furniture otherwise, there was no devastavit.[9] An executor or administrator with the will annexed, who makes payment of a legacy, does not become guilty of a devastavit because subsequently probate of the will is revoked or the will is adjudged invalid.[10] The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect to the mortgage.[11]

Necessity for violation of order of court. It has been held that there can be no devastavit which will sustain an action against an administrator until he has violated an order of the probate court to pay creditors.[12]

[§ 564] **b. Nature of Liability.** While waste or conversion by an executor or administrator raises a quasi contractual obligation on his part to the person injured,[13] it has been held that such liability is not contractual within the meaning of statutes conferring jurisdiction of actions on contracts express or implied.[14]

[§ 565] **c. Liability for Acts of Other Persons.** Acquiescence in waste or conversion by another may render the representative liable.[15] An executor or administrator is liable for a devastavit committed by his wife during coverture,[16] and if a devastavit is committed by the husband of an executrix, and she survives him, she is chargeable with the loss suffered by the estate.[17] An executor or administrator is not, however, chargeable with, or responsible for, the acts of his predecessor in office,[18] nor can he be held to respond for the acts of a coexecutor or coadministrator,[19] unless all the representatives acted jointly, or those not acting connived at the devastavit or omitted to perform their duty to the estate.[20]

[§ 566] **d. Evidence.** A devastavit will not be presumed.[21] In an action of debt against an executor merely suggesting a devastavit, the executor is not to be held personally liable, as a devastavit can only be established by establishing the debt against the estate by matter of record, and showing assets admitted by defendant's plea, confession, or default, or found by the verdict of a jury, against a plea of plene administravit generally, and that defendant has wasted such assets.[22]

[§ 567] **e. Effect of Consent or Concurrence.** One cannot charge as a devastavit in the personal representative an act done with his own consent and concurrence;[23] but the assent of the guardian ad litem of an infant legatee or distributee will not discharge the representative from liability.[24]

[§ 568] **f. Rank of Claims for Waste.** It has been held that a creditor holding a specialty debt due from an intestate and coming against the estate of his administrator, on account of a devastavit, can only take equally with such administrator's simple contract creditors, while his sureties must make up the balance.[25]

[§ 569] **g. Restraining Waste.** The representative may be restrained from committing waste[26]

4. Davies v. Flewellen, 29 Ga. 49.
5. Davies v. Flewellen, 29 Ga. 49.
6. Donaldson v. West Branch Bank, 1 Pa. 286.
7. Beale v. Barnett, 64 SW 838, 23 KyL 1118; In re Stevens, [1898] 1 Ch. 162.
[a] **Illustration.**—Where an administrator in good faith, and upon a consideration deemed by him to be sufficient, paid some small sums of interest, which he might not have been compelled to pay because demand was not made of him within one year after his qualification, the court will not charge him with negligence. Beale v. Barnett, 64 SW 838, 23 KyL 1118.
8. Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656.
9. In re Williams, (Mont.) 173 P 790.
10. Le Baron v. Fauntleroy, 2 Fla. 276; Poag v. Carroll, 23 S. C. L. 1.
11. Higgins v. Trusts Corp., 27 Ont. A. 432, 20 CanLTOccNotes 347 [aff 30 Ont. 684, 19 CanLTOccNotes 280].
12. Tate v. Norton, 94 U. S. 746, 24 L. ed. 222; Outlaw v. Yell, 5 Ark. 468.
13. Charlton v. Low, 3 P. Wms. 328, 24 Reprint 1087 (a person injured by a waste of assets becomes a simple contract creditor of the executor or administrator).
14. Sidle v. Anderson, 45 Pa. 464; Wilson v. Long, 12 Serg. & R. (Pa.) 58.
15. Pearson v. Darrington, 32 Ala. 227.
[a] **Timber cut by heir.**—Where the heirs of one who died intestate, supposing that all the debts had been paid by the administrator, divided the real estate among them, after which one of them cut wood and timber on the lands to a large amount, it was held in a suit brought by a creditor against the administrator on his bond that this did not constitute waste by the administrator, and that he was not bound to account for the value of the wood and timber cut, although the estate ultimately proved insolvent and the administrator was one of the heirs and participated in the division. Fuller v. Young, 10 Me. 365.
16. Smith v. Jewett, 40 N. H. 513; Moone v. Henderson, 4 S. C. Eq. 459; Smith v. Smith, 21 Beav. 385, 52 Reprint 908.
17. Calhoun's App., 39 Pa. 218; Bordley's Est., 3 Phila. (Pa.) 127; Soady v. Turnbull, L. R. 1 Ch. 494; Mounson v. Bourne, Cro. Car. 518, 79 Reprint 1049; Horsy v. Daniel, 2 Lev. 161, 83 Reprint 498; Adair v. Shaw, 1 Sch. & Lef. 243; Bellew v. Scott, 1 Str. 440, 93 Reprint 621.
18. Finn v. Hempstead, 24 Ark. 111.
19. See infra § 2836.
20. See infra § 2836.
21. Garrow v. Toxey, 171 Ala. 644, 54 S 556.
22. Ford v. Rouse, 24 S. C. L. 219.
23. U. S.—Hiller v. Ladd, 85 Fed. 703, 29 CCA 394.
Ala.—Colbert v. Daniel, 32 Ala. 314.
Conn.—Mathews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.
Mo.—State v. Stuart, 74 Mo. A. 182.
Nebr.—Johnson v. Pulver, 95 NW 697.
N. Y.—Matter of Douglas, 60 App. Div. 64, 69 NYS 687.
N. C.—Cain v. Hawkins, 50 N. C. 192.
Pa.—Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094; In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; Rine v. Hall, 187 Pa. 264, 40 A 1088; Donnelly's Est., 8 Pa. Dist. 182; Hoff's Est., 7 Pa. Dist. 93.
Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.
Va.—Breckinridge v. Breckinridge, 98 Va. 561, 31 SE 892.
W. Va.—Brewer v. Hutton, 45 W. Va. 106, 30 SE 81, 72 AmSR 804.
Que.—Hill v. Campbell, 15 Que. Super. 125.
[a] **Illustration.**—Where an executor, acting with the assent of a legatee, under an erroneous construction of the will, divided the estate and allotted to the widow a larger share than she was entitled to receive, such legatee could not charge the executor with a devastavit. Colbert v. Daniel, 32 Ala. 314.
24. In re Kennedy, 120 Cal. 458, 52 P 820.
25. Carow v. Mowatt, 2 Edw. (N. Y.) 57.
26. Lester v. Stephens, 113 Ga.

or ruining the estate by collusion with pretended creditors;[27] but the power and authority of the representative should not be withheld from him or interfered with except upon satisfactory proofs of such actual misconduct or threatened misconduct as will render the property and estate in his hands in his charge and custody likely to suffer loss and be jeopardized by its further continuance under his control and management.[28]

[§ 570] **3. Conversion—a. What Constitutes.**[29] An executor or administrator may be held guilty of conversion where he has corporate stock belonging to decedent assigned to himself personally and for his own benefit,[30] sells or disposes of property of the estate without authority,[31] sells property of decedent and purchases it himself,[32] applies assets of the estate to the use of a firm of which he is a member,[33] pays his own debt by a check signed with the name of the estate and the coexecutor,[34] makes a gratuitous bailment of a chattel belonging to the estate,[35] withdraws money deposited in bank to the credit of decedent for a specific purpose, but which decedent had refused to accept,[36] or refuses to allow a domestic servant, to whom the testator has orally given certain articles of personal property, causa mortis, to remove them from the house of the testator.[37] Where testatrix bequeathed to testamentary trustees personal estate, consisting of bonds and mortgages, which was not necessary to pay debts, the act of the executor in collecting such securities and reinvesting the funds constituted a conversion, and rendered him liable to account for the value of the original assets to the trustees in cash.[38]

A representative does not become guilty of conversion by merely asserting ownership of assets rightfully in his possession, although the claim is erroneous,[39] taking securities in his own name for debts due the estate, where he had no fraudulent intent,[40] using property of the estate where he married decedent's widow and there are infant children of her former marriage,[41] taking property of the estate into his possession and using it in connection with his own property without an order of court, for part of the time, and declaring that he intended to continue such use until decedent's debts should be paid when he would give the entire estate to decedent's widow and child,[42] or failing to pay a debt due by him to the estate, which is charged against him in his accounts.[43] Since one having a half interest in notes distributed to heirs under an order of distribution became a tenant in common with the distributees, the mere act of the administrator in turning over the notes to them was not a conversion thereof.[44]

[§ 571] **b. Election of Remedies.** In case of conversion, the beneficiaries of an estate may elect either to charge the representative with the value of the substituted property and its natural increase, or else to claim and pursue the converted property wherever it can be traced.[45] So also where assets have been transferred to a creditor of the personal representative, other creditors may elect to avoid such transaction, and hold the creditor liable for assets thus received, or may let the transaction stand and charge the personal representative for a devastavit.[46]

[§ 572] **4. Mingling Trust and Personal Funds or Property.** An executor or administrator should preserve the funds and property of decedent's estate distinct from his own so that such assets may be known and readily identified;[47] and if he mingles the trust property with his own or with other property, so that the two are indistinguishable, he becomes personally liable;[48] and it has been held that

495, 39 SE 109; Overton v. Overton, 10 La. 472; Bentley v. Bentley, (N. J. Ch.) 38 A 236; Wightman v. Brown, 1 S. C. Eq. 166. See also Clifton v. Keeler, 158 Mich. 615, 618, 123 NW 22, 24 ("By the foregoing we do not mean to hold that a court of equity has not jurisdiction in a proper case to restrain an administrator from unlawfully dissipating an estate. Such a case might arise").

[a] **Who may bring suit to restrain.**—Minor children, who are beneficiaries of their deceased father's estate after the expiration of the life estate of the mother, who is also executrix, may bring suit to restrain waste by the executrix in attempting to maintain a high standard of living for herself and children. Bentley v. Bentley, (N. J. Ch.) 38 A 286.

[b] **A prohibition against suing a personal representative within twelve months** after his appointment has no application to a suit to prevent waste, at least where the personal representative is insolvent and not under bond. Lester v. Stephens, 113 Ga. 495, 39 SE 109.

27. Overton v. Overton, 10 La. 472.

28. Laferty's Est., 15 Pa. Co. 300, 35 WklyNC 132.

29. Mingling trust and personal funds or property see infra § 572.

30. Holland v. Ball, 193 Mass. 80, 78 NE 772; Whitley v. Alexander, 73 N. C. 444.

31. Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466; Matter of Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 57 NE 1117 mem].

[a] **This is true even though** (1) the representative believed the property to be worthless. Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466. (2) Such property was placed with him for sale in decedent's lifetime. Matter of Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 57 NE 1117 mem].

32. Carraway v. Burbank, 12 N. C. 306.

33. Miller v. Williamson, 5 Md. 219.

34. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.

35. Lawson v. Lay, 24 Ala. 184.

36. Reynolds v. St. Paul Trust Co., 51 Minn. 236, 53 NW 457.

37. Scollard v. Brooks, 170 Mass. 445, 49 NE 741.

38. Matter of Ryer, 94 App. Div. 449, 88 NYS 52 [aff 180 N. Y. 532 mem, 72 NE 1150 mem].

39. Smith v. Rosser, 37 Ga. 353; Matter of Niles, 142 App. Div. 198, 126 NYS 1066.

40. Syme v. Badger, 92 N. C. 706.

41. Montgomery Branch Bank v. Wade, 13 Ala. 427.

42. Morgan v. Nelson, 43 Ala. 586.

43. Culbreth v. Smith, 124 N. C. 289, 32 SE 714.

44. Deweese v. Yost, 161 Mo. A. 10, 143 SW 72.

45. Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Kavanaugh v. Thompson, 16 Ala. 817; Julian v. Reynolds, 8 Ala. 680; Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518 mem, 94 NE 1099 mem].

46. Frank v. Thompson, 105 Ala. 211, 16 S 634.

Ala.—Key v. Boyd, 10 Ala. 154.

Ill.—Field v. Colton, 7 Ill. A. 379.

Ind.—Brackenridge v. Holland, 2 Blackf. 377, 20 AmD 123.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691; Hagthorp v. Hook, 1 Gill & J. 270.

N. J.—Zion Evangelical Lutheran Church v. Smith, 58 N. J. Eq. 25, 43 A 428.

N. Y.—Case v. Abeel, 1 Paige 393, 402.

"Executors and trustees must be made to understand that it is their duty to keep the funds of their trust separate and distinct from their other funds and business; that they should upon no consideration use the trust money themselves, or permit it to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation, and censure. If they neglect this obvious duty, they have no reason to complain if they meet with trouble and expense, and sometimes with heavy loss." Case v. Abeel, supra.

[a] **An executrix of a will which gives her a life estate** in the real and personal property of testator becomes a trustee for the residuary legatees, on proving the will, and under obligations to keep accurate accounts of the estate, and keep its funds separate from her own. Zion Evangelical Lutheran Church v. Smith, 58 N. J. Eq. 25, 43 A 428.

[b] **It is not fraud per se** to mingle private and official funds. Goodwin v. American Nat. Bank, 48 Conn. 550.

48. U. S.—Union Bank v. Smith, 24 F. Cas. No. 14,362, 4 Cranch C. C. 509.

Ala.—Henderson v. Henderson, 58 Ala. 582; McElroy v. Thompson, 42 Ala. 656.

Cal.—In re Richmond, 9 Cal. A. 402, 99 P 554.

Conn.—Cabot Bank's App., 26 Conn. 7.

Iowa.—Officer v. Officer, 120 Iowa 389, 94 NW 947, 98 AmSR 365.

Me.—Prescott v. Morse, 62 Me. 447.

Miss.—Adams v. Westbrook, 41 Miss. 385.

N. J.—Zion Evangelical Lutheran Church v. Smith, 58 N. J. Eq. 25, 43 A 428.

N. Y.—Matter of Hayes, 40 Misc.

beneficiaries may at their option elect to hold him accountable as for conversion in doing so,[49] although there is an inclination to respect innocent motive and the absence of intent or opportunity to make an individual profit, where due prudence was exercised under all the circumstances, so as to relieve the representative in such case from strict liability as though for conversion.[50] In case of loss the representative is liable without regard to the question whether the loss itself was caused by any fault of his.[51] So also where an executor sells, for a gross sum, goods of which a part belong to him and a part to the estate, money paid to him on account of such sale will be presumed to have been paid on account of the property belonging to the estate.[52]

[§ 573] **5. Extent of Liability.** Actual value of the assets at the time of their waste, conversion, embezzlement, or misappropriation, computed in lawful money, is usually the measure of the liability of the executor or administrator who was at fault,[53] and in case of conversion the representative may be charged with the highest value which can properly be placed on the property.[54] Proof that an administrator has converted to his own use a certain sum from the assets of the estate does not, in the absence of an accounting, create any presumption that he has not converted a greater sum.[55] The liability of an executor, on a claim against a vessel in which the testator owned an interest, arising while the vessel was being employed in his own business, has been held to be measured by the extent of the testator's interest.[56]

Conversion of business. Where an administratrix permitted the saloon of her intestate to pass into the control of her husband, and before the settlement of the estate she died, her estate was chargeable with the value of the saloon and interest thereon, and with its profits, if it was conducted in her interest,[57] but she could not be chargeable with the gross receipts, as she must be allowed the expense of conducting it.[58] In a case where the widow of a licensed saloon keeper took out letters of administration on her husband's estate, obtained a transfer of the license to herself, refused a large offer for it, became the tenant of the property in place of decedent, retained the other personal property for her own use, and carried on the business as her own, she was surcharged with a sum sufficient to pay her husband's creditors.[59] Where decedent had conducted his business for twenty-eight years, and after two years immediately succeeding his death the executors formed a corporation and took over

500, 82 NYS 792.

N. C.—Lippard v. Roseman, 72 N. C. 427.

[a] **What amounts to mingling.**—An executor, who renews notes and mortgages of the estate, taking the new notes and mortgages in his individual name without authority of court, in effect mingles trust property with his own the same as if he had deposited trust funds to his own credit. In re Richmond, 9 Cal. A. 402, 99 P 554.

[b] **Effect of mingling assets.**—When an executor mingles assets of the estate with his own property so that they can no longer be distinguished, the property in such assets is of necessity altered and vested in the executor individually. They become converted, or, technically speaking, "administered," and the executor remains accountable for their value. Union Bank v. Smith, 24 F. Cas. No. 14,362, 4 Cranch C. C. 509; Henderson v. Henderson, 58 Ala. 582; Prescott v. Morse, 62 Me. 447; Cox v. Wills, 49 N. J. Eq. 130, 22 A 794; Rorke v. McConville, 4 Redf. Surr. (N. Y.) 291.

[c] **The doctrine of confusion of goods** does not apply so as to cause the representative to forfeit his own property in cases of mingling. Matter of Mullon, 74 Hun 358, 26 NYS 682 [aff 145 N. Y. 98, 39 NE 821].

[d] **Mere delay by executors in calling in a debt** due to the testator from a firm of which some of the executors are members does not give the estate any right to share in the profits of the business. Vyse v. Foster, L. R. 8 Ch. 309 [aff L. R. 7 H. L. 318].

49. Henderson v. Henderson, 58 Ala. 582; Ditmar v. Bogle, 53 Ala. 169; Raines v. Raines, 51 Ala. 237; McElroy v. Thompson, 42 Ala. 656; Norwood v. Duncan, 10 Mart. (La.) 708.

50. Md.—State v. Cheston, 51 Md. 352.

N. Y.—Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 NE 759, LRA1916F 1059 [mod 170 App. Div. 679, 156 NYS 563].

N. C.—Whitley v. Alexander, 73 N. C. 444.

Pa.—Coggins' App., 3 Walk. 426.

Vt.—Burnham v. Marshall, 56 Vt. 365.

[a] **Illustrations.**—(1) Where an administrator found among the assets of the estate a large quantity of leaf tobacco, which he rendered more valuable by manufacturing it, and in the process of manufacture he mingled with it some of his own tobacco which he used as wrappers, this was not such a mingling of the assets of the estate with his individual property as rendered him liable to creditors. Whitley v. Alexander, 73 N. C. 444. (2) An executor, who deposited funds of estate to his individual account, is not guilty of a conversion, title being in him. Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 NE 759, LRA1916F 1059 [mod 170 App. Div. 679, 156 NYS 563].

51. U. S.—Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 29.

Ala.—Key v. Boyd, 10 Ala. 154.

Colo.—Hake v. Stotts, 5 Colo. 140.

Md.—Neale v. Hagthrop, 3 Bland 551.

N. J.—Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428.

N. Y.—Kellett v. Rathbun, 4 Paige 102.

Eng.—Freeman v. Fairlie, 3 Meriv. 29, 36 Reprint 12; Wankford v. Wankford, 1 Salk. 299, 91 Reprint 265.

[a] **Illustration.** — An executor loaned money of the estate to one Hall, and took a note executed by one Holt, secured by a mortgage from Holt to Hall. When the note became due Hall took it up and gave the executors a note for a larger amount, secured by a mortgage from Holt on property then supposed to belong to him; but the title afterward failed. The first note was surrendered by the executor in part payment for the larger one. It was held that the executor was liable for the amount lost by the failure of the mortgage security, because he had mingled assets of the estate with his individual funds. Key v. Boyd, 10 Ala. 154.

52. Rolain v. Darby, 6 S. C. Eq. 472.

53. Ala.—Irby v. Kitchell, 42 Ala. 438; Glenn v. Glenn, 41 Ala. 571.

Cal.—In re Scott, 1 Cal. A. 740, 83 P 85.

Mo.—State v. Berning, 74 Mo. 87.

N. Y.—Hayward v. Place, 4 Silv. Sup. 390, 7 NYS 523.

Pa.—Frey's Est., 6 Pa. Co. 84.

Va.—Moses v. Hart, 25 Gratt. (66 Va.) 795.

[a] **Illustration.** — Where executors sold certain cooperage belonging to the estate, without order of court, for a price in excess of the appraised value in the inventory, and reported that it had been sold at the latter figure, they were liable for its value, without proof that more money was received for the total cooperage sold than was stated in their accounts. In re Scott, 1 Cal. A. 740, 83 P 85.

[b] **When inventory value conclusive on representative.**—Where an administrator, on final accounting, was charged with the inventory value of certain chattels which he had allowed the widow to take, he cannot object that such value was too high, since, if he does not subject the goods to the proper test of their value by public sale, the inventory value is conclusive on him. Reiff's Est., 5 PaLJ 255, 3 PaLJ 310.

[c] **Liability limited to amount converted.**—An executor who has misappropriated funds of the estate can be held liable for no more than the proof shows to have remained in his hands. Hayward v. Place, 4 Silv. Sup. 390, 7 NYS 523.

54. Irby v. Kitchell, 42 Ala. 438; Cole v. Leake, 27 Miss. 767; Buck's Est., 185 Pa. 57, 39 A 821, 64 AmSR 816.

[a] **Illustration.**—On adjudication of an administrator's account, it appeared that deceased was engaged in the retail liquor business, and had a license; that the unexpired lease and the goodwill of the business, with the opportunity of procuring a transfer of the license, were worth from two thousand dollars to two thousand five hundred dollars, and that accountant, without making an effort to procure a purchaser, appropriated them to himself. It was held that accountant was properly surcharged with two thousand five hundred dollars. Buck's Est., 185 Pa. 57, 39 A 821, 64 AmSR 816.

[b] **The appraised value may be charged** where an executor or administrator has converted the personalty to his own use, unless he shows that such valuation is excessive. Cole v. Leake, 27 Miss. 767.

55. Matter of McCauley, 49 Misc. 209, 99 NYS 238.

56. Hanschell v. Swan, 23 Misc. 304, 51 NYS 42.

57. In re Suess, 37 Misc. 459, 75 NYS 938.

58. In re Suess, 37 Misc. 459, 75 NYS 938.

59. Brady's Est., 21 Pa. Super. 397.

the business, and carried it on in the same premises, and maintained the business without changing the sign over the premises, and, without attempting to ascertain whether the business had a goodwill, appropriated it to their own use, it was held that this should be charged in their accounting with its estimated value, equal to three times the average profit for a single year during the three fiscal years immediately succeeding decedent's death.[60]

A statutory penalty, exceeding the value of the property, is sometimes imposed on a representative whose misconduct has caused a loss of the estate.[61]

[§ 574] **6. Lien on Property of Representative.** There is no specific lien on the property of the representative to make good his waste or embezzlement.[62]

[§ 575] **7. Discharge from Liability.**[63] An administratrix who allows her husband to receive and convert to his own use the funds of an infant next of kin is not discharged from liability therefor upon the subsequent appointment of the husband as guardian of such infant, but is equally liable with such guardian.[64] The fact that the representative has distributed the estate of decedent does not relieve him from liability to a creditor who sues him for a devastavit within the period fixed by statute.[65]

[§ 576] **M. Loss or Depreciation of Assets—1. In General.** Executors and administrators are not insurers, nor will they be chargeable with the loss or depreciation of the assets where they have acted in good faith and with due prudence and diligence in the care and management of the estate,[66] but they are liable for losses which are the consequence of their own neglect of duty.[67]

60. Matter of Moore, 69 Misc. 535, 127 NYS 884 [aff 145 App. Div. 938 mem, 130 NYS 1122 mem].

61. Spaulding v. Cook, 48 Vt. 145 (double value of assets embezzled).

62. Connor v. Akin, 34 Ill. A. 431; Wilkes v. Harper, 2 Barb. Ch. 338 [aff 1 N. Y. 586].

[a] **Lien of judgment.**—In an action for embezzling the estate of an intestate, the county court has no authority to make its judgment a lien on all the lands of defendants, and the circuit court on appeal has no more power. Connor v. Akin, 34 Ill. A. 431.

63. Effect of consent or concurrence see supra § 567.

64. Altman v. Wile, 19 NYS 500 [aff 141 N. Y. 574, 36 NE 228].

65. Herpending v. Daniels, 11 KyL 358.

66. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449; Peyatte v. English, 19 F. Cas. No. 11,054a, Hempst. 24.

Ala.—Waller v. Ray, 48 Ala. 468.

Ark.—Dyer v. Jacoway, 59 Ark. 217, 6 SW 902.

Cal.—In re Gianelli, 146 Cal. 139, 79 P 841; In re Fernandez, 119 Cal. 579, 51 P 851.

Ill.—Christy v. McBride, 2 Ill. 75.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.

Ky.—Messmore v. Stone, 6 KyL 596, 13 Ky. Op. 304.

La.—Bertrand's Succ., 127 La. 857, 54 S 127; Stirling v. Lawrason, 31 La. Ann. 169.

Mich.—In re Choate, 165 Mich. 420, 131 NW 169; Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617; Cheever v. Ellis, 134 Mich. 645, 96 NW 1067; Owen v. Potter, 115 Mich. 556, 73 NW 977.

Miss.—Conwill v. Livingston, 61 Miss. 641.

Mo.—Powell v. Hurt, 108 Mo. 507, 17 SW 985; Fudge v. Durn, 51 Mo. 264; Stong v. Wilkson, 14 Mo. 116; Young v. Ray, (A.) 193 SW 608; Hills v. Evans, 114 Mo. A. 715, 91 SW 1022.

Nev.—In re Millenovich, 5 Nev. 161.

N. H.—Stevens v. Gage, 55 N. H. 175, 20 AmR 191.

N. J.—Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428; In re Barcalow, 29 N. J. Eq. 282 [rev on other grounds 36 N. J. Eq. 611].

N. Y.—McCabe v. Fowler, 84 N. Y. 314; Matter of Varet, 181 App. Div. 446, 168 NYS 896 [aff 224 N. Y. 573 mem, 120 NE 862 mem]; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Titus, 86 Misc. 375, 148 NYS 359 [rev on other grounds 156 NYS 509]; Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem]; Thompson v. Brown, 4 Johns. Ch. 619; Upson v. Badeau, 3 Bradf. Surr. 13.

N. C.—Pate v. Oliver, 104 N. C. 458, 10 SE 709; Keener v. Finger, 70 N. C. 35; Womble v. George, 64 N. C. 759; Finger v. Finger, 64 N. C. 183; Nelson v. Hall, 58 N. C. 32; Holderness v. Palmer, 57 N. C. 107; Deberry v. Ivey, 55 N. C. 370; Williams v. Maitland, 36 N. C. 92; Utly v. Rawlins, 22 N. C. 438; Perry v. Maxwell, 17 N. C. 488.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Pa.—In re Murnaghan, 107 A 886; In re Springer, 259 Pa. 46, 102 A 284; In re Borell, 256 Pa. 523, 100 A 953; In re Dauler, 247 Pa. 356, 93 A 511; Dabney's App., 120 Pa. 344, 14 A 158; In re Calhoun, 6 Watts 185; Donnelly's Est., 8 Pa. Dist. 182; Thomas' Est., 2 Kulp 213.

S. C.—Tompkins v. Tompkins, 18 S. C. 1; Johnson v. Henagan, 11 S. C. 93; Twitty v. Houser, 7 S. C. 153; O'Dell v. Young, 16 S. C. Eq. 155; Taveau v. Ball, 6 S. C. Eq. 456; Doud v. Sanders, 5 S. C. Eq. 277; Webb v. Bellinger, 2 S. C. Eq. 482.

Tenn.—In re Cator, 14 Lea 408; Mickle v. Brown, 4 Baxt. 468.

Tex.—Townsend v. Munger, 9 Tex. 300.

Va.—Jones v. Jones, 86 Va. 845, 11 SE 426; Le Grand v. Fitch, 79 Va. 635; Wayland v. Crank, 79 Va. 602; Cooper v. Cooper, 77 Va. 198; Tanner v. Bennett, 33 Gratt. (74 Va.) 251; Lingle v. Cook, 32 Gratt. (73 Va.) 262; Davis v. Harmon, 21 Gratt. (62 Va.) 194; Elliott v. Carter, 9 Gratt. (50 Va.) 541.

Wash.—In re Johnston, 181 P 209.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589; Anderson v. Piercy, 20 W. Va. 282; Williams v. Buster, 5 W. Va. 342.

Eng.—Job v. Job, 6 Ch. D. 562; Selby v. Bowie, 4 Giffard 300, 66 Reprint 720 [aff 9 Jur. N. S. 425]; Massey v. Baner, 1 Jac. & W. 242, 37 Reprint 367.

Ont.—Higgins v. Ontario, 27 Ont. A. 432 [aff 30 Ont. 684]; Re Fletcher, 26 Ont. 499.

"The inquiry in this, as in every other case, where a fiduciary is called to account and a liability is sought to be fixed upon him, is, did he act in the particular transaction which is questioned, within the scope of his powers, with good faith and ordinary prudence—not with 'sharpsighted vigilance,' as Chancellor Kent says, but with the same prudence and discretion that a prudent man under like circumstances is accustomed to exercise in his own affairs. If he did so act, 'he is not responsible for the consequences of his act, even though it result unexpectedly in the loss of the trust subject, or any part of it.'" Douglass v. Stephenson, 75 Va. 747, 749.

[a] **"The court is prompt to protect an administrator** or trustee against loss resulting from an honest mistake, but will not relieve him of loss resulting from measures adopted solely with a view to his own interest." Cooley v. Vansyckle, 14 N. J. Eq. 496, 500.

[b] **An executor or administrator is not liable for:** (1) Losses due to financial fluctuations. Cheever v. Ellis, 134 Mich. 645, 96 NW 1067. (2) Loss in collecting mortgages taken before his appointment, unless due to his want of reasonable diligence. Cheever v. Ellis, supra (3) An excusable failure to collect rent. Waller v. Ray, 48 Ala. 468. (4) Failure to get the highest price obtainable for property of the estate. Matter of Brower, 71 Misc. 398, 130 NYS 191. (5) Failure to enter deficiency judgments in foreclosures brought by him, where the judgments would have been worthless. Matter of Hayes, 40 Misc. 500, 82 NYS 792. (6) Where an executor, who was testator's son and had an interest in the profits of testator's business, renewed a current note to testator two weeks after his death, and the makers of the note failed eight months after the death, resulting in a loss on the note, the executor cannot be surcharged with the loss if the note was the last of a long series of renewals by the testator, and when it was renewed the makers were in the best credit, apparently solvent, and the executor had no reason to anticipate their failure. In re Hermann, 226 Pa. 543, 75 A 731. (7) Where a testator's personal estate amounted to less than sixty thousand dollars, of which forty thousand dollars was represented in interest-bearing bonds of two railroads, and the balance in other bonds, and he directed by his will that two funds of five thousand dollars each be invested in safe public securities bearing at least six per cent annual interest, or deposited with a trust company, and the interest paid to his sisters during their lives, and he died in 1872, and the administrator set apart five thousand dollars of each of the two classes of railroad bonds, and in the panic of '73 the bonds depreciated and were sold for forty-eight cents on the dollar, the administrator is not chargeable with the loss. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[c] **A loss of interest** arising from a debtor's refusal to pay an executor a debt before probate is too remote a consequence of a delay in proving the will to render the executor liable to account on the footing of willful default. In re Stevens, [1897] 1 Ch. 422 [aff [1898] 1 Ch. 162].

[d] **The fact that an administrator pays off a lien** on personal property of the estate, which, on a subsequent sale at public auction, fails to bring the amount of the lien, does not establish gross mismanagement of the estate, and the administrator is not chargeable with the loss, where he acted in good faith, and with reasonable care and prudence. In re Armstrong, 125 Cal. 603, 58 P 183.

[e] **The burden of proof** (1) is on those charging the representative with negligence. Johnson's Est., 11 Phila. (Pa.) 83. (2) It is incumbent upon the representative, if there is

sequence of bad faith or the want of due prudence and diligence.[67] The circumstances of each case must be considered in determining whether the representative has acted in good faith and with such prudence and diligence as to relieve him from liability for loss,[68] and as his duty is active, and not passive, to show the cause thereof, so that the court can see if it was incurred without his fault. In re Conser, 40 Or. 133, 66 P 607.

[f] **Circumstances disproving negligence.**—The contention that an executor was negligent with respect to certain notes, upon the deceased's indorsement of which the estate was held liable, for the reason that they were collectable from the maker, is disproved where it appears that the notes were left unpaid by the maker for several years, and were then disposed of by the holders at a heavy discount. Owen v. Potter, 115 Mich. 556, 73 NW 977.

[g] **Between an executor and legatees,** a case is to be decided upon a more liberal view of the discretion and power of the executor than as against creditors. In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLeg JNS 431]. To same effect McNair's App., 4 Rawle (Pa.) 148.

67. Ala.—Eubang v. Clark, 78 Ala. 73; Harris v. Parker, 41 Ala. 604; Dean v. Rathbone, 15 Ala. 328.

Ark.—Sharp v. Himes, 129 Ark. 327, 196 SW 131.

Cal.—In re Pease, 149 Cal. 167, 85 P 149; In re Carver, 123 Cal. 102, 55 P 770.

Ill.—Christy v. Christy, 225 Ill. 547, 80 NE 242; Whitney v. Peddicord, 63 Ill. 249; Rahe v. Jobusch, 197 Ill. A. 200; Fraser v. Fraser, 149 Ill. A. 186; Caruthers v. Caruthers, 99 Ill. A. 402.

Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

Kan.—Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

Ky.—Henderson Trust Co. v. Stuart, 108 Ky. 167, 55 SW 1082, 21 KyL 1164, 48 LRA 49; Foster v. Foster, 71 SW 524, 24 KyL 1396.

La.—Stone's Succ., 31 La. Ann. 311; Lafon v. His Creditors, 3 Mart. N. S. 707.

Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121; Hoffman v. Armstrong, 90 Md. 123, 44 A 1012.

Mich.—Porter v. Long, 136 Mich. 150, 98 NW 990, 4 AnnCas 177; Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.

Minn.—Ryan v. Williams, 92 Minn. 506, 100 NW 380.

Miss.—Boggan v. Walter, 20 Miss. 666.

Mo.—State v. Dickson, 213 Mo. 66, 111 SW 817; Fudge v. Durn, 51 Mo. 264; Foster v. Davis, 46 Mo. 268; State v. Meagher, 44 Mo. 356, 100 AmD 298.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. H.—Tuttle v. Robinson, 33 N. H. 104.

N. J.—Lindsley v. Dodd, 53 N. J. Eq. 69, 30 A 896 [rev on other grounds 53 N. J. Eq. 652, 33 A 963, 57 N. J. Eq. 334, 41 A 754, 915]; Vreeland v. Schoonmaker, 16 N. J. Eq. 512.

N. Y.—In re Heinze, 224 N. Y. 1, 120 NE 63; Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027]; Matter of Long Island L. & T. Co., 92 App. Div. 5, 87 NYS 318; Levett v. Polhemus, 86 App. Div. 495, 84 NYS 1049; Matter of Van de Veer, 63 App. Div. 495, 71 NYS 849; Matter of Hosford, 62 App. Div. 626, 71 NYS 163; Brinckerhoff v. Farias, 52 App. Div. 256, 65 NYS 358 [aff 170 N. Y. 427, 63 NE 437]; Matter of Donohue, 88 Misc. 359, 151 NYS 1094; Martin v. Andrews, 59 Misc. 298, 111 NYS 40; Matter of Feierabend, 38 Misc. 524, 77 NYS 1106; Matter of Baker, 27 Misc. 126, 57 NYS 398; In re Beer, 124 NYS 423; In re McGovern, 118 NYS 378; Prescott's Est., Tuck. Surr. 430.

N. C.—Smith v. Smith, 79 N. C. 455; Larkins v. Murphy, 71 N. C. 560; Beall v. Darden, 39 N. C. 76.

Pa.—In re Fulmer, 243 Pa. 226, 89 A 974; Irvine's Est., 203 Pa. 602, 53 A 502; Wilson's App., 115 Pa. 95, 9 A 473; Finney's App., 37 Pa. 323; Callaghan v. Hall, 1 Serg. & R. 241; Kauffeld's Est., 28 Pa. Super. 162 [rev 35 PittsbLegJNS 174]; Carr's Est., 24 Pa. Super. 369 [rev 8 Del. Co. 556]; Crouse's Est., 16 Pa. Super. 212; Hemphill's Est., 19 Pa. Dist. 606; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Furlong's Est., 10 Pa. Dist. 527; Spellier's Est., 4 Pa. Dist. 678, 17 Pa. Co. 286; Harris' Est., 12 Luz LegReg 58; Rice's Est., 14 Phila. 325; In re Campbell, 32 PittsbLeg JNS 409; Kier's Est., 10 PittsbLeg JNS 97; Schada's Est., 14 WklyNC 360.

S. C.—Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

Vt.—In re Hall, 70 Vt. 458, 41 A 508.

Va.—Beaty v. Downing, 96 Va. 451, 31 SE 612; Davis v. Chapman, 83 Va. 67, 1 SE 472, 5 AmSR 251; Strother v. Hull, 23 Gratt. (64 Va.) 652; Miller v. Jeffress, 4 Gratt. (45 Va.) 472.

W. Va.—Brewer v. Hutton, 45 W. Va. 106, 30 SE 81, 72 AmSR 804.

Eng.—Job v. Job, 6 Ch. D. 562; Re Barker, 77 L. T. Rep. N. S. 712; Piety v. Stace, 4 Ves. Jr. 620, 31 Reprint 319.

Can.—Low v. Gemley, 18 Can. S. C. 685.

Ont.—In re Nicholls, 29 Ont. L. 206, 4 OntWN 930, 24 OntWR 216, 4 Ont WN 1511; Clark v. Bellamy, 30 Ont. 532; Re Donaldson, 2 OntWR 810; Lawson v. Crookshank, 2 Ch. Chamb. (U. C.) 426.

"It is a very serious breach of trust, and a clear violation of law, for executors or trustees to do that which will diminish the value of the property committed to their care; and it is the imperative duty of every court to scrutinize their management of trust property, and hold them personally responsible for any loss which may result from their misconduct, mismanagement, or want of reasonable care and prudence in the discharge of their duties." Martin v. Andrews, 59 Misc. 298, 307, 111 NYS 40.

"The law holds an executor or administrator responsible for the want of due care in protecting the property of the estate from theft or loss, and the measure of the care and skill which they are required to use is that which a prudent man exercises in the direction of his own affairs." Booker v. Armstrong, 93 Mo. 49, 59, 4 SW 727.

[a] **A representative has been held liable for:** (1) A loss resulting from neglect to have a "vacancy permit" from an insurance company extended, the property having been destroyed by fire within the time for which the company had agreed to extend the permit upon application. Henderson Trust Co. v. Stuart, 108 Ky. 167, 55 SW 1082, 21 KyL 1164, 48 LRA 49. (2) Rent lost by his neglect. In re Saier, 158 Mich. 170, 122 NW 563. (3) A loss resulting from his granting a solvent surety on a note, the maker of which was insolvent, an extension of time until the note was barred. Foster v. Foster, 71 SW 524, 24 KyL 1396. (4) Taxes and penalties accumulating because of their failure to pay taxes on the real estate and permitting the widow, entitled to the net income of the estate, to take the gross rentals. Matter of Wagner, 132 App. Div. 306, 117 NYS 53. (5) Failure to secure a discount in paying the inheritance tax, when he had ample funds. In re Slater, (N. J. Prerog.) 102 A 384. (6) A debt loss through his relinquishing the security therefor. Fisher v. Skillman, 18 N. J. Eq. 229. (7) Money paid under an erroneous order of court which he failed to oppose. Brewer v. Hutton, 45 W. Va. 106, 30 SE 81, 72 AmSR 804. (8) Where a will showed that testator contemplated a settlement of his estate within three years, but the executor, by trading in realty and securities, prolonged the period of distribution, whereby losses resulted, the executor was properly surcharged with such losses and with payments for which the estate was not liable. In re Fulmer, 243 Pa. 226, 89 A 974. (9) An executor is rightly charged with the value of property as lost to the estate, on his testimony that he thought it belonged to the estate, but nevertheless abandoned a suit for its recovery, which he had begun, and allowed defendant therein to keep it on payment to him of money which he retained for himself. In re Pease, 149 Cal. 167, 85 P 149.

[b] **Money improperly retained.**—An administrator who improperly retains money which it is his duty to pay over at once to the persons entitled thereto is liable if it is subsequently lost through the failure of the bank in which he has deposited it. Harlow v. Mills, 58 Hun 391, 12 NYS 197.

[c] **Liability as bailee.**—(1) In the United States it is generally held that the liability of an executor or administrator for property of the estate in his hands is that of an ordinary bailee for hire. Lehman v. Robertson, 84 Ala. 489, 4 S 728; Carrico v. Brummel, 5 KyL 775; State v. Meagher, 44 Mo. 356, 100 AmD 298. (2) But in England it is held that he stands in the position of a gratuitous bailee. Job v. Job, 6 Ch. D. 562.

[d] **The fact that testatrix had been unwilling to insure** certain buildings did not excuse the executor from insuring the building so as to relieve him from liability for loss by fire. In re Ramsey, (N. J. Prerog.) 66 A 410.

[e] **A testamentary limitation of the executor's liability** will not readily be construed into an exemption from liability for mismanagement. Richardson's Est., 12 Phila. (Pa.) 32.

[f] **Estoppel.**—Where an administrator permitted a third person to acquire a title by possession to personal property of which the intestate died possessed, it was held that he could not, in a suit by the distributees for an account, deny the title of the intestate, and set up a title in a third person which had never been enforced. Holladay v. Holladay, 16 S. C. Eq. 279.

68. Bryan v. Mulligan, 11 S. C. Eq. 361; Williams v. Skinker, 25 Gratt. (66 Va.) 507; Raphael v. Boehm, 13 Ves. Jr. 407, 33 Reprint 347.

"The facts and circumstances, which are seldom, if ever, precisely the same in any two of these cases, but are more or less variant, must determine in each particular case whether the fiduciary has acted with that discretion and prudence which the rules of law require under these circumstances." Douglass v. Stephenson, 75 Va. 747, 750.

[a] **The principles involved in regulating the liability for losses** are (1) that in order not to deter persons from undertaking these offices the court is extremely liberal and (2) that care must be had to guard against abuse. Raphael v. Boehm, 13 Ves. Jr. 407, 33 Reprint 347; Powell v. Evans, 5 Ves. Jr. 839, 31 Reprint 886.

sive, a negligent failure to act may charge him with liability.[69]

[§ 577] **2. Real Property.** Wherever an executor or administrator becomes chargeable, under statute or otherwise, with the entire estate of the decedent, the rule stated above[70] applies with respect to real estate.[71]

[§ 578] **3. Property Never in Possession of Representative.** An executor or administrator is prima facie liable only for such assets as come into his possession,[72] but he may be charged with the value of property lost through his negligence, although he never had possession of it.[73]

[§ 579] **4. Depreciation of Currency.** In case funds of the estate become worthless through depreciation of the legal currency the usual standard of good faith and due diligence should apply.[74]

[§ 580] **5. Loss Through War or Public Authority.** The effect of war or public authority exercised de facto is that of vis major, and a personal representative who exercises good faith and such due care and diligence as the circumstances exact should not be charged personally for a loss to the estate thereby occasioned.[75]

[§ 581] **6. Destruction of Property.** An executor or administrator is not liable for the destruction of property of the estate by fire or other casualty if he took such precautions to avoid it as a prudent man would take in regard to his own property.[76] But an administrator is not entitled to a credit for nonnegotiable notes belonging to the estate which have been destroyed or stolen, for they may still be sued on and collected as lost instruments.[77]

[§ 582] **7. Theft.** The representative is not generally responsible for the loss resulting from property or funds of the estate being stolen,[78] although it is otherwise where the theft is attributable to his own negligence.[79]

[§ 583] **8. Death of Live Stock.** Loss in consequence of the death of live stock in the hands of an executor or administrator, resulting from natural causes, is not chargeable to him, where there was no dereliction of duty on his part in retaining possession of them until they died, instead of selling them.[80] The same rule has been applied to

69. Fisher v. Skillman, 18 N. J. Eq. 229; In re Holladay, 18 Or. 168, 22 P 750.

70. See supra § 576.

71. Wheeler v. Bolton, 92 Cal. 159, 28 P 558; Herteman's Est., 73 Cal. 545, 15 P 121; Matter of Lester, 172 App. Div. 509, 158 NYS 763; In re Irvine, 209 Pa. 321, 58 A 617; Fendrich's Est., 21 LancRev (Pa.) 233.

[a] **Illegally causing sale of land.**—An administrator who has illegally caused to be sold at sheriff's sale land claimed by his intestate under articles of agreement of which he had possession at his death is liable to an action by the heir for damages, and the measure of damages is the value of the land at private sale at the time of its sale by the sheriff, with interest. Weiting v. Nissley, 13 Pa. 650.

72. Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

73. Tuttle v. Robinson, 33 N. H. 104.

Liability for failure to collect assets generally see supra §§ 461, 462.

74. Ala.—Pitts v. Singleton, 44 Ala. 363.

Cal.—Sanderson's Est., 74 Cal. 199, 15 P 753.

Miss.—Rogers v. Tullos, 51 Miss. 685; Still v. Davidson, 51 Miss .153; Williams v. Campbell, 46 Miss. 57.

N. C.—Coggins v. Flythe, 113 N. C. 102, 18 SE 96; Williams v. Williams, 73 N. C. 413; Hagans v. Huffsteller, 65 N. C. 443.

S. C.—Koon v. Munro, 11 S. C. 139; West v. Cauthen, 9 S. C. 45; Stock v. Stock, 1 S. C. Eq. 191.

Va.—Dromgoole v. Smith, 78 Va. 665; Powell v. Stratton, 11 Gratt. (52 Va.) 792.

[a] **Where an administrator holds depreciated currency** (1) it is his duty in good faith to use it to pay debts and administration expenses, and he is liable for any loss that may result from his neglect to perform such duty. Rogers v. Tullos, 51 Miss. 685. (2) But he has been held not liable for not using such currency to pay debts where there was a probability that the estate might prove insolvent. Tompkins v. Tompkins, 18 S. C. 1.

[b] **Exchanging currency for gold.**—Where an executor in order to pay a coin debt of the estate exchanged five hundred dollars in currency, the property of the estate, for three hundred and seventy dollars in gold, getting current value for the greenbacks, he was liable to account only for the three hundred and seventy dollars. Sanderson's Est., 74 Cal. 199, 15 P 753.

[c] **Money paid out.**—An administrator cannot be allowed credit for payments alleged to have been received in Confederate money which "perished on his hands," when the fact of such perishing is not proved, but on the contrary his accounts show that he paid out a portion of the sum received. Turbeville v. Flowers, 27 S. C. 331, 3 SE 542.

[d] **The burden of proving that he could not invest** Confederate money which perished on his hands is on the administrator. Dromgoole v. Smith, 78 Va. 665.

75. Fudge v. Durn, 51 Mo. 264; Gay v. Grant, 101 N. C. 206, 8 SE 99; Green v. Barbee, 84 N. C. 69; Currie v. McNeill, 83 N. C. 176; Lacy v. Stamper, 27 Gratt. (68 Va.) 42; Newton v. Bushong, 22 Gratt. (63 Va.) 628, 12 AmR 553; Anderson v. Piercy, 20 W. Va. 282; Estill v. McClintic, 11 W. Va. 399.

[a] **Confiscation.**—An executor is not liable for property of the estate which was confiscated and seized by the government. Miller v. Cook, 77 Va. 806; Newton v. Bushong, 22 Gratt. (63 Va.) 628, 12 AmR 553.

[b] **Emancipation of slaves.**—An administrator is not liable for the value of slaves lost by emancipation where the other personalty in his hands was sufficient to pay the debts of the estate, the statute forbidding the sale of slaves unless the other personalty of the estate should be insufficient to pay the debts. Green v. Thompson, 84 Va. 376, 5 SE 507.

76. Montgomery v. Coldwell, 14 Lea (Tenn.) 29; Lawson v. Crookshank, 2 Ch. Chamb. (U. C.) 426; Croft v. Lindsey, 2 Freem. 1, 22 Reprint 1014.

77. Williams v. Cubage, 36 Ark. 307.

78. Ala.—Lehman v. Robertson, 84 Ala. 489, 4 S 728.

Ark.—Williams v. Cubage, 36 Ark. 307.

Mo.—State v. Powell, 67 Mo. 395, 29 AmR 512; Fudge v. Durn, 51 Mo. 264; State v. Meagher, 44 Mo. 356, 100 AmD 298.

N. H.—Stevens v. Gage, .55 N. H. 175, 20 AmR 191.

N. Y.—Furman v. Coe, 1 Cai. Cas. 96.

R. I.—Carpenter v. Carpenter, 12 R. I. 544, 34 AmD 716.

Eng.—Jones v. Lewis, 2 Ves. 240, 28 Reprint 155.

"If a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them [the goods] so as he would keep his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands; and for these not to be charged unless guilty of a devastavit; and if robbed, and he could not avoid it, he is not to be charged, at least in this court." Jones v. Lewis, supra [appr Job v. Job, 6 Ch. D. 562].

[a] **The ground on which these decisions rest** is that the administrator is the representative of the deceased, and is to be regarded as a trustee engaged in administering a private trust, and not as a public officer. State v. Powell, 67 Mo. 395, 29 AmR 512.

[b] **Proof of manner of loss.**—Where an executor undertakes to discharge himself from responsibility for the funds in his hands on the ground that such funds have been stolen from him, the fact of the loss in the manner asserted should be made to appear as clearly as the case admits. Foster v. Davis, 46 Mo. 268.

[c] **Theft of nonnegotiable notes.**—Williams v. Cubage, 36 Ark. 307 (set out supra § 581 text and note 77).

79. Ala.—Lehman v. Robertson, 84 Ala. 489, 491, 4 S 728.

Ga.—Tarver v. Torrance, 81 Ga. 261, 6 SE 177, 12 AmSR 311.

Mo.—Foster v. Davis, 46 Mo. 268.

Pa.—In re Skeer, 249 Pa. 288, 95 A 96; Powell's Est., 23 Pa. Dist. 286.

Wis.—Black v. Hurlbut, 73 Wis. 126, 40 NW 673.

[a] **"What is common or ordinary diligence,** or the lack of it, is more frequently a question of fact than of law, and . . . 'in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions, peculiar to the age; so that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" Lehman v. Robertson, 84 Ala. 489, 491, 4 S 728.

[b] **Money retained too long.**—An administrator who retains money of the estate in his hands long after the law requires its distribution is liable for it if stolen. Black v. Hurlbut, 73 Wis. 126, 40 NW 673.

80. Matter of Fernandez, 119 Cal. 579, 51 P 851; Sparrow's Succ., 44 La. Ann. 475, 10 S 882.

[a] **Illustration.**—Where a final settlement was delayed for several years without fault of the administrator, the death, during such delay, of work animals attached to the succession plantation, and annually leased with it, would be attributed to natural causes rather than to dereliction of

slaves.[81]

[§ 584] **9. Negligence or Fault of Agents or Servants.** While the representative has been held liable for loss resulting from the negligence or fault of agents or servants employed by him,[82] and there can be no doubt of such liability where there was concurrent negligence or fault on the part of the representative,[83] the generally accepted view is that the necessity of employing agents or attorneys in the collection of assets involves the risk of loss to the estate by their misconduct, negligence, or nonfeasance, and if a loss be sustained from such cause the executor or administrator is not liable if he exercised due prudence in the selection of the agent or attorney and his conduct was not otherwise negligent or improper.[84]

[§ 585] **10. Failure to Deposit or Safeguard.** The representative should be held liable for a loss caused by his failure to deposit or safeguard funds or property according to their character, where he has been lacking in good faith or ordinary prudence, but not otherwise.[85]

[§ 586] **11. Failure to Sell or Delay in Selling.** A representative who retains property or assets of the estate instead of selling the same is not, if he acted properly and prudently in so doing, liable for loss or depreciation in value which takes place while such property is retained;[86] but it is other-

duty on the part of the administrator in failing to obtain an order of sale. Sparrow's Succ., 44 La. Ann. 475, 10 S 882.

81. Morgan v. Nelson, 43 Ala. 586; Henry v. Graham, 30 S. C. Eq. 346.

82. Bayly's Succ., 30 La. Ann. 75; Harris' Succ., 29 La. Ann. 743; Noblet's Succ., 2 La. Ann. 281; Matter of Hayes, 40 Misc. 500, 82 NYS 792; In re Beer, 124 NYS 423; Schott's Est., Tuck. Surr. (N. Y.) 337; Kilbee v. Sneyd, 2 Molloy (Ir.) 186; Low v. Gemley, 18 Can. S. C. 685.

83. Ala.—Abercrombie v. Skinner, 42 Ala. 633.

Mich.—Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.

N. Y.—In re Beer, 124 NYS 423.

N. C.—Smith v. Smith, 79 N. C. 455.

Pa.—In re Skeer, 236 Pa. 404, 84 A 787, 42 LRANS 170.

Eng.—Pistor v. Dunbar, 1 Anstr. 107, 145 Reprint 815.

[a] **Illustrations.**—(1) An executrix of a deceased partner, giving power of attorney to sons of the other partner on his decease, is liable for the loss of the estate by embezzlement under such powers of attorney, where, from family reasons, she made no attempt to secure an accounting, whereby she could have saved the whole amount due the estate. In re Skeer, 236 Pa. 404, 84 A 787, 42 LRANS 170. (2) Where an administratrix, who delivered money belonging to the estate to her attorney for deposit in her name left with him the entire management and care of the estate and paid no attention to the deposit which he made, and the attorney deposited only a part of the money, and took the balance, and also raised and cashed her checks on the deposit which he afterward obtained, the administratrix should be surcharged with the amount the attorney failed to deposit, and also with the raised amount of such checks. In re Beer, 124 NYS 423.

[b] **Permitting agent or attorney to retain funds collected.**—(1) If an administrator permits an agent or attorney to retain, for several years, money of the estate collected by him, without any effort to collect it from the attorney, and it is thereby lost, the administrator is liable. Abercrombie v. Skinner, 42 Ala. 633; Reilly v. Porcher, 46 App. Div. 290, 61 NYS 662. (2) Thus, where an executor allowed his agent to foreclose a mortgage securing trust funds, take the deed in his name, and hold it for four years, without accounting for the money, he was liable to the estate for the loss caused by the agent's selling the land and appropriating the proceeds. Cheever v. Ellis, 134 Mich. 645, 96 NW 1067. (3) But where the collection was not made until after the death of the executor or administrator, his estate is not liable for misappropriation by the attorney, the debtors having been solvent, and there having been no immediate necessity for the collection of debts. Rayner v. Pearsall, 3 Johns. Ch. (N. Y.) 578.

[c] **The employment to bring suit of a person not authorized to practice law** renders the executor personally liable for losses that result from such person's want of skill. Wakeman v. Hazleton, 3 Barb. Ch. (N. Y.) 148.

[d] **Delegation of authority to collect debts.**—If an executor delegates his authority to another generally to collect the debts of the estate without authority in the will, he is liable for money misappropriated by such person. Thus, where the testator directed that his business should be carried on by one P, and the executor permitted him to get in the outstanding debts, the executor was liable for money collected by P and not paid over. Pistor v. Dunbar, 1 Anstr. 107, 145 Reprint 815.

[e] **Proceeds of sale lost by insolvency of commission merchant.**—Executors are liable to creditors of the estate for the proceeds of cotton lost by the insolvency of the commission merchant to whom the executors had shipped it for sale, where previous unfair dealings on the part of the commission merchant should have put the executors on their guard, although he was not notoriously insolvent at the time of the last shipment. Smith v. Smith, 79 N. C. 455.

[f] **Employment of person in confidence of decedent.**—An executor or administrator cannot divest himself of all responsibility regarding his trust by employing as agent to act in his stead a person who had been in the confidence and employment of decedent. Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.

84. U. S.—Green v. Hanberry, 10 F. Cas. No. 5,759, 2 Brock. 403.

Cal.—In re Taylor, 52 Cal. 477.

Ill.—Christy v. McBride, 2 Ill. 75.

Kan.—In re Beam, 8 Kan. A. 835, 57 P 854.

Ky.—McRoberts v. Carneal, 44 SW 442.

Mo.—Julian v. Abbott, 73 Mo. 580; Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

N. H.—Dodge v. Stickney, 62 N. H. 330.

N. J.—In re Sharp, 61 N. J. Eq. 601, 48 A 327; In re Slater, (Prerog.) 102 A 384.

N. Y.—McCabe v. Fowler, 84 N. Y. 314.

Pa.—Webb's Est., 165 Pa. 330, 30 A 827, 44 AmSR 666; In re Calhoun, 6 Watts 185; Schilskey's Est., 12 Pa. Dist. 181, 28 Pa. Co. 241.

Tenn.—James v. Wingo, 7 Lea 148.

Va.—Mills v. Talley, 83 Va. 361, 5 SE 368.

Eng.—In re De Clifford, [1900] 2 Ch. 707; Edmonds v. Peake, 7 Beav. 239, 29 EngCh 239, 49 Reprint 1056; Kilbee v. Sneyd, 2 Molloy 186; Dorchester v. Effingham, Taml. 279, 12 EngCh 279, 48 Reprint 111.

Can.—Low v. Gemley, 18 Can. S. C. 685 [dism app 5 Montr. Q. B. 186 (aff 4 Montr. Super. 92)].

Ont.—Dover v. Denne, 3 Ont. L. 664; Clark v. Bellamy, 27 Ont. A. 435 [rev 30 Ont. 532].

[a] **Where it is necessary for an administrator to employ a legal adviser,** and he makes the selection in good faith and with reasonabe prudence, he will not be responsible for errors or mistakes of counsel so employed. Sharp's Est., 61 N. J. Eq. 601, 48 A 327.

[b] **Employment of broker.**—An executor is justified in employing a broker to procure securities authorized by the will and in paying the purchase money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments; and he is not liable if the broker, instead of applying the money as intended, misappropriates it to his own use. Speight v. Gaunt, 9 App. Cas. 1 [aff 22 Ch. D. 727].

[c] **If the testator recommend a particular person** to be employed the executor is not liable merely for his default unless there has also been laches on the executor's part in not making him account. Kilbee v. Sneyd, 2 Molloy 186.

[d] **The burden of proof** is not on the executor or administrator, where he employed an agent to collect money and the money collected has been lost by the agent's insolvency to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. In re Brier, 26 Ch. D. 238.

85. Ala.—Lehman v. Robertson, 84 Ala. 489, 4 S 728.

Ga.—Tarver v. Torrance, 81 Ga. 261, 6 SE 177, 12 AmSR 311.

Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

Mo.—Greenwell v. Crow, 73 Mo. 638; Fudge v. Durn, 51 Mo. 264; State v. Meagher, 44 Mo. 356, 100 AmD 298.

N. H.—Stevens v. Gage, 55 N. H. 175, 20 AmR 191.

N. Y.—Cornwell v. Deck, 8 Hun 122; Furman v. Coe, 1 Cai. Cas. 96.

Tenn.—Montgomery v. Coldwell, 14 Lea 29.

Ont.—Lawson v. Crookshank, 2 Ch. Chamb. (U. C.) 426.

[a] **This rule has been applied:** (1) Where the representative kept money in the house for several years until it was destroyed by fire. Lawson v. Crookshank, 2 Ch. Chamb. (U. C.) 426. (2) Where there was a failure to insure property. Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

86. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710; In re Fisher, 128 Iowa 626, 104 NW 1023.

Ky.—Messmore v. Stone, 13 Ky. Op. 304.

Md.—Dugan v. Hollins, 11 Md. 41.

Miss.—Troup v. Rice, 55 Miss. 278.

N. J.—Brown v. Brown, 72 N. J. Eq. 667, 65 A 739; Parker v. Glover, 42 N. J. Eq. 559, 9 A 217.

N. Y.—Hancox v. Meeker, 95 N. Y. 528; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Mercantile Trust Co., 156 App. Div. 224, 141 NYS 460 [mod on other grounds 210 N. Y. 83, 103 NE 884]; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; In re Gray, 27 Hun 455 [mod on other

wise where he acted imprudently or improperly or exceeded his powers in retaining such property.[87] It has been said that a more liberal view of a representative's discretion in converting the decedent's assets into cash will be taken as regards legatees than as regards creditors.[88] It has been held that a representative who has acted in good faith and by retaining certain assets of the estate realized large profits and eventually disposed of a portion for more than the inventoried value of the whole will not be charged with losses on another portion because of a technical violation of his duty in not disposing of them;[89] but there is also authority for the view that where the executor has improperly retained securities, of which some have appreciated and others have depreciated in value, the beneficiaries may accept the benefit of the appreciation and still hold the representative liable for the loss on the other securities.[90]

[§ 587] **12. Acts Prior to Issuance of Letters.** An administrator may be held accountable to the estate for assets wasted or lost through his acts from the time of decedent's death to the time of the issuance of letters.[91]

[§ 588] **13. Losses Incurred as Life Tenant.** An executrix is not subject to surcharge for losses incurred as life tenant.[92]

[§ 589] **14. Assent of Heirs or Distributees.** Where an executor or administrator has acted in good faith, and his course of conduct has been requested, authorized, or assented to by the heirs or distributees, with knowledge of all the material facts, this may excuse him from any liability to them for resulting losses,[93] even though he has de-

grounds 91 N. Y. 502]; In re Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem]; Shumway v. Graves, 13 NYWklyDig 402; Weston v. Ward, 4 Redf. Surr. 415; McRae v. McRae, 3 Bradf. Surr. 199.

Pa.—In re Murnaghan, 107 A 886; In re Borell, 256 Pa 533, 100 A 953; In re Dauler, 247 Pa. 356, 93 A 511; Stewart's App., 110 Pa. 410, 6 A 321; Coggin's App., 3 Walk. 426; Newkirk's App., 3 Grant 323; Burkhart's Est., 18 Pa. Dist. 393; Brennan's Est., 15 Pa. Dist. 231; Donnelly's Est., 8 Pa. Dist. 182; Christian's Est., 13 Pa. Co. 283; Matter of Bosio, 2 Ashm. 437; Williamson's Est., 13 Phila. 195.

S. C.—Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 462, 42 SW 199.

Va.—Watkins v. Stewart, 78 Va. 111.

Wash.—In re Johnston, 181 P 209.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Eng.—Marsden v. Kent, 5 Ch. D. 598.

Ont.—In re Fulford, 29 Ont. L. 375, 5 OntWN 125, 14 DomLR 844.

Newfoundl.—Dearin v. Kough, 6 Newfoundl. 154.

[a] **Unavoidable delay in settling estate.**—Where an administrator could not settle the estate until another estate in which the heirs were interested was settled, and on that account deferred the sale of bank stock of the estate until it had greatly decreased in value, he was not liable for the loss. Matter of Thorp, 31 Misc. 581, 65 NYS 575, 1 Mills 553.

[b] **Discretion under will as to time of sale.**—Where testator devised the proceeds of real property, and directed the executors to dispose of it at such times as they might adjudge expedient, and at the time of testator's death the property was depreciated, and the executors delayed the sale for a considerable time, hoping for an appreciation, but it depreciated still more, the executors were held not liable for the loss or for necessary expenses in managing the estate. Matter of Hosford, 27 App. Div. 427, 50 NYS 550.

[c] **Discretion under order of court as to time of sale.**—Where an order of the probate court allowed an administrator to sell the cotton of the estate at such time as he judged best, the administrator was not liable for loss occasioned by depreciation in the price of the cotton between the time of its delivery to him and the time of its sale, in the absence of bad faith or negligence on his part. Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

[d] **Testamentary request that property be not sold.**—Executors are not chargeable with personal liability for failure to sell within three months bank stock of decedent which subsequently became worthless, where the will requested that it be not sold, and disposed of the future dividends. Northrup v. Browne, 204 Fed. 224, 122 CCA 496.

[e] **Difficulty as to title.**—Where testator at the time of his death had a paper title to certain land, but other parties have been in possession of the land under claim of ownership and title for thirty years, their possession and occupancy being of such a character as to give them valid title under the laws of the state in which the land is situated, the executor cannot be held liable for depreciation of the property because of his failure to sell it as directed by the will. In re Irvine, 209 Pa. 321, 58 A 617.

[f] **Injunction against disposing of assets.**—Where an administratrix assigned certain stock of the estate through her counsel to herself in her individual capacity, and the transaction was declared fraudulent, and the administratrix was ordered to hold the stock, and to account for it and its accumulations, and enjoined from disposing of it, she was entitled to an allowance in her account for depreciation of the stock pending the injunction. Greiner v. Greiner, 35 N. J. Eq. 134.

[g] **Delay in expectation of rise in market.**—If an executor, in the honest exercise of his discretion, delays selling goods or securities belonging to the estate in the expectation of a rise in the market, and in the meantime the market falls, he is not liable for the loss. Matter of Hosford, 27 App. Div. 427, 50 NYS 550; Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem, and aff 87 App. Div. 609 mem, 83 NYS 1117 mem]; Marsden v. Kent, 5 Ch. D. 598.

[h] **Delay pending litigation.**—Delay of an executor in selling bank stock which was yielding a good income will not render him liable for depreciation where he acted in good faith on the advice of counsel and of the residuary legatee, while disputed claims against the estate were in litigation. Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

87. Cal.—In re Stow, Myr. Prob. 97.

N. J.—In re Voorhees, 3 N. J. L. J. 211.

N. Y.—Mills v. Hoffman, 26 Hun 594; Matter of Macdonald, 4 Redf. Surr. 321; Gillespie v. Brooks, 2 Redf. Surr. 349.

Pa.—Sunday's App., 131 Pa. 584, 18 A 931; Carey's Est., 15 Pa. Dist. 527; Doyle's Est., 2 Del. Co. 196; Luffabarry's Est., 12 Phila. 6.

Eng.—Davenport v. Stafford, 14 Beav. 319, 51 Reprint 309.

Ont.—In re Nicholls, 29 Ont. L. 206, 4 OntWN 930, 24 OntWR 216, 4 OntWN 1511; Emes v. Emes, 11 Grant Ch. (U. C.) 325.

[a] **Directions of next of kin not controlling.**—An administrator, in determining the time for converting the assets of the estate into money for the purpose of distribution, is not controlled by the directions of one of the next of kin, even to the extent of her share in the estate. Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem].

[b] **Assessments on stock.**—Executors paying assessments on stock shares take the risk of the shares not being worth the assessment. If they allow the stock to be sold out for assessments, they take the risk that it is then worth more than the assessment. There is no law under which a court can authorize an executor to pay stock assessments. Unless creditors or heirs agree to hold him free from liability he should sell the stock as perishable. In re Stow, Myr. Prob. (Cal.) 97.

88. Coggin's App., 3 Walk. (Pa.) 426.

89. Matter of Porter, 5 Misc. 274, 25 NYS 822.

90. Gillespie v. Brooks, 2 Redf. Surr. (N. Y.) 349.

91. In re McGovern, 118 NYS 378.

92. Matter of Miller, 64 Misc. 232, 119 NYS 52 [mod on other grounds 138 App. Div. 885 mem, 122 NYS 1136 mem].

93. U. S.—Hiller v. Ladd, 85 Fed. 703, 29 CCA 394.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.

La.—Dickson v. Dickson, 23 La. Ann. 583.

Mich.—Ward v. Tinkham, 65 Mich. 695, 32 NW 901.

N. Y.—Matter of Hosford, 62 App. Div. 626, 71 NYS 163; Matter of Douglas, 60 App. Div. 64, 69 NYS 687; Luers v. Brunjes, 5 Redf. Surr. 32.

Okl.—In re Spann, 51 Okl. 309, 152 P 68.

Pa.—Seaton's App., 34 LegInt 87; Semple's Est., 28 PittsbLegJ 431.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

[a] **Illustration.**—Where it was understood among the heirs that an administrator might retain funds for the care of the widow, he was not guilty of negligence in retaining the proceeds of the mortgage and permitting the amount to remain on deposit in a bank until its failure three months later, and he was therefore not liable for the loss. Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

[b] **Circumstances not showing assent of heir.**—An administrator carried speculative accounts belonging to his intestate, instead of settling them, as he could have done. In July, 1892, an heir, with the other beneficiaries and the administrator, discussed plans for the distribution of the securities in the hands of the brokers after the debts due the brokers had been paid. No agreement was reached but the heir stated that she would enter into any agreement to which the others would consent. In December, 1892, and in January, 1893, the agent of the heir suggested to the administrator that the estate should be closed, and that it was de-

viated from the line of his duties.[94]

[§ 590] **15. Acting under Advice of Counsel.** Where a representative acted under advice of counsel, in good faith, this fact is entitled to great weight in his favor,[95] and will as a general rule relieve him of liability,[96] although it is not in and of itself sufficient conclusively to excuse him.[97]

[§ 591] **16. Extent of Liability.** The liability of an executor or administrator for the loss of assets is measured by the detriment sustained by the estate, which is the value of the property at the date of the loss.[98] Accordingly, where an executor has been held personally liable for losses from his investments of trust funds on insufficient security, and he has obtained for the estate title to the property taken as security, the legatees must quitclaim to him their claim to such property as a condition precedent to his paying the losses.[99]

[§ 592] **N. Torts—1. In General.** An executor or administrator cannot as such commit a tort, but any tort committed by him is committed individually, and renders him as an individual, and not the estate, liable in damages,[1] especially where the estate has derived no benefit from the representative's tortious act,[2] and the rule is the same whether the injury results from intentional wrong

sirable to have it settled as speedily as possible. Previous to this time the heir had expressed to the administrator a wish to obtain her share, and in April, 1893, the agent expressed regret to the administrator that the stocks had not been sold. It was held that the heir did not assent to his carrying the stock after February, 1893, and the administrator was liable to her for losses resulting after such date, although he acted in good faith and with ordinary prudence. Mathews' App., 76 Conn. 654, 57 A 694, 100 AmSR 1017.

94. Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

95. King v. Berry, 3 N. J. Eq. 261.

96. Matter of Joost, 50 Misc. 78, 100 NYS 378; Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

[a] **Where intricate questions of law involved.**—Matter of Joost, 50 Misc. 78, 100 NYS 378.

97. King v. Berry, 3 N. J. Eq. 261.

98. Wheeler v. Bolton, 92 Cal. 159, 28 P 558.

99. In re Roach, 50 Or. 179, 92 P 118.

1. U. S.—Thompson v. Canterbury, 12 Fed. 485, 2 McCrary 332.

Ala.—Brown v. Floyd, 163 Ala. 317, 50 S 995; Hunnicutt v. Higginbotham, 138 Ala. 472, 35 S 469, 100 AmSR 45; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Daily v. Daily, 66 Ala. 266; Shorter v. Urquhart, 28 Ala. 360; Gilmer v. Wier, 8 Ala. 72.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117; Toner v. Meussdorffer, 123 Cal. 462, 56 P 39; Sterrett v. Barker, 119 Cal. 492, 51 P 695; Eustace v. Jahns, 38 Cal. 3.

Colo.—Grimes v. Barndollar, 58 Colo. 421, 432, 148 P 256 [cit Cyc].

Conn.—Andrews v. Platt, 77 Conn. 63, 58 A 458.

Ga.—Cumberland Island Co. v. Bunkley, 108 Ga. 756, 33 SE 183; Carr v. Tate, 107 Ga. 237, 33 SE 47; Anderson v. Foster, 105 Ga. 563, 32 SE 373; Parker v. Barlow, 93 Ga. 700, 21 SE 213; Hundley v. Pendleton, 9 Ga. A. 268, 70 SE 1115.

Hawaii.—Kalua v. Camarinos, 11 Hawaii 557.

Ill.—Havill v. Newton, 202 Ill. A. 15; Monblatt v. Young, 199 Ill. A. 312.

Ind.—Moore v. Moore, 155 Ind. 261, 57 NE 242; Riley v. Kepler, 94 Ind. 308; Evans v. Hardy, 76 Ind. 527; Holderbaugh v. Turpin, 75 Ind. 84, 39 AmR 124; Hendrix v. Hendrix, 65 Ind. 329; Rose v. Cash, 58 Ind. 278; Cornthwaite v. Rockville First Nat. Bank, 57 Ind. 268; Hankins v. Kimball, 57 Ind. 42; Rodman v. Rodman, 54 Ind. 444; Mills v. Kuykendall, 2 Blackf. 47; Chaney v. Wood, (A.) 115 NE 333; Davis v. Schmidt, (A.) 31 NE 840.

Iowa.—Herd v. Herd, 71 Iowa 497, 32 NW 469.

Ky.—National Co-Op. Burial Assoc. v. Aul, 156 Ky. 750, 161 SW 1123.

La.—Louque v. Saloy, 45 La. Ann. 1386, 14 S 255.

Me.—Goulding v. Horbury, 85 Me. 227, 27 A 127, 35 AmSR 357; Plimpton v. Richards, 59 Me. 115.

Md.—Spencer v. Ragan, 9 Gill 480.

Mass.—Gridley v. Balston, Quincy 65.

Mich.—Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371.

Miss.—Fonte v. Horton, 36 Miss. 350.

Mo.—Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734; T. L. Horn Trunk Co. v. Delano, 162 Mo. A. 402, 142 SW 770.

N. Y.—Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950 [rev 76 Hun 55, 27 NYS 666]; Matter of Murray, 124 App. Div. 548, 108 NYS 1047; Reimers v. Schmitt, 68 App. Div. 299, 74 NYS 122; Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615 mem, 57 NE 1129 mem]; Guarantee Sav., etc., Co. v. Moore, 35 App. Div. 421, 54 NYS 787; Gatti-McQuade Co. v. Flynn, 79 Misc. 430, 140 NYS 135; Blum v. Dabritz, 39 Misc. 800, 81 NYS 315, 33 NYCivProc 290 [aff 78 NYS 207]; Matter of Hickey, 34 Misc. 360, 69 NYS 844; Lawyers' Surety Co. v. Reinach, 23 Misc. 242, 51 NYS 162 [aff 25 Misc. 150, 54 NYS 205]; McCue v. Finck, 20 Misc. 506, 46 NYS 242; Helling v. Bass, 121 NYS 1013; Blum v. Dabritz, 78 NYS 207 [aff 39 Misc. 800, 81 NYS 315, 33 NYCivProc 290; Watson v. Moriarty, 59 NYS 73.

N. C.—Whisnant v. Price, 175 N. C. 611, 96 SE 27.

Oh.—Deschler v. Franklin, 20 Oh. Cir. Ct. 56, 11 Oh. Cir. Dec. 188.

Or.—Fetting v. Winch, 54 Or. 600, 104 P 722, 38 LRANS 379, 21 Ann Cas 352.

Pa.—Moulson's Est., 1 Brewst. 296; Kline v. Richards, 4 LackJur 249; Skivington v. Palmer, 4 LackJur 245; Hay v. Parks, 7 North Co. 391, 14 YorkLegRec 180.

S. C.—Elmore v. Elmore, 58 S. C. 289, 36 SE 656, 51 LRA 261.

Tex.—Coutlett v. U. S. Mortgage Co., 94 Tex. 164, 58 SW 997; Cock v. Carson, 38 Tex. 284; Crayton v. Munger, 9 Tex. 285.

Vt.—Powers v. Caledonia County Grammar School, 106 A 836.

Va.—Belvin v. French, 84 Va. 81, 3 SE 891.

Can.—Ferrier v. Trepannier, 24 Can. S. C. 86.

Que.—Rielle v. Benning, 4 Montr. Super. 219, 11 Montr. Leg. N. 415.

[a] **Executors or administrators have been held personally liable for:** (1) Abuse of process. Lamorere v. Cox, 32 La. Ann. 246; Mell v. Barner, 135 Pa. 151, 19 A 940. (2) Infringements of patent rights. Thompson v. Canterbury, 12 Fed. 485, 2 McCrary 332. (3) Libels published by them. Rielle v. Benning, 4 Montr. Super. 219, 11 Montr. Leg. N. 415. (4) Injuries sustained by a canal boat through faulty construction of a bulkhead belonging to the estate. Mason v. Rhinelander, 16 F. Cas. No. 9,251, 8 Ben. (U. S.) 163. (5) Injuries resulting from their failure to keep in good order and repair property of which they have possession and control. Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371; T. L. Horn Trunk Co. v. Delano, 162 Mo. A. 402, 142 SW 770; Donohue v. Kendall, 50 N. Y. Super. 386 [aff 98 N. Y. 635 mem]; Helling v. Boss, 121 NYS 1013; Belvin v. French, 84 Va. 81, 3 SE 891; Ferrier v. Trepannier, 24 Can. S. C. 86. (6) Damages flowing from a wrongful revocation of a submission to arbitration of matters connected with the administration of the estate. Magoun v. Magoun, 84 App. Div. 232, 82 NYS 820.

[b] **Misapplication of proceeds of insurance.**—The estate is not liable to the widow for the misapplication by the administrator of the proceeds of an insurance policy paid to the administrator for the widow. Nickals v. Stanley, 146 Cal. 724, 81 P 117.

[c] **Torts of servant of administrator.**—Where a servant employed by an administrator in carrying on the business commits a tort while acting within the course of his employment, the administrator is liable therefor in his individual capacity. Kalua v. Camarinos, 11 Hawaii 557. See also Sinsabaugh v. Dun, 114 Ill. A. 523, 526 [aff 214 Ill. 70, 73 NE 390 ("We are not prepared to hold that appellees are exempt from liability for the torts of their agents or servants on the ground that they are acting as executors and trustees in the business of their testator").

[d] **Penalty for bringing diseased animals into state.**—An administrator who sells diseased or infected animals under an order of the probate court is not guilty of a violation of the statute, making it an offense for any person to bring infected or diseased animals into the state, or, after the proclamation by the governor, to receive in charge and transport and convey the same within the state, and also making the offender liable to persons injured thereby. Newell v. Clapp, 97 Wis. 104, 72 NW 366.

[e] **Advice to widow.**—An executor is not bound to give the widow any advice as to accepting or electing against the will; but if he consents to do so, he must exercise good faith and reasonable diligence. Hence, if the executor fraudulently induces the widow not to dissent from her husband's will within the time required by law, the proceedings assigning her year's support are binding on him. Bolin v. Barker, 75 N. C. 47.

[f] **An executor empowered merely to receive the rent** of a building until the guardian of an infant devisee is appointed, and owning no estate therein, is not personally responsible for damages caused by the overflow of water from a basin or other fixture therein, which he had no agency, active or passive, in producing. Robbins v. Mount, 27 N. Y. Super. 553, 33 HowPr 24.

[g] **Remedy for tort cannot be sought in orphans' court.**—Spencer v. Ragan, 9 Gill (Md.) 480.

2. Carr v. Tate, 107 Ga. 237, 33 SE 47.

or negligence.[3] But property or money actually received by the estate as assets through the representative's tortious conduct may sometimes be reached by the injured person.[4]

[§ 593] **2. Fraud.** The estate of a decedent is not liable for the fraud or false representations of the executor or administrator, but the fiduciary who practices the fraud is answerable personally therefor to the injured person.[5] The executor or administrator in the performance of his duties is, however, bound to act fairly and not fraudulently, and the estate cannot be permitted to derive any unjust or unconscionable advantage from his unauthorized or fraudulent misbehavior,[6] and where it appears that property fraudulently obtained was treated or used as assets of the estate, or that the estate received some benefit from his conduct, recourse may be had accordingly to a corresponding extent.[7] If the fraud is practiced upon or at the expense of the estate or those interested therein, the representative must of course respond therefor individually,[8] but although a transaction between an executor and a legatee will be closely scrutinized,[9] dealings between them are not necessarily fraudulent.[10] The fiduciary is entitled to the presumption of good faith in the discharge of his duties, and fraud, like any other tort, ought to be proved against him;[11] but in a case where plaintiff was the daughter, as well as

3. Boston Beef Packing Co. v. Stevens, 12 Fed. 279, 20 Blatchf. 443; Elmore v. Elmore, 58 S. C. 289, 36 SE 656, 51 LRA 261.

4. Cal.—Von Schmidt v. Bourn, 50 Cal. 616.

Colo.—Grimes v. Barndollar, 58 Colo. 421, 432, 146 P 256 [cit Cyc].

Iowa.—Herd v. Herd, 71 Iowa 497, 32 NW 469; Simpson v. Snyder, 54 Iowa 557, 6 NW 730.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Nichols v. Reyburn, 55 Mo. A. 1.

N. C.—McKinnie v. Oliphant, 2 N. C. 3.

"It will be conceded that where property, not belonging to an estate, is taken possession of and held in good faith by the administrator as being property belonging to such estate, a suit in replevin would lie by the owner of such property against the administrator in his official capacity. White v. McFarland, 148 Mo. A. 338, 128 SW 23. It would be fairly deducible from this and other authorities that where an administrator, under such circumstances, sells the property as part of the estate, but which does not in fact belong to the deceased or to his estate, and receives and uses the proceeds as part of said estate, a court of equity would afford relief to the owner by decreeing payment to be made for such property out of the funds of the estate." Silsby v. Wickersham, 171 Mo. A. 128, 132, 155 SW 1094.

"Trover, trespass, deceit, or any other action of the like nature will lie against executors where the thing itself has been used so as to go into and increase the testator's estate, so that the benefit thereof comes to the possession of the executor, otherwise where the thing is destroyed." McKinnie v. Oliphant, supra.

[a] **Extent of recovery.**—Where a special administrator made an unauthorized sale of stock pledged to decedent, and turned the proceeds over to executors subsequently appointed, the estate does not become liable to the pledgor for a conversion, so as to enable him to recover from it the enhanced value of the stock, although he might maintain an action against the executors to recover the proceeds of the sale or what actually became a part of the assets of the estate. Von Schmidt v. Bourn, 50 Cal. 616.

5. Conn.—Andrews v. Platt, 77 Conn. 63, 58 A 458.

Del.—Barwick v. White, 2 Del. Ch. 284.

Ga.—Harris v. Neil, 144 Ga. 519, 87 SE 661.

Ind.—Chaney v. Wood, (A.) 115 NE 333; Bright Nat. Bank v. Hanson, (A.) 113 NE 434.

Iowa.—Hazlett v. Burge, 22 Iowa 535.

Kan.—Brown v. Evans, 15 Kan. 88.

Ky. — Heath v. Allin, 1 A. K. Marsh. 442.

Mich.—Porter v. Long, 124 Mich. 584, 83 NW 601.

Minn. — Winston v. Young, 52 Minn. 1, 53 NW 1015; Fritz v. McGill, 31 Minn. 536, 18 NW 753.

N. C.—Pettijohn v. Williams, 46 N. C. 145.

Oh.—Westfall v. Dungan, 14 Oh. St. 276.

Tex.—Coutlett v. U. S. Mortgage Co., 94 Tex. 164, 58 SW 997.

Wash. — Kennedy v. Burr, 101 Wash. 61, 171 P 1022.

Man.—Maneer v. Sanford, 24 CanL TOccNotes 70.

But compare Crowley v. Hicks, 98 Wis. 566, 74 NW 348 (executors not individually liable for fraudulently preventing bidder at public sale of decedent's land from obtaining title thereto where, in so far as they dealt with the land, they acted in the capacity of executors).

[a] **Where an executor fraudulently had a short scale of timber made,** which had been sold by the testator to a firm composed of the executor and testator, such executor would be compelled to account for the shortage. Porter v. Long, 124 Mich. 584, 83 NW 601.

[b] **False representations on the sale of property** of the estate render the representative liable personally, but not in his representative capacity. Andrews v. Platt, 77 Conn. 63, 58 A 458; Riley v. Kepler, 94 Ind. 308; Huffman v. Hendry, 9 Ind. A. 324, 36 NE 727, 53 AmSR 351; Fritz v. McGill, 31 Minn. 530, 18 NW 753; Westfall v. Dungan, 14 Oh. St. 276; Dunlap v. Robinson, 12 Oh. St. 530; Maneer v. Sanford, (Man.) 24 CanLTOccNotes 70.

6. Bright Nat. Bank v. Hanson, (Ind. A.) 113 NE 434; Able v. Chandler, 12 Tex. 88, 62 AmD 518.

7. Chaney v. Wood, (Ind. A.) 115 NE 333; Bright Nat. Bank v. Hanson, (Ind. A.) 113 NE 434; Fritz v. McGill, 31 Minn. 536, 18 NW 753; Hasbrouck v. Blauvelt, 9 Hun (N. Y.) 200; Able v. Chandler, 12 Tex. 88, 62 AmD 518.

[a] **Petition.**—In an action to set aside an agreement made with an executor of an estate as to receiving certain securities as cash in payment of a claim, and to be permitted to recover judgment against the estate for the amount of the claim, where the petition alleges that the executor fraudulently induced plaintiff to accept worthless securities as cash and that the securities were not delivered to plaintiff but still remained in the possession of the executor, it sufficiently states a cause of action. Hasbrouck v. Blauvelt, 9 Hun (N. Y.) 200.

8. In re Pease, 149 Cal. 167, 85 P 149; Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; Branner v. Nichols, 61 Kan. 356, 59 P 633; Porter v. Long, 124 Mich. 584, 83 NW 601.

[a] **Where an administrator purchases property in fraud of the heirs,** and erects improvements thereon with money belonging to them, it is proper in an action to recover such property to charge him with rents and profits on it in its improved condition. Branner v. Nichols, 61 Kan. 356, 59 P 633.

[b] **No lien on account of fraud.**—Heirs of an estate have no equitable lien upon the share of a coheir who is executor or administrator, on account of his fraudulent administration of the estate. McClellan v. Solomon, 23 Fla. 437, 2 S 825, 11 AmSR 381.

[c] **A general charge of fraud and confederation is not a sufficient ground** upon which a court of equity will give aid against administrators alleged to have taken property of an intestate to the creditors of the intestate, where each defendant is sought to be made liable only for such portion of the property as he may have converted to his own use. Beck v. Rainey, 28 Miss. 111.

9. See supra § 560.

10. Stapleton v. Haight, 135 Iowa 564, 113 NW 351.

11. Roach v. Ames, 80 Ky. 6; Mitchell v. Berry, 1 Metc. (Ky.) 602.

[a] **Circumstances not amounting to fraud.**—(1) Hazlett v. Burge, 22 Iowa 535; Goodloe v. Rodes, 2 B. Mon. (Ky.) 86; Owen v. Potter, 115 Mich. 556, 73 NW 977; Griffin v. Nicholas, 224 Mo. 275, 123 SW 1063; Matter of Sprague, 40 App. Div. 615, 57 NYS 1128 [aff 162 N. Y. 646 mem, 57 NE 1125 mem]; Johnston v. McCain, 188 Pa. 513, 41 A 592; McDougall v. Bell, 10 Grant Ch. (U. C.) 283. (2) Since the payment of money at the request of an executor to relieve the estate from an encumbrance does not create a debt, payable as such out of the estate, an action for deceit cannot be founded on a representation, made by the executor to induce plaintiff to pay such money, that the estate was solvent and able to pay all debts. Winston v. Young, 52 Minn. 1, 53 NW 1015. (3) The mere purchase by an administrator of claims against the estate, although improper, is not fraud of such a character as will authorize a setting aside of his final settlement. Baldwin v. Dalton, 168 Mo. 20, 67 SW 599. (4) An executor is not liable for making an alleged false statement to one of the beneficiaries as to the value of his share in the estate, where the error arose from a failure to foresee an advance in the value of real estate. In re Cunningham, 212 Pa. 441, 61 A 993.

[b] **Circumstances amounting to fraud.**—(1) Sorrels v. Trantham, 48 Ark. 386, 3 SW 196, 4 SW 281; Ringgold v. Stone, 20 Ark. 526; Barwick v. White, 2 Del. Ch. 284; Leach v. Owensboro City R. Co., 137 Ky. 292, 125 SW 708. (2) Where an administrator, having personalty in his hands sufficient to pay taxes imposed on the lands of the estate, permits the city to sell them for nonpayment, and bids them in, and takes them from the city in his own name as assignment of the tax lease, he is guilty of an actual fraud. Kelly v. Pratt, 41 Misc. 31, 83 NYS 636.

the administratrix, of decedent, and defendant, who was the widow of that decedent and administratrix of another estate, assented to an amicable action to determine an award on a probated claim against the estate of which she was administratrix, and gave testimony favorable to plaintiff but made no defense to the action, it was held that fraud and collusion in procuring the award would be inferred in an intervention to except to the confirmation of the award.[12] It has been said that no matter how many acts of fraud an administrator may have been guilty of, such conduct will not divest him of his contractual rights under a valid mortgage which he has purchased.[13]

[§ 594] **O. Real Property and Interests Therein—1. Title and Authority in General—a. General Rule.** The general rule is that neither an executor nor an administrator has, as such, any inherent interest in, title to, or control over the realty of his decedent,[14] but the title to all real property of

12. White v. Penuel, 22 Del. 272, 66 A 362.

13. Guisti v. Guisti, 41 Nev. 349, 171 P 161.

14. U. S.—Brush v. Ware, 15 Pet. 93, 10 L. ed. 672; Herron v. Comstock, 139 Fed. 370, 71 CCA 466; Russell v. Russell, 129 Fed. 434 [rev on other grounds 134 Fed. 810, 67 CCA 436]; Scruggs v. Scruggs, 105 Fed. 28; Kohn v. McKinnon, 90 Fed. 623; Jones v. Lamar, 34 Fed. 454 [app dism 149 U. S. 777 mem, 13 SCt 1048 mem, 37 L. ed. 965 mem].

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Creel v. Creel, 167 Ala. 599, 52 S 902; Mayer v. Kornegay, 163 Ala. 371, 50 SE 880, 136 AmSR 79; Brown v. Mize, 119 Ala. 10, 24 S 453; McKay v. Broad, 70 Ala. 377; Nelson v. Murfee, 69 Ala. 598; Lee v. Downey, 68 Ala. 98; Cruikshank v. Luttrell, 67 Ala. 318; Turner v. Kelly, 67 Ala. 173; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Tyson v. Brown, 64 Ala. 244; Crawford v. McLeod, 64 Ala. 240; Calhoun v. Fletcher, 63 Ala. 574; Cockrell v. Coleman, 55 Ala. 583; Hall v. Hall, 47 Ala. 290; Chighizola v. Le Baron, 21 Ala. 406; Lucas v. Doe, 4 Ala. 679; Terry v. Ferguson, 8 Port. 500; Leavens v. Butler, 8 Port. 380.

Ark.—Doke v. Benton County Lumber Co., 114 Ark. 1, 169 SW 327, 52 LRANS 870; Anderson v. Levy, 33 Ark. 665; Kiernan v. Blackwell, 27 Ark. 235.

Cal.—Fickes v. Baker, 36 Cal. A. 129, 171 P 819.

Colo.—Adams v. Slattery, 36 Colo. 35, 85 P 87.

Conn.—Hotchkiss' App., 89 Conn. 420, 95 A 26; Ryder v. Lyon, 85 Conn. 245, 82 A 573; Lockwood v. Lockwood, 2 Root 409.

Fla.—Hedick v. Hedick, 38 Fla. 252, 21 S 101.

Ga.—Juhan v. Juhan, 104 Ga. 253, 30 SE 779; Sorrell v. Ham, 9 Ga. 55; Lester v. Toole, 20 Ga. A. 381, 93 SE 55; Bacon v. Howard, 19 Ga. A. 660, 91 SE 1066.

Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215; Dunham v. Slaughter, 268 Ill. 625, 109 NE 673 [rev 190 Ill. A. 497]; Emmerson v. Merritt, 249 Ill. 538, 94 NE 955; Gammon v. Gammon, 153 Ill. 41, 38 NE 890; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Le Moyne v. Quimby, 70 Ill. 399; Phelps v. Funkhouser, 39 Ill. 401; Walbridge v. Day, 31 Ill. 379, 83 AmD 227; Bennett v. Whitman, 22 Ill. 448; Buck v. Eaman, 18 Ill. 529; Smith v. McConnell, 17 Ill. 135, 63 AmD 340; Lane v. Thorn, 103 Ill. A. 215; Boudinot v. Winter, 91 Ill. A. 106 [aff 190 Ill. 394, 60 NE 553]; Richardson v. Richardson, 87 Ill. A. 354; Smith v. Hall, 19 Ill. A. 17.

Ind.—Moore v. Moore, 155 Ind. 261, 57 NE 242; Shobe v. Brinson, 148 Ind. 285, 47 NE 625; Hendrix v. Hendrix, 65 Ind. 329; Taylor v. Fickas, 64 Ind. 167, 31 AmR 114; Hankins v. Kimball, 57 Ind. 42; Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324; Halstead v. Coen, 31 Ind. A. 302, 67 NE 957.

Iowa.—Flora v. Brown, 159 Iowa 253, 140 NW 364; Hatton v. Wheaton, 158 Iowa 460, 139 NW 1108; In re Acken, 144 Iowa 519, 123 NW 187, AnnCas1912A 1166; Cummings v. Lynn, 121 Iowa 344, 96 NW 857; Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383; Gray v. Myers, 45 Iowa 158; Gladson v. Whitney, 9 Iowa 267.

Ky.—Sauer v. Taylor, 184 Ky. 609, 212 SW 583; U. S. Fidelity, etc., Co. v. Russell, 141 Ky. 601, 133 SW 572; Row v. Johnson, 78 SW 906, 25 KyL 1799; Warfield v. English, 11 SW 662, 11 KyL 263.

La.—Coste's Succ., 43 La. Ann. 144, 9 S 62; Bird v. Jones, 5 La. Ann. 643.

Me.—Crocker v. Smith, 32 Me. 244.

Mass.—Jones v. Treadwell, 169 Mass. 430, 48 NE 339; Brown v. Kelsey, 2 Cush. 243; Stearns v. Stearns, 1 Pick. 157; Gibson v. Farley, 16 Mass. 280; Hathaway v. Valentine, 14 Mass. 501; Willard v. Nason, 5 Mass. 240; Boylston v. Carver, 4 Mass. 598; Drinkwater v. Drinkwater, 4 Mass. 354; Dean v. Dean, 3 Mass. 258; Henshaw v. Blood, 1 Mass. 35.

Mich.—Pratt v. Millard, 154 Mich. 112, 117 NW 552; Thayer v. Lane, Walk. 200.

Miss.—Gordon v. James, 86 Miss. 604, 39 S 18, 1 LRANS 461; Nixon v. Seal, 27 S 875; Clayton v. Boyce, 62 Miss. 390; Hargrove v. Baskin, 50 Miss. 194; Farley v. Hord, 45 Miss. 96; Hall v. Hall, 27 Miss. 458; Pinson v. Williams, 23 Miss. 64.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072; McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730, 131 AmSR 561 [quot Cyc]; Stark v. Kirchgraber, 186 Mo. 633, 85 SW 868, 105 AmSR 629.

Nebr.—In re Buerstetta, 83 Nebr. 287, 119 NW 469; State v. Reeder, 5 Nebr. 203.

N. H.—Lane v. Thompson, 43 N. H. 320; Gregg v. Carrier, 36 N. H. 200.

N. J.—Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; In re Struble, (Prerog.) 101 A 177.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362; Hine v. Hine, 118 App. Div. 585, 103 NYS 535; Hershey v. Robson, 121 NYS 167; Matter of Woodoard, 13 NYSt 161; Mooers v. White, 6 Johns. Ch. 360.

N. C.—Speed v. Perry, 167 N. C. 122, 83 SE 176; Perkins v. Presnell, 100 N. C. 220, 6 SE 801; Womble v. George, 64 N. C. 759; Floyd v. Herring, 64 N. C. 409.

Oh.—Overturf v. Dugan, 29 Oh. St. 230; Piatt v. St. Clair, Wright 261.

Okl.—Moseley v. McBride, 40 Okl. 270, 138 P 138 [cit Cyc].

Or.—Malagamba v. McLean, 89 Or. 307, 173 P 1175; In re Noon, 49 Or. 286, 88 P 673, 90 P 673.

Pa.—Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Herron v. Stevenson, 259 Pa. 354, 102 A 1049; In re Morrison, 196 Pa. 80, 46 A 257; Merkel's Est., 131 Pa. 584, 18 A 931; Landis v. Scott, 32 Pa. 495; Bartolet's App., 1 Walk. 77; Jones' App., 3 Grant 250; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Tasker's Est., 14 Pa. Dist. 435; Knowles' Est., 12 Pa. Dist. 631; Henson's Est., 28 Pa. Co. 671; De Witt v. Lehigh Valley R. Co., 25 Pa. Co. 505; Thomas' Est., 22 Pa. Co. 518; New York, etc., Land Co. v. Wiedner, 3 LackLegN 250 [aff 169 Pa. 359, 32 A 557].

Philippine.—Malahacan v. Ignacio, 19 Philippine 434.

Porto Rico.—Crehore v. Registrar of Property, 22 Porto Rico 30.

R. I.—Jones v. East Greenwich Prob. Ct., 25 R. I. 361, 55 A 881; Draper v. Barnes, 12 R. I. 156.

S. C.—Perry v. Brown, 17 S. C. L 45; Crosland v Murdock, 15 S. C. L. 217.

Tenn. — Vance v. Fisher, 10 Humphr. 211; Stephenson v. Yandle, 3 Hayw. 109.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694; Pate v. McLain, (Civ. A.) 136 SW 538; Rice v. Conwill, 35 Tex. Civ. A. 341, 80 SW 393.

Vt.—Hawkins v. Hewitt, 56 Vt. 430; Austin v. Bailey, 37 Vt. 219, 86 AmD 703; Hyde v. Barney, 17 Vt. 280, 44 AmD 335; Tracy v. Spear, 10 Vt. 490.

Va.—Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407; Eppes v. Demoville, 2 Call (6 Va.) 22.

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

Wis.—Hinman v. Hinman, 126 Wis. 191, 105 NW 788; Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032; Volk v. Stowell, 98 Wis. 385, 74 NW 118; Marsh v. Waupaca County, 38 Wis. 250; Jones v. Billstein, 28 Wis. 221.

Wyo.—Cook v. Elmore, 25 Wyo. 393, 171 P 261.

Man.—Re Lewis, 5 Man. 44.

"He has no estate in or title to the lands. He only has the right and power, given exclusively by statute to intercept the rents in certain cases for certain purposes, and to recover the lands for this purpose, and to sell the same if necessary to pay debts of decedent, or he may, in certain cases, sell for distribution among the heirs." Mayer v. Kornegay, 163 Ala. 371, 374, 50 S 880, 136 AmSR 79.

"Upon the death of one seized by a heritable estate in lands, the title descends eo instanti, and vests in the heir at law, if there be no will giving it a different direction; . . . with the title, there also passes to the heir at law the right to the possession and after-accruing rents and profits, subject to the statutory power of the personal representative to take possession and claim rents accruing, or to let to rent, or to obtain an order and sell, for the purposes of administration." Calhoun v. Fletcher, 63 Ala. 574, 580.

"The learned counsel for defendants contend that, pending the administration of the succession, the ownership of the property is vested in the succession; and in support of that contention they cite the cases of New Orleans v. Stewart, 28 La. Ann. 180; State v. Brown, 32 La. Ann. 1020; Carter v. New Orleans, 33 La. Ann. 816; and Levy's Succ., 115 La. 377, 39 S 37, 8 LRANS 1180, 5 AnnCas 871. If these decisions went counter to the doctrine expressed by the maxim, 'Le mort saisit le vif,' whereby the ownership of the property is transmitted directly and immediately from the testator to the heir, or to the universal legatee, as the case may be, they would be in the teeth of the Code, and would simply have to be brushed aside. Far from it, they are to the contrary effect. Thus, in the case

decedent vests in his heirs or devisees, subject to the necessities of administration.[15] Accordingly an executor or administrator cannot release or give rights in the land,[16] preserve or impair homestead rights,[17] receive the rents,[18] release a right of way over the land,[19] bind the heirs by consenting to a proceeding for laying out a highway over the land,[20] create a lien on the land by erecting buildings thereon,[21] dedicate land to public use,[22] make a statutory plat,[23] ratify a deed executed by decedent when insane,[24] recover the surplus realized at a tax sale, even though he was in possession,[25] bind the heir by admissions relative to the land or the title thereto,[26] abandon a right of the estate in the location and surveys of public land located under a headright certificate, without express authority from the probate court,[27] object to a judgment vesting the title to the real estate in decedent's widow, where the court has, on the administrator's petition to sell real estate to pay debts, found that he had no right to sell it,[28] or discharge from liability one who has assumed payment of the purchase price of land sold by the testator and secured by rent privileges, which amount had been donated by the testator to a specified person, where such amount is not needed to pay the debts of the succession.[29]

[§ 595] **b. Effect of Testamentary Provisions.** The testator may, by his will, give to his executor such authority and control over real estate as he sees proper,[30] but the authority of an executor in this respect is strictly limited by the terms of the will.[31] Where the testator authorizes or directs the

cited from 32 La. Ann. 1020 (State v. Brown), the court expressly says: 'The maxim "Le mort saisit le vif," is expressly embodied in our Civil Code, and excludes the interposition of any temporary and qualified ownership, such as that of administrators, between the deceased and his heirs. Civ. Code, art. 940, et seq.' These decisions do not mean to hold, and do not hold, that the abstract being called 'succession' is owner of the property in the sense of excluding, or affecting in the slightest degree, the ownership vested in the heir or in the universal legatee. When these decisions speak of the succession being owner, they mean, as a matter of course, that it is holding for the true owner, and merely for the purposes of administration. Nothing that is said in them is intended to detract in the slightest degree from the recognized ownership of the heir, or of the universal legatee, as the case may be, and from the substantial rights (such as that of exemption from taxation) flowing from such ownership. This is very clearly expressed in Cross on Successions, § 35, as follows: 'The seisin of the succession representative operates merely to protect his title as detainer of the property for the purpose of his administration; while the seisin of the heir, conflicting in no respect with the other, operates as the sign of his title as owner of the estate, subject to its liquidation under administration. The former has actual control of the estate under the legal conditions prescribed; but it is the heir or universal legatee, as the case may be, who reaps all the propriety advantages of possession, such as accretion, prescription, perception of fruits, etc. So, Toulier (IV 582) says: "The seisin of the executor does not interefere with that of the heir of blood, or of the universal legatee, in the case where the latter has seisin. It is always the heir who has the véritable possession; he is alone seized as proprietor. The executor possesses only as depositary in the name of the heir, or universal legatee, who can put an end to the seisin by offering to turn over to the executor a sufficient amount to pay the movable legacies, or by giving security for their payment, and that, even when the testator had charged the executor to sell all his property."'" Tulane Univ. v. Board of Assessors, 115 La. 1025, 1029, 40 S 445.

[a] **The homestead** does not go into the administrator's hands as assets. Hedick v. Hedick, 38 Fla. 252, 21 S 101.

[b] **An executor, as a trustee, cannot hold the legal title** to land devised to the use of a beneficiary, unless the will expressly or impliedly creates in him a trust estate other than that of executor, or unless a trust is made necessary that testator's intent may be executed. In re Buerstetta, 83 Nebr. 287, 119 NW 469.

[c] **Possession of deeds.**—Where the executor has no power of sale or conversion of the real estate, the deeds and title papers will not be removed from the possession of one of the devisees who has equal rights with the others. Thomas' Est., 8 Pa. Dist. 400, 22 Pa. Co. 518.

[d] **If an heir or devisee conveys any real estate** of his decedent by a deed, he can presumably convey thereby no more than his own individual interest, even though he should purport to convey as personal representative of the decedent. Fields v. Bush, 94 Ga. 664, 21 SE 827.

[e] **Agreement by beneficiary who is also administratrix.**—A beneficiary's agreement that a railway company may, pending condemnation proceedings, construct its railway across the land in which has has an interest is not conclusive upon her as administratrix of the estate, where she is not the sole beneficiary. Chattanooga, etc., R. Co. v. Morrison, 140 Ga. 769, 79 SE 903.

[f] **Where the cestui que trust in a trust estate created by will assigns his interest** therein to the executor as collateral security for an indebtedness to the estate, although the executor has no control over the real estate, an equitable lien is created in his favor, which he can enforce in equity against the trustee. Edwards v. Barstow, 21 R. I. 562, 45 A 579.

[g] **The administrator is merely the agent of the heirs,** although he assumes to act in his representative capacity in the management of the real estate and the collection of the income thereof. Herron v. Stevenson, 259 Pa. 354, 102 A 1049; In re Morrison, 196 Pa. 80, 46 A 257.

[h] **A sale of a decedent's land under execution** issued on a judgment against the administrator is void and gives the purchaser no title, because the administrator had no title which the sale could affect. Lepage v. McNamara, 5 Iowa 124.

[i] **An administrator has no concern in perfecting the title** to the real estate of his decedent. Bailey v. Larrance, 104 Ill. A. 662.

15. U. S.—Albert v. Bascom, 245 Fed. 149.
Ala.—Brown v. Mize, 119 Ala. 10, 24 S 453.
Cal.—Beckett v. Selover, 7 Cal. 215, 68 AmD 237.
Ga.—Putnal v. Hickman, 148 Ga. 621, 97 SE 668.
Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215.
Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.
Tex.—Barrett v. Barrett, 31 Tex. 344.

[a] **The prayer of a bill by an administrator to divest title** to land out of adverse claimants, alleging that a sale of the land is necessary to pay intestate's debts, should be that the title is vested in intestate's heirs, and not in the administrator, and then on proper showing that the land is sold for the debts. Brown v. Mize, 119 Ala. 10, 24 S 453.

16. Hoagland v. Crum, 113 Ill. 365, 55 AmR 424; Mowe v. Stevens, 61 Me. 592.

17. Smith v. Moore, 109 S. C. 196, 95 SE 351.

18. Stoop's Est., 14 PittsbLegJNS (Pa.) 34.

19. Hankins v. Kimball, 57 Ind. 42.

20. Rush v. McDermott, 50 Cal. 471.

21. Weathersby v. Sinclair, 43 Miss. 189 (holding, however, that if he makes such erection the mechanic has a lien on the building, and may sell and remove it).

22. Kaime v. Harty, 73 Mo. 316 [rev 4 Mo. A. 357].

23. Lothrop v. Board of Public Works, 41 Mich. 724, 49 NW 924.

24. Brown v. Brown, 209 Mass. 388, 95 NE 796.

25. Fripp v. U. S., 19 Ct. Cl. 667.

26. Walbridge v. Day, 31 Ill. 379, 83 AmD 227; Jacobs v. Locke, 37 N. C. 286.

27. Pate v. McLain, (Tex. Civ. A.) 136 SW 538.

28. Shobe v. Brinson, 148 Ind. 285, 47 NE 625.

29. Consumers' Cordage Co. v. Converse, 8 Que. Q. B. 511.

30. U. S.—Flowers v. Foreman, 23 How. 32, 16 L. ed. 405; Kohn v. McKinnon, 90 Fed. 623.
Del.—Hilles v. Hilles, (Ch.) 98 A 296.
Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215; Emmerson v. Merritt, 249 Ill. 538, 94 NE 955; Ebey v. Adams, 135 Ill. 80, 25 NE 1013, 10 LRA 162.
La.—Bird v. Jones, 5 La. Ann. 643.
Pa.—Gray v. Henderson, 71 Pa. 368.

[a] **The actual seizin of an executor** is distinct from and paramount to the fictitious seizin which is said to vest in the heir immediately upon the death of the ancestor; and when that seizin is conferred upon the executor by the will, confirmed by judicial sanction, and actually assumed by his entering upon his functions, the heir can only take it from him afterward upon the performance of certain conditions, one of which is that the heir may be compelled to give security to the creditors. Bird v. Jones, 5 La. Ann. 643.

31. U. S.—Flowers v. Foreman, 23 How. 132, 16 L. ed. 405.
Ark.—Chase v. Cartright, 53 Ark. 358, 14 SW 90, 22 AmSR 207.
Cal.—Bennalack v. Richards, 116 Cal. 405, 48 P 622.
Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215; Dunham v. Slaughter, 268 Ill. 625, 109 NE 673.
Ind.—Nelson v. Nelson, (A.) 72 NE 482.
Ky.—Burgess v. Green, 7 Bush 263.
Miss.—Cohea v. Jemison, 68 Miss. 510, 10 S 46.
N. H.—Clough v. Clough, 71 N. H. 412, 52 A 449.

executor to sell the land, this gives him, according to the preponderance of authority, only a naked power of sale, and does not vest in him the title or any right to the possession of the land,[32] whether the power be given for the purpose of paying debts[33] or legacies[34] or making distribution;[35] but there is, on the other hand, authority for the view that such a direction does impliedly carry the title,[36] at least where this is necessary in order to carry out the provisions of the will.[37] It has also been held that authority given by will to executors to rent and lease and to repair and insure, by necessary implication, vests them with the legal title.[38] Of course the executor takes the title to land where it is expressly devised to him for the purpose of being sold,[39] or in trust for other pur-

N. J.—Brearley v. Molten, 62 N. J. Eq. 345, 50 A 317.

N. Y.—Downing v. Marshall, 1 Abb. Dec. 525.

Oh.—Knisley v. Young, 33 Oh. Cir. Ct. 439.

Pa.—Wilkinson v. Chambers, 181 Pa. 437, 37 A 569.

Tenn.—Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

Tex.—Lagow v. Glover, 77 Tex. 448, 14 SW 141.

Va.—Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

[a] **Construction of testamentary powers in particular cases.**—Flowers v. Foreman, 23 How. (U. S.) 132, 16 L. ed. 405; Chase v. Cartright, 53 Ark. 358, 14 SW 90, 22 AmSR 207; Bennalack v. Richards, 116 Cal. 405, 48 P 622; Emmerson v. Merritt, 249 Ill. 538, 94 NE 955; Nelson v. Nelson, (Ind. A.) 72 NE 482; Burgess v. Green, 7 Bush (Ky.) 263; Clough v. Clough, 71 N. H. 412, 52 A 449; Madigan v. Burns, 58 N. H. 12; Matter of Skinner, 81 App. Div. 449, 80 NYS 1067 [aff 180 N. Y. 515 mem, 72 NE 1151 mem]; Peo. v. Robinson, 29 Barb. (N. Y.) 77, 17 HowPr 534; Hamilton v. Hamilton, 63 Misc. 533, 118 NYS 588 [rev on other grounds 135 App. Div. 454, 119 NYS 986]; Sengens v. Fennel, 54 Misc. 133, 103 NYS 510; Ensign v. Ensign, 14 NYSt 181 [aff 120 N. Y. 655 mem, 24 NE 942 mem]; Matter of Sixty-seventh St., 60 HowPr (N. Y.) 264; James v. Beesly, 4 Redf. Surr. (N. Y.) 236; Rapp v. Cincinnati, etc., R. Co., 9 Oh. Dec. (Reprint) 302, 12 CincLBul 119; Wilkinson v. Chambers, 181 Pa. 437, 37 A 569; Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634; Lagow v. Glover, 77 Tex. 448, 14 SW 141; Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

[b] **No title is vested by** (1) a grant of authority to divide the estate. McCampbell v. Gilbert, 6 J. J. Marsh. (Ky.) 592. (2) Nor does a direction to divide rents, income, and profits vest the fee in the executor by implication. Robert v. Corning, 23 Hun 299 [aff 89 N. Y. 225].

[c] **Authority to carry on a farm for a year gives no longer estate.**—Cohea v. Jemison, 68 Miss. 510, 10 S 46.

[d] **Payment of expenses of maintaining property.**—Where there is a general power of sale conferred upon executors, they are authorized to pay the expenses of superintendence, necessary repairs, insurance, and taxes out of the rents thereof. Brearley v. Molten, 62 N. J. Eq. 345, 50 A 317.

32. U. S.—Meekins v. Branning Mfg. Co., 224 Fed. 202; Beadle v. Beadle, 40 Fed. 315, 2 McCrary 586.

Ala.—Chighizola v. Le Baron, 21 Ala. 406.

Cal.—Auguisola v. Arnaz, 51 Cal. 435.

Colo.—Cowell v. South Denver Real Est., Co., 16 Colo. A. 108, 63 P 991.

Del.—Hilles v. Hilles, (Ch.) 98 A 296; In re Journey, 7 Del. Ch. 1, 44 A 795; Lockwood v. Stradley, 1 Del. Ch. 298, 12 AmD 97.

Ga.—Thomas v. Owens, 131 Ga. 248, 62 SE 218.

Ill.—Dunham v. Slaughter, 268 Ill. 625, 109 NE 673 [rev 190 Ill. A. 497]; Emmerson v. Merritt, 249 Ill. 538, 94 NE 955; Smith v. Hunter, 241 Ill. 514, 89 NE 686, 132 AmSR 231.

Ind.—Thompson v. Schenck, 16 Ind. 194; Doe v. Lanius, 3 Ind. 441, 56 AmD 518; French v. French, 58 Ind. A. 621, 108 NE 786; Nelson v. Nelson, (A.) 72 NE 482, 36 Ind. A. 331, 75 NE 679.

Iowa.—Boland v. Tiernay, 118 Iowa 59, 91 NW 836.

Ky.—Labrot v. Seiler, 45 SW 102, 20 KyL 57; Baird v. Rowan, 1 A. K. Marsh. 214; Jameson v. Smith, 4 Bibb 307.

Me.—Bradt v. Hodgdon, 94 Me. 559, 48 A 179.

Miss.—Whitfield v. Thompson, 85 Miss. 749, 38 S 113; Cohea v. Jemison, 68 Miss. 510, 10 S 46.

Mo.—Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734; Compton v. McMahan, 19 Mo. A. 494.

N. J.—Schorb v. Haurand, 76 N. J. L. 768, 71 A 242; Baldwin v. Tucker, 61 N. J. Eq. 412, 48 A 547 [aff 64 N. J. Eq. 333, 55 A 1132]; Ashby v. Ashby, 59 N. J. Eq. 547, 46 A 522.

N. Y.—Parker v. Beer, 65 App. Div. 598, 72 NYS 955 [aff 173 N. Y. 332, 66 NE 3]; Smith v. Chase, 90 Hun 99, 35 NYS 615; Matter of Martens, 16 Misc. 245, 39 NYS 189; Jackson v. Schauber, 7 Cow. 187 [rev on other grounds 2 Wend. 13]; Marsh v. Wheeler, 2 Edw. 156.

N. C.—Barbee v. Penny, 172 N. C. 653, 90 SE 805; Floyd v. Herring, 64 N. C. 409; Bradshaw v. Ellis, 22 N. C. 20, 32 AmD 686.

Oh.—Martin v. Spurrier, 23 Oh. Cir. Ct. 110; Matter of Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff on other grounds 68 Oh. St. 58, 67 NE 156, 96 AmSR 648].

Pa.—Tasker's Est., 14 Pa. Dist. 435; Hallowell's Est., 9 Pa. Dist. 90; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466.

R. I.—Draper v. Barnes, 12 R. I. 156.

S. C.—Reeves v. Brayton, 36 S. C. 384, 15 SE 658; Baldwin v. Cooley, 1 S. C. 256; Ware v. Murph, 24 S. C. L. 54, 33 AmD 97; Ferguson v. King, 11 S. C. L. 588; Haskell v. House, 6 S. C. L. 106, 3 S. C. L. 242.

S. D.—Spencer v. Lyman, 27 S. D. 471, 131 NW 802.

Tenn.—Hope v. Johnson, 2 Yerg. 123; Moore v. Bedford, (Ch. A.) 56 SW 1038.

Va.—Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

Eng.—Doe v. Shotter, 8 A. & E. 905, 35 ECL 905, 112 Reprint 1081; Knocker v. Bunbury, 6 Bing. N. Cas. 306, 37 ECL 637, 133 Reprint 121; Lancaster v. Thornton, 2 Burr. 1027, 97 Reprint 689; Yates v. Compton, 2 P. Wms. 308, 24 Reprint 743.

[a] **Illustration.**—A devise that "all the rest and residue of my estate, both real and personal, be sold by my executors, and that the money arising from such sale . . . be appropriated" to certain purposes, gives the executors a naked power of sale, and does not vest them with the legal title to the land. Haskell v. House, 5 S. C. L. 242.

[b] **Authority to sell and reinvest.**—The authorization by testatrix of her executor and executrix to sell and dispose of her property at public or private sale as might be deemed best, and to reinvest the proceeds in such property as might be deemed to the best interest of her estate, did not create any estate in the executor and executrix so as to require and entitle them to retain possession as against a legatee for life of the income from testatrix's entire estate. Thomas v. Owens, 131 Ga. 248, 62 SE 218.

[c] **As against the owner of an undivided interest** the personal representative of a deceased coöwner is not entitled to possession. Spencer v. Lyman, 27 S. D. 471, 131 NW 802.

33. Doe v. Lanius, 3 Ind. 441, 56 AmD 518; Floyd v. Herring, 64 N. C. 409; Thomson v. Gaillard, 37 S. C. L. 418, 45 AmD 778; Ware v. Murph, 24 S. C. L. 54, 33 AmD 97; Ferguson v. King, 11 S. C. L. 588; Gordon v. Overton, 8 Yerg. (Tenn.) 121.

34. Doe v. Lanius, 3 Ind. 441, 56 AmD 518.

35. Doe v. Lanius, 3 Ind. 441, 56 AmD 518.

36. Shippen v. Clapp, 36 Pa. 89; Archer v. Sadler, 2 Hen. & M. (12 Va.) 370; Re Roberts, 10 Ont. L. 395, 6 OntWR 49.

[a] **Right to protect possession.**—An administrator with the will annexed, being in possession of lands therein directed to be sold, may maintain a caveat to prevent any other person from obtaining a patent for it. Archer v. Sadler, 2 Hen. & M. (12 Va.) 370.

37. Ill.—Lash v. Lash, 209 Ill. 595, 70 NE 1049.

Me.—Deering v. Adams, 37 Me. 264; Morton v. Barrett, 22 Me. 257, 39 AmD 575.

Nebr.—Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

Oh.—Martin v. Spurrier, 23 Oh. Cir. Ct. 110.

S. C.—Barbot v. Thompson, 94 S. C. 3, 77 SE 716.

[a] **Illustrations.**—(1) Where an executor is charged with the positive duty of selling the fee-simple title to land after the death of the widow and dividing the proceeds among certain legatees, he becomes a trustee, and by implication of law takes by the will such estate in the land as is necessary to enable him to sell and convey it, and therefore the remainder in fee passes to him, and not to the heirs at law. Lash v. Lash, 209 Ill. 595, 70 NE 1049. (2) Where a testator vests in his widow a life estate with the provision that after her death certain land shall be sold by the executors and the proceeds divided equally among his children, the power given to the executors with respect to conferring title is a power coupled with an interest and vests the fee in the executors. Knisely v. Young, 33 Oh. Cir. Ct. 439. (3) Where a will, without making any specific devise of real estate to the executor, directed the executor to sell it and to make and execute titles to the purchaser, he was by implication vested with the fee. Barbot v. Thompson, 94 S. C. 3, 77 SE 716.

38. Killam v. Allen, 52 Barb. (N. Y.) 605.

39. Ala.—Patton v. Crow, 26 Ala. 426; Chighizola v. Le Baron, 21 Ala. 406.

Del.—Hilles v. Hilles, (Ch.) 98 A 296.

Ga.—Harris v. Kitte, 119 Ga. 29, 45 SE 729; Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17.

Ill.—Smith v. Hunter, 241 Ill. 514, 89 NE 686, 132 AmSR 231; West v. Fitz, 109 Ill. 425.

Ind.—French v. French, 58 Ind. A. 621, 108 NE 786; Halstead v. Coen, 31 Ind. A. 302, 67 NE 957.

Ky.—Baird v. Rowan, 1 A. K. Marsh. 214.

poses,[40] or where such title is otherwise given to him by the will, either expressly or by necessary implication.[41]

[§ 596] **c. Statutory Modifications of Rule.** In some jurisdictions the statutes give to the executor or administrator a certain control over the land of decedent,[42] usually either for the purpose of preserving the same from waste during the course of administration,[43] effecting a division and distribution among those entitled,[44] or subjecting it to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose.[45] But such grants, being in derogation of the common law, must be strictly construed and the rights of the representative confined to those which are clearly given to him.[46]

[§ 597] **2. Actions Relating to Realty**[47]**—a. In General.** From the general rule that an executor or administrator has no title to, interest in, or control over the decedent's realty,[48] it follows that he is not ordinarily entitled to bring any action relating thereto.[49]

Me.—Bradt v. Hodgdon, 94 Me. 559, 48 A 179.

Mass.—Packard v. Marshall, 138 Mass. 301; Gerard v. Buckley, 137 Mass. 475.

Mo.—Compton v. McMahan, 19 Mo. A. 494.

Nebr.—Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303, 59 Nebr. 94, 80 NW 263.

N. J.—Bird v. Hawkins, 58 N. J. Eq. 229, 42 A 588.

N. Y.—Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470; Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Russell v. Hilton, 37 Misc. 642, 76 NYS 233 [mod on other grounds 80 App. Div. 178, 80 NYS 563 (aff on opinion below 175 N. Y. 525 mem, 67 NE 1089 mem)]; Jackson v. Schauber, 7 Cow. 187 [rev on other grounds 2 Wend. 13].

Pa.—Peirce v. Peirce, 199 Pa. 4, 48 A 689.

S. C.—Ware v. Murph, 24 S. C. L. 54, 33 AmD 97.

Tenn.—Moore v. Bedford, (Ch. A.) 56 SW 1038.

[a] **"The distinction** (1) is between a devise to executors to sell, as if the testator say, 'I devise my land to my executors to be sold;' and a devise that the executors shall sell, as where the testator says, 'I devise, or direct, that my lands be sold by my executors.' In the first case the fee passes to the executors; in the last, the fee passes to the heir, to be divested whenever the power is executed by the executors." Ware v. Murph. 24 S. C. L. 54, 55. (2) "There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In one case a naked authority is given to sell; in the other an authority to sell, coupled with an interest, is given. In the former case the freehold remains in the heirs until a sale is made by the executor; in the latter case a freehold immediately vests in the executor." Smith v. Hunter, 241 Ill. 514, 518, 89 NE 686, 132 AmSR 231.

[b] **Aliter under statute.**— Parkhurst v. Trumbull, 130 Mich. 408, 90 NW 25; Chamberlain v. Taylor, 105 N. Y. 185, 11 NE 625; Stewart v. Hamilton, 37 Hun (N. Y.) 19; Butler v. Bloomfield, 15 NYWklyDig 245.

40. Putnam Free School v. Fisher, 30 Me. 523; Rutherford Land, etc., Co. v. Sanntrock, (Ch.) 44 A 938 [60 N. J. Eq. 471, 46 A 648]; Hubbard v. Housley, 27 Misc. 276, 58 NYS 432 [aff 43 App. Div. 129, 59 NYS 392 (aff 160 N. Y. 688 mem, 55 NE 1096 mem)]; Matter of Martens, 16 Misc. 245, 39 NYS 189.

41. See cases cited infra this note.

[a] **Illustrations.**— (1) Under a will authorizing the executor to make such conveyances and disposition of the estate as should, in his opinion, be necessary to carry into effect the provisions of the will, the legal title to the real estate is vested in the executor. Hanson v. Brewer, 78 Me. 195, 3 A 574. (2) Where testator gave his executor "full power and authority . . . to make such disposition of any and all property of which I die seised and possessed as may be necessary to carry out the provisions of this instrument," this was sufficiently broad to convey title to the land coupled with a power of sale, although the land was not specifically described, and hence to give the executor such an interest as entitled him to maintain ejectment. Moody v. Macomber, 159 Mich. 657, 661, 124 NW 549, 134 AmSR 755.

[b] **Authority to collect income.**— If an administrator with the will annexed is given authority to collect the income of real estate, he may recover in ejectment against a tenant holding over. Lewis v. Sheerer, 1 LuzLegObs (Pa.) 122.

42. U. S.—Kohn v. McKinnon, 90 Fed. 623.

Ala.—White v. Harrison, 81 S 565; Randolph v. Vails, 180 Ala. 82, 60 S 159; Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79.

Ark.—Reeder v. Ford, 78 Ark. 603, 93 SW 560.

Ga.—Whitworth v. Wofford, 73 Ga. 259.

Iowa.—In re Acken, 144 Iowa 519, 123 NW 187, AnnCas1912A 1166.

Me.—Furlong v. Soule, 39 Me. 122.

Mo.—Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365.

Mont.—Murphy v. Nett, 51 Mont. 82, 149 P 713, LRA1915E 797.

N. J.—Brown v. Brown, 72 N. J. Eq. 667, 65 A 739.

Okl.—Jameson v. Goodwin, 43 Okl. 154, 141 P 767.

Or.—King v. Boyd, 4 Or. 326.

Wash.—Hyde v. Heller, 10 Wash. 586, 39 P 249.

Ont.—Re McCully, 23 Ont. L. 156, 2 OntWN 662, 18 OntWR 236.

See also infra § 603.

[a] **Administrator has no greater rights than decedent would have if alive** with respect to his property. Whitworth v. Wofford, 73 Ga. 259.

43. King v. Boyd, 4 Or. 326.

44. Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79; Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Brown v. Mize, 119 Ala. 10, 26 S 453; Haden v. Sims, 127 Ga. 717, 56 SE 989.

45. Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79; Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Brown v. Mize, 119 Ala. 10, 24 S 453.

Ark.—Reed v. Ash, 30 Ark. 775.

Iowa.—Flora v. Brown, 159 Iowa 253, 140 NW 364.

Mich.—Sylvester v. Button, 173 NW 502.

Okl.—Moseley v. McBride, 40 Okl. 270, 138 P 138.

Or.—King v. Boyd, 4 Or. 326.

Pa.—Herron v. Stevenson, 259 Pa. 354, 102 A 1049.

Tex.—Myers v. Jones, 4 Tex. Civ. A. 330, 23 SW 563.

Wis.—Hinman v. Hinman, 126 Wis. 191, 105 NW 788.

[a] **After all debts are discharged** and the administration practically closed, the administrator has no interest in the realty, although no formal order discharging him has been entered. Reed v. Ash, 30 Ark. 775.

[b] **Need of land for payment of debts must be shown.**—Myers v. Jones, 4 Tex. Civ. A. 330, 23 SW 562.

Application of realty to debts of decedent see infra § 1261.

46. Ind.—Edwards v. Haverstick, 47 Ind. 138.

Kan.—Brown v. Baxter, 77 Kan. 97, 94 P 155, 574.

Mich.—Campau v. Campau, 19 Mich. 116.

Mo.—McQuitty v. Wilhite, 218 Mo. 586, 592, 117 SW 730, 131 AmSR 561 [quot Cyc]; Hall v. Farmers', etc., Bank, 145 Mo. 418, 46 SW 1000.

Or.—King v. Boyd, 4 Or. 326.

Va.—Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

Wis.—Hinman v. Hinman, 126 Wis. 191, 106 NW 788.

[a] **Illustrations.**—(1) A statute conferring upon administrators the right to take possession of the estate of the deceased for the purpose of collecting rents, etc., does not create an intervening estate between that of the ancestor and that of the heir, converting the latter into an estate in expectancy. Campau v. Campau, 19 Mich. 116. (2) A statute providing that if land is devised to be sold, and no one is appointed, the executor may sell it, and if he fail to qualify, or having qualified, dies, an administrator with the will annexed may sell, gives the executor or administrator no title independent of the will. Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

47. Actions to recover possession see infra §§ 607–609.

Actions to set aside fraudulent conveyances by decedent see supra § 368.

Rights of action connected with realty as assets of estate see supra § 325.

48. See supra § 594.

49. Cal.—Field v. Andrada, 106 Cal. 107, 39 P 323.

Fla.—Terrell v. Weymouth, 32 Fla. 255, 13 S 429, 37 AmSR 94.

Ill.—Stark v. Brown, 101 Ill. 395.

Ind.—Taylor v. Fickas, 64 Ind. 167, 31 AmR 114.

Iowa.—Hook v. Garfield Coal Co., 112 Iowa 210, 83 NW 963.

Me.—Berry v. Whitaker, 58 Me. 422.

Mass.—Richards v. Sweetland, 6 Cush. 324.

Mo.—Thorp v. Miller, 137 Mo. 231, 38 SW 929.

Nebr.—Browner v. Ulmstead, 174 NW 417.

N. J.—Nelson v. Nelson, 57 N. J. Eq. 118, 36 A 280.

Pa.—Webb v. Bennett's Branch Impr. Co., 161 Pa. 623, 29 A 260.

[a] **The representative cannot sue:** (1) For damage done to the land subsequent to decedent's death. Taylor v. Fickas, 64 Ind. 167, 31 AmR 114; Hook v. Garfield Coal Co., 112 Iowa 210, 83 NW 963; Webb v. Bennett's Branch Impr. Co., 161 Pa. 623, 29 A 260. (2) To set aside a sheriff's sale under foreclosure, on the ground of fraud. Thorp v. Miller, 137 Mo. 231, 38 SW 929. (3) To set aside a conveyance made by decedent in his lifetime. Field v. Andrada, 106 Cal. 107, 39 P 323. (4) To recover real estate which once belonged to decedent, but was set off on an execution issued against him on a judgment obtained by fraud. Richards v. Sweetland, 6 Cush. (Mass.) 324. (5) To declare a resulting trust in land to the extent of money contributed thereto by decedent. Johnston v. Johnston, 173 Mo. 91, 73 SW 202, 96 AmSR 486, 61 LRA 166. (6) To adjudicate title to real estate conveyed by the will. Nelson v. Nelson, (N. J. Ch.) 36 A 280. (7) To enforce a trust and to compel a conveyance of land to himself. Janes v. Throckmorton, 57 Cal. 368. (8) To enforce a resulting trust

[§ 598] **b. Actions for Trespass and Waste.** Actions for trespass and waste accruing after the death of his decedent are maintainable by an executor or administrator, where he is given the right of possession by the provisions of the will or by statute,[50] but in the absence of any testamentary or statutory provision giving him such a right of possession, the general rule that the representative has no concern with the realty precludes the maintenance by him of such an action.[51]

[§ 599] **c. Actions to Quiet Title.** It is usually considered that actions to quiet or remove a cloud from the title to a decedent's real estate may be brought by an executor or administrator whose right of possession of such land at the time is established by will or statute,[52] but it is otherwise where the representative has no such right.[53] A creditor of an estate cannot bring suit to remove a cloud from the title of land belonging to the estate, except by leave of court, after refusal of the administrator to

in land not needed for payment of debts. Matlock v. Nave, 28 Ind. 35. (9) To reform a deed made to decedent in his lifetime. Shoemate v. Lockridge, 53 Ill. 503. See also Thiefes v. Mason, (N. J. Ch.) 36 A 946 (deed to decedent and her husband). (10) He cannot commence or prosecute a writ of review in a real action not brought to foreclose a mortgage. Berry v. Whitaker, 58 Me. 422. (11) Nor can he institute proceedings for the partition of land in which decedent was interested. Terrell v. Weymouth, 32 Fla. 255, 13 S 429, 37 AmSR 94.

50. Ala.—Drake v. Lady Ensley Coal, etc., Co., 102 Ala. 501, 14 S 749, 48 AmSR 77, 24 LRA 64; Sullivan v. Rabb, 86 Ala. 433, 5 S 746.

Ga.—Hart v. Brown, 145 Ga. 140, 88 SE 670.

Ind.—Pittsburgh, etc., R. Co. v. Swinney, 97 Ind. 586.

Me.—McNichol v. Eaton, 77 Me. 246.

Mass.—Dascomb v. Davis, 5 Metc. 335.

Minn.—Noon v. Finnegan, 29 Minn. 418, 13 NW 197.

N. Y.—Ogsbury v. Ogsbury, 45 Hun 388; Meeks v. Metropolitan El. R. Co., 58 N. Y. Super. 466, 11 NYS 697.

Tex.—Burdett v. Haley, 51 Tex. 540.

[a] **Trespass or leasehold.**—The administrator alone can sue for a trespass on a leasehold estate of decedent whether committed before or after the death of his intestate. Schee v. Wiseman, 79 Ind. 389.

[b] **Restraining waste.**—An administrator with the will annexed, who by the terms of the will was given possession of testator's real estate, with power to rent the same, and collect the rents and profits, and distribute them among the devisees, had sufficient interest to maintain an action to restrain a lessee of the land devised from committing waste by cutting growing timber therefrom. Halstead v. Coen, 31 Ind. A. 302, 67 NE 957.

51. Ala.—McKay v. Broad, 70 Ala. 377.

Colo.—Adams v. Slattery, 36 Colo. 35, 85 P 87.

Ga.—Hart v. Brown, 145 Ga. 140, 88 SE 670; Wheeler v. Wheeler, 135 Ga. 603, 69 SE 1112; Hendricks v. Southern R. Co., 123 Ga. 342, 51 SE 415.

Iowa.—Hook v. Garfield Coal Co., 112 Iowa 210, 83 NW 963.

Minn.—Noon v. Finnegan, 29 Minn. 418, 13 NW 197, 32 Minn. 81, 19 NW 391.

Mo.—Aubuchon v. Lory, 23 Mo. 99; Mize v. Burnett, 162 Mo. A. 441, 145 SW 150.

Vt.—Plumley v. Plumley, 84 Vt. 286, 79 A 45.

[a] **An administrator who is out of possession** of real estate, whether disseized or having surrendered the possession to the heir, can neither maintain trespass nor an action on the case in behalf of the heir for an act which is a damage to the inheritance. Lyman v. Webber, 17 Vt. 489.

[b] **Evidence insufficient to show right of possession.**—Hodges v. Stuart Lumber Co., 140 Ga. 569, 79 SE 462.

52. U. S.—Quinton v. Neville, 152 Fed. 879, 81 CCA 673.

Cal.—Rice v. Carey, 170 Cal. 748, 151 P 135; Collins v. O'Laverty, 136 Cal. 31, 68 P 327; Curtis v. Sutter, 15 Cal. 259. See also Boye v. Andrews, 10 Cal. A. 494, 102 P 551 (where the executor intervened in an action by heirs).

Colo.—Galligan v. Thomas S. Hayden Realty Co., 62 Colo. 477, 163 P 295; McKee v. Howe, 17 Colo. 538, 31 P 115.

Conn.—Munger v. Doolan, 75 Conn. 656, 55 A 169; Hall v. Pierson, 63 Conn. 332, 28 A 544.

Ill.—Schottler v. Quinlan, 263 Ill. 637, 105 NE 710.

Iowa.—Laverty v. Sexton, 41 Iowa 435.

Ky.—Newport v. Taylor, 16 B. Mon. 699.

La.—Williams v. Chaplain, 112 La. 1075, 36 S 859.

N. D.—Blakemore v. Roberts, 12 N. D. 394, 96 NW 1029.

Or.—Ladd v. Mills, 44 Or. 224, 75 P 141.

Wash.—Smith v. Stiles, 68 Wash. 345, 123 P 448.

W. Va.—Hogan v. Piggott, 60 W. Va. 541, 56 SE 189.

Wis.—Wheeler v. Single, 62 Wis. 380, 22 NW 569.

[a] **Ferry franchise.**—An executor directed by will to lease a ferry may maintain proceedings in equity to be quieted in the enjoyment of the franchise. Newport v. Taylor, 16 B. Mon. (Ky.) 699.

[b] **Necessary averments.**—Under a statute providing that the real estate of an intestate shall descend to his heirs subject to the payment of debts and that if the personalty is insufficient to pay the debts resort may be had to the realty, which may be sold, mortgaged, or leased by the administrator, a complaint by an administrator in his representative capacity to remove a cloud from the title to realty which fails to aver that the estate is insolvent, or that it is necessary to dispose of the realty to pay the debts, or that there are debts against the estate, does not state facts sufficient to constitute a cause of action. McKee v. Howe, 17 Colo. 538, 31 P 115. But compare Rice v. Carey, 170 Cal. 748, 151 P 135 (averment that property needed for purposes of administration not necessary).

[c] **The prayer** of a bill by an administrator to devest title to land out of adverse claimants, alleging that a sale of the land is necessary to pay intestate's debts, should be that the title be vested in intestate's heirs, and not in the administrator, and then, on proper showing, the land could be sold for the debts. Brown v. Mize, 119 Ala. 10, 24 S 453.

[d] **Contrary view.**—"Under the decedent's law of this state, the right of an administrator to the lands of his decedent is possessory only; and it is readily apparent from the section of the statute quoted that an administrator does not have title within the meaning of that section, so as to authorize him to maintain a suit to quiet title to real estate. In the case of Eayrs v. Nason, 54 Nebr. 143, 74 NW 408, it is held that 'judgment dismissing an administrator's action to quiet title is not a bar to a subsequent action by the heir against the defendants in the administrator's suit to quiet title to the same real estate, which has descended to the heir from the administrator's intestate.' And in that case the court say: 'But an action of ejectment is a possessory action, and while, because of the provisions of our statute, an administrator may maintain such an action, it does not follow that he may maintain an action to quiet title to the decedent's estate by removing a cloud therefrom, and we are of opinion that an administrator, in the absence of statutory authority therefor, cannot maintain such an action.' Under the provisions of the statute of this state, every action, with certain exceptions not material here, must be brought in the name of the real party in interest; and, the right of an administrator to the lands of his decedent being possessory only, he has no such title as will authorize him to maintain an action to quiet title. Such action must be brought in the name of the legatee or heir, the real party in interest." Youngson v. Bond, 64 Nebr. 615, 619, 90 NW 556, 558, 69 Nebr. 356, 95 NW 700, 5 AnnCas 191.

53. Ala.—Gulf Coal, etc., Co. v. Appling, 157 Ala. 325, 47 S 730.

Colo.—McKee v. Howe, 17 Colo. 538, 31 P 115.

Ill.—Gridley v. Watson, 53 Ill. 186; Cutter v. Thompson, 51 Ill. 390; Phelps v. Funkhouser, 39 Ill. 401; Smith v. McConnell, 17 Ill. 135, 63 AmD 340; Bailey v. Larrance, 104 Ill. A. 662.

Mich.—Hill v. Mitchell, 40 Mich. 389; Jenkins v. Bacon, 30 Mich. 154.

Minn.—Paine v. First Div. St. Paul, etc., R. Co., 14 Minn. 65.

Mo.—Thorp v. Miller, 137 Mo. 231, 38 SW 929.

N. J.—Nelson v. Nelson, 57 N. J. Eq. 118, 36 A 280.

N. Y.—Stevens v. Fogle, 73 Misc. 417, 130 NYS 1082.

Or.—King v. Boyd, 4 Or. 326.

"The administrator had no concern in perfecting the title to real estate, for it is the familiar law that none but the heirs or creditors, if they should be interested, could file the bill to correct the title." Bailey v. Larrance, 104 Ill. A. 662, 664.

[a] **The personal representative is not the owner** within the meaning of a statute providing that an action to quiet title must be brought by a person claiming to own the land. Nashville, etc., R. Co. v. Proctor, 152 Ala. 482, 44 S 669 [foll Gulf Coal, etc., Co., v. Appling, 157 Ala. 325, 47 S 730].

[b] **An action to quiet title to a water right** cannot be brought by the executor or adminstrator of the deceased owner. Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 P 1020.

[c] **An executor who is given authority to sell** (1) land cannot maintain a suit to quiet title to realty. Emmerson v. Merritt, 249 Ill. 538, 94 NE 955; Ryan v. Duncan, 88 Ill. 144; Gridley v. Watson, 53 Ill. 186; Cutter v. Thompson, 51 Ill. 390; Smith v. McConnell, 17 Ill. 135, 63 AmD 340; Stevens v. Fogle, 73 Misc. 417, 130 NYS 1082. (2) Nor can he sue to remove an encumbrance with a view to obtaining a better price at the sale. Cutter v. Thompson, 51 Ill. 531; Phelps v. Funkhouser, 39 Ill. 401.

bring suit.[54]

[§ 600] **d. Actions for Injuries during Decedent's Lifetime.** The executor or administrator is the proper party to maintain an action for damages for an injury to decedent's realty during his lifetime.[55]

[§ 601] **3. Possession and Use—a. In General.** The common-law rule, which still prevails except as modified by statute,[56] is that an executor or administrator is not entitled to the possession and use of the real estate of his decedent.[57]

[§ 602] **b. Effect of Testamentary Provisions.** An executor is entitled to possession of the real estate when the testator has by his will directed or permitted the executor to take possession thereof for any purpose.[58] So, a representative who is authorized to sell is entitled to the control and possession of the title deeds if this is necessary to a proper discharge of his duties,[59] although a mere power or sale does not, of itself, give any right of possession or use of the property until the sale.[60] It has been considered that where the executor is also devisee of land of which he is in possession, he must be regarded as holding the land in the capacity of executor until the debts of the decedent are paid.[61]

[§ 603] **c. Statutory Right of Possession—(1) In General.** In a number of jurisdictions statutes have been enacted giving to the personal representative, whether executor or administrator, the right under certain circumstances, or even generally, to take possession of the realty either for the purpose of sale or in order to apply as assets the proceeds realized from its use during the period of administration.[62] Where the right of possession is given only under certain circumstances, the repre-

54. Marshall v. Blass, 82 Mich. 518, 46 NW 947, 47 NW 516.

55. Schee v. Wiseman, 79 Ind. 389; Hanlen v. Baden, 6 Kan. A. 635, 49 P 615; Lake Roland Electric R. Co. v. Frick, 86 Md. 259, 37 A 650.

56. Statutory right of possession see infra §§ 603–606.

57. U. S.—Penn v. Butler, 19 F. Cas. No. 10,930, 4 Dall. 354, 1 L. ed. 864.

Ala.—Leavens v. Butler, 8 Port. 380.

Ark.—Hill v. Mitchell, 5 Ark. 608.

Colo.—Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 P 1020; Rupp v. Rupp, 10 Colo. A. 36, 52 P 290.

Conn.—Goodrich v. Thompson, 4 Day 215.

Ga.—Winn v. Simmons, 141 Ga. 680, 81 SE 1106; Adams v. Phillips, 132 Ga. 455, 64 SE 467; Johnson v. Johnson, 80 Ga. 260, 5 SE 629; Bacon v. Howard, 19 Ga. A. 660, 91 SE 1066.

Ill.—Ryan v. Duncan, 88 Ill. 144; Le Moyne v. Quimby, 70 Ill. 399; Shoemate v. Lockridge, 53 Ill. 503; Gridley v. Watson, 53 Ill. 186; Phelps v. Funkhouser, 39 Ill. 401; Walbridge v. Day, 31 Ill. 379, 83 AmD 227; Smith v. McConnell, 17 Ill. 135, 63 AmD 340; Roberts v. Baker, 65 Ill. A. 111.

Ind.—Hendrix v. Hendrix, 65 Ind. 329; Thompson v. Schenck, 16 Ind. 194; Comparet v. Randall, 4 Ind. 55.

Iowa.—Schneider v. Schneider, 125 Iowa 1, 98 NW 159; In re Pennock, 122 Iowa 622, 98 NW 480; Herriott v. Potter, 115 Iowa 648, 89 NW 91; Hook v. Garfield Coal Co., 112 Iowa 210, 83 NW 963; Hodgin v. Toler, 70 Iowa 21, 30 NW 1, 59 AmR 435; Gray v. Myers, 45 Iowa 158; Gladson v. Whitney, 9 Iowa 267; Little v. Sinnett, 7 Iowa 324.

Kan.—Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239.

Ky.—Wilson v. Unselt, 12 Bush 215.

La.—Le Blanc's Succ., 128 La. 1055, 55 S 672; Boudreaux v. Lower Terrebonne Refining, etc., Co., 127 La. 98, 53 S 456.

Me.—Crocker v. Smith, 32 Me. 244.

Mass.—Forbes v. Keyes, 193 Mass. 38, 78 NE 733; Gibson v. Farley, 16 Mass. 280; Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Pratt v. Millard, 154 Mich. 112, 117 NW 552; Rough v. Womer, 76 Mich. 375, 43 NW 573; Kellogg v. Beeson, 58 Mich. 340, 25 NW 300; O'Connor v. Boylan, 48 Mich. 209, 13 NW 519; Marvin v. Schilling, 12 Mich. 356; Streeter v. Paton, 7 Mich. 341; In re Campbell, 2 Dougl. 141; Thayer v. Lane, Walk. 200.

Miss.—Rucker v. Dyer, 44 Miss. 591; Crowder v. Shackelford, 35 Miss. 321; Billingslea v. Young, 33 Miss. 95; Glenn v. Thistle, 23 Miss. 42; Bullock v. Sneed, 21 Miss. 293.

Mo.—Burdyne v. Mackey, 7 Mo. 374.

Nebr.—Dillon v. Dillon, 171 NW 917; In re Dovey, 102 Nebr. 147, 166 NW 353.

N. H.—Lucy v. Lucy, 55 N. H. 9; Lane v. Thompson, 43 N. H. 320.

N. Y.—Hillman v. Stephens, 16 N. Y. 278; Griffith v. Beecher, 10 Barb. 432; Breevort v. McJimsey, 1 Edw. 551.

N. C.—Womble v. George, 64 N. C. 759; Floyd v. Herring, 64 N. C. 409.

Oh.—Haberly v. Treadgold, 67 Or. 425, 136 P 334.

Pa.—Sunday's App., 131 Pa. 584, 18 A 931; McManus's Est., 3 Pa. Dist. 183, 14 Pa. Co. 379, 34 WklyNC 222; Shisler's Est., 20 WklyNC 334.

R. I.—Draper v. Barnes, 12 R. I. 156.

S. C.—Reeves v. Brayton, 36 S. C. 384, 15 SE 658; Thompson v. Caldwell, 13 S. C. L. 390; Charleston Bank v. Inglesby, 17 S. C. Eq. 399.

Vt.—Tryon v. Tryon, 16 Vt. 313.

W. Va.—Laidley v. Kline, 8 W. Va. 218.

"An administrator, either general or special, has no interest in the real estate, and no right to the possession thereof, except where there is insufficint personal property to pay the debts and expenses of administration." Pratt v. Millard, 154 Mich. 112, 114, 117 NW 552.

"It descends to the heirs eo instante upon the death of the ancestor with the quantity of each definitely ascertained. From that instant, subject to the right of the administratrix to resort thereto for the payment of the debts of the deceased, they may dispose of the particular property as owners as they choose and are entitled to possession and to the rents and profits. If, in certain contingencies, the administrator takes possession of real estate, this is as official agent of the owners to care for the estate and conserve the rents and profits for their benefit under the direction of the court. The devolution of title is not interrupted or affected thereby, nor by the right of the administrator to sell or mortgage for the satisfaction of debts as each heir may transfer his definite portion subject thereto." In re Pitt, 153 Iowa 269, 272, 133 NW 660, 661.

[a] **If the heirs are present** to take charge of the real estate the executor or administrator has no authority to take possession of it. Comparet v. Randall, 4 Ind. 55; Indianapolis First Nat. Bank v. Hanna, 12 Ind. A. 240.

[b] **An administrator of the estate of a wife** was not entitled to possession of real property, in which the surviving husband had a curtesy interest, until his right of possession had been determined in a proceeding to which he was a party. Haberly v. Treadgold, 67 Or. 425, 136 P 334.

[c] **Homestead.**—The administrator has no right to possession of the real estate of decedent descending to the wife and heirs as a homestead. Cooley v. Jansen, 54 Nebr. 33, 74 NW 391.

[d] **Signing of lease does not conclusively show possession.**—The action of an administrator in signing, as administrator, leases of land which deceased had devised to his widow, and in collecting the rent and managing the property generally, does not show conclusively that he, and not she, was the party in possession, as it may be shown that she was his principal in all that he did. Foote v. Brown, 81 Conn. 218, 70 A 699.

58. Ill.—Mather v. Mather, 103 Ill. 607.

Ind.—Hendrix v. Hendrix, 65 Ind. 329.

La.—Charmbury's Succ., 34 La. Ann. 21; Dunlap v. Bailey, 7 La. 368.

N. J.—Stevens v. Stevens, 26 N. J. Eq. 154.

N. Y.—Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800.

N. C.—Drumright v. Jones, 39 N. C. 253.

Oh.—Roberts v. Roberts, 1 Disn. 177, 12 Oh. Dec. (Reprint) 560.

S. C.—Smith v. Byers, 102 S. C. 215, 86 SE 481; Brooks v. Brooks, 12 S. C. 422; Lawton v. Hunt, 23 S. C. Eq. 1.

[a] **It is the right and duty of an executor,** to whom seizin has been granted by the will, to take control and possession of all the property. Bertrand's Succ., 123 La. 784, 49 S 524.

[b] **Property to which possessory right under will extends.**—Where a will devised certain houses to testator's niece, to hold for life, with fee to her issue, with limitation over in case of her death without issue, a further provision authorizing the executors to take charge of real estate, except that directly devised with right to immediate possession, did not give the executors a right to hold the premises so devised to the niece, and, where they did hold such premises, the niece was entitled to an accounting of the rents. Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800.

59. Mills v. Mead, 7 Hun (N. Y.) 36.

60. See supra § 595.

61. Smith v. Byers, 102 S. C. 215, 86 SE 481.

62. U. S.—Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735 [aff 16 F. Cas. No. 9,393, 3 Sawy. 206]; Kohn v. McKinnon, 90 Fed. 623.

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Banks v. Speers, 97 Ala. 560, 11 S 841; Cruikshank v. Luttrell, 67 Ala. 318; Calhoun v. Fletcher, 63 Ala. 574; Phillips v. Gray, 1 Ala. 226.

Ark.—Chowning v. Stanfield, 49 Ark. 87, 4 SW 276; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Menifee v. Menifee, 8 Ark. 9.

Cal.—Ukiah Bank v. Rice, 143 Cal. 265, 76 P 1020, 101 AmSR 118; Webb v. Winter, 6 Cal. Unrep. Cas. 768, 65 P 1028; Collins v. O'Laverty, 136 Cal. 31, 68 P 327; Toland v. Earl, 129 Cal. 148, 61 P 914, 79 AmSR 100; Ryer v.

sentative has no right to possession unless such circumstances exist,[63] and cannot recover possession of the land from the heirs or devisees without showing the necessity, or the contingency, or the happening of the event which, under the statute, entitles him to possession.[64]

An order of court is necessary, under some statutes, to authorize the executor or administrator to take possession or control of realty,[65] and such order must be based upon the actual existence of the

Fletcher Ryer Co., 126 Cal. 482, 58 P 908; Plass v. Plass, 121 Cal. 131, 53 P 448; Crosby v. Dowd, 61 Cal. 557; Janin v. Browne, 59 Cal. 37; Harper v. Strutz, 53 Cal. 655; McCrea v. Haraszthy, 51 Cal. 146; Meeks v. Kirby, 47 Cal. 168; Cunningham v. Ashley, 45 Cal. 485; Meeks v. Hahn, 20 Cal. 620, Curtis v. Sutter, 15 Cal. 259; Curtis v. Herrick, 14 Cal. 117, 73 AmD 632; Harwood v. Marye, 8 Cal. 580; Grover v Hawley, 5 Cal. 485.

Conn.—Downey v. Moriarity, 81 Conn. 442, 71 A 581; Munger v. Doolan 75 Conn. 656, 55 A 169; Remington v. American Bible Soc., 44 Conn. 512.

Fla.—Johnson v. McKinnon, 45 Fla. 388, 34 S 272; Sanchez v. Hart, 17 Fla. 507.

Ga.—Doris v. Story, 122 Ga. 611, 50 SE 348; Crummey v. Bentley, 114 Ga. 746, 40 SE 765; Greenfield v. McIntyre, 112 Ga. 691, 38 SE 44; Dixon v. Rogers, 110 Ga. 509, 35 SE 781; Davitte v. Southern R. Co., 108 Ga. 665, 34 SE 327; Green v. Underwood, 108 Ga. 354, 33 SE 1009; Holt v. Anderson, 98 Ga. 220, 25 SE 496.

Ill.—Mather v. Mather, 103 Ill. 607.

Ind.—Kidwell v. Kidwell 84 Ind. 224; Hendrix v. Hendrix, 65 Ind. 329; Taylor v. Fickas, 64 Ind. 167, 31 AmR 114.

Iowa.—Schneider v. Schneider, 125 Iowa 1, 98 NW 159; Herriott v. Potter, 115 Iowa 648, 89 NW 91; Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383

Mass.—Stearns v. Stearns, 1 Pick. 157.

Mich.—Sylvester v. Button, 173 NW 502; Howes v. Barney, 199 Mich. 569, 165 NW 658; Moody v. Macomber, 159 Mich. 657, 124 NW 549, 134 AmSR 755; Wilmarth v. Reed, 83 Mich. 44, 46 NW 1031; Holbrooke v. Campau, 22 Mich. 288; Marvin v. Schilling, 12 Mich 356; Kline v. Moulton, 11 Mich. 370; Streeter v. Paton, 7 Mich. 341.

Minn.—Eyre v. Faribault, 121 Minn. 233, 141 NW 170, LRA1917A 685; Kern v. Cooper, 97 Minn. 509, 106 NW 962, Kern v. Cooper, 91 Minn. 121, 97 NW 648; Noon v. Finnegan, 29 Minn. 418, 13 NW 197; Miller v. Hoberg, 22 Minn. 249; Paine v. First Div. St. Paul, etc., R. Co., 14 Minn. 65.

Miss.—Farley v. Hord, 45 Miss. 96.

Mo.—Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524; In re Tuohy, 33 Mont. 230, 83 P 486; In re Higgins, 15 Mont. 474, 39 P 506, 28 LRA 116.

Nebr.—In re Dovey, 102 Nebr. 147, 166 NW 353; Tillson v. Holloway, 90 Nebr. 481, 134 NW 232, AnnCas 1913B 78.

Nev.—Gossage v. Crown Point Gold, etc., Min. Co., 14 Nev. 153.

N. D.—Blakemore v. Roberts, 12 N. D. 394, 96 NW 1029.

Or.—Goff v. Kelsey, 78 Or. 337, 153 P 103; Ladd v. Mills, 44 Or. 224, 75 P 141; Butler v. Smith, 20 Or. 126, 25 P 381; Hanner v. Silver, 2 Or. 336.

R. I.—Scott v. Monks, 16 R. I. 225, 14 A 860.

Tex.—Ansley v. Baker, 14 Tex. 607, 65 AmD 136; Bufford v. Holliman, 10 Tex. 560, 60 AmD 223; Graham v. Vining, 2 Tex. 433; Howard v. Texas, 2 Tex. 311; Thompson v. Duncan, 1 Tex. 485.

Utah.—Jenkins v. Jensen, 24 Utah 108, 66 P 773, 91 AmSR 783.

Vt.—Perrin v. Granger, 33 Vt. 101.

Wash.—Litzell v. Hart, 96 Wash. 471, 165 P 393; Wendler v. Woodward, 93 Wash. 684, 161 P 1043; Bishop v. Locke, 92 Wash. 90, 158 P 997; Noble v. Whitten, 38 Wash. 262, 80 P 451; In re Alfstad, 27 Wash. 175, 67 P 593; Balch v. Smith, 4 Wash. 497, 30 P 648; Ward v. Moorey, 1 Wash. T. 104.

Wis.—Hinn v. Gersten, 122 Wis. 222, 99 NW 338; McManany v. Sheridan, 81 Wis. 538, 51 NW 1011; Flood v. Pilgrim, 32 Wis. 376; Jones v. Billstein, 28 Wis. 221; Edwards v. Evans, 16 Wis. 181.

Wyo.—Rock Springs First Nat. Bank v. Ludvigsen, 8 Wyo. 230, 56 P 994, 57 P 934, 80 AmSR 928.

Man.—Re Bannerman, 2 Man 377.

[a] **Heir or devisee cannot as such maintain ejectment against executor.**—Plass v. Plass. 121 Cal. 131, 133, 53 P 448; Harper v. Strautz, 53 Cal. 655; Meeks v. Kirby, 47 Cal. 169; Chapman v. Hollister, 42 Cal. 462; Meeks v. Hahn, 20 Cal. 620.

[b] **Time of claiming possession.**—Where an executor, within one year after an estate is committed to his administration, makes claim for possession of testator's land, the heir is powerless to resist his claim; but after that time the executor has only a prima facie right of possession. Griffith v. Rudisill, 141 Ala. 200, 37 S 83.

[c] **Statute not retroactive.**—Statutes giving to executors and administrators the right to the possession of their decedents' real estate do not apply to administration pending when the statutes were passed, unless it is expressly so provided. Smith v. King, 22 Ala. 558; Philips v. Gray, 1 Ala. 226; Van Fleet v. Van Fleet, 49 Mich. 610, 14 NW 566.

[d] **When right to possession cannot be asserted against heirs.**—If administration upon the estate of a deceased person has been closed, and the land surrendered to the heirs, or if enough time has elapsed since the death of the intestate, thirty years being sufficient, to show that the lands are not required for the purposes of administration, the heirs or their grantees, being in possession, cannot be disturbed by the administrator. Cox v. Ingleston, 30 Vt. 258.

63. Ala.—Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Stovall v. Clay, 108 Ala. 105, 20 S 387; Lee v. Downey, 68 Ala. 98.

Ark.—Cook v. Franklin, 73 Ark. 23, 83 SW 325; Stewart v. Smiley, 46 Ark. 373; Culberhouse v. Shirey, 42 Ark. 25; Sisk v. Almon, 34 Ark. 391; Kiernan v. Blackwell, 27 Ark. 235; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Menifee v. Menifee, 8 Ark. 9.

Ga.—Craddock v. Kelly, 129 Ga. 818, 60 SE 193.

Mass.—Gibson v. Farley, 16 Mass. 280; Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559; Rough v. Womer, 76 Mich. 375, 43 NW 573; Campau v. Campau, 25 Mich. 127; Holbrook v. Campau, 22 Mich. 288; Marvin v. Schilling, 12 Mich. 356; Kline v. Moulton, 11 Mich. 370; Streeter v. Paton, 7 Mich. 341.

Minn.—Kern v. Cooper, 97 Minn. 509, 106 NW 962.

Nebr.—Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032; Cooley v. Jansen, 54 Nebr. 33, 74 NW 391.

Nev.—Gossage v. Crown Point Gold, etc., Min. Co., 14 Nev. 153.

N. H.—Lane v. Thompson, 43 N. H. 320; Gregg v. Currier, 36 N. H. 200; Bergin v. McFarland, 26 N. H. 533; Sparhawk v. Allen, 25 N. H. 261; Bean v. Moulton, 5 N. H. 450; Brackett v. Tillotson, 4 N. H. 208.

N. Y.—Matter of Mahnken, 101 Misc. 175, 167 NYS 456.

Vt.—Alexander v. Stewart, 50 Vt. 87; Roberts v. Morgan, 30 Vt. 319; Cox v. Ingleston, 30 Vt. 258; Cushman v. Jordon, 13 Vt. 597.

Wis.—Hinman v. Hinman, 126 Wis. 191, 105 NW 788; Volk v. Stowell, 98 Wis. 385, 74 NW 118; Filbey v. Carrier, 45 Wis. 469; Flood v. Pilgrim, 32 Wis. 376; Jones v. Billstein, 28 Wis. 221; Edwards v. Evans, 16 Wis. 181.

"While the executor has the right to the possession, that right is given in contemplation that it may become necessary to exercise it in the settlement of the estate for the purpose of the payment of claims against the estate. Hence it is that the duty of the executor is not made imperative to exercise the right in all cases, but is only permissible when the necessity arises for its exercise; and until such occasion does arise the heir or devisee who has entered upon the enjoyment of his property and estate ought not to be and cannot be lawfully disturbed. In other words, the right is given to the executor, and only accompanies the necessity for its exercise." Rough v. Womer, 76 Mich. 375, 381, 43 NW 573.

[a] **Circumstances showing necessity for possession.**—A necessity that the administrator should take possession of land occupied by defendant, who was one of the testator's heirs, for his, the administrator's, own protection, was shown by the following facts: Defendant was in possession of the land under a lease which was to terminate at the testator's death. The testator had bequeathed all his personalty to defendant and had devised his realty to his other heirs, but defendant continued in possession under an agreement that the administrator should have authority to withhold from defendant's share of the estate on final distribution the amount of rent due and to become due, and such share was declared by the agreement to be security for the rent. The will was disallowed and appeal was taken from the disallowance. Defendant was in default in payment of rent, and his share of the personalty was insufficient to pay the rent if the disallowance of the will should be affirmed. Wilmarth v. Reed, 83 Mich. 44, 46 NW 1031. See also Kern v. Cooper, 97 Minn. 509, 106 NW 962 (findings that possession necessary for purposes of administration held to be sustained by the evidence).

[b] **A necessity for possession is not shown** merely by proving that the estate of the intestate is liable for the payment of funeral expenses, and not showing also that there was not a sufficiency of personal property for paying the same, or some good reason why the administrator should make a division of the land or its proceeds among the heirs. Holt v. Anderson, 98 Ga. 220, 25 SE 496.

[c] **No duty to take possession is imposed** by such a statute, unless the necessity contemplated by the statute has arisen. Paine v. First Div. St. Paul, etc., R. Co., 14 Minn. 65; Hinman v. Hinman, 126 Wis. 191, 105 NW 788.

64. Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79; Matter of Mahnken, 101 Misc. 175, 167 NYS 456.

65. Fla.—Scott v. Jenkins, 46 Fla. 518, 35 S 101; Johnson v. McKinnon, 45 Fla. 388, 34 S 272; Finlayson v. Love, 44 Fla. 551, 33 S 306; Rose v. Withers, 39 Fla. 460, 22 S 724.

Iowa.—In re Pennock, 122 Iowa 622, 98 NW 480.

Ky.—Ellis v. Wren, 84 Ky. 254, 1 SW 440, 8 KyL 285.

necessity for the representative taking possession,[66] and upon notice to the heirs or devisees.[67]

The representative must be actually in possession of the land in order to exclude the heir or devisee.[68]

[§ 604] **(2) To What Lands Statute Applicable.** A statute giving right of possession of lands to the executor or administrator refers to such lands only as belonged to and were left by decedent, and not to lands bid in by the administrator or executor at a sale under execution or mortgage foreclosure, as to which he has the same right of possession as to personalty.[69] Neither does such a statute apply to lands situated in another state.[70]

[§ 605] **(3) Nature of Right of Possession.** The statutory right of executors and administrators to take possession of their decedents' real estate is temporary and limited to the purposes of administration.[71] Until it is exercised, it does not constitute an intervening estate in possession as against the heir,[72] and it ceases when the debts are paid and the estate settled.[73] But it includes the right to receive the rents,[74] and gives the representative a qualified interest in the land,[75] with all the rights and powers ordinarily incident to the right of possession.[76] The right is subject to the rights of the widow and family to dower and homestead;[77] and as it is purely statutory, it may be taken away after the representative has entered into possession, as well as before.[78]

[§ 606] **(4) Relation Back of Possession.** It has been held that when an administrator takes possession of his decedent's real estate, such possession relates back to the time of decedent's death.[79]

[§ 607] **d. Actions to Recover or Protect Possession—(1) In General.** By virtue of the directions of a will or under statute an executor or administrator may be temporarily entitled to prosecute or defend actions for recovering possession of decedent's land, as a sort of trustee or representative of the heirs or devisees and of the general interests of the estate;[80] but, where no interest in the realty of his decedent is thus vested in him, he has no such authority.[81] An administrator in possession of decedent's realty may invoke the aid of

Miss.—Miles v. Fink, 119 Miss. 147, 80 S 532.

Mo.—Grant v. Hathaway, 215 Mo. 141, 114 SW 609, 15 AnnCas 567; Langston v. Canterbury, 173 Mo. 122, 73 SW 151; Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499; Hall v. Farmers', etc., Bank, 145 Mo. 418, 46 SW 1000.

N. Y.—Matter of Mahnken, 101 Misc. 175, 167 NYS 456.

66. Langston v. Canterbury, 173 Mo. 122, 73 SW 151 (it is essential to the jurisdiction of the probate court, in proceedings for the direction of an administrator to take charge of the real estate of his intestate, that the record show that the order to take possession of or to sell the land is based on a showing that it is needed to pay debts).

67. Miles v. Fink, 119 Miss. 147, 80 S 532; Matter of Mahnken, 101 Misc. 175, 167 NYS 546.

68. Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Calhoun v. Fletcher, 63 Ala. 574; McCullough v. Wise, 57 Ala. 623; Russell v. Erwin, 41 Ala. 292; Golding v. Golding, 24 Ala. 122; Branch Bank v. Fry, 23 Ala. 770; Smith v. King, 22 Ala. 558; Chighizola v. Le Baron, 21 Ala. 406; Martin v. Williams, 18 Ala. 190; Harkins v. Pope, 10 Ala. 493; Masterson v. Girard, 10 Ala. 60; Lewon v. Heath, 53 Nebr. 707, 74 NW 274; Cox v. Ingleston, 30 Vt. 258; Hinman v. Hinman, 126 Wis. 191, 105 NW 788; Jones v. Billstein, 28 Wis. 221.

69. Kunzie v. Wixom, 39 Mich. 384.

70. Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

71. Ala.—Griffith v. Rudisill, 141 Ala. 200, 37 S 83.

Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.

Nebr.—Youngson v. Bond, 64 Nebr. 615, 90 NW 556 [aff on reh 69 Nebr. 256, 95 NW 700, 5 AnnCas 191].

Or.—King v. Boyd, 4 Or. 326; Hanner v. Silver, 2 Or. 336.

Tex.—Easterling v. Glythe, 7 Tex. 210, 56 AmD 45.

[a] **An executor has no title** to the realty, but only a right of possession, without any power of disposition, unless authorized by the court under the statute. Ryder v. Lyon, 85 Conn. 245, 82 A 573.

[b] **Possession not proprietary.**—The right of possession of an executor or administrator is only in the nature of a power, and not a proprietary interest. Lothrop v. Board of Public Works, 41 Mich. 724, 49 NW 924.

[c] **The right is not a chattel interest** which the administrator may dispose of as such. Campau v. Campau, 19 Mich. 116, 25 Mich. 127; Kline v. Moulton, 11 Mich. 370.

72. Hinman v. Hinman, 126 Wis. 191, 105 NW 788.

73. Cole v. Jerman, 77 Conn. 374, 59 A 425; Flood v. Pilgrim, 32 Wis. 376; Philips v. Sleusher, 3 Pinn. (Wis.) 457.

74. Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Menifee v. Menifee, 8 Ark. 9.

Right to rent of real estate generally see infra § 610.

75. Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Enos v. Sutherland, 11 Mich. 538; Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

[a] **Illustration.**—A statute giving the right to the possession of land to an executor or administrator gives him such an interest in the land as to entitle him to redeem a mortgage or to compel a release of a satisfied mortgage. Enos v. Sutherland, 11 Mich. 538.

76. Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Halleck v. Mixer, 16 Cal. 574; Wilson v. Wilson, 107 La. 139, 31 S 643.

[a] **Incidental rights and powers.**—(1) Executors and administrators may, by virtue of their general statutory authority, institute an action for the recovery of timber cut and removed from the land of the testator, and no special authorization from the probate court is requisite in such cases. Halleck v. Mixer, 16 Cal. 574. (2) They are necessary parties to all suits affecting the real estate. Curtis v. Sutter, 15 Cal. 259; Harwood v. Marye, 8 Cal. 580. (3) Where the surviving member of a community subsequently dies, leaving individual debts unpaid, necessitating an administration, it becomes the duty of the administrator of his succession to institute suit for partition of the property held in indivision by it and third persons. Wilson v. Wilson, 107 La. 139, 31 S 643.

77. Ala.—Banks v. Speers, 97 Ala. 560, 11 S 841; Calhoun v. Fletcher, 63 Ala. 574.

Ark.—Culberhouse v. Shirey, 42 Ark. 25; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Menifee v. Menifee, 8 Ark. 9.

Nebr.—Cooley v. Jansen, 54 Nebr. 33, 74 NW 391.

Or.—Butler v. Smith, 20 Or. 126, 25 P 381.

Wis.—McManany v. Sheridan, 81 Wis. 538, 51 NW 1011.

78. Campau v. Campau, 25 Mich. 127.

79. Noon v. Finnegan, 29 Minn. 418, 13 NW 197.

80. Ala.—Banks v. Speers, 97 Ala. 560, 11 S 841; Waddell v. Lanier, 62 Ala. 347; Patton v. Crow, 26 Ala. 426.

Ark.—Burton v. Gorman, 125 Ark. 141, 188 SW 561.

Cal.—Adams v. Prather, 176 Cal. 33, 167 P 534.

Ga.—Hammock v. Kemp, 146 Ga. 681, 92 SE 57; Gann v. Runyan, 134 Ga. 49, 67 SE 435; Bacon v. Howard, 19 Ga. A. 660, 91 SE 1066.

Ky.—De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663; Jennings v. Monks, 4 Metc. 103.

La.—Smith v. Sinnott, 44 La. Ann. 51, 10 S 413; Woodward v. Thomas, 38 La. Ann. 238.

Mo.—Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084.

Mont.—Black v. Story, 7 Mont. 238, 14 P 703.

N. J.—Besson v. Gribble, 39 N. J. Eq. 111.

N. Y.—Mosher v. Yost, 33 Barb. 277.

Okl.—Cutburth v. Bell, 55 Okl. 157, 155 P 1136.

Tex.—Gunter v. Fox, 51 Tex. 383.

Utah.—Hatch v. Hatch, 46 Utah 218, 148 P 433.

Vt.—Burnell v. Maloney, 36 Vt. 636; McFarland v. Stone, 17 Vt. 165, 44 AmD 325.

Wash.—Litzell v. Hart, 96 Wash. 471, 165 P 393; Wendler v. Woodward, 93 Wash. 684, 161 P 1043; Griffith v. James, 91 Wash. 607, 158 P 251; Gibson v. Slater, 42 Wash. 347, 84 P 648.

[a] **Necessity for possession must be shown.**—Holt v. Anderson, 98 Ga. 220, 25 SE 496.

[b] **Recovery from heir where sale necessary for distribution.**—Under Civ. Code (1895) §§ 3081, 3353, 3358, although an administrator may never have been in possession, and there may be no debts, and the heirs of the intestate may all be sui juris, yet, if a sale of the realty of the intestate will be necessary to make proper distribution among the heirs, the administrator could recover possession from the heir or one occupying the position of an heir. Gann v. Runyan, 134 Ga. 49, 67 SE 435, 436.

81. Ala.—Randolph v. Hubbert, 190 Ala. 610, 67 S 416.

Cal.—Boye v. Andrews, 10 Cal. A. 494, 102 P 551.

Conn.—Hubbel v. Prat, 1 Root 518.

Ga.—Wheeler v. Wheeler, 135 Ga. 603, 69 SE 1112; Adams v. Phillips, 132 Ga. 455, 64 SE 467.

Hawaii.—Matter of Lopez, 19 Hawaii 620.

Ill.—Richardson v. Richardson, 87

equity to protect his possession against a fraudulent claim thereto by another.[82]

[§ 608] **(2) Ejectment or Writ of Entry.** An executor or administrator entitled to temporary possession of his decedent's realty for the purpose of settling the estate may prosecute or defend an action of ejectment or a writ of entry;[83] but where he is not thus entitled to possession, or where the title vests directly in the heirs or devisees, with at most a power of sale in the representative, he has no such authority,[84] and as an administrator is not the proper party to prosecute an action of ejectment, he cannot maintain an appeal in such an action originally instituted by decedent.[85]

[§ 609] **(3) Forcible Entry and Detainer.** An executor or administrator is entitled to maintain an

Ill. A. 354; Roberts v. Baker, 65 Ill. A. 111.

Ind.—Thompson v. Schenck, 16 Ind. 194.

Iowa.—Kinsell v. Billings, 35 Iowa 154.

Ky.—Francis v. Richmond Min. Co., 181 Ky. 21, 203 SW 882.

La.—Preston v. Brady, 125 La. 535, 51 S 579.

Me.—Brown v. Strickland, 32 Me. 174.

Mass.—Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Pratt v. Millard, 154 Mich. 112, 117 NW 552.

Mo.—Holliday v. Doyon, 15 Mo. 407.

N. C.—Floyd v. Herring, 64 N. C. 409.

Wash.—Dunn v. Peterson, 4 Wash. 170, 29 P 998.

[a] **An administrator of a succession which owes no debts** has no right to bring alone a petitory action to recover real estate alleged to belong to the succession, where there are present in the parish heirs who have accepted the succession. Preston v. Brady, 125 La. 535, 51 S 579.

[b] **Where the heirs of a decedent obtained a decree putting them in possession** of decedent's real estate, rendered in a suit to destitute the administrator and to be put in possession, and the decree was not appealed from, and the heirs went into possession and continued in possession, they could not be divested and dispossessed by proceedings taken ex parte in the succession closed by the decree. Thibodeaux v. Thibodeaux, 126 La. 578, 52 S 773.

[c] **A special administrator** has no authority to maintain an action to recover real estate. Union Trust Co. v. Kirchberg, 174 Mich. 161, 140 NW 464.

82. Butts v. Purdy, 63 Or. 150, 125 P 313, 127 P 25.

83. Ala.—Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465; Wilson v. Kirtland, 172 Ala. 72, 55 S 174; Moragne v. Doe, 143 Ala. 459, 39 S 161, 111 AmSR 52, 5 Ann Cas 331; Pendley v. Madison, 83 Ala. 484, 3 S 618; Leatherwood v. Sullivan, 81 Ala. 458, 1 S 718; Morgan v. Casey, 73 Ala. 222; Landford v. Dunklin, 71 Ala. 594; Russell v. Erwin, 41 Ala. 292; Golding v. Golding, 24 Ala. 122.

Ark.—Burton v. Gorman, 125 Ark. 141, 188 SW 561; Chowning v. Stanfield, 49 Ark. 87, 4 SW 276; Culberhouse v. Shirley, 42 Ark. 25; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351.

Cal.—Harper v. Strautz, 53 Cal. 655; Meeks v. Hahn, 20 Cal. 620; Soto v. Kroder, 19 Cal. 87; Curtis v. Herrick, 14 Cal. 117, 73 AmD 632.

Fla.—Jacksonville, etc., R. Co. v. Adams, 27 Fla. 443, 9 S 2; Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 334; Sanchez v. Hart, 17 Fla. 507.

Ga.—Carter v. Darnell, 94 Ga. 656, 21 SE 849; Beaver v. Morrison, 22 Ga. 107, 68 AmD 486; Williams v. Rawlins, 10 Ga. 491; Bacon v. Howard, 19 Ga. A. 660, 91 SE 1066.

Ind.—Doe v. Mace, 7 Blackf. 2; Duchane v. Goodtitle, 1 Blackf. 117.

Ky.—Chapman v. Headley, 4 SW 189, 8 KyL 957.

Mass.—Richardson v. Hildreth, 8 Cush. 225.

Mich.—Moody v. Macomber, 159 Mich. 657, 124 NW 549, 134 AmSR 755; Barlage v. Detroit, etc., R. Co., 54 Mich. 564, 20 NW 587; Kline v. Moulton, 11 Mich. 370.

Mont.—Black v. Story, 7 Mont. 238, 14 P 703.

Nebr.—Tillson v. Holloway, 90 Nebr. 481, 134 NW 232, AnnCas1913B 78; Carson v. Dundas, 39 Nebr. 503, 58 NW 141.

N. H.—Pierce v. Jaquith, 48 N. H. 231.

N. Y.—Landon v. Townsend, 60 Hun 578, 14 NYS 522.

N. C.—Smathers v. Moody, 112 N. C. 791, 17 SE 532.

Or.—Humphreys v. Taylor, 5 Or. 260.

Pa.—Kirk v. Carr, 54 Pa. 285; Chew v. Chew, 28 Pa. 17; Carpenter v. Cameron, 7 Watts 51.

Utah.—McClelland v. Dickenson, 2 Utah 100.

Vt.—Alexander v. Stewart, 50 Vt. 87; Burnell v. Malony, 36 Vt. 636.

Wash.—Hazelton v. Bogardus, 8 Wash. 102, 35 P 602.

"There can be no doubt of the right of an administrator to maintain ejectment to recover possession of real estate of his intestate, and this without regard to whether, when recovered, it is intended for distribution or the payment of debts." Moragne v. Doe, 143 Ala. 459, 462, 39 S 161, 111 AmSR 52, 5 AnnCas 331.

[a] **The administrator of a mortgagee** who during his lifetime recovered a conditional judgment on a writ of entry to foreclose the mortgage may maintain a writ of entry in the supreme court against a disseizor to recover possession of the mortgaged premises. Richardson v. Hildreth, 8 Cush. (Mass.) 225.

[b] **Order of court for possession necessary.**—Under the statute an administrator cannot maintain ejectment for the land, nor a suit to remove a cloud from the title, in the absence of an order authorizing him to take possession. Hall v. Farmers', etc., Bank, 145 Mo. 418, 46 SW 1000.

[c] **Proof necessary to sustain action.**—Under Rev. St. (1892) § 1917, providing that real estate shall descend to the heir or devisee of a decedent, and remain in his possession until the executor or administrator shall take possession of or sell the same, under the order of the court, for the payment of debts, an administrator cannot maintain ejectment for land on proof of title and possession in his intestate at the time of his death, where the action was not commenced until after such statute took effect, and it does not appear when his decedent died, or when plaintiff was appointed, or that he has ever been in possession. Rose v. Withers, 39 Fla. 460, 22 S 724.

[d] **Necessity must appear.**—"An administrator may, in certain cases, as provided by statute, maintain ejectment against the heirs or strangers to recover the lands of his intestate. However, he can only maintain such action when necessary for the purposes of administration. He can only recover against the heirs by showing the necessity, and such state of facts as is provided by statute. He has no estate in or title to the lands. He only has the right and power, given exclusively by statute, to intercept the rents in certain cases for certain purposes, and to recover the lands for this purpose, and to sell the same if necessary to pay debts of decedent, or he may, in certain cases, sell for distribution among the heirs. He cannot recover the lands from the heirs, who are the legal owners, whatever may be his rights against strangers, without showing the necessity, or the contingency, or the happening of the event for which the statute authorizes him to maintain such action. Without this necessity or contingency provided for, he is a trespasser as against the heirs in attempting to assume to control the lands." Mayer v. Kornegay, 163 Ala. 371, 374, 50 S 880, 136 AmSR 79.

[e] **Construction of will.**—A will which authorizes executors, not only to sell at their option, but also to make valuation, division, and allotments of the estate devised, and to make deeds of conveyance therefor, breaks the descent, and vests the estate in the executors, so that the heir at law cannot maintain ejectment therefor. Wallace v. Wallace, 1 AmLRegNS (Pa.) 42.

84. U. S.—Kohn v. McKinnon, 90 Fed. 623.

Ala.—Stovall v. Clay, 108 Ala. 105, 20 S 387; Morgan v. Carey, 73 Ala. 222.

Ark.—Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Morrill v. Menifee, 5 Ark. 629.

Conn.—Livingston v. Bird, 2 Root 438.

Ga.—Head v. Driver, 79 Ga. 179, 3 SE 621; Bacon v. Howard, 19 Ga. A. 660, 91 SE 1066.

Ky.—Reynolds v. Boyd, 92 Ky. 249, 17 SW 572, 13 KyL 525.

Md.—Fredericks v. Cisco, 72 Md. 393, 20 A 190.

Mich.—Howes v. Barney, 199 Mich. 569, 165 NW 658.

Mo.—Whitworth v. Barnes, 256 Mo. 468, 165 SW 992; Grant v. Hathaway, 215 Mo. 141, 114 SW 609, 15 AnnCas 567; Burdyne v. Mackey, 7 Mo. 374.

Mont.—Carrhart v. Montana Mineral Land, etc., Co., 1 Mont. 245.

N. H.—Pierce v. Jaquith, 48 N. H. 231.

N. J.—Schorb v. Haurand, 76 N. J. L. 768, 71 A 242.

N. Y.—Chamberlain v. Taylor, 105 N. Y. 185, 11 NE 625; Smith v. Chase, 90 Hun 99, 35 NYS 615; Van Rensselaer v. Hayes, 5 Den. 477; Jackson v. McVey, 15 Johns. 234.

Okl.—Eller v. Noah, 168 P 819.

Tenn.—Peck v. Henderson, 7 Yerg. 18.

Vt.—Roberts v. Morgan, 30 Vt. 319; Cushman v. Jordan, 13 Vt. 597; Stone v. Gribbin, 3 Vt. 400; Chipman v. Sawyer, 1 Tyler 83.

Va.—Coles v. Jamerson, 112 Va. 311, 71 SE 618, 50 LRANS 407.

[a] **Where an administrator was appointed more than sixty years after the death** of his intestate, he cannot recover in ejectment lands which had descended to the heirs of his intestate, under some of whom defendant took possession, although some of the heirs assented to the granting of administration. Cushman v. Jordan, 13 Vt. 597.

85. Whitworth v. Barnes, 256 Mo. 468, 165 SW 992.

action of forcible entry and detainer where he is entitled to possession of the land,[86] or where decedent had a mere chattel interest therein,[87] but not otherwise.[88]

[§ 610] **4. Rents and Profits**[89]**—a. In General.** The personal representative has at common law no title or right to the rents and profits of the real estate of his decedent, accruing after the latter's death;[90] but possession and control of real estate such as will carry the right to rents and profits may be given to the executor or administrator by the will;[91] and statutes frequently give the representative the right under appropriate circumstances to receive the rents and profits either for the purpose of using them for payment of the debts or for other proper purposes connected with the administration.[92] In order to entitle the representative to the rents and profits under such statutes it must appear that the contingency contemplated by the statute has arisen and that the representative has complied with the requirements of the statute with reference to establishing his right,[93] one of the most usual of which is that there shall be an order of court authorizing the representative to rent or use the land and apply the rents and profits to the purposes of the administration.[94] A mere naked or

86. Ala.—Espalla v. Gottschalk, 95 Ala. 254, 10 S 755.
Cal.—Knowles v. Murphy, 107 Cal. 107, 40 P 111.
Fla.—Scott v. Lloyd, 16 Fla. 151.
Ill.—McDole v. Shepardson, 53 Ill. A. 513.
Iowa.—Beezley v. Burgett, 15 Iowa 192.
Vt.—Edmonds v. Morrill, Brayt. 20.
Wash.—Griffith v. James, 91 Wash. 607, 158 P 251.

87. Winningham v. Crouch, 2 Swan (Tenn.) 170.

88. Roberts v. Baker, 65 Ill. A. 111; McMullen v. Mayo, 16 Miss. 298; Carmichael v. Davis, 1 Miss. 221.

89. **As assets** see supra §§ 330–336.

90. Ala.—Masterson v. Girard, 10 Ala. 60.
Ark.—Phillips v. Grubbs, 112 Ark. 562, 167 SW 101.
Ill.—Dixon v. Niccolls, 39 Ill. 372, 89 AmD 312; Foltz v. Prouse, 17 Ill. 487; Sherman v. Dutch, 16 Ill. 283; Pritchard v. McGregor, 205 Ill. A. 362; Furman v. Wieczorkowski, 202 Ill. A. 347; Hollahan v. Sowers, 111 Ill. A. 263.
Ind.—Kidwell v. Kidwell, 84 Ind. 224; Trimble v. Pollock, 77 Ind. 576; King v. Anderson, 20 Ind. 385.
Iowa.—Crane v. Guthrie, 47 Iowa 542; Shawhan v. Long, 26 Iowa 488, 96 AmD 164; Laverty v. Woodward, 16 Iowa 1.
Kan.—Head v. Sutton, 31 Kan. 616, 3 P 280.
Ky.—Compton v. Moore, 167 Ky. 657, 181 SW 360; Kelly v. Pettus, 145 Ky. 250, 140 SW 189; Ball v. Covington First Nat. Bank, 80 Ky. 501; Combs v. Branch, 4 Dana 547.
Me.—Mills v. Merryman, 49 Me. 65; Stinson v. Stinson, 38 Me. 593.
Md.—Getzandaffer v. Caylor, 38 Md. 280.
Mass.—Cummings v. Watson, 149 Mass. 262, 21 NE 365; Lobdell v. Hayes, 12 Gray 236.
Mich.—Owings v. Owings, 150 Mich. 609, 114 NW 393.
Miss.—Bloodworth v. Stevens, 51 Miss. 475.
N. H.—Ayers v. Laighton, 73 N. H. 487, 63 A 43.
N. J.—Allen v. Van Houten, 19 N. J. L. 47.
N. Y.—In re Murray, 124 App. Div. 548, 108 NYS 1047; Matter of Spears, 89 Hun 49, 35 NYS 35; Fay v. Holloran, 35 Barb. 295; Matter of Van de Walker, 79 Misc. 661, 141 NYS 325; Walcoff v. Bittker, 67 Misc. 414, 122 NYS 680; Wright v. Williams, 5 Cow. 501; Kohler v. Knapp, 1 Bradf. Surr. 241.
N. C.—Fleming v. Chunn, 57 N. C. 422.
Okl.—Moseley v. McBride, 40 Okl. 270, 271, 138 P 138 [quot Cyc].
Pa.—Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Haslage v. Krugh, 25 Pa. 97; Adams v. Adams, 4 Watts 160; Jarrett's Est., 26 Pa. Dist. 160; Young's Est., 4 Pa. Dist. 44; McManus' Est., 3 Pa. Dist. 183, 14 Pa. Co. 379, 34 WklyNC 222; Klein's Est., 2 Pa. Dist. 813; Toland's Est., 26 Pa. Co. 221; O'Donnell's Est., 9 Kulp 123; Burnell's Est., 13 Phila. 387.
S. C.—Huff v. Latimer, 33 S. C. 255, 11 SE 758.
Tenn.—Combs v. Combs, 131 Tenn. 66, 173 SW 441; Smith v. Thomas, 14 Lea 324; Rowan v. Riley, 6 Baxt. 67; Combs v. Young, 4 Yerg. 218, 26 AmD 225.
Vt.—Stockwell v. Sargent, 37 Vt. 16.
Va.—Lightner v. Speck, 28 SE 326; Roberts v. Stanton, 2 Munf. (16 Va.) 129, 5 AmD 463.

[a] **An executor may be enjoined** from leasing the real estate and collecting the rent, where he has no right to do so under the will. Stevens v. Stevens, 69 Hun 332, 23 NYS 520.

[b] **To whom heir in possession liable.**—An heir in possession of real estate after the death of the ancestor, if liable for rent, is liable to the other heirs, and not to the administrator. Owings v. Owings, 150 Mich. 609, 114 NW 393.

[c] **Rents received by one who is both administrator and guardian** go to the guardianship account. Foteaux v. Lepage, 6 Iowa 123.

[d] **Distraining for rent against devisee.**—Where a will directed that testator's estate be divided among the children as they came of age or married, and one child married and with her husband occupied lands of the estate, and the executors refused to pay over her share of the estate or account for it, they could not distrain against the husband for rent due. McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342.

91. Md.—Emery v. Owings, 6 Gill 191.
N. H.—Madigan v. Burns, 58 N. H. 405.
N. Y.—Hannahs v. Hannahs, 68 N. Y. 610.
Pa.—Jones' App., 3 Grant 250.
Vt.—Clark v. Clark, 58 Vt. 527, 3 A 508.
Eng.—Bush v. Allen, 5 Mod. 63, 87 Reprint 520.

[a] **This power may be implied** where the provisions of the will are of such character as to indicate that such was the intention of the testator. Peirce v. Peirce, 195 Pa. 417, 46 A 78; Bush v. Allen, 5 Mod. 63, 87 Reprint 520.

[b] **An express authority to take possession** of the land, given to the executor by the will, carries with it, as a necessary incident to the possession, the right to take the rents and profits, and this right is not to be deemed as denied because the will contains no provision for their disposition when collected, the implication being that they are to go to the persons beneficially interested in the estate. Hubbard v. Housley, 43 App. Div. 129, 56 NYS 392 [aff 27 Misc. 276, 58 NYS 432, and aff 160 N. Y. 688 mem, 55 NE 1096 mem].

[c] **Testamentary provision for payment of encumbrance out of rent.**—Although ordinarily the debts of an estate are payable by executors only, where a will devised to testator's son a certain quarry, and provided that the rents arising from the quarry should be applied to discharge the encumbrance on the same, the son was entitled to the rents, in order to apply them on the debt, and they did not go to the executors. Emery v. Owings, 6 Gill (Md.) 191.

[d] **Will not giving right to collect rents.**—Where the only duty imposed upon the executors under the will with regard to the residuary real estate is to divide it into three equal parts and convey them to trustees, they have no right to lease or collect rents from the land, notwithstanding the fact that such residuary real estate is charged with a trust legacy in favor of one of the executors. Stevens v. Stevens, 69 Hun 332, 23 NYS 520.

92. Ala.—Harkins v. Pope, 10 Ala. 493.
Colo.—Rupp v. Rupp, 11 Colo. A. 36, 52 P 290.
Ga.—Craddock v. Kelly, 129 Ga. 818, 60 SE 193; Chisolm v. Spullock, 87 Ga. 665, 13 SE 571.
Ind.—Kidwell v. Kidwell, 84 Ind. 224; McClead v. Davis, 83 Ind. 263.
Iowa.—Laverty v. Woodward, 16 Iowa 1.
La.—Hoss v. Jones, 26 La. Ann. 659.
N. H.—Gregg v. Currier, 36 N. H. 200.
N. J.—Condit v. Neighbor, 13 N. J. L. 83.
N. Y.—In re Loew, 169 NYS 329.
Pa.—Bakes v. Reese, 150 Pa. 44, 24 A 634.
Wyo.—Cook v. Elmore, 25 Wyo. 393, 171 P 261.

[a] **Recovery of rents from heir.**—Mesne profits may be recovered by an administrator against an heir of intestate claiming as a distributee, where the land has been wrongfully withheld by such heir from the administrator, when it was necessary for the administrator to have possession thereof for the purpose of paying debts and making proper distribution. Craddock v. Kelly, 129 Ga. 818, 60 SE 193.

[b] **If there are no creditors and the administrator rents out the land,** the accruing rents, when not needed to pay the expenses of administration, belong to the heirs as such, although the legal right to collect is in the administrator, he being a mere trustee for them. Autrey v. Autrey, 94 Ga. 579, 20 SE 431.

[c] **Determination of lease.**—A statute authorizing administrators to receive, take possession of, sue for, and recover the rents, issues, and profits of the land of their intestates does not give an administrator power to determine an existing lease and sue for possession of the leased premises. Rupp v. Rupp, 11 Colo. A. 36, 52 P 290.

93. Brent v. Chipley, 104 Mo. A. 645, 78 SW 270; Moseley v. McBride, 40 Okl. 270, 271, 138 P 138 [quot Cyc].

94. Brent v. Chipley, 104 Mo. A. 645, 78 SW 270; Bealey v. Blake, 70 Mo. A. 229; Ayers v. Laighton, 73 N. H. 487, 63 A 43.

[a] **Order not retrospective.**—An order of the probate court directing the administrator to take possession of and rent the real estate for the payment of debts can have no retrospective effect, nor can it authorize

contingent power to sell does not give the representative a right to the rents and profits, but in such case the heirs or devisees may enter upon the estate and receive all rents and profits until such power is appropriately exercised.[95]

The consent of heirs or devisees may warrant the collection of rents of real estate by the executor,[96] and where rents and profits of real estate have been so received this gives the representative a lawful possession and a good title against all persons except the heirs.[97]

Land leased by decedent. It has been held that, where land is rented for a year and the lessor dies intestate within the year, the heirs have no title, merely as heirs, to the rent accruing for that year, but the rent is personalty and the right to collect and distribute it is in the administrator.[98]

[§ 611] **b. Actions to Recover.** Where the right to possess or control decedent's land is given by will or local statute, the executor or administrator may recover rent or sue for use and occupation,[99] but he cannot do so where no such rightful control exists.[1]

[§ 612] **c. Disposition.** It is proper to apply rents on the obligations of the estate;[2] and a representative who has collected rents may be protected where, instead of paying the same over to the heirs or other distributees, he has under prudent and reasonable circumstances applied the same beneficially for the premises, as in keeping down mortgage interest and preventing foreclosure at a sacrifice,[3] for needful labor on the premises,[4] or keeping the buildings in proper repair.[5] But it has been held that an administrator has no authority to apply rents collected to taxes and arrears of ground rent accruing subsequent to the death of decedent.[6] The court has refused to call a widow who was administratrix to account for rents and profits expended in the support of infant children of decedent;[7] and it has been held that under a statute giving executors and administrators possession and control of the real estate not specifically devised during the settlement of the estate, such possession and control was for the benefit of the persons entitled to the real estate and that rents and profits not needed for the payment of debts went on distribution with the land as incident thereto, and did not go to the residuary legatees.[8]

[§ 613] **d. Liability of Representative—(1) In General.** An executor or administrator who has taken possession or control of the real estate of his decedent must account for the rents and profits thereof;[9] but he is not responsible for rents for a time when the real estate was not in his possession

an administrator to recover from the heir rents collected by him after decedent's death, but prior to the order. Bealy v. Blake, 70 Mo. A. 229.

95. Ill.—Bucher v. Bucher, 86 Ill. 377.

Ind.—Doe v. Lanius, 3 Ind. 441, 56 AmD 518.

Md.—Guyer v. Maynard, 6 Gill & J. 420.

Mass.—Brooks v. Jackson, 125 Mass. 307; Lobdell v. Hayes, 12 Gray 236.

Mich.—Howard v. Patrick, 38 Mich. 795.

Miss.—Bullock v. Sneed, 21 Miss. 293.

N. H.—Gregg v. Currier, 36 N. H. 200.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362; Matter of Bampfield, 88 Misc. 463, 152 NYS 212, 214 [cit Cyc]; Matter of Van de Walker, 79 Misc. 661, 141 NYS 325; Campbell v. Johnston, 1 Sandf. Ch. 148.

Pa.—Peirce v. Peirce, 195 Pa. 417, 46 A 78; Pennsylvania Co.'s App., 168 Pa. 431, 32 A 25, 47 AmSR 893; Scott's Est., 19 Pa. Dist. 643; Howard's Est., 8 Pa. Dist. 125, 22 Pa. Co. 256; Young's Est., 16 Pa. Co. 54; Myers' Est., 9 Phila. 310; Blight v. Wright, 1 Phila. 549.

[a] **Where the devisee is made sole executor,** rents and profits of real estate belong to him as devisee, subject to the contingent duty of exercising a power of sale of the land to pay debts of the estate. Bucher v. Bucher, 86 Ill. 377.

96. Forbes v. Keyes, 193 Mass. 38, 41, 78 NE 733 ("The collection of rents of real estate by consent of the devisees, or the occupation of real estate by one of the executors, which appears to have been the source of some of the rents charged against them in the accounts of these executors, is permitted by statute, and decisions of this court recognize money so received as assets properly in the hands of an executor or administrator. Rev. Laws, c. 150, § 6").

97. Wilson v. Shearer, 9 Metc. (Mass.) 504.

98. Autrey v. Autrey, 94 Ga. 579, 20 SE 431 [foll Strickland v. Thornton, 2 Ga. A. 377, 58 SE 540 (the fact that the rent was payable in cotton and not money does not change the rule)].

99. Ala.—Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561.

Ill.—Bailey v. Campbell, 2 Ill. 110.

Ind.—McDowell v. Hendrix, 71 Ind. 286.

Iowa.—Durlam v. Steele, 88 Iowa 498, 55 NW 509; Toerring v. Lamp, 77 Iowa 488, 42 NW 378.

Ky.—Williamson v. Richardson, 6 T. B. Mon. 596.

Mo.—Logan v. Caldwell, 23 Mo. 372.

Pa.—Blight v. Ewing, 26 Pa. 135; Cobb v. Biddle, 14 Pa. 444.

Tex.—Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

[a] **Chattel interest of testator.**—An executor, in his declaration for rent falling due after the testator's death, must show that the estate of the testator in the premises was but a chattel. Williamson v. Richardson, 6 T. B. Mon. (Ky.) 596.

[b] **Ownership or contract to pay.**—In order to enable an administrator to maintain an action for the use and occupation of a farm, plaintiff or his intestate must have been the owner of the premises, or there must have been an express contract on the part of defendant to pay. Bailey v. Campbell, 2 Ill. 110.

[c] **Defenses.**—That defendant paid the rent demanded to a guardian appointed in another county, where the intestate died, there being no debtors or creditors of the estate, and the heirs being minors, is a defense which should be allowed to be made to a suit by an administrator not appointed until six years after the death of the intestate. Homuth v. Zapp, 20 Tex. 807.

[d] **Rents accruing upon a lease from decedent** may be sued for by the personal representative. McDowell v. Hendrix, 71 Ind. 286.

1. Ark.—Stewart v. Smiley, 46 Ark. 373.

Ga.—Wheeler v. Wheeler, 135 Ga. 603, 69 SE 1112.

Mo.—Landree v. Warren, 53 Mo. A. 442.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362 [rev 108 App. Div. 360 mem, 95 NYS 1122 mem].

Okl.—Moseley v. McBride, 40 Okl. 270, 138 P 138.

S. C.—Bagwell v. Jamison, 25 S. C. L. 249.

Wis.—Filbey v. Carrier, 45 Wis. 469.

[a] **Illustration.**—Where, by the terms of a will, testator's real estate passed directly to certain devisees in equal shares, and not to his executor, such executor had no capacity to sue to recover rents and profits of certain of such real estate from testator's cotenant. Coann v. Culver, 188 N. Y. 9, 80 NE 362.

2. Loscolzo v. Eggner, 23 Del. 260, 78 A 607; Patterson v. Patterson, 251 Ill. 153, 95 NE 1051.

[a] **Illustrations.**—(1) Where one was in possession of certain property in controversy as executor of his father and charged himself a fair amount for the use and occupation, and applied such amount to the payment of his father's debts, he was not liable for any part of the value of the use of the premises for such period to the devisee. Loscolzo v. Eggner, 23 Del. 260, 78 A 607. (2) Where one appointed executor of his mother's estate had accounted to her for the rents of her premises up to a designated date, and settlements were then had between the parties and a contract gave him the right to retain possession of the premises until a designated future date at an annual rental, which he had credited on a claim against her estate, he was not liable to account to other heirs and legatees for rents prior to such future date. Patterson v. Patterson, 251 Ill. 153, 95 NE 1051.

3. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131; Reynolds v. New Orleans Canal, etc., Co., 30 Ark. 520.

4. Ferguson v. Collins, 8 Ark. 241.

5. Henderson's Succ., 24 La. Ann. 435.

Allowance for expenditures for repairs and improvements see supra § 528.

Right to make repairs and improvements see infra § 616.

6. McManus' Est., 3 Pa. Dist. 183, 14 Pa. Co. 379.

Allowance for expenditure for taxes and assessments see supra § 550.

Taxes and assessments as obligations of estate see infra § 902.

7. Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619.

8. Remington v. American Bible Soc., 44 Conn. 512.

9. Ala.—Smith v. King, 22 Ala. 558.

or control unless he has been guilty of some laches or lack of good faith which has resulted in a loss to those entitled to the rents.[10] Where, however, it is necessary to sell lands for payment of debts, and the representative fails to take proper steps to that end within a reasonable time, he may be held liable for rent;[11] and it has been held that an executor who has permitted land, a life estate in which is charged by the will with the payment of expenses of administration, to pass into the possession of the devisee for life, and suffered him to enjoy the rents and profits thereof for more than twenty years, is justly chargeable with rents and profits to the amount of administration expenses.[12] Where testator at his death owned a house and lot occupied by the executor, whose wife was a residuary legatee, and it was agreed that she should have the house and lot in payment of her legacy, and a deed of the same was executed and delivered to her, and the executor with his family continued to occupy the house, and there was nothing to show that it was not advantageous to the estate to settle the claim of the wife by conveying the property, the executor was held not chargeable with the rental value of the property after the execution and delivery of the deed.[13]

[§ 614] **(2) In What Capacity Liable.** Whether the representative's liability to account for rents and profits is in his representative or his individual capacity depends upon the facts of the particular case.[14] The general rule is that, where the representative is lawfully in possession or control under testamentary or statutory authority, he accounts in his representative capacity for the rents and profits received as assets for the payment of debts or distribution as the case may be,[15] although negligence in the management of the property may subject him to personal liability;[16] while if he has taken possession or control without authority he is not in his representative capacity chargeable with, or liable

Conn.—Storer v. Hinkly, 1 Root 182.

Iowa.—In re Pennock, 122 Iowa 622, 98 NW 480.

Ky.—Rogers v. Burbridge, 13 Ky. Op. 517; Elliott v. Bush, 11 Ky. Op. 354.

La.—McNeely's Succ., 50 La. Ann. 823, 24 S 338.

Mass.—Coffey v. Coffey, 193 Mass. 398, 79 NE 742, 118 AmSR 535; Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

Mo.—Lewis v. Carson, 16 Mo. A. 342.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. H.—Ayers v. Laighton, 73 N. H. 487, 63 A 43.

N. J.—Brearley v. Brearley, 9 N. J. Eq. 21.

N. Y.—Griffith v. Beecher, 10 Barb. 432; Matter of Van de Walker, 79 Misc. 661, 141 NYS 325; Matter of Boyd, 4 Redf. Surr. 154.

N. C.—Jennings v. Copeland, 90 N. C. 572.

Oh.—Loveless v. Erie R. Co., 19 Oh. Cir. Ct. N. S. 277, 35 Oh. Cir. Ct. 87, 2 Oh. A. 404.

Pa.—Straub's App., 1 Pa. 86.

S. C.—Garlington v. Copeland, 32 S. C. 57, 10 SE 616.

Wash.—In re Alfstad, 27 Wash. 175, 67 P 593.

W. Va.—Fields v. Lawyer, 97 SE 597.

"If, during the settlement of the estate, the executors took possession of the real estate, they should account, in their administration, for the income they receive from it after the decree of insolvency." Harris v. Ingalls, 74 N. H. 35, 37, 64 A 727.

[a] **Illustration.**—Where a testator devised to his wife the life use of his realty, but made certain debts and expenses a charge on his realty to the extent of the insufficiency of his personalty therefor, and directed his wife as executrix to sell part of his realty or standing timber to pay such sums, leaving to her judgment what portions of land or timber to sell, she is chargeable on the settlement of her account for the sums received for timber cut and sold above what was necessary for the payment of the debts and expenses. Linzy v. Whitney, 110 App. Div. 462, 96 NYS 1075.

[b] **Where the personal representative occupies** a house belonging to the estate, his liability is the same as if he had received rent for it, and he and his sureties must account accordingly. McIntire v. Mower, 204 Mass. 233, 90 NE 567.

[c] **Rents collected by heirs as agents of executor.**—The rule holding an executor responsible to the estate for transcending his power in taking charge of the real estate and collecting the rents applies, although the heirs collect them, if they do so as his agents and he receives a commission thereon. Gamble v. Gibson, 59 Mo. 585.

[d] **When liability to widow accrues.**—An administrator is not liable to intestate's widow for rents from the estate until her distributive share is set aside. In re Pennock, 122 Iowa 622, 98 NW 480.

[e] **Loss of rents and profits.**—The representative should be charged wth rents and profits which have been lost to his negligence. In re Dolenty, 53 Mont. 33, 161 P 524.

[f] **An executor who is also residuary devisee** is not liable to account for rents and profits received by him. Newcomb v. Stebbins, 9 Metc. (Mass.) 540. But compare McNeely's Succ., 50 La. Ann. 823, 24 S 338 (an executor, who is also the universal legatee, who takes possession ex parte of all the property of the succession, and deals with it as his own, with knowledge of the existence of a minor forced heir, is chargeable with the rents of the portion of the succession which vested in such heir).

[g] **Executor as life tenant.**—Where an estate is left to the widow for life, she is entitled to the rents and profits until disposition by due process of law; and, if she is executrix and resides on the property, she need not charge herself in her account with rents for the same. In re Bare, 5 LancLRev (Pa.) 36. See also Clough v. Clough, 71 N. H. 412, 52 A 449 (an executor who occupied real estate in which a life interest has been devised to his coexecutor is not chargeable with rent as executor and cannot be credited in that capacity with money expended for taxes repairs, etc.).

[h] **Occupation as tenant of person entitled.**—An executor is not chargeable in his official capacity with timber, coal, and limestone taken from the testator's land, where he occupied the same as tenant of the life tenant. Lynn's App., 31 Pa. 44, 72 AmD 721. See also McCormick's App., 104 Pa. 146 (where the court refused in a proceeding for distribution to charge the administrator de bonis non with the will annexed with rent for land which he occupied before his appointment under lease from one who held it in trust for the heirs).

[i] **Not liable to heirs or devisees.**—(1) Where a will provided that the executor should sell the lands and pay the proceeds to certain legatees, it operated as a conversion of land into money at the death of testator, and the executor was not liable to the heirs for rent of the land during the time that it was occupied and cultivated by him. Williams v. Williams, 145 Mo. A. 382, 129 SW 454. (2) Where the estate is unsettled and possibly insolvent, an action will not lie by devisees against the executor for rents collected by him, although he took charge of and leased the property without a formal order of the probate court. Gamage v. Bushell, 1 Mo. A. 416.

10. Clark v. Guard, 73 Ala. 456; Jenks v. Terrell, 73 Ala. 238; Cross v. Johnson, 82 Ga. 67, 8 SE 56; Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324; Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

[a] **Illustration.** — An executor cannot be charged with the rent of real estate until it becomes necessary to reduce it to actual possession for the protection of the creditors, or until he is ordered to do so by the proper court. Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

[b] **A mere power to sell** real estate, given to an executor, does not render him responsible for the rents thereof. Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

11. Clark v. Knox, 70 Ala. 607, 45 AmR 93.

12. Tilton v. Tilton, 41 N. H. 479.

13. In re Lane, 79 Vt. 323, 65 A 102.

14. Patrick v. Roach, 27 Tex. 579.

15. Dix v. Morris, 66 Mo. 514 [aff 1 Mo. A. 93]; Stagg v. Jackson, 1 N. Y. 206.

[a] **Agreement with devisee.**—Where executors managed a farm under an arrangement with the sole devisee that they should take the products and account for them as assets, the fact that such sole devisee was also an executor would not prevent the executors from occupying the farm for the benefit of the estate so as to be chargeable with the income, and the products belonged to them in their representative capacity. Brigham v. Elwell, 145 Mass. 520, 14 NE 780. See also Mansfield v. Holton, 74 N. H. 417, 418, 68 A 541 ("The plaintiff managed the real estate under an agreement to apply the net income to the payment of debts; so if there was any such income while he had charge of the property, he has received money which it was his duty to apply as a part of the deceased's estate. Consequently, in this case he may be compelled as administrator to account for the net income of the real estate, although he could not be so compelled if he had managed the property for his own benefit, or for the benefit of the heirs. Perkins v. Perkins, 58 N. H. 405; Lucy v. Lucy, 55 N. H. 9").

16. Eppinger v. Canepa, 20 Fla. 262.

to, account for the rents and profits or proceeds received,[17] but is held to account therefor in his individual capacity on the theory that they have been received as agent or implied trustee for those entitled to the realty.[18] It is usually considered that, where the representative has received rents and accounted therefor or paid them out in discharge of the debts of his decedent, he is precluded from alleging that they belong to the heir and he received them without authority, and those entitled to the rents may charge him therewith in his representative capacity as for assets rightfully received;[19] and while if he received them without authority he is also chargeable in his individual capacity for what he has paid out,[20] the one entitled to the rents has the right to elect in which capacity he shall be charged, and he cannot defeat a recovery against him in his representative capacity on the ground that he is personally liable.[21]

[§ 615] **(3) Extent of Liability.** An executor or administrator who takes possession of, and uses the land of, decedent is properly chargeable with its rental value,[22] subject, however, to the qualifications that, where he manages the property hon-

17. Conn.—Goodrich v. Thompson, 4 Day 215.

Ind.—Kidwell v. Kidwell, 84 Ind. 224.

Kan.—Head v. Sutton, 31 Kan. 616, 3 P 280.

Mich.—Russell v. Wheeler, 129 Mich. 41, 88 NW 73.

N. H.—Ayers v. Laighton, 73 N. H. 487, 63 A 43; Clough v. Clough, 71 N. H. 412, 52 A 449; Perkins v. Perkins, 58 N. H. 405; Lucy v. Lucy, 55 N. H. 9.

Pa.—Hartz's App., 2 Grant 83.

S. C.—Jewell v. Jewell, 32 S. C. Eq. 296.

"If there had been no decree of insolvency—in other words, if the estate had been administered throughout in the solvent course—it would not probably be claimed that the administrators would be officially accountable in the settlement of their probate account for the funds received by them in the management of the real estate. . . . In such a case their acts in collecting the rents would be deemed merely the acts of individuals, and not of administrators, for which they might be personally accountable to the heirs in a proper proceeding, but not in the settlement of their administration account. As administrators, they would have no right, since no duty is imposed upon them, to intermeddle with the real estate of the intestate, in the absence of any suggestion of insolvency to the probate court. From this it necessarily results that, until the decree of insolvency was made, their occupation or management of the real estate in question and their collection of the rents cannot be justified as official acts in the administration of the estate. The sureties on their bond are not liable for their dishonest or unfaithful conduct in relation to matters not falling within the sphere of their official duty. Nor does the subsequent decree in insolvency under which, ordinarily, at least, the administrator is entitled to take possession of the real estate, have such a retroactive effect as to render their previous unauthorized management of the realty an administrative act for which they are accountable in the probate court." Ayers v. Laighton, 73 N. H. 487, 488, 63 A 43.

[a] **Sureties on bond not liable for rents and profits received by representative.**—Ayers v. Laighton, 73 N. H. 487, 63 A 43 (quoted supra this note); Perkins v. Perkins, 46 N. H. 110; Gregg v. Currier, 36 N. H. 200; Hartz's App., 2 Grant (Pa.) 83; Jewell v. Jewell, 32 S. C. Eq. 296.

[b] **Executrix as devisee.**—Where realty is devised to a widow for life, subject to the payment of debts and legacies, and she is appointed executrix, she is not liable to account for the rents as executrix and appropriate them to the payment of the debts and legacies, since, as she cannot collect the rent except as devisee, she cannot account for them as executrix. In re Stoop, 31 PittsbLegJ (Pa.) 34.

[c] **Presumption of occupation under homestead and dower right.**—Where a husband dies leaving a farm, and his widow, who is also administratrix, continues to occupy it with their children, and the statute does not authorize an administrator to have possession of the real estate, her possession will be presumed to be under her homestead and dower right, and she should not be charged with rent in her account as administratrix. Russell v. Wheeler, 129 Mich. 41, 88 NW 73.

[d] **In Missouri** (1) the rule is that, although the realty descends to the heirs, and the administrator has as a general rule nothing to do with it, yet when, as a matter of fact, he does retain the realty and collects the rents, he is to account for them to the probate court and his sureties are liable. Dix v. Morris, 66 Mo. 514 [aff 1 Mo. A. 93]; Gamble v. Gibson, 59 Mo. 585; Lewis v. Carson, 16 Mo. A. 342; Gamage v. Bushell, 1 Mo. A. 416. (2) But an administrator is not chargeable as such for rents collected by him from land of the intestate in another state, where such rents accrued after the intestate's death, in the absence of any proof that the laws of such state gave him as administrator any power to collect such rents. McPike v. McPike, 111 Mo. 216, 20 SW 12.

18. Ala.—Boyd v. Hunter, 44 Ala. 705; Powell v. Powell, 10 Ala. 900.

Ind.—Evans v. Hardy, 76 Ind. 527; Hendrix v. Hendrix, 65 Ind. 329; Rodman v. Rodman, 54 Ind. 444.

Kan.—Head v. Sutton, 31 Kan. 616, 3 P 280.

Ky.—Wilson v. Unselt, 12 Bush 215.

Me.—Kimball v. Sumner, 62 Me. 305.

Mass.—Newcomb v. Stebbins, 9 Metc. 540.

Mich.—Byrne v. Hume, 73 Mich. 392, 41 NW 331.

N. H.—Lucy v. Lucy, 55 N. H. 9; Gregg v. Currier, 36 N. H. 200.

N. Y.—Calyer v. Calyer, 4 Redf. Surr. 305; Levy's Est., Tuck. Surr. 148.

N. C.—Scroggs v. Stevenson, 100 N. C. 354, 6 SE 111.

Pa.—Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Walker's App., 116 Pa. 419, 9 A 654; Robb's App., 41 Pa. 45; Jones' App., 3 Grant 250; McCoy v. Scott, 2 Rawle 222, 19 AmD 640; Hall's Est., 8 Pa. Dist. 8; Young's Est., 16 Pa. Co. 54.

R. I.—Belcher v. Branch, 11 R. I. 226.

S. C.—Jewell v. Jewell, 32 S. C. Eq. 296.

Va.—Baker v. Baker, 87 Va. 180, 12 SE 346.

W. Va.—Fields v. Lawyer, 97 SE 597, 598 [cit Cyc].

[a] **Limitation of actions.**—Where a man who is executor of his deceased wife remains in possession of her land after her death, the statute of limitations will bar her devisees from recovering from him for the use of land except for the period of five years before suit, since his liability for such use is a personal one and not as executor. Baker v. Baker, 87 Va. 180, 12 SE 346.

19. Ala.—Terry v. Ferguson, 8 Port. 500.

Ind.—Evans v. Hardy, 76 Ind. 527.

Kan.—Kothman v. Markson, 34 Kan. 542, 9 P 218.

Miss.—Crowder v. Shackelford, 35 Miss. 321; Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Lyons v. Lyons, 101 Mo. A. 494, 74 SW 467.

N. Y.—Griffith v. Beecher, 10 Barb. 432.

Oh.—Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

Va.—Kincheloe v. Gibson, 115 Va. 119, 133, 78 SE 603 [cit Cyc].

[a] **No estoppel against creditors as to surplus.**—Where an administrator, on the assumption that the rents were assets, has paid some simple contract debts out of them, he is not thereby estopped from setting up the truth as to the surplus and insisting, when called to account by a simple contract creditor, that the moneys thus received were not assets. Griffith v. Beecher, 10 Barb. (N. Y.) 432.

[b] **Contrary view.**—"The application by the administrator of such rents, issues and profits to the payment of the debts against his decedent's estate, does not create any claim against the estate in favor of the heirs." Evans v. Hardy, 76 Ind. 527, 533. To same effect Hendrix x. Hendrix, 65 Ind. 329.

20. Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

21. Thomasson v. Lucas, 4 KyL 889; Conger v. Atwood, 28 Oh. St. 134, 140, 22 AmR 462 [foll Arbuckle v. Tracy, 15 Oh. 432; Howard v. Powers, 6 Oh. 92].

22. Ala.—Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.

Cal.—Misamore's Est., 90 Cal. 169, 27 P 68.

Ga.—Burks v. Beall, 77 Ga. 271, 3 SE 155.

Iowa.—In re Holderbaum, 82 Iowa 69, 47 NW 898.

Ky.—McCracken v. McCracken, 6 T. B. Mon. 342.

Mass.—McIntire v. Mower, 204 Mass. 233, 90 NE 567; Stearns v. Stearns, 1 Pick. 157; Gibson v. Farley, 16 Mass. 280.

N. J.—Bray v. Neill, 21 N. J. Eq. 343.

N. C.—Shuffler v. Turner, 111 N. C. 297, 16 SE 417.

Pa.—Burns v. Cox, 10 Phila. 8.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Va.—Davies v. Hughes, 86 Va. 909, 11 SE 488.

[a] **Representative must account for highest rent that can be obtained.**—McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342; Burns v. Cox, 10 Phila. (Pa.) 8. See also Camman v. Doughty, 79 N. J. Eq. 650, 84 A 270, 271 ("While it is true the amount of the rent with which the accountant has charged himself is all he received, yet the facts are such as seem to me to have made it his duty to have received at least the amount named above for the rental of the property. Witnesses in whose judgment I place confidence fix about that as a fair rental value").

[b] **Construction of parties to lease.**—Where an estate consisted in part of a homestead and a lot adjoining, on which was a building,

estly and with due diligence, he is liable only for such rents and profits as he may have received,[23] and that rents or profits to be accounted for by the representative are net, and subject to suitable deductions for his outlays, expenses, and services,[24] although not necessarily for improvements, or for any outlays or expenses inconsistent with an honest and prudent management of the property.[25]

Interest on the value of the rents may sometimes be charged against the representative.[26]

A statute providing a mode for determining the amount due for the use or income of real estate, when the occupation is such as to create a liability therefor, and the disposition of such amount, does not make an executor or administrator liable for the use and occupation of real estate for which he would not otherwise be liable in some form.[27]

[§ 616] **5. Repairs and Improvements.**[28] As a general rule the executor or administrator is not authorized to make repairs or improvements thereon and subject the estate or those beneficially interested to such expenditures,[29] but the power to make necessary repairs may of course be given to the executor by the terms of the will[30] or by statute.[31] An executor has been held authorized to make reasonable repairs and improvements on lease-

both of which were rented for a gross sum, and testator, the tenant, and the executor considered the rental of the building to be one half of such sum, the construction placed on the lease by the parties controlled, and the executor should be charged in his account with one half of the rent. Robinson v. Hadgkin, 99 Wis. 327, 74 NW 791.

[c] **Value of product taken.**—Executors who enter upon land of decedent, of which the devisee is in peaceable possession, and forcibly take possession of and carry away wheat growing thereon at the time of the testator's death, which the devisee is threshing, are liable to such devisee in an action of trover for the value of the property so taken. Rough v. Wormer, 76 Mich. 375, 43 NW 573.

[d] **Representative not chargeable with increased rental caused by improvements made by him.**—In re Brazill, 11 Grant Ch. (U. C.) 253.

23. Fla.—Anderson v. Northrop, 44 Fla. 472, 33 S 419.

Ky.—Dockins v. Vass, 124 SW 290; McCracken v. McCracken, 6 T. B. Mon. 342.

La.—Henderson's Succ., 24 La. Ann. 435.

Pa.—Burns v. Cox, 10 Phila. 8.

Tenn.—Coffee v. Ruffin, 4 Coldw. 487.

[a] **Uncollected royalties.**—Where a lease of coal land belonging to an estate required the mining of a certain amount each year, and the payment of royalties thereon, but did not require the payment of royalties on such amount, whether mined or not, and the leased land and all unmined coal therein were subsequently sold by order of court, the administrator of the estate could not be surcharged on accounting with uncollected royalties on coal which ought to have been but was not mined, as all such unmined coal was covered by the sale, and the estate thereby received its value. In re Hodgson, 158 Pa. 151, 27 A 878.

24. Fla.—Anderson v. Northrop, 44 Fla. 472, 33 S 419.

Ky.—Saunders v. Saunders, 2 Litt. 314.

N. H.—Sparhawk v. Allen, 25 N. H. 261.

N. Y.—Matter of Meikle, 20 NYS 88, 2 Conn. Surr. 97.

Pa.—Eavenson's App., 84 Pa. 172.

[a] **Where the representative's possession was unauthorized,** he is not entitled to credit for losses incurred in the management of the property. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

25. McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342; Wright v. Wright, 7 S. C. Eq. 185; In re Brazill, 11 Grant Ch. (U. C.) 253. See also Daniels v. Charles, 154 Ky. 232, 157 SW 32 (allowance for improvements denied on setting aside deed to administratrix).

[a] **A different rule** was applied in a case where an executrix, who had an annuity charged on the income of the testator's estate, expended money in good faith in improving the real estate and in other unauthorized ways, and was, in consequence, found largely indebted to the estate, it being held that her expenditure in improvements should be allowed in reduction of her indebtedness so far as such expenditure had enhanced the value of the estate and benefited those interested in it. Morley v. Matthews, 14 Grant Ch. (U. C.) 551.

Allowance for expenditure for improvement of property generally see supra § 528.

Authority to make repairs and improvements see infra § 616.

26. Harrison v. Harrison, 39 Ala. 489; Harvin v. Riggs, 9 S. C. Eq. 287.

Interest on funds of estate generally see supra §§ 495–510.

27. Almy v. Crapo, 100 Mass. 218.

28. Allowance of expenditures for repairs and improvements see supra § 523.

29. Ark.—Stuckey v. Stephens, 115 Ark. 572, 171 SW 908, AnnCas1917A 133.

N. J.—In re Arnot, 67 N. J. Eq. 434, 58 A 556.

N. Y.—In re Barthel, 177 NYS 565 [aff 182 NYS 914 mem].

Pa.—In re Fitch, 8 LackLegN 150.

Utah.—Rolfson v. Cannon, 3 Utah 232, 2 P 205.

[a] **An executor or administrator cannot complete a building** in the course of construction at the time of the death of the intestate. Doke v. Benton County Lumber Co., 114 Ark. 1, 169 SW 327, 52 LRANS 870.

[b] **The approval of those beneficially interested** of the action of an executor in using money of the estate to remodel a hotel owned by the estate and left vacant on his hands may preclude a surcharge against the executor of the amounts so expended. Matter of Lester, 172 App. Div. 509, 158 NYS 763.

[c] **The representative should apply to the court for authority** to make improvements on realty of decedent, and if he chooses to make them without first obtaining authority he assumes the burden clearly to prove the improvements were necessary and made in good faith. In re Hansen, (Utah) 184 P 197.

[d] **The court may direct** an administrator to complete a building begun by decedent where this is necessary to preserve the estate. Massey v. Doke, 123 Ark. 211, 185 SW 271.

30. Henry v. Henderson, 81 Miss. 743, 33 S 960, 63 LRA 616; Ladd v. Ladd, 74 N. H. 380, 68 A 462; Matter of Johnson, 32 App. Div. 634, 52 NYS 1081; Matter of Whitney, 75 Misc. 610, 136 NYS 633; Rankin's Est., 5 Pa. Co. 603.

[a] **Power to manage and control real estate** for the benefit of devisees, given to the executor by the will, may justify him in making necessary repairs or improvements. Henry v. Henderson, 81 Miss. 743, 33 S 960, 63 LRA 616; Matter of Johnson, 32 App. Div. 634, 52 NYS 1081; Rankin's Est., 5 Pa. Co. 603.

[b] **A direction to sell** real estate imposes upon the executors the duty to keep the property in repair and make it productive until a sale can be effective on reasonable terms. Corby's Est., 5 Kulp (Pa.) 160.

[c] **A naked power to sell** (1) does not authorize the representative to make repairs. Ashby v. Ashby, 59 N. J. Eq. 547, 46 A 522; Matter of Johnson, 32 App. Div. 634, 53 NYS 1081; Hopper v. Adee, 10 N. Y. Super. 235. (2) Nor in such case is the representative liable as such for repairs made at his request. Hopper v. Adee, 10 N. Y. Super. 235.

[d] **Will not giving power to improve realty.**—Where a will authorizes the executrix to make necessary collections, and convert only such assets into money as are necessary to pay the debts, and to turn over in kind all the rest and residue of the estate to a trustee, the executrix has no power to invest the funds of the estate in erection of improvements. Trimmier v. Darden, 61 S. C. 220, 39 SE 373.

[e] **Proper exercise of testamentary power.**—Under a codicil providing that if testatrix should die before making contemplated repairs on her buildings the executors should have the roofs slated and make such repairs on the foundation after consultation with the occupants of her house as they might deem proper, it is the executor's duty to slate the roofs of the buildings unslated at her death, and to make such reasonable repairs in the way of strengthening the timbers of the buildings as may be necessary to sustain the added weight, and render slating practicable. Ladd v. Ladd, 74 N. H. 380, 68 A 462.

31. Ala.—Vandegrift v. Abbott, 75 Ala. 487.

Ark.—Massey v. Doke, 123 Ark. 211, 185 SW 271.

Mich.—In re Norton, 169 Mich. 531, 135 NW 253.

N. J.—In re Arnot, 67 N. J. Eq. 434, 58 A 556.

Utah.—In re Hansen, 184 P 197.

[a] **Implied power.**—A representative who has under the statute power to lease lands of his decedent has implied power to contract to repair the leased premises. Vandegrift v. Abbott, 75 Ala. 487.

[b] **Limits of power.**—Under the act of April 9, 1897 (L. [1897] p 190), providing that executors and trustees holding land in trust under a will shall have power to improve it and erect buildings thereon when it shall be made to appear that the land devised is occupied in whole or in part by buildings that are insecure, dilapidated, or in need of repairs, or that the land is occupied by buildings that are incapable of producing an income proportionate to the value of the land, and that it would be to the advantage of the persons for whose benefit the lands are held that additions, repairs, and improvements be made, or that new buildings be erected, or both, an executrix is not authorized to erect new buildings in the place of buildings formerly standing on the land, which burned to their foundations. In re Arnot, 67 N. J. Eq. 434, 58 A 556 (holding also that as the statute expressly applies only where lands are held in trust for any person or persons for life or the happening of some event, an executrix is not entitled to use trust funds belonging to the estate to erect buildings on real estate subject by the terms of the will to a legal life es-

hold property occupied by the legatees or parties in interest jointly, where the lease contained a covenant of renewal, and to pay the value of improvements.[32] A power to make repairs extends only to such repairs as are necessary to keep the property in good condition, and does not authorize the making of improvements.[33] Even though executors and testamentary trustees are authorized by the will to make repairs on buildings devised to them in trust, they are not liable in their representative capacity upon a contract for such repairs.[34] A fund, received by executor of insured upon loss of the house and furniture, and held in trust for the life tenant and the remaindermen under the insured's will, is personalty, and not realty, so that the executor is not required to use it in rebuilding a house on the land.[35]

[§ 617] **6. Taxes and Insurance.** The personal representative should not as a general rule pay taxes assessed on real estate after decedent's death, or insurance on buildings, although under particular wills or by virtue of local legislation it may become his duty to do so.[36]

[§ 618] **7. Mortgaged and Encumbered Property—a. Purchase of Encumbrance by Representative.** The representative cannot buy for his own benefit a mortgage on the land of the estate;[37] but if he has advanced his own funds to prevent the property from being sacrificed and benefited the estate thereby, the mere fact that he took a transfer of the debt to himself does not render the transaction void,[38] or preclude his being credited with the amount advanced.[39]

[§ 619] **b. Discharge of Encumbrance—(1) In Interest of Estate Generally.** In some cases it has been considered proper for the personal representative to protect mortgaged or encumbered real estate by paying interest, or even the principal of the debt,[40] and it would seem clear that it is his duty to do this when the real estate is needed for the payment of debts and the particular property is worth more than the amount required to relieve it from the encumbrance thereon,[41] or, as it has been expressed, when the discharge of the encumbrance is beneficial to the estate.[42] On the other hand, however, some cases, applying strictly the rule that the representative is not concerned with the realty,[43] deny that he is under any duty or has any right to apply the assets to removing encumbrances from land[44] which is not needed for the payment of debts or for the purposes of administration.[45] In some states the representative can redeem or maintain a bill to redeem,[46] or an action to cancel a mortgage purporting to be executed by his decetate, with remainder to the children of the life tenants, although the life estate was subject to charges for the benefit of the remaindermen; nor is she entitled to use trust funds belonging to the estate to erect buildings on real estate acquired by her as executrix with funds of the estate).

32. Ames v. Downing, 1 Bradf. Surr. (N. Y.) 321.

33. In re Ullman, 31 Oh. Cir. Ct. 370; Rice v. Conwill, 35 Tex. Civ. A. 341, 80 SW 393; In re Alfstad's Est., 27 Wash. 175, 67 P 593.

34. O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238 [rev 42 App. Div. 171, 58 NYS 1044].

35. Millard v. Beaumont, 194 Mo. A. 69, 185 SW 547.

36. Allowance of expenditures for taxes and insurance see supra §§ 550, 551.

Taxes and assessments as liabilities of estate see infra § 902.

37. McCreedy v. Mier, 64 Ill. 495; Evertson v. Tappen, 5 Johns. Ch. (N. Y.) 497; Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388; Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551; Simpson v. Corbett, 5 Ont. 377 [app dism 10 Ont. A. 32].

38. Furth v. Wyatt, 17 Nev. 180, 30 P 828.

39. Burnett v. Lyford, 93 Cal. 114, 25 P 855.

40. Mich.—In re Fox, 159 Mich. 420, 124 NW 60.

Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525.

N. J.—In re Ramsey, (Prerog.) 66 A 410.

N. Y.—Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; Matter of Van Houten, 18 Misc. 524, 42 NYS 1115, 2 Gibb. Surr. 168 [rev on other grounds 18 App. Div. 301, 46 NYS 190]; Matter of Rolph, 9 NYS 293, 2 Conn. Surr. 191.

N. C.—Pate v. Oliver, 104 N. C. 458, 10 SE 709.

Can.—Kearney v. Kean, 3 Can. S. C. 332.

[a] **Statutory power.** — Pate v. Oliver, 104 N. C. 458, 10 SE 709.

[b] **Approval of previous redemption.**—Where an administrator used the personal assets to redeem land of the intestate from a mortgage not due and paid a bonus to further his purpose, a subsequent approval by the probate court is retroactive and has the same effect as an order to redeem previously made. Scudder v. Ames, 89 Mo. 496, 14 SW 525.

41. Ala.—Griffith v. Rudisill, 141 Ala. 200, 37 S 83.

Cal.—Matter of Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407.

Hawaii.—Kahoomana v. Carvalho, 11 Hawaii 516.

Ind.—Fry v. Lawson, 32 Ind. A. 364, 69 NE 1038; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

Kan.—Brown v. Evans, 15 Kan. 88.

Ky.—Cockrill v. Lindon, 43 SW 451, 19 KyL 1379.

La.—Williams v. Chaplain, 112 La. 1073, 36 S 859.

Me.—Young v. Tarbell, 37 Me. 509.

Mass.—Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

Mich.—Russell v. Wheeler, 129 Mich. 41, 88 NW 73, 8 DetroitLegN 836.

Minn.—Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433.

Mo.—Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477 [dist Scudder v. Ames, 89 Mo. 496, 14 SW 525].

Nebr.—Patrick v. Patrick, 72 Nebr. 454, 100 NW 939.

N. J.—Equitable L. Assur. Soc. v. Chesley, 63 N. J. Eq. 219, 49 A 718 [rev on other grounds 64 N. J. Eq. 348, 51 A 725]; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

N. Y.—Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154.

Pa.—Moore's Est., 198 Pa. 611, 48 A 884; Finley's Est., 10 Pa. Dist. 272, 25 Pa. Co. 261.

Tenn.—Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204; Yoe v. Sansom, (Ch. A.) 48 SW 317.

Tex.—Curran v. Texas Land, etc., Co., 24 Tex. Civ. A. 499, 60 SW 466.

W. Va.—Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

"No doubt is anywhere raised that the mortgages in Hadden's hands were valid and enforceable liens, or that the real estate covered thereby was worth much more than the amount due thereon. Under such circumstances, upon general principles, it became the duty of the executors, when foreclosure was threatened, to preserve the estate from waste and destruction by paying off and discharging such liens." Hetzel v. Easterly, 96 App. Div. 517, 522, 89 NYS 154.

[a] **Foreign lands.**—A duty to discharge encumbrances on realty has no application to real estate situated in a foreign state. Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

42. Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131; McNeill v. McNeill, 36 Ala. 109, 76 AmD 320; Mullins v. Yarborough, 44 Tex. 14.

43. See supra § 594.

[a] **Agreement for usury.**—An administrator cannot for the purpose of preventing a sale under a decree make an agreement binding the estate for the payment of interest at a higher rate than allowed by law. Williams v. Troop, 17 Wis. 463.

[b] **The right to release an equity of redemption** to the holder of the mortgage who agreed to receive the equity in payment of the debt which exceeded the value of the equity is doubtful enough to entitle the grantees to a decree confirming the arrangement. U. S. Bank v. Piatt, 5 Oh. 540.

44. Forward v. Forward, 6 Allen (Mass.) 494; In re Holladay, 18 Or. 168, 22 P 750.

[a] **The executor cannot extinguish a claim of dower** by the payment of money without the consent of all the devisees. Forward v. Forward, 6 Allen (Mass.) 494.

45. Young v. Tarbell, 37 Me. 509.

46. Ala.—Sharpe v. Miller, 157 Ala. 299, 47 S 701; Griffith v. Rudisill, 141 Ala. 200, 37 S 83.

Ill.—McCreedy v. Mier, 64 Ill. 495.

Ind.—Whisnand v. Small, 65 Ind. 120.

Mass.—Clark v. Seagraves, 186 Mass. 430, 71 NE 813; Mason v. Daly, 117 Mass. 403; Aiken v. Morse, 104 Mass. 277. Contra under earlier statute Smith v. Manning, 9 Mass. 422.

Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525.

Or.—In re Holladay, 18 Or. 168, 22 P 750.

W. Va.—Hogan v. Piggott, 60 W. Va. 541, 56 SE 189.

[a] **Court may order administrator to redeem.**—Scudder v. Ames, 89 Mo. 496, 14 SW 525.

[b] **Circumstances of each case govern.**—Whether or not it is the

dent, as fraudulent and void,[47] or as having been paid,[48] or to compel an assignment of a mortgage on the realty to prevent foreclosure and thus to save the estate from loss;[49] but the existence of such powers has also been denied.[50] A representative who goes beyond his duty in such matters must bear all losses resulting to the estate,[51] but in the absence of proof that the condition of the estate did not warrant the redemption of mortgaged property it will be presumed that the representative acted properly in redeeming.[52]

Mortgage on property given away by decedent during lifetime. Where a mortgage was given by testator on land which during his lifetime he gave to his widow without any valuable consideration, the land covered by the mortgage was the primary fund out of which it should be paid, and the widow, as executrix, could not in the first instance pay it off from the general property of the estate.[53]

Mortgage executed by representative. Assets of the estate may properly be applied in payment of a real estate mortgage legally executed by an executor or administrator for the purpose of raising funds.[54]

[§ 620] **(2) In Interest of Heir or Devisee.** The common-law rule that the personalty is the primary fund for payment of decedent's personal debts, to the exoneration of the realty,[55] has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain and unequivocal terms.[56] The rule relates, however, only to personal debts of decedent; and if he acquired land already subject to a mortgage his representative cannot be called upon to discharge it[57] unless dece-

duty of the personal representative, pursuant to the authority conferred on him, to redeem land which has been sold under execution or mortgage, depends on the circumstances of each case, and he is held to the exercise of reasonable discretion. McCreedy v. Mier, 64 Ill. 495.

[c] **The administrator may redeem without taking out a license to sell;** but in such case the result inures to the benefit of the widow and heirs. Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

[d] **Redemption from tax sale.**—The administrator of an estate, the personal property of which is insufficient to pay the debts, by reason whereof he is empowered to subject the real estate of his decedent to the payment of such debts, may redeem the land from a sale thereof for nonpayment of taxes. Hogan v. Piggott, 60 W. Va. 541, 56 SE 189.

[e] **Decree inures to benefit of widow and heirs.**—Where a suit is brought by an administrator to redeem land conveyed by his intestate by a deed absolute in form, but in fact given as a mortgage, if plaintiff has obtained no license to sell, a decree in his favor inures to the benefit of the widow and heirs of the intestate, and defendant must be ordered to make a conveyance to the heirs, subject to the right of the widow to dower if a right of dower exists. Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

47. West Troy Nat. Bank v. Levy, 127 N. Y. 549, 28 NE 592 [rev 2 NYS 162] (where the mortgage was in fact forged, and a creditor was entitled to bring an action to cancel the same on the refusal of the administrator to do so).

48. Epping v. Washington Inv. Assoc., 44 Or. 116, 74 P 923 (where plaintiff mortgaged certain premises to a building and loan association to secure a usurious loan, and, after making certain payments for interest, premium, and stock installments, he conveyed the property to his mother, subject to the mortgage, and she thereafter continued to make payments until shortly before she died, and upon her death plaintiff was appointed her executor, plaintiff was entitled to sue on behalf of himself, and as executor of his mother, to have such mortgage canceled, after the payments made by himself and his mother had been sufficient to extinguish the debt).

49. Mabbett v. Mabbett, 29 App. Div. 609, 51 NYS 529.

50. Nixon v. Seal, (Miss.) 27 S 875.

51. Cary v. Simmons, 87 Ala. 524, 6 S 416; In re Knight, 12 Cal. 200, 73 AmD 531; Smith v. Wagner, 106 Misc. 170, 174 NYS 205; Olin v. Arendt, 27 Misc. 270, 58 NYS 429; Williams v. Troop, 17 Wis. 463.

[a] **Where lands never belonged to decedent,** the representative is not entitled to credit for money advanced by him to disencumber them. Cary v. Simmons, 87 Ala. 524, 6 S 416 (where the land had come from another source to the distributees of the estate).

52. Goodrich v. Leland, 18 Mich. 110.

53. Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154.

54. In re Shively, 145 Cal. 400, 78 P 869.

55. See infra § 1261.

56. Cal.—In re Phinney, Myr. Prob. 239.

Conn.—Hull v. Holmes, 78 Conn. 362, 62 A 705.

Ill.—Sutherland v. Harrison, 86 Ill. 363.

Ind.—Newcomer v. Wallace, 30 Ind. 216; Linton v. Potts, 5 Blackf. 396; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

Mass.—Morse v. Bassett, 132 Mass. 502; Richardson v. Hall, 124 Mass. 228; Towle v. Swasey, 106 Mass. 100; Plimpton v. Fuller, 11 Allen 139; Hewes v. Dehon, 3 Gray 205.

N. H.—Tuttle v. Robinson, 33 N. H. 104.

N. J.—Lake v. Weaver, 80 N. J. Eq. 395, 86 A 817 [aff 80 N. J. Eq. 554, 86 A 821]; In re Ramsey, (Prerog.) 66 A 410; Dougherty v. Connolly, 61 N. J. Eq. 421, 48 A 777; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Higbie v. Morris, 53 N. J. Eq. 173, 32 A 372; Krueger v. Ferry, 41 N. J. Eq. 432, 5 A 452; Slack v. Emery, 30 N. J. Eq. 458; McLenahan v. McLenahan, 18 N. J. Eq. 101; Keene v. Munn, 16 N. J. Eq. 398; Whitehead v. Gibbons, 10 N. J. Eq. 230.

N. Y.—Lamport v. Beeman, 34 Barb. 239.

N. C.—Mahoney v. Stewart, 123 N. C. 106, 31 SE 384.

Oh.—Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408.

Pa.—Moore's Est., 198 Pa. 611, 48 A 884; In re Lennig, 52 Pa. 135; Meanor v. Hamilton, 27 Pa. 137; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Fish's Est., 16 Phila. 373.

R. I.—Wood v. Hammond, 16 R. I. 98, 17 A 324, 18 A 198; Gould v. Winthrop, 5 R. I. 319.

Vt.—Clapp v. Beardsley, 1 Aik. 168, 1 Vt. 151.

Va.—Dandridge v. Minge, 4 Rand. (25 Va.) 397.

Eng.—Evelyn v. Evelyn, 2 Barn. 118, 94 Reprint 393, Fitzg. 131, 94 Reprint 686, 2 P. Wms. 659, 24 Reprint 904; Bond v. England, 2 Kay & J. 44, 69 Reprint 687; Tower v. Rous, 18 Ves. Jr. 132, 34 Reprint 267; Hamilton v. Worley, 2 Ves. Jr. 62, 30 Reprint 523.

[a] **Reason for rule.**—"The personal estate had the benefit of the money for which the mortgage was given." Keene v. Munn, 16 N. J. Eq. 398, 400.

[b] **A specific devise** of land mortgaged by the testator to secure his own debt prima facie imports an intention that such debt shall be satisfied out of the general personal assets. Turner v. Laird, 68 Conn. 198, 35 A 1124.

[c] **Land devised to representative.**—An executor may pay a mortgage on property devised to him out of the funds of the estate. Brown v. Baron, 162 Mass. 56, 37 NE 772, 44 AmSR 331.

[d] **Personalty rather than rents.**—As between the legatee of the personalty and the devisee of the realty, the executor is not authorized to appropriate rents accruing after the testator's death to the satisfaction of a mortgage. In re Woodworth, 31 Cal. 595.

[e] **Unpaid purchase money** with which the land is charged is payable out of the personalty to the exoneration of the land in the hands of the heir or devisees. Lamport v. Beeman, 34 Barb. (N. Y.) 239.

[f] **Interest** on sums advanced by an administrator to redeem a mortgage should be allowed. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

[g] **Specific legacy.**—The heir or devisee cannot have his land exonerated out of a specific legacy. Ruston v. Ruston, 2 Yeats (Pa.) 54; Tankerville v. Fawcet, 2 Bro. Ch. 57, 29 Reprint 31, 1 Cox Ch. 237, 29 Reprint 31.

57. Cal.—Matter of Knight, 12 Cal. 296.

Ill.—Stiger v. Bent, 111 Ill. 328.

Ind.—Stieglitz v. Migatz, 182 Ind. 549, 105 NE 465.

Mass.—Creesy v. Willis, 159 Mass. 249, 34 NE 265.

Mich.—In re Wisner, 20 Mich. 442.

Nebr.—Patrick v. Patrick, 72 Nebr. 454, 100 NW 939.

N. J.—Hetzel v. Hetzel, 74 N. J. Eq. 770, 71 A 755; De Grauw v. Mechan, 48 N. J. Eq. 219, 21 A 193; Mount v. Van Ness, 33 N. J. Eq. 262 [aff 35 N. J. Eq. 113]; Campbell v. Campbell, 30 N. J. Eq. 415; McLenahan v. McLenahan, 18 N. J. Eq. 101.

Pa.—Peter's Est., 16 Pa. Super. 462; Hirst's Est., 12 Phila. 106 [aff 92 Pa. 491].

R. I.—Gould v. Winthrop, 5 R. I. 319.

Eng.—Forrester v. Leigh, Ambl. 171, 27 Reprint 114; Evelyn v. Evelyn, 2 Barn. 118, 94 Reprint 393, Fitzg. 131, 94 Reprint 686, 2 P. Wms. 659, 24 Reprint 904; Ancaster v. Mayer, 1 Bro. Ch. 454, 28 Reprint 1237, 18 ERC 177; Lawson v. Hudson, 1 Bro. Ch. 58, 28 Reprint 982 [aff 3 Bro. P. C. 424, 1 Reprint 1418]; Basset v. Percival, 1 Cox Ch. 268, 29 Reprint 1161; Barry v. Harding, 7 Ir. Eq. 313, 1 J. & L. 475; Pockley v. Pockley, 1 Vern. Ch. 37, 23 Reprint 290; Waring v. Ward, 7 Ves. Jr. 332, 32 Reprint 136.

dent made the debt his own,[58] a result which is not effected by a mere assumption of the encumbrance by decedent, by means of a covenant in the conveyance to him or some other agreement with the grantor.[59] It is also considered that the rule applies only in favor of the heirs or devisees, and that an alienee of the heir or devisee is not entitled to call on the representative to discharge the mortgage.[60] The common-law rule has been changed by statute in a few jurisdictions so that the person who takes land by descent or devise must satisfy a lien thereon out of his own property without resorting to the representative unless the testator expressly directs that the lien be otherwise paid.[61]

See also cases infra notes 58, 59.

"If it [the estate] come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate cum onere, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection or contract or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself." Hoff's App., 24 Pa. 200, 204.

"The rule, as I understand it, is that land incumbered by a mortgage, the payment of which is assumed by the grantee in the deed of conveyance therefor, is not to be paid by the executor of the grantee in favor of the heir or devisee, unless the decedent shall have assumed the debt in such manner as to show an intention to charge his personal estate." Monoghan v. Collins, (N. J. Ch.) 71 A 617, 620.

58. Ill.—Mosier v. Bowser, 226 Ill. 46, 80 NE 730 [rev 125 Ill. A. 565].

Ind.—Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

N. J.—Monoghan v. Collins, (Ch.) 71 A 617.

N. C.—Pate v. Oliver, 104 N. C. 458, 10 SE 709.

Pa.—In re Lennig, 52 Pa. 135; Hoff's App., 24 Pa. 200; Peter's Est., 16 Pa. Super. 462.

Eng.—Parsons v. Freeman, Ambl. 115, 27 Reprint 75; Hedges v. Hedges, 5 De G. & Sm. 330, 64 Reprint 1140; Bagot v. Oughton, Fortesc. 332, 92 Reprint 876, 1 P. Wms. 348, 24 Reprint 420; Oxford v. Rodney, 14 Ves. Jr. 417, 33 Reprint 581; Butler v. Butler, 5 Ves. Jr. 534, 31 Reprint 724; Woods v. Huntingford, 3 Ves. Jr. 128, 30 Reprint 930.

See also cases supra note 57; infra note 59.

59. Mass.—Creesy v. Willis, 159 Mass. 249, 34 NE 265.

N. J.—Mount v. Van Ness, 33 N. J. Eq. 262 [aff 35 N. J. Eq. 113]; Campbell v. Campbell, 30 N. J. Eq. 415; McLenahan v. McLenahan, 18 N. J. Eq. 101.

N. Y.—Cumberland v. Codrington, 3 Johns. Ch. 229, 8 AmD 492.

Pa.—Peter's Est., 16 Pa. Super. 462; Hirst's Est., 12 Phila. 106 [aff 92 Pa. 491].

R. I.—In re Hunt, 19 R. I. 139, 32 A 204, 61 AmSR 743; Gould v. Winthrop, 5 R. I. 319.

Va.—Pleasants v. Flood, 89 Va. 96, 15 SE 504.

Eng.—Billinghurst v. Walker, 2 Bro. Ch. 604, 29 Reprint 332; Tweddell v. Tweddell, 2 Bro. Ch. 101, 29 Reprint 58; Tankerville v. Fawcet, 2 Bro. Ch. 57, 29 Reprint 31; Shafto v. Shafto, 1 Cox Ch. 207; Butler v. Butler, 5 Ves. Jr. 534, 31 Reprint 724.

See also cases supra notes 57, 58.

"The question is not whether the decedent assumed to pay the mortgage, and so made himself liable therefor, as between him and his grantor, but whether he, by direct action, made himself liable, in his personal estate, to the mortgagee; that is, as between him and the mortgagee, expressly made the debt his own." Mount v. Van Ness, 33 N. J. Eq. 262, 265 [aff 35 N. J. Eq. 113].

"When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an encumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estate. There is good sense and justice in the principle, and I feel the force of the doctrine, that it requires very strong and decided proof of intention, before the Court can undertake to shift the natural course and order of obligation between the two estates." Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 257, 8 AmD 501.

"The principle which may be fairly extracted from the cases may be stated thus: When the decedent has purchased an estate, subject to an incumbrance which he has promised to pay, either by express words in the deed or by a direct contract with the vendor or mortgagee, or where he has himself created the incumbrance, the incumbrance as between his heirs and personal representatives will be paid out of the personalty. But where the words in the deed or contract simply import that the decedent intended to indemnify his vendor or mortgagee against the debt, in case the real estate was not sufficient to pay it, then the incumbrance must be paid out of the realty. In the various discussions which have arisen upon this subject in England and in this country, the question of intention has always been regarded as of paramount importance in determining the primary fund for payment. Where the intention speaks through the creation of the incumbrance or a direct promise to pay it, there can, of course, be no dispute. Whatever difficulty exists in the work of reconciling decisions apparently discordant will be found to have arisen from the attempt to extract from the acts or language of the decedent a meaning which did not properly belong to them. It may be safely assumed as a rule to which there is no exception, that where an intention on the part of the decedent to make the debt his own cannot be clearly shown, the incumbrance will remain a primary charge upon the real estate." Hirst's Est., 12 Phila. (Pa.) 106, 107.

[a] **Agreement to pay to vendor.**—Where decedent by contract with the vendor agreed to pay the debt either to the vendor directly or some third person designated by the vendor, in discharge of the preëxisting lien on the land, the heir was entitled to have the land exonerated. O'Conner v. O'Conner, 88 Tenn. 76, 12 SW 447, 7 LRA 33.

[b] **Effect of statute.**—A statute making the personalty the primary fund for the discharge of "all claims against the estate of the decedent" requires satisfaction out of the personalty of a mortgage to which land was subject at the time of its conveyance to decedent, where by such conveyance he undertook to indemnify the grantor if the latter should be obliged to pay the mortgage debt. Newcomer v. Wallace, 30 Ind. 216.

60. Mass.—Haven v. Foster, 9 Pick. 112, 19 AmD 353.

Mo.—In re Swan, 54 Mo. A. 17.

N. J.—Krueger v. Ferry, 41 N. J. Eq. 432, 5 A 452 [aff 43 N. J. Eq. 295]; Keene v. Munn, 16 N. J. Eq. 398.

N. Y.—Cumberland v. Codrington, 3 Johns. Ch. 229, 8 AmD 492.

Eng.—Scott v. Beecher, 5 Madd. 96, 56 Reprint 832; Hamilton v. Worly, 2 Ves. Jr. 62, 30 Reprint 523.

61. Draper v. Brown, 153 Mich. 120, 117 NW 213; Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851; Meyer v. Cahen, 111 N. Y. 270, 18 NE 852; Moseley v. Marshall, 22 N. Y. 200 [rev 27 Barb. 42]; Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Hauselt v. Patterson, 51 Hun 321, 4 NYS 772 [aff 124 N. Y. 349, 26 NE 937]; Moseley v. Marshall, 27 Barb. 42 [rev on other grounds 22 N. Y. 200]; Willcox v. Smith, 26 Barb. (N. Y.) 316; Matter of Robert, 72 Misc. 625, 132 NYS 396; Matter of Humphrey, 54 Misc. 198, 105 NYS 922; Johnson v. Corbett, 11 Paige (N. Y.) 265; House v. House, 2 NYLegObs 206, 10 Paige 158; Halsey v. Reed, 9 Paige (N. Y.) 446; Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 AmD 492; Rauchfuss v. Rauchfuss, 2 Dem. Surr. (N. Y.) 271; Williams v. Eaton, 3 Redf. Surr. (N. Y.) 503; Stevens v. Stevens, 2 Redf. Surr. (N. Y.) 265; Cornwell v. Deck, 2 Redf. Surr. (N. Y.) 87 [aff 8 Hun 122]; Leonino v. Leonino, 10 Ch. D. 460.

[a] **An equitable lien for the purchase price** of land bought by the decedent is not within the statute and the heir can call upon the representative to have the lien discharged out of the personalty. Wright v. Holbrook, 32 N. Y. 587 [aff 25 N. Y. Super. 516]; Lamport v. Beeman, 34 Barb. (N. Y.) 239.

[b] **A general direction for the payment of debts** as soon after testator's decease as it can conveniently be done does not affect the statutory rule. Meyer v. Cahen, 111 N. Y. 270, 18 NE 852; Taylor v. Wendel, 4 Bradf. Surr. (N. Y.) 324. But compare Turner v. Laird, 68 Conn. 198, 200, 35 A 1124 ("The word 'debts,' in such a connection, includes mortgage debts").

[c] **Where real and personal estate are included in the same mortgage,** there is nothing in the English statute to make the real estate primarily liable to bear the whole mortgage debt, but the intention of the mortgagor governs. Leonino v. Leonino, 10 Ch. D. 460; Trestrail v. Mason, 7 Ch. D. 655.

[d] **Reimbursement for payments made.**—Payments made by an executor in good faith and for the benefit of the persons entitled to the property may be reimbursed out of any funds in his possession belonging to such person. Matter of McKay, 33 Misc. 520, 68 NYS 925.

[e] **A direction by will to convert real estate into money** does not authorize the executors to pay off existing encumbrances, and if the result of such payments is disadvantageous, they are liable although they acted in good faith and in expectation of advantage to the estate. In re Gray, 27 Hun 455 [mod on other grounds 91 N. Y. 502].

[f] **Testamentary provisions showing intention that executor shall pay.**—Draper v. Brown, 153 Mich. 120, 117 NW 213; Sutherland v. Gesner, 27 Hun (N. Y.) 282.

The common-law rule should not be applied as between heirs or devisees and creditors, to the prejudice of the latter,[62] nor were the statutes changing the common-law rule meant to affect the rights of creditors,[63] but only to govern the rule of marshaling between the representative and the heirs or devisees.[64]

[§ 621] **(3) Effect of Testamentary Directions.** Where a testator has by his will given specific directions with respect to the course to be pursued in reference to encumbrances upon land, such directions must govern the action of the representative.[65]

[§ 622] **c. Mortgagee as Administrator.** It has been held that where a mortgagee becomes administrator of the mortgagor he is not precluded by his character as administrator from disposing of his mortgage in any manner he may deem best, and if he sells the property and gives a general warranty he does not thereby prejudice any right of the heirs to redeem, and he is not chargeable as administrator with the proceeds of the sale.[66] But it has also been held that such a mortgagee cannot exercise a power of sale in the mortgage but must pay the mortgage debt out of the personalty.[67]

[§ 623] **8. Leaseholds—a. In General.** Since a lease of lands is a chattel interest going to the representative as assets,[68] it devolves upon the representative to perform the contract and he is liable for a breach of it,[69] while on the other hand he may maintain ejectment with relation to the leased lands,[70] sue for a trespass when he is in possession,[71] or sue the landlord for forcible entry and taking possession on the death of the lessee.[72] An executor cannot bind the estate by acceptance of a lease for a term of years beginning after the death of decedent,[73] and an administrator of a lessee in a lease which provides for renewal only at the option of the lessee, on a valuation of the land only, the improvements belonging to the lessee, and making no provision for compensation therefor if there was no renewal, cannot bind the estate by a renewal, so that he is properly sued personally for the rent on a lease made to him as administrator.[74]

Cropping lease. Where a lease provided that the lessor should furnish seed and implements, and the lessee labor, and the crop to be divided in certain proportions, and the lessee died after the crop was grown, but before it was gathered, the representatives of the lessee were entitled to recover on a quantum meruit the amount of the lessee's interest in the crop, less the loss or damage caused by his death.[75]

[§ 624] **b. Liability for Rent.** It has been laid down as the rule that the representative who takes possession under a lease to his decedent is personally liable for rent accruing,[76] at least to the

62. Gibson v. Crehore, 5 Pick. (Mass.) 146; Rossiter v. Cossit, 15 N. H. 38; Dandridge v. Minge, 4 Rand. (25 Va.) 397; Bartholomew v. May, 1 Atk. 487, 26 Reprint 309.

[a] **Where the estate is insolvent** the administrator cannot apply the personal assets to the redemption of a mortgage made by the intestate for the benefit of the widow and heirs, as the lien of the creditors upon the personal assets is paramount to the claims of the widow and heirs. Gibson v. Crehore, 5 Pick. (Mass.) 146.

[b] **Application of rents and profits to mortgage debt.**—Creditors cannot complain of the administrator being allowed to remain in possession, where the mortgagee permitted him to take the rents and profits for the benefit of the heirs in extinguishment of the mortgage debt, and the administrator cannot be charged with the rents and profits in his account. Reynolds v. New Orleans Canal, etc., Co., 30 Ark. 520.

63. Wright v. Holbrook, 32 N. Y. 587.

[a] **Action on bond.**—The statute does not prevent a mortgagee from suing on the bond given him instead of enforcing his mortgage. Roosevelt v. Carpenter, 28 Barb. (N. Y.) 426.

[b] **A reservation out of personalty** will be directed by the surrogate to an amount sufficient to afford the mortgagee his proportion of his demand against the estate pro rata with the other creditors where there is reason to anticipate a deficiency upon the foreclosure of the mortgage. Williams v. Eaton, 3 Redf. Surr. (N. Y.) 503.

64. Roosevelt v. Carpenter, 28 Barb. (N. Y.) 426; Rice v. Harbeson, 2 Thomps. & C. 4 [aff 63 N. Y. 493]. See generally Marshaling Assets and Securities [26 Cyc 927].

65. Cal.—In re Heydenfeldt, 106 Cal. 434, 39 P 788.

Mass.—Bradford v. Forbes, 9 Allen 365.

Mo.—Knight v. Newkirk, 92 Mo. A. 258.

N. Y.—Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Mabbett v. Mabbett, 29 App. Div. 609, 51 NYS 529.

Oh.—Thompson v. Thompson, 4 Oh. St. 333.

Eng.—Forrest v. Prescott, L. R. 10 Eq. 545; Young v. Young, 26 Beav. 522, 53 Reprint 1000; Morrow v. Bush, 1 Cox Ch. 185, 29 Reprint 1120; Coventry v. Coventry, 2 Dr. & Sm. 470, 62 Reprint 699.

[a] **Illustration.**—Where executors are required by the will to pay a mortgage indebtedness, and funds are set apart from the estate with which to pay and discharge such indebtedness, it is their duty to pay such indebtedness, and their act in so doing cannot operate otherwise than as a payment and discharge of the mortgage, although they intend that it shall not so operate, and endeavor to preserve the lien by executing formal instruments of assignment. Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154.

[b] **Payment under revoked will.**—A payment in good faith, under direction by the will subsequently adjudged to have been revoked, will be credited to the administrator. The legatees and next of kin will be left to their claim against the land itself for the sum so paid. Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 339.

66. Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284.

67. Millard v. Gregoire, 47 N. S. 78.

68. See supra § 344.

69. Ind.—Miller v. Ready, 59 Ind. A. 195, 108 NE 605, 608 [cit Cyc].

Ky.—Brown v. U. S. Trust Co., 215 SW 815.

La.—Magruder v. Hornot, 110 La. 585, 34 S 696.

Mass.—Greenleaf v. Allen, 127 Mass. 248; Hovey v. Newton, 11 Pick. 421; Montague v. Smith, 13 Mass. 396.

Miss.—Winston v. Franklin Academy, 28 Miss. 118, 61 AmD 540.

N. Y.—Beatty v. Rosenberg, 173 App. Div. 645, 160 NYS 135; Walker v. Bradley, 89 Misc. 516, 153 NYS 686.

Pa.—Walker's Est., 6 Pa. Co. 515.

Tex.—Wilcox v. Alexander, (Civ. A.) 32 SW 561.

[a] **Ground rent.**—Where a testator directs his executor to sell certain realty subject to a ground rent, and such executors accept the trust, prove the will, and make partial payment of such ground rent, they will be deemed to have taken such possession of the land that an action of covenant may be maintained against them for arrears of such rent accruing during their possession, and the judgment therein need not be confined to the land out of which the rent issues. Newkumet v. Davidson, 13 WklyNC (Pa.) 10.

70. Duchane v. Goodtitle, 1 Blackf. (Ind.) 117; Mosher v. Yost, 33 Barb. (N. Y.) 277.

[a] **An executrix who assented to a bequest of a leasehold** cannot maintain ejectment against the legatee for recovery of the leasehold. Cole v. Cole, 1 Harr. & J. (Md.) 572.

71. Cunningham v. Baxley, 96 Ind. 367; Schee v. Wiseman, 79 Ind. 389.

72. Smith v. Dodds, 35 Ind. 452.

73. Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [rev 138 Ill. A. 361] (where after decedent's death, while owning a drug stock, defendant appeared and took possession of the stock as executor de son tort, defendant could not bind the estate by accepting a lease of the storeroom which had been executed to decedent, the term to commence subsequent to his death, and hence defendant's subsequent occupation of the premises and his payment of rent therefor monthly merely created a tenancy from month to month).

74. Chisholm v. Toplitz, 82 App. Div. 346, 82 NYS 1081 [aff 178 N. Y. 599 mem, 70 NE 1096 mem].

75. Parker v. Brown, 136 N. C. 280, 48 SE 657.

76. La.—Beeman's Succ., 47 La. Ann. 1355, 17 S 820.

Mass.—Inches v. Dickinson, 2 Allen 71, 79 AmD 765.

N. Y.—Legget v. Pelletreau, 213 N. Y. 237, 107 NE 509; Howard v. Heinerschit, 16 Hun 177.

Oh.—Becker v. Walworth, 45 Oh. St. 169, 12 NE 1.

Pa.—In re Kemp, 34 PittsbLegJ 82; Hill's App., 31 PittsbLegJ 375.

Eng.—Wollaston v. Hakewill, 3 M. & G. 297, 42 ECL 161, 133 Reprint 1157.

[a] **If the representative enters during a current quarter** and takes the profits from an under tenant or otherwise, he is personally liable for the rent for that quarter, although it commenced before the death of the lessee. Inches v. Dickinson, 2 Allen (Mass.) 71, 79 AmD 765; Ips-

extent of the profits of the land,[77] and in such case the lessor has an election either to look to the estate alone or to hold the representative personally liable.[78] But where the representative has not entered or held possession after the death of the lessee, he is liable for rent only in his representative capacity and not personally,[79] and is entitled to credit in his accounts for the rent paid.[80] The representative is not relieved from liability for rent by obtaining a purchaser ready to accept an assignment of the lease, but who afterward withdrew because the lessor refused to recognize him as a tenant.[81] The goods of a deceased lessee in the hands of his administrator are not subject to distress by the lessor or his representative.[82]

Occupancy during efforts to sublet. Where the term of a lease was unexpired when the lessee died, and his widow as administratrix made all reasonable and proper efforts to sublet the premises, occupying them in the meantime, she was not chargeable in her account with rent during the time of her occupancy.[83]

[§ 625] **c. Sale or Surrender of Lease.** A sale of a lease or the unexpired term as a chattel interest in the representative's hands may be valid, although made without a license from the court,[84] but the representative cannot lawfully surrender the lease and take another lease in his own name.[85]

[§ 626] **9. Contracts of Decedent—a. In General.** While the representative cannot as a general rule maintain an action on or perform a contract or covenant relating to real property of his decedent, since this devolves rather upon heirs or devisees,[86] he may be given ample authority by stat-

wich v. Martin, Cro. Jac. 411, 79 Reprint 351; Wollaston v. Hakewill, 3 M. & G. 297, 42 ECL 161, 133 Reprint 1157; Buckley v. Pirk, 1 Salk. 316, 91 Reprint 279; Bristol v. Guyse, 1 Saund. 111, 85 Reprint 119; Jevens v. Harridge, 1 Saund. 1, 85 Reprint 1.

[b] **The representative may be relieved from personal liability** if he can show an express contract on the part of the lessor to look to him as representative only, or such conduct on the part of the lessor as precludes him from enforcing personal liability. Becker v. Walworth, 45 Oh. St. 169, 12 NE 1.

[c] **When the lease is divested of its chattel qualities** by statute the representative is not personally liable for rent. Gausen v. Moormann, 5 OhS&CP 287, 5 OhNP 254.

[d] **Distinction depending on effectiveness of contract.**—Where a decedent has hired land by contract, complete and binding at the time of his death, it is the duty of his administrator to take possession of the term as assets of his estate; and he will not be personally liable on the contract, whether or not the probate court orders him to proceed with the cultivation of the land and fulfillment of the contract. But if the contract be incomplete, and not binding at the intestate's death, and be completed by his administrator, either of his own will or by order of the probate court, the claim will be against the administrator personally and not against the estate. Yarborough v. Ward, 34 Ark. 204.

[e] **Circumstances not amounting to taking possession.**—Decedent's brother, his administrator, who visited his apartment to look after the personalty and with the transfer tax appraiser twice after the death, permitting decedent's widow to use the furniture, did not take possession under decedent's lease and continue in possession. Beatty v. Rosenberg, 173 App. Div. 645, 160 NYS 135.

77. Fisher v. Fisher, 1 Bradf. Surr. (N. Y.) 335; Becker v. Walworth, 45 Oh. St. 169, 12 NE 1; Walker's Est., 6 Pa. Co. 515.

[a] **The representative is liable only for the real worth of the premises,** and while the rent reserved by the lease is prima facie evidence of the value of the premises and the extent of the representative's liability, it is open to him to show that the estate, during the time for which he is liable, was of less value. Inches v. Dickinson, 2 Allen (Mass.) 71, 79 AmD 765; Hornidge v. Wilson, 11 A. & E. 645, 39 ECL 347, 113 Reprint 559; Rubery v. Stevens, 4 B. & Ad. 241, 24 ECL 112, 110 Reprint 446; Hopwood v. Whaley, 6 C. B. 744, 60 ECL 744, 136 Reprint 1440.

[b] **For that portion of the rents which exceeds the profits** the representative is chargeable only as such. Fisher v. Fisher, 1 Bradf. Surr. (N. Y.) 335.

78. Becker v. Walworth, 45 Oh. St. 169, 12 NE 1.

[a] **Receipts not showing election.**—The mere fact that certain receipts for rent paid by the executor acknowledged the payment of the money by him as executor does not go to show that the lessor exercised an election between the personal liability of the executor and that of the estate, where the receipts were drawn in that form at the request of the executor, so that he might use them as vouchers, and where the insolvency of the estate was not known at the time the receipts were given. Becker v. Walworth, 45 Oh. St. 169, 12 NE 1.

79. Inches v. Dickinson, 2 Allen (Mass.) 71, 79 AmD 765; Traylor v. Cabanne, 8 Mo. A. 131.

[a] **Assumpsit will lie** against the representative for the rent if the decedent entered into possession under a lease containing an agreement to pay rent. Traylor v. Cabanne, 8 Mo. A. 131.

[b] **The rent provided for in the lease can be recovered** and the representative, having assets, cannot defend on the ground that the yearly value is less than the rent reserved. Traylor v. Cabanne, 8 Mo. A. 131.

[c] **An action for rent of land in another state** may be brought against the representative in the state in which he was appointed where the decedent had taken a lease. Traylor v. Cabanne, 8 Mo. A. 131.

80. Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem] (where an executor was obliged to pay the full sum of three hundred and seventy-five dollars on an outstanding lease held by deceased for the unexpired term, and received from subletting the property the sum of two hundred and twenty-five dollars, and there was no evidence that he could have obtained more, he was properly credited with the difference of one hundred and fifty dollars).

81. Johnson v. Stone, 215 Mass. 219, 220, 102 NE 366 ("If the sale had been perfected by an assignment, the defendant still would have been liable by privity of contract under the intestate's covenant to pay the rent for the amount shown by the stipulations of the parties, although the assignee also might have been bound through privity of estate. Way v. Reed, 6 Allen (Mass.) 364. Hovey v. Newton, 11 Pick. (Mass.) 421. Bradford v. Patten, 108 Mass. 153. Greenleaf v. Allen, 127 Mass. 248. Deane v. Caldwell, 127 Mass. 242. Donaldson v. Strong, 195 Mass. 429, 81 NE 267, and cases cited. Nor would the acceptance of rent from the assignee bar an action against the defendant for rent subsequently accruing and remaining unpaid. Way v. Reed, 6 Allen 364, 368, 369; Greenleaf v. Allen, 127 Mass. 248. The defendant could be relieved only by a surrender of the remainder of the term unconditionally accepted by the lessors, and in the absence of such evidence the judge properly ordered a verdict for the plaintiffs").

82. Gandy v. Dickson, 166 Pa. 422, 31 A 127 (although the lease gives the lessor a right of distress and extends the rights and liabilities of the parties to their respective "heirs, executors, administrators, successors, and assigns").

83. In re Schroeder, 113 App. Div. 204, 207, 99 NYS 176, 179 [aff 186 N. Y. 537 mem, 78 NE 1112 mem] ("The appellant should not be charged with rent for the premises for the time she remained in them after her husband's death. The estate being chargeable with the unexpired lease, she was justified in remaining in the house to be on hand to show it to prospective tenants and try to rent it if possible. The evidence shows that she used reasonable efforts to rent the house, and there is no evidence to the contrary. From all that appears $4,000 was not an unreasonable rental to ask for the house furnished, and there is evidence that she tried to rent it for a less amount unfurnished. By remaining in the house she was not subjecting the estate to any additional burden. The rent would have had to be paid just the same if she had moved out. It cannot be said that, had she moved out, the house could have been rented to some one else, for the evidence is all to the effect that it could not have been so rented").

84. La.—Kellar v. Blanchard, 21 La. Ann. 38.

Mass.—Amory v. Francis, 16 Mass. 308; In re Gay, 5 Mass. 419.

Miss.—Dillingham v. Jenkins, 15 Miss. 479.

Nebr.—Mulloy v. Kyle, 26 Nebr. 313, 41 NW 1117.

Pa.—Coppel's Est., 4 Phila. 378.

85. Keating v. Condon, 68 Pa. 75; Furlong's Est., 10 Pa. Dist. 527; Fow's Est., 14 Pa. Co. 648; Charles v. Byrd, 29 S. C. 544, 8 SE 1.

86. U. S.—McKay v. Carrington, 16 F. Cas. No. 8,841, 1 McLean 50.

Ala.—Porter v. Worthington, 14 Ala. 584; Lewis v. Moorman, 7 Port. 522.

Cal.—Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.

Ida.—Blake v. Lemp, 179 P 737.

Ky.—Shire v. Johnson, 38 SW 694, 18 KyL 853.

La.—Delassus v. Roumage, 3 La. Ann. 510.

Mass.—Caverly v. Simpson, 132 Mass. 462.

Mich.—Baxter v. Robinson, 11 Mich. 520.

Nebr.—Hovorka v. Havlik, 93 NW 990.

N. Y.—Palmer v. Morrison, 104 N. Y. 132, 10 NE 144.

ute or the express provisions of the will under which he acts to do so,[87] and heirs or devisees may also confer power upon him in such matters at least so as to conclude their own rights.[88] The intervention of the probate court is also frequently provided for in such matters; or equity will intervene to carry into practical effect a realty transaction beneficial to the estate.[89] But even though it is made the duty of executors and administrators to perform valid and uncompleted contracts entered into by testator, they may not expend the estate's funds to do new work which testator was not bound to do.[90] If the executor or administrator carries out decedent's contract he is bound to account for what he received thereunder,[91] while if in completing such contract he takes the title to property he holds such property in trust for the heirs.[92]

[§ 627] **b. Actions.** The personal representative of the vendor is generally the proper party to enforce specific performance or recover purchase money which is unpaid at the death of the vendor,[93] although if a conveyance has to be made the vendor's heirs or devisees may also be necessary parties.[94] So also, a person to whom a decedent had contracted to convey land may bring

N. C.—Mizell v. Dennis Simmons Lumber Co., 174 N. C. 68, 93 SE 436; Thrower v. McIntire, 20 N. C. 493, 34 AmD 382.

Wis.—Carpenter v. Fopper, 94 Wis. 146, 68 NW 874.

[a] **The acceptance of a deed by the administrator** of a deceased purchaser does not bind the estate to pay for the land. Shire v. Johnson, 38 SW 694, 18 KyL 853.

[b] **An administrator cannot sell** the interest of the estate in an executory contract for the purchase of lands, except as real estate, and after a license obtained from the court. Hovorka v. Havlik, (Nebr.) 93 NW 990.

[c] **Lien for repayment.**—While the administrator of one who has purchased land under a verbal contract is not entitled to enforce the contract, he has a lien on the land for the payment of the purchase money. Fuqua v. Fuqua, 16 SW 353, 13 KyL 130.

[d] **The representative cannot consent to a reformation** of a voluntary conveyance of decedent so as to include land not referred to therein. Fickes v. Baker, 36 Cal. A. 129, 171 P 819.

87. U. S.—Stewart v. Griffith, 217 U. S. 323, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639.

Ala.—Seabury v. Doe, 22 Ala. 207, 58 AmD 254.

Cal.—In re Bottoms, 156 Cal. 129, 103 P 849.

Ill.—Wright v. Buchanan, 123 NE 53; Burger v. Potter, 32 Ill. 66.

Ky.—Dawson v. Clay, 1 J. J. Marsh. 165.

Mich.—King v. Merritt, 67 Mich. 194, 34 NW 689.

Minn.—Wheeler v. McKeon, 137 Minn. 92, 162 NW 1070.

Mo.—Lake v. Meier, 42 Mo. 389.

N. Y.—Farley v. Secor, 167 App. Div. 80, 152 NYS 787.

Oh.—Pollock v. Pine, 2 Oh. Cir. Ct. 359.

Pa.—Bender v. Luckenbach, 162 Pa. 18, 29 A 295, 296; Wetherill v. Seitzinger, 4 PittsbLegJ 189.

S. C.—Douglass v. Dickson, 45 S. C. L. 417.

Wash.—Hyde v. Heller, 10 Wash. 586, 39 P 249.

Wis.—Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

[a] **A devise of land held under a bond for a deed** shows the testator's election to complete the purchase. Dawson v. Clay, 1 J. J. Marsh. (Ky.) 165.

[b] **Power not implied.**—Where there is no express power of sale conferred by will, the fact that there are many existing contracts for sale of land by the decedent will not create an implied power of sale in the executors because of convenience, where deeds can be given by the heirs and devisees under the will. Murdock v. Kelly, 62 App. Div. 562, 71 NYS 152.

88. Du Bose v. Ball, 64 Ga. 350.

89. U. S.—Aspley v. Murphy, 52 Fed. 570, 3 CCA 205.

Ala.—Stewart v. Stewart, 31 Ala. 207.

Cal.—In re Garnier, 147 Cal. 457, 82 P 68.

Ill.—Wright v. Buchanan, 123 NE 53; Burger v. Potter, 32 Ill. 66.

Mass.—Nazro v. Long, 179 Mass. 451, 61 NE 43.

Mich.—King v. Merritt, 67 Mich. 194, 34 NW 689.

Mo.—Lake v. Meier, 42 Mo. 389.

[a] **It is within the power of the legislature to enact** that, when the vendor in a contract to convey land dies before conveyance, the court may authorize the executor or administrator to convey the land on presentation of a verified petition by the purchaser. In re Garnier, 147 Cal. 457, 82 P 68.

[b] **Suit by stranger to rescind decree.**—The orphans' court cannot entertain a suit to rescind its decree for the specific performance of a decedent's contract for the sale of real estate, brought by a stranger to the litigation. Rafferty's Est., 9 Phila. (Pa.) 336.

90. Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303 (where testator devised a building "in course of construction," the executors were not bound to pay for the completion thereof).

91. Loring v. Cunningham, 9 Cush. (Mass.) 87 (purchase money).

92. Matter of McMonagle, 139 App. Div. 398, 124 NYS 258 (although there was no declaration by the representative to that effect). See also Montgomery v. Montgomery, (Tex. Civ. A.) 99 SW 1145 (an administratrix who paid a note from the assets of the estate, and took a deed in her individual capacity, held the premises in trust for the estate).

93. U. S.—Stewart v. Griffith, 217 U. S. 323, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639 [aff 31 App. (D. C.) 29].

Conn.—Weed v. Peck, 38 Conn. 86.

Ga. — Bryant v. Atlantic Coast Line R. Co., 119 Ga. 607, 46 SE 829.

Ill.—Hulshizer v. Lamoreux, 58 Ill. 72.

Kan.—Gilmore v. Gilmore, 60 Kan. 606, 57 P 505.

Ky.—Rachford v. Rachford, 13 SW 1075.

La.—Delaneuville v. Duhe, 114 La. 62, 38 S 20.

Mo.—Scott v. Davis, 141 Mo. 213, 42 SW 714.

Nebr.—Solt v. Anderson, 93 NW 205; Solt v. Anderson, 62 Nebr. 153, 86 NW 1076, 63 Nebr. 734, 89 NW 306; Jackson v. Phillips, 57 Nebr. 189, 77 NW 683.

N. J.—Miller v. Miller, 25 N. J. Eq. 354.

N. Y.—Wheeler v. Crosby, 20 Hun 140.

N. D.—Clapp v. Tower, 11 N. D. 556, 93 NW 862.

Or.—Wollenberg v. Rose, 41 Or. 314, 68 P 804.

Pa.—In re Huggins, 204 Pa. 167, 53 A 740; Simmons' Est., 140 Pa. 567, 21 A 402; West Hickory Min. Assoc. v. Reed, 80 Pa. 38.

W. Va.—Steenrod v. Wheeling, etc., R. Co., 27 W. Va. 1.

"By the Maryland Code, an executor may prosecute any personal action whatever, whether at law or in equity, that the testator might have prosecuted, except an action for slander. Code of 1888, art. 93, § 104. And by § 81 of the same article, the executor of a person who shall have made sale of real estate, and has died before receiving the purchase money, or conveying the same, may convey said real estate to the purchaser, and his deed shall be good and valid in law, and shall convey all the right, title, claim, and interest of such deceased person in such real estate as effectually as the deed of the party so dying would have conveyed the same; provided, the executor of the person so dying shall satisfy the orphans' court granting him administration that the purchaser has paid the full amount of the purchase money. These seem sufficient to make out the plaintiff's case, if there were nothing more. The proviso in the Maryland statute obviously must create a condition subsequent only, as it is not to be supposed that a purchaser would pay unless he got what he paid for at the same time. In substance, the Code points out the executor as the proper person to enforce the contract, gives him a right of action to that end and empowers him to make the deed. We do not perceive how a conveyance could be questioned, if made by an executor upon a cotemporaneous payment of the price, in pursuance of a binding contract of his testator, even without obtaining antecedent authority from the orphans' court. Therefore we do not perceive why the executor is not entitled to require specific performance if he is ready to deliver a deed at the moment of receiving the price." Stewart v. Griffith, 217 U. S. 323, 351, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639 [aff 31 App. (D. C.) 29].

[a] **Notice to widow and heirs not necessary.**—Simmons' Est., 140 Pa. 561, 21 A 402; West Hickory Min. Assoc. v. Reed, 80 Pa. 38; Sutter v. Ling, 25 Pa. 466.

[b] **Where the equitable title to and possession of land has passed** to a purchaser by a title bond executed by the vendor, the personal representative of the deceased vendor must sue for the purchase price. Doty v. Jameson, 93 SW 638, 29 KyL 507.

94. Scott v. Davis, 141 Mo. 213, 42 SW 714.

[a] **Where the property was a homestead** the heirs should be made parties, and the decree should provide that they, and not the personal representative, recover the purchase money. Solt v. Anderson, (Nebr.) 93 NW 205.

[b] **Where last payment due on delivery of deed.**—Where the purchasers have paid all that can be required of them before the giving of a deed for the land, and the heirs of the vendor will not give the necessary deed, the administrator of the vendor may bring a suit against the purchaser and the heirs for specific performance; and under such circumstances the tender of a deed is not a prerequisite to the bringing of the action. Wheeler v. Crosby, 20 Hun (N. Y.) 140.

suit against the personal representative for specific performance;[95] and if an action for specific performance is brought against the heirs of a deceased vendor the personal representative is a necessary party.[96] Upon the refusal of a party to convey land according to an agreement made on valuable consideration with a decedent, the personal representative of the purchaser cannot as a rule proceed to compel specific performance,[97] although he may sometimes bring an action to recover the purchase money paid by decedent[98] or damages for the breach of contract.[99] The vendor of land to a decedent who has not complied with the terms of sale has been held entitled to enforce specific performance against the purchaser's personal representative,[1] and it has also been held that an administrator who has in good faith refused to complete an executory contract of his intestate to purchase land, on which a part of the purchase money has been paid, may afterward avoid the consequences of his refusal by praying a specific performance.[2] In some states the probate court has been given jurisdiction over the specific enforcement of contracts of a decedent relative to real estate,[3] and authorized to empower the personal representative to fulfill a contract to convey

95. Ala.—Driver v. Hudspeth, 16 Ala. 348.
Ark.—Oliver v. Routh, 123 Ark. 189, 184 SW 843.
Iowa.—Collins v. Vandever, 1 Iowa 573; Fulwider v. Peterkin, 2 Greene 522.
Ky.—Grubbs v. Steele, 15 B. Mon. 570.
Minn.—In re Mousseau, 40 Minn. 236, 41 NW 977.
Mo.—Ferguson v. Bell, 17 Mo. 347.
Mont.—In re Grogan, 38 Mont. 540, 100 P 1044.
N. C.—Orr. v. Irwin, 4 N. C. 351.
Oh.—Pollock v. Pine, 2 Oh. Cir. Ct. 359, 5 Oh. Cir. Dec. 695.
Tex.—Walker v. Myers, 36 Tex. 203; Buchanan v. Park, (Civ. A.) 36 SW 807.
[a] **Land in ancther state.**—A bill in equity will lie to compel executors to convey lands in another state under contract entered into by their decedent, if defendants are within the jurisdiction of the court. Orr v. Irwin, 4 N. C. 351.
[b] **Heirs not necessary parties.**—Fulwider v. Peterkin, 2 Greene (Iowa) 522.
[c] **Notice to the heirs is necessary** and service of the notice on resident heirs must be personal and on nonresident heirs by publication. Grudds v. Steele, 15 B. Mon. (Ky.) 570.
[d] **The petition should disclose that decedent was the owner** of the land at the time of his death. Driver v. Hudspeth, 16 Ala. 348.
[e] **Proof of consideration necessary.**—Lindsay v. Coble, 37 N. C. 602.
[f] **Validity of order.**—Under a statute providing that the purchaser of a decedent, in a suit against the administrator for a conveyance, must file his complaint in writing, that the court must find that the sale was legally made, and that the order must be for title in conformity with the tenor of the bond for conveyance, an order of the probate court, in a suit by a purchaser against an administrator, to execute titles to all lands for which the estate stands bound is a nullity, as it is not made on consideration of the matters presented in the particular cause, but extends to all obligations of the deceased to convey. Jones v. Taylor, 7 Tex. 240, 56 AmD 48.
[g] **Agreement of executor to sell at reduced price.**—An agreement by the executor to sell for a less price than that fixed in the contract with his decedent is unauthorized and will not be enforced against the estate, even though he was given power by the will to sell the real estate, giving deeds and doing all lawful acts which the testator might do if living. Pollock v. Pine, 2 Oh. Cir. Ct. 359, 5 Oh. Cir. Dec. 695.
[h] **A parol contract** will not be enforced. Oliver v. Routh, 123 Ark. 189, 184 SW 843.
[i] **A deceased husband's contract affecting the marital homestead** will not be enforced where it was not joined in by the wife as required by statute. Oliver v. Routh, 123 Ark. 189, 184 SW 843.

96. Muldrow v. Muldrow, 2 Dana (Ky.) 386; Massie v. Donaldson, 8 Oh. 377.
97. Ala.—Brown v. Mize, 119 Ala. 10, 24 S 453.
Ky.—Cowan v. Hite, 2 A. K. Marsh. 238.
Nebr.—Cutler v. Meeker, 71 Nebr. 732, 99 NW 514, 8 AnnCas 951; Hovorka v. Havlik, 68 Nebr. 14, 93 NW 990, 110 AmSR 387.
N. Y.—Buck v. Buck, 11 Paige 170.
Tex.—Estes v. Browning, 11 Tex. 237, 60 AmD 238.
W. Va.—Bier v. Smith, 25 W. Va. 830.
Wis.—Carpenter v. Fopper, 94 Wis. 146, 68 NW 874.
[a] **Reason for rule.** — "Having neither a title nor a right to the possession of the land, it is difficult to apprehend what legal interest he can have in the specific performance of this contract. If performance is due, it is due to the heirs of the plaintiff's decedent, and not to the plaintiff. He has no interest to be vindicated, either in the title or in the possession. He does not represent the heirs. He is neither the real party in interest nor the trustee of an express trust in relation to this land. He has no interest." Carpenter v. Fopper, 94 Wis. 146, 147, 68 NW 874.
[b] **An administrator cannot join with an heir** to compel the conveyance of land purchased and paid for by the decedent. McKay v. Broad, 70 Ala. 377.
[c] **Effect of testamentary directions.**—Where testator dies before the performance of the contract to convey lands to him, his executors, although directed by the will to take all just and proper means to insure a conveyance of the land to the devisees, cannot sue to compel such conveyance. Buck v. Buck, 11 Paige (N. Y.) 170.
Contract for purchase of land as asset of estate see supra § 347.
98. Dougherty v. Goggan, 1 J. J. Marsh. (Ky.) 373; Wise v. Walker, 7 Pa. Cas. 87, 10 A 28.
[a] **The heirs are necessary parties.**—Wise v. Walker, 7 Pa. Cas. 87, 10 A 28.
99. Godfrey v. Dwinell, 40 Me. 94.
[a] **Rescinding election of decedent.**—Where, in an action for specific enforcement of a contract to assign a bond for a deed, defendant placed it out of the power of plaintiff to obtain title to a portion of the land, and he elected to accept such as could be conveyed, with damages for the loss of the remainder, but died before final decree, his executors, being substituted, might by leave of court withdraw such election and elect to take compensation in damages for the loss of all the land embraced in the contract. Pingree v. Coffin, 12 Gray (Mass.) 288.
1. Corkin v. Blake, 4 Phila. (Pa.) 10.
[a] **Allowance of claim for purchase money.**—In an action to enforce decedent's contract to purchase land, where the tender of a deed is necessary before the vendor has an absolute right to the purchase money, the county court may allow a claim for such money against the estate of the purchaser, and direct it to be paid on condition that such deed be executed and tendered. Gale v. Best, 20 Wis. 44.
[b] **Execution of purchase-money mortgage.**—Where a purchaser paid a part of the price and agreed to secure the balance by bond and mortgage on the land, but died before executing the mortgage, the vendor could maintain a bill in equity against the purchaser's administrator to compel specific performance of the contract to execute the mortgage. Corkin v. Blake, 4 Phila. (Pa.) 10.
[c] **A judgment compelling acceptance** of a conveyance may be enforced against the executor of the purchaser. Hogan's Succ., 5 La. A. (Orleans) 267.
2. Estes v. Browning, 11 Tex. 237, 60 AmD 238.
3. U. S.—Adams v. Lewis, 1 F. Cas. No. 60, 5 Sawy. 229.
Minn.—Mousseau v. Mousseau, 40 Minn. 236, 41 NW 977.
Mo.—Baldwin v. Whitcomb, 71 Mo. 651; Ferguson v. Bell, 17 Mo. 347.
Mont.—Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P 334.
Pa.—In re Huggins, 204 Pa. 167, 53 A 746; West Hickory Min. Assoc. v. Reed, 80 Pa. 38.
Tex.—Buchanan v. Park, (Civ. A.) 36 SW 807.
[a] **The power of the legislature** over the succession and conveyance of land being plenary, it may provide that a court of probate shall have jurisdiction to require an executor or administrator to convey land in pursuance of the written contract or bond of his decedent. Adams v. Lewis, 1 F. Cas. No. 60, 5 Sawy. 229.
[b] **Petition.**—(1) A petition for an order to convey according to decedent's contract, setting it forth, and alleging a certain sum as consideration, is sufficient. In re Grogan, 38 Mont. 540, 100 P 1044 (such a petition need not negative instances in which specific performance will not lie, as specified in § 6103; and also that it sufficiently showed compliance with the agreement by petitioner, where it alleged payment of the first and second installments and readiness to pay the remainder). (2) A petition for authority to convey lands according to a contract of sale by the decedent need not set out such contract in terms; it is sufficient if the substance be stated. Carter v. Jackson, 56 N. H. 364.
[c] **The petition must be verified** by the affidavit of the petitioner under the Missouri statute; without such affidavit the probate court acquires no jurisdiction to make the order prayed for. Baldwin v. Whitcomb, 71 Mo. 651.
[d] **Answer not amounting to application for relief.**—An answer of an administrator, admitting allegations of a petition in the probate court that his intestate "acquired and held" the legal title to land "in

real estate made by his decedent in his lifetime,[4] but it cannot compel him to do so unless the contract was in writing[5] and the other party has complied with its conditions.[6]

[§ 628] **c. Conveyance.** Ordinarily the representative has no power to execute conveyances in accordance with bonds for title or other executory contracts or covenants on the part of his decedent, this duty devolving rather upon the heir or devisee;[7] but such authority may be conferred by

trust" for the petitioner, is not an application for the relief provided by the statute, empowering the probate court to decree conveyances where there were outstanding bonds, obligations, or contracts in writing for conveyances of lands by the intestate. Maxson v. Jennings, 19 Tex. Civ. A. 700, 48 SW 781.

[e] **When dismissal by probate court proper.**—A petition to the county court to have the executor of one bound by contract to convey real estate, but dying before making the conveyance, decreed to make the conveyance, is properly dismissed, without prejudice to petitioner's right to proceed in the circuit court, where on the hearing the right of petitioner to have specific performance is found to be doubtful, it appearing that the contract price was only a third of the value of the property at the time of the hearing, that only a third of the contract price was paid when the contract was made, and that, although the contract, which was not recorded till nine years after its execution, provided that on payment of the balance of the purchase money, evidenced by the purchaser's note payable five years after date, and payment of the taxes, or on execution and tender of a mortgage securing the balance of the purchase money, the vendor would give a deed, no payment of the note or taxes, or tender of the same or of a mortgage, was made during the life of the vendor, who died four years after the note was due, and no reasons excusing such failure to make payment or tender being disclosed. Hartshorn v. Smith, 19 S. D. 653, 104 NW 467.

[f] **Presumption as to propriety of action.**—Where the court records showing the evidence on which the county court acted in directing the execution of a deed by an administrator, in fulfillment of his intestate's bond for title, had been destroyed by fire, a bond for title offered in evidence, purporting to have been executed by the intestate, but differing essentially from the recitals of the judgment directing the execution of the deed, as stated therein, was insufficient to show that it was the bond on which the court acted, or rebut the presumption that the court had sufficient evidence before it on which to render the judgment on which the deed was executed. Dutton v. Wright, 38 Tex. Civ. A. 372, 85 SW 1025.

[g] **Procedure on denying relief.**—Where the court is not satisfied that it ought to direct the representative to execute a conveyance pursuant to his decedent's contract to convey real estate, it cannot decide against the applicant on the merits, but must dismiss the petition, leaving him to his ordinary remedy by action. Mousseau v. Mousseau, 40 Minn. 236, 41 NW 977.

[h] **Construction of statute.**—A statute providing that when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases where such decedent, if living, might be compelled to make such conveyance, the probate court may require his executor or administrator to convey such real estate to the person entitled thereto, does not confer jurisdiction on the probate court to direct specific performance of a parol contract by which decedent in his lifetime agreed to convey certain water rights to his wife. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P 334 (holding also that where a decree of a probate court for specific performance of a contract by decedent in his lifetime to convey certain water rights to his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by Sess. L. [1899] p 145, subsequently passed, to validate judicial sales by executors and administrators, etc.).

[i] **An adversary proceeding is contemplated** by the statute and the probate court has no jurisdiction to decree specific performance of a contract of a decedent to convey land in an ex parte proceeding, on petition of the administrator for authority to convey to which the holder of the contract is not a party. Buchanan v. Parks, (Tex. Civ. A.) 36 SW 807.

[j] **Tender.**—On a petition for an order to convey according to decedent's contract, it was unnecessary for petitioner to make an actual tender of the amount due, where, prior to trial, he paid it into the county treasury for the administrator's use. In re Grogan, 38 Mont. 540, 100 P 1044.

[k] **Presumption in support of jurisdiction.**—The probate court being a court of limited jurisdiction, where a petition filed by an administrator to enforce a contract by deceased to convey certain water rights did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court therefore had jurisdiction to enforce the same. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P 334.

[l] **The right of an administratrix to sue the heirs** to compel them to specifically perform a contract of decedent for the sale of land is not dependent on the fact that the funds to be derived from the sale are necessary for the payment of the debts of decedent. Butman v. Butman, 213 Ill. 104, 72 NE 821 (holding also that in such a suit the administratrix may join herself in her personal right, as heir at law, as complainant, and that notice to the heirs is not required).

[m] **Time for proceeding.** — An agreement, supplementing a contract to convey, that on account of pendency of a suit in the federal circuit court the final payment should not be made until final determination of the suit "in said court" did not prevent the purchaser from enforcing performance before such determination, and applied to a determination in such court, and not to one on appeal; and hence a petition, after the determination, for an order requiring the vendor's administrators to convey was not premature. In re Grogan, 38 Mont. 540, 100 P 1044.

[n] **Notice to persons interested** (1) is necessary. Nazro v. Long, 179 Mass. 451, 61 NE 43. (2) A statute, providing that the representatives of a decedent who made a contract for the sale of land may obtain an order for a conveyance upon giving notice to the party to whom the deed is to be made, requires the service of notice on the purchaser, but does not require such service on the heirs of the deceased vendor when they refuse to convey, and the purchaser is ready and willing to perform. Butman v. Butman, 213 Ill. 104, 72 NE 821.

[o] **In Texas, prior to the act of Febr. 2, 1844,** the probate courts had no jurisdiction in cases for specific performance of contract. Houston v. Killough, 80 Tex. 296, 16 SW 56; Hooper v. Hall, 80 Tex. 154; McCarty v. Merry, (Civ. A.) 59 SW 304.

[p] **Such a statute does not apply** to a suit to compel an executrix to reconvey certain property conveyed to her testator by absolute deeds, which were in fact mortgages. Wadleigh v. Phelps, 149 Cal. 627, 87 P 93.

4. U. S.—Wythe v. Palmer, 30 F. Cas. No. 18,120, 3 Sawy. 412.

Conn.—Weed v. Peck, 38 Conn. 86.

Ill.—Butman v. Butman, 213 Ill. 104, 72 NE 821.

Iowa.—Collins v. Vandever, 1 Iowa 573.

Me.—May v. Boyd, 97 Me. 398, 54 A 938, 94 AmSR 509; Bates v. Sargent, 51 Me. 423.

Mass.—Nazro v. Long, 179 Mass. 451, 61 NE 43.

Nebr.—Holmes v. Columbia Nat. Bank, 97 NW 26; Solt v. Anderson, 62 Nebr. 153, 86 NW 1076, 63 Nebr. 734, 89 NW 306.

Pa.—Schoonover v. Ralston, 25 Pa. Super. 375; White's Pet., 13 Pa. Super. 201; Rigby's Est., 8 Pa. Super. 108, 42 WklyNC 434.

S. D.—Hartshorn v. Smith, 19 S. D. 653, 104 NW 467.

Tex.—Dutton v. Wright, 38 Tex. Civ. A. 372, 85 SW 1025; Maxson v. Jennings, 19 Tex. Civ. A. 700, 48 SW 781.

Wash.—Griggs Land Co. v. Smith, 46 Wash. 185, 89 P 477.

Ont.—Re McIntyre, 7 Ont. L. 548, 3 OntWR 258.

[a] **Invalid contract of decedent.**—A deed by an administratrix, executed under order of the probate court, is invalid where made in execution of a contract between the decedent, who was a colonist, to transfer half of his land under a headright certificate if the grantee would furnish the money to enter the land and survey it, as such contract was in contravention of an express statute forbidding a colonist to alienate his land before the final title was extended, and the county court at the time that the order was issued had no authority to decree specific performance of a contract for the conveyance of land. Broocks v. Payne, 58 Tex. Civ. A. 513, 124 SW 463.

[b] **An administrator pendente lite** is within a statute authorizing specific performance by decree of the orphans' court, on application of the executor or administrator. Logan's Est., 21 Pa. Co. 455.

5. Ala.—Wilkerson v. Vinson, 20 Ala. 131; Griggs v. Woodruff, 14 Ala. 9.

Cal.—Wadleigh v. Phelps, 149 Cal. 627, 87 P 93; Cory v. Hyde, 49 Cal. 469.

Me.—Bates v. Sargent, 51 Me. 423.

Mo.—McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730, 131 AmSR 561; Schulter v. Bockwinkle, 19 Mo. 647.

Pa.—Lindsay's Pet., 2 Del. Co. 197.

[a] **A bond for title is necessary** to support such a proceeding. Ford v. Holmes, 61 Ga. 419.

[b] **The petition must state** that the contract was in writing. Cory v. Hyde, 49 Cal. 469.

6. Ford v. Holmes, 61 Ga. 419; Bates v. Sargent, 51 Me. 423.

[a] **Where the purchaser has defaulted** in the contract the probate judge cannot empower the administrator to execute the deed, but if the purchaser makes payments after the breach he can enforce his rights arising thereunder only by a bill in equity. Bates v. Sargent, 51 Me. 423.

7. Blake v. Lemp, (Ida.) 179 P 737, 738 [cit Cyc]; Grimmell v. Warne, 21 Iowa 11; Wollenberg v. Rose, 41 Or. 314, 68 P 804.

[a] **Without adequate authority from a competent court,** an executor or administrator, as such, cannot

the will,[8] or by statute,[9] or order of court.[10] A deed of an executor or administrator, when the necessary authority to execute the same exists, is admissible in evidence without further proof [11] and has been held to be prima facie evidence of title in the grantee,[12] and relates back to the time of decedent's death so far as regards the capacity of the heirs to take.[13] Where an administrator's deed was executed under order of court, in fulfillment of decedent's bond for title, a subsequent objection, in trespass to try title, that the deed was invalid for failure to conform to the description of the land contained in the bond, was a collateral attack on the judgment, and unsustainable.[14] Where the representatives executed a deed as such representatives of community property of decedent and wife, reciting a decree of the probate court empowering such representatives to make title to the grantee according to a contract of deceased, and the receipt by them of the agreed consideration, it was held that, although the decree was void so that the deed was not binding on decedent's heirs, the grantee had the superior title, if decedent had contracted to convey the land to him, and he had paid the purchase money to decedent's legal representatives, of which facts the recitals in the deed as well as the fact that for sixty years thereafter no one claiming under decedent asserted claim to the land, but the grantee continuously asserted claim thereto and paid taxes thereon, were evidence.[15]

Delivery of decedent's deed. It has been held that the representative may deliver a deed executed by decedent in his lifetime upon the purchaser's compliance with his part of the contract of sale at the time stipulated,[16] although there is also authority for the contrary view.[17]

[§ 629] **d. Rescission or Revival.** An executor or administrator has ordinarily no authority as such to waive or rescind a contract or covenant for the sale or purchase of land made by his decedent,[18] although such a power may be exercised

make a deed to real estate, but the deed must come from the heirs, to carry a good title. Wollenberg v. Rose, 41 Or. 314, 68 P 804.

[b] **Administrator need not join in deed given by heirs.**—Gates v. McWilliams, 6 Dana (Ky.) 42.

[c] **Commissioner to sell.** — The executor should file a petition for the appointment of a commissioner to make sale, where the purchaser elects to exercise an option to purchase and doubt exists as to who is to receive purchase price. Thomas v. Heddon, 186 Ind. 48, 114 NE 218.

8. U. S.—Stewart v. Griffith, 217 U. S. 323, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639 [aff 31 App. (D. C.) 29].

D. C.—Griffith v. Stewart, 31 App. 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639].

Ky.—Hite v. Shrader, 3 Litt. 444.

Pa.—Rearich v. Swinehart, 11 Pa. 233, 51 AmD 540.

Tenn.—Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

[a] **Illustration.** — Authority to carry out an executory contract for the sale of testator's real property is conferred upon the executor by a will which invests him with full and complete authority over the testator's estate, and empowers him to sell the real property at public sale after one month's notice upon such terms as he thinks proper. Griffith v. Stewart, 31 App. (D. C.) 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639].

[b] **Where a testator gave his executors power to do any and everything** with his property that he could have done during his life, the executors had power to execute a deed confirming a deed given by their testator, but lost before registration. Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

9. U. S.—Stewart v. Griffith, 217 U. S. 323, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639.

Cal.—In re Garmer, 147 Cal. 457, 82 P 68.

Ga.—Chance v. Beall, 20 Ga. 142.

Ill.—Butman v. Butman, 213 Ill. 104, 72 NE 821.

N. C.—Hodges v. Hodges, 22 N. C. 72.

Pa.—Park v. Marshall, 4 Watts 382.

Tenn.—Bartlett v. Watson, 3 Sneed 287.

Wash.—Griggs Land Co. v. Smith, 46 Wash. 185, 89 P 477; Hyde v. Heller, 10 Wash. 586, 39 P 249.

Wis.—Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

Ont.—Re Wilson, 33 Ont. L. 500.

[a] **Statute held to apply only to sale for valuable consideration.**—Hodges v. Hodges, 22 N. C. 72.

[b] **Existence of bond for title must be established.** — Bartlett v. Watson, 3 Sneed (Tenn.) 287.

[c] **Statute permissive merely.**—Chance v. Beall, 20 Ga. 142.

[d] **Statute not giving authority.**—The authority given an administrator by Rev. St. (1899) §§ 129, 130, 146 (Annot. St. [1906] pp 379, 380, 384), on an order to rent the land, make repairs on fences and buildings, and sell land to pay debts, does not include authority to convey in performance of a contract of decedent, and hence an administrator cannot be required to do so by decree in equity. McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730, 131 AmSR 561.

[e] **Circumstances not warranting conveyance.**—Land purchased by a partnership was conveyed to two of the partners under an agreement in writing, to be held in trust for the use and benefit of the firm; but the deed did not purport to convey the land in trust, but to the grantees as individuals. Subsequently the partnership was incorporated. The grantees died, and an executor and son of one of them, although the will gave him no right to convey testator's real property, assumed to convey to the corporation the interest which testator took under the deed. His deed recited that testator, in conjunction with the other grantee, held the property in trust for "the copartnership . . . until a charter could be obtained for forming a joint-stock company, which was the object of such association," and that upon demand of the joint-stock company the deed was executed. Where there was nothing to show that the members of the partnership ever transferred their rights in the land to the corporation, or that they ever demanded the execution to it of the deed, the corporation could not demand the conveyance of the land to it, under a statute providing that, where a written agreement to convey land is made, and the person executing it dies before final conveyance, his personal representatives may execute the conveyance, so that the deed by the executor operated only to convey his individual interest. Byrd v. Phillips, 120 Tenn. 14, 111 SW 1109.

[f] **An administrator pendente lite** may make a deed in execution of the contract of a decedent for the sale of lands, according to the act of March 21, 1792. Park v. Marshall, 4 Watts (Pa.) 382.

10. See supra § 627.

[a] **Deed prepared by decedent.**—Where a deed expressing an unequivocal declaration of trust had been prepared but not executed by a decedent and was found among his papers indorsed to be delivered to certain named beneficiaries when desired, the executor was ordered to execute the deed. Raybold v. Raybold, 1 Phila. (Pa.) 369.

11. Hughes v. Wright, (Civ. A.) 97 SW 525 [rev on other grounds 100 Tex. 511, 101 SW 789, 123 AmSR 827, 11 LRANS 643] (administrator's deed made under the statute authorizing specific performance by an administrator of a contract for the conveyance of land made by his intestate).

12. Hughes v. Wright, (Tex. Civ. A.) 97 SW 525 [rev on other grounds 100 Tex. 511, 101 SW 789, 123 AmSR 827, 11 LRANS 643]; Dutton v. Wright, 38 Tex. Civ. A. 372, 85 SW 1025. But compare Hite v. Shrader, 3 Litt. (Ky.) 444 (where executors are vested by will with the naked power to execute a deed, in compliance with contracts to convey entered into by the testator, and a deed is executed by them, the recital in the deed of the contract is insufficient, where the grantee seeks to assert title under it without proof of such contract).

13. Blythe v. Easterling, 20 Tex. 565.

14. Dutton v. Wright, 38 Tex. Civ. A. 372, 85 SW 1025.

15. Cope v. Blunt, 38 Tex. Civ. A. 516, 91 SW 615.

16. Dettmer v. Behrens, 106 Iowa 585, 76 NW 853, 68 AmSR 326; Loring v. Cunningham, 9 Cush. (Mass.) 87.

17. Karmane v. Hoober, 3 Watts & S. (Pa.) 253.

18. Ala.—Matthews v. Dowling, 54 Ala. 202.

Ark.—Bender v. Bean, 52 Ark. 132, 12 SW 180, 241.

Ga.—Jones v. Ragan, 136 Ga. 653, 71 SE 1098.

Ky.—Ward v. Grayson, 9 Dana 280.

Mich.—Hunt v. Thorn, 2 Mich. 213.

N. C.—Owens v. Phelps, 92 N. C. 231.

Tenn.—Cotham v. Britt, 10 Heisk. 469; Wilkins v. Frierson, 2 Sneed 701.

W. Va.—Bier v. Smith, 25 W. Va. 830.

[a] **An administrator's consent to a decree of rescission** in a suit brought against him and the heirs of his intestate to have a purchase of land by the intestate rescinded cannot divest the interest of the heirs; nor is such a decree authorized by the additional fact that the unpaid balance of purchase money, together

pursuant to an order of the probate court where the personal property is insufficient to pay the debts;[19] and in some jurisdictions the probate court has, under statute, power to order the rescission of such a contract under other circumstances.[20] Where a purchaser has rightfully abandoned a contract for the conveyance of land, having the right to rescind, such contract is at an end, and cannot be revived by the action of his administrator in treating it as still in force;[21] and where the administratrix of the vendor of a contract for the sale of land elects, on default of the purchaser, to declare the contract forfeited, and the purchaser acquiesces in her election, her act is binding on the estate, and a subsequent administrator cannot revoke it, except for fraud.[22] It has also been held that if decedent had the right under the contract to have the purchase money refunded because he was dissatisfied with the property, such right may be enforced by his personal representative,[23] and that a court of equity will not, after the lapse of many years, disturb a contract of rescission, on the application of the heirs of the purchaser, where the administrator acted in good faith in making such contract and it might reasonably be considered beneficial to the heirs.[24]

[§ 630] **10. Sale—a. In General—(1) Rule Stated.** In the absence of some power contained in the will,[25] or of authority derived from statute[26] or an order of court,[27] neither an executor nor an administrator has any power whatever to sell the real estate of his decedent.[28] An unauthorized con-

with other debts of the estate, will render it insolvent. Matthews v. Dowling, 54 Ala. 202.

[b] **If the contract has been executed** by a conveyance to decedent, the heirs alone have the right to rescind. Bender v. Bean, 52 Ark. 132, 12 SW 180, 241; Campbell v. Kuhn, 45 Mich. 513, 8 NW 523, 40 AmR 479.

[c] **Statute not authorizing rescission.** — An agreement between the administrator of the purchaser of land and the vendor for the rescission of the bond for title, an accompanying agreement for sale of timber to the vendor of the land, and certain indebtedness of the purchaser and of the administrator to the vendor, was not within a statute, authorizing administrator to compromise claims in favor of the estate, where the debtors deliver bona fide all their property for the use of creditors, except such as is exempt, and to compromise all doubtful claims belonging to the estate, where the settlement will advance the interest of those represented, provided the ordinary shall first make an order directing such compromise, and, even if it was, the compromise could not be made without an order of the ordinary having first been made. Jones v. Ragan, 136 Ga. 653, 71 SE 1098.

[d] **The representative must be made a party** to a bill brought by the heirs for rescission on the ground of fraud, where the death of decedent occurred before the time fixed for the conveyance or where part of the purchase money remains unpaid. Rice v. Spotswood, 6 T. B. Mon. (Ky.) 40, 17 AmD 115.

[e] **Contrary view.**—(1) Pennock v. Freeman, 1 Watts (Pa.) 401; Hilard's Est., 8 LuzLegReg (Pa.) 137. (2) Where the purchaser becomes executor of the vendor's estate he may rescind the contract, being bound, however, to exercise good faith in the transaction. Sutton's Est., 13 Pa. Super. 492 [aff 200 Pa. 163, 49 A 776].

19. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879; Hunt v. Thorn, 2 Mich. 213.

20. Hamner v. Holmes, 12 Kan. 526; Hunt v. Thorn, 2 Mich. 213; Howard v. Babcock, 7 Oh. Pt. II 73; Pennock v. Freeman, 1 Watts (Pa.) 401.

[a] **Ex parte order.**—An order of the probate court authorizing an administrator on his ex parte petition to relinquish land belonging to the estate of his decedent to the vendor thereof upon the latter's surrender of the notes given for the purchase money does not operate to divest the title of the estate and vest it in the vendor, since it is not binding upon him. Bender v. Bean, 52 Ark. 132, 12 SW 180, 241.

21. Todd v. Caldwell, 10 Tex. 236.

22. Oakes v. Gillilan, (Nebr.) 95 NW 511.

23. Fuller v. Dempster, 8 Pa. Cas. 546, 11 A 670.

24. Ludlow v. Cooper, 4 Oh. St. 1.

25. Sale under testamentary authority see infra § 636 et seq.

26. Statutes authorizing or confirming sales see infra § 635.

27. Sales under order of court see infra § 1438 et seq.

28. U. S.—Brush v. Ware, 15 Pet. 93, 10 L. ed. 672; Hamilton Bank v. Dudley, 2 Pet. 492, 7 L. ed. 496; Anderson v. Messinger, 146 Fed. 929, 77 CCA 179, 7 LRANS 1094; Rafferty v. Mallory, 20 F. Cas. No. 11,526, 3 Biss. 362; Ware v. Brush, 29 F. Cas. No. 17,171, 1 McLean 533 [aff 15 Pet. 93, 10 L. ed. 672].

Ala.—Creel v. Creel, 167 Ala. 599, 52 S 902; Kirkbride v. Kelly, 167 Ala. 570, 52 S 660; Woods v. Legg, 91 Ala. 511, 8 S 342; Steel v. Steel, 64 Ala. 438, 38 AmR 15; Hall v. Hall, 47 Ala. 290; Calhoun v. King, 5 Ala. 523.

Ariz.—Costello v. Cunningham, 16 Ariz. 447, 147 P 701.

Ark.—Gibbs v. Singfield, 115 Ark. 385, 171 SW 144; Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, Ann Cas1916C 601; Burgauer v. Laird, 26 Ark. 256; Hill v. Mitchell, 5 Ark. 608.

Cal.—Hill v. Den, 54 Cal. 6.

Colo. — Reithman v. Filmore, 6 Colo. 120; Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

Ga.—R. O. Campbell Coal Co. v. Baker, 142 Ga. 434, 83 SE 105; Glore v. Scroggins, 124 Ga. 922, 53 SE 690; Beaty v. Stapleton, 110 Ga. 580, 35 SE 770; Dowdy v. McArthur, 94 Ga. 577, 21 SE 148; Ashburn v. Ashburn, 16 Ga. 213.

Ill.—Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345]; Burr v. Bloemer, 174 Ill. 638, 51 NE 821; Stillman v. Young, 16 Ill. 318.

Ind.—Moore v. Moore, 155 Ind. 261, 57 NE 242; Duncan v. Gainey, 108 Ind. 579, 9 NE 470; Kidwell v. Kidwell, 84 Ind. 224; Tate v. McLain, 74 Ind. 493; Hankins v. Kimball, 57 Ind. 42; Edwards v. Haverstick, 47 Ind. 138; Ward v. Crane, 3 Blackf. 393.

Iowa. — Hanson v. Hanson, 149 Iowa 82, 127 NW 1032.

Ky.—Sauer v. Taylor, 184 Ky. 609, 212 SW 583; Bayne v. Stratton, 131 Ky. 494, 115 SW 728; Buckner v. Cromie, 5 Bush 603; Banks v. Johnson, 4 J. J. Marsh. 649; Montague v. Carneal, 1 A. K. Marsh. 351; Worthington v. Smith, 12 Ky. Op. 711; Huston v. Dorsey, 1 Ky. Op. 217.

La.—Townsend v. Sykes, 38 La. Ann. 859.

Me.—Stevens v. Burgess, 61 Me. 89.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A 209; Carroll v. Andrews, 4 Harr. & M. 485.

Mass.—Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793; Frost v. Atwood, 73 Mich. 67, 4 NW 96, 16 AmSR 560.

Miss. — Hargrove v. Baskin, 50 Miss. 194; Adams v. Harris, 47 Miss. 144; Gelstrop v. Moore, 26 Miss. 206, 59 AmD 254; Edmundson v. Roberts, 3 Miss. 822; Chew v. Calvert, 1 Miss. 54.

Mont.—Broadwater v. Richards, 4 Mont. 80, 2 P 546.

N. H.—Harris v. Ingalls, 74 N. H. 35, 64 A 727; Ticknor v. Harris, 14 N. H. 272, 40 AmD 186.

N. J.—Campbell v. Cole, 71 N. J. Eq. 327, 64 A 461; Lippincott v. Lippincott, 19 N. J. Eq. 121.

N. Y.—Ranhofer v. A. C., etc., Hall Realty Co., 143 App. Div. 237, 128 NYS 230; Correll v. Lauterbach, 12 App. Div. 531, 42 NYS 143 [aff 159 N. Y. 553 mem, 54 NE 1089 mem]; Guthmann v. Meuer, 31 Misc. 810, 63 NYS 971; Bridgewater v. Brookfield, 3 Cow. 299; Craig v. Craig, 3 Barb. Ch. 76.

N. C.—Morton v. Blades Lumber Co., 152 N. C. 54, 67 SE 67; Gay v. Grant, 101 N. C. 206, 8 SE 99, 106.

Oh.—Carr v. Hull, 65 Oh. St. 394, 87 AmSR 623; Hoyt v. Day, 32 Oh. St. 101; Paine v. Skinner, 8 Oh. 159; Ludlow v. Johnston, 3 Oh. 553, 17 AmD 609.

Pa.—Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Wildermuth v. Long, 196 Pa. 541, 46 A 927; Karns v. Tanner, 74 Pa. 339; In re Finley, 10 Pa. Dist. 272, 25 Pa. Co. 261; Gumaer v. Barber, 2 LackLegN 237.

Porto Rico.—Criado v. Martinez, 25 Porto Rico 308.

R. I.—Reynolds v. Reynolds, 27 R. I. 520, 63 A 804.

S. C.—Hunter v. Hunter, 58 S. C. 382, 36 SE 734, 79 AmSR 845; Perry v. Brown, 17 S. C. L. 45.

Tex.—Matula v. Freytag, 101 Tex. 357, 107 SW 536 [rev (Civ. A.) 104 SW 492]; Grimes v. Smith, 70 Tex. 217, 8 SW 33; Bartley v. Harris, 70 Tex. 181, 7 SW 797; Ball v. Collins, 5 SW 622; Williams v. San Saba County, 59 Tex. 442; Pate v. McLain, (Civ. A.) 136 SW 538; Coy v. Gaye, (Civ. A.) 84 SW 441; Club Land, etc., Co. v. Dallas County, 26 Tex. Civ. A. 449, 64 SW 872 [rev in part on other grounds 95 Tex. 200, 66 SW 294].

Va.—Litterall v. Jackson, 80 Va. 604.

Wash.—Demaris v. Barker, 33 Wash. 200, 74 P 362.

Wis.—Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

Eng. — Bentham v. Wiltshire, 4 Madd. 44, 56 Reprint 625.

"Without express or necessarily implied power, an executor has no authority to sell the real estate of a testator." Hanson v. Hanson, 149 Iowa 82, 85, 127 NW 1032, 1033.

"If no power of sale of real estate is vested in an executor by the terms of a will, he can only acquire that power from the orphans' court in such cases as the statute has authorized that court to confer the power." Morris v. Dorsey, 77 N. J. Eq. 460, 463, 77 A 44, 46 [aff 80 N. J. Eq. 555, 85 A 1134].

"The administrator, therefore, has

veyance may be enjoined at the suit of heirs or devisees,[29] and a deed made by the representative without authority is void,[30] except as it may operate to pass his own interest in the land as heir or devisee,[31] and cannot affect the rights of other heirs or devisees who seasonably undertake to assert such rights.[32]

[§ 631] **(2) Contract of Sale.** While an unauthorized contract of sale entered into by the representative is not binding upon, and cannot be enforced against, the estate,[33] it is not necessarily void, but may bind the representative individually.[34] Where a contract for the sale of the land of a decedent is entered into by the widow and heirs, there is no such mutuality of obligation between the administrator and the purchaser as will entitle the administrator to enforce the contract.[35]

[§ 632] **(3) Status of Purchaser.** Although a sale by an administrator is void because made without an order of court for that purpose, yet the purchaser who goes into possession by consent of the administrator is not a trespasser, nor is he wrongfully in possession, and hence he cannot be subjected to a suit, unless he has refused to surrender possession upon demand.[36] Where a deed from an executor recited that he had power under the will to convey, although he had no such power, but both the executor and the purchaser acted in good faith, the purchaser, upon being deprived of the property, is entitled to a compensation for permanent improvements, as against which may be set off the claim of the heirs for use and occupation and for goods supplied to the purchaser, but the purchaser is not entitled to damages in addition.[37]

[§ 633] **(4) Liability of Representative for Unauthorized Sale.** Executors who sell without authority in the will or an order of court are bound to show the necessity of the sale and to account for the value of the property, whether such value was realized at the sale or not.[38] Where an infant has been appointed administratrix and has without authority sold real estate of decedent, he may subsequently come into court and disaffirm the contract upon the ground of fraud and minority,

no duty, right, or power to sell the lands of the estate, except for the purpose, and in the manner prescribed by the statute. Unless needed for some purpose of administration, such as paying debts of the estate, the personalty being insufficient for that purpose, or unless it becomes necessary to sell for distribution among the heirs, the administrator never has any right, power, or duty, as to the land. It belongs to the heirs or devisees. In no event can the administrator, without the aid of a court of competent jurisdiction, sell or even contract to sell the lands of the estate." Creel v. Creel, 167 Ala. 599, 603, 52 S 902, 903.

[a] **Land of an alien decedent** is subject to and protected by the same rule. Mobile Cong. Church v. Morris, 8 Ala. 182.

[b] **Person dealing with administrator bound to take notice of disability to sell.**—Rafferty v. Mallory, 20 F. Cas. No. 11,526, 3 Biss. 362.

[c] **Conveyance in payment of attorney's fees.**—An administrator has no power to convey land of his intestate to an attorney in payment of attorney's fees; nor will an approval of such conveyance by the probate court render it valid. Teal v. Terrell, 48 Tex. 491.

[d] **A military warrant or the certificate** on which the warrant was obtained cannot be sold by an executor unless power is given to him by the will to do so. Ware v. Brush, 29 F. Cas. No. 17,171, 1 McLean 533 [aff 15 Pet. 93, 10 L. ed. 672].

[e] **Effect of recital in order admitting will to probate.**—Where an order admitting a will to probate and appointing an executor recited that the will provided that no further action should be taken by the court other than the probate of the will, the appointment of the executor, and the filing and approving of an inventory and list of claims, the recital was not a part of the judgment, and no adjudication of the executor's rights to dispose of the land of the estate without an order of court. Gray v. Russell, 41 Tex. Civ. A. 526, 91 SW 235.

[f] **Assignee of representative.**—Where executors have without authority carried on the business of their decedent, their assignee for the benefit of creditors has no authority to sell decedent's real estate. Matter of Praetz, 87 Misc. 128, 150 NYS 221.

29. Beaty v. Stapleton, 110 Ga. 580, 35 SE 770; McClane v. McClane, 207 Pa. 465, 56 A 996.

30. Burgauer v. Laird, 26 Ark. 256; Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; Johnson v. Short, 43 Tex. Civ. A. 128, 94 SW 1082.

"That a deed made by an executor under a will which confers no power of sale without an order of the court, or its approval or sanction, is absolutely void, there can be no question; and this, too, without regard to whether his letters testamentary were temporary or permanent. If there be no power to sell real estate given to the executor in the will, he has no authority to deal with it, unless it is wanted to pay debts or legacies, in which case he must obtain an order from the court of probate to sell." Coy v. Gaye, (Tex. Civ. A.) 84 SW 441, 442.

31. U. S.—Rannels v. Rowe, 145 Fed. 296, 74 CCA 376 [certiorari den 207 U. S. 591, 28 SCt 257, 32 L. ed. 355].

Cal.—Moffitt v. Rosecrans, 136 Cal. 416, 69 P 87 (set out infra § 631 note 34 [a]).

Ga.—Glore v. Scroggins, 124 Ga. 922, 53 SE 690; Brown v. Rawlings, 119 Ga. 937, 47 SE 198.

La.—Wells v. Wells, 30 La. Ann. 935.

Tex.—Pate v. McLain, (Civ. A.) 136 SW 538; Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

[a] **Executors who are sole residuary devisees and legatees** and give bond as such for the payment of debts and legacies acquire absolute title to the land and may sell without a license of the probate court. Wells v. Wells, 30 La. Ann. 935; Clarke v. Tufts, 5 Pick. (Mass.) 337; Thompson v. Brown, 16 Mass. 172.

32. Forbes v. Keyes, 193 Mass. 38, 78 NE 733.

33. Ala.—Creel v. Creel, 167 Ala. 599, 52 S 902.

Ga.—R. O. Campbell Coal Co. v. Baker, 142 Ga. 434, 83 SE 105.

N. Y.—Bauman v. Goldthorpe, 129 App. Div. 19, 113 NYS 136.

N. C.—Hedgecock v. Tate, 168 N. C. 660, 85 SE 34, AnnCas1916D 449.

S. C.—Finley v. Burgoyne, 13 S. C. Eq. 133.

Va.—Litterall v. Jackson, 80 Va. 604.

B. C.—In re Howard, 16 B. C. 48.

[a] **An option** to purchase land of decedent cannot be given by the personal representative. R. O. Campbell Coal Co. v. Baker, 142 Ga. 434, 83 SE 105; Ward v. Gartside, 197 Ill. A. 314; Hedgecock v. Tate, 168 N. C. 660, 85 SE 34, AnnCas1916D 449.

[b] **Contract to sell on obtaining leave of court.**—A written contract, by which an administrator agrees to sell certain land of decedent for a price fixed, the conveyance to be made when the administrator shall have obtained permission of the surrogate's court, is void and not enforceable after the administrator obtains such permission. Bauman v. Goldthorpe, 129 App. Div. 19, 113 NYS 136. To same effect Logan v. Gigley, 9 Ga. 114; Bridgewater v. Brookfield, 3 Cow. (N. Y.) 299.

[c] **Specific performance will not be decreed** against an executor who contracted for the sale of a part of the real estate of the testator, believing at the time that he had authority to sell, but who, on discovering that the will did not authorize the sale, refused to convey. Finley v. Burgoyne, 13 S. C. Eq. 133.

34. Moffitt v. Rosencrans, 136 Cal. 416, 69 P 87; Dresel v. Jordan, 104 Mass. 407; Millard v. Smith, 119 Mo. A. 701, 95 SW 940.

[a] **Illustrations.**—(1) Where testator devised to his wife a certain tract of land and also an undivided one-half interest in another tract, and named the wife as executrix and one of the other devisees as executor of the will, and the wife, describing herself as executrix, joined with other devisees and the executor in executing a tract giving an option to purchase the land and also appointing a certain person as agent to make sale thereof, the wife was individually bound by contract. Millard v. Smith, 119 Mo. A. 701, 95 SW 940. (2) Where the executrix was the sole residuary legatee of the estate, and at the time of her agreement to sell the land, the time for claims against the estate had expired, and all debts and legacies had been paid, leaving in her hands more than sufficient to close the administration, and the executrix had thus become the sole beneficial owner of the land, the contract of sale is binding on her personally and the purchaser must be regarded in equity as the real owner of the land. Moffitt v. Rosencrans, 136 Cal. 416, 69 P 87.

35. Phillips v. Van Schaick, 37 Iowa 229.

36. Burgauer v. Laird, 26 Ark. 256.

37. Rose v. Parent, 2 OntWN 783, 18 OntWR 745 [foll Bain v. Fothergill, L. R. 7 H. L. 158].

38. Wellborn v. Rogers, 24 Ga. 558; Wright v. Wright, 7 S. C. Eq. 185.

[a] **Executor chargeable only with value of property and interest.**—Wright v. Wright, 7 S. C. Eq. 185.

for the purpose of avoiding personal liability for the unauthorized sale.[39]

[§ 634] **(5) Ratification of Unauthorized Sale.** Where an executor conveys land without authority and receives the proceeds, a devisee who, with knowledge or notice of the substantial facts, brings suit against the executor to recover such proceeds, elects to confirm and ratify the conveyance.[40]

[§ 635] **b. Statutes Authorizing or Confirming Sales.** In England and Ontario the statutes have given the personal representatives of decedents the right to dispose of and deal with the real property, as if the same were personal property vested in them.[41] In the United States the various state legislatures have from time to time passed special or private acts authorizing or confirming in particular cases the sale of a decedent's real estate by his personal representative,[42] but while there are decisions upholding such acts,[43] they have been frequently declared void as involving unauthorized usurpation by the legislature of judicial functions,[44] or on other constitutional grounds.[45]

[§ 636] **c. Sale under Testamentary Authority —(1) Power to Sell—(a) In General.** A testator may, by his will, confer on his executor the power to sell his real estate for the payment of debts or for any other lawful purpose to which the testator wishes the proceeds of his real estate to be applied.[46] It has been said, however, that an executor derives his power to act as such in the

39. Knox v. Nobel, 77 Hun 230, 28 NYS 355.

40. Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359.

41. In re Barrow-in-Furness, [1903] 1 Ch. 339; Re Ross, 7 Ont. L. 433, 2 OntWR 217, 3 OntWR 215, 24 CanLTOccNotes 213 [appr Re Wilson, 54 L. T. Rep. N. S. 600]; In re Moore, 21 CanLTOccNotes 562; Re Bowerman, 18 Ont. L. 122, 13 OntWR 891; Re Ross, 7 Ont. L. 433, 441, 2 OntWR 217, 3 OntWR 215, 24 CanLTOccNotes 213; In re Bradley, 6 Ont. L. 397, 2 OntWR 711; Re Bradburn, 3 Ont. L. 351; Re Wilson, 20 Ont. 397; In re Booth, 16 Ont. 429; Yost v. Adams, 13 Ont. A. 129 [dism app 8 Ont. 411].

"I think the executors may make a good title either under the Devolution of Estates Act, R. S. O. 1897, ch. 127, secs. 4, 9, and 16, or under the Trustee Act, R. S. O. 1897, ch. 129, sec. 18. By sec. 4 of the first Act all the testatrix's property vested in the executors, subject to the payment of debts. By sec. 9, as amended by 2 Edw. VII, ch. 17, sec. 9, the executors are empowered to sell real property to the same extent as personal property, and that enables them to sell for the payment of debts. That clause is, however, subject to the other provisions of the Act, and it is contended that this power is qualified by sec. 16. I do not think so. I think this section was intended to make it clear that executors had power to sell for purposes of distribution where there were no debts as well as where there were debts; and I think the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for the purposes of distribution only, which is not this case." Re Ross, supra.

[a] **Purpose of statute.**—The statute was passed to enable property which was charged with debts and legacies to be sold in any event, that is by the devisee if there was a devisee, by the executor if there was no devisee. In re Barrow-in-Furness, [1903] 1 Ch. 339.

[b] **Power not affected by testamentary provisions.**—An executor's "power to realize the estate for the benefit of creditors was paramount to the provisions of the will." Re Cavendish, 56 Sol. J. 468.

42. U. S.—Florentine v. Barton, 2 Wall. 210, 17 L. ed. 783; Leland v. Wilkinson, 10 Pet. 294, 9 L. ed. 430; Dubois v. McLean, 7 F. Cas. No. 4,107, 4 McLean 486.

Ala.—Holman v. Norfolk Bank, 12 Ala. 369.

Conn.—Manwaring v. Dishon, 1 Root 478.

Ill.—Davenport v. Young, 16 Ill. 548, 63 AmD 320; Doe v. Herbert, 1 Ill. 354, 12 AmD 192.

Mich.—King v. Merritt, 67 Mich. 194, 34 NW 689; Browning v. Howard, 19 Mich. 323.

Miss.—Williamson v. Williamson, 11 Miss. 715, 41 AmD 636.

Mo.—Gannett v. Leonard, 47 Mo. 205.

Va.—Corbell v. Zeluff, 12 Gratt. (53 Va.) 226.

43. Leland v. Wilkinson, 10 Pet. (U. S.) 294, 9 L. ed. 430; Lane v. Nelson, 79 Pa. 407.

[a] **In Missouri, prior to the constitution of 1865,** such acts were within the power of the legislature. Clusky v. Burns, 120 Mo. 567, 25 SW 585; Cargile v. Fernald, 63 Mo. 304.

44. Pryor v. Downey, 50 Cal. 388, 19 AmR 656; Rozier v. Fagan, 46 Ill. 404; Lane v. Doe, 4 Ill. 238, 36 AmD 543; Jones v. Perry, 10 Yerg. (Tenn.) 59, 30 AmD 430. See generally Constitutional Law § 239 et seq.

45. Pryor v. Downey, 50 Cal. 388, 19 AmR 656; Brenham v. Story, 39 Cal. 179; Hegarty's App., 75 Pa. 503.

[a] **Depriving heirs and devisees of property without due process of law.**—Culbertson v. Coleman, 47 Wis. 193, 2 NW 124.

46. U. S.—Fronsoe v. Bushnell, 251 Fed. 850, 164 CCA 66; Virginia, etc., Coal Co. v. Charles, 251 Fed. 83 [aff 254 Fed. 379, 165 CCA 599]; Meekins v. Branning Mfg. Co., 224 Fed. 202; Beadle v. Beadle, 40 Fed. 315, 2 McCrary 586; Lindenberger v. Matlock, 15 F. Cas. No. 8,360, 4 Wash. C. C. 278.

Ala.—Hardeman v. Hardeman, 79 S 356; Walker v. Murphy, 34 Ala. 591.

Ark.—Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601; Ludlow v. Flournoy, 34 Ark. 451.

Cal.—In re Loyd, 175 Cal. 699, 167 P 157; Ukiah Bank v. Rice, 143 Cal. 265, 76 P 1020, 101 AmSR 118; Sharp v. Loupe, 120 Cal. 89, 52 P 134, 586; In re Durham, 49 Cal. 490; In re Delaney, 49 Cal. 76; Larco v. Casaneuava, 30 Cal. 560; Payne v. Payne, 18 Cal. 291; Norris v. Harris, 15 Cal. 226.

Colo.—Ingham v. Ryan, 18 Colo. A. 347, 71 P 899.

Del.—Hilles v. Hilles, (Ch.) 98 A 296; Security Trust, etc., Deposit Co. v. Ward, 10 Del. Ch. 408, 93 A 385; In re Security Trust, etc., Deposit Co., 10 Del. Ch. 334, 92 A 244; In re Journey, 7 Del. Ch. 1, 44 A 795.

D. C.—Griffith v. Stewart, 31 App. 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639]; Rathbone v. Hamilton, 4 App. 475.

Fla.—Simmons v. Spratt, 26 Fla. 449, 8 S 123, 9 LRA 343.

Ga.—R. O. Campbell Coal Co. v. Baker, 142 Ga. 434, 83 SE 105; Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17; Harwell v. Foster, 102 Ga. 38, 28 SE 967.

Ill.—Dunham v. Slaughter, 268 Ill. 625, 109 NE 673 [rev 190 Ill. A. 497]; Smith v. Hunter, 241 Ill. 514, 89 NE 686, 132 AmSR 231; Kurtz v. Graybill, 192 Ill. 445, 61 NE 475 [aff 91 Ill. A. 76]; Mulligan v. Lambe, 178 Ill. 130, 52 NE 1052; Penn v. Fogler, 77 Ill. A. 365.

Iowa.—Lund v. Riggs, 174 Iowa 79, 156 NW 161; Feaster v. Fagan, 135 Iowa 633, 113 NW 479; Boland v. Tiernay, 118 Iowa 59, 91 NW 836.

Kan.—Linn County Bank v. Grisham, 185 P 54; Niquette v. Green, 81 Kan. 569, 106 P 270.

Ky.—Sauer v. Taylor, 184 Ky. 609, 212 SW 583; Stofer v. Stiltz, 179 Ky. 399, 200 SW 631; Varble v. Collins, 168 Ky. 247, 181 SW 1115, AnnCas1916D 448; Goddard v. Goddard, 160 Ky. 759, 170 SW 176, 164 Ky. 41, 174 SW 743; Smith v. Scott, 151 Ky. 64, 151 SW 42; Kerr v. Long, 88 SW 1068, 28 KyL 52; Offutt v. Hall, 87 SW 785, 27 KyL 1072; Smith v. Courtney, 85 SW 1101, 27 KyL 642; Waller v. Logan, 5 B. Mon. 515; McCulloch v. Sanders, 12 Ky. Op. 384.

Me.—Bradt v. Hodgdon, 94 Me. 559, 48 A 179; Chadbourne v. Rackliff, 30 Me. 354.

Md.—Lochary v. Corrigan, 132 Md. 371, 103 A 1006; Parker v. Leighton, 131 Md. 407, 102 A 552; Magruder v. Peter, 11 Gill & J. 217.

Mass.—Justice v. Soderlund, 225 Mass. 320, 114 NE 623; McLaughlin v. Greene, 198 Mass. 153, 83 NE 1112; Allen v. Dean, 148 Mass. 594, 20 NE 314; Greenough v. Wells, 10 Cush. 571; Fay v. Fay, 1 Cush. 93.

Mich.—Chamberlain v. Husel, 178 Mich. 1, 144 NW 549; Tracy v. Murray, 49 Mich. 35, 12 NW 900.

Miss.—Gordon v. McDougall, 84 Miss. 715, 37 S 298; Cohea v. Jemison, 68 Miss. 510, 10 S 46.

Mo.—Wisker v. Rische, 167 Mo. 522, 67 SW 218; Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734.

Nebr.—King v. Boettcher, 96 Nebr. 319, 147 NW 336; Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

N. H.—Bartlett v. Hill, 69 N. H. 197, 45 A 144.

N. J.—Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240]; Campbell v. Cole, 71 N. J. Eq. 327, 64 A 461; Lindley v. O'Reilly, 50 N. J. L. 636, 15 A 379, 7 AmSR 802, 1 LRA 79; Case v. Hasse, 83 N. J. Eq. 170, 93 A 728; Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450; Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362; Rositzke v. Meyer, 176 App. Div. 193, 162 NYS 613 [app dism 224 N. Y. 543 mem, 120 NE 875 mem]; Sandford v. Bronx Boro. Builders, 175 App. Div. 384, 161 NYS 975; Wellbrock v. Roddy, 169 App. Div. 251, 154 NYS 830; Lawrence v. Littlefield, 166 App. Div. 664, 152 NYS 130 [rev 147 NYS 760, and rev on other grounds 215 N. Y. 561, 109 NE 611]; Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686; Ranhofer v. A. C., etc., Realty Co., 143 App. Div. 237, 128 NYS 230; Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948; Odell v. Claussen, 120 App. Div. 535, 104 NYS 1104; Boehmcke v. McKeon, 119 App. Div. 30, 103 NYS 930; Walter v. Tomkins, 71 App. Div. 21, 75 NYS 557 [aff 179 N. Y. 555 mem, 71 NE 1141 mem]; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; Carpenter v. Bonner, 26 App. Div. 462, 50 NYS 298; Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83; Simmons v. Taylor, 19 App. Div. 499, 46 NYS 730; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Hart v.

transfer of immovable property from a compliance with the law of the place where he attempts to operate under the will and not from the will alone,[47] and the executor must take out letters testamentary in order lawfully to exercise the power which the testator has thus conferred upon him.[48] But where a testator desired that the county court assume no other control over his estate than to probate his will and record an inventory of the property, and expressly exempted the executors from giving bonds, and authorized them to sell at their discretion any of testator's land, the executors might sell without qualifying as such by giving bonds.[49] An executor's right to sell is superior to the right of partition vested in one who has purchased an undivided interest from a devisee;[50] and it is not limited because not coupled with an interest[51] or affected by the pendency of a suit by a creditor for a settlement of the estate;[52] nor is a power of sale for the purpose of paying testator's debts affected by the widow's dissent from the will.[53] A direction to an executor to sell real estate, the proceeds to become part of the residuary estate of the testator, has been held to be ineffectual as a power of sale where the will makes no disposition of the residuary estate,[54] but where a portion of a devise to executors in trust with power of sale was void because of the inability of some of the beneficiaries to take, it was held that the executors had power to sell the whole premises in order to carry out the valid portion, the heir being only entitled to her share of the proceeds of the sale in lieu of the invalid portion of the devise, as real estate, unchanged by its conversion into money.[55]

[§ 637] **(b) Implied Power.** It is not necessary that such settlement should not preclude the executors from administering the estate to pay debts as soon as practicable, and that their power to sell was continued until provision for the payment of testator's debts had been made, the executors had full power to sell testator's real estate to pay debts. Mersman v. Worthington, 72 SW 1094, 24 KyL 2115.

[c] **Creditors of an estate by account have no right to enjoin** the executrix from selling the real estate in the due course of administration, because she is insolvent, and twelve months have not elapsed since the grant of letters of administration, and because they fear that if she receives the proceeds they will lose their claims, no waste or mismanagement, or attempt thereat being alleged. Elam v. Elam, 72 Ga. 162.

[d] **If the validity of the will is in controversy,** and it has been admitted to probate without notice to the heirs and upon insufficient testimony, a sale of the decedent's real estate under a power contained in the alleged will may be restrained. Galbreath v. Everett, 84 N. C. 546.

[e] **Provision conferring express power.**—An express power of sale was held to be conferred on the executors by the following clause of the will: "I hereby direct that the place on which I live be sold as soon after my decease as the times will warrant, either publicly or privately, so as to make the best of it. Should it be thought best by my executors to divide it into small lots and sell at public sale, my will is that after the lots are tried at public sale and the amount ascertained, that the whole property be set up together and sale made in the best possible manner." Gray v. Henderson, 71 Pa. 368.

[f] **Object of power must be specified.**—To create a valid power of sale, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created. Wisker v. Rische, 167 Mo. 522, 67 SW 218; Sweeney v. Warren, 127 N. Y. 426, 24 AmSR 468.

[a] **Burden of proof as to power.**—One who asserts a title to real estate based upon a purchase from executors must show that a power of sale was conferred on the executors by the will. Banks v. Johnson, 4 J. J. Marsh. (Ky.) 649.

[b] **Settlement of controversy between heirs.**—Where a testator's will provided that his executors should have full power to sell, etc., and do everything for the benefit of the estate for the period of ten years, and a subsequent settlement of controversies between the heirs provided

[a] **Where validity of alleged will in controversy.**—An injunction against the sale of land is properly granted on motion of the heirs of a decedent, where the land has been advertised under a power contained in an instrument purporting to be a will, which has been admitted to probate without notice to the heirs and upon insufficient testimony, and the validity of which is in controversy. Galbreath v. Everett, 84 N. C. 546.

[b] **Power pending caveat to will.**—Under a statute declaring that all acts done by any executor "according to law," before any revocation of his letters, shall be valid, and providing that, on the court deciding against the probate of a will, the letters testamentary shall be revoked, and the power of the party under the letters shall cease, the power of an executor continues, notwithstanding the actual filing of a caveat to revoke the probate of the will, and a sale by an executor under a power in the will, made before the filing of the caveat, although not ratified until thereafter, is valid, such being an "act done according to law." Pacy v. Cosgrove, 113 Md. 315, 77 A 1114.

[c] **If the legal estate is devised to the executors** merely for the purpose of sale and conveyance, they may make the conveyance in order to fulfill the trust imposed on them, and it is not absolutely necessary that they should qualify fully as executors. Hogan v. Wyman, 2 Or. 302 [appr Brown v. Brown, 7 Or. 285].

Shurtleff, 76 Misc. 615, 137 NYS 249; Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215; Campbell v. Jennings, 22 Misc. 406, 50 NYS 278; Jackson v. Burr, 9 Johns. 104; Frost v. Frost, 4 Edw. 733.

N. C.—Barbee v. Penny, 172 N. C. 653, 90 SE 805; Broadhurst v. Mewborn, 171 N. C. 400, 88 SE 628; Speed v. Perry, 167 N. C. 122, 83 SE 176; Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867; Johnson v. Johnson, 108 N. C. 619, 13 SE 183; Beam v. Jennings, 89 N. C. 451; Floyd v. Herring, 64 N. C. 409; Den v. Proctor, 19 N. C. 439.

Oh.—Matter of Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff on other grounds 68 Oh. St. 58, 67 NE 156, 96 AmSR 648]; Hunt v. Hayes, 19 Oh. Cir. Ct. 151, 10 Oh. Cir. Dec. 388; Pollock v. Pine, 2 Oh. Cir. Ct. 359, 1 Oh. Cir. Dec. 529.

Or.—Jones v. Ross, 82 Or. 706, 162 P 974; Northrop v. Morquam, 16 Or. 173, 18 P 449.

Pa.—Tarrance v. Reuther, 185 Pa. 279, 39 A 956; Brittain's Est., 28 Pa. Super. 144; Sorkin v. Berman, 16 Pa. Dist. 683; Tinney's Est., 6 Pa. Dist. 765; Schroop v. Shaeffer, 2 Pa. Dist. 362; Reel's Pet., 32 Pa. Co. 200; Morgan's Est., 9 Pa. Co. 119; Mulley's Est., 10 Kulp 523; Cobleigh's Est., 8 LackLegN 107 [rev on other grounds 23 Pa. Super. 271].

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

S. C.—Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720; Fitzgerald v. Standish, 102 Tenn. 383, 52 SW 294; Lockhart v. Northington, 1 Sneed 318; Moore v. Bedford, (Ch. A.) 56 SW 1038.

Tex.—Holmes v. Sanders, (Civ. A.) 51 SW 333; Holmes v. Stone, (Civ. A.) 51 SW 518; Rogers v. Jones, 13 Tex. Civ. A. 453, 35 SW 812.

Eng.—Monsell v. Armstrong, L. R. 14 Eq. 423; In re Clay, 16 Ch. D. 3; Forbes v. Peacock, 11 M. & W. 630, 152 Reprint 957; Bentham v. Wiltshire, 4 Madd. 44, 56 Reprint 625.

Can.—Sea v. McLean, 14 Can. S. C. 632.

Ont.—Kennedy v. Suydam, 36 Ont. L. 512, 10 OntWN 150; Re Roberts, 10 Ont. L. 395, 6 OntWR 49; Matter of Booth, 16 Ont. 429.

47. Lucas v. Tucker, 17 Ind. 41; Harris v. Ingalls, 74 N. H. 339, 68 A 34; Webster v. Clarke, 100 Tex. 333, 99 SW 1019, 123 AmSR 813; Clarke v. Webster, (Tex. Civ. A.) 94 SW 1088.

[a] **Transfer under foreign will.**—"The executors had no power to convey the land in Texas, notwithstanding the recording of the will in the deed records, unless regularly probated in this state." Sparkman v. Davenport, (Tex. Civ. A.) 160 SW 410, 414.

48. In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605; Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955; Sparkman v. Davenport, (Tex. Civ. A.) 160 SW 410.

49. Jones v. Lewis, 8 Oh. Dec. (Reprint) 368, 7 CincLBul 211.

50. Mersman v. Worthington, 72 SW 1094, 24 KyL 2115.

51. Gaunt v. Tucker, 18 Ala. 27.

52. Matter of Green, 63 Misc. 638, 639, 118 NYS 747 ("The proceeds of sale have not come into the hands of the executor as a part of the fund under administration. He holds them simply as one who, without warrant, has sold the property of another and is ready to account for its price. An executor can account for proceeds of the sale of lands not devised to him in trust only when he has sold them pursuant to a power of sale contained in the will, and it is not conceivable that the results of a sale for which there is no valid warrant in the will became any part of the fund intrusted to him as executor. The proceeds of a sale which the executor as such had no right to make, and which he has made only in his individual capacity, cannot be the subject of accounting in this court").

53. Bender v. Paulus, 118 App. Div. 23, 105 NYS 240 [aff 197 N. Y. 369, 90 NE 994].

sary that the power to sell should be expressly given in terms by the will, but it may be implied[56] when it is clear that the testator intended that his executor should have such power or the directions of the will are such that a power of sale is necessary in order that they may be properly carried out;[57] but the courts will not put a strained construction upon the language of the will in order

56. U. S.—Meekins v. Branning Mfg. Co., 224 Fed. 202.

Ala.—Hardeman v. Hardeman, 79 S 356.

Ark.—Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601.

Del.—Hilles v. Hilles, (Ch.) 98 A 296; Leeds v. Sparks, 8 Del. Ch. 280, 68 A 239.

Fla.—Jacksonville First Baptist Church v. American Foreign Missions Comrs., 66 Fla. 441, 63 S 826, 827, AnnCas1916D 404 [quot Cyc].

Ky.—Varble v. Collins, 168 Ky. 247, 181 SW 1115, AnnCas1916D 448.

Me.—Bradt v. Hodgdon, 94 Me. 559, 48 A 179

Mo.—Wisker v. Rische, 167 Mo. 522, 67 SW 218.

N. H.—Harris v. Ingalls, 74 N. H. 339, 68 A 34 [cit Cyc].

N. J.—Wright v. Keasbey, (Ch.) 100 A 172; Jones v. Jones, 13 N. J. Eq. 236.

N. Y.—Cahill v. Russell, 140 N. Y. 402, 35 NE 664; Rositzke v. Meyer, 176 App. Div. 193, 162 NYS 613 [app dism 224 N. Y. 543 mem, 120 NE 875 mem]; Boehmcke v. McKeon, 119 App. Div. 30, 103 NYS 930; Salmon v. Salmon, 24 Misc. 416, 53 NYS 648; Matter of Hesdra, 20 NYS 79, 2 Conn. Surr. 514.

N. C.—Broadhurst v. Mewborn, 171 N. C. 400, 88 SE 628; Powell v. Woodcock, 149 N. C. 235, 62 SE 1071; Council v. Averett, 95 N. C. 131; Skinner v. Wood, 76 N. C. 109.

Pa.—Gray v. Henderson, 71 Pa. 368; Morgan's Est., 9 Pa. Co. 119.

S. C.—Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363.

Tenn.—Cowan v. Cowan, (Ch. A.) 53 SW 1101.

Tex.—Nations v. Neighbors, (Civ. A.) 201 SW 691.

Eng.—Gosling v. Carter, 1 Coll. 644, 28 EngCh 644, 63 Reprint 580; Greville v. Browne, 7 H. L. Cas. 689, 11 Reprint 275; Mather v. Norton, 16 Jur. 309; Bench v. Biles, 4 Madd. 187, 56 Reprint 676; Bentham v. Wiltshire, 4 Madd. 44, 56 Reprint 625.

Ont.—Re Eddie, 22 Ont. 556.

"An executor has implied authority to sell the real estate of the testator whenever it appears from the whole purview of the will to have been his intention that it should be sold and the proceeds applied to the purposes to which the executor alone may apply them. As a general rule an executor takes a power of sale by implication only when it is necessary in order to carry out the provisions of the will, and not merely because it would be of advantage to the real estate. Where a testator directs the payment of debts and legacies with the proceeds of real estate, or otherwise manifests an intent that the proceeds of the real estate should be so used, the executor takes a power of sale by implication; but a power of sale is not implied solely from a direction that the executor pay debts and legacies. A power of sale is also implied where real estate is devised to the executor for any purpose which is within the scope of his functions as such, or which require a sale, or where the residue is devised to him after direction to pay debts. But the executor does not take an implied power of sale where land is devised to another after payment of the testator's debts." Jacksonville First Baptist Church v. American Foreign Missions Comrs., 66 Fla. 441, 444, 63 S 826, 827, AnnCas 1916D 404.

57. U. S.—Meekins v. Branning Mfg. Co., 224 Fed. 202.

Ala.—Hardeman v. Hardeman, 79 S 356; Blount v. Moore, 54 Ala. 360.

Ark.—Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601.

Del.—Hilles v. Hilles, (Ch.) 98 A 296; Leeds v. Sparks, 8 Del. Ch. 280, 69 A 239.

D. C.—Rathbone v. Hamilton, 4 App. 475.

Fla. — Jacksonville First Baptist Church v. American Foreign Missions Comrs., 66 Fla. 441, 63 S 826, 827, AnnCas1916D 404 [quot Cyc].

Ida.—Jones v. Broadbent, 21 Ida. 555, 123 P 476.

Ill.—Lash v. Lash, 209 Ill. 595, 70 NE 1049; Poulter v. Poulter, 193 Ill. 641, 61 NE 1056; Stoff v. McGinn, 178 Ill. 46, 52 NE 1048.

Kan.—Niquette v. Green, 81 Kan. 569, 106 P 270.

Ky.—Varble v. Collins, 168 Ky. 247, 181 SW 1115, AnnCas1916D 448; Haggin v. Straus, 148 Ky. 140, 146 SW 391, 50 LRANS 642; Christian Widows', etc., Home v. Harber, 113 SW 818; Smith v. Courtney, 85 SW 1101, 27 KyL 642.

La.—Barrios' Succ., 135 La. 241, 65 S 229; Hart v. Schmidt, 6 La. 167.

Mass.—May v. Brewster, 187 Mass. 524, 73 NE 546; Putnam v. Story, 132 Mass. 205; Chandler v. Rider, 102 Mass. 268; McLaughlin v. Greene, 198 Mass. 153, 83 NE 1112; Going v. Emery, 16 Pick. 107, 26 AmD 645.

N. H.—French v. Lawrence, 76 N. H. 234, 81 A 705; Harris v. Ingalls, 74 N. H. 339, 68 A 34.

N. J.—Cooke v. Woman's Medical College, 82 N. J. Eq. 179, 87 A 131; Weber v. Waldeck, 63 A 495; Cook v. Cook, (Ch.) 47 A 732; Chandler v. Thompson, 62 N. J. Eq. 723, 48 A 583; Haggerty v. Lanterman, 30 N. J. Eq. 37.

N. Y.—O'Donaghue v. Smith, 184 N. Y. 365, 77 NE 621; Corse v. Chapman, 153 N. Y. 466, 47 NE 812 [aff 36 NYS 1124 mem]; Cahill v. Russell, 140 N. Y. 402, 35 NE 664; Rositzke v. Meyer, 176 App. Div. 193, 162 NYS 613 [app dism 224 N. Y. 543 mem, 120 NE 875 mem]; Boehmcke v. McKeon, 119 App. Div. 30, 103 NYS 930; Meehan v. Brennan, 16 App. Div. 395, 45 NYS 57; Van Winkle v. Fowler, 52 Hun 355, 5 NYS 317; In re Fox, 63 Barb. 157; Siefke v. Siefke, 34 Misc. 77, 69 NYS 514; In re Walsh, 144 NYS 442; Williams v. Williams, 152 App. Div. 323, 136 NYS 990 [aff 208 N. Y. 32, 101 NE 853, 46 LRANS 719]; Livingston v. Murray, 39 HowPr 102.

N. C.—Broadhurst v. Mewborn, 171 N. C. 400, 88 SE 628; Roper Lumber Co. v. Swain, 161 N. C. 566, 77 SE 700; Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867; Skinner v. Wood, 76 N. C. 109.

Pa.—Morgan's Est., 9 Pa. Co. 119.

R. I.—In re Mathewson, 12 R. I. 145.

S. C.—Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363.

Tenn.—Coal Creek Consol. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

Tex.—Carlton v. Goebler, 94 Tex. 93, 58 SW 829; Connely v. Putnam, (Civ. A.) 111 SW 164.

Wash.—Fulmer v. Gable, 73 Wash. 684, 132 P 641.

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

Eng.—Doe v. Hughes, 6 Exch. 223, 155 Reprint 523; Carlisle v. Cooke, [1905] 1 Ir. 269; Elton v. Harrison, 2 Swanst. 276, 36 Reprint 621.

"The general rule is that if a sale of the real estate is necessary to carry out the purposes of the testator, the power to make the sale will be given by implication, as otherwise the intention of the testator might be defeated. In those cases it will be presumed that the testator, having in view a duty imposed upon the executors of his will, intended that tney should sell his real estate, and omitted, through mistake or otherwise, to confer express power." Livingston v. Murray, 39 HowPr (N. Y.) 102, 103.

"If a sale of the real estate is necessary to carry out the purposes of the testator, the power to make the sale will be given by implication, as otherwise the intention of the testator might be defeated." Chandler v. Thompson, 62 N. J. Eq. 723, 726, 48 A 583.

"The intention is to be collected from all the parts of the will, and it must be clear; or else the heir at law shall not be disinherited." Oates v. Cooke, 3 Burr. 1684, 1686, 97 Reprint 1046. See also Anthony v. Rees, 2 Cromp. & J. 75, 83, 149 Reprint 31 ("It is clear, that we are bound to look at all the parts of the will, to see whether a provision which may at first appear absolute, be not qualified by some subsequent clause").

"No precise form of words is necessary to the creation of a power; if the intention to confer the power is apparent, to enable the executor to execute the trusts of the will, the power will be implied." Winston v. Jones, 6 Ala. 550, 554 [quot Blount v. Moore, 54 Ala. 360]. To same effect Hardeman v. Hardeman, (Ala.) 79 S 356.

[a] **Illustrations.**—(1) A clause in the will, "I hereby desire that my executor sell," impliedly confers power to sell. Herb v. Walther, 6 Pa. Dist. 687. (2) Where testator devised all his estate in trust for the purpose of continuing his business, it converted all the real and personal property not already invested in the business so as to be available as business capital at the discretion of the trustees, and a power to sell the real estate was therefore necessarily implied. Matter of O'Reilly, 59 Misc. 136, 112 NYS 208. (3) Where a will authorizes the executor to invest, manage, and control the estate according to his best judgment, in order to combine safety and productiveness, the executor is authorized to contract for the sale of unproductive real estate. Sargent v. Sibley, 8 Oh. Dec. (Reprint) 434, 8 CincLBul 6. (4) Where a testator, by his will, gives his executors power to do any and everything with his property that he could have done during his life, the executors have power to execute a deed confirming a deed given by their testator, but lost before registration. Coal Creek Consol. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634. (5) Where a will directs payment of all the testator's just debts and funeral expenses and devises "all the rest, residue, and remainder" of the estate to the executor, in trust, etc., the executor has an implied power of sale for the purpose of paying the debts. Coogan v. Ockershausen, 55 N. Y. Super. 286, 18 NYSt 366. (6) An intent on the part of the testator that his executor should sell the real estate was shown by the following provision of the will: "I give and bequeath all the residue of my estate, both real and personal, of whatever name or nature soever, or wherever said property may be found, to the cause of Christ, for the benefit and promotion of true evangelical piety and religion. And I do order and direct my executor hereafter named and appointed to collect all the above last specified property, as soon as can be done consistently without sacrificing too much by forcing the sale thereof in an improper manner." Going v. Emery, 16 Pick. (Mass.) 107, 26 AmD

to extract such a power from it when the testator's intention to give or the necessity for such a power is not clear.[58] So, the mere fact that a sale would be beneficial to the estate is not sufficient to raise an implied power of sale, where this is not necessary to carry out the provisions of the will.[59] A power of sale is implied where the residue after the payment of debts is devised to the executor,[60] but it is otherwise where such residuary devise is to a person other than the executor,[61] and no power of sale can be implied from the mere fact that the bequests under the will exceed the amount of the testator's personalty.[62] A power of sale is implied where land is devised to the executor for purposes naturally devolving upon him[63] or requiring a sale;[64] and it has been considered that the use of terms applicable to personalty particularly and exclusively indicates that all the property is to be converted into personalty and gives an implied power of sale.[65] A power of sale is not implied solely from a general direction to pay debts,[66] but where a testator directs the payment of debts and legacies with the proceeds of real estate, or otherwise manifests an intent that the proceeds of his real estate should be so used, the executor takes

645. (7) Where a will directs the sale of lands and the division of the proceeds among designated persons, the executor is charged by law with the duty of applying the fund produced by the sale to the payment directed to be made by the will, and is vested by implication of law with the power to sell the land, although not expressly authorized by the will. Lash v. Lash, 209 Ill. 595, 70 NE 1049. (8) Where land was devised to certain children with the direction that the testatrix's father should receive a given amount of money out of the land, a power in the executor to sell the land arises by implication. In re Walsh, 144 NYS 442. (9) Where, under a will, it is the duty of executors to collect outstanding accounts and pay all indebtedness of the estate, they may, if necessary, sell the whole or a part to pay the indebtedness, and convey a good, marketable title upon confirmation of sale by the probate court. Jones v. Broadbent, 21 Ida. 555, 123 P 476. (10) Where less than a month elapsed between the date of the execution of the will and the death of the testatrix, and the inventory disclosed the value of the real estate to be largely in excess of the personal property, and that testatrix more than exhausted her personal property by pecuniary legacies, the presumption arises that testatrix knew the personal property was insufficient to pay the pecuniary legacies provided for in the will. Thissell v. Schillinger, 186 Mass. 180, 71 NE 300. (11) A provision in a will, in relating to certain real estate that "I desire held by my executor until such a time as he deems prudent to sell so as to avoid forced sale, and in order to realize as much as possible out of said real estate, provided the time shall not exceed ten (10) years after my death," grants to the executor power to sell and convey. Niquette v. Green, 81 Kan. 569, 571, 106 P 270. (12) An executor in a will devising real estate to testator's wife for life, and declaring that after her death it shall be sold, and the proceeds equally divided between his children living at that time, has implied power to sell and distribute the proceeds among the children, but no trust is created or required in order to sell. Williams v. Williams, 152 App. Div. 323, 136 NYS 990. (13) A power of sale may be implied, from a power to manage the estate to the best advantage for the benefit of creditors. Carlton v. Goebler, 94 Tex. 93, 58 SW 829.

[b] **Devise of land to be sold for division.** — "The general rule undoubtedly is that, where land is devised to be sold for division among the heirs or devisees, without more, the executor is without power to convey (Council v. Averett, 95 N. C. 131); but the rule yields when a contrary intention appears from the terms of the will, and we are of opinion that the modification of the rule should prevail in the present case. The will disposes of a large real and personal estate, including the land in controversy, and directs very generally a sale of the same for division among the heirs, legatees, etc., chiefly among his four children, and concludes with the provision appointing the executors: 'To all intents and purposes to execute this my last will and testament according to the true intent and meaning of the same and every part and clause thereof.' A clause of this character was held to confer on an executor the power to sell realty in Saunders v. Saunders, 108 N. C. 327, 12 SE 909, and the authority is decisive of the question presented by this exception." Roper Lumber Co. v. Swain, 161 N. C. 566, 567, 77 SE 700.

58. U. S.—Dunlap v. Pyle, 8 F. Cas. No. 4,163, 5 McLean 322.

Ala.—Chandler v. Chandler, 87 Ala. 300, 6 S 153; Williams v. Williams, 49 Ala. 439.

Cal.—Hill v. Den, 54 Cal. 6.

Del.—Hilles v. Hilles, (Ch.) 98 A 296.

D. C.—Marfield v. McMurdy, 25 App. 342.

Fla. — Jacksonville First Baptist Church v. American Foreign Missions Comrs., 66 Fla. 441, 63 S 826, 827, AnnCas1916D 404 [quot Cyc].

Ga.—Rakestraw v. Rakestraw, 70 Ga. 806.

Ill.—Poulter v. Poulter, 193 Ill. 641, 61 NE 1056.

Ind.—Aldred v. Sylvester, 184 Ind. 542, 111 NE 914.

Mass.—Cronan v. Adams, 189 Mass. 190, 75 NE 101.

N. H.—Harris v. Ingalls, 74 N. H. 339, 68 A 34.

N. J.—Campbell v. Cole, 71 N. J. Eq. 327, 64 A 461 [aff 73 N. J. Eq. 384, 67 A 1052]; Chandler v. Thompson, 63 N. J. Eq. 723, 48 A 583; Smalley v. Smalley, 54 N. J. Eq. 591, 35 A 374; Seeger v. Seeger, 21 N. J. Eq. 90.

N. Y.—In re Roe, 119 N. Y. 509, 23 NE 1063; Murdock v. Kelly, 62 App. Div. 562, 71 NYS 152; Cahill v. Brennan, 68 Hun 540, 23 NYS 78.

N. C.—Mewborn v. Moseley, 97 SE 711.

Pa.—Clark v. Riddle, 11 Serg. & R. 311; Waddington's Est., 7 Pa. Dist. 499.

R. I.—Mathewson's Pet., 12 R. I. 145; Potter v. Brown, 11 R. I. 232.

S. C.—McCravey v. Otts, 90 S. C. 447, 74 SE 142.

Tenn.—Alexander v. Wallace, 8 Lea 569.

Tex.—Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181.

Vt.—Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 88 A 898.

Man.—Carruthers v. Carruthers, 21 Man. 781.

[a] **Illustrations.**—Power to sell real estate is not implied from: (1) A provision giving the executors "full and entire control of all my effects." Rakestraw v. Rakestraw, 70 Ga. 806. (2) A discretionary power "to settle my estate as they judge best for the interests of my heirs at law." Skinner v. Wood, 76 N. C. 109. (3) A direction to "manage" and "control" the estate. Blanton v. Mayes, 58 Tex. 422. (4) A direction "to take charge of my entire estate and execute this my last will." Alexander v. Wallace, 8 Lea (Tenn.) 569. (5) A will one clause of which gave an interest in certain lands to the widow "when my executors shall dispose of the same" did not empower executors to sell when another clause expressed a desire that the widow and children should own the lands jointly. McCravey v. Otts, 90 S. C. 447, 74 SE 142. (6) Where a testator by his will had directed as follows: "I hereby authorize and empower my executors to sell all, or any of my estate, real or personal, not herein specifically bequeathed or devised, either at public or private sale, and to execute and deliver good and sufficient deeds for all real estate sold, for the purpose of executing this will," it was held that the executors could not make title in the absence of any necessity to sell the real estate. Eberly v. Koller, 209 Pa. 298, 58 A 558.

59. Chandler v. Thompson, 62 N. J. Eq. 723, 48 A 583; Roe v. Vingut, 117 N. Y. 204, 22 NE 933, 21 AbbN Cas 404; Murdock v. Kelly, 62 App. Div. 562, 71 NYS 152.

60. Campbell v. Cole, 71 N. J. Eq. 327, 64 A 461; Coogan v. Ockershausen, 55 N. Y. Super. 286, 18 NYSt 366; Brown v. Brown, 7 Or. 285; Blatch v. Wilder, 1 Atk. 420, 26 Reprint 267.

61. Matter of Van Vleck, 32 Misc. 419, 66 NYS 727; Dunn v. Keeling, 13 N. C. 283; West of England, etc., Bank v. Murch, 23 Ch. D. 138; Colyer v. Finch, 5 H. L. Cas. 905, 10 Reprint 1159.

62. Cahill v. Brennan, 68 Hun 540, 23 NYS 78.

63. Vaughan v. Farmer, 90 N. C. 607.

64. Stewart v. Hamilton, 37 Hun (N. Y.) 19.

65. Cook v. Cook, (N. J.) 47 A 732 (so holding where testator devised all his property of whatever kind to executors in trust "to hold and invest" as might seem best, and certain amounts "to be paid from time to time" to beneficiaries).

66. Cal.—Huse v. Den, 85 Cal. 390, 24 P 790, 20 AmSR 232; Hill v. Den, 54 Cal. 6.

Mo.—Owen v. Ellis, 64 Mo. 77.

N. J.—Chandler v. Thompson, 62 N. J. Eq. 723, 48 A 583.

N. Y.—Matter of O'Brien, 39 App. Div. 321, 56 NYS 925; Matter of Liddle, 35 Misc. 173, 71 NYS 474.

Va.—Leavell v. Smith, 99 Va. 374, 38 SE 202.

[a] **Illustration.**—Where the introduction of a will recited that it was the testator's desire that all just debts and charges of his funeral be paid out of his estate, and declared that he nominated his wife to be executrix and authorized and empowered her to sell and convey any real estate for the purpose of carrying out the provisions of his will, the will did not give her authority to sell real estate for the payment of debts. Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 88 A 898.

a power of sale by implication.[67] A charge of debts on the realty implies, according to the English decisions, a power of sale,[68] but the view prevailing in the United States is that such a charge is not, of itself, sufficient to raise an implied power of sale.[69] A mere direction to distribute or divide an estate consisting in whole or in part of realty is not of itself sufficient to raise an implied power of sale,[70] but it is otherwise where a sale is necessary to effect a distribution, or the testator apparently contemplated that a sale should be made for that purpose;[71] and a fortiori, a will directing that testator's real estate shall be converted into money and that his executor shall distribute his estate among named beneficiaries empowers the executors to sell the real estate.[72] So also, a power of sale is implied where the testator blends the proceeds of real estate into one fund with the personalty for the purpose of distribution or accumulation or even where there is no direction to distribute.[73] A devise to an executor with directions to invest and pay over the income is generally held to give him implied power to sell real estate so devised in order to carry out the will;[74] but it

67. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.

Del.—Leeds v. Sparks, 8 Del. Ch. 280, 68 A 239.

Ind.—Coulter v. Bradley, 163 Ind. 311, 71 NE 903; American Cannel Coal Co. v. Clemmens, 132 Ind. 163, 31 NE 786.

N. J.—Chandler v. Thompson, 62 N. J. Eq. 723, 48 A 583.

N. Y.—Meakings v. Cromwell, 4 N. Y. Super. 512 [aff 5 N. Y. 136]; Matter of Rowley, 38 Misc. 622, 78 NYS 215.

N. C.—Skinner v. Wood, 76 N. C. 109.

Tex.—Carleton v. Hausler, 20 Tex. Civ. A. 275, 49 SW 118.

[a] **Where the will treats the entire estate as personalty,** and directs all gifts to be paid in money, it gives the executors power to sell. Webster v. Morris, 66 Wis. 366, 28 NW 353, 57 AmR 278.

[b] **Expowering executors to execute proper titles to purchasers** is in all respects substantially equivalent to devising the property to the executors for sale for payment of debts. Gordon v. McDougall, 84 Miss. 715, 37 S 298.

68. Bateman v. Bateman, 1 Atk. 421, 26 Reprint 268; Blatch v. Wilder, 1 Atk. 420, 26 Reprint 267; Cook v. Dawson, 29 Beav. 123, 54 Reprint 573, 64 EngCh 100, 45 Reprint 826]; Wrigley v. Sykes, 21 Beav. 337, 52 Reprint 889; Robinson v. Lowater, 17 Beav. 592, 51 Reprint 1165, 4 De G. M. & G. 272, 54 EngCh 215, 43 Reprint 875; Ball v. Harris, 4 Myl. & C. 264, 18 EngCh 264, 41 Reprint 103 [aff 8 Sim. 485, 8 EngCh 485, 59 Reprint 193]. Contra Doe v. Hughes, 6 Exch. 223, 155 Reprint 523.

[a] **Effect of particular devise.**—Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person who can make legal title. Colyer v. Finch, 5 H. L. Cas. 905, 10 Reprint 1159.

69. Ala.—Poole v. Daughdrill, 129 Ala. 208, 30 S 579.

Mo.—Owen v. Ellis, 64 Mo. 77.

N. J.—Snedeker v. Allen, 2 N. J. L. 32.

N. Y.—In re Fox, 52 N. Y. 530, 11 AmR 751 [aff 63 Barb. 157].

Or.—Worley v. Taylor, 21 Or. 589, 28 P 903, 28 AmSR 771.

70. Poulter v. Poulter, 193 Ill. 641, 61 NE 1056; Cronan v. Adams, 189 Mass. 190, 75 NE 101; Chandler v. Thompson, 62 N. J. Eq. 723, 48 A 583; Bijur v. Bijur, 49 Hun 235, 1 NYS 630.

[a] **Thus** authority to sell was not conferred by the following provision: "I give, devise, and bequeath all of my property, both real and personal, to my six children, as follows, that is to say: After the settlement and payment of all my just debts, then the residue of my estate, both real and personal, to be gathered into one general fund and divided into six equal parts, as follows: To my six children [naming them], each of them to receive a one-sixth share, which I give to them and to their heirs." Smalley v. Smalley, 54 N. J. Eq. 591, 592.

[b] **If a division can be effected by actual partition,** a power of sale for the purpose of partition is not implied. Bijur v. Bijur, 49 Hun 235, 1 NYS 630.

71. Ala.—Winston v. Jones, 6 Ala. 550.

Del.—Leeds v. Sparks, 8 Del. Ch. 280, 68 A 239.

Ga.—Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17.

Ill.—Lash v. Lash, 209 Ill. 595, 70 NE 1049; Stoff v. McGinn, 178 Ill. 46, 52 NE 1048.

Ky.—Offutt v. Hall, 87 SW 785, 27 KyL 1072.

Mass.—May v. Brewster, 187 Mass. 524, 73 NE 546; McLaughlin v. Greene, 198 Mass. 153, 83 NE 1112.

Nebr.—In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672.

N. J.—Cook v. Cook, 47 A 732; Varick v. Smith, 67 N. J. Eq. 1, 58 A 168.

N. Y.—O'Donaghue v. Smith, 184 N. Y. 365, 77 NE 621 [aff 85 App. Div. 324, 83 NYS 398]; Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Matter of Newell, 38 Misc. 563, 77 NYS 1116.

N. C.—Roper Lumber Co. v. Swain, 161 N. C. 566, 77 SE 700.

Oh.—Schaupp v. Jones, 12 OhS&CP 197.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017; Cowan v. Cowan, (Ch. A.) 53 SW 1101.

Eng.—Davies v. Jones, 24 Ch. D. 190.

[a] **Illustrations.**—(1) A will directing the executors to "divide" and distribute among testator's heirs and next of kin all the residue of his estate, consisting of both real and personal property, after providing for certain legacies, imposed on the executors the duty to divide and distribute the property, real and personal, and necessarily gave them the power to sell the property for that purpose, charging them with an active trust. McLaughlin v. Greene, 198 Mass. 153, 83 NE 1112. (2) The testator, by his will, gave to his wife a life estate in one-third part of his land, and a fifth part of his estate absolutely. He then recited that he had given to his daughter S certain property in trust which he estimated at one dollar, and provided as follows: "It is my will and desire that after the payment of all my just debts, and allotting to my wife her portion, as hereinbefore directed, to add to the residue of my estate of every description the said sum of one dollar value of property, conveyed in trust for the use of my daughter S, and to divide the sum total after making such addition into seven parts; and I do hereby direct and require my executors, hereinafter named, to distribute and pay over the residue of my estate, both real and personal, in the following manner, to wit: after deducting from one of said seven parts the said sum of one dollar, conveyed for the use of my daughter, S, to pay over to said trustees the residue of said portion, to be held by them in like trust, for her use and benefit of her and her heirs, and to pay to . . . [each of the testator's other six children] one seventh part of the residue of my estate as aforesaid, or to their legal representatives respectively." It was held that the executors were given power by the will to sell the lands of the testator to enable them to make distribution. Winston v. Jones, 6 Ala. 550 ("the terms 'add to' and 'divide into seven parts' necessarily imply that there was some fund, similar in kind, with which the addition could be made, and which, when added to, would be susceptible of division into parts. But how could money be added to land, and the product be divided into equal parts? Again, these parts so obtained are to be paid over to the legatees severally. The use of these terms is quite persuasive that the prevailing idea in the testator's mind was that of a sum of money which might be added to, divided, and paid over"). (3) Where after bequeathing a pecuniary legacy, and directing its investment, a testator provided as follows: "I will and bequeath all the remainder of any property in lands, . . . together with chattels, stock, shares, furniture and personal effects, to my brothers and sisters, or their representatives in equal shares," and after naming the beneficiaries and indicating their shares, appointed two persons who were not beneficiaries under his will "to be my executors, to carry out the intention of this my last will and testament," the executors were given an implied power of sale over the real estate. Carlisle v. Cooke, [1905] 1 Ir. 269.

[b] **A will devising land to be sold for division** among the devisees, and appointing executors to execute it according to its true intent and meaning, authorized the executor to sell the land. Roper Lumber Co. v. Swain, 161 N. C. 566, 77 SE 700.

[c] **Sale to prevent loss.**—A will conferring power on the executor to sell the property of the estate in case it cannot be divided in kind authorizes a sale of land which would lose in value if thus divided. Offutt v. Hall, 87 SW 785, 27 KyL 1072.

[d] **Failure of the executor to exercise the power** does not divest devisees of title to the land. Boland v. Tiernay, 118 Iowa 59, 91 NW 836.

72. Haggin v. Straus, 148 Ky. 140, 146 SW 391, 50 LRANS 642; In re Dauler, 230 Pa. 204, 79 A 498.

73. Ala.—Winston v. Jones, 6 Ala. 550.

Ill.—Poulter v. Poulter, 193 Ill. 641, 61 NE 1056.

Me.—Putnam Free School v. Fisher, 30 Me. 523.

N. J.—Belcher v. Belcher, 38 N. J. Eq. 126.

Pa.—Gray v. Henderson, 71 Pa. 368; Myers' App., 62 Pa. 104.

74. Cook v. Cook, (N. J.) 47 A 732; Belcher v. Belcher, 38 N. J. Eq. 126; Siefke v. Siefke, 34 Misc.

is always a question of the intention of the testator, and if from the general tenor of the will it appears that it was not intended by such direction to give power to the executor to sell, none will be implied.[75] Where there is an express devise of land to persons named in the will, there can be no power of sale in the executor by implication,[76] and even a charge of legacies on land devised beneficially does not give the executor any power of sale.[77] An unexecuted parol agreement to convey land creates against the promisor no debt or liability for the payment of which his executor will have implied power to sell land belonging to the estate.[78]

[§ 638] **(c) Construction of Power.** A court of probate jurisdiction may construe a power of sale given to an executor.[79] The law of the testator's domicile, rather than the law of the state where the land is located, governs in the construction of such a power,[80] and it should receive a liberal construction in order to effect the true purpose and intent of the testator.[81]

[§ 639] **(d) Extent of Power; Purpose of Sale.** It is usually considered that, where executors are given a general power of sale, they may sell at their discretion, as prudence may dictate, during the continuance of the trust, and are not limited to a sale for purposes of administration,[82] although they must not act arbitrarily or capriciously in

77, 69 NYS 514; Salmon v. Salmon, 24 Misc. 416, 53 NYS 648; Livingston v. Murray, 39 HowPr (N. Y.) 102; Powell v. Woodcock, 149 N. C. 235, 62 SE 1071; Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

[a] **Illustrations.**—(1) A power of sale will be implied where a testator has devised all his property, of whatever kind, to executors, in trust "to hold and invest" as might seem best, and certain amounts "to be paid from time to time" to beneficiaries, since the use of terms applicable to personalty particularly and exclusively indicates that all the property is to be converted into personalty. Cook v. Cook, (N. J. Ch.) 47 A 732. (2) An executor, to whom all of the testator's residuary estate is devised, "in trust to receive, hold, invest and reinvest," has by implication power to sell real estate to the end that he may discharge the trust. Powell v. Wood, 149 N. C. 235, 62 SE 1071.

75. Cruikshank v. Parker, 51 N. J. Eq. 21, 26 A 925 [rev on other grounds 52 N. J. Eq. 310, 29 A 685].

[a] **Illustrations.**—(1) A testator devised to his executors all the residue of his estate real and personal with power to sell, and directed them to divide it into four shares, three of which they were to pay over to three of the testator's children named in the will. The fourth share the executors were directed to "hold, retain, invest, and keep invested" for the testator's other child, Mrs. Paret, and to "collect and receive and pay or apply the rents, interest, and income arising therefrom" to her use for life. By the second codicil to the will the executors were directed to deduct from such fourth share the amount of the indebtedness to the testator of the beneficiary's husband, and the residue of such share was directed to be "held and invested and kept invested" for her by the executors, "who shall collect and pay or apply the interest and income thereof" to her use during her life. It was held that the direction to "invest and keep invested" the share of the fourth child did not authorize the executors to sell that part of the real estate which had been set apart as her share, but that it applied only to so much of that share as consisted of personalty. Cruikshank v. Parker, 51 N. J. Eq. 21, 26 A 925 [rev on other grounds 52 N. J. Eq. 310, 29 A 685]. (2) A direction to the executors to invest two thirds of the testator's estate, and to use the interest and so much of the principal as might be necessary for the education and maintenance of the testator's children, did not give the executors power by implication to sell the real estate. Seeger v. Seeger, 21 N. J. Eq. 90.

76. Jacksonville First Baptist Church v. American Foreign Missions Comrs., 66 Fla. 441, 63 S 826, AnnCas1916D 404; Gammon v. Gammon, 153 Ill. 41, 38 NE 890; Harris v. Ingalls, 74 N. H. 339, 68 A 34; Carruthers v. Carruthers, 21 Man. 781.

"The further provision that the executors shall have power to delay and postpone the payment of the share or shares of his children cannot, in my mind, be construed as a power conferred upon his executors to sell the residuary estate which he specifically devises to his children." Carruthers v. Carruthers, 21 Man. 781, 784.

77. Rambo v. Rumer, 4 Del. Ch. 9; Snedeker v. Allen, 2 N. J. L. 35, Reynolds v. Reynolds, 27 R. I. 520, 63 A 804; In re Rebbeck, 63 L. J. Ch. 596.

78. Masterson v. Stevens, (Tex. Civ. A.) 37 SW 364 [aff in part and rev in part 90 Tex. 417, 39 SW 292, 921].

79. Ogle v. Reynolds, 75 Md. 145, 23 A 137; Re Walton, 20 Man. 686.

80. Crusoe v. Butler, 36 Miss. 150.

81. Offutt v. Hall, 87 SW 785, 27 KyL 1072; Ross v. Barr, 53 SW 658, 21 KyL 974; Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867; Little v. Aikman, 28 U. C. Q. B. 337.

[a] **Illustrations.**—(1) Where testator's will provided that the estate should be divided among his daughters in kind, so far as could be done, but that, if it could not be done, the executor should sell it and divide the proceeds equally, it was the intention of testator that if by dividing the land, or any part of it, in lots, it would lose its value in the judgment of the executor, it should then be sold, and the money divided. Offutt v. Hall, 87 SW 785, 27 KyL 1072. (2) Where the will authorized sale of unremunerative property in the discretion of executor, subject to a provision requiring him to secure consent of the widow, he had power to sell unprofitable land and reinvest proceeds, where she in writing consented thereto. Shannonhouse v. Fleetwood, (N. C.) 100 SE 889.

[b] **Obscurities in other parts of will.**—Where testatrix devised real estate to her husband for life, with remainder to her children, a clause of the will empowering her executor to sell any part or the whole of the real estate, either for payment of debts or for any other purpose of the will, at his discretion, conferred on the executor power to sell the real estate, notwithstanding obscurity in other parts of the will in endeavoring to anticipate possible or probable contingencies, and in urging a sale within a specified time after testatrix's death. Trodgen v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867.

82. Ill.—Wardwell v. McDowell, 31 Ill. 364.

Ky.—Busch v. Rapp, 63 SW 479, 23 KyL 605.

N. J.—Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969.

N. Y.—Rositzke v. Meyer, 176 App. Div. 193, 162 NYS 613 [aff 95 Misc. 356, 159 NYS 464, and app dism 224 N. Y. 543 mem, 120 NE 875 mem]; Wellbrock v. Roddy, 169 App. Div. 251, 154 NYS 830; Lawrence v. Littlefield, 166 App. Div. 664, 152 NYS 130 [rev on other grounds 215 N. Y. 561, 109 NE 611]; Hess v. Hess, 132 App. Div. 749, 117 NYS 555; Walter v. Tomkins, 71 App. Div. 21, 75 NYS 557 [aff 179 N. Y. 555 mem, 71 NE 1141 mem]; Matter of Ryder, 41 App. Div. 247, 58 NYS 635.

Tex.—Tomlinson v. Drought, (Civ. A.) 127 SW 262.

[a] **Testamentary provisions giving general power of sale.**—Walter v. Tomkins, 71 App. Div. 21, 75 NYS 557 [aff 179 N. Y. 555 mem, 71 NE 1141 mem]; McCready v. Metropolitan L. Ins. Co., 83 Hun 526, 32 NYS 489 [aff 148 N. Y. 761 mem, 43 NE 988 mem]; Manier v. Phelps, 15 AbbNCas (N. Y.) 123.

[b] **Where the testator gave his executors "full power** to sell and convey any part or all of my real estate and personal property, and to reinvest the proceeds thereof in such manner as they may think to be for the best interests of my estate," the power was not restricted by implication to sales for investment, but was a general power, and authorized a sale for purposes of distribution as directed by the will. Manier v. Phelps, 15 AbbNCas (N. Y.) 123, 137.

[c] **An executor may sell to pay debts and legacies** where the will empowers him to sell the real estate, but expresses no object for the sale thereof and does not charge the payment of legacies therefrom. Wardwell v. McDowell, 31 Ill. 364.

[d] **Independent executor.**—Where a will declared that it was the wish of testatrix that the court should have no control over the estate except to probate the will and cause the executor to return an inventory, and empowered the executor to gather and collect all the property, collect all the debts, sell and convey any property, etc., he had power, without an order of court, to convey land belonging to the estate in payment for services rendered to him as executor. Baker v. Hamblen, (Tex. Civ. A.) 85 SW 467.

[e] **Sale must be in usual course of administration.**—Clark v. Clark, 172 Ill. 355, 50 NE 101.

[f] **Mere authority as distinguished from direction.**—Where a will authorized the executors to sell realty, but did not absolutely direct a conversion, and the estate was solvent, and there was no necessity to sell realty, an executor's power of sale was limited to the ordinary purposes incident to settling the estate. Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Schenck v. Clyde, 53 Pa. Super. 652, 654 ("It will be observed the will of the testatrix worked no conversion. It contains no absolute direction to sell. It simply invests her executor with power to make a sale of the real estate 'for the payment of my debts or for any other purpose.' The will creates no trust to be carried out by the executor other than the ordinary one imposed upon every executor or administrator to settle the estate according to law. As there were no debts, there was no occasion for any execution of the

the matter.[83] If, however, the power is limited, it can be exercised only under the circumstances, for the purposes, and in the manner provided for or contemplated in the will.[84] Thus, where the executor is given power to sell if necessary for certain purposes, the necessity must appear in order to uphold a sale,[85] but where the power is to sell if, in the opinion of the executor, it is necessary for a particular purpose, the conveyance is conclusive and the necessity need not be shown.[86] Where a will which made no disposition of the personal estate, and had no residuary clause, contained the following provision: "I authorize my executor to sell and convey," certain land "for the purpose of discharging all my debts," the direction did not indicate an intention that the personalty should be relieved from its primary liability for the payment of the debts, and therefore the executor could not sell it to the widow when they both knew that there was more than enough personalty to pay the debts.[87] If the consent of a majority of the persons interested in the estate is required before a power of sale can be exercised, and some are dead, the consent of a majority of the entire original number is still necessary.[88] Where testator directed his "executrix" to sell his property and in subsequent clause appointed his wife executrix, the wife had no power in her individual capacity

power for the purpose of paying them. It is true, the power conferred is without any express limitation of time within which it should be exercised. It must also be agreed that the language quoted defining the purposes for which the power might be lawfully exercised is general. But it does not follow from these facts that the executor named in the will, or a succeeding administrator de bonis non, might, at any indefinite time, after the death of the testatrix, sell and convey the property without any regard to the nature of the power conferred and the purposes for which it should be exercised. The power conferred must necessarily be construed in the light shed by the will on the purpose of the testatrix in conferring it. To the payment of her debts, of course, her property was legally devoted, and she might well empower her executor to sell her real estate for such purpose. Her expression 'or for any other purpose' must be construed in the light of the more specific purpose named. In other words, it would be for the purpose of executing her will. Beyond that he had nothing to do. To undertake to exercise such power for a purpose wholly foreign to any contemplated by the testatrix, according to her will, would be unwarranted").

83. Greme v. Parsons, 149 NYS 577; Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955; Thomas v. Atty.-Gen., 2 Y. & C. Exch. 525, 160 Reprint 504.

84. Colo.—McDermott v. Lindquist, 179 P 147; Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

Ga.—Satterfield v. Tate, 132 Ga. 256, 64 SE 60; McMillan v. Cox, 109 Ga. 42, 34 SE 341.

Ill.—McFarland v. McFarland, 177 Ill. 208, 52 NE 281.

Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Mich.—Petit v. Flint, etc., R. Co., 114 Mich. 362, 72 NW 238.

Nebr.—Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

N. J.—In re Carter, 88 A 1084; Snedeker v. Allen, 2 N. J. L. 32; Ryan v. Dodds, 65 N. J. Eq. 436, 56 A 131; Dougherty v. Connolly, 61 N. J. Eq. 421, 48 A 777.

N. Y.—Allen v. De Witt, 3 N. Y. 276; In re Duffy, 18 NYS 724.

N. C.—Barbee v. Penny, 174 N. C. 571, 94 SE 295.

Oh.—Bailey Co. v. Bradley, 23 Oh. Cir. Ct. N. S. 59.

Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.

Pa.—Kreise v. Cartledge, 262 Pa. 55, 104 A 855; Eberly v. Koller, 209 Pa. 298, 58 A 558; McClane v. McClane, 207 Pa. 465, 56 A 996 [rev 34 PittsbLegJNS 107]; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094; Swift's App., 87 Pa. 502; Allshouse's Est., 23 Pa. Super. 146; Rudy's Est., 19 Pa. Co. 390; Battersby v. Castor, 19 Pa. Co. 108; Adams' Est., 9 Pa. Co. 664; Deierler's Est., 10 Kulp 525.

S. C.—South Carolina R. Co. v. Toomer, 30 S. C. Eq. 270.

Tex.—Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

[a] **Illustration.** — Testator authorized his executors to sell coal underlying a certain farm, to pay the debts and legacies, and further provided that, if the coal was sold, the farm should be appraised, and that the executors (who were his sons), if they chose, might take the farm on paying the other children their proportionate shares, which were charged upon the land. On failure to take the farm, the executors were authorized to sell it, and to distribute the proceeds as provided in the will. He further directed that the estate not specially devised should be divided among his children. Without any sale of the coal, and without any appraisement, the executors executed to a railroad company a right of way through the farm. It was held, that the sale would be enjoined at the suit of the other children, as there was no authority under the will to make a sale for such purpose. McClane v. McClane, 207 Pa. 465, 56 A 996.

[b] **Executor may sell for any of the purposes named.**—Wetherill v. Com., 1 Pa. Cas. 22, 1 A 185.

[c] **What provisions of will govern.**—Where a will provided that a specific piece of realty should be sold to create a fund for the necessities of testator's widow, and to pay a legacy, the realty, if unsold on the death of the widow because such sale was unnecessary, fell into the residue with other unsold property, under a clause of the will directing a sale after the widow's death of all the remaining real estate for certain specified purposes, and was controlled as to the manner of sale and distribution of the proceeds by the provisions of the latter clause. Trask v. Sturges, 170 N. Y. 482, 63 NE 534.

[d] **Injunction against sale.**—Grantees of devisees of land may enjoin the executrix from exercising her power to sell such land for payment of debts of the testator, which are barred by limitation, such debts constituting no claim against the estate, and it being the executrix's duty to set up the bar. Butler v. Johnson, 111 N. Y. 204, 18 NE 643 [aff 41 Hun 206].

[e] **What constitute "claims and demands."**—Testator bequeathed all his property to executors, in trust to accumulate rents and profits until the remarriage or death of the widow, and not to dispose of the same until the happening of either of such events, "except as hereinafter provided." By the second clause he directed payment of all claims and demands on or against his estate, and then a division of rents and profits among his wife and children. By the sixth clause he conferred power on the executors to pay all encumbrances, "claims, and demands" against his estate, to raise money thereon and execute conveyances necessary in their judgment for the best interests of the estate, and to sell at either public or private sale. That the term "claims and demands," as so used, included a liability to repair tenement buildings belonging to the estate in accordance with directions of the tenement house department, and that the executors, therefore, having no available funds to make such repairs, had power to sell the property before the repairs were made by the department, at its expense, for the benefit of the estate. Hess v. Hess, 132 App. Div. 749, 117 NYS 555.

85. Colo.—Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

Ky.—Larue v. Larue, 3 J. J. Marsh. 156.

Md.—Moale v. Cutting, 59 Md. 510.

N. Y.—Marsh v. Consumers' Park Brewing Co., 220 N. Y. 205, 115 NE 513 [rev 162 App. Div. 256, 147 NYS 695]; Roseboom v. Mosher, 2 Den. 61.

Pa.—Eberly v. Koller, 209 Pa. 298, 58 A 558.

[a] **Evidence insufficient to show necessity.**—Lyons v. Shannahan, 64 App. Div. 264, 74 NYS 72.

[b] **Power to sell for purpose of executing will.**—In the absence of any necessity to sell testator's real estate, the executors could not make title under a will declaring, "I hereby authorize and empower my executors to sell all, or any part of my estate, real or personal, not herein specifically bequeathed or devised, either at public or private sale, and to execute and deliver good and sufficient deeds for all real estate sold, for the purpose of executing this will." Eberly v. Koller, 209 Pa. 298, 58 A 558.

[c] **Power to sell for best interest of estate.**—Where a power of sale was given by will to the executrix as such, and embraced only the right to make a sale for the best interests of the estate, it was a mere naked power to carry out the purposes of the will, and could not be used to divest the estates of devisees, unless such exercise was necessary in the execution of such purposes. Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

[d] **The fact that a sale would be to the advantage of the estate** does not warrant the exercise of a power given to be exercised only in case of an imperative necessity. Moale v. Cutting, 59 Md. 510.

[e] **Sale of more land than necessary.**—Where executors empowered by will to sell land for payment of debts sold more than enough to pay all the debts of their testator, they were liable to the heirs therefor, but bona fide purchasers could not be affected. Larue v. Larue, 3 J. J. Marsh. (Ky.) 156.

86. Roseboom v. Mosher, 2 Den. (N. Y.) 61.

87. Sweeney v. Warren, 127 N. Y. 426, 28 NE 413, 24 AmSR 468.

88. Crane v. Bolles, 49 N. J. Eq. 373, 24 A 237.

to sell for her own use.[89]

[§ 640] **(e) Discretionary or Mandatory Power; Compelling Exercise.** The power of sale may be either discretionary or mandatory;[90] that is, the testator may give his executor the power to make a sale but leave it to the discretion of the executor whether the power shall be exercised,[91] or impose upon the executor an absolute duty to sell, leaving him no discretion whatever in the matter.[92] Although an executor who has a discretionary power of sale may go into court for direction and guidance in the matter,[93] unless he does so of his own accord, the courts will not as a rule interpose to control him in an honest exercise of a discretion or a power with regard to the sale of decedent's real estate vested in him by the will;[94] but it would seem that if the circumstances are such that a refusal to sell amounts to an abuse of discretion the court may interfere.[95] In the case of a mandatory direction, it is well settled that if the executor neglects or refuses to sell, the court will compel him to do so at the instance of an interested person.[96]

89. Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.

90. Wisker v. Rische, 167 Mo. 522, 67 SW 218.

91. Ala.—Davis v. Lambert, 82 S 529.

Miss.—Whitfield v. Thompson, 85 Miss. 749, 38 S 113.

N. Y.—Wellbrock v. Roddy, 169 App. Div. 251, 154 NYS 830; Parker v. Beer, 65 App. Div. 598, 72 NYS 955 [aff 173 N. Y. 332, 66 NE 3].

R. I.—Goffe v. Goffe, 37 R. I. 542, 94 A 2, AnnCas1916B 240.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017.

[a] **Illustrations.**—(1) Where a will directs the estate to be sold, "if an equal, valid and satisfactory division thereof, in part or in whole, cannot otherwise be made," the executors are given a discretion as to the necessity of sale, and their judgment is conclusive if exercised in good faith. Bunner v. Storm, 1 Sandf. Ch. (N. Y.) 357. (2) A will devised specified property to testator's children for life, with remainder to the grandchildren. Item twelve directed the executors after two years to sell, if deemed compatible with the interest of the children, all lands on such terms as they think best. The same item directed one half the proceeds of such sales to be paid to the children in cash and the other half, if not consumed in making certain specified payments, to be invested in productive property, and to be held by the children under the limitations and conditions before set forth. Item thirteen provided that the residue of the personalty should be sold, and the proceeds, together with the proceeds of all other property not before disposed of, invested in productive property, to be held as provided by item twelve. Item fifteen declared that the property devised and bequeathed to testator's children, with the exception of a special legacy to each and one half the proceeds of the lands which the executors were by item twelve authorized to sell, was devised and bequeathed to the children for life, with remainder to the grandchildren. That item twelve, when considered in connection with the other provisions of the will, gave the executors discretion to sell the residue lands, but did not require them to make such sale. Whitfield v. Thompson, 85 Miss. 749, 38 S 113.

92. Ill.—Grove v. Willard, 280 Ill. 247, 117 NE 489; Lash v. Lash, 209 Ill. 595, 70 NE 1049.

Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Ky.—Rutherford v. Clark, 4 Bush 27.

Mass.—Thissell v. Schillinger, 186 Mass. 180, 71 NE 300.

N. Y.—Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686; Ayers v. Courvoisier, 101 App. Div. 97, 91 NYS 549; Carpenter v. Bonner, 26 App. Div. 462, 50 NYS 298; Stebbens v. Turner, 55 Misc. 587, 105 NYS 945; Russell v. Hilton, 37 Misc. 642, 76 NYS 233 [mod on other grounds 80 App. Div. 178, 80 NYS 563 (aff 175 N. Y. 525 mem, 67 NE 1089 mem)].

N. C.—Mewborn v. Moseley, 97 SE 711.

Pa.—In re Severns, 211 Pa. 65, 60 A 492; McClane v. McClane, 207 Pa. 465, 56 A 996 [rev 34 PittsbLegJNS 107].

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

[a] **A mandatory duty is imposed** (1) where the testator directed his executors to sell and convert his property into money for division among the legatees, within one year after the decease of his wife. Ross v. Roberts, 2 Hun 90, 4 Thomps. & C. 318 [aff 63 N. Y. 652]. (2) A residuary bequest to executors, "in trust, nevertheless, and I . . . authorize my executors . . . to rent, sell, or dispose of the rest . . . of my said real estate . . . and to place the residue of the money . . . arising from such sale or sales" at interest for the support of minor heirs, creates an imperative power to dispose of the residuary estate. Brown v. Doherty, 185 N. Y. 383, 78 NE 147, 113 AmSR 915 [aff 93 App. Div. 190, 87 NYS 563]. (3) Where testator devised the use of certain of his real estate to his son and his wife for life, to be sold at their death, and the proceeds divided among the son's children, and also provided that in case the son and his wife elected not to reside on the property, or refused to pay taxes or make repairs thereon, the executor was authorized to sell the same and invest the proceeds for the benefit of the son and his wife for life, and after their death to divide the same among the son's children, the will contained a mandatory direction to the executor to sell the property on the refusal of the son and his wife to pay taxes and make repairs thereon. Ayers v. Courvoisier, 101 App. Div. 97, 91 NYS 549.

[b] **Discretion merely as to time and manner of sale.**—Where testator made specific devises of his real estate, and also directed the sale of a portion, and division of the proceeds among named beneficiaries, a subsequent provision of the will appointing executors to dispose of his property "as they think best" merely vested in the executors a discretion as to the time and manner of selling the property he had directed sold. Thompson v. Thompson, 87 SW 790, 27 KyL 949.

[c] **Direction as to proceeds.**—If a will positively directs a sale it is not rendered discretionary by a further direction that the executors shall lay out the proceeds "to the best advantage" for the children. Muldrow v. Fox, 2 Dana (Ky.) 74.

93. Curren's Est., 11 Phila. (Pa.) 59; Hinton v. Cole, 3 Humphr. (Tenn.) 656.

Supervision and guidance of courts generally see supra § 393.

94. Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Md.—Lochary v. Corrigan, 132 Md. 371, 103 A 1006.

N. Y.—Keller v. Ogsbury, 121 N. Y. 362, 24 NE 803.

Pa.—Ludy's Est., 25 Pa. Dist. 345; Bullock's Est., 9 Pa. Dist. 690; Andrews' Est., 6 Pa. Dist. 24, 19 Pa. Co. 617; Castor's Est., 16 Phila. 360; Morris's Est., 16 Phila. 344; Bruner v. Naglee, 7 Phila. 384.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017.

Va.—Dixon v. McCue, 14 Gratt. (55 Va.) 540.

W. Va.—George v. Cooper, 15 W. Va. 666.

"Having had express authority, without the direction of the court or the consent of the beneficiaries or the remaindermen to sell the real estate, the only restraint which the court or the parties in interest could exercise over their right to execute this authority was with respect to the accounting." Weintraub v. Siegel, 133 App. Div. 677, 682, 118 NYS 261 [rev 57 Misc. 246, 109 NYS 215].

[a] **Debts charged on real estate.**—Where the power of sale given to the executor is a discretionary restrictive authority, he cannot be compelled in equity to sell the property for the payment of debts; and resort cannot be had to the surrogate's court to compel a sale. Their remedy is by action to establish their lien. Little Falls Nat. Bank v. King, 53 App. Div. 541, 65 NYS 1010.

95. White v. Crossman, 69 N. J. Eq. 528, 61 A 529; Haight v. Brisbin, 96 N. Y. 132; Wilcox v. Quinby, 20 NYS 5; In re Severns, 211 Pa. 68, 60 A 494; Carey's Est., 9 Kulp (Pa.) 336.

[a] **Fraud or manifest abuse of discretion must appear.**—The exercise of the power will not be interfered with by the courts merely on the ground of unreasonableness, but only for fraud or manifest abuse of discretion. Brown's Est., 20 LancL Rev (Pa.) 244. See also Castor's Est., 16 Phila. (Pa.) 360 (error, mistake, or willful disregard of duty).

96. Green v. Johnson, 4 Bush (Ky.) 164; Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731 [rev 67 App. Div. 628, 74 NYS 1132]; Rositzke v. Meyer, 176 App. Div. 193, 162 NYS 613 [aff 95 Misc. 356, 159 NYS 464, and app dism 224 N. Y. 543 mem, 120 NE 875 mem]; Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686; Matter of Hunter, 3 Redf. Surr. (N. Y.) 175; Mewborn v. Moseley, (N. C.) 97 SE 711; In re Simmon, 254 Pa. 231, 98 A 871; In re Dauler, 230 Pa. 204, 79 A 498; Erie Dime Sav., etc., Co. v. Vincent, 105 Pa. 315; Houck v. Houck, 5 Pa. 273; Marvill's Est., 16 Pa. Dist. 251, 33 Pa. Co. 465; Loughery's Est., 12 Pa. Dist. 386, 28 Pa. Co. 632; Rose's Est., 38 Pa. Co. 267.

[a] **Only when the executors have failed** in their duty will the court interfere to compel the exercise of the power. Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686.

[b] **Time or manner of executing trust.**—(1) While the court will enforce the due execution of a power coupled with a duty or trust, it will not interfere with the discretion of trustees as to the particular time or manner of their bona fide exercise of it. In re O'Connor, 12 Man. 325. (2) So an imperative power in executors to sell the residue of the estate, "as soon as practicable . . . having in mind the interest of all concerned," does not warrant its compulsory ex-

[§ 641] **(f) Control of Courts.**[97] Where a power of sale is given to the executor, he may proceed to sell the realty without recourse to the courts for a license,[98] and it is also held that, where the will gives power to the executor to sell land in case of a deficiency of assets, he must sell under the power and not under the statute authorizing sales by leave of the probate court.[99] But where the will, although empowering the executor to sell, declares that this power is subject to an order of court first being had, the executor cannot convey land without confirmation by the court of his contract of sale.[1] A void sale under order of court cannot be supported as an exercise of a power of sale under the will.[2]

[§ 642] **(g) Powers Incidental to Power of Sale—aa. In General.** Where the title to land, as well as a power of sale, is given to executors, it is held that they can make an agreement to assign a part to the widow for dower, in consideration of her releasing the residue, which, in the absence of collusion, will bind the heirs as well as creditors.[3] And it has been considered that the executor may also, as incidental to the power of sale, create easements, such as the right to use part of the property as a street, when the most advantageous mode of exercising the power is by dividing the property into building lots.[4] But a will authorizing execu-

ercise, although three years have elapsed, although the land could be sold "without difficulty" and although the executors have refused to sell to beneficiaries at the "fair and reasonable value" of the property, the will permitting purchase at the market value at testator's death as valued by the executors. Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686.

[c] **Jurisdiction of orphans' court to hold executor to account.**—Under the act of June 16, 1836, § 19, extending the jurisdiction of the orphans' court to all cases wherein executors may be in any way accountable for their testator's property, the orphans' court has exclusive jurisdiction to hold an executrix to account for the performance of a testator's trust vested in her to sell land. Erie Dime Sav., etc., Co. v. Vincent, 105 Pa. 315.

[d] **Parties to action to compel sale.**—A will gave testator's widow the family residence and one third of his personalty in satisfaction of her dower and thirds. After various other bequests, he provided for conversion and distribution of the residue among his children. The will empowered the executors to manage the estate until such conversion. Another clause provided for the widow's support until the distribution by way of advancement. The widow's executor is not a proper party to a suit to compel the executors to sell the lands and distribute the proceeds. Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686.

97. Compelling exercise of power see supra § 640.

98. Cal.—Ukiah Bank v. Rice, 143 Cal. 265, 76 P 1020, 101 AmSR 118; In re Durham, 49 Cal. 490; In re Delaney, 49 Cal. 76; Larco v. Casaneuava, 30 Cal. 560; Payne v. Payne, 18 Cal. 291.

Del.—In re Security Trust, etc., Deposit Co., 10 Del. Ch. 334, 92 A 244.

Iowa.—Lund v. Riggs, 174 Iowa 79, 156 NW 161.

Kan.—Linn County Bank v. Grisham, 185 P 54.

Ky.—Buckner v. Buckner, 215 SW 420; Betty v. Petrie, 138 Ky. 426, 128 SW 320; Kerr v. Long, 88 SW 1068, 28 KyL 52; E. O. Eshelby Tobacco Co. v. McNamara, 82 SW 620, 26 KyL 889.

Md.—Lochary v. Corrigan, 132 Md. 371, 103 A 1006; Parker v. Leighton, 131 Md. 407, 102 A 552; Brooks v. Bergner, 83 Md. 352, 35 A 98; Magruder v. Peter, 11 Gill & J. 323.

Mass.—Justice v. Soderlund, 225 Mass. 320, 114 NE 623.

Mich.—Chamberlain v. Husel, 178 Mich. 1, 144 NW 549; Battelle v. Parks, 2 Mich. 531.

Mo.—Wisker v. Rische, 167 Mo. 522, 67 SW 218; Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734.

N. M.—Bull v. Bal, 17 N. M. 466, 130 P 251.

N. Y.—Sandford v. Bronx Boro Builders, 175 App. Div. 384, 161 NYS 975.

Oh.—In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605; Wanzer v. Widow, 2 Oh. Dec. (Reprint) 323, 2 WestLMonth 426.

Or.—Jones v. Ross, 82 Or. 706, 162 P 974.

Pa.—In re Mulholland, 224 Pa. 536, 73 A 932, 132 AmSR 791; Sorkin v. Berman, 16 Pa. Dist. 683; Tinney's Est., 6 Pa. Dist. 765; Reel's Pet., 32 Pa. Co. 200.

Tex.—Dean v. Furrh, 58 Tex. Civ. A. 495, 124 SW 431.

"Whenever an executor has a power under a will to sell real estate, no license of any court is necessary to, or can give any additional validity to, any sale and conveyance which he may make. And it is considered a good reason, for refusing such license, that the power already exists." Going v. Emery, 16 Pick. (Mass.) 107, 26 AmD 645.

[a] **An adjudication as to the insufficiency of the personal assets** to meet debts and legacies is not a necessary preliminary to the exercise of a power of sale, conferred by the will, by the executor or an administrator with the will annexed. Bull v. Bal, 17 N. M. 466, 130 P 251.

[b] **Effect of seeking aid of court in other matters.**—When an executor or administrator with power under a will to sell an estate institutes an action asking the aid of the court with reference to any matter connected with the settlement of the estate, he does not by that act turn over to the court exclusive charge of the whole estate, and thus lose all power and control over it; and hence an action for settlement does not prevent an administrator with the will annexed from selling land belonging to the estate under a power conferred by the will. Harding v. Weisiger, 109 SW 890, 33 KyL 170.

[c] **Bond.**—A statute requiring persons licensed by the probate court to give bond before proceeding to make sales of real estate does not apply to an executor who makes a sale of real estate in execution of the power vested in him by the will. Bradt v. Hodgdon, 94 Me. 559, 48 A 179.

[d] **Interposition of claim by third persons.**—The statute with reference to the interposition of claims by third persons to arrest the sale of land by executors or administrators limits the right to cases where the sale is proceeding under an order of court or where proceedings are being taken in court for legal authority to make a sale and does not apply in case of a sale by an executor under power contained in the will. Harwell v. Foster, 102 Ga. 38, 28 SE 967.

[e] **Substituted administrator.**—Although an executor is entitled under a will to exercise a power of sale without judicial approval, a substituted administrator must procure approval. Randall v. Gray, 80 N. J. Eq. 13, 83 A 482.

[f] **In Vermont, on the other hand,** it is held that even though the testator by his last will authorized his executrix to sell his land without the consent of any person or court, that does not authorize her to sell land for the payment of debts without leave of the probate court, for the statutes create a complete system of probate procedure; and, while, under Pub. St. § 2889, the court will, if possible, give effect to the desires of the testator as to what lands shall be sold for debts, that does not deprive it of the custody of the estate, and an executor, if it is necessary to sell lands to pay debts, must do so in accordance with Pub. St. § 2888, declaring that they may be sold by license of the probate court for the payment of debts, for all estates are settled as insolvent estates. Wetmore, etc., Co. v. Bertoli, 87 Vt. 257, 88 A 898.

99. Wisker v. Rische, 167 Mo. 522, 67 SW 218; Matter of Rowley, 38 Misc. 622, 78 NYS 215; Matter of Rosenfield, 5 Dem. Surr. (N. Y.) 251.

[a] **Reason for rule.**—"It would seem to be unjust, unreasonable and improper for the court to permit such a proceeding, as it could benefit no one, and would be burdening the estate with expenses to the injury of those interested. Why should it confer a power with which the executors have already been clothed by the will? If they were to sell under that power, they could bring the proceeds into court, under the provisions of the Code, and they would be distributed as if they were derived from such a sale as the petitioners here seek." Matter of Davids, 5 Dem. Surr. (N. Y.) 14, 16.

1. McDermott v. Lindquist, (Colo.) 179 P 147.

2. Snow v. Bray, (Ala.) 73 S 542.

3. Harrow v. Johnson, 3 Metc. (Ky.) 578.

4. Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; Earle v. New Brunswick, 38 N. J. L. 47; Simmons v. Crisfield, 197 N. Y. 365, 90 NE 956, 26 LRANS 663; Matter of Opening Sixty-seventh St., 60 HowPr (N. Y.) 265.

"The authority given to them to sell it was of a broad and unlimited character, allowing that to be done as their judgment might indicate it to be proper and advantageous to his estate. The property was valuable for the occupancy and use of persons desiring to improve it. It was situated in that part of the city where it was available to be built upon, and it could be sold for that purpose only by providing some means of access to it. If the lots had been conveyed without the advantages of a street in front of them, they would evidently have been of much less value than if that means of approach and enjoyment were provided; a proper sale of property of this description necessarily includes the power to provide some means of ingress and egress to and from it, and that in such a locality can be used as well by the owners as by all other persons passing in the vicinity. In no other way can the proper advantage of this nature of property be acquired or enjoyed by the purchaser." Matter of Sixty-seventh St., 60 HowPr (N. Y.) 265, 270.

[a] **Contrary view.**—In England, under the Lands Clauses Consolidation Act, 1845, an executor or administrator who has no estate or interest in the land, but only a power to sell it, is not empowered to grant an easement over it. In re Barrow-in-Furness, [1903] 1 Ch. 339.

tors to sell and convey the coal underlying certain of the testator's lands, with the usual mining privileges, does not give them power to waive or release the right of surface or lateral support.[5] An unrestricted power of sale does not authorize a confession of judgment.[6]

[§ 643] **bb. Contracts of Sale; Options.** Where the will directs an executor to sell property with discretion as to terms and conditions, he has power to make a contract of sale and to enforce specific performance thereof,[7] and a contract of sale may be enforced against him.[8] But an executor who is empowered to sell cannot give an option on the property.[9]

[§ 644] **cc. Exchanges.** A mere power to sell given to an executor does not authorize him to exchange the land, either in whole or in part, for other land,[10] and consequently a contract of sale by which the executor agrees to accept other land in part payment, at a stipulated price, is void.[11] But where a testator expressly impresses the character of realty upon the proceeds of sale of his real estate during the existence of a life estate given by the will, and expressly confers power upon his executor to sell his real estate and with the proceeds purchase other real estate and to continue the transfer and disposition thereof in his discretion, this power authorizes a direct exchange.[12]

[§ 645] **(h) Revocation or Termination of Power.** A power of sale is not revoked by a subsequent contract made by the testator to sell the land,[13] by a codicil substituting other executors for those named in the will,[14] by a final order settling the estate and discharging the executor,[15] by the subsequent birth of issue not provided for by the will,[16] or by the remarriage of the widow and executrix.[17] Neither does the death of the sole beneficiary under a will, before the executor has sold property of the estate to pay the debts, as directed by the will, deprive the executor of that power.[18] Where a will directed a sale of all the real and personal estate of testatrix by the administrator for the benefit of a devisee, a further provision directing the interest and rents of the property to be used for the maintenance and education of the devisee did not abrogate the direction to the administrator to sell, since by the word "rents" the testatrix meant that, so long as the real estate remained unsold, the income arising therefrom, as well as the interest from the proceeds of the personal estate, should be applied to the support and education of the devisee.[19] But if a sale is directed for a specified purpose, the power to sell terminates with the purpose for which it was created;[20] and where the testator directs realty to be sold by his executor and the proceeds divided, the power becomes inoperative if the beneficiaries under the will elect to take the property as realty and retain it without conversion.[21] It has been held that a

5. Allshouse's Est., 23 Pa. Super. 146.

6. Rosengarten's Est., 30 Pa. Super. 244.

7. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 80 AmSR 89; Owen v. Riddle, 81 N. J. L. 546, 79 A 886, Ann Cas1912D 45.

[a] **Judgment to be rendered.**—In an action by the executor for specific performance judgment can be entered that defendant specifically perform, and if he refuses to do so that the property be sold by a referee, whose deed to the purchaser will convey all the title to the premises which the executor could have conveyed under the power in the will. Strauss v. Bendheim, 162 N. Y. 469, 56 NE 1007 [rev 44 App Div. 82, 60 NYS 398 (rev 28 Misc. 660, 59 NYS 1054)].

8. Leeds v. Sparks, 8 Del. Ch. 280, 68 A 239; Coles v. Kearney, 8 Oh. Dec. (Reprint) 733, 9 CincLBul 245.

[a] **The fact that the title is encumbered** does not relieve an executor who has power to sell from liability for specific performance of his contract of sale. Jones v. Lewis, 8 Oh. Dec. (Reprint) 268, 7 CincLBul 211.

9. Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867; Moore v. Trainer, 252 Pa. 367, 97 A 462.

[a] **Agreements construed as contracts of sale and not options.**—Agreements for the sale of land providing that title shall be transferred and payment therefor made at a future date, entered into by executors with power to sell, which did not include power to give options, must be construed as contracts and not as options. Moffit v. Fitzer, (Iowa) 141 NW 935.

10. Ky.—Ross v. Barr, 54 SW 658, 21 KyL 974.

N. Y.—Trimboli v. Kinkel, 226 N. Y. 147, 123 NE 205.

Oh.—Taylor v. Galloway, 1 Oh. 232, 13 AmD 605; Fleischman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

Wis.—King v. Whiton, 15 Wis. 684.

Ont.—Confederation Life Assoc. v. Clarkson, 6 Ont. L. 606, 2 OntWR 943.

[a] **A will conferring upon an executor "full power** to sell or dispose of any or all of the above real estate should he think it to the interest of my children to do so, and, should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales," gives to him no power to exchange the real estate for other lands. Confederation Life Assoc. v. Clarkson, 6 Ont. L. 606, 2 OntWR 943.

11. Ross v. Barr, 53 SW 658, 21 KyL 974.

12. Mayer v. McCune, 59 HowPr (N. Y.) 78.

13. Douglass v. Dickson, 45 S. C. L. 417.

14. Bruce v. Goodbar, 104 Tenn. 638, 58 SW 282.

15. Starr v. Willoughby, 218 Ill. 485, 75 NE 1029, 2 LRANS 623 (express power).

16. Woodliff v. Dunlap, 187 Ala. 255, 65 S 936 (the subsequent birth of issue merely imposes on the executor a duty to account to the after-born children for their share of the proceeds of the property).

17. Holman v. Houston Oil Co., (Tex. Civ. A.) 174 SW 886.

18. McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

19. Betty v. Petrie, 138 Ky. 426, 128 SW 320.

20. Mass.—Bates v. Bates, 134 Mass. 110, 45 AmR 305.

N. Y.—Trask v. Sturges, 170 N. Y. 482, 63 NE 534 [rev 56 App. Div. 625, 68 NYS 1149]; Bruner v. Meigs, 64 N. Y. 506; Walter v. Tomkins, 71 App. Div. 21, 75 NYS 557 [aff 179 N. Y. 555 mem, 71 NE 1141 mem]; Harvey v. Brisbin, 50 Hun 376, 3 NYS 676 [aff 143 N. Y. 151, 38 NE 108]; Fraser v. Bowerman, 104 Misc. 260, 171 NYS 835 [aff 174 NYS 903 mem]; Sharpsteen v. Tillou, 3 Cow. 651; Jackson v. Jansen, 6 Johns. 73.

Oh.—Ward v. Barrows, 2 Oh. St. 241, 251.

Pa.—Swift's App., 87 Pa. 502; Slokom v. Knight, 20 LancLRev 9.

W. Va.—Snider v. Snider, 3 W. Va. 200.

"In the construction of these powers, as well as in all the other provisions of the will, the intent of the testator is to be regarded; and whenever it appears that the object for which the power is given has been accomplished, or has become impossible, the power itself ceases to exist." Ward v. Barrows, supra.

[a] **Illustrations.**—(1) Where the will provided for the sale of all the testator's real estate and gave the widow the interest on one third of the proceeds, and the widow renounced the provision of the will and claimed dower, the executor had no right to sell, because the power was given in the expectation that the widow would accept and abide by the provisions made for her in the will, and with the purpose and intent that the land should be sold free from encumbrance and the proceeds of the sale disposed of as directed by the will. Snider v. Snider, 3 W. Va. 200. (2) On the death of the widow, to provide for whose support a power of sale was given to the executor, the purpose and with it the power cease to exist. Fidler v. Lash, 125 Pa. 87. (3) So, too, a power to sell for payment of debts ceases when the debts have been otherwise paid. Sweeney v. Warren, 127 N. Y. 426, 28 NE 413, 24 AmSR 468. To same effect Ward v. Barrows, 2 Oh. St. 241.

[b] **If the purposes have become unattainable,** (1) the power to sell terminates the same as if they had ceased to exist. Bates v. Bates, 134 Mass. 110, 45 AmR 305; Benedict v. Webb, 98 N. Y. 460. (2) And this is so although the purpose was defeated by the voluntary act of the person for whose benefit the power was given. Thus, where land subject to a power of sale is conveyed by the devisee, who was entitled to the entire proceeds in case of a sale, the power is extinguished. Hetzel v. Barber, 69 N. Y. 1.

21. Cal.—In re Loyd, 175 Cal. 699, 167 P 157.

Iowa.—Boland v. Tiernay, 118 Iowa 59, 91 NW 836.

N. J.—Cornon v. Coll, 69 N. J. Eq. 694, 60 A 1092.

N. Y.—Trask v. Sturges, 170 N. Y. 482, 63 NE 534 [rev 56 App. Div. 625, 68 NYS 1149]; Brooklyn Trust Co. v. Kernan, 108 Misc. 452, 177 NYS 717 [aff 180 NYS 931 mem].

Pa.—Reeser's Est., 4 Pa. Co. 417.

power to sell with the consent of a designated person terminates on the death of such person without having consented,[22] although it is otherwise where it is apparent that the intention of the testator was merely to require the consent of such person if living, and to continue the power after his death,[23] or that the requirement of such consent was subordinate to the principal purpose and intention of the will.[24] A discretionary power conferred upon executors jointly has been held to terminate with the death of one of them.[25] A power of sale given to an executor virtute officii ceases on the termination of his duties as executor, and cannot afterward be exercised by him, although he continues to act under the will as trustee.[26]

[§ 646] **(i) Effect of Partial Invalidity of Devise in Trust to Sell.** Where real estate is devised to executors in trust to sell and distribute the proceeds among designated beneficiaries, and a share thereof passes to testator's heirs by reason of the invalidity of the devise of that share, the whole property is subject to the exercise of the power of sale, provided a sale is necessary to carry out to the best advantage the valid provisions of the will.[27]

[§ 647] **(2) Who May Exercise Power[28]—(a) In General.** It is axiomatic that, where a testator authorizes or directs his executor to sell his real property, the executor is the proper person to make the sale,[29] although he has not power to sell after

[a] **Necessity for unanimous concurrence; time of election.**—Where a will devised the residue of testator's estate to three persons named, and appointed one of them excutor, with an express power of sale as to all the "real estate herein devised," such power of sale could not be defeated by the election of the devisees to take the subject of the devise in kind, unless all of them concurred, and the election was exercised before sale. Cronan v. Coll, 69 N. J. Eq. 694, 60 A 1092. To same effect Matter of Fagan, 166 App. Div. 214, 151 NYS 701 [mod 86 Misc. 144, 149 NYS 217]; Brooklyn Trust Co. v. Kernan, 108 Misc. 452, 177 NYS 717 [aff 180 NYS 931 mem].

22. Gulick v. Griswold, 160 N. Y. 399, 54 NE 780 [aff 14 App. Div. 85, 43 NYS 443].

23. Phillips v. Davies, 92 N. Y. 199.

24. Wisker v. Rische, 167 Mo. 522, 532, 67 SW 218 ("The will required the consent of the son and daughter of the testatrix to the sale. But this was clearly a subordinate requirement and idea to the principal purpose and intention of the will to provide homes for her children, and to pay her debts out of the residue of her property. The primary object and intention of the testatrix should not be allowed to fail because her secondary and subordinate intention had become impossible of fulfillment on account of the death of the son, whose consent to the sale was prescribed. To hold that the son's death, before the sale, had the effect to vitiate and annul the power, would not only pro tanto have the effect of holding that the testator died testate but became intestate thereafter by the subsequent death of her son, so far as the residue of her estate is concerned, but would also defeat the dominant scheme and controlling policy of the whole will. Such a narrow and destructive construction of the will and the power conferred upon the executor, would be contrary to the spirit of our statute, which abolished the fine distinction and subtleties of the common law. [Sec. 45, R. S. 1899]. For, if power given to more than one executor survives to and may be executed by those who remain, after the death of the donees, as this statute provides to be the case, no good reason can be given why the power of consent given by this will to the son and daughter, should not survive to the daughter, after the death of the son").

25. Ex. p. White, 118 Miss. 15, 78 S 949, 951 (where the testator appointed as executrix "his beloved wife, but a woman, who, perhaps, was not familiar with the transaction of business," and his son-in-law "a capable and experienced business man," and the court said: "It is reasonable to suppose that in the exercise of the unlimited power to sell real estate one should act as a check upon the other").

26. Goad v. Montgomery, 119 Cal. 552, 51 P 681, 63 AmSR 145; Boland v. Tiernay, 118 Iowa 59, 91 NW 836; Henson's Est., 12 Pa. Dist. 326, 28 Pa. Co. 671.

27. Bender v. Paulus, 197 N. Y. 369, 90 NE 994 [aff 118 App. Div. 23, 105 NYS 240].

[a] **The heir is only entitled to her share** of the proceeds of the sale in lieu of the invalid portion of the devise as real estate, unchanged by its conversion into money. Bender v. Paulus, 118 App. Div. 23, 105 NYS 240 [aff 197 N. Y. 369, 90 NE 994].

28. Exercise of power by administrator with will annexed see infra § 2779.

Exercise of power by one of two or more coexecutors see infra § 2831.

Who may make sale under order of court see infra §§ 1558–1560.

29. U. S.—Wilson v. Snow, 228 U. S. 217, 33 SCt 487, 57 L. ed. 807 [aff 35 App. (D. C.) 562.

Ga.—Satterfield v. Tate, 132 Ga. 256, 64 SE 60.

Ida.—Jones v. Broadbent, 21 Ida. 555, 123 P 476.

Ky.—Wells v. Lewis, 4 Metc. 269.

Mass.—Pratt v. Rice, 7 Cush. 209.

N. J.—Dolan v. Brown, 81 N. J. Eq. 262, 86 A 935.

N. Y.—Marsh v. Consumers' Brewing Co., 220 N. Y. 205, 115 NE 513.

S. C.—American Bible Soc. v. Noble, 32 S. C. Eq. 156.

Tenn.—Bruce v. Goodbar, 104 Tenn. 638, 58 SW 282.

Tex.—Holman v. Houston Oil Co., (Civ. A.) 152 SW 885.

Eng.—In re Fish, L. R. 13 Ir. 546.

[a] **Where the power is given to two executors,** (1) only one of whom has proved the will or remains in office, such executor can exercise the power alone. Varble v. Collins, 168 Ky. 247, 181 SW 1115, AnnCas1916D 448; Wells v. Lewis, 4 Metc. (Ky.) 269; Marsh v. Consumers' Brewing Co., 220 N. Y. 205, 115 NE 513; In re Fisher, L. R. 13 Ir. 546. (2) And where two executors named in a will were directed by it to sell a particular parcel of land to an individual named, for a specified sum, and to sell the other estate, if deemed necessary, to pay debts, etc., and both joined in the conveyance of the particular parcel, but afterward one of them alone sold and conveyed other lands of the testator, the purchaser of the last-mentioned land was not precluded from showing that the executor who did not join in the conveyance had refused and neglected to take upon himself the execution of the will, after joining in the first-mentioned conveyance. Roseboom v. Mosher, 2 Den. (N. Y.) 61. (3) At common law where there is a naked power given to coexecutors to sell land, it does not survive to one executor, but where the power is coupled with an interest it will survive. Muldrow v. Fox, 2 Dana (Ky.) 74; Wooldridge v. Watkins, 3 Bibb (Ky.) 349. (4) The power of sale given executors under a will is coupled with an interest and can be exercised by the survivor, where the active duty of managing the property and changing investments was given by the will, which provided that the debts were to be paid and the slaves taken care of and reinvestments made for the benefit of the testator's wife and children. Wilson v. Snow, 228 U. S. 217, 33 SCt 487, 57 L. ed. 807 [aff 35 App. (D. C.) 562]. (5) Where a testator gives his widow the right in conjunction with his other executor to sell the property in fee in case of necessity, the power of sale cannot be exercised by the wife alone, the other executor having died. Dolan v. Brown, 81 N. J. Eq. 262, 86 A 935.

[b] **Substitution of executors.**—(1) Where a will appointed certain persons executors with power to sell the testator's real estate, but a codicil annulled the section of the will in which such persons were appointed executors, and appointed certain other executors, and exonerated them from giving bond, such codicil did not annul the power to sell given the executors by the original will, but its effect was merely to substitute another set of executors with the same powers, duties, and discretion. Bruce v. Goodbar, 104 Tenn. 638, 58 SW 282. (2) So also, where a testator appointed three executors, but by a codicil revoked the appointment of one of them and substituted another person in his place, a power of sale given by the will vested in the two remaining original executors appointed by the will and the executor appointed by the codicil. Pratt v. Rice, 7 Cush. (Mass.) 209.

[c] **Marriage of executrix.**—Where the wife was appointed executrix with another, and the other died, her remarriage did not terminate a power of sale to pay debts of the estate, given by the will. Holman v. Houston Oil Co., (Tex. Civ. A.) 152 SW 885.

[d] **Grant of power personal to executor.**—A will devising real estate to a beneficiary for life, with gift over to her descendants, and empowering the executor to sell the property and hold the avails in place of the real estate, and appointing a son of testatrix executor, confers on the executor a power of sale, which is purely personal and does not survive the executor. Hart v. Shurtleff, 76 Misc. 615, 137 NYS 249.

[e] **The court will not direct a sale by a commissioner** where the will authorizes the executor to sell and there is no charge of insolvency or misconduct against him. American Bible Soc. v. Noble, 32 S. C. Eq. 156.

[f] **Sale through referee.**—There is no authority in law for a court, in compelling the exercise of a power of sale, to direct the sale to be made through a referee, it not having been charged or found that the executor was unfit or without capacity to make it. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731 [rev 67 App. Div. 628, 74 NYS 1132].

[g] **Circumstances not amounting to valid execution of power.**—A power given an executor to sell any such portion of the lands devised as might become necessary for any reason unforeseen by testator, but only with the consent of the devisees, was

his discharge as executor,[30] or where he has renounced the office.[31] It frequently happens, however, that a testator directs or authorizes a sale without expressly declaring by whom it shall be made, and in such case the rule is that the executor will take a power of sale by implication if the will imposes upon him the duty, or he is bound by law, to see to the application of the proceeds,[32] but not otherwise.[33] It has also been held that if the person appointed to sell refuses to perform the trust or dies before he has completed it, the sale should be made by the executor.[34] Where a will directing a sale of realty nominates no executor, there is no implied power of sale in any one, and the only way a sale can legally be made is by an application to the court.[35] The mere fact that a testamentary power might, upon the death of the executor, be exercised by an administrator with the will annexed,[36] does not deprive the court of jurisdiction to appoint a person to execute the power where no such administrator has been appointed.[37] Where testator devised real estate to his wife for life or during widowhood, and after her death or remarriage to his children and the descendants of any deceased child, and appointed the wife executor and trustee for her benefit for life or until remarriage, and provided that on her death or remarriage a son and daughter should be executors and trustees as successors to the wife with power to sell the residue, the wife during widowhood had no power to sell, but the power of sale could only be exercised by the son and daughter acting as executors and trustees on the wife's death or remarriage.[38] Where testatrix devised to her son in trust a certain farm, to be held for seven years for the use of her children, providing, however, that the farm might be sold at any time within such period if a majority of the children should elect, the executor had no power of sale over such real estate at the request of a majority of the children, but they alone could exercise control over the transfer of the title.[39] It has been held that, where a piece of land is devised to be sold for purposes of division among designated beneficiaries, if they are all sui juris and all concur, they may convey it by deed, or a single beneficiary may convey by deed his undivided interest in the property or in the proceeds of its sale.[40]

[§ 648] **(b) Delegation of Power.** An executor cannot delegate a discretionary power to sell land given him by the will,[41] but he may allow his agent or attorney in fact, subject to his supervision

not validly executed by a parol agreement to sell, made when no necessity had arisen, between the executor and a proposed purchaser, consented to by the devisees, and the execution by such devisees, at the direction of the executor, for the purpose of carrying out such parol agreement, of an ordinary warranty deed, without reference to the power. Satterfield v. Tate, 132 Ga. 256, 64 SE 60.

30. Boland v. Tiernay, 118 Iowa 59, 91 NW 836.

31. Travers v. Gustin, 20 Grant Ch. (U. C.) 106 (where the power was given to the executors merely as such and not by name).

32. U. S.—Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Peter v. Beverly, 70 Pet. 532, 9 L. ed. 522.

Ala.—Blount v. Moore, 54 Ala. 360.

Conn.—State v. Hunter, 73 Conn. 435, 47 A 665.

Del.—Security Trust, etc., Deposit Co. v. Ward, 10 Del. Ch. 408, 93 A 385.

D. C.—Griffith v. Stewart, 31 App. 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639]; Rathbone v. Hamilton, 4 App. 475.

Ill.—Lash v. Lash, 209 Ill. 595, 70 NE 1049; Bates v. Woodruff, 123 Ill. 205, 13 NE 845; Rankin v. Rankin, 36 Ill. 293, 87 AmD 205.

Ind.—Davis v. Hoover, 112 Ind. 423, 14 NE 468.

Ky.—Smith v. Courtnay, 85 SW 1101, 27 KyL 642 [cit Marrett v. Babb, 91 Ky. 90, 15 SW 4, 12 KyL 652]; Dean v. Dean, 7 T. B. Mon. 304; McCulloch v. Sanders, 5 KyL 517.

Md.—Baumeister v. Silver, 98 Md. 418, 56 A 825; Ogle v. Reynolds, 75 Md. 145, 23 A 137; Magruder v. Peter, 11 Gill & J. 217; Magruder v. Peter, 4 Gill & J. 323.

Mass.—Hale v. Hale, 137 Mass. 168.

Mich.—Mandlebaum v. McDonell, 29 Mich. 78, 18 AmR 61.

Miss.—Clark v. Hornthal, 47 Miss. 434.

Mo.—Wisker v. Rische, 167 Mo. 522, 67 SW 218.

Nebr.—Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

N. J.—Whitehead v. Wilson, 29 N. J. Eq. 396; Seeger v. Seeger, 21 N. J. Eq. 90; Chambers v. Tulane, 9 N. J. Eq. 146.

N. Y.—Officer v. Board of Home Missions, 47 Hun 352; Dorland v. Dorland, 2 Barb. 63; Meakings v. Cromwell, 4 N. Y. Super. 512 [aff 5 N. Y. 136]; Loring v. Binney, 3 How PrNS 143; Bogert v. Hertell, 4 Hill 492; Davoue v. Fanning, 2 Johns. Ch. 252.

N. C.—Council v. Averett, 95 N. C. 131; Vaughan v. Farmer, 90 N. C. 607; Hester v. Hester, 37 N. C. 330.

Oh.—Martin v. Spurrier, 23 Oh. Cir. Ct. 110.

Pa.—Silverthorn v. McKinster, 12 Pa. 67; Lloyd v. Taylor, 2 Dall. 223, 1 L. ed. 357; Maguire's Est., 10 Pa. Dist. 238.

S. C.—Drayton v. Grimke, 8 S. C. Eq. 392; Schoolbred v. Drayton, 2 S. C. Eq. 246.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017; Queener v. Trew, 6 Heisk. 59; Parker v. Sparkman, 2 Tenn. Cas. 544.

Wis.—Lawrence v. Barber, 116 Wis. 294, 93 NW 30.

Eng.—Blatch v. Wilder, 1 Atk. 420, 26 Reprint 267; Newton v. Bennet, 1 Bro. Ch. 135, 28 Reprint 1035; Carvill v. Carvill, 2 Ch. Rep. 301, 21 Reprint 685; Forbes v. Peacock, 11 M. & W. 630, 637, 152 Reprint 957, 960; Tylden v. Hyde, 2 Sim. & St. 238, 1 EngCh 239, 57 Reprint 337; Elton v. Harrison, 2 Swanst. 276 note a, 36 Reprint 621.

"The object of the power to sell was to raise money for the legacies, which it is, of course, the duty of the executor to discharge; and the will regulates the sale, by declaring it to be at public auction, which it would not have done, if it was intended that the sale should not be made by the constituted agents of the will, but under the directions of this Court. Indeed, taking the whole will together, I think it is a very necessary conclusion, that the executors were the persons intended by the testator to execute the power to sell." Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252, 255.

"Where a power is given to sell property for the purpose of either paying debts or legacies, or of converting them into a residuary fund, that power must from its nature belong to the executors. The estate, no doubt, in point of law, descends to the heir at law, subject to the power to sell; but the heir at law is not bound to make any distribution; that is the duty of the executors." Forbes v. Peacock, supra.

33. D. C.—Hamilton v. Clarke, 14 D. C. 428.

N. J.—Lippincott v. Lippincott, 19 N. J. Eq. 121.

N. C.—Broadhurst v. Mewborn, 171 N. C. 400, 88 SE 628; Council v. Averett, 95 N. C. 131.

Tenn.—McElroy v. McElroy, 110 Tenn. 137, 73 SW 105.

Eng.—Bentham v. Wiltshire, 4 Madd. 44, 56 Reprint 625.

[a] **Thus,** where a testator bequeathed an estate to his wife for life, and directed that after her death the estate should be sold to the highest bidder at public auction, and the money arising from such sale be disposed of among certain persons named in his will, and he appointed his wife and another person executors, the power was not given by implication to the executors, because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it. Bentham v. Wiltshire, 4 Madd. 44, 56 Reprint 625.

34. Wisker v. Rische, 167 Mo. 522, 67 SW 218 [foll Wisker v. Spring Ave. R. Co., 167 Mo. 534, 67 SW 1101].

35. Baumeister v. Silver, 98 Md. 418, 56 A 825.

[a] **Chancery has power to appoint and authorize a trustee** to carry out the provisions of a will, and a sale by a trustee appointed by the court to carry out the provisions of a will must be an absolute sale, subject only to the approval of the court. Ross v. Harney, 139 Ill. A. 513.

36. See infra § 2779.

37. Faile v. Crawford, 30 App. Div. 536, 52 NYS 353.

38. Ranhofer v. A. C., etc., Hall Realty Co., 143 App. Div. 237, 128 NYS 230.

39. Porterfield v. Porterfield, 85 Md. 663, 37 A 358.

40. Broadhurst v. Mewborn, 171 N. C. 400, 88 SE 628.

41. Ga.—Neal v. Patten, 47 Ga. 73.

Ky.—Floyd v. Johnson, 2 Litt. 109, 13 AmD 255.

N. Y.—Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Matter of Praetz, 87 Misc. 128, 150 NYS 221; Hart v. Shurtleff, 76 Misc. 615, 137 NYS 249; Berger v. Duff, 4 Johns. Ch. 368.

S. C.—Black v. Erwin, 16 S. C. L. 411.

Tex.—Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54]; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

[a] **Delegation of power to co-executor.**—Where a will authorizes such of the executors "as shall

or approval, to negotiate and make sales,[42] and may ratify a sale made by such agent or attorney.[43]

[§ 649] **(3) What Property May Be Sold.**[44] With reference to what property may be sold by the executor the provisions of the will must govern.[45] If the power given is to sell only certain specified realty, or only a certain part of the realty, the executor cannot sell any of the other realty without an order of court,[46] unless a power

qualify and survive" to sell testator's lands, all who qualify and survive must join in a contract of sale, and one of them cannot delegate to another the power to act for him, at least unless all have jointly agreed on the terms of sale, so that no discretion remains to be exercised, and even then the contract must purport to be that of all. Tarlton v. Gilsey, (N. J.) 37 A 467. But compare Roe v. Smith, 42 Misc. 89, 85 NYS 527 [aff 97 App. Div. 633 mem, 89 NYS 1115 mem] (where two executors were authorized by will to sell the lands of the estate as trustees, a written, unsealed agreement, purporting to be that of such executors, signed by one only of them, who had been authorized by the other executor to act for him in signing the contract, is enforceable).

[b] **An independent executor** cannot delegate his discretionary power with respect to a sale. McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

42. Webster v. Black, 142 Ga. 806, 83 SE 941; Scales v. Chambers, 113 Ga. 920, 39 SE 396; Colsten v. Chaudet, 4 Bush (Ky.) 666; Gates v. Dudgeon, 173 N. Y. 426, 66 NE 116, 93 AmSR 608 [rev 72 App. Div. 562, 76 NYS 561]; Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54]; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

[a] **Illustration.** — An executor with discretionary power to sell land exercised the power where he determined to sell particular land in small tracts, authorized an attorney in fact to negotiate sales and subdivide to suit purchasers, and considered the sales made by such agent to be advantageous to the estate, and assented thereto as they were made, and the facts concerning them were from time to time, as the business progressed, reported to him, although the deeds were executed by the attorney in fact. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

[b] **There seems to be a distinction,** in respect to the authority of an executor to act by an agent or attorney, between a devise of an estate to the executors in trust to sell and a devise merely of a power of sale. In the first case he may act by attorney, while in the other case he may not. May v. Frazee, 4 Litt. (Ky.) 391, 14 AmD 159.

[c] **Independent executors** may lawfully employ agents to negotiate sales of land for them. O'Brien v. Gilleland, 79 Tex. 602, 15 SW 681; Armstrong v. O'Brien, 83 Tex. 635, 19 SW 268; McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

[d] **Execution of written contract of sale.**—Where two executors have orally agreed to a contract for the sale of the land, authority to reduce the agreement to writing and formally sign it may be delegated by one to the other. Roe v. Smith, 42 Misc. 89, 85 NYS 527 [aff 97 App. Div. 633 mem, 89 NYS 1115 mem].

43. Lewis v. Reed, 11 Ind. 239; Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Terrell v. McCown, 91 Tex. 231, 43 SW 2.

44. Sale under order of court see infra §§ 1464–1482.

45. Ala.—Walker v. Murphy, 34 Ala. 591.

Cal.—Etcheborne v. Auzerais, 45 Cal. 121.

Ill.—Grove v. Willard, 280 Ill. 247, 117 NE 489.

Ky.—Nichols v. Nichols, 181 Ky. 814, 205 SW 913.

Mich.—Petit v. Flint, etc., R. Co., 114 Mich. 362, 72 NW 238.

Mo.—Liggat v. Hart, 23 Mo. 127.

Nebr.—Willier v. Cummings, 91 Nebr. 571, 136 NW 559, AnnCas1913D 287.

N. J.—Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450.

N. Y.—Matter of Levy, 41 Misc. 68, 83 NYS 647 [aff 97 App. Div. 630 mem, 89 NYS 1109 mem].

N. C.—Mewborn v. Moseley, 97 SE 711.

Oh.—Bailey Co. v. Bradley, 23 Oh. Cir. Ct. N. S. 59.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017; Cowan v. Cowan, (Ch. A.) 53 SW 1101; Wallace v. Phipps, 1 Tenn. Ch. A. 326.

Tex.—Nations v. Neighbors, (Civ. A.) 201 SW 691; Holmes v. Sanders, (Civ. A.) 51 SW 333.

Va.—Brock v. Philips, 2 Wash. (2 Va.) 68.

W. Va.—Snider v. Snider, 3 W. Va. 200.

B. C.—In re Land Registry Act, 22 B. C. 535.

N. B.—Gilbert v. Gilbert, 42 N. B. 288.

[a] **Will authorizing sale of all property.**—Where a will, after making several specific bequests, directed the executor "to sell the whole of my real, personal, and mixed property," and directed the disposition to be made of the proceeds, it sufficiently appeared on the face of the will that it was intended to cover and provide for the sale of all real property owned by the testator at the time of his death. Liggat v. Hart, 23 Mo. 127.

[b] **Wills authorizing sale of homestead.**—(1) The executors had power to sell the homestead upon the marriage of the widow where the will provided as follows: "I give and devise to my beloved wife . . . the use of my homestead, to consist of four acres, whereon I now reside, as long as she remains my widow. I also give to her one-half of the income of my estate, both real and personal, as long as she remains my widow; but should she marry, she then shall have one-third of the proceeds of my estate, both real and personal, to her own and separate use, and not at the control of her husband. I also give to my said wife . . . such of my household furniture as she brought to me at my marriage, and also such of my household furniture as she may choose. . . . It is my will, and I do hereby authorize my executors to sell and dispose of all my lands, real estate and personal property, not herein disposed of, as soon after my decease as can conveniently be done; also, after the death of my wife, to sell and dispose of the homestead, with the four acres attached, being the same hereinbefore devised to my wife during her widowhood." Huyler v. Kingsland, 11 N. J. Eq. 406, 407. (2) A testamentary provision authorizing the executor, in case the personal estate is insufficient to pay the debts, "to sell so much of my real estate as may be necessary for that purpose," authorizes the executor to sell the homestead, subject to the life estate of the widow. Willier v. Cummings, 91 Nebr. 571, 136 NW 559, AnnCas 1913D 287. (3) Where testator devised his entire estate, real and personal, to his executors in trust for his heirs, and gave them power to sell for the payment of debts, expressing a desire that his homestead should not be sold unless necessary, but that it should be used by his wife and children as a home, the executors had authority to sell the homestead if it should become necessary. Etcheborne v. Auzerais, 45 Cal. 121. (4) Where a testator, after devising a life estate in his home to his wife, directed that all his other real estate be sold, and he did not own any other real estate besides the home place, the clause "all my other real estate" referred to the reversionary interest in the home place, and the testator intended that such interest should be sold by his executors. Wallace v. Phipps, 1 Tenn. Ch. A. 326.

[c] **Will not providing sale of homestead.**—A will providing that testator's wife should have her portion of the homestead, and further provided that the sons should have the use of the rest, and, whenever the interest of the estate required, that a portion should be platted, and so many of the lots sold as were necessary to create a fund sufficient to pay from the income the taxes and expenses of platting, did not authorize a sale of any portion of the homestead where it had not been platted. Petit v. Flint, etc., R. Co., 114 Mich. 362, 72 NW 238.

[d] **Under a provision that the homestead shall not be sold until necessary,** and that it shall be used by wife and children, the executors have authority to sell it if it becomes necessary. Etcheborne v. Auzerais, 45 Cal. 121.

[e] **Land decreed to be sold under mortgage.**—Although a tract of land is decreed to be sold to satisfy a mortgage, the executor of the mortgagor, authorized by the will to sell all the testator's real and personal estate, may sell it for a full and fair price, with the consent of the mortgagee or his attorney. Nelson v. Carrington, 4 Munf. (18 Va.) 332, 6 AmD 519.

46. Ala.—Walker v. Murphy, 34 Ala. 591.

Ill.—Gill v. Grand Tower Min., etc., Co., 92 Ill. 249; Kinney v. Knoebel, 51 Ill. 112.

Ky.—Tarpy v. Lexington, etc., R. Co., 154 Ky. 345, 157 SW 726.

N. Y.—O'Reilly v. Platt, 80 App. Div. 348, 80 NYS 829.

N. C.—Brown v. Beard, 6 N. C. 125.

Pa.—Herb v. Walther, 6 Pa. Dist. 687.

Eng.—Dike v. Ricks, Cro. Car. 335, 79 Reprint 893.

[a] **Illustration.**—Where the will gives power to the executor to sell only lands situate in certain counties to pay the testator's debts, and such lands are insufficient for that purpose, the executor cannot, without an order of court, sell lands in other counties to make up the deficiency. Kinney v. Knoebel, 51 Ill. 112.

[b] **Sale of more than necessary.**—Under a will empowering an executor, if he deemed it necessary, to sell and convey so much of the real estate as might be required to pay the debts, his sale of the whole property for seven hundred dollars, where the debts amounted only to two hundred dollars, was unauthorized. Tarpy v. Lexington, etc., R. Co., 154 Ky. 345, 157 SW 726.

[c] **Where a testator authorized his executors to sell either one of two tracts,** the sale of one exhausted their power and they could not subsequently sell the other. Brown v. Beard, 6 N. C. 125.

[d] **Sale to make up deficiency of personal assets.**—Where the power is to sell all the tenements or so much as with the goods is sufficient to pay debts, etc., there must be a deficiency and a sale can be made only to the extent thereof. Dike v. Ricks, Cro. Car. 335, 79 Reprint 893.

[e] **Power to sell business.**—Where a will provided that testator devised to his executors all his real property in trust, to continue his

of sale in respect thereto can be fairly implied.[47] A power to sell "any" real property has been held to mean "all,"[48] and authority to sell "all and any part" of testator's realty has been construed to mean "all or any part" of the real estate of which testator died seized, and not to require that if any was sold, all should be sold.[49] A general power of sale has been held to authorize a sale of lands expressly devised, where such sale accorded with the testator's apparent intention,[50] but it has also been held that a clause authorizing the executors to sell or rent any property which testator possessed at his death applies only to property not specifically devised.[51] Under a power to sell lands executors cannot convey their testator's rights in land of which he died disseized, even to the disseizor.[52] Where an executor is empowered by the will to sell any portion of the real estate, he is vested with a discretion to determine what property shall be sold.[53] A power to sell and dispose of any of the testator's "securities" does not authorize the executor to sell any land.[54] A power to sell and convey all the testator's real estate at their discretion is sufficient to support a sale by the executors, not only of all the territorial extent of the lands whereof the testator died seized, but also of all his title and interest therein.[55] Where testator authorized his executors in their discretion to sell all of his real estate not specifically devised, except that devised to his wife, no part of which was to be sold without her consent, and also gave to his wife the income of certain buildings for life, or so long as she should remain unmarried, the power of sale was only a power to sell the remainders in the lands devised for life.[56] A widow cannot complain that more land was sold than would have been necessary to pay debts, where if her claims had been allowed in full the proceeds would not have been more than was necessary for this purpose.[57]

[§ 650] **(4) Notice to Heirs.** Where a part of a devise to executors in trust with power to sell was void and such part passed to the heir of the testator, the executor, intending to exercise the power, should notify the heir of his intention so to do.[58]

[§ 651] **(5) Time for Selling.**[59] Where the will contains directions as to the time at which the property shall be sold, such directions should of course be followed,[60] but the executor's power to sell is not ordinarily terminated by his failure

pawnbroking business until his son should arrive at twenty-five years of age, unless the executors should agree that the sale of his business before that time should be of benefit to his estate, when they were authorized to sell the same, and required the executors to collect the rents, profits, and income, and distribute the same according to the provisions of the will, such executors had no power to sell real estate, not a part of the pawnbroking business, before the son arrived at the age of twenty-five years. O'Reilly v. Platt, 80 App. Div. 348, 80 NYS 829.

47. Bates v. Woodruff, 123 Ill. 205, 13 NE 845; Corse v. Chapman, 153 N. Y. 466, 47 NE 812; Dearing v. Selvey, 50 W. Va. 4, 40 SE 478; Gilbert v. Gilbert, 42 N. B. 288.

[a] **After - acquired property.**—Where a testator directs his executor to sell the real estate owned by him at the time he made the will, describing it as "my said home farm," and the disposition of his estate is such that the purposes disclosed by the will cannot be effectuated without a sale of all the real estate of the testator, a power of sale as to after-acquired property is implied, and should be exercised by the executor. Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

48. Thomas v. Thomas, 110 SW 853, 855, 33 KyL 700 ("The express power is given the executors to sell any real or personal property of which the testator died possessed. It is evident that the word 'any' was used in the place of the word 'all' and was meant to include, besides the personal property, all of his real estate except his residence").

49. Fortser v. Winfield, 3 Misc. 435, 23 NYS 169 [rev on other grounds 142 N. Y. 327, 37 NE 111].

50. Butts v. Jammes, 68 Fla. 231, 66 S 1004.

51. Wilkinson v. Chambers, 181 Pa. 437, 37 A 569.

52. Poor v. Robinson, 10 Mass. 131.

53. Sharp v. Loupe, 120 Cal. 89, 52 P 134, 586; Siefke v. Siefke, 34 Misc. 77, 69 NYS 514.

[a] **A sale of one portion to pay debts secured by the other portion** is not an abuse of discretion. Sharp v. Loupe, 120 Cal. 89, 52 P 134, 586.

[b] **Sale of remainder in lands devised for life.**—Where a testator, having agreed with his second wife to pay her daughter three hundred dollars when she became of age or married, devised certain lands to his widow for life, with remainder over to his lawful heirs, and his estate was insolvent, his executors, under a power in the will to sell to pay debts, properly sold the remainder interest in the lands so devised to the widow to her, as guardian of her daughter, in settlement of such three hundred dollar claim. Sneed v. Russell, (Tenn. Ch. A.) 42 SW 213.

54. Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450.

55. Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969 (a sale by the executors under such power will divest the estate of the residuary devisees and of all those claiming under them).

56. Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240].

57. Harding v. Harding, 151 Ky. 398, 152 SW 259.

58. Bender v. Paulus, 197 N. Y. 369, 90 NE 994 [aff 105 NYS 240].

59. Sale under order of court see infra § 1579.

60. Ill.—Lash v. Lash, 209 Ill. 595, 70 NE 1049.

Ky.—Fowler v. Mercer, 170 Ky. 353, 185 SW 1117; Frederick v. Krombach, 170 Ky. 345, 185 SW 1116.

Mo.—In re Branch, 123 Mo. A. 573, 100 SW 516.

N. Y.—Hubbard v. Hubbard, 18 Misc. 276, 41 NYS 1011.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

Pa.—Gehr v. McDowell, 206 Pa. 100, 55 A 851; Herb v. Walther, 6 Pa. Dist. 687; Hanbest v. Grayson, 27 Pa. Co. 548.

S. C.—Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

[a] **Construction of wills.**—(1) Where a will in unequivocal terms gave testator's widow a life estate in certain property, and provided that at her death the property should be sold and the proceeds divided among testator's children in specified proportions, and the concluding sentence provided that the executor should "have the use of the above-described lands for one year free of rent, and is to have one year after my decease to sell the lands, and charge no fee for settling up the estate," the testator's evident intention was to give his widow a life estate, and after her death to give the executor a year's use of the land for compensation, at the expiration of which time he was to sell the same; and as the insertion of the word "wife's" between "my" and "decease" would have made that intention clear, and such word was evidently omitted by mistake, it would be supplied by the court to effectuate the testator's intention. Lash v. Lash, 209 Ill. 595, 70 NE 1049. (2) Where a testator granted to his executor the term of five years in which to sell his estate, "using said time as in the judgment of my executor and the family may be deemed best in the interest of my estate," a sale within five years was discretionary, and thereafter mandatory, and a sale by the executor after five years conveyed good title. Fredericks v. Kerr, 129 Pa. 365, 68 A 835. (3) Where testator provided by his will that his real estate should be sold when the youngest child of his son should come of age, and that if a sale was made during the lifetime of the son, a sum should be set aside for the support of his son, it was held that the sale would be made on the coming of age of the son's youngest child living at the death of the testator. Gehr v. McDowell, 206 Pa. 100, 55 A 851.

[b] **"Not less,"** in a direction that executors shall sell real estate "as soon as practicable, not less than eighteen months" after testator's death, means "within," such intention being apparent from the will as a whole. Hubbard v. Hubbard, 18 Misc. 276, 41 NYS 1011.

[c] **Where a testator devised land to be sold to educate his children,** it may be thence inferred that he intended the sale to be made during their minority. Muldrow v. Fox, 2 Dana (Ky.) 74.

[d] **Execution of deed.**—A power of sale in an executor to be executed within a given time does not necessitate the execution of a deed within that period if the sale itself has been within it, and parol evidence is admissible to show that a deed dated after the expiration of the period is in consummation of a sale made within the period. Harlan v. Brown, 2 Gill (Md.) 475, 41 AmD 436.

[e] **Sale of leased land to tenant.**—Where a will recited that testatrix has rented certain real estate for three years, and directed the executor, in case of her death before the expiration of the lease, to collect

to do so within the time directed by the will,[61] although there are a few cases in which such a power has been held to terminate by such nonexercise.[62] If no time for the sale is fixed by the will, it is discretionary with the executor when he will sell,[63] and while this rule is subject to the limitation that it is his duty to sell within a reasonable time,[64] a long lapse of time since the probate of a will does not constitute any objection to the exercise of a power to sell real estate, if the duty to sell it still exists,[65] although it may, it has been held, enable the heirs or devisees to prevent

the rents, and to give the tenant three months' notice before the expiration of his term, and authorized the executor to sell such property, and in another clause testatrix expressed a wish that her estate might be settled as soon as convenient "after sale has been made of my said property," the executors were entitled to sell the land without terminating the tenant's possession, and hence a sale to the tenant without giving the three months' notice was proper. Hanbest v. Grayson, 206 Pa. 59, 55 A 786.

[f] **Effect of testamentary direction.**—A direction in a will to the executor to sell testator's land "as soon as the same can be done without sacrifice" refers to the time when the land can be sold, and does not lessen his duty when he decides to offer it for sale to employ the degree of diligence characterizing the conduct of a reasonably prudent person in the management of his own affairs, and he takes the proceeds of the sale in his capacity of executor. In re Branch, 123 Mo. A. 573, 100 SW 516.

[g] **Intention of testator governs.**—"The time when a power in trust for the sale of the testator's real estate can legally and properly be executed must, like every other disposition of property by will, depend upon the intention of the testator, to be ascertained upon an examination of everything contained within the four corners of the will, and with reference to the objects the testator had in contemplation by the execution of the power. It is not very strange, therefore, that we should find cases in the books on this subject which are apparently in conflict with each other, until they are analyzed in reference to this principle of carrying into effect the intention of the testator." Edgerton v. Conklin, 25 Wend. (N. Y.) 224, 238.

[h] **Effect of statute.**—A statute providing that real estate not disposed of by executors or administrators within twelve months after the testator's death shall go to the devisees or heirs beneficially entitled, unless the executors or administrators have registered a caution as therein provided, does not apply to sales under a power in a will containing express directions as to the time and manner of conversion. Hewett v. Jermyn, 29 Ont. 383 [foll In re Koch, 25 Ont. 262].

61. Cal.—Kidwell v. Brummagim, 32 Cal. 436.

Mo.—In re Branch, 123 Mo. A. 573, 100 SW 516.

N. J.—Molton v. Sutphin, 66 N. J. Eq. 20, 57 A 974; Brearley v. Molten, 62 N. J. Eq. 345, 50 A 317; Marsh v. Love, 42 N. J. Eq. 112, 6 A 889; Chasmar v. Bucken, 37 N. J. Eq. 415.

N. Y.—Mott v. Ackerman, 92 N. Y. 539; Spitzer v. Spitzer, 38 App. Div. 436, 56 NYS 470. But see infra note 62.

Pa.—Fredericks v. Kerr, 219 Pa. 365, 68 A 835; Shalter's App., 43 Pa. 83, 82 AmD 552; Miller v. Meetch, 8 Pa. 417; Ricker v. Kaetz, 69 Pa. Super. 182; In re Dice, 32 PittsbLeg JNS 242. But see infra note 62.

R. I.—Myers v. Cady, 22 R. I. 549, 48 A 797.

Eng.—Pearce v. Gardner, 10 Hare 287, 44 EngCh 279, 68 Reprint 935; Cuff v. Hall, 1 Jur. N. S. 972.

Ont.—Re Walton, 2 OntWN 428, 17 OntWR 760.

[a] **Illustrations.**—(1) A testamentary clause, whereby testatrix directed that certain real estate should be sold and conveyed by her executrix "within five years from my decease," and the proceeds divided between two beneficiaries, was merely directory in respect to the limit of time for sale, and the executrix retained power of sale after the expiration of the limited period. Molton v. Sutphin, 66 N. J. Eq. 20, 57 A 974. (2) A limitation of the time is inoperative when it is evident that the intention of the testator was that all his property should be converted into money and divided in the manner directed by the will. Waldron v. Schlang, 47 Hun (N. Y.) 252.

[b] **Compelling execution of power.**—If an executor fails to act pursuant to a direction that he shall sell real estate within a certain time, he may be compelled by a court of equity to sell, even after the lapse of such time. Marsh v. Love, 42 N. J. Eq. 112, 6 A 889.

62. Daly v. James, 8 Wheat. (U. S.) 495, 5 L. ed. 670; Richardson v. Sharpe, 29 Barb. (N. Y.) 222; Herb v. Walther, 6 Pa. Dist. 687.

63. Ky.—Busch v. Rapp, 63 SW 479, 23 KyL 605; Muldrow v. Fox, 2 Dana 74.

N. Y.—Haight v. Brisbin, 96 N. Y. 132; Matter of Varet, 181 App. Div. 446, 168 NYS 896 [aff 224 N. Y. 573 mem, 120 NE 862 mem]; Matter of Ryder, 41 App. Div. 247, 58 NYS 635; Carpenter v. Bonner, 26 App. Div. 462, 50 NYS 298; Dorland v. Dorland, 2 Barb. 63.

Pa.—Luken's Est., 10 Pa. Dist. 118; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287].

S. C.—Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

Va.—Wimbish v. Rawlins, 76 Va. 48.

[a] **Discretion not interfered with.**—Where testator devised his real property to his widow and children until his youngest child should reach a certain age, when he directed it to be sold and the proceeds divided, and also authorized the executor, if he should deem it more beneficial to sell before the youngest child reached the age designated, and divide the proceeds, the court would not interfere with the discretion of the executor, where he did not think it proper to make the sale before the time appointed. Greer v. McBeth, 33 S. C. Eq. 254.

[b] **A direction for sale within a year "if possible"** gives the executors a discretion as to the time of sale. Ludy's Est., 25 Pa. Dist. 345.

[c] **A court of equity may order an immediate sale** by an executor, although the direction in the will is that he shall sell the property as soon as convenient after the testator's death, and when in his judgment he shall consider it most advantageous. Mehl v. Hilliker, 20 NYWklyDig 416; In re Severns, 211 Pa. 65, 60 A 492.

64. Ind.—Davis v. Hoover, 112 Ind. 423, 14 NE 468.

N. J.—McCoury v. Leek, 14 N. J. Eq. 70.

N. Y.—In re Weston, 91 N. Y. 502; Walbridge v. Brooklyn Trust Co., 143 App. Div. 502, 128 NYS 686.

Pa.—Erie Dime Sav., etc., Co. v. Vincent, 105 Pa. 315.

S. C.—Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

Ont.—Emes v. Emes, 11 Grant Ch. (U. C.) 325.

"In the exercise of such power of sale, however, the executors necessarily should use reasonable prudence to see that the real estate is not sacrificed, but under pretense of protecting or regulating the estate they cannot continue indefinitely to refuse to sell the real estate and satisfy this legacy, or to wait for some imaginary rise in value of the same." Matter of Levy, 41 Misc. 68, 69, 83 NYS 647 [aff 97 App. Div. 630, 89 NYS 1109 mem].

[a] **What is a reasonable time** within which an executor should execute a direction to convert land to money depends on the circumstances of each particular case. In the absence of special modifying facts, the eighteen months within which an executor must account might be considered a reasonable time. In re Weston, 91 N. Y. 502, 510 ("there is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. Hughes v. Empson, 22 Beav. 181, 52 Reprint 1077; Buxton v. Buxton, 1 Myl. & C. 80, 13 EngCh 80, 40 Reprint 307; Garrett v. Noble, 6 Sim. 504, 9 EngCh 504, 58 Reprint 683; Bate v. Hooper, 5 De G. M. & G. 338, 54 EngCh 269, 43 Reprint 901; Morgan v. Morgan, 14 Beav. 72, 51 Reprint 214; Marsden v. Kent, 5 Ch. D. 598. The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this state, at all events, there is no arbitrary standard").

[b] **The sale should be made as soon as possible without sacrifice** where the direction to sell is imperative, and the executors, offering the land for sale a year after the probate of the will, should sell to the highest bidder, and where they have refused a reasonable price, no allowance will be made for the cost of again offering the property for sale or for after-accruing taxes and insurance. In re Quin, 5 NYS 261, 1 Conn. Surr. 381.

[c] **Liabilities in case of delay.**—Delay on the part of executors to sell lands directed by the will to be sold for the payment of debts will render the executors liable for rents and profits. Emes v. Emes, 11 Grant Ch. (U. C.) 325.

[d] **An executor who is vested with discretion** in the sale of real estate is not liable for delaying the sale longer than necessary where he is guilty of no fraud but only of a mistake of judgment. In re Cunningham, 212 Pa. 451, 61 A 996; In re Cunningham, 212 Pa. 441, 61 A 993.

[e] **Liability for rise in value after sale.**—Executors are not liable for a speculative rise in the value of real estate subsequent to the sale, if they exercised ordinary prudence in selling. Scully's Est., 31 Pittsb LegJNS (Pa.) 307.

[f] **Agreement of all parties interested** may warrant a postponement of the conversion of realty directed to be sold. Harrah's Est., 7 Pa. Dist. 170, 20 Pa. Co. 606.

65. U. S.—Reeve v. North Carolina Land, etc., Co., 141 Fed. 821, 73 CCA 287 [certiorari den 203 U. S. 588, 27 SCt 776, 51 L. ed. 329].

the execution of the power and take possession of the land and dispose of it as they may deem proper, if they consider that course more to their interest than a sale under the will.[66] If the will directs a sale to be made at a future time, or on the happening of a contingency, it is apparent that the power does not exist until the time arrives or the contingency happens, and if a sale is made prior thereto it is void,[67] unless the will gives authority to the executor, at his discretion, to sell at a time other than that named in the will,[68] although some cases have considered that, where the sale was to be made upon the happening of a contingency which was sure to happen, the executor might sell before it actually happened, where the beneficiaries consented.[69] Executors who are directed to sell on the happening of a certain event, are not, however, bound to sell as soon as the event happens, on any terms or for any price that may be offered, but they are to see that the price and terms are rea-

Ill.—Grove v. Willard, 280 Ill. 247, 117 NE 489.

Ky.—Muldrow v. Fox, 2 Dana 74.

Md.—Hoffman v. Hoffman, 66 Md. 568, 8 A 466.

N. J.—Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969.

N. Y.—Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017.

Tex.—McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

But compare Henson's Est., 12 Pa. Dist. 326, 28 Pa. Co. 671 (it is at least doubtful whether a power of sale, given as a mere incident to the office of executor, could be validly exercised seventeen years after the death of the testator, where the estate has been not only presumptively, but actually, fully administered and awarded to the executors as trustees under the will).

[a] **Illustrations.**—(1) Under a general clause in a will authorizing executors to sell real estate to pay testator's debts, but not to sell a certain farm until they could get thirty dollars an acre for it, a sale of such farm after a lapse of five years at a less price will be upheld when necessary to pay testator's debts. Kurtz v. Graybill, 192 Ill. 445, 61 NE 475 [aff 91 Ill. A. 76]. (2) A lapse of twenty-nine years does not defeat the power. Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83.

[b] **Closing of estate.**—An executor, having power under the will to sell and convey any part of the testator's property, had authority to direct the making of a sheriff's deed, to which the testator was entitled, to a third party, who had acquired the equitable title, notwithstanding the remainder of the estate had been closed, where he had not resigned or been discharged. Reeve v. North Carolina Land, etc., Co., 141 Fed. 821, 72 CCA 287 [certiorari den 203 U. S. 588, 27 SCt 776, 51 L. ed. 329].

[c] **The fact that the beneficiary of the estate dies** before the executor has sold the property to pay the debts of the testator, as directed in the will, does not strip him of the power to perform that duty as executor, and force the creditor to resort to proceedings against the estate of such beneficiary. McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

[d] **Until the purpose for which the power was given is accomplished** the power of sale continues, although the settlement of the personal estate has been completed. Hoffman v. Hoffman, 66 Md. 568, 8 A 466.

66. Muldrow v. Fox, 2 Dana (Ky.) 74.

[a] **The statute of limitations may be invoked** by an heir or devisee, or by a purchaser from either, to prevent the sale of the land to pay debts and legacies, when the executor's right to sell is derived from the will alone. Butler v. Johnson, 41 Hun 206 [aff 111 N. Y. 204, 18 NE 643].

67. Ala.—Massey v. Modawell, 73 Ala. 421; Jones v. Morris, 61 Ala. 518.

Mich.—Petit v. Flint, etc., R. Co., 114 Mich. 362, 72 NW 238.

N. J.—Fairly v. Kline, 3 N. J. L. 322, 4 AmD 414; Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450; Ryan v. Dodds, 65 N. J. Eq. 436, 56 A 131; Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969; Hampton v. Nicholson, 23 N. J. Eq. 423; Booraem v. Wells, 19 N. J. Eq. 87; Isham v. Delaware, etc., R. Co., 11 N. J. Eq. 227.

N. Y.—Hetzel v. Barber, 69 N. Y. 1; Ayers v. Courvoisier, 101 App. Div. 97, 91 NYS 549; Matter of McLaughlin, 2 Bradf. Surr. 107.

N. C.—Davis v. Howcott, 21 N. C. 460.

Pa.—Loomis v. McClintock, 10 Watts 274.

S. C.—Jennings v. Teague, 14 S. C. 229.

Va.—Raper v. Sanders, 21 Gratt. (62 Va.) 60; Jackson v. Ligon, 3 Leigh (30 Va.) 161.

Eng.—Mosley v. Hide, 17 Q. B. 91, 79 ECL 91, 117 Reprint 1216; Want v. Stallibrass, L. R. 8 Exch. 175; Coxe v. Day, 13 East 118, 104 Reprint 312; Smith v. Great Northern R. Co., 23 WklyRep 126.

Ont.—Henry v. Simpson, 19 Grant Ch. (U. C.) 522.

"It is a general rule that a power cannot be exercised before the time in which it was the intention of the grantor of the power that it should be exercised. This was the principle assumed by Lord Coke, Co. Litt. 113a; and in Coxe v. Day, 13 East 118, 104 Reprint 312, it was adjudged that when a power of leasing was given to B, to be exercised after the death of A, it could not be exercised during the life of A. 4 Kent's Com. 334. Vide also Blacklow v. Laws, 2 Hare 40, 24 EngCh 40, 67 Reprint 17; Johnstone v. Baber, 8 Beav. 233, 50 Reprint 91, where the power of the court of chancery to decree a sale of real property in anticipation of the time appointed in the instrument creating the trust is expressly denied." Rodman v. Munson, 13 Barb. (N. Y.) 63, 83.

[a] **Illustrations.**—(1) Where testator devised an estate for life in certain property to his widow, with power to sell and appropriate the proceeds to her own use, and devised the residue of his property, including that devised to his wife, to his executor, in trust to sell on the death of the widow, if she should not have sold it in her lifetime, the proceeds to be divided in the manner named, the will created two succeeding powers of sale, one to be exercised by the widow for her own benefit, and the other to be exercised by the executor after the widow's death for the benefit of others, so that the executor could not exercise his powers of sale during the life of the widow for her benefit, even by her consent. Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450. (2) Where a will gave testatrix's husband a life estate in certain land, and directed the land to be sold after the husband's death and the proceeds divided among nine persons, and further gave the executor "full power to do all that is needed to the full execution thereof, to sell and convey, by deed or otherwise, real and personal property; to make all payments, divisions and dispositions herein provided," the power of sale was given merely for purpose of distribution after the husband's death, and did not empower the executor to sell before that time. Ryan v. Dodds, 65 N. J. Eq. 436, 56 A 131.

[b] **A direction not to sell until a named price can be obtained** (1) attached to a general clause in a will authorizing executors to sell real estate is to be construed, not as a limitation upon the authority of the executors, but merely as evidencing a desire on the part of the testator reasonably to conserve the estate to the best advantage. In such case the property should be withheld a reasonable time from sale in the hope of realizing the price fixed, but, if it is not realized within a reasonable period, the sale should take its course under the general provisions of the will. Kurtz v. Graybill, 91 Ill. A. 76 [aff 192 Ill. 445, 61 NE 475] (where a sale at less than the price fixed, after a lapse of five years, was upheld). (2) Where a will directed that certain "ore land shall remain unsold until it shall bring ten thousand dollars," and provided further that "after the death of my wife all my real estate, and the real estate and personal property hereby bequeathed to my said wife, is to be sold," the two clauses, taken together, were construed to mean that the ore land could not be sold during the life of the testator's wife for less than ten thousand dollars, but after her death it should be sold without any limitation. Knaub's Est., 13 YorkLegRec (Pa.) 161.

[c] **An injunction will lie** to prevent a contemplated sale where conditions precedent have not happened. Deierler's Est., 10 Kulp (Pa.) 525; McClane v. McClane, 207 Pa. 465, 56 A 996 [rev 34 PittsbLegJNS 107].

[d] **Judgment of executor as to happening of contingency.**—Where power was given to the executor to sell real property "so soon as the value of property shall recover from the depression caused by the existing war," the executor was the proper judge as to when it should be expedient to sell, and his judgment should not be interfered with if there was no reason for supposing that he did not act in good faith. Jennings v. Teague, 14 S. C. 229.

[e] **Neither the court nor the legislature can authorize** a sale contrary to testator's intent that no sale should be made before the time fixed by him. Ervine's App., 16 Pa. 256, 55 AmD 499; Bristow v. Skirrow, 27 Beav. 590, 54 Reprint 234; Johnstone v. Baber, 8 Beav. 233, 50 Reprint 91; Blacklow v. Laws, 2 Hare 40, 24 EngCh 40, 67 Reprint 17.

68. Hanbest v. Grayson, 206 Pa. 59, 55 A 786 [aff 11 Pa. Dist. 497, 27 Pa. Co. 548]; Greer v. McBeth, 33 S. C. Eq. 254.

69. Snell v. Snell, 38 N. J. Eq. 119; Kilpatrick v. Barron, 125 N. Y. 751, 26 NE 925.

[a] **Illustration.**—A power given to executors to sell at the death of the widow was well executed where the widow, for whose benefit the sale was postponed, joined as one of the executors in the deed, and the fee passed to the purchaser. Gast v. Porter, 13 Pa. 533 (so holding on the ground that the intention of the testator governed the case, and made it an exception to the general rule that a devise to executors to sell on a contingeny cannot be executed until the contingency happens).

sonable, satisfactory, fair, and adequate and that the property is not sacrificed needlessly for some nominal amount.[70] It has been held that the executor should not sell while there is a cloud on the title of the land, which affects its value;[71] and the time for the conversion of property may be extended by the agreement of all persons interested.[72] A conveyance by the executor before probate of the will has been held good where the will was afterward probated.[73] Where an executor is given power to hold and manage realty, or to rent it, or to sell it, he is not required to elect at the outset of his administration which course he will pursue, but, after managing it for a time and renting it for a time, may exercise the power of sale.[74] The power of an executor to sell real estate to distribute the estate cannot be exercised after devisees have conveyed a part of their interests in the estate.[75]

[§ 652] **(6) Manner and Conduct of Sale.**[76] An executor who is given a power of sale by the will has as a rule considerable discretion as to the manner and conduct thereof,[77] but of course any directions given in the will are controlling,[78] and it is sometimes provided by statute that in the absence of directions in the will the sale must be conducted in all respects as if made under order of court.[79] While public auction sales are sometimes insisted on,[80] the more general rule permits a private sale at the discretion of the executor, prudently and honestly exercised.[81] Statutes with respect to appraisement, advertisement, notice, and the like are usually held applicable only to sales under judicial license, and not to those made under a power in the will;[82] and it has been held that a testamentary direction that an appraisal by the executor shall precede the sale of property under a power created by the will does not necessarily make the appraisal a positive prerequisite to the exercise of the power.[83] Notice has been held not essential to the validity of a sale under testamentary authority.[84] A general statute requiring a special bond for the sale of a decedent's realty[85] has been held not to apply to a sale by an executor under power in the will,[86] but it is sometimes expressly required by statute that an executor selling under testamentary power shall give bond.[87] Where the powers conferred by a will included the power to settle, adjust, and compromise all debts owing by the testator, and to make settlement with his former partners and each of them, without authority from any court, and to sell and convey either at public or private sale any or all of the testator's real estate on such terms as to the executors should seem best, a sale made by them under such powers, without giving notice of the time, place, and terms of sale, and without including the value of the real estate in the bond given by them when they qualified, did not render the conveyance invalid.[88] It is within the discretion of the executor at a public sale to bid up the property, in his representative capacity, to the price at which he

70. Hancox v. Meeker, 95 N. Y. 528.

71. In re Ricaud, 57 Cal. 421; Peck v. Peck, 9 Yerg. (Tenn.) 301.

72. Harrah's Est., 7 Pa. Dist. 170, 20 Pa. Co. 606 (in such case the court will not on petition of an assignee of one of the parties direct the public sale of such property in the face of a probable loss of one third of its value).

73. Wilson v. Wilson, 54 Mo. 213.

74. Goddard v. Goddard, 160 Ky. 759, 170 SW 176.

75. Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948.

76. **Sale under order of court** see infra §§ 1578–1583.

77. Colo.—Ingham v. Ryan, 18 Colo. A. 347, 71 P 899.

Ky.—Offutt v. Hall, 87 SW 785, 27 KyL 1072; McCulloch v. Sanders, 12 Ky. Op. 384.

Miss.—Buckingham v. Wesson, 54 Miss. 526; Jelks v. Barrett, 52 Miss. 315.

Mont.—Goodell v. Sanford, 31 Mont. 163, 77 P 522.

N. J.—Hatt v. Rich, 59 N. J. Eq. 492, 45 A 969.

Pa.—Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287].

Va.—Shepherd v. Darling, 120 Va. 586, 91 SE 737.

Wash.—Sharp v. Greene, 22 Wash. 677, 62 P 147.

[a] **The orphans' court has no power to control** the discretion of an executor as to the sale of real estate when it has been honestly and correctly exercised. Andrews' Est., 6 Pa. Dist. 24, 19 Pa. Co. 215.

[b] **The courts will not direct the manner of sale.**—Morehead v. France, 153 Ky. 44, 154 SW 378.

78. Schlicker v. Hemenway, 110 Cal. 579, 42 P 1063, 52 AmSR 116; Napier v. Napier, 89 Ga. 48, 14 SE 870; Gordon v. McDougall, 84 Miss. 715, 37 S 298; Hetzel v. Barber, 69 N. Y. 1; Pendleton v. Fay, 2 Paige (N. Y.) 202.

[a] **What directions govern.**—Where a will provided that a specific piece of realty should be sold to create a fund for the necessities of testator's widow, and to pay a legacy, if unsold on the death of the widow because such sale was unnecessary, the realty fell into the residue with other unsold property, under a clause of the will directing a sale after the widow's death of all the remaining real estate for certain specified purposes, and was controlled as to the manner of sale and distribution of the proceeds by the provisions of the latter clause. Trask v. Sturges, 170 N. Y. 482, 63 NE 534 [rev 56 App. Div. 625, 68 NYS 1149].

[b] **Advisory directions.**—Where the testator, after expressing the wish that his real estate should not be sacrificed by an immediate sale, and that certain timber lands should be held by the executors until the other real estate should be disposed of, "suggested" a mode of proceeding in order that his "wishes and ideas" might be carried out, it was held that the provision in regard to the timber land was advisory only, and that the executors might in their discretion effect a sale, notwithstanding the other real estate was undisposed of. Judevine v. Judevine, 61 Vt. 587, 18 A 778, 5 LRA 517.

79. Jones v. Ross, 82 Or. 706, 162 P 974.

80. Gaines v. New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950; Ashurst v. Ashurst, 13 Ala. 781; Bender v. Bailey, 130 La. 341, 57 S 998.

81. Ga.—Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

Ind.—Munson v. Cole, 98 Ind. 502.

Iowa.—Hunter v. Amish, 164 Iowa 397, 145 NW 877.

Ky.—Buckner v. Buckner, 215 SW 420; Christian Widows', etc., Home v. Harber, 113 SW 818.

Miss.—Buckingham v. Wesson, 54 Miss. 526.

Mo.—In re Branch, 123 Mo. A. 573, 100 SW 516.

Mont.—Goodell v. Sanford, 31 Mont. 163, 77 P 522.

N. M.—Bull v. Bal, 17 N. M. 466, 130 P 251 [quot Cyc].

N. Y.—McDermut v. Lorillard, 1 Edw. 273.

Pa.—Orne's Est., 7 Pa. Dist. 337.

S. C.—Huger v. Huger, 30 S. C. Eq. 217.

[a] **Illustration.**—An executrix, directed by the will of her deceased husband to sell his land as soon as it could be done without sacrifice, who sold it to her son at the highest price she had reason to think could be obtained therefor, without attempting to obtain other bids and without putting it on the market, exercised proper prudence in the management of the estate. In re Branch, 123 Mo. A. 573, 100 SW 516.

[b] **Conveyance of mortgaged property to mortgagee.**—Where executors were empowered by will to sell the real estate of testator, and the estate was insufficient to pay his debts, and the mortgagee threatened to foreclose, and a judgment of deficiency was possible, a conveyance of the mortgaged property to the mortgagee, where only a small part of the price had been paid, was a valid exercise of the power. Clody v. Southard, 57 Misc. 242, 109 NYS 411.

[c] **What law governs.**—Where a will by implication authorizes the sale by the executor of land situated in various states, the manner of sale will depend upon the laws of the states where the respective parcels of land are situated. Harris v. Ingalls, 74 N. H. 339, 68 A 34.

82. Jackson v. Williams, 50 Ga. 553; Munson v. Cole, 98 Ind. 502; McDermut v. Lorillard, 1 Edw. (N. Y.) 273; Huger v. Huger, 30 S. C. Eq. 217.

83. Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83.

84. Bagley v. San Francisco, 19 Cal. A. 255, 125 P 931. Contra Jones v. Ross, 82 Or. 706, 162 P 974 (under statute, where will does not direct manner of sale).

85. See infra § 1562.

86. Bradt v. Hodgdon, 94 Me. 559, 48 A 179; Tenney v. Poor, 14 Gray (Mass.) 500, 77 AmD 340; Alley v. Lawrence, 12 Gray (Mass.) 373.

87. Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345] (bond must be given regardless of whether the land lies within or without the state).

88. Valentine v. Wysor, 123 Ind. 47, 23 NE 1076, 7 LRA 788.

desires to sell.[89]

[§ 653] **(7) Terms and Conditions.**[90] A power of sale given to executors by will can only be exercised by a conveyance to an actual, bona fide, money purchaser,[91] and it is the duty of the executor to realize the best price obtainable.[92] The safer and more prudent course when exercising a power is to sell for cash or its equivalent;[93] but where the will gives the executor power to sell on credit, he may do so at his discretion,[94] and sales with mortgage security on the land itself for deferred payments are sometimes justified, in the exercise of good faith and reasonable prudence.[95] Where testator directs his executor to sell and convey the coal underlying the lands, with the usual mining privileges, the executor cannot be surcharged with money which he could have obtained by conveying the coal by a deed containing a waiver and release of the right of the surface and lateral support.[96] A deed executed by the widow, surviving children, and executors of a deceased partner, conveying decedent's interest in certain real estate held by the partners in common to the surviving partner in consideration of his conveying to decedent's sons shares in the real estate which had been set off to them in the division, was not an exercise of a power of sale contained in decedent's will, authorizing his executors to sell his real estate "either for cash or part on bond and mortgage, as they might deem advisable."[97] A will authorizing the executrix to manage the estate as she should deem best, and to sell any portion or the whole thereof, and to invest the proceeds as she should deem fit, has been held to empower the executrix to convey real property to a trustee, who was to hold for a syndicate which was to plat the same, under the terms of which sale the purchase price secured by a lien on the property was made payable in installments.[98] A sale made during the term of a lease executed by the testator must be subject to the rights of the lessee.[99]

[§ 654] **(8) Confirmation.**[1] It is sometimes required by statute that a sale of realty under testamentary authority shall be confirmed or ratified by the court of probate jurisdiction,[2] but in the absence of such a requirement confirmation by the

89. Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363.

90. **Sale under order of court** see infra §§ 1584–1586.

91. Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303; Schoellkopf Holding Co. v. Kavinoky, 216 N. Y. 507, 111 NE 60.

[a] **Illustration.**—Where the executors under a will giving them power "to sell and convey" if necessary for the payment of debts conveyed the real estate to one of the testator's heirs upon the sole consideration that she would mortgage it to secure money for the use of the executors, and then reconvey to them subject to the mortgage, which was done, this transaction was not a sale and conveyance within the meaning of the will. Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

92. In re Branch, 123 Mo. A. 573, 100 SW 516; Johnson v. Johnson, 72 Mo. A. 386; Fisher v. Skillman, 18 N. J. Eq. 229.

[a] **If a reasonable price is bid** when the property is offered for sale by the executor, he should accept it; otherwise he will not be allowed the cost of again offering the property for sale. Nethercott v. Kelly, 57 N. Y. Super. 27, 5 NYS 259.

93. Ill.—Clark v. Clark, 172 Ill. 355, 50 NE 101.

N. Y.—Adair v. Brimmer, 74 N. Y. 539.

N. C.—McLarty v. Broom, 67 N. C. 311.

Oh.—Taylor v. Galloway, 1 Oh. 232, 13 AmD 605.

Pa.—Shippen v. Clapp, 29 Pa. 265.

Va.—Wayland v. Crank, 79 Va. 602.

[a] **What is a sale for money.**—Where executors made a sale of land, and a part of the consideration money was secured by a judgment of the purchaser against another man, assigned to the executors and guaranteed by the purchaser, the sale was for money and not void. Shippen v. Clapp, 29 Pa. 265.

[b] **Where some special consideration is taken in lieu of money** by the representative on his own responsibility he may make himself individually liable for realizing a full equivalent. Parshal's App., 65 Pa. 224; Mitchell's Est., 1 LegGaz (Pa.) 74.

[c] **Taking judgment against third persons in payment.**—If executors selling real estate under a power in the will accept in payment a judgment against a third person which is guaranteed by the purchaser, and it is lost by the neglect, the purchaser is discharged, and the executors are personally liable. Shippen v. Clapp, 36 Pa. 89.

[d] **Taking shares of stock in payment.**—A power given to executors to sell land does not authorize them to sell the testator's coal lands for the purpose of organizing a mining company and to receive its stock in payment; and if they do so, they are chargeable with the sum for which the lands could have been sold, with interest. Adair v. Brimmer, 74 N. Y. 539.

[e] **Circumstances showing cash consideration merely incidental.**—Where two years after testator died his executrix, who was authorized by the will to sell realty to pay debts, conveyed land by deed, reciting a consideration of one hundred dollars cash and the promise of the grantee to pay "a large amount of back taxes and the taxes of the current year," it was held that the court would assume that most of the taxes accrued in testator's lifetime, so as to be a debt of the estate, and that the cash consideration was merely incidental. Fitzgerald v. Standish, 102 Tenn. 383, 52 SW 294.

94. Jackson v. Williams, 50 Ga. 553.

[a] **Improper security.**—A copartner of the purchaser is not such security for the purchase money as the executor is authorized to take. Southall v. Taylor, 14 Gratt. (55 Va.) 269.

95. Woodrux v. Lounsberry, 40 N. J. Eq. 545, 5 A 99 [aff 42 N. J. Eq. 699, 11 A 113]; Faile v. Crawford, 30 App. Div. 536, 52 NYS 353; McElroy v. Nucleus Assoc., 131 Pa. 393, 18 A 1063. See also Goodell v. Sanford, 31 Mont. 163, 77 P 522 (purchase price payable in installments secured by lien).

[a] **Illustration.**—The will provided that, upon the decease of his wife, the whole estate should be converted into cash, but that the proceeds of all sales made prior to her decease be invested on bond and mortgage, it was held that the testator did not intend to require a sale for money, but to prevent the sale for other property except the equivalent of cash, and that, accordingly, the trustees were authorized to accept a purchase-money mortgage in part payment. Faile v. Crawford, 30 App. Div. 536, 52 NYS 353.

[b] **Construction of will.**—Where testator ordered that his farm should be sold "to the best advantage and highest bidder; one third of the purchase money being secured . . . by bond and mortgage," and the interest payable to his wife for life, and he referred to this money "as secured on the farm for her benefit," and charged it with the payment of her debts and funeral expenses, and gave the balance to his children, the will did not require a first mortgage lien to the amount of the third of the purchase money. Cumberland Trust Co. v. Padgett, 70 N. J. Eq. 349, 354, 61 A 837, 840 ("In this case the mortgage in question was by the terms of the will not to be taken as security for a loan of money, but to secure a part of the price of the land sold. The will ordered that the land should be sold 'to the best advantage and highest bidder.' To secure these characteristics might readily require the purchase-money mortgage to be, not first, but second, because the highest bidder might need to borrow money on first mortgage, in order to pay the highest price for the farm").

[c] **Effect of taking void mortgage.**—Where an executor who sold land under a power in the will took a mortgage to secure payment of the interest to the life tenant and the principal to the remaindermen, and the mortgage proved to be void because of defective execution, the executor was allowed to compel payment of the purchase money to himself. McElroy v. Nucleus Assoc., 131 Pa. 393, 18 A 1063.

96. Allshouse's Est., 23 Pa. Super. 146.

97. Huber v. Case, 93 App. Div. 479, 87 NYS 663.

98. Goodell v. Sanford, 31 Mont. 163, 77 P 522.

99. Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601.

1. **Sale under order of court** see infra §§ 1631–1644.

2. U. S.—Provident Life, etc., Co. v. Mills, 91 Fed. 435.

Cal.—In re Richards, 154 Cal. 478, 98 P 528; Ukiah Bank v. Rice, 143 Cal. 265, 76 P 1020, 101 AmSR 118; Bennallack v. Richards, 125 Cal. 427, 58 P 65, 116 Cal. 405, 48 P 622; In re Durham, 49 Cal. 490.

Ida.—Jones v. Broadbent, 21 Ida. 555, 123 P 476.

Md.—Lochary v. Corrigan, 132 Md. 371, 103 A 1006; Ogle v. Reynolds, 75 Md. 145, 23 A 137; Carter v. Van Bokkelen, 73 Md. 175, 20 A 781.

Mont.—Goodell v. Sanford, 31 Mont. 163, 77 P 522.

court is not necessary,[3] and even a statutory requirement of confirmation has been held not to apply where real estate is devised to the executor in trust for purposes mentioned in the will, and a sale of such real estate directed.[4]

Objections not sufficient to prevent confirmation. As a sale by an executor passes only such interest as the testator had in the property,[5] it is not a ground of objection to a confirmation of the sale that another person has an interest in property;[6] nor, when it is within the discretion of the executor whether he will make a sale under the power, can confirmation be successfully opposed on the ground that the sale is not for the best interest of the estate[7] or of some particular heir.[8]

Limitations on power of court to refuse confirmation. When a proper memorandum of the sale is made, the executors have exercised the power conferred upon them by the will, and the sale, in the absence of fraud or irregularity, is binding upon the estate, subject to confirmation; and the court must confirm it unless the price bid is disproportionate to the value of the property, and it is made to appear that an increased bid of ten per cent can be obtained.[9]

Notice of hearing. It has been held that where the sale was made at public auction, the judge must make an order fixing a day for hearing the report, and the clerk must give notice thereof; and in the absence of such order and notice by the clerk, the court has no power to confirm the sale, and, if it make an order of confirmation, may, on its own motion, set it aside.[10]

Questions considered on application. An administrator cum testamento annexo, applying for approval of his sale of testator's lands, must establish by proof his right to act as such administrator in the state in order to give jurisdiction to the orphans' court,[11] but on such an application the court may not consider or adjudicate upon a claim that the lands descended to testator's heirs at law, or were specifically devised by his will, and were not within the power of sale conferred by the will.[12]

Judgment not amounting to confirmation. Where a residuary legatee sought by petition to have the executors account for the rents and profits of real estate which they had sold to a third person, and the executors answered, and the court after settling their account entered a judgment by which their deeds conveying the real estate were adjudged valid, the judgment was not a confirmation of the sale.[13]

Revocation or correction of ratification. Where the order of ratification of a sale, made and reported by executors under authority conferred by the will, has been procured by an honest mistake, the orphans' court has the power of revocation and correction, provided the application is made within a reasonable time.[14]

Effect of ratification by beneficiaries. Where an executor had authority to sell land for the benefit of certain persons, and purporting to act under the power he did so, but failed to make any return so that there was no confirmation, the beneficiaries having so ratified the sale as to estop them from disputing it, it was held that the court having jurisdiction of the probate proceedings might, because of

Or.—Northrop v. Marquam, 16 Or. 173, 18 P 449.

[a] **Character of sale not affected by statutory requirement of confirmation.**—A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale is confirmed give to it the incidents of a judicial sale. The purchaser deals with the executor in making the purchase as he would with any other vendor, and his rights and liabilities are governed by the rules applicable to such sales generally. The sale is treated as if made under the power; and the purchaser is required to examine the sufficiency of this power, as he is that of any other power under which a sale may be made. Goodell v. Sanford, 31 Mont. 163, 77 P 522 [appr In re Pearsons, 98 Cal. 603, 33 P 451].

[b] **Contract for sale.**—Under a statute, declaring that on a return of a sale by the executors, if it appears that the price is disproportionate and a sum exceeding the bid by ten per cent can be had, the sale may be vacated, where executors acting under a power of sale in the will orally agreed to sell certain property, and received a portion of the purchase money, such contract for sale must be confirmed, unless the price paid was disproportionate, and an increased bid of ten per cent can be obtained. In re Robinson, 142 Cal. 152, 75 P 777.

[c] **A sale under a foreign will** does not need confirmation under the statute. Smith v. Montgomery, 75 Md. 138, 23 A 145.

[d] **A sale by an independent executor** is not within the Washington statute requiring confirmation. Provident Life, etc., Co. v. Mills, 91 Fed. 435.

[e] **Confirmation merely erroneous.**—Where the court having jurisdiction construes a will as authorizing a sale without notice, an order confirming such sale is not void for want of jurisdiction, but at most erroneous, and the title of the purchaser at such sale is good as against one claiming under decedent. Tatum v. Iowa Water Co., 34 Cal. A. 55, 166 P 817.

3. Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Ky.—Haggin v. Straus, 148 Ky. 140, 146 SW 391, 50 LRANS 642. But compare Hamilton v. Hamilton, 51 SW 170, 21 KyL 260 (where the court, without considering whether confirmation was necessary, held that the sale then before it should be confirmed).

Md.—Thompson v. Thomas, etc., Co., 132 Md. 483, 104 A 49.

N. C.—Shute v. Austin, 120 N. C. 440, 27 SE 90.

Pa.—Schwartz's Est., 168 Pa. 204, 31 A 1085; Brittain's Est., 28 Pa. Super. 144.

"A sale under a power in a will need not be confirmed by the court, nor is any order of court necessary to authorize the executor to convey. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will unless the aid of the court is required to supply some omission in the terms of the instrument creating the power." In re Mulholland, 224 Pa. 536, 543, 73 A 932, 132 AmSR 791.

[a] **Order of sale merely advisory.**—Where a will empowers an executor to sell the real estate, an order of the chancellor in a suit by the executor which directs a sale by him "under the authority and responsibilities conferred upon him by the will," is merely advisory, and a sale is the exercise of the power conferred by the will, and it is not necessary that the sale be reported to and confirmed by the court. Haggin v. Straus, 148 Ky. 140, 146 SW 391, 50 LRANS 642.

[b] **A court of equity has no jurisdiction** to confirm a sale of land by executors under a power in the will and not under order of court. Shute v. Austin, 120 N. C. 440, 27 SE 90.

[c] **Where the will requires approval of the court** if a sale is made for certain purposes, approval is not necessary if the sale made for other purposes. Thompson v. Thomas, etc., Co., 132 Md. 483, 104 A 49.

[d] **The orphans' court may confirm** the sale under the act of April 13, 1854 (P. L. p 368), providing that, in all cases wherein any of the courts might have authorized any sale or conveyance, such a sale or conveyance made without order of court may be ratified and confirmed. Donnelly v. Byers, 234 Pa. 339, 83 A 296.

[e] **The orphans' court will ratify** a sale of land by executors with power to sell, and allow security to be entered, in order that the lien of debts not of record may be discharged. Wainwright's Est., 11 Phila. (Pa.) 147.

4. In re Pforr, 144 Cal. 121, 77 P 825; Bennalack v. Richards, 116 Cal. 405, 48 P 622; In re Pearsons, 98 Cal. 603, 33 P 451; Williams' Est., 92 Cal. 183, 28 P 227, 679; In re Delaney, 49 Cal. 76 [aff Myr. Prob. 9].

5. See infra § 681.

6. In re Wickersham, 139 Cal. 652, 73 P 541 [rev 138 Cal. 355, 70 P 1076, 71 P 437].

7. In re Wickersham, 139 Cal. 652, 73 P 541 [rev 138 Cal. 355, 70 P 1076, 71 P 437].

8. In re Wickersham, 139 Cal. 652, 73 P 541 [rev 138 Cal. 355, 70 P 1076, 71 P 437].

9. In re Robinson, 142 Cal. 152, 75 P 777.

10. Perkins v. Gridley, 50 Cal. 97; In re Durham, 49 Cal. 490.

11. In re Devine, 62 N. J. Eq. 703, 49 A 138.

12. In re Devine, 62 N. J. Eq. 703, 49 A 138.

13. In re Richards, 154 Cal. 478, 98 P 528.

14. Montgomery v. Williamson, 37 Md. 421.

the estoppel, confirm the sale and direct execution of the conveyance upon a compliance with the terms of the contract by the purchaser.[15]

Review of confirmation. An order confirming an executor's sale of realty is ordinarily subject to review,[16] and on appeal from such an order it is the duty of appellant to furnish the return of sale.[17] Where, on an application for the confirmation of an executor's sale of real estate, the purchaser filed objections on the ground of want of jurisdiction, and on such objections being overruled the court took testimony on the merits without any answer or other opposition being filed by such purchaser, and refused to confirm the sale, the purchaser was not entitled to review such refusal on appeal from an order denying his motion for a new trial.[18]

[§ 655] **(9) Who May Purchase[19]—(a) In General.** As a general rule where an executor is authorized to sell he may sell to any person.[20]

[§ 656] **(b) Executor or Administrator—aa. General Rule.** It is well established as a general rule that an executor or administrator cannot become the purchaser at his own sale of the property of his decedent.[21] Neither can one executor or administrator lawfully become the purchaser at a sale made by his coexecutors or coadministrators.[22] The rule precludes the representative not only from purchasing outright, but also from being interested in any purchase at a sale by him;[23] neither is it confined in its application to a direct purchase, but an indirect purchase by means of an agent or a third person who is the ostensible purchaser but who really acts for the representative in order to enable him to acquire title may also be avoided.[24]

15. In re Walker, 149 Cal. 214, 85 P 310.

16. Lee v. Benzes, (Tex. Civ. A.) 209 SW 768. Contra Dundas' App., 7 Pa. Cas. 629, 12 A 485.

17. In re Robinson, 142 Cal. 152, 75 P 777.

18. In re Richards, 139 Cal. 72, 72 P 633 (such remedy is available only where the action of the court is dependent on extrinsic facts presented to it in the form of pleadings).

19. Sale of personalty see infra §§ 735–743.

Sale under order of court see infra §§ 1587–1599.

20. Mason v. Devenny, 30 Pittsb LegJNS (Pa.) 216, 14 YorkLegRec 75.

[a] **Testamentary direction to offer land to particular person.**—Where the will directed the executor to offer the testator's land to a certain person at a fixed price, and if he refused to sell at public or pricate sale for the best price offered, the person named could refuse the option and afterward buy at a less price from the executor, and a deed from the executor to such person at a price less than that named in the will was a valid execution of the power and conveyed a good title. Mason v. Devenny, 30 PittsbLegJNS (Pa.) 216, 14 YorkLegRec 75.

21. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Price v. Morris, 19 F. Cas. No. 11,414, 5 McLean 4.

Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Del.—Downs v. Rickards, 4 Del. Ch. 416.

Fla.—Price v. Winter, 15 Fla. 66.

Ga.—Griffin v. Stephens, 119 Ga. 138, 46 SE 66; Moore v. Carey, 116 Ga. 28, 42 SE 258; Pirkle v. Cooper, 113 Ga. 828, 39 SE 289; Anderson v. Green, 46 Ga. 361.

Ill.—Stickel v. Crane, 189 Ill. 211, 59 NE 595; Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204]; Ebelmesser v. Ebelmesser, 99 Ill. 541; Sloan v. Graham, 85 Ill. 26.

Ky.—Schlickman v. Dusing, 180 Ky. 506, 203 SW 295; Faucett v. Faucett, 1 Bush 511, 89 AmD 639; Darcus v. Crump, 6 B. Mon. 363.

La.—Tucker v. Benedict, 114 La. 203, 38 S 142.

Md.—Haslett v. Glenn, 7 Harr. & J. 17.

Miss.—McGowan v. McGowan, 48 Miss. 553.

N. J.—Wright v. Wright, 7 N. J. L. 175, 11 AmD 546; Booraem v. Wells, 19 N. J. Eq. 87; Holcomb v. Holcomb, 11 N. J. Eq. 281; Scott v. Gamble, 9 N. J. Eq. 218; Williamson v. Johnson, 5 N. J. Eq. 537.

N. Y.—Reynolds v. Ætna L. Ins. Co., 28 App. Div. 591, 51 NYS 446 [aff 160 N. Y. 635, 55 NE 305]; Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215; Stiles v. Burch, 5 Paige 132.

Okl.—Vaughan v. Vaughan, 162 P 1131.

Pa.—Brittain's Est., 28 Pa. Super. 144.

Philippine.—Navel v. Enriquez, 3 Philippine 669.

S. C.—McGuire v. McGowen, 4 S. C. Eq. 486.

Va.—Staples v. Staples, 24 Gratt. (65 Va.) 225; Bailey v. Robinson, 1 Gratt. (42 Va.) 4, 42 AmD 540.

Wash.—Stewart v. Baldwin, 86 Wash. 63, 149 P 662 [cit Cyc].

W. Va.—Ash v. Wells, 76 W. Va. 711, 86 SE 750; Middleton v. Bowyer, 75 W. Va. 187, 83 SE 723.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539; O'Dell v. Rogers, 44 Wis. 136.

Eng.—Crowe v. Ballard, 3 Bro. Ch. 117, 29 Reprint 443, 2 Cox Ch. 253, 30 Reprint 118, 1 Ves. Jr. 215, 30 Reprint 308; Fox v. Mackreth, 2 Bro. Ch. 400, 29 Reprint 224; Lister v. Lister, 6 Ves. Jr. 631, 31 Reprint 1231; Ex p. Hughes, 6 Ves. Jr. 617, 31 Reprint 1223; Ex p. Reynolds, 5 Ves. Jr. 707, 31 Reprint 816; Campbell v. Walker, 5 Ves. Jr. 678, 31 Reprint 801.

"It is elementary law that an executor is a trustee and as such is forbidden to acquire in his own right any part of the trust estate." Metzler v. Warner, 156 Ill. A. 31, 44 [aff 249 Ill. 341, 94 NE 522].

"No person acting in a fiduciary character can purchase at his own sale, directly or indirectly, or acquire by purchase any interest in the trust estate, without the consent of the beneficiary or others interested therein, or of the court having jurisdiction of the trust. Shuman's App., 27 Pa. 64; Hannum's App., 2 Pennyp. 103; or unless, if selling under a power, he is by its terms permitted to purchase: Springer's Est., 51 Pa. 342." Brittain's Est., 28 Pa. Super. 144, 147.

[a] **Conveyance in satisfaction of debt.**—The executor of a will giving power to sell realty could not, although he was a legatee and creditor, convey any portion thereof to himself in satisfaction of a debt owing to him from the estate. Ash v. Wells, 76 W. Va. 711, 86 SE 750.

[b] **Representative cannot acquire title by paying debts from his own funds.**—Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Graham v. Jones, 24 S. C. 241.

[c] **Matters not affecting right to set aside sale.**—The right to have a purchase by the executor or administrator at his own sale set aside cannot be defeated because of the insolvency of the estate, because on a resale the property will bring less than at the first sale, because the representative used money of his own to pay debts of the estate believing that the sale to himself would be allowed to stand, or because he procured a creditor of the decedent who was secured by a deed to the land to allow it to be sold free from the encumbrance of the deed. Pirkle v. Cooper, 113 Ga. 828, 39 SE 289.

[d] **A contrary doctrine** finds support in a few early cases. Hampton v. Shehan, 7 Ala. 295; Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 AmD 39; Huger v. Huger, 30 S. C. Eq. 217 (statute authorizing purchase); Lindsay v. Lindsay, 1 S. C. Eq. 150.

22. Cal.—In re Richards, 154 Cal. 478, 98 P 528.

Ga.—Newton v. Roe, 33 Ga. 163.

N. J.—Skillman v. Skillman, 15 N. J. Eq. 388.

N. Y.—Pease v. Creque, 15 NY WklyDig 15.

Pa.—Bunting's Est., 5 Pa. Co. 623.

Que.—Carter v. Molson, 8 Montr. Leg. N. 281 [aff 6 Montr. Leg. N. 372].

[a] **Election of beneficiaries.**—Where executors empowered to sell real estate sold certain real property to a coexecutor, those interested in the estate on a return of the sale could elect to have the sale confirmed or rejected. In re Richards, 154 Cal. 478, 98 P 528.

[b] **Right of contingent remainderman to object.**—Testator directed his executors to sell his real estate in such a manner as they deemed best, and to set apart a trust fund and divide the balance with gift over in a certain contingency. The executors sold the real estate, and title to it passed to one of them through a third person. Those in whom the remainder vested subject to be divested in the event for which provision was made in the gift over released the right to question the title. The accounts of the executors were approved by the surrogate's court on due notice to all parties in interest. It was held that the sale to one of the executors was not voidable at the election of the contingent remainderman, whose only right was to compel the executors to account for the actual value of the real estate. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261 [rev 57 Misc. 246, 109 NYS 215].

23. Colgate v. Colgate, 23 N. J. Eq. 372; Vaughan v. Vaughan, (Okl.) 162 P 1131.

[a] **Sale to firm of which representative a member.**—A contract made by an executor with a firm of which he himself is a member for the sale of the whole of his testator's real estate, if opposed by any of the cestuis que trust, will not be required to be specifically performed. Colgate v. Colgate, 23 N. J. Eq. 372.

[b] **Circumstances not sufficient to show interest.**—Larzelere v. Starkweather, 38 Mich. 96.

24. U. S.—Tufts v. Tufts, 24 F.

[§ 657] **bb. Limitations of Rule.** Express authority in the will may, of course, warrant a purchase by the executor,[25] and the executor may obtain leave of court to purchase at his own sale, in which case a purchase by him will give him good title.[26] It has also been asserted that where the representative has a personal interest in the property he may become the purchaser,[27] and a purchase by the representative has also been upheld where the sale was a fair one and a fair price was given for the property.[28] Neither does the rule under discussion apply to a purchase, under an option in a lease executed by the testator, by a corporation lessee in which the executor is a stockholder.[29] Where a mortgagee was appointed administrator of the estate of the mortgagor, but did not take possession of the mortgaged premises or take any steps to have them sold for the payment of debts, but foreclosed his mortgage while he was acting as administrator, he had the right to become the purchaser at the foreclosure sale.[30] Where a member of a firm owning realty dies, the administrator of the deceased partner may, in his private or individual capacity, purchase the land from the survivor.[31] There is no reason why an administrator appointed in one state should not become the purchaser of land of his decedent situated in another state.[32] A person who was nominated as an executor in the will, but has not qualified or acted as such, may purchase the property of the testator at a sale made by the executor or executors who did qualify,[33] or a representative who has resigned or been discharged may become a purchaser at a sale subsequently made by the personal representatives remaining in office, or by his successor.[34] A representative who has sold real property of his decedent may purchase the same for himself from the purchaser at his sale, provided the first sale was real and bona fide and not a mere sham or pretense to enable the representative to acquire title.[35]

[§ 658] **cc. Whether Sale Void or Voidable.** A purchase by an executor or administrator at his own sale is usually held to be not void but merely voidable at the option of those interested;[36] but where the transaction is tainted with actual fraud, it is void.[37] So also, where the executors had no power to sell, but under the mistaken belief that they had, sold the real estate, and became the purchasers of a portion of it, it was held that the sale was void, and could not be enforced against them.[38]

[§ 659] **dd. Ratification.** A purchase by an executor or administrator at his own sale may be

Cas. No. 14,233, 3 Woodb. & M. 456.

Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Ga.—Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252.

Ill.—Elmstedt v. Nicholson, 186 Ill. 580, 58 NE 381.

Md.—Singstack v. Harding, 4 Harr. & J. 186, 7 AmD 669.

Mass.—Jenison v. Hapgood, 7 Pick. 1, 19 AmD 258.

Mich.—Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793.

Miss.—Buckingham v. Wesson, 54 Miss. 526.

N. J.—Hance v. McKnight, 11 N. J. L. 385; Skillman v. Skillman, 15 N. J. Eq. 388; Winter v. Geroe, 5 N. J. Eq. 319 [rev on other grounds 5 N. J. Eq. 655].

N. Y.—Peo. v. Open Bd. Stock Brokers Bldg. Co., 92 N. Y. 98; Reynolds v. Ætna L. Ins. Co., 28 App. Div. 591, 51 NYS 446 [aff 160 N. Y. 635, 55 NE 305]; Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215; Jackson v. Walsh, 14 Johns. 407.

Pa.—Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Bunting's Est., 5 Pa. Co. 623.

Va.—Davies v. Hughes, 86 Va. 909, 11 SE 488. See also Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752 (where the agent of the administratrix purchased through another person).

Can.—Daly v. Brown, 39 Can. S. C. 122.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

[a] **Illustration.**—A conveyance by an executor to his brother, who on the same day conveyed to him individually a third interest in the realty, made without leave of court, is voidable. Prentice v. Townsend, 143 App. Div. 151, 127 NYS 1006.

[b] **A contract made by prospective purchasers with the executrix** to hold the land for her benefit, on her paying the interest quarterly, until she should find it convenient to pay the principal, and then to convey to her, they purchasing the land at less than its true value at that time, was against public policy and voidable. Tufts v. Tufts, 24 F. Cas. No. 14,233, 3 Woodb. & M. 456.

[c] **Evidence held insufficient** to show that a sale by an administrator to a person who later conveyed the property to such administrator was for the administrator rather than for such purchaser. Abernathie v. Rich, 256 Ill. 166, 99 NE 883.

25. Curtis v. Brewer, 140 Mich. 139, 103 NW 579; Fennimore v. Fennimore, 3 N. J. Eq. 292; Brittain's Est., 28 Pa. Super. 144.

[a] **Illustration.**—Where a testator directs by his will that if either of his executors at public sale purchase any part of his real estate, the other executor shall execute a deed conveying the land so purchased, either of the executors has a right to purchase, and the other is bound to execute the necessary conveyance; and the latter is not entitled to insist on the payment of the purchase money to him as a condition of his making a conveyance, but the purchaser may retain the purchase money to be accounted for by him as executor. Fennimore v. Fennimore, 3 N. J. Eq. 292.

[b] **This is true, although** such purchase is expressly forbidden by statute. Curtis v. Brewer, 140 Mich. 139, 103 NW 579.

26. In re McPherran, 212 Pa. 425, 61 A 934; Dundas' App., 7 Pa. Cas. 629, 12 A 485; Brittain's Est., 28 Pa. Super. 144.

27. Julian v. Reynolds, 8 Ala. 680; McLane v. Spence, 6 Ala. 894; Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 AmD 39; In re Goss, 73 Wash. 330, 132 P 409; Collins v. Collins, 7 Newfoundl. 549. Contra Michoud v. Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

28. Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 AmD 39; Price v. Springfield Real Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595; McKey v. Young, 4 Hen. & W. (14 Va.) 430; Toler v. Toler, 2 Patt. & H. (Va.) 71; Collins v. Collins, 7 Newfoundl. 549. See also Camsusa v. Coigdarripe, 11 B. C. 177 (where the executor went into partnership with the purchaser).

[a] **Under a former statute in Missouri** an executor or administrator had a right to purchase at his own sale by paying not less than three fourths of the appraised value. Price v. Springfield Real Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595.

29. Enslen v. Enslen, 178 Ky. 610, 199 SW 794.

30. Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433.

31. Jones v. Sharp, 9 Heisk. (Tenn.) 660.

32. Sheldon v. Rice, 30 Mich. 296, 18 AmR 136.

33. Valentine v. Duryea, 37 Hun (N. Y.) 427.

34. Clark v. Denton, 36 N. J. Eq. 419 [aff 36 N. J. Eq. 534].

35. Enslen v. Enslen, 178 Ky. 610, 199 SW 794; Henninger v. Boyer, 10 Pa. Co. 506; Wayland v. Crank, 79 Va. 602; Staples v. Staples, 24 Gratt. (65 Va.) 225.

[a] **Use of purchase-money notes in payment.**—Where executors have made a parol sale of land, and taken the purchaser's notes, and one of them purchases the purchaser's interest, he may if solvent use the notes taken from the purchaser by the executors in payment of his purchase money, and the original sale will not be abrogated. Silverthorn v. McKinster, 12 Pa. 67.

36. Ark.—Holloway v. Eagle, 135 Ark. 206, 205 SW 113; Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398.

Cal.—In re Richards, 154 Cal. 478, 98 P 528.

Ga.—Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666; Griffin v. Stephens, 119 Ga. 138, 46 SE 66; Moore v. Carey, 116 Ga. 28, 42 SE 258; Anderson v. Green, 46 Ga. 361; Newton v. Roe, 33 Ga. 163.

Ill.—Stickel v. Crane, 189 Ill. 211, 59 NE 595; Ebelmesser v. Ebelmesser, 99 Ill. 541; Sloan v. Graham, 85 Ill. 26.

N. Y.—Prentice v. Townsend, 143 App. Div. 151, 127 NYS 1006; Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem]; Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215; Pease v. Creque, 15 NYWklyDig 15.

Oh.—Harrison v. Heckler, 6 Oh. Cir. Ct. 443.

Okl.—Chastain v. Pender, 52 Okl. 133, 152 P 833 [quot Cyc].

Pa.—Painter v. Henderson, 7 Pa. 48; Bruch v. Lantz, 2 Rawle 392, 21 AmD 458; Bunting's Est., 5 Pa. Co. 623.

Tenn.—Camp v. Riddle, 128 Tenn. 294, 160 SW 844, AnnCas1915C 145.

W. Va.—Ash v. Wells, 76 W. Va. 711, 86 SE 750; Middleton v. Bowyer, 75 W. Va. 187, 83 SE 723.

Wis.—Keilly v. Severson, 149 Wis. 251, 135 NW 875; In re McClear, 147 Wis. 60, 132 NW 539.

37. Sheldon v. Woodbridge, 2 Root (Conn.) 473; Tucker v. Benedict, 114 La. 208, 38 S 142.

38. Drayton v. Drayton, 2 S. C. Eq. 250 note.

ratified by the persons interested.[39] An acquiescence in the sale by the heirs for a long time will create a presumption of ratification,[40] and an heir or legatee who receives the proceeds with knowledge of the facts thereby ratifies the sale or becomes estopped subsequently to attack it.[41] Where the sale to himself was the only thing done by the administrator in connection with the administration the fact that the heirs joined in a petition praying that the administrator be discharged does not estop them to attack the sale.[42]

[§ 660] **ee. Representative Not Bona Fide Purchaser.** Even though a purchase by a representative at a sale by himself or by his corepresentatives pursuant to a power in the will is not set aside, still he is not a bona fide purchaser and entitled to protection as such.[43]

[§ 661] **ff. Bona Fide Purchaser from Representative.** Although a purchase by a representative at his own sale is voidable, a deed from him conveying the property to a bona fide purchaser who pays a valuable consideration will pass title,[44] and after there has been such a conveyance by the representative the original purchase by him will not be set aside.[45]

[§ 662] **gg. Liability of Representative Who Has Purchased.** An executor or administrator who has purchased or been interested in the purchase of real estate of his decedent sold by him is chargeable with the actual value of the property and not merely with the amount realized at the sale,[46] and he must also account for the profits made by a resale of the property to a bona fide purchaser;[47] but he is not chargeable with the value of land bid off by him at his sale, but lost through want of title in the testator.[48] Where the personal representative has improperly become the purchaser at a sale unnecessarily made by him, the heirs or devisees have a remedy in equity against him to compel a reconveyance of the property or a payment of the excess of the value, as ascertained by a second sale, over the price paid.[49]

[§ 663] **(c) Relative of Representative.** A sale to a near relative of the representative is improper and voidable,[50] especially if the representative has unduly favored such purchaser.[51] In a case where the court authorized the executor's wife to bid at a sale of real estate under testamentary power, it was held that the executor should be surcharged with the difference on the amount received on a sale to his wife and what would have been realized at a fair sale.[52]

[§ 664] **(d) Agent or Partner of Representative.** A sale by a personal representative to his agent or partner or to a firm of which he is a member cannot be upheld against the objection of the heirs or devisees,[53] especially where there has been bad faith in the transaction.[54]

[§ 665] **(e) Attorney of Representative.** A sale by an executor or administrator to his own attorney is improper for the reason that the sale may be supposed to be made under the influence, if not

39. Ga.—Brantley v. Cheeley, 42 Ga. 209; Newton v. Roe, 33 Ga. 163.
Ill.—Stickel v. Crane, 189 Ill. 211, 59 NE 595; Ebelmesser v. Ebelmesser, 99 Ill. 541; Sloan v. Graham, 85 Ill. 26.
La.—Prothro v. Prothro, 33 La. Ann. 598.
N. J.—Hance v. McKnight, 11 N. J. L. 385.
N. Y.—Geyer v. Snyder, 140 N. Y. 394, 35 NE 784.
Pa.—Bunting's Est., 5 Pa. Co. 623.
[a] **The guardian of a minor cannot consent** that the administrator may purchase property of the estate at a given price; and where the administrator does so purchase the property, and pays over to the guardian the portion due to the minor, he does not estop the latter from seeking to set aside the purchase, when the minor has had no settlement with the guardian, and has received no part of the proceeds of the sale. Moore v. Carey, 116 Ga. 28, 42 SE 258 (holding further that, where in an action to set aside such sale it is sought to estop plaintiff on the ground that his guardian had collected the amount due him as his portion of the proceeds of the sale, and had paid it over to him on his arrival at majority after putting him in possession of all the facts, testimony of the guardian that, when he made the payment, it was stipulated by the ward that it should have no other effect than to pass the fund into his possession and should not estop him from seeking to set aside the sale was relevant).

40. Hoyt v. Latham, 143 U. S. 553, 12 SCt 568, 36 L. ed. 259 [rev 14 Fed. 433, 4 McCrary 587]; Griffin v. Stephens, 119 Ga. 138, 46 SE 66; Brantley v. Cheeley, 42 Ga. 209; Newton v. Roe, 33 Ga. 163.

41. Crane v. Lowe, 59 Kan. 606, 54 P 666; Pease v. Creque, 15 NYWkly Dig 15; Middleton v. Bowyer, 75 W. Va. 187, 83 SE 723.
[a] **Knowledge of facts surrounding sale necessary.**—Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215.

42. Tucker v. Benedict, 114 La. 203, 216, 38 S 142 ("A logical reason for the heirs not calling for an account was that there was nothing which the administrator had to account for, save for this illegal act, and as to that they preferred (as they had the unquestionable legal right to do) moving directly for the recovery of their own property itself, still existing in kind, than attempting to hold him liable in damages for false administration").

43. Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252; Bruch v. Lantz, 2 Rawle (Pa.) 392, 21 AmD 458.

44. Moore v. Carey, 116 Ga. 28, 42 SE 258; Walker v. Walker, 101 Mass. 169; Wyman v. Hooper, 2 Gray (Mass.) 111; Robins v. Bates, 4 Cush. (Mass.) 104; Blood v. Hayman, 13 Metc. (Mass.) 231; Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793.
[a] **This rule has been applied** where the administrator conveyed to his wife. Moore v. Carey, 116 Ga. 28, 42 SE 258.

45. Harrison v. Heckler, 6 Oh. Cir. Ct. 443, 3 Oh. Cir. Dec. 530; Shaw v. Tackaberry, 29 Ont. L. 490, 4 Ont. WN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

46. Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615 mem, 57 NE 1128 mem]; In re Scheidt, 2 Woodw. (Pa.) 355; Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 Ont WN 255, 15 DomLR 475.

47. Ill.—Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].
N. Y.—Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem].
Pa.—Cope's Est., 27 Pa. Co. 366, 4 LackJur 45.
Wis.—In re McClear, 147 Wis. 60, 132 NW 539.
Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

48. Hapgood v. Jennison, 2 Vt. 294.

49. Jennison v. Hapgood, 7 Pick. (Mass.) 1, 19 AmD 258.

50. Buckingham v. Wesson, 54 Miss. 526; Scott v. Gamble, 9 N. J. Eq. 218; In re Schnebly, 249 Pa. 208, 94 A 827; Schaefer's Est., 10 Pa. Co. 100; Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475. But compare In re Branch, 123 Mo. A. 573, 579, 100 SW 516, 518 (where an executrix who was directed by the will of her deceased husband to sell his land as soon as this could be done without sacrifice, sold it to her son at the highest price she had reason to think could be obtained therefor, without attempting to obtain other bids and without putting it on the market, she exercised proper prudence in the management of the estate. "It was quite natural and not at all censurable, that she should desire her son, who had been his father's mainstay during his last days, to have the home place, instead of a stranger. Such preference, if she did not permit it to work an injury to the other heirs, could not be regarded rightly in any other light than praiseworthy; and, if she determined on letting her son have the farm at the highest price she had reason to think could be obtained for it, she should not be pronounced derelict for not seeking other buyers").
[a] **The rule applies to:** (1) A sale to the husband of the executrix. Scott v. Gamble, 9 N. J. Eq. 218; Schaefer's Est., 10 Pa. Co. 100. (2) A sale to the wife of the executor for less than the real value. In re Schnebly, 249 Pa. 208, 94 A 827.

51. Oberlin College v. Fowler, 10 Allen (Mass.) 545; In re Schnebly, 249 Pa. 208, 94 A 827.

52. Dundas' App., 64 Pa. 325.

53. Mettler v. Warner, 156 Ill. A. 31 [aff 249 Ill. 341, 94 NE 522]; Harrod v. Norris, 11 Mart. (La.) 297, 13 AmD 350; Jackson v. Larche, 11 Mart. (La.) 284; Colgate v. Colgate, 23 N. J. Eq. 372; Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752.

54. Summers v. Reynolds, 95 N. C. 404; Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752.

the pressure, of legal advice and induced by confidential relations which ought to be above suspicion.[55] This is especially true where the representative is illiterate and incompetent for the trust,[56] and in such case the attorney may at the option of the parties in interest be charged as trustee of the property purchased and required to account therefor,[57] without any evidence that the sale was in fact unfair or the price inadequate.[58]

[§ 666] **(10) Conveyance[59] — (a) Form and Contents in General.** A will giving the executor power to sell carries by necessary implication the power to convey,[60] which authority, it is held, may be delegated.[61] Although it is the better practice for a conveyance by an executor pursuant to a power to include a recital of such power,[62] such a recital is not necessary to the validity of the conveyance,[63] provided that the instrument shows that the grantor had in view the subject of the power.[64] Neither is it necessary that the conveyance should set out the existence of circumstances warranting the sale [65] or show that the sale was made in the manner authorized.[66] Where the power is given to two or more executors all should join in executing the deed, if all remain in office;[67] but if one or more fail to qualify or vacate the office, those who do qualify or who remain in office may execute the deed alone.[68] A deed which describes the grantor as executor is not invalid because not signed by him as executor,[69] nor is a deed invalid because of the omission of the word "grant" therefrom, where the words "remise, release and forever quit claim" are used.[70]

[§ 667] **(b) Warranties or Covenants.** A power of sale given by the will does not authorize an executor to bind the estate by covenants of general warranty,[71] but it has been held that, if he makes such covenants, they operate as a personal obligation,[72] unless the terms of the covenant indi-

55. O'Dell v. Rogers, 44 Wis. 136; Cook v. Berlin Woolen Mills Co., 43 Wis. 433; In re Taylor Orphan Asylum, 36 Wis. 534; Gillett v. Gillett, 9 Wis. 194.

[a] **Nominal purchase for want of satisfactory bid.**—Where the attorney for the executors, to whom power of sale was given, became the nominal purchaser, for want of a satisfactory bid, he holds the title in trust for the executors and cannot hold it for himself. In re Taylor Orphan Asylum, 36 Wis. 534.

56. Mills v. Mills, 26 Conn. 213; O'Dell v. Rogers, 44 Wis. 136.

57. O'Dell v. Rogers, 44 Wis. 136.

58. O'Dell v. Rogers, 44 Wis. 136.

59. **Deed pursuant to sale under order of court** see infra §§ 1714–1729.

60. Griffith v. Stewart, 31 App. (D. C.) 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639]; Buckner v. Buckner, (Ky.) 215 SW 420; Mewborn v. Moseley, (N. C.) 97 SE 711.

61. Betty v. Petrie, 138 Ky. 426, 128 SW 320; Terrell v. McCown, 91 Tex. 231, 43 SW 2.

[a] **Conveyance through court commissioner.**—Where a will directs the administrator to sell all the real and personal estate of testatrix for the benefit of a devisee, the administrator may convey the land by deed after selling it, and can also convey it through a commissioner of the court's appointment; hence, a deed made by the latter passes a good title. Betty v. Petrie, 138 Ky. 426, 128 SW 320.

62. Smith v. Henning, 10 W. Va. 596.

63. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.

Conn.—Lockwood v. Sturdevant, 6 Conn. 373.

D. C.—Coombs v. O'Neal, 8 D. C. 405.

Ga.—Wiggs v. Hendricks, 147 Ga. 444, 94 SE 556; Street v. Collier, 118 Ga. 470, 45 SE 294; Terry v. Rodahan, 79 Ga. 278, 5 SE 38, 11 AmSR 420; Shiels v. Lamar, 58 Ga. 590.

Mo.—Armor v. Frey, 253 Mo. 447, 161 SW 829.

Nebr.—Willier v. Cummings, 91 Nebr. 571, 136 NW 559, AnnCas1913D 287.

N. Y.—Doody v. Hollwedel, 22 App. Div. 456, 48 NYS 93; Bradish v. Gibbs, 3 Johns. Ch. 523.

Pa.—Allison v. Kurtz, 2 Watts 185.

S. C.—Glenn v. Walker, 100 SE 706; Holladay v. Holladay, 16 S. C. Eq. 279; Peace v. Spierin, 2 S. C. Eq. 460.

W. Va.—Smith v. Henning, 10 W. Va. 596.

Eng.—Andrews v. Emmot, 2 Bro. Ch. 300, 29 Reprint 162; Bennett v. Aburrow, 8 Ves. Jr. 609, 32 Reprint 492.

"An executor's deed, unaccompanied either by an order of sale from the court of ordinary or by the will conferring a power of sale, is good as color of title." Dodge v. Cowart, 131 Ga. 549, 550, 62 SE 987.

64. Carpenter v. Webb, 20 Del. 34, 55 A 1011; Coombs v. O'Neal, 8 D. C. 405; Terry v. Rodahan, 79 Ga. 278, 5 SE 38, 11 AmSR 420. See generally Powers [31 Cyc 1033].

[a] **Deed held sufficient.**—Carpenter v. Webb, 20 Del. 34, 55 A 1011.

[b] **Power must be shown in evidence.**—A deed from the administrator of a deceased owner of property is not evidence of title in the grantee without the authority under which the administrator acted being shown. Forrest v. Wallace, 3 Walk. (Pa.) 86.

65. Justice v. Soderlund, 225 Mass. 320, 114 NE 623.

66. Turnipseed v. Hawkins, 12 S. C. L. 272.

67. Daugharty v. Drawdy, 134 Ga. 650, 68 SE 472; Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 SE 439, 133 Ga. 472, 66 SE 168, 134 AmSR 213; Wells v. Lewis, 4 Metc. (Ky.) 269; Halbert v. Grant, 4 T. B. Mon. (Ky.) 580; Armor v. Frey, 253 Mo. 447, 466, 161 SW 829; Fleming v. Burnham, 100 N. Y. 1, 2 NE 905 [rev 36 Hun 456]; Mohn v. King, 41 App. Div. 611, 58 NYS 97.

"We call attention to the fact that it was held in Hosch Lumber Co. v. Weeks, 123 Ga. 366, 51 SE 439, that in selling wild land under the statute of that State, the executors must all join. That doctrine was reaffirmed on a second appeal, reported in 133 Ga. 472, 66 SE 168, 134 AmSR 213. The industry of counsel for respondent has not been able to furnish a precedent to the contrary." Armor v. Frey, supra.

[a] **A deed from the devisee** of the land and its proceeds tendered by the executors cannot without the purchaser's consent validate a deed under a power in the will, which was void because executed by only one of two joint executors. Wells v. Lewis, 4 Metc. (Ky.) 269.

[b] **Effect of deed by one alone.**—Where executors, acting under an imperative power in the will, offered certain real estate for sale at public auction, and after the sale, at which both executors were present, a deed was made to the purchaser by one of them, in which, for no assigned reason, the other did not join, and several years later the executor not joining died, without having at any time disputed the validity of the sale, the purchaser became the owner of the whole equitable title, the heirs at most holding the legal title as his trustees. Brown v. Doherty, 185 N. Y. 383, 78 NE 147, 113 AmSR 915 [aff 93 App. Div. 190, 87 NYS 563].

[c] **One as attorney in fact for others.**—Where two executors were authorized by the will to sell and convey land, and no particular mode of execution was required, they had the right to constitute one of themselves attorney in fact to execute a deed. Glenn v. Walker, (S. C.) 100 SE 706.

68. Wells v. Lewis, 4 Metc. (Ky.) 269; In re Fisher, L. R. 13 Ir. 546.

[a] **Presumption.**—Fifty years after the execution of a deed by two executors it will be presumed that all the acting executors signed it, although it is shown that there was a third executor. Fleming v. Burnham, 26 Hun (N. Y.) 456.

69. Virginia, etc., Coal Co. v. Charles, 251 Fed. 83 [aff 254 Fed. 379, 165 CCA 599]; Dodge v. Cowart, 131 Ga. 549, 62 SE 987 [foll Sapp v. Cline, 131 Ga. 433, 62 SE 529].

[a] **A fortiori** an objection that a deed by two executors, to be valid, should be signed by both "as executors," instead of merely using the word "executor," cannot be sustained where it clearly appears upon the face of the deed that they executed it in their representative capacity as executors. Glenn v. Walker, (S. C.) 100 SE 706.

70. Justice v. Soderlund, 225 Mass. 320, 114 NE 623.

71. Ill.—Bauerle v. Long, 187 Ill. 475, 58 NE 458, 52 LRA 643 [aff 88 Ill. A. 177].

Ky.—Ross v. Barr, 53 SW 658, 21 KyL 974.

N. Y.—Ramsey v. Wandell, 32 Hun 482; Bostwick v. Beach, 31 Hun 343 [aff 103 N. Y. 414, 9 NE 41]; Mayer v. McCune, 59 HowPr 78.

N. C.—Godley v. Taylor, 14 N. C. 178.

Pa.—Whiteside v. Flora, 12 Pa. Dist. 153, 27 Pa. Co. 25, 8 Del. Co. 459, 19 LancLRev 299.

S. C.—Ivey v. Vaughan, 93 S. C. 203, 76 SE 464, 43 LRANS 377, Ann Cas1914D 900.

Va.—Grantland v. Wight, 5 Munf. (19 Va.) 295.

[a] **Special warranty.**—An executor selling the land of his testator by virtue of a power given by the will is not bound to convey with general warranty, without an agreement to that effect, but only with special warranty against himself and all persons claiming under him, notwithstanding a written agreement after the sale that he would make a good and indefeasible title to the purchaser, for such an agreement is to be understood in reference to the terms of the sale. Grantland v. Wight, 5 Munf. (19 Va.) 295.

72. Ind.—Jones v. Noe, 71 Ind. 368.

Ky.—Ross v. Barr, 53 SW 658, 21 KyL 974; Nicholas v. Jones, 3 A. K. Marsh. 385; Collins v. Sanders, 5 KyL 860.

N. Y.—Mayer v. McCune, 59 HowPr 78.

N. C.—Godley v. Taylor, 14 N. C. 178.

S. C.—Wurdeman v. Robertson, 12 S. C. Eq. 115. But see infra this note.

cate that he did not intend to bind himself personally.[73] An executor cannot bind the estate by a covenant inserted in a deed to property sold by him under a naked power of sale,[74] but where two adjoining city lots were devised with a naked power of sale in the executor, and he conveyed one of them by deed containing a covenant that the grantee should not erect a building on the lot nearer than twenty feet from the street, and that no building should be erected on the adjoining lot nearer than the same distance from the street line, and subsequently conveyed the adjoining lot by deed containing no covenants, it was held that it was presumptively within the power of the executor to convey, as appurtenant to the lot first sold, an easement of light, air, and prospect over the remaining lot, and that the covenant restricting the use of the lot last sold was valid as against the purchaser, although no action could be maintained against the estate for damages for its violation.[75] It has also been held that, where on a sale of real estate under a power in the will the executors stipulated that all taxes, assessments, etc., would be allowed out of the purchase money and the property conveyed free from all encumbrances, and several years afterward an unpaid assessment which was a lien on the property was discovered, the purchaser might recover the amount of such assessment from the executors as such,[76]

[§ 668] **(c) Construction and Effect.** In matters of description the usual rules of construction as applied to conveyances will apply to a deed of land from an executor or administrator.[77] A covenant by the representative against his own acts does not by implication warrant the title or amount to a covenant that his decedent was seized of the premises.[78] The deed of an executor who had no estate whatever in the land, but only a power to sell, will be considered an exercise of that power;[79] but where the executor who conveyed had an individual interest but no power of sale, his conveyance passes his individual interest only,[80] and even where he had both an individual interest and a power to convey as executor, his conveyance made without actual reference to the power has been presumed a deed of his individual interest alone,[81] although it has also been considered that under such circumstances a question of intent arises.[82] The deed is not evidence of own-

Can.—Baley v. Measam, 2 Revde Legis 337.

Ont.—McDonald v. McDonell, 6 U. C. Q. B. O. S. 109.

[a] **Illustration.**—Executors having a power to sell lands of their testator are personally bound by a covenant that they, "executors," etc., "do forever warrant and defend," etc. Godley v. Taylor, 14 N. C. 178.

[b] **An executor may give his personal warranty of title,** assuming the consequences, and sell accordingly. Mayer v. McCune, 59 HowPr (N. Y.) 78; Baley v. Measam, 2 RevdeLegis 337.

[c] **Extent of liability.**—Where executors conveyed land by deed and covenanted to the extent of assets to warrant and defend title, they rendered themselves personally liable to the extent of assets in their hands, and a failure to answer on a prayer for a discovery was an implied admission of assets. Nicholas v. Jones, 3 A. K. Marsh. (Ky) 385. See also Manifee v. Morrison, 1 Dana (Ky.) 208 (where the court, although considering the liability of an executor on such a covenant to be in his representative character, also considered that it was limited to the extent of the assets).

[d] **The liability of an executor on his covenants of warranty is not affected** by the fact that the purchaser had notice of the will, under which the executor had no power to sell. Wurdeman v. Robertson, 12 S. C. Eq. 115.

[e] **A covenant of warranty against encumbrances done or suffered by himself** does not render an executor to whom a discretionary power to sell land was given, liable to his purchaser where the land is sold for taxes assessed prior to his sale. Jackson v. Sassaman, 29 Pa. 106.

[f] **Knowledge of purchaser that executor is without power to sell.**—An executor, selling property of the testator, with warranty, cannot protect himself against a suit for breach of the warranty on the ground that the purchaser had notice of the will, under which the executor had no power to sell. Wurdeman v. Robertson, 12 S. C. Eq. 115.

[g] **Contrary view.**—"We see nothing in the case to show that at the time of the execution and delivery of the deed (when the rights were fixed) that there was any expectation of a personal liability by those who executed the deed 'as executors,' or those to whom the conveyance was made. If, therefore, these defendants are held to a personal liability, it will not be by reason of any agreement or understanding between the parties, or by reason of any agreement contained in the deed, but simply because the law created one liability from an ineffectual effort to create another. Has the law created this arbitrary liability? If so, it ought to be enforced. . . . Here the advertisement held out no hope of any personal or other guaranty—no evidence that the purchaser was misled by anything that was done or said. The warranty had not hurt the plaintiff in any respect whatsoever. The liability, if it was created, was created without consideration and without agreement. McDowall v. Reed, 28 S. C. 466, 6 SE 300. This was a suit on a bond signed by J. P. Reed, trustee. There was nothing in the bond to show for whom Reed was trustee, or what were the terms of his trust. The term 'trustee' was a mere description of the person. . . . We see no case, even where the obligee or vendee has been misled to his injury, in which a person assuming an authority which he did not have, and which he ought to have known he did not have, was held to a greater liability than the injury which he had inflicted. There are some dicta in some of these cases that are broad; but the decisions themselves restrict the recovery to the injury. There was no injury here that arose from the warranty clause." Ivey v. Vaughan, 93 S. C. 203, 206, 207, 208, 76 SE 464, 43 LRANS 377, AnnCas 1914D 908.

73. Thayer v. Wendell, 23 F. Cas. No. 13,873, 1 Gall. 37; Baxter v. Camp, 126 Ga. 354, 54 SE 1036; Day v. Brown, 2 Oh. 345.

[a] **Illustrations.**—(1) A covenant in a deed by executors, to warrant and defend, "as executors are bound by law to do," is not a personal covenant. Day v. Brown, 2 Oh. 345. (2) A covenant as executor, "but not otherwise," in a conveyance by an executor does not bind him personally, even though it may not be binding on the estate of the testator. Thayer v. Wendell, 23 F. Cas. No. 13,873, 1 Gall. 37.

74. Simmons v. Crisfield, 197 N. Y. 365, 90 NE 956, 26 LRANS 663 [aff 123 App. Div. 201, 108 NYS 234].

75. Simmons v. Crisfield, 197 N. Y. 365, 90 NE 956, 26 LRANS 663 [aff 123 App. Div. 201, 108 NYS 234].

76. Alexander v. Greacen, 36 Misc. 526, 73 NYS 1001 [rev 36 Misc. 133, 72 NYS 1085].

77. Floyd v. Adams, 1 A. K. Marsh. (Ky.) 72; Hiss v. McCabe, 45 Md. 77; Matter of Fagan, 166 App. Div. 214, 151 NYS 701. See also Deeds §§ 195–480.

[a] **Description carrying right or easement in street.**—Bloomfield v. Ketcham, 95 N. Y. 657.

78. Sandford v. Travers, 20 N. Y. Super. 498 [mod on other grounds 40 N. Y. 140].

79. Willier v. Cummings, 91 Nebr. 571, 136 NW 559, AnnCas1913D 287; Jones v. Wood, 16 Pa. 25.

80. Rannels v. Rowe, 145 Fed. 296, 74 CCA 376 [certiorari den 207 U. S. 591, 28 SCt 257, 32 L. ed. 355]; Morrison v. Bowman, 29 Cal. 337; Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

81. Reeves v. Barrett, (Ark.) 13 SW 77; Armor v. Frey, 253 Mo. 447, 468, 161 SW 829; Jones v. Wood, 16 Pa. 25; Hay v. Mayer, 8 Watts (Pa.) 203, 34 AmD 453; Frisby v. Withers, 61 Tex. 134.

"We have not been able to find any authority for holding that a deed appearing on its face to be the individual act of the grantor can be construed to be his act as executor, either under power in a will, or under an order of the court." Armor v. Frey, supra.

82. Ill.—Funk v. Eggleston, 92 Ill. 515, 34 AmR 136.

Ind.—South v. South, 91 Ind. 221, 46 AmR 591.

Iowa.—Feaster v. Fagan, 135 Iowa 633, 635, 113 NW 479.

Mass.—Chase v. Ladd, 155 Mass. 417, 29 NE 637.

Nebr.—Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

"When an executor authorized by will to make a conveyance has also an individual interest in the property, as devisee or otherwise, the question whether a conveyance by such person is an exercise of the power to convey given in the will, or the exercise only of the right to pass such person's individual interest, is a question of intent to be determined by consideration of the language used in the instrument and the circumstances under which it was executed and accepted." Feaster v. Fagan, supra.

[a] **Where the conveyance shows that it was intended as an execution of the trust** under the will it will

ership by decedent at the time of his death.[83] Where the grantor in a conveyance styles himself the executor of a person last seized, and possession accompanies the deed, it will be presumed after the lapse of many years that the grantor had authority to make the deed.[84] Under a statute excepting out of a will the interest of any child or children not named or provided for, a sale by an executor under a power in the will, while it transfers to the purchaser all that the executor could lawfully sell, does not affect the interest of such child or children.[85] The mere form of a conveyance by an executor under a power in the will may be disregarded and the effect of the conveyance determined by the power.[86]

A deed executed under a power of attorney given by an executor authorized by will to sell the property is presumably valid.[87]

Effect of lack of seal. A deed by an executor, not under seal and in execution of a power, will be upheld as a contract to convey; and where testator's heirs have received a substantial part of the estate, they cannot defeat the deed because of the absence of the seal.[88]

[§ 669] **(11) Payment and Recovery of Purchase Money**[89]**—(a) In General.** Where real property is sold by executors under a power in the will, the executors are authorized to collect and receive the purchase money and enforce any security given for deferred payments,[90] and they do not lose their power as such to receive the money, nor is the purchaser relieved of his duty to pay to them because an unsuccessful effort has been made to secure the payment of the principal sum to the persons ultimately entitled to receive it from the executors.[91] Where an executor having power under the will to sell at any time makes a sale before the time of distribution under the will has arrived, he is authorized to take notes payable to himself in payment for the property.[92] Where executors offer real property of their testatrix for sale pursuant to the terms of the will, and a contract for the sale thereof is entered into with a person having no knowledge of the existence of a restrictive agreement, signed by the testatrix, with other property owners, thereby imposing a servitude on the land, the purchaser cannot be compelled specifically to perform the contract.[93] Where devisees transfer their undivided interest in the property, they cannot, as against the executor, be heard to allege fraud on the part of the transferee, or to deny the transfer, when the executor sells to such transferee and credits him on the price with the devisees' share of the proceeds.[94] Where the executor has sold realty it must be presumed that the money paid therefor is in his hands waiting distribution or that the persons entitled thereto have received it.[95]

[§ 670] **(b) Payment in Confederate Money.** Payment of purchase money or of a bond and mortgage given to secure the same, when due, in Confederate money, may be good and discharge the debt if the payment was made and accepted in good faith,[96] and an executor or administrator receiving such payment in good faith at a time when Confederate money was the only currency in general circulation is not liable for the resulting loss.[97]

[§ 671] **(c) Actions to Recover—aa. In General.** The right of the executor to sue for the purchase money and coerce payment follows as incidental to his right to receive the same,[98] but where he had no legal right to sell, he cannot maintain an action for the purchase money.[99]

Enforcement of vendor's lien. Under a statute authorizing a person with whom or in whose name a contract is made for the benefit of another to sue thereon, administrators to whom a note for the purchase money of land sold by the estate is made payable can maintain an action to enforce a vendor's lien thereon, although the conveyance was made by the heirs.[1]

[§ 672] **bb. Defenses.** Fraud in the sale has been held a good defense to an action by the executor for the purchase money.[2] Where the property was sold without any contract as to encumbrances, and conveyed by deed without covenants, the fact that taxes were a lien thereon at the time of the sale, and were paid by the purchaser to remove the

not be considered an individual conveyance of the executors, although they had an individual interest in the property. Feaster v. Fagan, 135 Iowa 633, 113 NW 479; Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

83. McBride v. Loomis, (Tex. Commn. A.) 212 SW 480.

84. Maverick v. Austin, 17 S. C. L. 59 (where thirty years had elapsed).

85. Northrop v. Marquam, 16 Or. 173, 18 P 449.

86. Dodge v. Cowart, 131 Ga. 549, 62 SE 987; Robeno v. Marlatt, 6 Pa. Co. 251.

87. Webster v. Black, 142 Ga. 806, 83 SE 941.

88. Vaught v. Williams, (N. C.) 97 SE 737.

89. **Sale under order of court** see infra §§ 1603–1623.

90. Matter of Fagan, 166 App. Div. 214, 151 NYS 701; McElroy v. Nucleus Assoc., 131 Pa. 393, 18 A 1063; Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

[a] **Security given by legatees who purchased.**—Where real estate sold by an executor as directed by the will is purchased by legatees under the will who give a mortgage for part of the purchase money, it is not a sufficient defense to a scire facias issued on the mortgage that the money due from the purchasers on the mortgage is due to themselves as legatees. Nelson v. McLaughlin, 20 Pa. Co. 385.

[b] **Sale to grantee of devisees.**—Where devisees of an undivided interest in land, each conveyed to their uncle, the executor selling under power to such uncle was justified in crediting him with the devisees' share of the purchase price. Matter of Fagan, 166 App. Div. 214, 151 NYS 701 [mod 86 Misc. 144, 149 NYS 217].

[c] **Unauthorized sale by third person.**—Where a person without authority of law sold land belonging to an estate, after the death of decedent and before administration, and received part of the purchase money therefor, the representatives of decedent could not maintain an action against such person or his executor for money had and received to their use, nor for the use of the estate, since they had not been deprived of any legal or equitable interest in the land by such sale. Crews v. Heard, 7 Ga. 60.

[d] **A testamentary provision for payment to the heirs** may preclude the operation of this rule. Morales v. López, 3 Porto Rico 81.

91. McElroy v. Nucleus Assoc., 131 Pa. 393, 18 A 1063.

92. Smith v. Blair, 5 KyL 687; Rogers v. Jones, 13 Tex. Civ. A. 453, 35 SW 812.

93. Scudder v. Watt, 98 App. Div. 228, 90 NYS 605 (covenant against manufacture or sale of intoxicating liquor on premises).

94. Matter of Fagan, 166 App. Div. 214, 151 NYS 701 [mod 86 Misc. 144, 149 NYS 217].

95. Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

96. Glasgow v. Lipse, 117 U. S. 327, 6 SCt 757, 29 L. ed. 901.

[a] **In case of fraud** the rule is otherwise. McBurney v. Carson, 99 U. S. 567, 25 L. ed. 378.

97. Womack's Succ., 29 La. Ann. 577; Mills v. Mills, 28 Gratt. (69 Va.) 442.

[a] **Scaling by property standard.**—Moore v. Harnsberger, 26 Gratt. (67 Va.) 667 (construing and applying the Virginia statute).

98. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89; Duer v. Harrill, 9 N. C. 50.

99. Fambro v. Gantt, 12 Ala. 298; Richardson v. Crooker, 7 Gray (Mass.) 190; McKendry v. Shannon, 201 Pa. 331, 50 A 936.

1. McClure v. Bigstaff, 37 SW 294, 38 SW 431, 18 KyL 601.

2. Miller v. Baynard, 7 Del. 559, 83 AmD 168; Keily v. Saunders, 236 Pa. 593, 85 A 9.

[a] **This rule has been applied:** (1) Where the executor employed a puffer, by reason of which the purchaser was compelled to bid twelve dollars an acre more for the property than he would otherwise have been compelled to pay. Miller v. Raynard, 7 Del. 559, 83 AmD 168. (2) Where there were misstatements in the advertisement of sale. Keily v. Saunders, 236 Pa. 593, 85 A 9.

[b] **Remedy only against executor personally.**—False and fraudulent representations made by the executor at the time of the sale in re-

encumbrance thereof, constitutes no defense to an action for the price.[3]

Counterclaims and credits. In an action on a note given to an executor for the purchase price of property sold by the executor to defendant, an answer that the testator was indebted to defendant in a sum named is not good as a counterclaim,[4] nor can a note for a certain amount executed by one of defendants to the mother of one of the minor legatees, which was not agreed to by the executor and which has never been paid, be allowed as a credit.[5]

Restoration of status quo. Although an executor's deed may have been defective, as purporting to convey his own interest only in the property, he having no legal interest in it, but only a naked power to sell, still the purchaser acquires an equitable estate by the deed which he must reconvey or offer to reconvey, before he can make any defense to the payment of notes given for the purchase money;[6] but it has been held that, where the sale itself is invalid, the purchaser is not bound to offer to surrender possession to entitle him to resist the collection of the purchase money.[7]

Estoppel. A purchaser of real estate from executors and trustees, on sale without order of court, after ratification by the orphans' court, when all persons interested appeared, and the fund from the sale has been distributed and a dividend paid creditors, is not entitled to question the validity of the sale in an action on a bond for the price.[8] So also beneficiary purchasers under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, are estopped from claiming that they received no title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.[9]

[§ 673] **(d) Resale and Recovery of Difference in Price.** In most jurisdictions where the purchaser refuses to complete his purchase, the executor has a remedy by making a resale and proceeding against the purchaser for the difference in price,[10] but this remedy is not exclusive and does not preclude an action for the purchase money.[11]

[§ 674] **(12) Proceeds[12]—(a) Liability of Representative.** An executor will be compelled to account in the probate court for the proceeds of real estate sold by him pursuant to the directions of the will,[13] and in a proper case an executor into whose hands proceeds of the sale of realty have come, or are to come, may be required to give security therefor;[14] but where a sale is made by the representative without authority, he cannot be compelled to account in his representative capacity for the proceeds.[15] Where the executor sells lands under a power conferred by the will on him personally, and not as executor, he should not include the proceeds of sale in his executor's account,[16] nor should proceeds received as trustee and not as executor be brought into the administration account.[17] So also where executors, having no power as such to sell land, sell the testator's land as agents for the devisees, they cannot be required to account as executors for the proceeds of such sales.[18]

spect to its subject matter are not available either as a defense or by way of recoupment or counterclaim in such an action, the remedy of the purchaser, if any, being against the executor personally. Westfall v. Dungan, 14 Oh. St. 276.

3. Boaz v. McChesney, 53 Ind. 193.

4. Dunn v. Carpenter, 10 KyL 494; Mellen v. Boarman, 21 Miss. 100.

[a] **Advances to decedent for purchase.**—Where A and B purchased land, A advancing B's part of the price and taking the title in his own name, and B afterward died insolvent, and the property was sold at auction by agreement of the executor and A, and A bought it, he was entitled to retain his advances out of the proceeds in his hands. Blanchard v. Lockett, 3 La. Ann. 98.

5. Wright v. Heffner, 57 Tex. 518.

6. Bond v. Ramsey, 89 Ill. 29 (where a second deed is made and tendered before the bringing of an action upon such notes, which does convey all the interest the testator had, this is all the purchaser can exact, and a recovery can be had on the notes).

7. Fambro v. Gantt, 12 Ala. 298; Washington v. McCaughan, 34 Miss. 304. But compare Keen v. McAfee, 116 Ga. 728, 42 SE 1022 (where, at an executors' sale, land is sold, and the purchaser gives his promissory notes in payment, and is sued thereon by the executors, there is no error in sustaining a demurrer to a plea filed by the purchaser which alleges that the executors represented to him that they had a right to sell, but that in fact neither the executors nor the testator had title to the land, and there was, therefore, a failure of consideration, and that the executors had no order of any court authorizing the sale which was therefore void, it appearing from the plea that defendant went into possession under the sale, and still retains possession, claiming to have subsequently purchased the true title).

8. Donnelly v. Byers, 234 Pa. 339, 83 A 296.

9. Goodell v. Sanford, 31 Mont. 163, 77 P 522.

10. Adams v. McMillan, 7 Port. (Ala.) 73; Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89.

[a] **Sufficiency of averments in declaration.**—An averment, in a declaration to recover a deficiency in price on resale of land previously sold to defendant, that the vendor had power to sell as executor is sufficient, without an allegation that the title of the vendor's testator was good. Adams v. McMillan, 7 Port. (Ala.) 73.

11. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89.

12. Disposition of proceeds of sale under order of court see infra §§ 1730–1735.

13. Parker v. Leighton, 131 Md. 407, 102 A 552; In re Branch, 123 Mo. A. 573, 100 SW 516; Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300]; Stagg v. Jackson, 1 N. Y. 206; Matter of Collins, 70 Hun 273, 24 NYS 226 [aff 144 N. Y. 522, 39 NE 629]; Matter of Blauvelt, 60 Hun 394, 15 NYS 586 [rev on other grounds 131 N. Y. 249, 30 NE 194]; Mayer v. McCune, 59 HowPr (N. Y.) 78; Bloodgood v. Bruen, 2 Bradf. Surr. (N. Y.) 8; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

[a] **Amount paid in satisfaction of dower should be credited.**—Meeks v. Thompson, 8 Gratt. (49 Va.) 134, 56 AmD 134.

[b] **Conveyance of individual interest.**—One who before his appointment as administrator deeds "all his rights, title, and interest of and in" land of which intestate died seized is not liable to the personal representatives or heirs of intestate for the purchase money, since his deed neither conveys nor attempts to convey any interest of the intestate or of the heirs. Wildermuth v. Long, 196 Pa. 541, 46 A 927.

14. Holmes v. Cock, 2 Barb. Ch. (N. Y.) 426.

Bond of personal representative generally see supra §§ 189–230.

15. Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627 mem, 55 NE 1096 mem].

"The proceeds of sale have not come into the hands of the executor as a part of the fund under administration. He holds them simply as one who, without warrant, has sold the property of another and is ready to account for its price. An executor can account for proceeds of the sale of lands not devised to him in trust only when he has sold them pursuant to a power of sale contained in the will, and it is not conceivable that the results of a sale for which there is no valid warrant in the will became any part of the fund intrusted to him as executor. The proceeds of a sale which the executor as such had no right to make, and which he has made only in his individual capacity, cannot be the subject of accounting in this court." Matter of Green, 63 Misc. 638, 639, 118 NYS 747.

[a] **Where the interest of a devisee has been improperly sold** by the executor, the devisee may waive the tort and pursue the purchase money in an action for money had and received against the person to whom the executor paid it. Stoner v. Zimmerman, 21 Pa. 394.

16. Matter of Brown, 5 Dem. Surr. (N. Y.) 223.

17. In re Aston, 5 Whart. (Pa.) 228.

18. Offutt v. Devine, (Ky.) 53 SW 816, 49 SW 1065, 20 KyL 1732; Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627 mem, 55 NE 1096 mem].

[§ 675] **(b) How Far Regarded as Personalty.** In case of a sale of a decedent's realty there is a conversion into personalty only to the extent to which the purchase money may be required as personalty for the particular object for which the sale is made, otherwise such proceeds, although in the form of money, remain impressed with the character of realty so far as to determine who is entitled thereto.[19] Where an executor, having power to sell certain land on the death of testator's widow and divide the proceeds among testator's heirs, sold the same during the widow's life, his void deed did not convert the equitable interest of the legatees in the property, so as to compel them to interplead with the widow's representatives as to their contesting claims on the purchase money paid for such deed.[20]

[§ 676] **(c) Disposition of Proceeds.** Where a power of sale is lawfully exercised for certain specified purposes, it is the duty of the executor to devote the proceeds to such purposes, and to pay over the surplus, if any remains after the special purpose has been carried out, to such persons as the will intended.[21] Where the testator has authorized or directed a sale of land for the payment of debts, the money arising therefrom becomes legal assets for that purpose,[22] and it has been held that even though a sale is not made for the payment of debts the proceeds must be applied to the debts if needed therefor.[23] So also an executor who has paid out in satisfaction of decedent's debts a sum in excess of the personalty may reimburse himself from the proceeds of a sale of the realty.[24] But it has also been held that, where real estate was not converted into personalty by the terms of a will until sale thereof more than two years from the date of testator's death, the proceeds were discharged from liability for decedent's debts.[25] Where testator divided his whole estate into two parts, called "personal fund" and "real estate," and it was plainly his intention that the real estate should bear the expense of the conversion thereof into money, equity will charge such expense to the proceeds of such real estate, although there is a general provision in the will for the payment of all debts from the personal fund.[26] While money received from the sale of mortgaged land belonging to an insolvent estate cannot be taken to pay the cost of a settlement suit in which a mortgage lien is enforced, so as to leave an amount insufficient to satisfy the mortgage, if personal property is used in paying insurance, taxes, repairs, and interest on the mortgaged property to an extent exceeding what is taken to pay costs of settlement, including attorney's fee, commissioner's fee, and advertising, the mortgagee cannot complain, especially where he would have been required to pay a large part of such expenses out of the proceeds in case of foreclosure.[27] Where, after recovery of a judgment against devisees, but before execution sale thereunder the executors exercised their power of sale, the execution purchaser was not entitled to follow the fund in the executor's hands.[28] Where an executor by mistake or otherwise has sold land not belonging to his testator the true owner is entitled to the purchase money.[29]

[§ 677] **(d) Liability of Purchaser as to Application of Proceeds.** The general rule is that, where a purchaser from an executor who sells under a power contained in the will pays over the purchase money in good faith to his vendor, he is under no duty or obligation to see to the proper application or distribution of the money by the latter;[30] and

19. Cronise v. Hardt, 47 Md. 433; Matter of Fritsch, 80 Misc. 385, 142 NYS 555; Post v. Benchley, 15 NYSt 618 [app dism 110 N. Y. 665 mem, 18 NE 480 mem]; In re Raleigh, 206 Pa. 451, 55 A 1119; Maguire's Est., 10 Pa. Dist. 238. But compare Holcomb v. Wright, 5 App. (D. C.) 76, 86 ("The sale was decreed to be made by virtue of the will, and the sale was made under that decree, and finally ratified; and we must suppose that the sale was properly made, and the realty converted into personalty").

20. Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450.

21. U. S.—Dixon v. Ramsay, 7 F. Cas. No. 3,933, 1 Cranch C. C. 496.

Ill.—In re Whitman, 22 Ill. 511.

Ky.—Buckner v. Buckner, 215 SW 420; Ducker v. Stubblefield, 9 B. Mon. 577.

Md.—Cronise v. Hardt, 47 Md. 433; State v. Nicols, 10 Gill & J. 27.

N. J.—Tonnele v. Zabriskie, 51 N. J. Eq. 557, 26 A 808.

N. Y.—In re McComb, 117 N. Y. 378, 22 NE 1070; Bogert v. Hertell, 4 Hill 492; Mayer v. McCune, 59 HowPr 78.

N. C.—Peacock v. Harris, 85 N. C. 146.

Pa.—Hannum v. Spear, 2 Dall. 291, 1 L. ed. 386.

[a] **Proceeds equitable assets.**—The proceeds of sales of lands made under a will to pay debts are equitable assets. Dixon v. Ramsay, 7 F. Cas. No. 3,933, 1 Cranch C. C. 496.

[b] **Surplus distributed as real estate.**—In re Raleigh, 206 Pa. 451, 55 A 1119.

22. Ky.—Harding v. Harding, 451 Ky. 398, 152 SW 259; Marrett v. Babb, 91 Ky. 90, 15 SW 4, 12 KyL 652; Muldoon v. Crawford, 14 Bush 125; Grider v. Payne, 9 Dana 188; Loftus v. Locker, 1 J. J. Marsh. 297.

Mo.—Governor v. Chouteau, 1 Mo. 731.

N. J.—Smith v. Bloomsbury First Presb. Church, 26 N. J. Eq. 132.

Oh.—Stiver v. Stiver, 8 Oh. 217.

Pa.—Philadelphia's App., 112 Pa. 470, 4 A 4.

[a] **Payment of mortgage.**—Where a testatrix charged her real estate with the payment of her debts, and empowered her executors to sell so much thereof as should be necessary for that purpose, the proceeds of land sold to pay debts could not be applied to the payment of mortgage debts, to the prejudice of creditors not secured by mortgage. Van Vechten v. Keator, 63 N. Y. 52.

23. In re Bolton, 146 N. Y. 257, 40 NE 737 [aff 31 NYS 588]; Matter of Newell, 38 Misc. 563, 77 NYS 1116.

[a] **Illustration.**—Where land is sold under a power to sell for payment of legacies, the proceeds are applicable to the debts in case the personalty is insufficient. Matter of Newell, 38 Misc. 563, 77 NYS 1116.

[b] **A power to sell when for the best interests of the estate** will be deemed to authorize executors to apply the proceeds to the payment of debts which would be a burden on property unsold, and this, although the power does not expressly direct such application of the property. Olyphant v. Phyfe, 27 Misc. 64, 58 NYS 217.

[c] **Right lost by limitations.**—A testator who died in 1839, directed his executors to sell his real estate, but they neglected to do so till 1856. Where in 1842 the executors rendered their final account of the personal estate, which was insufficient to pay the debts of the testator, and a dividend was declared, and the executors were directed by the surrogate to distribute among the creditors any surplus that might be left after paying expenses of administration, creditors who received their dividend were barred by the statute of limitations from obtaining, in 1857, payment of the remainder of their claim out of the real estate sold by the executors in 1856. Warren v. Paff, 4 Bradf. Surr. (N. Y.) 260.

[d] **Arrangement as to discharge of liens.**—Where the real estate of two deceased tenants in common was sold by their executors, and in order to make clear title the executors paid off liens on the real estate, one paying a larger amount than the other under an agreement that on the distribution of the estate a proper adjustment should be made, a simple contract creditor of one decedent could not object to this adjustment. Strough's Est., 2 Chest. Co. (Pa.) 291.

24. In re Bolton, 146 N. Y. 257, 40 NE 737.

25. In re Cooper, 206 Pa. 628, 56 A 67, 98 AmSR 799.

26. Mathews v. Tyree, 53 W. Va. 298, 44 SE 526.

27. Sumrall v. Vanarsdall, 111 SW 310, 33 KyL 768.

28. Comrie v. Kleman, 162 App. Div. 510, 147 NYS 589.

29. Miller's App., 84 Pa. 391.

[a] **Partnership land.**—A sale by an executor of a partner of the whole of a lot of land, in ignorance of the partnership, entitles claimant under the other partner to his proportion of the purchase money, with interest. Lee v. Craig, 1 A. K. Marsh. (Ky.) 177.

30. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177; Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308; Greenway v. Roberts, 10 F. Cas. No. 5,790, 2 Cranch C. C. 246.

Ark.—Ludlow v. Flournoy, 34 Ark. 451.

Del.—Leeds v. Sparks, 8 Del. Ch. 280, 68 A 239.

Ga.—Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

Ill.—Whitman v. Fisher, 74 Ill. 147; Wardwill v. McDowell, 31 Ill. 364.

the validity of the deed of the executor is not impaired by his using the money for a purpose other than that contemplated by the will.[31] It has been held, however, that if the debts are specific or scheduled, it becomes the duty of the purchaser to see that the purchase money is applied in satisfaction thereof.[32] Certain limitations of the rule have been recognized in England,[33] where it is held that if the power is given to sell for payment of legacies alone the purchaser is responsible for such application of the purchase money.[34] But in the United States the general rule is the same even though the sale is for payment of legacies.[35]

[§ 678] **(e) Proceedings for Distribution.** Equity formerly took exclusive jurisdiction over the proceeds of a sale of real estate under a will as to compelling distribution,[36] but probate courts are now vested by statute with authority over such matters.[37] In an action to sell certain real estate of decedent and to make distribution of the proceeds arising from the sale, moneys received by the executor from a sale of property under a power of sale in the will cannot be directed to be applied to the payment of the debts of the estate.[38]

[§ 679] **(13) Nature, Validity, and Effect of Sale.**[39] A sale by an executor acting under the authority of a power conferred by the will is in no sense judicial in its character,[40] and the purchaser deals with the executor as he would with any other vendor.[41] A sale or conveyance under a power in the will transfers all title that the testator had and divests the heirs of all title by descent,[42] but where

Ind.—Munson v. Cole, 98 Ind. 502.
Kan.—Linn County Bank v. Grisham, 185 P 54.
Ky.—Buckner v. Buckner, 215 SW 420; Middrow v. Fox, 2 Dana 74.
Md.—Seldner v. McCreery, 75 Md. 287, 23 A 641; Alther v. Barroll, 22 Md. 500; Coombs v. Jordan, 3 Bland 284, 22 AmD 236.
Mass.—Andrews v. Sparhawk, 13 Pick. 393.
Mo.—Drumheler v. Haff, 23 Mo. A. 161.
N. J.—Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33; Dewey v. Rugles, 25 N. J. Eq. 35.
N. Y.—Coogan v. Ockershausen, 55 N. Y. Super. 286, 18 NYSt 366.
N. C.—Hauser v. Shore, 40 N. C. 357.
Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.
Pa.—In re Cochrane, 202 Pa. 415, 51 A 989; Grant v. Hook, 13 Serg. & R. 259; Keas' Est., 9 Pa. Dist. 269; Dinsmore v. Kelso, 4 Brewst. 34; McCartney's Est., 18 Phila. 35, 2 Pa. Co. 202, 18 WklyNC 51.
S. C.—Laurens v. Lucas, 27 S. C. Eq. 217.
Tex.—Rogers v. Jones, 13 Tex. Civ. A. 453, 35 SW 812.
Va.—Hughes v. Tabb, 78 Va. 313; Davis v. Christian, 15 Gratt. (56 Va.) 11; Meeks v. Thompson, 8 Gratt. (49 Va.) 134, 56 AmD 134.
Eng.—Corser v. Cartwright, L. R. 7 H. L. 731; Sabin v. Heape, 27 Beav. 553, 54 Reprint 218; Robinson v. Lowater, 17 Beav. 592, 51 Reprint 1165 [aff 5 De G. M. & G. 272, 54 Eng Ch 215, 43 Reprint 875]; Smith v. Guyon, 1 Bro. Ch. 186, 28 Reprint 1072; Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 635, 42 Reprint 700; Colyer v. Finch, 5 H. L. Cas. 905, 10 Reprint 1159; Jones v. Noyes, 4 Jur. N. S. 1033; Shaw v. Borrer, 1 Keen 559, 15 EngCh 559, 48 Reprint 422; Eland v. Eland, 4 Myl. & C. 420, 18 EngCh 420, 41 Reprint 162; Ball v. Harris, 4 Myl. & C. 264, 18 EngCh 264, 41 Reprint 103 [aff 8 Sim. 485, 8 EngCh 485, 59 Reprint 193]; Forbes v. Peacock, 1 Phil. 717, 19 EngCh 717, 41 Reprint 805 [rev 12 Sim. 528, 35 EngCh 447, 59 Reprint 1235]; Doran v. Wiltshire, 3 Swanst. 699, 36 Reprint 1027.

[a] **Reasons for rule.**—(1) "The risks attending such sales would greatly discourage purchasers." Ludlow v. Flournoy, 34 Ark. 451, 464. (2) "It would defeat a sale, if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts, which he would have no means of ascertaining." Hauser v. Shore, 40 N. C. 357, 362.

[b] **Illustration.**—Where power is given to the executor to sell for the payment of debts generally, or debts and legacies, a purchaser from him is not bound to see to the application of the purchase money, even if he has notice of the debts. Gardner v. Gardner, 9 F. Cas. No. 15,227, 3 Mason 178 [mod on other grounds 12 Wheat. 498, 6 L. ed. 706]; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Cadbury v. Duval, 10 Pa. 265; Page v. Adam, 4 Beav. 269, 49 Reprint 342; Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 635, 42 Reprint 700; Balfour v. Welland, 16 Ves. Jr. 151, 33 Reprint 941.

[c] **The purchaser's knowledge that the executor is embarrassed** in his affairs is not such proof that the money is likely to be misapplied as to be notice to the purchaser of the bad faith of the executor. Davis v. Christian, 15 Gratt. (56 Va.) 11.

31. Whitman v. Fisher, 74 Ill. 147 (where the proceeds of a sale under a power to sell for the payment of legacies were used to pay debts).

32. Andrews v. Sparhawk, 13 Pick. (Mass.) 393 [foll Gardner v. Gardner, 9 F. Cas. No. 5,227, 3 Mason 178 (mod 12 Wheat. 498, 6 L. ed. 706)].

33. Abbot v. Gibbs, 1 Eq. Cas. Abr. 358, 21 Reprint 1101; Haynes v. Forshaw, 11 Hare 93, 45 EngCh 93, 68 Reprint 1201; Johnson v. Kennett, 3 Myl. & K. 624, 10 EngCh 624, 40 Reprint 238 [rev 6 Sim. 384, 9 EngCh 384, 58 Reprint 638; Horn v. Horn, 2 Sim. & St. 448, 1 EngCh 448, 57 Reprint 417; Watkins v. Cheek, 2 Sim. & St. 199, 1 EngCh 199, 57 Reprint 321; Spalding v. Shalmer, 1 Vern. Ch. 301, 23 Reprint 483.

34. Johnson v. Kennett, 3 Myl. & K. 624, 10 EngCh 624, 40 Reprint 238.

[a] **Payment of debts before sale.**—Where the power was given to sell for the payment of both debts and legacies, but the debts had been paid at the time of the sale, and this was known to the purchaser, it was held by Lord Chancellor Lyndhurst that the rule applicable to a charge of legacies alone does not apply, because "the rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule." Johnson v. Kennett, 3 Myl. & K. 624, 10 EngCh 624, 631, 40 Reprint 238.

[b] **There is no distinction** between a case where the debts were paid after the death of the testator and before the sale by the executor, and a case where the testator left no debts. "The case must stand upon one of two grounds: either that there are no debts within the knowledge of the purchaser, and then it is indifferent whether there were no debts at the death of the testator, or no debts at the time of the purchase, or, which is more satisfactory and open to no ambiguity, on the ground that when a testator, by his will, charges his estate with debts and legacies, he shows that he means to intrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable, and all stand upon one footing; namely, that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator and drawing none of those fine distinctions which embarrass courts and counsel, and lead to litigation, and it is one to which I shall adhere as long as I sit in this court." Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 635, 652, 42 Reprint 700.

35. Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Cadbury v. Duval, 10 Pa. 265. See also cases supra note 30.

[a] **Reason for rule.**—"To hold a purchaser liable to see legacies paid would in fact involve him in the account of the debts which must be first paid." Cadbury v. Duval, 10 Pa. 265. To same effect Keas' Est., 9 Pa. Dist. 269.

36. Monroe v. Wilson, 6 T. B. Mon. (Ky.) 122.

37. Ex p Hayes, 88 Ind. 1; Hart v. Dunbar, 12 Miss. 273; Holmes v. Cock, 2 Barb. Ch. (N. Y.) 426; In re Vandervoort, 1 Redf. Surr. (N. Y.) 270; Bloodgood v. Bruen, 2 Bradf. Surr. (N. Y.) 8.

38. Matter of Gedney, 30 Misc. 18, 62 NYS 1023.

39. **Sale under order of court** see infra §§ 1689–1705.

40. In re Pearson, 98 Cal. 603, 33 P 451, 102 Cal. 569, 36 P 934; Harwell v. Foster, 102 Ga. 38, 28 SE 967; Goodell v. Sanford, 31 Mont. 163, 77 P 522.

41. In re Pearson, 102 Cal. 569, 36 P 934.

42. Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17; Peebles v. Watts, 9 Dana (Ky.) 102, 33 AmD 531; Matter of Fagan, 166 App. Div. 214, 151 NYS 701; Smyth v. Anderson, 31 Oh. St. 144.

[a] **Judgment against heir.**—(1) The title of the purchaser goes behind the lien of a judgment against an heir or residuary legatee and cuts it off. Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17. (2) Even a levy against the devisee does not prevent the execution of the power of sale or affect the title of the purchaser. Smyth v. Anderson, 31 Oh. St. 144.

[b] **The interest of a pretermitted child** in real estate is not divested by

a conveyance of the testator's land by the executor is invalid because of a lack of power, the title remains in the heirs or devisees.[43] A sale of land by executors under a power in the will to sell for the payment of debts is good against creditors[44] and discharges the land from the lien of debts not of record,[45] or even of a judgment rendered against decedent in his lifetime.[46] A testator cannot, by any power of sale in his will, relieve his land from liability for his debts in case the personalty is insufficient to pay them,[47] and it has even been considered that a sale for purposes other than the payment of debts will not give the purchaser a title discharged from all claim and demand on account of the debts,[48] although there is also authority for the view that a bona fide purchaser from an executor who has a power of sale takes good title as against creditors of decedent,[49] whose only remedy is against the proceeds in the hands of the executor,[50] or against the executor personally in case he has misapplied the proceeds.[51] It is not necessary to the validity of an executor's sale under a power in the will to pay the mortgages and legacies that all the facts appear of record,[52] and the presumption, after a long lapse of time, is that the circumstances existed which warranted the exercise by an executor of a power of sale.[53] Where the will charges the debts generally upon the land and a sale is made with the collusion of the purchaser for the purpose of preventing the payment of the debts, the land will remain charged with the debts in the hands of the purchaser.[54] A sale by an executor pursuant to direction in the will is not invalid because of the invalidity of the testamentary directions as to the disposition of the proceeds.[55] Where the will contains a power of sale, but gives no power to mortgage the realty, a conveyance made for the purpose of indirectly subjecting the property to a mortgage is invalid.[56] An executor will not be compelled by a decree of the orphans' court to execute a deed for real estate of the testator sold by him, where it appears that some of the devisees agreed with the other devisees that the property should not be struck off below a certain price, and that the crier disregarded this understanding, and sold the property at a lower price to some of the parties to the agreement.[57] A sale can derive no aid from a power given by the will unless made under the power.[58]

Estoppel. An estoppel to complain of a sale to pay debts results from the action of heirs or devisees in joining the executor in a conveyance of land sold for this purpose.[59] Where executors sold real estate under a power in the will, and under a decree settling their accounts the cash received by such sale appeared, it did not estop one interested in the estate, having notice of such accounting, from contesting the validity of the sale, where the account did not set out the facts rendering the sale invalid, and no issue as to its validity was tendered.[60] Where one of several coexecutors executes a deed depending for its validity on the signature of all, the heirs will not be held to have acquiesced in the unauthorized act, where there is no evidence of actual notice of the execution of the deed brought home to them, and the deed is not recorded until after the execution and record of a later deed by an administrator de bonis non of the estate.[61]

Void agreement for sale. An agreement by an executor, for himself and the other executors, to sell certain land of the estate, when the executors perfected title to the property, has been held to be void, as contrary to public policy.[62] Where a conveyance was made and deed executed by executors after the will had been probated, and they were qualified and empowered to convey, it was immaterial that, before their appointment, they had made an unauthorized or void agreement to sell to the same grantee.[63]

[§ 680] **(14) Title and Rights of Purchaser**[64] **—(a) In General.** After a will is admitted to probate it is the law for the administration of the testator's estate, and a sale by virtue of a power con-

a sale under a power in the will. Smith v. Steen, 20 N. M. 436, 150 P 927.

43. U. S.—Gaines v. De la Croix, 6 Wall. 719, 18 L. ed. 965.

N. J.—Pratt v. Worrell, 66 N. J. Eq. 194, 57 A 450.

N. Y.—Matter of Green, 63 Misc. 638, 118 NYS 747.

Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.

Vt.—Powers v. Caledonia County Grammar School, 106 A 836.

Wis.—King v. Whiton, 15 Wis. 684.

[a] **Sale under will subsequently set aside.**—A sale by executors under one will passes no title as against the universal legatee under a subsequent will duly probated. Gaines v. New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950.

44. Grant v. Hook, 13 Serg. & R. (Pa.) 259; Hannum v. Spear, 2 Dall. (Pa.) 291, 1 L. ed. 386.

45. Cadbury v. Duval, 10 Pa. 265; Connelly's Est., 3 Del. Co. (Pa.) 402.

46. McDaniel v. Edwards, 56 Ga. 444; Stallings v. Ivey, 49 Ga. 274; Carhart v. Vann, 46 Ga. 389; Sims v. Ferrill, 45 Ga. 585.

[a] **Effect as to lands not sold.**—Where land subject to the lien of a judgment against the decedent is sold by his executors and the proceeds applied to the payment of junior liens, this does not discharge, in favor of the heirs or devisees, the lien of the judgment upon other lands remaining in their possession. Konigmaker v. Brown, 14 Pa. 269 [foll Wells v. Baird, 3 Pa. 351].

[b] **Judgment against executor.**—A private sale by an executor under the will authorizing such a sale will not divest the lien of a judgment against the executor, although the judgment was founded on a liability of the estate created after the death of the testator. Hollinshed v. Woodward, 124 Ga. 721, 52 SE 815.

47. Betts v. Cobb, 121 Ala. 154, 25 S 692; Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 227, 131 SW 949 [cit Cyc]; Hollinshead v. Woodward, 124 Ga. 721, 52 SE 815; Mayer v. McCune, 59 HowPr (N. Y.) 78.

[a] **Protection of bona fide purchaser.**—Property in the hands of a bona fide purchaser from executors who have power to sell will be protected by compelling the executors, if they have assets, to pay claims against it. Latrobe v. Tiernan, 2 Md. Ch. 474.

[b] **Judgment against executor.**—Where after testator's death judgment was entered against his executrix in a suit commenced against him in his lifetime, and under a testamentary power the executrix contracted to convey his lands in fee simple, she could not compel specific performance of the agreement before satisfaction of the judgment, since the lands might be subjected to payment of the judgment. Mayer v. McCune, 59 HowPr (N. Y.) 78.

48. Hannum v. Spear, 2 Dall. (Pa.) 291, 1 L. ed. 386 (power to sell for payment of legacies).

49. Personeni v. Goodale, 199 N. Y. 323, 92 NE 754; Matter of Newell, 38 Misc. 563, 77 NYS 1116.

50. See supra § 676.

51. Personeni v. Goodale, 199 N. Y. 323, 339, 92 NE 754.

"We see no distinction between a case where personal property is squandered and one where the proceeds of real property sold under a valid power of sale are so squandered." Personeni v. Goodale, supra.

52. Justice v. Soderlund, 225 Mass. 320, 114 NE 623.

53. Fronsoe v. Bushnell, 251 Fed. 850, 164 CCA 66.

54. Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

55. Peters v. Bowman, 19 F. Cas. No. 11,029 [aff 98 U. S. 56, 25 L. ed. 91].

56. Arnoux v. Phyfe, 6 App. Div. 505, 39 NYS 973 [aff 159 N. Y. 552 mem, 54 NE 1089 mem].

57. Cobleigh's Est., 23 Pa. Super. 271.

58. Alabama Conference M. E. Church South v. Price, 42 Ala. 39, 50; Clark v. Clark, 172 Ill. 355, 50 NE 101; Goodell v. Sanford, 31 Mont, 163, 77 P 522.

"The law is unvarying and unbending, that no support is given to a sale by a power when it is plain that the sale was made without reference to the power." Alabama Conference M. E. Church South v. Price, supra.

59. Buckner v. Buckner, (Ky.) 215 SW 420.

60. Weintraub v. Siegel, 57 Misc. 246, 109 NYS 215.

61. Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 SE 439.

62. Blumenthal v. Cain, 22 Ga. A. 596, 96 SE 710.

63. Hunter v. Amish, 164 Iowa 397, 145 NW 877.

64. **Rights of divested purchaser** see infra § 687.

ferred thereby is as complete an administration of the property and passes title thereto as effectually as if made under an order of court.[65] A purchaser in good faith from an executor who has power to sell gets a title and possession which is good at law, even though the sale is prematurely or indiscreetly made, or the necessity for the exercise of the power has not arisen, or the sale was made for an inadequate consideration, or in violation of the executor's duty, the relief against him, if any can be had, being only in equity and at the instance of the beneficiary whose interests have been prejudiced.[66] Neither is the purchaser's title as against beneficiaries affected by the executor's misappropriation of the proceeds.[67] But a sale of land by executors without consideration or outside the scope of the power given them by the will is void as to the immediate grantee and subsequent grantees with notice, at the suit of the estate of the testator and his creditors, or at the suit of prior judgment creditors of the beneficiaries in such estate.[68] Where on a sale of testator's real estate under a testamentary power the executors stipulated that all taxes, assessments, etc., would be allowed out of the purchase money, and the property conveyed free from all encumbrances, it was held that where seventeen years after the sale and deed an unpaid assessment which was a lien on the property was discovered, the purchaser could recover from the executors the assessment as for money had and received, although the assessment was compromised and paid by a guaranty company which had insured the title.[69]

Relation back. Where the executor is authorized to sell but not given title, the title of a purchaser from the executor relates back to the testator's death.[70]

[§ 681] **(b) Rule of Caveat Emptor.** A sale by an executor passes only such interest as testator had in the property,[71] and a purchaser whose deed contains no covenants to cover defects in title takes at his own risk, and unless he can show fraudulent representations upon which he relied as an inducement to his purchase, he is without remedy in case

Sale under order of court see infra §§ 1696, 1705.

65. Ga.—Penn v. Mutual Cotton Oil Co., 106 Ga. 152, 32 SE 17.

Ill.—Clark v. Adkisson, 241 Ill. 109, 89 NE 265; Starr v. Willoughby, 218 Ill. 485, 75 NE 1029, 2 LRANS 623.

Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Ky.—Kerr v. Long, 88 SW 1068, 28 KyL 52; E. O. Eshelby Tobacco Co. v. McNamara, 82 SW 620, 26 KyL 889.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. Y.—McCarty v. Downes, 161 App. Div. 667, 146 NYS 973.

S. D.—Spencer v. Lyman, 27 S. D. 471, 480, 131 NW 802.

Tex.—Glover v: Coit, 36 Tex. Civ. A. 104, 81 SW 136.

"A sale of this character by executors or trustees under a will is in parity, on the same footing, with a judicial sale; that, where there is jurisdiction or authority to make the sale, the purchaser takes the complete title of the decedent, relieved of all burdens and liabilities of the administrator under which the sale is made, and that the purchase price or proceeds of such sale steps in and takes the place of the property so dispensed of, and which proceeds become liable for the burdens of administration, for the payment of debts, legacies, etc., and all of which in no manner concerns the purchaser at such sale, or in any manner affects his title, that the heir takes a distributive share of the proceeds, and has no title to the land after the decease of the ancestor, with the possible exception of posthumous or pretermitted children (Northrop v. Marquam, 16 Or. 173, 18 P 449). The proceeds of the land, when the sale is fair, are just as available to the creditors as the land itself. The land could only be sold once to satisfy the debts, and, when that has been fairly done by the trustees and the proceeds turned into the channels of administration for the payment of debts, it would certainly be inequitable to again charge the same land with the payment of the same debts." Spencer v. Lyman, supra.

[a] **Purchaser may acquire fee.**—Clark v. Adkisson, 241 Ill. 109, 89 NE 265; Feaster v. Fagan, 135 Iowa 633, 113 NW 479; Kerr v. Long, 88 SW 1068, 28 KyL 52; E. O. Eshelby Tobacco Co. v. McNamara, 82 SW 620, 26 KyL 889.

[b] **Where an executor takes title to land on which decedent held a mortgage** in satisfaction of it, a purchaser from him without an order of court takes a good title. Battey v. Battey, 94 Nebr. 729, 144 NW 786.

[c] **Where the rights of creditors were not involved,** and the executrix was the sole devisee under a will, the fact that the will was not an independent one, and that a sale by the executrix was made without an order of the county court, was not such an irregularity as to defeat the title of purchasers who purchased after the probate of the will as an independent one. Glover v. Coit, 36 Tex. Civ. A. 104, 81 SW 136.

[d] **Revocation of probate after sale.**—The purchaser's title is not liable to be affected by the subsequent revocation of the probate of the will, though the sale is made before the time to appeal from the admission of the will to probate has elapsed. Reed v. Reed, 91 Ky. 267.

66. Ala.—Traylor v. Marshall, 11 Ala. 458.

D. C.—Contee v. Lyons, 19 D. C. 207.

Ga.—Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164; Reeves v. Bolles, 95 Ga. 402, 22 SE 626; Fields v. Carlton, 84 Ga. 597, 11 SE 124; Bagley v. Stephens, 78 Ga. 304, 2 SE 545; Atkinson v. Central Georgia Agricultural, etc., Co., 58 Ga. 227.

Ky.—Busch v. Rapp, 63 SW 479, 23 KyL 605; Reed v. Reed, 91 Ky. 267, 15 SW 525, 12 KyL 867, 11 LRA 513; Coleman v. McKinney, 3 J. J. Marsh. 246; Larue v. Larue, 3 J. J. Marsh. 156; Freer v. Chandler, 1 Ky. Op. 301.

Md.—Jenifer v. Beard, 4 Harr. & M. 73.

N. J.—Lindley v. O'Reilly, 50 N. J. L. 636, 15 A 379, 7 AmSR 802, 1 LRA 79.

N. Y.—McCarty v. Downes, 161 App. Div. 667, 146 NYS 973.

N. C.—Simpson v. Simpson, 93 N. C. 373.

Pa.—Keas' Est., 9 Pa. Dist. 269; Corby's Est., 4 Kulp 169.

S. C.—Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

Va.—Mills v. Mills, 28 Gratt. (69 Va.) 442.

Wash.—Sharp v. Greene, 22 Wash. 677, 62 P 147.

W. Va.—Smith v. Henning, 10 W. Va. 596.

[a] **Conveyance before patent issued.**—A deed executed by an executor under a will before the emanation of a patent can convey no legal title to the land; but if the patent issue in the name of the executor it operates in favor of the prior conveyance by way of estoppel. Lewis v. Baird, 15 F. Cas. No. 8,316, 3 McLean 56.

[b] **A positive showing that the executor sold as such** is not necessary to show a good title in a purchaser from an executor, there being no question of good faith. Harvey v. Van Cott, 71 Hun 394, 25 NYS 25 [aff 149 N. Y. 579 mem, 43 NE 987 mem].

67. Cochrane's Est., 202 Pa. 415, 51 A 989.

Purchaser not bound to see to application of proceeds see supra § 677.

68. Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303; Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955; Coy v. Gaye, (Tex. Civ. A.) 84 SW 441.

[a] **Neither an estate nor its administrator can be held a constructive trustee** of the legal title for purchasers from an executor who had no authority to sell, but, if necessary, the purchasers may be held as trustees in invitum for the benefit of the estate. Coy v. Gaye, (Tex. Civ. A.) 84 SW 441.

[b] **Where a sale of a land certificate by an administratrix is collaterally attacked,** it devolves on the attacking parties to show the absence of some essential element, or the existence of some fact that would destroy the validity of the transaction. McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718

[c] **Independent executor.**—Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale. Haring v. Shelton, (Tex.) 122 SW 13 [aff (Civ. A.) 114 SW 389].

[d] **Case not within rule.**—Where executors having a power of sale for the payment of debts offered for sale at auction a lot described as sixty acres more or less, the lot being unsurveyed and the conditions of sale providing for a survey to be made after the sale at the joint expense of vendors and purchaser, and the lot was sold at a price per acre, and on being surveyed it was found to contain one hundred and seventeen acres, the purchaser was nevertheless entitled to specific performance, and the executors could not refuse to convey upon the ground that the proceeds were considerably more than was needed for the payment of debts. Sea v. McLean, 14 Can. S. C. 632.

69. Alexander v. Greacen, 36 Misc. 526, 73 NYS 1001 [rev 36 Misc. 133, 72 NYS 1085].

70. Meekins v. Branning Mfg. Co., 224 Fed. 202.

71. Wickersham's Est., 139 Cal. 652, 73 P 541, 7 Cal. Unrep. Cas. 70, 70 P 1079; Louisiana, etc., Lumber Co. v. Southern Pine Lumber Co., (Tex. Civ. A.) 171 SW 537; Powers

the title proves defective or he otherwise gets less than he expected to secure by his purchase.[72] But where the executor assures one about to purchase that he will make him a clear title and the purchase is made accordingly the purchaser is entitled to a title free from encumbrance;[73] and it has also been held that in case of a mistake, where the proceeds of the sale are still within the control of the court, relief may be granted to a purchaser.[74]

[§ 682] **(c) Protection as Bona Fide Purchaser.** Where one purchases land from an executor as such, he is bound to know whether or not the latter is authorized by the will to make the sale,[75] and if the executor has no such power the purchaser is not an innocent or bona fide purchaser,[76] and acquires no title.[77] But where the executor has power to sell, a purchaser from him acquires good title notwithstanding the bad faith of the executor in making the sale, where he had no knowledge of such bad faith,[78] for the purchaser has a right to presume that the executor is acting in good faith,[79] and is not bound to inquire whether a necessity for the exercise of the power given by the will exists.[80] The purchaser cannot, however, safely disregard information which he cannot avoid receiving without extraordinary negligence;[81] and if he has notice that the sale is made for a purpose other than that for which the will empowers the executor to sell, or is otherwise unauthorized, the legal title of the devisees is not divested.[82] But it has been held that where an executor sells land, in excess of the power conferred by the will, to pay debts of the testator, the purchaser is subrogated to the rights of creditors, and can hold possession of the land as security for so much of the money as was paid on the debts.[83] Where the sale is tainted with fraud and covin between the executor and the purchaser, it is absolutely void and the title to the property remains unchanged.[84]

v. Caledonia County Grammar School, (Vt.) 106 A 836.

72. U. S.—Brush v. Ware, 15 Pet. 93, 10 L. ed. 672.
Cal.—Miller v. Gray, 136 Cal. 261, 68 P 770.
Ga.—Jones v. Warnock, 67 Ga. 484.
Ill.—Bond v. Ramsey, 89 Ill. 29.
Kan.—Headrick v. Yount, 22 Kan. 344.
Ky.—Casey v. Casey, 13 SW 718, 12 KyL 19.
Mont.—Goodell v. Sanford, 31 Mont. 163, 77 P 522.
Nebr.—Neary v. Neary, 97 NW 302.
N. Y.—Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482.
Va.—Syme v. Johnston, 3 Call (7 Va.) 558; Brock v. Philips, 2 Wash. (2 Va.) 68.

[a] **Illustration.**—Where an executor conveyed real property of the estate without recourse to the grantor in any event, and the purchaser paid five thousand dollars less than the value of the property, and alleged neither fraud nor mistake, but went into the transaction with his eyes open and fully advised of all the circumstances, he was not entitled to relief in equity, although the executor assumed to sell and convey the whole title, whereas the decedent was in fact vested with only an undivided one-fourth part, the balance having escheated to the state. Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482.

[b] **The purchaser deals with the executor as he would with any other vendor,** and it is incumbent on him to examine the title for himself and point out any objections he may have to the title tendered him by the executor; and he cannot treat such sale as a judicial sale of property under the order of court, and object to confirmation there by reason of facts impairing or defeating the title. In re Pearsons, 98 Cal. 603, 33 P 451.

73. Reiner's App., (Pa.) 12 A 850.
74. Thomas' Est., 22 Pa. Dist. 373.
75. U. S.—Brush v. Ware, 15 Pet. 93, 10 L. ed. 672.
Cal.—Hill v. Den, 54 Cal. 6.
Ga.—Satterfield v. Tate, 132 Ga. 256, 64 SE 60; Johnson v. Porter, 115 Ga. 401, 41 SE 644.
Ky.—Buckner v. Buckner, 215 SW 420.
Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.
S. C.—Ivey v. Vaughan, 93 S. C. 203, 76 SE 464, 43 LRANS 377, Ann Cas1914D 900.
Tex.—Coy v. Gaye, (Civ. A.) 84 SW 441; Masterson v. Stevens, (Civ. A.) 37 SW 364.

76. Herdlicka v. Evans, 165 Iowa 207, 145 NW 84; Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955; Masterson v. Stevens, (Tex. Civ. A.) 37 SW 364.

77. See supra § 680.

78. Scudder v. Stout, 10 N. J. Eq. 377; Staples v. Staples, 24 Gratt. (65 Va.) 225.

79. Davis v. Christian, 15 Gratt. (56 Va.) 11.

80. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.
Ga.—Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.
Ky.—Rutherford v. Clark, 4 Bush 27, 35.
Pa.—Eisenbrown v. Burns, 30 Pa. Super. 46.
W. Va.—Smith v. Henning, 10 W. Va. 596.
Eng.—In re Tanqueray-Willaume, 20 Ch. D. 465, 21 ERC 540.
Ont.—Re Bradburn, 3 Ont. L. 351.

"When a will directs the sale of real estate, if necessary, for the payment of all the testator's debts or legacies, a purchaser at any such sale, not being presumed to know, or to be able by reasonable diligence to know, the conditions of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale, and consequent want of authority to make it." Rutherford v. Clark, supra [quot Tarpy v. Lexington, etc., R. Co., 154 Ky. 345, 347, 157 SW 728].

[a] **Reason for rule.**—"If this purchaser would be required to investigate, whether a necessity for a sale existed and conclude that it did exist, and the legatee differ with him in such conclusion, the validity of the title would be made to depend on the verdicts of as many juries as the parties might be able to secure in determining the very question which the testator declared should be decided by his executors. 'It would render the power useless, for no prudent man would buy under such a load of responsibilities.' Grant v. Hook, 13 Serg. & R. (Pa.) 259; Doran v. Piper, 164 Pa. 430, 30 A 306." Eisenbrown v. Burns, 30 Pa. Super. 46, 49. To same effect Rutherford v. Clark, 4 Bush (Ky.) 27.

[b] **If the power of sale is for the payment of debts** the purchaser is not ordinarily required to ascertain the existence of debts. Smith v. McIntyre, 95 Fed. 585, 37 CCA 177; Wright v. Zeigler, 1 Ga. 324, 44 AmD 656; Keas' Est., 9 Pa. Dist. 269; Smith v. Henning, 10 W. Va. 596; In re Tanqueray-Willaume, 20 Ch. D. 465, 21 ERC 540; Re Bradburn, 3 Ont. L. 351; Mercer v. Neff, 29 Ont. 680.

81. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.
Ga.—Fletcher v. American Trust, etc., Co., 111 Ga. 301, 36 SE 767, 78 AmSR 164.
Ky.—Larue v. Larue, 3 J. J. Marsh. 156.
Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.
Va.—Davis v. Christian, 15 Gratt. (56 Va.) 11.
Eng.—In re Tanqueray-Willaume, 20 Ch. D. 465, 21 ERC 540.

[a] **Inquiry as to debts may be necessitated by** lapse of sufficient time to raise a presumption of payment. Smith v. McIntyre, 95 Fed. 585, 37 CCA 177; Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164; In re Tanqueray-Willaume, 20 Ch. D. 465, 21 ERC 540.

[b] **If an executor sells more land than is required** for the purpose for which the power of sale was given, the title of the purchaser is not affected by that fact, unless he had notice of it. Larue v. Larue, 3 J. J. Marsh. (Ky.) 156, 160 ("What debts Larue [the testator] owed, or how much land it was necessary to sell to pay them, were matters of which the executors should judge, and upon which, they alone, were competent to decide. The testator reposed confidence in them, and gave them authority to act, and thereby, strangers were invited to entertain confidence. It would, therefore, be unjust to permit strangers, who purchased in good faith, to sustain injury from the frauds of the executors").

82. Cal.—Huse v. Den, 85 Cal. 390, 24 P 790, 20 AmSR 232.
Ga.—Johnson v. Porter, 115 Ga. 401, 41 SE 644.
Ky.—Tarpy v. Lexington, etc., R. Co., 154 Ky. 345, 346, 157 SW 726; Rutherford v. Clark, 4 Bush 27; Luke v. Marshall, 5 J. J. Marsh. 353.
Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.
Tex.—Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; Coy v. Gaye, (Civ. A.) 84 SW 441.
W. Va.—Smith v. Henning, 10 W. Va. 596.

"The general rule is that a trustee's act beyond the scope of the authority conferred upon him, is invalid, and if the person dealing with the trustee has notice that the trustee is exceeding his authority, he has no higher rights than the trustee was authorized to confer. We see no reason why this rule should not be applied to a sale made by an executor without authority where his want of authority was known to the purchaser at the time he purchased." Tarpy v. Lexington, etc., R. Co., supra.

83. Mobley v. Jackson, 105 S. C. 450, 90 SE 23.

84. Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

[§ 683] **(15) Setting Aside Sale[85]—(a) Jurisdiction.** Jurisdiction of the probate court to set aside an executor's sale for fraud has been denied,[86] this being a matter of which equity takes jurisdiction.[87] But under some statutes the probate court is given this jurisdiction[88] unless the circumstances are such that the estate is no longer interested.[89]

[§ 684] **(b) Grounds.** A sale of real estate by the executor under power conferred by a will which is imperfectly executed will be set aside.[90] Where executors empowered to sell real estate sold certain real property to a coexecutor, and the sale was confirmed without the knowledge of those interested in the estate that the coexecutor was the purchaser, those interested may sue to rescind the sale or to have it declared that the coexecutor holds title in trust for the estate.[91] A sale may be set aside because it was not adequately advertised and unfairness in the sale resulted from the fact.[92] Where a will authorized the executor to sell so much of the real estate as was necessary to pay the debts, and he sold the whole property for a sum more than three times the amount of the debts, it was held proper to set aside the sale as against a purchaser with notice.[92½]

Fraud. A false representation by the executor or administrator, selling without an order of court, to the effect that the sale is authorized by the will, entitles the purchaser who was thereby misled and induced to buy to a rescission of the contract in equity.[93] A sale may be set aside where it is made to appear that it is tainted with fraud and collusion between the executor and the purchaser by reason of which the interests of the estate or of the heirs or devisees have been injuriously affected;[94] and it has been held that the mere fact that in conducting the sale the executor placed himself in antagonism to the interests of the devisees, by collusion with the real purchaser, was sufficient to entitle the devisees to have the sale set aside whether they were in fact prejudiced or not.[95] An heir attacking a sale by an executor empowered by the will to sell real estate devised to him in trust for beneficiaries and divide the proceeds, on the ground that the power of sale had failed as to the share which passed to the heir because of the invalidity of the gift of such share, may also question the sale on the ground of the fraud of the executor.[96]

Mistake. Where a sale is made by the acre, ignorance on the part of the executor as to the exact acreage of the land sold is not such a mistake as entitles him to relief from a sale of more land than was necessary.[97]

Want or failure of consideration. Mere inadequacy of price is not usually considered a sufficient ground for setting aside a sale by an executor,[98] but it is otherwise where the inadequacy is so gross as to indicate fraud, undue advantage, improvidence, or an abuse of the power conferred;[99] and in some states the fact that on a resale a sum at least ten per cent greater than that paid at the first sale, exclusive of the expenses of the resale, can be obtained, is a sufficient ground for setting aside the sale and ordering a resale.[1] A sale may also be set

85. Sale under order of court see infra §§ 1648–1682.

86. Matter of Valentine, 1 Misc. 491, 23 NYS 289; Hawley v. Tesch, 72 Wis. 299, 39 NW 483.

87. Agne v. Schwab, 123 App. Div. 746, 108 NYS 487; Hawley v. Tesch, 72 Wis. 299, 39 NW 483.

[a] **Equity will grant relief where** the executrix of an insolvent estate, herself also insolvent, made an unauthorized and fraudulent sale of land by a deed which was not void or voidable on its face. Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 88 A 898.

88. In re Schnebly, 249 Pa. 208, 94 A 827; In re Spencer, 227 Pa. 469, 76 A 172; In re Mulholland, 224 Pa. 536, 73 A 932, 132 AmSR 791; In re Tyson, 191 Pa. 218, 43 A 131; Johnson's App., 114 Pa. 132, 6 A 556; Dundas' App., 64 Pa. 325; Fricke's Est., 16 Pa. Super. 38; Early's Est., 24 Pa. Dist. 153; Reeser's Est., 4 Pa. Co. 417.

[a] **Illustration.** — The orphans' court has authority to set a sale of land aside under such power where it appears that one only of two executors acted in execution of the power. Daily's App., 87 Pa. 487.

[b] **Extent of authority.**—The authority of the orphans' court to set aside a sale in pursuance of a testamentary power is no more extensive than that exercised by the court over a sale in pursuance of its own order. In re Mulholland, 224 Pa. 536, 73 A 932, 132 AmSR 791.

89. Barber's App., 125 Pa. 564, 18 A 394.

90. Early's Est., 24 Pa. Dist. 153; Dunlap v. Dunlap, 4 S. C. Eq. 305.

91. In re Richards, 154 Cal. 478, 98 P 528.

92. Owen v. Owen, (N. J.) 102 A 812.

92½. Tarpy v. Lexington, etc., R. Co., 154 Ky. 345, 157 SW 726.

93. Stark v. Henderson, 30 Ala. 438; Lowry v. McDonald, Sm. & M. Ch. (Miss.) 620; Crisman v. Beasley, Sm. & M. Ch. (Miss.) 561; Adams' Est., 9 Pa. Co. 664; Woods v. North, 6 Humphr. (Tenn.) 309, 44 AmD 312.

[a] **An express representation is not necessary,** for the mere offering of the property for sale by the executor amounts to a representation that he has power to sell. Lowry v. McDonald, Sm. & M. Ch. (Miss.) 620; Crisman v. Beasley, Sm. & M. Ch. (Miss.) 561; Woods v. North, 6 Humphr. (Tenn.) 309, 44 AmD 312.

94. Howell v. Sebring, 14 N. J. Eq. 84; Brittain's Est., 28 Pa. Super. 144; Reeser's Est., 4 Pa. Co. 417.

[a] **The fact that the administrator purchased** at his own sale, although it may not be relied on as a substantial ground of relief, may give character to his conduct in regard to the sale and thus tend to substantiate a charge of fraud. Howell v. Sebring, 14 N. J. Eq. 84.

[b] **Evidence not sufficient to show fraud.**—Brown v. Brown, 64 Mich. 75, 31 NW 34; Owen v. Owen, (N. J.) 102 A 812.

95. Larkin v. Crawford, 5 KyL 326.

96. Bender v. Paulus, 197 N. Y. 369, 90 NE 994 [aff 105 NYS 240].

97. Sea v. McLean, 1 B. C. Pt. II, 67.

98. Cal.—In re Robinson, 142 Cal. 152, 75 P 777.

Ill.—Kimball v. Lincoln, 99 Ill. 578 [aff 7 Ill. A. 470].

Md.—Boyd v. Smith, 127 Md. 359, 96 A 526.

Mo.—Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

N. J.—Owen v. Owen, 102 A 812.

N. Y.—Osgood v. Franklin, 2 Johns. Ch. 1, 7 AmD 513 [aff 14 Johns. 527].

Pa.—Andrew's Est., 6 Pa. Dist. 24, 19 Pa. Co. 617; Dietrich's Est., 1 LehighValLR 193.

W. Va.—Bradford v. McConihay, 15 W. Va. 732.

[a] **Anything in excess of fifty per cent of the value** is not ordinarily regarded as a grossly inadequate price. Owen v. Owen, (N. J.) 102 A 812.

[b] **Inadequate rate of interest in purchase-money mortgage.**—A trustee of persons interested in the estate cannot object to the confirmation of a sale by the executor under a power in a will on the ground that the interest provided for by the purchase-money mortgage will not furnish his beneficiaries sufficient revenue, unless he shows that an equally secure investment of the trust funds can be obtained at a higher rate of interest. Knight's Est., 7 Pa. Dist. 469.

99. Md.—Boyd v. Smith, 127 Md. 359, 96 A 526.

Mo.—Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

N. J.—Owen v. Owen, 102 A 812.

N. Y.—Osgood v. Franklin, 2 Johns. Ch. 1, 7 AmD 513 [aff 14 Johns. 527].

Pa.—Fricke's Est., 16 Pa. Super. 38; Dietrich's Est., 1 LehighValLR 193.

Tenn. — Camp v. Riddle, 160 SW 844.

Tex.—Lee v. Benzes, (Civ. A.) 209 SW 768.

[a] **Inadequacy of price is a circumstance to be weighed** in connection with other evidence on the issue of fraud. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

[b] **A deed made by an executor to himself** for a grossly inadequate consideration, is voidable at the instance of the persons injured. Camp v. Riddle, (Tenn.) 160 SW 844.

[c] **"Even a bona fide sale** may be set aside and a resale ordered when this is manifestly to the interest of the estate." Brittain's Est., 28 Pa. Super. 144, 148.

[d] **Evidence not showing such inadequacy as to indicate fraud.**—Brown v. Brown, 64 Mich. 75, 31 NW 34; Sharp v. Greene, 22 Wash. 677, 62 P 147.

1. In re Robinson, 142 Cal. 152,

aside for failure of consideration.[2] The mere fact that an executor received Confederate currency in payment for his testator's land sold by him is not ground for setting the sale aside if the payment was made and received in good faith.[3]

[§ 685] **(c) Who May Attack Sale.** Creditors,[4] legatees,[5] or distributees[6] are in such immediate interest that if the proceeds of an improper, fraudulent, or improvident sale are insufficient to settle their specific claims in full they may seek such redress; but devisees[7] or heirs[8] are usually the persons injuriously affected by an improper sale, and these may proceed by virtue of their several interests, where the sale should be set aside. Even these, however, may become estopped to attack the sale,[9] and this is the result where they have ratified or acquiesced in the sale, received their respective portions of the purchase money, or otherwise participated knowingly in the benefits of the transaction.[10] Proceedings by the executor or administrator to set aside a sale may be upheld in a case where he himself is free from fault;[11] but an executor or administrator who becomes a party to improper dealings with the estate or who himself is

75 P 777; Perkins v. Gridley, 50 Cal. 97; In re Durham, 49 Cal. 490; Clad's Est., 24 Pa. Dist. 243; Pollard v. McFillen, 6 Phila. (Pa.) 125.

[a] **Advance offer by original purchaser.**—Under a statute authorizing the court to set aside an executor's sale if an offer of ten per cent more in amount than that named in the return be made in writing by some responsible person, the court may set aside the sale on such an offer being made by the original purchaser. In re Reed, 3 Cal. A. 142, 85 P 155.

2. White v. Bailey, 65 W. Va. 573, 64 SE 1019, 23 LRANS 232.

3. Blount v. Moore, 54 Ala. 360.

4. Ark.—Montgomery v. Back, 75 Ark. 184, 86 SW 1006.

Ga.—Hamilton v. Cargile, 127 Ga. 762, 56 SE 1022.

Ill.—Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].

N. J.—Incandescent Light, etc., Co. v. Stevenson, 83 N. J. Eq. 482, 91 A 802.

Pa.—Lothrop v. Wightman, 41 Pa. 297.

Vt.—Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 88 A 898.

[a] **The fact that creditors might have an accounting and recover upon the bond** will not deprive them of the right to maintain a suit to set aside the deed, for the remedy on the bond is merely secondary and cumulative. Wetmore, etc., Granite Co. v. Bertoli, 87 Va. 257, 88 A 898.

5. Bledsoe v. Bledsoe, 29 Ga. 385; Barnard v. Keathley, 230 Mo. 209, 130 SW 306; Agne v. Schwab, 123 App. Div. 746, 108 NYS 487.

[a] **Residuary legatees.**—Where an executor with power to sell sold real estate for about one half its value and appropriated the advantage to himself by obtaining title to the property to the detriment of the residuary legatees, the latter could sue to set aside the conveyance and were not required to waive the fraud and proceed to compel the executor to report his sale and account for the proceeds. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

[b] **When legatee cannot complain.**—Although a sale by the executor may be void as to the devisee, a legatee, whose legacy is charged on the land, cannot complain of the sale where it is not shown that the land was sold for less than its value, that it would sell for more on a resale, or that the proceeds have been misapplied to the injury of the legatee. Randle v. Carter, 62 Ala. 95.

6. Anderson v. Anderson, 64 Ala. 403.

7. Ala.—Randle v. Carter, 62 Ala. 95.

Ga.—Pirkle v. Cooper, 113 Ga. 828, 39 SE 289.

N. Y.—Agne v. Schwab, 123 App. Div. 746, 108 NYS 487.

Pa.—Reeser's Est., 4 Pa. Co. 417.

Tex.—Holmes v. Stone, (Civ. A.) 51 SW 518.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

[a] **The sole beneficiary of an insolvent estate may attack a sale of the realty.**—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 Ont WR 630, 5 OntWN 255, 15 DomLR 475.

[b] **Sale of homestead.**—Where a husband dies, leaving as the only constituent member of his family his wife, in whom by law and by her husband's will the homestead rights vest, a child who is a devisee of a portion of the remainder cannot question the power of the executor to sell the homestead unless it affirmatively appears that the sale was not to pay debts and legacies. Holmes v. Stone, (Tex. Civ. A.) 51 SW 518.

8. Hamilton v. Cargile, 129 Ga. 762, 56 SE 1022; Pirkle v. Cooper, 113 Ga. 828, 39 SE 289; Woods v. Woods, 13 La. Ann. 139; Lothrop v. Wightman, 41 Pa. 297; Reeser's Est., 4 Pa. Co. 417; O'Dell v. Rogers, 44 Wis. 136.

[a] **What law governs as to majority of heirs.**—The question when an heir became of full age so as to entitle her within a reasonable time to sue to avoid executors' sale of her ancestor's property for irregularities therein is to be determined by the law of the state where such property was situated and the testator had his domicile. O'Dell v. Rogers, 44 Wis. 136.

[b] **When heirs not entitled to recover.**—Where testator provided that his lands should not be sold for distribution except under certain circumstances for thirteen years from the date of his will, but before the expiration of this period the executrix sold at a private sale, the heirs at law of the testator, as such, could not recover in ejectment against the purchaser, for if the executrix did not have authority to make the aforesaid sale the title remained in her for the purpose of executing the will of the testator and did not pass to plaintiffs. Neisler v. Moore, 58 Ga. 334.

9. In re Schnebly, 249 Pa. 208, 94 A 827; Cox v. Rust, (Tex. Civ. A.) 29 SW 807.

[a] **Laches** may create an estoppel. In re Schnebly, 249 Pa. 208, 94 A 827.

[b] **When devisees not estopped.**—Where there was testimony that there was ample personal estate of a testator to educate and support his children without selling any of his land, and that the money received by the executrix for land sold by her was lent out, and there was no evidence that any of the children ever received any portion of it, they were not estopped from asserting their title to the land devised to them by the father. Foote v. Sanders, 72 Mo. 616.

10. U. S.—Hussey v. U. S., 222 U. S. 88, 32 SCt 33, 56 L. ed. 106.

Ala.—Creamer v. Holbrook, 99 Ala. 52, 11 S 830. But compare Walker v. Murphy, 34 Ala. 591 (the receipt by the heirs at law and devisees of their respective portions of the purchase money, arising from an unauthorized sale of land by the executor, does not estop them from recovering the land in an action at law; if available at all as an estoppel, it is only in equity).

Ga.—Battle v. Wright, 116 Ga. 218, 42 SE 347; Knox v. Laird, 92 Ga. 123, 17 SE 988.

Kan.—Crane v. Lowe, 59 Kan. 606, 54 P 666.

La.—Ray v. McLain, 106 La. 780, 31 S 315.

Mich.—Cleland v. Casgrain, 92 Mich. 139, 52 NW 460.

Minn.—Lovejoy v. McDonald, 59 Minn. 393, 61 NW 320.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. C.—Spainhour v. Walraven, 36 N. C. 352.

[a] **Illustration.**—A widow, who, being the devisee under her husband's will, received the purchase price of an estate in real property which was conveyed by his executor in the mistaken belief that it was subject to testamentary devise, and rested ten years without asserting her claim to the property after a decision of the highest court of the state to the effect that a moiety of such property was in law her community property, must be deemed to have ratified the sale, so as to preclude her grantees from asserting title as against the United States, claiming under the executor's deed. Hussey v. U. S., 222 U. S. 88, 32 SCt 33, 56 L. ed. 106.

[b] **What amounts to ratification.**—Where heirs at law bring an administrator to an accounting and obtain judgment against him, in part based upon the proceeds of land of the intestate purporting to have been regularly sold by him, their conduct amounts to a ratification of the sale. Battle v. Wright, 116 Ga. 218, 42 SE 347.

[c] **Giving quitclaim deed.**—An heir at law who knows that a private sale of certain property of a decedent is sought to be made, and who takes part in the accomplishment of such a result, and makes a quitclaim deed in order to effectuate that purpose, is in no position to invoke equitable relief to set aside a sale so made on the ground that it is a private sale, and not a public administrator's sale. Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

[d] **Suing executor for proceeds.**—If an executor has no authority to convey land, but did so and received the proceeds, and a devisee, with knowledge or notice of the substantial facts, brought suit against the executor to recover the proceeds, this amounted to an election to confirm and ratify the conveyance. Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359.

11. In re Richards, 154 Cal. 478, 98 P 528; Coy v. Gaye, (Tex. Civ. A.) 84 SW 441; White v. Bailey, 65 W. Va. 573, 64 SE 1019, 23 LRANS 232.

[a] **Neither an estate, nor its administrator, is estopped** from claiming land sold by a former executor to carry out a compromise entered into between the executor and contestants of the will, to which neither the creditors nor legatees were parties, where none of the money received for the sale was paid into court or accounted for in any way, or expended for the benefit of the estate or anyone having an interest in or any claim against it. Coy v. Gaye, (Tex. Civ. A.) 84 SW 441.

culpable as to the occasion of setting the sale aside, especially when he receives the proceeds, cannot be heard in equity to impeach the sale of the land or to deny its validity.[12] Strangers or third persons having no interest in the estate cannot make any attack upon the sale.[13]

The remedy of a pretermitted child, with respect to realty conveyed by the executor, is by suit to quiet title or partition or both, and not, in the absence of fraud, by a suit to set aside the conveyance.[14]

[§ 686] **(d) Proceedings.** A contention that a sale of real estate by an executor should be set aside because made for an inadequate sum cannot be considered on objections to his final accounting.[15] Where there is no showing that plaintiff secured any part of the purchase price, the fact that there is no offer to return the price is immaterial,[16] nor is an attempt to secure the removal of the executor a condition precedent to the exercise by creditors of an insolvent estate of their right to set aside an unauthorized sale of realty.[17] In some states there are statutes limiting the time within which an action by heirs or devisees to recover land improperly sold by an executor or administrator may be commenced,[18] and such an action may also be barred by laches.[19] A petition to set aside a sale of land which an executor had bought at his own sale will not be dismissed because another beneficiary had filed exceptions to the executor's account for the purpose of surcharging him with the profits of the sale, nor because such exceptant had joined in the petition to set aside the sale.[20] The purchaser[21] as well as the executor must be made a party to proceedings to avoid a sale of real estate made by the latter.[22] Complainant must make out a case for relief in his pleadings,[23] and a party is bound by

[b] **Fraudulent purchase by coexecutor.**—Where executors empowered to sell real estate sold certain real property, and a coexecutor became the purchaser, and no return of the sale was made to the court, the executor might at any time sue to rescind the sale for fraud of the coexecutor. In re Richards, 154 Cal. 478, 98 P 528.

[c] **Attack on sale by coexecutor in individual capacity.**—Where two coexecutors and cotrustees, claiming title for the estate to certain realty, sued to set aside a sale of the premises made by the third coexecutor and cotrustee to a stranger, and the agreement of sale showed on its face that it was made in the individual and not the representative capacity of such third coexecutor and cotrustee, the suit was properly dismissed. In re Spencer, 227 Pa. 469, 76 A 172.

12. Ala.—Hopper v. Steele, 18 Ala. 828.

Cal.—Larco v. Casaneuava, 30 Cal. 560.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. J.—Hance v. McKnight, 11 N. J. L. 385.

Wash.—Davis v. Ford, 15 Wash. 107, 45 P 739, 46 P 393.

W. Va.—White v. Bailey, 65 W. Va. 573, 64 SE 1019, 23 LRANS 232.

Wis.—O'Dell v. Rogers, 44 Wis. 136.

[a] **Acts in individual capacity.**—One may sue as executor to set aside a conveyance fraudulently induced, although plaintiff in his individual capacity colluded with defendant in despoiling estate. Smith v. David Stevenson Brewing Co., 50 Misc. 395, 100 NYS 521.

13. Cal.—In re Richards, 154 Cal. 478, 98 P 528.

Ga.—Hamilton v. Cargile, 127 Ga. 762, 56 SE 1022.

N. J.—Hance v. McKnight, 11 N. J. L. 385.

Pa.—Lothrop v. Wightman, 41 Pa. 297.

Tex.—McDonald v. Hamblen, 78 Tex. 628, 14 SW 1042.

[a] **A creditor of one of the heirs** cannot have the sale avoided. Lothrop v. Wightman, 41 Pa. 297.

[b] **In an action against a mere wrongdoer** by one in possession of the land, where plaintiff offered in evidence his deed, which appeared to be a deed from one executor to another, defendant could not object that the sale by the executors had not been made as directed by the will of the testator. Hillegass v. Hillegass, 5 Pa. 97.

14. Smith v. Steen, 20 N. M. 436, 150 P 927.

15. In re Conser, 40 Or. 138, 66 P 607 (the purchaser is not ordinarily a part to the proceeding for final accounting, nor is there any process by which he may be brought in, and the proceeding is wholly inappropriate for the purpose of setting aside a sale).

16. Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

17. Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 88 A 898.

18. Campbell v. Drais, 125 Cal. 253, 57 P 994; Keilly v. Severson, 149 Wis. 251, 135 NW 875.

[a] **When statute not applicable.**—Code Civ. Proc. § 1573, providing that action for recovery of an estate sold by an administrator shall be commenced within three years next after the settlement of the final account, does not prevent action after that time by children of deceased to quiet title to their half interest in the land as to which the sale was void, where the purchaser at such sale acknowledged their title and held for them as tenant in common, and the action was against the mortgagee of such purchaser, who when taking the mortgage was informed of their title and who purchased under foreclosure of the mortgage, they not being obliged to bring their action until he sought to gain possession under the title founded on the foreclosure. Campbell v. Drais, 125 Cal. 253, 57 P 994.

19. Dewein v. Hooss, 237 Mo. 23, 139 SW 195; Middleton v. Bowyer, 75 W. Va. 187, 83 SE 723.

[a] **Delay amounting to laches.**—Where a testator died in 1868, authorizing his wife, an executrix, to sell property to pay his debts, and within a few years thereafter she sold some of the property for that purpose, the claim that she did not obtain a fair value for land sold and that there was a misappropriation of rents of some of the others, made by the children more than thirty years after, was barred for laches, they having had ample opportunity for redress under Rev. St. (1879) § 43, by application for revocation of the letters testamentary. Dewein v. Hooss, 237 Mo. 23, 139 SW 195.

[b] **Delay not amounting to laches.**—The fact that persons entitled to realty did not file a petition to set aside an unauthorized sale by an executor, until seven years after the sale, did not bar their right to relief, where the petition was filed promptly after death of the executor, prior to which time they had no right of possession. In re Schnebly, 249 Pa. 208, 94 A 827.

20. Brittain's Est., 28 Pa. Super. 144 (the orphans' court has power to grasp the whole matter in controversy and deal with the exceptions and the petition as justice in the case requires).

21. Davidson v. Buchanan, 164 App. Div. 352, 149 NYS 640; Dundas' App., 64 Pa. 325.

[a] **Purchase by agent of executor.**—One who bids in property as an agent for an executor at a sale made by authority of the executor is not a necessary party to a suit to set aside the sale, brought on the ground that the executor could not purchase at his own sale. Stilly v. Rice, 67 N. C. 178.

[b] **Conduit to title to executor.**—In a suit by residuary legatees to set aside a deed made by the executor to his son, who reconveyed it to his father, the son was not a necessary party because he was a mere conduit for the passing of the legal title to the father. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

22. Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991; Dundas' App., 64 Pa. 325.

[a] **Executors under superseded will.**—In a bill filed after the probate of a will to recover property sold by executors appointed by a former will, previously admitted to probate, it is not necessary to make such executors parties. Gaines v. Hennen, 24 How. (U. S.) 553, 16 L. ed. 770.

[b] **Waiver of objection.**—Where the widow and executrix is not made a party to a suit to set aside a sale by her of the testator's property to defendant under power in the will, the failure to take advantage of the defect either by demurrer or answer constitutes a waiver of the objection. Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

23. Hughes v. Hughes, 87 Ala. 652, 6 S 353; Davidson v. Buchanan, 164 App. Div. 352, 149 NYS 640.

[a] **Complaints held insufficient.**—(1) A complaint in an action to set aside a sale of land on account of fraud, which alleged collusion between the executrix and the purchaser, by which they became jointly interested, although the deed was taken in the name of the purchaser alone; that the buyer afterward conveyed to the executrix a half interest in the lots for one half of the original purchase price; that two months thereafter they both sold the lots for a large amount; and that at the time of the first sale the price of the lots was rising and there was no necessity for the sale, which allegations were denied in the answer, did not make out a case for relief, as it failed to aver that the market price of the lots when first sold exceeded the price obtained therefor, and whether any, or what, improvements were put upon them between that time and the second sale. Hughes v. Hughes, 87 Ala. 652, 6 S 353. (2) A complaint in eject-

the admissions in his pleadings.[24] Persons complaining of the exercise of a power of sale to pay debts have the burden of showing that there were no debts when the sale was made.[25] When a representative's sale to himself is set aside by the court the annulment must be complete, it cannot be partial;[26] but a judgment setting aside such a sale affects only those who are before the court when it is rendered.[27] Where, in a suit by an heir attacking the validity of a sale by the executor under a power to sell real estate devised to him in trust and pay the proceeds to designated beneficiaries, on the ground of the invalidity in part of the gifts to the beneficiaries, the complaint alleged that the premises were so situated that a partition could not be made without prejudice to the owners thereof, and that a sale was necessary, failure to find that a sale was necessary to carry out to the best advantage the valid provisions of the will did not render erroneous a judgment adjudging the validity of the sale by the executor.[28] On setting aside a purchase by the representative at his own sale, it is the duty of the court to adjust the equities between the parties.[29] Where a will gives the executor a power of sale of land he has a right of appeal from an order setting aside a sale made under the power.[30] Where a sale is set aside, the original purchaser has no standing to question the power of the court to direct a resale.[31]

[§ 687] **(16) Divested Purchaser's Rights, Remedies, and Liabilities.**[32] A purchaser from an executor must rely on the covenants in his deed,[33] or upon the personal liability of the executor,[34] and cannot usually have relief against the heirs or devisees in case the property is lost to him through a defect of title or a lack of authority to sell in the executor.[35] But restitution of the purchase money or payments made is favored in equity as far as possible, where an unauthorized sale is set aside, especially if the purchaser has parted with his consideration in good faith,[36] and the estate or the beneficiaries have received benefit therefrom;[37] and where debts of the estate have been paid out of the proceeds of an invalid sale, the divested purchaser is usually held to be entitled to be subrogated to the rights of the creditors and to be indemnified out of the land,[38] although this has been denied.[39] On the setting aside of a sale by an executor or administrator the purchaser may be called on to account for rents and profits;[40] but he has been allowed re-

ment by a legatee against the grantees of the executors in a will authorizing them to sell the testator's real estate for the payment of debts, if the personal estate prove insufficient therefor, which does not allege that the personal estate was sufficient for the payment of the debts, and that it was unnecessary to sell the real estate, is defective, for failing to show that the exercise of the power of sale was unauthorized. Walter v. Tomkins, 71 App. Div. 21, 75 NYS 557 [aff 179 N. Y. 555 mem, 71 NE 1141 mem]. (3) Where a devisee sued to set aside transfers of real property from the executors to testator's widow and from her to others, an allegation that the latter took relying on the record title, without any allegation that they participated in an alleged fraud and conspiracy between the executors and the widow, was insufficient. Davidson v. Buchanan, 164 App. Div. 352, 149 NYS 640.

[b] **A failure to allege nonacquiescence in the complaint was immaterial** where the answer averred that plaintiff in a suit to set aside a sale of land acquiesced in such sale, and the replication denied the allegation. Cowell v. South Denver Real Est. Co., 16 Colo. A. 108, 63 P 991.

24. Hughes v. Hughes, 87 Ala. 652, 6 S 353.

25. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

26. Pirkle v. Cooper, 113 Ga. 828, 39 SE 289.

27. Pirkle v. Cooper, 113 Ga. 828, 39 SE 289.

28. Bender v. Paulus, 197 N. Y. 369, 90 NE 994 [aff 105 NYS 240].

29. Stickel v. Crane, 189 Ill. 211, 59 NE 595; Chastain v. Pender, 52 Okl. 133, 152 P 833 [cit Cyc]; Sneed v. Russell, (Tenn. Ch. A.) 42 SW 213; Ash v. Wells, 76 W. Va. 711, 86 SE 750.

[a] **This is done by** requiring the heirs or devisees to account to the representative for the money paid by him and the debts of the estate assumed by him at the time of the conveyance. Stickel v. Crane, 189 Ill. 211, 59 NE 595.

[b] **Charging debt on land.**—Where a sale by executors of the remainder interest in certain land was set aside after many years as invalid, a debt of the testator was properly fixed as a charge on such land, it appearing that such sale had been made in good faith for the purpose of paying the same. Sneed v. Russell, (Tenn. Ch. A.) 42 SW 213.

Divested purchaser's rights, remedies, and liabilities see infra § 687.

30. In re Bagger, 78 Iowa 171, 42 NW 639.

31. In re Reed, 3 Cal. A. 142, 85 P 155.

32. Sale under order of court see infra §§ 1683–1687.

Title and rights of purchaser generally see supra §§ 680-682.

33. Nicholas v. Jones, 3 A. K. Marsh. (Ky.) 385; Spring v. Parkman, 12 Me. 127.

[a] **The purchaser cannot maintain assumpsit** against the executor to recover back the consideration paid in case of a defect of title or authority. Spring v. Parkman, 12 Me. 127.

34. Frazier v. Tubb, 2 Heisk. (Tenn.) 662 (where land sold and intended to be conveyed by an executor is omitted from the deed, and it turns out that the testator had no title, the executor is personally liable to the purchaser for the money received, although the estate of his testator is settled).

35. Nicholas v. Jones, 3 A. K. Marsh. (Ky.) 385; Coy v. Gaye, (Tex. Civ. A.) 84 SW 441.

36. Cal.—In re Richards, 154 Cal. 478, 98 P 528.

Ill.—Stickel v. Crane, 189 Ill. 211, 59 NE 595.

Md.—Young v. Twigg, 27 Md. 620.

Miss.—Weaver v. Norwood, 59 Miss. 665; Grant v. Lloyd, 20 Miss. 191.

Okl.—Chastain v. Pender, 52 Okl. 133, 152 P 833.

Pa.—Frick's Est., 16 Pa. Super. 38; Bodder's Est., 14 Pa. Dist. 53.

S. C.—Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

Wis.—Winslow v. Crowell, 32 Wis. 639; Blodgett v. Hitt, 29 Wis. 169.

"The decree requires complainants, if they desire to subject the land to partition, to account to the estate of Sarah Stickel for the money paid by her and the debts assumed by her when the conveyance was made. It would be manifestly unjust and inequitable to permit them to take the real estate notwithstanding these deeds, and at the same time refuse to pay the money which was realized from that sale. The transaction by which the widow became the purchaser of the lands being not absolutely void, but voidable, it was the duty of the court, upon setting it aside, to adjust the equities between the parties,—and this, we think, it has fairly done." Stickel v. Crane, 189 Ill. 211, 219, 59 NE 595.

[a] **Restitution not an indispensable prerequisite to setting aside wrongful sale.**—Walker v. Quigg, 6 Watts (Pa.) 87, 31 AmD 452.

[b] **Where a sale by executors to a coexecutor was refused confirmation,** the executors were required to return the purchase price paid. In re Richards, 154 Cal. 478, 98 P 528.

[c] **In an action by a purchaser from executors for the possession** of real estate, brought after the court had refused to confirm the sale, the executor and residuary legatee assailing the sale is not entitled to the possession without restoring the purchaser price paid, after an accounting between the parties. In re Richards, 145 Cal. 478, 98 P 528.

37. Carideo v. Austin, 88 App. Div. 35, 84 NYS 777; Mayes v. Blanton, 67 Tex. 245, 3 SW 40.

[a] **Failure of sale through executors' inability to pass clear title.**—Where executors under a power of sale contained in the will have entered into a contract of sale, but such contract is not carried out because of their inability to convey a clear title, the purchaser is entitled to recover from them as executors, a portion of the purchase price paid at or before the execution of the contract, for the estate must be deemed to have received the benefit of such amount; but the executors are not chargeable as such with the sum paid by the prospective purchaser for examination of the title. Carideo v. Austin, 88 App. Div. 35, 84 NYS 777.

38. Duncan v. Gainey, 108 Ind. 579, 9 NE 470; Springs v. Harven, 56 N. C. 96; Scott v. Dunn, 21 N. C. 425, 30 AmD 174; Hunter v. Hunter, 58 S. C. 382, 36 SE 734, 79 AmSR 845, 63 S. C. 78, 41 SE 33, 90 AmSR 663; Stone v. Crawford, 1 Tex. Unrep. Cas. 605.

[a] **The purchaser is entitled to retain possession** of the land until the amount he paid for it with interest has been repaid to him, although the sale was void. Stone v. Crawford, 1 Tex. Unrep. Cas. 605.

39. Hampton v. Nicholson, 23 N. J. Eq. 423.

40. Boland v. Tiernay, 118 Iowa 59, 91 NW 836; Wood v. Nicholls, 33 La. Ann. 744; Weaver v. Norwood, 59 Miss. 665; Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

[a] **Basis of accounting.**—Where an executor sells lands under a defective power, the purchaser should only be required to account to the

imbursements for necessary expenditures for the preservation of the property[41] and compensation for proper improvements,[42] although interest on the purchase money has been denied.[43] It has been held that where a sale of realty has been set aside because made to the representative's agent, the extent of the interest of the legatees ought to be ascertained by a proper account, so that the purchaser may if he thinks proper remove the interest by paying to them the unsatisfied parts of their legacies.[44]

[§ 688] **(17) Liabilities of Executor or Administrator.**[45] An executor or administrator selling land is chargeable with the consideration acknowledged or shown to have been received by him in the transaction,[46] and any profit arising from such a sale beyond his just recompense belongs properly not to the representative personally, but to those beneficially interested in the estate.[47] He is ordinarily to be charged only with what was actually obtained or received by him;[48] and as he is required to exercise, in making the sale, merely such care as a reasonably prudent man would exercise in conducting his own affairs,[49] he is not, in the absence of fraud or negligence, liable for selling at a price less than what might have been obtained.[50] But he may be surcharged in his account with such price as he ought to have obtained rather than with that which was actually realized, where culpable negligence or misconduct on his part induced a loss.[51] An agreement by an executor in a contract of sale to buy off the widow's dower right or to pay off encumbrances created by the testator binds, not the estate, but only the executor personally.[52] If the executor makes false representations concerning the land he is to sell he is personally liable;[53] but an executor who sells real estate under a power in the will does not become personally liable in case of a failure of title.[54] Executors who have conveyed under a power of sale land of which their testator was in equity a mere trustee are liable as such to the person having the equitable title to such land for the damages sustained by him to the extent of the purchase money.[55] An executor may be held personally liable for loss arising from his failure to sell land as directed in the will.[56]

[§ 689] **11. Lease—a. Power to Lease.** As a general rule an executor or administrator is without authority to lease his decedent's land;[57] but

beneficiaries under the will for the rents and profits actually received, and not for the rental value. Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

41. Wood v. Nichols, 33 La. Ann. 744 (where representative purchased in bad faith and in breach of his trust).

42. Wood v. Nichols, 33 La. Ann. 741.

43. Layton v. Hogue, 5 Or. 93 (purchase by executor through agent).

44. Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752.

45. Personal liability on covenant or warranty see supra § 667.

Sale under order of court see infra §§ 1736-1740.

46. Speed v. Nelson, 8 B. Mon. (Ky.) 499; Matter of Mitchell, 1 Pearson (Pa.) 428; Davis v. Wright, 20 S. C. L. 560.

[a] **Chargeable with price named in deed.**—Speed v. Nelson, 8 B. Mon. (Ky.) 499.

47. Fisher's App., 34 Pa. 29; Rosenberger's App., 26 Pa. 67; Lamberton v. Smith, 13 Serg. & R. (Pa.) 309.

48. U. S.—Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228.

La.—Pipkin's Succ., 7 La. Ann. 617.

N. J.—Rolfe v. Van Sickle, 40 N. J. Eq. 158; Dey v. Codman, 39 N. J. Eq. 258.

Oh.—Brown v. Reed, 56 Oh. St. 264, 46 NE 982.

Pa.—In re Cunningham, 212 Pa. 441, 61 A 993; In re Springer, 51 Pa. 342; Hazzard's Est., 6 Pa. Co. 637; Hinkle's Est., 4 Pa. Co. 2, 18 Phila. 216, 20 WklyNC 351.

Tenn.—Stretch v. McCampbell, 1 Tenn. Ch. 41.

Va.—Wayland v. Crank, 79 Va. 611; Elliott v. Carter, 9 Gratt. (50 Va.) 541; Lawrason v. Davenport, 2 Call (6 Va.) 95.

Wis.—King v. Whiton, 15 Wis. 684.

Ont.—Re Donaldson, 3 OntWR 290.

49. Shepherd v. Darling, 120 Va. 586, 91 SE 727.

50. Rolfe v. Van Sickle, 40 N. J. Eq. 158; Dey v. Codman, 39 N. J. Eq. 258; In re Cunningham, 212 Pa. 441, 61 A 993.

[a] **Depreciation of mortgaged property.**—If property subject to a purchase-money mortgage taken by executors depreciates in value after the mortgage was taken, the executors are not liable, if they acted prudently. Woodruff v. Lounsberry, 40 N. J. Eq. 545, 5 A 99 [aff 42 N. J. Eq. 699 mem, 11 A 113 mem].

[b] **Loss due to postponing time of sale.**—An executor is not liable for loss caused by mere errors of judgment in postponing the time of sale, where the will gives him a large discretion in that matter. In re Cunningham, 212 Pa. 441, 61 A 993.

51. U. S.—Pulliam v. Pulliam, 10 Fed. 23.

Ill.—In re Corrington, 124 Ill. 363, 16 NE 252; McDonough v. Hanifan, 7 Ill. A. 50.

Md.—Hurtt v. Fisher, 1 Harr. & G. 88.

N. J.—Rolfe v. Van Sickle, 40 N. J. Eq. 158; Dey v. Codman, 39 N. J. Eq. 258; Fisher v. Skillman, 18 N. J. Eq. 229.

N. Y.—Matter of Vandvort, 8 App. Div. 341, 40 NYS 791.

Oh.—Brown v. Reed, 56 Oh. St. 264, 271, 46 NE 982; Reed v. Brown, 10 Oh. Cir. Ct. 44, 6 Oh. Cir. Dec. 15.

Pa.—Leslie's App., 63 Pa. 355.

Vt.—Woods v. Creditors, 4 Vt. 256.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

"When the executor, acting under an order of the court to sell real estate, or exercising for that purpose a testamentary power like this, sells in good faith and with due regard to the duty which he owes to creditors and legatees, his duty to account is performed by charging himself with the proceeds of the sale. He thus accounts for that portion of the assets in his hands for administration. But, if such faith is not exercised, the price received does not represent the performance of his legal duty; and, if that price only is charged, there is, in that respect, a failure to account." Brown v. Reed, supra.

[a] **Election of beneficiaries.**—If the executor makes a collusive sale for an inadequate price, the beneficiaries may either apply to have the sale set aside or may affirm the sale and charge the executor with the actual value of the property. Matter of Vandvort, 8 App. Div. 341, 40 NYS 791.

52. Bostwick v. Beach, 31 Hun 343 [aff 103 N. Y. 414, 9 NE 41, 25 NY WklyDig 98].

53. West v. Wright, 98 Ind. 335; Pettijohn v. Williams, 46 N. C. 145.

[a] **Fraud of person to whom purchaser referred by representative.**—Where the executor of one tenant in common, having a power to sell the testator's interest in the property owned in common, referred the purchaser to the other tenant in common as one acquainted with the property, and such tenant committed a fraud in his representations of the qualities and condition of the property, such executor was personally liable for the fraud. Pettijohn v. Williams, 46 N. C. 145.

Liability for fraud generally see supra § 593.

54. Twitty v. Lovelace, 97 N. C. 54, 2 SE 661.

55. Wall v. Kellogg, 16 N. Y. 385.

56. Haight v. Brisbin, 100 N. Y. 219, 3 NE 74.

57. Ala.—Golding v. Golding, 24 Ala. 122; Long v. McDougald, 23 Ala. 413.

Ark.—Hill v. Mitchell, 5 Ark. 608.

Cal.—Brosnan v. Kramer, 135 Cal. 36, 66 P 979.

Iowa.—Cohen v. Hayden, 157 NW 217.

Kan.—Black v. Dressell, 20 Kan. 153.

Ky.—Campbell v. Sacray, 44 SW 980, 19 KyL 1912; Rutherford v. Clark, 4 Bush 27.

Mich.—Weise v. Rich, 77 Mich. 325, 43 NW 979.

Miss.—Miles v. Fink, 119 Miss. 147, 80 S 532; Murphy v. Thomas, 41 Miss. 429.

Mo.—Thorp v. Miller, 137 Mo. 231, 38 SW 929.

Nebr.—Jackson v. O'Rorke, 71 Nebr. 418, 98 NW 1068.

N. Y.—Stevens v. Stevens, 69 Hun 332, 23 NYS 520; Ely v. Scofield, 35 Barb. 330.

N. C.—Lee v. Lee, 74 N. C. 70.

Pa.—Merkel's Est., 131 Pa. 584, 18 A 931; King v. Myers, 60 Pa. Super. 345; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Tasker's Est., 14 Pa. Dist. 435, 30 Pa. Co. 298; Lancaster County v. Lancaster, 11 Pa. Dist. 605.

Utah.—In re Campbell, 173 P 688.

"There is no legal theory on which either executors or trustees can presumably bind their estate by a five-years lease, or by verbal representations concerning the condition of the estate, resulting in unliquidated damages to a large amount. Without evidence of the precise character of the powers granted by the will to executors or trustees, there was nothing to found an action; and this could not be shown by parol, and was not shown at all." Weise v. Rich, 77 Mich. 325, 326, 43 NW 979, 980.

[a] **Alteration of lease given by testator.**—An executor has no power to alter or modify a lease executed by the testator, as this would be in effect making a new lease, without an order of the probate court under

such power may exist by virtue of testamentary or statutory provisions or an order of court.[58] If such authority is conferred at all it must be strictly pursued,[59] otherwise the rights of heirs, devisees, or other beneficiaries in such property are not controlled or concluded.[60] But where the power to lease exists, an invalid option to purchase given in connection with the lease does not prevent a recovery of the rent.[61]

A power to sell does not authorize the making of a lease of the property.[62]

The acquiescence of heirs or devisees, or their waiver of their rights, may operate to validate the acts of an executor or administrator in leasing the lands of decedent;[63] but it has been held that the

proceedings had for that purpose. Brosnan v. Kramer, 135 Cal. 36, 66 P 979.

[b] **After the payment of debts and final settlement of the estate,** an administrator has no authority to lease the land of his intestate. Jackson v. O'Rorke, 71 Nebr. 418, 98 NW 1068.

58. U. S.—Raynolds v. Hanna, 55 Fed. 783 [rev on other grounds 59 Fed. 923, 8 CCA 370].

Ala.—Shotts v. Cooper, 74 S 353; Randolph v. Vails, 180 Ala. 82, 60 S 159; Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Jones v. Peebles, 133 Ala. 290, 32 S 60; Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; Palmer v. Steiner, 68 Ala. 400; Cruikshank v. Luttrell, 67 Ala. 318; Turner v. Kelly, 67 Ala. 173; James v. Faulk, 54 Ala. 184; Griffin v. Bland, 43 Ala. 542; Harrison v. Harrison, 39 Ala. 489; Boynton v. McEwen, 36 Ala. 348; Chighizola v. Le Baron, 21 Ala. 406; Martin v. Williams, 18 Ala. 190.

Ark.—Yarborough v. Ward, 34 Ark. 204; Hill v. Mitchell, 5 Ark. 608.

Cal.—Brosnan v. Kramer, 135 Cal. 36, 66 P 979; Doolan v. McCauley, 66 Cal. 473, 6 P 130.

Conn.—Pastine v. Altman, 107 A 803.

Ind.—Burbank v. Dyer, 54 Ind. 392; Duchane v. Goodtitle, 1 Blackf. 117; Halstead v. Coen, 31 Ind. A. 302, 67 NE 957; Indianapolis First Nat. Bank v. Hanna, 12 Ind. A. 240, 39 NE 1054.

Kan.—Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 P 995, 1 AnnCas 403.

Ky.—Clay v. Anderson, 141 Ky. 455, 132 SW 1039; Given v. Shouse, 12 Ky. Op. 372.

La.—Richmond's Succ., 35 La. Ann. 858.

Md.—Thompson v. Thomas, etc., Co., 132 Md. 483, 104 A 49.

Mich.—Grady v. Warrell, 105 Mich. 310, 63 NW 204.

Minn.—Smith v. Park, 31 Minn. 70, 16 NW 490.

Miss.—Murphy v. Thomas, 41 Miss. 429.

Mo.—Spicer v. Spicer, 249 Mo. 582, 155 SW 832, AnnCas1914D 238; Hall v. Farmers', etc., Bank, 145 Mo. 418, 46 SW 1000; Thorp v. Miller, 137 Mo. 231, 38 SW 929; Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365; Lass v. Eisleben, 50 Mo. 122; Rector v. Ranken, 1 Mo. 371; Brent v. Chipley, 104 Mo. A. 645, 78 SW 270; Bealey v. Blake, 70 Mo. A. 229; Eoff v. Thompkins, 2 Mo. A. 464 [aff 66 Mo. 225].

Mont.—State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

N. Y.—Killam v. Allen, 52 Barb. 605; Matter of Cutter, 104 Misc. 694, 172 NYS 293; Sengens v. Fennel, 54 Misc. 133, 103 NYS 510; Russell v. Hilton, 37 Misc. 642, 76 NYS 233 [mod on other grounds 80 App. Div. 178, 80 NYS 563 (aff on op. below 175 N. Y. 525 mem, 67 NE 1089 mem)]; Hedges v. Riker, 5 Johns. Ch. 163; Ferguson v. Broome, 1 Bradf. Surr. 10.

N. C.—Hoyle v. Stowe, 13 N. C. 318.

Oh.—Breuer v. Hayes, 10 Oh. Dec. (Reprint) 391, 21 CincLBul 29 [aff 10 Oh. Dec. (Reprint) 583, 22 CincL Bul 144].

Or.—Boyer v. Anduiza, 90 Or. 163, 175 P 853.

Pa.—Moore v. Trainer, 252 Pa. 367, 97 A 462; Hauck v. Stauffer, 31 Pa. 235.

Philippine.—Tipton v. Martinez, 5 Philippine 477.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288.

Man.—Lumbers v. Montgomery, 22 Man. 735.

Ont.—Re Trusts, 21 Ont. 528.

[a] **Implied power.**—(1) A devise to executors in trust for a cestui que trust for life, and in default of issue over to a third person, with power to the executors to sell and dispose of so much of the realty as will be necessary to fulfill the will, is sufficient to authorize the executors to execute leases of the realty on such terms as are reasonable and necessary to carry into effect the testator's intention as expressed in the will. Hedges v. Riker, 5 Johns. Ch. (N. Y.) 163. (2) Where a testator by his will directs that certain moneys, including the rent of his lands, be invested by his executor, there is an implied authority to the executor to lease lands. McCall v. Peachy, 3 Munf. (17 Va.) 288. (3) So also an executor has full authority to lease land devised to him in trust, with power to manage and control it, according to his own judgment and discretion, the same as the testator himself could do if living. Raynolds v. Hanna, 55 Fed. 783 [rev on other grounds 59 Fed. 923, 8 CCA 370]; Peirce v. Peirce, 195 Pa. 417, 46 A 78. (4) Where a will gives executors the discretion to sell and dispose of all or any part of the testator's real estate, and does not require sale, it is within the executor's implied power to lease the property until a sale is actually made. Moore v. Trainer, 252 Pa. 367, 97 A 462. To same effect Hedges v. Riker, 5 Johns. Ch. (N. Y.) 163.

[b] **An express power to lease a part may be extended by implication** to all the testator's real estate. Thus, where the testator directed that his widow should cultivate as much of his land, during her life or widowhood, as she pleased, and that "the balance" should be rented out by his executors, it was held that the power of leasing extended to the whole estate, on the termination of the widow's estate for life. Hoyle v. Stowe, 13 N. C. 318.

[c] **Court may order lease of mine.**—Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084.

[d] **Lease of unopened coal mines.**—Where the chief if not the sole value of land is for coal mining purposes, and the only profit to be derived therefrom is by sale or lease of the coal, either of which the executor in his discretion has power to do, the fact that the coal mines were not opened in the life of the testator does not affect the authority of the executor to lease the same, so as to make the rental thereof income of the estate. Raynolds v. Hanna, 55 Fed. 783 [rev on other grounds 59 Fed. 923, 8 CCA 370].

[e] **Construction of power.**—Where a testator directed that his widow should cultivate as much of his land during her life or widowhood as she pleased, and empowered his executors to rent out the balance, the executors had power on her decease to lease the whole of the premises. Hoyle v. Stowe, 13 N. C. 318.

[f] **Oil and gas lease.**—Where a resident of Ohio, owning a farm in Kansas that had never been used for other than agricultural purposes, executed a will therein providing that the executor and trustee should take charge of the said premises, and "lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality," the executor and trustee was not authorized to execute an oil and gas lease granting to the lessee all the oil and gas under such premises, and bind the legatees thereby. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 P 995, 1 AnnCas 403.

[g] **Leases under order of court of equity.**—In a suit in equity by the heirs at law against the widow of decedent who is also administratrix of his estate and who claims an interest in the real property, it is the duty of the court not only to protect the rights of decedent, but also the rights of creditors; and it has jurisdiction to authorize the administratrix to lease the property during the pendency of the litigation. Ex p. Barker, 127 Ala. 203, 28 S 574.

[h] **Acknowledgment of lease by married executrix.**—An executrix who while sole enters into an agreement to lease land belonging to the estate is competent to acknowledge the lease for registration after her marriage, without being privily examined, for such lease does not convey any interest of hers. Darden v. Neuse, etc., Steam-Boat Co., 107 N. C. 437, 12 SE 46.

[i] **Statutes not retroactive.**—Philips v. Gray, 1 Ala. 226; Carpenter v. Harris, 51 Mich. 223, 16 NW 383; Van Fleet v. Van Fleet, 49 Mich. 610, 14 NW 566.

59. Ala.—Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131; Chighizola v. Le Baron, 21 Ala. 406; Martin v. Williams, 18 Ala. 190.

Mich.—Grady v. Warrell, 105 Mich. 310, 63 NW 204.

N. Y.—Van Orden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948.

Philippine.—Enriquez v. Watson, 6 Philippine 84.

Alta.—St. Germain v. Reneault, 2 Alta. L. 371.

[a] **Sustaining lease wherein power exceeded.**—Under a statute allowing an executor to take possession of the real and personal property of his testator, and to lease the same "from year to year," a lease for two years, although void as a lease for that term, is valid as a lease from year to year. Grady v. Warrell, 105 Mich. 310, 63 NW 204.

60. Cohen v. Hayden, (Iowa) 157 NW 217; Chighizola v. Le Baron, 21 La. 406; St. Germain v. Reneault, 2 Alta. L. 371.

61. Moore v. Trainer, 252 Pa. 367, 97 A 432.

62. Slocum v. Slocum, 4 Edw. (N. Y.) 613; Breuer v. Hayes, 10 Oh. Dec. (Reprint) 391, 21 CincLBul 29 [aff 10 Oh. Dec. (Reprint) 583, 22 CincLBul 144]; Peirce v. Peirce, 195 Pa. 417, 46 A 78; King v. Myers, 60 Pa. Super. 345; Young's Est., 4 Pa. Dist. 44, 16 Pa. Co. 54.

[a] **Perpetual lease.**—A power to sell real estate in order to pay debts, and to divide the estate, given by will does not authorize executors to make a perpetual lease with privilege of purchase. Breuer v. Hayes, 10 Oh. Dec. (Reprint) 391, 21 Cinc LBul 29 [aff 10 Oh. Dec. (Reprint) 583, 22 CincLBul 144].

63. Phillips v. Grubbs, 112 Ark. 562, 167 SW 101; Stearns v. Stearns, 1 Pick. (Mass.) 157; Miles v. Fink, 119 Miss. 147, 80 S 532; Ashley v. Young, 79 Miss. 129, 29 S 322; Brent

trustees of a residuary estate are not estopped to maintain an action to enjoin the executrix from leasing and collecting rents from residuary real estate by acquiescence in previous acts of the executrix of the same character.[64]

Upholding lease as individual lease. Where a widow and executrix who was also the sole legatee and devisee, except as to two dollars left to testator's children, executed a lease to property styling herself "administratrix and executrix" of the estate, without any order of court, it was held that as the property had become hers under the will, and the lease thus became her individual contract, she could elect to treat the words "administratrix and executrix" as words of personal description, so that the lease should be good as her individual lease.[65]

Appointment of receiver to rent land. In a case where a large amount of vacant land formed a part of the estate, it was held proper to appoint a receiver to rent the land, pending an action by the executor to construe the will, to allot dower to the widow, and to settle the estate.[66]

[§ 690] **b. Term.** Leases by executors or administrators, when authorized, should ordinarily be for short terms,[67] although a long lease may be sustained if it is in conformity with the local system and beneficial to the inheritance.[68] A statute providing that no executor shall rent the real estate, unless ordered by the probate court to do so for a term not exceeding two years, does not mean that the executor, at the expiration of two years from the date of the order of court, ipso facto loses all control or interest in the land, but only that he may not rent the land for a longer term.[69] Under statutes restricting the power to lease to the period allowed for the settlement of an estate, any lease made for a definite term is subject to termination by the final settlement of the estate and discharge of the representative.[70]

[§ 691] **c. Recovery of Rent.** A power in the personal representative to lease carries with it the power to receive and collect rent;[71] and a tenant who takes possession under a lease from the representative cannot in an action against him for rent dispute the representative's power to make the contract.[72] A lessee from an executor cannot purchase judgments against the testator and set them off against the rent unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate.[73]

[§ 692] **d. Recovery of Possession.** The personal representative is the proper person to bring an action to recover possession from a tenant holding under a lease from him, while the estate remains unsettled.[74]

[§ 693] **e. Actions for Waste.** Although an executor who has no interest as reversioner cannot maintain an action against a lessee for waste committed on premises leased by him,[75] he may maintain an action on covenants in the lease against committing waste.[76]

[§ 694] **f. Rights of Lessee.** An executor's or administrator's lease does not imply any covenant of quiet enjoyment;[77] and if the lessee loses part or all of the land he cannot recover back from the estate the rent paid or any portion thereof.[78]

[§ 695] **g. Liability of Representative.** If the representative rents out the land of his decedent he holds the rent collected as assets of the estate, and for the use of those legally entitled to it,[79] and he cannot escape liability therefor by setting up that he leased the land without authority.[80] He is not liable for losses of rent which could not have been avoided by the exercise of good faith and ordinary prudence and diligence,[81] but for losses resulting from his fraud or culpable negligence, whether in reference to collection, taking security, or other-

v. Chipley, 104 Mo. A. 645, 78 SW 270.

[a] **Acceptance of rent.** — (1) Where an executor, assuming to act as agent for the beneficiaries, made a five-year lease of property belonging to the estate, the acceptance by the beneficiaries of rents under the lease was a ratification of the lease; it was not previously authorized by them. Phillips v. Grubbs, 112 Ark. 562, 167 SW 101. (2) The acceptance of rent from the executor by the devisees will not be considered a ratification of the lease, in the absence of a writing to that effect. King v. Myers, 60 Pa. Super. 345.

64. Stevens v. Stevens, 69 Hun 332, 23 NYS 520.

65. Pine Bluff Aerie No. 209 F. O. E., 91 Ark. 284, 122 SW 655.

66. Clay v. Anderson, 141 Ky. 455, 132 SW 1039.

67. Lass v. Eisleben, 50 Mo. 122; Tipton v. Martinez, 5 Philippine 477.

68. Re Trusts, 21 Ont. 528.

69. Spicer v. Spicer, 249 Mo. 582, 155 SW 832, AnnCas1914D 238.

70. Doolan v. McCauley, 66 Cal. 476, 6 P 130; Burbank v. Dyer, 54 Ind. 392; Smith v. Park, 31 Minn. 70, 16 NW 490.

71. Morse v. Morse, 85 N. Y. 53.

[a] **Covenant to repair in part payment of rent.**—In an action by an administrator on a covenant to him as such to make repairs in part payment of rent, his recovery is limited to the damages from the breach, and does not extend to an injury to the inheritance or a depreciation in the rental value of the land after the term expires. Manion v. Lambert, 10 Bush. (Ky.) 295.

[b] **Lease by executor under will subsequently set aside.**—Where an executor, acting under a will which was afterward set aside, leased the land of his supposed testator for a year, and the tenant enjoyed the demised premises without interruption, neither the administrator subsequently appointed nor the heir of the intestate could maintain an action against the tenant for use and occupation. Boyd v. Sloan, 18 S. C. L. 311.

72. Caldwell v. Harris, 4 Humphr. (Tenn.) 24. But compare Bowler v. Erhard, 4 Oh. Dec. (Reprint) 256, 1 ClevLRep 173 (such an objection cannot be made by demurrer, but only in the answer by way of defense).

73. White v. Bannister, 1 Wash. (1 Va.) 166.

74. Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; Lass v. Eisleben, 50 Mo. 122; Eoff v. Tompkins, 2 Mo. A. 464 [aff 66 Mo. 225].

75. Page v. Davison, 22 Ill. 111.

76. Page v. Davidson, 22 Ill. 111.

77. Miller v. Gray, 136 Cal. 261, 263, 68 P 770 ("It is well settled that an administrator in making sales of real estate is the mere instrument of the law to transfer such title, and only such title as is held by the estate. His deed is in fact but a quitclaim deed, and so it is uniformly held touching such sales that the doctrine of caveat emptor applies. . . . The same principle applies in case of lease. It is but an estate for years, carved out of and dependent upon the sufficiency of the title of the larger estate of the deceased. In this respect there is no distinction between a lease by an administrator and lease by a guardian; and it is uniformly held that a guardian's lease does not imply any covenant of quiet enjoyment. . . . Moreover, an administrator cannot contract so as to make his estate liable, except as authorized by statute. . . . Gray, as administrator, had the power to make this lease . . . but in leasing he carved out an estate for years from such title and interest only as were in the estate of Turner").

78. Miller v. Gray, 136 Cal. 261, 68 P 770.

79. Terry v. Ferguson, 8 Port. (Ala.) 500; Cohen v. Hayden, (Iowa) 157 NW 217; In re McKee, 13 Pittsb LegJNS (Pa.) 392.

[a] **Lease by administrator to himself.**—Where an administrator, who was also one of the heirs, publicly rented out the lands of the estate without authority, and himself became the lessee of the most valuable plantation, these facts alone do not justify a charge against him in his account of a higher rent than that bid at the public letting. Harrison v. Harrison, 39 Ala. 489.

[b] **Ground rent.**—An executor who has let lands of the estate on ground rent is not chargeable with the principal of the ground rent. Apple's Est., 2 Phila. (Pa.) 239.

80. Terry v. Ferguson, 8 Port. (Ala.) 500; Hartnett v. Fegan, 3 Mo. A. 1.

81. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131; Clark v. Eubank, 80 Ala. 584, 3 S 49; Dockins v. Vass, (Ky.) 124 SW 290; Smith's Est., 6 Kulp (Pa.) 76.

[a] **Where an executor was given**

wise, he is liable.[82] An administrator who has power to rent out real estate, but through whose negligence it is not rented, is chargeable with the rental value;[83] but where executors are given a naked power to sell real estate, without the legal title or the right to possession, they are not liable for the rents which might have been made by leasing the same until a sale could be made.[84] Where an executor contracts to lease the real estate, under a power in the will, and dies before performance, his own estate is not liable for the breach.[85] A devisee of an undivided interest in land who, as tenant in common, takes possession and leases the whole property, assuming to act as executor, but without express testamentary authority so to lease, is personally bound.[86]

[§ 696] **12. Mortgage**[87]**—a. Authority in General.** The personal representative cannot, merely by virtue of his office, mortgage the lands of his decedent,[88] but authority to do so is frequently conferred by will, or by statute authorizing this to be done pursuant to an order of or license from the probate court.[89] A power to mortgage need not be expressed in the will, but may be implied from

a discretion as to renting land, he was not liable for renting it at one hundred dollars to one hundred and fifty dollars per year, although he might possibly have been able to rent it at two hundred dollars to three hundred and fifty dollars per year. Dockins v. Vass, (Ky.) 124 SW 290.

[b] **Amount of rent not the only consideration.**—Where an executor leases property belonging to the testator, it does not follow that he should lease to those who offer to pay the highest rent; but the purposes for which the property is to be used, the responsibility of the lessee, the length of time for which he may agree to lease, and many other circumstances of the kind must necessarily be taken into consideration. Matter of Millenovich, 5 Nev. 161.

82. Clark v. Eubank, 80 Ala. 584, 3 S 49; Eubank v. Clark, 78 Ala. 73; Matter of Hunt, 3 NYSt 346; Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

[a] **Extent of liability.**—Where rents are lost through an executor's negligence, he is liable only for such amount as could have been realized by the use of due diligence, and not for the entire stipulated rent. Matter of Hunt, 3 NYSt 346.

83. James v. Faulk, 54 Ala. 184.

84. Dunn v. Renick, 33 W. Va. 476, 10 SE 810.

85. Hauck v. Stauffer, 31 Pa. 235.

86. Cohen v. Hayden, (Iowa) 157 NW 217.

87. [a] **A mortgage under order of court** being largely governed by the same principles as a sale under order of the court is treated in connection with that subject. See infra § 1438 et seq.

Mortgage or pledge of personalty see infra § 753.

88. Ala.—Kirkbride v. Kelly, 167 Ala. 570, 52 S 660; Steel v. Steel, 64 Ala. 455, 38 AmR 15.

Ark.—Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601.

Cal.—Webb v. Winter, 6 Cal. Unrep. Cas. 768, 65 P 1028.

Ga.—Putney v. Bryan, 142 Ga. 118, 82 SE 519.

Ill.—Smith v. Hutchinson, 108 Ill. 662.

Iowa.—Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383.

Kan.—Black v. Dressell, 20 Kan. 153.

Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.

Mich.—Detroit F. & M. Ins. Co. v. Aspinall, 45 Mich. 330, 7 NW 907.

Nebr.—Henry v. Henry, 73 Nebr. 746, 103 NW 441.

N. J.—Goodell v. Taylor, (Ch.) 97 A 569.

N. Y.—Arnoux v. Phyfe, 6 App. Div. 605, 39 NYS 973 [aff 159 N. Y. 552 mem, 54 NE 1089 mem].

N. C.—Dancy v. Duncan, 96 N. C. 111, 1 SE 455.

Tex.—Smithwick v. Kelly, 79 Tex. 564, 15 SW 486.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88.

Va.—Leavell v. Grasty, 114 Va. 763, 77 SE 605.

Wis.—Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

Eng.—Doe v. Hughes, 6 Exch. 223, 155 Reprint 523.

"The personal representative can do nothing save as the statute gives him authority to divest or incumber the title to the realty which descends to the heir or devisee." Kirkbride v. Kelly, 167 Ala. 570, 574, 52 S 660.

[a] **Mortgage not enforceable against estate.**—One who enters into partnership with an executor, and advances money for the partnership undertaking on security of a mortgage of the trust property without contemplating that the proceeds of the mortgage should in any way benefit the estate, cannot enforce the mortgage against the estate. Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 58 A 607.

[b] **Mortgage given pending proceeding for sale.**—An executor has no power to mortgage real estate for the payment of debts while an application to sell it for that purpose is pending; and if he does so the mortgagee acquires no title as against the purchaser at the sale, but he is entitled to reimbursement of the amount paid out by him on the mortgage. Dancy v. Duncan, 96 N. C. 111, 1 SE 455.

[c] **Mortgage directed by probate court held invalid.**—Black v. Dressell, 20 Kan. 153.

89. U. S.—Ames v. Holderbaum, 44 Fed. 224.

Cal.—In re Shively, 145 Cal. 400, 78 P 869; Matter of Pforr, 144 Cal. 127, 77 P 825; In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; Fast v. Steele, 127 Cal. 202, 59 P 585; Thomas v. Parker, 97 Cal. 456, 32 P 562; Stambach v. Emerson, 6 Cal. Unrep. Cas. 986, 69 P 856 [aff 139 Cal. 282, 72 P 991].

Ga.—Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164.

Ill.—Starr v. Moulton, 97 Ill. 525.

Ind.—Smith v. Eels, 27 Ind. A. 321, 61 NE 200; De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 81 AmSR 95.

Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

Ky.—Talliferro v. Thornton, 80 SW 1097, 26 KyL 183.

La.—De Lerno's Succ., 34 La. Ann. 38.

Mich.—Russell v. Wheeler, 129 Mich. 41, 88 NW 73; Long v. Landman, 118 Mich. 174, 76 NW 374; Cahill v. Bassett, 66 Mich. 407, 33 NW 722; Detroit F. & M. Ins. Co. v. Aspinall, 45 Mich. 330, 7 NW 907; Church v. Holcomb, 45 Mich. 29, 7 NW 167; Griffin v. Johnson, 37 Mich. 87.

Minn.—Brown v. Morrill, 45 Minn. 483, 48 NW 328.

Miss.—Stokes v. Payne, 58 Miss. 614, 38 AmR 340.

Mo.—Dewein v. Hooss, 237 Mo. 23, 139 SW 195.

N. J.—Loebenthal v. Raleigh, 36 N. J. Eq. 169.

N. Y.—Freifeld v. Mankowski, 37 Misc. 303, 75 NYS 454; Ferguson v. Broome, 1 Bradf. Surr. 10.

Or.—Lawrey v. Sterling, 41 Or. 518, 69 P 460.

Pa.—Grubb v. Galloway, 203 Pa. 236, 52 A 176, 93 AmSR 764; Hemphill v. Pry, 188 Pa. 243, 41 A 530; Spencer v. Jennings, 114 Pa. 618, 8 A 2; Hilton's App., 116 Pa. 351, 9 A 342; Morgan's App., 110 Pa. 271, 4 A 506; West v. Cochran, 104 Pa. 482; Steffy's App., 76 Pa. 94; Rieder v. Miller, 68 Pa. Super. 529; Kleckner's Est., 19 Pa. Dist. 148; Corbett's Est., 10 Pa. Dist. 59; Schrack's Est., 9 Pa. Dist. 149; Burton's Est., 4 Pa. Dist. 106, 16 Pa. Co. 289; Miller's Case, 14 Pa. Co. 479; Laughlin's Est., 6 Pa. Co. 447; In re Smith, 8 Lack LegN 308; Kurtz's Est., 16 LancLRev 205.

S. C.—Spencer v. Godfrey, 8 S. C. Eq. 468.

Tex.—Faulk v. Dashiell, 62 Tex. 642, 50 AmR 542.

Wash.—McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

Eng.—Re Wilson, 54 L. T. Rep. N. S. 600.

[a] **Power broad enough to authorize mortgage.**—(1) A power authorizing an executor to continue the testator's business for a season, and to exercise his own judgment in the management and sale of the estate in order to pay testator's debts, and to sell or mortgage the property if necessary to secure debts, which he was authorized to renew, was sufficiently broad to authorize the executor to mortgage certain of testator's real estate to a bank to secure a note made for money borrowed to discharge the indebtedness of the estate. Talliferro v. Thornton, 80 SW 1097, 26 KyL 183. (2) A will authorized testator's wife, as executrix, to sell such property as she might deem best, real or personal, to pay off his indebtedness, and provided that she should not give bond or render account. Another clause bequeathed one dollar each to his children, and another bequeathed the balance to his wife during her natural life, "granting her full power and absolute authority to dispose of all or so much as she desires and as might be necessary to provide for her and the children during her life," and at her death the "residue if any" to be divided among the children. The executrix sold for testator's indebtedness all but three town lots, on one of which was a hotel; the other two producing no revenue. It was held that the executrix had power to encumber the hotel property to meet the indebtedness of the testator, she retaining possession and making it her home, and it appearing that a sale would not leave sufficient property to support her. Dewein v. Hooss, 237 Mo. 23, 139 SW 195.

[b] **Construction of testamentary power.**—Where a testator provided by his will, first, that all his debts be paid out of the first realized assets of his estate, second, that his executor stand in his place, for the purpose of managing his property, in such way as to realize the best income therefrom, and in paying off the indebtedness on the land, and third, that his executor, for the purpose expressed in the second clause, have full power to make loans for the pur-

the powers and instructions given therein to the executor,[90] and an express power may be extended by implication to property other than that designated.[91] A power given by will can, of course, be exercised only when the circumstances contemplated by the will arise,[92] and for the purposes for which it is given,[93] and the same is true of a statutory power.[94] Where power to mortgage is given to the

pose of meeting said indebtedness on said land, and to execute mortgages on a certain part of the land, and to execute such papers as should be for the best interest of the estate, testator's intention was that mortgages be given only for meeting indebtedness on the real estate. Iowa Loan, etc., Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

[c] **Equity may authorize a mortgage** instead of a sale of lands expressly charged by the will with the payment of testator's debts. Loebenthal v. Raleigh, 36 N. J. Eq. 169.

[d] **Remarriage of executrix.**—Where a testator appointed his widow executrix and guardian of their minor children, gave the entire estate for her own use, and the residue to the children on her death or remarriage, and authorized the executrix to mortgage and convey the whole of testator's property as she should deem best for carrying the provisions of the will into effect, a mortgage executed by her after remarriage was valid, in the absence of proof that it was for any other purpose than to carry out the provisions of the will, or that the mortgagee was chargeable with notice. Mutual L. Ins. Co. v. Shipman, 108 N. Y. 19, 15 NE 58.

[e] **Consent to mortgage of heir's interest.**—Where a will provided that the executor should keep the property together, until a granddaughter should become of age, unless he should think it would be better for all the heirs to make an earlier division, such power did not authorize the executor to consent to a mortgage of the undivided interest of one of the heirs prior to the granddaughter's arrival at majority. Garman v. Hawley, 132 Mich. 321, 93 NW 871.

[f] **Persons nominated as executors but who have not qualified** have no power to execute a mortgage of the testator's real estate to secure a debt owing by him, even though the will gives the executors as such power to sell and convey real estate and make such provision for the payment of debts as they deem best. Andrews v. Minor, 58 SW 443, 22 KyL 561.

[g] **Power not in conflict with statute.**—A power given by will to mortgage the testator's real estate for the payment of his debts does not conflict with a statute providing that if the personal estate of a decedent shall be inadequate to satisfy his debts a sufficient portion of the real estate may be ordered to be sold for that purpose. Ames v. Holderbaum, 44 Fed. 224; Iowa Loan, etc., Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

[h] **A temporary administrator** cannot institute a proceeding to mortgage land for the payment of debts. The statute only authorizes such a proceeding by the executor or administrator other than the temporary administrator, or by a creditor. Duryea v. Mackey, 151 N. Y. 204, 45 NE 458.

[i] **Wills not giving power to mortgage.**—(1) A testamentary provision that it is the wish of testatrix that certain realty be retained by her executor, as the investment of the principal of the trust, "so long as the same may be expedient in a judicious administration" of her estate, does not authorize him to mortgage it, but is simply a request to defer a sale so long as practicable under the law. Brown v. Brown, 70 N. H. 623, 47 A 591. (2) A provision in a will that certain real estate be retained "so long as the same may be expedient in a judicial administration" of the estate is simply a request that the executor should defer a sale so long as practicable under the law relating to the settlement of estates and does not authorize him to mortgage the property. Brown v. Brown, 70 N. H. 623, 47 A 591. (3) A clause in a will providing that the executor shall keep the real estate together for a designated period of time, unless he shall think it better to make an earlier division, confers only a power of division, and does not authorize the executor to direct or consent to a mortgage of the undivided interest of a devisee. Garman v. Hawley, 132 Mich. 321, 93 NW 871, 9 DetroitLegN 630.

[j] **Order of court not necessary where power to mortgage given by will.**—Iowa Loan, etc., Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

[k] **Taxes and assessments** against the premises are debts for which the property can be mortgaged. Long v. Landman, 118 Mich. 174, 76 NW 374.

[l] **On collateral attack it will be presumed** that a mortgage which the executor had power to execute under the statute was regularly executed on behalf of the estate. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

[m] **Mortgage to executor.**—The court has no power to authorize the executor to lend money to the estate and to direct the clerk of the orphans' court to execute and deliver a mortgage. Wilhelm's Est., 20 Pa. Co. 413.

90. Ga.—Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164.

Ill.—Starr v. Moulton, 97 Ill. 525.

Iowa.—Roberts v. Hale, 124 Iowa 296, 99 NW 1075, 1 AnnCas 940.

Ky.—Talliferro v. Thornton, 80 SW 1097, 26 KyL 183.

Mo.—Dewein v. Hooss, 237 Mo. 23, 139 SW 195.

Or.—Lawrey v. Sterling, 41 Or. 518, 69 P 460.

Pa.—Reider v. Miller, 68 Pa. Super. 529.

Tex.—Faulk v. Dashiell, 62 Tex. 642, 50 AmR 542.

Wash.—Miller v. Borst, 11 Wash. 260, 39 P 662.

Eng.—In re Jones, 59 L. J. Ch. 31.

[a] **Illustrations.**—(1) Executors have implied power to mortgage the real estate of the testator in order to pay pressing claims against the estate, where all the residuary estate was devised to them, and full power given to them by the will to settle the testator's accounts and to wind up his affairs, "and, in doing so, to make any sales and arrangements they or he shall judge expedient." In re Jones, 59 L. J. Ch. 31, 33. (2) They also have power to mortgage real estate where they are directed to manage it in such a way as to make it as productive as possible, and to this end are given the power to sell and convey such parts of it as they in their discretion may deem necessary to accomplish the purpose in question. Starr v. Moulton, 97 Ill. 525. (3) Or where they are given authority, without the intervention of the court, to manage and control the estate in their discretion for the interest of the testator's children, and to "sell, exchange, and dispose of" it as they may deem necessary for such interest, the power to mortgage is implied. Faulk v. Dashiell, 62 Tex. 642, 50 AmR 542. (4) The power may also be inferred merely from the expressed intention of the testator that his estate should be administered without the aid of any court. Miller v. Borst, 11 Wash. 260, 39 P 662.

[b] **The power to raise money for payment of debts** in such way as an executor shall deem best, necessarily implies authority to secure the loan by mortgage. It also implies authority to enter into a contract binding the estate for repayment of the loan, including attorneys' fees and costs in case the debt has to be collected by suit, where such provisions are not improper or unusual. Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164. To same effect as to statutory power to mortgage. Lowrey v. Sterling, 41 Or. 518, 69 P 460.

[c] **A will authorizing the executor to carry on the testator's business** and conferring unlimited power of control and management authorizes him to mortgage real estate used in the business to secure its indebtedness. Roberts v. Hale, 124 Iowa 296, 99 NW 1075, 1 AnnCas 940.

91. Brown v. Morrill, 45 Minn. 483, 491, 48 NW 328 (where a will gave power to the executors to join with the testator's copartner in the execution of any mortgages that might become necessary for the proper conduct of the firm business, "for the sale or mortgaging of firm's pine lands and stumpage, for the purpose of borrowing money for said business, and renewing and continuing any firm indebtedness," the will did not limit the authority to the mortgaging of the pine lands and stumpage).

92. Smith v. Peyrot, 201 N. Y. 210, 94 NE 662 [rev 134 App. Div. 954, 118 NYS 1143 (aff 116 NYS 543)].

[a] **Circumstances not showing necessity for exercise of power.**—A testatrix, after making specific bequests, gave the residue of her estate to her five children to be divided equally, except that two thousand dollars was to be deducted from one of the shares, and the executors were empowered to sell or mortgage the real property "for the purpose of carrying out the provisions of this instrument." After the debts and the specific legacies were paid, the executors sought to mortgage the real estate to raise funds to loan or advance to the heirs. It was held that the necessity for the exercise of the power did not exist, and that a mortgage of the realty was beyond the power of the executors. Smith v. Peyrot, 201 N. Y. 210, 94 NE 662 [rev 134 App. Div. 954, 118 NYS 1143 (aff 116 NYS 543)].

93. Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

[a] **Illustration.**—A power to mortgage "for the payment of my debts and purposes of my estate" confers no authority on an executrix to mortgage to obtain funds to carry on the business of the decedent, where she is empowered by the will to carry it on for her sole and separate use and benefit; or to pay taxes, interest, and repairs for which she is personally liable as life tenant. Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

94. See cases infra this note.

[a] **Purposes for which mortgage proper.**—(1) Under a statute authorizing the execution of a mortgage for the "purpose of paying the debts against the estate of any deceased person," the probate court may authorize a mortgage for the payment of debts and charges accruing after the decease of testator. Long v. Landman, 118 Mich. 174, 76 NW 374. (2) Under a statute authorizing executors and administrators to mortgage estate real property for the purpose of funding the estate debt, an administrator may mortgage estate real property to secure money to pay estate indebtedness, although it con-

executor, it is not exhausted by a single exercise, but he may execute successive mortgages on the property.[95]

A naked power to sell does not, according to the weight of authority include a power to mortgage,[96] although the contrary view has been asserted in some cases,[97] and a limitation is asserted in other cases which hold that if the power to sell was for the payment of debts, or of a specific charge, and the property was devised subject thereto, a power to mortgage may be implied from the power to sell, unless the will shows a contrary intent.[98]

Consent or acquiescence of the beneficiaries may validate a mortgage executed by the personal representative without authority.[99]

[§ 697] **b. Stipulations and Provisions of**

sist of but one debt. Lawrey v. Sterling, 41 Or. 518, 69 P 460.

95. Ames v. Holderbaum, 44 Fed. 224; Iowa Loan, etc., Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

96. U. S.—Thomas v. Provident L. etc., Co., 138 Fed. 348, 70 CCA 488 [certiorari den 200 U. S. 618, 26 SCt 755, 50 L. ed. 622].

Ark.—Heiseman v. Lowenstein, 113 Ark. 404, 169 SW 224, AnnCas1916C 601.

Cal.—Webb v. Winter, 6 Cal. Unrep. Cas. 768, 65 P 1028.

Conn.—O'Brien v. Flint, 74 Conn. 502, 51 A 547.

Ga.—McMillan v. Cox, 109 Ga. 42, 34 SE 341.

Ill.—Smith v. Hutchinson, 108 Ill. 662.

Iowa.—Hubbard v. German Catholic Cong., 34 Iowa 31.

Ky.—Miller v. Mook, 5 KyL 327.

Mich.—Parkhurst v. Trumbull, 130 Mich. 408, 90 NW 25.

Miss.—Stokes v. Payne, 58 Miss. 614, 38 AmR 340.

Mo.—Price v. Courtney, 87 Mo. 387, 56 AmR 453.

Nebr.—Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 NW 303.

N. J.—Dubois v. Van Valen, 61 N. J. Eq. 331, 48 A 241; Ferry v. Laible, 31 N. J. Eq. 566.

N. Y.—Arnoux v. Phyfe, 6 App. Div. 605, 39 NYS 973 [aff 159 N. Y. 552 mem, 54 NE 1089 mem]; Coutant v. Servoss, 3 Barb. 128; Freifeld v. Mankowski, 37 Misc. 303, 75 NYS 454; Olyphant v. Phyfe, 27 Misc. 64, 58 NYS 217 [rev on other grounds 48 App. Div. 1, 62 NYS 688 (aff 166 N. Y. 630 mem, 60 NE 1117 mem)]; Bloomer v. Waldron, 3 Hill 361; Cumming v. Williamson, 1 Sandf. Ch. 17. But see infra note 97.

Or.—Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955.

S. C.—Allen v. Ruddell, 51 S. C. 366, 29 SE 198.

Va.—Green v. Claiborne, 83 Va. 386, 5 SE 376.

Ont.—Re Webb, 2 OntWR 230.

"There is some conflict in the authorities on this question, but we believe that the better reasoning, if not the weight of authority, is to the effect that a mere power of sale does not include a power to mortgage. . . . This results from the fact that a mortgage is regarded as a security for debt rather than a conditional estate, and hence its execution is regarded as creating an incumbrance rather than as transferring the title. That is to say, a mortgage is treated as a mere security for a debt, and the legal estate can only be used for the purpose of enforcing the payment of the debt secured. The cardinal principle that governs in the construction of powers is to effectuate the intention of the donor; but we cannot gather from the terms of the will any intention on the part of the testator looking to a mortgage of his estate. The will does not in express terms authorize the executors either to borrow money or to mortgage the real estate. By the terms of the will, the executors were directed to close up the estate as speedily as possible, and to pay the debts of the testator and the legacies named in the will promptly. The testator anticipated that the whole estate might be necessary to pay all the legacies and to pay his debts. Therefore, in the last clause of his will he provided that if his estate was not sufficient to pay all the legacies after the payment of his debts, the legacies should be proportionately reduced. All this precludes the supposition that a mortgage was ever within the intention of the testator. See Williamson v. Grider, 97 Ark. 588, 135 SW 361. And as we have already seen, a power of sale does not include the power to mortgage except in those states where a mortgage is characterized as a conditional sale instead of being regarded as a security for a debt." Heiseman v. Lowenstein, 113 Ark. 404, 416, 169 SW 224, AnnCas1916C 601.

[a] **Illustrations.**—(1) Where real estate was specifically devised, without authority to the executors to encumber the same to raise money to pay debts, the executors were only authorized to sell so much thereof as necessary to pay debts, and could not encumber the same. Leavell v. Grasty, 114 Va. 763, 77 SE 605. (2) An executor empowered by the testator to sell his home place, if necessary for the maintenance of his widow and children, and invest in a less expensive home, had no power to mortgage the home place to provide for the maintenance of the widow and children. Miller v. Mook, 5 KyL 327.

[b] **A power to "dispose of"** realty does not include the power to mortgage. Rutherford Land, etc., Co. v. Sannstock, 60 N. J. Eq. 471, 46 A 648 [disappr as to this point but aff (Ch.) 44 A 938].

[c] **A power to sell for the purpose of making a division** of the proceeds among the devisees does not authorize the executors to mortgage it to secure money borrowed by them. Smith v. Hutchinson, 108 Ill. 662.

[d] **A power to sell real estate and invest the proceeds** does not authorize the executor to mortgage the land for the purpose of raising money, and the approval by the court of such proceedings will not render it valid, but the estate having received the money advanced on such mortgage will be required to repay it with legal interest. Deery v. Hamilton, 41 Iowa 16.

[e] **The true principle** is, that a power to sell and convey may include the power to mortgage, but it does not necessarily do so; and whether such power is or is not included depends upon the character of the estate, the words granting the power, and the purpose for which the debt was created. McMillan v. Cox, 109 Ga. 42, 49, 34 SE 341.

97. Williams v. Woodard, 2 Wend. (N. Y.) 487; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094; Rosengarten's Est., 30 Pa. Super. 244 (dictum); Stevenson v. Roberts, 25 Tex. Civ. A. 577, 64 SW 230; Mills v. Banks, 3 P. Wms. 1, 9, 24 Reprint 943.

"A power to sell implies a power to mortgage, which is a conditional sale." Mills v. Banks, supra [quot Ball v. Harris, 4 Myl. & C. 264, 268, 18 Eng Ch 264, 41 Reprint 103].

98. U. S.—Thomas v. Provident L., etc., Co., 138 Fed. 348, 70 CCA 488 [certiorari den 200 U. S. 618, 26 SCt 755, 50 L. ed. 622].

Mass.—Hoyt v. Jaques, 129 Mass. 286.

N. J.—Lœbenthal v. Raleigh, 36 N. J. Eq. 169.

N. Y.—Freifeld v. Mankowski, 37 Misc. 303, 75 NYS 454.

Pa.—Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

Wis.—Lardner v. Williams, 98 Wis. 514, 74 NW 346.

Eng.—Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 635, 42 Reprint 700.

[a] **Thus,** (1) power to mortgage real estate was given by a will by which the testator devised to his wife his entire estate, "giving her full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper," and at her death the residue not specifically disposed of by her to be kept for the benefit of the testator's children. Kent v. Morrison, 153 Mass. 137, 26 NE 427, 25 AmSR 616, 10 LRA 756. (2) So also where testator devised all his property to his wife to sell for the payment of his debts, and the next clause of the will was as follows: "Also I do constitute and make Elizabeth my wife, and Thomas Woods of Willingham, my executors, whom I do appoint to sell and dispose of all my estates and chattels, in such manner and form as they shall jointly agree upon; or not to sell, if it seems most advisable to keep them, or in any way that they shall think proper, so that every creditor have his money; and if sold, all overflush to my wife, towards her support and her family, if any there be, after paying my brother for his trouble and all other debts whatsoever," it was held that the will gave to the executors a discretion to mortgage as well as to sell for the payment of debts. Woods v. Woods, 1 Myl. & C. 401, 13 EngCh 401, 40 Reprint 429. (3) Where legacies are made a charge on the real estate and the will gives a power to sell for the purpose of satisfying them and a power to mortgage "for the purpose of facilitating the management, preservation, and productiveness" of the estate, a mortgage is authorized to satisfy the legacies, where such course conserves and advances the interests concerned. Freifeld v. Mankowski, 37 Misc. 303, 306, 75 NYS 454. (4) Power to mortgage real estate was given by a will which authorized the testator's widow to sell and dispose of it as she might deem best for the support of herself and family, and carry on the business of the testator. Lardner v. Williams, 98 Wis. 514, 519, 74 NW 346 ("In so holding, we are not to be understood as holding that a simple power of sale will authorize a mortgage. This is a question upon which the decisions are not uniform").

[b] **"Where power of sale is given to raise a particular charge only,** and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be adopted, and it is within the limits of the power intended to be conferred. It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided." Loebenthal v. Raleigh, 36 N. J. Eq. 169, 172.

99. Shimmel v. Morse, 57 App. Div. 434, 63 NYS 322, 68 NYS 1148 [aff 30 Misc. 257, 63 NYS 322].

[a] **Assent of principal legatee.**—Where the principal legatee in a will,

Mortgage. It has been held that authority given to the representative by will or by statute to mortgage the realty authorizes him to stipulate for the payment of attorney's fees in the event of its becoming necessary to collect the debt by suit.[1] An executor giving a mortgage on his testator's property may in England include a power of sale.[2]

[§ 698] **c. Construction of Mortgage.** Whether or not a mortgage is that of the representative as such, or simply his individual mortgage, should, in a jurisdiction under the statutes of which a mortgage is not an instrument under seal, be determined not only from the form of the instrument itself, but by reading it in the light of the facts and circumstances attending its execution, and considering the situation of the parties.[3]

[§ 699] **d. Title, Rights, and Liabilities of Mortgagee.** The rule of caveat emptor applies to mortgagees of property from executors or administrators,[4] and where a mortgagee lends prematurely or the transaction is unauthorized, he obtains no title or security as against a subsequent purchaser,[5] although he will be entitled to repayment out of the proceeds of the sale.[6] A bona fide mortgagee who advances upon the security of a decedent's land is not bound to see to the representative's application of the fund realized by the mortgage,[7] nor does the fact that payment of claims against the land of a testator was made by the executor without the approbation of the court affect the validity of a mortgage given under a power in the will to secure the loan with which such payment was made.[8] But where a mortgagee lends under such circumstances that he is chargeable with constructive notice of the executor's intention to apply the money to an improper purpose, he cannot hold the mortgage as against the estate.[9]

[§ 700] **e. Right to Attack Mortgage.** Where property charged with the payment of a legacy was sold, and the proceeds paid to the legatee in partial discharge of the legacy, neither she nor a judgment creditor nor residuary devisees named in the will were entitled, in the absence of fraud on the part of the executors, to object to the validity of a mortgage executed by them on land belonging to the estate without express authority in the will, all of the proceeds of such mortgage having been applied to pay debts of the estate.[10]

Estoppel. Creditors of a testator may by their acquiescence for a number of years in the executor's management of the estate under the provisions of the will become estopped to question the validity of mortgages executed by him under authority given by the will;[11] but although an administrator by mortgaging the land of decedent, title to which had not been perfected, was enabled to purchase it for the heirs, the latter are not estopped in an action to foreclose the mortgage to plead the invalidity of the administrator's act because of the benefits resulting to them, it appearing that the money was not borrowed by the heirs or by anyone in their name or at their request.[12]

[§ 701] **f. Personal Liability of Representative.** It has been held that where an executor, empowered by a will to mortgage his testator's property, executes a mortgage in his capacity as executor containing warranties of title and a promise to pay taxes and attorney's fees, and gives his notes for the money secured thereby, he is personally bound therefor, as giving the notes and making the warranties are not necessary to the execution of the power.[13] Executors of a grantee of mortgaged premises, who executed a mortgage extension agreement, have been held individually liable for payment of the mortgage debt, and a deficiency judgment resulting from a sale of the premises, although the agreement described them as executors.[14]

[§ 702] **g. Effect of Unauthorized Mortgage.** Where a mortgage was unauthorized, the fact that the money lent thereon was used to pay debts of the estate gives the lender no equitable lien on the mortgaged property or other assets,[15] but under such circumstances the estate is bound in equity to re-

whose interest was prior to that of all other beneficiaries, and was greater than the part of the estate mortgaged by the executor to secure a loan to pay debts, did not object to such mortgage, but joined therein with the executor, it was immaterial to the rights of the other beneficiaries whether the mortgage was authorized by the will. Talliferro v. Thornton, 80 SW 1097, 26 KyL 183.

1. Fletcher v. American Trust, etc., Co., 111 Ga. 300, 36 SE 767, 78 AmSR 164; Lawrey v. Sterling, 41 Or. 518, 69 P 460. But compare De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 92, 81 AmStR 95, 99 ("By the terms of the mortgage the mortgagor agreed to warrant the title to the land, and promised to pay taxes and attorney fees. By these promises, which are free from ambiguity and not to be explained by extrinsic evidence, the mortgagor was made personally liable").

2. Cruikshank v. Duffin, L. R. 13 Eq. 555; Russell v. Plaice, 18 Beav. 21, 52 Reprint 9 [overr Sanders v. Richards, 2 Coll. 568, 33 EngCh 568, 63 Reprint 864, and foll Vane v. Rigden, L. R. 5 Ch. 663; In re Chawner, L. R. 8 Eq. 569].

3. Ames v. Holderbaum, 44 Fed. 224.

4. Ga.—Putney v. Bryan, 142 Ga. 118, 82 SE 519.

Mass.—Donnelly v. Alden, 229 Mass. 109, 118 NE 298.

Nebr.—Neary v. Neary, 97 NW302.

N. J.—Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 58 A 607.

Pa.—Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

Ont.—London, etc., Loan, etc., Co. v. Wallace, 8 Ont. 539.

5. Dancy v. Duncan, 96 N. C. 111, 1 SE 455.

6. Dancy v. Duncan, 96 N. C. 111, 1 SE 455.

7. Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

N. J.—Shipman v. Lord, 58 N. J. Eq. 380, 44 A 215 [aff on op. below 60 N. J. Eq. 484, 46 A 1101].

N. Y.—Danziger v. Deline, 25 Misc. 635, 56 NYS 354 [aff 51 App. Div. 618, 64 NYS 1134].

Pa.—Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

Tex.—Tomlinson v. Drought, (Civ. A.) 127 SW 262; Prieto v. Leonards, 32 Tex. Civ. A. 205, 74 SW 41.

Wash.—Wallace v. Grant, 27 Wash. 130, 67 P 578.

Eng.—Farhall v. Farhall, L. R. 7 Eq. 286; Shalcross v. Dixon, 7 L. J. Ch. 180; Ball v. Harris, 4 Myl. & C. 264, 18 EngCh 264, 41 Reprint 103.

[a] **The principle on which the rule rests,** when the power is given for the payment of debts and legacies, is that the testator has shown his intention to be to intrust the trustees with the power of receiving and applying the money. Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 635, 42 Reprint 700.

[b] **The rule applies only when** the power to mortgage is legally exercised. Shipman v. Lord, 58 N. J. Eq. 380, 44 A 215 [aff on op. below 60 N. J. Eq. 484, 46 A 1101]; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094; Wallace v. Grant, 27 Wash. 130, 67 P. 578.

8. Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW550.

9. Goodell v. Taylor, (N. J. Ch.) 97 A 569.

10. Thomas v. Provident Life, etc., Co., 138 Fed. 348, 70 CCA 488 [certiorari den 200 U. S. 618, 26 SCt 755, 50 L. ed. 622].

11. Ames v. Holderbaum, 44 Fed. 224; Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

12. Black v. Dressell, 20 Kan. 153.

13. De Coudres v. Union Trust Co., 25 Ind. A. 271, 58 NE 90, 91, 81 AmSR 95, 99 ("While the will in the case at bar gave authority to sell or mortgage the real estate, it did not give authority to execute the promissory notes. The execution of the notes was not essential to the execution of the mortgage; it was not a necessary incident thereto; neither the express promise of the mortgagor to pay the mortgage nor the execution of the notes was necessary"). But see as to attorney's fees supra § 697.

14. Smith v. Wagner, 106 Misc. 170, 174 NYS 205.

15. Putney v. Bryan, 142 Ga. 118, 82 SE 519; Henry v. Henry, 73 Nebr. 746, 102 NW 441.

[a] **Subrogation not permitted.**—One who has made a loan to an ad-

pay the amount advanced with interest.[16] A mortgage executed without authority by an executor who is also interested in the estate, while not binding upon the estate is, it has been held, binding upon him personally to the extent of his individual interest in the property.[17] In a case where one executor mortgaged land of the estate to his coexecutor, it was held that the legal effect of the mortgage was to enable the mortgagee to hold the estate in his own right as against the executor who made the mortgage, but that he was a trustee so far as the beneficiaries under the will were concerned.[18]

[§ 703] **13. Acquisition by Representative**[19]**—a. In His Individual Capacity—(1) In General.** The office of an executor or administrator does not per se disable him as an individual from buying bona fide with his own money property to which the estate has no right,[20] and the heirs or devisees cannot compel him to give them the benefit of such a purchase, even though decedent in his lifetime had been in negotiation for the purchase of the same property.[21] But his duty does preclude him from purchasing an outstanding adverse title to land of which his decedent died seized and claiming title to such land for his own benefit,[22] and any title so acquired by him will inure to the benefit of the estate;[23] and generally speaking, where he buys or redeems land with funds of the estate, or procures judgment satisfied from land in right of the estate, or in dereliction of duty abuses the confidence reposed in him by seeking an undue personal advantage in the acquisition of property from the exercise of his representative authority, he will be considered in equity, whatever may have been the formal expression of the conveyance or of notes given for the purchase money, as holding the property in his representative capacity or as a trustee of the estate and those in interest, and his acts will inure to the benefit of those interested therein, at the same time that his rights and title are effective as against others.[24] So an administrator has no right to purchase land in his own right at a sheriff's sale under

ministrator upon a void mortgage, a part of which was used to pay a previously executed void mortgage, is not entitled to subrogation to a lien discharged with the proceeds of the earlier mortgage. Henry v. Henry, 73 Nebr. 746, 103 NW 441.

16. Thomas v. Provident Life, etc., Co., 138 Fed. 348, 70 CCA 488 [certiorari den 200 U. S. 618, 26 SCt 755, 50 L. ed. 622].

17. Webb v. Winter, 6 Cal. Unrep. Cas. 768, 65 P. 1028; Shrigley v. Black, 59 Kan. 487, 53 P 477; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. 558, 42 A 1094.

[a] **Mortgage by executors and devisees.**—A mortgage executed upon the estate of a decedent by devisees under his will, some of whom are executors of his estate and sign as such, but who have no authority from the probate court so to do, is a valid instrument, binding the respective obligors, including the executors, in their individual capacity, and constitutes a lien upon the respective interests of the mortgagors in the mortgaged estate. Shrigley v. Black, 59 Kan. 487, 53 P 477.

18. Beaty v. Shaw, 13 Ont. 21.

19. Acquisition of personalty see infra §§ 754–757.

20. Ala.—Mosely v. Lane, 27 Ala. 62, 62 AmD 752.

Ill.—Abernathie v. Rich, 256 Ill. 166, 99 NE 883.

Kan.—Briggs v. Chicago, etc., R. Co., 56 Kan. 526, 43 P 1131; Merket v. Smith, 33 Kan. 66, 5 P 394.

Ky.—Longest v. Tyler, 1 Duv. 192.

Miss.—Glenn v. Thistle, 23 Miss. 42.

Pa.—Beck v. Uhrich, 16 Pa. 499.

Tex.—Berryman v. McDonald, 49 Tex. Civ. A. 81, 107 SW 944.

[a] **Illustration.**—Where an administrator sold land of the estate on twelve months' credit, and distributed the note, taken in payment, among the creditors of the estate in proportion to their claims, and when the note was due, the purchaser of the land reconveyed it to the administrator, in his individual capacity, in trust for the various creditors as part payment of the note, the interest of the estate in the land was completely divested by the administrator's sale, and the reconveyance to the administrator in his individual capacity did not give the heirs any interest in the land. Berryman v. McDonald, 49 Tex. Civ. A. 81, 107 SW 944.

[b] **The administrator of a deceased vendor**. (1) may purchase from the purchaser the land conveyed to him, the vendor's estate having no interest therein. Davis v. Ragland, 42 Tex. Civ. A. 400, 93 SW 1099. (2) An administrator de bonis non could purchase for himself at foreclosure sale property formerly owned by his intestate but transferred by him during his lifetime. Abernathie v. Rich, 256 Ill. 166, 99 NE 883.

[c] **Where the testator had bought land the title to which was wholly void,** and not merely defective, the land being public land, the executor could purchase it for his own benefit when it was sold by the government, and it was immaterial that the vendor of the testator (supposing, but without any contract or agreement with the executor, that the latter was acting for the estate) assisted in clearing away preemption rights, and otherwise facilitated the executor in getting the title. Glenn v. Thistle, 23 Miss. 42.

[d] **Purchase of property of decedent's debtor.**—Pending a suit in equity brought by an executor to subject land of his testator's debtor to the payment of the debt, the vendor of the land to the debtor obtained a decree for the sale of the land for a balance of the purchase money, and at the sale the executor bought the land. He afterward sold it and applied a portion of the proceeds to the payment of the debt due his testator, leaving a balance in his hands more than sufficient to reimburse him for his purchase. It was held that he was bound to apply the proceeds to the payment of the debt, but was entitled to retain the surplus profits. Longest v. Tyler, 1 Duv. (Ky.) 192.

[e] **Purchase at foreclosure of mortgage due estate.**—"A purchase by an executor or administrator under foreclosure of a mortgage due the estate is not absolutely void against the whole world, whether the purchase be in his individual name or as executor or administrator." Phillips v. Love, 57 Kan. 828, 833, 48 P 142.

[f] **Purchase with assets of estate.**—(1) An executor or administrator may sustain a title to the land which he has purchased in his own name with assets of the estate upon clear proof that he was in advance to the estate for more than the amount paid. Buckingham v. Wesson, 54 Miss. 526. (2) But if he purchases lands or other property with the money of the estate, and afterward resells it at a profit, the benefit of the purchase inures to the estate and not to himself individually. Mosely v. Lane, 27 Ala. 62, 62 AmD 752.

21. Gay v. Gay, 5 Allen (Mass.) 181; Glenn v. Thistle, 23 Miss. 42.

22. Culberhouse v. Shirley, 42 Ark. 25; Lucich v. Medin, 3 Nev. 93, 93 AmD 376; Perkins v. Blood, 36 Vt. 273; North v. Barnum, 10 Vt. 220, 12 Vt. 205; Watkins v. Zwietusch, 47 Wis. 513, 3 NW 35.

23. Lucich v. Medin, 3 Nev. 93, 93 AmD 376; North v. Barnum, 10 Vt. 220.

[a] **A purchase by the attorney of the representative** is subject to the same rule. Turner v. Fryberger, 94 Minn. 433, 103 NW 217, 110 AmSR 375.

24. Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Wells v. Elliott, 68 Ala. 183.

Ark.—Reeves v. Barrett, 13 SW 77; Atchley v. Reeves, 23 Ark. 233.

Ga.—Benjamin v. Gill, 45 Ga. 110.

Ill.—McCreedy v. Mier, 64 Ill. 495; Willenborg v. Murphy, 36 Ill. 344; Kenney v. Keplinger, 89 Ill. A. 570.

Ind.—Murphy v. Teter, 56 Ind. 545.

Iowa.—McCrory v. Foster, 1 Iowa 271.

Ky.—Blakey v. Blakey, 3 J. J. Marsh. 674; Aulbach v. Read, 77 SW 204, 25 KyL 1130; Stone v. Burge, 74 SW 250, 24 KyL 2424; Scott v. Proctor, 13 SW 790, 12 KyL 57.

Me.—Tebbetts v. Estes, 52 Me. 566; Webber v. Webber, 6 Me. 127.

Mass.—Phillips v. Rogers, 12 Metc. 405; Brooks v. Whitney, 11 Metc. 413; Johnson v. Bartlett, 17 Pick. 477; Hancock v. Minot, 8 Pick. 29; Boylston v. Carver, 4 Mass. 598.

Mich.—Kunzie v. Wixom, 39 Mich. 384; Sheldon v. Rice, 30 Mich. 296, 18 AmR 136.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420; Buie v. Pollock, 54 Miss. 9; Williams v. Stratton, 18 Miss. 418.

N. H.—Thurston v. Kennett, 22 N. H. 15; Smith v. Smith, 11 N. H. 459; Gibson v. Bailey, 9 N. H. 168.

N. J.—Goodell v. Taylor, (Ch.) 97 A. 569; Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428; Brownlee v. Lockwood, 20 N. J. Eq. 239; Rutherford Land, etc., Co. v. Sanntrock, 44 A 938 [aff 60 N. J. Eq. 471, 46 A 648].

N. Y.—Zilkin v. Carhart, 3 Bradf. Surr. 376.

N. C.—Jones v. Slaughter, 96 N. C. 541, 2 SE 681.

Okl.—Vaughan v. Vaughan, 162 P 1131.

S. C.—Henry v. Archer, 8 S. C. Eq. 535.

Tenn.—Phillips v. Terrell, 10 Heisk. 417; Cox v. Cox, Peck 443; Myrick v. Boyd, 3 Hayw. 179.

Tex.—McCoy v. Crawford, 9 Tex. 353.

Vt.—Shaw v. Partridge, 17 Vt. 626; Tryon v. Tryon, 16 Vt. 313.

Va.—Morgan v. Fisher, 82 Va. 417.

Wis.—Gillett v. Gillett, 9 Wis. 194.

Ont.—Beaty v. Shaw, 13 Ont. 21.

[a] **Title not void but voidable.**—Murphy v. Teter, 56 Ind. 545.

[b] **Executor trustee for heirs and not for legatees and devisees.**—Watson v. Child, 30 S. C. Eq. 129.

[c] **The heirs may bring trespass to try title** after the estate has been administered as to land conveyed to

executions issued upon a judgment in his own favor and one held by him as administrator.[25] Where one named as executrix does not qualify or assume to act as such, she cannot be held as a trustee merely because she is made the grantee in a deed conveying land to which the testator held a bond for a deed, no part of the funds of the estate having been used in the purchase of such land.[26] Where a deed absolute in form, but intended as a mortgage, runs to the grantee individually, but is made in fact for the benefit of the estate of which she is administratrix, she must, on a bill to redeem, account for the rents and profits as administratrix.[27]

Ratification or acquiescence. Ratification by heirs or other parties in interest, or long acquiescence with full knowledge of the facts, may estop them to object to the acquisition of property of the estate by the representative, and debar third persons from questioning the transaction.[28]

[§ 704] **(2) Purchase from Widow, Heir, or Devisee.**[29] It is generally considered that an executor or administrator, acting fairly in the premises, may purchase from an heir or devisee, or from the widow of the decedent, his or her interest in the estate,[30] and although such a purchase is regarded with high disfavor,[31] and will be held invalid if the representative has taken any advantage of his position or been guilty of any fraud or misrepresentation,[32] the judicial disposition is usually to do no more than presume strongly against the validity of such a purchase and require the fiduciary to show affirmatively adequacy of consideration and the general fairness of the transaction,[33] and if the transaction is in good faith and without fraud it

the representative. Easterling v. Blythe, 7 Tex. 210, 56 AmD 45.

[d] **Right as against creditors.**—Where a purchaser of land under a bond for title made permanent improvements upon the land, which so greatly enhanced its value that it became unquestionably worth considerably more than the amount of the purchase-money debt, and then died, his estate, although no portion of the purchase money had been paid, had an equitable interest in the property, which his administrator could not, as against the rights of creditors, lawfully acquire by paying the purchase money, and taking to himself personally a deed from the original vendor. Whiddon v. Williams, 98 Ga. 310, 24 SE 437.

[e] **Right of purchaser.**—A purchaser of lands of a testator from the executrix with notice that she had purchased them with assets of the estate is a trustee for testator's creditors to the extent that the lands were paid for by the executrix with such assets. Buckingham v. Wesson, 54 Miss. 526.

[f] **A compromise between an administratrix and the heirs** by which the heirs on certain considerations give a receipt "in full satisfaction of all liabilities" incurred by the administratrix on account of matters connected with the estate "discharging her from her trust as administratrix" changes her bare title as trustee of certain lands purchased by her individually with assets of the estate into a fee simple. Jones v. Slaughter, 96 N. C. 541, 2 SE 681.

25. Montgomery v. Black, 75 Ark. 184, 86 SW 1006 (at such sale he represents the interest of the estate as much as he does his own, and the duty rests upon him to see that the property brings as much as possible).

26. Gall v. Stoll, 259 Ill. 174, 102 NE 225.

27. Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

28. Randolph v. Vails, 180 Ala. 82, 60 S 159; Prewitt v. Morgan, (Ky.) 119 SW 174; Hicks v. Weems, 14 La. Ann. 629; New York Cent. etc., R. Co. v. Cottle, 102 Misc. 30, 168 NYS 463 [aff 187 App. Div. 131, 175 NYS 178].

[a] **Illustrations.**—(1) Where an administratrix purchased in her own behalf at a judicial sale land belonging to the estate, and the heirs at law remained silent for nearly forty years, they ratified the purchase. Prewitt v. Morgan, (Ky.) 119 SW 174 (the heirs having elected to ratify the administratrix's purchase, their title passed to her, and any claim they had in respect thereto was personal against her so long as it remained unextinguished by satisfaction or limitation). (2) In an action by the heirs of an estate to declare a lien in their favor on a certain lot, alleged to have been purchased and improved by defendant administratrix with funds of the estate, and mortgaged by her to her codefendants to secure her individual debt to them, there is no error in a decree applying the rents of the lot to the satisfaction of the mortgage, as the heirs, by electing to have a lien declared on the lot instead of claiming the lot itself, confirm the title of the administratrix to it. Foley v. Leva, 101 Ala. 395, 13 S 747.

29. Transactions with heirs, etc., generally see supra § 560.

30. U. S.—Cardoner v. Day, 253 Fed. 572.

Ark.—Cornish v. Johns, 74 Ark. 231, 85 SW 764.

Ga.—Collier v. Collier, 137 Ga. 658, 74 SE 275, AnnCas1913A 1110.

Iowa.—Schneider v. Schneider, 125 Iowa 1, 98 NW 159; Herron v. Herron, 71 Iowa 428, 32 NW 407.

Minn.—Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433.

N. Y.—Matter of Devoe, 66 App. Div. 1, 72 NYS 962 [aff 171 N. Y. 281, 53 NE 1102, 57 LRA 536]; Hurrell v. Hurrell, 65 App. Div. 527, 72 NYS 902.

Okl.—Kelly v. Blackwell, 164 P 103.

Or.—Highland v. Tollisen, 75 Or. 578, 147 P 558.

Philippine.—Navel v. Enriquez, 3 Philippine 669.

Tenn.—Woman's College v. Horne, (Ch.) 60 SW 609.

Wis.—Barker v. Barker, 14 Wis. 131.

[a] **Where no fiduciary relation exists.**—Where the executor or administrator does not hold lands for sale to pay debts nor as trustee for the heirs, and no fiduciary relation exists, he is entitled to purchase. Barker v. Barker, 14 Wis. 131.

[b] **Under the laws of the late republic of Texas** in force on June 1, 1844, an administrator could purchase from an heir of his intestate the interest of such heir in the lands belonging to the succession. Erskine v. De la Baum, 3 Tex. 406, 49 AmD 751.

[c] **Purchase of widow's interest.**—As an executor cannot acquire title adverse to the heirs, where testator gives a life estate in land to his wife with remainder to his heirs, and the wife conveys her interest to the executor, on the death of the wife the remainder vests in the heirs and is held by the executor for their benefit, and is a part of the estate, subject to distribution under the will. Blackwell v. Blackwell, 86 Tex. 207, 24 SW 389 [rev (Civ. A.) 23 SW 31].

[d] **Statutory prohibition.**—In re Blackinton, 29 Ida. 310, 158 P 492.

31. Ala.—Williams v. Powell, 66 Ala. 20, 41 AmR 742; Coster v. Brack, 19 Ala. 210; Ashurst v. Ashurst, 13 Ala. 781.

Cal.—Golson v. Dunlap, 73 Cal. 157, 14 P 576.

Ky.—Wright v. Arnold, 14 B. Mon. 638, 61 AmD 172.

Md.—Pairo v. Vickery, 37 Md. 467.

Mo.—State v. Jones, 53 Mo. A. 207.

N. Y.—In re Randall, 152 N. Y. 508, 46 NE 945.

N. C.—Peyton v. Smith, 22 N. C. 325.

Pa.—Parshall's App., 65 Pa. 224; Miller's App., 30 Pa. 478.

S. C.—Watson v. Hill, 32 S. C. L. 78.

[a] **A purchase from a guardian** of his ward's interest is within the rule. Black v. Keenan, 5 Dana (Ky.) 310.

[b] **An executor's purchase of the widow's dower interest** will inure to the estate for the benefit of those entitled to it. Moore v. Moore, 5 Dana (Ky.) 464.

32. Boddie v. Ward, 151 Ala. 198, 44 S 105; Reeder v. Meredith, 78 Ark. 111, 93 SW 558, 115 AmSR 22; Mays v. Pelly, (Ky.) 125 SW 713; Parks v. Brooks, 188 Mich. 645, 155 NW 450. See also cases supra first note this section.

[a] **Representation must have been false to warrant relief.**—To entitle an heir to relief in equity from a deed executed by him of the estate of decedent to decedent's administrator upon representations of the administrator, such representations must have been false. Boddie v. Ward, 151 Ala. 198, 44 S 105.

[b] **Who may attack purchase.**—One beneficiary cannot dispute the purchase by the representative of another beneficiary's share. Peyton v. Smith, 22 N. C. 325.

[c] **No compensation for improvements will be allowed** where the representative acted in bad faith. Reeder v. Meredith, 78 Ark. 111, 93 SW 558, 115 AmSR 22.

33. Ark.—Reeder v. Meredith, 78 Ark. 111, 93 SW 558, 115 AmSR 22.

Cal.—Golson v. Dunlap, 73 Cal. 157, 14 P 576.

Ill.—Taylor v. Taylor, 259 Ill. 524, 102 NE 1086.

Ind.—Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336.

Ky.—Mays v. Pelly, 125 SW 713; Wright v. Arnold, 14 B. Mon. 638, 61 AmD 172; Handlin v. Davis, 4 KyL 675.

Mo.—State v. Jones, 53 Mo. A. 207.

N. H.—Lovell v. Briggs, 2 N. H. 218.

N. Y.—Matter of Ledrich, 68 Hun 396, 22 NYS 978.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc].

Utah.—Haight v. Pearson, 11 Utah 51, 39 P 479.

[a] **Expression of honest opinion.**—The expression by an administrator of his honest opinion as to a question of law in negotiating for the purchase of an heir's interest in the estate is not ground for setting aside the sale to him as obtained by fraud and misrepresentation, although he may have been mistaken in his opinion. Dowdall v. Cannedy, 32 Ill. A. 207.

[b] **Circumstances not showing**

may be treated as a similar transaction between strangers would be.[34]

[§ 705] **(3) Purchase of Decedent's Realty at Judicial or Execution Sale.** With reference to an executor or administrator purchasing land of decedent for himself at a judicial or execution sale, the rule is that he shall not be allowed to purchase property which he holds in trust, either directly or indirectly, or to antagonize the interests of the estate he represents by taking an adverse interest,[35] especially where the sale was made in consequence of his default in not paying the debt for which the property was sold, when he had sufficient funds in his hands for that purpose,[36] or where he was guilty of fraud.[37] But in cases where the representative was not a trustee of the real estate at the time of the purchase, and the transaction was a fair one, and the sale was not due to any neglect or failure of duty on his part, a purchase by him has been allowed to stand.[38] Where the property is purchased at the sale by a third person, who makes the purchase in good faith, there is no reason why the administrator should not subsequently purchase the property from him.[39] Where certain land of a

purchase by executor from legatee.— Where a legatee sold land to one who, after holding it for eighteen years, transferred it to the executor in a proceeding for an accounting, and it appeared that at the time of the sale the legatee requested the executor to buy the land, and approved the sale to the person who did buy, the act of the executor in taking title was not sufficient to show that he was himself the real purchaser at the first sale. In re Cunningham, 212 Pa. 441, 61 A 993.

34. Ala.—Boddie v. Colburn, 151 Ala. 669, 44 S 108.

Ark.—Flowers v. Flowers, 84 Ark. 557, 559, 106 SW 949, 120 AmSR 84.

Ind.—Carter v. Lee, 51 Ind. 292.

Nebr.—Shelby v. Creighton, 2 Nebr. (Unoff.) 264, 267, 96 NW 382.

N. Y.—Clark v. Jacobs, 56 HowPr 519.

Okl.—Kelly v. Blackwell, 164 P 103 [quot Cyc].

Wash.—In re Goss, 73 Wash. 330, 132 P 409.

"A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the action of every shadow of suspicion. . . . Any withholding of information or ignorance of the facts or of his rights on the part of the cestui que trust, or any inadequacy of price, will make such purchaser a constructive trustee." Perry Trusts § 195 [quot Flowers v. Flowers, supra; Reeder v. Meredith, 78 Ark. 111, 115 AmSR 22].

[a] **The sale is good at law,** although disfavored and voidable in equity. Jackson v. Potter, 4 Wend. (N. Y.) 672.

[b] **While the sale remains uncontested** the administrator has the usual rights against tenants. Carter v. Lee, 51 Ind. 292.

35. U. S.—Alan v. Gillet, 21 Fed. 273; Rafferty v. Mallory, 20 F. Cas. No. 11,526, 3 Biss. 362.

Ark.—Holloway v. Eagle, 135 Ark. 206, 205 SW 113; Eagle v. Terrell, 95 Ark. 434, 130 SW 550; Wright v. Campbell, 27 Ark. 637.

Ga.—Fleming v. Foran, 12 Ga. 594.

Ill.—Roberts v. Weimer, 130 Ill. A. 297 [aff 227 Ill. 138, 81 NE 40].

Ind.—Hunsucker v. Smith, 49 Ind. 114; Martin v. Wyncoop, 12 Ind. 266, 74 AmD 209.

Iowa.—Welch v. McGrath, 59 Iowa 519, 10 NW 810, 13 NW 638.

Ky.—Bartlett v. Gray, 4 KyL 615; Rogers v. Burbridge, 7 KyL 42, 48, 13 Ky. Op. 517.

La.—Abshire v. Lege, 133 La. 254, 62 S 667; Stanbrough's Succ., 37 La. Ann. 275.

Md.—Turner v. Bouchell, 3 Harr. & J. 99.

Miss.—Deanes v. Whitfield, 107 Miss. 273, 65 S 246.

Mo.—Dillinger v. Kelley, 84 Mo. 561; Harper v. Mansfield, 58 Mo. 17.

N. J.—Rickey v. Hillman, 7 N. J. L. 180; Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; Marshall v. Carson, 38 N. J. Eq. 250, 48 AmR 319; Carson v. Marshall, 37 N. J. Eq. 213 [aff 38 N. J. Eq. 250, 48 AmR 319]; Johns v. Norris, 27 N. J. Eq. 485.

N. Y.—Prindle v. Beveridge, 58 N. Y. 592 [aff 7 Lans. 225]; Rogers v. Rogers, 3 Wend. 503, 20 AmD 716 [aff Hopk. Ch. 515].

Okl.—Vaughan v. Vaughan, 162 P 1131.

Pa.—Riddle v. Murphy, 7 Serg. & R. 230; Guier v. Kelly, 2 Binn. 294; Williamson v. Lamb, 2 Miles 383; Finley's Est., 25 Pa. Co. 261.

[a] **Purchase not void but voidable merely.**—Welch v. McGrath, 59 Iowa 519, 10 NW 810, 13 NW 638; New York Cent., etc., R. Co. v. Cottle, 102 Misc. 30, 108 NYS 463 [aff 187 App. Div. 131, 175 NYS 178].

[b] **In whose favor trust results; participation in fraud.**—A decedent's widow and his administrator agreed to procure a foreclosure sale of the intestate's land, at which the administrator was to buy the land at an inadequate price by giving out at the sale that he was purchasing for the widow, and thus dissuading others from bidding. Thereafter the administrator purchased the land at the sale and agreed to convey it to the widow for the price at which it was struck off to him. On his refusal subsequently to do so, the widow and the intestate's only child filed a bill to redeem. Although the widow, having participated in the fraud, was not entitled to relief, the property acquired by the administrator would be regarded as held for the benefit of the child. Johns v. Norris, 27 N. J. Eq. 485.

[c] **Sale under judgment held by representative.**—If the personal property is insufficient to pay the debts, the executor or administrator becomes a trustee for the heirs and devisees, and will not be permitted to sell the land, under a judgment held by him, and become the purchaser. Rogers v. Rogers, 3 Wend. (N. Y.) 503, 20 AmD 716 [aff Hopk. (N. Y.) 515].

[d] **Extent of liability.**— Dilworth's App., 108 Pa. 92.

36. Prindle v. Beveridge, 7 Lans. 225 [aff 58 N. Y. 598].

[a] **Illustration.**—Where executors clothed with a power, in trust, to sell for the benefit of infant heirs, negligently permitted the land to be sold under a mortgage, and became the purchasers, the cestuis que trust might elect whether the sale should stand, or the land be resold, or a reconveyance to them be made. Campbell v. Johnston, 1 Sandf. Ch. (N. Y.) 148.

37. Johns v. Norris, 27 N. J. Eq. 485.

38. Ga.—Collier v. Collier, 137 Ga. 658, 74 SE 275, AnnCas1913A 1110.

Ill.—Stark v. Brown, 101 Ill. 395.

Iowa.—Stevenson v. Polk, 71 Iowa 278, 32 NW 340; Welch v. McGrath, 59 Iowa, 519, 10 NW 810, 13 NW 638.

La.—Sojourner v. Fourney, 35 La. Ann. 918.

Minn.—Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433.

Mo.—Dillinger v. Kelley, 84 Mo. 561.

N. J.—Rickey v. Hillman, 7 N. J. L. 180; Johns v. Norris, 22 N. J. Eq. 102 [rev on other grounds 27 N. J. Eq. 485]; Earl v. Halsey, 14 N. J. Eq. 332.

N. Y.—Hollingsworth v. Spaulding, 54 N. Y. 636.

Pa.—Meanor v. Hamilton, 27 Pa. 137; McManus' Est., 3 Pa. Dist. 183, 14 Pa. Co. 379, 34 WklyNC 222.

S. C.—Huson v. Wallace, 18 S. C. Eq. 1.

Tenn.—Women's College v. Horne, (Ch. A.) 60 SW 609.

[a] **Thus** the court has upheld a purchase by the administrator of his decedent's realty at a tax sale, as he was under no obligation to pay taxes assessed against the land. Stark v. Brown, 101 Ill. 395, 401 ("His purchase conflicting with no duty he owed the heirs at law in regard to the land, in allowing it to be made, no temptation is afforded to a betrayal of trust").

[b] **An executor who is also a legatee** can purchase lands of the estate sold on foreclosure, in the absence of bad faith, and where he has no money of the estate in his hands to prevent the sale, and uses no portion of the estate to pay for the property. Connor v. Gibbons, 228 Pa. 617, 77 A 1009.

[c] **A mortgagee who becomes administrator** of the estate of the mortgagor does not thereby lose the right to foreclose his mortgage, or to purchase the property at the foreclosure sale, when he acts fairly and in good faith. Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433 (where the purchase was for the full amount due on the mortgage, with the costs of foreclosure). But compare King v. Turner, 112 Ark. 337, 165 SW 949 (the mortgagee under a deed of trust who became mortgagor's administrator with the will annexed, had the right to have the mortgaged lands sold under the deed of trust, but not to become the purchaser, but holding further that such purchase was not invalid, where the devisee without any fraud or undue influence being practiced, asked him to buy the land, stating that she thought she could redeem it later).

[d] **Where a joint administrator was a defendant to partition** both as an individual and as a personal representative, and the judgment authorized any party to purchase, he could purchase in his individual capacity, without being chargeable as trustee for the plaintiff heirs, although the joint answer of the administrators asked for substantially the same relief asked in the complaint; but he could not take individual advantage of information received as administrator so as to work a fraud. La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146 [aff 198 N. Y. 591 mem, 92 NE 1089 mem].

[e] **Burden of proof as to fairness.**—Where an administrator, who was also guardian of the infant heirs, purchased the real estate of the intestate at a sale under a decree in partition, the burden of proof was on him to show that he gave a full price; and he having sold the land six years afterward at a great advance was compelled to account for the advanced price. Huson v. Wallace, 18 S. C. Eq. 1.

39. O'Brien v. Wilson, 82 Miss. 93, 33 S 946.

F. E. BRIGHTMAN
ATTORNEY-AT-LAW
1244 FIRST NATIONAL BANK BLDG.
CHICAGO

decedent was partitioned among his heirs by the probate court, that set apart to one of the heirs ceased to be the property of the estate, the administrator ceased to have any control thereover, and was not bound to pay the taxes thereon, or do anything to protect the rights of the heir, even though the administration had not been closed; and hence he could purchase the property at a tax sale thereof.[40]

[§ 706] **b. In His Representative Capacity—(1) In General.** An executor or administrator has as a rule no power to buy land with personalty of the estate, unless authorized to do so by the will or by statute;[41] but if he so purchases the property purchased will be considered in equity as part of the estate and as impressed with the character of the purchase money, and an equitable lien of creditors of decedent is sometimes favorably regarded in such a connection.[42] Where a decedent at the time of his death had an inchoate right in land under a contract of purchase or otherwise, the personal representative may complete the purchase and take a deed to himself in his representative capacity in trust for the persons interested in the estate,[43] and, even though the representative completes the purchase in his own name, the purchase may be held to be made for the benefit of the estate where it sufficiently appears from the evidence that this was the intention of the representative.[44] Where executors have a discretion in regard to investment in real property, or where there is a necessity of receiving real estate in payment of a debt, the beneficiaries are bound to accept the property thus acquired.[45] The regularity of proceedings in the probate court under which an administrator was authorized to purchase land in controversy is not subject to collateral attack in an action of trespass to try title by such administrator.[46] Where title is taken in the name of coexecutors, they hold as joint tenants with the right of survivorship and not as tenants in common.[47]

[§ 707] **(2) Purchase at Judicial or Execution Sale.** The general rule is that when it is for the interest of the estate that he should do so, the executor or administrator is justified in purchasing land for the estate at a foreclosure sale under a mortgage belonging to the estate,[48] or an execution sale under a judgment in his favor on some debt due decedent.[49] In such a case the representative may take a deed in his own name and by a deed executed in his own name give a good title to others which the beneficiaries of the estate cannot dispute;[50] but the purchase is presumed to be intended for the benefit of the estate, and requires him to account and turn over the property or its proceeds to the parties who would have been entitled to the mortgage or judgment debt if paid, the premises in his hands taking that character accordingly; and while he is chargeable with rents and profits later received or justly accruing, he should be reimbursed for his reasonable outlays and for such sum as he actually paid in the purchase.[51] Where an executor, in satisfaction of mortgage debts, accepted conveyances of the encumbered land and also foreclosed mortgages, and, on the sale, took deeds therefor to himself as executor, it was held that he must, as a condition precedent to his discharge and the liberation of his bondsmen, convey the premises to the

40. Griswold v. Comer, (Tex. Civ. A.) 161 SW 423.

41. Lamotte v. Steidinger, 266 Ill. 600, 107 NE 850; Wilson v. Mason, 158 Ill. 304, 42 NE 134, 49 AmSR 162 [aff 57 Ill. A. 325].

[a] **Purchase for benefit of creditors and heirs.**—If the owner of an improvement on land forfeited to the state for taxes and subsequently donated dies, his administrator is entitled to be paid by the donee for the improvements, and upon failure of the donee to pay for it may purchase the land in his representative capacity for the benefit of the creditors and heirs. Surginer v. Paddock, 31 Ark. 528.

[b] **Status of property purchased under power in will.**—Where an executor invests the proceeds of an estate consisting of personal property in realty, under discretionary power conferred in the will, the realty thus acquired is realty in law and in fact, and subject to all the incidents of such property. Holmes v. Picket, 51 S. C. 271, 29 SE 82.

42. Ark.—Collins v. Warner, 32 Ark. 87.

Kan.—Merket v. Smith, 33 Kan. 66, 5 P 394.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420; Shaw v. Thompson, Sm. & M. Ch. 628.

Nebr.—Blake v. Chambers, 4 Nebr. 90.

Tex.—Shelton v. Bone, (Civ. A.) 26 SW 224.

43. Lewis v. Wells, 50 Ala. 198; In re Smith, 4 Nev. 254, 97 AmD 531.

[a] **Legal title of representative.**—A conveyance of land to which a deceased person was entitled before his death, to his administrator as such, places the legal title to the land in the administrator, and he may maintain an action to assert rights in the land. In re Smith, 4 Nev. 254, 97 AmD 531.

Contract for purchase of realty as assets see supra § 347.

44. Avila v. Pereira, 120 Cal. 589, 52 P 840; Coleman v. Florey, (Tex. Civ. A.) 61 SW 412.

45. Blaisdell v. Stevens, 16 Vt. 179.

46. Spikes v. Howard, 51 Tex. Civ. A. 389, 111 SW 792.

47. Lamotte v. Steidinger, 266 Ill. 600, 107 NE 850.

48. U. S.—Rafferty v. Mallory, 20 F. Cas. No. 11,526, 3 Biss. 362.

Ark.—Jones v. Graham, 36 Ark. 383.

Cal.—In re Miner, 46 Cal. 564.

Colo.—Dusing v. Nelson, 7 Colo. 184, 2 P 922.

Ill.—Lamotte v. Steidinger, 266 Ill. 600, 606, 107 NE 850 [cit Cyc].

Iowa.—Stevenson v. Polk, 71 Iowa 278, 32 NW 340.

Kan.—Phillips v. Love, 57 Kan. 828, 48 P 142; Briggs v. Chicago, etc., R. Co., 56 Kan. 526, 43 P 1131.

La.—Sojourner v. Fourney, 35 La. Ann. 918.

Minn.—Lewis v. Welch, 47 Minn. 193, 48 NW 608, 49 NW 665.

N. J.—Holcomb v. Coryell, 11 N. J. Eq. 476; Holcomb v. Holcomb, 11 N. J. Eq. 281; Goodell v. Taylor, (Ch.) 97 A 569.

N. Y.—Bryan v. Carroll, 122 App. Div. 301, 106 NYS 668.

49. Ark.—Williamson v. Furbush, 31 Ark. 539.

Ga.—Crawford v. Tribble, 69 Ga. 519.

Ind.—Mitchell v. Hodges, 87 Ind. 491; Murphy v. Teter, 56 Ind. 545.

Ky.—Jackson v. Roberts, 95 Ky. 410, 25 SW 879, 15 KyL 831.

La.—Lafayette v. Preston, 3 La. Ann. 381.

Md.—Wilson v. Miller, 30 Md. 82, 96 AmD 568.

Pa.—Oeslager v. Fisher, 2 Pa. 467; Bowler's Est., 8 Pa. Co. 522.

[a] **Representative may maintain forcible detainer against one withholding possession.**—Rice v. Brown, 77 Ill. 549.

[b] **Contrary view.**—Sedgwick v. Sedgwick, 2 Cal. Unrep. Cas. 363, 4 P 570.

50. Ill.—Lamotte v. Steidinger, 266 Ill. 600, 107 NE 850.

N. H.—Fifield v. Sperry, 20 N. H. 338.

N. Y.—Lockman v. Reilly, 95 N. Y. 64.

Tex.—Bennett v. Kiber, 76 Tex. 385, 13 SW 220.

Vt.—Higley v. Smith, 1 D. Chipm. 409, 12 AmD 701.

[a] **Error in making out the deed to the heirs** does not preclude the title of the representative as to an asset of the estate. Bennett v. Kiber, 76 Tex. 385, 13 SW 220.

51. Ind.—Murphy v. Teter, 56 Ind. 545.

La.—Sojourner v. Fourney, 35 La. Ann. 918.

Md.—Wilson v. Miller, 30 Md. 82, 96 AmD 568.

Minn.—Lewis v. Welch, 47 Minn. 193, 48 NW 608, 49 NW 665.

Mo.—Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

N. Y.—Haberman v. Baker, 128 N. Y. 253, 28 NE 370, 13 LRA 611; Lockman v. Reilly, 95 N. Y. 64; Fellows v. Fellows,, 4 Cow. 682, 15 AmD 412; Clark v. Clark, 8 Paige 152, 35 AmD 676.

Pa.—Drysdale's App., 14 Pa. 531; Oeslager v. Fisher, 2 Pa. 467; Bowler's Est., 8 Pa. Co. 522.

S. C.—Haynsworth v. Bischoff, 6 S. C. 159.

Tenn.—Phillips v. Terrell, 10 Heisk. 417.

[a] **Property so purchased remains personalty so far as estate concerned.**—Mustin's Est., 8 Pa. Dist. 180.

[b] **Executor not chargeable with land as so much money.**—Bowler's Est., 8 Pa. Co. 522.

[c] **Requiring executor to convey.**—Where an executor bid in, in his own name, land on which the estate had a mortgage, had the certificate of sale issued to him personally, and

legatees as tenants in common.[52]

[§ 708] **(3) Property Taken in Payment of Debts.** Where land is taken by the executor or administrator in payment of a debt due the estate, the land becomes assets in his hands and not property held in his individual right, and it should by way of substitution be subjected by him to the payment of debts and legacies, and to distribution, like personalty.[53]

The heirs cannot disaffirm the purchase of a debtor's realty if the representative acted prudently and for the good of the estate, especially if they delay unduly to proceed in the matter.[54]

[§ 709] **(4) Sale or Mortgage of Property Acquired.** It has been asserted that a representative, unless, of course, he has a power of sale under the will, cannot sell, without an order of court, realty acquired by him in his representative capacity;[55] but the weight of authority is in support of the representative's power to sell such realty in his discretion without any order of court,[56] and a power to mortgage property so acquired has also been asserted.[57] Under such circumstances the purchaser is not required to see to the application of the purchase money;[58] but the representative is chargeable therewith, and should appropriate it duly and account for it.[59] A sale by an executor of such property may be set aside when tainted with fraud in which the purchaser participated.[60]

Exchange. Executors who hold realty by virtue of the foreclosure of a mortgage in favor of the estate are not entitled to exchange it for other realty, and, unless the persons entitled to share in that part of the estate consent to or ratify the trade, the executors are liable to account for the value of the realty conveyed to them.[61]

[§ 710] **P. Personal Property—1. Title and Authority—a. In General.** The common-law rule, which is still the general rule on the subject, is that the title to personal property of a decedent, testate or intestate, vests in the personal representative until administration is completed and the estate fully settled or distributed, or until he chooses or becomes forced to part with it earlier;[62] and the rule applies

so recorded it, and reported the property as belonging to the estate and received credit for it in his account, he should be required to make proper conveyance. In re Richmond, 9 Cal. A. 413, 99 P 558.

52. In re Roach, 50 Or. 179, 92 P 118.

53. Ill.—Coombs v. Furey, 255 Ill. 61, 99 NE 78; Greer v. Walker, 42 Ill. 401.

Mich.—Williams v. Towl, 65 Mich. 204, 31 NW 835.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. J.—Lippincott v. Bechtold, 54 N. J. Eq. 407, 34 A 1079.

N. Y.—Yonkers Sav. Bank v. Kinsley, 78 Hun 186, 28 NYS 925; In re Potter, 32 Hun 599.

Pa.—In re Billington, 3 Rawle 48.

S. C.—Reynolds v. Rees, 23 S. C. 438.

Tenn.—Evans v. Beaumont, 16 Lea 713.

[a] **An action to partition** such lands among the legatees will not lie. Coombs v. Furey, 255 Ill. 61, 99 NE 78.

54. In re Billington, 3 Rawle (Pa.) 48.

55. Rafferty v. Mallory, 20 F. Cas. No. 11,526, 3 Biss. 362; Baldwin v. Timmins, 3 Gray (Mass.) 302; Johnson v. Bartlett, 17 Pick. (Mass.) 477; Foster v. Huntington, 5 N. H. 108.

[a] **A sale is voidable only** and not void. Thomas v. Le Baron, 10 Metc. (Mass.) 403.

[b] **Who may avoid sale.**—An administrator who recovers judgment as such and levies execution on land holds the legal estate in the land to the use of the heirs of his intestate; and if he sells and conveys the same without having obtained license so to do the conveyance can be avoided only by those for whose use he was seized. Thomas v. Le Baron, 10 Metc. (Mass.) 403.

[c] **Heirs or devisees may be estopped to disaffirm** by knowingly receiving proceeds of the sale and similar acts. Baldwin v. Timmins, 3 Gray (Mass.) 302; Thomas v. Le Baron, 10 Metc. (Mass.) 403; Ward v. Ward, 15 Pick. (Mass.) 511.

56. U. S.—Long v. O'Fallon, 19 How. 116, 15 L. ed. 550.

Cal.—Christy v. Fisher, 58 Cal. 256.

Iowa.—Stevenson v. Polk, 71 Iowa 278, 32 NW 340.

Md.—Seldner v. McCreery, 75 Md. 287, 23 A 641.

Mich.—Williams v. Towl, 65 Mich. 204, 31 NW 835; Little v. Lesia, 5 Mich. 119.

Miss.—Columbus Banking, etc., Co. v. Humphries, 64 Miss. 258, 1 S 232.

Mo.—Hogan v. Welcher, 14 Mo. 177.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. J.—Goodell v. Taylor, (Ch.) 97 A. 569; Banta v. School Dist. No. 3, 39 N. J. Eq. 123; Wilson v. Staats, 33 N. J. Eq. 524.

N. Y.—Haberman v. Baker, 128 N. Y. 253, 28 NE 370, 13 LRA 611; Lockman v. Reilly, 95 N. Y. 64 [rev 29 Hun 434 (rev 10 AbbNCas 351)]; Bryan v. Carroll, 122 App. Div. 301, 106 NYS 668; Cook v. Ryan, 29 Hun 249; Valentine v. Belden, 20 Hun 537.

N. D.—Clapp v. Tower, 11 N. D. 556, 93 NW 862.

Pa.—Oeslager v. Fisher, 2 Pa. 467. "Where land is taken in payment of debts due the estate, such land becomes assets of the estate, and may be sold without an order of the court, even though no power of sale is contained in the will. 18 Cyc 351. Such land will be treated as personalty, and may be sold by the executor without an order of the court in those jurisdictions where he is not required to obtain leave of court to sell personalty." Battey v. Battey, 94 Nebr. 729, 734, 144 NW 786.

[a] **As incident to the right of the personal representative of a mortgagee to foreclose** a mortgage, the representative has the right to dispose of property which comes to the estate through the foreclosure. Bryan v. Carroll, 122 App. Div. 301, 106 NYS 668.

[b] **Effect of power of sale.**—Where a testator owned two tracts of land, one in partnership with his brother and another individually, and empowered his executors to sell and convey the latter, and after his death the deed to the partnership tract, although in form absolute, was held a mortgage only, and the land being ordered sold to pay the mortgage, the executors bought it in, they took it with the same power to sell and convey it afterward as was given with reference to the other tract. Cummins v. Carrick, 2 SW 490, 8 KyL 600.

[c] **If the heirs elect to take the land** instead of the proceeds of a sale thereof, the representative has no power to sell. Gumaer v. Barber, 2 LackLegN (Pa.) 237.

57. McLean v. Ladd, 66 Hun 341, 21 NYS 196; Edmonds v. Crenshaw, 5 S. C. Eq. 224.

[a] **Power denied.**—Goodell v. Taylor, (N. J. Ch.) 97 A 569.

58. Long v. O'Fallon, 19 How. (U. S.) 116, 15 L. ed. 550.

59. Bechtold v. Read, (N. J. Ch.) 28 A 264; Capehart v. Huey, 10 S. C. Eq. 405; Harrison v. Henderson, 7 Heisk. (Tenn.) 315.

60. Thomson v. Shackelford, 6 Tex. Civ. A. 121, 24 SW 980.

[a] **Partial avoidance.**—Where a will directed the executor to collect the debts due testator and divide them equally between five persons, one of whom was the executor, and to defraud one of such legatees, who was also a creditor of the executor, the latter conveyed land taken in satisfaction of such debts to one having knowledge of his intent, in a suit by such defrauded legatee alone, the conveyance would be held void only as to two fifths of the land, the executor being authorized by the will to sell any portion of the estate to satisfy legacies. Thomson v. Shackelford, 6 Tex. Civ. A. 121, 24 SW 980.

61. Hine v. Hine, 118 App. Div. 585, 103 NYS 535 (where executors made an unauthorized exchange of realty, receiving property subject to a mortgage, which was afterward foreclosed, a devisee who assigned his "claim, if any," to the surplus proceeds of the foreclosure, thereby ratified the act of the executors, and was not entitled to a share in the value of the realty conveyed by them in the exchange, although the assignment stated that the assignor made no claim to the surplus proceeds, and that the encumbered property was bought by the executors without his consent).

62. U. S.—Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485, and certiorari den 199 U. S. 605, 26 SCt 746, 50 L. ed. 330]; Scruggs v. Scruggs, 105 Fed. 28; Bodemuller v. U. S., 39 Fed. 427; Kidder v. U. S., 19 Ct. Cl. 561; Chaplin v. U. S., 19 Ct. Cl. 424; Hamner v. U. S., 13 Ct. Cl. 7.

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Ferguson v. Morris, 67 Ala. 389; Shelton v. Carpenter, 60 Ala. 201; Nelson v. Stollenwerck, 60 Ala. 140; Hutchinson v. Owen, 59 Ala. 326; Baldwin v. Hatchett, 56 Ala. 461; Van Hoose v. Bush, 54 Ala. 342; Waring v. Lewis, 53 Ala. 615; Moses v. Clark, 46 Ala. 229; Beattie v. Abercrombie, 18 Ala. 9; Brashear v. Williams, 10 Ala. 630.

Ark.—Whelan v. Edwards, 31 Ark. 723; Pryor v. Ryburn, 16 Ark. 671; Lemon v. Rector, 15 Ark. 436.

Cal.—Rankin v. Newman, 114 Cal. 635, 46 P 742, 34 LRA 265.

Conn.—Hotchkiss' App., 89 Conn. 420, 95 A 26; Ives v. Beecher, 75 Conn. 153, 52 A 746; Buckingham's App., 60 Conn. 143, 22 A 509; Woodhouse v. Phelps, 51 Conn. 521; Johnson v. Connecticut Bank, 21 Conn. 148; Perkins v. Stone, 18 Conn. 270; Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580; Roorbach v. Lord, 4 Conn. 347; Taber v. Packwood, 1 Day 150.

Ga.—Harrell v. Harrell, 123 Ga. 267, 51 SE 283; Juhan v. Juhan, 104

to contingent as well as absolute interests of decedent in personal property, whether of a corporeal or incorporeal description, including rights in bonds, contracts, and choses in action, as well as goods and chattels.[63]

The title of the executor or administrator is exclusive, he being the only representative recognized by law in regard to personal assets;[64] and even prop-

Ga. 253, 30 SE 779; Liptrot v. Holmes, 1 Ga. 381.

Ida.—Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152.

Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215; Irwin v. Sample, 213 Ill. 160, 72 NE 687; Lewis v. Lyons, 13 Ill. 117; Huddleston v. Henderson, 181 Ill. A. 176.

Ind.—Pittsburgh, etc., R. Co. v. Gipe, 160 Ind. 360, 65 NE 1034; Pond v. Sweetser, 85 Ind. 144; Bearss v. Montgomery, 46 Ind. 544; Craig v. Norwood, 61 Ind. A. 104, 108 NE 395; Weaver v. Meyer, 32 Ind. A. 587, 70 NE 409.

Iowa.—Blackman v. Baxter, 125 Iowa 118, 100 NW 75, 70 LRA 250, 2 AnnCas 707; Herriott v. Potter, 115 Iowa 648, 89 NW 91; Wilson v. Breeding, 50 Iowa 629.

Kan.—Vaughn v. Brown, 81 Kan. 1, 105 P 30; Brown v. Baxter, 77 Kan. 97, 94 P 155, 574; Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239; Lappin v. Mumford, 14 Kan. 9; Presbury v. Pickett, 1 Kan. A. 631, 42 P 405.

Ky.—U. S. Fidelity, etc., Co. v. Russell, 141 Ky. 601, 133 SW 572; McLemore v. Sebree Coal, etc., Co., 121 Ky. 53, 88 SW 1062, 28 KyL 25; Brunk v. Means, 11 B. Mon. 214; Lair v. Keys, 1 Ky. Op. 599.

La.—Cresswell's Succ., 8 La. Ann. 122; Watts v. Frazer, 5 La. 383.

Me.—Wright v. Holmes, 100 Me. 508, 62 A 507, 3 LRANS 769, 4 Ann Cas 583; Merrill v. Wooster, 99 Me. 460, 59 A 596.

Md.—Hagthorp v. Hook, 1 Gill & J. 270; Neale v. Hagthrop, 3 Bland 551; Salmon v. Clagett, 3 Bland 125.

Mass.—Flynn v. Flynn, 183 Mass. 365, 67 NE 314; Clapp v. Stoughton, 10 Pick. 463; Dawes v. Boylston, 9 Mass. 352, 6 AmD 72; Hays v. Jackson, 6 Mass. 149; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173.

Mich.—Shattuck v. Watson, 164 Mich. 167, 170, 129 NW 196 [quot Cyc]; Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559; Foote v. Foote, 61 Mich. 181, 28 NW 90; Hollowell v. Cole, 25 Mich. 345.

Miss.—Gordon v. James, 86 Miss. 719, 39 S 18, 1 LRANS 461; Andrews v. Brumfield, 32 Miss. 107; Marshall v. King, 24 Miss. 85; Browning v. Watkins, 18 Miss. 482.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 SW 42; Messersmith v. Messersmith, 264 Mo. 610, 175 SW 914; Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072; Seilert v. McAnally, 223 Mo. 535, 122 SW 1064, 135 AmSR 522; Strode v. Gilpin, 187 Mo. 383, 86 SW 77; Langston v. Canterbury, 173 Mo. 122, 73 SW 151; Smith v. Denny, 37 Mo. 20; Brueggeman v. Jurgenson, 24 Mo. 87; Leakey v. Maupin, 10 Mo. 368, 47 AmD 120; Darr v. Thomas, 127 Mo. A. 1, 106 SW 95; Perkins v. Goddin, 111 Mo. A. 429, 85 SW 936; Tye v. Tye, 88 Mo. A. 330; McDowell v. Christian Church Orphan School, 87 Mo. A. 386; Becraft v. Lewis, 41 Mo. A. 546; State v. Moore, 18 Mo. A. 406; Rouggley v. Teichmann, 10 Mo. A. 257.

N. H.—Bartlett v. Hill, 69 N. H. 197, 45 A 144; Stone v. Gilman, 58 N. H. 135; Shirley v. Healds, 34 N. H. 407.

N. J.—Schrafft v. Wolters, 61 N. J. Eq. 467, 48 A 782; Hayes v. Hayes, 45 N. J. Eq. 461, 17 A 634.

N. M.—Smith v. Steen, 20 N. M. 436, 150 P 927.

N. Y.—Peo. v. Smith, 172 App. Div. 826, 159 NYS 1073 [aff 219 N. Y. 222, 114 NE 50]; Pearse v. National Lead Co., 162 App. Div. 766, 147 NYS 989; Huyler v. Dolson, 101 App. Div. 83, 91 NYS 794; Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; Garvey v. U. S. Fidelity, etc., Co., 77 App. Div. 391, 79 NYS 337; Berkeley v. Kennedy, 62 App. Div. 609, 70 NYS 762; Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909; Robinson v. Adams, 30 Misc. 537, 63 NYS 816 [mod on other grounds 81 App. Div. 20, 80 NYS 1098 (aff 179 N. Y. 558 mem, 71 NE 1139 mem)].

N. C.—Varner v. Johnston, 112 N. C. 570, 17 SE 483; Whit v. Ray, 26 N. C. 14; Foster v. Cook, 8 N. C. 509.

Oh.—Matter of Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff on other grounds 68 Oh. St. 58, 67 NE 156, 96 AmSR 648]; In re Sattler, Oh. Prob. 183, 10 Oh. Dec. (Reprint) 440, 21 CincLBul 161.

Okl.—Litz v. Alva Exch. Bank, 15 Okl. 564, 83 P 790.

Or.—Hadley v. Hadley, 73 Or. 179, 144 P 80; Thorson v. Hooper, 57 Or. 75, 109 P 388; Casto v. Murray, 47 Or. 57, 81 P 388, 883; State v. O'Day, 41 Or. 495, 69 P 542; Weider v. Osborn, 20 Or. 307, 25 P 715.

Pa.—Bungard v. Miller, 5 Pa. Cas. 122, 8 A 209; Shugar v. Garman, 2 Pa. Cas. 490, 4 A 56; Thomas's Est., 22 Pa. Co. 518.

S. C.—Dial v. Gary, 14 S. C. 573, 37 AmR 737; Kaminer v. Hope, 9 S. C. 253; Crosland v. Murdock, 15 S. C. L. 217.

Tenn.—Peak v. Ligon, 10 Yerg. 469; Thurman v. Shelton, 10 Yerg. 383; Boring v. Jobe, (Ch. A.) 53 SW 763.

Tex.—Richardson v. Vaughn, (Civ. A.) 22 SW 1112.

Va.—Brockenbrough v. Turner. 78 Va. 438.

W. Va. — McKimmie v. Postlethwait, 78 W. Va. 273, 88 SE 833.

Wis. — Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389; Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074; McKenney v. Minahan, 119 Wis. 651, 97 NW 489; Hemmy v. Hawkins, 102 Wis. 56, 78 NW 177, 72 AmSR 863; Gundry v. Henry, 65 Wis. 559, 27 NW 401; Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 529.

"All the personal property of a testator vests in his executor by the probate of the will." Lathrop v. Merrill, 207 Mass. 6, 10, 92 NE 1019.

"No principle of law is more generally acknowledged, than that the executor or administrator is, for every purpose, the owner of the moneys of his intestate which have come to his hands." Lacompte v. Seargent, 7 Mo. 351, 352.

He "holds it in trust for heirs and legatees, and that he alone can sue for and recover the assets of such deceased person." Richardson v. Cole, 160 Mo. 372, 376, 61 SW 182, 83 AmSR 479.

"The personal property of a decedent, not disposed of by his will, 'descends to and is distributed among his heirs, in the same way and manner that real estate. not divided, [devised] descends' by the statute, (Hutch. Dig. 624, § 52,) subject, however, to the rights of the administrator. But his title exists only for special purposes; for the collection and preservation of the assets; for the payment of the debts, and for distribution. These duties require that the executor or administrator should be invested with the title requisite to their performance. Hence, notwithstanding the peculiar phraseology of the statute, it has always been held that he acquired, by the grant of administration, the legal title to the personalty; and, consequently, that distribution, or some equivalent act, is necessary to confer upon the distributees a complete and perfect title to the personal estate of the deceased." Andrews v. Brumfield, 32 Miss. 107, 112.

[a] **Where property is willed to executors** to convert into a fund, and keep and distribute, etc., the title remains in them until it is actually distributed; and where a discretion is to be exercised before distribution the ultimate distributee has no vested interest in the property until such discretion has been exercised. In re Jones, 13 F. Cas. No. 7,444, 6 Biss. 68.

[b] **A testator who specifically devises real estate only,** leaving personalty undisposed of, and who appoints an executor, shows an intention that the executor shall administer the personalty; otherwise, he would have nothing to do. Matter of Maccaffil, 57 Misc. 264, 107 NYS 1115 [aff 127 App. Div. 21, 111 NYS 315].

[c] **Where a buyer dies his administrator may take possession** of the goods as his successor, and where he does so and puts an end to the right of stoppage of the seller before it is attempted to be exercised, the title to the goods vests in the estate, and cannot be defeated by the seller in an action of replevin. Jacobs v. Bentley, 86 Ark. 186, 110 SW 594, 126 AmSR 1086.

[d] **Extent of title and authority.**—"At common law, an executor or administrator had the same property in, and, of course, the same powers over, the personal effects or estate of his decedent, that such decedent had at and before his death." Weyer v. Franklin Second Nat. Bank, 57 Ind. 198, 203 [quot Rogers v. Zook, 86 Ind. 237, 241].

[e] **Transportation of property to another state.**—The title vested in an administrator appointed by the court of the decedent's domicil is not divested by the transportation of the property to another state for sale. Crescent City Ice Co. v. Stafford, 6 F. Cas. No. 3,387, 3 Woods 94.

[f] **Testator's widow is not entitled to** interest on or increase of testator's personal property pending administration. Harding v. Harding, 151 Ky. 398, 152 SW 259.

[g] **Lien of factor.**—If a person die in possession of goods, and they come into the hands of his administrator, the title is changed; and a factor who may afterward receive the goods from an administrator cannot hold them or their proceeds, on account of advances made to deceased in his lifetime, without the assent of the administrator. Swilley v. Lyon, 18 Ala. 552.

63. Clapp v. Stoughton, 10 Pick. (Mass.) 463; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72.

[a] **The legal title to a note** remains in the administrator of the payee, although in a division of the personal property, made before his appointment, it fell to one whose agent had demanded payment of the maker, and had agreed to accept interest at a certain rate for an unlimited length of time. Prouty v. Wilson, 123 Mass. 297.

64. U. S.—Moore v. Fidelity Trust Co., 138 Fed. 1, 70 CCA 663 [aff 134 Fed. 489]; Scruggs v. Scruggs, 105 Fed. 28.

Ala.—Blackburn v. Fitzgerald, 130 Ala. 584, 30 S 568; Beattie v. Abercrombie, 18 Ala. 9; Vanderveer v. Alston, 16 Ala. 494; Kelly v. Kelly, 9 Ala. 908, 44 AmD 469.

erty specifically bequeathed vests in him subject to distribution, as in cases of intestacy.[65]

Where executors are also appointed trustees, their title to the testator's personalty as executors is superior to and takes precedence over their title as trustees.[66]

The general rule is modified by statute in a few jurisdictions so that the title to personal, as well as real, property vests in the heirs or the beneficiaries under the will, subject to the lien of the executor and administrator for the payment of debts and to his right of possession.[67]

[§ 711] **b. Nature of Title.** The representative, as such, takes no beneficial interest in the personalty, but takes it only for the purpose of administration and distribution to those entitled,[68] and as to the surplus remaining after the payment of debts he is a mere trustee for those beneficially

Cal.—Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P 172.

Fla.—Scott v. Jenkins, 46 Fla. 518, 35 S 101.

Mass.—Flynn v. Flynn, 183 Mass. 365, 67 NE 314.

Mo.—Becraft v. Lewis, 41 Mo. A. 546; Rouggley v. Teichmann, 10 Mo. A. 257.

N. H.—Stone v. Gilman, 58 N. H. 135; Shirley v. Healds, 34 N. H. 407.

N. J.—McCormick v. Stephany, 57 N. J. Eq. 257, 41 A 840.

N. Y.—Smith v. New York Second Nat. Bank, 169 N. Y. 467, 62 NE 577 [rev 52 App. Div. 631, 65 NYS 1146]; Huyler v. Dolson, 101 App. Div. 83, 91 NYS 794; Garvey v. U. S. Fidelity, etc., Co., 77 App. Div. 391, 79 NYS 337; Robinson v. Adams, 30 Misc. 537, 63 NYS 816 [mod on other grounds 81 App. Div. 20, 80 NYS 1098 (aff 179 N. Y. 559 mem, 71 NE 1139 mem)].

Pa.—Bungard v. Miller, 5 Pa. Cas. 122, 8 A 209.

Tenn. — Willard v. Cunningham, (Ch. A.) 48 SW 399.

W. Va.—Turk v. Hevener, 49 W. Va. 204, 49 W. Va. 476; Richardson v. Donehoo, 16 W. Va. 685.

[a] **Distributees can derive title only through due administration** under the direction of the proper court, although the statute provides that the estate of a decedent, after all just debts and claims are paid, "shall descend to and be distributed" among the decedent's children, etc. The language of the statute, it is said, merely designates the ultimate rights of parties, and was never designed to interfere with the ordinary and approved mode of collecting debts due the estate through an administrator. Leamon v. McCubbin, 82 Ill. 263.

[b] **Execution issued after the death of the intestate** on a judgment rendered against him in his lifetime cannot be levied on his goods in the hands of the administrator. McMahon v. Glasscock, 5 Yerg. (Tenn.) 304.

65. Floyd v. Breckenridge, 4 Bibb (Ky.) 14; Hayes v. Hayes, 45 N. J. Eq. 461, 17 A 634; Robinson v. Adams, 30 Misc. 537, 63 NYS 816 [mod on other grounds 81 App. Div. 20, 80 NYS 1098 (aff 179 N. Y. 559 mem, 71 NE 1139 mem)]; Melms v. Pfister, 59 Wis. 186, 18 NW 255.

[a] **If a chattel is bequeathed to the person who is also appointed executor,** he holds it as executor until he signifies by some act his election to hold it as legatee. Floyd v. Breckenridge, 4 Bibb (Ky.) 14.

66. Lockman v. Reilly, 95 N. Y. 64; Harris v. Ely, 25 N. Y. 138; Grasser v. Eckart, 1 Binn. (Pa.) 575.

67. U. S.—Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615 (Utah statute).

Cal.—Matter of Miller, 121 Cal. 353, 53 P 906; Rankin v. Newman, 114 Cal. 635, 46 P 742, 34 LRA 265; Bayly v. Muehe, 65 Cal. 349, 3 P 467, 4 P 202, 486; Chapman v. Hollister, 42 Cal. 462; In re Woodworth, 31 Cal. 595; Jahns v. Nolting, 29 Cal. 507; Meeks v. Hahn, 20 Cal. 620; Updegraff v. Trask, 18 Cal. 458; Haynes v. Meeks, 10 Cal. 110, 70 AmD 763; Beckett v. Selover, 7 Cal. 215, 68 AmD 237.

La. — McDermott's Succ., 51 La. Ann. 173, 24 S 787.

Tex.—Ansley v. Baker, 14 Tex. 607, 65 AmD 136; Graham v. Vining, 2 Tex. 433; Howard v. Republic, 2 Tex. 311; Thompson v. Duncan, 1 Tex. 485; Stevenson v. Roberts, 25 Tex. Civ. A. 577, 64 SW 230; William J. Lemp Brewing Co. v. La Rose, 20 Tex. Civ. A. 575, 50 SW 460.

"Strictly speaking, perhaps, the legal title, even to the personal property of the decedent, does not vest in the executor or administrator under our system. But a special property in the real and personal estate vests in him, charged with the trust, not only to apply it to the payment of claims presented, but, from the nature of the trust and his representative capacity, to do such acts in carrying out contracts of deceased as the law imposes upon him the obligation of performing." Janin v. Browne, 59 Cal. 37, 45.

[a] **Both real and personal property descend to the heir** or to the beneficiary named in the will, with a qualified right in the personal representative, who holds it for the purpose of administration, more like a receiver than a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court. Murphy v. Crouse, 135 Cal. 14, 66 P. 971, 87 AmSR 90.

[b] **"In cases where neither moneys are to be collected, nor debts to be paid,** and where it is not necessary for the purpose of distribution that an administrator should be appointed, and none is in fact appointed, the legal title to the personal estate should be held to vest, without distribution, under the statute, 'in the same way and manner' that the title to the real estate vests in the heir-at-law." Andrews v. Brumfield, 32 Miss. 107, 113.

68. U. S.—Alston v. Cohen, 1 F. Cas. No. 265, 1 Woods 487.

Ark.—Hill v. Mitchell, 5 Ark. 608.

Cal.—In re Wood, 143 Cal. 522, 77 P 481.

Conn.—Hotchkiss' App., 89 Conn. 420, 95 A 26; Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204; Woodhouse v. Phelps, 51 Conn. 521.

Del.—Robinson v. Burton, 2 Del. Ch. 314.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 1 SCt 233, 45 L. ed. 339].

Fla.—Broome v. Alston, 8 Fla. 307.

Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215; Moore v. Brandenburg, 248 Ill. 232, 93 NE 733, 140 AmSR 206.

Iowa.—Blackman v. Baxter, 125 Iowa 118, 100 NW 75, 70 LRA 250, 2 AnnCas 707; Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa 293, 82 NW 765.

Me.—Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338; Dalton v. Dalton, 51 Me. 170.

Mass.—Hutchins v. State Bank, 12 Metc. 421; Clapp v. Stoughton, 10 Pick. 463; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Weeks v. Gibbs, 9 Mass. 74.

Mich.—Foote v. Foote, 61 Mich. 181, 28 NW 90; Hatheway v. Weeks, 34 Mich. 237; Gilkey v. Hamilton, 22 Mich. 283.

Minn.—Granger v. Harriman, 89 Minn. 303, 94 NW 869.

Miss.—Hall v. Hall, 27 Miss. 458.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 SW 42; Millard v. Beaumont, 194 Mo. A. 69, 185 SW 547; Richardson v. Cole, 160 Mo. 372, 61 SW 182, 83 AmSR 479; Lessing v. Vertrees, 32 Mo. 431; Byers v. Weeks, 105 Mo. A. 72, 79 SW 485; McDowell v. Christian Church Orphan School, 87 Mo. A. 386; Goebel v. Foster, 8 Mo. A. 443.

N. H.—Perry v. Hale, 44 N. H. 363; Lane v. Thompson, 43 N. H. 320; Shirley v. Healds, 34 N. H. 407; Wheeler v. Perry, 18 N. H. 307; Abbott v. Tenney, 18 N. H. 109.

N. Y.—Steinway v. Steinway, 163 N. Y. 183, 57 NE 312 [aff 24 App. Div. 104, 48 NYS 1046]; Huyler v. Dolson, 101 App. Div. 83, 91 NYS 794; Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; Matter of Avery, 45 Misc. 529, 92 NYS 974; Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909.

Pa.—McClintock's App., 29 Pa. 360.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024; Williams v. Seabrook, 14 S. C. L. 371; Johns v. Johns, 12 S. C. L. 132.

Tex.—Stevenson v. Roberts, 25 Tex. Civ. A. 577, 64 SW 230.

Va.—Leake v. Leake, 75 Va. 792.

Wis.—Scott v. West, 63 Wis. 529, 24NW 161, 25 NW 529.

Eng.—Howard v. Jemmet, 3 Burr. 1368, 97 Reprint 878; Farr v. Newman, 4 T. R. 621, 100 Reprint 1209, 2 ERC 214; Jennings v. Newman, 4 T. R. 347, 100 Reprint 1056.

"The mere legal title passes to the administrator; the equitable descends to the heirs or legatees who are entitled to distribution." Richardson v. Cole, 160 Mo. 372, 376, 61 SW 182, 83 AmSR 479. To same effect Foote v. Foote, 61 Mich. 181, 28 NW 90.

"The rule that personalty descends to the administrator is but a fiction of law invented for convenience and the benefit of creditors. His title is not absolute, it is a qualified one. He holds as trustee merely for creditors and distributees. And when the debts of the estate are paid, the residue by law descends to the heir at law. The heir at all times has an equity in such property subject to the trust title of the administrator." Byers v. Weeks, 105 Mo. A. 72, 77, 79 SW 485.

"It is true, that at common law the legal property in the personal estate of the testator vests, on his death, in the executor, and for many purposes may be regarded as the owner. He may, for instance, maintain an action for a wrongful conversion of the property, or for any injury to the property, in his individual name, and for every purpose necessary to enable him to discharge the duties of his office he is regarded in law as the owner of the property. As a necessary incident to the nature of the office, he has a disposing power over the property; but that he is the owner for every purpose, cannot be maintained upon either reason or authority." Lessing v. Vertrees, 32 Mo. 431, 434.

[a] **Rights of creditors of representative.**—The effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator; nor are the makers of a note given to the administrator for goods of the decedent sold by him liable as garnishees to a judgment creditor, as being debtors of such administrator. Lessing v. Vertrees, 32 Mo. 431.

[b] **Where the representative charges himself with the value of goods** in his administration account, this is not a conversion of the goods such as will render them subject to

entitled.[69] Accordingly where the personal property left by the intestate is disposed of by the sole heir and distributee, and there are no debts to be proved against the estate, an administrator subsequently appointed on the petition of such sole distributee cannot recover the property so disposed of;[70] and where a testatrix bequeathed all of her personal estate to testamentary trustees to hold, invest, and reinvest the principal, and to receive, hold, and disburse the income for the purposes mentioned in the will, and no special power or authority was given to the executor, it was held that the title to the property bequeathed to the trustees, it not being necessary to pay debts, vested in them immediately on testatrix's death, the executor being authorized only to possess himself of such property and deliver it to the trustees.[71]

The representative cannot acquire absolute title to the property by merely paying the debts or discharging the obligations of the estate,[72] except by virtue of statutes which relieve an executor who is also residuary legatee from the necessity of returning an inventory on his giving bond to pay all the debts and legacies, under which statutes it is held that the executor, on giving such bond, becomes immediately the absolute owner of the estate in his own right.[73]

[§ 712] **c. When Title Vests; Relation Back.** It is usually considered that the title of the executor, being derived from the will, vests at the moment of decedent's death,[74] while the title of an administrator, being based upon the ground of administration, vests when his letters are granted.[75] However, in any event, the title of the representative relates back to the death of decedent,[76] although it does not render the intervening possession of the heirs wrongful.[77]

[§ 713] **2. Possession and Use.** The right to the possession and use of the personal estate of a decedent, whether testate or intestate, vests at once in the personal representative,[78] to the exclusion of

execution for his debts. Robinson v. Burton, 2 Del. Ch. 814.

[c] **An executor is not a mere stakeholder of the assets,** but, with respect thereto, he is a trustee, with a legal title, with power to dispose of the personal effects. Leake v. Leake, 75 Va. 792.

[d] **An executor cannot deny the title of his testator** to property of which he is in possession as executor. Manigault v. Holmes, 8 S. C. Eq. 283.

69. U. S.—McDermott v. Copeland, 9 Fed. 536.
Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159.
Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.
Ill.—Anderson v. Shepard, 285 Ill. 544, 121 NE 215.
Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 SW 42; Millard v. Beaumont, 194 Mo. A. 69, 185 SW 547; Byers v. Weeks, 105 Mo. A. 72, 79 SW 485.
N. Y.—In re Mullon, 145 N. Y. 98, 39 NE 821.

[a] **Formal transfers of title unnecessary.**—Upon payment of all debts, legacies, and charges, the title to the remaining assets at once vests in the legatees or distributees, without any formal transfer from the legal representative of the estate. In re Mullon, 145 N. Y. 98, 39 NE 821; Matter of McCarthy, 26 NYCivProc 397.

[b] **Right of heirs legal.**—"It is sometimes said that an executor holds as trustee for the legatees. But all that is meant by that is that he holds title to his testator's goods in autre droit, Weeks v. Gibbs, 9 Mass. 74, and not in his own right. The right of those for whom he holds is a legal and not an equitable right, and is enforced by an action at law." Lathrop v. Merrill, 207 Mass. 6, 10, 92 NE 1019.

70. Cooper v. Hayward, 71 Minn. 374, 74 NW 152, 70 AmSR 330.

71. Matter of Ryer, 94 App. Div. 449, 88 NYS 52 [aff 180 N. Y. 532 mem, 72 NE 1150 mem].

72. Wilson v. Taylor, 30 F. Cas. No. 17,840a, 2 Hayw. & H. 334; Dennis v. Dennis, 15 Md. 73; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Weeks v. Gibbs, 9 Mass. 74; Hampton's Case, 17 Serg. & R. (Pa.) 144.

73. Clarke v. Tufts, 5 Pick. (Mass.) 337; Durfee v. Abbott, 50 Mich. 278, 15 NW 454; McElroy v. Hatheway, 44 Mich. 399, 6 NW 867; Richardson v. Bailey, 69 N. H. 384, 41 A 263, 76 AmSR 176; Moody v. Davis, 67 N. H. 300, 38 A 464; Batchelder v. Russell, 10 N. H. 39; Tarbell v. Whiting, 5 N. H. 63.

74. Ala.—Pruett v. Pruett, 131 Ala. 578, 32 S 638.
Ill.—Wheeler v. Chicago Title, etc., Co., 217 Ill. 128, 75 NE 455.
N. H.—Shirley v. Healds, 34 N. H. 407.
N. Y.—Matter of Hoagland, 51 App. Div. 347, 64 NYS 920 [aff 164 N. Y. 573 mem, 68 NE 1088 mem].
S. C.—Williams v. Seabrook, 14 S. C. L. 371; Johns v. Johns, 12 S. C. L. 132.
Wis.—Scott v. West, 63 Wis. 529, 24 NW 161, 25 NW 529.
Eng.—Woolley v. Clark, 5 B. & Ald. 744, 7 ECL 405, 106 Reprint 1363; Roe v. Summerset, 2 W. Bl. 692, 96 Reprint 407.

[a] **The law knows no interval** between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period. Whitehead v. Taylor, 10 A. & E. 210, 37 ECL 131, 113 Reprint 81.

[b] **Effect of statutes.**—Although the common-law rule was as stated in the text, it has been abrogated by the statutes which make the right of an executor to administer depend upon his qualifying as such under the law, and limit his powers to that of a mere trustee taking nothing in his own right but everything for others. Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa 293, 82 NW 765.

75. Ala.—Snodgrass v. Cabiness, 15 Ala. 160.
Ga.—Liptrot v. Holmes, 1 Ga. 381.
Ind.—Smith v. Ferguson, 90 Ind. 229, 46 AmR 216.
Md.—Salmon v. Clagett, 3 Bland 125.
N. M.—Perea v. Harrison, 7 N. M. 666, 41 P 529.
Okl.—Litz v. Alva Exch. Bank, 15 Okl. 570, 73 P 790.
S. C.—Poag v. Miller, 23 S. C. L. 11.
Tenn.—Killebrew v. Murphy, 3 Heisk. 546.
Eng.—Woolley v. Clark, 5 B. & Ald. 744, 7 ECL 405, 106 Reprint 1363; Murray v. East India Co., 5 B. & Ald. 204, 7 ECL 118, 106 Reprint 1167; Pratt v. Swaine, 8 B. & C. 285, 15 ECL 146, 108 Reprint 1049.

[a] **The legal title is suspended** between the time of decedent's death and the granting of letters of administration. Salmon v. Clagett, 3 Bland (Md.) 125; Litz v. Alva Exch. Bank, 15 Okl. 570, 83 P 790; Killebrew v. Murphy, 3 Heisk. (Tenn.) 546; Brown v. Bibb, 2 Coldw. (Tenn.) 434; Fay v. Reager, 2 Sneed (Tenn.) 200.

76. Cal.—In re Heeney, 3 Cal. A. 548, 86 P 842.
Ill.—Hardy v. Wallis, 103 Ill. A. 141.
Ind. T.—James v. Nunley, 6 Ind. T. 336, 97 SW 1028.
Mass.—Smith v. Northampton Bank, 4 Cush. 1; Lawrence v. Wright, 23 Pick. 128; Wonson v. Sayward, 13 Pick. 402, 23 AmD 691; Jewett v. Smith, 12 Mass. 309.
Mo.—Darr v. Thomas, 127 Mo. A. 1, 106 SW 95.
N. Y.—Peo. v. Smith, 172 App. Div. 826, 159 NYS 1073 [aff 219 N. Y. 222, 114 NE 50]; Pearse v. National Lead Co., 162 App. Div. 766, 147 NYS 989.
Tenn.—Anderson v. Louisville, etc., R. Co., 128 Tenn. 244, 159 SW 1086.

[a] **The doctrine of relation does not authorize** a widow, afterward appointed administratrix of the estate of her husband, to take possession, by herself or agent, prior to such appointment, of personalty claimed by and in the possession of another, although at the husband's death he had a mortgage on such property. James v. Nunley, 6 Ind. T. 336, 97 SW 1028.

77. Hardy v. Wallis, 103 Ill. A. 141.

78. U. S.—Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485, and certiorari den 199 U. S. 605, 26 SCt 746, 50 L. ed. 330]; Scruggs v. Scruggs, 105 Fed. 28.
Ala.—Upchurch v. Norsworthy, 12 Ala. 532.
Ariz.—Terr. v. Forrest, 1 Ariz. 49, 25 P 527
Cal.—Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P 172; Page v. Tucker, 54 Cal. 121; Jahns v. Nolting, 29 Cal. 507; Lucas v. Todd, 28 Cal. 182; Harwood v. Marye, 8 Cal. 580.
Conn.—Roorbach v. Lord, 4 Conn. 347; Taber v. Packwood, 1 Day 150.
Del.—Frick v. Miller, 107 A 391.
Ind.—Smith v. Ferguson, 90 Ind. 229, 46 AmR 216.
Ky.—Cook v. Burton, 5 Bush 64.
Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.
Md.—Cain v. Warford, 7 Md. 282.
Mich.—Morris v. Vyse, 154 Mich. 253, 117 NW 639, 129 AmSR 472; Ormsbee v. Piper, 123 Mich. 265, 82 NW 36; Parks v. Norris, 101 Mich. 71, 59 NW 428; Palmer v. Palmer, 55 Mich. 293, 21 NW 352; Albright v. Cobb, 30 Mich. 355; Hollowell v. Cole, 25 Mich. 345; Cullen v. O'Hara, 4 Mich. 132.
Minn.—Brown v. Strom, 113 Min. 1, 129 NW 136.
Miss.—Hunter v. Forrest, 115 Miss. 7, 75 S 753.
Mo.—Naylor v. Moffatt, 29 Mo. 126; Gillet v. Camp, 19 Mo. 404; Messenbaugh v. Goll, 198 Mo. A. 698, 202 SW 265; Millard v. Beaumont, 194 Mo. A. 69, 185 SW 547.
Nev.—Buckley v. Buckley, 16 Nev. 180.

the widow, next of kin, legatees, or creditors,[79] and continues until distribution is ordered or the debts and legacies are settled;[80] but, although the executor has the right to the custody of the papers of his testator, the parties in interest have a right to examine them.[81] No order of court is necessary to authorize the representative to take possession of the personalty,[82] nor is the representative's right of possession impaired by an injunction forbidding distribution.[83] The representative is the proper person to sue for property of decedent which another person has converted to his use.[84] The mere posses-

N. H.—Tappan v. Tappan, 30 N. H. 50.

N. J.—Graydon v. Graydon, 23 N. J. Eq. 229 [rev on other grounds 25 N. J. Eq. 561].

N. Y.—Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1118 mem].

N. C.—Anonymous, 3 N. C. 161.

Oh.—In re Sattler, 10 Oh. Dec. (Reprint) 440, 21 CincLBul 161.

Pa.—Moseley's Est., 12 Phila. 50.

R. I.—Tillinghast v. Holbrook, 7 R. I. 230.

Tex.—Rotan Grocery Co. v. Pate, (Civ. A.) 169 SW 378; Stafford v. Dunovant's Est., (Civ. A.) 81 SW 65.

Vt.—Church v. Church, 80 Vt. 228, 67 A 549.

Wash.—Bishop v. Locke, 92 Wash. 90, 158 P 997.

Wis.—Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

"Until settlement and distribution of an intestate estate, the personal property would rightly be in the custody of the administrator." Morris v. Vyse, 154 Mich. 253, 259, 117 NW 639, 641, 129 AmSR 472.

[a] **An executor has an absolute control** over all the personal effects of his testator. Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

[b] **An administrator of an escheated estate** is the proper custodian of the personalty belonging to it, and he cannot be compelled to turn it over to a receiver appointed to take charge of the estate, because such receiver is entitled to the custody of the real estate only. Terr. v. Forrest, 1 Ariz. 49, 25 P 527.

[c] **Family furniture.**—Where no provision is made by will or statute for maintaining and keeping the family in possession of the family furniture or disposing of such property, and the same may be needful for sale or settlement of the estate, the representative may assume its virtual possession and control and the family can assert no title against him. Graydon v. Graydon, 23 N. J. Eq. 229 [rev on other grounds 25 N. J. Eq. 561]; Moseley's Est., 12 Phila. (Pa.) 50.

[d] **Notes.**—Where a wife, holding certain notes against her husband, bequeathed to him the interest on the notes for life, they were not collectable by her executor during the husband's life, but the executor was entitled to the possession and control thereof for that period. Church v. Church, 80 Vt. 228, 67 A 549.

[e] **Agreement of beneficiaries to dispense with administration.**—An administrator duly appointed without appeal is entitled to the possession of the uncollected choses in action belonging to the estate in the hands of the widow's administrator, although the heirs and the widow had agreed that there should be no administration. Ormsbee v. Piper, 123 Mich. 265, 82 NW 36.

[f] **A legacy for life,** as a general rule, should be invested by the executor, but this depends upon the terms of the will, and even though the will does not relieve the executor from the necessity of making the investment, whether he shall retain the securities or deliver them to the legatee depends upon the provisions of the will or in some cases upon the orders of the court. Foley v. Syet, 121 Md. 79, 88 A 38.

[g] **Marriage of administratrix.**—While the marriage of an administratrix extinguishes her authority as such (see supra § 263), it does not follow that she has not the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. Buckley v. Buckley, 16 Nev. 180.

[h] **Special statute not depriving administrator of right to possession.**—Tillinghast v. Holbrook, 7 R. I. 230.

[i] **Testamentary provisions.**—Where testator gave property to his wife for life, and appointed her executrix, it was held that he intended that the personal property should be delivered to her as life tenant, and not held by her as executrix. Sydnor v. Graves, 119 Md. 321, 86 A 341.

[j] **Pending appeal from order refusing to revoke letters.**—A decree for the payment to an administrator of money belonging to the estate will not be denied on the ground that an appeal has been taken from the overruling of a motion for the revocation of his letters. Melanpy v. O'Bryonville Bldg., etc., Co., 13 OhS&CP 192.

[k] **When administrator cannot recover possession.**—Where the personal property left by the intestate is disposed of by the sole heir and distributee, and there are no debts to be proved against the estate, an administrator subsequently appointed on the petition of such sole distributee cannot recover the property so disposed of. Cooper v. Hayward, 71 Minn. 374, 74 NW 152, 70 AmSR 330.

[l] **Possession not as administrator.**—A person about to be appointed public administrator of the estate of an intestate who consents to receive manual possession of securities formerly belonging to his intestate, under an agreement to return the same on demand to one claiming title by reason of a gift from intestate in her lifetime, is not in legal possession of such securities as such administrator, although he retains such possession after being appointed such. In re Teeple, 196 Ill. A. 378.

79. U. S.—Moore v. Fidelity Trust Co., 138 Fed. 1, 70 CCA 663 [aff 134 Fed. 489]; Scruggs v. Scruggs, 105 Fed. 28.

Ala.—Huddleston v. Huey, 73 Ala. 215; Upchurch v. Norsworthy, 12 Ala. 532.

Ark.—George v. Elms, 46 Ark. 260; Purcelly v. Carter, 45 Ark. 299.

Cal.—Jahns v. Nolting, 29 Cal. 507.

Ga.—People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 SE 20; Jones v. McCleod, 61 Ga. 602.

Ind.—Pond v. Sweetser, 85 Ind. 144; Douglass v. McCarer, 80 Ind. 91; Carr v. Huette, 73 Ind. 378; McCoy v. Payne, 68 Ind. 327; Ferguson v. Barnes, 58 Ind. 169.

Me.—Wright v. Holmes, 100 Me. 508, 62 A 507, 3 LRANS 769, 4 AnnCas 583; Frost v. Libby, 79 Me. 56, 8 A 149.

Md.—Hanson v. Brawner, 2 Md. 90.

Mass.—Flynn v. Flynn, 183 Mass. 365, 67 NE 314.

Mich.—Hillman v. Schwenk, 68 Mich. 297, 36 NW 670.

Mo.—Byers v. Weeks, 105 Mo. A. 72, 79 SW 485.

Nebr.—Edney v. Baum, 70 Nebr. 159, 97 NW 252.

N. J.—McDonald v. O'Connell, 39 N. J. L. 317.

N. C.—Carter v. Greenwood, 58 N. C. 410.

Pa.—Guthrie v. Kerr, 85 Pa. 303.

S. C.—Richardson v. Cooley, 20 S. C. 347.

Wis.—Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

[a] **A creditor has no right to take possession** of a decedent's personal property. Bungard v. Miller, 5 Pa. Cas. 122, 8 A 209.

[b] **Where an heir has possessed himself of the fund** (1) and converted the same to his own use, the administrator has an absolute right to recover the value thereof from such heir, although the latter may thereafter be entitled to have a portion of the fund distributed to him. Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389. (2) Where the next of kin of a decedent took possession of his estate and divided it out among themselves, and sold some of it, equity could not protect them by restraining an administrator, regularly appointed, from recovering the property in actions at law. Carter v. Greenwood, 58 N. C. 410.

[c] **Right as between executor and guardian of legatee.**—Where a testator bequeathed certain slaves to a certain person, "should she attain the age of eighteen years," making other disposition of them if she should die before attaining that age, and gave the income to support the legatee and another person, the executor and not the guardian of the legatee was entitled to the possession of the slaves while she was under eighteen. Hanson v. Brawner, 2 Md. 90.

[d] **Transfer by widow before letters granted.**—A gift by decedent's widow of personal property belonging to the estate between the decedent's death and the granting of letters of administration does not confer on the donee either title or right to possession as against the administrator. Jahns v. Nolting, 29 Cal. 507.

[e] **Money used by the widow** for the support of the family must be accounted for by her to the administrator. Griffin v. Simpson, 33 N. C. 126.

[f] **Specific legacies.**—(1) The legatee of a specific legacy is entitled to possession immediately upon the death of the testator, unless the property may be needed to pay debts. Robinson's Est., 24 Pa. Co. 588. (2) Specific articles in the possession of the person to whom they are bequeathed may be allowed to remain in his possession if manual delivery would entail hardship, on his giving bond to pay their appraised value in case they should be needed to pay debts. Bohrer's Est., 7 Pa. Dist. 307, 21 Pa. Co. 129.

[g] **An exception** to the rule stated in the text is where a sole distributee of an estate against which there are no debts has disposed of the personalty, in which case the administrator is not entitled to recover possession. Cooper v. Hayward, 71 Minn. 274, 74 NW 152, 70 AmSR 330.

80. Page v. Tucker, 54 Cal. 121; Curtis v. Sutter, 15 Cal. 259; Grimmell v. Warner, 21 Iowa 11.

81. Neece v. Neece, 104 Va. 343, 51 SE 739.

82. Langston v. Canterbury, 173 Mo. 122, 73 SW 151.

83. McCutchen v. McCutchen, 8 Port. (Ala.) 151.

84. Cal.—Ham v. Henderson, 50 Cal. 367.

Ind.—Smith v. Ferguson, 90 Ind. 229, 46 AmR 216; Niehaus v. Cooper, 22 Ind. A. 610, 52 NE 761.

Ky.—Easley v. Easley, 18 B. Mon. 86.

Me.—Carlisle v. Burley, 3 Me. 250.

Mo.—Smith v. Grove, 12 Mo. 51; Perkins v. Goddin, 111 Mo. A. 429, 85 SW 936.

N. Y.—Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1118 mem].

Tex.—Rotan Grocery Co. v. Pate, (Civ. A.) 169 SW 378.

Wis.—Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

sion of personal property, not wholly wrongful, by a decedent at the time of his death under a claim of title devolves upon his executor or administrator the immediate right of possession,[85] and the latter may recover the possession in an action of trover against any one who may have dispossessed or withheld possession from him;[86] but trover will not lie by an administrator to recover a chattel which, although inventoried and appraised as the property of decedent, is claimed adversely, and has never been in the administrator's possession.[87]

[§ 714] **3. Rights of Action.** Choses in action pass to the personal representative,[88] who is also invested with the general rights of action pertaining to personal property.[89] It follows that, in the absence of some default, fraud, or refusal to act on the part of the personal representative, an heir cannot sue on rights of action belonging to the estate.[90]

[§ 715] **4. Pledged or Mortgaged Property.** It is the duty of the personal representative in the exercise of good faith and ordinary or reasonable prudence to employ funds of the estate in redeeming from pledge or chattel mortgage whatever personalty of the estate may have been placed in security, which is worth redeeming by reason of a greater value than the secured indebtedness;[91] and contracts of pledge or mortgage which bound decedent will also bind his executor or administrator to the extent of available assets in his hands,[92] and

[a] **When suit in equity necessary.**—An executor, having merely a naked power of sale of a slave, can enforce his right to the possession of the slave, for the purpose of sale, only by a suit in equity. O'Neal v. Beall, 10 B. Mon. (Ky.) 272.

[b] **Property left in possession of the residuary legatee** on his promise to pay specific legacies may be recovered by the executor if the residuary legatee fails to pay the legacies. Carlisle v. Burley, 3 Me. 250.

[c] **Recovery of damages.**—An administrator is entitled to recover for the estate damages for being deprived of the use and possession of a chattel after the issuance of letters of administration, but he cannot recover damages for the seizure or detention of the chattels during decedent's lifetime, or prior to the issuance of letters of administration, unless it is shown that the chattel was damaged, or the estate depreciated, by the seizure or detention during that period. Day v. Horton, 23 Man. 623.

[d] **Property exempt from administration.**—Where the personal property did not exceed three hundred dollars in value, and therefore passed to the widow and minor children exempt from administration, the administrator cannot sue for possession of a part of such property from a third person. Bertig v. Higgins, 89 Ark. 70, 115 SW 935.

Proceedings for recovery of assets generally see supra §§ 425–437.

85. Cullen v. O'Hara, 4 Mich. 132.

[a] **Illustration.**—The personal representative has the right to retain stock in trade held in the name of decedent, who conducted business for another under decedent's name, until the time for filing claims against the estate has expired or creditors have been paid, although such property in fact belong to a third person for whom the business was conducted. Hunter v. Forrest, 115 Miss. 7, 75 S 753.

86. Kirby v. Clark, 1 Root (Conn.) 389; Cullen v. O'Hara, 4 Mich. 132; Smith v. Grove, 12 Mo. 51.

87. Hill v. Beall, 41 Ga. 607.

88. Ala.—Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55; Butler v. Gazzam, 81 Ala. 491, 1 S 16.

Ariz.—In re Tamer, 179 P 643.

Cal.—Sayward v. Houghton, 119 Cal. 545, 51 P 853, 52 P 44.

Ind.—Coffinberry v. McClellan, 164 Ind. 131, 73 NE 97; Indianapolis, etc., R. Co. v. Price, 153 Ind. 31, 53 NE 1018.

Mo.—Jacobs v. Maloney, 64 Mo. A. 270.

N. H.—Ladd v. Wiggin, 35 N. H. 421, 69 AmD 551.

N. Y.—Ongley v. Marcin, 180 App. Div. 685, 168 NYS 30.

Pa.—Young v. Patterson, 165 Pa. 423, 30 A 1011.

W. Va.—McKimmie v. Postlethwait, 78 W. Va. 273, 88 SE 833.

[a] **Thus** where a bond binds the obligor to pay to the obligee, her executors, administrators, or assigns, a certain sum "for her own interest and as trustee" for certain others, the administrator of the obligee can sue thereon. Young v. Patterson, 165 Pa. 423, 30 A 1011.

[b] **The possession and production of a note** by the executor of one of two persons to whom it was given is prima facie evidence that the note is his in his right as executor and that it is unpaid. Tisdale v. Maxwell, 58 Ala. 40.

[c] **Action to enforce performance of contract.**—Upon compliance by an administrator with the conditions of a contract entered into by his intestate whereby, upon the payment of a stipulated sum within a limited time, certain stock held by another in trust was to be transferred to the intestate, the administrator may bring an action for the performance of the contract. Sayward v. Houghton, 119 Cal. 545, 51 P 853, 52 P 44.

89. U. S.—New York Mut. L. Ins. Co. v. Farmers', etc., Nat. Bank, 173 Fed. 390.

Ala.—Blakeney v. Blakeney, 6 Port. 109, 30 AmD 574.

Ark.—Collins v. Warner, 32 Ark. 87.

Cal.—Ham v. Henderson, 50 Cal. 367.

Del.—Frick v. Miller, 107 A 391.

Ga.—Johnson v. Stewart, 41 Ga. 549.

Iowa.—Morrison v. Burlington, etc., R. Co., 84 Iowa 663, 51 NW 75.

Mich.—Morris v. Vyse, 154 Mich. 253, 117 NW 639, 129 AmSR 472.

N. Y.—Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1108 mem].

N. C.—Allen v. Watson, 5 N. C. 189.

Tenn.—Winningham v. Crouch, 2 Swan 170.

W. Va.—McKimmie v. Postlethwait, 78 W. Va. 273, 88 SE 833.

Ont.—Mummery v. Grand Trunk R. Co., 1 Ont. L. 622.

90. Holland v. Kelly, 177 Cal. 507, 171 P 421, 422 [cit Cyc].

91. Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440.

Cal.—In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; In re Armstrong, 125 Cal. 603, 58 P 183.

Colo.—Erie v. Lane, 22 Colo. 273, 44 P 591.

Hawaii.—Hawaiian Trust Co., Ltd. v. Waterhouse Trust Co., 18 Hawaii 410.

Ky.—Chorn v. Chorn, 98 Ky. 627, 33 SW 1107, 17 KyL 1178.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

Mo.—State v. Taylor, 100 Mo. A. 481, 74 SW 1032.

Mont.—Horsfall v. Royles, 20 Mont. 495, 52 P 199.

N. Y.—Matter of Boericke, 93 Misc. 410, 158 NYS 138; In re McGovern, 118 NYS 378.

Pa.—Heck's Est., 31 PittsbLegJNS 347.

Tex.—Barnes v. Scottish-American Mortg. Co., 29 Tex. Civ. A. 443, 68 SW 529.

[a] **Property must be worth more than amount required to discharge lien.**—Richardson v. Kennedy, 74 Tex. 507, 12 SW 279.

[b] **Redemption before presentation of claim.**—An administrator may redeem pledged property of the estate without waiting for a claim to be presented, provided he is willing to take the risk that the debt will not exceed the value of the property pledged. In re Eidenmuller, Myr. Prob. (Cal.) 87.

[c] **An executor may pay dues on stock pledged** by the testator as additional security for a mortgage loan, although the estate is insolvent. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190].

[d] **Where the estate is insolvent** (1) the executor may pay a chattel mortgage executed by the testator if this is necessary to save the property from foreclosure. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190]. (2) But he cannot do so where the lien of the mortgage has expired by failure of the mortgagee to renew it, since the mortgagee is in such case entitled only to be paid pro rata with the general creditors. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190]; Rock Spring First Nat. Bank v. Ludvigsen, 8 Wyo. 230, 56 P 994, 57 P 934, 80 AmSR 928.

[e] **Redemption resulting in loss.**—The mere fact that an administrator pays off a lien on personal property of the estate, which, on a subsequent sale at public auction, fails to bring the amount of the lien, does not establish gross mismanagement of the estate, and the administrator is not chargeable with the loss, where he acted in good faith, and with reasonable care and prudence. In re Armstrong, 125 Cal. 603, 58 P 183.

[f] **When executor not liable for failure to redeem.**—Where a testator before his death had pledged stock as collateral for a loan, and the stock stood in the pledgee's name, and the executors, having no assets with which to pay the debt, without selling securities specifically bequeathed, allowed the stock to remain in the broker's name, receiving the dividends less the interest, and subsequently the broker died insolvent, and had pledged the stock, their conduct was not so negligent as to render them personally liable. McCourt's App., 11 WklyNC (Pa.) 161.

92. Stewart v. Fry, 3 Ala. 573; Kinder v. King, 180 Ill. A. 62; Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190]; Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.

[a] **Possession of pledged property.**—A pledgee of certificates of stock is entitled to hold them as against an administrator of the

the pledgee's or mortgagee's rights on default must be respected by him.[93] It is not, however, the duty of an executor or administrator to pledge his own property or use his own credit in order to borrow money to redeem pledged property of the estate.[94] A person who, before the granting of letters of administration, sells any of the property of a decedent covered by a chattel mortgage, is sometimes made, by statute, chargeable therewith and liable to an action by the administrator for double the value of the property so sold or alienated.[95]

[§ 716] 5. **Sale—a. Power to Sell and Transfer Title—(1) Personalty in General—(a) At Common Law—aa. In General.** Under the common-law rule, and in the absence of any statute providing otherwise, an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass good title to a purchaser;[96] and the courts of one state will presume that the common-law rule prevails in

pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied, and a statute providing that the administrator shall have the right to the possession of the estate as it existed at the death of intestate does not authorize him to recover possession of such property. Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.

[b] **A pledgee of certificates of stock** is entitled to hold them as against an administrator of the pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied. Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.

[c] **An executor should not be charged,** on judicial settlement of his accounts, with the value of stock pledged by the testator as additional security for a mortgage debt, since the estate and the creditors are benefited by the reduction of the mortgage debt by such pledge. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190].

93. Mathew v. Mathew, 138 Cal. 334, 71 P 344; Levin v. Russell, 42 N. Y. 251; Western Newspaper Union v. Thurmond, 27 Okl. 261, 111 P 204, AnnCas1912B 727; In re Moore, 198 Pa. 611, 48 A 884.

[a] **Illustrations.**—(1) A provision in a chattel mortgage that on default in the payment of the debt secured the mortgagee may take possession of the property is operative against the executor of the mortgagor, who is personally liable for a refusal to yield possession, although he was about to sell the property under an order of court. Mathew v. Mathew, 138 Cal. 334, 71 P 344. (2) The public administrator of the city of New York is liable personally for the taking or detention of personal property from the possession of a mortgagee of the property, where the mortgagee had obtained possession of the property on default in payment of his mortgage during the lifetime of the mortgagor, although the public administrator acted in his official capacity and in good faith, and in the belief that the property belonged to the mortgagor at the time of his death. Levin v. Russell, 42 N. Y. 251.

[b] **Executors should not be surcharged** with the difference between what stocks were sold for and their present value, where the stocks had been pledged as collateral by a firm of which testator was a member, and they were sold for payment of the debt by the survivor, pursuant to an agreement between the partners that if either of them died the survivor should regulate the sale at his discretion. In re Moore, 198 Pa. 611, 48 A 884.

[c] **Replevin against administrator.**—(1) Where a chattel mortgage provided that, on condition broken, mortgagee might take possession, on refusal to yield possession, replevin would lie against the administrator of the mortgagor. Western Newspaper Union v. Thurmond, 27 Okl. 261, 111 P 204, AnnCas1912B 727. (2) Where a chattel mortgagor dies in possession of the property, even after condition is broken, and the administrator has taken possession, the mortgagee cannot maintain replevin, but his interest is transferred to the fund arising from the sale by the administrator. Lingler v. Wesco, 79 Oh. St. 225, 86 NE 1004, 128 AmSR 714, 21 LRANS 182.

94. In re Holladay, 18 Or. 168, 22 P 750.

95. Litz v. Alva Exch. Bank, 15 Okl. 564, 83 P 790.

96. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Williams v. Cobb, 219 Fed. 663, 134 CCA 217 [aff 242 U. S. 307, 37 SCt 115, 61 L. ed. 325]; Broadwell v. Banks, 134 Fed. 470; Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114.

Ala.—Baldwin v. Hatchett, 56 Ala. 461; Van Hoose v. Bush, 54 Ala. 342; Waring v. Lewis, 53 Ala. 615; Reynolds v. Kirkland, 44 Ala. 312; Ikelheimer v. Chapman, 32 Ala. 676; Beattie v. Abercrombie, 18 Ala. 9; Wier v. Davis, 4 Ala. 442.

Ark.—Pelham v. Wilson, 4 Ark. 289.

Cal.—Rankin v. Newman, 114 Cal. 635, 46 P 742, 34 LRA 265.

Conn.—Buckingham's App., 60 Conn. 143, 22 A 509; Johnson v. Connecticut Bank, 21 Conn. 148; Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580.

D. C.—Phœnix Mut. L. Ins. Co. v. Harris, 45 App. 474.

Fla.—May v. May, 7 Fla 207, 68 AmD 431.

Ill.—Makepeace v. Moore, 10 Ill. 474; Christy v. Christy, 125 Ill. A. 442 [aff 225 Ill. 547, 80 NE 242].

Ind.—Rogers v. Zook, 86 Ind. 237; Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

Iowa.—Marshall County v. Hanna, 57 Iowa 372, 10 NW 745.

Kan.—Lappin v. Mumford, 14 Kan. 9.

Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748; Anderson v. Irvine, 6 B. Mon. 231; Smith v. Pollard, 4 B. Mon. 66; Ward v. Lewis, 3 J. J. Marsh. 505; Stamps v. Beaty, Hard. 337.

La.—Morrill v. Carr, 2 La. Ann. 807.

Me.—Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338; Crooker v. Jewell, 31 Me. 306.

Md.—Miller v. Williamson, 5 Md. 219; Evans v Iglehart, 6 Gill & J. 171; Allender v. Riston, 2 Gill & J. 86; Phippard v. Forbes, 4 Harr. & M. 481; Lark v. Linstead, 2 Md. Ch. 162; Neale v. Hagthrop, 3 Bland 551; Salmon v. Clagett, 3 Bland 125.

Mass.—Clark v. Blackington, 110 Mass. 369; Shaw v. Spencer, 100 Mass. 392, 1 AmR 115, 97 AmD 107; In re Gay, 5 Mass. 419.

Mich.—Drake v. Cloonan, 99 Mich. 121, 57 NW 1098, 41 AmSR 586; Gustin v. Bay City Union School-Dist., 94 Mich. 502, 54 NW 156, 34 AmSR 361.

Miss.—Booyer v. Hodges, 45 Miss. 78; Hutchins v. Brooks, 31 Miss. 430; Bland v. Muncaster, 24 Miss. 62, 57 AmD 162.

Mo.—Smarr v. McMaster, 35 Mo. 349; Overfield v. Bullitt, 1 Mo. 749; Boeger v. Langenberg, 42 Mo. A. 7.

Nebr.—Edney v. Baum, 70 Nebr. 159, 97 NW 252; Mulloy v. Kyle, 26 Nebr. 313, 41 NW 1117.

N. J.—Hayes v. Hayes, 45 N. J. Eq. 461, 17 A 634.

N. M.—Smith v. Steen, 20 N. M. 436, 444, 150 P 927 [quot Cyc].

N. Y.—In re Heinze, 224 N. Y. 1, 120 NE 63 [aff 181 App. Div. 915, 167 NYS 1104]; Leitch v. Wells, 48 N. Y. 585; Sherman v. Willett, 42 N. Y. 146; Gibbs v. Flour City Nat. Bank, 86 Hun 103, 34 NYS 195; Rogers v. Squires, 26 Hun 388 [aff 98 N. Y. 49]; Glaser v. Burns, 154 NYS 21 [mod on other grounds 170 App. Div. 321, 155 NYS 936]; In re Oatman, 5 NYLegObs 378; Hertell v. Bogert, 9 Paige 52 [rev on other grounds 4 Hill 492]; Field v. Schieffelin, 7 Johns. Ch. 150, 11 AmD 441; Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383.

N. C.—Polk v. Robinson, 42 N. C. 235; Wilson v. Doster, 42 N. C. 231; Bradshaw v. Simpson, 41 N. C. 243; Gray v. Armistead, 41 N. C. 74; Tyrrell v. Morris, 21 N. C. 559.

N. D.—Winterberg v. Van De Vorste, 19 N. D. 417, 122 NW 866; Boschker v. Van Beek, 19 N. D. 104, 122 NW 338.

Oh.—Jelke v. Goldsmith, 52 Oh. St. 449, 40 NE 467, 49 AmSR 730.

Or.—Weider v. Osborn, 20 Or. 307, 25 P 715.

Pa.—Bayard v. Farmers', etc., Bank, 52 Pa. 232; Petrie v. Clark, 11 Serg. & R. 377, 14 AmD 636; Jaquett's Est., 13 LancBar 13.

S. C.—Rhame v. Lewis, 34 S. C. Eq. 269.

Tenn.—Hadley v. Kendirck, 10 Lea 525; Johnson v. Kay, 8 Humphr. 142; McAlister v. Montgomery, 3 Hayw. 94; Sneed v. Hooper, Cooke 200, 5 AmD 691.

Tex.—McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718.

Vt.—Mead v. Byington, 10 Vt. 116.

Va.—Hunter v. Lawrence, 11 Gratt. (52 Va.) 111, 62 AmD 640; Knight v. Yarborough, 4 Rand. (25 Va.) 566.

Wis.—Hemmy v. Hawkins, 102 Wis. 56, 78 NW 177, 72 AmSR 863; Munteith v. Rahn, 14 Wis. 210; Williams v. Ely, 13 Wis. 1.

Eng.—Mead v. Orrery, 3 Atk. 235, 26 Reprint 937; Nugent v. Gifford, 1 Atk. 463, 26 Reprint 294; Russell v. Plaice, 18 Beav. 21, 52 Reprint 9; Andrew v. Wrigley, 4 Bro. Ch. 125, 29 Reprint 812, 2 ERC 137; Scott v. Tyler, 2 Bro. Ch. 431, 29 Reprint 241, Dick. 712, 21 Reprint 448; Sanders v. Richards, 2 Coll. 568, 33 EngCh 568, 63 Reprint 864; Bonney v. Ridgard, 1 Cox Ch. 145, 29 Reprint 1101; Miles v. Durnford, 2 De G. M. & G. 641, 13 EngL&Eq 123, 51 EngCh 501, 42 Reprint 1022; Haynes v. Forshaw, 11 Hare 93, 45 EngCh 95, 68 Reprint 1201; Keane v. Roberts, 4 Madd. 332, 56 Reprint 728; Ball v. Harris, 8 Sim. 485, 8 EngCh 485, 59 Reprint 193 [aff 4 Myl. & C. 264, 18 EngCh 264, 41 Reprint 103]; Whale v. Booth, 4 T. R. 625 note a, 100 Reprint 1211; Humble v. Bill, 2 Vern. Ch. 444, 23 Reprint 884; McLeod v. Drummond, 14 Ves. Jr. 360, 33 Reprint 556 [aff 17 Ves. Jr. 154, 34 Reprint 59]; Hill v. Simpson, 7 Ves. Jr. 152, 32 Reprint 63.

Man.—Lumbers v. Montgomery, 22 Man. 735.

Ont.—Re Fulton, 7 Ont. L. 445, 3 OntWR 406.

"The administrator does not need the help of the court of equity to sell personal property when a sale is necessary for the payment of the debts." Hessig v. Hessig, 131 Ky. 514, 526, 115 SW 748. To same ef-

another state in the absence of any showing that it has been changed by statute.[97] Accordingly it has been held that an executor or administrator may sell equitable as well as legal assets,[98] property which is specifically bequeathed,[99] a residue of personal property given for life with remainder over,[1] patent rights,[2] a claim for services rendered by decedent,[3] land certificates which have not been located,[4] a mining contract not for a term certain,[5] and the interest of decedent in pledged property.[6] But fixtures cannot be separated from real estate and sold as personal property,[7] nor is a reversionary interest in chattels the subject of sale by an executor or administrator,[8] and it has been held that, where it does not appear that the sale is necessary for the payment of debts or legacies, and is not made so by the terms of the will, the beneficiaries may elect to take the property in specie.[9]

[§ 717] **bb. Power Can Be Exercised Only While in Office.** The authority to sell can be exercised only while the personal representative is in office, because his title to the assets is divested as soon as he ceases to be executor or administrator,[10] but a sale while in office is not invalidated by the subsequent removal, resignation, or discharge of the representative.[11] Where a person named as executor did not qualify by giving bond as required by statute, a sale by him is void as against an executor who did qualify.[12]

[§ 718] **cc. Sale in Satisfaction of Debts of Representative.** It was formerly the rule at law that executors and administrators could make a valid sale of the personal property of decedent in satisfaction of their individual debts,[13] but the rule in equity, which now obtains both in England and in the United States, is that they cannot sell in payment of their individual debts[14] unless they are in

fect McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718.

[a] **"This general power of sale and disposition flows from** the nature of the interest which executors and administrators are said to have in the personal property of their testators and intestates. In quality their interest is not the absolute, proper, and general interest which every person has in his own goods, for they are seized in right of another merely, and as ministers or dispensers of the goods of the dead. But in quantity their interest is coextensive with that of the persons whom they represent. As an incident to such ownership they have, subject to the limitations above stated, the same absolute power of disposal and control." Williams v. Ely, 13 Wis. 1, 7.

[b] **The principle** (1) on which the power of disposal rests is that in many cases it is necessary for the executor or administrator to sell in order to perform the duties of his office, and no one would buy from him if liable afterward to be called to account. Whale v. Booth, 4 T. R. 625 note a, 100 Reprint 1211. (2) "It is of great consequence that no rules should be laid down here, which may impede executors in their administration, or render their disposition of the testator's effects unsafe, or uncertain to the purchaser." Scott v. Tyler, Dick. 712, 725, 21 Reprint 448. (3) "An executor or administrator is, in equity, regarded as a trustee; but then, in equity, as well as at law, an administrator is considered, in general, as the absolute owner of the assets of the deceased, whether they be legal or equitable, or choses in action. The exercise of the powers of unqualified ownership to a certain extent is indispensably necessary to enable him to execute his trust, and to discharge his duty to advantage, and also to prevent the general inconvenience of implicating and entangling third persons in inquiries as to the application he may propose to make of the money produced by the conversion of the assets. A fair purchaser for a valuable consideration is in no way bound to see to the application of the purchase money by an executor. He cannot have the means of knowing the debts of the deceased, and is, therefore, absolved from all inquiry respecting them. Upon these general principles, not even a creditor of the deceased is permitted to follow the assets so aliened; for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets. And a specific or residuary legatee can stand upon no higher ground, in this respect, than a creditor." Salmon v. Clagett, 3 Bland (Md.) 125, 169.

[c] **A sale for payment of debts** may be made by an executor although the testator has by his will provided a fund for that purpose. Tyrrell v. Morris, 21 N. C. 559.

[d] **Representative may sell for purpose of distributing proceeds.—** Lumbers v. Montgomery, 22 Man. 735.

[e] **Sale to creditor in satisfaction of debt.—**(1) Under the general authority of the executor or administrator to sell the personal property of decedent to pay debts, he may, in the absence of statutory restrictions, sell a chattel to a creditor of decedent in satisfaction of the debt. Parker v. Daughtry, 111 Ala. 529, 20 S 362; Hepworth v. Heslop, 6 Hare 561, 31 EngCh 561, 67 Reprint 1286. (2) He need not wait for a judgment to be recovered against him by the creditor. Smith v. Pollard, 4 B. Mon. (Ky.) 66.

97. Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 AmD 39; Rogers v. Zook, 86 Ind. 237.

98. Nugent v. Gifford, 1 Atk. 463, 26 Reprint 294 (there is no difference in equity between the power of an executor to dispose of equitable and of legal assets).

99. U. S.—Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615.

Ala.—Alexander v. Bates, 127 Ala. 328, 28 S 415.

Md.—Allender v. Riston, 2 Gill & J. 86.

Miss.—Joslin v. Caughlin. 26 Miss. 134.

N. J.—Hayes v. Hayes, 45 N. J. Eq. 461, 17 A 634.

N. Y.—Matter of McCarthy, 26 NY CivProc 397.

Pa.—Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820.

S. C.—Saxon v. Barksdale, 4 S. C. Eq. 522.

Wis.—Roys v. Vilas, 18 Wis. 169.

Eng.—Langley v. Oxford, Ambl. 17, 27 Reprint 9; Elliot v. Merriman, 2 Atk. 41, 26 Reprint 422, Barn. 78, 27 Reprint 562, 21 ERC 535; Andrew v. Wrigley, 4 Bro. Ch. 125, 29 Reprint 812, 2 ERC 137; McMullen v. O'Reilley, 15 Ir. Ch. 251; Ewer v. Corbet, 2 P. Wms. 149, 24 Reprint 676.

[a] **Reason for rule.—**"If equity were otherwise, it would be a great hinderance to the payment of debts and legacies; and would lay an embargo upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences." Ewer v. Corbet, 2 P. Wms. 148, 24 Reprint 676.

[b] **Ordinarily the exercise of this power is proper only when:** (1) Some necessity for it exists, as when the other personal property is insufficient for the payment of decedent's debts. Alexander v. Bates, 127 Ala. 328, 28 S 415; Ramser v. Blair, 123 Ala. 139, 26 S 341; Matter of McCarthy, 26 NYCivProc 397; Saxon v. Barksdale, 4 S. C. Eq. 522. (2) A sale is necessary to protect the interests of the legatee. Joslin v. Caughlin, 26 Miss. 134.

[c] **The rule was questioned in some early cases.—**Hayes v. Hayes, 45 N. J. Eq. 461, 17 A 634; Duke v. Palmer, 31 S. C. Eq. 380; Saxon v. Barksdale, 4 S. C. Eq. 522; Garnett v. Macon, 10 F. Cas. No. 5,245, 6 Call (10 Va.) 308; Humble v. Bill, 2 Vern. Ch. 444, 23 Reprint 884.

1. Jones v. Simmons, 42 N. C. 178; Smith v. Barham, 17 N. C. 420, 25 AmD 721.

2. Brooks v. Jenkins, 4 F. Cas. No. 1,953, 3 McLean 432 (an assignment of a patent which has been renewed in the administrator's name is valid).

3. Lappin v. Mumford, 14 Kan. 9.

4. McLain v. Pate, 58 Tex. Civ. A. 500, 505, 124 SW 718 ("Land certificates prior to their location have always been treated by our courts as personal property, which may be transferred as any other chattel").

5. Horn v. Bowen, 4 Oh. Dec. (Reprint) 419, 2 ClevLRep 133 (such a contract with stipulations for payment of a yearly amount until mining operations commence is a chattel capable of sale as such by the lessee's administrator).

6. Bell v. Mills, 123 Fed. 24, 59 CCA 104.

[a] **Right of lien creditor.—**Where property of the estate subject to a chattel mortgage is sold by the personal representatives, the lien creditor has the first claim on the proceeds. Baker v. Becker, 67 Kan. 831, 72 P 860.

7. Walters' Est., 10 Kulp (Pa.) 221.

8. May v. May, 7 Fla. 207, 68 AmD 431 (although it may be subjected to the payment of debts by proceedings in equity).

9. Lane v. Albertson, 78 App. Div. 607, 79 NYS 947.

10. Whorton v. Moragne, 62 Ala. 201.

11. Benson v. Rice, 11 S. C. L. 577; Price v. Nesbit, 10 S. C. Eq. 445.

12. Monroe v. James, 4 Munf. (18 Va.) 194.

13. Allender v. Riston, 2 Gill & J. (Md.) 86; Whale v. Booth, 4 T. R. 625 note a, 100 Reprint 1211; Farr v. Newman, 4 T. R. 621, 100 Reprint 1209, 2 ERC 214.

An executor or administrator may make an effectual disposal of the assets "in consideration of a debt of his own and to discharge his own debt, if there be no fraud in the creditor in accepting of such disposal." Doe v. Fallows, 2 Cromp. & J. 481, 149 Reprint 204.

14. Ala.—Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617.

Cal.—Snyder v. Jack, 140 Cal. 584,

advance to the estate.[15]

[§ 719] **(b) Under Statute.** In many jurisdictions statutes have been enacted requiring the sanction of the court before the representative can sell or otherwise dispose of the personalty.[16] Some of the statutory provisions as to the sale of personalty have been considered to be merely directory and for the protection of the representative, and not to affect his jus disponendi and power to pass a good title,[17] but it has also been held that a sale without order or executor shall sell any dividend paying securities which the decedent owned at his death until so ordered by the court, applies only to stocks that were actually paying dividends, and not to stocks which "may" at some time pay dividends, and by necessary implication authorizes an executor or administrator to sell nondividend paying stocks as personal property. Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

74 P 139, 355; Horton v. Jack, 126 Cal. 521, 58 P 1051.

Ill.—Lang v. Metzger, 86 Ill. A. 117.

Md.—Miller v. Williamson, 5 Md. 219.

N. Y.—Clark v. Coe, 52 Hun 379, 5 NYS 243; Colt v. Lasnier, 9 Cow. 320.

N. C.—Hendrick v. Gidney, 114 N. C. 543, 19 SE 598.

Pa.—Garrand v. Pittsburgh, etc., R. Co., 29 Pa. 154; Miller v. Ege, 8 Pa. 352; Linton's App., 14 WklyNC 450; Martin's App., 13 WklyNC 167; Ellis' App., 8 WklyNC 538.

Va.—Graff v. Castleman, 5 Rand (26 Va.) 195, 16 AmD 741; Dodson v. Simpson, 2 Rand. (23 Va.) 294.

Wis.—Stronach v. Stronach, 20 Wis. 129; Weir v. Mosher, 19 Wis. 311.

Eng.—Ricketts v. Lewis, 20 Ch. D. 745; In re Morgan, 18 Ch. D. 93; Downes v. Power, 2 Ball & B. 491; Collinson v. Lister, 20 Beav. 356, 52 Reprint 639; Andrew v. Wrigley, 4 Bro. Ch. 125, 29 Reprint 812, 2 ERC 137; Scott v. Tyler, 2 Bro. Ch. 431, 29 Reprint 241, Dick. 712, 21 Reprint 448; Pannell v. Hurley, 2 Coll. 241, 33 EngCh 241, 63 Reprint 716; Bonney v. Ridgard, 1 Cox Ch. 145, 29 Reprint 1101; Haynes v. Forshaw, 11 Hare 93, 45 EngCh 95, 68 Reprint 1201; Cole v. Muddle, 10 Hare 186, 44 EngCh 181, 68 Reprint 892; Keane v. Robarts, 4 Madd. 332, 56 Reprint 728; Eland v. Eland, 4 Myl. & C. 420, 18 EngCh 420, 41 Reprint 162; Wilson v. Moore, 1 Myl. & K. 126, 7 EngCh 126, 39 Reprint 629; Cubbidge v. Boatwright, 1 Russ. 549, 46 EngCh 489, 38 Reprint 212; Watkins v. Cheek, 2 Sim. & St. 199, 1 EngCh 200, 57 Reprint 321; McLeod v. Drummond, 17 Ves. Jr. 154, 34 Reprint 59; Hill v. Simpson, 7 Ves. Jr. 152, 32 Reprint 63.

[a] **Under special circumstances, however,** it has been held in equity that sales in payment of the individual debts of the executor or administrator were valid. Mead v. Orrery, 3 Atk. 235, 26 Reprint 937; Nugent v. Gifford, 1 Atk. 463, 26 Reprint 294.

15. Graff v. Castleman, 5 Rand. (26 Va.) 195, 16 AmD 741. See also cases supra note 14.

16. U. S.—Tate v. Norton, 94 U. S. 746, 24 L. ed. 222; Ventress v. Smith, 10 Pet. 161, 9 L. ed. 382; Massenberg v. Denison, 107 Fed. 18, 46 CCA 120.

Ala.—Peavy v. Griffin, 152 Ala. 256, 44 S 400; Waring v. Lewis, 53 Ala. 615; Riddle v. Hill, 51 Ala. 224; Reynolds v. Kirkland, 44 Ala. 312; Ikelheimer v. Chapman, 32 Ala. 676; Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89; Woolfork v. Sullivan, 23 Ala. 548; Lay v. Lawson, 23 Ala. 377; Hopper v. Steele, 18 Ala. 828; Dearman v. Dearman, 4 Ala. 521. And see Chandler v. Chandler, 87 Ala. 300, 6 S 153.

Alaska.—In re McIntire, 1 Alaska 73.

Ark.—Pierce v. Whipple, 123 Ark. 132, 184 SW 837; Winningham v. Holloway, 51 Ark. 385, 11 SW 579.

Cal.—Rankin v. Newman, 114 Cal. 635, 46 P 742, 34 LRA 265; Wickersham v. Johnston, 104 Cal. 407, 38 P 89, 43 AmSR 118; In re Sanderson, 13 P 497; Matter of Radovich, 74 Cal. 536, 16 P 321, 5 AmSR 466; Hill v. Den, 54 Cal. 26.

D. C.—Phœnix Mut. L. Ins. Co. v. Harris, 45 App. 474.

Ga.—Whitehurst v. Mason, 140 Ga. 148, 78 SE 938; Poullain v. Brown, 82 Ga. 412, 9 SE 1131; Lawrence v. Philpot, 27 Ga. 585; Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

Ill.—Wilkinson v. Ward, 42 Ill. A. 541.

Ind.—Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498; Rogers v. Zook, 86 Ind. 237.

Ky.—Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

La.—De Egana's Succ., 18 La. Ann. 59.

Md. — Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A 209; Brooks v. Bergner, 83 Md. 352, 35 A 98; Kuykendall v. Devecmon, 78 Md. 537, 28 A 412; Crow v. Hubbard, 62 Md. 560; Stewart v. Firemen's Ins. Co., 53 Md. 564; Williams v. Holmes, 9 Md. 281; Mitchell v. Williamson, 6 Md. 210; Miller v. Williamson, 5 Md. 219; Allender v. Riston, 2 Gill & J. 86; Phippard v. Forbes, 4 Harr. & M. 481; Lark v. Linstead, 2 Md. Ch. 162; Albert v. Baltimore Sav. Bank, 1 Md. Ch. 407.

Mich.—Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Miss.—Joslin v. Caughlin, 32 Miss. 104; Henderson v. Clarke, 27 Miss. 436; Gelstrop v. Moore, 26 Miss. 206, 59 AmD 254; Bland v. Muncaster, 24 Miss. 62, 57 AmD 162; Edmundson v. Roberts, 3 Miss. 822.

Mo.—State v. Dickson, 213 Mo. 66, 111 SW 817; Weil v. Jones, 70 Mo. 560; Boeger v. Langenberg, 42 Mo. A. 7.

Mont.—State v. Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

Nebr.—Edney v. Baum, 70 Nebr. 159, 97 NW 252.

Oh. — National Surety Co. v. Haughton, 13 Oh. Cir. Ct. N. S. 523.

Okl.—Jones v. Wheeler, 28 Okl. 771, 101 P 1112.

Or.—Weider v. Osborn, 20 Or. 307, 25 P 715.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024; Jones v. McNeill, 19 S. C. L. 84; Harth v. Heddlestone, 2 S. C. L. 321; Rhame v. Lewis, 34 S. C. Eq. 269; Saxon v. Barksdale, 4 S. C. Eq. 522.

Tenn.—Cheek v. Wheatley, 3 Sneed 484; Bell v. Speight, 11 Humphr. 451; Bryan v. Martin, 5 Humphr. 565; Herron v. Marshall, 5 Humphr. 443, 42 AmD 444.

Tex.—Matula v. Freytag, 101 Tex. 357, 107 SW 536 [rev (Civ. A.) 104 SW 492]; Altgelt v. Alamo Nat. Bank, 98 Tex. 252, 83 SW 6 [rev (Civ. A.) 79 SW 582]; Mitchell v. De Witt, 20 Tex. 294; Robinson v. Martell, 11 Tex. 149; Webb v. Reynolds, (Commn. A.) 207 SW 914; Goldstein v. Susholtz, (Civ. A.) 105 SW 219.

Va.—Green v. Thompson, 84 Va. 376, 5 SE 507.

"Our statute has changed the common law, and requires the executor or administrator to apply to the ordinary for leave to sell (which application in the case of personal property shall be made at least ten days before the order is granted), and that advertisement be made of the day and time of sale. The intention of the law of this State seems to be that all sales of the property of decedents shall be public, after full notice to all parties interested therein." Poullain v. Brown, 82 Ga. 412, 423, 9 SE 1131 [quot Whitehurst v. Mason, 140 Ga. 148, 150, 78 SE 938].

[a] **Necessity of following order of court.**—Where the administrator seeks the authority of the court and obtains it, he must be held bound to pursue the authority granted to entitle him to protection from liability. Morton v. Johnston, 124 Mich. 561, 83 NW 369.

[b] **Dividend paying securities.**—A statute providing that no administrator or executor shall sell any dividend paying securities which the decedent owned at his death until so ordered by the court, applies only to stocks that were actually paying dividends, and not to stocks which "may" at some time pay dividends, and by necessary implication authorizes an executor or administrator to sell nondividend paying stocks as personal property. Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

[c] **Private sale.**—Under a statute empowering an administrator to sell personal property necessary to pay debts or legacies without an order of court at public sale, an administrator has no power in any case to sell personal property at private sale, except on an order of a probate court directing a private sale and prescribing the terms thereof. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072. To same effect State v. Dickson, 213 Mo. 66, 111 SW 817.

[d] **Statutes strictly construed.**—Bland v. Muncaster, 24 Miss. 62, 57 AmD 162.

[e] **Statutes applicable only to tangible personalty.** — Chandler v. Chandler, 87 Ala. 300, 6 S 153; Curry v. Peebles, 83 Ala. 225, 3 S 622; Waring v. Lewis, 53 Ala. 615; Reynolds v. Kirkland, 44 Ala. 312; Weider v. Osborn, 20 Or. 307, 25 P 715.

[f] **Assignment not within statute.**—Where administrators paid fees to the county clerk of the city and county of San Francisco for filing inventories and appraisements as required by an unconstitutional statute, it would be presumed that the probate court refused to give them credit for such payments in their accounts, and that they were chargeable to them individually, and hence being recoverable in their individual capacities, they were authorized to assign their claims without an order of court, such assignments not being within the statute providing that no sale of any property of an estate shall be valid unless made under order of the superior court. Trower v. San Francisco, 157 Cal. 752, 109 P 617.

17. U. S.—Newell v. West, 18 F. Cas. No. 10,150, 2 Bann. & A. 113, 13 Blatchf. 114 (Massachusetts statute); Massenberg v. Denison, 107 Fed. 18, 46 CCA 120 (Texas statute).

D. C.—Phœnix Mut. L. Ins. Co. v. Harris, 45 App. 474.

Iowa.—Flynn v. Chicago Great Western R. Co., 159 Iowa 571, 141 NW 401, 45 LRANS 1098.

Mass.—Clark v. Blackington, 110 Mass. 369.

Nebr.—Edney v. Baum, 70 Nebr. 159, 97 NW 252.

N. Y.—Sherman v. Willett, 42 N. Y. 146; Matter of Oakman, 5 NYLeg Obs 378.

N. C.—Odell v. House, 144 N. C. 647, 57 SE 395; Fanshaw v. Fanshaw, 22 N. C. 59 note; Wynns v. Alexander, 22 N. C. 58.

S. C.—Harth v. Heddlestone, 2 S. C. L. 321.

Vt.—Mead v. Byington, 10 Vt. 116.

Wis.—Munteith v. Rehn, 14 Wis. 210.

[a] **As a result of this view** it has been held that an order authorizing a sale of patent rights will not be granted, unless unusual circumstances exist which render it inadvisable for the administrator to sell on his own responsibility. In re Staud, 176 NYS 694.

out an order of court is absolutely void and passes no title to the purchaser.[18]

[§ 720] **(c) Effect of Testamentary Provisions.** A power of sale may be conferred on an executor by the will, in which event he acts in making the sale by virtue of the power so conferred, and not by virtue of his common-law power or pursuant to any authority derived from the probate court.[19] As a general rule statutes requiring an order of court to authorize a sale of personalty do not apply in cases where the testator has by his will expressly authorized the executor to sell,[20] although it has been held that if the testator desires the power to be exercised without such order it should be so expressed in the will and otherwise an order is necessary.[21]

Restrictions may also be imposed by the will on the executor with reference to the sale of the testator's personalty,[22] although an executor may sometimes be justified in selling, notwithstanding the sale is in opposition to a direction of the will.[23]

[§ 721] **(2) Perishable Property and Annual Crops.** Although the law may require the representative to obtain authority from the court to sell the personalty, yet if he is unable to obtain the order from the court in time to prevent loss and he makes a sale, the maxim, Lex non cogit ad impossibilia, is applicable,[24] and annual crops are sometimes expressly excepted from the operation of a statute requiring an order of court to authorize a sale.[25] The administrator has authority to sell sufficient of the annual crops to reimburse one who has made advances to him to aid in putting in the crops on the estate.[26] As a general rule when perishable property is given by a will to one for life with remainder to another, it is the duty of the executor to sell the property and invest the fund, only the interest on which would belong to the person having the life estate;[27] but if the will indicates an intention that the life tenant shall enjoy the property in specie, it should not be sold.[28]

[§ 722] **(3) Choses in Action—(a) In General.** The common-law rule is that an executor or administrator may transfer choses in action of the estate as fully as if he was the absolute owner thereof,[29]

18. Ventress v. Smith, 10 Pet. (U. S.) 161, 9 L. ed. 382; Bragg v. Massie, 38 Ala. 89, 79 AmD 82; Fambro v. Gantt, 12 Ala. 298; Pistole v. Street, 5 Port. (Ala.) 64; Whitehurst v. Mason, 140 Ga. 148, 78 SE 938; Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A 209.

19. Ala.—McCollum v. McCollum, 33 Ala. 711.

Cal.—In re Durham, 49 Cal. 490; Norris v. Harris, 15 Cal. 226.

Ga.—Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359; Jackson v. Williams, 50 Ga. 553.

Ill.—Smith v. Taylor, 21 Ill. 296.

N. C.—Mewborn v. Moseley, 97 SE 711.

[a] **Where a will directs the sale of all the testator's property,** but does not designate the person by whom the sale is to be made, it devolves on the executor by necessary implication, because whenever such a power is given by will the law casts it on the person who is appointed by the testator to execute the will, unless it is specially delegated to another. McCollum v. McCollum, 33 Ala. 711.

20. Ala.—Chandler v. Chandler, 87 Ala. 300, 6 S 153; McCollum v. McCollum, 33 Ala. 711.

Ark.—Winningham v. Holloway, 51 Ark. 385, 11 SW 579.

Ga.—Lawrence v. Philpot, 27 Ga. 585; Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

Ky.—Crenshaw v. Ware, 148 Ky. 196, 146 SW 426; Trimble v. Lebus, 94 Ky. 304, 22 SW 329, 15 KyL 85.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024.

Wash.—In re Crim, 89 Wash. 395, 154 P 811.

[a] **Power to sell must be clearly given.**—(1) Chandler v. Chandler, 87 Ala. 300, 6 S 153 (no power to sell without leave of the probate court is conferred by a provision in a will that "all the rest and residue of my estate, real and personal and mixed, I desire to be collected together by my executor and be used in the settlement of my just debts," because such a provision is no more than a dedication of the property to the uses to which the law itself would have devoted it, and leaves the executor with precisely the same rights in respect to it which he would have taken in the absence of the provision quoted). (2) A mere direction to pay the debts does not authorize the executor to sell without an order of the ordinary. Neal v. Patten, 40 Ga. 363.

[b] **The court has no authority to order a sale** of the decedent's personalty if the power is vested in the executor by the will. McCollum v. McCollum, 33 Ala. 711.

21. Brooks v. Bergner, 83 Md. 352, 35 A 98.

22. Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240]; Smith v. Smith, 1 S. C. Eq. 304.

[a] **Illustration.**—Testator directed that his executors, unless they considered it advisable, should not sell certain stock until twenty-five years after testator's decease. In the meantime the dividends thereof were to be divided among the same persons and in the same proportion as the residuary estate was directed to be divided. The will also provided that, if the income derived from certain property held in trust for his wife should be less than the amount which the will provided should be paid to the wife, the income and dividends arising from the stock of such corporation held by his executors in trust should be used in making up such deficiency. It was held that the executors were not authorized to sell the stock unless the widow married again, in which case her income was to cease, or unless she died. Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 A 337 [aff 74 N. J. Eq. 848, 71 A 240].

[b] **Provisions not restricting power.**—(1) A will did not preclude a sale of stocks and bonds by an executor and guardian by a statement that testator considered them a good investment and suggested that they remain as they were, but making the executor guardian of the children and giving him power to manage. Crenshaw v. Ware, 148 Ky. 196, 146 SW 426. (2) The fact that the testator had created a particular fund for the payment of his debts, of which the property sold was not a part, and that the purchaser had notice of a will, did not affect the validity of the sale. Tyrrell v. Morris, 21 N. C. 559.

23. Stephens v. Milnor, 24 N. J. Eq. 358; Meeker v. Crawford, 5 Redf. Surr. (N. Y.) 450.

[a] **It may be proper to sell** (1) where a sale is necessary for distribution. Meeker v. Crawford, 5 Redf. Surr. (N. Y.) 50. (2) An executor is justified in selling a constantly depreciating stock for less than par, although testators expressly wished that it should not be sold below par. Stephens v. Milnor, 24 N. J. Eq. 358.

24. Levering v. Levering, 64 Md. 399, 2 A 1 (a subsequent ratification of the sale would be equivalent to a prior order).

25. Whitehurst v. Mason, 140 Ga. 148, 78 SE 938.

[a] **Shipping cotton abroad.**—The statute requiring an executor or administrator to obtain leave of the ordinary before selling any of the decedent's property, except annual crops, which may be sent to market without such order, contemplates the domestic market, and where an administrator shipped cotton abroad in order to obtain a better price, and it was lost by the sinking of the ship, the administrator was liable for its value because of his unauthorized act. Poullain v. Brown, 82 Ga. 412, 9 SE 1131.

26. Starling v. Wyatt, (Miss.) 27 S 526.

27. Woods v. Sullivan, 1 Swan (Tenn.) 507.

28. Woods v. Sullivan, 1 Swan (Tenn.) 507.

29. U. S.—Owsley v. New York Cent. Trust Co., 196 Fed. 412; Broadwell v. Banks, 134 Fed. 470; May v. Logan County, 30 Fed. 250.

Ala.—Winter v. London, 99 Ala. 263, 12 S 438; Chandler v. Chandler, 87 Ala. 300, 6 S 153; Butler v. Gazzam, 81 Ala. 491, 1 S 16; Nelson v. Stollenwerck, 60 Ala. 140; Hutchinson v. Owen, 59 Ala. 326; Baldwin v. Hatchett, 56 Ala. 461.

Cal.—Low v. Burrows, 12 Cal. 181.

Conn.—Hough v. Bailey, 32 Conn. 288; Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580.

Ill.—Hickox v. Frank, 102 Ill. 660; Walker v. Craig, 18 Ill. 116; Dwight v. Newell, 15 Ill. 333; Makepeace v. Moore, 10 Ill. 474.

Ind.—Hamrick v. Craven, 39 Ind. 241.

Iowa.—Marshall Co. v. Hanna, 57 Iowa 372, 10 NW 745.

Ky.—Trimble v. Lebus, 94 Ky. 304, 22 SW 329, 15 KyL 85.

Me.—Chase v. Bradley, 26 Me. 531.

Mass.—Clark v. Blackington, 110 Mass. 369.

Mich.—Brand v. Smith, 99 Mich. 395, 58 NW 363.

Miss.—Owen v. Moody, 29 Miss. 79; Searles v. Scott, 22 Miss. 94; Scott v. Searles, 15 Miss. 498, 45 AmD 317; Miller v. Helm, 10 Miss. 687.

N. H.—Ladd v. Wiggin, 35 N. H. 421, 69 AmD 551.

N. Y.—Petersen v. Chemical Bank, 32 N. Y. 21, 29 HowPr 240, 88 AmD 298; Wickham v. Roberts, 112 App. Div. 742, 98 NYS 1092; Mahaney v. Walsh, 16 App. Div. 601, 44 NYS 969; Huck v. Kraus, 50 Misc. 528, 99 NYS

and, although ordinarily choses in action should be collected, rather than sold, circumstances may render a sale, even at a discount, beneficial to the estate; and of the existence of such circumstances the executor or administrator is to judge in the exercise of the discretion committed to him.[30]

A claim which is essentially for the benefit of another may be assigned by the administrator to such other person, since the only interest of the estate is to see it paid to such person.[31]

Transfers in satisfaction of the decedent's debts may be made by an executor or administrator,[32] but the personal representative has no right to make such a transfer to the prejudice of other creditors of the estate,[33] although it will be sustained as between himself and the transferee.[34]

A transfer in satisfaction of an individual debt of the representative is unauthorized.[35]

Statutes requiring sales of personalty to be under order of court have been held in some cases to apply only to tangible personalty, and not to affect the representative's power to dispose of choses in action,[36] but the more generally accepted view is that such statutes are not so restricted but apply to choses in action as well as tangible personalty.[37]

[§ 723] **(b) Foreign Debts.** While the more generally accepted view is that an executor or administrator may assign a claim against a nonresident of the state in which he was appointed and is acting so as to authorize the assignee to sue the debtor in the courts of the latter's domicile,[38] the right of the representative to make such an as-

490; Matter of Fould, 35 Misc. 171, 71 NYS 473; Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383; Meeker v. Crawford, 5 Redf. Surr. 450.

N. C.—Dickson v. Crawley, 112 N. C. 629, 17 SE 158; Riddick v. Moore, 65 N. C. 382; Bradshaw v. Simpson, 41 N. C. 243; Gray v. Armistead, 41 N. C. 74; Tyrrell v. Morris, 21 N. C. 559.

Oh.—Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Pa.—Henke's App., 10 Pa. Cas. 295, 14 A 45.

S. C.—Chapman v. Charleston, 30 S. C. 549, 9 SE 591, 3 LRA 311; Reynolds v. Rees, 23 S. C. 438.

Va.—Trevelyan v. Lofft, 83 Va. 141, 1 SE 901; Morris v. Duke, 2 Patt. & H. 462.

Wis.—Winslow v. Crowell, 32 Wis. 639.

[a] **Land certificate.** — A certificate for a league and labor of land is not a chose in action, but a chose in possession, and therefore a vendible commodity for the payment of the debts of the deceased. Peevy v. Hurt, 32 Tex. 146.

[b] **A judgment is assignable** (1) by the judgment creditor's executor or administrator. Dickson v. Crawley, 112 N. C. 629, 17 SE 158. (2) So a decree foreclosing a mortgage for nonpayment of one of the installments due under it, and finding a certain sum due and a certain sum to become due on account of the unmatured installments, may be assigned by the mortgagee's administrator, and the assignment will carry with it the mortgage and the notes secured by it. Brand v. Smith, 99 Mich. 395, 58 NW 363.

[c] **Contracts relating to land.**— A contract for the construction of a railroad provided that the contractor should receive a conveyance of thirty sections of land on completion of each ten miles of road. On the death of the contractor before completing the construction of the road, it was held that his rights under the contract as to the uncompleted portion constituted a chose in action which his administrator could assign, but that as to the completed portion his right to a conveyance was real estate which the administrator could not sell except under an order of court as for a sale of lands. Winslow v. Crowell, 32 Wis. 639.

[d] **Presumption as to transfer.**— A transfer of a lease executed by an executor in his individual name will be presumed to have been executed in the discharge of his executorial duties, although twenty-six years have elapsed since the lease was granted to him as executor. In re Venn, [1894] 2 Ch. 101.

[e] **A right of action for infringement of a patent** owned by a decedent may be transferred by his executor or administrator. May v. Logan County, 30 Fed. 250.

[f] **Assignment in individual name.** — Where the administratrix, the widow of the decedent, transferred a judgment by executing an assignment in her individual name alone, only her dower interest in the judgment passed by the transfer. Halsey v. Bush, 30 SW 4, 17 KyL 132.

30. Conn. — Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580.

Kan.—Lappin v. Mumford, 14 Kan. 9, 16.

Nebr.—Holt v. Rust-Owen Lumber Co., 2 Nebr. (Unoff.) 170, 96 NW 613.

Nev.—In re Millenovich, 5 Nev. 161.

Pa.—In re Billington, 3 Rawle 48.

Va.—Trevelyan v. Lofft, 83 Va. 141, 1 SE 901.

"It is true, bonds, notes, bills, and accounts are not ordinarily sold, and in most cases ought not to be. They are regarded as personal property, in a sort of intermediate condition between goods and chattels and money, the standard of value; as it were, the former in process of reduction to the latter. Hence the interests of the estate are generally promoted by the collection, rather than the sale, of such property. But nevertheless they are personal property, and, as such, subject to sale." Lappin v. Mumford, supra.

[a] **Sale at discount.**—Where an administrator had sold real estate on credit more advantageously than it could have been sold for cash, and was subsequently pressed for money, he was justified in selling at a discount some of the securities taken for the price, the interest of the estate being thereby promoted. In re Billington, 3 Rawle (Pa.) 48.

[b] **Mining stocks which are only an expense** to the estate should be disposed of, unless it is quite evident that it would be for the interest of the estate to hold them. In re Millenovich, 5 Nev. 161.

31. Christy v. Chicago, etc., R. Co., 70 Mo. A. 43.

32. Cowgill v. Linnville, 20 Mo. A. 138.

[a] **Unauthorized assignment.** — The statute does not permit the assignment of a note to a person who is jointly liable with the estate on a note to a third person, because a joint obligor is not a creditor of the estate, although he may become such by paying the note to the third person. Chandler v. Stevenson, 68 Mo. 450.

33. Whittaker v. Wright, 35 Ark. 511; Payne v. Flournoy, 29 Ark. 500; Stephens v. Cotterell, 99 Pa. 188; James' App., 89 Pa. 54; Fritz v. Thomas, 1 Whart. (Pa.) 66, 29 AmD 29.

34. Neely v. Bair, 157 Pa. 417, 27 A 777.

35. Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226; Shelton v. Carpenter, 60 Ala. 201.

Del.—Barwick v. White, 2 Del. Ch. 284.

Ind.—Thomasson v. Brown, 43 Ind. 203.

Miss.—Scott v. Searles, 15 Miss. 498, 45 AmD 317; Miller v. Helm, 10 Miss. 687.

N. C.—Hendrick v. Gidney, 114 N. C. 543, 19 SE 598; Latham v. Moore, 59 N. C. 167.

Tenn.—Smartt v. Watterhouse, 6 Humphr. 158.

Tex.—Bledsoe v. White, 42 Tex. 130.

[a] **Alienee of solvent representative held to acquire title.**— Where the executor or administrator of the decedent is solvent, and in payment of a debt of his own, alienates choses in action received by him as the price of property of the decedent which he has sold, the equities of the alienee are equal to the equities of the creditor's estate, and therefore the legal title of the alienee will prevail. Thackum v. Longworth, 11 S. C. Eq. 267 (where it is admitted, however, that a different rule is applicable where the executor or administrator making such transfer is insolvent). But compare Fisher v. Bassett, 9 Leigh (36 Va.) 119, 33 AmD 227 (the assignee cannot, in equity, avail himself of the transfer, unless the administrator had purchased the claim from the next of kin, or had made such advances as to justify him in appropriating it to himself).

36. Chandler v. Chandler, 87 Ala. 300, 6 S 153; Curry v. Peebles, 83 Ala. 225, 3 S 622; Weider v. Osborn, 20 Or. 307, 25 P 715; Chapman v. Charleston, 30 S. C. 549, 9 SE 591, 3 LRA 311; Rhame v. Lewis, 34 S. C. Eq. 269.

37. U. S.—Broadwell v. Banks, 134 Fed. 470.

Ark.—Winningham v. Holloway, 51 Ark. 385, 11 SW 579.

Cal.—Wickersham v. Johnston, 104 Cal. 407, 38 P 89, 43 AmSR 118.

Ga.—Thompson v. Thompson, 77 Ga. 692, 3 SE 261; Smith v. Griffin, 32 Ga. 81.

Kan.—Pierce v. Batten, 3 Kan. A. 396, 42 P 924.

La.—Burbank v. Payne, 17 La. Ann. 15, 87 AmD 513; Nicholson v. Chapman, 1 La. Ann. 222.

Mo.—Weil v. Jones, 70 Mo. 560; Stagg v. Linnenfelser, 59 Mo. 336; Marshall v. Meyers, 96 Mo. A. 643, 70 SW 927.

[a] **Individual claim of representative.** — Where administrators paid fees to the county clerk of the city and county of San Francisco for filing inventories and appraisements as required by an unconstitutional statute, it would be presumed that the probate court refused to give them credit for such payments in their accounts, and that they were chargeable to them individually, and hence being recoverable in their individual capacities, they were authorized to assign their claims without an order of court. Trower v. San Francisco, 157 Cal. 762, 109 P 617.

38. U. S.—Harper v. Butler, 2 Pet. 239, 7 L. ed. 410.

Ky.—Cope v. Daniel, 9 Dana 415.

Miss.—Owen v. Moody, 29 Miss. 79; Andrews v. Carr, 26 Miss. 577.

signment has been denied, apparently on the view that to give effect to such assignment would extend the representative's authority beyond the state in which he was appointed, and amount to an administration in another state, to the possible detriment of resident creditors.[39]

[§ 724] **(c) Cause of Action for Death.** The administrator of a decedent who left a widow and infant children may not without consideration assign to the widow a cause of action for decedent's death.[40]

[§ 725] **(d) Commercial Paper.** According to the common-law rule it is within the power of an executor or administrator to indorse over and transfer commercial paper payable to his decedent,[41] and it necessarily follows from this that he may transfer such paper when it is payable to himself in his representative capacity.[42] In some jurisdictions the representative is held to have power to transfer negotiable paper without an order of court authorizing him to do so, although the statute requires an order of court to authorize the transfer of personalty, it being considered that such statutes do not apply to negotiable instruments,[43] but in other jurisdictions such statutes are held to include negotiable instruments.[44] In some jurisdictions the power of the executor or administrator to transfer notes is limited to certain specific cases.[45] In those states where the administrator has power to indorse and assign notes due decedent it will be presumed that an administrator in another state has the same power,[46] unless it is alleged or shown that the administrator's power is regulated or restricted by statute of that state,[47] while in a state where the

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618 [overr Thompson v Wilson, 2 N. H. 291].

N. Y.—Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298, 29 HowPr 240.

N. C.—Riddick v. Moore, 65 N. C. 382; Grace v. Hannah, 51 N. C. 94; Leake v. Gilchrist, 13 N. C. 73.

R. I. — Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 108, 2 AmSR 881.

[a] **Reason for rule.**—"The title to a negotiable instrument passes by indorsement, and if indorsed by an administrator, who is the representative of the deceased owner, in the proper settlement of an estate and without affecting the rights of other parties, why should its effect be limited to the boundaries of the state where the deceased lived? Not only would this limit the negotiability of the instrument, but it would cast upon an administrator the unnecessary burden of procuring letters of administration in another state simply to collect an admitted debt. Moreover, suppose the administrator, indorsee, and maker lived in the same state at the time of the indorsement, but that the maker subsequently removed to another state; could it be claimed that the indorsee would be barred from suing in the second state because his title came through an administrator who would himself be incapable of bringing suit in that state? Yet the elements of title, in the case supposed, would be the same as in the case in question. We see no reason why the residence of the maker should affect or control the plaintiff's title or his right to sue. The right of action is transitory; the holder of a note must collect of the maker where he can find him. If, therefore, as against the maker, the holder's title to a note is good, his right of action should be good also. We therefore hold that, in a case like this, in which no interests but those of the parties to the note are involved—and we say this without passing upon the effect of a transfer when there are creditors in this state—an administrator in another state may transfer a note upon which the indorsee may sue in this state." Mackay v. St. Mary's Church, 15 R. I. 121, 123, 23 A 108, 2 AmSR 881.

39. Stearns v. Burnham, 5 Me. 261, 17 AmD 228; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173; In re Ames, 52 Mo. 290; McCarty v. Hall, 13 Mo. 480; Dial v. Gary, 14 S. C. 573, 37 AmR 737.

40. Flynn v. Chicago Great Western R. Co., 159 Iowa 571, 141 NW 401, 45 LRANS 1098. See also Death § 71.

41. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718.

Conn.—Hough v. Bailey, 32 Conn. 288.

Ill.—Walker v. Craig, 18 Ill. 116; Dwight v. Newell, 15 Ill. 333; Walker v. Kirk, 14 Ill. 55; Makepeace v. Moore, 10 Ill. 474.

Ind.—Latta v. Miller, 109 Ind. 302, 10 NW 100; Rogers v. Zook, 86 Ind. 237; Krutz v. Stewart, 76 Ind. 9; Thomasson v. Brown, 43 Ind. 203; Hamrick v. Craven, 39 Ind. 241; Thomas v. Reister, 3 Ind. 369; Crist v. Crist, 1 Ind. 570, 50 AmD 481.

Iowa.—Marshall County v. Hanna, 57 Iowa, 372, 10 NW 745.

Ky.—Sanders v. Blain, 6 J. J. Marsh. 446, 22 AmD 86.

Me.—Malbon v. Southard, 36 Me. 147.

Md.—Lucas v. Byrne, 35 Md. 485.

Mich.—Drake v. Cloonan, 99 Mich. 121, 57 NW 1098, 41 AmSR 586.

Miss.—Booyer v. Hodges, 45 Miss. 78; Owen v. Moody, 29 Miss. 79; Andrews v. Carr, 26 Miss. 577; Miller v. Helm, 10 Miss. 687; Prosser v. Leatherman, 5 Miss. 237, 34 AmD 121.

N. Y.—Bogert v. Hertell, 4 Hill 492; Wheeler v. Wheeler, 9 Cow. 34; Southerland v. Bush, 7 Johns. Ch. 17, 11 AmD 383.

N. C.—Cox v. Wilson First Nat. Bank, 119 N. C. 302, 26 SE 22; Grace v. Hannah, 51 N. C. 94; Wilson v. Doster, 42 N. C. 231; Bradshaw v. Simpson, 41 N. C. 243; Gray v. Armistead, 41 N. C. 74.

Oh.—Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Or.—Weider v. Osborn, 20 Or. 207, 35 P 715.

R. I.—Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 103, 2 AmSR 881.

Tex.—Abercrombie v. Stillman, 77 Tex. 589, 14 SW 196.

Vt.—Cahoon v. Moore, 11 Vt. 604; Griswold v. Barnum, 5 Vt. 269.

Wis.—Cleveland v. Harrison, 15 Wis. 670.

Eng.—Rawlinson v. Stone, 3 Wils. C. P. 1, 95 Reprint 899.

Ont.—Hard v. Palmer, 20 U. C. Q. B. 208.

[a] **An administrator may ratify** the act of decedent's wife, when decedent was unconscious from illness, in indorsing over a note of which decedent was payee, where the proceeds of the note went into the estate before the death of the decedent. Seaver v. Weston, 163 Mass. 202, 39 NE 1013.

[b] **A specific legatee who has been appointed executor but not qualified** cannot transfer the bill. Stagg v. Linnenfelser, 59 Mo. 336.

[c] **The sole heir and next of kin** cannot make a good transfer, as against the payee's administrator. Pritchard v. Norwood, 155 Mass. 539, 30 NE 80.

[d] **A residuary legatee,** who was appointed executor, may transfer a note payable "to the order of J. V. Mehling estate." Peltier v. Babillion, 45 Mich. 384, 8 NW 99.

42. Ala.—Nelson v. Stollenwerck, 60 Ala. 140; Clark v. Moses, 50 Ala. 326; Moses v. Clark, 46 Ala. 229.

Ark.—Payne v. Flournoy, 29 Ark. 500.

Ill.—Walter v. Kirk, 14 Ill. 55.

Ind.—Daffey v. State, 15 Ind. 441.

Miss.—Booyer v. Hodges, 45 Miss. 78; Miller v. Helm, 10 Miss. 687.

Mo.—Vandeventer v. Florida Sav. Bank, 162 Mo. A. 34, 141 SW 900.

Tex.—Groce v. Herndon, 2 Tex. 410; Lipscombe v. Ward, 2 Tex. 277; Gayle v. Ennis, 1 Tex. 184.

[a] **Statute not applicable to note running to representative.**—While a statute providing that administrators shall assign the notes, stock, etc., of the estate to creditors, legatees, and distributees, in discharge of their claim equal to the amount of such bond or note, prohibits the assignment of a note, except in discharge of such claims, it only applies to the assets of the estate, and does not prohibit the assignment by administrators of a note executed to them as such in payment of a judgment of the estate since the legal title to the note vested in the administrators; assets going into the administrators' hands directly from intestate being treated differently from those going into their hands during the course of administration. Vandeventer v. Florida Sav. Bank, 162 Mo. A. 34, 141 SW 900.

43. Ala.—Nelson v. Stollenwerck, 60 Ala. 140.

Ill.—Wooley v. Lyon, 117 Ill. 244, 6 NE 885, 57 AmR 867.

Ind.—Rogers v. Zook, 96 Ind. 237.

Miss.—Booyer v. Hodges, 45 Miss. 78; Owen v. Moody, 29 Miss. 79; Andrews v. Carr, 26 Miss. 577.

N. H.—Ladd v. Wiggins, 35 N. H. 421, 69 AmD 551.

Or.—Weider v. Osborn, 20 Or. 307, 25 P 715.

S. C.—Rhame v. Lewis, 34 S. C. Eq. 269.

44. Cal.—Wickersham v. Johnston, 104 Cal. 407, 38 P 89, 43 AmSR 118.

Ga.—Thompson v. Thompson, 77 Ga. 692, 3 SE 261.

La.—Burbank v. Payne, 17 La. Ann. 15, 87 AmD 513.

Mo.—Stagg v. Linnenfelser, 59 Mo. 336.

Okl.—Jones v. Wheeler, 23 Okl. 771, 101 P 1112.

[a] **If the transfer is not detrimental to the estate** of the deceased it is not necessarily void. Marston v. Winter, 10 La. Ann. 210.

45. Whittaker v. Wright, 35 Ark. 511; Payne v. Flournoy, 29 Ark. 500; Stagg v. Linnenfelser, 59 Mo. 336; Cowgill v. Linnville, 20 Mo. A. 138; Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

46. Rogers v. Zook, 86 Ind. 237; Clark v. Blackington, 110 Mass. 369.

47. Rogers v. Zook, 86 Ind. 237.

administrator must be authorized by order of court before he can assign a note, it has been presumed that the law of a foreign country is the same.[48]

[§ 726] **(e) Effect of Assignment.** An authorized assignment of a claim by the executor or administrator of the claimant enables the assignee to sue on the claim anywhere.[49] Where an administratrix was fraudulently induced to assign a policy on her intestate's life, and the assignee transferred it to another with knowledge of the fraud, but who did not know that the transfer was made without an order of court, the ultimate transferee did not acquire title to the property.[50]

[§ 727] **(4) Stocks and Bonds.** At common law the executor or administrator has power to transfer stocks and bonds which belonged to his decedent at the time of his death,[51] but the statutes sometimes prohibit the sale of property of this character without an order of court.[52] Where a transfer is to be made, it may be made in the representative's own name,[53] and such an assignment carries with it a cause of action for the conversion of stock.[54] In the absence of ancillary administration or statutory prohibition the domiciliary administrator duly appointed has authority to sell and assign the stock of decedent in a foreign corporation.[55]

[§ 728] **(5) Mortgages.** As a general rule the authority of the executor or administrator of a mortgagee extends to an assignment of the mortgage debt,[56] although it is sometimes required that an order of court to that effect be procured in order to warrant such an assignment.[57] An assignment by an executor of a mortgage held by his testator, and not foreclosed, is valid, although it contains a provision that upon the payment of certain other specified claims held by the assignee against a third person the mortgage shall be canceled and discharged.[58]

[§ 729] **b. Duty to Sell.** Executors and administrators are not required to sell nonperishable property unless the will so directs, or unless a sale is necessary to pay debts or legacies.[59] Under a statute requiring the court, on application of the executor, to direct the sale of such portion of the personal effects of a decedent as are of a perishable nature, or which from any cause would otherwise be "likely to depreciate in value," an executor is not bound, under penalty of personal liability for loss resulting from his failure so to do, to procure a sale of property such as stocks subject to fluctuations in market value and which may or may not depreciate according to such fluctuations, but is only bound to exercise reasonable business prudence in the matter.[60]

[§ 730] **c. Time for Sale.**[61] So far as an executor or administrator may be bound to sell and dispose of personalty, he should proceed to do so within a reasonable time,[62] and where the will gives

48. Wickersham v. Johnston, 104 Cal. 407, 38 P 89, 43 AmSR 118.

49. Owsley v. New York Cent. Trust Co., 196 Fed. 412.

Assignment of foreign debts see supra § 723.

50. Whitehurst v. Mason, 140 Ga. 148, 78 SE 938.

51. Ex p. Jones, 13 F. Cas. No. 7,443, 4 Cranch C. C. 185; Christy v. Christy, 125 Ill. A. 442 [aff 225 Ill. 547, 80 NE 242]; Hutchins v. State Bank, 12 Metc. (Mass.) 421; In re Heinze, 224 N. Y. 1, 120 NE 63; Leitch v. Wells, 48 N. Y. 585; Lockwood v. U. S. Steel Corp., 153 App. Div. 655, 138 NYS 725 [rev on other grounds 209 N. Y. 375, 103 NE 697, LRA1915C 471].

52. Stinson v. Thornton, 56 Ga. 377; Weyer v. Franklin Second Nat. Bank, 57 Ind. 198; Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935; Trimble v. Lebus, 94 Ky. 304, 22 SW 329, 15 KyL 85; Butler v. Butler, 10 R. I. 501.

[a] **Statute not applicable to testamentary trustee.**—Crenshaw v. Ware, 148 Ky. 196, 146 SW 426.

[b] **Election as to course to be pursued.**—If the administrator would make a legal sale and transfer of stock as administrator, he must strictly pursue one of two courses: He must either assume the whole inventory of the personal estate of the intestate at the appraised value; or he must under the license of the judge of probate sell the same at public auction upon a sufficient previous notice of sale. French v. Currier, 47 N. H. 88.

53. Leitsch v. Wells, 48 N. Y. 585; Mahaney v. Walsh, 16 App. Div. 601, 44 NYS 969; Henke's App., 10 Pa. Cas. 295, 14 A 45.

54. Mahaney v. Walsh, 16 App. Div. 601, 44 NYS 969.

55. Hutchins v. State Bank, 12 Metc. (Mass.) 421; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618; Election of Directors of Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 A 191; Middlebrook v. Merchants' Bank, 3 Abb. Dec. (N. Y.) 295, 3 Keyes 135.

56. Ga.—Reeves v. Bolles, 95 Ga. 402, 22 SE 626.

Me.—Libby v. Mayberry, 80 Me. 137, 13 A 577; Crooker v. Jewell, 31 Me. 306.

Md.—McCauseland v. Baltimore Humane Impartial Soc., 95 Md. 741, 54 A 918.

Mass.—Burt v. Ricker, 6 Allen 77 [dist Ex p. Blair, 13 Metc. 126].

Mich.—Drake v. Cloonan, 99 Mich. 121, 57 NW 1098, 41 AmSR 586; Reynolds v. Smith 57 Mich. 194, 23 NW 727.

N. H.—Ladd v. Wiggin, 35 N. H. 421, 69 AmD 551.

N. J.—Goodell v. Munroe, 86 N. J. Eq. 18, 97 A 152.

N. Y.—Washburn v. Benedict, 46 App. Div. 484, 61 NYS 387; Read v. Knell, 69 Hun 541, 23 NYS 941 [aff 143 N. Y. 484, 39 NE 4]; Smith v. Tiffany, 16 Hun 552.

N. C.—Neil v. Newbern, 5 N. C. 133.

Wis.—Cleveland v. Harrison, 15 Wis. 670; Williams v. Ely, 13 Wis. 1.

[a] **A decree of foreclosure** of a mortgage on realty may be assigned by the administrator and the assignment will carry with it the note and mortgage. Brand v. Smith, 99 Mich. 395, 58 NW 363.

[b] **A conveyance absolute in form, but intended as security** for a loan, is in effect a mortgage, and the executor of the lender, on assigning the note given for the loan, may also convey the land to the assignee. Reeves v. Bolles, 95 Ga. 402, 22 SE 626.

57. Pierce v. Batten, 3 Kan. A. 396, 42 P 924; Weimer v. Karch, 5 Pa. Co. 203.

[a] **Necessary showing.**—It must appear to the court that all parties in interest in the land encumbered have joined in the application for the assignment. Weimer v. Karch, 5 Pa. Co. 203.

58. Burt v. Ricker, 6 Allen (Mass.) 77.

59. In re Fisher, 128 Iowa, 626, 104 NW 1023; Matter of Mullon, 74 Hun 358, 26 NYS 683 [aff 145 N. Y. 98, 39 NE 821, and dist Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520].

[a] **Illustration.**—An executrix of an estate which was subject to no debts, and one half of which went to her and the other half to a trustee for others, was not obliged to sell stocks purchased by testator for investment purposes and bringing a fair profit on the investment, but could discharge her trust by simply making division of the shares of stock. In re Fisher, 128 Iowa, 626, 104 NW 1023.

60. In re Fisher, 128 Iowa 626, 104 NW 1023.

61. Sale under order of court see infra § 1579.

62. U. S.—Northrup v. Browne, 204 Fed. 224, 122 CCA 496; Pulliam v. Pulliam, 10 Fed. 53.

Ala.—Steel v. Knox. 10 Ala. 608.

La.—Goodbear v. Gary, 1 La. Ann. 240.

Me.—Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338.

N. H.—Griswold v. Chandler, 5 N. H. 492.

N. J.—In re Green, 37 N. J. Eq. 254.

N. Y.—In re Gray, 91 N. Y. 502; Matter of Thompson, 41 Misc. 420, 84 NYS 1111, 4 Mills Surr. 69; Campbell v. Purdy, 5 Redf. Surr. 434; Weston v. Ward, 4 Redf. Surr. 415.

Pa.—Bosio's Est., 2 Ashm. 437.

S. C.—Nicholson v. Whitlock, 57 S. C. 36, 35 SE 412.

Tenn.—Mickle v. Brown, 4 Baxt. 468.

[a] **"Each case must stand upon its own facts;** that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this state, at all events, there is no arbitrary standard." Matter of Gray, 91 N. Y. 502, 510.

[b] **Immediate sale.**—It is much the safer rule for an administrator to convert the assets into money immediately. But this is not always practicable nor always to the best interest of the estate. In re Allam, 199 Pa. 573, 49 A 252.

[c] **Hasty or improvident sale not required.**—An executor or administrator is not required to sell hastily or improvidently if the situation or circumstances are of such a character as seriously to lessen the price for which the property ought to sell. Mickle v. Brown, 4 Baxt. (Tenn.) 468.

[d] **Perishable property** ought to be sold without delay; and if the executor or administrator fails to do so, and retains it until it deteriorates in value, he is chargeable with its

the executor a discretion as to the time of sale, and he acts in good faith, he is not chargeable with loss resulting from selling at the time when he did, whether his judgment that such sale could then be made without a sacrifice was or was not reasonable.[63] An executor or administrator is not to be controlled by the directions of the next of kin,[64] nor should he attempt to sell the personalty before probate of the will and the issuance of letters testamentary.[65] The English rule, which is followed in some American cases, fixes one year from decedent's death or the granting of letters as the time within which a sale shall ordinarily be made,[66] although the sale may be deferred beyond that time where the executor or administrator acts in good faith for the benefit of the estate, and with reasonable prudence.[67] The lapse of many years since a testator's death may raise a presumption that all debts have been paid, so as to put a subsequent purchaser on inquiry,[68] but this rule has been held not applicable to leaseholds,[69] and the transfer of a land certificate by an administratrix before her discharge has been held valid without an order of court, although made eighteen years after letters were taken out.[70]

[§ 731] **d. Manner and Conduct of Sale.**[71] At common law the manner of sale is a matter resting in the discretion of the personal representative,[72] who may sell at either private or public sale as he may deem best;[73] but in some states the statutes require a public or auction sale unless the probate court has specially authorized a private sale.[74] It

value at the time when it should have been sold. Steele v. Knox, 10 Ala. 608.

[e] **Small estate owing large debts.**—Where a succession was small and much in debt, it was held that the executor should sell as soon as the inventory should be made, and that he would be personally charged with any expenses resulting from the delay, if he suffered more than a year to elapse before selling. Goodbear v. Gary, 1 La. Ann. 240.

[f] **Where an administrator acts with good faith,** and with that degree of caution which prudent men exhibit in the conduct of their own affairs, he is to be liberally dealt with, and will not be charged with a loss resulting from his failure to make an immediate sale of personalty. Matter of Green, 37 N. J. Eq. 254; Weston v. Ward, 4 Redf. Surr. (N. Y.) 415; Stewart's App., 110 Pa. 410, 6 A 321; Bosio's Est., 2 Ashm. (Pa.) 437.

[g] **Delay held proper.**—Decedent died in Philadelphia Dec. 20, 1826. One item of his personalty was an ostrich which he had been engaged in exhibiting. The ostrich was inventoried at three hundred dollars. The administrator sold all the other personalty at public auction, but did not put the ostrich up for sale publicly, although he attempted to dispose of it at private sale. He retained two persons (who had been employed for the same purpose by the intestate in his lifetime) to superintend the care and exhibition of the ostrich; and he exhibited it in Philadelphia, from December, 1826, until some time in the month of April, 1827, when it was removed from Philadelphia for the purpose of exhibiting it in New York. It was taken as far as Frankford, when it died and was afterward sold for forty-five dollars. It was held that the administrator was not chargeable with the value of the bird. Bosio's Est., 2 Ashm. (Pa.) 437, 439 ("But four months elapsed between the taking of the inventory and the death of the bird; those four months were the most inauspicious in the year, either for its sale or exhibition; and the property was of that peculiar kind that few customers, even under favorable circumstances, could be anticipated. To have made a public sale immediately after the intestate's death would have been the almost certain means of sacrificing the property; and its postponement was, apparently at least, for the benefit of the estate. . . . The bird was a native of the warmest regions of the globe, care and danger always accompanying the keeping of it during a bleak North American winter; and the kind of adventurous spirits who, in general, are disposed to embark in the purchase of such a curiosity, in hopes of ultimate gain from its exhibition, would, in general, be desirous of buying in the spring, when they might have the chance of one season at least of successful experiment. The loss likely to be sustained by this estate shows the folly of such a winter purchase. Testing the conduct of this administrator by the principles of good faith and the obligations of ordinary prudence, I see nothing to find fault with. From the time he took possession of the bird, he continually offered it for sale, and declined closing with offers made him, only because they were entirely inadequate. It is true that his asking price was beyond the appraisement, yet it was beneath what his intestate actually paid for the property, and it does not appear that the price demanded was a fixed and absolute limit").

Liability for failure to sell or delay in selling see supra § 586.

63. Harrah's Est., 15 Pa. Dist. 930; Staples v. Staples, 24 Gratt. (65 Va.) 225.

64. Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554 mem, 71 NE 1140 mem].

65. Smith v. Barham, 17 N. C. 420, 25 AmD 721; Monroe v. James, 4 Munf. (18 Va.) 194.

66. Sunday's App., 131 Pa. 584, 18 A 931; In re Johnston, 9 Watts & S. (Pa.) 107; Donnelly's Est., 8 Pa. Dist. 182; Kennedy's Est., 8 PittsbLegJNS (Pa.) 135; Hughes v. Empson, 22 Beav. 181, 52 Reprint 1077; Sculthorpe v. Tipper, L. R. 13 Eq. 232.

[a] **Where a testator gives an absolute discretion** to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable, in the absence of mala fides, for loss arising to the estate from the nonconversion. In re Norrington, 13 Ch. D. 654.

67. Marsden v. Kent, 5 Ch. D. 598; Buxton v. Buxton, 1 Myl. & C. 80, 13 EngCh 80, 40 Reprint 307; In re Hirst, 11 L. T. Rep. N. S. 533.

68. In re Tanqueray-Willaume, 20 Ch. D. 465, 21 ERC 540; In re Molyneaux, L. R. 15 Ir. 383.

69. In re Venn, [1894] 2 Ch. 101; In re Whistler, 35 Ch. D. 561.

70. McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718.

71. **Sale under order of court** see infra §§ 1578–1583.

72. Wier v. Davis, 4 Ala. 442; Cannon v. Jenkins, 16 N. C. 422; Bradshaw v. Cruise, 4 Heisk. (Tenn.) 260; Johnson v. Kay, 8 Humphr. (Tenn.) 142.

73. Johnson v. Kay, 8 Humphr. (Tenn.) 142.

74. U. S.—Gaines v. De la Croix, 6 Wall. 719, 18 L. ed. 965; Ventress v. Smith, 10 Pet. 161, 9 L. ed. 382; Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449 (Tennessee statute).

Ala.—Wilson v. Armstrong, 42 Ala. 168, 94 AmD 635; Beene v. Collenberger, 38 Ala. 647; McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Bogan v. Camp, 30 Ala. 276; Hopper v. Steele, 18 Ala. 828; Fambro v. Gantt, 12 Ala. 198; Dearman v. Dearman, 4 Ala. 521; Wier v. Davis, 4 Ala. 442.

Fla.—May v. May, 7 Fla. 207, 68 AmD 431.

Ga.—Miller v. Hines, 145 Ga. 616, 89 SE 689; Fussell v. Dennard, 118 Ga. 270, 45 SE 247; Neal v. Patten, 40 Ga. 363.

Ill.—Burnap v. Dennis, 4 Ill. 478.

Ind.—Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498; Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

La.—Pinard v. George, 30 La. Ann. 384; Donaldson v. Hull, 7 Mart. N. S. 112; De Lemos v. Garcia, 1 Mart. N. S. 324.

Miss.—Ware v. Houghton, 41 Miss. 370, 93 AmD 258; Worten v. Howard, 10 Miss. 527, 41 AmD 607; Baines v. McGee, 9 Miss. 208; Cable v. Martin, 1 Miss. 558.

Mo.—State v. Dickson, 213 Mo. 66, 111 SW 817.

N. C.—Dickson v. Crawley, 112 N. C. 629, 17 SE 158; Pate v. Kennedy, 104 N. C. 234, 10 SE 188; Davis v. Marcum, 57 N. C. 189.

Oh.—Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Va.—Hudson v. Hudson, 5 Munf. (19 Va.) 180.

[a] **Statute directory merely.**—The statute requiring sales by executors to be public and under an order of the county court is merely directory, and a private sale to a bona fide purchaser is valid. Wynns v. Alexander, 22 N. C. 58; Tyrrell v. Morris, 21 N. C. 559 (unless impeached for fraud).

[b] **A private sale is void,** and the administrator cannot enforce payment of the purchase money. Wilson v. Armstrong, 42 Ala. 168, 94 AmD 635; Beene v. Collenberger, 38 Ala. 647; McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Fambro v. Gantt, 12 Ala. 298.

[c] **Liability for private sale.**—An executor or administrator who sells at private sale for cash ought to be charged with such sum as the property would have sold for at public auction for cash. Hudson v. Hudson, 5 Munf. (19 Va.) 180.

[d] **Sale not within statute.**—A requirement that property belonging to vacant successions can only be sold at public auction after advertisement, does not apply to sales under a statutory provision, that if a succession is so small that no one will accept the curatorship, the judge, after ordering an inventory, shall appoint the district attorney curator, who shall cause the effects to be sold and the proceeds applied to payment of the debts, the whole to be done in as summary a manner as possible to diminish costs. Simmons v. Saul, 138 U. S. 439, 11 SCt 369, 34 L. ed. 1054.

[e] **Sale of crops at market.**—(1) An executor may sell annual crops at

has been held, however, that such a statute does not control a discretion given to executors by the will with respect to the manner of sale.[75] It has been held to be a matter of indifference whether an executor or trustee observes the order of sale enjoined in the will or not, provided that no depreciation takes place in the property whose sale is irregularly postponed;[76] and a testamentary direction that certain paintings owned by the testator and of which a sale is directed "are to be taken to Europe to be recognized by art authorities" in order that the highest price be obtained for them has been held to be directory merely.[77]

[§ 732] **e. By Whom Sale Made.** As a general rule the sale is to be made by the executor or administrator,[78] and if the will directs that property shall be sold, without naming the person to sell, the executor is the proper person to carry out the directions.[79] While an executor cannot delegate to another the execution of a special power of sale committed to him by the will in personal trust and confidence,[80] neither an executor nor an administrator is required to act personally, but he may employ an agent or auctioneer to sell.[81] In case of such employment, however, the sale is still the representative's own act, and he is responsible for the negligence or defalcation of the agent, unless he used due and proper care in making the selection.[82]

[§ 733] **f. Price.** It is the duty of an executor or administrator to realize the best price obtainable for the property,[83] and if he fails in this duty he is personally liable to the persons interested in the estate for the difference between the amount received and the amount which he could have realized.[84] But if he acts in good faith and with reasonable prudence and diligence he cannot be held liable as for a devastavit upon the theory that he might have sold for a better price than he actually obtained,[85] and he is properly credited with the difference between the par value of bonds and what they brought on a sale, where it does not appear that they were sold for less than their market value.[86] It is sometimes required that the property shall not be sold for less than its appraised value,[87] but it has been held that a statute providing that unless the purchase price of property belonging to a succession is equal to its actual value its sale for less than the amount of its appraisement is void relates only to the first offering, and when the property is readvertised for sale and at a second offering sold on a twelve-months' credit it may be validly sold for whatever it will bring.[88] Where the will of a partner fixed the

private sale, but they must be actually carried to market and sold there and cannot be sold at private sale on the estate. Neal v. Patten, 40 Ga. 363. (2) The crops must not be sent to a foreign market; to do this is a devastavit, for which it is no excuse that it was done to avoid seizure by the government. Poullian v. Brown, 82 Ga. 412, 9 SE 1131.

[f] **A sale in the usual course of business** (1) of a stock of merchandise may be ordered under a statute authorizing the court to order personal property to be sold at private sale. In re Osburn, 36 Or. 8, 58 P 521. (2) A statute providing that when one dies leaving a stock of merchandise the court may allow the executor or administrator to dispose of the same at private sale, the terms being first made known to the court, is intended to confer authority to permit a private sale, upon certain terms, and this presupposes some definite offer by one proposing to buy the whole or a portion of the stock, and an order authorizing a private sale of such stock in the usual course of business is void. Tell City Furniture Co. v. Stiles, 60 Miss. 849.

[g] **One distributee cannot bind another** distributee by directions authorizing the administrator to sell assets at private sale without order of the probate court. State v. Dickson, 213 Mo. 66, 111 SW 817.

[h] **Ex parte approval.**—Assignment by an administratrix at private sale of a policy of insurance on the life of her intestate was illegal, and not validated by an ex parte order of approval entered by the ordinary of the county. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935.

[i] **If there are minor heirs,** an executor cannot sell at private sale, although he is authorized by the will to act extrajudicially. De Lemos v. Garcia, 1 Mart. N. S. (La.) 324.

75. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

76. Olliver v. King, 1 Jur. N. S. 1066.

77. Case v. Hasse, 83 N. J. Eq. 170, 176, 93 A 728 ("I see no reason why these pictures should be transported to Germany for any purpose. I do not think that the provision in the will is mandatory; it is merely directory; and this appears from the fact that the thing that was in the mind of the testatrix was that the pictures should bring a high price, or at least their full value, evidently believing that better prices could be obtained there than here. This was negatived by an expert picture dealer in his testimony; he was of the opinion that they could be sold as well here as in Germany").

78. See cases infra notes 79, 80.

[a] **The public administrator,** pending a contest as to the right to letters of administration, may be authorized to sell such portions of the assets in his charge as may be necessary for the preservation and benefit of the estate. Public Administrator v. Burdell, 4 Bradf. Surr. (N. Y.) 252.

79. McCollum v. McCollum, 33 Ala. 711.

80. Neal v. Patten, 47 Ga. 73; Berger v. Duff, 4 Johns. Ch. (N. Y.) 368.

81. Lewis v. Reed, 11 Ind. 239, 241; Landry v. Laplos, 113 La. 697, 37 S 606; Trouilly's Succ., 52 La. Ann. 276, 26 S 851; Rabasse's Succ., 51 La. Ann. 590, 25 S 326; Campbell v. Owens, 32 La. Ann. 265; Kelly v. Wimbish, (Tex. Civ. A.) 65 SW 386.

"If he is authorized by the court to sell goods at public sale, he can appoint an auctioneer to sell them. If he is thus authorized to sell property at private sale, he can appoint an agent to negotiate the sale within the limits fixed by the court, which sale he might approve and report to the court for ratification." Lewis v. Reed, supra.

82. Smith v. Smith, 79 N. C. 455 (executors who shipped cotton to an insolvent firm of commission merchants were liable to the creditors of the estate, where the unfair dealings of the firm as to a former shipment were sufficient to put the executors on their guard, although the firm was reputed to be solvent).

83. Christy v. Christy, 225 Ill. 547, 80 NE 242; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319; In re Branch, 123 Mo. A. 573, 100 SW 516.

84. Ga.—Skrine v. Simmons, 11 Ga. 401.

Ill.—Christy v. Christy, 225 Ill. 547, 80 NE 242 [aff 125 Ill. A. 442].

Ky.—Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

N. Y.—Matter of Saltus, 3 Abb. Dec. 243, 3 Keyes 500; Matter of Feierabend, 38 Misc. 524, 77 NYS 1106.

N. C.—Grant v. Reese, 94 N. C. 720.

Va.—Pinckard v. Woods, 8 Gratt. (49 Va.) 140.

[a] **Illustration.**—The sale of a good judgment for less than its face value renders the administrator liable for the difference. Grant v. Reese, 94 N. C. 720.

[b] **Sale of securities at discount.**—If an executor sells bonds for less than their value, he thereby commits a devastavit, unless it appears that the interests of the estate manifestly required such a sale. Accordingly it was held that a sale of bonds at a discount of between eighteen and twenty per cent was unauthorized where the circumstances of the estate did not require it. Pinckard v. Woods, 8 Gratt. (49 Va.) 140.

[c] **Inadequacy of price did not appear where** the administrator sold for seven hundred and fifty dollars a lease appraised at five hundred dollars, although a witness testified that he had offered one thousand dollars, but it appeared that the witness did not need the premises for his business, because he had just bought and moved into another place, and he testified on cross-examination that he did not have the money offered, and did not know how he could have become the purchaser if his offer had been accepted. Dugan's Est., Tuck. Surr. (N. Y.) 338.

[d] **A creditor consenting to a sale for an inadequate price** cannot hold the administrator liable for the loss. Cain v. Hawkins, 50 N. C. 192.

85. Miller v. Hider, 9 Colo. A. 50, 47 P 406; Woody v. Smith, 65 N. C. 116; Rice v. Hunt, 7 Lea (Tenn.) 33.

[a] **Illustrations.**—(1) If the sale was conducted fairly, after due notice, and without connivance with the purchaser, the administrator cannot be charged with a devastavit because the widow purchased many articles at the sale at a nominal price, on account of the bystanders forbearing to bid against her. Woody v. Smith, 65 N. C. 116. (2) An administrator was not liable for the loss to the estate caused by selling at a discount of twenty per cent certificates of deposit in a bank which had suspended, but which resumed payment after the sale, where the sale was public and was fairly made. Miller v. Hider, 9 Colo. A. 50, 47 P 406.

86. Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

87. In re McIntire, 1 Alaska 73.

88. Campbell v. Owens, 32 La. Ann. 265.

price which his surviving partners should pay for the goodwill of the firm, the remaindermen could not, in the absence of bad faith, fraud, or collusion, complain that the executors sold on the terms prescribed.[89]

[§ 734] **g. Terms and Conditions.**[90] While it has been said that if the representative sells for anything but cash, except in rare and exceptional cases, he becomes the guarantor of the result of the transaction, and if it proves unfortunate he may be charged as for a devastavit,[91] the more general rule allows him to sell upon reasonable credit,[92] although where he does so he must take good security for the deferred payments,[93] and if he fails to take security or takes insufficient security he is liable for any resulting loss.[94] In-

89. Brown v. Brown, 122 App. Div. 576, 107 NYS 864.

90. Sale under order of court see infra §§ 1584–1586.

91. Foster v. Thomas, 21 Conn. 285; Matter of Gilman, 39 Misc. 762, 80 NYS 1122 [rev on other grounds 82 App. Div. 186, 81 NYS 713]; Macbeth v. Macbeth, 26 U. C. Q. B. 549. See also Estill v. McClintic, 11 W. Va. 399 [foll Hoke v. Hoke, 12 W. Va. 427] (where an administrator sells personalty of his decedent, and takes bonds therefor, this is a conversion of the assets of the estate, rendering the administrator liable to account for the amount of the sales, the bonds becoming his individual property; but a court of equity will relieve him from responsibility upon its being shown that they were rendered unavailable without any fault on his part, he having acted prudently, diligently, and conscientiously in the premises).

92. Ark.—Perkins v. Crabtree, 5 Ark. 475.

Ind.—Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

N. Y.—In re Heinze, 224 N. Y. 1, 120 NE 63 [aff 181 App. Div. 915, 167 NYS 1104]; Matter of Woodbury, 13 Misc. 474, 35 NYS 485.

N. C.—Stone v. Hinton, 36 N. C. 15.

Tenn. — Bradshaw v. Cruise, 4 Heisk. 260.

Va.—Hudson v. Hudson, 5 Munf. (19 Va.) 180.

See also infra notes 93, 94.

[a] **Illustration.**—Where a will directed a sale and did not prescribe the terms of sale, a sale on a credit of twelve months was proper. Stone v. Hinton, 36 N. C. 15.

[b] **Sale must be for payment of debts and legacies.**—The statute, authorizing executors, when necessary for the payment of debts and legacies, to sell sufficient of decedent's personalty on credit, with "approved security," does not authorize an executor to sell on credit except for the payment of debts and legacies. Matter of Woodbury, 13 Misc. 474, 35 NYS 485.

[c] **Liability for not selling on credit.**—Where an executor or administrator sells at private sale for cash, he ought to be charged therefor such further sum as the property would have brought upon a reasonable credit, if the situation of the estate would admit such credit. Hudson v. Hudson, 5 Munf. (19 Va.) 180.

[d] **Where the statute fixes the period of credit.** a sale on a longer credit is void. Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498 (ten years' credit where statute authorized twelve months).

93. Ala.—Payne v. Pippey, 49 Ala. 599; Walls v. Grigsby, 42 Ala. 473; Betts v. Blackwell, 2 Stew. & P. 373.

Ark.—Perkins v. Crabtree, 5 Ark. 475.

Fla.—Sherrell v. Shepard, 19 Fla. 300.

Ill.—Bowen v. Shay, 105 Ill. 132; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108].

Ind.—Meek v. Beaver, 25 Ind. A. 576, 58 NE 730.

Ky.—Jones v. Commercial Bank, 78 Ky. 413.

Miss. — Bodley v. McKinney, 17 Miss. 339; Gordon v. Gibbs, 11 Miss. 473.

N. J.—Vreeland v. Schoonmaker, 16 N. J. Eq. 512.

N. Y.—Hasbrouck v. Hasbrouck, 27 N. Y. 182; Matter of Woodbury, 13 Misc. 474, 35 NYS 485; Orcutt v. Orms, 3 Paige 459; King v. King, 3 Johns. Ch. 552.

N. C.—Pate v. Kennedy, 104 N. C. 234, 10 SE 188; Davis v. Marcum, 57 N. C. 189.

Pa.—In re Johnston, 9 Watts & S. 107.

S. C.—Roberts v. Adams, 2 S. C. 337; Massey v. Cureton, 15 S. C. Eq. 181; Stukes v. Collins, 4 S. C. Eq. 207.

Tenn.—Mickle v. Brown, 4 Baxt. 468; Bradshaw v. Cruise, 4 Heisk. 260.

W. Va.—Wolfe v. Morgan, 61 W. Va. 287, 56 SE 504.

[a] **Security is required when a sale is private** as well as when it is made at public auction. Bowen v. Shay, 105 Ill. 132.

[b] **Sufficiency of security.** — Where an executor sold goods of testator on credit, and accepted as security a man generally reputed as good for the amount, this was sufficient to relieve him from liability, although the security did not possess a freehold. Konigmacher v. Kimmel, 1 Penr. & W. (Pa.) 207, 21 AmD 374.

[c] **Taking the note of a third person indorsed by the purchaser** is not a compliance with a statute requiring the representative to take a bond of the purchaser with approved security. Steger v. Bush, Sm. & M. Ch. (Miss.) 172.

[d] **Failure of distributee's husband to object.**—The omission of an administrator to take the security required by law on selling the property of the estate cannot be excused upon the mere ground that the distributee's husband, who may not have known what was the administrator's duty, was present and made no objection; nor is the distributee estopped from objecting to the credit. Walls v. Grigsby, 42 Ala. 473.

[e] **Taking security after delivery of the property to the purchaser** (1) satisfies the requirement of the law, and therefore an administrator is not chargeable as for a failure to take required security merely because he delivered the property to the purchaser and permitted him to remove it from the state before the security was given. Dean v. Rathbone, 15 Ala. 328. (2) But if he is unable to obtain the security after delivering the property to the purchaser, he becomes liable for the price. Betts v. Blackwell, 2 Stew. & P. (Ala.) 373.

[f] **A sale is not rendered void** by a failure to observe a statutory requirement that security be taken. Lay v. Lawson, 23 Ala. 377.

[g] **It was formerly held in South Carolina** that there was no inflexible rule forbidding an executor or administrator to sell without security. Taveau v. Ball, 6 S. C. Eq. 456.

94. Ala.—Payne v. Pippey, 49 Ala. 599; Stewart v. Stewart, 31 Ala. 207; Betts v. Blackwell, 2 Stew. & P. 373.

Ark.—Pierce v. Whipple, 123 Ark. 132, 184 SW 837.

Conn.—Foster v. Thomas, 21 Conn. 285.

Fla.—Sherrell v. Shepard, 19 Fla. 300.

Ga.—English v. Horn, 102 Ga. 770, 29 SE 972.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108.

Ind.—Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498; Lindley v. State, 116 Ind. 235, 18 NE 45.

Ky.—Jones v. Commercial Bank, 78 Ky. 413.

Mo.—State v. Taylor, 112 Mo. A. 585, 87 SW 7.

N. J.—Vreeland v. Schoonmaker, 16 N. J. Eq. 512.

N. Y.—Matter of Beach, 1 Misc. 27, 22 NYS 1079; Orcutt v. Orms, 3 Paige 459; King v. King, 3 Johns. Ch. 552.

N. C.—Davis v. Marcum, 57 N. C. 189.

Pa.—Paul v. Kennedy, 1 Grant 399; McGee's Est., 1 Phila. 443.

S. C.—Peay v. Fleming, 11 S. C. Eq. 97; Stukes v. Collins, 4 S. C. Eq. 207; Evans v. Evans, 1 S. C. Eq. 515; Smith v. Smith, 1 S. C. Eq. 304.

W. Va.—Wolfe v. Morgan, 61 W. Va. 287, 56 SE 504.

[a] **It is gross negligence** for an administrator to sell property on credit and take no security other than the bond of the purchaser. Roseman v. Pless, 65 N. C. 374.

[b] **The fact that the price exceeded the value** of the goods sold will not relieve the administrator from liability, if he fails to take security as required by law. Hasbrouck v. Hasbrouck, 27 N. Y. 182.

[c] **The financial standing of the purchaser** at the time of the sale does not affect the liability of an executor or administrator who fails to take security. Massey v. Cureton, 15 S. C. Eq. 181.

[d] **Representative liable for whole of purchase money.**—An administrator who sells the estate of his intestate on credit, and without security, is to be charged with the whole purchase money, and is precluded from showing that the price was too high. Hasbrouck v. Hasbrouck, 27 N. Y. 182 [rev 37 Barb. 579].

[e] **Unauthorized approval of probate judge.**—The administrator cannot shield himself by showing that the probate judge approved the security, in the absence of any law conferring such power on the probate judge. Sherrell v. Shepard, 19 Fla. 300.

[f] **Representative chargeable with interest.**—Lindley v. State, 116 Ind. 235, 18 NE 45.

[g] **Delay in giving security.**—The representative is not chargeable with the value of property sold by him and delivered to the purchaser before the latter has complied with the terms of sale as to security, if the purchaser afterward complies therewith. Dean v. Rathbone, 15 Ala. 328.

[h] **Sale as for cash through factors; delivery before payment.**—Where factors employed by an executor sold crops to a house of unsuspected credit, and did not require security because the sale was intended as a cash sale, and payment was demanded on the fourth day after the sale, and frequently thereafter, but the purchaser failed, the executor was not negligent in part-

solvency of sureties at the time they were accepted shows prima facie that the personal representative was negligent;[95] but an executor or administrator who accepts sureties who are at the time sufficient is not chargeable because of their subsequent insolvency,[96] or because an action on the note was successfully defended without fault on his part,[97] unless the sale was unauthorized and improper,[98] or the security was such as he had no right to take.[99]

Approval of security. As a general rule it is for the executor or administrator to determine the sufficiency of the security, and he is personally liable for any loss occasioned by his negligence or improper conduct in regard thereto,[1] but approval by the court is sometimes required.[2]

What security may be taken. Although as a general rule an executor or administrator relieves himself of personal liability for the price of goods of the estate sold on credit, where he takes sureties of sufficient financial ability at the time when he accepted them, he cannot relieve himself of liability by taking nonresidents of the state,[3] or a person who is the purchaser's partner in business;[4] and there is authority for the view that the personal security afforded by sureties on the note of the purchaser should not be allowed at all.[5]

Exchange of property. Where administrators, instead of selling bonds for cash, exchanged them for stock of a corporation which proves worthless, they were properly surcharged with the loss.[6]

[§ 735] **h. Who May Purchase[7]—(1) In General.** The general rule, subject to certain exceptions about to be discussed,[8] is that anyone may buy the property for what it will bring at a sale thereof.[9]

[§ 736] **(2) Personal Representative—(a) General Rule.** It is well settled as a general rule that an executor or administrator has no right, without the consent of the beneficiaries, to purchase the property at a sale thereof, either public or private, whether the sale is made by himself or by his coexecutor or coadministrator,[10] and a purchase by an executor or administrator from a third person

ing with the crop without security for the payment and hence was not chargeable with the loss. Taveau v. Ball, 6 S. C. Eq. 456.

[i] **Reservation of title.**—An administrator who sells chattels of the estate merely reserving title as security does so at his own peril, and is responsible for resulting loss, the statute directing that he take notes with good security for the price. Pierce v. Whipple, 123 Ark. 132, 184 SW 837.

[j] **Delivery in escrow.**—Where an administrator sold property and delivered it in escrow pending payment which might have been postponed for three years, there was no sale on credit for more than one year such as is prohibited by statute, but the depositary held the shares as a bailee. In re Heinze, 224 N. Y. 1, 120 NE 63 [aff 181 App. Div. 915, 167 NYS 1104].

95. Stewart v. Stewart, 31 Ala. 207; Curry v. Peo., 54 Ill. 263.

96. Searcy v. Holmes, 45 Ala. 225; Bodley v. McKinney, 17 Miss. 339; Gordon v. Gibbs, 11 Miss. 473; In re Johnston, 9 Watts & S. (Pa.) 107; Wilson's App., 4 Pennyp. (Pa.) 432.

[a] **It must appear that** the insolvency occurred or was discovered after the note was given, and the executor cannot discharge himself from liability for the amount of the note merely by showing that the parties thereto "proved insolvent." He must also show that they were either solvent or reputed to be solvent when the note was given. Stewart v. Stewart, 31 Ala. 207.

97. Stewart v. Stewart, 31 Ala. 207 (a successful defense to a note given for the price of property relieves the executor or administrator from liability, if it was not through his fault that the purchaser was able to defend, although the parties to the note were insolvent).

98. Smith v. Smith, 1 S. C. Eq. 304 (if the sale was unauthorized the executor is not relieved from liability by the fact that he took security and the sureties afterward became insolvent).

99. Peay v. Fleming, 11 S. C. Eq. 97 (taking security other than is authorized by the order of court is at the risk of the administrator, and he must bear any loss that ensues).

1. Hamilton v. Bonham, 20 Oh. Cir. Ct. 252, 10 Oh. Cir. Dec. 834 (the representative cannot arbitrarily reject security offered which is of the kind required by the statute, where the sureties have the requisite qualifications).

2. Matter of Woodbury, 13 Misc. 474, 35 NYS 485.

3. Roberts v. Adams, 2 S. C. 337.

4. Southall v. Taylor, 14 Gratt. (55 Va.) 269.

5. Matter of Woodbury, 13 Misc. 474, 35 NYS 485 (in this case the executor sold property of decedent and took the note of the purchaser with an indorser, after satisfying himself that the note was good and such as business men would ordinarily exact in commercial dealings. Soon afterward the maker of the note went into bankruptcy and the indorser became irresponsible. On his accounting, the executor claimed exemption from liability for the reason that the note was an "approved security" within Code Civ. Proc., § 2717, which provides for such security upon a sale by the executor or administrator of the personal property of the deceased. The court, however, held that the "approved security" required by the statute meant national and state bonds and mortgages on real estate, "because it [the sale on credit] is an investment for the time being of the assets of the estate, and courts have held rigidly to the rule that if trustees, without express authority in some legal form, invest in notes, stocks, or bonds, they will be held responsible for all losses occasioned by such investments").

6. In re Locher, 219 Pa. 46, 67 A 954.

7. **Sale under order of court** see infra §§ 1587–1599.

8. See infra §§ 736–743.

9. Owen v. Potter, 115 Mich. 556, 73 NW 977.

10. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Williams v. Cobb, 219 Fed. 663, 134 CCA 217 [aff 242 U. S. 307, 37 SCt 115, 61 L. ed. 325].

Ala.—Saltmarsh v. Beene, 4 Port. 283, 30 AmD 525.

Ark.—Wright v. Campbell, 27 Ark. 637.

Cal.—Jones v. Hanna, 81 Cal. 507, 22 P 883; Gardner v. Tatum, 81 Cal. 370, 22 P 880; Danielwitz v. Sheppard, 62 Cal. 339; Swanger v. Mayberry, 59 Cal. 91; Edwards v. Estell, 48 Cal. 194.

Conn.—Filley v. Phelps, 18 Conn. 294.

Del.—In re Pennewell, 105 A 377; Downs v. Rickards, 4 Del. Ch. 416.

Ill.—Kruse v. Steffens, 47 Ill. 112; Miles v. Wheeler, 43 Ill. 123; Lockwood v. Mills, 39 Ill. 602; Mettler v. Warner, 156 Ill. A. 31 [aff 249 Ill. 341, 94 NE 522].

Iowa.—Dillon v. Allen, 46 Iowa 299, 26 AmR 145.

Ky.—Churchill v. Akin, 5 Dana 475; Ely v. Com., 5 Dana 398; Miller v. Towles, 4 J. J. Marsh. 255.

La.—Baldwin v. Carleton, 15 La. 394.

Md.—Scott v. Burch, 6 Harr. & J. 67; Conway v. Green, 1 Harr. & J. 151.

Mass.—Blasdel v. Fowle, 120 Mass. 447, 21 AmR 533.

Mich.—Owen v. Potter, 115 Mich. 556, 73 NW 977.

Minn.—In re Robbins, 94 Minn. 433, 103 NW 217.

Miss.—McGowan v. McGowan, 48 Miss. 553; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319; Baines v. McGee, 9 Miss. 208.

Mo.—Porter v. Jones, 52 Mo. 399.

N. H.—Brackett v. Tillotson, 4 N. H. 208; Perkins v. Thompson, 3 N. H. 144; Currier v. Green, 2 N. H. 225.

N. J.—Goodell v. Monroe, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152]; In re Frey, 73 N. J. Eq. 346, 67 A 192; Slocum v. Wooley, 43 N. J. Eq. 451, 11 A 264.

N. Y.—Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev 18 App. Div. 301, 46 NYS 190].

N. C.—Tayloe v. Tayloe, 108 N. C. 69, 12 SE 836; Froneberger v. Lewis, 79 N. C. 426; Froneberger v. Lewis, 70 N. C. 456; Tate v. Dalton, 41 N. C. 562; Ford v. Blount, 25 N. C. 516; Villines v. Norfleet, 17 N. C. 167; Cannon v. Jenkins, 16 N. C. 422; Carraway v. Burbank, 12 N. C. 306; Ryden v. Jones, 8 N. C. 497, 9 AmD 660; Britton v. Browne, 4 N. C. 332; Tomlinson v. Detesatius, 3 N. C. 284.

N. D.—Macfadden v. Jenkins, 169 NW 151.

Pa.—Bowers v. Bowers, 26 Pa. 74, 67 AmD 398; Roger's Est., 18 Pa. Dist. 127; Coppel's Est., 4 Phila. 378.

S. C.—Britton v. Johnson, 11 S. C. Eq. 430; Edmonds v. Crenshaw, 6 S. C. Eq. 252; Teague v. Dixon, 5 S. C. Eq. 97; Perry v. Dixon, 4 S. C. Eq. 504 note.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88; Mead v. Byington, 10 Vt. 116.

W. Va.—Tiernan v. Minghini, 28 W. Va. 314; Newcomb v. Brooks, 16 W. Va. 32.

Eng.—Hall v. Hellet, 1 Cox Ch. 134, 29 Reprint 1096; Watson v. Toone, 6 Madd. 153, 56 Reprint 1050.

Ont.—Yost v. Crombie, 8 U. C. C. P. 159.

[a] **Reasons for rule.**—(1) "The entire control which the administrator has over his own sale, and the great temptation to fraud, has induced the courts to decide that the price at which he may purchase shall not be regarded as conclusive of the value. It is in the nature of an offer made by him which those entitled to the amount may accept, and if they do, he is bound; but if they are able to show that the property is of greater value, he must account ac-

who was an actual bidder at the sale, but who was acting in collusion with the executor or administrator, or pursuant to an agreement or understanding with him, is merely an indirect purchase by him at his own sale, and is therefore subject to the same infirmity as if he had purchased in the first instance.[11] The fact that the sale was fair and the price adequate does not, according to the weight of authority, prevent the application of the rule;[12] but there is also authority for the view that the representative may become a purchaser at his own sale, if he makes the sale fairly and pays full value.[13]

[§ 737] **(b) Effect of Sale.** It is usually considered that a sale by an executor or administrator to himself is not void but only voidable at the option of those interested in the estate,[14] and it is valid as to them until it is set aside at their instance,[15] and may be allowed to stand where it appears that the price was fair and that the transaction was for the benefit of the estate, and satisfactory to those beneficially interested.[16] As to

cordingly." Foster v. Brown, 37 S. C. L. 254, 256. (2) "This doctrine rests on the ground, well established in equity, that no trustee or person filling a fiduciary relation shall be allowed to make a profit to himself by the purchase, sale, or use of the property so intrusted to him." Yost v. Crombie, 8 U. C. C. P. 159.

[b] **Lien for price against property in the hands of subsequent purchaser.**—Where an administrator becomes a purchaser at his own sale, even if the purchase is valid, the statutory lien for the price of the property still exists on the property in his hands and may be enforced against the property in the hands of his purchaser, although he paid the price to the administrator, since payment to the estate is the only thing that can discharge the lien. Baines v. McGee, 9 Miss. 208.

[c] **Purchase by executor who has not qualified.**—A sale is not to be avoided merely because the purchaser has the power to become executor or trustee of the property purchased, as by proving the will which relates thereto, where in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. Clark v. Clark, 9 App. Cas. 733.

[d] **Purchase by corporation.**—Where administrator disposes of property of the estate to a corporation in which he is interested, the purchase is a purchase by the administrator, and value of property and any profits by corporation accrue to estate, and administrator is accountable. Macfadden v. Jenkins, (N. D.) 169 NW 151.

11. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076.

Ark. — Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Cal.—Jones v. Hanna, 81 Cal. 507, 22 P 883.

Ga.—Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252.

Ill.—Lockwood v. Mills, 39 Ill. 602.

Miss.—McGowan v. McGowan, 48 Miss. 553; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

N. Y.—Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff on op below 162 N. Y. 615 mem, 57 NE 1129 mem]; Matter of Bach, 12 NYS 712, 2 Conn. Surr. 490; Matter of Barlow, 15 NYSt 721.

N. C.—Joyner v. Conyers, 59 N. C. 78.

Pa.—Painter v. Henderson, 7 Pa. 48.

Va.—Staples v. Staples, 24 Gratt. (65 Va.) 225.

[a] **Reason for rule.**—"It would be a miserable evasion of the law if he could rightfully do this through the intervention of an agent." Ford v. Blount, 25 N. C. 516, 519.

[b] **Agreement between executor or administrator and purchaser.**—An executor or administrator cannot make any arrangement in trust or confidence with a purchaser, so as to obtain any profit or interest in the sale. Jones v. Hanna, 81 Cal. 507, 22 P 883; Lockwood v. Mills, 39 Ill. 602; McGowan v. McGowan, 48 Miss. 553; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

12. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076.

Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006; Jones v. Graham, 36 Ark. 383. But see infra note 13.

Cal.—San Diego v. San Diego, etc., R. Co., 44 Cal. 106; Boyd v. Blankman, 29 Cal. 34, 87 AmD 146.

Conn.—Matter of Bach, 12 NYS 712, 2 Conn. Surr. 490.

Del.—Downs v. Rickards, 4 Del. Ch. 416.

Ga.—Lowery v. Idleson, 117 Ga. 778, 45 SE 51; Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252; Anderson v. Green, 46 Ga. 361; Shine v. Redwine, 30 Ga. 780; Mercer v. Newsom, 23 Ga. 151.

Ill.—Lockwood v. Mills, 39 Ill. 602; Thorp v. McCullum, 6 Ill. 614.

Ky.—Blakey v. Blakey, 3 J. J. Marsh. 674.

Mass.—Ives v. Ashley, 97 Mass. 198; Harrington v. Brown, 5 Pick. 519.

Miss.—Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

Nev.—Furth v. Wyatt, 17 Nev. 180, 30 P 828.

N. Y.—Boerum v. Schenck, 41 N. Y. 182; Metropolitan El. R. Co. v. Manhattan R. Co., 11 Daly 373, 14 AbbNCas 102; Davoue v. Fanning, 2 Johns. Ch. 252.

N. C.—Cannon v. Jenkins, 16 N. C. 422; Gordon v. Finlay, 10 N. C. 239; Ryden v. Jones, 8 N. C. 497, 9 AmD 660.

Pa.—Grim's App., 105 Pa. 375; Lothrop v. Wightman, 41 Pa. 297; Copple's Est., 4 Phila. 378.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88; Mead v. Byington, 10 Vt. 116.

Va.—Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752. But see infra note 13.

Wis. — Stronach v. Stronach, 20 Wis. 129.

[a] **Purchase at appraised value.**—A purchase by the administrator of the personal property at its appraised value will not be upheld if there is any suspicion of fraud or unfairness. Queeney's Est., 12 Luz LegReg (Pa.) 25.

[b] **At law a different view prevails** and it must not only appear that the person occupying the fiduciary relation has become the purchaser, but it must also appear that the sale was accompanied by fraud. Lockwood v. Mills, 39 Ill. 602.

13. Cornish v. Johns, 74 Ark. 231, 85 SW 764; Stallings v. Foreman, 11 S. C. Eq. 401; Anderson v. Fox, 2 Hen. & M. (12 Va.) 245.

"There is nothing more common than for an executor to be a purchaser of his own sale of his testator's estate, and most commonly to the advantage of the legatees." McKey v. Young, 4 Hen. & M. (14 Va.) 430, 431.

14. U. S.—Williams v. Cobb, 242 U. S. 307, 37 SCt 115, 61 L. ed. 325; Williams v. Cobb, 219 Fed. 663, 134 CCA 217 [aff 242 U. S. 307, 37 SCt 115, 61 L. ed. 325].

Ala.—Brannan v. Oliver, 2 Stew. 47, 19 AmD 39.

Ga.—Grubbs v. McGlawn, 39 Ga. 672.

Mass.—Harrington v. Brown, 5 Pick. 519.

N. J.—Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152].

N. Y.—Forbes v. Halsey, 26 N. Y. 53; Hawley v. Cramer, 4 Cow. 717.

N. C.—Tate v. Dalton, 41 N. C. 562.

Pa.—Grim's App., 105 Pa. 375.

Vt.—Noyes v. Woodruff, 100 A 759.

[a] **Creditors** have the same right as heirs to sue to set aside a purchase by the administrator at his own sale. Grubbs v. McGlawn, 39 Ga. 672.

[b] **An executor was guilty of no wrong** in purchasing at par a note due the estate at a time when the estate was in pressing need of money and the value of the collateral securing the note was less than the amount due thereon. Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

[c] **Sale held void.**—Michoud v. Girod, 4 How. (U. S.) 503, 557, 11 L. ed. 1076 ("The purchase is void, and will be set aside at the instance of the cestui que trust, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. We are aware that cases may be found in the reports of some of the chancery courts in the United States, in which it has been held that an executor may purchase, if it be without fraud, any property of his testator, at open and public sale, for a fair price, and that such purchase is only voidable, and not void as we hold it to be. But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale. Why should the rule be relaxed in the case of persons most frequently exposed to the temptations of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? Is it not better that the cause of the evil shall be prohibited than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?"); Macarty v. Bond, 9 La. 351 (a sale to the administrator is absolutely null, and may be attacked by an opposing creditor without alleging that it was in fraud of his rights or to his injury).

15. Mercer v. Newson, 23 Ga. 151; Benson v. Benson, 97 Mo. A. 460, 71 SW 360; Mitchell v. Dunlap, 10 Oh. 117; Sullivan v. Sweeny, 189 Pa. 474, 42 A 45.

16. Raines v. Raines, 51 Ala. 237;

the representative the sale is valid and cannot be avoided by him,[17] nor will it be set aside at the instance of persons who have no interest in the estate.[18]

[§ 738] **(c) Exceptions to Rule.** The rule forbidding an executor or administrator to purchase property of the estate is not of universal application, but is subject to several exceptions.[19] Thus it has been held that he may purchase with the consent of all the persons interested in the estate,[20] or where he is himself a beneficiary of the estate,[21] or may take specific property to pay any indebtedness of the estate to himself for advances or otherwise.[22] In some jurisdictions executors and administrators have been expressly authorized by statute, subject to certain restrictions, to purchase at sales of their decedents' property.[23]

[§ 739] **(d) Ratification.** A sale by an executor or administrator to himself may be ratified by those interested in the estate,[24] and there is a ratification where such persons, with knowledge of the facts, acquiesce or fail to object within a reasonable time,[25] or accept a note given by the personal representative for the purchase money,[26] or where the representative accounts with them for the price, without any unfairness in the settlement and with knowledge on their part of all the facts.[27]

[§ 740] **(e) Purchase from Original Purchaser.** The representative may purchase from a purchaser, if the original transaction was in good faith and without collusion,[28] but the court will look with great jealousy at such a transaction, particularly where the transfer of bids or title takes place very soon after the sale.[29]

[§ 741] **(f) Liability of Representative.** The representative who purchases the property of the estate becomes personally liable for the price,[30] or

Childress v. Childress, 3 Ala. 752; In re Millenovich, 5 Nev. 161; Anderson v. Fox, 2 Hen. & M. (12 Va.) 245; Whatton v. Toone, 5 Madd. 54, 56 Reprint 815.

[a] **Bona fide purchaser from representative.**—Where an executor at his own sale bid fairly in order to enhance the price of the same, and the property was struck off to him, and he sold it, without collusion, to one who had bid against him, the purchaser acquired an absolute title. Cannon v. Jenkins, 16 N. C. 422.

Consent to sale see infra § 738.

Ratification of sale see infra § 739.

17. Benson v. Benson, 97 Mo. A. 460, 71 SW 360; McClure v. Miller, 8 S. C. Eq. 107, 21 AmD 522. But compare Sullivan v. Sweeny, 189 Pa. 474, 475, 42 A 45 ("Had the defendant applied for relief within a short time after the giving of the note, and offered to put the estate in statu quo, she would probably have had little difficulty in convincing us that the sale was one which under the circumstances should not have been made. She has, however, delayed until probably all the stock of goods which she has received has been used, and long enough to enjoy all the chances of success in the venture, and must we think be held to have distinctly elected to be bound by the bargain. This leaves her with nothing to rely upon, except the fact that she, being the defendant, is one of the executors, also a plaintiff, a bare technicality").

18. Md.—Williams v. Marshall, 4 Gill & J. 376; Richardson v. Jones, 3 Gill & J. 163, 22 AmD 293.

Mass.—Harrington v. Brown, 5 Pick. 519.

N. Y.—Jackson v. Van Dalfsen, 5 Johns. 43.

Pa.—Lothrop v. Wightman, 41 Pa. 297.

S. C.—Price v. Nesbit, 10 S. C. Eq. 445.

[a] **A mortgagor** cannot set up as a defense to an action to foreclose the mortgage that plaintiff, as administrator of the mortgagee, assigned the mortgage to a third person, by whom it was at once assigned back to plaintiff as an individual. Read v. Knell, 143 N. Y. 484, 39 NE 4 [aff 69 Hun (N. Y.) 541, 23 NYS 941].

[b] **Creditor of heir cannot question authority to sell.**—Lothrop v. Wightman, 41 Pa. 297.

[c] **The successor in office of an executor or administrator** cannot attack the validity of a purchase by his predecessor. Price v. Nesbit, 10 S. C. Eq. 445.

19. Williams v. Marshall, 4 Gill & J. (Md.) 376; Yost v. Crombie, 8 U. C. C. P. 159.

20. Tayloe v. Tayloe, 108 N. C. 69, 12 SE 836; Lyon v. Lyon, 43 N. C. 201.

[a] **Consent of minors by the guardian** of their persons is insufficient. Roger's Est., 18 Pa. Dist. 127.

21. Frazer v. Lee, 42 Ala. 25; Payne v. Turner, 36 Ala. 623; McCartney v. Calhoun, 17 Ala. 301; McLane v. Spence, 6 Ala. 894; Saltmarsh v. Beene, 4 Port. (Ala.) 283, 30 AmD 525; Brannan v. Oliver, 2 Stew. (Ala.) 47, 19 AmD 37; Froneberger v. Lewis, 79 N. C. 426; Trimmier v. Trail, 18 S. C. L. 480.

[a] **Purchase to extent of interest.**—An administrator entitled to a share of the estate may lawfully purchase at his own sale to the extent of his interest. Trimmier v. Trail, 18 S. C. L. 480.

22. Ely v. Com., 5 Dana (Ky.) 398; Haddix v. Haddix, 5 Litt. (Ky.) 201; Yost v. Crombie, 8 U. C. C. P. 159, 160.

"He is not obliged to sell the assets and pay himself out of the money, but may retain the assets themselves. So if the testator's plate was pledged to its full value, the executors might redeem it with their own money and retain it (Woodward v. Darcy, Plowd. 184), and if they pay debts of the testator's with their own money they may retain his goods to the value as their own. The form of a sale by auction was no more than a mode of ascertaining the value of the goods which he took. And the creditor may test the matter as to whether the goods seized exceed in value the sum for which the plaintiff had a right to retain, by suggesting a devastavit, if there is not enough to satisfy his claim out of the remaining assets of the estate, which appears a more reasonable mode of proceeding than by interpleader in a case of this description." Yost v. Crombie, supra.

"As he has the right to retain property at its fair value, in payment of a debt due to himself from the estate, his purchase may be considered as an election to retain, where he has the right to retain; and on that ground his title might not be disturbed, but he would be held to account for the full value, at whatever nominal price he may have purchased." Churchill v. Akin, 5 Dana (Ky.) 475, 482.

23. Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Griswold v. Chandler, 5 N. H. 492; Clark v. Clark, 65 N. C. 655; Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917; Finch v. Finch, 28 S. C. 164, 5 SE 348, 13 AmSR 665.

[a] **Rights of distributees.** — Where an administrator purchased cotton at such a sale, and charged himself with the full market value, and then resold the cotton, taking a mortgage on land to secure the price, the distributees of the estate, on foreclosure of the mortgage and purchase of the land by the administrator, had no interest in such land, although the notes taken on the resale of the cotton were payable to the administrator in his representative capacity. Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917.

24. Cal.—Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Ill.—Williams v. Rhodes, 81 Ill. 571.

Ind.—Hoover v. Malen, 83 Ind. 195.

La.—Wood v. Nicholls, 33 La. Ann. 744; Prothro v. Prothro, 33 La. Ann. 598.

Mass.—Dudley v. Sanborn, 159 Mass. 185, 34 NE 181; Ives v. Ashley, 97 Mass. 198.

Nev.—Furth v. Wyatt, 17 Nev. 180, 30 P 828.

N. C.—Lyon v. Lyon, 43 N. C. 201; Villines v. Norfleet, 17 N. C. 167.

Pa.—Grim's App., 105 Pa. 375.

S. C.—Trimmier v. Trail, 18 S. C. L. 480.

[a] **The heirs of one who has ratified the sale** are bound by his ratification. Mayer v. Schneider, 122 Ill. A. 4.

25. Ala. — Daniel v. Stough, 73 Ala. 379.

Ark.—Bland v. Fleeman, 58 Ark. 84, 23 SW 4.

Ga.—Flanders v. Flanders, 23 Ga. 249, 68 AmD 523.

Ill.—Mayer v. Schneider, 122 Ill. A. 4.

Ky.—Morrison v. Garrott, 22 SW 320, 15 KyL 305.

Md.—Williams v. Marshall, 4 Gill & J. 376.

N. C.—Tate v. Dalton, 41 N. C. 562.

Pa.—Grim's App., 105 Pa. 375.

Va.—Todd v. Moore, 1 Leigh (28 Va.) 457.

26. Mills v. Mills, 57 Fed. 873.

27. Tate v. Dalton, 41 N. C. 562; Villines v. Norfleet, 17 N. C. 167; Petty v. Harman, 16 N. C. 191.

28. Ark.—West v. Waddill, 33 Ark. 575; Payne v. Flournoy, 29 Ark. 500.

Ky.—Smith v. Pollard, 4 B. Mon. 66.

Md.—Scott v. Burch, 6 Harr. & J. 67.

Nev.—In re Millenovich, 5 Nev. 161.

S. C.—Britton v. Lewis, 29 S. C. Eq. 271.

Tenn.—Johnson v. Kay, 8 Humphr. 142.

Va.—Wayland v. Crank, 79 Va. 602; Staples v. Staples, 24 Gratt. (65 Va.) 225.

29. In re Millenovich, 5 Nev. 161; Britton v. Lewis, 29 S. C. Eq. 271.

Colorable purchase through intermediary see supra § 736.

30. Raines v. Raines, 51 Ala. 237; Young v. Wickliffe, 7 Dana (Ky.) 447; Mouton v. Beauchamp, 10 La. Ann. 666; Julian v. Wrightsman, 73 Mo. 569.

[a] **Liability for full price.**—Where an administrator bought two slaves of the estate at his own sale in 1864, at twelve hundred dollars,

value[31] thereof, and is chargeable with the amount as cash after the expiration of the term of credit.[32] It has been held that if the representative purchases at less than the appraised value he will be accountable for the difference,[33] and also that if he purchases and resells at a profit, such profit belongs to the estate.[34] An administrator who, having taken property of the estate, crediting it therefor, is personally sued therefor by another is not entitled to a credit, on his accounting, for the amount of the judgment recovered against him.[35]

[§ 742] **(3) Relative of Representative.** The husband of an executrix or administratrix cannot purchase from her or from her coexecutors or coadministrators without the consent of all the beneficiaries.[36] A sale by an executor or administrator to his son has been considered improper;[37] but it has also been held that a public sale of the assets to the son of the executor was not invalid, where a proper notice was given, and the price obtained was the best price bid, and there was no pretense that the purchase in any way operated to the benefit of the executor.[38]

[§ 743] **(4) Surviving Partner of Decedent.**[39] A surviving partner who is disposing of the property of the partnership in the absence of an executor or administrator of the deceased partner cannot buy the partnership effects himself, for he cannot at the same time occupy the position of vendor and purchaser;[40] but the reason which would forbid a transaction of this character has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased partner, and such a purchase is permissible.[41] Where the executor of the estate of a deceased partner sold to the surviving partner the interest of the estate in the business, and the same was then acquired by a firm in which such survivor and the executor, individually, had almost the entire interest, and the sale was approved by the county court in proceedings to which the legatees of the deceased partner were not parties, and they did not know of the transaction until long after the term of court had expired, a court of equity had jurisdiction to set the sale aside.[42]

[§ 744] **i. Conveyance and Transfer.**[43] If a sale is made under a power given by the will, and is absolute, and possession is delivered by the executor, no bill of sale or other written evidence is necessary to transfer the title to the purchaser.[44] It has been held that, where there is a written conveyance in which the executor neglects to recite his authority to convey, the conveyance will nevertheless be referred to such authority.[45] The purchaser of corporate stock at an executor's sale has the right to demand the identical shares purchased,[46] but the executor is entitled to a reasonable time after the sale in which to deliver the

he is liable therefor at such price, in the absence of proof that they were worth less in good currency. McDonald v. Jacobs, 85 Ala. 64, 4 S 605.

[b] **Liability to creditors.**—Where an executor makes purchases at a sale of the testator's goods, he is liable to creditors for the amount, unless he applies it to a debt of his own of as high dignity as that of the creditor who claims it. Young v. Wickliffe, 7 Dana (Ky.) 447.

[c] **Representative chargeable with interest.**—Julian v. Wrightsman, 73 Mo. 569.

31. McDonald v. Jacobs, 85 Ala. 64, 4 S 605; Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615 mem, 57 NE 1129 mem]; Whitley v. Alexander, 73 N. C. 444; Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917.

[a] **Time of valuation.**—The executor or administrator may be charged with the full value of the property at the time of the sale, with interest, or with the present value and the net income from the time of the sale. Stiles v. Burch, 5 Paige (N. Y.) 132.

[b] **If the property becomes worthless in his hands,** as in the case of emancipated slaves, he is liable for the value at the time of the sale. McDonald v. Jacobs, 85 Ala. 64, 4 S 605.

[c] **Property fluctuating in value.**—Where an executor sold to himself, at private sale, shares of stock belonging to the estate, on his accounting, the parties in interest were disposed to sanction the purchase, the executor was held liable for the market value of the stock on the day of the sale, with interest. Barker v. Smith, 1 Dem. Surr. (N. Y.) 290.

[d] **Corporate stock.**—Where an executor, being desirous of acquiring stock owned by the estate in order to secure control of the corporation, sold it under such circumstances as evidenced an intention to prevent others from bidding and obtaining it for his own benefit, and became the purchaser, and the persons interested elected to treat the transaction as a sale, the executor would be surcharged with the fair value of the stock, to be determined by evidence as to what persons were willing to pay for it, it not being generally dealt in. Matter of Haug, 55 Misc. 481, 106 NYS 850.

[e] **Statutory liability for actual value at time of sale.**—Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917; Finch v. Finch, 28 S. C. 164, 5 SE 348, 13 AmSR 665.

32. Childress v. Childress, 3 Ala. 752; Berry v. Hart, 1 S. C. 125.

[a] **The obligation of an executor to account** to a legatee springs out of the relation of the parties; and a purchase by the former at his own sale of chattels belonging to the estate of his testator does not convert the obligation into one arising from the contract of sale. Hence an executor who has purchased slaves belonging to the estate cannot in accounting to a legatee set up as a defense that his liability grew out of a contract the consideration of which was the purchase money of slaves. Berry v. Hart, 1 S. C. 125.

33. In re Pennewell, (Del.) 105 A 377; Wilbanks v. Crosno, 112 Ill. A. 503; Griswold v. Chandler, 5 N. H. 492; Matter of Bussman, 182 App. Div. 335, 170 NYS 420.

[a] **This liability is not discharged by confirmation of the sale.**—Wilbanks v. Crosno, 112 Ill. A. 503.

34. Hawaii.—Matter of Turner, 1 Hawaii 266.

Ill.—Wilbanks v. Crosno, 112 Ill. A. 503.

N. Y.—In re Bussman, 182 App. Div. 335, 170 NYS 420; Matter of Ver Valen, 24 NYS 133, Pow. Surr. 435.

N. C.—Ford v. Blount, 25 N. C. 516.

Pa.—Coppels' Est., 4 Phila. 378.

Tenn.—Johnson v. Kay, 8 Humphr. 142.

Eng.—Whatton v. Toone, 5 Madd. 54, 56 Reprint 815.

[a] **Sale by coexecutor.**—One executor cannot make a valid agreement to purchase property of the estate at a valuation from his coexecutor without becoming liable for the profits, if any are made. Gordon v. Finlay, 10 N. C. 239.

[b] **In case of a purchase by a partner of the executor with partnership funds** the executor is liable for the full amount of the profits resulting from the purchase, and not merely for his share. Wilbanks v. Crosno, 112 Ill. A. 503.

[c] **Effect of lapse of time.**—An executor purchasing assets belonging to the estate with the assent of the persons then interested will not after a length of time be answerable for a profit which he has made, unless he purchased with a fraudulent intention. Whatton v. Toone, 5 Madd. 54, 56 Reprint 815.

[d] **A representative who subsequently acquires an interest** in goods sold by him in good faith to a third person is not required to account for any profits. Johnson v. Kay, 8 Humphr. (Tenn.) 142.

35. Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615 mem, 57 NE 1129 mem].

36. Lowery v. Idson, 117 Ga. 778, 45 SE 51; Scott v. Gorton, 14 La. 111, 33 AmD 576; In re Pepperell, 27 Wkly Rep 410.

37. John v. Jones, 34 L. T. Rep. N. S. 570.

38. Bowker's Est., 5 WklyNC (Pa.) 493.

39. Rights of surviving partners generally see Partnership [30 Cyc 620].

40. Kimball v. Lincoln, 99 Ill. 578 [aff 7 Ill. A. 470].

41. Kimball v. Lincoln, 99 Ill. 578 [aff 7 Ill. A. 470]; Roys v. Vilas, 18 Wis. 169; Chambers v. Howell, 11 Beav. 6, 50 Reprint 718.

42. Mettler v. Warner, 249 Ill. 341, 94 NE 522.

43. Sale under order of court see infra §§ 1714–1729.

44. Woods v. Burrough, 2 Head (Tenn.) 202.

45. Legge v. Magwood, 16 S. C. L. 116; Holladay v. Holladay, 16 S. C. Eq. 279. But compare Little v. Chauvin, 1 Mo. 626 (where a deed for a slave was executed by several persons, all of whom were heirs and some of whom were administrators of the owner of the slave, but the deed did not state in which character the conveyance was made, it was held that it could not be read in evidence to show title in the purchaser).

46. Ohio Valley Banking, etc., Co. v. Wathen, 166 Ky. 274, 179 SW 230.

stock certificate.[47]

[§ 745] **j. Payment or Recovery of Price.**[48] The giving of a note for property purchased at an administrator's sale is not a payment therefor,[49] nor is an executor or administrator authorized to receive other property in payment for property sold by him.[50] It is presumed, after the lapse of a proper time for collecting the purchase money, that the representative has collected it.[51] Where the representative sells through an agent, partly for cash and partly on credit, and the purchasers make a cash payment to the agent, he receives it to the use of the representative.[52] Fraudulent representations in the sale may be set up by a deceived purchaser, either by action as against the representative personally or by way of defense against his own note given for the purchase money,[53] and in an action on such a note the purchaser may also show that the property for which the note was given was taken out of his possession and sold under judgments against the estate, and that the consideration of the note thus failed.[54] The purchaser upon discovering any irregularity or defect which justifies him either in rescinding the sale or in claiming damages should act promptly and so far as possible on his part seek to place the representative and estate in statu quo;[55] but where the sale is void in its inception the representative cannot coerce payment of the purchase money, and the purchaser may set up the invalidity of the contract without placing the representative in statu quo by a return of the property.[56] Where a physician and eye specialist entered into a contract with an oculist, who was administrator of the estate of a deceased physician, to purchase the business and goodwill, and the administrator, for himself, subsequently solicited the physician's as well as the oculist's business from deceased's former patients, there was a breach of the contract, precluding recovery of the portion of the price appertaining to the goodwill.[57] The purchaser may by agreement with the representative discharge his note given for the purchase money by applying the amount to the payment of the creditors of the estate,[58] but he cannot set off a debt due him from decedent against the purchase money,[59] at least where the assets are exhausted by claims having precedence in law.[60] Where an administrator takes the note of a third person, indorsed by the purchaser at the sale, and also the bond of the purchaser, and agrees to collect the note and apply the proceeds to the payment of the bond, the administrator's neglect in collecting the note, and a loss thereby, cannot relieve the purchaser from the payment of his bond, or the property from the statutory mortgage thereon.[61] Where an executor sold tobacco, made on his testator's estate, and collected a part only of the money, the residue belonged to the devisees who might pursue the debtors without recourse to the executor.[62] Where one bought property from an administrator and, through mutual mistake, paid for more articles than he received, the administrator obtained no title to the overpayment, and could convey none to the heirs.[63]

A payment in Confederate money during the Civil War might be effective,[64] and the representative has been held not chargeable with a loss resulting from his acceptance of such money in payment, where in so doing he acted in good faith and without negligence,[65] and where a sale was made with reference to Confederate money, and after the close of the war the executors settled with the purchaser at one tenth of the price bid, such settlement being

47. Ohio Valley Banking, etc., Co. v. Wathen, 166 Ky. 274, 179 SW 230 (purchaser not released from liability on bid by executor's failure to deliver certificate within ten days after sale).

48. Sale under order of court see infra §§ 1603–1623.

49. Dedman v. Williams, 2 Ill. 154.

50. Columbus Banking, etc., Co. v. Humphries, 64 Miss. 258, 1 S 232; Edney v. Baum, 70 Nebr. 159, 97 NW 252; Powers v. Powers, 48 HowPr (N. Y.) 389; In re Morrison, [1901] 1 Ch. 701.

[a] **Illustration.**—Executors and trustees have no power to make, and the court has no jurisdiction to sanction, the sale of a testator's business for shares or debentures in a company to be formed to take it over. In re Morrison, [1901] 1 Ch. 701.

51. Cole v. Leake, 27 Miss. 767; Gordon v. Gibbs, 11 Miss. 473.

52. Heffernan v. Grymes, 2 Leigh (29 Va.) 512.

53. Ala.—Riddle v. Hill, 51 Ala. 224; Craddock v. Stewart, 6 Ala. 77; Rice v. Richardson, 3 Ala. 428.

Ga.—Williamson v. Walker, 24 Ga. 257, 71 AmD 119.

Ill.—Welch v. Hoyt, 24 Ill. 117; Ray v. Virgin, 12 Ill. 216.

Ind.—Riley v. Kepler, 94 Ind. 308; Huffman v. Hendry, 9 Ind. A. 324, 36 NE 727, 53 AmSR 351.

Ky.—Phillips v. Keifer, 2 Metc. 478.

Miss.—Hutchins v. Brooks, 31 Miss. 430; George v. Bean, 30 Miss. 147.

Wis.—Newell v. Clapp, 97 Wis. 104, 72 NW 366.

"If the administrator makes representations which he knows to be untrue, for the purpose of deceiving the purchaser, who is thereby deceived, without that degree of negligence on his part, which will throw the responsibility of the deception upon himself, we hold that he may show that fraud in defense to the note. This does not dispense with the application of the rule, caveat emptor, to such sales. I know of no case where that rule has ever been so applied as to excuse a fraud. The utmost vigilance may often be unable to guard against the practices of the fraudulent. As has been repeatedly decided by this court, in the absence of fraud, the purchaser at such sales must not only look out for the title, but for the quality of the article which he purchases. Nor can the administrator bind the estate by a warranty of either. If he assumes to do so, he would be personally responsible upon such warranty. This is carrying the doctrine of risk to the purchaser and immunity to the estate far enough. To go farther, and sanction the practice of a fraud, would tend to drive all prudent men from such sales, which would prove a serious detriment to estates." Ray v. Virgin, 12 Ill. 216, 218.

[a] **False representations by auctioneer.**—"The right to make such defense is not destroyed, by the mere fact that such fraud was not perpetrated by the administrator himself, but by the auctioneer employed by him to make the sale, whilst in the very act of making the sale. For it is well settled that no one can hold an interest obtained through the fraud of another, any more than if the fraud were committed by himself. In legal contemplation, it is as much against conscience to attempt to avail one's self of the iniquity of an agent, after it is known, as if there had been preconcert." Atwood v. Wright, 29 Ala. 346.

54. Welch v. Hoyt, 24 Ill. 117; Buckels v. Cunningham, 14 Miss. 358.

[a] **Tax sale.**—One purchasing personal property of an administrator individually and permitting it to be sold without resistance for a tax due by the estate and repurchasing it is estopped to set up the eviction as a defense to the notes given to the administrator for the price. Johnson v. Dunbar, 26 La. Ann. 188.

55. Joslin v. Caughlin, 30 Miss. 502.

56. Fambro v. Gantt, 12 Ala. 298.

57. Ferris v. Pett, (R. I.) 105 A 369.

58. Pittman v. Pittman, 59 Miss. 203 [dist Bales v. Hyman, 57 Miss. 330].

59. Steel v. Steel, 12 Pa. 64.

60. Willis v. Loan, 2 T. B. Mon. (Ky.) 141; Bales v. Hyman, 57 Miss. 330.

61. Steger v. Bush, Sm. & M. Ch. (Miss.) 172.

62. Cary v. Macon, 4 Call (8 Va.) 605.

63. Redington Hub Co. v. Putnam, 76 N. H. 336, 82 A 715.

64. Wright v. Scott, 46 Ala. 200.

[a] **Liability under scaling act.**—Depriest v. Patterson, 92 N. C. 399.

65. Moffatt v. Loughridge, 51 Miss. 211; Williams v. Williams, 43 Miss. 430; Kerns v. Wallace, 64 N. C. 187; Finger v. Finger, 64 N. C. 183; Johnson v. Henagan, 11 S. C. 93; Kennedy v. Briere, 45 Tex. 305.

[a] **Improper receipt and retainer of Confederate money.**—An administrator who during the Civil War was authorized by the probate court to sell property on credit, but sold for cash and instead of paying creditors, as he might have done, kept the Confederate money received in payment, which became valueless, is chargeable with the loss, although he acted in good faith and sold the property for a fair price. Williams v. Campbell, 46 Miss. 57.

[b] **Representatives held liable.**—Bruce v. Strickland, 47 Ala. 192; White v. Gardner, 37 Tex. 407.

Acceptance of depreciated currency generally see supra § 447.

made in good faith and the amount realized being more than the value of the Confederate currency at the date of the purchase, the executors were accountable only for the amount actually received.[66]

[§ 746] **k. Application of Proceeds.**[67] The price of property sold, whether it is in cash or by the purchaser's note, and all other consideration or security realized, should be applied by the executor or administrator for the benefit of the estate in due course of law, and he will be held accountable accordingly;[68] but the purchaser is not bound to see to the application of the proceeds nor is he responsible for any misapplication thereof,[69] unless he had at the time of payment reasonable ground for believing that the executor intended to misapply the money or was in the very transaction applying it to his own private use, in which event he is responsible to the persons injured.[70]

If an executor sells the property of another among the succession effects, the owner of such property is entitled to the proceeds of its sale, not by virtue of any privilege, but because of ownership thereof.[71]

[§ 747] **1. Validity and Effect of Sale.**[72] In the absence of any showing to the contrary it is presumed that an executor or administrator who has made a sale or transfer has exercised his power rightfully;[73] and where personalty not owned by decedent but found among his chattels at the time of his death is sold the sale will usually be upheld and the right of the true owner limited to a recovery of the proceeds of sale or at most of such damages as will indemnify him.[74] A sale of property by an agent appointed by a power of attorney made by an executor, but not authorized by will to be made, is illegal as against creditors.[75] A sale of the property by a person named as executor, but who did not qualify, is void as against an executor who did qualify;[76] but where, under the existing law, an administrator has power to sell personalty, a sale by him is valid, although his letters are subsequently revoked upon the admission of a will to probate.[77] The fact that personalty belonging to an estate is traded by the executor for real estate without authority does not prevent the purchaser from getting title to the personalty which is delivered to him.[78] While a sale of personal property by an administrator without an order of court, where this is required, would be void as to distributees, if the distributees assent to it no one can complain, except perhaps creditors whose debts are unpaid or an administrator de bonis non seeking the property as assets to pay debts.[79] So also where heirs authorized and concurred in a sale of shares of stock made by the administrator, they will not be heard to say that the sale was not necessary.[80] Where an administrator acquires possession of property previously disposed of by him at a private sale, conducted in his individual capacity, he may not set up as against his purchasers the invalidity of the sale made by himself.[81] Lapse of time accompanied with proof of possession under the sale will raise a presumption in favor of the regularity of the proceedings[82] and cure informalities,[83] but it cannot cure a total want of authority.[84]

66. Smith v. Prothro, 2 S. C. 371.
67. See also infra § 1090.
Sale under order of court see infra §§ 1730–1735.
68. Pence v. Makepeace, 75 Ind. 480; Morrison v. Page, 9 Dana (Ky.) 428; Montmollin v. Gaunt, 5 Dana (Ky.) 405; Kemp's Est., 17 PittsbLeg JNS (Pa.) 82; Godwin v. Godwin, 4 Leigh (31 Va.) 410.
[a] **Discharging mortgage on property sold.**—The proceeds of cattle of decedent's estate, sold by his administrator, should be withdrawn from the general assets, and applied to discharging a mortgage thereon exceeding such proceeds. Baker v. Becker, 67 Kan. 831, 72 P 860.
[b] **Sale of property of third person.**—Where an administrator innocently sells another's property, believing that it belongs to his estate, the owner is entitled to the fund realized from the sale; and if its amount cannot be shown he may claim distribution pro rata on the value of the property with the other creditors. Kemp's Est., 34 Pittsb LegJ (Pa.) 82.
[c] **Payment of judgment.**—Where an administrator sold a note which had been given to intestate by one who subsequently recovered a judgment against the estate, it was the duty of the administrator, after selling the note, to pay the judgment. Pence v. Makepeace, 75 Ind. 480.
69. U. S.—Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.
Ky.—Morrison v. Page, 9 Dana 428.
Md.—Allender v. Riston, 2 Gill & J. 86.
N. J.—Goodell v. Munroe, 86 N. J. Eq. 18, 97 A 152.
N. Y.—Leitch v. Wells, 48 N. Y. 585; Gibbs v. Flour City Nat. Bank, 86 Hun 103, 34 NYS 195; Bogert v. Hertell, 4 Hill 492.
N. C.—Tyrell v. Morris, 21 N. C. 559.
Pa.—In re Cochrane, 202 Pa. 415, 51 A 989 [aff 2 Blair Co. 194]; Pennsylvania L. Ins., etc., Co. v. Austin, 42 Pa. 257.
Tenn.—Hadley v. Kendrick, 10 Lea 525.
Va.—Brockenbrough v. Turner, 78 Va. 438; Jones v. Clark, 25 Gratt. (66 Va.) 642; Davis v. Christian, 15 Gratt. (56 Va.) 11.
Eng.—Scott v. Tyler, 2 Bro. Ch. 431, 29 Reprint 241, Dick. 712, 21 Reprint 448; Bonney v. Ridgard, 1 Cox Ch. 146, 29 Reprint 1101; Ward v. Ward, 4 Ir. Ch. 215; Ewer v. Corbet, 2 P. Wms. 149, 24 Reprint 676; Humble v. Bill, 2 Vern. Ch. 444, 23 Reprint 884.
"The purchaser is not bound to see to the application of the money, and cannot be made liable, unless he is fixed with notice, as by showing, that the proceeds are applied to a debt of his own; which would not only fix him with notice, but make him a participator in the fraud, or by showing, in some other way, that he had actual notice of the intended misapplication. Putting him on enquiry, or constructive notice, will not do." Gray v. Armistead, 41 N. C. 74, 77.
"His title is complete by sale and delivery; what becomes of the price, is no concern to the purchaser." Scott v. Tyler, Dick. 712, 725, 21 Reprint 448.
[a] **The purchaser's knowledge of the existence of a claim** for a legacy or a debt against the estate generally does not charge him with the duty of seeing to the application of the purchase money. Keen v. James, 39 N. J. Eq. 527, 51 AmR 29; Leitch v. Wells, 48 N. Y. 585; Wood's App. 92 Pa. 379, 37 AmR 694.
70. Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310; Morrison v. Page, 9 Dana (Ky.) 428; Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152].
71. Cook's Succ., Mann. Unrep. Cas. (La.) 134.
72. Sale under order of court see infra §§ 1689–1713.
Where representative is the purchaser see supra § 737.
73. Iowa.—Marshall County v. Hanna, 57 Iowa 372, 10 NW 745.
Miss.—Booyer v. Hodges, 45 Miss. 78.
N. Y.—Gibbs v. Flour City Nat. Bank, 86 Hun 103, 34 NYS 195.
S. C.—Pulliam v. Byrd, 21 S. C. Eq. 34; Price v. Nesbit, 10 S. C. Eq. 445.
Tex.—McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718.
Va.—Knight v. Yarborough, 4 Rand. (25 Va.) 566.
Wis.—Williams v. Ely, 13 Wis. 1.
74. Waterhouse v. Bourke, 14 La. Ann. 358. See also Donaldson v. Rust, 6 Mart. (La.) 260 (the owner can claim the proceeds as he could have claimed the chattel had it not been sold, and need not claim as a creditor).
75. Neal v. Patten, 47 Ga. 73.
76. Monroe v. James, 4 Munf. (18 Va.) 194.
77. Phippard v. Forbes, 4 Harr. & M. (Md.) 481; Benson v. Rice, 11 S. C. L. 577.
78. Edney v. Baum, 70 Nebr. 159, 97 NW 252 (holding further that the purchaser, having obtained title to the goods, is liable in an action for damages by reason of fraud in the purchase if the executors elect to affirm the sale).
79. Boeger v. Langenberg, 42 Mo. A. 7; Kelso v. Vance, 2 Baxt. (Tenn.) 334.
Effect on administrator de bonis non of contracts and transactions of predecessor see infra § 2755.
80. Beale v. Barnett, 64 SW 838, 23 KyL 1118.
81. Bragg v. Massie, 38 Ala. 89, 79 AmD 82.
82. Wyatt v. Scott, 33 Ala. 313.
83. Wyatt v. Scott, 33 Ala. 313; Roberts v. Brown, 14 La. Ann. 597.
84. Wyatt v. Scott, 33 Ala. 313; Robert v. Brown, 14 La. Ann. 597.

[§ 748] **m. Ratification of Sale; Laches.** An unauthorized sale of personalty may be ratified by sanction of or confirmation by the probate court,[85] or through acquiescence of the beneficiaries,[86] or the right to attack the sale may be lost through laches;[87] but the representative cannot ratify a sale made by his own agent to the prejudice of creditors of the estate and others in interest.[88] Where no order of the court was necessary to authorize an executor to sell part of corporate stock, the only asset of the estate, to raise money to save the balance of the stock from forfeiture and to pay debts, the subsequent probate of the will in effect ratified the sale.[89]

[§ 749] **n. Title and Rights of Purchaser.**[90] A purchaser at a sale by an executor or administrator having power to sell acquires a good title,[91] although the situation of the estate did not necessitate or warrant the sale,[92] or although the representative was committing a fraud or devastavit upon the estate,[93] unless he knew of the facts,[94] or is chargeable with constructive notice.[95] Neither does the fact that the representative misapplies the proceeds prevent a purchaser for value and in good faith from acquiring a good title.[96] The purchaser acquires no title, however, where the sale

85. Holt v. Rust-Owen Lumber Co., 2 Nebr. (Unoff.) 170, 96 NW 613; Hicks v. Stone, 9 Oh. Dec. (Reprint) 132, 11 CincLBul 67; Brewster v. Baxter, 2 Wash. T. 135, 3 P 844.

[a] **Illegal sale.**—Where an administratrix assigned at private sale a policy of insurance on the life of her intestate, this was illegal, and the ordinary of the county had no authority, either in term time or vacation, to pass an ex parte order approving such transfer, and thereby to render it valid. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935.

86. Cloud v. Hartridge, 28 Ga. 272; Beale v. Barnett, 64 SW 838, 23 KyL 1118; State v. Dickson, 213 Mo. 66, 111 SW 817.

[a] **Unnecessary sale.**—Objection that a sale was unnecessary cannot be raised by the persons beneficially interested, where the sale was made with their knowledge and consent. Beale v. Barnett, 64 SE 838, 23 KyL 1118.

87. Shelby v. Creighton, 65 Nebr. 485, 91 NW 369 (delay for fifteen years after filing of account showing sale).

88. Neal v. Patten, 47 Ga. 73.

89. In re Crim, 89 Wash. 395, 154 P 811 (sale cannot be avoided because will subsequently declared void for lack of testamentary capacity).

90. Sale under order of court see infra §§ 1696–1705.

91. Ala.—Nelson v. Stollenwerck, 60 Ala. 140; Baldwin v. Hatchett, 56 Ala. 461; Van Hoose v. Bush, 54 Ala. 342; Waring v. Lewis, 53 Ala. 615; Killam v. Costley, 52 Ala. 85; Moses v. Clark, 46 Ala. 229.

Conn.—Hough v. Bailey, 32 Conn. 288.

Del.—Massey v. Farmers' Bank, 1 Del. Ch. 399.

Ga.—King v. King, 37 Ga. 205; Wright v. Zeigler, 1 Ga. 324, 44 AmD 656.

Ill.—Clark v. Adkisson, 241 Ill. 109, 89 N. E. 265; Walker v. Craig, 18 Ill. 116.

Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

Iowa.—Marshall County v. Hanna, 57 Iowa 372, 10 NW 745.

Mass.—Shaw v. Spencer, 100 Mass. 392, 1 AmR 115, 97 AmD 107; Hutchins v. State Bank, 12 Metc. 421.

Miss.—Miller v. Helm, 2 Miss. 687.

Mo.—Rocheblave v. Potter, 1 Mo. 561, 14 AmD 305.

Nebr.—Battey v. Battey, 94 Nebr. 729, 144 NW 786.

N. M.—Smith v. Steen, 20 N. M. 436, 150 P 927.

N. Y.—Dillaye v. Commercial Bank, 51 N. Y. 345; Leitch v. Wells, 48 N. Y. 585.

N. D.—Boschker v. Van Beek, 19 N. D. 104, 122 NW 338.

Oh.—Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Pa.—Petrie v. Clark, 11 Serg. & R. 377, 14 AmD 636.

S. C.—Pulliam v. Byrd, 21 S. C. Eq. 134.

Tenn.—Johnson v. Kay, 8 Humphr. 142.

Va.—Lingle v. Cook, 32 Gratt. (73 Va.) 262; Jones v. Clark, 25 Gratt. (66 Va.) 642; Staples v. Staples, 24 Gratt. (65 Va.) 225; Knight v. Yarborough, 4 Rand. (25 Va.) 566.

Eng.—Graham v. Drummond, [1896] 1 Ch. 968; Chandler v. Thompson, Hob. 265, 80 Reprint 411.

[a] **"A bare act of sale** of the assets by the executor is a sufficient indemnity to the purchaser, if there be no collusion." Kent in Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17, 11 AmD 383.

[b] **After a sale by one coadministrator,** and payment in full of the price, no fraud or collusion being charged, the administrators cannot maintain an action as for conversion. Kenyon v. Olney, 15 NYS 416.

[c] **Previous contract of sale with another person by coexecutor.** — Where one of several executors contracted to sell slaves of the testator, and another of the executors sold and delivered the same slaves to another person, who had full knowledge of the previous sale, the first purchaser had only an equitable right, and the second sale vested the legal title, which in a court of law must prevail. Smith v. Mabry, 9 Yerg. (Tenn.) 313.

[d] **Previous sale by decedent without delivery of possession.** — Where a bill of sale was executed by decedent, but he was permitted to remain in possession of the property and died in possession, a sale made to another person by the executors for valuable consideration and without notice was good against the first sale. Rocheblave v. Potter, 1 Mo. 561, 14 AmD 305.

[e] **Sale after levy of execution.** —Where a sheriff, after levying upon the personal estate of a deceased debtor, allowed the administrators to sell the same, the execution creditor could not impeach the title of the purchaser, but must take his remedy against the sheriff. Massey v. Farmers' Bank, 1 Del. Ch. 399.

[f] **A sale in satisfaction of a debt** due from the decedent to the purchaser is not subject to repudiation by the executor or administrator, on the estate afterward proving insolvent and being so declared. Parker v. Daughtry, 111 Ala. 529, 20 S 362.

[g] **Upon a bill by an administrator de bonis non** to recover a certificate of stock transferred to defendant bank by the first administrator in fraud of the estate as collateral security for a loan, it was held that the bank would be protected as a bona fide purchaser, but would be required on payment of the debt with interest, less dividends, to deliver the certificate to the estate. Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

[h] **As against a pretermitted child,** a sale of personalty by personal representatives during the pendency of administration proceedings under power of sale in the will passes good title. Smith v. Steen, 20 N. M. 436, 150 P. 927.

92. Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

Ky.—Anderson v. Irvine, 6 B. Mon. 231; Stamps v. Beaty, Hard. 337.

Md.—Miller v. Williamson, 5 Md. 219.

N. C.—Tyrrell v. Morris, 21 N. C. 559.

Va.—Knight v. Yarborough, 4 Rand. (25 Va.) 566; Sale v. Roy, 2 Hen. & M. (12 Va.) 69; Langley v. Oxford, Ambl. 795.

[a] **Purchaser not bound to inquire into representative's purpose in selling.**—Miller v. Williamson, 5 Md. 219.

[b] **The fact that the testator had provided a particular fund** for the payment of debts, of which the property sold was not a part, and that the purchaser had notice of the will, will not affect the validity of the sale. Tyrrell v. Morris, 21 N. C. 559.

[c] **The purchaser cannot compel the executor to rescind** a sale of property specifically bequeathed, whether or not the sale was necessary for the payment of debts. Sale v. Roy, 2 Hen. & M. (12 Va.) 69.

[d] **Legatee's remedy is against executor.**—Sale v. Roy, 2 Hen. & M. (12 Va.) 69.

93. Van Hoose v. Bush, 54 Ala. 342; Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730; Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820; Lipscomb v. Ward, 2 Tex. 277.

94. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

Ky.—Morrison v. Page, 9 Dana 428.

Md.—Williamson v. Morton, 2 Md. Ch. 94.

Miss.—Miller v. Helm, 10 Miss. 687; Prosser v. Leatherman, 4 Miss. 237, 34 AmD 121.

N. C.—Wilson v. Doster, 42 N. C. 231; Bradshaw v. Simpson, 41 N. C. 243.

Pa.—Schell v. Depreven, 198 Pa. 600, 48 A 813, 82 AmSR 820.

S. C.—Rhame v. Lewis, 34 S. C. Eq. 269.

Va.—Jones v. Clark, 25 Gratt, (66 Va.) 642; Pinckard v. Woods, 8 Gratt. (49 Va.) 140; Sale v. Roy, 2 Hen. & M. (12 Va.) 69.

Wis.—Stronach v. Stronach, 20 Wis. 129.

Eng.—Walker v. Taylor, 8 Jur. N. S. 681; Ewer v. Corbet, 2 P. Wms. 148, 24 Reprint 676.

[a] **Actual collusion must be shown** between the executor and the purchaser or creditor in order to defeat the title of the alienee of an executor in a court of law. Williamson v. Morton, 2 Md. Ch. 94.

[b] **If a balance is due the executor** to the amount of a note transferred, it is not a fraud on his part to appropriate the note for the payment of his own debts. Ward v. Turner, 42 N. C. 73.

95. Lang v. Metzger, 86 Ill. A. 117; Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152]; Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820.

[a] **Circumstances putting purchaser on inquiry.**—The fact that an executor applies estate assets in payment of his own debt is of itself a circumstance of suspicion which ought to put a purchaser on inquiry as to the propriety of the transaction. Lang v. Metzger, 86 Ill. A. 117.

96. Mass.—Ashton v. Atlantic Bank, 3 Allen 217.

N. H.—Sherburne v. Goodwin, 44 N. H. 271.

N. Y.—Leitch v. Wells, 49 N. Y. 585; Clark v. Coe, 52 Hun 279, 5 NYS 243.

was made without authority or in an unauthorized manner,[97] or where the sale is tainted with fraud by reason of collusion between himself and the representative;[98] nor is even a purchaser for value protected where the conveyance by the representative was in payment of his private debt,[99] unless the executor who thus sells is also residuary legatee, and the purchaser has no notice of any unsatisfied debts of the testator or any grounds which render it improper for the executor so to deal with the assets.[1] In all such cases the distributees may recover the property,[2] although the representative is estopped by his own act from recovering the property by an action at law in his own name.[3] The purchaser of a chattel does not obtain title to money and other valuables which had been secreted therein by decedent and which none of the parties knew that it contained, but holds such money and valuables, on discoverv thereof, as treasure trove for the personal representative of decedent.[4] The usual rule of caveat emptor applies to a purchase of personalty from an executor or administrator,[5] and the general rule is that there is no implied warranty,[6] either of title[7] or of soundness,[8] although there is authority for the view that there is an implied warranty of soundness and title.[9] The representative may, however, make a warranty and thus bind himself personally,[10] but he cannot bind the estate by a warranty,[11] although it has been held that a breach of warranty is available as a defense in an action against the purchaser for the price.[12] A purchaser of choses in

Oh.—Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Va.—Dodson v. Simpson, 2 Rand. (23 Va.) 294.

[a] **Even though the sale is in bad faith** on the part of the executor or administrator, and with the intent and for the purpose of converting the proceeds of the sale to his own use, the purchaser is not required to see to the proper application of the purchase money, but he will be protected in his purchase, in case he acts in good faith, and without notice of the bad faith and wrongful intention of the executor or administrator. Ashton v. Atlantic Bank, 3 Allen (Mass.) 217; Sherburne v. Goodwin, 44 N. H. 271; Jelke v. Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730; Dodson v. Simpson, 2 Rand. (23 Va.) 294.

97. Ala.—Fambro v. Gantt, 12 Ala. 298.

Ga.—Neal v. Patten, 40 Ga. 363; Worthy v. Johnson, 10 Ga. 358, 54 AmD 393.

Md.—Williamson v. Morton, 2 Md. Ch. 94.

Miss.—Magee v. Gregg, 19 Miss. 70.

Tenn.—Herron v. Marshall, 5 Humphr. 443, 42 AmD 444.

[a] **Purchaser bound to see that representative is apparently proceeding according to law.**—Neal v. Patten, 40 Ga. 363.

[b] **Notice of contents of will.**—A party dealing with an executor, as such, has notice of the existence of a will and its contents, the will being open to inspection upon the public records. Williamson v. Morton, 2 Md. Ch. 94.

[c] **A private sale** conveys no title where the law requires a public sale. Fambro v. Gantt, 12 Ala. 298.

[d] **Where representative entitled to part of property.**—Where an administrator, in right of his wife, was entitled to one third of the property sold by him at private sale, the purchaser acquired title to that extent. Cable v. Martin, 1 Miss. 558.

[e] **Expense in keeping slaves.**—One who purchases slaves from an executor who sells without authority is a wrongdoer, and is not entitled to compensation for the support and raising of the slaves, and for physicians' bills, taxes, etc., beyond the hire; but this relief is afforded him incidentally, by allowing him to recoup against the claim for hire. Gee v. Graves, 2 Head (Tenn.) 239.

[f] **Protection of subsequent bona fide purchaser.**—Where an administrator sells railroad stock, at private sale, and his purchaser sells a bona fide purchaser without notice, the title of such purchaser will be protected as against the heirs of such estate. Stinson v. Thornton, 56 Ga. 377; Nutting v. Thomason, 46 Ga. 34.

98. Ala.—Waring v. Lewis, 53 Ala. 615.

Del.—Barwick v. White, 2 Del. Ch. 284.

Ill.—Makepeace v. Moore, 10 Ill. 474.

Md.—Lark v. Linstead, 2 Md. Ch. 162.

Miss.—Booyer v. Hodges, 45 Miss. 78.

Mo.—Boeger v. Langenberg, 42 Mo. A. 7.

N. C.—Tyrrell v. Morris, 21 N. C. 559.

Tenn.—Sneed v. Hooper, Cooke 200, 5 AmD 691.

Va.—Knight v. Yarborough, 4 Rand (25 Va.) 566.

[a] **Notes transferred for illegal purposes may be recovered** from the transferee, if he had notice of the wrongful purpose of the transfer. Barwick v. White, 2 Del. Ch. 284; Makepeace v. Moore, 10 Ill. 474; Miller v. Williamson, 5 Md. 219; Booyer v. Hodges, 45 Miss. 78; Scott v. Searles, 15 Miss. 498, 45 AmD 317; Miller v. Helm, 10 Miss. 687.

99. Clark v. Coe, 52 Hun 379, 5 NYS 243.

1. Graham v. Drummond, [1896] 1 Ch. 968; Mead v. Orrery, 3 Atk. 235, 26 Reprint 937; Nugent v. Gifford, 1 Atk. 463, 26 Reprint 294; Storry v. Walsh, 18 Beav. 559, 52 Reprint 219; Whale v. Booth, 4 T. R. 625 note, 100 Reprint 1211.

[a] **This rule applies even though** such purchaser or mortgagee has thereby acquired only an equitable interest in the asset, if perfected by giving any necessary notice to the legal owner; but it does not apply when the executor, or the court administering the estate, still retains sufficient control over the asset to apply it for the benefit of creditors. Graham v. Drummond, [1896] 1 Ch. 968.

2. Herron v. Marshall, 5 Humphr. (Tenn.) 443, 42 AmD 444.

3. Fambro v. Gantt, 12 Ala. 298; Herron v. Marshall, 5 Humphr. (Tenn.) 443, 42 AmD 444.

4. Hutmacher v. Harris, 38 Pa. 491, 80 AmD 502.

5. Md.—Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A. 209.

Miss.—Ware v. Houghton, 41 Miss. 370, 93 AmD 258; Hutchins v. Brooks, 31 Miss. 430; George v. Bean, 30 Miss. 147.

Mo.—Richardson v. Palmer, 36 Mo. A. 88.

N. Y.—Sherman v. Willett, 42 N. Y. 146.

N. C.—Andres v. Lee, 21 N. C. 318.

S. C.—Eastland v. Longshorn, 10 S. C. L. 194.

Tex.—Doxey v. Burns, 37 Tex. 719.

[a] **The maxim caveat emptor applies to an executor who purchases** with the consent of the persons interested in the estate. Parker v. Leathers, 55 N. C. 249.

[b] **Assignment of mortgage running to executor.**—The assignment of a mortgage, which shows on the face thereof that it is made by the assignor as executor, notifies the assignee that the assignor does not hold the mortgage in his own right, but in the capacity of executor, and furnishes information of the particular estate to which it belongs, and the assignee is not a bona fide purchaser without notice of any infirmity in the title. Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A 209.

6. Ala.—Pool v. Hodnett, 18 Ala. 752; Ricks v. Dillahunty, 8 Port. 133.

Conn.—Bartholomew v. Warner, 32 Conn. 98, 85 AmD 251.

Ill.—Bingham v. Maxcy, 15 Ill. 295.

Md.—Mockbee v. Gardner, 2 Harr. & G. 176.

Miss.—Cogan v. Frisby, 36 Miss. 178; Hutchins v. Brooks, 31 Miss. 430; George v. Bean, 30 Miss. 147; Joslin v. Caughlin, 26 Miss. 134; Mellen v. Boarman, 21 Miss. 100.

Mo.—Richardson v. Palmer, 36 Mo. A. 88.

Tex.—Thompson v. Munger, 15 Tex. 523, 65 AmD 176; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735.

7. Ware v. Houghton, 41 Miss. 370, 93 AmD 258; Ranney v. Meisenheimer, 61 Mo. A. 434.

8. George v. Bean, 30 Miss. 147.

9. O'Neall v. Abney, 18 S. C. L. 317; Eastland v. Longshorn, 10 S. C. Eq. 194.

[a] **Estate liable.** — The estate alone is liable on such warranty, and the representative is not personally liable unless for misrepresentation. Duncan v. Bell, 11 S. C. 153.

[b] **Circumstances negativing warranty of soundness.** — McLean v. Green, 27 S. C. L. 17.

10. Ala.—Stoudenmeier v. Williamson, 29 Ala. 558.

Ga.—Aven v. Beckom, 11 Ga. 1; Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

Ill.—Ray v. Virgin, 12 Ill. 216.

Ind.—Huffman v. Hendry, 9 Ind. A. 324, 36 NE 727, 53 AmSR 351.

Ky.—Collins v. Sanders, 5 KyL 860, 12 Ky. Op. 579.

N. Y.—Westphal v. Carter, 1 Misc. 403, 20 NYS 945.

Tenn. — Sypert v. Sawyer, 7 Humphr. 413.

[a] **An auctioneer has no authority** to make a warranty binding on the executor. Blood v. French, 9 Gray (Mass.) 197.

11. U. S.—The Monte Allegre, 9 Wheat. 616, 6 L. ed. 174.

Ga.—Ramsey v. Blalock, 32 Ga. 376; Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

Ill.—Welch v. Hoyt, 24 Ill. 117; Ray v. Virgin, 12 Ill. 216.

Ind.—Huffman v. Hendry, 9 Ind. A. 324, 36 NE 727, 53 AmSR 351.

Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.

Miss.—Hutchins v. Brooks, 31 Miss. 430; George v. Bean, 30 Miss. 147; Mellen v. Boarman, 21 Miss. 100.

Oh.—Westfall v. Dungan, 14 Oh. St. 276; Dunlap v. Robinson, 12 Oh. St. 530; Lockwood v. Gilson, 12 Oh. St. 526.

Pa.—Whiteside v. Flora, 27 Pa. Co. 25, 8 Del. Co. 459, 19 LancLRev 299.

Tex.—Thompson v. Munger, 15 Tex. 523, 65 AmD 176; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735.

12. Craddock v. Stewart, 6 Ala. 77; Peden v. Moore, 1 Stew. & P. (Ala.) 71, 21 AmD 649.

action, sold at an administrator's sale, who buys in good faith takes them discharged of all equities which attach on them merely as assets;[13] but equity will follow the property into the hands of one who is not a purchaser for value,[14] or who, although he paid a valuable consideration, has been guilty of fraud and collusion with the representative to the injury of the estate.[15] A purchaser who accepts delivery or possession on condition that he shall acquire no title until payment of the price is estopped to repudiate such condition.[16] A purchaser who has paid the purchase money, which has been applied to the payment of debts and to exonerate other property, cannot be compelled to surrender the property because of an irregularity in the appointment of the administrator without the purchase money being first refunded.[17] The estate is not liable to a purchaser on the ground that the executor induced the purchase by false representations.[18]

[§ 750] **o. Setting Aside Sale**[19]**—(1) Grounds.** Mere inadequacy of price does not invalidate a sale of personalty by an executor or administrator and is not in itself a sufficient ground for setting the sale aside,[20] but inadequacy of price coupled with other suspicious circumstances or irregularities in the sale may warrant setting the same aside.[21] Fraud or collusion between the purchaser and the representative making the sale is sufficient ground for setting the sale aside;[22] and it has been laid down that a sale regularly made at a public auction as required by law can be avoided only for such fraud or collusion.[23] But on the other hand it has been held that the fact that the purchaser has chilled the bidding at a public sale may furnish ground for setting aside the sale,[24] and an unnecessary sale at which the representative becomes the purchaser may be set aside.[25]

[§ 751] **(2) Proceedings.** An action to avoid a sale by an executor or administrator for his own debt may be brought by creditors, legatees, or distributees.[26] Ordinarily the personal representative cannot attack his own sale on the ground that it was made without authority,[27] but where an administratrix having made an invalid assignment of a life policy belonging to the estate placed the policy in the hands of an attorney who stated he did not see how to prevent payments by the company to the assignee, and later retired without having brought suit, whereupon the administratrix employed other counsel, her former attorney's declaration did not estop her to set aside the transfer for fraud.[28] An offer of indemnity is unnecessary where a bill in equity is filed to set aside a purchase by the representative at his own sale,[29] and in a case where certain corporate stock belonging to plaintiff had been fraudulently sold by an executor, and the purchaser had received from the corporation thereon more than the amount received by the plaintiff as the proceeds of the sale, plaintiff was not required to surrender anything as a condition to receiving a return of the stock.[30]

Parties. If the widow of an intestate is surviving she, as well as the heirs, should be made a party to an action to avoid a sale.[31]

Pleading. In a proceeding to set aside an administrator's sale of certain stock belonging to his intestate for fraud the petition must allege the facts constituting the fraud.[32]

Decree. Where a creditor of an intestate's estate sought to set aside a sale and conveyance made by the administrator for the payment of debts on the ground of fraud, the administrator not being a party to the suit, but it did not appear

13. Rhamé v. Lewis, 34 S. C. Eq. 269.

14. Petrie v. Clark, 11 Serg. & R. (Pa.) 377, 14 AmD 636.

15. Barnawell v. Threadgill, 40 N. C. 86; Petrie v. Clark, 11 Serg. & R. (Pa.) 377, 14 AmD 636.

16. Pierce v. Whipple, 123 Ark. 132, 184 SW 837, (although the statute authorizes only security of another kind).

17. Ragland v. Green, 22 Miss. 194.

18. Huffman v. Hendry, 9 Ind. A. 324, 36 NE 727, 53 AmSR 351.

19. **Sale under order of court** see infra §§ 1648–1682.

20. Kimball v. Lincoln, 99 Ill. 578 [aff 7 Ill. A. 470].

21. Ala.—Gayle v. Singleton, 1 Stew. 566.
Ga.—Skrine v. Simmons, 11 Ga. 401.
Ill.—Christy v. Christy, 225 Ill. 547, 80 NE 242.
Ky.—Heath v. Allin, 1 A. K. Marsh. 442.
N. C.—Joyner v. Conyers, 59 N. C. 78.
Tenn.—Maxwell v. Burns, (Ch.) 59 SW 1067.
Eng.—Scott v. Tyler, 2 Bro. Ch. 431, 29 Reprint 241, Dick. 712, 21 Reprint 448; McMullen v. O'Reilley, 15 Ir. Ch. 251.

[a] **Thus** a sale by an administrator to his brother and copartner was set aside, it appearing to the court from the evidence that the sale was made at an undervalue so gross that it ought to be deemed fraudulent and void. Rice v. Gordon, 11 Beav. 265, 50 Reprint 818.

[b] **Circumstances not showing inadequacy.**—Geyer v. Snyder, 140 N. Y. 394, 35 NE 784 [aff 69 Hun 115, 23 NYS 200]; Matter of Bolton, 71 Hun 32, 24 NYS 799.

22. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.
Cal.—In re Johnson, 7 Cal. A. 436, 94 P 592.
Ga.—Rogers v. Fort, 19 Ga. 94.
Ill.—Christy v. Christy, 225 Ill. 547, 80 NE 242.
Ky.—Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.
La.—McDermott's Succ., 51 La. Ann. 173, 24 S 787.
Md.—Allender v. Riston, 2 Gill & J. 86.
Mass.—Shaw v. Spencer, 100 Mass. 393, 97 AmD 107, 1 AmR 115.
Mich.—Pierce v. Holzer, 65 Mich. 263, 32 NW 431.
Miss.—Planters' Bank v. Neely, 8 Miss. 80, 40 AmD 51.
Tenn.—Smartt v. Watterhouse, 6 Humphr. 158; Parker v. Gilliam, 10 Yerg. 394.
Va.—Dodson v. Simpson, 2 Rand. (23 Va.) 294.
Wis.—Williams v. Ely, 13 Wis. 1.
Eng.—Whale v. Booth, 4 T. R. 625 note a, 100 Reprint 1211.

[a] **Evidence sufficient to sustain finding that sale not fraudulent.**—Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

23. Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

24. Anderson v. Pedigo, 126 Ind. 564, 26 NE 397 (a widow who induces the creditors of her deceased husband to stay away from the executor's sale of the personalty by her representation that she will bid a designated sum for the property, and who bids it off for a smaller amount, and at much less than its actual value, acquires no valid title, and the sale will be set aside).

[a] **Statements by a brother of the purchaser,** not authorized to act for her, that she would bid a designated sum for the property, are not binding on her, and will not affect her title, although in reliance on such statements some of the creditors absented themselves from the sale. Anderson v. Pedigo, 126 Ind. 564, 26 NE 397.

25. Rosserd v. Depriest, 5 Gratt. (46 Va.) 6, 50 AmD 94; Anderson v. Fox, 2 Hen. & M. (12 Va.) 245.

26. Anderson v. Fox, 2 Hen. & M. (12 Va.) 245; Stronach v. Stronach, 20 Wis. 129.

[a] **Where there are no creditors or legatees,** the distributees are the proper persons to bring action. Stronach v. Stronach, 20 Wis. 129.

[b] **When heirs cannot object.**—Where succession property has been sold to pay for work done for its preservation, the sale being conducted under the direction of the executor and coöwners, and the proceeding has been recognized in the executor's final account, and the succession is insolvent, the judgment of homologation concludes the heirs, who cannot set the sale aside. Lesseps v. Lapène, 34 La. Ann. 112.

27. Bragg v. Massie, 38 Ala. 89, 79 AmD 82; Hopper v. Steele, 18 Ala. 828; Fambro v. Gantt, 12 Ala. 298; Pistole v. Street, 5 Port. (Ala.) 64.

28. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935.

29. Rayne v. Turner, 36 Ala. 623.

30. Smith v. Moore, 199 Fed. 689, 118 CCA 127.

31. Stronach v. Stronach, 20 Wis. 129.

32. Chappell v. Chappell, 124 Ky. 691, 99 SW 959, 30 KyL 935.

that the suing creditor was the only creditor of the estate, a decree directing the payment to such creditor out of the proceeds of the sale was erroneous, but the proceeds should have been put in the hands of the administrator to be applied according to law under the supervision of the probate court.[33]

[§ 752] **p. Liability of Representative.**[34] The usual rule requiring good faith, due diligence, and sound judgment[35] applies in cases of sales by a personal representative,[36] but where an administrator has used such a degree of intelligence as a man of ordinary prudence would have exercised, he is not personally liable for selling personal property without the authorization of an order of court.[37] Where the representative sells property of the estate, he is chargeable with the price realized,[38] especially if the sale was made without authority,[39] in which case the failure of the security taken does not relieve him from liability.[40] Even though personal property may have been sold by the representative for less than its full value, he is not chargeable with more than the price actually realized where he has been guilty of no bad faith or negligence in the transaction;[41] but he is chargeable with the actual or appraised value where he sells for less without authority[42] or in an unauthorized manner,[43] where he is guilty of improperly making or conducting a sale at which less than the true or appraised value is realized,[44] or where he has failed to keep an account of the amount actually realized.[45] Distributees, who direct an administrator to sell personal assets of the estate at a private sale without order of the probate court, are bound by his action, where he acts in good faith, and cannot hold him liable for a greater sum than he obtained on the sale,[46] nor can distributees complain of an administrator's action in selling personal assets at private sale without order of court if they suffer no damage thereby.[47] If the representative acting in good faith and without negligence takes security which is apparently good and sufficient when taken, he is not liable if it finally proves insufficient,[48] nor is he liable if otherwise a loss occurs not attributable to his fault or laches;[49] but he is liable for any loss due to his lack of diligence in collecting or realizing on

33. State Bank v. White, 23 Mo. 342, 66 AmD 671.

34. Sale under order of court see infra §§ 1736–1741.

35. See supra § 463.

36. Hawaii.—Savidge v. Antone, 19 Hawaii 329.

N. J.—Schweitzer v. Bonn, 55 N. J. Eq. 107, 31 A 24; In re Green, 37 N. J. Eq. 254.

N. Y.—In re Hearns, 214 N. Y. 426, 108 NE 816; Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 87 App. Div. 609 mem, 83 NYS 1117 mem]; Matter of Fidelity Loan, etc., Co., 23 Misc. 211, 51 NYS 1124.

N. C.—Tayloe v. Tayloe, 108 N. C. 69, 12 SE 836.

Pa.—Stewart's App., 110 Pa. 410, 6 A 321; Matter of McCann, 2 Pearson 486.

Va.—Lingle v. Cook, 32 Gratt. (73 Va.) 262; Pickard v. Woods, 8 Gratt. (49 Va.) 140.

37. Christy v. Christy, 125 Ill. A. 442 [aff 225 Ill. 547, 80 NE 242].

38. Ala.—Irby v. Kitchell, 42 Ala. 438.

Cal.—Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

Kan.—Musick v. Beebe, 17 Kan. 47.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

N. J.—Schick v. Grote, 42 N. J. Eq. 352, 7 A 852.

Va.—Boaz v. Hammer, 27 Gratt. (68 Va.) 382.

W. Va.—Wolfe v. Morgan, 61 W. Va. 387, 56 SE 504.

[a] **Illustration.**—An administrator who finds property among the assets of the estate, takes possession of it as the property of the estate, and sells it, having no claim to it himself, and it not being claimed by any other person, is estopped from setting up a claim adverse to the estate, and is liable to the estate for the property thus sold. Irby v. Kitchell, 42 Ala. 438.

[b] **If the representative sells for more than the appraised value,** he is of course chargeable with the price actually realized. Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466 (with interest); Boaz v. Hammer, 27 Gratt. (68 Va.) 382.

[c] **Property not inventoried.**—The representative is chargeable with the price received for property of the decedent sold by him, although it was not inventoried and he did not charge himself with the price. Shick v. Grote, 42 N. J. Eq. 352, 7 A 852; In re Merchant, 39 N. J. Eq. 506 [aff 41 N. J. Eq. 349, 7 A 633].

[d] **Where sale set aside.**—A representative who makes a sale is liable to his successor for the cash received by him, although the sale is set aside, where the possession of the purchaser is not interfered with, nor the sale actually disturbed, nor the cash paid or notes given by the purchaser returned, and the successor sues on and collects the notes. Musick v. Beebe, 17 Kan. 47.

[e] **Where title defective.**—Where the representative receives money for property sold to which the title proves defective, he must be charged with the money unless he can show himself to be under a legal obligation to refund. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

39. Henning v. Conner, 2 Bibb (Ky.) 188; Smith v. Smith, 1 S. C. Eq. 304; Little v. Cook, 10 Lea (Tenn.) 715.

40. Smith v. Smith, 1 S. C. Eq. 304.

41. Ala.—Clary v. Sanders, 43 Ala. 287.

Ill.—Christy v. Christy, 125 Ill. A. 442 [aff 225 Ill. 547, 80 NE 242].

Ky.—Bailey v. Penick, 10 KyL 239.

N. Y.—In re Bolton, 141 N. Y. 554, 35 NE 1079 [aff 5 Misc. 475, 26 NYS 333]; Matter of New York L. Ins., etc., Co., 86 App. Div. 247, 83 NYS 883; Matter of Titus, 86 Misc. 375, 148 NYS 359 [rev on other grounds 170 App. Div. 764, 156 NYS 509]; Matter of Brower, 71 Misc. 398, 130 NYS 191; In re Schleff, 169 NYS 814.

N. C.—Woody v. Smith, 65 N. C. 116.

Pa.—In re Seidman, 261 Pa. 540, 104 A 799; In re Semple, 189 Pa. 385, 42 A 28.

[a] **Chilling of sale by widow.**—Where the personal property of an intestate is sold by the administrator, and the widow purchases many articles at the sale at a nominal price, on account of the bystanders forbearing to bid against her, the administrator cannot be charged with a devastavit if he conducted the sale fairly, after due public notice, and without connivance with the widow. Woody v. Smith, 65 N. C. 116.

42. Cal.—Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

La.—Harris' Succ., 29 La. Ann. 743.

Mass.—Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.

N. Y.—Matter of Johnston, 74 Hun 618, 26 NYS 966 [aff 144 N. Y. 563 mem, 39 NE 643 mem].

S. C.—Wright v. Wright, 7 S. C. Eq. 185.

Wis.—Munteith v. Rahn, 14 Wis. 210; Williams v. Ely, 13 Wis. 1.

[a] **Improvident sale.**—Where an administrator sold at auction one eighth of a leasehold estate for one hundred and ten dollars, and it appeared from the consideration on the sale of another eighth conveyed by the intestate in his lifetime and thereafter sold, that its value was one thousand five hundred dollars, the sale by the administrator was improvidently made and he should be charged with the value of the one eighth of the leasehold estate with interest. Matter of Johnston, 74 Hun 618, 26 NYS 966 [aff 144 N. Y. 563, 39 NE 643].

[b] **Liable only for value.**—Even if an executor sells property without a license from the ordinary, he can be charged only with the value of the property and interest. Dudley v. Sanborn, 159 Mass. 185, 34 NE 181; Wright v. Wright, 7 S. C. Eq. 185.

43. State v. Dickson, 213 Mo. 66, 111 SW 817; Cannon v. Jenkins, 16 N. C. 422.

[a] **Where an administrator sells personal assets of the estate at private sale** without order of the probate court, he assumes the risk of his conduct, and although he acts in good faith, he is liable to dissenting distributees for loss resulting from his lack of prudence and skill in making the sale. State v. Dickson, 213 Mo. 66, 111 SW 817.

[b] **A statute imposing a penalty for selling otherwise than at public auction** is not applicable to a case where an executor gave a part of a standing crop for hauling the remainder to the crib. McDaniel v. Johns, 53 N. C. 414.

44. Brackett v. Tillotson, 4 N. H. 208; In re Heinze, 224 N. Y. 1, 120 NE 63; Harvey v. Steptoe, 17 Gratt. (58 Va.) 289; Macbeth v. Macbeth, 26 U. C. Q. B. 549.

45. Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428.

46. State v. Dickson, 213 Mo. 66, 111 SW 817.

[a] **An agent of an adult distributee** cannot be considered as the agent of a distributee who is a minor, so as to bind him by directions given to the administrator authorizing him to sell personal assets of the estate at private sale without order of the probate court. State v. Dickson, 213 Mo. 66, 111 SW 817.

47. State v. Dickson, 213 Mo. 66, 111 SW 817.

48. See supra § 734.

49. Ala.—Stewart v. Stewart, 31 Ala. 207.

the security.[50] Where a representative acting in good faith has sold at what is apparently a fair price, he is not chargeable with profits made by the purchaser on a new sale shortly afterward.[51] Where an executor sells property of the estate, together with property of his own, for a gross sum, a portion of which he receives, the amount received will be presumed to be on account of the property belonging to the estate.[52]

[§ 753] **6. Pledge or Mortgage.**[53] It is usually considered that, in the absence of any statutory or testamentary provision to the contrary, an executor or administrator has power to raise money on the security of the assets in his hands by pledge or mortgage in order to pay the debts or fulfill other purposes of administration,[54] and may give to the mortgagee or pledgee a power of sale.[55] The pledgee or mortgagee acquires good title as such where he acts in good faith,[56] even though the representative is guilty of a breach of trust in connection with the transaction;[57] but where he knew or might have known that the loan was not

Md.—Watkins v. Bevans, 6 Md. 489.

N. J.—Green v. Groocock, 35 N. J. Eq. 474.

Pa.—Wilson's App., 4 Pennyp. 432.

S. C.—Bryan v. Mulligan, 11 S. C. Eq. 361.

Vt.—Mead v. Byington, 10 Vt. 116.

50. Raines v. Raines, 51 Ala. 237; Beeman's Succ., 47 La. Ann. 1355, 17 S 820; In re Johnston, 9 Watts & S. (Pa.) 107; Southall v. Taylor, 14 Gratt. (55 Va.) 269.

51. In re Seidman, 261 Pa. 540, 104 A 799; Fisher's App., 34 Pa. 29; Bewley's Est., 12 Phila. (Pa.) 56.

[a] **Property taken by representative at appraised value.**—Where an administratrix elects to take certain of the effects of the decedent at the appraised value and sells them for much more, she is accountable for the proceeds of the sale. Pilkington v. Gaunt, 5 Dana (Ky.) 410.

52. Rolain v. Darby, 6 S. C. Eq. 472.

53. **Mortgage of realty** see supra §§ 696–702.

54. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.

Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226.

Conn.—Blodgett v. American Nat. Bank, 49 Conn. 9; Goodwin v. American Nat. Bank, 48 Conn. 550.

Iowa.—Deery v. Hamilton, 41 Iowa 16.

Me.—Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 345.

Mass.—Warren v. Pazolt, 203 Mass. 328, 89 NE 381 [cit Cyc].

N. Y.—In re Heinze, 224 N. Y. 1, 120 NE 63 [aff 181 App. Div. 915, 167 NYS 1104]; Gottberg v. U. S. National Bank, 13 NYS 841, 26 Abb NCas 50 [aff 16 NYS 45].

N. C.—Wilson v. Doster, 42 N. C. 231; Tyrrell v. Morris, 21 N. C. 559.

Pa.—In re Ryman, 254 Pa. 455, 99 A 24 [cit Cyc]; Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820.

W. Va.—McCreery v. Bluefield First Nat. Bank, 55 W. Va. 663, 47 SE 890.

Wis.—Hemmy v. Hawkins, 102 Wis. 56, 78 NW 177, 72 AmSR 863.

Eng.—Berry v. Gibbons, L. R. 8 Ch. 747; Farhall v. Farhall, L. R. 7 Ch. 123; Vane v. Rigden, L. R. 5 Ch. 663; Child v. Thorley, 16 Ch. D. 151; Cruikshank v. Duffin, L. R. 13 Eq. 555; Mead v. Orrery, 3 Atk. 235, 26 Reprint 937; Russell v. Plaice, 18 Beav. 21, 52 Reprint 9; Andrew v. Wrigley, 4 Bro. Ch. 125, 29 Reprint 812, 2 ERC 124; McLeod v. Drummond, 17 Ves. Jr. 152, 34 Reprint 59 [aff 14 Ves. Jr. 353, 33 Reprint 556].

[a] **Reason for rule.**—"It seems to me to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as to sell, and it would be very inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets of the testator. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done. If the executor can give a preference to a creditor by paying money to him it appears impossible to say that he cannot give the preference by mortgaging the assets to him, which would be the same thing in effect as if he mortgaged to a stranger to raise the money and paid the money to the creditor." Vane v. Rigden, L. R. 5 Ch 663, 670.

[b] **Equitable assets** may be mortgaged. Nugent v. Gifford, 1 Atk. 463, 26 Reprint 294.

[c] **Choses in action** (1) belonging to a decedent's estate may be mortgaged or pledged by the executor or administrator, and a mortgage or pledge may be effected either by an actual assignment or by a deposit. Scott x. Tyler, 2 Bro. Ch. 431, 29 Reprint 241, 2 Dick. 712, 21 Reprint 448; Vane v. Rigden, L. R. 5 Ch. 663. (2) "The authorities do not prevent the pledging of choses in action to secure the debts of or to borrow money for the estate." Farmers', etc., Bank v. Sandford, 150 Ala. 195, 199, 43 S 226.

[d] **The representative cannot pledge the credit of the estate** generally, but only specific assets. Farhall v. Farhall, L. R. 7 Ch. 123.

[e] **Contract to mortgage crops.**—The administrators of an estate have not authority to enter into a contract to mortgage all the crops grown on the estate to pay a mortgage on the land given by their intestate, and future advances to be made by the mortgagee to assist in raising the crops. Jones v. Peebles, 133 Ala. 290, 32 S 60.

[f] **Mortgage of leasehold to raise money for repairs.**—An administrator has no power to mortgage leaseholds of the intestate in order to raise money for repairing the property, where the leases do not contain covenants requiring the lessee to repair, and such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money was raised. Ricketts v. Lewis, 20 Ch. D. 745.

[g] **A testamentary power of sale,** standing alone and unaided by other provisions in the will, does not authorize a mortgage or pledge. Freeman v. Bristol Sav. Bank, 76 Conn. 212, 56 A 527.

[h] **Contrary view.**—Ford v. Russell, Freem. (Miss.) 42, 51 ("It is certain that the executor, as such, possesses no power to pledge the estate of his testator for the loan of money"); Boeger v. Langenberg, 42 Mo. A. 7 (except as permitted by statute); Merchants' Nat. Bank v. Weeks, 53 Vt. 115, 38 AmR 661.

55. Russell v. Plaice, 18 Beav. 21, 52 Reprint 9, 11 ("The power which the executor or administrator possesses of making a valid mortgage appears to me to include in it a power to give all that is properly incidental to that species of alienation. An executor who sells property of his testator necessarily gives the purchaser a power of selling the property bought, because such a power is incidental to and inseparable from the estate conferred upon him by the conveyance. The power of sale given to a mortgagee must, I think, be considered, not as the delegation of a power intrusted to the executor, which is a power to sell for the benefit of his cestui que trust, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the person interested in the assets would be injured, because in that case a mortgage could not be effected, unless on terms less advantageous than could be obtained if the person advancing his money obobtained the same security as if he was dealing with the absolute owner of the estate").

56. Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338; Wickenheiser v. Colonial Bank, 168 App. Div. 329, 153 NYS 1035; Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820; Schell v. Deperven, 198 Pa. 591, 48 A 815; Miles v. Durnford, 2 De G. M. & G. 641, 51 EngCh 501, 42 Reprint 1022.

[a] **Debt originally contracted on personal security of executor.**—It is not enough to impeach a mortgage of part of the assets that it was made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets. Miles v. Durnford, 2 De G. M. & G. 641, 51 EngCh 501, 42 Reprint 1022.

[b] **Where a coexecutor pledges** personal property of the estate in fraud thereof, but the pledgee acts in good faith and without actual or constructive notice, he acquires good title to the property. Schell v. Deperven, 198 Pa. 591, 48 A 815.

[c] **Property specifically bequeathed.**—The fact that property fraudulently pledged by a coexecutor, without the knowledge of the pledgee, while the estate is in the course of administration, is specifically bequeathed to the executor as trustee does not impose a greater duty of making inquiry on the pledgee to prevent charging him with constructive notice of the fraud, and thus defeat his claim as a bona fide pledgee than if the property was a simple asset of the estate. Schell v. Deperven, 198 Pa. 600, 48 A 813, 82 AmSR 820.

[d] **Individual note of executor.**—Where a bank in good faith lent money to an executor on his individual note, secured by a pledge of stock belonging to the estate, and on his statement that the loan was for the purposes of the estate, the pledge was held valid, so that the stock could not be recovered without refunding the loan. Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338.

57. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Lowry v. Commercial, etc., Bank, 15 F. Cas. No. 8,581, Taney 310.

Ala.—Farmers', etc., Bank v. Sanford, 150 Ala. 195, 43 S 226.

Me.—Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 AmR 338.

Md.—Miller v. Williamson, 5 Md. 219.

Mass.—Lyman v. National Bank of Republic, 181 Mass. 437, 63 NE 923.

N. J.—Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq.

for any just purpose of administration, he becomes a participant in the wrong and cannot hold the pledged or mortgaged property against the beneficiaries,[58] although his possession will generally hold good as against the representative.[59] The fact that the mortgage or pledge was given to secure an individual debt of the executor or administrator establishes the wrongful character of the transaction, and charges the mortgagee or pledgee with notice thereof.[60]

Application of proceeds.[61] A pledgee or mortgagee making a loan in good faith, and without notice of any intended misapplication by the personal representative, is not responsible for the application of the proceeds of the loan.[62]

[§ 754] **7. Acquisition by Representative**[63]**—a. In Representative Capacity.** Money received or property acquired by the representative in his fiduciary capacity and in the exercise of his official duties becomes assets of the estate in his hands,[64]

18, 97 A 152]; Prall v. Tilt, 27 N. J. Eq. 393 [aff 28 N. J. Eq. 479].

N. Y.—Smith v. New York Second Nat. Bank, 169 N. Y. 467, 62 NE 577 [rev 52 App. Div. 631, 65 NYS 1146]; Wickenheiser v. Colonial Bank, 168 App. Div. 329, 153 NYS 1035; Gottberg v. U. S. National Bank, 13 NYS 841, 26 AbbNCas 50.

Pa.—Schell v. Deperven, 198 Pa. 591, 48 A 815.

Tex.—Prieto v. Leonards, 32 Tex. Civ. A. 205, 74 SW 41.

W. Va.—McCreery v. Bluefield First Nat. Bank, 55 W. Va. 663, 47 SE 890.

Wis.—Hemmy v. Hawkins, 102 Wis. 56, 78 NW 177, 72 AmSR 863.

58. Ill.—Richley v. Childs, 114 Ill. A. 173.

Md.—Clagett v. Salmon, 5 Gill & J. 314; Allender v. Riston, 2 Gill & J. 86; Salmon v. Clagett, 3 Bland 125.

N. J.—Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152]; Prall v. Hamil, 28 N. J. Eq. 66.

N. Y.—Leitch v. Wells, 48 N. Y. 585; Moore v. American L. & T. Co., 15 NYS 382.

N. C.—Wilson v. Doster, 42 N. C. 231.

Pa.—Schell v. Deperven, 198 Pa. 591, 48 A 815; Wood's App., 92 Pa. 379, 37 AmR 694; Allegheny First Nat. Bank's App., 19 WklyNC 309.

Va.—Graff v. Castleman, 5 Rand. (26 Va.) 195, 16 AmD 741.

Eng.—Ricketts v. Lewis, 20 Ch. D. 745; Collinson v. Lister, 7 De G. M. & G. 634, 56 EngCh 491, 44 Reprint 247. See also Downes v. Power, 2 Ball & B. 491; Hall v. Andrews, 27 L. T. Rep. N. S. 195.

[a] **Pledge of property held as trustee after discharge as executor.**—Where an executor to whom certain stock is devised as trustee is discharged as executor thereof, and the stock transferred to him as trustee six years after the death of the testator, the pledge of such stock by him as executor, two years thereafter, in fraud of the beneficiaries, does not give the pledgee good title thereto, although he has no actual notice of the fraud, since the facts are sufficient to put him on inquiry which will show that the stock is no longer held by the executor in such capacity. Schell v. Deperven, 198 Pa. 591, 48 A 815.

[b] **There must be direct evidence** that the executor or administrator was acting for a purpose not connected with the administration of the estate, and such evidence is not furnished by the fact that the transaction was in the executor's individual name and that the pledgee could have ascertained by inquiring that the securities pledged were held by the executor as such. Gottberg v. U. S. National Bank, 13 NYS 841, 26 Abb NCas 50.

[c] **A pledge of assets to secure payment of a debt of a third person** is on its face an application of the assets in a manner wholly inconsistent with the duty of the executor or administrator, and the pledgee is a party to the breach of trust; and therefore the pledge will be considered at least prima facie as a fraudulent application of the assets as against all who have a claim on them, as creditors or next of kin of the decedent. Salmon v. Clagett, 3 Bland (Md.) 125.

59. Salmon v. Clagett, 3 Bland (Md.) 125; Lyman v. National Bank of Republic, 181 Mass. 437, 63 NE 923; Kenyon v. Olney, 15 NYS 416.

60. U. S.—Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.

Ind.—Nugent v. Laduke, 87 Ind. 482.

Md.—Miller v. Williamson, 5 Md. 219; Williamson v. Morton, 2 Md. Ch. 94.

N. J.—Goodell v. Monroe, 87 N. J. Eq. 328, 100 A 238 [rev 86 N. J. Eq. 18, 97 A 152].

N. Y.—Clark v. Coe, 52 Hun 379, 5 NYS 243.

Pa.—Odd Fellows Sav. Bank's App., 123 Pa. 356, 16 A 606; Wood v. Ellis, 10 Phila. 138 [aff 8 WklyNC 538]; Linton's App., 14 WklyNC 450; Martin's App., 13 WklyNC 167.

Wis.—Stronach v. Stronach, 20 Wis. 129; Weir v. Mosher, 19 Wis. 311.

Eng.—In re Scott, [1895] 1 Ch. 596.

[a] **If the pledgee has reason to believe** that a pledge of assets is not made for the benefit of the estate, but for the borrower's private use, he cannot hold such assets as security for money advanced by him. Le Baron v. Long Island Bank, 53 HowPr (N. Y.) 286.

[b] **Pledge to secure debt of firm of which representative a member.**—The fact that an executor pledged assets of the estate to secure a debt due to the pledgee by a mercantile firm, of which the executor was a member, is sufficient, in contemplation of law, to notify them that he was about to commit a devastavit, and they are charged with knowledge of all the limitations which the will as well as the law imposes on the executor. Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Miller v. Williamson, 5 Md. 219.

[c] **Property bequeathed to executor.**—A mortgage given by an executor as a security for his own debt, on assets of his testator which have been absolutely bequeathed to him, is not valid, if the mortgagee has notice that debts of the testator remain unpaid. Hall v. Andrews, 27 L. T. Rep. N. S. 195.

[d] **Transaction voidable merely.**—A mortgage or pledge to secure an individual debt is not absolutely void, but is only voidable at the instance of the persons interested in the estate. Boeger v. Langenberg, 42 Mo. A. 7.

61. See also supra § 746.

62. Farmers', etc., Bank v. Sanford, 150 Ala. 195, 199, 43 S 226; Gottberg v. U. S. National Bank, 13 NYS 841, 26 AbbNCas 50 [aff 16 NYS 45].

"There is a broad distinction between pledging notes of the estate to secure an antecedent debt of the trustee and pledging them as security for a present or subsequent consideration. In the latter case the pledgee is not required to follow the money lent and see that it is applied to the benefit of the estate." Farmers', etc., Bank v. Sanford, supra.

[a] **Circumstances imposing duty.**—An executor applied to defendant for a loan, offering as security certain shares of stock belonging to the estate. The application was rejected on the ground that the executor did not have the consent of the persons who were named in the will as his coexecutors, although defendant was advised that the acting executor alone could bind the estate. The application was then abandoned. Afterward the executor's lawyer called on defendant in reference to the matter, and in the course of the conversation with defendant's officers it was suggested that if the stock were transferred to one of the members of the decedent's family, the loan could be arranged. Thereupon the stock was transferred to S, a legatee under the will, and an application was made by her for the loan with the stock as security. The loan was made accordingly, and the joint note of the executor and S was taken by defendant. S paid nothing for the stock so transferred to her. It was held that the loan was not made to the executor, but to S, and that it at once concerned defendant to see that the money was properly applied to the use of the estate; and that until that was done, defendant dealt at its own peril, because it knew from the face of the proceeding that the proper application of the proceeds of the loan, if actually intended, depended on the will and consent of S, and was not at all at the sole option of the executor. Moore v. American L. & T. Co., 115 N. Y. 65, 21 NE 681.

63. Acquisition of realty see supra §§ 703–709.

64. Ill.—Barnes v. Peo., 197 Ill. A. 511 [aff 275 Ill. 381, 114 NE 168].

Ky.—Aulbach v. Read, 77 SW 204, 25 KyL 1130.

Me.—Emerson v. Hewins, 64 Me. 297.

Miss.—Harper v. Archer, 28 Miss. 212.

N. Y.—Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

S. C.—Huson v. Wallace, 18 S. C. Eq. 1.

Vt.—Clapp v. Beardsley, 1 Vt. 151.

Va.—Burton v. Slaughter, 26 Gratt. (67 Va.) 914.

[a] **Proceeds of insurance policy.**—Where a policy of insurance was issued in favor of a life tenant, and after her death the house was destroyed by fire and the amount of the policy was paid to her administrator, the money was held by him in trust for her estate and was a charge against him, whether or not the estate was entitled to the fund. Overstreet v. Reddick, 117 Ga. 331, 43 SE 723.

[b] **Assignment of mortgage.**—An assignment taken by an administrator of a mortgage of his intestate is presumed to inure to the estate, and one claiming under it as inuring to the administrator individually must rebut the presumption, as by showing that the administrator purchased with his own funds, or he must show himself ignorant of any of the circumstances raising the presumption. Clapp v. Beardsley, 1 Vt. 151.

[c] **Renewal of charter.**—Where, upon the death of a person having a charter for a ferry, his wife, who was his administratrix and had the care of the children, although not their legal guardian, obtained a renewal of the charter in her own name, she took the charter as trus-

and the same is true of securities taken for debts due decedent or on a sale of decedent's assets.[65] So also property purchased by the representative with the funds of his decedent is the property of the estate held by him in trust for the heirs and distributees,[66] and whatever may have been gained or saved by an executor or administrator to the estate by way of compromise or award, and whatever profit may have accrued to the representative acting as such, belongs rightfully to the estate and should be accounted for.[67] Where the representative recovers in his own name upon a contract made with him personally after the death of his decedent, respecting the estate, or receives money for the use of the estate, he is answerable as representative for the amount.[68] It has been held that an administrator cannot buy property mortgaged by a chattel mortgage to the intestate, and bind the estate by a promise made in his capacity as administrator to pay therefor.[69]

[§ 755] **b. In Individual Capacity—(1) In General.** An executor or administrator cannot purchase for himself property of the estate,[70] or buy out for himself his decedent's share in a partnership,[71] and a sale indirectly made by him to a corporation in which he is largely interested is, in law, deemed fraudulent, and may be affirmed or disaffirmed at the option of the parties in interest.[72] But an executor is not guilty of any wrong where he purchases at par a note due the estate at a time when the estate is in pressing need of money, and the value of the collateral securing the note is less than the amount due thereon.[73] Where an executor without authority to carry on a business of his testator, purchases goods for that purpose, the title to such goods vests in him individually, and they are subject to an execution against him.[74] Where intestate died leaving certain real estate subject to notes for the purchase price secured by a trust deed thereon, purchase of such notes by the administrator constituted a purchase in his individual capacity, and not for the estate.[75]

[§ 756] **(2) Purchase of Interest of Heir or Legatee.**[76] While an executor or administrator may, if the transaction is fair and the consideration adequate, purchase the interest of a legatee or distributee,[77] such a transaction should be closely

tee for the estate. Huson v. Wallace, 22 S. C. Eq. 1.

[d] **Extra allowance from debtor.**—If an executor or administrator receives from a debtor an allowance over and above the amount of the demand, for extra trouble in the settlement and adjustment of it, he is not bound to account for it; and if he should exact and receive extra interest he could not be charged with it in his administration account. Gordon v. West, 8 N. H. 444.

[e] **Goods purchased to carry on decedent's business.**—Where an executor, without authority to carry on a business of his testator, purchases goods for that purpose, the title to such goods vests in him individually. Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 S 258.

[f] **Evidence showing that property was purchased in representative capacity.**—Aulbach v. Read, 77 SW 204, 25 KyL 1130.

65. Ala.—King v. Green, 2 Stew. 133, 19 AmD 46.

Ind.—Krutz v. Stewart, 76 Ind. 9.

Ky.—Jones v. Everman, 15 B. Mon. 631, 63 AmD 521.

Me.—Dalton v. Dalton, 51 Me. 170.

S. C.—Glass v. Baxter, 4 S. C. Eq. 153.

Va.—Pulliam v. Winston, 5 Leigh (32 Va.) 324.

[a] **A bond payable to an administrator as such** is assets in the hands of an administrator de bonis non. King v. Green, 2 Stew. (Ala.) 133, 19 AmR 46.

[b] **The execution of a note to one as administrator** is prima facie evidence that the consideration of the note was the assets of the estate of the intestate. Jones v. Everman, 15 B. Mon. (Ky.) 631, 63 AmD 521.

[c] **Note taken in individual name.**—The court will follow a note of hand, as the property of an estate, if given for assets of the estate sold by the administrator, although taken in the individual name of the administrator, and will enjoin proceedings to enforce execution on the part of the individual creditors of the administrator. Glass v. Baxter, 4 S. C. Eq. 153.

[d] **Transfer.**—The representative's transfer without due consideration of a note or bond given him for a debt of the estate, even though expressed to himself individually, is a breach of trust. Krutz v. Stewart, 76 Ind. 9; Dalton v. Dalton, 51 Me. 170; Rhame v. Lewis, 34 S. C. Eq. 269; Pulliam v. Winston, 5 Leigh (32 Va.) 324.

[e] **Assumption of debt.**—(1) Where an administrator sells property of an intestate and takes notes therefor, it is competent for him to consider himself the debtor of the estate and hold the notes as his own. Rix v. Nevins, 26 Vt. 384. (2) If he accounts in money for the full amount of the note, and the settlement is accepted and the administrator discharged, the note becomes his private property. Smith v. Gregory, 75 Mo. 121.

66. In re Barnes, 197 Ill. A. 511 [aff Barnes v. Earle, 275 Ill. 381, 114 NE 168]; Parker v. Portis, 14 Tex. 166.

[a] **A claim against the estate purchased** by a personal representative with funds of the estate inures to the estate. Barnes v. Peo., 197 Ill. A. 511 [aff 275 Ill. 381, 114 NE 168].

[b] **Executrix and life tenant.**—Where an executrix having the right to possession of the estate for life or widowhood, purchased property with the mesne profits, such property belonged to her individually and was not part of the estate. Lyles v. Sims, 16 S. C. L. 42.

67. La.—Longbottom v. Babcock, 9 La. 44.

Md.—Gephart v. Strong, 20 Md. 522.

N. J.—Vreeland v. Westervelt, 45 N. J. Eq. 572, 17 A 695.

N. Y.—Paff v. Kinney, 1 Bradf. Surr. 1.

Pa.—Saeger v. Wilson, 4 Watts & S. 501; In re Heager, 15 Serg. & R. 65; Roger's Est., 18 Pa. Dist. 127; Woods v. Irwin, 13 Pa. Co. 276.

Wis.—Gillett v. Gillett, 9 Wis. 194.

68. Mowry v. Adams, 14 Mass. 327; Dawes v. Boyleston, 9 Mass. 337, 6 AmD 72.

69. West v. Dean, 15 Oh. Cir. Ct. 261, 9 Oh. Cir. Dec. 797.

70. Pine Bluff Bank v. Levi, 90 Ark. 166, 118 SW 250; Queeney's Est., 12 LuzLegReg (Pa.) 25.

[a] **He cannot take personalty at its appraised value** where there is any suspicion of fraud or unfairness; such sale will be set aside. Queeney's Est., 12 LuzLegReg (Pa.) 25.

[b] **Liability for inventory value.**—Where executors purchase a steamboat belonging to the estate and turn it over to a corporation which they organize, the sale is void, and they are liable for the inventory value of the boat. Matter of Boyer, 54 Misc. 182, 105 NYS 857.

Purchase at his own sale see supra §§ 736–741.

71. Bagwell v. Bagwell, 72 Ga. 92; Moses v. Moses, 50 Ga. 9; Mettler v. Warner, 156 Ill. A. 31 [aff 249 Ill. 341, 94 NE 522]; Matter of Barlow, 15 NYSt 721; Hall's App., 40 Pa. 409.

[a] **Accounting for profits where restoration impossible.**—Where a wrongful sale was made by executors of a partnership interest, and specific restoration was impossible, it was proper to require them to account for the profits and the value of the goodwill. Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem].

[b] **Sale by qualified executor to executor not yet qualified.**—A sale of a partnership interest of decedent by a qualified executor to a person named in the will as an executor, but not yet qualified, is voidable. Matter of Silkman, 121 App. Div. 202, 105 NYS 872 [aff 190 N. Y. 560 mem, 83 NE 1131 mem].

72. Roberts v. Weimer, 130 Ill. A. 297 [aff 227 Ill. 138, 81 NE 40].

73. Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

74. Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 S 258.

75. Mayer v. McCracken, 245 Ill. 551, 92 NE 355.

76. Transactions with heirs, etc., generally see supra § 560.

77. U. S.—Littell v. Hackley, 126 Fed. 309, 61 CCA 295 [certiorari den 194 U. S. 635, 24 SCt 858, 48 L. ed. 1160].

Iowa.—Stapleton v. Haight, 135 Iowa 564, 113 NW 351.

La.—Crow v. Griffin, 6 La. Ann. 316; Ross v. Ross, 3 La. Ann. 533.

N. C.—Wilson v. Wilson, 17 N. C. 181.

Or.—Lombard v. Carter, 36 Or. 266, 268, 59 P 473.

[a] **Compromise of judgment of testator against executor.**—An agreement between an executor and the beneficiaries under the will, whereby the beneficiaries agreed to assign to the executor the benefit of two judgments in favor of the testator against him upon debts in which he was surety, the executor agreeing to charge himself with one half of the judgments, has been upheld, it appearing that the agreement was entered into at the instance of the beneficiaries under the advice of their attorneys, that all defendants in the two judgments, the executor included, were insolvent, and that the beneficiaries were fully informed as to their interest in the claims. Downy v. Talbott, 4 KyL 453.

[b] **A statutory prohibition** of the purchase by an executor of the interests of legatees renders such a purchase voidable only and not void. French v. Phelps, 20 Cal. A. 101, 128 P 772.

scrutinized,[78] for the relation of the parties makes such a dealing suspicious and imposes on the representative the burden of showing that no advantage has been taken by him;[79] and if the transaction is tainted with fraud or imposition it will not be allowed to stand.[80] In any event, however, where the personal representative purchases the interest of a particular heir or legatee, only the vendor can object to the transaction, and the other heirs or legatees have no right to object.[81] A presumption that the representative purchased from the legatees may arise where he retains property which belonged to the estate, claiming it as his own, for a considerable time after the close of the administration.[82] Where, after an administratrix had filed her account, she obtained from the heir an assignment of certain stocks belonging to the estate to which the heir was entitled, such transaction could not be considered as amounting to a delivery of the stocks to the heir by the administratrix and a transfer of them to her after settlement of the estate.[83] Where an administratrix obtained a voidable assignment of certain stocks belonging to the estate from the heir, she was liable, on the heir's disaffirmance, to account for the value of the stocks, dividends received thereon by her, and interest on the avails of a sale thereof from the time the stocks were sold.[84] It is not unlawful for an executor to transfer at par, in settlement of a legacy, stock which is worth less than par, and at the same time to agree to repurchase the stock later at an advanced price on his personal account.[85]

[§ 757] **(3) Purchase at Judicial or Execution Sale.** A personal representative is at liberty to purchase the goods of his decedent at a judicial or execution sale,[86] unless he has in some way caused the sale to be made, or is indirectly the vendor thereat.[87]

IX. ALLOWANCE TO SURVIVING SPOUSE OR CHILDREN

[§ 758] **A. In General—1. Origin.** At common law the maintenance and care of decedent's family form no part of the duty of an executor or administrator, and he has no right to make any expenditures out of the assets of the estate for that purpose;[88] but most of the states in the Union have provided by statute for the temporary maintenance of the widow and family of a decedent, out of his estate, until they receive their distributive shares, or until some other provision can be made for their support.[89] This allowance is of purely statutory origin,[90] no provision whatever being made by common law for supplying the wants or administering to the necessities of the widow and children immediately after the death of the head of the family.[91]

[§ 759] **2. Nature and Purpose.** What is commonly known as the "widow's allowance" is usually an absolute provision to which a widow is entitled in her own right and which she may dispose of as she sees proper.[92] It is not intended to compensate the widow for any apparent injustice to which she may, in any case, be exposed by the statute rules of distribution, or by the will of her husband, but merely to furnish her and the children dependent upon her with a reasonable maintenance and support for a short period,[93] although the allowance itself does not depend upon whether

78. Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; Stapleton v. Haight, 135 Iowa 564, 113 NW 351.

79. Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; State v. Jones, 131 Mo. 194, 33 SW 23; Wilson v. Wilson, 17 N. C. 181; In re Biel, L. R. 16 Eq. 577.

80. Johnson v. Johnson, 5 Ala. 90; State v. Culhane, 78 Conn. 622, 63 A 636; Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; Baxter v. Costin, 45 N. C. 262.

[a] **Lapse of time.**—A lapse of twenty years without dissent may preclude the avoidance of such a purchase. Fisher's Est., 7 Pa. Co. 17.

81. Peyton v. Enos, 16 La. Ann. 135; Hale v. Aaron, 77 N. C. 371.

[a] **Thus,** a purchase by an executor of a special legacy is not in fraud of the rights of the residuary legatees, and he can be held to no accountability to them for any profit he may make by such purchase. Hale v. Aaron, 77 N. C. 371.

82. Cole v. Collett, Litt. Sel. Cas. (Ky.) 47.

83. State v. Culhane, 78 Conn. 622, 63 A 636.

84. State v. Culhane, 78 Conn. 622, 63 A 636.

85. Weymouth v. Goodwin, 105 Me. 510, 75 A 61, 64 ("We see nothing illegal in this. It did not affect the estate, except that as the plaintiff allowed her share to be satisfied with stock at greater than its actual value, it left so much more for other legatees. The only one who stood to lose was the defendant, and he was willing to take the chance. We think he must abide his choice").

86. Haddix v. Haddix, 5 Litt. (Ky.) 201; Earl v. Halsey, 14 N. J. Eq. 332; Blount v. Davis, 13 N. C. 19.

87. Boatwell v. Raynell, 3 N. C. 1.

Purchase at his own sale see supra §§ 736–741.

88. Ala.—Willis v. Willis, 9 Ala. 330.

Ark.—Menifee v. Ball, 7 Ark. 520.

Cal.—In re McSwain, 176 Cal. 280, 287, 168 P 117.

Ill.—Kelley v. Helmkamp, 40 Ill. A. 35.

Md.—Scott v. Dorsey, 1 Harr. & J. 227.

Mass.—Washburn v. Hale, 10 Pick. 429; Ripley v. Sampson, 10 Pick. 371.

N. J.—Graydon v. Graydon, 25 N. J. Eq. 561 [rev 23 N. J. Eq. 229].

Tex.—Mitchell v. Harrison, 32 Tex. 331.

See also infra § 775.

"Indeed, it would be a breach of trust for them to expend any of the effects of the estate for their benefit. The care of the children is entirely out of their province." Menifee v. Ball, 7 Ark. 520, 523.

[a] **Use of furniture.**—An executor has no right to leave the testator's furniture in the family mansion for the use of the family, where the will did not provide for maintaining or keeping the family in the mansion, but directed that all the movable property should be sold. Graydon v. Graydon, 25 N. J. Eq. 561 [rev 23 N. J. Eq. 229].

[b] **When the estate is kept together under an order of court** the administrator has no power to maintain the family establishment and support the family out of the estate, but the expenses of each member should be charged against his share of the estate. Hinson v. Williamson, 74 Ala. 180.

89. See the statutes; and In re Finch, 173 Cal. 462, 160 P 556; In re Barthel, 177 NYS 565 [aff 182 NYS 914].

90. Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361; Williams v. Jones, 95 N. C. 504.

"The right of the widow to a year's support is also purely statutory." Broadnax v. Broadnax, 160 N. C. 432, 433, 76 SE 216, 42 LRANS 725.

91. Hubbard v. Wood, 15 N. H. 74; Matter of Mersereau, 38 Misc. 208, 77 NYS 329.

92. Colo.—Grover v. Grover, 169 P 578.

Ky.—Newman v. Winlock, 3 Bush 241; Miller v. Miller, 6 KyL 738.

Mich.—Moore v. Moore, 48 Mich. 271, 12 NW 180.

Mo.—Mowser v. Mowser, 87 Mo. 437.

Nebr.—In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672; In re Fletcher, 83 Nebr. 156, 119 NW 232.

Tenn.—Crenshaw v. Moore, 124 Tenn. 528, 137 SW 924, 34 LRANS 1161, AnnCas1913A 165.

Utah.—In re Pugsley, 27 Utah 489, 76 P 560.

Vt.—Sawyer v. Sawyer, 28 Vt. 245.

[a] **A widow does not succeed to the husband's title** to property set apart to her as a year's support, but acquires the same adversely to his administrator, by virtue of the statute, conferring such right. Crenshaw v. Moore, 124 Tenn. 528, 137 NW 924, 34 LRANS 1161, AnnCas1913A 165. To same effect Grover v. Grover, (Colo.) 169 P 578.

93. Ala.—Kelley v. Kelley, 9 Ala. A. 306, 63 S 740.

Ark.—Calhoun v. Moore, 79 Ark. 109, 94 SW 931.

Cal.—Keyes v. Cyrus, 100 Cal. 522, 34 P 722, 38 AmSR 296; Walkerley's Est., 77 Cal. 642, 20 P 150; Bell v. Bell, 2 Cal. A. 338, 83 P 814.

Colo.—Wilson v. Wilson, 55 Colo. 70, 132 P 67.

Conn.—Havens' App., 69 Conn. 684, 38 A 795; Barnum v. Boughton, 55 Conn. 117, 10 A 514.

Fla.—Carter v. Carter, 20 Fla. 558, 51 AmR 618.

such children exist or whether decedent left a family with her.[94] This allowance is intended as a provision independent of any dower or other distributive interest in the estate,[95] and is in the nature of a preferred claim against the estate, the effect of which is to limit the power of a testator to dispose of his property.[96] It cannot be treated as a debt against the estate,[97] but is more in the nature of a part of the cost of administration.[98] It cannot be set off against a debt due by the widow to the estate,[99] but it may be denied her pending litigation.[1] The provision for the widow's

Ga.—Goss v. Harris, 117 Ga. 345, 43 SE 734.

Ill.—Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219].

Iowa.—Zunkel v. Colson, 109 Iowa 695, 81 NW 175; Newaus v. Newaus, 79 Iowa 32, 44 NW 213.

Ky.—Short v. Calway, 83 Ky. 501, 4 AmSR 168; Newman v. Winlock, 3 Bush 241.

Mass.—Glover v. Glover, 215 Mass. 576, 102 NE 945; Lisk v. Lisk, 155 Mass. 153, 29 NE 375; Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Paine v. Hollister, 139 Mass. 144, 29 NE 541; Slack v. Slack, 123 Mass. 443; Allen v. Allen, 117 Mass. 27; Wright v. Wright, 13 Allen 207; Drew v. Gordon, 13 Allen 120; Hollenbeck v. Pixley, 3 Gray 521; Adams v. Adams, 10 Metc. 170.

Mich.—Moore v. Moore, 48 Mich. 271, 12 NW 180.

Minn.—Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

Mo.—Mowser v. Mowser, 87 Mo. 437.

N. H.—Woodbury v. Woodbury, 58 N. H. 44; Foster v. Foster, 36 N. H. 437; Kingman v. Kingman, 31 N. H. 182; Mathes v. Bennett, 21 N. H. 188; Duncan v. Eaton, 17 N. H. 441; Hubbard v. Wood, 15 N. H. 74.

N. Y.—Matter of Williams, 31 App. Div. 617, 52 NYS 700, 28 NYCivProc 79; Matter of Mersereau, 38 Misc. 208, 77 NYS 329.

N. C.—Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361; In re Stewart, 140 N. C. 28, 52 SE 255; Little v. Bennett, 58 N. C. 156.

Pa.—Hettrick v. Hettrick, 55 Pa. 290; Saunder's Est., 12 LancBar 77.

Tenn.—Bayless v. Bayless, 4 Coldw. 359.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

Utah.—In re Park, 25 Utah 161, 70 P 671.

Vt.—Sawyer v. Sawyer, 28 Vt. 245.

Wash.—In re Lavenberg, 104 Wash. 515, 177 P 328.

[a] **The design of the statute** (1) is to furnish the necessary sustenance for the household for one year from decedent's death, and to enable the widow to keep her domestic circle, as respects the remaining members, unbroken during that time, and the allowance of bedding, furniture, and provisions should be made upon this basis. Strawn v. Strawn, 53 Ill. 263. To same effect Vincent v. Vincent, 1 Heisk. (Tenn.) 333. (2) "The purpose of the statute providing for the widow's allowance is to secure, to some extent at least, support to the wife and children during the period of administration, and is founded in part at least upon considerations of public policy." Wilson v. Wilson, 55 Colo. 70, 73, 132 P 67, 69. (3) "We are of opinion that this provision is intended for the present relief of the widow, for the maintenance of herself and children; that it is temporary in its nature, and personal in its character, and confers no absolute or contingent right of property which can survive her, or go to her personal representative." Adams v. Adams, 10 Metc. (Mass.) 170, 171.

[b] **The statute contemplates an immediate allowance** for the support of the family of the deceased without waiting for the final results of the deliberate processes of judicial determination. Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

[c] **Regarded as an advancement, if estate is solvent.**—The exemption of personal property to the value of one thousand dollars to the widow and minor children of a decedent, when selected and allowed, vests in them the absolute title and entire interest in the property so selected and allowed, free from all claims of creditors; but if the estate is solvent, this exemption is in the nature of an advancement to them, to be accounted for by them on final settlement as parts of their distributive shares, or of their legacies, if there is a will disposing of the entire estate. Hunter v. Law, 68 Ala. 365.

94. Moore v. Moore, 48 Mich. 271, 12 NW 180; First Nat. Bank of Commerce v. Donald, 112 Miss. 681, 73 S 723; Mowser v. Mowser, 87 Mo. 437; Sawyer v. Sawyer, 28 Vt. 245.

95. Ala.—Barton v. Laundry, 79 S 308.

Ark.—Jameson v. Jameson, 117 Ark. 142, 173 SW 851; Ex p. Grooms, 102 Ark. 322, 143 SW 1063; Remshard v. Renshaw, 102 Ark. 309, 143 SW 1092.

Colo.—Deeble v. Alerton, 58 Colo. 166, 143 P 1096, AnnCas1916C 863; Wilson v. Wilson, 55 Colo. 70, 132 P 67 [cit Cyc].

Ga.—Cole v. Cole, 135 Ga. 19, 68 SE 784; Robson v. Lindrum, 47 Ga. 250.

Ind.—In re Mertes, 181 Ind. 478, 104 NE 753; Nelson v. Wilson, 61 Ind. 255; Loring v. Craft, 16 Ind. 110; Cheek v. Wilson, 7 Ind. 354; Hays v. Buffington, 2 Ind. 369.

Iowa.—In re Miller, 143 Iowa 120, 121 NW 700; In re Peet, 79 Iowa 185, 44 NW 354; In re Dennis, 67 Iowa 110, 24 NW 746; Mahaffy v. Mahaffy, 61 Iowa 679, 17 NW 46.

Ky.—Miller v. Miller, 7 KyL 149.

Mich.—Bliss v. Livingston Prob. Judge, 149 Mich. 271, 112 NW 911; Miller v. Shipper, 32 Mich. 194.

Mo.—Martin v. Jones, 155 Mo. A. 490, 134 SW 1097.

Mont.—Tyler v. Tyler, 50 Mont. 65, 144 P 1090.

Oh.—Bause v. Muhme, 13 Oh. Cir. Ct. 501, 7 Oh. Cir. Dec. 224.

Pa.—In re Hildebrand, 262 Pa. 112, 104 A 866.

S. D.—In re James, 38 S. D. 107, 160 NW 525.

"Such bounties allowed under the statute to the widow are no part of her dower proper, though they do in some respects resemble it, for she has an absolute property in them, and not a life estate. Bryant v. McCune, 49 Mo. 546; Glenn v. Gunn, 88 Mo. A. 423; Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260. In this view essentially the Supreme Court receded from the fundamental proposition involved in Griffith v. Canning, 54 Mo. 282, as appears by the more recent case of State v. Taylor, 72 Mo. 656, though no reasoning is given, for in that case it is declared the widow of a childless husband is entitled to take such statutory allowances, and this, too, whether she elects to take her dower or the one-half of her deceased husband's estate under the statute heretofore referred to. It is to be noted of this case that the opinion was prepared by the same judge who wrote Griffth v. Canning; this, too, when that case alone was cited in the briefs in support of the contrary doctrine. The principles of the two adjudications reflect a fundamental variance which may not be reconciled, and it would have relieved us of much labor had the first decision been expressly overruled as it should have been, instead of by process sub silentio. Besides this authority, which entirely repels the idea that the widow by electing to take one-half of the estate postponed her claim to the statutory allowance to that of a distributee after the debts are paid, the more recent case of Waters v. Herbeth, 178 Mo. 166, 77 SW 305, declares the purpose of sections 115, 116, 117, Rev. St. 1909, is to give the articles mentioned and the rights thereto to the widow immediately, and that her right attaches at once upon the death of her husband. The court declares in that case that the articles and rights contemplated by those sections are to form no part of the estate either for the creditors or the distributees, and, furthermore, that the rights of the widow immediately dissever such articles from the corpus of the estate. It is said, too, those sections of the statute and the rights of the widow thereunder are not to be considered in any manner in connection with section 351, which confers upon her the right to one-half of the deceased husband's real and personal property subject to the payment of debts, provided he dies without children or other descendants. From these more recent decisions of the Supreme Court, it is obvious that the doctrine of Griffith v. Canning, supra, no longer obtains as the rule of decision in that tribunal, and, after putting that adjudication out of the way, it is entirely clear that the widow did not forego her right to the $400 allowance by the mere act of electing under the statutes to take one-half of her husband's estate in lieu of her dower in real estate as mentioned by the pointed reference to the several sections of the statute pertaining to dower in lands in sections 353 and 355, which confer the right and point out the method of declaring the election." Martin v. Jones, 155 Mo. A. 490, 496, 134 SW 1097.

[a] **That property has been set apart as a homestead** for the benefit of the wife and minor children does not defeat their right after the husband's death to the statutory year's support, even though for more than a year succeeding his death they may have lived on the homestead estate and derived a support from it. Bardwell v. Edwards, 117 Ga. 824, 45 SE 40.

[b] **A surviving husband,** (1) who was joint owner of the fee, was entitled not only to his one fourth of the rents, his share as joint owner, but also to one third of the other three fourths of the rent until dower was allotted or the land was sold. Hamilton v. Riney, 140 Ky. 476, 131 SW 287. (2) Under a statute providing that a widower shall, in addition to curtesy, be allowed to keep, as his absolute property, all of the property provided for a widow out of her husband's estate, a widower can take, regardless of the birth of issue. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16 [foll Ferguson v. Gentry, 206 Mo. 203, 104 SW 108].

96. In re James, 38 S. D. 107, 160 NW 525.

Priority over other claims generally see infra §§ 804–808.

97. Barnum v. Boughton, 55 Conn. 117, 10 A 514; Short v. Galway, 83 Ky. 501, 4 AmSR 168.

98. Deeble v. Alerton, 58 Colo. 166, 143 P 1096, AnnCas1916C 863; Wilson v. Wilson, 55 Colo. 70, 132 P 67; In re Miller, 143 Iowa 120, 121 NW 700; In re Peet, 79 Iowa 185, 44 NW 354; In re Dennis, 67 Iowa 110, 24 NW 746; Mahaffy v. Mahaffy, 61 Iowa 679, 17 NW 46; Bliss v. Livingston Prob. Judge, 149 Mich. 271, 112 NW 911; Miller v. Stepper, 32 Mich. 194.

99. Leaverton v. Leaverton, 40 Tex. 218.

1. Cooke v. Barker, Hopk. (N. Y.) 134.

allowance is usually held to apply regardless of the testacy or intestacy of decedent[2] or the solvency or insolvency of the estate;[3] but if decedent left no estate or assets sufficient for providing the statutory allowance, no obligation rests upon the executor or administrator to furnish it.[4] Where, as is sometimes the case, certain specified articles are set aside as exempted for the widow, such articles are not to be treated as assets, and are not subject to distribution, nor can they be claimed from the widow by the personal representative of the decedent.[5]

[§ 760] **3. Necessitous Circumstances.** It is sometimes considered that the allowance or exemptions granted by statute which take priority of debts due by the estate presuppose the surviving widow, children, or family to be in necessitous circumstances,[6] and an allowance may be refused where no good reason is shown for granting it.[7] But there is also authority for the view that the right is an absolute one, not dependent upon the widow being in necessitous circumstances,[8] and that the court's discretion extends only to the amount to be awarded, and an allowance may not be denied entirely.[9]

[§ 761] **4. What Law Governs.** It has been considered that the widow's allowance is to be determined by the law of the domicile of decedent,[10] in force at his death;[11] but there is also authority for the view that, where the widow is an actual and bona fide resident of a state other than that of her husband's residence, the law of the state of the widow's residence governs,[12] and that the allowance provided by the statute of a state may be granted, out of property within the state, to the widow of a nonresident decedent.[13] However,

2. U. S.—Hull v. Dicks, 235 U. S. 584, 35 SCt 152, 59 L. ed. 372.
Ky.—Graves v. Graves, 10 B. Mon. 31.
Miss.—Turner v. Turner, 30 Miss. 428; McReary v. Robinson, 20 Miss. 318.
Nebr.—Fletcher v. Fletcher, 83 Nebr. 156, 119 NW 232 [foll In re Leavitt, 85 Nebr. 521, 124 NW 114].
Tenn.—Pride v. Watson, 7 Heisk. 232; Curd v. Curd, 9 Humphr, 171.
But see In re Harrison, 2 Ont. L. 217 [foll In re Twigg, [1892] 1 Ch. 579 (Devolution of Estates Act § 12) [Ont. Rev. St. (1897) c 127], as to the widow's statutory claim for one thousand dollars, does not apply where there is a partial intestacy).
[a] **Allowance to surviving husband.**—Rev. St. (1899) § 111, providing that, if a wife shall die intestate owning personal property in her own name, in addition to curtesy, her widower shall be allowed to keep as his absolute property all the articles and property, and be entitled to all the remedies and reliefs relating to the deceased wife's property as is provided for the widow in the deceased husband's property under §§ 105–107, 109, has no application to the estate of a wife who died testate. Black v. Brittain, 116 Mo. A. 386, 92 SW 500.
[b] **Statutes limited to intestate estates.**—Richardson v. Frederitze, 35 Mo. 266.
3. See infra § 771.
4. Weckerly's Est., 11 WklyNC (Pa.) 287.
5. Ala.—Byrd v. Jones, 84 Ala. 336, 4 S 375; Davis v. Davis, 63 Ala. 293.
Cal.—Walkerley's Est., 77 Cal. 642, 20 P 150.
Ill.—Strawn v. Strawn, 53 Ill. 263.
Ky.—Ballard v. Ballard, 9 KyL 574.
Mo.—Hasenritter v. Hasenritter, 77 Mo. 162.
N. Y.—Kain v. Fisher, 6 N. Y. 597; Kapp v. Public Administrator, 2 Bradf. Surr. 253.
Pa.—Barr's App., 3 Walk. 93; Palethorp's Est., 14 Pa. Co. 286; Kern v. Clark, 3 Pa.. C. Pl. 112.
Tex.—O'Docherty v. McGloin, 25 Tex. 67.
[a] **A homestead subject to final partition and distribution is not assets** in the hands of the administrator, but the use of it as a homestead is reserved to the family during the period of administration. O'Docherty v. McGloin, 25 Tex. 67.
6. Conn.—Leavenworth v. Marshall, 19 Conn. 408.
La.—In re Coreil, 83 S 13; Morris' Succ., 137 La. 719, 69 S 151; Thompson's Succ., 4 La. A. (Orleans) 21.
Mass.—Glover v. Glover, 215 Mass. 576, 102 NE 945; Chase v. Webster, 168 Mass. 228, 46 NE 705; Porter v. Porter, 165 Mass. 157, 42 NE 565; Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Hollenbeck v. Pixley, 3 Gray 521.
N. H.—Foster v. Foster, 36 N. H. 437.
Tex.—Sloan v. Webb, 20 Tex. 189.
[a] **The statute regards the two essentials facts,** (1) that the deceased died rich, and that the surviving widow and children are in necessitous circumstances, in which case she can recover from the succession of her husband one thousand dollars. Comeau v. Miller, 46 La. Ann. 1324, 16 S 172; Waddell's Succ., 44 La. Ann. 361, 10 S 808; Tugwell's Succ., 43 La. Ann. 879, 9 S 499; Wellmayer's Succ., 34 La. Ann. 819; De Boroblanc's Succ., 32 La. Ann. 17; Sabalot v. Populus, 31 La. Ann. 854; White's Succ., 29 La. Ann. 702; Claudel v Palao, 28 La. Ann. 872; Newman's Succ., 27 La. Ann. 593; McCoy v. McCoy, 26 La. Ann. 686; Bouvet's Succ., 25 La. Ann. 431; Liles' Succ., 24 La. Ann. 490; Mangum v. Bacon, 24 La. Ann. 130; Cerise's Succ., 24 La. Ann. 96; Liddell's Succ., 22 La. Ann. 9; Leatt v. Williams, 22 La. Ann. 81; Harrell v. Harrell, 17 La. 374; Stewart v. Stewart, 13 La. Ann. 398; Yarborough's Succ., 13 La. Ann. 378 (widow without children); Hunter's Succ., 13 La. Ann. 257 (widow's claim privileged); Duchamp v. Butterly, 11 La. Ann. 67. (2) If the amount of the entire property of the widow and children amounts to one thousand dollars nothing can be withdrawn from the estate for their support, although some of them have nothing. Elliott v. Elliott, 31 La. Ann. 31; Melancon's Succ., 25 La. Ann. 535; Stewart v. Stewart, supra. (3) But their pecuniary circumstances at any time subsequent to decedent's death do not affect their rights. Marx's Succ., 27 La. Ann. 99. (4) Where the mother claims the widow's homestead, and proves the necessitous circumstances of herself and the children, she is entitled to the usufruct, and the children to the amount. Fatjo's Succ., 52 La. Ann. 1561, 28 S 135. (5) The husband does not die rich when the estate is burdened with an usufruct not terminating until after his death. Wilzler v. Harvey, 9 La. A. (Orleans) 190.
[b] **Where the widow is feeble in health and unable to earn her own living** and has received nothing from the estate, it is the duty of the court to order an allowance for her. Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.
[c] **Minor children with separate estates.**—Where two minor children, orphans, had separate property of the value of nearly twenty-five hundred dollars, they were not entitled to an allowance for a year's support out of the property of the estate of their deceased father, on the ground that they had separate property, adequate to their maintenance, which brought them within the exceptions of the statute. Sloan v. Webb, 20 Tex. 189.
7. De Boisblanc's Succ., 32 La. Ann. 17; White's Succ., 29 La. Ann. 702; Aaron's Succ., 11 La. Ann. 671; Kersey v. Bailey, 52 Me. 198; Hollenbeck v. Pixley, 3 Gray (Mass.) 521.
8. See infra § 771.
9. Sawyer v. Sawyer, 28 Vt. 245.
10. Mitchell v. Word, 64 Ga. 208; Short v. Galway, 83 Ky. 501, 4 AmSR 168; Gilman v. Gilman, 53 Me. 184; Richardson v. Lewis, 21 Mo. A. 531.
11. Taylor v. Pettus, 52 Ala. 287; Shumate v. McGarity, 83 Pa. 38; Rees' Est., 20 Pa. Dist. 815.
12. Jones v. Layne, 144 N. C. 600, 603, 57 SE 372, 11 LRANS 361 ("The fiction that the law of the domicil governs as to personalty applies only to the distribution of the surplus, and does not obtain as against debts, legacies, charges of administration, and taxes, and hence cannot prevail against the year's provision, which is superior to all these, when the wife is actually and bona fide residing here with her children at the time of her husband's death. The technical rule that her husband's domicil is her domicil is well settled, but the fiction of domicil does not, as we have seen, control as to realty, nor even as to personalty, except in the distribution of the surplus. The year's provision is not in the nature of such distribution, but a humane provision of urgency taking precedence of all other claims against the estate. From its very nature and purpose, it has nothing to do with the husband's domicil, but is for the support of the wife and children if residing here at his death. Dower is allotted to the widow according to the law here, and not according to the law of the husband's domicil. There is no reason why the year's provision should not also be allotted to the widow as allowed by our statute, if she is actually and bona fide resident here").
13. In re Stromberg, 119 Minn. 325, 328–329, 138 NW 428 ("Justice Mitchell, in the concurring opinion in Bejamin v. Laroche, 39 Minn. 334, 40 NW 156, in apt and terse language, expresses the true status of the personal property which the surviving spouse takes under our law: 'I concur, but would place the decision upon the ground that the right of a widow to the property allowed her by subdivision 1, § 1, chapter 51 [R. L. 1905, § 3653] is as absolutely vested the instant of the death of her husband as that to her distributive share of the balance of the estate, the only difference being that in the one case the property is subject to administration, and in the other not.' That this is now the law appears clearly from the opinion in Sammons v. Higbie, 103 Minn. 448, 115 NW 265, where Mr. Justice Brown says with reference to a

it has been considered that an allowance provided for by the statute of one state will not be enforced in equity in another state as an indebtedness, on a deficiency of personal assets, in the absence of a statute providing for such allowance.[14]

[§ 762] **5. Construction of Statutes.** Although statutes providing for an allowance to the widow and children should be beneficially construed,[15] they cannot be extended beyond their obvious purpose,[16] and are generally presumed to be prospective and not retrospective.[17]

[§ 763] **B. Homestead and Exemption Rights.** The statutes sometimes set apart for the surviving wife, husband, or children, the homestead and the personal property which decedent held exempt from execution in his lifetime,[18] but such provisions are discussed elsewhere in their appropriate places in this work.[19]

[§ 764] **C. Quarantine or Other Occupation or Use—1. Widow's Right in General.** A widow's quarantine[20] is her right to enjoy the mansion house together with its farm or plantation, rent free, for a fixed time after her husband's death[21] or until dower is assigned her.[22] Actual possession

widow's right under this statute: 'The clear intention of the legislature was to vest an absolute right to the property mentioned in the widow; the only act remaining to be done after the husband's death being the designation of the particular property selected by her. . . . It was clearly not the intention that the property so "allowed" should enter into the administration of the estate at all.' The fiction of law that the situs of the personal property of a nonresident decedent is in the state or country of his domicil is only for the purpose of distributing the residue of the estate, subject to the expenses of administration and the rights of creditors, in the state where the property is actually found. Property not subject to administration or distribution need have no situs by fiction of law to come into the possession of the true owner. No legislative intent to restrict the scope of the beneficiaries named in the first subdivision of said section 3653 to resident widows or widows of nonresident decedents is found in the language itself. It is all comprehensive. In view of the fact that enactments of similar import to said section are found so generally upon the statutes of sister states, it would seem that by comity we should extend to a widow who comes into the state where the only property of her deceased husband is found, the same right she would have had if both she and her deceased husband were domiciled here.' In the case note to Jones v. Layne, 144 N. C. 600, 57 SE 373, 11 LRANS 361, it is said: 'A state within whose borders personal assets of a decedent are found has the power to grant an exemption or allowance to the widow out of those assets, irrespective of the domicil of her husband at the time of his death. . . . Generally, however, the local statutes on the subject are not explicit with respect to the effect of the residence or domicil of the deceased in another state at the time of his death; and in such situation the well-established principle of private international law, that the distribution of the personal estate of a decedent is governed by the law of his domicil is allowed to control.' Even when such statutes are not explicit a restricted construction has not been given. Jones v. Layne, supra, and In re Gill, 79 Iowa 296, 44 NW 553, 9 LRA 126. In Kapp v. Public Admr., 2 Bradf. Surr. (N. Y.) 258, upon facts similar to those here involved and under a statute much like our own, the rights of the widow to certain personal property of her deceased husband were not limited by the fact of decedent's domicil in another state").

14. Hansel v. Chapman, 2 App. (D. C.) 361.

15. Cal.—In re Whitney, 171 Cal. 750, 154 P 855; Rountree v. Montague, 30 Cal. A. 170, 157 P 623.

Ga.—Bonds v. Allen, 25 Ga. 343.

Ill.—Moss v. Moss, 208 Ill. A. 589.

Ind.—Hamilton v. Matlock, 22 Ind. 47.

Ky.—Graves v. Graves, 10 B. Mon. 31.

Mass.—Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.

Mo.—In re Ryan, 174 Mo. A. 202, 156 SW 759.

Nev.—In re Walley, 11 Nev. 260.

N. C.—Van Norden v. Primm, 3 N. C. 149.

Pa.—In re Hildebrand, 262 Pa. 112, 104 A 866; Hill v. Hill, 42 Pa. 198; Bald's App., 40 Pa. 328; Neiman's Est., 20 Pa. Dist. 49.

Wash.—In re Lavenberg, 104 Wash. 515, 177 P 328.

"It is not true, as suggested, that these statutes are to be construed strictly as in derogation of the common law and every word employed therein given effect so as to restrain the rights conferred. On the contrary, though they are not in entire consonance with the common law, they are highly remedial in character and are to be construed so as to carry out the obvious intention of the Legislature and effectuate the benign spirit and broad purpose contemplated." In re Ryan, 174 Mo. A. 202, 212, 156 SW 759 [appr Perry v. Strawbridge, 209 Mo. 621, 108 SW 641, 123 AmSR 510, 16 LRANS 244, 14 AnnCas 92; In re Ferguson, 206 Mo. 203, 104 SW 108; Keeney v. McVoy, 206 Mo. 42, 103 SW 946].

[a] **Illustration.**—Under Rev. St. (1909) §§ 114, 115, 116, and 119, providing for a widow's allowance and for allowances to minor children of a deceased widow, section 120, defining a widower's rights in the estate of his deceased wife, and section 8057 prescribing a rule of construction, where the deceased was a divorced woman whose husband was then living, her minor son was entitled to the same allowances as if she had been a widow. In re Ryan, 174 Mo. A. 202, 156 SW 759.

[b] **Cumulative grant.**—A statute granting support to a widow out of the husband's estate is cumulative with a statute allowing a certain amount of a deceased insolvent's effects to the family. Bonds v. Allen, 25 Ga. 343.

[c] **The word "may"** in a statute providing that the probate judge "may set apart" all personal property for the use of the family under certain circumstances is to be construed as "shall." In re Walley, 11 Nev. 260.

16. Smith v. Quinn, 60 Colo. 281, 153 P 217; Bush v. Bush, 41 Ind. A. 46, 83 NE 386.

[a] **Illustration.**—A statute providing that a surviving wife and minor children shall be allowed to occupy the dwelling house of the family, and the fields adjacent thereto, if any, not exceeding forty acres, free of rent, for one year from decedent's death, does not give the family of a decedent crops that had been harvested, although not removed from the land, prior to his death. Bush v. Bush, 41 Ind. A. 46, 83 NE 386.

17. Swayze v. Wade, 25 Kan. 551; Cook v. Sexton, 79 N. C. 305; Shumate v. McGarity, 83 Pa. 38; Young's Est., 1 Phila. (Pa.) 403.

18. See statutory provisions.

[a] **Probate homestead.**—Provision is sometimes made for a probate homestead, to be set apart to the widow during the administration of the estate and until its final distribution. In re Leavy, 141 Cal. 646, 75 P 301, 99 AmSR 92.

[b] **A homestead is not assets** in the hands of an administrator. Dillon v. Dillon, (Nebr.) 171 NW 917.

[c] **Provision not in conflict with provision for family support.**—Rev. St. (1898) § 2829, providing that homesteads and all exempt property shall be set apart for the surviving wives, husbands, and minor children, is not in conflict with, and was not repealed by § 3847, as amended by Sess. L. (1903) p 51 c 57, which deals exclusively with questions of "family support" and the summary administration and settlement of estates not exceeding one thousand five hundred dollars in value. In re Syndergaard, 31 Utah 490, 88 P 616.

19. Continuance of personal property exemption for benefit of surviving husband, wife, children, or next of kin see Exemptions [18 Cyc 1401].

Homestead rights of surviving husband, wife, children, or heirs see Homesteads [21 Cyc 562].

20. [a] **The time was originally forty days,** whence the term "quarantine" is derived. See Coke Litt. p. 34b.

21. Ind.—Hoover v. Agnew, 91 Ind. 370.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.

Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917.

Me.—Young v. Estes, 59 Me. 441.

N. Y.—Corey v. Peo., 45 Barb. 262; Jackson v. O'Donaghy, 7 Johns. 247.

Oh.—Wanzer v. Smith, 2 Oh. Dec. (Reprint) 323, 2 WestLMonth 426.

Pa.—Kline's Est., 1 LegGaz 428.

S. C.—McCully v. Smith, 18 S. C. L. 103.

[a] **A widow who is administratrix** has the right to occupy the homestead until it is otherwise disposed of. In re Dalton, 183 Iowa 1013, 168 NW 332.

22. Ala.—Callahan v. Nelson, 128 Ala. 671, 29 S 555; Norton v. Norton, 94 Ala. 481, 10 S 436; Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524; Renagh v. Turrentine, 60 Ala. 557; Perrine v. Perrine, 35 Ala. 644; Oakley v. Oakley, 30 Ala. 131; Pharis v. Leachman, 20 Ala. 662; Shelton v. Carrol, 16 Ala. 148.

Ark.—Martin v. Conner, 115 Ark. 359, 171 SW 125; Flowers v. Flowers, 84 Ark. 557, 106 SW 949, 120 AmSR 84; Griffin v. Dunn, 79 Ark. 408, 96 SW 190; Reagan v. Hodges, 70 Ark. 563, 69 SW 581; Davenport v. Davenaux, 45 Ark. 341; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351.

Fla.—Palmer v. Palmer, 47 Fla. 200, 35 S 983.

Ga.—Calhoun v. Calhoun, 58 Ga. 247; Rambo v. Bell, 3 Ga. 207.

Ill.—Maring v. Meeker, 263 Ill. 136, 105 NE 31; Walker v. Doane, 108 Ill. 236; Attridge v. Billings, 57 Ill. 489; Trask v. Baxter, 48 Ill. 406.

Ky.—Bush v. Fitzgeralds, 125 SW 716; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Driskell v. Hanks, 18 B. Mon. 855; White v. Clark, 7 T. B. Mon. 640; Roach v. Hubbard, Litt. Sel. Cas. 235; Jones v. Jones, 3 KyL 534, 11 Ky. Op. 412.

Mich.—Barris v. Emmons, 173 Mich. 590, 139 NW 872; In re Graff, 123 Mich. 456, 82 NW 248; Zoellner v. Zoellner, 53 Mich. 620, 19 NW 556.

or affirmative assertion of such claim on her part is not essential, possession by her agent or tenant being sufficient;[23] and the widow is entitled to quarantine, whether she resided in the mansion house or elsewhere at the time of her husband's death.[24] The right of the widow is, however, effective only against those claiming under decedent and not against those claiming under a title adverse to him.[25] On termination of the right the heir is entitled to possession,[26] and where the period of occupation is fixed, trespass or ejectment may be maintained against the widow if she stays beyond the time allowed, although dower has not been assigned to her.[27]

[§ 765] **2. Nature of Right.** The widow's right of quarantine is in addition to and independent of her allowance for support[28] and not in lieu of dower.[29] As a general rule the right is regarded, not as an estate in land, but as a mere personal privilege belonging to the widow,[30] which is not assignable[31] or subject to execution against her,[32] and which dies with her.[33] However, the right to quarantine has also been regarded as a possessory right which may be assigned so as to transfer to the assignee all the incidents of the right which belonged to the widow prior to the transfer;[34] and it has been held that before assignment of dower the widow has a freehold estate for life in the land of her husband unless it is sooner defeated by the heir,[35] and that the widow's right may be transferred to another.[36]

[§ 766] **3. Property Subject to Quarantine.** In general the right extends only to houses and lands of which the widow is dowable,[37] and does not extend to mortgaged[38] or leased[39] premises. The right usually extends to the mansion house[40] in

Miss.—Wallis v. Doe, 10 Miss. 220.

Mo.—Casteel v. Potter, 176 Mo. 76, 75 SW 597; Quick v. Rufe, 164 Mo. 408, 64 SW 102; Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747; Carey v. West, 139 Mo. 146, 40 SW 661; Fischer v. Siekmann, 125 Mo. 165, 28 SW 435; Gentry v. Gentry, 122 Mo. 202, 26 SW 1090; Roberts v. Nelson, 86 Mo. 21; Whaley v. Whaley, 50 Mo. 577; Orrick v. Pratt, 34 Mo. 226; Stokes v. McAllister, 2 Mo. 163.

N. J.—De Roche v. Myers, 69 N. J. L. 14, 54 A 558; Ackerman v. Shelp, 8 N. J. L. 125; Moffett v. Trent, 66 N. J. Eq. 143, 56 A 1035; Davis v. Lowden, 56 N. J. Eq. 126, 38 A 648.

Oh.—Wanzer v. Smith, 2 Oh. Dec. (Reprint) 323, 2 WestLMonth 426.

Va.—Devaughn v. Devaughn, 19 Gratt. (60 Va.) 556.

[a] **A widow who has a statutory separate estate** is not entitled to retain the possession of the dwelling house as quarantine except to the extent that it may be necessary to make her separate estate equal to her dower interest. Billingslea v. Glen, 45 Ala. 540.

[b] **If the widow is executrix or administratrix** she should be reasonably prompt in proceeding for the allotment of dower, otherwise she may lose her right to quarantine. Benagh v. Turrentine, 60 Ala. 557.

[c] **The statute of limitations** does not begin to run against a husband's heirs and in favor of the widow in possession under her right of quarantine until the assignment of dower. Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747.

[d] **Neglect of surviving husband to cause allotment of his dower.**—A surviving husband, being the one who should cause his dower to be allotted, may not profit by his own neglect so as to get the use of the property rent free until the allotment. Hamilton v. Riney, 140 Ky. 476, 131 SW 287.

23. Ala.—Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524; Oakley v. Oakley, 30 Ala. 131.

Ark.—Davenport v. Devenaux, 45 Ark. 341.

Ill.—Trask v. Baxter, 48 Ill. 406.

Ky.—White v. Clarke, 7 T. B. Mon. 640.

N. J.—Craige v. Morris, 25 N. J. Eq. 467.

Oh.—Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

24. King v. King, 155 Mo. 406, 56 SW 534 (where a wife claimed quarantine in her deceased husband's mansion house, evidence that she had abandoned it was not competent to show an abandonment by the husband, and thereby defeat her claim).

25. Taylor v. McCrackin, 2 Blackf. (Ind.) 260.

26. Lincoln Trust Co. v. Hutchinson, 65 Misc. 590, 120 NYS 811.

27. Jackson v. O'Donaghy, 7 Johns. (N. Y.) 247; McCully v. Smith, 18 S. C. L. 103; Tool v. Pride, 1 Overt. (Tenn.) 234.

28. Calhoun v. Calhoun, 58 Ga. 247.

29. Perrine v. Perrine, 35 Ala. 644.

30. Griffin v. Dunn, 79 Ark. 408, 96 SW 190 [foll Flowers v. Flowers, 84 Ark. 557, 106 SW 949, 120 AmSR 84]; Phillips v. Williams, 130 Ky. 773, 113 SW 908; Burk v. Osborn, 9 B. Mon. (Ky.) 579; Acor's Est., 29 LegInt (Pa.) 378; Roach v. Davidson, 5 S. C. L. 80.

[a] **The widow is considered as continuing her husband's estate** during the continuance of quarantine. Roach v. Davidson, 5 S. C. L. 80.

31. Penney v. Weems, (Ala.) 39 S 574; Norton v. Norton, 94 Ala. 481, 10 S 436; Griffin v. Dunn, 79 Ark. 408, 96 SW 190 [foll Flowers v. Flowers, 84 Ark. 557, 106 SW 949, 120 AmSR 84]; Phillips v. Williams, 130 Ky. 773, 783, 113 SW 908; Wallis v. Doe, 10 Miss. 220.

"As we construe the statute, it was enacted for the personal benefit of the widow, when she was grieved and in a helpless condition on the account of the loss of her husband. She had the right to the benefits of the property rent free, but she had no right to convey this privilege." Phillips v. Williams, supra.

[a] **Mortgage.**—An attempt by a widow to convey her right of quarantine to a mortgagee as security for a debt is unenforceable at law. Penney v. Weems, (Ala.) 39 S 574.

32. Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079.

33. Clancy v. Stephens, 92 Ala. 577, 9 S 522.

34. Phillips v. Presson, 172 Mo. 24, 72 SW 501; Graham v. Stafford, 171 Mo. 692, 72 SW 507 [dist Quick v. Rufe, 164 Mo. 408, 64 SW 102]; Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747; Carey v. West, 139 Mo. 146, 40 SW 661; Fischer v. Siekmann, 125 Mo. 165, 28 SW 435; Brown v. Moore, 74 Mo. 633; Jones v. Manly, 58 Mo. 559; Stokes v. McAllister, 2 Mo. 163.

[a] **A deed from the widow conveys to the grantee the right to exclusive possession** until dower is assigned as against adult children of the homesteader but not as against his minor children. Phillips v. Presson, 172 Mo. 24, 72 SW 501.

[b] **If the assignee and his heirs have been in continuous possession** since the assignment, the statute of limitations does not begin to run in their favor or against the heirs of the deceased husband until assignment of dower or the death of the widow. Graham v. Stafford, 171 Mo. 692, 72 SW 507; Osborn v. Weldon, 146 Mo. 185, 47 SW 936; Carey v. West, 139 Mo. 146, 40 SW 661; Brown v. Moore, 74 Mo. 633.

35. Ackerman v. Shelp, 8 N. J. L. 125.

[a] **A grantee of the dower rights in possession** is not required, before the dower is assigned, to account for rent. Moffett v. Trent, 66 N. J. Eq. 143, 56 A 1035.

36. Gosselin v. Smith, 154 Ill. 74, 39 NE 980.

[a] **A widow may release to the owner of the fee** her right to use and occupy the premises. Maring v. Meeker, 263 Ill. 136, 105 NE 31.

37. Ala.—Callahan v. Nelson, 128 Ala. 671, 29 S 555; Melton v. Andrews, 76 Ala. 586; Slatter v. Meek, 35 Ala. 528; Inge v. Murphy, 14 Ala. 289.

Ark.—Reagan v. Hodges, 70 Ark. 563, 69 SW 581.

Ga.—Hill v. Hill, 81 Ga. 516, 8 SE 879.

Me.—Young v. Estes, 59 Me. 441.

Mo.—Casteel v. Potter, 176 Mo. 76, 75 SW 597; Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

W. Va.—Booker v. Jarrett, 72 W. Va. 606, 78 SE 754.

[a] **A house erected after decedent's death** is not within the statute. McClurg v. Turner, 74 Mo. 45.

[b] **Where a husband voluntarily conveyed real estate to his wife** for life, and died, she was entitled to occupy the premises under the deed or as widow, until dower was assigned, as provided by a statute. Barris v. Emmons, 173 Mich. 590, 139 NW 872.

38. Young v. Estes, 59 Me. 441; Davis v. Lowden, 56 N. J. Eq. 126, 38 A 648.

39. Ogbourne v. Ogbourne, 60 Ala. 616; Pizzala v. Campbell, 46 Ala. 35; Tincher v. Phillips, 37 Mo. A. 621; Davis v. Lowden, 56 N. J. Eq. 126, 38 A 648; Voelckner v. Hudson, 3 N. Y. Super. 215.

[a] **Where a portion of a building is rented** as a store and the remainder occupied as a dwelling, the widow is not entitled to remain in possession of the rented portion. Davis v. Lowden, 56 N. J. Eq. 126, 38 A 648.

40. Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

[a] **Mansion house on land not owned in fee.**—That the mansion house is located on land in which the husband had only a life estate does not affect the widow's right of quarantine in that part of the land owned by her husband in fee. Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

[b] **A probate homestead,** as provided for by the California statute, extends to the dwelling house in which claimant resides and the land on which it is situated, with no specified limitation of value if the estate is not insolvent and hence the fact that premises suitable for probate homestead purposes are indivisible and constitute in value nearly one half the estate does not impair the homestead right. In re Levy, 141

which decedent resided at the time of his death[41] and the curtilage appurtenant thereto.[42] It has been held, however, that the right of quarantine is not confined to contiguous lands, especially where the different parts have been used together and not as separate and independent holdings,[43] although the widow has no right to retain possession of a tract about two and one-half miles away.[44]

Property specifically devised may, it has been held, be set apart as a probate homestead for the family.[45]

[§ 767] **4. Right to Rents and Profits.** The terms "mansion" and "messuages" in the statutes entitling a widow to quarantine therein include the rents and profits thereof during the period of occupancy[46] unless, where her right continues until dower is assigned, she is at fault in delaying such assignment.[47] This right is not affected by the fact that her possession of the house and land is detrimental to the best interests of the estate.[48] If the rent of the dwelling house and land which she is entitled to occupy has been received by the executor, administrator, or other person during the period allowed her, she may maintain an action at law against him for its recovery.[49] Under a statute providing that "the wife shall be entitled to one-third of the rents and profits of her husband's dowable real estate, from his death till dower is assigned," the widow is entitled to the gross rents during that time, without any deduction for taxes, insurance, or repairs.[50]

[§ 768] **5. Liabilities Incident to Occupancy.** A widow in possession of quarantine property for a considerable period may be charged with her fair proportion of the cost of incidental repairs upon the dwelling house,[51] but not for the cost of perma-

Cal. 646, 75 P 301, 99 AmSR 92 (where a testator at the time of his death occupied as his home the third floor of a three-story building, which was subdivided into flats of one floor each, suitably arranged to be rented separately, the flat in which he lived being more valuable for rental purposes than the others, the building and the lot on which it was located could have been selected as a homestead under the statute defining the same as "the dwelling house in which the claimant resides, and the land on which the same is situated;" and hence, apart from the question of its value, it was properly set aside as a homestead for the widow pending administration).

41. Callahan v. Nelson, 128 Ala. 671, 29 S 555; Reeves v. Brooks, 80 Ala. 26; Melton v. Andrews, 76 Ala. 586; Clary v. Sanders, 43 Ala. 287; Waters v. Williams, 38 Ala. 680; McAllister v. McAllister, 37 Ala. 484; Oakley v. Oakley, 30 Ala. 131; Inge v. Murphy, 14 Ala. 289; Palmer v. Palmer, (Fla.) 35 S 983; Clay v. Anderson, 141 Ky. 455, 132 SW 1039; King v. King, 155 Mo. 406, 56 SW 534.

[a] **Where decedent owned two mansion houses,** and the one in which he resided at the time of his death was so dilapidated as to be uninhabitable, it was proper for the court to allow the widow to take for the time being the other house, which was habitable. Clay v. Anderson, 141 Ky. 455, 132 SW 1039.

42. Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Stewart v. Stewart, 3 J. J. Marsh. (Ky.) 48; Booker v. Jarrett, 72 W. Va. 606, 78 SE 754.

[a] **The word "curtilage,"** used in the statute relating to the allowance to a widow before dower is assigned, was borrowed from the English statutes, meaning the inclosed space surrounding a dwelling and contained within the same inclosure, the dwellings and outhouses of all kinds in England being generally surrounded by a fence inclosing a small piece of land embracing the yards and outbuildings near the house. Booker v. Jarrett, 72 W. Va. 606, 78 SE 754.

[b] **A small storeroom within the yard** inclosing the mansion house, once occupied by the husband with merchandise, but afterward used by him as a storageroom, the entire premises constituting part of his home farm, is part of the curtilage, to the possession of which his widow is entitled until dower assigned. Booker v. Jarrett, 72 W. Va. 606, 78 SE 754.

[c] **A farm without buildings on it** which adjoins and was used by the husband in connection with a farm belonging to the wife, upon which latter was a mansion house occupied by them both until the husband's death, cannot be included in the widow's quarantine. McKaig v. McKaig, 50 N. J. Eq. 325, 25 A 181.

[d] **The word "messuage"** in a statute authorizing a widow to remain in possession of the mansion house and messuage of her deceased husband includes only lands adjoining the house to the extent of a few acres. Grimes v. Wilson, 4 Blackf. (Ind.) 331. But see Orrick v. Pratt, 34 Mo. 226 (where such term was held to include the plantation on which the mansion was situated).

43. Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

44. Maring v. Meeker, 263 Ill. 136, 105 NE 31.

45. In re Kennedy, 157 Cal. 517, 108 P 280, 29 LRANS 428.

46. Ala.—Reeves v. Brooks, 80 Ala. 26; Inge v. Murphy, 14 Ala. 289.

Ind.—Willetts v. Schuyler, 3 Ind. A. 118, 29 NE 273.

Ky.—Graham v. Graham, 6 T. B. Mon. 561, 17 AmD 166.

Mo.—Shoultz v. Lee, 260 Mo. 719, 168 SW 1146; Smith v. Stephens, 164 Mo. 415, 64 SW 260; Gentry v. Gentry, 122 Mo. 202, 26 SW 1090; Orrick v. Pratt, 34 Mo. 226.

N. J.—Flynn v. O'Malley, (Ch.) 33 A 402; Merchant v. Comback, 41 N. J. Eq. 349, 7 A 633; Craige v. Morris, 25 N. J. Eq. 467.

Oh.—Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

W. Va.—Engle v. Engle, 3 W. Va. 246.

"The widow's right to quarantine and all its incidents and profits is necessarily exclusive and she is entitled to the whole rent as the result of being the undisputed possessor of the whole plantation with the mansion house." Smith v. Stephens, 164 Mo. 415, 422, 64 SW 260.

[a] **A growing crop** (1) is included in the rents and profits. Blair v. Murthree, 81 Ala. 454, 2 S 18; Engle v. Engle, 3 W. Va. 246. (2) But the widow is not entitled to crops harvested before decedent's death, although not removed until afterward. Bush v. Bush, 41 Ind. A. 46, 83 NE 386.

[b] **Fruits and products.**—"A fair construction of this section means, we think, that the surviving wife and minor children shall not only occupy the messuage and adjacent fields, if any, not exceeding forty acres, but that they shall receive, use and enjoy the fruits and products of the same which naturally ripen, mature and come off during the year which they have the right to occupy the premises. To restrict the meaning of the section to the mere occupancy of the fields, without the use and enjoyment of its products, would be a 'barren ideality,' and would wholly frustrate the benefits and purposes contemplated in its enactment. The finding of the court in this case shows that the straw in controversy was the product of the field, which grew and matured during the year which the appellant had a right to occupy it and enjoy its fruits, and that the appellee had no right to it, and that he took it wrongfully, and converted it to his own use. The finding, therefore, shows that the appellant has a right to recover the value of the straw." Swain v. Bartlow, 62 Ind. 546, 548 [quot Jones v. Jones, 81 Ind. 292, 293].

[c] **Emblements** belong to the widow and children and it will not be assumed that the administrator appropriated them as assets. Tucker v. Murphy, 71 Ind. 576.

[d] **Where there is a mortgage** on the premises, the widow is entitled to rents until the mortgagee forecloses or takes possession. Boynton v. Sawyer, 35 Ala. 497.

[e] **If the widow collects rents as administratrix,** and does not charge herself with them, it will be held that she takes them under her quarantine right. Smith v. Stephens, 164 Mo. 415, 64 SW 260.

[f] **In Kentucky** (1) The widow was formerly entitled to all the rents and profits of the farm on which was the family residence. Brewer v. Vanarsdale, 6 Dana 204; Graham v. Graham, 6 T. B. Mon. 561, 17 AmD 166. (2) But a later statute fixed her right at one third of the rents and profits of all her husband's dowable real estate from his death until dower was assigned, without any deduction for taxes, insurance, or repairs. Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079.

[g] **Rents of a farm several miles distant** from decedent's residence cannot be retained by the will under a claim of quarantine. Smith v. Smith, 13 Ala. 329.

47. Benagh v. Turrentine, 60 Ala. 557.

48. Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

49. Reeves v. Brooks, 80 Ala. 26; Boynton v. Sawyer, 35 Ala. 497; Oakley v. Oakley, 30 Ala. 131; Inge v. Murphy, 14 Ala. 289; Orrick v. Pratt, 34 Mo. 226; Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

[a] **Defenses.**—It is no defense in a suit by the widow against the executor to recover the rent of the plantation between the time of the husband's death and the assignment of dower, that he paid the debts of the estate from the income of the plantation, leaving the entire personalty to be divided, of which the widow received her share, but he is entitled to credit for the share so received by her. McAllister v. McAllister, 37 Ala. 484.

[b] **Action for assignment of dower may be maintained at same time with action for accounting.**—Gentry v. Gentry, 122 Mo. 202, 26 SW 1090.

50. Morton v. Morton, 112 Ky. 706, 709, 66 SW 641, 23 KyL 2079.

51. Benagh v. Turrentine, 60 Ala. 557.

nent repairs.[52] Prior to the assignment of dower she is not chargeable with rent for her occupancy,[53] nor may an action for use and occupation be maintained against her.[54] She is not chargeable with interest on mortgages on the quarantine property,[55] nor is her interest as dower or quarantine to be diminished by the taxes assessed either in her husband's lifetime or during her quarantine.[56]

[§ 769] **6. Enforcement or Defense of Right.** The widow's right to the possession of the mansion house, messuage, and plantation may be enforced by an action of ejectment,[57] but not by an action of forcible entry and detainer.[58] The widow's neglect to apply for the assignment of dower is not a good defense against her assertion of her right of quarantine.[59] Until the period of her occupancy has expired she may successfully defend an action of ejectment against her,[60] but an answer in ejectment claiming the right to hold the land under a right of dower, but alleging that dower had not been assigned and failing to allege anything as to the premises being the mansion or farm attached thereto, is fatally defective.[61]

[§ 770] **7. Forfeiture of Right.** The widow's right of quarantine may be forfeited by her removal from or abandonment of the premises,[62] and it has been held that a widow who occupies a portion of decedent's premises with the family and rents the remainder is not entitled to the whole under the right of quarantine.[63] The widow's right is not lost by her remarriage [64] or insanity,[65] nor is it affected by the removal of the children.[66]

[§ 771] **D. Maintenance and Support—1. Liability of Estate in General.** Under various statutes the property of decedent may be used or expended, pending administration, for the necessary maintenance of his widow and young children, for a limited period, and to a reasonable amount, regardless of the solvency of the estate,[67] and according to some authorities, even though the widow may

52. Nelson v. Barnett, 123 Mo. 564, 27 SW 520.

53. Slatter v. Meek, 35 Ala. 528; Clairteaux's Succ., 35 La. Ann. 1178; In re Graff, 123 Mich. 456, 82 NW 248; Moffett v. Trent, (N. J. Ch.) 56 A 1035.

[a] **This is true, although** she was not dowable of the house because of want of title in her husband. Slatter v. Meek, 35 Ala. 528.

54. In re Graff, 123 Mich. 456, 82 NW 248.

55. Gentry v. Gentry, 122 Mo. 202, 26 SW 1090; Cronley v. Cronley, 40 N. J. Eq. 30.

56. Shoultz v. Lee, 260 Mo. 719, 168 SW 1146; Graves v. Cochrane, 68 Mo. 74 [appr Smith v. Stephens, 164 Mo. 415, 64 SW 260].

57. Bowles v. Lowery, 181 Ala. 603, 62 S 107 [cit Cyc]; Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524; Phillips v. Presson, 172 Mo. 24, 72 SW 501; King v. King, 155 Mo. 406, 56 SW 534; Roberts v. Nelson, 86 Mo. 21; Miller v. Talley, 48 Mo. 503; Stokes v. McAllister, 2 Mo. 163.

[a] **Widow may maintain ejectment against purchaser in possession.**—Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524.

[b] **If one acquired title to land by adverse possession,** his widow, as such, can maintain ejectment for it, provided it is so related to the place of his last residence as to make it the subject of the widow's quarantine right. Bowles v. Lowery, 181 Ala. 603, 62 S 107.

58. Aiken v. Aiken, 12 Or. 203, 6 P 682.

59. Callahan v. Nelson, 128 Ala. 671, 29 S 555.

60. Shelton v. Carrol, 16 Ala. 148; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Phillips v. Presson, 172 Mo. 24, 76 SW 501; Graham v. Stafford, 171 Mo. 692, 72 SW 507; Fischer v. Siekmann, 125 Mo. 165, 28 SW 435; Jones v. Manly, 58 Mo. 559; Kane v. McCown, 55 Mo. 181; Stokes v. McAllister, 2 Mo. 163; Den v. Bilderback, 16 N. J. L. 497; Den v. Dodd, 6 N. J. L. 367.

61. Gates v. Solomon, 73 Ark. 8, 83 SW 348.

62. Norton v. Norton, 94 Ala. 481, 10 S 436; Maring v. Meeker, 263 Ill. 136, 141, 105 NE 31; Burk v. Osborn, 9 B. Mon. (Ky.) 579.

"The right to retain this possession under that law was an additional remedy to enforce her assignment of dower. By leaving the State and remaining away for five years, during which time her children, under their guardian, were in possession of the property, she undoubtedly lost by abandonment her right to this additional remedy, and under that law was not justified, on her return, in demanding re-possession of the premises, or any part thereof, until dower was assigned." Maring v. Meeker, supra.

63. Keeney v. Henning, 58 N. J. Eq. 74, 42 A 807; Davis v. Lowden, 56 N. J. Eq. 126, 38 A 648.

64. Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747.

65. Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524.

66. Zoellner v. Zoellner, 53 Mich. 620, 19 NW 556.

67. U. S.—Hull v. Dicks, 235 U. S. 584, 35 SCt 152, 59 L. ed. 372.

Ala.—Hinson v. Williamson, 74 Ala. 180; Pickens v. Pickens, 35 Ala. 442; Pinckard v. Pinckard, 24 Ala. 250.

Cal.—In re Cowell, 164 Cal. 636, 130 P 209; In re Treat, 162 Cal. 250, 121 P 1003; In re Snowball, 156 Cal. 235, 104 P 446; In re Lux, 100 Cal. 593, 35 P 341.

Conn.—Havens' App., 69 Conn. 684, 39 A 795.

Ga.—Cole v. Elfe, 23 Ga. 235; Hopkins v. Long, 9 Ga. 261.

Ky.—Graves v. Graves, 10 B. Mon. 31; Bronaugh v. Bronaugh, 6 Dana 124.

La.—Fatjo's Succ., 52 La. Ann. 1561, 28 S 135; Broadway's Succ., 3 La. Ann. 591.

Mass.—Whitcomb v. Taylor, 192 Mass. 555, 78 NE 536; Fellows v. Smith, 130 Mass. 376.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759; Marskey v. Lawrence, 121 Mich. 577, 80 NW 571.

Miss.—Turner v. Turner, 30 Miss. 428; Nelson v. Smith, 20 Miss. 662; McReary v. Robinson, 20 Miss. 318; McNulty v. Lewis, 16 Miss. 520.

Mo.—Lowe v. Lowe, 163 Mo. A. 209, 146 SW 100.

Nebr.—In re Leavitt, 85 Nebr. 521, 124 NW 114 [den reh 122 NW 881]; Fletcher v. Fletcher, 83 Nebr. 156, 119 NW 232 [foll In re Leavitt, 85 Nebr. 521, 124 NW 114].

N. Y.—Ryan v. Halligan, 136 App. Div. 65, 120 NYS 646.

Or.—In re Dekum, 28 Or. 97, 41 P 159.

Pa.—Pettit's App., 39 Pa. 324.

Tenn.—Crenshaw v. Moore, 124 Tenn. 528, 137 SW 924, 34 LRANS 1161, AnnCas1913A 165; Pride v. Watson, 7 Heisk. 232; Curd v. Curd, 9 Humphr. 171.

Utah.—In re Pugsley, 27 Utah 489, 76 P 560.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

Wis.—Henry's Est., 65 Wis. 551, 27 NW 351.

Ont.—Cook v. Noble, 12 Ont. 81.

[a] **The widow has an absolute right** to an allowance for support during the period of administration, although a portion of the real estate is set aside to her as her share of the estate. In re Pugsley, 27 Utah 489, 76 P 560.

[b] **A widow is entitled to reimbursement of sums expended by her** for reasonable support and maintenance during her quarantine. Matter of Brown, 77 Misc. 507, 137 NYS 978.

[c] **That the widow is a legatee** under the will does not as a matter of law prevent her from obtaining such an allowance as a court of probate, in view of such legacy and all the circumstances, judges to be necessary. Havens' App., 69 Conn. 684, 38 A 795.

[d] **Widow not provided for by will.**—Where a husband devised all his property to his sisters, to the exclusion of his wife, she was entitled to the year's support provided by statute. Whitehead v. Kirk, 106 Miss. 706, 64 S 658.

[e] **If the property exempt from execution is insufficient** to support the widow for a year, a monthly allowance may be ordered to her. In re Dekum, 28 Or. 97, 41 P 159.

[f] **An allowance in lieu of provisions** to which a widow is entitled under the statute is an appropriation to cover only a deficiency in grain, meat, vegetables, groceries, and other provisions, and should not include compensation for the lack of any other articles allowed her as her absolute property. See v. See, 66 Mo. A. 566.

[g] **A husband is entitled to an allowance for provisions** which were not on hand. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

[h] **Where an estate is kept together** under an order of the probate court, according to the statute, the administrator has no authority to keep up the family establishment and to support the family at the expense of the estate, but the reasonable expenses of the several members of the family should be charged against each separately. Hinson v. Williamson, 74 Ala. 180; Pickens v. Pickens, 35 Ala. 442.

[i] **Claims for caring for the widow** during her fatal illness pending the administration of the husband's estate may be paid as allowances to the widow. In re Bell, 70 Wash. 498, 127 P 100.

[j] **Expenses of sickness in family.**—Expenses preliminary and incidental to the confinement of an insane adult daughter may be paid by the widow out of the estate. Matter of Morris, 11 NYS 201, 2 Conn. Surr. 372.

[k] **When allowance properly refused.**—It is within the county clerk's discretion not to allow a widow anything for support where during ad-

have an income of her own, or be financially able to support herself without any aid from the estate.[68] A fortiori such allowance should not be denied to a widow who has obtained relief by borrowing money or through charity and afterward applies for an allowance.[69] It has been held, however, that the total advance to a widow for her support during a contest of her husband's will should be deducted from her share as next of kin, if the will is broken, or from her interest under the will, if it is sustained.[70]

[§ 772] **2. Estate of Mother.** In the absence of testamentary provision therefor,[71] the minor children of a deceased mother are not as a general rule entitled to maintenance and support out of her estate,[72] although this is sometimes allowed by statute,[73] especially where the father of the children predeceased their mother.[74]

[§ 773] **3. Period of Allowance.** A year's support is usually the extreme statutory limit,[75] especially where the estate is insolvent,[76] and under some statutes the period specified is considerably less.[77] Where the statute provides for an allowance to the widow "during the progress of the settlement of the estate," the widow can claim the allowance for such length of time only as is reasonably necessary to settle the estate.[78] Under a statute providing that certain specified articles shall remain in the possession of the widow during the time she lives with and provides for such minor child or children as there may be, the widow has been held entitled to such articles so long as she is able and willing to keep up the family circle and provide for minor children, although the minor children leave her without her fault.[79]

[§ 774] **4. Maintenance Prior to Allowance.** If the representative makes any advance to the widow or children before a decree of allowance, he does so at his own risk, as an advance upon such allowance as may be afterward made by the probate court,[80] but the courts generally pursue a liberal course both in permitting expenditures in advance of judicial allowance and in allowing a reasonable credit therefor to the executor or administrator in his probate accounts.[81]

[§ 775] **5. Education and Support of Chil-**

ministration she is in the state hospital for the insane and is maintained by it without cost to her or her husband's estate. In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672.

68. In re Bump, 162 Cal. 274, 92 P 643; In re Lux, 100 Cal. 593, 35 P 341, 114 Cal. 73, 45 P 1023; Busby v. Busby, 120 Iowa 536, 538, 95 NW 191; Palethorp's Est., 14 Pa. Co. 286; Sawyer v. Sawyer, 28 Vt. 249.

"The allowance to a widow for a year's support is not a mere charity, to be withheld because she has property of her own by which she could possibly keep herself and children during the first year of her widowhood. The statute, it is true, says the allowance shall be made if 'necessary' . . . but this language should have not only a reasonable, but liberal, construction to promote the purpose of its enactment. In the ordinary estate, even when of considerable value, the wife and young children of a deceased husband have during the first year special need of the assistance which this statute contemplates. If there is real estate, the title passes at once to the heirs or devisees in common, and considerable time is required before the fractional shares coming to these helpless members of the family can be made available as a means of support. If there be money or other personal estate, it passes to the administrator, who may not rightfully distribute any part of it until the court directs. If the minor children have any property in their own right, it also is subject to like delay in being reduced to available form or made productive of income. Moreover, the mother should not be required or allowed to trench upon the infant's property, and particularly the principal fund, except in clear cases of necessity, and time is required for interest and rents to be earned." Busby v. Busby, supra.

[a] **Income inadequate for support.**—An allowance to widow for support during settlement of estate may be made concurrent with the receipt of an income by her, whether from the estate or elsewhere, if it is inadequate. Havens' App., 69 Conn. 684, 38 A 795.

Contrary view see supra § 760.

69. Glover v. Glover, 215 Mass. 576, 102 NE 945.

70. Matter of Hitchler, 21 Misc. 417, 47 NYS 1069.

71. Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63].

72. Ala.—Davenport v. Brooks, 92 Ala. 627, 9 S 153.

Colo.—Smith v. Quinn, 60 Colo. 281, 153 P 217.

Ga.—Phelps v. Daniel, 86 Ga. 363, 12 SE 584.

La.—Geisler's Succ., 32 La. Ann. 1289 [overr Coleman's Succ., 27 La. Ann. 289]; Longley's Succ., 1 La. A. (Orleans) 231.

Oh.—Hance v. Chappel, 20 Oh. Cir. Ct. 214, 11 Oh. Cir. Dec. 139.

Pa.—King's App., 84 Pa. 345; McKeen v. Ehret, 31 Pa. Co. 142.

[a] **Where father living.** — A year's support for a minor child of a married woman cannot be assigned out of her estate, upon her husband, the father of the child, surviving. Phelps v. Daniel, 86 Ga. 363, 12 SE 584.

73. Quinn v. Campbell, 126 Ala. 280, 28 S 676; In re Murphy, 30 Wash. 9, 70 P 109.

74. Ga.—Brown v. Hemphill, 74 Ga. 795.

Ill.—Lesher v. Wirth, 14 Ill. 39.

Mo.—Baer v. Pfaff, 44 Mo. A. 35; Lewis v. Castello, 17 Mo. A. 593.

Oh.—In re Hinton, 64 Oh. St. 485, 60 NE 621; In re Glenn, 23 Oh. Cir. Ct. 397.

Pa.—Hime's App., 94 Pa. 381 [dist King's App., 84 Pa. 345].

[a] **Where a widow acquires land by devise from her husband** she takes it subject to the lien of his outstanding debts, and upon her death a minor child is not entitled to three hundred dollars' exemption out of such land as the property of his mother to the exclusion of the creditors of his deceased father. Wanger's App., 105 Pa. 346 [dist Hime's App., 94 Pa. 381; King's App., 84 Pa. 345].

75. Cal.—In re Fretwell, 154 Cal. 638, 98 P 1058; Walkerley's Est., 77 Cal. 642, 20 P 150; In re Montgomery, 60 Cal. 648.

Ga.—Kinard v. Clay, 138 Ga. 544, 75 SE 636; Smith v. Foster, 119 Ga. 376, 46 SE 425; Miller v. Ennis, 107 Ga. 663, 34 SE 302; Hill v. Lewis, 91 Ga. 796, 18 SE 63; Phelps v. Daniel, 86 Ga. 363, 12 SE 584; Wells v. Wilder, 36 Ga. 194; Blassingame v. Rose, 34 Ga. 418; Cole v. Elfe, 23 Ga. 235.

Ill.—Strawn v. Strawn, 53 Ill. 263.

Iowa.—Busby v. Busby, 120 Iowa 536, 95 NW 191.

Mich.—McDonald v. Hollywood, 130 Mich. 691, 90 NW 666; Marskey v. Lawrence, 121 Mich. 577, 80 NW 571.

Miss.—Whitehead v. Kirk, 106 Miss. 706, 64 S 658; Turner v. Turner, 30 Miss. 428; Nelson v. Smith, 20 Miss. 662; McReary v. Robinson, 20 Miss. 318; McNulty v. Lewis, 16 Miss. 520.

Mo.—In re Austin, 73 Mo. A. 61.

Oh.—Bause v. Muhme, 13 Oh. Cir. Ct. 501, 7 Oh. Cir. Dec. 224; In re Diller, 6 OhS&CP 182, 5 OhNP 255.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629; Crocker v. Crocker, 19 Tex. Civ. A. 296, 46 SW 870.

[a] **Where there are debts of decedent to be paid,** the widow is not entitled to a second years' support of herself. Martin v. Gaissert, 139 Ga. 693, 78 SE 40.

[b] **The fact that litigation is pending** between a widow and the representative over the return of appraisers appointed to assign dower will not authorize the granting of a second year's support. Smith v. Foster, 119 Ga. 376, 46 SE 425.

76. In re Treat, 162 Cal. 250, 121 P 1003; Montgomery's Est., 60 Cal. 648; In re Dougherty, 34 Mont. 336, 86 P 38.

[a] **In such case the court has no discretion** as to the duration of the allowance, and it terminates at the expiration of one year from the granting of letters testamentary or of administration, although the order does not specify its duration. In re Treat, 162 Cal. 250, 121 P 1003.

77. Fellows v. Smith, 130 Mass. 376; Duncan v. Eaton, 17 N. H. 441; Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[a] **Illustration.**—Sums paid for electric lighting for the house in which the administratrix lived after her husband's death, and for coal used in the house more than sixty days thereafter, were properly disallowed as credits, under a statute giving the wife the right to household supplies for a period of sixty days only. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

78. In re Dougherty, 34 Mont. 336, 86 P 38.

[a] **Persons interested in the estate are not estopped** to object to an an allowance to the widow for a period after the expiration of a reasonable time for the settlement of the estate, because they could have compelled the widow, as administratrix, to have promptly settled and distributed the estate, but failed to do so. In re Dougherty, 34 Mont. 336, 86 P 38.

79. Scofield v. Scofield, 6 Hill (N. Y.) 642.

80. Washburn v. Hale, 10 Pick. (Mass.) 429.

81. Cal.—In re Fernandez, 119 Cal. 579, 51 P 851.

dren.[82] Strictly speaking an executor or administrator should not make expenditures for the education and maintenance of decedent's infant children and will not be allowed the same in his administration accounts;[83] but such expenditures have frequently been allowed where they were reasonable, made in good faith, and suitable to the condition and circumstances of the children, and the estate was sufficient,[84] and where there was no appointed guardian,[85] or where the right to make them was vested in the executor by the will.[86]

[§ 776] **6. Maintenance during Quarantine.** The widow, while fully conforming to the statutory requirements, is entitled to her reasonable support out of the estate, whether it is solvent or insolvent, during her quarantine,[87] even though an inventory of the estate has been made and the statutory portion of the assets set off for the widow.[88]

[§ 777] **E. Amount or Value—1. In General.** Under some statutes the amount of the allowance is definitely fixed;[89] but as a general rule the amount is left to the discretion of the court,[90] subject in some jurisdictions, to statutory provisions that it shall not exceed a designated sum.[91] The widow has been held entitled to interest, after appraisal, on an amount allotted but not turned over to her,[92] but not to rents and profits pending an

Ga.—Simmons v. Byrd, 49 Ga. 285.
N. Y.—Shepard v. Stebbins, 48 Hun 247, 17 NYSt 900; Matter of Hitchler, 21 Misc. 417, 47 NYS 1069, 2 Gibbs. Surr. 272.
Pa.—Norton's Est., 4 Pa. Dist. 198.
Vt.—Huntley v. Denny, 65 Vt. 185, 26 A 486; Sawyer v. Sawyer, 28 Vt. 245.

82. Child of divorced parents see infra § 820.

83. U. S.—Patterson v. Phillips, 18 F. Cas. No. 10,829a, Hempst. 69.
Ala.—Wright v. Wright, 64 Ala. 88.
Ark.—Martin v. Campbell, 35 Ark. 137; Harris v. Foster, 6 Ark. 388.
La.—Froderick's Succ., 12 La. Ann. 521.
Mass.—Brewster v. Brewster, 8 Mass. 131.
Miss.—Price v. Mitchell, 18 Miss. 179; Washburn v. Phillips, 13 Miss. 600.
Mo.—Clark v. Bettelheim, 144 Mo. 258, 46 SW 135.
N. J.—Stiles v. Stiles, 2 N. J. L. 348.
N. Y.—Johnson v. Corbett, 11 Paige 265; Black's Est., Tuck. Surr. 145.
N. C.—Latta v. Russ, 53 N. C. 111.
Tex.—Mitchell v. Harrison, 32 Tex. 331.
Vt.—Mead v. Byington, 10 Vt. 116.
N. S.—Re Ryerson, 29 N. S. 81.
[a] **This rule applies where:** (1) The estate is insolvent. Clark v. Bettelheim, 144 Mo. 258, 46 SW 135. (2) The children are more than seven years of age. Mead v. Byington, 10 Vt. 116.

84. Ala.—Wright v. Wright, 64 Ala. 88.
Ark.—Martin v. Campbell, 35 Ark. 137.
Cal.—Moore v. Moore, 60 Cal. 526.
Ga.—Carter v. Davidson, 138 Ga. 317, 75 SE 155; Cheney v. Cheney, 73 Ga. 66.
Iowa.—In re Bennison, 173 Iowa 368, 155 NW 835.
Mo.—McPike v. McPike, 111 Mo. 216, 20 SW 12.
N. Y.—Clark v. Clark, 8 Paige 152, 35 AmD 676.
S. C.—Darby v. Darby, 7 S. C. Eq. 451.
Tenn.—Faver v. Parker, 101 Tenn. 141, 46 SW 453.
[a] **Expenditures before notice of insolvency** have been allowed. Darby v. Darby, 7 S. C. Eq. 451.
[b] **It is no ground for disallowing an administrator's claim** for the support of the intestate's infant children that a separate account was not kept of the expenditures for each child, where it appears that the children were given a common home and the necessaries for all were supplied from the common fund. Shepard v. Stebbins, 48 Hun 247, 17 NYSt 900.
[c] **A surviving widow** is entitled to such allowance for the maintenance and education of minor children, according to their fortune left them by their father. Wilkes v. Rogers, 6 Johns. (N. Y.) 566.

85. Glover v. Hill, 85 Ala. 41, 4 S 613; Munden v. Bailey, 70 Ala. 63; Perry v. Field, 40 Ark. 175; Johnston v. Maples, 49 Ill. 101; Browne v. Bedford, 4 Dem. Surr. (N. Y.) 304.

86. In re Van Houten, 3 N. J. Eq. 220, 29 AmD 707; Matter of Berry, 5 Dem. Surr. (N. Y.) 458; Mansfield's Est., 15 Pa. Dist. 904; Young v. Purvis, 11 Ont. 597.
[a] **An executor may be compelled by the court to use the principal** for the support of the testator's child where he is given such discretion by the will, and his refusal to do so is not honest and in good faith. Matter of Berry, 5 Dem. Surr. (N. Y.) 458.
[b] **Compelling beneficiaries to work.**—It is not within the discretion of an executor under a will vesting in him discretion as to the application of an income to maintain the beneficiaries thereunder, to oblige such beneficiaries to labor for a living in order that a fund may accumulate for their future benefit, if the income is adequate for their support. Levy's Est., 2 Phila. (Pa.) 138.

87. Lowery v. Rowland, 104 Ala. 420, 16 S 88; Matter of Brown, 77 Misc. 507, 137 NYS 978; Matter of Wachter, 16 Misc. 137, 38 NYS 941; In re Mehn, 124 NYS 173; Johnson v. Corbett, 11 Paige (N. Y.) 265.
[a] **Absence from home.**—Where at the time of the husband's death the widow is away from home attending him, and does not return immediately afterward, she will not be entitled to charge the estate for her support during the forty days succeeding his decease. Fisk v. Cushman, 6 Cush. (Mass.) 20, 52 AmD 761.

88. Matter of Wachter, 16 Misc. 137, 38 NYS 941.

89. O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462; In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672; Matter of Campbell, 48 Misc. 278, 96 NYS 768, 17 NYAnnCas 346.

90. Cal.—In re Cowell, 170 Cal. 362, 149 P 808; In re Cowell, 164 Cal. 636, 130 P 209; In re Bump, 152 Cal. 274, 92 P 643, 645; Matter of Nolan, 145 Cal. 559, 79 P 428; In re Lufkin, 131 Cal. 291, 63 P 469; Matter of Slade, 122 Cal. 434, 55 P 158; Matter of Lux, 114 Cal. 89, 45 P 1028; In re Lux, 100 Cal. 593, 35 P 341; Wills v. Booth, 6 Cal. A. 197, 91 P 759; Bell v. Bell, 2 Cal. A. 338, 83 P 814.
Conn.—Havens' App., 69 Conn. 684, 38 A 795.
Ill.—Gillett v. Gillett, 207 Ill. 136, 69 NE 942 [aff 109 Ill. A. 126].
Iowa.—In re McClellan, 174 NW 691; In re Bennison, 173 Iowa 368, 155 NW 835; Busby v. Busby, 120 Iowa 536, 95 NW 191; In re Dewell, 88 Iowa 14, 55 NW 11; McReynolds' Est., 61 Iowa 585, 16 NW 729.
Me.—Walker, Appellant, 83 Me. 17, 21 A 176; Kersey v. Bailey, 52 Me. 198; In re Gowen, 32 Me. 516; In re Cooper, 19 Me. 260.
Mass.—Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536; Chase v. Webster, 168 Mass. 228, 46 NE 705; Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Slack v. Slack, 123 Mass. 443; Wright v. Wright, 13 Allen 207; Drew v. Gordon, 13 Allen 120; Hollenbeck v. Pixley, 3 Gray 521; Hale v. Hale, 1 Gray 518; Litchfield v. Cudworth, 15 Pick. 23; Washburn v. Hale, 10 Pick. 429; Washburn v. Washburn, 10 Pick. 374.
Mich.—In re Stetson, 184 Mich. 402, 151 NW 552; Maney v. Casserly, 134 Mich. 252, 96 NW 478; North v. Van Tassel, 84 Mich. 69, 47 NW 663.
Minn.—Strauch v. Uhler, 95 Minn. 304, 104 NW 535.
Miss.—Whitehead v. Kirk, 106 Miss. 706, 64 S 658.
N. H.—Woodbury v. Woodbury, 58 N. H. 44; Piper v. Piper, 34 N. H. 563; Cunnings v. Allen, 34 N. H. 194; Kingman v. Kingman, 31 N. H. 182; Mathes v. Bennett, 21 N. H. 188; Buffum v. Sparhawk, 20 N. H. 81; Duncan v. Eaton, 17 N. H. 441.
N. C.—Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.
Utah.—In re Pugsley, 27 Utah 489, 76 P 560.
Vt.—Richardson v. Merrill, 32 Vt. 27; Sawyer v. Sawyer, 28 Vt. 249.
Wis.—Ford v. Ford, 80 Wis. 565, 50 NW 409.

91. Ark.—Lambert v. Tucker, 83 Ark. 416, 104 SW 131; Wilson v. Massie, 70 Ark. 25, 65 SW 942; Hampton v. Physick, 24 Ark. 561.
Ga.—Smith v. Smith, 115 Ga. 692, 42 SE 72; Donaldson v. Anderson, 104 Ga. 673, 30 SE 883; Stewart v. Stewart, 74 Ga. 355.
Ind.—Hays v. Buffington, 2 Ind. 369.
Mo.—Wolfe v. Wolfe, 154 Mo. A. 218, 134 SW 33.
N. Y.—Daggett v. Daggett, 14 NYS 182 [aff 9 NYS 652, 2 Conn. Surr. 230]; In re Koch, 9 NYS 814, 24 Ann Cas 468; Kelly v. Moore, 18 AbbNCas 468.
[a] **The widow is not absolutely entitled to the amount named** in the statute but the court may fix the allowance at less. Smith v. Smith, 115 Ga. 692, 42 SE 72.

92. Huey v. Huey, 26 Iowa 525; Gilman v. Gilman, 54 Me. 531.
[a] **Contrary view.** — Field v. Field, 215 Ill. 496, 74 NE 443 [aff 117 Ill. A. 307, and foll Stunz v. Stunz, 131 Ill. 210, 23 NE 407].
[b] **Where a money judgment has been entered in favor of the widow** for a certain balance due her on her widow's award, she is entitled to interest on that judgment. Brown v. Burley, 168 Ill. A. 114. See also Turner v. Fell, 142 Ill. A. 458, 460 ("The certificate of evidence does not show that the widow elected to take the balance due on her award in money and at least until this was done, and her selection of personal property and election to take the balance in money approved by the court, she certainly had no money judgment which would bear interest. Field v. Field, 215 Ill. 496, 74 NE 443. Whether a case would be made where interest would be allowable

appeal from the allotment.[93] The widow is not entitled to a homestead and a year's support where the aggregate of the two provisions exceed the amount which may be set apart as a homestead and exemption.[94] Under a statute providing for an allowance for the support of the widow "and her family" and defining the word family as including every child "who was residing with the deceased at his death and whose age did not then exceed fifteen years" it has been held that the allowance should be based upon the number of children under fifteen residing with the widow at the time of the death of the husband, although one of such children died before the application for an allowance was filed.[95] It has been held that money received by the widow and minor children from benevolent societies of which decedent was a member, and due to his family at his death, should be deducted from the amount allowed by law;[96] and that the statute does not contemplate that the widow shall live at the homestead and consume the provisions belonging to the estate and have a year's support also allowed, but that when she applies for an assignment of a year's support she must be charged with the value of what she has previously consumed.[97] A statute providing that the widow shall receive real estate of the market value of five thousand dollars does not entitle her to such quantity of real estate as will produce for her an income of six per cent per annum on five thousand dollars over and above expenses.[98] A widow has been held properly chargeable with interest on sums of money given to her over and above what she was entitled to for allowance during the settlement of the estate.[99]

In case the property is sold for an amount sufficient to pay all the allowances to which a surviving husband is entitled, he has a right to the full amount of such allowances, although the property was appraised at less than the amount thereof.[1]

Effect of testamentary provision. A widow to whom an allowance for a year has been made pursuant to statute has been held not entitled to claim, in addition thereto, the income of the real and personal property during the period of the allowance, by virtue of a provision of the will giving her the use of all of testator's real and personal property for life.[2]

Sustenance during quarantine covers no more than the supplies left on the homestead during the widow's quarantine,[3] or her reasonable board during the same period,[4] and does not embrace the widow's mourning outfit [5] or any expenses to attend the funeral of her husband.[6] Neither is a widow who is in good health, except that she is worried on account of wrongdoing in respect to testator's estate, entitled to a nurse as a part of her reasonable sustenance.[7]

[§ 778] **2. Matters to Be Considered in Fixing Amount—a. In General.** The allowance should be reasonable in amount,[8] and the reasonableness depends, of course, upon the circumstances of each particular case.[9] In fixing the amount it is proper to consider the social station and wants of the widow and children, and the degree and estate of the husband at the time of his death,[10] giving due

on a widow's award after the approval of her selection and election by the court is not presented for decision").

93. Dyer v. Dyer, 17 R. I. 547, 23 A 910.

94. Green v. Hambrick, 118 Ga. 569, 45 SE 420.

95. In re Hayes, 112 N. C. 76, 78, 79, 16 SE 904 ("We see no reason why we should disregard the plain words of the statute and restrict the allotment of the year's support, as contended for by the administrator, to the measure of the family at the time of the application. . . . The number of children residing in the family at the death of the intestate, according to the report of the commissioners, was two. The amount of the allotment was fixed by the statute and was personal to the widow. How necessary must it have been to her then, when the death of her husband was followed probably by the sickness, and soon by the death, of one of the children—this sad event, we may well presume, entailing more of expense and of immediate necessity upon her than the amount of the allowance to her on account of the child!").

96. Wellmeyer's Succ., 34 La. Ann. 819.

97. Wells v. Wilder, 36 Ga. 194.

98. Byrne's Est., 21 Pa. Dist. 205.

99. Ludington v. Patton, 121 Wis. 649, 99 NW 614.

1. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

2. In re Stetson, 184 Mich. 402, 151 NW 552.

3. In re Mehn, 124 NYS 173.

[a] **Consumption by other members of family.**—An allowance to a widow for provisions should not be restricted to what she might consume personally, but should include what was necessary for her relatives who were members of the family, and remained in the family after the husband's death. Matter of Griffith, 49 Misc. 405, 100 NYS 215.

4. In re Mehn, 124 NYS 173.

[a] **In the absence of other proof of value,** the widow may be allowed for sustenance at the rate paid for her board during decedent's lifetime. Matter of Stiles, 64 Misc. 658, 120 NYS 714; In re Mehn, 124 NYS 173.

5. In re Mehn, 124 NYS 173.

6. In re Mehn, 124 NYS 173.

7. Matter of Percival, 79 Misc. 567, 141 NYS 180.

8. In re Mehn, 124 NYS 173.

9. See cases infra this note.

"The reasonableness of the sum to be allowed for sustenance is to be determined in the light of all the circumstances of the particular case. Allowance may be more or less, as the case may seem to require, or none at all, if it appears that, all things considered, none ought to be made, but the discretion is a legal discretion, and is subject to review on appeal." In re Mehn, 124 NYS 173, 176.

[a] **Illustrative cases.**—As to the reasonableness or unreasonableness of particular allowances see In re Lufkin, 131 Cal. 291, 63 P 469; Whitt v. Ketchum, 84 Ga. 128, 10 SE 503; Lang v. Hopkins, 10 Ga. 37; Gillett v. Gillett, 207 Ill. 136, 69 NE 942 [aff 109 Ill. A. 126]; Strawn v. Strawn, 53 Ill. 263; Rankin v. Rankin, 158 Iowa 488, 139 NW 1079; In re Dewell, 88 Iowa 14, 55 NW 11; McReynold's Est., 61 Iowa 585, 16 NW 729; Eversole v. Eversole, 169 Ky. 793, 185 SW 487, LRA1916E 593; Chase v. Webster, 168 Mass. 228, 46 NE 705; Lisk v. Lisk, 155 Mass. 153, 29 NE 375; Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Allen v. Allen, 117 Mass. 27; Washburn v. Washburn, 10 Pick. (Mass.) 374; Maney v. Casserly, 134 Mich. 252, 96 NW 478; Bacon v. Perkins, 100 Mich. 183, 58 NW 835; Whitehead v. Kirk, 106 Miss. 706, 64 S 658; McReary v. Robinson, 20 Miss. 318; In re Dougherty, 34 Mont. 336, 86 P 38; Woodbury v. Woodbury, 58 N. H. 44; Foster v. Foster, 36 N. H. 437; Piper v. Piper, 34 N. H. 563; Buffum v. Sparhawk, 20 N. H. 81; Williamson v. Bitting, 159 N. C. 321, 74 SE 808; Rhode Island Hospital Trust Co. v. Hopkins, 38 R. I. 59, 94 A 724; Sanderlin v. Sanderlin, 1 Swan (Tenn.) 441; Read v. Franklin, (Tenn. Ch.) 60 SW 215; Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441; Richardson v. Merrill, 32 Vt. 27; State v. Thurston County Super. Ct., 48 Wash. 141, 92 P 942; In re Drasdo, 36 Wash. 478, 78 P 1022; Ford v. Ford, 80 Wis. 565, 50 NW 409.

10. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Cal.—In re Lux, 100 Cal. 593, 35 P 341.

Ga.—Carter v. Davidson, 138 Ga. 317, 75 SE 155; Smith v. Smith, 115 Ga. 692, 42 SE 72; Stewart v. Stewart, 74 Ga. 355; Young v. Anderson, 19 Ga. A. 551, 91 SE 900.

Ill.—Moss v. Moss, 208 Ill. A. 589.

Iowa.—In re McClellan, 174 NW 691.

La.—Morris' Succ., 137 La. 719, 69 S 151.

Me.—Walker's App., 83 Me. 17, 21 A 176.

Mass.—Glover v. Glover, 215 Mass. 576, 102 NE 945; Porter v. Porter, 165 Mass. 157, 42 NE 565; Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Washburn v. Washburn, 10 Pick. 374.

Mich.—In re Stetson, 184 Mich. 402, 151 NW 552.

Minn.—Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

Miss.—Whitehead v. Kirk, 106 Miss. 706, 64 S 658; Haughton v. Brandon, 40 Miss. 729.

N. J.—Read v. Patterson, 47 N. J. Eq. 595, 22 A 1076.

N. Y.—Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63]; In re Mehn, 124 NYS 173; Thompson v. Carmichael, 3 Sandf. Ch. 120.

N. C.—Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.

Oh.—Howland's Est., 5 OhS&CP 582, 7 OhNP 606.

Pa.—Pettit's App., 39 Pa. 324.

regard to the widow's private estate not received from her husband.[11] It is also proper to take into consideration the value and financial condition of the estate,[12] and this has been deemed a factor of more importance than the situation of the family,[13] although, on the other hand, it has been said that the reasonableness of allowances to the widow from the estate of the deceased husband is not affected by the question whether the estate will ever be sufficient to pay them.[14] Funds paid out of a solvent estate by order of court to the widow and minor children, for their support during its settlement, need not be repaid because the administrator has lost money in the management of a business owned by the estate, so as to render the estate insolvent, or as a condition precedent to holding realty, not connected with the losing business, free from trade debts incurred therein.[15]

[§ 779] **b. Effect of Dower and Other Interests.** Although the allowance to the widow is independent of any dower or distributive interest in the estate,[16] and in addition to any provision made for her by the will,[17] it has been held proper, in fixing the amount of the allowance, to give due regard to the value of the widow's expected dower or distributive interests,[18] and the provision sought to be made for her by her husband.[19]

[§ 780] **3. Specific Articles.** Some statutes provide certain specific articles which the widow shall be entitled to take.[20] Things thus specifically exempted to the widow are hers absolutely, irrespective of value and free from all set-off against any interest she may have in the balance of her husband's estate upon its distribution,[21] and if any

R. I.—Rhode Island Hospital Trust Co. v. Hopkins, 38 R. I. 59, 94 A 724.

Tenn.—Vincent v. Vincent, 1 Heisk. 333; Read v. Franklin, (Ch. A.) 60 SW 215.

Utah.—In re Pugsley, 27 Utah 489, 76 P 560.

Wash.—In re Drasdo, 36 Wash. 478, 78 P 1022.

"The provision in section 1466 that the court 'must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances' implies that before making the order, the court will ascertain the circumstances of the family and of the estate out of which the allowance is to be made. This will involve an inquiry, among other matters, into their habits and mode of life during the lifetime of the decedent; the requirements of the several members of the family—depending upon their age and condition—whether for education, physical support, or health, and also the condition and extent of the property belonging to the estate." Bell v. Bell, 2 Cal. A. 338, 340, 83 P 814, 815.

[a] **A trip to a summer resort,** when suitable to the station of the family and customary, may be allowed. Pickens v. Pickens, 35 Ala. 442.

[b] **The rent of a pew** in church rented by the widow for the use of herself and children after the testator's death cannot be allowed to her on her accounting as executrix. Scott v. Monell, 1 Redf. Surr. (N. Y.) 431.

11. Cal.—In re Lufkin, 131 Cal. 291, 63 P 469.

La.—Morris' Succ., 137 La. 719, 69 S 151; De Boisblanc's Succ., 32 La. Ann. 17; Aaron's Succ., 11 La. Ann. 671; Rodrique v. Barthelmy, 10 La. A. (Orleans) 253.

Me.—Walker's App., 83 Me. 17, 21 A 176.

Mass.—Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371; Washburn v. Washburn, 10 Pick. 374.

N. H.—Duncan v. Eaton, 17 N. H. 441.

12. Ga.—Carter v. Davidson, 138 Ga. 317, 75 SE 155.

Minn.—Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

Mo.—Peugh v. McKinney, (A.) 211 SW 83.

N. H.—Duncan v. Eaton, 17 N. H. 441.

Oh.—In re Mullen, 6 OhS&CP 134, 5 OhNP 392.

Utah.—In re Pugsley, 27 Utah 489, 76 P 560.

Wash.—In re Drasdo, 36 Wash. 478, 78 P 1022.

Can.—Re Rundle, 52 Can. S. C. 114 [dism app 32 Ont. L. 312, 7 Ont WN 350].

13. Strauch v. Uhler, 95 Minn. 304, 308, 104 NW 535.

"The extent of that allowance must be determined primarily by the value of the estate. Due, but not controlling, regard should be had as to the situation in life and previous manner of living of the widow or children, for family expenditures must be adapted to the resources of the estate. It would be gross injustice to permit such an allowance to confiscate the estate, and in effect rob its creditors. Accordingly, where as in this case, the claim is made that the estate is insolvent the allowance should be made with proper reference to the facts, as far as the same can be ascertained, without undertaking to finally adjudicate either the value of the property or the validity of the claims." Strauch v. Uhler, supra.

14. Jones v. Bartlett, (Tex. Civ. A.) 189 SW 1107.

15. Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.

16. See supra § 759.

17. Jameson v. Jameson, 117 Ark. 142, 173 SW 851; Latch v. Latch, 21 Ga. A. 545, 94 SE 853. See also infra § 759.

18. Ala.—Thompson v. Thompson, 51 Ala. 493.

Ill.—Strawn v. Strawn, 53 Ill. 263.

Iowa.—In re Hieschler, 13 Iowa 597.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

N. H.—Duncan v. Eaton, 17 N. H. 441.

Pa.—Jones' App., 62 Pa. 324; Minnick's Est., 18 Phila. 40.

Tex.—Nelson v. Lyster, 32 Tex. Civ. A. 356, 74 SW 54.

[a] **Thus** a widow is not entitled to accept a devise of the real estate, and in addition claim the right to have other property sold and to be allowed a year's support from the proceeds thereof. Nelson v. Lyster, (Tex. Civ. A.) 74 SW 54.

[b] **Discretion of court and condition at distribution.**—In some states the allowance is so purely for present and immediate support that it may or may not be treated as part of the widow's share in her husband's estate, according to the court's discretion and the eventual condition at distribution. Thompson v. Thompson, 51 Ala. 493; Strawn v. Strawn, 53 Ill. 263; Foster v. Foster, 36 N. H. 437.

19. Matter of Drasdo, 36 Wash. 478, 78 P 1022.

20. Ala.—Phillips v. Phillips, 151 Ala. 527, 44 S 391, 125 AmSR 40, 15 AnnCas 157.

Ky.—Crabtree v. Crabtree, 11 KyL 812.

Nebr.—In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672; In re Fletcher, 83 Nebr. 156, 119 NW 232.

N. Y.—Matter of Griffith, 49 Misc. 405, 100 NYS 215.

Vt.—Sawyer v. Sawyer, 28 Vt. 245.

Ont.—Pickering v. Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 Ont WR 697, AnnCas1912A 530.

[a] **No difference can be made between** the vested title of a widow to specific articles, there being none other, and the vested right to have them set apart where there are others. Crabtree v. Crabtree, 11 KyL 812.

[b] **Construction of statutes.**—(1) A statute giving to the widow and children, as exempt, "the clothing of the family, the clothes of the widow, and her ornaments proper for her station," does not give to the widow the right to have the wearing apparel and ornaments of her deceased husband set off to her. Matter of Griffith, 49 Misc. 405, 100 NYS 215. (2) Nor is the husband, under a provision that in case his wife dies "the same articles and personal property" shall be set apart to him, entitled to the wife's clothing and ornaments. Matter of Whiting, 19 Misc. 85, 43 NYS 969.

[c] **The term "household furniture"** has been held to include: (1) a piano (Matter of Allen, 36 Misc. 398, 72 NYS 750), (2) used as a means of support by the widow and minor children of decedent (Phillips v. Phillips, 151 Ala. 527, 44 S 391, 125 AmSR 40, 15 AnnCas 157). (3) A "silver card receiver used on hat rack." Phillips v. Phillips, supra. (4) But cows and other property of that class cannot, by the most liberal construction of the statute, be brought under the head of "household furniture." Matter of Griffin, 118 App. Div. 515, 103 NYS 345.

[d] **The term "wearing apparel"** has been held to include: (1) A watch and chain Chamboredon v. Fayet, 176 Ala. 211, 57 S 845. (2) A ring valued at twenty dollars and a watch and chain valued at thirty-five dollars. Phillips v. Phillips, 151 Ala. 527, 44 S 391, 125 AmSR 40, 15 Ann Cas 157. (3) The epaulets and bosom pin of a naval officer but not his watch, watch key, watch chain, cords and seals, finger ring, sword and sword belt. Sawyer v. Sawyer, 28 Vt. 245.

[e] **An iron safe and an electric battery are** neither articles of personal apparel nor household or kitchen furniture, necessary for the use and comfort of a family, and so a minor child cannot claim such articles as exempt from administration under Code (1907) § 4199. Chamboredon v. Fayet, 176 Ala. 211, 57 S 845.

21. Ala.—Jackson v. Wilson, 117 Ala. 432, 23 S 521; Carter v. Hinkle, 13 Ala. 529.

Ill.—Boyer v. Boyer, 21 Ill. A. 534; Rutledge v. Rutledge, 21 Ill. A. 357.

Ky.—Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 716; Husbands v. Bullock, 1 Duv. 21; Harris v. Adams, 78 SW 156, 25 KyL 1492; Woods v. Robinson, 46 SW 23, 19

of such articles are wanting she usually is entitled to an allowance of money or other property in lieu thereof,[22] although this is sometimes denied.[23] Where, however, all the articles specified are on hand she is compelled to take them, and cannot have money or other property in lieu thereof, although the statute provides for an allowance of other property or money in lieu of articles not on hand;[24] and in such case she is entitled to nothing more in the way of exemptions, although the value of the property may be less than the amount designated by statute to be allowed in lieu of articles not on hand.[25] In the absence of an allegation that a gift inter vivos by intestate to his son was made with a view of committing a fraud against the rights of intestate's widow, or that it had that effect, she was not entitled to avoid the gift on the ground that she was prejudiced thereby, in that there was no property out of which to assign her the articles to which she was entitled by law, as exempt from distribution.[26] As to articles not exempted which the widow may keep or receive the general rule charging her with their value must apply.[27]

[§ 781] **4. When Whole Estate Set Apart.** In some jurisdictions statutes have been enacted providing that in case the estate does not exceed a certain specified amount, there shall be no administration thereon, or if administration has commenced there shall be no further proceedings therein, but the whole shall be set apart to the widow or minor children;[28] and where it is made to appear that the value of the estate brings it within the statute, all of it must be so set apart regardless

KyL 1659; Fedder v. Fedder, 12 KyL 191.

Md.—Crow v. Hubard, 62 Md. 560.

Mo.—State v. Taylor, 72 Mo. 656.

Nebr.—In re Manning, 85 Nebr. 60, 122 NW 711.

N. Y.—Crawford v. Nassoy, 173 N. Y. 163, 65 NE 962 [rev 55 App. Div. 433, 67 NYS 108]; Brigham v. Bush, 33 Barb. 596.

Tenn.—Bayless v. Bayless, 4 Coldw. 359; Curd v. Curd, 9 Humphr. 171.

Vt.—Sawyer v. Sawyer, 28 Vt. 245.

[a] **Trespass** may be maintained by the widow against the executor for selling such property under an order of the orphans' court. Carter v. Hinkle, 13 Ala. 529.

[b] **Conversion** may be maintained by the widow against the representative where he has refused upon demand to make an inventory as required by the statute, and has appropriated to his own use property and money belonging to her. Crawford v. Nassoy, 173 N. Y. 163, 65 NE 962 [rev 55 App. Div. 433, 67 NYS 108].

22. Colo.—Pueblo Western Nat. Bank v. Rizer, 12 Colo. A. 202, 55 P 268.

D. C.—Howard v. Howard, 38 App. 575.

Ga.—Taylor v. Flint, 35 Ga. 124.

Ky.—Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 716; Davidson v. Davidson, 1 KyL 360, 10 Ky. Op. 828; Wood v. Robinson, 46 SW 23, 19 KyL 1659; Welch v. Welch, 44 SW 960, 19 KyL 1945; Fedder v. Fedder, 12 KyL 191.

Minn.—Stromberg v. Stromberg, 119 Minn. 325, 138 NW 428.

Pa.—Hunt's App., 100 Pa. 590.

Tex.—Linares v. Linares, 93 Tex. 84, 53 SW 579 [aff (Civ. A.) 51 SW 510]; Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

Va.—Riggan v. Riggan, 93 Va. 78, 24 SE 920.

[a] **Amount to be allowed.**—Under a statute providing that certain specified articles of the husband's property are to be set apart to the widow, and, if wanting, money or other property in lieu thereof, not exceeding seven hundred and fifty dollars, property so set apart, and received by her, is not to be estimated as part of the seven hundred and fifty dollars she is entitled to receive in lieu of property not on hand. Wood v. Robinson, 46 SW 23, 19 KyL 1659.

23. Stromberg v. Stromberg, 119 Minn. 325, 326, 138 NW 428 ("We are clear that the trial court was right in holding that, where a decedent left no household goods, the widow is not entitled to have any allowance in lieu thereof. If there be household goods, she is entitled to select and keep such to the value of $500, but the statute, section 3653, R. L. 1905, does not allow her to select an equivalent in other property. Her right to the selection of certain specified articles of her deceased husband's property is clearly confined to those articles, the household goods not to exceed a fixed value").

[a] **In New York** the cases are not in harmony. (1) The right to an allowance in lieu of specific articles was asserted in Matter of Baird, 126 App. Div. 439, 110 NYS 708; Matter of Williams, 31 App. Div. 617, 52 NYS 700, 28 NYCivProc 79 [foll Matter of Hulse, 41 Misc. 307, 84 NYS 220; In re Hembury, 37 Misc. 454, 75 NYS 933]; Matter of Bern, 52 Misc. 426, 103 NYS 167; Matter of Bidgood, 36 Misc. 516, 73 NYS 1061. (2) But it was denied in Baucus v. Stover, 24 Hun 109 [rev on other grounds 89 N. Y. 1]; Matter of Stiles, 64 Misc. 658, 120 NYS 714; Matter of Weaver, 53 Misc. 244, 104 NYS 475; Matter of Griffith, 49 Misc. 405, 100 NYS 215; Matter of Campbell, 48 Misc. 278, 96 NYS 768, 17 NYAnnCas 346; Matter of Keough, 42 Misc. 387, 86 NYS 807; Matter of Perry, 38 Misc. 167, 77 NYS 271. (3) An allowance in money or other property if the articles mentioned do not exist is now expressly prohibited by statute. Code Civ. Proc. § 2670.

[b] **That the matter depends upon the provisions of the statute** was the view of the court in Nelson v. Troll, 173 Mo. A. 51, 156 SW 16 (where a surviving husband was held entitled to an allowance for provisions not on hand because the statute provided that if they were not on hand "the court shall make a reasonable appropriation of the assets of the estate to supply such deficiency," but the court said with relation to wearing apparel, implements of industry, etc., that "plaintiff is not entitled to an allowance on account of such articles, unless they were owned by his wife at the time of her death, for the statute gives no allowance in lieu of them when it appears they are not on hand").

24. Welch v. Welch, 44 SW 960, 19 KyL 1945.

25. Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 717.

26. Burge v. Burge, 76 SW 873, 25 KyL 979.

27. Menifee v. Menifee, 8 Ark. 9; Swayze v. Wade, 25 Kan. 551; Drum's Succ., 26 La. Ann. 539.

28. Ala.—Landers v. Hayes, 195 Ala. 533, 72 S 106; Headen v. Headen, 171 Ala. 521, 54 S 646; Quinn v. Campbell, 126 Ala. 280, 28 S 676; Jackson v. Wilson, 117 Ala. 432, 23 S 521; Chandler v. Chandler, 87 Ala. 300, 6 S 153; Nance v. Nance, 84 Ala. 375, 4 S 699, 5 AmSR 378.

Ariz.—Molina v. Ramirez, 15 Ariz. 249, 138 P 17.

Ark.—Wilson v. Massie, 70 Ark. 25, 65 SW 942; Harrison v. Lamar, 33 Ark. 824; Hampton v. Physick, 24 Ark. 561.

Cal.—In re Neff, 139 Cal. 71, 72 P 632; In re Atwood, 127 Cal. 427, 59 P 770; McGuire v. Lynch, 126 Cal. 579, 59 P 27; In re Bachelder, 123 Cal. 466, 56 P 97; In re Leslie, 118 Cal. 72, 50 P 29; In re Palomares, 63 Cal. 402; Wills v. Booth, 6 Cal. A. 197, 91 P 759; Bell v. Bell, 2 Cal. A. 338, 83 P 814.

Ga.—Smith v. Smith, 115 Ga. 692, 42 SE 72; Lowery v. Powell, 109 Ga. 192, 34 SE 296; Stewart v. Stewart, 74 Ga. 355; Doyle v. Martin, 61 Ga. 410.

Ind.—Warner v. Warner, 30 Ind. A. 578, 66 NE 760.

Iowa.—Adkinson v. Breeding, 56 Iowa 26, 8 NW 685.

Ky.—O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462.

Mass.—Brazer v. Dean, 15 Mass. 183.

Mich.—Stanton v. Foster, 122 Mich. 219, 80 NW 1084.

Mo.—Pidcock v. Buffam, 61 Mo. 370; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

Okl.—Perryman v. Woodward, 37 Okl. 792, 133 P 244.

Pa.—Henry's Est., 6 Pa. Co. 28; Bubbs' Est., 18 LancLRev 383; Welsh's Est., 14 WklyNC 175.

S. D.—Smith v. Terry Peak Miners' Union, 16 S. D. 631, 94 NW 694.

Tex.—Linares v. Linares, 93 Tex. 84, 53 SW 579 [aff (Tex. Civ. A.) 51 SW 510].

Utah.—In re Farmer, 17 Utah 80, 53 P 972.

Vt.—Boyden v. Ward, 38 Vt. 628.

Wash.—Scott v. Stark, 75 Wash. 610, 135 P 643.

[a] **Illustration.**—Where on an application by a widow to have a house and lot set apart to her as a homestead, it appeared that she was not entitled to it as such, that the house and lot were the only assets of any considerable value, and that they were worth less than five hundred dollars, it was properly awarded to her to make up an allowance in lieu of homestead. Linares v. Linares, 93 Tex. 84, 53 SW 579 [aff (Civ. A.) 51 SW 510].

[b] **The word "estate,"** as used in such a statute means the whole mass of intestate's property. Perryman v. Woodward, 37 Okl. 792, 133 P 244.

[c] **Whether the property is homestead or not,** it all passes to the widow if it does not exceed the statutory allowance in amount or value. Headen v. Headen, 171 Ala. 521, 54 S 646.

[d] **Statute applicable to separate estate of wife.**—In re Leslie, 118 Cal. 72, 73, 50 P 29 ("We see no reason why the provisions of that section do not apply to the separate property of both the wife and husband equally with the community property. The section is broad in its terms, and in no way is it there indicated that community property only was in the mind of the legislature when this law was enacted. It refers in terms to the estate of any deceased person. There is no more reason why a small

of whether the estate is solvent or insolvent.[29] In some jurisdictions the statutes to this effect are applicable only to personal property and not to realty,[30] but a court has allowed the widow of an intestate the whole of the personal estate, and directed the charges of administration to be deducted from the proceeds of real estate sold by order of court for the payment of the intestate's debts.[31] It has been held that an order or decree of the probate court is necessary to vest the property in the widow;[32] but it has also been considered that, where the estate does not exceed the specified amount, title vests absolutely in the widow by operation of law without any judicial allotment,[33] and that if the court fails to make an order setting apart the property the widow may, in a proceeding against her to account for the estate, show that it does not exceed the statutory amount and thus avail herself of the benefit of the statute.[34] Notice to all persons interested is sometimes required as a prerequisite to setting aside the entire estate to the widow.[35]

[§ 782] **F. Persons Entitled—1. In General.** The object of the statutes under discussion is to provide temporary support for those only who are dependent upon the deceased,[36] and the benefits of such a statute cannot be extended to persons who were not within the contemplation of the legislature.[37] While the word "family" as used in such statutes has been held to refer only to a surviving husband or wife or minor children,[38] it has also been considered that the term may embrace other persons who formed part of the domestic circle of decedent at the time of his death,[39] although it cannot be extended to mere boarders or lodgers.[40]

[§ 783] **2. Widow.** The widow is invariably entitled to the benefit of the statutory provision for maintenance and support,[41] but in order to have the benefit of such a statute, she must have been lawfully married to decedent,[42] or at least have been living with him as his wife under an honest belief that she was lawfully married to him,[43] and must as a rule have been a member of his family at the time of his death.[44] The allowance to the widow is not ordinarily dependent upon there being any other family of decedent,[45] even though the

separate estate of the deceased husband or wife should not be set apart to the minor children than there is why an estate of community property should not be set apart. The object and purpose is subserved in both cases. The reasons for taking the estate out of administration, and setting it aside to the minor children, are the same whatever may be the technical character of the property belonging to the estate").

[e] **Settlement by probate judge; power of appointee.**—Under a statute providing that when a person dies leaving no estate, except personal property of trifling value, the judge of the county court shall take charge of the estate personally, or by some person he may appoint, and pay out of it the burial and other expenses, and set apart to the widow and minor children, if any, the residue, the responsibility of gathering and distributing such property is on the judge, and a person appointed by him to take physical possession of the property is a mere custodian, and has not legal capacity to sue, as agent of the county court, to collect from a fraternal society of which deceased was a member a sum for funeral expenses. Smith v. Terry Peak Miners' Union, 16 S. D. 631, 94 NW 694.

[f] **Abatement of proceedings.**—Proceedings by a widow to have the whole of an estate set aside to her without administration abate on her death, where there are no minor children; and hence, where she dies pending an appeal from an order denying her application, the appeal will be dismissed. In re Bachelder, 123 Cal. 466, 56 P 97.

[g] **Sale by husband before death.**—Where a husband executed a bill of sale of his personal property immediately before his death, a decree of court setting aside the estate to the widow pursuant to a statute vesting it in her, when it does not exceed five hundred dollars, does not operate to divest title from the purchaser under the bill of sale, although possession of the property was not delivered until after the husband's death. Warner v. Warner, 30 Ind. A. 578, 66 NE 760.

[h] **Right to sue on claim due decedent.**—Where the personal property does not exceed the amount of the widow's exemption, she may maintain an action upon any claim due decedent. Lasseter v. Deas, 9 Ala. A. 564, 571, 63 S 735 (where it was said, however: "In determining the defendant's liability and the amount of his indebtedness to the deceased husband, the defendant would be entitled to plead and prove any legal set-off he might have to the demand sued upon, without regard to any exemption existing in favor of the widow to property belonging to her deceased husband at the time of his death, for her right of exemption could only pertain to the amount actually due from the defendant to her husband at the time of his death, and, in determining what that amount is, the defendant is entitled, when properly pleaded, to have taken into consideration any set-off to the demand sued upon that exists in his favor").

[i] **Such a statute is not impliedly repealed** by a subsequent act dealing with the right to select a homestead after the death of the husband. Scott v. Stark, 75 Wash. 610, 135 P 643.

[j] **Statute repealed.**—The act of Jan. 2, 1851, providing that, where the whole of a decedent's estate did not exceed in value three hundred dollars, it should be allowed to the widow, was repealed by the act of Dec. 8, 1852, commonly known as the "Homestead Act," in so far at least as regarded the homestead rights of the minor children conferred by the latter act. Rowland v. Wadly, 71 Ark. 273, 72 SW 994.

29. Smith v. Smith, 115 Ga. 692, 42 SE 72; O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462.

30. Wilson v. Massie, 70 Ark. 25, 65 SW 942 [dist Harrison v. Lamar, 33 Ark. 824, as decided under earlier statutes since repealed]; Pidcock v. Buffam, 61 Mo. 370.

31. Brazer v. Dean, 15 Mass. 183.

32. Stanton v. Foster, 122 Mich. 219, 80 NW 1084.

33. Contra Headen v. Headen, 171 Ala. 521, 54 S 646.

34. Hampton v. Physick, 24 Ark. 561.

35. Wills v. Booth, 6 Cal. A. 197, 91 P 759 (notice need not be by publication).

36. In re McSwain, 176 Cal. 280, 287, 168 P 117; Miller v. Ennis, 107 Ga. 663, 34 SE 302; Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.

37. In re McSwain, 176 Cal. 280, 287, 168 P 117; Hamilton v. Riney, 140 Ky. 476, 131 SW 287; Krumenacker v. Andis, 38 N. D. 500, 165 NW 524; Hance v. Chappell, 20 Oh. Cir. Ct. 214, 11 Oh. Cir. Dec. 139.

[a] **Illustrations.**—(1) A statute providing that certain articles shall be set apart to the widow or infant children of an intestate does not apply to the husband of a deceased married woman. Hamilton v. Riney, 140 Ky. 476, 131 SW 287. (2) An allowance to be set apart to "the widow or infant child" from the estate of an intestate, to infant child, if no "mother" survives, and to the "widow" if there be no infant children, or if none reside in the family with the "widow," does not apply to the husband and children of an intestate wife. Thaxton v. Walters, 130 Ky. 235, 113 SW 118.

38. In re McSwain, 176 Cal. 280, 287, 168 P 117. See also Whaley v. Whaley, 50 Mo. 577 (the word "family" does not include assistants who may be necessary to the house or manage the farm).

39. Strawn v. Strawn, 53 Ill. 263; Durkin's Succ., 30 La. Ann. 669.

[a] **A grandmother** in destitute circumstances and without the means of support is entitled to an allowance as alimony from the estate of her grandchildren. Lyon's Succ., 22 La. Ann. 627.

40. Strawn v. Strawn, 53 Ill. 263.

41. See the statutes.

42. In re Byrne, Myr. Prob. (Cal.) 1; Kroell v. Kroell, 219 Ill. 105, 76 NE 63, 4 AnnCas 801; In re Grossman, (Pa.) 106 A 86; Grimm's Est., 131 Pa. 199, 18 A 1061, 17 AmSR 796, 6 LRA 717; Immendorf's Est., 7 Pa. Dist. 449, 21 Pa. Co. 268 [aff 190 Pa. 590, 42 A 959]; Green's Est., 5 Pa. Co. 605; Foster's Est., 4 Wkly NC (Pa.) 75; Walker v. Walker, (Tex. Civ. A.) 136 SW 1145.

"The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife." Kroell v. Kroell, 219 Ill. 105, 111, 76 NE 63, 4 AnnCas 801 [rev 120 Ill. A. 76].

43. Young's App., 52 Mich. 592, 18 NW 373.

44. Martin's Est., 5 Pa. Co. 504; Scullin's Est., 5 Pa. Co. 188.

[a] **Maintenance of family relation until removal of husband to hospital.**—A wife who maintained the family relation with her husband until he became so ill that he had to be removed to a hospital will be entitled to her exemption after his death. Wallace's Est., 40 Pa. Super. 595.

Effect of separation or divorce see infra §§ 819, 820.

45. Smith v. Smith, 115 Ga. 692, 42 SE 72; McMahill v. McMahill, 113 Ill. 461; Willetts v. Schuyler, 3 Ind. A. 118, 29 NE 273.

[a] **A second wife without issue** is entitled to quarantine. Willetts

statute grants the allowance to widow and children,[46] although the existence of a family has the effect, under some statutes, of increasing the allowance.[47] The widow's right to the statutory allowance becomes vested upon the death of her husband, and is not dependent upon a demand by her.[48] It has been held that the property set apart to the widow does not become absolutely hers, and she has no right to sell the same and receive the proceeds to her own use, but that such property, when no longer needed or used by her, falls into the general estate, and is to be distributed according to law, although it is not liable for the debts of decedent.[49]

[§ 784] **3. Children—a. In General.** Although under some statutes the allowance goes to the widow to the exclusion of the children,[50] the provision is generally made for the benefit of the children as well as the widow,[51] and if no lawful widow survives, or in case of her death, the allowance usually goes to decedent's surviving children, if any.[52] Minor children, or children not over a specified age, are the usual sole objects of such legislation, next to or in connection with the widow;[53] but some statutes embrace even adult children, provided they are actually in decedent's household and have a legal or moral right to be clothed and fed by the widow,[54] or out of decedent's estate,

v. Schuyler, 3 Ind. A. 118, 29 NE 273.

46. Ala.—Little v. McPherson, 76 Ala. 552.

Ga.—Stewart v. Stewart, 74 Ga. 355; Woodbridge v. Woodbridge, 70 Ga. 733.

Ky.—Newman v. Winlock, 3 Bush 241.

Nev. In re Walley, 11 Nev. 260.

N. Y.—Kain v. Fisher, 6 N. Y. 597, Seld. 11.

Tenn.—Compton v. Perkins, 92 Tenn. 715, 23 SW 66.

Vt.—Sawyer v. Sawyer, 28 Vt. 245.

47. McMahill v. McMahill, 113 Ill. 461; In re Stewart, 140 N. C. 28, 52 SE 255.

[a] **Where children do not reside with the widow,** she is not entitled to an additional allowance for them. In re Stewart, 140 N. C. 28, 52 SE 255.

48. Pyles v. Bowie, 123 Md. 13, 90 A 772.

49. Meyer v. Meyer, 23 Iowa 359, 92 AmD 432; Paup v. Sylvester, 22 Iowa 371; Gaskell v. Case, 18 Iowa 147; Schaffner v. Grutzmacher, 6 Iowa 137; Wilmington v. Sutton, 6 Iowa 44.

50. Ill.—Weaver v. Weaver, 109 Ill. 225.

Ky.—Harris v. Adams, 117 Ky. 407, 78 SW 156, 25 KyL 1492.

Mich.—In re Service, 155 Mich. 179, 118 NW 948.

Minn.—Benjamin v. Laroche, 39 Minn. 334, 40 NW 156.

Mo.—Mowser v. Mowser, 87 Mo. 437; Hastings v. Myers, 21 Mo. 519.

N. Y.—Johnson v. Corbett, 11 Paige 265.

N. C.—Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.

Pa.—Henkel's Est., 13 Pa. Super. 337.

[a] **Under a statute allowing "the widow or the children,"** the widow may take to the exclusion of the children. Henkel's Est., 13 Pa. Super. 337.

[b] **Children not residing with widow.**—(1) Personal property of an intestate set apart by the statute as exempted from distribution is for the exclusive benefit of the widow, where there are no infant children of the intestate residing with her, infant children of the intestate not residing with the widow not being entitled to any part of the property thus set apart, or to any interest therein, although they be children by a former marriage, and have no natural mother. Alexander v. Alexander, 86 Ky. 688, 7 SW 156, 8 KyL 839. (2) Under the statute permitting a widow and minor children to occupy the dwelling house and adjacent fields, not exceeding forty acres, for one year from the death of the husband, free of rent, where the minor children are removed by their guardian, he cannot maintain an action against the widow to recover any part of the rental value of the premises for such year. Weaver v. Low, 29 Ind. 57.

51. Ala.—Ford v. Strong, 78 S 918.

Cal.—McGuire v. Lynch, 126 Cal. 576, 59 P 27.

Colo.—Smith v. Quinn, 60 Colo. 281, 153 P 217.

Ga.—Hill v. Van Duzer, 111 Ga. 867, 36 SE 966.

Miss.—Womack v. Boyd, 31 Miss. 443.

N. C.—In re Stewart, 140 N. C. 28, 52 SE 255.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

[a] **Widow cannot apply allowance to individual debts.**—Where a year's support is set aside for the benefit of the widow and minor children, the widow cannot apply the proceeds thereof to the payment of her individual debt, since such application would deprive the children of their rights. Hill v. Van Duzer, 111 Ga. 867, 36 SE 966.

[b] **Where the widow refused to assume the control and maintenance** of two stepchildren under fifteen years of age for a year after the death of her husband, she was only entitled to an allowance of three hundred dollars, the allowance for the children being payable to their guardian. In re Stewart, 140 N. C. 28, 52 SE 255.

[c] **A minor child who is not living with the widow** is entitled to her share, since such right is given, not as an incident to the family relation, but because of minority. Ford v. Strong, (Ala.) 78 S 918; Lanford v. Lee, 119 Ala. 248, 24 S 578, 72 AmSR 914.

[d] **Widow may waive her rights in favor of children.**—Where the widow, having ample means of her own, gives her consent, the whole of the allowance may be assigned for the use and support of the minor children. In re Palomares, 63 Cal. 402.

[e] **Rights in mother's estate.**—Under some of the statutes the minor child of a widow is entitled to support out of her estate. See supra § 772.

[f] **Residence of children.**—Where a husband dies leaving a widow and minor children and only exempt property, the children, so long as the widow lives, have no right to the possession or disposition thereof unless and until they mature and leave the family, when they become entitled to their proportion of what remains. Kelley v. Kelley, 9 Ala. A. 306, 63 S 740 (therefore, where a husband left a widow and minor children and an estate consisting of less than one thousand dollars, an action on a note which was part of such estate, all of which was exempt to the widow and minor children, could only be brought by the widow alone and not by her and the minors).

52. Ala.—Phillips v. Phillips, 151 Ala. 527, 44 S 391, 125 AmSR 40, 15 AnnCas 157; Brown v. Walter, 58 Ala. 310; Carter v. Hinkle, 13 Ala. 529.

Ga.—Miller v. Ennis, 107 Ga. 663, 34 SE 302; Woodbridge v. Woodbridge, 70 Ga. 733.

Ill.—Wolford v. Deemer, 89 Ill. A. 524.

Ky.—Burgett v. Clarke, 4 KyL 518.

Me.—Davis v. Gower, 85 Me. 167, 26 A 1048.

Minn.—Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

Miss.—Whitcomb v. Reid, 31 Miss. 567, 66 AmD 579; Edwards v. McGee, 27 Miss. 92.

Mo.—In re Ryan, 174 Mo. A. 202, 156 SW 759.

N. C.—In re Stewart, 140 N. C. 28, 52 SE 255.

Pa.—In re Grossman, 106 A 86; Fiddler's Est., 14 Pa. Dist. 359; Alexander's Est., 13 Phila. 564; McElroy's Est., 13 Phila. 320.

Tenn.—Rhea v. Greer, 86 Tenn. 59, 5 SW 595.

Tex.—Lockhart v. White, 18 Tex. 102.

Wash.—In re Murphy, 30 Wash. 9, 70 P 109; Matter of Gorkow, 20 Wash. 563, 56 P 385.

53. Ala.—Quinn v. Campbell, 126 Ala. 280, 28 S 676; Wiggins v. Mertins, 111 Ala. 164, 20 S 356; Henderson v. Tucker, 70 Ala. 381; Childs v. Jones, 60 Ala. 352; Thompson v. Thompson, 51 Ala. 493; Turner v. Whitten, 40 Ala. 530; Kelley v. Kelley, 9 Ala. A. 306, 63 S 740.

Ark.—Quattlebaum v. Triplett, 69 Ark. 91, 61 SW 162.

Ga.—Miller v. Ennis, 107 Ga. 663, 34 SE 302; Whitt v. Ketchum, 84 Ga. 128, 10 SE 503.

La.—Vives' Succ., 35 La. Ann. 371; Durkin's Succ., 30 La. Ann. 669.

N. Y.—In re Lyon, 137 NYS 171.

N. C.—In re Hayes, 112 N. C. 76, 16 SE 904.

Oh.—Banse v. Muhme, 13 Oh. Cir. Ct. 501, 7 Oh. Cir. Dec. 224.

Pa.—McKeen v. Ehret, 14 Pa. Dist. 661; Steel's Est., 13 Phila. 398.

Tenn.—Thompson v. Alexander, 11 Heisk. 313; Sanderlin v. Sanderlin, 1 Swan 441.

Tex.—Cooper v. Pierce, 74 Tex. 526, 12 SW 211.

Vt.—Mead v. Byington, 10 Vt. 116.

Wash.—In re Murphy, 30 Wash. 9, 70 P 109.

Ont.—Cook v. Noble, 12 Ont. 81.

[a] **The word "children"** as used in such a statute, has been construed to mean minor children only. Quattlebaum v. Triplett, 69 Ark. 91, 61 SW 162.

[b] **A child over eighteen but under twenty-one** years of age is a minor within the meaning of the statute. Lanford v. Lee, 119 Ala. 248, 24 S 578, 72 AmSR 914.

[c] **A married minor daughter,** not a member of her father's household but living with and supported by her husband, is not entitled to share in the allowance granted to a widow and minor children. Goss v. Harris, 117 Ga. 345, 43 SE 724; Miller v. Ennis, 107 Ga. 663, 34 SE 302. Abiter under Alabama statute. Lanford v. Lee, 119 Ala. 248, 24 S 578, 72 AmSR 914.

[d] **Children are entitled to maintenance only until they reach majority.**—Cook v. Noble, 12 Ont. 81.

54. Strawn v. Strawn, 53 Ill. 263; Gillett v. Gillett, 109 Ill. A. 126 [aff 207 Ill. 136, 69 NE 942]; Whaley v. Whaley, 50 Mo. 577; Lane's Est., 6 Pa. Dist. 618; Nelson v. Thompson, 2 Pa. Dist. 844; Young's Est., 15 Pa. Co. 374, 35 WklyNC 316; Halbe's Est., 9 Pa. Co. 512, 20 Phila. 117; Kelly's Est., 1 Kulp (Pa.) 365.

[a] **All female children, regardless of their ages,** who reside with the widow, are entitled to the benefits

where there is no widow.[55] Where after a year's support has been set apart to a widow for herself and a minor child, the child voluntarily removes from the residence of her mother and relinquishes further care and support by the mother, she cannot recover for her own separate use any part of the sum so set apart,[56] nor where an allowance has been made to the widow for the support of the family, should an additional allowance be made for the support of a child in the absence of special circumstances.[57]

[§ 785] **b. Posthumous Children.** A posthumous child is entitled to share in the statutory apportionment with the other children,[58] or the birth of a posthumous child may entitle the widow to the benefit of an additional allowance provided for in case there are children residing with the widow.[59]

[§ 786] **c. Illegitimate Children.** Illegitimate children are not, it has been held, entitled to an allowance for support out of their deceased father's estate.[60]

[§ 787] **d. Children of Successive Marriages.** Children of decedent by a former wife have been held to share in the allowance,[61] unless they do not reside with the widow.[62] It has been held that when the family embraces two sets of minor children by different wives each set is entitled to an allowance, and the portion going to each should be specified,[63] and also that an administrator on the joint estates of a deceased husband and his first wife cannot appropriate the entire allowance for the one year's support made by the court, although furnished from the community property of the first marriage, to the exclusive use of the children of the first marriage, if there are minor children of the deceased husband by a subsequent marriage.[64] The fact that mother remarried and left her second husband surviving does not affect the right of her children by her first husband in their father's estate.[65]

[§ 788] **e. Stepchildren.** A statute making provision for the widow "and her family" has been held to apply to children of the widow by a former husband, who are under age and reside with her,[66] and a similar construction has been placed upon a statute providing an allowance for "the children of the intestate, or of the widow, or of both."[67] But a statute providing that certain articles "shall be set apart to the widow or infant child or children," has been held to refer to the infant child or children of intestate and not to include his wife's infant children by a former marriage.[68]

[§ 789] **f. Effect of Adoption.** It has been held that where minor children, after their father's death, were adopted by other persons, they ceased to be of the family of their deceased father, and so were no longer within the benefit of statutes making provision for the family of deceased.[69]

[§ 790] **4. Grandchildren.** It is usually held that grandchildren of decedent are not within the scope of statutes providing for the support of the family,[70] although it has also been considered grandchildren in necessitous circumstances may be permitted to share in the allowance.[71]

[§ 791] **5. Husband.** Under some statutes a surviving husband is entitled to an allowance from the estate of his wife,[72] while under other such

of the allowance. Gillett v. Gillett, 207 Ill. 136, 69 NE 942 [aff 109 Ill. A. 126 (the circumstances showed that a daughter was a member of the family and not a mere boarder, although she contributed to the household expenses, and such daughter was entitled to an allowance, although she possessed an independent fortune in her own right)].

[b] **Married adult children possessed of means** are not entitled to the statutory exemption from their father's estate. Steel's Est., 13 Phila. (Pa.) 398.

55. Gillett v. Gillett, 109 Ill. A. 126 [aff 207 Ill. 136, 69 NE 942]; Wolford v. Deemer, 89 Ill. A. 524; Barr's App., 1 Mon. (Pa.) 764, 3 Walk. 93; Lane's Est., 6 Pa. Dist. 618; Young's Est., 3 Pa. Dist. 758; Halbe's Est., 9 Pa. Co. 512, 20 Phila. 117.

[a] **A married adult daughter** (1) dependent upon decedent for support may be entitled to the statutory allowance out of his estate. Wolford v. Deemer, 89 Ill. A. 524; Armstrong's Est., 2 Chest. Co. (Pa.) 496. (2) A married adult daughter not dependent but living with her parent is entitled to an allowance. Stevenson's Est., 23 Pa. Dist. 747; Hoffman's Est., 25 Pa. Co. 633. (3) A married daughter who was living with deceased at the time of his death is not entitled to an award, where she was intending to resume her marital relations and was in part supported by her husband. Evans v. Evans, 164 Ill. A. 614. To same effect Quick v. Patterson, 186 Ill. A. 223.

[b] **Widowed daughter.**—Under a statute providing that, where decedent was a householder and head of a family and left no widow, any children residing with him at his death shall receive the same allowance as is given to the widow, the facts that a daughter living with her widowed father at his death was an adult and a widow, that while her husband lived she did not live with her father, that she returned to her father's home at his request, that he paid her for her services, and that she owned property and had an income from other sources, and shared equally with her brothers and sisters under her father's will, do not defeat her right to an allowance under the statute. Wolford v. Deemer, 89 Ill. A. 524.

56. Miller v. Ennis, 107 Ga. 663, 34 SE 302.

57. In re McSwain, 176 Cal. 280, 287, 168 P 117 (where the child ceased to live with the mother, the person with whom the child lived, or its guardian, was not entitled to an allowance for its support, unless the mother was in fault in the matter).

58. Shelby v. Shelby, 1 B. Mon. (Ky.) 266; Womack v. Boyd, 31 Miss. 443.

59. Husbands v. Bullock, 1 Duv. (Ky.) 21.

60. Dalton v. Halpin, 27 La. Ann. 382. Contra Collins v. Hallier, 12 La. Ann. 678.

61. Nevins' App., 47 Pa. 230 (in such case one third of the money should be paid to the widow and the remainder applied for the benefit of the children).

62. Alexander v. Alexander, 86 Ky. 688, 7 SW 156, 9 KyL 839; In re Stewart, 140 N. C. 28, 52 SE 255; Major v. Major, 111 Tenn. 193, 76 SW 817.

[a] **Children placed in custody of guardian.**—Stepchildren of the widow provided for by decedent's will and placed in the custody of a guardian do not constitute part of the family after his death, and the widow is not entitled to an extra allowance for their support. Holloman v. Holloman, 125 N. C. 29, 34 SE 99.

[b] **Children taken away from widow after death of father.**—Where children by a former wife, who were living in the household of their father at the time of his death, are afterward taken away against the widow's consent, it is error to direct any part of the allowance to be paid to their guardian. Vincent v. Vincent, 1 Heisk. (Tenn.) 333.

63. Phillips v. Atkinson, 139 Ga. 740, 78 SE 116; Miller v. Ennis, 107 Ga. 663, 34 SE 302; Taylor v. Flint, 35 Ga. 124.

64. Harmon v. Bynum, 40 Tex. 324.

65. Quinn v. Campbell, 126 Ala. 280, 28 S 676.

66. Sanderlin v. Sanderlin, 1 Swan (Tenn.) 441.

67. Whitworth v. Hager, 124 Tenn. 355, 140 SW 205.

68. Howland v. Harr, 123 Ky. 732, 97 SW 358, 30 KyL 53.

69. Pillsbury v. Title Ins., etc., Co., 175 Cal. 454, 166 P 11.

70. Watzke's Succ., 139 La. 868, 72 S 423; Ross v. Martin, 104 Tex. 558, 140 SW 432, 141 SW 518 [rev. (Civ. A.) 128 SW 718].

71. Durkin's Succ., 30 La. Ann. 669.

[a] **Thus** where a man died, leaving a widow in necessitous circumstances, and an insolvent estate, and the widow died without claiming the one thousand dollars reserved to her by law, and the children of the deceased were all adults, but there were minor grandchildren of the deceased, the offspring of a daughter who died previously to him, his grandchildren were held entitled to the one thousand dollars from the succession in preference to the adult heirs or creditors. Vives' Succ., 35 La. Ann. 371.

72. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16; Black v. Brittain, 116 Mo. A. 386, 92 SW 500; In re O'Shea, 85

statutes no such allowance is made.[73]

[§ 792] **6. Nonresidents.** While under some statutes the allowance may be granted to nonresident widows or children,[74] the allowance is more generally granted only to widows, children, or families resident within the state at the time of the decedent's death,[75] unless their nonresidence was caused by decedent's wrongful acts.[76]

Change of residence. A widow or child who was a resident of the state at the time of decedent's death does not lose the right to an allowance by a subsequent change of residence,[77] and, conversely, one who was a nonresident at the time of decedent's death cannot acquire the right to an allowance by subsequently becoming a resident of the state.[78]

Temporary absence of the widow from the state is not a relinquishment or waiver of her legal exemptions in her husband's estate,[79] nor does the fact that decedent died outside of the state defeat his widow's right to an allowance where his domicile, at the time of his death, was in the state.[80]

The fact that the husband's domicile was elsewhere has been held not to defeat the right of a widow who is a bona fide resident of the state.[81]

[§ 793] **G. Property Subject to Allowance—1. In General.** It has been considered that property set apart for the widow and children must be actually on hand or due,[82] and an allowance cannot be made for a certain recovery charged on the estate generally.[83]

[§ 794] **2. Personalty Generally.** The statutory allowance comes from all personalty belonging unqualifiedly to decedent,[84] notwithstanding specific or general bequests elsewhere,[85] unless, of course, the statute limits the right to property not law-

Nebr. 156, 122 NW 881; Matter of Baird, 126 App. Div. 439, 110 NYS 708.

73. Rourke's App., 91 Conn. 76, 98 A 718; Hamilton v. Riney, 140 Ky. 476, 131 SW 287; Thaxton v. Walters, 130 Ky. 235, 113 SW 118; Work's Est., 24 Pa. Dist. 129; Matter of Klingler, 2 Pearson (Pa.) 533; Hall's Est., 1 Del. Co. (Pa.) 327; Bertolet's Est., 2 Woodw. (Pa.) 439; In re Bowen, 95 Wash. 82, 163 P 379.

[a] **Allowance made for maintenance of minor children.**—In re Murphy, 30 Wash. 9, 70 P 109.

74. Jones v. Cooner, 142 Ga. 127, 82 SE 445; Maddox v. Patterson, 80 Ga. 719, 6 SE 581; Farris v. Battle, 80 Ga. 187, 7 SE 262; Mitchell v. Word, 64 Ga. 208; Duplain's Succ., 113 La. 786, 37 S 755; Christie's Succ., 20 La. Ann. 383, 96 AmD 411; Banse v. Muhme, 13 Oh. Cir. Ct. 501, 7 Oh. Cir. Dec. 224; In re Leavenberg, 104 Wash. 515, 177 P 328 [appr Griesemer v. Boyer, 13 Wash. 175, 43 P 17].

[a] **Where the intestate died on his way to this country,** leaving a widow and minor children in Germany, it was held that they were entitled to the allowance, although they had never even been in the state of New York. Kapp v. Public Admr., 2 Bradf. Surr. (N. Y.) 258.

[b] **Husband resident in state.**—On the death of a husband and father residing in Georgia, his widow and minor children are entitled to a year's support out of his estate as against his creditors, whether resident or nonresident, although his family may never have resided in Georgia, and although they may have lived for a long time separate and apart from him, he having made no provision for them by will or otherwise, in lieu of the statutory allowance for their year's support. Farris v. Battle, 80 Ga. 187, 7 SE 262.

75. Ala.—Ex p. Pearson, 76 Ala. 521; Auerbach v. Pritchett, 58 Ala. 451.

Ill.—Veile v. Koch, 27 Ill. 129; Hutchings v. Hutchings, 137 Ill. A. 495.

Me.—Smith v. Howard, 86 Me. 203, 29 A 1008, 41 AmSR 537.

Mass.—Shannon v. White, 109 Mass. 146.

Miss.—Barber v. Ellis, 68 Miss. 172, 8 S 390.

Mo.—In re Austin, 73 Mo. A. 61; Richardson v. Lewis, 21 Mo. A. 531.

N. C.—Hollomon v. Hollomon, 125 N. C. 29, 34 SE 99; In re Hayes, 112 N. C. 76, 16 SE 904; Simpson v. Cureton, 97 N. C. 112, 2 SE 668; Medley v. Dunlap, 90 N. C. 527.

N. D.—Krumenacker v. Andis, 38 N. D. 500, 165 NW 524.

Pa.—Platt's App., 80 Pa. 501; Spier's App., 26 Pa. 233; Larocco's Est., 10 Pa. Dist. 568; Troxell's Est., 13 Montg. Co. 68; Monk's Est., 9 Montg. Co. 113; Coates' Est., 12 Phila. 171; In re Strain, 15 PittsbLegJNS 369.

S. D.—In re James, 38 S. D. 107, 160 NW 525.

Tenn.—Graham v. Stull, 92 Tenn. 673, 22 SW 738, 21 LRA 241.

[a] **Reason for rule.**—"The law contemplates a family living together and existing as a family." Krumenacker v. Andis, 38 N. D. 500, 512, 165 NW 524.

[b] **Circumstances not showing residence in state.**—(1) Testator, dying within the state, had lived at the place of his decease for a number of years for business purposes, his family remaining in another state where they made their home. Testator often declared that he was only in the state temporarily, and that his home was in another state; and testator's wife, who visited him in his last illness, expressed the intention to take him back to the other state in case of his recovery. Testator had voted at one primary election in the state, and had been elected alderman, but had refused to serve. It was held that as the testator had never taken up his residence with the intention of making it his home, his widow was not entitled to the homestead exemptions or year's support allowed by law to residents of the state. Hascall v. Hafford, 107 Tenn. 355, 65 SW 423, 89 AmSR 952. (2) Where decedent never owned a home of any kind in the state, but had lived in a number of different places within the state, and for a year before his death his wife had lived in another state, and decedent was lost at sea while returning to this country from Australia, his widow did not reside in the state and was therefore not entitled to a widow's award. Hutchings v. Hutchings, 137 Ill. A. 495.

76. Balmforth's Est., 26 Pa. Super. 491; Coates' Est., 12 Phila. (Pa.) 171.

[a] **Desertion.**—Grieve's Est., 165 Pa. 126, 30 A 727 [appr Krumenacker v. Andis, 38 N. D. 500, 165 NW 524].

77. O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462; White's Succ., 29 La. Ann. 702; Campbell v. Whitsett, 66 Mo. A. 444.

78. Simpson v. Cureton, 97 N. C. 112, 2 SE 668; Medley v. Dunlap, 90 N. C. 527; Spier's App., 26 Pa. 233.

79. Richter v. Richter, 180 Ala. 218, 60 S 880.

80. In re Hager, 150 Ill. A. 347.

81. Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361.

Effect of separation on right to allowance see infra § 819.

82. Scruggs v. Morel, 22 Ga. A. 93, 95 SE 316; Dorscheimer's Est., 12 Pa. Super. 34; Cate v. Cate, (Tenn. Ch. A.) 43 SW 365.

[a] **Illustration.**—A widow, having claimed cash as exempt to her, may not, in case the cash in the possession of decedent at his death does not equal the amount claimed, wait until an estate has been converted, and then claim out of a fund which did not exist before. Dorscheimer's Est., 12 Pa. Super. 34.

[b] **Property the title to which was not vested in decedent** at the time of his death cannot be set aside as a year's support for the widow and children. Scruggs v. Morel, 22 Ga. A. 93, 95 SE 316.

83. Cate v. Cate, (Tenn. Ch. A.) 43 SW 365.

84. Colo.—Grover v. Clover, 169 P 578.

Ga.—Summerford v. Gilbert, 37 Ga. 59; Scruggs v. Morel, 22 Ga. A. 93, 95 SE 316.

Mass.—Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.

Mich.—Watson v. Wagner, 202 Mich. 397, 168 NW 428.

Mo.—Peugh v. McKinney, (A.) 211 SW 83.

N. Y.—Peo. v. Prendergast, 146 App. Div. 713, 131 NYS 441.

Oh.—Sterritt v. Lingo, 6 OhS&CP 481, 4 OhNP 366.

Pa.—Eddy's Est., 12 Phila. 17.

Tenn.—Conquest v. Broadway Nat. Bank, 134 Tenn. 17, 183 SW 160; Combs v. Combs, 131 Tenn. 66, 173 SW 441.

[a] **The term "personal property"** as used in a statute providing that such parts of the personal property of a deceased person as the probate court may allow as necessaries to his widow for herself shall not be taken as assets for the payment of debts, legacies, or charges of administration, means the personal property left by decedent at the time of his death, as to which, on the appointment of a personal representative, the probate court acquired jurisdiction to allow to the widow as necessaries whatever she ought to receive. Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.

[b] **Hay and corn matured and gathered** before decedent's death is personalty. Peugh v. McKinney, (Mo. A.) 211 SW 83.

[c] **Proceeds of property levied upon** before the husband's death cannot be taken for the widow's exemption if the property was subject to attachment against the husband. Blake v. Durrell, 103 Ky. 600, 45 SW 883, 20 KyL 270.

[d] **Personal property subject to a chattel mortgage,** although duly appraised and set off to a widow by order of court, may be replevied by the mortgagee; but the widow may redeem it by paying the debt or probably obtain an order for the sale of the property and payment to her of the proceeds of such sale in excess of the debt. Recker v. Kilgore, 62 Ind. 10.

[e] **A bank deposit subject to an offset** on account of commercial paper of the depositor held by the bank is not subject to allowance. Conquest v. Broadway Nat. Bank, 134 Tenn. 17, 183 SW 160.

85. Cal.—In re Whitney, 171 Cal. 750, 154 P 855.

fully disposed of by the will of decedent.[86] But advancements made to children during a decedent's lifetime form no part of the estate and are not subject to be brought into hotchpot for the benefit of an allowance to the widow.[87]

[§ 795] **3. Undivided Interests.** While it has been held that a decedent's unascertained share in an unliquidated fund which others share or control cannot be applied to the widow's allowance,[88] it has also been asserted that articles of personal property in which he had only an undivided one-half interest may be set off to the widow.[89]

[§ 796] **4. Partnership Property.** It is generally held that the property of a partnership cannot be set aside for an allowance to the widow and children of a deceased partner,[90] although the residue or surplus, after the payment of partnership debts, is applicable for this purpose;[91] but there is also authority for the view that an allowance may be made to the widow of a surviving partner from the firm assets, as from his own personal estate,[92] even though the firm is insolvent.[93]

[§ 797] **5. Community Property.** In a state where the community property system prevails[94] it has been held that either separate property of decedent or community property may be set apart for the widow's allowance.[95]

[§ 798] **6. Growing Crops.** Crops growing on decedent's lands at the time of his death are usually regarded as being subject and applicable to the support of the surviving wife and children.[96]

[§ 799] **7. Proceeds of Life Insurance.** That the proceeds of life insurance may be set aside for the widow's allowance has been both asserted[97] and denied.[98]

[§ 800] **8. Amount Recovered for Wrongful Death.** A widow is not entitled to a statutory allowance out of an amount recovered for the wrongful death of decedent.[99]

[§ 801] **9. Realty Generally.** While it is held

Ind.—Jelly v. Elliott, 1 Ind. 119, Smith 32.
Ky.—Burtle v. Thomas, 6 B. Mon. 401.
Me.—Paine v. Paulk, 39 Me. 15; Brown v. Hodgdon, 31 Me. 65.
Md.—Negro William v. Kelly, 5 Harr. & J. 59.
Mass.—Bush v. Clark, 127 Mass. 111.
Mo.—Nelson v. Troll, 173 Mo. A. 51, 156 SW 16; Elstroth v. Dickmeyer, 88 Mo. A. 418; In re Motier, 7 Mo. A. 514.
Nebr.—Godman v. Converse, 43 Nebr. 463, 61 NW 756 [overr 38 Nebr. 657, 57 NW 394].
N. Y.—Banks v. Taylor, 10 AbbPr 199.
N. C.—Van Norden v. Primm, 3 N. C. 149.
Pa.—Graves' Est., 134 Pa. 377, 19 A 684; Nerpel's App., 91 Pa. 334.
S. D.—Meyer v. Meyer, 25 S. D. 596, 127 NW 595 [cit Cyc].
Tenn.—Bayless v. Bayless, 4 Coldw. 359; Turner v. Fisher, 4 Sneed 209.

"The right of a widow to her exemption is, by the express provision of the Act of Assembly which confers it (April 14, 1851, P. L. 613), placed beyond the testamentary authority of the husband. It is given whether he dies 'testate or intestate;' and as it is not in his power to prevent her from demanding it, it is equally out of his power, as it is out of the power of the court, to interfere with her right to determine whether the amount to which she is entitled shall be made up, in whole or in part, of articles 'retained,' of cash, or of real estate," Gourley's Est., 11 Pa. Dist. 429, 26 Pa. Co. 529.

[a] **Allowance to specific legatee.**—A daughter is not compelled to take her exemption out of property specifically bequeathed to her, but may take it out of property bequeathed to others or to herself and others. Lane's Est., 6 Pa. Dist. 618.

86. In re Rausch, 35 Minn. 291, 28 NW 920; Johnson v. Johnson, 32 Minn. 513, 21 NW 725.

87. Miller's Est., 2 Brewst. (Pa.) 355.

88. Rust v. Billingslea, 44 Ga. 306; Summerford v. Gilbert, 37 Ga. 59.

89. Matter of Hallenbeck, 195 N. Y. 143, 88 NE 16, 133 AmSR 782 [mod 119 App. Div. 757, 104 NYS 568].

90. U. S.—In re Dobert, 165 Fed. 749.
Ga.—Wood v. Brown, 121 Ga. 471, 49 SE 295.
Ill.—King v. Goodwin, 130 Ill. 102, 22 NE 533, 17 AmSR 277.
La.—Stauffer's Succ., 21 La. Ann. 520.
Mo.—Julian v. Wrightsman, 73 Mo. 569.
R. I.—Burrough v. Knutton, 13 A 108.

"Administration of partnership estates being confided exclusively to the surviving partner, the county court has no control over partnership assets, and hence is without authority to set aside allowances to the widow and children from such assets, and can only do so out of any residue coming to the heirs or personal representatives after the payment of partnership debts. The estate of the deceased partner in such residue must be measured by the interest which the decedent, during his life, had in the partnership, the extent of which is ascertainable by reference to the articles between the partners. This opinion would be unduly extended by analyzing articles 2037 to 2062 of the Revised Statutes of the state, which provide for allowances to the widow and children of a decedent and regulate the procedure in reference thereto. But an examination of those articles will disclose that it is only the estate of the decedent out of which the allowance may be set aside—an estate which may be inventoried and appraised, and one which is under the control and supervision of the county court, and one which that court is authorized to sell—the individual estate of the decedent, and not an undefined and unascertainable interest in the partnership assets." In re Dobert, 165 Fed. 749, 756.

[a] **Continuance of partnership business under will.**—Where by a will testator directed that the business of a partnership, of which he was a member, should be carried on by his partner, who was made executor, after his death, and that his entire estate should be bound for the debts contracted in continuing such partnership, the widow of testator is not entitled to intervene where an equitable petition to reach the firm property has been filed by creditors after the continuation of the business, for the purpose of having a judgment made to her for a year's support to herself and son to be given priority to the partnership debts. Ferris v. Van Ingen, 110 Ga. 102, 35 SE 347.

[b] **A husband's interest in firm property in the hands of a receiver** is not subject to the widow's allowance until the lien acquired thereon by means of a creditor's bill during the husband's lifetime is discharged. King v. Goodwin, 130 Ill. 102, 22 NE 333, 17 AmSR 277.

91. In re Dobert, 165 Fed. 749; Wood v. Brown, 121 Ga. 471, 49 SE 295; American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116.

92. Hewitt v. Hayes, 204 Mass. 586, 90 NE 985, 27 LRANS 154; Bush v. Clark, 127 Mass. 111.

93. Bush v. Clark, 127 Mass. 111.

94. See Husband and Wife [21 Cyc 1633].

95. In re Finch, 173 Cal. 462, 160 P 556.

96. Snead v. Scott, 182 Ala. 97, 62 S 36; Neal v. Smith, 123 Ga. 26, 50 SE 922; Peugh v. McKinney, (Mo. A.) 211 SW 83; Sessoms v. Taylor, 148 N. C. 369, 62 SE 424.

[a] **The widow of a tenant** is not interested in the title to a growing crop as between the administrator of the tenant and the landlord further than the recovery of so much as will pay her allotment for a year's support. Sessoms v. Taylor, 148 N. C. 369, 62 SE 424.

[b] **Mortgaged crops.**—Children of a decedent who left growing crops covered by a chattel mortgage take the crops as part of their exemptions, subject to the mortgage, even though they harvest them. Snead v. Scott, 182 Ala. 97, 62 S 36.

[c] **Recovery in trover by widow.**—Where a portion of the crop owned by tenant at his death was set apart to the widow as a year's support, she could recover the same in trover from one to whom the landlord without authority had delivered it as payment on a debt which deceased owed such person, although the tenant owed the landlord one fourth of the crop for rent, and such conversion was made before the year's support was set apart. Neal v. Smith, 123 Ga. 26, 50 SE 922.

97. McLean v. Martin, 155 Ala. 208, 45 S 295; In re Miller, 121 Cal. 353, 53 P 906; Meyer v. Meyer, 25 S. D. 596, 600, 127 NW 595.

"Although a policy of insurance made payable to the insured or to his administrators, executors, or assigns may be disposed of by will under section 1956, Civ. Code, it is nevertheless subject to the statutory allowance of the surviving husband or wife and minor children under the provisions of sections 728, 1073, Civ. Code, section 348, Code Civ. Proc., and sections 153, 154 of the Probate Code, all of which sections of the statute must be construed together, under familiar rules of construction, and must be so construed as to give effect to each section." Meyer v. Meyer, supra.

[a] **Amount of premiums.**—The court may set apart decedent's life insurance to the widow, where the annual premiums paid do not exceed five hundred dollars, and where the insurance was payable to decedent's executors or administrator. In re Miller, 121 Cal. 353, 53 P 906.

98. Agee v. Saunders, 127 Tenn. 680, 157 SW 64, 46 LRANS 788; German-American State Bank v. Godman, 83 Wash. 231, 145 P 221.

99. Broadnax v. Broadnax, 160

under some statutes that the realty may be applied to the allowance for the widow and children, either equally with the personalty or whenever the latter proves insufficient,[1] under other statutes it is held that the allowance is payable from personalty only, and even though the personalty is insufficient to pay the full amount authorized by law, the deficiency cannot be supplied from real estate, or the surplus proceeds of a sale thereof.[2]

[§ 802] **10. Homestead.** It has been held that the homestead cannot be resorted to to satisfy the allowance for support of the widow and children,[3] but in a case where a man took a homestead and died, leaving his wife as the only beneficiary thereof, his children having become of age, it was held that she could take a year's support out of the homestead.[4] It has also been held that, where a homestead has been set apart to the widow, the interest of decedent's heirs in remainder in such homestead is liable to be sold to pay a family allowance made in favor of the widow.[5]

[§ 803] **11. Income of Real Estate.** The rents of realty willed to testator's children have been held not subject to the widow's allowance.[6] A statute permitting an allowance out of the income of decedent's real estate has been held to contemplate the net income, that is, that portion of the income which remains after taxes and necessary expenses have been discharged.[7]

[§ 804] **H. Priority Over Other Claims—1. In General.** The widow's allowance or claim to exempt personalty usually takes precedence over the claims of legatees or distributees,[8] and of all other claims against the estate[9] except debts due the

N. C. 432, 434, 42 LRANS 725 ("The allowance can only be set apart from the personal estate of the deceased, and the right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term").

Beneficiaries of recovery for death of decedent see Death §§ 58–71.

1. Cal.—In re Tittel, 139 Cal. 149, 72 P 909.

Colo.—Grover v. Clover, 169 P 578; Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ga.—McSwain v. Ricketson, 129 Ga. 176, 58 SE 655; Cox v. Cody, 75 Ga. 175; Vandigrift v. Potts, 72 Ga. 665; Steed v. Cruise, 70 Ga. 168; Cleghorn v. Johnson, 69 Ga. 369; Cully v. Bloomingdale, 68 Ga. 756; Tabb v. Collier, 68 Ga. 641; Miller v. Defoor, 50 Ga. 566.

Ill.—Deltzer v. Scheuster, 37 Ill. 301; Cruce v. Cruce, 21 Ill. 46; Rector v. Reavill, 3 Ill. A. 232.

Ind.—Dotson v. Faulkenburg, 186 Ind. 417, 116 NE 577; Claypool v. Jaqua, 135 Ind. 499, 35 NE 285; Leib v. Wilson, 51 Ind. 550 [dist as decided under earlier and different statute Jelly v. Elliott, 1 Ind. 119, Smith 32]; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

Mich.—North v. Van Tassel, 84 Mich. 69, 47 NW 663.

Minn.—Blakeman v. Blakeman, 64 Minn. 315, 67 NW 69.

Nebr.—In re Fletcher, 83 Nebr. 156, 119 NW 232.

N. Y.—In re Collard, 18 NYS 176, Pow. Surr. 1.

Oh.—Allen v. Allen, 18 Oh. St. 234.

Pa.—Thomas' Est., 152 Pa. 63, 25 A 164; Graves' Est., 134 Pa. 377, 19 A 684; Nerpel's App., 91 Pa. 334; Hufman's App., 81 Pa. 329; Detweiler's App., 44 Pa. 243; Sipes v. Mann, 39 Pa. 414; Lyman v. Byam, 38 Pa. 475; Larrison's App., 36 Pa. 130; Heyer's Est., 4 Pa. Dist. 756; Klein's Est., 2 Pa. Dist. 813, 14 Pa. Co. 72; Daggett's Est., 7 Pa. Co. 338; Graves' Est., 6 Pa. Co. 312; Raybold's Est., 2 Pa. Co. 257; Williams' Est., 1 Kulp 362; Andress' Est., 14 Phila. 263; Rank's Est., 12 Phila. 67; Bryan's Est., 4 Phila. 228; Scott's Est., 2 Phila. 135; McCann's Est., 27 Wkly NC 439.

Tex.—Wilkin v. Simmons, (Civ. A.) 151 SW 1145.

"We are of opinion that a consideration of all of the sections of chapter 23 . . . (Comp. St. 1905), warrants the conclusion that the maintenance of the widow and minor children of a testator, pending the settlement of his estate, may be charged upon the real estate itself, if the income therefrom and the personal property be insufficient for the payment thereof and the other expenses of administering such estate. We have not overlooked Godman v. Converse, 43 Nebr. 463, 61 NW 756, but the court was there concerned solely with section 176, c. 23, supra, and the testator had explicitly restricted the widow to her bequest, which was generous, for her support." In re Fletcher, 83 Nebr. 156, 161, 119 NW 232, 234.

[a] **Where the real and personal estate together are sufficient to pay debts** and leave a surplus, wants of the children may be supplied out of the personal estate, although it is not alone sufficient to satisfy the debts. In re Billington, 3 Rawle (Pa.) 48.

[b] **The widow is not authorized to make a selection** from the real estate so as to render it liable to be sold. Scott's Est., 2 Phila. (Pa.) 135.

[c] **Title to land.**—Testator died leaving a widow and an insane son. He devised his realty to his wife for life or widowhood, and on her death or marriage one half to the son if restored to sanity, and provided that the other half, on the wife's death or marriage before the restoration of the son to sanity, should be disposed of by the executor and the proceeds expended in endowing graves and erecting suitable monuments over testator and his wives and son. On testator's death his widow occupied the land until it was set aside to her as a year's support, which was done after the son's death. The judgment allowing the widow support in the land was not void on the theory that title had passed out of testator's estate at the time the support was assigned. Reynolds v. Norvell, 129 Ga. 512, 59 SE 299.

[d] **Where decedent in his lifetime conveyed** his property without being joined by his wife for the purpose of preventing her from receiving her just portion of his estate, the court may decree the widow a lien for her award on the real estate so conveyed by the husband. Blankenship v. Hall, 233 Ill. 116, 84 NE 192, 122 AmSR 149.

[e] **Mortgaged property** is subject to the allowance under the Georgia statute. British, etc., Mortg. Co. v. Worrill, 168 Fed. 120.

[f] **The statutes do not apply** to: (1) Real estate which decedent held at his death as trustee in another's right. Hill v. Hill, 81 Ga. 516, 8 SE 879. (2) Lands in another state or country. Hansel v. Chapman, 2 App. (D. C.) 361; Hopper's Est., 2 Phila. (Pa.) 367. (3) The proceeds of sale under a foreclosed mortgage which belong to the mortgagee. Nerpel's App., 91 Pa. 334.

2. Ala.—Chamboredon v. Fayet, 176 Ala. 211, 57 S 845.

Ark.—Kitchens v. Jones, 87 Ark. 502, 113 SW 29, 128 AmSR 36, 19 LRANS 723; Calhoun v. Moore, 79 Ark. 109, 94 SW 931.

Conn.—Havens' App., 69 Conn. 684, 38 A 795.

D. C.—Hansel v. Chapman, 2 App. 361.

Ky.—Bowling v. Shepherd, 91 Ky. 273, 15 SW 527, 12 KyL 831.

La.—Warner v. Hall, etc., Lumber Co., 121 La. 81, 46 S 108.

Me.—Paine v. Paulk, 39 Me. 15.

Mass.—Hale v. Hale, 1 Gray 518.

Mo.—Ritchey v. Withers, 72 Mo. 556; Drowry v. Bauer, 68 Mo. 155; Pidcock v. Buffam, 61 Mo. 370; Peugh v. McKinney, (A.) 211 SW 83; Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260; Elstroth v. Young, 88 Mo. A. 418; In re Lloyd, 44 Mo. A. 670; Jewell v. Knettle, 39 Mo. A. 262; In re Motier, 7 Mo. A. 514.

N. C.—Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361.

Tenn.—Combs v. Combs, 131 Tenn. 66, 173 SW 441; Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091; Cate v. Cate, (Ch. A.) 43 SW 365.

"The status of the decedent's estate is fixed under this statute when he dies, and the allowance contemplated by it must be made out of the personal property as it then existed, and not from the proceeds of realty which may thereafter assume personal form." Kitchens v. Jones, 87 Ark. 502, 506, 113 SW 29, 128 AmSR 36, 19 LRANS 723.

[a] **An administrator has no authority to transfer land** to the children by an allotment or a dation en paiement to them in lieu of money, and the mother cannot legally bind the minors to accept title to the land without their consent. Warner v. Hall, etc., Lumber Co., 121 La. 81, 46 S 108.

3. Hadsall v. Hadsall, 82 Nebr. 587, 118 NW 331.

4. Cook v. Cook, 138 Ga. 88, 74 SE 795.

5. In re Tittel, 139 Cal. 149, 72 P 909.

6. Lamar v. Belcher, 154 Mo. A. 571, 136 SW 748.

7. Niland v. Niland, 154 Wis. 514, 143 NW 170, AnnCas1915B 1127.

8. Ark.—Hill v. Mitchell, 5 Ark. 608.

Cal.—In re Whitney, 171 Cal. 750, 154 P 855.

Colo.—Grover v. Clover, 169 P 578.

La.—Thompson's Succ., 4 La. A. (Orleans) 21.

Me.—Gilman v. Gilman, 54 Me. 531.

Mich.—Miller v. Stepper, 32 Mich. 194.

Mo.—Glenn v. Gunn, 88 Mo. A. 442.

N. C.—Williams v. Jones, 95 N. C. 504.

S. D.—In re James, 38 S. D. 107, 160 NW 525; Meyer v. Meyer, 25 S. D. 596, 601, 127 NW 595 [cit Cyc].

9. U. S.—Postmaster-Gen. v. Robbins, 19 F. Cas. No. 11,314, 1 Ware 163.

Ala.—Wiggins v. Mertins, 111 Ala. 164, 20 S 356.

Ark.—Jerry v. Sturdivant, 203 SW 694; Hill v. Mitchell, 5 Ark. 608.

Colo.—Grover v. Clover, 169 P 578; Wilson v. Wilson, 55 Colo. 70, 73, 132 P 67 [cit Cyc].

Conn.—Havens's App., 69 Conn. 684, 38 A 795.

Ga.—Aiken v. Davidson, 146 Ga. 252, 91 SE 34; Jones v. Cooner, 137 Ga. 681, 74 SE 51; Goss v. Harris, 117 Ga. 345, 43 SE 734; Commercial Bank v. Burckhalter, 98 Ga. 736, 25 SE

United States,[10] tax liens,[11] and vendors'[12] or landlords'[13] liens. Under some statutes the allowance is accorded priority over the expenses of the last illness and funeral of decedent,[14] but under other statutes this priority is denied.[15] So also some statutes have been held to give the allowance priority over administration expenses,[16] but such priority is usually denied,[17] which latter view is consistent

917; Ullman v. Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 SE 409; Livingston v. Langley, 79 Ga. 169, 3 SE 909.

Ind.—Comer v. Light, 175 Ind. 367, 93 NE 660, 94 NE 325 [rev (A.) 92 NE 344].

Iowa.—Tetzloff v. May, 172 Iowa 617, 154 NW 905; Buttschaw v. Miller, 72 Iowa 225, 33 NW 642; In re Dennis, 67 Iowa 110, 24 NW 746; Adkinson v. Breeding, 56 Iowa 26, 8 NW 685.

Ky.—O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462; Pinson v. Sanders, 96 SW 444, 29 KyL 715.

La.—Campbell's Succ., 115 La. 1035, 40 S 449; Sparrow's Succ., 44 La. Ann. 475, 10 S 882; Thompson's Succ., 4 La. A. (Orleans) 21.

Mass.—Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.

Mich.—Miller v. Stepper, 32 Mich. 194.

Miss.—O'Brien v. Wilson, 82 Miss. 93, 33 S 946; Mason v. O'Brien, 42 Miss. 420.

Mo.—Hastings v. Myers, 21 Mo. 519; Lowe v. Lowe, 163 Mo. A. 209, 146 SW 100; Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260; Hill v. Evans, 114 Mo. A. 715, 91 SW 1022; Glenn v. Gunn, 88 Mo. A. 442.

N. C.—Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361; Denton v. Tyson, 118 N. C. 542, 24 SE 116; Williams v. Jones, 95 N. C. 504.

Pa.—Peebles' Est., 157 Pa. 605, 27 A 792; Allentown's App., 109 Pa. 75; Hill v. Hill, 32 Pa. 511; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Book v. O'Neil, 2 Pa. Super. 306; Norton's Est., 4 Pa. Dist. 198; Irwin's Est., 19 Pa. Co. 595; Rank's Est., 12 Phila. 67.

S. D.—In re James, 38 S. D. 107, 160 NW 525; Meyer v. Meyer, 25 S. D. 596, 127 NW 595 [cit Cyc].

Tenn.—Faver v. Parker, 101 Tenn. 141, 46 SW 453.

Tex.—Lewis v. Steiner, 84 Tex. 364, 19 SW 516; Wilkins v. Briggs, 48 Tex., Civ. A. 596, 107 SW 135; King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839; Zieschang v. Helmke, (Civ. A.) 84 SW 436; In re Laurence, 32 Tex. Civ. A. 596, 107 SW 135; King

Utah.—In re Farmer, 17 Utah 80, 53 P 972.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

"It seems to be generally held . . . that the widow's allowance or claim to exempt property takes precedence over the claims of legatees and distributees, and of all other claims against the estate of her deceased husband, except expenses of administration, last illness, funeral charges, and tax liens. 18 Cyc. 386, 387." Meyer v. Meyer, 25 S. D. 596, 601, 127 NW 595.

[a] **A minor child's allowance out of his mother's estate** is good as against his mother's debts but not as against the debts of his father who devised the estate to his mother. Lewis' Est., 2 Chest. Co. (Pa.) 42.

[b] **Debts not liens against the husband's estate** prior to the passage of the act making the allowance are postponed to the widow's claim to the statutory exemption. Hill v. Hill, 42 Pa. 198; Baldy's App., 40 Pa. 328; Mulford v. Thatcher, 4 Lanc Bar (Pa.) 46, 1 LegChron 97.

[c] **The fact that the executors paid out the entire personal estate** in liquidation of valid claims against the estate was no defense to the widow's application for an allowance therefrom for her necessary support. Taylor v. Whitcomb, 192 Mass. 555, 78 NE 536.

[d] **Allowances to minor children** are within the rule. Deemer's Est., 18 Pa. Co. 496.

[e] **Subrogation to rights of vendor of realty against personalty.**— Where a creditor of an insolvent testator holding a vendor's lien on real estate refused to file such claim against the estate, but sold the property on foreclosure of his lien, the testator's personal estate being the primary fund for the payment of such debt, and the widow's homestead and dower claim being superior to that of general creditors, she was entitled to subrogation to the rights of the lien creditor as against the personal estate, and to the allowance of dower and homestead from the surplus arising on the sale of the real estate, and from the pro rata share of the personal estate to which the lien creditor would have been entitled had he filed a claim against the estate. Whitmore v. Rascoe, 112 Tenn. 621, 85 SW 860; Yoe v. Sansom, (Tenn. Ch. A.) 48 SW 317.

[f] **Effect of allowance of claim.**— Where an independent executrix, while acting as such, allowed a claim against the estate of her deceased husband, and thereafter the administration was changed, she being appointed administratrix with the will annexed; whereupon the court made an allowance for a year's support to her and her minor children; her prior allowance of such claim did not estop her from afterward claiming priority over the same for her widow's allowance. King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839.

10. Cupp's Est., 14 YorkLegRec (Pa.) 16.

11. Meyer v. Meyer, 25 S. D. 596, 127 NW 595; State v. Jordan, 25 Tex. Civ. A. 17, 59 SW 826, 60 SW 1008.

[a] **Contrary view.**— Allentown's App., 109 Pa. 75.

12. Ga.—Ullman v. Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 SE 409.

Ky.—Collier v. Kant, 15 KyL 845.

La.—Peters' Succ., 114 La. 952, 38 S 690; Rawls' Succ., 27 La. Ann. 560; Foulkes' Succ., 12 La. Ann. 537.

Mo.—Lazonby v. Smithey, 151 Mo. A. 285, 131 SW 708.

Pa.—Kauffman's App., 112 Pa. 645, 4 A 20; Hildebrand's App., 39 Pa. 133; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Ramberger's Est., 14 LancBar 110; Rizer's Est., 11 Wkly NC 563; Cupp's Est., 14 YorkLegRec 16.

Tex.—Mabry v. Ward, 50 Tex. 404; Zieschang v. Helmke, (Civ. A.) 84 SW 436; Parlin, etc., Co. v. Davis, (Civ. A.) 74 SW 951; Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.

[a] **Where a bank furnished a person with money to purchase property,** holding the property as collateral for the payment of the loan, the lien has the character of a vendor's lien, and is superior to any claim for allowances by the widow of the pledgor. Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.

[b] **A reservation of title to a chattel sold,** as security for the purchase money, is merely a chattel mortgage and does not give a vendor's lien. Parlin, etc., Co. v. Davis, (Tex. Civ. A.) 74 SW 951.

13. Walker v. Patterson, 33 Tex. Civ. A. 650, 77 SW 437 (a landlord's lien on a tenant's crop for supplies and advances is superior to a claim of the tenant's widow and children for an allowance for support).

14. Ga.—Aiken v. Davidson, 146 Ga. 252, 91 SE 34; Whitehead v. McBride, 73 Ga. 741.

Ky.—Russell v. Russell, 14 KyL 236.

La.—Campbell's Succ., 115 La. 1035, 40 S 449.

Mass.—Kingsbury v. Wilmarth, 2 Allen 310.

Minn.—Stromberg v. Stromberg, 119 Minn. 325, 138 NW 428.

Mo.—Brown v. Keen, (A.) 201 SW 621; In re Ulrici, 177 Mo. A. 584, 160 SW 812.

N. Y.—Peo. v. Prendergast, 146 App. Div. 713, 131 NYS 441. Contra Matter of Berns, 52 Misc. 426, 103 NYS 167.

N. C.—Jones v. Layne, 144 N. C. 600, 57 SE 372, 11 LRANS 361; Denton v. Tyson, 118 N. C. 542, 24 SE 116.

Pa.—Hurst's Est., 25 Pa. Dist. 1054; Norton's Est., 4 Pa. Dist. 198; Formad's Est., 3 Pa. Dist. 13, 14 Pa. Co. 104; Weir's Est., 10 Pa. Co. 187, 20 Phila. 146; Groome's Est., 7 Pa. Co. 519; Cupp's Est., 14 YorkLegRec 16.

Tex.—Krueger v. Wolf, 12 Tex. Civ. A. 167, 33 SW 663.

[a] **Where funeral benefits are collected** from a beneficial society, the widow is not entitled to claim such money as part of her exemption. Hurst's Est., 25 Pa. Dist. 1054. To same effect Walter's Est., 29 Pa. Co. 316.

[b] **The husband's allowance has priority.**—Brown v. Keen, (Mo. A.) 201 SW 621 (right to priority not affected by liability for expenses of wife's last sickness); Matter of Baldwin, 67 Misc. 353, 124 NYS 859.

15. Ill.—McCord v. McKinley, 92 Ill. 11.

Ind.—Comer v. Light, 175 Ind. 367, 93 NE 660, 94 NE 325 [rev (A.) 92 NE 344]; Weir v. Sanders, 124 Ind. 391, 24 NE 980; Fleming v. Henderson, 123 Ind. 234, 24 NE 236; Green v. Weever, 78 Ind. 494.

Iowa.—Buttschaw v. Miller, 72 Iowa 225, 33 NW 642.

Ky.—O'Hara v. O'Hara, 182 Ky. 260, 206 SW 462.

La.—Foulkes' Succ., 12 La. Ann. 537.

S. D.—Meyer v. Meyer, 25 S. D. 596, 601, 127 NW 595 [cit Cyc].

Tex.—King v. Battaglia, 36 Tex. Civ. A. 28, 84 SW 839; Zieschang v. Helmke, (Civ. A.) 84 SW 436; In re Laurence, 32 Tex. Civ. A. 465, 74 SW 779.

Utah.—In re Thorn, 24 Utah 209, 67 P 22.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

Ont.—Pickering v Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 Ont WR 697, AnnCas1912A 530.

[a] **Application of realty.**—Under a statute, providing that decedents' estates of less value than fifteen hundred dollars shall be set apart to the widow in fee after payment of expenses of the last sickness, funeral charges, and expenses of administration, a parcel of realty worth less than fifteen hundred dollars, and being the entire corpus of an estate, should be sold to pay the expenses referred to, and not set apart to the widow before such charges are paid. In re Thorn, 24 Utah 209, 67 P 22.

16. Hays v. Buffington, 2 Ind. 369; In re Ulrici, 177 Mo. A. 584, 160 SW 812; Denton v. Tyson, 118 N. C. 542, 24 SE 116; Norton's Est., 4 Pa. Dist. 198.

17. Ala.—Loeb v. Richardson, 74 Ala. 311.

Ind.—Comer v. Light, 175 Ind. 367, 93 NE 660, 94 NE 325 [rev (A.) 92 NE 344].

La.—Foulkes' Succ., 12 La. Ann. 537.

Pa.—McIntyre's Est., 25 Pa. Dist. 139.

S. D.—Meyer v. Meyer, 25 S. D. 596, 601, 127 NW 595 [cit Cyc].

Utah.—In re Thorn, 24 Utah 209, 67 P 22.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

with the rule that such allowances are in the nature of administration expenses,[18] and can work no hardship where the statute permits the entire estate to be assigned to the widow and children without administration where it does not exceed a certain amount.[19] A widow is entitled to her statutory allowance before payment of the expenses of litigation by the administrator in an attempt to defeat her rights.[20] The widow's claim to an allowance out of decedent's share in partnership assets is postponed to partnership debts.[21]

[§ 805] **2. Mortgages and Pledges.** Unless the widow relinquishes her claim to an allowance or exemption,[42] it is usually accorded priority over a mortgage created by decedent,[23] although an exception is sometimes recognized in the case of a mortgage given for purchase money.[24] The claim has not priority over a mortgage lien adhering to the title when decedent acquired it,[25] or a mortgage executed by the widow as executrix for money borrowed to be used in lieu of a family allowance.[26] The same distinction has been applied to a pledge;[27] and the widow's title under a judgment granting her a year's support has been held subservient to the title of the purchasers under a bill of sale executed by the husband to secure a note given as collateral for advancements for farm supplies and a bill of sale by the widow to secure advances.[28] A widow's right to a yearly allowance for herself and children, and in lieu of a homestead, has been held to be inferior to the claim of a bank on a life policy, delivered to it by decedent to secure a debt.[29]

[§ 806] **3. Mechanics' Liens.** A mechanic's lien creditor is usually postponed to the widow's allowance.[30]

[§ 807] **4. Judgments.** A judgment creditor, except for purchase money,[31] is usually postponed to the widow's allowance,[32] unless the judgment was obtained prior to the enactment of the statute granting the allowance and continued a lien until the husband's death.[33]

[§ 808] **5. Attachments and Executions.** The widow's allowance usually takes precedence of all liens by attachment and execution.[34] This has been held to be true even with respect to property upon which a levy has been made,[35] but other cases assert that the attachment or execution is entitled to priority with respect to property levied on,[36] unless of course the property was exempt from levy under the statute.[37]

18. See supra § 759.
19. See supra § 781.
20. In re Ulrici, 177 Mo. A. 584, 160 SW 812.
21. Wood v. Brown, 121 Ga. 471, 49 SE 295; Ferris v. Van Ingen, 110 Ga. 102, 35 SE 347; Boone v. Sirrine, 38 Ga. 121.
22. Sumner v. McKee, 89 Ill. 127; McCollum v. Perigo, 16 Pa. Super. 566; Newnom v. Hedeman, (Tex. Civ. A.) 184 SW 298.
Bar, waiver, or relinquishment of claim generally see infra §§ 810–824.
23. In re Fleury, Myr. Prob. (Cal.) 227; Derrick v. Sams, 114 Ga. 81, 39 SE 924; Miller v. McDonald, 72 Ga. 20; Cully v. Bloomingdale, 68 Ga. 756; Murphy v. Vaughan, 55 Ga. 361; Elfe v. Cole, 26 Ga. 197; Comeau v. Miller, 46 La. Ann. 1324, 16 S 172; Cason's Succ., 32 La. Ann. 790; Rodrique v. Barthelmy, 10 La. A. (Orleans) 253; Newnom v. Hedeman, (Tex.) 184 SW 298; Krueger v. Wolf, 12 Tex. Civ. A. 167, 33 SW 663.
[a] **Unencumbered property to be resorted to first.**—The widow and minors have not an untrammelled choice as to the particular fund or property out of which they will satisfy their claim. They are restricted to the proceeds of unencumbered property, where there is enough of such, and, if not, must attack the junior mortgages before seeking payment at the expense of the older ones. And when the widow and minor children seek to appropriate all, or a portion of the proceeds of property specially mortgaged to the payment of their claim against a decedent's estate, the burden is on them to show the absence of other available property, not encumbered, or affected only by the younger mortgages. Sarat v. L'Hote, 2 McG. (La.) 29.
[b] **Mortgage entitled to priority.**—(1) Kauffman's App., 112 Pa. 645, 4 A 20; Nerpel's App., 91 Pa. 334; Rowe's Est., 22 Pa. Super. 597; Beetem v. Getz, 5 Pa. Super. 71, 41 Wkly NC 69; Graves' Est., 6 Pa. Co. 312; Bilger v. Bilger, 4 Pa. Co. 109; In re Rowe, 11 Kulp (Pa.) 32; Cupp's Est., 14 YorkLegRec (Pa.) 16. Contra Lambert's Est., 2 Woodw. (Pa.) 239. (2) Where the personalty of a decedent was subject at his death to a valid chattel mortgage, the right of the minor children to the growing crops as part of their exemptions was subject to the lien of the mortgage, notwithstanding the fact that they gathered the crops by their own labor. Snead v. Scott, 182 Ala. 97, 62 S 36.
24. Fairbanks v. Robinson, 64 Cal. 250, 30 P 812; Brigham v. Brigham, 113 Ga. 810, 39 SE 309; Lambert's Est., 2 Woodw. (Pa.) 239. Contra Puffer v. Caldwell, 111 Ga. 798, 36 SE 927 (chattel mortgage); Wilson v. Peeples, 61 Ga. 218.
[a] **Statute not retroactive.**—The act of Aug. 17, 1903 (Acts [1903] p 76), providing that a vendor of personalty, taking a mortgage to secure the price, shall state it is for such purpose, and in such case neither the widow nor minor children of purchaser shall be entitled to a year's support out of such personalty as against vendor until the purchase money shall be paid, has only a prospective operation, and, as against the widow's right to a year's support, it does not give priority to a mortgage executed before its passage, although given for the price of personalty described in it, and although the mortgagor did not die until after passage of the act. Corbitt v. Newbern, 132 Ga. 457, 64 SE 479.
25. Murphy v. Vaughan, 55 Ga. 361; Graves' Est., 6 Pa. Co. 312.
26. Curtis v. Schell, 129 Cal. 208, 61 P 951, 79 AmSR 107.
27. Ullman v. Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 SE 409; Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.
[a] **Burden of proof.**—The burden of showing that the pledgee's claim is of a character which does not take precedence of her demand for allowances is on the widow. Fulton v. Denison Nat. Bank, 26 Tex. Civ. A. 115, 62 SW 84.
28. Moore v. Ramsey, 144 Ga. 118, 86 SE 219.
29. Clark v. Southwestern L. Ins. Co., (Tex. Civ. A.) 113 SW 335.
30. Gleason v. Traynham, 111 Ga. 887, 36 SE 969; Hildebrand's App., 39 Pa. 133; Enos v. Brant, 24 Pa. Co. 416; Bilger v. Bilger, 4 Pa. Co. 109; Bower's Est., 18 WklyNC (Pa.) 124; In re Dennis, 67 Iowa 110, 24 NW 746. Contra Molz's Est., 4 Phila. (Pa.) 187.
[a] **Incomplete lien postponed.**—In re Dennis, 67 Iowa 110, 24 NW 746.
31. Mayhugh v. Washington, 17 Pa. Dist. 1001; Ramberger's Est., 14 LancBar (Pa.) 110.
32. Ga. — Augusta Commercial Bank v. Burckhalter, 98 Ga. 736, 25 SE 917; Jackson v. Corbin, 39 Ga. 102; Spicer v. Spicer, 21 Ga. 200.
Ind.—Quakenbush v. Taylor, 86 Ind. 270; Mead v. McFadden, 68 Ind. 340.
Miss.—First Nat. Bank of Commerce v. Donald, 112 Miss. 681, 73 S 723.
Pa.—Kauffman's App., 112 Pa. 645, 4 A 20; Horn's Est., 1 Lehigh ValLR 222.
Tex.—Giddings v. Crosby, 24 Tex. 295.
[a] **Judgment for tort postponed.**—Turner v. Hammerle, 53 Ind. A. 437, 101 NE 827.
[b] **Land redeemed by widow.**—Where a widow, holding an execution against the administrator of her deceased husband for a year's support, redeems land which the husband, in his lifetime, had conveyed to another to secure a debt, her lien then attaches to the land, and is paramount to the lien of a creditor of the husband who obtained a judgment before execution of the security deed. Commercial Bank v. Burckhalter, 98 Ga. 736, 25 SE 917.
33. Rishell v. Rishell, 48 Pa. 243.
Statutes not retroactive see supra § 762.
34. James v. Marcus, 18 Ark. 421; Tetzloff v. May, 172 Iowa 617, 154 NW 905; Tetzloff v. May, 151 Iowa 441, 131 NW 647, AnnCas1913A 341; Williams v. Jones, 95 N. C. 504; Mayhugh v. Washington, 17 Pa. Dist. 1001; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Mulford v. Thatcher, 4 LancBar (Pa.) April 12, 1873, 1 Leg Chron (Pa.) 97. Contra Grant v. Hughes, 82 N. C. 216 (the effect of which was almost immediately abrogated by a statutory enactment establishing the rule stated in the text. See 82 N. C. 697).
35. Tetzloff v. May, 151 Iowa 441, 131 NW 647, AnnCas1913A 341.
36. Ark.—James v. Marcus, 18 Ark. 421.
Ga.—Singleton v. Huff, 49 Ga. 582.
Ind.—Mead v. McFadden, 68 Ind. 340.
Ky.—Blake v. Durrell, 103 Ky. 600, 45 SW 883, 20 KyL 270.
Pa.—Thompson's App., 36 Pa. 418; Barrett v. Barrett, 9 Pa. Co. 454; McMullin's Est., 15 Phila. 558, 11 Wkly NC 562.
[a] **Reason for rule.**—"The attachment lien upon the husband's property can no more be disturbed by his death than it could be by his marriage and establishment as a housekeeper, had he been single at the date of the levy. The status of the lienholder cannot be changed by the death of the debtor." Blake v. Durrell, 103 Ky. 600, 603, 45 SW 883, 20 KyL 270.
37. Dixon v. Aldrich, 127 Ind. 296, 26 NE 843.

[§ 809] **I. How Allowance Paid.**[38] Where the allowance is for the sole benefit of the widow, it is not payable to any one else,[39] although if it is paid to her attorney, she in fact receives it by receiving credit on an amount previously advanced to her by him.[40] The widow is usually entitled to have her statutory allowance allotted to her in money,[41] but it may sometimes be allotted in notes payable to her deceased husband,[42] or a judgment on a note may be selected by the widow for her allowance.[43] If the widow claims her allowance in cash it must be taken usually either out of money actually in possession, or from the proceeds of stocks, bonds, loans, or other investments, or of indebtedness due decedent, when converted or reduced to money;[44] she cannot compel the legal representative to sell goods so as to give her the amount which is exempted to her by statute.[45]

Installments. It is held that the court may, in a proper case, direct the executor to pay to the widow, for the support of herself and children, a sum of money in quarterly installments, instead of setting apart for their support specific property, and it is not a valid objection to such order that the executor has not, at the time, enough money on hand to pay the first installment.[46]

[§ 810] **J. Bar, Waiver, or Relinquishment—1. In General.** A widow's right to an allowance or exemption may be waived[47] by her acts inconsistent with her assertion of the right,[48] but is not lost by acts capable of another explanation, and not amounting to an estoppel,[49] and unless she assents

38. Money in lieu of articles specifically exempted see supra § 780.

39. In re Service, 155 Mich. 179, 118 NW 948.

40. In re Service, 155 Mich. 179, 118 NW 948.

41. Ala.—Ex p. Reavis, 50 Ala. 210.

Colo.—Western Nat. Bank. v. Rizer, 12 Colo. A. 202, 55 P 268.

Ind.—Bowman v. Olrick, 105 Ind. 478, 75 NE 820; Leib v. Wilson, 51 Ind. 550.

Iowa.—McReynolds' Est., 61 Iowa 585, 16 NW 729.

Miss.—Nelson v. Smith, 20 Miss. 662; McNulty v. Lewis, 16 Miss. 520.

N. Y.—Matter of Durscheidt, 65 Hun 136, 19 NYS 973

Pa.—Finney's App., 113 Pa. 11, 4 A 60.

Tenn.—Rice v. Hunt, 7 Lea 33.

[a] **The court may allow a certain sum by way of commutation** for provisions on hand at the husband's death but which had been used by the administrator. Green v. Ford, 17 Ark. 586.

[b] **An allowance to a widow acting as personal representative** may be set off on judicial settlement of her account as representative. Matter of Warner, 53 App. Div. 565, 65 NYS 1022; Williamson's Est., 12 Phila. (Pa.) 144.

[c] **Election.**—An exception by a claimant to an administrator's report, showing a money allowance to the widow, on the ground that she "had elected" to take money in lieu of the statutory personal property without accounting for the latter, is a solemn and conclusive admission that an election was made, within a statute requiring an allowance of either to be made "at her election." Western Nat. Bank v. Rizer, 12 Colo. A. 202, 55 P 268.

42. Howle v. Edwards, 113 Ala. 187, 20 S 956; Cummings v. Cummings, 51 Mo. 261; Groff's Est., 2 LancLRev (Pa.) 413; Williams v. Hall, 33 Tex. 212.

[a] **Notes disposed of in the testator's lifetime** for a specific purpose cannot be applied to the payment of the widow's statutory exemption. Matter of Hildebrand, 1 Misc. 245, 23 NYS 148.

43. Gilman v. Gilman, 54 Me. 531.

44. Iowa.—McReynolds' Est., 61 Iowa 585, 16 NW 729.

Me.—Gilman v. Gilman, 54 Me. 531.

Mo.—Cummings v. Cummings, 51 Mo. 261; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

Pa.—Speakman's App., 71 Pa. 25; Larrison's App., 36 Pa. 130; Giebe's Est., 35 Pa. Co. 463; McChesney's Est., 6 Pa. Co. 653; Gensemer's Est., 3 LancLRev 26.

Tenn.—Cate v. Cate, (Ch. A.) 43 SW 365.

[a] **A distinction has been recognized** where the cash in hand does not equal the amount claimed, based upon whether the widow claims the exemption in money or out of moneys due, it being held (1) that in the former case she cannot wait until the personalty has been sold and converted into cash and then apply for an exemption out of the proceeds (Hunt's App., 100 Pa. 590; Dorscheimer's Est., 12 Pa. Super. 34, 7 Pa. Dist. 726; Tyler's Est., 4 Kulp (Pa.) 300; Groff's Est., 2 LancLRev 413; Venus' Est., 2 YorkLegRec (Pa.) 193), (2) while if she claims her exemption out of moneys due the estate she is entitled to have it paid out of such moneys after they have been collected by the executors, although at the time it was claimed there may have been no money in their hands (Rigby's Est., 18 Pa. Super. 5).

45. Witmer's Est., 2 Pearson (Pa.) 473; Gensemer's Est., 3 Lanc LRev (Pa.) 26.

46. McReynolds' Est., 61 Iowa 585, 16 NW 729.

47. Ark.—Raymond v. Raymond, 134 Ark. 484, 204 SW 311.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46.

Ind.—Buffington v. Buffington, 151 Ind. 200, 51 NE 328.

Minn.—Rickert v. Wardell, 142 Minn. 96, 170 NW 915; In re Rogers, 141 Minn. 93, 169 NW 477.

S. D.—In re James, 38 S. D. 107, 160 NW 525.

48. Ark.—Salinger v. Black, 68 Ark. 449, 60 SW 229.

Ill.—Kroell v. Kroell, 219 Ill. 105, 76 NE 63, 4 AnnCas 801

Minn.—Sammons v. Higbie, 103 Minn. 448, 452, 115 NW 265 [cit Cyc].

N. Y.—Matter of Campbell, 48 Misc. 278, 96 NYS 768, 17 NYAnnCas 346.

Pa.—McChesney's Est., 6 Pa. Co. 663.

Wis.—Baldwin v. Frisbie, 163 Wis. 26, 157 NW 526.

[a] **A waiver may be shown by:** (1) Electing to retain less than the statutory amount. Baskin's App., 38 Pa. 65; Davis' App., 34 Pa. 256. (2) Instituting proceedings requiring the executor to account, by which the assets of the estate are consumed. Mulhollen's Est., 5 Pa. Dist. 70. (3) Where a widow entitled to dower left the state before assignment and remained away five years, during which time her children, under their guardian, were in possession, she lost by abandonment her right to remain in possession until assignment of dower. Maring v. Meeker, 263 Ill. 136, 105 NE 31. (4) Where, at the time of an appraisal, the widow was present and stated that she was satisfied with what had been set off to her, and desired the rest of the estate to be used to pay the debts of decedent, so that no claims would come against the real estate, the full title to which had become vested in her, and the appraisers acted on the suggestion, it was a waiver of the right of the widow to have certain property set apart. Matter of Campbell, 48 Misc. 278, 96 NYS 768, 17 NYAnnCas 346.

49. Ala.—Chamboredon v. Fayet, 176 Ala. 211, 57 S 845.

Ga.—Kinard v. Clay, 138 Ga. 544, 75 SE 636.

Ind.—Denny v. Denny, 113 Ind. 22, 14 NE 593.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.

Mo.—Brown v. Keen, (A.) 201 SW 621.

Pa.—Wissel's App., 4 Pennyp. 236.

Tex.—King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839.

[a] **A waiver is not shown by:** (1) A partial selection of exempt articles. Denny v. Denny, 113 Ind. 22, 14 NE 593. (2) Consenting to a sale without waiving her right. McCann's Est., 9 Pa. Co. 408. (3) So also the fact that the administratrix with the will annexed joined in an application by a secured creditor to have certain land covered by the creditor's deed of trust sold did not preclude her and her minor children from having the proceeds of the sale appropriated to the payment of her net allowance, there being no other property from the proceeds of which such allowance could be satisfied. King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839. (4) Neither does a widow waive her exemption by failing to object to an appraisement which does not set apart to her all of the property to which she is entitled. In re Ring, 132 Iowa 216, 109 NW 710.

[b] **Election to take child's portion of realty.**—Under a statute, providing that, when the husband shall die leaving a child or children or other descendants, the widow, if she has a child or children by such husband living, may, in lieu of dower of the one-third part of the lands for life, elect to be endowed absolutely in a share of such lands equal to the share of a child of such deceased husband, the "share of the child" referred to means its share in the real estate, not its interest in the personalty, and the widow's exercise of her election to take a child's portion does not affect her right to the bounty provided by section 107, when it is applied for in the time prescribed by section 108. Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

[c] **Collection of rents.**—(1) Where a will bequeathed to testator's widow the right to the rents and profits of real estate for life, the fact that she collected the rents from the real estate while the will was in litigation did not bar her right to support out of the real estate devised. Kinard v. Clay, 138 Ga. 544, 75 SE 636. (2) Children of an insolvent decedent are not estopped from claiming their statutory exemption by receiving rents of the estate amounting to more than such exemption. McElroy's Est., 8 WklyNC (Pa.) 184.

[d] **Acknowledgment of deed of trust given by husband.**—"It is well settled that the acknowledgment by

her right cannot be barred by her husband's waiver of his exemption rights,[50] or by any act of his personal representative.[51] It is also held that a widow's acts as executrix or administratrix will not bar her claim to an allowance unless they amount to a mismanagement of the estate or a failure to fulfill her legal duties.[52] Where real estate is set apart for a widow and her child for their support, if the child becomes of age, marries, and removes from the land, she cannot, after such removal, demand as tenant in common with her mother a partition of such land.[53] It has been held that a waiver by the widow may wholly, or in part, conclude others of the family whom she represents,[54] but this has also been denied.[55] Where transfers to a widow by her husband are set aside as fraudulent, and the property sold, widow's and support allowances which she has elected not to claim during administration will not be allowed from the proceeds.[56]

[§ 811] **2. Antenuptial Agreement.** The widow's allowance is not commonly affected by an antenuptial agreement, relinquishing such rights as dower, homestead, or inheritance in her intended husband's estate, especially if no special consideration appears for her doing so;[57] and there is authority for the view that under no circumstances can a wife, by an antenuptial contract, deprive herself of the right to an allowance;[58] but the rule established by the great weight of authority is that the wife may exclude, by appropriate and sweeping terms, all such statutory rights, so far at least as concerns herself, especially where a fair consideration is stipulated which she accepts from his estate when a widow.[59] Nevertheless the contract, to be valid, must be fairly and intelligently executed by the

a married woman of a deed of trust given by her husband does not deprive her of the right, when the estate is insolvent, or the minor children of the decedent, to have the proceeds of the sale of the property upon which the deed of trust was given applied to the payment of the widow's and children's allowance for a year's support after her husband's death." King v. Battaglia, 38 Tex. Civ. A. 28, 37, 84 SW 839 [foll Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629].

[e] **Abandonment of will contest.**—Where the guardian of a minor child, in consideration of a cash payment by the other legatees, abandoned a contest of the will of the ward's father, the right of the minor to the exemption provided by statute was not lost, as the consideration so paid was not a part of the property disposed of by the will. Chamboredon v. Fayet, 176 Ala. 211, 57 S 845.

[f] **Rule applicable to widower.**—Brown v. Keen, (Mo. A.) 201 SW 621.

50. Spencer's App., 27 Pa. 218; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; McMullin's Est., 11 WklyNC 562.

51. Moore v. McLure, 124 Ala. 120, 27 S 499; Little v. McPherson, 76 Ala. 552; In re Fretwell, 154 Cal. 638, 98 P 1058.

[a] **Illustration.** — The widow's right to a family allowance is not affected by the fact that a former administrator of the estate gave to her, without authority, funds of the estate. In re Fretwell, 154 Cal. 638, 98 P 1058.

52. Ga.—King v. Johnson, 96 Ga. 497, 23 SE 500.

Ill.—Moore v. Sweeney, 28 Ill. A. 547.

Md.—Beachley v. Bollinger, 119 Md. 151, 86 A 135.

N. Y.—Matter of Hulse, 41 Misc. 307, 84 NYS 220.

Pa.—Kelly's Est., 14 Pa. Co. 51.

[a] **Personal judgment against widow in action against her as administratrix.**—Under a statute allowing a widow one hundred and fifty dollars and seventy-five dollars respectively out of the personalty, where decedent dies and does not leave surviving children by the widow, she was entitled to an allowance of that sum, although absolute judgment was rendered against her personally in an action against her as administratrix upon a claim against the estate. Beachley v. Bollinger, 119 Md. 151, 86 A 135.

53. Bridges v. Barbree, 127 Ga. 679, 56 SE 1025.

54. Henkel's Est., 13 Pa. Super. 337; Staley's Est., 21 Pa. Dist. 72.

55. Jones v. Cooner, 137 Ga. 681, 74 SE 51 (although a widow may be estopped from asserting her claim to a year's support, such estoppel will not debar her minor children from having a year's support in their deceased father's estate).

56. Baldwin v. Frisbie, 163 Wis. 26, 157 NW 526.

57. Ala.—Richter v. Richter, 180 Ala. 218, 60 S 880.

Cal.—In re Whitney, 171 Cal. 750, 154 P 855.

Colo.—Wilson v. Wilson, 55 Colo. 70, 73, 132 P 67 [cit Cyc].

Ill.—Yockey v. Marion, 269 Ill. 342, 110 NE 34; Brenner v. Gauch, 85 Ill. 368; Phelps v. Phelps, 72 Ill. 545, 22 AmR 149.

Ind.—Claypool v. Jaqua, 135 Ind. 499, 35 NE 285.

Iowa.—In re Johnson, 154 Iowa 118, 134 NW 553, 37 LRANS 875; In re Miller, 143 Iowa 120, 121 NW 700; In re Peet, 79 Iowa 185, 44 NW 354; Mahaffy v. Mahaffy, 61 Iowa 679, 17 NW 46; McReynold's Est., 61 Iowa 585, 16 NW 729.

Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917.

Me.—Wentworth v. Wentworth, 69 Me. 247.

Mass.—Blackinton v. Blackinton, 110 Mass. 461.

Mich.—Bliss v. Caille Bros. Co., 149 Mich. 601, 113 NW 317, 12 AnnCas 513; Pulling v. Durfee, 85 Mich. 34, 48 NW 48.

Mo.—Mowser v. Mowser, 87 Mo. 437; Lawrence v. Lawrence, (A.) 208 SW 496; Lowe v. Lowe, 163 Mo. A. 209, 146 SW 100.

N. Y.—Sheldon v. Bliss, 8 N. Y. 31.

[a] **The right is not released by** (1) an antenuptial agreement whereby the wife agreed to accept a certain sum as all that she should "receive of the estate." In re Miller, 143 Iowa 120, 121 NW 700. (2) Neither does an antenuptial agreement providing that the wife, in consideration of a payment made and love and affection, "hereby agrees to release, and does release, all claim which upon the death of the first party, she as his widow may have in his estate, whether in right of dower or as her distributive share in the personalty, or otherwise, under the laws of this state," deprive the wife of her right to an allowance for maintenance. Fulling v. Durfee, 85 Mich. 34, 40, 48 NW 48 ("The agreement here was intended to bar relator's 'right of dower, and all of her right to share in the estate,' and cannot be extended to include statutory 'allowances pertaining to administration.' The claims referred to are those which she, as widow would be entitled to make at the time of the distribution of the estate"). (3) So also the right to a widow's award is not barred by an antenuptial contract by which the wife has agreed to accept whatever provision may be made for her by the will of her husband, followed by the acceptance by her of the provisions of such a will, where neither the contract nor the will provides for the relinquishment of the award. Pratz v. Pratz, 122 Ill. A. 101.

[b] **In the absence of express language to that effect,** it will be presumed that parties to an antenuptial agreement did not intend to include the wife's absolute right to provision and subsistence for one year after her husband's death as one of her marital rights in the property and estate of her husband. Lowe v. Lowe, 163 Mo. A. 209, 146 SW 100.

58. In re Johnson, 154 Iowa 118, 121, 134 NW 553, 554, 37 LRANS 875 [foll In re Uker, 154 Iowa 428, 134 NW 1061] ("We now reach the conclusion that by no provision in an antenuptial contract, no matter how fair and reasonable it may be in itself in view of circumstances of the parties, can the prospective wife relinquish or cut herself off from the right to an allowance for support under the statute, provided the court finds such allowance to be a proper one when applied for. Of course, the circumstances, including the provisions of the contract itself, may be taken into account in determining whether an allowance should be made; but, if in the particular case the court finds an allowance to be proper, no relinquishment or waiver in the antenuptial contract can be relied upon to defeat the right to it.").

59. Cal.—In re Cutting, 174 Cal. 104, 161 P 1137; In re Whitney, 171 Cal. 750, 154 P 855; In re Yoell, 164 Cal. 540, 129 P 999.

Conn.—Cowles v. Cowles, 74 Conn. 24, 49 A 195; Staub's App., 66 Conn. 127, 33 A 615.

Ill.—Yockey v. Marion, 269 Ill. 342, 110 NE 34; Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219]; Kroell v. Kroell, 219 Ill. 105, 76 NE 63, 4 AnnCas 801 [rev 120 Ill. A. 76]; McMahill v. McMahill, 113 Ill. 461; Weaver v. Weaver, 109 Ill. 225; Brenner v. Gauch, 85 Ill. 368; Rotes v. Phelps, 194 Ill. A. 73; Edwards v. Martin, 39 Ill. A. 145.

Ind.—Buffington v. Buffington, 151 Ind. 200, 51 NE 328; Claypool v. Jaqua, 135 Ind. 499, 35 NE 285; McNutt v. McNutt, 116 Ind. 545, 19 NE 115, 2 LRA 372; Shaffer v. Matthews, 77 Ind. 83.

Me.—Bright v. Chapman, 105 Me. 62, 72 A 750.

Mass.—Paine v. Hollister, 139 Mass. 144, 29 NE 541. But compare Blackinton v. Blackinton, 110 Mass. 461 (holding that it is no defense to a petition by a widow to a probate court, for an allowance out of her husband's estate, that by a marriage contract she released all claim upon his estate, the decision seeming to be based upon the reason that the probate court had no power to try the validity of the contract or to give effect to its provisions).

Nebr.—Rieger v. Schaible, 81 Nebr. 58, 116 NW 953, 81 Nebr. 33, 115 NW 560, 17 LRANS 866.

N. H.—In re Heald, 22 N. H. 265.

N. Y.—Young v. Hicks, 92 N. Y. 235.

intended wife, and its terms must be reasonable;[60] and, if the provision secured to her is disproportionate to the means of the intended husband, there is a presumption of designed concealment on his part,[61] and the burden is upon those claiming in his right to prove that there was full knowledge on the wife's part of all that materially affected the contract.[62]

The rights of the children cannot be barred by an antenuptial agreement of the widow.[63]

[§ 812] **3. Postnuptial Agreement.** That a wife may relinquish her right to a widow's allowance or exemption by a postnuptial agreement based upon a valid consideration has been both asserted[64] and denied.[65] Even if the power exists an agreement will not be construed as a waiver of the widow's rights in this respect unless such an intention is entirely clear.[66] Neither is the wife bound by such an agreement where there was no consideration therefor.[67] It has also been held that an oral

N. C.—Perkins v. Brinkley, 133 N. C. 86, 45 SE 465; Cauley v. Lawson, 58 N. C. 132.

Oh.—Phillips v. Phillips, 14 Oh. St. 308; Broadstone v. Baldwin, 8 OhS&CP 235, 5 OhNP 39.

Pa.—Ludwig's App., 101 Pa. 535; Tiernan v. Binns, 92 Pa. 248; Dillinger's App., 35 Pa. 357; Bean's App., 2 LegGaz 244; Plank's Est., 1 York LegRec 108.

Wis.—In re Deller, 141 Wis. 255, 124 NW 278, 25 LRANS 751.

[a] **Any language sufficiently comprehensive** to include the allowance is adequate, and it is not essential that it should be relinquished in terms. Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219].

[b] **The right is released by:** (1) A contract not to claim as heir or survivor in the property of the husband. In re Yoell, 164 Cal. 540, 129 P 999. (2) A release of "all rights of dower, curtesy, or survivorship, as well as all other rights, either vested or inchoate, . . . which may be created or established by virtue of such marriage by the common law or any statute." Cowles v. Cowles, 74 Conn. 24, 25, 49 A 195. (3) A renunciation of all claims in law or equity of curtesy, dower, homestead, survivorship, or otherwise. Kroell v. Kroell, 219 Ill. 105, 76 NE 63, 4 Ann Cas 801. (4) A covenant not to sue for or demand any distributive share or interest as surviving spouse. Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219]. (5) A contract reciting that the woman releases "any and all claims." Buffington v. Buffington, 151 Ind. 200, 51 NE 328. (6) An agreement not to claim any interest in any property of the husband. Perkins v. Brinkley, 133 N. C. 86, 45 SE 465. (7) A marriage settlement assigning a life policy held by the intended husband to his intended wife in full satisfaction of any and all claims she might have in his estate, and wherein she covenanted that the settlement should be a bar both in law and in equity to any claim she might make to any part of the real or personal estate of her husband. Bright v. Chapman, 105 Me. 62, 72 A 750. (8) So also an antenuptial agreement, by which each party waives and releases all rights in the property of the other, being made by the woman with full knowledge of the nature, character, and value of the man's property, is effective to extinguish, not only her right of dower, widow's award, and thirds, but also her right of homestead, there being no minor children. Colbert v. Rings, 231 Ill. 404, 83 NE 274. (9) And an antenuptial contract made in good faith between parties, each of whom had real and personal property not disproportionate in value, providing that each thereby released and renounced all dower and other interest in the estate which the other party had or should thereafter acquire, with the intent that the property of each should descend to his or her lawful heirs, devested of all claims of dower or other interest that the other contracting party might have as husband or wife, widower, or widow, under the laws, was sufficient to bar the wife's statutory allowance, the rights of children not being involved. Rieger v. Schaible, 81 Nebr. 33, 115 NW 560, 17 LRANS 866 [reh den 81 Nebr. 58, 116 NW 953, 17 LRANS 866].

[c] **Where agreement is violated.**— Where an antenuptial agreement provides that the husband shall make a certain settlement on his widow by will, in lieu of dower or any set portion, and the terms of the will do not correspond with such agreement, his widow is entitled to the exempted property allowed by statute. Sheldon v. Bliss, 8 N. Y. 31.

[d] **A wife is not bound by an oral agreement** to relinquish her statutory allowance in the event she survives her husband, in consideration of the payment by him, in his lifetime, of money to and for the use of another. Yelton v. Kerns, 16 Ind. A. 92, 44 NE 687.

[e] **Repudiation of contract.**—(1) An executory antenuptial contract releasing the widow's award may be repudiated by her, especially where the family consists in part of a child of the deceased husband. Zachman v. Zachmann, 201 Ill. 380, 66 NE 256, 94 AmSR 180. (2) "But when, without fraud or imposition, she deliberately accepts from her husband's legal representatives that which, by the terms of the contract, she was to receive in lieu of the award, the right to repudiate the contract at once ceases, and under such circumstances she is estopped from setting up a claim to the award itself,—and this is clearly right, upon the plainest principles of natural as well as legal justice." Weaver v. Weaver, 109 Ill. 225, 234.

60. Achilles v. Achilles, 151 Ill. 136, 37 NE 693; Weaver v. Weaver, 109 Ill. 225.

61. Achilles v. Achilles, 151 Ill. 136, 37 NE 693.

62. See also Ross v. Ross, 34 PittbsLegJNS (Pa.) 354 (in an action by a widow to recover from the estate of her deceased husband her widow's exemption of three hundred dollars, the defense that plaintiff entered into a written antenuptial agreement with her husband whereby she released all her interest in his estate will not prevent a recovery where the evidence is conflicting and uncertain as to whether the agreement was executed before marriage or whether it was executed at all, and it further is proved that plaintiff was unacquainted with the value of her husband's estate and that she did not comprehend the meaning of the instrument); Achilles v. Achilles, 151 Ill. 136, 37 NE 693.

63. Yockey v. Marion, 269 Ill. 342, 110 NE 34; Kroell v. Kroell, 219 Ill. 105, 112, 76 NE 63, 4 AnnCas 801 [rev 120 Ill. A. 76]; Brown v. Brown, 80 SW 470, 25 KyL 2264.

"It is true that in the case of Phelps v. Phelps, 72 Ill. 545, 22 AmR 149, the justice delivering the opinion indulged in observations on the subject of public policy, but the grounds of the decision were that a child was born of the marriage and was living with the widow at the time of filing the petition; that a widow's award is for the joint benefit of the widow and the minor children of the decedent; that, the specific allowance being as much for the benefit of the children as the widow, she has no power to deprive the children of such benefit by an antenuptial contract, and that to effect the purpose of the statute it is necessary that the widow shall share in the benefit of the award. If the wife had no power to release the widow's award because it was for the benefit of herself and the minor child, and the benefit of the provision of the statute could only be secured to the child by setting off the award to the mother as the natural guardian, the question of public policy was of no importance. If there was a want of power, the fact was conclusive in the case, and the attempted release would have been ineffective, no matter what public policy was. It is clear that the public concern that widows shall not become charges upon the public charitable institution of the State was not the ground of the decision, inasmuch as the court said that if there had been no child or children of the decedent residing with the widow after his death a very different question would have been presented, and that in such a case the award would have been for her sole use, and might be treated as a personal right which she could relinquish. It was distinctly held that the effect of the ante-nuptial contract was to bar her dower and prevent her taking any portion of the estate as heir under the statute, and, so far as considerations of public policy that widows shall not become public charges is concerned, the same rule would apply to dower and inheritance as to the award. The court afterward defined the exact scope of that decision in Weaver v. Weaver, 109 Ill. 225, where the court said: 'The only thing actually decided by the Phelps Case is that the award of a widow having a family consisting in part of a minor child of the deceased is not barred by an unexecuted ante-nuptial contract.' The court also said: 'The result of the decisions of this court, as we understand them, go to this extent, but no further. A widow having a family consisting in part of the decedent's children is entitled to the widow's award notwithstanding there is an outstanding ante-nuptial executory contract by which she has agreed to accept a certain sum of money or something else in lieu of it.'" Kroell v. Kroell, supra.

64. In re Whitney, 171 Cal. 750, 154 P 855; In re Yoell, 164 Cal. 540, 129 P 999; Spangler v. Dukes, 39 Oh. St. 642; In re Roth, 9 OhS&CP 429, 6 OhNP 498; Schmitt's Est., 5 Pa. Co. 183.

Articles of separation see infra § 819.

65. Odenwelder's Est., 16 Pa. Co. 459 (a married woman cannot, without statutory authority, make a postnuptial agreement relinquishing her right to her widow's exemption, and the Married Persons Property Act of 1893 does not give her such power).

66. In re Finch, 173 Cal. 462, 160 P 556; In re Whitney, 171 Cal. 750, 154 P 855; Bliss v. Livingston Prob. Judge, 149 Mich. 271, 112 NW 911.

67. Richter v. Richter, 180 Ala. 218, 60 S 889 (an agreement made by a wife with her husband, who had made a bequest to her of four hundred dollars, "and no more, no less,"

agreement by which the wife relinquishes her statutory allowance for a valuable consideration moving to a third person in the event that she survives her husband does not bind her.[68]

[§ 813] **4. Testamentary Provisions and Election—a. In General.** Testamentary provisions cannot, of themselves, interfere with the statutory right of the widow and children to support out of the estate,[69] and hence a will disposing of all of testator's estate and making no provision for the widow cannot affect her right to the statutory allowance;[70] but in such case she may claim her allowance or exemption without dissenting from the will.[71]

[§ 814] **b. Election to Take under Will.** While it has been held that if a widow elects to accept provision made for her in the decedent's will she cannot claim her statutory allowance in addition thereto,[72] the more general view is that the widow is entitled to her statutory allowance in addition to any provision made for her by the will,[73] even though such provision is in lieu of dower or similar rights,[74] unless such allowance would be inconsistent with the provisions of the will,[75] as where

which recites the bequest in settlement of her interest, and which declares that she is satisfied with the provision in the will and agrees to accept the four hundred dollars in full satisfaction and agrees to take the same in monthly installments after his death, or in a lump sum at the option of the executors, is, so far as exemptions created by law are concerned, without consideration and is not binding on her, and she may demand her legal exemptions).

68. Yelton v. Kerns, 16 Ind. A. 92, 44 NE 687.

69. Cal.—In re Whitney, 171 Cal. 750, 154 P 855.

Ida.—Lemp v. Lemp, 184 P 222.

Ill.—Deke v. Huenkemeier, 124 NE 381.

Mo.—Lowe v. Lowe, 163 Mo. A. 209, 146 SW 100.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

[a] **The right of minor children** to have an allowance set apart for their support is not affected by a devise of all testator's property to his widow. Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629. Contra Semple's Est., 3 LancLRev (Pa.) 328 (an adopted son of the decedent cannot claim the statutory exemption where the widow elected to take under the will leaving her all the decedent's property).

70. Cal.—In re Whitney, 171 Cal. 750, 154 P 855.

Iowa.—In re Peet, 79 Iowa 185, 44 NW 354; Linton v. Crosby, 61 Iowa 293, 16 NW 113; Ward v. Wolf, 56 Iowa 465, 9 NW 348.

Ky.—Graves v. Graves, 10 B. Mon. 31.

Md.—Crow v. Hubard, 62 Md. 560.

Mich.—In re Pulling, 93 Mich. 274, 52 NW 1116; Miller v. Stepper, 32 Mich. 194.

N. Y.—Matter of Mersereau, 38 Misc. 208, 77 NYS 329.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629; Runnels v. Runnels, 27 Tex. 515.

Wis.—Baker v. Baker, 57 Wis. 382, 15 NW 425.

"The power of testamentary disposition of property, as conferred and defined by the statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children." Sulzberger v. Sulzberger, 50 Cal. 385, 387 [quot In re Kennedy, 157 Cal. 517, 522, 108 P 280, 282, 29 LRANS 428].

71. Turner v. Cole, 24 Ala. 364; In re Peet, 79 Iowa 185, 44 NW 354; Godman v. Converse, 38 Nebr. 657, 57 NW 394; Piper v. Piper, 34 N. H. 563.

72. Iowa.—Zunkel v. Colson, 109 Iowa 695, 81 NW 175.

La.—Claudel v. Palao, 28 La. Ann. 872.

Me.—Brown v. Hodgdon, 31 Me. 65.

Miss.—McGaughey v. Eades, 78 Miss. 853, 29 S 516 [appr Turner v. Turner, 30 Miss. 428].

N. C.—Perkins v. Brinkley, 133 N. C. 86, 45 SE 465; Flippin v. Flippin, 117 N. C. 376, 23 SE 321.

Tex.—Trousdale v. Trousdale, 35 Tex. 756; Little v. Birdwell, 27 Tex. 688; Nelson v. Lyster, (Civ. A.) 74 SW 54.

[a] **"This rule results from** the doctrine of election, which involves the notion that no man can claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect to that instrument; he cannot both accept and reject it, or avail himself of its benefits as to a part and defeat its provisions as to other parts." McGaughey v. Eades, 78 Miss. 853, 857, 29 S 516.

[b] **An executor is not bound to advise the widow** as to her best course in accepting or not accepting such provision, but if he assumes to advise her he should do so with honest purpose and good discretion. Bolin v. Barker, 75 N. C. 47.

73. Ala.—Richter v. Richter, 180 Ala. 218, 60 S 880.

Cal.—In re Cowell, 164 Cal. 636, 130 P 209; In re Bump, 152 Cal. 274, 92 P 643; Walkerley's Est., 77 Cal. 642, 20 P 150.

Ga.—Kinard v. Clay, 138 Ga. 544, 75 SE 636; Reynolds v. Norvell, 129 Ga. 512, 59 SE 299; Latch v. Latch, 21 Ga. A. 545, 94 SE 853.

Ill.—Deltzer v. Scheuster, 37 Ill. 301.

Ind.—Bowman v. Olrick, 165 Ind. 478, 75 NE 820; Shafer v. Shafer, 129 Ind. 394, 28 NE 867; Shipman v. Keys, 127 Ind. 353, 26 NE 896; Smith v. Smith, 76 Ind. 236; Whiteman v. Swem, 71 Ind. 530; Nelson v. Wilson, 61 Ind. 255; Dunham v. Tappan, 31 Ind. 173; Loring v. Craft, 16 Ind. 110; Cheek v. Wilson, 7 Ind. 354; Pierce v. Pierce, 21 Ind. A. 184, 51 NE 954; Whisnand v. Fee, 21 Ind. A. 270, 52 NE 229; Richards v. Hollis, 8 Ind. A. 353, 35 NE 572.

Mass.—Williams v. Williams, 5 Gray 24.

Mich.—Hill v. Kalamazoo Prob. Judge, 123 Mich. 77, 87 NW 113.

Mo.—Hasenritter v. Hassenritter, 77 Mo. 162; Register v. Hensley, 70 Mo. 189; Bryant v. McCune, 49 Mo. 546; Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260; Glenn v. Hunn, 88 Mo. A. 423; Schoeneich v. Reed, 8 Mo. A. 356; In re Klostermann, 6 Mo. A. 314.

Nebr.—In re O'Shea, 85 Nebr. 156, 122 NW 881; Fletcher v. Fletcher, 83 Nebr. 156, 119 NW 232 [foll In re Leavitt, 85 Nebr. 521, 124 NW 114].

N. J.—Mulford v. Mulford, 42 N. J. Eq. 68, 6 A 609.

N. M.—Andros v. Flournoy, 22 N. M. 582, 166 P 1173.

N. Y.—In re Frazer, 92 N. Y. 239; Vedder v. Saxton, 46 Barb. 188; Matter of Mersereau, 38 Misc. 208, 77 NYS 329.

Oh.—Watts v. Watts, 38 Oh. St. 480; Bane v. Wick, 14 Oh. St. 505; Collier v. Collier, 3 Oh. St. 369; Wanzer v. Widow, 2 Oh. Dec. (Reprint) 323, 2 WestLMonth 426; In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

Pa.—Peebles' Est., 157 Pa. 605, 27 A 792; Compher v. Compher, 25 Pa. 31; Rogers' Est., 21 Pa. Dist. 1006; Irwin's Est., 6 Pa. Dist. 351, 19 Pa. Co. 595; Snider's Est., 4 Pa. Dist. 515; Snider's Est., 16 Pa. Co. 233; Lutz's Est., 1 Pa. Co. 157.

Tenn.—Wilson v. Morris, 94 Tenn. 547, 29 SW 966.

Vt.—Meech v. Weston, 33 Vt. 561.

Wis.—Baker v. Baker, 57 Wis. 382, 15 NW 425.

"The mere fact that she has elected to accept a testamentary provision made for her by her husband will not deprive her of this absolute statutory allowance." Bowman v. Olrick, 165 Ind. 478, 482, 75 NE 820.

[a] **A claim under the real property law,** for forty days' sustenance while occupying the house of the husband, is forfeited by accepting an absolute devise of all the real estate. Matter of Meuschke, 61 Misc. 9, 114 NYS 722.

74. Ala.—Chandler v. Chandler, 87 Ala. 300, 6 S 153.

Cal.—In re Lufkin, 131 Cal. 291, 63 P 469.

Ind.—Shipman v. Keys, 127 Ind. 353, 26 NE 896; Hurley v. McIver, 119 Ind. 53, 21 NE 325; Langley v. Mayhew, 107 Ind. 198, 6 NE 317, 8 NE 157; Smith v. Smith, 76 Ind. 236; Cheek v. Wilson, 7 Ind. 354.

Me.—Brown v. Hodgdon, 31 Me. 65.

Mass.—Williams v. Williams, 5 Gray 24.

Mich.—Moore v. Moore, 48 Mich. 271, 12 NW 180; Miller v. Stepper, 32 Mich. 194.

Mo.—State v. Taylor, 72 Mo. 656; Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260; Glenn v. Gunn, 88 Mo. A. 423.

Nebr.—In re Leavitt, 85 Nebr. 521, 124 NW 114 [den reh 122 NW 881].

N. J.—Mulford v. Mulford, 42 N. J. Eq. 68, 6 A 609.

N. Y.—Vedder v. Saxton, 46 Barb. 188.

Oh.—Watts v. Watts, 38 Oh. St. 480; In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

Pa.—Peeble's Est., 157 Pa. 605, 27 A 792; Stineman's App., 34 Pa. 394; Compher v. Compher, 25 Pa. 31; Snider's Est., 16 Pa. Co. 233; In re Friedlinger, 12 Phila. 80.

Tenn.—Wilson v. Morris, 94 Tenn. 547, 29 SW 966.

Vt.—Meech v. Weston, 33 Vt. 561.

[a] **"We find a practically unanimous opinion** that this statutory bounty is not dower in the strict sense, and that a provision in a will that its bequest to the widow of the testator shall be in lieu of dower does not deprive the widow of her right to the allowance." Ellis v. Ellis, 119 Mo. A. 63, 69, 96 SW 260.

75. Cal.—In re Cowell, 164 Cal. 636, 130 P 209.

Ind.—Bowman v. Olrick, 165 Ind. 478, 75 NE 820; Buffington v. Buffington, 151 Ind. 200, 51 NE 328; Like v. Cooper, 132 Ind. 391, 31 NE 1118; Shafer v. Shafer, 129 Ind. 394, 28 NE 867; Shipman v. Keys, 127 Ind. 353, 26 NE 896; Hurley v. McIver, 119 Ind. 53, 21 NE 325; Langley v. Mayhew, 107 Ind. 198, 6 NE 317, 8 NE 157; Whetsell v. Louden, 25 Ind. A. 257, 57 NE 952; McDonald v. Moak, 24 Ind. A. 528, 57 NE 159; Whisnand v. Fee, 21 Ind. A. 270, 52 NE 229; Snodgrass v. Meeks, 12 Ind. A. 70, 38 NE 833; Richards v. Hollis, 8 Ind. A. 353, 35 NE 572.

Mo.—Ellis v. Ellis, 119 Mo. A. 63, 96 SW 260.

Nebr.—Godman v. Converse, 43 Nebr. 463, 61 NW 756.

N. J.—Mulford v. Mulford, 42 N. J. Eq. 68, 6 A 609.

it appears that the testamentary provision was intended to be in lieu of the widow's statutory rights in her husband's estate.[76]

[§ 815] **c. Dissent from Will.** Where the widow elects not to take under the will, she is usually held entitled to her allowance,[77] nor is the allowance barred by electing to take a child's part in lands in lieu of dower.[78]

[§ 816] **5. Separate Estate or Homestead.** Notwithstanding the widow may have a separate estate of her own, or may continue to occupy the homestead, she is usually granted the statutory allowance and exemption, especially if the income from such separate property is insufficient for a due maintenance.[79] But it has been held that a widow is not entitled to a homestead and a year's supply, where the aggregate of the two provisions exceeds the amount which may be set apart as a homestead and exemption under the law,[80] and that where a husband as the head of a family has a homestead set apart for himself and wife, and the widow after his death continues upon the property constituting the homestead for a great number of years, enjoying during that period the rents, issues, and profits of the homestead, she will not be allowed, after the expiration of such a time, to take a year's support out of the homestead property, but will be conclusively presumed to have made an election in favor of the enjoyment of the homestead as such, and against the right to have a year's support set apart to her.[81] Where an intestate left as his only estate property which was set aside as a homestead for himself and family, and his widow lived on the property for several months until her death, without making an application for a year's support, it was held that she had elected to take the homestead rather than the year's support, and her executor could not have the property set apart as a year's support to her estate.[82]

[§ 817] **6. Misconduct.** Although some cases consider that misconduct is not sufficient to bar an allowance in the absence of an actual separation or divorce,[83] it is usually held that a widow's allowance may be denied for her misconduct, as in case of her adultery or a separation because of her own misconduct, while the marriage existed,[84] or

N. Y.—Matter of Allen, 36 Misc. 398, 73 NYS 750.

Oh.—In re Witner, 10 OhS&CP 30, 7 OhNP 143; In re Rierdon, 5 Oh S&CP 606, 5 OhNP 516.

Pa.—Matter of Maier, 1 Pearson 420; McManus' Est., 14 Phila. 660.

Wis.—Golder v. Littlejohn, 30 Wis. 344.

Ont.—Re Tatham, 2 Ont. L. 343.

[a] **A general disposition of the residue** of testator's property, not purporting to be in lieu of the widow's absolute claim, was not enough to compel her to elect between the will and the absolute claim, and she was entitled to both. Shipman v. Keys, 127 Ind. 353, 26 NE 896.

[b] **Where the wife is given a life estate in all** the testator's property, and she accepts the provisions of the will and enters into enjoyment of her estate, she is not entitled to any further allowance from the estate. Golder v. Littlejohn, 30 Wis. 344. To same effect Bowman v. Olrick, 165 Ind. 478, 75 NE 820; Peck v. Sherwood, 56 N. Y. 615. But compare Kinard v. Clay, 138 Ga. 544, 75 SE 636 (a widow is entitled to twelve months' support out of her deceased husband's estate, notwithstanding his will, probated over her caveat, bequeathing to her a life estate in all his real estate and personal property).

76. Cal.—In re Bump, 152 Cal. 274, 92 P 643; In re Lufkin, 131 Cal. 291, 63 P 469.

Ga.—Reynolds v. Norvell, 129 Ga. 512, 59 SE 299.

Ill.—Cowdrey v. Hitchcock, 103 Ill. 262.

Ind.—Bowman v. Olrick, 165 Ind. 478, 75 NE 820; Cameron v. Parish, 155 Ind. 329, 56 NE 547; Buffington v. Buffington, 151 Ind. 200, 51 NE 328; Shafer v. Shafer, 129 Ind. 394, 28 NE 867; Hurley v. McIver, 119 Ind. 53, 21 NE 325; Langley v. Mayhew, 107 Ind. 198, 6 NE 317, 8 NE 157; Snodgrass v. Meeks, 12 Ind. A. 70, 38 NE 833; Richards v. Hollis, 8 Ind. A. 353, 35 NE 572.

Mo.—Hasenritter v. Hasenritter, 77 Mo. 162; In re Klostermann, 6 Mo. A. 314.

Pa.—McManus' Est., 14 Phila. 660.

[a] **Repudiation of acceptance.**—The acceptance by the widow of a legacy in lieu of her dower and year's support and taking the executor's personal note in satisfaction of the legacy may be repudiated by her at any time before the record of the will and qualification of the executor on return of the note to its maker. Hill v. Hill, 88 Ga. 612, 15 SE 674.

77. Ill.—Brack v. Boyd, 202 Ill. 440, 66 NE 1073.

Ind.—Ratliff v. Baldwin, 29 Ind. 16, 92 AmD 330.

Ky.—Franzell v. Franzell, 153 Ky. 171, 154 SW 912.

Me.—Brown v. Hodgdon, 31 Me. 65.

Mass.—Crane v. Crane, 17 Pick. 422. But see In re Currier, 3 Pick. 375 (where a widow who had waived the provision made for her in the will was held entitled to no allowance, beside her apparel, out of the personal estate, the husband having died testate and the estate not appearing to be insolvent).

Mo.—Register v. Hensley, 70 Mo. 189; Norvell v. Cooper, 155 Mo. A. 445, 134 SW 1095. Contra Griffith v. Canning, 54 Mo. 282.

N. C.—Perkins v. Brinkley, 133 N. C. 86, 45 SE 465.

Pa.—Irwin's Est., 6 Pa. Dist. 351; Irwin's Est., 19 Pa. Co. 595.

Tex.—Runnels v. Runnels, 27 Tex. 515; Nelson v. Lyster, 32 Tex. Civ. A. 356, 74 SW 54.

Wis.—In re Wilber, 52 Wis. 295, 9 NW 162.

[a] **Where the statute limits the time for dissenting** to the will, a suit for a year's support, brought after the expiration of the time so limited, cannot be sustained. Perkins v. Brinkley, 133 N. C. 86, 45 SE 465.

[b] **Contrary view.**—Pearson v. Darrington, 32 Ala. 227.

78. Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

79. Ala.—Darden v. Reese, 62 Ala. 311; Thompson v. Thompson, 51 Ala. 493; Johnston v. Davenport, 42 Ala. 317; Jordan v. Strickland, 42 Ala. 315; Chisolm v. Chisolm, 41 Ala. 327.

Ark.—Word v. West, 38 Ark. 243.

Cal.—In re Finch, 173 Cal. 462, 160 P 556; In re Bump, 152 Cal. 274, 92 P 643; In re Lux, 114 Cal. 89, 45 P 1028; In re Lux, 100 Cal. 593, 35 P 341.

Ga.—Reynolds v. Norvell, 129 Ga. 512, 59 SE 299; Bardwell v. Edwards, 117 Ga. 824, 45 SE 40. But compare Cook v. Cook, 138 Ga. 88, 74 SE 795 (a widow, at the death of her husband, is not entitled to hold the homestead and at the same time take a year's support).

Ill.—Miller v. Hammond, 126 Ill. A. 267.

Iowa.—Newans v. Newans, 79 Iowa 32, 44 NW 213.

Mass.—Lisk v. Lisk, 155 Mass. 153, 29 NE 375.

Miss.—Hardin v. Osborne, 43 Miss. 532; Wally v. Wally, 41 Miss. 657; Whitley v. Stephenson, 38 Miss. 113; Coleman v. Brooke, 37 Miss. 71.

Pa.—McIntyre's Est., 44 Pa. Co. 111; Palethorp's Est., 34 WklyNC 68.

Vt.—Sawyer v. Sawyer, 28 Vt. 249.

[a] **Upon abandoning the homestead** the widow may have it sold to pay her award. Miller v. Hammond, 126 Ill. A. 267 (occupancy of the homestead is not computed as laches in enforcing the award).

Necessitous circumstances as requisite to allowance see supra § 760.

80. Green v. Hambrick, 118 Ga. 569, 45 SE 420.

81. Culpepper v. Crane, 139 Ga. 665, 77 SE 1058.

82. Ehrlich v. Silverstein, 121 Ga. 54, 48 SE 703.

83. Chase v. Webster, 168 Mass. 228, 46 NE 705; In re Diller, 6 Oh S&CP 182, 5 OhNP 255.

[a] **The wife's living in adultery** does not forfeit her right where there has been no divorce. In re Diller, 6 OhS&CP (Oh.) 182, 5 OhNP 182.

Effect of separation or divorce see infra §§ 819, 820.

84. U. S.—Daniels v. Taylor, 145 Fed. 169, 76 CCA 139 [rev 5 Ind. T. 219, 82 SW 727].

Ind.—Owen v. Owen, 57 Ind. 291; Shaffer v. Richardson, 27 Ind. 122.

La.—Richard v. Lazard, 108 La. 540, 32 S 559.

Mo.—Lyons v. Lyons, 101 Mo. A. 494, 74 SW 467.

N. C.—Leonard v. Leonard, 107 N. C. 171, 12 SE 60; Cook v. Sexton, 79 N. C. 305; Walters v. Jordan, 34 N. C. 170.

Pa.—Hill v. Hill, 42 Pa. 198; Martin's Est., 5 Pa. Co. 504; Scullin's Est., 5 Pa. Co. 188.

[a] **Where a wife had abandoned her husband and lived in adultery,** she was not entitled to quarantine. Lyons v. Lyons, 101 Mo. A. 494, 74 SW 467.

[b] **The fact that the widow had been her husband's concubine** does not impair her claim. Sabalot v. Populus, 31 La. Ann. 854.

[c] **The wife's former adultery discontinued before the death of her husband,** is not a bar to a decree for an allowance to her from the estate of her deceased husband. Zeigler v. Mize, 132 Ind. 403, 31 NE 945.

[d] **Where a husband had knowledge of his wife's past immoral conduct** before he married her, and subsequently associated with immoral women, accompanied by the wife, she was not deprived, by reason of her immoral conduct during mar-

her fraud or misconduct during administration, especially if she is executrix or administratrix, may debar her.[85]

[§ 818] **7. Felonious Killing of Husband.** It has been held that the fact that a wife has been convicted of feloniously killing her husband did not deprive her of the right to her statutory allowance out of his estate.[86]

[§ 819] **8. Separation.** Under some statutes it has been held that the special allowance to a widow should be denied where she was not living in a family relation with her husband at the time of his death,[87] unless her separation was involuntary and through no fault of hers or was based upon reasons constituting a sufficient ground for divorce;[88] but under other statutes it has been considered that the right of the widow to an allowance is not defeated because of a mere separation between herself and her husband,[89] even though

riage, of her right as widow. In re Drasdo, 36 Wash. 478, 78 P 1022.

85. King v. Johnson, 94 Ga. 665, 21 SE 895; Nowling v. McIntosh, 89 Ind. 593; Speakman's App., 71 Pa. 25.

86. In re Mertes, 181 Ind. 478, 480, 104 NE 753; Eversole v. Eversole, 169 Ky. 793, 185 SW 487, LRA1916E 593.

"The act in question provides that the party guilty of killing another shall not take of the property by devise or descent. It has been often decided by this court that the statutory allowance to the widow of five hundred dollars does not pass to her, by reason of any law of descent, but is a preferred claim payable out of the personal estate of the deceased husband, if sufficient, and if insufficient then the balance shall be paid out of the real estate. . . . Therefore it must be conceded that the appellant's interest of five hundred dollars in her deceased husband's estate does not descend to her as his heir, and therefore the act of 1907 does not control. As there is no pretense that it was given her under the provisions of any will, therefore the provision that she shall not take by devise has no force in this case. The act in question is confined to 'devise' and 'descent' and could not be made to apply in this case, without reading something into the statute, which was not included therein by the legislature." In re Mertes, supra.

87. U. S.—Daniels v. Taylor, 145 Fed. 169, 76 CCA 139 [rev 5 Ind. T. 219, 82 SW 727, 5 AnnCas 226].

Cal.—In re Yoell, 164 Cal. 540, 129 P 999; In re Bose, 158 Cal. 428, 111 P 258; In re Miller, 158 Cal. 420, 424, 111 P 255 [quot Cyc]; In re Byrne, Myr. Prob. 1.

La.—Richard v. Lazard, 108 La. 540, 32 S 559.

Me.—Kersey v. Bailey, 52 Me. 198.

Mass.—Hollenbeck v. Pixley, 3 Gray 521.

Mo.—Fisher v. Clopton, 110 Mo. A. 663, 85 SW 623.

Oh.—In re Roth, 9 OhS&CP 429, 6 OhNP 498.

Pa.—Nye's App., 126 Pa. 341, 17 A 618, 12 AmSR 873; Speidel's App., 107 Pa. 18; Platt's App., 80 Pa. 501; Hettrick v. Hettrick, 55 Pa. 290; Odiorne's App., 54 Pa. 175, 93 AmD 683; Price's App., 2 Mon. 554; Myers' Est., 24 Pa. Super. 142; Creighton's Est., 7 Pa. Dist. 251, 21 Pa. Co. 83; Welsh's Est., 5 Pa. Dist. 675, 18 Pa. Co. 517, 39 WklyNC 167; Kahn's Est., 3 Pa. Dist. 806, 16 Pa. Co. 72; In re McCanna, 25 Pa. Co. 657; Martin's Est., 5 Pa. Co. 504; Burkett's Est., 5 Pa. Co. 501; Groves' Est., 5 Pa. Co. 498, 2 Del. Co. 476, 3 Kulp 475; Scullin's Est., 5 Pa. Co. 188; Adose v. Fossit, 1 Pearson 304; Tozer v. Tozer, 2 AmLReg 510; Ross' Est., 6 Kulp 521; Sander's Est., 12 LancBar 77, 1 YorkLegRec 115; Coates' Est., 6 WklyNC 367.

Tex.—Earle v. Earle, 9 Tex. 630.

Utah.—In re Park, 25 Utah 161, 69 P 671.

Alta.—Drewry v. Drewry, [1916] 2 AC 631, 30 DomLR 581, 35 WestLR 266, 11 WestWkly 266 [rev 9 Alta. L. 363, 27 DomLR 716].

"These sections quite plainly contemplate the case of a widow who in the lifetime of her husband lived with him as a member of his family, and performed the duties of that relation, and not one who willingly separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family." Daniels v. Taylor, 145 Fed. 169, 171, 76 CCA 139, 7 AnnCas 352 [rev 5 Ind. T. 219, 82 SW 727, 5 AnnCas 226].

[a] **Separation by mutual consent** is a bar to the wife's right of allowance. Fisher v. Clopton, 110 Mo. A. 663, 85 SW 623; In re Roth, 9 Oh S&CP 429, 6 OhNP 498; Linares v. Linares, 93 Tex. 84, 53 SW 579; Matter of Park, 25 Utah 161, 69 P 671.

[b] **Articles of separation** (1) may bar the widow's allowance. Noah's Est., 73 Cal. 583, 15 P 287, 2 AmSR 829; Fisher v. Clopton, 110 Mo. A. 663, 85 SW 623; Speidel's App., 107 Pa. 18; Dillinger's App., 35 Pa. 357; Henkel's Est., 13 Pa. Super. 337; Schmitt's Est., 5 Pa. Co. 183; Linares v. Linares, 93 Tex. 84, 53 SW 579; In re Park, 25 Utah 161, 69 P 671. (2) But they cannot bar the right of a minor child. Henkel's Est., 13 Pa. Super. 337.

88. Cal.—In re Miller, 158 Cal. 420, 424, 111 P 255 [quot Cyc].

D. C.—Shaw v. Saxman, 46 App. 526.

Mass.—Slack v. Slack, 123 Mass. 443.

N. H.—Newton v. Truesdale, 69 N. H. 634, 45 A 646.

Oh.—In re Roth, 9 OhS&CP 429, 6 OhNP 498.

Pa.—Nye's App., 126 Pa. 341, 17 A 618, 12 AmSR 873; Terry's App., 55 Pa. 344; Balmforth's Est., 26 Pa. Super. 491; Baker's Est., 25 Pa. Dist. 650; McIntyre's Est., 25 Pa. Dist. 139; Reed's Est., 21 Pa. Dist. 906; Dixon's Est., 16 Pa. Dist. 35; Sigrist's Est., 13 Pa. Dist. 735; Balmforth's Est., 13 Pa. Dist. 222, 30 Pa. Co. 144; Welsh's Est., 5 Pa. Dist. 675, 18 Pa. Co. 517, 39 WklyNC 167; Sigrist's Est., 30 Pa. Co. 576; Balmforth's Est., 30 Pa. Co. 144; Reilly's Est., 28 Pa. Co. 544; Spence's Est., 5 Pa. Co. 494; Simpson's Est., 5 Pa. Co. 326, 22 WklyNC 172; Wright's Est., 5 Pa. Co. 228; Sander's Est., 12 LancBar 77, 1 YorkLegRec 115; Weidler's Est., 19 LancLRev 212; Moore's App., 40 LegInt 350; In re Krewson, 18 Montg. Co. 114; De Walt's Est., 21 PittsbLegJNS 275; Groom's Est., 6 YorkLegRec 139.

Tex.—Linares v. Linares, 93 Tex. 84, 53 SW 579.

Utah.—In re Beason, 49 Utah 24, 161 P 678.

[a] **The burden of showing that the separation was not for sufficient cause** is on the person claiming that the widow has forfeited her allowance. Linares v. Linares, 93 Tex. 84, 53 SW 579.

[b] **The reasonable cause which justifies** a wife in abandoning her husband, and prevents such exemption, is such as would entitle her to a divorce; and a single act of indignity, falling short of endangering life, is not a sufficient cause, especially where it occurred a long time before the separation, and had been condoned. Myers' Est., 24 Pa. Super. 142.

[c] **Where desertion is justifiable.** —An intestate left a widow to whom he was married in 1855, after having unlawfully cohabited with her for eight years. They lived together after marriage for about two years, when difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year, and then return. Before she went away he withdrew his consent, but she insisted on leaving. At the end of the year she returned; but finding that he had a housekeeper, with whom she believed him to be living in adultery, there being no bed in the house but his own, she went away and never returned, and was not asked to do so, but continued living apart from him, rendering him no services, and supporting herself until his death, which took place some years afterward. She had no children by him, was in her seventieth year, and had no means of support. The probate court, upon the application of the widow, made her an allowance of three hundred and fifty dollars, and its decree was affirmed, on appeal by the administratrix, by a justice of the court. It was held, upon appeal to the full court, that the decree should be affirmed with costs. Slack v. Slack, 123 Mass. 443.

[d] **Desertion by husband.**—Where a husband leaves his wife in a foreign country with the understanding that she is to follow him when he shall have made a home for her in this country, and he subsequently settles in Pennsylvania, but does not inform her of his whereabouts, and afterward bigamously marries another woman and then dies, the first wife is entitled to the widow's exemption out of his estate if it appears that she was at all times ready to join her husband, and would have done so if she had not been kept in ignorance of his whereabouts. Grive's Est., 165 Pa. 126, 30 A 727 [dist Spier's App., 26 Pa. 233].

[e] **Minor children** living apart from their father at his death by reason of his desertion of and failure to provide for them are entitled to the statutory exemption notwithstanding a statute requiring residence with deceased at the time of his death. Rappe's Est., 4 LancLRev (Pa.) 316.

[f] **A deserted wife** is not estopped, by her failure to follow her husband to another jurisdiction and demand support, from claiming the right to participate in his estate after his death. Shaw v. Saxman, 46 App. (D. C.) 526.

89. Cal.—In re Gould, 183 P 146.

Colo.—Deeble v. Alerton, 58 Colo. 166, 143 P 1096, AnnCas1916C 863.

Ga.—Aiken v. Davidson, 146 Ga. 252, 91 SE 34; Smith v. Smith, 112 Ga. 351, 37 SE 407.

La.—In re Coreil, 83 S 13; Liddell's Succ., 22 La. Ann. 9; Egan's Succ., Mann. Unrep. Cas. 399.

Mass.—Welch v. Welch, 181 Mass. 37, 63 NE 982; Chase v. Webster, 168 Mass. 228, 46 NE 705.

Minn. — Sammons v. Higbie, 103 Minn. 448, 115 NW 265.

Mo.—Mowser v. Mowser, 87 Mo. 437; Comerford v. Coulter, 82 Mo. A. 362; King v. King, 64 Mo. A. 301.

N. Y.—Shedd's Est., 133 N. Y. 601,

it was due to her own misconduct.[90]

Reconciliation after separation. Where, after a contract for separation, the parties become reconciled and live together, the surviving wife, where the personalty directed by statute to be set aside to her is insufficient for her support, is entitled to an allowance for her maintenance pending administration.[91]

[§ 820] **9. Divorce.** The widow's special allowance or exemption cannot be successfully claimed by a former wife of decedent who was divorced from him prior to his death,[92] and this has been held to be true even though the divorce was incomplete or invalid, where by virtue thereof she has long lived voluntarily apart from her husband.[93] A void divorce procured by the husband from a foreign tribunal does not deprive the widow of the statutory allowance,[94] but where a wife separated from her husband and remarried under the erroneous belief that she was divorced, and had children by such second marriage and never at any time had conjugal relations with decedent, she cannot be said to be a member of his family so as to entitle her to a widow's or family allowance.[95]

An interlocutory decree of divorce, requiring the husband to transfer to the wife certain property and allotting all other property of the community to the husband "free and clear of all claim of the wife," has been held not to defeat her statutory claim to a family allowance on his death.[96]

Support of child. Where an allowance for the support of a child has been granted in a decree of divorce, it is proper to deny an application by the mother, after the father's death, for an additional allowance for the support of the child under the statute relating to decedents' estates.[97]

[§ 821] **10. Relinquishment after Death of Decedent.** While a widow's release of her allowance and exemptions after her husband's death does not necessarily conclude the rights of the children residing with her,[98] it will debar her,[99] especially when settlement of the estate has proceeded upon the faith of it,[1] unless she was imposed upon by others.[2] But she will not be barred unless the instrument executed by her clearly shows an intention to release these statutory rights,[3] and a consideration for the release is necessary.[4] Where the husband waives his right to have exempt property set apart to him from the estate of his deceased wife by refusing tender thereof from her executor, his executrix is barred from making a claim to have such property set apart.[5]

[§ 822] **11. Remarriage.** While the remarriage of the widow does not divest her or minor children of allowances and exemptions already vested,[6] it ordinarily bars her from any subsequent claim upon the estate,[7] the order of allowance thereupon terminating without any further order of the court.[8] However, the widow's rights may continue notwithstanding her remarriage where this is in accordance with the legislative intent as shown by the statute.[9]

30 NE 1147 [aff 60 Hun 367, 14 NYS 841].

Oh.—In re McMillan, 28 Oh. Cir. Ct. 645.

Pa.—McIntyre's Est., 44 Pa. Co. 111; Groome's Est., 7 Pa. Co. 519.

[a] **A separation agreement** providing that neither party shall claim any part of the other's estate does not constitute a waiver in the absence of a plain provision to that effect. Deeble v. Alerton, 58 Colo. 166, 143 P 1096, AnnCas1916C 863.

90. Chase v. Webster, 168 Mass. 228, 46 NE 705.

91. Hale v. Hale, 40 Okl. 101, 135 P 1143.

92. Dobson v. Butler, 17 Mo. 87; In re McMillan, 28 Oh. Cir. Ct. 645; Richardson's Est., 132 Pa. 292, 19 A 82; Fyock's Est., 9 LancLRev (Pa.) 89.

[a] **A decree of divorce a mensa et thoro** with an order for alimony at the suit of the wife will defeat her claim to exemption. Hettrick v. Hettrick, 55 Pa. 290; Evans' Est., 21 Pa. Super. 430; Fyock's Est., 9 LancLRev (Pa.) 89. Contra Evans' Est., 27 Pa. Co. 154.

93. Byrne's Est., Myr. Prob. (Cal.) 1.

94. Field v. Field, 215 Ill. 496, 74 NE 443 [aff 117 Ill. A. 307]; Platt's App., 80 Pa. 501; Pickering v. Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 OntWR 697, AnnCas1912A 530.

95. In re Byrne, Myr. Prob. (Cal.) 1.

96. In re Gould, (Cal.) 183 P 146.

97. Cline v. Cline, 183 Iowa 1255, 166 NW 698.

98. Phelps v. Phelps, 72 Ill. 545, 22 AmR 149.

99. Clark v. Emerson, 141 Ga. 612, 81 SE 870; Giles v. Giles, 135 Ga. 683, 70 SE 335; Telford v. Boggs, 63 Ill. 498; Berg's Est., 1 Woodw. (Pa.) 75; Baldwin v. Frisbie, 163 Wis. 26, 157 NW 526.

[a] **Illustration.**—Where decedent left a small estate worth less than five hundred dollars, and was survived by a widow and children by a former wife, and after his death the wife contracted with the children to receive fifty dollars in lieu of any claim on the estate, this agreement, if made without fraud and with knowledge of her rights, barred a subsequent application for a year's support. Giles v. Giles, 135 Ga. 683, 70 SE 335.

1. Telford v. Baggs, 64 Ill. 498; Berg's Est., 1 Woodw. (Pa.) 75.

2. Mayrand v. Mayrand, 194 Ill. 45, 61 NE 1040 [aff 96 Ill. A. 481]; Matter of Creighton, 201 Ill. A. 271; Ellsworth v. Ellsworth, 33 Iowa 164; Rudd v. Rudd, (Ky.) 214 SW 791; Potter's Est., 6 Pa. Super. 627; Reed's Est., 21 Pa. Dist. 906; Marckus' Est., 39 Pa. Co. 143; Nace's Est., 14 LancBar (Pa.) 42.

3. Penney v. Weems, (Ala.) 39 S 574; In re Moore, 57 Cal. 446; Marckus' Est., 20 Pa. Dist. 728; Slifer's Est., 13 Pa. Dist. 326, 29 Pa. Co. 496.

[a] **A bill of sale** expressly limited to property owned by her "as heir at law of her said husband" did not deprive the widow of her statutory exemption. In re Moore, 57 Cal. 446.

[b] **A quitclaim deed** executed by the widow after her husband's death conveyed only her interest in the property which she received upon his death by succession, and did not deprive her of her homestead right in such property. In re Moore, 57 Cal. 437.

[c] **Joinder by a widow and an heir in a mortgage** to a third person does not constitute a release by the widow to the heir of her right to quarantine. Penney v. Weems, (Ala.) 39 S 574.

4. Richter v. Richter, 180 Ala. 218, 60 S 880.

[a] **Burden of proof.** — Where a husband, who bequeathed four hundred dollars to his wife, procured from her an agreement to accept it in satisfaction of her exemption claim against his estate, and after his death his children, who were her stepchildren, procured from her a release of her interest in the estate in consideration of the payment of the bequest, the children had the burden of proving that the release was based on a fair and adequate consideration and free from undue influence. Richter v. Richter, 180 Ala. 218, 60 S 880.

[b] **Circumstances not showing consideration.**—Where a widow executed a deed to the executors releasing her exemption rights in the estate of her husband in consideration of a bequest made to her, the mere fact that the executors accelerated the payment of the bequest by borrowing the money to satisfy it did not show a consideration and was but a voluntary act on their part. Richter v. Richter, 180 Ala. 218, 60 S 880.

5. Matter of Campbell, 96 App. Div. 561, 89 NYS 569.

6. Ala.—Shelton v. Carrol, 16 Ala. 148 (quarantine before dower).

Cal.—In re Moore, 170 Cal. 60, 148 P 205.

Ga.—Swain v. Stewart, 98 Ga. 366, 25 SE 831.

Ill.—Claffy v. Farrell, 196 Ill. A. 239.

Ky.—Burgett v. Clarke, 4 KyL 518.

Mich.—Bacon v. Perkins, 109 Mich. 183, 58 NW 85.

Pa.—Davis' Est., 5 Pa. Co. 505; Somers' Est., 9 WklyNC 559; Venus' Est., 1 YorkLegRec 193.

[a] **The interest of infant children** in property set apart for the use of a widow and minor children is not destroyed by her remarriage. Burgett v. Clarke, 4 KyL 518.

7. Franek v. Brewster, 141 La. 1031, 76 S 187.

8. Hamilton's Est., 66 Cal. 576, 6 P 493; Franek v. Brewster, 141 La. 1031, 76 S 187; Machemer's Est., 140 Pa. 544, 21 A 441; Kern's App., 120 Pa. 523, 14 A 435; Alfree's Est., 22 Pa. Dist. 486; Staley's Est., 21 Pa. Dist. 72; Seittenspinner's Est., 6 Pa. Dist. 454, 19 Pa. Co. 630; Davis' Est., 5 Pa. Co. 505; Cronan v. Scranton, 2 LackJur (Pa.) 413; Cook v. Noble, 12 Ont. 81.

9. In re Moore, 170 Cal. 60, 148 P

[§ 823] **12. Delay in Applying.** It is the duty of a widow to make her claim for an allowance or exemption promptly,[10] although such claim is not governed by a statute limiting the time for the presenting of claims generally,[11] nor will a delay beyond the statutory period for causing an appraisement bar the widow of her right.[12] While a delay which is reasonable under existing circumstances may be allowed,[13] an unreasonable delay will usually have the effect of defeating her right,[14] at all events where the tardy assertion of her claim would cause embarrassment and difficulty in set-

205; Threadgold's Est., 26 Pa. Dist. 621.

10. Zunkel v. Colson, 109 Iowa 695, 81 NW 175; Gillespie v. Hymans, 15 N. C. 119; Krawczyk's Est., 11 Pa. Dist. 179; Hunt's Est., 14 Phila. (Pa.) 330.

[a] **Application during period of support.**—As a general rule an application for allowance can only be entertained during the time for which support is intended. Zunkel v. Colson, 109 Iowa 695, 81 NW 175.

11. Miller v. Miller, 82 Ill. 463; Johnston v. Thompson, 145 Mo. A. 463, 122 SW 761; In re Ulrici, (Mo. A.) 122 SW 761.

12. Henry v. Tillar, 70 Ark. 246, 67 SW 310.

[a] **Application must be made before confirmation of appraiser's report.**—Parties claiming an interest in the annual allowance made by the probate court for the support of the widow and children of a decedent must present their claim before the report of the appraisers, appointed to set aside the allowance, has been confirmed by the court; otherwise they will be deemed to have waived their rights in favor of other beneficiaries whose claims are presented. Dease v. Cooper, 40 Miss. 114.

13. Ala.—Little v. McPherson, 76 Ala. 552.

Ark.—Henry v. Tillar, 70 Ark. 246, 67 SW 310.

Cal.—In re Fretwell, 154 Cal. 638, 98 P 1058.

Ga.—Lester v. Reynolds, 144 Ga. 143, 86 SE 321.

Ill.—Fick v. Armstrong, 136 Ill. A. 26.

Mass.—Glover v. Glover, 215 Mass. 576, 102 NE 945; Welch v. Welch, 181 Mass. 37, 62 NE 982.

Mo.—Campbell v. Whitsett, 66 Mo. A. 444.

N. H.—Kingman v. Kingman, 31 N. H. 182.

N. C.—Ex p. Rogers, 63 N. C. 110.

Pa.—Terry's App., 55 Pa. 344; Towanda Bank App., 1 Mon. 463; Bower's Est., 17 Pa. Super. 59; Reed's Est., 21 Pa. Dist. 906; Merion Title, etc., Co. v. Stadelman, 12 Pa. Dist. 641, 9 Del. Co. 71, 19 Montg. Co. 106; Krawczyk's Est., 11 Pa. Dist. 179; Lane's Est., 6 Pa. Dist. 618; Irwin's Est., 6 Pa. Dist, 351, 19 Pa. Co. 595; Kirchner's Est., 6 Pa. Dist. 138, 19 Pa. Co. 216; Snider's Est., 4 Pa. Dist. 458, 16 Pa. Co. 238; Kelly's Est., 3 Pa. Dist. 15, 14 Pa. Co. 51; Cocker's Est., 1 Pa. Dist. 158, 11 Pa. Co. 243; Cocker's Est., 1 Pa. Dist. 81, 11 Pa. Co. 243; Irwin's Est., 19 Pa. Co. 595; Birk's Est., 11 Pa. Co. 569; Weir's Est., 10 Pa. Co. 187; McCann's Est., 9 Pa. Co. 408; Groome's Est., 7 Pa. Co. 519; Buddy's Est., 7 Pa. Co. 466; Spence's Est., 5 Pa. Co. 494; Nace's Est., 14 LancBar 42; Hurley's Est., 12 Phila. 47; Kirkpatrick's Est., 5 Phila. 98; Koch's Est., 12 WklyNC 305; Rizer's Est., 11 WklyNC 563; Rank's Est., 5 WklyNC 555; Groome's Est., 6 YorkLegRec 139.

S. D.—In re James, 38 S. D. 107, 160 NW 525.

[a] **Illustrations.**—The widow's rights have been held not lost by a delay of: (1) One year, the widow being administratrix. Buddy's Est., 7 Pa. Co. 466. (2) Thirteen months, where no intervening rights had accrued. Irwin's Est., 6 Pa. Dist. 351, 19 Pa. Co. 595. (3) Eighteen months. Fick v. Armstrong, 136 Ill. A. 26. (4) Two years. Miller v. Miller, 82 Ill. 463; Reed's Est., 21 Pa. Dist. 906; Snider's Est., 4 Pa. Dist. 458, 16 Pa. Co. 238. (5) Two years and eighteen days. Potter's Est., 6 Pa. Super. 627. (6) Two years and eight months. Lisk v. Lisk, 155 Mass. 153, 29 SE 375. (7) Three years after administration. In re Fretwell, 154 Cal. 638, 98 P 1058. (8) Four years. In re Welch, 106 Cal. 427, 39 P 805.

[b] **A claim within one year after the grant of letters testamentary** is in time where no inconvenience has been caused and no costs incurred by reason of the delay. Merion Title, etc., Co. v. Stadelman, 12 Pa. Dist. 641, 9 Del. Co. 71, 19 Montg. Co. 106.

[c] **Delay in learning of the husband's death** may excuse delay in applying for an allowance. Terry's App., 55 Pa. 344.

[d] **Ignorance of existence of property.**—A widow, ignorant of the fact that her husband had an interest in a paid-up policy on the life of another, who died after the husband's death, is not guilty of laches barring her from recovering a cash allowance in lieu of provisions out of the money paid on the policy, especially where the estate of the deceased husband was not prejudiced by her delay of about nine years in demanding the allowance. In re Ulrici's Est., (Mo. A.) 122 SW 761.

[e] **Where articles are to be selected,** there must concur a failure of the widow to select and a failure of the probate judge to appoint persons to make the selection in order to bar the widow's right. Little v. McPherson, 76 Ala. 552.

[f] **Delay caused by the parties who object** to the allowance to the widow of her exemption estops them from taking advantage of such delay, as against the widow. Kirchner's Est., 6 Pa. Dist. 138, 19 Pa. Co. 216.

[g] **Where representations of heirs have prevented the widow from claiming her exemption,** she may do so in her account as executrix. Ferguson's Est., 10 Kulp (Pa.) 141.

[h] **In analogy to the statutory provision as to judgment liens,** the widow's right is not barred until after seven years from her husband's death. Allen v. Hempstead, 154 Ill. A. 91. To same effect Tarrant v. Kelly, 81 Ill. A. 118.

[i] **The burden is on the widow** to show that she made her claim promptly on hearing of the death, or other facts tending to excuse the delay. Grove's Est., 5 Pa. Co. 498; Simpson's Est., 5 Pa. Co. 326, 22 WklyNC 172.

[j] **Where a demand is not required** of the widow and minor children in order to secure a year's allowance, mere lapse of time will not be considered as a waiver or relinquishment of such right. In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

14. Ala.—Henderson v. Tucker, 70 Ala. 381.

Ga.—Birt v. Brown, 106 Ga. 23, 31 SE 755.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Maring v. Meeker, 263 Ill. 136, 105 NE 31; Sotek v. Sotek, 192 Ill. A. 406.

Ind.—Johnson v. Robertson, 7 Blackf. 425.

Iowa.—Zunkel v. Colson, 109 Iowa 695, 81 NW 175.

La.—Sarat v. L'Hote, 2 McG. 29.

Miss.—Dease v. Cooper, 40 Miss. 114.

Mo.—Drowry v. Bauer, 68 Mo. 155; Lamar v. Belcher, 154 Mo. A. 571, 136 SW 748.

Nebr.—In re Bayer, 145 NW 1030.

N. H.—Kingman v. Kingman, 31 N. H. 182.

N. Y.—Cornwell v. Deck, 2 Redf. Surr. 87.

N. C.—Cook v. Sexton, 79 N. C. 305.

Oh.—Evans v. Evans, 31 Oh. Cir. Ct. 635.

Pa.—Kern's App., 120 Pa. 523, 14 A 435; Williams' App., 92 Pa. 69; Burk v. Gleason, 46 Pa. 297; Baskin's App., 38 Pa. 65; Lawley's App., 6 Pa. Cas. 337, 9 A 327; Marshall's Est., 30 Pa. Super. 574; Elsasser's Est., 17 Pa. Super. 622; Davies v. Murbach, 17 Pa. Super. 207; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Rust's Est., 13 Pa. Dist. 696, 30 Pa. Co. 432; Bavington's Est., 5 Pa. Dist. 285; Mulhollen's Est., 5 Pa. Dist. 70; Snider's Est., 4 Pa. Dist. 458, 16 Pa. Co. 238; Hoffeditz's Est., 4 Pa. Dist. 125; Formad's Est., 3 Pa. Dist. 13, 14 Pa. Co. 104; Fee's Est., 36 Pa. Co. 408; Ehrehart's Est., 18 Pa. Co. 536; Neill v. Kuhn, 15 Pa. Co. 565; In re Kelly, 14 Pa. Co. 51; Davey's Est., 9 Pa. Co. 125; Donoghue's Est., 7 Pa. Co. 319, 19 Phila. 220; Davis' Est., 5 Pa. Co. 505; Michaels' Est., 5 Pa. Co. 321; McLaughlin's Est., 4 Pa. Co. 295; Roberts' Est., 3 Pa. Co. 365, 20 WklyNC 380; Matter of Clark, 2 Pearson 489; Matter of Maier, 1 Pearson 420; John's Est., 1 Chest. Co. 311; McNeill's Est., 6 Kulp 168; Pickett's Est., 5 Kulp 303; In re Fassold, 4 LackJur 37; Cronan v. Scranton, 2 LackJur 413; In re Hughes, 1 Lack Jur 85; Griffiths' Est., 1 LackLegN 311; Maier's Est., 1 LegGaz 475, 2 LuzLegObs 66; In re Durnin, 1 Lehigh CoLJ 8; Donoghue's Est., 19 Phila. 220; Hunt's Est., 14 Phila. 330; Heller's Est., 11 Phila. 120; Dech's Est., 6 Phila. 72; Cranse's Est., 6 Phila. 71; Tibbin's Est., 5 Phila. 100; In re Bryan, 4 Phila. 228; Dutch's Est., 31 PittsbLegJNS 55; Pratt's Est., 23 WklyNC 543; Silvius' Est., 20 Wkly NC 389; Weckerly's Est., 11 WklyNC 287; Berg's Est., 1 Woodw. 75.

S. C.—Haltiwanger v. Windhorn, 44 S. C. 413, 22 SE 446.

Tex.—McGowen v. Zimpelman, 53 Tex. 479.

[a] **Illustrations.**—The widow's rights have been held lost by a delay of: (1) A year. Cook v. Sexton, 79 N. C. 305. (2) About a year. In re Mayer, (Nebr.) 145 NW 1029. (3) Two years. Holmes' Est., 20 Pa. Co. 434. (4) Two years and a half without sufficient excuse. Groves' Est., 5 Pa. Co. 498. (5) Three years. Fox's Est., 5 Kulp (Pa.) 218. (6) More than three years. Machemer's Est., 140 Pa. 544, 21 A 441. (7) Four years. Hubbard v. Wood, 15 N. H. 74. (8) Nearly ten years. Tarrant v. Kelly, 81 Ill. A. 118. (9) Ten years. Jespersen v. Mech, 213 Ill. 488, 72 NE 1114. (10) Twenty-five years. Tiebout v. Millican, 61 Tex. 514. (11) Thirty years. Mathes v. Bennett, 21 N. H. 188.

[b] **An allowance has also been refused:** (1) Where the applicant delayed until after her discharge as administratrix. Zunkel v. Colson, 109 Iowa 695, 81 NW 175. (2) Where application was not made until after appraisement. Maiers' Est., 1 LegGaz (Pa.) 475, 2 LuzLegObs 66. (3) Where a guardian delayed for five years after probate to claim an exemption for minor children. Dutch's Est., 31 PittsLegJNS (Pa.) 55.

[c] **A widow who has failed to dissent** from the will cannot maintain an action to recover a year's support brought six months after probate. Perkins v. Brinkley, 133 N. C. 86, 45 SE 465.

tling the estate[15] or unduly prejudice intervening rights.[16] So the widow's right may be lost if her application is not made until after the estate has been distributed,[17] the personalty used for the payment of debts,[18] or the property of the estate sold,[19] although there is no hard and fast rule of law that declares that a widow's claim of exemption is always too late if an order of sale has been already obtained.[20] Delay in taking out letters of administration has been held to be chargeable to the widow so as to preclude her setting up such delay as an excuse for her own delay in claiming her statutory allowance or exemptions,[21] but the weight of authority supports the contrary view.[22] The right of a child of deceased to have a probate homestead set aside to her out of the estate is forfeited by her failure to apply therefor during her minority.[23] Mere delay of a widow in demanding the accumulated allowance which has been regularly set apart for her does not forfeit her right to it.[24] Where a widow is barred by laches from administering on her husband's estate to procure the setting off of her award, her creditors cannot procure administration for this purpose in order that the award may be subjected to their claims.[25] A delay of a guardian cannot operate to give his own claim against the estate priority over the allowance to his ward.[26]

[§ 824] **13. Death of Beneficiary.** The death of the widow before her right to the statutory allowance and exemptions has become vested causes it to lapse;[27] but in the event of her death after the right has vested in her the benefit passes to her legal representatives,[28] or may pass to the infant children,[29] unless, under the statute, they are entitled to support only as members of the widow's family.[30] Under some statutes where there are no children, the collateral heirs of a husband may claim the benefit of his exemptions.[31]

[§ 825] **K. Selection or Setting Apart—1. By Persons Entitled.** The right to exempted property cannot usually ripen into a full title until selection

[d] **Where minor children allowed over two years to elapse** after the remarriage of their mother before making application for statutory exemption allowances, their claim was barred notwithstanding their minority. Cronan v. Scranton, 2 LackJur (Pa.) 413.

[e] **Where there are other causes justifying suspicion,** a long delay in bringing suit may itself be considered as a suspicious circumstance. Sarat v. L'Hote, 2 McG. (La.) 29.

15. Kingman v. Kingman, 31 N. H. 182; Lawley's App., (Pa.) 9 A 327; Davis' Est., 2 Kulp (Pa.) 84; Hunt's Est., 11 WklyNC (Pa.) 123; Somer's Est., 9 WklyNC (Pa.) 559.

16. Pott's App., 3 Walk. (Pa.) 135; Kelly's Est., 3 Pa. Dist. 15, 14 Pa. Co. 51; Birk's Est., 11 Pa. Co. 569 [dist Kern's App., 120 Pa. 523, 14 A 435]; McCann's Est., 9 Pa. Co. 408; Scullin's Est., 5 Pa. Co. 188; Roberts' Est., 3 Pa. Co. 365, 20 WklyNC 380; Tibbin's Est., 5 Phila. (Pa.) 100; Kirkpatrick's Est., 5 Phila. (Pa.) 98; Koch's Est., 12 WklyNC (Pa.) 305; Hurley's Est., 5 WklyNC (Pa.) 101.

17. Lamar v. Belcher, 154 Mo. A. 571, 136 SW 748.

18. Drowry v. Bauer, 68 Mo. 155 (under such circumstances the widow cannot claim out of the proceeds of real estate subsequently sold to pay the remainder of the debts).

19. Henderson v. Tucker, 70 Ala. 381; Johnson v. Robertson, 7 Blackf. (Ind.) 425; Lamar v. Belcher, 154 Mo. A. 571, 136 SW 748; Pickett's Est., 5 Kulp (Pa.) 303; Cranse's Est., 6 Phila. (Pa.) 71.

20. Marshall's Est., 30 Pa. Super. 574.

21. Cronan v. Scranton, 2 LackJur (Pa.) 413; Hughes' Est., 1 LackJur (Pa.) 85.

22. In re Ulrici, (Mo. A.) 122 SW 761; Ex p. Rogers, 63 N. C. 110, 111; Marshall's Est., 30 Pa. Super. 574.

"Does the lapse of eight years without administration upon the estate of an intestate, bar the widow's right to claim a year's provision when administration is granted? If she files her petition 'at or before the first term when administration is granted,' she complies with the language of the act, and we can see no reason for a construction different from the plain import of the words. On the contrary, if the widow has supported herself and family during the first year of her destitution, it would appear reasonable that she should be reimbursed out of the estate of her husband. But it is suggested, that, as she had the right to administer in preference to others, and neglected to do so for that length of time, she thereby forfeited her right to a year's support. There may have been very good reasons for her failure to procure administration. She may have been prevented from so doing by circumstances beyond her control. Such a construction would operate very harshly upon old or infirm widows, or upon those who could not give the requisite bonds, and would defeat the humane purposes of the act, in the very cases which call loudest for its assistance. If the suggestion of delay has any weight, it applies to the next of kin and creditors with as much force as it does to the widow, for they could have claimed the right of administration promptly, when the widow failed to apply for and procure the same." Ex p. Rogers, supra [dist Gillespie v. Hyman, 15 N. C. 119].

23. In re Heywood, 149 Cal. 129, 84 P 824.

24. In re Nelson, 167 Cal. 321, 139 P 692.

25. Jespersen v. Mech, 213 Ill. 488, 72 NE 1114.

26. Deemer's Est., 18 Pa. Co. 496.

27. Iowa.—Zunkel v. Colson, 109 Iowa 695, 81 NW 175.

Me.—Tarbox v. Fisher, 50 Me. 236.

Mass.—Adams v. Adams, 10 Metc. 170.

Nebr.—In re Bayer, 145 NW 1029, 1030.

N. J.—Carey v. Monroe, 54 N. J. Eq. 632, 35 A 456.

N. C.—Simpson v. Cureton, 97 N. C. 114, 28 SE 668; Ex p. Dunn, 63 N. C. 137; Kimball v. Deming, 27 N. C. 418; Cox v. Brown, 27 N. C. 194.

Pa.—Mulhollen's Est., 5 Pa. Dist. 70; Lafferty's Est., 16 Phila. 211, 12 WklyNC 535; Beck's Est., 7 York LegRec 118.

Wis.—In re Hemphill, 157 Wis. 331, 339, 147 NW 1089 [cit Cyc].

28. Cal.—In re Lux, 114 Cal. 89, 45 P 1028.

Ga.—Swain v. Stewart, 98 Ga. 366, 25 SE 831; Brown v. Joiner, 80 Ga. 486, 5 SE 497; Brown v. Joiner, 77 Ga. 232, 3 SE 157.

Ill.—York v. York, 38 Ill. 522; Allen v. Hempstead, 154 Ill. A. 91; Fick v. Armstrong, 136 Ill. A. 26.

Ind.—Bratney v. Curry, 33 Ind. 399.

Iowa.—In re Rice, 146 Iowa 48, 124 NW 792.

Md.—Pyles v. Mowie, 123 Md. 13, 17, 90 A 772 [cit Cyc].

Mass.—Drew v. Gordon, 13 Allen 120.

Minn.—Poupore v. Stone-Ordean-Wells Co., 132 Minn. 409, 157 NW 648; Sammons v. Higbie, 103 Minn. 448, 115 NW 265.

Mo.—Mahoney v. Nevins, 190 Mo. 360, 88 SW 731; Cummings v. Cummings, 51 Mo. 261; McFarland v. Baze, 24 Mo. 156; Hastings v. Myers, 21 Mo. 519; Lazonby v. Smithey, 151 Mo. A. 285, 131 SW 708.

N. Y.—Matter of Hulse, 41 Misc. 307, 84 NYS 220.

N. C.—Tart v. Tart, 154 N. C. 502, 70 SE 929, AnnCas1912A 952.

Oh.—Sherman v. Sherman, 21 Oh. St. 631; Bane v. Wick, 14 Oh. St. 505; Dorah v. Dorah, 4 Oh. St. 292.

Pa.—Burton's Est., 26 Pa. Dist. 677; Styers' Est., 42 Pa. Co. 623; Buddy's Est., 7 Pa. Co. 466; Daggett's Est., 7 Pa. Co. 338; Pickett's Est., 1 SusqLeg Chron 39.

S. D.—In re James, 38 S. D. 107, 160 NW 525.

Vt.—Johnson's Est., 41 Vt. 467.

"This provision becomes the absolute property of the widow on the death of the husband, though she should die without applying for it." Lamar v. Belcher, 154 Mo. A. 571, 572, 136 SW 748.

[a] **Illustration.**—Where an allowance was made to a widow by the court, and she was not paid all of it, but had expended for her support an amount equal to the sum allowed, some of which she had borrowed, the balance unpaid did not lapse by reason of her death after the end of the first year, but was payable to her administrator. In re Rice, 146 Iowa 48, 124 NW 792.

[b] **Right of selection surviving to representative.**—On the death of a widow before the property allowed to her by statute has been set apart by order of the probate court, or before she has selected the same, the property and right to selection survives to her personal representative. Sammons v. Higbie, 103 Minn. 448, 115 NW 265.

[c] **The right of a surviving husband** to select personal property may be exercised by his administrator. In re Walberg, 130 Minn. 462, 153 NW 876.

[d] **Exercise or nonexercise of right.**—The decree of a judge of probate allowing to a widow personal estate, to a certain amount, as necessaries, if not appealed from, establishes conclusively her right to select such items from the inventory as she may prefer, to that amount, and to demand the same from the executor, and such right, if exercised by her in her lifetime, survives to her legal representatives, but if not so exercised it does not survive. Drew v. Gordon, 13 Allen (Mass.) 120.

29. Dickerson v. Nash, 74 Ga. 357; Mallory v. Mallory, 12 KyL 684; Price v. Nichols, 12 KyL 421; Crabtree v. Crabtree, 11 KyL 812.

30. Kimball v. Deming, 27 N. C. 418; Cox v. Brown, 27 N. C. 194.

31. Dorman v. Grace, 57 Tex. Civ. A. 386, 122 SW 401.

is made and the property separated from the rest of the estate,[32] although under some statutes a selection or setting apart is not necessary where the value of decedent's property does not exceed a given amount.[33] Whether with or without an order of court, and whether before or during administration, the fact of such selection should be established as the statute may have provided.[34] The selection may be made at the appraised value of property[35] notwithstanding a rise in value after appraisal;[36] but the widow has not a right of selection at her own valuation where others are willing to give more for the property.[37] Selections from both realty and personalty may be made at the same time.[38] The right to select continues as long as the statute designates, and the representative cannot defeat such selection by prematurely or improperly using the assets for other purposes of administration;[39] but it has been held that the widow is restricted to the designation made.[40] The guardian of one minor child may select as next friend of another minor child.[41] The filing of a petition by a widow and minor children for the setting apart of one thousand dollars out of the proceeds of a life insurance policy payable to the estate constitutes a sufficient selection of such property;[42] and where the statute allows the widow to occupy lands up to a certain amount, a sufficient selection is indicated by occupying and using the land or by claiming the annual crops when interfered with by others.[43]

[§ 826] **2. By Executors, Administrators, Commissioners, or Appraisers—a. In General.** Under some statutes the property must be set apart by decedent's personal representatives,[44] by commissioners appointed for that purpose,[45] or by appraisers,[46] upon the widow's seasonable and proper demand,[47] or, under some statutes, without any demand.[48]

[§ 827] **b. Liability of Representative for Refusing to Act or Abusing Power.** If the personal representative wrongfully refuses to act or abuses his power in the premises he may be controlled by the court and made to rectify,[49] or he may be held liable in an action by the widow for the recovery of the allowance or exemption,[50] or for its conversion,[51] or in an action for damages.[52] Interest may be allowed from the date of the representative's refusal

32. Ala.—Mitcham v. Moore, 73 Ala. 542; Tucker v. Henderson, 63 Ala. 280; Mattox v. Feagan, 57 Ala. 274.
Ind.—Harrell v. Hammond, 25 Ind. 104; Jelly v. Elliott, Smith 32.
N. J.—Carey v. Monroe, 54 N. J. Eq. 632, 35 A 456.
Pa.—Birk's Est., 11 Pa. Co. 569.
Wis.—In re Hemphill, 157 Wis. 331, 339, 147 NW 1089 [cit Cyc].
Ont.—Pickering v. Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 OntWR 697, AnnCas1912A 530.
[a] **Selection necessary only as designation.**—A statute declaring that there shall be "allowed" to a widow the personal property of her deceased husband therein described vests in the widow an unqualified right to the property on the husband's death, and selection thereof by her is not essential to the investiture of the right, but only necessary as a designation of the particular property she elects to claim. Sammons v. Higbie, 103 Minn. 448, 115 NW 265.

33. Headen v. Headen, 171 Ala. 521, 54 S 646; Jackson v. Wilson, 117 Ala. 432, 23 S 521; Gamble v. Kellum, 97 Ala. 677, 12 S 82; Chandler v. Chandler, 87 Ala. 300, 6 S 153; Nance v. Nance, 84 Ala. 375, 4 S 699, 5 AmSR 378; Toner's Est., 5 WklyNC (Pa.) 387.
[a] **Appropriation by the widow is equivalent** to a selection under such circumstances. Jackson v. Wilson, 117 Ala. 432, 23 S 521.
When whole estate set apart see supra § 781.

34. Ala.—Mitcham v. Moore, 73 Ala. 542.
Ga.—Horn v. Truett, 114 Ga. 995, 41 SE 498.
Ind.—Hoover v. Agnew, 91 Ind. 370.
Tex.—Chifflet v. Willis, 74 Tex. 245, 11 SW 1105.
Wis.—Wilcox v Matteson, 53 Wis. 23, 9 NW 814, 40 AmR 754; Tomlinson v. Nelson, 49 Wis. 679, 6 NW 366.

35. Harrell v. Hammond, 25 Ind. 104; Hays v. Buffington, 2 Ind. 369.

36. Overturf v. Wear, 26 Oh. St. 538.

37. Huber's Est., 27 Pa. Dist. 25.

38. Bobb's Est., 1 Woodw. (Pa.) 317.

39. Little v. McPherson, 76 Ala. 552; Heller v. Leisse, 13 Mo. A. 180.

40. Dorscheimer's Est., 12 Pa. Super. 34; McCann's Est., 9 Pa. Co. 408; Buddy's Est., 7 Pa. Co. 466.

41. Jones' Est., 2 Chest. Co. (Pa.) 302.

42. McLean v. Martin, 155 Ala. 208, 45 S 295.

43. Hoover v. Agnew, 91 Ind. 370.

44. Ind.—Harrell v. Hammond, 25 Ind. 104.
Minn.—Nordlund v. Dahlgren, 130 Minn. 462, 153 NW 876, AnnCas1917B 941.
N. J.—Read v. Patterson, 47 N. J. Eq. 595, 22 A 1076.
N. D.—Brudevold v. Waldorf, 37 N. D. 516, 164 NW 154.
Pa.—Compher v. Compher, 25 Pa. 31; Rigby's Est., 8 Pa. Super. 108, 42 WklyNC 434; Hamme's Est., 21 Pa. Dist. 58; Blackburn's Est., 20 Pa. Dist. 641.
Tenn.—Rhea v. Creer, 86 Tenn. 59, 5 SW 595.
Tex.—Mitchell v. Harrison, 32 Tex. 331.
[a] **Assets not exempt** (1) should not be set apart to the widow but should be inventoried as assets of the estate. In re Holderbaum, 22 Iowa 69, 47 NW 898. (2) An administrator cannot set apart exempt property for the use of children as against the claim of a married daughter whose interest would be affected thereby. Shannon v. Davis, 64 Miss. 717, 2 S 240.
[b] **Property must pass through hands of representative.**—All property and money set apart for the widow and children must pass through the hands of the executors, except in cases where decedent's estate does not exceed three hundred dollars. Rigby's Est., 8 Pa. Super. 108, 42 WklyNC 434.

45. Vaughn v. Fitzgerald, 112 Ga. 517, 37 SE 752; Rhea v. Green, 86 Tenn. 59, 5 SW 595.
[a] **A nunc pro tunc order** that the commissioners' return be entered of record may be made where it does not appear that there are any objections to the return, and the failure to enter it on the records was through the mistake or negligence of the ordinary. Vaughn v. Fitzgerald, 112 Ga. 517, 37 SE 752.

46. Ala.—Moore v. McLure, 124 Ala. 120, 27 S 499.
Ga.—Jacobson v. Jacobson, 107 Ga. 29, 32 SE 877; Clark v. Fleming, 78 Ga. 782, 4 SE 12.
Miss.—Holliday v. Holland, 41 Miss. 528.
N. Y.—Matter of Bidgood, 36 Misc. 516, 73 NYS 1061; Daggett v. Daggett, 14 NYS 182 [aff 9 NYS 652, 2 Conn. Surr. 230].
Oh.—Heck v. Heck, 6 Oh. Dec. (Reprint) 604, 7 AmLRec 13.
[a] **The right of the widow to apply** for the setting apart of exempt property is not dependent on the appointment of appraisers. McLean v. Martin, 155 Ala. 208, 45 S 295.

47. Hamilton v. Matlock, 22 Ind. 47; McNulty v. Lewis, 16 Miss. 520; Lyman v. Byam, 38 Pa. 475; Compher v. Compher, 25 Pa. 31; Torstenson's Est., 3 Pa. Co. 13; Bryan's Est., 4 Phila. (Pa.) 228; Groff's Est., 2 Lanc LRev (Pa.) 413.
[a] **Demand by widow inures to benefit of her assignee.**—Brown v. Bernhamer, 159 Ind. 538, 65 NE 580.

48. Rush v. Kelley, 34 Ind. A. 449, 73 NE 130; Chism v. Chism, 2 Ky. Op. 461.

49. Ala.—Jarrell v. Payne, 75 Ala. 577.
Ky.—Franzell v. Franzell, 153 Ky. 171, 154 SW 912.
N. J.—Read v. Patterson, 47 N. J. Eq. 595, 22 A 1076.
N. Y.—Sheldon v. Bliss, 8 N. Y. 31 [aff 7 Barb. 152].
Pa.—Fiddler's Est., 14 Pa. Dist. 359; Bryan's Est., 4 Phila. 228.
[a] **If the executor makes an unreasonable allowance** the court may interfere and make such an allowance as he in the exercise of a proper discretion ought to have made. Read v. Patterson, 47 N. J. Eq. 595, 22 A 1076.
[b] **The duty of making return** to the probate court of the exemption claimed by the widow or guardian of minors rests on the personal representative and he is accountable for negligence or failure to make it. Jarrell v. Payne, 75 Ala. 577.

50. Brown v. Bernhamer, 159 Ind. 538, 65 NE 580; Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462; Neely v. McCormick, 25 Pa. 255.
[a] **Where an administrator disregards a demand** made by a widow for her exemption, when the fund is yet intact in his hand, and distributes the money without taking any refunding bonds, and without asking the court to make a decree of distribution or to appoint an auditor, he will be personally liable to the widow for the whole amount of her exemption, if such exemption is properly due to her. Marshall's Est., 30 Pa. Super. 574.
[b] **The widow is not required to make a specific selection** before maintaining an action for the exempt property. Hamilton v. Matlock, 22 Ind. 47.

51. Taylor v. Taylor, 53 Ala. 135; Barwick v. Rackley, 46 Ala. 402; Noblett v. Dillinger, 23 Ind. 505; Neely v. McCormick, 25 Pa. 252; Torstenson's Est., 3 Pa. Co. 13.
[a] **Previous order for delivery necessary.**—Noblett v. Dillinger, 23 Ind. 505.

52. Compher v. Compher, 25 Pa. 31; Torstenson's Est., 3 Pa. Co. 13.

to pay the allowance,[53] but not, it has been held, until after an election to take the allowance in cash.[54]

[§ 828] **c. Credit for Allowance in Accounts.** An order of court is not always necessary to enable the executor or administrator to make reasonable and proper payments to the widow for a family allowance;[55] and if he actually appropriates assets for allowance to the widow, or proceeds fairly with her permission to appropriate, he is entitled to credit accordingly.[56]

Insolvency of estate. A payment by the administrator to the widow for family support when the estate was solvent, and there was no reason to think that it would be insolvent, should be allowed, although when the account is settled, the estate is insolvent.[57]

[§ 829] **3. Appraisement—a. Necessity.** An actual appraisement of the estate is usually a prerequisite to a proper setting apart of the widow's allowance,[58] unless she elects to claim her exemption in money or out of evidences of debts,[59] or the estate has previously been appraised,[60] or unless the statute dispenses therewith.[61] It has been considered that an appraisement is necessary only where the widow elects to take personal estate,[62] and hence where she claims her exemption out of the proceeds of realty an appraisement is not necessary;[63] but where she elects to retain cash from the personalty and the inventory shows that decedent left no cash, an appraisement of realty is necessary to entitle the widow to her allowance from the proceeds of realty.[64] It has been held that if a widow, who is neither executrix nor administratrix, and has not been guilty of laches, makes a demand for an appraisement of the real estate, before an order of sale for the payment of debts is asked for, she may claim her exemption out of the fund arising from the sale, although no appraisement has been made.[65]

[§ 830] **b. Demand.** It has been held that a seasonable demand of appraisement by the widow is required where such appraisement is an essential preliminary to her allowance,[66] but there is also authority for the view that the executor or administrator instead of the widow may demand an appraisement.[67]

[§ 831] **c. Appraisers.** The appraisers should usually be disinterested persons, and the same who appraise the general estate of decedent.[68] Two appraisers are sufficient under some statutes.[69]

[§ 832] **d. Oath of Appraisers.** The oath of the appraisers should be in substantial conformity to the statutory requirements.[70]

[§ 833] **e. Time for Appraisement.** An appraisement will be ordered on the widow's application at any time while the estate remains unsettled.[71] An appraisement made before the solvency of the estate is determined is valid.[72]

[§ 834] **f. Necessity for Compliance with Statutory Requirements.** The appraisement must be made in the manner provided by statute.[73]

[§ 835] **g. Notice of Proceedings.** It has been held that no notice is required of proceedings to

53. Brown v. Bernhamer, 159 Ind. 538, 65 NE 580; Balmforth's Est., 14 Pa. Dist. 55.

54. Turner v. Fell, 142 Ill. A. 458.

55. In re Lux, 114 Cal. 89, 45 P 1028; Dickinson v. Henderson, 122 Mich. 583, 81 NW 583.

56. Ala.—Barwick v. Rackley, 46 Ala. 402.

Cal.—In re Lux, 114 Cal. 89, 45 P 1028.

Ky.—Grider v. Rodes, 5 Bush 277.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

N. Y.—Matter of Shanley, 95 Misc. 427, 160 NYS 733.

N. J.—Cooley v. Vansyckle, 14 N. J. Eq. 496.

Oh.—Watts v. Watts, 38 Oh. St. 480.

Pa.—In re Avery, 1 Pa. C. Pl. 151; Williamson's Est., 12 Phila. 144.

[a] **A widow who is executrix or administratrix** (1) need not make formal demand on herself, but may take the exempted property and claim credit in her account. In re Carroll, (Pa.) 107 A 664; Cocker's Est., 1 Pa. Dist. 158, 11 Pa. Co. 243; Atherton's Est., 8 Kulp (Pa.) 150. Contra Chiffet v. Willis, 74 Tex. 245, 11 SW 1105. (2) An administratrix, who did not claim the exemption to which she was entitled, deeming herself entitled to the whole of the estate, may, it appearing that she was not so entitled, claim the exemption on settlement of her accounts. Matter of Shanley, 95 Misc. 427, 160 NYS 733.

57. In re Fernandez, 119 Cal. 579, 51 P 851.

58. Ala.—McLean v. Martin, 155 Ala. 208, 45 S 295; Mattox v. Feagan, 57 Ala. 274.

Ga.—Putnal v. Hickman, 148 Ga. 621, 97 SE 668; Clark v. Fleming, 78 Ga. 782, 4 SE 12.

Ind.—Harrell v. Hammond, 25 Ind. 104.

Iowa.—Adkinson v. Breeding, 56 Iowa 26, 8 NW 685.

Oh.—Heck v. Heck, 6 Oh. Dec. (Reprint) 604, 7 AmLRec 13.

Pa.—In re Hollinger, 259 Pa. 72, 102 A 409; In re Gwynn, 239 Pa. 246, 86 A 792; In re Gwynn, 239 Pa. 238, 86 A 789; Hufman's App., 81 Pa. 329; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Byrne's Est., 21 Pa. Dist. 205; Walter's Est., 12 Pa. Dist. 122, 28 Pa. Co. 176; Torstenson's Est., 3 Pa. Co. 13; In re Avery, 1 Pa. C. Pl. 151; Nixon's App., 6 WklyNC 496.

[a] **Appointment of auditor.**—Where the widow has had set apart to her articles of personal property and cash from the estate, the administrator cannot pay the cash out of the proceeds of the sale of the real estate without the appointment of an auditor. Avery's Est., 1 Pa. C. Pl. 751.

[b] **Personalty retained by the widow without appraisement** may be surcharged against her, but such retention furnishes no ground for exception to the appraisement. Groves' Est., 12 YorkLegRec (Pa.) 180.

59. In re Hollinger, 259 Pa. 72, 102 A 409; Seller's Est., 82 Pa. 153; Larrison's App., 36 Pa. 130; Towanda Bank's App., 1 Mon. (Pa.) 463; Rigby's Est., 8 Pa. Super. 108, 42 Wkly NC 434; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Riley's Est., 13 Pa. Dist. 442, 30 Pa. Co. 416; Walters' Est., 28 Pa. Co. 176; Birk's Est., 11 Pa. Co. 569; Groome's Est., 7 Pa. Co. 519; Koch's Est., 15 Phila. 581; Rowland's Est., 15 Phila. 525; Weckerly's Est., 11 WklyNC 287; Gerrity's Est., 1 LegRec 214.

60. McCann's Est., 9 Pa. Co. 408.

61. Crawford v. Nassoy, 173 N. Y. 163, 65 NE 962 [rev 55 App. Div. 433, 67 NYS 108].

62. Klein's Est., 2 Pa. Dist. 813, 14 Pa. Co. 72.

63. Good's App., 152 Pa. 63, 25 A 164; Beetem v. Getz, 5 Pa. Super. 71, 41 WklyNC 69; Gibson's Est., 5 Pa. Super. 57; Silvius' Est., 17 WklyNC 447.

64. Formad's Est., 3 Pa. Dist. 13, 14 Pa. Co. 104 [foll Hufman's App., 81 Pa. 329].

65. Gibson's Est., 5 Pa. Super. 57.

66. Hamilton v. Matlock, 22 Ind. 47; McNulty v. Lewis, 16 Miss. 520; Hufman's App., 81 Pa. 329; Larrison's App., 36 Pa. 130; Davis' App., 34 Pa. 256; Rowe's Est., 11 Kulp (Pa.) 32; Gerrity's Est., 1 Leg Rec (Pa.) 214; Andress' Est., 14 Phila. (Pa.) 263; Somers' Est., 14 Phila. (Pa.) 261; Heller's Est., 11 Phila. (Pa.) 120; Bryan's Est., 4 Phila. (Pa.) 228. But see infra note 67.

67. Cash v. Cash, 67 Ark. 278, 54 SW 744; In re Rierdon, 5 OhS&CP 606, 5 OhNP 516; Lane's Est., 6 Pa. Dist. 618.

68. Calvit v. Calvit, 32 Miss. 124; Vandevort's App., 43 Pa. 462; Bushley's Est., 20 Pa. Co. 188; Eddy's Est., 12 Phila. (Pa.) 17.

[a] **Where the appraisers were sureties for the widow** as administratrix they were not disinterested persons and their appraisement should be set aside. Grove's Est., 12 YorkLegRec (Pa.) 180. But compare Macaltioner's Est., 8 Pa. Co. 252 (one only a surety).

[b] **Appraisers to set off an allowance to a minor child** cannot be appointed by the minor or his guardian. Eddy's Est., 12 Phila. (Pa.) 17.

69. Schimpf's Est., 24 Pa. Dist. 412; Work's Est., 24 Pa. Dist. 129.

70. McCanna's Est., 25 Pa. Co. 657 (where the statute requires that the appraisers shall be sworn or affirmed "well and truly and without prejudice or partiality, to value and appraise said goods and in all respects to perform their duty as appraisers to the best of their skill and judgment," an oath that the appraisers "will well and truly to the best of their skill and judgment appraise the real and personal estate" is insufficient).

71. In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

72. Rees' Est., 20 Pa. Dist. 815.

73. Horn v. Truett, 114 Ga. 995, 41 SE 498; In re Gwynn, 259 Pa. 238, 86 A 789.

[a] **One who claims to be entitled**

set apart the exemptions of the widow and children by appraisers;[74] but it has also been held that if a new appraisement is ordered, notice of proceedings therein should be given to the executor or administrator.[75]

[§ 836] **h. Powers and Duties of Appraisers.** It has been held that a statute requiring appraisers to set apart property is mandatory[76] and leaves them no discretion except as to the nature of the property,[77] and where the appraisers have omitted to set aside property of the value specified, the decree on the judicial accounting of the executor should award that relief to the surviving husband.[78] Whether appraisers are to set apart specifically or merely to certify value and report to the court, they should perform their duty diligently,[79] and they cannot set apart more than the specified value or amount.[80] The items should be appraised separately,[81] but things which belong to the widow absolutely need not be appraised.[82] It has been held that appraisers appointed on the application of the widow cannot appraise if she dies meanwhile.[83] The value of a decedent's land in relation to his widow's exemption should be computed on so much of the land as decedent owned, and not on the entire tract, where decedent was not the sole owner.[84] Where, in a proceeding to have a widow's three hundred dollar exemption charged upon her husband's lands, the widow also elected to take real estate to the value of five thousand dollars, the appraisers had no authority to determine the value of the husband's lands out of which the widow elected to take her exemption, where they determined such land to be worth more than three hundred dollars and that it could not be divided without prejudice.[85]

[§ 837] **i. Certificates as to Feasibility of Division.** A certificate in writing that the division returned can be made without injury to the whole property is sometimes required.[86]

[§ 838] **j. Report or Return—(1) In General.** The appraisers should make and file a true return within the time limited by statute,[87] and their report must describe the land set aside with certainty.[88] But where a report of appraisers to set apart a year's support shows that they appraised the entire estate and designated the whole of it as a year's allowance to the widow, failure minutely to describe the realty in the report does not render the proceedings void.[89] An appraisement may be invalid for uncertainty[90] or for setting down the value of the property too high or too low;[91] but it is not invalidated by mere inaccuracy in describing the property,[92] and it has been held that the fact that a return set apart as a year's support an excessive amount, in view of the condition of the estate as to solvency, does not authorize the jury to treat the return as void, in a collateral attack thereon seven years after it was admitted to record.[93] The appraisers' return is taken to be prima facie correct[94] and is accepted as showing the true value of the property, unless fraud be made to ap-

to land by virtue of a year's support alleged to have been set apart to him and others out of the land by appraisers must show that there has been a full compliance with all the requirements of the law in regard to the setting apart of the year's support. Horn v. Truett, 114 Ga. 995, 41 SE 498.

74. Moore v. McLure, 124 Ala. 120, 126, 27 S 499 ("No provision is made for any personal notice to the widow or minor children of this proceeding and none is required. It is one of those steps which the law requires to be taken by the court in the process of administering estates, without personal notice to any one, and without reference to whether the widow or minor child has any personal knowledge of the step being taken. It is only where the widow or minor child or children or other person in interest feeling aggrieved files written exceptions to the report of the appraisers within thirty days after its filing that personal notice to the adverse parties is required to be given. Code, § 2084").

75. Heck v. Heck, 34 Oh. St. 369 [aff. 6 Oh. Dec. (Reprint) 604, 7 AmLRec 13].

76. Matter of Baird, 126 App. Div. 439, 110 NYS 708; Matter of Bidgood, 36 Misc. 516, 73 NYS 1061.

77. Matter of Bidgood, 36 Misc. 516, 73 NYS 1061.

78. Matter of Baird, 126 App. Div. 439, 110 NYS 708.

79. Beavers v. Wilson, 144 Ga. 231, 86 SE 1089; In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613]; York v. York, 38 Ill. 522; Matter of Pollard, Oh. Prob. 216; Strine's Est., 21 LancLRev (Pa.) 30.

80. Applegate v. Cameron, 2 Bradf. Surr. (N. Y.) 119; In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

[a] **If any portion of the estate has been used by the widow** for her support, the same should be taken into consideration by the appraisers in making her allowance. In re Rierdon, 5 OhS&CP 606, 5 OhNP 516.

81. Drake's Est., 1 WklyNC (Pa.) 85.

82. Boyer v. Boyer, 21 Ill. A. 534; Rutledge v. Rutledge, 21 Ill. A. 357.

83. Brown v. Joiner, 77 Ga. 232, 3 SE 157; Kapp v. Public Admr., 2 Bradf. Surr. (N. Y.) 258.

84. Landors v. Hayes, 196 Ala. 533, 72 S 106.

85. In re Gwynn, 239 Pa. 246, 86 A 792.

86. Bushley's Est., 20 Pa. Co. 188; Henry's Est., 6 Pa. Co. 28.

87. Cowan v. Corbett, 68 Ga. 66; Williams' Est., 141 Pa. 436, 21 A 673; Rhea v. Greer, 86 Tenn. 59, 5 SW 595.

[a] **Judgment on return not filed on time.**—A judgment setting apart a year's support is not void because the appraiser's return was not filed within thirty days of their appointment. Jensen v. Watters, 136 Ga. 703, 71 SE 1104; Whatley v. Watters, 136 Ga. 701, 71 SE 1103.

88. Beavers v. Wilson, 144 Ga. 231, 86 SE 1089; McSwain v. Ricketson, 129 Ga. 176, 58 SE 655.

89. Moore v. Moore, 126 Ga. 735, 55 SE 950.

90. McSwain v. Ricketson, 129 Ga. 176, 58 SE 655; Kiff v. Kiff, 95 N. C. 71; Matter of Galloway, 1 Pearson (Pa.) 404.

[a] **Illustrations.**—(1) A return of appraisers setting apart a year's support, which does not purport to embrace the entire estate of decedent, but designated items of property, and containing as one item, "175 acres of land, more or less, of lot of land No. 49 in the 6th district," is, as to such item, too vague to be capable of enforcement. McSwain v. Ricketson, 129 Ga. 176, 58 SE 655. (2) A description of land in the report of commissioners who set apart a year's support as "20 acres of land valued at $250," is too indefinite to be enforced, where it does not appear that entire estate of decedent was intended to be set aside. Hutchinson v. Woodward, 145 Ga. 325, 89 SE 208.

[b] **Necessity for extraneous evidence.**—The return of appraisers appointed to set apart a year's support to a widow and minor child is not necessarily void for uncertainty in the description of the land because extraneous evidence is necessary to apply the description to the subject matter. Palmer v. Newberry, 141 Ga. 61, 80 SE 322.

91. Drygalski's Est., 6 Kulp (Pa.) 50; Davis' Est., 5 Kulp (Pa.) 162; Wallace's Est., 6 WklyNC (Pa.) 503.

92. Allen v. Lindsay, 113 Ga. 521, 38 SE 975; Smith v. Smith, 112 Ga. 351, 37 SE 407; Parker v. Brown, 136 N. C. 280, 48 SE 657.

[a] **Descriptions held sufficient.**—(1) A return of appraisers wherein land set apart as a year's support to a widow and her minor children is described as "the remaining interest in the H place, including 46 acres more or less of lot No. 121—50 acres more or less of Lot No. 176—one and one half acres of lot 121," is not void for uncertainty; and extrinsic evidence is admissible to apply the description to the subject matter. Sizemore v. Willis, 130 Ga. 666, 61 SE 536. (2) Where a return of commissioners appointed to allot a year's support stated that they had allotted from crops in the field "cotton, $60; five barrels of corn, $15; peanuts, $125. The value of all of the articles allotted was only $254.75, leaving a deficiency of $245.25." The allottment was sufficiently definite, so that the record thereof was properly admitted in an action by the widow for a conversion of the property allotted. Parker v. Brown, 136 N. C. 280, 48 SE 657.

93. Stewart v. Jones, 139 Ga. 68, 76 SE 574.

94. Palmer v. Newberry, 141 Ga. 61, 80 SE 322; Smith v. Smith, 115 Ga. 692, 42 SE 72; Birt v. Brown, 106 Ga. 23, 31 SE 755; Robson v. Harris, 82 Ga. 153, 7 SE 926; Young v. Anderson, 19 Ga. A. 551, 91 SE 900; Gray v. Ray, 19 Ga. A. 510, 91 SE 901; Crouch v. Smith, 1 Md. Ch. 401; Williams v. Hale, 20 Miss. 562; Dotson's Est., 28 Pa. Co. 9.

[a] **The burden of showing the return to be incorrect** is on the person objecting thereto. Smith v. Smith, 115 Ga. 692, 42 SE 72; Lee v. English, 107 Ga. 152, 33 SE 39; Gunn v. Pettygrew, 93 Ga. 327, 20 SE 328;

pear.[95] Where the return described the property set aside as a certain number of acres of land, "more or less, including homestead," it was held that the words "more or less" indicated that no precise number of acres was intended, but that the statement of the quantity was given as descriptive of the land assigned.[96] A report purporting merely to allow the property to the widow does not exclude the children.[97] Where the return of property set apart as a year's support to a widow and four minor children has been approved and entered of record, it is not void because it omits the names of the minor children.[98] The return cannot be altered after it has been filed.[99]

[§ 839] **(2) Objections and Hearing Thereon.** Persons interested may file objections to the report,[1] and a hearing on such objections should be had,[2] the court being sometimes permitted to substitute its own judgment for that of the appraisers concerning the award.[3]

[§ 840] **(3) Collateral Attack.** A return setting apart as a year's support an excessive amount cannot be treated as void in a collateral attack thereon seven years after it was admitted to record.[4]

[§ 841] **(4) Record.** Where commissioners are appointed to set apart and assign to a widow and her minor children a year's support, their return is not effective as a judgment until recorded, although no objections are filed.[5] Mere delay in recording the return does not divest interests thereunder.[6]

[§ 842] **k. Confirmation.** The probate court has usually the power to confirm or disallow the report of appraisers,[7] and the judge's confirmation, when made is conclusive as a judgment in rem, binds all others in interest unless attacked on the special grounds available for such judgments, and fixes at once the widow's award as her exclusive property.[8] The confirmation is, however, only conclusive as to the matters to which it relates.[9] Where the property selected is destroyed before the appraisement is approved and no interests of creditors are involved, the court may decline to approve the appraisement;[10] and although the jurisdiction of the probate court to award exempt property to a widow extends no farther than to confirm the report of commissioners setting apart the property and to declare that result, an additional provision in a decree that the title is vested in the widow in fee is mere surplusage and does not affect its validity.[11] Where objections to the return have been sustained so as to have the effect of amending the return, the return and the judgment may be recorded and will be effective to set apart as support the property or money included in the report as corrected by the judgment.[12] A judgment lien against land appraised to the widow is not sufficient to prevent confirmation when the title vested in her is made subject to the lien.[13] It has been considered that a formal judgment is necessary only where the appraisers set apart a sum of money,[14] and a record confirming a commissioner's report setting aside a year's support out of testator's land has the effect and force of a judgment.[15]

[§ 843] **l. Effect of Setting Apart.** Where there were two sets of children living at the time the year's support was set apart and the return did not specify what portion of the land should be set apart to the children of the deceased wife, but instead set apart a year's support generally, it was held that whatever might be the rights of the children of the surviving wife, the children of the deceased wife could claim no benefit under the year's support proceedings.[16] Where, on the widow's petition for a year's support, part of a lot was set apart for her and decedent's minor children, and on her subsequent petition for herself and the chil-

Robson v. Harris, 82 Ga. 153, 7 SE 926.

95. Neiman's Est., 20 Pa. Dist. 49; Drygalski's Est., 6 Kulp (Pa.) 50.

96. Hancock v. King, 133 Ga. 734, 66 SE 949.

97. Allen v. Lindsay, 113 Ga. 521, 28 SE 975.

98. Sizemore v. Willis, 130 Ga. 666, 61 SE 536.

99. Miller's Est., 1 LegGaz (Pa.) 59.

1. Mulherin v. Kennedy, 120 Ga. 1080, 48 SE 437.

[a] **Grounds of objection. —** A creditor may file objections on the ground that the amount allowed is excessive and that the appraisers failed to consider the insolvency of the estate. Mulherin v. Kennedy, 120 Ga. 1080, 48 SE 437.

[b] **Time for objections.**—Where an application has been made by a widow for a year's support from the estate of her deceased husband, and after notice has been given to the legal representatives appraisers have been appointed and have made a return, and a citation has been published, objections may be made at or before the next term of the court of ordinary, and if not made until such term, they should be made before final action on the publication, and objections made after the final application are too late. Foster v. Turnbull, 125 Ga. 654, 55 SE 925 (no objections having been filed to a widow's allowance and the ordinary, at first term of court, having ordered that the return of the appraisers shall be recorded after regular application, notice, citation, and publication, it is not an abuse of discretion to refuse to open a judgment at a late date during the term and allow objections to be then filed).

[c] **Amendment.**—The court's intimation of an intention to sustain a motion to dismiss the caveat to the report made on a widow's application for a year's support does not deprive the caveators of their right to amend. Ray v. Ray, 142 Ga. 290, 82 SE 892.

2. Jones v. Cooner, 142 Ga. 127, 82 SE 445.

[a] **The burden of proof** as to the incorrectness or impropriety of the report is on the objectors. Jones v. Cooner, 142 Ga. 127, 82 SE 445; Young v. Anderson, 19 Ga. A. 551, 91 SE 900; Gray v. Ray, 19 Ga. A. 510, 91 SE 901.

[b] **The solvency of the estate may be considered** in passing on objections of a creditor. Aiken v. Davidson, 146 Ga. 252, 91 SE 34.

3. In re Hodson, 201 Ill. A. 412 [aff 277 Ill. 137, 115 NE 159].

4. Stewart v. Jones, 139 Ga. 68, 76 SE 574.

5. Watson v. Watson, 143 Ga. 425, 85 SE 324; Selph v. Selph, 133 Ga. 409, 65 SE 881.

6. Roberts v. Dickerson, 95 Ga. 727, 22 SE 654.

7. Marshall v. Rose, 86 Ill. 374; Miller v. Miller, 82 Ill. 463; Field v. Field, 117 Ill. A. 307 [aff 215 Ill. 496, 74 NE 443].

"The whole matter of the widow's award remained within the jurisdiction of the Probate Court till it made an order either denying any award or approving a particular award." Kenton v. Hager, 150 Ill. A. 347, 351.

8. Ala.—Headen v. Headen, 171 Ala. 521, 54 S 646.

Cal.—Rountree v. Montague, 30 Cal. A. 170, 157 P 623.

Ill.—Scoville's Est., 20 Ill. A. 426; Wood v. Johnson, 13 Ill. A. 548.

Miss. — Holliday v. Holland, 41 Miss. 528; Ex p. Buck, 40 Miss. 239; Williams v. Hale, 20 Miss. 562; McNulty v. Lewis, 16 Miss. 520.

N. Y.—Applegate v. Cameron, 2 Bradf. Surr. 119.

Or.—McAtee v. McAtee, 23 Or. 469, 32 P 297.

Pa.—Williams' Est., 141 Pa. 436, 21 A 673; Seller's Est., 82 Pa. 153; Baldy's App., 40 Pa. 328; Runyan's App., 27 Pa. 121; Scott's Est., 18 Pa. Super. 375; Merion Title, etc., Co. v. Stadelman, 12 Pa. Dist. 641, 9 Del. Co. 71, 19 Montg. Co. 106; Neiman's Est., 38 Pa. Co. 307; Frey's Est., 6 Pa. Co. 84; Henry's Est., 6 Pa. Co. 28; McLaughlin's Est., 4 Pa. Co. 295; Kunkle's Est., 4 Pa. Co. 234; Berg's Est., 1 Woodw. 75; Brenner's Est., 15 YorkLegRec 125.

9. Seller's Est., 82 Pa. 153.

10. Kunkle's Est., 4 Pa. Co. 234.

11. Headen v. Headen, 171 Ala. 521, 54 S 646.

12. Winn v. Lunsford, 130 Ga. 436, 61 SE 9.

13. In re Simons, 11 Pa. Super. 13; Mayhugh v. Washington, 17 Pa. Dist. 1001.

14. Cowan v. Corbett, 68 Ga. 66 (otherwise the title vests in the family after six months without judgment).

15. Reynolds v. Norvell, 129 Ga. 512, 59 SE 299.

16. Horn v. Truett, 114 Ga. 995, 41 SE 498.

dren the return was amended to make the description of the lot more definite, which amendment was made the ordinary's judgment, the children were bound by that judgment.[17]

[§ 844] **m. Setting Aside Appraisement or Allotment.** The award may be set aside by the probate court, even after the term at which it was approved, where the applicant acts with reasonable promptness.[18] A claim that the property was valued too low will not suffice to set aside the appraisement, except on very clear testimony,[19] but an appraisement will be set aside where many articles were clearly undervalued and some were appraised without being seen.[20] The probate court cannot set aside the allotment to the widow on its own motion.[21] Laches may bar the widow's right to have a decree of confirmation opened and the appraisement set aside, even as to a single item.[22]

[§ 845] **n. Review.** Some statutes permit an appeal from the probate court,[23] either in all cases or where the allowance of the appraisers has been increased or diminished;[24] and it has been considered that an appeal from the final order of the probate court opens all questions.[25] But it has been held that on appeal there is no power to modify the report of the appraisers.[26] Where, on trial of the objections to an allowance to a widow, the ordinary overrules the objections and approves a report of the appraisers and enters a judgment setting apart the property as a year's support, an appeal to the superior court by the creditors suspends the judgment, and the widow acquires no vested right to the property until affirmance by the superior court.[27] The objector is held to be entitled to open and close upon appeal from the appraisers' return where both parties introduce evidence.[28] A caveat to the appraisers' report cannot be amended on appeal so as to bring in issue an objection not made in the lower court,[29] but a merely formal amendment may be permitted.[30] Where the appeal results in a reduction of the award, costs of the proceedings are properly allowed against the applicant.[31]

[§ 846] **o. Marshaling Assets and Interpleader.** Where, after appeal by a creditor from an order of the ordinary overruling his objections to an allowance to a widow, the administrator of the deceased husband files a petition to marshal the assets, and alleges that the creditor claims to own a portion of the land set apart as a year's support, and that other creditors claim other portions thereof, and prays that they and the widow interplead, a decree in favor of the creditors, and holding that the title to the property set apart was in the creditors at the time of the husband's death, binds not only the administrator, but the heirs of the deceased and his widow, although the administrator of the widow, who had died pending the litigation, was dismissed from the bill before the decree.[32]

[§ 847] **L. Allowance by Court—1. In General.** Usually the property set off to the widow should regularly pass through the probate court with other administration of the estate;[33] and it is within the discretion of such court to apportion a reasonable allowance for the maintenance of decedent's family pending administration,[34] either upon its own motion [35] or upon the application of a proper person.[36] The court has also power to grant such orders or entertain such proceedings as may be necessary to enforce a setting apart of the allowance or exemption.[37]

17. Seeland v. Denton Realty Corp., 148 Ga. 628, 97 SE 691.

18. Hodson v. Hodson, 277 Ill. 137, 115 NE 159.

19. Davenport's Est., 4 Kulp (Pa.) 255; Dixon's Est., 1 Kulp (Pa.) 141.

20. Grove's Est., 12 YorkLegRec (Pa.) 180.

21. Ex p. Reavis, 50 Ala. 210.

22. McLaughlin's Est., 4 Pa. Co. 295.

23. Mulherin v. Kennedy, 120 Ga. 1080, 48 SE 437; Durham v. Durham, 107 Ga. 285, 33 SE 76; Daniel v. Phelps, 86 Ga. 363, 12 SE 584; Robson v. Harris, 82 Ga. 153, 7 SE 926.

24. Reidermann v. Tafel, 9 Oh. Dec. (Reprint) 393, 12 CincLBul 284 (discussing the change effected by the act of April 15, 1882).

25. Kenton v. Hager, 150 Ill. A. 347.

26. Simek v. Urban, 159 Ill. A. 373.

27. Mulherin v. Kennedy, 120 Ga. 1080, 48 SE 437 (the only effect of the judgment appealed from is to present alienation of the property).

28. Lee v. English, 107 Ga. 152, 33 SE 39; Gunn v. Pettygrew, 93 Ga. 327, 20 SE 328; Robson v. Harris, 82 Ga. 153, 7 SE 926. But compare Cheney v. Cheney, 73 Ga. 66 (applicant stands in place of plaintiff in ordinary case, and is entitled to open and close).

29. Jacobson v. Jacobson, 107 Ga. 29, 32 SE 877.

30. Ray v. Ray, 142 Ga. 290, 82 SE 892 (a caveat to the return of the appraisers on a widow's application for a year's support could be amended on appeal, by adding after the names of the caveators the words "as children and heirs at law of R, deceased").

31. Chambliss v. Bolton, 146 Ga. 734, 92 SE 204.

32. Mulherin v. Kennedy, 120 Ga. 1080, 48 SE 437.

33. Griswold v. Mattix, 21 Mo. A. 282.

[a] **Small estates.**—(1) Where a decedent leaves less than one thousand dollars of personalty, the title and possession thereto pass to the widow and minor children immediately without administration or allotment. Snead v. Scott, 182 Ala. 97, 62 S 36. (2) Where an intestate leaves an estate not exceeding three hundred dollars, the estate vests in the widow and children without an order of court. Perryman v. Woodward, 37 Okl. 792, 133 P 244.

34. Cal.—In re Cowell, 170 Cal. 362, 149 P 808; In re Slade, 122 Cal. 434, 55 P 158; Garrity's Est., 108 Cal. 463, 38 P 628, 41 P 481; In re Lux, 100 Cal. 593, 35 P 341.

Conn.—Lawrence v. Security Co., 56 Conn. 423, 15 A 406, 1 LRA 342.

Mich.—In re Power, 92 Mich. 106, 52 NW 298; North v. Van Tassel, 84 Mich. 69, 47 NW 663.

Miss.—Womack v. Boyd, 31 Miss. 443.

R. I.—Babcock v. Hopkinton Prob. Ct., 18 R. I. 555, 30 A 461.

Wash. — State v. Lichtenberg, 4 Wash. 231, 29 P 999.

[a] **Where the widow and children live apart** and the latter are elsewhere maintained, the court should apportion the statute allowance. Womack v. Boyd, 31 Miss. 443.

[b] **Physician's charges and funeral expenses** incurred for the benefit of minor children are properly allowable. In re Murphy, 30 Wash. 9, 70 P 109.

[c] **Expenditures made by representative.**—It is error for the court to direct the executor to treat the expenditures made by him, the question for the necessity of which is reserved until a final accounting, as money in hand, and to apply the same to paying a family allowance. In re Smith, 118 Cal. 462, 50 P 701.

[d] **Pending an appeal on the question of the marriage** one claiming to be the widow, but whose claim is contested, cannot be granted an allowance. State v. Lichtenberg, 4 Wash. 231, 29 P 999.

[e] **Contest of probate.**—(1) A decree for maintenance pending a contest of the will, where the testamentary provision for the widow is the income of a trust fund, should be limited to the present earning capacity of such fund, with arrears for the amount so earned up to the date of the decree. Matter of Hitchler, 21 Misc. 417, 47 NYS 1069. (2) No allowance can be made to a widow by the surrogate pending an appeal from the probate of the will, although she is executrix and legatee. Riegelmann's Est., 2 NYCivProc 98, 1 Dem. Surr. 86.

[f] **Maintenance pending a suit by an executor,** for leave to account and be discharged from his trust, will not be ordered for the benefit of a person interested in the estate when there is no money in court. Bogert v. Bogert, 2 Edw. (N. Y.) 399.

35. Leach v. Pierce, 93 Cal. 614, 29 P 235; Peo. v. Cass County, 35 Mich. 220; Chifflet v. Willis, 74 Tex. 245, 11 SW 1105; Connell v. Chandler, 11 Tex. 249; Phelps v. Phelps, 16 Vt. 73.

36. **Who may apply for allowance** see infra § 852.

37. Smith v. Smith, 96 Ga. 772, 22 SE 332; Rocco v. Cicalla, 12 Heisk. (Tenn.) 508.

[a] **Attachment may issue** from the probate court to compel the administrator to pay to the widow money in his hands set apart for her support. Rocco v. Cicalla, 12 Heisk. (Tenn.) 508.

[b] **A receiver may be appointed** to rent the property and pay monthly sums to the widow where the

[§ 848] **2. Form of Proceedings.** An allowance of a year's support to the widow can only be made in a proceeding for the administration of the estate, and not in a suit to quiet title to lands standing in decedent's name, to which the widow claims title.[38]

[§ 849] **3. Time for Application or Allowance.** The widow's petition for an allowance may be filed within a reasonable time after decedent's death,[39] or after the filing of an inventory and appraisement,[40] and under various statutes such application may be at the term of the court at which letters of administration are taken out,[41] or at which final settlement is made.[42] It has been held that an allowance for the support of the family may be made by the probate court before the return of the inventory and appraisal,[43] or before exempt property and homstead have been set apart for the use of the family;[44] but statutes sometimes limit the power of the court to make allowances to the widow so that it can be exercised only in settling the accounts of the executor or administrator.[45]

[§ 850] **4. Counterclaim.** Where a widower claims personal property of his wife, the administrator may set up as a counterclaim claimant's unauthorized use of property, other than that which passed to claimant absolutely, before the administrator came into possession.[46]

[§ 851] **5. Jurisdiction.** In the matter of making the widow's allowance, a probate court has only such jurisdiction and authority as is given to it by statute.[47] The court should not, in this connection, determine matters which lie outside its own statutory jurisdiction and pertain to the ordinary courts of justice[48] or matters of which jurisdiction has previously been obtained by another court.[49] The court of probate has, however, jurisdiction to determine which of two claimants is entitled to a widow's award,[50] and where a separation agreement between husband and wife making complete disposition of their property rights has been fully executed, and the wife is nevertheless claiming a widow's allowance, the probate court has equitable jurisdiction to pass upon the validity and effect of such agreement.[51] A circuit court cannot make any allowance for the support of the widow where the probate court, having original and exclusive jurisdiction in the matter, was not appealed to.[52]

[§ 852] **6. Parties.** A petition for an allowance on behalf of the widow may be made by the personal representative,[53] by the widow her-

right to the property is contested by adult children of the decedent by a former marriage. Smith v. Smith, 96 Ga. 772, 22 SE 332.

38. German v. Heath, 139 Iowa 52, 116 NW 1051.

39. Benagh v. Turrentine, 60 Ala. 557; Birt v. Brown, 106 Ga. 23, 31 SE 755; Irwin's Est., 6 Pa. Dist. 351; Rank's Est., 12 Phila. (Pa.) 67.

[a] **Application before administration.**—A widow cannot apply for the setting apart of exempt property to her before administration, unless sixty days have elapsed since decedent's death without administration. Headen v. Headen, 171 Ala. 521, 54 S 646.

Effect of delay in applying see supra § 823.

40. Krawczyk's Est., 11 Pa. Dist. 179.

41. Gillespie v. Hymans, 15 N. C. 119.

42. Coulter v. Lyda, 102 Mo. A. 401, 76 SW 720.

43. Strauch v. Uhler, 95 Minn. 304, 307, 104 NW 535, 536 ("If the construction were adopted that no allowance for the support of the family could be made until after the return of the inventory and appraisement, the widow and children might be left entirely without means of support until the executor or administrator had been appointed, and until three months thereafter the inventory had been made and returned, and until thereafter appraisers were appointed, performed their duties, and reported to the probate court. Such construction would involve hardships which it is the reasonable purpose of the statutes, construed as a whole, to prevent. The direct converse has, moreover, been the generally accepted construction and practice. That contemporaneous exposition should be given great weight. State v. Northern Pac. R. Co., 95 Minn. 43, 103 NW 731. Accordingly, before the return of the inventory and appraisement the surviving family is entitled to apply for the statutory allowance, and the probate court may properly grant reasonable provision for its support for the statutory period").

44. In re Snowball, 156 Cal. 235, 104 P 446; Garrity's Est., 108 Cal. 463, 38 P 628, 41 P 481.

45. Burroughs v. Knutton, (R. I.) 13 A 108.

46. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

47. Ala.—Chamblee v. Cole, 128 Ala. 649, 30 S 630; Turner v. Whitten, 40 Ala. 530.

Ill.—Hodson v. Hodson, 201 Ill. A. 412; Creighton v. Creighton, 201 Ill. A. 271; Kenton v. Hager, 150 Ill. A. 347.

Mich.—North v. Van Tassel, 84 Mich. 69, 47 NW 663.

Mo.—Fisher v. Clopton, 110 Mo. A. 663, 85 SW 623.

N. Y.—Bliss v. Sheldon, 7 Barb. 152 [aff 8 N. Y. 31].

Oh.—Moore v. Idlor, 26 Oh. Cir. Ct. 502; Wanzer v. Smith, 2 Oh. Dec. (Reprint) 323, 2 WestLMonth 426.

Pa.—Livengood's Est., 15 Pa. Dist. 239.

R. I.—Burroughs v. Knutton, 13 A 108.

Tex.—Nelson v. Lyster, 32 Tex. Civ. A. 356, 74 SW 54.

Wash.—In re Lavenberg, 104 Wash. 515, 177 P 328; Matter of Guye, 63 Wash. 167, 114 P 1041.

[a] **Illustration.**—The court sitting in probate is without jurisdiction to order an allowance to the widow in a case within the statute authorizing wills providing for the settlement of estates without the intervention of the court, although there are statutes defining the right of the widow, and authorizing the setting apart to her of the property of decedent, since the two statutes provide distinct methods of settling an estate under a will. Matter of Guye, 63 Wash. 167, 114 P 1041.

[b] **Annulment of bequest.** — A probate court has no jurisdiction of a widow's application to annul or suspend a clause bequeathing certain notes to another, and to have such notes sold and an allowance made to her from the proceeds, where she has not applied for an administration upon the estate and disclaimed all right under the will. Nelson v. Lyster, 32 Tex. Civ. A. 356, 74 SW 54.

[c] **No jurisdiction to allow claim for exemption.**—Krawczyk's Est., 11 Pa. Dist. 179.

[d] **Where no executor or administrator has been appointed,** the orphans' court cannot entertain a petition by the decedent's widow for her exemption out of funds in the sheriff's hands representing the surplus derived from a foreclosure sale to satisfy a mortgage on decedent's lands. Cox's Est., 11 WklyNC (Pa.) 137. But compare Towanda Bank's App., 1 Mon. (Pa.) 463 (where an administration was regarded as not essential).

48. Ala. — Taylor v. Taylor, 53 Ala. 135.

Cal.—In re McSwain, 176 Cal. 280, 168 P 117.

Ga.—Dix v. Dix, 132 Ga. 630, 64 SE 790.

Mo.—Cauley v. Truitt, 63 Mo. A. 356.

N. Y.—Bulkley v. Staats, 4 Redf. Surr. 524.

Pa.—Barrett v. Barrett, 9 Pa. Co. 454.

[a] **It is not within the province of the probate court to determine** that the parent of a child, who is a fit person to control its custody and education, is not educating it so as to fit it for a calling for which the court may believe it has natural talent. In re McSwain, 176 Cal. 280, 168 P 117.

[b] **Conflicting claims of ownership.**—A court of ordinary has no jurisdiction to determine conflicting claims of ownership between a widow applying for the setting apart of a year's support and a person asserting title adversely to the estate. Dix v. Dix, 132 Ga. 630, 64 SE 790.

[c] **Property sold by administrator.**—The probate court cannot allow the widow's exemption out of funds of an insolvent estate in the hands of the administrator de bonis non where the administrator in chief sold the property exempt from administration and applied the proceeds in the course of administration, her remedy in such case being against the administrator for the conversion. Taylor v. Taylor, 53 Ala. 135.

49. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

50. Field v. Field, 117 Ill. A. 307 [aff 215 Ill. 496, 74 NE 443].

51. In re Yoell, 164 Cal. 540, 129 P 999.

52. Moore v. Idlor, 26 Oh. Cir. Ct. 502.

53. Garrity's Est., 108 Cal. 463, 38 P 628, 41 P 485; Bardwell v. Edwards, 117 Ga. 824, 45 SE 40; Brown

self,[54] or by a committee in lunacy if she is insane,[55] or on behalf of minors by a guardian[56] or next friend.[57] Where the widow acts for her minor children as well as for herself, such children are plaintiffs, and the judgment is in their behalf.[58] All persons interested should be made parties, such as the administrator[59] and children, whether minor[60] or adult.[61]

[§ 853] **7. Notice.**[62] While notice of the widow's petition and proceedings thereunder should usually be given to the executor or administrator,[63] unless he otherwise has notice[64] or has waived formal notice by his voluntary appearance,[65] it has been considered in a number of cases that notice to the personal representative or the heirs is not essential to the jurisdiction of the court;[66] and an allowance will not be disturbed for want of notice.[67] Notice to general creditors is not ordinarily required,[68] although it has been held necessary where the whole estate is set apart.[69] The widow and children cannot complain that notice of the proceedings was not given to others.[70]

[§ 854] **8. Application or Petition.** Under some statutes a written application is necessary,[71] but under others the application need not be in writing.[72] Even where a written petition is required its allegations need not be precise, but informalities and omissions are treated with leniency,[73] although, where a homestead has been set apart to the widow and children, it has been held proper to refuse to make a family allowance out of the estate where the petition therefor failed to state that the homestead was insufficient for the support of the family.[74] A complaint by a widow against the administrator to recover her statutory allowance, which alleges that she has demanded the amount of the administrator, and although "said administrator had, as such, sufficient funds with which to comply with said demand, or a part thereof," he refused to pay, sufficiently alleges the existence of funds with which to pay the allowance,[75] and it is not necessary that a copy of the will be attached to the complaint, although the will devises to her such part of her husband's estate "as she may be entitled to under the statutes in force at the time of his death, and nothing more," her action being under the statute, and not on the will.[76] A petition "in the nature of a bill in equity for a new trial," by minor children of an insolvent decedent, asking that a judgment of foreclosure in which they were not made parties be set aside, and also asking the court to fix and pay out of certain property their allowance, is sufficient as to the prayer for allowance, although they are not entitled to have the judgment set aside.[77] Where a widow whose husband had died testate petitioned for an allowance from his estate for a year's support for herself and minor children, the petition alleging that the husband died intestate, that there was a certain sum in the hands of the executors, and stating what sum was necessary for support of herself and children, a charge that the petition was fraudulent was not supported, although the widow had means of her own when the petition was made.[78] It has been held that while it would be the better practice to file separate peti-

v. Joiner, 77 Ga. 232, 3 SE 157; Forbes v. Anderson, 54 Ga. 93; Mackie v. Glendenning, 49 Ga. 367.

[a] **An adult son who is executor** may petition for the widow. Garrity's Est., 108 Cal. 463, 38 P 628, 41 P 485.

[b] **A new application** may be made by the administrator without waiting for the entry of a remittitur where an order vacating a judgment setting apart a widow's allowance is affirmed by the supreme court, the widow having died before the commissioners had acted. Brown v. Joiner, 80 Ga. 486, 5 SE 497.

54. Ala.—McLean v. Martin, 155 Ala. 208, 45 S 295; Jordan v. Strickland, 42 Ala. 315.

Cal.—In re Slade, 122 Cal. 434, 55 P 158.

Me.—Tarbox v. Fisher, 50 Me. 236.

N. C.—Gillespie v. Hymans, 15 N. C. 119.

Oh.—Matter of Pollard, Oh. Prob. 216.

Pa.—Potts' App., 3 Walk. 135.

R. I.—Babcock v. Hopkinton Prob. Ct., 18 R. I. 555, 30 A 461.

[a] **The death of the widow abates her petition** if no final decree of allowance has been made. Tarbox v. Fisher, 50 Me. 236.

55. Baker's Est., 25 Pa. Dist. 650; Garrett's Est., 14 WklyNC (Pa.) 310.

56. Edwards v. McGee, 27 Miss. 92; Eddy's Est., 12 Phila. (Pa.) 17.

57. Butts v. Pugh, 54 Ga. 465.

58. Hendrix v. Causey, 148 Ga. 164, 96 SE 180.

59. McElmurray v. Loomis, 31 Fed. 395; Allen v. Hempstead, 154 Ill. A. 91.

[a] **An administrator has a right to be a party** to the making and return of the appraisement bill and widow's award. If the appraisement is made without notice to or knowledge of the administrator, it is irregular and may be set aside; but it will not be so set aside unless harm has resulted. In re Hallock, 154 Ill. A. 91.

60. Woolley v. Sullivan, 92 Tex. 28, 45 SW 367, 46 SW 629 [mod (Civ. A.) 43 SW 919].

61. Schmitt v. Kahrs, 1 Dem. Surr. (N. Y.) 114.

62. Notice before setting aside entire estate to widow see supra § 781.

63. Ga.—Mackie v. Glendenning, 49 Ga. 367.

Mich.—Bacon v. Perkins, 100 Mich. 183, 58 NW 835; Freeman v. Washtenaw, 79 Mich. 390, 44 NW 856.

Miss.—Morgan v. Morgan, 36 Miss. 348.

Mont.—In re Dougherty, 34 Mont. 336, 86 P 38.

Nebr.—In re Whiton, 86 Nebr. 367, 125 NW 606; In re Fletcher, 83 Nebr. 156, 119 NW 232.

R. I.—Babcock v. Hopkinton Prob. Ct., 18 R. I. 555, 30 A 461.

[a] **Oral notice** is sufficient. Bacon v. Perkins, 100 Mich. 183, 58 NW 835.

64. Forbes v. Anderson, 54 Ga. 93.

65. Johnson v. Tyson, 45 Cal. 257; Butts v. Pugh, 54 Ga. 465.

66. Ala.—Headen v. Headen, 171 Ala. 521, 54 S 646.

Mass.—Wright v. Wright, 13 Allen 207.

Mont.—In re Dougherty, 34 Mont. 336, 86 P 38.

Nebr.—In re Whiton, 86 Nebr. 367, 125 NW 606; In re Fletcher, 83 Nebr. 156, 119 NW 232.

Pa.—Irwin's Est., 19 Pa. Co. 595.

[a] **Reason for rule.**—"Under the provisions of the statute governing the subject . . . the widow is entitled to an allowance as a matter of right, on grounds of public policy . . . and no notice of the court's intention or action in the matter is required." In re Dougherty, 34 Mont. 336, 343, 86 P 39.

[b] **Proceeding is in rem.**—A proceeding in probate to set apart certain property as exempt to the widow is a proceeding in rem, so that personal notice to the heirs is not essential. Headen v. Headen, 171 Ala. 521, 54 S 646.

[c] **Failure to notify heirs** not jurisdictional. In re Whiton, 86 Nebr. 367, 125 NW 606.

67. Morgan v. Morgan, 36 Miss. 348; Babcock v. Hopkinton Prob. Ct., 18 R. I. 555, 30 A 461.

68. In re Palomares, 63 Cal. 402; Goss v. Greenaway, 70 Ga. 130; In re Fritch, 179 Mo. A. 434, 164 SW 659. Contra Fischesser v. Thompson, 45 Ga. 459.

69. Wills v. Booth, 6 Cal. A. 197, 91 P 759.

70. Hendrix v. Causey, 148 Ga. 164, 96 SE 180.

71. Fischesser v. Thompson, 45 Ga. 459.

72. Cummings v. Cummings, 51 Mo. 261.

73. Headen v. Headen, 171 Ala. 521, 54 S 646; Jordan v. Strickland, 42 Ala. 315; Lester v. Reynolds, 144 Ga. 143, 86 SE 321; Freeman v. Washtenaw, 79 Mich. 390, 44 NW 856; O'Neill's Est., 23 Pa. Dist. 584; Leberman's Est., 7 Pa. Dist. 517.

[a] **Illustration.**—A petition for an award of exempt property to a widow which alleged that the property, real and personal, at decedent's death did not exceed in value and amount the exemptions allowed in favor of his widow, and that petitioner averred that at the time of his death the said H was seized and possessed of the following real estate described, being in value less than two thousand dollars, was not fatally defective for failure to show that the property "of the decedent" at his death did not exceed in amount and value the statutory allowance to the widow. Headen v. Headen, 171 Ala. 521, 54 S 646.

74. Luther's Est., 67 Cal. 319, 7 P 708.

75. Brown v. Bernhamer, 159 Ind. 538, 65 NE 580.

76. Brown v. Bernhamer, 159 Ind. 538, 65 NE 580.

77. Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629 [mod (Civ. A.) 43 SW 919].

78. Busby v. Busby, 120 Iowa 536, 95 NW 191 (her right to an allowance did not depend on whether the husband died testate or intestate, and the allegations of the petition as

tions for the widow's personal property exemption and for her statutory allotment out of the realty, relief may be granted under a petition praying for both.[79] Where the statute does not require a widow's application for the setting apart of exempt property of her deceased husband's estate to be verified, such application may be amended by inserting the name of a minor child, who was entitled to participate in the allowance.[80]

[§ 855] **9. Objections and Exceptions.** Any person concerned in the administration of the estate may interpose a caveat to an application for a year's support.[81] Objections and exceptions to the allowance should be clear and specific, as well as seasonably made,[82] but persons interested in an intestate's estate are not estopped to object to an allowance to the widow for a period after the expiration of a reasonable time for the settlement of the estate, because they could have compelled her, as administratrix, to have promptly settled and distributed the estate, but failed to do so.[83] Where the ordinary has duly complied with the statutory requirements as to issuing citation and publishing notice with regard to an application for a year's support, it is too late, after the adjournment of the term of his court to which the citation is returnable, to file objections to the granting of such application.[84]

[§ 856] **10. Evidence.** It is incumbent upon the petitioner to show all facts necessary to establish the right to an allowance,[85] as that she was decedent's lawful wife at the time of his death,[86] that the allowance is necessary,[87] or that the children have no other resources.[88] But the burden is upon the one asserting it to show the fact of divorce[89] or the nonresidence of decedent,[90] and it has also been held incumbent on one who claims that a wife has forfeited her right to allowance by reason of her separation from decedent to show that there was no sufficient cause to justify such separation.[91] The widow is presumed to be a proper person to receive the family allowance and to have the custody of the children.[92] The presumption being that decedent's wife was a member of his family,[93] proof that applicant is the widow imposes on one opposing the application the burden of showing that she was not a member of decedent's family at the time of his death.[94] Evidence of the financial condition of the estate is admissible,[95] and where the guardian of decedent's child applies for a separate allowance for his ward, the widow, to whom a family allowance has been made, should be allowed to testify that she is willing and able properly to support the child.[96] A contract between a widow and other devisees disposing of the estate otherwise than as directed by the will which, by decree, has been determined to be a valid contract, is admissible on the hearing of the widow's application for an allowance.[97] On an application by a widow for an allowance pending administration and the probate of the will, evidence, opposing the application, that she wrongfully appropriated money of her husband to her own use during his lifetime is wholly irrelevant.[98] Since a family allowance for minor children must be paid to their guardian or for necessaries, and not paid to the guardian ad litem, the poverty of the mother having custody of the children is immaterial except as a circumstance justifying an increase of the allowance.[99] A judgment of the circuit court approving an estimate of appraisers on a widow's award was not without evidence to support it merely because the estimate of the appraisers was not offered in evidence, the report not being evidence, but merely the basis of the proceeding.[1] Where the widow, in her petition for an allowance, alleges that there was no issue of the marriage, and the administrator, in his petition for letters, alleges that decedent died without issue, the fact may be considered established, and no evidence thereof is necessary.[2]

[§ 857] **11. Trial or Hearing.** The hearing of an application for an allowance involves the discretionary powers of the court,[3] in the determination or enforcing of which it may exercise summary and

to what was required to support herself and children did not amount to a statement that she had no resources of her own).

79. Callahan's Est., 21 Pa. Dist. 356.

80. McLean v. Martin, 155 Ala. 208, 45 S 295.

81. Mathews v. Rountree, 123 Ga. 327, 51 SE 423; In re Grossman, (Pa.) 106 A 88.

[a] **A cosurety of decedent** on a bond on which suit has been brought may interpose a caveat. Mathews v. Rountree, 123 Ga. 327, 51 SE 423.

[b] **Children of decedent's first wife** may attack the validity of his second marriage. In re Grossman, (Pa.) 106 A 88.

82. Kelly v. Garrett, 67 Ala. 304; Ray v. Ray, 142 Ga. 290, 82 SE 892; Jones v. Cooner, 142 Ga. 127, 82 SE 445; Foster v. Turnbull, 126 Ga. 654, 55 SE 925; Jackson v. Warthen, 110 Ga. 812, 36 SE 234; Laslie v. Laslie, 87 Ga. 477, 13 SE 596; Parks v. Johnson, 79 Ga. 567, 5 SE 243; Tetzloff v. May, 181 Iowa 1263, 165 NW 328; Bray's Est., 12 Phila. (Pa.) 54; Storey's Est., 16 WklyNC (Pa.) 571.

83. In re Dougherty, 34 Mont. 336, 86 P 38.

84. Jackson v. Warthen, 110 Ga. 812, 36 SE 234.

85. Wilson v. Allen, 108 Ga. 275, 33 SE 975; Creighton v. Creighton, 201 Ill. A. 271.

86. Wilson v. Allen, 108 Ga. 275, 33 SE 975; Guyger's Est., 8 Pa. Co. 308; King's Est., 9 Kulp (Pa.) 56.

[a] **A slight preponderance** of evidence in her favor is sufficient. Guyger's Est., 8 Pa. Co. 308.

[b] **Evidence held sufficient** to show marriage to decedent. Hewlett v. Watson, 134 Ga. 516, 67 SE 1128.

87. Clark v. Emerson, 141 Ga. 612, 81 SE 870; Caldwell v. Caldwell, 54 Iowa 456, 6 NW 714; Glover v. Glover, 215 Mass. 576, 102 NE 945; Stewin v. Thrift, 30 Wash. 36, 70 P 116.

[a] **Accordingly,** where on an application, made by a minor orphan a few days before reaching his majority, to have the personal property left by his parents set apart to him, there is no showing that the property is needed for his support during his minority, there is no error in denying the application. Stewin v. Thrift, 30 Wash. 36, 70 P 116.

[b] **Evidence insufficient to support** an allowance of fifteen hundred dollars to widow for necessities following husband's death and to show that five hundred dollars would be a sufficient allowance. Glover v. Glover, 215 Mass. 576, 102 NE 945.

88. Caldwell v. Caldwell, 54 Iowa 456, 6 NW 714; Stewin v. Thrift, 30 Wash. 36, 70 P 116.

89. In re Edwards, 58 Iowa 431, 10 NW 793.

90. O'Neill's Est., 11 Pa. Co. 491.

[a] **Where the decedent's will recited that he was a nonresident,** the burden was on the widow to show that he was a resident. Shannon v. White, 109 Mass. 146.

91. Linares v. Linares, 93 Tex. 84, 53 SW 579 [aff (Civ. A.) 51 SW 510] (when the trial court finds that a husband and wife are living apart by agreement, and that the wife was induced thereto by reason of the cruel treatment of the husband, it will be presumed the cruelty was sufficient to justify the separation, and that she had not thereby forfeited her right, as surviving widow, to an allowance from the estate).

92. In re McSwain, 176 Cal. 280, 168 P 117.

93. Lemp v. Lemp, (Ida.) 184 P 224.

94. Lemp v. Lemp, (Ida.) 184 P 224.

95. Strauch v. Uhler, 95 Minn. 304, 104 NW 535.

96. In re McSwain, 176 Cal. 280, 168 P 117.

97. In re Rogers, 141 Minn. 93, 169 NW 477.

98. In re Bump, 152 Cal. 274, 92 P 643.

99. In re Snowball, 156 Cal. 235, 104 P 446.

1. Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219].

2. In re Coreil, (La.) 83 S 13.

3. Martin v. Gaissert, 139 Ga. 693, 78 SE 40; Kersey v. Bailey, 52 Me. 198; Whaley v. Whaley, 50 Mo. 577.

[a] **Question should not be submitted to jury.**—Whaley v. Whaley, 50 Mo. 577.

plenary powers,[4] as by allowing an amendment of the petition,[5] by granting a stay of proceedings,[6] or by trying issues out of regular order.[7] But the court can determine only such questions as are raised by the pleadings,[8] and its discretion does not extend to refusing the allowance, where the conditions contemplated by the statute providing therefor exist.[9] Where a jury trial is had, the functions of the jury are confined to a consideration of the facts of the case under instructions declaring the law.[10]

[§ 858] **12. New Trial.** A new trial is not authorized where, on a widow's petition, written objections were filed and after a hearing the allowance was granted.[11] A motion for a new trial is not a proper procedure after the court in probate proceedings sets apart a homestead to the widow, with certain property as exempt from execution, and awards her a family allowance, it being the duty of the court ex parte and without petition to make such orders.[12]

[§ 859] **13. Judgment or Order**[13]**—a. In General.** The granting of the widow's allowance or exemption should be made by a proper judgment or order,[14] which should recite notice to the personal representative,[15] sufficiently describe the property set aside,[16] and afford relief by an appropriation of assets in the hands of the executor or administrator, rather than by a judgment against him personally.[17] A judgment in the alternative is improper,[18] but mere informalities or immaterial omissions in the judgment do not usually affect its validity.[19] The presumptions are in favor of the judgment or order,[20] and it need not contain a finding that the allowance is necessary,[21] that property exempt from execution and already set apart is insufficient,[22] or that the value of exempt property set apart is not in excess of the statutory limit.[23] A judgment setting apart a year's support is not void because the return of the appraisers was not filed within the time specified by the order appointing them,[24] and as against creditors whose debts are not secured by the loan deed, a judgment of a year's support, assigning the widow and minor children of a decedent a specifically described tract of land, subject to a loan deed for a stated amount, is not void on the ground that the title to the land was not in decedent.[25]

[§ 860] **b. Nunc Pro Tunc Order.** An order nunc pro tunc may be made covering the same items included in the original order upon objection thereto and due notice given of a subsequent hearing.[26]

[§ 861] **c. Operation and Effect.** An order for an allowance during settlement of the estate covers the entire period required for settlement,[27] notwithstanding a previous order limiting twelve months for the settlement,[28] and continues in effect, although erroneous or improper, so long as it is not set aside.[29] An order making a temporary allow-

4. Smith v. Smith, 12 R. I. 456 (an examination and decision of claims against a husband's estate may be made by the court to enable it to decide whether the realty prayed for by the widow will probably be needed to pay his debts).

5. Hudson v. Stewart, 48 Ala. 204.

6. O'Neill's Est., 11 Pa. Co. 491.

7. Leaverton v. Leaverton, 40 Tex. 218 (a motion filed to compel an administrator to pay over the widow's allowance may be called for disposal before it is regularly reached on the docket).

8. In re Yoell, 164 Cal. 540, 129 P 999.

9. In re Lavenberg, 104 Wash. 515, 177 P 328.

10. Rhode Island Hospital Trust Co. v. Hopkins, 38 R. I. 59, 80, 94 A 724 (it was error to instruct the jury "For the time being you are passing on this thing as the Probate Court in control of this estate on this particular matter").

11. Leach v. Pierce, 93 Cal. 614, 29 P 235.

12. Shipman v. Unangst, 150 Cal. 425, 88 P 1090.

13. Necessity for order where widow entitled to entire estate see supra § 781.

14. Sexton v. Burruss, 146 Ga. 685, 92 SE 217; Watson v. Watson, 143 Ga. 425, 85 SE 324; Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11; Dickinson v. Henderson, 122 Mich. 583, 81 NW 583.

[a] **A memorandum of the amount** allowed the widow for her support, entered by the probate judge on his docket, does not constitute such an order. Dickinson v. Henderson, 122 Mich. 583, 81 NW 583.

15. Fischesser v. Thompson, 45 Ga. 459 (a judgment not reciting that the representatives of the estate have been notified is void as against a creditor who had no notice of the application therefor).

16. Pelham v. Smith, 137 Ga. 39, 72 SE 417; Hawes v. Elam, 131 Ga. 323, 62 SE 227; Sellers v. Carter, 20 Ga. A. 815, 93 SE 497.

[a] **A judgment setting aside a year's support to a widow being in effect a conveyance** to the widow of an interest in decedent's property, the description of the property must be such as to render it capable of identification, and extrinsic evidence is receivable to apply the description to the subject matter; and where it appeared that decedent at his death owned two noncontiguous tracts of land, upon one of which he lived for many years prior to his death, which was known as his home place and was estimated to contain about four hundred and fifty acres, and that the widow, immediately after the judgment assigning her a year's support, took possession of the land and has continuously remained in possession, claiming under the judgment, an assignment of support in "four hundred and fifty acres of land, more or less, including homestead, four hundred and fifty dollars," sufficiently described the land. Hancock v. King, 133 Ga. 734, 66 SE 949.

17. Whaley v. Whaley, 50 Mo. 577; Bower's Est., 17 Pa. Super. 59; Cupps' Est., 14 YorkLegRec (Pa.) 16.

[a] **Where an executor has disposed of** articles required by statute to be set apart to the widow, his liability is personal and a judgment against him thereon is properly enforced by rule. Franzell v. Franzell, 153 Ky. 171, 154 SW 912.

[b] **Judgment not binding assets.** —Where objections to the return of the appraisers, setting aside a year's support upon a widow's application therefor, having been filed, the case was carried by appeal to the superior court, and there, upon trial of the same, a verdict was returned in favor of applicant for a given amount, and thereupon a judgment was rendered as follows, after stating the case: "The jury having returned a verdict in the above-stated case for $101.38, it is thereupon considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant, James Beall, administrator, etc., the sum of $101.38 principal and $9.65 costs of suit," such judgment was in terms a judgment against James Beall individually, and was not binding upon the assets of the estate of the administrator's decedent. Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125.

[c] **Interest** should not be allowed as a personal judgment against the representative. Jones v. Bartlett, (Tex. Civ. A.) 189 SW 1107.

18. Cash v. Cash, 67 Ark. 278, 54 SW 744.

19. In re Fretwell, 154 Cal. 638, 98 P 1058; Baker v. Baker, 51 Wis. 538, 8 NW 289.

[a] **Accordingly** (1) the fact that the judgment is not signed by judge or entered of record does not affect its validity. Baker v. Baker, 51 Wis. 538, 8 NW 289. (2) Where an allowance was not applied for until more than three years after administration granted, the fact that an order granting it provided that it should run for twelve months from decedent's death was a nonprejudicial irregularity. In re Fretwell, 154 Cal. 638, 98 P 1058.

20. In re Nolan, 145 Cal. 559, 79 P 428; Fulghum v. Fulghum, 111 Ga. 635, 36 SE 602, 37 SE 774; Tabb v. Collier, 68 Ga. 641; Beachley v. Bollinger, 119 Md. 151, 86 A 135.

[a] **Illustration.**—Where seventy-five dollars was allowed to a decedent's widow in settling the estate under a statute granting that sum, where decedent leaves no infant child, while one hundred and fifty dollars is allowed her in case of a surviving child, it must be presumed that decedent left no infant child surviving. Beachley v. Bollinger, 119 Md. 151, 86 A 135.

21. Haven's App., 69 Conn. 684, 38 A 795 (such finding is implied).

22. In re Welch, 106 Cal. 427, 39 P 805.

23. In re Slade, 122 Cal. 434, 55 P 158 (a finding that the farming utensils of a debtor are exempt is equivalent to a finding that their value is not in excess of the limit prescribed by the statute).

24. Whatley v. Watters, 136 Ga. 701, 71 SE 1103 [foll Jensen v. Watters, 136 Ga. 703, 71 SE 1104].

25. Whatley v. Watters, 136 Ga. 701, 71 SE 1103 [foll Jensen v. Watters, 136 Ga. 703, 71 SE 1104].

26. In re Murphy, 30 Wash. 9, 70 P 109.

27. Haven's App., 69 Conn. 684, 38 A 795; Marskey v. Lawrence, 121 Mich. 577, 80 NW 571.

28. Haven's App., 69 Conn. 684, 38 A 795.

29. Ind.—Downs v. Downs, 17 Ind. 95.

ance before the return of the inventory of the estate by the executors ceases to be operative upon such return,[30] even though it contains the words "until further order" of the court.[31] An order fixing a widow's allowance is conclusive of her right thereto when not appealed from.[32] Where a court sitting in probate removed the independent executrix and appointed her administratrix, a subsequent allowance to testator's widow and children was res judicata in a contest over the classification of claims.[33]

[§ 862] **d. Enforcement.** An independent intervention cannot be filed by a minor son for the purpose of securing the payment of a judgment for a year's support, unless the widow has failed or neglected to intervene or is in collusion with other creditors.[34]

[§ 863] **e. Setting Aside.**[35] It has been held that a county court may, for fraud or mistake, vacate at a subsequent term an order approving the award for the widow's allowance,[36] and that an administrator who pays out money on allowance orders before distribution is charged with knowledge of the power of the court over such orders and makes the payment at his own risk.[37] It is also held that a widow who appeals from an order of the county court vacating an order approving her allowance, and subsequently appears to ask a new allowance, waives any objections to the jurisdiction of the court over her person on the motion to vacate the order.[38] Where a widow, in violation of an agreement with her stepchildren, procured the ordinary to set apart whole of the estate for a year's support, it was held that a court of equity, on timely application, would set aside the judgment for fraud, the stepchildren having had no actual knowledge of the proceeding before final judgment, the estate having been undervalued, and the judgment being grossly excessive.[39]

[§ 864] **f. Collateral Attack.** An order for a family allowance is not subject to collateral attack.[40]

[§ 865] **14. Review.** Appeals generally in probate proceedings have been treated elsewhere.[41] An appeal usually lies from the judgment or decree of the probate court making or refusing an allowance to the widow,[42] although it has been held otherwise where the issue was as to the amount of the allowance and the kind of property of which it should consist,[43] or where the order was merely interlocu-

N. H.—Mathes v. Bennett, 21 N. H. 188.
Okl.—In re Foreman, 157 P 279.
Pa.—Dorscheimer's Est., 7 Pa. Dist. 726.
Vt.—Richardson v. Merrill, 32 Vt. 27.

30. In re Cowell, 164 Cal. 636, 130 P 209.

31. In re Bell, 142 Cal. 97, 75 P 679; Crew v. Pratt, 119 Cal. 131, 51 P 44; In re Lux, 100 Cal. 593, 35 P 341.

32. Cal.—In re Nelson, 167 Cal. 321, 139 P 692.
Ga.—Seeland v. Denton Realty Corp., 148 Ga. 628, 97 SE 681.
Ill.—In re Hodson, 201 Ill. A. 412 [aff 277 Ill. 137, 115 NE 159].
Minn.—Wellner v. Eckstein, 105 Minn. 444, 117 NW 830.
Wash.—In re Hamilton, 184 P 337.

[a] **Conclusive only as to right.**—A judgment allowing a widow and her minor children a year's support is conclusive only that she is entitled to the amount of the judgment, if there be assets to pay it. Wood v. Brown, 121 Ga. 471, 49 SE 295.

33. King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839.

34. Ferris v. Van Ingen, 110 Ga. 102, 28 SE 347.

35. Decrease or revocation of allowance see infra § 871.

36. Clemes v. Fox, 25 Colo. 39, 53 P 225 (where the grounds on which the court vacated such an order do not appear, the vacation is presumed to have been for fraud or mistake).

37. Clemes v. Fox, 25 Colo. 39, 53 P 225.

38. Clemes v. Fox, 25 Colo. 39, 53 P 225.

39. Ellis v. Hogan, 147 Ga. 609, 95 SE 4.

40. Ala.—Jenkins v. Clisby, 145 Ala. 665, 39 S 735.
Cal.—In re Bette, 171 Cal. 583, 153 P 949; In re Treat, 162 Cal. 250, 121 P 1003; In re Nolan, 145 Cal. 559, 79 P 428; Crew v. Pratt, 119 Cal. 131, 51 P 44.
Ga.—Riddle v. Shoupe, 147 Ga. 387, 94 SE 236; Sexton v. Burruss, 146 Ga. 685, 92 SE 217; Wright v. Clark, 145 Ga. 534, 89 SE 618; Groover v. Brown, 118 Ga. 491, 45 SE 310; Fulghum v. Fulghum, 111 Ga. 635, 36 SE 602, 37 SE 774; Goss v. Greenaway, 70 Ga. 130; Tabb v. Collier, 68 Ga. 641.
Ill.—Hodson v. Hodson, 201 Ill. A. 412.
Mont.—In re Dougherty, 34 Mont. 336, 86 P 38.
Oh.—In re Hess, 33 Oh. Cir. Ct. 449.
Pa.—Greenawalt's Est., 16 Pa. Super. 263; Merion Title, etc., Co. v. Stadelman, 12 Pa. Dist. 641, 9 Del. Co. 71, 19 Montg. Co. 106; Neill v. Kuhn, 15 Pa. Co. 565; Carr's Est., 15 Pa. Co. 354; Frey's Est., 6 Pa. Co. 84.
Tex.—Leaverton v. Leaverton, 40 Tex. 218; Lockhart v. White, 18 Tex. 102; King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839.
Vt.—Richardson v. Merrill, 32 Vt. 27.
"While lapse of time between the death of a husband and the application by his widow for a year's support, during which time she lived upon the land and made use of the personalty of her deceased husband, may furnish ground to defeat the application before the ordinary, yet when the final judgment of that court has been rendered in the case, it is too late to attack it, especially before another court, except for causes apparent upon the face of the record, showing a want of jurisdiction either of the person or subject-matter." Goss v. Greenaway, 70 Ga. 130 [quot Reynolds v. Norvell, 129 Ga. 512, 515, 59 SE 299, 301].

41. See Appeal and Error 3 C. J. p 256 et seq.

42. Ala.—Chandler v. Chandler, 87 Ala. 300, 6 S 153.
Cal.—In re Treat, 162 Cal. 250, 121 P 1003; In re Wood, 145 Cal. 522, 77 P 481; Pennie v. San Francisco Super. Ct., 89 Cal. 31, 26 P 617; Stevens' Est., 83 Cal. 322, 23 P 379, 17 AmSR 252.
Ill.—Hodson v. Hodson, 277 Ill. 137, 115 NE 159; Lane v. Thorn, 103 Ill. A. 215.
Iowa.—Tetzloff v. May, 181 Iowa 1253, 165 NW 328.
Kan.—Swayze v. Wade, 25 Kan. 551.
La.—Easum's Succ., 49 La. Ann. 1345, 22 S 364.
Me.—In re Cooper, 19 Me. 260.
Mass.—Chase v. Webster, 168 Mass. 228, 46 NE 705; Wright v. Wright, 13 Allen 207; Washburn v. Washburn, 10 Pick. 374.
Mich.—Peo. v. Cass County, 35 Mich. 220. But compare Koch v. Koch, 121 Mich. 667, 80 NW 641 (an appeal does not lie from an allowance by the probate court for the support of a widow).
Mo.—In re Fritch, 179 Mo. A. 434, 164 SW 659; Coulter v. Lyda, 102 Mo. A. 401, 76 SW 720.
Mont.—In re Dougherty, 34 Mont. 336, 86 P 38.
Nebr.—In re Fletcher, 83 Nebr. 156, 119 NW 232; Rieger v. Schaible, 81 Nebr. 33, 115 NW 560, 17 LRANS 866, 16 AnnCas 700 [reh den 81 Nebr. 58, 116 NW 953, 17 LRANS 866, foll In re Fletcher, 83 Nebr. 156, 119 NW 232, and cit Cyc].
N. H.—Woodbury's App., 57 N. H. 483; Piper v. Piper, 34 N. H. 563.
N. C.—Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.
Wash.—In re Cannon, 18 Wash. 101, 50 P 1021.

[a] **An appeal lies from a modifying order** making an allowance to a widow and intended to supersede the previous order similar in character containing different provisions. In re Cannon, 18 Wash. 101, 50 P 1021.

[b] **Discontinuance of allowance.**—An order made by the court in probate proceedings after the administratrix's final account was settled, discontinuing a monthly family allowance to the widow, was appealable. In re Chapman, 158 Cal. 740, 112 P 302.

[c] **An order directing executors to resume payments** to the family of decedent, after they had withheld the same on the ground that the estate was insolvent, was in effect one making an allowance for a widow, and appealable. In re Treat, 162 Cal. 250, 121 P 1003.

[d] **Laches may bar** a petition to review the widow's award. In re Mulliken, 211 Ill. A. 263 (delay of twenty months).

43. Dunn v. Kelley, 69 Me. 145; Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Bordwell v. Saginaw Cir. Judge, 119 Mich. 421, 78 NW 468; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

[a] **Dispute as to other matters.**—An appeal as to such issue would not lie at the instance of the heirs, although there was a dispute as to whether the person claiming the allowance was the widow or not. Bordwell v. Saginaw Cir. Judge, 119 Mich. 421, 78 NW 468.

[b] **A finding of the trial court as to a reasonable sum** for provisions for the widower for a year is not open to review on appeal. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

tory.[44] An appeal may be taken by any party aggrieved by the decree below,[45] such as the personal representative,[46] a creditor,[47] or a distributee.[48] Where an order making an allowance to a widow refers to a previous order of a similar character, but makes different provisions from those of such previous order, the previous order is no longer in force, so that an appeal from the modifying order brings up the whole question for review.[49] An objection not raised in the probate court cannot be considered on appeal.[50] On an appeal by a beneficiary under a will from a decree granting an allowance to the testator's widow for her necessities following decedent's death, that view of the evidence most favorable to the widow should be adopted,[51] and where the showing made to the county court is sufficient to justify an award made to the widow for her allowance out of an insolvent estate, it will not be reversed.[52] The discretion of the probate judge will not be disturbed on appeal unless he has abused it,[53] has been guilty of manifest error,[54] or has exceeded his jurisdiction.[55] Neither will findings, in support of which there is evidence, be reviewed.[56] Under some statutes the appellate court tries the case de novo and is not confined to a review of the order appealed from on the return of the probate court.[57] A widow who has appealed from a judgment against her on her petition for an allowance is entitled to dismiss where she is not prepared for trial;[58] and where a widow who is also administratrix has appealed from an order denying her motion to set apart to her as widow the whole of the estate, but has filed no undertaking on appeal, the appeal must be dismissed.[59] A judgment of the circuit court on appeal from the estimate of appraisers on the widow's award has been held not improper, because it affirmed and approved the order of the probate court, as if it were a court of review, where such part of the judgment was merely preliminary and was followed by a judgment containing all the formal requisites.[60] A judgment denying to a widow a family allowance as prayed for by her in an amended petition therefor, rendered on appeal by certain creditors of decedent from a judgment awarding an allowance, precludes the widow from further proceeding under the original petition, and inures to the benefit of all creditors of decedent, and a creditor appealing generally from the judgment and order granting an allowance is entitled to a reversal, although he stood on his demurrer to the original petition which was overruled, and took no further part in the proceedings, during which the petition was amended so as to withstand the demurrer, by alleging other distinct grounds for its relief.[61]

[§ 866] **15. Costs.** Costs are usually in the discretion of the court,[62] which may allow costs to a widow who has prevailed in two successive appeals from a decree granting her an allowance,[63] allow costs out of the estate where the widow has died after the filing of a petition for an allowance,[64] or refuse to allow either party the costs of an appeal.[65] Where appraisers set apart to a husband as exempt certain articles specified in the statute, and also set apart a sum of money in lieu of other articles mentioned in the statute, an allowance of costs to the husband could not be sustained where the decree was reversed so far as it directed the executor to pay the money set apart by the appraisers.[66] Where the decree makes the allowance a charge on real estate, such costs as were incident to, or occasioned by, such charge and proceedings to enforce it, including costs of an appeal from the decree, may be collected.[67] Where an appeal from an allowance of the widow's exemption was dismissed, it was held that the costs to which the widow was entitled did not include the cost of the petition and advertising the widow's claim,[68] or the cost of printing the record on the appeal.[69] A decree may be amended so as to include costs.[70]

44. Bond v. Marx, 53 Ala. 177; Catterson's App., 100 Pa. 9; Julbe v. Guzman, 14 Porto Rico 36.

45. In re Fretwell, 152 Cal. 573, 93 P 283; In re Wood, 145 Cal. 522, 77 P 481; In re Levy, 141 Cal. 646, 75 P 301, 99 AmSR 92.

46. In re Fretwell, 152 Cal. 573, 93 P 283; In re Levy, 141 Cal. 646, 75 P 301, 99 AmSR 92; In re Carriger, (Cal.) 41 P 700; In re Welch, 106 Cal. 427, 39 P 805; Lane v. Thorn, 103 Ill. A. 215; Saunders v. Russell, 60 N. C. 97; In re Cannon, 18 Wash. 101, 50 P 1021.

47. In re Fretwell, 152 Cal. 573, 93 P 283; Woodbury's App., 57 N. H. 483.

48. In re Levy, 141 Cal. 646, 75 P 301, 99 AmSR 92; Perry v. Perry, 4 N. C. 617.

49. In re Cannon, 18 Wash. 101, 50 P 1021.

50. Johnston v. Davenport, 42 Ala. 317.

51. Glover v. Glover, 215 Mass. 576, 102 NE 945.

52. Clemes v. Fox, 25 Colo. 39, 53 P 225.

53. Cal.—In re Bump, 152 Cal. 274, 92 P 643; In re Lux, 100 Cal. 593, 35 P 341.

Iowa.—Tetzloff v. May, 181 Iowa 1253, 165 NW 328; Rankin v. Rankin, 158 Iowa 488, 139 NW 1079.

Mich.—Power's Est., 92 Mich. 106, 52 NW 298; Freeman v. Washtenaw, 79 Mich. 390, 44 NW 856.

Mo.—Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

N. C.—Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.

Pa.—In re Dorris, 223 Pa. 311, 72 A 623.

[a] **Illustration.**—Where testator directed an allowance out of the income of his estate for household expenses of his family, an allowance by the orphans' court in its discretion will not be reversed, where it was made after depositions taken, and the evidence showed that the household consisted of the same persons as those living with him in his lifetime, that the amount was less than usually spent by him, that the widow was an invalid, and that the allowance was fair under all the circumstances. In re Dorris, 223 Pa. 311, 72 A 623.

[b] **The court's ruling, fixing the preliminary allowance** to be made to a widow until the inventory is returned, will not be disturbed on appeal, in the absence of an abuse of discretion. In re Cowell, 164 Cal. 636, 130 P 209.

[c] **In Vermont** the discretion of the probate court is subject to re-examination on appeal by the county court but cannot be revised by the supreme court. Leach v. Leach, 51 Vt. 440; Frost v. Frost, 40 Vt. 625; Phelps v. Phelps, 16 Vt. 73.

54. Glover v. Glover, 215 Mass. 576, 102 NE 945; Chase v. Webster, 168 Mass. 228, 46 NE 705.

[a] **The decree of a single justice,** granting an allowance from a decedent's estate to the widow to provide for her necessities following the husband's death, should not be overturned unless plainly wrong. Glover v. Glover, 215 Mass. 576, 102 NE 945.

55. Bliss v. Sheldon, 7 Barb. (N. Y.) 152.

56. Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 SE 593.

57. In re Strauch, 95 Minn. 304, 104 NW 535.

58. In re Howard, 128 Mo. A. 482, 106 SW 116 (it was not an objection thereto that the administration of the estate might be indefinitely postponed by successive presentations of her claim and dismissals, since the allowance must be applied for before the personal property of the estate was distributed or sold).

59. In re Wood, 143 Cal. 522, 77 P 481 (if the appeal was taken in appellant's individual capacity, the failure to give the undertaking is sufficient ground for a dismissal while, in her representative capacity, she was not injured by the order so as to be entitled to appeal therefrom).

60. Pavlicek v. Roessler, 222 Ill. 83, 78 NE 11 [rev 121 Ill. A. 219].

61. In re Bell, 153 Cal. 345, 95 P 378.

62. Chambliss v. Bolton, 146 Ga. 734, 92 SE 204; Kahn's Est., 16 Pa. Co. 72.

63. Slack v. Slack, 123 Mass. 443; Allen v. Allen, 117 Mass. 27.

64. Tarbox v. Fisher, 50 Me. 236.

65. Kingman v. Kingman, 31 N. H. 182.

66. Matter of Baird, 126 App. Div. 439, 110 NYS 708.

67. Balmforth's Est., 14 Pa. Dist. 55.

68. Hines' Est., 24 Pa. Co. 504 [foll Homiller's Est., 17 WklyNC (Pa.) 238].

69. Hines' Est., 24 Pa. Co. 504.

70. Simpson's App., 1 Mon. (Pa.) 202.

[§ 867] **M. Effect of Allowance—1. In General.** Property of a decedent, which is directed by statute to be set apart to a widow, vests in her at once by operation of law on the death of her husband.[71] The setting apart of property to her by way of such allowance vests in her or in her and her children a complete title under most statutes[72] and payment or delivery of the allowance or exemption should be made directly to the widow to be held in trust for the maintenance of herself and minor children.[73] Where an order for a family allowance has been made and remains in force, the executor or administrator is bound to pay it,[74] unless, of course, he has not funds or property out of the estate out of which it can be paid.[75] Where a year's support is set apart out of homestead property, the homestead becomes extinguished.[76] Where part of decedent's property is set aside as a year's support of his widow and their minor child, and separate property is set aside for the support of decedent's minor child by a former marriage, the estates in the property so set aside are separate.[77]

[§ 868] **2. Right of Disposal.** The widow has sometimes the right to mortgage or dispose of the property and appropriate the proceeds for the support of herself and children in any manner[78] that does not deprive the minor children of the benefit thereof;[79] and the widow is sometimes relieved, by statute, from accountability to the children for the disposition of the family allowance.[80] It has also been held that, where lands are set apart as a year's support to a widow and her child, if the child becomes of age and removes from the land, the widow may sell the same for her own support,[81] notwithstanding the fact that she has married

71. Brown v. Joiner, 77 Ga. 232, 3 SE 157; Kellogg v. Graves, 5 Ind. 509; Mallory v. Mallory, 92 Ky. 316, 17 SW 737, 13 KyL 579; Singleton v. McQuerry, 8 KyL 782; Sammons v. Higbie, 103 Minn. 448, 115 NW 265 [cit Cyc].

72. Ala.—Headen v. Headen, 171 Ala. 521, 54 S 646; Mitcham v. Moore, 73 Ala. 542; Brooks v. Martin, 43 Ala. 369, 94 AmD 686.

Ariz.—Molina v. Ramirez, 15 Ariz. 249, 138 P 17.

Cal.—McGuire v. Lynch, 126 Cal. 576, 59 P 27.

Ga.—Hendrix v. Causey, 148 Ga. 164, 96 SE 180; Jones v. Wilkes, 146 Ga. 803, 92 SE 517; Stringfellow v. Stringfellow, 112 Ga. 494, 37 SE 767; Miller v. Miller, 105 Ga. 305, 31 SE 186; Doyle v. Martin, 61 Ga. 410.

Ill.—York v. York, 38 Ill. 522; Kellogg v. Holly, 29 Ill. 437.

Ky.—Harris v. Adams, 117 Ky. 407, 78 SW 1492, 25 KyL 156.

Minn.—Benjamin v. Laroche, 39 Minn. 334, 40 NW 156.

Mo.—Cummings v. Cummings, 51 Mo. 261; Bryant v. McCune, 49 Mo. 546.

Okl.—Perryman v. Woodward, 37 Okl. 792, 133 P 244.

Pa.—Runyan's App., 27 Pa. 121; Daggett's Est., 7 Pa. Co. 338; Kunkle's Est., 4 Pa. Co. 234; Rowe's Est., 11 Kulp 36.

Tex.—Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

"As matter of law, when a valid decree of allotment is made, the statute operates automatically upon the title and immediately vests in it fee simple in the widow." Headen v. Headen, 171 Ala. 521, 528, 54 S 646.

[a] **Where the land is set apart to the widow only** the children take no beneficial interest therein. Anderson v. Walker, 114 Ga. 505, 40 SE 705.

[b] **Widow takes complete title.**—Harris v. Adams, 117 Ky. 407, 78 SW 156, 25 KyL 1492.

[c] **Children take undivided one half.**—McGuire v. Lynch, 126 Cal. 576, 59 P 27.

[d] **Money payable to the widow** under an order of the court belongs to her estate, although payment was stayed by an appeal from the order, which was not affirmed until after her death. In re Lux, 114 Cal. 73, 45 P 1023.

[e] **Administrator cannot recover property.**—Where property has been properly set apart as a year's support to the widow and children of a decedent, a suit cannot be maintained by the administrator to recover it for the purposes of administration. Winn v. Lumsford, 130 Ga. 436, 61 SE 9.

[f] **Source of title.**—Where a homestead is set apart absolutely by order of the probate court, the title of the person to whom it is so set apart is in no way derived by will, even though such person was the devisee, but comes solely from the homestead order, and money paid from the funds of the estate by order of the court for the maintenance of the widow and children is on the same basis. In re Kennedy, 157 Cal. 517, 108 P 280, 29 LRANS 428.

[g] **Right of widow to maintain trover.**—Where a portion of a crop owned by a tenant at the time of his death was set apart to his widow as a year's support, she could recover the same in trover from one to whom the landlord, without any authority, had delivered it as payment on a debt which the deceased owed such person, although the tenant owed the landlord one fourth of the crop for rent, and such conversion was made before the year's support was set apart. Neal v. Smith, 123 Ga. 26, 50 SE 922.

[h] **Should the widow die without disposing of** personalty allowed her by statute, such property would go to her heirs through the administrator, as against the claims of general creditors of the husband. Lazonby v. Smithey, 151 Mo. A. 285, 131 SW 708.

[i] **A subsequent order authorizing a sale** by the administrator is void. Molina v. Ramirez, 15 Ariz. 249, 138 P 17.

[j] **Ownership of property other than homestead.**—Where there was an actual homestead, the fact that decedent owned other real property could not prevent the vesting of a fee simple title thereto in the widow, provided the aggregate in amount and value did not exceed the statutory allowance. Headen v. Headen, 171 Ala. 521, 54 S 646.

[k] **The widow has entire control** of the family allowance, and may appropriate it to her own use to the exclusion of the other members of the family. In re Maier, 1 LegGaz (Pa.) 455, 2 LuzLegObs 65.

[l] **The contrary rule sometimes prevails.**—Meyer v. Meyer, 23 Iowa 359, 92 AmD 432; Wilmington v. Sutton, 6 Iowa 44.

73. Lanford v. Lee, 119 Ala. 248, 24 S 578, 72 AmSR 914; Nevin's App., 47 Pa. 230; Henkel's Est., 13 Pa. Super. 337.

74. In re Foreman, (Okl.) 157 P 279, 280 ("The administrator is no person to set himself up to determine whether or not said order was proper, or whether or not he will obey it").

75. Niland v. Niland, 154 Wis. 514, 143 NW 170, AnnCas1915B 1127 (where the allowance to a widow during administration, ordered under a statute authorizing an allowance out of the income, exceeds the net income, the administrator is discharged from payment of the excess regardless of whether the allowance can be modified).

76. Moore v. Moore, 126 Ga. 735, 55 SE 950.

77. Phillips v. Atkinson, 139 Ga. 740, 78 SE 116 (where the child of the widow died, the interest of such child vested in the widow for her support, and the other child could not recover any part thereof).

78. Jones v. Wilkes, 146 Ga. 803, 92 SE 517; Reese v. Reese, 146 Ga. 684, 92 SE 218; Corbin v. Shiver, 131 Ga. 312, 62 SE 186; Sizemore v. Willis, 130 Ga. 666, 61 SE 536; Ragan v. Shiver, 130 Ga. 474, 61 SE 1; Bridges v. Barbree, 127 Ga. 679, 56 SE 1025; Bardwell v. Edwards, 117 Ga. 824, 45 SE 40; Allen v. Lindsey, 113 Ga. 521, 38 SE 975; Stringfellow v. Stringfellow, 112 Ga. 494, 37 SE 767; Whitt v. Ketchum, 84 Ga. 128, 10 SE 503; Cox v. Cody, 75 Ga. 175; Steed v. Cruise, 70 Ga. 168; Cleghorn v. Johnson, 69 Ga. 369; Burgett v. Clarke, 4 KyL 518; Teddlie v. Riser, 121 La. 666, 46 S 688; Sipes v. Mann, 39 Pa. 414.

"Where lands belonging to the estate of a decedent are duly set apart as a year's support to his widow and minor child, while the title to the same vests in such widow and minor, the widow may sell and convey such lands in fee simple for the purpose of deriving from the proceeds a support for herself and the child." Bridges v. Barbree, 127 Ga. 679, 56 SE 1025.

[a] **Illustration.**—A widow may dispose of land included in her allowance to pay a fine in order to obtain her release from imprisonment and to obtain supplies for herself and child. Swain v. Stewart, 98 Ga. 366, 25 SE 831.

[b] **Conceding that the mother holds the fund in usufruct,** she has the legal right as such to make use of it for her own interest, subject to the children's right to demand in money the amount due them at the termination of her usufruct. Teddlie v. Riser, 121 La. 666, 46 S 688.

79. Hill v. Van Duzer, 111 Ga. 867, 36 SE 966; Nanny v. Allen, 77 Tex. 240, 13 SW 989.

[a] **The widow cannot:** (1) Apply the proceeds of such property to the payment of her individual debt. Hill v. Van Duzer, 111 Ga. 867, 36 SE 966. (2) Use the proceeds of the land to extinguish a debt contracted by decedent. Gibbs v. Land, 136 Ga. 261, 71 SE 136. (3) Sell the land and buy other land taking title in herself and her second husband. Vandigrift v. Cox, 72 Ga. 665.

80. Bell v. Bell, 2 Cal. A. 338, 83 P 814.

81. Tate v. Phillips, 144 Ga. 698,

again,[82] and that if the children are of age, but have left the land for the widow's support, a sale and conveyance by the widow divests the title of the children as heirs of the decedent and their claims upon the land as beneficiaries under the allowance.[83] But under other statutes the right of the widow to dispose of the property is denied.[84]

[§ 869] **3. Lien.** An allowance awarded to a widow out of her husband's estate but for which no property has been assigned constitutes a lien to be enforced like other liens,[85] and does not cease to be a lien because the widow, who is also administratrix, has received more than the amount of the award from the rent of the homestead, and in settling up a claim for causing decedent's death.[86]

[§ 870] **N. Increase or Further Allowance.** Allowance for a limited period is permitted under some statutes with a further discretionary allowance during the progress of administration upon the petition of the widow, or children, if she is dead, if the estate is solvent, and the former allowance insufficient.[87] So also a further allowance may sometimes be made where new assets have come to the estate.[88] Such increase or further allowance should be granted in accordance with a just discretion and with due regard to the rights of others who may be interested in the estate;[89] but it has been held to be no ground for denying such further allowance that the widow has abundant means of her own,[90] or that she and the children left the state on the death of decedent and continued to reside elsewhere.[91] After the probate court has overruled an application for a further allowance, unless its action is vacated by appeal or other proceeding, it cannot review and increase the allowance.[92]

Services rendered to the estate by the widow. It has been held that a widow who has drawn her support from the estate of her husband during the year following his death, although it was not formally set apart, and although she rendered valuable services to the estate throughout the same period, is entitled to no further allowance by way of a year's support, but if she would obtain compensation for her services, she must look to his representatives.[93]

Additional allowance to children. It has been held that a judge of probate, after making an allowance to a widow, out of her husband's estate, for herself and the minor children of a previous wife, cannot afterward decree an additional allowance to such children for the reason that the widow abandoned them without their receiving the benefit of any of the funds in her hands;[94] and a fortiori it is improper to make an additional allowance for a child where a substantial family allowance has already been made to the widow and it does not appear that she is not applying the same to the benefit of the child.[95] But in another case where judgment was rendered on an agreed statement of facts, setting aside a second year's support for minors, and objections were made on the ground that one year's support had already been set aside to the minor children and widow, and that during the life of the widow she had been assigned out of the estate a dower, on which she and the minor children lived during the year for which

87 SE 1023; Bridges v. Barbree, 127 Ga. 679, 56 SE 1025.

[a] **Widow may convey directly to person rendering services.**—Tate v. Phillips, 144 Ga. 698, 87 SE 1023.

82. Bridges v. Barbree, 127 Ga. 679, 56 SE 1025.

83. Ragan v. Shiver, 130 Ga. 474, 61 SE 1.

84. Meyer v. Meyer, 23 Iowa 359, 92 AmD 432; Gaskell v. Case, 18 Iowa 147; Schaffner v. Grutzmacher, 6 Iowa 137; Wilmington v. Sutton, 6 Iowa 44; Rands v. Brain, 5 Utah 197, 14 P 129, 5 Utah 272, 15 P 1.

85. Josey v. Gordon, 107 Ga. 108, 32 SE 951; Reilly v. Reilly, (Ill.) 26 NE 604; Scott v. Greathouse, 71 Ind. 581; O'Neill's Est., 23 Pa. Dist. 584; Klein's Est. 14 Pa. Co. 72.

86. Reilly v. Reilly, (Ill.) 26 NE 604.

87. Cal.—In re Lux, 100 Cal. 593, 35 P 341; Matter of Roberts, 67 Cal. 349, 7 P 733; Luther's Est., 67 Cal. 319, 7 P 708.

Ga.—Kennedy v. Paulk, 133 Ga. 401, 65 SE 852; Edenfield v. Edenfield, 131 Ga. 571, 62 SE 980; Birt v. Brown, 106 Ga. 23, 31 SE 755; Woodbridge v. Woodbridge, 70 Ga. 733.

Iowa.—In re Bennison, 173 Iowa 368, 155 NW 835.

Me.—Davis v. Gower, 85 Me. 167, 26 A 1048; Gilman v. Gilman, 53 Me. 184.

Mass.—Hale v. Hale, 1 Gray 518.

Mich.—Pulling v. Durfee, 88 Mich. 387, 50 NW 319.

Nebr.—James v. O'Neill, 70 Nebr. 132, 97 NW 22.

N. H.—Cummings v. Allen, 34 N. H. 194.

N. C.—Mann v. Mann, 173 N. C. 20, 91 SE 355.

N. D.—Tyvand v. McDonnell, 37 N. D. 251, 164 NW 1.

Oh.—Moore v. Moore, 46 Oh. St. 89, 18 NE 489; Sherman v. Sherman, 21 Oh. St. 631.

Wash.—Griesemer v. Boyer, 13 Wash. 171, 43 P 17.

[a] **Interested person.**—One having a valid claim against the widow's estate for taking care of her in her last sickness is an "interested person" who may make such petition. Sherman v. Sherman, 21 Oh. St. 631.

[b] **Delay in distribution.**—Where a will was propounded by an executor, and a caveat interposed by heirs at law, not including the widow, and a year's support was set apart to her, and by reason of the appeal the estate was kept together for longer than twelve months, the widow was entitled to have a second year's support assigned to her, although there was no provision in the will directing the estate to be held together for more than twelve months. Edenfield v. Edenfield, 131 Ga. 571, 62 SE 980.

88. Paine v. Forsaith, 84 Me. 66, 24 A 590; Schimpf's Est., 24 Pa. Dist. 412.

89. Ga.—Birt v. Brown, 106 Ga. 23, 31 SE 755.

Me.—Davis v. Gower, 85 Me. 167, 26 A 1048.

Mass.—Porter v. Porter, 165 Mass. 157, 42 NE 565; Hale v. Hale, 1 Gray 518.

Mich.—Pulling v. Durfee, 88 Mich. 387, 50 NW 319.

N. H.—Cummings v. Allen, 34 N. H. 194.

N. D.—Tyvand v. McDonnell, 37 N. D. 251, 164 NW 1.

Oh.—Moore v. Moore, 46 Oh. St. 89, 18 NE 489.

Pa.—Davis' App., 34 Pa. 256.

Tex.—Marks v. Hill, 46 Tex. 345; Little v. Birdwell, 27 Tex. 688.

Wash.—Griesemer v. Boyer, 13 Wash. 171, 43 P 17.

[a] **Where the debts exceeded the whole estate,** which was about six thousand four hundred dollars, and the widow's dower was worth six hundred and forty dollars, and the court had allowed her six hundred dollars, a further allowance was not reasonable. Cummings v. Allen, 34 N. H. 194.

[b] **When the personal estate is exhausted.**—After the widow has received the amount of the first allowance, and all the personal estate has been exhausted in the payment of debts and charges of administration, although within one year from the appointment of the administrator, no further allowance can be made to the widow, and no appeal can be taken by her, or allowed on her petition, from the decree making the first allowance. Hale v. Hale, 1 Gray (Mass.) 518.

[c] **When denial proper.**—Where a year's support, on application of the widow, has been set apart to her from the estate of her deceased husband by proceedings in the court of ordinary, to which no exceptions were filed, and from which no appeal was taken, her petition to the ordinary to vacate such judgment with the view of having set aside to her the entire estate, which she alleges is worth less than five hundred dollars, is demurrable, when the only ground for the relief sought is a mistake of the appraisers, made before the application for a year's support was filed, by including in their inventory property which did not belong to the estate, and which, if eliminated from their return, would have reduced their estimate of the value of the estate to less than five hundred dollars. Especially is this true when it does not appear from the petition that the facts therein stated were not known to the petitioner, and could not have been ascertained by the exercise of ordinary diligence, before the final judgment sought to be set aside was rendered. Birt v. Brown, 106 Ga. 23, 31 SE 755.

90. In re Lux, 100 Cal. 593, 35 P 341; Griesemer v. Boyer, 13 Wash. 171, 43 P 17.

91. Griesemer v. Boyer, 13 Wash. 171, 43 P 17.

92. Moore v. Moore, 46 Oh. St. 89, 18 NE 489.

93. Blassingame v. Rose, 34 Ga. 418.

94. Davis v. Gower, 85 Me. 167, 26 A 1048.

95. In re McSwain, 176 Cal. 280, 168 P 117.

an application for support was made, but it did not appear that a continuance of the administration for a longer time than one year was attributable to the minors, it was held that their right to support was personal to them, and existed as a matter of law, and the enjoyment of the gratuity afforded by their mother of living with her was no reason for depriving them of the same.[96]

[§ 871] **O. Decrease or Revocation of Allowance.** Upon an application within a reasonable time an order of the court may be made modifying or revoking a former order of allowance,[97] but such an order cannot be made retroactive in its effect or require the widow to account for any portion of what she may already have received or expended.[98] It has been held that no appeal lies from an order discontinuing an allowance to a widow.[99] Where, upon showing a change in the condition of the estate or the circumstances of the widow, a reasonable reduction or stoppage appears justified, all further property will fall into the general personal estate as assets.[1] An executor or administrator is charged with knowledge of the power of the court to modify or set aside orders for allowances and pays out money without or on such orders at his own risk.[2] An order discontinuing a family allowance will be presumed, on collateral attack, to have been made on proper notice.[3]

[§ 872] **P. Rights of Creditors[4]—1. In General.** An allowance by order of the court for the widow and children is not subject to the demands of decedent's creditors, either in the widow's own hands[5] or in the hands of her assignee.[6] But a creditor may have the judgment or order making the allowance vacated for good cause shown, as for fraud or mistake.[7] Where a family allowance was granted from the proceeds of an estate before the return of the inventory, and the executors continued to make payments under such order after the return of the inventory, and the court impliedly recognized its continuance by subsequently modifying it and thereafter granting ex parte orders authorizing the custodian of the funds of the estate to pay certain sums on account thereof, under the mistaken belief, which was shared by creditors of the estate, that it did not become ineffective on the return of such inventory, these facts did not prevent the creditors from contesting such payments on an application for the allowance of the accounts of the administratrix.[8] Where the widow selects

96. Kennedy v. Paulk, 133 Ga. 401, 65 SE 852.

97. Cal.—In re Boselly, 176 P 45; In re Nelson, 167 Cal. 321, 139 P 692; Cahill v. San Francisco Super. Ct., 145 Cal. 42, 78 P 467; In re Montgomery, 60 Cal. 648; Overton v. Overton, 13 Cal. A. 117, 108 P 1021; Bell v. Bell, 2 Cal. A. 338, 83 P 814.

Ga.—Lester v. Reynolds, 144 Ga. 143, 86 SE 321.

Iowa.—Busby v. Busby, 120 Iowa 536, 95 NW 191.

Mass.—Dale v. Hanover Nat. Bank, 155 Mass. 141, 29 NE 371.

Mich.—McDonald v. Hollywood, 130 Mich. 691, 90 NW 666; Marskey v. Lawrence, 121 Mich. 577, 80 NW 571.

Nebr.—James v. O'Neill, 70 Nebr. 132, 97 NW 22.

Okl.—In re Foreman, 157 P 279, 280 [cit Cyc].

R. I.—Rhode Island Hospital Trust Co. v. Hopkins, 38 R. I. 59, 94 A 724.

Wis.—Ford v. Ford, 80 Wis. 565, 50 NW 409.

[a] **Fraud** may be a sufficient ground for setting aside an allowance. Ellis v. Hogan, 147 Ga. 609, 95 SE 4.

[b] **Where the court retained its power over the order** by the provision, "until the further order of this court," it was its duty and within its power, on a proper showing, to reduce or discontinue the allowance. Matter of Overton, 13 Cal. A. 117, 108 P 1021.

[c] **Such order is discretionary** where there is no objection filed within the time which is allowed therefor. Foster v. Turnbull, 126 Ga. 654, 55 SE 925.

[d] **It was not an abuse of discretion to reduce** an allowance to a widow from five hundred dollars to fifty dollars monthly after partial distribution had reduced the estate from five hundred and eighty-seven thousand dollars to seventy-six thousand dollars, since the allowance is to be based upon a consideration of the condition of the estate, at the time it is made. In re Nelson, 167 Cal. 321, 139 P 692.

[e] **Change of conditions.**—Upon its being shown that the condition of the estate or of the family had changed since an order was made allowing the widow a certain sum, at certain intervals, for her support pending the settlement of the estate, the county judge might make an order diminishing such allowance for the future, at his discretion. Baker v. Baker, 51 Wis. 538, 8 NW 289.

[f] **Allowance pending administration.**—An order allowing a widow a certain sum monthly, pending administration, is subject to modification. James v. O'Neill, 70 Nebr. 132, 97 NW 22.

[g] **Suspension without petition and notice.**—Where a probate judge had made a family allowance to one as the widow of the deceased, which has become final, he had no power to suspend the allowance without a petition filed or notice given. In re Nolan, 145 Cal. 559, 79 P 428.

[h] **Delay precluding relief.**—(1) Where one of the executors of a will learned of an order granting testator's widow an allowance for a year's support, a few days after the order was entered, an application by him, made two years later, to set aside the order, cannot be maintained, because of his delay, even though the widow was guilty of fraud in making the application. Busby v. Busby, 120 Iowa 536, 95 NW 191. (2) Where the county court approved an allowance to the widow, and the residuary legatee, having been brought into court for probate of the will, did not file a petition for reduction of the allowance until fifteen months after the award was made, the petition was properly dismissed for failure to ask the aid of the court within a reasonable time. Hodson v. Hodson, 277 Ill. 137, 115 NE 159.

[i] **Where all the facts were before the court** when the order was made, it is final, and, no appeal being taken, cannot thereafter be changed in amount. Stevens' Est., 83 Cal. 322, 23 P 379, 17 AmSR 252.

98. Cal.—In re Nelson, 167 Cal. 321, 139 P 692.

Iowa.—Harshman v. Slonaker, 53 Iowa 467, 5 NW 685.

Mass.—Pettee v. Wilmarth, 5 Allen 144.

Mich.—Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.

Mo.—In re Fritch, 179 Mo. A. 434, 164 SW 659.

Wis.—Ford v. Ford, 80 Wis. 565, 50 NW 409; Baker v. Baker, 51 Wis. 538, 8 NW 289.

[a] **Funds paid out of a solvent estate** by order of court to the widow and minor children for their support during its settlement need not be repaid because the estate has become insolvent. Frey v. Eisenhardt, 116 Mich. 160, 74 NW 501.

[b] **Allowance in lieu of year's provision.**—The action of the probate court in allowing a widow a sum of money in lieu of a year's provision is a final judgment, and cannot be modified by the probate court at a subsequent term, no appeal having been taken. In re Fritch, 179 Mo. A. 434, 164 SW 659 (the statute authorizing probate courts to vacate an order allowing a demand against an estate within four months after the allowance thereof is inapplicable to such allowance).

99. Matter of Overton, 13 Cal. A. 117, 108 P 1021.

1. Dessaint v. Foster, 72 Iowa 639, 34 NW 454; Paup v. Sylvester, 22 Iowa 371; Gaskell v. Case, 18 Iowa 147; Baker v. Baker, 51 Wis. 538, 8 NW 289.

2. In re Lux, 100 Cal. 606, 35 P 345; Clemes v. Fox, 25 Colo. 39, 53 P 225.

[a] **Interest on improper payments.**—Where an executor without an order of court pays the widow a family allowance in excess of what the court afterward allows, he is liable for interest on the excess at the legal rate compounded annually. In re Lux, 100 Cal. 606, 35 P 345.

3. In re Chapman, 158 Cal. 740, 112 P 302.

4. Right to appeal from judgment or order making allowance see supra § 865.

Right to object to allowance by appraisers see supra § 839.

5. Ala.—Wiggins v. Mertins, 111 Ala. 164, 20 S 356.

Ga.—Hardy v. Hardy, 143 Ga. 703, 86 SE 780; Marshall v. Charland, 106 Ga. 42, 31 SE 791.

Pa.—McIntyre's Est., 44 Pa. Co. 111.

Tex.—Leaverton v. Leaverton, 40 Tex. 218.

Vt.—Boyden v. Ward, 38 Vt. 628.

[a] **A minor child's attaining majority** before the exemptions are selected or set apart does not entitle a creditor of the estate to that child's proportionate share of the exemption, but the entire amount will go to th other children. Wiggins v. Mertins, 111 Ala. 164, 20 S 356.

6. Schmidt v. Wieland, 35 Cal. 343.

7. Central Nat. Bank v. Fitzgerald, 94 Fed. 16; Clemes v. Fox, 25 Colo. 39, 53 P 225.

8. In re Bell, 142 Cal. 97, 75 P 679.

and claims or disposes of property to which she is not entitled as against the decedent's creditors, their rights will be judicially protected,[9] and if a judgment setting aside a year's support to the widow is void as far as the real estate is concerned because it is insufficiently described, the judgment creditors of the estate do not need the aid of a court of equity to have such property sold to pay the debts.[10]

Creditors of widow. Property set apart for a year's support of the widow and her minor children jointly is not subject to payment of a judgment for a debt contracted by the widow individually, in consideration of which minors had no interest.[11]

[§ 873] **2. Limitations and Laches.** Creditors will be denied relief, even where the allowances are extravagant or otherwise improper, where they are guilty of laches in applying for such relief,[12] as where they fail to object thereto until after final settlement of the executor's accounts including such payments,[13] or where they do not appeal from the order granting the allowance or ask that it be set aside.[14]

A statutory limitation of the time within which creditors may proceed to set aside a judgment setting apart a year's support is sometimes found.[15]

[§ 874] **Q. Rights of Heirs, Distributees, or Legatees.** The allowance is good as against the distributees, heirs, or legatees of decedent, unless strong reasons are shown for setting it aside;[16] and where on the hearing of a petition for an order of sale to enforce a decree charging a widow's exemption on land, it appears that the prior proceedings are regular on their face, an heir may not attack the decree and demand a reinvestigation of the domicile of decedent at the time of his death, since such a decree is res judicata.[17] Neither is a widow to whom a family allowance has been paid accountable to the children after their majority for a share of what was not expended for their support.[18] Where a widow abandoned personal property to her children without claiming her exemption, the children could bring an action for its recovery without joining the widow as a party plaintiff.[19]

X. ALLOWANCE AND PAYMENT OF CLAIMS

[§ 875] **A. Liabilities of Estate—1. Obligations of Decedent in General.** So far as assets may have reached his hands in due course every executor or administrator is bound to administer the estate committed to him according to law, by paying the debts, claims, and charges upon it,[20] in their legal order of preference,[21] before paying legacies or making any distribution to the heirs.[22] This duty is enjoined upon him by law, by his oath and bond, and by a sound public policy, which treats each decedent's estate, except for the widow's or children's allowance,[23] as a fund, subject to all lawful debts of and demands against him, and to all reasonable charges consequent upon his death. Obligations incurred by decedent during his lifetime may in general be presented in the modes pointed out by local statute, against his executor or administrator and be duly enforced against the estate;[24] but in order for a claim to be allowed, it must appear that there is an actual indebtedness or a just claim for compensation [25] against decedent or his estate,[26] and it is only the legal, and not the

9. Eell v. Hall, 76 Ala. 546.

10. White Sewing Mach. Co. v. Coble, 137 Ga. 38, 72 SE 416.

11. Caldwell v. Zimmerman, 20 Ga. A. 818, 93 SE 559.

12. Central Nat. Bank v. Fitzgerald, 94 Fed. 16; Stewart v. Jones, 139 Ga. 68, 76 SE 574; Pelham v. Smith, 137 Ga. 39, 72 SE 417; Tetzloff v. May, 181 Iowa 1253, 165 NW 328.

[a] **Five years' delay will estop** creditors to attack the allowance. Tetzloff v. May, 181 Iowa 1253, 165 NW 328.

13. In re Bell, 142 Cal. 97, 75 P 679; Giebe's Est., 35 Pa. Co. 463.

14. Thompson v. Staacke, 131 Cal. 1, 63 P 81, 668; In re Fernandez, 119 Cal. 579, 51 P 851; Rountree v. Montague, 30 Cal. A. 170, 157 P 623.

15. White Sewing Mach. Co. v. Coble, 137 Ga. 38, 72 SE 416 (proceeding must be commenced within three years after date of judgment).

16. Ga.—Reese v. Reese, 146 Ga. 684, 92 SE 218; Tate v. Phillips, 144 Ga. 698, 87 SE 1023; Miller v. Defoor, 50 Ga. 566.

Mich.—In re Miner, 166 NW 882.

Miss.—Grafton v. Smith, 66 Miss. 408, 6 S 209.

Pa.—Greenawalt's Est., 16 Pa. Super. 263; Mansfield's Est., 15 Pa. Dist. 904.

Tex. — Stonebreaker v. Friar, 70 Tex. 202, 7 SW 799.

17. Greenwalt's Est., 16 Pa. Super. 263.

18. Bell v. Bell, 2 Cal. A. 338, 83 P 814.

19. Snead v. Scott, 182 Ala. 97, 62 S 36.

20. Ala.—Daniel v. Baldwin, 148 Ala. 292, 40 S 421.

Ill.—Matter of Bell, 210 Ill. A. 350.

Iowa.—In re Leigh, 173 NW 143.

N. Y.—Matter of Burr, 48 Misc. 56, 96 NYS 225 [rev on other grounds 118 App. Div. 482, 104 NYS 29].

Tex.—Gibson v. Oppenheimer, (Civ. A.) 154 SW 694.

See also cases infra this section and §§ 876–1265.

[a] **The debts constitute a lien** upon all the property of the estate, subject to the payment of debts. Gibson v. Oppenheimer, (Tex. Civ. A.) 154 SW 694.

21. Classification and priorities of debts see infra §§ 1152–1192.

22. Priority of debts over legacies and distributive shares see infra § 1273.

23. Priority of allowance to surviving widow or children over debts of decedent see supra §§ 804–808.

24. Ala.—Dean v. Portis, 11 Ala. 104.

Colo.—Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223.

Conn.—Kingsbury v. Tolland, 2 Root 355.

Ga.—McIntosh v. Humbleton, 35 Ga. 94, 89 AmD 276.

Ill.—Kinder v. King, 180 Ill. A. 62.

Iowa.—Rule v. Carey, 178 Iowa 184, 159 NW 699.

Ky.—Taylor v. Jefferson, 167 Ky. 454, 180 SW 801.

La.—Union Bank v. McDonogh, 7 La. Ann. 231.

Me.—Hamlin v. Mansfield, 88 Me. 131, 33 A 788.

Mich.—Henze v. Rogatzky, 199 Mich. 558, 165 NW 629.

Mo.—Fisher v. Bagnell, 194 Mo. A. 581, 186 SW 1097; Robbins v. Robbins, 175 Mo. A. 609, 158 SW 400.

N. Y.—Riblet v. Wallis, 1 Daly 360.

N. D.—Brudevold v. Waldorf, 37 N. D. 516, 164 NW 154.

Pa.—McNair's App., 4 Rawle 148.

Eng.—Hervey v. Audland, 14 Sim. 531, 37 EngCh 531, 60 Reprint 463; Lee v. Muggeridge, 5 Taunt. 36, 1 ECL 32, 128 Reprint 599.

Ont.—Re Williamson, 39 Ont. L. 413, 12 OntWN 154.

[a] **An order on trustees** who hold a fund for decedent, although inoperative as such, may be evidence of indebtedness as against his individual estate on which the allowance of a claim may be based. Newton's App., 5 WklyNC (Pa.) 521.

25. Conn.—Merwin's App., 72 Conn. 167, 43 A 1055.

Ga.—McNulty v. Pruden, 62 Ga. 135.

Ind.—Fuller v. Fuller, 21 Ind. A. 42, 51 NE 373.

Iowa.—McCormick v. Hanks, 105 Iowa 639, 75 NW 494.

Ky.—Barnett v. Adams, 82 SW 406, 26 KyL 622; Hale v. Howard, 38 SW 1085, 18 KyL 1041.

Mass.—Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

N. Y.—Genet v. Willock, 93 App. Div. 588, 87 NYS 938; Matter of Warner, 53 App. Div. 565, 65 NYS 1022.

Or.—Muldrick v. Galbraith, 31 Or. 86, 49 P 886; Weill v. Clark, 9 Or. 387.

Pa.—Kline's Est., 9 Pa. Dist. 386; Gilman's Est., 9 Pa. Co. 111.

Vt.—Potter v. Potter, 64 Vt. 298, 23 A 856.

[a] **Liquidated demands.**—(1) A claim acknowledged by the debtor to be correct, and so entered on his books, which were referred to on the day preceding his death as correctly stating the amount to his expected administrator, has been held to be a "liquidated demand," within the statute, upon the creditor's limiting his claim against the estate to that amount. McNulty v. Pruden, 62 Ga. 135. (2) Under the statute making one half the fee of an attorney a retainer and payable immediately, such half is a "liquidated demand" against the estate of a client who died before the services were rendered under a parol agreement of counsel to defend certain indictments at a gross sum. McNulty v. Pruden, 62 Ga. 135.

26. Ala.—Harkins v. Hughes, 60 Ala. 316.

Ark.—Bender v. Wooten, 35 Ark. 31.

Colo.—Hulbert v. Walley, 3 Colo. A. 250, 32 P 985.

merely moral, obligations of decedent which are thus upheld.[27]

Among general obligations of decedent recoverable against the estate are the expenses of his last illness;[28] claims arising out of his contracts,[29] as for

Ga.—Carter v. Tippins, 113 Ga. 636, 38 SE 946.
Kan.—Hayner v. Trott, 4 Kan. A. 679, 46 P 37.
Ky.—Harding v. Harding, 132 Ky. 133, 116 SW 305.
La.—Normand v. Barbin, 18 La. Ann. 611.
Md.—Flater v. Weaver, 108 Md. 668, 71 A 309.
Mass.—Johnson v. Kimball, 172 Mass. 398, 52 NE 386.
Miss.—Smith v. Jeffrey, 16 S 377.
Mo.—Wernecke v. Kenyon, 66 Mo. 275.
N. Y.—Metropolitan Trust Co. v. Truax, 154 App. Div. 442, 139 NYS 181 [aff 210 N. Y. 528 mem, 103 NE 1127 mem]; Matter of Warner, 53 App. Div. 565, 65 NYS 1022; Strevell v. Jones, 92 NYS 719 [aff 106 App. Div. 334, 94 NYS 627].
N. C.—Baker v. Dawson, 131 N. C. 227, 42 SE 588; Lindsay v. Darden, 124 N. C. 307, 32 SE 678.
Or.—Weill v. Clark, 9 Or. 387.
Pa.—McKown's Est., 198 Pa. 102, 47 A 1113; Kline's Est., 9 Pa. Dist. 386; Sutch's Est., 31 PittsbLegJNS 123 [rev on other grounds 201 Pa. 305, 50 A 943]; Scott's Est., 14 York LegRec 77.
Vt.—Potter v. Potter, 64 Vt. 298, 23 A 856.
Eng.—Ward v. Audland, 8 Beav. 201, 50 Reprint 79.

[a] **Illustrations.**—(1) Where a debt due one merchant was included in a mortgage taken by another from a joint customer, and the mortgage was not paid before the death of the mortgagee, the surviving merchant's debt cannot be proved against decedent's estate. Bender v. Wooten, 35 Ark. 31. (2) An unliquidated claim for breach of a covenant of warranty committed by an heir of the covenantor cannot be filed and allowed as a claim against the estate of the ancestor. Pastorious v. Davis, 9 Colo. A. 426, 48 P 833. (3) In order to recover against the estate of a decedent for funeral expenses of his wife or for her care and nursing, it must be shown that they were incurred on the credit of decedent, or with the intent to collect them from his estate, or that he promised to pay them. Johnson v. Kimball, 172 Mass. 398, 52 NE 386. (4) Where a wife placed money and property in the control of her husband, and he invested them, together with a greater amount of his own funds and conveyed to her the greater proportion of the property he procured, his estate after his death is not liable for the amount she placed in his hands, and hence she held no proper claim against his executors for the amount, although the investment was a failure resulting in a loss of the fund. Matter of Watson, 115 App. Div. 310, 100 NYS 993 [aff 187 N. Y. 541 mem, 80 NE 1122 mem]. (5) Sureties of an administrator who have been compelled to pay a debt against the estate, and have obtained against the administrator a judgment for the amount of such debt and the costs of the suit, are not entitled to have such judgment allowed by the probate court as a claim against the estate. Wernecke v. Kenyon, 66 Mo. 275. (6) Where the husband of testatrix, while a life tenant of her estate, used no part thereof for his support, an agreement between him and claimant for his care and support creates no legal liability against the estate of testatrix. Matter of Alden, 75 Misc. 436, 135 NYS 511. (7) Where a note indorsed by a decedent for a son, one of his executors, matures after decedent's death, and is not paid nor protested, and a renewal note made by the son indorsed by another son, also an executor, the son who indorses the second note is not entitled, after he has been compelled to pay the note, to recoup himself from his father's estate. Hildebrand's Est., 42 Pa. Super. 99. (8) An executor who, under a power in the will of his testator, enters into a contract to lease the real estate for a term of years, and dies without having executed the lease or given possession of the premises, does not render his own estate liable for the breach of such contract, and no action therefor can be maintained against his representatives. Hauck v. Stauffer, 31 Pa. 235.

[b] **Debts contracted by the widow or heirs** of decedent are not properly and immediately debts of the estate. Harkins v. Hughes, 60 Ala. 316; Hulbert v. Walley, 3 Colo. A. 250, 32 P 985; Milton v. McCloskey, 12 Ky. Op. 388; Normand v. Barbin, 18 La. Ann. 611; Potter v. Potter, 64 Vt. 298, 23 A 856.

[c] **The occupancy of a dwelling house by a widow** after the death of her husband does not render his estate liable for the rent of such house. Carter v. Tippins, 113 Ga. 636, 38 SE 946.

[d] **Antenuptial debts of a wife,** incurred without decedent's knowledge or express promise to pay, cannot be charged against his estate. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[e] **Costs of lunacy proceedings.**—Where decedent died during the pendency of lunacy proceedings against her, her estate is not liable for the costs of such proceedings or for counsel fees of an attorney acting adversely to her. In re Englert, 32 PittsbLegJNS (Pa.) 16.

[f] **Unperfected gifts** create no liability against the estate of the donor. Weale v. Ollive, 17 Beav. 252, 51 Reprint 1030; Ward v. Audland, 8 Beav. 201, 50 Reprint 79; Callaghan v. Callaghan, 8 Cl. & F. 374, 8 Reprint 145; Cotten v. Missing, 1 Madd. 176, 56 Reprint 66; Dillon v. Coppin, 4 Myl. & C. 647, 18 EngCh 647, 41 Reprint 249; Searle v. Law, 15 Sim. 95, 38 EngCh 95, 60 Reprint 553.

27. Conn.—Merwin's App., 72 Conn. 167, 43 A 1055.
Ky.—Lucking v. Gegg, 12 Bush 298.
Mass.—Stone v. Gerrish, 1 Allen 175.
Mo.—Greenabaum v. Elliott, 60 Mo. 25; Wheeler v. Ball, 26 Mo. A. 443.
N. Y.—Matter of Hamilton, 34 Misc. 607, 70 NYS 426 [rev on other grounds 70 App. Div. 73, 75 NYS 66 (aff 172 N. Y. 652 mem, 65 NE 1117 mem)]; Franklin v. Low, 1 Johns. 396.
Pa.—Phillips' App., 34 Pa. 489; In re Dettermaier, 13 Pa. Super. 170; Lippincott's Est., 31 PittsbLegJNS 372; Sutch's Est., 31 PittsbLegJNS 123 [rev on other grounds 201 Pa. 305, 50 A 943].
Eng.—Smith v. White, L. R. 1 Eq. 626; Gough v. Findon, 7 Exch. 48, 155 Reprint 850; Beyer v. Adams, 3 Jur. N. S. 709; Grath v. Earnshaw, 3 Y. & C. Exch. 584, 160 Reprint 834. See also Hatch v. Searles, 24 L. J. Ch. 22 [aff 2 Smale & G. 147, 65 Reprint 342].
Ont.—Francis v. Allan, 12 OntWN 101.

[a] **Illustration.**—The mere fact that decedent conceived the idea that he ought to return to his deceased wife's people the amount received by him on his marriage, and his statements to that effect, are insufficient on which to base an action against his estate to recover such amount. Fuqua v. Hagan, 107 SW 735, 736, 32 KyL 1040 ("The evidence does not show a legal obligation on his part to pay it. It is probable that he intended the money to be paid and would have paid it if he had lived longer, but what he might do voluntarily is one thing, and what the court can compel an executor to do is a different thing. The executor is not warranted in paying anything but legal obligations").

28. McNeely v. McNeely, 50 La. Ann. 823, 24 S 338; Cunningham v. Lakin, 50 Wash. 394, 97 P 447.

[a] **Claim based on statute.**—Under a statute giving to expenses of the last sickness a preference over the ordinary debts of decedent, a physician performing a surgical operation on a person who was unconscious as the result of a physical injury, and rendering other professional services to such person, all during his last illness, is entitled to recover the reasonable value of the services not by reason of any contract, express or implied, but by virtue of the statute. Cunningham v. Lakin, 50 Wash. 394, 97 P 447.

29. Ark.—Massey v. Doke, 123 Ark. 211, 185 SW 271.
Cal.—Thompson v. Oreña, 134 Cal. 26, 66 P 24; Norton v. Norton, (A.) 183 P 214.
Colo.—Dawley v. Dawley, 60 Colo. 73, 152 P 1171.
Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Caldwell v. Guyer, 89 Ill. A. 110 [rev on other grounds 189 Ill. 581, 60 NE 50].
Ind.—Bond v. Orndorf, 77 Ind. 583.
Md.—Steele v. Steele, 75 Md. 477, 23 A 959.
Mass.—Browne v. McDonald, 129 Mass. 66.
Minn.—Hayford v. Dougherty, 174 NW 442.
Mo.—Wabash R. Co. v. Ordelheide, 88 Mo. A. 589 [aff 172 Mo. 436].
Nebr.—Gillett v. Sweeney, 97 NW 795; In re Devries, 97 NW 590.
N. Y.—U. S. Title Guaranty, etc., Co. v. Marks, 116 App. Div. 341, 101 NYS 483; Clift v. Mercer, 79 App. Div. 369, 79 NYS 622; Ritchie v. Bennett, 35 App. Div. 68, 54 NYS 379; Hegeman v. Moon, 60 Hun 412, 15 NYS 596 [aff 131 N. Y. 462, 30 NE 487].
N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592; Baker v. Dawson, 131 N. C. 227, 42 SE 588; Calloway v. Angel, 127 N. C. 414, 37 SE 454.
Or.—Bull v. Payne, 47 Or. 580, 84 P 697.
Pa.—Crowley's Est., 7 Pa. Dist. 322; Brubaker's Est., 17 LancLRev 390; Breeswine's Est., 11 YorkLegRec 141.
S. C.—Horne v. McRae, 53 S. C. 51, 30 SE 701.
Tenn.—Cate v. Cate, (Ch. A.) 43 SW 365.
Vt.—Brown v. Dunn, 75 Vt. 264, 55 A 364; State Univ. v. Baxter, 43 Vt. 645.
W. Va.—Hurxthal v. St. Lawrence Boom, etc., Co., 53 W. Va. 87, 44 SE 520, 97 AmSR 954.
Eng.—Batthyany v. Walford, 36 Ch. D. 269; Skidmore v. Bradford, L. R. 8 Eq. 134; Bradbury v. Morgan, 1 H. & C. 249, 158 Reprint 877; Wheatley v. Lane, 1 Saund. 216, 85 Reprint 228; Sollers v. Lawrence, Willes 413, 125 Reprint 1243.

[a] **Illustration.**—An instrument by which decedent promises to pay to the order of "R. or family" a certain amount, although it may not be good as a promissory note because of the payee being in the alternative, is an enforceable claim of R against decedent's estate as a special contract for a sufficient consideration. Robbins v. Robbins, 175 Mo. A. 609, 158 SW 400.

[b] **Where express words of limitation to the contrary are not found** the presumption is that the promisor

instance his contract for board and lodging,[30] to support another person,[31] to pay an annuity,[32] to pay for services rendered to a relative,[33] or to contribute money for the building of a church;[34] claims arising from decedent's breach of contract[35] or the failure of the consideration for a contract;[36] claims arising out of the relation of husband and wife[37] or the severance of such relation,[38] a judicial sale which has been set aside,[39] the receipt by decedent of money belonging to another,[40] the receipt of usury,[41] the payment of money for the benefit of decedent,[42] the liability of a life tenant to the remainderman,[43] the failure of a life tenant to pay taxes against the land,[44] the personal liability of a director[45] or stockholder[46] in a corporation, the execution of

intends to bind his personal representatives; and hence, where a testator employed counsel to defend his brother in a certain action from beginning to end and to make the best defense possible, no restriction being placed on the counsel, the contract survived the testator and was enforceable against his executors. Barrett v. Towne, 196 Mass. 487, 82 NE 698, 13 LRANS 643.

[c] **Support of child.**—A contract with the mother for the support of the promisor's illegitimate child is binding on his executors. Stumpf's App., 116 Pa. 33, 8 A 866.

[d] **Subsequent contract not affecting right of recovery on original contract.**—Plaintiff conveyed a mining claim to decedent to sell and to pay one thousand five hundred dollars on the sale being made. Decedent made the sale and failed to pay plaintiff. Subsequently plaintiff agreed to accept three hundred dollars and a farm on decedent clearing the title thereto. Before perfecting the title decedent died, and plaintiff filed a claim against the estate on the original agreement, and the issue was limited to the purchase price of the claim at the time it was conveyed. It was held that his right of recovery was not affected by the subsequent agreement. Bull v. Payne, 47 Or. 580, 84 P 697.

[e] **Contract of agency.**—Where a decedent employed an agent to negotiate the purchase of mining property of a corporation, and before the agent had completed the purchase, the agency was terminated, but before its termination, the agent had, pursuant to the agreement, bought a great number of shares of the corporate stock which caused him financial loss, the agent had a provable claim for the loss sustained, although the agency was terminated. Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223.

[f] **The executor of an unauthorized agent** is liable on the implied contract of the agent as to his authority. Collen v. Wright, 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259 [aff 8 E. & B. 647, 92 ECL 647, 120 Reprint 241].

[g] **Evidence not sufficiently definite.**—Where, in a suit for services and expenditures made in caring for an infant at the request of defendant's intestate, it appeared that a large part of plaintiff's claim consisted of moneys expended, of which she had kept no account, evidence that, considering the care bestowed on the infant, the expenditures for food, clothing, etc., plaintiff regarded the reasonable value of her services and expenses at from nine dollars to ten dollars a week, was not sufficiently definite to entitle plaintiff to recover under a contract by intestate to pay, not a definite sum, but what was necessary for the support of the child. Blumert v. Hoes, 127 App. Div. 547, 111 NYS 823.

Performance of decedent's obligation by personal representative see supra § 472.

30. Laird v. Laird, 127 Mich. 24, 86 NW 436; Nine's Est., 2 Woodw. (Pa.) 403.

[a] **Recovery limited to agreed price.**—Laird v. Laird, 127 Mich. 24, 86 NW 436.

31. Calkins v. Calkins, 220 Ill. 111, 77 NE 102; Norris v. Archibald, 29 PittsbLegJNS (Pa.) 289.

[a] **Where the grantee in a deed agrees to support the grantors** as part of the consideration, and dies while the grantors are yet living, they may make such damages as they have sustained the basis of a claim against the grantee's estate. Calkins v. Calkins, 220 Ill. 111, 77 NE 102.

32. Cox v. Maxwell, 151 Mass. 336, 24 NE 50.

33. Moore v. Smith, 121 Ga. 479, 49 SE 601 (where a father employs another to care for his invalid son until the latter's death, promising to give for the services a portion of the father's estate, and the father dies before the son, the person employed has a claim on quantum meruit for the services performed against the father's estate).

34. Re Mountgarret, 29 T. L. R. 325; Anderson v. Kilborn, 22 Grant Ch. (U. C.) 385.

[a] **Time of entering into contract on faith of promise.**—A testator promised to defray the cost of certain alterations in a chapel in which he was interested, provided the total expense did not exceed a certain amount. Estimates were obtained and submitted to the testator, and thereafter the provost of the chapel entered into a formal contract for the work. Where the testator died after some of the work had been executed, but before a contract for the remainder had been entered into, the testator's estate was liable for the cost of so much only of the work in respect of which a contract had been entered into before the testator's death. Re Mountgarret, 29 T. L. R. 325.

35. Buell v. Adams, 157 Mich. 248, 121 NW 752; Mendehall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179.

36. Garber v. Armentrout, 32 Gratt. (73 Va.) 235.

37. Conn.—Scutt's App., 43 Conn. 108.

Del.—Burton v. Rodney, 5 Del. 441.

Ind.—Worth v. Patton, 5 Ind. A. 272, 31 NE 1130.

La.—McCloskey's Succ., 29 La. Ann. 237.

Mo.—Winner v. Schucart, (A.) 215 SW 905.

N. Y.—Dalrymple v. Arnold, 21 Hun 110.

N. C.—Steel v. Steel, 36 N. C. 452.

Pa.—Shield's Est., 2 Chest. Co. 473.

38. Ill.—Matter of Bell, 210 Ill. A. 350.

Mass.—McIlroy v. McIlroy, 208 Mass. 458, 94 NE 696, AnnCas1912A 934.

Mich.—Martin v. Thison, 153 Mich. 516, 116 NW 1013, 126 AmSR 537, 18 LRANS 257.

Mo.—Lukowski v. Lukowski, 108 Mo. A. 204, 83 SW 274.

N. Y.—Matter of Brace, 105 Misc. 178, 173 NYS 636.

Oh.—Hassaurek v. Markbreit, 68 Oh. St. 554, 67 NE 1066.

Pa.—Heilman's Est., 21 Pa. Dist. 181.

R. I.—Gilbert v. Hayward, 37 R. I. 303, 92 A 625.

Wash.—Stone v. Bayley, 75 Wash. 184, 134 P 820, 48 LRANS 429.

[a] **Alimony** awarded against decedent is a claim against his estate. Martin v. Thison, 153 Mich. 516, 116 NW 1013, 126 AmSR 537, 126 LRANS 257; Hassaurek v. Markbreit, 68 Oh. St. 554, 67 NE 1066; Heilman's Est., 21 Pa. Dist. 181.

[b] **Support of wife after separation.**—An order of the probate court requiring a husband to support his wife, who is living apart from him, may be enforced against his estate after his death for arrears incurred during his lifetime, the amount required for support being a debt of record established by judgment. McIlroy v. McIlroy, 208 Mass. 458, 94 NE 696, AnnCas1912A 934.

[c] **Maintenance of children.**—(1) Where a divorced wife was entitled to recover against her divorced husband for the maintenance of their children, awarded to her custody by the divorce decree, she was entitled to maintain a claim for such maintenance against her husband's estate after his death. Lukowski v. Lukowski, 108 Mo. A. 204, 83 SW 274. (2) A contract between a husband and wife pending divorce proceedings, whereby the husband agreed to pay twenty-five dollars monthly for the maintenance of his minor daughter, survives his death, and constitutes a continuing claim against his estate. Stone v. Bayley, 75 Wash. 184, 134 P 820, 48 LRANS 429.

[d] **An allowance for attorney fees in divorce proceedings** is not enforceable against the husband's estate. Kellogg v. Stoddard, 89 App. Div. 137, 84 NYS 1015 [rev 40 Misc. 92, 81 NYS 271].

39. Westerfield v. Williams, 59 Ind. 221.

40. Frank v. Morley, 106 Mich. 635, 64 NW 577; In re Brown, 210 Pa. 499, 60 A 149.

41. Proctor v. Terrill, 8 B. Mon. (Ky.) 451.

42. Litchfield v. Carpenter, 49 SW 22, 20 KyL 1189; Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838.

[a] **A voluntary payment by a stranger** of debts of a decedent creates no claim against the estate. Falls v. Jones, 107 Mo. A. 357, 81 SW 455.

43. Farris v. Stoutz, 78 Ala. 130; Prescott v. Grimes, 143 Ky. 191, 136 SW 206, 33 LRANS 669; Ormonde v. Kynersley, 5 Madd. 369, 56 Reprint 936. But compare Moore v. Idlor, 26 Oh. Cir. Ct. 502 (a person holding property in trust for life, with remainder over to certain persons, does not occupy the relation of debtor to them, so as to entitle them as creditors to file their claim for money with her executor).

[a] **Waste.**—(1) Where a life tenant, while in possession of the property, permitted it to become in disrepair and go to waste, the remainderman's claims for waste were enforceable against the life tenant's estate after the latter's death. Prescott v. Grimes, 143 Ky. 191, 136 SW 206, 33 LRANS 669. (2) Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable for it. Ormonde v. Kynersley, 5 Madd. 369, 56 Reprint 936.

44. Penn v. Penn, 120 Ky. 557, 87 SW 306, 27 KyL 946.

45. Anderson v. Metropolitan Stock Exch., 198 Mass. 76, 84 NE 120.

46. U. S.—Kirtley v. Holmes, 107 Fed. 1.

Ark.—Lanigan v. North, 69 Ark. 62, 63 SW 62.

Ill.—Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136].

Kan.—Cooper v. Ives, 62 Kan. 395, 63 P 434.

Mo.—Manville v. Edgar, 8 Mo. A. 324.

Vt.—Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 A 176.

[a] **Necessity for judgment against estate.**—The claim of a judgment creditor of a corporation

an appeal bond,[47] the use and occupation of property by decedent in his lifetime,[48] or a note or due bill of decedent.[49] Voluntary bonds or covenants are binding on the estate at common law, although postponed in order of payment to debts founded on a valuable consideration.[50] A check drawn[51] or note made[52] by a husband in favor of his wife which has not been presented or paid may be allowed against his estate. A penalty incurred by decedent on a contract made while living, or damages as for careless or wrongful performance or for a breach may be allowed against the estate.[53] A parol promise to pay a debt is sufficient to warrant a judgment against the assets of a decedent.[54] A personal obligation to pay an annuity secured by a deed of trust in which, as well as in his last will, the obligor manifests an intention to make it an exclusive charge against his real estate, has been held to be notwithstanding a proper claim for allowance against the estate.[55] Where a will recited that testator had in his possession thirteen thousand dollars in notes and contracts belonging to his wife, and provided that his estate should be responsible therefor to her, with interest from the date of the will, and the testator had managed his wife's property as her agent, and continued to do so after the date of the will, dividends on bank stock of the wife in the husband's possession, accruing after the date of the will, and which he had reinvested for her, not being part of the original debt, should not be allowed as a credit thereon, but should be an additional charge against the estate.[56]

[§ 876] **2. Secured Claims.** Where a creditor holds pledge, mortgage, or other lien security on his own behalf, he has the option after his debtor's death to enforce such security for his own indemnity or to file his claim as a general creditor of the estate;[57] but where a decedent dies seized of land subject to a mortgage given by a prior owner,

against the estate of a deceased stockholder is not provable in the probate court until it has been reduced to judgment against the estate. Douglass v. Loftus, 85 Kan. 720, 119 P 74, AnnCas1913A 378, LRA 1915B 797.

47. Sheppard v. Tyler, 92 Cal. 552, 28 P 601.

48. Story v. McCormick, 70 Kan. 323, 78 P 819.

[a] **Joint occupancy with claimant.**—In an action to charge the estate of a decedent with rent for the use of a dwelling house and certain land occupied by him as a residence, in the absence of any express or implied contract, the fact that plaintiff, his stepdaughter, lived with him during the time for which the rent is asked, and until his death made no demand for rent does not preclude recovery. Story v. McCormick, 70 Kan. 323, 78 P 819.

[b] **Claim not asserted during decedent's lifetime.**—Where a nephew made payments of rent for certain premises on behalf of his uncle, who was impecunious, and permitted such uncle to occupy the property, while the nephew either owned or controlled it as lessee, without making any claim for rent during the uncle's lifetime, and first demanded it after he had disagreed with his uncle's widow, he was not entitled to recover for use and occupation. Genet v. Willock, 93 App. Div. 588, 87 NYS 938.

49. Ga.—Penick Supply Co. v. Anderson, (A.) 97 SE 889.

Ill.—Smith v. Goodrich, 167 Ill. 46, 47 NE 316 [rev 67 Ill. A. 418].

Ind.—Bond v. Orndorf, 77 Ind. 583.

Iowa.—Gillett v. McFarland, 106 Iowa 746, 76 NW 663.

La.—Savory's Succ., 32 La. Ann. 506.

Pa.—Clinton's Est., 9 Pa. Dist. 455, 24 Pa. Co. 218.

Tex.—Nease v. James, (Civ. A.) 72 SW 87.

Vt.—State Univ. v. Baxter, 43 Vt. 645.

Eng.—Dawson v. Kearton, 3 Smale & G. 186, 65 Reprint 617.

[a] **A note given for the purchase price of land** is enforceable against the personal estate of the purchaser after his decease, like any other personal debt. Smith v. Goodrich, 167 Ill. 46, 47 NE 316 [rev 67 Ill. A. 418].

[b] **A stipulation for payment of attorney fees** in case of collection by action is binding on the estate of the maker. Jewett v. Hurrie, 121 Ind. 404, 23 NE 262; Bond v. Orndorf, 77 Ind. 583; Gillett v. McFarland, 106 Iowa 746, 76 NW 663; Rowe's Est., 22 Pa. Super. 597; Nease v. James, (Tex. Civ. A.) 72 SW 87.

50. Isenhart v. Brown, 2 Edw. (N. Y.) 341; Stephens v. Harris, 41 N. C. 57; Jones v. Powell, 1 Eq. Cas. Abr. 84, 21 Reprint 896; Garrard v. Dinorben, 5 Hare 213, 26 EngCh 213, 67 Reprint 891; Lomas v. Wright, 2 Myl. & K. 769, 7 EngCh 769, 39 Reprint 1138; Lechmere v. Carlisle, 3 P. Wms. 211, 24 Reprint 1033; Clough v. Lambert, 10 Sim. 174, 16 EngCh 174, 59 Reprint 579; Dawson v. Kearton, 3 Small & G. 186, 65 Reprint 617; 2 Williams Ex. p 217.

51. Wilkinson's Est., 192 Pa. 117, 43 A 466.

52. Martin v. Curd, 1 Bush (Ky.) 327; Wilkinson's Est., 192 Pa. 117, 43 A 466.

[a] **Note presented to wife.**—A widow holding a note of her husband which was given to her by her father as her separate estate is entitled to the same rights and privileges, to the extent of such note, as his other creditors. Martin v. Curd, 1 Bush (Ky.) 327.

[b] **Presumption as to payment.**—Where a note and a check drawn by a husband in favor of his wife some time before his death are in her possession at the time of his death, and are afterward presented by her executors as claims against his estate, the fact that he was at all times able to pay them raises no presumption that they were paid, nor does the fact that she was her husband's executrix raise any presumption that they had been paid, and that she took them from among his papers after his death. In re Wilkinson, 192 Pa. 117, 43 A 466.

53. Wabash R. Co. v. Ordelheide, 88 Mo. A. 589; Price v. Haeberle, 25 Mo. A. 201; Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 32 AmD 534; Troup v. Smith, 20 Johns. (N. Y.) 33; Dougherty v. Stephenson, 20 Pa. 210.

[a] **Termination of contract on death of decedent.**—Where an employee was hired by the month under a parol contract, such contract was terminated by the death of his employer, and the employee could not recover damages for breach of the contract resulting from his employer's death. Womrath's Est., 23 Wkly NC (Pa.) 434.

[b] **Breach by administrator.**—Where decedent held lands as security for advancements to claimant, and they agreed that decedent should sell the lands or the timber therefrom to pay the debt and certain commissions, and that whatever land remained after such payments should be owned by decedent and claimant in common, a breach of the agreement by decedent's administrator did not give rise to a claim against the estate of which the probate court had jurisdiction, but claimant's remedy was in equity for an accounting of the trust. Nester v. Ross, 98 Mich. 200, 57 NW 122.

54. Rann v. Hughes, 4 Bro. P. C. 27, 2 Reprint 18, 7 T. R. 350 note, 101 Reprint 1014.

55. Doellner v. Schmieding, 16 Mo. A. 559.

56. Harding v. Harding, 132 Ky. 133, 116 SW 305.

57. Ark.—Lofland v. Cowger, 68 Ark. 274, 57 SW 797; Richardson v. Hickman, 32 Ark. 406; Barber v. Peay, 31 Ark. 392; Nicholls v. Gee, 30 Ark. 135; Hall v. Denckle, 28 Ark. 506.

Cal.—Mathew v. Mathew, 138 Cal. 334, 71 P 344.

Ill.—Matter of Dyer, 201 Ill. A. 183.

Iowa.—Black v. Black, 40 Iowa 88; Moores v. Ellsworth, 22 Iowa 299; Allen v. Moer, 16 Iowa 307.

Kan.—Crooker v. Pearson, 41 Kan. 410, 21 P 270.

Ky.—Avey v. Stearman, 145 Ky. 574, 140 SW 1055.

Md.—Ellicott v. Ellicott, 6 Gill & J. 35.

Mo.—Day v. Graham, 97 Mo. 398, 11 SW 55; Edmonson v. Phillips, 73 Mo. 57; Greenwell v. Heritage, 71 Mo. 459; Cassatt v. Vogel, 14 Mo. A. 317.

Nebr.—Appleget v. Greene, 12 Nebr. 304, 11 NW 322.

N. Y.—Wright v. Holbrook, 32 N. Y. 587 [aff 25 N. Y. Super. 516, 18 AbbPr 202]; Mills v. Mills, 50 App. Div. 221, 63 NYS 771 [mod 28 Misc. 633, 59 NYS 1048]; Thompson v. Sullivan, 60 HowPr 71.

N. C.—Pate v. Oliver, 104 N. C. 458, 10 SE 709.

Pa.—Tubbs' Est., 161 Pa. 252, 28 A 1109; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367.

Ont.—Chamberlen v. Clark, 1 Ont. 135 [aff 9 Ont. A. 273].

[a] **Money received from the sale of the security** operates as part payment of the claim. Jamison v. Adler-Goldman Comm. Co., 59 Ark. 548, 28 SW 35.

[b] **A decedent's undertaking to assume an encumbrance** on land purchased by him creates a debt enforceable against his estate. Pate v. Oliver, 104 N. C. 458, 10 SE 709.

[c] **One suing to surcharge an administratrix's settlement cannot complain** because a chattel mortgagee was permitted to prove his claim against the estate instead of foreclosing, since adoption of the latter method would have increased the expense. Avey v. Stearman, 145 Ky. 574, 140 SW 1055.

[d] **Allowance of attorney's fees.**—A mortgagee may present his mortgage to an auditor of the orphans' court for allowance during the pendency of a scire facias sur mortgage in the court of common pleas,

such mortgage is not a debt of decedent which can be paid out of his personal estate in the absence of a contract by him assuming the mortgage debt,[58] and such debt has been held not payable out of decedent's personal estate even though he covenanted with his vendor to pay it.[59] Where a will made no provision for payment of indebtedness other than for testator's last illness and funeral expenses, payment by the executor of a note secured by mortgage on land conveyed by the testator to his wife by a deed of gift containing no reference to the mortgage was not proper.[60]

[§ 877] **3. Joint Obligations.**[61] At common law, where one of two or more joint contractors or obligors dies, the survivor alone is held liable;[62] but equity will charge the estate of decedent where some good reason therefor is shown,[63] such as the insolvency of the survivor,[64] or his inability to discharge the indebtedness,[65] and in a number of states the common-law rule has been changed by statute so as to permit the creditor or obligee to enforce his claim against the estate of decedent.[66] A joint obligor with decedent who has paid the entire amount has been held entitled to contribution as against decedent's estate.[67]

Where the obligation is joint and several, the estate of a deceased obligor is liable the same as he would be if living.[68]

[§ 878] **4. Services Rendered to Decedent—a. In General—(1) Where Payment Promised or Expected.**[69] A claim for services rendered to decedent may be allowed against his estate, whether such services were rendered upon an express contract for a fixed payment, or merely as meritorious and needful, without any express contract, but with the expectation of reasonable compensation there-

and the auditor may not only allow the amount of the mortgage debt, but also the attorney's commissions specified in the mortgage. Rowe's Est., 22 Pa. Super. 597.

[e] **Surrender or exhaustion of lien.**—(1) A mortgage creditor of a decedent cannot prove his claim against the estate without either surrendering his mortgage lien, or exhausting it by sale and applying the proceeds thereof toward the debt. Macgill v. Hyatt, 80 Md. 253, 30 A 710. (2) One holding a mortgage on land of an intestate may not insist that the mortgage shall be paid out of personalty, to the exoneration of the realty, but must first enforce his lien, looking to the personal estate only for any deficiency. Moore v. Dunn, 92 N. C. 63.

[f] **Statutes sometimes compel** a secured creditor to resort first to his security, in the interest of unsecured creditors. Darr v. Thomas, 127 Mo. A. 1, 106 SW 95.

Presentation of secured claim see infra § 955.

Secured claims against insolvent estates see infra §§ 1794, 1795.

58. Ryan v. Holliday, 110 Cal. 335, 42 P 891; Steiglitz v. Migatz, (Ind.) 105 NE 465; Creesy v. Willis, 159 Mass. 249, 34 NE 265; Andrews v. Bishop, 5 Allen (Mass.) 490; Matter of Mason, 1 Pars. Eq. Cas. (Pa.) 129; Baldwin's Est., 1 Chest. Co. (Pa.) 315.

59. Creesy v. Willis, 159 Mass. 249, 34 NE 265; Matter of Mason, 1 Pars. Eq. Cas. (Pa.) 129.

[a] **A mortgagee has no standing as a creditor of the estate until** he has sought his remedy against the land. In re Tritten, 238 Pa. 555, 86 A 461.

60. Matter of Well, 7 Cal. A. 515, 94 P 856.

61. Survivorship among joint contractors see Contracts § 588.

62. Conn.—Bundy v. Williams, 1 Root 543.

Ind.—Hayes v. Crutcher, 54 Ind. 260; Braxton v. State, 25 Ind. 82.

Mass.—Lee v. Blodget, 214 Mass. 374, 102 NE 67; Burnside v. Merrick, 4 Metc. 537; Foster v. Hooper, 2 Mass. 572.

N. J.—Thompson v. Johnson, 40 N. J. L. 220.

N. Y.—Matter of Robinson, 40 App. Div. 23, 57 NYS 502; German American Coffee Co. v. O'Neill, 102 Misc. 165, 169 NYS 421; Gere v. Clark, 6 Hill 350.

Or.—McLaughlin v. Head, 86 Or. 361, 168 P 614, LRA1918B 303.

Pa.—Kennedy v. Carpenter, 2 Whart. 344; Pecker v. Julius, 2 Browne 31.

Va.—Atwell v. Milton, 4 Hen. & M. (14 Va.) 253; Richardson v. Johnson, 2 Call (6 Va.) 527; Harrison v. Field, 2 Wash. (2 Va.) 136.

Eng.—Simpson v. Vaughan, 2 Atk. 31, 26 Reprint 415; Primrose v. Bromley, 1 Atk. 89, 26 Reprint 58; Richardson v. Horton, 6 Beav. 185, 49 Reprint 796; Other v. Iveson, 3 Drew. 177, 61 Reprint 870; Rawstone v. Parr, 3 Russ. 424, 3 EngCh 424, 38 Reprint 635 [rev on other grounds 3 Russ. 539, 3 EngCh 539, 38 Reprint 678]; Godson v. Good, 6 Taunt. 587, 1 ECL 766, 128 Reprint 1163; Towers v. Moor, 2 Vern. Ch. 98, 23 Reprint 673; Cloyne v. Young, 2 Ves. 91, 28 Reprint 60.

"At common law the death of one of two joint contractors severs the promise and renders the survivor liable thereon, as on his several promise. In such case, the survivor only can be sued on the contract, and the executor or administrator of the deceased party, if sued, may plead the survivorship in bar, or give it in evidence on a trial of the merits." In re Rice, 7 Allen (Mass.) 112, 114.

[a] **The rule applies to:** (1) A joint covenant. Rowan v. Woodward, 2 A. K. Marsh. (Ky.) 140. (2) A joint note. Thompson v. Johnson, 40 N. J. L. 220. (3) A debt due from a partnership. Grant v. Shurter, 1 Wend. (N. Y.) 148.

63. See cases infra notes 64, 65.

[a] **Extent of charge.**—Equity seeks to know whether decedent was equally bound or not, and the disposition is to charge the estate with only one half at the utmost, unless it appears that decedent was the principal debtor or that the survivor is insolvent. Watkins v. Worthington, 2 Bland (Md.) 509; Brooks v. Dent, 1 Md. Ch. 523; Yorks v. Peck, 14 Barb. (N. Y.) 644.

[b] **Statute giving remedy at law.**—A statute, providing that the representatives of a deceased joint contractor shall be liable to the same extent as if the contract had been several, gives an adequate remedy at law against such representatives and deprives equity of jurisdiction on the ground that the death of the contractor released his estate at law. Curtis v. Mansfield, 11 Cush. (Mass.) 152.

64. Brown v. Benight, 3 Blackf. (Ind.) 39, 23 AmD 373; Richardson v. Draper, 87 N. Y. 337; Hauck v. Craighead, 67 N. Y. 432; Barnes v. Seligman, 55 Hun 339, 8 NYS 834 [aff 130 N. Y. 372, 29 NE 760]; Bowman v. Kistler, 33 Pa. 106; Cowell v. Sikes, 2 Russ. 191, 3 EngCh 191, 38 Reprint 307.

[a] **Inability to procure satisfaction from survivor must be averred.**—Hauck v. Craighead, 67 N. Y. 432 [rev 8 Hun 237].

65. Conn. — Camp v. Grant, 21 Conn. 41, 54 AmD 321.

Fla.—Fillyau v. Laverty, 3 Fla. 72.

Ga.—Bennett v. Woolfolk, 15 Ga. 213.

Mass. — Burnside v. Merrick, 4 Metc. 537.

Pa. — Kennedy v. Carpenter, 2 Whart. 344.

Eng.—Ex p. Kendall, 17 Ves. Jr. 514, 34 Reprint 199.

66. Ind.—Ralston v. Moore, 105 Ind. 243, 4 NE 673; Fiscus v. Robbins, 60 Ind. 100; Milam v. Milam, 60 Ind. 58; Hays v. Crutcher, 54 Ind. 260; Braxton v. State, 25 Ind. 82.

Iowa.—Sellon v. Braden, 13 Iowa 365.

Ky.—Maxey v. Averill, 2 B. Mon. 107.

Mass. — Sampson v. Shaw, 101 Mass. 145, 3 AmR 327; Curtis v. Mansfield, 11 Cush. 152; Foster v. Hooper, 2 Mass. 572.

Mich.—Stewart v. Bruen, 39 Mich. 619; Manning v. Williams, 2 Mich. 105.

N. J.—Garrison v. Reed, 77 N. J. L. 569, 72 A 301; Fleming v. Reed, 77 N. J. L. 563, 72 A 299; Thompson v. Johnson, 40 N. J. L. 220.

N. Y.—Matter of Robinson, 40 App. Div. 23, 57 NYS 502.

Oh.—Burgoyne v. Ohio L. Ins. Co., 5 Oh. St. 586.

Pa.—Bouman v. Kistler, 33 Pa. 106; Judd's Est., 9 Kulp 326.

Tex.—Altgelt v. Elmendorf, (Civ. A.) 84 SW 412.

Ont.—Cook v. Dodds, 6 Ont. L. 608, 2 OntWR 936.

[a] **Where a widow procured an assignment** of a claim against her husband's estate, based on a judgment against her husband and another, she was entitled to collect the entire amount thereof from her husband's estate. McCormick v. National Bank of Commerce, (Tex. Civ. A.) 106 SW 747.

[b] **The creditor must exhaust his remedy against the survivor** (1) before proceeding against the estate for the full amount of the debt. Matter of Robinson, 40 App. Div. 23, 57 NYS 502; Voorhis v. Childs, 17 N. Y. 354; Hosack v. Rogers, 25 Wend. (N. Y.) 213; Hammond v. Hoffman, 2 Redf. Surr. (N. Y.) 92. (2) The estate of a deceased joint debtor is not liable where it is not shown that the surviving joint debtors are insolvent. Booth Bros., etc., Granite Co. v. Baird, 83 App. Div. 495, 82 NYS 432.

[c] **The repeal of such a statute** does not affect the liability of the estate on a prior contract. Allen v. Stovall, 94 Tex. 618, 63 SW 863, 64 SW 777.

67. In re Colket, 217 Pa. 643, 66 A 980.

68. Ill.—Poiset v. Townsend, 166 Ill. A. 384.

Minn.—Bolles v. Boyer, 141 Minn. 404, 170 NW 229.

Miss.—Davis v. Blumenberg, 107 Miss. 432, 65 S 503.

Pa.—Hughes' Est., 9 Kulp 333.

Tex.—McCormick v. National Bank of Commerce, (Civ. A.) 106 SW 747.

Eng.—Tippins v. Coates, 18 Beav. 401, 52 Reprint 158.

69. Agreement to compensate by will see infra § 886.

for,[70] irrespective of whether the remuneration, in the mode contemplated, was prevented by accident or design.[71] So where services are rendered in consideration of a promise to compensate for the same by a conveyance of lands, and the promisor dies without making the conveyance, the value of the services may be recovered in an action against his personal representatives.[72] It must of course be shown that services have been actually rendered,[73] and that decedent consented to or contracted for the performance thereof.[74]

Failure to demand payment during decedent's

70. Ala.—Allen v. Stradford, 78 S 955.

Ark.—Lewis v. Lewis, 75 Ark. 191, 87 SW 134.

Cal.—Todd v. Martin, 4 Cal. Unrep. Cas. 805, 37 P 872.

Conn.—Huntington's App., 73 Conn. 582, 48 A 766; Starkey's App., 61 Conn. 199, 23 A 923.

D. C.—Tuohy v. Trail, 19 App. 79.

Ga.—Phinazee v. Bunn, 123 Ga. 230, 51 SE 300

Ill.—Harrison v. Lindley, 104 Ill. 245; Spalding v. White, 184 Ill. A. 217.

Ind.—Weesner v. Weesner, (A.) 124 NE 710; Willette v. Miller, 46 Ind. A. 133, 92 NE 6.

Iowa.—Drake v. McGee, 178 Iowa 1345, 161 NW 84; In re Pauly, 174 Iowa 122, 156 NW 355; In re Oldfield, 158 Iowa 98, 138 NW 846.

Kan.—Bonebroke v. Tauer, 67 Kan. 827, 72 P 521.

Ky.—Humble v. Humble, 152 Ky. 160, 153 SW 249; Dockins v. Vass, 124 SW 290; Walker v. Ganote, 116 SW 689; Jefferson v. Watson, 13 Ky. Op. 282.

La.—Alexander's Succ., 110 La. 1027, 35 S 273; Schmidt's Succ., 108 La. 293, 32 S 413; Dauenhauer v. Browne, 47 La. Ann. 341, 16 S 827.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487.

Md.—Marx v. Marx, 127 Md. 373, 96 A 544; Giering v. Sauer, 120 Md. 295, 87 A 774; Doyle v. Gibson, 119 Md. 36, 85 A 961; Wallace v. Schaub, 81 Md. 594, 32 A 324.

Mass.—Wirth v. Kuehn, 191 Mass. 51, 77 NE 641.

Mich.—Parmalee v. Wigent, 189 Mich. 507, 155 NW 577; Luizzi v. Brady, 140 Mich. 73, 103 NW 574; Shane v. Shearsmith, 137 Mich. 32, 100 NW 123; Gray v. Seeley, 133 Mich. 319, 94 NW 1061; Van Slambrook v. Little, 127 Mich. 61, 86 NW 402.

Minn.—State v. Freeborn County Prob. Ct., 142 Minn. 283, 171 NW 928.

Mo.—Ryans v. Hospes, 167 Mo. 342, 67 SW 285; Sharkey v. McDermott, 91 Mo. 647, 4 SW 107, 60 AmR 270; Taylor v. Hudson, 145 Mo. A. 377, 129 SW 261; Christianson v. McDermott, 123 Mo. A. 448, 100 SW 63; Hall v. Getman, 121 Mo. A. 630, 97 SW 607; McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728; Graham v. Rapp, 105 Mo. A. 590, 80 SW 42; Truesdail v. Truesdail, 72 Mo. A. 155; Hayden v. Parsons, 70 Mo. A. 493; McQueen v. Wilson, 51 Mo. A. 138; Koch v. Hebel, 32 Mo. A. 103.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

N. J. Anderson v. Searles, 107 A 429; Waldron v. Davis, 70 N. J. L. 788, 58 A 293, 66 LRA 591.

N. Y.—Cannon v. Sares, 177 App. Div. 588, 164 NYS 294; Matter of Cushman, 177 App. Div. 127, 163 NYS 712; Strevell v. Jones, 106 App. Div. 334, 94 NYS 627; Matter of Bradbury, 105 App. Div. 250, 93 NYS 418; Lane v. Calby, 95 App. Div. 11, 88 NYS 465; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Leahy v. Campbell, 70 App. Div. 127, 75 NYS 72; Kellogg v. Ogden, 27 App. Div. 214, 50 NYS 650; Matter of Funk, 49 Misc. 199, 98 NYS 934; In re Stringer, 15 NYS 461; Martin v. Wright, 13 Wend. 460, 28 AmD 468.

N. C.—Whitaker v. Whitaker, 138 N. C. 205, 50 SE 630.

Oh.—Gogreve v. Day, 30 Oh. Cir. Ct. 609.

Pa.—Harper's Est., 196 Pa. 137, 46 A 302; Wall's App., 38 Pa. 464; Rouse v. Morris, 17 Serg. & R. 328; Metz's App., 11 Serg. & R. 204; Davies' Est., 60 Pa. Super. 360; Applegren's Est., 59 Pa. Super. 289; Martin's Est., 54 Pa. Super. 168; McTamany's Est., 44 Pa. Super. 484; Bleadingheiser v. Crumrine, 34 Pa. Super. 241; Currey's Est., 26 Pa. Super. 479; Rehrig's Est., 25 Pa. Dist. 173; Yeager's Est., 18 Pa. Dist. 980; Boileau's Est., 18 Pa. Dist. 320; Cummiskey's Est., 18 Pa. Dist. 43; Currey's Est., 14 Pa. Dist. 211; Bugh's Est., 9 Pa. Dist. 276, 23 Pa. Co. 660; Ward's Est., 41 Pa. Co. 207; Boyer's Est., 37 Pa. Co. 252; Michael's Est., 5 Pa. Co. 321; Harrar v. Edwards, 17 LancLRev 223; In re Clarke, 33 PittsbLegJNS 365; In re Weld, 33 PittsbLegJNS 281.

R. I.—Johnson v. Taylor, 73 A 307.

S. C.—Horne v. McRae, 53 S. C. 51, 30 SE 701.

Tenn.—Montgomery v. Clark, (Ch.) 46 SW 466.

Tex. — Henderson v. Davis, (Civ. A.) 191 SW 358; Morrison v. Brooks, (Civ. A.) 189 SW 1094; Flannery v. Chidgey, 33 Tex. Civ. A. 638, 77 SW 1034; Von Carlowitz v. Bernstein, 28 Tex. Civ. A. 8, 66 SW 464.

Utah.—Reed v. Hume, 25 Utah 248, 70 P 998.

Vt.—Raymond v. Sheldon, 104 A 106; Gilfillan v. Gilfillan, 90 Vt. 94, 96 A 704.

Va.—Baker v. Baker, 87 Va. 180, 12 SE 346.

Wash.—Olsen v. Hagan, 102 Wash. 321, 172 P 1173; Thompson v. Jackson, 85 Wash. 330, 148 P 5.

Wis.—Baehr v. Buell, 133 Wis. 119, 113 NW 433; Leitgabel v. Belt, 108 Wis. 107, 83 NW 1111.

Ont.—Walker v. Boughner, 18 Ont. 448.

[a] **Circumstances raising obligation to pay.** — Where services by plaintiff were acknowledged by decedent, who exacted a promise that these services should be continued to his wife after his death, with the direction that the wife make suitable provision for the services rendered and to be rendered, a binding contract is made and a debt created against the estate for services performed after as well as before the death of decedent. Gogreve v. Day, 30 Oh. Cir. Ct. 609.

[b] **The mere rendition and acceptance of services** is sufficient to raise an obligation on the part of a decedent to pay therefor in the absence of proof that they were not to be paid for. Wallace v. Schaud, 81 Md. 594, 32 A 324.

[c] **A promise in writing to compensate one for her kindness,** in an amount out of proportion to the services rendered, constitutes a valid claim against decedent's estate. Matter of Todd, 47 Misc. 35, 95 NYS 211.

[d] **Services rendered to a person as nurse** during his illness may constitute a claim against his estate, although there is no direct evidence that such services were rendered at his express request. Circumstances surrounding the transaction, or a request by the family or physician of the sick person, may be equivalent to his direct request. Todd v. Martin, 4 Cal. Unrep. Cas. 805, 37 P 872.

[e] **Expectation of compensation through inheritance by wife.**—Where plaintiff furnished defendant's testator with board and money, not as a gift, but with the expectation that it was to create a liability for its repayment, and the testator did not understand that what he received was intended as a mere gratuity, plaintiff's right to recover therefor was not taken away by the fact that he expected that his actual reimbursement would come through his wife's inheritance from the testator, and that he did not look forward to obtaining reimbursement from any other source. Wirth v. Kuehn, 191 Mass. 51, 77 NE 641.

[f] **Void contract with wife of decedent.**—Although the nursing of a husband was performed under a contract with the wife void because of her inability to contract, his estate was liable for the services under an implied promise. Flannery v. Chidgey, 33 Tex. Civ. A. 638, 77 SW 1034.

[g] **Medical services to decedent's children.**—Where medical services rendered to a woman's children are recognized by her as constituting a liability against her, her husband and executor may after her death pay such bills out of her estate. Baker v. Baker, 87 Va. 180, 12 SE 346.

[h] **A physician's bill for attendance on a married woman** has been held not chargeable against her estate, since such bill constitutes a personal debt of her husband. In re Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163; Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

[i] **The fact that board is not collected when due** during decedent's lifetime does not prevent its collection after his death where it appears that he had promised to pay all he owed and that there was a good cause for the leniency shown in collecting. Patterson's Est., 9 Pa. Dist. 259, 23 Pa. Co. 567.

[j] **Where a servant performed extra services** with the expectation and on the promise that she should receive a certain sum at her employer's death, she is entitled to recover that sum, although she would have performed the services without any promise of payment. Graham v. Rapp, 105 Mo. A. 590, 80 SW 42.

[k] **Promise of payment a question for jury.**—Hamilton v. Hamilton, 26 Ind. A. 114, 59 NE 344.

71. Gall v. Gall, 27 App. Div. 173, 50 NYS 563 [app dism 160 N. Y. 696 mem, 55 NE 1095 mem]; McRae v. McRae, 3 Bradf. Surr. (N. Y.) 199.

72. Ritchie v. Bennett, 35 App. Div. 68, 54 NYS 379 (a recovery therefor may be had without demanding a conveyance from the heirs).

73. Miller v. Simpson, 2 SW 171; Alexander's Succ., 110 La. 1027, 35 S 273; Miller's Est., 136 Pa. 239, 20 A 796; Johnston's Est., 12 YorkLegRec (Pa.) 181.

[a] **Evidence sufficient to show rendition of services.**—Kellogg v. Ogden, 27 App. Div. 214, 50 NYS 650.

74. Ky.—Carr v. Calvert, 102 SW 282, 31 KyL 303.

La.—Schulte's Succ., 1 La. A. (Orleans) 70.

Me.—Coombs v. Hogan, 116 Me. 437, 102 A 237.

Mass.—Johnson v. Kimball, 172 Mass. 398, 52 NE 386.

Mich.—Quillan v. Van Dyke, 171 Mich. 195, 137 NW 79.

N. J.—Anderson v. Searles, 107 A 429.

N. Y.—Matter of Wever, 179 App. Div. 952 mem, 165 NYS 1038 mem; McDermott v. Conlon, 153 App. Div. 69, 137 NYS 1105; McGrath v. Alger, 43 App. Div. 496, 60 NYS 122; Matter of Devoe, 68 Misc. 490, 111 NYS 638; Matter of Duke, 57 Misc. 541, 109 NYS 1087; Margraf v. McLean, 31 Misc. 820, 64 NYS 1112.

lifetime will not necessarily defeat a claim against his estate for meritorious and valuable services performed at his request,[75] and so where services are rendered in the first instance with the expectation of payment, but the claimant refrains from presenting the claim in the expectation of receiving a legacy, he may still recover for his services, if such expectation is disappointed.[76] But where a claim for services or board is first made after the decease of the alleged debtor, the presumption obtains that payment was made or that it was not intended to demand payment,[77] and evidence to establish a claim for services against a decedent's estate not made during his lifetime must be other than mere loose declarations, and must clearly and distinctly establish a contract between claimant and decedent.[78]

Care of lunatic. Services in caring for, nursing, and administering to the health and comfort of a lunatic are necessaries, which are recoverable after her death against her estate.[79]

[§ 879] **(2) Voluntary Services.** Compensation cannot be allowed for services which were performed without any claim for payment during decedent's lifetime, or any expectation of being paid specifically therefor, and without any express or implied promise of remuneration, even though their performance may have been prompted by the hope of obtaining a gift or legacy which has not been fulfilled;[80] and a direction on the part of decedent

Pa.—In re Schoyer, 252 Pa. 96, 97 A 104; Rehrig's Est., 25 Pa. Dist. 173; Monaghan's Est., 13 Pa. Dist. 694; Conaughton's Est., 2 Pa. Dist. 189, 12 Pa. Co. 590; Bugh's Est., 23 Pa. Co. 660.

Tex.—Morrison v. Brooks, (Civ. A.) 189 SW 1094; Lane v. Bristow, (Civ. A.) 188 SW 970.

Vt.—Gilfillan v. Gilfillan, 90 Vt. 94, 96 A 704.

Wash.—Thompson v. Jackson, 85 Wash. 330, 148 P 5.

B. C.—Ledingham v. Skinner, 21 B. C. 41.

[a] **Express request not necessary.**—Services may have been rendered under such circumstances that proof of their rendition will be sufficient to charge decedent's estate therefor, without proof of an expressed request for such services. Todd v. Martin, (Cal.) 37 P 872.

[b] **A mere bequest of money** is not evidence of a contract or debt against the testator, nor, although expressed to be for a particular service, should it be regarded as evidence of a debt or previous contract to pay the money therefor. Montgomery v. Miller, 4 B. Mon. (Ky.) 470.

[c] **Agreement with third person.**—One who cared for decedent during her life under an agreement with a third person has no claim for his services against the estate. Montgomery v. Clark, (Tenn. Ch. A.) 46 SW 466. See also Merwin's App., 72 Conn. 167, 43 A 1055 (express contract with conservator of insane person).

75. Gaines v. Del Campo, 30 La. Ann. 245; Bugh's Est., 9 Pa. Dist. 276, 23 Pa. Co. 660.

76. D. C.—Robeson v. Niles, 18 D. C. 182.

Ill.—Neish v. Gannon, 198 Ill. 219, 64 NE 1000 [aff 98 Ill. A 248].

Mass.—Wirth v. Kuehn, 191 Mass. 51, 77 NE 641.

Pa.—Roberts v. Swift, 1 Yeates 209, 1 AmD 295.

Eng.—Baxter v. Gray, 3 M. & G. 771, 42 ECL 402, 133 Reprint 1349.

But see infra § 679 text and note 80.

Agreement to compensate by will see infra § 886.

77. In re Peiffer, 261 Pa. 209, 104 A 576; Kelly's Est., 6 Pa. Dist. 685; Conaughton's Est., 2 Pa. Dist. 189, 12 Pa. Co. 590; Sayers' Est., 8 Pa. Co. 32; McGeever's Est., 9 Kulp (Pa.) 399.

78. In re Weaver, 182 Pa. 349, 38 A 12.

79. Waldron v. Davis, 70 N. J. L. 788, 58 A 293, 66 LRA 591.

80. Ala.—Morrow v. Allison, 39 Ala. 70.

Cal.—Hanson's Est., 133 Cal. 38, 65 P 14.

Conn.—Gillette's App., 82 Conn. 500, 74 A 762.

Ill.—Kolb v. Stephens, 176 Ill. A. 391.

Ind.—Hunt v. Osborn, 40 Ind. A. 646, 82 NE 933.

Iowa.—Hankins v. Young, 174 Iowa 383, 156 NW 380; In re Squire, 168 Iowa 597, 150 NW 706.

Ky.—Foley v. Dillon, 105 SW 461, 32 KyL 222; Finley v. Keinningham, 79 SW 236, 25 KyL 1955.

La.—Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135.

Me.—Coombs v. Hogan, 116 Me. 437, 102 A 237; Hatch v. Dutch, 113 Me. 405, 94 A 487; Leighton v. Nash, 111 Me. 525, 90 A 385.

Md.—Pearre v. Smith, 110 Md. 531, 73 A 141; Bantz v. Bantz, 52 Md. 686; Lee v. Lee, 6 Gill & J. 316.

Miss.—Hoyle v. Smith, 113 Miss. 729, 74 S 611.

Mo.—Morrison v. Morrison, 197 Mo. A. 527, 196 SW 1082; Korte v. Boynton, (A.) 196 SW 89; Hayden v. Parsons, 70 Mo. A. 493.

N. J.—Egerton v. Egerton, 17 N. J. Eq. 419.

N. Y.—Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Schultz v. Carrard, 103 App. Div. 609, 94 NYS 740; Weidman v. Thompson, 53 App. Div. 22, 65 NYS 481; Matter of O'Neill, 49 App. Div. 414, 63 NYS 291; Matter of Schmidt, 68 Misc. 13, 124 NYS 856; Matter of Devoe, 58 Misc. 490, 111 NYS 638; Matter of Duke, 57 Misc. 541, 109 NYS 1087; In re Babcock, 169 NYS 800 [aff 185 App. Div. 906 mem, 171 NYS 1078 mem]; Clark v. Todd, 16 NYS 491; McRae v. McRae, 3 Bradf. Surr. 199.

Pa.—Normile v. Osborne, 207 Pa. 367, 56 A 937; In re Weaver, 182 Pa. 349, 38 A 12; Miller's Est., 136 Pa. 239, 20 A 796; Thompson v. Stevens, 71 Pa. 161; Little v. Dawson, 4 Dall. 111, 1 L. ed. 763; Nagy's Est., 64 Pa. Super. 28; Applegren's Est., 59 Pa. Super. 289; Piersol's Est., 27 Pa. Super. 204; Boileau's Est., 18 Pa. Dist. 320; Cummiskey's Est., 18 Pa. Dist. 43; Powell's Est., 16 Pa. Dist. 544; McKallen's Est., 15 Pa. Dist. 338; Funk v. Holahan, 13 Pa. Dist. 38; Clarke's Est., 13 Pa. Dist. 3; Panick's Est., 12 Pa. Dist. 71, 28 Pa. Co. 71; Engle's Est., 9 Pa. Dist. 743; Heilman's Est., 4 Pa. Dist. 571; Nesbit's Est., 38 Pa. Co. 535; Beller's Est., 38 Pa. Co. 419; Panick's Est., 28 Pa. Co. 71; Cridland's Est., 8 Pa. Co. 6; Carman's Est., 5 Pa. Co. 16; Voldemar's Est., 4 Pa. Co. 577; Lally's Est., 4 Pa. Co. 177; Baer's Est., 20 LancLRev 126; Clark's Est., 12 Phila. 147; Cousty's Est., 12 Phila. 98; Moffett's Est., 11 Phila. 79; Abercrombie's Est., 11 Phila. 21; Heilman's Est., 17 YorkLegRec 149.

R. I.—Slocum v. Wilbour, 24 R. I. 11, 51 A 1050.

Tex.—Van Carlowitz v. Bernstein, 28 Tex. Civ. A. 8, 66 SW 464.

Va.—Teawalt v. Ramey, 103 Va. 42, 48 SE 505.

Eng.—Maddison v. Alderson, 8 App. Cas. 467; Le Sage v. Coussmaker, 1 Esp. 187; Roberts v. Smith, 4 H. & N. 315, 157 Reprint 861; Baxter v. Gray, 3 M. & G. 771, 42 ECL 402, 133 Reprint 1349; Osborn v. Guy's Hospital, 1 Str. 728, 93 Reprint 812.

Ont.—Mooney v. Grant, 2 OntWR 978, 979.

See also infra § 882 text and note 20.

But see supra § 878 text and note 76.

"There was no contract while the services were being rendered, and plaintiff had no right to claim pay for them upon finding that the income of the money only and not the principal had been bequeathed to her." Mooney v. Grant, supra.

[a] **Statement of claimant that services gratuitous.**—Where a claim for services for nursing is filed against a decedent's estate, the claimant's declaration to a third person that she was serving decedent solely from the love she bore to him will bar her claim, when made in reply to the repeated proposals of decedent's brother to furnish a nurse, and when no proof is given to the value or duration of the services. Engle's Est., 9 Pa. Dist. 743.

[b] **Circumstances not raising implied promise to pay.** — Where claimant, who long had been intimately associated with decedent, at one time being in his employment as a laborer, and then as renter of his land for many years, in the last sickness of deceased went to his house unasked and unsolicited, even though gratefully received, as his friendship with deceased warranted, and entered the sick chamber to nurse deceased as a friend, while deceased was surrounded by his family and other friends who were anxious to serve him, and no stipulation was made that the service of claimant should be paid for, no promise will be implied. Teawalt v. Ramey, 103 Va. 42, 48 SE 505.

[c] **Claim asserted as mere afterthought.**—Testator left money in trust for his daughter, but the will provided that, if she should refuse to become a member of the executor's family, the fund was to go to the executor's son. The executor paid the money over to his son, and in an action by the daughter the defense was that she had refused to become a member of the executor's family, but it was held on appeal that the provisions of the will had not been complied with, in that the executor had not used proper diligence to have the daughter become a member of his family; and, on remand of the cause, the executor answered that the son had a claim on the estate, arising on contract between the son and testator, whereby he was to be paid for the nursing of the testator, which claim exceeded the amount of the trust fund paid over to the son. The executor had not required any proof of such claim from the son, and the action was not commenced by the daughter until ten years after testator's death, during which time nothing was heard of the claim. It was held that the defense as to the son's claim was a mere afterthought, and of no avail to defendant. Finley v. Keinningham, 79 SW 236, 25 KyL 1955.

[d] **Expressions of decedent's gratitude** for what claimants had done for him, and of a purpose to compensate them, by leaving them

to his executors to pay for services voluntarily rendered to decedent will not create a claim against the estate,[81] nor will the expression by decedent of an intention to pay therefor have this effect.[82] The rule is not changed by the fact that the services were rendered under a mistake as to the conditions existing;[83] but where persons were induced to support a decedent for several years by her fraudulent pretense that she was destitute, the fact being otherwise, they were held entitled to be compensated out of her estate.[84]

[§ 880] **(3) Where Services Compensated for.** Where services have been fully paid for in the lifetime of decedent, there cannot of course be any further recovery on that account against the estate,[85] and where the claimant has received a stated sum periodically for wages or salary, in payment of board or otherwise, the presumption is against a larger allowance, unless decedent is shown to have agreed accordingly.[86] So also, a sufficient legacy or devise to a person who has performed services for decedent may discharge a claim for such services.[87]

[§ 881] **b. Persons in Family Relation—(1)**

his farm at his death, did not amount to an express promise to pay them for their services, nor were they sufficient as an unqualified acknowledgment of an indebtedness on his part therefor. Dowell v. Dowell, 137 Ky. 167, 125 SW 283.

81. Stone v. Gerrish, 1 Allen (Mass.) 175; Stadermann v. Heins, 78 App. Div. 563, 79 NYS 674; Gallagher v. Brewster, 1 App. Div. 65, 36 NYS 1081 [rev on other grounds 153 N. Y. 364, 47 NE 450]; Fehl's Est., 13 Pa. Super. 601.

[a] **Such a direction is competent as an admission,** although it does not amount to a contract. Gallagher v. Brewster, 153 N. Y. 354, 47 NE 450 [rev 1 App. Div. 65, 36 NYS 1081].

82. Smith v. Birdsall, 106 Ill. A. 264; Clawson v. Moore, 29 Ill. A. 296; Reilly v. Burkelman, 149 App. Div. 548, 134 NYS 13; Appollonio v. Langley, 106 App. Div. 40, 94 NYS 274; Clark's Est., 12 Phila. (Pa.) 147; In re Bryant, 73 Vt. 240, 50 A 1065.

[a] **Intent to remember in will.**—The fact that testatrix expressed an intent to remember her nephew in her will is insufficient to show a contract on her part to compensate him for services rendered during her lifetime. Matter of Devoe, 58 Misc. 490, 111 NYS 638.

83. Royston v. McCulley, (Tenn. Ch. A.) 59 SW 725, 52 LRA 899.

84. Eggers v. Anderson, 63 N. J. Eq. 264, 49 A 578, 55 LRA 570 [rev 61 N. J. Eq. 85, 47 A 727].

85. Ga.—Gaithers v. Lee, 135 Ga. 375, 69 SE 477.

La.—Carstens's Succ., 142 La. 114, 76 S 328; Littell's Est., 50 La. Ann. 299, 23 S 314.

Pa.—Watson's Est., 8 Pa. Dist. 341; Osborne v. McKay, 42 Pa. Co. 44.

Vt.—Gilfillan v. Gilfillan, 90 Vt. 94, 96 A 704.

[a] **Illustrations.**—(1) Where a contract for services alleged to have been entered into, between decedent and the claimant had apparently been abandoned, and the claimant had accepted without demur, during the lifetime of decedent, a less sum, the claimant could not be allowed to recover against the estate for services at a certain rate fixed by herself. Watson's Est., 8 Pa. Dist. 341. (2) A claim by a married woman against a decedent's estate for nursing the decedent cannot be sustained where it appears that the claimant and her husband were tenants of decedent under a written contract by which in consideration for the use of the premises the claimant's husband covenanted to board the decedent, "including washing, mending, cleaning his rooms, attending his stove and caring for him in time of sickness." Eaby's Est., 42 Pa. Super. 500.

[b] **Donation during lifetime.**—Where a physician, the relative of an aged and infirm lady, rendered her professional services extending through several years, without contract with her, but being told she would compensate him, and shortly before her death she gave into his hands five thousand dollars in cash, which he claimed was a donation to his wife, but which passed under his administration and control, it was held that said donation was the remuneration referred to, and that he was not entitled to recover on a large claim for professional services made after her death. Littell's Est., 50 La. Ann. 299, 23 S 314.

[c] **Claimant must show nonpayment.**—Harrar v. Edwards, 17 Lanc LRev (Pa.) 223.

86. Conn.—Leahy v. Cheney, 90 Conn. 611, 98 A 132, LRA1917D 809.

Ky.—Stanberry v. Robinson, 27 SW 973, 16 KyL 309.

La.—Alexander's Succ., 110 La. 1027, 35 S 273; Turnell's Succ., 34 La. Ann. 888.

N. Y.—Reilly v. Burkelman, 149 App. Div. 548, 134 NYS 13; Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Ross v. Harden, 44 N. Y. Super. 26; Matter of Fordham, 100 Misc. 737, 165 NYS 1038; Matter of Drapers, 74 Misc. 335, 134 NYS 236; Heywood v. Doherty, 121 NYS 610.

Pa.—Wise v. Martin, 232 Pa. 159, 81 A 184; Rorer's Est., 5 Pa. Co. 73, 19 Phila. 5; Eaby's Est., 42 Pa. Super. 500; Wise v. Martin, 42 Pa. Super. 443; Piersol's Est., 27 Pa. Super. 204; Garretson's Est., 15 Pa. Dist. 947; Kritser's Est., 13 Pa. Dist. 325; Panick's Est., 12 Pa. Dist. 71, 28 Pa. Co. 71; Wortman's Est., 6 Pa. Dist. 44; Carst v. Hoover, 32 Pa. Co. 77; Panick's Est., 28 Pa. Co. 71; Wartman's Est., 19 Pa. Co. 143; Womrath's Est., 6 Pa. Co. 262; Robinson's Est., 5 Pa. Co. 578; Springer's Est., 2 Chest. Co. 44.

"Of course, if she received regular wages, the presumption would be, as the court charged at the defendant's request, that such regular payments were in full for all services rendered." Reilly v. Burkelman, 149 App. Div. 548, 551, 134 NYS 13.

[a] **Illustrations.**—(1) A claim for nursing, not made until after decedent's death, should be disallowed where decedent paid board regularly and gave a legacy to the claimant, who was a stranger in blood. Cain's Est., 31 PittsbLegJNS (Pa.) 367. (2) Where claimant's husband contracted with her paralyzed brother's committee to take care of the brother at their home for thirty-five dollars a month, and after four years had the compensation increased to thirty-seven dollars and fifty cents, which was paid until the afflicted man's death, claimant could not recover from the estate for taking care of him and nursing him while he was at her house, it appearing such service was contemplated by her husband's contract. Carr v. Calvert, 102 SW 282, 31 KyL 303. (3) In an action against a decedent's estate to recover twenty-five dollars per week for nursing him during his last illness, she cannot recover, where during that time she was employed at two dollars per week, without evidence of an express contract to pay for the nursing, and loose declarations made by decedent, indefinite understandings, and anticipated benefactions are insufficient for that purpose. Wise v. Martin, 232 Pa. 159, 81 A 184. (4) Where a husband entered into a contract with an aged man to move his family into the latter's house and take care of him, and his family was to have the use of half of the house and the husband was to receive thirty dollars a month, and his wife assisted in the performance of the services for which the contract was made, some of which were of an unpleasant character, and the wife occasionally received the monthly payments, and never objected to their sufficiency or claimed anything for nursing, she could not recover after the death of the owner compensation for nursing and otherwise caring for decedent during his life. Normile v. Osborne, 207 Pa. 367, 56 A 937.

[b] **Housekeeper.**—Where a person was employed by a decedent at fixed wages as housekeeper, such person cannot recover against decedent's estate additional compensation for nursing, in the absence of an express contract to that effect, or an agreement to provide for such compensation by a legacy. Piersol's Est., 27 Pa. Super. 204.

[c] **A domestic servant and nurse,** who has received fixed wages for her services as such, cannot recover for extra services in the absence of an express contract. Grossman v. Thunder, 212 Pa. 274, 61 A 904.

[d] **Statement by decedent that compensation insufficient.**—A claim for extra compensation for nursing decedent, in addition to the compensation for services for general housework, cannot be sustained on expressions and indications of belief by decedent that plaintiff was not sufficiently paid under her contract for housework, these not constituting a new contract. Howard v. Drexler, 14 Pa. Super. 59.

[e] **An instrument signed merely by decedent** reciting "I . . . being of sound mind, desire that Mrs. Susanna Stadermann, for her sacrifices day and night and diligent nursing for me, receive two hundred and fifty dollars," while prima facie an evidence of indebtedness, was shown not to be so by the fact that said party had no connection with its execution, and was at the time engaged in nursing deceased at an agreed rate per week. Stadermann v. Heins, 78 App. Div. (N. Y.) 563, 79 NYS 674.

[f] **Where presumption does not arise.**—Where a parent whose diseased condition required constant care was boarded and cared for by his son and daughter-in-law, the fact that he paid his board gave rise to no presumption that this payment was intended as full satisfaction for all services rendered him. Fry v. Fry, 119 Mo. A. 476, 94 SW 990.

87. Gillette's App., 82 Conn. 500, 74 A 762; Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135; Eaton v. Benton, 2 Hill (N. Y.) 576; Cain's Est., 31 PittsbLegJNS (Pa.) 367. But compare In re Ansley, 41 N. S. 527, 533 (where it is said: "Then it is said that Mrs. Chesley [claimant]

Presumption That Services Were Gratuitous. The courts regard with suspicion and disfavor claims brought against an estate for personal services rendered by relatives, especially where the latter are members of decedent's immediate family or household, as the presumption is that such services between persons occupying such relations are intended to be gratuitous,[88] and hence claims against the estate of a decedent made by near relatives for personal services require stronger proof to establish

did get a legacy. It is true that by the residuary clause she and the other executor take the residue, and it is also true that there may be something in the residue; but I have argued the case in vain if that circumstance is not wholly irrelevant. The case is not that there was an agreement or understanding between Mrs. Ansley [decedent] and Mrs. Chesley that the latter was to be remunerated by a legacy, and behold she has a legacy. It is this: that at most Mrs. Chesley expected a legacy; she expected as the testatrix' property in fact; but there was no understanding or agreement between them that she was to be remunerated in this way").

[a] **Reason of rule.**—"Justice does not require that a contract to pay should be implied where it is apparent that ample compensation has already been made by will, and when it is obvious that there was no expectation of payment by either party." Gillette's App., 82 Conn. 500, 504, 74 A 762.

[b] **Illustration.**—Where, during the last three years of decedent's life, a sister cared for her, without demanding any pay and without the making of any contract to receive pay other than decedent's promise to "pay her well for waiting on her," and decedent bequeathed an annuity of one hundred dollars per year to the sister, she was not entitled to any further compensation than that provided by the will. Trinick's Est., 8 Pa. Dist. 126.

88. Ala.—Borum v. Bell, 132 Ala. 85, 31 S 454.

Ark.—Williams v. Walden, 82 Ark. 136, 100 SW 898; Lewis v. Lewis, 75 Ark. 191, 87 SW 134.

Conn.—Freeland's App., 92 Conn. 306, 102 A 590.

D. C.—Tuohy v. Trail, 19 App. 79.

Ill.—Stokes v. Stokes, 240 Ill. 330, 88 NE 829; Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Keyes v. Thornton, 150 Ill. A. 523; Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436]; Smith v. Birdsall, 106 Ill. A. 264; Gall v. Stark, 98 Ill. A. 121; Hickman v. Eggmann, 53 Ill. A. 561; Patterson v. Collar, 31 Ill. A. 340; Ginders v. Ginders, 21 Ill. A. 522; Hayden v. Henderson, 21 Ill. A. 299; Dawdy v. Nelson, 12 Ill. A. 74.

Ind.—Wright v. McLarinan, 92 Ind. 103; Hedrick v. Hedrick, 48 Ind. A. 658, 94 NE 728; Irwin v. Jones, 46 Ind. A. 588, 92 NE 787; Ellis v. Baird, 31 Ind. A. 295, 67 NE 960; Fuller v. Fuller, 21 Ind. A. 42, 51 NE 373.

Iowa.—Herrick v. Hayes, 173 NW 110; Feltes v. Tobin, 171 NW 739; Hankins v. Young, 174 Iowa 383, 156 NW 380; In re Squire, 168 Iowa 597, 150 NW 706; Broughton v. Nicholson, 150 Iowa 119, 129 NW 814; In re Bishop, 130 Iowa 250, 106 NW 637; Scully v. Scully, 28 Iowa 548.

Kan.—Greenwell v. Greenwell, 28 Kan. 675; Ayres v. Hull, 5 Kan. 419; Jones v. Humphreys, 10 Kan. A. 545, 63 P 26.

Ky.—Farley v. Stacey, 177 Ky. 109, 197 SW 636, 1 ALR 1181; Benge v. Fouts, 174 Ky. 654, 192 SW 703; Turner v. Young, 155 Ky. 604, 159 SW 1165; Dowell v. Dowell, 137 Ky. 167, 125 SW 283; Conway v. Conway, 130 Ky. 218, 113 SW 94; Thomas v. Hobbs, 112 SW 574, 33 KyL 995; Green v. Green, 119 Ky. 103, 82 SW 1011, 26 KyL 1007; Durr v. Durr, 82 SW 581, 26 KyL 855 [reh den 83 SW 629, 26 KyL 1235]; Dance v. Magruder, 80 SW 1120, 26 KyL 220; Gaunce v. Barlow, 70 SW 284, 24 KyL 929; Reynolds v. Reynolds, 92 Ky. 556, 18 SW 517, 13 KyL 793; Peak v. Grover, 14 KyL 206; Griggs v. Love, 13 KyL 175.

La.—Pons' Succ., 142 La. 721, 77 S 515, AnnCas1918D 939; Daste's Succ., 125 La. 657, 51 S 677, 29 LRA NS 297; Oubre's Succ., 109 La. 516, 33 S 583; Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135; Templeman's Succ., 13 La. 798, 64 S 718.

Me.—Coombs v. Hogan, 116 Me. 437, 102 A 237; Hatch v. Dutch, 113 Me. 405, 94 A 487.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47; Marx v. Marx, 127 Md. 373, 96 A 544; Fletcher v. Elosser, 126 Md. 244, 94 A 776; Giering v. Sauer, 120 Md. 295, 87 A 774; Harper v. Davis, 115 Md. 349, 80 A 1012, 35 LRANS 1026, AnnCas1913A 861; Duckworth v. Duckworth, 98 Md. 92, 56 A 490; Wallace v. Schaub, 81 Md. 594, 32 A 324.

Mass.—Sherry v. Littlefield, 122 NE 300; Marple v. Morse, 180 Mass. 508, 62 NE 966; Johnson v. Kimball, 172 Mass. 398, 52 NE 386.

Mich.—Foote v. Hoffman, 200 Mich. 464, 166 NW 924; Montgomery v. Montgomery, 158 NW 117; In re De Haan, 169 Mich. 146, 134 NW 983; Hialey v. Hialey, 157 Mich. 45, 121 NW 465; Decker v. Kanous, 129 Mich. 146, 88 NW 398.

Minn.—Lovell v. Beedle, 138 Minn. 12, 163 NW 778; McCord v. Knowlton, 79 Minn. 299, 82 NW 589.

Miss.—Hoyle v. Smith, 113 Miss. 729, 731, 74 S 611 [cit Cyc].

Mo.—Clow v. Wormington, (A.) 206 SW 415; Wood v. Lewis, (A.) 200 SW 681; Morrison v. Morrison, 197 Mo. A. 527, 196 SW 1082; Miles v. Whitesides, (A.) 183 SW 340; Bowman v. Shelton, 175 Mo. A. 696, 158 SW 404; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Kingston v. Roberts, 175 Mo. A. 69, 157 SW 1042; McGrath v. O'Hare, 175 Mo. A. 9, 156 SW 826; Hartley v. Hartley, 173 Mo. A. 18, 155 SW 1099; Rose v. Mays, 139 Mo. A. 246, 122 SW 769; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; Cole v. Fitzgerald, 132 Mo. A. 17, 111 SW 628; McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495; Moore v. Renick, 95 Mo. A. 202, 68 SW 936.

N. J.—Frean v. Hudson, 87 N. J. L. 244, 93 A 582; Disbrow v. Durand, 54 N. J. L. 343, 24 A 545, 33 AmSR 678; Ridgway v. English, 22 N. J. L. 409; Hammond v. Cronkright, 47 N. J. Eq. 447, 20 A 847; Updike v. Titus, 13 N. J. Eq. 151.

N. Y.—Collyer v. Collyer, 113 N. Y. 442, 21 NE 114; Matter of Zegel, 171 App. Div. 513, 157 NYS 735; Seaman v. Jamison, 158 App. Div. 832, 144 NYS 209; More v. Shepard, 133 App. Div. 471, 117 NYS 1095; Matter of Goss, 98 App. Div. 489, 90 NYS 769; Platt v. Hollands, 85 App. Div. 231, 83 NYS 556; Matter of Pearl, 62 App. Div. 519, 71 NYS 93; Wamsley v. Wamsley, 48 App. Div. 330, 62 NYS 954; Matter of Stevenson, 86 Hun 325, 33 NYS 493; Lynn v. Smith, 35 Hun 275; Carpenter v. Weller, 15 Hun 134; Green v. Roberts, 47 Barb. 521; Dye v. Kerr, 15 Barb. 444; Ulrich v. Ulrich, 60 N. Y. Super. 237, 17 NYS 721; Matter of Schmidt, 68 Misc. 13, 124 NYS 856; Matter of Devoe, 58 Misc. 490, 111 NYS 638; Matter of Duke, 57 Misc. 541, 109 NYS 1087; Matter of De Freest, 41 Misc. 535, 85 NYS 74; Matter of Warner, 39 Misc. 432, 79 NYS 363; Matter of Liddle, 35 Misc. 173, 71 NYS 474; Matter of Jones, 28 Misc. 338, 59 NYS 893; In re Babcock, 169 NYS 800 [aff 185 App. Div. 906 mem, 171 NYS 1078 mem]; Roblee v. Callentine, 19 NYWklyDig 153; Matter of Reuter, 5 Dem. Surr. 162; Keller v. Stuck, 4 Redf. Surr. 294.

N. C.—Henderson v. McLain, 146 N. C. 329, 59 SE 873.

N. D.—Bergerson v. Mattern, 170 NW 877 [cit Cyc].

Oh.—Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 493; Hinkle v. Sage, 67 Oh. St. 256, 65 NE 999; In re Skelton, 20 Oh. Cir. Ct. 704, 11 Oh. Cir. Dec. 372; Edgar v. Schock, 16 Oh. Cir. Ct. N. S. 118 [aff 85 Oh. St. 448 mem, 98 NE 1124 mem].

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

Pa.—In re Peiffer, 261 Pa. 209, 104 A 576; In re Payne, 204 Pa. 535, 54 A 337; Zimmerman v. Zimmerman, 129 Pa. 229, 18 A 129, 15 AmSR 720; Ulrich v. Arnold, 120 Pa. 170, 13 A 831; Houck v. Houck, 99 Pa. 552; Hertzog v. Hertzog, 29 Pa. 465; Lynn v. Lynn, 29 Pa. 369; Raub's Est., 67 Pa. Super. 33; Moore v. Minor, 58 Pa. Super. 77; Hatfield's Est., 50 Pa. Super. 450; In re Dettenmaier, 13 Pa. Super. 170; Lafferty's Est., 2 Pa. Dist. 205, 13 Pa. Co. 82; McHugh's Est., 1 Pa. Dist. 154; Fletcher's Est., 28 Pa. Co. 124; Porter's Est., 15 Pa. Co. 607; Cooper's Est., 7 Pa. Co. 365; Lally's Est., 4 Pa. Co. 177; Fox's Est., 3 Pa. Co. 258; Rogan's Est., 10 Kulp 138; Thomas' Est., 5 Kulp 213; Eckert's Est., 18 LancLRev 58; Monk's Est., 9 Montg. Co. 113; Heathcote's Est., 16 Phila. 389; Kelly's Est., 16 Phila. 285; Hess' Est., 13 Phila. 285; Enoch's Est., 3 Phila. 147.

R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595; Newell v. Lawton, 20 R. I. 307, 38 A 946.

S. C.—Wessinger v. Roberts, 67 S. C. 240, 45 SE 169; In re Kirkpatrick, 34 S. C. 255, 13 SE 450.

Utah.—Nephi First Nat. Bank v. Christensen, 39 Utah 568, 118 P 778.

Vt.—Danyew v. Powers, 84 Vt. 255, 78 A 785; In re Bryant, 73 Vt. 240, 50 A 1065; Andrus v. Foster, 17 Vt. 556; Fitch v. Peckham, 16 Vt. 150.

Va.—Williams v. Stonestreet, 3 Rand. (24 Va.) 559. But compare Cary v. Macon, 4 Call (8 Va.) 605 (a mother's estate will be allowed from the father's estate, for her services in boarding their children during her lifetime, although she made no charge therefor).

Wash.—Zuhn v. Harst, 100 Wash. 359, 170 P 1033; Hodge v. Hodge, 47 Wash. 196, 91 P 764, 11 LRANS 873.

W. Va.—Hanly v. Potts, 52 W. Va. 263, 43 SE 218.

Wis.—Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943; Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895; Leitgabel v. Belt, 108 Wis. 107, 83 NW 1111; Tyler v. Burrington, 39 Wis. 376; Hall v. Finch, 29 Wis. 278, 9 AmR 559.

N. S.—Sherry v. Waddell, 27 N. S. 312.

[a] **"It is a rule universally recognized** that, when the services are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and the benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule when there is no actual blood relationship existing between the parties, provided they sustain to each other the ordinary relations of members of the same family." It has been held, however, that, when the family relationship exists, it is not necessary to prove the terms of a direct and positive contract. Morrisey v. Faucett, 28 Wash. 52, 61, 68 P 352 [quot Hodge v. Hodge, 47 Wash. 196, 198, 91 P 264, 11 LRANS 873].

[b] **The doctrine rests upon** the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist, although composed of remote

them than ordinary claims by strangers.[89] The rule applies when the family relationship actually existed between claimant and decedent, although there was neither consanguinity, affinity, nor adoption.[90]

This rule has been applied to a claim by a child against the estate of a parent[91] or one standing in relations or even of persons between whom there is no tie of blood. The application of the rule is not limited by a mere proprinquity of kindred. Disbrow v. Durand, 54 N. J. L. 343, 24 A 545, 33 AmSR 678.

[c] **Illustrations.**—(1) Where a family consisted of a father, mother, brother, and three sisters living on a farm belonging to the brother, one of the sisters enjoying the same conveniences as the other members of the family, and sharing the work of the common home and assisting in the work of the household in the same manner as her other sisters, will be presumed, in the absence of any express promise, to have worked gratuitously, and the services cannot form the foundation of a claim against the estate of the brother after his death. Matter of Schmidt, 68 Misc. 13, 124 NYS 856. (2) A claimant for services rendered a decedent was induced to render the services by the fact that, when he was a homeless orphan, decedent had cared for him. Decedent paid a sum as surety for claimant while he and his wife were living with decedent. Claimant took the place of a son in the household of decedent, and, apart from decedent occupying his rooms, the manner of living of the parties was that of a single family. Claimant kept no account either of the boarding of decedent or of any services rendered to him by way of nursing. Claimant, while living in the home of decedent, and while the parties were living together as members of one family, was faithful. It was held not to raise an implication of a promise of decedent to pay for services rendered. Irwin v. Jones, 46 Ind. A. 588, 92 NE 787.

[d] **Adult member of family.**—When a member of the family, after he is twenty-one, continues to live with the family, and thereupon and thereafter renders services, the law will not imply a promise to pay for the services. Matter of Milligan, 112 App. Div. 373, 98 NYS 480.

[e] **Whether the family relation in fact exists** where a person not a relative is taken into the family of another must be determined from the particular facts of the case. Boyd v. Starbuck, 18 Ind. A. 210, 47 NE 1079.

[f] **"The burden is on him** (1) who claims a money recompense for personal services performed, whether voluntary, or upon the request of the other, to establish a contract, expressed or implied, for such consideration." Williams v. Waldin, 82 Ark. 136, 143, 100 SW 898, 900. (2) "No recovery can be had unless an express contract or circumstances equivalent thereto is shown." Daste's Succ., 125 La. 657, 662, 51 S 677, 29 LRANS 297.

89. Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

Ky.—Armstrong v. Shannon, 177 Ky. 547, 197 SW 950; Benge v. Fouts, 174 Ky. 654, 192 SW 703; Hardiman v. Crick, 131 Ky. 358, 115 SW 236, 133 AmSR 248; Foley v. Dillon, 105 SW 461, 32 KyL 222; Wallace v. Denny, 90 SW 1046, 28 KyL 978.

Me.—Coombs v. Hogan, 116 Me. 437, 102 A 237.

Md.—Wallace v. Schaub, 81 Md. 594, 32 A 324.

Mo.—Clow v. Wormington, (A.) 206 SW 415; Morrison v. Morrison, 197 Mo. A. 527, 196 SW 1082; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838; Mabary v. Mabary, 173 Mo. A. 437, 158 SW 690; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495.

N. Y.—Meehan v. Heffernan, 73 App. Div. 615, 76 NYS 789; Ulrich v. Ulrich, 60 N. Y. Super. 237, 17 NYS 721; Matter of Drapers, 74 Misc. 335, 134 NYS 236; Matter of Stiles, 64 Misc. 658, 120 NYS 714; Matter of Warner, 39 Misc. 432, 79 NYS 363; Matter of Liddle, 35 Misc. 173, 71 NYS 474; Havens v. Havens, 3 NYS 219.

Oh.—Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 493; Edgar v. Schock, 16 Oh. Cir. Ct. N. S. 118 [aff 85 Oh. St. 448 mem, 98 NE 1124 mem].

Pa.—In re Peiffer, 261 Pa. 209, 104 A 576; In re Miller, 222 Pa. 334, 71 A 185; Raub's Est., 67 Pa. Super. 33; Hill's Est., 18 Pa. Dist. 736; Lafferty's Est., 2 Pa. Dist. 205, 13 Pa. Co. 82; Wildonger's Est., 2 Pa. Dist. 192, 12 Pa. Co. 616, 32 WklyNC 184; Whitmer's Est., 19 Pa. Co. 533; Fox's Est., 3 Pa. Co. 258.

Vt.—In re Bryant, 73 Vt. 240, 50 A 1065.

W. Va.—Swiger v. Evans, 75 W. Va. 236, 83 SE 917.

Wis.—Oates v. Erskine, 116 Wis. 586, 93 NW 444; Tyler v. Burrington, 39 Wis. 376.

Man.—Re Montgomery, 20 Man. 444.

Ont.—Mooney v. Grant, 2 OntWR 978.

"Claims of this character against a decedent's estate should be carefully scanned by the court. They should be established only upon clear and satisfactory proof that the services were rendered under a mutual understanding or agreement of the parties that they would be paid for." Hoskins v. Saunders, 80 Conn. 19, 21, 66 A 785.

[a] **An express contract** must be proved, or it must be shown that at the time the service was rendered both parties intended and expected that the service was to be paid for, and in such cases stricter proof is required than in other cases. Humble v. Humble, 152 Ky. 160, 153 SW 249.

[b] **Not living together.**—"The presumption that services rendered by one sister to another, when they are not living together as members of the same family, are to be paid for, is much more easily rebutted than it would be if the services had been rendered to a stranger." Mooney v. Grant, 2 OntWR 978, 979.

Weight and sufficiency of evidence in support of claims for services see infra § 1123.

90. Nelson v. Poorman, (Mo. A.) 215 SW 753; Evers v. Gardner, 17 Oh. Cir. Ct. N. S. 571, 1 Oh. A. 317.

91. Ala.—Meyers v. Meyers, 141 Ala. 343, 37 S 451; Borum v. Bell, 132 Ala. 85, 31 S 454.

Cal.—Crane v. Derrick, 157 Cal. 667, 109 P 31.

Conn.—Freeland's App., 92 Conn. 306, 102 A 590.

D. C.—Tuohy v. Trail, 19 App. 79.

Ind.—Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550.

Iowa.—In re Squire, 168 Iowa 597, 150 NW 706.

Kan.—Griffith v. Robertson, 73 Kan. 666, 85 P 748; Jones v. Humphreys, 10 Kan. A. 545, 63 P 26.

Ky.—Wallace v. Denny, 90 SW 1046, 28 KyL 978.

La.—Pons' Succ., 142 La. 721, 77 S 515, AnnCas1918D 939; Templeman's Succ., 134 La. 798, 64 S 718.

Md.—Duckworth v. Duckworth, 98 Md. 92, 56 A 490.

Mass.—Sherry v. Littlefield, 122 NE 300; Marple v. Morse, 180 Mass. 508, 62 NE 966.

Mich.—In re Teller, 200 Mich. 181, 166 NW 865; In re De Haan, 169 Mich. 146, 134 NW 983; Wright v. Senn, 85 Mich. 191, 48 NW 545.

Mo.—Denny v. Brown, 193 SW 552; Morrison v. Morrison, 197 Mo. A. 527, 196 SW 1082; Crowley v. Dagley, 174 Mo. A. 561, 161 SW 366; Mabary v. Mabary, 173 Mo. A. 437, 158 SW 690; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; Fry v. Fry, 119 Mo. A. 476, 94 SW 990; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495.

N. J.—Ridgway v. English, 22 N. J. L. 409; Hammond v. Cronkright, 47 N. J. Eq. 447, 20 A 847; Gardner v. Schooley, 25 N. J. Eq. 150.

N. Y.—Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Conway v. Cooney, 111 App. Div. 864, 98 NYS 171; Comstock v. Comstock, 57 Barb. 453; Green v. Roberts, 47 Barb. 521; Hallock v. Teller, 2 Dem. Surr. 206.

N. C.—Stallings v. Ellis, 136 N. C. 69, 48 SE 548.

Pa.—Zimmerman v. Zimmerman, 129 Pa. 229, 18 A 129, 15 AmSR 720; Houck v. Houck, 99 Pa. 552; Leidig v. Coover, 47 Pa. 534; Hess's Est., 13 Phila. 285.

S. C.—Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

Utah.—Mathias v. Tingey, 39 Utah 561, 118 P 781, 38 LRANS 749.

W. Va.—Swiger v. Evans, 75 W. Va. 236, 83 SE 917.

Wis.—Tyler v. Burrington, 39 Wis. 376.

"The legal presumption of a promise to pay for services rendered by one person at the request of another, where there is no contract or agreement for compensation, is reversed when the services are rendered by a child to its parent. . . . But this is only a presumption of fact which may be overcome by evidence of an express promise by the parent to pay for the services, or where the evidence shows the child rendered the services in expectation of payment and the parent intended to pay for them." Stone v. Troll, 134 Mo. A. 308, 311, 114 SW 82.

[a] **Reasons for rule.**—(1) "It is well settled here and elsewhere, that between parent and child, there can be no recovery by the child for the board of the parent or for services rendered him by the child, in the absence of an express agreement therefor. Although a son may render services to his parent, the law regards such services as but the performance of a filial duty, which every man owes his parents, and implies no contract for compensation therefor." Meyers v. Meyers, 141 Ala. 343, 346, 37 S 451. (2) "A son finding his aged mother dangerously ill and unable to care for herself, being himself comfortably situated and abundantly able financially to do so, takes her to his home and makes her a member of his household, there treating her in all respects as an affectionate son would treat his mother, and repeatedly assuring her that she was always welcome to a home with him, and never intimating that she was expected to or should in justice pay him for board, lodging, or care. It seems to us that the natural inference of any reasonable person would be that neither of the parties would expect for a moment that pecuniary compensation by one to the other was contemplated by either, and certainly that the son was prompted by no such sordid motive in thus caring for his mother, even though she had property amounting in value to ten thousand dollars, and had been living in another place for some years." Crane v. Derrick, 157 Cal. 667, 672, 109 P 31.

[b] **A claim by an adopted son** for services will not be allowed, even though the adoption papers are defective. Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895.

[c] **Separate residence.**—The presumption that services rendered to a mother by a daughter are gratuitous

loco parentis,[92] a claim by a stepchild against the estate of his or her step-parent,[93] a claim by a parent[94] or one standing in loco parentis[95] against the estate of a child, a claim by a grandparent against the estate of a grandchild[96] or by a grandchild against the estate of a grandparent,[97] a claim by a brother or sister against the estate of a brother or sister,[98] a claim by a wife against the estate of her husband,[99] a claim by a son-in-law against the estate of his father-in-law[1] or mother-in-law,[2] a claim by a daughter-in-law against the estate of her father-in-law[3] or mother-in-law,[4] a claim by a sister-in-law against the estate of a brother-in-law with whom she lived,[5] a claim by a nephew or niece against the estate of an uncle or aunt,[6] a claim by an uncle or aunt against the estate of a

is not of itself destroyed by the fact that they were not members of the same household. Foote v. Hoffman, 200 Mich. 464, 166 NW 924; Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

92. Ala.—Patterson v. Carter, 147 Ala. 522, 41 S 133.

Ga.—Phillips v. Owens, 135 Ga. 500, 69 SE 705; Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 AnnCas 392.

Ill.—Smith v. Birdsall, 106 Ill. A. 264.

La.—Daste's Succ., 125 La. 657, 51 S 677, 29 LRANS 297.

Mo.—Nelson v. Poorman, (A.) 215 SW 753.

N. Y.—Matter of Dailey, 43 Misc. 552, 89 NYS 538.

Pa.—Fross' App., 105 Pa. 258.

Wis.—Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

"There is a presumption that the kindly services rendered by a foster daughter to her foster father during his last illness are gratuitous, and the law will not allow recovery for such services in the absence of an express promise to pay for them, or the presence of such circumstances as will be equivalent to such a promise." Daste's Succ., supra.

[a] **Where a father bound his six year old child to another** until she was twenty one years of age, with the right to control and have the services of such child until that time, and the person to whom the child was bound agreed to give her one hundred dollars when she became of age, and the employer died when the child was sixteen years of age, neither the child nor the father could recover from the estate of the deceased employer, where the services were of no greater value than what was done and received by her. Gaithers v. Lee, 135 Ga. 375, 69 SE 477.

[b] **Value of services exceeding value of education and support.**—Where one assumes the relation of a parent to a child not of kin, taken at the age of three years, and faithfully discharges the duties of that relation by receiving the child into his family, educating and supporting her, and there is no express agreement to pay her wages, she cannot sue such person's executors for services rendered decedent while a minor, although the value of such services may exceed the expenses of her education and support. Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 Ann Cas 392.

[c] **Where a child is adopted by a husband, but not by his wife,** services rendered by the child to the household during the life of the father will be presumed to be rendered on account of the adopted father, and compensation therefor is not recoverable against the estate of the mother. In re Carroll, 219 Pa. 440, 68 A 1038, 123 AmSR 673.

93. Oliver v. Hammond, 85 Ga. 323, 11 SE 655; Leighton v. Nash, 111 Me. 525, 90 A 385.

94. Malone v. Malone, 106 Ala. 567, 17 S 676; Hatch v. Hatch, 60 Vt. 160, 13 A 791.

95. Smith v. Birdsall, 106 Ill. A. 264.

96. Lewis v. Hershey, 45 Ind. A. 104, 90 NE 332; Shepherd v. Young, 8 Gray (Mass.) 152, 69 AmD 242.

[a] **Illustration.**—Where one lives from her birth to her marriage with her grandfather, as a member of his family, he furnishing board and clothing, and she rendering services, it is presumed that the necessities and comforts so furnished by him and the services so rendered by her were gratuitously furnished and done, so that his estate is not entitled to money received by him as trustee for her for what he so furnished her. Lewis v. Hershey, 45 Ind. A. 104, 90 NE 332.

97. Shutts v. Franke, 42 Ind. A. 275, 85 NE 781; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Barhite's App., 126 Pa. 404, 17 A 617.

[a] **Illustration.**—Where claimant resided with her grandmother, since deceased, and the only services claimant performed for her were such as a dutiful child renders to an afflicted and helpless parent, without hope or expectation of pecuniary reward, plaintiff could not maintain a claim against the grandmother's estate therefor. Shutts v. Franke, 42 Ind. A. 275, 85 NE 781.

[b] **Where deceased did not stand in loco parentis** with plaintiffs, and they were not members of his family, at the time they were called to attend him in his last illness, the presumption of an implied promise by deceased to pay for such services was not rebutted by the fact that he was their grandfather. Whitaker v. Whitaker, 138 N. C. 205, 50 SE 630.

98. Oubre's Succ., 109 La. 516, 33 S 583; Weiss v. Bader, 124 App. Div. 495, 108 NYS 920; Robinson v. Cushman, 2 Den. (N. Y.) 149; Keller v. Stuck, 4 Redf. Surr. (N. Y.) 294; Rogan's Est., 10 Kulp (Pa.) 138; O'Brien's Est., 17 Phila. (Pa.) 456; Geesey's Est., 18 YorkLegRec (Pa.) 85.

[a] **Services as physician.**—The brother of a decedent can recover from the estate for his services as physician only the usual charge, and not for an uninterrupted attendance and service, it appearing that he slept and ate at the house, and went in and out at his pleasure. Moffett's Est., 11 Phila. (Pa.) 79.

[b] **A claim for care of testator's wife by her sister** could not be sustained against testator's estate, in the absence of an agreement to pay therefor where the circumstances indicated that the services were intended at the time to be gratuitous. Matter of Stiles, 64 Misc. 658, 120 NYS 714.

[c] **Circumstances under which presumption does not arise.**—Where sisters have not lived together and are dependent on their labor for their livelihood, and one furnishes board and services to her sick sister until her death, there is no presumption that the services were gratuitous. Matter of Lannon, 75 Misc. 66, 134 NYS 974.

[d] **Contrary view.**—In an action by a sister of a decedent against his administrator for washing done for deceased and for nursing him in his last illness, evidence that these services were performed is sufficient to justify a recovery, the burden being on defendant to show that they were rendered gratuitously. Dance v. Magruder, 26 KyL 220, 80 SW 1120.

99. Stokes v. Stokes, 240 Ill. 330, 88 NE 829; Matter of Reuter, 5 Dem. Surr. (N. Y.) 162; Horn v. Shelton, 6 Tenn. Civ. A. 530.

1. In re Babcock, 169 NYS 800 [aff 185 App. Div. 906 mem, 171 NYS 1078 mem]; Williams v. Stonestreet, 3 Rand. (24 Va.) 559.

[a] **Contrary view.**—Dunn v. Currie, 141 N. C. 123, 53 SE 533.

2. Gall v. Stark, 98 Ill. A. 121; Henderson v. McLain, 145 N. C. 329, 59 SE 873; Betz's Est., 15 Pa. Super. 563, 18 LancLRev 97; Eckert's Est., 18 LancLRev 58.

[a] **Old and helpless mother-in-law.**—Where a mother-in-law entered a family and became one of them, supervising the children in place of her deceased daughter, and acted as a grandmother would in a house where there were children, and the relation existed for over twenty years without any agreement as to board, or any payment thereof, and she finally became helpless and was an absolute charge for eighteen months after she reached the age of eighty years, the son-in-law was entitled to reasonable pay for her support and care during such eighteen months for under such circumstances there was no presumption that the services were gratuitous, but there was an implied contract to pay for them, and the necessary expense was a proper charge against her estate, but he was not entitled to recover for board furnished before she became helpless. Henderson v. McLain, 146 N. C. 329, 59 SE 873.

[b] **The relationship of stepson-in-law and stepmother-in-law** living together is too remote to raise the presumption that they were living together for mutual convenience, and that services rendered the stepmother-in-law by the stepson-in-law were gratuitous, and the rule that much stricter proof is required to establish a contract of one of such persons to pay for services rendered by the other, in enforcing claim against decedent's estate, than in ordinary cases, does not apply. Hardiman v. Crick, 131 Ky. 358, 115 SW 236, 133 AmSR 248.

3. Ginders v. Ginders, 21 Ill. A. 522; Sutherland v. Sutherland, 142 Ky. 688, 134 SW 1152; In re Peiffer, 261 Pa. 209, 104 A 576.

[a] **Where a husband contracted to take care of his father during** the last years of his life for the use of his father's farm, the son's wife was not entitled to recover from her father-in-law's estate for ordinary services purely domestic in character rendered him in the household of her husband, although she was entitled, as against her husband, to her own earnings. Durr v. Durr, 82 SW 581, 26 KyL 855 [reh den 83 SW 629, 28 KyL 1235].

[b] **Contrary view.**—Koebel v. Beetson, 112 App. Div. 639, 98 NYS 408.

4. Rock v. Rock, 105 App. Div. 157, 93 NYS 646 (the law will presume that services rendered by a daughter-in-law in attending a sick mother-in-law are prompted by feelings of affection with no hope of compensation, especially where no claim was asserted until after the provisions of the will were made known).

5. Hatfield's Est., 50 Pa. Super. 450; Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

[a] **A claim for services as housekeeper** will not be sustained where there was no express contract to pay for such services, and claimant was a sister-in-law of decedent, and lived in his family and performed the ordinary services of a domestic. Hatfield's Est., 50 Pa. Super. 450.

[b] **The family relationship will not be presumed** in an action by a sister-in-law against the estate of a brother-in-law for services as housekeeper. Caskey v. Kineavy, 60 Pa. Super. 87.

6. Colo.—Tucker v. Tucker, 21 Colo. A. 94, 121 P 125.

nephew or niece,[7] and a claim by a grandnephew or grandniece against a granduncle or grandaunt.[8] So also, where decedent, after retiring from business, went to reside with his sisters, and furnished a part of the coal and provisions, he was under no obligation to support any of the members of the household, including a ward of one of his deceased sisters, and was not the head of the family so as to render his estate responsible for services rendered therein by the ward.[9] The relationship of cousins between claimant and decedent may be sufficient to raise the presumption where the family relation also existed[10] but not otherwise.[11]

The fact that claimant was under no legal obligation to furnish support or services to his deceased relative is immaterial,[12] a moral obligation being sufficient.[13]

[§ 882] **(2) When Payment Allowed.** The presumption that services rendered to a person in the family relation were intended to be gratuitous is rebuttable,[14] and a person standing in such relation to a decedent may recover for his services where there was an express contract or promise of the decedent to pay therefor,[15] either written or

Ill.—Martin v. Martin, 89 Ill. A. 147.

Ky.—Armstrong v. Shannon, 177 Ky. 547, 197 SW 950; Green v. Green, 119 Ky. 103, 82 SW 1011, 26 KyL 1007.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47.

N. Y.—Matter of Duke, 57 Misc. 541, 109 NYS 1087; Matter of Jones, 28 Misc. 338, 59 NYS 893.

Pa.—In re Bean, 107 A 671; Lafferty's Est., 2 Pa. Dist. 205, 13 Pa. Co. 82; Larkin's Est., 17 Phila. 503; Heathcote's Est., 16 Phila. 389 [aff sub nom. Wall's App. 111 Pa. 460, 5 A 229, 56 AmR 288]; Enoch's Est., 3 Phila. 147.

Wis.—Leitgabel v. Belt, 108 Wis. 107, 83 NW 1111.

[a] **On the other hand,** there is authority for the view that such relationship is not sufficiently close to raise the presumption that services were gratuitous. Tucker v. Tucker, 21 Colo. A. 94, 121 P 125; Neudecker v. Leister, 132 Md. 571, 104 A 47; Evan's Est., 60 Pa. Super. 83.

7. Barnett v. Adams, 83 SW 406, 26 KyL 622; Matter of Devoe, 58 Misc. 490, 111 NYS 638; Moore v. Minor, 58 Pa. Super. 77.

[a] **Illustration.**—Where decedent, while between the ages of three and seven, was cared for by an aunt, who presented no claim for such care to decedent's father, who was living at the time and for nine years thereafter, a claim for such care made by the aunt's administrator on the death of the aunt and decedent at the same time some two years after the death of decedent's father was properly disallowed. Barnett v. Adams, 82 SW 406, 26 KyL 622.

[b] **Payment of board.**—Where a nephew lived with his aunt, regularly paying board, there is no presumption of an implied contract for additional compensation for nursing, etc. Clark's Est., 12 Phila. (Pa.) 147.

8. Kelly's Est., 16 Phila. (Pa.) 285.

9. Pearre v. Smith, 110 Md. 531, 73 A 141.

10. Wood v. Lewis, (Mo. A.) 200 SW 681 (decedent a cousin of claimant's husband).

11. Parmalee v. Wigent, 189 Mich. 507, 155 NW 577.

12. Crane v. Derrick, 157 Cal. 667, 671, 109 P 31 ("Manifestly the mother could not by any process of law have compelled support at the hands of her son. That fact, however, is of no importance here. The question on this appeal is simply whether the facts we have stated sufficiently support the conclusion of the trial court that there was no implied promise on the part of the mother to compensate her son for the support and care given").

13. Sutherland v. Sutherland, 142 Ky. 688, 134 SW 1152 ("This court has frequently held that where one owes another a moral obligation that would influence him to render personal services of the character here charged for, the party rendering such services cannot recover therefor unless he shows one of two things: Either that they were rendered under an express contract, by the terms of which he was to be paid therefor, or else that at the time the services were rendered the party rendering same expected compensation and the party receiving them intended to pay therefor").

14. Ala.—Butler v. Kent, 152 Ala. 594, 44 S 863; Patterson v. Carter, 147 Ala. 522, 41 S 133.

Ark.—Lewis v. Lewis, 75 Ark. 191, 87 SW 134.

Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

D. C.—Tuohy v. Trail, 19 App. 79.

Fla.—Mills v. Joiner, 20 Fla. 479.

Ga.—Phinazee v. Bunn, 123 Ga. 230, 51 SE 300.

Ill.—Neish v. Gannon, 198 Ill. 219, 64 NE 1000 [aff 98 Ill. A. 248]; Sherman v. Whiteside, 190 Ill. 576, 60 NE 838 [aff 93 Ill. A. 572]; Switzer v. Kee, 146 Ill. 577, 35 NE 160; Overbeck v. Ahlmeier, 106 Ill. A. 606; Martin v. Martin, 89 Ill. A. 147; Jones v. Adams, 81 Ill. A. 183; Chapman v. Barnes, 29 Ill. A. 184; Killpatrick v. Helston, 25 Ill. A. 127; Ginders v. Ginders, 21 Ill. A. 522.

Ind.—Masters v. Jones, 158 Ind. 647, 64 NE 218; Hamilton v. Hamilton, 26 Ind. A. 114, 59 NE 344; Boyd v. Starbuck, 18 Ind. A. 310, 47 NE 1079.

Iowa.—Hankins v. Young, 174 Iowa 383, 156 NW 380; Sarchfield v. Hayes, 112 NW 1100; Harrison v. Harrison, 124 Iowa 525, 100 NW 344; Scully v. Scully, 28 Iowa 548.

Kan.—Griffith v. Robertson, 73 Kan. 666, 85 P 748.

Mass.—Guild v. Guild, 15 Pick. 129.

Mich.—Laird v. Laird, 127 Mich. 24, 86 NW 436; Dickerson v. Dickerson, 50 Mich. 37, 14 NW 691.

Minn.—Schwab v. Pierro, 43 Minn. 520, 46 NW 71.

Mo.—Hart v. Hess, 41 Mo. 441; Fry v. Fry, 119 Mo. A. 476, 94 SW 990; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495; Wood v. Flannery, 89 Mo. A. 632; Truesdail v. Truesdail, 72 Mo. A. 155; Koch v. Hebel, 32 Mo. A. 103.

N. J.—Updike v. Ten Broeck, 32 N. J. L. 105; De Camp v. Wilson, 31 N. J. Eq. 656.

N. Y.—In re Hamilton, 172 N. Y. 652, 65 NE 1117 [aff 70 App. Div. 73, 75 NYS 66]; Tyndall v. Van Auken, 106 App. Div. 238, 94 NYS 269; Green v. Roberts, 47 Barb. 521; Matter of Funk, 49 Misc. 199, 98 NYS 934; Matter of Dailey, 43 Misc. 552, 89 NYS 538; Matter of Pfohl, 20 Misc. 627, 43 NYS 1086; In re Merchant, 6 NYS 875; Patterson v. Patterson, 13 Johns. 379; Jacobsen v. La Grange, 3 Johns. 199; Matter of Strickland, 5 NYS 854, 2 Conn. Surr. 10; Valentine v. Valentine, 4 Redf. Surr. 265; McRae v. McRae, 3 Bradf. Surr. 199.

N. C.—Winkler v. Killian, 141 N. C. 575, 54 SE 540, 115 AmSR 694; Dunn v. Currie, 141 N. C. 123, 53 SE 533; Whitaker v. Whitaker, 138 N. C. 205, 50 SE 630.

Oh.—Hinkle v. Sage, 67 Oh. St. 256, 65 NE 999; In re Skelton, 20 Oh. Cir. Ct. 704, 11 Oh. Cir. Dec. 372.

Or.—Wilkes v. Cornelius, 21 Or. 341, 23 P 473.

Pa.—Smith v. Milligan, 43 Pa. 107; Silver's Est., 6 Pa. Dist. 267; Bushley's Est., 20 Pa. Co. 188; Embree's Est., 18 LancLRev 57.

S. C.—Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

Tenn.—Waddell v. Waddell, (Ch. A.) 42 SW 46.

Vt.—McDowell v. McDowell, 75 Vt. 401, 56 A 98, 98 AmSR 831.

Va.—Lightner v. Speck, 28 SE 326; Hughes v. Patterson, 91 Va. 664, 22 SE 485.

Wis.—Laughnan v. Laughnan, 165 Wis. 348, 162 NW 169; Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943; Leitgabel v. Belt, 108 Wis. 107, 83 NW 1111; Tyler v. Burrington, 39 Wis. 376; Pellage v. Pellage, 32 Wis. 136.

Ont.—Walker v. Boughner, 18 Ont. 448.

[a] **Payments made by decedent** to claimant "on account of services" may be shown to rebut the presumption. Greenwood v. Judson, 109 App. Div. 398, 96 NYS 147.

15. Conn.—Freeland's App., 92 Conn. 306, 102 A 890.

Ga.—Belcher v. Craine, 135 Ga. 73, 68 SE 839; Jackson v. Buice, 132 Ga. 51, 63 SE 823.

Ill.—Spalding v. White, 184 Ill. A. 217; Vogel v. Murphy, 182 Ill. A. 631; Mayer v. Schneider, 112 Ill. A. 28 [aff 212 Ill. 286, 72 NE 436].

Ind.—Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550.

Iowa.—Drake v. McGee, 178 Iowa 1345, 161 NW 84; Rule v. Carey, 178 Iowa 184, 159 NW 699; Hankins v. Young, 174 Iowa 383, 156 NW 380.

Ky.—Armstrong v. Shannon, 177 Ky. 547, 197 SW 950; Benge v. Fouts, 174 Ky. 654, 192 SW 703.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47.

Mass.—Sherry v. Littlefield, 122 NE 300.

Mich.—In re Teller, 200 Mich. 181, 166 NW 865.

Minn.—Lovell v. Beedle, 138 Minn. 12, 163 NW 778.

Mo.—Biggerstaff v. Riley, 192 Mo. A. 92, 179 SW 744; Stone v. Troll, 134 Mo. A. 308, 114 SW 82.

N. J.—Updike v. Ten Broeck, 32 N. J. L. 105.

N. Y.—Conway v. Cooney, 111 App. Div. 864, 88 NYS 171; Matter of Andrest, 96 Misc. 389, 160 NYS 505; Matter of Parker, 69 Misc. 136, 126 NYS 165; Hallock v. Teller, 2 Dem. Surr. 206.

Oh.—Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 493; Hinkle v. Sage, 67 Oh. St. 256, 65 NE 999.

Pa.—Klees' Est., 63 Pa. Super. 202; Curry's Est., 26 Pa. Super. 479; Dettenmaier's Est., 8 Pa. Dist. 273; Patterson's Est., 23 Pa. Co. 567; Ewing's Est., 18 LancLRev 73.

R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595.

S. D.—Higgs v. Bigelow, 39 S. D. 359, 164 NW 89 [cit Cyc].

Va.—Baker v. Baker, 3 Munf. (17 Va.) 222.

Wash.—Zuhn v. Harst, 100 Wash. 359, 170 P 1033.

Wis.—McHatton v. McDonnell, 166 Wis. 323, 165 NW 468; Laughnan v. Laughnan, 165 Wis. 348, 162 NW 169; Olson v. Olson, 149 Wis. 248, 135 NW 836.

Wyo.—Pool v. Pool, 21 Wyo. 435, 133 P 372.

verbal,[16] or where the circumstances are such as to show clearly a mutual intention that the services should be paid for and thus raise an implied contract,[17] or to impose upon decedent a duty to make

Ont.—In re Rutherford, 34 Ont. L. 395, 9 OntWN 32; Wilson v. Howe, 5 Ont. L. 323, 2 OntWR 52; Rycroft v. Trusts, etc., Co., 12 OntWN 240.

[a] **No specific sum need be fixed in promise to pay.**—Baker v. Baker, 3 Munf. (17 Va.) 222.

[b] **Affirmative evidence of contract necessary.**—Kelly's Est., Tuck. Surr. (N. Y.) 28.

[c] **A person who has supported and cared for one relative at the request of another** and upon the promise of the latter to pay therefor has a valid claim against the estate of the latter for compensation. Grimm v. Taylor, 96 Mich. 5, 55 NW 447; In re Payne, 204 Pa. 535, 54 A 337.

[d] **Absence of demand.**—Where services were rendered by a niece to her aunt for four years periodically up to the time of the aunt's death, there is no presumption of payment, or of the absence of a contract to pay, because no demand for payment is shown to have been made before decedent's death, a promise to pay being shown, and claimant not depending on these services for a living. Ewing's Est., 18 LancLRev (Pa.) 73.

[e] **Promise rebuts presumption that services were gratuitous.**—Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550.

[f] **A contract for payment out of decedent's estate** is sufficient, and it is not necessary that there should have been a contract on which complainant could have sued in decedent's lifetime. Hobin v. Hobin, 33 R. I. 249, 80 A 595.

[g] **An agreement by a father to pay his daughter a stated sum weekly** for her services as housekeeper was sufficient to establish a claim against the estate. Matter of Milligan, 112 App. Div. 373, 98 NYS 480.

[h] **Full performance prevented by death of decedent.**—Where the understanding between plaintiff and her father was that she should remain at home and assist him in the care of the house, farm, and stock, and help pay off the debts, and that when the debts were paid off he would compensate her for her services, and she performed services accordingly, she is entitled to compensation from his estate, although his death before the debts were paid made it impossible for her to complete the agreement. Harrison v. Harrison, 124 Iowa 525, 100 NW 344.

[i] **Contract to pay for past services.**—A contract by a father to pay his adult son one thousand dollars for past services and twenty dollars per month for future services is supported by a valid consideration. Olson v. Olson, 149 Wis. 248, 135 NW 836.

[j] **Certainty of promise.**—On a claim against an estate for personal services by decedent's granddaughter while living in his family, she was bound to prove a promise to pay, but not a promise to pay certain sums, at certain times, for certain services. Hobin v. Hobin, 33 R. I. 249, 80 A 595.

[k] **Promise too vague to support claim.**—The promise made by deceased to plaintiff's mother that if plaintiff would come and live with deceased, she would do a good part for plaintiff, is too vague to constitute an agreement on which plaintiff could recover against the estate for services performed while living with deceased. McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728.

[l] **Notice of intention to charge.**—Where a mother-in-law promised to pay her son-in-law for her board, it is not essential to his right to recover from her estate that he should have notiffed her that he intended to charge therefor. White v. Almy, 34 R. I. 29, 82 A 397.

[m] **Minority of a child** does not defeat its claim for payment for services rendered under contract. Sherry v. Littlefield, (Mass.) 122 NE 300.

[n] **After an express disclaimer of an intention to charge,** nothing short of an express promise to pay will establish a claim. Fletcher's Est., 12 Pa. Dist. 16, 28 Pa. Co. 124.

16. Bowman v. Shelton, 175 Mo. A. 696, 158 SW 404; Updike v. Ten Broeck, 32 N. J. L. 105; Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 493; Hinkle v. Sage, 67 Oh. St. 256, 65 NE 999; Edgar v. Schock, 16 Oh. Cir. Ct. N. S. 118 [aff 85 Oh. St. 448 mem, 98 NE 1124 mem].

17. Ala.—Kinnebrew v. Kinnebrew, 35 Ala. 628.

Ark.—Miller v. Summers, 187 SW 664.

Cal.—Crane v. Derrick, 157 Cal. 667, 109 P 31.

Conn.—Freeland's App., 92 Conn. 306, 102 A 590; Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

Ga.—Jackson v. Buice, 132 Ga. 51, 63 SE 823; McComb v. Hines, 123 Ga. 246, 51 SE 300.

Ill.—Byers v. Thompson, 66 Ill. 421; Freeman v. Freeman, 65 Ill. 106; Keyes v. Thornton, 150 Ill. A. 523; Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436]; Overbeck v. Ahlmeier, 106 Ill. A. 606; Jones v. Adams, 81 Ill. A. 183; Killpatrick v. Helston, 25 Ill. A. 127.

Ind.—Miller v. Miler, 47 Ind. A. 239, 94 NE 243; Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550; Hill v. Hill, 45 Ind. A. 99, 90 NE 331.

Iowa.—Herrick v. Hayes, 173 NW 110; Feltes v. Tobin, 171 NW 739; Hankins v. Young, 174 Iowa 383, 156 NW 380; In re Squire, 168 Iowa 597, 150 NW 706; Wence v. Wykoff, 52 Iowa 644, 3 NW 685.

Ky.—Benge v. Fouts, 174 Ky. 654, 192 SW 703; Hamilton v. Preston, 166 Ky. 61, 178 SW 1146; Humble v. Humble, 152 Ky. 160, 153 SW 249.

Md.—Marx v. Marx, 127 Md. 373, 96 A 544.

Mass.—Sherry v. Littlefield, 122 NE 300; McKenna v. Twombly, 206 Mass. 62, 91 NE 1023.

Mich.—Foote v. Hoffman, 200 Mich. 464, 166 NW 924; In re Scully, 199 Mich. 181, 165 NW 688; Maynard v. Schrumpf, 192 Mich. 494, 158 NW 845; Hialey v. Hialey, 157 Mich. 45, 121 NW 465; In re Smith, 152 Mich. 197, 115 NW 1052; O'Connor v. Beckwith, 41 Mich. 657, 3 NW 166.

Minn.—Lovell v. Beedle, 138 Minn. 12, 163 NW 778.

Mo.—Bowman v. Shelton, 175 Mo. A. 696, 158 SW 404; Crowley v. Dagley, 174 Mo. A. 561, 161 SW 366; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838; Rose v. Mayes, 139 Mo. A. 246, 122 SW 769; Brinton v. Thomas, 138 Mo. A. 64, 119 SW 1016; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; Fry v. Fry, 119 Mo. A. 476, 94 SW 990; Allen v. Allen, 101 Mo. A. 676, 74 SW 396; Ramsey v. Hicks, 53 Mo. A. 190.

N. H.—Page v. Page, 73 N. H. 305, 61 A 356, 6 AnnCas 510.

N. J.—Frean v. Hudson, 87 N. J. L. 244, 93 A 582; De Camp v. Wilson, 31 N. J. Eq. 656.

N. Y.—Greenwood v. Judson, 109 App. Div. 398, 96 NYS 147; Benedict v. Sliter, 82 Hun 190, 31 NYS 413; Matter of Duke, 57 Misc. 541, 109 NYS 1087; Matter of Dailey, 43 Misc. 552, 89 NYS 538; In re Babcock, 169 NYS 800 [aff 185 App. Div. 906 mem, 171 NYS 1078 mem]; In re Harter, 148 NYS 766; Clark v. Bradley, 20 NYS 452 [aff 139 N. Y. 653 mem, 35 NE 207 mem].

N. C.—Debruhl v. New Bern Banking, etc., Co., 172 N. C. 839, 90 SE 9; Winkler v. Killian, 141 N. C. 575, 54 SE 540, 115 AmSR 694; Dunn v. Currie, 141 N. C. 123, 53 SE 533.

N. D.—Bergerson v. Mattern, 170 NW 877 [cit Cyc].

Oh.—Thompson v. Jones, 33 Oh. Cir. Ct. 182; In re Skelton, 20 Oh. Cir. Ct. 704, 11 Oh. Cir. Dec. 372; Thompson v. Jones, 13 Oh. Cir. Ct. N. S. 493.

Pa.—Raub's Est., 67 Pa. Super. 33; Klees' Est., 63 Pa. Super. 202; Patterson's Est., 23 Pa. Co. 567; Gridland's Est., 8 Pa. Co. 6; Silvius' Est., 3 LackLegN 84; Embree's Est., 18 LancLRev 57.

R. I.—White v. Almy, 34 R. I. 29, 82 A 397.

S. C.—Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

S. D.—Higgs v. Bigelow, 39 S. D. 359, 164 NW 89 [cit Cyc].

Utah.—Wilkin v. O'Brien, 176 P 853; Nephi First Nat. Bank v. Christensen, 39 Utah 568, 118 P 778; Mathias v. Tingey, 39 Utah 561, 118 P 781, 38 LRANS 749.

Va.—Chancellor v. Ashby, 2 Patt. & H. 26.

Wash.—Zuhn v. Harst, 100 Wash. 359, 170 P 1033; Hodge v. Hodge, 47 Wash. 196, 91 P 764, 11 LRANS 873.

W. Va.—Clark v. Gruber, 74 W. Va. 533, 82 SE 338.

Ont.—Brown v. Davy, 18 Ont. 559; Stoddart v. Allan, 7 OntWR 750; Campbell v. Pond, 4 OntWR 16.

[a] **Facts raising implied promise of payment.**—During the last few years of deceased's life, especially the last few months, the attendance of a male nurse was necessary, and the duties of the nurse were unpleasant and in frequent requisition. Claimant, a nephew, lived near him, and, with another nephew of deceased, performed the duties of nurse. Deceased frequently sent for his nephews, and they frequently attended him without being sent for, anticipating the necessity of going to him. The visits were necessary several times a day, and often at night, claimant rendering the greater service. It was held sufficient to raise an implied contract with deceased for payment for claimant's services. Lewis v. Lewis, 75 Ark. 191, 87 SW 134.

[b] **That parent and child did not live together** in the family relation is a circumstance to be regarded in determining whether there was an implied promise to pay for services rendered by the child. Foote v. Hoffman, 200 Mich. 464, 166 NW 924, LRA1918D 400; Page v. Page, 73 N. H. 305, 61 A 356, 6 AnnCas 510; Winkler v. Killian, 121 N. C. 575, 54 SE 540, 115 AmSR 694; Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

[c] **The nature of the services is an important factor** in determining whether it is to be regarded as gratuitous. Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

[d] **Professional services,** rendered in the usual course of business, are not presumed to be intended to be gratuitous. Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265.

[e] **Extraordinary and menial services.**—"This court has recognized a distinction between ordinary services performed by the wife of the son of an intestate and services of an extraordinary and menial kind. Frailey v. Thompson, 49 SW 13, 20 KyL 1179. As to the latter services covering a long period of years there is no presumption that they are a gratuity, and it is not necessary to prove an express contract by stricter proof than is required in other cases. Here the intestate was confined to his bed for several years. He could not control his bowels, and frequently could not control his kidneys. Often his bed had to be changed. Not only that, but he had a syphilitic gangrene on his feet and other parts of his body. Appellee had to change his bed clothing and bathe his body. In doing this she incurred danger of infection. While

compensation therefor;[18] and where, although decedent and claimant were relatives, the relation was not such as imposed any special obligation on claimant of support of, care for, or tenderness toward decedent, a claim for compensation will be more favorably regarded, and in a suitable case upheld, especially where decedent and claimant did not live together.[19] But a mere expectation of a child that he will be provided for by his father's will is not sufficient to support a claim for compensation for services,[20] nor will declarations of intention on the part of decedent, which are not communicated to the claimant, suffice.[21] Neither will a claim for compensation be sufficiently supported by decedent's mere expressions of gratitude and a desire to compensate where such expressions fall short of indicating any contract for payment.[22]

[§ 883] **c. In Whose Favor Claim Exists.** Where decedent had resided with a husband and wife, but was not shown to have had knowledge of the fact that the husband had told his wife that she could have the money derived from decedent's board, the implied contract to pay for such board was to pay to the husband as the head of the family, and not to the wife.[23]

[§ 884] **d. Nature of Claim.** A claim against an estate for services performed at the request of decedent and with his knowledge, and alleging that they were worth a stated sum, is not a claim on an express contract, but is a claim on quantum meruit, and is supported by proof of performance

now and then some one was employed to assist her, it appears that no one else could be gotten who was willing to perform these services for any length of time. It is not shown that any of intestate's other children ever volunteered to wait on him, or did perform any of the services performed by appellee. She bore this unusual burden without the assistance of any of the other members of the family. For such extraordinary and menial services as appellee performed, we think the proof is sufficient to show that they were performed with the expectation both on her part and on the part of the intestate that she should be paid therefor." Humble v. Humble, 152 Ky. 160, 163, 153 SW 249. To similar effect Durr v. Durr, 82 SW 581, 26 KyL 855 [reh den 83 SW 629, 26 KyL 1235].

[f] **Demands on express and on implied contracts not inconsistent.**—A demand by an adult child for compensation for services rendered a deceased parent, based on an actual contract between the parties, and a demand based on the theory of a contract implied by law binding the parent who was insane, to pay for the services, are not inconsistent. Hartley v. Hartley, 173 Mo. A. 18, 25, 155 SW 1099, 1101 ("Both are contracts equally valid in the law—the one an actual contract, and the other a strictly implied one—and by virtue of each an identical liability may be entailed, that is, to respond for the reasonable value of services or goods furnished which are actually necessary").

18. Ind.—Lockwood v. Robbins, 125 Ind. 398, 25 NE 455.

Ky.—Mark v. Boardman, 89 SW 481, 28 KyL 455, 1 LRANS 819.

Oh.—Spink v. Spink, 28 Oh. Cir. Ct. 94.

Pa.—Strawbridge's App., 5 Whart. 568.

Tenn.—Key v. Harris, 116 Tenn. 161, 92 SW 235, 8 AnnCas 200.

[a] **Illustration.**—While it is the general rule that no allowance will ordinarily be made to either a father or mother out of the estate of their deceased minor children for their past maintenance and support, yet where it appears that a mother was furnishing such support, and has no estate, or an estate small and trifling in comparison to that of the minor, and that the maintenance given to the minor for his benefit was under circumstances practically coercive on the mother, and that in doing so she was compelled to assume a burden not naturally and legally hers alone, such allowance may be made. Spink v. Spink, 28 Oh. Cir. Ct. 94.

[b] **Detriment to claimant.**—A sister, who cared for her brother at her home during his last illness, nursing him and performing for him unpleasant menial services, his presence at her home being of no benefit to her, but a positive detriment, was entitled to enforce her claim for nursing and menial services against her brother's estate. Mark v. Boardman, 89 SW 481, 28 KyL 455, 1 LRA NS 819.

[c] **Care of idiot sister.**—Where in a suit to establish a claim for services rendered by claimant to her deceased sister, it appeared that deceased was an idiot, and had been so during her entire life, that for a number of years she was almost helpless, that she and claimant lived together, and that all the wants of the deceased were supplied by claimant, claimant was held entitled to such compensation as the deceased would have accorded claimant, if she had acquired full possession of her mental faculties before her death, and had possessed an ordinary sense of justice. Key v. Harris, 116 Tenn. 161, 92 SW 235, 8 AnnCas 200.

[d] **Even a near relative may be allowed** for services to, or support of, the decedent in the absence of any express or implied contract on his part to pay, where the claimant is under no obligation to furnish such services or support and the circumstances show such allowance to be just, as in a case of support and maintenance by a mother of an adult son possessed of means but incapable of taking care of himself or his property by reason of intemperance. Strawbridge's App., 5 Whart. (Pa.) 568.

[e] **Where a minor not related is taken into a decedent's family and treated as a servant** instead of a member of the family, she may recover for her services, although there was no express agreement for compensation. Lockwood v. Robbins, 125 Ind. 398, 25 NE 455.

19. Ark.—Lewis v. Lewis, 75 Ark. 191, 87 SW 134.

Cal.—In re Rohrer, 160 Cal. 574, 117 P 672, AnnCas1913A 479; Wood v. James, 15 Cal. A. 253, 114 P 587 [quot Cyc].

Colo.—Tucker v. Tucker, 21 Colo. A. 94, 121 P 125.

Ill.—Waldron v. Alexander, 133 Ill. 30, 24 NE 557; Morrow v. Duggan, 176 Ill. A. 415; Quigly v. Harold, 22 Ill. A. 269.

Iowa.—Ogden v. Keerl, 152 Iowa 106, 131 NW 682.

Ky.—Duke v. Crump, 215 SW 41; Mark v. Boardman, 89 SW 481, 28 KyL 455, 1 LRANS 819.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47.

Mich.—Foote v. Hoffman, 200 Mich. 464, 166 NW 924, LRA1918D 400; Weessies v. Van Dyke, 159 Mich. 180, 123 NW 608.

Miss.—Peeler v. Peeler, 11 S 318.

Mo.—Sprague v. Sea, 152 Mo. 327, 53 SW 1074; Truesdail v. Truesdail, 72 Mo. A. 155.

N. Y.—Doremus v. Lott, 49 Hun 284, 1 NYS 793; Matter of Lannon, 75 Misc. 66, 134 NYS 974; Matter of Stiles, 64 Misc. 658, 120 NYS 714; In re Harter, 148 NYS 766; Fleer v. Finken, 15 NYS 514; Valentine v. Valentine, 4 Redf. Surr. 265.

Pa.—Smith v. Milligan, 43 Pa. 107; Evans' Est., 60 Pa. Super. 83; Currey's Est., 14 Pa. Dist. 211; Gehman's Est., 27 Pa. Co. 396; Lillich's Est., 9 Pa. Co. 25; Fox's Est., 3 Pa. Co. 258; McCarty's Est., 9 Phila. 318; Russell's Est., 7 Phila. 64.

Vt.—McDowell v. McDowell, 75 Vt. 401, 56 A 98, 98 AmSR 831.

"The degree of the relationship may strengthen or diminish the implication that the services are acts of gratuitous kindness and affection, according to its proximity or remoteness." Crane v. Derrick, 157 Cal. 667, 672, 109 P 31.

[a] **Where a grandfather hires a minor grandson** at a stated monthly compensation, no presumption arises from the relationship that the grandson's services for the second month were gratuitously rendered. McDowell v. McDowell, 75 Vt. 401, 56 A 98, 98 AmSR 831.

[b] **Services by niece.**—Where a claimant against decedent's estate for services to the decedent in her lifetime is a niece of decedent, the relationship tends to rebut the presumption of a contract to pay, but is not sufficient to overcome such presumption unless other circumstances against the presumption are also shown. Ewing's Est., 18 LancLRev (Pa.) 73.

[c] **No relationship, other than that of parent and child,** between a claimant and decedent whose estate is sought to be charged for services rendered in a last illness will per se rebut the presumption of a promise to pay for them. Weber's Est., 7 North. Co. (Pa.) 1, 13 YorkLegRec 66.

20. Benge v. Fouts, 174 Ky. 654, 192 SW 703; Clow v. Wormington, (Mo. A.) 206 SW 415; In re Helpbringer, 175 Mo. A. 325, 162 SW 288.

21. Kleinberg v. Kinealy, (Mo. A.) 193 SW 981; Matter of Duke, 57 Misc. 541, 109 NYS 1087. See also supra § 879 text and note 80.

22. Ill.—Smith v. Birdsall, 106 Ill. A. 264.

Ky.—Humble v. Humble, 152 Ky. 160, 153 SW 249; Price v. Price, 101 Ky. 28, 39 SW 429, 19 KyL 211; Reynolds v. Reynolds, 92 Ky. 556, 18 SW 517, 13 KyL 793.

Md.—Duckworth v. Duckworth, 98 Md. 92, 56 A 490.

Mo.—Kingston v. Roberts, 175 Mo. A. 69, 157 SW 1042.

Pa.—Wildonger's Est., 2 Pa. Dist. 192, 12 Pa. Co. 616, 32 WklyNC 184.

[a] **Claim must be proved according to law.**—Declarations of a father that his son should be paid for work performed for him can be regarded as referring to an account presented by the son after the father's death, or to the services claimed for therein, only where the correctness of the claim is otherwise proved according to law. Duckworth v. Duckworth, 98 Md. 92, 56 A 490.

23. O'Donnell v. McCann, 73 N. J. Eq. 640, 68 A 752.

and value.[24]

[§ 885] **e. Amount of Allowance.**[25] Where the services rendered were based upon an express contract for a specified remuneration such contract must govern,[26] even though the agreed compensation is unusually high;[27] but where the services are rendered merely upon an implied contract to pay or in the expectation of compensation, such compensation as is reasonable under the circumstances will be allowed,[28] and the allowance is not governed by the value which the claimant has placed upon his services in making his claim,[29] or the amount for which the claim is placed upon the account of the representative.[30]

The fact that a fixed monthly allowance was paid and accepted for a long time will not bar a larger allowance for caring for an aged person for a later period during which the services were more onerous by reason of his illness and the usual allowance was not paid.[31]

Consideration of use of property by claimant. Where an adult child, living apart from the home of his parent, rendered services for the parent and used her property, it was held that in the absence of fraud or gross neglect his claim against her estate for compensation should be reduced only by what he actually received from the use of the property, and not what he could have received by more diligent management.[32]

Interest may be allowed where the services have extended over a long period.[33]

Services by persons other than claimant. A claimant is not entitled to recover for additional services by her husband and son where there is nothing in the implied contract arising out of the facts in evidence authorizing her to employ third persons to render services to decedent.[34]

[§ 886] **f. Agreement to Compensate by Will.**[35] An agreement of decedent whereby he undertook to compensate another out of his estate for services rendered, or to be rendered, binds his estate, and the person who renders the services, failing to receive the promised legacy or bequest, may claim a reasonable recompense from the estate,[36] and even

24. Baehr v. Buell, 133 Wis. 119, 113 NW 433.

25. Where decedent agreed to compensate by will see infra § 886.

26. Kan.—In re Burkhart, 103 Kan. 97, 172 P 1024.

Ky.—Carr v. Calvert, 102 SW 282, 31 KyL 303.

La.—Carstens' Succ., 142 La. 114, 76 S 328.

Mich.—Laird v. Laird, 127 Mich. 24, 86 NW 436.

N. Y.—Lasher v. McDermott, 157 App. Div. 100, 141 NYS 574; Matter of Mosher, 103 App. Div. 459, 93 NYS 123 [aff 185 N. Y. 556 mem, 77 NE 1191 mem]; Matter of Johnson, 32 App. Div. 634, 52 NYS 1081; Hallock v. Teller, 2 Dem. Surr. 206.

Pa.—Grossman v. Thunder, 212 Pa. 274, 61 A 904; Normile v. Osborne, 207 Pa. 367, 56 A 937; Brose's Est., 155 Pa. 619, 26 A 766; Piersol's Est., 27 Pa. Super. 204; Howard v. Drexler, 14 Pa. Super. 59; Wartman's Est., 19 Pa. Co. 143.

27. Lasher v. McDermott, 157 App. Div. 100, 141 NYS 574.

[a] **Illustration.**—A wandering peddler, for services rendered to him, executed a writing promising payment to claimant of five thousand dollars after his death from his estate "for all my trouble and all her kindness to [him]." He had stayed at claimant's house for several days at a time, five or six times a year, without making any payment therefor. He called the instrument a "Unique Charity." It was held that the facts showed that decedent knew that the compensation was beyond the value of the services rendered, but that the claim under the instrument was valid and enforceable against his estate. Matter of Todd, 47 Misc. 35, 95 NYS 211.

28. U. S.—Quirk v. Bank, etc., Co., 244 Fed. 682, 157 CCA 130.

Cal.—White v. Deering, (A.) 179 P 401.

Ga.—Belcher v. Craine, 135 Ga. 73, 68 SE 839.

Iowa.—Drake v. McGee, 178 Iowa 1345, 161 NW 84; In re Oldfield, 175 Iowa 118, 156 NW 977, LRA1916D 1260, AnnCas1917D 1007; Broughton v. Nicholson, 150 Iowa 119, 129 NW 814.

Kan.—Masterson v. Masterson, 100 Kan. 108, 163 P 617.

Ky.—Benge v. Creech, 175 Ky. 6, 192 SW 817; Benge v. Fouts, 174 Ky. 654, 192 SW 703; Humble v. Humble, 152 Ky. 160, 153 SW 249; Green v. Teutschmann, 97 SW 7, 29 KyL 1149; Parrish v. Ferguson, 12 Ky. Op. 444.

La.—Alexander's Succ., 110 La. 1027, 35 S 273; Lacoste's Succ., 108 La. 57, 32 S 181.

Mich.—McNamara v. Michigan Trust Co., 155 Mich. 585, 119 NW 1074.

Minn.—Wagner v. Seaberg, 138 Minn. 37, 163 NW 975.

Mo.—Hinshaw v. Raines, (A.) 185 SW 1192.

N. J.—Goetz v. Walters, (Sup.) 59 A 20.

N. Y.—Koebel v. Beetson, 112 App. Div. 639, 98 NYS 408; Matter of Lannon, 75 Misc. 66, 134 NYS 974.

N. C.—Debruhl v. Banking, etc., Co., 172 N. C. 839, 90 SE 9.

Pa.—Boyer's Est., 37 Pa. Co. 252; Olsen v. Swartz, 30 Pa. Co. 529; McCann's Est., 28 Pa. Co. 46; Bugh's Est., 23 Pa. Co. 660.

Va.—Lightner v. Speck, 28 SE 326.

Wis.—Heber v. Heber, 139 Wis. 472, 121 NW 328.

N. S.—In re Ansley, 41 N. S. 527.

Ont.—Dixon v. Garbutt, 10 OntWR 838.

"We think the true measure is such sum as the jury might from the evidence find plaintiff's services to have been reasonably worth." Green v. Teutschmann, 97 SW 7, 29 KyL 1149.

[a] **Matters to be considered.**—(1) Where a neighbor had rendered personal attendance and service to decedent, and decedent had agreed to pay therefor, the value of the services is not to be measured by those of an ordinary house servant, who receives not only wages, but also board and lodging, but the additional labor in going to decedent whenever her services should be required must be considered. McDonough's Est., 6 Pa. Co. 527. (2) Where a claim was filed against decedent's estate for attendance and services during the lifetime and last sickness of decedent, the relations of the parties and the circumstances under which the services were rendered might be shown, and the sum usually paid to persons who render services for hire, and the ordinary charges for rooms and board were not necessarily controlling. Luizzi v. Brady, 140 Mich. 73, 103 NW 574. (3) Where decedent allowed his son to plant an orchard and put other costly improvements on a farm as though it belonged to the son, it was inequitable, on settling decedent's estate, to charge the son with full rental value of the farm, and allow him to set off merely the cost of the trees and the planting thereof, without regard to their value when in full bearing, and the care and attention bestowed on them for years. Lightner v. Speck, (Va.) 28 SE 326. (4) The value of the succession may be considered by the court in fixing the fees due by a succession for professional services of physicians. Haley's Succ., 50 La. Ann. 840, 24 S 285. (5) If plaintiff contracted to take care of and wait on defendant's decedent, and plaintiff, her husband and children, lived with decedent, plaintiff could not recover for anything furnished by her for the support of the family, or consumed by herself, her husband and children, as it was the husband's duty to support them, nor could plaintiff be chargeable with what she had received as a gift from decedent, but would be chargeable with whatever he may have paid her for her services in taking care of and waiting on him; and if plaintiff contracted with defendent's decedent to go to his home, care for him and wait on him, and if the cooking of his meals and serving thereof was part of her duty under the contract in taking care of him and waiting on him, she could recover therefor, the cooking and serving of the meals in such a case not being a mere boarding of decedent by plaintiff. Belcher v. Craine, 135 Ga. 73, 68 SE 839.

[b] **Wages in customary vocation.**—Services rendered by a sister in the last illness of her sister will be based on the wages she received in her customary vocation of cook, in the absence of evidence as to value. Matter of Lannon, 75 Misc. 66, 134 NYS 974.

[c] **Amounts to be allowed under particular circumstances.**—Bartholomew v. Adams, 143 Iowa 354, 121 NW 1026; Walker v. Ganote, (Ky.) 116 SW 689; Barnett v. Adams, 82 SW 406, 26 KyL 622; Forsythe v. Thompson, 157 Mich. 669, 122 NW 219; In re McNamara, 155 Mich. 585, 119 NW 1074; Oliver v. Jessup, 137 Mich. 642, 100 NW 900; Goetz v. Walters, (N. J. Sup.) 59 A 20; Koebel v. Beetson, 112 App. Div. 639, 98 NYS 408; Cunningham v. Hewett, 84 App. Div. 114, 81 NYS 1102 [aff 177 N. Y. 541 mem, 69 NE 1122 mem]; Matter of Lannon, 75 Misc. 66, 134 NYS 974; Moyer's Est., 49 Pa. Super. 187; Carothers' Est., 41 Pa. Super. 126; Wisner's Est., 22 LancLRev (Pa.) 50.

29. Matter of Duke, 57 Misc. 541, 109 NYS 1087.

30. Schmidt's Succ., 108 La. 293, 32 S 413 (such amount is not conclusive if it is shown that the services were really of greater value).

31. Smith v. Hopper, 3 OntWN 1039, 21 OntWR 891, 3 DomLR 339.

32. Winkler v. Killian, 141 N. C. 575, 54 SE 540, 115 AmSR 694.

33. Matter of Duke, 57 Misc. 541, 109 NYS 1097.

34. Christianson v. McDermott, 123 Mo. A. 448, 100 SW 63.

35. [a] **Services in mere hope or expectation** of legacy or devise but without a promise see supra § 879.

36. Colo.—Taylor v. Wilder, 165 P

though a parol agreement of this kind would be void under the statute of frauds, it is sufficient foundation for a claim against the promisor's estate.[37] The promise must, however, have been definite,[38] as well as contractual and irrevocable.[39] But where deceased agreed to make a will in plaintiff's favor in consideration of his performing certain services, plaintiff's recovery cannot be defeated on the ground of his breach where decedent acquiesced in the modification of the contract.[40] If the promise has been fulfilled, the claimant cannot claim anything further,[41] but even though a legacy has been left to the claimant, if such legacy is clearly insufficient to compensate for the services rendered, additional compensation may be allowed.[42]

Amount. It has been held that where the agreement of decedent was specific as to the amount which the claimant should receive, such amount should be allowed without regard to the actual value of the services,[43] but where there is a mere gen-

766; Snowden v. Clemons, 5 Colo. A. 251, 38 P 475.

Conn.—Hull v. Thoms, 82 Conn. 647, 74 A 925.

D. C.—Robeson v. Niles, 18 D. C. 182.

Ill.—Freeman v. Freeman, 65 Ill. 106.

Ind.—Bell v. Hewitt, 24 Ind. 280. Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550; Carroll v. Swift, 10 Ind. A. 170, 37 NE 1061.

Kan.—Griffith v. Robertson, 73 Kan. 666, 85 P 748.

Ky.—Yowell v. Bottom, 175 Ky. 635, 194 SW 768; Benge v. Fouts, 174 Ky. 654, 192 SW 703; Benge v. Fouts, 163 Ky. 796, 174 SW 510; Walker v. Ganote, 116 SW 689; Story v. Story, 61 SW 279, 22 KyL 1731, 62 SW 865, 22 KyL 1869; Thomas v. Feese, 51 SW 150, 21 KyL 206; Usher v. Flood, 83 Ky. 552; Myles v. Myles, 6 Bush 237.

La.—Nimmo v. Walker, 14 La. Ann. 581; Simon's Succ., 8 La. A. (Orleans) 115.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47.

Mich.—Montgomery v. Montgomery, 191 Mich. 398, 158 NW 117; Shane v. Shearsmith, 137 Mich. 32, 100 NW 123; Ewers v. White, 114 Mich. 266, 72 NW 184; Rhea v. Meyers, 111 Mich. 140, 69 NW 239; Plant v. Weeks, 39 Mich. 117.

Minn.—Schwab v. Pierro, 43 Minn. 520, 46 NW 71.

Mo.—Taylor v. Hudson, 145 Mo. A. 377, 129 SW 261; Christianson v. McDermott, 123 Mo. A. 448, 100 SW 63.

N. J.—Gay v. Mooney, 67 N. J. L. 27, 50 A 596; Titus v. Hoagland, 39 N. J. Eq. 294.

N. Y.—Collier v. Rutledge, 136 N. Y. 621, 32 NE 626; Shakespeare v. Markham, 72 N. Y. 400; Robinson v. Raynor, 28 N. Y. 494; Chambers v. Boyd, 116 App. Div. 208, 101 NYS 486; Bair v. Hager, 97 App. Div. 358, 90 NYS 27, 15 NYAnnCas 283; Lane v. Calby, 95 App. Div. 11, 88 NYS 465; Leahy v. Campbell, 70 App. Div. 127, 75 NYS 72; Gall v. Gall, 27 App. Div. 173, 50 NYS 563 [app dism 160 N. Y. 696 mem, 55 NE 1095 mem]; Matter of Funk, 49 Misc. 199, 98 NYS 934; Shimer v. Kinder, 12 NYSt 728.

N. C.—Miller v. Lash, 85 N. C. 51, 39 AmR 678.

Oh.—Walters v. Heidy, 19 Oh. Cir. Ct. N. S. 252, 1 Oh. A. 66; Sayler v. Sellers, 19 Oh. Cir. Ct. N. S. 206, 2 Oh. A. 439; Clark v. Boltz, 10 Oh. Cir. Ct. N. S. 1.

Pa.—Moorhead v. Fry, 24 Pa. 37; MacInnies' Est., 21 Pa. Dist. 373; Yeager's Est., 18 Pa. Dist. 980; Harper's Est., 7 Pa. Dist. 532; Cook's Est., 2 Pa. Dist. 193; O'Mara's Est., 31 Pa. Co. 469; Unger's Est., 20 Pa. Co. 168; Cridland's Est., 8 Pa. Co. 6.

Tenn.—Taylor v. Wood, 4 Lea 504.

Tex.—Raycraft v. Johnston, 41 Tex. Civ. A. 466, 93 SW 237; Von Carlowitz v. Bernstein, 28 Tex. Civ. A. 8, 66 SW 464.

Wash.—Pelton v. Smith, 50 Wash. 459, 97 P 460.

Wis.—Jilson v. Gilbert, 26 Wis. 637, 7 AmR 100; Bayliss v. Pricture, 24 Wis. 651.

Wyo.—Pool v. Pool, 21 Wyo. 435, 133 P 372.

Ont.—Re Rutherford, 34 Ont. L. 395, 9 OntWN 32; Walker v. Boughner, 18 Ont. 448; Rycroft v. Trusts, etc., Co., 12 OntWN 240.

"In such circumstances, the party rendering services is entitled to compensation as a creditor of the estate for the value of the services whether the failure to make the agreed compensation arose from accident or design." Bair v. Hager, 97 App. Div. 358, 359, 90 NYS 27, 15 NYAnnCas 283.

[a] **Nature of contract to compensate by will.**—Where plaintiff went to live with decedent, upon her request to come and live with her and care for her in her declining years and upon decedent's promise to provide proper compensation in her will, the contract for her services was an implied contract. Gillan v. O'Leary, 124 App. Div. 498, 108 NYS 1024.

[b] **Revocation of will by birth of issue.**—The principle stated in the text is applicable where the employer executes a will providing for the agreed compensation, which is revoked by his subsequent marriage and the birth of issue. Gall v. Gall, 27 App. Div. 173, 50 NYS 563 [app dism 160 N. Y. 696 mem, 55 NE 1095 mem].

[c] **Will lost or destroyed.**—Where a father agreed to compensate his son by leaving his property to him if the son would take care of the father during his declining years, the son may maintain an action on the quantum meruit, even though the father made a will devising the property, it appearing that the will was lost or destroyed, and could not be found after the father's death. Pool v. Pool, 21 Wyo. 435, 133 P 372.

[d] **Action need not be based on breach of agreement.**—Where services rendered were not gratuitous, but under an understanding that compensation should be made by will, which was not done, there may be a recovery on a quantum meruit, and it is not necessary to base an action on the breach of the agreement. Pelton v. Smith, 50 Wash. 459, 97 P 460.

[e] **Uncorroborated evidence** of a daughter that her father, to whom she had made advances for the support of his family, and her mother, had promised in consideration for the advances to leave her a portion of their property, is insufficient in equity, after the death of the father and mother, to create a charge on the estate of either. Cochrane v. McEntee, (N. J. Ch.) 51 A 279.

37. Ind.—Schoonover v. Vachon, 121 Ind. 3, 22 NE 777; Bell v. Hewitt, 24 Ind. 280.

Ky.—Story v. Story, 61 SW 279, 22 KyL 1731, 62 SW 865, 22 KyL 1869.

Md.—Neudecker v. Leister, 132 Md. 571, 104 A 47.

Mich.—In re Williams, 106 Mich. 490, 64 NW 490.

Mo.—Bowman v. Shelton, 175 Mo. A. 696, 158 SW 404; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Hall v. Getman, 121 Mo. A. 630, 97 SW 607.

N. J.—Updike v. Ten Broeck, 32 N. J. L. 105; Smith v. Smith, 28 N. J. L. 208, 74 AmD 49.

Pa.—Graham v. Graham, 34 Pa. 475.

Tex.—Raycraft v. Johnston, 41 Tex. Civ. A. 466, 93 SW 237.

Wis.—Nelson v. Christensen, 169 Wis. 373, 172 NW 741; Laughnan v. Laughnan, 165 Wis. 348, 162 NW 169; Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895.

38. Yowell v. Bottom, 175 Ky. 635, 199 SW 768; Graham v. Graham, 34 Pa. 475.

[a] **Illustration.**—Agreement by a testator during his lifetime to bequeath, to one who has rendered services to him, "as much as to any relative on earth," is too indefinite to be enforced against the executor. Graham v. Graham, 34 Pa. 475.

[b] **A mere intention of decedent to** make a will recognizing the services rendered is not sufficient. Yowell v. Bottom, 175 Ky. 635, 194 SW 768.

39. Eggers v. Anderson, 63 N. J. Eq. 264, 49 A 578, 55 LRA 570 [rev 61 N. J. Eq. 85, 47 A 727]; Jordan v. Dutton, 1 Phila. (Pa.) 437.

Contract to make will see Wills [40 Cyc 1063].

40. Gauss v. Trump, 48 Mont. 92, 135 P 910.

41. Girty v. Girty, 180 Ky. 786, 203 SW 730; Finn v. Sowder, 139 Mich. 623, 103 NW 177.

[a] **Illustration.**—Where, in an action on a claim for services against decedent's estate, claimant testified that testatrix promised to leave her property to claimant in consideration of such services, and admitted that she was claiming all testatrix's household goods and an interest in the real estate under the will, she was not entitled to recover any further sum against the estate. Finn v. Sowder, 139 Mich. 623, 103 NW 177.

[b] **Where testator died insolvent,** but bequeathed all his property to claimant as he had promised to do, claimant could not recover for her services. Girty v. Girty, 180 Ky. 786, 203 SW 730.

42. Porter v. Dunn, 131 N. Y. 314, 30 NE 122 [rev 61 Hun 310, 16 NYS 771; Reynolds v. Robinson, 64 N. Y. 589; Nesbit's Est., 20 Pa. Dist. 700.

43. Conn.—Hull v. Thoms, 82 Conn. 647, 74 A 925.

Mich.—Sword v. Keith, 31 Mich. 247.

Mo.—Koch v. Hebel, 32 Mo. A. 103.

N. Y.—Matter of Funk, 49 Misc. 199, 98 NYS 934; Matter of Mallory, 13 Misc. 595, 35 NYS 155.

Pa.—Moorhead v. Fry, 24 Pa. 37.

[a] **Promise to leave claimant in comfortable circumstances.**—Under a contract with one deceased to leave the claimant in comfortable circumstances, so that she should not have to work for a livelihood, if she would take care of him and attend to him during his lifetime, the claimant is entitled to an amount from the estate sufficient to keep her without work, taking into consideration her condition in life. Cottrell's Est., 11 Phila. (Pa.) 93.

[b] **Amount not exceeding what should have been received under will.**—Where one promised to pay another by will for services rendered, but died without making a will, and the services were performed pursuant to the agreement, there could be a recovery for the value thereof, not exceeding the amount which claimant should have received by will. Hull v. Thoms, 82 Conn. 647, 74 A 825.

[c] **Contrary view.**—"In such case the value of the service performed,

eral promise to compensate, no amount being specified, the reasonable value of the services measures the amount to be allowed.[44]

[§ 887] **5. Loans or Advances to Decedent.** Money paid out for the use and benefit of decedent, with his knowledge and consent, can be recovered against the estate without showing a positive direction or a definite writing,[45] and loans and advances are sometimes allowed in equity by way of adjustment between the estate of a deceased spouse and the survivor,[46] or to other persons standing in a family relation to decedent.[47] The payment must, however, have been made under such circumstances as to impose on decedent an obligation to make repayment and establish the relation of debtor and creditor between him and the person making the payment;[48] and where children who were of age agreed that their father might use money belonging to their deceased mother with which to bury her, they were not entitled to recover any part of the amount so expended from the estate of their father.[49] Where one promises that persons taking up his notes shall be reimbursed out of his estate, the notes must be taken up during his lifetime in order to create a liability against his estate,[50] but the agreement of decedent in his lifetime, on receiving an accommodation note from plaintiff to be discounted, to pay and protect the note at maturity, is binding on his administrator.[51]

[§ 888] **6. Covenants of Decedent.** A covenant by deed, mortgage, or other instrument will bind the covenantor's estate, if broken during his lifetime,[52]

and not the value of the property agreed to be conveyed, is the measure of damages." Nelson v. Masterson, 2 Ind. A. 524, 28 NE 731, 732.

44. Kan.—Griffith v. Robertson, 73 Kan. 666, 85 P 748.

N. Y.—Collier v. Rutledge, 136 N. Y. 621, 32 NE 626; Robinson v. Raynor, 28 N. Y. 494; Bair v. Hager, 97 App. Div. 358, 90 NYS 27, 15 NYAnnCas 283; Ritchie v. Bennett, 35 App. Div. 68, 54 NYS 379; Matter of Funk, 49 Misc. 199, 98 NYS 934.

Tex.—Raycraft v. Johnston, 41 Tex. Civ. A. 466, 93 SW 237.

Wash.—Pelton v. Smith, 50 Wash. 459, 97 P 460.

Wyo.—Pool v. Pool, 21 Wyo. 435, 133 P 372.

"Where services are rendered in pursuance of a mutual understanding that payment shall be made by bequest or devise, and the party dies without making the expected compensation, the one rendering the services stands as a creditor of the state for their value." Lane v. Calby, 95 App. Div. 11, 12, 88 NYS 465.

45. Conn.—Donovan's App., 41 Conn. 551.

Ky.—Gillian v. Gillian, 146 Ky. 15, 141 SW 370.

Mass.—Wirth v. Kuehn, 191 Mass. 51, 77 NE 641.

Mich.—Montgomery v. Montgomery, 191 Mich. 398, 158 NW 117; Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838.

N. Y.—Matter of Lese, 176 App. Div. 744, 163 NYS 1014; Matter of Lese, 176 App. Div. 744, 163 NYS 1014; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Matter of Stringer, 15 NYS 461; Broome v. Van Hook, 1 Redf. Surr. 444.

Pa.—In re Levi, 224 Pa. 233, 73 A 334; Clarke's Est., 13 Pa. Dist. 3.

Tex.—Sutton v. Page, 4 Tex. 142.

[a] **Illustration.**—Where notes for money lent were executed by a maker not having sufficient mental capacity to do so, his estate was liable in an action by a holder with notice to the extent that it received the benefit of the proceeds of the note, including an amount paid to a third person in compromising a suit for the benefit of the maker's estate, the fee of the attorney in such suit, and an amount shown to have been received by the maker's foreman out of the proceeds of one of the notes and used for the benefit of the maker's estate. Sebree v. Crutchfield, 146 Ky. 517, 142 SW 1017.

[b] **Payment of taxes.**—Where an administratrix paid taxes on decedent's land before his death, and while he was incompetent, the amount thereof should be allowed her, although no request on his part to pay the taxes were shown. Matter of Brown, 60 Misc. 35, 112 NYS 599.

[c] **Money expended for support of decedent and family.**—Where an administratrix before decedent's death expended money for the support of decedent and his family on his promise that it should be paid out of the estate, the amount thereof will be allowed. Matter of Brown, 60 Misc. 35, 112 NYS 599.

46. Ala.—Martin v. Foster, 38 Ala. 688; Andrews v. Huckabee, 30 Ala. 143.

Ark.—Black v. Black, 60 Ark. 390, 30 SW 755.

Ill.—Pinneo v. Goodspeed, 104 Ill. 184.

Md.—Rullman v. Winterling, 101 Md. 35, 60 A 468.

Mo.—Deer v. Deer, (A.) 180 SW 572.

Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409.

N. Y.—Herrington v. Robertson, 7 Hun 368 [aff 71 N. Y. 280]; Matter of Darrow, 64 Misc. 224, 118 NYS 1082.

Pa.—Kern's Est., 171 Pa. 55, 33 A 129.

Ont.—Loftus v. Harris, 30 Ont. L. 479, 5 OntWN 770; Elliott v. Russell, 19 Ont. 413.

[a] **Illustration.**—Where a married woman borrowed money on a mortgage on her personal property, and it was used in the business of her husband, and after his death, the mortgage was paid out of money received from an insurance policy on the decedent's life in the widow's favor, the widow was entitled to recover the amount of the loan from her husband's estate. In re Levi, 224 Pa. 233, 73 A 334.

[b] **Payment of mortgage on homestead.**—Where decedent purchased a homestead for himself and wife, and assumed a mortgage thereon, and the wife paid the mortgage to protect her homestead interest, not intending to relinquish her right to repayment, she was entitled to subrogation to the rights of the mortgagee, which extended only to the right to foreclose the mortgage on the property, or trace the proceeds of the property, if possible, and enforce an equitable lien thereon; but she was not entitled to enforce a legal claim for the money so advanced against the general assets of her husband's estate. Charmley v. Charmley, 125 Wis. 297, 103 NW 1106, 110 AmSR 827.

[c] **Contributions by both spouses.**—Moneys derived partially from the husband, and partially from the wife's own earnings, and used in improving the real estate during the husband's lifetime, will not be allowed the widow. McMonigle v. McMonigle, 42 N. J. Eq. 64, 6 A 314.

[d] **Void contract.**—A claim against decedent's estate by his widow for money received by him from her while their marriage was in contemplation, and used by him with her knowledge and as she intended, to procure a divorce from his former wife, being based on a void contract, was properly disallowed. In re Mathiot, 243 Pa. 375, 90 A 139.

47. Litchfield v. Carpenter, 49 SW 22, 20 KyL 1189; Titus v. Hoagland, 39 N. J. Eq. 294; Wamsley v. Wamsley, 48 App. Div. 330, 62 NYS 954.

[a] **Measure of recovery.**—Where, in consideration of the support of his parents and the payment of debts against the father existing at the date of the agreement, plaintiff was to have the use of the father's farm and the personal property thereon, and its avails were to belong to him, and he provided for the support and care of his parents, and paid the greater portion of the father's debts, and disposed of some of the personal property, the measure of his recovery against the father's estate, where the personal property had been taken by the representatives of the estate, was the value of the property taken, less the amount of the unpaid debts. Wamsley v. Wamsley, 48 App. Div. 330, 62 NYS 954.

[b] **Set-off.**—Where A advanced money for his mother's support under an agreement that at her death he should be repaid from her estate, which money A procured from his wife, promising her that she should stand in his stead, it was held that equity would enforce the wife's claim against the mother's estate, but that the mother having a claim against her son and not being aware of the assignment this claim should be set off against the wife's claim. Titus v. Hoagland, 39 N. J. Eq. 294.

48. Freeland's App., 92 Conn. 306, 102 A 590; Winter v. Winter, 90 Mich. 197, 51 NW 363; Matter of Brown, 60 Misc. 35, 112 NYS 599; In re Simmonson, 164 Wis. 590, 160 NW 1040.

[a] **Payment of life insurance premiums.**—Where it appeared that the administratrix of an estate during the lifetime of decedent paid premiums on a policy on his life, payable to her on his death, and after his death she received the amount of the policy, a claim by her for the premiums so paid should not be allowed, without proof of any request by decedent that she should pay such premiums. Matter of Brown, 60 Misc. 35, 112 NYS 599.

49. Hespen v. Hespen, 105 SW 99, 31 KyL 1328.

50. Gaston v. Gaston, 80 S. C. 157, 61 SE 393 (for the reason that a power coupled with an interest is limited to the lifetime of the donor).

51. Klein v. Runk, 130 App. Div. 474, 114 NYS 1062.

52. U. S.—Elliott v. Garvin, 166 Fed. 278, 92 CCA 196.

Iowa.—Goodnow v. Wells, 67 Iowa 654, 25 NW 864.

Ky.—Lot v. Parish, 1 Litt. 393.

Mass.—Estabrook v. Hapgood, 10 Mass. 313.

Mich.—Sheldon v. Warner, 59 Mich. 444, 26 NW 667; Dennis v. Sharer, 56 Mich. 224, 22 NW 879.

N. C.—Wiggins v. Pender, 132 N. C. 628, 44 SE 362, 61 LRA 772.

even though the executors or representatives of the covenantor are not named in the covenant,[53] and for a breach of a personal covenant of decedent the estate will be liable, although such breach occurs after his death.[54] But a claim for a breach of covenant running with the land, occurring after the death of the covenantor, is usually enforceable against the heir or devisee rather than against the estate.[55]

[§ 889] **7. Contracts of Guaranty or Suretyship—a. In General.** The estate of a deceased guarantor or surety remains liable on the obligation after his death, and claims growing out of the same are allowable,[56] even though the contract is not, in express terms, made binding on the executors or administrators of the surety or guarantor.[57] But equity will not enforce payment out of a decedent's estate of a debt on which he was surety where it does not appear that the principal is unable to pay,[58] nor while such liability remains contingent does it constitute a claim which the obligee may prove against the estate in the probate court.[59] It has also been

Va.—Tabb v. Binford, 4 Leigh (31 Va.) 132, 26 AmD 317.

Wash.—Brownfield v. Holland, 63 Wash. 86, 114 P 890.

Eng.—Thurseden v. Warthen, 2 Bulstr. 158, 80 Reprint 1031; Harwood v. Hilliard, 2 Mod. 268, 86 Reprint 1065; Macartney v. Blundell, 2 Ridgw. P. C. 113.

Ont.—Re Murray, 4 Ont. L. 418; 1 OntWR 576.

[a] **Costs incurred** in an action against the representative on a covenant of decedent may be allowed. Lot v. Parish, 1 Litt. (Ky.) 393.

[b] **The executors of a deceased lessee** are liable for the breach of the covenant of their testator to pay rent accruing before or after his death. Brownfield v. Holland, 63 Wash. 86, 114 P 890.

[c] **Covenant to build on leased premises.**—Where a covenant, by decedent in a lease, to build on the demised premises, expired during his lifetime, the court refused to decree specific performance, but held that the remedy of the lessor was confined to an action for damages. Re Murray, 4 Ont. L. 418, 1 OntWR 576.

53. McClure v. Gamble, 27 Pa. 288; Harrison v. Sampson, 2 Wash. (2 Va.) 155; Lee v. Cooke, 1 Wash. (1 Va.) 306; Williams v. Burrell, 1 C. B. 402, 50 ECL 402, 135 Reprint 596.

[a] **The same is true where the heir is named** without naming the executor. McClure v. Gamble, 27 Pa. 288; Williams v. Burrell, 1 C. B. 402, 50 ECL 402, 135 Reprint 596.

54. Elliott v. Garvin, 166 Fed. 278, 92 CCA 196; Hunt's App., 105 Pa. 128; Brownfield v. Holland, 63 Wash. 86, 114 P 890; Carman v. Wightman, 10 OntWR 135.

[a] **Extent of liability.**—Liability on the personal covenant of a testator for the payment of money not running with the land, after his death, is not restricted to the lands affected by the covenant. Jones' Est., 12 WklyNC (Pa.) 388.

55. Booth v. Starr, 5 Day (Conn.) 275, 5 AmD 149; Keteltas v. Penfold, 4 E. D. Smith (N. Y.) 122; Scott v. Scott, 70 Pa. 244; Kershaw v. Supplee, 1 Rawle (Pa.) 131.

[a] **Covenant by life tenant.**—If a tenant for life makes a lease for years, and dies before its expiration, and the remainderman evicts the lessee, no action on the implied covenant will lie against the executor of the lessor, as the covenant in law expired with the term. McClowry v. Croghan, 1 Grant (Pa.) 307.

[b] **Covenant in lease renewable forever.**—Where a lease, renewable forever, contained an express covenant on the part of the lessee to pay rentals during the term, the death of the lessee did not, under the statute subjecting leasehold estates renewable forever to the law of descents and distributions governing estates in fee, convert the term into a life estate, and the lessor could pursue the estate of the deceased lessee for recovery of accruing rentals so long as there could be found assets of the estate subject thereto. Broadwell v. Banks, 134 Fed. 470.

Liability of heirs or devisees on real covenant see Covenants §§ 89, 90.

56. Ala.—Hightower v. Moore, 46 Ala. 387.

Ill.—Union Trust Co. v. Shoemaker, 172 Ill. A. 365.

Iowa.—Royal Ins. Co. v. Davies, 40 Iowa 469, 20 AmR 581.

Ky.—Black v. Bush, 7 B. Mon. 210.

Me.—Green v. Young, 8 Me. 14, 22 AmD 218.

Minn.—Palmer v. Pollock, 26 Minn. 433, 4 NW 1113.

N. Y.—Wood v. Fisk, 63 N. Y. 245, 20 AmR 528.

Pa.—Jones' App., 11 WklyNC 554.

R. I.—In re Hunt, 19 R. I. 139, 32 A 204, 61 AmSR 743.

S. C.—Knotts v. Butler, 31 S. C. Eq. 143, 146.

Tex.—Allen v. Stovall, (Civ. A.) 62 SW 87 [rev on other grounds 94 Tex. 618, 63 SW 863, 64 SW 777].

Va.—Coleman v. Stone, 85 Va. 386, 7 SE 241.

Eng.—Atkinson v. Grey, 1 Smale & G. 577, 65 Reprint 253.

Ont.—Canada Exch. Bank v. Springer, 7 Ont. 309.

"What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked, how long shall such a guaranty continue in force? and the answer is, until it be ended according to its terms." Knotts v. Butler, supra.

"A contract to pay money, although it falls due after the decease of the obligor, does survive. And what is the difference between an agreement to pay at a future period or on a future contingency? The contract is to be completed, not by any personal performance, but by the payment of money." White v. Com., 39 Pa. 167, 176.

[a] **This rule has been applied to** a surety on the bond of: (1) An administrator. Hightower v. Moore, 46 Ala. 387; Mundorff v. Wangler, 44 N. Y. Super. 495, 57 HowPr 372. (2) A trustee. White v. Com., 39 Pa. 167. (3) A guardian. Moore v. Wallis, 18 Ala. 458. (4) An insurance agent. Rapp v. Phœnix Ins. Co., 113 Ill. 390, 55 AmR 427; Royal Ins. Co. v. Davies, 40 Iowa 469, 20 AmR 581. (5) A bank cashier. Canada Exch. Bank v. Springer, 7 Ont. 309. (6) A deputy sheriff. Green v. Young, 8 Me. 14, 22 AmD 218; White v. Com., 39 Pa. 167. (7) It has also been applied to a guarantor of the fidelity of a collector or clerk. Calvert v. Gordon, 3 M. & R. 124.

[b] **Where the contract of the sureties is several,** it may be enforced against the estate of a decedent surety. Besore v. Potter, 12 Serg. & R. (Pa.) 154.

[c] **Guaranty by wife of husband's debt.**—Although in a mortgage by a wife, of her estate for the debt of her husband, she is merely a surety, her death does not release her estate from the mortgage lien. Miner v. Graham, 24 Pa. 491.

[d] **A guaranty by a partnership** is not terminated by the death of the sole surviving partner. Kernochan v. Murray, 111 N. Y. 306, 18 NE 868, 7 AmSR 744, 2 LRA 183.

[e] **Liability of estate after administration closed.**—The statute declaring bonds joint in form to be joint and several, and charging the "representatives" of a deceased surety with liability thereon, did not intend to charge the administrator and not the estate in the hands of the heirs, but the liability of the estate for breaches occurring after the death of the surety continues after the administration is closed. Allen v. Stovall, (Tex. Civ. A.) 62 SW 87 [rev on other grounds 94 Tex. 618, 63 SW 863, 64 SW 777].

[f] **Stipulation prohibiting judgment against surety during principal's lifetime.**—A copy or written statement of a bond payable after the death of the principal debtor, filed for the purpose of continuing the lien created by the intestate laws against the real estate of the surety after his death, will not be stricken off, notwithstanding such bond contained a stipulation that no judgment should be entered thereon against the surety during the lifetime of the principal. Stevenson v. Long, 23 Pa. Co. 391.

[g] **Liability on agreement and not on account.**—A, of the first part, entered into an agreement, under seal, with B as principal and C as surety of the second part, that A should furnish B with merchandise, B should sell and account to A for the proceeds, A to allow him one half of the profits for his services. C died and A filed an account in the probate court for allowance against his administrator for a balance in the hands of B under the above agreement. The claim was properly rejected, as the liability of C's administrator, if any existed, was upon the agreement and not upon the account. Willamouicz v. Strong, 8 Ark. 467.

57. White v. Com., 39 Pa. 167; Lloyd's v. Harper, 16 Ch. D. 290, 1 ERC 680.

58. Patterson v. Chrisman State Bank, 55 Ind. A. 331, 102 NE 880; Shropshire v. Reno, 5 Dana (Ky.) 583; Jones v. Degge, 84 Va. 685, 5 SE 799.

[a] **Exhaustion of remedy against principal.**—Before the estate of the surety can be subjected to the payment of the indebtedness, the property of the principal should be first exhausted. Jones v. Degge, 84 Va. 685, 5 SE 799.

[b] **It is only where the principal is insolvent or nonresident** that the estate of the deceased surety can, under the statute, be resorted to. Patterson v. Chrisman State Bank, 55 Ind. A. 331, 102 NE 880 (holding, however, that notes on which a decedent whose estate was being administered in Indiana, was a surety, were enforceable against the estate, where the principals were residents of another state, although claimant was a bank doing business in that state, and decedent in his lifetime was also a resident of that state).

59. Sauer v. Griffin, 67 Mo. 654.

[a] **A covenant for payment of a debt at a future day** is not a contingent, but an actually existing debt. Atkinson v. Grey, 1 Smale & G. 577, 65 Reprint 253.

held that, where, on the removal of an administrator, his sole bondsman is appointed administrator de bonis non, and by order of court charges himself in his account with the penalty of the bond, such penalty cannot upon his death be presented as a claim against his estate.[60]

[§ 890] **b. Divisible Contracts.** Where the consideration passes at different times, and the contract is therefore separate and divisible, the liability of the estate of the surety or guarantor is terminated by his death, and notice of that event,[61] but not by the death of the surety without such notice.[62]

[§ 891] **c. Joint Contracts—(1) In General.** In case of a joint contract of suretyship or guaranty, the estate of a deceased surety is discharged in law from liability, the survivor alone being responsible, and a court of equity will not as a general rule enforce the obligation against the representatives of the deceased obligor,[63] even though the contract is in terms made binding upon the executors and administrators of the obligors,[64] unless the contract was made joint instead of several by fraud or mistake[65] or there was a previous equity which gave the promisee a right to a several indemnity from each of the obligors, as in case of money loaned to both of them.[66] But this rule has been changed in some jurisdictions by statutes making the estate of a deceased joint debtor liable to the same extent that the debtor was liable during his lifetime.[67]

[§ 892] **(2) Contribution between Cosureties.** It is usually held that the liability of joint sureties for contribution is distinct from their liability to the obligee, and arises from an implied agreement among the sureties that as between themselves they will contribute ratably towards discharging any liability they may incur in consequence of becoming such sureties, and such liability is binding on the representatives of any of the sureties who may die.[68]

[§ 893] **d. Indemnity to Surety.** Sureties who have been compelled to pay the indebtedness of their principal have a legal demand for reimbursement, which is, of course, enforceable against the estate of the principal after his death,[69] and the fact that the surety paid the indebtedness out of the proceeds of stock given by the principal to the surety does not deprive the surety of the right to be repaid from the estate of the principal.[70]

[§ 894] **8. Claims for Trust Funds.** Upon a trustee's death his indebtedness to the trust becomes

Presentation of contingent claims see infra § 947.

60. Brown v. Jacobs, 24 Nebr. 712, 40 NW 137.

61. National Eagle Bank v. Hunt, 16 R. I. 148, 13 A 115; Harris v. Fawcett, L. R. 15 Eq. 311; Coulthart v. Clementson, 5 Q. B. D. 42, 21 ERC 664.

[a] **A guaranty of the paper of a third person** to be discounted by a bank in the future is several, and is terminated by the death of the guarantor, and notice of that event. National Eagle Bank v. Hunt, 16 R. I. 148, 13 A 115.

[b] **A continuing guaranty for payment of subsequent advances** (1) is terminated by notice of the death of the guarantor. Coulthart v. Clementson, 5 Q. B. D. 42, 21 ERC 664. (2) This is true although the guaranty provides that it shall continue in force six months after notice by the guarantor of its termination. Harris v. Fawcett, L. R. 15 Eq. 311.

62. Hecht v. Weaver, 34 Fed. 111, 13 Sawy. 199; Bradbury v. Morgan, 1 H. & C. 249, 158 Reprint 877.

[a] **Bond for repayment of advances.**—The estate of the surety on a bond for repayment of advances is liable for advances made after the death of the surety and before notice is given of the termination of the liability of the surety, especially when the surety binds himself, his executors, etc. Hecht v. Weaver, 34 Fed. 111, 13 Sawy. 199.

[b] **Continuing guaranty for the payment** for goods to be sold in the future is not terminated merely by the death of the guarantor. Bradbury v. Morgan, 1 H. & C. 249, 158 Reprint 877.

63. U. S.—Hunt v. Rousmanier, 1 Pet. 1, 7 L. ed. 27, 8 Wheat. 174, 5 L. ed. 589.

Md.—Waters v. Riley, 2 Harr. & G. 305, 18 AmD 302.

N. J.—Dixon v. Vanderberg, 35 N. J. Eq. 47.

N. Y.—Richardson v. Draper, 87 N. Y. 337 [aff 23 Hun 188]; Davis v. Van Buren, 72 N. Y. 587; McNulty v. Hurd, 72 N. Y. 518; Hauck v. Craighead, 67 N. Y. 432; Risley v. Brown, 67 N. Y. 160; Getty v. Binsse, 49 N. Y. 385, 10 AmR 379; Bradley v. Burwell, 3 Den. 61.

Pa.—Kennedy v. Carpenter, 2 Whart. 344; Weaver v. Shryock, 6 Serg. & R. 262.

Tex.—Glasscock v. Hamilton, 62 Tex. 143.

Va.—Harrison v. Field, 2 Wash. (2 Va.) 136.

Eng.—Richardson v. Horton, 6 Beav. 185, 49 Reprint 796; Simpson v. Field, 2 Ch. Cas. 22, 22 Reprint 827; Jones v. Beach, 2 De G. M. & G. 886, 51 EngCh 693, 42 Reprint 1119; Wilmer v. Currey, 2 De G. & Sm. 347, 64 Reprint 156; Other v. Ivison, 3 Drew, 177, 61 Reprint 870; Sumner v. Powell, 2 Meriv. 30, 35 Reprint 852; Wilkinson v. Henderson, 1 Myl. & K. 582, 7 Engch 582, 39 Reprint 801; Rawstone v. Parr, 3 Russ. 539, 3 EngCh 539, 38 Reprint 678.

[a] **This rule has been applied to:** (1) An injunction bond. Pickersgill v. Lahens, 15 Wall. (U. S.) 141, 21 L. ed. 119. (2) An appeal bond. Wood v. Fisk, 63 N. Y. 245, 20 AmR 528 [rev 4 Hun 525]; Comins v. Pottle, 22 Hun (N. Y.) 287. (3) A bail bond. Davis v. Van Buren, 6 Daly 391 [aff 72 N. Y. 587].

[b] **United States as obligee.**—The rule applies although the United States is the obligee. U. S. v. Archer, 24 F. Cas. No. 14,464, 1 Wall. Jr. 173.

[c] **A joint judgment** against surety and principal will not affect the discharge of the estate of the surety by his death. U. S. v. Price, 9 How. 83, 13 L. ed. 56.

[d] **In Indiana** the common-law rule as to the discharge of a joint surety by death has never been in force. Hudelson v. Armstrong, 70 Ind. 99.

64. Pecker v. Julius, 2 Browne (Pa.) 31.

65. U. S. v. Cushman, 25 F. Cas. No. 14,908, 2 Sumn. 426; Olmsted v. Olmsted, 38 Conn. 309; Powell v. Kettelle, 6 Ill. 491.

[a] **Illustration.**—Where a joint note is taken in payment of school lands, instead of a several note as required by statute, equity would treat the note as several so as to enforce it against the estate of a deceased surety. Powell v. Kettelle, 6 Ill. 491.

66. Richardson v. Draper, 87 N. Y. 337; Boyd v. Bell, 69 Tex. 735, 7 SW 657; Simpson v. Vaughan, 2 Atk. 31, 26 Reprint 415.

[a] **Note given in discharge of prior debt.**—The fact that the obligation was given for the discharge of a prior obligation on which the surety was liable, was sufficient to render his estate liable in equity. Boyd v. Bell, 69 Tex. 735, 7 SW 657.

[b] **Benefit inuring to surety.**—Where one of the chief promoters and stockholders in a corporation, in consideration of the donation of land for a site for a rolling mill and a loan of one hundred and fifty thousand dollars on the bonds of the corporation, guaranteed the bonds jointly with the other promoters, he received a benefit from the loan, so as to render his estate liable in equity on the guaranty. Richardson v. Draper, 87 N. Y. 337.

67. Randall v. Sackett, 77 N. Y. 480. See also Bergstroem v. State, 58 Tex. 92; Mays v. Cockrum, 57 Tex. 352 (both decided under a statute not now in force).

[a] **Statute not retroactive.**—Randall v. Sackett, 77 N. Y. 480.

68. Colo.—McAllister v. Irwin, 31 Colo. 254, 73 P 47.

Ill.—Trego v. Cunningham, 267 Ill. 367, 108 NE 350.

Ind.—Clevenger v. Matthews, (A.) 75 NE 23.

Mo.—Comstock v. Keating, 115 Mo. A. 372, 91 SW 416.

N. Y.—Bradley v. Burwell, 3 Den. 61.

Pa.—In re Colket, 217 Pa. 643, 66 A 980.

R. I.—Connolly v. Dolan, 22 R. I. 60, 46 A 36, 84 AmSR 816.

S. C.—Knotts v. Butler, 31 S. C. Eq. 143; McKenna v. George, 19 S. C. Eq. 15.

Tex.—Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

Eng.—Ramskill v. Edwards, 31 Ch. D. 100.

[a] **The county court has jurisdiction** to hear and determine such a claim for contribution. McAllister v. Irwin, 31 Colo. 254, 73 P 47.

[b] **A claim for contribution being equitable** in character, the probate court will apply equitable rules in determining the judgment thereon. Trego v. Cunningham, 267 Ill. 367, 108 NE 350.

[c] **Contrary view.**—A surety paying the debts of his principal acquires no rights against any persons other than the principal that the creditor did not have, and therefore could not compel the estate of a joint cosurety to contribute. Waters v. Riley, 2 Harr. & G. (Md.) 305, 18 AmD 302.

69. Hill's Est., 67 Cal. 238, 7 P 664; Walker v. Drew, 20 Fla. 908.

70. Kern's Est., 171 Pa. 55, 33 A 129.

a demand against his estate to be authenticated, allowed, classed, and paid out of the assets as other demands,[71] and where decedent made improper investments, commingled trust funds with his own so that they cannot be identified, or wasted or embezzled the trust funds in his hands, the claims of the beneficiaries whether for a partial or total satisfaction become those of ordinary creditors against decedent's estate.[72]

[§ 895] **9. Contracts of Purchase.**[73] Purchase money due from a deceased purchaser upon a valid contract of sale is such a debt of decedent as the representative may rightfully pay;[74] but it has been held otherwise as to a contract of sale purely executory, under which decedent did not receive the property, where the estate of the deceased purchaser cannot complete the sale to advantage.[75]

[§ 896] **10. Alimony to Illegitimate Child.** It has been held that an illegitimate child has a right of action for alimony only against the parent or his heirs and such alimony is not a debt against the succession, and hence an action therefor cannot be properly brought against the administrator.[76]

[§ 897] **11. Claims Invalid as against Decedent.**[77] Claims which would be illegal and void as against decedent if living are not enforceable against the estate.[78]

[§ 898] **12. Unmatured Claims.** Unmatured claims against an estate are usually provided for by statutes[79] which ordinarily permit proof of claims which, although unmatured, will become absolutely due at some definite future time.[80] But it is considered that such a statute contemplates only the allowance of such unmatured debts as will become due on some specified date, capable of ascertainment by the court at the time the claim is

71. U. S.—Johnson v. Garner, 233 Fed. 756, 768 [cit Cyc].
Ark.—Hill v. State, 23 Ark. 604.
Ill.—Jarrett v. Johnson, 116 Ill. A. 592.
Ky.—Harding v. Harding, 132 Ky. 133, 116 SW 305.
Pa.—Gaffney's Est., 146 Pa. 49, 23 A 163.
S. C.—McDowell v. Caldwell, 7 S. C. Eq. 43, 16 AmD 635; Walker v. Bynum, 4 S. C. Eq. 555.
Tex.—Moore v. Moore, 89 Tex. 29, 33 SW 217.
Wash.—In re Blattner, 89 Wash. 412, 154 P 796, 92 Wash. 48, 158 P 1015.

[a] **Trust recited in will.**—Where a will recited that testator had in his possession thirteen thousand dollars in notes and contracts belonging to his wife, and provided that his estate should be responsible for the payment of the sum to her, with interest from the date of the will, and the estate had been charged with the original indebtedness acknowledged by the will, the wife was not entitled to credit for the proceeds of a note, where the money for which it was given was part of the original debt. Harding v. Harding, 132 Ky. 133, 116 SW 305.

72. Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440.
Ark.—Purcelly v. Carter, 45 Ark. 299; Patterson v. McCann, 39 Ark. 577; Green v. Brooks, 25 Ark. 318; Hill v. State, 23 Ark. 604.
Cal.—In re Dutard, 147 Cal. 253, 81 P 519.
Ill.—Jarrett v. Johnson, 216 Ill. 212, 74 NE 756.
Ind.—Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Benson v. Liggett, 78 Ind. 452.
La.—Shall v. Foley, 27 La. Ann. 651.
Mass.—Von Arnim v. American Tube Works, 188 Mass. 515, 74 NE 680; Johnson v. Ames, 11 Pick. 173.
Mich.—Frank v. Morley, 106 Mich. 635, 64 NW 577.
N. Y.—Fowler v. Hebbard, 40 App. Div. 108, 57 NYS 531; Price v. Brown, 10 AbbNCas 67.
Oh.—In re Turpin, 5 OhS&CP 410, 7 OhNP 569.
Pa.—In re Middleby, 249 Pa. 203, 94 A 820, LRA1915F 1041; Leonard's Est., 9 Pa. Co. 410; Gaw's Est., 12 Phila. 4.
Eng.—Grayburn v. Clarkson, L. R. 3 Ch. 605; Devaynes v. Robinson, 24 Beav. 86, 53 Reprint 289; Richardson v. Horton, 6 Beav. 185, 49 Reprint 796; Scurfield v. Howes, 3 Bro. Ch. 90, 29 Reprint 425; Walsham v. Stainton, 1 De G. J. & S. 678, 66 Eng Ch 527, 46 Reprint 268; Richardson v. Jenkins, 1 Drew. 477, 61 Reprint 534; Adair v. Shaw, 1 Sch. & Lef. 243; Montfort v. Cadogan, 17 Ves. Jr. 485, 34 Reprint 188.

[a] **A suit for breach of trust as an executor survives** against the personal representative of the executor. Price v. Brown, 10 AbbNCas (N. Y.) 67.

[b] **The fact that there were co-trustees** will not prevent a cause of action for a breach by one from surviving against his estate. Richardson v. Jenkins, 1 Drew. 477, 61 Reprint 534.

73. Contracts of decedent with reference to realty generally see supra §§ 626, 629.

74. Ala.—Jones v. Hert, 192 Ala. 111, 68 S 259 [quot Cyc].
Mich.—Probasco v. Cook, 39 Mich. 714.
Mo.—Chapman v. Merritt, 45 Mo. A. 179.
Pa.—Riegelman's Est., 174 Pa. 476, 34 A 120; Thompson v. Adams, 55 Pa. 479; In re McCracken, 29 Pa. 426; Graham's Est., 6 Kulp 269.
Tenn.—Cox v. Cox, Peck 443.
Ont.—Carman v. Wightman, 10 Ont WR 135.

[a] **The assertion of a vendor's lien** on the land debars the presentment of a claim against the personal assets. Pott's App., 5 Pa. 500.

[b] **A vendor who has brought ejectment** to enforce payment of the purchase money has no claim on the personal estate of the deceased purchaser. Pott's App., 5 Pa. 500.

75. Miskimen v. Culbertson, 162 Ill. 236, 44 NE 396; Gross v. Thornson, 208 Ill. A. 600; Gantt v. Mechin, 30 Mo. A. 532.

[a] **Nature of liability, if any.**—Conceding that a tender of bonds which decedent had agreed to purchase to decedent's administratrix was sufficient acceptance by the seller, and her refusal to take them created a new liability, it was not one which could be enforced as a claim in probate against his estate, but was a liability incurred by the administratrix, enforceable in another tribunal. Riner v. Husted, 13 Colo. A. 523, 58 P 793.

76. Drouet v. Drouet, 26 La. Ann. 323.

77. Debts payable after death see infra § 899.

78. Conn.—Watrous v. Chalker, 7 Conn. 224.
Ill.—Hirschl v. Meeker, 185 Ill. A. 626; Greenfield v. Maclin, 183 Ill. A. 596.
Iowa.—In re Doore, 166 NW 763.
Mass.—Hayes v. Gill, 226 Mass. 388, 115 NE 492; Smith v. Mayo, 9 Mass. 62, 6 AmD 28.
Pa.—In re Fogg, 249 Pa. 63, 94 A 453; Imhoff v. Witmer, 31 Pa. 243; Snayberger's Est., 62 Pa. Super. 390.
S. C.—McTier v. Hunter, 22 S. C. L. 159.
W. Va.—Haymond v. Hyer, 80 W. Va. 594, 92 SE 854, LRA1918B 1.
Ont.—McEwan v. Toronto Gen. Trusts Corp., 36 Ont. L. 244, 10 Ont WN 22 [allowing app 9 OntWN 185].

[a] **A testamentary provision for payment of all "just debts"** does not embrace illegal or invalid claims. Smith v. Mayo, 9 Mass. 62, 6 AmD 28; Smith's App., 1 Pennyp. (Pa.) 48.

[b] **The declaration of an executor** that "we will settle the account" cannot make his testatrix's estate liable for a debt, for which, being a married woman, she was not liable in her lifetime. McTier v. Hunter, 22 S. C. L. 159.

79. See the statutes.

80. U. S.—U. S. v. North Carolina Bank, 6 Pet. 29, 8 L. ed. 308.
Ala.—Jones v. Hert, 192 Ala. 111, 68 S 259 [cit Cyc].
Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Dunnigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 493 [rev 19 Ill. A. 310]; Hall v. Hoxsey, 84 Ill. 616; Mackin v. Haven, 88 Ill. A. 434 [aff 187 Ill. 480, 58 NE 448].
Ind.—Maddox v. Maddox, 97 Ind. 537; Hathaway v. Roll, 81 Ind. 567.
Ky.—Hinklebein v. Totten, 60 SW 641, 22 KyL 1357.
Mass.—Ames v. Ames, 128 Mass. 277; Haverhill Loan, etc., Assoc. v. Cronin, 4 Allen 141; Eaton v. Whitaker, 6 Pick. 465 [as stated in Harding v. Smith, 11 Pick. 478].
Minn.—Bolles v. Boyer, 140 Minn. 404, 170 NW 229.
Mo.—Wilbur v. Wilbur, (A.) 201 SW 387; Empire Paving, etc., Co. v. Prather, 58 Mo. A. 487; Schmieding v. Doellner, 13 Mo. A. 228.
Tex.—Dunn v. Sublett, 14 Tex. 521.
Vt.—Brown v. Dunn, 75 Vt. 264, 55 A 364.
Wis.—Austin v. Saveland, 77 Wis. 108, 45 NW 955.

[a] **Illustration.**—An agreement to pay a sum of money to a decedent's estate on the death of the decedent's widow is an absolute undertaking to pay, provable before the commissioners as a claim against the estate of the deceased promisor. Brown v. Dunn, 75 Vt. 264, 55 A 364.

[b] **A rebate of interest** is sometimes provided for. Dunnigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 496 [rev 19 Ill. A. 310]; Hall v. Hoxsey, 84 Ill. 616.

[c] **The present value** of (1) an annuity (Schmieding v. Doellner, 13 Mo. A. 228), (2) an amount payable in the future (Hinklebein v. Totten, 60 SW 641, 22 KyL 1357), may be proved against the estate of the obligor.

[d] **A claim for work and labor** is presumably due after the person for whom the work is performed is dead, although it is not essential that it should be due in order to constitute a valid cause of action against his estate. Lockwood v. Robbins, 125 Ind. 398, 25 NE 455.

presented and allowed.[81]

[§ 899] **13. Debts Payable after Death.** The fact that a debt or obligation contracted by decedent in his lifetime is by its terms not payable until after his death does not preclude its enforcement against his estate,[82] and a contract for payment by the promisor's executor or administrator creates a debt equally as binding as though the promise had been for payment by the promisor himself.[83]

[§ 900] **14. Contingent Claims.** A debt depending upon some contingency which may never happen is not as a general rule one which may be said to be owing by decedent in such sense as to be an immediate burden on the assets or presently provable against the estate,[84] although it is otherwise, of course, where the contingency happened and the claim thus became absolute in decedent's lifetime.[85] The presentation, proof, and allowance of contingent claims are, however, matters which in many states are regulated by statute,[86] and it is frequently provided that the personal representative must retain funds for the purpose of meeting such claims when they shall accrue.[87]

[§ 901] **15. Claims Founded in Tort.**[88] As torts died with the person at common law, claims founded in tort were not in earlier times considered in connection with the settlement of estates. But in modern practice, based to a very great extent upon statute, a claim growing out of a tort may survive against the tort-feasor's estate, especially if the estate has been directly or indirectly increased

81. Brown v. Rouse, 116 Ill. A. 513; Wilbur v. Wilbur, (Mo. A.) 201 SW 387.

[a] **Provision not postponing payment indefinitely.**—After the death of the maker of certain notes representing a community indebtedness, his widow made an agreement with certain of her husband's creditors, including the holders of the notes, for an extension until January 1, 1901. The agreement also provided that the parties should make certain further advancements in cash and merchandise which should be paid before payment of the old indebtedness. It was held that such provision for preferred payment did not indefinitely postpone the maturity of the old indebtedness, and was, therefore, no obstacle, after the widow's removal as survivor of the community and the appointment of an administrator, to the right of the holders of the notes to present and establish them as a claim against the maker's estate. Dashiell v. Moody, 44 Tex. Civ. A. 87, 97 SW 843.

82. Cal.—Patterson v. Chapman, 176 P 37 [cit Cyc].

Colo.—Dawley v. Dawley, 60 Colo. 73, 152 P 1171.

Conn.—Corr's App., 62 Conn. 403, 26 A 478.

Ind.—Woods v. Matlock, 19 Ind. A. 364, 48 NE 384.

Mass.—Charron v. Day, 228 Mass. 305, 117 NE 347.

Minn.—Fitzgerald v. English, 73 Minn. 266, 76 NW 27.

Mo.—Grimes v. Reynolds, 94 Mo. A. 576, 68 SW 588.

N. Y.—Hegeman v. Moon, 60 Hun 412, 15 NYS 596 [aff 131 N. Y. 462, 30 SE 487].

Pa.—Kritser's Est., 13 Pa. Dist. 325; Stevenson v. Long, 23 Pa. Co. 391.

S. D.—Meade County v. Welch, 34 S. D. 348, 148 NW 601.

Eng.—Powell v. Graham, 7 Taunt. 580, 2 ECL 501, 129 Reprint 232.

[a] **A note payable after the death of the maker** is a valid claim against his estate. Hegeman v. Moon, 60 Hun 412, 15 NYS 596 [aff 131 N. Y. 462, 30 NE 487].

[b] **The claim of a county for treatment and maintenance of an insane person,** although not enforceable until after such person's death, constitutes a claim against his estate. Meade County v. Welch, 34 S. D. 348, 148 NW 601.

[c] **Promise to pay at or before death.**—An express promise on valuable consideration to pay a certain sum at or before the death of the promisor may be enforced after his death against his estate. Woods v. Matlock, 19 Ind. A. 364, 48 NE 384.

[d] **A husband or wife** might, at common law, enforce against the estate of a deceased spouse claims on contract which could not be asserted at law during the lifetime of the other party. Grimes v. Reynolds, 94 Mo. A. 576, 68 SW 588.

[e] **Inadequacy of consideration.**—Where decedent in his lifetime wrote a letter acknowledging a debt, and directing his creditor to prove it against his estate, it was held that proof of a gross deficiency of consideration would tend to show an intent to evade the statute relative to the execution of wills, in which case the claim should be allowed for only the amount of the consideration. Fitzgerald v. English, 73 Minn. 266, 76 NW 27.

83. Harrison v. Vreeland, 38 N. J. L. 366; Hegeman v. Moon, 60 Hun 412, 15 NYS 596 [aff 131 N. Y. 462, 30 NE 487]; Ex p. Tindal, 8 Bing. 402, 21 ECL 595, 131 Reprint 449; Plumer v. Marchant, 3 Burr. 1380, 97 Reprint 884; Powell v. Graham, 7 Taunt. 580, 2 ECL 580, 129 Reprint 232; Milbourn v. Ewart, 5 T. R. 381, 101 Reprint 213.

84. Ark.—Walker v. Byers, 14 Ark. 246.

Ill.—Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300; Bocock v. Leet, 210 Ill. A. 402.

Mass.—Ames v. Ames, 128 Mass. 277.

N. J.—Terhune v. White, 34 N. J. Eq. 98 [foll Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 (aff 60 N. J. Eq. 444, 46 A 1099)].

Oh.—Ginn v. Hathaway, 16 Oh. Cir. Ct. N. S. 534.

Pa.—Chapman's Est., 18 Pa. Dist. 354.

R. I.—Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

Tex.—Dunn v. Sublett, 14 Tex. 521.

Vt.—Brown v. Dunn, 75 Vt. 264, 55 A 364; Sargent v. Kimball, 37 Vt. 320; Jones v. Cooper, 2 Aik. 54, 16 AmD 678.

Wis.—Davis v. Davis, 137 Wis. 640, 119 NW 334; South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 NW 583, 58 LRA 82; Austin v. Saveland, 77 Wis. 108, 45 NW 955; Mann v. Everts, 64 Wis. 614, 25 NW 209.

Eng.—Henderson v. Gilchrist, 17 Jur. 570; Wentworth v. Chevell, 3 Jur. N. S. 805; Read v. Blunt, 5 Sim. 567, 9 EngCh 567, 58 Reprint 451.

[a] **This rule has been applied to:** (1) A claim based on the assumption of a mortgage, before foreclosure. Terhune v. White, 34 N. J. Eq. 98 [foll Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 (aff 60 N. J. Eq. 444, 46 A 1099)]. (2) A claim on a bond of indemnity, the condition of which has not been broken. Jones v. Cooper, 2 Aik. (Vt.) 56, 16 AmD 678. (3) A claim on a replevin bond. Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 NE 1050 [aff 172 Ill. A. 365].

[b] **Claims not contingent.**—(1) Where decedent made a written acknowledgment of an indebtedness, with an executory promise to pay it out of the proceeds of land named, and gave plaintiff an option to take the land for the debt, and a certain amount in addition, and decedent's administrator subsequently sold the land, plaintiff could recover the amount of the debt from decedent's estate, as the indebtedness was not dependent on the sale of the land. Calloway v. Angel, 127 N. C. 414, 37 SE 454. (2) The indorser of a negotiable promissory note containing a stipulation that "the drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note" is liable absolutely for its payment and hence it may be presented against the estate for settlement before maturity. Dunigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 496 [rev 19 Ill. A. 310]. (3) A provision in a note, due at the maker's death, that the executor shall pay the note after payment of funeral expenses and debts, if any, does not render the note a contingent claim, but at most only shows the intention of the maker to postpone the payment of a binding obligation until his other debts are paid. Simon v. Jones, (Ark.) 138 SW 986.

[c] **A claim for rent to accrue** in the future for the unexpired term of a lease is not a contingent claim. Bowler v. Emery, 29 R. I. 310, 70 A 7.

[d] **"The mere fact that an accounting is necessary** to determine the amount due does not make a claim a contingent claim." Davis v. Davis, 137 Wis. 640, 648, 119 NW 334, 337.

85. Ala.—McDowell v. Jones, 58 Ala. 25.

Ill.—Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104 [aff 93 Ill. A. 31]; Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136].

Minn.—Fitzhugh v. Harrison, 75 Minn. 481, 78 NW 95.

Nebr.—Stichter v. Cox, 52 Nebr. 532, 72 NW 848.

Vt.—Sargent v. Kimball, 37 Vt. 320.

86. Norton v. Norton, (Cal. A.) 183 P 214; Berryhill v. Peabody, 72 Minn. 232, 75 NW 220; Huntzch v. Massolt, 61 Minn. 361, 63 NW 1069; McKeen v. Waldron, 25 Minn. 466; Sharp v. Sharp, (Utah) 180 P 580; Logan v. Dixon, 73 Wis. 533, 41 NW 713; Mann v. Everts, 64 Wis. 372, 25 NW 209.

[a] **Claim within statute.**—Where one presenting a claim against an estate gives credit for property received by him from the widow, and takes judgment for the balance only, and the administrator afterward recovers from him the value of the property so received, he may prove against the estate the sum so credited, it being within the statute relating to contingent claims. Hall v. Wilson, 6 Wis. 433.

Necessity of presenting contingent claims see infra § 948.

87. Union Trust Co. v. Shoemaker, 172 Ill. A. 365; Greene v. Dyer, 32 Me. 460; Hoyt v. Bonnett, 50 N. Y. 538 [rev 58 Barb. 529]; Mann v. Everts, 64 Wis. 372, 25 NW 209.

Reservation of assets generally see infra §§ 1257–1423.

88. Abatement or survival of causes of action ex delicto generally see Abatement and Revival §§ 339, 389.

or benefited by the tort.[89]

[§ 902] **16. Taxes and Assessments.**[90] Personal assessments charged against decedent during his lifetime, or taxes or assessments chargeable rightfully against the personal estate in the due process of settlement, are payable by the representative on their preferential footing,[91] and the representative should also pay assessed taxes which became a lien on decedent's real estate before his death.[92] An executor or administrator who is lawfully and properly in possession or control of the real estate may properly pay taxes assessed thereon after decedent's death, and should receive credit therefor in his accounts,[93] unless the benefits which he has personally derived from such possession are such as to offset the expenditure for this purpose;[94]

89. Cal.—Leverone v. Weakley, 155 Cal. 395, 101 P 304.
Ind.—State v. Givan, 45 Ind. 267.
Mass.—Wineburg v. U. S. Steam, etc., R. Adv. Co., 173 Mass. 60, 53 NE 145, 73 AmSR 261.
Mont.—Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 P 10.
N. J.—Cooper v. Crane, 9 N. J. L. 173.
N. Y.—Matter of Lowerre, 48 Misc. 317, 96 NYS 764.
S. C.—Stock v. Parker, 7 S. C. Eq. 376.
Tex.—Middleton v. Pipkin, (Civ. A.) 56 SW 240.

90. Expenditures in payment of taxes and assessments see supra § 550.

91. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30.
Conn.—Cornwall v. Todd, 38 Conn. 443; Bulkley v. Clark, 2 Root 60.
Ind.—Graham v. Russell, 152 Ind. 186, 52 NE 806; Cullop v. Vincennes, 34 Ind. A. 667, 72 NE 166.
Iowa.—Findley v. Taylor, 97 Iowa 420, 66 NW 744; McGregor v. Vanpel, 24 Iowa 436.
Ky.—Floyd v. Floyd, 7 B. Mon. 290; Thrasher v. Lewis, 13 KyL 926.
Me.—Bangor v. Peirce, 106 Me. 527, 76 A 945, 138 AmSR 363, 29 LRANS 770.
Mass.—Rotch v. Morgan, 105 Mass. 426; Wood v. Torrey, 97 Mass. 321; Cook v. Leland, 5 Pick. 236.
Mich.—Herrick v. Big Rapids, 53 Mich. 554, 19 NW 182.
Minn.—In re Jefferson, 35 Minn. 215, 28 NW 256.
Mo.—Langston v. Canterbury, 173 Mo. 122, 73 SW 151; State v. Tittmann, 103 Mo. 553, 15 SW 936.
Nev.—In re Millenovich, 5 Nev. 161.
N. H.—Fuller v. Gale, 78 N. H. 544, 103 A 308; Jaffrey v. Smith, 76 N. H. 168, 80 A 504.
N. J.—State v. Jones, 39 N. J. L. 650; State v. Holmdel Tp., 39 N. J. L. 79; Brown v. Brown, 72 N. J. Eq. 667, 65 A 739; Dey v. Codman, 39 N. J. Eq. 258; Holcombe v. Holcombe, 29 N. J. Eq. 597.
N. Y.—Peo. v. Ogdensburgh, 48 N. Y. 390; Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612 mem, 77 NYS 413]; In re McMahon, 14 AbbNCas 405, 67 HowPr 113; McMahon v. Beekman, 65 HowPr 427; Williams v. Holden, 4 Wend. 223.
N. C.—James v. Withers, 126 N. C. 715, 36 SE 178.
Or.—Johnson v. Oregon City, 2 Or. 327.
Pa.—Littleton's App., 93 Pa. 177; Alter's Est., 4 Pa. Co. 558, 19 Phila. 9; Behee's Est., 8 Kulp 157; Casner's Est., 2 Kulp 474; Fell's Est., 13 Phila. 289.
R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798; Williams v. Herrick, 18 R. I. 120, 25 A 1099.
Tenn.—Gallatin v. Alexander, 10 Lea 475; Wooten v. House, (Ch. A.) 36 SW 932.
Va.—Nimme v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.
Wis.—Bogue v. Laughlin, 149 Wis. 271, 136 NW 606, 40 LRANS 927, AnnCas1913C 1367 [cit Cyc].
Eng.—Williams v. George, 3 Curt. Eccl. 343.

[a] **This rule has been applied to:** (1) An income tax. Littleton's App., 93 Pa. 177. (2) A church rate. Williams v. George, 3 Curt. Eccl. 343. (3) Water rates. Behee's Est., 8 Kulp (Pa.) 157.

[b] **Although a tax had not become a lien** at the time of decedent's death, yet the fact that he had become personally liable to pay it when it should be levied by the proper officers on the assessment rolls, which had become complete, made it a debt of decedent, which could be properly paid by his executors out of his estate. Matter of Franklin, 26 Misc. 107, 56 NYS 858; Bogue v. Laughlin, 149 Wis. 271, 136 NW 606, 40 LRANS 927, AnnCas1913C 1367 [cit Cyc].

[c] **Retaining funds which might have been distributed.**—The fact that an executor retained in his hands during his administration funds that he might have distributed among the legatees was not ground for charging him with taxes paid by him on such funds, since it is presumed the funds would have been assessed to the legatees if in their hands. Matter of Sudds, 32 Misc. 182, 66 NYS 231 [app dism 75 App. Div. 612 mem, 77 NYS 413].

[d] **Where an executor makes a false return** of property of the estate for taxation, the penalty provided by statute for such an offense cannot be inflicted on the estate. Leper v. Pulsifer, 57 Ill. 110.

[e] **Apportionment of tax.**—Where a tax is assessed against a decedent's estate as a whole, a decree, on final accounting, apportioning the tax ratably against a trust fund and the balance of the estate is just. Matter of Kenworthy, 63 Hun 165, 17 NYS 655.

92. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30; Chandler v. Chandler, 87 Ala. 300, 6 S 153.
Ill.—Shaw v. Camp, 56 Ill. A. 23.
Ind.—Graham v. Russell, 152 Ind. 186, 52 NE 806; Henderson v. Whitinger, 56 Ind. 131; Barnum v. Rallihan, 63 Ind. A. 349, 112 NE 561.
Iowa.—Findley v. Taylor, 97 Iowa 420, 66 NW 744.
Ky.—Penn v. Penn, 120 Ky. 557, 87 SW 306, 27 KyL 946.
Minn.—In re Zien, 134 NW 498.
Miss.—Bowers v. Williams, 34 Miss. 324.
N. H.—Jaffrey v. Smith, 76 N. H. 168, 80 A 504.
N. J.—Shearman v. Cameron, 76 N. J. Eq. 426, 74 A 979 [rev on other grounds 78 N. J. Eq. 532, 80 A 545]; Brown v. Brown, 72 N. J. Eq. 667, 65 A 739.
N. Y.—In re Babcock, 115 N. Y. 450, 22 NE 263; Smith v. Cornell, 113 N. Y. 320, 21 NE 140 [aff 52 N. Y. Super. 499]; Matter of Warshauer, 183 App. Div. 83, 170 NYS 556; Stewart's Est., 90 Hun 94, 35 NYS 366; Matter of Franklin, 26 Misc. 107, 56 NYS 858; Krueger v. Schlinger, 19 Misc. 221, 43 NYS 205; Mitchell v. Bowne, 63 HowPr 1; Matter of Noyes, 3 Dem. Surr. 369; Griswold v. Griswold, 4 Bradf. Surr. 216; Seabury v. Bowen, 3 Bradf. Surr. 207; Dugan's Est., Tuck. Surr. 338.
Pa.—Decker's Est., 22 Pa. Co. 46; Fell's Est., 13 Phila. 289.
Tenn.—Fitzgerald v. Standish, 102 Tenn. 383, 52 SW 294.
Va.—Kincheloe v. Gibson, 115 Va. 119, 78 SE 603; Dillard v. Dillard, 77 Va. 820.

[a] **A purchaser of land from the devisee** can enforce payment of the taxes on the land, due at the time of the testator's death, from the personal assets of the estate. Findley v. Taylor, 97 Iowa 420, 66 NW 744.

[b] **Property in which decedent had life estate.**—As under the direct provisions of the statute it is the duty of a life tenant to pay taxes and keep the property free from lien, so that it may pass to the remaindermen clear of all charges, the estate of a widow, holding at the time of her death a life estate under her husband's will, was liable for taxes becoming a lien on the land the day before her death. Penn v. Penn, 120 Ky. 557, 87 SW 306, 27 KyL 946. To same effect In re Zien, (Minn.) 134 NW 498.

[c] **Assessments for public improvements** are not a charge against the personal estate of the deceased owner of the land assessed. Hessig v. Hessig, 131 Ky. 514, 115 SW 748; In re Hun, 144 N. Y. 472, 39 NE 376; Matter of Hewitt, 40 Misc. 322, 81 NYS 1030. Contra Parker v. Bernal, 66 Cal. 113, 4 P 1090; Bangor v. Peirce, 106 Me. 527, 76 A 945, 138 AmSR 363, 29 LRANS 770; Seabury v. Bowen, 3 Bradf. Surr. (N. Y.) 207 (a special assessment on real estate which was confirmed at the time of decedent's death, although a lien on the lands, is also a personal debt of the decedent, and should be paid out of the personal estate).

[d] **Taxes which do not become a personal charge** against the property owner, but are merely a lien on the particular property, should not be paid out of the personalty as debts of decedent. Matter of Hewitt, 40 Misc. 522, 81 NYS 1030.

[e] **Liability to purchaser with respect to delinquent taxes.**—The heirs and not the administrator of a deceased vendor are liable to the purchaser for delinquent taxes paid by him to prevent a sale of the land for taxes. Creigh v. Boggs, 19 W. Va. 240.

93. Ala.—Cummings v. Bradley, 57 Ala. 224.
Ark.—Armstrong v. Cashion, 16 SW 666.
Ga.—Rudolph v. Underwood, 83 Ga. 664, 16 SE 55.
Mich.—Long v. Landman, 118 Mich. 174, 76 NW 374.
N. J.—Dey v. Codman, 39 N. J. Eq. 258.
Oh.—Warner v. York, 16 Oh. Cir. Ct. N. S. 369 [aff 75 Oh. St. 595 mem, 80 NE 1135 mem].
Pa.—Roup's Est., 14 PittsbLegJNS 101.
S. C.—Pollitzer v. Beinkempen, 76 S. C. 517, 57 SE 475.
Tex.—Read v. Franklin, (Civ. A.) 60 SW 215.

[a] **Illustration.**—Where a widow, claiming under an alleged will of her husband, held the estate as life tenant and executrix, and the will was thereafter declared invalid, on an accounting with the heir and an administrator it was proper to allow her taxes paid out of her separate estate. Read v. Franklin, (Civ. A.) 60 SW 215.

[b] **Duty to pay taxes.**—It is the duty of administrators if lands are in their possession and capable of yielding rents to pay the taxes out of the rents and not to permit the premises to be sold for taxes. Cummings v. Bradley, 57 Ala. 224.

94. Del.—Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.
Mass.—Wiggin v. Swett, 6 Metc. 194, 39 AmD 716.
Mich.—In re Graff, 123 Mich. 456, 82 NW 248.

but, save so far as he may have special authority over the real estate to sell or manage it, or may need it specially to sell for the payment of debts, he is not warranted in paying taxes on it assessed or levied after decedent's death, since these are charges on the land for the heirs or devisees to pay.[95] If the land is sold or partitioned under order of the court, taxes or assessments accruing subsequent thereto are not debts of decedent which it is the right or duty of the executor or administrator to pay.[96]

Inheritance or succession taxes, although ultimately chargeable against the shares of the several legatees or distributees, are ordinarily to be paid out of the estate by the personal representative.[97]

[§ 903] **17. Continuing Obligations.** The policy of the law does not favor the continuance of the liability of a deceased contracting party after the time at which estates of decedents are usually administered, and it ought not to be so continued unless the terms of the instrument and the attending circumstances are such that no other result is possible.[98] But where a contract between a husband and wife pending divorce proceedings provided that the husband was to pay a monthly sum for the maintenance of a minor daughter, the payments "to continue during the minority of said child but to cease upon her earlier death," and that the agreement was to be binding as though incorporated in the divorce decree, the obligation survived the death of the husband, and constituted a continuing claim against his estate.[99]

[§ 904] **18. Discharged Claims.** Where the claim against decedent has been discharged, it cannot of course be allowed.[1]

[§ 905] **19. Agreement of Representative to Pay.**[2] While the personal representative may render himself personally liable to pay a claim presented against the estate, he cannot bind the estate by his express or implied promise to pay a claim which was not an obligation of the decedent in his lifetime or for which the estate is not properly and directly liable.[3] But where the consideration of a representative's contract to pay is a debt due by

N. H.—Clough v. Clough, 71 N. H. 412, 52 A 449.
Pa.—Villee's Est., 9 LancLRev 353; Pratt's Est., 3 LancLRev 203.
[a] **Illustrations.**—(1) Where testator devised to his wife, whom he appointed executrix, the use of his dwelling house for life, directing that it should be kept in repair out of his other estate, she was not entitled to charge the estate for taxes assessed on the house when in her possession under the will. Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716. (2) A widow who is also administratrix of the decedent cannot be allowed to occupy the premises of the decedent as a residence, rent free, and then charge against the estate items for taxes paid during such occupation. In re Graff, 123 Mich. 456, 82 NW 248.

95. Ill.—Stark v. Brown, 101 Ill. 395; Phelps v. Funkhouser, 39 Ill. 401; Shaw v. Camp, 56 Ill. A. 23.
Ind.—Henderson v. Whitinger, 56 Ind. 131.
Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.
Kan.—Reading v. Wier, 29 Kan. 429.
Ky.—Caine v. Rich, 110 SW 289, 33 KyL 261.
Minn.—Nordlund v. Dahlgren, 130 Minn. 462, 153 NW 876, AnnCas1917B 941.
Mo.—Langston v. Canterbury, 173 Mo. 122, 73 SW 151.
N. H.—Lucy v. Lucy, 55 N. H. 9.
N. J.—Polhemus v. Middleton, 37 N. J. Eq. 240; Howard v. Francis, 30 N. J. Eq. 444; Holcombe v. Holcombe, 29 N. J. Eq. 597.
N. Y.—In re Selleck, 111 N. Y. 284, 19 NE 66; Willcox v. Smith, 26 Barb. 316; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163; Matter of Hun, 7 Misc. 409, 28 NYS 253 [aff 80 Hun 605 mem, 30 NYS 1132 mem]; Matter of Benedict, 15 NYSt 746; Matter of Kick, 11 NYSt 688; Bates v. Underhill, 3 Redf. Surr. 365; Griswold v. Griswold, 4 Bradf. Surr. 216.
N. C.—Hahn v. Mosely, 119 N. C. 73, 25 SE 713; Young v. Kennedy, 95 N. C. 265.
Oh.—Piatt v. St. Clair, Wright 526; Matter of Turpin, Oh. Prob. 124.
Pa.—Walker's App., 116 Pa. 419, 9 A 654; Jackson v. Sassaman, 29 Pa. 106; Henry v. Horstick, 9 Watts. 412; McManus's Est., 3 Pa. Dist. 183, 14 Pa. Co. 379, 34 WklyNC 222; Alter's Est., 4 Pa. Co. 558, 19 Phila. 9; Dunkle's Est., 17 LancLRev 61; Watson's Est., 6 LuzLegReg 13.
Tenn.—Fitzgerald v. Standish, 102 Tenn. 383, 52 SW 294.
Tex.—Moore v. Bryant, 10 Tex. Civ. A. 131, 31 SW 223.
Va.—Dillard v. Dillard, 77 Va. 820.
[a] **This is true, even though** the administrator and the next of kin are tenants in common of the realty. Matter of Foulds, 35 Misc. 171, 71 NYS 473.
[b] **When charge allowable.**—(1) The payment by the executor of taxes accruing on the real estate subsequent to the testator's death being for the benefit of the heirs, the court, after a long lapse of time, will presume a request, and allow it as a charge against the estate (Broome v. Van Hook, 1 Redf. Surr. (N. Y.) 444), (2) especially when such payment was not objected to at the time by any of those interested (Robertson v. Breckinbridge, (Va.) 31 SE 892). (3) So also if the heirs permit real estate to be returned delinquent for the nonpayment of taxes, and the executors pay such taxes to prevent the loss of the land, they will be entitled, as against the residuary legatees, to credit for the taxes so paid, whether or not the executors, having a naked power to sell, were under a duty to pay such taxes. Dunn v. Renick, 33 W. Va. 476, 10 SE 810. (4) Where the estate is insolvent, it is proper for the executor to preserve the real estate by the payment of taxes. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115 [rev on other grounds 18 App. Div. 301, 46 NYS 190]. (5) It has also been held, without considering whether an administrator has authority to collect rents, that administrators who have charged themselves with the rents are entitled to credit for taxes paid. Matter of Turpin, Oh. Prob. 124.
[c] **Taxes paid by mortgagee purchasing at foreclosure sale.**—The payment of taxes assessed upon real estate of the deceased before his death, by the mortgagee of such estate, who has bought it at a foreclosure sale at a price less than the amount due on the mortgage, the terms of the sale providing for such payment out of the purchase money, does not entitle such purchaser to be reimbursed for the taxes out of the assets of the estate. Leviness v. Cassebeer, 3 Redf. Surr. (N. Y.) 491.

96. Ambleton v. Dyer, 53 Ark. 224, 13 SW 926; Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Dillard v. Dillard, 77 Va. 820. But compare Eddy's Est., 13 Phila. (Pa.) 262 (where land has been sold to pay debts, the executor may be allowed in his account for taxes and arrears of ground rent accruing after the confirmation of the sale and before the execution of the deed, and for the amount of a city claim for work done to the premises during the same period).

97. Cal.—In re Chesney, 1 Cal. A. 30, 81 P 679.
N. H.—Fuller v. Gale, 78 N. H. 544, 103 A 308.
R. I.—Fitzgerald v. Rhode Island Hospital Trust Co., 24 R. I. 59, 52 A 814.
Eng.—In re King, [1904] 1 Ch. 363; Berry v. Gaukroger, [1903] 2 Ch. 116; In re Clemow, [1900] 2 Ch. 182 [foll In re Treasure, [1900] 2 Ch. 648].
B. C.—In re Pearse, 10 B. C. 280.
Ont.—Re Holland, 3 Ont. L. 406.

98. Smith's Est., 22 Pa. Dist. 1007; Filon's Est., 20 Pa. Co. 193.
[a] **Illustration.** — Where before the death of a lessee, and before the expiration of the lease, the business carried on by him upon the demised premises was sold under execution and purchased by his wife who continued the business, it would be presumed that the lease was sold as part of the business, and hence the lessor was not entitled to claim rent accruing under the lease after the lessee's death against his estate. Loftis' Est., 3 Pa. Co. 195.

99. Stone v. Bayley, 75 Wash. 184, 187, 134 P 820, 48 LRANS 429.

1. Lear v. Friedlander, 45 Miss. 559; Funk's Est., 21 LancLRev (Pa.) 149.
[a] **Judgment apparently paid.**—Where counsel in presenting other claims accidently discover an unsatisfied judgment for a large amount in favor of their client, a brother of decedent, who was pressing a small note without apparent recollection of such judgment, and there is testimony that he had had a settlement with decedent at the time when the note was given, the judgment should be disallowed. Funk's Est., 21 Lanc LRev (Pa.) 149 (holding also that a judgment given by decedent in favor of his father's executors, one of whom was his said brother, which was included in their inventory and no credit claimed for it, should be disallowed as presumably paid, when presented by such brother against the estate).
[b] **Things done in satisfaction of debt.**—Where the obligee in a bond requested the obligor to keep her children for the debt, and he did this until his death, when the bond was found among his private papers, the bond should not be treated as paid, but the estate should be allowed a fair compensation for the maintenance of the children until decedent's death, less the value of their services, and charged with the remainder, if any. Hughes v. Patterson, 91 Va. 664, 22 SE 485.

2. Claim barred by limitations see infra §§ 913, 914.

3. Ala.—Colvin v. Owens, 22 Ala. 782.

decedent, the representative is not liable further than he has received assets, and if he has received no assets is not liable at all.[4]

[§ 906] **20. Claims Barred by Limitation[5]—a. In General.** As a general rule a claim which was barred by the statute of limitations at the time of the debtor's death cannot properly be allowed against his estate,[6] and the personal representative is under no legal obligation to pay it;[7] but in some jurisdictions where the period required to bar the claim expires after decedent's death but before the presentment of the claim or the settlement and distribution of the estate, the claim is not barred,[8] unless it is not enforced within the prescribed time after the issuing of letters testamentary or of administration.[9]

In computing the time under the statute of limitations, when pleaded by the personal representative or heirs of decedent, the time after the granting of letters during which the personal representative cannot be sued must be deducted.[10]

If a creditor is appointed executor or administrator of the debtor's estate, the running of the statute of limitations against the representative's claim is usually held to be suspended,[11] although there is authority for the contrary view.[12]

Where a suit is abated by the death of defendant and cannot be revived against his administrator because of the insolvency of his estate, the debt is not barred by limitations as a claim against the estate if at the time the suit was brought it was not so barred.[13]

Bar against security only. A mortgage debt not barred at the time of the mortgagor's death is pay-

Ark.—Yarborough v. Ward, 34 Ark. 204.

Fla.—May v. May, 7 Fla. 207, 68 AmD 431.

La.—Reihl v. Martin, 29 La. Ann. 15.

Mass.—Shepherd v. Young, 8 Gray 152, 69 AmD 242 [foll Washburn v. Hale, 10 Pick. 429; Ripley v. Sampson, 10 Pick. 371].

N. Y.—O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238; Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950.

N. C.—Williams v. Chaffin, 13 N. C. 333.

Pa.—Solliday v. Bissey, 12 Pa. 347; Beeson v. McNabb, 2 Pa. 422; Grier v. Huston, 8 Serg. & R. 402, 11 AmD 627; Wireman's App., 7 Pa. Dist. 759, 43 WklyNC 334; Bowen v. Miller, 3 PaLJ 326.

S. C.—Milwer v. Jay, 47 S. C. 430, 25 SE 298; McGrath v. Barnes, 13 S. C. 328, 36 AmR 687.

Va.—Braxton v. Harrison, 11 Gratt. (52 Va.) 30.

Eng.—Bradley v. Heath, 3 Sim. 543, 6 EngCh 543, 57 Reprint 1101.

4. Lair v. Miller, 2 Litt. (Ky.) 66 [foll Rucker v. Wadlington, 5 J. J. Marsh. (Ky.) 238].

5. Limitations generally see Limitations of Actions [25 Cyc 963].

Time to sue and limitations with respect to actions against executors and administrators see infra §§ 1906–1913, 1923–1976.

6. Ark.—Miller v. Summers, 124 Ark. 599, 187 NW 664.

Cal.—In re Aldersley, 174 Cal. 366, 163 P 206; Etchas v. Orena, 127 Cal. 588, 60 P 45; McGrath v. Carroll, 110 Cal. 79, 42 P 466.

Fla.—Patterson v. Cobb, 4 Fla. 481.

Ill.—Bromwell v. Bromwell, 139 Ill. 424, 28 NE 1057.

Ky.—Payne v. Pusey, 8 Bush 564.

La.—In re Romero, 38 La. Ann. 947.

Mass.—Rice v. Merrill, 223 Mass. 279, 111 NE 860; Grinnell v. Baxter, 17 Pick. 383.

Mich.—Hollister v. Kinyon, 195 Mich. 261, 161 NW 962; Rodgers v. Lamb, 137 Mich. 241, 100 NW 440; Kimball v. Kimball, 16 Mich. 211.

Miss.—Loviza v. Lynch, 115 Miss. 694, 76 S 629.

Mo.—Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8.

Mont.—In re Mouillerat, 14 Mont. 245, 36 P 185.

Nebr.—In re Hinrich, 93 Nebr. 551, 141 NW 152; In re Brusha, 87 Nebr. 254, 126 NW 1079.

N. J.—Pursel v. Pursel, 14 N. J. Eq. 514.

N. Y.—Butler v. Johnson, 111 N. Y. 204, 18 NE 643; Gilbert v. Comstock, 93 N. Y. 484; Matter of Hoes, 183 App. Div. 38, 170 NYS 543; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Matter of Primmer, 49 Misc. 413, 99 NYS 830; Mooers v. White, 6 Johns. Ch. 360; Burnett v. Noble, 5 Redf. Surr. 69.

N. C.—Twiddy v. Mullen, 176 N. C. 16, 96 SE 653.

Or.—In re Webster, 74 Or. 489, 145 P 1063.

Pa.—Gardner's Est., 19 Pa. Dist. 136 [aff 228 Pa. 282, 77 A 509, 29 LRANS 685]; Monaghan's Est., 13 Pa. Dist. 694; Otterson's Est., 7 Pa. Dist. 379; McFarland's Est., 5 Pa. Dist. 761.

R. I.—Gilbert v. Hayward, 37 R. I. 303, 92 A 625.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393; Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Tex.—Swift v. Trotti, 52 Tex. 498.

Va.—Tazewell v. Whittle, 13 Gratt. (54 Va.) 329.

Wis.—Jones v. Keep, 23 Wis. 45.

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

Ont.—Re Rutherford, 34 Ont. L. 395, 9 OntWN 32.

[a] **Rule applicable to claims of personal representative.**—Grinnell v. Baxter, 17 Pick. (Mass.) 383; Payne v. Pusey, 8 Bush (Ky.) 564; Matter of Brown, 77 Misc. 507, 137 NYS 978; Burnett v. Noble, 5 Redf. Surr. (N. Y.) 59; Hoch's App., 21 Pa. 280; Monroe's Est., 9 Kulp (Pa.) 334.

[b] **A presumption of payment** (1) for services rendered decedent six years previously arises on account of such delay where the claim might have been made to decedent during his lifetime. Monroe's Est., 9 Kulp (Pa.) 334; In re Beecher, 29 Pittsb LegJNS (Pa.) 84. (2) But where the debt is one of record nothing less than the lapse of twenty years will raise such a presumption. In re Breeswine, 11 YorkLegRec (Pa.) 141. See generally Payment [30 Cyc 1173].

[c] **Claim secured by mortgage on realty.**—Where a claim against an estate, secured by a mortgage on real estate, was barred by limitations, it was not a debt payable by the executors, but was an encumbrance on the real estate, subject to which such real estate should be sold, if necessary, to pay debts. Robinson v. Cogswell, 192 Mass. 79, 78 NE 389.

[d] **Acknowledgments by the debtor in his lifetime** may of course take a debt out of the operation of the statute so that the claim may be properly allowed against his estate. Greenwood v. Judson, 109 App. Div. 398, 96 NYS 147; Rogers v. Southern, 4 Baxt. (Tenn.) 67.

[e] **Where no one having a beneficial interest in the result pleads the statute,** an auditor may not disallow a claim because of the bar of limitations. Smull's Est., 24 Pa. Co. 124.

7. Cal.—McGrath v. Carroll, 110 Cal. 79, 42 P 466.

Mo.—Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8.

Pa.—Scull v. Wallace, 15 Serg. & R. 231.

Wash.—Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482.

Eng.—Midgley v. Midgley, [1893] 3 Ch. 282.

N. B.—Kelley v. Ayer, 41 N. B. 489.

Ont.—King v. Rogers, 31 Ont. 573.

[a] **One of several representatives may plead** the statute where the others stand neutral. Scull v. Wallace, 15 Serg. & R. (Pa.) 231; Davis' Est., 1 Phila. (Pa.) 360.

8. Bromwell v. Bromwell, 139 Ill. 424, 28 NE 1057; Duffy v. Kilroe, 116 Miss. 7, 76 S 681; McClintock's App., 29 Pa. 360; Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

[a] **Contrary view.** — Perry v. Munger, 7 Tex. 589.

9. Duffy v. Kilroe, 116 Miss. 7, 76 S 681; In re Powers, 124 N. Y. 361, 26 NE 940; Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482; Gleason v. Hawkins, 32 Wash. 464, 73 P 533.

[a] **The qualification of the executor or administrator** and filing of his bond is equivalent to taking out letters, within the meaning of this rule. Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482.

[b] **The fact that an executor fails to proceed with the administration** does not excuse a creditor who allows his claim to become barred, inasmuch as he has a statutory remedy whereby he could enforce administrative proceedings. Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482.

[c] **Time of first accounting.**—(1) Under statutes providing that the statute of limitations shall not bar a claim by a personal representative against the estate, provided it is presented at the first accounting, and was not barred at the death of the decedent, and that the statute of limitations shall be suspended against such claims from the death of decedent until the first judicial settlement of the personal representative's account, it is immaterial that the first accounting is not made within six years after one year from the issuing of letters testamentary or of an administration. In re Powers, 124 N. Y. 361, 26 NE 940 [aff 11 NYS 396]. (2) The statute applies only to "a debt due from the decedent to the accounting party" and not to a debt which was owing to a third person but which has been assigned to the representative. Matter of Robbins, 7 Misc. 264, 27 NYS 1009.

10. Lee v. Downey, 68 Ala. 98; Steele v. Steele, 64 Ala. 438, 38 AmR 15.

11. Semmes v. Magruder, 10 Md. 242; State v. Reigart, 1 Gill (Md.) 1, 39 AmD 628; Spencer v. Spencer, 4 Md. Ch. 456; Brown v. Stewart, 4 Md. Ch. 368; Grinnell v. Baxter, 17 Pick. (Mass.) 383; Oliver v. Smith, 94 Miss. 879, 49 S 1; Matthews v. Matthews, 66 Miss. 239, 6 S 201; Preston v. Cutter, 64 N. H. 461, 13 A 874; McLaughlin v. Newton, 53 N. H. 531.

12. Kuhlman's Est., 178 Pa. 43, 35 A 918.

13. Bassett v. McKenna, 52 Conn. 437.

able out of the personalty, although a suit to foreclose the mortgage is barred.[14]

A judgment which cannot be enforced by execution, by reason of lapse of time since its rendition, may nevertheless be proved as a claim against the estate of the judgment debtor.[15]

[§ 907] **b. Power of Representative to Waive Bar—(1) In General.** In some jurisdictions the rule is that an executor or administrator is bound to interpose the statute of limitations when it is available to bar claims against the estate, and has no power to waive the bar,[16] unless with the consent of the persons beneficially interested in the estate.[17] But in other jurisdictions, the courts, while considering that it is, as a general rule, the duty of the representative to assert the bar of the statute where the claim was barred at the time of decedent's death,[18] has been judicially declared outlawed by a competent court,[19] or is so stale as to raise the presumption of payment,[20] he is not absolutely bound to assert the bar in all cases, but is left a certain measure of discretion, and may waive the bar where he believes the claim to be well founded and just,[21] at least where the personal

14. Gleason v. Hawkins, 32 Wash. 464, 73 P 533.

15. Ex p. Goldsmith, 68 S. C. 528, 47 SE 984.

16. Ark.—Abbott v. Johnston, 130 Ark. 1, 195 SW 676; Rhodes v. Cannon, 112 Ark. 6, 164 SW 752; Williams v. Risor, 84 Ark. 61, 104 SW 547; Cox v. Phelps, 65 Ark. 1, 45 SW 990; Rector v. Conway, 20 Ark. 79; Rogers v. Wilson, 13 Ark. 507. Contra Scott v. Penn, 68 Ark. 492, 495, 60 SW 235 ("An administrator is not bound to plead the statute of limitations under ordinary circumstances"); Conway v. Reyburn, 22 Ark. 290, 302.

Cal.—Reay v. Heazelton, 128 Cal. 335, 60 P 977; Etchas v. Orena, 127 Cal. 588, 60 P 45; Vrooman v. Li Po Tai, 113 Cal. 302, 45 P 470; McGrath v. Carroll, 110 Cal. 79, 42 P 466.

Conn.—House v. Peacock, 84 Conn. 54, 78 A 723.

Fla.—Patterson v. Cobb, 4 Fla. 481.

Ida.—Dern v. Olsen, 18 Ida. 358, 110 P 164, LRA1915B 1016, AnnCas 1912A 1.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Langworthy v. Baker, 23 Ill. 484; McCoy v. Morrow, 18 Ill. 519, 68 AmD 578; Bromwell v. Shubert, 40 Ill. A. 330 [aff 139 Ill. 424, 28 NE 1057].

Kan.—Hanson v. Towle, 19 Kan. 273.

La.—Driscoll's Succ., 125 La. 287, 51 S 200; Romero's Succ., 31 La. Ann. 721; Villere v. Villere, 26 La. Ann. 380; Miltenberger v. Witherow, 24 La. Ann. 183; Dickson v. Compton, 24 La. Ann. 83; Flanner v. Lecompte, 23 La. Ann. 193; Sevier v. Gordon, 21 La. Ann. 373.

Mich.—Hollister v. Kinyon, 195 Mich. 261, 161 NW 962; Draper v. Brown, 153 Mich. 120, 117 NW 213.

Miss.—Woods v. Elliott, 49 Miss. 168; Huntington v. Bobbitt, 46 Miss. 528; Byrd v. Wells, 40 Miss. 711; Trotter v. Trotter, 40 Miss. 704; Bingaman v. Robertson, 25 Miss. 501; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41.

Mo.—Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8; Cape Girardeau County v. Harbison, 58 Mo. 95.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772; In re Mouillerat, 14 Mont. 245, 36 P 185.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

Nev.—Jones v. Powning, 25 Nev. 399, 60 P 833.

N. Y.—Schutz v. Morette, 146 N. Y. 137, 40 NE 780 [rev 81 Hun 518, 31 NYS 391]; Butler v. Johnson, 111 N. Y. 204, 18 NE 643; McLaren v. McMartin, 36 N. Y. 88, 1 Transcr. A. 226, 3 AbbPrNS 345, 33 HowPr 449; Bloodgood v. Bruen, 8 N. Y. 362, Seld. 129; Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 87 NE 1187 mem]; Matter of Goss, 98 App. Div. 489, 90 NYS 769; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Bucklin v. Chapin, 1 Lans. 443; Matter of Dater, 55 Misc. 185, 106 NYS 354; Matter of Burr, 48 Misc. 56, 96 NYS 225 [rev on other grounds 118 App. Div. 482, 104 NYS 29]; Matter of Pray, 40 Misc. 516, 82 NYS 807; Matter of Bradley, 25 Misc. 261, 54 NYS 555 [aff 42 App. Div. 301, 59 NYS 115]; Balz v. Underhill, 19 Misc. 215, 44 NYS 419 [aff 16 App. Div. 635 mem, 46 NYS 1089 mem]; Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179; Matter of Kirkpatrick, 9 Misc. 228, 30 NYS 283; Matter of Hill, 7 NYS 328, 2 Conn. Surr. 25; Burnett v. Noble, 5 Redf. Surr. 69. But see Hammon v. Huntley, 4 Cow. 493 (dictum to the contrary).

S. C.—Brantley v. Bittle, 72 S. C. 179, 51 SE 561; Mulwee v. Jay, 47 S. C. 430, 25 SE 298; Shaw v. Barksdale, 25 S. C. 204; Bolt v. Dawkins, 16 S. C. 198; Godbold v. Vance, 14 S. C. 458; Wilson v. Wilson, 16 S. C. Eq. 329; Moore v. Porcher, 8 S. C. Eq. 195; Haselden v. Whitesides, 33 S. C. L. 353; Reigne v. Desportes, 23 S. C. L. 118. Contra Walter v. Radcliffe, 2 S. C. Eq. 577.

Tex.—Howard v. Johnson, 69 Tex. 655, 7 SW 522; Cone v. Crum, 52 Tex. 348; King v. Cassidy, 36 Tex. 531; Moore v. Hillebrant, 14 Tex. 312, 65 AmD 118; Moore v. Hardison, 10 Tex. 467; Jackson v. Stone, (Civ. A.) 155 SW 960; Vinson v. Whitfield, (Civ. A.) 133 SW 1095.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Va.—Smith v. Pattie, 81 Va. 654; Seig v. Acord, 21 Gratt. (62 Va.) 365, 8 AmR 605; Tazewell v. Whittle, 13 Gratt. (54 Va.) 329; Tunstall v. Pollard, 11 Leigh (38 Va.) 1.

W. Va.—Findley v. Cunningham, 53 W. Va. 1, 44 SE 472; Stiles v. Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 SE 986; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

"It is certainly the duty of an executor to raise the question of the Statute of Limitations." Matter of Milligan, 112 App. Div. 373, 376, 98 NYS 480.

"He is not authorized to pay a claim that is barred by limitation." Jackson v. Stone, (Tex. Civ. A.) 155 SW 960, 961.

[a] **Reason for rule.**—"The executor or administrator is in effect a trustee of the funds of the estate for the benefit of the creditors and heirs, and cannot waive any substantial right which materially affects their interests." Vanderpool v. Vanderpool, 48 Mont. 448, 454, 138 P 772.

[b] **A representative's unreasonable delay in making objections** to a claim presented to him does not preclude him from asserting the statute of limitations as a bar to such claim. Bucklin v. Chapin, 1 Lans. (N. Y.) 443.

[c] **A former adjudication of the surrogate's court,** dismissing a creditor's petition for an accounting and containing the statement that the proceeding was barred by the statute of limitations does not constitute a final adjudication upon the validity of the creditor's claim. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694 [rev 67 App. Div. 628, 74 NYS 1132].

[d] **The personal representative of an administrator** has no connection in law with the estate of the first decedent, and cannot waive the bar of the statute. Redfearn v. Craig, 57 S. C. 534, 35 SE 1024.

[e] **Where the representative knows facts making the statute inapplicable,** he is not required to plead the statute of limitations, although the claim is apparently barred. Radford v. Fowlkes, 85 Va. 820, 8 SE 817.

[f] **Where defense would cut off rights of estate against third persons.**—"The court should not allow an administrator to make such a defense where its manifest operation would be to cut off the rights of the estate against third parties." King v. Cassidy, 36 Tex. 531, 538.

17. Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Matter of Miles, 33 Misc. 147, 68 NYS 368 [rev 61 App. Div. 562, 71 NYS 71, but aff 170 N. Y. 75, 62 NE 1084]; Findley v. Cunningham, 53 W. Va. 1, 44 SE 472; Sawyer v. Metters, 133 Wis. 350, 113 NW 682.

[a] **Illustration.**—A claim is relieved of the bar where, in addition to a written acknowledgment and promise by the executor, the heirs, devisees, and legatees sign another paper requesting the executor to pay the claim, and reciting that if it is paid they will make no claim against him on account thereof. Spicer v. Raplee, 4 App. Div. 471, 38 NYS 806.

18. McBride v. Hunter, 64 Ga. 655; Du Bignon v. Backer, 61 Ga. 206.

19. Crabtree v. Graham, 81 Ga. 290, 6 SE 426; Midgley v. Midgley, [1893] 3 Ch. 282.

20. Barnawell v. Smith, 58 N. C. 168; McCulloch v. Dawes, 9 D. & R. 40, 22 ECL 587.

Presumption of payment from lapse of time see Payment [30 Cyc 1273].

21. U. S.—West v. Smith, 8 How. 402, 12 L. ed. 1130; In re Huger, 100 Fed. 805; Fairfax v. Fairfax, 8 F. Cas. No. 4,613, 2 Cranch C. C. 25.

Ala.—Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Teague v. Corbitt, 57 Ala. 529; Pollard v. Scears, 28 Ala. 484, 65 AmD 364; Ex p. Perryman, 25 Ala. 79, 60 AmD 494; Hall v. Darrington, 9 Ala. 502; Knight v. Godbolt, 7 Ala. 304.

Del.—Chambers v. Fennemore, 4 Del. 368.

Iowa.—In re Baumhover, 151 Iowa 146, 130 NW 817 [cit Cyc]; Trimble v. Marshall, 66 Iowa 233, 23 NW 645; Welch v. McGrath, 59 Iowa 519, 13 NW 838, 10 NW 810.

Ky.—McCoy v. McCoy, 125 SW 177; Payne v. Pusey, 8 Bush 564; Let v. Colston, 5 T. B. Mon. 238; Maxey v. Wallhatt, 11 Ky. Op. 31.

Md.—Dunnigan v. Cummins, 115 Md. 289, 80 A 922; Fledderman v. Fledderman, 112 Md. 226, 76 A 85; Houck v. Houck, 112 Md. 122, 76 A 581; Semmes v. Magruder, 10 Md. 242; Quynn v. Carroll, 10 Md. 197; Miller v. Dorsey, 9 Md. 317; Chapman v. Dixon, 4 Harr. & J. 527; Forbes v. Perrie, 1 Harr. & J. 109.

Mass.—Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452; Thayer v. Hollis, 3 Metc. 369; Emerson v. Thompson, 16 Mass. 429; Scott v. Hancock, 13 Mass. 162.

N. H.—Hodgdon v. White, 11 N. H. 208.

N. J.—Shreve v. Joyce, 36 N. J. L.

estate is sufficient to pay the debt without resorting to the realty.[22] It has been said, however, that the rule allowing the personal representative to waive the bar of the statute is anomalous and ought not to be extended.[23]

[§ 908] **(2) As to Representative's Own Claim.**[24] In some jurisdictions the representative may waive the statute of limitations as to a claim of his own, or may exercise his right of retainer, although his claim was barred at the time of decedent's death,[25] and a fortiori, where the bar did not become effective until after decedent's death,[26] although in other jurisdictions the rule is otherwise where the claim was barred in the debtor's lifetime,[27] or at the date of the representative's qualification,[28] or before his intention to retain for the debt was made known.[29]

[§ 909] **(3) Waiver by One of Several Representatives.** It is generally considered that, where the personal representative has the power to take a debt of the estate out of the operation of the statute of limitations, a promise by one of several coexecutors or coadministrators may be sufficient for this purpose,[30] and likewise the statute of limi-

44, 13 AmR 417; Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Pursel v. Pursel, 14 N. J. Eq. 514.

N. C.—Halliburton v. Carson, 100 N. C. 99, 5 SE 912, 6 AmSR 565; Barnawell v. Smith, 58 N. C. 168; Leigh v. Smith, 38 N. C. 442, 42 AmD 182; Williams v. Maitland, 36 N. C. 92.

Oh.—Joyce v. Hart, 11 Oh. Dec. (Reprint) 487, 27 CincLBul 144.

Pa.—Woods v. Irwin, 141 Pa. 278, 21 A 603, 23 AmSR 282; Ritter's App., 23 Pa. 95; Steele v. Steele, 12 Pa. 64; Kennedy's App., 4 Pa. 149; Biddle v. Moore, 3 Pa. 161; Fritz v. Thomas, 1 Whart. 66, 29 AmD 39; Smith v. Porter, 1 Binn. 209; Michaels' Est., 5 Pa. Co. 321; Morgan v. Kirkpatrick, 2 Pa. Co. 262; Matter of Smith, 1 Ashm. 352; Rowe's Est., 11 Kulp 36. Contra Watts v. Devor, 1 Grant 267.

Tenn.—Bates v. Elrod, 13 Lea 156; Langham v. Baker, 5 Baxt. 701; Batson v. Murrell, 10 Humphr. 301, 51 AmD 707; Brown v. Porter, 7 Humphr. 373; Puckett v. James, 2 Humphr. 565.

Eng.—Midgley v. Midgley, [1893] 3 Ch. 282; In re Rownson, 29 Ch. D. 358, 9 ERC 342; Norton v. Frecker, 1 Atk. 526, 26 Reprint 330; McCulloch v. Dawes, 9 D. & R. 40, 22 ECL 587; Hunter v. Baxter, 3 Giffard 214, 66 Reprint 388; Hill v. Walker, 4 Kay & J. 166, 70 Reprint 69; Stahlschmidt v. Lett, 1 Smale & G. 415, 65 Reprint 182; Williamson v. Naylor, 3 Y. & C. Exch. 210 note a, 160 Reprint 677.

Ont.—Re Rutherford, 34 Ont. L. 395, 9 OntWN 32.

"It is well settled, both in England and this country, that the executor may or may not at his pleasure, plead the statute of limitations. It is indeed more prudent, that he should do so, but he cannot be compelled to plead it, by a legatee." Leigh v. Smith, 38 N. C. 442, 448, 42 AmD 182.

[a] **Reason for rule.**—"The law does not require of him, in the expressive words of another, in opposition to an argument, that it was the legal duty of the representative to plead the statutory bar, 'to make him sin in his grave;' and such is the well established doctrine in this State." Halliburton v. Carson, 100 N. C. 99, 107, 5 SE 912, 6 AmSR 565.

[b] **The rule applies to an appointee in trust** under a will executed by a married woman who acted under a power of appointment. Leigh v. Smith, 38 N. C. 442, 42 AmD 182.

[c] **Although a presumption of payment may have arisen** from lapse of time, the representative may properly pay the debt if he has personal knowledge or ample proof that it still subsists. Halliburton v. Carson, 100 N. C. 99, 5 SE 912, 6 AmSR 565 [dist Barnawell v. Smith, 58 N. C. 168].

[d] **Negligent conduct of defense.**—Although the representative is not bound to plead the statute, yet if he refuses payment on the sole ground that the claim is barred, and thereby induces litigation in which he acts as his own attorney, he must exercise the same degree of diligence that would be required of him in making any other defense, especially where he stands in intimate and confidential relations to the creditors; and under such circumstances, if he so negligently conducts the defense that the creditor recovers judgment, he is not entitled to credit for the judgment, although he is forced to pay it. Teague v. Corbitt, 57 Ala. 529.

[e] **An executor may confess judgment** for a bona fide debt, although it is barred by the statute of limitations. Woods v. Irwin, 141 Pa. 278, 21 A 603, 23 AmSR 282.

22. Lee v. Downey, 68 Ala. 98; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Pollard v. Scears, 28 Ala. 484, 65 AmD 364.

23. Stiles v. Burch, 5 Paige (N. Y.) 132; Midgley v. Midgley, [1893] 3 Ch. 282; In re Rownson, 29 Ch. D. 358; Phillips v. Beal, 32 Beav. 26, 55 Reprint 11.

24. Right of retainer generally see infra §§ 1193–1201.

25. Ala.—Trimble v. Fariss, 78 Ala. 260; Harwood v. Harper, 54 Ala. 659; Glenn v. Glenn, 41 Ala. 571; Knight v. Godbolt, 7 Ala. 304.

Ky.—Payne v. Pusey, 8 Bush 564.

Mo.—Miller v. Hoover, 121 Mo. A. 568, 97 SW 210.

Eng.—In re Rownson, 29 Ch. D. 358, 9 ERC 342; Hunter v. Baxter, 3 Giffard 214, 66 Reprint 388; Clinton v. Brophy, 10 Ir. Eq. 139; Sharman v. Rudd, 4 Jur. N. S. 527; Hill v. Walker, 4 Kay & J. 166, 70 Reprint 69; Stahlschmidt v. Lett, 1 Smale & G. 415, 65 Reprint 182.

Ont.—In re Starr, 2 Ont. L. 762; Emes v. Emes, 11 Grant Ch. (U. C.) 325; Crooks v. Crooks, 4 Grant Ch. (U. C.) 615.

[a] **Retainer as against land or its proceeds.**—Retainer by an executor or administrator cannot be exercised against land or its proceeds until the claim is established, after adversary proceedings commenced within the period of limitations. Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.

26. Semmes v. Magruder, 10 Md. 242; Preston v. Cutter, 64 N. H. 461, 13 A 874; McLaughlin v. Newton, 53 N. H. 531; Piper v. Clark, 18 N. H. 415.

27. Ark.—Rector v. Conway, 20 Ark. 79.

Conn.—Ensign v. Batterson, 68 Conn. 298, 36 A 51.

Ga.—Beckham v. Beckham, 113 Ga. 381, 38 SE 817 [dist Baker v. Bush, 25 Ga. 594, 71 AmD 193].

Mass.—In re Richmond, 2 Pick. 567.

N. Y.—Matter of Robbins, 7 Misc. 264, 27 NYS 1009; Rogers v. Rogers, 3 Wend. 503, 20 AmD 716; Burnett v. Noble, 5 Redf. Surr. 69. See also Gilbert v. Comstock, 93 N. Y. 484 (recognizing the rule but holding that by reason of a part payment made by the testator, the liability for whatever was unpaid six years prior thereto was renewed).

Oh.—In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44.

Or.—Farrow v. Nevin, 44 Or. 496, 75 P 711.

Pa.—Hoch's App. 21 Pa. 280; Clayton's Est., 38 Pa. Co. 577; Hartz's Est., 20 LancLRev 25; Eckert's Est., 18 LancLRev 58.

S. C.—Cooper v. Peyton, 9 S. C. Eq. 259.

Tenn.—Williams v. Williams, 15 Lea 438; Shields v. Alsup, 5 Lea 508; Hamner v. Hamner, 3 Head 398.

W. Va.—Cann v. Cann, 40 W. Va. 138, 20 SE 910.

[a] **Even when payment of claims barred by limitation is authorized by the will,** the personal representative cannot waive the statute against a claim in his own favor. Williams v. Williams, 15 Lea (Tenn.) 438. Effect of testamentary provisions generally see infra § 916.

28. Sanderson v. Sanderson, 17 Fla. 820; Godbold v. Vance, 14 S. C. 458; Batson v. Murrell, 10 Humphr. (Tenn.) 301, 51 AmD 707.

29. Harrison v. Henderson, 7 Heisk. (Tenn.) 315; Byrn v. Fleming, 3 Head (Tenn.) 658; Wharton v. Marberry, 3 Sneed (Tenn.) 603.

30. Del.—Conoway v. Spicer, 5 Del. 425.

Ky.—Northcut v. Wilkinson, 12 B. Mon. 408; Head v. Manners, 5 J. J. Marsh. 255; Hord v. Lee, 4 T. B. Mon. 36; Hord v. Lee, 2 T. B. Mon. 131.

Mass.—Emerson v. Thompson, 16 Mass. 429.

N. J.—Shreve v. Joyce, 36 N. J. L. 44, 13 AmR 417.

N. Y.—Hammon v. Huntley, 4 Cow. 493 (dictum).

S. C.—Lomax v. Spierin, 23 S. C. L. 365; Briggs v. Starke, 9 S. C. L. 111, 12 AmD 659.

[a] **In England** (1) the rule was formerly to the contrary. Tullock v. Dunn, R. & M. 416, 21 ECL 784; Holland v. Clark, 1 Y. & Coll. 151, 20 EngCh 151, 62 Reprint 831. (2) But under Lord Tenterden's Act a promise in writing made and signed by one of several executors in his representative capacity is binding upon the decedent's estate and takes the debt out of the statute of limitations. Astbury v. Astbury, [1898] 2 Ch. 111; In re Macdonald, [1897] 2 Ch. 181.

[b] **In Alabama** (1) a promise by one of two administrators to pay a debt is sufficient to take it out of the statute of limitations, when the action is against him only after the decease of his coadministrator. Hall v. Darrington, 9 Ala. 502. (2) But where the promise is made by one acting alone, it will not take the case out of the statute, if the action is against both representatives. Pitts v. Wooten, 24 Ala. 474; Caruthers v. Mardis, 3 Ala. 599.

[c] **In Maryland** (1) a promise or acknowledgment by one of several representatives will take the case out of the statute, whre the promise or acknowledgment was made before the statute had fully run against the claim. McCann v. Sloan, 25 Md. 575. (2) But the claim must be established by other proof and the promise or acknowledgment cannot be relied on for the purpose of establishing the existence of the debt as against the other representative.

tations may be tolled by a part payment made by one of several representatives.[31] But there is also authority for the view that one of several representatives cannot revive a barred debt by a new promise.[32]

[§ 910] **(4) Bar Accruing after Death of Decedent.**[33] Where the bar of the statute had not accrued at the time of decedent's death, the executor or administrator may, according to some authorities, extend the time or waive the bar subsequently accruing,[34] especially where the delay of the claimant was at the request of the personal representative,[35] but this also has been denied.[36]

[§ 911] **(5) Where Personal Representative Entitled to Entire Estate.** It has been held that where the personal representative is entitled to the entire estate as sole distributee, legatee, or devisee, he has the same power to waive the statute of limitations as the debtor had in his lifetime;[37] but there is also authority for the view that where a debt against a decedent was barred by limitations, it cannot be revived by a promise to pay made by the administrator in his representative capacity, although such administrator was the sole heir,[38]

[§ 912] **c. Power of Heirs or Devisees to Waive Bar.** Inasmuch as the heir or devisee has no authority over the estate, he cannot, by any acknowledgment, promise, or part payment, affect the operation of the statute of limitations or the presumption of payment as to a debt of decedent, so far as the estate is concerned,[39] although he is managing the estate without letters of administration,[40] or has been appointed personal representative but has not yet qualified.[41] But so far as his own rights or property are concerned the statute of limitations is a personal defense to him, and he may of course waive it[42] or become estopped to plead it.[43]

[§ 913] **d. Acts Constituting Waiver—(1) Acknowledgment of Promise to Pay—(a) In General.** In many jurisdictions a representative's acknowledgment and promise to pay an indebtedness barred by the statute of limitations is not sufficient to waive the bar;[44] and it is held in some of these jurisdictions that the representative's promise to

Pole v. Simmons, 49 Md. 14; McCann v. Sloan, supra. (3) As the promise or acknowledgment operates only to interrupt or toll the statute, it can have no effect unless made before the claim becomes barred. Pole v. Simmons, 45 Md. 14.

[d] **Debt of corepresentative.**—One of two joint representatives cannot, by his admission and acknowledgment, revive a debt of the other against the estate which was barred at the decedent's death. Seig v. Acord, 21 Gratt. (62 Va.) 365, 8 AmR 605.

31. Heath v. Grenell, 61 Barb. (N. Y.) 190; Matter of Bradley, 25 Misc. 261, 54 NYS 555 [aff sub nom. Matter of Sargent, 42 App. Div. 301, 59 NYS 105].

32. Peck v. Botsford, 7 Conn. 172, 18 AmD 92; Clark v. Maguire, 35 Pa. 259; Forney v. Benedict, 5 Pa. 225; Fritz v. Thomas, 1 Whart. (Pa.) 66, 29 AmD 39; Reynolds v. Hamilton, 7 Watts (Pa.) 420.

33. As to representative's own claim see supra § 908.

34. Ga.—Ray v. Strickland, 89 Ga. 840, 16 SE 90; Jordan v. Brown, 72 Ga. 495; Marietta Sav. Bank v. Janes, 66 Ga. 286; Smith v. Hudspeth, 63 Ga. 212; Castellaw v. Guilmartin, 54 Ga. 299.

Miss.—Byrd v. Wells, 40 Miss. 711.

Nev.—Jones v. Powning, 25 Nev. 399, 60 P 833.

N. Y.—Heath v. Grenell, 61 Barb. 190.

S. C.—Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663.

[a] **Keeping subsisting debt in force.**—The rule preventing the personal representative from reviving a barred debt does not prevent him from keeping a subsisting debt in force as by making payments thereon. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694 [rev 67 App. Div. 628, 74 NYS 1132]; Heath v. Grenell, 61 Barb. (N. Y.) 190.

[b] **Time of appointment controlling.**—(1) The representative cannot lawfully waive the bar or pay claims against which the statute of limitations had run at the time of his decedent's death or of his own qualification as representative. Woods v. Elliott, 49 Miss. 168; Byrd v. Wells, 40 Miss. 711; Trotter v. Trotter, 40 Miss. 704. (2) But he may be allowed credit for money paid on debts of the estate which were barred by the statute of limitations at the time of their payment if they were not barred at the time of his appointment. Byrd v. Wells, supra.

35. McCoy v. McCoy, (Ky.) 125 SW 177, 178 ("As the administrator had acknowledged the justice of the claim when it was presented to him, soon after his qualification and within six months after the death of Mrs. McCoy, and had asked the plaintiff to wait until the litigation with W. H. McCoy was decided, promising to pay the claim when he got the money, he properly refused to plead limitation in this action, when the suit was brought several years afterward. No part of the claim was barred when it was presented to him, properly proven up. The delay had been induced by him. An administrator is not required to act in bad faith. He may do what an individual may do under like circumstances, and, when the plaintiff had not brought suit at his request, it would have been an act of bad faith on his part to take advantage of the delay by pleading limitation because more than five years had elapsed when the suit was brought since some of the services were rendered. The distributees of the estate had no right to demand of him that he should act in bad faith or attempt to take advantage of the delay which he had himself caused").

36. Dern v. Olsen, 18 Ida. 358, 369, 110 P 164, LRA1915B 1016, AnnCas 1912A 1; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

"It was the intention of the lawmakers to prohibit the administrator in any manner extending the bare of the statute of limitations or to interrupt its running against the debt or claim held against the estate he represents. It is claimed, however, by appellant that the insertion of the words 'which was barred by the statute of limitations at the time of the death of the decedent' expresses an intent on the part of the lawmakers to prohibit the administrator from renewing or reviving a debt already barred, but did not intend to prohibit him extending the time that the statute may run against a debt which was not barred at the death of the decedent. This statute standing alone, is subject to the construction claimed for it by appellant, when read in connection with the other provisions of the statute it seems to us that the phrase, 'at the time of the death of the decedent,' must have been added to prevent any confusion arising on account of the provisions of section 5471, whereby the time during which there is a vacancy in the administration is to be included and eliminated from the running of the statute. That time could not run prior to the death of the debtor, but necessarily runs subsequent to his death, and while the obligation on its face might show that the statute had run against the claim, still, as a matter of fact, which is subject to proof, there may have been a long period of time intervening during which there was no administrator or executor to whom the claim could be presented. This view of the statute is reinforced by the provisions of section 4078, which we have heretofore considered in this opinion. That statute provides that an acknowledgment cannot take the case out of the operation of the statute 'unless the same is contained in some writing signed by the party to be charged thereby.' Now 'the party to be charged' is the debtor, and not his legal representative. Hansen v. Towle, 19 Kan. 282. There is no personal liability against the administrator or executor for the debts of the decedent. The administrator or executor is only liable in a representative capacity, and in that capacity only to the extent of the assets of the estate. The acknowledgment of a debt or liability under this provision of the statute so as to take it out of the operation of the statute of limitation appeals to the conscience and sense of fair dealing of the debtor. After he is dead, his legal representative is purely and solely a legal representative of the estate and not of the person of the deceased. He is purely a business representative, and in no way can represent the conscience or sense of equity and justice of the deceased debtor. When the debtor dies the power and authority to waive the bar of the statute of limitations dies with him, and the conscience and sense of fair dealing to which this statute appeals thereupon loses the medium of expression and action to take the obligation out of the operation of the statute of limitations." Dern v. Olsen, supra.

37. Sumter v. Morse, 11 S. C. Eq. 87; Suhre v. Benton, (Tex. Civ. A.) 25 SW 822.

38. House v. Peacock, 84 Conn. 54, 78 A 723.

39. Felton's Est., 7 Pa. Dist. 262; Gibson v. Lowndes, 28 S. C. 285, 5 SE 727; Bolt v. Dawkins, 16 S. C. 198; Smith v. Pattie, 81 Va. 654.

40. Bolt v. Dawkins, 16 S. C. 198.

41. Gibson v. Lowndes, 28 S. C. 285, 5 SE 727; Bolt v. Dawkins, 16 S. C. 198.

42. Grimball v. Mastin, 77 Ala. 553; Lengar v. Hazlewood, 11 Lea (Tenn.) 539.

43. See infra § 921.

44. U. S.—Thompson v. Peter, 12 Wheat. 565, 6 L. ed. 730; Wilkins v. Murphey, 29 F. Cas. No. 17,663, Brunn. Coll. Cas. 21, 3 N. C. 282.

Fla.—Sanderson v. Sanderson, 17 Fla. 820; Patterson v. Cobb, 4 Fla. 481.

Kan.—Milbourne v. Kelley, 93 Kan.

pay before the debt becomes barred does not interrupt the running of the statute in favor of the estate,[45] but that whether the promise is made before or after the expiration of the statutory period, if it is supported by a valid consideration,[46] it binds the representative as his personal contract,[47] and precludes him from deriving any advantage from the previous lapse of time.[48] The distinction has been made, however, that, while the representative's promise will not revive a debt barred in the debtor's lifetime, if the statutory period expires after his death the promise will remove the bar[49] or interrupt the running of the statute.[50] In a number of jurisdictions, however, a representative may revive a barred debt if his acknowledgment is unqualified, amounting to an implied promise to pay,[51] or if he makes an express promise to

753, 145 P 816, AnnCas1916D 389; Hanson v. Towle, 19 Kan. 273.

La.—Romero's Succ., 31 La. Ann. 721; Dickson v. Compton, 24 La. Ann. 83; Flanner v. Lecompte, 23 La. Ann. 193.

Miss.—Huntington v. Bobbitt, 46 Miss. 528; Trotter v. Trotter, 40 Miss. 704; Waul v. Kirkman, 25 Miss. 609; Bingaman v. Robertson, 25 Miss. 501; Sanders v. Robertson, 23 Miss. 389; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41.

Mo.—Bambrick v. Bambric, 157 Mo. 423, 58 SW 8; Cape Girardeau County v. Harbison, 58 Mo. 90.

N. Y.—Schutz v. Morette, 146 N. Y. 137, 40 NE 780 [rev 81 Hun 518, 31 NYS 39]; Butler v. Johnson, 111 N. Y. 204, 18 NE 643; In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 7 NYCiv Proc 273, 15 AbbNCas 189, 3 Dem. Surr. 301]; Barry v. Lambert, 98 N. Y. 300, 50 AmR 677; Bloodgood v. Bruen, 8 N. Y. 362, Seld. 129; Yates v. Wing, 42 App. Div. 356, 59 NYS 78; Bucklin v. Chapin, 1 Lans. 443; Heath v. Grenell, 61 Barb. 190; Matter of Bradley, 25 Misc. 261 [aff 42 App. Div. 301, 59 NYS 105]; Balz v. Underhill, 19 Misc. 215, 44 NYS 419 [aff 16 App. Div. 635 mem, 46 NYS 1089 mem]; Clark v. Clark, 8 Paige 152, 35 AmD 676; Stiles v. Burch, 5 Paige 132; Matter of Dunn, 5 Dem. Surr. 124. But see Hammon v. Huntley, 4 Cow. 493 (contrary dictum).

N. C.—Grady v. Wilson, 115 N. C. 344, 20 SE 518, 44 AmSR 461; Flemming v. Flemming, 85 N. C. 127; Oates v. Lilly, 84 N. C. 643. But see Cobham v. Administrators, 3 N. C. 6, 2 AmD 612 (admission by an administrator, when a note of his intestate was presented to him, in the form "it is the signature of the deceased, and all his just debts shall be paid" sufficient to take the case out of the statute of limitations).

Oh.—Miller v. Ewing, 68 Oh. St. 176, 67 NE 292; Drouilliard v. Wilson, 1 Oh. Dec. (Reprint) 555, 10 WestLJ 385.

Pa.—In re Claghorn, 181 Pa. 608, 37 A 921; In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680; Clark v. McGuire, 35 Pa. 259; Steel v. Steel, 12 Pa. 64; Forney v. Benedict, 5 Pa. 225; Fritz v. Thomas, 1 Whart. 66, 29 AmD 39; Reynolds v. Hamilton, 7 Watts 420; Matter of McWilliams, 5 PaLJ 265. See also Jones v. Moore, 5 Binn. 573, 6 AmD 428 (an acknowledgment does not revive an old debt but is some evidence of a promise to pay).

S. C.—Brantley v. Bittle, 72 S. C. 179, 51 SE 561; Milwee v. Jay, 47 S. C. 430, 25 SE 298; Bolt v. Dawkins, 16 S. C. 198; Reigne v. Desportes, 23 S. C. L. 118; Pearce v. Zimmerman, 16 S. C. L. 305; Jones v. Jenkins, 13 S. C. L. 494; Knox v. McCall, 3 S. C. L. 531; Wilson v. Wilson, 16 S. C. Eq. 329; Moore v. Porcher, 8 S. C. Eq. 195.

Tenn.—Ricketts v. Ricketts, 4 Lea 163; Peck v. Wheaton, Mart. & Y. 353; Hoss v. Crouch, (Ch. A.) 48 SW 724.

Tex.—Moore v. Hillebrant, 14 Tex. 312, 65 AmD 118; Moore v. Hardison, 10 Tex. 467.

Va.—Smith v. Pattie, 81 Va. 654; Seig v. Acord, 21 Gratt. (62 Va.) 365, 8 AmR 605; Tazewell v. Whittle, 13 Gratt. (54 Va.) 329; Fisher v. Duncan, 1 Hen. & M. (11 Va.) 563, 3 AmD 605.

Wash.—Montreal Bank v. Buchanan, 32 Wash. 480, 73 P 482.

W. Va.—Findley v. Cunningham, 53 W. Va. 1, 44 SE 472; Stiles v. Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 SE 986; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

"There can be no doubt at this day that an administrator or an executor cannot charge the estate he represents by the acknowledgment of a debt barred by the statute of limitations." Moore v. Hillebrant, 14 Tex. 312, 315, 65 AmD 118.

[a] **Reason for rule.**—"It seems idle to assert as a principle of law that an executor cannot bind the estate by any contract, and yet permit him by a new promise to charge the estate with a debt extinct by operation of a statute." Patterson v. Cobb, 4 Fla. 481, 487.

[b] **Giving a new note** in place of one already prescribed does not revive the debt. Dickson v. Compton, 24 La. Ann. 83.

[c] **A partial payment** by an administrator on account of a claim barred by the statute in the lifetime of decedent is not sufficient to revive the claim against the estate. Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258.

[d] **A surrogate's decree** establishing the indebtedness of an estate upon a promissory note given by decedent, and ordering a pro rata payment thereon out of the assets, does not in law amount to a promise by the representative to pay the balance of the debt so as to deprive him of the benefit of the statute of limitations. Arnold v. Downing, 11 Barb. (N. Y.) 554.

[e] **Where the representative was a joint promissor** with decedent, his acknowledgment or new promise is sufficient to take the claim out of the statute. Johnson v. Beardslee, 15 Johns. (N. Y.) 3.

45. Oates v. Lilly, 84 N. C. 643; In re Claghorn, 181 Pa. 608, 37 A 921; In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680; Forney v. Benedict, 5 Pa. 225; Butler v. Fechner, (Tex. Civ. A.) 200 SW 1126; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

46. Wilkings v. Murphey, 29 F. Cas. No. 17,663, Brunn. Col. Cas. 21, 3 N. C. 282; Steel v. Steel, 12 Pa. 64; Forney v. Benedict, 5 Pa. 225 [expl Case v. Cushman, 1 Pa. 241].

47. Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Oates v. Lilly, 84 N. C. 643; In re Claghorn, 181 Pa. 608, 37 A 921; In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680; Forney v. Benedict, 5 Pa. 225; McGrath v. Barnes, 13 S. C. 328, 36 AmR 687.

"The recognition of a debt barred by the statute by the personal representative is but a new promise, on which he must be sued personally; he is not answerable in his representative capacity for any cause of action not created by the decedent himself. If he revive the cause of action by a new promise, then the promise is essentially a new contract, which alone can be relied on to sustain the action." In re Claghorn, 181 Pa. 608, 614, 37 A 921.

[a] **Contrary view.**—"As the old promise is not revived but superseded by the new one, the consideration of a moral obligation would be wanting to make him personally liable." Reynolds v. Hamilton, 7 Watts (Pa.) 420, 421.

48. Forney v. Benedict, 5 Pa. 225.

49. Jordan v. Brown, 72 Ga. 495; Marietta Sav. Bank v. Janes, 66 Ga. 286; Du Bignon v. Backer, 61 Ga. 206; Pearce v. Zimmerman, 16 S. C. L. 305.

[a] **Arbitrary action not permitted.**—Where the administrator has filed a bill to marshal assets and has brought the creditors with their claims before the court, he cannot arbitrarily relieve certain claims of the bar of the statute and plead the statute as to others. He will either be compelled to abstain from all interference in the matter, or, if allowed to interfere, it will be upon the condition that he applies the same rule to all who have equally meritorious claims. Jordan v. Brown, 72 Ga. 495.

50. McLaren v. McMartin, 36 N. Y. 88; Matter of Robbins, 7 Misc. 264, 27 NYS 1009; Johnson v. Beardslee, 15 Johns. (N. Y.) 3; Johnson v. Ballard, 45 S. C. L. 178; Lomax v. Spierin, 23 S. C. L. 365; Reigne v. Desportes, 23 S. C. L. 118; Wilson v. Wilson, 16 S. C. Eq. 329; Walter v. Radcliffe, 2 S. C. Eq. 577; Braxton v. Harrison, 11 Gratt. (52 Va.) 30; Bishop v. Harrison, 2 Leigh (29 Va.) 532.

[a] **A promise by a former representative** is, it seems, equally available in an action against an administrator de bonis non. Bishop v. Harrison, 2 Leigh (29 Va.) 532 [foll Braxton v. Harrison, 11 Gratt. (52 Va.) 30].

[b] **In Louisiana** (1) where the claim of a creditor is duly presented and thereupon formally acknowledged by the representative, the latter becomes from that time the trustee of the creditor, and that prescription does not run against the claim as long as decedent's heirs allow the assets of the estate to remain in the representative's custody. Renshaw v. Stafford, 30 La. Ann. 853 [expl and dist Sevier v. Gordon, 21 La. Ann. 373]; Romero's Succ., 29 La. Ann. 493. See also Johnson v. Waters, 111 U. S. 640, 4 SCt 619, 28 L. ed. 547 (stating Louisiana rule); Cloutier v. Lemee, 33 La. Ann. 305 (new promise suspends prescription during entire period of administration). (2) The filing by the representative of a statement of debts including the claim in question is a sufficient acknowledgment within the foregoing rule. Porter v. Hornsby, 32 La. Ann. 337. (3) And so is the placing of the debt on the representative's account and asking for authority to pay it. Maraist v. Guilbeau, 31 La. Ann. 713. (4) The written acknowledgment or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription. Patrick's Succ., 30 La. Ann. 1071.

51. Ala.—Martin v. Ellerbe, 70 Ala. 326; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Pollard v. Scears, 28 Ala. 484, 65 AmD 364; Townes v. Ferguson, 20 Ala. 147; Hall v. Darrington, 9 Ala. 502; Newhouse v. Redwood, 7 Ala. 598.

Del.—Chambers v. Fennemore, 4 Del. 368. But see Gailey v. Washington, 2 Del. 204; Parkins v. Bennington, 1 Del. 209 (both decided under a statute since repealed).

pay[52] in writing.[53]

An account stated by an executor or administrator with a creditor of the estate, before the claim has been barred by lapse of time, will arrest the running of the statute of limitations with respect thereto.[54]

[§ 914] **(b) Sufficiency of Acknowledgment or Promise.**[55] In order that the representative's acknowledgment or promise may have any effect in saving a claim from the bar of limitations, it must be made in his representative capacity[56] and voluntarily;[57] must be made to the creditor himself or his agent, not to a third person,[58] or if made to a third person must be intended to be communicated to the creditor and to influence his conduct;[59] and must be definite and unequivocal.[60] A mere recognition of the debt is not sufficient; there must be a distinct promise to pay or such an acknowledgment as amounts to a promise.[61] An acknowledgment contained in a petition or pleading by the representative in a proceeding to which the creditor is a party may be sufficient,[62] but it is otherwise where the creditor is not a party.[63]

[§ 915] **(2) Partial Payment.**[64] Partial payment of a debt affected by the statute of limitations, whether the payment is made by the debtor in his lifetime or by his personal representative after his death, is regarded as a constructive acknowledgment of the debt's existence and as an act

Ky.—Northcut v. Wilkinson, 12 B. Mon. 408; Head v. Manner, 5 J. J. Marsh. 255.

Md.—Semmes v. Magruder, 10 Md. 242; Quynn v. Carroll, 10 Md. 197.

Mass.—Emerson v. Thompson, 16 Mass. 429; Sullivan v. Holker, 15 Mass. 374; Baxter v. Penniman, 8 Mass. 133.

N. H.—Preston v. Cutter, 64 N. H. 461, 13 A 874; Brewster v. Brewster, 52 N. H. 52; Hodgdon v. White, 11 N. H. 208; Buswell v. Roby, 3 N. H. 467.

N. J.—Hewes v. Hurff, 69 N. J. L. 263, 55 A 275.

Eng.—Phillips v. Beal, 32 Beav. 26, 55 Reprint 11; Atkins v. Tredgold, 2 B. & C. 23, 9 ECL 23, 107 Reprint 291; Briggs v. Wilson, 5 De G. M. & G. 12, 54 EngCh 10, 43 Reprint 772; McCulloch v. Dawes, 9 D. & R. 40, 22 ECL 587; Browning v. Paris, 5 M. & W. 118, 151 Reprint 51; Tullock v. Dunn, R. & M. 416, 21 ECL 784.

Ont.—King v. Rogers, 31 Ont. 573 (recognizing the rule but holding the acknowledgment proved insufficient).

"If in any case where a claim is barred, an administrator would be justified in suffering a recovery against him, on pleas going merely to the merits, there can be no reason why his deliberate promise or acknowledgment of a debt, should not revive the cause of action." Chambers v. Fennemore, 4 Del. 368, 376.

[a] **The promise of a former representative** is equally available in an action against an administrator de bonis non. Emerson v. Thompson, 16 Mass. 429; Sullivan v. Holker, 15 Mass. 374.

52. Del.—Walter v. Miller, 1 Del. 7.

Ky.—Head v. Manner, 5 J. J. Marsh. 255.

Me.—Bunker v. Athearn, 35 Me. 364; Oakes v. Mitchell, 15 Me. 360; Manson v. Gardiner, 5 Me. 108.

Md.—Ecker v. New Windsor First Nat. Bank, 59 Md. 291; Quynn v. Carroll, 10 Md. 197; Chapman v. Dixon, 4 Harr. & J. 527; Forbes v. Perrie, 1 Harr. & J. 109.

Mass.—Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

N. H.—Preston v. Cutter, 64 N. H. 461, 13 A 874.

53. Ensign v. Batterson, 68 Conn. 298, 36 A 51; Peck v. Botsford, 7 Conn. 172, 18 AmD 92; Clawson v. McCune, 20 Kan. 337; Hewes v. Hurff, (N. J.) 55 A 275; Shreve v. Joyce, 36 N. J. L. 44, 13 AmR 417; Holland v. Clark, 1 Y. & Coll. 151, 20 EngCh 151, 62 Reprint 831.

54. Chambers v. Fennemore, 4 Del. 368; Smith v. Forty, 4 C. & P. 126, 19 ECL 438; Ashby v. James, 11 M. & W. 542, 152 Reprint 920; Watkins v. Washburn, 2 U. C. Q. B. 291.

55. See generally Limitation of Actions [25 Cyc 1342].

56. In re Sullenberger, 72 Cal. 549, 14 P 513; Chapman v. Dixon, 4 Harr. & J. (Md.) 527; Heath v. Grenell, 61 Barb. (N. Y.) 190; Bishop v. Harrison, 2 Leigh (29 Va.) 532.

[a] **An unauthorized promise of the representative's brother** is not sufficient to take the debt out of the statute. Jones v. Jenkins, 13 S. C. L. 494.

57. Everitt v. Williams, 45 N. J. L. 140; Arnold v. Downing, 11 Barb. (N. Y.) 554.

58. Morris v. Herdman, 3 Del. 286; Lewis' Est., 18 Pa. Dist. 1005; Jamison v. Lindsay, 15 S. C. L. 93; King v. Rogers, 31 Ont. 573.

59. In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 15 AbbNCas 189, 3 Dem. Surr. 301].

60. Md.—Pole v. Simmons, 49 Md. 14.

N. H.—Gage v. Dudley, 64 N. H. 271, 9 A 786.

N. J.—Everitt v. Williams, 45 N. J. L. 140.

N. C.—Grady v. Wilson, 115 N. C. 344, 20 SE 518, 44 AmSR 161; Fleming v. Fleming, 85 N. C. 127.

Tenn.—Ricketts v. Ricketts, 4 Lea 163.

Eng.—Scott v. Jones, 4 Cl. & F. 382, 7 Reprint 147.

Ont.—King v. Rogers, 31 Ont. 573, 575.

"One of three things must be proved: (1) A distinct acknowledgment of the debt; (2) a distinct promise to pay the debt; or (3) a conditional promise as to which the condition has happened." King v. Rogers, supra. See also Reigne v. Desportes, 23 S. C. L. 118 (as to the happening of the condition).

61. U. S.—Thompson v. Peter, 12 Wheat. 565, 6 L. ed. 730.

Conn.—Peck v. Botsford, 7 Conn. 172, 18 AmD 92.

D. C.—Washington Market Co. v. Beckley, 15 D. C. 163.

Me.—Bunker v. Athearn, 35 Me. 364; Oakes v. Mitchell, 15 Me. 360.

Md.—Houck v. Houck, 112 Md. 122, 76 A 581.

Pa.—Fritz v. Thomas, 1 Whart. 66, 29 AmD 39; Lewis' Est., 18 Pa. Dist. 1005.

S. C.—Reigne v. Desportes, 23 S. C. L. 118.

Va.—Fisher v. Duncan, 1 Hen. & M. (11 Va.) 563, 3 AmD 605.

Eng.—Briggs v. Wilson, 5 De G. M. & G. 12, 54 EngCh 10, 43 Reprint 772; McCulloch v. Dawes, 9 D. & R. 40, 22 ECL 587.

Ont.—King v. Rogers, 31 Ont. 573.

[a] **The principle** is this: A slight acknowledgment of an existing debt is sufficient to take the case out of the statute, because the jury may, and ought to presume a new promise; but the acknowledgment is to be taken altogether, and if, on the whole, it is inconsistent with a new promise, no new promise shall be implied, and the statute shall bar. Scull v. Wallace, 15 Serg. & R. (Pa.) 231.

[b] **Retaining assets to pay a claim,** even when the act of retainer is evidenced by the record, does not amount to such a promise, admission, or acknowledgment as will waive the statutory bar. Pole v. Simmons, 49 Md. 14 [foll Washington Market Co. v. Beckley, 15 D. C. 163].

62. Ga.—McMillan v. Toombs, 74 Ga. 535.

La.—Troendle v. De Bouchel, 33 La. Ann. 753.

N. Y.—Matter of Robbins, 7 Misc. 264, 27 NYS 1009.

N. C.—Woodlief v. Bragg, 108 N. C. 571, 13 SE 211.

Pa.—Ritchey's Est., 8 Pa. Super. 527, 43 WklyNC 194.

Eng.—Moodie v. Bannister, 4 Drew. 432, 62 Reprint 166; Smith v. Poole, 12 Sim. 17, 35 EngCh 17, 59 Reprint 1036.

[a] **Including a debt in a petition for the sale of property** (1) to pay debts of the estate has been held a sufficient acknowledgment to interrupt the running of the statute. Troendle v. De Bouchel, 33 La. Ann. 753; Berens v. Boutee, 31 La. Ann. 112. (2) But the contrary has been held on the ground that the representative was compelled by law to insert the debt and thus that there could be no inference of an intention to renew or extend the liability. Everitt v. Williams, 45 N. J. L. 140.

[b] **The filing of an account** (1) by an executor in the orphans' court, whether under the compulsion of a citation sur petition or by a voluntary act, tolls the running of the statute as to the fund brought into court by the account in respect to claims presented before final adjudication. Ritchey's Est., 8 Pa. Super. 527, 43 WklyNC 194. (2) But where the representative in his petition for judicial settlement of his accounts named the holder of a judgment as a creditor to be cited, merely describing him as a "judgment creditor" without specifying the amount of the judgment or the date of its recovery and without stating that any sum was due thereon, there was not such a written acknowledgment of the debt as would take it out of the operation of Code Civ. Proc. § 376, which provides that a judgment shall be presumed to be paid after the expiration of twenty years unless within that time there is a payment made or an acknowledgment in writing signed by the party to be charged. In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 15 AbbNCas 189, 3 Dem. Surr. 301].

63. Everitt v. Williams, 45 N. J. L. 140; In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 15 AbbNCas 189, 3 Dem. Surr. 301]; Black v. White, 13 S. C. 37.

[a] **Order to sell lands to pay debts.**—An order to sell lands to pay debts is not such an adjudication in favor of a creditor whose debt is included therein as prevents the administrator from setting up the statute of limitations in an action against him for the debt, for the creditor is not a party to the order or to the proceedings in which it is rendered; and if the proceeds of a sale of lands under such an order are impressed with a trust for the payment of debts, the administrator is not thereby estopped from resorting to the statute at law, but if relief may be had on that ground it must be sought in a court of equity. Everitt v. Williams, 45 N. J. L. 140.

64. See generally Limitations of Actions [25 Cyc 1368].

from which a promise to pay the balance may be implied; in other words, the act of making part payment is treated as evidence of an intention to waive the benefit of the statute, and, like other facts in evidence, is given weight according to the attending circumstances.[65] In some jurisdictions part payment by the representative will not revive a debt which was barred in the debtor's lifetime,[66] but it is generally held that a partial payment made by the personal representative on a debt of the estate before the period of limitations has expired operates to interrupt or toll the statute as to the unpaid residue,[67] and the same rule applies with respect to the common-law presumption of payment from lapse of time.[68] In order, however, that a part payment may toll the statute, it must be such a payment as can be treated as an admission of the continued existence of the debt and as an implied promise to pay the balance.[69]

[§ 916] **e. Effect of Testamentary Provisions.**[70] An explicit direction in a testator's will to disregard the statute of limitations in the payment of his debts authorizes the representative to pay all just debts, although barred by limitation,[71] and a direction to the executor to pay a specified debt is clearly a recognition of the debt, and an expression of an intention that it shall be paid regardless of the statute.[72] An acknowledgment or admission contained in a will in which the debt is specifically mentioned may be sufficient to toll the statute of limitations, and it appears to be quite sufficient if in the form of a direction to the executor to pay the debt,[73] but it cannot have this effect if the instrument is not properly attested and therefore does not consitute a valid will,[74] or if the will is revoked before the creditor knows of the promise or acknowledgment.[75] But a direction to pay all "just debts" is not sufficient to waive the bar.[76] The promise or acknowledgment in the will must be unconditional, or if coupled with terms and conditions of any kind they must be fulfilled;[77] and if a legacy or devise is relied upon as an admission

65. Cox v. Phelps, 65 Ark. 1, 45 SW 990; Foster v. Starkey, 12 Cush. (Mass.) 324; McLaren v. McMartin, 36 N. Y. 88, 1 Transcr. A. 226, 3 Abb PrNS 345, 33 HowPr 449; Arnold v. Downing, 11 Barb. (N. Y.) 554; Matter of Lowerre, 48 Misc. 317, 96 NYS 764; In re Claghorn, 181 Pa. 608, 37 A 921; Forney v. Benedict, 5 Pa. 225.

66. La.—Lafon v. His Executors, 3 Mart. N. S. 707.

Me.—Manson v. Gardiner, 5 Me. 108.

N. Y.—McLaren v. McMartin, 36 N. Y. 88, 1 Transcr. A. 226, 3 AbbPrNS 345, 33 HowPr 449; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Heath v. Grenell, 61 Barb. 190; Matter of Dunn, 5 Dem. Surr. 124.

Pa.—In re Claghorn, 181 Pa. 608, 37 A 921.

S. C.—Milwee v. Jay, 47 S. C. 430, 25 SE 298.

67. Ill.—Waughop v. Bartlett, 165 Ill. 124, 46 NE 197.

La.—Beatty v. Tete, 9 La. Ann. 131.

Md.—Semmes v. Magruder, 10 Md. 242; Quynn v. Carroll, 10 Md. 197.

Mass.—Foster v. Starkey, 12 Cush. 324 [foll Slattery v. Doyle, 180 Mass. 27, 61 NE 264].

N. H.—Brewster v. Brewster, 52 N. H. 52.

N. Y.—Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694 [rev 67 App. Div. 628, 74 NYS 1132]; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Heath v. Grenell, 61 Barb. 190; Matter of Bradley, 25 Misc. 261, 54 NYS 555.

Pa.—Lewis' Est., 18 Pa. Dist. 1005.

[a] **An express promise to pay the balance is not necessary,** the implied promise arising from the fact of part payment being sufficient. Foster v. Starkey, 12 Cush. (Mass.) 324.

[b] **Part payment by a former representative** tolls the statute as against the administrator de bonis non. Semmes v. Magruder, 10 Md. 242; Quynn v. Carroll, 10 Md. 197. But see Miller v. Dorsey, 9 Md. 317 (orphans' court will have question for determination by court of law).

[c] **Where a person administers both as tutor and curator,** any payment which he makes upon the debt, whether made in the one capacity or the other, interrupts prescription. Ducker's Succ., 10 La. Ann. 758.

[d] **Payment on claim afterward assigned to administrator.**—A payment made by an administrator on the claim of a third person stops the running of the statute against the claim, although it is afterward assigned to the administrator. Matter of Robbins, 7 Misc. 264, 27 NYS 1009.

[e] **Joint settlement.**—The payment of interest on the individual note of a testator, given at the time of a joint settlement by him and his wife, before her death, does not operate to prevent the statute of limitations from running against his deceased wife's note, which was included in the settlement. Shipman v. Lord, 58 N. J. Eq. 380, 44 A 215 [aff 60 N. J. Eq. 484 mem, 46 A 1101 mem].

68. Richardson v. Peterson, 2 Del. 366; Bell v. Wood, 94 Va. 677, 27 SE 504.

69. Ark.—Cox v. Phelps, 65 Ark. 1, 45 SW 990.

Kan.—Root v. Bradley, 1 Kan. 437.

Mass.—Hathaway v. Haskell, 9 Pick. 42.

N. H.—Brewster v. Brewster, 52 N. H. 52.

N. Y.—Arnold v. Downing, 11 Barb. 554.

R. I.—Kilton v. Providence Tool Co., 22 R. I. 605, 48 A 1039.

[a] **Payment must be voluntary.**—Arnold v. Downing, 11 Barb. (N. Y.) 554.

[b] **A part payment out of representative's own funds** on an overdue note of his decedent will not stop the running of the statute in favor of the estate. Heath v. Grenell, 61 Barb. (N. Y.) 190.

[c] **A claim not authenticated by affidavit** as required by the statute of nonclaim cannot be legally allowed or paid by the representative, hence a part payment or the payment of interest on such a claim does not suspend the statute of limitations, although such payments are subsequently approved by the probate court. Cox v. Phelps, 65 Ark. 1, 45 SW 990.

70. Devise to executor in trust to pay debts see infra § 919.

71. Glassell v. Glassell, 147 Cal. 510, 82 P 42; Williams v. Williams, 15 Lea (Tenn.) 438; Campbell v. Shotwell, 51 Tex. 27.

[a] **The executors should enforce** a clause in the will expressly waiving the statute of limitations, and directing them to pay all obligations notwithstanding such statute. Glassell v. Glassell, 147 Cal. 510, 82 P 42.

[b] **Claims of the representative** (1) barred by statute cannot be paid under a provision empowering him to pay if he sees proper just debts barred by the statute of limitations (Williams v. Williams, 15 Lea (Tenn.) 438), (2) unless the provision empowers him to make a settlement of the account between himself and the testator without limitations as to time (Hamner v. Hamner, 3 Head (Tenn.) 398).

[c] **Right to interpose statute.**—The executors are not precluded by such a provision from pleading the statute of limitation in bar of a suit on one of the liabilities embraced within such provision. Bosworth v. Smith, 9 R. I. 67.

72. Cal.—Glassell v. Glassell, 147 Cal. 510, 82 P 42.

Fla.—McHardy v. McHardy, 7 Fla. 301.

Ill.—Waughop v. Bartlett, 165 Ill. 124, 46 NE 197.

N. Y.—Gilbert v. Morrison, 53 Hun 442, 6 NYS 491.

Pa.—Bickel's Est., 9 Pa. Dist. 129.

Va.—Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

[a] **Illustration.**—Where a will expressly enumerates various obligations of the testator, and directs the executors to pay the obligations so enumerated without reference to any law of limitations, "which I positively repudiate & waive," such waiver of the defense of limitation against the enumerated obligations is binding on the executors, and enforceable against them in a suit brought by one of the enumerated creditors on his claim. Glassell v. Glassell, 147 Cal. 510, 82 P 42.

[b] **Where the will recognizes the debt and directs payment of the principal and interest** by the testamentary trustee, and the trustee pays the interest, the debt is taken out of the operation of the statute. Waughop v. Bartlett, 165 Ill. 124, 46 NE 197 [aff 61 Ill. A. 252].

73. Ill.—Waughop v. Bartlett, 165 Ill. 124, 46 NE 197 [aff 61 Ill. A. 252]; Miller v. Simons, 71 Ill. A. 369.

Iowa.—Stewart v. McFarland, 84 Iowa 55, 50 NW 221.

N. Y.—Gilbert v. Morrison, 53 Hun 442, 6 NYS 491.

Pa.—Pillion's Est., 15 Pa. Co. 8, 35 WklyNC 68.

Va.—Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

74. Allen v. Collier, 70 Mo. 138, 35 AmR 416.

75. Smith v. Camp, 58 Hun 434, 12 NYS 363; Petrie v. Mott, 38 Hun (N. Y.) 259.

76. Peck v. Botsford, 7 Conn. 172, 18 AmD 92; Rogers v. Rogers, 3 Wend. (N. Y.) 503, 20 AmD 716; Smith v. Porter, 1 Binn. (Pa.) 209.

[a] **Such a direction does not preclude the executor** from pleading the statute of limitations. Smith v. Porter, 1 Binn. (Pa.) 209.

77. Stewart v. McFarland, 84 Iowa 551, 50 NW 221; Stansbury v. Stansbury, 20 W. Va. 23.

of a debt, the legatee or devisee, by electing to enforce his claim as creditor, waives the admission and cannot rely upon it to prevent the operation of the statute.[78]

Power may be conferred upon an executor by will which will authorize him to make an acknowledgment or promise to pay which will take a debt out of the operation of the statute.[79]

[§ 917] **f. Who May Interpose Statute When Waived by Representative—(1) Creditors.** As a general rule a creditor whose claim is not barred by the statute of limitations is entitled to interpose the statute against claims which are barred where the assets are insufficient to pay all in full, and the failure of the representative to interpose the statute does not affect the right of the creditor to do so.[80] Where the statute is thus interposed, the personal representative has no longer any power to bind the objecting creditor by acknowledging the debt as a subsisting claim,[81] but it has been said that a creditor's resistance of a barred claim of another creditor is effectual only when it would have been effectual if made by the representative himself.[82] The rule permitting a creditor to interpose the statute of limitations against the claim of another creditor applies where claimant is the personal representative.[83]

The individual creditors of a sole heir who is also administrator may plead the statute of limitations against debts of decedent and as against such creditors the administrator cannot by any promise revive the barred debts.[84]

[§ 918] **(2) Legatees and Distributees.** Where the representative has a discretion as to interposing the statute of limitations,[85] it is clear on principle that his failure or refusal to plead the statute should be binding on those entitled to the personal estate as legatees or next of kin and should preclude them from taking advantage of the statute, and it has been so held,[86] although the rule has not always been strictly adhered to,[87] and has been considered not applicable where the claim was that of the representative himself.[88] Where the representative cannot waive the statute,[89] his failure to interpose it does not bind the legatees or next of kin and the statute may be pleaded by them,[90] especially against a claim of the representative himself.[91]

[§ 919] **(3) Heirs and Devisees.** An heir or devisee may interpose the statute of limitations against a claim sought to be enforced against the real estate descended or devised,[92] and, since the personal representative has no power or control over the real estate, his failure to interpose the statute of limitations to a creditor's claim can have no effect to subject the real estate to the creditor's demand and cannot prevent the heir or devisee from invoking the statute.[93] So also the

78. Stewart v. McFarland, 84 Iowa 55, 50 NW 221; Cresman v. Caster, 2 Browne (Pa.) 123; Stansbury v. Stansbury, 20 W. Va. 23.

79. Waul v. Kirkman, 25 Miss. 609.

80. Ga.—McBride v. Hunter, 64 Ga. 655.

La.—Lafon v. His Executors, 3 Mart. N. S. 707.

N. Y.—In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 15 AbbNCas 189, 3 Dem. Surr. 301]; Matter of Bork, 55 Misc. 179, 106 NYS 361; Matter of Dunn, 5 Dem. Surr. 124.

N. C.—Oates v. Lilly, 84 N. C. 643; Williams v. Maitland, 36 N. C. 92.

Pa.—In re Claghorn, 181 Pa. Co. 608, 37 A 921; In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680 [dist McWilliams' App., 117 Pa. 111, 11 A 383]; Ritter's App., 23 Pa. 95; In re Kittera, 17 Pa. 416; Felton's Est., 7 Pa. Dist. 262.

S. C.—Wilson v. Wilson, 16 S. C. Eq. 329.

Tenn.—Bates v. Elrod, 13 Lea 156.

Va.—Smith v. Pattie, 81 Va. 654.

Eng.—Coope v. Crosswell, L. R. 2 Ch. 112.

[a] **Reason for rule.**—"It is settled that this defence as well as other legal defences may be set up by one interested creditor against the claims of another, as the representative might himself do, since their rejection will enlarge the pro rata shares of such debts as are allowed. . . . This right of the creditor to oppose the claim preferred by another, grows out of his relations to the cause as a plaintiff with adversary interests in this respect against his associate plaintiffs, since in a separate action against the personal representative, he is not bound to interpose the statute to defeat a just claim." Oates v. Lilly, 84 N. C. 643, 644.

[b] **Confession of judgment on barred claim.** — The representative may confess a judgment on a debt barred by the statute of limitations even though the estate is insolvent. This does not constitute a fraud in law upon the creditors, and unless fraud or collusion is alleged the creditors have no standing to ask that the judgment be opened so that they may interpose the statute. Woods v. Irwin, 141 Pa. 248, 21 A 603, 23 AmSR 282.

81. In re Kendrick, 107 N. Y. 104, 13 NE 762 [aff 15 AbbNCas 189, 3 Dem. Surr. 301].

82. Oates v. Lilly, 84 N. C. 643; Hoch's App., 21 Pa. 280.

83. Burnett v. Noble, 5 Redf. Surr. (N. Y.) 69; Re Ross, 29 Grant Ch. (U. C.) 385.

84. Smith v. Pattie, 81 Va. 654.

85. See supra § 907.

86. Ex p. Perryman, 25 Ala. 79, 60 AmD 494; Yingling v. Hesson, 16 Md. 112; Leigh v. Smith, 38 N. C. 442, 42 AmD 182; Clinton v. Brophy, 10 Ir. Eq. 139.

[a] **The right to interpose the statute as a technical plea** against a creditor's claim in proceedings in the orphans' court is vested solely in the personal representative, although the court may consider the fact of the bar in connection with other evidence in determining the justice of the claim; but no decision of the orphans' court will divest the jurisdiction of a court of law over the same subject matter. Bowling v. Lemar, 1 Gill (Md.) 358 (where the court did not decide whether in proceedings at law the legatee or distributee can defeat the claims of creditors by the plea of limitations).

87. Ritter's App., 23 Pa. 95; Hoch's App., 21 Pa. 280; Clarke's Est., 1 Phila. (Pa.) 356; In re Wenham, [1892] 3 Ch. 59; Re Rutherford, 34 Ont. L. 395, 9 OntWN 32.

[a] **In England** the rule appears to depend upon the proceeding in which the legatee or distributee attempts to set up the statute. In re Wenham, [1892] 3 Ch. 59; Briggs v. Wilson, 5 De G. M. & G. 12, 54 Eng Ch 10, 43 Reprint 772; Shewen v. Vanderhorst, 1 Russ. & M. 347, 5 EngCh 347, 39 Reprint 134, 2 Russ. & M. 75, 11 EngCh 75, 39 Reprint 323.

88. Hoch's App., 21 Pa. 280. But compare Clinton v. Brophy, 10 Ir. Eq. 139 (representative may retain for debt barred by limitations although statute set up by legatees or next of kin).

[a] **Statute not available as plea but proper for consideration.**—A legatee or distributee cannot set up the statute in the orphans' court as a plea against the representative's claim, but the court may look to the fact of such a bar as evidence to be weighed with all other testimony in relation to any claim in determining on its justice and the propriety of passing or rejecting it. Yingling v. Hesson, 16 Md. 112; Bowling v. Lemar, 1 Gill (Md.) 358.

89. See supra § 907.

90. Lafon v. His Executors, 3 Mart. N. S. (La.) 707; Partridge v. Mitchell, 3 Edw. (N. Y.) 180; Burnett v. Noble, 5 Redf. Surr. (N. Y.) 69; Treat v. Fortune, 2 Bradf. Surr. (N. Y.) 116; Clarke v. Jenkins, 24 S. C. Eq. 318; Wilson v. Wilson, 16 S. C. Eq. 329. But compare Willcox v. Smith, 26 Barb. (N. Y.) 316 (claim not barred in decedent's lifetime).

[a] **The statute may be set up at a reference** to take an account of debts and of the administration. Partridge v. Mitchell, 3 Edw. (N. Y.) 180.

91. Burnett v. Noble, 5 Redf. Surr. (N. Y.) 69; Treat v. Fortune, 2 Bradf. Surr. (N. Y.) 116; Sumter v. Morse, 11 S. C. Eq. 87; Cooper v. Peyton, 9 S. C. Eq. 259.

92. Ala.—Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Bond v. Smith, 2 Ala. 660.

Ill.—Langworthy v. Baker, 23 Ill. 484; McCoy v. Morrow, 18 Ill. 519, 68 AmD 578.

Ky.—Payne v. Pusey, 8 Bush 564.

Md.—Dent v. Maddox, 4 Md. 522; Collinson v. Owens, 6 Gill & J. 4.

N. Y.—Butler v. Johnson, 111 N. Y. 204, 18 NE 643 [rev 41 Hun 206]; Willcox v. Smith, 26 Barb. 316; Mooers v. White, 6 Johns. Ch. 360; Warren v. Paff, 4 Bradf. Surr. 260; Skidmore v. Romaine, 2 Bradf. Surr. 122.

S. C.—McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497 [dist Bolt v. Dawkins, 16 S. C. 198].

Tenn.—Bates v. Elrod, 13 Lea 156; Peck v. Wheaton, Mart. & Y. 353.

Tex.—Tucker v. Bryan, 1 Tex. A. Civ. Cas. § 1157.

W. Va.—McClaugherty v. Croft, 43 W. Va. 270, 27 SE 246.

93. U. S.—Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621 (applying law of Maryland).

Ala.—Steele v. Steele, 64 Ala. 438,

representative's acknowledgment of the debt or his promise to pay it does not bind the real estate belonging to the heirs or devisees or affect their right to plead the statute,[94] and the same is true of a part payment[95] or a payment of interest[96] by the representative, although the rule appears to be otherwise where there is a devise to the executor in trust to pay debts.[97]

Judgment against representative. It is generally held that where a creditor of the estate recovers judgment against the representative and payment of the judgment is claimed from the real estate, or where the personal representative has paid the judgment and claims reimbursement from land, the heir or devisee may protect his interests by showing that the debt on which the judgment is founded was barred at the time of its rendition,[98] although there is also authority for the view that this cannot be done unless fraud or collusion is shown.[99]

Where the personal representative, as a creditor, seeks to enforce against the land or the proceeds thereof a claim barred in the lifetime of decedent, the statute of limitations may be interposed by the heirs and devisees,[1] and as against them the representative cannot revive the claim.[2]

[§ 920] **(4) State Holding by Escheat.** Where land has escheated to the state, neither the failure of the representative to plead the statute of limitations nor his acknowledgment of the debt affects the right of the state to interpose the statute.[3]

[§ 921] **(5) Estoppel to Plead Statute.**[4] Where legatees or distributees induce a creditor to delay enforcement of his claim until it becomes barred by the statute of limitations, they are estopped by their conduct from pleading the statute;[5] and it has been held that where they stand by without making inquiry into the affairs of the estate or offering any objection and permit the personal rep-

38 AmR 15; Scott v. Ware, 64 Ala. 174; Teague v. Corbitt, 57 Ala. 529; Pollard v. Scears, 28 Ala. 484, 65 AmD 364.

Ill.—Langworthy v. Baker, 23 Ill. 484; McCoy v. Morrow, 18 Ill. 519, 68 AmD 578.

Ky.—Withers v. Withers, 100 SW 253, 30 KyL 1099; Grotenkemper v. Bryson, 79 Ky. 353; Payne v. Pusey, 8 Bush 564; Jones v. Mitchell, 9 KyL 858.

La.—Lafon v. His Executors, 3 Mart. N. S. 707.

Md.—Dent v. Maddox, 4 Md. 522; Collinson v. Owens, 6 Gill & J. 4.

Mass.—Thayer v. Hollis, 3 Metc. 369; Scott v. Hancock, 13 Mass. 162.

N. Y.—Butler v. Johnson, 111 N. Y. 204, 18 NE 643 [rev 41 Hun 206]; Matter of O'Rourke, 12 Misc. 248, 34 NYS 45; Mooers v. White, 6 Johns. Ch. 360.

N. C.—Bevers v. Park, 88 N. C. 456.

Pa.—Hemphill v. Pry, 183 Pa. 593, 38 A 1020.

S. C.—Brock v. Kirkpatrick, 60 S. C. 322, 38 SE 779, 85 AmSR 847; McKinlay v. Gaddy, 26 S. C. 573, 2 SE 497 [dist Bolt v. Dawkins, 16 S. C. 198].

Tenn.—Bates v. Elrod, 13 Lea 156; Peck v. Wheaton, Mart. & Y. 353; Woodfin v. Anderson, 2 Tenn. Ch. 331.

Eng.—Briggs v. Wilson, 4 De G. M. & G. 12, 54 EngCh 10, 43 Reprint 772; Putnam v. Bates, 3 Russ. 188, 3 Eng Ch 188, 38 Reprint 547.

"The statute of limitations had perfected a bar as to all these debts, before the grant of letters testamentary to the appellant. It is not now in his power to remove it, or by any act, admission, or promise, to revive these debts, so that they would be chargeable on the lands, divesting the possession of the devisee, or of his alienees, and incumbering the estate with their payment." Lee v. Downey, 68 Ala. 98, 102.

[a] **Requiring personal representative to plead statute.**—The heir or devisee entitled to the real estate after the payment of debts may by a proper proceeding require the personal representative to plead the statute of limitations and upon his refusal to do so will be permitted to defend. Payne v. Pusey, 8 Bush (Ky.) 564; Lusk v. Anderson, 1 Metc. (Ky.) 426.

[b] **As to such claims as have not been reduced to judgment** against the representative, the heirs and devisees may interpose the statute, although the representative has not done so. Proctor v. Proctor, 105 N. C. 222, 10 SE 1036; Smith v. Brown, 101 N. C. 347, 7 SE 890; Speer v. James, 94 N. C. 417; Bevers v. Parks, 88 N. C. 456.

94. Ala.—Grimball v. Mastin, 77 Ala. 553; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Teague v. Corbitt, 57 Ala. 529; Harwood v. Harper, 54 Ala. 659; Bond v. Smith, 2 Ala. 660.

Ky.—Grotenkemper v. Bryson, 79 Ky. 353; Jones v. Mitchell, 9 KyL 858.

Md.—McDowell v. Goldsmith, 24 Md. 214; Collinson v. Owens, 6 Gill & J. 4.

N. Y.—Mooers v. White, 6 Johns. Ch. 360.

S. C.—Gibson v. Lowndes, 28 S. C. 285, 5 SE 727.

Tenn.—Henderson v. Tipton, 88 Tenn. 255, 14 SW 380; Peck v. Wheaton, Mart. & Y. 353; Woodfin v. Anderson, 2 Tenn. Ch. 331.

Eng.—Fordham v. Wallis, 10 Hare 217, 44 EngCh 210, 68 Reprint 905.

[a] **Where the executors were also devisees** and promised to pay the debt, the promise being made before the statutory period expired, and an action was brought to enforce the debt against the heirs and devisees, it was held upon the principle that the promise of one joint debtor will take the debt out of the statute as to the other, that the promise was binding upon the heirs and the other devisees, although they had not acknowledged the demand. Johnson v. Beardslee, 15 Johns. (N. Y.) 3.

[b] **Aliter, where claim not barred at time of decedent's death.**—Woodlief v. Bragg, 108 N. C. 571, 13 SE 211.

95. Gilpin v. Phemmer, 10 F. Cas. No. 5,451, 2 Cranch C. C. 54 (applying law of Maryland); Grimball v. Mastin, 77 Ala. 553; Lafon v. His Executors, 3 Mart. N. S. (La.) 707; Gibson v. Lowndes, 28 S. C. 285, 5 SE 727.

[a] **Where a judgment had been rendered against the debtor in his lifetime** and existed as a lien on the land at the time of his death, and judgment on a scire facias was rendered against the representative, it was held that a part payment by the representative would repel the presumption of payment arising from lapse of time, although it would be otherwise had the debt not been reduced to judgment. Lattimer v. Peterson, 2 Del. 366.

96. Fordham v. Wallis, 10 Hare 217, 44 EngCh 210, 68 Reprint 905.

[a] **Consent.**—The payment of interest by the personal representative tolls the statute as to all parties who consent to the payment, but not as to minor heirs, since they are incapable of giving their consent. Hemphill v. Pry, 183 Pa. 593, 38 A 1020.

97. Waughop v. Bartlett, 165 Ill. 124, 46 NE 197 [aff 61 Ill. A. 252]; Fordham v. Wallis, 10 Hare 217, 44 EngCh 210, 68 Reprint 905.

Effect of testamentary provisions generally see supra § 916.

98. U. S.—Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621 (applying law of Maryland); Deneale v. Stump, 8 Pet. 526, 8 L. ed. 1032 (applying law of Virginia).

Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Teague v. Corbitt, 57 Ala. 529; Darrington v. Borland, 3 Port. 9.

Ky.—Jones v. Commercial Bank, 78 Ky. 413.

Md.—Dent v. Maddox, 4 Md. 522; Collinson v. Owens, 6 Gill & J. 4.

N. Y.—Sharpe v. Freeman, 45 N. Y. 802.

S. C.—Gilliland v. Caldwell, 1 S. C. 194.

Tenn.—Pea v. Waggoner, 6 Tenn. 242; Woodfin v. Anderson, 2 Tenn. Ch. 331.

W. Va.—Saddler v. Kennedy, 20 W. Va. 636; Laidley v. Kline, 8 W. Va. 218.

99. Woodlief v. Bragg, 108 N. C. 571, 13 SE 211; Long v. Oxford, 108 N. C. 280, 13 SE 112; Proctor v. Proctor, 105 N. C. 222, 10 SE 1036; Smith v. Brown, 101 N. C. 347, 7 SE 890; Speer v. James, 94 N. C. 417.

1. Payne v. Pusey, 8 Bush (Ky.) 564; In re Richmond, 2 Pick. (Mass.) 567; Dring v. Greetham, 23 L. J. Ch. 156.

[a] **Obtaining payment out of personalty.**—Where the representative may waive the statute as to his own claim (see supra § 908), it has been said that if on the settlement of his accounts he obtains out of the personal estate payment of a claim which has been properly proved and allowed, the heir has no remedy, although the statute of limitations might have been pleaded by the debtor in his lifetime and the personal estate is insufficient to pay all the debts. Payne v. Pusey, 8 Bush (Ky.) 564.

2. In re Richmond, 2 Pick. (Mass.) 567.

3. Mooers v. White, 6 Johns. Ch. (N. Y.) 360.

4. Estoppel generally see Estoppel 21 C. J. p 1052.

5. McWilliams' App., 117 Pa. 111, 11 A 383 [dist York's App., 110 Pa. 69, 1 A 162, 2 A 65]; Divine v. Miller, 70 S. C. 225, 49 SE 479, 106 AmSR 743.

[a] **Executors who are sole legatees** may be thus estopped. In re Claghorn, 181 Pa. 608, 37 A 921.

[b] **Where the representative is also an heir** his acknowledgment and promise will bind him individually to the extent of his interest. Divine v. Miller, 70 S. C. 225, 49 SE 479, 106 AmSR 743.

resentative to pay a debt barred by the statute, they are bound by his payment and cannot object to his being credited therewith.[6] The heirs also may by their conduct be estopped to plead the statute.[7] But the fact that heirs, legatees, or distributees may have become estopped to set up the statute does not preclude a creditor from pleading it in protection of his own claim,[8] or if the barred debt has been paid a creditor may object to the allowance to the representative of credit in his accounts for the payment so made.[9]

[§ 922] **21. Claims Arising after Death of Decedent**[10]**—a. In General.** As a general rule claims arising after decedent's death are not allowable directly against the estate,[11] although in many cases where the representative has rendered himself personally liable on such claim, if the claim properly arose out of some matter connected with the administration, he is allowed, after paying the same, to reimburse himself from the assets.[12] There are, however, to be found in the reports a number of cases in which the rule stated above has been departed from.[13]

[§ 923] **b. Claims Arising Out of Performance of Contract with Decedent.** The estate of a decedent may be held liable for a claim arising out of the performance after his death of an executory contract made with him during his lifetime,[14] even

6. Ritter's App., 23 Pa. 95.

7. Lengar v. Hazlewood, 11 Lea (Tenn.) 539.

[a] **Heirs inducing third persons to take up debts.**—Where the heirs recognized certain claims as subsisting debts of the estate, and the deed of trust securing the debts as being an encumbrance upon the land, and by asserting that the debts were valid liens upon the land induced other persons to take up the debts, assuring such persons that they should have the land in satisfaction thereof, the heirs could not rely upon the statute of limitations. Lengar v. Hazlewood, 11 Lea (Tenn.) 539.

8. In re Claghorn, 181 Pa. 608, 37 A 921 [dist McWilliams' App., 117 Pa. 111, 11 A 383]; Felton's Est., 7 Pa. Dist. 262.

[a] **Fraudulent concealment of right of action.**—Where through the fraud of decedent in his lifetime and of the legatees, who were also executors, after his death, the claimant's right of action was concealed and not discovered by him until the statutory period had expired, it was held that the claim dated only from the discovery of the fraud, and therefore that another creditor could not successfully interpose the statute. In re Claghorn, 181 Pa. 608, 37 A 921.

9. Matter of Oosterhoudt, 15 Misc. 556, 38 NYS 179 (the consent of the heirs to payment of an outlawed debt is not binding on creditors of the estate).

10. **Taxes and assessments** see supra § 902.

11. Ala.—Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79.

Ariz.—Garver v. Thomas, 15 Ariz. 38, 135 P 724.

Cal.—In re Williams, 3 Cal. Unrep. Cas. 788, 32 P 241; In re Heeney, 3 Cal. A. 548, 86 P 842.

Ga.—Walton v. Reid, 148 Ga. 176, 96 SE 214.

Ill.—Smith v. McLaughlin, 77 Ill. 596.

Ind.—Mills v. Kuykendall, 2 Blackf. 47.

Iowa.—In re Doore, 166 NW 763.

Ky.—Lucking v. Gegg, 12 Bush 298.

Md.—Simmons v. Tongue, 3 Bland 341; Watkins v. Worthington, 2 Bland 509.

Mass.—Browne v. McDonald, 129 Mass. 66.

Mich.—Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371.

Mo.—Ferguson v. Carson, 86 Mo. 673 [aff 9 Mo. A. 497]; U. S. Presbyterian Church v. McElhinney, 61 Mo. 540.

N. J.—Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

N. Y.—Herrich v. Hyman, 61 Misc. 606, 113 NYS 971.

N. C.—Alexander v. Alexander, 120 N. C. 472, 27 SE 121.

Pa.—Kukulski's Est., 23 Pa. Dist. 442.

Philippine.—Dariano v. Fidalgo, 14 Philippine 62; Bowler v. Alcazar, 13 Philippine 282; Escueta v. Sy-Juilliong, 5 Philippine 405; Philippine Trading Co. v. Crossfield, 5 Philippine 400.

Tex.—Giddings v. Heiskill, 44 Tex. 386.

Man.—Dean v. Lehberg, 17 Man. 64.

"Creditors of the estate are persons who are such or become such because of some dealings or transactions with the decedent during his lifetime. Their claims are debts or obligations with which the personal representative had nothing to do originally." Garver v. Thomas, 15 Ariz. 38, 41, 135 P 724.

[a] **This rule has been applied** (1) to the charge of a physician for a post mortem examination, made on a coronor's inquest. Smith v. McLaughlin, 77 Ill. 596. (2) It has also been held that a devisee of unpatented land belonging to the testator cannot call on the personal estate of the testator to pay the purchase money and fees for patenting the land on taking out title. In re Keysey, 9 Serg. & R. (Pa.) 71.

[b] **Charge on lands.**—"The debts contracted by the administrator are never a charge upon the lands. They must be debts incurred by the decedent, and they must be in excess of the value of the personal property." Mayer v. Kornegay, 163 Ala. 371, 375, 50 S 880, 881, 136 AmSR 79.

[c] **Allowance as evidence of existence of claim before decedent's death.**—In a suit by an executor to set aside a conveyance by his testator in alleged fraud of creditors, the allowance of claims by commissioners of the estate which did not show on their face that they accrued after testator's death constituted prima facie evidence of their existence before that period. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879.

[d] **Conversion by executor.**—A decedent's estate is not liable for the conversion by the executor of property claimed by him as part of the estate, the executor being personally liable. Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950 [rev 76 Hun 55, 27 NYS 666]. Tort of representative generally see supra § 592.

[e] **Costs adjudged before decedent died,** although assessed after, are a valid claim against the estate. Salter v. Neaville, 1 Bradf. Surr. (N. Y.) 488.

[f] **Insurance of realty.**—Where premises were insured five years after the owner's death, and a note for premiums was given by the heirs and indorsed by the administrator, the insurer had no claim against the estate, the title being in the heirs, and it appearing that they had insured on their own account for the benefit of the mortgagee. Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

12. Miller's Est., 18 Pa. Dist. 216.

Debts incurred in conduct of business see supra §§ 478, 479.

Expenditures in course of administration see supra §§ 513–558.

13. See cases infra this note; and infra §§ 923–934.

[a] **Illustrations.**—(1) In an action against the estate of a deceased person on a note stipulating for the payment of attorney's fees, such fees may be recovered as a proper claim against the estate. Bond v. Orndorf, 77 Ind. 583. (2) If an executor receives the amount of a judgment which the testator had assigned, and charges himself with it as executor, the estate of the testator is responsible for it. Congrove v. Sanders, 3 J. J. Marsh. (Ky.) 574. (3) Where property of another person is sold as that of the estate, the claim of the owner to the proceeds is regarded as a claim against the estate. Morgan's Est., 14 Pa. Co. 62. (4) Where in an action commenced against decedent before his death, his administrator gave an appeal bond with surety, and the surety had to pay the judgment, his claim was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased. Ferguson v. Carson, 86 Mo. 673 [aff 9 Mo. A. 497]. (5) Where, under the charter of a corporation, the stockholders are liable for its debts, the estate of a deceased stockholder may be held liable for a debt which arose after his death. Manville v. Edgar, 8 Mo. A. 324. (6) Where executors confessed judgment against the estate in lieu of a judgment against a creditor of the estate, who was also a legatee, and took the latter's receipt for so much, to be accounted for on settlement, such transaction, being merely a substitution of creditors, and not an undertaking to pay a third person's debt, is a charge upon the estate, and execution may issue against the personal property thereof. Miller v. Ege, 8 Pa. 352.

[b] **Subrogation.**—While a person who advances supplies for the making of a crop to an administrator who is carrying on decedent's farm under orders of the court must look alone to the crop for reimbursement and cannot subject the corpus of the estate, still where the proceeds of the crop have been applied to the payment of general creditors, he is subrogated to their rights and is entitled to satisfaction of his demand pro tanto out of the general assets. Evans v. Robertson, 54 Miss. 683.

14. Ind.—Toland v. Wells, 59 Ind. 529; Toland v. Stevenson, 59 Ind. 485.

Mass.—Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865.

N. Y.—U. S. Title Guaranty, etc., Co. v. Marks, 116 App. Div. 341, 101 NYS 483.

Pa.—Nine's Est., 2 Woodw. 403.

Va.—Ferguson v. Willis, 88 Va. 136, 13 SE 392.

Wash.—Mendenhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179.

Wis.—Lenz v. Brown, 41 Wis. 172.

[a] **A conditional subscription** to a charity is collectable on performance of the condition after the death of the subscriber. Converse's Est., 21 Pa. Dist. 571.

[b] **A verbal request by testator in his last illness** is insufficient to bind the estate in law or equity. Deas v. McRae, 65 Ga. 531.

[c] **Where estate is insolvent,** the liability is limited to the amount due on the contract at the time of dece-

though the personal representative notified claimant not to proceed with performance of the contract.[15]

[§ 924] **c. Funeral Expenses**[16]**—(1) Liability of Estate Generally.** The estate of a decedent is liable for the reasonable expenses of his funeral and burial,[17] and this rule is usually considered applicable to the estate of a married woman[18] or

dent's death. Davis' Est., 17 Pa. Dist. 570.

15. Ferguson v. Wills, 88 Va. 136, 13 SE 392.

[a] **Illustration.**—Where one has contracted with a person since deceased to build a church, the fact that the administrator shortly after the work was commenced gave notice not to proceed therewith and that the estate would not be responsible therefor was no bar to a recovery for work done afterward when the church was completed according to the contract. Ferguson v. Wills, 88 Va. 136, 13 SE 392.

16. As preferred claim see infra § 1160.

Propriety of expenditures for see supra § 521.

17. Ala.—Sewell v. Sewell, 74 S 343; Hatchett v. Curbow, 59 Ala. 516.

Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; O'Donnell v. Slack, 123 Cal. 285, 55 P 906, 43 LRA 388; Matter of Weringer, 100 Cal. 345, 34 P 825.

Colo.—Hulbert v. Walley, 3 Colo. A. 250, 32 P 985.

Ind.—Hildebrand v. Kinney, 172 Ind. 447, 87 NE 832, 19 AnnCas 788; Raugh v. Weis, 138 Ind. 42, 37 NE 331; Smith v. Calloway, 7 Blackf. 86; Maitlen v. Maitlen, 44 Ind. A. 559, 89 NE 966.

Iowa.—In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295; Clark v. Sayre, 122 Iowa 591, 98 NW 484; Foley v. Brocksmit, 119 Iowa 457, 93 NW 344, 97 AmSR 324, 60 LRA 571.

Ky.—Compton v. Lancaster, 114 SW 260.

La.—McNeely's Succ., 50 La. Ann. 823, 24 S 338.

Me.—Fogg v. Holbrook, 88 Me. 169, 33 A 792, 33 LRA 660; Phillips v. Phillips, 87 Me. 324, 32 A 963.

Mass.—Rice v. New York Cent., etc., R. Co., 195 Mass. 507, 81 NE 285; Marple v. Morse, 180 Mass. 508, 62 NE 966; Pettingill v. Abbott, 167 Mass. 307, 45 NE 748; Constantinides v. Walsh, 146 Mass. 281, 15 NE 631, 4 AmSR 311; Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708; Studley v. Willis, 134 Mass. 155; Luscomb v. Ballard, 5 Gray 403, 66 AmD 374; Adams v. Butts, 16 Pick. 343; Hapgood v. Houghton, 10 Pick. 154.

Minn.—Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286; McNally v. Weld, 30 Minn. 209, 14 NW 895.

Mo.—Hayden v. Maher, 67 Mo. A. 434.

N. H.—Trueman v. Tilden, 6 N. H. 201.

N. J.—Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

N. Y.—Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Benedict v. Ferguson, 15 App. Div. 96, 44 NYS 307; Laird v. Arnold, 42 Hun 136; Laird v. Arnold, 25 Hun 4; Dalrymple v. Arnold, 21 Hun 110; McCue v. Garvey, 14 Hun 562; Lucas v. Hessen, 13 Daly 347, 17 AbbNCas 271; Rappelyea v. Russell, 1 Daly 214; O'Connor v. Dorney, 97 Misc. 596, 163 NYS 394; Matter of Shanley, 95 Misc. 427, 160 NYS 733; Matter of Moran, 75 Misc. 90, 134 NYS 968; Matter of Flynn, 75 Misc. 87, 134 NYS 874; Matter of Wingersky, 75 Misc. 79, 134 NYS 877; Huhna v. Theller, 35 Misc. 296, 71 NYS 752; Matter of Smith, 18 Misc. 139, 41 NYS 1093; Hatton v. Cunningham, 162 NYS 1008; In re Crawford, 144 NYS 565; Kessell v. Hapen, 8 NYSt 352.

N. C.—Ray v. Honeycutt, 119 N. C. 510, 26 SE 127; Parker v. Lewis, 13 N. C. 21 [dist Gregory v. Hooker, 8 N. C. 394, 9 AmD 646].

Oh.—McClellan v. Filson, 44 Oh. St. 184, 5 NE 861, 58 AmR 814; Kennedy v. Price, 23 Oh. Cir. Ct. N. S. 12; Clawson v. Briggs, 16 Oh. Cir. Ct. N. S. 225.

Or.—In re Murray, 56 Or. 132, 107 P 19; In re Osburn, 36 Or. 8, 58 P 521.

Pa.—In re Parry, 188 Pa. 38, 41 A 384, 68 AmSR 850; In re France, 75 Pa. 220; Flintham's App., 11 Serg. & R. 16; Lutton's Est., 17 Pa. Super. 342; Hudson's Est., 15 Pa. Dist. 490; Kraan's Est., 14 Pa. Dist. 136, 31 Pa. Co. 93; Campbell's Est., 9 Pa. Dist. 729, 24 Pa. Co. 480; Harding's Est., 7 Pa. Dist. 679, 21 Pa. Co. 641; Scott's Est., 15 Pa. Co. 316; Smith v. Teacle, 8 Pa. Co. 150; Hoopes' Est., 2 Chest. Co. 67.

R. I.—O'Reilly v. Kelly, 22 R. I. 151, 46 A 681, 84 AmSR 833, 50 LRA 483; Johnson's Pet., 15 R. I. 438, 8 A 248; Buxton v. Barrett, 14 R. I. 40.

Tenn.—Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204.

Utah.—Dunn v. Wallingford, 47 Utah 491, 155 P 347.

Vt.—Sawyer v. Hebard, 58 Vt. 375, 3 A 529; Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.

Wis.—Schneider v. Breier, 129 Wis. 446, 109 NW 99, 6 LRANS 917; McLaughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273.

Eng.—Green v. Salmon, 8 A. & E. 348, 35 ECL 625, 112 Reprint 869; Stag v. Punter, 3 Atk. 119, 26 Reprint 872, 2 ERC 147; Hancock v. Podmore, 1 B. & Ad. 260, 20 ECL 477, 109 Reprint 783; Lucy v. Walrond, 3 Bing. N. Cas. 841, 32 ECL 386, 132 Reprint 634; Tugwell v. Heyman, 3 Campb. 298; Anonymous, 12 Mod. 257, 88 Reprint 1305; Brice v. Wilson, 3 N. & M. 512, 28 ECL 615; Arlot v. Churchland [cit Rogers v. Price, 3 Y. & J. 32, 148 Reprint 1081]; Rogers v. Price, 3 Y. & J. 28, 148 Reprint 1080.

Ont.—Re Way, 6 Ont. L. 614, 2 OntWR 1072.

"Funeral expenses are an obligaiton created by law against the estate of a decedent." Nashville Trust Co. v. Carr, (Tenn. Ch. A.) 62 SW 204, 205.

"They are liabilities or charges against his estate, raised up and imposed by law, as distinguished from obligations arising by some act or promise of the decedent. They stand in the same category as the expenses of administration. An administrator is a trustee for the payment of funeral expenses, because they are impositions of the law, precisely and for the like reasons that he is a trustee for the persons who are entitled to the distributive shares of an estate by virtue of the statute of descents, or for creditors of the estate proper." Hildebrand v. Kinney, 172 Ind. 447, 451, 87 NE 832, 19 AnnCas 788 [rev (Ind. A.) 83 NE 379].

[a] **Reason for rule.**—"The presumption is that funeral expenses are incurred on the credit of the estate of the deceased." Rice v. New York Cent., etc., R. Co., 195 Mass. 507, 81 NE 285.

[b] **The representative is liable on an implied promise** to persons furnishing a funeral suitable to the degree of decedent, although this is done by direction of a third person. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411; Matter of Moran, 75 Misc. 90, 134 NYS 968; Sinnott's Est., 15 Pa. Dist. 873, 33 Pa. Co. 391; Tugwell v. Heyman, 3 Campb. 298; Rogers v. Price, 3 Y. & J. 28, 148 Reprint 1080.

[c] **Decedent's estate, and not his widow** is liable for the expenses of his funeral. Compton v. Lancaster, (Ky.) 114 SW 260.

[d] **A widow may order** the interment for her deceased husband on a scale in proportion to deceased's financial condition, for which the estate will be liable. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

[e] **Funeral expenses incurred before appointment of representative.**—Under the statute an administrator is bound to pay, out of the assets in his hands, the funeral expenses, including the purchase of a burial lot, at the request of the widow and next of kin, although such expenses are incurred before his appointment. Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708.

[f] **Assent of administrator before appointment.**—The assent of a person to the correctness of the funeral expenses ordered by another renders him liable therefor as administrator when he subsequently takes out administration. Lucy v. Walrond, 3 Bing. N. Cas. 841, 32 ECL 386, 132 Reprint 634.

[g] **Obligation of mere custodian of decedent's property.**—While it is the duty of an executor or administrator to provide for the burial of his testator or intestate, if not already done by others, no such duty rests on the custodian of deceased's personal property, and hence where a married woman dies leaving personal property which passes into her husband's possession, and the latter dies without paying the wife's funeral expenses, no personal liability attaches to one subsequently coming into possession of such property as administrator of the husband. Romig v. Sheldon, 124 NYS 26 [aff 142 App. Div. 925, 127 NYS 1141].

18. Cal.—Matter of Weringer, 100 Cal. 345, 34 P 825.

Iowa.—In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295.

Mass.—Hayes v. Gill, 226 Mass. 388, 115 NE 492; Constantinides v. Walsh, 146 Mass. 281, 15 NE 631, 4 AmSR 311.

N. Y.—Matter of Smith, 18 Misc. 139, 41 NYS 1093; Hatton v. Cunningham, 162 NYS 1008.

Oh.—McClellan v. Filson, 44 Oh. St. 184, 5 NE 861, 58 AmR 814.

Pa.—Scott's Est., 15 Pa. Co. 316.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728; Johnson's Pet., 15 R. I. 438, 8 A 248; Buxton v. Barrett, 14 R. I. 40.

Tenn.—Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204.

[a] **Funeral ordered by husband.**—The funeral expenses of a married woman, although ordered by her husband, are enforceable against her estate. Nashville Trust Co. v. Carr, (Tenn. Ch. A.) 62 SW 204.

[b] **Where the husband is insolvent,** the estate of a deceased wife is liable for her funeral expenses. Scott's Est., 15 Pa. Co. 316.

[c] **Effect of judgment against husband.**—A married woman's estate is not relieved from liability for her funeral expenses by the fact that judgment has been recovered therefor against her husband. Johnson's Pet., 15 R. I. 438, 8 A 248.

[d] **Where a husband acting as personal representative of his deceased wife** (1) pays her funeral expenses, he is entitled to credit therefor in his accounts. McCue v. Garvey, 14 Hun (N. Y.) 562; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163. (2) Contra, unless the wife has charged such expenses upon her separate estate, or they are made a charge upon her estate by statute. Re Montgomery, 20 Man.

an infant.[19]

Express promise by executor. The estate is not, however, liable on an express promise by the executor to pay for funeral expenses where one would not be implied by law, or upon one different from that which would be implied.[20]

[§ 925] **(2) Reliance on Credit of Third Person.** Where the undertaker or other person furnishing work or accessaries for the funeral or burial has done so upon the order and credit of a third person, he should look immediately to such person for payment.[21]

[§ 926] **(3) Reimbursement from Estate.** Where the representative or a third person has rendered himself liable for the funeral expenses and has been compelled to pay them, or has defrayed such expenses in an emergency and under proper circumstances, he is entitled to reimbursement from the estate so far as the expenditures were reasonable and proper.[22] This rule has been held to permit a husband to be reimbursed from the estate of his deceased wife for her funeral expenses which he paid,[23] notwithstanding his common-law obligation to see to her proper interment;[24] but there is also authority for the view that the husband is not entitled to reimbursement where he was financially able to bury his wife in a suitable manner;[25] and the right of reimbursement is denied where this would operate to the detriment of creditors of the wife.[26]

[§ 927] **(4) Items and Amount of Expenditure.**[27] The funeral expenses include not only the solemnization of the interment, but also the ceremonies and accompaniments attending the same.[28]

444.

[e] **Husband primarily liable.—** Where a married woman dies leaving a husband surviving her, the husband is primarily liable, and not her estate, for the payment of her funeral expenses. Kenyon v. Brightwell, 120 Ga. 606, 48 SE 124, 1 AnnCas 169.

19. Maitlen v. Maitlen, 44 Ind. A. 559, 89 NE 966; Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58.

[a] **Where the father of a minor is insolvent,** the expenses of the minor's funeral and last sickness are proper charges against the minor's estate. Maitlen v. Maitlen, 44 Ind. A. 559, 89 NE 966.

20. Durkin v. Langley, 167 Mass. 577, 46 NE 119; Hapgood v. Houghton, 10 Pick. (Mass.) 154.

21. Ga.—Kenyon v. Brightwell, 120 Ga. 606, 48 SE 124, 1 AnnCas 169.

Mass.—Johnson v. Kimball, 172 Mass. 398, 52 NE 386.

Mich.—Sears v. Giddey, 41 Mich. 590, 2 NW 917, 32 AmR 168.

N. Y.—Lucas v. Hessen, 13 Daly 347, 17 AbbNCas 271; Matter of Moran, 75 Misc. 90, 134 NYS 968; McCullough v. McCready, 52 Misc. 542, 102 NYS 633 [aff 122 App. Div. 888 mem, 106 NYS 1135 mem]; Hoffman v. Kanze, 7 Misc. 237, 27 NYS 260; Hatton v. Cunningham, 162 NYS 1008; Kessell v. Hapen, 8 NYSt 352; Matter of Hill, 17 AbbNCas 273; Quin v. Hill, 4 Dem. Surr. 69.

Pa.—Houston's Est., 21 Pa. Dist. 395.

Wash.—Anderson v. Koen, 82 Wash. 310, 144 P 35.

Eng.—Green v. Salmon, 8 A. & E. 348, 35 ECL 625, 112 Reprint 869 [expl Brice v. Wilson, 3 N. & M. 512, 28 ECL 615].

"There is no case which goes the length of deciding that if the funeral be ordered by a person to whom credit is given, the executor is liable." Brice v. Wilson, 3 N. & M. 512, 28 ECL 615 [lim Green v. Salmon, 8 A. & E. 348, 35 ECL 625, 112 Reprint 869 ("The judgment there probably means that the executor, where credit has been given to another person, is not liable to the undertaker; if it lays down more, the law stated is extrajudicial")].

[a] **The executor or administrator is not liable** for the funeral expenses when it appears that the credit therefor was extended to a third person on the express promise of such third person to pay the bill. Kenyon v. Brightwell, 120 Ga. 606, 48 SE 124, 1 AnnCas 169 [foll Lucas v. Hessen, 13 Daly (N. Y.) 347].

[b] **A mere request** by the widow for the funeral or burial does not imply a personal obligation on her part to pay therefor. Hayden v. Maher, 67 Mo. A. 434.

22. Cal.—Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.

Ill.—Golsen v. Golsen, 127 Ill. A. 84.

Iowa.—In re Skilman, 146 Iowa 601, 125 NW 343, 140 AmSR 295.

Mass.—Hayes v. Gill, 226 Mass. 388, 115 NE 492; Marple v. Morse, 180 Mass. 508, 62 NE 966; Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708; Hapgood v. Houghton, 10 Pick. 154.

Minn.—Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286; McNally v. Weld, 30 Minn. 209, 14 NW 895.

Mo.—Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951.

N. J.—Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

N. Y.—Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Matter of McDonough, 132 App. Div. 614, 117 NYS 258; Pache v. Oppenheim, 93 App. Div. 221, 87 NYS 704 [aff as to this point but rev on other grounds 84 NYS 926]; Hewett v. Bronson, 5 Daly 1; Rappelyea v. Russell, 1 Daly 214; Barter v. Hawksworth, 102 Misc. 242, 169 NYS 475; Matter of Powers, 75 Misc. 85, 134 NYS 967; Matter of McDermott, 49 Misc. 402, 99 NYS 829; Kessell v. Hapen, 8 NYSt 352; Matter of Miller, 4 Redf. Surr. 302.

N. C.—Ray v. Honeycutt, 119 N. C. 510, 26 SE 127.

Oh.—Clawson v. Briggs, 16 Oh. Cir. Ct. N. S. 225.

Pa.—In re France, 75 Pa. 220; Sinnott's Est., 15 Pa. Dist. 873, 33 Pa. Co. 391; Harding's Est., 7 Pa. Dist. 679, 21 Pa. Co. 641; Burke's Est., 15 Pa. Co. 9; Meyer's Est., 18 Phila. 42.

S. C.—Waters v. Register, 76 S. C. 132, 56 SE 849.

Tenn.—Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

Tex.—Wright v. Harned, (Civ. A.) 163 SW 685.

Utah.—Dunn v. Wallingford, 47 Utah 491, 155 P 347, 351 [cit Cyc].

Va.—Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653.

[a] **Illustration.—**Where decedent while working for claimant telephone company was killed by a fall from one of its poles, and claimant's auditor, who was present at the time, directed an undertaker to care for the body, and furnish such things as were requisite for the funeral, claimant, in paying such expenses was neither an interloper nor a mere volunteer, and therefore was entitled to recover the amount so paid, if reasonable, as a claim against decedent's estate, independent of any question of subrogation to the rights of the undertaker or of an assignment of his claim. Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW. 951.

[b] **Payment at request of foster children.—**One who paid the reasonable funeral expenses of a decedent, at the request of his foster children, is entitled to recover the same of the personal representative as on a quasi contract. Waters v. Register, 76 S. C. 132, 56 SE 849.

[c] **Others than the widow or next of kin** may lawfully incur expenses for the interment of decedent's body and recover the amount of such expenses from his estate, provided they are not mere interlopers, and the expenses are reasonable and suitable to the estate. Wright v. Harned, (Tex. Civ. A.) 163 SW 685.

[d] **Where the widow has received funeral benefits** from an association of which decedent was a member, she is not entitled to reimbursement for expenditures not exceeding the amount so received. Matter of Shanley, 95 Misc. 427, 160 NYS 733; In re Griffiths, 1 LackLegN (Pa.) 311; Meyer's Est., 18 Phila. (Pa.) 42; Hyneman's Est., 11 Phila. (Pa.) 135, 2 WklyNC 571.

[e] **Where an heir at law voluntarily paid** the funeral expenses of an intestate, the court would not allow the expenses to be refunded out of the intestate's personal estate. Coleby v. Coleby, 12 Jur. N. S. 496.

[f] **Action against administrator without notice.—**Where a person of his own motion buries decedent, and without giving the administrator notice of the expenses, sues him, he cannot recover. Gregory v. Hooker, 8 N. C. 394, 9 AmD 646.

23. Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; McCue v. Garvey, 14 Hun (N. Y.) 562; Kessler v. Hessen, 19 AbbNCas (N. Y.) 86; Jackson v. Westerfield, 61 HowPr (N. Y.) 399.

24. Pache v. Oppenheim, 93 App. Div. 221, 87 NYS 704 [rev 84 NYS 926]; Matter of Very, 24 Misc. 139, 53 NYS 389.

25. Lott v. Graves, 67 Ala. 40; Smyley v. Reese, 53 Ala. 89, 25 AmR 598; Gustin v. Bryden, 205 Ill. A. 204.

26. Wheeler's Est., 4 Pa. Dist. 265.

27. Allowance to representative see supra § 525.

28. Cal.—Matter of Weringer, 100 Cal. 345, 34 P 825.

Ill.—Smith v. McLaughlin, 77 Ill. 596.

Iowa.—Foley v. Brocksmit, 119 Iowa 457, 93 NW 344, 97 AmSR 324, 60 LRA 571.

La.—Holbert's Succ., 3 La. Ann. 436.

Me.—Fogg v. Holbrook, 88 Me. 169, 33 A 792, 33 LRA 660.

Miss.—Donald v. McWhorter, 44 Miss. 124.

N. Y.—Matter of Smith, 75 App. Div. 339, 78 NYS 130, 11 NYAnnCas 427; Hewett v. Bronson, 5 Daly 1; Matter of Kiernan, 38 Misc. 394, 77 NYS 924.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Pa.—Metzroth's Est., 19 Pa. Dist. 54; Campbell's Est., 9 Pa. Dist. 729, 24 Pa. Co. 480; Cullen's Est., 7 Pa. Dist. 394 [aff 8 Pa. Super. 494]; McHugh's Est., 1 Pa. Dist. 154; Santee's Est., 9 Kulp 142.

R. I.—O'Reilly v. Kelly, 22 R. I. 151, 46 A 681, 84 AmSR 833, 50 LRA 483.

Tenn.—Steger v. Frizzell, 2 Tenn.

What shall be the reasonable expenses of funeral or burial for reimbursement from the estate, and what items may be properly included in such a charge, must depend largely upon the station in life of decedent and his family, and the condition of his estate; and justice to creditors as well as to the surviving family demands that there shall be no extravagant outlay to their loss.[29]

Special circumstances may justify an expenditure unusually great in one or more particulars,[30] as where one dies far from his home or his proper burial place and transportation of the body becomes necessary and proper,[31] or where kindred and friends are summoned from a distance to attend the funeral or accompany the remains from a distant point.[32] But the fact that decedent expressed a wish to be buried in an expensive coffin does not authorize an expenditure for a coffin not suited to the pecuniary condition of the estate.[33]

[§ 928] **(5) Funeral Expenses of Decedent's Wife and Family.** The funeral expenses of the decedent's wife and family are sometimes made, by statute, a charge upon his estate,[34] and they have been held to be payable out of his estate even in the absence of an express statutory provision where decedent and his wife and children perished in a common disaster.[35]

[§ 929] **d. Tombstones and Monuments.**[36] The expense of erecting a tombstone or monument at the grave of decedent is usually allowed against the estate,[37] especially where the estate is

Ch. 369.

Eng.—Tugwell v. Heyman, 3 Campb. 298; Edwards v. Edwards, 2 Cromp. & M. 612, 149 Reprint 905; Rogers v. Price, 3 Y. & J. 28, 148 Reprint 1080.

[a] **Items of expenditure.**—(1) A suit of clothes for burial seems a proper item for allowance (Steger v. Frizzell, 2 Tenn. Ch. 369), and (2) flowers (O'Reilly v. Kelly, 22 R. I. 151, 46 A 681, 84 AmSR 833, 50 LRA 483. Contra Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem] [flowers for grave]), and (3) carriage hire, vaults, and tombstones may be added in various instances where the decedent's estate will bear it (Donald v. McWhorter, 44 Miss. 124). (4) But it is otherwise as to dinners furnished to persons attending the funeral or feed for their horses. Shaeffer v. Shaeffer, 54 Md. 679, 39 AmR 406; Santee's Est., 9 Kulp (Pa.) 142. (5) Expenditures for a wake, made at the request of the widow of decedent who left no children, being reasonable, are recoverable of the executors as expenses of the funeral, they being proper in character. McCullough v. McCready, 52 Misc. 542, 102 NYS 633 [aff 122 App. Div. 888 mem, 106 NYS 1135 mem]. (6) So the expense of a banquet at a wake, consisting of cheese, crackers, and tobacco, has been held a proper item of funeral expenses. Johnson's Est., 8 Pa. Co. 1. (7) Charges for mere kindly offices or for use of one's house for funeral services, if by a relative, are looked upon with disfavor. Hewett v. Bronson, 5 Daly (N. Y.) 1; McHugh's Est., 152 Pa. 442, 25 A 875. (8) In an early case where the estate was insolvent, no expenses were allowed except for coffin, ringing of the bell, and the fees of the clerk and bearers. Shelly's Case, 1 Salk. 296, 91 Reprint 262. (9) The expense of a post-mortem examination is not chargeable against the estate as a part of the funeral expenses. Smith v. McLaughlin, 77 Ill. 596. (10) But a charge for disinterment and reburial has been allowed. Allen v. Allen, 3 Dem. Surr. (N. Y.) 524.

[b] **Mourning apparel.**—(1) Out of regard to particular circumstances or a decedent's last directions, an allowance from the estate has sometimes been made for items not strictly within the rules of funeral charges, such as a moderate outlay for the mourning apparel of the widow and children. Holbert's Succ., 3 La. Ann. 436; In re Wachter, 16 Misc. 137, 38 NYS 941, 1 Gibb. Surr. 552; Allen v. Allen, 3 Dem. Surr. (N. Y.) 524; Matter of Wood, 1 Ashm. (Pa.) 314. (2) Even mourning rings for the relatives, under an earlier fashion, have been allowed. Paice v. Canterbury, 14 Ves. Jr. 364, 33 Reprint 560. (3) But where the estate is insolvent such charges seem hardly allowable. Jenks v. Mathews, 31 Me. 318; Flintham's Est., 11 Serg. & R. (Pa.) 16; Johnson v. Baker, 2 C. & P. 207, 12 ECL 530.

29. D. C.—Matter of Butler, 10 D. C. 535.

Hawaii.—Matter of Vida, 1 Hawaii 152.

Iowa.—Foley v. Brocksmit, 119 Iowa 457, 93 NW 344, 97 AmSR 324, 60 LRA 571.

La.—Hearing's Succ., 28 La. Ann. 149.

Mo.—Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

N. J.—Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

N. Y.—Kittle v. Huntley, 67 Hun 617, 22 NYS 519; Matter of Moran, 75 Misc. 90, 134 NYS 968; Matter of Wingersky, 75 Misc. 79, 134 NYS 877; Matter of Primmer, 49 Misc. 413, 99 NYS 830; In re Crawford, 144 NYS 565.

N. C.—Barbee v. Green, 92 N. C. 471.

Oh.—Kroll v. Close, 82 Oh. St. 190, 92 NE 29, 28 LRANS 571 [cit Cyc].

Pa.—Ferry's Est., 25 Pa. Dist. 302; Hirschmeyer's Est., 23 Pa. Dist. 1102; Loughrey's Est., 21 Pa. Dist. 180; Sinnott's Est., 15 Pa. Dist. 873, 33 Pa. Co. 391; Williams's Est., 14 Pa. Dist. 407; Cullen's Est., 7 Pa. Dist. 394; Smith v. Teacle, 8 Pa. Co. 150; Hasson's Est., 5 Pa. Co. 19; Gorman's Est., 2 Kulp 61.

Tenn.—Wiles Bros. v. Wynne, 139 Tenn. 397, 201 SW 515; Steger v. Frizzell, 2 Tenn. Ch. 369.

Tex.—Wright v. Harned, (Civ. A.) 163 SW 685.

Eng.—Green v. Salmon, 8 A. & E. 348, 112 Reprint 869; Stag v. Punter, 3 Atk. 119, 26 Reprint 872, 2 ERC 147; Hancock v. Podmore, 1 B. & Ad. 260, 20 ECL 477; Yardley v. Arnold, C. & M. 434, 41 ECL 239, 10 M. & W. 141, 152 Reprint 416.

"The condition of the life of the deceased and the size of his estate are always factors to consider in determining what are 'reasonable funeral expenses.'" In re Crawford, 144 NYS 565, 566.

[a] **Where the estate is insolvent and there are minor children,** no more should be allowed than is necessary for decent Christian burial. Gorman's Est., 2 Kulp (Pa.) 61.

[b] **Repudiation of expensive casket.**—Where an undertaker procured and placed a dead body in a casket more expensive than the wife desired, and she immediately repudiated his action, and caused the body to be buried by other undertakers in another casket, the expensive casket being stored by such other undertakers, the first undertaker was not entitled to recover from the estate the price of the casket furnished by him. Wright v. Harned, (Tex. Civ. A.) 163 SW 685.

[c] **Decedent's manner of living not controlling.**—Where one died, in Texas, possessed of a poor estate and leaving a widow in miserable financial condition, a funeral in New York, involving expensive transportation charges and a new casket purchased on the arrival of the remains in New York, were not matters of such necessity as to imply a promise of the widow, as administratrix, to pay for them, and the extravagance of the decedent's manner of living should not be considered as authorizing a heavier expense for his burial. Matter of Moran, 75 Misc. 90, 134 NYS 968.

[d] **Where the husband is entitled to the whole estate** the cost of burial is immaterial. Williams' Est., 14 Pa. Dist. 407.

[e] **A statute prescribing a maximum for insolvent estates** applies only where insolvency existed at the death of decedent. Bauman v. Armbruster, 8 La. A. (Orleans) 202 [rev on other grounds 129 La. 191, 55 S 760].

[f] **Claims held reasonable and proper.**—Kittle v. Huntley, 67 Hun 617, 22 NYS 519; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Allen v. Allen, 3 Dem. Surr. (N. Y.) 524; Campbell's Est., 9 Pa. Dist. 729, 24 Pa. Co. 480.

[g] **Claims held excessive.**—Foley v. Brocksmit, 119 Iowa 457, 93 NW 344, 97 AmSR 324, 60 LRA 571; Matter of Moran, 75 Misc. 90, 134 NYS 968; Matter of Power, 75 Misc. 85, 134 NYS 967; Matter of Primmer, 49 Misc. 413, 99 NYS 830; Matter of Kiernan, 38 Misc. 394, 77 NYS 924; Cullen's Est., 8 Pa. Super. 494; Bauman's Est., 5 Pa. Co. 579; Hasson's Est., 5 Pa. Co. 19; Wiles Bros. v. Wynne, 139 Tenn. 397, 201 SW 515; Wright v. Harned, (Tex. Civ. A.) 163 SW 685.

30. Houston's Est., 21 Pa. Dist. 395 (holding funeral at boarding house).

31. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411; In re Parry, 188 Pa. 38, 41 A 384, 68 AmSR 850; Harding's Est., 7 Pa. Dist. 679, 21 Pa. Co. 641; Carpenter's Est., 16 Phila. (Pa.) 290; Stag v. Hunter, 3 Atk. 119, 26 Reprint 872, 2 ERC 147.

32. Jennison v. Hapgood, 10 Pick. (Mass.) 77; Mann v. Lawrence, 3 Bradf. Surr. (N. Y.) 424; Wall's App., 38 Pa. 464; Harding's Est., 7 Pa. Dist. 679, 21 Pa. Co. 641; Carpenter's Est., 16 Phila. (Pa.) 290.

33. Barbee v. Green, 92 N. C. 471.

34. Alter v. O'Brien, 31 La. Ann. 452; Bauman v. Armbruster, 8 La. A. (Orleans) 202 [rev on other grounds 129 La. 191, 55 S 760].

35. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 441.

36. Propriety of expenditure by representative for see supra § 522.

37. Ala.—Hatchet v. Curbow, 59 Ala. 516; Bendall v. Bendall, 24 Ala. 295, 60 AmD 469.

Cal.—In re Aldersley, 174 Cal. 366, 163 P 206; Van Emon v. Tulare County Super. Ct., 76 Cal. 589, 18 P 877, 9 AmSR 258; In re Koppikus, 1 Cal. A. 84, 81 P 732. But compare Matter of Hincheon, 159 Cal. 755, 116

ample,[38] such expenditure being sometimes considered a part of the "funeral expenses."[39] But the expenditure in this connection which will be allowed against the estate must be reasonable, taking into consideration the amount of the estate and also its condition as to solvency or insolvency,[40] and as the erection of a monument is not a matter of such urgent and immediate necessity as the funeral and interment, this expense should be incurred only by, or at least with the consent of, the personal representative; and where a person having no authority in the premises from the representative has ordered and procured the erection of a tombstone or monument, the courts have refused to hold the estate liable either to the person who actually furnished the tombstone or monument, or to the person who ordered and procured the same in case he has paid therefor.[41]

[§ 930] **e. Burial Lots.**[42] The cost of a burial lot for interment, especially where the purchase of a place of burial is immediately necessary, is allowed either as a direct charge against the estate or by holding the estate liable to reimburse a person who has paid for it,[43] subject like other similar charges to the rule that it must be reasonable;[44] but a debt incurred by the widow in inclosing the

P 47, 36 LRANS 303 (a claim for moving the remains of testator's mother and sister to a certain burial plot and erecting a monument over testator's grave, although pursuant to his request, was not binding on his executors, the will containing no directions in this regard).

Conn.—Fairman's App., 30 Conn. 205.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ind.—Pease v. Christman, 158 Ind. 642, 64 NE 90; In re Gray, (A.) 91 NE 745.

Iowa.—In re Lester, 169 Iowa 15, 150 NW 1033, AnnCas1917B 255; Lutz v. Gates, 62 Iowa 513, 17 NW 747; Crapo v. Armstrong, 61 Iowa 697, 17 NW 41.

Ky.—Hespen v. Hespen, 105 SW 99, 31 KyL 1328.

La.—Smith's Succ., 9 La. Ann. 107.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

Mich.—Jackson v. Leech, 113 Mich. 391, 71 NW 846.

Miss.—Donald v. McWhorter, 44 Miss. 124.

N. J.—Griggs v. Veghte, 47 N. J. Eq. 179, 19 A 867.

N. Y.—Laird v. Arnold, 42 Hun 136; Laird v. Arnold, 25 Hun 4; Owens v. Bloomer, 14 Hun 296; Matter of Howard, 3 Misc. 170, 23 NYS 836; Wood v. Vandenburgh, 6 Paige 277; Valentine v. Valentine, 4 Redf. Surr. 265; Matter of Mount, 3 Redf. Surr. 9 note; Matter of Erlacher, 3 Redf. Surr. 8; Cornwell v. Deck, 2 Redf. Surr. 87.

Pa.—Crosson's App., 125 Pa. 380, 17 A 423; In re Porter, 77 Pa. 43; McGlinsey's App., 14 Serg. & R. 64; Lutton's Est., 17 Pa. Super. 342 [aff 10 Kulp 161]; Cullen's Est., 8 Pa. Super. 494; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; Duffy's Est., 9 Kulp 409; Meyer's Est., 18 Phila. 42.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

Tenn.—Cate v. Cate, (Ch. A.) 43 SW 365.

Ont.—Menzies v. Ridley, 2 Grant Ch. (U. C.) 544.

[a] **An executor can bind the estate** for the purchase price of a suitable tombstone for his testator. Jackson v. Leech, 113 Mich. 291, 71 NW 846. Contra Durkin v. Langley, 167 Mass. 577, 46 NE 119.

[b] **The executor need not consult the relatives** of decedent as to the purchase of a tombstone. Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356.

[c] **Even though the estate is insolvent** a suitable tombstone may be allowed for. Fairman's App., 30 Conn. 205; Crapo v. Armstrong, 61 Iowa 697, 17 NW 41.

[d] **Where the testator has created a special fund** for the purpose of erecting a monument, no allowance will be made out of the general assets. Durkin v. Langley, 167 Mass. 577, 46 NE 119.

[e] **Monument ordered by decedent.**—The cost of a monument ordered at the expense and request of decedent, who approved the contract and promised to pay therefor, is a proper charge against the estate. Cate v. Cate, (Tenn. Ch. A.) 43 SW 365.

[f] **Subjecting land to claim.**—A claim for the price of a monument sold to the personal representative is a debt of the estate for payment of which the land of the decedent can be sold at the instance of the person furnishing the tombstone. Laird v. Arnold, 42 Hun (N. Y.) 136.

[g] **Family monument.** — The estate of a deceased father is not liable for the erection by his sons of a family monument to the memory of the father and other members of the family. Morgan v. Morgan, 83 Ill. 196. But compare In re Aldersley, 174 Cal. 366, 163 P 206 (fact that monument is intended to serve also as monument for grave of another no objection to allowance).

[h] **A claim for a tomb is not a debt against the community** but must be borne by the estate of the deceased partner. Smith's Succ., 9 La. Ann. 107.

38. Allen v. Allen, 3 Dem. Surr. (N. Y.) 524.

39. Pease v. Christman, 158 Ind. 642, 64 NE 90; State v. St. Louis County Prob. Ct., 138 Minn. 107, 164 NW 365, LRA1918A 766; Laird v. Arnold, 42 Hun (N. Y.) 136; Owens v. Bloomer, 14 Hun (N. Y.) 296; Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

[a] **Contrary view.**—Sinnott v. Kenaday, 14 App. (D. C.) 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339]; In re Lester, 169 Iowa 15, 150 NW 1033, AnnCas1917B 255; Sweeney v. Muldoon, 139 Mass. 304, 307, 31 NE 720, 52 AmR 708 ("The purchase of a tombstone cannot be considered as a part of the charges or necessary expenses of the funeral, within the meaning of these provisions of the statutes. It was not intended that any person might erect a tombstone to the deceased and charge the administrator with the cost of it, as a debt or a preferred debt against the estate. The necessity for a decent burial arises immediately upon the decease, and the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose; but there is no similar necessity for the erection of a tombstone, and, if a tombstone is erected without the authority of the administrator, the statutes have not made the cost of erecting it a debt of the estate").

40. Ala.—Bendall v. Bendall, 24 Ala. 295, 60 AmD 469.

Conn.—Fairman's App., 30 Conn. 205.

Iowa.—In re Lester, 169 Iowa 15, 150 NW 1033, AnnCas1917B 255.

Ky.—Burbridge v. Roberts, 7 KyL 42.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

N. H.—Reynolds v. Jones, 78 N. H. 84, 97 A 557; Lund v. Lund, 41 N. H. 355; Brackett v. Tillotson, 4 N. H. 208.

N. Y.—Springsteen v. Samson, 32 N. Y. 703; Tickel v. Quinn, 1 Dem. Surr. 425.

Pa.—Webb's Est., 165 Pa. 330, 30 A 827, 44 AmSR 666; Lutton's Est., 17 Pa. Super. 342; O'Brien's Est., 23 Pa. Dist. 198; Miller's Est., 18 Pa. Dist. 216; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; Duffy's Est., 9 Kulp 409; In re Connolly, 11 PittsbLegJNS 355.

Tenn.—Cannon v. Apperson, 14 Lea 553.

Ont.—Archer v. Severn, 13 Ont. 316.

Sask.—In re Carley, 4 Sask. L. 280 (not allowed).

[a] **Illustrative cases as to the reasonableness of particular claims or expenditures.**—Bendall v. Bendall, 24 Ala. 295, 60 AmD 469; Burbridge v. Roberts, 7 KyL 42; Crothers v. Crothers, 123 Md. 603, 91 A 691; Lund v. Lund, 41 N. H. 355; Matter of Smith, 75 App. Div. 339, 78 NYS 130, 11 NYAnnCas 427; Matter of Shipman, 82 Hun 108, 31 NYS 571; Matter of Meuschke, 61 Misc. 9, 114 NYS 722; Matter of Howard, 3 Misc. 170, 23 NYS 836; Matter of Beach, 1 Misc. 27, 22 NYS 1079; Campbell v. Purdy, 5 Redf. Surr. (N. Y.) 434; Burnett v. Noble, 5 Redf. Surr. (N. Y.) 69; Matter of Luckey, 4 Redf. Surr. (N. Y.) 95; Matter of Erlacher, 3 Redf. Surr. (N. Y.) 8; In re Connolly, 11 PittsbLegJNS (Pa.) 355; Geiger's Est., 12 WklyNC (Pa.) 439; Cannon v. Apperson, 14 Lea (Tenn.) 553; Archer v. Severn, 13 Ont. 316.

41. Cal.—Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.

Ill.—Foley v. Bushway, 71 Ill. 386.

Ind.—Lerch v. Emmett, 44 Ind. 331.

Iowa.—Argo v. Donover, 80 Iowa 214, 45 NW 744.

Mass.—Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708.

Wis.—Samuel v. Thomas, 51 Wis. 549, 8 NW 361.

But see Menzies v. Ridley, 2 Grant Ch. (U. C.) 544 (where testator's sister had procured the monument, and the widow, who was the acting executrix, having in hand no funds of the estate, gave her note to the sister, and it was held that, although the note was not paid, the amount thereof should be allowed to the executrix as against objections of the testamentary guardian of infant legatees).

[a] **The administrator is not authorized to pay** for a tombstone purchased after his appointment, but not at his request. Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708.

[b] **The fact that the administrator knew** of the work being done and did not object made no difference. Foley v. Bushway, 71 Ill. 386.

[c] **A widow** is not an "heir" within the meaning of a statute providing that heirs can erect monuments to the dead, and she cannot erect a monument at expense of her husband's estate. Higginbothom v. Higginbothom, 177 Ky. 271, 197 SW 627, LRA1918A 1105.

42. Propriety of expenditure by representative for see supra § 523.

43. Marple v. Morse, 180 Mass. 508, 62 NE 966; Pettengill v. Abbott, 167 Mass. 307, 45 NE 748; Sweeney v. Muldoon, 139 Mass. 304, 31 NE 720, 52 AmR 708; Donald v. McWhorter, 44 Miss. 124; Allen v. Allen, 3 Dem. Surr. (N. Y.) 524.

44. Pettengill v. Abbott, 167 Mass. 307, 45 NE 748.

burial lot is not payable out of the estate.[45] Where decedent was buried in her father's cemetery lot, the cost of walling up her grave, the work being ordered by her father, was allowed against her estate.[46]

[§ 931] **f. Services Rendered to Estate.**[47] A reasonable compensation for services rendered to the estate after decedent's death is payable out of the estate,[48] either by allowing a claim directly against the estate in favor of the person who has rendered such services,[49] or by allowing the representative credit in his accounts for the amount expended by him for services, which is the more usual course where the services were rendered under a contract or agreement directly with him,[50] the view of some courts being that under such circumstances the representative only, and not the estate, is directly liable to the person performing the services,[51] unless the representative is insolvent,[52]

45. Meyer's Est., 18 Phila. (Pa.) 42.

46. Webb's Est., 18 Pa. Dist. 179 ("The cost of a grave in a public plot would not have been much less").

47. Expenditures by representative for counsel fees and costs see supra §§ 530–549.

Expenses of administration see infra § 933.

48. Cal.—In re Hite, 155 Cal. 448, 101 P 448.

Ill.—Matter of Dyer, 201 Ill. A. 183.

Iowa.—Lund v. Riggs, 174 Iowa 79, 156 NW 161.

Kan.—Milbourne v. Kelley, 93 Kan. 753, 145 P 816, AnnCas1916D 389.

Ky.—Miller v. Keown, 176 Ky. 117, 195 SW 430.

La.—Pons' Succ., 142 La. 721, 77 S 515, AnnCas1918D 939; McNeely v. McNeely, 50 La. Ann. 823, 24 S 338.

Mich.—Marx v. McMorran, 136 Mich. 406, 99 NW 396.

Mo.—Merritt v. Merritt, 62 Mo. 150; State v. Garesche, 198 Mo. A. 457, 200 SW 735; Mayhall v. Stoecker, (A.) 191 SW 1117; Powell v. Powell, 23 Mo. A. 365.

Nebr.—Hazlett v. Moore, 89 Nebr. 372, 131 NW 589.

N. Y.—Matter of Kings County Trust Co., 86 Misc. 176, 149 NYS 124. But compare Herrlich v. Hyman, 61 Misc. 606, 607, 113 NYS 971 ("The plaintiff claims that the action is based on a quantum meruit and not on an express contract, but the allegations are of services rendered for the defendants' intestate after his death and not in his lifetime. He was not bound to pay for them at any time up to the moment of his death, and so his representatives cannot be held liable by reason of his liability").

Oh.—Trumpler v. Royer, 95 Oh. St. 194, 115 NE 1018.

Pa.—Foster's Est., 63 Pa. Super. 169; Crow's Est., 19 Pa. Dist. 120; Kraan's Est., 14 Pa. Dist. 136, 31 Pa. Co. 93; Fluehr's Est., 11 Pa. Dist. 194.

R. I.—Connolly v. Dolan, 22 R. I. 60, 46 A 36, 84 AmSR 816.

Tex.—Hare v. Pendleton, (Civ. A.) 214 SW 948.

W. Va.—Shepherd v. Hammond, 3 W. Va. 484.

[a] **An allowance has been made for:** (1) The services of an attorney. Friend v. Graham, 10 La. 438 (services of an attorney in removing an administrator inure to the creditors and heirs, and should be paid for from the succession, although he was employed at the request of some of the heirs); In re Lutz, 175 Mo. A. 427, 162 SW 679; Hazlett v. Moore, 89 Nebr. 372, 131 NW 589. (2) The commission of an agent employed to sell real estate. Matson v. Pearson, 121 Mo. A. 120, 97 SW 983. (3) The services of decedent's business manager who, on his employer's death without known heirs, took charge of the property in good faith until the heirs were found. Bryan's Est., 180 Pa. 192, 36 A 738.

[b] **Services rendered after death pursuant to previous employment.**—Where an attorney was retained in a suit, and after the client's death he performed legal services in the same suit for the administrator, a claim presented to the administrator for fees in the suit, without going into details, must be considered as a claim against the estate for services rendered to the deceased during his lifetime. Stark v. Hart, 22 Tex. Civ. A. 543, 55 SW 378.

[c] **Defense of action by cosurety of decedent.**—Where the surviving cosurety on a bond has defended an action brought to collect it after decedent's death and thereby saved several hundred dollars, the estate of decedent is liable to him for one half of the counsel fees and costs incurred in such defense. Connolly v. Dolan, 22 R. I. 60, 46 A 36, 84 AmSR 816.

[d] **Litigation by creditor on behalf of estate.**—One of the creditors of an estate who in good faith maintains necessary litigation to save the property and secure its proper application is entitled to have the fees of his attorney paid from the estate. In re Weed, 163 Pa. 600, 30 A 278.

[e] **Allowance of representative's commission to person performing services.**—On a bill brought to enforce against an administratrix an agreement to give the complainant certain of the real estate of her intestate, in consideration that he would effect a compromise of certain claims against the estate, it was held that he might reasonably be allowed, as damages for nonperformance, besides his advances and interest, the commission of ten per cent for extra trouble in collecting the debts which the law would have allowed the administratrix. Shepherd v. Hammond, 3 W. Va. 484.

[f] **Fees of auctioneer at void sale.**—Where an auctionneer sold property at the request of the curator of a vacant estate, and it turned out that the estate was not vacant and the sale was therefore void for want of legal authority of the curator to sell, the auctioneer had no claim against the estate for his fees as auctioneer. Navarro's Succ., 24 La. Ann. 105.

[g] **Failure of representative to object.**—Where administrators, although cognizant of the services rendered by certain attorneys, interposed no objection, and it was expected that the estate should pay for such services as were directly beneficial to it, the attorneys were entitled to an allowance therefor, although the administrators had never employed them in such a manner as to be personally bound for such services. Marx v. McMorran, 136 Mich. 406, 99 NW 396.

[h] **Services not beneficial to estate.**—Where an attorney voluntarily gave advice and information to a prospective administrator in his individual capacity, who was thereby put on inquiry as to the existence of assets, which were discovered by the administrator through information obtained wholly from other sources because of the attorney's refusal to give such information, the attorney was not entitled to compensation as one who had rendered services beneficial to the estate, and his claim therefor could not be allowed. Flater v. Weaver, 108 Md. 668, 71 A 309.

[i] **Effect of threat of litigation.**—The fact that one of two attorneys who had rendered services to an executor stated that unless paid a large attorney's fee, and unless the notary was paid an equally large fee, there would be litigation over it did not deprive him of his right to a fee for the services. Cahill v. Bianki, 134 La. 617, 64 S 488.

[j] **Where an executor improperly employs a second attorney without discharging the one first employed,** and the two attorneys perform services beneficial to the estate, they will be allowed a single fee in a lump sum. Cahill v. Bianki, 134 La. 617, 64 S 488.

49. Cal.—In re Hite, 155 Cal. 448, 101 P 448.

Ind.—Baker v. Cauthorn, 23 Ind. A. 611, 55 NE 963, 77 AmSR 443.

Iowa.—Lund v. Riggs, 174 Iowa 79, 156 NW 161.

Ky.—Newcomb v. Newcomb, 60 SW 642, 22 KyL 1359; Jones v. Jones, 39 SW 251, 19 KyL 129.

La.—Kernan's Succ., 105 La. 592, 30 S 239.

Mo.—State v. Walsh, 67 Mo. A. 348.

Nebr.—Hazlett v. Moore, 89 Nebr. 372, 131 NW 589.

N. Y.—Jacobson v. Levine, 59 Misc. 449, 110 NYS 1002.

Or.—Knight v. Hamaker, 40 Or. 424, 67 P 107.

Pa.—In re Parry, 188 Pa. 38; 41 A 384, 68 AmSR 850.

Wis.—Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

[a] **Attorney's fees.**—The probate court may allow attorney's fees for services rendered to the administrator directly in favor of the attorney instead of in favor of the administrator, and order payment out of the assets of the estate. State v. Walsh, 67 Mo. A. 348.

[b] **Claim of attorney employed by administrator who has neglected his duties.**—The failure of an administrator, authorized to employ an attorney, to perform his duties as administrator does not prevent an attorney employed by him, and rendering services for the estate, from having a valid claim against the estate for fees, although such claim is also a personal claim against the administrator. Knight v. Hamaker, 40 Or. 424, 67 P 107.

[c] **Discretion of court.**—On an application by an attorney for compensation for services other than in ordinary probate proceedings, the probate court has the same discretion as in allowing to the administrator attorney's fees paid by him, and it should deny the application, although not opposed, if the services should not be paid for out of the estate. In re Hite, 155 Cal. 448, 101 P 448.

50. See supra § 529.

51. See supra §§ 484, 485.

52. Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26; Pike v. Thomas, 65 Ark. 437, 47 SW 110; Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46; In re Murray, 56 Or. 132, 107 P 19.

[a] **Judgment against representative returned unsatisfied.**—Where an execution on a judgment against an administratrix for legal services is returned unsatisfied, and the administratrix is insolvent, a judgment may be recovered against her in her representative capacity, to be paid from the funds of the estate. Sar-

or has removed from the jurisdiction,[53] or the claim is for the care of live stock.[54] In order to justify such an allowance, however, the services must have been performed for the estate itself; claims for services for the widow, heirs, or other parties in interest cannot be so allowed,[55] and a fortiori, it is proper to refuse an allowance for managing an estate to one who acted for a corporation wrongfully in charge of the estate.[56] It is also necessary that the services should have been performed either at the request of decedent made before his death or at the instance of some person having some authority, or at least some apparent authority, to act for decedent or his estate,[57] and compensation has been refused for services rendered as a mere volunteer pending the appointment of an administrator.[58] So also a devisee doing work on an unfinished house pending administration, in order to protect the property, has been held not entitled to recover from the estate therefor.[59] The person performing the services must have done so in the expectation of being compensated therefor, and one who at the time of performing the services intended them to be gratuitous cannot thereafter obtain compensation therefor against the estate.[60] The allowance must be a reasonable one, taking into consideration the amount of the estate, the value of the services, and the time and trouble which their performance entailed,[61] and the amount rests largely in the discre-

torelli v. Ezagni, 64 Misc. 115, 118 NYS 46.

[b] **Insolvency of successor.**—The statute requiring only that the administrator who made the contract or incurred the liability shall be insolvent, it was not necessary, in an action against the successor of the administratrix contracting for the services, and others, to allege that the successor and the other defendants were insolvent. Leahart v. Deedmeyer, 158 Ala. 295, 48 S 371.

53. In re Murray, 56 Or. 132, 107 P 19.

54. In re Murray, 56 Or. 132, 107 P 19. But compare infra note 58 [a].

55. Ark.—Paget v. Bergen, 67 Ark. 522, 55 SW 938; McPaxton v. Dixon, 15 Ark. 97.

Cal.—In re Friedman, 176 Cal. 226, 168 P 21; In re Walden, 174 Cal. 776, 164 P 639; Matter of Marrey, 65 Cal. 287, 3 P 896.

Conn.—In re Simons, 55 Conn. 239, 11 A 36.

Fla.—Hedlick v. Hedlick, 38 Fla. 252, 21 S 101.

Iowa.—In re Officer, 122 Iowa 553, 98 NW 314.

Ky.—McGoodwin v. Shelby, 181 Ky. 230, 204 SW 171; Pepper v. Pepper, 98 SW 1039, 30 KyL 460; Clarke v. Garrison, 79 SW 240, 25 KyL 1999.

La.—Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135; Kernan's Succ., 105 La. 592, 30 S 239; Muntz v. Brown, 11 La. Ann. 472.

Md.—Koenig v. Ward, 104 Md. 564, 65 A 345.

Mich.—In re Myron, 165 Mich. 63, 130 NW 338; Gray v. Seeley, 132 Mich. 319, 94 NW 1061.

Mo.—Wilbur v. Wilbur, (A.) 201 SW 387.

N. C.—James v. Withers, 126 N. C. 715, 36 SE 178.

Pa.—McGregor's Est., 131 Pa. 359, 18 A 902; Nax's Est., 18 Pa. Dist. 423; In re Kelly, 10 Pa. Dist. 297, 25 Pa. Co. 254; Lewis' Est., 6 Pa. Co. 457; Grant's Est., 18 LancLRev 36.

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899.

Wis.—Ford v. Ford, 88 Wis. 122, 59 NW 464.

[a] **Illustration.**—Testator sold his land to his son, taking notes. He left his estate to his wife for life, with remainder to his children. The widow purchased other land, giving notes therefor, and subsequently assigning the son's notes as collateral security, and on suit on both sets of notes the widow and son employed claimant as attorney, and after adverse judgment and before sale he filed a suit for the settlement of the estate, and compelled the former plaintiff to seek her relief in this suit. Claimant also filed a claim against the estate in favor of the son's wife. It was held that, in allowing claimant's fees as attorney for the executors, he was not entitled to compensation for the services rendered the widow and the son and his wife. Clarke v. Garrison, 79 SW 240, 25 KyL 1999.

[b] **An attorney for absent heirs,** who has rendered no beneficial services to the succession, is not entitled to a fee out of the estate. Delano's Succ., 125 La. 869, 51 S 1019.

[c] **Services rendered in working decedent's farm or caring for his widow** after his death are not provable against his estate, unless under contract with him. In re Myron, 165 Mich. 63, 130 NW 338.

[d] **The expenses of litigation between the heirs** of an intestate as to their respective rights cannot be made a general charge against the succession. Hughes' Succ., 14 La. Ann. 863.

[e] **Contest over administration.**—In a contest for the administration of a succession the attorney of the defeated applicant has no claim for his services against the succession, but in a case where the defeated applicant is named as an alternate executor in the will of the deceased, his attorney will be entitled to a reasonable compensation from the succession for such of his services as were beneficial to the estate, such as procuring an inventory and the appointment of an attorney of absent heirs and the like. Florance's Succ., 36 La. Ann. 304.

[f] **Where allowance made to suspended administrator for services.**—Where, on settling the account of an administrator who had been suspended, the court allowed him a certain sum for the services of a certain attorney, such attorney cannot recover such sum from the successor of such administrator or from the estate, but he must look for pay to his employer. McKee v. Soher, 138 Cal. 367, 71 P 438, 649.

[g] **Attorney's fees of infant who is a necessary party to suits involving estate.**—Where an infant who has no property except his prospective interest in a decedent's estate is a necessary party to suits for construction of the will and involving the estate, none of which are commenced by him or on his behalf, expenses for an attorney, incurred by his guardian ad litem, will be allowed out of the estate as part of the expenses of settlement. Ford v. Ford, 88 Wis. 122, 59 NW 464.

[h] **Incidental benefit to estate.**—Where attorneys representing half the claims against intestate's estate devoted much time to investigating its condition, and applied for removal of the administrator, but induced him to resign without compensation, and the widow and heirs of deceased waived their exemptions, these arrangements benefiting the estate in the sum of sixteen thousand dollars, it was held that they, not having acted otherwise than under the employment by their clients, were not entitled to an allowance for services to the estate. In re Officer, 122 Iowa 553, 98 NW 314.

56. Davidson v. I. M. Davidson Real Estate, etc., Co., 249 Mo. 474, 155 SW 1.

57. Ala.—Hearrin v. Savage, 16 Ala. 286.

Colo.—In re Currier, 19 Colo. A. 245, 74 P 340.

Ind.—Baker v. Cauthorn, 23 Ind. A. 611, 55 NE 963, 77 AmSR 443.

Iowa.—In re Officer, 122 Iowa 553, 98 NW 314.

Ky.—Conrad v. Conrad, 156 Ky. 231, 160 SW 937.

Mont.—Wight v. Dolenty, 53 Mont. 168, 162 P 387.

N. Y.—McMahon v. Smith, 136 App. Div. 839, 121 NYS 736 [app dism 202 N. Y. 587 mem, 96 NE 112 mem]; Jacobson v. Levine, 59 Misc. 449, 110 NYS 1002.

Oh.—In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44.

Pa.—Cary's Est., 10 Kulp 227.

Man.—Dean v. Lehberg, 17 Man. 64.

[a] **Acts of representative prior to qualification.**—Acts done by an executor in the interest of his trust, prior to his qualification as such, become binding on the estate upon his qualification; hence attorneys who, previous to an executor's qualification, gave him advice as to whether he could qualify and as to his bond and rendered services in procuring such bond are entitled to file their claim therefor against, and collect it out of, the estate. Baker v. Cauthorn, 23 Ind. A. 611, 55 NE 963, 77 AmSR 443.

58. Mathie v. Hancock, 78 Vt. 414, 63 A 143.

[a] **Illustration.**—Where plaintiff, after the death of his employer, continued to furnish feed for and exercise his horses until they were taken possession of by his employer's administrator, and it did not appear that it was necessary for plaintiff to do so, either on grounds of humanity or otherwise, he was a mere volunteer, and was not entitled to recover therefor on a quasi contract as against such administrator. Mathie v. Hancock, 78 Vt. 414, 63 A 143.

59. Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.

60. Butcher v. Geissenhainer, 125 App. Div. 272, 109 NYS 159; Royston v. McCulley, (Tenn. Ch. A.) 59 SW 725, 52 LRA 899.

61. U. S.—Florida Internal Imp. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

Ky.—Conrad v. Conrad, 156 Ky. 231, 160 SW 937; Clarke v. Garrison, 79 SW 240, 25 KyL 1999.

La.—Cahill v. Bianki, 134 La. 617, 64 S 488.

Mich.—Marx v. McMorran, 136 Mich. 406, 99 NW 396.

N. Y.—Matter of Kings County Trust Co., 86 Misc. 176, 149 NYS 124.

Pa.—Kraan's Est., 14 Pa. Dist. 136, 31 Pa. Co. 93; Bayle's Est., 12 Pa. Dist. 73, 28 Pa. Co. 125, 19 Montg. Co. 134.

W. Va.—Lynch v. Spicer, 53 W. Va. 426, 44 SE 255; Fowler v. Lewis, 36 W. Va. 112, 14 SE 447.

[a] **In determining what is a reasonable attorney's fee** for services rendered in the settlement of a decedent's estate, the court should consider not only the amount of the estate and the character of the services rendered, but also the fact that part of the services were not properly chargeable to the estate, but to devisees or claimants. Clarke v. Garri-

tion of the court.[62] A claim against an estate for services of an attorney, employed by the special administrator in a contest over decedent's will, should be disallowed, where the parties stipulated for a discontinuance of the suit and disallowance of one will and for the probating of the other without costs to either party.[63]

[§ 932] **g. Loans or Advances to Estate.** While advances to an estate are not commonly recoverable by action at law against the executor or administrator,[64] the equity and probate rule favors the reimbursement of loans or advances made suitably and in good faith by the representative, the surviving spouse, kindred, distributees, or creditors for the immediate benefit of the estate.[65] But an allowance to reimburse an annuitant under the will

son, 79 SW 240, 25 KyL 1999.

[b] **Character of services the main consideration.**—"While an attorney should have a more liberal allowance made him for his services in advising the personal representative in the settlement of a large estate than he should where less money is involved, his fee should, in the main, be regulated by the character of the services he renders the estate. If this service is valuable, his compensation should be liberal. If it is not valuable, and yet competent and good his compensation should be fair. No fixed rule can be adopted by which a scale of fees for attorneys can be laid down. All that can be said is that they must be reasonable, taking into consideration the character of services rendered, the time employed, the size of the estate, and the extent of the litigation." Harding v. Harding, 132 Ky. 133, 154, 116 SW 305, 311.

[c] **The court should also consider** the fact that part of the services were not properly chargeable to the estate, but to devisees or claimants. Clarke v. Garrison, 79 SW 240, 25 KyL 1999.

[d] **Allowance held reasonable.**—An allowance of eighteen hundred dollars to a lawyer for services requiring a trip to Europe to attend to the transportation of the body of a deceased person from Europe is not excessive, where the services involved the loss of fifty-five days from professional duties, and although not strictly professional, were undertaken on a telegram from deceased's wife, from which claimant, who was her legal adviser, might infer that she needed legal advice. In re Parry, 188 Pa. 38, 41 A 384, 68 AmSR 850.

[e] **Attorney's fees held reasonable.**—(1) Where an administrator was sued on two notes, one for fifteen thousand dollars and the other for twenty-one thousand pounds English money, and defeated the action as to the latter note, the allowance to his attorneys of a fee of twenty-five hundred dollars will not be disturbed on appeal, there being uncontradicted evidence that the fee is reasonable and customary. Newcomb v. Newcomb, 60 SW 642, 22 KyL 1359 (holding further that the fact that in litigation then pending the bulk of the estate was afterward adjudged to plaintiff in such action as executrix under a foreign probate of a will of decedent, and that there would have been no occasion for her action if she had waited until the termination of that litigation, did not affect the amount of compensation to which the attorneys for the administrator were entitled for defending that action). (2) A fee of one thousand dollars for two attorneys who served the executor of an estate worth over eighty thousand dollars is not excessive, although the executor was relieved of his trust by heirs represented by other attorneys. Cahill v. Bianki, 134 La. 617, 64 S 488.

[f] **Attorney's fees held unreasonable.**—(1) An allowance of seven thousand five hundred dollars to an attorney for defending a suit for fraud brought against the executors of an estate amounting to about two hundred thousand dollars and for prosecuting a suit for the construction of the will, and defending a suit involving back taxes, and advising the executors as to the disposition of the estate, is unreasonable and should be reduced to three thousand five hundred dollars. Baldwin v. Barber, 148 Ky. 370, 146 SW 1124. (2) An allowance of twelve hundred dollars to attorneys representing an estate is excessive, where it appeared that their services were largely rendered in promoting the individual interests of heirs. Bickel v. Bickel, 79 SW 215, 25 KyL 1945.

62. Conrad v. Conrad, 156 Ky. 231, 160 SW 937; Delano's Succ., 125 La. 869, 51 S 1019.

[a] **Discretion not disturbed on appeal.**—The fee of counsel for succession, as fixed by the judge before whom the services are rendered, will not be disturbed on appeal, where not manifestly above the customary professional charges in such cases. Delano's Succ., 125 La. 869, 51 S 1019.

63. Zimmer v. Saier, 155 Mich. 388, 119 NW 433, 130 AmSR 575.

64. Hourquebie v. Girard, 12 F. Cas. No. 6,732, 2 Wash. C. C. 212; Benedict v. Chase, 58 Conn. 196, 20 A 448, 8 LRA 120; Brandon v. Brandon, 4 Thomps. & C 385, 50 HowPr 328 [aff 66 N. Y. 401].

65. U. S.—Baring v. Putnam, 2 F. Cas. No. 984, 1 Holmes 261.

Ala.—Jenks v. Terrell, 73 Ala. 238.

Ark.—Whittaker v. Wright, 35 Ark. 511.

Conn.—Benedict v. Chase, 58 Conn. 196, 20 A 448.

Iowa.—In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295.

Ky.—Gilliam v. Gilliam, 146 Ky. 15, 141 SW 370.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

Mo.—Maupin v. Boyd, 5 Mo. 106.

Mont.—In re Williams, 47 Mont. 325, 330, 132 P 421 [cit Cyc].

Nebr.—Tillson v. Halloway, 98 Nebr. 509, 153 NW 545.

N. J.—Van Duin v. Van Duin, 42 N. J. Eq. 325, 5 A 647.

N. Y.—Bolton v. Myers, 146 N. Y. 257, 40 NE 737; Matter of Fingar, 101 Misc. 516, 168 NYS 361; Atlantic Trust Co. v. Powell, 23 Misc. 289, 50 NYS 866.

N. C.—Johnston v. Cutchin, 133 N. C. 119, 45 SE 522.

Oh.—Veldman v. Lindeman, 7 Oh. Dec. (Reprint) 676, 4 CincLBul 911.

Pa.—In re Bentley, 196 Pa. 497, 46 A 898; In re Mustin, 188 Pa. 544, 41 A 618; McCurdy's App., 5 Watts & S. 397; Hartz's Est., 20 LancLRev 25.

Eng.—Robison v. Killey, 30 Beav. 520, 54 Reprint 991; Spackman v. Holbrook, 2 Giffard 198, 66 Reprint 83,

Ont.—Loftus v. Harris, 30 Ont. L. 479, 5 OntWN 770.

"While it is not within the power of an executor or administrator by advances made by him to the estate to thereby make the estate his debtor regardless of the character or quality of his claim, yet it is equally well settled that such advances, made suitably and in good faith for the benefit of the estate, may be allowed and recovered as claims against the estate." In re Williams, 47 Mont. 325, 330, 331, 132 P 421 [cit Cyc].

"It is no argument to say that a claim for advances should not be allowed, since the administrator would be placed in the situation of passing upon his own claim. Section 7542, Revised Codes, specifically recognizes the fact that an executor or administrator may be a creditor of an estate, and provides the method of allowing such a claim." In re Williams, supra.

[a] **This rule has been applied** (1) to a payment of debts by the widow (Gilliam v. Gilliam, 146 Ky. 15, 141 SW 370), (2) before the appointment of an administrator (Jenks v. Terrell, 73 Ala. 238). (3) A creditor may pay taxes to protect his interest and be reimbursed out of the proceeds of a foreclosure sale. Whittaker v. Wright, 35 Ark. 511. (4) Debts of a testator, paid in good faith by his executrix and residuary life legatee, are properly allowed against his estate, although the legatee took possession of the estate without proving the will. Ver Duin v. Ver Duin, 42 N. J. Eq. 325, 5 A 647. (5) Where a deceased wife's will expressly directs the payment of funeral expenses from her estate, the husband is entitled to reimbursement for such expenses. In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295. (6) Where testator bequeathed his estate to his wife, with directions to support and educate the children until they were of age, and provided that after her death the property should be divided among his children, and letters of administration were granted to the widow and testator's brother, and after the widow's death the brother continued the maintenance of the minor children as one family for two years, until the appointment of a general guardian and in so doing expended his own money, equity could allow him to be reimbursed, he having done what on application the court would have directed him to do. Brandon v. Brandon, 4 Thomps. & C. 385, 50 HowPr 328 [aff 66 N. Y. 401]. (7) A claim of testator's daughter for repairs to the real estate and other expenses incurred by the testator and paid by the daughter out of her earnings was properly allowed, but money advanced to pay household expenses was not a proper charge, where the evidence shows that it was voluntarily contributed. Matter of Meuschke, 61 Misc. 9, 114 NYS 722.

[b] **Money credited to decedent by mistake and drawn by representative.**—An administrator de bonis non is liable to a banker for money credited by mistake to the intestate in his lifetime, and drawn by and paid to the original administrator in the belief that it belonged to the estate. Baring v. Putnam, 2 F. Cas. No. 984, 1 Holmes 261.

[c] **Representative stands as assignee of original creditors.**—An executor can be allowed for debts of the estate paid by him out of his own means only as assignee of such debts in place of the original creditors. Vulte v. Martin, 44 HowPr (N. Y.) 18.

[d] **Dower in mortgaged land.**—The fact that the widow of one who had given a mortgage upon realty took dower in the land does not entitle the mortgagee, in a distribution of the assets of the estate of the deceased husband, to be treated as having "contributed" anything toward the payment of its liabilities. Bellerby v. Thomas, 105 Ga. 477, 30 SE 425.

[e] **Loan to pay debt barred by limitations.**—A note executed by an executor for money borrowed to pay a debt of testator's which was barred by limitations is not a charge against the estate, but is binding against the executor and the beneficiaries under the will who authorized the executor

for debts of the testator paid from the annuity is erroneous where there is no proof that any money from which the annuity could have been paid has been applied to the payment of testator's debts.[66]

Interest may and should be allowed to an executor or administrator who advances money for the benefit of the estate under proper circumstances.[67]

Advances for benefit of beneficiaries. A claim for reimbursement out of the estate cannot be successfully urged by one whose advances were made for the individual benefit of those entitled to share in the estate, and not for the benefit of the estate itself.[68]

[§ 933] **h. Expenses of Administration.**[69] The legitimate expenses of administration are to be met out of the assets of the estate,[70] but the proper mode of doing this is for the representative to make the necessary disbursements, for which he will be allowed credit in his accounts, rather than by allowing such expenses as a direct charge against the estate,[71] as the expenses of administration are not usually considered debts of decedent.[72] A statute limiting the lien of debts of decedent against his real estate does not run against claims of executors for compensation due them, for such a claim is not a debt of decedent but a part of the expenses of administration.[73]

Administration expenses have been held to include the expenses of probating the will[74] or defending

to make such loan. Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258.

66. Matter of Gedney, 33 Misc. 160, 68 NYS 627.

67. Re McRae, 28 N. S. 20 [foll Menzies v. Ridley, 2 Grant Ch. (U. C.) 544] (holding, however, that in the case at bar a proper case for the allowance of interest had not been made out).

68. McGraw v. Tillery, 176 Ala. 451, 58 S 421; Boudreaux v. Lower Terrebonne Refining, etc., Co., 127 La. 98, 53 S 456.

[a] **Illustration.**—Where a plantation was operated by the widow of decedent individually and as the tutrix of her children and by the major children jointly for their joint account as property belonging to them of which they were in actual possession, and on that theory they borrowed money for operating the plantation and executed a mortgage to secure it, the creditor, who took the notes of the widow and the heirs individually for the debt, together with the mortgage from them individually, and who sued them individually, could not urge that he was a creditor of the succession of decedent. Bourdreaux v. Lower Terrebonne Refining, etc., Co., 127 La. 98, 53 S 456.

69. Costs of administration as preferred claim see infra § 1160.

Services rendered to estate generally see supra § 931.

70. Ark.—Massey v. Doke, 123 Ark. 211, 185 SW 271; Yarborough v. Ward, 34 Ark. 204.

Colo.—U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

Ga.—Mapp v. Long, 62 Ga. 568.

Ill.—Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300; In re Thurber, 209 Ill. A. 533.

Iowa.—In re Wells, 142 Iowa 255, 120 NW 713.

La.—McNeely's Succ., 50 La. Ann. 823, 24 S 338.

Mass.—Brown v. Kelsey, 2 Cush. 243; Sawyer v. Baldwin, 20 Pick. 378.

Mo.—Callaway v. Title, etc., Co., 132 Mo. A. 466, 111 SW 905.

N. Y.—Matter of Scherer, 111 App. Div. 23, 30, 97 NYS 171 [cit Cyc]; Douglas v. Yost, 64 Hun 155, 18 NYS 830; In re Mahoney, 37 Misc. 472, 75 NYS 1056.

Oh.—Harbeson v. Mellinger, 18 Oh. Cir. Ct. N. S. 504, 35 Oh. Cir. Ct. 195, 2 Oh. A. 75.

Pa.—Cobaugh's App., 24 Pa. 143; Wilson's App., 3 Walk. 216; Carey's Est., 10 Kulp 227; France's Est., 16 WklyNC 350.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728; Hazard v. Engs, 14 R. I. 5.

W. Va.—Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

Wis.—Ferguson v. Woods, 124 Wis. 544, 102 NW 1094.

Eng.—In re King, [1904] 1 Ch. 363.

Ont.—Re Munro, 12 OntWN 371.

[a] **Meaning of "testamentary expenses" as used in will.**—In re King, [1904] 1 Ch. 363; In re St. Albans, [1900] 2 Ch. 873; In re Lewis, [1900] 2 Ch. 176; In re Maryon-Wilson, [1900] 1 Ch. 565.

[b] **Meaning of "executorship expenses" as used in will.**—Sharp v. Lush, 10 Ch. D. 468.

[c] **Expenses of administration of husband's estate not chargeable against estate of widow.**—Moreland v. Gilliam, 21 Ark. 507.

[d] **Ascertaining pregnancy of widow.**—Rollwagen v. Powell, 8 Hun (N. Y.) 210.

[e] **Payment by a person liable as guarantor** does not affect the liability of the estate. In re Thurber, 209 Ill. A. 533.

71. Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Ark.—Yarborough v. Ward, 34 Ark. 204.

Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; In re Kruger, 143 Cal. 141, 76 P 891; Sullivan v. Lusk, 7 Cal. A. 186, 94 P 92.

Conn.—Chambers v. Robbins, 28 Conn. 544.

Iowa.—Clark v. Sayre, 122 Iowa 591, 98 NW 484.

Mo.—Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089.

N. Y.—Matter of McDonough, 132 App. Div. 614, 117 NYS 258; In re Nocton, 162 NYS 215.

Pa.—Christian's Est., 29 Pa. Co. 4.

Wis.—Brown v. McGee, 117 Wis. 389, 94 NW 363.

[a] **When rule not applicable.**—Where an attorney employed by executors in a will contest executed a release to them, providing that he would make no further personal claim against them for his services, but that any further claim should be made against the estate, such provision could not be treated as surplusage, on the theory that the attorney, having been employed by the executors prior to the probate of the will, could have maintained no claim against the estate, the rule that executors are personally liable on their contracts, although made for the benefit of the estate, and that ordinarily such contracts are not enforceable directly against the estate being neither absolute nor unqualified. Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779.

[b] **Testamentary provision excluding personal liability of representative.**—Where a will provided that the expenses of administration shall be charged upon and paid out of the estate of the testator both real and personal, the administratrix, to whom one half of the estate has been devised for life, and who is the assignee of the other half, is not personally liable for such expenses. Boynton v. Laddy, 10 NYS 622.

72. Ill.—Chicago Title, etc., Co. v. Fine Arts Bldg. Corp., 288 Ill. 142, 123 NE 300.

Iowa.—In re Smith, 165 Iowa 614, 146 NW 836; Clarke v. Sayre, 122 Iowa 591, 98 NW 484.

N. Y.—In re Mahoney, 37 Misc. 472, 75 NYS 1056; Matter of Franklin, 26 Misc. 107, 56 NYS 858.

Pa.—Beyer v. Keylor, 45 Pa. Super. 389; In re Borland, 34 PittsbLegJNS 227.

S. C.—Ex p. Simmons, 69 S. C. 385, 48 SE 279.

Wis.—Brown v. McGee, 117 Wis. 389, 94 NW 363.

[a] **Contract of administrator and heirs.**—Where the administrator and heirs enter into a contract with a real estate agent to sell the realty of the estate for a fixed commission, his claim is against the administrator and the heirs personally, and he has no claim for commission against the estate. Ex p. Simmons, 69 S. C. 385, 48 SE 279.

[b] **Contrary view.**—(1) "Whatever the law may be elsewhere, the status of expenses accruing after the death of testator or intestate and in connection with the administration and settlement of the estate is here by law absolutely fixed; such expenses are undoubtedly covered by the statutory classification of demands 'against the estate,' and no amount of ingenuity or skill in argument could demonstrate the contrary." U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 565, 98 P 828 [foll Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717]. (2) "The costs of administering said estate . . . are debts payable by said estate." Harbeson v. Mellinger, 18 Oh. Cir. Ct. N. S. 504, 507, 35 Oh. Cir. Ct. 195, 2 Oh. A. 75.

73. Cobaugh's App., 24 Pa. 143.

74. U. S.—Bradford v. Boudinot, 3 F. Cas. No. 1,765, 3 Wash. C. C. 122.

Ala.—Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.

Hawaii.—Notley v. Brown, 16 Hawaii 575.

Ind.—Fillinger v. Conley, 163 Ind. 584, 72 NE 597.

Mass.—Hampden Trust Co. v. Leary, 186 Mass. 577, 72 NE 88.

N. Y.—Douglas v. Yost, 64 Hun 155, 18 NYS 830.

R. I.—Hazard v. Engs, 14 R. I. 5.

[a] **Where a will was ultimately established,** attorneys employed by the executor named in the will, before probate, to resist a contest thereof, were entitled to payment of their fees from the assets of the estate. Fillinger v. Conley, 163 Ind. 584, 72 NE 597.

[b] **The expenses of resisting an appeal** from a decree admitting the will to probate are administration expenses. Hazard v. Engs, 14 R. I. 5.

[c] **Claim against realty.**—A claim for the expenses of having a will probated is not a liability against the real estate, except where the land has to be sold for payment of debts. Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.

[d] **No allowance for expenses connected with a pending contest.**—Credit will not be allowed a representative for expenditures made in connection with a contest over a will which is still pending, as liability

against an action for revocation of probate,[75] the expenses of litigation in behalf of the estate,[76] the compensation of the personal representative,[77] and an estate duty taxable under the laws of the country where decedent was domiciled.[78] Attorney's fees for services rendered to the representative in connection with the performance of his duties are expenses of administration and payable out of the assets,[79] and expenses incurred by the executor in carrying out the provisions of the will stand upon the same footing as expenses of administration.[80]

Expenses of administration have been held not to include the costs of a suit in which plaintiff, whose rights as heir, although recognized, were held extinguished, failed to take anything,[81] the costs of an unsuccessful plaintiff in a suit to obtain revocation of the probate of a will,[82] the expenses of an heir, incurred after an administrator was appointed, in hunting up other heirs or next of kin,[83] the cost of recording deeds to the administrator,[84] the expense of a sale of decedent's land by a stranger, although made under color of an order of the probate court,[85] the expenses attending an unsuccessful effort to establish a paper as the will of decedent,[86] or the premium on an executor's bond on sale of realty.[87] Payments in the adjustment of conflicting claims to an estate by those asserting title thereto cannot be construed as debts, or treated as expenses in settlement of the estate.[88] An heir who, as such, successfully prosecutes an action for removal of the executors, is not entitled to payment out of the estate of his expenditures in the removal, although he afterward becomes special administrator.[89] If a husband's curtesy estate in the property of his deceased wife gives him possession to the exclusion of the administrator, the expenses of fencing the property, insurance on a building thereon, and other expenses for the benefit of the husband, are not chargeable against the estate.[90] Expenses incurred in taking testimony on a contest of a will are not expenses of the administration of an estate by a

for such expenditures cannot be fixed until the contest is determined. Titlow's Est., 11 Pa. Co. 625.

[e] **Probate obtained by stranger.**—Costs and expenses incurred in the propounding, establishing, and probate of a will by a person who is not therein named as executor and upon whom is cast no legal or moral duty to establish the will are not a proper charge against the estate. Gayle v. Johnson, 80 Ala. 388.

75. In re Prince, [1898] 2 Ch. 225 (these are included within "testamentary expenses" charged by the will upon the real estate).

[a] **Where the executor knew of the invalidity of the will** at the time when he procured probate thereof, the rule is otherwise. Morere's Succ., 3 La. A. (Orleans) 155.

76. Mass.—Hampden Trust Co. v. Leary, 186 Mass. 577, 72 NE 88.

N. Y.—Matter of Swart, 2 Silv. Sup. 585, 6 NYS 608; In re Mahoney, 37 Misc. 472, 75 NYS 1056.

Pa.—France's Est., 16 WklyNC 350.

Tex.—Manning v. Mayers, 79 Tex. 653, 15 SW 638.

Wis.—Ferguson v. Woods, 124 Wis. 544, 102 NW 1094.

[a] **Creditor's suits.**—In England a similar rule obtains as to costs in creditor's suits. Sanderson v. Stoddart, 32 Beav. 155, 55 Reprint 61; Newbegin v. Bell, 23 Beav. 386, 53 Reprint 152; Sutton v. Doggett, 3 Beav. 9, 43 EngCh 8, 49 Reprint 4; Gaunt v. Taylor, 2 Hare 413, 24 EngCh 413, 67 Reprint 170; Barker v. Wardle, 2 Myl. & K. 818, 7 EngCh 818, 39 Reprint 1157; Larkins v. Paxton, 2 Myl. & K. 320, 7 EngCh. 320, 39 Reprint 965; Loomes v. Stotherd, 1 Sim. & St. 458, 1 EngCh 458, 57 Reprint 183.

77. Cobaugh's App., 24 Pa. 143; Brown v. McGee, 117 Wis. 389, 94 NW 363; Re McRae, 28 N. S. 20.

[a] **A claim of an administrator whose appointment has been revoked** (1) for reimbursement for moneys expended and services rendered in good faith pursuant to his appointment is to be allowed, if at all, as a part of the expenses of administration. Brown v. McGee, 117 Wis. 389, 94 NW 363. (2) Such a claim renders the late administrator a "person interested" entitled to demand an accounting. Re McRae, 28 N. S. 20.

78. In re Kortright, 237 Pa. 138, 85 A 109.

79. U. S.—McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369.

Ark.—Kenyon v. Gregory, 127 Ark. 525, 192 SW 887.

Cal.—In re Riviere, 7 Cal. A. 755, 96 P 16.

Colo.—U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289.

Ky.—Root v. Green, 81 SW 243, 36 KyL 315.

La.—Gilmore's Succ., 8 La. A. (Orleans) 295.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Mich.—Marx v. McMorran, 136 Mich. 406, 99 NW 396.

Mo.—Goodman v. Goodman, 155 Mo. A. 574, 134 SW 1051; Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089.

N. Y.—In re Thompson, 41 Barb. 237; Matter of Crouch, 41 Misc. 349, 84 NYS 936.

Pa.—Fitzsimmons v. Safe Deposit, etc., Co., 189 Pa. 514, 42 A 41; Foster's Est., 63 Pa. Super. 169.

Philippine.—Escueta v. Sy-Juilliong, 5 Philippine 405; Philippine Trading Co. v. Crossfield, 5 Philippine 400.

Tex.—Callaghan v. Grenet, 66 Tex. 236, 18 SW 507; Williams v. Robinson, 56 Tex. 347; Gammage v. Rather, 46 Tex. 105.

W. Va.—Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

[a] **The lien of the attorney** is not lost by the transfer of the assets, unadministered, to a coexecutor by order of the surrogate. Matter of Crouch, 41 Misc. 349, 84 NYS 936.

[b] **A judgment recovered against an administrator for attorney's services** (1) rendered in the administration of the estate adjudges that the services constituted actual, necessary, just, and reasonable expenses of the administration, which must be borne by the estate. In re Thompson, 41 Barb. (N. Y.) 237 [aff 1 Redf. Surr. 490]. (2) Enforcement of judgment under New York statutes see In re Thompson, supra.

[c] **Participation of legatees in calling in attorney.**—A decedent's estate is properly charged with the counsel fees paid to counsel for services rendered for an administrator with the will annexed in defending the will against attack, although certain of the legatees, as well as the administrator, had a share in calling in such counsel. McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369.

[d] **Amount of allowance.**—Where a former attorney for the executors of an estate had represented them in the probate of the will, in the appointment and qualification of the executors and the preparation and presentment of the inventory and appraisement, and for more than a year had acted with reference to the settlement of the estate and presented four petitions for orders to make loans, for which services he was paid, when other attorneys were substituted, who made five reports for the executors which were simple matters of computation, and they received one thousand dollars for conducting a chancery suit for the construction of the will, and had been paid four hundred dollars additional for services rendered in the settlement of the estate, a claim for a further allowance to them of one hundred and fifteen dollars should be denied. Giger v. Bishop, 231 Ill. 472, 83 NE 289.

[e] **Proceeding in which allowed.**—Expenses and counsel fees of an executor must be allowed in the proceeding in which the expenses are incurred or the services rendered, and after settlement on appeal of the account of an executor in a decree for which no provision was made for payment of expenses or counsel fees in that proceeding, neither the judge of probate, nor the supreme court of probate, has power, in the settlement of a subsequent action, to allow him credit for such expenses and counsel either in connection with the hearing before the judge of probate or on appeal. In re Palmer, 110 Me. 441, 86 A 919.

[f] **An order of allowance is appealable** by the attorney or any person interested in the estate. In re Riviere, 7 Cal. A. 755, 96 P 16.

80. Brown v. Kelsey, 2 Cush. (Mass.) 243; Edwards v. Love, 94 N. C. 365; Sharp v. Lush, 10 Ch. D. 468.

[a] **The expense of managing a fund,** the income of which is given to a legatee for life, is a general charge upon the whole estate. Brown v. Kelsey, 2 Cush. (Mass.) 243; Sawyer v. Baldwin, 20 Pick. (Mass.) 378.

81. Truxillo v. Truxillo, 11 La. Ann. 412.

82. In re Prince, [1898] 2 Ch. 225.

83. In re Glynn, 57 Minn. 21, 58 NW 684.

84. Calvert v. Holland, 9 B. Mon. (Ky.) 458.

85. Swan v. Wheeler, 4 Day (Conn.) 137.

86. Gilbert v. Bartlett, 9 Bush. (Ky.) 49; Dodd v. Anderson, 197 N. Y. 466, 90 NE 1137, 27 LRANS 336, 18 AnnCas 738.

[a] **An allowance will not be made for the services of an attorney** employed to try to probate an invalid will. Gilbert v. Bartley, 9 Bush (Ky.) 49.

87. Clever's Est., 26 Pa. Dist. 80.

88. In re Wells, 142 Iowa 255, 120 NW 713.

89. Bell v. Thompson, 145 Cal. 646, 79 P 358.

90. Johnson v. Savage, 50 Or. 294, 91 P 1082.

temporary administrator which it is proper for him to pay from the funds of the estate.[91] The cost of raising a fund, including counsel fees, auctioneer's charges, commissions, etc., fall upon the fund, and are not chargeable as "costs of administration."[92] Where a testator gave his widow the income of all his property for life for her benefit and support, but provided that out of the income she should pay all necessary repairs on the buildings and all taxes, besides insurance, and the executors were empowered to pay all debts, it was held that, the executors having under a power from the wife collected the income from the property, the estate was not chargeable with the expense of collecting it, or with repairs, taxes, and insurance.[93] An administrator should not be allowed the expense of procuring evidence for use in an action against the estate,[94] especially where he is himself a lawyer and has been allowed the fees of attorneys in the action, and the testimony collected was never used.[95]

[§ 934] **i. Support, Etc., Furnished to Decedent's Family.** Support, attendance, and the like furnished by the executor or administrator to the surviving members of decedent's family should be charged by him against their respective shares in or allowances from the decedent's state, and debts incurred or expenditures made for these purposes do not constitute proper claims against the estate itself, or entitle him to reimbursement therefrom, nor may others sue the representative on such claims.[96] But where decedent by suitable provision in his will has imposed a duty of support upon his personal representative, reimbursement from the estate may be proper.[97] So also where testator left all of his estate to his wife during her widowhood, and she lived with the executor, promising to pay her board, it was held that the value of such board should be allowed to the executor in his account.[98]

[§ 935] **22. Claims of Executors or Administrators.** A claim of an executor or administrator against the estate stands upon an equal footing with other claims,[99] although in some jurisdictions such

91. Matter of McNamee, 25 Misc. 260, 55 NYS 425.

92. Teaf's Est., 7 Pa. Co. 463.

93. Matter of Turfler, 24 NYS 91, Pow. Surr. 421.

94. In re Collyer, 9 NYS 297, 1 Conn. Surr. 546.

95. Matter of Van Buren, 19 Misc. 373, 44 NYS 357.

96. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Ark.—Bomford v. Grimes, 17 Ark. 567.

Ga.—Pryor v. West, 72 Ga. 140.

Ind.—Sorin v. Olinger, 12 Ind. 29.

Mich.—In re Myron, 165 Mich. 63, 130 NW 338.

N. J.—In re Atkinson, 86 N. J. Eq. 173, 98 A 269 [cit Cyc]; Johnston v. Morrow, 28 N. J. Eq. 327.

N. Y.—Matter of Hyatt, 80 Misc. 466, 142 NYS 455; Matter of Alden, 75 Misc. 436, 135 NYS 511.

Pa.—Lawall v. Kreidler, 3 Rawle 300; Marschall's Est., 8 Pa. Dist. 313.

S. C.—Wilson v. Huggins, 45 S. C. L. 410.

[a] **The rule has been applied to:** (1) Medical attendance on the widow. Pinckard v. Pinckard, 24 Ala. 250. (2) Medical attendance on the surviving family. Bomford v. Grimes, 17 Ark. 567. (3) Supplies furnished to a surviving minor child. Pryor v. West, 72 Ga. 140. (4) Board and support of infant children. Black's Est., Tuck Surr. (N. Y.) 145. (5) Board and education of surviving minor children. Sorin v. Olinger, 12 Ind. 29. (6) Services to the widow. Flanders v. Greely, 64 N. H. 357, 10 A 686.

97. Reid v. Porter, 54 Mo. 265; Hammond v. Cronkright, 47 N. J. Eq. 447, 20 A 847; Wilson v. Staats, 33 N. J. Eq. 524.

[a] **Amount of allowance.**—Where a testator has directed that his executrix, his daughter, should use so much of the proceeds of sales of his real estate as should be necessary to support his wife, the daughter, with whom the mother boarded, may recover from the estate of testator for the actual cost of the board, and for money actually paid out for attendance for the mother, but should not be allowed for profits or for her own services, and no items being furnished as to clothing and spending money alleged to have been furnished to the mother by the daughter, the latter should not be allowed anything in that behalf. Hammond v. Cronkright, 47 N. J. Eq. 447, 20 A 847.

[b] **Testamentary direction to support out of rents and profits.**—Where a will empowered the executor to use the rents and profits of the whole real estate for the support of an infant legatee until she reached the age of twenty-one, and he made certain alleged expenditures in her behalf for board and other necessities, when he did not at the time have any money in his hands to which she was entitled, and it did not appear that he was related to the infant, or owed any duty to provide her with the alleged necessaries, he was not entitled to have his claim for money paid out for the infant's support adjudged a lien on the proceeds of a sale of the realty. Johnson v. Weir, 72 App. Div. 325, 76 NYS 76 [aff 36 Misc. 737, 74 NYS 358].

[c] **Will held not to impose liability for support upon estate.**—Lloyd v. Gill, 5 Tenn. Civ. A. 129.

98. Gee v. Hasbrouck, 128 Mich. 509, 515, 87 NW 621 ("The charge is, in our opinion, a proper one, being equivalent to money paid for her support").

99. U. S.—Nichols v. Hodges, 1 Pet. 562, 7 L. ed. 263.

Ark.—Free v. Maxwell, 212 SW 325.

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

Ga.—Oliver v. Hammond, 85 Ga. 323, 11 SE 655.

Ill.—Johnson v. Gillett, 52 Ill. 358. Compare Fragd v. Fragd, 175 Ill. A. 246 (an executor occupies a fiduciary relation to the heirs and legatees of the estate, and it is his duty to protect their interests against claimants, especially when he is a claimant).

Ky.—Dockins v. Vass, 124 SW 290.

Md.—Edelen v. Edelen, 11 Md. 415.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

Mo.—Callaway v. Title, etc., Co., 132 Mo. A. 466, 111 SW 905.

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 168 P 522; In re Williams, 47 Mont. 325, 132 P 421.

N. H.—Rollins v. Rollins, 77 N. H. 385, 92 A 339.

N. Y.—Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Matter of McCord, 2 App. Div. 324, 37 NYS 852, 3 NYAnnCas 64; Matter of Drummond, 100 Misc. 78, 165 NYS 78; Matter of Saunders, 57 Misc. 273, 109 NYS 316; Matter of Perry, 5 Misc. 149, 25 NYS 716.

Pa.—Moore's Est., 13 Pa. Dist. 137.

Vt.—Evarts v. Nason, 11 Vt. 122.

Wash.—In re Parkes, 178 P 830.

Eng.—In re Gilbert, [1898] 1 Q. B. 282.

"The law recognizes that an administrator may assume the attitude of a mere creditor against the estate without forfeiting his office or right to compensation." Goodman v. Griffith, 155 Mo. A. 574, 581, 134 SW 1051.

[a] **Care of decedent and wife.**—It was proper to allow an executor's claim against the estate for nursing and caring for the testator and his wife up to the time of their death, where the services were reasonably worth the sum charged. Dockins v. Vass, (Ky.) 124 SW 290.

[b] **Claim for services may be allowed.**—Edelen v. Edelen, 11 Md. 415 (the personal services of a widow and administratrix after the death of her husband, in nursing his slaves and furnishing them with necessaries, are a proper subject for a claim against the estate); Evarts v. Nason, 11 Vt. 122 (the time spent and the expenses incurred by an executor in procuring an injunction against a judgment obtained through the fraud of his coexecutor and a third person against the estate, without his knowledge, may be allowed to him in his account); Rix v. Smith, 8 Vt. 365 (it is not a sufficient objection to allowance to an administrator for services that they were for the purpose of realizing a balance supposed to be due to himself).

[c] **Services as attorney.**—Where a will directed that testator's executor might act as attorney for the estate and make charge therefor, and the executor furnished services, assigned his claim, and the assignor brought suit against the executor and his coexecutor on the claim, it was held that the action not being a case where action must first be brought against the executors and they in turn reimburse themselves out of the estate, and not imposing a personal liability on the coexecutor, the action would not lie, but the proper practice would be to present the claim for allowance against the estate. Jacobsen v. Levine, 59 Misc. 449, 110 NYS 1002.

[d] **Where the issuance of trust certificates was necessary** in connection with the disposition of part of the property of a testator who was possessed of a large estate, a trust company, which was one of the executors, was properly allowed payment for its services in acting as trustee for the holders of such certificates, such services being independent of its duties as executor. Moore's Est., 13 Pa. Dist. 137.

[e] **Indebtedness to estate.**—It is not a valid objection to a charge in an executor's account for expenses of sickness and burial of testator's wife during his lifetime that the executor was at the time he paid such expenses indebted to the estate. Titlow's Est., 11 Pa. Co. 625.

[f] **Proof of claim to procure order to sell realty.**—Where an estate is not fully settled, and the administrator has exhausted the personal assets in the payment of debts not his

claims require the approval of the probate court,[1] or a suitable person must be appointed to represent the estate with respect thereto.[2] Such a claim must, however, be established by legal evidence in the same manner as that of any other claimant,[3] and the representative must show that the demand is a valid[4] and existing[5] one. Such claims should be closely examined and scrutinized,[6] and, of course, rejected where they appear to be illegal or unjust.[7] Where a decedent agreed to convey to a person who afterward became his executor a city lot of a certain value as a compensation for services rendered, and died after the services were rendered, but before conveying the lot, it was held that the value of the lot was to be regarded as the measure of compensation, so that the executor was entitled to be allowed a claim for the value of the lot against the estate, and was not required to present the claim for the reasonable value of his services.[8]

The fact that the representative treats a fund as assets of the estate does not prevent him from claiming a share in that fund as his own by reason of a demand against the estate.[9]

Conveyance of property pursuant to contract of decedent. Under statutes providing in substance that, when the vendor in a contract to convey land dies before conveyance, the court may authorize the executor or administrator to convey the land on presentation of a verified petition by the purchaser, an executor or administrator has the same right as an outside party to file a petition for, and obtain, a conveyance of property which the decedent contracted during his lifetime to convey to him, and need not first resign his position as executor or administrator, in order to have his claim enforced against the estate.[10]

Legacy to executor in payment; proof of will. Where a testator leaves to his executor, who is a creditor, a less amount than is due in payment of the debt, and the executor proves the will, he cannot claim more than the amount so given to him.[11]

Laches may bar the assertion of a claim of the representative.[12]

[§ 936] **23. Purchase of Claims against Estate.** An executor or administrator is not allowed to make a profit by purchasing claims against the estate for less than their face value and then procuring an allowance for the full amount, but he is entitled to credit for only the amount actually expended in the purchase of such claim,[13] and the same rule

own, he may prove a claim due to him personally, preparatory to obtaining an order to sell the real estate. Johnson v. Gillett, 52 Ill. 358.

[g] **Failure of representative to collect note on which decedent surety.**—Where an administrator owns a note upon which the intestate is surety, and willfully omits to collect it when he can, and the principal afterward becomes insolvent, the estate is discharged. Jones v. Graham, 36 Ark. 383.

[h] **Credit on notes of representative held by others.**—A debt owing an executor by the estate cannot be paid by giving the executor credit on notes against him individually, held by strangers or by the heirs. Honeywell's Est., 10 Kulp (Pa.) 164.

[i] **Interest.**—An executor having a private demand against the testator upon which the testator told him to charge reasonable interest will not be allowed compound interest. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

1. Merrill v. Regan, 117 Me. 182, 103 A 155; Matter of Burr, 48 Misc. 56, 96 NYS 225 [rev on other grounds 118 App. Div. 482, 104 NYS 29].

[a] **Leave of court** is necessary to authorize an executor to pay his own claim. Sison v. Azarraga, 30 Philippine 129.

2. Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

3. Cal.—In re Heeney, 3 Cal. A. 548, 86 P 842.

N. Y.—McDermott v. Conlon, 153 App. Div. 69, 137 NYS 1105; Matter of Gill, 101 App. Div. 607, 91 NYS 1095 [rev on other grounds 183 N. Y. 347, 76 NE 274]; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Matter of Saunders, 57 Misc. 273, 109 NYS 316; Vulte v. Martin, 44 HowPr 18.

Pa.—In re Ellis, 254 Pa. 402, 98 A 1083.

Man.—Re Montgomery, 20 Man. 444.

Ont.—Shaw v. Tackaberry, 29 Ont. L. 490, 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

[a] **Uncontradicted evidence of the representative** is not sufficient. In re Heeney, 3 Cal. A. 548, 86 P 842.

[b] **Approval of the surrogate** is sufficient. Shaw v. Tackaberry, 29 Ont. L. 490. 4 OntWN 1369, 24 OntWR 630, 5 OntWN 255, 15 DomLR 475.

4. Ala.—Spear v. Banks, 125 Ala. 227, 27 S 979.

N. J.—Pursel v. Pursel, 14 N. J. Eq. 514.

N. M.—Clancey v. Clancey, 7 N. M. 405, 37 P 1105, 38 P 168.

N. Y.—Kydd v. Dalrymple, 2 Dem. Surr. 630.

Pa.—Magaldo's Est., 13 Pa. Dist. 149.

Tenn.—Bland v. Gollaher, (Ch. A.) 48 SW 320.

W. Va.—Cann v. Cann, 40 W. Va. 138, 20 SE 910.

[a] **Reimbursement of sureties by administrator.**—On an accounting by an administrator de bonis non, the principal administrator is not entitled to repayment of money paid by him to his sureties to recompense them for money paid by them on account of his devastavit. Spear v. Banks, 125 Ala. 227, 27 S 979.

[b] **Representative cannot charge estate with burial lot owned by himself in which decedent buried.**—Bland v. Gollaher, (Tenn. Ch. A.) 48 SW 320.

[c] **Claim for payment of ground rent.**—Administrators settling the accounts of an insolvent estate cannot be substituted for a ground landlord whom they have paid, and receive credit for the money so paid, although the intestate covenanted to pay the rent. In re Torr, 2 Rawle (Pa.) 250.

[d] **Services to decedent.**—An executor is not entitled to compensation for services rendered his testator during the latter's life, where the services were mutually beneficial, and no evidence is given that any compensation was expected or intended, and the charge was not made until after the account was filed and exceptions thereto had been taken. Egerton v. Egerton, 17 N. J. Eq. 419.

5. Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35; Pendleton v. Whiting, Wythe (Va.) 38.

[a] **Presumption of satisfaction.**—Where an executor, twenty-five years after the death of the testator, set up a book debt against the estate, but it appeared that the testator possessed personal estate, and no account was given of the disposition of it by the executor, it was presumed that his debt, if any, had been satisfied out of the assets. Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35.

6. In re Hite, 155 Cal. 448, 101 P 448; In re Dimmick, 111 La. 655, 35 S 801.

7. In re Hite, 155 Cal. 448, 101 P 448.

8. In re Towne, 143 Cal. 507, 77 P 446.

9. Buckley v. Buckley, 157 Mass. 536, 32 NE 863.

10. In re Garnier, 147 Cal. 457, 82 P 68.

11. Syme v. Badger, 92 N. C. 706.

12. In re Young, 144 Mich. 663, 108 NW 88; Farrell v Farrell, 142 App. Div. 605, 127 NYS 764 [rev on other grounds 205 N. Y. 450, 98 NE 857].

[a] **Illustrations.**—(1) Where an administratrix paid out of her own money claims against the estate, and filed an account showing this, which was allowed by a judgment unappealed from, and she then did nothing to enforce her claim except to file a petition five years after to sell real estate, and took no further steps until ten years thereafter, her claim was barred, although deceased gave administratrix the estate for life, this not preventing the closing of the estate during her life, and although she had negotiations with the heirs relative to reimbursing her. In re Young, 144 Mich. 663, 108 NW 88. (2) Where a widow during the seven years she survived her husband never sought to establish claims of her insane father, or of herself, against her husband's estate, her executor, who was her second husband, was not as against the claims of the children of the first marriage to the proceeds of a sale of real estate devised to them, entitled to a credit for the amount due her as a creditor of her husband's estate, based on her claims, and as sole heir of her deceased father. Farrell v. Farrell, 142 App. Div. 605, 127 NYS 764 [rev on other grounds 205 N. Y. 450, 98 NE 857].

13. Ala. — Powell v. Powell, 80 Ala. 11; Eubank v. Clark, 78 Ala. 73.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12; Wolf v. Banks, 41 Ark. 104; Trimble v. James, 40 Ark. 393.

Conn.—Johnson v. Blackman, 11 Conn. 342.

Ky.—Calvert v. Holland, 9 B. Mon. 458; Mitchum v. Mitchum, 3 Dana 260; Miller v. Towles, 4 J. J. Marsh. 255; Desha v. Desha, 11 KyL 405.

La.—Draughon v. Quillen, 23 La. Ann. 237.

Mich.—Owen v. Potter, 115 Mich. 556, 73 NW 977.

Miss.—Anderson v. Duke, 28 Miss. 87.

Nev.—Furth v. Wyatt, 17 Nev. 180, 30 P 828.

applies where the purchase is made before the appointment as administrator but in contemplation thereof.[14] But a third person who purchases claims against the estate becomes a creditor of the estate[15] and is entitled to receive the full amount of his claim, or in case of insolvency his percentage on the full amount, regardless of what he paid for it;[16] and the personal representative cannot be held liable for the difference.[17]

[§ 937] **B. Presentation and Allowance**[18]**—1. Necessity for Presentation—a. In General.** In most of the states there are express statutory provisions, commonly termed statutes of nonclaim, to the effect that claims against the estate of a decedent shall be exhibited or presented to the personal representative or to the probate court,[19] usually

N. Y.—Matter of Rainforth, 40 Misc. 609, 83 NYS 57; Hawley v. Mancius, 7 Johns. Ch. 174; Evertson v. Tappen, 5 Johns. Ch. 497; Van Horne v. Fonda, 5 Johns. Ch. 388; Paff v. Kinney, 1 Bradf. Surr. 1.

N. D.—Macfadden v. Jenkins, 169 NW 151.

Pa.—In re Heager, 15 Serg. & R. 65; Woods v. Irwin, 13 Pa. Co. 276.

S. C.—Robinson v. Gist, 11 S. C. Eq. 467.

S. D.—Bidwell v. Smith, 23 S. D. 120, 123, 120 NW 880.

Tex.—Chevallier v. Wilson, 1 Tex. 161.

Wis.—Gillett v. Gillett, 9 Wis. 194.

Eng.—Ex p. James, 8 Ves. Jr. 337, 32 Reprint 385; Ex p. Lacey, 6 Ves. Jr. 625, 31 Reprint 1228.

[a] **Reason for rule.**—"The plaintiff acquired this claim as a trustee while such trustee, and it is repugnant to all sense of justice and equity that he now get over four times what he paid on the same." Bidwell v. Smith, supra.

[b] **This rule is very stringent** and applies even where the purchase was made by borrowing money at a high rate of interest and by the sale of the administrator's individual property, although the estate was thereby saved from insolvency. Trimble v. James, 40 Ark. 393.

[c] **The transferee of a judgment** against a succession, who holds it by virtue of a transfer made by the agent of the heirs and administrator of the estate who acquired the judgment by compromise with the creditor, can recover from the succession only the amount which the agent and administrator paid the judgment creditor. Draughon v. Quillen, 23 La. Ann. 237.

[d] **Transaction presumed to be a payment.**—(1) It being the duty of the representative to discharge claims instead of purchasing them on his own account, it will generally be presumed that where he pays a creditor and takes the latter's securities the transaction is a payment of the claim and not a purchase thereof. Johnson v. Blackman, 11 Conn. 342. (2) Therefore the securities in the representative's hands will be deemed extinguished and he can be allowed only the sum paid for them. Borst v. Bovee, 5 Hill (N. Y.) 219 (the indorsers on the creditor's note were discharged and that evidence as to the insolvency of the estate was not admissible); Gillett v. Gillett, 9 Wis. 194.

[e] **Claims which may be purchased.**—An executor has a right to purchase claims against his testator for moneys received by testator as a guardian and agent, where none of the funds received by the testator in such manner ever came into the hands of the executor, and there is no fraud or concealment on his part. Murray v. Barden, 132 N. C. 136, 43 SE 600.

[f] **Claim presented to representative.**—Where a creditor of an intestate gave to the administratrix a receipted bill for his debt, stating that he intended to present the amount thereof to the administratrix, and not to discharge the estate, the administratrix could charge the estate with the amount of the receipt. Buxton v. Barrett, 14 R. I. 40.

[g] **Settlement of claims at discount.**—If an administrator pays a dividend of an insolvent estate to a bank in its depreciated currency, or otherwise settles claims against the estate for less than the amount due, he is not entitled to the benefit of the amount thus saved, but it will belong to the estate. Anderson v. Duke, 28 Miss. 87; Dahlgren v. Peale, 24 Miss. 142.

14. Chevallier v. Wilson, 1 Tex. 161.

15. Moffatt v. Loughridge, 51 Miss. 211; Veldman v. Lindeman, 7 Oh. Dec. (Reprint) 676, 4 CincLBul 911; Swensen v. Walker, 3 Tex. 93.

[a] **A person who lent money to an administratrix** to save the estate from forced sale and to whom the claims paid off with such money were transferred can recover thereon from the estate. Veldman v. Lindeman, 7 Oh. Dec. (Reprint) 676, 4 CincLBul 911.

[b] **Effect of authority from administrator.**—An administrator may bind himself but cannot bind the estate by authorizing a person to buy up claims against the estate, and one who incurs expense by purchasing such claims at the instance of the administrator must look to him and not to the estate for reimbursement unless they are established as valid subsisting claims against the estate in the manner prescribed by law. Johnson v. Brown, 25 Tex. Suppl. 120 [dist Swenson v. Walker, 3 Tex. 93].

[c] **When representative precluded from contesting claim.**—Where a person has purchased a claim against the estate upon the faith of its allowance and approval by the probate judge, and the assurance of the administrator that it will be paid, the administrator is precluded from contesting its original justice or that it is binding on the estate. Swenson v. Walker, 3 Tex. 93.

16. Owen v. Potter, 115 Mich. 556, 73 NW 977; Halsted v. Hyman, 3 Bradf. Surr. (N. Y.) 426; Luther v. Hunter, 7 N. D. 544, 75 NW 916; In re Ralston, 158 Pa. 645, 28 A 139.

[a] **This rule has been applied to:** (1) A surety on the bond of the representative. Halsted v. Hyman, 3 Bradf. Surr. (N. Y.) 426; Luther v. Hunter, 7 N. D. 544, 75 NW 916. (2) One who was named as executor but renounced. In re Ralston, 158 Pa. 645, 28 A 139.

[b] **Anyone except the executor** may lawfully buy claims at a discount, and collect their full value. Owen v. Potter, 115 Mich. 556, 73 NW 977.

[c] **Applying assigned claims to purchase price of property.**—Where the testator's widow and her two brothers formed a partnership to buy at a discount claims against the estate, which was generally believed to be insolvent, and to apply them at their full value to the purchase of property belonging to the estate, an order of the probate court permitting them to be so applied to the amount of forty per cent of the purchase price, which the parties did, thereby acquiring the bulk of the property of the estate at a large profit to themselves, it was held that these transactions were not fraudulent as to legatees and creditors whose claims remained unsatisfied. Owen v. Potter, 115 Mich. 556, 73 NW 977.

[d] **Where a stranger and an administrator unite** in the purchase at a discount of a debt due from the intestate, they stand in the same relation that the administrator would occupy if he alone had made the purchase, and can recover of the estate no more than they paid for the debt. Mitchum v. Mitchum, 3 Dana (Ky.) 260.

Right of debtor to set off claims purchased at a discount in action by representative see infra § 1876.

17. Owen v. Potter, 115 Mich. 556, 73 NW 977 (this is true even though the assignor of the claim, being a corporation in which the executor was a stockholder, would have sold it to the estate at the same discount allowed to the claimant, and the executor is not culpable in sharing as a stockholder in the proceeds of the sale by the corporation).

18. Presentation of claim:
Condition precedent to action thereon see infra §§ 1836–1841.
Prerequisite to action against heir or devisee see Descent and Distribution § 398.

19. U. S.—Soliss v. General Electric Co., 213 Fed. 204, 129 CCA 548; Ogden v. Witherspoon, 18 F. Cas. No. 10,461, 3 N. C. 227.

Ala.—Burgess v. Burgess, 79 S 193; Traweek v. Hagler, 75 S 152; Farris v. Stoutz, 78 Ala. 130; Floyd v. Clayton, 67 Ala. 265; McDowell v. Jones, 58 Ala. 25; Fretwell v. McLemore, 52 Ala. 124; Halfman v. Ellison, 51 Ala. 543; Erwin v. Mobile Branch Bank, 14 Ala. 307; Jones v. Lightfoot, 10 Ala. 17.

Ariz.—O'Doherty v. Toole, 2 Ariz. 288, 15 P 28.

Ark.—Furst v. Sanders, 134 Ark. 407, 204 SW 426; Hicks v. Hicks, 113 Ark. 598, 167 SW 95; Cox v. Phelps, 65 Ark. 1, 45 SW 990; Gist v. Gans, 30 Ark. 285; Meyer v. Quartermous, 28 Ark. 45.

Cal.—Bechtel v. Chase, 156 Cal. 707, 106 P 81; Barthe v. Rogers, 127 Cal. 52, 59 P 310; Morrow v. Barker, 119 Cal. 65, 51 P 12; Marsh v. Dooley, 52 Cal. 232 [expl In re Crosby, 55 Cal. 574]; In re Halleck, 49 Cal. 111.

Colo. — Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378; Thompson v. White, 25 Colo. 226, 54 P 718.

Fla.—May v. Vann, 15 Fla. 553; Ellison v. Allen, 8 Fla. 206.

Hawaii.—Matter of Kaiu, 17 Hawaii 514.

Ida.—Coughlin v. Lemp, 180 P 990 mem.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Waughop v. Bartlett, 165 Ill. 124, 46 NE 197; Kittredge v. Nicholes, 162 Ill. 410, 44 NE 742 [aff 60 Ill. A. 604]; Barnard v. Barnard, 119 Ill. 92, 8 NE 320; Blanchard v. Williamson, 70 Ill. 647; Harris v. Douglas, 64 Ill. 466; Rosenthal v. Magee, 41 Ill. 370; Reitzell v. Miller, 25 Ill. 67; Thorn v. Watson, 10 Ill. 26; Gustin v. Bryden, 205 Ill. A. 204; Tinker v. Babcock, 107 Ill. A. 78 [aff 204 Ill. 571, 68 NE 445]; Wallace v. Monroe, 22 Ill. A. 602; Wilding v. Rhein, 12 Ill. A. 384.

Ind.—Armacost v. Lindley, 116 Ind. 295, 19 NE 138; Tracewell v. Peacock, 55 Ind. 572; State v. Givan, 45 Ind. 267; Hyatt v. Mavity, 34 Ind. 415; St. Joseph County Sav. Bank v. Randall, 37 Ind. A. 402, 76 NE 1012.

Iowa.—Wickham v. Hull, 102 Iowa 469, 71 NW 352; Schlutter v. Duhling, 100 Iowa 515, 69 NW 884; Cory v. Gillespie, 94 Iowa 347, 62 NW 837; Bayless v. Powers, 62 Iowa 601, 17 NW 907; Willcox v. Jackson, 51 Iowa 296, 1 NW 536; O'Donnell v. Hermann, 42 Iowa 60; Braught v. Grif-

within a specified time after the death of the debtor, the appointment of an executor or administrator of his estate, or the publication of a notice calling for claims.[20] The provisions of some of these statutes make is necessary for the creditor not only to exhibit his claim to the personal representative within the statutory period, but also to present it to the probate court for allowance[21] or to file it in the court having probate jurisdiction;[22] but statutes requiring such filing have been held to be directory only, on the ground that presentation to the personal representative is of itself sufficient to prevent the claim from being barred.[23] Under some statutes it is required that the creditor shall not only present but prove his claim within a limited period, presentation alone not being sufficient to prevent the statutory bar;[24] while under others nothing more than formal, ex parte proof is required at the time of presentation.[25] By some statutes it is provided that no claim shall be a charge against, or a lien upon, the estate, unless presented or filed within a certain time,[26] while under others, the effect of nonpresentation within the statutory time is merely to postpone the claimant to those creditors who have duly presented their claims,[27] or to release the representative from liability to the creditor for payment of debts, legacies, and distributive shares before the claim is presented, and to confine the creditor to such assets as remain undistributed or, in the absence thereof, to remit him

fith, 16 Iowa 26; Woodward v. Laverty, 14 Iowa 381; Galloway v. Trout, 2 Greene 595.

Kan.—Scroggs v. Tutt, 23 Kan. 181; Clawson v. McCune, 20 Kan. 337.

Ky.—Holmes v. Lusk, 78 Ky. 548.

Me.—Marshall v. Perkins, 72 Me. 343.

Mass.—Aiken v. Morse, 104 Mass. 277.

Mich.—Thurber v. Aldrich, 167 Mich. 656, 133 NW 620.

Minn.—Berryhill v. Gasquoine, 88 Minn. 281, 92 NW 1121; Jorgensen v. Larson, 85 Minn. 134, 88 NW 439; Gilman v. Maxwell, 79 Minn. 377, 82 NW 669; Hill v. Nichols, 47 Minn. 382, 50 NW 367; Fern v. Lenthold, 39 Minn. 212, 39 NW 399; State v. Ramsey County Prob. Ct., 25 Minn. 22; Kentucky Commercial Bank v. Slater, 21 Minn. 172.

Miss.—Harris v. Hutcheson, 65 Miss. 9, 3 S 34; Robertson v. Demoss, 23 Miss. 298; Cohen v. Sinking Fund Comrs., 15 Miss. 437.

Mo.—Richardson v. Harrison, 36 Mo. 96; C. H. Albers Comm. Co. v. Vogelsang, (A.) 190 SW 1058; State v. Browning, 102 Mo. A. 455, 76 SW 719; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053; Wilks v. Murphy, 19 Mo. A. 221; Bauer v. Gray, 18 Mo. A. 173.

Mont.—Melton v. Martin, 28 Mont. 150, 72 P 414.

N. H.—Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25; Walker v. Cheever, 39 N. H. 420; Harris v. Davis, 1 N. H. 248.

N. M.—Janes v. Brunswick, 8 N. M. 105, 42 P 72.

N. Y.—In re Gall, 182 N. Y. 270, 74 NE 875; Cornes v. Wilkin, 79 N. Y. 129 [aff 14 Hun 428]; Clapp v. Schaus, 156 App. Div. 681, 141 NYS 451; New York v. Gorman, 26 App. Div. 191, 49 NYS 1026; Thayer v. Clark, 48 Barb. 243 [aff 41 N. Y. 620]; Matter of Brown, 60 Misc. 35, 112 NYS 599; Matter of Smith, 58 Misc. 493, 111 NYS 1085.

N. C.—Ridley v. Thorp, 3 N. C. 343.

Oh.—Robson v. Evans, 20 Oh. Cir. Ct. N. S. 122, 35 Oh. Cir. Ct. 510, 3 Oh. A. 248.

Okl.—Osborn v. Foresythe, 54 Okl. 40, 153 P 207; In re Barnett, 52 Okl. 623, 153 P 653.

Or.—Brown v. Truax, 58 Or. 572, 115 P 597; In re Murray, 56 Or. 132, 107 P 19; Willis v. Marks, 29 Or. 493, 45 P 293.

Pa.—Emerick's Est., 172 Pa. 191, 33 A 550; Oliver's App., 101 Pa. 299; Stœver's App., 3 Watts & S. 154; Barrett's Est., 54 Pa. Super. 124; Piper's Est., 12 Pa. Dist. 443, 28 Pa. Co. 589; Wright's Est., 5 Pa. Co. 228; Cowan's Est., 28 PittsbLegJNS 119.

Philippine.—Matter of Pascual, 11 Philippine 34.

R. I.—Anderson v. Williams, 26 R. I. 64, 58 A 251.

S. C.—Edwards v. King, 7 S. C. 370; Miller v. Mitchell, 8 S. C. Eq. 437.

S. D.—Marker v. Van Gerpen, 39 S. D. 648, 166 NW 151; Hart v. Bjerke, 34 S. D. 557, 149 NW 423.

Tex. — Buchanan v. Wagnon, 62 Tex. 375; Converse v. Sorley, 39 Tex. 515; Green v. Rugely, 23 Tex. 539; Danzey v. Swinney, 7 Tex. 617; McDougald v. Hadley, 1 Tex. 490; National Guaranty Loan, etc., Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

Utah.—Fullerton v. Bailey, 17 Utah 85, 53 P 1020.

Wash.—First Security, etc., Co. v. Englehart, 181 P 13; Schubach v. Redelsheimer, 92 Wash. 124, 158 P 739; Ward v. Magaha, 71 Wash. 679, 129 P 395; Spokane v. Costello, 57 Wash. 183, 106 P 764; Foley v. McDonnell, 48 Wash. 272, 93 P 321.

Wis.—Franklin v. Killilea, 126 Wis. 88, 104 NW 993.

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

[a] **"The object of the law** in fixing a definite period within which claims must be presented is to insure the speedy settlement of the affairs of a deceased person and the early delivery of the property of the estate into the hands of the persons entitled to receive it. As we said in the case of McMicking v. Conpieng (21 Philippine 211), 'it is the policy of every people which maintains the principle of private ownership of property that he who owns a thing shall not be deprived of its possession or use except for the most urgent and imperative reasons and then only so long as is necessary to make the rights which underlie these reasons effective;' and, 'it is a principle of universal acceptance which declares that one has the instant right to occupy that which he owns, and it is only in the presence of reasons of the strongest and most urgent nature that that principle is prevented from accomplishing the purpose which underlies it.' It is distinctly against the interests of justice and in direct opposition to the policy of the law to extend unduly the time within which estates should be administered and thereby keep the property from the possession and use of those who are entitled to it." In re De Dios, 24 Philippine 573, 576.

[b] **Statute strictly construed.**— A statute which bars claims against an estate if not presented within the prescribed time, is to be strictly construed, and its operation is not to be extended beyond the letter of the statute as construed by the courts. Wickes v. Walden, 161 Ill. A. 3.

[c] **The fact that the personal representative includes the claim in a report** made to the court as a foundation for a proceeding to sell land to pay debts does not relieve the creditor from the necessity of complying with a statute requiring that claims be exhibited to the court. Roberts v. Flatt, 142 Ill. 485, 32 NE 484 [aff 42 Ill. A. 608].

[d] **An administratrix ad colligendum** is not such a representative of the estate as to require a presentation of a claim against the estate within eighteen months after the grant of letters to her. Erwin v. Mobile Branch Bank, 14 Ala. 307.

[e] **Special cases in which statutes not applicable.** — Martin v. Asher, 25 Ind. 237; Braxton v. State, 25 Ind. 82; Grey v. Lewis, 79 Ky. 453; Clunk's Est., 5 Pa. Co. 280; Loder's Est., 5 Pa. Co. 276; Wright's Est., 5 Pa. Co. 228.

20. Time for presentation see infra §§ 958–969.

21. Henn v. McGinnis, 182 Iowa 131, 165 NW 406; Farmers' Sav. Bank v. Burgin, 73 Mo. A. 108; Price v. McCause, 30 Mo. A. 627.

Allowance by court see infra §§ 1051–1054.

22. Cory v. Gillespie, 94 Iowa 347, 62 NW 837; Keys v. Keys, 217 Mo. 48, 116 SW 537.

23. Bell v. Mills, 123 Fed. 24, 59 CCA 104 (construing California statutes); In re Schroeder, 46 Cal. 304; Willis v. Farley, 24 Cal. 490.

[a] **Statute permissive only.**—In re Chisholm, 50 N. S. 341.

[b] **No time limit for presentation to court.**—The exhibition of a properly authenticated claim to the personal representative arrests the statute of nonclaim, and the law does not limit the time for presenting the claim to the probate court for classification. Randolph v. Ward, 29 Ark. 238.

24. Pearson v. Christman, 93 Iowa 703, 91 NW 1085; Collamore v. Wilder, 19 Kan. 67.

[a] **A claim of the fourth class** must be filed and proved within a certain time after notice of the representative's appointment or it will be barred unless the claim is pending in court or peculiar circumstances entitle the claimant to equitable relief. Pearson v. Christman, 93 Iowa 703, 91 NW 1085; Orcutt v. Hanson, 70 Iowa 604, 31 NW 950; Clark v. Tallman, 68 Iowa 372, 27 NW 261; Colby v. King, 67 Iowa 458, 25 NW 704; Brownell v. Williams, 54 Iowa 353, 6 NW 530; Lacey v. Loughridge, 51 Iowa 629, 2 NW 515; Noble v. Morrey, 19 Iowa 509; Woodward v. Laverty, 14 Iowa 381.

25. Mardis v. Shakleford, 4 Ala. 493; Jones v. Pharr, 3 Ala. 283.

[a] **Witnesses need not be produced** at time of presentation. Posey v. Decatur Bank, 12 Ala. 802.

26. O'Brien v. Larson, 71 Minn. 371, 74 NW 148; Emerick's Est., 172 Pa. 191, 33 A 550; Demmy's App., 43 Pa. 155.

[a] **Where the probate court erroneously allows** a claim not presented within the statutory period, the error does not go to the jurisdiction of the court. O'Brien v. Larson, 71 Minn. 371, 74 NW 148.

27. Turk v. Ritchie, 104 Va. 587, 52 SE 339.

Priority dependent upon time of filing or proving claim see infra § 1181.

to his remedy against the heirs, devisees, legatees, and distributees to whom assets have come.[28] Where statutes of the latter character are found, it has been held that the claim may be filed and an accounting demanded at any time before the final discharge of the representative,[29] unless the circumstances are such that the creditor is estopped by his delay.[30] The statutes of nonclaim are in some states considered as statutes of limitation,[31] but in others they are considered merely as special acts designed for the purpose of facilitating the speedy settlement of decedents' estates.[32] It has also been held that a statutory provision that the failure of a holder of a note to present it for allowance against the deceased principal's estate within two years after the granting of letters testamentary or of administration will release the surety enters into and forms a part of the contract, and is not merely a statute of limitation.[33] These statutes are not usually given a retroactive effect.[34] There can be no judicial determination that there are no claims against an estate until the expiration of the statutory time for filing claims.[35]

If a valid presentation of a claim has once been made, a change in the administration by the appointment of another representative does not necessitate a second presentation.[36] So also, where a claim has been duly presented by a creditor and is afterward assigned, presentation by the assignee is unnecessary,[37] and, where a creditor has duly presented or filed his claim, a surety who pays the debt stands in the place of the creditor as to the steps already taken to enforce the claim and is subrogated to the creditor's rights to prosecute the claim to allowance and payment.[38] Where a claim has been originally presented or filed in time, a mere substitution of parties, made necessary by a decision of the supreme court, after the expiration of the time limited for presentation, does not make the claim a new one so as to be barred because not presented within the required period.[39]

Even independent of statute a failure to present and prove a claim within a reasonable time may amount to waiver of the same,[40] or through long failure to present the claim or to take any steps to enforce it the creditor may be barred by laches.[41]

Effect of foreign statute. Where decedent left property within the state, the claim of a resident of the state, so far as such property is concerned, is not affected by a statute of another state, where administration is had, barring claims for nonpresentation.[42]

[§ 938] **b. Effect of Representative's Knowledge of Existence of Debt.** The more general view is that knowledge on the part of an executor or administrator of the existence of a debt or claim against the estate is not sufficient to dispense with the necessity of presentation,[43] although a contrary

28. In re Mullon, 145 N. Y. 98, 39 NE 821; O'Conner v. Gifford, 117 N. Y. 275, 22 NE 1036 [aff 3 NYS 337 (rev 3 NYS 207, 6 Dem. Surr. 71)]; Erwin v. Loper, 43 N. Y. 521; Matter of Recknagel, 148 App. Div. 268, 132 NYS 99; Ford v. Rouse, 24 S. C. L. 219.

Effect of failure to make due presentation generally see infra §§ 1020–1034.

29. In re Mullon, 145 N. Y. 98, 39 NE 821; Matter of Recknagel, 148 App. Div. 268, 132 NYS 99; Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162]; Ford v. Rouse, 24 S. C. L. 219.

30. O'Conner v. Gifford, 117 N. Y. 275, 22 NE 1036 [aff 3 NYS 337 (rev 3 NYS 207, 6 Dem. Surr. 71)]; Matter of Crise, 7 NYS 202, 2 Conn. Surr. 59.

31. Hicks v. Hicks, 113 Ark. 598, 167 SW 95; Williamson v. McCrary, 33 Ark. 470; Linthicum v. Tapscott, 28 Ark. 267; Whitmore v. San Francisco Sav. Union, 50 Cal. 145; Cohea v. Sinking Fund Comrs., 15 Miss. 437; Ryans v. Boogher, 169 Mo. 673, 67 SW 1048.

32. Ala.—Yniestra v. Tarleton, 67 Ala. 126.

Ill.—Waughop v. Bartlett, 165 Ill. 124, 46 NE 197; Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136]; Smith v. Preston, 82 Ill. A. 285.

N. J.—Newbold v. Fenimore, 53 N. J. L. 307, 21 A 939; O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

Tex.—Standifer v. Hubbard, 39 Tex. 417; Ryan v. Flint, 30 Tex. 382.

Vt.—Briggs v. Thomas, 32 Vt. 176.

33. Curry v. Mack, 90 Ill. 606.

34. Ala.—Morrissett v. Carr, 127 Ala. 277, 27 S 844; Aycock v. Johnson, 119 Ala. 405, 24 S 543; Andrews v. Huckabee, 30 Ala. 143; McHenry v. Wells, 28 Ala. 451.

Ark.—Hicks v. Hicks, 113 Ark. 598, 167 SW 95; Rhodes v. Cannon, 112 Ark. 6, 164 SW 752.

Cal.—Hibernia Sav., etc., Soc. v. Hayes, 56 Cal. 297.

Ill.—Hathaway v. Merchants' L. & T. Co., 218 Ill. 580, 75 NE 1060, 4 AnnCas 164 [aff 121 Ill. A. 478].

Ky.—Holmes v. Lusk, 78 Ky. 548, 1 KyL 259.

Minn.—State v. Ramsey County Probate Ct., 25 Minn. 22.

Mo.—Ambs v. Caspari, 13 Mo. A. 587.

Nebr.—Korff v. Bueker, 75 Nebr. 60, 105 NW 1099.

Pa.—Benner v. Phillips, 9 Watts & S. 13.

Tex.—Harrison v. Knight, 7 Tex. 47.

[a] **Estates in progress of administration.**—The act of 1840, requiring claims against estates of decedents to be presented to the executor or administrator for his approval, governed the procedure in the administration of the estates then in progress of administration, as well as those of which the administration, was subsequently opened. Harrison v. Knight, 7 Tex. 47.

35. Seery v. Murray, 107 Iowa 384, 77 NW 1058; Ogooshevitz v. Arnold, 197 Mich. 203, 163 NW 946, 165 NW 633; In re Higgins, 15 Mont. 474, 39 P 506, 28 LRA 116.

36. Ala. — Floyd v. Clayton, 67 Ala. 265.

Fla.—McHardy v. McHardy, 7 Fla. 301.

Ida. — Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

Ky.—Cochran v. Germania Bank, 10 KyL 449.

N. Y.—Matter of Hallenbeck, 119 App. Div. 757, 104 NYS 568 [mod on other grounds 195 N. Y. 143, 88 NE 16, 133 AmSR 782].

Tex.—Parks v. Lubbock, (Civ. A.) 50 SW 466.

[a] **Presentation to special administrator.**—As an executor cannot ratify the rejection of a claim by the special administrator, even if his conduct amounted to a ratification, he was not estopped to raise the objection that a claim, although presented to the special administrator, had never been presented to him. Ward v. Magaha, 71 Wash. 679, 129 P 395.

37. Ryan v. Flanagan, 38 N. J. L. 161.

38. Braught v. Griffith, 16 Iowa 26; Harman v. Harman, 62 Nebr. 452, 87 NW 177.

[a] **Classification.**—The surety is entitled to demand payment of the claim as in the class in which the claim was placed by the original filing. Braught v. Griffith, 16 Iowa 26.

39. McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585].

40. Barnard v. Barnard, 119 Ill. 92, 8 NE 320; Harris v. Douglas, 64 Ill. 466; O'Connor v. Gifford, 117 N. Y. 275, 22 NE 1036 [aff 3 NYS 337 (rev 3 NYS 207, 6 Dem. Surr. 71)].

41. U. S.—Rogers v. Law, 1 Black 253, 17 L. ed. 58.

Minn.—Hill v. Nichols, 47 Minn. 382, 50 NW 367; O'Mulcahy v. Gragg, 45 Minn. 112, 47 NW 543.

N. Y.—O'Connor v. Gifford, 117 N. Y. 275, 22 NE 1036 [aff 3 NYS 337 (rev 3 NYS 207, 6 Dem. Surr. 71)].

Pa.—Haage's App., 17 Pa. 181; Clarke's Est., 1 Phila. 356; Simpson's Est., 1 Phila. 300.

Tex.—Chandler v. Hudson, 11 Tex. 32.

42. Lipperd v. Lipperd, (Mo. A.) 163 SW 934 (this is true notwithstanding Rev. St. [1909] § 1895, providing that when a cause of action has been fully barred by the laws of the state in which it originated, such bar shall be a complete defense to any action in Missouri, since a creditor residing in the state is entitled to have the estate administered and his claim adjudicated in the state).

43. Ala.—Brannan v. Sherry, 195 Ala. 272, 71 S 106; Borum v. Bell, 132 Ala. 85, 31 S 454; Allen v. Elliott, 67 Ala. 432; McDowell v. Jones, 58 Ala. 25; Owens v. Corbitt, 57 Ala. 92; Clark v. Washington, 44 Ala. 291; Pipkin v. Hewlett, 17 Ala. 291; Hallett v. Mobile Branch Bank, 12 Ala. 193; Boggs v. Mobile Branch Bank, 10 Ala. 976; Jones v. Lightfoot, 10 Ala. 17; Bigger v. Hutchings, 2 Stew. 445.

Ark. — Kaufman v. Redwine, 97 Ark. 546, 134 SW 1193.

Cal.—Pico v. De la Guerra, 18 Cal. 422; In re Heeney, 3 Cal. A. 548, 86 P 842.

Conn.—Dime Sav. Bank v. McAleney, 76 Conn. 141, 55 A 1019; Pike v. Thorp, 44 Conn. 450.

Fla.—Bush v. Adams, 22 Fla. 177; Fillyau v. Laverty, 3 Fla. 72.

Ga.—Stokes v. Robertson, 143 Ga. 721, 85 SE 895.

Ill.—Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104 [aff 93 Ill. A. 31]; Roberts v. Flatt, 142 Ill. 485, 32 NE 484 [aff 42 Ill. A. 608].

view is asserted in some jurisdictions.[44] It has been held, however, that, where the same person is personal representative of both the debtor and the creditor, a formal presentation of the claim is unnecessary;[45] and in a case where the executor was also president of a corporation which held a note given by decedent, it was held that his knowledge and possession of the note as president of the corporation were equivalent to knowledge and possession thereon as executor, and hence dispensed with presentation.[46] So, also, where the administrator agreed with a mortgagee that, if he would waive his mortgage and permit the property to be sold, his note would be first paid, it was held that the mortgagee need not file a formal claim.[47] It has also been held that the effect of payment by the representative of interest on a mortgage may be to dispense with or raise a presumption of presentation.[48]

[§ 939] **c. Effect of Suit on Claim—(1) In General.** Although there is some authority to the contrary,[49] the weight of authority supports the view that the commencement of a suit and its continuous prosecution operates as a presentation of a claim or obviates the necessity of presentation,[50] even though claimant does not succeed in his action.[51] But this result is not produced where plaintiff voluntarily submits to a nonsuit,[52] or where the proceedings instituted are voluntarily abandoned

Md.—Steuart v. Carr, 6 Gill 430.

Mo.—Madison County Bank v. Suman, 79 Mo. 527; Pfeiffer v. Suss, 73 Mo. 245; Taylor v. George, 159 Mo. A. 160, 140 SW 611.

N. J.—Vandyke v. Chandler, 10 N. J. L. 49.

N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288.

Pa.—Shand's Est., 1 Pa. Co. 600.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Eng.—Re Frewen, 60 L. T. Rep. N. S. 953.

"It is the duty of the claimant to institute a proper proceeding upon his claim, and the fact that the executors know that a claim is made which is not exhibited in court makes no difference." Morse v. Pacific R. Co., 191 Ill. 356, 361, 61 NE 104 [aff 93 Ill. A. 31].

[a] **Reason for rule.—**"The plain and obvious design of the statute was, to enable distributees, and legatees, to demand a distribution of the estate, at the expiration of eighteen months from the grant of letters, unless it was necessary for the executor, or administrator, to retain it longer in his hands, for the purpose of paying debts. To justify him in so doing, he must be furnished with the evidence that claims exist against the estate, and will be enforced. This evidence the statute requires, to be a presentment of the claim, and in our opinion, nothing short of an actual presentment will satisfy its demand." Jones v. Lightfoot, 10 Ala. 17, 24.

44. Conant v. Machen, 27 Colo. A. 310, 148 P 872; Perry v. West, 40 Miss. 233; Mobile Branch Bank v. Rhew, 37 Miss. 110; Brown v. Hill, 27 Miss. 44; Brown v. Hill, 26 Miss. 643; Ellis v. Carlisle, 16 Miss. 552; Miller v. Jefferson College, 13 Miss. 651; Gordon v. Gibbs, 11 Miss. 473; Miller v. Helm, 10 Miss. 687; Helm v. Smith, 10 Miss. 403; In re Gill, 199 N. Y. 155, 92 NE 390; Matter of Recknagel, 148 App. Div. 268, 132 NYS 99; Edwards v. King, 7 S. C. 370. Contra Niles v. Crocker, 88 Hun 312, 34 NYS 761; Matter of Brown, 60 Misc. 35, 112 NYS 599; Matter of Morton, 7 Misc. 343, 28 NYS 82; Cruikshank v. Cruikshank, 9 HowPr (N. Y.) 350; Livingston v. Gardner, 4 Redf. Surr. (N. Y.) 516 note.

"The protection afforded by the statute is only where the executor or administrator distributes in good faith. Here unquestionably she had knowledge of the respondent's claim, for she stated its existence in her account filed in proceedings taken against her by other creditors, and the distribution among those creditors was made on the basis of the existence of the respondent's claim. If she desired to avoid any liability to the respondent, she could have cited him to appear on the accounting made by her." In re Gill, 199 N. Y. 155, 157, 92 NE 390 [quot Matter of Recknagal, 148 App. Div. 268, 272, 132 NYS 99].

45. Thomas v. Chamberlain, 39 Oh. St. 112.

46. Brown v. Brown, 56 Conn. 249, 14 A 718, 7 AmSR 307, 58 Conn. 85, 19 A 236.

47. In re Sparks, 101 Wash. 462, 172 P 545.

48. Miller v. Crosby, 68 Fla. 365, 67 S 76.

49. Newbold v. Fenimore, 53 N. J. L. 307, 21 A 939; Dickinson's Est., 4 Pa. Dist. 777.

[a] **This view has been asserted where there was:** (1) A bill to discover and follow trust funds. Robins v. Arnold, 42 N. J. Eq. 511, 8 A 721. (2) A bill to foreclose a mortgage. Mutual Ben. L. Ins. Co. v. Howell, 32 N. J. Eq. 146.

50. U. S.—Schurmeier v. Connecticut Mut. L. Ins. Co., 171 Fed. 1, 96 CCA 107 [certiorari dism 219 U. S. 586, 31 SCt 470, 54 L. ed. 347] (stating rule in Minnesota).

Ala.—Weller v. Rensford, 185 Ala. 333, 64 S 366; Freeman v. Pullen, 119 Ala. 235, 24 S 57; Floyd v. Clayton, 67 Ala. 265; McDougald v. Dawson, 30 Ala. 553; Hunley v. Shuford, 11 Ala. 203; Jones v. Lightfoot, 10 Ala. 17.

Ark.—Easley v. Rowe, 210 SW 145; Clark v. Shelton, 16 Ark. 474.

Fla.—Ellison v. Allen, 8 Fla. 206; Fillyau v. Laverty, 3 Fla. 72.

Ill.—Scheel v. Eidman, 68 Ill. 193 [dist Gilbert v. Guptill, 34 Ill. 112].

Iowa.—Hanen v. Lenander, 178 Iowa 569, 160 NW 18; Mullen v. Callanan, 167 Iowa 367, 149 NW 516. Contra Henn v. McGinnis, 182 Iowa 131, 165 NW 406.

Ky.—Lyttle v. Davidson, 67 SW 34, 23 KyL 2262.

Md.—Steuart v. Carr, 6 Gill 430.

Minn.—Connecticut L. Ins. Co. v. Schurmeier, 117 Minn. 473, 136 NW 1, AnnCas1913D 462.

Miss.—Smith v. Smith, 4 Miss. 216.

Mo.—State v. Holtcamp, 266 Mo. 347, 181 SW 1007; McKee v. Allen, 204 Mo. 655, 103 SW 76; Ryans v. Boogher, 169 Mo. 673, 69 SW 1048; Madison County Bank v. Suman, 79 Mo. 527; Farrar v. Comfort, 33 Mo. 44; Tevis v. Tevis, 23 Mo. 256; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053; Gewe v. Hanszen, 85 Mo. A. 136.

N. Y.—Ruth v. Davenport, 18 NYS 721, 22 NYCivProc 121.

N. C.—McLeod v. Graham, 132 N. C. 473, 43 SE 935.

Pa.—Bartley's Est., 6 Pa. Dist. 436, 19 Pa. Co. 599.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 260, 93 P 723, 14 AnnCas 926 [quot Cyc].

[a] **Reason for rule.** — "By the writ, with the indorsement thereon, the defendant [executor] is informed of the nature of the demand, and that the plaintiff insists upon its payment. He could not be more effectually advertised of both these facts if the claim was formally presented to him and payment demanded." Hunley v. Shuford, 11 Ala. 203.

[b] **Right of creditor to choose forum.—**The creditor is not compelled to present his claim to the probate court for allowance but may choose his forum and resort in the first instance to the circuit court if that court has jurisdiction. Rosenthal v. Magee, 41 Ill. 370.

[c] **An action in a federal court** by a foreign creditor is within the rule. Connecticut L. Ins. Co. v. Schurmeier, 117 Minn. 473, 136 NW 1, AnnCas1913D 462.

[d] **The issuing of a citation in the orphans' court** in the effort to collect a claim against a decedent's estate is commencing an action, and is equivalent to a suit at law in the common pleas, and hence is sufficient to toll the limitation of liens. Bartley's Est., 6 Pa. Dist. 436.

[e] **Amendment of petition. —** A suit upon the agreement recited in a bond is a sufficient exhibition of plaintiff's demand to save it from the operation of the statute, although plaintiff afterward amends his petition and sues upon the bond for the penalty. Farrar v. Comfort, 33 Mo. 44.

[f] **Judgments** (1) obtained in suits against an executor or administrator begun within the period of limitation are not included within the statute requiring that claims shall be both exhibited and presented. Gewe v. Hanszen, 85 Mo. A. 136. (2) So also a judgment rendered by a court of competent jurisdiction against a personal representative in an action brought within two years from the grant of letters will be as binding as if the claim had been presented and allowed in the county court. Roberts v. Flatt, 142 Ill. 485, 32 NE 484 [aff 42 Ill. A. 608]; Darling v. McDonald, 101 Ill. 370. (3) But in a foreclosure proceeding this effect is not produced if the decree of foreclosure merely provides for a sale on failure to pay the sum found due, and does not require the personal representative to pay any deficiency after the sale. Roberts v. Flatt, supra.

[g] **Statutory exception. —** (1) The statute requiring claims to be filed and proved within a certain time contains an exception as to claims "pending in the district or supreme court." Moore v. McKinley, 60 Iowa 367, 14 NW 768; O'Donnell v. Hermann, 42 Iowa 60; McCrary v. Deming, 38 Iowa 527; Cooley v. Smith, 17 Iowa 99. (2) But this provision does not apply to proceedings in the district court for the establishment of the claim; the statute contemplates claims pending on the law or equity side of the district court, and not those pending within its probate jurisdiction. Farmers', etc., Bank v. Cleveling, 84 Iowa 677, 51 NW 178.

51. Garrow v. Carpenter, 1 Port. (Ala.) 359; McCoy v. Jackson, 21 Ark. 472; Knisely v. Leathe, 256 Mo. 341, 166 SW 257; Ruth v. Davenport, 18 NYS 721, 22 NYCivProc 121.

52. Dilbone v. Moorer, 14 Ala. 426; Bigger v. Hutchings, 2 Stew. (Ala.) 445.

[a] **If plaintiff suffers a nonsuit under the ruling of the court** against

by him,[53] or vacated for irregularity,[54] and are not renewed. It has also been held that presentation is not dispensed with by reason of the bringing of an action against the representative in a court which has not jurisdiction thereof;[55] that the filing of a petition to be allowed to intervene in a suit against the administrator is not a sufficient presentation of a claim to the administrator where the petition for intervention is denied,[56] and that the taking of a default judgment against the representative, which is subsequently vacated for insufficiency of the service of summons, is not a presentation of the claim.[57] Neither is an action against the representative in his personal capacity an effective substitute for presentation of the claim.[58]

[§ 940] **(2) Claims in Suit at Decedent's Death.** The mere pendency of a suit against decedent at his death is not a presentation or exhibition of the claim within the meaning of the statute of nonclaim, nor does it dispense with the necessity of presentation,[59] unless the statute so provides.[60] But where plaintiff within the time limited for the presentation of claims obtains an order of revivor or making the administrator a party to such suit, this order is generally equivalent to, and dispenses with, the actual presentation of the claim,[61] unless of course the statute requires a presentation of the claim under such circumstances.[62] There must, however, be a revivor within the period limited by statute for presentation in order to prevent the claim becoming barred,[63] and of course the action must have been on the specific claim, and not for another purpose.[64] If plaintiff suffers a nonsuit after such revivor and institutes a new suit within a year, it is not necessary to exhibit the claim again to the administrator.[65]

[§ 941] **d. Effect of Insolvency of Estate.** In the absence of special statutory provisions the ordinary statutes of nonclaim requiring presentation of claims within a certain period are applicable, although the estate is declared insolvent.[66]

his right to recover on the case as presented, it seems that the institution of the suit would, if sufficiently descriptive of the claim, be regarded as a sufficient presentation. Dilbone v. Moorer, 14 Ala. 426.

53. Pipkin v. Hewlett, 17 Ala. 291.

54. Boggs v. Mobile Branch Bank, 10 Ala. 970.

55. Wernse v. McPike, 100 Mo. 476, 13 SW 809, 86 Mo. 565.

56. Weller v. Rensford, 185 Ala. 333, 64 S 366.

57. Boggs v. Mobile Branch Bank, 10 Ala. 970.

58. Easley v. Rowe, (Ark.) 210 SW 145 (action in justice's court).

59. Ala.—Moss v. Mosley, 148 Ala. 168, 41 S 1012.

Cal.—Pearson v. Parsons, 173 Cal. 336, 159 P 1173.

Colo.—Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 P 310.

Fla.—Bush v. Adams, 22 Fla. 177.

Iowa.—Schlutter v. Dahling, 100 Iowa 515, 69 NW 884.

Wash.—Spokane v. Costello, 57 Wash. 183, 106 P 764.

60. Fern v. Leuthold, 39 Minn. 212, 39 NW 399; The Home v. Selling, 91 Or. 428, 179 P 261.

[a] **Where defendant dies after verdict** against him and judgment is thereafter entered without substituting the executor, presentation of the claim is not necessary. Berkey v. Judd, 27 Minn. 475, 8 NW 383.

61. Ala. — Moss v. Mosley, 148 Ala. 168, 41 S 1012; Malone v. Hundley, 52 Ala. 147; Garrow v. Carpenter, 1 Port. 359.

Ark.—Eddins v. Graddy, 28 Ark. 500; McCoy v. Jackson, 21 Ark. 472; State Bank v. Tucker, 15 Ark. 39; Walker v. Byers, 14 Ark. 246.

Cal.—In re Page, Myr. Prob. 61.

Fla.—Anderson v. Agnew, 38 Fla. 30, 20 S 766; Ellison v. Allen, 8 Fla. 206.

Ind.—Holland v. Holland, 131 Ind. 196, 30 NE 1075; Clodfelter v. Hulett, 92 Ind. 426.

Iowa.—O'Donnell v. Hermann, 42 Iowa 60.

Kan.—Kothman v. Skaggs, 29 Kan. 5.

Ky.—Gray v. Patton, 11 Ky. Op. 327.

Minn.—Berkey v. Judd, 27 Minn. 475, 8 NW 383.

Mo.—In re Hensley, 121 Mo. A. 695, 97 SW 645.

N. Y.—Benedict v. Caffe, 10 N. Y. Super. 669; Tindal v. Jones, 11 Abb Pr 258, 19 HowPr 469; Lemen v. Wood, 16 HowPr 285.

Oh.—Glass v. Buzzard, 33 Oh. Cir. Ct. 144 [aff 85 Oh. St. 461 mem, 98 NE 1120 mem].

Okl.—Coleman v. Bowles, 181 P 304, 306 [cit C. J.].

Or.—The Home v. Selling, 91 Or. 428, 179 P 261.

Tex.—Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

Wash. — Mcgrath v. Gilmore, 15 Wash. 558, 46 P 1032.

Wis.—Mitchell Street State Bank v. Froedtert, 169 Wis. 120, 170 NW 822.

[a] **The statutory affidavit is unnecessary** in such a case. Goodrich v. Fritz, 9 Ark. 440.

[b] **Presentment or demand not a prerequisite to revivor.**—Clodfelter v. Hulett, 92 Ind. 426; Cochran v. Whittaker, 10 KyL 495 (holding, however, that plaintiff must make the expurgatory affidavit required by statute); Gray v. Patton, 3 KyL 393; Apperson v. Hazelrigg, 2 KyL 64; Musser v. Chase, 29 Oh. St. 577; Strong v. Eldridge, 8 Wash. 595, 36 P 696.

[c] **Where the revivor is invalid** because the scire facias is void for not describing the claim or the court in which the action was pending, it is insufficient to dispense with a presentation. Waddill v. John, 57 Ala. 93.

[d] **Where a defendant dies pending his appeal** from a judgment, and his executors are substituted, and obtain a reversal, the claim need not be presented to his executors before a retrial. Megrath v. Gilmore, 15 Wash. 558, 46 P 1032.

[e] **Action pending in foreign state.**—A statute dispensing with the presentation of a claim on which an action is pending does not apply to actions pending in a foreign state. Commercial Bank v. Slater, 21 Minn. 172.

62. Frazier v. Murphy, 133 Cal. 91, 65 P 326; Faulkner v. Hendy, 123 Cal. 467, 56 P 99; Vermont Marble Co. v. Black, 123 Cal. 21, 55 P 599; Falkner v. Hendy, 107 Cal. 49, 40 P 21, 386; Hibernia Sav., etc., Soc. v. Wackenreuder, 99 Cal. 503, 34 P 219; Derby v. Jackman, 89 Cal. 1, 26 P 610; Bollinger v. Manning, 79 Cal. 7, 21 P 375; U. S. v. Hailey, 2 Ida. (Hasb.) 22, 3 P 263.

[a] **The presentation of the claim must be proved,** although it is not denied in the answer. Derby v. Jackman, 89 Cal. 1, 26 P 610. But compare In re Page, Myr. Prob. (Cal.) 61 (question of nonpresentation cannot be raised in probate court where it was not raised in district court).

[b] **Reversal on appeal of representative.**—Where a judgment rendered against a decedent in his lifetime is reversed on an appeal taken by the administratrix as substituted defendant, the judgment creditor cannot recover from the administratrix if he has failed to present his claim against the estate, as the action is deemed to be pending until its final determination on appeal unless the judgment is sooner satisfied, and the judgment cannot be considered satisfied by an execution issued and levy made before decedent's death and a sale thereunder after the appeal was taken. Vermont Marble Co. v. Black, 123 Cal. 21, 55 P 599.

[c] **Suits by United States.**—The Idaho statute applies to suits by the United States as well as to suits by private individuals. U. S. v. Hailey, 2 Ida. (Hasb.) 22, 3 P 263.

63. Ala.—Waddill v. John, 57 Ala. 93; Travis v. Tartt, 8 Ala. 574.

Ark.—State Bank v. Tucker, 15 Ark. 39.

Colo.—Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 598, 114 P 310.

Fla.—Bush v. Adams, 22 Fla. 177.

Mo.—In re Hensley, 121 Mo. A. 695, 97 SW 645.

"The fact that the Code provides a suit shall not abate by the death of a defendant does not obviate the necessity of continuing it in the method the Code prescribes within the one year provided for the allowance of claims, if the plaintiff in the action desires to share in the advantage of presenting his claim within that time, for it is only by complying with the Code that he elects or is permitted to continue and prosecute his action to judgment against the administrator." Denver First Nat. Bank v. Hotchkiss, supra.

[a] **Illustration.**—Where, pending an appeal from a judgment for plaintiff, defendant died, and administration was pending more than two years before the administrator entered his appearance as such, the claim was barred. In re Hensley, 121 Mo. A. 695, 97 SW 645.

[b] **The service of a scire facias** (1) to revive a judgment upon the personal representative would be in effect a presentment of the claim. Jones v. Lightfoot, 10 Ala. 17. (2) But it is otherwise, if the scire facias is voluntarily abandoned. Pipkin v. Hewlett, 17 Ala. 291. See also Waddill v. John, 57 Ala. 93 (the scire facias abandoned because void). (3) In such case the issuance of an alias scire facias after eighteen months from the grant of letters, on which the executor is made a party, is not such a presentation as will save the claim from the bar. Waddill v. John, supra.

64. Fern v. Leuthold, 39 Minn. 212, 39 NW 399.

65. McCoy v. Jackson, 21 Ark. 472.

66. McDowell v. Jones, 58 Ala. 25;

[§ 942] **e. Effect of Testamentary Provisions.** A mere formal direction in a will that all the testator's just debts shall be paid does not obviate the necessity of presenting and proving claims within the statutory period;[67] but it is usually considered that if the will empowers and directs the executor as to the sale of property, the payment of debts and legacies, and the management of the estate, and especially if it confers upon him a power to sell, or vests in him an express trust for the purpose of paying debts, etc., or directs that the estate be managed and settled without the intervention of the court, the claims of creditors need not be presented,[68] although to impose a trust on the land so as to produce this effect the intention of the testator must be clear, certain, and free from ambiguity.[69]

[§ 943] **2. What Claims Should Be Presented—a. In General.** As a general rule all claims against decedent should be presented for allowance,[70] and as used in the statutes under discussion the word "claims" is held to include such debts or demands as existed against decedent in his lifetime and might have been enforced against him by personal actions for the recovery of money,[71] or, as it has been expressed, every species of liability which the

Cawthorne v. Weisinger, 6 Ala. 714; Marley v. Cummings, 5 Sneed (Tenn.) 479.

Presentation of claims against insolvent estates see infra §§ 1768–1773.

67. Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15.

Ark. — Kaufman v. Redwine, 97 Ark. 546, 134 SW 1193.

Kan.—Collamore v. Wilder, 19 Kan. 67.

Miss.—Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 S 160; Cohn v. McClintock, 107 Miss. 831, 66 S 217; Gwin v. Nettles, 18 S 798.

N. J.—O'Neil v. Freeman, 45 N. J. L. 208.

Philippine.—Santos v. Manarang, 27 Philippine 209.

68. Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15; Carrington v. Manning, 13 Ala. 611.

Miss. — Cohn v. McClintock, 107 Miss. 831, 66 S 217; O'Reily v. McGuiggan, 91 Miss. 498, 44 S 986, 15 AnnCas 623; Gwin v. Nettles, 18 S 798; Abbay v. Hill, 64 Miss. 340, 1 S 484.

Oh.—Cogreve v. Day, 30 Oh. Cir. Ct. 609.

Tex.—Smythe v. Caswell, 65 Tex. 379; Taylor v. Davidson, (Civ. A.) 120 SW 1018; Bell v. Farmers', etc., Nat. Bank, 33 Tex. Civ. A. 408, 76 SW 798; Parks v. Lubbock, (Civ. A.) 50 SW 466.

Wash.—In re Macdonald, 29 Wash. 422, 69 P 1111; Moore v. Kirkman, 19 Wash. 605, 54 P 24.

[a] **Illustration.**—Where one who had devised his real estate to his wife for life with power of sale for the benefit of the estate directed her to make suitable provision for plaintiff on account of services rendered, a conveyance by the widow to plaintiff of property forming no more than an adequate consideration for the services is a conveyance for the benefit of the estate, and plaintiff is entitled to a decree quieting her title to such property, although she had never presented her claim to the executor who had knowledge of its existence. Cogreve v. Day, 30 Oh. Cir. Ct. 609.

[b] **Will creating express trust for payment of debts.**—By item 1 of his will, testator directed that all of his just debts be paid "as soon as can be done without injury to my estate." By item 2 he directed that one hundred dollars and an annuity during the life of a servant be paid to her. By item 5 he gave to his wife all of his personal property during her natural life, with power to sell and dispose of it as she might see fit, "but in such event the proceeds are to be placed in the corpus of my estate subject to the provisions hereinafter specified." By item 6 he directed the sale of encumbered property in another state "as soon as can be done without too great loss," with discretion to lease or sell at public or private sale, and finally authorizing the extension of the payments due on the property, or the renewal or execution of other judicious loans and mortgages to pay the encumbrance. By item 7 the executors were given full power to carry on and cultivate testator's plantations, or to lease or sell any and all real or personal property of testator in the state of his domicile, "which may be deemed necessary or expedient to pay my debts," providing that certain pieces of real estate be held to the last. By item 8 he directed that his wife claim no allowance, and charge no commissions for services against his estate, but that she be allowed a reasonable amount for the support of herself, family, and household, to be charged in her account against testator's estate, to be decided by her own judgment. By item 9, "subject to the foregoing articles," testator gave the entire control of his estate to his executors, and to his wife the entire use and income, rents and profits for life, with power to dispose of one fourth of his estate remaining at her death, by last will and testament, in default of which the one fourth was to remain part of his estate. By item 10, "subject to the life estate" of his wife, testator disposed of the remainder of his estate. It was held that the will created an express trust for the payment of debts. Gordon v. McDougall, 84 Miss. 715, 37 S 298, 5 LRANS 355.

Independent executors generally see infra §§ 2895–2902.

69. Cohn v. McClintock, 107 Miss. 831, 66 S 217; Gwin v. Nettles, (Miss.) 18 S 798; Abbay v. Hill, 64 Miss. 340, 1 S 484.

[a] **Parol evidence of destroyed will.**—Where the testator's will, together with the book in which it had been recorded, had been destroyed by fire, and the contents of the will was proved by a witness who testified that he had often examined the will, that his recollection of its contents was that it provided that the testator's debts should be paid out of his estate by his executor, and that it authorized his executor to sell any part of the estate, real or personal, for the payment of debts, the evidence was not sufficiently certain to impose upon the testator's real estate a trust for the payment of debts, so as to prevent a claim from being barred. Gwin v. Nettles, (Miss.) 18 S 798.

70. Ala.—McDowell v. Jones, 58 Ala. 25; Fretwell v. McLemore, 52 Ala. 124; Ray v. Thompson, 43 Ala. 434, 94 AmD 696.

Ark.—Walker v. Byers, 14 Ark. 246.

Cal.—Geary St., etc., R. Co. v. Bradbury Est. Co., 175 P 457; Morse v. Steele, 149 Cal. 303, 86 P 693; In re Hallack, 49 Cal. 111; Gray v. Palmer, 9 Cal. 616.

Fla.—Fremd v. Hogg, 68 Fla. 331, 67 S 75, AnnCas1917B 155.

Ind.—Nation v. Green, (A) 114 NE 895.

Iowa.—Henn v. McGinnis, 182 Iowa 131, 165 NW 406; Wolfe v. Knapp, 127 Iowa 479, 103 NW 369.

Ky.—Hood v. Hood, 80 Ky. 39.

Mich.—Showers v. Robinson, 43 Mich. 502, 5 NW 988.

Mo.—Burckhartt v. Helfrich, 77 Mo. 376; State v. Browning, 102 Mo. A. 455, 76 SW 719.

N. J.—Hackensack Trust Co. v. Van den Berg, 105 A 719.

N. Y.—Cornes v. Wilkin, 79 N. Y. 129 [aff 14 Hun 428]; Matter of Hallenbeck, 119 App. Div. 757, 104 NYS 568 [mod on other grounds 195 N. Y. 143, 88 NE 16, 133 AmSR 782].

N. C.—Ridley v. Thorpe, 3 N. C. 525.

Oh.—Robson v. Evans, 20 Oh. Cir. Ct. N. S. 122, 35 Oh. Cir. Ct. 510, 3 Oh. A. 248.

Pa.—In re Gardner, 228 Pa. 282, 77 A 509, 29 LRANS 685; In re Moore, 211 Pa. 338, 60 A 987.

S. D.—Meade County v. Welch, 34 S. D. 348, 148 NW 601.

Wash.—Gray v. Hickey, 94 Wash. 370, 162 P 564.

"We think it clear that the claims and demands which the statute contemplates shall be exhibited . . . are all claims capable of being asserted in any court of justice, either of law or equity, existing either at the time of the death of the deceased, or coming into existence at any time after the death, and before the expiration of the two years." Walker v. Byers, 14 Ark. 246, 253.

71. U. S.—Newberry v. Wilkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111].

Ala.—McDowell v. Brantley, 80 Ala. 173.

Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Ark.—Stewart v. Thomasson, 94 Ark. 60, 126 SW 86 [quot Simon v. Jones, 138 SW 986, 987].

Cal.—Fallon v. Butler, 21 Cal. 24, 81 AmD 140; Gray v. Palmer, 9 Cal. 616.

Minn.—Knutsen v. Krook, 111 Minn. 352, 357, 127 NW 11, 20 Ann Cas 852 [cit Cyc].

Mont.—Dodson v. Nevitt, 5 Mont. 518, 6 P 358.

Nebr.—Stichter v. Cox, 52 Nebr. 532, 72 NW 843.

N. J.—Hackensack Trust Co. v. Van den Berg, 105 A 719.

N. H.—Rice v. Connelly, 71 N. H. 382, 52 A 446.

Or.—Weill v. Clark, 9 Or. 387.

Pa.—Gaffney's Est., 146 Pa. 49, 23 A 163; McCann's Est., 28 Pa. Co. 46.

S. D.—Kline v. Gingery, 25 S. D. 16, 124 NW 958.

Utah.—Martin v. Saxton, 48 Utah 488, 160 P 441 [cit Cyc].

Vt.—Sawyer v. Hebard, 58 Vt. 375, 3 A 529.

Wash.—Crowe v. Atkinson Constr. Co., 67 Wash. 420, 121 P 841, AnnCas 1913D 273.

"The claims and demands which the statute contemplates shall be exhibited to the executor or administrator in the manner provided by the statute before the end of two years from the granting of letters, on pain of being forever barred, are all claims capable of being asserted in a court of justice, either law or equity existing either at the time of the death of the deceased, or coming into existence at any time after the death, and before the expiration of the two

personal representative can be called on to pay out of the general funds of the estate.[72] Debts or demands not falling within this category need not as a general rule be presented.[73] The rule requiring presentation applies to claims of corporations,[74] or nonresident creditors,[75] and to claims contracted out of as well as within the state.[76] Where a claim is satisfied by a division of a fund in the claimant's hands and a retention of his portion, he need not present his claim.[77]

Among claims which should be presented may be mentioned claims founded on contract generally,[78] a claim arising out of a contract of guaranty[79] or indemnity,[80] a claim arising during decedent's lifetime under a bond to which he was a party,[81] a claim for damages for breach of contract or covenant,[82] a claim arising out of a partnership,[83] a claim founded on a devastavit committed by an executor or administrator since deceased,[84] a claim founded on services to decedent,[85] a claim for wages,[86] a claim for board furnished to decedent,[87] a claim by a surety who has paid his principal's debt for reimbursement from his estate,[88] a claim of a principal debtor against the estate of a per-

years—including, of course, all claims or demands, running to certain maturity, although not yet payable, to be adjusted presently upon equitable principles of discount according to the rate of interest when matured, or to be provided for at the date of maturity without discount, and excluding such claims only as might be inchoate and contingent." Stewart v. Thomasson, 94 Ark. 60, 63, 126 SW 86 [quot Simon v. Jones, (Ark.) 138 SW 986, 987].

[a] **"Claim" synonymous with "cause of action."**—Newberry v. Wilkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111]; Crowe v. Atkinson Constr. Co., 67 Wash. 420, 121 P 841, AnnCas1913D 273.

[b] **"Claim" and "demand" synonymous.**—Batchelder v. White, 82 Vt. 132, 71 A 1111.

[c] **"Claim" means legal demand.**—Gray v. Palmer, 9 Cal. 616.

[d] **"Creditors" of an estate are** only those who have become such because of dealings or transactions with the testator in his lifetime, concerning whose claim the personal representative had nothing to do originally, but which must be approved and allowed, as prescribed by statute. Garver v. Thoman, 15 Ariz. 38, 135 P 724.

[e] **Claims sued on** may be presented. Moss v. Mosley, 148 Ala. 168, 41 S 1012.

72. Newberry v. Wilkinson, 199 Fed. 673, 118 CCA 111.

73. Ala.—Locke v. Palmer, 26 Ala. 312.

Ark.—Massey v. Doke, 123 Ark. 211, 185 SW 271.

Cal.—In re Clanton, 171 Cal. 381, 153 P 459; Hibernia Sav., etc., Soc. v. Conlin, 67 Cal. 178, 7 P 477; Fallon v. Butler, 21 Cal. 24, 81 AmD 140; Furman v. Craine, 18 Cal. A. 41, 121 P 1007.

Ind.—Chaney v. Wood, (A.) 115 NE 333.

Iowa.—In re Walker, 150 Iowa 284, 128 NW 376, 129 NW 952; Pratt v. Fishwild, 121 Iowa 642, 96 NW 1089; Rogers v. Gillett, 56 Iowa 266, 9 NW 204.

N. H.—Rice v. Connelly, 71 N. H. 382, 52 A 446.

S. D.—Kline v. Gingery, 25 S. D. 16, 124 NW 958.

Tex.—Maryland Fidelity, etc., Co. v. Texas Land, etc., Co., 40 Tex. Civ. A. 489, 90 SW 197.

Utah.—Martin v. Saxton, 48 Utah 488, 160 P 441 [cit Cyc].

Vt.—Manning v. Leighton, 65 Vt. 84, 26 A 258, 24 LRA 684.

Wis.—Beggs v. Behrend, 156 Wis. 34, 145 NW 207.

[a] **Illustrations.**—(1) Where a claim has been filed against an estate and the parties jointly liable are insisting that the estate shall pay the whole debt, and that their liability to the estate shall not exceed half the amount so paid, such claim is not such a claim as is required to be presented within twelve months. Pratt v. Fishwild, 121 Iowa 642, 96 NW 1089. (2) Where after the death of a partner another partner died, and his estate was in process of settlement in the county court in which the personal representative of the partner first dying filed no claim, a subsequent action by such representative against the executors of the partner who died last, and the surviving partner, for an accounting was not affected by a statute requiring the presentation of claims. Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074. (3) A demand for rescission of the sale of a stallion and return of the purchase notes is not a "claim" which must be presented. Kline v. Gingery, 25 S. D. 16, 124 NW 958. (4) Where, after a vendor in an executory contract of sale had rescinded the sale, and had brought trespass to try title against the purchaser's widow, individually and as administratrix, and had sequestered the property, the administratrix continued in possession on her executing a replevy bond, a claim by the vendor for the rents of the land during the pendency of his action and until the rendition of final judgment in his favor was not a claim against the estate of the deceased purchaser, and the district court had jurisdiction of an action for the rents, and as the claim for rents was not a claim against the estate of the deceased purchaser, it was not necessary to present it to the administratrix for allowance. Maryland Fidelity, etc., Co. v. Texas Land, etc., Co., 40 Tex. Civ. A. 489, 90 SW 197.

[b] **Where the life tenant of personalty invested it in realty** so as to become a trustee of the realty for the remaindermen, the statute of nonclaim, relating to the presentation of claims against an estate to the administrator, would not apply to bar an action by the remaindermen to enforce their equity in the lands, their right not being a money demand. Small v. Hockinsmith, 158 Ala. 234, 48 S 541.

[c] **Allowance of credit on note due decedent.**—An administrator may properly allow credits on a note due decedent, which he knows to be just and such as could be established, without requiring a suit and without the credits being established in the manner prescribed by statute for other claims against the estate. Stonebreaker v. Friar, 70 Tex. 202, 7 SW 799.

[d] **Allowance as claim a mere irregularity.**—While a claim for goods bought by the administratrix, and necessary for the preservation of the estate, being an indebtedness of the administratrix, should not have been filed against the estate, yet since the county court had jurisdiction both of the settlement of claims against the estate and the allowance of expenses of administration, it was a mere irregularity to allow such expense as a claim. Beggs v. Behrend, 156 Wis. 34, 145 NW 207.

74. State v. Crutcher, 2 Swan (Tenn.) 504.

75. Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 30; Winter v. Winter, 101 Wis. 494, 77 NW 883.

76. Jones v. Drewry, 72 Ala. 311.

[a] **Such claims were expressly excepted from** the operation of the statute of nonclaim of 1815, which was superseded by the code of 1852. Jones v. Drewry, 72 Ala. 311; Sanford v. Wicks, 3 Ala. 369; Bigger v. Hutchings, 2 Stew. (Ala.) 445.

77. Sharpstein v. Freidlander, 54 Cal. 58.

78. Lundy v. Lemp, (Ida.) 179 P 738; Blake v. Lemp, (Ida.) 179 P 737; Berryhill v. Gasquoine, 88 Minn. 281, 92 NW 1121; Gilman v. Maxwell, 79 Minn. 377, 82 NW 669; Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.

[a] **Claim not arising on contract.**—Where a guardian used his ward's money in payment of his debts, and subsequently by concealing this fact obtained an order of the probate court, authorizing him to borrow the ward's money at a low rate of interest, a claim for legal interest for the use of the ward's money was not one arising upon contract within the Montana statute. Smith v. Smith, 210 Fed. 947 [aff 224 Fed. 1, 139 CCA 465].

79. National Guaranty L., etc., Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

80. Maddock v. Russell, 109 Cal. 417, 42 P 139.

81. Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.

82. Ala.—McDowell v. Jones, 58 Ala. 25.

Cal.—Morrison v. Land, 169 Cal. 580, 147 P 259.

Ind.—Ratcliff v. Leuning, 30 Ind. 289; Hartman v. Lee, 30 Ind. 281.

Me.—Boothby v. Boothby, 76 Me. 17.

Minn.—Clark v. Gates, 84 Minn. 381, 87 NW 941.

Miss.—Pickett v. Ford, 5 Miss. 246.

Tenn.—Smith v. Hickman, Cooke 330.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

[a] **Breach of warranty.**—Clark v. Gates, 84 Minn. 381, 87 NW 941.

[b] **A breach of covenant seizin.**—McDonald v. McElroy, 60 Cal. 484.

[c] **A money claim arising out of a breach of contract of sale** must be presented. Jorgensen v. Larson, 85 Minn. 134, 88 NW 439; Smith v. Hickman, Cooke (Tenn.) 330; Lewis v. Hickman, 2 Overt. (Tenn.) 317. Contra Bullion v. Campbell, 27 Tex. 653; Peters v. Phillips, 19 Tex. 70, 70 AmD 319; Evans v. Hardeman, 15 Tex. 480; Robinson v. McDonald, 11 Tex. 385, 62 AmD 480.

83. In re Gladough, 1 Alaska 649.

84. Page v. Bartlett, 101 Ala. 193, 13 S 768; Taylor v. Robinson, 69 Ala. 269; McDowell v. Jones, 58 Ala. 25; Fretwell v. McLemore, 52 Ala. 124.

[a] **Fraudulent concealment.**—That the devastavit was fraudulently concealed by the deceased administrator in his lifetime does not affect the statute of nonclaim. Taylor v. Robinson, 69 Ala. 269. See infra § 961.

[b] **Aliter, where claim is on administration bond.**—Gordon v. Gibbs, 11 Miss. 473.

85. Etchas v. Orena, 127 Cal. 588, 60 P 45; Grant v. Grant, 63 Conn. 530, 29 A 15, 38 AmSR 379; In re Kessler, 87 Wis. 660, 59 NW 129, 41 AmSR 74.

86. Grant v. Grant, 63 Conn. 530, 29 A 15, 33 AmSR 379.

87. Tyndall v. Van Auken, 106 App. Div. 238, 94 NYS 269.

88. Bauer v. Gray, 18 Mo. A. 164.

son sued as his trustee in "trustee process,"[89] a claim of a tenant in common for rents collected by a deceased cotenant,[90] a claim against the estate of a deceased life tenant for dissipating the goods in which he had only the life estate,[91] a sheriff's claim for money advanced to decedent for taxes,[92] a claim in favor of a wife for money lent to her deceased husband,[93] a money claim against a deceased wife in favor of the administrator of her husband, who predeceased her,[94] an unpaid allowance to decedent's wife for separate maintenance or alimony,[95] and claims of heirs based on the appropriation of community property by one member of the community after the death of the other.[96] Where a wife was induced to sign a satisfaction of a judgment for alimony while of unsound mind, and she continued of unsound mind until her death, which occurred after the death of the husband, it was necessary to file the judgment as a claim against decedent's estate in order to recover the alimony awarded.[97] The claims of heirs against an administrator for exoneration from a mortgage made by decedent have been held barred where not presented before the rule to bar creditors was made absolute.[98]

It has been held not necessary to present purely equitable claims,[99] the claim of a guardian for compensation or for services and expenses,[1] a claim arising out of an agreement by decedent to make a will in claimant's favor,[2] the claim of an administrator's attorney for fees,[3] a claim on a mortgage given to secure the debt of a third person,[4] a claim of a life insurance company for credit on the policy for the amount of an unpaid premium note,[5] a claim arising under a contract between the claimant and decedent's widow, while she was acting as independent executrix,[6] a claim based upon the statutory liability of a stockholder in a national bank,[7] a claim against decedent for misappropriation of funds as guardian,[8] claims for legacies or distributive shares[9] or the widow's award out of the personal property of the estate,[10] a claim by an heir to an extra allowance on distribution of the estate by virtue of an agreement with the other heirs,[11] or claims of title or for possession or recovery of property.[12] A right acquired by garnishment against a decedent, being a mere liability and not a "claim," need not be registered.[13] Where, in a foreclosure against the devisee and heirs of a deceased purchaser of mortgaged premises personally liable for the debt, it appears from devisee's cross petition that the executor, who is also residuary legatee, has received personalty exceeding the mortgage, such executor may be compelled to discharge it, and the right to enforce payment is not barred by failure of the mortgagee to file a claim against the deceased purchaser's estate for payment of the mortgage.[14]

89. Chapman v. Gayle, 32 N. H. 141; Hurlburt v. Hinde, 86 Vt. 517, 86 A 739.

90. McKneely v. Terry, 61 Ark. 527, 33 SW 953.

91. Quicksall v. Chew, (N. J. Ch.) 38 A 442.

92. Brown v. Porter, 7 Humphr. (Tenn.) 373.

93. In re Pepper, 158 Cal. 619, 112 P 62, 31 LRANS 1092; Barry v. Minahan, 127 Wis. 570, 170 NW 488.

94. White v. Blankenbeckler, 115 Mo. A. 722, 92 SW 503 (where a widow took charge of all her deceased husband's property, and continued to use and dispose of it as she pleased during her lifetime, her administrator could not be sued by her husband's administrator as for a conversion of such property in the absence of an identification of any of such property as coming into the hands of administrator, but the remedy of her husband's administrator was by a proceeding in the probate court for the allowance of a demand against the widow's estate).

95. Gilbert v. Haywood, 37 R. I. 303, 92 A 625.

96. Rose v. England, 51 Tex. 617.

97. Wilson v. Fahnestock, 44 Ind. A. 35, 86 NE 1037.

98. Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851.

99. U. S.—Heaton v. Thatcher, 59 Fed. 731.

Cal.—In re Clanton, 171 Cal. 381, 153 P 459.

Conn.—State v. Northrop, 106 A 504.

Ida.—Toulouse v. Burkett, 2 Ida. 184, 10 P 26.

Iowa.—Linn County v. Day, 16 Iowa 158.

N. H.—Page v. Whidden, 59 N. H. 507.

Vt.—Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 A 176; Brown v. Sumner, 31 Vt. 671; Herrick v. Belknap, 27 Vt. 673; Sparhawk v. Buell, 9 Vt. 41.

[a] **On the other hand,** there are authorities which hold that the requirement extends to equitable as well as legal claims. Yniestra v. Tarleton, 67 Ala. 126; Walker v. Byers, 14 Ark. 246; Rowan v. Kirkpatrick, 14 Ill. 1; Lovell v. Nelson, 11 Allen (Mass.) 101, 87 AmD 706; Williams v. Conrad, 11 Humphr. (Tenn.) 412.

1. In re Walker, 150 Iowa 284, 128 NW 376, 129 NW 952; Scattergood v. Ingram, 86 Oh. St. 76, 98 NE 923.

2. Contra Morrison v. Land, 169 Cal. 580, 147 P 259; Oles v. Mackey, 58 Colo. 295, 144 P 891; Oles v. Wilson, 57 Colo. 246, 141 P 489.

3. In re Lutz, 175 Mo. A. 427, 162 SW 679.

4. Hibernia Sav., etc., Soc. v. Conlin, 67 Cal. 178, 7 P 477.

5. Union Cent. L. Ins. Co. v. Washburn, 158 Ala. 169, 48 S 475.

6. King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839 (although the claim consisted of indebtedness for funeral and other expenses legally chargeable to the estate, paid by claimant, it was not necessary that it should be presented to the administratrix with the will annexed for allowance).

7. Mortimer v. Potter, 213 Ill. 178, 72 NE 817 [aff 114 Ill. A. 422].

8. Smith v. Smith, 224 Fed. 1, 139 CCA 465 [aff 210 Fed. 947].

9. Amos v. Campbell, 9 Fla. 187; Cook v. Cook, 92 Ind. 398; Re Ashman, 15 Ont. L. 42, 10 OntWR 250.

[a] **Complaint for allowance of legacy may be in form of claim against estate.**—Fickle v. Snepp, 97 Ind. 289, 49 AmR 449.

[b] **On the other hand,** it is held in Ontario that a notice given pursuant to statute, providing for notice to creditors and others to prove claims, cuts off the claim of absent next of kin to share in estate. Re Ashman, 15 Ont. L. 42, 10 OntWR 250.

10. Miller v. Miller, 82 Ill. 463; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

11. Rogers v. Gillett, 56 Iowa 266, 9 NW 204.

12. U. S.—Order of St. Benedict of New Jersey v. Steinhauser, 179 Fed. 137 [aff 234 U. S. 640 mem, 34 SCt 932 mem, 58 L. ed. 1512 mem].

Ala.—Hunnicutt v. Higginbotham, 138 Ala. 472, 35 S 469, 100 AmSR 45; Smith v. Gillam, 80 Ala. 296; Andrews v. Huckabee, 30 Ala. 143; Locke v. Palmer, 26 Ala. 312.

Ark.—Fred v. Asbury, 105 Ark. 494, 152 SW 155, 157 [cit Cyc].

Cal.—Sprague v. Walton, 145 Cal. 228, 78 P 645; Kerns v. McKean, 65 Cal. 411, 4 P 404 [foll Kerns v. Dean, 77 Cal. 555, 19 P 817]; Gunter v. Janes, 9 Cal. 643.

Mass.—Haven v. Haven, 181 Mass. 573, 64 NE 410.

Mo.—Bramell v. Adams, 146 Mo. 70, 47 SW 931.

N. H.—Rice v. Connelly, 71 N. H. 382, 52 A 446.

N. J.—Quicksall v. Chew, (Ch.) 38 A 442.

S. D.—Purdin v. Archer, 4 S. D. 54, 54 NW 1043.

Tex.—Schmitt v. Jaques, 26 Tex. Civ. A. 125, 62 SW 956; Curran v. Texas Land, etc., Co., 24 Tex. Civ. A. 499, 60 SW 466; Barlow v. Anglin, (Civ. A.) 45 SW 857. Contra Hall v. McCormick, 7 Tex. 269.

[a] **Illustration.**—Where a note is inventoried as an asset of an estate and is claimed by a third person, his relief is by a bill in equity as against the maker of the note or his representatives and the representatives of decedent, and not by a presentation of claim for the note in the probate court. In re Ferdon, 69 N. J. Eq. 762, 62 A 551.

[b] **A claim for money which can be identified** in specie as belonging to claimant need not be presented. Sprague v. Walton, 145 Cal. 228, 78 P 645.

[c] **A claim for property pledged** need not be presented. Retter v. Rothschild, 4 Cal. Unrep. Cas. 103, 33 P 849. But see Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647 (the buyer of corporate stock, the title to the stock remaining in the seller, must, on the death of the seller, present his claim to the administrator of the seller).

[d] **A claim to have property declared community property** of petitioner and decedent and delivered to him instead of being distributed to the distributees should be presented to the personal representative. Rowland's Est., 74 Cal. 523, 16 P 315, 8 AmSR 464.

13. Harris v. Hutcheson, 65 Miss. 9, 3 S 34.

14. Schade v. Connor, 84 Nebr. 51, 120 NW 1012.

Where it appeared in a proceeding by an administrator to collect assets that an agent of decedent was to be allowed a commission for selling property, it was proper to allow the retention of such commission wihout forcing the agent to probate his claim.[15]

[§ 944] **b. Public Debts—(1) Debts Due to United States.** The statutes of the several states in regard to the presentation of claims have as a rule no application to claims due the United States, either as a bar to the claims or as affecting their enforcement in the federal courts.[16] But it has been held that where the United States is compelled to come into a state court to enforce its rights, it must come in as any other suitor;[17] and where the presentation of the claim to the executor or administrator is a prerequisite to the right to sue thereon, the United States must comply with such requirement.[18]

[§ 945] **(2) Debts Due to State, County, Etc.—(a) In General.** It is usually considered that a claim due to a state must be presented,[19] although this has been denied,[20] and it is sometimes expressly required by statute that debts due to the state be paid without presentation to the probate court for allowance.[21] A claim for a debt due to a county must be presented.[22]

[§ 946] **(b) Taxes and Assessments.** The more general view is that the requirement of presentation does not apply to claims for taxes and assessments, whether assessed before or after the death of decedent,[23] although there is also support for the view that a presentation of such a claim is necessary.[24]

Claim for reimbursement for taxes paid. A mortgagee who has paid taxes, as provided for in a mortgage made by decedent, after presentation of the claim founded on the note and mortgage, may be allowed reimbursement on foreclosure without presentation of his claim,[25] but where a purchaser, to whom decedent in his lifetime conveyed land by warranty deed, has been compelled to pay taxes which were a lien on the property at the time of the conveyance, his claim for reimbursement must be presented.[26]

[§ 947] **c. Contingent Claims—(1) What Claims Are Contingent.** Within the meaning of the statutes relating to presentation of claims against a decedent's estate, a contingent claim is one under which the existence of any right or liability is not presently certain or absolute but is dependent upon some future event which may or may not happen; if the right or liability exists independent of the event, the claim is absolute, notwithstanding until the happening of the event it may be uncertain in amount or unenforceable.[27]

15. In re Armstrong, 182 Ill. A. 482.

16. U. S. v. Fidelity Trust Co., 121 Fed. 766, 58 CCA 42; U. S. v. Backus, 24 F. Cas. No. 14,491, 6 McLean 443, 445; U. S. v. Hoar, 26 F. Cas. No. 15,373, 2 Mason 311; Pond v. Dougherty, 6 Cal. A. 686, 92 P 1035.

"The exclusive jurisdiction given to the Probate Court, in the settlement of decedent's estates, cannot affect the claims of the Government, however it may bear on private claims. The mode of proceeding in the Probate Court, and the time given for the settlement of accounts, cannot regulate the claims of the government, nor affect the remedies given to it under its own laws. The demand in this case has been adjusted by the accounting department, under the laws of Congress, and there can be no obligation to present the account for adjustment, to the Probate Court of Michigan. Such a rule of procedure would subject the action of the Federal Government to the regulation of a state Government." U. S. v. Backus, supra.

[a] **One whose claim arises by subrogation** to the rights of the United States is also relieved from the necessity of presentation. Pond v. Dougherty, 6 Cal. A. 686, 92 P 1035.

17. U. S. v. Hailey, 2 Ida. (Hasb.) 22, 3 P 263.

18. U. S. v. Hailey, 1 Ida. (Hasb.) 22, 3 P 263.

19. Ark.—Hill v. State, 23 Ark. 604.

Ga.—Mahone v. Central Bank, 17 Ga. 111.

Ind.—State v. Edwards, 11 Ind. A. 226, 38 NE 544.

Pa.—In re Mitchell, 2 Watts 87.

Tenn.—State v. Crutcher, 2 Swan 504.

[a] **Claims due a bank which is entirely owned by the state** (1) must be presented like the claims of ordinary creditors, as such bank is a mere corporation and not invested with the attributes of sovereignty. State Bank v. Gibson, 6 Ala. 814. (2) A debt due to the Central Bank of Georgia is within the statute requiring presentation of claims. Mahone v. Central Bank, 17 Ga. 111.

20. U. S. v. Hoar, 26 F. Cas. No. 15,373, 2 Mason 311; Parmilee v. McNutt, 9 Miss. 179.

21. State v. Tittmann, 103 Mo. 553, 15 SW 936.

22. In re Jacob, 119 Iowa 176, 93 NW 94.

23. Cal.—Hancock v. Whittemore, 50 Cal. 522; Peo. v. Olvera, 43 Cal. 492.

Ind.—Graham v. Russell, 152 Ind. 186, 52 NE 806; Henderson v. Whitinger, 56 Ind. 131; Nation v. Green, (A.) 114 NE 895; Barnum v. Rallihan, 63 Ind. A. 349, 112 NE 561; Cullop v. Vincennes, 34 Ind. A. 667, 72 NE 166.

Iowa.—Findley v. Taylor, 97 Iowa 420, 66 NW 744.

Md.—Bonaparte v. State, 63 Md. 465.

Mo.—State v. Tittmann, 103 Mo. 553, 569, 15 SW 936, 941.

Oh.—Gager v. Prout, 48 Oh. St. 89, 26 NE 1013.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Wis.—Bogue v. Laughlin, 149 Wis. 271, 136 NW 606, 40 LRANS 927, AnnCas1913C 1367.

[a] **Reason of rule.** — "Ample power is given to assess against the executors, and they are bound to pay the taxes and reimburse themselves out of the estate in their hands. No reason appears why a different rule should apply in regard to omitted property and other property belonging to the estate, and in each case, under our statutes, the assessment is against the executors. As we have seen, the tax is a debt against the owner, the person assessed is liable for the tax, but has a remedy against the beneficial owner and a lien on the property, and can reimburse himself out of the property in his possession." Bogue v. Laughlin, 149 Wis. 271, 284, 136 NW 606, 610, 40 LRANS 927, AnnCas 1913C 1367.

[b] **An executor or administrator is affected with notice** of taxes levied against property of the estate in his custody, or against property of decedent in his lifetime which has become property of the estate. Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926. To same effect Cullop v. Vincennes, 34 Ind. A. 667, 72 NE 166.

[c] **Taxes assessed pending administration** are expenses of administration, and need not be presented as a "claim" against the estate. Peo. v. Olvera, 43 Cal. 492.

[d] **Claims for inheritance taxes are not** necessarily within an exception of claim for taxes from the requirement of presentation and proof. Nation v Green, (Ind. A.) 114 NE 895.

[e] **Insolvent estate.**—Personal tax bills must be presented and allowed against the estates of insolvent debtors in the same manner and with like effect as other indebtedness of such debtors. State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97.

24. Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 327; In re Jefferson, 35 Minn. 215, 28 NW 256; Millett v. Early, 16 Nebr. 266, 20 NW 352.

[a] **Claims for municipal taxes** are included in a statute requiring all "demands" against a decedent's estate to be verified. Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 327.

25. Humboldt Sav., etc., Soc. v. Burnham, 111 Cal. 343, 43 P 971; German Sav., etc., Soc. v. Hutchinson, 68 Cal. 52, 8 P 627.

26. Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926 (the executor or administrator is not affected with notice of unpaid taxes on property which decedent conveyed in his lifetime, and in which he had no interest at the time of his death).

27. U. S.—Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95.

Ala.—Farris v. Stoutz, 78 Ala. 130; McDowell v. Jones, 58 Ala. 25; Fretwell v. McLemore, 52 Ala. 124; Jones v. Lightfoot, 10 Ala. 17.

Ark.—Simon v. Jones, 138 SW 986.

Cal.—Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; Matter of McDougald, 146 Cal. 196, 79 P 875; Verdier v. Roach, 96 Cal. 467, 31 P 554; In re Halleck, Myr. Prob. 46 [aff 49 Cal. 111].

Colo.—Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 P 310.

Conn.—Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163.

Ill.—Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136].

Ind.—Ratcliff v. Leunig, 30 Ind. 289.

Iowa.—Sankey v. Cook, 82 Iowa 125, 47 NW 1077.

Kan.—McDaniel v. Putman, 100 Kan. 550, 164 P 1167, LRA1917E 1100.

Me.—Greene v. Dyer, 32 Me. 460.

Mass.—Pratt v. Lamson, 128 Mass.

528; Ames v. Ames, 128 Mass. 277.

Mich.—Crosby v. Montcalm Cir. Judge, 125 Mich. 24, 83 NW 1040; Osmun v. Oakland Cir. Judge, 107 Mich. 27, 64 NW 949.

Minn.—Martz v. McMahan, 114 Minn. 34, 129 NW 1049; Jorgenson v. Larson, 85 Minn. 134, 88 NW 439.

Miss.—McWilliams v. Norfleet, 60 Miss. 987.

Mo.—Tenney v. Lasley, 80 Mo. 664 (such a claim is contingent).

Nebr.—Stichter v. Cox, 52 Nebr. 532, 72 NW 848.

N. H.—Hall v. Martin, 46 N. H. 337.

N. J.—Terhune v. White, 34 N. J. Eq. 98 [foll Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 (aff 60 N. J. Eq. 444, 46 A 1099)].

N. Y.—Jemison v. Blowers, 5 Barb. 686.

R. I.—Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

Tex.—National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

Vt.—Brown v. Dunn, 75 Vt. 264, 55 A 364; Atherton v. Fullam, 55 Vt. 388; Curley v. Hand, 53 Vt. 524; Sargent v. Kimball, 37 Vt. 320.

Wash.—In re Macdonald, 29 Wash. 422, 69 P 1111.

Wis.—Schmidt v. Grenzow, 162 Wis. 301, 156 NW 143, AnnCas1917B 163; South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 NW 583, 58 LRA 82 [expl Greene v. Dyer, 32 Me. 460]; Austin v. Saveland, 77 Wis. 108, 45 NW 955.

[a] **Distinction between contingent and unmatured claims.**—Verdier v. Roach, 96 Cal. 467, 31 P 554. Unmatured claims see infra § 949.

[b] **The liability of a surety** (1) on a contract for the mere payment of money is not contingent. Dunnigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 496; Ratcliff v. Leunig, 30 Ind. 289. (2) But his liability on a penal bond for the performance of certain duties by his principal is contingent until the condition of the bond is broken. Mann v. Everets, 64 Wis. 372, 25 NW 209. (3) The latter rule governs as to liability of a surety on an administration bond. Palmer v. Pollock, 26 Minn. 433, 4 NW 1113. (4) A guardian's bond. Hantzch v. Massolt, 61 Minn. 361, 63 NW 1069; McKeen v. Waldron, 25 Minn. 466; McWilliams v. Norfleet, 60 Miss. 987. (5) Immediately after a devastavit by the administrator the liability of the surety becomes absolute, and does not remain contingent until the amount of the devastavit has been judicially ascertained, and such claims are within the operation of the statute of nonclaim. Pratt v. Northam, 11 F. Cas. No. 11,376, 5 Mason 95; Page v. Bartlett, 101 Ala. 193, 13 S 768; Taylor v. Robinson, 69 Ala. 269; McDowell v. Jones, 58 Ala. 25; Owens v. Corbitt, 57 Ala. 92; Foster v. Holland, 56 Ala. 474; Fretwell v. McLemore, 52 Ala. 124; Hooper v. Bryant, 3 Yerg. (Tenn.) 1. But compare Atherton v. Fullam, 55 Vt. 388 (the liability of a surety on an administration bond did not become "absolute," nor had the claim against the surety "accrued," until after the final judgment against the administrator settling his account). (6) On the death of a ward the liability of the surety on the guardian's bond becomes an "accrued" claim. Glass v. Woolf, 82 Ala. 281, 3 S 11.

[c] **The liability of an indorser of a promissory note** (1) is contingent until maturity, demand, and notice of dishonor, and where the indorser dies before the maturity of the note, the statute of nonclaim does not run until the liability becomes absolute, and the fact that the indorser without the knowledge of the indorsee was indemnified by the maker so that demand and notice were waived cannot have the effect to set the statute of nonclaim in operation before the note matures. Cockrill v. Hobson, 16 Ala. 391. To same effect Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163; Dunnigan v. Stevens, 19 Ill. A. 310 [rev on other grounds 122 Ill. 396, 13 NE 651, 3 AmSR 496]. (2) When, however, the indorser has waived presentment, his liability is absolute, instead of contingent. Dunnigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 496.

[d] **Claim of indorser against maker's estate.**—Where an unmatured negotiable note is indorsed by the payee and held by the indorsee, and after the probate court fixes the time for presenting claims against the deceased maker's estate the indorser is compelled to pay the note, he then becomes a creditor and is entitled to present his claim within the statutory period thereafter. Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163.

[e] **A subsisting demand** which had matured and was capable of being enforced by suit during the lifetime of the debtor is not a contingent claim, and therefore must be presented within the ordinary period of limitation. McDowell v. Jones, 58 Ala. 25; Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104 [aff 93 Ill. A. 31]; Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136]; Stichter v. Cox, 52 Nebr. 532, 72 NW 848.

[f] **A claim payable on a third person's death** is an absolute and unconditional claim payable in the future, only the time of payment being uncertain. It is an accrued claim when created, payment being postponed merely until the death occurs. Farris v. Stoutz, 78 Ala. 130; McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100; Tenney v. Lasley, 80 Mo. 664 (such a claim is contingent); Brown v. Dunn, 75 Vt. 264, 55 A 364.

[g] **Claim dependent upon a person reaching a certain age.**—A covenant to convey land upon a certain person reaching a certain age is contingent until the person reaches the specified age. Pinkston v. Huie, 9 Ala. 252.

[h] **Claim dependent upon action of court.**—(1) In some states it is held that a claim dependent upon the action of a court in granting or refusing relief is not a contingent claim; that if the claimant is not entitled to a judgment or decree he has no claim, but that if he is entitled his claim cannot be regarded as contingent on whether its enforcement by suit will be granted or refused. Jones v. Lightfoot, 10 Ala. 17 (demand dependent upon correction of mistake in a deed); Jorgenson v. Larson, 85 Minn. 134, 88 NW 439. (2) But in other states claims depending for their validity upon the action of a court are deemed contingent. Backus v. Cleaveland, Kirby (Conn.) 36; Sankey v. Cook, 82 Iowa 125, 47 NW 1077; Senat v. Findley, 51 Iowa 20, 50 NW 575.

[i] **Warranty of title.**—A claim for damages for breach of such a warranty is contingent until the property has been recovered from the buyer by a person holding a paramount title. Payson v. Hadduck, 19 F. Cas. No. 10,862, 8 Biss. 293; Walker v. Byers, 14 Ark. 246; Dugger v. Oglesby, 99 Ill. 405; Blair v. Allen, 55 Ind. 409; Hall v. Martin, 46 N. H. 337; Caplinger v. Vaden, 5 Humphr. (Tenn.) 629.

[j] **Liability on a replevin bond** is contingent until the determination of the replevin action. Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22.

[k] **Liability as garnishee.**—A right acquired by garnishment creates a mere liability against the garnishee before judgment on the garnishment, and therefore the claim of the garnishing creditor need not before judgment be filed against the estate of the garnishee. Harris v. Hutcheson, 65 Miss. 9, 3 S 34.

[l] **Assumption of mortgage.**—(1) A claim by the mortgagee against the purchaser on his assumption of a mortgage on the land conveyed is contingent until foreclosure of the mortgage. Terhune v. White, 34 N. J. Eq. 98 [foll Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 (aff 60 N. J. Eq. 444, 46 A 1099)]. To same effect Stichter v. Cox, 52 Nebr. 532, 72 NW 848. (2) Where the purchaser executes a bond to the mortgagee to pay the mortgage assumed, no claim for a deficiency can be made unless the claim is presented. Mutual Ben. L. Ins. Co. v. Howell, 32 N. J. Eq. 146.

[m] **Deceased partner's liability.**—When the liability of the estate of a deceased partner for partnership indebtedness is dependent on the insolvency of the surviving partner, a claim therefor as against the estate is contingent during the solvency of the surviving partner. Pendleton v. Phelps, 19 F. Cas. No. 10,923, 4 Day (Conn.) 476.

[n] **The claim of a surviving partner** against the estate of a deceased partner for contribution has been held contingent until the business of the firm is settled. Logan v. Dixon, 73 Wis. 533, 41 NW 713.

[o] **Note not due.**—(1) An absolute liability on a note payable at a future day is not a contingent claim and must be presented within the time limited for presenting existing claims. Austin v. Saveland, 77 Wis. 108, 45 NW 955. (2) Unmatured claims generally see infra § 949.

[p] **Lease providing for payment of taxes and insurance; claim of colessee for contribution.**—When a lease requires the lessees to pay taxes assessed on the property and to keep the property insured, a claim by one of the lessees against the estate of his colessee for contribution for insurance premiums paid after the death of the colessee and for payment of taxes assessed after his death is contingent. Oswald v. Pillsbury, 61 Minn. 520, 63 NW 1072.

[q] **Stockholders' liability** (1) for the debts of the corporation to the extent of the unpaid subscription is contingent until the assets of the corporation are distributed, being dependent upon the insolvency of the corporation. Rankin v. Big Rapids, 133 Fed. 670, 66 CCA 568; Mortimer v. Potter, 213 Ill. 178, 72 NE 817 (stockholder of national bank); Wickham v. Hull, 102 Iowa 469, 71 NW 352; National German-American Bank v. Tapley, 56 Minn. 420, 57 NW 1065; Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 50 NW 1117, 31 AmSR 637, 15 LRA 470; Robinett v. Starling, 72 Miss. 652, 18 S 421; Garesche v. Lewis, 15 Mo. A. 565 [aff 93 Mo. 197, 6 SW 54]; Hazlett v. Blakely, 70 Nebr. 613, 97 NW 808; In re Macdonald, 29 Wash. 422, 69 P 1111; South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 NW 583, 58 LRA 82. (2) But when the liability is absolute, the fact that the amount thereof has not been determined in an action against the stockholder does not on the revival after his death of the action against his administrator render the claim a contingent one, not presentable until its amount is determined. Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 P 310. (3) So an assessment of a stockholder's liability by a court against stock held by a decedent's estate, accruing within the time limited for presenting claims against the estate, but not presented during that time, is barred. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

[r] **Contingent fee.**—A claim for attorney fees which were contingent upon recovery is a contingent claim. Burton v. Lockert, 9 Ark. 411; Morgan v. Gibson, 42 Mo. A. 234.

[s] **Breach of contract of sale of realty.**—Where a landowner enters into an agreement for the sale of his

[§ 948] **(2) Necessity for Presentation.**[28] Under some statutes it is not necessary to present contingent claims, but they may be enforced whenever the liability becomes fixed by the happening of the contingency, even though this occurs after the time limited for presentation.[29] But this rule is often limited either by the express provisions of the statutes or by the decisions, so that the requirement of the statute does not apply while the claim remains contingent, but begins to run upon the happening of the contingency which fixes the liability, or at the time when the claim accrues, even though this date is after the expiration of the general period limited for presenting claims,[30]

land, in which the wife does not join, damages for breach upon his death cease to be contingent upon the absolute refusal of the widow to convey as to her statutory third therein. Jorgensen v. Larson, 85 Minn. 134, 88 NW 439.

[t] **Absolute guaranty.**—Liability on the absolute guaranty of the debt of another is not contingent so as to excuse the failure to present. National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

[u] **A claim for rent to accrue** under a lease to terminate upon destruction of the leased premises is contingent. Mackin v. Haven, 187 Ill. 480, 58 NE 448 [aff 88 Ill. A. 434].

[v] **Covenant against encumbrances.**—A claim for damages for breach of a covenant against encumbrances is contingent prior to a substantial breach. Whittern v. Krick, 31 Ind. A. 577, 68 NE 694.

[w] **Enforcement of claim dependent on reformation of instrument.**—The fact that the enforcement of the claim is dependent on the reformation of a deed does not render it contingent. Jones v. Lightfoot, 10 Ala. 17.

[x] **The fact that there are conditions to be performed by the claimant** (1) before he can enforce the claim will not render it contingent. Painter v. Smith, 2 Root (Conn.) 142. (2) Accordingly, a note the payment of which is contingent upon the performance of some act on the part of the payee must nevertheless be presented like any other claim against an estate, although it is not due at the time that the final settlement of the estate is made. Cincinnati, etc., R. Co. v. Heaston, 43 Ind. 172. (3) So also a claim for damages for breach of a contract to convey land becomes absolute on payment of the purchase price, and does not remain contingent until a demand for a conveyance. The distinction is made between an "accrued claim" and the accrual of the cause of action. King v. Mosely, 5 Ala. 610.

[y] **Claim founded on executor's breach of duty.**—(1) The claim which the creditor of an estate may have against the executor, by reason of his acts or omissions as executor, is one which becomes fixed in the lifetime of the executor, and is not contingent on the fact that the estate may prove insolvent on an account taken after the death of the executor, and in the event of his death such claim must be presented for allowance to the administrator of his estate within the time fixed in the notice to creditors. In re Halleck, 49 Cal. 111 [aff Myr. Prob. 46]. (2) The personal liability of an administrator to creditors of the estate after settlement of his account and order by the probate court for payment of creditors becomes absolute, and the claims of creditors against him personally are no longer contingent. Sargent v. Kimball, 37 Vt. 320.

[z] **Claims for indemnity** (1) are contingent until the person entitled to be indemnified has been damaged. Stone v. Clarke, 40 Ill. 411; Bullard v. Moor, 158 Mass. 418, 33 NE 928; Harding v. Smith, 11 Pick. (Mass.) 478; Jones v. Carrollton Bank, 71 Miss. 1023, 16 S 344. (2) So the claim of a sheriff against the estate of his deputy for a default of his deputy is contingent until the sheriff has been charged or has answered for the same. Neil v. Cunningham, 2 Port. (Ala.) 171.

28. As prerequisite to an action against heirs and devisees see Descent and Distribution § 308.

29. U. S.—Rankin v. Herod, 140 Fed. 661; Rankin v. Big Rapids, 133 Fed. 670, 66 CCA 568; Payson v. Hadduck, 19 F. Cas. No. 10,862, 8 Biss. 293.

Ala.—Jones v. Lightfoot, 10 Ala. 17.

Ark.—Hendricks v. Keesee, 32 Ark. 714; Walker v. Byers, 14 Ark. 246.

Cal.—Pico v. De La Guerra, 18 Cal. 422.

Fla.—May v. Vann, 15 Fla. 553.

Ill.—Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 NE 1050; Mackin v. Haven, 187 Ill. 480, 58 NE 448 [aff 88 Ill. A. 434]; Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22; Dugger v. Oglesby, 99 Ill. 405; Dunnigan v. Stevens, 19 Ill. A. 310 [rev on other grounds 122 Ill. 396, 13 NE 651, 3 AmSR 496].

Ind.—Blair v. Allen, 55 Ind. 409; Whittern v. Krick, 31 Ind. A. 577, 68 NE 694.

Iowa.—Pratt v. Fishwild, 121 Iowa 642, 96 NW 1089; Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502; Security F. Ins. Co. v. Hansen, 104 Iowa 264, 73 NW 596; Wickham v. Hull, 102 Iowa 469, 71 NW 352; Sankey v. Cook, 82 Iowa 125, 47 NW 1077; Senat v. Findley, 51 Iowa 20, 50 NW 575.

Mass.—Bullard v. Moor, 158 Mass. 418, 33 NE 928; Harding v. Smith, 11 Pick. 478.

Minn.—Jorgenson v. Larson, 85 Minn. 134, 88 NW 439; Oswald v. Pillsbury, 61 Minn. 520, 63 NW 1072; Hantzch v. Massolt, 61 Minn. 361, 63 NW 1069; McKeen v. Waldron, 25 Minn. 466.

Miss.—Savings, etc., Assoc. v. Tartt, 81 Miss. 276, 32 S 115; Robinett v. Starling, 72 Miss. 652, 18 S 421; Jones v. Carrollton Bank, 71 Mass. 1023, 16 S 344; Harris v. Hutcheson, 65 Miss. 9, 3 S 34; McWilliams v. Norfleet, 60 Miss. 987; Buckingham v. Walker, 48 Miss. 609; Gordon v. Gibbs, 11 Miss. 473.

Mo.—State v. Tittmann, 134 Mo. 162, 35 SW 579; Chambers v. Smith, 23 Mo. 174; Morgan v. Gibson, 42 Mo. A. 234.

Nebr.—Stichter v. Cox, 52 Nebr. 532, 72 NW 848.

Nev.—Pruett v. Caddigan, 176 P 787.

N. H.—Walker v. Cheever, 39 N. H. 420; Parker v. Read, 9 N. H. 121; Sibley v. McAllaster, 8 N. H. 389.

N. J.—Ray Est. Corp. v. Steelman, 90 N. J. L. 184, 100 A 209; Wakeman v. Paulmier, 39 N. J. L. 340; Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 [aff 60 N. J. Eq. 444, 46 A 1099]; Terhune v. White, 34 N. J. Eq. 98.

N. C.—Godley v. Taylor, 14 N. C. 178.

Tenn. — Caplinger v. Vaden, 5 Humphr. 629; Bradford v. McLemore, 3 Yerg. 318.

Tex.—National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

Wash.—In re Macdonald, 29 Wash. 422, 69 P 1111.

Wis.—South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 NW 583, 58 LRA 82; Blakely v. Smock, 96 Wis. 611, 71 NW 1052; Logan v. Dixon, 73 Wis. 533, 41 NW 713; Mann v. Everts, 64 Wis. 372, 25 NW 209.

[a] **Unauthorized investment by guardian.**—Where a guardian invested funds of her ward in a note and mortgage without authority of court, the statute limiting the time of filing claims against the estate did not apply to the filing of a claim for the amount of such mortgage with the executor of such guardian, since such claim was contingent on the acceptance of the investment by the ward on coming of age, and also because the ward was not a creditor of the estate until coming of age. Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502.

30. U. S.—Rankin v. Big Rapids, 133 Fed. 670, 66 CCA 568 (construing Michigan statute); Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569.

Ala.—Stakely v. Executive Committee, etc., 145 Ala. 379, 39 S 653; Glass v. Woolf, 82 Ala. 281, 3 S 11; Farris v. Stoutz, 78 Ala. 130; McDowell v. Jones, 58 Ala. 25; Fretwell v. McLemore, 52 Ala. 124; Jones v. Lightfoot, 10 Ala. 17; Pinkston v. Huie, 9 Ala. 252; Neil v. Cunningham, 2 Port. 171.

Cal.—Verdier v. Roach, 96 Cal. 467, 31 P 554; Davidson v. Rankin, 34 Cal. 503; Gleason v. White, 34 Cal. 258; Pico v. De la Guerra, 18 Cal. 432.

Conn.—State v. Northrop, 106 A 504; Gay's App., 61 Conn. 445, 23 A 829; Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163; Bacon v. Thorp, 27 Conn. 251; Hawley v. Botsford, 27 Conn. 80.

Fla.—May v. Vann, 15 Fla. 553.

Mich.—Hancock Mut. L. Ins. Co. v. Hill, 108 Mich. 126, 65 NW 758.

Mo.—State v. Tittmann, 134 Mo. 162, 35 SW 579; Tenney v. Lasley, 80 Mo. 664; Chambers v. Smith, 23 Mo. 174; Finney v. State, 9 Mo. 227.

Nebr.—Hazlett v. Blakely, 70 Nebr. 613, 97 NW 808; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

Vt.—Atherton v. Fullam, 55 Vt. 388.

Wis.—South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 NW 583, 58 LRA 82; Blakely v. Smock, 96 Wis. 611, 71 NW 1052; Webster v. Lawson, 73 Wis. 561, 41 NW 710; Mann v. Everts, 64 Wis. 372, 25 NW 209; Ernst v. Nau, 63 Wis. 134, 23 NW 492.

[a] **Formerly in Connecticut** (1) there was no limitation of the time for presenting contingent claims, but they might be presented at any time after they accrued (Pendleton v. Phelps, 19 F. Cas. No. 10,923, Brunn. Col. Cas. 95, 4 Day (Conn.) 476; Bacon v. Thorp, 27 Conn. 251 [expl Griswold v. Bigelow, 6 Conn. 258; Booth v. Starr, 5 Day (Conn.) 419]; Backus v. Cleaveland, Kirby (Conn.) 36), (2) even though they accrued after settlement and distribution of the estate (Griswold v. Bigelow, supra).

[b] **Accrual of claim and accrual of right of action.**—(1) In some states the meaning of these statutory provisions concerning contingent claims is not that a claim must be presented within a certain period after the right of action has accrued, but that it must be presented within that period after the claim itself has accrued. A claim may fall within the operation of the statute and thus require presentation, although the right of action thereon has not accrued; it is enough that a definite right to demand in the future exists. Glass v. Woolf, 82 Ala. 281, 3 S 11; McDowell v. Jones, 58 Ala. 25; Jones v. Lightfoot, 10 Ala. 17; King v. Mosely, 5 Ala. 610; Austin v. Saveland, 77 Wis. 108, 45 NW 955. (2) But in other states the period for presentation begins when the right of action accrues. Gay's App., 61 Conn. 445, 23 A 829; Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163. (3) Thus in Missouri the statute does not begin to run until the

or after the administration has been closed or the estate settled,[31] claims arising out of suretyship frequently calling for the application of this principle.[32] It has been held, however, that if there is no personal representative when the claim accrues, the statute does not begin to run until an administrator is appointed.[33] On the other hand, some statutes requiring presentation of claims within a fixed period include, either expressly or by implication, contingent claims,[34] any difficulty as to the

right to recover substantial damages accrues. State v. Tittmann, 134 Mo. 162, 35 SW 579; Tenney v. Lasley, 80 Mo. 664; Greenabaum v. Elliott, 60 Mo. 25; Chambers v. Smith, 23 Mo. 174; Miller v. Woodward, 8 Mo. 169. (4) And no distinction is recognized between a merely nominal right of recovery and no right of recovery at all. Chambers v. Smith, supra. (5) Thus while a cause of action accrues on a bond or covenant at the breach thereof, yet where the breach is merely formal and substantial damages afterward result therefrom, the statutory period begins to run only from the time when the right to recover such damages accrues. State v. Tittmann, 134 Mo. 162, 35 SW 579; Chambers v. Smith, supra. (6) Where there has been a change in the statutory period, the statute in force when the cause of action accrued is controlling. Greenabaum v. Elliott, supra.

[c] **Presentation before maturity** of the claim is sufficient. Russell v. Bristol, 49 Conn. 251.

[d] **The claim of surviving partners** against the estate of a deceased partner for contribution for losses sustained by the firm is a contingent claim which does not become absolute until the business of the firm is settled, the assets converted, and the debts paid, and which need not be presented for allowance before that time. Logan v. Dixon, 73 Wis. 533, 41 NW 713.

[e] **A claim for money loaned and payable on demand** which was capable of being enforced by the creditor before the death of the debtor is not within a statute permitting the filing of claims which accrue or become absolute after the time limited for creditors to present their claims and providing that the same may be presented and proved at any time within one year after they shall accrue or become absolute. Barry v. Minahan, 127 Wis. 570, 107 NW 488.

[f] **When claim becomes absolute.**—A contingent claim does not become absolute, within the meaning of a statute requiring presentation within one year after the claim becomes absolute, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate. Hazlett v. Blakely, 70 Nebr. 613, 97 NW 808.

31. Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569; State v. Tittmann, 134 Mo. 162, 35 SW 579.

[a] **The contingent claim provided for by the Wisconsin statute** (1) is one which accrues and becomes absolute before the administration of the estate is closed and before a decree of distribution has been rendered by the county court. The statutes do not apply to a contingent claim which does not accrue and is incapable of being established by proof until after the estate has been fully administered. Such a claim need not be presented for allowance. Mann v. Everts, 64 Wis. 372, 25 NW 209 [dist Ernst v. Nau, 63 Wis. 134, 23 NW 492]. (2) Where the estate has been fully settled and the assets have been distributed before a contingent claim becomes absolute, and the claim is then presented, if the executor or administrator has not sufficient assets to pay the whole of the claim the creditors may recover the balance from the heirs, devisees, or legatees who have received sufficient real and personal property from the debtor's estate. Logan v. Dixon, 73 Wis. 533, 41 NW 713; Mann v. Everts, supra. (3) Liability to refund on deficiency of assets see infra §§ 1424–1437.

[b] **Claim accruing after partial settlement of estate.** — Under the statute if a creditor, after a contingent claim has become absolute, presents it within the statutory period thereafter, he can be paid only out of the assets still remaining in the hands of the personal representative and not then lawfully distributed or applied to the payment of other debts previously presented and allowed against the estate. Logan v. Dixon, 73 Wis. 533, 41 NW 713.

32. Ala.—Page v. Bartlett, 101 Ala. 193, 13 S 768; Taylor v. Robinson, 69 Ala. 269.

Fla.—Gibson v. Mitchell, 16 Fla. 519.

Iowa.—Braught v. Griffith, 16 Iowa 26.

Mich.—Hancock Mut. L. Ins. Co. v. Hill, 108 Mich. 126, 65 NW 758.

Miss.—Savings, etc., Assoc. v. Tartt, 81 Miss. 276, 32 S 115.

Mo.—State v. Browning, 102 Mo. A. 455, 76 SW 719.

Tenn.—Reeves v. Pulliam, 7 Baxt. 119.

Wis.—Ernst v. Nau, 63 Wis. 134, 23 NW 492.

[a] **A claim of a surety for contribution from a cosurety** is contingent until payment of the debt, at which time it accrues or becomes absolute, and where the cosurety dies before the debt is paid, the presentation of such claim against the estate of the deceased cosurety is governed by the rule of the text. Gibson v. Mitchell, 16 Fla. 519; May v. Vann, 15 Fla. 553; Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119; Maxey v. Carter, 10 Yerg. (Tenn.) 521; Ernst v. Nau, 63 Wis. 134, 23 NW 492.

[b] **A claim of a surety for reimbursement from the principal debtor** (1) remains contingent until the surety pays the debt, and where the principal debtor dies before payment by the surety, the period in which the surety must present his claim is computed from the time of payment. Cawthorne v. Weisinger, 6 Ala. 714; McBroom v. Governor, 6 Port. (Ala.) 32; Neil v. Cunningham, 2 Port. (Ala.) 171; Savings, etc., Assoc. v. Tartt, 81 Miss. 276, 32 S 115; Burton v. Rutherford, 49 Mo. 255; Miller v. Woodward, 8 Mo. 169; Bauer v. Gray, 18 Mo. A. 164; Ewing v. Maury, 3 Lea (Tenn.) 381; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119; Marshall v. Hudson, 9 Yerg. (Tenn.) 57; Webster v. Lawson, 73 Wis. 561, 41 NW 710. (2) And it has been held that the right of the surety to present his claim within the statutory period thereafter is not affected by the fact that the creditor failed to present his own claim against the deceased principal's estate. Cawthorne v. Weisinger, 6 Ala. 714; McBroom v. Governor, 6 Port. (Ala.) 32. (3) But the due presentation of the creditor's claim against the deceased debtor's estate relieves the surety, upon payment of the debt, of the necessity of presenting his claim against the estate, for he is subrogated to the creditor's rights and remedies and stands in the latter's place as to the steps already taken to enforce the claim. Braught v. Griffith, 16 Iowa 26; Fisher v. Columbia Bldg., etc., Assoc., 59 Mo. A. 430.

[c] **A claim against the estate of deceased surety** on a bond in favor of the obligee named therein accrues at the time when suit might have been brought against the surety if living, and not at the time of the rendition of judgment against the principal and a surviving surety. Hancock Mutual L. Ins. Co. v. Hill, 108 Mich. 126, 65 NW 758.

[d] **A claim against a surety on a trustee's bond,** which is conditioned for a faithful performance of the trustee's duties, does not accrue until a breach of condition by a default of the trustee, and the statute of nonclaim does not begin to run until the breach occurs. McDowell v. Brantley, 80 Ala. 173.

[e] **Claim against surety on agent's bond.**—Where decedent was surety on a bond given by an agent to plaintiff and conditioned for the faithful performance of his contract of agency until his final discharge, and the agent continued in the employment of plaintiff until after the decedent had died and his estate had been settled, and then absconded in default to plaintiff, it was held that, although parts of plaintiff's claim against the agent might have been deemed due at an earlier date, yet they became merged in the one claim which accrued and matured at the termination of the agency, and the same was a proper claim to be audited and allowed against the decedent's estate after the time limited for that purpose. Michel Brewing Co. v. Wightman, 97 Wis. 657, 75 NW 316.

[f] **Claim against surety on personal representative's bond.**—A claim against the estate of a deceased surety on the bond of an insolvent executor, for a legacy which vested at the testator's death, must be presented to the surety's personal representative within the prescribed period after the grant of administration, although the time of payment of the legacy was postponed until after the surety's death. Foster v. Holland, 56 Ala. 474.

[g] **A claim against a surety on a guardian's bond** accrues at the time when the ward dies or attains his majority and the guardian fails forthwith to make a settlement of his accounts; the statute of nonclaim begins to run at this date and is not postponed until a judicial ascertainment of the guardian's liability. Glass v. Woolf, 82 Ala. 281, 3 S 11.

33. Gay's App., 61 Conn. 445, 23 A 829.

34. U. S.—Schurmeier v. Connecticut Mut. L. Ins. Co., 137 Fed. 42, 69 CCA 22.

Ark.—Bennett v. Dawson, 15 Ark. 412, 18 Ark. 334; Walker v. Byers, 14 Ark. 246 [overr Allen v. Byers, 12 Ark. 593; Burton v. Lockert, 9 Ark. 411].

Cal.—Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; Morrow v. Barker, 119 Cal. 65, 51 P 12; Verdier v. Roach, 96 Cal. 467, 31 P 554; Janin v. Browne, 59 Cal. 37.

Ida.—Lundy v. Lemp, 179 P 738; Blake v. Lemp, 179 P 737.

Ill.—Pearson v. McBean, 231 Ill. 536, 83 NE 173 [aff 133 Ill. A. 585].

Iowa.—In re Mardis, 148 Iowa 740, 127 NW 1021; Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502.

Mass.—Electric Welding Co. v. Fitz, 215 Mass. 315, 102 NE 354.

N. H.—Walker v. Cheever, 39 N. H. 420.

N. Y.—Cornes v. Wilkin, 79 N. Y. 129 [aff 14 Hun 428]; Hoyt v. Bonnett, 50 N. Y. 538 [rev 58 Barb. 529].

Wash.—Barto v. Stewart, 21 Wash. 605, 59 P 480 [overr Neis v. Farqu-

amount and time of payment being obviated by some provision for the reservation of sufficient assets to pay such claims when they shall accrue.[35] Some of the statutes provide that contingent claims which cannot be proved or allowed as debts may be presented with the proofs thereof to the probate court, or to the commissioners for a report thereon.[36] Under such statutes a claim which was contingent at the time of the debtor's death but became absolute before the expiration of the time limited for creditors to present their claims to the commissioners cannot thereafter, and while the commission remains open, be properly presented to the probate court for allowance as a contingent claim, but must be presented to the commissioners for allowance as an absolute debt;[37] but where the claim accrues or becomes absolute after the time for presentation to the commissioners has expired, it may be presented to the personal representative within the time limited after its accrual.[38]

[§ 949] **d. Claims Not Due.** As a general rule claims which are not yet due but run to a certain maturity should be presented within the statutory period.[39] This is sometimes required although the

harson, 9 Wash. 508, 37 P 697].

[a] **Presentation in order to participate in inventoried assets.**—(1) A contingent claim must be presented within the statutory period in order that claimant may participate in the inventoried assets; if the claim is not presented within that period the creditor will be confined to uninventoried assets subsequently discovered, even though the claim does not accrue until the period has expired. Snydacker v. Swan Land, etc., Co., 154 Ill. 220, 40 NE 466 [rev 51 Ill. A. 211, and disappr Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22]; Stone v. Clarke, 40 Ill. 411. See also Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104 [aff 93 Ill. A. 31]. (2) This rule, however, is entirely distinct from the rule applicable in suits by creditors to enforce against the deceased debtor's heirs and devisees claims which have accrued or become absolute after the period of presentation. Payson v. Hadduck, 19 F. Cas. No. 10,862, 8 Biss. 293; Snydacker v. Swan Land, etc., Co., 154 Ill. 220, 40 NE 466 [rev 51 Ill. A. 211, and dist Dugger v. Ogelsby, 99 Ill. 405]. (3) Rights of unpresented claim as to assets remaining or subsequently discovered see infra § 1033.

[b] **Claims becoming absolute before expiration of time for presentation.**—Under Gen. St. (1894) §§ 4511, 4514, a contingent claim which arises on a contract and which does not become absolute and capable of liquidation before the expiration of the time limited for creditors to present their claims is not barred, the only contingent claims barred by the statute being those which become certain and absolute before the time fixed for the presentation of claims has expired. Berryhill v. Peabody, 72 Minn. 232, 75 NW 220; Oswald v. Pillsbury, 61 Minn. 520, 63 NW 1072; Hantzch v. Massolt, 61 Minn. 361, 63 NW 1069. To same effect McKeen v. Waldron, 25 Minn. 466. But see Hunt v. Burns, 90 Minn. 172, 95 NW 1110 (although the claim accrues or becomes absolute after the expiration of the time limited for the presentation of claims it will be barred if not presented before the administration is finally closed; the reason being that, under the statute the creditor may on application to the court be allowed to present his claim, although the regular period for presentation has expired); Jorgenson v. Larson, 85 Minn. 134, 88 NW 439 (to similar effect).

[c] **A claim on an indemnity covenant in a lease** must be presented within the time limited in the notice, although the covenantee was not damaged until after the expiration of the time. Verdier v. Roach, 96 Cal. 467, 31 P 554.

[d] **A claim which did not exist until after the expiration of the statutory period** for presenting claims is not barred thereby. In re Macdonald, 29 Wash. 422, 69 P 1111.

[e] **Undistributed or reserved assets.**—A contingent claim or one upon which no recovery against an estate could be predicated until the happening of a particular event cannot be enforced against the deceased's estate if not presented within the statutory period, even as to undistributed assets or assets reserved by the representatives of such estate especially for the purpose of meeting such contingent claim in the event of the same being enforced. Pearson v. McBean, 133 Ill. A. 585 [aff 231 Ill. 536, 83 NE 173].

35. See infra § 1423.

36. Osmun v. Oakland Cir. Judge, 107 Mich. 27, 64 NW 949; Brown v. Dunn, 75 Vt. 264, 55 A 364; Lytle v. Bond, 39 Vt. 388; Sargent v. Kimball, 37 Vt. 320.

[a] **A claim against the estate of an administrator,** founded upon the latter's failure to pay over to creditors the amount which was in his hands upon the settlement of his account, and which was ordered by the probate court to be paid to them, is an absolute claim which accrued in the lifetime of the administrator and must be prosecuted as such before the commissioners; it cannot properly be allowed by the probate court as a contingent claim. Sargent v. Kimball, 37 Vt. 320.

[b] **A note payable absolutely** and secured by a real estate mortgage is not, as between the holder and the estate of the maker, a contingent claim within the meaning of the statute. Osmun v. Oakland Cir. Judge, 107 Mich. 27, 64 NW 949.

[c] **An indorsement** may be allowed as a contingent claim against the estate of decedent. Curley v. Hand, 53 Vt. 524.

[d] **Uncertainty as to identity of claimant.**—Where there is outstanding against the estate a claim which is due to one person, but which, upon the happening of some future event, which may or may not happen, will become due to another person, the latter is entitled to have it allowed as a contingent claim. Curley v. Hand, 53 Vt. 524.

[e] **Liability of widow for breach of covenant.**—The liability of decedent's widow who was his devisee and legatee, for a breach of covenant or warranty contained in a deed executed by the testator, was not, under the facts involved, such a contingent claim as required presentation under the statute. Clark v. Winchell, 53 Vt. 408.

37. Lytle v. Bond, 39 Vt. 388.

38. Atherton v. Fullam, 55 Vt. 388.

39. U. S.—Morgan v. Hamlet, 113 U. S. 449, 5 SCt 583, 28 L. ed. 1043.

Ala.—Jones v. Hert, 192 Ala. 111, 68 S 259; McDowell v. Jones, 58 Ala. 25; Cockrill v. Hobson, 16 Ala. 391; Jones v. Lightfoot, 10 Ala. 17; King v. Mosely, 5 Ala. 610.

Ark.—Watkins v. Parker, 97 Ark. 492, 134 SW 1187; Planters' Mut. Ins. Co. v. Nelson, 80 Ark. 103, 96 SW 123; Bennett v. Dawson, 18 Ark. 334; Bennett v. Dawson, 15 Ark. 412; Walker v. Byers, 14 Ark. 246.

Cal.—Morrow v. Barker, 119 Cal. 65, 51 P 12; Swain's Est., 67 Cal. 637, 8 P 497; Janin v. Browne, 59 Cal. 37; Pico v. De La Guerra, 18 Cal. 422.

Fla.—May v. Vann, 15 Fla. 553; Fillyau v. Laverty, 3 Fla. 72.

Ida.—Lundy v. Lemp, 179 P 738; Blake v. Lemp, 179 P 737.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22; Dunnigan v. Stevens, 122 Ill. 396, 13 NE 651, 3 AmSR 496; Hall v. Hoxsey, 84 Ill. 616; Trego v. Cunningham, 205 Ill. A. 25; Wickes v. Walden, 161 Ill. A. 3; McElroy v. Brooke, 104 Ill. A. 220; Johnson v. Tryon, 78 Ill. A. 158; Robinson v. Harrington, 61 Ill. A. 543.

Ind.—Maddox v. Maddox, 97 Ind. 537; Cincinnati, etc., R. Co. v. Heaston, 43 Ind. 172.

Kan.—McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100.

Mass.—Bassett v. Drew, 176 Mass. 141, 57 NE 384; Pratt v. Lamson, 128 Mass. 528.

Miss.—Harris v. Hutcheson, 65 Miss. 9, 3 S 34.

Mo.—State v. Browning, 102 Mo. A. 455, 76 SW 719; Kavanaugh v. Shaughnessy, 41 Mo. A. 657; Garesché v. Lewis, 15 Mo. A. 565 [aff 93 Mo. 197, 6 SW 54]; Hicks v. Jamison, 10 Mo. A. 35; Traylor v. Cabanne, 8 Mo. A 131.

N. Y.—Cornes v. Wilkin, 79 N. Y. 129 [aff 14 Hun 428]; International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842; Hoyt v. Bonnett, 58 Barb. 529 [aff Tuck. 491, and rev on other grounds 50 N. Y. 538].

Tex.—Dunn v. Sublett, 14 Tex. 521.

Vt.—Brown v. Dunn, 75 Vt. 264, 55 A 364.

Wash.—Barto v. Stewart, 21 Wash. 605, 59 P 480 [overr Neis v. Farquharson, 9 Wash. 517, 37 P 697].

Wis.—In re Kleinschmidt, 167 Wis. 450, 167 NW 827; Schmidt v. Grenzow, 162 Wis. 301, 156 NW 143, Ann Cas1917B 163; Austin v. Saveland, 77 Wis. 108, 45 NW 955.

"All demands 'subsisting at the time of the death of the testator or intestate, whether matured or not, capable of being asserted in a court of justice, whether of law or equity,' must be exhibited within the statutory period or else barred." Watkins v. Parker, 97 Ark. 492, 494, 134 SW 1187, 1188.

[a] **The words "justly due,"** as used in a statute with respect to presentation refer to the validity of the claim and not to the time of its payment. Cassatt v. Vogel, 12 Mo. A. 323.

[b] **"All debts and demands."**—A statute requiring the presentation of all debts and demands against the estate requires the presentation of debts not due. Fillyau v. Laverty, 3 Fla. 72. But see Sampson v. Sampson, 63 Me. 328 [disappr dictum Webber v. Webber, 6 Me. 127] (holding that L. [1872] c 85 § 14 et seq. did not require the presentation of claims not due).

[c] **Accrued claim.** — A claim which will certainly become due is an "accrued" claim within the meaning of a statute, requiring claims to be presented within a certain time after they have accrued, and such a claim must be presented although it does not mature within the time specified for presentation. Farris v. Stoutz, 78 Ala. 130. See also King v. Mosely, 5 Ala. 610 (where a distinction is made between an accrued claim and the accrual of the cause of action on a claim).

[d] **A contract to pay rent** for the whole term, containing a clause providing that for certain contingencies

claims will not mature within the time limited for presenting demands;[40] but under other statutes presentation of such claims prior to maturity is not required.[41] Where a claim has been presented and exhibited before the time when payment is due, it is unnecessary to present and exhibit it again after maturity.[42] Provision is, however, sometimes made by statute for the presentation of claims accruing after decedent's death within a certain time after their maturity.[43]

Interest. A statute providing that no interest accruing after his death shall be allowed on any claim against decedent's estate, unless the claim is presented to the personal representative within one year after his appointment, has been held not to apply to a claim not due until after the appointment of the administrator.[44]

[§ 950] **e. Unliquidated Claims.**[45] While it has been held necessary to present unliquidated claims arising out of contract,[46] there is also authority for the view that unliquidated claims need not be presented.[47]

[§ 951] **f. Claims Based on Tort.** While it has been held that unliquidated claims based upon tort need not be presented,[48] there are also authorities in which the presentation of such claims has been considered necessary.[49]

[§ 952] **g. Claims Arising after Death of Decedent.**[50] The statutes of nonclaim usually apply only to claims which existed against decedent in his lifetime, and do not require the presentation of claims which come into existence after his death;[51]

the term may be shortened, may be presented as a claim for allowance and settlement against an estate. McElroy v. Brooke, 104 Ill. A. 220; Kavanaugh v. Shaughnessy, 41 Mo. A. 657; Traylor v. Cabanne, 8 Mo. A. 131.

[e] **Uncertain contracts.** — Contracts so uncertain as to be declared void at any time on default of payment of installments are not within the purport of a statute providing for the presentation of claims not yet due. Robison v. Harrington, 61 Ill. A. 543.

[f] **Where time of maturity uncertain.**—The statute with reference to the presentation and allowance of claims not due does not apply to a claim the time of maturity of which is uncertain, and such claim cannot be presented for payment before maturity and a rebate had thereon. Tenney v. Lasley, 80 Mo. 664.

[g] **A claim payable on the death of a third person** should be presented. Brown v. Dunn, 75 Vt. 264, 55 A 364. Contra Tenney v. Lasley, 80 Mo. 664.

[h] **Claims not requiring presentation.**—(1) A promissory note payable after the death of a husband and wife and to the husband's heirs, administrators, or assigns need not be presented for allowance before its maturity. Tenny v. Lasley, 80 Mo. 664. (2) A liability on a stock subscription subject to call need not be presented. Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

[i] **When failure to present not laches.**—Where a beneficiary under a will was not entitled to receive any part of the estate of testator until another beneficiary arrived at the age of thirty years, the failure of the latter and a third person to assert their claims against the estate of the trustee before that time could not prejudice the former, and could not amount to laches as to him. Houck v. Houck, 112 Md. 112, 76 A 581.

40. Ala.—Farris v. Stoutz, 78 Ala. 130.

Cal.—Verdier v. Roach, 96 Cal. 467, 31 P 554; Janin v. Browne, 59 Cal. 37.

Ill.—Johnson v. Tryon, 78 Ill. A. 158.

Me.—Pettengill v. Patterson, 39 Me. 498.

Minn.—Oswald v. Pillsbury, 61 Minn. 520, 63 NW 1072.

Pa.—Oliver's App., 101 Pa. 299; Pratt's Est., 16 Pa. Dist. 223.

Reservation of assets see infra § 1423.

41. Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569; Middletown Fourth Ecclesiastical Soc. v. Mather, 15 Conn. 587; Morgan v. Gibson, 42 Mo. A. 234; Bradford v. McLemore, 3 Yerg. (Tenn.) 318.

[a] **Presentation at any time before estate fully administered.**—A creditor whose right of action does not accrue within two years after the giving of the administration bond may present his claim to the probate court at any time before the estate is fully administered. Thompson v. De Visser, 219 Mass. 40, 106 NE 548; Cobb v. Kempton, 154 Mass. 266, 28 NE 264 (a claim by the executrix of a ward against the administrators of the guardian for a balance due on the guardian's final account, which was not allowed by the probate court until more than two years after the appointment of the administrators, might be presented at any time before the guardian's estate was fully administered since such claim did not "accrue" until it was allowed); Pratt v. Lamson, 128 Mass. 528; Hammond v. Granger, 128 Mass. 272.

42. Pease v. Phelps, 10 Conn. 62.

43. Michel Brewing Co. v. Wightman, 97 Wis. 657, 73 NW 316.

44. Pepper v. Harper, 47 SW 620, 20 KyL 837 [foll Kentucky Title Co. v. English, 50 SW 968, 20 KyL 2024].

45. **Tort claims** see infra § 951.

46. Fretwell v. McLemore, 52 Ala. 124; Peabody v. Allen, 194 Mass. 345, 80 NE 582; Whitlock's Est., Tuck. 491 [aff 58 Barb. 529 (rev on other grounds 50 N. Y. 538)].

[a] **Illustration.**—A claim under a contract with decedent to pay to the petitioner one half of the loss incurred in a joint venture, where to cover a part of this deficiency there is a fixed claim existing against a third party, only the amount of which remains to be determined, is sufficiently definite to come within the statute. Peabody v. Allen, 194 Mass. 345, 80 NE 582.

[b] **Claim for partnership accounting.**—A claim by representatives of a deceased partner against the estate of another partner whose decease took place earlier must be presented or is barred by the statute of nonclaim. Morgan v. Morgan, 68 Ala. 80.

47. Jacobs' Succ., 5 Rob. (La.) 270; Anderson v. Birdsall, 19 La. 441; King v. Cassidy, 36 Tex. 531; McGar v. Nixon, 36 Tex. 289; Bullion v. Campbell, 27 Tex. 653; Evans v. Hardeman, 15 Tex. 480; Robinson v. McDonald, 11 Tex. 385, 62 AmD 480; Garrett v. Gaines, 6 Tex. 435; Merle v. Andrews, 4 Tex. 200; Hume v. Perry, (Tex. Civ. A.) 136 SW 594, 596; Wells v. Hobbs, 57 Tex. Civ. A. 375, 122 SW 451; National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231; Neis v. Farquharson, 9 Wash. 508, 37 P 697.

"While the language of the statute is general, and is sufficiently comprehensive in terms to include all claims for money . . . the courts have limited its application to those where the amount claimed is fixed and definite, not contingent or indeterminate, and which are susceptible of verification by affidavit." Hume v. Perry, supra.

[a] **A claim on a guaranty** by a locator, to the obligee, of a dollar per acre for land, if he will accept of a certain selection, is a claim for unliquidated damages, being the amount which the value of the land falls short of that price, and such claim need not be presented to an administrator before suit. Evans v. Hardeman, 15 Tex. 480.

[b] **A demand for discovery and accounting,** since it necessarily involves an uncertain amount, need not be presented to the administrator for allowance. Neis v. Farquharson, 9 Wash. 508, 37 P 697.

48. Cal.—Hardin v. Sin Claire, 115 Cal. 460, 47 P 363.

Minn.—Comstock v. Matthews, 55 Minn. 111, 56 NW 583.

Miss.—Feld v. Borodofski, 87 Miss. 727, 40 S 816.

Okl.—Jones v. Woodward, 50 Okl. 704, 151 P 586; American Trust Co. v. Chilty, 36 Okl. 479, 129 P 51.

Tex.—Blum v. Welborne, 58 Tex. 157; Ferrill v. Mooney, 33 Tex. 219.

49. Ark.—Purcelly v. Carter, 45 Ark. 299.

Cal.—McGrath v. Carroll, 110 Cal. 79, 42 P 466.

N. H.—Simpson v. Gafney, 66 N. H. 261, 20 A 931.

N. J.—Hackensack Trust Co. v. Van den Berg, 105 A 719.

R. I.—Randall v. Brayton, 26 R. I. 233, 58 A 734.

Vt.—Warner v. Crane, 16 Vt. 79. "The very gist of plaintiff's action was the alleged fraud perpetrated upon him by Foster [decedent]. Such fraud must be alleged and proved, and, in order that an action may be maintained against the administrator of an estate, a claim of this kind must be fully presented according to law." Grubb v. Chase, 158 Cal. 352, 355, 111 P 90.

[a] **A claim for damages for the obstruction of a right of way** survives the death of the person erecting the obstruction, but should be presented to his administrator before suit is brought thereon. Randall v. Brayton, 26 R. I. 233, 58 A 734.

[b] **Claims against the estate of a deceased administrator** for a devastavit must be presented. Purcelly v. Carter, 45 Ark. 299; Patterson v. McCann, 39 Ark. 577.

50. **As liabilities of estate** see supra §§ 922–934.

51. Ala.—Roche Undertaking Co. v. De Bardeleben, 7 Ala. A. 232, 236, 60 S 1000 [cit Cyc].

Ark.—Perry v. Field, 40 Ark. 175; Yarborough v. Ward, 34 Ark. 204; Bomford v. Grimes, 17 Ark. 567.

Cal.—Miller v. Katz, 10 Cal. A. 576, 578, 102 P 946 [cit Cyc].

Colo.—Gordon-Liger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717; U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

Ill.—In re Thurber, 209 Ill. A. 533.

Iowa.—Savery v. Sypher, 39 Iowa 675.

Md.—Coburn v. Harris, 58 Md. 87.

but some statutes which provide that such claims shall be charges against the estate require that they shall be presented to the probate court for inspection and allowance.[52] It has been considered that even though presentation of such claims is not required, they may be presented for the purpose of obtaining an order directing the representative to pay them as expenses of administration,[53] and where claimant has an election to look to the representative personally or to the estate, he must present the claim if he wishes to assert it against the estate.[54]

[§ 953] **h. Claims of Representative.** Under some statutes the only difference between the claims held by the executor or administrator against the estate and those held by others is that the presentation and proof should be made directly to the court or a judge thereof or to commissioners in the first instance, the representative, as well as other claimants, being required to make presentation within the time limited by statute.[55] But under other statutes the executor or administrator is accorded a full right of retainer of the assets,[56] whether as to his own claim as an ordinary creditor against decedent, or such demands as arise on his behalf in the due course of administration; and he is permitted, regardless of the non-claim barrier, to assert and prove his own claim in the course of an accounting,[57] unless the estate is insolvent.[58]

Minn.—Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286.

N. J.—Ray Est. Corp. v. Steelman, 90 N. J. L. 184, 100 A 209.

Oh.—Humphrey v. Huff, 20 Oh. Cir. Ct. N. S. 178, 3 Oh. A. 111.

Or.—In re Murray, 56 Or. 132, 107 P 19.

Tenn.—Brown v. Porter, 7 Humphr. 373.

Tex.—King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839.

Vt.—Manning v. Leighton, 65 Vt. 84, 26 A 258, 24 LRA 684.

Wis.—Beggs v. Behrend, 156 Wis. 34, 145 NW 207; Brown v. McGee, 117 Wis. 389, 94 NW 363; McLoughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273.

[a] **This rule has been applied to:** (1) A claim for services rendered to the estate. Yarborough v. Ward, 34 Ark. 204. (2) Claim for advances by the representative for the benefit of the estate. Nealley's App., 110 Me. 552, 88 A 480; Brown v. Porter, 7 Humphr. (Tenn.) 373. (3) Claims for funeral expenses. Roche Undertaking Co. v. De Bardeleben, 7 Ala. A. 232, 236, 60 S 1000 [cit Cyc]; Potter v. Lewin, 123 Cal. 146, 55 P 783; Dampeir y. St. Paul Trust Co., 46 Minn. 526, 49 NW 286; King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839; Sawyer v. Hebard, 58 Vt. 375, 3 A 529. But see infra note 52. (4) Claims for administration expenses. Holland v. Dike, 135 Ark. 372, 205 SW 648; In re Thurber, 209 Ill. A. 533. (5) Claims for expenses incurred in the administration and settlement of the estate. Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717. (6) Claims founded on the acts of contracts of the representative. Peo. v. Olvera, 43 Cal. 492; Savery v. Sypher, 39 Iowa 675; Wakeman v. Paulmier, 39 N. J. L. 340; In re Murray, 56 Or. 132, 107 P 19; Brown v. Porter, 7 Humphr. (Tenn.) 373; King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839; McLaughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273. (7) Debts incurred under testamentary provisions. Perry v. Field, 40 Ark. 175. (8) A claim for family expenses incurred under a will. Prince v. Prince, 47 Ala. 283. (9) A claim for building materials furnished an executor under a contract entered into with decedent, which were used to complete a wall which decedent was under contract to build. Coburn v. Harris, 58 Md. 87. To same effect Massey v. Doke, 123 Ark. 211, 185 SW 271. (10) A claim, arising after decedent's death, based on his liability as a stockholder for the debts of a corporation. Miller v. Katz, 10 Cal. A. 576, 102 P 946.

52. Stults v. Forst, 135 Ind. 297, 34 NE 1125; Powell v. Powell, 23 Mo. A. 365; Butterworth v. Bredemeyer, 89 Wash. 677, 155 P 152.

[a] **Claims for funeral expenses** are sometimes, under such statutes, required to be presented. Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951; Walley v. Gentry, 68 Mo. A. 298; Butterworth v. Bredemeyer, 89 Wash. 677, 155 P 152.

[b] **The claim of a purchaser at an administration sale** to be reimbursed on account of failure of title must be presented. Stults v. Forst, 135 Ind. 297, 34 NE 1125.

53. Yarborough v. Ward, 34 Ark. 204.

54. Gammage v. Rather, 46 Tex. 105; Price v. Melvre, 25 Tex. 769, 78 AmD 558.

55. U. S.—Gallivan v. Jones, 102 Fed. 423, 42 CCA 408.

Ala.—McKenzie v. Matthews, 153 Ala. 437, 44 S 958.

Cal.—In re Long, 9 Cal. A. 754, 100 P 892; In re Garnier, 147 Cal. 457, 82 P 68; Hildebrandt's Est., 92 Cal. 433, 28 P 486; In re Taylor, 10 Cal. 482, 16 Cal. 434.

Ill.—Millard v. Harris, 119 Ill. 185, 10 NE 387; Fragd v. Fragd, 175 Ill. A. 246.

Ind.—Wright v. Wright, 72 Ind. 149; Chidester v. Chidester, 42 Ind. 469.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710; Clark v. Tallman, 68 Iowa 372, 27 NW 261; Janes v. Brown, 48 Iowa 568.

Mich.—In re Hodges, 157 Mich. 198, 121 NW 748; Draper v. Brown, 153 Mich. 120, 117 NW 213; Benjamin v. Early, 123 Mich. 93, 81 NW 973; Paw Paw First Nat. Bank v. Sherman, 117 Mich. 602, 76 NW 97; Clark v. Davis, 32 Mich. 154.

Mo.—Williamson v. Anthony, 47 Mo. 299; Nelson v. Russell, 15 Mo. 356.

N. Y.—Matter of Gill, 42 Misc. 457, 87 NYS 252 [aff 101 App. Div. 607, 91 NYS 1095 (rev on other grounds 183 N. Y. 347, 76 NE 247)].

Or.—Farrow v. Nevin, 44 Or. 496, 75 P 711.

Pa.—In re Clauser, 1 Watts & S. 208.

R. I.—Kenyon v. Hayhurst, 35 R. I. 380, 87 A 168; Fenner v. Manchester, 6 R. I. 140.

Tenn.—Williams v. Williams, 15 Lea 438; Byrn v. Fleming, 3 Head 658; Smith v. Sprout, (Ch. A.) 58 SW 376.

Tex.—Puckett v. McCall, 30 Tex. 457; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

Vt.—In re Hayes, 90 Vt. 286, 98 A 45; Wetmore, etc., Granite Co. v. Bertoli, 87 Vt. 257, 262, 88 A 898; Story v. Hall, 86 Vt. 31, 83 A 653, 40 LRANS 1136; Riley v. McInlear, 61 Vt. 254, 17 A 729, 19 A 996 [dist French v. Winsor, 24 Vt. 402].

Wash.—In re Parkes, 178 P 830.

"Under the provisions of our statutes as they now are, it is considered that all creditors of the same class stand on an equal footing and that if an executor or administrator has a claim against the estate he must present it to the commissioners or else it is barred." Wetmore, etc., Granite Co. v. Bertoli, supra.

[a] **Capacity in which claim held.**—The rule stated in the text is true whether the claim is held in his personal right, or in some other fiduciary relation. Wright v. Wright, 72 Ind. 149.

[b] **If the representative has an equitable interest in a creditor's claim,** presentation is properly made to the court or a judge thereof. In re Crosby, 55 Cal. 574.

[c] **Where there are several personal representatives,** one of whom is a creditor of the estate, his claim should be presented to the others, not to the court or judge. Galivan v. Jones, 102 Fed. 423, 42 CCA 408 (construing California statute).

[d] **Presentation and allowance after time prescribed therefor.**—Presentation and allowance of an executor's claim against the estate, after the time fixed for such presentation and without notice to the residuary legatee, is a violation of the executor's duty to the legatee. Fragd v. Fragd, 175 Ill. A. 246.

[e] **Estoppel of heirs** to object that executor's claim was not presented and allowed. Hopkins v. Hopkins, 99 Mich. 56, 57 NW 1083.

56. Retention of assets by representative see infra §§ 1193–1201.

57. Ark.—Holland v. Doke, 135 Ark. 372, 205 SW 648.

Fla.—Sanderson v. Sanderson, 17 Fla. 820.

Ga.—Willis v. Sutton, 116 Ga. 283, 42 SE 526.

Ill.—Millard v. Harris, 119 Ill. 185, 10 NE 387 [aff 17 Ill. A. 512].

Kan.—In re Hoover, 180 P 275.

Me.—Nealley's App., 110 Me. 552, 88 A 480.

Md.—State v. Reigart, 1 Gill 1, 39 AmD 628.

Mass.—Brown v. Greene, 181 Mass. 109, 63 NE 2, 92 AmSR 404.

N. H.—McLaughlin v. Newton, 53 N. H. 531.

Oh.—Thomas v. Chamberlain, 39 Oh. St. 112.

Or.—In re Murray, 56 Or. 132, 107 P 19.

R. I.—Duffy v. McHale, 35 R. I. 16, 85 A 36.

Vt.—French v. Winsor, 24 Vt. 402; Adams v. Adams, 22 Vt. 50.

[a] **Reason for rule.**—"When a sole executor or administrator has a claim against the estate there is no person to whom he can exhibit his demand under this statute, except himself, and he knows of the existence of the claim without any exhibit of demand. The statute cannot apply to the executor under such circumstances, for the reason that he has notice of the existence of the claim, and his serving upon himself a notice in writing of that claim cannot serve any useful purpose. He would not know any more after the notice had been served than he knew before." In re Hoover, (Kan.) 180 P 275.

[b] **Same person administrator of debtor and of creditor.**—Where the same person is administrator of the estates of both the creditor and the debtor, no formal presentation of the claim of the estate of the creditor against the estate of the debtor is necessary. Thomas v. Chamberlain, 39 Oh. St. 112.

58. Newell v. West, 149 Mass. 520, 21 NE 954; Green v. Russell, 132 Mass. 536.

[§ 954] **i. Judgments.** As a general rule the fact that a claim against a decedent has been reduced to judgment does not do away with the necessity of presenting the claim for allowance,[59] especially where the judgment has become dormant.[60] But in some jurisdictions the presentation and filing of a judgment is necessary only in order to secure its payment out of the personal assets and a failure to file the judgment does not affect its lien upon decedent's realty.[61] It has been held, however, that judgments must be presented, even to protect the lien.[62]

Where suit is brought against an administrator to revive a judgment against the intestate, the lien of which has been pursued, presentation of the claim is not necessary.[63]

Where an execution was placed in the hands of the sheriff and the administrator of the judgment debtor, on seeing the execution, applied to the creditor for indulgence, which was granted to him, these facts afforded sufficient proof of a presentation of the demand to avoid a plea of the statute of nonclaim.[64]

Judgment of which representative has obtained modification. When an executrix substituted as defendant, after the death of judgment defendant pending a motion for a new trial, appears on such motion, and obtains a modification of the judgment, such judgment need not be presented to the executrix.[65]

A judgment against the executor or administrator in his representative capacity need not, it has been held, be presented,[66] although a presentation for the purpose of classification is sometimes required.[67]

Presentation of the claim on which the judgment

59. Ala.—Ray v. Thompson, 43 Ala. 434, 94 AmD 696; Harrison v. Jones, 33 Ala. 258; Jones v. Lightfoot, 10 Ala. 17; Thrash v. Sumwalt, 5 Ala. 13; Ready v. Thompson, 4 Stew. & P. 52.

Ariz.—O'Doherty v. Toole, 2 Ariz. 288, 15 P 28.

Ark.—Powell v. Macon, 40 Ark. 541; Keith v. Parks, 31 Ark. 664.

Cal.—Sanders v. Russell, 86 Cal. 119, 24 P 852, 21 AmSR 26.

Fla.—Union Bank v. Powell, 3 Fla. 175, 52 AmD 367.

Ill.—Winslow v. Leland, 128 Ill. 304, 21 NE 588; Clingman v. Hopkie, 78 Ill. 152; Turney v. Gates, 12 Ill. 141; Paschall v. Hailman, 9 Ill. 285; Welch v. Wallace, 8 Ill. 490.

Ind.—Wilson v. Fahnestock, 44 Ind. A. 35, 86 NE 1037.

Iowa.—Bayless v. Powers, 62 Iowa 601, 17 NW 907.

Kan.—Scroggs v. Tutt, 20 Kan. 271, 23 Kan. 181.

La.—Bertin v. Phillips, 1 La. Ann. 173.

Miss.—Robertson v. Demoss, 23 Miss. 298.

Mo.—McFaul v. Haley, 166 Mo. 56, 65 SW 995.

N. Y.—Matter of Morton, 7 Misc. 343, 28 NYS 82.

Tex.—Jenkins v. Cain, 72 Tex. 88, 10 SW 391; Converse v. Sorley, 39 Tex. 515; Birdwell v. Kauffman, 25 Tex. 189; Cunningham v. Taylor, 20 Tex. 126; Hall v. McCormick, 7 Tex. 269; Allen v. Reilly, 62 Tex. Civ. A. 624, 131 SW 1152.

Wis.—Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

[a] **A judgment is a claim** within the meaning of a statute requiring the presentation of all claims against a decedent's estate. Ready v. Thompson, 4 Stew. & P. (Ala.) 52.

[b] **A judgment rendered in another state** (1) must be presented. Reid v. Bloodworth, (Ala.) 76 S 376. (2) The necessity for presenting such a judgment is not affected by the federal constitutional provision requiring full faith and credit to be given to such judgment. Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

[c] **Judgment in another state allowing claim.**—A statute barring all claims against the estate if not filed within a certain time applies to a judgment allowing a claim against a decedent in a proceeding to settle his estate in a court of another state. Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

[d] **A judgment which merely forecloses a vendor's lien** upon real property of the decedent, without including any personal award against the estate, need not be certified to the probate court for payment. Ferguson v. McCrary, 20 Tex. Civ. A. 529, 50 SW 472. But see Converse v. Sorley, 39 Tex. 515, 521 ("we can perceive no reason why an exception should be made in favor of a lien, whether vendor's, by judgment or mortgage").

[e] **Set-off in action by administrator.**—"The right of a defendant in an action brought by an administrator for the recovery of any debt or claim in favor of his intestate to set off adverse claims is recognized by statute, and in such cases the defendant need not present his demand to the probate court, but may avail himself of the same in the district court without that formality." Martin County Nat. Bank v. Bird, 92 Minn. 110, 112, 99 NW 780.

[f] **Purpose of presentation.**—(1) In Missouri there is some apparent confusion in the cases as to whether a judgment is to be presented for allowance or merely classification. Beekman v. Richardson, 150 Mo. 430, 51 SW 689; Wernse v. McPike, 100 Mo. 476, 13 SW 809 [overr Wernse v. McPike, 76 Mo. 249; Ewing v. Taylor, 70 Mo. 394; Gibson v. Vaughan, 61 Mo. 418; Carondelet v. Desmoyer, 27 Mo. 36; Bryan v. Mundy, 14 Mo. 458]; Brown v. Woody, 64 Mo. 547; Gewe v. Hanszen, 85 Mo. A. 136. (2) But the question seems to be finally settled in McFaul v. Haley, 166 Mo. 56, 65 SW 995 [foll Wencker v. Thompson, 96 Mo. A. 59, 69 SW 743] (reviewing the earlier decisions and holding that the action of the court upon the judgment presented, even if denominated merely "classifying," is a judgment, and not "a mere ministerial, or clerical or nondescript act," and the proceeding may involve a trial of fact inasmuch as while the court cannot go behind the judgment to inquire into the merits of the cause of action, yet the representative may defeat the claim if he can establish that the judgment has been paid or has for any cause ceased to subsist as a valid demand).

[g] **Allowance after expiration of time for filing.**—Since an unreversed mortgage foreclosure deficiency judgment against an estate was conclusive against the executor, no one was prejudiced by the allowance of the judgment as a claim against the estate, although the time for filing claims had expired. In re Leiser, 138 Wis. 401, 120 NW 274.

[h] **Presentation to commissioners not necessary.**—Where defendant dies after a verdict against him, and judgment is thereafter entered without substituting the personal representative, neither the judgment nor the claim need be presented to the commissioners appointed to audit claims, but on a certified copy of the judgment being filed in the probate court it is entitled to be paid. Berkey v. Judd, 27 Minn. 475, 8 NW 383.

60. Davis v. Shawhan, 34 Iowa 91; Robertson v. Demos, 23 Miss. 298; Hall v. McCormick, 7 Tex. 269.

61. Ariz.—O'Doherty v. Toole, 2 Ariz. 288, 15 P 28.

Cal.—Christerson v. French, 132 P 27.

Ill.—Winslow v. Leland, 128 Ill. 304, 21 NE 588.

Iowa.—Boyd v. Collins, 70 Iowa 296, 30 NW 574 [dist Bayless v. Powers, 62 Iowa 601, 17 NW 907]; Baldwin v. Tuttle, 23 Iowa 66.

Mo.—Peters v. Holliday, 40 Mo. 544.

N. Y.—Matter of Morton, 7 Misc. 343, 28 NYS 82.

N. C.—Oldham v. Rieger, 145 N. C. 254, 58 SE 1091.

Oh.—Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408.

Or.—Knott v. Shaw, 5 Or. 482 (lien on both realty and personalty).

Pa.—McMurray v. Hopper, 43 Pa. 468.

Tex.—Cole v. Robertson, 6 Tex. 356, 55 AmD 784.

[a] **Subjecting property fraudulently conveyed.**—Although under the statute of nonclaim a judgment becomes forever barred as a claim against the estate if it is not presented or filed within the time limited, the statute does not bar an action to subject property fraudulently conveyed by decedent in his lifetime to a judgment not so presented or filed. O'Doherty v. Toole, 2 Ariz. 288, 15 P 28; Harlin v. Stevenson, 30 Iowa 371.

[b] **Execution levied on the homestead** creates no lien, and therefore the judgment must be presented to the administrator. Sanders v. Russell, 86 Cal. 119, 24 P 852, 21 AmSR 26.

[c] **Loss of lien.**—A judgment rendered against a decedent prior to his death can be enforced against the real estate upon which it is a lien, without being filed as a claim against the estate, only while the judgment lien exists. Davis v. Shawhan, 34 Iowa 91.

62. Ready v. Thompson, 4 Stew. & P. (Ala.) 52; Keith v. Parks, 31 Ark. 664; Union Bank v. Powell, 3 Fla. 175, 52 AmD 367.

63. Cole v. Robertson, 6 Tex. 356, 55 AmD 784.

64. Harrison v. Jones, 33 Ala. 258.

65. Brennan v. Brennan, 65 Cal. 517, 4 P 561.

66. Brennan v. Brennan, 65 Cal. 517, 4 P 561; Darling v. McDonald, 101 Ill. 370; Manning v. Mayes, 79 Tex. 653, 15 SW 638.

[a] **A judgment for costs against an administrator** does not lose its priority, although not presented in the county court within thirty days after it was rendered, as required by statute, since the statute applies only to judgments obtained on claims which have been rejected by the administrator. Manning v. Mayes, 79 Tex. 653, 15 SW 638.

67. Ryans v. Boogher, 169 Mo. 673, 69 SW 1048; In re Richardson, 97 Wash. 488, 166 P 776.

was based may dispense with the necessity of presenting the judgment itself.[68]

[§ 955] **j. Secured Claims.** According to the weight of authority, a creditor whose claim is secured by mortgage, pledge, or any specific lien need not present his claim for allowance in order to preserve his right to subject the property covered by the lien to the satisfaction of his claim,[69] for the reason that such claims cannot in any just sense be considered claims against the estate, but the right to subject specific property to the claim arises from the contract of the debtor whereby he has

[a] **Where executors take an appeal** from a judgment against them, operating as a supersedeas, so that the probate court would not have jurisdiction to classify it, a failure to file in the probate court until after appeal is not laches. Ryans v. Boogher, 169 Mo. 673, 69 SW 1048.

68. In re Gillen, 169 Wis. 58, 171 NW 758.

69. Ala.—Traweek v. Hagler, 75 S 152; Smith v. Gillam, 80 Ala. 296; George v. George, 67 Ala. 192; Flinn v. Barber, 61 Ala. 530; Mahone v. Haddock, 44 Ala. 92; Inge v. Boardman, 2 Ala. 331; Duval v. McLoskey, 1 Ala. 708.

Ark.—Citizens' Bank v. Moore, 134 Ark. 554, 204 SW 619; Hodges v. Taylor, 13 SW 129; Powell v. Macon, 40 Ark. 541; McClure v. Owens, 32 Ark. 443; Richardson v. Hickman, 32 Ark. 406; Simms v. Richardson, 32 Ark. 297; Barber v. Peay, 31 Ark. 392; Nicholls v. Gee, 30 Ark. 135; Hall v. Denckla, 28 Ark. 506; Pope v. Boyd, 22 Ark. 535.

Cal.—In re Huntoon, 174 Cal. 282, 163 P 52; Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P 242, 132 AmSR 81; Brown v. Sweet, 127 Cal. 332, 59 P 774; Hibernia Sav., etc., Soc. v. Wackenreuder, 99 Cal. 593, 34 P 219; More v. Calkins, 95 Cal. 435, 30 P 583, 29 AmSR 128; German Sav., etc., Soc. v. Fisher, 92 Cal. 502, 28 P 591; Anglo-Nevada Assur. Corp. v. Nadeau, 90 Cal. 393, 27 P 302; Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019; Mechanics' Bldg., etc., Assoc. v. King, 83 Cal. 440, 23 P 376; Dreyfuss v. Giles, 79 Cal. 409, 21 P 840; Bollinger v. Manning, 79 Cal. 7, 21 P 375; Bull v. Coe, 77 Cal. 54, 18 P 808, 11 AmSR 235; Hibernia Sav., etc., Soc. v. Conlin, 67 Cal. 178, 7 P 477; Security Sav. Bank v. Connell, 65 Cal. 574, 4 P 580; Camp v. Grider, 62 Cal. 20; In re Kibbe, 57 Cal. 407; Flores v. Stone, 21 Cal. A. 105, 131 P 348, 351, 352.

Ill.—Kittredge v. Nicholes, 162 Ill. 410, 44 NE 742 [aff 60 Ill. A. 604]; Mulvey v. Johnson, 90 Ill. 457; Dodge v. Mack, 22 Ill. 93; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Matter of Dyer, 201 Ill. A. 183; Waughop v. Bartlett, 61 Ill. A. 252 [aff 165 Ill. 124, 46 NE 197].

Ind.—Beach v. Bell, 139 Ind. 167, 38 NE 819; La Plante v. Convery, 98 Ind. 499; McCallam v. Pleasants, 67 Ind. 542; Bell v. Hobaugh, 65 Ind. 598; Noble v. McGinnis, 55 Ind. 528; Cole v. McMickle, 30 Ind. 94; St. Joseph County Sav. Bank v. Randall, 37 Ind. A. 402, 76 NE 1012.

Iowa.—In re Brackey, 166 Iowa 109, 147 NW 188; Allen v. Moer, 16 Iowa 307.

Kan.—Linn County Bank v. Grisham, 185 P 54; Smith v. Kibbe, 178 P 427; Andrews v. Morse, 51 Kan. 30, 32 P 640.

Mich.—Willard v. Van Leeuwen, 56 Mich. 15, 22 NW 185; Clark v. Davis, 32 Mich. 154.

Minn.—Hill v. Townley, 45 Minn. 167, 47 NW 653.

Miss.—Miller v. Jefferson College, 13 Miss. 651; Miller v. Helm, 10 Miss. 687; Jefferson College v. Dickson, Freem. 474.

Mo.—Tucker v. Wells, 111 Mo. 399, 20 SW 114; Holland Banking Co. v. See, (A.) 130 SW 354.

Nebr.—National L. Ins. Co. v. Fitzgerald, 61 Nebr. 692, 85 NW 948.

Nev.—Kirnan v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090; Rickards v. Hutchinson, 18 Nev. 215, 2 P 52, 4 P 702.

N. M.—Ross v. Lewis, 23 N. M. 524, 169 P 468, 469 [cit Cyc].

N. Y.—Matter of Eadie, 39 Misc. 117, 78 NYS 967.

Oh.—Fisher v. Mossman, 11 Oh. 42.

Okl.—Fawcett v. McGahan-McKee Lumber Co., 39 Okl. 68, 134 P 388; International Bank, etc., Co. v. Tolbert, 28 Okl. 595, 115 P 601.

Or.—Teel v. Winston, 22 Or. 489, 29 P 142.

Philippine.—Osorio v. San Augustin, 25 Philippine 404.

S. D.—Massey v. Fralish, 37 S. D. 91, 156 NW 791; Fish v. De Laray, 8 S. D. 320, 66 NW 465, 59 AmSR 764; Kelsey v. Welch, 8 S. D. 255, 66 NW 390.

Vt.—Hurlbert v. Brigham, 56 Vt. 368; Pelton v. Johnson, 52 Vt. 138; Walker v. Baxter, 26 Vt. 710; Richmond v. Aiken, 25 Vt. 324; Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697; Putnam v. Russell, 17 Vt. 54, 42 AmD 478.

Wash.—Macdonald v. O'Shea, 58 Wash. 169, 108 P 436, AnnCas1912A 417; Casey v. Auld, 4 Wash. 167, 29 P 1048; Reed v. Miller, 1 Wash. 426, 25 P 334; Scammon v. Ward, 1 Wash. 179, 23 P 439.

Wis.—Edgerton v. Schneider, 26 Wis. 385.

[a] **This rule has been applied to:** (1) A pledge. Galland's Est., 92 Cal. 293, 28 P 287; In re Kibbe, 57 Cal. 407; Whitmore v. San Francisco Sav. Union, 50 Cal. 145; Wright v. Ross, 36 Cal. 414; Hurlbert v. Brigham, 56 Vt. 368. (2) A chattel mortgage. Flores v. Stone, 21 Cal. A. 105, 131 P 348, 351, 352; Purdin v. Archer, 4 S. D. 54, 54 NW 1043. (3) A mechanic's lien. Fish v. DeLaray, 8 S. D. 320, 66 NW 465, 59 AmSR 764. Contra Crowe v. Adkinson Constr. Co., 67 Wash. 420, 121 P 841, AnnCas 1913D 273. (4) The lien of a building and loan association for dues and penalties. Mechanics' Bldg., etc., Assoc. v. King, 83 Cal. 440, 23 P 376. (5) A specific lien acquired by levy under execution. Barber v. Peay, 31 Ark. 392; Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P 242, 132 AmSR 81.

[b] **A vendor's lien** (1) reserved in the deed need not be presented. Nicholls v. Gee, 30 Ark. 135; Allen v. Smith, 29 Ark. 74; Hall v. Denckla, 28 Ark. 506. (2) The same has been held true of the equitable lien of a vendor. Flinn v. Barber, 61 Ala. 530. (3) But it has also been held that a vendor's equitable lien cannot be distinguished from the debt itself and requires presentation. Linthicum v. Tapscott, 28 Ark. 267 [foll McKneely v. Terry, 61 Ark. 527, 33 SW 953].

[c] **An attorney may retain from funds collected** for decedent for his services without presentation of his claim to commissioners. Hurlbert v. Brigham, 56 Vt. 368.

[d] **A mortgagee's right to foreclose is not affected** by the death of the mortgagor. National L. Ins. Co. v. Fitzgerald, 61 Nebr. 692, 85 NW 948.

[e] **A power of sale** contained in a deed of trust continues in full force after the grantor's death, and no judicial foreclosure is required, and hence in such case a statute allowing an action for foreclosure of a mortgage against a decedent's estate without presentation of the claim secured to the executor or administrator, only "when all recourse against any other property of the estate is expressly waived in the complaint," does not apply. More v. Calkins, 95 Cal. 435, 30 P 583, 29 AmSR 128.

[f] **Forfeiture for nonpayment.**—A vendor may bring ejectment to enforce a forfeiture for nonpayment of the purchase price without presentation of his claim to the administrator of the purchaser. Kerns v. Dean, 77 Cal. 555, 19 P 817, 65 Cal. 411, 4 P 404.

[g] **A laborer's lien** on saw logs arises by operation of law and stands upon an entirely different basis from a lien created by mortgage, and such a lien cannot be enforced against the estate of a decedent unless it has been first presented to the executor or administrator. Casey v. Ault, 4 Wash. 167, 29 P 1048.

[h] **Liens or encumbrances on the homestead** are sometimes required to be presented. Browne v. Sweet, 127 Cal. 332, 59 P 774; McGahey v. Forrest, 109 Cal. 63, 41 P 817; Wise v. Williams, 88 Cal. 30, 25 P 1064; Perkins v. Onyett, 86 Cal. 348, 24 P 1024; Sanders v. Russell, 86 Cal. 119, 24 P 852, 21 AmSR 26; Rosenberg v. Ford, 85 Cal. 610, 24 P 779; Hearn v. Kennedy, 85 Cal. 55, 24 P 606; Mechanics' Bldg., etc., Assoc. v. King, 83 Cal. 440, 23 P 376; Bollinger v. Manning, 79 Cal. 7, 21 P 375; Camp v. Grider, 62 Cal. 20. (2) So where a mortgage on homestead property is executed by a husband and wife, and upon the death of one of them the property is set apart to the survivor, the mortgagee can neither foreclose the mortgage nor have personal judgment on the notes against the survivor unless he first duly presents his claim against the estate. Hibernia Sav., etc., Soc. v. Thornton, 109 Cal. 427, 42 P 447, 50 AmSR 52; Hearn v. Kennedy, 85 Cal. 55, 24 P 606; Mechanics' Bldg., etc., Assoc. v. King, supra; Bollinger v. Manning, supra; Camp v. Grider, supra; Votypka v. Valentine, (Cal. A.) 182 P 76. (3) This is true, even though there are no other assets of the estate that can be subjected to the payment of the mortgage. Bollinger v. Manning, supra.

[i] **The requirement of presentation does not apply:** (1) Where the homestead did not exist at the time of decedent's death, but was set apart subsequently by the court. McGahey v. Forrest, 109 Cal. 63, 41 P 817. (2) Where a deed of trust has been given by which title is transferred to a trustee. Athearn v. Ryan, 154 Cal. 554, 98 P 390; Weber v. McCleverty, 149 Cal. 316, 86 P 706. (3) Where, in connection with a mortgage on the homestead given to a building and loan association, the stock held by decedent in the association is also pledged, the pledge may be foreclosed without any presentation of claim against the estate. Mechanics' Bldg., etc., Assoc. v. King, 83 Cal. 440, 23 P 376.

[j] **An express waiver of recourse against other property** (1) is sometimes required in order that a lien may be enforced without presentation. Ryan v. Holliday, 110 Cal. 335, 42 P 891; More v. Calkins, 95 Cal. 435, 30 P 583, 29 AmSR 128; German Sav., etc., Co. v. Fisher, 92 Cal. 502, 28 P 591; Anglo-Nevada Assur. Corp. v. Nadeau, 90 Cal. 393, 27 P 302; Mechanics' Bldg., etc., Assoc. v. King, 83 Cal. 440, 23 P 376; Dreyfuss v. Giles, 79 Cal. 409, 21 P 840; Security Sav. Bank v. Connell, 65 Cal. 574, 4 P 580; Heeser v. Taylor, 1 Cal. A. 619, 92 P 977. (2) A mortgage existing at the time decedent purchased land is not a claim against his estate and is not within such requirement. Ryan v. Holliday, 110 Cal. 335, 42 P 891.

[k] **Counsel fees** cannot be recovered unless the claim is presented. Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019.

Judgment lien see supra § 954.

during life set aside certain property for its payment, and such property does not, except in so far as its value may exceed the debt, belong to the estate, and the instrument being of record or the property being in the possession of the creditor is notice to all the world of the contract.[70] Nevertheless, in some states the requirement of presentation is held to apply to secured claims,[71] and the right to foreclose is sometimes suspended by statute until the claim has been proved and allowed.[72] Where a mortgagee, pledgee, or other secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate and thus to enforce his claim against property not covered by his lien or held by him as security, his claim stands on the same footing with the claims of other creditors and must be presented for allowance.[73] The security of a mortgagee, pledgee, or other secured creditor is not affected by his presentation and securing the allowance of his claim.[74]

Right of heirs with respect to exoneration of land. Where intestate died indebted to a bank on a demand note secured by a mortgage on real estate, the heirs were held entitled to have intestate's personal assets applied as far as possible by the administrator in payment of such note and mortgage, to the exoneration of the land, although the note was not filed as a claim against the estate, and no demand was made by the holder for payment out of the personal estate.[75]

[§ 956] **k. Claims for Trust Funds and Enforcement of Trusts.** The statutory requirement of

70. Smith v. Gillam, 80 Ala. 296; Reid v. Sullivan, 20 Colo. 498, 39 P 338; Dayett v. Willits, 9 Del. Ch. 424, 74 A 689; Miller v. Jefferson College, 13 Miss. 651; Miller v. Helm, 10 Miss. 687; Jefferson College v. Dickson, Freem. (Miss.) 474.

71. Fremd v. Hogg, 68 Fla. 331, 67 S 75, AnnCas1917B 155; Bush v. Adams, 22 Fla. 177; Taylor v. Williams, 101 Tex. 388, 108 SW 815; Whitmire v. May, 96 Tex. 317, 72 SW 375; Wilson v. Harris, 91 Tex. 427, 44 SW 65 [aff (Civ. A.) 40 SW 868]; Bradford v. Knowles, 86 Tex. 505, 25 SW 1117; Buchanan v. Wagnon, 62 Tex. 375; Gaston v. Boyd, 52 Tex. 282; Cannon v. McDaniel, 46 Tex. 303; Cundiff v. Simpson, 32 Tex. 144; Robertson v. Paul, 16 Tex. 472; Danzey v. Swinney, 7 Tex. 617; Graham v. Vining, 1 Tex. 639, 2 Tex. 433; Degetau v. Mayer, (Tex. Civ. A.) 145 SW 1054; Tiboldi v. Palms, (Tex. Civ. A.) 78 SW 726 [aff 97 Tex. 414, 79 SW 23]; Texas Loan Agency v. Dingee, (Tex. Civ. A.) 75 SW 866.

[a] **"The owner of collateral security is not a mere mortgagee or lienholder,** who must prove up his debt in the probate court." Clarke v. Dallas First Nat. Bank, (Tex. Civ. A.) 150 SW 203.

[b] **The holder of a note secured by mortgage** (1) need not present both note and mortgage for approval; the presentation of the note is sufficient. Cannon v. McDaniel, 46 Tex. 303; Cundiff v. Simpson, 32 Tex. 144; Simpson v. Reily, 31 Tex. 298. (2) Aliter under the probate law of 1840, as to a note secured by a trust deed. Wilson v. Harris, 91 Tex. 427, 44 SW 65 [aff (Civ. A.) 40 SW 868].

[c] **A vendor's lien** (1) is not lost by failure to present a claim. Curran v. Texas Land, etc., Co., 24 Tex. Civ. A. 499, 60 SW 466. (2) It need not be presented against the estate of a subsequent purchaser of the property subject thereto. Ferguson v. McCrary, 20 Tex. Civ. A. 529, 50 SW 472.

[d] **Foreclosure sale valid.**—(1) Where the grantor in a deed of trust subsequently conveyed the land to a third person, and thereafter died insolvent, and less than four years from his death and after administration on the grantor's estate had closed, the land was sold under foreclosure, the sale was valid, although the claim secured by the deed had not been presented to the estate of the grantor. Miles v. Coleman Nat. Bank, 37 Tex. Civ. A. 73, 84 SW 284.

72. Townsend v. Thompson, 24 Colo. 411, 51 P 433; Sullivan v. Sheets, 22 Colo. 153, 43 P 1012; Reid v. Sullivan, 20 Colo. 498, 39 P 338.

73. Ala.—Chamblee v. Proctor, 82 S 21; Traweek v. Hagler, 75 S 152; Mahone v. Haddock, 44 Ala. 92; Duval v. McLoskey, 1 Ala. 708.

Cal.—In re Huntoon, 174 Cal. 282, 163 P 52; In re Kibbe, 57 Cal. 407; Marsh v. Dooley, 52 Cal. 232; Sichel v. De Carrillo, 42 Cal. 493; Wright v. Ross, 36 Cal. 414.

Colo.—Reid v. Sullivan, 20 Colo. 498, 39 P 338.

Ill.—Roberts v. Flatt, 142 Ill. 485, 32 NE 484 [aff 42 Ill. A. 608]; Mulvey v. Johnson, 90 Ill. 457.

Ind.—Beach v. Bell, 139 Ind. 167, 38 NE 819.

Iowa.—Colby v. King, 67 Iowa 458, 25 NW 704.

Kan.—Andrews v. Morse, 51 Kan. 30, 32 P 640.

Mich.—Willard v. Van Leeuwen, 56 Mich. 15, 22 NW 185; Clark v. Davis, 32 Mich. 154.

Minn.—Hill v. Townley, 45 Minn. 167, 47 NW 653.

Miss.—Jefferson College v. Dickson, Freem. 474.

Mo.—Tucker v. Wells, 111 Mo. 399, 20 SW 114.

Nev.—Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090; Rickards v. Hutchinson, 18 Nev. 215, 2 P 52, 4 P 702.

N. J.—Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851; Smith v. Crater, 43 N. J. Eq. 636, 12 A 530; Mutual Ben. L. Ins. Co. v. Howell, 32 N. J. Eq. 146.

Or.—Teel v. Winston, 22 Or. 489, 29 P 142.

S. D.—Massey v. Fralish, 37 S. D. 91, 156 NW 791; Thurber v. Miller, 11 S. D. 124, 75 NW 900; Kelsey v. Welch, 8 S. D. 255, 66 NW 390.

Vt.—Hurlbert v. Brigham, 56 Vt. 368; Pelton v. Johnson, 52 Vt. 138; Walker v. Baxter, 26 Vt. 710; Richmond v. Aiken, 25 Vt. 324; Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697.

Wash.—Reed v. Miller, 1 Wash. 426, 25 P 334; Scammon v. Ward, 1 Wash. 179, 23 P 439.

Wis.—Schmidt v. Grenzow, 162 Wis. 301, 156 NW 143, AnnCas1917B 163; Pereles v. Leiser, 119 Wis. 347, 96 NW 799.

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

Man.—Frontenac Loan Co. v. Morrice, 4 Man. 442.

"The mortgagee may waive his mortgage and pursue the debtor upon his obligation to pay. That is, he may sue upon the note to secure which the mortgage was given and waive the security. So a mortgagee having a debt against an estate may file his debt as a claim without pursuing the land pledged as security for the debt. Of course, if the mortgagee seeks to enforce his claim against the estate and waive his mortgage, he must file his claim as required by law, and within the time provided by law, unless some equitable reason is shown why it was not filed before the expiration of the period allowed for filing claims. But this rule does not apply where a devisee of specific real estate, which is incumbered by a mortgage, applies to have the mortgage discharged out of the personal assets in the hands of the executor." In re Brackey, 166 Iowa 109, 116, 147 NW 188.

[a] **Claim based on assumption of mortgage.**—A claim against the estate of a decedent on his assumption of a mortgage is, before foreclosure, only contingent, and consequently cannot be proved as a debt against his estate before that time. Terhune v. White, 34 N. J. Eq. 98 [foll Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072 (aff 60 N. J. Eq. 444, 46 A 1099)].

[b] **Allowing security to be otherwise disposed of.**—A claim on a note originally secured by chattel mortgage is barred by nonpresentation, although the mortgagee permitted the mortgaged property to be sold under the belief that there was plenty of property to pay the debts of the decedent and the administrator agreed that he should be paid. Colby v. King, 67 Iowa 458, 25 NW 704.

[c] **Presentation of claim before enforcing security.**—A claim founded upon a bond of decedent secured by mortgage may be presented to the administrator before the mortgaged premises are sold. Smith v. Crater, 43 N. J. Eq. 636, 12 A 530.

[d] **Aliter as to mortgages.**—Cole v. McMickle, 30 Ind. 94; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

[e] **Void sale on foreclosure.**—Where scire facias proceedings on a mortgage given by decedent resulted in a void sale and a deed to the mortgagee, so that there was no payment, the orphans' court may, on distribution of the estate, with the assent of plaintiff in the scire facias, entertain and decide on the claim, the facts having been reported by the auditor and the amount of the claim having been fixed, although plaintiff had not previously made any claim on the fund for distribution. In re Smith, 194 Pa. 259, 45 A 82.

74. U. S.—Schuelenburg v. Martin, 2 Fed. 747, 1 McCrary 348.

Ark.—Simms v. Richardson, 32 Ark. 297.

Cal.—Morton v. Adams, 124 Cal. 229, 56 P 1038, 71 AmSR 53; Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019; Moran v. Gardemeyer, 82 Cal. 96, 23 P 6.

Conn.—Beard's App., 78 Conn. 481, 62 A 704.

Hawaii.—Castle Est., Ltd. v. Haneberg, 20 Hawaii 123.

Ida.—Kendrick State Bank v. Barnum, 31 Ida. 562, 173 P 1144, 2 ALR 1129.

Ill.—Peo. v. Phelps, 78 Ill. 147.

Ind.—Hight v. Taylor, 97 Ind. 392; Clarke v. Henshaw, 30 Ind. 144.

Iowa.—Moores v. Ellsworth, 22 Iowa 299.

Kan.—Crooker v. Pearson, 41 Kan. 410, 21 P 270.

Vt.—Putnam v. Russell, 17 Vt. 54, 42 AmD 478.

75. Beard's App., 78 Conn. 481, 62 A 704. See also In re Brackey, 166 Iowa 109, 149 NW 188 (quoted supra note 74).

presentation does not apply to the claims of a cestui que trust for whom decedent was trustee so long as the trust fund or property can be traced and the trust enforced by suitable proceedings;[76] but where the fund or property cannot be traced and the cestui que trust seeks redress as a general creditor of the estate, he must present his claim.[77]

[§ 957] **3. Against Whom Statutes of Nonclaim Run.**[78] The limitation of time within which claims must be presented for allowance in the probate court is inseparable from the peculiar procedure prescribed in each jurisdiction;[79] it is a part of that procedure and so not like a general statute of limitations, and can be applied only to persons who are bound by such special mode of procedure.[80] But where the statute of nonclaim makes no exception as to any persons or class of persons, the courts can make none;[81] and hence in the absence of some provision to the contrary, the statutes of nonclaim run against nonresident as well as resident,[82] and

76. U. S.—Newberry v. Winkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111]; Order of St. Benedict of New Jersey v. Steinhauser, 179 Fed. 137 [aff 234 U. S. 640 mem, 34 SCt 932 mem, 58 L. ed. 1512 mem]; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16.

Ark.—Pope v. Boyd, 22 Ark. 535.

Cal.—Brown v. Sebastopol, 153 Cal. 704, 96 P 363, 19 LRANS 178; In re Dutard, 147 Cal. 253, 81 P 519; Elizalde v. Elizalde, 137 Cal. 634, 66 P 369, 70 P 861; Bryne v. McGrath, 130 Cal. 316, 62 P 559, 80 AmSR 127; McGrath v. Carroll, 110 Cal. 79, 42 P 466; Tyler v. Mayre, 95 Cal. 160, 27 P 160, 30 P 196; Roach v. Caraffa, 85 Cal. 436, 25 P 22; Gillespie v. Winn, 65 Cal. 429, 4 P 411; In re Kibbe, 57 Cal. 407; Sharpstein v. Friedlander, 54 Cal. 58; Lathrop v. Bampton, 31 Cal. 17, 89 AmD 141; Gunter v. Janes, 9 Cal. 643; Gray v. Palmer, 9 Cal. 616; Peo. v. Houghtaling, 7 Cal. 348; Elizalde v. Murphy, 11 Cal. A. 32, 103 P 904; Kauffman v. Foster, 3 Cal. A. 741, 86 P 1108.

Colo.—Central City First Nat. Bank v. Hummel, 14 Colo. 259, 23 P 986, 20 AmSR 257, 8 LRA 788.

Conn.—Connecticut Trust, etc., Co. v. Security Co., 67 Conn. 438, 35 A 342.

Fla.—Bloxham v. Crane, 19 Fla. 163.

Ill.—Gillett v. Hickling, 16 Ill. A. 392.

Mass.—Johnson v. Ames, 11 Pick. 173.

Mo.—Bramell v. Adams, 146 Mo. 70, 47 SW 931.

Nev.—Thompson v. Reno Sav. Bank, 19 Nev. 242, 9 P 121, 3 AmSR 883.

N. J.—Harrison v. Patterson, (Ch.) 50 A 113; Smith v. Combs, 49 N. J. Eq. 420, 24 A 9.

N. D.—Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219.

Pa.—Trought's Est., 12 Pa. Dist. 137, 28 Pa. Co. 302.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554.

Tex.—Vandever v. Freeman, 20 Tex. 233, 70 AmD 391.

Utah.—Hatch v. Hatch, 46 Utah 116, 148 P 1096; Hamilton v. Dooly, 15 Utah 280, 49 P 769.

Wis.—Biron v. Scott, 80 Wis. 206, 49 NW 747.

"It is well settled that where recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate." Brown v. Sebastopol, 153 Cal. 704, 707, 96 P 363, 19 LRANS 178.

[a] **Reasons for rule.**—(1) The cestui que trust "is seeking his own property only.—not to enforce a claim against the estate and property of the decedent." Roach v. Caraffa, 85 Cal. 436, 444, 25 P 22. (2) "Where the executor or administrator has property which belongs to another, the owner is not required to present his account as if he were a creditor. The claimant of specific property, and not of a debt, cannot be called a creditor within the meaning of the Probate Law." Gunter v. James, 9 Cal. 643, 659 [quot Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 158, 73 A 382, 19 AnnCas 554].

[b] **Illustration.**—The statutes providing for the pesentation of claims against decedents' estates before suit do not apply to an asserted ownership of a decedent's property based on the existence of a trust created by decedent in her lifetime for the benefit of plaintiff, based on a contract, supported by valuable consideration, binding decedent to adopt plaintiff and give all her property to plaintiff. Furman v. Craine, 18 Cal. A. 41, 46, 121 P 1007 ("Plaintiff did not claim that the estate was indebted to her, and she held no claim payable out of the estate in course of administration. Her contention is that she is the sole beneficiary of a trust impressed upon the property remaining after the payment of costs of administration and all claims against it, and as such equitable owner entitled to a conveyance thereof from those holding the legal title").

[c] **Decree construing trust binding on parties.**—Where a court having jurisdiction construed a testamentary trust, and intestate in obedience to the decree segregated the trust fund from his other property in acceptance of the trust, the decree became binding on all the parties then before the court as the law of the estate, so that it was unnecessary that the claim for such trust fund should have been presented by the parties entitled thereto as against intestate's estate to entitle them to maintain an action to recover the fund. Kauffman v. Foster, 3 Cal. A. 741, 86 P 1108.

[d] **The proper method of reaching realty** in the hands of distributees which was held in trust by decedent, or the proceeds of funds held in trust by him is to procure an order of sale from the probate court after establishing the validity of the claim against the estate, and not by a suit in equity to impress the property with a trust. Mathewson v. Wakelee, 83 Conn. 75, 75 A 93.

77. Ala.—Taylor v. Robinson, 69 Ala. 269; Rhodes v. Hannah, 66 Ala. 215.

Ark.—Stewart v. Thomasson, 94 Ark. 60, 126 SW 86; McIlroy Banking Co. v. Dickson, 66 Ark. 327, 50 SW 868; Nichols v. Shearon, 49 Ark. 75, 4 SW 167; Padgett v. State, 45 Ark. 495; Patterson v. McCann, 39 Ark. 577; Connelly v. Weatherly, 33 Ark. 658; Hill v. State, 23 Ark. 604.

Cal.—Title Ins., etc., Co. v. Ingersoll, 158 Cal. 474, 111 P 360; McGrath v. Carroll, 110 Cal. 79, 42 P 466; Gillespie v. Winn, 65 Cal. 429, 4 P 411; Sharpstein v. Friedlander, 54 Cal. 58; In re Halleck, 49 Cal. 111; Lathrop v. Bampton, 31 Cal. 17, 89 AmD 141.

Ind.—Spicer v. Hockman, 72 Ind. 120.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33; Fowler v. True, 76 Me. 43.

Mass.—Atty.-Gen. v. Brigham, 142 Mass. 248, 7 NE 851.

Mo.—Bramell v. Adams, 146 Mo. 70, 47 SW 931.

Nebr.—Robinson v. Tower, 95 Nebr. 198, 145 NW 348.

Pa.—In re Loughran, 257 Pa. 534, 101 A 817.

S. D.—Marker v. Van Gerpen, 39 S. D. 648, 166 NW 151.

[a] **It is necessary to present:** (1) A claim of a ward against the estate of a deceased guardian for a settlement of guardianship. Rhodes v. Hannah, 66 Ala. 215; Nichols v. Shearon, 49 Ark. 75, 4 SW 167; Smith v. Smithson, 48 Ark. 261, 3 SW 49; Padgett v. State, 45 Ark. 495; Connelly v. Weatherly, 33 Ark. 658; Gillespie v. Winn, 65 Cal. 429, 4 P 411; Spicer v. Hockman, 72 Ind. 120; Bemis v. Bemis, 13 Gray (Mass.) 559. (2) A claim of a ward against the estate of a deceased guardian for a devastavit. Newberry v. Wilkinson, 199 Fed. 673, 118 CCA 111 [aff 190 Fed. 62]. (3) A claim against a deceased executor or administrator in favor of the estate of which he had charge. Taylor v. Robinson, 69 Ala. 269; Purcelly v. Carter, 45 Ark. 299; Patterson v. McCann, 39 Ark. 577; In re Halleck, 49 Cal. 111 [aff Hallack's Est., Myr. Prob. 46]; Sargent v. Kimball, 37 Vt. 320.

[b] **While an administrator is in his lifetime a trustee** for the distributees of the estate, at his death he ceases to be such and his indebtedness to the trust becomes a demand against his estate, to be authenticated, allowed, classed, and paid like any other demand. Purcelly v. Carter, 45 Ark. 299.

[c] **Right of recovery not affected by presentation of claim.**—Where a guardian converted funds of his wards and died without having accounted therefor, the fact that the wards presented their claims for allowance to the guardian's executors before bringing action thereon did not affect their right of recovery, although it changed their remedy. Miller v. Ash, 156 Cal. 544, 105 P 600.

[d] **The remedy by an action at law for conversion** of a trust fund by a trustee becomes changed by the death of the trustee, and must be enforced as prescribed by the statute in relation to the presentation of claims against estates of decedents. Robinson v. Tower, 95 Nebr. 198, 145 NW 348.

78. As against United States, state, county, etc. see supra §§ 944–946.

79. Hartman v. Fishbeck, 18 Fed. 291; Van Haaren v. Tierney, 180 Mich. 192, 146 NW 660, 661, AnnCas 1916A 588 [quot Cyc].

80. Hartman v. Fishbeck, 18 Fed. 291.

81. Conn.—Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647.

Me.—Rowell v. Patterson, 76 Me. 196.

N. H.—Chapman v. Gale, 32 N. H. 141; Phillips v. Leavitt, Smith 130.

N. C.—Ridley v. Thorpe, 3 N. C. 343.

Wis.—Barry v. Minahan, 127 Wis. 570, 107 NW 488; Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

82. U. S.—Morgan v. Hamlet, 113 U. S. 449, 6 SCt 583, 28 L. ed. 1043 (construing Arkansas statute); Hale v. Coffin, 120 Fed. 470, 57 CCA 528 [aff 114 Fed. 567].

Ark.—Turner v. Risor, 54 Ark. 33, 15 SW 13; Erwin v. Turner, 6 Ark. 14.

Iowa.—Roaf v. Knight, 77 Iowa 506, 42 NW 433.

N. H.—Phillips v. Leavitt, Smith 130.

Wis.—Fields v. Mundy, 106 Wis.

infant as well as adult [83] claimants, and also against married women [84] and insane persons,[85] and the estate of a deceased creditor.[86] Some statutes, however, allow infants [87] and married women [88] a certain time after the removal of their disabilities within which to present their claims, and special provisions with respect to nonresident claimants are sometimes found.[89]

[§ 958] **4. Time for Presentation—a. In General.** The time within which claims against the estate of a decedent must be presented is usually fixed by statute,[90] although it is sometimes fixed

383, 82 NW 343, 80 AmSR 39; Winter v. Winter, 101 Wis. 494, 77 NW 883.

[a] **Rule applies to both domestic and ancillary administrations.**—Winter v. Winter, 101 Wis. 494, 77 NW 883.

[b] **Presentation to a foreign administrator** in an ancillary administration is no presentation to the representative in the domestic state. Turner v. Riser, 54 Ark. 33, 15 NW 13.

[c] **Allowance in foreign jurisdiction.**—The fact that the claim of a nonresident may have been allowed against the estate of the same decedent in a foreign jurisdiction does not affect the bar of the domestic statute. Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

83. U. S.—Morgan v. Hamlet, 113 U. S. 449, 5 SCt 583, 28 L. ed. 1043.

Ark.—Nichols v. Shearon, 49 Ark. 75, 4 SW 167; Smith v. Smithson, 48 Ark. 261, 3 SW 49; Padgett v. State, 45 Ark. 495; Connelly v. Weatherly, 33 Ark. 658; Hill v. State, 23 Ark. 604.

Iowa.—Boyle v. Boyle, 126 Iowa 167, 101 NW 748, 3 AnnCas 575.

Me.—Baker v. Bean, 74 Me. 17.

Mass. — Hall v. Bumstead, 20 Pick. 2.

Mich.—Van Haaren v. Tierney, 180 Mich. 192, 194, 146 NW 660, AnnCas 1916A 588 [quot Cyc].

N. C.—Rayner v. Watford, 13 N. C. 338.

Tenn.—Jones v. Reynolds, 5 Baxt. 644; Williams v. Conrad, 11 Humphr. 412; Foster v. Maxey, 6 Yerg. 224.

"Our statute makes no exceptions as to persons or classes of persons, and under the rule the minority of the claimant did not suspend the application of the statute." Van Haaren v. Tierney, supra.

[a] **Illustration.**—A statute providing that claims against an estate shall be filed within twelve months after the first publication of the notice of the administrator's appointment, and containing no exception in favor of a creditor laboring under a disability, applies to infants so that notice of an administrator's application for discharge to a creditor whose claim had not been filed is not required, although such creditor was at the time under the disability of infancy. Boyle v. Boyle, 126 Iowa 167, 101 NW 748, 3 AnnCas 575.

84. Barry v. Minahan, 127 Wis. 570, 107 NW 488.

[a] **Circumstances not relieving from bar.**—Where an administratrix of a wife, failed to file a claim against the estate of her decedent's husband within the time required by statute, the bar of the statute was not affected by the fact of a claim having been unsuccessfully prosecuted by the son of plaintiff's decedent after being duly filed, to declare a trust as to the same claim for the amount thereof against the estate of the husband, which was defeated on the ground that no trust existed, although the son, as her heir, might profit by a recovery on the part of his mother's administratrix. Barry v. Minahan, 127 Wis. 570, 107 NW 488.

85. Rowell v. Patterson, 76 Me. 196 (although the insane person has no guardian for two years next after the notice of the administrator's appointment).

86. Beasley v. Waugh, 51 Ala. 156; Milan v. Pemberton, 12 Mo. 598; Phillips v. Leavitt, Smith (N. H.) 130.

[a] **The fact that administration is not granted on the estate of the creditor** until after the expiration of the time limited for the presentation of claims against the estate of the debtor does not take the case out of the operation of the statute. Glass v. Woolf, 82 Ala. 281, 3 S 11; Beasley v. Waugh, 51 Ala. 156.

87. Whetstone v. McQueen, 137 Ala. 301, 34 S 229; Burford v. Steele, 80 Ala. 147; Walker v. Crews, 73 Ala. 412; Moore v. Wallis, 18 Ala. 458; Peo. v. Brooks, 22 Ill. A. 594 [aff 123 Ill. 246, 14 NE 39].

[a] **The fact that the infant has a guardian** does not exclude him from the benefit of the exception. Burford v. Steele, 80 Ala. 147; Moore v. Wallis, 18 Ala. 458.

[b] **A voluntary settlement and distribution** of assets by an administrator does not relieve him of liability to a creditor whose time to present his claim was extended by reason of his disability, and who had not been guilty of laches. Whetstone v. McQueen, 137 Ala. 301, 34 S 229.

88. Grier v. Robbins, 175 Mo. A. 604, 158 SW 389 (such a provision is not abrogated by the mere passage of a statute enabling a married woman to sue and be sued as though single).

89. U. S.—Grubb v. Clayton, 11 F. Cas. No. 5,849a, Brunn. Col. Cas. 30, 3 N. C. 378.

Cal.—Cullerton v. Mead, 22 Cal. 95.

Conn.—Williams v. Belden, 1 Root 464.

Ill.—Mason v. Johnson, 24 Ill. 159, 76 AmD 740.

Ind.—Yoast v. Willis, 9 Ind. 548.

Miss.—Wilkinson v. Barringer, 23 Miss. 319.

Tenn.—Humbard v. Smith, 10 Yerg. 249.

[a] **Who are nonresident creditors.**—The question whether a creditor is or is not a resident creditor is determined by his residence at the time of the grant of letters of administration on the debtor's estate, and his subsequent removal into the state will not take him out of the statutory exception in favor of nonresident creditors. Humbard v. Smith, 10 Yerg. (Tenn.) 249.

[b] **Absence of creditor from state.**—(1) Under a statute providing that when it shall be made to appear by affidavit of the claimant "to the satisfaction" of the executor, administrator, or probate court, that the claimant had no knowledge of the notice to present claims, by reason of his absence from the state, his claim may be presented at any time before final distribution, the officers named have no right arbitrarily to say that they are not satisfied, and to therefore reject a claim. Cullerton v. Mead, 22 Cal. 95. (2) One who knew of deceased's death, was present in the state during the first two publications of the notice to present claims, returned to the state, and had actual notice of the publication for more than one month prior to the expiration of the time for filing claims, but yet failed to do so until long after that time had expired, was not one who, "by reason of being out of the state," had no notice "as provided in this chapter" to present his claim, within the meaning of Code Civ. Proc. § 1493, and his claim was therefore barred. MacGowan v. Jones, 142 Cal. 593, 76 P 503.

[c] **Meaning of term "beyond the seas."**—A person in California, being within the national limits of the United States, is not "beyond the seas," within the meaning of such phrase in a statute, limiting the time for the presentation of claims. Mason v. Johnson, 24 Ill. 159, 76 AmD 740.

[d] **"Out of the state."**—A nonresident creditor, after commencement of an action against the executor, which was dismissed, ceases to be a creditor "out of the state," and is no longer entitled to the benefit of the statute. Yoast v. Willis, 9 Ind. 548.

[e] **Partnership.**—(1) Claims due a partnership, one member of which is a nonresident, must be presented within the time limited for the presentation of claims by residents. Allen v. Farrington, 2 Sneed (Tenn.) 526. (2) But where the resident member assigns, prior to the debtor's death, his interest in the debt due the firm to the nonresident members, they may present the claim within the time limited for the presentation of claims by nonresidents. Bailey v. Brooks, 11 Heisk. (Tenn.) 1.

[f] **A foreign corporation** is not within the benefit of such a statute merely because its technical principal place of business is in the state of its incorporation, where all its property is located within the state where the administration is pending, all its officers and agents are there, all meetings of its directors are held there, all its business is transacted there and it was organized to carry on business in such state. Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206.

90. U. S.—Smith v. Smith, 224 Fed. 1, 139 CCA 465; Soliss v. General Electric Co., 213 Fed. 204, 129 CCA 548.

Ala.—County v. Montgomery, 195 Ala. 197, 70 S 642; Aycock v. Johnson, 119 Ala. 405, 24 S 543.

Ark.—Davis v. Cramer, 133 Ark. 224, 202 SW 239; Georgia State Sav. Assoc. v. Dearing, 128 Ark. 149, 193 SW 512; Miller v. Summers, 124 Ark. 599, 187 SW 664; Little v. Arkansas Trust, etc., Co., 124 Ark. 466, 187 SW 629.

Cal.—Paterson v. Schmidt, 111 Cal. 547, 44 P 161.

Colo.—Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Werner v. Freilich, 268 Ill. 58, 108 NE 711; Hataway v. Merchants' L. & T. Co., 218 Ill. 580, 75 NE 1060, 4 AnnCas 164; Mortimore v. Potter, 213 Ill. 178, 72 NE 817; Tinker v. Babcock, 204 Ill. 571, 68 NE 445; In re Thurber, 209 Ill. A. 533; Reynolds v. Reynolds, 186 Ill. A. 397; Hallgren v. Utt, 155 Ill. A. 640; Hathaway v. Merchants' L. & T. Co., 121 Ill. A. 478 [aff 218 Ill. 580, 75 NE 1060, 4 AnnCas 164]; Peo. v. Brooks, 22 Ill. A. 594 [aff 123 Ill. 246, 14 NE 39].

Ind.—Tilson v. Hoosier Tropical Fruit Co., 43 Ind. A. 684, 88 NE 524.

Iowa.—Harter v. Harter, 181 Iowa 1181, 165 NW 315; Seery v. Murray, 107 Iowa 384, 77 NW 1058.

Kan.—McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100; Milbourne v. Kelley, 93 Kan. 753, 145 P 816, AnnCas1916D 389.

Ky.—Holmes v. Lusk, 78 Ky. 548.

Miss.—Cohn v. McClintock, 107 Miss. 831, 66 S 217.

Mo.—C. H. Albers Commn. Co. v. Vogelsang, (A.) 190 SW 1058; Grier v. Robbins, 175 Mo. A. 604, 158 SW 389.

Nebr.—Superior First Nat. Bank. v. Bradshaw, 91 Nebr. 714, 136 NW 1015; Korff v. Bueker, 75 Nebr. 60, 105 NW 1099.

N. J.—Ray Est. Corp. v. Steelman, 90 N. J. L. 184, 100 A 209.

N. M.—Buss v. Dye, 21 N. M. 146,

by order of court within limits prescribed by statute.[91] As to the time of presentation the statutes of nonclaim, not the general statutes of limitations, are controlling,[92] although where there is no controlling or applicable statute of nonclaim, the general statute of limitations will be applied by analogy to furnish a limit to the time within which claims may be presented,[93] and where, through the failure of the personal representative to proceed with the usual and ordinary settlement of the estate, the statute of nonclaim cannot be called into operation, the general statute of limitations will revive and run against claims from the date of the representative's appointment and qualification.[94] It has also been held that in the absence of statute claims must be presented within a reasonable time.[95] When the statute requires that the court shall by its order fix the times and places for receiving and examining claims, and shall give notice of such times and places and of the time limited for presenting claims, the order must state such times and places,[96] and the notice must be given according to the terms of the statute or claims not presented will not be barred.[97] The notice cannot cure defects in the original order.[98] Where the statute provides that a period for presenting claims shall be fixed by the court, and that after the expiration of this period the court shall, by final decree, order that all claims not presented within that period shall be barred except as to subsequently discovered assets, the fixed period is not extended by implication until the rendition of the final decree, and a claim is barred if not presented within the time limited.[99] The presentation of claims is not conditional upon the inventory; but the creditors must

153 P 74.

N. Y.—International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842.

Oh.—Sayler v. Sellers, 19 Oh. Cir. Ct. N. S. 206, 2 Oh. A. 439.

Okl.—Anderson v. Anderson, 165 P 145.

Or.—In re Murray, 56 Or. 132, 107 P 19.

Pa.—Loughran's Est., 26 Pa. Dist. 123.

S. D.—Printz-Biederman Co. v. Torgeson, 168 NW 796.

Va.—Com. v. McCue, 109 Va. 302, 63 SE 1066.

Wis.—In re Gillin, 169 Wis. 58, 171 NW 758; In re Kleinschmidt, 167 Wis. 450, 167 NW 827; In re Ryan, 157 Wis. 576, 147 NW 993, AnnCas1916D 840.

[a] **The value of the estate is sometimes a factor** (1) in determining the time, a longer time being allowed when the value is over a certain sum; and the time must be stated in the representative's notice to creditors. Paterson v. Schmidt, 111 Cal. 457, 44 P 161; In re Loeven, Myr. Prob. (Cal.) 203. (2) The ascertainment of the value of the estate by the personal representative cannot be impeached or contradicted by him when he has stated it in his inventory and appraisal. In re Loeven, supra. (3) But it may be impeached or contradicted by a creditor. Paterson v. Schmidt, supra.

[b] **What law governs.**—The time within which claims must be presented is fixed by the law in force when publication is made. Robertson v. Demoss, 23 Miss. 298.

[c] **All claims, whether due or not due,** stand upon the same footing as to the time of presentation. Swain's Est., 67 Cal. 637, 8 P 497.

[d] **Retroactive operation of statute.**—(1) A statute shortening the time within which claims against decedents' estates shall be presented does not have a retroactive effect so as to shorten the period for the presentation of claims against estates in process of administration at the time of the passage of the act. Morrissett v. Carr, 127 Ala. 277, 27 S 844. (2) A statute disallowing interest on claims unless demand was made within one year does not apply where the administrator qualified before the law took effect. Holmes v. Lusk, 78 Ky. 548.

[e] **Such statutes are highly penal** and are to be strictly construed. In re Jameson, (Okl.) 182 P 518.

[f] **Construction of statutes.**—(1) Under Code § 3347, requiring the administrator first to pay the charges of the last sickness of deceased, and § 3348, classifying other demands, making claims filed within six months after the first publication of the notice of the administrator's appointment the third class, and all other debts the fourth class, and § 3349, barring all claims of the fourth class not filed and notice thereof served within twelve months of the publication of the administrator's appointment, a physician's claim for services rendered a deceased in his last illness is not barred because not filed until after the expiration of the twelve months, where the estate is unsettled and solvent. Wolfe v. Knapp, 127 Iowa 479, 103 NW 369. (2) Although Mills St. Annot. § 4784 provides that claimants may exhibit claims after the day fixed by the administrator upon giving ten days' notice of the time they intend to present the same, where notice was not given within one year from the grant of letters the claim was barred under § 4780. Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378. (3) Orphans' Act (P. L. [1898] p 741) § 76, providing that, in any suit for a legacy or distributive share, it shall be no defense that there are disputed claims outstanding against the estate, if the executor shall have neglected for six months to obtain an order to limit creditors and to proceed thereon according to law, unless a suit brought within a year from the granting of probate be pending on such claim, merely permits a legatee to prosecute his suit to judgment, which will not be enforced pending the ultimate settlement of the estate, and such section or a decree barring creditors provided for by the act operate only to protect the executor from molestation by belated claims of creditors, so that the estate may be speedily settled, and do not operate as a limitation against the claims of creditors. O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

91. Conn.—Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647; Weeks v. Hull, 19 Conn. 376, 50 AmD 249; Wooden v. Cowles, 11 Conn. 292.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

N. J.—Young v. Young, 45 N. J. L. 197; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Lewis v. Champion, 40 N. J. Eq. 59; Gould v. Tingley, 16 N. J. Eq. 501.

Vt.—Batchelder v. White, 82 Vt. 132, 71 A 1111.

Wis.—Pereles v. Leiser, 119 Wis. 347, 96 NW 799; Butler v. Templeton, 115 Wis. 382, 91 NW 969; Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39; Austin v. Saveland, 77 Wis. 108, 45 NW 955 [dist Brill v. Ide, 75 Wis. 113, 43 NW 559].

92. U. S.—Mills v. Scott, 99 U. S. 25, 25 L. ed. 294 (construing Georgia statute); Schurmeier v. Connecticut Mut. L. Ins. Co., 171 Fed. 1, 96 CCA 107 [certiorari dism 249 U. S. 586, 31 SCt 470, 55 L. ed. 347].

Ala.—Griestra v. Tarleton, 67 Ala. 126.

Ark.—Biscoe v. Sandefur, 14 Ark. 568; Walker v. Byers, 14 Ark. 246; State Bank v. Walker, 14 Ark. 234.

Iowa.—Mosher v. Goodale, 129 Iowa 719, 106 NW 195.

Mo.—Montelius v. Sarpy, 11 Mo. 237; Mabary v. Mabary, 173 Mo. A. 437, 158 SW 690; State v. Browning, 102 Mo. A. 455, 76 SW 719.

N. H.—Walker v. Cheever, 39 N. H. 420 [dist Whipple v. Stevens, 19 N. H. 150; Boardman v. Paige, 11 N. H. 431; Peaslee v. Breed, 10 N. H. 498, 34 AmD 178].

Pa.—Gavaghan's Est., 31 Pa. Co. 253.

Philippine. — Santos v. Manarang, 27 Philippine 209.

S. D.—In re Roberts, 170 NW 580.

Tex.—Gaston v. Boyd, 52 Tex. 282.

Vt.—Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697.

93. O'Mulcahey v. Gragg, 45 Minn. 112, 47 NW 543; In re Gardner, 228 Pa. 282, 77 A 509, 29 LRANS 685.

[a] **Illustration.**—Where a partner in a banking firm dies after the issuance and maturity of a certificate of deposit, a claim for payment thereof from his estate must be made within six years from the death of the partner, or it will be barred by analogy to the statute of limitations. In re Gardner, 228 Pa. 282, 77 A 509, 29 LRANS 685.

[b] **Payment will not be presumed** from mere lapse of time less than the period fixed by the general statute of limitations. Grafton Bank v. Doe, 19 Vt. 463, 47 AmD 697.

94. Mason's App., 75 Conn. 406, 53 A 895.

95. O'Mulcahey v. Gragg, 45 Minn. 112, 47 NW 543; Nebraska Wesleyan Univ. v. Bowen, 73 Nebr. 598, 103 NW 275.

96. Hart v. Nance, 4 KyL 625; Brill v. Ide, 75 Wis. 113, 43 NW 559.

[a] **Order complying with statute.**—An order made June 11, 1901, providing that the time allowed for creditors to present their claims for examination and allowance was limited from the date thereof, until and including Jan. 6, 1902, and ordering that the claims and demands of all persons against decedent be examined and adjusted by the court at the regular term thereof to be held at the office of the county judge, at a specified place in the county, on the first Tuesday in January, 1902, and that notice is given by publication of the order for four successive weeks once in each week, in a certain newspaper published in the county, the first publication to be within fifteen days from the date of the order, was a sufficient compliance with Rev. St. (1898) § 3840. Barry v. Minahan, 127 Wis. 570, 107 NW 488.

97. Brill v. Ide, 75 Wis. 113, 43 NW 559; Gardner v. Callaghan, 61 Wis. 91, 20 NW 685.

98. Brill v. Ide, 75 Wis. 113, 43 NW 559.

99. Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813;

file their claims within the time limited or be barred, and are not entitled to wait until an inventory is filed showing property which can be devoted to the payment of debts.[1]

A claim of the representative, when presentation thereof is required,[2] must be presented within the same time as a claim of any other creditor,[3] but where the private account of one executor was paid by the others shortly after appointment of the executors, it was held that the fact that no application for allowance thereof was made until after the statutory limit for suits against the executors had passed did not render it barred by limitations.[4]

An order discharging an executor or administrator before the expiration of the time allowed for filing claims is not binding on persons without notice thereof, and such persons have a right to file claims during the remainder of the period.[5]

[§ 959] **b. Computation of Time.**[6] Under some statutes the period within which claims against an estate must be presented runs from the time when letters testamentary or of administration are granted,[7] not from the representative's advertisement or publication of notice;[8] and it has been held that until administration has been granted the statute of nonclaim does not begin to run.[9] In computing the period of limitation under these statutes the day on which the letters were granted is excluded.[10] Other statutes fix the time within which claims must be presented at a certain period after the publication of a notice setting forth the grant of letters or calling on creditors to present their claims,[11] but such statutes have been held not to

Ray Est. Corp. v. Steelman, 90 N. J. L 184, 100 A 209; Young v. Young, 45 N. J. L. 197; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Meade County v. Welch, 34 S. D. 348, 148 NW 601.

[a] **Earlier decisions in New Jersey** were to the contrary. Ryder v. Wilson, 41 N. J. L. 9; Parker v. Combs, 34 N. J. Eq. 522; Miller v. Harrison, 34 N. J. Eq. 374; Terhune v. White, 34 N. J. Eq. 98.

[b] **Construction of the earlier New Jersey statutes** on the period for presentation of claims. Ryder v. Wilson, 41 N. J. L. 9; Ryan v. Flanagan, 38 N. J. L. 161; Campfield v. Ely, 13 N. J. L. 150; Miller v. Harrison, 34 N. J. Eq. 374; Terhune v. White, 34 N. J. Eq. 98.

1. Mosher v. Goodale, 129 Iowa 719, 106 NW 195; In re Jacob, 119 Iowa 176, 93 NW 94; Paw Paw First Nat. Bank v. Sherman, 117 Mich. 602, 76 NW 97; Jacobs v. Jacobs, 7 OhS& CP 486; Franklin v. Killilea, 126 Wis. 88, 104 NW 993.

2. See supra § 953.

3. In re Long, 9 Cal. A. 754, 100 P 892 [foll Morrow v. Barker, 119 Cal. 65, 51 P 12; In re Hildebrandt, 92 Cal. 433, 28 P 486; In re Taylor, 10 Cal. 482, 16 Cal. 434].

[a] **Circumstances not showing grounds for allowance after statutory period.**—The administrator held a note against decedent, secured by a mortgage. There were no other claims, and he told his attorney the facts, and he advised that it was not necessary to file the note as a claim, and that the administrator might rely on the security of the mortgage. The attorney did not know the terms of the mortgage until the period for filing claims had elapsed. The facts did not establish equitable grounds on which the administrator could rely for an allowance of his claim after the expiration of the statutory period. McDermott v. McDermott, 138 Iowa 351, 116 NW 122.

4. In re Palmer, 110 Me. 441, 86 A 919.

[a] **Claim of infant.**—Where the statute allowed an infant, two years after the removal of the disability to bring an action, and another statute allowed eighteen months for the presentation of a claim against a decedent's estate, and a person against whom such a claim existed died less than two years after the infant reached majority, the time for presenting the claim was extended to the extent of the difference between the eighteen months and the portion of the two years which remained unexpired at the time of decedent's death, the result being that the infant had the full eighteen months within which to present the claim. Lewis v. Hershey, 45 Ind. A. 104, 90 NE 332.

5. In re Kimball, 158 Iowa 273, 139 NW 456.

6. Claims not due see supra § 949.

Contingent claims see supra § 947.

7. U. S.—Morgan v. Hamlet, 113 U. S. 449, 5 SCt 583, 28 L. ed. 1043.

Ala.—Aycock v. Johnson, 119 Ala. 405, 24 S 543; Merchants' Nat. Bank v. McGee, 108 Ala. 304, 19 S 356; Glass v. Woolf, 82 Ala. 281, 3 S 11; Halfman v. Ellison, 51 Ala. 543; Montgomery Bank v. Plannett, 37 Ala. 222; McHenry v. Wells, 28 Ala. 451; Cawthorne v. Weisinger, 6 Ala. 714; Thrash v. Sumwalt, 5 Ala. 13; Johnson v. Bain, (A.) 81 S 849.

Ark.—Davis v. Cramer, 133 Ark. 224, 202 SW 239; Little v. Arkansas Trust, etc., Co., 124 Ark. 466, 187 SW 629; Connelly v. Weatherly, 33 Ark. 658; Walker v. Byers, 14 Ark. 246 [overr Allen v. Byers, 12 Ark. 593; Burton v. Lockert, 9 Ark. 411].

Colo.—Milner Bank, etc., Co. v. Whipple, 61 Colo. 252, 156 P 1098.

Ill.—Wener v. Freilich, 268 Ill. 58, 108 NE 711 [aff 188 Ill. A. 577]; Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104 [aff 93 Ill. A. 31]; Shephard v. Rhodes, 60 Ill. 301; Peo. v. White, 11 Ill. 341; Tinker v. Babcock, 107 Ill. A. 78 [aff 204 Ill. 571, 68 NE 445].

Mo.—Kimm v. Osgood, 19 Mo. 60; Johnston v. Thompson, 145 Mo. A. 463, 122 SW 761; State v. Browning, 102 Mo. A. 455, 76 SW 719; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053.

N. H.—Walker v. Cheever, 39 N. H. 420; Gookin v. Sanborn, 3 N. H. 491.

Oh.—Walters v. Heidy, 19 Oh. Cir. Ct. N. S. 252, 1 Oh. A. 66.

Pa.—In re Cowan, 28 PittsbLegJ 119.

Tex.—Buchanan v. Wagnon, 62 Tex. 375; Graham v. Vining, 1 Tex. 639; McDougald v. Hadley, 1 Tex. 490.

[a] **Revocation of original grant.**—If, on the discovery of a will, letters previously granted are revoked and letters with the will annexed are issued to another person, claims against the estate, in order to share equally in the distribution, must be presented for allowance within two years from the granting of the first letters. Shephard v. Rhodes, 60 Ill. 301.

[b] **The claim of a ward against the estate of a deceased guardian** must be presented within the period prescribed by the statute of nonclaim whether the guardian has made a final setlement or not. The statute of nonclaim, unlike the statute of limitations, runs from the grant of administration, not from the final settlement. Connelly v. Weatherly, 33 Ark. 658.

[c] **The issuance of letters ad colligendum** does not start the statute running. Wener v. Freilich, 268 Ill. 58, 108 NE 711 [aff 188 Ill. A. 577].

8. Cawthorne v. Weisinger, 6 Ala. 714; Johnson v. Bain, (Ala. A.) 81 S 849; Little v. Arkansas Trust, etc., Co., 124 Ark. 466, 187 SW 629; Peo. v. White, 11 Ill. 341; Hooper v. Bryant, 3 Yerg. (Tenn.) 1.

9. Ala.—Merchants' Nat. Bank v. McGee, 108 Ala. 304, 19 S 356.

Ark.—Sorrels v. Trantham, 48 Ark. 386, 3 SW 198, 4 SW 281; Hanf v. Whittington, 42 Ark. 491; Word v. West, 38 Ark. 243; McCustian v. Ramey, 33 Ark. 141.

Mich.—Baker v. Halleck, 128 Mich. 180, 87 NW 100.

Mo.—McKinzie v. Hill, 51 Mo. 303, 11 AmR 450; Polk v. Allen, 19 Mo. 467.

Wash.—Gleason v. Hawkins, 32 Wash. 464, 73 P 533.

[a] **Long delay in issuing letters.**—The rule applies although the appointment is not made until twelve years after decedent's death. Baker v. Halleck, 128 Mich. 180, 87 NW 100.

[b] **Claims accruing after death of decedent.**—The same rule has been held to apply with respect to a statute requiring claims, accruing after decedent's death, to be presented within four months after their accrual. In re Cowles, 61 Conn. 445, 23 A 829.

[c] **Contrary view.**—Where no administrator has been appointed, the claim of a creditor will become barred by limitation at the end of three years after the last date at which an administrator might have been appointed. Brown v. Baxter, 77 Kan. 97, 94 P 155, 574.

10. Allen v. Elliott, 67 Ala. 432; Kimm v. Osgood, 19 Mo. 60.

11. U. S.—Soliss v Electric Co., 213 Fed. 204, 129 CCA 548 (stating rule in Oklahoma); Schurmeier v. Connecticut Mut. L. Ins. Co., 171 Fed. 1, 96 CCA 107 [certiorari dism 219 U. S. 586, 31 SCt 470, 55 L. ed. 347].

Cal.—Janin v. Browne, 59 Cal. 37.

Conn.—Mason's App., 75 Conn. 406, 53 A 895.

Ind.—Tilson v. Hoosier Tropical Fruit Co., 43 Ind. A. 684, 88 NE 524.

Iowa.—Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502; Wickham v. Hull, 102 Iowa 469, 71 NW 352; Schlutter v. Dahling, 100 Iowa 515, 69 NW 884.

Me.—McGuire v. Murray, 107 Me. 108, 77 A 692.

Mich.—Pratt v. Houghtaling, 45 Mich. 457, 8 NW 72.

Miss.—Robertson v. Demoss, 23 Miss. 298; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41; Dowell v. Weber, 10 Miss. 452; Helm v. Smith, 10 Miss. 403.

Mo.—In re Hensley, 121 Mo. A. 695, 97 SW 645; Spaulding v. Suss, 4 Mo. A. 541.

N. J.—Simons v. Forster, 73 N. J. L. 338, 63 A 858.

N. Y.—O'Connor v. Gifford, 117 N. Y. 275, 22 NE 1036.

Or.—In re Conant, 43 Or. 530, 73 P 1018.

S. C.—Miller v. Mitchell, 8 S. C. Eq. 437.

Utah.—Fullerton v. Baily, 17 Utah 25, 53 P 1020.

preclude the presentation of claims before notice is published.[12] Statutes are also found under which the time runs from the date of the order of the court, directing the publication of notice for the presentation of claims.[13] Again under some statutes which require claims to be filed in court rather than presented to the executor or administrator, the time for filing begins to run from the death of decedent.[14] Under some statutes a claim is barred if not presented within a certain time before final settlement of the estate,[15] but a statute prohibiting the filing of claims against an estate after the order for partition and distribution permits by implication the filing of claims at any time prior thereto, although the representative's application for final settlement is on file.[16] Under a statute requiring that commissioners be appointed to allow claims against an estate, and that the court or judge fix the time and place for the presentation of claims the rights of creditors to enforce their demands are not barred so long as no commissioners are appointed and no time or place is fixed.[17] Where the statutes require that the time for exhibiting claims against an estate be fixed by an order of court, the time is computed from the making of the order and not from its publication,[18] but the day on which the order is made is excluded from the computation.[19] Where testator gave his whole estate to his executors in trust, with power of sale to pay debts, etc., to be exercised when they deemed advisable, and his real property was encumbered and unsalable, and the executors made no sale thereof for ten years after his death, during which time they had no assets to pay debts, the executors were trustees of the creditors, so that limitations did not run until the sale of the real estate.[20]

[§ 960] **c. Postponement and Interruption of Statute**[21]**—(1) In General.** It is generally held that the statute of nonclaim, when once it begins to run, continues to run, no exceptions or interruptions being allowed to intervene unless expressly provided for,[22] but provision is sometimes made for claims accruing after the expiration of the limited period.[23] Where, notwithstanding a suit to enforce specific performance of decedent's alleged contract to convey certain land to claimant in consideration of his services, claimant filed a claim in proper time consisting of seventeen items, including one relating to purchases for or improvements on land for decedent and another relating to a note for money borrowed, a notice served on the administrator that the items other than those specified were, "for the present, withdrawn," and that the two excepted items were to come on for trial, the remaining items being held until determination of a claim for specific performance, the items withdrawn were never dismissed from the claim filed but, even if they were, claimant was entitled to refile them within five months after the final disposition of the claim for specific performance and while the estate remained unsettled.[24]

[§ 961] **(2) Fraudulent Concealment of Claim or Cause of Action.** It is generally held that unless otherwise provided by the statute, the fraudulent concealment of the existence of a claim or

Wash.—Foley v. McDonnell, 48 Wash. 272, 93 P 321.

[a] **Where there has been a change in the statute,** the law in force when publication was made governs as to the time within which claims must be presented. Hibernia Sav., etc., Soc. v. Hayes, 56 Cal. 297; Robertson v. Demoss, 23 Miss. 298.

[b] **Date of filing proof of publication.**—Where the period for presentation begins to run from the first publication of the notice to creditors, it is not affected by the date of filing the proof of publication. In re Conant, 43 Or. 530, 73 P 1018.

[c] **Delay in filing proof of publication of the notice** does not prevent the running of the statute from the time of publication. In re Conant, 43 Or. 530, 73 P 1018.

[d] **Notice by special administrator.**—The special administrator not being authorized to allow claims against the estate, a notice by him of his appointment does not start running the time within which claims must be presented. Pickering v. Weiting, 47 Iowa 242.

[e] **The notice must be in accordance with an order** of the court or clerk in order that it may set the statute running. Craig v. Craig, 167 Iowa 340, 149 NW 454.

Notice to creditors see infra §§ 973–979.

12. McCann v. Pennie, 100 Cal. 547, 35 P 158; Janin v. Browne, 59 Cal. 37; Ricketson v. Richardson, 19 Cal. 330; Field v. Field, 77 N. Y. 294; Russell v. Lane, 1 Barb. (N. Y.) 519; Johnson v. Corbett, 11 Paige (N. Y.) 265.

13. Wooden v. Cowles, 11 Conn. 292.

14. Janes v. Brunswick, 8 N. M. 105, 42 P 72; Demmy's App., 43 Pa. 155; Loughran's Est., 26 Pa. Dist. 123.

[a] **As against a claim for funeral expenses** the statute begins to run twenty days after the death of decedent. Hildebrand v. Kinney, (Ind. A.) 83 NE 379.

15. Schrichte v. Stites, 127 Ind. 472, 26 NE 77, 1009; Tilson v. Hoosier Tropical Fruit Co., 43 Ind. A. 684, 88 NE 524; Peabody v. Allen, 194 Mass. 345, 80 NE 582.

[a] **The term "final settlement,"** as used in a statute providing that claims not filed at least thirty days before the final settlement of the estate shall be barred, means the presentation of the account for final settlement at the time fixed by law, and claims not filed thirty days before that time will be barred. Schrichte v. Stites, 127 Ind. 472, 26 NE 77, 1009; Roberts v. Spencer, 112 Ind. 85, 13 NE 129.

[b] **A premature settlement by the representative** cannot operate to defeat a creditor's right to file his claim, and the fact that the representative has no notice of the claim does not justify a settlement in advance of the time named in the statute. Shirley v. Thompson, 123 Ind. 454, 24 NE 253 [cit Dillman v. Barber, 114 Ind. 403, 16 NE 825; Floyd v. Miller, 61 Ind. 224].

[c] **A claim for contribution by a joint judgment debtor** who has paid joint judgments rendered against himself and decedent's estate cannot be defeated by the filing and approving of the representative's final settlement report; and it is not necessary that the whole of the debt be paid at the time of settlement if it is paid when contribution is sought. Harter v. Songer, 138 Ind. 161, 37 NE 595.

[d] **Effect of vacating settlement.**—Where an order approving the representative's report and discharging the representative is vacated and set aside, the estate is left as if no final report had ever been filed, and the period for filing claims is reopened. Chicago, etc., R. Co. v. Harshman, 21 Ind. A. 23, 51 NE 343.

16. Bledsoe v. Beiler, 66 Tex. 437, 1 SW 164.

17. Pratt v. Houghtaling, 45 Mich. 457, 8 NW 72; Wilkinson v. Winne, 15 Minn. 159.

18. Wooden v. Coles, 11 Conn. 292.

19. Weeks v. Hull, 19 Conn. 376, 50 AmD 249.

20. Matter of Prince, 56 Misc. 222, 107 NYS 296.

21. **In cases of infancy or coverture** see supra § 957.

22. Ala.—Lowe v. Jones, 15 Ala. 545; Decatur Branch Bank v. Hawkins, 12 Ala. 755; Decatur Branch Bank v. Donelson, 12 Ala. 741; Thrash v. Sumwalt, 5 Ala. 13.

Conn.—Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647.

Ill.—Peo. v. White, 11 Ill. 341.

Iowa.—Mosher v. Goodale, 129 Iowa 719, 106 NW 195.

Kan.—McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100; Milbourne v. Kelley, 93 Kan. 753, 145 P 816, AnnCas1916D 389.

Mich.—Seilnacht v. Durfee, 167 NW 837.

Mo.—Richardson v. Harrison, 36 Mo. 96.

Nebr.—Burling v. Allvord, 77 Nebr. 861, 867, 110 NW 683 [cit Cyc].

N. C.—Ridley v. Thorpe, 3 N. C. 343.

S. D.—In re Roberts, 170 NW 580.

Wis.—Barry v. Minahan, 127 Wis. 570, 107 NW 488; Franklin v. Killilea, 126 Wis. 88, 104 NW 993; Butler v. Templeton, 115 Wis. 382, 91 NW 969.

23. In re Ryan, 157 Wis. 576, 147 NW 993, AnnCas1916D 840.

[a] **Claim within statute.**—Under a statute declaring that if a claim shall accrue after the expiration of the limited time it may be presented and proved at any time within one year after accrual, a claim by an attorney for contribution against the estate of his deceased partner based on a judgment rendered after the expiration of the time limited by order for presentation of claims and the payment thereof by the attorney is not barred when presented within one year after judgment. In re Ryan, 157 Wis. 576, 147 NW 993, AnnCas 1916D 840.

[b] **Claim not accruing after expiration of time.**—Franklin v. Killilea, 126 Wis. 88, 104 NW 993.

24. Black v. Miller, 158 Iowa 293, 138 NW 535.

cause of action, either by decedent in his lifetime [25] or by his personal representative,[26] does not affect the operation of the nonclaim statute or defer the beginning of the statutory period to the time when the facts are discovered, and that provisions of the general statute of limitations on this point are not applicable by analogy.[27] But on the other hand there is authority for the view that claimant may be afforded equitable relief under such circumstances.[28]

[§ 962] **(3) Absence of Representative from State.** It has been held that, where the statute of nonclaim has begun to run it will continue, notwithstanding the personal representative removes from the state and continues absent until the statutory period has expired;[29] and where the statutes require that the personal representative shall notify creditors to present their claims at the place where he resides or transacts business, claims may be legally presented at such place whether the representative is there to receive them or not, and therefore his absence from the state is immaterial.[30] But there is also authority for the view that if the executor or administrator by his absence from the state prevents the presentation of a claim the claim will not be barred,[31] although a merely temporary absence which does not prevent the creditor from presenting his claim by the exercise of reasonable diligence will not extend the statutory period.[32] If, however, there are two executors it is only the period during which both are absent that will be excluded.[33] It is sometimes expressly provided by statute that the period of the representative's absence from the state shall be excluded in computing the period for presentation.[34]

[§ 963] **(4) Vacancy in Office of Representative.** It has been held that, where the statutory period begins to run from the date of the issuance of letters testamentary or of administration,[35] any interval in the administration because of a vacancy in the office of executor or administrator must be excluded in computing the time.[36] But it has also been asserted that the death of the personal representative, after the issuance of letters, does not interrupt the running of such a statute [37] for the reason that the creditor can have another administrator appointed or can himself apply in certain cases, and hence presentation of his claim is not impossible.[38]

[§ 964] **(5) Premature Discharge of Representative.** The statutory time for filing claims has been held to be suspended during the time a premature order of discharge of an executor or administrator remains of record,[39] but it has also been considered that an unauthorized discharge of the representative before settlement of the estate, being a nullity, does not excuse a creditor's failure to exhibit his claim.[40]

[§ 965] **(6) Death of Creditor.** The running of the statute is not interrupted by the death of the creditor,[41] nor does an appeal from the probate of the creditor's will relieve his executors from the necessity of presenting his claim against the debtor's estate within the period limited.[42]

Where a creditor disappeared two years before his debtor's death and was never heard from, there was no presumption that he was not living during the period for presenting claims against the deceased debtor's estate, and the period was not extended.[43]

[§ 966] **(7) Appeal from Probate.**[44] Where an order is made limiting the time for the presentation of claims against a testator's estate, a subsequent appeal from an order admitting the will to probate does not suspend the period of limitation.[45]

[§ 967] **(8) War.** It has been held that the statutes of nonclaim did not run in the seceding states during the Civil War,[46] and on the other hand that, where the statute began to run before the civil law was suspended on account of the war, it did not stop running,[47] and that constitutional provisions suspending the statute of limitations during the Civil War did not apply to the statutes of nonclaim.[48] A statute passed during the war of the Revolution disabling British subjects from suing in the state courts was held to suspend the operation of the state statute of nonclaim.[49]

[§ 968] **d. Extension by Agreement with Representative.** The personal representative has authority to make a contract with a creditor of the estate, whereby the time of payment of the creditor's claim is extended, provided that the contract is for the benefit of the estate, and such a contract operates to extend the period limited for the presentation of the claim and relieves the creditor from the imputation of laches if he presents his claim

25. Taylor v. Robinson, 69 Ala. 269; Yniestra v. Tarleton, 67 Ala. 126; Burling v. Alvord, 77 Nebr. 861, 110 NW 683. But compare Fisk's App., 81 Conn. 433, 71 A 559 (persons seasonably presenting a claim against their father's estate are not chargeable with laches, where the claim arose from an agreement of trust for them by the father, which he concealed from them, so that it came to their knowledge after his death).

[a] **The fact that claimant did not discover fraud** on the part of a decedent until after the expiration of the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim. Burling v. Allvord, 77 Nebr. 861, 110 NW 683.

26. Fragd v. Fragd, 175 Ill. A. 246; Roberts v. Spencer, 112 Ind. 85, 13 NE 129.

27. Yniestra v. Tarleton, 67 Ala. 126.

28. Sugar River Bank v. Fairbank, 49 N. H. 131 (if he proceeds with due diligence and institutes proceedings for relief promptly after discovering his claim).

Relief under statutes see infra § 1023.

29. Lowe v. Jones, 15 Ala. 545; Decatur Branch Bank v. Donelson, 12 Ala. 741.

30. Douglass v. Folsom, 21 Nev. 441, 33 P 660.

31. Walker v. Cheever, 39 N. H. 420.

32. Walker v. Cheever, 39 N. H. 420.

33. Adoue v. Gonzales, 22 Tex. Civ. A. 73, 54 SW 367.

34. Adoue v. Gonzales, 22 Tex. Civ. A. 73, 54 SW 367.

35. See supra § 959.

36. Walker v. Byers, 14 Ark. 246; In re Jameson, (Okl.) 182 P 518.

[a] **Removal of the administrator** tolls the statute until a successor is appointed. In re Jameson, (Okl.) 182 P 518.

37. Pipkin v. Hewlett, 17 Ala. 291; Lowe v. Jones, 15 Ala. 545; Peo. v. White, 11 Ill. 341.

38. See cases supra note 37.

39. In re Kimball, 158 Iowa 273, 139 NW 456.

40. Blanchard v. Williamson, 70 Ill. 647.

41. Glass v. Woolf, 82 Ala. 281, 3 S 11; Beasley v. Waugh, 51 Ala. 156; Morrow v. Barker, 119 Cal. 65, 51 P 12; Hill v. Mixter, 5 Allen (Mass.) 27; Nelson v. Haeberle, 26 Mo. A. 1.

42. Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647.

43. Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647.

44. Appeal from probate of creditor's will see supra § 965.

45. Brannan v. Sherry, 195 Ala. 272, 71 S 106; Douglass v. Folsom, 21 Nev. 441, 33 P 660; Delaplane v. Smith, 38 Oh. St. 413; Butler v. Templeton, 115 Wis. 382, 91 NW 969.

46. Grace v. Martin, 47 Ala. 135; Mays v. Rogers, 37 Ark. 155; Worthington v. De Bardlekin, 33 Ark. 651; Williamson v. McCrary, 33 Ark. 470.

[a] **As between citizens of a nonseceding state** the statute was not suspended during the Civil War. McKinzie v. Hill, 51 Mo. 303, 11 AmR 450.

47. Richardson v. Harrison, 36 Mo. 96.

48. Standifer v. Hubbard, 39 Tex. 417; Ryan v. Flint, 30 Tex. 382.

49. Ogden v. Witherspoon, 18 F. Cas. No. 10,461, 3 N. C. 227.

within the period thus extended,[50] but where such a contract would be prejudicial to the interests of the estate, it cannot be given this effect.[51]

[§ 969] **e. Presentation before Appointment of Representative.** While it is obviously improper to present a claim against an estate before the appointment of a personal representative, it has been held that an administrator cannot object that a claim against the estate was presented to him several days before his appointment, where he held it a year thereafter before rejecting it.[52]

[§ 970] **5. Place of Presentation.** Where a certain place is designated for the presentation of claims to the personal representative, presentation at that place is sufficient, although the representative is not there to receive the claim.[53] Under a statute authorizing presentation to be made to the personal representative at his residence or place of business, the words "place of business" are construed to include the place selected for the transaction of the business of the estate, although the representative may be engaged in business elsewhere,[54] and the designation in the notice to creditors of a certain place where claims shall be presented makes that place the representative's residence or place of business within the meaning of the statute.[55] A statute providing that presentation may be made by filing the claim, or a statement thereof, in the "office" of the judge of probate does not authorize presentation of the claim in the probate court or in the court of chancery.[56] Filing a copy of the claim with the clerk of the county court within the statutory period is sometimes sufficient to keep the claim from being barred,[57] and presentation to the representative has been held to be equally effective.[58]

[§ 971] **6. By and to Whom Presentation Made —a. By Whom Made.** The presentation of a claim may be made by any person who has an interest in the claim, and a legal or equitable right to enforce it,[59] and only by such a person.[60] If the creditor is of full age he is the proper person to present his claim; there is no authority for his appearance by a next friend,[61] although if he is not mentally competent to make an affidavit the claim should be presented by his guardian or a committee of his person and estate.[62] A valid presentation may be made by the equitable owner of the claim,[63] but if the claim is presented in the name of the legal owner, an appeal from disallowance is properly taken in his name.[64] The assignee of a claim may present and enforce it in his own name,[65] and a claim against the estate of a deceased surety on an executor's bond may be filed in the name of the actual claimant, although it is provided by statute that actions on executors' bonds shall be prosecuted in the name of the people for the use of the persons injured.[66] The properly appointed and duly qualified[67] executor or administrator of a deceased creditor has, of course, full authority to present

50. North v. Walker, 66 Mo. 453 [aff 2 Mo. A. 174]; Smarr v. McMaster, 35 Mo. 349; Matter of Martin, 159 App. Div. 926, 144 NYS 306 [rev on other grounds 211 N. Y. 328, 105 NE 546]; Dashiell v. Moody, 44 Tex. Civ. A. 87, 97 SW 843.

51. Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

52. Scott Stamp etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

53. Roddan v. Doane, 92 Cal. 555, 28 P 604.

54. Roddan v. Doane, 92 Cal. 555, 28 P 604; Bollinger v. Manning, 79 Cal. 7, 21 P 375; Hoyt v. Bonnett, 58 Barb. 529 [rev on other grounds 50 N. Y. 538, and disappr Murray v. Smith, 22 N. Y. Super. 689].

[a] **The office of the representative's attorney** may be the proper place for presenting claims. Roddan v. Doane, 92 Cal. 555, 28 P 604; Bollinger v. Manning, 79 Cal. 7, 21 P 375.

55. Douglass v. Folsom, 21 Nev. 441, 33 P 660; Hoyt v. Bonnett, 58 Barb. 529 [rev on other grounds 50 N. Y. 538, and disappr Murray v. Smith, 22 N. Y. Super. 689].

56. Weller v. Rensford, 185 Ala. 333, 337, 64 S 366, 367 ("The statute contemplates, as an alternative, presentation by following a certain process 'in the probate office.' No provision for presentation to the 'probate court' is made, and none for presentation to the chancery court, in the sense the demurrant seems to have had in mind").

57. Wallace v. Gatchell, 106 Ill. 315.

[a] **The clerk's neglect** to keep the claim on the docket, and the omission of a special order to continue the case from term to term, cannot affect the validity of the exhibition of the claim. Barbero v. Thurman, 49 Ill. 283.

58. Wells v. Miller, 45 Ill. 33 [foll Mason v. Tiffany, 45 Ill. 392].

59. Ala.—Hunt v. Curtis, 151 Ala. 507, 44 S 54; McDowell v. Jones, 58 Ala. 25; Blankenship v. Nimmo, 50 Ala. 506; Cook v. Davis, 12 Ala. 551; Boggs v. Branch Bank, 10 Ala. 970.

Cal.—In re Crosby, 55 Cal. 574 [dist Marsh v. Dooley, 52 Cal. 232].

Ill.—Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304].

Mich.—Campau v. Miller, 46 Mich. 148, 9 NW 140.

Mo.—Dorsey v. Burns, 5 Mo. 334.

N. Y.—International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842.

S. C.—Westfield v. Westfield, 13 S. C. 482; Ex p. Hanks, 13 S. C. Eq. 231.

[a] **A person subrogated to the right of a creditor** may file his claim directly against the estate. Campau v. Miller, 46 Mich. 148, 9 NW 140.

[b] **The pledgee of a note and mortgage** may present the claim against the estate of the maker. Ponce v. McElvy, 47 Cal. 154.

[c] **The payee and legal owner of a note and mortgage,** so long as it remains in his possession unassigned is the person to present it, and on his failure to do so the claim is barred, although the equitable owner resides out of the state, and did not know of the death of the payor. Marsh v. Dooley, 52 Cal. 232.

[d] **Statutory right to enforce claim for benefit of another.**—Where, by an agreement between a harvester company and its agent, it held title to all machines sold until the agent's obligation to the company therefor was met, and upon a sale the purchaser's note was therefore taken in the name of the company but the agent thereafter settled with the company, its interest or claim on the machine or its proceeds then ceasing, the company could thereafter present a claim on the note to the purchaser's executor and prosecute a proceeding on such claim, under the statute authorizing actions to be brought by the person with whom or in whose name a contract is made for the benefit of another, especially where the company appeared by its attorney, and the agent was actively engaged in prosecuting the proceeding, thus protecting defendants against any subsequent claim by either. International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842.

60. Rayburn v. Rayburn, 130 Ala. 217, 30 S 365; Allen v. Elliott, 67 Ala. 432; McDowell v. Jones, 58 Ala. 25; Cook v. Davis, 12 Ala. 551; Walker v. Heller, 104 Ind. 327, 3 NE 114; Marshall v. Perkins, 72 Me. 343; International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842.

61. Kline's Est., 9 Pa. Dist. 386.

62. Kline's Est., 9 Pa. Dist. 386; Thurston v. Holbrook, 31 Vt. 354.

63. Hunt v. Curtis, 151 Ala. 507, 44 S 54; Hogan v. Calvert, 21 Ala. 194; In re Crosby, 55 Cal. 574 [dist Marsh v. Dooley, 52 Cal. 232].

64. Amory v. Greer, 58 Vt. 58, 2 A 719.

65. Dixon v. Buell, 21 Ill. 203.

66. Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304].

67. See cases infra this note.

[a] **Before qualification** the personal representative of a deceased creditor cannot make a valid presentation of a claim in favor of his decedent. Henry v. Roe, 83 Tex. 446, 18 SW 806.

[b] **Where letters of administration on the creditor's estate are absolutely void,** the administrator is without authority to make a valid presentation of claims due the estate which he purports to represent, and an attempted presentation of such claims by him is, in legal effect, the act of a stranger, and does not prevent the operation of the statute of nonclaim. McDowell v. Jones, 58 Ala. 25, 35 ("We are, however, constrained to declare that appointment void — a mere nullity; and that the presentment made by Richards [the person whose appointment as administrator was void] was the act of a stranger, which may have given to the appellant notice of the existence of the claim, but did not, and could not, inform him of the further indispensable element of a presentment, that the estate of the intestate was looked to for payment").

[c] **A foreign administrator** cannot present a claim before taking out ancillary letters of administration. Henry v. Roe, 83 Tex. 446, 18 SW 806.

[d] **Presentation by executor before probate of will.**—An executor may present a claim due his testator before probate of the will. Feustmann v. Gott, 65 Mich. 592, 32 NW 869.

claims in favor of the estate which he represents,[68] and he may exercise this authority at any time before his formal discharge and during the period of presentation, although his final settlement has been filed and an order of distribution entered.[69] It has also been held that a claim may be presented by the heirs of a deceased claimant.[70] Presentation may be made by a lawfully authorized agent of claimant,[71] but unless otherwise provided by statute the personal representative of the deceased debtor has no authority to present the claim of a creditor against the estate,[72] and a statute providing for the presentation of claims of the estate by way of set-off to the claims of creditors does not authorize the personal representative to present a creditor's claim for the purpose of setting off against it a claim of the estate against the creditor.[73] No one but the creditor himself or a person duly authorized by him can make a presentation of a claim against an estate so as to bind the creditor,[74] and a presentation by a person having no interest in the claim is a nullity and will not avoid the operation of the statute of nonclaim.[75] So where the statement of the claim shows a cause of action in favor of a person other than claimant, it is insufficient.[76] But the fact that a person not interested is united with the real owner of a claim filed is immaterial, since a payment to either would be by consent of the other, their association being voluntary.[77] It has been held that if a claim is presented by the wrong person and it appears that it is a proper claim for adjustment against the estate, the court may allow the proper person to appear and prosecute the demand;[78] and where a claim presented by an unauthorized person is disallowed, it has been held that upon becoming vested with the proper authority the person who presented the claim may, by taking an appeal from the order of disallowance, ratify and make valid the original presentation.[79] Where the creditor died, leaving a nonintervention will,[80] presentation of the claim by his executor as his own individual claim was sufficient, where the executor was the sole heir and sole beneficiary under the will, and the will had been filed for probate before the claim was presented, although it had not been admitted to probate.[81]

Claim for services rendered by wife. It has been held that a claim against the estate of a decedent for services rendered by a wife while living with her husband is community property and should be presented by the husband.[82]

Claim based on stockholder's liability. Where, after creditors have recovered judgment in their suit to enforce the liability of stockholders of an insolvent bank, one of them files claim for the judgment recovered by him in such suit against the estate of a deceased stockholder liable under the judgment, his claim against the estate is for the benefit of all the creditors, and they have a right to share in the amount he recovers in proportion to

68. Cal.—Davis v. Browning, 91 Cal. 603, 27 P 937.
Del.—Fidelity Ins., etc., Co. v. Niven, 11 Del. 64.
Mich.—Feustmann v. Gott, 65 Mich. 592, 32 NW 869.
Mo.—Tonnies v. McIntyre, 82 Mo. A. 268.
Wash.—Harvey v. Pocock, 100 Wash. 263, 170 P 545.
[a] **Foreign executor.**—An executor appointed by the will of a foreign creditor may file a claim due his testator's estate against the estate of the deceased debtor in the domestic state before proving the foreign will in the latter state, since the probate of the foreign will merely furnishes evidence of the executor's existing rights, and if this evidence is furnished at the trial it is sufficient. Feustmann v. Gott, 65 Mich. 592, 32 NW 869.
[b] **Foreign corporation appointed administrator.**—A corporation created by the laws of the state of Pennsylvania, and authorized by its charter to administer upon the estates of decedents, may, as administrator, by its treasurer, make probate of a debt owing to it from the estate of a decedent in Delaware under the statute of the latter state. Fidelity Ins., etc., Co. v. Niven, 11 Del. 64.

69. Tonnies v. McIntyre, 82 Mo. A. 268.

70. Hunt v. Curtis, 151 Ala. 507, 44 S 54.

71. Ala.—Hallett v. Mobile Branch Bank, 12 Ala. 193.
Me.—Marshall v. Perkins, 72 Me. 343.
Mass.—Converse v. Nichols, 202 Mass. 270, 89 NE 135.
Nev.—Douglass v. Folsom, 22 Nev. 217, 38 P 111.
N. Y.—Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem].
[a] **Notice by a notary public** to the administrator of the indorser of the protest and nonpayment of a note, and that he will be held for payment, is sufficient. Hallett v. Mobile Branch Bank, 12 Ala. 193.
[b] **A receiver of a corporation** who is authorized by the decree appointing him "to sue for . . . compromise and settle any and all stockholders' liability" is the proper person to present a petition to the probate court based on the liability of a deceased stockholder. Converse v. Nichols, 202 Mass. 270, 89 NE 135.

72. In re Hobson, 40 Colo. 332, 91 P 929; Roberts v. Flatt, 42 Ill. A. 608 [aff 142 Ill. 485, 32 NE 484]; Jenkins v. Morrow, 131 Mo A. 288, 109 SW 1051; Moore v. Bachelder, 51 Vt. 50.
[a] **Reason for rule.**—"The executor is the representative of the estate, and he could not properly accept employment from, or act as the agent of, the claimant in presenting a claim against the estate for adjustment." In re Hobson, 40 Colo. 332, 337, 91 P 929.
[b] **Presentation by the attorney of the representative,** to whom claimant presented his claim, is not proper. Brannon v. Sherry, 195 Ala. 272, 71 S 106.
[c] **Action by court on claim so presented.**—Where an administrator acting in good faith presented to the probate judge a claim against the estate, and the judge passed upon it without appointing any person to defend, this should be construed as amounting to an exhibition of the claim so as to prevent its being barred. Williamson v. Anthony, 47 Mo. 299.

73. Moore v. Bachelder, 51 Vt. 50 (holding also that an unauthorized presentation of a creditor's claim by the administrator did not give the commissioners any jurisdiction over the creditor or over his claim, notwithstanding the claim had been adjudicated by the commissioners and their report accepted and recorded by the probate court).

74. Jenkins v. Morrow, 131 Mo. A. 288, 109 SW 1051; Whitcomb v. Davenport, 63 Vt. 656, 22 A 723; Moore v. Batchelder, 51 Vt. 50.

75. Jones v. Peebles, 130 Ala. 269, 30 S 564; Rayburn v. Rayburn, 130 Ala. 217, 30 S 365; McDowell v. Jones, 58 Ala. 25; Boggs v. Mobile Branch Bank, 10 Ala. 970; Marshal v. Perkins, 72 Me. 343; Thurston v. Holbrook, 31 Vt. 354.
[a] **Presentation of a note by a prior holder** is insufficient. Marshal v. Perkins, 72 Me. 343.

76. Cook v. Davis, 12 Ala. 551; Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163; Walker v. Heller, 104 Ind. 327, 3 NE 114; Marshall v. Perkins, 72 Me. 343.
[a] **Indorsee of note.**—Where a negotiable promissory note not yet due is indorsed by the payee and held by the indorsee, the indorsee, not the indorser, is the creditor of the deceased maker's estate, and as long as he holds the note he is the only person who may present it. Meriden Steam Mill Lumber Co. v. Guy, 40 Conn. 163.
[b] **A note payable to a third person** will not support a claim unless the affidavit shows that claimant has either a legal or an equitable interest in it. Cook v. Davis, 12 Ala. 551.
[c] **Where a promissory note is indorsed in blank,** it may be presented in the name of anybody consenting. Whitford v. Herting, 60 Ill. A. 413.

77. Perkins v. Berry, 103 N. C. 131, 9 SE 621.

78. Holdridge v. Holdridge, 53 Vt. 546.

79. Thurston v. Holbrook, 31 Vt. 354 (where the claim was presented on behalf of a person non compos mentis, and after the disallowance the person who had presented the claim was appointed guardian of the creditor).

80. **Independent executors** see infra §§ 2895–2902.

81. Harvey v. Pocock, 100 Wash. 263, 170 P 545.

82. Smith v. Furnish, 70 Cal. 424, 12 P 392 (holding, however, that if such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and suit is thereafter instituted, a judgment in favor of the husband and wife in an action subsequently brought by them will not be reversed for informality in the presentation).

their rights as fixed by the judgment rendered in the creditors' action.[83]

[§ 972] **b. To Whom Made.** While presentation is ordinarily made to the personal representative,[84] this rule is not universal, and under some statutes the presentation is properly made to the court,[85] to the clerk of the court,[86] or to commissioners appointed to pass on claims.[87] Where a claim has been presented to an executor or administrator lawfully holding the office at the time of such presentation, his subsequent removal, resignation, or death, or the revocation of his letters, and the appointment of a new representative, does not necessitate a new presentation of the claim to the latter.[88] The presentation of a claim to the personal representative before his qualification [89] or after he has been discharged [90] is of no effect. As a general rule if there are two or more personal representatives presentation of a claim to one of them is sufficient.[91] It is not ordinarily proper to present claims to an administrator pendente lite,[92] or ad colligendum,[93] although presentation to a representative of the latter class is sometimes permitted,[94] and a presentation by a nonresident creditor to an ancillary administrator appointed in another state is insufficient as regards the distribution of the assets in the state in which primary administration was granted.[95] If the statute requires presentation to be made to the personal representative and does not provide for presentation to his agent or attorney, claims must be presented to the representative in person, and the presentation to his agent or attorney is insufficient, unless it is shown that the agent or attorney delivered the demand or notice to his principal in due time.[96] The law does not contemplate that in a mere claim against a decedent's estate third persons shall be joined as defendants with the representative.[97] The allowance of a claim against a partnership is not an exhibition of the claim against the individual estate of a deceased partner.[98] Where a note was payable to a partnership of which the administrator was a member, it was proper to present it to the probate court for allowance without having presented it to the administrator under a statute providing that an administrator may establish any demand of his against his intestate by presenting and proving it to the satisfaction of the court.[99]

[§ 973] **7. Notice to Creditors** [1]**—a. Necessity for Notice.** The personal representative is generally required by statute to publish a notice to creditors, informing them of his appointment or of the granting of letters to him, and calling upon them to present their claims, the statutes usually making express provision as to the time when the notice shall be given, the manner and period of publication, etc.[2] In some states under the statutes of which commissioners are appointed to examine claims against decedent's estates, the notice to creditors of the time limited for filing claims is required to be given by the commissioners.[3] Unless the statutes expressly so provide, the giving of notice to creditors by the personal representative is in no sense a prerequisite to his entering upon the discharge of his duties,[4] and his failure to give the notice does not operate to annul his appointment.[5] In some jurisdictions the statutes providing for the publication of notice by the personal representative are intended solely for his own protection, and so far as concerns the rights of creditors to payment out of the estate there is no legal obligation on him to give notice at all;[6] but in these jurisdictions, as in others, if the personal representative has paid out the assets to legatees or distributees, he cannot escape personal liability to an unpaid creditor without showing full compliance with the statutes requiring notice.[7] Where the period for presenting claims dates from some time

83. Dietrich v. Loney, 169 Wis. 469, 172 NW 229.

84. See supra § 937; and cases infra this section.

85. See supra §§ 937, 953.

86. Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 S 160.

87. Santos v. Manarang, 27 Philippine 209.

88. Weller v. Rensford, 185 Ala. 333, 64 S 366; Floyd v. Clayton, 67 Ala. 265; McHardy v. McHardy, 7 Fla. 301; Hart v. Bjerke, 34 S. D. 557, 149 NW 423; Parks v. Lubbock, (Civ. A.) 50 SW 466 [rev on other grounds 92 Tex. 635, 51 SW 322].

89. Mobile Branch Bank v. Hallett, 12 Ala. 671 [foll Borum v. Bell, 132 Ala. 85, 31 S 454]; Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8.

90. Gibson v. Mitchell, 16 Fla. 519.

91. Ala.—Carrington v. Odom, 124 Ala. 529, 27 S 510; Mardis v. Shackleford, 4 Ala. 493; Acre v. Ross, 3 Stew. 288.

Cal.—Willis v. Farley, 24 Cal. 490.

Fla.—Barnes v. Scott, 29 Fla. 285, 11 S 48; McHardy v. McHardy, 7 Fla. 301.

Kan.—Cross v. Long, 66 Kan. 293, 71 P 524; Clark v. Parkville, etc., R. Co., 5 Kan. 654.

N. Y.—Lambert v. Craft, 98 N. Y. 342; Genet v. Binsse, 3 Daly 239.

Tex.—Dean v. Duffield, 8 Tex. 235, 58 AmD 108.

92. Houston v. Houston, 3 Humphr. (Tenn.) 652.

93. Erwin v. Mobile Branch Bank, 14 Ala. 307.

94. Berry, etc., Co., v. Dante, 43 App. (D. C.) 110 (collector).

95. Turner v. Risor, 54 Ark. 33, 15 SW 13.

96. Ala.—Brannan v. Sherry, 195 Ala. 272, 71 S 106.

Cal.—Roddan v. Doane, 92 Cal. 555, 28 P 604.

D. C.—Parish v. Hedges, 34 App. 21.

Me.—Rawson v. Knight, 71 Me. 99.

Nev.—Douglass v. Folsom, 21 Nev. 441, 33 P 660, 22 Nev. 217, 38 P 111.

N. Y.—Hardy v. Ames, 47 Barb. 413; Genet v. Binsse, 3 Daly 239.

[a] **The fact that the attorney's name was appended to the notice** to creditors as "attorney for the estate" does not change the rule, the law recognizing no such officer as a general attorney for a decedent's estate. Douglass v. Folsom, 21 Nev. 441, 33 P 660.

[b] **A distinction,** however, is to be observed between cases where the creditor's failure to make due and proper presentation of his claim affects his right to share in the assets of the estate, and cases where it affects merely his right of action against the personal representative, as where the statute is intended for the latter's protection; in the latter class of cases it is held that if the personal representative, without statutory authority, appoints an agent or attorney to receive claims, he cannot avail himself of the protection of the statute. Rawson v. Knight, 71 Me. 99; Johnson v. Myers, 103 N. Y. 666, 9 NE 55; Hardy v. Ames, 47 Barb. (N. Y.) 413; Whitmore v. Foose, 1 Den. (N. Y.) 159.

97. Niblack v. Goodman, 67 Ind. 174; Noble v. McGinnis, 55 Ind. 528.

98. Burton v. Rutherford, 49 Mo. 255.

99. Hall v. Rea, 85 Ark. 269, 107 SW 1176.

1. Notice by court see supra § 958.

2. See the statutes; and Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; Riosa v. Valenciano, 20 Philippine 170.

3. Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

[a] **Premature publication of order.**—Where notice of the expiration of the time allowed for presenting claims was published prior to making the order by the commissioners appointed to examine such claims, fixing such time, claimant was entitled to an order allowing her claim to be filed and directing a hearing thereon. Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

4. Johnson v. Barker, 57 Iowa 32, 10 NW 289; In re Conser, 40 Or. 138, 66 P 607.

5. Johnson v. Barker, 57 Iowa 32, 10 NW 289.

6. Fliess v. Buckley, 90 N. Y. 286 [aff 24 Hun 514]; Field v. Field, 77 N. Y. 294; Matter of Recknagel, 148 App. Div. 268, 132 NYS 99; Bullock v. Bogardus, 1 Den. (N. Y.) 276; Wood v. Weightman, L. R. 13 Eq. 434.

7. Md.—Glenn v. Smith, 17 Md. 260; Rawlings v. Adams, 7 Md. 26; Steuart v. Carr, 6 Gill 430.

N. Y.—Clayton v. Wardell, 2 Bradf. Surr. 1.

N. C.—Lee v. Patrick, 31 N. C. 135; McLin v. McNamara, 22 N. C. 82.

Eng.—Wood v. Weightman, L. R. 13 Eq. 434.

Ont.—Stewart v. Snyder, 27 Ont. A. 423 [aff 30 Ont. 110].

[a] **Statutory liability to creditors resulting from failure to give notice.**—Johnson v. Bain, (Ala. A.) 81 S 849.

[b] **Practice under the English statutes** (22 & 23 Vict. c 35 § 29). In re Bracken, 43 Ch. D. 1 [expl Wood v. Weightman, L. R. 13 Eq. 434].

[c] **Advertisement in Ontario Ga-**

other than the publication of notice to creditors by the representative, the omission of the representative to give this notice does not relieve the creditors from the necessity of presenting their demands, but the statute of nonclaim runs whether the notice is published or not,[8] it being held that, so far as the statute of nonclaim is concerned, the requirements as to notice are merely directory.[9] But where the period for presenting the claims begins at the publication of notice to creditors,[10] the statute of nonclaim does not operate to bar claims not presented unless notice has been given within the time and in the manner prescribed by law,[11] and it has been held that unless such notice has been duly given, an order cannot properly be made closing the allowance of claims.[12] If the proper statutory notice has been given, the creditor's want of actual notice is not material and will not affect the running of the nonclaim statute against his demand,[13] unless the latter statute excepts from its operation, as it does in some states, creditors who have not received notice.[14] It has been said that creditors of an estate are not bound to take any cognizance of a notice the publication of which is not made within the time stated in the statute.[15] But it has been held that actual notice that the debtor has died and that administration has been granted upon his estate has the same effect as the statutory notice, and necessitates the creditor's compliance with the statute of nonclaim, although the personal representative wholly neglects to give the notice required by law,[16] especially where the creditor deals with the appointee as the legal representative of the estate.[17] Where the personal representative seeks to enforce a claim of his own against the estate, he cannot take advantage of his own neglect to give the statutory notice to creditors.[18] The failure of the personal representative to give notice to creditors does not affect the general statute of limitations,[19] or estop him from claiming the benefit of that statute.[20]

[§ 974] **b. Sufficiency of Notice and Publication—(1) In General.** In jurisdictions where notice to creditors is necessary, all the statutory requirements as to the notice and as to the time, place, and manner of its publication must be strictly complied with;[21] but the statutes should be given a construction which will be reasonable, in view of

zette unnecessary.—Re Cameron, 15 Ont. Pr. 272 [dist Wood v. Weightman, L. R. 13 Eq. 434].

8. Ala.—Montgomery Bank v. Plannett, 37 Ala. 222; Cawthorne v. Weisinger, 6 Ala. 714; Thrash v. Sumwalt, 5 Ala. 13; Acre v. Ross, 3 Stew. 288; Johnson v. Bain. (A.) 81 S 849.

Ark.—Little v. Arkansas Trust, etc., Co., 124 Ark. 466, 187 SW 629.

Ill.—Peo. v. White, 11 Ill. 341.

Kan.—In re Hoover, 180 P 275.

Tenn.—Todd v. Wright, 12 Heisk. 442; Atkinson v. Settle, 5 Yerg. 299; Hooper v. Bryant, 3 Yerg. 1; Pea v. Waggoner, 5 Hayw. 1.

Tex.—Graham v. Vining, 1 Tex. 639; McDougald v. Hadley, 1 Tex. 490.

[a] **Rule applicable to claims of executor.**—In re Hoover, (Kan.) 180 P 275.

9. Todd v. Wright, 12 Heisk. (Tenn.) 442; Crabaugh v. Hart, 3 Yerg. (Tenn.) 431; Hooper v. Bryant, 3 Yerg. (Tenn.) 1.

10. See supra § 959.

11. Cal.—Wise v. Williams, 88 Cal. 30, 25 P 1064; Smith v. Hall, 19 Cal. 85.

Del.—Bradley v. Kent, 12 Del. 372, 32 A 286.

Fla.—Fillyau v. Laverty, 3 Fla. 72.

Iowa.—McConaughy v. Wilsey, 115 Iowa 589, 88 NW 1101; Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502; Johnson v. Barker, 57 Iowa 32, 10 NW 289.

Md.—Steuart v. Carr, 6 Gill 430.

Mich.—Pratt v. Houghtaling, 45 Mich. 457, 8 NW 72.

Miss.—Boutwell v. Farmers', etc., Bank, 118 Miss. 50, 79 S 1; Alabama Branch Bank v. Windham, 31 Miss. 317; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41; Pearl v. Conley, 15 Miss. 356; Dowell v. Webber, 10 Miss. 452; Helm v. Smith, 10 Miss. 403.

Mo.—Wilson v. Gregory, 61 Mo. 421; Stiles v. Smith, 55 Mo. 363; Clark v. Collins, 31 Mo. 260; Bryan v. Mundy, 17 Mo. 556; Hawkins v. Ridenhour, 13 Mo. 125; Spaulding v. Suss, 4 Mo. A. 541.

Mont.—In re Higgins, 15 Mont. 474, 39 P 506, 28 LRA 116.

Nebr.—Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

N. J.—Petrie v. Voorhees, 18 N. J. Eq. 285.

N. Y.—Tucker v. Tucker, 4 Abb. Dec. 428, 4 Keyes 136; Whitmore v. Foose, 1 Den. 159.

N. C.—Valentine v. Britton, 127 N. C. 57, 37 SE 74; Gilliam v. Willey, 54 N. C. 128; Lee v. Patrick, 31 N. C. 135.

Oh.—In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44.

Okl.—State v. Soliss, 152 P 1114.

S.D.—In re Stroup, 40 S. D. 37, 166 NW 155.

Wash.—McFarland v. Fairlamb, 18 Wash. 601, 52 P 239.

Wis.—Gardner v. Callaghan, 61 Wis. 91, 20 NW 685.

Ont.—Stewart v. Snyder, 27 Ont. A. 423 [dism app 30 Ont. 110].

[a] **Presentation before suit.**—Failure to give notice to creditors dispenses with the presentation of a claim within the time limited by statute, but does not dispense with presentation before suit. McFarland v. Fairlamb, 18 Wash. 601, 52 P 239 [expl Donnerberg v. Oppenheimer, 15 Wash. 290, 46 P 254].

[b] **Limitation on right to sue.**—Revisal (1905) § 39, directing the publication of a general notice in the administration of an estate, being independent of § 93, requiring a claimant to sue within six months after notice of rejection of his claims, the publication of notice under the former is not necessary to the enforcement of the latter. Morissey v. Hill, 142 N. C. 355, 55 SE 193.

12. North v. Van Tassel, 84 Mich. 69, 47 NW 663 (an order granted under such circumstances did not operate to prevent an allowance to a decedent's widow for the support of herself and minor children during the progress of settlement).

13. Hawkeye Ins. Co. v. Lisker, 122 Iowa 341, 98 NW 127.

14. Pacific States Sav., etc., Co. v. Fox, 25 Nev. 229, 59 P 4.

15. Pearl v. Conley, 15 Miss. 356.

16. Walker v. Gill, 18 S. C. L. 105.

17. Clawson v. McCune, 20 Kan. 337; Collamore v. Wilder, 19 Kan. 67; Danzey v. Swinney, 7 Tex. 617.

[a] **A claimant who presents his claim to the administrator** for allowance is estopped by his own act from denying that he had notice of the grant of administration, and in such a case it is immaterial whether publication was made or not. Danzey v. Swinney, 7 Tex. 617.

18. Fragd v. Fragd, 175 Ill. A. 246; In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44.

19. McMillan v. Hayward, 94 Cal. 357, 29 P 774.

20. Keyser's App., 124 Pa. 80, 16 A 577, 2 LRA 159 [expl and reaff York's App., 110 Pa. 69, 1 A 162, 2 A 65 (overr In re McCandles, 61 Pa. 9; McClintock's App., 29 Pa. 360)].

21. Cal.—Wise v. Williams, 88 Cal. 30, 25 P 1064; Votypka v. Valentine, (A.) 182 P 76.

Fla.—Bush v. Adams, 25 Fla. 809, 6 S 860.

Ill.—Wener v. Freilich, 268 Ill. 58, 108 NE 711.

Iowa.—Craig v. Craig, 167 Iowa 340, 149 NW 454.

Md.—Glenn v. Hobb, 17 Md. 260.

Miss.—Boutwell v. Farmers', etc., Bank, 118 Miss. 50, 79 S 1; Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 S 160; Marshall v. John Deere Plow Co., 99 Miss. 284, 54 S 948; Pearl v. Conley, 15 Miss. 356.

Mo.—Stiles v. Smith, 55 Mo. 363.

N. Y.—Dolbeer v. Casey, 19 Barb. 149.

N. C.—Lee v. Patrick, 31 N. C. 135; McLin v. McNamara, 22 N. C. 82.

Oh.—In re Ringwald, 5 OhS&CP 452, 5 OhNP 496.

Okl.—In re Jameson, 182 P 518; State v. Soliss, 152 P 1114.

S. D.—Union Sav. Assoc. v. Somers, 40 S. D. 177, 166 NW 638.

Wash.—Strand v. Stewart, 51 Wash. 685, 99 P 1027.

Ont.—Stewart v. Snyder, 27 Ont. A. 423 [dism app 30 Ont 110].

[a] **Illustration.**—Under Code (1906) § 2107, requiring claims against a decedent's estate to be filed within one year after publication of notice to creditors, and under § 2103, requiring such notice to advise all claimants to have their claims registered within one year, and that failure to do so will bar the claims, a notice stating that the person publishing it has been appointed administrator, and advising all persons having claims to deal as the law directs, is insufficient. Marshall v. John Deere Plow Co., 99 Miss. 284, 54 S 948.

[b] **Calendar and not lunar months** are contemplated by the statute. Glenn v. Hobb, 17 Md. 260.

[c] **Notice by a special administrator** (1) is of no effect. Pickering v. Weiting, 47 Iowa 242; Wener v. Freilich, 268 Ill. 58, 108 NE 711 [aff 188 Ill. A. 577] (administrator ad collegendum). (2) And where letters pendente lite have been revoked by the grant of letters testamentary or of administration, the new representative should give the statutory notice to creditors, although such notice may have been given by his predecessor. In re Worthington, 54 Md. 359.

[d] **A successor to the first administrator** must give notice for the full statutory period less the time during which notice was given by the first administrator. In re Jameson,

local conditions as to means and facilities for publication,[22] and slight errors and omissions which are not misleading and do not affect the substance of the notice are immaterial.[23] If the statute does not prescribe any particular form, the notice should be made so ample, full, and clear in its terms that it will operate as a warning to creditors.[24] An administrator may authorize his attorney to sign a notice to creditors in the administrator's name and on his behalf,[25] and it has also been held that the notice need not be signed by the representative, but signature of the clerk of the court is sufficient.[26] If the statute imposes upon the personal representative the duty to publish the notice in a newspaper, and does not restrict him in his choice, the selection of the newspaper rests with him.[27] Under a statute providing that the notice shall be published as often as the court or judge shall direct, but not less than a specified number of times in a stated period, the order of the court or judge need not specify the period or frequency of publication unless the court requires more than the minimum fixed by law.[28] Publication in advance of the order directing or regulating the notice has been held invalid,[29] but a first publication made after the order for publication was signed is valid, although it was made before such order was entered.[30]

Notice of appointment of administrator. A notice directing persons having claims against the estate to present them within a specified time, and signed by the administrator as such, has been held a sufficient notice of his appointment.[31]

[§ 975] **(2) Statement of Time for Presenting Claims.** Although it is better practice for the notice to specify the time for the presentation of claims,[32] this is not necessary in the absence of express statutory requirement, but it is sufficient if it calls for presentation "within the time prescribed by law."[33] It has been held, however, that if the personal representative undertakes to state in the notice the period for presentation, he must do so correctly, and if the notice provides that claims shall be presented within a longer period than that prescribed by statute, it is nugatory and claims will not be barred by failure to present within the statutory period.[34] Under a statute providing for a longer period for presentation, where the value of the estate exceeds a certain sum, and requiring the period to be stated in the representative's notice to creditors, if the representative erroneously states a shorter period he does not thereby affect the creditors' rights to present their claims within the longer period.[35]

[§ 976] **(3) Statement of Place for Presenting Claims.** Under a statute requiring that the notice shall direct the creditors to present their claims to the personal representative at the place of his residence or business, to be specified in the notice, if the notice states the place for presentation it need not further state that the designated place is the representative's residence or place of business.[36] A notice signed by the administrators and dated at a certain place has been held sufficient to designate their place of business.[37]

[§ 977] **c. Waiver of Irregularities.** A creditor may waive irregularities in the notice or its publication by failing to object thereto at the proper time.[38]

[§ 978] **d. Proof of Notice.** In states where due notice to creditors is a prerequisite to the operation of the nonclaim statute, if the personal representative relies on the statute as a bar to a claim

(Okl.) 182 P 518.

[e] **Publication in a newspaper** (1) printed and published in the county is not a sufficient compliance with a statute requiring advertisement at the courthouse and at other public places. McLin v. McNamara, 22 N. C. 82. (2) But it is a substantial compliance with that part of the statute requiring advertisement at other public places. Blount v. Porterfield, 3 N. C. 161.

[f] **Newspaper in which notice must be published.**—Under the statute the notice must be published in some newspaper of the county, where there is such a paper. Brouse v. Law, 127 Cal. 152, 59 P 384.

[g] **Newspaper must be printed in English.**—Where the statute requires notice to be published in a newspaper, the publication must be made in a newspaper printed in the English language, unless the statute makes some exception; and this has been held true, although the decedent was a German and nearly all his business transactions had been made with Germans. In re Ringwald, 5 Oh S&CP 452, 5 OhNP 496.

[h] **A change in the date of publication of a weekly newspaper** from a certain day in the week to a subsequent day in the same week does not invalidate a notice published for a certain number of successive weeks as required by statute. Stœver's App., 3 Watts & S. (Pa.) 154.

22. Montelius v. Sarpy, 11 Mo. 237 (the publication of the notice of the grant of letters of administration need not be completed within thirty days from the grant of letters, but need only be begun in that time).

23. Acre v. Ross. 3 Stew. (Ala.) 288; Finney v. Barnes, 97 Mass. 401; Stokes v. Lemon, etc., Co., 96 Miss. 868, 52 S 457.

[a] **Illustration.**—An administrator's notice, requiring claims against the estate to be filed within a year, is not void for using the word "file," instead of "register." Stokes v. Lemon, etc., Co., 96 Miss. 868, 52 S 457.

[b] **Description of representative.**—A notice given by an executor is sufficient, although it describes him as administrator. Finney v. Barnes, 97 Mass. 401.

24. Amos v. Campbell, 9 Fla. 187; Ellison v. Allen, 8 Fla. 206; Craig v. Craig, 167 Iowa 340, 149 NW 454.

[a] **Form of notice held sufficient.**—Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 S 160.

25. Meikle v. Cloquet, 44 Wash. 513, 87 P 841.

26. Roberts v. Spencer, 112 Ind. 81, 13 NE 127.

27. Brouse v. Law, 127 Cal. 152, 59 P 384 (under Code Civ. Proc. § 1490, giving to the court the power to select a newspaper where no newspaper is published in the county, the power of the court is limited to the case specified, and that the power conferred upon the court to examine the character of a notice that has been published and to adjudge whether or not due publication has been made does not involve the power to designate in the original order the newspaper in which the notice shall be published).

28. Hensley v. Sacramento County Super. Ct., 111 Cal. 541, 44 P 232 [dist Wise v. Williams, 88 Cal. 30, 25 P 1064].

29. Wise v. Williams, 88 Cal. 30, 25 P 1064; McConaughy v. Wilsey, 115 Iowa 589, 88 NW 1101; Ribble v. Furmin, 71 Nebr. 108, 98 NW 420; Union Sav. Assoc. v. Somers, 40 S. D. 177, 166 NW 638.

[a] **Evidence of the mere fact of publication** is not sufficient to establish the regularity of the notice under a statute providing that the personal representative shall give such notice as the court or clerk may direct, in the absence of any evidence showing that the publication was made pursuant to any order; and the court will not presume from the mere fact of publication that an order directing publication was made. McConaughy v. Wilsey, 115 Iowa 589, 88 NW 1101.

[b] **A contrary view** was expressed in Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372 (where the court afterward adjudged the publication sufficient).

30. Votypka v. Valentine, (Cal. A.) 182 P 76.

31. Gilbert v. Little, 2 Oh. St. 156.

32. May v. Mann, 15 Fla. 553; Amos v. Campbell, 9 Fla. 187; Ellison v. Allen, 8 Fla. 206.

33. May v. Vann, 15 Fla. 553; Ellison v. Allen, 8 Fla. 206; Fillyau v. Laverty, 3 Fla. 72.

34. Wilson v. Gregory, 61 Mo. 421; Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372; Brill v. Ide, 75 Wis. 113, 43 NW 559.

[a] **Variation of one day.**—A notice dated Sept. 16, and first published Sept. 17, requiring presentation of claims within one year after the first publication was sufficient, although the statute required presentation within one year after the date of the notice. Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372.

35. Paterson v. Schmidt, 111 Cal. 457, 44 P 161; In re Loeven, Myr. Prob. (Cal.) 203.

[a] **Representative's determination of value of estate not binding upon creditors.**—Paterson v. Schmidt, 111 Cal. 457, 44 P 161.

36. Douglass v. Folsom, 21 Nev. 441, 33 P 660.

37. Stœver's App., 3 Watts & S. (Pa.) 154.

38. Bush v. Adams, 25 Fla. 809, 6 S 860; Robertson v. Agricultural Bank, 28 Miss. 237.

of a creditor, he must affirmatively prove that he gave the statutory notice to creditors in the manner and within the time prescribed by law.[39] Publication of the notice may be proved by producing the newspaper containing it.[40] Some statutes provide that the giving of the statutory notice may be proved by affidavit,[41] but under such a statute the affidavit has been held to be only prima facie evidence, the newspaper in which the notice was published being more satisfactory evidence of its contents,[42] and it has been held that the giving of due notice may be proved by any competent evidence, the affidavit being deemed unnecessary.[43] Where the statute requires that an order or decree be made showing that due notice to creditors has been given, performance of this requirement may be compelled by mandamus,[44] but in order to authorize the court to make such a decree there must be proof of compliance with the statute by filing a copy of the notice in court,[45] and such an order or decree is not conclusive, but may be contradicted by evidence that the publication was insufficient.[46] It has been held that a statute requiring proof of publication of the notice to be filed with the clerk of the court within a certain time is directory, not mandatory, and that, where the publication has in fact been duly made the date of the filing of proof is not jurisdictional,[47] but another statute requiring the executor or administrator to file in court a copy of the publication of notice to creditors with a statement of the date of its first publication and the name of the newspaper has been considered mandatory.[48] The jurisdiction of commissioners to hear and allow claims does not depend upon the making of proof before them that notice to creditors of the hearing and allowance has been published;[49] but if such notice has in fact been published the commissioners may act, although no formal proof thereof is made before them.[50] The statutes requiring that notice be given and proof thereof made are intended for the benefit of creditors, and a residuary legatee, not being a creditor, is not entitled to object at the final settlement that the proof of publication of the notice was irregular, especially where he has not been injured by the irregularity.[51]

[§ 979] **e. Effect of Notice as to Legatees.** Notice to creditors by an executor as to the time for the presentation of claims brings a legatee within the county court's jurisdiction for that time only.[52]

[§ 980] **8. Notice of Intention to Present Claims.** A notice of intention to exhibit claims is not necessary to arrest the running of limitations, a filing only being necessary.[53]

[§ 981] **9. Notice of Presentation or Filing.** Under some statutes notice of the filing of a claim in court is required to be given to the personal representative,[54] but under others the filing and entering of the claim constitutes sufficient notice to the representative and prevents the statutory bar, summons or personal notice to him within the statutory period for filing or presentation not being required for this purpose,[55] although it is required in order to obtain jurisdiction of his person so that the court may adjudicate the claim.[56] Although the statutes

39. Iowa.—Craig v. Craig, 167 Iowa 340, 149 NW 454; McConaughy v. Wilsey, 115 Iowa 589, 88 NW 1101.
Mass.—Hudson v. Hulbert, 15 Pick. 423.
Miss.—Pearl v. Conley, 15 Miss. 356.
Mo.—Stiles v. Smith, 55 Mo. 363; Wiggins v. Lovering, 9 Mo. 262.
N. C.—Gilliam v. Willey, 54 N. C. 128.

[a] **Presumption of due posting.**—Where the probate court issued an order requiring an administrator to give notice of his appointment by advertising in a newspaper and by posting up notifications, and it was proved that he advertised in a newspaper but not that he posted up notifications, the presumption of due compliance with the law was not sufficient to enable the jury to find affirmatively that the administrator had obeyed the order, such a finding being necessary to sustain a title. Hudson v. Hulbert, 15 Pick. (Mass.) 423.

40. Wise v. Williams, 88 Cal. 30, 25 P 1064; Hudson v. Hulbert, 15 Pick. (Mass.) 423.

[a] **Genuineness of paper.**—It is not necessary to produce evidence showing the newspaper to be genuine, provided that there is no evidence to impeach its genuineness. Hudson v. Hulbert, 15 Pick. (Mass.) 423.

41. Brownell v. Williams, 54 Iowa 353, 6 NW 530.

[a] **The personal representative is competent** to prove the giving of notice, under a statute providing that the proof may be made "by the affidavit of any competent witness." Brownell v. Williams, 54 Iowa 353, 6 NW 530.

42. Wise v. Williams, 88 Cal. 30, 25 P 1064.

43. Estes v. Wilkes, 16 Gray (Mass.) 363.

44. Hensley v. Sacramento County Super. Ct., 111 Cal. 541, 44 P 232; Johnston v. Napa County Super. Ct., 105 Cal. 666, 39 P 36.

45. Hawkins v. Marin County Super. Ct., 165 Cal. 743, 134 P 327.

46. Wise v. Williams, 88 Cal. 30, 25 P 1064.

47. In re Conant, 43 Or. 530, 73 P 1018.

48. Hawkins v. Marin County Super. Ct., 165 Cal. 743, 134 P 327.

49. Wilkinson v. Conaty, 65 Mich. 614, 32 NW 841.

50. Wilkinson v. Conaty, 65 Mich. 614, 32 NW 841.

51. In re Conser, 40 Or. 138, 66 P 607.

52. Fragd v. Fragd, 175 Ill. A. 246.

53. Brown v. Stair, 25 Colo. A. 140, 136 P 1003.

54. Thompson v. Romack, 174 Iowa 155, 156 NW 310; Craig v. Craig, 167 Iowa 340, 149 NW 454; Ashton v. Miles, 49 Iowa 564 [dist Noble v. Morrey, 19 Iowa 509]; Baker v. Chittuck, 4 Greene (Iowa) 480; Faler v. Culver, 94 Kan. 123, 146 P 333; Taylor v. George, 159 Mo. A. 160, 140 SW 611; Taylor v. Superior Ct., 30 R. I. 560, 76 A 644.

[a] **Notice equivalent to service of process.**—"We have held that: 'the statute was literally complied with and its purpose accomplished when notice to the representative of the deceased debtor was given according to law in a manner that is held to be equivalent to the service of process upon a defendant, so as to subject the executor or administrator to the jurisdiction of the court or other tribunal, and give validity to the judgment or allowance that may follow.'" Potter v. Harvey, 34 R. I. 71, 79, 82 A 812.

[b] **Service on one of two administrators** is sufficient. Clark v. Parkville, etc., R. Co., 5 Kan. 654.

[c] **Presentation of judgment.**—(1) Compliance with this requirement has been held to be necessary where a judgment is presented to the court for allowance. Gibson v. Vaughan, 61 Mo. 418 [overr on another point Johnson v. Beazley, 65 Mo. 250, 27 AmR 276]. (2) But it is otherwise where the judgment is presented for classification. Stephens v. Bernays, 119 Mo. 143, 24 SW 46; Wernse v. McPike, 100 Mo. 476, 13 SW 809 [overr Wernse v. McPike, 76 Mo. 249; Ewing v. Taylor, 70 Mo. 394; Bryan v. Mundy, 14 Mo. 458].

[d] **Actual knowledge** of the representative is not equivalent to legal written notice to him. Taylor v. George, 159 Mo. A. 160, 140 SW 611.

[e] **Amended claim.**—An executrix who has been notified of the filing of a claim and has appeared to resist it, is not entitled to notice of the filing of an amended statement of the claim. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

[f] **Waiver of notice.**—A written waiver of notice must be given in order to confer jurisdiction, unless the waiver of notice is made in open court. Taylor v. George, 159 Mo. A. 160, 140 SW 611.

[g] **Appearance to resist** the claim operates as a waiver of notice. Thompson v. Romack, 174 Iowa 155, 156 NW 310; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; McLeary v. Doran, 79 Iowa 210, 44 NW 360; Faler v. Culver, 94 Kan. 123, 146 P 333.

[h] **Facts not showing waiver of notice.**—Tayor v. George, 159 Mo. A. 160, 140 SW 611.

55. Brown v. Stair, 25 Colo. A. 140, 136 P 1003; Wallace v. Gatchell, 106 Ill. 315; Barbero v. Thurman, 49 Ill. 283; Peo. v. White, 11 Ill. 341; Phœnix Ins. Co. v. Guderyahn, 20 Ill. A. 161; Noble v. McGinnis, 55 Ind. 528; Campbell v. Lindlay, 18 Ind. 234.

56. Wallace v. Gatchell, 106 Ill. 315; Hales v. Holland, 92 Ill. 494; Propst v. Meadows, 13 Ill. 157; Phœnix Ins. Co. v. Guderyahn, 20 Ill. A. 161; Foley v. Wallace, 2 Ind. 174; Scroggs v. Tutt, 20 Kan. 271; Chaves v. Perea, 3 N. M. 71, 2 P 73.

[a] **Service upon one of two administrators only.**—A claim against an estate can be allowed, although the summons was served on one of two administrators only and was void for want of a seal, where such

do not provide that heirs and distributees shall have notice of claims presented for allowance against the estate, circumstances may exist under which it becomes the legal duty of the representative to give notice to the heirs, distributees, or other persons interested in the estate.[57]

[§ 982] **10. Sufficiency of Presentation—a. In General.** As a general rule a creditor can exhibit his claim against the estate of his deceased debtor only in the manner indicated by the local statute.[58] A substantial compliance with the provisions of the statute may, however, be sufficient,[59] especially where accepted by the probate court in passing upon the claim.[60]

Filing. Placing a file mark on an envelope containing a claim has been held to be a sufficient filing.[61]

[§ 983] **b. To Representative.** To constitute a valid presentation to the executor or administrator the claim must be properly brought to his notice, and the creditor must plainly show an intention to look to the estate for payment,[62] but the creditor is not required to prove his claim when presented.[63] A claim is presented when it is exhibited to the representative[64] and filed in the probate court,[65] and as a rule no particular formalities are required,[66]

administrator was the active one and he and the attorney for both administrators appeared. Tewalt v. Irwin, 164 Ill. 592, 46 NE 13.

57. Lapham v. Lacy, 161 Mich. 176, 125 NW 738; Link v. Link, 48 Mo. A. 345.

[a] **Such circumstances may exist where** (1) the personal representative, after assuring the heirs and distributees that he has no claim against the estate, proceeds without their knowledge to present and have allowed a claim in his own favor. Link v. Link, 48 Mo. A. 345. (2) So where an executor and his wife, who were beneficiaries under the will, and who had boarded testator, stated to the other beneficiaries their satisfaction with the terms of the will, and that the provisions for them in the will were doubtless for the care they had bestowed on testator out of their affection for him, it was a fraud for the executor to thereafter file a claim against the estate without giving the other beneficiaries personal notice thereof, and to have the claim allowed without oath or proof and on service by publication. Lapham v. Lacy, 161 Mich. 176, 125 NW 738.

58. Colo.—Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717; Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378; In re Hobson, 40 Colo. 332, 91 P 929.

D. C.—Parish v. Hedges, 34 App. 21.

Ky.—McKnoll v. Wear, 1 Ky. Op. 447.

Mo.—Pfeiffer v. Suss, 73 Mo. 245; Burton v. Rutherford, 49 Mo. 255; Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497; Britian v. Fender, 116 Mo. A. 93, 92 SW 179.

Nev.—Douglass v. Folsom, 21 Nev. 441, 38 P 660.

Wash.—Empson v. Fortune, 102 Wash. 16, 172 P 873.

[a] **Notice by letter** by one that he and another person have claims against the estate for considerable sums of money advanced to decedent to enable him to prosecute a claim against the government does not constitute notice of a claim thereafter asserted by such other person, based upon a contract between him and decedent, under the terms of which decedent was to pay him a stated sum for services and advances in the prosecution of the claim, especially in view of a statute providing that knowledge or notice of a claim to an executor must be "by an exhibition of the claim, legally authenticated." Parish v. Hedges, 34 App. (D. C.) 21.

[b] **The claim of a surety on an appeal bond** of deceased, who paid the amount due under his obligation on the appeal being dismissed, and filed a claim therefor against the estate, was not on a judgment, within a statute, providing the manner of exhibiting such a claim, although to the claim was attached the transcript of the judgment docket, bearing the written assignment to him of the judgment. German American Trust Co. v. National Surety Co., 55 Colo. 499, 136 P 457.

59. Cal.—Raggio v. Palmtag, 155 Cal. 797, 103 P 312; Swain's Est., 67 Cal. 637, 8 P 497.

Conn.—Hammett v. Starkweather, 47 Conn. 439.

Ill.—Tisdale v. Davis, 198 Ill. A. 116.

Iowa.—Craig v. Craig, 167 Iowa 340, 149 NW 454.

Miss.—Davis v. Blumenberg, 107 Miss. 432, 65 S 503; Smith v. Smith, 4 Miss. 216.

Mo.—Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24; North v. Walker, 66 Mo. 453 [aff 2 Mo. A. 174]; Hicks v. Jamison, 10 Mo. A. 35.

N. D.—Sunberg v. Sebelius, 38 N. D. 413, 165 NW 564 [cit Cyc].

Pa.—Morgan's Est., 2 Pa. Dist. 816, 14 Pa. Co. 62.

Vt.—Batchelder v. White, 82 Vt. 132, 71 A 1111.

Wash.—Brownfield v. Holland, 63 Wash. 86, 114 P 890.

[a] **Sufficient presentation.**—Where a claimant exhibited claim to administratrix and actually presented it for allowance to probate court, but later voluntarily dismissed that action and commenced another, the exhibition and presentation was sufficient to destroy the absolute effect of the one-year limitation. Home Ins. Co. v. Wickham, (Mo. A.) 196 SW 385.

60. Hicks v. Jamison, 10 Mo. A. 35 [cit Williamson v. Anthony, 47 Mo. 299].

61. Smith v. Goodrich, 167 Ill. 46, 47 NE 316 [rev on other grounds 67 Ill. A. 418].

62. Ala.—Jones v. Peebles, 130 Ala. 269, 30 S 564; Allen v. Elliott, 67 Ala. 432; Smith v. Fellows, 58 Ala. 467; McDowell v. Jones, 58 Ala. 25.

Colo.—Cone v. Eldridge, 51 Colo. 564, 119 P 616.

Conn.—Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 A 1019.

Ind.—Culver v. Yundt, 112 Ind. 401, 14 NE 91.

Mo.—Hicks v. Jamison, 10 Mo. A. 35; Spaulding v. Suss, 4 Mo. A. 541.

[a] **Illustration.**—A claim is not "exhibited" to an administrator unless shown with a view to procuring its allowance. An exhibition in the course of negotiations for a compromise is not the exhibition contemplated; nor is a mere delivery of the demand sufficient, nothing being said, done, or written to show the intention to procure an allowance. Neither is exhibiting a claim for classification presenting it for allowance. Pfeiffer v. Suss, 73 Mo. 245.

63. Posey v. Decatur Bank, 12 Ala. 802; Jones v. Pharr, 3 Ala. 283; Hamblin v. Hook, 6 La. 73.

64. Ala.—Weller v. Rensford, 185 Ala. 332, 64 S 366.

Cal.—Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439.

Me.—Rawson v. Knight, 71 Me. 99.

Mo.—Keys v. Keys, 217 Mo. 48, 116 SW 537.

Nev.—Douglass v. Folsom, 21 Nev. 441, 33 P 660.

N. Y.—Gansevoort v. Nelson, 6 Hill 389.

N. C.—Hinton v. Pritchard, 126 N. C. 8, 35 SE 127.

Or.—Willis v. Marks, 29 Or. 493, 45 P 293.

Vt.—Batchelder v. White, 82 Vt. 132, 71 A 1111.

[a] **"Present" and "exhibit" are synonymous.**—Willis v. Marks, 29 Or. 493, 45 P 293; Batchelder v. White, 82 Vt. 132, 71 A 1111.

[b] **Personal presentation to the administrator** is sufficient. Weller v. Rensford, 185 Ala. 333, 64 S 366.

[c] **A personal interview** between the creditor and the representative is not necessary. Gansevoort v. Nelson, 6 Hill (N. Y.) 389.

[d] **The presentation need not be personal,** but the claim may be left for the executor or administrator in case of his absence from the place designated for the presentation of claims. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Roddan v. Doane, 92 Cal. 555, 28 P 604; Bollinger v. Manning, 79 Cal. 7, 21 P 375; Rawson v. Knight, 71 Me. 99; Douglass v. Folsom, 21 Nev. 441, 33 P 660.

[e] **The claim may be presented by letter** (1) or in any other way which deals fairly with the administrator and the interests which he represents. Gansevoort v. Nelson, 6 Hill (N. Y.) 389. But see Parish v. Hedges, 34 App. (D. C.) 21 (supra § 982 note 58 [a]); Adoue v. Gonzales, 22 Tex. Civ. A. 73, 54 SW 367 (holding that the mailing of a claim to the personal representative is not such a presentation as is required). (2) Where a claim was presented against a decedent's estate in the form of a letter, but the parties, in disregard of the informal presentation, adopted the letter as the basis of the issue, by consent referred the same, and litigated, without objection, every question on which it was based, plaintiff became entitled to recover, if, on any theory presented by the evidence, he established a valid, legal demand against the estate. Merino v. Munoz, 99 App. Div. 201, 90 NYS 985.

[f] **Note not left in possession of executor.**—The presentation of a note to the executor, the validity of which he acknowledges and upon which he makes part payment, is a sufficient filing, although the note is not left in possession of the executor. Hinton v. Pritchard, 126 N. C. 8, 35 SE 127. See also Stonestreet v. Frost, 123 N. C. 640, 31 SE 836 (where a sheriff presented an execution issued before the decedent's death to the administrator and demanded payment, and the claim was admitted to be correct).

65. Keys v. Keys, 217 Mo. 48, 116 SW 537 (the word "presentation" in a statute requiring the presentation of claims does not mean an actual presentation to the judge and a hearing on the claim).

66. Conn.—Mead's App., 46 Conn. 417.

Fla.—Fillyau v. Laverty, 3 Fla. 72.

N. H.—Ross v. Knox, 71 N. H. 249, 51 A 910.

Tex.—Altgelt v. Elmendorf, (Civ. A.) 86 SW 41.

Vt.—Batchelder v. White, 82 Vt. 132, 71 A 1111.

[a] **Illustration.**—Where the holder of a note of decedent sent to the commissioners of the estate a statement of the note to the effect that the amount due on a note of decedent in favor of the creditor was as shown therein, followed by a statement of

but it is sufficient to make a display or profert of the claim, accompanied by a proper voucher or affidavit, and give the representative a reasonable opportunity to examine into and determine for himself the justness and validity of the demand.[67] A claim was not sufficiently presented, where the claimant went several times to the office specified in the notice, and, not finding the executor there, finally left it with an employee after the time for presentation.[68]

[§ 984] **c. To Court.** Under some statutes the claimant may, as a substitute for presenting the claim to the executor or administrator, file the claim in the probate court;[69] and under others he is required to present the claim to the court in the first instance.[70] The delivery of the claim to the clerk of the probate court,[71] or to the probate judge,[72] is a sufficient filing or presentation to the probate court, and the claim may be filed in vacation as well as in term time.[73] But a claim filed in the office of the probate judge must be brought to the attention of the judge or his clerk within the statutory period, and merely placing it in a box appropriated for such papers without the knowledge of the judge or his clerk is insufficient.[74] So also a claimant who makes out the claim and takes it to the home of the clerk of the probate court to have it sworn to, without requesting the clerk to file it, does not thereby file the claim.[75] If, however, the creditor properly files his claim or a proper statement thereof, he has discharged his duty, and the fact that the judge in docketing the claim describes it insufficiently cannot affect the creditor's rights.[76]

[§ 985] **d. Statement and Verification of Claims—(1) Statement—(a) Necessity for Writing.** The statutes requiring the presentation or filing of claims usually expressly provide or clearly contemplate that the claims shall be stated in writing;[77] and it has been considered that, even though the statute does not expressly so require, claims against an estate ought properly to be presented in writing,[78] although there is also authority for the view that claims need not be presented in writing, unless expressly required by statute.[79] Casual conversations with the personal representative regarding the claim do not amount to a sufficient presentation;[80] nor is it sufficient merely to mention the approximate amount of a claim to the representative and show him a bill of items for a portion thereof.[81]

[§ 986] **(b) Form and Requisites.** No fixed form is ordinarily required, nor is the technical accuracy and certainty of description which is essential in pleading necessary. All that is necessary as a general rule is that the statement shall give notice that a claim exists against the estate, for payment of which the creditor looks to the estate, that the statement shall be so clear and unambiguous as to distinguish the claim with reasonable cer-

the amount of the note, amount of a payment thereon, and the interest due, the note was sufficiently presented. Batchelder v. White, 82 Vt. 132, 71 A 1111.

[b] **Failure to object to the form** of presentation may amount to a waiver of defects. Ross v. Knox, 71 N. H. 249, 51 A 910.

67. Willis v. Marks, 29 Or. 493, 45 P 293.

[a] **Right to possession of evidence of claim.**—The representative upon presentation of a claim has no right to retain the written evidence of the claim, that is, the statement and voucher or affidavit, for a longer period of time than will be sufficient for him properly to inspect it and determine upon its justness and validity. While he can retain the claim for a reasonable time, this is the extent of his right and beyond this the creditor is entitled to the possession of the claim and may recover it by an action of replevin. Willis v. Marks, 29 Or. 493, 45 P 293.

68. Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372.

69. Agnew v. Walden, 84 Ala. 502, 4 S 672; Floyd v. Clayton, 67 Ala. 265; Thornton v. More, 61 Ala. 347; Halfman v. Ellison, 51 Ala. 543; Walker v. Wigginton, 50 Ala. 579; Ransom v. Quarles, 16 Ala. 437; In re Hobson, 40 Colo. 332, 91 P 929; Barbero v. Thurman, 49 Ill. 283.

70. Mayberry v. Moore, 137 Ill. A. 40; Fern v. Leuthold, 39 Minn. 212, 39 NW 399.

[a] **Presentation to the administrator out of court** is not sufficient. Mayberry v. Moore, 137 Ill. A. 40, 42 ("We are of opinion that the making out of the account and claim, swearing to it and presenting it to the administratrix out of court, as was done in this case, did not arrest the running of the Statute of Limitations with respect to the rights of the heir in the real estate. An heir's right in intestate real estate ought not to be prejudiced by acts of claimants and administrators not done in court, or in some proper manner timely evidenced in court").

71. Erwin v. McGuire, 44 Ala. 499; Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24.

[a] **Illustration.** — A demand against a decedent's estate, otherwise sufficient, which, after proper notice to the administrator, was lodged with the clerk of the probate court and by him filed before the statutory two years had elapsed, was sufficiently presented to the court. Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24.

[b] **The omission of the clerk to file the claim** will not prevent the presentation to him for the purpose of filing from operating as a sufficient filing. Rutherford v. Mobile Branch Bank, 14 Ala. 92.

72. Erwin v. McGuire, 44 Ala. 499; Barbero v. Thurman, 49 Ill. 283.

[a] **Even though the claim was dropped from the docket** by inadvertence, such presentation was sufficiently exhibited to prevent the bar of the statute of nonclaim. Barbero v. Thurman, 49 Ill. 283.

73. Wallace v. Gatchell, 106 Ill. 315.

74. Phillips v. Beene, 38 Ala. 248; Beene v. Phillips, 37 Ala. 312.

75. Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497.

76. Floyd v. Clayton, 67 Ala. 265; Barbero v. Thurman, 49 Ill. 283.

77. Ala.—Smith v. Fellows, 58 Ala. 467.

Me.—Merrill v. Regan, 117 Me. 182, 103 A 155; Marshall v. Perkins, 72 Me. 343; Millett v. Millett, 72 Me. 117.

Miss.—Bankston v. Coopwood, 99 Miss. 511, 55 S 48.

Mo.—Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8; Jenkins v. Morrow, 131 Mo. A. 288, 109 SW 1051; Britian v. Fender, 116 Mo. A. 93, 92 SW 179; Williams v. Gerber, 75 Mo. A. 18; Roethlisberger v. Caspari, 12 Mo. A. 514.

N. Y.—Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 NE 483 [aff 15 App. Div. 181, 44 NYS 493]; Niles v. Crocker, 88 Hun 312, 34 NYS 761; Matter of Morton, 7 Misc. 343, 28 NYS 82; King v. Todd, 15 NYS 156, 21 NYCivProc 114, 27 AbbNCas 149; Cruikshank v. Cruikshank, 9 HowPr 350; Robert v. Ditmas, 7 Wend. 522.

[a] **A claim of the representative** is subject to this requirement. In re Palmer, 110 Me. 441, 86 A 919.

[b] **Claims on open account** should be presented in writing. Smith v. Fellows, 58 Ala. 467.

[c] **The administrator has no authority to pay** a claim not presented in accordance with the statute requiring one desiring to probate a claim to present the written evidence thereof, if any, or a statement thereof in writing. Leham v. Rowe, 95 Miss. 446, 49 S 622.

[d] **Similar requirement of rule of court.**—Kemper's Est., 21 LancL Rev (Pa.) 174.

[e] **The "written evidence" required** by a statute, requiring one desiring to probate a claim to present the written evidence thereof, if any, or, if there is no written evidence, a statement thereof in writing, must show that claimant is prima facie entitled to the amount claimed, and disclose the nature and amount of the claim with such certainty as to bar an action therefor when paid. Accordingly, where the only written evidence of a claim against the estate of a certain amount was two canceled checks, marked "Paid," payable to the order of intestate and another respectively, and each being indorsed by intestate and another, as they showed no liability to any one they were not sufficient. Lehman v. Powe, 95 Miss. 446, 49 S 622.

78. Smith v. Fellows, 58 Ala. 467; Bigger v. Hutchings, 2 Stew. (Ala.) 445; Pike v. Thorp, 44 Conn. 450; Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 NE 483 [aff 15 App. Div. 181, 44 NYS 493].

79. Lafferty v. Lafferty, 10 Ark. 268; Ayer v. Chadwick, 66 N. H. 385, 23 A 428; Little v. Little, 36 N. H. 224; Tebbetts v. Tilton, 31 N. H. 273; Mathes v. Jackson, 7 N. H. 259.

80. Miller v. Summers, (Ark.) 187 SW 664; Pike v. Thorp, 44 Conn. 450; Matter of Morton, 7 Misc. 343, 28 NYS 82.

81. Pike v. Thorp, 44 Conn. 450; Cruikshank v. Cruikshank, 9 HowPr (N. Y.) 350.

tainty from all other similar claims, and that it shall give such information concerning the nature and amount of the demand as to enable the representative to act intelligently in providing for its payment or in rejecting it.[82] What will be a sufficient compliance with these requirements must de-

82. Ala.—Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Borum v. Bell, 132 Ala. 85, 31 S 454; Jones v. Peebles, 130 Ala. 269, 30 S 564; Parker v. Eufaula Nat. Bank, 121 Ala. 516, 25 S 1001; Agnew v. Walden, 95 Ala. 108, 10 S 224, 84 Ala. 502, 4 S 672; Floyd v. Clayton, 67 Ala. 265; Bibb v. Mitchell, 58 Ala. 657; Smith v. Fellows, 58 Ala. 467; Flinn v. Shackleford, 42 Ala. 202; Harrison v. Jones, 33 Ala. 258; Pollard v. Seears, 28 Ala. 484, 65 AmD 364; Hogan v. Calvert, 21 Ala. 194; Ransom v. Quarles, 16 Ala. 437; Posey v. Decatur Bank, 12 Ala. 802; Hallett v. Mobile Branch Bank, 12 Ala. 193.

Ark.—Miller v. Summers, 187 SW 664; Lafferty v. Lafferty, 10 Ark. 268.

Cal.—Doolittle v. McConnell, 174 P 305; Western States L. Ins. Co. v. Lockwood, 166 Cal. 185, 135 P 496; Elizalde v. Murphy, 163 Cal. 681, 126 P 978; Pollitz v. Wickersham, 150 Cal. 238, 88 P 911; In re McDougald, 146 Cal. 196, 79 P 875; Etchas v. Orena, 127 Cal. 588, 60 P 45; Maurer v. King, 127 Cal. 114, 59 P 290; Faulkner v. Hendy, 123 Cal. 467, 56 P 99; McGrath v. Carroll, 110 Cal. 79, 42 P 466; Duncan v. Thomas, 81 Cal. 56, 22 P 297; Swain's Est., 67 Cal. 637, 8 P 497; Aguirre v. Packard, 14 Cal. 171, 73 AmD 645; White v. Deering, (A.) 179 P 401; Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

Colo.—Brown v. Stair, 25 Colo. A. 140, 136 P 1003.

Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785; Pratt v. Stoner, 78 Conn. 310, 61 A 1009; Corr's App., 62 Conn. 403, 26 A 478; Hammett v. Starkweather, 47 Conn. 439; Mead's App., 46 Conn. 417; White v. Brown, 19 Conn. 577.

Fla.—Fillyau v. Laverty, 3 Fla. 72.

Ill.—Thompson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304]; Wells v. Miller, 45 Ill. 33; Carter v. Pierce, 114 Ill. A. 589.

Ind.—Leimgruber v. Leimgruber, 172 Ind. 370, 86 NE 73, 88 NE 593; Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Masters v. Jones, 158 Ind. 647, 64 NE 213; Miller v. Eldridge, 126 Ind. 461, 27 NE 132; Lockwood v. Robbins, 125 Ind. 398, 25 NE 455; Stricker v. Barnes, 122 Ind. 348, 23 NE 263; Culver v. Yundt, 112 Ind. 401, 14 NE 91; Price v. Jones, 105 Ind. 543, 5 NE 683, 55 AmR 230; Stapp v. Messeke, 94 Ind. 423; Hileman v. Hileman, 85 Ind. 1; Hathaway v. Roll, 81 Ind. 567; Wright v. Jordan, 71 Ind. 1; Niblack v. Goodman, 67 Ind. 174; Ramsay v. Fouts, 67 Ind. 78; Dodds v. Dodds, 57 Ind. 293; Noble v. McGinnis, 55 Ind. 528; Bryson v. Kelley, 53 Ind. 486; Post v. Pedrick, 52 Ind. 490; Ginn v. Collins, 43 Ind. 271; Hannum v. Curtis, 13 Ind. 206; Crabb v. Atwood, 10 Ind. 322; St. Joseph County Sav. Bank v. Randall, 37 Ind. A. 402, 76 NE 1012; Woods v. Matlock, 19 Ind. A. 364, 48 NE 384; Hyatt v. Bonham, 19 Ind. A. 256, 49 NE 361; Thornburg v. Buck, 13 Ind. A. 446, 41 NE 85; Cooper v. Griffin, 13 Ind. A. 212, 40 NE 710; Gibbs v. Ely, 13 Ind. A. 130, 41 NE 351; Stewart v. Small, 11 Ind. A. 100, 38 NE 826; Parrett v. Palmer, 8 Ind. A. 356, 35 NE 713, 52 AmSR 479; Doan v. Dow, 8 Ind. A. 324, 35 NE 709; Knight v. Knight, 6 Ind. A. 268, 33 NE 456; Sheeks v. Fillion, 3 Ind. A. 262, 29 NE 786; Brown v. Sullivan, 3 Ind. A. 211, 29 NE 453; Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

Iowa.—In re Howell, 179 Iowa 969, 162 NW 231; Rule v. Carey, 178 Iowa 184, 159 NW 699; Sullenbarger v. Ahrens, 168 Iowa 288, 150 NW 71; Craig v. Craig, 167 Iowa 340, 149 NW 454; Chariton Nat. Bank v. Whicher, 163 Iowa 571, 145 NW 299; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; Harrison v. Harrison, 124 Iowa 525, 100 NW 344; Chicago Univ. v. Emmert, 108 Iowa 500, 79 NW 285.

Kan.—Hayner v. Trott, 46 Kan. 70, 26 P 415.

Me.—Merrill v. Regan, 117 Me. 182, 103 A 155; Hurley v. Farnsworth, 107 Me. 306, 78 A 291; Millett v. Millett, 72 Me. 117.

Mich.—King v. Brewer, 121 Mich. 339, 80 NW 238; Grimm v. Taylor, 96 Mich. 5, 55 NW 447; Schlee v. Darrow, 65 Mich. 362, 32 NW 717.

Miss.—Fairley v. Fairley, 82 S 267; Rogers v. Rosenstock, 117 Miss. 144, 77 S 958; Duffey v. Kilroe, 116 Miss. 7, 11, 76 S 681 [cit Cyc]; Barner v. Rule, 116 Miss. 600, 77 S 521; Davis v. Blumenberg, 107 Miss. 432, 65 S 503; Bankston v. Coopwood, 99 Miss. 511, 55 S 48; Foster v. Shaffer, 84 Miss. 197, 36 S 243; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41; Smith v. Smith, 4 Miss. 216.

Mo.—Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24; Watkins v. Donnelly, 88 Mo. 322; Sublett v. Nelson, 38 Mo. 487; Hinshaw v. Raines, (A.) 185 SW 1192; Biggerstaff v. Riley, 192 Mo. A. 92, 179 SW 744; Hays v. Miller, 189 Mo. A. 72, 173 SW 1096; In re Lutz, 175 Mo. A. 427, 162 SW 679; Britain v. Fender, 116 Mo. A. 93, 92 SW 179; Corson v. Waller, 104 Mo. A. 621, 78 SW 656; Walker v. Gay, 73 Mo. A. 89; Wood v. Land, 35 Mo. A. 381; Lenk Wine Co. v. Caspari, 11 Mo. A. 382.

Nebr.—Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

Nev.—Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090.

N. H.—Ross v. Knox, 71 N. H. 249, 51 A 910; Ayer v. Chadwick, 66 N. H. 385, 23 A 428; Little v. Little, 36 N. H. 224; Tebbetts v. Tilton, 31 N. H. 273; Mathes v. Jackson, 7 N. H. 259.

N. Y.—Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 NE 483 [aff 15 App. Div. 181, 44 NYS 493]; White v. Campbell, 143 App. Div. 953, 128 NYS 354; Linden v. Thieriot, 105 App. Div. 405, 94 NYS 246; Niles v. Crocker, 88 Hun 312, 34 NYS 761; Matter of Morton, 7 Misc. 343, 28 NYS 82; King v. Todd, 15 NYS 156, 21 NYCiv Proc 114, 27 AbbNCas 149; Cruikshank v. Cruikshank, 9 HowPr 350; Gansevoort v. Nelson, 6 Hill 389.

Oh.—Miller v. Ewing, 68 Oh. St. 176, 67 NE 292.

Okl.—Hamilton v. Blakeney, 165 P 141.

Or.—Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173; Goltra v. Penland, 42 Or. 18, 69 P 925.

Pa.—Morgan's Est., 2 Pa. Dist. 816, 14 Pa. Co. 62.

R. I.—White v. Almy, 34 R. I. 29, 82 A 397.

S. D.—Black Hills Trust, etc., Bank v. Plunkett, 40 S. D. 130, 166 NW 527; In re Kirfel, 37 S. D. 292, 157 NW 1057.

Tex.—Gaston v. McKnight, 43 Tex. 619; Cherry v. Speight, 28 Tex. 503; Chandler v. Meckling, 22 Tex. 36; Trigg v. Moore, 10 Tex. 197; Hansell v. Gregg, 7 Tex. 223.

Wash.—Parkes v. Burkhart, 101 Wash. 659, 172 P 908.

"It is not required that a claim against an estate should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should, of course, as said in McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466, 'sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it.'" Pollitz v. Wickersham, 150 Cal. 238, 250, 88 P 911 [quot Elizalde v. Murphy, 163 Cal. 681, 689, 126 P 978].

"No more is required of the claimant than the identification of his claim, in the exhibition thereof, to the extent that the administrator may be appraised of its amount and origin and thus be enabled to investigate it intelligently and that a recovery upon it may operate as a bar to any other action based upon the same cause. With these purposes accomplished, the court acquires jurisdiction over the demand and, notwithstanding it may be meager and, to some extent, indefinite in statement, if the administrator is satisfied to go to trial upon the merits without first moving to have it made more definite and certain, he waives all such defects and will not be heard to object to them, especially after verdict." Britian v. Fender, 116 Mo. A. 93, 96, 92 SW 179.

"It is nevertheless essential that a claim, however informal, should so specify and identify the transaction out of which it arose as to apprise all concerned of its general nature and character, and the amount claimed, so that it can be properly investigated and defended against if desired." Carter v. Pierce, 114 Ill. A. 589, 592.

[a] **Statement of consideration.**—Where the claim is founded upon a parol promise, the consideration must be stated with such particularity that the court may determine whether it is legally sufficient. Windell v. Hudson, 102 Ind. 521, 2 NE 303.

[b] **Entitling claim.**—The statutory provision requiring the statement to be entitled with the name of plaintiff and defendant is directory. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

[c] **Informal statement with oral explanation.**—Where the written statement, although somewhat informal, was accompanied by an oral explanation, it was held sufficient. Hammett v. Starkweather, 47 Conn. 439.

[d] **A statement of a definite sum** in a claim for services does not preclude a recovery of the reasonable value of the services. White v. Almy, 34 R. I. 29, 82 A 397.

[e] **Omission of the dollar sign** or the word "dollars" in connection with figures was harmless, where the attached affidavit gave the amount due in dollars and cents. Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

[f] **Note and account.**—Where a claim was on a note, the claimant could not recover on stating on account. Keys v. Keys, 217 Mo. 48, 116 SW 537.

[g] **A claim for services of a physician** need not allege that the physician was licensed to practice. Cooper v. Griffin, 13 Ind. A. 212, 40 NE 710.

[h] **Incorrect statement as to basis of claim.**—Where plaintiff's claim was made on the basis of a common interest in a business, which was conducted by plaintiff and decedent as partners, and which ceased, and deceased had agreed to account for plaintiff's interest, when a corporation was formed which took over the business and property and issued the stock therefor to deceased, and it appeared that they continued to own the stock in common, an accounting could not be had without a new claim being presented, or at least further evidence as to the business of the corporation being given. White v. Campbell, 143 App. Div. 953, 128 NYS 354.

[i] **It is not necessary to allege the evidence** on which claimant relies to establish his claim. White v. Almy, 34 R. I. 29, 82 A 397.

pend largely upon the character of each case and more or less particularity of description will be required according to the nature of the claim.[83] The statement must, of course, show that a liability exists

[j] **A claim for a specified sum "& int.,"** allowed by the administrator and approved by the court in similar language, is a claim for the specified sum and interest, the abbreviation standing for the word "interest." Raggio v. Palmtag, 155 Cal. 797, 103 P 312.

[k] **The insufficiency of the statement of one or more separate items** in a claim does not render the entire claim insufficient. Sheeks v. Fillion, 3 Ind. A. 262, 29 NE 786; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

[l] **Claim not in form of statement of indebtedness.**—A notice of claim describing the exact nature and extent of the indebtedness and containing a copy of the notes and judgment on which the claim was based was not defective because it omitted to put the claim in the form of a statement of indebtedness against the estate. Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24.

[m] **Immaterial details need not be stated.**—Thompson v. Oreña, 134 Cal. 26, 66 P 24.

[n] **Claims presented to commissioners.**—(1) The principle stated in the text applies to statement of claims presented to commissioners. Mead's App., 46 Conn. 417. (2) On appeal from the commissioners, however, the requirements, under a rule of court in Connecticut (see 58 Conn. 588) are more strict. Merwin's App., 72 Conn. 167, 43 A 1055; Donahue's App., 62 Conn. 370, 26 A 399. (3) Prior to this rule all that was necessary was that the claim should be so stated that it could be understood. Corr's App., 62 Conn. 403, 26 A 478 [foll Tolles' App., 54 Conn. 521, 9 A 402; Mead's App., 46 Conn. 417; American Bd. Foreign Mission Comrs. App., 27 Conn. 344; Mills v. Wildman, 18 Conn. 124].

[o] **A motion duly made in the circuit court** pursuant to a statute against an administrator to compel him to refund money which had been paid as security for decedent, and an appearance and resistance of the motion by the administrator, was a sufficient presentation. Smith v. Smith, 4 Miss. 216.

[p] **Motion for allowance of attorney's fees.**—Where no request was made in the probate court for a more definite statement of the services rendered by the attorney of an administrator, and the only objection to his motion for the allowance of his fee was to the introduction of any evidence in the hearing on appeal to the circuit court, a written motion alleging the appointment of the administrator, that the attorney had acted as such from the time of the appointment and performed necessary legal services up to the time of settlement, and praying the allowance of a reasonable attorney's fee, is sufficient. In re Lutz, 175 Mo. A. 427, 162 SW 679.

[q] **Express and implied contracts.**—The rule that, where the complaint is based upon an implied contract, a recovery cannot be had on an express contract does not apply to a mere statement of a claim filed against a decedent's estate. Masters v. Jones, 158 Ind. 647, 64 NE 213.

[r] **Sufficiency of statement should be questioned by demurrer.**—Merwin's App., 72 Conn. 167, 43 A 1055.

[s] **Variance.**—There is no variance because the claim, filed against a decedent's estate on a guaranty of notes, merely described notes as signed by S, and guaranteed by P, deceased, which was correct as far as it went, and the notes, when produced, also showed the names of other indorsers. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

[t] **A statute establishing uniformity in the use of blanks** in the probate court cannot operate to deprive claimant of his remedy because there is no prescribed form adopted to the existing situation. Merrill v. Regan, 117 Me. 182, 103 A 155.

83. Ala.—Floyd v. Clayton, 67 Ala. 265; Bibb v. Mitchell, 58 Ala. 657.

Ark.—Josephs v. Briant, 108 Ark. 171, 157 SW 136.

Cal.—Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

Colo.—Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

Ind.—Leimgruber v. Leimgruber, 172 Ind. 370, 86 NE 73, 88 NE 593.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Mich.—Grimm v. Taylor, 96 Mich. 5, 55 NW 447.

Miss.—Foster v. Shaffer, 84 Miss. 197, 36 S 243.

Mo.—Keys v. Keys, 217 Mo. 48, 116 SW 537.

N. Y.—Foster v. Shaffer, 84 Miss. 197, 36 S 243.

S. D.—In re Kirfel, 37 S. D. 292, 157 NW 1057.

[a] **Statements held sufficient.**—(1) A claim reading: "To providing a home for and care and support of Lucy S. Hoskins, from the decease of her husband until her death $2,000." Hoskins v. Saunders, 80 Conn. 19, 66 A 785. (2) A statement which recited that decedent "held in trust and converted the sum of $2,000 belonging to" claimant, which amount was set out at the right of the claim, and further recited: "Creditor—Paid on above account, $500; balance, $1,500." Brown v. Stair, 25 Colo. A. 140, 136 P 1003. (3) A statement of a claim for money had and received, setting out the nature of the demand, the dates and amounts of the several sums paid for the use of decedent, and the character of the claim, consisting of deposits in a bank and in a building and loan association as proceeds from a business running through a period of several years. Leimgruber v. Leimgruber, 172 Ind. 370, 86 NE 73, 88 NE 593. (4) A statement of a claim for services rendered, showing the total number of days of service and wages per day, and stating the total sum with amount paid and balance due. Duncan v. Thomas, 81 Cal. 56, 22 P 297. (5) "To services rendered as per contract," between certain dates, "$200." Smith v. Williams, 123 Mo. A. 479, 480, 100 SW 55. (6) A statement "For legal advice and services rendered [deceased] $500." Foster v. Shaffer, 84 Miss. 197, 198, 36 S 243. (7) A statement of a claim for legal services rendered testator in a divorce suit, accompanied by an account, referring to a certain trip and procuring evidence to be used in a suit, and reciting that testator employed claimant to do certain work and agreed to pay her ten thousand dollars. Josephs v. Briant, 108 Ark. 171, 157 SW 136. (8) A statement of claim against an estate for legal services, which stated the general nature of the services, such as renting land, looking after its taxation, giving legal advice, etc. Sandusky v. Courtney, 168 Mo. A. 325, 153 SW 1084. (9) A statement in the following form "Estate of C. C. Brown, deceased, To Gobin Stair, Dr. April, '08. That C. C. Brown held in trust and converted the sum of Two Thousand Dollars belonging to Gobin Stair, $2,000. Credit-Paid on above account $500. Balance, $1,500." Brown v. Stair, 25 Colo. A. 140, 142, 143, 136 P 1003 ("Upon its face, the claim as filed appears to be upon an account of one transaction only, consisting of a single debit of $2,000 for money received by Brown for the use of the claimant and converted to Brown's own use, and a single credit of $500 paid thereon. Although inartistically drawn, it sufficiently states the demand under the statute making formal pleadings unnecessary in such probate matters.—Section 8002, Mills' (1912), R. S., 1908, section 7212. It appears beyond controversy that the executrix knew of the claim. As the facts generally upon which it was based were, and for a long time prior to its filing had been, known to her, she could in no manner have been prejudiced by the form in which it was presented").

[b] **Statement held insufficient.**—Where a claim due to one of the executors was decribed as "amount due on note signed by deceased in favor of Francis Palmer, $61.93," and the date of the note was not given, and it did not appear whether the amount stated was the face of the note, or the face and interest, or the balance due, the statement was insufficient. In re Palmer, 110 Me. 441, 86 A 919.

[c] **A claim upon an unmatured promissory note** is sufficient if in the usual form, containing a copy of the note and being followed by the statutory affidavit. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 P 951; Landis v. Woodman, 126 Cal. 454, 58 P 857.

[d] **A notice of the nonpayment of a promissory note,** personally served on the executor of an indorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the operation of the statute of nonclaim, if it describes the note with accuracy, and informs the personal representative who the holder is and that he looks to the representative for payment. Mobile Branch Bank v. Hallett, 12 Ala. 671. See also Walker v. Wigginton, 50 Ala. 579 (construing Rev. Code § 2196 [Code (1896) § 133] which provides for the filing of a claim in the office of the probate judge instead of presentation); Helm v. Smith, 10 Miss. 403 (notice by mail of dishonor).

[e] **Where exact amount not ascertainable.**—Where the claim arose out of decedent's liability as surety upon the bond of the administrator of another estate, a claim in the following form "To cash due said estate of Marcos Elizalde, deceased, by reason of said Luigi Marre becoming surety on the bond of Ernest Graves as administrator of the estate of said Marcos A. Elizalde, deceased, the sum of $6163.65. Interest on said sum from Aug. 1, 1900, at 7 per cent. per annum $1063.90," was sufficient, although the exact amount of the claim could not be known until determination of a pending suit for an accounting. Elizalde v. Murphy, 163 Cal. 681, 689, 126 P 978 ("It is, of course, apparent that the exact amount due from the estate of Marre could not be stated until this accounting was had. The purpose of presenting a claim is to advise the party against whom the claim is presented of its nature. The Code nowhere defines the precise form of such a claim").

[f] **Balance of account.**—(1) Unless otherwise required by statute a balance struck in an account between parties may be presented as a claim without specifying the particular items of the account. In re Swain, 67 Cal. 637, 8 P 497 [foll Parker v. Eufaula Nat. Bank, 121 Ala. 516, 25 S 1001 (presentation of a balanced bank book sufficient)]. (2) It is otherwise, however, when such specification is required by statute. Thurmond v. Sanders, 21 Ark. 255; Roethlisberger v. Caspari, 12 Mo. A. 514.

on the part of the estate and in favor of the claimant,[84] and the claim must be exhibited or presented in its entirety; the creditor has no right to divide it into parts and exhibit or present it piecemeal.[85] Where, however, a claimant has several claims arising at different times and growing out of different transactions, he may file separate and distinct claims for each transaction which is separate and distinct from those in other claims.[86] Under some statutes the statement of the claim takes the place of a petition and must be regarded as a statement of the cause of action; hence the cause of action must be sufficiently set forth in the statement filed.[87] The fact that the statement of the claim is for a larger amount than is due does not justify the exclusion of evidence to prove the actual amount of the debt.[88] Where, at the time when a claim was presented to an administrator for allowance, it was not barred by limitations, either actually or apparently, but when the administrator acted upon and rejected it, about a year thereafter, it was barred on its face, the claim not stating intestate's absence from the state for a period which would take the claim out of the statute when rejected, in view of the administrator's delay, he could not claim that the notice of claim was insufficient because it did not show, when acted upon, that it was not barred by limitations.[89] The claim should be filed in the name of the legal or equitable owner,[90] and the name of claimant,[91] as well as the name of decedent,[92] should be accurately stated; but the omission of the name of the personal representative, the statement being made out in the name of the estate of the decedent, is not a fatal defect.[93] So also the fact that a demand is made out against decedent by name instead of against his estate or his personal representative will not justify a refusal to admit evidence to support it.[94] It is usually required that any credits[95] or off-

[g] **Inaccuracies not invalidating presentation.**—(1) Where H, defendant's intestate, in making his individual note, signed it "H. & Co.," and in making presentment to the administrator it was improperly described as signed by H individually, the presentment was not thereby rendered invalid. Sears v. Howe, 80 Conn. 414, 68 A 983, 12 AnnCas 809. (2) Where claimant presented to the administrator of the deceased debtor a verified claim, and gave the date of the mortgage securing it, without giving the names of the parties thereto, and incorrectly describing one of the parcels of the land mortgaged, but the claim was presented in a sealed envelope containing the original note and mortgage, as the note and mortgage were made a part of the claim, it was sufficiently presented within Code Civ. Proc. § 1497. Raggio v. Palmtag, 155 Cal. 797, 103 P 312.

[h] **A claim for "services in the care and aiding and support"** of decedent's sister and minor children is broad enough to include aid and support by the contribution of money. Grimm v. Taylor, 96 Mich. 5, 55 NW 447.

[i] **Claim for back taxes.**—No pleading other than the tax bill need be filed in the probate court on a demand for back personal taxes against the estate of a decedent. State v. Seehorn, 139 Mo. 582, 39 SW 809.

84. Ala.—Cook v. Davis, 12 Ala. 551.

Cal.—Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985.

Ind.—Miller v. Eldridge, 126 Ind. 461, 27 NE 132; Lockwood v. Robbins, 125 Ind. 398, 25 NE 455; Thomas v. Merry, 113 Ind. 83, 15 NE 244; Culver v. Vundt, 112 Ind. 401, 14 NE 91; Walker v. Heller, 104 Ind. 327, 3 NE 114; Moore v. Stephens, 97 Ind. 271; Huston v. Centerville First Nat. Bank, 85 Ind. 21; Hileman v. Hileman, 85 Ind. 1; Davis v. Huston, 84 Ind. 272; Dodds v. Dodds, 57 Ind. 293; Post v. Pedrick, 52 Ind. 490; Ginn v. Collins, 43 Ind. 271; Thompson v. Ristine, 13 Ind. 459; Hannum v. Curtis, 13 Ind. 206; McCulloch v. Smith, 24 Ind. A. 536, 57 NE 143, 79 AmSR 281; Woods v. Matlock, 19 Ind. A. 364, 48 NE 384; Hyatt v. Bonham, 19 Ind. A. 256, 49 NE 361; Cooper v. Griffin, 13 Ind. A. 212, 20 NE 710; Stewart v. Small, 11 Ind. A. 100, 38 NE 826; Parrett v. Palmer, 8 Ind. A. 356, 35 NE 713, 52 AmSR 479; Doan v. Dow, 8 Ind. A. 324, 35 NE 709; Sheeks v. Fillion, 3 Ind. A. 262, 29 NE 786; Worley v. Hineman, (A.) 29 NE 570; Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004; Taggert v. Tevanny, 1 Ind. A. 339, 27 NE 511.

Iowa.—Pickrell v. Hiatt, 81 Iowa 537, 46 NW 1062.

Me.—Marshall v. Perkins, 72 Me. 343.

Miss.—Fairley v. Fairley, 82 S 267.

N. Y.—Bloodgood v. Sears, 64 Barb. 71.

Wash.—Empson v. Fortune, 102 Wash. 16, 172 P 873.

[a] **A note which is payable to a third person** and which contains nothing to show that the claimant is its holder, either by indorsement, assignment, or delivery, will not support the claim unless the affidavit shows that the claimant has either a legal or equitable interest in the note. Cook v. Davis, 12 Ala. 551.

85. Clawson v. McCune, 20 Kan. 337; Pfeiffer v. Suss, 73 Mo. 245; Potter v. Harvey, 34 R. I. 71, 82 A 812.

"No claimant has the right to sever claims otherwise indivisible, for the purpose of making one part thereof a claim to be preferred over the other part." Potter v. Harvey, 34 R. I. 71, 82 A 812, 816.

86. Staggers v. Staggers, 155 Ill. A. 133.

87. Bremer County v. Curtis, 54 Iowa 72, 6 NW 135; Baker v. Chittuck, 4 Greene (Iowa) 480; Headley v. Jenkins, 13 KyL 463.

[a] **Illustration.**—The proof of a claim which the statute requires to be tendered to the personal representative should show every fact touching its validity which it would be necessary to aver in a petition, and if it does not, the personal representative should refuse payment. Headley v. Jenkins, 13 KyL 463.

[b] **When creditor not a natural person.**—Under a statute requiring claims to be entitled in the name of the claimant against the administrator of the estate, as such, with the name of the estate, etc., the claimant need not aver in what capacity, whether as a corporation, partnership, or person, it acted in presenting the claim, unless the pleading is assailed by motion. Chicago Univ. v. Emmert, 108 Iowa 500, 79 NW 285.

[c] **Representative need not plead.**—A statute providing that creditors shall file statement of their demands in the clerk's office and give notice thereof to the representative does not contemplate that a claim thus filed should stand for a declaration to which the representative should be compelled to plead, and therefore the representative cannot be required against his consent to appear and plead to a claim so filed. Stewart v. Cantrall, 6 Blackf. (Ind.) 74.

88. Mead's App., 46 Conn. 417.

89. Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

90. See supra § 971.

[a] **Partners.**—All the acting resident partners must join in the probate of a claim due the firm, under a statute requiring the "person holding the debt" to make probate, although it seems otherwise as to secret or nonresident partners. Gregory v. Bailey, 4 Del. 256.

[b] **A note indorsed in blank** may be probated in the name of any one consenting. Whitford v. Herting, 60 Ill. A. 413.

[c] **Where a person files a claim as administrator of another estate** (1) he does so in his representative capacity and in favor only of the estate named. Barker v. Thompson, 98 Ill. A. 78. (2) Where a statement of a claim is presented by a person who therein describes himself simply as an administrator, without naming the estate which he represents or showing whether the claim is in favor of that estate or of himself personally, the presentation is insufficient. Bibb v. Mitchell, 58 Ala. 657.

[d] **Change of ownership after filing.**—"One who acquires title in a claim filed against an estate after the date of filing, may prosecute the same in the name of the party filing." Hoopeston Nat. Bank v. Williams, 181 Ill. A. 122, 125 (where a claim filed against an estate by a corporation is afterward transferred to a trustee for the benefit of the stockholders, the trustee may continue the prosecution in the name of the corporation).

91. Cooper v. Griffin, 13 Ind. A. 212, 40 NE 710.

[a] **Claimant's christian name** must be stated, and a statement merely giving the initials of claimant's name is insufficient. Cooper v. Griffin, 13 Ind. A. 212, 40 NE 710.

[b] **Variance; married name of claimant.**—There was no variance between a claim which designated claimant, a widow, as "Lizzie Summerhays Craig" and proof that she was known as "Mrs. Ed. Craig" or "Mrs. Edward Craig." Craig v. Craig, 167 Iowa 340, 149 NW 454.

92. Halfman v. Ellison, 51 Ala. 543; Beene v. Collenberger, 38 Ala. 647.

[a] **A misnomer of decedent** in the statement of a claim filed in the office of the probate judge invalidates the presentation, since the statement would not, on examination by the representative, show that the claim was against decedent. Halfman v. Ellison, 51 Ala. 543 (claim was filed against the estate of "Ethelwood" Halfman, decedent's christian name being Ethelbert).

93. Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511; In re Jefferson, 35 Minn. 215, 28 NW 256; Coots v. Morgan, 24 Mo. 522.

[a] **The personal representative need not be formally made a party** to the statement or named therein, especially if he appears and contests the claim. Niblack v. Goodman, 67 Ind. 174; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511 [dist Wells v. Wells, 71 Ind. 509].

94. Coots v. Morgan, 24 Mo. 522.

95. Miller v. Eldridge, 126 Ind. 461, 27 NE 132.

sets[96] existing in favor of decedent or his estate shall be stated.

[§ 987] **(c) Production of Original Instrument or Copy.** Where the claim is founded on a written instrument, such as a bill or note, it is not necessary to present or file the original instrument, unless the statute expressly so requires, if the claim and the instrument are properly and sufficiently described in the statement presented,[97] and the filing or presentation of a copy of the instrument accompanied by the statutory affidavit is generally held sufficient.[98] The presentation of even a copy of the note or other written instrument on which the claim is based is not necessary unless required by statute, but the presentation is sufficient if the claim or note is properly described.[99] Some statutes, however, expressly require that where the claim is founded upon a written instrument or an account, either the original or a copy must accompany the claim,[1] but such statutes do not apply to cases where the instrument has been lost and no copy can be obtained,[2] or where the instrument is only collaterally involved and is not the basis of the claim;[3] and it has been held that presentation of a copy may be

[a] **A statement of credits in gross** is sufficient. Miller v. Eldridge, 126 Ind. 461, 27 NE 132.

96. Hibbard v. Clark, 39 Nev. 230, 156 P 447.

97. Agnew v. Walden, 95 Ala. 108, 10 S 224, 84 Ala. 502, 4 S 672; Flinn v. Shackleford, 42 Ala. 202; Rutherford v. Mobile Branch Bank, 14 Ala. 92; Posey v. Decatur Bank, 12 Ala. 802; White v. Brown, 19 Conn. 577; Altgelt v. Elmendorf, (Tex. Civ. A.) 86 SW 41.

98. Ala.—Agnew v. Walden, 84 Ala. 502, 4 S 672; Erwin v. McGuire, 44 Ala. 499; Flinn v. Shackleford, 42 Ala. 202; Stubbs v. Beene, 37 Ala. 627; Rutherford v. Mobile Branch Bank, 14 Ala. 92; Posey v. Decatur Bank, 12 Ala. 802; Rowdon v. Young, 12 Ala. 234.

Ark.—Davenport v. Davenport, 110 Ark. 222, 161 SW 189.

Colo.—Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

Ind.—Price v. Jones, 105 Ind. 543, 5 NE 683, 55 AmR 230; Hathaway v. Roll, 81 Ind. 567; Pulley v. Perfect, 30 Ind. 379; Crabb v. Atwood, 10 Ind. 322; Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

Iowa.—Braught v. Griffith, 16 Iowa 26; Baker v. Chittuck, 4 Greene 480.

N. H.—Tebbetts v. Tilton, 31 N. H. 273; Mathes v. Jackson, 7 N. H. 259.

Wash.—Olympia First Nat. Bank v. Root, 19 Wash. 111, 52 P 521; McFarland v. Fairlamb, 18 Wash. 601, 52 P 239.

[a] **Claim based on judgment.**—Under a statute providing that the manner of exhibiting claims against decedents' estates shall be by filing an exemplification of the record on which the claim is founded, a transcript of the judgment docket of the district court was insufficient. Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378 (holding also that the filing of a claim was insufficient, where it was based on a judgment that had not been entered).

[b] **The representative may demand production of the original** instrument and such demand must be complied with. McFarland v. Fairlamb, 18 Wash. 601, 52 P 239.

99. Agnew v. Walden, 84 Ala. 502, 4 S 672, 95 Ala. 108, 10 S 224; In re Crosby, 55 Cal. 574; Gaston v. McKnight, 43 Tex. 619.

[a] **Where the claim is based on a judgment** it is not necessary that a certified copy of the judgment should be presented as part of the claim unless the statute so provides, although it may be the duty of the representative to require evidence or vouchers sufficient to establish to his satisfaction the justice of the claim. In re Crosby, 55 Cal. 574 (prior to Hittel Gen. L. pp 881–884, a claim based on a judgment might properly consist, so far as presentation was concerned, only of a statement of the material parts of the judgment); Gaston v. McKnight, 43 Tex. 619 (an abstract which properly describes the judgment, its date, amount, parties, etc., and which is accompanied by the affidavit of the holder, is sufficient). See also Ransom v. Quarles, 16 Ala. 437 (the certificate of the clerk of the court in which judgment was rendered is sufficient if it substantially describes the judgment, and that the omission to specify the costs is immaterial).

1. Cal.—Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985; In re McDougald, 146 Cal. 191, 79 P 878; Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019.

Colo.—Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717; Gilmour v. Central City First Nat. Bank, 21 Colo A. 301, 121 P 767.

Ind.—Blasingame v. Blasingame, 24 Ind. 86; McCullough v. Smith, 24 Ind. A. 536, 57 NE 143, 79 AmSR 281.

Iowa.—Baker v. Chittuck, 4 Greene 480.

Miss.—Wells v. McCollough, 113 Miss. 401, 74 S 289; McMahan v. Foy, 104 Miss. 309, 61 S 421.

Mo.—Fenn v. Reber, 153 Mo. A. 219, 132 SW 627; Britian v. Fender, 116 Mo. A. 93, 92 SW 179; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053; Roethlisberger v. Caspari, 12 Mo. A. 514.

S. D.—Black Hills Trust, etc., Bank v. Plunkett, 40 S. D. 130, 166 NW 527.

[a] **Requirement jurisdictional.**—Britian v. Fender, 116 Mo. A. 93, 92 SW 179.

[b] **Copy insufficient where original required.**—A claim was properly disallowed, where claimant filed only a copy of the receipt evidencing the claim, instead of filing the receipt itself, as required by statute. McMahan v. Foy, 104 Miss. 309, 61 S 421. To same effect In re Hobson, 40 Colo. 332, 91 P 929.

[c] **What instrument is foundation of claim.**—The instrument of writing on which the claim of the beneficiary under a trust deed for taxes paid on the land against the estate of the mortgagor was founded, within the meaning of Rev. St. (1908) § 7212, was the covenant of the trust deed, which required the mortgagor to pay all costs of the trust, including money advanced for taxes, and not the tax receipts or the secured notes, so that the covenant in the tax deed must be exhibited in probate court. Gilmour v. Central City First Nat. Bank, 21 Colo. 301, 121 P 767.

[d] **Mutilated note.**—Where the claim is founded on a promissory note which has been mutilated since execution by having the signature torn away and the torn portion lost, the statement of the claim must account for the mutilation and show that the holder is innocent thereof. McCullough v. Smith, 24 Ind. A. 536, 57 NE 143, 97 AmSR 281.

2. Blasingame v. Blasingame, 24 Ind. 86; Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

[a] **Where a creditor lost the original after probate, but filed copies** thereof on the day fixed for filing, it was error to disallow his claim on the ground that it was not filed on the day set. Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

3. Conant v. Machen, 27 Colo. A. 310, 148 P 872; Bryson v. Kelley, 53 Ind. 486; Britian v. Fender, 116 Mo. A. 93, 92 SW 179; Dorais v. Doll, 33 Mont. 314, 83 P 884.

[a] **Illustrations.**—(1) Where decedent was surety on a note for plaintiff, and on one occasion plaintiff handed him one half of the amount of the note with a request that it be applied as a partial payment, and decedent stated that he needed the money for his own use and suggested a renewal of the note, which was done, after which plaintiff was compelled to pay the entire note, and on another occasion plaintiff was to borrow money from another with decedent as surety, and the money having been left for plaintiff with decedent, the latter failed to pay it over to plaintiff, plaintiff's cause of action against the estate by virtue of such transactions was in assumpsit for money had and received and not on the notes, and hence he was not required by Rev. St. (1899) § 188, to set out the notes in question in a statement of the claim. Britian v. Fender, 116 Mo. A. 93, 92 SW 179 (a statement of claim averring that decedent's estate was indebted to claimant, as of Nov. 20, 1902, to two hundred dollars paid to decedent to be credited on the note of claimant and decedent, at a certain bank, which decedent failed to do, and on another date, "to money on Frady note," sufficiently showed the nature of the claim). (2) Where a claimant against an administrator had entered into a contract for the sale of ice to a firm of which decedent was a member, had then made a compromise with the firm, and had finally made an oral agreement for the payment of the amount last agreed upon in installments at certain dates, his claim was not based on either of the prior contracts, but on the oral agreement, and hence did not fall within Code Civ. Proc. § 2607, providing that a copy of the instrument on which a claim is founded must accompany the claim. Dorais v. Doll, 33 Mont. 314, 83 P 884.

[b] **Claims not based on judgment.**—(1) Where guaranteed notes were secured by mortgage, and judgment was rendered against the guarantors in the action to foreclose, and the notes were transferred to the guarantors after payment by them, their claim against the estate of the maker for the amount so paid was founded upon the notes, and not upon the judgment of foreclosure, so that it was not necessary to file the exemplification of the judgment with the claim against the estate. Cone v. Eldridge, 51 Colo. 564, 119 P 616. (2) The claim of the surety on the appeal bond of decedent, who pays the amount due under his obligation on the appeal being dismissed, and files a claim therefor against the estate, with the transcript of the judgment docket, bearing the written assignment to him of the judgment, attached, is not a judgment within Rev. St. (1908) § 7212, requiring in such case the claim to be exhibited by filing an exemplification of the record, the transcript and assignment merely showing for what the advancement was made. German American Trust Co. v. National Surety Co., 55 Colo. 499, 136 P 457.

[c] **Notes given to toll the statute**

waived by the personal representative.[4] It is sufficient to file or present an original note on which the claim is based, accompanied by the proper affidavit,[5] but as canceled checks disclose no liability at all on the part of the estate to anyone, filing such checks is not sufficient evidence of a claim arising out of the transaction in which they were given.[6]

Assigned instrument. Where a note secured by mortgage given by decedent was assigned to the administratrix, the filing of a copy of the note with the claim was sufficient without a copy of the assignment.[7]

[§ 988] **(d) Production of Vouchers.**[8] Unless the statute expressly so requires, the creditor need not present vouchers in support of his claim,[9] and if the statute provides that the representative may require satisfactory vouchers, they need not be presented unless the representative makes a request for them.[10] But where vouchers are required, they must conform to the statute.[11] Where a widow, as administratrix of her husband's estate, claimed the right to an allowance for a minor child's share of the cost of supporting the family during administration, she was not required to furnish itemized receipts from other persons for the amount of the child's share; but it was sufficient for her to file a voucher from herself individually to herself as administratrix for the care and support of the infant, provided no objections were made as to the value of such support and maintenance.[12]

[§ 989] **(e) Secured Claims.** Provision is made by some statutes whereby a statement of a claim which is secured by a mortgage or other lien must describe the same, and, where it has been recorded, refer to the date, volume, and page of the record.[13] Under such a statute merely presenting a copy of a note which states that it is secured by mortgage is not a sufficient presentation of the mortgage,[14] and such presentation has been held to operate as a waiver of the mortgage lien,[15] although this has been denied.[16] But a statute providing that if the claim is secured by mortgage or other evidence of lien, the mortgage, etc., or a certified copy from the record shall be attached to the claim and filed therewith, has been held to be merely directory, it being sufficient if the claim is otherwise sufficiently described in the statement;[17] and the creditor's failure to assert his lien in the affidavit authenticating his claim has been held not to constitute a waiver of the lien.[18] It has been considered proper to present the whole mortgage debt as due on the bond, such a claim amounting to a claim for any deficiency which may remain after the security has been exhausted.[19]

[§ 990] **(f) Signature.** Although the statute requires "a statement of the claim in writing signed by the creditor," it is sufficient that he signs the affidavit attached to the claim.[20]

of limitations after the original notes presented on a claim against an estate were executed should not be exhibited in the probate court until the defense of limitations is raised. Gilmour v. Central City First Nat. Bank, 21 Colo. A. 301, 121 P 767.

4. Grimes v. Booth, 19 Ark. 224; Grimes v. Bush, 16 Ark. 647; Borden v. Fowler, 14 Ark. 471.

[a] **The question of waiver is one of fact** to be determined by the jury or by the court sitting as a jury. Grimes v. Booth, 19 Ark. 224; Grimes v. Bush, 16 Ark. 647.

5. Floyd v. Clayton, 67 Ala. 265; Borden v. Fowler, 14 Ark. 471; Lafferty v. Lafferty, 10 Ark. 268; Price v. Jones, 105 Ind. 543, 5 NE 683, 55 AmR 230; Hansell v. Gregg, 7 Tex. 223.

6. Lehman v. Powe, 95 Misc. 446, 456, 49 S 622 ("These canceled checks disclose no liability at all on the part of the estate to any one. In fact, they showed no liability from any person to another, and could not have been used as a foundation for a suit in any court. They could have been used, it is true, as evidence in a suit for money loaned, if in fact they related to such a transaction, but only as one link in the evidence necessary to maintain such a suit. Their mere introduction in evidence in such a suit, unaided by other evidence, would not have proven anything. The words 'written evidence,' as used in the statute, clearly mean such a writing as by its terms or on its face evidences the fact that a liability exists on the part of the estate in favor of the claimant. Code 1906, § 2106 is mandatory, and, unless it has been complied with, the administrator, under Code 1906, § 2105, has no authority to pay the claim; nor has the court power to order him so to do, unless Code 1906, § 2106 has been complied with. The allowance of this claim was error. In some of the states, probably in most of them, the statute does not require that claims shall be presented for probate in any particular form; but where the statute does so require, as is the case with us, it must be complied with").

7. In re McDougald, 146 Cal. 191, 79 P 878.

8. [a] **The word "voucher"** used in the statute means the affidavit of claimant to the effect that the amount claimed is justly due, etc. Willis v. Marks, 29 Or. 493, 45 P 293.

9. Gansevoort v. Nelson, 6 Hill (N. Y.) 389.

10. Willcox v. Smith, 26 Barb. (N. Y.) 316; Russell v. Lane, 1 Barb. (N. Y.) 519; Townsend v. New York L. Ins. Co., 4 NYCivProc 398; Gansevoort v. Nelson, 6 Hill (N. Y.) 389; Morgan v. Bartlette, 3 Oh. Cir. Ct. 431, 2 Oh. Cir. Dec. 244; Olympia First Nat. Bank v. Root, 19 Wash. 111, 52 P 521.

11. McDaniel v. Clements, 11 Ky. Op. 96 (words "just claims" held objectionable).

12. In re Lyon, 137 NYS 171.

13. Moore v. Russell, 133 Cal. 297, 65 P 624, 85 AmSR 166; In re Turner, 128 Cal. 388, 60 P 967; Culver v. Yundt, 112 Ind. 401, 14 NE 91; Worley v. Hineman, (Ind. A.) 29 NE 570.

[a] **Description held sufficient.**—McDougald's Est., 146 Cal. 191, 79 P 878; Moore v. Russell, 133 Cal. 297, 65 P 624, 85 AmSR 166; San Diego Cons. Nat. Bank v. Hayes, 112 Cal. 75, 44 P 469.

[b] **Description held insufficient.**—Worley v. Hineman, (Ind. A.) 29 NE 570.

14. In re Turner, 128 Cal. 328, 60 P 967; Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019.

15. In re Turner, 128 Cal. 328, 60 P 967.

16. Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019; Massey v. Fralish, 37 S. D. 91, 156 NW 791.

17. Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090.

18. Ball v. Hill, 48 Tex. 634; Sutherland v. Elmendorf, 24 Tex. Civ. A. 137, 57 SW 890.

19. Smith v. Wilson, 79 N. J. Eq. 310, 321, 81 A 851 ("The matter I think is made plain by the case of Crater v. Smith, 42 N. J. Eq. 348, 7 A 575 [aff 43 N. J. Eq. 636, 12 A 530]. The practice of presenting under oath the whole mortgage debt as due on the bond is sustained by this case, but what the claim amounts to is not a claim for the whole debt, but merely a claim for the payment of any deficiency which may thereafter be declared due to the claimant after his primary security [the land] has been exhausted. Mr. Justice Van Syckle (43 N. J. Eq. 639, 12 A 531), speaking for the entire court of errors and appeals, discusses the effect of the act of March 12, 1880, as amended in 1881, upon 'bonds and mortgages given for the same indebtedness' by a decedent whose estate was before the court, and he says (at p 639): 'The act of 1881 prohibits suit upon the bond until sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar. If not presented within the time so limited, it cannot be presented at all. The object of said act is to compel the mortgagee to look primarily to the mortgaged premises for payment, and to limit the time for suing for deficiency to six months from the date of sale.' In the light of this authoritative exposition of the relation of the mortgage debt in this case, to the land covered by the mortgage and the personal estate of the mortgagor who signed the bond and contracted the debt, what possible ground can there be for holding that the complainants as assignees of the mortgage or as parties subrogated by payment of the mortgage to the mortgagee's rights, can stand in any different position from that which the original mortgagee would occupy upon the death of the mortgagor? The complainants if subrogated merely succeed to certain fixed rights and remedies; they get no further or higher rights; they must therefore exhaust their remedy against the land first, and their proof, if properly made in time, would only entitle them under the statute, within the time limited, to recover any deficiency in case such deficiency remained after the proceeds of the sale of the land had been exhausted").

20. Bankston v. Coopwood, 99 Miss. 511, 514, 55 S 48 ("To sustain his position, the appellee relies on the case of Walker v. Nelson, 87 Miss. 268, 39 S 809. In that case the court

[§ 991] **(g) Amendment—aa. In General.** Statements of claims are generally subject to amendment, provided that substantial justice will be promoted thereby, that the cause of action embraced in the original statement is not changed, that new items are not added, and of course that the original statement contains allegations upon which an amendment may be predicated, such amendments being allowed either under the general statutes relating to amendments of pleadings or under special statutes applicable to claims of creditors in administration proceedings.[21]

Making more definite and certain. The personal representative to whom a claim is presented has sometimes the right to require the creditor to make the statement of the claim more definite and certain.[22]

[§ 992] **bb. Time for Amendment.** It has been held that after the time for presenting or filing claims has expired an amendment will not be allowed,[23] at least where it increases the amount of the claim[24] or substitutes a different claim for the same amount;[25] but there is also authority for the view that, where a claim was originally filed in time, an amendment may be allowed after such time has expired,[26] and it has been held that an amendment

said: 'The itemized account attempted to be probated against the estate of the decedent was not signed by the creditor, nor was there any affidavit attached thereto.' We have examined the original record in that case, and find that the creditor signed neither the account nor the affidavit attached thereto. That case, therefore, is not authority for the contention here made that a signing of the statutory affidavit attached to the account is not a sufficient signing of the account. Such a contention was not presented to the court, and the language used by the court in that case was addressed to the particular facts of the case. A substantial, and not a literal, compliance with the statute is required. 'A statement of the claim in writing signed by the creditor' is necessary under the statute; but a signing by the creditor of the affidavit is a substantial compliance with this requirement. The affidavit is attached to the account, and is a part of it. The purpose of the statute in requiring the claim to be signed is to identify it and verify its correctness. A signing of the affidavit attached to the claim is necessarily a signing of the claim itself in the sense of the statute. The statute does not point out any particular place where the claim shall be signed").

21. Cal.—Davis v. San Joaquin County Super. Ct., 35 Cal. A. 473, 170 P 437.

Conn.—Donahue's App., 62 Conn. 370, 26 A 399.

Ill.—McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585]; Belleville Sav. Bank v. Bornman, 7 NE 686, 10 NE 552; Springer v. De Wolf, 193 Ill. A. 55; Johnson v. Devine, 192 Ill. A. 453; Old School Presb. Church v. Paxton, 180 Ill. A. 658.

Ind.—Peden v. King, 30 Ind. 181; Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

Iowa.—In re Howell, 179 Iowa 969, 162 NW 231; Hankins v. Young, 174 Iowa 383, 156 NW 380; Chariton Nat. Bank v. Whicher, 163 Iowa 571, 145 NW 299; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; Baker v. Chittuck, 4 Greene 480.

Kan.—Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

La.—Sangfried's Succ., 114 La. 878, 38 S 593.

Minn.—In re Davis, 142 Minn. 187, 171 NW 778.

Mo.—Corson v. Waller, 104 Mo. A. 621, 78 SW 656.

Nebr.—In re Gamble, 91 Nebr. 199, 135 NW 558.

Nev.—Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090.

Pa.—Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536.

Vt.—Maughan v. Burns, 64 Vt. 316, 23 A 583.

Wis.—Longwell v. Mierow, 130 Wis. 208, 109 NW 943.

[a] **Illustrations.**—(1) It was within the discretion of the trial court to permit the amendment of a claim to show an agreement of decedent to pay at his death for services rendered by claimant so that his claim therefor was not barred by limitations where the claim as originally presented, although not containing any statement of such agreement, included enough to suggest that it was based on an agreement of some sort, and that the right thereunder was not barred by limitations. Longwell v. Mierow, 130 Wis. 208, 109 NW 943. (2) Where a claim alleged that decedent requested claimant to pay the balance on certain notes and agreed to repay him therefor, and that claimant made payment accordingly, an amended claim was properly allowed which was in substance the same as the original, except that it alleged that on payment by claimant the payee delivered the notes to him, and that claimant was still the holder. In re Gamble, 91 Nebr. 199, 135 NW 558. (3) An amendment by attaching a note and mortgage to the claim may be permitted. Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090. (4) Failure to attach a copy of a note on which the claim is based may be cured by amendment. Chariton Nat. Bank v. Whicher, 163 Iowa 571, 145 NW 299.

[b] **The amount of the claim may be increased by amendment** (1) where the claim is based upon a quantum meruit and its nature and identity are not changed. Maughan v. Burns, 64 Vt. 316, 23 A 583. See also Bogue v. Corwine, 80 Mo. A. 616 (substitution of claims permitted). (2) It is not an objection to an itemized amendment that it shows a greater amount to be due than was formerly claimed. Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

[c] **Amendment must not change ground of action.**—Donahue's App., 62 Conn. 370, 26 A 399. See also Merwin's App., 72 Conn. 167, 43 A 1055 (amendment held not to have this effect).

[d] **A second statement** of a claim may be treated as an amendment of the original statement. Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

[e] **Liberality should be exercised** in regard to amendments. White v. Deeing, (Cal. A.) 179 P 401.

22. Weller v. Weller, 4 Hun (N. Y.) 195; Townsend v. New York L. Ins. Co., 4 NYCivProc 398.

23. Cal.—In re Turner, 128 Cal. 388, 60 P 967; Sullenberger's Est., 72 Cal. 549, 14 P 513.

Colo.—Dickey v. Dickey, 8 Colo. A. 141, 45 P 228.

Miss.—Lehman v. George, 99 Miss. 798, 56 S 167.

Mo.—Wernse v. McPike, 100 Mo. 476, 13 SW 809 [overr Wernse v. McPike, 86 Mo. 565].

S. D.—Printz-Biederman Co. v. Torgeson, 168 NW 796.

[a] **Amendment to show security.**—A claimant will not be allowed to amend his claim by adding that it was secured by a mortgage, after the expiration of the time for the presentation of claims. In re Turner, 128 Cal. 388, 60 P 967.

[b] **Defective probation.** — Where a claim was not probated in the manner required by law, so that its registration did not stop the running of the statute, the probation cannot, on an application made after the claim is barred by limitations, be amended. Lehman v. George, 9 Miss. 798, 56 S 167.

24. Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

25. Dickey v. Dickey, 8 Colo. A. 141, 45 P 228.

26. Old School Presb. Church v. Paxton, 180 Ill. A. 658; In re Howell, 179 Iowa 969, 162 NW 231; Hankins v. Young, 174 Iowa 383, 156 NW 380; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

[a] **Illustration.** — Where the original claim filed purports to be based on a judgment, and an amended claim, filed against the same estate after the lapse of the two years allowed by statute for the exhibition of claims, is based on a check and money loaned, the statute of limitations does not apply, notwithstanding such amended claim sets up a new cause of action, where it appears by extraneous evidence that the original and amended claims pertained to the same transaction. Carter v. Pierce, 114 Ill. A. 589.

[b] **An amendment by substituting the name of the real party in interest** may be allowed after the expiration of the time for filing claims. McCall v. Lee, 120 Ill. 261, 11 NE 522.

[c] **What amounts to amendment.**—Where one having a claim filed an informal claim on May 10, 1905, within the period of limitations, a more formal statement of the claim, filed after the expiration of the period allowed for filing claims, but reciting that the claim was for services performed by claimant, "as stated in her claim filed on the 10th day of May, 1905," could not be regarded as a separate and distinct claim, but was an amendment of the prior statement. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

[d] **Original claim sufficient to warrant evidence of liability.**—Where claims each alleged that decedent's estate was justly indebted to claimant in a specified sum on a note of a third person attached thereto, which, however, did not show that decedent was a party, the claims were nevertheless sufficient, in the absence of demurrer or motion, to justify evidence of decedent's liability, and were therefore amendable after the time for filing claims had expired. Chariton Nat. Bank v. Whicher, 163 Iowa 571, 145 NW 299.

[e] **Express and implied contracts.**—Where a claim, based on an implied contract was filed within the time allowed by law for presentation of such claims, an amendment of the statement of claim, filed after the expiration of the period of limitation, did not permit the intervention of the defense of limitations, although the amended statement set up the contract as an express one. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

[f] **Consistency with original statement.**—Although a statement of claim was subject to a motion to make more definite, and was demur-

is allowable on appeal.[27]

[§ 993] **cc. Effect of Amendment.** Where the time of filing is material, as where it bears on the rank or priority of the claim, an amendment does not deprive claimant of the benefit of his original filing.[28]

[§ 994] **(2) Verification**[29] **— (a) Necessity— aa. In General.** It is very generally provided by statute that claims presented or filed shall be verified by an affidavit as to their correctness and justness, and such requirements are usually held to be imperative.[30] It has even been held that the affidavit cannot be waived by the personal representative or dispensed with by the probate court.[31] Under some statutes, however, verification is necessary only when required by the personal representative,[32] and where this is the case, the creditor need not make the affidavit unless the representative requests him to do so,[33] and a want of verification may of course be waived.[34] It has also been held that, while the creditor cannot enforce payment unless his claim is properly verified, if objection is taken on that ground, the representative may pay an unverified claim and be allowed credit for the payment, provided that he knows and can prove that the claim is valid, subsisting, and just,[35] espe-

rable, as showing on its face that the claim was barred by limitations, an amendment of the statement, filed before any motion to make more specific was made, setting up additional matter preventing the application of the bar, was not inconsistent with the original statement. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

27. Cerson v. Waller, 104 Mo. A. 621, 78 SW 656; Maughan v. Burns, 64 Vt. 316, 23 A 583.

28. Ala.—Flinn v. Shackleford, 42 Ala. 202.

Conn.—Corr's App., 62 Conn. 403, 26 A 478; Mead's App., 46 Conn. 417.

Ind.—Hannum v. Curtis, 13 Ind. 206; Thornburg v. Buck, 13 Ind. A. 446, 41 NE 85.

Iowa.—In re Blackman, 143 Iowa 553, 120 NW 664; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

Kan.—Hayner v. Trott, 46 Kan. 70, 26 P 415.

Miss.—Henderson v. Ilsley, 19 Miss. 9, 40 AmD 41.

Mo.—Walker v. Gay, 73 Mo. A. 89; Wood v. Land, 35 Mo. A. 381.

Tex.—Chandler v. Meckling, 22 Tex. 36; Trigg v. Moore, 10 Tex. 197.

"No amendment which is germane to a claim as originally stated, which does not destroy the substantial identity of the claim, or substitute some other new or different subject of the claimant's demand, will deprive him of the advantage of his original filing." Chariton Nat. Bank v. Whicher, 163 Iowa 571, 579, 145 NW 299.

[a] **Change in amount.**—Correction of a claim stating a sum less than the true amount due by subsequent amendment is not the filing of a new claim, nor does it take the claim out of the list where its original filing placed it. In re Blackman, 143 Iowa 553, 120 NW 664.

29. Affidavits generally see Affidavits 2 C. J. p 314.

30. Ala.—Kennedy v. Lyle, 76 S 962; Brannan v. Sherry, 195 Ala. 272, 71 S 106.

Ark.—McIlroy Banking Co. v. Dickson, 66 Ark. 327, 50 SW 868; Cox v. Phelps, 65 Ark. 1, 45 SW 990; Wilkerson v. Gordon, 48 Ark. 360, 3 SW 183; Ross v. Hine, 48 Ark. 304, 3 SW 190; Alter v. Kinsworthy, 30 Ark. 756; Green v. Brooks, 25 Ark. 318; Saunders v. Rudd, 21 Ark. 519; State Bank v. Walker, 14 Ark. 234; Rogers v. Wilson, 13 Ark. 507; Ryan v. Lemon, 7 Ark. 78.

Cal.—Perkins v. Onyett, 86 Cal. 348, 24 P 1024; Pico v. De La Guerra, 18 Cal. 422.

Colo.—Tucker v. Tucker, 21 Colo. A. 94, 121 P 125.

D. C.—Parish v. Hedges, 34 App. 21.

Ill.—Smith v. Goodrich, 167 Ill. 46, 47 NE 316 [rev 67 Ill. A. 418].

Ind.—Worley v. Hineman, (A.) 29 NE 570.

Kan.—Clawson v. McCune, 20 Kan. 337.

Ky.—Harding v. Bullard, 172 Ky. 417, 189 SW 242; Leach v. Kendall, 13 Bush 424; Curry v. Bryant, 7 Bush 301; Trabue v. Harris, 1 Metc. 597; Rogers v. Mitchell, 1 Metc. 22; Isom v. Holcomb, 110 SW 249, 33 KyL 307; Hayden v. Kale, 7 KyL 375; Maxey v. Wallhatt, 11 Ky. Op. 31; McKnoll v. Wear, 1 Ky. Op. 447.

Md.—Kent v. O'Hara, 7 Gill & J. 212; Dyson v. West, 1 Harr. & J. 567.

Miss.—Persons v. Griffin, 112 Miss. 643, 73 S 624; Cudahy Packing Co. v. Miller, 103 Miss. 435, 60 S 574; Walker v. Nelson, 87 Miss. 268, 39 S 809; Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549.

Mo.—Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897; Williams v. Gerber, 75 Mo. A. 18.

N. M.—Clancey v. Clancey, 7 N. M. 405, 37 P 1105, 38 P 168.

N. Y.—Williams v. Purdy, 6 Paige 166.

Or.—Zachary v. Chambers, 1 Or. 321.

S. C.—Brown v. Brown, 45 S. C. 408, 23 SE 137.

S. D.—In re Roberts, 170 NW 580; In re Hawgood, 37 S. D. 565, 159 NW 117.

Tex.—Anderson v. Cochran, 93 Tex. 583, 57 SW 29; Converse v. Sorley, 39 Tex. 515; Gillmore v. Dunson, 35 Tex. 435; Walters v. Prestidge, 30 Tex. 65; Whitmire v. Powell, (Civ. A). 117 SW 433.

Wash.—First Security, etc., Co. v. Englehart, 181 P 13; Empson v. Fortune, 102 Wash. 16, 172 P 873; McFarland v. Fairlamb, 18 Wash. 601, 52 P 239.

[a] **The object of requiring the affidavit** of the creditor is not to prove the existence of the debt, as it is not evidence for that purpose, but it is to prevent the exhibition against the estate of claims which are fictitious or which were discharged by the debtor in his lifetime, and also to prevent the allowance of claims against which there exist legal offsets which are known only to the claimant, and which those who are interested in the estate may be unable to establish by legal proof. Williams v. Purdy, 6 Paige (N. Y.) 166.

[b] **The affidavit is an indispensable jurisdictional prerequisite** (1) to the allowance and registration of the claim under the code of 1892. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549. (2) Under the former statutes the rule was not so strict. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549; Sims v. Sims, 30 Miss. 333; Smith v. Smith, 4 Miss. 216.

[c] **The requirement applies only where** the creditor presents his demand to the probate court for allowance and has no application to an action in another court. Stiles v. Smith, 55 Mo. 363.

[d] **The requirement is merely directory** and an oath may be administered after the claim is filed. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; Moore v. McKinley, 60 Iowa 367, 4 NW 768; Wile v. Wright, 32 Iowa 451; Goodrich v. Conrad, 24 Iowa 254.

[e] **Verification cannot be supplied on appeal.**—Clancey v. Clancey, 7 N. M. 405, 37 P 1105, 38 P 168.

31. Ark.—Cox v. Phelps, 65 Ark. 1, 45 SW 990; Ross v. Hine, 48 Ark. 304, 3 SW 190; Alter v. Kinsworthy, 30 Ark. 756; Green v. Brooks, 25 Ark. 318; Walker v. Byers, 14 Ark. 246; Rogers v. Wilson, 13 Ark. 507.

Kan.—Clawson v. McCune, 20 Kan. 337.

Miss.—Persons v. Griffin, 112 Miss. 643, 73 S 624.

N. M.—Clancey v. Clancey, 7 N. M. 405, 37 P 1105, 38 P 168.

Tex.—Converse v. Sorley, 39 Tex. 515; Gillmore v. Dunson, 35 Tex. 435.

W. Va.—Crotty v. Eagle, 35 W. Va. 143, 13 SE 59.

32. Kinnan v. Wight, 39 N. J. Eq. 501; Russell v. Lane, 1 Barb. (N. Y.) 519; Matter of Morton, 7 Misc. 343, 28 NYS 82; King v. Todd, 15 NYS 156, 21 NYCivProc 114, 27 AbbNCas 149.

33. Willcox v. Smith, 26 Barb. (N. Y.) 316; Russell v. Lane, 1 Barb. (N. Y.) 519; Townsend v. New York L. Ins. Co., 4 NYCivProc 398; Gansevoort v. Nelson, 6 Hill (N. Y.) 389.

34. Seymour v. Goodwin, 68 N. J. Eq. 189, 192, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134]; Matter of Dorland, 100 Misc. 236, 166 NYS 616.

"The provision of the statute requiring the claims to be presented under oath was intended primarily for the protection of the executor or administrator, and where the estate was solvent the executor could, if he chose, waive this provision and recognize or pay any claim which he knew, or became satisfied was just, without requiring the oath of the creditor." Seymour v. Goodwin, supra.

35. Terrell v. Roland, 86 Ky. 67, 4 SW 825, 9 KyL 258. See also Overly v. Overly, 1 Metc. (Ky.) 117 (where the personal representative, acting in good faith, has paid an unverified claim, his failure to require an affidavit being a mere oversight, he may subsequently require an affidavit to be made and may thus be entitled to credit for the payment even after an order settling his accounts have been reversed on appeal).

[a] **In Mississippi** (1) under the earlier statutes the law was as stated in the text. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549; Sims v. Sims, 30 Miss. 333; Smith v. Smith, 4 Miss. 216. (2) But the later statutes expressly forbid the representative to pay unverified claims. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRANS 549.

[b] **In New Jersey** (1) it was formerly stated that no recognition of a claim by the personal representative or by the probate court could dispense with the requirement that claims be presented under oath and within the statutory period. Lewis v. Champion, 40 N. J. Eq. 959; Gould v. Tingley, 16 N. J. Eq. 501. (2) But it had been decided that, where the estate was solvent, the representative could pay debts which he was satisfied were just, even though the claims were not verified. Kinnan v. Wight, 39 N. J. Eq. 501. (3) It has since been provided by statute that, if the personal representative in good faith pays a claim not presented under oath, and the claim is proved to have been a just one, he shall have allowance for the

cially if the claim has been passed by the probate court;[36] and, where an executor who is also residuary legatee gives bond to pay debts and legacies, he may settle and pay claims at his discretion, subject to objections from no one except the sureties on his bond.[37] In the absence of any statute so providing, a claim need not as a rule be verified by the oath or affidavit of the claimant,[38] although in a few states local practice, independent of any express legislative enactment, requires that such claims be supported by affidavit.[39]

Jurisdictional character of requirement. It has been held that verification of the claim is essential to the jurisdiction of the court,[40] and an allowance of a claim which was not accompanied by the required affidavit of its justice, etc., is without force.[41] But there is also authority for the view that such requirement is not jurisdictional,[42] and it has been held that the want of the statutory affidavit may be supplied by the claimant's oath as a witness in open court,[43]

The original affidavit must accompany the claim and it is not sufficient to attach a copy thereof.[44]

An additional affidavit of a person other than the claimant, who states that he believes the claim to be just and gives the reason for his belief, is sometimes required where the demand is other than an obligation signed by decedent or a judgment.[45] But if the executor or administrator is the only competent witness, his refusal to make the affidavit dispenses with further proof, except the claimant's own oath.[46]

It will be presumed on appeal that a claim presented to the court for allowance was properly verified, the record being silent with regard thereto.[47]

[§ 995] **bb. What Claims Must Be Verified—(aa) In General.** As a general rule all claims and demands against the estate are required to be verified,[48] even though they are not yet due,[49] or an action thereon was pending at the time of decedent's death.[50] The statutes requiring the verification of claims do not, however, apply to demands for which the estate is not directly or properly liable, such as claims arising after decedent's death and on obligations contracted by the personal representative,[51] and it has been considered that contingent or indeterminate claims need not be verified.[52] It has been held that the claim of a bank seeking to enforce its statutory lien on the stock of a deceased debtor need not be accompanied by the statutory affidavit,[53] but an affidavit has been held necessary to authenticate a claim arising out of an alleged breach of trust by decedent.[54]

[§ 996] **(bb) Claims Reduced to Judgment.** It has been held that unless the statute expressly so provides, a claim based on a judgment need not be verified,[55] and that, where a judgment has been

payment if there is sufficient assets to pay the debts of equal degree in full, and that, if the assets are not sufficient, the representative shall be allowed for the pro rata amount which the creditor would have been entitled to receive if the claim had been presented duly verified. Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833 mem, 66 A 1134 mem (aff 74 N. J. Eq. 856 mem, 72 A 123)]; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

36. Semmes v. Magruder, 10 Md. 242.

[a] **Claim of representative.**—This rule applies where the representative seeks to retain for the amount of his own claim. Owens v. Collinson, 3 Gill & J. (Md.) 25.

37. Wheeler v. Hatheway, 58 Mich. 77, 24 NW 780; Durfee v. Abbott, 50 Mich. 278, 15 NW 454.

38. Marsh v. Dooley, 52 Cal. 232; Probate Judge v. Hairston, 5 Miss. 242.

[a] **Presentation to representative.**—Verification of a claim is required only when presentation is made by filing the claim or a statement thereof in the office of the probate judge; a valid presentation may be made to the representative personally without verification by affidavit or otherwise. Peevy v. Farmers', etc., Bank, 132 Ala. 82, 31 S 466 [foll Nicholas v. Sands, 136 Ala. 267, 33 S 815]; Rayburn v. Rayburn, 130 Ala. 217, 30 S 365; Nicholas v. Sands, 136 Ala. 267, 33 S 815; Jones v. Pharr, 3 Ala. 283.

39. Hahnlin's App., 45 Pa. 343; Brown v. Brown, 45 S. C. 408, 23 SE 127; Westfield v. Westfield, 13 S. C. 482; Ex p. Hanks, 13 S. C. Eq. 231.

40. Bicks v. Tanzey, 181 Mo. 515, 80 SW 902; Burnett v. McCluey, 78 Mo. 676; Hargadine v. Van Horn, 72 Mo. 370; Dorn v. Parsons, 56 Mo. 601; Merchants' Bank v. Ward, 45 Mo. 310; Perry v. Alford, 5 Mo. 503; Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897; Williams v. Gerber, 75 Mo. A. 18; Million v. Ohnsorg, 10 Mo. A. 432.

41. Whitmire v. Powell, (Tex. Civ. A.) 117 SW 433.

42. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; Gutierrez v. Scholle, 12 N. M. 328, 78 P 50.

[a] **Allowance merely erroneous.**—The judgment of a probate court allowing a claim against an estate in the form of a note which is not sworn to is erroneous, but not void for want of jurisdiction, although the statute requires all claims to be sworn to. Gutierrez v. Scholle, 12 N. M. 328, 78 P 50.

43. Terrell v. Rowland, 86 Ky. 67, 4 SW 825, 9 KyL 258; Overly v. Overly, 1 Metc. (Ky.) 117; Kincheloe v. Gorman, 29 Mo. 421.

[a] **Supplying defect by oral oath.**—Under the statute allowing claims to be verified either by affidavit or by oath in open court, if a written affidavit is filed from which a requisite fact is omitted, it may be supplied by an oral oath which need not appear of record. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

44. Ash v. Clark, 32 Wash. 390, 73 P 351.

45. Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928; Dewhurst v. Shepherd, 102 Ky. 239, 43 SW 253, 19 KyL 1260; Nutall v. Brannin, 5 Bush (Ky.) 11; Trabue v. Harris, 1 Metc. (Ky.) 597; Hansford v. Parrish, 7 KyL 94.

[a] **Affidavits held sufficient.**—A claim for services performed at irregular times during several years, so that it was difficult to specify what they were or when they were performed, was sufficiently supported by affidavits stating that the persons making them knew that the claimant performed services for decedent, that they believe his claim was just and correct, giving their reasons, where there was ample evidence that the claimant did perform services for the decedent for which he had not been paid, and for which the decedent intended to pay him, since the claim was of such a nature that no one could positively swear that he knew various items were just and correct. Lancaster v. O'Brien, 136 Ky. 589, 124 SW 854.

[b] **Insufficient statement of reason.**—An affidavit by an employee of a claimant on an account giving as the only reason for his belief as to the correctness of the account that he had examined complainant's books and found that the account against decedent appeared on the books as on the copy of the account to which his affidavit was attached is insufficient. Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225.

46. Trabue v. Harris, 1 Metc. (Ky.) 597.

47. Wood v. Flanery, 89 Mo. A. 632.

43. Brasher v. Lyle, 13 Ala. 524; Walker v. Byers, 14 Ark. 246; Nutall v. Brannin, 5 Bush (Ky.) 11.

[a] **Claim of surety for reimbursement.**—The claim of a surety on the note of a decedent to be reimbursed for money paid thereon should be verified as a claim for money on account; a verification of the note is insufficient. Nutall v. Brannin, 5 Bush (Ky.) 11.

49. Cassatt v. Vogel, 12 Mo. A. 323 [aff 94 Mo. 646, 8 SW 169].

50. Worthley v. Hammond, 13 Bush (Ky.) 510; Matthews v. Jones, 2 Metc. (Ky.) 254.

Claims reduced to judgment see infra § 996.

51. Hayden v. Hayden, 105 Ark. 95, 150 SW 415; Crenshaw v. Duff, 113 Ky. 912, 69 SW 962, 24 KyL 718; Lucking v. Gegg, 12 Bush (Ky.) 298; Berry v. Graddy, 1 Metc. (Ky.) 553; Eggen v. Huston, 11 KyL 235; Polly v. Covington, 10 KyL 361.

[a] **Claims for recovery of usury paid to the administrator** need not be verified. Crenshaw v. Duff, 113 Ky. 912, 69 SW 962, 24 KyL 718.

52. Hume v. Perry, (Tex. Civ. A.) 136 SW 594.

53. McIlroy Banking Co. v. Dixon, 66 Ark. 327, 50 SW 868.

54. Green v. Brooks, 25 Ark. 318.

[a] **Defalcation by bank cashier.**—McIlroy Banking Co. v. Dickson, 66 Ark. 327, 50 SW 868.

55. Goodrich v. Fritz, 9 Ark. 440; Marsh v. Dooley, 52 Cal. 232; Cullerton v. Mead, 22 Cal. 95; Howe v. Brown, 287 Ill. 532, 123 NE 46.

[a] **Death pending appeal.**—Where judgment is obtained against a party, and pending the appeal he dies, but

rendered against an executor or administrator in his representative capacity, the judgment,[56] or duly certified copy thereof,[57] constitutes a sufficient proof or authentication of the claim on which the judgment is founded. But in some jurisdictions a judgment rendered against decedent in his lifetime must be verified in the same manner as other claims.[58]

Foreign judgment. Whatever may be the rule as to a domestic judgment, a judgment allowing a claim against the estate in a foreign administration must, when exhibited against the estate in the domestic administration, be accompanied by the affidavit required by the law of the forum.[59]

[§ 997] **(cc) Claims Secured by Mortgage.** It has been held that a mortgage is not a "claim for money" within the meaning of a statute specifying the manner in which such claims shall be verified.[60]

[§ 998] **(dd) Claims of State or Municipality.** It has been held that a statute requiring verification of claims does not, in the absence of an expressed intention, include claims of the state or its agents;[61] but on the other hand it has been held that claims of a municipality for unpaid taxes must be verified by the statutory affidavit,[62] except where the taxes have accrued after decedent's death.[63]

[§ 999] **(ee) Claims of Personal Representative.** In a number of jurisdictions the statutes require that a claim asserted by the personal representative as a creditor shall be supported by his affidavit to the effect that the claim is justly due and unpaid and that there are no offsets, etc.,[64] and the affidavit must, like the affidavit of any other creditor, substantially conform to the statute.[65]

[§ 1000] **(ff) Amended Claims.** Where an original statement of a claim is accompanied by the proper affidavit, an amended or additional statement thereafter filed by leave of court need not be supported by another affidavit.[66]

[§ 1001] **(b) By Whom Affidavit Made.** Ordinarily the affidavit should be made by the creditor himself,[67] or at least by someone having a legal or equitable interest in the claim asserted,[68] and, unless otherwise provided by statute, an affidavit by a third person, such as the creditor's agent, or attorney,[69] or husband,[70] is not sufficient even when based upon his own knowledge.[71] It has also been held that where a third person has paid a debt of decedent and, without showing by independent proof that the payment was made at decedent's request, seeks reimbursement from the estate, his own affidavit in support of his claim is not sufficient but he must obtain the affidavit of the original creditor.[72] The statutes in some states, however, provide that the affidavit may be made by a third person who is acquainted with the facts to be sworn to and who is otherwise competent to testify,[73] or by the agent or attorney of the claimant.[74]

Joint and several claims. It has been held that a joint claim may be sufficiently verified by the affidavit of one of the joint claimants;[75] but it is otherwise where the claim is due to two or more persons severally.[76]

Claim of partnership. It has been held that,

the judgment is affirmed and afterward revived against his administrator and certified to the probate court for classification and allowance, the statutory affidavit is not a prerequisite to its allowance in the probate court. Goodrich v. Fritz, 9 Ark. 440.

56. Smith v. Smith, 4 Miss. 216; Crane v. Moses, 13 S. C. 561.

57. Bradwell v. Wilson, 158 Ill. 346, 42 NE 145 [rev 57 Ill. A. 162]; Darling v. McDonald, 101 Ill. 370.

58. Bayless v. Powers, 62 Iowa 601, 17 NW 907; Scroggs v. Tutt, 20 Kan. 271; Curry v. Bryant, 7 Bush (Ky.) 301.

[a] **Affidavit of freedom from usury.** — A judgment recovered against a decedent upon a note will not constitute a valid claim against his estate, unless an affidavit is filed showing the claim to be free from usury. Owsley v. Boles, 124 Ky. 775, 99 SW 1157, 30 KyL 1016.

59. Smith v. Goodrich, 167 Ill. 46, 47 NE 316 [rev 67 Ill. A. 418].

60. Simpson v. Reily, 31 Tex. 298. Contra Robertson v. Paul, 16 Tex. 472.

61. Arnold v. Com., 80 Ky. 135, 3 KyL 623, 11 Ky. Op. 515.

62. Graves v. Georgetown, 154 Ky. 207, 157 SW 33; Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 327; Leach v. Kendall, 13 Bush (Ky.) 424.

63. Polly v. Covington, 10 KyL 361.

64. Cal.—Hildebrandt's Est., 92 Cal. 433, 28 P 486; Macoleta v. Packard, 14 Cal. 178.

Ind.—Gibbs v. Ely, 13 Ind. A. 130, 41 NE 351.

Ky.—Hood v. Maxwell, 66 SW 276, 23 KyL 1791.

Miss.—Persons v. Griffin, 112 Miss. 643, 73 S 624.

N. Y.—Terry v. Dayton, 31 Barb. 519; Matter of Clapsaddle, 4 Misc. 355, 24 NYS 313, Pow. Surr. 111; Clark v. Clark, 8 Paige 152, 35 AmD 676; Williams v. Purdy, 6 Paige 166; Wood v. Rusco, 4 Redf. Surr. 380.

Pa.—McCann's Est., 28 Pa. Co. 46.

Tex.—Puckett v. McCall, 30 Tex. 457.

[a] **Funds of estate not an "offset."**—The fact that the representative holds in his official capacity more money than the amount of his claim against the estate does not preclude his making the affidavit alleging "that there are no offsets" to his claim. Hildebrandt's Est., 92 Cal. 433, 28 P 486.

65. Matter of Clapsaddle, 4 Misc. 335, 24 NYS 313, Pow. Surr. 111.

66. Clark v. Bomford, 20 Ark. 440; Pence v. Young, 22 Ind. A. 427, 53 NE 1060; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

[a] **Illustration.**—Where a creditor, who presented to the executor a properly authenticated account for services performed, had rendered to the testator in his lifetime an account for the same services but for a smaller amount, upon rejection of the verified account presented to the executor, the smaller account might be allowed without further verification, and even if verification was necessary the objection came too late after final judgment. Clark v. Bomford, 20 Ark. 440.

67. Ark.—Marshall v. Green, 24 Ark. 410; Beirne v. Imboden, 14 Ark. 237.

Miss.—Saunders v. Stephenson, 94 Miss. 676, 47 S 783; McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

N. Y.—Williams v. Purdy, 6 Paige 166.

Or.—Zachary v. Chambers, 1 Or. 321.

S. C.—Westfield v. Westfield, 13 S. C. 482.

68. Cook v. Davis, 12 Ala. 551.

[a] **The personal representative** of a deceased creditor (1) is of course the proper person to make the affidavit in support of a claim in favor of the deceased creditor's estate. Davis v. Browning, 91 Cal. 603, 27 P 937; Deringer v. Deringer, 11 Del. 64. (2) Where the creditor's administrator is a corporation, an affidavit by the proper officer thereof is as valid as an affidavit made by any other administrator. Deringer v. Deringer, supra.

69. Ark.—Beirne v. Imboden, 14 Ark. 237.

Cal.—Macoleta v. Packard, 14 Cal. 178.

Miss.—Persons v. Griffin, 112 Miss. 643, 73 S 624; Saunders v. Stephenson, 94 Miss. 676, 47 S 783.

Or.—Zachary v. Chambers, 1 Or. 321.

S. C.—Westfield v. Westfield, 13 S. C. 482.

[a] **Affidavit by agent or attorney sufficient.**—McIntosh v. Greenwood, 15 Tex. 116; Hansell v. Gregg, 7 Tex. 223.

70. McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

[a] **An affidavit by the creditor's husband as her agent** is fatally defective, notwithstanding any excuse therefor. Saunders v. Stephenson, 94 Miss. 676, 47 S 783.

71. Beirne v. Imboden, 14 Ark. 237.

72. McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

73. Mason v. Bull, 26 Ark. 164.

74. Ala.—Erwin v. McGuire, 44 Ala. 499; Planters', etc., Mobile Bank v. Smith, 14 Ala. 416.

Ark.—Orene Parker Co. v. Emerson, 91 Ark. 256, 120 SW 968; Mason v. Bull, 26 Ark. 164.

Cal.—Doolittle v. McConnell, 174 P 305; Davis v. Browning, 91 Cal. 603, 27 P 937; Perkins v. Onyett, 86 Cal. 348, 24 P 1024.

Ind.—Hanna v. Fisher, 95 Ind. 383.

Ky.—Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928; Howard v. Leavell, 10 Bush 481.

Mo.—Peter v. King, 13 Mo. 143; Dawson v. Wombles, 104 Mo. A. 272, 78 SW 823.

S. D.—Detroit Automatic Scale Co. v. Torgeson, 36 S. D. 564, 156 NW 86.

Tex.—Heath v. Garrett, 46 Tex. 23.

75. Ashley v. Gunton, 15 Ark. 415; Walker v. Byers, 14 Ark. 246; Dubbs v. Haworth, 102 Kan. 603, 171 P 624; Cecil v. Negro Rose, 17 Md. 92.

76. Cecil v. Negro Rose, 17 Md. 92.

where the claim is in favor of a partnership, all the acting or managing partners must join in making probate of the claim, and therefore a probate by only one of the members of the firm is insufficient unless it appears that the other members are not active partners.[77]

Assigned claims. It is sometimes required by statute that, where a claim has been assigned after the death of the decedent, both the assignor and the assignee shall join in the verification;[78] but where a claim is properly authenticated when exhibited to the executor, and subsequently it is assigned, it is not necessary that the assignee verify the claim.[79]

A claim of a corporation must necessarily be verified by an agent,[80] and a statute providing that, when the affidavit is made by a person other than the claimant, the reason therefor must be set forth does not apply when the claimant is a corporation and the affidavit is made by an officer thereof.[81] The statutes sometimes require verification by a designated officer or officers,[82] and in such case an affidavit by another officer is insufficient.[83] In the absence of any such statutory designation the affidavit is properly made by that officer or agent who is most familiar with the facts relating to the debt.[84]

The claim of a minor may be authenticated by his next friend.[85]

[§ 1002] **(c) Who May Take Affidavit—aa. In General.** Under a general statutory authority to take affidavits a clerk of court may take the affidavit required by statute to accompany claims against decedents' estates,[86] and commissioners of deeds appointed by the governor to act in other states have authority to take the affidavits necessary to support claims against decedent's estates.[87] A commissioner of a federal court has no authority to take the affidavit.[88]

[§ 1003] **bb. Necessity for Showing Officer's Authority.** An affidavit made before a magistrate or other officer of another state must be accompanied by the proper authentication of his official character and authority,[89] but it is otherwise as to commissioners of deeds appointed by the governor to act in other states, as they are officers of the state by whose authority they are appointed, and their official character and authority are matters of which the courts of that state will take judicial notice.[90]

[§ 1004] **(d) Form and Sufficiency of Affidavit**[91]**—aa. In General.** The statutes usually either expressly require or clearly contemplate that the oath supporting a claim shall be in the form of an affidavit in writing.[92] The affidavit must show that the demand is a just and subsisting demand,[93] and substantially comply with all the material requirements of the statute,[94] and all the material allegations required by the statute, or their

77. Gregory v. Bailey, 4 Del. 256.

78. Stone v. Kaufman, 25 Ark. 186.

[a] **Such a requirement is not applicable where** (1) a claim is assigned, after the death of the creditor, by the distributees of his estate. Winningham v. Holloway, 51 Ark. 385, 11 SW 579 ("It is clear that the statutes refer to such assignors as were authorized to collect the debt; for the affidavit required is to the effect 'that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded (naming it) is justly due.' The administrator of Ethridge is not required to make the affidavit to the claim in controversy, because he was not the assignor; and the distributees are the assignors but were not required to make it because they were not authorized to collect and are not presumed to know what was paid. The statute fails to make any provision for an authentication by an assignor in a case of this kind"). (2) Neither does it apply where a debtor's note was in custodia legis at the time of his death and was subsequently sold by the court. Triplett v. Attwood, 133 Ark. 181, 202 SW 817.

79. Collier v. Trice, 79 Ark. 414, 96 SW 174.

80. Orene Parker Co. v. Emerson, 91 Ark. 256, 120 SW 968.

81. Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 516, 99 P 731 ("This affidavit [by the treasurer] is not made by a third person; it is made by the corporation itself, through one of its authorized officers, which, of course, is the only way a corporation can act").

82. State v. Collins, 16 Ark. 32; Fidelity Ins., etc., Co. v. Niven, 11 Del. 64.

[a] **Cashier or treasurer.**—Lanigan v. North, 69 Ark. 62, 63 SW 62.

[b] **Corporation acting as administrator.**—A statute authorizing the verification of a claim "due" to a corporation to be made by certain officers of the corporation authorizes the verification of a claim due a corporation as administrator to be made by such officers. Fidelity Ins., etc., Co. v. Niven, 11 Del. 64.

83. Lanigan v. North, 69 Ark. 62, 63 SW 62; Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225.

[a] **Illustration.**—Under the statute the affidavit of a nonresident corporation claimant may be made before a notary at its chief office or principal place of business in the state of its residence by its chief officer, or, in his absence from the county of its principal place of business, by its treasurer or other authorized agent, the affidavit in the latter case to show the official title of the chief officer, his absence from the county, and authority of the treasurer or other agent to make the affidavit, and such an affidavit which does not purport to have been made by the corporation's chief officer, or state that he was absent from the county, or that the corporation's treasurer, in the absence of its chief officer from the county, was authorized to make the affidavit, is insufficient. Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225.

84. Western States L. Ins. Co. v. Lockwood, 166 Cal. 185, 135 P 496; Cox v. Higginbotham, 76 SW 1079, 25 KyL 1057.

[a] **Secretary in charge of books** may verify. Western States L. Ins. Co. v. Lockwood, 166 Cal. 185, 135 P 496.

85. Reed v. Ryburn, 23 Ark. 47.

86. Lafferty v. Lafferty, 10 Ark. 268; Etter v. Dugan, 1 Tex. Unrep. Cas. 175.

[a] **The clerk's authority is not excluded by** a statute authorizing judges, justices of the peace, and notaries public to take such affidavits. Lafferty v. Lafferty, 10 Ark. 268.

87. Smith v. Van Gilder, 26 Ark. 527; Kaufman v. Stone, 25 Ark. 336; Stone v. Kaufman, 25 Ark. 186; Hailey v. McGee, 19 Tex. 107; Greenwood v. Woodward, 18 Tex. 1.

88. Winder v. Hendricks, 56 Cal. 464.

89. Alter v. Kinsworthy, 30 Ark. 756.

90. Smith v. Van Gilder, 26 Ark. 527.

[a] **The certificate and official seal of the commissioner** are sufficient evidence of his official character. Kaufman v. Stone, 25 Ark. 336.

91. Additional affidavit under Kentucky statute see supra § 994.

92. Lay v. Clark, 31 Ala. 409; Anderson v. Cochran, 93 Tex. 583, 57 SW 29; Shelton v. Berry, 19 Tex. 154, 70 AmD 326.

93. Cook v. Davis, 12 Ala. 551.

[a] **The affidavit must show something for which the estate is responsible** as a money demand or as ascertained damages. Cook v. Davis, 12 Ala. 551.

[b] **Insufficient affidavit.**—An affidavit to an account merely stating that the account is a correct inventory of the goods purchased was held insufficient. Lay v. Clark, 31 Ala. 409.

94. Ala.—Dennis v. Coker, 34 Ala. 611; Pickle v. Ezzel, 27 Ala. 623.

Ark.—Hayden v. Hayden, 105 Ark. 95, 150 SW 415.

Cal.—Perkins v. Onyett, 86 Cal. 348, 24 P 1024.

Del.—Lolley v. Needham, 1 Del. 86.

Ky.—Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225; Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928; Dewhurst v. Shepherd, 103 Ky. 239, 43 SW 253, 19 KyL 1260; Leach v. Kendall, 13 Bush 424; Trabue v. Harris, 1 Metc. 597; Smithson v. Baker, 9 KyL 494; Hayden v. Kale, 7 KyL 375; Hansford v. Parrish, 7 KyL 94.

Md.—Cecil v. Negro Rose, 17 Md. 92; Dyson v. West, 1 Harr. & J. 567.

Miss.—Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549; McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

Okl.—Westinghouse Electric, etc., Co. v. Robinson, 42 Okl. 754, 142 P 1105.

Tex.—Gillmore v. Dunson, 35 Tex. 435; Walters v. Prestidge, 30 Tex. 65; Whitmire v. Powell, (Civ. A.) 117 SW 433; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

Sask.—In re Mussetter, 1 Sask. L. 369.

[a] **Such compliance must appear on the face of the affidavit;** a mere statement in the affidavit that af-

equivalent, must be incorporated in the affidavit.[95] Under various statutes it has been held necessary that the affidavit should show that the sum claimed is justly due,[96] state that the claim is not usurious,[97] state that there is no offset or discount against the claim,[98] disclose all the credits,[99] state that all legal payments, credits, and offsets have been allowed[1] or that nothing has been paid on the demand except what is credited thereon,[2] show that nothing has been paid, except what is credited,[3] and state that the creditor had not received any security.[4] A substantial compliance with the statute is ordinarily held sufficient, and immaterial errors and omissions or slight departures from the strict statutory form will be disregarded,[5] and hence, although the statute requires that the verified statement filed shall set forth the credits and deductions, if it does not expressly require succinctness and definiteness in stating them, a simple statement of them is sufficient,[6] and may be contained either in the statement of the claim or in the affidavit supporting it.[7] An affidavit is not invalidated by an erroneous statement of a fact not required to be stated,[8] leaving a blank space where the amount of the claim should appear, if such amount can be ascertained from the record as from the commissioner's report on file in the case,[9] or the use of the word "claimant" instead of "affiant," where it appears from the affidavit that the same person is both claimant and affiant.[10] Neither does the fact that the affidavit to a claim in favor of a partnership fails to show that the affiant is a member of the firm render payment of the claim improper, where such person is in fact a member.[11] The statutory affidavit reciting that the claim is "justly due" may properly be used to support a claim which is payable at a future day or which, while absolute in its obligation, is payable upon the happening of some contingency, the word "due" in the affidavit being given the meaning of "owing."[12] A claimant is not required to specify in his affidavit an independent demand which is known

fiant appeared and made oath "according to law" is not sufficient. Evans v. Bonner, 2 Harr. & M. (Md.) 377.

95. Ky.—Dewhurst v. Shepherd, 102 Ky. 239, 43 SW 253, 19 KyL 1260.

Md.—Cecil v. Negro Rose, 17 Md. 92.

Miss.—Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549.

N. Y.—Matter of Clapsaddle, 4 Misc. 355, 24 NYS 313.

Tex.—Walters v. Prestidge, 30 Tex. 65; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

[a] **Where there are two affidavits** made on different dates, an omission of a substantial averment in the later one is not supplied by the earlier one. Dyson v. West, 1 Harr. & J. (Md.) 567.

96. Hayden v. Hayden, 105 Ark. 95, 150 SW 415; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

[a] **"Justly due and owing"** is the euqivalent of "justly due and wholly unpaid." Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

97. Owsley v. Boles, 124 Ky. 775, 99 SW 1157, 30 KyL 1016; Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549.

[a] **This is necessary although** it may appear from an inspection of the claim that it is not usurious. Cudahy Packing Co. v. Miller, 103 Miss. 435, 60 S 574.

[b] **The administrator need not pay** a judgment based on a usurious note and subsequently sue to recover back the money. Owsley v. Boles, 124 Ky. 775, 99 SW 1157, 30 KyL 1016.

98. Gee Chong Pong v. Harris, (Cal. A.) 175 P 806; Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928.

[a] **"An affidavit that there is no legal offset or counterclaim** against the claim does not comply with the statute. The word 'legal' is not in the statute, and the insertion of this word renders the affidavit only a statement of the belief of the affiant as to the legality of an offset against it. The word 'counterclaim' is not synonymous with 'discount.' 'Discount' is any deduction, while 'counterclaim' is ordinarily used to signify some claim against the debt. If the charges are more than reasonable, or if the consideration of the contract has partly failed, there would be a discount against the claim, although not a counterclaim in the ordinary use of the term." Spradlin v. Stanley, 124 Ky. 701, 703, 99 SW 965, 30 KyL 928.

[b] **"Off-set" does not include "discount."**—"The plaintiff stated in his affidavit that his account against the decedent 'was just and due him, and was wholly unpaid, and there was no just off-set against the same known to him, and there was no usury contained therein.' In addition to the statement contained in this affidavit, the statute requires the claimant to state that there is 'no discount against the demand.' . . . Unless, therefore, the term set-off is sufficiently comprehensive to embrace discounts as well as set-offs, or unless the affidavit which was made contains some other expression which necessarily excludes the idea of the existence of any discount against the debt, it cannot be regarded as being sufficient." Trabue v. Harris, 1 Metc. (Ky.) 597, 598.

99. Lolley v. Needham, 1 Del. 86 (it is not sufficient to refer generally to the books of decedent).

1. Gillmore v. Dunson, 35 Tex. 435 (an affidavit alleging merely that all payments and credits have been allowed is insufficient).

2. Eddy v. Loyd, 90 Ark. 340, 119 SW 264.

[a] **Sufficient affidavit.**—An affidavit declaring that the account is "just and true," and that the amount named "is justly due after all just credits have been given," is sufficient, under Kirby Dig. § 114, providing that the affidavit shall state that nothing has been paid on the demand, except what is credited thereon, and that the sum demanded is due. Eddy v. Loyd, 90 Ark. 340, 119 SW 264.

3. Hayden v. Hayden, 105 Ark. 95, 150 SW 415; Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

[a] **Insufficient affidavit.** — Under the statute requiring the affidavit to state that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to it to the knowledge of affiant, an affidavit that the claim is due and unpaid, and that there are no offsets against it and no credits thereon, is insufficient. Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

4. Smoot v. Bunbury, 1 Harr. & J. (Md.) 136.

5. Ark.—Eddy v. Loyd, 90 Ark. 340, 119 SW 264; Smith v. Van Gilder, 26 Ark. 527; State v. Collins, 16 Ark. 32; Beirne v. Imboden, 14 Ark. 237.

Cal. — Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 P 951; Guerian v. Joyce, 133 Cal. 405, 65 P 972; Griffith v. Lewin, 129 Cal. 596, 62 P 172; Davis v. Browning, 91 Cal. 603, 27 P 937; Hall v. San Francisco Super. Ct., 69 Cal. 79, 10 P 257; Gee Chong Pong v. Harris, (A.) 175 P 806.

Ind.—Smith v. Denman, 48 Ind. 65; Story v. Story, 32 Ind. 137.

Ky.—Lancaster v. O'Brien, 136 Ky. 589, 124 SW 854; Beddow v. Wilson, 90 SW 228, 28 KyL 661; Sherley v. Sherley, 17 SW 628, 13 KyL 565.

Miss.—Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

Mo.—Merchants' Bank v. Ward, 45 Mo. 310 [dist Peter v. King, 13 Mo. 143]; Hays v. Miller, 189 Mo. A. 72, 173 SW 1096; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053; Lenk Wine Co. v. Caspari, 11 Mo. A. 382.

Mont.—Dorais v. Doll, 33 Mont. 314, 83 P 884; Empire State Min. Co. v. Mitchell, 29 Mont. 55, 74 P 81.

N. D.—Patrick v. Austin, 20 N. D. 261, 127 NW 109.

Okl.—Westinghouse Electric, etc., Co. v. Robinson, 42 Okl. 754, 142 P 1105.

S. D.—In re Roberts, 170 NW 580; In re Hawgood, 37 S. D. 565, 159 NW 117.

Tex.—Crosby v. McWillie, 11 Tex. 94; Dowell v. Collin County Nat. Bank, 59 Tex. Civ. A. 244, 126 SW 29.

[a] **Affidavits held sufficient.**—Guerian v. Joyce, 133 Cal. 405, 65 P 972; Hall v. San Francisco Super. Ct., 69 Cal. 79, 10 P 257; Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511; Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189; Westinghouse Electric, etc., Co. v. Robinson, 42 Okl. 754, 142 P 1105; Dowell v. Collin County Nat. Bank, 59 Tex. Civ. A. 244, 126 SW 29.

[b] **Affidavit by officer of corporation held sufficient.**—State v. Collins, 16 Ark. 32.

[c] **A verified answer** containing the proper statutory averments is a sufficient affidavit of claim against the estate of a decedent. Beddow v. Wilson, 90 SW 228, 28 KyL 661.

6. Miller v. Eldridge, 126 Ind. 461, 27 NE 132.

7. Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

8. Cochran v. Germania Nat. Bank, 8 KyL 790.

9. Thompson v. Bailey, 1 KyL 321.

10. Warren v. McGill, 103 Cal. 153, 37 P 144; Davis v. Browning, 91 Cal. 603, 27 P 937; Gee Chong Pong v. Harris, (Cal. A.) 175 P 806; Dorais v. Doll, 33 Mont. 314, 83 P 884.

[a] **Where the affidavit is made by an agent** of claimant, such an error is fatal. Perkins v. Onyett, 86 Cal. 348, 24 P 1024 (where the affidavit stated that there were no offsets "to the knowledge of the claimant" instead of "to the knowledge of the affiant").

11. Davis v. Blumberger, 107 Miss. 432, 65 S 503.

12. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 P 951; Cassatt v. Vogle, 12 Mo. A. 323 [aff 94 Mo. 646, 8 SW 169]; In re Roberts,

to the personal representative and which is conceded to be due from claimant to the estate, but which the administrator may or may not plead as a counterclaim at his option.[13] Irregularities in the affidavit may be waived by the representative's failure to make seasonable and specific objections thereto,[14] and after approval and allowance of the claim the affidavit cannot be impeached, except in a direct proceeding.[15]

The fact that the claimant is a relative of decedent does not necessitate a stronger verification of his claim than is required of any other creditor.[16]

An affidavit made in the debtor's lifetime is clearly insufficient.[17]

A mistake in the name of decedent will, as in the statement of a claim, render the affidavit defective.[18]

[§ 1005] **bb. Showing Knowledge of Affiant.**[19] Where the statute requires the affidavit to be made by claimant or some other person who knows that the claim is correct and that it is due, the affidavit must be made upon the affiant's knowledge, and if made "to the best of his knowledge, information, and belief" it is not sufficient.[20] But it has been held that the affidavit need not expressly show that the affiant speaks from his own knowledge, or show the source of his knowledge.[21]

[§ 1006] **cc. Affidavit by Person Other than Claimant.** It has been held that an affidavit by the agent or attorney of claimant need not show on its face the fact that the affiant is acting as agent or attorney,[22] if this fact is known to the personal representative,[23] although it is, of course, otherwise if the statute requires this fact to be disclosed.[24] Some of the statutes allowing the affidavit to be made by a person other than claimant require that such an affidavit shall set forth the reason why it is not made by claimant himself,[25] and shall state that the affiant is cognizant of the facts contained therein,[26] but in the absence of the latter requirement the fact of the affiant's knowledge or means of knowledge need not be recited in the affidavit but may be shown by evidence aliunde.[27]

[§ 1007] **dd. Signature.** Unless the statute or a rule of court requires the affidavit to be signed by the affiant, an affidavit otherwise sufficient is not rendered invalid by the omission of the affiant's signature;[28] but where the statute requires the affidavit to be signed by the party making it, the signature of the affiant is essential to the validity of the presentation.[29]

[§ 1008] **ee. Amendment.** It is usually considered that a defect in an affidavit supporting a claim may be cured by amendment[30] before the expiration of the time for the presentation and verification of claims.[31] But a defective affidavit cannot be amended under a statute not enacted until the period for filing or presenting claims has expired,[32] and where a claim has not been probated in the manner required by law, so that its registration does not stop the running of the statute, the probation cannot be amended on an application

(S. D.) 170 NW 580; Barto v. Stewart, 21 Wash. 605, 59 P 480.

13. Osborne v. Parker, 66 App. Div. 277, 72 NYS 894.

14. Dubbs v. Haworth, 102 Kan. 603, 171 P 624; Morgan v. Bartlette, 3 Oh. Cir. Ct. 431, 2 Oh. Cir. Ct. 244; Heath v. Garrett, 46 Tex. 23; Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Etter v. Dugan, 1 Tex. Unrep. Cas. 175.

[a] **Where the objection is too obscure** to point out any specific defect as being relied on, the defect will be deemed waived. Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

15. Cannon v. McDaniel, 46 Tex. 303.

16. Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265.

17. Wilkerson v. Gordon, 48 Ark. 360, 361, 3 SW 183 ("The requirement of the statute for authenticating claims . . . is not fulfilled by an affidavit made at some period in the lifetime of the decedent, to the effect that he was justly indebted to the affiant in a sum stated, and that nothing had been paid or delivered toward the satisfaction of the demand. Such an affidavit might be true when made, but not true if applied to the facts existing at the date of the debtor's death").

18. Beene v. Collengerger, 38 Ala. 647 (Jesse Beene instead of Benjamin Beene).

19. Affidavit by person other than claimant see infra § 1006.

20. Pickle v. Ezzell, 27 Ala. 623 [foll Dennis v. Coker, 34 Ala. 611].

21. Sherley v. Sherley, 17 SW 628, 629, 13 KyL 565 ("Undoubtedly the witness must speak from his own knowledge; but if he says the claim is just and correct, this is equivalent to saying that he knows it is so").

[a] **Where the claimant is a partnership,** an affidavit which does not show that the affiant is a member of the firm or is acquainted with the facts sworn to is insufficient. Lanigan v. North, 69 Ark. 62, 63 SW 62.

22. Hanna v. Fisher, 95 Ind. 383; Empire State Min. Co. v. Mitchell, 29 Mont. 55, 74 P 81; Heath v. Garrett, 46 Tex. 23.

23. Hanna v. Fisher, 95 Ind. 383; Heath v. Garrett, 46 Tex. 23.

24. Peter v. King, 13 Mo. 143; Dawson v. Wombles, 104 Mo. A. 272, 78 SW 823.

25. Perkins v. Onyett, 86 Cal. 348, 24 P 1024; Maier Packing Co. v. Frey, 5 Cal. A. 80, 89 P 875; Empire State Min. Co. v. Mitchell, 29 Mont. 55, 74 P 81; Westinghouse Electric, etc., Co. v. Robinson, 42 Okl. 754, 142 P 1105; Detroit Automatic Scale Co. v. Torgeson, 36 S. D. 564, 156 NW 86.

[a] **Affidavit by attorney of corporation.**—An affidavit by the attorney of a claimant showing the claimant is a corporation and that none of its officers resides in the county sufficiently shows the reason why the affidavit is not made by claimant. Empire State Min. Co. v. Mitchell, 29 Mont. 55, 74 P 81.

[b] **Affidavit held insufficient.**—Where a claim was supported by an affidavit made in the following form: "Maier Packing Co., by Simon Maier, Pres. . . . being duly sworn, says," etc., and signed "Maier Packing Company, Simon Maier, Pres.," but it did not disclose that claimant was a corporation, the affidavit was defective in not assigning some reason which would relieve claimant from making it. Maier Packing Co. v. Frey, 5 Cal. A. 80, 81, 89 P 875.

26. Lanigan v. North, 69 Ark. 62, 63 SW 62; Perkins v. Onyett, 86 Cal. 348, 24 P 1024; Trabue v. Harris, 1 Metc. (Ky.) 597; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87. See also Peter v. King, 13 Mo. 143 (under statute since repealed).

27. Dawson v. Wombles, 104 Mo. A. 272, 78 SW 823. See also Pestridge v. Irwin, 46 Ala. 653, 660 ("The briefs of the counsel for the appellant admit that there was a verification by Sheffield for the claimants, and the grounds of their objection was, that his testimony in the cause shows he was ignorant of the correctness of the claims. Nevertheless, there was a formal and apparently complete verification, even if really defective or insufficient. This deficiency was supplied by proof before the final decree").

28. Mahan v. Owen, 23 Ark. 347 [foll Gill v. Ward, 23 Ark. 16]; Tucker v. Tucker, 21 Colo. A. 94, 121 P 125; Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Alford v. Cochrane, 7 Tex. 485.

29. Anderson v. Cochran, 93 Tex. 583, 57 SW 29; Lanier v. Taylor, (Tex. Civ. A.) 41 SW 516.

30. Gillespie v. Campbell, 149 Ala. 193, 43 S 28; Walker v. Wigginton, 50 Ala. 579; Fox v. Lawson, 44 Ala. 319; Chadwell v. Chadwell, 98 Ky. 643, 33 SW 1118; Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049; Dawson v. Wombles, 104 Mo. A. 272, 78 SW 823; Lonkey v. Powning, 25 Nev. 428, 62 P 235.

[a] **Illustrations.**—(1) The defect in the verification arising from the omission of the averment that the sum demanded is the sum due after allowing proper credits may be cured by an amendment. Gillespie v. Campbell, 149 Ala. 193, 43 S 28. (2) An affidavit by an agent which is defective for failure to disclose that it was made by an agent may be cured by amendment. Dawson v. Wombles, 104 Mo. A. 272, 78 SW 823. (3) Where a claim for funeral expenses was filed by a corporation, and on appeal to the circuit court, a plea to the jurisdiction was preferred because the claim was verified by W as an individual, and not as agent of the corporation, the court properly overruled the plea, and permitted the filing of an amended affidavit by W as president of the corporation, such not being a jurisdictional defect. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

[b] **Contrary view.** — Alter v. Kinsworthy, 30 Ark. 756.

31. Planters', etc., Mobile Bank v. Smith, 14 Ala. 416.

32. Dennis v. Coker, 34 Ala. 611.

made after the claim is barred by limitations.[33]

[§ 1009] **(e) Effect of Verification.** A proper affidavit of verification entitles the claim to be allowed without further proof if no exception is taken.[34]

[§ 1010] **11. Evidence as to Presentation**[35]**— a. Presumptions and Burden of Proof.** It has been held that the burden of proving a presentation is upon claimant,[36] but other cases assert that in the absence of proof of the time when a claim was presented against an estate, and of any objection in the probate court that it was not presented within the time limited, it must be presumed that it was presented in due time.[37]

[§ 1011] **b. Admissions or Part Payment by Representative.**[38] Where the personal representative admits or acknowledges that a claim has been duly presented, his admission or acknowledgment is competent evidence of the fact,[39] whether he made it before or after the expiration of the statutory period for presentation, if he was then the acting personal representative,[40] and the competency of this evidence is not impaired by his subsequent resignation.[41] But it has been held that, where an administrator makes a report of insolvency, founded on his knowledge of claims, the report does not indicate that a claim included therein has been duly presented, although on the basis of this report the estate is declared insolvent.[42] A part payment made by the representative after the expiration of the period limited for presenting claims is a fact tending to show that the claim was duly presented.[43]

[§ 1012] **c. Request for Indulgence.** The fact that an executor or administrator, when shown an execution against his decedent, applied for an indulgence, sufficiently shows a presentation of the claim.[44]

[§ 1013] **d. Rejection of Claim.** The rejection of a claim is not admissible to prove that it was presented unless there is proof of the signature of the representative to the rejection.[45]

[§ 1014] **e. Judgment against Representative.** A judgment recovered against an executor or administrator is, as against the heirs or devisees, in a suit to subject land to the payment of the judgment, evidence of the presentation of the claim on which the judgment was recovered.[46]

[§ 1015] **f. Best and Secondary Evidence.**[47] Where the fact of due presentation or filing of a claim is a matter properly appearing of record in the probate court, the record is the appropriate medium of proof under the best evidence rule, and unless the record evidence is produced or its absence explained, parol evidence is not admissible.[48]

[§ 1016] **g. Weight and Sufficiency of Evidence.**[49] The sufficiency of the evidence to establish the due presentation of a claim is a matter for determination by the jury, in cases tried before a jury,[50] and in other cases for the court trying the facts.[51] An indorsement on an instrument on which the claim is founded to the effect that the claim was presented to the personal representative at a certain date which was within the statutory period, it being shown that claimant was the sole owner of the instrument, has been held sufficient evidence of presentation.[52] Where defendants claim the benefit of the statute of nonclaim by way of plea, but do not positively deny in their answer the presentation of complainant's demand, proof of presentation by one witness is sufficient.[53]

[§ 1017] **12. Withdrawal of Claim.** Where the statute provides that a claim may be presented by filing it or a statement thereof in the office of the judge of probate, the claim or statement filed must remain on file during the rest of the statutory period, and if the creditor after filing the claim

33. Lehman v. George, 99 Miss. 798, 56 S 167.

34. Flinn v. Shackleford, 42 Ala. 202; Cook v. Davis, 12 Ala. 551.

35. See generally Evidence §§ 13, 88.

36. Weller v. Rensford, 185 Ala. 333, 64 S 366; Evans v. Norris, 1 Ala. 511; In re King, 102 Wash. 299, 172 P 1167.

37. Cal.—In re Aldersley, 174 Cal. 366, 163 P 206.

Iowa.—Craig v. Craig, 167 Iowa 340, 149 NW 454.

N. Y.—Matter of Nelson, 63 Misc. 627, 118 NYS 673.

Tex.—Francis v. Williams, 14 Tex. 158.

Wis.—Oakes v. Buckley, 49 Wis. 592, 6 NW 321.

38. Admissions of executor or administrator as evidence against estate generally see Evidence § 486.

39. Grimball v. Mastin, 77 Ala. 553; Pharis v. Leachman, 20 Ala. 662; Starke v. Keenan, 5 Ala. 590; Brown v. Brown, 16 Conn. 249, 14 A 718, 7 AmSR 307; Mathes v. Jackson, 7 N. H. 259.

[a] **An admission that a demand is a subsisting debt** against the estate is equivalent to an admission that it is an enforceable liability of the estate, and not barred by the statute of nonclaim. Grimball v. Mastin, 77 Ala. 553; Frazier v. Prayton, 36 Ala. 691; Pharis v. Leachman, 20 Ala. 662; Mathes v. Jackson, 7 N. H. 259 (admission that claim was due, and promise to pay).

[b] **Admissions or acknowledgments by one of several representatives** are equally competent. Starke v. Keenan, 5 Ala. 590.

[c] **Against whom admission is competent.**—Where the suit is in chancery, for the purpose of subjecting to the payment of the intestate's debts property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of complainant's demand is evidence not only against the administrator, but also against the cestuis que trust. Pharis v. Leachman, 20 Ala. 662.

40. Grimball v. Mastin, 77 Ala. 553; Pharis v. Leachman, 20 Ala. 662.

41. Grimball v. Mastin, 77 Ala. 553; Starke v. Keenan, 5 Ala. 590.

42. McDowell v. Jones, 58 Ala. 25. Contra Pharis v. Leachman, 20 Ala. 662.

43. Pharis v. Leachman, 20 Ala. 662; Miller v. Crosby, 68 Fla. 365, 67 S 76; Francis v. Williams, 14 Tex. 158.

[a] **Payment of interest by representative, sole legatee and devisee.**—Where a personal representative, who was also sole legatee and devisee, paid interest on a mortgage note after the expiration of the period for presentation, some of the payments being made after the settlement of the estate, and the mortgage was afterward discovered to be void for want of title in the deceased mortgagor, the payments constituted no evidence of the presentation of the claim, but were more in consonance with an intention of the parties to continue the loan and not have it paid out of the estate in settlement. Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 A 1019.

44. Harrison v. Jones, 33 Ala. 258; Puckett v. James, 2 Humphr. (Tenn.) 565.

45. Chico Bank v. Spect, 2 Cal. Unrep. Cas. 675, 11 P 740.

46. Darrington v. Borland, 3 Port. (Ala.) 9.

47. See generally Evidence §§ 1219, 1379.

48. Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Franklin v. Brownson, 2 Tyler (Vt.) 103.

[a] **The best evidence is:** (1) The docket entry. Kornegay v. Mayer, 135 Ala. 141, 38 S 36. (2) The commissioner's report containing a list of claims presented. Franklin v. Brownson, 2 Tyler (Vt.) 103.

[b] **Even the testimony of the probate judge** is inadmissible. Kornegay v. Mayer, 135 Ala. 141, 33 S 36.

49. See generally Evidence §§ 1730, 1806.

50. Ala.—Frazier v. Praytor, 36 Ala. 691.

Ark.—Keffer v. Stuart, 127 Ark. 498, 193 SW 83.

Ill.—Somers v. Petteys, 175 Ill. A. 168.

La.—McCloskey's Succ., 144 La. 438, 80 S 650.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487.

Mo.—Wernse v. McPike, 100 Mo. 476, 13 SW 809.

N. D.—Sunberg v. Sebelius, 38 N. D. 413, 165 NW 564.

[a] **Evidence held sufficient.** — Carhart v. Clark, 31 Ala. 396; Kiffer v. Stuart, 127 Ark. 498, 193 SW 83.

[b] **Evidence held insufficient.** — Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851.

51. Finney v. Rollins, (Ark.) 192 SW 210.

52. Rayburn v. Rayburn, 130 Ala. 217, 30 S 365.

53. Pharis v. Leachman, 20 Ala. 662.

withdraws it, and does not leave in its place a proper statement or restore the claim to the files, his act operates as an abandonment of the presentation, as otherwise the personal representative might be misled or deceived;[54] but the withdrawal of the statement of a claim for a mere temporary purpose and under such circumstances that no inference of an intention to abandon the claim can arise does not affect the rights acquired by the creditor through the presentation or filing.[55] Where the claim presented is the result of a compromise agreement with the representative, which is afterward repudiated by him, the creditor may withdraw the claim and substitute another for the amount justly due, although the latter claim is for a greater amount than the former.[56]

[§ 1018] **13. Effect of Presentation—a. In General.** The presentation of a claim against a decedent's estate amounts to a demand for payment,[57] and vests the court with jurisdiction thereof,[58] and it has been considered that, where the claim has been filed and entered on the docket it is the commencement of an action.[59] But the mere presentation does not in and of itself, establish the validity of the claim,[60] although it has been held that, where the personal representative does not dispute a claim presented, or offer to refer it, the claim acquires the character of a liquidated debt,[61] and where administrators have collected the assets and filed a petition for the settlement of their accounts, the fund in their hands becomes a trust fund for the benefit of creditors, whose claims were presented to the administrators in due time, and were not disputed, and such claims do not afterward become barred by lapse of time.[62] Proof of a claim while the estate is in the hands of a collector acting as administrator pendente lite, will operate to suspend the running of the statute of limitations against the claim;[63] and it has been held that a claimant's exhibition of his claim to the administrator and presentation thereof to the probate court, although he later dismissed that action and commenced another, was sufficient to destroy the effect of a short statute of limitation.[64] The presentation of a claim is not an election to rely solely upon the liability of the estate, so as to preclude claimant from resorting to other remedies,[65] nor is claimant limited in his right to recover to the particular grounds stated.[66] Neither can the presentation of one claim deprive claimant of the right subsequently to present another and different claim.[67] Where a guardian converted funds of his

54. Floyd v. Clayton, 67 Ala. 265.

55. Black v. Miller, 158 Iowa 293, 138 NW 535; Stamps v. Bell, 2 Baxt. (Tenn.) 170.

[a] **The rule applies where:** (1) The claim is withdrawn for the purpose of preparing a petition for its allowance and returned. Clough v. Ide, 107 Iowa 669, 78 NW 697. (2) The claim is withdrawn for the purpose of enforcing it against a third person. Braught v. Griffith, 16 Iowa 26; Stamps v. Bell, 2 Baxt. (Tenn.) 170.

56. Bogue v. Corwine, 80 Mo. A. 616.

57. Stapp v. Messeke, 94 Ind. 423.

58. De Clerque v. Campbell, 125 Ill. A. 357.

[a] **Duration of jurisdiction.** — The filing of a claim on the adjustment day fixed by the administrator, and having judgment entered on it, stops the running of the statute; and the jurisdiction of the court, with such status of the claim as to the statute, continues till a final order disposing of the cause is made, notwithstanding the subsequent setting aside of such judgment, and an appeal from the order setting it aside, void because such order was merely interlocutory, and this although no special orders of continuance from time to time were entered. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

[b] **A failure to continue the hearing** upon the claim from term to term does not deprive the court of such jurisdiction; the only effect of such failure is to require claimant to give the administrator notice of the hearing upon the claim. De Clerque v. Campbell, 125 Ill. A. 357.

59. Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511; Agnew's Est., 24 Pa. Co. 327, 7 LackLegN 33.

"The demand of one's legal rights in the orphans' court, according to the form of procedure in that court, is the equivalent of the issuing of a summons in the common pleas. It is not essential in either court that the claim be reduced to final judgment within six years. . . . When the presentation of a claim to an auditor is accompanied by proof and adjudicated favorably by an auditor within six years, which is adjudicated by the orphans' court after the lapsing of the six years, it cannot properly be said that the claimant has not made a lawful demand of his right within six years." Agnew's Est., 24 Pa. Co. 327, 334, 7 LackLegN 33 (where the auditor to whom the claim was presented died without making a report).

60. In re Whitehead, 38 App. Div. 319, 321, 56 NYS 989 ("The mere presentation to the executors of a claim, with silence on the part of the executors in respect thereto, does not render the claim an established one so as to give to the surrogate jurisdiction to decree its payment on a settlement of the executors' accounts"). See also In re Callahan, 152 N. Y. 320, 326, 46 NE 486 ("We are of opinion that mere silence on the part of an executor or administrator after a presentation of a claim under the statute, accompanied by lapse of time, will not in any case preclude the representative from thereafter contesting its validity. . . . But the claim does not become established from mere silence of the executor or administrator").

61. Matter of Prince, 56 Misc. 222, 107 NYS 296.

62. Matter of Hannon, 46 Misc. 229, 230, 93 NYS 207 ("When the administrators had liquidated the estate to the extent of collecting the assets and bringing the surplus into court for distribution among the creditors and the next of kin of decedent . . . it becomes a trust fund in their hands for the benefit of an established and certain cestui que trust, the creditors being in a preferred class and the next of kin taking thereafter. . . . It is a fund in court to be disposed of under the court's decree, just as if the money had been deposited in a court depository awaiting the ordinary course of judicial proceedings or the happening of some future event. I take it that the claims of creditors can no more suffer the allegation or charge of being presumed to be paid than can the next of kin be charged at the instance of the accountants with having received and been paid their share or interest in the decedent's estate. It would not lie in the mouth of the administrators to plead the Statute of Limitations as against the next of kin until they had in some way repudiated their liability to account. Matter of Meyer, 98 App. Div. 7, 90 NYS 185").

63. Berry, etc., Co. v. Dante, 43 App. (D. C.) 110.

64. Home Ins. Co. v. Wickham, (Mo. A.) 196 SW 385.

65. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 S 469, 100 AmSR 45; Edwards v. Wagner, 121 Cal. 376, 53 P 821; McLaughlin v. McGee, 131 Md. 156, 101 A 682; Taylor v. Davidson, (Tex. Civ. A.) 120 SW 1018.

[a] **Illustrations.**—(1) The presentation of a claim for services rendered decedent does not preclude the right to claim certain drafts as a gift causa mortis from him; and the failure to prosecute the claim for services does not deprive the donee of setting up, as a defense to an action by the administrator to recover the drafts, that they were her property by virtue of such gift. Edwards v. Wagner, 121 Cal. 376, 53 P 821. (2) Where, in an action for conversion of money, it appeared that plaintiff had given it to his wife to keep, and that she died with it in her possession; and that plaintiff presented a claim against her estate, of which defendant was executor, who refused to recognize or pay it, the bare presentation of the claim to the executor was no election to rely on it as a claim against the estate, and not against defendant individually for the alleged tort of converting such money. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 S 469, 100 AmSR 45.

[b] **Vendor's lien not waived.** — The filing and allowance of a claim generally against the estate of a deceased purchaser for the balance of the purchase price of land do not constitute a waiver by a vendor of his right to a vendor's lien therefor, under Civ. Code § 3046, which provides that one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. Selna v. Selna, 125 Cal. 357, 58 P 16, 73 AmSR 47.

[c] **The presentation of a claim to an independent executor** does not affect claimant's right to sue. Taylor v. Davidson, (Tex. Civ. A.) 120 SW 1018.

66. Lincoln's First Nat. Bank v. Sandmeyer, 164 Ill. A. 98.

67. Koebel v. Beetson, 112 App. Div. 639, 98 NYS 408.

[a] **Illustration.**—In suit to es-

wards and died without having accounted therefor, the fact that the wards presented their claims for allowance to the guardian's executors before bringing action thereon did not affect their right of recovery, although it changed their remedy.[68]

[§ 1019] **b. Defective Presentation.** A defective presentation of a claim does not estop claimant from again presenting it, in due form, within the time allowed.[69] A second presentation of a claim may be treated as an amendment.[70]

[§ 1020] **14. Effect of Failure to Make Due Presentation**[71]**—a. In General.** As a general rule a claim not presented within the statutory period is, as between the creditor and the estate, forever barred and extinguished both as to the remedy and as to the right.[72] But under some statutes the failure to present a claim within the statutory period does not of itself absolutely bar the claim, but precludes the creditor from participating in the inventoried assets of the estate and confines him to

tablish a claim for services performed as a professional nurse for decedent, it appeared that she had presented a claim against the estate for cash advanced, that the claim was allowed, and that she signed a receipt reciting that it was in full of all claims against the estate. Her affidavit in support of the claim for cash advanced stated that the account presented embraced all items of expense due her. Claimant claimed that the administrator desired to reimburse her for the moneys which she had advanced, and that she made a bill for that purpose, and did not observe that the receipt covered anything further. It was held that the facts shown authorized a finding that she did not intend to present a claim for anything except the money that she had paid out, and she was not thereby foreclosed from thereafter presenting a bill for her personal services. Koebel v. Beetson, 112 App. Div. 639, 98 NYS 408.

68. Miller v. Ash, 156 Cal. 544, 105 P 600.

69. Westbay v. Gray, 116 Cal. 660, 48 P 800; Warren v. McGill, 103 Cal. 153, 37 P 144; Chariton Nat. Bank v. Whicher, 163 Iowa 571, 145 NW 299; Patrick v. Austin, 20 N. D. 261, 127 NW 109; Crosby v. McWillie, 11 Tex. 94.

70. Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004; Simmons v. Tongue, 3 Bland (Md.) 341.

Amendment of statement of claims see supra §§ 991–993.

71. Cross references:

Failure of creditor to present claim against principal's estate see Principal and Surety [32 Cyc 228].

Secured claim see supra § 955.

With respect to action against heirs or distributees see Descent and Distribution § 308.

72. U. S.—Goodno v. Hotchkiss, 237 Fed. 686.

Ala.—Hamil v. Flowers, 184 Ala. 301, 63 S 994; Allen v. Elliott, 67 Ala. 432; Yniestra v. Tarleton, 67 Ala. 126; McDowell v. Jones, 58 Ala. 25; Merritt v. Vincent Mercantile Co., 157 Ala. 576, 47 S 731; Halfman v. Ellison, 51 Ala. 543; Decatur Branch Bank v. Hawkins, 12 Ala. 755; Badger v. Kelly, 10 Ala. 944; Thrash v. Sumwalt, 5 Ala. 13; Johnson v. Bain, 81 S 849.

Ark.—Davis v. Cramer, 133 Ark. 224, 202 SW 239; Georgia State Sav. Assoc. v. Dearing, 128 Ark. 149, 193 SW 512; Kaufman v. Redwine, 97 Ark. 546, 134 SW 1193; Planters' Mut. Ins. Assoc. v. Nelson, 80 Ark. 103, 96 SW 123.

Cal.—In re Huntoon, 174 Cal. 282, 163 P 52; Mcrrow v. Barker, 119 Cal. 65, 51 P 12; Hibernia Sav., etc., Soc. v. Laidlaw, 4 Cal. A. 626, 88 P 730.

Conn.—Bidwell v. Beckwith, 86 Conn. 462, 85 A 682; Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935; Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647; Brown v. Reed, 2 Root 189; Painter v. Smith, 2 Root 142; Fanning v. Coit, Kirby 423.

Ida.—Lundy v. Lemp, 179 P 738; Blake v. Lemp, 179 P 737.

Ill.—In re Davies, 201 Ill. A. 165; Schneider v. Foote, 71 Ill. A. 410.

Iowa.—Mosher v. Goodale, 129 Iowa 719, 106 NW 195.

Kan.—In re Hoover, 180 P 275; McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100; Milbourne v. Kelley, 93 Kan. 753, 145 P 816, AnnCas1916D 389.

Ky.—Hill v. Mayes, 117 Ky. 877, 79 SW 276, 25 KyL 2023.

Mass.—Moyer v. Bray, 227 Mass. 303, 116 NE 511; Estabrook v. Moulton, 223 Mass. 359, 111 NE 859; Thompson v. De Visser, 219 Mass. 40, 106 NE 548; Stebbins v. Scott, 172 Mass. 356, 52 NE 535.

Mich.—Seilnacht v. Wayne Prob. Judge, 201 Mich. 536, 167 NW 837; In re Hodges, 157 Mich. 198, 121 NW 748; Draper v. Brown, 153 Mich. 120, 117 NW 213; Paw Paw First Nat. Bank v. Sherman, 117 Mich. 602, 76 NW 97.

Minn.—State v. Ross, 133 Minn. 172, 157 NW 1075; Jorgenson v. Larson, 85 Minn. 134, 88 NW 439; Gilman v. Maxwell, 79 Minn. 377, 82 NW 669; O'Brien v. Larson, 71 Minn. 371, 74 NW 148.

Miss.—Johnson v. Success Brick Mach. Co., 93 Miss. 169, 46 S 957.

Mo.—Cowan v. Mueller, 176 Mo. 192, 75 SW 606; Beekman v. Richardson, 150 Mo. 430, 51 SW 689; Richardson v. Harrison, 36 Mo. 96; Weber v. Jantzen, (A.) 180 SW 432; In re Hensley, 121 Mo. A. 695, 97 SW 645; State v. Browning, 102 Mo. A. 455, 76 SW 719; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053; Farmers' Sav. Bank v. Burgin, 73 Mo. A. 108; Price v. McCause, 30 Mo. A. 627; Wilks v. Murphy, 19 Mo. A. 221.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

Nebr.—Nebraska Wesleyan Univ. v. Bowen, 73 Nebr. 598, 103 NW 275; Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813; Stichter v. Cox, 52 Nebr. 532, 72 NW 848; Huebner v. Sesseman, 38 Nebr. 78, 56 NW 697.

N. H.—Chapman v. Gale, 32 N. H. 141; Gookin v. Sanborn, 3 N. H. 491.

N. J.—Ray Est. Corp. v. Steelman, 100 A 209; Cunningham v. Stanford, 69 N. J. L. 9, 54 A 245; Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134].

N. M.—Buss v. Dye, 21 N. M. 146, 153 P 74.

Okl.—In re Jameson, 182 P 518; Anderson v. Anderson, 165 P 145; Redwine v. Ansley, 32 Okl. 317, 122 P 679.

Or.—Farrow v. Nevin, 44 Or. 496, 75 P 711.

Pa.—Com. v. Beachly, 262 Pa. 545, 105 A 820; In re Loughran, 257 Pa. 534, 101 A 817; In re Bradshaw, 243 Pa. 114, 89 A 831; Barrett's Est., 54 Pa. Super. 124; Gardner's Est., 19 Pa. Dist. 136; Shand's Est., 1 Pa. Co. 600.

Philippine.—Matter of Ceballos, 13 Philippine 315.

R. I.—Anderson v. Williams, 26 R. I. 64, 58 A 251; Thompson v. Hoxsie, 25 R. I. 377, 55 A 930.

S. D.—Printz-Biederman Co. v. Torgeson, 168 NW 796; Thurber v. Miller, 11 S. D. 124, 75 NW 900.

Tenn.—Hooper v. Bryant, 3 Yerg. 1.

Tex.—Buchanan v. Wagnon, 62 Tex. 375; Millican v. Millican, 15 Tex. 460; Graham v. Vining, 1 Tex. 639, 2 Tex. 433; McDougald v. Hadley, 1 Tex. 490.

Vt.—Hurlburt v. Hinde, 86 Vt. 517, 86 A 739; Batchelder v. White, 82 Vt. 132, 71 A 1111; Probate Ct. v. Gale, 47 Vt. 473; Soule v. Benton, 44 Vt. 309; Briggs v. Thomas, 32 Vt. 176.

Wash.—First Security, etc., Co. v. Englehart, 181 P 13; Butterworth v. Bredemeyer, 89 Wash. 677, 155 P 152.

Wis.—In re Kleinschmidt, 167 Wis. 450, 167 NW 827; Schmidt v. Grenzow, 162 Wis. 301, 156 NW 143, Ann Cas1917B 163; In re Leiser, 138 Wis. 401, 120 NW 274; Davis v. Davis, 137 Wis. 640, 119 NW 334; Franklin v. Killilea, 126 Wis. 88, 104 NW 993; Pereles v. Leiser, 119 Wis. 347, 96 NW 799; Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39; Winter v. Winter, 101 Wis. 494, 77 NW 883; Austin v. Saveland, 77 Wis. 108, 45 NW 955; Carpenter v. Murphey, 57 Wis. 541, 15 NW 798.

[a] **This rule has been applied to** a claim of liability under an agreement for an assignment of patent rights. Thurber v. Aldrich, 167 Mich. 653, 133 NW 620.

[b] **A claim which became absolute before the expiration of the time** fixed by the court for filing claims is barred if not filed within that time. Burling v. Allvord, 77 Nebr. 861, 110 NW 683.

[c] **This is true, although** the claim was based on the fraudulent representations of decedent. Planters' Mut. Ins. Assoc. v. Nelson, 80 Ark. 103, 96 SW 123.

[d] **"So absolute is the bar of** such an one from participation in the assets of the estate that even when all the creditors who have presented and established their claims in the probate court have been paid in full, and a surplus remains in the hands of the administrator for distribution to the next of kin, not only will the probate court not entertain his claim, but no other court can give him such relief." Cowan v. Mueller, 176 Mo. 192, 197, 75 SW 606.

[e] **The county court has no power or authority to allow** the claim of an administrator against the estate, where the claim was not presented to the county judge for allowance before it was barred by limitations. Farrow v. Nevin, 44 Or. 496, 75 P 711.

[f] **It is error to order payment** of a claim which has not been duly presented. Lehman v. Powe, 95 Miss. 446, 49 S 622.

[g] **When statute may be interposed.**—A plea of nonclaim may be filed by an administratrix in the circuit court on review by certiorari of a default judgment against her in a justice court. Merritt v. Vincent Mercantile Co., 157 Ala. 576, 47 S 731.

[h] **A testamentary direction for payment of debts** does not require payment of a claim not presented at the proper time. Kaufman v. Redwine, 97 Ark. 546, 649, 134 SW 1193 ("The direction in the will for the executor to pay all just debts does not mean that he should pay them without probate. There is nothing in the will to indicate that the testator intended that his estate should be administered in any other than the regular way under the statute, which requires 'all demands against the estates of deceased persons,' 'all such demands as may be exhibited,' etc. The statute provides the very means for ascertaining whether the claims against the estate are just debts").

uninventoried assets afterward discovered,[73] while under others the creditor who has not duly presented his claim is merely postponed to creditors whose claims have been duly presented, and if assets have been paid out he can obtain payment only out of the residue, if any,[74] or if the estate has been distributed he loses his remedy against the personal representative and can look only to the property in the hands of the distributees.[75] Where a claim has not been presented within the statutory period, it cannot thereafter be allowed either in a court of original jurisdiction[76] or on appeal,[77] unless a special statute grants relief from the consequences of the delay and the remedy provided has been duly taken.[78] The creditor's failure to present his demand within the time prescribed by the statute has been held to prevent him from compelling legatees to refund if sufficient assets to pay the claim were retained by the executor,[79] and this although the assets retained have subsequently been wasted or have become unavailable and the executor is insolvent.[80] Where the delay of a creditor in presenting his claim does not defeat but merely defers his right to payment, he is still entitled to require of the personal representative a proper administration of the estate,[81] and to contest the settlement of the representative's accounts.[82] The fact that a claim based upon a bond was not presented within the required time has been held to be no evidence that the execution of the bond was procured through fraud or mistake.[83]

Where a claim is secured, failure to present it affects merely the right of the creditor who resorts to the general assets, and does not deprive him of the right to enforce his security,[84] unless the statute provides otherwise.[85]

[§ 1021] **b. Who May Take Advantage of Failure to Present.** The failure of a creditor to present his claim may be taken advantage of not only by the executor or administrator, but also by the heirs,[86] or devisees[87] or even by other creditors.[88]

[§ 1022] **c. Excuses and Relief**[89]**—(1) In General.** It may be stated broadly that, according to the weight of authority, a creditor cannot be excused for failure to present his claim regardless of the reasons therefor, and cannot be relieved of the consequences of his neglect, unless he is granted indulgence by virtue of some statutory provision.[90]

[i] **Judgment.** — Where a judgment was recovered in 1893 and the judgment debtor died in 1897 and no claim was presented against his estate, the judgment could not be enforced in 1912, as the judgment lien expired in 1903, and the claim based on the judgment was barred by failure to present it within the statutory period after decedent's death. James v. Weisman, 161 Iowa 488, 143 NW 428.

[j] **Creditor without notice of action to settle estate.**—Where a creditor failed to file her claim against a decedent's estate, although she had no actual notice of an action to settle it, in which judgment was rendered, and the entire estate distributed to participating creditors, she could not thereafter compel contribution from such creditors. Hill v. Mayes, 117 Ky. 877, 79 SW 276, 25 KyL 2023.

[k] **Sureties on an administrator's bond** were in no way liable to a creditor who failed to present his claim on account of a devastavit by the administrator, although the creditor recovered a judgment on the claim against the administrator. Gookin v. Sanborn, 3 N. H. 491.

[l] **Subrogation.** — A creditor of an estate who has failed to present his claim is not subrogated to the rights of a surety under a mortgage given by decedent for his indemnity. Watson v. Rose, 51 Ala. 292.

[m] **The repeal of a statute** barring claims not presented prevents the claim from being barred where the time for presentation had not expired at the time of the repeal. Ryans v. Boogher, 169 Mo. 673, 69 SW 1048.

[n] **A claim for trust funds** in the hands of decedent is not within the rule. Walker v. Crews, 73 Ala. 412.

[o] **Lapse of time in absence of statute.**—The lapse of time without presentation of claims "may raise a strong inference that there are no debts; but, in the absence of a statute of limitations, there is no such conclusive presumption." Ogooshevitz v. Arnold, 197 Mich. 203, 163 NW 946, 948, 165 NW 633.

73. See infra § 1033.

74. See infra § 1034.

75. U. S.—In re McAusland, 235 Fed. 173 (New Jersey statute).
Ky.—Hood v. Hood, 80 Ky. 38; Stull v. Davidson, 12 Bush 167.
Mich.—Brown v. Forsche, 43 Mich. 492, 5 NW 1011.
Pa.—Smith's Est., 1 Ashm. 352.
Tex.—Bledsoe v. Beiler, 66 Tex. 437, 1 SW 164.
Liabilities of heirs or distributees with respect to debts of decedent see Descent and Distribution §§ 271–332.

76. Cal.—Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.
Mich.—McGee v. McDonald, 66 Mich. 628, 33 NW 737.
Mo.—Wilks v. Murphy, 19 Mo. A. 221.
Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.
Or.—Farrow v. Nevin, 44 Or. 496, 75 P 711.

77. McGee v. McDonald, 66 Mich. 628, 33 NW 737; Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

78. See infra § 1023.

79. Miller v. Mitchell, 8 S. C. Eq. 437.

80. Miller v. Mitchell, 8 S. C. Eq. 437.

81. Harpending v. Daniels, 11 KyL 858.

82. U. S. Equitable L. Assur. Soc. v. Chesley, 63 N. J. Eq. 219, 49 A 718 [aff 64 N. J. Eq. 348, 51 A 725]; Martine's Est., 11 AbbNCas (N. Y.) 50.
"The barred creditor has a status which enables him to except to the accounts of an administrator." Jorfan v. Logue, 76 N. J. Eq. 471, 472, 79 A 426.

83. Johnston v. Derr, 110 N. C. 1, 14 SE 641.

84. Doe v. McLoskey, 1 Ala. 708; Whitmore v. San Francisco Sav. Union, 50 Cal. 145; Sichel v. De Carrillo, 42 Cal. 493; Schade v. Connor, 84 Nebr. 51, 120 NW 1012.

[a] **Liability of representative who has received personalty as residuary legatee.**—Where, in a foreclosure suit brought against a devisee and the heirs of a deceased purchaser of the mortgaged premises who is personally liable for the payment of the mortgage debt, it appears from the cross petition of the devisee that the executor of the will, who is also the residuary legatee, has received personal property belonging to the estate of the testator exceeding the amount of the lien sought to be enforced, such executor may be compelled to pay off and remove the mortgage lien; and the right to enforce such payment is not barred by reason of the failure of the mortgagee to file a claim against the estate of the deceased purchaser for the payment of the mortgage debt. Schade v. Connor, 84 Nebr. 51, 120 NW 1012.

Necessity for presentation of secured claim see supra § 955.

85. Culberhouse v. Hawthorne, 107 Ark. 462, 156 SW 421; Hurlburt v. Hinde, 86 Vt. 517, 86 A 739.

[a] **Mortgage of homestead.**—Where a widow executed a mortgage on the homestead, which vested in her on the death of her husband, and on her death the holder of the mortgage failed to present any claim against her estate within the time limited for presentation of claims, no action could thereafter be maintained thereon either to recover the debt or to foreclose the mortgage. Hibernia Sav., etc., Soc. v. Laidlaw, 4 Cal. A. 626, 88 P 730.

86. Ala.—Farris v. Stoutz, 78 Ala. 130; Thrash v. Sumwalt, 5 Ala. 13.
Ill.—Peo. v. Brooks, 22 Ill. A. 594 [aff 123 Ill. 246, 14 NE 39].
Minn.—Hill v. Nichols, 47 Minn. 382, 50 NW 367; Hill v. Townley, 45 Minn. 167, 47 NW 653.
N. Y.—Selover v. Coe, 63 N. Y. 438.
Tenn.—Peck v. Wheaton, Mart. & Y. 353.
Tex.—Gaston v. Boyd, 52 Tex. 282; Graham v. Vining, 2 Tex. 433.

[a] **Estoppel to object to lack of demand.**—Children who give orders to their deceased father's creditors for payment of their claims out of a certain fund which he assigned to them, thereby leading them to understand that no demand need be made on his personal representative, cannot object to payment of the orders that such demand was not made. Drye v. Cunningham, 74 SW 272, 24 KyL 2500.

87. Farris v. Stoutz, 78 Ala. 130; May v. Parham, 68 Ala. 253.

88. McBroom v. Covenor, 6 Port. (Ala.) 32; Smith v. Sprout, (Tenn. Ch. A.) 58 SW 376.

[a] **Where the estate is insolvent,** other creditors may raise the defense of failure to present a claim. Smith v. Sprout, (Tenn. Ch. A.) 58 SW 376.

89. Postponement and interruption of statute see supra §§ 960–967.

90. U. S.—Goodno v. Hotchkiss, 237 Fed. 686; Schurmeier v. Connecticut Mut. L. Ins. Co., 171 Fed. 1, 96 CCA 107.
Ala.—Gordon v. Ballentine, 50 Ala. 99.
Cal.—Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303.
Colo.—Metz v. Peo., 6 Colo. A. 57, 40 P 51.

Nevertheless there is some authority for the view that such relief may be granted.[91]

[§ 1023] **(2) Relief under Statutes—(a) In General.** In a number of jurisdictions the courts, or the judges thereof, have been given, by statute, power to extend, in proper cases, the time for pres-

Conn.—Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647.
Ill.—Smith v. Smith, 206 Ill. A. 239.
Ind.—Roberts v. Spencer, 112 Ind. 85, 13 NE 129.
Iowa.—McDermott v. McDermott, 138 Iowa 351, 116 NW 122.
Mass.—Stebbins v. Scott, 172 Mass. 356, 52 NE 535.
Mass.—Cockrell v. Seasongood, 33 S 77.
Mo.—Burckhartt v. Helfrich, 77 Mo. 376.
Mont.—Melton v. Martin, 28 Mont. 150, 72 P 414.
N. J.—Lewis v. Champion, 40 N. J. Eq. 59.
Oh.—Delaplane v. Smith, 38 Oh. St. 413.
Pa.—Barrett's Est., 54 Pa. Super. 124.
R. I.—Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.
Wash.—Meikle v. Cloquet, 44 Wash. 513, 87 P 841.
Wis.—Holden v. Curry, 85 Wis. 504, 55 NW 965.

"The court cannot relieve him of the consequences of his own neglect by directing the executors to pay a demand which became barred by his failure to pursue the plain requirements of the statute." In re Hincheon, 159 Cal. 755, 760, 116 P 47, 36 LRANS 303.

[a] **Illustrations.**—(1) The fact that a creditor directs its traveling collector to look after a claim in a certain county after the debtor's death, and that the collector reports on other claims, but not on that one, does not entitle the creditor to file the claim against the debtor's estate after its bar by limitations. Hawkeye Ins. Co. v. Lisker, 122 Iowa 341, 98 NW 127. (2) Where a claim was based on a note secured by mortgage, no recovery could be had thereon against the estate after plaintiff's failure to file the same within the time limited, on the theory that decedent had fraudulently obtained and recorded a release of the mortgage, such fraud being material to show only that the mortgage was a valid and subsisting lien. Franklin v. Killilea, 126 Wis. 88, 104 NW 993. (3) An administrator who has distributed the assets will not be surcharged with a claim of a physician who had attended decedent, where the physician knew of decedent's death, and the probate of her will, but made no claim on the administrator until two years had elapsed after the taking out of letters and proper publication of notice thereof. Barrett's Est., 54 Pa. Super. 124. (4) Where an administrator not only gave the notices required by law, but went to a creditor personally and told him of his appointment and that, in order for the creditor to have his judgment adjusted, it was necessary to present the same as a claim against the estate, the administrator was not guilty of any act inducing the creditor not to present his claim within the time required by law. Meikle v. Cloquet, 44 Wash. 513, 87 P 841.

[b] **Relief cannot be granted because of:** (1) The creditor's ignorance of the debtor's death. Beekman v. Richardson, 150 Mo. 430, 51 SW 689. (2) The creditor's ignorance of the requirement of presentation and misleading conduct of the representative. Cockrell v. Seasongood, (Miss.) 33 S 77. (3) The death of the creditor after the death of the debtor. Morrow v. Barker, 119 Cal. 65, 51 P 12. (4) The fact that the creditor expected to receive as a legacy under decedent's will a greater sum than the amount of his claim. Gordon v. Ballentine, 50 Ala. 99. (5) The absence of the executor from the place appointed for the presentation of claims. Metz v. Peo., 6 Colo. A. 57, 40 P 51. (6) The pendency of an appeal from the probate of the will. Cone v. Dunham, 59 Conn. 145, 20 A 311, 8 LRA 647. (7) The fact that the probate of the will is subsequently set aside. Delaplane v. Smith, 38 Oh. St. 413. (8) Assurances on the part of the representative that the creditor's claim is good. Stebbins v. Scott, 172 Mass. 356, 52 NE 535; Lewis v. Champion, 40 N. J. Eq. 59. (9) The representative's promise to pay when sufficient assets are received. Pike v. Thorp, 44 Conn. 450; Mosher v. Goodale, 129 Iowa 719, 106 NW 195; Lewis v. Champion, 40 N. J. Eq. 59.

[c] **A previous professional engagement of the creditor's attorneys** does not constitute an excuse for failure to present or file his claim within the statutory period. Roberts v. Spencer, 112 Ind. 85, 13 NE 129.

[d] **Refusal of attorney to act.**—Where a judgment creditor who was entitled to file his judgment as a claim against an intestate's estate requested the administrator's attorney to look after the renewal and collection of such judgment, and the attorney promptly notified the creditor that he was employed by the administrator and could not act for the creditor, the attorney was not derelict in failing to inform the creditor concerning his rights in the premises so as to excuse presentment of his claim. Meikle v. Cloquet, 44 Wash. 513, 87 P 841.

[e] **The failure of an executor to comply with the request of a claimant** to present a claim founded on a note delivered to the executor is no excuse for the claimant's failure to file his claim. In re Hobson, 40 Colo. 332, 91 P 929.

[f] **Filing claim with guardian.**—Where a claimant failed to file his claim within a year after notice of the administrator's appointment had been given, the fact that the claim had been filed with decedent's guardian prior to his death did not excuse the creditor's delay. Bentley v. Starr, 123 Iowa 657, 99 NW 555.

[g] **Representations of administrator before appointment.**—(1) An administrator de bonis non is not estopped from urging the bar of the statute of limitations against a claim because of his representation to the claimant, made before his appointment, that there was ample time for the presentation of such a claim. Hallgren v. Utt, 155 Ill. A. 640. (2) Neither is a failure to present the claim excused by reason of a promise of the administrator, before his appointment to pay the claim. Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8.

[h] **Relief in equity.**—In the absence of statutory authority a court of equity will not interpose to grant relief to a creditor whose claim is barred by his neglect to comply with the statute of nonclaim. Beekman v. Richardson, 150 Mo. 430, 51 SW 689; Bauer v. Gray, 18 Mo. A. 173; Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403 [aff 63 Ill. A. 534]; Blanchard v. Williamson, 70 Ill. 647.

91. Ky.—Hamilton v. Wright, 87 SW 1093, 27 KyL 1144.
La.—Finegan's Succ., 135 La. 473, 65 S 614.
N. H.—Sugar River Bank v. Fairbank, 49 N. H. 131.
Eng.—Lashley v. Hogg, 11 Ves. Jr. 602, 32 Reprint 1222.
Ont.—Millichamp v. Toronto Gen. Trusts Corp., 3 OntWR 375.

"It has long been the practice of the Court to allow creditors who, either by inadvertence, or relying upon their securities, fail to come in and prove their claims within the time limited by the notice to creditors, to come in at any time while the funds of the estate are in Court, and establish their claims as creditors of the estate: Lashley v. Hogg, 11 Ves. Jr. 602, 32 Reprint 1222. And over a century and a half ago the Court of Chancery, in Ex p. Stiles, 1 Atk. 208, 26 Reprint 135, prescribed the conditions upon which that relief may be obtained, which, with one exception, have been recognized ever since. In that case Lord Chancellor Hardwicke said: 'Upon the common equity of this Court, if creditors will make an affidavit that they have not read the Gazette, they will be admitted, so as not to disturb the former dividend, and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners (now assignees) can proceed to make a second.' The only case in which this rule seems to have been modified (if accurately reported) was Ex p. Long, 2 Bro. Ch. 50, 29 Reprint 26, where Lord Chancellor Thurlow held that when creditors who had not received a former dividend were allowed to come in and prove their debts, they should only be allowed future dividends pari passu with the other creditors. But Lord Redesdale, L. C. of Ireland, in Re Wheeler, 1 Sch. & Lef. 242, said: 'I have observed a practice here different from that in England; that when a creditor comes forward to prove after a dividend has been made, he is not allowed any benefit of that dividend, but is only admitted to receive his share of the future dividends. I do not think this is warranted by the statute. It may be that a creditor has kept back from some fraudulent intent, or with a view to delay the proceedings; in such a case the practice may be proper. But where everything on the part of the creditor has been fair, and the delay has been occasioned by accident, or unavoidable circumstances (as, for instance, in the case of a foreign creditor who cannot have received notice in time), the commissioners (now assignees) ought to apply the fund in the first place to put such creditor on a footing with the others. If the effects are not sufficient for that, the other creditors can have no further dividend; if there be enough, all must take alike in the future dividend.' And in a note, the reporter adds: 'It is now the constant practice to permit creditors, without an order, to proceed after a dividend and in the first place to direct them to be paid equal to those who had proved before, and then to direct a general distribution of the residue. Lord Redesdale, in conformity with this, reformed a practice which had prevailed in Ireland to the contrary.' Without reviewing intermediate cases, it will be sufficient to refer to In re McMurdo, [1902] 2 Ch. 684, as laying down the general principles upon which the Court allows creditors to come in and prove their claims after the time limited for them to prove has expired." Millichamp v. Toronto Gen. Trusts Corp., supra.

[a] **Illustrations.**—(1) Where presentation was prevented by fraudulent concealment by decedent, a bill in equity may be maintained to obtain satisfaction out of the surplus in the hands of heirs and distributees, if commenced properly after discovery of claim. Sugar River Bank v. Fairbank, 49 N. H. 131. (2) Where an apparently just claim is left unproved by what appears to be mere inadvertence, a further opportunity may be afforded to make the proof, unless there appears to be some sufficient reason to the

entation of claims of creditors against the estates of decedents,[92] or to allow presentation after the expiration of such time.[93]

[§ 1024] **(b) Who May Seek Relief.** A creditor whose claim has been presented to the commissioners without his authority and has been disallowed is still a creditor who has failed to present his claim so as to bring him within a statute authorizing an extension of time for such creditors and the renewal of the commission on application of such a creditor.[94]

[§ 1025] **(c) Time for Seeking Relief.** Some of the statutes provide that extensions shall not be granted after a certain period from the expiration of the time originally limited for presenting claims;[95] but it is not ordinarily necessary that the petition for the extension should allege that it is filed within the time allowed.[96]

[§ 1026] **(d) Payment of Costs as Condition of Relief.** A statute authorizing the opening of an estate to allow a claim to be filed, provided all costs and charges in the probate court shall be paid by

contrary. Finegan's Succ., 135 La. 473, 65 S 614. (3) An executor who, by resisting the reference of a settlement suit to the commissioner by showing the unprepared condition of the estate to pay claims, and by assuring the claimant of the full payment of his demands, and requesting him not to sue, induces a claimant to delay the filing of his claims for more than a year from the executor's qualification is estopped to assert the failure of the claimant to file his claims with the commissioner, or to demand payment from the executor within the year specified, as a ground of forfeiture of his right to interest. Hamilton v. Wright, 87 SW 1093, 27 KyL 1144.

92. Cal.—Johnston v. Napa County Super. Ct., 105 Cal. 666, 39 P 36.

Mich.—Bresler v. Wayne Prob. Judge, 152 Mich. 167, 115 NW 960; Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; McGee v. McDonald, 66 Mich. 628, 33 NW 737; Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326; Peo. v. Monroe County Prob. Judge, 16 Mich. 204.

Minn.—Hunt v. Burns, 90 Minn. 172, 95 NW 1110; State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609, 908; St. Croix Boom Corp. v. Brown, 47 Minn. 281, 50 NW 197; Gibson v. Brennan, 46 Minn. 92, 48 NW 460; In re Mills, 34 Minn. 296, 25 NW 631; Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134.

Miss.—Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

Nebr.—Ribble v. Furmin, 71 Nebr. 108, 98 NW 420; Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

N. H.—Cummings v. Farnham, 75 N. H. 135, 71 A 632; Parker v. Gregg, 23 N. H. 416.

N. J.—Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

Philippine.—Santos v. Manarang, 27 Philippine 209; In re De Dios, 24 Philippine 573.

Vt.—Whitcomb v. Davenport, 63 Vt. 656, 22 A 723; Sleeper v. Gould, 53 Vt. 111.

Wis.—Seidemann v. Karstaedt, 130 Wis. 117, 109 NW 942; Brill v. Ide, 75 Wis. 113, 43 NW 559; Smith v. Grady, 68 Wis. 215, 31 NW 477; Tredway v. Allen, 20 Wis. 475; Boyce v. Foote, 19 Wis. 199.

[a] **An extension to enable an heir to contest a creditor's claim** is not authorized by a statute allowing an extension of time for creditors to prove claims. Graves v. Graves, 58 N. H. 24.

[b] **Publication of notice.**—Where, upon proof of the publication of notice to creditors, the judge determines that the publication has not given proper notice to creditors he may, within the period limited, direct a new notice to be given as though there had been no previous attempt to do so, and in such a case the time for the presentation of claims begins to run only from the giving of the new notice. But where the court recognizes that a publication already made gives notice, although in the opinion of the judge not the best notice, the judge cannot, after the expiration of the time for presentation, extend that time by ordering additional notice, but will be compelled to sign an order or decree showing that due notice to creditors has been given. Johnston v. Napa County Super. Ct., 105 Cal. 666, 39 P 36.

93. U. S.—Schurmeier v. Connecticut Mut. L. Ins. Co., 137 Fed. 42, 69 CCA 22 (rule in Minnesota).

Ill.—Wickes v. Walden, 161 Ill. A. 3.

Iowa.—Ball v. James, 176 Iowa 647, 158 NW 684; Craig v. Craig, 167 Iowa 340, 149 NW 454.

La.—Finegan's Succ., 135 La. 473, 65 S 614.

Mass.—Ryan v. Lyon, 212 Mass. 416, 99 NE 169.

Nev.—Pacific States Sav., etc., Co. v. Fox, 25 Nev. 229, 59 P 4.

N. H.—Jones v. Herbert, 77 N. H. 282, 90 A 854.

Utah.—Sharp v. Sharp, 180 P 580.

[a] **Recovery in equity.**—A creditor of a decedent whose claim has not been prosecuted within two years after the executor or administrator has published notice of his appointment may recover in equity against the estate if he is not chargeable with culpable neglect in failing to enforce the claim before the statutory bar had run; but he cannot recover unless the claim would have been enforceable against the personal representative if he had been sued within the prescribed period. Ryan v. Lyon, 212 Mass. 416, 99 NE 169.

[b] **If the claimant had no knowledge of the claim,** he is entitled, after the expiration of the time for presentation, to present his claim at any time before the filing of the final account. Pacific States Sav., etc., Co. v. Fox, 25 Nev. 229, 59 P 4.

[c] **Circumstances warranting equitable relief.**—(1) The existence of peculiar circumstances which entitle the claimant to equitable relief is the test under the Iowa statute. Asher v. Pegg, 146 Iowa 541, 123 NW 739, 30 LRANS 890; Mosher v. Goodale, 129 Iowa 719, 106 NW 195; Schlutter v. Dahling, 100 Iowa 515, 69 NW 884; Manning v. Stout, 93 Iowa 233, 61 NW 963; Ury v. Bush, 85 Iowa 698, 52 NW 666; Lamm v. Sooy, 79 Iowa 593, 44 NW 893; Orcutt v. Hanson, 70 Iowa 604, 31 NW 950; Willcox v. Jackson, 51 Iowa 296, 1 NW 536; Burroughs v. McLain, 37 Iowa 189; Johnston v. Johnston, 36 Iowa 608; Shomo v. Bissell, 20 Iowa 68; Brewster v. Kendrick, 17 Iowa 479. (2) No general rule is laid down; each case must be considered upon its own merits and determined according to its own peculiar facts. Asher v. Pegg, 146 Iowa 541, 123 NW 739, 30 LRANS 890; In re Ring, 132 Iowa 216, 109 NW 710; Mosher v. Goodale, 129 Iowa 719, 106 NW 195; Hawkeye Ins. Co. v. Lisker, 122 Iowa 341, 98 NW 127; In re Jacob, 119 Iowa 176, 93 NW 94; Manatt v. Reynolds, 114 Iowa 688, 87 NW 683; Henry v. Day, 114 Iowa 454, 87 NW 416; Hawkeye Ins. Co. v. Lisker, 122 Iowa 341, 98 NW 127; Schlutter v. Dahling, 100 Iowa 515, 69 NW 884; Corey v. Gillespie, 94 Iowa 347, 62 NW 837; Manning v. Stout, 93 Iowa 233, 61 NW 963; Ury v. Bush, 85 Iowa 698, 52 NW 666; Sankey v. Cook, 82 Iowa 125, 47 NW 1077; Lamm v. Sooy, 79 Iowa 593, 44 NW 893; Roaf v. Knight, 77 Iowa 506, 42 NW 433; Orcutt v. Hanson, 70 Iowa 604, 31 NW 950 [dist Clark v. Tallman, 68 Iowa 372, 27 NW 261]; Colby v. King, 67 Iowa 458, 25 NW 704; Ingham v. Dudley, 60 Iowa 16, 4 NW 82; Pettus v. Farrell, 59 Iowa 296, 13 NW 319; Wilcox v. Jackson, 57 Iowa 278, 10 NW 661; Lacey v. Loughridge, 51 Iowa 629, 2 NW 515; Senat v. Findley, 51 Iowa 20, 50 NW 575; Phelps v. Thompson, 48 Iowa 641; Baldwin v. Dougherty, 39 Iowa 50; Burroughs v. McLain, 37 Iowa 189; Johnston v. Johnston, 36 Iowa 608; Davis v. Shawhan, 34 Iowa 91; Brayley v. Ross, 33 Iowa 505; Wile v. Wright, 32 Iowa 451; Shomo v. Bissell, 20 Iowa 68; Preston v. Day, 19 Iowa 127; Brewster v. Kendrick, 17 Iowa 479; McCormack v. Cook, 11 Iowa 267. (3) The fact that the estate is solvent and unsettled when the claim is filed is an important consideration in determining whether the delay should be excused. Schurmeier v. Connecticut Mut. L. Ins. Co., 171 Fed. 1, 96 CCA 107; Bentley v. Starr, 123 Iowa 657, 99 NW 555; Ury v. Bush, 85 Iowa 698, 52 NW 666; Sankey v. Cook, 82 Iowa 125, 47 NW 1077; Lamm v. Sooy, 79 Iowa 593, 44 NW 893; Pettus v. Farrell, 59 Iowa 296, 13 NW 319, Senat v. Findley, 51 Iowa 20, 50 NW 525; Baldwin v. Dougherty, 39 Iowa 50; Johnston v. Johnston, 36 Iowa 608; Bragley v. Ross, 33 Iowa 505; Brewster v. Kendrick, 17 Iowa 479; McCormack v. Cook, 11 Iowa 267. (4) But this fact alone is not sufficient. In re Jacob, 119 Iowa 176, 93 NW 94; Brownell v. Williams, 54 Iowa 353, 6 NW 530; Davis v. Shawhan, 34 Iowa 91. (5) After final settlement of the estate a belated claimant should be held to very strict proof of equitable circumstances to warrant the allowance of his claim, especially where he knew all the time of the circumstances on which he relies and of the debtor's death. Potter v. Brentlinger, 117 Iowa 536, 91 NW 809; Shomo v. Bissell, 20 Iowa 68.

94. Whitcomb v. Davenport, 63 Vt. 656, 22 A 723.

95. Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813 [crit Tredway v. Allen, 20 Wis. 475]; Whitcomb v. Davenport, 63 Vt. 656, 22 A 723; Sleeper v. Gould, 53 Vt. 111; Gardner v. Callaghan, 61 Wis. 91, 20 NW 685. Compare Tredway v. Allen, 20 Wis. 475 (under earlier statute).

[a] **Invalidity of original order.**—Such a provision is not applicable where the original order limiting the time for presentation of claims was invalid. Gardner v. Callaghan, 61 Wis. 91, 20 NW 685.

96. Whitcomb v. Davenport, 63 Vt. 656, 22 A 723 (where there is nothing in the record before a reviewing court to preclude the possibility that the fact of due filing appeared and was acted upon in the court of original jurisdiction, the reviewing court will not deprive the petitioner of his remedy because of his omission to allege the fact).

[a] **Proper procedure on appeal** where the record does not show that the petition for extension was presented within the required time. Whitcomb v. Davenport, 63 Vt. 656, 22 A 723.

the claimant, does not require the payment of costs on appeal to the circuit court.[97]

[§ 1027] **(e) Proceedings—aa. In General.** The special proceedings pointed out by the statute for extending the time must be duly taken or a claim not presented within the regular period cannot be allowed.[98] A federal court has jurisdiction to entertain a suit in equity to permit the presentation of, and allow a claim for, good cause shown, after the time limited by the order of the probate court but within the time allowed by the statute.[99] Under some of the statutes the personal representative and other persons interested have the right to appear and contest the application for the reopening or revivor of the commission and for the extension of the time of presentation,[1] but unless otherwise provided by statute it is not necessary to give notice to the personal representative before granting an order of extension.[2] A creditor who seeks relief from his default in the matter of presenting his claim must show a claim of apparent merit,[3] and present a good reason for relieving him from the consequences of his apparent neglect;[4] and in passing upon the application the court should consider all the attendant circumstances, including the conduct of the creditor and the condition of the estate,[5] and the diligence of the creditor not only in endeavoring to present his claim within the statutory period but also in applying for the extension.[6] The same strictness of proof is not required as when application is made for relief from a default in a civil action,[7] and an extension of time may even be granted on a verified petition showing good cause therefor without hearing extrinsic evi-

97. Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580.

98. In re Hodges, 157 Mich. 198, 121 NW 748; McGee v. McDonald, 66 Mich. 628, 33 NW 737; Hunt v. Burns, 90 Minn. 172, 95 NW 1110; Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

[a] **This is true** regardless of whether the allowance is sought in the county court or on appeal to the district court. Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

99. Schurmeier v. Connecticut Mut. L. Ins. Co., 137 Fed. 42, 69 CCA 22 (holding, however, that actions at law for the allowance of such claims cannot be maintained, because they are barred in the absence of judicial permission to present them after the time limited by the order of the probate court, and this permission can be granted in the federal court in a suit in equity only).

1. McGee v. McDonald, 66 Mich. 628, 33 NW 737.

2. Stockwell v. Reid, (Mich.) 136 NW 476; Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; Parker v. Gregg, 23 N. H. 416.

3. State v. George, 123 Minn. 59, 142 NW 945; State v. Williams, 123 Minn. 57, 142 NW 945.

[a] **Contrary view.**—On an application to the probate court for the revivor of a commission or upon an application for mandamus to compel such revivor, the merits of the claim for which the revivor is sought are not open for investigation. Stockwell v. Reid, (Mich.) 136 NW 476; Haft v. Shiawassee County Cir. Judge, 56 Mich. 592, 23 NW 326.

4. In re Kimball, 158 Iowa 273, 139 NW 456; Blunt v. McCoombs, 110 Me. 211, 85 A 748; State v. Ross, 133 Minn. 172, 157 NW 1075; State v. Williams, 123 Minn. 57, 58, 142 NW 945. See also cases infra note 5.

"When the court is asked to exercise its discretion, the application must present a claim of apparent merit and good cause must be shown for opening the default and for relieving the applicant from apparent neglect as well." State v. Williams, supra.

[a] **Circumstances warranting relief.**—Where an executor was the sole beneficiary under the will, and was prematurely discharged, such equitable circumstances existed as to entitle a claimant who had no notice of the discharge to equitable relief as to a claim not filed before the discharge. In re Kimball, 158 Iowa 273, 139 NW 456.

[b] **Showing not warranting relief.**—It was not an abuse of discretion to refuse to permit a claim to be filed after time, where the only excuse presented was a statement in the moving papers that the default was due to a misunderstanding of movant's attorney, and no affidavit or evidence of the attorney was presented. State v. Williams, 123 Minn. 57, 142 NW 945.

5. Cal.—Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; MacGowan v. Jones, 142 Cal. 593, 76 P 503.

Ill.—Smith v. Smith, 206 Ill. A. 239.

Mass.—Estabrook v. Moulton, 223 Mass. 359, 111 NE 859.

Minn.—State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580; State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609, 908; St. Croix Boom Corp. v. Brown, 47 Minn. 281, 50 NW 197; Gibson v. Brennan, 46 Minn. 92, 48 NW 460; State v. Ramsey County Prob. Ct., 42 Minn. 54, 43 NW 692; In re Mills, 34 Minn. 296, 25 NW 631.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

N. Y.—Barter v. Hawksworth, 102 Misc. 242, 169 NYS 475.

Wis.—Smith v. Grady, 68 Wis. 215, 31 NW 477.

[a] **When extension proper.**—(1) The probate court should extend the time for presentation of claims, so as to allow a claimant who has used due diligence to file his claim, where such extension will not delay the settlement of the estate, even though the claim has already been presented and allowed in the state of decedent's residence. State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609. (2) Where a claim founded on a foreign judgment had been presented, but had been disallowed on the ground that the judgment was void for want of jurisdiction, and an application was made in due time thereafter to obtain an extension of time within which to present a claim based upon the original demand upon which the judgment was founded, the application ought to have been granted. Smith v. Grady, 68 Wis. 215, 31 NW 477.

6. Iowa.—Mosher v. Goodale, 129 Iowa 719, 106 NW 195; Bentley v. Starr, 123 Iowa 657, 99 NW 555; In re Jacob, 119 Iowa 176, 93 NW 94; Porter v. Brentlinger, 117 Iowa 536, 91 NW 809; Schlutter v. Dahling, 100 Iowa 515, 69 NW 884; Cory v. Gillespie, 94 Iowa 347, 62 NW 837; Pearson v. Christman, 93 Iowa 703, 61 NW 1085; Roaf v. Knight, 77 Iowa 506, 42 NW 433; Clark v. Tallman, 68 Iowa 372, 27 NW 261; Brownell v. Williams, 54 Iowa 353, 6 NW 530; Lacey v. Loughridge, 51 Iowa 629, 2 NW 515; Willcox v. Jackson, 51 Iowa 296, 1 NW 536; Phelps v. Thompson, 48 Iowa 641; Davis v. Shawhan, 34 Iowa 91; Hazlett v. Burge, 22 Iowa 531; Ferrall v. Irvine, 12 Iowa 52.

Me.—Holway v. Ames, 100 Me. 208, 60 A 897.

Minn.—State v. Ross, 133 Minn. 172, 157 NW 1075; St. Croix Boom Corp. v. Brown, 47 Minn. 281, 50 NW 197; Gibson v. Brennan, 46 Minn. 92, 48 NW 460; State v. Ramsay County Prob. Ct., 42 Minn. 54, 43 NW 692; Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134.

Nebr.—Nebraska Wesleyan Univ. v. Bowen, 73 Nebr. 598, 103 NW 275.

N. H.—Cummings v. Farnham, 75 N. H. 135, 136, 71 A 632.

"The relief afforded under that statute to creditors . . . who have not prosecuted their claims within the time prescribed by law, is based upon grounds of justice and equity, and want of culpable negligence on the part of the claimant." Cummings v. Farnham, supra.

[a] **Delay precluding relief.**—A claim should not be allowed to be filed where it is not presented until more than eight months after the expiration of the time fixed by an order of the court for that purpose, in the absence of a showing of diligence and unavoidable mistake or accident or of fraud warranting the interposition of a court of equity. Nebraska Wesleyan Univ. v. Bowen, 73 Nebr. 598, 103 NW 275.

[b] **Circumstances showing negligence.**—Where a creditor had general knowledge of transactions of deceased as general manager of the business in which he was interested, and had access to the debtor's books from August to November before his action at law against decedent's estate was barred, he was chargeable with culpable negligence in not prosecuting his claim within the time limited by statute, unless he had been misled by fraud, or had relied on an agreement with the administrator. Holway v. Ames, 100 Me. 208, 60 A 897.

[c] **Culpable neglect** within the meaning of the statute requiring the creditor to be free therefrom is a culpable want of watchfulness and diligence and unreasonable inattention. Holway v. Ames, 100 Me. 208, 60 A 897.

[d] **The unexplained forgetfulness of the creditor** as to the existence of the claim is no ground for relief. Porter v. Brentlinger, 117 Iowa 536, 91 NW 809.

[e] **A creditor who merely mailed a statement** of his claim to the executor, and, although he received no reply from the executor, took no further steps until his claim was barred is not entitled to relief. Cory v. Gillespie, 94 Iowa 347, 62 NW 837.

[f] **Relying on traveling collector not sufficient diligence.**—Hawkeye Ins. Co. v. Lisker, 122 Iowa 341, 98 NW 127.

7. State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609, 908; In re Mills, 34 Minn. 296, 25 NW 631; Seymour v. Goodwin, 74 N. J. Eq. 856, 72 A 123.

[a] **Proof sustaining bill.**—A bill to enforce a claim, after decree barring claims, on the theory that the solicitor of the executrix had waived a verification of the claim, which alleges that the solicitor acted as the business agent of the executrix, is sustained by proof that the solicitor was the agent of the executrix in the transaction involving the presentation of the claim. Seymour v. Goodwin, 74 N. J. Eq. 856, 72 A 123.

dence in support of the petition.[8]

[§ 1028] **bb. Discretion of Court.** Under some statutes the right of a belated claimant is absolute,[9] but the more general rule is that whether relief shall be granted is a matter resting in the discretion of the court,[10] which will not be disturbed unless abused.[11] The courts are, however, liberal in relieving claimants from defaults of this kind,[12] especially where no injury can result to innocent parties,[13] and where good cause is shown for the exercise of this power relief should be granted,[14] and a refusal of the court of first instance to grant relief is properly reversed on appeal.[15]

[§ 1029] **cc. Review.** An order of a court of probate jurisdiction, denying to a creditor who has not duly presented or filed his claim the relief permitted by the local statutes, is generally held to be a final order from which an appeal may be taken.[16] But on the other hand an order of a probate judge reviving a commission on claims for the purpose of considering the claim of a creditor who had once before secured such an order for the consideration of a different claim has been held not appealable,[17] and it has been considered that a decision on appeal in an intermediate court affirming an order which extends a commission on claims and directs the commissioners to hear and adjudicate upon a specified claim is not a judgment or final order according to the course of the common law, and therefore cannot be reviewed on writ of error.[18] It has also been held that, where the court grants an extension and allows the claim of the creditor, the adjudication as to the extension may be reviewed on appeal from the order allowing the claim.[19]

Judgment on appeal. A judgment of the district court upon an appeal from a refusal of an extension, remanding the cause to the county court, with direction to "permit the filing of the claim, and to set a day for hearing, and to proceed and hear and pass upon the same," is not the proper judgment, but a hearing in the district court on such claim should be had in the same manner as though the appeal had been from an order disallowing the claim upon hearing before the county court.[20]

[§ 1030] **(f) Vacating Acceptance of Commissioner's Report.** Where an order extending the time for exhibiting claims to the commissioner has been granted after an order accepting the commissioner's first report, the probate court can vacate the order of acceptance.[21]

[§ 1031] **(g) Effect of Failure of Revived Commission to Act.** Where a commission on claims has been revived, the failure of the commissioners to

8. Seidemann v. Karstaedt, 130 Wis. 117, 109 NW 942.

9. Draper v. Brown, 153 Mich. 120, 117 NW 213; Bresler v. Wayne Prob. Judge, 152 Mich. 167, 115 NW 960; Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; Quinn v. McGovern, 97 Mich. 114, 56 NW 226; Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326. But compare Peo. v. Monroe County Prob. Judge, 16 Mich. 204 (matter discretionary under eastern statute).

"The order reviving the commission is a matter of right which may be made ex parte and without notice. There is no distinction in principle between an application to revive a commission to hear a part of a claim which might, if known, have been presented to the original commissioners, and an application for a second revival to hear a part of a claim, or a distinct claim, which might, if known, have been presented to the commissioners upon the first revival of the commission. . . . All that was necessary to be shown in the petition was that the petitioner was a creditor whose claim had not been presented and passed upon by the commission, and that the estate was not yet closed." Stockwell v. Reid, (Mich.) 136 NW 476, 479.

[a] **Right may be enforced by mandamus.**—Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; Hart v. Shiawassee County Cir. Judge, 56 Mich. 592, 23 NW 326.

10. Iowa.—Manatt v. Reynolds, 114 Iowa 688, 87 NW 683.

Mich.—Peo. v. Monroe County Prob. Judge, 16 Mich. 204.

Minn.—State v. Hennepin County Prob. Ct., 142 Minn. 499, 172 NW 210; State v. Ross, 133 Minn. 172, 157 NW 1075; State v. Williams, 123 Minn. 57, 142 NW 945; State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580; St. Croix Boom Corp. v. Brown, 47 Minn. 281, 50 NW 197; Gibson v. Brennan, 46 Minn. 92, 48 NW 460; In re Mills, 34 Minn. 296, 25 NW 631.

Nebr.—Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

Philippine.—Santos v. Manarang, 27 Philippine 209; In re De Dios, 24 Philippine 573.

Wis.—Smith v. Grady, 68 Wis. 215, 31 NW 477.

[a] **Nature of discretion.**—The discretion of the county court with respect to belated claims is the same kind of discretion that a court of equity has in actions for the specific performance of contracts; it is not to be arbitrarily exercised, but when proper and timely application is made and good cause is shown, the court must extend the time as the circumstances of the case may require. Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

[b] **Mandamus will not lie** to review the action of the court in refusing an extension of time, his action being discretionary. Peo. v. Monroe County Prob. Judge, 16 Mich. 204.

11. State v. Williams, 123 Minn. 57, 142 NW 945; Gibson v. Brennan, 46 Minn. 92, 48 NW 460; In re De Dios, 24 Philippine 573.

12. State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580.

"We are disposed to be liberal in the construction of this statute, to the end that all persons making bona fide claims against an estate may have fair opportunity to be heard." State v. Williams, 123 Minn. 57, 58, 142 NW 945; State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580.

13. State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580.

14. Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134.

15. Manatt v. Reynolds, 114 Iowa 688, 87 NW 683; State v. Polk County Prob. Ct., 79 Minn. 257, 82 NW 580; Ribble v. Furmin, 71 Nebr. 108, 98 NW 420; Smith v. Grady, 68 Wis. 215, 31 NW 477.

16. Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326; Ribble v. Furmin, 71 Nebr. 108, 98 NW 420; Whitcomb v. Davenport, 63 Vt. 656, 22 A 723. See also Appeal and Error §§ 406–411.

[a] **A refusal to revive a commission** to pass upon claims may be reviewed by appeal. Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326; Whitcomb v. Davenport, 63 Vt. 656, 22 A 723.

[b] **The personal representatives of a deceased creditor may appeal.**—Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326.

[c] **Certiorari the only remedy.**—The statutes do not authorize the review of such an order of refusal by an appeal and hence a writ of certiorari is available. Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134.

17. Bresler v. Wayne Prob. Judge, 152 Mich. 167, 168, 115 NW 960 ("That an order based upon a creditor's first application is not appealable was, in effect, determined by this court in Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852. In Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326, it was held that a creditor who had not presented his entire claim to commissioners might, upon discovering the fact after the allowance by the commissioners, have the commission revived for the presentation of the balance of his claim, as a matter of right. 'The right of the creditor who has failed to present his claim in such case, and have it heard before a revived commission or before the judge of probate, any time before the estate is closed, is given by the statute, and the probate court has no discretionary power to deprive him of it.' There is no distinction in principle between an application to revive a commission to hear a part of a claim, which might, if known, have been presented to the original commissioners, and an application for a second revival to hear a part of a claim, or a distinct claim, which might, if known, have been presented to the commissioners upon the first revival of the commission. We think it is the policy of the statute (3 Comp. Laws, § 9373), as indicated by the decisions cited, to permit a creditor to present to a revived commission any claim not theretofore presented, so long as the estate remains open. Since the order reviving the commission is a matter of right which may be made ex parte and without notice, no valid defense will be cut off by such order").

18. Churchill v. Burt, 32 Mich. 490 (decision of circuit court affirming order of probate court).

19. State v. Hennepin County Prob. Ct., 28 Minn. 381, 10 NW 209 [dist Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134] (certiorari will not lie).

20. Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

21. Parker v. Gregg, 23 N. H. 416.

meet, take final action, and make their report within the time fixed by the order does not defeat the claims of creditors.[22]

[§ 1032] **(h) Effect of Extension.** An extension of time does not affect the operation of the general statute of limitations but merely gives the claimant an opportunity to present and litigate his claim, subject to all legal defenses which may have attached thereto.[23] It is the policy of a statute providing for the revival of a commission on claims on the application of a creditor who has failed to present his claim, if made at any time before the estate is closed, to permit a creditor to present to a revived commission any claim not theretofore presented so long as the estate remains open,[24] but an order reviving the commission does not cut off any valid defense against a claim.[25]

[§ 1033] **d. Rights as to Subsequently Discovered Assets.** Under some statutes a creditor who has not presented his claim within the regular statutory period, although precluded from sharing in the inventoried assets of the estate, is entitled to participate in subsequently discovered assets not inventoried or accounted for by the personal representative,[26] provided, however, that his claim is

22. Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852.

23. Briggs v. Thomas, 32 Vt. 176.

24. Bresler v. Wayne Prob. Judge, 152 Mich. 167, 115 NW 960.

25. Bresler v. Wayne Prob. Judge, 152 Mich. 167, 115 NW 960.

26. Colo.—Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 P 310; Thompson v. White, 25 Colo. 226, 54 P 718; Townsend v. Thompson, 24 Colo. 411, 51 P 433; McClure v. La Plata County, 23 Colo. 130, 46 P 677.

Ill.—Pearson v. McBean, 231 Ill. 536, 83 NE 173; Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104; Waughop v. Bartlett, 165 Ill. 124, 46 NE 107 [aff 61 Ill. A. 252]; Snydacker v. Swan Land, etc., Co., 154 Ill. 220, 40 NE 466; Darling v. McDonald, 101 Ill. 370; Mulvey v. Johnson, 90 Ill. 457; Blanchard v. Williamson, 70 Ill. 647; Shepard v. Lawrence County Nat. Bank, 67 Ill. 292; Russell v. Hubbard, 59 Ill. 335; Stone v. Clarke, 40 Ill. 411; Wingate v. Pool, 25 Ill. 118; Peacock v. Haven, 22 Ill. 23; Bradford v. Jones, 17 Ill. 93; Stillman v. Young, 16 Ill. 318; Sloo v. Pool, 15 Ill. 47; Ryan v. Jones, 15 Ill. 1; Rowan v. Kirkpatrick, 14 Ill. 1; Peo. v. White, 11 Ill. 341; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Thorn v. Watson, 10 Ill. 26; Smith v. Smith, 206 Ill. A. 239; Tinker v. Babcock, 107 Ill. A. 78 [aff 204 Ill. 571, 68 NE 445]; Morse v. Gillette, 93 Ill. A. 23 [aff 191 Ill. 371, 61 NE 1136]; Smith v. Preston, 82 Ill. A. 285; Tillson v. Ward, 46 Ill. A. 179; Peo. v. Brooks, 22 Ill. A. 594 [aff 123 Ill. 246, 14 NE 39]; Wilding v. Rhein, 12 Ill. A. 384.

Iowa.—Durston v. Pollock, 91 Iowa 668, 60 NW 221.

Me.—Littlefield v. Eaton, 74 Me. 516.

Mass.—Fay v. Haskell, 207 Mass. 207, 93 NE 641; Aiken v. Morse, 104 Mass. 277; Holland v. Cruft, 20 Pick. 321.

N. J.—Jordan v. Logue, 76 N. J. Eq. 471, 79 A 426; Cunningham v. Stanford, 69 N. J. L. 9, 54 A 245; Ryder v. Wilson, 41 N. J. L. 9; Vandyke v. Chandler, 10 N. J. L. 49; Terhune v. White, 34 N. J. Eq. 98.

Philippine.—In re Reyes, 17 Philippine 188.

[a] **Debts due to the United States** are payable out of subsequently discovered assets according to the rule of the text. Holland v. Cruft, 20 Pick. (Mass.) 321.

[b] **Note secured by trust deed.**—Although a note secured by trust deed is not exhibited to the executrix within a year from the granting of letters testamentary, yet, where the validity of the claim is admitted, the trust deed may be foreclosed, and the deficiency, if any, may be satisfied, pro rata, out of any assets not inventoried, discovered after the expiration of the year. Townsend v. Thompson, 24 Colo. 411, 51 P 433.

[c] **The property liable** is that which has not been inventoried or accounted for by the personal representative, regardless of the time when, or the person by whom, it is discovered. It makes no difference with the creditor's rights whether the property not inventoried is discovered before or after he obtains his judgment or brings his suit, or whether it is first discovered by him or by the personal representative. Shepard v. Lawrence County Nat. Bank, 67 Ill. 292; Stone v. Clark, 40 Ill. 411; Bradford v. Jones, 17 Ill. 93.

[d] **What are subsequently discovered assets.**—(1) As a general rule no property can be considered new assets which has been in the hands and under the control of the personal representative, or has been inventoried, or which is the product, profits, or proceeds of such property, although it may have assumed, or have been converted into, a new and different form. Littlefield v. Eaton, 74 Me. 516; Robinson v. Hodge, 117 Mass. 222; Alden v. Stebbins, 99 Mass. 616; Bradford v. Forbes, 9 Allen (Mass.) 365; Chenery v. Webster, 8 Allen (Mass.) 76; Veazie v. Marrett, 6 Allen (Mass.) 372; Sturtevant v. Sturtevant, 4 Allen (Mass.) 122; Fay v. Taylor, 2 Gray (Mass.) 154; Stearns v. Stearns, 1 Pick. (Mass.) 157. The following have been held not to be new assets subject to the claims of belated creditors: (2) Money accruing from patent rights that were inventoried. Robinson v. Hodge, 117 Mass. 222. (3) The proceeds of inventoried real estate which has been sold for the payment of debts. Alden v. Stebbins, 99 Mass. 616; Chenery v. Webster, 8 Allen (Mass.) 76 [foll Aiken v. Morse, 104 Mass. 277]. (4) The proceeds of a judgment rendered in a suit begun in the decedent's lifetime. Bradford v. Forbes, 9 Allen (Mass.) 365. (5) Property received by an administrator de bonis non in satisfaction of the liability by a surety of a former administrator who had failed to account for property inventoried. Veazie v. Marrett, 6 Allen (Mass.) 372. (6) The proceeds of notes received in payment for an inventoried interest in a partnership. Sturtevant v. Sturtevant, 4 Allen (Mass.) 422. (7) The rents of inventoried real estate. Littlefield v. Eaton, 74 Me. 516; Alden v. Stebbins, 99 Mass. 616. (8) The proceeds of logs and lumber sold from inventoried land. Littlefield v. Eaton, 74 Me. 516. (9) Profits received by the representative from the continuance of the business of the partnership in which the decedent was a partner. Copeland v. Fifield, 180 Mass. 223, 62 NE 249. (10) The earnings of an inventoried schooner. Littlefield v. Eaton, 74 Me. 516. (11) Money received by the heirs on a mortgage of the decedent's real estate and turned over to the representative to pay debts of the estate, where the representative with the assent of the probate judge has entered the sum on his account. Littlefield v. Eaton, 74 Me. 516. (12) Land is subsequently discovered estate where under an erroneous construction of the will it was treated for over two years by all the parties as not belonging to the estate. Sutton v. Read, 176 Ill. 69, 51 NE 801.

[e] **Property recovered by setting aside a fraudulent assignment** made by the intestate in his lifetime is assets which the belated creditor can subject to his claim. Holland v. Cruft, 20 Pick. (Mass.) 321.

[f] **Time of discovery.**—It is not necessary that property not inventoried or accounted for be discovered before a judgment can be rendered against the administrator, but the creditor is entitled to a special judgment, payable out of assets thereafter to be inventoried, corresponding to the common-law judgment quando acciderint. Darling v. McDonald, 101 Ill. 370; Shepard v. Lawrence County Nat. Bank, 67 Ill. 292; Russell v. Hubbard, 59 Ill. 335; Stone v. Clarke, 40 Ill. 411; Peacock v. Haven, 22 Ill. 23; Bradford v. Jones, 17 Ill. 93.

[g] **It is not necessary that the creditor should himself discover** the assets. Shepard v. Lawrence County Nat. Bank, 67 Ill. 292.

[h] **What constitutes accounting for property.**—(1) Where executors fixed an appraised value to an insufficient description which they intended to represent certain land which testator had owned, and subsequently conveyed the land to the persons entitled to take under the will, and reported to the court, they had "accounted for" the land within a statute permitting a creditor not presenting his claim within two years to subject property not accounted for to the payment thereof. Auburn State Bank v. Brown, 172 Ill. 284, 50 NE 144 [aff 72 Ill. A. 584]. (2) Where a resident of Illinois died, leaving lands in Iowa which were separately devised, his executor, by probating the will in Iowa so as to give effect to the devise, "accounted for" the lands so as to place them beyond the reach of creditors who had not filed their claims within the required time. Durston v. Pollock, 91 Iowa 668, 60 NW 221.

[i] **Legacy in executor's hands.**—(1) Under the New Jersey statutes a creditor, who has not presented his claim in due time, and who is bound by a decree of the orphans' court barring claims of creditors against the executors, may nevertheless maintain an action against the executors to obtain payment of a ratable portion of his debt from any legacy which has not been paid over by the executors or has been attached in their hands. Dodson v. Sevars, 52 N. J. Eq. 611, 30 A 477 [aff 53 N. J. Eq. 347, 33 A 388]. (2) But these statutes give the right of action only after final settlement has been made in the court where the executor's account must be passed. Cunningham v. Stanford, 68 N. J. L. 7, 52 A 374; Emson v. Allen, 62 N. J. L. 491, 41 A 703; O'Neill v. Freeman, 45 N. J. L. 208.

[j] **When statute not available.**—Revisal (1905) § 94, allowing a claimant who has not presented his claim within twelve months after notice duly published, to assert his demand as against unadministered assets of the estate, is not available under § 41, if personal notice to exhibit his claim has been served on the creditor, and he fails to make exhibit within six months. Morissey v. Hill, 142 N. C. 355, 55 SE 193.

proved and allowed for this purpose.[27] The claim may be presented and allowed at any time before the debt is barred by the general statute of limitations,[28] although it will be at the expense of the claimant.[29] The creditor, if successful in establishing his claim, is entitled to a special judgment, to be satisfied out of the uninventoried assets subsequently discovered.[30]

[§ 1034] **e. Rights as to Assets Remaining Unadministered.** Under some statutes a creditor who has failed to present or file his claim within the required time is postponed to other creditors and not entitled to share with them in the pro rata distribution, but may obtain payment out of the assets remaining unadministered, if there are any;[31] but it has been held that the sole object of such a provision is to permit the belated creditor to reach the personal estate while subject to the control of the administrator, and that it does not give him the right to compel a sale of the land when the personal estate is exhausted.[32]

[§ 1035] **15. Waiver of Due Presentation.**[33] The personal representative being in a sense a trustee for all the parties interested in the estate, it is his duty to protect them against every demand which is not legally enforceable against the estate.[34] As a general rule therefore he cannot waive the requirements of the statutes of nonclaim,[35] and if

27. Wingate v. Poole, 25 Ill. 118.

28. Blanchard v. Williamson, 70 Ill. 647. Compare Tillson v. Ward, 46 Ill. A. 179 (remedy must be presumed within a reasonable time).

29. Blanchard v. Williamson, 70 Ill. 647.

30. Denver First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 P 310; Townsend v. Thompson, 24 Colo. 411, 51 P 433; McClure v. La Plata County, 23 Colo. 130, 46 P 677; Darling v. McDonald, 101 Ill. 370; Mulvey v. Johnson, 90 Ill. 457; Shepard v. Lawrence County Nat. Bank, 67 Ill. 292; Stone v. Clarke, 40 Ill. 411; Peacock v. Haven, 22 Ill. 23; Bradford v. Jones, 17 Ill. 93; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Smith v. Preston, 82 Ill. A. 285.

[a] **The judgment must be special,** not general, and should direct that execution be levied out of property which has not been inventoried or accounted for by the personal representative, but should not be limited by reason of the time when, or the person by whom, the property is first discovered. Mulvey v. Johnson, 90 Ill. 457; Russell v. Hubbard, 59 Ill. 335; Stone v. Clarke, 40 Ill. 411; Bradford v. Jones, 17 Ill. 93.

31. Ga.—Goodwin v. Hightower, 30 Ga. 249; Yerby v. Matthews, 26 Ga. 549; Mahone v. Georgia Cent. Bank, 17 Ga. 111.

Iowa.—Wolfe v. Knapp, 127 Iowa 479, 103 NW 369.

Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.

Ky.—Grey v. Lewis, 79 Ky. 453.

Miss.—Ales v. Plant, 61 Miss. 259.

N. J.—Jordan v. Logue, 76 N. J. Eq. 471, 79 A 426.

N. Y.—Baggott v. Boulger, 9 N. Y. Super. 160; Matter of Morton, 7 Misc. 343, 28 NYS 82; Lesser v. Keller, 29 NYS 829; Martine's Est., 11 Abb NCas 50; Matter of Phyfe, 5 NYLeg Obs 331.

Or.—In re Murray, 56 Or. 132, 107 P 19.

Pa.—Stœver's App., 3 Watts & S. 154; In re Mitchell, 2 Watts 87; Matter of Smith, 1 Ashm. 352; Cowan's Est., 28 PittsbLegJNS 119; McClintock's Est., 15 PittsbLegJNS 287.

S. C.—Ford v. Rouse, 24 S. C. L. 219; Sebring v. Keith, 20 S. C. L. 340; Ex p. Hanks, 13 S. C. Eq. 231.

Tex.—Buchanan v. Wagnon, 62 Tex. 375; Ryan v. Flint, 30 Tex. 382; Hall v. McCormick, 7 Tex. 269.

"The statute requiring claims to be presented to the administrator within six months from the publication of the notice to creditors, only postpones claims not presented within that time until the payment of those so presented." In re Murray, 56 Or. 132, 137, 107 P 19.

"If there is a surplus at the settlement of the estate, such creditor may then present his claim to the administrator and be paid to the extent that the surplus is found sufficient for that purpose. If the claim so presented is disputed by the administrator, distribution is suspended until suit is brought to determine the validity of the claim." Jordan v. Logue, 76 N. J. Eq. 471, 79 A 426.

[a] **A physician's claim for services** rendered to decedent in his last illness is not barred because not filed until after the expiration of twelve months from the publication of notice of the appointment of an administrator, where the estate remains unsettled and solvent. Wolfe v. Knapp, 127 Iowa 479, 103 NW 369.

[b] **The claims of nonresident creditors** are included, subject, however, to a deduction for sums received or receivable from the foreign assets, if any, of the estate. Grey v. Lewis, 79 Ky. 453.

[c] **Mortgage creditor foreclosing after first distribution.**—Where a mortgage creditor, without presenting his claim prior to an intermediate accounting, foreclosed his mortgage and obtained a deficiency judgment after distribution under the intermediate accounting, in view of a statute providing that no preference should be given in the payment of any debt over other debts of the same class, he was entitled upon the final accounting to be allowed out of the assets then on hand the same share or dividend that he would have received had he presented his claim in time for the first distribution. Home Ins. Co. v. Lyon, 3 Dem. Surr. (N. Y.) 69.

[d] **Necessity for proof of judicial settlement.**—The right of heirs who have presented no claim against an administrator for exoneration of their land from a mortgage made by deceased within the time required by law to present a claim, where the estate is settled and a surplus remains in the administrator's hands, cannot be asserted where there is no proof of a judicial settlement of the estate by the administrator. Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851.

32. Nagle v. Ball, 71 Miss. 330, 13 S 929; Ales v. Plant, 61 Miss. 259; Beller's Est., 38 Pa. Co. 419.

33. Extension of time by agreement with representative see supra § 968.

34. Rogers v. Wilson, 13 Ark. 507; Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

Duty of representative to contest claims see infra § 1080.

35. U. S.—Pulliam v. Pulliam, 10 Fed. 23 (construing Tennessee statute).

Ala.—Grimball v. Mastin, 77 Ala. 553; Pipkin v. Hewlett, 17 Ala. 291; Decatur Branch Bank v. Hawkins, 12 Ala. 755.

Ark.—Abbott v. Johnston, 130 Ark. 1, 195 SW 676; Rhodes v. Cannon, 112 Ark. 6, 164 SW 752; Nichols v. Shearon, 49 Ark. 75, 4 SW 167; Rogers v. Wilson, 13 Ark. 507.

Cal.—Harp v. Calahan, 46 Cal. 222.

Conn.—Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 A 1019; Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935; Pike v. Thorp, 44 Conn. 450.

Ill.—Millard v. Harris, 119 Ill. 185, 10 NE 387; Hapke v. Peo., 29 Ill. A. 546.

Kan.—Collamore v. Wilder, 19 Kan. 67.

Ky.—Harding v. Bullard, 172 Ky. 417, 189 SW 242.

Mich.—Clark v. Davis, 32 Mich. 154.

Minn.—Gilman v. Maxwell, 79 Minn. 377, 82 NW 669; Bunnell v. Post, 25 Minn. 376.

Miss.—Cockrell v. Seasongood, 33 S 77; Nagle v. Ball, 71 Miss. 330, 13 S 929.

Mo.—Wilks v. Murphy, 19 Mo. A. 221.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813; Huebner v. Sesseman, 38 Nebr. 78, 56 NW 697.

Nev.—Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 553.

Oh.—Crouse v. Frybarger, 22 Oh. Cir. Ct. 315, 12 Oh. Cir. Dec. 254.

S. D.—Detroit Automatic Scale Co. v. Torgeson, 36 S. D. 564, 156 NW 86.

Tenn.—Apperson v. Harris, 7 Lea 323; Byrn v. Fleming, 3 Head 658; Brown v. Porter, 7 Humphr. 373; Pea v. Waggoner, 5 Hayw. 1.

Tex.—Converse v. Sorley, 39 Tex. 515; Allen v. Reilly, 62 Tex. Civ. A. 624, 131 SW 1152.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926; Fullerton v. Bailey, 17 Utah 85, 53 P 1020.

Wash.—Empson v. Fortune, 102 Wash. 16, 172 P 873; Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372; Ward v. Magaha, 71 Wash. 679, 129 P 395 [cit Cyc].

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

[a] **Neither the personal representative nor the probate court** has the power to dispense with the requirements of the statute. Converse v. Sorley, 39 Tex. 515.

[b] **Adopting pleadings of special administrator.**—Where an executor adopted the pleadings of a special administrator in an action on a claim, and did not plead the nonpresentation of the claim to the executor, such presentation was not waived, the executor having no power to waive any requirement of the statute. Ward v. Magaha, 71 Wash. 679, 129 P 395.

[c] **The notice of demand** (1) required to place a claim in the fifth class cannot be waived by the personal representative. Hicks v. Jamison, 10 Mo. A. 35; Spaulding v. Suss, 4 Mo. A. 541. (2) Even though he has misled the creditor by false and fraudulent statements as to the terms of the law requiring notice, he is not estopped thereby. Spaulding v. Suss, 4 Mo. A. 541. (3) The personal representative may, however, enter his appearance and waive notice of demand for the purpose of allowance. Madison County Bank v. Suman, 79 Mo. 527; Waltemar v. Schnick, 102 Mo. A. 133, 76 SW 1053. (4) By appearing and contesting the claim on its merits he waives his

he pays a claim which has not been duly presented he is not entitled to credit for the payment.[36] In conformity to this principle it is generally held that he is bound to plead the statute, and that his failure to do so cannot avail the claimant [37] or preclude the heirs and legatees from pleading the statute on settlement of the representative's account.[38] In some jurisdictions, moreover, the representative's failure to plead the statute renders him liable for a devastavit in case payment is enforced against the estate.[39] Although by misleading statements and assurances the representative induces a creditor to omit compliance with the statute, the claim will nevertheless become barred and the representative will not be estopped to contest it,[40] unless some statutory provision intervenes whereby the creditor may be afforded relief.[41] A part payment of a claim on condition that the creditor holds the representative harmless in case of a deficiency does not affect the operation of the statute of nonclaim, or prevent the representative from objecting that the claim has not been duly presented;[42] and the representative cannot by a promise to pay revive against the estate a debt barred by the statute.[43] On the other hand there is authority for the view that formal requirements as to presentation may be waived by the personal representative,[44] and will be held to be waived where he fails to make seasonable objec-

right to object that he did not receive such notice. Kincheloe v. Gorman, 29 Mo. 421; Wencker v. Thompson, 96 Mo. A. 59, 69 SW 743. (5) The date of the waiver is to be taken as the date of the exhibition or presentation of the demand. Madison County Bank v. Suman, 79 Mo. 527; Wencker v. Thompson, 96 Mo. A. 59, 69 SW 743. (6) The representative's parol promise to pay, made before his qualification, is inoperative to bind the estate or to waive notice of the claim. Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8. (7) A waiver of a notice of a claim made in open court and noted on the record, or on the claim, is such evidence of an exhibition thereof as will take it out of the statute of limitations. Milan v. Pemberton, 12 Mo. 598.

36. Ark.—Nichols v. Shearon, 49 Ark. 75, 4 SW 167.

Minn.—Bunnell v. Post, 25 Minn. 376.

Nebr.—Huebner v. Sesseman, 38 Nebr. 78, 56 NW 697.

N. J.—Lewis v. Champion, 40 N. J. Eq. 59.

R. I.—Kenyon v. East Greenwich Prob. Ct., 27 R. I. 566, 65 A 267.

Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

[a] **Waiver of right to object.**—The heirs or other persons entitled to object may waive their right by entering into a bona fide settlement with the representative. Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

[b] **An administrator is personally liable for paying** a debt extinguished by the statute. Kenyon v. East Greenwich Prob. Ct., 27 R. I. 566, 65 A 267.

[c] **In New Jersey** (1) it was formerly stated that no recognition of a claim by the personal representative or by the probate court could dispense with the requirement that claims be presented under oath and within the statutory period (Lewis v. Champion, 40 N. J. Eq. 59; Gould v. Tingley, 16 N. J. Eq. 501), (2) although it had been decided that, where the estate was solvent, the representative could pay debts which he was satisfied were just even though the claims were not verified (Kinnan v. Wight, 39 N. J. Eq. 501). (3) But it has been provided by statute (Gen. St. p 2408; Pub. L. [1898] p 739 § 68), that if the personal representative in good faith pays a claim not presented under oath, and the claim is proved to have been a just one, the representative shall have allowance for the payment if there is sufficient assets to pay the debts of equal degree in full, and that if the assets are not sufficient the representative shall be allowed for the pro rata amount which the creditor would have been entitled to receive if the claim had been presented duly verified. Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

[d] **Recovery back of payment.**—If, in the absence of any fraud or deceit, the representative, with full knowledge of all the facts, voluntarily pays a claim which has not been presented, he cannot recover from the claimant the amount paid. Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 553. Contra Miner v. Raymond, 113 Mich. 28, 71 NW 501.

[e] **Contrary view.**—In re Pennock, 122 Iowa 622, 98 NW 480.

37. U. S.—Pulliam v. Pulliam, 10 Fed. 23 (construing Tennessee statute).

Ark.—Rogers v. Wilson, 13 Ark. 507.

Ga.—Hoskins v. Sheddon, 70 Ga. 528 (construing Tennessee statute).

Ill.—Hapke v. Peo., 29 Ill. A. 546.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

Tenn.—Apperson v. Harris, 7 Lea 323; Brown v. Porter, 7 Humphr. 373.

Utah.—Fullerton v. Bailey, 17 Utah 85, 53 P 1020.

[a] **In Iowa the decisions are apparently inconsistent.**—(1) It has been held that the personal representative is not bound to plead the statute but that whenever it appears to the court from an inspection of the claim or otherwise that the claim has not been filed or proved as required it is the duty of the court to reject it. Brownell v. Williams, 54 Iowa 353, 6 NW 530. (2) But it has also been held that the representative might pay claims and have credit for the payment, although the claims had not been properly filed against the estate. In re Pennock, 122 Iowa 622, 98 NW 480.

[b] **Contrary view.**—Where the claim is a just one, the personal representative is not bound to plead the statute. Williams v. Maitland, 36 N. C. 92.

38. Pulliam v. Pulliam, 10 Fed. 23 (construing Tennessee statute); Stillman v. Young, 16 Ill. 318; Bunnell v. Post, 25 Minn. 376.

[a] **Estoppel.**—Where a testator gave a certain fund to his children, and the latter gave to the testator's creditors orders on the executors for payment out of the fund, thereby leading the creditors to believe that no demand need be made of the executors, the children were estopped to object that such a demand was not made. Drye v. Cunningham, 74 SW 272, 24 KyL 2500.

[b] **When a bona fide settlement has been had** between the administrator and the heirs, in which they have allowed him for claims paid which were not probated, the same claims may be allowed in a subsequent suit by the heirs to compel an accounting. Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

39. Hoskins v. Sheddon, 70 Ga. 528 (construing Tennessee statute); Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772; Apperson v. Harris, 7 Lea (Tenn.) 323; Byrn v. Fleming, 3 Head (Tenn.) 658; Brown v. Porter, 7 Humphr. (Tenn.) 373.

40. Ill.—Hallgren v. Utt, 155 Ill. A. 640.

Me.—Hurley v. Farnsworth, 107 Me. 306, 78 A 291.

Miss.—Cockrell v. Seasongood, 33 S 77; Nagle v. Ball, 71 Miss. 330, 13 S 929.

Mo.—Bambrick v. Bambrick, 157 Mo. 423, 58 SW 8; Spaulding v. Suss, 4 Mo. A. 541.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

N. J.—Lewis v. Champion, 40 N. J. Eq. 59.

S. D.—Detroit Automatic Scale Co. v. Torgeson, 36 S. D. 564, 156 NW 86.

Wash.—Seattle Nat .Bank v. Dickinson, 72 Wash. 403, 130 P 372.

"We think it clear that the evidence does not establish the proposition that the defendant intentionally waived the duty of the plaintiff to furnish her with the information required of him by the statute. It was not her duty to ask for the information. It was his duty to furnish it. Neither was it her duty to point out to him omissions in his claim as presented. It was his duty to present his whole claim, all the items and details of it. Assurance from her merely that she would not pay a wrong bill did not release him from the duty of presenting his claim as required by the statute before beginning his action. At the most the assurance could only apply to the claims or items of claim that were sufficiently presented." Hurley v. Farnsworth, 107 Me. 306, 310, 78 A 291.

[a] **Illustration.**—An administrator who long before the running of limitations agreed to waive service of notice of claim against decedent's estate was not thereby estopped from pleading limitations, where claimant delayed the presentation of his claim until limitations had run. Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497.

[b] **Executors who are sole devisees and legatees** are not estopped to rely on nonpresentation of the claim as a defense by reason of their promise to pay the claim. Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 P 372.

41. See supra § 1023.

42. Gorman v. Nairne, 12 Ala. 338.

43. Halfman v. Ellison, 51 Ala. 543; Decatur Branch Bank v. Hawkins, 12 Ala. 755; Colby v. King, 67 Iowa 458, 25 NW 704.

44. Ala.—Jones v. Peebles, 130 Ala. 269, 30 S 564.

Iowa.—Thompson v. Romack, 174 Iowa 155, 156 NW 310.

Kan.—Faler v. Culver, 94 Kan. 123, 146 P 333.

Ky.—Maynard v. Maynard, 178 Ky. 332, 198 SW 910; Harding v. Bullard, 172 Ky. 417, 189 SW 242; Gray v. Graziani, 165 Ky. 771, 178 SW 1070.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487; Littlefield v. Cook, 112 Me. 551, 92 A 787.

Mo.—Monumental Bronze Co. v. Doty, 99 Mo. A. 195, 73 SW 234, 78 SW 850.

N. Y.—Matter of Dorland, 100 Misc. 236, 166 NYS 616.

Wash.—In re Sparks, 101 Wash. 462, 172 P 545.

See also Seymour v. Goodwin, 74 N. J. Eq. 856, 72 A 123 (evidence held to show that solicitor of executrix had authority to waive ver-

tion,[45] and even in jurisdictions where the representative cannot dispense with presentation there are cases holding that if he appears in court and, without raising any objection to the creditor's failure to comply with the statute, contests the claim on its merits, he waives his right of objection.[46] Where the administrator of a deceased guardian presented the guardianship account to the probate court, and obtained a decree on certain items thereof, he could not afterward object that items which were charged against the guardian in that adjudication were improperly charged, because not first presented to the commissioners of the deceased guardian's estate.[47]

Legatees and distributees may, as affects themselves, waive presentation of claims, as where they give to claimants an order on a certain fund for payment of claims.[48]

[§ 1036] **16. Allowance or Rejection—a. By Personal Representative—(1) In General.** The personal representative is very generally authorized to pass upon the justice of claims presented against the estate, and may admit or allow the same so as to bind the estate,[49] although under some statutes, even after the admission of a claim by the personal representative, the approval of the probate court is essential to its due allowance and payment.[50] Under a statute providing that all claims must be presented and allowed before the administrator could have "rightful authority" to pay them, a payment made by the heirs of an intestate on a mortgage indebtedness owed by the latter, prior to the appointment of one of such heirs as administrator, was not validated by such appointment.[51]

[§ 1037] **(2) Effect of Conflict of Interests.** Where the executor or administrator is interested

ification of claim against decedent).

[a] **Where the creditor and the representative entered into a contract** in writing in which the creditor's claim was set forth and described, and the representative bound himself to devote the rents and profits of decedent's lands to the payment of the claim, there was a sufficient presentation. Jones v. Peebles, 130 Ala. 269, 30 S 564.

[b] **Circumstances not showing intention to waive notice of presentation.**—An administrator wrote to persons having a claim against the estate, after the account had been filed with the probate court, stating that the account "opens new fields for operations, but we will not discuss that matter now;" that they were not very far apart, but that there were some matters which claimants would have to include, and that it was the administrator's purpose to be fair to them, and stated that they would meet when the court was held and fix the matter, as there was but little difference between them; and another letter informed claimants of the day court would convene, and requested them to come down on that date, "and we will fix our business, if we can." It was held that the letters did not show an intention by the administrator to waive notice of the presentation of the creditors' demand against the estate. Taylor v. George, 159 Mo. A. 160, 140 SW 611.

45. Cal.—Doolittle v. McConnell, 174 P 305; Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

Ky.—King v. King, 182 Ky. 665, 207 SW 1; Howard v. Leavell, 10 Bush 481.

Me.—Rawson v. Knight, 71 Me. 99.

N. H.—Ross v. Knox, 71 N. H. 249, 51 A 910.

N. J.—Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134].

N. Y.—Merino v. Munoz, 99 App. Div. 201, 90 NYS 985; Matter of Dorland, 100 Misc. 236, 166 NYS 616.

Oh.—Cheeseman v. Kyle, 15 Oh. St. 15.

Or.—In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029.

[a] **Where an administrator has seen and examined a claim,** and is subsequently requested to allow it, which he refuses to do, the claim being present in the pocket of its owner, and the administrator being so told, a formal presentation of the claim is not necessary, but may be presumed to be waived. Cheeseman v. Kyle, 15 Oh. St. 15.

46. Ark.—Leake v. Sutherland, 25 Ark. 219.

Cal.—Guerian v. Joyce, 133 Cal. 405, 65 P 972; Hentsch v. Porter, 10 Cal. 555.

Ind. T.—Plummer v. Wells, 6 Ind. T. 189, 90 SW 303.

Ky.—King v. King, 182 Ky. 665, 207 SW 1.

Oh.—Pepper v. Sidwell, 36 Oh. St. 454; Daykin v. Emery, 10 Oh. Cir. Ct. 652, 5 Oh. Cir. Dec. 121.

Or.—Chamberlain v. Hibbard, 26 Or. 428, 38 P 437; Derkeny v. Belfils, 4 Or. 258; Hopwood v. Patterson, 2 Or. 49.

"The objection that the claim was not presented by the proper person is a matter in abatement only, and waived by joining issue on the merits without raising it in the county court." In re Morgan, 46 Or. 233, 242, 77 P 608, 78 P 1029.

[a] **Illustration.**—Where an administrator disallowed a judgment filed as a claim, but appeared and defended an action thereafter brought to compel such allowance, he thereby waived the claimant's failure to file the claim with the clerk of the proper court after its disallowance by the administrator. Plummer v. Wells, 6 Ind. T. 189, 90 SW 303.

[b] **The filing of a demurrer to a petition** on a claim against the estate is a waiver of the demand and proof required by St. § 3872. Lyttle v. Davidson, 67 SW 34, 23 KyL 2262.

47. In re Pierce, 68 Vt. 639, 35 A 546.

48. Drye v. Cunningham, 74 SW 272, 24 KyL 2500.

49. Ind.—Lasure v. Carter, 5 Ind. 498.

La.—Beeman's Succ., 47 La. Ann. 1355, 17 S 820; Richmond's Succ., 35 La. Ann. 858; Prudhomme's Succ., 23 La. Ann. 228.

Mont.—Dorais v. Doll, 33 Mont. 314, 83 P 884.

N. Y. — Matter of Dorland, 100 Misc. 236, 166 NYS 616; Matter of Nelson, 63 Misc. 627, 118 NYS 673; Matter of Prince, 56 Misc. 222, 107 NYS 296; Matter of Le Baron, 67 HowPr 346; Wright v. Beirne, 2 Dem. Surr. 539.

N. D.—Sunberg v. Sebelius, 38 N. D. 413, 165 NW 564.

Oh.—Thomas v. Chamberlain, 39 Oh. St. 112.

Okl.—Osborn v. Foresythe, 54 Okl. 40, 153 P 207.

Pa.—Carroll's Est., 4 Pa. Dist. 680, 17 Pa. Co. 273.

Tex.—Oldham v. Smith, 26 Tex. 530; Reeves v. Fuqua, (Civ. A.) 184 SW 682.

[a] **The district court has no jurisdiction to instruct** an administrator as to whether he shall reject or allow a claim filed against the estate. Jackson v. Jackson, 8 Oh. Dec. (Reprint) 105, 5 CincLBul 647.

[b] **Admission in open court.**—On proceedings for the settlement of an executor's account, an admission by him in open court that he takes no issue with any creditor as to the amount due on his claim of the time when it accrued binds the estate. Matter of Prince, 56 Misc. 222, 107 NYS 296.

[c] **An executor's promise to pay a claim which had been adjudicated in favor of his testator** in the latter's lifetime would not bind the estate, public policy preventing such promise from being given effect, even if there was no other ground on which it could be held not binding. Fledderman v. Fledderman, 112 Md. 226, 76 A 85.

50. Ark.—Gist v. Gans, 30 Ark. 285; Meyer v. Quartermous, 28 Ark. 45; Walker v. Byers, 14 Ark. 246; Hudson v. Breeding, 7 Ark. 445.

Cal.—Jones v. Walden, 145 Cal. 523, 78 P 1046; Nally v. McDonald, 66 Cal. 530, 6 P 390.

Iowa.—McDermott v. McDermott, 138 Iowa 351, 116 NW 122; Byer v. Healy, 84 Iowa 1, 50 NW 70; In re Seavey, 82 Iowa 440, 48 NW 924; Schriver v. Holderbaum, 75 Iowa 33, 39 NW 125; Bayless v. Powers, 62 Iowa 601, 17 NW 907; Ordway v. Phelps, 45 Iowa 279; Riordan v. White, 42 Iowa 432; Karr v. Stivers, 34 Iowa 123.

Kan.—Wright v. Stage, 86 Kan. 475, 121 P 491.

Md.—Coburn v. Harris, 58 Md. 87.

N. D.—Sunberg v. Sebelius, 38 N. D. 413, 165 NW 564.

Tex.—Wygal v. Woodlief, 76 Tex. 604, 13 SW 569; Danzey v. Swanney, 7 Tex. 617; Neill v. Hodge, 5 Tex. 487; Butler v. Fechner, (Civ. A.) 200 SW 1126.

"There is no adjudication of a claim filed against an estate until it has been passed upon by the court." McDermott v. McDermott, 138 Iowa 351, 353, 116 NW 122.

[a] **An order by the court to an administrator to pay** a claim duly sworn to and filed is sufficient to indicate that the claim is approved by the court, even where it has not been formally proved up. Marlow v. Marlow, 48 Iowa 639.

[b] **The probate court cannot enforce payment until** the claim has been allowed by the administrator. Price v. McIvre, 25 Tex. 769, 78 AmD 558.

[c] **Value of claim.**—(1) A personal representative is not allowed to pay any demand against the estate over the sum of fifty dollars, until the same has been allowed or approved by the probate court. Wright v. Stage, 86 Kan. 475, 121 P 491. (2) The statute cannot be evaded by splitting up a single and entire demand into demands of less than fifty dollars each. Clawson v. McCune, 20 Kan. 337.

51. In re Heeney, 3 Cal. A. 548, 86 P 842.

in a claim against his decedent's estate, he is disqualified from passing upon such claim,[52] the statute usually providing for the probate or other designated court to pass upon the claim in such case.[53] But the allowance by the representative of such a claim does not render it void.[54] An administrator who authorizes a person to purchase claims against the estate is not thereby precluded from passing upon them.[55] The fact that an administrator who is jointly liable with decedent upon a contract of guaranty allows a claim against the estate founded upon such contract does not tend to show collusion between the administrator and the claimant to allow or enforce such claim against the esate in fraud of the rights of the heirs.[56]

[§ 1038] **(3) Action by One of Several Representatives.** The general rule is that the allowance or rejection of a claim against the estate by one of two or more personal representatives is binding upon the estate.[57] But it has been held that the orphans' court cannot allow one executor the amount of the debt claimed by him from testator's estate, if his coexecutor disputes its payment.[58]

[§ 1039] **(4) Time for Action on Claim.** Executors and administrators are entitled to a reasonable time for the examination of claims and accounts against the estate before indorsing thereon their allowance or rejection.[59]

[§ 1040] **(5) Effect of Failure to Act on Claim.** There is considerable difference of opinion as to the effect of a failure of the representative to act on a claim within the time specified by statute, or a reasonable time, after its presentation. According to some authorities such inaction operates as an allowance of the claim,[60] which thus acquires the character of a liquidated and undisputed debt of the estate.[61] But it has also been considered that the mere failure of the representative to act on the claim does not amount to an admission of its validity by which the estate will be bound,[62] and according to numerous authorities the failure of the representative to act on the claim

52. Hildebrandt's Est., 92 Cal. 433, 28 P 486; Hill's Est., 67 Cal. 238, 7 P 664; In re Crosby, 55 Cal. 574; State v. Reinhardt, 31 Mo. 95; Matter of Gill, 42 Misc. 457, 87 NYS 252 [aff 101 App. Div. 607 mem, 91 NYS 1095 mem (rev on other grounds 183 N. Y. 347, 76 NE 274)]; Johnson v. Brown, 25 Tex. Suppl. 120.

[a] **This rule has been applied** where the administrator served as attorney of a creditor or the estate. Henderson v. Ayres, 23 Tex. 96.

[b] **Incorporation of claim in account as admitted.**—Where an executrix has a claim against the estate, her incorporation of it in her account as an admitted claim, without the same proof as is required for other claims, is insufficient to establish it. Matter of Gill, 42 Misc. 457, 87 NYS 252 [aff 101 App. Div. 607 mem, 91 NYS 1095 mem (rev on other grounds 183 N. Y. 347, 76 NE 274)].

[c] **Where the same person is administrator of two estates** whose interests conflict, as where there is a demand in behalf of one to be presented for allowance against the other, he cannot legally act as administrator of both estates in the matter of obtaining an allowance of the demand, but should resign the administration of one of the estates. If he fails to resign, and attempts to act in the same capacity for both estates, and the demand is allowed, the proceeding will be regarded as a nullity. State v. Reinhardt, 31 Mo. 95; State v. Bidlingmaier, 26 Mo. 483; Clark v. Crosswhite, 28 Mo. A. 34.

53. Ind.—Hubbard v. Hubbard, 16 Ind. 25.

Mont.—In re Williams, 47 Mont. 325, 132 P 421.

N. H.—Rollins v. Rollins, 77 N. H. 385, 92 A 339.

N. J.—Ludlow v. Ludlow, 4 N. J. L. 219.

N. Y.—In re Marcelle, 165 N. Y. 70, 58 NE 796; Snyder v. Snyder, 96 N. Y. 88 [rev 30 Hun 186, 4 NYCiv Proc 370].

[a] **If one of several joint executors has a claim** against the estate he cannot compel his coexecutors to allow and credit it before the ordinary, but must resort to a court of equity. Ludlow v. Ludlow, 4 N. J. L. 189.

[b] **Where the representative has assigned his claim,** his assignee is not confined to the remedy provided by statute to enable the executor himself to enforce his claim. Snyder v. Snyder, 96 N. Y. 88 [rev 30 Hun 186, 4 NYCivProc 370].

54. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

55. Johnson v. Brown, 25 Tex. Suppl. 120.

56. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

57. Cal.—Willis v. Farley, 24 Cal. 490. Contra In re Whitmore, Myr. Prob. 103.

Kan.—Cross v. Long, 66 Kan. 293, 71 P 524.

Md.—Coburn v. Harris, 53 Md. 367.

Mass. — Haskell v. Manson, 200 Mass. 559, 86 NE 937, 128 AmSR 452.

N. Y.—Matter of Dorland, 100 Misc. 236, 166 NYS 616; Matter of Prince, 56 Misc. 222, 107 NYS 296; Brennan's Est., 9 NYCivProc 56, 4 Dem. Surr. 322; Wheeler v. Wheeler, 9 Cow. 34.

Tex.—Dean v. Duffield, 8 Tex. 235, 58 AmD 108. But compare McLane v. Belvin, 47 Tex. 493 (where by will three executors were appointed with authority to administer without control of a court of probate, and all qualified as such, two of such executors could not allow a claim against the estate).

Ont.—Carman v. Wightman, 10 OntWR 135.

58. Middleton v. Middleton, 35 N. J. Eq. 115.

59. Nebr.—Dredla v. Baache, 60 Nebr. 655, 83 NW 916.

Oh.—Keenan v. Saxton, 13 Oh. 41.

Or.—Goltra v. Penland, 45 Or. 254, 77 P 129; Willis v. Marks, 29 Or. 493, 45 P 293.

Tex.—Bulter v. Fechner, (Civ. A.) 200 SW 1126.

Wis.—Large v. Large, 29 Wis. 60.

[a] **Six months is a reasonable time** within a statute providing that the executor or administrator has a reasonable time after the presentation of a claim in which to examine it and determine whether he will allow or reject it, and if he fails to do either within such time, the claim will, in law, be disallowed. Goltra v. Penland, 45 Or. 254, 77 P 129.

60. Kirman v. Powning, 25 Nev. 378, 60 P 834, 61 P 1090; Hicks v. Wilbur, 38 R. I. 268, 94 A 872; Lewis v. Douglas, (R. I.) 93 A 961; Fitz-Simon v. Fitz-Simon, 28 R. I. 555, 68 A 431; Dickey v. Corliss, 41 Vt. 127.

[a] **Even though a claim is bad,** it cannot be disallowed after the expiration of the thirty days allowed by the statute, except upon newly discovered evidence, and newly discovered evidence which is inadmissible because hearsay, is not sufficient. Coventry Prob. Ct. v. Sweet, 35 R. I. 291, 86 A 892.

[b] **Newly discovered evidence.**—An executor, charged with unfaithful administration because of his failure to pay creditors whose claims have been filed and allowed, cannot, under Court and Practice Act (1905) § 886, providing that within thirty days after the expiration of the statutory period for the filing and allowance of claims, and at any time thereafter before payment, on evidence discovered after the statutory period, the executor shall file a statement disallowing such claims as he intends to contest, etc., relieve himself from liability, unless he at least shows that he has some definite prospect of being able to procure testimony warranting him to contest claims, he being guilty of unfaithful administration in not disallowing a claim within the statutory time, and in not paying it within a reasonable time after the expiration of the period, where the statute specifically provides that he must pay. Fitz-Simon v. Fitz-Simon, 28 R. I. 555, 68 A 431.

[c] **Failure to disallow through accident.**—Where an executor has exercised due care and diligence, but by accident and mistake did not find a claim in time to disallow it, as provided by law, he should be granted leave to file a statement of disallowance. Sherman v. Cooney, (R. I.) 90 A 657.

[d] **Unauthorized claim. — It is** not necessary that an administrator should disallow an unauthorized second and distinct claim springing out of a continuous running account for services, and failure to disallow the claim does not constitute an allowance thereof, nor render the administrator guilty of unfaithful administration. Potter v. Harvey, 34 R. I. 71, 82 A 812.

[e] **Accident. —** Where an executrix exercised due care and by accident did not find a claim in time to disallow it as provided by law, she should have been granted leave to file a statement of disallowance. Sherman v. Cooney, (R. I.) 90 A 657.

[f] **The executor's failure to file a statement** in the probate court denying the validity of a duly presented claim is not equivalent to the allowance of the claim. Providence Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

61. Lambert v. Craft, 98 N. Y. 342; Magee v. Vedder, 6 Barb. (N. Y.) 352; Matter of Prince, 56 Misc. 222, 107 NYS 296; Matter of Miller, 9 NYS 60, 2 Conn. Surr. 134; Matter of Phyfe, 5 NYLegObs 331; Matter of Cowdrey, 5 Dem. Surr. (N. Y.) 453; Underhill v. Newburger, 4 Redf. Surr. (N. Y.) 499. But see infra text and note 2.

62. In re Callahan, 152 N. Y. 320, 326, 46 NE 486; Schutz v. Morette, 146 N. Y. 137, 144, 46 NE 780 [rev 81 Hun 518, 31 NYS 39]; Coombs v. Joerg, 125 App. Div. 615, 110 NYS 6; Matter of Whitehead, 38 App. Div. 319, 56 NYS 989; Matter of Doran, 38 NYS 544, 2 NYAnnCas 40.

"Mere silence on the part of an executor or administrator after the presentation of a claim under the

within the time allowed therefore operates as a rejection.[63]

[§ 1041] **(6) Form and Sufficiency of Allowance or Rejection.** Any acts or statements of the representative which evince an intention to pay a claim against the estate or amount to an admission of its validity and justice will be sufficient to constitute an allowance thereof;[64] but equivocal acts or statements not evincing such an intention or amounting to such an admission are not sufficient.[65] While the decision of an executor or administrator rejecting a claim against the estate need not be in writing[66] or in any particular form,[67] the disallowance and notice thereof to the creditor should be in terms so unequivocal that the latter may know with certainty when his claim, if not sued upon, will be barred by the statute of limitations;[68] and where the personal representative does or says anything from which the creditor may reasonably infer that the determination to reject the claim is not final, but that it will be further examined and considered, such claim is not rejected within the meaning of the statutes.[69] An indorsement of the word "rejected" on a claim together with the signature of the representative's name is a sufficient rejection,[70] and a claim so indorsed is not reinstated by an erasure of the representative's signature thereto more than three months afterward.[71] An administrator rejecting a claim does not waive formal defects therein by failure to disclose the ground of rejection.[72]

[§ 1042] **(7) Notice of Rejection.**[73] Where the representative directs his attorney to reject a particular claim, the rejection by the attorney is as effectual as though the representative had personally notified the claimant of the rejection.[74] Where a claimant caused his claim to be prepared by a member of a firm of attorneys, and it was served on the executor, indorsed by the firm, service of notice of rejection of the claim on such firm was sufficient, although the actual employment of the attorneys had been limited to a preparation of the

statute, accompanied by lapse of time, will not in any case preclude the representative from thereafter contesting its validity. If the claim is not rejected, and on an accounting no objection is taken to its allowance, then the surrogate would be authorized to treat it as an admitted claim and direct its payment. But the claim does not become established from mere silence of the executor or administrator." In re Callahan, supra.

"The presentation of a claim, followed by inaction, the executor or administrator neither admitting nor rejecting it, does not, we think, find the estate as upon an account stated. It may be justly claimed that the executor or administrator ought, in the fair discharge of his duty both to the creditor and to the estate, to examine the claim within a reasonable time and make known his position in respect to it. But it would be hazardous, in view of the ignorance or inexperience of the persons called upon to act as executors or administrators, to construe mere silence on his part as an admission that the claim was a valid one. The creditor must see to it that the claim is admitted and allowed by the executor or administrator, and an implied admission from silence is not sufficient." Schutz v. Morette, supra.

[a] **An allowance is not to be inferred without some affirmative recognition** of the claim. Matter of Brown, 60 Misc. 35, 112 NYS 599.

[b] **Failure to act for more than a year.**—An account presented as a claim does not become established by the failure of decedent's executor to reject the claim until more than a year after its presentation. Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041.

[c] **Former decisions overruled.**—"In view of the decision of the court of appeals in Schutz v. Morette, 146 N. Y. 137, 40 NE 780 [rev 81 Hun 518, 31 NYS 39], many decisions to the effect that where a claim has been presented to, and not rejected within a reasonable time by, the legal representatives of the estate against which it is alleged to be held, it must be taken to be admitted, and the statute of limitations is not set running, must be considered to be overruled, and some distinct admission must be proved." Matter of Doran, 38 NYS 544, 2 NYAnnCas 40.

63. Ark.—Bellows v. Chief, 20 Ark. 424.

Cal.—Haberly v. Haberly, 27 Cal. A. 139, 149 P 53.

Iowa.—Flora v. Brown, 159 Iowa 253, 140 NW 364.

N. D.—Sunberg v. Sebelius, 38 N. D. 413, 165 NW 564; Patrick v. Austin, 20 N. D. 261, 127 NW 109; In re Smith, 13 N. D. 513, 101 NW 890; Farwell v. Richardson, 10 N. D. 34, 84 NW 558.

Okl.—Williams v. Jackson, 179 P 603.

Or.—Goltra v. Penland, 45 Or. 254, 77 P 129.

Tex.—Butler v. Fechner, (Civ. A.) 200 SW 1126.

"Their claims . . . were disallowed by operation of law, by the failure of the administrator to approve them." Flora v. Brown, 159 Iowa 253, 258, 140 NW 364.

[a] **Constructive rejection equivalent to rejection by written indorsement.**—In re Smith, 13 N. D. 513, 101 NW 890.

[b] **Belated indorsement of allowance.** — An administrator's indorsement for allowance on a claim after more than three months after expiration of the ten day period allowed by statute for allowance was void and did not operate to allow or validate the claim, as at the time of indorsement the claim had passed beyond jurisdiction and was a rejected claim. Williams v. Jackson, (Okl.) 179 P 603.

64. See cases infra this note.

[a] **This rule has been applied** where the representative: (1) Placed a debt on his account and asked authority to pay it. Maraist v. Gilbeau, 31 La. Ann. 713. (2) Agreed to pay a decree. Western Reserve Bank v. McIntire, 40 Oh. St. 528. (3) Filed a petition for the sale of land and included therein the claim of a creditor whom the representative had frequently assured would be paid the same as other creditors. Smock v. Bouse, 12 Oh. Cir. Ct. 46, 5 Oh. Cir. Dec. 293. (4) Withdrew his answer in a suit on a rejected claim and consented to judgment. Heath v. Garrett, 46 Tex. 23.

[b] **Part payment without dispute** is an allowance of the whole claim. Thomas v. Chamberlain, 39 Oh. St. 112.

65. Iowa.—Lamm v. Sooy, 79 Iowa 593, 44 NW 893.

La.—Figuras v. Benoist, 11 La. Ann. 683.

N. Y.—Matter of Brown, 60 Misc. 35, 112 NYS 599.

R. I.—Providence Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

S. C.—McKinlay v. Gaddy, 26 S. C. 573, 2 SE 479.

Tex.—Price v. McIvre, 25 Tex. 769, 78 AmD 558.

Wis.—Hepp v. Huefner, 61 Wis. 148, 20 NW 923.

[a] **A bare acknowledgment that an account is just,** made by the representative, is not sufficient to charge the estate with the debt. Ciples v. Alexander, 7 S. C. L. 767.

[b] **The execution and delivery of a note for services to be rendered** to the estate is not an allowance of the claim. Price v. McIvre, 25 Tex. 769, 78 AmD 558.

[c] **Inclusion in schedule.** — A statement of claims which have never been presented in writing to the administratrix, in her account filed, in the schedule of claims presented, together with the names of the claimants and the nature of their claims, is not an allowance of the claim. Matter of Brown, 60 Misc. 35, 112 NYS 599.

66. Matter of Jacobs, 109 App. Div. 293, 96 NYS 133.

67. Randolph v. Ward, 29 Ark. 238; Jones v. Walden, 145 Cal. 523, 78 P 1046; Matter of Jacobs, 109 App. Div. 293, 96 NYS 133.

[a] **Allowance of a claim for less than the full amount thereof** is a rejection of the rest of it. Jones v. Walden, 145 Cal. 523, 78 P 1046.

[b] **Waiver of notice.**—When a claim is presented to the administrator within the required time, and a waiver of notice indorsed thereon, it is tantamount to a rejection and reference of it to the probate court. Randolph v. Ward, 29 Ark. 238.

68. Bradley v. Vail, 48 Conn. 375; Harter v. Taggart, 14 Oh. St. 122; Aiken v. Coolidge, 12 Or. 244, 6 P 712.

[a] **A distinct refusal to allow a claim** is a rejection, although no formal demand is made at the time that the executors should indorse their allowance upon the claim. Harter v. Taggart, 14 Oh. St. 122.

[b] **If the representative relies on a defect in form** alone he should say so, or he will be deemed to have waived it. Aiken v. Coolidge, 12 Or. 244, 6 P 712.

69. Hoyt v. Bonnett, 50 N. Y. 538; Reynolds v. Collins, 3 Hill (N. Y.) 36; Elliot v. Cronk, 13 Wend. (N. Y.) 35; Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 414; Barsalou v. Wright, 4 Bradf. Surr. (N. Y.) 164.

70. Dorais v. Doll, 33 Mont. 314, 83 P 884 (indorsement by attorney under representative's direction).

71. Burks v. Bennett, 62 Tex. 277.

72. Detroit Automatic Scale Co. v. Torgeson, 36 S. D. 564, 156 NW 86.

73. **Necessity of, to start running of statute requiring suit within designated time after rejection** see infra § 1941.

74. Dorais v. Doll, 33 Mont. 314, 83 P 884; Selover v. Coe, 63 N. Y. 438; Wintermeyer v. Sherwood, 77

claim.[75] An executor is justified in assuming, in the absence of anything to the contrary, that his decision as to a claim presented against the estate will be communicated to the attorney for the claimant.[76]

[§ 1043] **b. By Commissioners—(1) In General.** Some of the statutes provide for the appointment of commissioners, for the purpose of passing upon and adjusting claims against decedents' estates,[77] and the right to have claims presented to, and passed upon by, commissioners exists even where the executor is also residuary legatee and gives bond to pay all debts and legacies.[78] But a claim need not be proved before commissioners, if the executor, as residuary legatee, has conceded his liability for it if the debt should appear to have been assumed by the testator.[79]

[§ 1044] **(2) Appointment and Qualification.** The power and duty to appoint commissioners is usually vested in the probate court.[80] The appointment of commissioners may be made at any time during the progress of the administration,[81] and the court may, on the application of a creditor, revive a commission after its report is filed at any time before the estate is settled.[82] Where the court neglects to appoint commissioners, the creditor has a right to call for them.[83] Notice and a hearing is a prerequisite to the granting of a petition for the renewal of a commission to receive and adjust claims,[84] and it is improper to appoint a third commissioner without notice, and on an ex parte application, where the two already appointed disagree as to a claim.[85] The commissioners should be disinterested persons,[86] and should be duly appointed and sworn before entering upon the duties of office.[87] A provision, in an order appointing a temporary administrator to pass on the claim of the administrator, that he furnish a bond and publish for two weeks notice of his appointment, is waived where the court approves the claim on the day of the order, with knowledge that bond has not been filed.[88]

[§ 1045] **(3) Powers and Duties.** In respect to claims accruing in the lifetime of decedent, which by law survive, and where the facts necessary to give jurisdiction and authority exist, the commissioners act judicially,[89] and their judgment, rendered upon due investigation of the claim, should be respected in the probate court and elsewhere.[90] They are usually, however, not authorized to pass upon debts and expenses incurred subsequent to decedent's death,[91] or claims which are contingent,[92] or purely equitable in their nature.[93] Where the statute makes no provision for exhibition of claims in favor of the estate before commissioners, except to offset claims presented by creditors, the commissioners have no jurisdiction, of their own motion, to allow and include in their report a claim of the estate against a creditor who did not come before them or present his claim for allowance.[94]

[§ 1046] **(4) Notice of Hearing.** Where the administrator appears before the commissioners appointed to hear claims, he is not prejudiced by the failure of the latter to give him statutory notice of the time and place of hearing.[95]

[§ 1047] **(5) Report.** The report of the commissioners should be filed within the time specified in the order appointing them or designated by statute,[96] but the fact that the report was returned before the expiration of the time for the presentment of claims does not render the same void.[97] The death of the auditor, after having adjudicated and

Hun (N. Y.) 193, 28 NYS 449.

75. Lockwood v. Dillenbeck, 104 App. Div. 71, 93 NYS 321.

76. Matter of Jacobs, 109 App. Div. 293, 96 NYS 133.

77. Conn.—Mills v. Wildman, 18 Conn. 124.

Ky.—Story v. Story, 34 SW 540, 18 KyL 97.

Me.—Rogers v. Rogers, 67 Me. 456.

Mass.—Ripley v. Collins, 162 Mass. 450, 38 NE 1133.

Mich.—Hinckley's App., 160 Mich. 284, 125 NW 24; Crosby v. Montcalm Cir. Judge, 125 Mich. 24, 83 NW 1040; In re Vedder, 122 Mich. 439, 81 NW 356; Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; Osmun v. Oakland Cir. Judge, 107 Mich. 27, 64 NW 949; Campau v. Miller, 46 Mich. 148, 9 NW 140; Buchoz v. Pray, 36 Mich. 429.

Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.

Nebr.—Dredla v. Baache, 60 Nebr. 655, 83 NW 916; Schaberg v. McDonald, 60 Nebr. 493, 83 NW 737; Craig v. Anderson, 3 Nebr. (Unoff.) 638, 92 NW 640.

R. I.—Mason v. Taft, 23 R. I. 388, 50 A 648.

S. C.—Rouse v. Raynal, 12 S. C. Eq. 210.

Vt.—Batchelder v. White, 82 Vt. 132, 71 A 1111.

Va.—Marshal v. Cheatham, 88 Va. 31, 13 SE 308.

[a] **Auditor.**—An officer appointed by the court to pass upon and allow such claims, is sometimes called an auditor. Axtell's App., 3 Pa. Cas. 488, 6 A 560; Fehl's Est., 13 Pa. Super. 601.

78. In re Vedder, 122 Mich. 439, 81 NW 356 [foll Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 NW 34].

79. Wheeler v. Hatheway, 58 Mich. 77, 24 NW 780.

80. Smith v. Lloyd, 76 Mich. 619, 39 NW 756; State v. Ramsey County Prob. Ct., 25 Minn. 28; Bryant v. Livermore, 20 Minn. 313; Wilkinson v. Winne, 15 Minn. 159; Axtell's App., 3 Pa. Cas. 488, 6 A 560.

81. Wilkinson v. Winne, 15 Minn. 159.

[a] **Commissioners may be appointed before inventory filed.**—Bryant v. Livermore, 20 Minn. 313.

82. Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852; Martin v. White, 58 Vt. 398, 3 A 498.

83. Powers v. Powers, 57 Vt. 49.

84. White v. White, (Vt.) 99 A 305.

85. Smith v. Lloyd, 76 Mich. 619, 39 NW 756.

86. See cases infra note 87.

[a] **The judge of probate is not barred** from acting as commissioner. Cummings v. Halsted, 26 Minn. 151, 1 NW 1052.

[b] **Where a creditor presents his claim** to commissioners whom he deems disqualified by reason of interest, he thereby waives such objection. Bryant v. Livermore, 20 Minn. 313.

87. Cummings v. Halsted, 26 Minn. 151, 1 NW 1052; Bryant v. Livermore, 20 Minn. 313; Ashley v. Eggers, 59 Wis. 563, 18 NW 471.

88. Hendron v. Kinner, 110 Iowa 544, 80 NW 419, 81 NW 783.

89. Finley v. Dubay, 112 Mich. 334, 70 NW 885; Clark v. Davis, 32 Mich. 154; Mason v. Taft, 23 R. I. 388, 50 A 648.

[a] **Claim within jurisdiction.** — The commissioners had jurisdiction to determine an absolute claim on a note signed by decedent and secured by a real estate mortgage. Flynn v. Lorimer, 141 Mich. 707, 105 NW 37.

90. Flynn v. Lorimer, 141 Mich. 707, 105 NW 37; Finley v. Dubay, 112 Mich. 334, 70 NW 885; Wilkinson v. Conaty, 65 Mich. 614, 32 NW 841; Lothrop v. Conely, 39 Mich. 757; Axdell's App., 43 LegInt (Pa.) 476.

91. Greenleaf v. Sabin, 1 Root (Conn.) 468; Mason v. Taft, 23 R. I. 388, 50 A 648; Hatch v. Hatch, 60 Vt. 160, 13 A 791. But compare Booth v. Radford, 57 Mich. 357, 24 NW 102 (funeral expenses and the expenses of decedent's last sickness may properly be allowed as preferred claims by the commissioners).

92. Campau v. Miller, 46 Mich. 148, 9 NW 140; Shurbun v. Hooper, 40 Mich. 503; Buchoz v. Pray, 36 Mich. 429.

[a] **The commissioners can only receive and report the evidence** relating to such claims; the claims are not definitely adjudicated until they are supposed to have become absolute. Campau v. Miller, 46 Mich. 148, 9 NW 140; Buchoz v. Pray, 36 Mich. 429.

[b] **Claim held not contingent.**— Where relator presented a claim for a certain sum, which might be reduced by the application of the proceeds of a certain contract, but more than one year had elapsed since the making of the contract before the report of the committee was made on the claim, such claim was not contingent, so as to deprive the committee of jurisdiction to pass on it, since there was nothing to indicate that the contract had not been performed, and a final disposition made of its proceeds. Crosby v. Montcalm Cir. Judge, 125 Mich. 24, 83 NW 1040.

93. McKinney v. Hamilton, 53 Mich. 497, 19 NW 263; Brown v. Sumner, 31 Vt. 671. But compare Spaulding v. Warner, 52 Vt. 29 (they have jurisdiction of claims originating in equitable principles, where the right and extent of recovery are readily ascertainable).

94. Moore v. Bachelder, 51 Vt. 50.

95. Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852.

96. Hansell's Est., 11 Phila. (Pa.) 47.

97. Johnson v. Johnson, 66 Mich.

allowed the claim, but before making his report, does not deprive the claimant of the benefit of the proof of adjudication of his claim with respect to preventing the bar of the statute of limitations.[98] The probate court has power to accept or reject the report of the commissioners, and in passing upon it is not confined to matters appearing on the face thereof, but may exercise its discretion in inquiring into the genuineness and identity of the claims and the regularity of the report generally;[99] but in order that the report of a commissioner allowing a claim shall be sustained, it is essential that the claim so allowed shall have been proved before him by competent testimony.[1] It is usually considered that the report of the commissioners allowing or disallowing a claim, when filed and approved by the probate court, is final, and has the effect of a judgment, unless duly appealed from,[2] and an objection to a report on the ground of irregularity comes too late where the correction might have been seasonably sought on appeal.[3] It has been held, however, that an order allowing a claim in a suit to settle a decedent's estate, no exception having been made to the report of the commissioner declaring it a just claim, is not final, no distribution being ordered and no final relief being given.[4]

[§ 1048] **(6) Recommitment of Claim or Report.** Where an auditing judge allowed a claim, but exceptions thereto, based on the incompetency of the claimant as a witness, were urged, it was held proper to recommit the matter to the auditing judge.[5] Where the authority of commissioners to allow and adjust claims had expired and all power to extend it was gone, the probate court had no authority to recommit a report on a claim to such commissioners.[6]

[§ 1049] **(7) Effect of Failure to Act.** Claims against the estate cannot be defeated by the failure of the commissioners to take final action and make their report within the time fixed by the order,[7] and where commissioners failed to act on a claim duly presented, and their report did not mention it, and the creditor, without legal fault, did not discover the failure until his statutory remedies had expired, it was held that he might have relief in equity.[8]

[§ 1050] **(8) Compensation of Commissioners.** Where a commissioner is appointed to report on claims he should be given only the statutory allowance,[9] and should be required to file a statement showing the number of days he was engaged.[10]

[§ 1051] **c. By Court[11]—(1) In General.** Under some statutes claims are presented to the probate court or the judge thereof for allowance, and upon due notice and opportunity given to the personal representative to appear, and upon proof of claim presented, the court or the judge will allow or disallow the claim;[12] and, under these statutes, the personal representative cannot pay any claims

525, 23 NW 413; Sowles v. Quinn, 61 Vt. 354, 17 A 493.

[a] **Heirs cannot object.**—On an appeal by heirs from the allowance of a claim against the estate, they cannot object to a premature return by the commissioners on claims which could damnify no one but a creditor who had no opportunity to present his claim. Johnson v. Johnson, 66 Mich. 525, 23 NW 413.

98. Agnew's Est., 24 Pa. Co. 327, 7 LackLegN 33.

99. Peck v. Sturges, 11 Conn. 420; Palmer v. Palmer, 61 Me. 236; Whitcomb v. Hutchinson, 48 Vt. 310; Hodges v. Thacher, 23 Vt. 455; Newel v. Keith, 11 Vt. 214; Armentrout v. Shafer, 89 Va. 566, 16 SE 726.

[a] **Reconsideration of acceptance.**—Although the court has caused to be entered on the report "filed, accepted, and ordered to be recorded," it may, before the report is actually recorded, reject the same for errors found therein, and send it back to the commissioners for correction. Adarene v. Marlow, 33 Vt. 558.

[b] **It is no objection to the report** that other and prior items to the account presented were considered, where those items were not included in the settlement. Newel v. Keith, 11 Vt. 214.

1. Brown v. Cresap, 61 W. Va. 315, 56 SE 603, 9 LRANS 997.

2. Me.—Palmer v. Palmer, 61 Me. 236.

Mich.—Finley v. Dubay, 112 Mich. 334, 70 NW 885.

Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.

Oh.—Cromwell v. Herron, 11 Oh. Cir. Ct. 448, 5 Oh. Cir. Dec. 196.

Vt.—Tute v. James, 50 Vt. 124.

3. Whitcomb v. Hutchinson, 48 Vt. 310.

4. McClure v. Mills, 99 SW 221, 30 KyL 509.

5. Hirschmeyer's Est., 23 Pa. Dist. 1102, 1104 ("As it is quite possible that the claimant can establish his claim by competent testimony, we feel that the matter should be recommitted to the auditing judge for further hearing").

6. In re Hayes, 90 Vt. 286, 98 A 45.

7. Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852.

8. Batchelder v. White, 82 Vt. 132, 71 A 1111 (the fact that the creditor made an unsuccessful application to the probate court would not bar his suit in equity).

9. Hessig v. Hessig, 131 Ky. 514, 115 SW 748.

10. Hessig v. Hessig, 131 Ky. 514, 115 SW 748.

11. Notice of filing claim as prerequisite of jurisdiction see supra § 981.

12. Ala.—Lapsley v. Goldsby, 14 Ala. 73; Parks v. Stonum, 8 Ala. 752.

Ark.—Kenyon v. Gregory, 127 Ark. 525, 192 SW 887.

Ariz.—In re Tamar, 179 P 643.

Colo.—Hotchkiss v. Denver First Nat. Bank, 37 Colo. 228, 85 P 1007.

Ill.—Hales v. Holland, 92 Ill. 494; Matter of Bell, 210 Ill. A. 350; Kingan v. Burn, 104 Ill. A. 661; Miller v. Simons, 71 Ill. A. 369.

Kan.—Wright v. Stage, 86 Kan. 475, 121 P 491; Scroggs v. Tutt, 20 Kan. 271.

Mich.—Buck v. Lockwood, 193 Mich. 242, 159 NW 509.

Miss.—Mobile Branch Bank v. Rhew, 37 Miss. 110.

Mo.—Cassatt v. Vogel, 94 Mo. 646, 8 SW 169; Peck v. Fillingham, 199 Mo. A. 277, 202 SW 465; Church v. Church, 73 Mo. A. 421; State v. Walsh, 67 Mo. A. 348; Dingle v. Pollick, 49 Mo. A. 479.

N. M.—Chaves v. Perea, 3 N. M. 71, 2 P 73.

N. C.—Barnes v. Fort, 169 N. C. 431, 86 SE 340.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390; In re Smith, 13 N. D. 513, 101 NW 890.

Tex.—Butler v. Fechner, (Civ. A.) 200 SW 1126.

Wis.—Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

Que.—Ex p. Clark, 10 Que. Pr. 291.

[a] **Jurisdiction of probate court exclusive.**—Since a probate court has original and exclusive jurisdiction of the administration of the estates of deceased persons, and since under Comp. L. (1897) cc 252, 253, relating to payments of debts of estates and accounts of executors, no claims can be allowed against such estates unless presented in that court for allowance, and since an appeal to the circuit court from a will contest in the probate court does not remove the entire estate to the circuit court, but only gives that court jurisdiction to hear and determine the will contest, the circuit court, on an appeal from a will contest in the probate court, has no jurisdiction to order the allowance out of the funds of the estate of money necessary to enable the defeated parties to perfect an appeal to the supreme court. Goff v. Cass Cir. Judge, 152 Mich. 212, 115 NW 1059.

[b] **It is not the province of a court of equity** (1) to allow or disallow claims, or to administer the estate, especially after the subject has been entered on in the probate court. Draper v. Brown, 153 Mich. 120, 117 NW 213. (2) The general rule that a court of chancery has no power to audit a claim against the estate of a decedent is subject to an exception where the amount is not contested and all the parties affected are before the court, and the question is raised incidentally to others. Yalomstein v. Yalomstein, 190 Mich. 615, 157 NW 372.

[c] **Legal or equitable demands allowable.**—The probate court has jurisdiction to allow against an estate money demands, whether legal or equitable in their nature. Grimes v. Reynolds, 184 Mo. 679, 83 SW 1132 [aff 94 Mo. A. 576, 68 SW 588] (where a wife, having a separate estate, gave a note to her husband for money borrowed, and after her death he proved the note as an ordinary demand against her estate in the probate court, that court had jurisdiction to allow the demand, and the husband was not obliged to seek relief in a court of equity).

[d] **Claim against representative for legal services.**—Under a statute, expressly conferring jurisdiction on the county court of all matters relating to the estates of decedents, such court had jurisdiction to determine the expense incurred by an administrator for legal services, and, on the application of the attorneys rendering same, after the administrator had become a defaulter without

out of the assets of the estate until allowed by the probate court.[13] But in the absence of statutory authority a probate court has no jurisdiction to direct the personal representative to pay a claim asserted against the estate.[14]

Federal courts in equity have jurisdiction to establish the claim of a foreign creditor against the estate of a decedent by a decree to that effect.[15]

Taxes assessed against the executor need not be allowed as other claims by the probate court.[16]

[§ 1052] **(2) Notice of Hearing.** While the probate court may order notice to parties in interest before proceeding to hear the claim of an executor against an estate, such notice is not a condition precedent to the court's jurisdiction.[17] Where an order was entered fixing the fee of an attorney appointed to represent minor devisees and legatees, as authorized by statute, the mere fact that there had been no previous account filed by the executor was insufficient to establish want of notice of the application to fix such fee to all persons interested.[18]

[§ 1053] **(3) Hearing and Determination.** In passing upon claims the probate court is not governed by the technical rules of the common law,[19] but where equitable relief is required, the court will adopt equitable procedure,[20] and where it appears that the claimant is equitably entitled to the amount claimed, it is proper to allow his claim.[21] Provision is sometimes made by statute for the appointment of an attorney to represent the decedent's estate where the personal representative asserts a claim against it.[22] A waiver by the administrator of notice of the presentation of a claim is not a consent to a hearing on such claim prior to the time provided by law.[23] A suspicious claim will be rejected, unless supported by very strong proof.[24]

[§ 1054] **(4) Order or Decree and Record.** The order or decree entered by the court on passing upon a claim against a decedent's estate should be against the executor or administrator[25] for the allowance of the claim at an amount certain to be paid out of the assets of the estate,[26] or for the disallowance of the claim.[27] The probate court has jurisdiction to make an order authorizing and di-

having paid for such services, to decree that the value thereof should constitute a lien on the assets of the estate in favor of the attorneys. Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

[e] **Claim not within jurisdiction.**—The probate court had no jurisdiction over a claim arising from the fact that mortgagees foreclosed deeds of trust given by testatrix on realty specifically devised to claimants, thus forcing claimants to pay such encumbrances. Peck v. Fillingham, 199 Mo. A. 277, 202 SW 465.

[f] **Probate judge in vacation** cannot allow claims. Dingle v. Pollick, 49 Mo. A. 479; Murphy v. Harris, (Miss.) 48 S 232; Chaves v. Perea, 3 N. M. 71, 2 P 73.

[g] **Nonintervention will.**—The probate court has no power to pass upon claims against an estate administered under a nonintervention will. Schubach v. Redelsheimer, 92 Wash. 124, 158 P 739. Nonintervention wills generally see infra §§ 2895–2902.

[h] **In Quebec** the court cannot authorize the testamentary executors to pay a debt of the testator unless it is ascertained and undisputed by the heirs, or the payment of it is unjustly refused by the heir, or where the heir cannot give a consent to such a payment, as in cases of unsound mind or absence, or where the heir has refused the bequest, or there is no heir or legatee. This entirely discretionary authorization will not be accorded if the debt is disputed or disputable by the heir upon apparently reasonable grounds. Ex p. Clark, 10 Que. Pr. 291.

[i] **Consent of parties.**—In the ordinary administration of a decedent's estate creditors are not obliged to put their claims in judgment unless they are rejected by the administrator, but the validity and amount of such claims may, by consent of the parties, be adjudicated by the surrogate. De Coppet v. Cone, 199 N. Y. 56, 92 NE 411, 139 AmSR 844, 20 AnnCas 841.

13. Reitzell v. Miller, 25 Ill. 67; Wallace v. Monroe, 22 Ill. A. 602; In re Kappelman, 101 Kan. 654, 168 P 876; Wright v. Stage, 86 Kan. 475, 121 P 491; In re Hensley, 121 Mo. A. 695, 97 SW 645; Wilks v. Murphy, 19 Mo. A. 221.

14. Miniggio v. Hutchins, 43 App. (D. C.) 117.

15. Connecticut Mut. L. Ins. Co. v. Schurmeier, 117 Minn. 473, 136 NW 1, AnnCas1913D 462 (such a decree, when a certified copy thereof is filed in the proper probate court, stands as a claim duly proved and allowed against the estate of the decedent, and it is the duty of the personal representative to pay the claim in due course of administration without any order of the probate court allowing the claim or directing its payment).

16. State v. Packard, 250 Mo. 686, 157 SW 598.

17. Kenyon v. Hayhurst, 35 R. I. 380, 87 A 168.

18. In re Carpenter, 146 Cal. 661, 80 P 1072.

19. Hoblit v. Sandmeyer, 166 Ill. A. 431.

20. Trego v. Cunningham, 267 Ill. 367, 108 NE 350 [rev 188 Ill. A. 70]; Woman's American Baptist Home Mission Soc. v. Rayburn, 203 Ill. A. 577; Hoblit v. Sandmeyer, 166 Ill. A. 431; Spink v. Spink, 28 Oh. Cir. Ct. 94.

[a] **Illustration.**—Where a claim presented to the probate court, based on a judgment, is claimed not to be joint and several as against decedent and his codefendant, the court of probate, under its equitable powers, may look back of the judgment to the obligation on which it was based, and if such obligation was joint and several allow the claim accordingly. Harris v. Harris, 116 Ill. A. 537.

[b] **Statutory grant of jurisdiction carries equitable powers.**—A statutory grant to the probate court of jurisdiction to allow or reject claims made by an executor or administrator against the estate he represents, carries with it such equitable jurisdiction as is necessary to a full and complete exercise of the powers specifically conferred. Spink v. Spink, 28 Oh. Cir. Ct. 94.

21. Hoblit v. Sandmeyer, 166 Ill. A. 431.

22. Powell v. Jackson, 60 Ind. A. 597, 111 NE 208.

23. State v. Pratt, 183 Mo. A. 209, 170 SW 418.

24. Richards v. McLain, 118 La. 424, 43 S 38; In re Flaacke, (N. J. Prerog.) 64 A 1020; In re DeForest, 119 App. Div. 782, 104 NYS 342.

[a] **Claims disallowed.**—(1) Where an executor claimed to have rendered services for his testator extending over a period of nearly five years, when testator was amply able to have paid any just claim on demand but no demand was made in testator's lifetime, and the claim is made up from entries in claimant's diary which show neither any amount indicating the value of the services nor that the value had been agreed on, the claim was held unsustainable in the absence of proof of the reasonable value of the services. In re Flaacke, (N. J. Prerog.) 64 A 1026. (2) Where a petition recited a contract between petitioner and testatrix for the payment of a certain sum monthly to petitioner, and that during proceedings for the probate of the will the executors agreed to continue the payments, and did so for a time, and then refused to continue them, and the verified answer of the executrix alleged that when they made the agreement they were not acquainted with the contract and did not know that it had been rendered void because petitioner had violated conditions precedent, and that petitioner had commenced an action to have the will declared void, and the will, which was made part of the answer, showed the condition to be that petitioner should remain unmarried, and there was nothing to show she had married, and it was alleged that the will directed payment of the installment, but provided that no one contesting the will should receive any benefit thereunder, the surrogate properly treated the answer as not showing any defense to the claim. Matter of De Forrest, 119 App. Div. 782, 104 NYS 342 [aff 189 N. Y. 544 mem, 82 NE 1125 mem].

25. West v. Krebaum, 88 Ill. 263; Maddox v. Maddox, 97 Ind. 537; Martin v. Shannon, 101 Iowa 620, 70 NW 720; Roberts v. Weadock, 98 Wis. 400, 74 NW 93.

[a] **However,** an order allowing a claim is not bad because entitled against the estate instead of against the administrator, where the administrator appeared in the case. West v. Krebaum, 88 Ill. 263.

26. Cal.—In re McDougald, 146 Cal. 191, 79 P 878.

Ind.—Maddox v. Maddox, 97 Ind. 537.

Mich.—La Roe v. Freeland, 8 Mich. 531.

Mo.—State v. James, 82 Mo. 509.

N. Y.—McNulty v. Hurd, 72 N. Y. 518.

[a] **What will be determined.**—On an application for a decree for the payment of a judgment against decedent, the surrogate will determine the amount remaining due on the judgment, and who is the owner, but not whether there has been an accord and satisfaction, or whether the estate is entitled in equity to a release or discharge in whole or in part. McNulty v. Hurd, 72 N. Y. 518.

[b] **Order should be for costs also in proper cases.**—Maddox v. Maddox, 97 Ind. 537.

27. Johnson v. Gillett, 52 Ill. 358; La Roe v. Freeland, 8 Mich. 531.

[a] **Order held sufficient.**—An order of the county court that "after having taken the matter under ad-

recting that a note presented as a claim against an estate be paid by the exercise by the executrix of the option therein reserved to pay by delivery of corporate stock.[28] The order of entry and allowance is sufficient, although not signed by the county judge, where the claim appears on the schedule of claims, showing its allowance on the day fixed for hearing claims, and also on the entry book, in the handwriting of the county judge, showing the name of the claimant, the amount of the claim, and the amount allowed on such day.[29] Where the estate is insufficient to pay general claims in full, an order directing payment of a particular claim in full, without determining whether such claim is preferred, is improper.[30] Where a defendant who has a claim against an estate files an answer in which he sets up that there is in his hands for collection an amount in notes owing to the estate larger than the amount of his claim, and the commissioner reports that he will retain such claim out of the funds in his hands when collected, it is not error for the court, after the death of the one asserting the claim, to decree to his personal representatives upon an answer filed for that purpose, the amount of the claim asserted by the decedent, there being no proof that he in his lifetime collected and retained the amount, nor any contention that the claim is not a just charge against the estate.[31] Where a claim against an estate was erroneously presented to the probate court for allowance by the administrator, instead of by the claimant, accompanied by the affidavit required by statute, a judgment of the probate court allowing the claim and directing its payment out of the assets of the estate was void for want of jurisdiction.[32] A judgment allowing claims possesses all the attributes of judgments of courts of general jurisdiction and is res judicata as to all issues properly belonging in the case.[33] The court has, however, inherent power to correct or amend its own order or decree[34] or its records.[35] A claim shown to have been filed after it was barred by limitations will not be presumed to have been allowed by the court unless that fact affirmatively appears upon the record.[36]

[§ 1055] **(5) Effect of Failure of Court to Act.** Under some statutes the failure of the probate judge to indorse his allowance or rejection upon a claim within a designated time after it has been presented to him is equivalent to a rejection,[37] but such a provision is not applicable to claims pending in the probate court upon an order setting aside their former allowance by the administrator upon objections by the heirs.[38]

[§ 1056] **(6) Approval after Rejection.** It is usually held that a claim may be approved and allowed by a county judge after it has been rejected, either by nonaction or written indorsement, at any time before it is barred by limitations;[39] but, on the other hand, an order purporting to allow a claim after it had been disallowed by the personal representative has been held void.[40]

[§ 1057] **d. Set-Off.** The statutes usually provide that, where a creditor presents a claim to the commissioners, or to the court of probate, the personal representative may exhibit claims of the deceased as a set-off to the claim of the creditor, and the commissioners or the court shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be;[41] and it has been held that a claim not so asserted cannot subse-

visement, the court this day, after due deliberation, rejects the claim" is a sufficiently formal judgment. Johnson v. Gillett, 52 Ill. 358.

28. In re Vance, 152 Cal. 760, 93 P 1010.

29. McCormack v. McCormack, 53 Nebr. 255, 73 NW 693.

30. In re Blattner, 92 Wash. 48, 158 P 1015, 89 Wash. 412, 154 P 796.

31. Brown v. Cresap, 61 W. Va. 315, 56 SE 603, 9 LRANS 997.

32. Jenkins v. Morrow, 131 Mo. A. 288, 109 SW 1051.

33. In re Perkins, 166 Mo. A. 170, 148 SW 969; Donnell v. Wright, 147 Mo. 639, 49 SW 874; Henry v. McKerlie, 78 Mo. 416; Smith v. Sims, 77 Mo. 269; Johnson v. Beazley, 65 Mo. 250, 27 AmR 276; Barber Asphalt Pav. Co. v. Field, 132 Mo. A. 628, 97 SW 179; Reichner v. Reichner, 237 Pa. 540, 85 A 877.

[a] **Illustration.**—A judgment allowing a claim against the estate of a deceased widow is res judicata to the extent of the establishment of the debt in proceedings to charge the debt against the estate of the deceased husband, leaving a will giving his wife the use of his estate for life, with gift over after her death on the payment of her debts. Pierce v. Pierce, 139 Mo. A. 416, 122 SW 1147.

[b] **Prima facie evidence.**—An orphans' court decree, awarding to a creditor his claim against the decedent's estate, is prima facie evidence in other proceedings of the correctness of the claim. Reichner v. Reichner, 237 Pa. 540, 85 A 877.

[c] **The record of the county court, showing the allowance** of claims which were filed after the adjustment day and after an order of sale of real estate but within two years allowed for the presentation of claims, does not amount to judgments on the claims. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

Effect of allowance of claim by probate court see supra §§ 1063, 1064.

34. Page v. Ralph, 55 Ark. 52, 17 SW 365; Schwartz's Est., 2 Woodw. (Pa.) 393.

Amendment of judgment generally see Judgments [23 Cyc 859].

35. Ritchey v. Withers, 72 Mo. 556.

[a] **Illustration.**—Where the probate judge allowed a claim, and placed it in a certain class, and the clerk in making the indorsement on the demand and in the book of abstracts of demands made a mistake and put the claim in another class, this might be corrected by a nunc pro tunc entry. Ritchey v. Withers, 72 Mo. 556.

[b] **Improper amendment.**—A probate court which had in the presence of the administrator and a claimant against the estate made an order allowing a claim against the individual estate of the decedent, and having approved the entry for the permanent record in the presence of both parties had no authority, after the departure of plaintiff and without any notice to him or his attorney, to alter the judgment entry by interlining provisions to the effect that all debts of the deceased not also allowed against the estate of a partnership of which he was a member should be first paid, and that the claim should not be payable out of the assets of the individual estate until the individual debts should have been satisfied. Ault v. Bradley, 191 Mo. 709, 90 SW 775.

36. Janes v. Brunswick, 8 N. M. 345, 45 P 878.

37. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901; Stevens v. D. R. Dunlap Mercantile Co., 112 Miss. 524, 73 S 570; Stevens v. D. R. Dunlap Mercantile Co., 108 Miss. 690, 67 S 160; Patrick v. Austin, 20 N. D. 261, 127 NW 109.

38. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

39. Gillespie v. Wright, 93 Cal. 169, 28 P 862; Calanan v. McClure, 47 Barb. 206; In re Smith, 13 N. D. 513, 516, 101 NW 890; Burks v. Bennett, 62 Tex. 277.

"There is no reason why the county judge cannot, in his discretion, set aside a previous rejection and allow a claim, provided, only, this is done before it is barred." In re Smith, supra.

40. In re Barnett, 52 Okl. 623, 153 P 653.

41. Iowa.—Iowa-Minnesota Land Co. v. Conner, 136 Iowa 674, 677, 112 NW 820 [cit Cyc].

Ky.—Harding v. Harding, 132 Ky. 133, 116 SW 305.

Mich.—McNamara v. Michigan Trust Co., 155 Mich. 585, 119 NW 1074; Peo. v. McCutcheon, 40 Mich. 244; Willard v. Fralick, 31 Mich. 431.

Mo.—In re Jarboe, 227 Mo. 59, 127 SW 26; Cassatt v. Vogel, 94 Mo. 646, 8 SW 169; Robinson v. Walker, 50 Mo. 19; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

Pa.—McCaul's Est., 12 Pa. Dist. 769; Baizley's Est., 10 Pa. Dist. 398; McCaul's Est., 28 Pa. Co. 161; Fluehr's Est., 27 Pa. Co. 602; In re Van Buren, 32 PittsbLegJNS 154.

Vt.—Bliss v. Little, 63 Vt. 86, 22 A 13; Hatch v. Hatch, 60 Vt. 160, 13 A 791.

W. Va.—Brown v. Cresap, 61 W. Va. 315, 56 SE 603, 9 LRANS 997.

[a] **Such set-off must be confined to** claims of the deceased, and cannot include demands which never belonged to the deceased. Willard v. Fralick, 31 Mich. 431.

[b] **A set-off cannot be withdrawn** when once asserted. Peo. v. McCutcheon, 40 Mich. 244.

[c] **A claim under a contract which is void** as against public policy

quently be enforced against the creditor, or set off by the personal representative in an action to enforce an allowance against the estate.[42] But it has also been considered that, where the representative relies upon the assurance of the creditor and omits to assert a proper set-off to the claim before the commissioners, so that the set-off becomes barred and the time for renewing the commission expires, the acts of the claimant will be deemed a constructive fraud, and equity will grant relief.[43] Under a statute requiring a claimant to file an affidavit that the claim is justly due and that there are no just counterclaims to the same, a demand against which there exists an equitable set-off or counterclaim may be adjusted in equity before it is allowed and paid out of the decedent's estate.[44]

[§ 1058] **e. Setting Aside Allowance—(1) In General.** The probate court has, as a general rule, power to set aside the allowance or disallowance of a claim against a decedent's estate,[45] especially where such allowance or disallowance was obtained ex parte.[46] A suit in equity may also be maintained to set aside for fraud an order or decree of the probate court allowing a claim against a decedent's estate;[47] and the statutory remedy for the vacation of the allowance in the probate court is not exclusive, but concurrent with the remedy afforded by such a suit.[48] An administrator who has disallowed a claim may afterward, it has been held, revoke his action, and allow the same;[49] but it has been held that, where the administrator has allowed a claim in full, he cannot withdraw such allowance by protesting against an approval thereof by the court.[50]

[§ 1059] **(2) Who May Attack Allowance.** Heirs and devisees[51] and distributees and legatees as well as personal representatives[52] may move to have an allowance set aside on proper grounds, when injuriously affected thereby, no matter how small their interests in the estate may be. A receiver of decedent's estate represents the interests of the creditors as well as of the estate, and, if a motion by the receiver to set aside an order of the surrogate granting allowances out of the estate is denied, the motion cannot be renewed by the creditors or any one of them without leave of court.[53]

is not a proper set-off. Bumm's Est., 8 Pa. Dist. 191.

[d] **An equitable set-off** may be adjusted in a court of equity before its allowance and payment. Schwarz v. Harris, 206 Fed. 936.

42. McMorrin v. Overholt, 14 Ark. 244; Olmstead v. Bailey, 35 Conn. 584; Jamison v. Wickham, 67 Mo. A. 575; Bliss v. Little, 63 Vt. 86, 22 A 13; Hatch v. Hatch, 60 Vt. 160, 13 A 791.

43. Cutting v. Cutting, 91 Vt. 395, 100 A 911.

44. Schwarz v. Harris, 206 Fed. 936.

45. Ala.—Wills v. Rand, 41 Ala. 198.

Ark.—Scott v. Penn, 68 Ark. 492, 60 SW 235.

Cal.—In re Hite, 155 Cal. 448, 101 P 448.

Colo.—McLaughlin v. Rote, 62 Colo. 505, 163 P 841; Clemes v. Fox, 25 Colo. 39, 53 P 225.

Ida.—Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901; In re Coryell, 16 Ida. 201, 101 P 723.

Ill.—Schlink v. Maxton, 153 Ill. 447, 38 NE 1063 [aff 48 Ill. A. 471]; Lima Cong. v. Hopkins, 201 Ill. A. 316; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228].

Ind.—Beard v. Peru First Presb. Church, 15 Ind. 490.

Iowa.—In re Gray, 178 Iowa 517, 159 NW 978; In re Scholes, 170 Iowa 93, 152 NW 3; Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; In re Douglas, 140 Iowa 603, 117 NW 982; In re Davenport, 85 Iowa 293, 52 NW 197.

Kan.—Wolfley v. McPherson, 61 Kan. 492, 59 P 1054 [rev (A.) 57 P 257]; Lutz v. Balcom, 53 P 523.

Mich.—Lyle v. Anderson, 123 Mich. 601, 82 NW 246.

Mo.—Keele v. Keele, 118 Mo. A. 262, 94 SW 775; Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897; Mason v. Gaither, 106 Mo. A. 354, 80 SW 277; Casey v. Murphy, 7 Mo. A. 247.

Nebr.—McGraw v. Humboldt State Bank, 60 Nebr. 716, 84 NW 99; McKenna v. McCormick, 60 Nebr. 595, 83 NW 844.

Tex.—McGar v. Nixon, 36 Tex. 289.

Vt.—In re Hayes, 90 Vt. 286, 98 A 45.

"The probate court has large control over an executor or administrator, and may at any time before his discharge correct his accounts and settlements for mistake or fraud." Rabbett v. Connolly, 153 Iowa 607, 614, 133 NW 1060, 1063.

[a] **"The statute,** in terms devoid of ambiguity or doubt, reserves to the probate court upon compliance with its provisions, at instance of one of the enumerated parties in interest, including a creditor of the estate, power and right to vacate an order of allowance, try the matter anew, and allow or reject such demand." Mason v. Gaither, 106 Mo. A. 354, 357, 80 SW 277.

[b] **Application to vacate allowance a direct attack.**—Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; In re Douglas, 140 Iowa 603, 117 NW 982.

[c] **Presumption as to jurisdiction over person of claimant.**—The county court in vacating an order allowing a claim is presumed to have had jurisdiction over the person of the claimant, unless the contrary affirmatively appears by the record. Clemes v. Fox, 25 Colo. 39, 53 P 225.

[d] **Where fraud or mistake has intervened** in the allowance of a claim, the county court has jurisdiction to set it aside after the close of the term at which it was allowed, if the facts are such that a court of equity would entertain jurisdiction of a bill to set aside a judgment. Schlink v. Maxton, 153 Ill. 447, 38 NE 1063 [aff 48 Ill. A. 471].

[e] **Statute authorizing vacation of allowance constitutional.**—King v. Stotts, 254 Mo. 198, 162 SW 246.

[f] **The pendency of an appeal** from the allowance of a claim will not prevent claimant from instituting proceedings before the court making the allowance to set the same aside. Beard v. Peru First Baptist Church, 15 Ind. 490.

[g] **Claim payable in Confederate money.**—An administrator's allowance of a claim payable in Confederate money and approval thereof by the probate court are absolute nullities, and proof that the allowance and approval were made or obtained by fraud is not necessary. McGar v. Nixon, 36 Tex. 289.

[h] **Jurisdiction in district court only.**—An allowance and approval of a claim by the administrator and the chief justice of the county court can only be set aside or nullified by an original proceeding commenced in the district court for that purpose; it cannot be done by the county court. Cone v. Crum, 52 Tex. 348; Swan v. House, 50 Tex. 650; Hoffner v. Brander, 23 Tex. 631; Eccles v. Daniels, 16 Tex. 136; Moore v. Hillebrant, 14 Tex. 312, 65 AmD 118.

46. Cal.—Sullenberger's Est., 72 Cal. 549, 14 P 513.

Iowa.—In re Gray, 178 Iowa 517, 159 NW 978.

Mo.—State v. James, 82 Mo. 509; Martin v. La Master, 63 Mo. A. 342.

N. H.—Parker v. Gregg, 23 N. H. 416.

N. Y.—Matter of Warrin, 28 Misc. 695, 60 NYS 191, 1 Mills 246.

S. C.—Fraser v. Charleston, 23 S. C. 373.

47. Central Nat. Bank v. Fitzgerald, 94 Fed. 16; Jones v. Brinker, 20 Mo. 87; Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897; Purdy v. Gault, 19 Mo. A. 191; In re Lindsay, 184 Pa. 262, 39 A 82.

48. King v. Stotts, 254 Mo. 198, 162 SW 246; Walther v. Null, 233 Mo. 104, 134 SW 993; Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897.

[a] **Accordingly,** where the holder of a note which had been fully paid filed such note against the maker's estate, and made a false affidavit that the whole amount thereof was due over and above all offsets as required by statute, and the court allowed the same against the estate, the administrator having no knowledge or information leading him to believe that the note had been paid, a suit in equity was thereafter maintainable by him to set aside the judgment. Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897.

49. Husted v. Hoyt, 12 Conn. 160.

50. Hensel v. International Bldg., etc., Assoc., 85 Tex. 215, 20 SW 116.

51. Schlink v. Maxton, 153 Ill. 447, 38 NE 1063 [aff 48 Ill. A. 471]; Lancaster v. Gould, 46 Ind. 397; Keele v. Keele, 118 Mo. A. 262, 94 SW 775; Martin v. La Master, 63 Mo. A. 342; Link v. Link, 48 Mo. A. 345; Giddings v. Steele, 28 Tex. 732, 91 AmD 336; Claiborne v. Tanner, 18 Tex. 68; Farmer v. Saunders, 60 Tex. Civ. A. 197, 128 SW 941.

[a] **Illustration.**—Where a proceeding to establish a claim was transferred to the circuit court because the judge of probate was disqualified, and the circuit court allowed the claim without hearing any evidence and after refusing an heir of decedent leave to contest it, the heir was entitled to pray for an order vacating the order allowing the demand. Keele v. Keele, 118 Mo. A. 262, 94 SW 775.

52. Cal.—Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

Colo.—McLaughlin v. Rote, 62 Colo. 505, 163 P 841.

Ill.—Sherman v. Whiteside, 190 Ill. 576, 60 NE 838.

Ind.—Lancaster v. Gould, 46 Ind. 397; Bell v. Ayres, 24 Ind. 92.

Iowa.—In re Davenport, 85 Iowa 293, 52 NW 197.

Tex.—Cone v. Crum, 52 Tex. 348.

53. Irving Nat. Bank v. Kernan, 3 Redf. Surr. (N. Y.) 1.

But a party who appears and contests the allowance of a claim cannot afterward move to vacate the allowance on the same ground on which he contested it.[54]

[§ 1060] **(3) Time for Application.** Proceedings to vacate an order of allowance or classification of claims must be brought within the time limited by statute if there is any statute applicable thereto,[55] otherwise it has been held that they must be brought within a reasonable time.[56] In some states, however, the allowance may be vacated at any time while the estate remains unsettled,[57] and a mistake may be corrected by equitable proceedings even after final settlement and discharge of the representative.[58]

[§ 1061] **(4) Grounds.** The discretionary power of the probate court to amend or vacate its own orders or judgments continues only until the expiration of the term at which such orders or judgments were rendered,[59] and after that time the court can act in respect to the matter only according to fixed principles of law,[60] and unless a motion to vacate made at a subsequent term presents some of the grounds enumerated in the statute it cannot be granted.[61] The usual grounds for vacating or setting aside an order or decree of the probate court allowing or disallowing a claim are that such order or judgment was procured by fraud or misrepresentation, or through mistake, surprise, or excusable inadvertence or neglect,[62] or that proper notice was not given to the personal representative or the creditors of the estate.[63] Where an administratrix with the will annexed has told the beneficiaries under the will that she would not assert any claim against the estate, and afterward, without notice, filed a personal claim which was allowed, equity will set the allowance aside.[64] The mere fact that a claim was barred by the general statute of limitations when allowed has been held to be no ground for setting aside an allowance thereof,[65] particularly where the personal representative had not availed himself of such plea;[66] but

54. Keele v. Keele, 118 Mo. A. 262, 273, 94 SW 775 (to allow such a course "would annul, as far as the allowance of demands against the estates of deceased persons is concerned, the general doctrines governing the effect of former adjudications").

55. Hoshall v. Brown, 102 Ark. 114, 143 SW 1081; Wolfley v. McPherson, 61 Kan. 492, 59 P 1054 [rev (A.) 57 P 257]; Keele v. Keele, 118 Mo. A. 262, 94 SW 775; Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897; McKenna v. McCormick, 60 Nebr. 595, 83 NW 844.

[a] **After the term.**—Determinations of the probate court as to claims against an estate cannot be reopened or set aside after term, except by a proceeding in equity on the ground of fraud. Hoshall v. Brown, 102 Ark. 114, 143 SW 1081.

56. Snow v. Mather, 52 Tex. 650; Eccles v. Daniels, 16 Tex. 136; Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679; Deadock v. Ray, 111 Wis. 489, 87 NW 477.

[a] **Time held reasonable.**—Where orders approving certain claims as legal charges against the estate were entered, respectively, Nov. 7, 1901, and Jan. 30, 1902, a suit brought to set aside such orders, filed April 24, 1902, was instituted within a reasonable time. Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679

57. Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228]; In re Douglas, 140 Iowa 603, 117 NW 982; In re Sawyer, 124 Iowa 485, 100 NW 484; Tucker v. Stewart, 121 Iowa 714, 97 NW 148; Dorris v. Miller, 105 Iowa 564, 75 NW 482; Cowins v. Tool, 36 Iowa 82.

58. In re Douglas, 140 Iowa 603, 117 NW 982.

59. McGrew v. Humboldt State Bank, 60 Nebr. 716, 84 NW 99.

60. McGrew v. Humboldt State Bank, 60 Nebr. 716, 84 NW 99.

61. Lima Cong. v. Hopkins, 201 Ill. A. 316; Hendron v. Kinner, 110 Iowa 544, 80 NW 419, 81 NW 783; McGrew v. Humboldt State Bank, 60 Nebr. 716, 84 NW 99; McKenna v. McCormick, 60 Nebr. 595, 83 NW 844.

62. Ark.—Davis v. Rhea, 90 Ark. 261, 119 SW 271; Scott v. Penn, 68 Ark. 492, 60 SW 235.

Colo.—McLaughlin v. Rote, 62 Colo. 505, 163 P 841; Clemes v. Fox, 25 Colo. 39, 53 P 225.

Del.—White v. Penuel, 22 Del. 272, 66 A 362.

Ida.—Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

Ill.—Sherman v. Whiteside, 190 Ill. 576, 60 NE 838 [aff 93 Ill. A. 572]; Schlink v Maxton, 153 Ill. 447, 38 NE 1063 [aff 48 Ill. A. 471].

Ind.—Statelar v. Sample, 29 Ind. 315.

Iowa.—In re Scholes, 170 Iowa 93, 152 NW 3; Snelling v. Kroger, 89 Iowa 247, 56 NW 446; In re Davenport, 85 Iowa 293, 52 NW 197.

La.—Lyons' Succ., Mann. Unrep. Cas. 312.

Minn.—In re Gragg, 32 Minn. 142, 19 NW 651.

Mo.—Fitzpatrick v. Stevens, 114 Mo. A. 497, 89 SW 897.

Philippine.—Dariano v. Fidalgo, 14 Philippine 62.

Tex.—Hicks v. Oliver, 78 Tex. 233, 14 SW 575; Cone v. Crum, 52 Tex. 348; Lott v. Ballaud, 21 Tex. 167; Eccles v. Daniels, 16 Tex. 136; Jones v. Underwood, 11 Tex. 116.

Wis.—McLachlan v. Staples, 13 Wis. 448.

"Courts of probate jurisdiction are very jealous in guarding the interests of the estates of deceased persons, and when the action of any party connected with the administration of such estates is tainted in the slightest degree with fraud, such courts will take jurisdiction for the purpose of remedying whatever injury the estate may have suffered thereby." Dariano v. Fidalgo, 14 Philippine 62, 67.

[a] **"That parties having an interest in the estate** may contest the allowance of a claim on the ground of fraud and collusion is well settled." In re Douglas, 140 Iowa 603, 606, 117 NW 982.

[b] **Presumption as to grounds.**—Where the grounds on which a county court at a subsequent term vacated orders allowing claims and approving the widow's allowance do not appear, the vacation is presumed to have been for fraud or mistake. Clemes v. Fox, 25 Colo. 39, 53 P 225.

[c] **Negligence not sufficient ground.**—It must be shown that the claim was allowed through fraud and collusion with the executor, and not through negligence. Sherman v. Whiteside, 190 Ill. 576, 60 NE 838 [aff 93 Ill. A. 572].

[d] **Constructive fraud of administrator.**—An administrator is guilty of at least constructive fraud when he procures the allowance of a claim, without contest, by purchasing the shares of the only objecting heirs who were within the jurisdiction, and a judgment allowing such claim should be vacated for his fraud. Gorham v. Gorham, 54 Ind. A. 408, 103 NE 16.

[e] **Claim afterward discovered to have been paid.**—Where a mortgage note of decedent has been placed on the tableau of debts by the administrator as a valid claim against the succession, and he afterward finds evidence of its payment in whole or in part, and applies to the court to correct the error, and gives notice of his application to the parties interested, proof will be received of such payment and effect given to it, and the debt will be stricken from the tableau, or so much thereof as is satisfactorily proved to have been paid. Lyons' Succ., Mann. Unrep. Cas. (La.) 312.

[f] **Excuse for nonappearance held insufficient.** — Where a claim against an estate filed by an administrator was allowed a subsequent vacation of the allowance on the application of one who knew of the time for hearing, but failed to appear and oppose the claim, and whose only excuse for not appearing was that he felt confident that the administrator would administer the estate honestly and not permit unjust claims to be allowed, was an abuse of discretion. In re Kidder, 53 Minn. 529, 55 NW 738.

63. Ill.—Propst v. Meadows, 13 Ill. 157.

Iowa.—In re Gray, 178 Iowa 517, 159 NW 978; McLeary v. Doran, 79 Iowa 210, 44 NW 360.

Mo.—Martin v. Nichols, 63 Mo. A. 342.

Or.—Knight v. Hamaker, 40 Or. 424, 67 P 107.

Pa.—Carroll's Est., 4 Pa. Dist. 680, 17 Pa. Co. 273.

Vt.—Wells v. Morse, 11 Vt. 9.

64. Taylor v. Marshall, 56 Colo. 214, 138 P 25.

65. Dyer v. Jacoway, 50 Ark. 217, 6 SW 902; Shurbun v. Hooper, 40 Mich. 503.

[a] **Reason for rule.**—"If there was any objection growing out of the statute of limitations to the validity of the claims passed upon, it should have been raised before the commissioners or on appeal, and cannot properly be considered in this action." Shurbun v. Hooper, 40 Mich. 503 [quot Andrews v. Osborne, 159 Mich. 77, 82, 123 NW 599].

[b] **Where most of the items of a claim were not barred by limitations,** the fact that some of them were barred did not oust the probate court of jurisdiction, and was not ground for setting aside the probate in an action by decedent's heirs against legatees of the claimant. Andrews v. Osborne, 159 Mich. 77, 123 NW 599.

66. Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41].

there is also authority for the view that the fact that a claim was barred by limitations is a sufficient reason for setting it aside at the suit of the heirs.[67] Where the allowance or disallowance of a claim is sought to be set aside on the ground of newly discovered evidence, it should be shown why such evidence could not with due diligence have been furnished earlier; and to be available as a ground for reopening the case such evidence should be controlling and not cumulative only.[68]

[§ 1062] **(5) Proceedings.** If an order is made out of court and without notice allowing a claim against an estate, no notice of a motion to set it aside is necessary;[69] and a claimant, who is ruled to pay back money which the court, under a clear mistake, has directed its commissioner to pay him, is not prejudiced by a failure to notify him of the motion to correct the judgment.[70] It has been held that a notice of motion to open an order disallowing a claim can be properly served on the attorney for the administrator if this is done before an order of final distribution.[71] As a general rule, where fraud is relied on, the facts constituting the alleged fraud must be set out;[72] and a petition to vacate the report of commissioners of an estate is fatally defective where it does not allege the date of decedent's death or of the appointment of the administrator, or whether the estate has been fully administered.[73] An affidavit following the language of the statute may be sufficient.[74] An objection going to the sufficiency of the application to vacate the allowance of a claim should be raised by demurrer and not by motion to strike out.[75] Since an order of the probate court allowing or disallowing a claim has substantially the effect of a judgment,[76] where proceedings are instituted to vacate such order or decree, the presumption is that the allowance was made upon satisfactory vouchers and proofs, or that the claim was disallowed for want of sufficient evidence or some fatal irregularity, and the burden of proving otherwise is upon the party seeking to vacate the order or decree.[77] Affidavits may properly be filed in support of a motion by heirs of a decedent to set aside an allowance of a claim against the estate.[78] The moving party is not required to give such proof against the allowance as would be required to defeat the claim on a hearing on the merits, but only such a probable showing against the propriety of the allowance as will convince the court that the matter ought to be reheard;[79] and it has been held that the court may set aside or modify the allowance of a claim against the estate approved by the administrator and allowed by the clerk in vacation without any evidence except what may be shown by the papers.[80] Where the administrator makes no showing of facts in resistance of an application to set aside an order allowing his claim against the estate, the court may treat the application as true and grant relief.[81] The fact that a claimant obtained an allowance of his claim for more than he was entitled to does not establish fraud in obtaining the allowance;[82] but a holding that the allowance of an executor's claim against the estate was fraudulent is justified, where it seems that it was such executor's intention to secure its allowance without the knowledge of the residuary legatee, since he filed it after the time fixed for the presentation of claims and without notice to the residuary legatee, although he was aware of its existence at that time and the claim as filed affords no light to any one who might dispute it.[83] Where it is sought to set aside the allowance of claims upon the ground that they were barred by limitations, mere proof that the claims themselves appeared on their face to be barred is insufficient without evidence of the nonexistence of the facts

67. In re Brusha, 87 Nebr. 254, 126 NW 1079; Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

[a] **Presumption and proof of bar.**—(1) When the claim, although apparently barred, has been allowed and aproved, it will be presumed to have been within exceptions preventing the bar. Cone v. Crum, 52 Tex. 348. (2) An order of approval can be set aside by the beneficiaries of decedent only on direct proof that the debt was barred at the time of its allowance, and that no fact existed which suspended the statute during the time of its apparent operation. Howard v. Johnson, 69 Tex. 655, 7 SW 522; Campbell v. Shotwell, 51 Tex. 27; Mosely v. Gray, 23 Tex. 496; Hillebrant v. Burton, 17 Tex. 138.

68. Williams v. Price, 11 Cal. 212; McDaniels v. Van Fosen, 11 Iowa 195; Bowen v. Steere, 6 R. I. 251.

69. Sullenberger's Est., 72 Cal. 549, 14 P 513.

70. Wilmes v. Thobin, 11 KyL 678 (such claimant had his day in court).

71. In re Stroup, 40 S. D. 37, 166 NW 155.

72. Statelar v. Sample, 29 Ind. 315; Andrews v. Osborne, 159 Mich. 77, 123 NW 599.

[a] **Complaints held insufficient.**—Statelar v. Sample, 29 Ind. 315; Andrews v. Osborne, 159 Mich. 77, 123 NW 599.

73. In re Hayes, 82 Vt. 92, 71 A 1047 (where the petition alleged merely that the administrator had agreed to keep the petitioner informed as to the progress made in the settlement of the estate, and that he was led to believe that no debts existed against it other than those of the last sickness and burial, but that a claim had been allowed in favor of the administrator which was fraudulent and of which he did not learn until long after the commissioners' report had been accepted by the probate court, and the time to appeal had expired).

74. King v. Stotts, 254 Mo. 198, 162 SW 246 (an affidavit stating that affiant has good reason to believe and believes that a claim has been improperly allowed and will furnish satisfactory evidence of the fact, and asking for a vacation of the allowance of the claim and a trial anew).

75. In re Douglas, 140 Iowa 603, 117 NW 982; Wattels v. Minchen, 93 Iowa 517, 61 NW 915; Irwin v. Yeager, 74 Iowa 174, 37 NW 136.

76. See infra § 1063.

77. Cal.—Swain's Est., 67 Cal. 637, 8 P 497.

Colo.—Jones v. Bradley, 8 Colo. A. 178, 45 P 229.

Ind.—Stout v. Morgan, 6 Ind. 369.

La.—Ford v. Newcomer, 14 La. Ann. 706, 707.

N. Y.—Matter of Warrin, 56 App. Div. 414, 67 NYS 763.

Pa.—Clever's Est., 44 Pa. Co. 232.

Tex.—Henderson v. Ayres, 23 Tex. 96; Hillebrant v. Burton, 17 Tex. 138; Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

"Although the judgments of homologation, recognizing the verity of the claims set up against the succession, may not be technically, as to these plaintiffs, res judicata, which excludes all proof to the contrary, yet they constitute, especially at this distance of time, prima facie proof, which imposes upon plaintiffs the burden of establishing the fraud and deception by them alleged." Ford v. Newcomer, supra.

[a] **A statement that the administrator illegally procured an allowance** in his favor does not make out a case for equitable relief. Jones v. Brinker, 20 Mo. 87.

[b] **Evidence sufficient to show fraud.**—Doud v. Lockett, (Mo. A.) 215 SW 769.

78. Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060.

79. King v. Stotts, 254 Mo. 198, 162 SW 246; Keele v. Keele, 118 Mo. A. 262, 94 SW 775.

[a] **Findings showing sufficient evidence.**—Where an heir applied for an order vacating an allowance, and the court, in entering judgment vacating the allowance, found that the administrator made a mistake in confessing judgment and that the claim was improperly allowed, the findings showed that the court was satisfied that the showing made by the heir established a probability against the propriety of the allowance of the claim, sufficient to justify the court to vacate the order. Keele v. Keele, 118 Mo. A. 262, 94 SW 775.

80. Ordway v. Phelps, 45 Iowa 279.

81. In re Douglas, 140 Iowa 603, 117 NW 982.

82. Davis v. Rhea, 90 Ark. 261, 119 SW 271 (holding also that where an administrator, after disallowing a claim, employed a reputable attorney to represent the estate at the trial, where the claim was allowed in full, the administrator, after being satisfied that the claim was meritorious, was not required at the request of the heirs to appeal to the circuit court, and his refusal was not evidence of fraud justifying setting aside the allowance).

83. Fragd v. Fragd, 175 Ill. A. 246.

or circumstances which would have taken the claims out of the operation of the statute at the time when they were allowed.[84] If the allowance is set aside, the probate court has jurisdiction to determine on a hearing whether the claim should be allowed at all.[85]

[§ 1063] **f. Effect of Allowance or Rejection—(1) By Probate Court—(a) Upon Claimant and Personal Representative.** While the allowance or disallowance of a claim against an estate by the probate court, either directly or by way of approval of the act of commissioners or the personal representative in reference to such claim, may not be regarded as a judgment in the strict sense of the term,[86] it operates as an adjudication between the claimant and the personal representative, and binds the latter and the estate equally with the former.[87] So when claims have been once allowed against the estate, payment can be enforced without any revivor against a new administrator.[88] It has been held that an artisan's lien is not affected by the lienor's presenting his claim to the probate court and the allowance of the same;[89] and that the mere disallowance of part of a claim secured by

84. Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

85. King v. Stotts, 254 Mo. 198, 162 SW 246.

86. Cal.—Louis v. Triscony, 58 Cal. 304; Magraw v. McGlynn, 26 Cal. 420 [aff 8 Wall. (U. S.) 639, 19 L. ed. 531].

Ind.—Fiscus v. Robbins, 60 Ind. 100.

Iowa.—Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060.

Miss.—Rogers v. Rosenstock, 117 Miss. 144, 77 S 958; State v. Bowen, 45 Miss. 347.

Mo.—Whitecloud Mill., etc., Co. v. Thomson, 264 Mo. 595, 175 SW 897 [transf from Ct. of App., 166 Mo. A. 170, 148 SW 969].

87. U. S.—Tate v. Norton, 94 U. S. 746, 24 L. ed. 222; Owsley v. Central Trust Co., 196 Fed. 412; Kendall v. Hardenbergh, 94 Fed. 911; Campbell v. Strong, 4 F. Cas. No. 2,367a, Hempst. 265.

Ala.—McDougald v. Rutherford, 30 Ala. 253; Coffin v. McCullough, 30 Ala. 107.

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373; James v. Gibson, 73 Ark. 440, 84 SW 485; Carter v. Engles, 35 Ark. 205; Yoes v. Moore, 29 Ark. 121; Wright v. Campbell, 27 Ark. 637; Wyatt v. Burr, 25 Ark. 476; Cossitt v. Biscoe, 12 Ark. 95; Dooley v. Watkins, 5 Ark. 705; Biscoe v. Butts, 5 Ark. 305.

Cal.—Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P 435; Walkerly v. Bacon, 85 Cal. 137, 24 P 638; In re McKinley, 49 Cal. 152; In re Schroeder, 46 Cal. 304; Magraw v. McGlynn, 26 Cal. 420 [aff 8 Wall. (U. S.) 639, 19 L. ed. 531]; In re Hidden, 23 Cal. 362; Beckett v. Selover, 7 Cal. 215, 68 AmD 237; Deck v. Gherke, 6 Cal. 666; Falkner v. Folsom, 6 Cal. 412; Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

Ill.—Mason v. Bair, 33 Ill. 194; Stone v. Wood, 16 Ill. 177.

Ind.—Brown v. Darrah, 95 Ind. 86; Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270; La Porte v. Organ, 5 Ind. A. 369, 32 NE 342.

Iowa.—In re Scholes, 170 Iowa 93, 152 NW 3; Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; In re Pennock, 122 Iowa 622, 98 NW 480; Hendron v. Kinner, 110 Iowa 544, 80 NW 419, 81 NW 783; Snelling v. Kroger, 89 Iowa 247, 56 NW 446; Gault v. Sickles, 85 Iowa 266, 52 NW 206; Ashton v. Miles, 49 Iowa 564; Little v. Sinnett, 7 Iowa 324.

Kan.—Shoemaker v. Brown, 10 Kan. 383.

Ky.—Robertson v. Robertson, 72 SW 813, 24 KyL 2020.

La.—Brown's Succ., 27 La. Ann. 328; Ford v. Newcomer, 14 La. Ann. 706.

Me.—Merrill v. Regan, 117 Me. 182, 103 A 155.

Mass.—Mitchell v. Pease, 7 Cush. 350.

Mich.—Chapoton v. Prentis, 144 Mich. 283, 107 NW 879; Norman v. Olney, 64 Mich. 553, 31 NW 555.

Minn.—McCord v. Knowlton, 79 Minn. 299, 82 NW 589; Lewis v. Welch, 47 Minn. 193, 48 NW 608, 49 NW 665; Barber v. Bowen, 47 Minn. 118, 49 NW 684; State v. Ramsey County Prob. Ct., 25 Minn. 22.

Mo.—Walther v. Null, 233 Mo. 104, 134 SW 993; Ladd v. Stephens, 147 Mo. 319, 48 SW 915; Clark v. Bettelheim, 144 Mo. 258, 46 SW 135; Munday v. Leeper, 120 Mo. 417, 25 SW 381; Smith v. Sims, 77 Mo. 269; Tutt v. Boyer, 51 Mo. 425; Dullard v. Hardy, 47 Mo. 403; Jones v. Brinker, 20 Mo. 87; McKinney v. Davis, 6 Mo. 501; Ivie v. Ewing, 120 Mo. A. 124, 96 SW 481; Funk v. Seehorn, 99 Mo. A. 587, 74 SW 445.

Mont.—In re Tuohy, 33 Mont. 230, 83 P 486.

Nebr.—Yeatman v. Yeatman, 35 Nebr. 422, 53 NW 385.

N. H.—Probate Judge v. Robins, 5 N. H. 246.

N. M.—Ross v. Lewis, 23 N. M. 524, 169 P 468.

N. Y.—Wilcox v. Gilchrist, 85 Hun 1, 32 NYS 608; Matter of Stevens, 53 Hun 637, 6 NYS 638; Thayer v. Clark, 48 Barb. 243 [aff 41 N. Y. 620 mem]; Matter of Nelson, 63 Misc. 627, 118 NYS 673; Matter of Bradley, 25 Misc. 261, 54 NYS 555 [aff 42 App. Div. 301, 59 NYS 105]; Matter of Phyfe, 5 NYLegObs 331; Wood v. Byington, 2 Barb. Ch. 387.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Okl.—National Lumber, etc., Co. v. Robinson, 48 Okl. 140, 149 P 1133.

Or.—Johnston v. Shofner, 23 Or. 111, 31 P 254.

Pa.—High's Est., 136 Pa. 222, 20 A 421, 423; O'Kane's Est., 28 Pa. Co. 240.

Tex.—Thomas v. Bonnie, 66 Tex. 635, 2 SW 724; Gibson v. Hale, 57 Tex. 405; Swan v. House, 50 Tex. 650; Cannon v. McDaniel, 46 Tex. 303; Giddings v. Steele, 28 Tex. 732, 91 AmD 336; Howard v. Battle, 18 Tex. 673; Moore v. Hillebrant, 14 Tex. 312, 65 AmD 118; Wood v. Wheeler, 11 Tex. 122; Neill v. Hodge, 5 Tex. 487; Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

Vt.—Bennett v. Camp, 54 Vt. 36; Rix v. Nevins, 26 Vt. 384; Woods v. Pettis, 4 Vt. 556; Bates v. Kimball, 2 D. Chipm. 77; Atherton v. Flagg, 2 D. Chipm. 61.

Wash. — Nash v. Wakefield, 30 Wash. 581, 71 P 33.

W. Va.—Hurxthal v. St. Lawrence Boom, etc., Co., 53 W. Va. 87, 44 SE 520, 97 AmSR 954.

Wis.—Roberts v. Weadock, 98 Wis. 400, 74 NW 93; Jameson v. Barber, 56 Wis. 630, 14 NW 859; Moerchen v. Stoll, 48 Wis. 307, 4 NW 352; Price v. Dietrich, 12 Wis. 626.

[a] **Illustration.**—Where one presented notes as a claim at the audit of an administrator's account, which claim was disallowed because barred by the presumption of payment, and also on the ground that claimant had been a partner of decedent, and that the amount claimed had been carried on the firm books to his credit, blended with other moneys arising from his share of profits, and that his interest in the partnership had been sold at sheriff's sale, no recovery could be had thereon against the administrator. Barclay v. Barclay, 230 Pa. 467, 79 A 667.

[b] **Prima facie evidence in other proceedings.**—"A decree of the orphans' court awarding to a creditor his claim against a decedent's estate, is prima facie evidence of the correctness of the claim in other proceedings." Reichner v. Reichner, 237 Pa. 540, 548, 85 A 877.

[c] **Limitations of the rule.**—(1) The rule that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against decedent himself and not to expenses of the administrator; and the latter are not conclusively determined until final settlement and judgment thereon. In re Erickson, 78 Nebr. 642, 111 NW 356. (2) "While an administrator will be protected, even against the heirs, in the payment of a claim duly allowed and ordered paid in due course of administration, though it subsequently develops that such claim was not proper to be allowed for payment, yet this rule is restricted to such claims allowed and paid in good faith and without fraudulent connivance of an administrator having knowledge at the time of payment that such claim should not have been allowed." Whittemore v. Coleman, 144 Ill. A. 109, 112 [aff 239 Ill. 450, 88 NE 228].

[d] **Judgment of referee where executor does not present facts within his knowledge.**—Where, on presentation of a claim against the estate of a decedent by his widow, it was disallowed by the executors and referred, but the executors not only failed to defend the claim, but failed to present the facts within their knowledge to the referee, his judgment allowing the claim could not be relied on to protect the executors in their payment of it. Matter of Watson, 115 App. Div. 310, 100 NYS 993 [aff 187 N. Y. 541 mem, 80 NE 1122 mem].

[e] **Merely a protection of representative.**—The orphans' court passing a claim has no power to determine the rights of the claimant against the estate, or to order the payment of the claim, and its decision is only prima facie, and operates as a protection to the executor in the event of its liquidation by a disbursement of the funds held by him in his representative capacity. Houck v. Houck, 112 Md. 122, 76 A 581; Levering v. Levering, 64 Md. 399, 2 A 1; State v. Reigart, 1 Gill (Md.) 1, 39 AmD 628.

[f] **Approval by clerk of allowance by executor.**—The allowance of a claim against the estate by an executor and the approval thereof by the clerk is not final, but provisional and temporary, and finality can only be predicated upon allowance by the court itself under the statute. Ryan v. Hutchinson, 161 Iowa 575, 143 NW 433.

88. Brown v. Nelms, 86 Ark. 368, 112 SW 373 (such claims continue as subsisting judgments against the estate until they are paid).

89. Lithgow v. Sweedberg, (Tex. Civ. A.) 78 SW 246.

mortgage, in the absence of proof as to the ground of disallowance, does not bar proceedings to foreclose the mortgage.[90]

[§ 1064] **(b) Upon Heirs, Distributees, Etc.** While the allowance of a claim against the estate by the court has been held to be prima facie binding on the heirs where they had due notice of the hearing and an opportunity to oppose the claim,[91] even though they did not avail themselves of the opportunity,[92] the general rule is that the allowance of a claim by the probate or county court is not conclusive as against the heir or distributee, and that he may contest such allowance when the representative's final account is presented for approval.[93] Neither does the allowance of a claim against the personal representative have the effect of creating a technical lien on the land as against the heir or devisee.[94]

[§ 1065] **(2) By Commissioners.** The decision of commissioners on claims in the probate court is in no sense a common-law judgment,[95] but such commissioners act in a judicial capacity and their action in a case of which they have jurisdiction, unappealed from, is conclusive.[96] In a suit by an executor to set aside a conveyance by his testator in alleged fraud of creditors, the allowance by commissioners of claims which do not show on their face that they accrued after testator's death constitutes prima facie evidence of their existence before that period.[97]

[§ 1066] **(3) By Personal Representative.** It is usually considered that claims presented to the personal representatives and admitted and allowed by them acquire the character of liquidated and undisputed debts against the estate;[98] and the representatives cannot thereafter question the propriety of

90. Palmer v. Sanger, 143 Ill. 34, 32 NE 390 [rev 36 Ill. A. 485].

91. Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Goeppner v. Leitzelmann, 98 Ill. 409; Rosenthal v. Renick, 44 Ill. 202; Mason v. Bair, 33 Ill. 194; Hopkins v. McCann, 19 Ill. 113; Stone v. Wood, 16 Ill. 177; Horn v. Sayer, 184 Ill. A. 326; Thomas v. Williams, 80 Kan. 632, 103 P 772, 25 LRANS 1304 [cit Cyc].

92. Mason v. Bair, 33 Ill. 194.

93. U. S.—Owsley v. Central Trust Co., 196 Fed. 412.

Ariz.—In re Tamer, 179 P 643.

Cal.—Wise v. Williams, 88 Cal. 30, 25 P 1064; Sullenberger's Est., 72 Cal. 549, 14 P 513; In re Crosby, 55 Cal. 574; Beckett v. Selover, 7 Cal. 215, 68 AmD 237; Kowalsky v. Santa Cruz County Super. Ct., 13 Cal. A. 218, 109 P 158.

Fla.—Sanderson v. Sanderson, 17 Fla. 820.

Ida.—In re Coryell, 16 Ida. 201, 101 P 723.

Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Sinnickson v. Perkins, 231 Ill. 492, 83 NE 194; Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Schlink v. Maxton, 153 Ill. 447, 38 NE 1063; Shepard v. Speer, 140 Ill. 238, 29 NE 718; Ward v. Durham, 134 Ill. 195, 25 NE 745; In re Corrington, 124 Ill. 363, 16 NE 252; Goeppner v. Leitzelmann, 98 Ill. 409; Marshall v. Rose, 86 Ill. 374; Rosenthal v. Renick, 44 Ill. 202; Mason v. Bair, 33 Ill. 194; Hopkins v. McCann, 19 Ill. 113; Stone v. Wood, 16 Ill. 177.

Iowa.—Flora v. Brown, 159 Iowa 253, 140 NW 364; Levi v. Levi, 156 Iowa 297, 136 NW 696.

Ky.—Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 227.

La.—Minor v. Harding, 4 La. 378.

Miss. — Sumrall v. Sumrall, 24 Miss. 258.

Mont.—In re Barker, 26 Mont. 279, 67 P 941; In re Mouillerat, 14 Mont. 245, 36 P 185.

Vt.—Wells v. Morse, 11 Vt. 9.

"Defendant, as one of those entitled to participate in the distribution of his mother's estate, might, no doubt, have appeared and resisted the allowance of the claim; but his failure to do so would not, in our judgment, preclude him from questioning the validity of the claim after it was allowed by the probate court, when it was sought in this proceeding to subject to the payment of such claim the real estate which defendant claimed title to under a deed executed before the death of his mother." Levi v. Levi, 156 Iowa 297, 305, 136 NW 696.

[a] **An ex parte approval** (1) is not conclusive against persons beneficially interested Minor v. Harding, 4 La. 378. (2) "The allowance was entirely ex parte; and it was not the intention of the statute to make such ex parte allowance a judgment, concluding the rights of the heirs. It is merely the acknowledgment of such claim as a claim against the estate, to be paid in the due course of administration, subject, however, to be challenged and contested in the manner specified under the statute; and this must necessarily be so, because if the judgment was binding upon the heirs of the estate, then it would become so without their having any opportunity of contesting the same or offering proof to the probate judge with reference to such claim, and their interests would be bound without having had an opportunity to appear and contest such claim; but this contention is disproved by the provisions of the statute itself, which gives the right to any heir to contest any claim upon the hearing of the account rendered by the administrator." In re Coryell, 16 Ida. 201, 213, 101 P 723.

[b] **The report of a conservator** charging for personal services, filed after the death of his ward, made a part of his subsequent report as "conservator and administrator," and approved by the court without notice to the heirs at law, is not a final adjudication of such claim, but is open to investigation on hearing of a petition to sell real estate for the payment of debts. Houchens v. Houchens, 173 Ill. A. 174.

[c] **An approval of payment of an encumbrance** on property, from which no appeal has been taken, cannot subsequently be attacked by a devisee of the property. Roloson v. Riggs, 274 Mo. 522, 203 SW 973.

[d] **"As to the personal estate,** the allowance of a claim against an estate, not appealed from, is conclusive, not only upon the executors, but also upon the heirs and legatees, unless its allowance was procured by fraud and collusion between the claimant and the personal representatives. . . . Any other rule would lead to the intolerable practice of compelling persons holding claims against an estate to litigate them first with the administrator or executor, and afterward with the heirs or legatees upon the same points which might have been investigated in the first case." Sherman v. Whiteside, 93 Ill. A. 572, 574 [aff 190 Ill. 576, 60 NE 838].

94. Ill.—Noe v. Moutray, 170 Ill. 169, 48 NE 709.

Ind.—Hight v. Taylor, 97 Ind. 392.

Mich.—Hunt v. Rabitoay, 125 Mich. 137, 84 NW 59, 84 AmSR 563.

Mo.—Kennerly v. Shepley, 15 Mo. 640, 57 AmD 219.

N. J.—Mott v. Newark German Hospital, 55 N. J. Eq. 722, 37 A 757.

[a] **This is true even though** the executor is devisee. Mott v. Newark German Hospital, 55 N. J. Eq. 722, 37 A 757.

95. McKinney v. Curtiss, 60 Mich. 611, 27 NW 691.

96. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879; Flynn v. Lorimer, 141 Mich. 707, 105 NW 37; Lowry v. Stevens, 6 Vt. 113.

"The allowance of the note by the commissioners on the estate was equivalent to a judgment, and merged the original claim." Warner v. Bronson, 81 Vt. 121, 134, 69 A 655.

[a] **Disallowance.**—(1) A creditor is barred of his claim by a disallowance by the commissioners. Penderson v. Avery, 1 Root (Conn.) 103. (2) The mere fact that a creditor's claim was disallowed by the commissioner raises no presumption that it was not presented in good faith or that he was not a "creditor" within the meaning of the statute. Bliss v. Little, 63 Vt. 86, 22 A 13.

97. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879.

98. Ill.—Horn v. Sayer, 184 Ill. A. 326.

La.—Prudhomme's Succ., 23 La. Ann. 228; Baillio v. Wilson, 6 Mart. N. S. 334.

Mo.—Todd v. Terry, 26 Mo. A. 598.

N. Y.—In re Miles, 170 N. Y. 75, 62 NYS 1084; Schutz v. Morette, 146 N. Y. 137, 40 NE 780; Lambert v. Craft, 98 N. Y. 342; McNulty v. Hurd, 72 N. Y. 518; Matter of Dole, 168 App. Div. 253, 153 NYS 895; Matter of Warrin, 56 App Div. 414, 67 NYS 763; Willcox v. Smith, 26 Barb. 316; Magee v. Vedder, 6 Barb. 352; Matter of Dorland, 100 Misc. 236, 166 NYS 616; Beebe v. Prime, 99 Misc. 668, 166 NYS 56; Matter of Nelson, 63 Misc. 627, 118 NYS 673; Matter of Miner, 39 Misc. 605, 80 NYS 643; Matter of Von der Lieth, 25 Misc. 255, 55 NYS 428; Le Baron's Est., 6 NYCivProc 62.

N. C.—Stonestreet v. Frost, 123 N. C. 640, 31 SE 836.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798.

[a] **Compromise agreement.**—An executor who for a sufficient consideration has entered into a compromise agreement with a claimant against the estate is estopped to repudiate anything conceded thereby. Todd v. Terry, 26 Mo. A. 598.

[b] **Contingent claim.**—An executor's approval of a claim, upon its face merely contingent, whether in conjunction with the ex parte act of the probate judge or not, cannot give it the validity of a judgment. Pico v. De la Guerra, 18 Cal. 422. See Blanchard v. Conger, 61 Iowa 153, 16 NW 59 (recognizing rule).

[c] **Contrary view.**—(1) Allowance of the claim is not conclusive of its validity against the estate, and it may be contested by either the administrator who allowed it or the administrator de bonis non. Thomas v. Chamberlain, 39 Oh. St. 112. (2) A successor in the administration is not bound by the act of his predecessor in admitting the justness of a

their approval of a claim, unless there is manifest error.[99] Such action has been held to fix a new date, as of the date of presentation, from which the statute of limitation runs against the claim.[1] The allowance by an administrator of a claim based upon notes upon which the administrator and decedent had guaranteed payment does not render the claim void or uncollectable even if the allowance by the administrator was a nullity.[2] The heir is not bound by the extrajudicial statement of the personal representative that he believes the debt to be due,[3] or by his formal approval or allowance of a claim,[4] although the admission of the representative that a claim against an estate is valid establishes its validity prima facie and puts the burden of proving otherwise upon one who objects to it.[5] The rejection of a claim by an executor or administrator is of no judicial force whatever, and cannot affect the creditor's right of action, but it merely remits him to his remedy by an action at law or the special proceeding allowed by statute to establish and enforce his claim.[6] It is not incumbent upon the representative to file in the probate court a claim which he has rejected.[7]

[§ 1067] **(4) Allowance of Portion of Claim.** It has been held that the allowance by the personal representative of a portion of a claim against the estate and its approval by the probate court is not an adjudication as to the balance of the claim, which may be considered and disposed of just as if no such allowance had been made.[8] But there is also authority for the view that the allowance by the representative of a claim for less than the full amount thereof is a rejection of the rest of the claim;[9] and the creditor may treat such partial allowance as a rejection of the entire claim and sue for the entire amount,[10] although where the holder of a note secured by mortgage presents a claim based thereon to the administrator of the debtor and obtains the allowance of interest to a specified time, he is not deprived of his right to future interest.[11]

[§ 1068] **g. Collateral Attack.** The action of the probate court in allowing or disallowing a claim against the estate is not subject to collateral attack;[12] and the same is true of a final decree bar-

claim. McKnoll v. Wear, 1 Ky. Op. 447.

99. Beeman's Succ., 47 La. Ann. 1355, 17 S 820; Winn's Succ., 33 La. Ann. 1392; Lilley's Succ., 6 Rob. (La.) 24; Matter of Scheuer, 161 App. Div. 525, 146 NYS 707; Matter of Prince, 56 Misc. 222, 107 NYS 296.

[a] **Where there is no legal foundation for a claim** the representative's recognition of it as proper to be paid is not binding upon him or the estate. Fledderman v. Fledderman, 112 Md. 226, 76 A 85; Webster v. Le Compte, 74 Md. 249, 22 A 232.

1. Matter of Nelson, 63 Misc. 627, 118 NYS 673.

2. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

3. Minor v. Harding, 4 La. 378; Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

4. Timmons v. Gochenour, (Ind. A.) 117 NE 279; Matter of Neufeld, 50 Misc. 215, 100 NYS 444; Irvine v. Beck, 62 Or. 593, 596, 125 P 832; In re Chambers, 38 Or. 131, 62 P 1013.

"The allowance of the claim by the executor is only his approval of it, and does not bind the heirs or creditors who have an opportunity to contest it upon the settlement of the final account." Irvine v. Beck, supra.

5. Lambert v. Craft, 98 N. Y. 342; In re Fraser, 92 N. Y. 239; Matter of Warrin, 56 App. Div. 414, 67 NYS 763; Matter of Dorland, 100 Misc. 236, 166 NYS 616; Matter of Prince, 56 Misc. 222, 107 NYS 296; Matter of Le Bacon, 67 HowPr (N. Y.) 346.

[a] **Bar of limitations.**—Where a claim has been presented to the executor and not disputed or rejected by him, but allowed, it is fair to assume that the claim was not barred by limitations at the time of its acceptance, and the burden is upon those who dispute the claim to show the contrary. Matter of Nelson, 63 Misc. 627, 118 NYS 673.

6. U. S.—U. S. v. Fidelity Trust Co., 121 Fed. 766, 58 CCA 42.

Cal.—In re Bette, 171 Cal. 583, 153 P 949.

Md.—State v. Reigart, 1 Gill 1, 39 AmD 628.

N. Y.—In re Roberts, 214 N. Y. 369, 108 NE 562; Matter of Phyfe, 5 NYLegObs 331.

N. D.—Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

Oh.—Morgan v. Bartlette, 3 Oh. Cir. Ct. 431, 2 Oh. Cir. Dec. 244.

Okl.—In re Barnett, 52 Okl. 623, 153 P 653.

Or.—In re Chambers, 38 Or. 131, 62 P 1013.

Pa.—Cowen v. Gonder, 5 Phila. 15.

[a] **Rejection not res judicata.**—(1) An administrator acts merely as an auditor, and hence his rejection of a claim is not res judicata. Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754. (2) In allowing or rejecting any claim he acts merely as an auditor. His allowance or rejection simply means that he is or is not satisfied as to the justice of the claim, but it is in no sense a judicial determination, as he is not vested with judicial functions respecting it. Chambers v. Chambers, 38 Or. 131, 62 P 1013.

7. Chandler v. Kootenai County Prob. Ct., 26 Ida. 172, 141 P 635.

8. Smith v. McFadden, 56 Iowa 482, 9 NW 350.

9. Jones v. Walden, 145 Cal. 523, 78 P 1046.

[a] **Disallowance of interest.**—Where a claim on a note secured by mortgage was presented for the principal sum "and accrued interest," but it was allowed and approved for the principal sum only, and suit to foreclose the mortgage was not brought until three months thereafter, interest from the date of the note could not be allowed in the foreclosure suit. San Diego Cons. Nat. Bank v. Hayes, 112 Cal. 75, 44 P 469.

10. Haub v. Leggett, 160 Cal. 491, 117 P 556 (while a creditor may treat a partial allowance of his claim by the executors as a rejection of the entire claim and sue without presenting the claim to the judge of the superior court, he may also, after having his claim partially allowed by the executors and such partial allowance approved by judge, sue for the whole claim, an allowed claim not amounting to an absolute judgment so as to merge the whole claim into an order of allowance and bar an action against the estate for the entire claim).

11. Raggio v. Palmtag, 155 Cal. 797, 103 P 312.

12. Ark.—James v. Gibson, 73 Ark. 440, 84 SW 485; Stokes v. Pillow, 64 Ark. 1, 40 SW 580.

Cal.—Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

Conn.—Shelton v. Hadlock, 62 Conn. 143, 25 A 483.

Ill.—Sinnickson v. Perkins, 231 Ill. 492, 83 NE 194.

Ind.—Phipps v. Sappenfield, 54 Ind. A. 139, 102 NE 841.

Iowa.—Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; In re Pennock, 122 Iowa 622, 98 NW 480.

Kan.—Van Dusen v. Topeka Woolen Mill Co., 74 Kan. 437, 87 P 74.

Mass.—McCooey v. New York, etc., R. Co., 182 Mass. 205, 65 NE 62.

Mich.—Griffin v. Hovey, 179 Mich. 104, 146 NW 210; Palm's App., 44 Mich. 637, 7 NW 200.

Mo.—Desloge v. Tucker, 196 Mo. 587, 94 SW 283; Clark v. Thais, 173 Mo. 628, 73 SW 616; Clark v. Bettelheim, 144 Mo. 258, 46 SW 135; Munday v. Leeper, 120 Mo. 417, 25 SW 381; Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861; Johnson v. Beazley, 65 Mo. 250, 27 AmR 276.

Nebr.—Yeatman v. Yeatman, 35 Nebr. 422, 53 NW 385.

N. M.—Ross v. Lewis, 23 N. M. 524, 169 P 468.

N. Y.—Sutherland v. St. Lawrence County, 42 Misc. 38, 85 NYS 696 [rev on other grounds 101 App. Div. 299, 91 NYS 962].

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Tex.—Firebaugh v. Ward, 51 Tex. 409; Smith v. Downes, 40 Tex. 57; Cannon v. Bonner, 38 Tex. 487; Baker v. Rust, 37 Tex. 242; Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

Wis.—Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

"A probate court has jurisdiction to allow claims against the estates of dead men and to marshal their assets; hence a judgment rendered allowing the claim and assigning it to a class is as impregnable to attack, collaterally, as a judgment of a superior court. Those rules of law that clothe the one with a warm frock of protection clothe the other." Walther v. Null, 233 Mo. 104, 113, 134 SW 993.

[a] **Illustration.**—Since the county court has jurisdiction to determine the amount legally chargeable against a decedent's estate for attorney's services rendered the administrator, and to charge the estate with a lien therefor, the court having settled the administrator's accounts and imposed such lien, its act was not subject to collateral attack in a proceeding to recover for a defalcation by the administrator against his bondsmen. Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

[b] **Except for fraud or collusion** in procuring it, a judgment allowing a claim cannot be collaterally attacked. Davis v. Rhea, 90 Ark. 261, 119 SW 271; James v. Gibson, 73 Ark. 440, 84 SW 485; Sinnickson v. Perkins,

ring all claims against the estate not presented within the time limited by notice.[13]

[§ 1069] **h. Appeal and Review—(1) In General.** The statutes usually permit an appeal from a final order, judgment, or decree of the probate court or commissioners, allowing a claim against a decedent's estate.[14] In some jurisdictions the disallowance of a claim by the court is regarded as a final order which may be reviewed by appeal or writ of error;[15] but in others no appeal will lie from the disallowance of a claim, the remedy of the party aggrieved being an action at law to enforce his claim.[16] Merely interlocutory orders or decrees with reference to the allowance of claims are not appealable,[17] nor will any appeal lie from a merely ministerial act of the judge.[18] It has been held that a question of the validity of an order of the probate court granting a renewal of a commission to receive claims against a decedent's estate was properly brought before the county court by an appeal from the report of the commissioners.[19]

[§ 1070] **(2) Objections and Exceptions.**[20] Objections in the nature of exceptions to irregularities in the proceedings, on the hearing on a claim against a decedent's estate, previous to the final decree, must be taken at the time of the hearing, in order to be available on appeal.[21]

[§ 1071] **(3) Who May Appeal.**[22] As a general rule any person affected by a judgment or decree of the probate court with respect to claims against the estate may appeal therefrom, whether a party to the record or not.[23] Appellant must,

231 Ill. 492, 83 NE 194 (so far as personal property affected).

[c] **Instrument not constituting judgment.**—An instrument headed, "Account made by R.," indorsed, "Within account approved," over the signature, "B., County Judge of P. County, Chickasaw Nation," and "Recorded," over the signature of the clerk, is not a judgment, but an account, and therefore open to attack. Howell v. Brown, 5 Ind. T. 718, 83 SW 170.

Collateral attack on judgments generally see Judgments [23 Cyc 1055].

13. Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134].

14. Ark.—Page v. Ralph, 55 Ark. 52, 17 SW 365.

Cal.—In re Williams, 3 Cal. Unrep. Cas. 788, 32 P 241.

Colo.—Clemes v. Fox, 6 Colo. A. 377, 40 P 843.

Conn.—Peck v. Sturges, 11 Conn. 420.

Ill.—Ramsley v. Whitbeck, 183 Ill. 550, 56 NE 322 [rev 81 Ill. A. 210].

Ind.—Taggart v. Tevanny, 1 Ind. A. 339, 27 NE 511.

Iowa.—In re Baumhover, 151 Iowa 146, 130 NW 817.

Md.—Stevenson v. Schriver, 9 Gill & J. 324.

Mich.—Smith v. Lloyd, 76 Mich. 619, 39 NW 756; Patton v. Bostwick, 39 Mich. 218; La Roe v. Freeland, 8 Mich. 531.

Minn.—State v. Freeborn County Prob. Ct., 142 Minn. 283, 171 NW 928; State v. Hennepin County Prob. Ct., 28 Minn. 381, 10 NW 209.

Mo.—Keele v. Keele, 118 Mo. A. 262, 94 SW 775.

Nebr.—Fitch v. Martin, 83 Nebr. 124, 119 NW 25; Herman v. Beck, 68 Nebr. 566, 94 NW 512.

N. H.—Cossar v. Truesdale, 69 N. H. 490, 45 A 252.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

R. I.—Donnelly v. McNally, 19 R. I. 665, 37 A 810.

Tex.—Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81; Hume v. Perry, (Civ. A.) 136 SW 594.

Vt.—Robinson v. Robinson, 32 Vt. 738.

Wis.—Parry v. Wright, 20 Wis. 483.

See also Appeal and Error § 406 et seq.

[a] **Appeal is the only remedy;** a bill in chancery will not lie on behalf of the aggrieved party. Page v. Ralph, 55 Ark. 52, 17 SW 365; Patton v. Bostwick, 39 Mich. 218. But compare Adams v. Adams, 22 Vt. 50 (where there are claims existing between the personal representative and the estate, the allowance of the claim by the commissioners may be reviewed and adjusted by the court of chancery).

[b] **When appeal unnecessary.**—No appeal is necessary from a decree of the probate court which is wholly unauthorized and a mere nullity. Bond v. Dunbar, 2 N. H. 216.

[c] **Submission by mutual agreement.**—Where by mutual agreement a contested claim is submitted to the decision of the probate court, such decision is final and no appeal lies. Piper v. Clark, 18 N. H. 415.

[d] **Appeal not allowed.**—In re Tamer, (Ariz.) 179 P 643. See also Treece v. Carr, (Tenn. Ch. A.) 58 SW 1078 (where a master has reported a claim against an estate as just, and a chancellor has concurred therein, it is conclusive on appeal).

[e] **Certiorari the only available remedy.**—Since no appeal would lie from the decree of the court ordering payment of the claims, certiorari is the proper remedy for reviewing the decree. Clarke v. Richmond Prob. Ct., 29 R. I. 37, 69 A 4.

15. Ala.—McNiel v. Macon, 20 Ala. 772.

Cal.—In re Williams, 3 Cal. Unrep. Cas. 788, 32 P 241.

Colo.—Clemes v. Fox, 6 Colo. A. 377, 40 P 843.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108.

Minn.—Capehart v. Logan, 20 Minn. 442.

Mo.—King v. Stotts, 254 Mo. 198, 162 SW 246.

N. H.—Chapman v. Gale, 32 N. H. 141.

[a] **How appeal taken.**—A creditor, in case of disallowance of a part of his claim, must appeal from the decision on the claim as presented, and not from that part of the decision disallowing a portion of his claim. Capehart v. Logan, 20 Minn. 442.

16. Ida.—In re Coryell, 16 Ida. 201, 101 P 723.

Mont.—In re Barker, 26 Mont. 279, 67 P 941.

Nev.—In re Powning, 25 Nev. 428, 62 P 235.

Okl.—In re Barnett, 52 Okl. 623, 153 P 653.

Tex.—Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81; Campbell v. Tackaberry, 51 Tex. 37.

Wash.—Wilkins v. Wilkins, 1 Wash. 87, 23 P 411.

17. Kowalsky v. Santa Cruz County Super. Ct., 13 Cal. A. 218, 109 P 158; In re Coryell, 16 Ida. 201, 101 P 723; Churchill v. Burt, 32 Mich. 490.

[a] **This rule has been applied to:** (1) A refusal to permit an amendment of a claim. In re Turner, 128 Cal. 388, 60 P 967. (2) An order vacating the allowance of a claim. Kowalsky v. Santa Cruz County Super. Ct., 13 Cal. A. 218, 109 P 150; In re Coryell, 16 Ida. 201, 101 P 723. Contra McKenna v. McCormick, 60 Nebr. 595, 83 NW 844. (3) An order reviving a commission on claims for the purpose of considering the claim of a creditor of the estate who once before secured such an order for the consideration of a different claim. Bresler v. Wayne Prob. Judge, 152 Mich. 167, 115 NW 960.

18. Kennedy v. Cress, 19 Iowa 42.

19. White v. White, (Vt.) 99 A 305.

20. In civil action generally see Appeal and Error §§ 580, 959.

21. Ala.—Street v. Street, 113 Ala. 333, 21 S 138; Watson v. McClanahan, 13 Ala. 57; Cook v. Davis, 12 Ala. 551.

Colo.—Cone v. Eldridge, 51 Colo. 564, 119 P 616.

Ill.—Old School Presb. Church v. Paxton, 180 Ill. A. 658.

Ind.—Brown v. Sullivan, 3 Ind. A. 211, 29 NE 453.

Ky.—McCarty v. McCarty, 11 KyL 366.

La.—Gollain's Succ., 31 La. Ann. 173.

Mo.—Chidsey v. Howell, 91 Mo. 622, 4 SW 446, 60 AmR 267.

Vt.—Thorp v. Thorp, 75 Vt. 34, 52 A 105.

22. In civil action generally see Appeal and Error §§ 464, 579.

23. Ark.—Jamison v. Adler-Goldman Commn. Co., 59 Ark. 548, 28 SW 35. But compare Davis v. Rhea, 90 Ark. 261, 263, 119 SW 271 ("The heirs at law, not being parties to the record in the probate court, had no right to appeal from the judgment of that court, and their only remedy was by suit to set aside the judgment on account of fraud in the procurement thereof. Scott v. Penn, 68 Ark. 492, 60 SW 235").

Cal.—In re Riviere, 7 Cal. A. 755, 96 P 16.

Conn.—Fairweather v. Curtiss, 2 Root 32; Staniford v. Hide, 1 Root 263.

Md.—Stevenson v. Schriver, 9 Gill & J. 324.

Mich.—Hammond v. Wayne Cir. Judge, 140 Mich. 371, 103 NW 996.

Minn.—Schultz v. Brown, 47 Minn. 255, 49 NW 982; Lake v. Albert, 37 Minn. 453, 35 NW 177.

Mo.—Keele v. Keele, 118 Mo. A. 262, 273, 94 SW 775.

N. H.—Chapman v. Haley, 43 N. H. 300.

Tex.—Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81; Harper v. Stroud, 41 Tex. 367; Farmer v. Saunders, 60 Tex. Civ. A. 197, 128 SW 941.

Vt.—Arnold v. Brook, 36 Vt. 204. "An executor, administrator, heir, devisee, legatee, creditor, or other person having an interest in an estate may appeal from a judgment allowing against the estate a demand exceeding $10." Keele v. Keele, supra.

[a] **Illustration.**—Where, after a partnership had filed a claim against an estate, the firm assets were in the course of bankruptcy proceedings transferred to a third party, and no move was made to substitute the latter as claimant, the partnership was entitled to appeal from an order substituting the public administrator as claimant, and in effect precluding the partnership from recovering on the claim. Hawkins v. Quinette, 156 Mo. A. 153, 136 SW 246.

[b] **An administrator representing**

however, show an interest in the matter litigated; a grievance, in the legal sense, existing only when the judgment, order, or decree complained of bears upon his interest;[24] and in several jurisdictions, creditors, devisees, legatees, or heirs can appeal from the decision of the commissioners or the probate court, only where the personal representative fails or declines to take such appeal.[25]

[§ 1072] **(4) Time for Appealing.**[26] Statutes giving the right of appeal from an order or decree of the probate court usually require the appeal to be taken within a prescribed time after the date of entry of such order or decree.[27] But the practice sometimes permits of an application for leave to appeal after the time limited for taking the appeal has expired.[28]

[§ 1073] **(5) Application, Bond, and Notice.**[29] An application for appeal need not set forth upon oath a formal statement of the facts, but records of the probate court, or if need be evidence aliunde may supply the appellate court with the requisite proof.[30] Under the statutes of several states, the giving of a bond with sureties approved by the court is a condition precedent to the right to appeal,[31] and it is also ordinarily required that a notice of appeal should be given by appellant to the other parties in interest.[32]

[§ 1074] **(6) Pleading on Appeal.** In some states formal pleadings are not required on appeal.[33] It is sometimes required that, on appeal from the rejection of a claim by commissioners, the declaration must conform to the claim and the bill of particulars,[34] and such an appeal is properly dismissed where it appears that no service of the petition and declaration has been made upon the administrator;[35] but it has been held that, where no new issue is formed in the circuit court, and no declaration is filed, the report of the commissioners setting forth the nature of the claim will stand as a declaration in the case.[36] Under a statute requiring that a statement of the nature and amount of a claim filed on appeal from a disallowance thereof by the commissioners shall conform so far as may be, in form and substance, to the requirements of a complaint on the claim in a civil action, such statement controls the amount recoverable as fully as the ad damnum clause in a complaint in such an action.[37]

[§ 1075] **(7) Effect of Appeal.** The general rule is that an appeal from an order or decree of the probate court allowing or disallowing a claim has the effect of vacating such order or decree,[38] and the same has been held to be true of an appeal from the action of commissioners appointed to pass on claims,[39] although it has been held that such

the persons interested in the estate may appeal from the allowance of a claim against the estate and show that his interest is that of administrator. Gillette's App., 82 Conn. 500, 74 A 762.

[c] **One of two administrators may appeal** from an order allowing claims, although his coadministrator withholds his consent to such appeal. Hammond v. Judge, 140 Mich. 371, 103 NW 996.

[d] **An order making an allowance to an attorney** being "a subject of appeal, not only by the attorney who makes the application, but by any other interested party, it is unnecessary to consider the objection that appellants are not parties aggrieved by the order. Having an interest in the estate, they have the right to appeal." In re Riviere, 7 Cal. A. 755, 756, 96 P 16.

24. Ala.—Anderson v. Anderson, 37 Ala. 683.

Conn.—Banks v. Basset, 2 Root 297.

Iowa.—In re Carroll, 149 Iowa 617, 128 NW 929.

La.—Pettis' Succ., 11 La. Ann. 177.

Mont.—In re Barker, 26 Mont. 279, 67 P 941.

Pa.—Mays' Est., 25 Pa. Super. 267; Kern's Est., 18 Pa. Super. 506.

Tex.—Stark v. Seale, 59 Tex. 1.

[a] **Illustration.**—An appeal from a judgment in probate does not lie in favor of a creditor, because another creditor is allowed too much by the commissioners, but the appeal must be taken by the personal representative. Banks v. Basset, 2 Root (Conn.) 297.

[b] **Appeal by administrator from disallowance.**—(1) An administratrix who had not paid certain claims, nor become liable thereon in any way in the administration of the estate, was not on appeal entitled to complain of an order disallowing the claims. In re Carroll, 149 Iowa 617, 128 NW 929. (2) An administrator cannot appeal as such from an order disallowing his individual claim against the estate, and on such an appeal his individual rights will not be considered. In re Barker, 26 Mont. 279, 67 P 941.

25. Downing v. Porter, 9 Mass. 386; Crouch v. Wayne Cir. Judges, 52 Mich. 596, 18 NW 374; Herman v. Beck, 68 Nebr. 566, 94 NW 512; Gilbert v. Howe, 47 Vt. 402.

26. In civil action generally see Appeal and Error §§ 1032, 1087.

27. Brackett v. Burnham, 199 Mich. 326, 165 NW 665; In re Charles, 35 Minn. 438, 29 NW 170; Auerbach v. Gloyd, 34 Minn. 500, 27 NW 193; Schooley's Est., 7 Kulp (Pa.) 226; Cilley v. Flander, 62 Vt. 82, 19 A 116; Robinson v. Robinson, 32 Vt. 738.

[a] **When report considered made.**—After an application had been made for the removal of commissioners, the mere leaving of their report with the judge before hearing on the application, under an understanding that it should be filed after disposal of the application, if the commissioners were not removed, was not a returning of the report within a statute requiring an appeal to be taken within sixty days after the returning of the report of the commissioners, but such return should be considered as made on the day when filed, after determination of the application, as respects the right of appeal. Hinckley's App., 160 Mich. 284, 125 NW 24.

28. In re Brown, 87 Vt. 465, 89 A 872.

[a] **Sufficiency of petition.**—A petition by decedent's widow for leave to appeal after the time to appeal had expired, on the ground of "fraud, accident, or mistake," setting forth the facts of the case, was sufficient to call for the exercise of the discretion of the court and not demurrable. Congden v. Congden, 59 Vt. 597, 10 A 732.

29. In civil action generally see Appeal and Error §§ 1088, 1347.

30. Conn.—Comstock's App., 55 Conn. 214, 10 A 559.

Ill.—Thorp v. Goewey, 85 Ill. 611.

Mich.—Winter v. Winter, 90 Mich. 197, 51 NW 363.

N. H.—Cossar v. Truesdale, 69 N. H. 490, 45 A 252.

Vt.—Thorp v. Thorp, 75 Vt. 34, 52 A 1051; Whitcomb v. Davenport, 63 Vt. 656, 22 A 723; Woodbury v. Woodbury, 48 Vt. 94.

31. Sullivan v. Breen, 93 Ill. A 526; Home Sav. Bank v. Lillibridge, 113 Mich. 385, 71 NW 638; King v. Gridley, 69 Mich. 84, 37 NW 50; Dickinson's App. 2 Mich. 337; Arnold v. Brook, 36 Vt. 204.

[a] **The power to approve such bond cannot be delegated** to the clerk of the court. Sullivan v. Breen, 93 Ill. A. 526.

[b] **The personal representative is specially exempted** from giving bond on appeal from an order granting an allowance. Adoue v. Gonzales, 22 Tex. Civ. A. 73, 54 SW 367.

32. Baskins v. Wylds, 39 Ark. 347; McIntosh v. Wheeler, 58 Kan. 324, 49 P 77; Home Sav. Bank v. Lillibridge, 113 Mich. 388, 71 NW 638; Schultz v. Brown, 47 Minn. 255, 257, 49 NW 982; Lake v. Albert, 37 Minn. 453, 35 NW 117.

[a] **Direction of judges as to notice.**—Under a statute providing that on appeal from the decision of the commissioners on a claim against a decedent's estate appellant shall give notice in such manner as the judge of probate shall direct, notice need not be given to other creditors of the estate by a claimant appealing from the disallowance of his claim, where the probate judge does not direct it to be given them. Home Sav. Bank v. Lillibridge, 113 Mich. 385, 71 NW 638.

[b] **An appeal in chancery will not necessarily be dismissed** for want of notice of the appeal itself, as such notice is merely to enable the appellee to prepare for the appeal and he is entitled to notice of hearing besides. Simpson v. Mansfield R. Co., 38 Mich. 626.

[c] **Appeal by heirs.**—The heirs may appeal from the allowance of a claim without giving notice of such appeal, although they did not appear and contest the claim in the probate court. Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81.

33. Thorp v. Goewey, 85 Ill. 611; Rassieur v. Zimmer, 249 Mo. 175, 155 SW 24.

34. Hillebrands v. Nibbelink, 40 Mich. 646.

35. Field v. Smith, 62 N. H. 698.

36. White v. Allen, 18 Mich. 194 (any judgment beyond the claim presented to the commissioners is erroneous).

37. Beardsley's App., 83 Conn. 34, 75 A 141.

38. Smith v. Lloyd, 76 Mich. 619 39 NW 756; Callaghan v. Grenet, 66 Tex. 236, 17 SW 507.

39. Wetmore, etc., Granite Co. v. Ryle, (Vt.) 107 A 109; Manchester Dist. Prob. Ct. v. Kent, 49 Vt. 380; Woodbury v. Woodbury, 48 Vt. 94; Stearns v. Stearns, 30 Vt. 213.

an appeal is not the initiation of a new proceeding, but merely the continuance of the same proceeding, transferring the case from one tribunal to another,[40] where, in some jurisdictions, the matter is tried de novo without regard to what was adjudicated by the commissioners or the court below.[41] A claimant who appeals from the rejection of his claim waives his right to ask for the appointment of a third commissioner.[42] In the Philippine Islands the perfection of an appeal by the administrator is equivalent to the institution of a separate action in the court of first instance.[43]

[§ 1076] **(8) Proceedings in Appellate Court.** The presumption is in favor of the regularity of the presentment and proof in the lower tribunal,[44] but upon a review of matters wholly within the discretion of the probate court, all of the facts which may have actuated the court should be presented.[45] The action of the lower court will not be disturbed unless manifest error is made to appear;[46] and the order, judgment, or decree of the lower tribunal will not be reversed where the error complained of is harmless,[47] or for causes not apparent of record.[48] Want of due notice to the representative may, however, afford a sufficient ground for a reversal.[49] In a number of jurisdictions, on appeal from the order or decree of the probate court, there is a trial de novo,[50] each party being entitled to a trial by jury at his election,[51] and if the claimant declines to make proof of his claim in the court to which the appeal is taken, the case must be dismissed.[52] On motion of appellant the court may require the claimant to make his claim more specific and definite.[53] On the trial of an appeal the case cannot be enlarged and no claim can be heard which was not passed upon in the first instance;[54] and where a claim is allowed in part and disallowed in part, and an appeal is taken as to the part allowed, but there is no appeal as to the part disallowed, the portion of the claim which was disallowed is not before the appellate court, and such disallowance cannot be reviewed.[55] The validity of a judgment of the probate court allowing and classifying a claim cannot be questioned on appeal from a denial of an order to pay the demand pursuant to the judgment.[56]

[§ 1077] **i. Costs and Allowances.** The allowance of costs to the party prevailing and against the unsuccessful party is usually within the discretion of the court.[57] In some jurisdictions, where a formal presentment and establishment of claims against the estate is requisite, costs are allowed the successful claimant where his claim is contested,[58] if such claim was properly presented.[59] But an estate is not liable for the costs on claims filed after the term of court designated by the statutes

40. Calderwood v. Calderwood, 38 Vt. 171 (this is true whether the appeal is taken within twenty days, or allowed by the supreme or county court after twenty days have expired).

41. See infra § 1076.

42. Smith v. Lloyd, 76 Mich. 619, 39 NW 756.

43. Villaneuva v. Chavez, 24 Philippine 170.

44. Ala.—Boggs v. Mobile Branch Bank, 12 Ala. 494.

Ky.—Cox v. Higginbotham, 76 SW 1079, 25 KyL 1057.

N. M.—Gutierrez v. Scholle, 12 N. M. 328, 78 P 50.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Tex.—Wright v. Pate, 1 SW 661.

45. Gibson v. Brennan, 46 Minn. 92, 48 NW 460.

46. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; Harrison's Est., 31 Pa. Super. 485.

[a] **Where the action of the lower tribunal was dependent upon questions of fact,** such action will not be disturbed unless manifest error be made to appear. Gilliland's Est., 6 Pa. Dist. 138, 19 Pa. Co. 285.

[b] **A finding of an auditing judge** based upon sufficient evidence that a claim against a decedent, based upon a mortgage, was fraudulent, will not be set aside except for manifest error. Harrison's Est., 31 Pa. Super. 485.

[c] **Allowance of claim based on judgment on note.**—Where a judgment was recovered against a decedent during his lifetime, it should not be disallowed as a claim against the estate at the instance of a creditor on the ground that the note on which the judgment was rendered was without consideration; the finding of the auditor that the note was not given to defraud creditors having been confirmed by the court below. In re McPherran, 212 Pa. 432, 61 A 956.

[d] **Matters peculiarly within knowledge of trial court.**—A finding of the trial court that an executrix appeared to resist a claim, and the entry of a nunc pro tunc order in pursuance of such finding will not be reviewed on the appeal of the executrix from an order allowing the claim since the finding and order, in respect to such appearance, was a matter peculiarly within the knowledge of the trial court. Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301.

47. Anderson v. Greensburgh, etc., Turnp. Co., 48 Ind. 467; Harman v. McMullin, 85 Va. 187, 7 SE 349; Tredway v. Allen, 20 Wis. 475.

48. Baskins v. Wylds, 39 Ark. 347.

49. Baskins v. Wylds, 39 Ark. 347 (where the record showed lack of notice).

50. McLaughlin v. Rote, 62 Colo. 505, 163 P 841; In re Thurber, 209 Ill. A. 533; King v. Stotts, 254 Mo. 198, 162 SW 246. See also cases infra note 51.

[a] **Jurisdiction of whole controversy.**—Where the probate court vacated, on the petition of heirs, a default judgment allowing a claim, and then, after hearing, rendered judgment for claimant in a less sum, and claimant appealed to the circuit court, complaining of the vacation of the allowance and the judgment for an inadequate sum, the court acquired jurisdiction of the whole controversy. King v. Stotts, 254 Mo. 198, 162 SW 346.

51. Colo.—McLaughlin v. Rote, 62 Colo. 505, 163 P 841.

Conn.—Comstock's App., 55 Conn. 214, 10 A 559; Middletown Fourth Ecclesiastical Soc. v. Mather, 15 Conn. 587.

Ill.—Thorp v. Goewey, 85 Ill. 611.

Mich.—Patrick v. Howard, 47 Mich. 40, 10 NW 71.

Mo.—Watkins v. Donnelly, 88 Mo. 322.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

Or.—Johnston v. Shofner, 23 Or. 111, 31 P 254.

Vt.—Lynde v. Davenport, 57 Vt. 597; Woodbury v. Woodbury, 48 Vt. 94.

Wis.—York v. Orton, 65 Wis. 6, 26 NW 166.

[a] **The allowance of the trial of an issue of fact by a jury is discretionary** with the county court. Hurlburt v. Miller, 72 Vt. 110, 47 A 393.

52. King v. Stotts, 254 Mo. 198, 162 SW 246.

53. Watkins v. Donnelly, 88 Mo. 322.

54. Patrick v. Howard, 47 Mich. 40, 10 NW 71; Harrison's Est., 31 Pa. Super. 485.

[a] **Illustration.**—Where a person presents a mortgage against an estate, and claims in the orphans' court that it was given for money loaned, he cannot, after having his claim disallowed in the orphans' court assert in the appellate court that the mortgage was given by decedent for the support of the latter's parents. Harrison's Est., 31 Pa. Super. 485.

55. Moerchen v. Stoll, 48 Wis. 307, 4 NW 352.

56. Dooley v. Ryan, 153 Mo. A. 669, 134 SW 30.

57. Gillett v. McFarlan, 106 Iowa 746, 76 NW 663; Munn v. Munn, 20 N. J. Eq. 472; Metzger's Est., 18 LancLRev (Pa.) 43; Resser's App., 39 LegInt (Pa.) 421; Sharp's Est., 1 LehighValLR (Pa.) 228; Miers v. Betterton, 18 Tex. Civ. A. 430, 45 SW 430.

[a] **Where an executor presents an unfounded claim** against the estate, the court may charge him with the costs of witnesses called in support of the claim. Bartolet's App., 1 Walk. (Pa.) 77.

[b] **Division of costs.**—Moneys wrongfully paid under mistake of fact to an administrator are directed by the court to be paid by the administrator to the party rightfully entitled, the costs of audit will be directed to be paid from the two funds, each bearing its proportionate part. Burbaker's Est., 4 LancLRev (Pa.) 90.

[c] **The fees of witnesses** produced before the auditor in support of a claim which the auditor rejected as unfounded were properly disallowed as against the estate. Danner's Est., 2 LehighValLR (Pa.) 422.

[d] **If a claimant is unsuccessful** in the prosecution of his claim against the estate he becomes personally liable for the costs. McCullough's Est., 5 Pa. Co. 87, 20 WklyNC 471.

58. Ind.—Crane v. Hopkins, 6 Ind. 44.

Iowa.—Pernham v. Weeks, 180 Iowa 649, 163 NW 454.

Mo.—Gibbs v. Mann, 4 Mo. 55.

N. Y.—Carter v. Barnum, 24 Misc. 220, 53 NYS 539, 28 NYCivProc 161; Browning v. Vanderhover, 4 AbbNCas 166, 55 HowPr 97; Mason v. Codwise, 6 Johns. Ch. 297.

Vt.—O'Hear v. Skeeles, 22 Vt. 152; Sutton v. Sutton, 21 Vt. 74.

59. Clapp v. Schaus, 156 App. Div. 681, 141 NYS 451.

for the adjustment thereof.[60] It has been held that the costs cannot be taxed against a claimant, unless his claim was filed more than a year after the issuance of letters of administration and due notice thereof.[61] An administratrix appealing from an order disallowing claims cannot complain that costs on affirmance were taxed against her as administratrix, and not against her distributive share as an heir.[62]

Attorney's fees cannot be allowed on a note presented against an estate, where the note does not provide therefor,[63] and the failure to claim attorney's fees when notes were originally presented, and the allowance of the claims without attorney's fees, will constitute a bar to a subsequent action to recover them.[64] Where a note signed by defendant's intestate provided for ten per cent attorneys' fees if placed with attorneys for collection, and after defendant's appointment as administrator, he notified claimant to present his claims for payment, but the note was not due, and claimant informed him that he had a year in which to present the claim, and thereafter, when interest on the note became due, placed the note with his own attorneys, who presented the claim and demanded attorneys' fees, claimant was not entitled to attorneys' fees.[65] Under a statute providing that no action shall be brought by summons and complaint against an administrator on a claim against decedent, but the holder, whether the claim is due or not, shall file a statement thereof in the office of the clerk of the court in which the estate is pending, the payee of a note of a decedent which provides for the payment of attorney's fees is not entitled to attorney's fees where a claim on the note is filed before it is due or there has been any breach of condition.[66]

[§ 1078] **17. Proof of Claim at Second Audit.** The fact that a creditor has not been able to prove his claim by competent testimony at the audit of the first account of the executor will not prevent him from offering such proof, if he has secured it, at the audit of a second account of the executor, the fund for distribution being different.[67]

[§ 1079] **C. Disputed Claims—1. Contest of Claims in General—a. Who May Contest or Object to Claims.** The representative may contest any claim which in his opinion ought not be allowed against the estate,[68] and any person having an interest in the estate adverse to the allowance of the claim may contest it.[69] Heirs and distributees may contest the allowance of the claims of creditors[70] or of the representative;[71] and one creditor may contest the claims of other creditors,[72] provided the

60. Milner Bank, etc., Co. v. Whipple, 61 Colo. 442, 158 P 811; Russell v. Hubbard, 59 Ill. 335; Floyd v. Miller, 61 Ind. 224; Walters v. Hutchins, 29 Ind. 136.

61. Floyd v. Miller, 61 Ind. 224.

62. In re Carroll, 149 Iowa 617, 128 NW 929.

63. Miers v. Betterton, 18 Tex. Civ. A. 430, 45 SW 430.

64. Wicks-Nease v. Janes, 31 Tex. Civ. A. 151, 72 SW 87.

65. Adoue v. Kirby, (Tex. Civ. A.) 114 SW 163.

66. St. Joseph County Sav. Bank v. Randall, 37 Ind. A. 402, 76 NE 1012.

67. Shuman's Est., 45 Pa. Super. 587.

68. Ind.—Lang v. Clapp, 103 Ind. 17, 2 NE 197.

La.—Richard v. Ouviere, 10 La. Ann. 723.

Miss.—Bell v. Faison, 53 Miss. 354; Overstreet v. Trainer, 24 Miss. 484.

Nebr.—Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

N. Y.—Matter of Parker, 1 Barb. Ch. 154.

Va.—Reid v. Windsor, 111 Va. 825, 69 SE 1101.

[a] **A special administrator** may contest claims against the estate but his authority ceases upon the appointment and qualification of a general administrator. Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

[b] **The fact that an estate is insufficient to pay all creditors in full** does not prevent the administrator from defending claims for which he believes the estate is not liable. Reid v. Windsor, 111 Va. 825, 69 SE 1101.

[c] **Claim for taxes.**—A statute providing that in case of neglect of an administrator or executor to pay taxes, the county treasurer shall present at the next term of court a brief statement in writing, setting forth the facts and amount of delinquency, does not deprive the administrator, even by implication, of the right to test the sufficiency of such facts by filing a demurrer. Lang v. Clapp, 103 Ind. 17, 2 NE 197.

69. Cal.—In re More, 121 Cal. 635, 54 P 148.

Ind.—Mackey v. Ballou, 112 Ind. 198, 13 NE 715.

Iowa.—In re Douglas, 140 Iowa 603, 117 NW 982.

Mich.—McGee v. McDonald, 66 Mich. 628, 33 NW 737.

Minn.—Semper v. Coates, 93 Minn. 80, 100 NW 663.

N. J.—King v. Rockhill, 41 N. J. Eq. 273, 7 A 437.

N. Y.—Matter of Parker, 1 Barb. Ch. 154.

Oh.—Todd v. Todd, 27 Oh. Cir. Ct. 224.

R. I.—Mason v. Taft, 23 R. I. 388, 50 A 648.

[a] **Widow.**—Under a statute, authorizing any heir or creditor of a deceased person to request an administrator or executor to reject any claim presented for allowance, a widow may file a requisition on an executor to disallow a claim, as the words "any heir," or "creditor," include devisees and legatees or any person whomsoever whose property may be affected by the recovery of a judgment. Todd v. Todd, 27 Oh. Cir. Ct. 224.

[b] **One who has purchased real estate** which, there being no personal property, is liable to be sold by the administrator to make assets to pay an allowance, if it is a legal charge against the estate, has such an interest as gives him a right to contest its validity. Mackey v. Ballou, 112 Ind. 198, 13 NE 715.

[c] **A judgment in favor of a representative** upon a claim presented by him and rejected by the judge may be contested by any person interested in the estate in the same manner as other allowed claims; but in such cases the burden is upon the person contesting to show that the claim was not properly allowed. In re More, 121 Cal. 635, 54 P 148.

[d] **Opposing revival of commission or new commission.**—The executor and others interested have a right to appear and contest an application for the allowance or revival of a commission, or the appointment of new commissioners to allow claims not presented to the first commissioners. McGee v. McDonald, 66 Mich. 628, 33 NW 737.

[e] **The allowance of a claim of an administratrix** by the judge may be contested by any person interested in the estate, the same as other allowed claims might be contested. Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

70. Colo.—In re Hobson, 40 Colo. 332, 91 P 929.

Ill.—Bell v. Bennett, 188 Ill. A. 62.

La.—Romero's Succ., 28 La. Ann. 607.

Okl.—In re Jameson, 182 P 518.

Tex.—Farmer v. Saunders, 60 Tex. Civ. A. 197, 128 SW 941.

Wis.—In re Koch, 148 Wis. 548, 134 NW 663.

[a] **An heir may file a requisition on the representative** to disallow and reject a claim, but this provision does not apply to the payment of legacies, nor can a legatee or devisee file such a requisition. Hunt v. Hayes, 19 Oh. Cir. Ct. 151, 10 Oh. Cir. Dec. 388.

[b] **Appearance to protect remote interest.**—In a hearing on a claim against the estate, an heir may be permitted to appear personally, or by attorney, to protect his remote interest, although he is not strictly an adverse party. In re Koch, 148 Wis. 548, 134 NW 663.

71. McDermott v. McDermott, 138 Iowa 351, 353, 116 NW 122; In re Davenport, 85 Iowa 293, 53 NW 197; Cover v. Stockdale, 16 Md. 1; Willcox v. Smith, 26 Barb. (N. Y.) 316; Hoch's App., 21 Pa. 280.

"Where the executor or administrator holds a claim against the estate for which he is acting, an heir may question the validity thereof. He is interested in the settlement of the estate, and the claim of the administrator is adverse to his interest." McDermott v. McDermott, supra.

[a] **A special representative may be appointed** by the court to contest a claim of the personal representative, even though it arose after decedent's death. Nation v. Green, (Ind. A.) 114 NE 895.

[b] **Only on accounting.**—As the statute relating to presentation of claims against an estate makes no provision for a hearing thereon at which heirs may be heard as contestants, they may not contest them on their original presentation; but their remedy, in case of allowance thereof, is by contest of administrator's current account, or on his final settlement and accounting. In re Tamer, (Ariz.) 179 P 643.

72. Cavaroc v. Fournet, 28 La. Ann. 587; Oates v. Lilly, 84 N. C. 643; Felton's Est., 7 Pa. Dist. 262; Mason v. Taft, 23 R. I. 388, 50 A 648.

assets are insufficient to pay the claims of all.[73] But an objection cannot be made by a person who, although interested in the estate, could not be benefited by a disallowance of the claim,[74] and a fortiori one who is not interested in the estate has no right to contest the allowance of claims against it.[75]

[§ 1080] **b. Duty of Representative to Contest Claims.**[76] It is the duty of the representative to contest all claims presented against the estate which he believes, or has reason to believe, are unfounded or unjust,[77] or which are not presented and authenticated according to the requirements of the statute.[78] But the propriety of contesting particular claims must frequently be left largely to the representative's discretion and no presumption of bad faith or misconduct will be made against him.[79]

[§ 1081] **c. Grounds of Objection.** The executor or administrator is entitled to avail himself of any equitable or legal defense existing against the claim presented for allowance.[80] Objections to a claim may be based on a denial of its justice or validity,[81] or may rest on the ground that the claim is barred,[82] or that the claimant has not complied with the statutory requirements as to its presentation and authentication.[83] But it is not a valid objection to the claim of a creditor that a similar demand has been presented against another estate,[84] or to the claim of a representative that he has not filed his administration bond.[85]

[§ 1082] **d. Time for Making Objection.** Where the time for making objections is limited by statute, no objection can be made after the time limited on any ground existing prior to the expiration of this period,[86] but objections founded on matters subsequently occurring may be interposed at any time prior to the rendition of a final decree in favor of the creditor,[87] and the court may also in its discretion extend the time originally limited.[88] An objection for want of proper authentication of a claim may be made at any time before final judgment,[89] but not thereafter.[90] So also an objection that a claim was never presented to an executor is too late after the court, in settling the executor's account, has made an order for the payment of the claim.[91] Distributees may contest a claim of the representative without waiting for him to exhibit an administration account including the same.[92]

[§ 1083] **e. Mode of Making Objection.** The representative is not required to specify objections to a claim,[93] but his objections may be orally interposed.[94] So also it has been held that a general objection by the widow in her own behalf, and as guardian of an infant child, to the allowance of a claim founded on a note, a copy of which was filed, was sufficient, and the defenses of limitations, and of the failure to file the note itself, were available.[95] A notice served by an executor that he doubts the

[a] **One not shown to be a creditor** of the succession cannot oppose the allowance of claims set up by others. Floyd's Succ., 12 Rob. (La.) 197.

73. Cavaroc v. Fournet, 28 La. Ann. 587; Mason v. Taft, 23 R. I. 388, 50 A 648.

74. Hoopes' Est., 2 Chest. Co. (Pa.) 67.

75. Cumberland Univ. v. Robertson, 99 SW 1152, 30 KyL 947; Semper v. Coates, 93 Minn. 76, 100 NW 662; In re Williams, 118 NYS 562.

[a] **One whose claim has been judicially denied** has no standing to object to the allowance of other claims. In re Williams, 118 NYS 562.

[b] **The executrix of a deceased executor,** called to account for the executor's proceedings, has no authority over the original estate except to account for and pay over to the surviving executor thereof such funds of the estate as came to the deceased executor's hands, and cannot contest a claim against the original estate. Matter of Wood, 70 Misc. 467, 128 NYS 1102.

[c] **Remainderman taking after decease of life tenant.**—The beneficiary in a will, entitled to what remains of the estate at the death of a life tenant given the right to use testator's property, has no interest in claims against the estate of the life tenant. Cumberland Univ. v. Robertson, 99 SW 1152, 30 KyL 947.

76. Duty to interpose statute of limitations see supra § 907.

77. Ala.—Teague v. Corbitt, 57 Ala. 529; Green v. Fagan, 15 Ala. 335.

Ark.—Rogers v. Wilson, 13 Ark. 507.

Conn.—Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Trefo v. Cunningham, 205 Ill. A. 25; Hornbeek v. Hornbeek, 156 Ill. A. 232.

Ind.—Gorham v. Gorham, 54 Ind. A. 408, 103 NE 16; Ray v. Moore, 24 Ind. A. 480, 56 NE 937.

Md.—Fletcher v. Elosser, 126 Md. 244, 250, 94 A 776 [quot Cyc]; Strasbaugh v. Dallam, 93 Md. 712, 50 A 417.

N. Y.—In re Lyons, 173 NYS 590; In re Lydicker, 1 NYS 895.

Va.—Reid v. Windsor, 111 Va. 825, 69 SE 1101.

W. Va.—Crotty v. Eagle, 35 W. Va. 143, 13 SE 59.

Eng.—In re Rownson, 29 Ch. D. 358, 9 ERC 342.

"It is his duty to guard and protect the estate which he represents against those who may seek to diminish it by presenting fraudulent, illegal, or unfounded claims for allowance; and, above all, the duties of his trust forbid him from doing any act or entering into any arrangement whereby he will gain a personal advantage at the expense of the estate." Gorham v. Gorham, 54 Ind. A. 408, 103 NE 16, 18.

[a] **This rule applies to** claims predicated upon an obligation of suretyship assumed by such testator. Hornbeek v. Hornbeek, 156 Ill. A. 232.

[b] **The same degree of diligence** must be exercised as in the prosecution of actions accruing to him in his representative capacity. Teague v. Corbitt, 57 Ala. 529.

78. Walker v. Byers, 14 Ark. 246; Fragd v. Fragd, 175 Ill. A. 246.

Waiver of due presentation see supra § 1035.

79. Pearson v. Darrington, 32 Ala. 227; In re Pillsbury, 175 Cal. 454, 166 P 11; Norman v. Miller, 40 S. D. 399, 167 NW 391.

80. Foote v. Foote, 61 Mich. 181, 28 NW 90; In re Roberts, 214 N. Y. 369, 108 NE 562.

81. In re Weir, 168 Cal. 330, 143 P 612; In re Depuy, 9 NYS 121; Koch v. Alker, 3 Dem. Surr. (N. Y.) 148.

82. Craig v. Craig, 167 Iowa 340, 149 NW 454; Yingling v. Hesson, 16 Md. 112; Bowling v. Lamar, 1 Gill (Md.) 358; Oates v. Lilly, 84 N. C. 643.

83. Beirne v. Imboden, 14 Ark. 237; Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

[a] **How objection taken.**—An objection for want of proper authentication may be taken by either plea, motion, or objection to the admissibility of evidence. Beirne v. Imboden, 14 Ark. 237.

84. Montgomery's Est., 3 Brewst. (Pa.) 306.

85. In re Houck, 23 Or. 10, 17 P 461.

86. Chandler v. Wynne, 85 Ala. 301, 4 S 653; Moore v. Winston, 66 Ala. 296; Thornton v. Moore, 61 Ala. 347; Matter of Messing, 95 Misc. 1, 160 NYS 218.

87. Thornton v. Moore, 61 Ala. 347; Thames v. Herbert, 61 Ala. 340; Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

88. King v. Rockhill, 41 N. J. Eq. 273, 7 A 437.

89. Beirne v. Imboden, 14 Ark. 237.

[a] **Laches precluding defense against allowance of interest.**—A defense in opposition to the allowance of interest upon a claim against an estate, on the ground that a properly verified claim was not presented to the personal representative within a year after the death of the decedent, must be made promptly, and cannot be asserted twelve years after the making of a demand for the payment of the claim and after proof of verification has been obscured by time and death. Beddow v. Wilson, 90 SW 228, 28 KyL 661.

90. Clark v. Bomford, 20 Ark. 440; Snider v. McAtee, 165 Mo. A. 260, 147 SW 136.

91. L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

92. Cover v. Stockdale, 16 Md. 1.

93. Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985; Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

[a] **Defective presentation.**—Where a claim presented against a decedent's estate was not accompanied by a copy of the principal note, as security for which deceased gave a note, a general objection is sufficient. Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985.

94. Alvater v. Central City First Nat. Bank. 45 Colo. 528, 103 P 378; Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497.

[a] **To invoke the bar of limitations** to a claim against a decedent's estate it is not necessary to file a written pleading setting up limitations, either in the probate court or in the circuit court on appeal. Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497.

95. In re Hobson, 40 Colo. 332, 91 P 929.

justice of a verified claim against the estate and offers to refer it binds him and estops him from claiming that he rejected the claim.[96]

[§ 1084] **f. Waiver of Objections and Estoppel.**[97] Mere silence on the part of a representative after presentation of a claim, accompanied by lapse of time, will not preclude him from thereafter contesting its validity,[98] unless in jurisdictions where failure to act on the claim amounts to an allowance.[99] But by filing at the instance of an alleged creditor an account including the latter's claim the representative will be estopped to dispute its validity,[1] and if by verbally admitting the validity of a claim and stating that it will be paid he induces a third person to take the claim he cannot thereafter contest it in the hands of such third person.[2] A failure to object to a claim for want of affidavit and proof, until after judgment, is a waiver of the objection.[3] Refusal to pay a claim on the sole ground that it was not presented in time is a waiver of objections as to the manner in which it was presented,[4] and objections based on irregularities in filing and docketing a claim are waived by a general appearance of the representative.[5] So also where the court has jurisdiction of the subject matter, an executor who appears and files his demurrer to a paragraph of a claim which had never been placed on the appearance docket for rejection or allowance by him waives the objection that the claim had not been filed;[6] and where the representative waives his statutory right to require that a claimant shall bring his claim against the estate before the court in the mode prescribed by the decedents' act, his demurrer to an entire claim consisting of several distinct items will not be sustained if any one of such items states a good cause of action.[7] Where, after a claim against a decedent's estate had been transferred to the issue docket, the claimant was permitted, without objection on the part of the administrator, to amend the statement by introducing therein an item of claim based on facts which accrued after the claim was filed in the clerk's office and was placed on the docket on which it was the administrator's duty to allow or reject claims, the administrator could not by answer in bar of such part of the claim raise an objection which he had so waived to the making of such amendment.[8] Where an administratrix as such pays a portion of a bill of an expert accountant, and it is agreed between them that the accountant shall present his claim for the balance against the estate and that the administratrix shall not be held personally responsible therefor, the administratrix cannot object to the payment of the balance out of the estate merely because she is the sole distributee thereof.[9]

The heirs may be estopped by their conduct from contesting a claim,[10] and where they are estopped the representative is also estopped in a proceeding where he represents only their interests.[11]

[§ 1085] **2. Proceedings for Determination as to Disputed Claims—a. Arbitration**[12]**—(1) Right to Submit.** The general rule at common law, which is also established by express statutes in some jurisdictions, is that an executor or an administrator has the right to submit to arbitration claims against the estate which he represents.[13] No special authority from the probate court is required for the

96. Van Ness v. Kenyon, 75 Misc. 526, 135 NYS 802 [aff 151 App. Div. 948 mem, 136 NYS 1149 mem].

97. Waiver of due presentation see supra § 1035.

98. In re Callahan, 152 N. Y. 320, 46 NE 486 [rev 87 Hun 210, 33 NYS 1016]; Schultz v. Mouette, 146 N. Y. 137, 40 NE 780; Matter of Jacobs, 109 App. Div. 293, 96 NYS 133; Matter of Brown, 76 App. Div. 185, 78 NYS 297, 12 NYAnnCas 37; Matter of Clauss, 16 App. Div. 34, 44 NYS 805.

"The doctrine that the lapse of a reasonable time without objection made, transforms an account rendered into an account stated, has a much more restricted application when the claimant deals with an executor." Matter of Jacobs, supra.

99. See supra § 1040.

1. Wright v. Beirne, 2 Dem. Surr. (N. Y.) 539.

2. Swenson v. Walker, 3 Tex. 93.

3. Gray v. Marshall, 13 SW 913, 12 KyL 103; Coates v. Dunnivant, (Mo. A.) 182 SW 821.

4. Kentucky Title Co. v. English, 50 SW 968, 20 KyL 2024.

5. Sanders v. Hartage, 17 Ind. A. 243, 46 NE 604.

6. Frazer v. Boss, 66 Ind. 1.

7. Stapp v. Messeke, 94 Ind. 423.

8. Sheeks v. Fillion, 3 Ind. A. 262, 29 NE 786.

9. Webb's Est., 33 Pa. Super. 41.

10. Crothers v. Crothers, 123 Md. 603, 91 A 691; Jenks v. Black, 96 Mich. 122, 55 NW 563.

11. Crothers v. Crothers, 123 Md. 603, 91 A 691; Jenks v. Black, 96 Mich. 122, 55 NW 563.

12. Submission to arbitration as claims in favor of estate see supra § 395.

13. U. S.—Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228.

Ala.—Jones v. Deyer, 16 Ala. 221.

Iowa.—Sullivan v. Nicoulin, 113 Iowa 76, 84 NW 978.

Ky.—Overly v. Overly, 1 Metc. 117.

Me.—Kendall v. Bates, 35 Me. 357.

Mass.—Whitney v. Cook, 5 Mass. 139; Chadbourn v. Chadbourn, 9 Allen 173; Bean v. Farnam, 6 Pick. 269.

Miss.—Bailey v. Dilworth, 18 Miss. 404, 48 AmD 760.

Mo.—In re Jarboe, 227 Mo. 59, 84, 127 SW 26 [quot Cyc].

N. H.—Cogswell v. Concord, etc., R. Co., 68 N. H. 192, 44 A 293.

N. J.—McKeen v. Oliphant, 18 N. J. L. 442; Crum v. Moore, 14 N. J. Eq. 436, 82 AmD 262.

N. Y.—Wood v. Tunnicliff, 74 N. Y. 38.

Oh.—Childs v. Updyke, 9 Oh. St. 333; Bradstreet v. Pross, 9 Oh. Dec. (Reprint) 154, 11 CincLBul 117.

Pa.—Peters' App., 38 Pa. 239; Grace v. Sutton, 5 Watts 540.

R. I.—Parker v. Providence, etc., Steamboat Co., 17 R. I. 376, 22 A 284, 23 A 102, 33 AmSR 869, 14 LRA 414.

S. C.—Swicard v. Wilson, 9 S. C. L. 218.

S. D.—Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394.

Vt.—Powers v. Douglass, 53 Vt. 471, 38 AmR 699; Dickinson v. Dutcher, Brayt. 104.

Va.—Nelson v. Cornwell, 11 Gratt. (52 Va.) 724; Wheatley v. Martin, 6 Leigh (33 Va.) 62.

W. Va.—Wamsley v. Wamsley, 26 W. Va. 45.

Eng.—Love v. Honeybourne, 4 D. & R. 814, 16 ECL 222; Pearson v. Henry, 5 T. R. 6, 101 Reprint 3.

Ont.—Reid v. Reid, 16 U. C. C. P. 247. But compare In re Williams, 22 Ont. A. 196 (where it was doubted whether a statutory power to submit to arbitration, granted to executors, extended to administrators).

[a] **Source of power.**—(1) The power arose by reason of the full dominion which the law gives to the executor or administrator over the assets, and the full discretion which is vested in him for the settlement and liquidation of all claims due to and from the estate. District of Columbia v. Bailey, 171 U. S. 161, 18 SCt 868, 43 L. ed. 118 [rev on other grounds 9 App. (D. C.) 360]. (2) The power results from the representative's power to settle all claims in favor of or against the estate which he represents. Nelson v. Cornwell, 11 Gratt. (52 Va.) 724. (3) It is "based upon the fact that he has power to prosecute or defend suits." Cogswell v. Concord, etc., R. Co., 68 N. H. 192, 194, 44 A 293.

[b] **Effect of statutes.**—The common-law power in regard to submitting to arbitration is not affected or impaired in any way by the statutes. The purpose and effect of the statutes are to relieve executors and administrators from individual liability for any injury to the estate that might result from the arbitration. Overly v. Overly, 1 Metc. (Ky.) 117; Logsdon v. Roberts, 3 T. B. Mon. (Ky.) 255; Chadbourn v. Chadbourn, 9 Allen (Mass.) 173; Wood v. Tunnicliff, 74 N. Y. 38; Powers v. Douglass, 53 Vt. 471, 38 AmR 699.

[c] **One of two administrators** may submit a matter in dispute between himself in right of his intestate and another to arbitration and the award will bind the estate. Grace v. Sutton, 5 Watts (Pa.) 540.

[d] **Deputy sheriff.**—When the administration of an estate has been committed to the sheriff, the deputy sheriff has no power to submit to arbitration a suit to which the decedent was a party in his lifetime, and which has been revived in the name of the sheriff. Thompson v. Thompson, 6 Munf. (20 Va.) 514.

[e] **A special administrator** cannot submit claims to arbitration. Sullivan v. Nicoulin, 113 Iowa 76, 84 NW 978.

[f] **Claims not referable under the statute** may be submitted to arbitration. Wood v. Tunnicliff, 74 N. Y. 38.

exercise of this right,[14] unless, as is frequently the case, the statute requires the sanction of the probate court;[15] nor is the right affected by statutory provisions authorizing a reference of disputed claims.[16] In a few jurisdictions, however, the right of the representative to submit to arbitration has been denied.[17] The heirs or other persons beneficially interested have no right to submit a claim against the estate to arbitration while the estate is subject to administration.[18]

[§ 1086] **(2) Submission—(a) Form.** A valid submission to arbitration may be made by parol,[19] and there need not be any express agreement to abide by the award, as this will be implied from the fact of submission.[20]

[§ 1087] **(b) Effect.** An agreement to submit to arbitration is not an admission of assets,[21] unless the representative covenants to abide by and pay the amount of the award,[22] and not even then if from the articles of submission a contrary intention appears.[23] But such submission will preclude a plea of plene administravit in an action on the award.[24]

[§ 1088] **(3) Powers of Arbitrators.** The powers of arbitrators and the extent of their authority depend upon the terms of the agreement between the parties,[25] which will be strictly construed.[26] A statute conferring on orphans' courts the power, with the consent of the parties, to arbitrate between a claimant and an administrator has been held to refer only to claims against the estate which are asserted against the administrator in his fiduciary character.[27]

[§ 1089] **(4) Award—(a) Form.** Where claims against a person both individually and in his capacity as executor or administrator are submitted to arbitration, the award should clearly distinguish between moneys which are to be paid by him in his fiduciary character and those for which he is personally bound.[28]

[§ 1090] **(b) Operation and Effect.** At common law a representative who submits disputed claims to arbitration acts at his peril, and if the award is less favorable to the estate than an action at law would be he may be held liable to account for the loss to the heirs of other persons interested in the estate;[29] but the award is binding and the injury can be redressed only by charging the representative with a devastavit.[30] This rule has, however, been changed by statute in some jurisdictions.[31] The award is binding upon the representative,[32] in his fiduciary capacity,[33] and upon the

14. In re Jarboe, 227 Mo. 59, 84, 127 SW 26 [quot Cyc]; Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394; Dickinson v. Dutcher, Brayt. (Vt.) 104.

15. Ky.—Overly v. Overly, 1 Metc. 117.

Md.—Browne v. Preston, 38 Md. 373.

Mass.—Bacon v. Crandon, 15 Pick. 79.

Miss.—Regan v. Stone, 15 Miss. 104; Reed v. Wiley, 13 Miss. 394.

N. J.—McKeen v. Oliphant, 18 N. J. L. 442.

N. Y.—White v. Story, 43 Barb. 124; Tracy v. Suydam, 30 Barb. 110; Matter of Eichman, 33 Misc. 322, 68 NYS 636; Woodin v. Bagley, 13 Wend. 453.

N. C.—McLeod v. Graham, 132 N. C. 473, 43 SE 935.

Oh.—Anderson v. Baker, 14 Oh. St. 173; Childs v. Updyke, 9 Oh. St. 333.

Pa.—Peters' App., 38 Pa. 239.

Vt.—Noyes v. Phillips, 57 Vt. 229; Powers v. Douglass, 53 Vt. 471, 38 AmR 699.

W. Va.—Wamsley v. Wamsley, 26 W. Va. 45.

16. Mo.—In re Jarboe, 227 Mo. 59, 84, 127 SW 26 [quot Cyc].

N. Y.—Wood v. Tunnicliff, 74 N. Y. 38.

Oh.—Childs v. Updyke, 9 Oh. St. 333.

S. D.—Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394.

Vt.—Powers v. Douglass, 53 Vt. 471, 38 AmR 699.

17. Clark v. Hogle, 52 Ill. 427; Reitzell v. Miller, 25 Ill. 67; Callaghan v. Grenet, 66 Tex. 236, 18 SW 507. See also Lattier v. Rachal, 12 La. Ann. 695, 696 ("Although then, it should be conceded, that administrators have no right to submit to arbitration the interests of the estate they may administer, yet as such prohibition is intended to protect the right of parties interested, submissions thus made are not absolutely null, and their want of authority may be cured by the acquiescence and ratification of the parties represented by them").

[a] **The reason for this view** is that "his allowance of the claim should depend upon his own opinion as to its justice, formed upon such facts in reference to it as he can call to his aid, and not upon the opinion of other parties." Callaghan v. Grenet, 66 Tex. 236, 239, 18 SW 507.

[b] **Rejected claim.**—Arbitration is not the proper mode for the establishment of a rejected claim against an estate. Yarborough v. Leggett, 14 Tex. 677.

18. Stahl v. Brown, 72 Iowa 720, 32 NW 105.

19. Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 430; Whitney v. Phœnix, 4 Redf. Surr. (N. Y.) 180.

20. Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 430.

21. Sumner v. Williams, 8 Mass. 162, 5 AmD 83; Grace v. Sutton, 5 Watts (Pa.) 540; Montgomery's App., 3 Pa. Cas. 514, 7 A 231; Spivy v. Webster, 2 Dowl. P. C. 46; Love v. Honeybourne, 4 D. & R. 814, 16 ECL 222; Matter of Joseph, 1 Russ. & M. 496, 5 EngCh 496, 39 Reprint 191; Worthington v. Barlow, 7 T. R. 453, 101 Reprint 1072; Pearson v. Henry, 5 T. R. 6, 101 Reprint 3 [disappr Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328].

Same rule as to consent to reference see infra § 1096.

22. McKeen v. Oliphant, 18 N. J. L. 442; Wood v. Tunnicliff, 74 N. Y. 38; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

23. McKeen v. Oliphant, 18 N. J. L. 442.

24. Riddell v. Sutton, 5 Bing. 200, 15 ECL 541, 130 Reprint 1037.

25. Alexander v. Burton, 21 N. C. 469.

26. Alexander v. Burton, 21 N. C. 469.

27. Browne v. Preston, 38 Md. 373.

28. Lyle v. Rodgers, 5 Wheat. (U. S.) 394, 5 L. ed. 117.

29. U. S.—District of Columbia v. Bailey, 171 U. S. 161, 18 SCt 868, 43 L. ed. 118 [rev on other grounds 9 App. (D. C.) 360].

Iowa.—Sullivan v. Nicoulin, 113 Iowa 76, 84 NW 978.

Ky.—Overly v. Overly, 1 Metc. 117.

Mass.—Bean v. Farnam, 6 Pick. 269.

Mo.—In re Jarboe, 227 Mo. 59, 127 SW 26.

N. J.—Crum v. Moore, 14 N. J. Eq. 436, 82 AmD 262.

N. Y.—Wood v. Tunnicliff, 74 N. Y. 38.

Tex.—Yarborough v. Leggett, 14 Tex. 677.

Va.—Nelson v. Cornwell, 11 Gratt. (52 Va.) 724; Wheatley v. Martin, 6 Leigh (33 Va.) 62.

"It is true that at common law he acted at his peril and if the award happened to be less than what could have been obtained by a suit at law, he might be liable, but the agreement to arbitrate was always good." In re Jarboe, 227 Mo. 59, 85, 127 SW 26.

[a] **If there was no culpable error** on the part of the executor or administrator in submitting a claim to arbitration, it is said to be doubtful whether he would be held liable. Overly v. Overly, 1 Metc. (Ky.) 117.

30. Wheatley v. Martin, 6 Leigh (33 Va.) 62.

31. Overly v. Overly, 1 Metc. (Ky.) 117; Chadbourn v. Chadbourn, 9 Allen (Mass.) 173; Yarborough v. Leggett, 14 Tex. 677.

32. U. S.—Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228.

Ky.—Overly v. Overly, 1 Metc. 117.

Mass.—Bean v. Farnam, 6 Pick. 269; Coffin v. Cottle, 4 Pick. 454.

N. J.—Crum v. Moore, 14 N. J. Eq. 436, 82 AmD 262.

N. Y.—Wood v. Tunnicliff, 74 N. Y. 38.

N. C.—McLeod v. Graham, 132 N. C. 473, 43 SE 935.

S. C.—Swicard v. Wilson, 9 S. C. L. 218.

S. D.—Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394.

Va.—Wheatley v. Martin, 6 Leigh (33 Va.) 62.

Eng.—Worthington v. Barlow, 7 T. R. 453, 101 Reprint 1072; Pearson v. Henry, 5 T. R. 6, 101 Reprint 3; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

33. Del.—Lank v. Kinder, 4 Del. 457.

Ky.—Overly v. Overly, 1 Metc. 117.

N. H.—Cogswell v. Concord, etc., R. Co., 68 N. H. 192, 44 A 293.

N. J.—McKeen v. Oliphant, 18 N. J. L. 442.

Oh.—Childs v. Updyke, 9 Oh. St. 333.

Pa.—Peters' App., 38 Pa. 239; Grace v. Sutton, 5 Watts 540.

Va.—Wheatley v. Martin, 6 Leigh (33 Va.) 62.

Eng.—Worthington v. Barlow, 7 T. R. 453, 101 Reprint 1072; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

Ont.—Reid v. Reid, 16 U. C. C. P. 247.

[a] **Construction of award.**—Where an administrator submitted to arbitration disputed accounts of his intestate, binding himself and his heirs to abide and perform the award, an award ordering him to pay a specified sum "out of the estate of said deceased" only bound him to pay out of that fund as much as he could pay

creditors of the estate,[34] and also upon the heirs and devisees.[35] As against the representative it has been held that if he covenants to abide by and pay the amount of the award he will be personally bound for the full amount awarded,[36] although in form he covenanted as representative,[37] unless from a fair construction of the articles of submission a contrary intention appears;[38] but in the absence of such an agreement he is bound only in his representative capacity and according to the amount of assets.[39] The submission is an implied promise to pay from the assets in his hands and no further promise is necessary to sustain an action on this award.[40] As between different creditors, an award in favor of one does not entitle him to any priority of payment over other creditors but merely establishes and liquidates the claim.[41]

[§ 1091] **(5) Revocation of Submission.** A wrongful revocation of the submission gives rise to a cause of action against the executor or administrator in his individual and not in his representative capacity.[42]

[§ 1092] **b. Reference—(1) Authority to Refer.**[43] There are in many jurisdictions statutory provisions expressly authorizing a submission of disputed claims to referees[44] or auditors.[45] These statutes are designed merely to afford an expeditious and inexpensive method of determining such claims,[46] and do not preclude the right of the parties to resort to arbitration[47] or to an ordinary action at law,[48] nor do they make it the duty of either party to offer to refer.[49]

[§ 1093] **(2) What Claims May Be Referred.** Only such claims may be referred as the statutes permitting the reference authorize.[50] Statutes providing generally for a reference of all claims against the estate cover all claims of whatever nature which the representative is competent to settle and adjust[51] and which have been rejected or disputed by him;[52] and so include claims not yet due,[53] claims of an equitable as well as of a legal nature,[54] and claims arising out of tort as well as out of contract.[55] But claims within the meaning of the statutes comprise only such as accrued during the life of decedent or would have accrued against him if he had lived.[56] An individual claim of the representative against the estate may be referred,[57] but it is otherwise as to a claim of the representative as such.[58]

[§ 1094] **(3) Refusal to Refer.** Either the representative or the claimant may refuse to refer a disputed claim upon an offer to refer made by the other party,[59] but the probate court has no discretion to refuse a reference where the representa-

consistently with the law and rights of other creditors, such being the clear intention of the parties. McKeen v. Oliphant, 18 N. J. L. 442.

[b] **Personal liability.**—Where an administrator and an heir of the estate submitted their differences to arbitration, assumpsit would lie against the administrator personally upon the award. Powers v. Douglass, 53 Vt. 471, 38 AmR 699.

34. Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228. See also cases supra note 34.

35. Wheatley v. Martin, 6 Leigh (33 Va.) 62.

36. Wood v. Tunnicliff, 74 N. Y. 38; Powers v. Douglass, 53 Vt. 471, 38 AmR 699; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

37. Wood v. Tunnicliff, 74 N. Y. 38; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

38. Sumner v. Williams, 8 Mass. 162, 5 AmD 83; McKeen v. Oliphant, 18 N. J. L. 442; Wood v. Tunnicliff, 74 N. Y. 38; Ferrin v. Myrick, 41 N. Y. 315; Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044; Love v. Honeybourne, 4 D. & R. 814, 16 ECL 222; Worthington v. Barlow, 7 T. R. 453, 101 Reprint 1072; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

39. Grace v. Sutton, 5 Watts (Pa.) 540; Powers v. Douglass, 53 Vt. 471, 38 AmR 699; Wheatley v. Martin, 6 Leigh (33 Va.) 62; Pearson v. Henry, 5 T. R. 6, 101 Reprint 3 [dist Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328].

40. Swicard v. Wilson, 9 S. C. L. 218.

41. Wood v. Tunnicliff, 74 N. Y. 38.

42. Magoun v. Magoun, 84 App. Div. 232, 82 NYS 820.

43. Consent to reference as to claims in favor of estate see supra § 395.

44. Me.—Kendall v. Bates, 35 Me. 357.

Md.—Browne v. Preston, 38 Md. 373.

Mass.—Whitney v. Cook, 5 Mass. 139; Coffin v. Cottle, 4 Pick. 454.

Mich.—Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580.

Miss.—Bell v. Faison, 53 Miss. 354; Boyd v. Lowry, 53 Miss. 352; Allen v. Miles, 36 Miss. 640.

N. H.—McLaughlin v. Newton, 53 N. H. 531; Kingman v. Probate Judge, 31 N. H. 171.

N. Y.—Hustis v. Aldridge, 144 N. Y. 508, 39 NE 649; Wood v. Tunnicliff, 74 N. Y. 38; Eighmie v. Strong, 49 Hun 16, 1 NYS 502, 15 NYCivProc 119; Francisco v. Fitch, 25 Barb. 130; Russell v. Lane, 1 Barb. 519; Brockett v. Bush, 18 AbbPr 337.

N. C.—McLeod v. Graham, 132 N. C. 473, 43 SE 935; Dunn v. Beaman, 126 N. C. 766, 36 SE 172; Lassiter v. Upchurch, 107 N. C. 411, 12 SE 63.

Oh.—Anderson v. Baker, 15 Oh. St. 173; Childs v. Updyke, 9 Oh. St. 333; Bradstreet v. Pross, 9 Oh. Dec. (Reprint) 154, 11 CincLBul 117.

S. D.—Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394.

Vt.—Noyes v. Phillips, 57 Vt. 229.

45. Coulston's Est., 161 Pa. 151, 28 A 1020 [aff 3 Pa. Dist. 99, 14 Pa. Co. 243]; Curley's Est., 9 Pa. Dist. 276, 23 Pa. Co. 659; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Seybert's Est., 5 Pa. Co. 35.

[a] **An auditor will not be appointed when** the estate is largely solvent, and the appointment is sought by a single creditor, and the executors deny the liability of the estate and oppose the appointment of an auditor. McMillin's Est., 21 Pa. Co. 17.

46. Roulston v. Roulston, 5 Misc. 569, 26 NYS 667; Lassiter v. Upchurch, 107 N. C. 411, 12 SE 63.

47. See supra § 1085.

48. Mowell v. Van Buren, 77 Hun 569, 28 NYS 1035.

49. Proude v. Whiton, 15 HowPr (N. Y.) 304.

[a] **Privilege of reference may be waived by representative.**—Terry v. Cape Fear Bank, 20 Fed. 773.

50. Dana v. Prescott, 1 Mass. 200; In re Mudge, 118 NYS 568; Sands v. Craft, 10 AbbPr (N. Y.) 216, 18 HowPr 438; In re Denny, 2 Hill (N. Y.) 220.

51. Skidmore v. Post, 32 Hun (N. Y.) 54; Francisco v. Fitch, 25 Barb. (N. Y.) 130; Russell v. Lane, 1 Barb. (N. Y.) 519; Brockett v. Bush, 18 AbbPr (N. Y.) 337; Noyes v. Phillips, 57 Vt. 229.

[a] **A claim of a ward of the deceased** accruing in his lifetime for a balance of a trust fund is a claim "against deceased" for which his estate is liable, and may be referred. Fowler v. Hebbard, 40 App. Div. 108, 57 NYS 531.

52. Buckhout v. Hunt, 16 HowPr (N. Y.) 407.

[a] **Until a claim has been rejected or disputed** by the representative the claimant is not in a position to propose a reference. Buckhout v. Hunt, 16 HowPr (N. Y.) 407.

[b] **A judgment docketed against decedent in his lifetime** is not a claim which may be rejected and referred, but is a debt, the validity of which has been established by a court of competent jurisdiction. Matter of Browne, 35 Misc. 362, 71 NYS 1034.

53. International Harvester Co. v. Champlin, 155 App. Div. 847, 140 NYS 842.

54. Skidmore v. Post, 32 Hun (N. Y.) 54; White v. Story, 43 Barb. (N. Y.) 124; Francisco v. Fitch, 25 Barb. (N. Y.) 130; Brockett v. Bush, 18 AbbPr (N. Y.) 337.

55. Brockett v. Bush, 18 AbbPr (N. Y.) 337 [disappr Akely v. Akely, 17 HowPr (N. Y.) 21].

56. Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950; Genet v. Willock, 93 App. Div. 588, 87 NYS 938; Shorter v. Mackey, 13 App. Div. 20, 43 NYS 112; Skidmore v. Post, 32 Hun (N. Y.) 54; Godding v. Porter, 17 AbbPr (N. Y.) 374; Joyce v. McGuire, 2 NYCityCt 422.

[a] **A claim for funeral expenses** cannot be referred. Genet v. Willock, 93 App. Div. 588, 87 NYS 938; In re Mudge, 118 NYS 568.

[b] **A claim for a legacy** is not a claim against the estate which an executor may refer. Godding v. Porter, 17 AbbPr (N. Y.) 374.

[c] **The claim of an executor against the estate of his deceased coexecutor** for property, the use of which was given to the coexecutor for life by the will, is not a claim against the testator's estate which may be referred if disputed but is a claim against the estate of the coexecutor. Shorter v. Mackey, 13 App. Div. 20, 43 NYS 112.

[d] **The fact that an item of the claim accrued after decedent's death** does not deprive the referees of authority to allow it. McDaniels v. McDaniels, 40 Vt. 340, 94 AmD 408.

57. Dana v. Prescott, 1 Mass. 200; McLaughlin v. Newton, 53 N. H. 531.

58. Dana v. Prescott, 1 Mass. 200.

59. Wood v. Tunnicliff, 74 N. Y.

tive and claimant mutually agree thereto.[60] Neither party can be said to have refused to refer until the other has in some way manifested his willingness to do so,[61] but a neglect to answer an offer or proposition to refer might be deemed a refusal.[62]

[§ 1095] **(4) Agreement to Refer—(a) Form and Requisites.** In the case of a statutory reference, although the offer to refer may be by parol,[63] the agreement itself must be in writing,[64] and must be submitted to the surrogate or probate judge for approval,[65] and filed in the clerk's office.[66] The agreement to refer should substantially present the issues between the parties,[67] but matters of defense need not be set up therein.[68]

[§ 1096] **(b) Effect.** An agreement to refer and the filing of such agreement in the office of the clerk operate as a voluntary appearance by the parties,[69] and also as a waiver of the right to have the matter in dispute tried by a jury.[70] The agreement confers power on the probate court to appoint a referee to adjust the matters in dispute, and the parties cannot thereafter object to such reference.[71] It is not, however, an admission by the representative of sufficient assets to pay the claim,[72] nor is an offer to refer made by a representative after a refusal to pay a claim a waiver of the statute of limitations, unless the offer is accepted before the claim is barred and there is an actual submission as proposed.[73]

[§ 1097] **(5) Nature of Proceeding.** The statutory reference has been said to be not an action but a special proceeding,[74] but it is a judicial proceeding terminating in a judgment,[75] and is substantially a suit.[76] Such a reference may have, under statute, the same standing as a reference in an action in the supreme court.[77]

[§ 1098] **(6) Waiver of Defects.** Statutory provisions which are not jurisdictional but relate merely to matters of procedure may be waived by the parties,[78] and where the court has jurisdiction of the subject matter the voluntary appearance of the parties confers jurisdiction of their persons and is a waiver of all irregularities in the prior proceedings.[79] But the representative by consenting to refer does not waive the objection that the claim was not referable under the statute.[80]

[§ 1099] **(7) Selection and Appointment of Referees.** Under some of the statutes the selection of the referees is made by the parties agreeing to the reference as a part of their agreement and then submitted to the probate court for approval,[81] and the probate judge cannot make the selection unless the parties have failed to agree and consent to accept such persons as he may select,[82] or one of the referees selected refuses to serve,[83] or the report of the first referees is rejected and the claim is referred to new referees.[84] Under other statutes the selection is made by the probate judge[85] upon notice to all persons who may be affected by the proceedings.[86] The number of referees is ordinarily specified by statute,[87] but the parties may agree to the appointment of a different number,[88] or that the probate judge shall himself act as referee.[89]

[§ 1100] **(8) Powers of Referees.** The referees possess only such powers as are expressly conferred or may be fairly inferred from the provisions of the statute authorizing the reference.[90] They do not possess the same powers as referees in ordinary actions[91] unless such powers are expressly conferred by statute.[92]

[§ 1101] **(9) Revocation of Order of Reference.**

38; Proude v. Whiton, 15 HowPr (N. Y.) 304 [aff see 15 HowPr 305].

60. Kingman v. Probate Judge, 31 N. H. 171.

61. Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Proude v. Whiton, 15 HowPr (N. Y.) 304 [aff see 15 How Pr 305].

[a] **An unqualified rejection of a claim** by a representative, unaccompanied by an offer to refer, is not equivalent to a refusal to do so. Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Proude v. Whiton, 15 HowPr (N. Y.) 304 [aff see 15 HowPr 305, and overr Fort v. Gooding, 9 Barb. 388].

62. Proude v. Whiton, 15 HowPr (N. Y.) 304.

63. Roberts v. Pike, 13 NYS 559, 19 NYCivProc 422 [aff 14 NYS 957].

64. Van Ness v. Kenyon, 208 N. Y. 228, 101 NE 881, AnnCas1914D 221; Bucklin v. Chapin, 53 Barb. (N. Y.) 488, 35 HowPr 155; Roberts v. Pike, 13 NYS 559, 19 NYCivProc 422.

65. Burnett v. Gould, 27 Hun (N. Y.) 366; Anderson v. Baker, 15 Oh. St. 173.

66. Burnett v. Gould, 27 Hun (N. Y.) 366; Anderson v. Baker, 15 Oh. St. 173.

67. Woodin v. Bagley, 13 Wend. (N. Y.) 453.

68. Tracy v. Suydam, 30 Barb. (N. Y.) 110.

69. Tracy v. Suydam, 30 Barb. (N. Y.) 110.

70. Adams v. Brady, 67 Hun 521, 22 NYS 466 [aff 139 N. Y. 608, 35 NE 203]; Masten v. Budington, 18 Hun (N. Y.) 105.

[a] **The waiver is not restricted to the first reference** to which the parties consented, and if the report is rejected the court may against the consent of one of the parties appoint a new referee and resubmit the claim. Adams v. Brady, 67 Hun 521, 22 NYS 466.

71. In re Jarboe, 227 Mo. 59, 127 SW 26.

72. Sinclair v. Wilson, 3 Penr. & W. (Pa.) 167; Hoare v. Muloy, 2 Yeates (Pa.) 161.

Same rule as to submission to arbitration see supra § 1087.

73. Cornes v. Wilkin, 79 N. Y. 129 [aff 14 Hun 428].

74. Eldred v. Eames, 115 N. Y. 401, 22 NE 216; Mowry v. Peet, 88 N. Y. 453; Mowell v. Van Buren, 77 Hun 569, 28 NYS 1035; Denise v. Denise, 41 Hun (N. Y.) 9 [aff 110 N. Y. 562, 18 NE 368]; Coe v. Coe, 37 Barb. (N. Y.) 232, 14 AbbPr 86; Robert v. Ditmas, 7 Wend. (N. Y.) 522.

75. Coe v. Coe, 37 Barb. (N. Y.) 232, 14 AbbPr 86.

76. Coe v. Coe, 37 Barb. (N. Y.) 232, 14 AbbPr 86; Robert v. Ditmas, 7 Wend. (N. Y.) 522.

77. Lee v. Lee, 85 Hun 588, 33 NYS 115; Rutherford v. Soop, 85 Hun 119, 32 NYS 636; Jenkinson v. Harris, 27 Misc. 714, 59 NYS 548.

78. Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580; Bradstreet v. Pross, 9 Oh. Dec. (Reprint) 154, 11 CincLBul 117.

79. Regan v. Stone, 15 Miss. 104; Montgomery v. Burgess, 92 Hun 289, 36 NYS 711; Bucklin v. Chapin, 53 Barb. (N. Y.) 488, 35 HowPr 155; In re Ludlam, 13 Pa. 188; Benedict's Est., 4 LancLRev (Pa.) 99.

80. Van Slooten v. Dodge, 145 N. Y. 327, 29 NE 950; Shorter v. Mackey, 13 App. Div. 20, 43 NYS 112.

81. Tilney v. Clendenning, 1 Dem. Surr. (N. Y.) 212.

82. Tilney v. Clendenning, 1 Dem. Surr. (N. Y.) 212.

83. Hustis v. Aldridge, 144 N. Y. 508, 39 NE 649 (in such case the court cannot vacate the reference but must appoint another referee unless the stipulation expressly provides otherwise).

84. Adams v. Brady, 67 Hun 521, 22 NYS 466 [aff 139 N. Y. 608, 35 NE 203]; Masten v. Budington, 18 Hun (N. Y.) 105.

85. Kingman v. Probate Judge, 31 N. H. 171; Noyes v. Phillips, 57 Vt. 229.

86. Kingman v. Probate Judge, 31 N. H. 171.

87. Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580; Tilney v. Clendenning, 1 Dem. Surr. (N. Y.) 212.

88. Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580.

89. McLaughlin v. Newton, 53 N. H. 531.

90. Bell v. Faison, 53 Miss. 354; Eldred v. Eames, 115 N. Y. 401, 22 NE 216 [rev 48 Hun 253]; Roulston v. Roulston, 5 Misc. 569, 26 NYS 667 [aff 78 Hun 609 mem, 28 NYS 1117 mem]; Brong's Est., 20 Pa. Dist. 1041.

[a] **Compelling attendance of witnesses.**—An auditor appointed by the orphans' court is authorized and empowered to compel the attendance of witnesses and to issue attachment against the body of witnesses. Edris' Est., 25 Pa. Co. 377.

91. Eldred v. Eames, 115 N. Y. 401, 22 NE 216 [rev 48 Hun 253].

[a] **A referee could not:** (1) Require a bill of particulars. Townsend v. New York L. Ins. Co., 4 NYCiv Proc 398. (2) Permit the claimant to amend his claim. Eldred v. Eames, 115 N. Y. 401, 22 NE 216 [rev 48 Hun 253]; Mowell v. Van Buren, 77 Hun 569, 28 NYS 1035. (3) In any way vary or enlarge the matter referred. Roulston v. Roulston, 5 Misc. 569, 26 NYS 667 [aff 78 Hun 609 mem, 28 NYS 1117 mem]; Townsend v. New York L. Ins. Co., 4 NY CivProc 398.

92. Lee v. Lee, 85 Hun 588, 33 NYS 115; Rutherford v. Soop, 85 Hun 119, 32 NYS 636; Jenkinson v. Harris, 27 Misc. 714, 59 NYS 548; Lassiter v.

The court may revoke an order of reference while the reference is pending, upon proof of facts which might render further proceedings before the referees fraudulent or injurious to the rights of persons interested in the claim referred or in the estate,[93] and may do so on the application of one who is not a party to the reference and against the consent of those who are parties thereto.[94]

[§ 1102] **(10) Bringing in of New Parties and Intervention.** If while the reference is pending it appears that the presence of other persons is necessary to a complete determination of the controversy the court may order them to be brought in and made parties.[95] But a legatee cannot intervene in a proceeding on a disputed claim against the estate, which has been referred and has assumed the status of an action in the supreme court, on the ground of collusion between the administrator and the claimant, and consequent danger to his legacy.[96]

[§ 1103] **(11) Proceedings before Referee.** The hearing on a statutory reference may be conducted without filing any pleadings,[97] the agreement to refer supplying the place of both pleadings and process;[98] but notice of the time of the hearing should be given.[99] The hearing must be confined strictly to the particular claim referred,[1] and the claimant must satisfy the referees of its justice and validity.[2] Any defense may be urged which is available to defeat the claim,[3] including the statute of limitations,[4] and every species of legal proof adapted to show the injustice or invalidity of the claim in whole or in part is admissible.[5] It is not necessary that the testimony taken on the hearing before the referees should be signed and filed.[6] On a hearing before an auditor, an issue to try a disputed question of fact before a jury may, it has been held, be demanded,[7] although such an issue is not a matter of right on every disputed claim, but it must be shown that there exists some disputed fact, for the determination of which a jury is necessary.[8]

[§ 1104] **(12) Findings, Award, or Report.** The only finding which the referee is authorized to make is that the claim in question be allowed or disallowed,[9] and he cannot, after rejecting the claim, make an affirmative finding in favor of the estate against claimant,[10] unless the court directs him, as it may do, on his report that the claim is unfounded, and on application of the representative, to report on any claim in favor of the estate against claimant.[11] The award is a nullity as to any finding by the referees which is in excess of their authority,[12] but if that part of their award, which is within the scope of their authority, is independent of and clearly distinguishable from the rest, it may be affirmed as to that part and rejected as to the balance.[13] A report finding the claim invalid is in the nature of a nonsuit, and does not require any special findings of fact.[14]

[§ 1105] **(13) Return and Approval of Report.** In the absence of a statute giving the reference the same standing as a reference in an action and authorizing judgment to be entered upon the report,[15] the report of the referees must be returned to and approved by the court before judgment can be entered thereon,[16] the return being made not to the surrogate or probate judge who approved the selection of the referees but to the court of general jurisdiction in which the rule for their appointment was entered.[17] On presentation of the report the court may either set it aside or accept it and render judgment thereon,[18] but the findings of a referee or auditor upon questions of fact will be sustained unless they are clearly contrary to the

Upchurch, 107 N. C. 411, 12 SE 63.

[a] **Under such a grant the referee may:** (1) Allow an amendment of the claim. Lounsbury v. Sherwood, 53 App. Div. 318, 65 NYS 676; Lee v. Lee, 85 Hun 588, 33 NYS 115. (2) Adjudicate upon the question of costs. Jenkinson v. Harris, 27 Misc. 714, 59 NYS 548. (3) But he cannot require a bill of particulars. Rutherford v. Soop, 85 Hun 119, 32 NYS 636.

93. Lathrop v. Hitchcock, 38 Vt. 496.

94. Lathrop v. Hitchcock, 38 Vt. 496.

95. Mowry v. Peet, 7 AbbNCas (N. Y.) 195.

96. Honigbaum v. Jackson, 97 App. Div. 527, 90 NYS 182 (the statute providing for bringing in as a party one who has an interest therein, but is not made a party thereto, does not apply to actions in which no specific or tangible property is involved and a mere money judgment is sought).

97. Rutherford v. Soop, 85 Hun 119, 32 NYS 636; Tracy v. Suydam, 30 Barb. (N. Y.) 110; Woodin v. Bagley, 13 Wend. (N. Y.) 453.

98. Robert v. Ditmas, 7 Wend. (N. Y.) 522.

99. Wasserman's Est., 6 Pa. Dist. 343, 19 Pa. Co. 372; Carroll's Est., 4 Pa. Dist. 680.

[a] **The representative need not give notice to his cestuis que trust** of the hearing, although such notice would be prudent and proper. Mayer v. Gilligan, 2 NYS 702.

1. Mowell v. Van Buren, 77 Hun 569, 28 NYS 1035; Rowlston v. Rowlston, 5 Misc. 569, 26 NYS 667 [aff 78 Hun 609 mem, 28 NYS 1117 mem].

2. Matter of Carpenter, 178 App. Div. 165, 165 NYS 10; Street v. Ransom, 62 App. Div. 519, 71 NYS 93; Yates v. Root, 4 App. Div. 439, 38 NYS 663; Tracy v. Suydam, 30 Barb. (N. Y.) 110.

[a] **Claims should be carefully scrutinized** and should be established only upon clear and satisfactory proof. Barrett v. Bailey, 59 App. Div. 300, 69 NYS 246.

[b] **Evidence held insufficient.—** Corless v. Carlisle, 137 App. Div. 611, 122 NYS 407; Jenkins v. Jenkins, 83 S. C. 537, 65 SE 736 (to show that note was signed by decedent).

3. Simons v. Steele, 82 App. Div. 202, 81 NYS 737 [aff 177 N. Y. 542 mem, 69 NE 1131 mem].

[a] **Any defense which decedent could have made** alive may be set up. Tracy v. Suydam, 30 Barb. (N. Y.) 110.

[b] **Nonresidence of the representative** is no ground for rejecting his individual claim against the estate. Newton's Est., 11 Phila. (Pa.) 100.

4. Simons v. Steele, 82 App. Div. 202, 81 NYS 737 [aff 177 N. Y. 542 mem, 69 NE 1131 mem]; Rutherford v. Soop, 85 Hun 119, 32 NYS 636; Tracy v. Suydam, 30 Barb. (N. Y.) 110; Woodin v. Bagley, 13 Wend. (N. Y.) 453.

[a] **The referee may of his own motion give effect to the statute** of limitations where the defense is not raised by the representative. Simons v. Steele, 82 App. Div. 202, 81 NYS 737 [aff 177 N. Y. 542 mem, 69 NE 1131 mem].

5. Tracy v. Suydam, 30 Barb. (N. Y.) 110 (within this rule a set-off or part payment may be proved in reduction of the amount of the claim).

6. Kellogg v. Werner, 6 Hun (N. Y.) 452.

7. Hansell's Est., 11 Phila. (Pa.) 47.

[a] **Such an application is too late** when made after: (1) All the evidence on both sides has been given on a rehearing. Tassey's App., 1 Pa. Cas. 341, 3 A 101. (2) The audit is closed and notice given that the report is prepared for filing. White's Est., 11 Phila. (Pa.) 100.

8. Hansell's Est., 11 Phila. (Pa.) 47; Beehler's Est., 3 Phila. (Pa.) 254.

[a] **Mere delay** in presenting a sealed note for payment is not sufficient of itself to authorize the granting of an issue by an auditor to determine whether the debt has been paid, or has lost its value by the delay. Hummel's Est., 3 Phila. (Pa.) 442.

9. Bell v. Faison, 53 Miss. 354.

10. Gilmore v. Hubbard, 12 Cush. (Mass.) 220; Mowry v. Peet, 88 N. Y. 453.

11. Hendrickson v. Dickson, 19 Hun (N. Y.) 290.

12. Gilmore v. Hubbard, 12 Cush. (Mass.) 220.

13. Gilmore v. Hubbard, 12 Cush. (Mass.) 220; Unterrainer v. Seelig, 13 S. D. 148, 82 NW 394.

14. Matter of Carpenter, 178 App. Div. 165, 165 NYS 10.

15. See Jenkinson v. Harris, 27 Misc. 714, 59 NYS 548 (under the statute as amended in 1893 a confirmation of the report by the court was no longer necessary).

16. Harmon v. Haines, 68 N. H. 28, 38 A 734; Burnett v. Gould, 27 Hun (N. Y.) 366.

17. Anderson v. Baker, 15 Oh. St. 173.

18. Harmon v. Haines, 68 N. H. 28, 38 A 734; Coe v. Coe, 37 Barb. (N. Y.) 232, 14 AbbPr 86; Boyd v.

evidence,[19] or unless there is an absence of evidence sufficient in law to sustain them.[20] If the report is rejected, the court may appoint new referees and resubmit the claim to them,[21] or if the report is merely defective in form it may be sent back to the same referee for correction.[22] It has been held that if the report is not accepted the court cannot substitute its own finding for that which the referee should have made and render judgment thereon,[23] but there is also authority for the view that the court, on return of the report, may set it aside and make findings of fact and law of its own from the evidence.[24] The statutes as to the time within which referees appointed in ordinary actions must make and deliver their report do not apply to a statutory reference of a disputed claim.[25]

[§ 1106] **(14) Effect of Award.** It has been held that the award is equivalent to a judgment and can be attacked only for fraud or collusion,[26] and is binding upon the heirs, although they were not parties to the proceeding;[27] and also that a judgment entered on the report of the referee is equivalent to a judgment by confession.[28]

[§ 1107] **(15) Second Reference.**[29] The granting of a second reference for newly discovered evidence is a matter resting largely in the discretion of the court.[30]

[§ 1108] **c. Hearing before Commissioners.** In some jurisdictions provision is made by statute for the appointment of commissioners to pass upon disputed claims,[31] and a court of chancery may in a suit against the representative appoint commissioners to ascertain and report upon claims against the estate.[32] The commissioners, although in a sense they act judicially, are not strictly speaking a court,[33] but are appointed to act in a particular case only, after which their authority ceases.[34] Under a statute providing that where claims are deemed by the executor or administrator to be exorbitant, unjust, or illegal, commissioners may be appointed to determine the claims and that "no action shall be maintained on any claim so committed unless proved before said commissioners," the word "maintained" refers to the prosecution to a conclusion of an action already begun.[35] The hearing should be had on notice to the parties interested,[36] but may be conducted without formal pleadings,[37] and any objections and defenses may be interposed which would be available in an action on the claim.[38] The evidence taken before the commissioners should be returned to the probate court.[39] Exceptions to the report are in the nature of special demurrers, and must specifically point out the errors complained of.[40] The commissioners have no

Bigelow, 14 HowPr (N. Y.) 511; Beecher's Est., 5 Pa. Co. 115.

[a] **A motion for a new trial** upon case and exceptions may be made after the referee's report is confirmed. Eighmie v. Strong, 49 Hun 16, 1 NYS 502, 15 NYCivProc 119.

[b] **The court may vacate the judgment** rendered upon confirmation of the report, the power to do so being an incident of the power to set aside the report. Young v. Cuddy, 23 Hun (N. Y.) 249 [app dism 88 N. Y. 647 mem].

19. Hendron v. Kinner, 110 Iowa 544, 80 NW 419, 81 NW 783; Hart v. Tuite, 75 App. Div. 323, 78 NYS 154; Coale v. Coale, 63 App. Div. 32, 71 NYS 214; O'Neill v. Barry, 20 App. Div. 121, 46 NYS 752; In re Coulston, 161 Pa. 151, 28 A 1020 [aff 3 Pa. Dist. 99, 14 Pa. Co. 243]; Litle's Est., 23 Pa. Dist. 1014; Pratt's Est., 16 Pa. Dist. 223; Furbush's Est., 16 Pa. Dist. 205; Shaw's Est., 16 Pa. Dist. 186; Lukens' Est., 10 Pa. Dist. 294; Curley's Est., 9 Pa. Dist. 276, 23 Pa. Co. 659; Gilliland's Est., 6 Pa. Dist. 138, 19 Pa. Co. 285; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Hoffman's Est., 32 Pa. Co. 569; Ward's Est., 22 Pa. Co. 516; Boyer's Est., 7 Pa. Co. 285; McDonough's Est., 6 Pa. Co. 527; Seybert's Est., 5 Pa. Co. 35; Bromley's Est., 18 Phila. (Pa.) 7; White's Est., 11 Phila. (Pa.) 100; Wedekind's Est., 11 Phila. (Pa.) 68; Sheetz's Est., 2 Woodw. (Pa.) 407; Scott's Est., 14 YorkLegRec (Pa.) 77.

20. Fiscus' Est., 13 Pa. Super. 615; Fehl's Est., 13 Pa. Super. 601.

21. Adams v. Brady, 67 Hun 521, 22 NYS 466 [aff 139 N. Y. 608, 35 NE 203]; Masten v. Budington, 18 Hun (N. Y.) 105.

22. Shea v. Cornish, 22 NYS 168, 29 AbbNCas 289; Hirschmeyer's Est., 23 Pa. Dist. 1102.

23. Coe v. Coe, 37 Barb. (N. Y.) 232, 14 AbbPr 86.

24. Fullerton Lumber Co. v. Massard, 144 Mo. A. 61, 128 SW 831.

25. Godding v. Porter, 17 AbbPr (N. Y.) 374.

26. Lassiter v. Upchurch, 107 N. C. 411, 12 SE 63; Speer v. James, 94 N. C. 417.

27. Lassiter v. Upchurch, 107 N. C 411, 12 SE 63.

28. In re Jarboe, 227 Mo. 59, 127 SW 26.

29. On rejection of report see supra § 1105.

30. Turner v. Young, 155 Ky. 604, 159 SW 1165 (it is not an abuse of discretion to deny a rereference in a proceeding by a daughter against her mother's estate, to recover for services performed, for newly discovered evidence coming from claimant's daughter, that claimant stated in her mother's presence that she expected pay for services rendered, and her mother said, "Yes, yes," diligence being wanting).

31. Me.—Palmer v. Palmer, 61 Me. 236; Bates v. Ward, 49 Me. 87.

Mich.—Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852.

R. I.—Mason v. Taft, 23 R. I. 388, 50 A 648.

Vt.—Metcalf v. Metcalf, 89 Vt. 63, 94 A 1; Davis v. Flint, 67 Vt. 485, 32 A 473; Martin v. White, 58 Vt. 389, 3 A 498.

Wis.—Price v. Dietrich, 12 Wis. 626.

[a] **Where an executor is residuary legatee** and has given bond to pay the debts and legacies no commission need be issued to consider claims against the estate. Durfee v. Abbott, 50 Mich. 278, 15 NW 454.

32. Gayle v. Singleton, 1 Stew. (Ala.) 566; Wilson v. Wilson, 4 KyL 450; Davis v. Roberts, Sm. & M. Ch. (Miss.) 543.

[a] **The regular practice in a suit to settle an estate** is for creditors to file their claims before the commissioners; and where so filed either party may at once take proof on the same, or they can wait until the report is filed and then except to the report, and the court will allow time to take proof on the exceptions. Exceptions may allege any fact showing that the claim ought not to be paid, including a plea of limitations. Wilson v. Wilson, 4 KyL 450.

33. Shurbun v. Hooper, 40 Mich. 503; Mason v. Taft, 23 R. I. 388, 50 A 648.

34. Shurbun v. Hooper, 40 Mich. 503.

35. Shurtleff v. Redlon, 109 Me. 62, 67, 82 A 645 ("It is, however, urged most strenuously that the word 'maintained' as used in R. S., c. 66 § 54 is equivalent to commenced or brought. It is true that this is, perhaps, the ordinary meaning of the word in legal phraseology but it is not always so used in our statutes, as in R. S., c. 84, § 146, we find 'bring and maintain,' in R. S., c. 83, § 108, 'brought or maintained' and R. S. c. 107 § 16, 'commenced or maintained' where the word means something more than begin or institute and the meaning is fairly equivalent to prosecute what has been begun. See also R. S., c. 89, §§ 4, 6, 9, 14. It is apparent that the word maintain is used in three meanings; to commence, Burbank v. Auburn, 31 Me. 590, 591; to commence and prosecute to a conclusion, Kinsey v. Ohio Southern R. Co., 3 OhS&CP 249, 250, 2 OhNP 175 and to prosecute to a conclusion that which has already been begun: Smith v. Lyon, 44 Conn. 175, 178. The court is of the opinion that as used in R. S., c. 66, § 54, the word maintain means to prosecute to a conclusion an action already begun and that the inhibition was inserted out of abundant caution to more clearly differentiate proceedings upon such claims from those against insolvent estates where, as we have seen, the commencement of suits is forbidden after a decree of insolvency. To inhibit the commencement of an action after the claim is duly and legally committed to the commissioners by decree of the Probate Court is unnecessary in view of the fact that the report of the commissioners is made final saving only the right of appeal; R. S., c. 66, § 54").

36. Gayle v. Singleton, 1 Stew. (Ala.) 566.

[a] **If the representative appears** and is present at the hearing he cannot object to want of notice. Heavenrich v. Nichols, 113 Mich. 508, 71 NW 852.

37. Mason v. Taft, 23 R. I. 388, 50 A 648.

38. Mason v. Taft, 23 R. I. 388, 50 A 648 (statue of limitations available without being specially pleaded).

39. Buchoz v. Pray, 37 Mich. 512 (mandamus will lie to compel the commissioners to return evidence to the probate court).

40. Reid v. Windsor, 111 Va. 825, 69 SE 1101 (an exception to a commissioner's report allowing claims against an estate, that "the within report is excepted to because the commissioner allows the claim of M., based on a note for" a certain sum, "and purporting to be signed by said M." and another, sufficiently raised the question of the validity of M's debt).

jurisdiction of claims in behalf of the estate except as offsets to adversary claims.[41] An appeal will lie from the decision of commissioners,[42] but their adjudication as to matters within their authority is final and conclusive unless appealed from,[43] and unless the appeal is prosecuted according to the requirements of the statute.[44] It is sometimes provided that if a claim is not paid within thirty days after the report of the commissioners is accepted, claimant may file a copy of the report in the office of the clerk of the court and execution may be issued thereon.[45] A commissioner who is directed to take proof on a number of contested claims is not entitled to compensation for separate reports on the several claims.[46]

[§ 1109] **d. Proceedings in Probate Court—(1) Probate Jurisdiction as to Disputed Claims[47]—(a) Rule in Absence of Statute.** In the absence of statute probate courts have no jurisdiction to try and determine disputed claims against an estate,[48] even with the consent of the parties;[49] and where the same court is both a court of probate and a court of general jurisdiction, it cannot while sitting as a court of probate try disputed claims, but a suit must be brought on the civil side of the docket.[50] As soon as a claim is disputed the jurisdiction of the probate court over it is suspended until its validity is established in another forum,[51] and any proceedings then pending in the probate court to enforce its payment should be dismissed.[52] By a disputed claim, however, is meant one which is disputed by the representative and not a claim which an heir, legatee, or other person interested in the estate may deem unfounded or unjust;[53] and where the claim has been allowed by the representative its validity may be passed upon by the probate court if on the settlement of the representative's accounts it is disputed by some person interested in the estate.[54] The probate court may also determine whether the claim was ever presented to the representative,[55] and whether it was allowed or rejected by him.[56]

[§ 1110] **(b) Equitable Jurisdiction.** Probate courts do not possess the general powers of courts of equity,[57] their equitable jurisdiction being limited to such as is expressly conferred by statute

41. Allen v. Rice, 22 Vt. 333.

42. Palmer v. Palmer, 61 Me. 236; Price v. Dietrich, 12 Wis. 626. See also infra § 1129.

43. Shurtleff v. Redlon, 109 Me. 62, 82 A 645; Palmer v. Palmer, 61 Me. 236; Shurbun v. Hooper, 40 Mich. 503; Price v. Dietrich, 12 Wis. 626.

44. Palmer v. Palmer, 61 Me. 236; Bates v. Ward, 49 Me. 87.

45. Palmer v. Palmer, 61 Me. 236.

46. Hays v. Johnson, 99 SW 332, 30 KyL 614.

47. On application for sale of property to pay debts see infra § 1519.

48. U. S.—Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569.

Cal.—In re Bette, 171 Cal. 583, 153 P 949.

Conn.—Isaacs v. Stevens, 13 Conn. 499.

D. C.—Mercer v. Hogan, 15 D. C. 520; Keyser v. Breitbarth, 14 D. C. 19.

Md.—Levering v. Levering, 64 Md. 399, 2 A 1; Bowie v. Ghiselin, 30 Md. 553; Miller v. Dorsey, 9 Md. 317.

Mich.—In re Brown, 198 Mich. 544, 165 NW 929; Buck v. Lockwood, 193 Mich. 242, 159 NW 509.

Miss.—Arnold v. Hamer, Freem. 509.

Mo.—Albert Grocer Co. v. Painter, 66 Mo. A. 480.

N. J.—Miller v. Pettit, 16 N. J. L. 421; Partridge v. Partridge, 46 N. J. Eq. 434, 19 A 662, 47 N. J. Eq. 601, 22 A 1075; Middleton v. Middleton, 35 N. J. Eq. 115; Vreeland v. Vreeland, 16 N. J. Eq. 512.

N. Y.—Glacius v. Fogel, 88 N. Y. 434 [aff 25 Hun 227]; McNulty v. Hurd, 72 N. Y. 518; Tucker v. Tucker, 4 Abb. Dec. 428, 4 Keyes 136; Matter of Hammond, 92 Hun 478, 36 NYS 1074; Barker v. Laney, 90 Hun 108, 35 NYS 626; Ashley v. Lamb, 50 Hun 568, 3 NYS 715; Cooper v. Felter, 6 Lans. 485; Montross v. Wheeler, 4 Lans. 99; Curtis v. Stilwell, 32 Barb. 354; Andrews v. Wallace, 29 Barb. 350; Disoway v. Washington Bank, 24 Barb. 60; Wilson v. Baptist Education Soc., 10 Barb. 308; Magee v. Vedder, 6 Barb. 352 [dist Fitzpatrick v. Brady, 6 Hill 581; Kidd v. Chapman, 2 Barb. Ch. 414]; Forman v. Lawrence, 6 Thomps. & C. 640; Matter of Cole, 85 Misc. 630, 148 NYS 1099; Matter of Scheetz, 62 Misc. 166, 116 NYS 428; Matter of Peterson, 62 Misc. 161, 116 NYS 286; Matter of Von der Lieth, 25 Misc. 255, 55 NYS 428; Matter of Strickland, 5 NYS 851, 1 Conn. Surr. 435; Wellenberger's Est., 15 NYSt 719, 6 Dem. Surr. 364 [disappr Dakin v. Demming, 6 Paige 95]; Matter of Dunn, 8 NYSt 766; In re Brown, 3 NYCivProc 39, 1 Dem. Surr. 136; Adams v. Glidden, 6 Dem. Surr. 197 [dist Lambert v. Craft, 98 N. Y. 342]; Stevens v. Stevens, 2 Redf. Surr. 265; In re Jones, 1 Redf. Surr. 263; Jennings v. Phelps, 1 Bradf. Surr. 485; Shaw's Est., Tuck. Surr. 352 [disappr Campbell v. Bruen, 1 Bradf. Surr. 224]; Matter of Phyfe, 5 NYLegObs 331.

Okl.—Osborn v. Foresythe, 153 P 207.

Pa.—In re Warner, 2 Whart. 295; Metts' App., 1 Whart. 7; Bumm's Est., 8 Pa. Dist. 191; Matter of Latimer, 2 Ashm. 520; Frantz's Est., 6 Lanc Bar 1.

S. C.—Brown v. McWhite, 30 S. C. 356, 9 SE 277.

Tex.—Neill v. Hodge, 5 Tex. 487; Marx v. Freeman, 21 Tex. Civ. A. 429, 52 SW 647.

Wis.—Hooe v. Lockwood, 3 Pinn. 42, 3 Chandl. 41.

Ont.—In re MacIntyre, 11 Ont. L. 136, 7 OntWR 122.

"It [the orphans' court] had no power to determine the rights of the claimant against the estate, or to order the payment of the claim, and its order dismissing the petition did not affect the appellee's right to enforce his claim in a Court of law or equity." Houck v. Houck, 112 Md. 122, 131, 76 A 581.

[a] **Where the validity of a judgment debt is disputed,** the surrogate's court has no jurisdiction to determine questions as to its validity, although it may pass upon any payments made and determine the balance due and may also determine who is the owner of the judgment and entitled to the money. McNulty v. Hurd, 72 N. Y. 518; Matter of Wait, 39 Misc. 74, 78 NYS 869, 12 NYAnn Cas 141, 3 Mills Surr. 293; Matter of Browne, 35 Misc. 366, 71 NYS 1037, 2 Mills Surr. 277.

[b] **Legal services.** — Probate courts have no jurisdiction of an action against an executor for legal services rendered him before an allowance of a claim against the estate therefor. Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089.

[c] **Negligence and malfeasance of decedent as corporate officer.**— The orphans' court has no jurisdiction over a claim against the decedent's estate, based on his negligence and malfeasance while president of a trust company, where it is not shown that he personally received any money as a result of his conduct. In re Locher, 219 Pa. 42, 67 A 953.

[d] **Claims against the representative** in favor of the estate cannot be tried by the probate court. Winton's App., 111 Pa. 387, 5 A 240. See also McManus v. McDowell, 11 Mo. A. 436 (claim against former representative).

[e] **Claims arising after decedent's death** are within the rule. Matter of Hyatt, 80 Misc. 466, 142 NYS 455; Matter of Alden, 75 Misc. 436, 135 NYS 511, 9 Mills Surr. 46.

49. In re Walker, 136 N. Y. 20, 32 NE 633.

50. Marx v. Freeman, 21 Tex. Civ. A. 429, 52 SW 647; In re Mussetter, 1 Sask. L. 369.

51. Wilson v. Baptist Education Soc., 10 Barb. (N. Y.) 308; Matter of Alden, 75 Misc. 436, 135 NYS 511, 9 Mills Surr. 46; In re Brown, 3 NYCiv Proc 39, 2 McCartyCivProc 274, 1 Dem. Surr. 136.

52. Matter of Hammond, 92 Hun 478, 36 NYS 1074; Matter of Corbett, 90 Hun 182, 35 NYS 945; In re Lyman, 11 NYS 530.

[a] **The objection** (1) when made in opposition to a petition for a decree for payment of a claim should be in writing (Kiernan's Est., 4 NY CivProc 218) and (2) verified, but the defect will be considered waived if not objected to by the other party (Matter of Corbett, 90 Hun 182, 35 NYS 945).

[b] **The dismissal** may be made without allowing claimant to reply to the representative's objection to the claim. Matter of Hammond, 92 Hun 478, 36 NYS 1074.

53. Vreeland v. Vreeland, 16 N. J. Eq. 512; Matter of Strickland, 5 NYS 851, 1 Conn. Surr. 436.

54. Powell v. Jackson, 60 Ind. A. 597, 111 NE 208; In re Strickland, 5 NYS 851, 1 Conn. Surr. 436.

55. Matter of Reinach, 41 Misc. 78, 83 NYS 651, 3 Mills Surr. 583. See also cases infra note 56.

56. In re Miles, 170 N. Y. 75, 62 NE 1084 [rev 61 App. Div. 562, 71 NYS 71 (rev 33 Misc. 147, 68 NYS 368]; Matter of Doig, 125 App. Div. 746, 110 NYS 93; Matter of Scheetz, 62 Misc. 166, 116 NYS 428; Matter of Jacobs, 109 App. Div. 293, 96 NYS 133; Potts v. Baldwin, 67 App. Div. 434, 74 NYS 655 [aff 173 N. Y. 335, 66 NE 4]; Matter of Reinach, 41 Misc. 78, 83 NYS 651, 3 Mills Surr. 583; Matter of Von der Lieth, 25 Misc. 255, 55 NYS 428, 2 Gibb. Surr. 603; In re Lydicker, 1 NYS 895; Bowne v. Lange, 4 Dem. Surr. (N. Y.) 350.

57. Moore v. Winston, 66 Ala. 296; Butler v. Lawson, 72 Mo. 227; Castlio v. Martin, 11 Mo. A. 251; McNulty v. Hurd, 72 N. Y. 518; Matter of Wait, 39 Misc. 74, 78 NYS 869, 12 NYAnn

or is necessarily incident to the proper exercise of duties directly imposed.[58] Under statutes conferring jurisdiction on probate courts to pass upon disputed claims[59] they may determine simple demands whether of a legal or equitable nature,[60] but as to matters of purely equitable cognizance they have no jurisdiction,[61] and such cases must be decided either by an amicable reference or by a bill in equity.[62]

[§ 1111] **(c) Statutory Jurisdiction.** In a number of the states jurisdiction to try disputed claims has been conferred upon probate courts by statute.[63] Under some statutes this jurisdiction is limited and can be exercised only under certain circumstances or as to particular classes of claims,[64] and in such cases the statute will be strictly construed and held to confer no new jurisdiction other than that clearly provided.[65]

Counterclaims of estate. The jurisdiction of the probate court to determine claims against the estate sometimes carries with it jurisdiction to adjudicate upon counterclaims or cross demands of the estate against claimant,[66] and in case the claim of the estate exceeds that of the claimant, to give judgment against claimant for the excess.[67]

Equity will not control the probate court in its

Cas 141, 3 Mills Surr. 293; Hall v. Bruen, 1 Bradf. Surr. (N. Y.) 435; Leonard v. Leonard, 67 Vt. 318, 31 A 783.

58. Maginn v. Green, 67 Mo. A. 616; Mt. Olive, etc., Coal Co., v. Slevin, 56 Mo. A. 107.

59. See infra § 1111.

60. McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585]; Hurd v. Slaten, 43 Ill. 348; Dixon v. Buell, 21 Ill. 203; Hobilt v. Sandmeyer, 166 Ill. A. 431; Harris v. Harris, 116 Ill. A. 537; Clark v. Carr, 45 Ill. A. 469; In re Leigh, (Iowa) 173 NW 143; State v. Riegart, 1 Gill (Md.) 1, 39 AmD 628; Hoffmann v. Hoffmann, 126 Mo. 486, 29 SW 603; Hammons v. Renfrow, 84 Mo. 332; Maginn v. Green, 67 Mo. A. 616; Mt. Olive, etc., Coal Co. v. Slevin, 56 Mo. A. 107.

61. Bellows v. Cheek, 20 Ark. 424; Buck v. Lockwood, 193 Mich. 242, 159 NW 509; Butler v. Lawson, 72 Mo. 227; Holliday v. Nolan, 93 Mo. A. 403, 67 SW 663; Mt. Olive, etc., Coal Co. v. Slevin, 56 Mo. A. 107; Miller v. Fulton, 206 Pa. 595, 56 A 74; In re Fulton, 200 Pa. 545, 50 A 187.

[a] **The probate court has no jurisdiction where** the claim involves: (1) An accounting. Miller v. Fulton, 206 Pa. 595, 56 A 74. (2) The rescission of a contract. Bellows v. Cheek, 20 Ark. 424; Ivie v. Ewing, 120 Mo. A. 124, 96 SW 481. (3) The following of a trust fund through various transmutations. Butler v. Lawson, 72 Mo. 227.

62. Horn v. Sayer, 184 Ill. A. 326; In re Fulton, 200 Pa. 545, 50 A 187; Re Fenwick, 35 Ont. L. 29, 9 OntWN 227, 25 DomLR 850.

63. U. S.—Fidelity Trust Co. v. Alexander, 243 Fed. 162, 156 CCA 28 [rev 238 Fed. 938].

Alaska.—In re Gladough, 1 Alaska 649.

Ark.—Bellows v. Cheek, 20 Ark. 424; Pennington v. Gibson, 6 Ark. 447.

Ill.—Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304]; Deiterman v. Ruppel, 200 Ill. 199, 65 NE 707; Ward v. Durham, 134 Ill. 195, 25 NE 745.

Ind.—Noble v. McGinnis, 55 Ind. 528; Alexander v. Alexander, 48 Ind. 559; Stanford v. Stanford, 42 Ind. 485.

La.—Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 S 48; Irwin's Succ., 33 La. Ann. 63; Kerley's Succ., 18 La. Ann. 583; Smith v. Wilson, 2 La. 257.

Mich.—Buck v. Lockwood, 193 Mich. 242, 159 NW 509; Staniszewski v. Lane, 165 Mich. 585, 131 NW 180.

Mo.—Grimes v. Reynolds, 184 Mo. 679, 83 SW 1132, 94 Mo. A. 576, 68 SW 588; Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 SW 684; Hoffmann v. Hoffmann, 126 Mo. 486, 29 SW 603; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16; Mitchell v. Martin, 63 Mo. A. 560; Mt. Olive, etc., Coal Co. v. Slevin, 56 Mo. A. 107.

N. Y.—Matter of Mt. Vernon Trust Co., 175 App. Div. 353, 161 NYS 1060 [aff 223 N. Y. 563 mem, 119 NE 1061 mem]; Matter of Rabell, 175 App. Div. 345, 162 NYS 218; Matter of DeForest, 119 App. Div. 782, 104 NYS 342 [aff 189 N. Y. 544 mem, 82 NE 1125]; Matter of Schwartz, 87 Misc. 559, 151 NYS 374; Matter of Peterson, 64 Misc. 217, 118 NYS 1077, 7 Mills Surr. 233 [aff 137 App. Div. 435, 121 NYS 738]; Sellis' Case, 4 AbbPr 272; Babcock v. Lillis, 4 Bradf. Surr. 218; Campbell v. Bruen, 1 Bradf. Surr. 224.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Or.—Orvine v. Beck, 62 Or. 593, 125 P 832; In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029; Wilkes v. Cornelius, 21 Or. 341, 23 P 473.

Pa.—In re Fitzgerald, 252 Pa. 568, 97 A 935; Phillips v. Allegheny Valley R. Co., 107 Pa. 465; McMurray's App., 101 Pa. 421; Hammett's App., 83 Pa. 392; Bull's App., 24 Pa. 286; In re Gochenauer, 23 Pa. 460; Guth's App., 5 A 728; In re Kittera, 17 Pa. 416; Crawford v. Parker, 26 Pa. Co. 414; Boys' Est., 1 Pa. Co. 66; Galbfell's Est., 30 PittsbLegJNS 325.

Tex.—Ralston v. Stainbrook, (Civ. A.) 187 SW 413.

Utah.—Welsh v. Buck, 48 Utah 653, 161 P 455.

Vt.—Sherman v. Abell, 46 Vt. 547.

Wis.—Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404.

[a] **The pecuniary limitation imposed on the jurisdiction** of county courts does not apply to the examination and allowance of claims against a decedent's estate as an exercise of probate power. In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029.

[b] **Claim for return of purchase money paid under contract of sale.—** Where decedent contracted to convey and warrant the title to land to plaintiff in consideration of twenty five hundred dollars, but the title failed, and decedent's estate got the benefit of the consideration so paid, the purchaser's right to a return thereof constituted a proper claim against decedent's estate, within the jurisdiction of the probate court. Elliott v. Garvin, 166 Fed. 278, 92 CCA 196 [aff 7 Ind. T. 679, 104 SW 878].

[c] **Claim of firm creditor against deceased partner.—** While the orphans' court has no jurisdiction to settle a partnership account, it has jurisdiction to consider the demand of one claiming as a firm creditor against the estate of a deceased partner. Barclay v. Barclay, 230 Pa. 467, 79 A 667.

[d] **Claim for personal injuries.—** The court has jurisdiction of a claim for injuries to a licensee, due to decedent's negligence in failing to properly inspect and repair an areaway in the rented building of which decedent was the owner. Staniszewski v. Lane, 165 Mich. 585, 131 NW 180.

[e] **The surrogate may fix the amount due for funeral expenses** if six months have not elapsed since the rejection of the claim by the personal representatives. Matter of Powers, 75 Misc. 85, 134 NYS 967.

[f] **Effect of discharge in bankruptcy.—**The surrogate's court has the right to determine the validity of controverted claims which the administrator alleges have been released by decedent's discharge in bankruptcy. Matter of Peterson, 64 Misc. 217, 118 NYS 1077, 7 Mills Surr. 233 [aff 137 App. Div. 435, 121 NYS 738 (the court did not act outside of its jurisdiction by giving effect to a judgment against decedent rendered in a state court and then holding such judgment barred by decedent's discharge in bankruptcy)].

64. Ill.—Rone v. Robinson, 188 Ill. A. 438.

Md.—Browne v. Preston, 38 Md. 373.

Mich.—Buck v. Lockwood, 193 Mich. 242, 159 NW 509.

N. J.—Miller v. Pettit, 16 N. J. L. 421.

N. Y.—Matter of Bork, 55 Misc. 179, 106 NYS 361, 6 Mills Surr. 186.

Wash.—Schubach v. Redelscheimer, 92 Wash. 124, 158 P 739.

Wis.—Hall v. Wilson, 6 Wis. 433.

[a] **Written consent of the parties** is sometimes required. Clark v. Scovill, 191 N. Y. 8, 83 NE 659 [aff 116 App. Div. 923, 101 NYS 1116]; Clark v. Hyland, 88 App. Div. 392, 84 NYS 640; Matter of Edmonds, 47 App. Div. 229, 62 NYS 652; Matter of Warner, 39 Misc. 432, 79 NYS 363; Matter of Kirby, 36 Misc. 312, 73 NYS 509.

[b] **Where the representative's objection of a claim is served by mail,** (1) this operates to double the time within which the creditor may consent that the claim be determined by the surrogate on the judicial settlement of the representative's accounts, or bring action on the claim. Matter of Smith, 58 Misc. 493, 111 NYS 1085, 6 Mills Surr. 403 [appr Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041]. (2) But such service cannot operate to double the time within which the representative may file his consent to submit the claim to the surrogate. Persbacker v. Murphy, 153 App. Div. 492, 138 NYS 537.

[c] **Contingent claims.—**The probate court may hear and determine "contingent claims" which cannot be presented as debts before the commissioners and allowed by them. Hall v. Wilson, 6 Wis. 433.

[d] **Insolvent estates. —** Under some statutes the probate court has jurisdiction only in the case of solvent estates. Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569; Miller v. Pettit, 16 N. J. L. 421; Middleton v. Middleton, 35 N. J. Eq. 115.

65. Clark v. Hyland, 88 App. Div. 392, 84 NYS 640.

66. In re Jarboe, 227 Mo. 59, 127 SW 26; Nelson v. Troll, 173 Mo. A. 51, 156 SW 16 (in all cases where counterclaims are otherwise authorized by law); Mitchell v. Martin, 63 Mo. A. 560 [dist Thomas v. Dunnica, 15 Mo. 385 (decided under an earlier statute)].

[a] **This power is incidental** to the power to try the claim against the estate. Matter of Mt. Vernon Trust Co., 175 App. Div. 353, 161 NYS 1060 [aff 223 N. Y. 563 mem, 119 NE 1061 mem].

67. Jones v. Jones, 21 Ark. 409; Mitchell v. Martin, 63 Mo. A. 560 [dist Thomas v. Dunnica, 15 Mo. 385 (decided under an earlier statute)].

[a] **Judgment cannot be for larger amount than set-off claimed.—**Jones v. Jones, 21 Ark. 409.

[b] **Power denied.—**Matter of Wilmot, 39 Misc. 686, 80 NYS 651, 3 Mills Surr. 418.

province of determining and adjudicating questions of the allowance or disallowance of claims against estates of decedents.[68]

[§ 1112] **(d) Claims of Representative.** In some states jurisdiction is conferred by statute upon probate courts to pass upon claims of the representative against the estate which he represents,[69] and under such statutes the court may pass upon claims of an equitable as well as a legal nature.[70] The probate court may also pass upon a claim of the representative under statutes giving it jurisdiction to determine claims of creditors presented on an application to sell real estate.[71] But in the absence of statute the general rule as to lack of jurisdiction to determine disputed claims applies to claims of the representative.[72]

[§ 1113] **(2) Nature of Proceeding.** Proceedings in the probate court for the trial and determination of disputed claims are usually summary.[73] It has been said that the proceeding is neither an action at law nor a suit in equity but is distinctively statutory and sui generis,[74] and is not governed by the technical rules of pleading, procedure, evidence, and the like which apply to formal suits at law,[75] unless the statute makes the rules of procedure in civil cases apply.[76] In the absence of statute the proceeding need not be formally entitled but an entitling or description which will identify it is sufficient.[77]

[§ 1114] **(3) Defenses.** Whatever would be a good defense in an ordinary suit on a claim is equally good in a proceeding to establish the claim in the probate court,[78] and equitable, as well as legal defenses, may be interposed;[79] but where the claim presented is based upon a judgment, it cannot be defeated by matters which might have been interposed as a defense to the action in which the judgment was rendered.[80] The statute of limitations is a good defense,[81] and is available without being specially pleaded.[82]

[§ 1115] **(4) Parties.** The heirs are not necessary party defendants to proceedings to establish ordinary claims against the estate.[83] Where a note given by decedent was assignable, it is not necessary that the original payee, who has assigned it, should be made a party to proceedings for its collection from the estate.[84] In a proceeding for the allowance of a claim against the estate, based on the ground that obligors in a bond, for the purpose of indemnifying themselves, had created a fund which was deposited with decedent, who agreed to invest the same, pay the interest thereon annually to the obligors, protect them on their obligation, and pay to them the part of the fund remaining on the discharge of the obligation, all the obligors were indispensable parties,[85] especially where it did not appear that the conditions under which the obligors would become entitled to the fund had been complied with.[86]

[§ 1116] **(5) Citation, Notice, and Appearance.** Where proceedings are instituted in the probate court to establish a disputed claim, notice must be given to the representative,[87] but this requirement will be deemed to be waived if he appears and

68. Sherman v. Abell, 46 Vt. 547.

69. Mercer v. Hogan, 15 D. C. 520; Wood v. Farwell, 195 Mass. 559, 81 NE 294; Neilley v. Neilley, 89 N. Y. 352 [rev 23 Hun 651]; Boughton v. Flint, 74 N. Y. 476 [rev 13 Hun 206]; Shakespeare v. Markham, 72 N. Y. 400 [rev on this point 10 Hun 311]; Kyle v. Kyle, 67 N. Y. 400 [aff 3 Hun 458]; Sexton v. Sexton, 64 App. Div. 385, 72 NYS 213 [aff 174 N. Y. 510, 66 NE 1116]; Matter of Flood, 16 AbbPrNS 407; Barras v. Barras, 4 Redf. Surr. 263.

[a] **Only on a judicial settlement of the accounts** can such claims be determined. Matter of Ryder, 129 N. Y. 640, 29 NE 309 [rev 13 NYS 542, 2 Conn. Surr. 224]; Starbuck v. Farmers' L. & T. Co., 28 App. Div. 308, 51 NYS 8.

[b] **Only claims of which the representative is sole owner** can be determined by the surrogate's court. Matter of Jones, 2 Misc. 221, 23 NYS 767 [crit Shakespeare v. Markham, 72 N. Y. 400].

[c] **Failure to agree to arbitration.**—Where an administrator had a claim against the estate, and there was a failure to agree upon an arbitration, it was the duty of the court to pass upon the claim. Wood v. Farwell, 195 Mass. 559, 81 NE 294.

70. Boughton v. Flint, 74 N. Y. 476 [rev 13 Hun 206]; Sexton v. Sexton, 64 App. Div. 385, 72 NYS 213 [aff 174 N. Y. 510, 66 NE 1116].

71. Matter of Williams, 1 Misc. 35, 22 NYS 906.

72. Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221 [rev on other grounds 228 U. S. 346, 33 SCt 510, 57 L. ed. 867]; Middleton v. Middleton, 35 N. J. Eq. 115.

[a] **The fact that a claim is presented and proved** in a proceeding where the surrogate has had no jurisdiction to try the claim and order it paid will not prevent claimant from setting up the claim in another action. Thornton v. Moore, 26 Misc. 120, 56 NYS 1100 [aff 41 App. Div. 617 mem, 58 NYS 1150 mem].

73. Hayner v. Trott, 46 Kan. 70, 26 P 415; Sublett v. Nelson, 38 Mo. 487; Phillips v. Russell, 24 Mo. 527; Pruitt v. Muldrick, 39 Or. 353, 65 P 20. But compare Balovich's Succ., 9 La. A. (Orleans) 364 (proceeding by rule not available).

74. Grier v. Cable, 159 Ill. 29, 42 NE 395 [aff 53 Ill. A. 350]. But compare McIntosh v. Brown, 159 Iowa 41, 139 NW 926 (proceedings in probate court to establish claims are proceedings at law).

75. Thompson v. Black, 200 Ill. 465 [aff 102 Ill. A. 304]; Scheel v. Eidman, 68 Ill. 193; Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Strasbaugh v. Dullam, 93 Md. 712, 50 A 417; Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

Formal pleadings not required see infra § 1118.

76. Leslie v. Ebner,, (Ind. A.) 117 NE 511.

77. In re Jefferson, 35 Minn. 215, 28 NW 256.

78. Iowa.—Lucas v. Cassaday, 2 Greene 208.

Miss.—Turner v. Ellis, 24 Miss. 173.

Mo.—McFaul v. Haley, 166 Mo. 56, 65 SW 995.

N. Y.—Burnett v. Noble, 5 Redf. Surr. 69.

Pa.—In re Heinz, 33 PittsbLegJNS 146.

[a] **Insufficient defense.**—Where a note is held by a legatee under a will as a claim against the estate of the testatrix, the legatee's mother, which she directs in her will to be paid, it is not a valid objection to its being allowed as a claim that the proceeds of the note were used by testatrix to pay a mortgage on real estate devised to the legatee by his father, where it appears that the testatrix's will was made after the devise and she knew the purpose for which the proceeds of the note were used. In re Duffy, 32 PittsbLegJNS (Pa.) 97.

79. Wilcox v. Powers, 6 Mo. 145.

80. McClain's Est., 5 Pa. Dist. 155, 17 Pa. Co. 432.

81. Pennington v. Gibson, 6 Ark. 447; Agnew's Est., 24 Pa. Co. 327, 7 LackLegN 33.

82. Bromwell v. Bromwell, 139 Ill. 424, 28 NE 1057; Smith v. Smith, 206 Ill. A. 239; Huber v. McGlynn, 161 Ill. A. 69; Bromwell v. Schubert, 40 Ill. A. 330 [aff 139 Ill. 424, 28 NE 1057]; Brownell v. Williams, 54 Iowa 353, 6 NW 530.

83. Stanford v. Stanford, 42 Ind. 485 (holding also that guardians of the heirs are not necessary parties). See also In re Koch, 148 Wis. 548, 134 NW 663 (the heir is not an adverse party but may nevertheless appear to protect his remote interest).

84. Collier v. Trice, 79 Ark. 414, 96 SW 174.

85. Denison v. Jerome, 43 Colo. 456, 96 P 166.

86. Denison v. Jerome, 43 Colo. 456, 96 P 166.

87. Ark.—Bellows v. Cheek, 20 Ark. 424; Pennington v. Gibson, 6 Ark. 447.

Iowa.—Thompson v. Romack, 174 Iowa 155, 156 NW 310.

Mich.—Durfee v. Abbott, 50 Mich. 278, 15 NW 454.

Miss.—Murphy v. Harris, 93 Miss. 286, 48 S 232.

Mo.—McFaul v. Haley, 166 Mo. 56, 65 SW 995.

[a] **Where an executor has given bond as residuary legatee,** he and his sureties are entitled to personal service, and notice by publication as in ordinary proceedings to adjust claims against the estate is not sufficient. Durfee v. Abbott, 50 Mich. 278, 15 NW 454.

[b] **Order without notice void.**—An order requiring an administrator to pay attorney's fees for services rendered in the settlement of the estate, entered on petition therefor, presented and heard in vacation without notice to the administrator, is void. Murphy v. Harris, 93 Miss. 286, 48 S 232.

contests the claim upon its merits[88] or consents to a continuance.[89] In the case of a claim of the representative against the estate, notice should be given to the heirs who are of age.[90] Where the notice of hearing required by statute was not given, the failure of the claimant to appear was excusable.[91]

[§ 1117] **(6) Docketing Claims.** Claims filed against the estate but not admitted by the representative cannot be tried without his consent until there has been a compliance with a statute requiring that such a claim shall be filed and placed on the appearance docket of the court ten days before the first day of the term, and if it is not admitted by the executor or administrator before the last day of the term it shall be transferred to the issue docket for trial at the following term.[92]

[§ 1118] **(7) Pleadings.** Proceedings in the probate court for the trial and determination of disputed claims are ordinarily conducted without formal pleadings,[93] it being sufficient for claimant to merely file a succinct statement of his claim.[94] The claim should be presented in writing,[95] but need not conform to the technical requirements of a complaint,[96] or contain a formal demand for judgment of any kind,[97] and is sufficient if it apprises defendant of the nature and amount of the claim and shows enough to bar another action for the same demand.[98] A demurrer is not ordinarily the proper mode of questioning the sufficiency of the statement of a claim,[99] although it is sometimes permitted by statute to test the sufficiency of the statement or any subsequent pleading in this manner.[1] An administrator who goes to trial on the merits waives his right to move to require claimant to make his claim more definite and certain.[2] The resistance of defendant, without a written answer, puts in issue all matters upon which a defense to the claim could be based, usually set up by a general denial,[3] and no matters need be specially pleaded unless required by statute.[4] If, however, a party elects to file a formal written plea

88. Bellows v. Cheek, 20 Ark. 424; Thompson v. Romack, 174 Iowa 155, 156 NW 310; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 130 AmSR 301; In re Jarboe, 227 Mo. 59, 127 SW 26.

[a] **Failure to present the claim on the day named** in the notice is immaterial where the statute only requires the term to be stated and the representative is present on the day the claim is presented. Phillips v. Russell, 24 Mo. 527.

[b] **Waiver by claimants and administrator.**—Where claimants against the estates of a deceased partner and of the firm, and the administrator of the estates, who filed counterclaims, waived formal notice, and by writing entered their appearance in the probate court for the adjustment of the claims and counterclaims, the probate court acquired jurisdiction of the parties. In re Jarboe, 227 Mo. 59, 127 SW 26.

89. Sullivan v. Deadman, 19 Ark. 484 [dist Pennington v. Gibson, 6 Ark. 447]; State v. Walker, 14 Ark. 234; Voorhies v. Eubank, 6 Iowa 274.

[a] **Failure to furnish a copy of the claim** to the representative is also waived by appearance and consent to a continuance. Borden v. Fowler, 14 Ark. 471.

90. Patterson v. Phillips, 18 F. Cas. No. 10,829a, Hempst. 69.

91. In re Stroup, 40 S. D. 37, 166 NW 155.

92. Scott v. Dailey, 89 Ind. 477.

93. Ark.—Bellows v. Cheek, 20 Ark. 424; Pennington v. Gibson, 6 Ark. 447.

Ill.—Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304]; Thorp v. Goewey, 85 Ill. 611; Trego v. Cunningham, 205 Ill. A. 25; Harney v. McCann, 175 Ill. A. 250.

Ind.—Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Stricker v. Barnes, 122 Ind. 348, 23 NE 263; Hanna v. Fisher, 95 Ind. 383; Stapp v. Messeke, 94 Ind. 423; Hileman v. Hileman, 85 Ind. 1.

Iowa.—Sullenbarger v. Ahrens, 168 Iowa 288, 150 NW 71; Harrison v. Harrison, 124 Iowa 525, 100 NW 344; Scovil v. Fisher, 77 Iowa 97, 41 NW 583.

Kan.—Hayner v. Trott, 46 Kan. 70, 26 P 415.

Mich.—Patrick v. Howard, 47 Mich. 40, 10 NW 71.

Mo.—Denny v. Brown, 193 SW 552; Sublett v. Nelson, 38 Mo. 487; Phillips v. Russell, 24 Mo. 527; C. H. Albers Commn. Co. v. Vogelsang, 196 Mo. A. 180, 190 SW 1058; Peper Auto. Co. v. St. Louis Union Trust Co., (A.) 187 SW 109; Monumental Bronze Co. v. Doty, 99 Mo. A. 195, 73 SW 234, 78 SW 850.

Nebr.—Fitch v. Martin, 83 Nebr. 124, 119 NW 25; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

Oh.—Matter of Gerke, Oh. Prob. 289.

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

[a] **Pleas presumed to be orally interposed.**—Harney v. McCann, 175 Ill. A. 250.

[b] **Conformity to practice in circuit court.**—County court rules requiring claimant, on objection to allowance of a claim, to present a statement of the nature and character of the claim and the facts relied on, which shall be the complaint and shall be verified as complaints are verified in the circuit court, and providing that the objecting party shall present his answer and may set forth a counterclaim, etc., show an intention that the practice prevailing in the circuit court as to pleading shall be followed where an objection is interposed to a claim filed in the county court against the estate of a decedent. Heber v. Heber, 139 Wis. 472, 121 NW 328.

94. Doolittle v. McConnell, (Cal.) 174 P 305; Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Stricker v. Barnes, 122 Ind. 348, 23 NE 263; Davis v. Huston, 84 Ind. 272; Post v. Pedrick, 52 Ind. 490; Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035; Staniszewski v. Lane, 165 Mich. 585, 131 NW 180; Matter of Lucas, 92 Misc. 85, 155 NYS 1017.

95. Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304]; Hayner v. Trott, 46 Kan. 70, 26 P 415; Van Vleck v. Burroughs, 6 Barb. (N. Y.) 341.

96. Cal.—Doolittle v. McConnell, 174 P 305.

Ill.—Thomson v. Black, 200 Ill. 465, 65 NE 1092 [aff 102 Ill. A. 304].

Ind.—Davis v. Huston, 84 Ind. 272; Ginn v. Collins, 43 Ind. 271; Hannum v. Curtis, 13 Ind. 206. Compare Johnson v. Kent, 9 Ind. 252 (claim subject to same rules of construction as other pleadings).

Iowa.—Drake v. McGee, 178 Iowa 1345, 161 NW 84; Hanen v. Lenander, 178 Iowa 569, 160 NW 18; Thompson v. Romack, 174 Iowa 155, 156 NW 310.

Mo.—Sublett v. Nelson, 38 Mo. 487.

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

[a] **Claim under both express and implied contract.**—In a proceeding to establish a claim for board and care, it may be alleged that the board was furnished and care rendered under an express contract, and also under an implied contract. Sarchfield v. Hayes, (Iowa) 112 NW 1100.

97. Hanna v. Fisher, 95 Ind. 383.

98. Stapp v. Messeke, 94 Ind. 423; Davis v. Huston, 84 Ind. 272; Post v. Pedrick, 52 Ind. 490; Ginn v. Collins, 43 Ind. 271; Hannum v. Curtis, 13 Ind. 206; Hayner v. Trott, 46 Kan. 70, 26 P 415; Phillips v. Russell, 24 Mo. 527; Sandusky v. Courtney, 168 Mo. A. 325, 153 SW 1084; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

[a] **The statement must contain sufficient facts** to show, prima facie at least, that the estate is indebted to the claimant. Walker v. Heller, 104 Ind. 327, 3 NE 114.

[b] **The claim is sufficient if filed in such form** as unmistakably to disclose the nature of the transaction that gave rise to it. Monumental Bronze Co. v. Doty, 99 Mo. A. 195, 73 SW 234, 78 SW 850.

99. Hayner v. Trott, 46 Kan. 70, 26 P 415.

1. Stapp v. Messeke, 94 Ind. 423; Pence v. Young, 22 Ind. A. 427, 53 NE 1060.

2. Sandusky v. Courtney, 168 Mo. A. 325, 153 SW 1084.

3. Columbia Nat. Bank v. Miller, (Ind. A.) 120 NE 711; Scovil v. Fisher, 77 Iowa 97, 41 NW 583; Sandusky v. Courtney, 168 Mo. A. 325, 153 SW 1084.

4. In re Hobson, 40 Colo. 332, 91 P 929; Smith v. Smith, 206 Ill. A. 239; Pence v. Young, 22 Ind. A. 427, 53 NE 1060; Dick v. Dumbauld, 10 Ind. A. 508, 38 NE 78; C. H. Albers Commn. Co. v. Vogelsang, 196 Mo. A. 180, 190 SW 1058; Peper Auto. Co. v. St. Louis Union Trust Co., (Mo. A.) 187 SW 109; Sandusky v. Courtney, 168 Mo. A. 325, 153 SW 1084.

[a] **Illustration.**—Under the statute authorizing the heirs and beneficiaries to object to the allowance of a claim, and providing that a contested claim shall be determined in the same manner as in actions before justices of the peace, a general objection by the widow in her own behalf, and as guardian of an infant child, to the allowance of a claim founded on a note, a copy of which was filed, was sufficient, and the defenses of limitations and of the failure to file the note itself were available. In re Hobson, 40 Colo. 332, 91 P 929.

[b] **The defense of payment** in whole or in part is available without a special plea. Simons v. Beaver, 15 Ind. A. 510, 43 NE 478.

[c] **Nothing but a set-off or counterclaim** need be specially pleaded. Griffin v. Hodshire, 119 Ind. 235, 21 NE 741; Trees v. Millikan, 43 Ind. A. 256, 85 NE 123; Dick v. Dumbauld, 10 Ind. A. 508, 38 NE 78; Kennedy v. Graham, 9 Ind. A. 624, 35 NE 925, 37 NE 25.

[d] **Effect of statute.**—Under statutes requiring that special defenses

in a proceeding of this kind he must, it is held, conform to the rules of pleading.[5]

Verification of answer. Where a promissory note purporting to have been made by a decedent is filed as a claim against his estate, the answer of the administrator denying the execution of the instrument need not be sworn to in order to put plaintiff to proof of its execution.[6]

Amendment. If the statement is insufficient claimant should be allowed to amend by filing a more full and particular statement,[7] but the claim cannot be enlarged by amendment,[8] and an amendment may be denied if the effect would be to cause a continuance and it relates to a distinct claim which need not be determined in the same proceeding.[9]

[§ 1119] **(8) Issues, Proof, and Variance.** In an action upon a rejected claim, claimant can recover only upon the cause of action set forth in the claim.[10] It has been held that where objection is made to a claim for services on the sole ground that claimant was fully paid in decedent's lifetime, this is the only issue open for consideration,[11] but it has also been considered that where the only pleadings consist of the claim and a denial thereto, all matters of defense, except set-off and counterclaim, may be given in evidence.[12] A claim, alleging a written agreement of decedent to pay plaintiff a certain sum in consideration of the conveyance by a third person of a tract of land, is not supported by proof of a parol agreement to that effect.[13] Where a claim against decedent's estate for funeral expenses was not challenged in the statement of defenses by defendant's counsel as extravagant considering decedent's wealth and position in life, evidence that the interment was extravagant was not within the issues.[14] Where decedent's relatives before his death procured the appointment of a committee for him, and treated the committee as trustee, on the hearing of decedent's sister's claim against his estate for caring for him, defended on the ground that the services were covered by her husband's contract with the committee, no question could be raised as to the legality of the committee's appointment.[15] Where a claim for work is resisted only on the ground that the whole amount of work alleged was not performed, claimant is not bound to prove the value of the work.[16] It is not a material variance that the claim on a guarantee of notes merely described the notes as signed by a certain person and guaranteed by decedent, which was correct as far as it went, and the notes, when produced, showed also the names of other indorsers.[17] Neither is there a variance between a claim presented for services as a clerk for a certain period at twenty dollars per week, with a credit amounting to seven dollars per week for such period, and proof of employment of plaintiff by deceased at twenty dollars per week, plaintiff to draw seven dollars per week, and leave the balance with deceased with which to furnish a house which was to have been built for plaintiff, the money not being held under a trust, but still being owed for services.[18] It has also been held that the fact that the claim stated a definite sum did not prevent a recovery of the reasonable value of the services enumerated, the claim being equally consistent with the recovery upon an express contract or an implied contract for reasonable value.[19] But it has been held that no recovery could be had on a claim for services where the notice of claim specified an agreement different from that relied on at the trial.[20]

[§ 1120] **(9) Evidence—(a) Presumptions and Burden of Proof.** There is no legal presumption that a decedent was indebted at the time of his death, and the burden of proving the existence of such indebtedness is upon the party asserting it,[21] but where a widow puts in a claim against her husband's estate for moneys admitted to have been paid out by her at the husband's request, out of her separate property, as premiums on policies on

must be pleaded, and that any defense showing matter of excuse, discharge, or release, or any defense which by some other matters seeks to avoid the legal effect of facts alleged, must be specially pleaded, on a claim against decedent's estate for services rendered, evidence that claimant intended that the services should be gratuitous was inadmissible, where such claim was not specially pleaded. Saddler v. Pickard, 142 Iowa 691, 121 NW 374.

5. Bellows v. Cheek, 20 Ark. 424; Pennington v. Gibson, 6 Ark. 447; Holman v. Mayhew, 15 Ind. 263; Norman v. Norman, 11 Ind. 288; Jackson v. Butts, 5 Ind. A. 384, 32 NE 96.

6. Barnett v. Cabinet Makers' Union, 28 Ind. 254.

7. Cal.—In re Hidden, 23 Cal. 362.

Ind.—Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

Iowa.—Sullenbarger v. Ahrens, 168 Iowa 288, 150 NW 71.

Mich.—Dayton v. Dakin, 103 Mich. 65, 61 NW 349.

Minn.—In re Davis, 142 Minn. 187, 171 NW 778.

Nebr.—In re Gamble, 91 Nebr. 199, 135 NW 558.

[a] **Illustration.**—Where a claim for board and care did not indicate whether it was based on an express or implied contract, a pleading filed asserting that there was an express contract was properly permitted to be amended by alleging that there was an implied contract, and the amendment was not subjected to the objection that it set up a cause of action not included in the claim filed. Sarchfield v. Hayes, (Iowa) 112 NW 1100.

8. Dayton v. Dakin, 103 Mich. 65, 61 NW 349.

9. Guion v. Giller, 101 Iowa 333, 70 NW 201.

10. In re Dutard, 147 Cal. 253, 81 P 519.

11. Irvine v. Beck, 62 Or. 593, 125 P 832 (under such circumstances, the employment, the services rendered, and their reasonable value are admitted).

12. Griffin v. Hodshire, 119 Ind. 235, 21 NE 741; Trees v. Millikan, 43 Ind. A. 256, 85 NE 123; Dick v. Dumbauld, 10 Ind. A. 508, 38 NE 78; Kennedy v. Graham, 9 Ind. 624, 35 NE 925, 37 NE 25. Compare Denbo v. Wright, 53 Ind. 226 (where no answer has been filed the complaint is deemed to be controverted as if a denial were filed, and evidence of affirmative matter of defense, such as a settlement of the matter in controversy, is inadmissible).

[a] **An allegation that the claim is not a proper or legal claim against the estate** is sufficient, in the absence of a demurrer or any other objection, to put in issue the value of the various elements of the claim. In re Weir, 168 Cal. 330, 143 P 612.

13. Leonard v. Leonard, 134 Iowa 131, 111 NW 409.

14. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

15. Carr v. Calvert, 102 SW 282, 31 KyL 303.

16. Christman's Est., 11 Pa. Dist. 363.

17. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

18. Cheney v. McGarvin, 7 Cal. A. 71, 93 P 386.

19. White v. Almy, 34 R. I. 29, 82 A 397.

20. Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

21. Cal.—Barthe v. Rogers, 127 Cal. 52, 59 P 310.

Colo.—Gilmour v. Hawley Merchandise Co., 21 Colo. A. 307, 121 P 765.

Ind.—Schele v. Wagner, 163 Ind. 20, 71 NE 127; Hunt v. Osborn, 40 Ind. A. 646, 82 NE 933; Indiana Trust Co. v. Byram, 36 Ind. A. 6, 72 NE 670, 73 NE 1094.

Ky.—Cottrell v. Barnes, 90 SW 1048, 28 KyL 1014; Dewhurst v. Shepherd, 102 Ky. 239, 43 SW 253.

La.—In re Dimmick, 111 La. 655, 35 S 801.

Md.—Simmons v. Tongue, 3 Bland 341.

Mich.—Hampton v. Van Nest, 196 Mich. 404, 163 NW 83.

N. Y.—Matter of Gilman, 92 Misc. 140, 156 NYS 169 [aff 175 App. Div. 185, 161 NYS 645]; Matter of Day, 86 Misc. 131, 149 NYS 221; Matter of Peterson, 64 Misc. 217, 118 NYS 1077, 7 Mills Surr. 233 [aff 137 App. Div. 435, 121 NYS 738]; In re Mara, 137 NYS 141.

Pa.—In re Cummiskey, 224 Pa. 509, 73 A 916, 132 AmSR 787; Shenk's Est., 59 Pa. Super. 467; Elder's Est., 23 Pa. Dist. 154; Monaghan's Est.,

his life, the burden is upon the executor to show that the moneys were a gift to decedent.[22] Where an indebtedness is evidenced by a bond or note, the creditor need not prove that it has not been paid but the burden of proving payment or other matter in discharge is upon the opposite party,[23] and the same is true where the existence of an indebtedness at one time is otherwise established[24] or admitted.[25] Where the execution of a note, filed as a claim against the estate, and the genuineness of the maker's signature are in issue, the burden of proof is on claimant as to these matters.[26] Where a judgment against decedent was entered after his death, the burden of showing that he died before jurisdiction was acquired by the court, through the filing of a bond on appeal from a justice's court, is on the personal representative.[27] Where a claim is based on a receipt for money paid for decedent during his lifetime, it will be presumed that it was paid by claimant as the agent of decedent and not with funds advanced by him, where the form of the receipt is consistent with such payment;[28] and, where the representative pays outstanding debts against the estate, it will be presumed that he did so as representative, and if he claims to have advanced money therefor, the burden is upon him to show this fact, and also the amount actually paid.[29]

Claims admitted or allowed by representative. A claim which has been allowed or admitted by the representative is usually regarded as prima facie valid so that the burden of proving its invalidity is upon the party opposing it,[30] although it has been held otherwise where the opposition was by parties other than the representative.[31] If the admission of the claim is denied by the representative the burden is upon claimant to show that it was admitted.[32]

Claims for services rendered. Ordinarily the fact that services were rendered a decedent at his request or with his approval raises a presumption that they were to be paid for,[33] but where claimant was a member of decedent's immediate family it will be presumed that the services were gratuitous, and the burden is upon claimant to show the contrary.[34] In the case of claims for domestic services, it will be presumed that wages were regularly paid when due, or that it was understood that no compensation was to be made,[35] and where a servant makes a claim for extra compensation for acting as nurse and housekeeper for decedent, but admits that she received the compensation at which she was originally employed, it is incumbent upon her to show some agreement, express or implied, for extra compensation.[36] With respect to board and nursing it has been considered that in the absence of an express contract the law will presume that periodical payments were made where the decedent was in receipt of an income.[37] Where a person employed as sick nurse claims to have rendered additional services in other capacities, no recovery can be had on a quantum meruit, unless their value be satisfactorily proved.[38]

Due presentation of claim. The burden of proving due presentation of the claim is on claimant.[39]

Want of consideration. It is incumbent on the representative to prove want of consideration where he relies on this to defeat the claim.[40]

Long delay in presenting or prosecuting a claim

13 Pa. Dist. 694, 30 Pa. Co. 385; Magaldo's Est., 13 Pa. Dist. 149; Engle's Est., 9 Pa. Dist. 743; In re Anderson, 33 PittsbLegJNS 199; In re Farmerie, 33 PittsbLegJNS 69.

Va.—Scott v. Porter, 99 Va. 553, 39 SE 220.

Wis.—Markwell v. Thorn, 28 Wis. 548.

N. S.—In re Kaulbach, 45 N. S. 62.

"It is incumbent upon the plaintiff to prove by proper evidence the validity of his claim made against the estate of a deceased person." Gilmour v. Hawley Merchandise Co., 21 Colo. A. 307, 312, 121 P 765.

[a] **If it is doubtful whether the deceased debtor was principal or surety** on a claim set up, the burden is upon the creditor to show that he was principal, or that the principal was insolvent. Simmons v. Tongue, 3 Bland (Md.) 341.

[b] **An executor or administrator having a claim against the estate** (1) of his decedent has the burden of proving it in the same manner and with the same degree of strictness as any other creditor. Hood v. Maxwell, 66 SW 276, 23 KyL 1791; In re Dimmick, 111 La. 655, 35 S 801; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Matter of Smith, 75 App. Div. 339, 78 NYS 130; Matter of Gill, 42 Misc. 457, 87 NYS 252 [aff 91 NYS 1095 mem]; McCann's Est., 11 Pa. Dist. 244; Scott v. Porter, 99 Va. 553, 39 SE 220; Leavell v. Smith, 99 Va. 374, 38 SE 202. (2) So a personal representative, being the custodian of the books and papers of his decedent, has the burden of proving title to documentary evidence showing him to be a creditor of the estate. In re Simond, 201 Pa. 413, 50 A 1005; McGeary's App., 5 Cent. Rep. (Pa.) 852.

22. Elliott v. Russell, 19 Ont. 413.

23. Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Bell v. Bennett, 188 Ill. A. 62.

Iowa.—Sheldon v. Thornburg, 153 Iowa 622, 133 NW 1076; Craig v. Craig, 167 Iowa 340, 149 NW 454.

N. Y.—Matter of Macomber, 11 NYS 198, 2 Conn. Surr. 279.

N. C.—Moore v. Brown, 51 N. C. 106.

Pa.—Schaefer's Est., 16 Pa. Dist. 537; Hess' Est., 9 Pa. Dist. 19.

24. Herrick v. Hayes, (Iowa) 173 NW 110.

25. Rhodes' Succ., 39 La. Ann. 473, 2 S 36; Wilhelm's Est., 49 Pa. Super. 213.

[a] **An opposition based solely on the ground that the debt has been extinguished,** impliedly admits that it was once due, and like the plea of payment, imposes the burden of proof upon the party urging it. Rhodes' Succ., 39 La. Ann. 473, 2 S 36.

[b] **Where the will admits the existence of a debt,** the burden of showing payment is on the representative. Wilhelm's Est., 49 Pa. Super. 213.

26. In re Chismore, 166 Iowa 217, 147 NW 297.

27. Gunby v. Cooper, 177 Mo. A. 354, 164 SW 152.

28. Pursel v. Pursel, 14 N. J. Eq. 514.

29. Gillett v. Gillett, 9 Wis. 194.

30. In re Loshe, 62 Cal. 413; Shiels v. Nathan, 12 Cal. A. 604, 108 P 34; Romero's Succ., 43 La. Ann. 975, 9 S 919; Matter of Dorland, 100 Misc. 236, 166 NYS 616; Sullivan v. Rosson, 148 NYS 611; Matter of Le Baron, 6 NYCivProc 62, 67 HowPr 346, 3 Dem. Surr. 37; Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265; Montgomery v. Nash, 23 Tex. 157.

[a] **Fraudulent or negligent allowance.**—One contesting a claim which has been allowed by one of two executors has the burden of establishing that the allowance was fraudulent or negligent. Matter of Dorland, 100 Misc. 236, 166 NYS 616.

31. Matter of Warrin, 28 Misc. 695, 60 NYS 191, 1 Mills Surr. 246; In re Chambers, 38 Or. 131, 62 P 1013.

32. Matter of Phyfe, 5 NYLegObs 331.

33. Ginders v. Ginders, 21 Ill. A. 522; In re Oldfield, 158 Iowa 98, 138 NW 846; In re Ogden, 152 Iowa 106, 131 NW 682; Broughton v. Nicholson, 150 Iowa 119, 129 NW 814; Parmalee v. Wigent, 189 Mich. 507, 155 NW 577; Luizzi v. Brady, 140 Mich. 73, 103 NW 574; Evans' Est., 60 Pa. Super. 83; Martin's Est., 54 Pa. Super. 168; Bugh's Est., 9 Pa. Dist. 276, 23 Pa. Co. 660; Michael's Est., 5 Pa. Co. 321; Hess' Est., 13 Phila. (Pa.) 285. See generally supra § 878.

34. Lyons v. Jackson, (Mass.) 122 NE 304; Sherry v. Littlefield, (Mass.) 122 NE 300; Patterson's Est., 23 Pa. Co. 567. See generally supra § 881.

35. In re Carson, 256 Pa. 60, 100 A 577; Winfield v. Beaver Trust Co., 229 Pa. 530, 79 A 138; Hatfield's Est., 50 Pa. Super. 450; Shuman's Est., 45 Pa. Super. 587; Monaghan's Est., 13 Pa. Dist. 694, 30 Pa. Co. 385; Wiley's Est., 11 Pa. Dist. 416; Trinick's Est., 8 Pa. Dist. 126, 22 Pa. Co. 282; Patterson's Est., 23 Pa. Co. 567; Koecker's Est., 9 Pa. Co. 238, 20 Phila. 71; Rorer's Est., 5 Pa. Co. 73; Voldemar's Est., 4 Pa. Co. 577; Kelly's Est., 16 Phila. (Pa.) 285; Walker's Est., 14 LancBar (Pa.) 64; Evans v. Eby, 19 LancLRev (Pa.) 243; Fosbinder's Est., 2 LehighValLR 270.

36. Trautman v. Traub, 150 Iowa 23, 129 NW 322.

37. Haines' Est., 17 Pa. Dist. 420.

38. Dolsen's Succ., 129 La. 577, 56 S 514.

39. Weller v. Rensford, 185 Ala. 333, 64 S 366.

40. Bell v. Bennett, 188 Ill. A. 62; Harney v. McCann, 175 Ill. A. 250 (check); Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327; Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

[a] **Where decedent promised to pay a check previously made by him,** with knowledge of all the facts, it will be presumed that he was liable, and that all conditions necessary to fix his liability were complied with. Harney v. McCann, 175 Ill. A. 250.

creates a strong presumption against its validity,[41] particularly where the claim was not asserted in the lifetime of the alleged debtor.[42]

[§ 1121] **(b) Admissibility.** In a proceeding to establish a disputed claim it is competent to inquire into all the facts and circumstances having a tendency to prove or disprove the existence or validity of the claim.[43] So where the claim is based on an alleged loan to decedent, evidence is admissible of the financial condition of the parties,[44] or of the fact that at the time of the alleged loan claimant was indebted to decedent.[45] Where a claim was for personal services, an attempt of the decedent to make a will in which claimant was a beneficiary has been held admissible as showing an intent to compensate plaintiff.[46] Evidence which is not relevant or material to the particular facts in issue,[47] or which tends to raise a new or collateral issue, is not admissible.[48] Evidence of a demand on decedent's husband, in decedent's presence, for payment for services to decedent is immaterial.[49] It is not competent to show in support of a claim for services to decedent that before the employment decedent had endeavored to make claimant a beneficiary in an insurance policy,[50] and where the claim is for funeral expenses, evidence as to the wholesale cost of caskets like that furnished by claimant

41. Rogers v. Law, 1 Black. (U. S.) 253, 17 L. ed. 58; Bodenheimer v. Bodenheimer, 35 La. Ann. 1005; White v. Devendorf, 127 App. Div. 791, 111 NYS 815; Trinick's Est., 8 Pa. Dist. 126, 22 Pa. Co. 282; Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380; Seybert's Est., 5 Pa. Co. 35; Voldemar's Est., 4 Pa. Co. 577; Fosbinder's Est., 2 LehighValLR (Pa.) 270; McQuinn's Est., 18 Phila. (Pa.) 78.

42. Seacord v. Matteson, 56 Ill. A. 439; Shenk's Est., 59 Pa. Super. 467; Monaghan's Est., 13 Pa. Dist. 694, 30 Pa. Co. 385; Flood's Est., 8 Pa. Dist. 634, 23 Pa. Co. 304; Trinick's Est., 8 Pa. Dist. 126, 22 Pa. Co. 282; Kelly's Est., 6 Pa. Dist. 685; McQuinn's Est., 18 Phila. (Pa.) 78; McEwen v. Toronto Gen. Trusts Corp., 36 Ont. L. 244, 10 OntWN 22 [allowing app 9 OntWN 185, and app allowed on other grounds 54 Can. S. C. 381].

43. Ala.—Hunt v. Curtis, 151 Ala. 507, 44 S 54.

Ga.—Kitchens v. Pool, 146 Ga. 229, 91 SE 81; Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 AnnCas 392.

Ill.—Smythe v. Evans, 209 Ill. 376, 70 NE 906 [rev 108 Ill. A. 145]; Vogel v. Murphy, 182 Ill. A. 631; Mark v. Miles, 59 Ill. A. 102.

Iowa.—Sarchfield v. Hayes, 112 NW 1100.

Mass.—Butler v. Butler, 225 Mass. 22, 113 NE 577.

Mich.—Fishell v. Fishell, 172 NW 432; In re Davis, 200 Mich. 500, 166 NW 899; Maynard v. Schrumpf, 192 Mich. 494, 158 NW 845; Bolthouse v. De Spelder, 181 Mich. 153, 147 NW 589; Forsythe v. Thompson, 157 Mich. 669, 122 NW 219; Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838.

Nebr.—Gandy v. Bissell, 81 Nebr. 102, 115 NW 571.

N. H.—Elwell v. Roper, 72 N. H. 585, 58 A 507; Wright v. Davis, 72 N. H. 448, 57 A 235.

N. D.—Livingston v. Holt, 38 N. D. 556, 165 NW 975.

Or.—Bull v. Payne, 47 Or. 580, 84 P 697.

Pa.—Haas' Est., 16 Pa. Dist. 251, 34 Pa. Co. 557; Rhoades' Est., 13 Pa. Dist. 287, 29 Pa. Co. 512, 5 LackJur 155; Trinick's Est., 8 Pa. Dist. 126, 22 Pa. Co. 282.

S. D.—In re Kirfel, 37 S. D. 292, 157 NW 1057.

Vt.—In re Peaslee, 76 Vt. 402, 57 A 967.

[a] **Illustration.**—On the trial of a claim by a married woman against the estate of a decedent, evidence of a conversation between claimant and her husband by which they agreed that she should receive compensation for her services to the decedent as her own property, was admissible where it was shown that there was an arrangement between claimant and decedent known and assented to by the husband, that she should be entitled to the compensation personally and liability to the husband was negatived. Barclay v. Coman, 146 Mich. 650, 110 NW 49.

[b] **Offer to sell claim.**—Where the claim is based on a note the rightful possession of which is disputed evidence is admissible on the part of the claimant that prior to decedent's death he made repeated and public offers to sell the same, such evidence tending to show that he was asserting it as a claim against decedent in his lifetime. Passmore v. Passmore, 50 Mich. 626, 16 NW 170, 45 AmR 62.

[c] **Realization of indebtedness and attempt to avoid payment.**—Where decedent by deed shortly before his death conveyed all of his lands to a third person for a nominal consideration, which deed was withheld from record until after decedent's death, and it appears from the testimony of his surviving wife that she at least joined in the deed because of rumor which she and decedent had heard relative to a claim against decedent, such deed is proper evidence, on the filing of the claim against decedent's estate, as a circumstance tending to show that decedent realized that there was a claim outstanding against him, and that the deed was made to evade, if possible, the payment thereof. Gandy v. Bissell, 81 Nebr. 102, 115 NW 571, 81 Nebr. 117, 117 NW 349.

44. Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838; Matter of Mulligan, 82 Misc. 336, 143 NYS 686 [aff 165 App. Div. 912 mem, 150 NYS 1098 mem].

45. Graham v. Graham, 111 N. Y. 502, 19 NE 53.

46. Hobin v. Hobin, 33 R. I. 249, 80 A 595. But compare Luizzi v. Brady, 140 Mich. 73, 103 NW 574 (evidence that decedent attempted to execute a codicil to her will in order to add a bequest to claimant of a sum equivalent to the amount claimed for services is inadmissible, and error in admitting it is not cured by an instruction limiting the evidence to its bearing on the intent to pay something).

47. Ala.—Gillespie v. Campbell, 149 Ala. 193, 43 S 28.

Colo.—Gilmour v. Central First Nat. Bank, 21 Colo. A. 301, 121 P 767.

Ga.—Wardlaw v. Frederick, 13 Ga. A. 594, 79 SE 523.

Ill.—Grier v. Barkley, 182 Ill. A. 541; Seacord v. Matteson, 56 Ill. A. 439.

Ind.—Sullivan v. Sullivan, 6 Ind. A. 65, 32 NE 1132.

Iowa.—In re Ogden, 152 Iowa 106, 131 NW 682; Smith v. McFadden, 56 Iowa 482, 9 NW 350.

Mich.—Parmelee v. Wigent, 189 Mich. 507, 155 NW 577; Stockwell v. Sedina, 170 Mich. 476, 136 NW 476; Partridge v. Meeker, 169 Mich. 303, 135 NW 248; Beecham v. Wetherbee, 160 Mich. 585, 125 NW 702; McGregor v. McGregor, 156 Mich. 487, 120 NW 1071; Laird v. Laird, 127 Mich. 24, 86 NW 436.

Mo.—Brinton v. Thomas, 138 Mo. A. 64, 119 SW 1016.

N. H.—Elwell v. Roper, 72 N. H. 585, 58 A 507.

N. J.—Armitt v. English, 79 N. J. L. 8, 74 A 130.

N. Y.—Sipple v. Fickett, 158 App. Div. 306, 143 NYS 124; Vaughn v. Strong, 12 NYS 251.

Pa.—Hentzler v. Weniger, 32 Pa. Super. 164.

Vt.—McDowell v. McDowell, 75 Vt. 401, 56 A 98, 98 AmSR 831.

Wis.—McNaughton v. McClure, 169 Wis. 288, 171 NW 936; Thoni v. McDonnell, 166 Wis. 319, 165 NW 290; Fitzpatrick v. Phelan, 58 Wis. 250, 16 NW 606.

[a] **Will and inventory.**—"Ordinarily in the trial of a claim against an estate it is not material whether decedent died testate or intestate, or, if he made a will, what were the circumstances surrounding its execution, or whether or not an inventory has or has not been filed in the estate." Grier v. Barkley, 182 Ill. A. 541, 544.

[b] **On an issue as to payment** of the claim the fact that decedent had money on deposit to the claimant's knowledge is no evidence of payment and is properly excluded. McDowell v. McDowell, 75 Vt. 401, 56 A 98, 98 AmSR 831.

[c] **Evidence as to the mental and physical condition** of decedent in the latter part of his life is properly excluded where defendant does not offer to show in what manner if any plaintiff took an undue advantage of such condition. Sullivan v. Sullivan, 6 Ind. A. 65, 32 NE 1132.

[d] **Where a claim is based on a specific contract** for a certain amount for services rendered, evidence of the actual value of the service is immaterial and inadmissible. Matter of Johnson, 32 App. Div. 634, 52 NYS 1081.

[e] **In an action on a claim to recover the purchase price of land** bought at a sheriff's sale under an execution against the decedent, the deed to which has been set aside, it is error to admit evidence of the amount expended by the purchaser in improvements on the property, since there can be no recovery for improvements, except on a proceeding taken under the occupying claimant law. Westerfield v. Williams, 59 Ind. 221.

[f] **Evidence of the relations of the parties** which is merely preliminary and will aid in the better appreciation of the other evidence as it is adduced may be admitted, although having no direct bearing upon the particular fact in issue. Kinney v. McFaul, 122 Iowa 452, 98 NW 276.

[g] **Representative's knowledge of claim.**—Where it was claimed that plaintiff has been guilty of laches preventing a recovery, the testimony of the administratrix as to when she first learned of the claim was properly excluded. Patterson v. Chrisman State Bank, 55 Ind. A. 331, 102 NE 880.

48. Curd v. Wisser, 120 Iowa 743, 95 NW 266; Stocks v. Cannon, 139 N. C. 60, 51 SE 802.

49. Sheldon v. Thornburg, 153 Iowa 622, 133 NW 1076.

50. Scheu v. Blum, 119 App. Div. 825, 104 NYS 887.

is properly excluded.[51]

Books, papers, and other documents. The usual rules as to the admissibility of documentary evidence apply.[52] Claimant's books of account are admissible in evidence where the claim is based upon an open account,[53] or for services rendered,[54] or, where the claim is based upon a note against the estate which is contested, as a circumstance to show that the note was for the same amount as the books showed to be due.[55] A memorandum against his interest found among the papers of decedent showing a debt due by him is admissible in favor of a party seeking to establish the fact stated,[56] and conversely papers found among the effects of the decedent, the genuineness of which is sufficiently proved, and which tend to show a payment by him of the claim presented, are admissible in evidence.[57] On an issue whether a claim against decedent for a balance due for an interest in a firm purchased by him from claimant is fraudulent, the tax lists for the year preceding and the year of the purchase, showing the amount at which the firm property was listed for taxation, are admissible.[58] It has been held that in the absence of an affidavit denying the execution of notes on which a claim is based against decedent as guarantor, the notes are admissible in evidence without proof of execution.[59] Where a claim is based upon a contract by which a married woman engaged claimant to serve her until her death under an agreement that claimant should be compensated by her will out of her separate estate, the will of the married woman's husband devising property to her, and an inventory of his estate, as well as the will of the married woman, and an inventory of her estate, are admissible in evidence to show that the married woman had separate property and that claimant was not compensated according to the contract.[60] Where a son claims against the estate of his father for services, notes executed by the father payable to the son after the father's death and delivered to a third person are admissible in evidence as tending to show the amount which the father intended the son to have;[61] but where, in such case, the court has permitted counsel to show statements made by the son at other times, it is not error to exclude prior claims not verified, presented to, or filed with the commissioners.[62] A paper executed by the decedent which is testamentary in its nature is not admissible, unless it has been admitted to probate.[63] Where a claim is based on a note, checks of decedent dated prior to the making of the note are inadmissible as evidence of payment thereof.[64]

Declarations and admissions. The usual rules as to the admissibility of admissions and declarations apply.[65] Evidence of declarations of decedent has been held admissible on an issue as to whether services were understood as being gratuitous or for compensation,[66] and evidence that the claim was previously presented for a smaller amount is admissible as an admission on the part of the claimant as to the amount rightfully due.[67] So also the admissions of decedent may be accepted as furnishing a fair measure of his actual indebtedness for board

51. Waters v. Register, 76 S. C. 132, 134, 56 SE 849 ("Such evidence would bear only indirectly on the question of the retail value, and to make it enlightening, it would have been necessary to enter into the difficult and intricate inquiry as to what would be a reasonable difference between the wholesale and retail price of the caskets in the special business of an undertaker. The inquiry should have been directed to the market value of such caskets at retail").

52. See Evidence § 900 et seq.

[a] **Letters written by decedent** are not admissible unless they relate to matters embraced in plaintiff's claim. Shirts v. Rooker, 21 Ind. A. 420, 52 NE 629.

[b] **Letters to decedent.**—In proceedings to establish a claim for services against decedent's estate, a letter written by plaintiff's daughter to decedent not shown to have been written at plaintiff's direction, nor with his knowledge, was inadmissible to show the circumstances under which plaintiff lived with decedent, and whether the services were rendered with an expectation that they should be paid for. Hammer v. Crawford, (Mo.) 93 SW 348.

53. Miller v. Pratz, 179 Ill. A. 204; Kilbourn v. Anderson, 77 Iowa 501, 42 NW 431; Kelley's Est., 5 Pa. Dist. 263.

54. Radcliffe v. Chaves, 15 N. M. 258, 110 P 699; Yearsley's App., 48 Pa. 531.

55. Baker v. Halleck, 128 Mich. 180, 87 NW 100.

56. In re Davis, 200 Mich. 500, 166 NW 899; Gallagher v. Brewster, 153 N. Y. 364, 47 NE 450 [rev 1 App. Div. 65, 36 NYS 1081].

57. Taylor v. Greene, 129 Mich. 564, 89 NW 343.

58. Daniels v. Fowler, 123 N. C. 35, 31 SE 598.

59. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224 (stating rule prior to July 1, 1907).

60. Bolthouse v. De Spelder, 181 Mich. 153, 147 NW 589.

61. Abel v. Roosenraad, 173 Mich. 93, 138 NW 325.

62. Abel v. Roosenraad, 173 Mich. 93, 138 NW 325.

63. Wilson v. Van Leer, 103 Pa. 600; Funk v. Holahan, 13 Pa. Dist. 38.

64. In re Royer, 217 Pa. 626, 66 A 854.

65. See Evidence §§ 166 et seq, 323.

[a] **Illustration.** — Where there was no issue on a claim for funeral services that the funeral provided was extravagant, evidence that the widow, when she gave the order, stated that her deceased husband was in the habit of buying the best, and as to the kind of funeral she wished for him, and the inventory showing that he left a large estate, was irrelevant. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

[b] **Declarations of decedent** as to unpleasant relations with his other children are not admissible in support of a claim by one child for boarding the deceased parent. Laird v. Laird, 127 Mich. 24, 86 NW 436.

66. Ill.—Harney v. McCann, 175 Ill. A. 250; Ginders v. Ginders, 21 Ill. A. 522.

Ind.—Knight v. Knight, 6 Ind. A. 268, 33 NE 456.

Mich.—Hialey v. Hialey, 157 Mich. 45, 121 NW 465.

Mo.—Lillard v. Wilson, 178 Mo. 145, 77 SW 74; Hayden v. Parsons, 70 Mo. A. 493.

Pa.—Yeager's Est., 18 Pa. Dist. 980; Rhoades' Est., 13 Pa. Dist. 287, 29 Pa. Co. 512, 5 LackJur 155; Murphy's Est., 11 Pa. Dist. 85, 26 Pa. Co. 256.

R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595.

Wis.—Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

"The declarations of deceased, that he intended his son should have everything he possessed, and that he intended to give him his farm in Minnesota, is some evidence of an understanding between the father and son that the latter should be compensated for his services." Stone v. Troll, 134 Mo. A. 308, 311, 114 SW 82.

[a] **Declaration throwing light on relation of parties.**—In an action by a son against his father's estate for services rendered, evidence that the father stated to witness that if he did as the son did witness would win out, that the son had worked for many years without drawing much money, and that he would undoubtedly some time own the business, was admissible as throwing light on the relation of the parties. Hialey v. Hailey, 157 Mich. 45, 121 NW 465.

[b] **Declarations not communicated to claimant.**—Where an uncle devised a house valued at five thousand dollars to his nephew, who presented a claim against the estate for sixteen thousand dollars for services rendered for a period of twenty-one years, based on an alleged oral agreement that he would be paid therefor by the last will of his uncle at his death, expressions of an intent by the uncle to compensate the nephew, made in conversation with third persons during some fifteen or twenty years, are no part of the contract where it was not shown that they were communicated to the nephew to induce him to render the services and that he performed in consideration thereof. Matter of Duke, 57 Misc. 541, 109 NYS 1087, 6 Mills Surr. 541.

[c] **Self-serving declaration.** — In a daughter's action against her father's estate for services rendered for him in his lifetime, under an alleged promise to compensate her therefor in his will, by devising certain property to her, any statement made by decedent that he did not consider himself indebted to plaintiff for her services, made out of plaintiff's presence, was a self-serving declaration, and was not admissible. Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550.

67. Ludlow v. Pearl, 55 Mich. 312, 21 NW 315.

furnished him.[68]

[§ 1122] **(c) Weight and Sufficiency—aa. In General.** While the uncontradicted testimony of a single witness, whose competency or credibility is not impeached, is sufficient, if believed, to establish a claim against a decedent's estate,[69] unless corroboration is required by statute,[70] the general rule is that claims should be established by very satisfactory evidence, and that such claims and the evidence adduced to support them should be carefully scrutinized so as to prevent, as far as possible, the allowance of unjust or fictitious demands.[71] This

68. Murphy's Est., 11 Pa. Dist. 85, 26 Pa. Co. 266.

69. Haas' Est., 16 Pa. Dist. 251, 34 Pa. Co. 557; McCarroll's Est., 44 Pa. Co. 300; Banes' Est., 4 Pa. Co. 495; MacEwan v. Toronto Gen. Trusts Corp., 54 Can. S. C. 381 [allowing app 36 Ont. L. 244, 10 OntWN 22 (allowing app 9 OntWN 185)].

70. Turgeau's Succ., 130 La. 650, 58 S 497; Piffet's Succ., 37 La. Ann. 871; In re Kaulbach, 45 N. S. 62.

[a] **Amount of claim.**—The testimony of one witness is not alone sufficient, where the amount of the claim is over five hundred dollars, but it may be sufficient when supported by corroborative circumstances. Moise's Succ., 107 La. 717, 31 S 990.

71. Colo.—De Monco v. Means, 47 Colo. 457, 107 P 1107.

Ida.—Tritthart v. Tritthart, 24 Ida. 186, 133 P 121.

Ill.—Grier v. Barkley, 182 Ill. A. 541. But compare Scott v. Wright, 138 Ill. A. 105, 107 ("It was also serious error to tell the jury . . . that where a claim is not presented until after the death of the alleged debtor, it should be carefully scrutinized. Such is not the law. A claim against the estate of a deceased person stands upon the same basis as any other").

Iowa.—Holmes v. Connable, 111 Iowa 288, 82 NW 780.

Ky.—Ware v. Bennett, 143 Ky. 743, 137 SW 532.

La.—Richards v. McLain, 118 La. 424, 43 S 38; Gates v. Walker, 8 La. Ann. 277.

Miss.—Bouie v. Wood, 43 S 480; North v. Lowe, 63 Miss. 31; McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

Mont.—Gauss v. Trump, 48 Mont. 92, 135 P 910.

N. Y.—In re Marcellus, 165 N. Y. 70, 58 NE 796; Van Slooten v. Wheeler, 140 N. Y. 624, 35 NE 583; Matter of Wever, 179 App. Div. 952, 165 NYS 1038; Matter of Dole, 168 App. Div. 253, 153 NYS 895; Sipple v. Fickett, 158 App. Div. 306, 143 NYS 124; Ryan v. Halligan, 136 App. Div. 65, 120 NYS 646; White v. Devendorf, 127 App. Div. 791, 111 NYS 815; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [app dism 197 N. Y. 521 mem, 90 NE 1156 mem]; Stafford v. Brown, 120 App. Div. 156, 104 NYS 801; Maisenhelder v. Crispell, 105 App. Div. 219, 94 NYS 707; Walbaum v. Heaney, 104 App. Div. 412, 93 NYS 640; Robinson v. Carpenter, 77 App. Div. 520, 79 NYS 283; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Porter v. Rhoades, 48 App. Div. 635, 63 NYS 112; Rix v. Hunt, 16 App. Div. 540, 44 NYS 988; Wheeler v. Eastwood, 88 Hun 160, 34 NYS 513; Barner v. Rule, 116 Miss. 600, 77 S 521; Matter of Dorland, 100 Misc. 236, 166 NYS 616; Janz v. Schwender, 95 Misc. 142, 159 NYS 200; Matter of Lothrop, 94 Misc. 54, 158 NYS 998; Matter of Lothrop, 94 Misc. 52, 158 NYS 999; Matter of Salisbury, 41 Misc. 274, 84 NYS 215, 4 Mills Surr. 26.

Pa.—In re Fry, 229 Pa. 473, 78 A 1033; In re Royer, 217 Pa. 626, 66 A 854; In re Mueller, 159 Pa. 590, 28 A 491; Graham v. Graham, 34 Pa. 475; Shenk's Est., 59 Pa. Super. 467; Glentworth's Est., 17 Pa. Dist. 292; Monaghan's Est., 13 Pa. Dist. 694, 13 Pa. Co. 385; Hamilton's Est., 11 Pa. Dist. 103, 26 Pa. Co. 422; Baizley's Est., 10 Pa. Dist. 298, 25 Pa. Co. 422; Atkinson's Est., 9 Pa. Dist. 404; Martin's Est., 6 Pa. Dist. 58, 19 Pa. Co. 209; Tasker's Est., 5 Pa. Dist. 6; Muller's Est., 2 Pa. Dist. 456; Hoffman's Est., 32 Pa. Co. 569; Funk v. Holahan, 20 LancLRev 267.

W. Va.—Ash v. Wells, 76 W. Va. 711, 86 SE 750; Brown v. Cresap, 61 W. Va. 315, 56 SE 603, 9 LRANS 997.

"Claims against a dead man's estate based on parol evidence must be rigidly scanned, if they might have been enforced against him while living, they are the subject of just suspicion." In re Mathiot, 243 Pa. 375, 90 A 139, 140.

[a] **Limitations of rule.**—"We are urged by appellant's counsel to remember in approaching this question that claims such as the one at bar are easy to make and hard to disprove; that the only witness who could specifically deny the alleged modification, establish nonperformance of the agreement, or show that full compensation had been made, is dead; that no defense is possible save as it may be found in the improbability of the stories of the plaintiff's witnesses when tested by comparison with other evidence in the case or by ordinary rules of human conduct under similar circumstances. In so far as this admonition implies that courts generally should scrutinize with more than usual care the quality of the proof presented in such cases, assent may be given; and, in so far as the proof consists of oral declarations of the deceased, caution was enjoined upon the trial court and jury by the statute. (Rev. Codes, sec. 8028; Escallier v. Great Northern R. Co., 46 Mont. 238, 127 P 458, AnnCas1914B 468.) We can find, however, no authority in our Code for the application of any different rule as to the quantum of proof from the one prescribed for civil action generally or for the assertion that this court may or should employ any different canons of review from those which obtain in other actions at law. The jury, who were the judges of the weight and credibility of the testimony, the trial judge, who, if he thought the verdict contrary to the weight of the evidence, could have set it aside, have expressed their satisfaction with the respondent's contention. It is to be presumed that they exercised all the caution and scrutiny enjoined upon them by the law, and it is not to be supposed that they were any the less solicitous for the integrity of decedents' estates than are we. The question before us is, therefore, the same as in other appeals in actions at law, viz., whether there is any substantial evidence to support the verdict of the jury." Gauss v. Trump, 48 Mont. 92, 98, 135 P 910.

[b] **Evidence held sufficient.**—Linch v. McLemore, 15 Ala. 632; Free v. Maxwell, (Ark.) 212 SW 325; Mitchell v. Brown, 18 Cal. A. 117, 122 P 426; Brown v. Douglas First Nat. Bank, 49 Colo. 393, 113 P 483; Brown v. Stair, 25 Colo. A. 140, 136 P 1003; Grier v. Barkley, 182 Ill. A. 541; Harney v. McCann, 175 Ill. A. 250; Grant v. Odiorne, 43 Ill. A. 402; Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035; Cunningham v. Packard, 6 Ind. A. 34, 32 NE 333; Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004; Rule v. Carey, 178 Iowa 184, 159 NW 699; Sullenbarger v. Ahrens, 168 Iowa 288, 150 NW 71; Craig v. Craig, 167 Iowa 340, 149 NW 454; McElroy v. Allfree, 131 Iowa 518, 108 NW 119; In re Reeve, 111 Iowa 260, 82 NW 912; Weisinger v. Harding, (Ky.) 115 SW 800; Fisher's Succ., 141 La. 189, 74 S 900; Moise's Succ., 107 La. 717, 31 S 990; Steele v. Steele, 75 Md. 477, 23 A 959; In re Davis, 200 Mich. 500, 166 NW 899; Greenman v. Gillerman, 188 Mich. 74, 154 NW 82; Stockwell v. Sedina, 170 Mich. 476, 136 NW 476 (sufficient to go to jury); McGregor v. McGregor, 156 Mich. 487, 120 NW 1071; Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400; Crampton v. Newton, 132 Mich. 149, 93 NW 250; Van Buskirk v. Hoy, 114 Mich. 425, 72 NW 246; Kosanke v. Kosanke, 137 Minn. 115, 162 NW 1060; Wells v. McCullough, 113 Miss. 401, 74 S 289; Oviatt v. Weber, (Mo. A.) 194 SW 75; Gauss v. Trump, 48 Mont. 92, 135 P 910; Tillson v. Holloway, 98 Nebr. 509, 153 NW 545; Yearsley v. Blake, 85 Nebr. 736, 124 NW 161; Middleton v. Middleton, 35 N. J. Eq. 141; Klein v. Runk, 130 App. Div. 474, 114 NYS 1062; White v. Devendorf, 127 App. Div. 791, 111 NYS 815; Matter of Hamilton, 70 App. Div. 73, 75 NYS 66 [rev 34 Misc. 607, 70 NYS 426]; Coale v. Coale, 63 App. Div. 32, 71 NYS 214; Breed v. Breed, 55 App. Div. 121, 67 NYS 162; Fisher v. Filon, 90 Hun 605, 35 NYS 283; Kingston Nat. Bank v. Van Buren, 88 Hun 564, 34 NYS 772; Heyne v. Dorflier, 57 Hun 591, 10 NYS 908; Matter of Fingar, 101 Misc. 516, 168 NYS 361; Matter of Brown, 77 Misc. 507, 137 NYS 978, 9 Mills Surr. 434; Matter of Neil, 35 Misc. 254, 71 NYS 840, 2 Mills Surr. 259; In re Mara, 137 NYS 151; In re Powers, 11 NYS 396 [aff 124 N. Y. 361, 26 NE 940], Bull v. Payne, 47 Or. 580, 84 P 697; In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029; In re Royer, 217 Pa. 626, 66 A 854; Kuhlman's Est., 178 Pa. 43, 35 A 918; Shirk's App., 10 Pa. Cas. 631, 14 A 413; Martin's Est., 54 Pa. Super. 168; Russell's Est., 46 Pa. Super. 136; Litle's Est., 23 Pa. Dist. 1014; McDonald's Est., 13 Pa. Dist. 483; Patterson's Est., 9 Pa. Dist. 259, 23 Pa. Co. 567; Hess' Est., 9 Pa. Dist. 19; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Tasker's Est., 17 Pa. Co. 332; Walton's Est., 4 Kulp 487; Bradley's Est., 16 Phila. 219; Arnold's Est., 5 Phila. 215; Lippincott's Est., 31 PittsbLegJNS 373; Gaston v. Gaston, 80 S. C. 157, 61 SE 393; Treece v. Carr, (Tenn. Ch. A.) 58 SW 1078; Zonig v. Boehme, 60 Wash. 500, 111 P 566; Faulkner v. Thomas, 48 W. Va. 148, 35 SE 915; Longwell v. Mierow, 130 Wis. 208, 109 NW 943; Gudden v. Gudden, 113 Wis. 297, 89 NW 111.

[c] **Evidence held not sufficient.**—Leigh v. Williams, 64 Ark. 165, 41 SW 323; Mahan v. Owen, 23 Ark. 347; Dickey v. Dickey, 8 Colo. A. 141, 45 P 228; Miller v. Pratz, 179 Ill. A. 204; Mark v. Miles, 59 Ill. A. 102; McClure v. Lenz, 40 Ind. A. 56, 80 NE 988; Lamb v. Whitaker, (Iowa) 170 NW 737; Trautman v. Traub, 150 Iowa 23, 129 NW 322; Stickley v. Hanson, (Iowa) 102 NW 514; Murphy v. McCarthy, 108 Iowa 38, 78 NW 819; Weisinger v. Harding, (Ky.) 115 SW 800; Collins v. Collins, 102 SW 867, 31 KyL 563; Dewhurst v. Shepherd, 102 Ky. 239, 43 SW 253, 19 KyL 1260; Webb v. Webb, 6 T. B. Mon. 163; Allsop v. Owensboro Deposit Bank, 69 SW 1102, 24 KyL 762; Larmeau's Succ., 142 La. 1050, 78 S 113; Fisher's Succ., 141 La. 189, 74 S 900; Floyd's Succ., 12 Rob. (La.) 197; Justis v. Justis, 99 Md. 69, 57 A 23; Young v. Mackall, 4 Md. 362; In re McLaughlin, (Mich.)

rule is very strictly applied where the proof consists of parol evidence as to admissions or declarations of decedent,[72] and in cases where the claim is made by the personal representative,[73] and where the only evidence in support of the claim is the testimony of the claimant himself.[74] A mere receipt for money is not sufficient to establish the existence of a debt,[75] nor is a book account of sums of money lent to a person since deceased sufficient in the absence of other evidence, to support a claim therefor against decedent's estate.[76] So also a due bill signed by decedent, and found among his private papers after his death, is not alone sufficient evidence of a debt, although it may be so when coupled with confidential instructions, oral and written, to his executor to pay it.[77]

Corroboration of claimant. In the absence of statute the uncorroborated testimony of the claimant may be sufficient to establish his claim, if the court is entirely satisfied as to its truthfulness,[78] there being no absolute rule of law that corroboration is necessary;[79] but it is sometimes provided by statute that a disputed claim cannot be established by the testimony of the claimant alone,[80] and in any event the uncorroborated testimony of the claimant is not sufficient as a matter of law.[81]

139 NW 50; In re Mintzer, 33 Minn. 470, 23 NW 845; Carr v. Carr, 102 Nebr. 158, 166 NW 254; Loeb v. Huston, 98 Nebr. 314, 152 NW 553; Gillett v. Sweeney, 5 Nebr. (Unoff.) 197, 97 NW 795; Devries v. Devries, 5 Nebr. (Unoff.) 179, 97 NW 590; Van Slooten v. Wheeler, 140 N. Y. 624, 35 NE 583 [rev 21 NYS 329, 15 NYS 591]; Blumert v. Hoss, 127 App. Div. 547, 111 NYS 823; Clem v. Fairchild, 127 App. Div. 261, 111 NYS 262; Matter of Steenwerth, 97 App. Div. 116, 89 NYS 654; Matter of Clarke, 57 App. Div. 430, 68 NYS 243; Crippen v. Crippen, 53 Hun 232, 6 NYS 378; Matter of Kirkpatrick, 9 Misc. 228, 30 NYS 283, 1 Gibb. Surr. 71; De Mets v. Moss, 17 NYS 902 [app dism 136 N. Y. 620 mem, 32 NE 1014 mem]; Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388; Matter of Dorland, 100 Misc. 236, 166 NYS 616; In re Clymer, 202 Pa. 580, 52 A 52; In re McKown, 198 Pa. 102, 47 A 1113; Hunter's Est., 147 Pa. 549, 23 A 973; Russell's Est., 46 Pa. Super. 136; Baizley's Est., 10 Pa. Dist. 398, 25 Pa. Co. 432; Wears' Est., 25 Pa. Dist. 30; Burk's Est., 15 Pa. Dist. 206; Marschall's Est., 8 Pa. Dist. 313; Loftis' Est., 3 Pa. Co. 195; Ettla v. People's Trust, etc., Co., 18 LancL Rev. 374; McFarland's Est., 12 Phila. 122; In re Anderson, 33 PittsbLeg JNS 199; In re Riling, 33 PittsbLeg JNS 77; Arnold v. Draper, (R. I.) 106 A 581; Kislingbury v. Evans, 40 Utah 356, 121 P 571; Nottingham v. Lynchburg Trust, etc., Bank, (Va.) 29 SE 684; Heber v. Heber, 139 Wis. 472, 121 NW 328; Kelley v. Ayers, 41 N. B. 489.

72. Iowa.—Holmes v. Connable, 111 Iowa 298, 82 NW 780.

Ky.—Brewer v. Hieronymus, 41 SW 310, 19 KyL 645.

La.—McLain's Succ., 141 La. 376, 75 S 85; Wilder v. Franklin, 10 La. Ann. 279; Gates v. Walker, 8 La. Ann. 277.

Mich.—Lattin v. Lattin, 156 Mich. 223, 120 NW 609; Clancy v. Leach, 125 Mich. 630, 84 NW 1105.

Mo.—Beene v. Beene, 56 Mo. A. 504.

N. Y.—Apthorp v. Thurston, 153 App. Div. 572, 138 NYS 41; Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899; Scheu v. Blum, 119 App. Div. 825, 104 NYS 887.

Pa.—Heffner's Est., 134 Pa. 436, 19 A 693; McMahon's Est., 132 Pa. 175, 19 A 68; Graham v. Graham, 34 Pa. 475; Thompson's App., 10 Pa. Cas. 574, 13 A 952; Appelgren's Est., 23 Pa. Dist. 624; Willdonger's Est., 12 Pa. Co. 616; Rhodes' Est., 18 Phila. 18.

Wash.—Anderson v. Osborn, 62 Wash. 400, 114 P 160.

Ont.—McEwan v. Toronto Gen. Trusts Corp., 36 Ont. L. 244, 10 Ont WN 22 [allowing app 9 OntWN 185, and app allowed on other grounds 54 Can. S. C. 381].

"The testimony of witnesses who swear to the admissions of a dead man is weak, and should not be acted upon without great caution. Rosseau v. Rouss, 180 N. Y. 116, 72 NE 916." Hoffman v. Condon, 134 App. Div. 205, 206, 118 NYS 899.

"The courts, before upholding an oral agreement of this kind, which, if carried out, will divert the property of the decedent from its natural channels, will require it to be established by clear convincing proof. In fact it must be a case of extraordinary equity and sustained by unmistakable evidence before it can measure up to the rigid rule of late adopted by the Court of Appeals. (Holt v. Tuite, 188 N. Y. 17, 80 NE 364; Rosseau v. Rouss, 180 N. Y. 116, 72 NE 916; Hamlin v. Stevens, 177 N. Y. 39, 69 NE 118; Mahaney v. Carr, 175 N. Y. 454, 67 NE 903)". White v. Devendorf, 127 App. Div. 791, 111 NYS 815.

[a] **Where such evidence is clear, positive, and specific,** it may be sufficient to establish the validity of the claim. Hialey v. Hialey, 157 Mich. 45, 121 NW 465; McCann's App., 6 Pa. Cas. 15, 9 A 48; McCarroll's Est., 44 Pa. Co. 300; MacEwen v. Toronto Gen. Trusts Corp., 54 Can. S. C. 381 [allowing app 36 Ont. L. 244, 10 OntWN 22 (allowing app 9 OntWN 185)].

73. Matter of Carrington, 163 App. Div. 544, 148 NYS 952; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Matter of Humfreville, 6 App. Div. 535, 39 NYS 550; Matter of People's Trust Co., 79 Misc. 595, 141 NYS 201; Matter of Brown, 77 Misc. 507, 137 NYS 978, 9 Mills Surr. 434; Matter of Carrington, 163 App. Div. 544, 148 NYS 952; Wright's Accounting, 16 AbbPrNS (N. Y.) 429; Williams v. Purdy, 6 Paige (N. Y.) 166; Adams' Est., Tuck. Surr. (N. Y.) 109; In re Hoffer, 156 Pa. 473, 27 A 11.

[a] **Where the statute requires the representative's claim to be proved,** it contemplates the same proof which is required to prove any other claim against the estate which is objected to, and the affidavit of the representative verifying his claim is insufficient. Underhill v. Newburger, 4 Redf. Surr. (N. Y.) 499.

[b] **Evidence sufficient** to establish claim of representative. Matter of Van Buren, 19 Misc. 373, 44 NYS 357, 2 Gibb. Surr. 1.

74. La.—Larmeau's Succ., 142 La. 1050, 78 S 113; Turgeau's Succ., 130 La. 650, 58 S 497.

Miss.—McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

N. Y.—In re Marcellus, 165 N. Y. 70, 58 NE 796; Seaman v. Jamison, 158 App. Div. 832, 144 NYS 209; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Matter of Schwartz, 87 Misc. 559, 151 NYS 374.

Tenn.—Bratcher v. Bratcher, (Ch.) 62 SW 1108.

Eng.—Rawlinson v. Scholes, 79 L. T. Rep. N. S. 350.

Ont.—Scott v. Allen, 26 Ont. L. 571, 3 OntWN 1484, 22 OntWR 597, 5 DomLR 767.

N. B.—Kelley v. Ayer, 41 N. B. 489.

See also cases infra note 81.

[a] **The affidavit of the claimant** is not sufficient to establish a claim for paying a decedent's debt in his lifetime, without showing by independent proof that the payment was made at the request of decedent, or that he recognized the validity of the debt, or the propriety of its payment for him by the claimant. McWhorter v. Donald, 39 Miss. 779, 80 AmD 97.

[b] **The sole testimony of a son** is not sufficient to establish a contract with his deceased father to support the latter for a certain consideration as the basis of a claim against the estate of the father, where, at the time he claimed to be supporting his father, he was living on the latter's farm. Bratcher v. Bratcher, (Tenn. Ch. A.) 62 SW 1108.

75. Farinas' Est., 13 Philippine 63.

76. Matter of Linn, 2 Pearson (Pa.) 487.

77. O'Neill v. O'Neill, 18 S. C. 360, 44 AmR 579.

78. Re Griffin, 79 L. T. Rep. N. S. 442; Rawlinson v. Scholes, 79 L. T. Rep. N. S. 350.

79. In re Hodgson, 31 Ch. D. 177; Re Griffin, 79 L. T. Rep. N. S. 442; Rawlinson v. Scholes, 79 L. T. Rep. N. S. 350 [disappr In re Finch, 23 Ch. D. 267].

80. Ill.—Kingan v. Burns, 104 Ill. A. 661.

Or.—Harding v. Grim, 25 Or. 506, 36 P 634.

Can.—Thompson v. Coulter, 34 Can. S. C. 261.

Alta.—Voyer v. Lepage, 8 Alta. L. 139.

Ont.—Girardot v. Curry, 38 Ont. L. 350, 11 OntWN 277, 33 DomLR 272.

[a] **Extent of corroboration required.**—"The testimony of the respondent as to the reasons for the delay was not corroborated by other testimony; but, in my opinion, it was not necessary that it should have been, as his testimony as to the main question, the making of the agreement, was so corroborated, and the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true." McGregor v. Curry, 31 Ont. L. 261, 270, 5 OntWN 90, 25 OntWR 58, 6 OntWN 202, 20 DomLR 706 [aff (Can.) 25 DomLR 771].

[b] **Where there are two joint claimants,** the fact that they both testified to substantially the same thing is not the corroboration which the statute requires. Taylor v. Regis, 26 Ont. 483.

[c] **An instruction** that the jury cannot rely on claimant's testimony alone, and, if he comes into court without any evidence except his own, he cannot recover, and that while he is a competent witness he cannot prevail unless he proves his case by other competent evidence, is sufficient against the objection that it admits a recovery on claimant's own testimony. Bull v. Payne, 47 Or. 580, 84 P 697.

[d] **Documentary evidence** introduced by claimant may suffice without corroboration. Brocklebank v. Barter, 8 Alta. L. 262.

81. Nottingham v. Lynchburg Trust, etc., Bank, (Va.) 29 SE 684; Re Griffin, 79 L. T. Rep. N. S. 442; Rawlinson v. Scholes, 79 L. T. Rep. N. S. 350; Doidge v. Mimms, 13 Man.

Stale claims are regarded with special disfavor, and require very strong and conclusive testimony to establish them,[82] particularly where the claim was never asserted in decedent's lifetime.[83]

[§ 1123] **bb. Claims for Services.** To establish a claim for services, proof of an express contract is not in all cases essential,[84] but claimant must show either an express contract or an implied agreement or mutual understanding that the services were to be paid for,[85] by clear and satisfactory proof;[86] and where there is no express contract the facts showing an implied contract or mutual understanding must be fairly established.[87] The existence or nonexistence of such an implied agreement or mutual understanding may be established from the circumstances of the particular

48; Re Blank, 5 Terr. L. 230. See also cases supra note 74.

82. U. S.—Rogers v. Law, 1 Black 253, 17 L. ed. 58.

La.—Rogge v. Nouvet, 50 La. Ann. 1220, 23 S 933; Wood v. Egan, 39 La. Ann. 684, 2 S 191; Bodenheimer v. Bodenheimer, 35 La. Ann. 1005; Woods' Succ., 30 La. Ann. 1002; Wilder v. Franklin, 10 La. Ann. 279; Simpson v. Powell, 7 La. Ann. 555.

N. Y.—White v. Devendorf, 127 App. Div. 791, 111 NYS 815; Matter of Humfreville. 6 App. Div. 535, 39 NYS 550.

Pa.—In re Miller, 188 Pa. 214, 41 A 532; Heffner's Est., 134 Pa. 436, 19 A 693; Irwin's Est., 133 Pa. 1, 19 A 284; Geiger's App., 1 Mon. 547, 16 A 851; Geiger's Est., 14 Pa. Super. 523; Seybert's Est., 5 Pa. Co. 35; Williamson's Est., 12 Phila. 144.

S. C.—Chalmers v. Kinard, 38 S. C. 126, 16 SE 778, 895; Hanks v. Williams, 15 S. C. Eq. 203.

Va.—Perkins v. Lane, 82 Va. 59.

Ont.—McEwan v. Toronto Gen. Trusts Corp., 36 Ont. L. 244, 10 Ont WN 22 [allowing app 9 OntWN 185, and app allowed on other grounds 54 Can. S. C. 381].

[a] **Delay in presenting a check** of decedent until after his death, which was eighteen months after the date of the check, does not make it a stale demand, and in the absence of evidence of payment by decedent, after the date of the check, the claim should be allowed. Barnes v. Dunn, 19 App. Div. 326, 46 NYS 115.

Claims for services see infra § 1123.

83. U. S.—Rogers v. Law, 1 Black 253, 17 L. ed. 58.

Ill.—Brock v. Slaten, 82 Ill. 282; Seacord v. Matteson, 56 Ill. A. 439.

La.—Woods' Succ., 30 La. Ann. 1002.

Me.—Liberty v. Haines, 103 Me. 182, 68 A 738.

Miss.—Carter v. Judge Adams County Prob. Ct., 10 Miss. 42.

N. Y.—Kearney v. McKeon, 85 N. Y. 136; Matter of Wever, 179 App. Div. 952, 165 NYS 1038; White v. Devendorf, 127 App. Div. 791, 111 NYS 815; Porter v. Rhoades, 48 App. Div. 635, 63 NYS 112 [app dism 170 N. Y. 583 mem, 63 NE 1121 mem]; Matter of De Freest, 41 Misc. 535, 85 NYS 74, 4 Mills Surr. 84; Matter of Wilmot, 39 Misc. 686, 80 NYS 651, 3 Mills Surr. 418; Wright v. Wright, 4 Redf. Surr. 345.

Pa.—Burk's Est., 15 Pa. Dist. 206; Flood's Est., 8 Pa. Dist. 634, 23 Pa. Co. 304.

Ont.—McEwan v. Toronto Gen. Trusts Corp., 36 Ont. L. 244, 10 Ont WN 22 [allowing app 9 OntWN 185, and app allowed 54 Can. S. C. 381].

[a] **When it appears that there were subsequent dealings** in which claimant was to some extent a debtor of decedent, but that he never presented his claim in reduction of his debt, the weight of suspicion becomes very great, and justifies a demand for distinct and definite proof, and the clearest indication of honesty and fairness. Kearney v. McKeon, 85 N. Y. 136; Porter v. Rhoades, 48 App. Div. 635, 63 NYS 112 [app dism 170 N. Y. 583 mem, 63 NE 1121 mem].

Claim for services see infra § 1123.

84. Ill.—Neish v. Gannon, 198 Ill. 219, 64 NE 1000 [aff 98 Ill. A. 248]; Sherman v. Whiteside, 190 Ill. 576, 60 NE 838 [aff 93 Ill. A. 572]; Chapman v. Barnes, 29 Ill. A. 184; Killpatrick v. Helston, 25 Ill. A. 127; Ginders v. Ginders, 21 Ill. A. 522.

Mich.—Buell v. Adams, 157 Mich. 248, 121 NW 752; Decker v. Kanous, 129 Mich. 146, 88 NW 398.

Mo.—Baxter v. Troll, 152 Mo. A. 557, 133 SW 1188.

N. J.—De Camp v. Wilson, 31 N. J. Eq. 656.

N. Y.—Matter of Doubleday, 173 App. Div. 739, 159 NYS 947 [aff 220 N. Y. 590 mem, 115 NE 1037 mem].

Pa.—McCarroll's Est., 44 Pa. Co. 300.

Wis.—In re Happel-Bossi, 133 Wis. 119, 113 NW 433. Contra Leitgabel v. Belt, 108 Wis. 107, 83 NW 1111.

[a] **Where otherwise the claim would be barred by limitations,** an express contract must, of course, be shown. Cook's Est., 12 Pa. Co. 621.

85. Ga.—Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 AnnCas 392.

Ill.—Ginders v. Ginders, 21 Ill. A. 522.

Ind.—Ellis v. Baird, 31 Ind. A. 295, 67 NE 960.

Iowa.—Trautman v. Traub, 150 Iowa 23, 129 NW 322.

Ky.—Humble v. Humble, 152 Ky. 160, 153 SW 249; Sutherland v. Sutherland, 142 Ky. 688, 134 SW 1152.

Mass.—Lyons v. Jackson, 122 NE 304.

Miss.—Hoyle v. Smith, 113 Miss. 729, 74 S 611; Bell v. Oates, 97 Miss. 790, 53 S 491.

Mo.—Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Brand v. Ray, 156 Mo. A. 622, 137 SW 623.

N. Y.—Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Matter of Devoe, 58 Misc. 490, 111 NYS 638, 6 Mills Surr. 399.

N. C.—De Bruhl v. New Bern Banking, etc., Co., 172 N. C. 839, 90 SE 9.

Oh.—Bolsinger v. Halliday, 22 Oh. Cir. Ct. N. S. 289.

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

Pa.—Haines' Est., 17 Pa. Dist. 420; Hess' Est., 13 Phila. 285.

Wash.—Hodge v. Hodge, 47 Wash. 196, 91 P 764, 11 LRANS 873.

Wis.—Tyler v. Burrington, 39 Wis. 376; Hall v. Finch, 29 Wis. 278, 9 AmR 559.

86. Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

Ind.—Pease v. Christman, 158 Ind. 642, 64 NE 90.

Ky.—Foley v. Dillon, 105 SW 461.

Md.—Duckworth v. Duckworth, 98 Md. 92, 56 A 490.

Mich.—Decker v. Kanous, 129 Mich. 146, 88 NW 398.

N. Y.—Maisenhelder v. Crispell, 105 App. Div. 219, 94 NYS 707; Matter of Goss, 98 App. Div. 489, 90 NYS 769; Pattat v. Pattat, 93 App. Div. 102, 87 NYS 140; Platt v. Hollands, 85 App. Div. 231, 83 NYS 556; Meehan v. Heffernan, 73 App. Div. 615, 76 NYS 789; Raynor v. Robinson, 36 Barb. 128; Matter of Warner, 39 Misc. 432, 79 NYS 363, 3 Mills Surr. 349; Matter of Liddle, 35 Misc. 173, 71 NYS 474, 2 Mills Surr. 254; Matter of Hamilton, 34 Misc. 607, 70 NYS 426 [rev 70 App. Div. 73, 75 NYS 66 (aff 172 N. Y. 652 mem, 65 NE 1117 mem)].

Oh.—Bolsinger v. Halliday, 22 Oh. Cir. Ct. N. S. 289, 4 Oh. A. 311.

Pa.—In re Weaver, 182 Pa. 349, 38 A 12; Flood's Est., 8 Pa. Dist. 634, 23 Pa. Co. 304; Kelly's Est., 6 Pa. Dist. 685; Shaffer's Est., 6 LackLegN 137; Clark's Est., 12 Phila. 147.

Tenn.—Bratcher v. Bratcher, (Ch.) 62 SW 1108.

Wis.—Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895.

[a] **Illustration.**—A claim against a decedent's estate for services rendered on a farm will not be sustained, where claimant does not show any contract, nor what the services were, nor when, where, or under what circumstances they were rendered. In such a case declarations by decedent to third persons that claimant had worked for him and that he owed him money, but without stating how much he owed, are insufficient to support the claim. Riemensberger's Est., 29 Pa. Super. 596, 598 ("Claims for services against a decedent's estate must be established by evidence other than that of mere loose declarations, and must be such as to clearly and distinctly establish a contract, whether express or implied, between the claimant and the decedent").

[b] **Contract to compensate by will.**—"Such contracts are dangerous in character, easily fabricated, may carry with them a long and silent account of many years' standing; and, therefore, they should be definite and certain and clearly proved by satisfactory evidence." Matter of Duke, 57 Misc. 541, 542, 109 NYS 1087, 6 Mills Surr. 541.

[c] **Uncorroborated testimony of a son** claiming for services to his father is insufficient. Bratcher v. Bratcher, (Tenn. Ch.) 62 SW 1108.

[d] **The uncontradicted testimony of one witness** as to the rendition and value of services rendered a decedent is sufficient to establish such testimony in an action against the estate. Berry v. Ballard, 3 KyL 58.

87. Ill.—Kolb v. Stephens, 176 Ill. A. 391.

Iowa.—Bartholomew v. Adams, 143 Iowa 354, 121 NW 1026.

Mich.—Decker v. Kanous, 129 Mich. 146, 88 NW 398.

Minn.—Beneke v. Beneke, 119 Minn. 441, 138 NW 689, AnnCas1914B 381.

Miss.—Hoyle v. Smith, 113 Miss. 729, 74 S 611.

N. Y.—Matter of Wever, 179 App. Div. 952, 165 NYS 1038; Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [aff 197 N. Y. 521 mem, 90 NE 1156 mem]; Matter of Stevenson, 86 Hun 325, 33 NYS 493; Matter of Stacey, 89 Misc. 88, 152 NYS 717; Matter of Warner, 39 Misc. 432, 79 NYS 363, 3 Mills Surr. 349; Cannon v. Sares, 177 App. Div. 588, 164 NYS 294.

Oh.—Bolsinger v. Halliday, 22 Oh. Cir. Ct. N. S. 289.

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

Pa.—Lewis' Est., 50 Pa. Super. 417; Appelgren's Est., 23 Pa. Dist. 624; Elder's Est., 23 Pa. Dist. 154; O'Mara's Est., 31 Pa. Co. 469.

S. C.—Sullivan v. Latimer, 38 S. C. 158, 17 SE 701.

Wis.—Tyler v. Burrington, 39 Wis. 376; Hall v. Finch, 29 Wis. 278, 9 AmR 559.

Wyo.—Pool v. Pool, 21 Wyo. 435, 133 P 372.

case,[88] as by proof of the character of the services rendered,[89] particular relations between the parties, as of friendship[90] or obligation,[91] the financial condition of the parties,[92] or proof of whether similar services previously performed were gratuitous or for compensation;[93] but no general rule can be laid down applicable to all cases as to what facts and circumstances are sufficient to show the existence or nonexistence of such agreement or understanding.[94] Particularly strong and convincing proof is required where the claim is stale,[95] or where the services extended over a considerable period and no demand for compensation was ever made during decedent's lifetime,[96] or where there are any circumstances connected with the claim tending to render it improbable or suspicious.[97] Since services rendered a decedent by a member of his immediate family, or a person living with him as such, are presumed to be gratuitous,[98] the proof in such cases must be sufficient to overcome this presumption;[99] but in an action by a husband and wife to recover for services rendered the wife's deceased

88. Ill.—Chapman v. Barnes, 29 Ill. A. 184.
Ind.—Miller v. Miller, 47 Ind. A. 239, 94 NE 243.
Iowa.—In re Oldfield, 175 Iowa 118, 156 NW 977, LRA1916D 1260, AnnCas 1917D 1067; In re Oldfield, 158 Iowa 98, 138 NW 846.
Mich.—Forsythe v. Thompson, 157 Mich. 669, 122 NW 219.
Mo.—Rose v. Mays, 139 Mo. A. 246, 122 SW 769.
N. Y.—Matter of Cushman, 177 App. Div. 127, 163 NYS 712.
Pa.—Engle's Est., 9 Pa. Dist. 743; Harper's Est., 7 Pa. Dist. 532.
R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595.
[a] **Claimant need not have kept an account** with decedent and charged him with each item of service at the time it was rendered in order to establish an understanding that the services were to be paid for. McCleery v. McLean, 11 Ill. A. 344.

89. Chapman v. Barnes, 29 Ill. A. 184; De Camp v. Wilson, 31 N. J. Eq. 656.

90. In re Riker, 85 N. J. Eq. 122, 94 A 622; Clark v. Todd, 16 NYS 491; Graham v. Gulliver, 4 NYS 33; Harper's Est., 7 Pa. Dist. 532; West's Est., 2 Pa. Dist. 268, 13 Pa. Co. 93; Voldemar's Est., 4 Pa. Co. 577.
[a] **Where services were first rendered through motives of friendship** and neighborly kindness, it will be presumed that the original relation continued in the absence of proof to the contrary. Conaughton's Est., 2 Pa. Dist. 189, 12 Pa. Co. 590.

91. Mead v. Cavanaugh, 161 App. Div. 177, 146 NYS 353; Graham v. Gulliver, 4 NYS 33; Sullivan v. Latimer, 38 S. C. 158, 17 SE 701.

92. Matter of Childs, 5 Misc. 560, 26 NYS 721; Wiley's Est., 11 Pa. Dist. 416, 27 Pa. Co. 279; Sullivan v. Latimer, 38 S. C. 158, 17 SE 701.

93. In re Newton, (Iowa) 171 NW 708; O'Brien's Est., 17 Phila. (Pa.) 456.
[a] **The fact that gratuitous services were rendered** raises no presumption that subsequent services of a different character and rendered under different conditions were also gratuitous. Hayden v. Henderson, 21 Ill. A. 299.

94. In re Young, 39 Mich. 429; Marsh's Est., 12 Pa. Dist. 98, 28 Pa. Co. 190; In re Robinson, 33 Pittsb LegJNS (Pa.) 214; In re Campbell, 32 PittsbLegJNS (Pa.) 409.
[a] **Evidence held sufficient.**—Doolittle v. McConnell, (Cal.) 174 P 305; Wood v. James, 15 Cal. A. 253, 114 P 587; Eppert v. Gardiner, 48 Ind. A. 188, 93 NE 550; Hill v. Hill, 45 Ind. A. 99, 90 NE 331; In re Pauly, 174 Iowa 122, 156 NW 355; Sullenbarger v. Ahrens, 168 Iowa 288, 150 NW 71; Wise v. Outtrim, 139 Iowa 192, 117 NW 264, 30 AmSR 301 (sufficient to go to jury); Miller v. Ewing, 163 Ky. 401, 174 SW 22; McCoy v. McCoy, (Ky.) 125 SW 177; Lancaster v. O'Brien, 136 Ky. 589, 124 SW 854; Galloway v. Galloway, 70 SW 48, 24 KyL 857; Fournier's Succ., 1 La. A. (Orleans) 245; Herman v. Oehrl, 116 Md. 512, 82 A 161; Wallace v. Schaub, 81 Md. 594, 32 A 324; Sherry v. Littlefield, (Mass.) 122 NE 300; Foote v. Hoffman, 200 Mich. 464, 166 NW 924; McNall v. Mitchell, 178 Mich. 493, 144 NW 850; Forsythe v. Thompson, 157 Mich. 669, 122 NW 219; Shane v. Shearsmith, 137 Mich. 32, 100 NW 123; In re Davis, 142 Minn. 187, 171 NW 778; Wagner v. Seaberg, 138 Minn. 37, 163 NW 975; Loviza v. Lynch, 115 Miss. 694, 76 S 629; Hays v. Miller, 189 Mo. A. 72, 173 SW 1096; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; Cole v. Fitzgerald, 132 Mo. A. 17, 111 SW 628 (sufficient to go to jury); Graham v. Rapp, 105 Mo. A. 590, 80 SW 42; Robinson v. Raynor, 28 N. Y. 494 [rev 36 Barb. 128]; Matter of Bradbury, 105 App. Div. 250, 93 NYS 418; Matter of Mosher, 103 App. Div. 459, 93 NYS 123 [aff 185 N. Y. 556 mem, 77 NE 1191 mem]; Matter of Hamilton, 70 App. Div. 73, 75 NYS 66 [aff 172 N. Y. 652 mem, 65 NE 1117 mem]; Hardenstein v. Brien, 96 Miss. 493, 50 S 979; In re Harper, 196 Pa. 137, 46 A 302; Lindsey's App., (Pa.) 15 A 434; Maquire's Est., 22 Pa. Dist. 539; MacInnies' Est., 21 Pa. Dist. 373; Sheehan's Est., 15 Pa. Dist. 356; Dettenmaier's Est., 8 Pa. Dist. 273; McCarroll's Est., 44 Pa. Co. 300; Hobin v. Hobin, 33 R. I. 249, 80 A 595; Higgs v. Bigelow, 39 S. D. 359, 164 NW 89; Anderson v. Osborn, 62 Wash. 400, 114 P 160; Nelson v. Christensen, 169 Wis. 373, 172 NW 741; McNaughton v. McClure, 169 Wis. 288, 171 NW 936.
[b] **Evidence held not sufficient.**—Leahy v. Cheney, 90 Conn. 611, 98 A 132, LRA1917D 809; Clawson v. Moore, 29 Ill. A. 296; Shutts v. Franke, 42 Ind. A. 275, 85 NE 781; Kibby v. Kibby, 8 Ind. A. 698, 35 NE 840; Smay v. Roberts, (Iowa) 164 NW 236; Trautman v. Traub, 150 Iowa 23, 129 NW 322; Sutherland v. Sutherland, 142 Ky. 688, 134 SW 1152; Gaunce v. Barlow, 70 SW 284, 24 KyL 929; Larmeau's Succ., 142 La. 1050, 78 S 113; Lowe v. Lowe, 111 Md. 113, 73 A 878; Pearre v. Smith, 110 Md. 531, 73 A 141; Lyons v. Jackson, (Mass.) 122 NE 304; In re De Haan, 169 Mich. 146, 134 NW 983; Davidson's App., 163 Mich. 502, 128 NW 738; Lapham v. Lacy, 161 Mich. 176, 125 NW 738; Wright v. Senn, 85 Mich. 191, 48 NW 545; McDermott v. Conlan, 153 App. Div. 69, 137 NYS 1105; Halladay v. Haas, 147 App. Div. 180, 132 NYS 25; Blumert v. Hoes, 127 App. Div. 547, 111 NYS 823; Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Weiss v. Bader, 124 App. Div. 495, 108 NYS 920; In re O'Neill, 49 App. Div. 414, 63 NYS 291; In re Hewlett, 19 NYS 193; In re Miller, 222 Pa. 334, 71 A 185; Carpenter v. Hays, 153 Pa. 432, 25 A 1127; Riemensberger's Est., 29 Pa. Super. 596; Hoffman's Est., 15 Pa. Dist. 524; McKallen's Est., 15 Pa. Dist. 338; Black's Est., 12 Pa. Dist. 720; McCaul's Est., 11 Pa. Dist. 773; Hamilton's Est., 11 Pa. Dist. 103, 26 Pa. Co. 422; Cook's Est., 12 Pa. Co. 621; Gossard v. Stevens, 40 S. D. 67, 166 NW 233; In re Ansley, 41 N. S. 527.

95. Ala.—Malone v. Malone, 106 Ala. 567, 17 S 676.
Ill.—Roberts v. Roberts, 175 Ill. A. 109.
La.—Gaines' Succ., 45 La. Ann. 1424, 14 S 251; Rice's Succ., 14 La. Ann. 317.
Mich.—Vandecar v. Nowland, 188 Mich. 429, 154 NW 137, 139 [quot Cyc].
N. Y.—Matter of Wever, 179 App. Div. 952, 165 NYS 1038; Matter of Zegel, 171 App. Div. 513, 157 NYS 735; In re Clyde, 155 NYS 621 [rev on other grounds 159 NYS 947]; Matter of Childs, 5 Misc. 560, 26 NYS 721.
Or.—Scott v. Merrill, 74 Or. 568, 146 P 99, 101 [cit Cyc].
Pa.—Wait's App., 4 Pa. Cas. 511, 9 A 943; Coulston's Est., 3 Pa. Dist. 99, 14 Pa. Co. 243; West's Est., 2 Pa. Dist. 268; McQuinn's Est., 18 Phila. 78; Kelly's Est., 16 Phila. 285.
As to claims generally see supra § 1122.

96. Ala.—Malone v. Malone, 106 Ala. 567, 17 S 676.
Ky.—Thomas v. Hobbs, 112 SW 574, 33 KyL 995.
La.—Rice's Succ., 14 La. Ann. 317.
Me.—Liberty v. Haines, 103 Me. 182, 68 A 738.
Mich.—Vandecar v. Nowland, 188 Mich. 429, 435, 154 NW 137 [quot Cyc]; Wright v. Senn, 85 Mich. 191, 48 NW 545.
Miss.—Carter v. Judge Adams County Prob. Ct., 10 Miss. 42.
N. J.—In re Flaacke, (Prerog.) 64 A 1020.
N. Y.—Matter of Wever, 179 App. Div. 952, 165 NYS 1038; Lyon v. Smith, 142 App. Div. 186, 126 NYS 994; Rock v. Rock, 105 App. Div. 157, 93 NYS 646; Hart v. Tuite, 75 App. Div. 323, 78 NYS 154; Hughes v. Davenport, 1 App. Div. 182, 37 NYS 243; Rowland v. Howard, 75 Hun 1, 25 NYS 1018; Matter of Mulligan, 82 Misc. 336, 143 NYS 686 [aff 165 App. Div. 912 mem, 150 NYS 1098 mem]; Matter of Devoe, 58 Misc. 490, 111 NYS 638, 6 Mills Surr. 399; Matter of Pray, 40 Misc. 516, 82 NYS 807, 3 Mills Surr. 540; Matter of Wilmot, 39 Misc. 686, 80 NYS 651, 3 Mills Surr. 418; Matter of Childs, 5 Misc. 560, 26 NYS 721; Clark v. Todd, 16 NYS 491.
Pa.—In re Mueller, 159 Pa. 590, 28 A 491; In re Miller, 159 Pa. 575, 28 A 443; Miller's Est., 136 Pa. 239, 20 A 796; Shenk's Est., 59 Pa. Super. 467; Kelly's Est., 24 Pa. Dist. 651; Appelgren's Est., 23 Pa. Dist. 624; Maguire's Est., 22 Pa. Dist. 539; Glentworth's Est., 17 Pa. Dist. 292; Monaghan's Est., 13 Pa. Dist. 694, 30 Pa. Co. 385; Wiley's Est., 11 Pa. Dist. 416, 27 Pa. Co. 279; Heilman's Est., 4 Pa. Dist. 571; West's Est., 2 Pa. Dist. 268; Conaughton's Est., 2 Pa. Dist. 189, 12 Pa. Co. 590; Koecker's Est., 9 Pa. Co. 238, 20 Phila. 71; Murray's Est., 6 Pa. Co. 632; Keith's Est., 5 Pa. Co. 581; Voldemar's Est., 4 Pa. Co. 577; Shaffer's Est., 6 Lack LegN 137; Kelly's Est., 16 Phila. 285.
R. I.—Gorton v. Johnson, 23 R. I. 138, 49 A 499.
"Claims for personal services which might have been presented to the debtor during his lifetime are the subjects of suspicion when presented after his death, and must be proved by clear and explicit testimony." Riemensberger's Est., 29 Pa. Super. 596, 598.
As to claims generally see supra § 1122.

97. Moore v. Smith, 103 Mich. 387, 61 NW 538; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [app dism 197 N. Y. 521 mem, 90 NE 1156 mem]; Hughes v. Davenport, 1 App. Div. 182, 37 NYS 182; Wood v. Rusco, 4 Redf. Surr. (N. Y.) 380.

98. See supra § 1120.

99. Ga.—Phillips v. Owens, 135 Ga. 500, 69 SE 705.

grandmother, a letter written by the wife stating that she did not expect to come into possession of anything when the grandmother died does not, as a matter of law, estop her from claiming compensation for her services.[1] A statement in an instrument executed by intestate, giving his niece a certain sum, that it was in "consideration of her care and attention during my sickness" has been held prima facie evidence, in an action thereon against the estate, that he received the care and attention stated therein.[2]

[§ 1124] **(10) Hearing.** Where objections are filed to the allowance of a claim, the issues presented should be heard by the probate judge,[3] and the matter is pending in his court until it is determined.[4] A hearing on a contested claim is at law and not in equity.[5] The person seeking to establish a claim has the affirmative of the issue and is entitled to open and close the case.[6] A party may introduce his evidence in the order in which he prefers.[7] Under some statutes only proof by deposition can be heard on the final trial.[8] The submission of disputed questions of fact to a jury is discretionary with the probate court,[9] and it may do so of its own motion.[10] Where the trial is had before a jury it is for them to determine whether the family relationship existed between decedent and one claiming compensation for services rendered to him,[11] whether there was contract to pay for the services,[12] and whether claimant is entitled to compensation;[13] and it is also for the jury to determine whether a note was supported by good and sufficient consideration[14] or was obtained by undue influence.[15] Where there was evidence of an agreement by decedent to pay claimant for services rendered without specifying the amount, the agreement being merely to pay him "handsomely and more than any percentage would amount to," it was a question of fact as to what compensation was reasonable in view of the terms as to contract and services rendered.[16] Instructions to the jury should, of course, advise them clearly of the questions properly presented for their consideration and the principles of law applicable thereto.[17]

Ky.—Conway v. Conway, 130 Ky. 218, 113 SW 94.

Mich.—Vandecar v. Nowland, 188 Mich. 429, 154 NW 137; In re Tolsma, 183 Mich. 314, 149 NW 1050; Decker v. Kanous, 129 Mich. 146, 88 NW 398.

Miss.—Hoyle v. Smith, 113 Miss. 729, 74 S 611.

Mo.—Clow v. Wormington, 206 SW 415; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838.

N. Y.—Matter of Zegel, 171 App. Div. 513, 157 NYS 735; In re Clyde, 155 NYS 621 [rev on other grounds 159 NYS 947].

Oh.—Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 493.

Or.—Wilkes v. Cornelius, 21 Or. 348, 28 P 135.

Pa.—Wiley's Est., 11 Pa. Dist. 416, 27 Pa. Co. 279; McGlinchey's Est., 27 Pa. Co. 469.

Wis.—Bostwick v. Bostwick, 71 Wis. 273, 37 NW 405.

[a] **Evidence held sufficient.**—In re Rohrer, 160 Cal. 574, 117 P 672, AnnCas1913A 479; Crampton v. Logan, 28 Ind. A. 405, 63 NE 51; Ashley v. Smith, 152 Mich. 197, 115 NW 1052; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838; Hartley v. Hartley, 173 Mo. A. 18, 155 SW 1099; Taylor v. Hudson, 145 Mo. A. 377, 129 SW 261; Cupp v. McCallister, 144 Mo. A. 111, 129 SW 435 (to take question to jury); Brinton v. Thomas, 138 Mo. A. 64, 119 SW 1016; Allen v. Allen, 101 Mo. A. 676, 74 SW 396; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495; Ely v. Ely, 64 N. J. Eq. 790, 53 A 1125 [aff (Ch.) 50 A 657]; Freeman v. Brown, 151 N. C. 111, 65 SE 743; Nephi First Nat. Bank v. Christensen, 39 Utah 568, 118 P 778; Marx v. Marx, 132 Wis. 113, 111 NW 1103.

[b] **Evidence held not sufficient.**—Crane v. Derrick, 157 Cal. 667, 109 P 31; Phillips v. Owens, 135 Ga. 500, 69 SE 705; Shutts v. Franke, 42 Ind. A. 275, 85 NE 781; Waechter v. Walters, 41 Ind. A. 408, 84 NE 22; Conway v. Conway, 130 Ky. 218, 113 SW 94; Thomas v. Hobbs, 112 SW 574, 33 KyL 995; Daste's Succ., 125 La. 657, 51 S 677, 29 LRANS 297; Lowe v. Lowe, 111 Md. 113, 73 A 878; Rose v. Mays, 139 Mo. A. 246, 122 SW 769; More v. Shepard, 133 App. Div. 471, 117 NYS 1095; Landers v. Forbes, 70 App. Div. 619, 74 NYS 833; Newell v. Lawton, 20 R. I. 307, 38 A 946; Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

1. Lambert v. Hodgdon, 172 Mo. A. 24, 154 SW 450.

2. Spencer v. Potter, 85 Vt. 1, 80 A 821.

3. In re Coryell, 16 Ida. 201, 101 P 723; Matter of Browne, 35 Misc. 362, 71 NYS 1034, 2 Mills Surr. 274.

[a] **Where a judgment is presented as a claim** against an intestate's estate, it is for the surrogate to determine to whom the judgment is payable, and whether it has in fact been paid. Matter of Browne, 35 Misc. 362, 71 NYS 1034, 2 Mills Surr. 274.

4. In re Coryell, 16 Ida. 201, 101 P 723.

5. Mosher v. Goodale, 129 Iowa 719, 106 NW 195.

6. Yingling v. Hesson, 16 Md. 112.

7. Ginn v. Collins, 43 Ind. 271.

[a] **Accordingly,** on the trial of a proceeding to enforce a claim against a decedent's estate, it was not error to admit evidence of the value of personal service, rendered by plaintiff to decedent, his father, before any proof was given of an express promise by decedent to pay for such services. Ginn v. Collins, 43 Ind. 271.

8. Cottrell v. Barnes, 90 SW 1048, 28 KyL 1014.

9. Esterly v. Rua, 122 Fed. 609, 58 CCA 548; Kates' Est., 148 Pa. 471, 24 A 77; Ike's Est., 8 Pa. Dist. 501, 23 Pa. Co. 7.

[a] **A trial by jury cannot be demanded** by the parties as a matter of right, but both issues of law and of fact are to be tried by the court unless referred. Esterly v. Rua, 122 Fed. 609, 58 CCA 548.

[b] **An issue will not be granted** on a mere naked allegation where the evidence is not sufficient to show any real matter in dispute. Ike's Est., 8 Pa. Dist. 501, 23 Pa. Co. 7.

[c] **Where the testimony is conflicting** upon the question of whether a promissory note presented as a claim against the estate is a forgery, the orphans' court may, with the acquiescence of the auditing judge, award a precept to the court of common pleas to try the issue before a jury. Blinn's Est., 21 Pa. Dist. 426.

10. In re Dutton, 205 Pa. 244, 54 A 903; Blinn's Est., 21 Pa. Dist. 426.

11. Caskey v. Kineavy, 60 Pa. Super. 87.

12. Ill.—Ross v. Ross, 204 Ill. A. 636.

Ind.—Weesner v. Weesner, (A.) 124 NE 710.

Iowa.—Parnham v. Weeks, 180 Iowa 649, 163 NW 454.

Mich.—Stoner v. McConaughy, 181 Mich. 381, 148 NW 161.

Minn.—Lovell v. Beedle, 138 Minn. 12, 163 NW 778.

Wis.—Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

13. Bettinghouse v. Bettinghouse, 156 Mich. 169, 120 NW 617 (where on the trial of a claim by a son against his mother's estate for board and services alleged to have been rendered decedent, there was evidence justifying the inference that no pecuniary reward was expected, the court properly refused to instruct that claimant was entitled to some amount, the question being for the jury).

14. Parker v. O'Bryen, 181 Mo. A. 487, 164 SW 648.

15. Parker v. O'Bryen, 181 Mo. A. 487, 164 SW 648.

16. McNall v. Mitchell, 178 Mich. 493, 144 NW 850.

17. See cases infra this note.

[a] **Where there was no material evidence that complainant rendered any services** to decedent personally, the court erred in instructing that, if complainant was not a member of decedent's family, and rendered useful services to him in his lifetime, the fact of their rendition was prima facie evidence of their acceptance by him, and, in the absence of proof to the contrary, or of an express contract, raised an obligation to pay what they were reasonably worth. Pearre v. Smith, 110 Md. 531, 73 A 141.

[b] **Construction of ambiguous instrument.**—On the trial of a disputed claim against the estate of a decedent on an instrument purporting to give plaintiff a certain sum payable by the administrator for the care and attention given intestate during his sickness, signed by intestate, it was error to refuse to charge that if he signed the instrument with intent to bind his estate, but that part of the consideration was love and affection and part for services rendered with the understanding that they should be paid for, the jury could separate the consideration and determine how much was intended for services and how much as a gift, and render a verdict for the value of the services and disallow the remainder, the instrument being ambiguous and subject to such a construction under the evidence. Spencer v. Potter, 85 Vt. 1, 80 A 821.

[c] **Instructions not applicable to facts.**—In an action against the administrator of a decedent, brought by the husband of a granddaughter of decedent for board furnished him, the refusal of instructions on the subject of gratuitous services to a member of a family was proper, where it appeared that plaintiff was poor, that decedent was possessed of means, and expected to pay and did make payments from time to time, and counsel for the adminis-

[§ 1125] **(11) Findings and Decision.** Where the proof is insufficient to warrant a judgment for any sum, it is proper to dismiss the claim.[18] On a claim for personal services by decedent's granddaughter, a request for a special finding, whether the relation of grandfather and grandchild changed to that of master and servant was properly refused,[19] as was also a request for a special finding as to when any express contract of employment was entered into where the evidence showed that decedent's promises were continuing.[20] Where, in proceedings to establish a claim for boarding and caring for decedent, there was a general verdict for plaintiff, but in answer to special interrogatories the jury found that claimant had no contract with decedent, and that no amount was promised, and that decedent for a number of years prior to her death lived among her children, of whom claimant was one, such findings were not in irreconcilable conflict with the general verdict, and it was error to enter a judgment for defendant non obstante veredicto.[21]

[§ 1126] **(12) Judgment—(a) In General.** The judgment rendered in a probate court on the trial of a disputed claim is not a judgment in the technical sense, on which execution may issue,[22] but it simply ascertains whether the claim should be allowed and if allowed it is ordered to be paid from the assets of the estate.[23] Even a formal order of allowance is not necessary, but if the judgment as rendered is such in effect, this is sufficient.[24] The judgment must be for a definite sum [25] which cannot be more than the amount of the claim.[26] Where two persons have, at the audit of an administrator's account, presented distinct claims for services rendered in selling property of decedent, each claiming to have sold the property and to be entitled to compensation, and there being no privity of contract between them, the decree should be separate, and not joint.[27]

[§ 1127] **(b) Effect and Conclusiveness.** The judgment is a final adjudication as to the validity and amount of the claim,[28] and has the same conclusive force as the judgments of other tribunals,[29] is entitled to the same presumptions as to regularity and validity,[30] and cannot be questioned in a collateral proceeding.[31] It is binding upon the representative,[32] the claimant,[33] the heirs [34] and leg-

trator stated that decedent paid his way and intended to pay his board. Yoder v. Engelbert, 155 Iowa 515, 136 NW 522.

[d] **Presumption as to payment.**—An instruction that if plaintiff never demanded payment during decedent's lifetime for services in caring for and boarding him, it must be presumed that decedent paid for such services, and before the jury could find for plaintiff under such circumstances, they must find that decedent did not pay, was sufficient to protect defendant. Cole v. Waters, 164 Mo. A. 567, 147 SW 552.

[e] **It was error to instruct the jury** that they could infer that an indebtedness was paid if decedent from time to time during the rendition of services transferred money or property to claimants without disclosing his purpose in making such transfers, regardless of the value of the services rendered or the amount of money or value of property transferred. Atkinson v. Maris, 40 Ind. A. 718, 81 NE 745.

18. Weisinger v. Harding, (Ky.) 115 SW 800.

19. Hobin v. Hobin, 33 R. I. 249, 80 A 595.

20. Hobin v. Hobin, 33 R. I. 249, 80 A 595.

21. Vaught v. Barnes, 29 Ind. A. 387, 62 NE 93, 63 NE 864, 64 NE 623.

22. Russell v. Hubbard, 59 Ill. 335; Bentley v. Brown, 123 Ind. 552, 24 NE 507; Voorhies v. Eubank, 6 Iowa 274.

[a] **A judgment is not void because** it directs execution thereon. National Lumber, etc., Co. v. Robison, 48 Okl. 140, 149 P 1133.

23. Cal.—Hall v. Cayot, 141 Cal. 13, 74 P 299.

Ida.—McElroy v. Whitney, 24 Ida. 210, 133 P 118.

Ill.—Russell v. Hubbard, 59 Ill. 335.

Ind.—Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

Iowa.—Voorhies v. Eubank, 6 Iowa 274.

Mo.—Lipperd v. Lipperd, 181 Mo. A. 106, 163 SW 934.

Mont.—Gauss v. Trump, 48 Mont. 92, 135 P 910.

N. M.—Guiterrez v. Scholle, 12 N. M. 328, 78 P 50.

[a] **The judgment only establishes the claim** (1) in the same manner as if allowed by the representative and approved by the court. Hall v. Cayot, 141 Cal. 13, 74 P 299. (2) "A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due." McElroy v. Whitney, 24 Ida. 210, 133 P 118.

[b] **Upon proof of a claim payable in installments** some of which are not yet due judgment may be rendered for its payment at different times as the installments fall due. Wolfe v. Wilsey, 2 Ind. A. 549, 28 NE 1004.

[c] **Where the claim was not filed within the proper time** and can be paid only out of subsequently discovered assets, the judgment should in this regard be special and not general. Russell v. Hubbard, 59 Ill. 335.

[d] **Claim certified to circuit court.**—On the trial of a claim against a decedent's estate, certified into a circuit court, the judgment for claimant should not award execution, but should be ordered certified to the probate court for classification against the estate. Lipperd v. Lipperd, 181 Mo. A. 106, 163 SW 934.

[e] **An amendment** to a judgment against an administrator in an action on a claim, by inserting an omitted provision that it must "be paid in due course of administration," did not change the effect of the judgment, since such words were therefore a part of the judgment under the statute. McElroy v. Whitney, 24 Ida. 210, 133 P 118.

24. Boyl v. Simpson, 23 Ind. 393. See also U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828 (where a judgment of the county court fixed the compensation of an attorney for legal services in the settlement of the estate of decedent and directed that the administrator should pay the judgment, the administrator was bound to pay, although a special order requiring him to pay was not made).

25. Whilt's Est., 20 Pa. Dist. 1097.

26. Russell v. Hubbard, 59 Ill. 335.

27. In re McNulty, 230 Pa. 387, 79 A 645.

28. James v. Gibson, 73 Ark. 440, 84 SW 485; Bentley v. Brown, 123 Ind. 552, 24 NE 507; Culver v. Lutz, 171 Ky. 690, 189 SW 240; In re McCaul, 12 Pa. Dist. 769.

29. James v. Gibson, 73 Ark. 440, 84 SW 485; Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316; Moody v. Peyton, 135 Mo. 482, 36 SW 621, 58 AmSR 604; Chapman's Est., 18 Pa. Dist. 354.

[a] **In the absence of fraud or collusion** the judgment is final and conclusive. Jackson v. Gorman, 70 Ark. 88, 66 SW 346; Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316 [rev 100 Ill. A. 70]; Ward v. Durham, 134 Ill. 195, 25 NE 745; Sturges v. Sheriff, 14 La. Ann. 231; Moody v. Peyton, 135 Mo. 482, 36 SW 621, 58 AmSR 604; Alexander's Est., 31 Pa. Co. 274; Sherman v. Abell, 46 Vt. 547.

30. Peo. v. Gray, 72 Ill. 343; Little v. Sinnett, 7 Iowa 324; Million v. Ohnsorg, 10 Mo. A. 432; Guitierrez v. Scholle, 12 N. M. 328, 78 P 50.

31. Ark.—Jackson v. Gorman, 70 Ark. 88, 66 SW 346.

Cal.—In re Cook, 14 Cal. 129.

Conn.—Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

Ill.—Tenk v. Lock, 26 Ill. A. 216.

Ind.—Phipps v. Sappenfield, 54 Ind. A. 139, 102 NE 841.

Mich.—O'Connor v. Boylan, 49 Mich. 209, 13 NW 519.

32. U. S.—Owsley v. Central Trust Co., 196 Fed. 412.

Ind.—Bentley v. Brown, 123 Ind. 552, 24 NE 507.

Iowa.—Ryan v. Hutchinson, 161 Iowa 575, 143 NW 433.

Mo.—Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Knecht v. U. S. Savings Inst., 2 Mo. A. 563.

Okl.—National Lumber, etc., Co., v. Robison, 48 Okl. 140, 149 P 1133.

[a] **Final so far as personalty concerned.**—"Such judgment is final against the representative so far as personalty is concerned, but is merely prima facie evidence of debt as against realty. The reasons for which distinction are laid down in Noe v. Moutray, 170 Ill. 169, 48 NE 709. The doctrine has been recently redeclared in Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316." Owsley v. New York Central Trust Co., 196 Fed. 412, 416.

[b] **A judgment on a claim in favor of the representative** is equally binding upon the estate and upon subsequent representatives as would be the allowance of a claim in favor of any other creditor. Bentley v. Brown, 123 Ind. 552, 24 NE 507.

33. Culver v. Lutz, 171 Ky. 690, 189 SW 240; Shepherd v. Bevans, 4 Md. Ch. 408.

34. Sturges v. Sheriff, 14 La. Ann. 231; Moody v. Peyton, 135 Mo. 482, 36 SW 621, 58 AmSR 604.

atees,[35] and other creditors.[36] So also, where the court, on the trial of a disputed claim against an estate, allowed a set-off outside the issues, but claimant did not appeal, the judgment is conclusive as against him.[37]

[§ 1128] **(c) Vacating or Setting Aside.** While the power of probate courts to set aside their own orders or judgments allowing claim has been asserted,[38] it has been held that such courts have no jurisdiction to set aside their own adjudications and grant rehearings,[39] at least after the term at which a judgment was rendered.[40] Nor will a court of chancery grant such relief in the absence of a clear showing of fraud or mistake.[41] So an objection that claims presented for allowance in probate proceedings are barred by limitations should be presented before the commissioners or on appeal from their allowance in probate proceedings, and cannot be considered in an action to set aside the probate proceedings,[42] and while the fact that a referee appointed to pass upon a disputed claim allowed an amendment of the claim filed, and that a judgment materially differing from that asked for in the claim was rendered on the amended claim, may be ground for reversing the judgment on appeal, it is not ground for the vacation of such judgment at a subsequent term.[43] Allegations, in a suit to set aside probate proceedings allowing a claim, that claimant wrongfully presented his claim, which was false and fraudulent, and fraudulently procured its allowance by false testimony, are too general to require equitable intervention on the ground of fraud.[44] Where some of the items of a claim presented for allowance were not barred by limitations, the fact that some of them were barred did not oust the probate court of jurisdiction, and was not ground for setting aside the probate proceedings in an action by decedent's heirs against legatees of claimant.[45]

[§ 1129] **e. Appeal—(1) Right to Appeal.** Appeals from judgments or orders of probate courts allowing or rejecting disputed claims are in most jurisdictions expressly permitted by statute.[46] Where there is a remedy by appeal a suit in equity cannot be maintained to enjoin the enforcement of the probate decree,[47] nor will mandamus lie to compel a probate judge to allow a rejected claim.[48] The decision of a referee under a statutory reference may be reviewed either by a motion for a new trial by way of opposing the motion to confirm the report or by a direct appeal from the judgment entered on the report.[49] The fact that after a commissioner's report of liabilities of the estate, allowing defendant's claim, was filed in an action for administration, other creditors filed petitions asserting claims against the estate, will not prevent

35. Ward v. Durham, 134 Ill. 195, 25 NE 745.

36. Owsley v. Central Trust Co., 196 Fed. 412; Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316 [rev 100 Ill. A. 70].

[a] **Foreign creditor.**—Where a foreign creditor of a decedent's estate, under administration in Illinois, elected to file its claim there, it was bound by a judgment allowing the claim not only as to such allowance, but by the rate of interest prescribed in the Illinois law. Owsley v. Central Trust Co., 196 Fed. 412.

37. Irvine v. Beck, 62 Or. 593, 125 P 832.

38. In re Roeske, 205 Ill. A. 366; Tisdale v. Davis, 198 Ill. A. 116; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228]; Meckel's App., 112 Pa. 554, 4 A 447; In re Stroup, 40 S. D. 37, 166 NW 155.

39. Ark.—Hoshall v. Brown, 102 Ark. 114, 143 SW 1081.

Cal.—In re Cook, 14 Cal. 129.

Ky.—Culver v. Lutz, 171 Ky. 690, 189 SW 240.

Mich.—Hitchcock v. Genesee Prob. Judge, 99 Mich. 128, 57 NW 1097.

Tex.—Moore v. Hillebrant, 14 Tex. 312, 65 AmD 118.

40. Culver v. Lutz, 171 Ky. 690, 189 SW 240.

41. Ward v. Durham, 134 Ill. 195, 25 NE 745; Hendron v. Kinner, 110 Iowa 544, 80 NW 419, 81 NW 783; Andrews v. Osborn, 159 Mich. 77, 123 NW 599.

[a] **To authorize relief** against a judgment on the ground of fraud, accident, or mistake there must have been a valid defense thereto on the merits which has been lost, which loss was occasioned by the fraud or act of the prevailing party or by mistake on the part of the losing party unmixed with any negligence or default on his part. Ward v. Durham, 134 Ill. 195, 25 NE 745.

[b] **The mere fact that claims allowed are on their face barred** by limitations is not sufficient to justify an order setting aside the allowance. Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

42. Andrews v. Osborn, 159 Mich. 77, 123 NW 599.

43. Riley v. Ryan, 103 App. Div. 176, 93 NYS 386 [rev 45 Misc. 151, 91 NYS 952].

44. Andrews v. Osborn, 159 Mich. 77, 123 NW 599.

45. Andrews v. Osborn, 159 Mich. 77, 123 NW 599.

46. Ark.—Hoshall v. Brown, 102 Ark. 114, 143 SW 1081; Ex p. Cheatham, 6 Ark. 437.

Cal.—In re Hite, 155 Cal. 448, 101 P 448.

Colo.—Corning v. Ryan, 3 Colo. 525; Tucker v. Tucker, 21 Colo. A. 94, 121 P 125.

Ill.—Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316 [rev 100 Ill. A. 70]; Grier v. Cable, 159 Ill. 29, 42 NE 395 [aff 53 Ill. A. 350]; Bassett v. Noble, 15 Ill. A. 360.

Ind.—Walker v. Heller, 104 Ind. 327, 3 NE 114.

Kan.—Morgan v. Saline Valley Bank, 4 Kan. A. 668, 46 P 61.

Ky.—Culver v. Lutz, 171 Ky. 690, 189 SW 240.

Mich.—Bartlett v. Wayne Cir. Judge, 133 Mich. 604, 95 NW 721; Buchoz v. Pray, 36 Mich. 429.

Minn.—State v. Freeborn County Prob. Ct., 142 Minn. 283, 171 NW 928; Stellmacher v. Bruder, 93 Minn. 98, 100 NW 473; Smith v. Pence, 62 Minn. 321, 64 NW 822.

Nebr.—Riddle v. Furmin, 71 Nebr. 108, 98 NW 420.

N. H.—Harmon v. Haines, 68 N. H. 28, 38 A 734; Sawyer v. Copp, 6 N. H. 42.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Oh.—Royer v. Trumpler, 7 Oh. A. 312 [aff 95 Oh. St. 194, 115 NE 1018].

Tex.—Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81.

Vt.—Lathrop v. Hitchcock, 38 Vt. 496.

Wis.—Groner v. Hield, 22 Wis. 200.

See also Appeal and Error § 406 et seq.

[a] **What statute governs.**—An appeal from an order rejecting a claim against a decedent's estate will not lie under the general statute providing for appeals, but must be prosecuted under the statute providing for appeals by a party aggrieved by a matter connected with a decedent's estate. Dallam v. Stockwell, 33 Ind. A. 620, 71 NE 911.

[b] **An appeal from an order for the hearing of claims** generally, made after the appointment of a special and before the appointment of a general administrator, is the appropriate remedy by which to test the validity of such order, and of the allowance of claims thereunder. Jenks v. Black, 96 Mich. 122, 55 NW 563.

[c] **Disallowance of claim not a nonsuit.**—A judgment disallowing a claim against the estate is not a judgment of nonsuit. "It is and evidently was intended to be a formal judgment of disallowance, and had the same force and effect as a judgment against the claimant that a judgment of allowance of the claim under the same circumstances would have had as against the executor." Hence it is appealable. Tucker v. Tucker, 21 Colo. A. 94, 97, 121 P 125.

[d] **Writ of review.**—Where it was claimed that the county court exceeded its jurisdiction in allowing the claim of an administrator for money alleged to have been loaned by him to decedent, because the court was prohibited by statute from doing so, the court's order allowing the claim was reviewable by writ of review. Farrow v. Nevin, 44 Or. 496, 75 P 711.

[e] **Certiorari** does not lie to the county court sitting in probate. Schaeffer v. Burnett, 221 Ill. 315, 77 NE 546.

[f] **Appeal not allowed.**—In re Tamer, (Ariz.) 179 P 643.

47. Reilly v. Porcher, 46 App. Div. 290, 61 NYS 662.

48. Ex p. Cheatham, 6 Ark. 437.

49. Riley v. Ryan, 103 App. Div. 176, 93 NYS 386; Foote v. Valentine, 48 Hun 475, 1 NYS 410, 14 NYCivProc 332; Coe v. Coe, 37 Barb. (N. Y.) 232; Boyd v. Bigelow, 14 HowPr (N. Y.) 511.

[a] **Motion for new trial not necessary.**—Where a party appears and unsuccessfully opposes a motion for confirmation of the report he may appeal from the judgment entered thereon without first moving at a special term for a new trial on a case and exceptions. Kellogg v. Clark, 23 Hun (N. Y.) 393.

[b] **Costs in proceedings on a statutory reference** of a claim against a decedent's estate are within the discretion of the court and its decision

the administrator from then appealing from a decree confirming the report filed.[50]

[§ 1130] **(2) Who May Appeal.** Some of the statutes provide that any person who may consider himself aggrieved may appeal,[51] in which case it is not necessary that appellant should be a party of record to the proceedings in the probate court but merely that he should be aggrieved thereby.[52] Under such statutes heirs or distributees are parties interested in the allowance of claims and are entitled to appeal[53] in their own names,[54] although not parties to the record.[55] Under some statutes, however, the executor or administrator alone represents the estate with respect to creditors,[56] and the heirs are not entitled to an appeal with respect to the allowance of a claim[57] unless the representative refuses to take an appeal,[58] in which case the heirs are entitled to control the proceedings without interference from the representative.[59] Where, in the case of claims presented by the representative the court appoints some person to defend the action in the probate court, the estate may appeal, through the person appointed, from an allowance of the claim,[60] and a corepresentative who is also a legatee may in either capacity appeal from the allowance of a claim in favor of the other representative.[61] The representative is a proper party to appeal in behalf of those whose interests he represents from the allowance of the claims of creditors,[62] but creditors whose claims have been rejected must appeal on their own account,[63] since as to them the representative is a party adversely interested.[64] Where there are ample funds to meet any claim which may be allowed, one claimant cannot appeal from a decree allowing the claim of another.[65] Where a claim is disallowed the personal representative cannot appeal.[66]

[§ 1131] **(3) From What Action Appeal May Be Taken.** A formal entry of judgment is not necessary to authorize an appeal, but any entry which plainly indicates the determination of the probate court to allow or disallow the claim is sufficient.[67]

will not be reviewed. Hauxhurst v. Ritch, 119 N. Y. 621, 23 NE 176.

50. Reid v. Windsor, 111 Va. 825, 69 SE 1101.

51. Weer v. Gand, 88 Ill. 490; Pfirshing v. Falsh, 87 Ill. 260; Darwin v. Jones, 82 Ill. 107; Daboll v. Field, 9 R. I. 266; Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81; Lathrop v. Hitchcock, 38 Vt. 496.

[a] **Appellant must be a person aggrieved,** although the statute literally provides that any person "who may consider" himself aggrieved may appeal, and so before one as a creditor can appeal from an order of the probate court he must have filed a claim as a creditor. Wallace v. Chicago, etc., Stove Co., 46 Ill. A. 571.

52. Weer v. Gand, 88 Ill. 490; Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81; Lathrop v. Hitchcock, 38 Vt. 496.

53. McCormick v. Groh, (Mo. A.) 198 SW 445; Murphy v. Murphy, 2 Mo. A. 156; Farmer v. Saunders, 60 Tex. Civ. A. 197, 128 SW 941.

[a] **The administrator of an heir** has the same right to appeal under the statute that the heir would have had. Hammers v. Sanders, 106 Mo. A. 100, 80 SW 16.

[b] **A purchaser of the interest of a distributee** may appeal from the allowance of a claim. Hammers v. Sanders, 106 Mo. A. 100, 80 SW 16.

[c] **An heir at law of an adjudicated insolvent estate** has no standing to appeal from the allowance of a creditor's claim, where, even if the claim were disallowed, the balance would not be sufficient to pay the other creditors. The heir in such a case is not a "person aggrieved" within the meaning of the statutes. Shuman's Est., 45 Pa. Super. 587.

54. Pfirshing v. Falsh, 87 Ill. 260; Burns v. Keas, 20 Iowa 16.

55. Murphy v. Murphy, 2 Mo. A. 156.

56. Hall v. Rutherford, 89 Ark. 553, 117 SW 548.

57. Hall v. Rutherford, 89 Ark. 553, 117 SW 548; Scott v. Penn, 68 Ark. 492, 60 SW 235; Johnson v. Williams, 28 Ark. 478; O'Brien v. Murphy, 136 Minn. 327, 162 NW 356; Carney v. Superior Ct., 30 R. I. 276, 74 A 1018.

"The heirs at law, not being parties to the record in the probate court, had no right to appeal from the judgment of that court, and their only remedy was by suit to set aside the judgment on account of fraud in the procurement thereof." Davis v. Rhea, 90 Ark. 261, 263, 119 SW 271.

58. King v. Ingham Cir. Judge, 69 Mich. 84, 37 NW 50; Daniels v. Stevens, 60 Mich. 219, 27 NW 1; Adams v. Murphy, 136 Minn. 471, 162 NW 357; O'Brien v. Murphy, 136 Minn. 327, 162 NW 356; Groner v. Hield, 22 Wis. 200.

[a] **A neglect to appeal** within the time limited for taking an appeal is equivalent to "declining" to do so within the meaning of the statute and gives the heirs the right to appeal. Groner v. Hield, 22 Wis. 200.

59. King v. Ingham Cir. Judge, 69 Mich. 84, 37 NW 50; O'Brien v. Murphy, 136 Minn. 327, 162 NW 356.

60. Bassett v. Noble, 15 Ill. A. 360.

61. Hesson v. Hesson, 14 Md. 8.

62. Alaska.—In re Gladough, 1 Alaska 649.

Colo.—Denison v. Jerome, 43 Colo. 456, 96 P 166.

Mich.—Shear v. Shear, 1 Mich. N. P. 216.

Miss.—Overstreet v. Trainer, 24 Miss. 484.

R. I.—Daboll v. Field, 9 R. I. 266.

[a] **Where appeals are not taken as a matter of right** but must be allowed by the court, a representative will not be allowed to appeal, as he is not personally interested, unless it is shown that he does so in the interest of heirs or others affected by the allowance of the claims. In re Gladough, 1 Alaska 649.

[b] **If the representative declines to appear** and a judgment is rendered in the probate court, upon his default, allowing a claim, he cannot appeal. In re Carver, 10 S. D. 609, 74 NW 1056.

[c] **One of two administrators** may appeal from an order allowing claims, although his coadministrator declines to consent thereto. Hammond v. Wayne Cir. Judge, 140 Mich. 371, 103 NW 996.

[d] **A special administrator,** after defending a claim against an estate in the probate court, may appeal to the circuit court without first obtaining leave of the probate court. McNamara v. Michigan Trust Co., 148 Mich. 346, 111 NW 1066.

[e] **An administrator of an insolvent estate may** appeal from a judgment allowing a claim against the estate as a claim of the first class, where such allowance will injuriously affect the rights of other creditors. Denison v. Jerome, 43 Colo. 456, 96 P 166.

[f] **Claims reported as uncontested.**—Where a creditor of a decedent makes a claim before an auditor, and no other creditor or claimant objects, and the auditor allows the claim reporting that it was not contested, and the court confirms his report, the executor has no standing on appeal to object to the allowance of the claim. Mays' Est., 25 Pa. Super. 267.

63. Ala.—Pearson v. Darrington, 32 Ala. 227.

Cal.—In re Hite, 155 Cal. 448, 101 P 448.

La.—Henderson's Succ., 113 La. 101, 36 S 904; Trouilly's Succ., 52 La. Ann. 276, 26 S 851.

Mich.—Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326.

Mo.—Hawkins v. Quinette, 156 Mo. A. 153, 136 SW 246.

[a] **An attorney rendering services** to an administrator may appeal from an order denying compensation. In re Hite, 155 Cal. 448, 101 P 448.

[b] **The executors of a creditor of an estate** are sufficiently aggrieved by the probate court's refusal to entertain a claim belonging to the estate which they represent to be entitled to appeal from such a decision. Hart v. Shiawassee Cir. Judge, 56 Mich. 592, 23 NW 326.

[c] **Bankruptcy of claimant.**—Where after a partnership had filed a claim against an estate, the firm assets were, in the course of bankruptcy proceedings, transferred to a third person, but no move was made to substitute the latter as claimant, the partnership was entitled to appeal from an order substituting the public administrator as claimant and in effect precluding the partnership from recovering on the claim. Hawkins v. Quinette, 156 Mo. A. 153, 136 SW 246.

64. Pearson v. Darrington, 32 Ala. 227.

65. In re McNulty, 230 Pa. 387, 79 A 645 (holding also that on such an appeal, the administrator, who has not taken proper legal steps to contest the claim allowed by appealing from the decree allowing it, has no standing to contest both claims and seek to have them rejected).

66. Crenshaw v. Sanford, 14 Ariz. 1, 123 P 31 ("The administrator is not and could not be aggrieved by reason of the judgment of the lower court. 'It is a sound proposition, that administrators, general and special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and therefore will not be heard to appeal from such orders.' In re Welch, 106 Cal. 427, 39 P 805; Schlegel v. Sisson, 8 S. D. 476, 66 NW 1087. We conclude that the administrator in this cause has no such interest in the demands of creditors against the estate as to authorize him to appeal from a judgment disallowing such demands. He is fully protected by the judgment of the district court, and ought not be permitted to use the funds of the estate in prosecuting litigation that cannot involve him in liability").

67. Corning v. Ryan, 3 Colo. 525.

Where the probate court allows a portion and disallows the balance of a claim of the same general character, an appeal may be taken from that portion of the order which disallows the claim.[68] An appeal will not lie from an order granting a motion to vacate the allowance of a claim against the estate.[69]

[§ 1132] **(4) Time for Taking Appeal.** The time within which appeals may be taken is ordinarily prescribed by statute,[70] and if the appeal is not taken within the time limited it may be dismissed on motion,[71] But under the statutes of some states the court may, under certain circumstances, allow an appeal after the regular time has expired.[72] Where the time allowed for taking an appeal had expired, an amendment to the judgment against an administrator, by inserting merely words which the statute would have read into the judgment, did not revive the time so as to renew the right of appeal.[73] Where, after the time has elapsed, leave to appeal from an allowance by the commissioners is sought on the ground of accident or mistake, the petitioner cannot complain that the court in that proceeding determined the merits of his defense,[74] and it cannot be presumed that the lower court did not consider the averments of the verified petition because the finding stated that, except from the petition, it did not appear whether the petitioner believed the claim to be just or unjust.[75]

[§ 1133] **(5) Jurisdiction on Appeal.** The fact that appellee, the claimant, does not enter an appearance in the circuit court on an appeal from the allowance of a claim in the probate court does not deprive the circuit court of jurisdiction.[76] Where defendant, in an action to establish a claim against an estate, entered upon trial in the district court on appeal without objecting to that court's jurisdiction on the ground that the probate court did not have jurisdiction to try the issue involved, which was the existence of a constructive trust, the objection to the district court's jurisdiction was waived.[77] Where, after disallowance of a claim by the probate court, a paper was filed stipulating the facts, signed by counsel but not authenticated, it could not be considered by the superior court for any purpose, since it was not a certified transcript, and if it was considered as an agreed statement of facts, the jurisdiction passed to the supreme court.[78]

[§ 1134] **(6) Allowance of Appeal.** An order directing that notice of appeal from a probate decree allowing a claim be served on the administrator by delivering to him a certified copy of the order and application for the appeal, and by serving notice of hearing thereof, is a sufficient order allowing the appeal, although it does not so state in terms.[79] The order allowing the appeal may be made after the time limited by the statute if the application for the order was made before the expiration of this period and appellant was without fault in making and prosecuting it.[80]

[§ 1135] **(7) Parties.** On an appeal by a creditor from a disallowance of his claim the representative is the only necessary defendant in error and other creditors need not be made parties.[81] But if it appears that another person is jointly liable by contract with decedent on the claim presented such person may be made a party.[82] Where, after disallowance in the probate court, the claim is assigned, the court may permit the assignee to be substituted as claimant on the appeal.[83]

[§ 1136] **(8) Notice of Appeal.** On an appeal by a claimant from a rejection of his claim process need only be issued to and served upon the representative who is the nominal party to the record, and other persons interested in the estate must take notice of such service.[84] An appeal by some of the creditors from a judgment dismissing all claims cannot be dismissed because of failure to serve notice of the appeal on other claimants whose claims were not of sufficient amount to give them the right to appeal.[85]

[§ 1137] **(9) Proceedings for Appeal—(a) In General.** The proceedings for taking an appeal from judgments of the probate court are regulated by statute.[86] In some cases it is provided that the

68. Stellmacher v. Bruder, 93 Minn. 98, 100 NW 473.

69. Kowalsky v. Santa Cruz County Super. Ct., 13 Cal. A. 218, 109 P 158.

70. U. S.—Mauro v. Ritchie, 16 F. Cas. No. 9,312, 3 Cranch C. C. 147.

Colo.—Tucker v. Tucker, 21 Colo. A. 94, 121 P 125.

Ill.—Darwin v. Jones, 82 Ill. 107.

Ind.—Miller v. Carmichael, 98 Ind. 236; Yearley v. Sharp, 96 Ind. 469; Bell v. Mousset, 71 Ind. 347.

Md.—Porter v. Timanus, 12 Md. 283; Mayhew v. Soper, 10 Gill & J. 366.

Mo.—Stephens v. Bernays, 119 Mo. 143, 24 SW 46.

Nebr.—Drexel v. Rochester Loan, etc., Co., 65 Nebr. 231, 91 NW 254; Baacke v. Dredla, 57 Nebr. 92, 77 NW 341.

Va.—Reid v. Windsor, 111 Va. 825, 69 SE 1101.

Wis.—Groner v. Hield, 22 Wis. 200.

[a] **Effect of affidavit as showing status of claimant.**—Where an affidavit attached to a claim filed by administrators against another estate appeared to have been made in Ohio and recited that one of the administrators of the "estate of B, late of said county, deceased," was sworn, etc., it did not establish the fact that the administrators filing the claim were foreign administrators, and therefore required to take an appeal from a disallowance within thirty days thereafter. Davis v. Huston, 84 Ind. 272.

[b] **Extension of time by disability.**—Under a statute permitting any one interested in the estate to have the proceedings of the county court revised any time within two years thereafter, and giving minors and married women two years after the removal of their disabilities in which to apply for such revision, it was not necessary that such proceeding be begun before the administration was closed, three of appellants being minors when the suit was begun and one being a feme covert. Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

71. Miller v. Carmichael, 98 Ind. 236; Yearley v. Sharp, 96 Ind. 469; Baacke v. Dredla, 57 Nebr. 92, 77 NW 341.

72. Yearley v. Sharp, 96 Ind. 469; Rutherford v. Allen, 62 Vt. 260, 19 A 714; Groner v. Hield, 22 Wis. 200.

[a] **Where the right to appeal is contingent** on the refusal of the representative to do so and he does not expressly decline to appeal during the time limited, the heirs should be allowed to appeal after its expiration. Groner v. Hield, 22 Wis. 200.

73. McElroy v. Whitney, 24 Ida. 210, 133 P 118.

74. In re Brown, 87 Vt. 465, 89 A 872.

75. In re Brown, 87 Vt. 465, 89 A 872.

76. In re Lynch, 207 Ill. A. 165.

77. Brown v. Stair, 25 Colo. A. 140, 136 P 1003.

78. Whitford, etc., Co. v. Townsend, 32 R. I. 392, 79 A 960.

79. Pruden v. Clark, 148 Mich. 163, 111 NW 853.

80. Burns v. Keas, 20 Iowa 16.

81. Huntsville Branch Bank v. Steele, 10 Ala. 915.

82. Claypool v. Gish, 108 Ind. 424, 9 NE 382.

83. Harman v. Harman, 62 Nebr. 452, 87 NW 177.

84. Motsinger v. Coleman, 16 Ill. 71; In re Koch, 148 Wis. 548, 134 NW 663.

[a] **An heir** who appears at the hearing of a claim is not an adverse party on whom notice of appeal from the action of the probate court must be served. In re Koch, 148 Wis. 548, 134 NW 663.

85. In re Ennis, 96 Wash. 352, 165 P 119.

86. Drake v. McGee, 178 Iowa 1345, 161 NW 84. See the statutes.

[a] **Bill of exceptions and bond.**—The proper mode of appealing from a decision of the probate justice in regard to the allowance of a claim is by tendering a bill of exceptions, and entering into bond within ninety days. Scott v. Crow, 7 Ill. 347.

appeal shall be taken in the same manner as appeals from a justice of the peace;[87] in others in the same manner as actions are commenced in the court where the appeal is heard;[88] and in still others on a case made and settled by the surrogate as upon an appeal in an ordinary action.[89] Where a probate decree included both of claimant's demands, and recited the allowance of an appeal therefrom, and the cost bond given recited the amount of the two claims in the aggregate as the amount litigated, an objection that the appeal was from separate probate decrees, and that only one was appealed from, cannot be sustained.[90] Where the statute provides that the affidavit for appeal shall be made by "the party aggrieved, his agent or attorney" it is unnecessary that an affidavit by an attorney should show why he makes it.[91]

[§ 1138] **(b) Record.** The transcript of the record must show all the proceedings in the probate court and contain all the evidence,[92] and must be filed within the time allowed therefor by statute.[93] Where a record shows that an appeal from an allowance against an estate was prayed for and granted to administrators severally or jointly, it is immaterial that only one of the administrators perfected the appeal.[94] It is sometimes required that, on appeal from a probate order allowing a claim against a decedent's estate, a certified copy of the records of the commissioners on claims should be duly filed.[95] Where the practice requires that statements of the nature and amount of a claim filed on appeal from a disallowance thereof by the commissioners appointed by courts of probate shall conform, as far as may be, in form and substance, to the requirements of a complaint on the claim in a civil action, such a statement controls the amount recoverable as fully as the ad damnum clause in a complaint in such an action.[96]

[§ 1139] **(c) Bond.** On appeal from judgments of the probate court appellant is ordinarily required by statute to give a bond,[97] which must be approved,[98] and filed within the time prescribed by the statute.[99] On an appeal by a creditor from a disallowance of his claim the bond properly runs to the representative.[1] Where the bond required by statute is not given, the appeal should be dismissed,[2] but if the bond is defective the appeal should not be dismissed absolutely in the first instance, but conditionally, in case a new or amended bond is not filed within a reasonable time to be fixed by the court.[3] Under some statutes the personal representative[4] or a person appointed to defend against a demand of the personal representative[5] may appeal without giving a bond.

[§ 1140] **(10) Objections and Exceptions.** Objections to the allowance of a claim not made in the probate court cannot be urged for the first time on appeal,[6] but will be considered as waived,[7] unless the objection is one which the representative has no right to waive.[8] In the case of an heir appealing from the allowance of a claim where the representative refuses to appeal, it is not neces-

87. Ford v. Stuart First Nat. Bank, 201 Ill. 120, 66 NE 316 [rev 100 Ill. A. 70]; Beardsley v. Hill, 61 Ill. 354; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

88. Voorhies v. Eubank, 6 Iowa 274.

89. Matter of Sherwood, 75 App. Div. 342, 78 NYS 186; Matter of Sunderlin, 69 Hun 403, 23 NYS 648.

90. Gillett v. Chavez, 12 N. M. 353, 78 P 68.

91. Perrin v. Liner, 129 Ark. 242, 195 SW 355.

92. Baker v. Hentig, 22 Kan. 323; Woods' Succ., 30 La. Ann. 1002; Matter of Sunderlin, 69 Hun 403, 23 NYS 648; In re Carpenter, 4 Pa. 222.

[a] **Where there is a conflict of testimony** touching a claim against an estate and the record does not afford sufficient information to enable the court to estimate it the judgment of the lower court thereon will not be disturbed. In re Labauve, 39 La. Ann. 388, 1 S 830.

[b] **A writ of certiorari** will be allowed to supply papers necessary to the record which have been accidentally omitted. Woods' Succ., 30 La. Ann. 1002.

93. Wilt v. Martinsville First Nat. Bank, (Ind. A.) 114 NE 91.

94. Kolb v. Stephens, 176 Ill. A. 391.

95. Pruden v. Clark, 148 Mich. 163, 111 NW 853.

96. Beardsley's App., 83 Conn. 34, 75 A 141.

97. Darwin v. Jones, 82 Ill. 107; Stafford v. Kimmel, 188 Ill. A. 281; Bell v. Mousset, 71 Ind. 347; Dallam v. Stockwell, 33 Ind. A. 620, 71 NE 911; King v. Ingham Cir. Judge, 69 Mich. 84, 37 NW 50; Daniels v. Stevens, 60 Mich. 219, 27 NW 1; McCormick v. Groh, (Mo. A.) 198 SW 445.

[a] **Bond not required from creditor appealing from disallowance.—** McKenzie v. Crowley, 119 Ark. 185, 177 SW 873.

98. Hepner v. Hepner, 112 Ill. A. 598; Bartlett v. Wayne Cir. Judge, 133 Mich. 604, 95 NW 721.

99. Perrin v. Liner, 129 Ark. 242, 195 SW 355; Darwin v. Jones, 82 Ill. 107; Leslie v. Ebner, (Ind. A.) 117 NE 511; W. R. Mumford Co. v. Terry, 43 Ind. A. 339, 87 NE 253; Bartlett v. Wayne Cir. Judge, 133 Mich. 604, 95 NW 721.

1. Daniels v. Stevens, 60 Mich. 219, 27 NW 1.

2. Perrin v. Liner, 129 Ark. 242, 195 SW 355; Stafford v. Kimmel, 188 Ill. A. 281; W. R. Mumford Co. v. Terry, 43 Ind. A. 339, 87 NE 253; Dallam v. Stockwell, 33 Ind. A. 620, 71 NE 911.

[a] **A filing nunc pro tunc** cannot be permitted. Stafford v. Kimmel, 188 Ill. A. 281.

[b] **Where a bond is not offered until after a dismissal** for lack of a bond it is proper to refuse to accept the bond. Perrin v. Liner, 129 Ark. 242, 195 SW 355.

3. King v. Ingham Cir. Judge, 69 Mich. 84, 37 NW 50.

4. Walker v. Heller, 104 Ind. 327, 3 NE 114; Miller v. Carmichael, 98 Ind. 236; Winter v. Winter, 90 Mich. 197, 51 NW 363; McCormick v. Groh, (Mo. A.) 198 SW 445.

5. Smith v. Smith, 131 Mo. A. 201, 110 SW 662.

6. Ark.—Miller v. Summers, 124 Ark. 599, 187 SW 664.

Colo.—Cone v. Eldridge, 51 Colo. 564, 119 P 616.

Conn.—Fisk's App., 81 Conn. 433, 71 A 559.

Ill.—Old School Presb. Church v. Paxton, 180 Ill. A. 658.

Ind.—Cummins v. Peed, 109 Ind. 71, 9 NE 603.

Iowa.—Stevens v. Witter, 88 Iowa 636, 55 NW 535.

Kan.—Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

Ky.—Maynard v. Maynard, 178 Ky. 332, 198 SW 910; Hamilton v. Preston, 166 Ky. 61, 178 SW 1146.

N. J.—In re Atkinson, 98 A 269 [aff (Prerog.) 96 A 89].

N. M.—Gillett v. Chaver, 12 N. M. 353, 78 P 68.

N. Y.—Weller v. Weller, 4 Hun 195.

Pa.—Shuman's Est., 45 Pa. Super. 587.

Va.—Reid v. Windsor, 111 Va. 825, 69 SE 1101.

[a] **This rule has been applied to an objection:** (1) That the claim was not properly entitled. Clough v. Ide, 107 Iowa 669, 78 NW 697. (2) That the claim was not legally verified. Cone v. Eldridge, 51 Colo. 564, 119 P 616. (3) That the claim was filed against the executor instead of against the estate. Old School Presb. Church v. Paxton, 180 Ill. A. 658. (4) That the evidence was insufficient to establish the claim. Reid v. Windsor, 111 Va. 825, 69 SE 1101.

[b] **An objection that a claim was not referable** if not made on the reference cannot be urged for the first time on appeal from the decision of the referee. Weller v. Weller, 4 Hun (N. Y.) 195.

[c] **That fraud is not specifically charged** in respect to a claim presented to commissioners, or in the statement of claim on appeal to the superior court, and is not found in terms by such court, is immaterial, the facts stated, standing unexplained, showing constructive fraud as matter of law. Fisk's App., 81 Conn. 433, 71 A 559.

[d] **Showing, in application for appeal.—** It is not necessary that a person appealing from the decision or report of commissioners in allowing a claim should show by his application for appeal that he appeared before the commissioners and objected to the allowance, but it is sufficient if it appears by such application that the sum allowed by the commissioners, and to which he then by his application objects, is at least twenty dollars. Shear v. Shear, 1 Mich. N. P. 216.

7. Ala.—Boggs v. Mobile Branch Bank, 12 Ala. 494.

Ill.—Morrow v. Duggan, 176 Ill. A. 415.

Kan.—Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

N. Y.—Weller v. Weller, 4 Hun 195.

Pa.—Mays' Est., 25 Pa. Super. 267.

8. Reay v. Heazelton, 128 Cal. 335, 60 P 977.

Waiver of:

Due presentation see supra § 1035.

Statute of limitations see supra §§ 907–911.

sary, to sustain his right of appeal, that the act of the probate court in allowing the claim should have been objected to.[9]

[§ 1141] **(11) Amendment on Appeal.** The statutes sometimes permit the statement of claims to be amended on appeal, where this does not change the cause of action,[10] but the court in which an appeal is pending cannot allow an amendment to the original claim adding entirely new items.[11]

[§ 1142] **(12) Hearing and Determination.** In a number of jurisdictions on appeal from a judgment of a probate court the case is tried de novo,[12] but where the probate court has rendered a judgment adjusting the claims against the estate of a deceased partner and the firm estate, under an agreement authorizing the rendition of a judgment subject to the right to appeal to the circuit court on the evidence taken before the referee appointed by the probate court, the parties on appeal to the circuit court are bound by the agreement, and the circuit court must dispose of the case on the evidence taken before the referee.[13] The trial is usually conducted without filing any formal pleadings,[14] unless required by the court,[15] and no technical form for framing the issues is necessary, the only requirement being that the nature of the controversy shall clearly appear.[16] The issues on appeal must be the same as in the probate court,[17] and

9. Groner v. Hield, 22 Wis. 200.

10. Conn.—Fisk's App., 81 Conn. 433, 71 A 559.

Ill.—Killpatrick v. Helston, 25 Ill. A. 127.

Mo.—Corson v. Waller, 104 Mo. A. 621, 78 SW 656.

Nebr.—In re Cormick, 100 Nebr. 669, 160 NW 989, LRA1917D 265.

Vt.—Cutting v. Ellis, 67 Va. 70, 30 A 688.

[a] **Illustrations.**—(1) A notice to an administrator containing receipts from decedent on which a claim is based, and stating that it will be presented for allowance, as required by statute on which notice the claim is tried in probate court, is not a nullity, but may be amended on appeal to the circuit court by adding a statement of the "amount and nature of the claim," as required by the statute. Corson v. Waller, 104 Mo. A. 621, 78 SW 656. (2) Where the claim presented to the commissioners and, as first presented by claimants on appeal to the superior court, alleged that land was conveyed to decedent under an agreement that at his death it, if not sold, should be conveyed to claimants, or, if sold, that on his death the proceeds should be paid to claimants, and that it was sold by him, an amendment alleging that the land was conveyed to decedent on an agreement that he under Gen. St. § 642 would hold the lands in trust for claimants was permissible, the legal effect of such agreement being that, if he died without performing it, claimants would be entitled to claim the lands, if not sold, or, if they had been sold, their proceeds, and the real object of claimants, as disclosed by either form of expression, being the same. Fisk's App., 81 Conn. 433, 71 A 559.

[b] **The claimant may increase the amount** of his claim where the amount is a matter of opinion and not of express contract and he thinks the claim as at first presented was too small. Killpatrick v. Helston, 25 Ill. A. 127.

[c] **A defective verification** of the claim may be amended on appeal. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

11. Corson v. Waller, 104 Mo. A. 621, 78 SW 656; Taylor v. Thieman, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

12. Ark.—Miller v. Summers, 124 Ark. 599, 187 SW 664; Grimes v. Bush, 16 Ark. 647.

Cal.—In re Higgins, 158 Cal. 355, 111 P 8.

Colo.—McAfee v. McAfee, 56 Colo. 144, 136 P 1051.

Ill.—In re Thurber, 209 Ill. A. 533; Creighton v. Creighton, 201 Ill. A. 271.

Iowa.—Voorhies v. Eubank, 6 Iowa 274.

Kan.—Neil v. Case, 25 Kan. 510, 37 AmR 259; Morgan v. Saline Valley Bank, 4 Kan. A. 668, 46 P 61.

Mich.—Hollister v. Kinyon, 195 Mich. 261, 161 NW 962.

Minn.—In re Savage, 141 Minn. 346, 170 NW 585; Lovell v. Beedle, 138 Minn. 12, 163 NW 778.

Mo.—In re Jarboe, 227 Mo. 59, 127 SW 26; Berry v. Henslee, 38 Mo. 392; Elstroth v. Young, 78 Mo. A. 651.

Nebr.—Keeler v. Hiles, 172 NW 363; In re Gamble, 91 Nebr, 199, 135 NW 558.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

R. I.—Tiffany v. Morgan, 73 A 465.

Tex.—Glenn v. Kimbrough, 70 Tex. 147, 8 SW 81.

Wis.—Central Bank v. St. John, 17 Wis. 157.

[a] **The appellate court must determine** whether the claim was filed in time, and whether an amendment allowed by the county court was such a departure as amounted to a new and different claim after the time limited therefor had expired. In re Gamble, 91 Nebr. 199, 135 NW 558.

[b] **The jurisdiction of the district court on appeal** (1) is no greater than that of the probate court, and where the statute requires the claim to be established by competent testimony in the probate court it must be established in the same manner on appeal (Phillips v. Faherty, 9 Kan. A. 380, 58 P 801; Morgan v. Saline Valley Bank, 4 Kan. A. 668, 46 P 61) (2) and the administrator cannot confess judgment. Phillips v. Faherty, 9 Kan. A. 380, 58 P 801.

[c] **On appeal from an allowance by commissioners** where no formal issue is made in the circuit court, the case is tried in the same manner as if it were before the commissioners. Westra v. Westra, 101 Mich. 526, 60 NW 55.

[d] **Determination below as to necessity of will contest not conclusive.**—On objections to an allowance of fees to attorneys who resisted a will contest, a determination below that it was necessary and proper for the executor to resist the contest is not conclusive. In re Higgins, 158 Cal. 355, 111 P 8.

[e] **Burden of proof.**—Where specific objections to an allowance of witness' and attorney's expenses by an executor were made in the county court, the burden was on the executor to introduce evidence justifying such allowance on an appeal to the circuit court. Fitch v. Huntington, 125 Wis. 204, 102 NW 1066.

[f] **Admissibility of evidence.**—On the trial on appeal from the disallowance by commissioners of a claim against the estate of a decedent who was a member of a partnership, testimony by the administration as to the amount of claims which decedent paid that he owed the firms, including what she paid, was irrelevant. Partridge v. Meeker, 169 Mich. 303, 135 NW 248.

[g] **Submission of proceedings in probate court to jury.**—Although, under the particular circumstances which may arise on the trial in the district court of a claim which has been appealed to that court from the probate court, it may be proper to permit evidence of the date when such claim was filed in the probate court and the last date for filing claims, it is not proper to submit to the jury copies of the entire proceedings in the probate court. Gandy v. Bissell, 81 Nebr. 102, 115 NW 571 [mod on reh 81 Nebr. 117, 117 NW 349].

[h] **Instruction as to decision on evidence.**—On appeal from the decree of the probate court allowing plaintiff's claim after a hearing in which evidence was introduced, an instruction, requested by defendant, that what happened in the probate court was purely a formal matter, was properly refused, the court having already instructed that the jury should decide the case on the evidence before them as if it was before them in the first instance. Tiffany v. Morgan, (R. I.) 73 A 465.

[i] **Amount of recovery.**—On appeal to the district court the question of the amount to which claimant was entitled was for the jury and a direction that claimant could not recover an amount more than he did below was erroneous. McAfee v. McAfee, 56 Colo. 144, 136 P 1051.

13. In re Jarboe, 227 Mo. 59, 127 SW 26.

14. Haffamier v. Hund, 10 Kan. A. 579, 63 P 659; Hoffman v. Pope, 74 Mich. 235, 41 NW 907; Wencker v. Thompson, 96 Mo. A. 59, 69 SW 743; Keeler v. Hiles, (Nebr.) 172 NW 363; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

[a] **The statute of limitations** may be invoked without a written plea. Wencker v. Thompson, 96 Mo. A. 59, 69 SW 743.

[b] **A set-off** cannot be given in evidence in a court of record unless specially pleaded, and where proceedings are conducted summarily without formal pleadings the record cannot be amended to include such a defense where it was not presented in the probate court, but to be admissible it must be filed in the probate court. Berry v. Henslee, 38 Mo. 392.

[c] **Even where the statute provides for formal written pleadings** on appeal the fact that a trial is had without such pleadings is a mere irregularity not affecting the jurisdiction of the court. Stuart v. Stuart, 70 Minn. 46, 72 NW 819; Lake v. Albert, 37 Minn. 453, 35 NW 177.

15. In re Savage, 141 Minn. 346, 170 NW 585; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994.

16. Drake v. McGee, 178 Iowa 1345, 161 NW 84; King v. Brewer, 121 Mich. 339, 80 NW 238; Comstock v. Smith, 26 Mich. 306.

17. Cal.—In re Weir, 168 Cal. 330, 143 P 612.

Ky.—Hamilton v. Preston, 166 Ky. 61, 178 SW 1146.

Mich.—Raub v. Nisbett, 111 Mich. 38, 69 NW 77.

Minn.—In re Savage, 141 Minn. 346, 170 NW 585.

Mo.—Snider v. McAtee, 165 Mo. A. 260, 147 SW 136.

Nebr.—In re Cormick, 100 Nebr. 669, 160 NW 989, LRA1917D 265; Fitzgerald v. Union Sav. Bank, 65 Nebr. 97, 90 NW 994; Graham v. Townsend, 62 Nebr. 364, 87 NW 169.

[a] **Illustration.**—Where a claim has been disallowed because not filed in time, and an appeal is taken to the district court, a hearing should be had in the district court in the

claimant cannot base his right to recover on a theory different from and inconsistent with that asserted in the court below,[18] nor can he present a new and different claim,[19] or enlarge his claim by including new items.[20] A fortiori, claims not presented to the commissioners in the probate court cannot be considered on an appeal from an allowance of other claims.[21] The presumption is in favor of the propriety of the proceedings in the probate court,[22] and a recital in a judgment allowing a claim that the case came on for trial by agreement of the parties is conclusive upon appeal.[23] The action of the probate court will not be interfered with unless it is manifest that there was error[24] which was prejudicial to the complaining party,[25] especially where such action involved the exercise of discretion.[26] A notice of appeal that the residuary legatee appeals from the order allowing the claim does not restrict the appeal to the consideration of the part of the order allowing a certain sum, and prevent any review of that part disallowing a portion of the claim.[27] Where claimant appealed from a judgment allowing his claims in part, but the estate did not appeal from the allowance, and it was not claimed that one of the claims allowed was unjust, the court properly allowed such claim to stand as a part of the verdict and judgment in the case.[28] Where creditors whose claims have been rejected failed to appeal, the judgment appealed from will not be disturbed at the instance of the executor, whose appeal does not bring up their cases.[29] A judgment which is erroneous in reciting that plaintiff shall have and recover a particular amount from the administrator instead of merely adjudging that the administrator paid the amount in due course, need not be reversed, but may be ordered corrected on remittitur,[30] and a judgment sustaining a claim, which is improper only because it orders execution to issue, may be corrected on appeal.[31]

[§ 1143] **(13) Order or Judgment.** It has been considered that the appellate court may make the order which, in its opinion, the judge of probate should have made.[32] The judgment rendered in the appellate court is not an ordinary judgment against the

same manner as if the claim had been disallowed on hearing, and the court should not remand the cause with directions to permit the filing of the claim and to set a day for hearing. Ribble v. Furmin, 71 Nebr. 108, 98 NW 420.

[b] **In a case where no pleadings are filed,** if either party tries to introduce new issues objection may be taken by objecting to evidence introduced in support of such issues. Fitzgerald v. Union Sav. Bank, 64 Nebr. 97, 90 NW 994.

[c] **Construction of issues.**—Issues framed by the interposition of objections in the county court to the allowance of a claim will be construed with great liberality in the district court. Fitch v. Martin, 83 Nebr. 124, 119 NW 25.

[d] **An issue tried and contested on the trial** is to be treated on appeal as within the pleadings, where it had been so treated on the trial, although the demand filed was defective. Snider v. McAtee, 165 Mo. A. 260, 147 SW 136.

18. Raub v. Nisbett, 111 Mich. 38, 69 NW 77. But compare Lincoln First Nat. Bank v. Sandmeyer, 164 Ill. A. 98 [foll Thomson v. Black, 200 Ill. 465, 65 NE 1092] (claimant is not limited in his right to recover to the particular ground stated in his claim).

19. Luizzi v. Brady, 140 Mich. 73, 103 NW 574; Patrick v. Howard, 47 Mich. 40, 10 NW 71; In re Savage, 141 Minn. 346, 170 NW 585; Stuart v. Stuart, 70 Minn. 46, 72 NW 819; Cutting v. Ellis, 67 Vt. 70, 30 A 688; Taylor v. Thiemann, 132 Wis. 38, 111 NW 229, 122 AmSR 943.

[a] **A different rule is sometimes laid down by statute** under which claimant may recover on claims not previously presented where the failure to do so was due to fraud, accident, or mistake. Cutting v. Ellis, 67 Vt. 70, 30 A 688.

20. Luizzi v. Brady, 140 Mich. 73, 103 NW 574; Corson v. Waller, 104 Mo. A. 621, 78 SW 656.

[a] **Illustration.**—Where a written claim was filed in the probate court for attendance and service during the lifetime and last sickness of decedent, claimant was not entitled to enlarge the claim on appeal to the circuit court to cover a demand for bedding belonging to claimant which was destroyed because of the nature of decedent's illness, or a demand for loss of profits to claimant's business of boarding house keeper by the dismissal of a number of her boarders in the interest of quiet and proper nursing of decedent. Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

21. In re De Haan, 169 Mich. 146, 134 NW 983.

22. Iowa.—Drake v. McGee, 178 Iowa 1345, 161 NW 84.

Miss.—Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

Mo.—Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

N. M.—Gutierrez v. Scholle, 12 N. M. 328, 78 P 50.

N. Y.—Matter of Cushman, 177 App. Div. 127, 163 NYS 712.

[a] **Supplying of defect in proof of claim.**—Where a corporation's claim was erroneously verified by the corporation's president as an individual, it could be presumed on appeal that such defect was supplied by parol proof in the probate court. Wagoner Undertaking Co. v. Jones, 134 Mo. A. 101, 114 SW 1049.

[b] **Finding as to relation of decedent to note on which claim based.**—On appeal from a decision allowing a claim based upon a note, which did not show whether the decedent was liable as maker or indorser, it will be presumed that the chancellor ascertained the relation of decedent to the note. Keiffer Bros. Co. v. Bank of Commerce, 105 Miss. 662, 63 S 189.

23. Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83.

24. Ill.—Wilson v. Phares, 184 Ill. A. 128.

Ind.—Dearing v. Coulson, 48 Ind. A. 414, 96 NE 9, 10.

Mich.—McNall v. Mitchell, 178 Mich. 493, 144 NW 850.

Miss.—Barner v. Rule, 116 Miss. 600, 77 S 521.

Pa.—In re Fry, 229 Pa. 473, 78 A 1033; Newhouse's Est., 39 Pa. Super. 452.

"We cannot weigh the evidence on appeal in a case of this kind." Dearing v. Coulson, supra.

[a] **Illustration.**—A decree sustaining objections of an administrator to the allowance of claims on the ground that the claims were not probated as required by law will be affirmed where the record does not contain the note or either of the accounts attempted to be probated so that the appellate court has no means of determining whether they are such claims as could be, or have been, legally probated. Horne v. McAlpin, 101 Miss. 129, 57 S 420.

[b] **Findings of fact** will not be disturbed where they are sustained by any other evidence and there is no manifest error. McNall v. Mitchell, 178 Mich. 493, 144 NW 850; Wilhelm's Est., 49 Pa. Super. 213 (finding that a debt acknowledged by a testator in his will has not been paid); Newhouse's Est., 39 Pa. Super. 452 (finding that a note of decedent presented at the audit ten years after the date of the note, had not been paid).

[c] **An award for services** found to have been performed for a decedent's estate will not be disturbed on appeal, except for manifest error. In re McNulty, 230 Pa. 387, 79 A 645.

25. Chipman v. Perdue, 135 Ark. 559, 205 SW 892; Matter of Steenwerth, 97 App. Div. 116, 89 NYS 654.

[a] **Error in rejecting evidence necessarily prejudicial.**—Where a witness on behalf of a claimant, having first appeared to oppose the claim, and after he had been paid a sum by claimant to be deducted from her share of decedent's estate, in accordance with a compromise between the heirs for the interest which witness might have in the estate, he testified as the main witness on behalf of claimant, the objectors were necessarily prejudiced by the refusal to permit him to be asked on cross-examination if he had not first appeared at the office of the counsel for the objectors to the claim, ready to contest it. Matter of Steenwerth, 97 App. Div. 116, 89 NYS 654.

26. Radenbach's Est., 52 Pa. Super. 461 (where a claim is presented in the orphans' court against an estate of a decedent based upon a balance alleged to be due upon an unsettled account, the discretion of the court will not be reviewed on appeal where there is sufficient and competent evidence to show that claimant and decedent had treated the business transactions between them involving the sale of various chattels as constituting a current open mutual account, the various items to operate as a set-off to each other, and the balance when ascertained to constitute the debt, and that when decedent made her last purchase, being within six years prior to the presentation of the claim, that purchase was made by her with the understanding that it was upon such unsettled account).

27. First Unitarian Soc. v. Houliston, 96 Minn. 342, 105 NW 66.

28. Abel v. Roosenraad, 173 Mich. 93, 138 NW 325.

29. Henderson's Succ., 113 La. 101, 36 S 904.

30. Gauss v. Trump, 48 Mont. 92, 135 P 910.

31. Stratton's Est. v. Finnerty, 57 Colo. 413, 140 P 796; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83.

32. Westinghouse Electric, etc., Co. v. Robison, 42 Okl. 754, 142 P 1105; Barnaby v. O'Donnell, 49 N. S. 386, 25 DomLR 739.

[a] **Thus,** where a claim is disallowed on the ground that it is not sufficiently verified and the appellate

representative on which execution may be issued, but is merely an allowance or disallowance of the claim which is certified to the probate court,[33] unless the statute makes other provision therefor.[34] The judgment may classify the claims against the estate,[35] but it is not essential to its validity that it should do so.[36] An order for judgment does not necessarily contain the exact language in which the entry of judgment should be made, but the clerk is supposed to understand the order with reference to the case and to make the entry in the proper form.[37] An order on appeal from an order refusing to set aside a judgment on an executor's claim against the estate, providing that "the claim be held in abeyance and not paid or credited until the final report is made by the executor and heard upon notice of hearing to all parties interested," apparently means that there shall be a rehearing on the claim, and if this is the meaning, the order should specifically set aside the allowance of the claim, but should not fix the time when the lower court should hear the claim.[38] Where a claim was allowed in the probate court against an executor and an appeal perfected to the circuit court, which rendered a judgment against the executor, such judgment was only voidable, although the will was set aside, the executor removed, and an administrator appointed before it was rendered.[39] On a writ to review an order of the county court allowing an administrator's claim against the estate, it was error for the circuit court, in reversing the order, to adjudge that the administrator should be charged with interest on a balance in his hands from a certain date, such question being within the jurisdiction of the county court, and its determination thereon not being reviewable on writ of review.[40]

[§ 1144] **(14) Dismissal of Appeal.** If appellant does not prosecute his appeal it may be dismissed and the judgment of the lower court allowed to stand.[41] But a motion to dismiss the appeal can be made only upon the notice required by the rules of court.[42]

[§ 1145] **f. Costs[43]—(1) On Trial in Probate Court.** Costs on the trial of disputed claims in probate courts are usually regulated by statute,[44] under which the matter is sometimes confided to the discretion of the court.[45] In the absence of a statute providing expressly for the allowance of costs in such cases it has been held that the equity powers of the court were broad enough to authorize an allowance against the estate of costs necessarily incurred in sustaining a valid claim.[46]

Security for costs may be required under some circumstances.[47]

[§ 1146] **(2) On Reference.** The costs to be awarded on a statutory reference are regulated by statute,[48] under which costs are sometimes awarded according to the provisions relating to actions against executors and administrators,[49] and by the

court holds that the verification is sufficient, it is the duty of the appellate court to render judgment against the estate. Westinghouse Electric, etc., Co. v. Robison, 42 Okl. 754, 142 P 1105.

33. Ida.—Miller v. Lewison Nat. Bank, 18 Ida. 124, 108 P 901.

Iowa.—Voorhies v. Eubank, 6 Iowa 274.

Mich.—Tyler v. Gallop, 68 Mich. 185, 35 NW 902, 13 AmSR 336.

Mo.—Lipperd v. Lipperd, 181 Mo. A. 106, 163 SW 934; Wood v. Flanery, 89 Mo. A. 632; Ambs v. Caspari, 13 Mo. A. 587.

Nebr.—Bennett v. Taylor, 4 Nebr. (Unoff.) 800, 96 NW 669.

[a] **Judgment to be paid in due course of administration.**—Where objections are made by heirs to claims filed against the estate, and, after a hearing thereon by the probate court, an appeal is taken to the district court, a judgment in the district court against the administrator for the aggregate amount due upon the claims, with direction that the judgment be paid by the administrator in due course of administration, is proper. Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.

34. Brown v. Douglas First Nat. Bank, 49 Colo. 393, 113 P 483 (judgment against an administrator rendered on appeal from the allowance of a claim should be entered in district court).

35. Ambs v. Caspari, 13 Mo. A. 587.

36. McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585].

37. Nichols v. Nichols, 80 Vt. 242, 67 A 531.

[a] **Thus,** where the county court in a case which was an appeal from the disallowance by commissioners appointed by the probate court of a claim ordered that, on payment of a certain sum to defendant on or before a certain time for witnesses and counsel for the term, the case be continued, "otherwise let judgment be entered for defendant . . . with costs and certified down," judgment entered by the clerk after expiration of the time limited, on failure of plaintiff to make the payment to defendant: "Judgment that the claim of appellant against the estate of N. be disallowed with costs of defendant, and ordered sent to probate court. Defendant's costs of $20.36" being appropriate to the case, and in compliance with the order, could not be said to be not in accordance with the order. Nichols v. Nichols, 80 Vt. 242, 67 A 531.

38. Fragd v. Fragd, 175 Ill. A. 246.

39. Larimer v. Snell, 181 Ill. A. 50 (where no effort has been made to set aside such judgment, it is not error for the circuit court to enter an order requiring the administrator to pay the claim on a citation filed by claimant).

40. Farrow v. Nevin, 44 Or. 496, 75 P 711.

41. Voorhies v. Eubank, 6 Iowa 274.

42. Pruden v. Clark, 148 Mich. 163, 111 NW 853.

43. See generally Costs 15 C. J. p 1.

44. Colo.—Brown v. Douglas First Nat. Bank, 49 Colo. 393, 113 P 483.

Ill.—Beardsley v. Hill, 61 Ill. 354; Russell v. Hubbard, 59 Ill. 335; Robnett v. Robnett, 43 Ill. A. 191; Richardson v. Allman, 40 Ill. A. 90.

N. Y.—Matter of Kohler, 99 Misc. 233, 165 NYS 718; Matter of Ingraham, 35 Misc. 577, 72 NYS 62, 2 Mills Surr. 291.

Okl.—Selzer v. Selzer, 45 Okl. 372, 145 P 318.

Pa.—Sloan's Est., 9 Pa. Dist. 498, 24 Pa. Co. 288; Nolde's Est., 21 Lanc LRev 59 [aff 27 Pa. Super. 413].

45. Richardson v. Allman, 40 Ill. A. 90; Matter of Kohler, 99 Misc. 233, 165 NYS 718; Matter of Coonley, 38 Misc. 219, 77 NYS 269, 3 Mills Surr. 130; Matter of Ingraham, 35 Misc. 577, 72 NYS 62, 2 Mills Surr. 291; McCullough's Est., 8 Pa. Co. 247.

[a] **No costs to either party.**—In a case where the commissioners on an estate refused a claimant a finding to which he was entitled by which the evidence would be returned into the probate court, and also disallowed his claim, and on appeal the circuit court set aside the disallowance, but erroneously allowed the claim contingently, and the supreme court reversed its judgment, as the original error was not claimant's, and as the responsibility for subsequent errors was about equal, no costs would be allowed to either party. Buchoz v. Pray, 37 Mich. 512.

46. Kelly's Est., 10 Pa. Dist. 297, 25 Pa. Co. 254; Decker's Est., 22 Pa. Co. 46; Dixon v. Garbutt, 10 OntWR 838.

47. See the statutes; and generally Costs §§ 464–575.

[a] **In Nova Scotia** security is required from a nonresident claimant not having available assets in the province, where the claim is contested and the matter is one likely to involve considerable costs. In re Priest, 43 N. S. 230.

48. Denise v. Denise, 110 N. Y. 562, 18 NE 368 [aff 41 Hun 9]; Kearney v. McKeon, 85 N. Y. 136; Outhouse v. Odell, 84 Hun 494, 32 NYS 388, 24 NYCivProc 289; Henning v. Miller, 83 Hun 403, 31 NYS 878; Adams v. Olin, 78 Hun 309, 29 NYS 131; Babbage v. Webster, 72 Hun 456, 25 NYS 300; Matter of McQueen, 58 Hun 172, 11 NYS 509, 19 NYCivProc 290; Agar v. Tibbets, 56 Hun 272, 9 NYS 591, 18 NYCivProc 338; Dryer v. Brown, 55 Hun 612, 10 NYS 53, 24 AbbNCas 59, 144; Walker v. Gardener, 8 Misc. 468, 29 NYS 669; Hallock v. Bacon, 16 NYS 725, 21 NYCivProc 255; Hearn v. Sullivan, 13 AbbNCas (N. Y.) 371; Munson v. Howell, 12 AbbPr (N. Y.) 77, 20 HowPr 59; Radley v. Fisher, 24 HowPr (N. Y.) 404; Avery v. Smith, 9 HowPr (N. Y.) 349; Van Sickler v. Graham, 7 HowPr (N. Y.) 208; Newton v. Sweet, 4 HowPr (N. Y.) 134, 2 CodeRep 61; Lansing v. Cole, 3 CodeRep (N. Y.) 246; Robert v. Ditmas, 7 Wend. (N. Y.) 552.

49. Persbacker v. Murphy, 153 App. Div. 492, 138 NYS 537; Whitcomb v. Whitcomb, 92 Hun 443, 36 NYS 607; Outhouse v. Odell, 84 Hun 494, 32 NYS 388, 24 NYCivProc 289; Henning v. Miller, 83 Hun 403, 31 NYS 878; Adams v. Olin, 78 Hun 309, 29 NYS 131.

[a] **If the representative is successful** in resisting the claim, he is entitled to costs as a matter of

referee instead of by the court.[50] The statute sometimes permits the prevailing party on a reference to recover his necessary disbursements.[51]

[§ 1147] **(3) Effect of Refusal to Refer.** The statutes have sometimes[52] permitted costs to be awarded against the representative and in favor of a successful claimant where the representative refused to submit the claim to a reference.[53]

[§ 1148] **(4) Effect of Refusal to Consent to Determination on Accounting.** Under a statute allowing the surrogate to pass upon disputed claims by consent of the parties on a judicial settlement of the representative's accounts, costs could be awarded against a representative who did not consent to have the claim so determined,[54] but if the claimant commenced his action before the expiration of the time within which the representative may file such consent he thereby waived his right to costs.[55]

[§ 1149] **(5) Effect of Unreasonable Resistance to Claim.** Costs cannot be taxed against a representative where it does not appear that his resistance of the claim was unreasonable.[56] But if the claim was unreasonably resisted the representative is chargeable with costs,[57] provided the demand was presented within the time limited by a notice published as prescribed by law,[58] and in such cases the costs may be taxed either against the representative personally or be paid out of the estate as the court, under the circumstances of the particular case, may direct.[59] The rule applies to references as well as to actions.[60] Where the action is in the supreme court the facts showing such unreasonable resistance must be certified by the judge or referee before whom the trial took place,[61] but this requirement does not affect the right of the prevailing party to recover his disbursements.[62] What will amount to an unreasonable resistance depends upon the circumstances of the particular case.[63]

[§ 1150] **(6) Costs on Appeal.** Under the statutes in some jurisdictions costs on appeal from a judgment of the probate court are within the discretion of the appellate court;[64] and in others the prevailing party may recover his costs against the

right. Winne v. Hills, 91 Hun 89, 36 NYS 683.

50. Domeyer v. Hoes, 99 App. Div. 294, 90 NYS 1074; Jenkinson v. Harris, 27 Misc. 714, 59 NYS 548; Fisher v. Bennett, 21 Misc. 178, 47 NYS 114.

51. Larkins v. Maxon, 103 N. Y. 680, 9 NE 56; Osborne v. Parker, 66 App. Div. 277, 72 NYS 894; Whitcomb v. Whitcomb, 92 Hun 443, 36 NYS 607; Niles v. Crocker, 88 Hun 312, 34 NYS 761; Outhouse v. Odell, 84 Hun 494, 32 NYS 388, 24 NYCivProc 289; Hatch v. Stewart, 42 Hun (N. Y.) 164; Krill v. Brownell, 40 Hun (N. Y.) 72, 10 NYCivProc 8 [overr Miller v. Miller, 32 Hun 481, 67 HowPr 135; Daggett v. Mead, 11 AbbNCas 116]; Hallock v. Bacon, 16 NYS 725, 21 NY CivProc 255; Hall v. Edmunds, 67 HowPr (N. Y.) 202.

52. Repeal of such provision see N. Y. Laws (1897) c 469.

53. Davis v. Gallagher, 37 App. Div. 626, 55 NYS 1060; Snyder v. Snyder, 26 Hun (N. Y.) 324; Effray v. Masson, 18 NYS 350, 22 NYCiv Proc 59; Nellis v. Duesler, 18 NYS 315; Roberts v. Pike, 13 NYS 559, 19 NYCivProc 422; Wilkinson v. Littlewood, 67 HowPr (N. Y.) 474; Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Stephenson v. Clark, 12 HowPr (N. Y.) 282; Cruikshank v. Cruikshank, 9 HowPr (N. Y.) 350; Bradley v. Burwell, 3 Den. (N. Y.) 261; Robertson v. Sheill, 3 Den. (N. Y.) 161; Swift v. Blair, 12 Wend. (N. Y.) 278.

54. Persbacker v. Murphy, 153 App. Div. 492, 138 NYS 537; Carter v. Barnum, 24 Mis. 220, 53 NYS 539, 28 NYCivProc 161.

55. Hart v. Hart, 45 App. Div. 280, 61 NYS 131.

56. Johnson v. Myers, 103 N. Y. 666, 9 NE 55; Demarest v. Smith, 143 App. Div. 104, 127 NYS 659; Scheu v. Blum, 119 App. Div. 825, 104 NYS 887; Domeyer v. Hoes, 99 App. Div. 294, 90 NYS 1074; Matter of Raab, 47 App. Div. 33, 62 NYS 332; Vaughn v. Strong, 66 Hun 278, 21 NYS 154; Harrison v. Ayers, 18 Hun (N. Y.) 336; Ehrenreich v. Lichtenberg, 59 NYS 383; Buckhout v. Hunt, 16 How Pr (N. Y.) 407; Stephenson v. Clark, 12 HowPr (N. Y.) 282.

[a] **If the amount of the claim as presented is materially reduced** (1) the resistance will be held not to be unreasonable. Johnson v. Myers, 103 N. Y. 666, 9 NE 55; Rauth v. Davenport, 18 NYS 721, 22 NYCiv Proc 121; Daggett v. Mead, 11 Abb NCas (N. Y.) 116; Pinkernelli v. Bischoff, 2 AbbNCas (N. Y.) 107; Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Robert v. Ditmas, 7 Wend. (N. Y.) 522. So the resistance was not unreasonable where the amount of the claim was reduced: (2) From three thousand dollars to three hundred dollars. Rauth v. Davenport, 18 NYS 721, 22 NYCivProc 121. (3) From thirteen hundred dollars to nine hundred and ninety-two dollars and fifty cents. Matter of Raab, 47 App. Div. 33, 62 NYS 332. (4) From forty-five hundred and seventy-two dollars and eighty-eight cents to eleven hundred and seventy-nine dollars and twenty cents. Matter of Ingraham, 35 Misc. 577, 72 NYS 62, 2 Mills Surr. 291. (5) From one thousand dollars to three hundred and fifty dollars. Cruikshank v. Cruikshank, 9 HowPr (N. Y.) 350. (6) From one hundred and fifty-seven dollars to one hundred and ten dollars. Comstock v. Olmstead, 6 How Pr (N. Y.) 77. (7) But where a claim was reduced from one hundred and ninety-six dollars to one hundred and seventy-eight dollars and fifty cents, the representative denying any liability, this was held not to be such a material reduction as to relieve the representative from liability for costs. Dukelow v. Searles, 20 NYS 348.

57. Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem]; Matter of Runions, 71 Misc. 641, 130 NYS 1039; Matter of Post, 30 Misc. 551, 64 NYS 369, 1 Mills Surr. 479; Brainerd v. De Graef, 29 Misc. 560, 61 NYS 953; Dukelow v. Searles, 20 NYS 348; Darling v. Halsey, 2 AbbNCas (N. Y.) 105; Linn v. Clow, 14 HowPr (N. Y.) 508.

[a] **Illustration.**—Where a claim was entirely rejected by the administrator, who offered no evidence to show that the claim was not in every respect correct and reasonable, on allowance of the claim by the surrogate, claimant should be allowed costs in addition to his disbursements. Matter of Runions, 71 Misc. 641, 130 NYS 1039, 8 Mills Surr. 135.

58. Niles v. Crocker, 88 Hun 312, 34 NYS 761.

59. Osborne v. Parker, 66 App. Div. 277, 72 NYS 894; Matter of Post, 30 Misc. 551, 64 NYS 369, 1 Mills Surr. 479.

60. Brainerd v. De Graef, 29 Misc. 560, 61 NYS 953; Fisher v. Bennett, 21 Misc. 178, 47 NYS 114.

[a] **The award of costs is discretionary with the referee** where the claim has been unreasonably resisted, and his discretion can be reviewed only by appeal. Domeyer v. Hoes, 99 App. Div. 294, 90 NYS 1074.

61. Lounsbury v. Sherwood, 53 App. Div. 318, 65 NYS 676; Whitcomb v. Whitcomb, 92 Hun 443, 36 NYS 607; Brainerd v. De Graef, 29 Misc. 560, 61 NYS 953; Parkhill v. Hillman, 12 HowPr (N. Y.) 353.

[a] **Certificate necessary where costs taxed by referee.**—Whitcomb v. Whitcomb, 92 Hun 443, 36 NYS 607.

[b] **The certificate of the trial judge** (1) that the claim had been duly presented and payment unreasonably resisted or a reference refused is indispensable as the basis of costs against the administrator. Scheu v. Blum, 119 App. Div. 825, 104 NYS 887. (2) A certificate of a circuit judge that the demand of a plaintiff had been unreasonably resisted by executors states the fact, and not the evidence of the fact. If such certificate is erroneous, it must be corrected on motion. Foot v. Gumaer, 12 Wend. (N. Y.) 195.

[c] **The certificate need not be incorporated in the report** of the referee but may be made separately and after the report is filed. Brainerd v. De Graef, 29 Misc. 560, 61 NYS 953.

62. Osborne v. Parker, 66 App. Div. 277, 72 NYS 894; Lounsbury v. Sherwood, 53 App. Div. 318, 65 NYS 676; Whitcomb v. Whitcomb, 92 Hun 443, 36 NYS 607.

63. Robert v. Ditmas, 7 Wend. (N. Y.) 522; Long v. Oxford, 104 N. C. 408, 10 SE 525.

[a] **The fact that the resistance of the representative is ineffectual** does not necessarily show that it was improper to make it. Nicholson v. Showerman, 6 Wend. (N. Y.) 554.

64. Richardson v. Allman, 40 Ill. A. 90; Donaldson v. Raborg, 28 Md. 34; Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580; Dodge v. Stanton, 12 Mich. 408; Hatch v. Hatch, 60 Vt. 160, 13 A 791.

[a] **Where the representative appeals without reasonable ground** for resisting the allowance and taking the appeal it is proper that claimant should recover the costs of the appeal. Dodge v. Stanton, 12 Mich. 408.

[b] **Where the representative is claimant** and the court appoints a special representative to defend the claim, to entitle the special representative to recover the costs of an appeal from an allowance it must appear that he acted in good faith and with reasonable prudence in appealing. Switzer v. Kee, 69 Ill. A. 499.

[c] **On appeal from the decision of commissioners** where their allowance is greatly decreased it is proper to apportion the costs. Hatch v. Hatch, 60 Vt. 160, 13 A 791.

other party.[65] Where a claim was allowed, and the contestant, on appealing from the allowance, gave an undertaking as required by statute to pay all damages and costs which might be awarded against him on appeal, and the judgment on appeal was adverse to him, the costs and disbursements of claimant on appeal were properly awarded against the contestant.[66] Where an exception was taken not only to the correctness of the county court's overruling of a motion to dismiss a petition to vacate a report of commissioners allowing a claim, but also to its affirmance of a judgment of the probate court which was in part right and in part wrong, no costs should be allowed.[67]

[§ 1151] **D. Priorities and Payment—1. Authority and Duty to Pay.** One of the most important duties of the personal representative is the payment of debts which have been legally established against the estate,[68] in their order,[69] and the assets in his hands are primarily chargeable with the payment of such debts,[70] and continue so until the claims are paid[71] or barred by statute.[72] In a broad sense the representative holds decedent's estate as a trust fund for the payment of his debts.[73] Where there is no lien the assets of the estate, real or personal, can as a rule be applied to the payment of the debts only by or through the personal representative unless a contrary provision is made in decedent's will;[74] but it has been held in England that a personal representative may assign the assets to trustees for the benefit of decedent's creditors and that the assignment is valid as against a judgment obtained by a creditor against the representative.[75] Where one is executor or administrator of two estates and becomes possessed of the property of both, it will be presumed that he retains from the assets of one estate an amount due from it to the other estate, whether as a debt or as unliquidated damages.[76]

[§ 1152] **2. Classification and Priorities of Debts—a. What Law Governs.**[77] The priorities of debts are governed wholly by the law of the jurisdiction in which the representative acts and from which he derives his authority.[78]

65. Martin v. Nichols, 54 Mo. A. 594; Sargeant v. Sargeant, 18 Vt. 330.

[a] **Where an heir appeals in the name of the representative** from the allowance of a claim and the allowance is sustained, the costs should be taxed against the estate and not against the heir. Harrington v. Evans, 49 Mo. A. 372.

[b] **In cases of appeals from commissioners** costs should abide the event of the suit, and be taxed after the same rules as in other civil cases, unless there are peculiar circumstances in the case. Sargeant v. Sargeant, 18 Vt. 330.

66. Marx v. Marx, 132 Wis. 113, 111 NW 1103.

67. In re Hayes, 90 Vt. 286, 98 A 45.

68. Colo.—U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

Conn.—Brainerd v. Cowdrey, 16 Conn. 1.

Ga.—Churchill v. Bee, 66 Ga. 621; Windsor v. Bell, 61 Ga. 671; McIntosh v. Hambleton, 35 Ga. 94, 89 AmD 276.

Ill.—Mosier v. Bowser, 226 Ill. 46, 80 NE 730.

Ind.—Owen Creek Presb. Church v. Taggart, 44 Ind. A. 393, 89 NE 406.

Ky.—Chorn v. Chorn, 98 Ky. 627, 33 SW 1107.

La.—Delaneuville v. Duhe, 114 La. 62, 38 S 20; Willis' Succ., 109 La. 281, 33 S 314; Hoss' Succ., 42 La. Ann. 1022, 8 S 833; Meissonier v. Laurent, 14 La. Ann. 14.

Md.—Baldwin v. Mitchell, 86 Md. 379, 38 A 775; Emery v. Owings, 6 Gill 191.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

Mich.—Henze v. Rogatzky, 199 Mich. 558, 165 NW 629.

Mo.—Hill v. Barton, 194 Mo. A. 325, 188 SW 1105.

N. H.—Walker v. Hill, 73 N. H. 254, 60 A 1017.

N. Y.—Schmitz v. Langhaar, 88 N. Y. 503; Matter of Miner, 39 Misc. 605, 80 NYS 643, 3 Mills Surr. 377.

N. C.—Holden v. Strickland, 116 N. C. 185, 21 SE 684; Wadsworth v. Davis, 63 N. C. 251.

Okl.—National Lumber, etc., Co. v. Robison, 48 Okl. 140, 149 P 1133.

Or.—Rutenic v. Hamaker, 40 Or. 444, 67 P 196.

Pa.—Duval's App., 38 Pa. 112.

S. C.—Farys v. Farys, 5 S. C. Eq. 261.

Wis.—Gillett v. Gillett, 9 Wis. 194.

Eng.—Nicholls v. Judson, 2 Atk. 300, 26 Reprint 583.

Ont.—McPhadden v. Bacon, 13 Grant Ch. (U. C.) 591.

[a] **Upon removal by the court** the representative has of course no further authority to pay debts. Rutenic v. Hamaker, 40 Or. 444, 67 P 196.

[b] **The duty of an administrator of a deceased township trustee** with respect to delivering over money belonging to the township is analogous to that which would have devolved upon the trustee if he had lived until the expiration of his term, but when the money received by the deceased trustee has been so far converted by him in his lifetime as to render its identification as the property of the township impracticable, the administrator is not required to deliver over to the successor of such trustee money which may have been derived from other sources or make good the money so converted, except in payment of the allowance regularly made against the estate. Rowley v. Fair, 104 Ind. 189, 3 NE 860.

[c] **The usual way in which charges against an estate are satisfied** is for the administrator to collect the debts and to sell personal property not specifically bequeathed and use the proceeds for that purpose. Walker v. Hill, 73 N. H. 254, 60 A 1017.

[d] **When duty arises.**—The official duty to pay demands against the estate does not arise until a claim has been duly exhibited, and it cannot be enforced until the claim has been established by suit or in some other authorized mode. Caulfield v. Green, 73 Conn. 321, 47 A 334.

Liability for failure to make payment see infra §§ 1236–1238.

Failure to pay debts as breach of administration bond see infra §§ 2579, 2580.

Liability for paying legatees and distributees before creditors see infra § 1341.

69. Classification and priorities of debts see infra §§ 1152–1192.

70. Daniel v. Baldwin, 148 Ala. 292, 40 S 421.

71. Daniel v. Baldwin, 148 Ala. 292, 40 S 421.

72. Daniel v. Baldwin, 148 Ala. 292, 40 S 421 (statute of nonclaim).

73. Bankers' Surety Co. v. Meyer, 205 N. Y. 219, 98 NE 399, AnnCas 1913D 1218 [aff 146 App. Div. 867, 131 NYS 857]; Blood v. Kane, 130 N. Y. 514, 29 NE 994, 15 LRA 490.

74. Emery v. Owings, 6 Gill (Md.) 191; Holden v. Strickland, 116 N. C. 185, 21 SE 684; Tuck v. Walker, 106 N. C. 285, 11 SE 183; Mauney v. Holmes, 87 N. C. 428; Murchison v. Williams, 71 N. C. 135; Duval's App., 38 Pa. 112.

[a] **Effect of testamentary trust.**—Where a testator names an executor in his will, and devises land to others in trust with a direction to sell, the proceeds to be applied to the payment of debts, he does not thereby confer upon the testamentary trustees the powers and duties of the executor as to paying the debts, unless the will contains a clear expression of an intention to that effect. Duval's App., 38 Pa. 112.

75. Wolverhampton, etc., Banking Co. v. Marston, 7 H. & N. 148, 158 Reprint 428.

76. McLane v. Spence, 6 Ala. 894.

77. In administration generally see supra § 54.

Payment of claims by ancillary administrator see infra § 2697.

78. U. S.—Smith v. Union Bank, 5 Pet. 518, 8 L. ed. 212 [aff 24 F. Cas. No. 14,362, 4 Cranch C. C. 21]; Harrison v. Sterry, 5 Cranch 289, 3 L. ed. 104.

La.—Mary's Succ., 2 Rob. 438; Olivier v. Townes, 2 Mart. N. S. 93.

Md.—De Sobry v. De Laistre, 2 Harr. & J. 191, 3 AmD 535.

Mass.—Dawes v. Head, 3 Pick. 128.

N. H.—Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

N. C.—Moye v. May, 43 N. C. 131, 54 N. C. 84.

Pa.—In re Miller, 3 Rawle 312, 24 AmD 345.

Philippine.—Gamboa v. Floranza, 12 Philippine 191.

S. C.—Dial v. Gary, 14 S. C. 573, 37 AmR 737.

Va.—Tunstall v. Pollard, 11 Leigh. (38 Va.) 1.

Eng.—In re Kloebe, 28 Ch. D. 175 [expl Cook v. Gregson, 2 Drew 286, 61 Reprint 729, and disappr Wilson v. Dunsany, 18 Beav. 293, 52 Reprint 115]; Pardo v. Bingham, L. R. 6 Eq. 485.

Ont.—Milne v. Moore, 24 Ont. 456.

[a] **Reason for rule.**—"The ground on which the assets are to be collected by the authority, and administered according to the law of the country, in which they happen to be at the decedent's death, is the claim which its citizens have to the protection and assistance of the government in the prosecution of their rights." In re Miller, 3 Rawle (Pa.) 312, 319, 24 AmD 345.

[b] **The law of the place of the contract** does not govern in determining the priority of a claim arising out of such contract. Harrison v. Sterry, 5 Cranch (U. S.) 289, 3 L. ed. 104; Union Bank v. Smith, 24 F. Cas. No. 14,362, 4 Cranch C. C. 21; Pardo v. Bingham, L. R. 6 Eq. 485.

[§ 1153] **b. At Common Law—(1) Classification.** At common law the proper expenses of the funeral and of proving the will, if one existed, had priority over all debts, and this priority has not been taken away by modern statutes.[79] Apart from these expenses the debts of decedent were, under the common-law system, divided into three main classes: (1) Debts of record; (2) debts by specialty; and (3) debts by simple contract.[80] These were payable in the following order: (1) Debts of record or by specialty due to the crown;[81] (2) other debts of record, such as final judgments rendered against decedent in his lifetime,[82] final decrees of a court of equity being on the same footing;[83] (3) specialty debts, such as debts due on bonds, covenants, and other sealed instruments, when founded on a consideration,[84] and rent in arrear in decedent's lifetime;[85] (4) debts due by simple contract, that is, contracts not under seal, such as bills and notes, and promises resting in parol or implied in law;[86] and (5) specialty debts not founded on a valuable consideration.[87]

Where the assets were sufficient to pay all the debts, it seems that the order of priority was considered immaterial and was not strictly followed.[88]

At the present time the common-law order of classification is observed but little, if at all, the matter of priorities being almost exclusively regulated by statute.[89]

[§ 1154] **(2) Preference among Debts of Same Class—(a) Right of Representative to Give Preference.** At common law an executor or administrator has the right to pay one creditor of a given class in full, although the assets are insufficient to satisfy the claims of other creditors of the same class.[90] But if a creditor obtains a judgment or decree against the executor or administrator, such creditor must be satisfied before any others of the same class;[91] and after the representative has notice of the commencement of an action at law against him by a creditor he cannot make a voluntary payment to any other creditor of equal degree,[92] al-

79. See infra § 1160.

80. Com. v. Logan, 1 Bibb (Ky.) 529.

Definition of terms used in text see Debt § 8.

81. Com. v. Logan, 1 Bibb (Ky.) 529.

[a] **But debts due the crown did not have priority over** debts which were otherwise of superior dignity; the preference extended only to debts of equal or inferior degree. Com. v. Logan, 1 Bibb (Ky.) 529; Klinck v. Keckley, 11 S. C. Eq. 250; Public Accounts v. Greenwood, 1 S. C. Eq. 450.

Debts to state see infra §§ 1163–1165.

82. Ill.—Woodworth v. Paine, 1 Ill. 374.

Ky.—Place v. Oldham, 10 B. Mon. 400; Com. v. Barstow, 3 B. Mon. 290.

N. J.—Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618.

N. Y.—Hamed's Case, 4 AbbPr 270; Ainslie v. Radcliff, 7 Paige 439; Trust v. Harned, 4 Bradf. Surr. 213.

N. C.—Garrett v. Johnson, 29 N. C. 231.

Pa.—Ramsey's App., 4 Watts 71.

Eng.—Fuller v. Redman, 26 Beav. 600, 53 Reprint 1030; Searle v. Lane, 2 Freem. 103, 22 Reprint 1086, 2 Vern. Ch. 37, 88, 23 Reprint 634, 667; Robinson v. Tonge, 3 P. Wms. 400, 24 Reprint 1117; Berrington v. Evans, 3 Y. & C. Exch. 384, 160 Reprint 751.

Man.—Frontenac Loan Co. v. Morice, 3 Man. 462.

[a] **The priority was not founded on any supposed lien** on decedent's land. Ainslie v. Radcliff, 7 Paige (N. Y.) 439.

[b] **The dormancy of a judgment** did not affect its dignity in administration. Garrett v. Johnson, 29 N. C. 231.

[c] **A decree for an accounting** did not stand on the footing of a final judgment or decree. Searle v. Lane, 2 Freem. 103, 22 Reprint 1086, 2 Vern. Ch. 37, 88, 213 Reprint 634, 637; Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756.

[d] **A judgment of a justice of the peace,** not being a matter of record, did not rank with judgments of courts of record, but when the representative had notice of the judgment he was bound to pay it before specialties. Garrett v. Johnson, 29 N. C. 231.

[e] **Among several judgments or decrees** no priority was recognized by reason of prior date of recovery. Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618 [dist Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619]; Ainslie v. Radcliff, 7 Paige (N. Y.) 439 [dist Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619].

[f] **A debt due by recognizance of special bail** had priority over a debt by specialty. Moon v. Pasteur, 4 Leigh (31 Va.) 35.

[g] **Until enrollment a recognizance** had no preference over specialty debts. Bernes v. Weisser, 2 Bradf. Surr. (N. Y.) 212; Bothomly v. Fairfax, 1 P. Wms. 334, 24 Reprint 413, 2 Vern. Ch. 750, 23 Reprint 1090.

83. Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; Ainslie v. Radcliff, 7 Paige (N. Y.) 439; Woddrop v. Ward, 3 S. C. Eq. 203; Garner v. Briggs, 4 Jur. N. S. 230; Searle v. Lane, 2 Vern. Ch. 88, 23 Reprint 667; Perry v. Phelips, 10 Ves. Jr. 3, 33 Reprint 756.

[a] **Judgment or decree must be final.**—Ex p. Farrars, 13 S. C. 254; McIntosh v. Brooks, 34 S. C. L. 133 note; McIntosh v. Wright, 9 S. C. Eq. 385.

[b] **A judgment in the lord mayor's court against a garnishee** did not entitle plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. Holt v. Murray, 1 Sim. 485, 2 EngCh 485, 57 Reprint 659.

84. Ky.—Com. v. Barstow, 3 B. Mon. 290; Com. v. Logan, 1 Bibb 529.

N. C.—Roundtree v. Sawyer, 15 N. C. 44.

S. C.—Rippon v. Townsend, 1 S. C. L. 445; Harbison v. Giles, 1 S. C. L. 275.

Tex.—Dunn v. Sublett, 14 Tex. 521.

Eng.—Pinchon's Case, 9 Coke 86b, 77 Reprint 859; In re Le Geyt, 3 De G. J. & S. 570, 68 EngCh 570, 46 Reprint 757; Turner v. Turner, 1 Jac. & W. 39, 37 Reprint 290; Greenwood v. Brudnish, Prec. Ch. 534, 24 Reprint 239; Atkinson v. Grey, 1 Smale & G. 577, 65 Reprint 253.

Ont.—Hutchinson v. Edmison, 11 Grant Ch. (U. C.) 477.

[a] **Effect of naming heir in bond.**—In applying the proceeds of the real estate a creditor by bond in which the heirs were named took priority over a specialty creditor under a security in which the heirs were not expressly named. Richardson v. Jenkins, 1 Drew. 477, 61 Reprint 534.

[b] **Separate property of deceased married woman.**—In distributing the separate property of a deceased married woman, a bond was not entitled to any priority over debts by simple contract since the bond, considered merely as a bond, was void. Anonyous, 18 Ves. Jr. 258, 34 Reprint 315.

85. In re Hastings, 6 Ch. D. 610 (per Malins, V. C.); Kidd v. Boone, L. R. 12 Eq. 89; Clough v. French, 2 Coll. 277, 33 EngCh 276, 63 Reprint 733; Thompson v. Thompson, 9 Price 464, 147 Reprint 152.

[a] **Relation of landlord and tenant essential.**—Vincent v. Godson, 4 De G. M. & G. 546, 53 EngCh 428, 43 Reprint 620 [aff 1 Smale & G. 384, 65 Reprint 168].

[b] **Lands outside of England.**—The rule whereby rent was classed as a specialty debt did not apply to rents of lands outside of England. Vincent v. Godson, 4 De G. M. & G. 546, 53 EngCh 428, 43 Reprint 620 [aff 1 Smale & G. 384, 65 Reprint 168].

[c] **Rent of "fishing-room" not entitled to priority.**—Chancey v. Brooking, 1 Newfoundl. 314.

[d] **An award of damages on cancellation** of a lease is not entitled to rank as a specialty debt. Talbot v. Shrewsbury, L. R. 16 Eq. 26.

86. Com. v. Barstow, 3 B. Mon. (Ky.) 290; Com. v. Logan, 1 Bibb (Ky.) 529; Rippon v. Townsend, 1 S. C. L. 445; Harbison v. Giles, 1 S. C. L. 275.

87. Isenhart v. Brown, 2 Edw. (N. Y.) 341; Shephens v. Harris, 41 N. C. 57; Jones v. Powell, 1 Eq. Cas. Abr. 84, 21 Reprint 896; Garrard v. Dinorben, 5 Hare 213, 26 EngCh 213, 67 Reprint 891; Lomas v. Wright, 2 Myl. & K. 769, 7 EngCh 769, 39 Reprint 1138; Lechmere v. Carlisle, 3 P. Wms. 211, 24 Reprint 1033; Fairbeard v. Bowers, Prec. Ch. 17, 24 Reprint 9, 2 Vern. Ch. 202, 23 Reprint 731; Clough v. Lambert, 10 Sim. 174, 16 EngCh 174, 59 Reprint 579; Dawson v. Kearton, 3 Smale & G. 186, 65 Reprint 617; 2 Williams Ex. p 217.

88. Turner v. Turner, 1 Jac. & W. 39, 37 Reprint 290.

89. See infra § 1156.

90. U. S.—Wilson v. Wilson, 30 F. Cas. No. 17,848, 1 Cranch C. C. 255.

Ga.—Green v. Allen, 45 Ga. 205; Bomgaux v. Bevan, Dudl. 110.

N. Y.—Schmitz v. Langhaar, 88 N. Y. 503; McKay v. Green, 3 Johns. Ch. 56.

N. C.—McLean v. Leath, 68 N. C. 95; Brandon v. Allison, 66 N. C. 532; Wadsworth v. Davis, 63 N. C. 251; Anonymous, 2 N. C. 295.

Va.—Mayo v. Bentley, 4 Call (8 Va.) 528.

Eng.—In re Hankey, [1899] 1 Ch. 541; Lyttleton v. Cross, 3 B. & C. 317, 10 ECL 150, 107 Reprint 751; In re Harris, 56 L. J. Ch. 754; Waring v. Danvers, 1 P. Wms. 295, 24 Reprint 396.

Man.—McArthur v. Macdonnell, 3 Man. 9.

Aliter under modern statute see infra § 1156.

91. See infra § 1155.

92. Ga.—Bomgaux v. Bevan, Dudl. 110.

Ky.—Gregg v. Com., 9 Dana 343.

N. Y.—Schmitz v. Langhaar, 88 N. Y. 503.

N. C.—Wadsworth v. Davis, 63 N. C. 251; Hall v. Gully, 26 N. C. 345;

though he may give preference to another creditor of equal degree by confessing judgment in his favor.[93] Notice of the commencement of a suit in equity does not, however, have the effect of destroying the representative's right of preference,[94] and he can make a voluntary payment to another creditor of the same class at any time before final decree.[95] If a creditor files a bill in equity against an executor or administrator for the benefit of himself and all other creditors, and a decree is had for an account and distribution, this is in the nature of a decree in favor of all the creditors,[96] and although the legal priorities of creditors are not affected by the decree,[97] the right of a preference among creditors of equal degree is gone.[98]

[§ 1155] **(b) Right of Creditor to Obtain Preference.** At common law, among creditors of the same class, the one who first reduces his claim to judgment against the personal representative has priority over the others as a reward for his superior diligence;[99] and the same rule applies to decrees in equity against the personal representative.[1] But in order to entitle the creditor to preference his judgment or decree must be final.[2] Judgments or decrees obtained by a creditor against the personal representative do not, however, belong to the same class as judgments recovered against decedent in his lifetime,[3] and a creditor who obtains judgment against the personal representative does not thereby acquire priority over creditors whose claims are of superior dignity to that upon which the judgment is founded.[4] The mere bringing of an action against a personal representative, while it may prevent him from making voluntary payments to other creditors of the same class,[5] does not entitle the creditor bringing the action to any priority over other creditors who may institute actions,[6] but the priority of the claims of the several creditors who institute actions is determined according to the dates of their respective judgments.[7] A decree made for the administration of the estate on a bill in equity filed on behalf of all the creditors operates as a decree in favor of all the creditors, and a subsequent judgment in favor of a single creditor entitles him to no preference with regard to the payment of his claim.[8] A person holding the legal title to land, half of which belongs in equity to decedent, cannot have a debt against decedent satisfied out of the land to the exclusion of other creditors, but must come in equally with them.[9]

[§ 1156] **c. Under Modern Statutes—(1) In General.** The common-law order of priority still exists in so far as it has not been expressly abrogated or superseded by the local administration laws;[10] but the power of state legislatures to regulate the priorities of claims against decedent's estates is well settled,[11] and the common-law rules have been very generally superseded by statutes, differing widely in the various jurisdictions, classifying the debts of decedents and specifying the or-

White v. Arrington, 25 N. C. 166; Anonymous, 2 N. C. 295.

Eng.—Waring v. Danvers, 1 P. Wms. 295, 24 Reprint 396; Parker v. Dee, 3 Swanst. 529 note, 36 Reprint 968.

[a] **Since the Judicature Act of 1873,** which provides that when the rules of equity and those of common law conflict, the former shall prevail, the rule in equity must be followed; and an administrator is entitled after notice of an action brought against him by one creditor to apply the assets in payment of the debt of another creditor. Vibart v. Coles, 24 Q. B. D. 364 [foll In re Radcliffe, 7 Ch. D. 733].

93. Wilson v. Wilson, 30 F. Cas. No. 17,848, 1 Cranch C. C. 255; Gregg v. Com., 9 Dana (Ky.) 343; Allison v. Davidson, 21 N. C. 46; Anonymous, 2 N. C. 295; Lyttleton v. Cross, 3 B. & C. 317, 10 ECL 150, 107 Reprint 751; Waring v. Danvers, 1 P. Wms. 295, 24 Reprint 396; Parker v. Dee, 3 Swanst. 529 note, 36 Reprint 968.

[a] **A court of equity will not interfere by injunction** to restrain the representative from confessing judgment. Wilson v. Wilson, 30 F. Cas. No. 17,848, 1 Cranch C. C. 255.

94. Schmitz v. Langhaar, 88 N. Y. 503; Sandridge v. Spurgen, 37 N. C. 269; Allison v. Davidson, 21 N. C. 46; Vibart v. Coles, 24 Q. B. D. 364; Oxford v. Daston, Colles 229, 1 Reprint 262; Mason v. Williams, 2 Salk. 507, 91 Reprint 433; Maltby v. Russell, 2 Sim. & St. 227, 1 EngCh 227, 57 Reprint 333.

95. Wadsworth v. Davis, 63 N. C. 251; Sandridge v. Spurgen, 37 N. C. 269; Allison v. Davidson, 21 N. C. 46; Mason v. Williams, 2 Salk. 507, 91 Reprint 433.

[a] **A decree quod computet** (1) on a bill filed by a creditor against an executor for the purpose of collecting his own debt does not prevent the executor from paying other claims of equal dignity before final decree. Sandridge v. Spurgen, 37 N. C. 269; Allison v. Davidson, 21 N. C. 46; Smith v. Eyles, 2 Atk. 385, 26 Reprint 633; Mason v. Williams, 2 Salk. 507, 91 Reprint 433. (2) But it is otherwise where the bill is filed on behalf of all the creditors. Sandridge v. Spurgen, supra; Allison v. Davidson, supra; Jones v. Jukes, 2 Ves. Jr. 518, 30 Reprint 753.

96. Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756; Paxton v. Douglas, 8 Ves. Jr. 520, 32 Reprint 456.

97. Nunn v. Barlow, 1 Sim. & St. 588, 1 EngCh 588, 57 Reprint 232.

98. Sandridge v. Spurgen, 37 N. C. 269; Allison v. Davidson, 21 N. C. 46; In re Harris, 56 L. J. Ch. 754; Mitchelson v. Piper, 8 Sim. 64, 8 Eng Ch 64, 59 Reprint 26.

99. Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740]; Mapes v. Coffin, 5 Paige (N. Y.) 296; Henderson v. Burton, 38 N. C. 259; In re Bentinck, [1897] 1 Ch. 673 (per Sterling J.); In re Stubbs, 8 Ch. D. 154, 2 ERC 203; In re Williams, L. R. 15 Eq. 270, 2 ERC 200; Ashley v. Pocock, 3 Atk. 208, 26 Reprint 921; Jennings v. Rigby, 33 Beav. 198, 55 Reprint 343; Vincent v. Godson, 3 De G. & Sm. 717, 64 Reprint 675; Fowler v. Roberts, 2 Giffard 226, 66 Reprint 95.

1. Bank of England v. Morice, 2 Bro. P. C. 465, 1 Reprint 1068; Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756.

2. Garner v. Briggs, 4 Jur. N. S. 230; Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756.

[a] **Decree quod computet.**—A mere decree against the executor for an accounting with a direction for payment according to the result of the account does not entitle the creditor obtaining the decree to any priority over a judgment subsequently obtained. Smith v. Eyles, 2 Atk. 385, 26 Reprint 633; Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756.

[b] **Judgment quod recuperet.**—Where in an action of covenant an interlocutory judgment quod recuperet was signed, but before final judgment defendant died, and his executor confessed judgment to a bond creditor, the executor could plead the judgment confessed in bar to a scire facias in the action of covenant. Smith v. Eyles, 2 Atk. 385, 26 Reprint 633.

3. 2 Williams Ex. p 201.

4. U. S.—Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740].

Ga.—Davis v. Smith, 5 Ga. 274, 48 AmD 279.

N. Y.—Mount v. Mitchell, 31 N. Y. 356; Parker v. Gainer, 17 Wend. 559; Ainslie v. Radcliff, 7 Paige 439; St. John's Est., Tuck. Surr. 126.

N. C.—Henderson v. Burton, 38 N. C. 259; Roundtree v. Sawyer, 15 N. C. 44.

Wis.—Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

5. See supra § 1154.

6. Anonymous, 2 N. C. 296.

7. Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740]; Ashley v. Pocock, 3 Atk. 208, 26 Reprint 921; Dolloud v. Johnson, 2 Smale & G. 301, 65 Reprint 410; Perry v. Phelips, 10 Ves. Jr. 34, 32 Reprint 756.

[a] **The creditor who first proceeds upon his judgment quando** and fixes the administrator with assets, must first be paid without any regard to the priority of the judgments. McLean v. Leach, 68 N. C. 95 [foll Dancy v. Pope, 68 N. C. 147].

8. In re Stubbs, 8 Ch. D. 154, 2 ERC 203; Parker v. Bingham, 33 Beav. 535, 55 Reprint 476; Shepherd v. Kent, Prec. Ch. 190, 24 Reprint 92, 2 Vern. Ch. 435, 23 Reprint 879.

9. Moore v. Searcy, 17 F. Cas. No. 9,774a, Hempst. 52.

10. Woodworth v. Paine, 1 Ill. 374; Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411; Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384.

[a] **In New Mexico,** if the statutes are silent as to the priority of a particular class of debts, the courts are compelled to resort to the civil law of Spain and Mexico. Crenshaw v. Delgado, 1 N. M. 376.

11. Central Bank v. Little, 11 Ga. 346; Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. A. 58].

der in which they shall be paid,[12] or even, sometimes, abolishing all preferences and placing all debts on an equality with respect to the right of payment.[13] The provisions of the local statutes fixing the order of payment are mandatory; they cannot be changed or disregarded by the court[14] or by the representative,[15] nor is it within the power of a testator to change or affect the rights of creditors with respect to payment of their claims out of his estate by any provisions in his will[16] or any expressions of his wishes or intentions.[17] The rights of creditors and the relative priorities of their claims become fixed at the time of the debtor's death,[18] and the law then in force controls,[19] and it is immaterial that the debt was contracted[20] or the claim reduced to judgment[21] before the enactment of that law. Nor does the application of such a statute to a debt existing at the time of its enactment render the statute open to the objection that it impairs the obligation of a contract.[22]

A statute giving priority to the allowance to a

12. U. S.—Wellman v. Bethea, 243 Fed. 222.
Ala.—Scott v. Ware, 64 Ala. 174.
Ark.—Simon v. Pine Bluff Trust Co., 99 Ark. 523, 138 SW 986.
Colo.—McCutchen v. Osborne, 61 Colo. 408, 158 P 136; U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.
Del.—Robinson v. Robinson, 3 Del. 433.
Ga.—Hargroves v. Cooke, 15 Ga. 321; Smith v. Ellington, 14 Ga. 379.
Ill.—In re Bell, 210 Ill. A. 350; Merchants' L. & T. Co. v. Hulette, 187 Ill. A. 161; Ross v. Will, 121 Ill. A. 421.
Ind.—Hildebrand v. Kinney, 172 Ind. 447, 87 NE 832, 19 AnnCas 788 [rev (A.) 83 NE 379].
Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.
Ky.—Brown v. U. S. Trust Co., 215 SW 815.
La.—Franek v. Brewster, 141 La. 1031, 76 S 187; Finegan's Succ., 135 La. 473, 65 S 614.
Mass.—Hayes v. Gill, 226 Mass. 388, 115 NE 492.
Mich.—In re Keene, 202 Mich. 646, 168 NW 943.
Mo.—Raymuth Real Est., etc., Co. v. Robinson, 199 Mo. A. 515, 204 SW 276.
N. Y.—In re Casserly, 170 NYS 841.
N. C.—Evans v. Norris, 2 N. C. 411.
Pa.—Frazer v. Tunis, 1 Binn. 254; Dorsey v. Tunis, 4 Yeates 93.
S. C.—Heath v. Belk, 12 S. C. 582; Rice v. Cannon, 8 S. C. Eq. 172; Rippon v. Townsend, 1 S. C. L. 445; Harbison v. Giles, 1 S. C. L. 275.
W. Va.—Morris v. Westerman, 79 W. Va. 502, 92 SE 567.
Wis.—Schneider v. Breier, 129 Wis. 446, 109 NW 99, 6 LRANS 917.
Eng.—In re Bentinck, [1897] 1 Ch. 673; Crowder v. Stewart, 16 Ch. D. 368; In re Hastings, 6 Ch. D. 610; Re Orsmond, 58 L. T. Rep. N. S. 24.

[a] **Classification applies to insolvent estates.**—Hildebrand v. Kinney, 172 Ind. 447, 453, 87 NE 832, 19 AnnCas 788 [rev (A.) 83 NE 379] ("We think that the legislature intended to classify the charges against the estate of decedents, and that the rule is not different with respect to solvent and insolvent estates, unless specific liens absorb the property").

[b] **Statute applicable to estate of married woman.**—Schneider v. Breier, 129 Wis. 446, 109 NW 99, 6 LRANS 917.

[c] **Right of creditor to classification.**—A creditor of a partnership estate whose claim property belongs to the fifth class should not be precluded from an allowance of his claim in that class by the fact that the claim is subject to the equitable rights of other creditors. In re Perkins, 166 Mo. A. 170, 148 SW 969.

13. Gunn v. Boone, 7 Heisk. (Tenn.) 8; Rains v. Rainey, 11 Humphr. (Tenn.) 261; Reid v. Huff, 9 Humphr. (Tenn.) 345; Dance v. McGregor, 5 Humphr. (Tenn.) 428; Mosier v. Zimmerman, 5 Humphr. (Tenn.) 62; Black v. Planters' Bank, 4 Humphr. (Tenn.) 367; Chamberlen v. Clark, 9 Ont. A. 273 [dism app 1 Ont. 135]; Taylor v. Brodie, 21 Grant Ch. (U. C.) 607; Henry v. Sharp, 18 Grant Ch. (U. C.) 16; Bank of British North America v. Mallory, 17 Grant Ch. (U. C.) 102; Parsons v. Gooding, 33 U. C. Q. B. 499.

14. Ark.—Simon v. Pine Bluff Trust Co., 99 Ark. 523, 138 SW 986.
Cal.—Tompkins v. Weeks, 26 Cal. 50.
Ill.—Colton v. Field, 131 Ill. 398, 22 NE 545.
Ind.—Jenkins v. Jenkins, 63 Ind. 120.
Iowa.—Hart v. Jewett, 11 Iowa 276.
La.—Peters' Succ., 114 La. 952, 38 S 690.
N. Y.—Thomson v. Taylor, 71 N. Y. 217.
N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.
Or.—In re Osburn, 36 Or. 8, 58 P 521.
Va.—Deering v. Kerfoot, 89 Va. 491, 16 SE 671.
Wash.—In re Blattner, 92 Wash. 43, 158 P 1015.
W. Va.—Gardner v. Gardner, 47 W. Va. 368, 34 SE 792.

[a] **Illustration.**—If the decree of a surrogate for an executor's payment of a debt before the final accounting remains unexecuted when the general decree for the distribution of the estate among the creditors is made, it must, in case of insufficiency of assets to pay the debts in full, give way to the paramount authority of the statute providing for equality between the creditors, and the creditor obtaining the decree cannot claim a preference under it. Thomson v. Taylor, 71 N. Y. 217.

15. Ark.—Simon v. Pine Bluff Trust Co., 99 Ark. 523, 138 SW 986.
Cal.—Tompkins v. Weeks, 26 Cal. 50.
Conn.—Bennett v. Ives, 30 Conn. 329.
Ga.—Yancey v. Citizens' Bank, etc., Co., 14 Ga. A. 310, 80 SE 700.
Iowa.—In re Dennis, 67 Iowa 110, 24 NW 746.
Ky.—Place v. Oldham, 10 B. Mon. 400.
La.—Peters' Succ., 114 La. 952, 38 S 690.
Mass.—Harriman v. Tyndale, 184 Mass. 534, 69 NE 353.
Pa.—Mason's App., 89 Pa. 402.
Ont.—Re Williamson, 39 Ont. L. 413, 12 OntWN 154, 36 DomLR 783.

[a] **The representative is not entitled to credit** for payment in disregard of the statutory order, although made under order of the probate court. Tompkins v. Weeks, 26 Cal. 50.

[b] **An executor de son tort** is as much bound by such statutes as a rightful executor. Bennett v. Ives, 30 Conn. 329.

[c] **Person receiving payment chargeable with knowledge.**—"One accepting a payment from an administrator does so with knowledge that the administrator has no right to direct the application of the payment in a manner contrary to law. It follows that a surety upon a note cannot defeat recovery by showing that the principal is dead, and that the administrator of his estate made certain payments to the holder of the note, with the understanding that the payments should be applied in satisfaction of the note, and that the holder of the note failed to so apply the payments, but did appropriate them to other indebtedness due by the estate." Yancey v. Citizens' Bank, etc., Co., 14 Ga. A. 310, 80 SE 700.

Liability of representative for payment out of order of priority see infra §§ 1231, 1232.

16. Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949; Richardson v. Richardson, 87 Ill. A. 354, 358; Little Falls Nat. Bank v. King, 53 App. Div. 541, 65 NYS 1010; Moore v. Byers, 65 N. C. 240.

"No creditor can be prejudicially affected by the terms of a will. His rights are fixed and determined by the law, and not in any manner controlled by the will of his debtor. A creditor's right to be paid out of the assets of his debtor's estate does not depend upon testamentary provisions, but is secured by the law, and is the same and none other, both in testate and intestate estates." Richardson v. Richardson, supra.

17. Mason v. Man, 3 S. C. Eq. 116 (a declaration by a debtor on his death bed that a specified debt is sacred, and a request that it shall be paid, will not affect the order of payment).

18. Ga.—Columbus Third Nat. Bank v. Strauss, 135 Ga. 324, 69 SE 482; Green v. Allen, 45 Ga. 205; Williams v. Price, 21 Ga. 507, 510; Bomgaux v. Bevan, Dudl. 110.
Ill.—Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. 58]; Clingman v. Hopkie, 78 Ill. 152.
La.—Gragard's Succ., 106 La. 298, 30 S 885; Boyce v. Escoffie, 2 La. Ann. 872.
N. Y.—Little Falls Nat. Bank v. King, 53 App. Div. 541, 65 NYS 1010; Ainslie v. Radcliff, 7 Paige 439.
N. C.—Mauney v. Holmes, 87 N. C. 428.
Pa.—In re Donnelly, 246 Pa. 308, 92 A 306; Strouse v. Lawrence, 160 Pa. 421, 28 A 930; Patterson's App., 96 Pa. 93; Diechman's App., 2 Whart. 395, 30 AmD 271; Scott v. Ramsey, 1 Binn. 221; Matter of Patterson, 1 Ashm. 336.
S. C.—Tucker v. Condy, 28 S. C. Eq. 281; Thomas v. McElwee, 34 S. C. L. 131; Hutchison v. Bates, 17 S. C. L. 111.

19. Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. 58]; Paschall v. Hailman, 9 Ill. 285; Deichman's App., 2 Whart. (Pa.) 395, 30 AmD 271; Price v. Harrison, 31 Gratt. (72 Va.) 114.

[a] **Statutes not retroactive.**—Statutes regulating the priorities of debts do not apply to the estates of persons who died before such statutes were enacted. Woodworth v. Paine, 1 Ill. 374; Betts v. Bond, 1 Ill. 287; Price v. Harrison, 31 Gratt. (72 Va.) 114.

20. State v. Dickson, 38 Ga. 171; Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. A. 58]; Deichman's App., 2 Whart. (Pa.) 395, 30 AmD 271.

21. State v. Dickson, 38 Ga. 171; Paschal v. Hailman, 9 Ill. 285 [dist Woodworth v Paine, 1 Ill. 374; Betts v. Bond, 1 Ill. 287]; Deichman's App., 2 Whart. (Pa.) 395, 30 AmD 271.

22. State v. Dickson, 38 Ga. 171; Deichman's App., 2 Whart. (Pa.) 395, 30 AmD 271.

surviving wife or children[23] does not otherwise affect the order of preference in which creditors are to be paid; and after such claim has been paid, the claims to which inferior privileges are accorded should be paid in the order established by law.[24]

[§ 1157] **(2) Preference among Debts of Same Class—(a) Right of Representative to Give Preference.** The representative's right to prefer one creditor over another is generally abolished and all debts of the same class are made payable pro rata in case of deficiency of assets.[25]

[§ 1158] **(b) Right of Creditors to Obtain Preference.** Under modern American statutes a creditor cannot, by the exercise of superior diligence, obtain any preference over other creditors, but a judgment recovered by him against the personal representative has no higher rank than the claim on which it is founded and gives the claim no preference.[26] Even the fact that a creditor by his diligence has increased the assets by the discovery of a fund applicable to the claims of creditors does not entitle him to any preference over other creditors of the same class; but the newly discovered fund will be distributed among all the creditors according to the local statute.[27] Where an unpreferred creditor has received a dividend on the first annual distribution, and afterward, but within the time limited for the exhibition and allowance of claims, other demands of the same class are allowed, the latter must be paid an equal percentage with the first before the first can share in a second distribution.[28]

[§ 1159] **(3) Preferred Claims—(a) In General.** In the modern administration of estates there are no priorities among creditors except as given by statute.[29] Where preferred claims are enumerated in the same class the order in which they are enumerated is immaterial, and if the statute does not expressly prefer any one of them over another all are payable pro rata if the assets are insufficient to

23. See supra §§ 804–808.

24. Peters' Succ., 114 La. 952, 38 S 690.

25. U. S.—U. S. v. Wardwell, 28 F. Cas. No. 16,640, 5 Mason 82.

Ala.—Scott v. Ware, 64 Ala. 174.

Ark.—Payne v. Flourney, 29 Ark. 500.

Conn.—Bennett v. Ives, 30 Conn. 329.

Ga.—Carter v. Penn, 79 Ga. 747, 4 SE 696; Green v. Allen, 45 Ga. 205; Wylly v. King, Ga. Dec. Pt. 11, 7; Bomgaux v. Bevan, Dudl. 110.

Ill.—Colton v. Field, 131 Ill. 398, 22 NE 545; Dunlap v. McGhee, 98 Ill. 287; Peo. v. Phelps, 78 Ill. 147; Armstrong v. Cooper, 11 Ill. 560; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Hart v. Jewett, 11 Iowa 276.

Ky.—Com. v. Richardson, 8 B. Mon. 81.

La.—Harkin's Succ., 2 La. Ann. 923; Boyce v. Escoffie, 2 La. Ann. 872.

Md.—Wyse v. Smith, 4 Gill & J. 295.

Mass.—Harriman v. Tyndale, 184 Mass. 534, 69 NE 353.

N. Y.—Thomson v. Taylor, 71 N. Y. 217; Mount v. Mitchell, 31 N. Y. 356; Matter of Mt. Vernon Trust Co., 175 App. Div. 353, 161 NYS 1060 [aff 223 N. Y. 563 mem. 119 NE 1061 mem]; Little Falls Nat. Bank v. King, 53 App. Div. 541, 65 NYS 1010; Matter of Philp, 29 Misc. 263, 61 NYS 241; Allen v. Bishop, 25 Wend. 414; St. John's Est., Tuck. Surr. 126.

N. C.—Moore v. Byers, 65 N. C. 240.

Oh.—McDonald v. Aten, 1 Oh. St. 293.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Pa.—Stephens v. Cotterell, 99 Pa. 188; Prevost v. Nicholls, 4 Yeates 479; Cairns' Est., 13 Phila. 350; Ritter's Est., 11 Phila. 12; In re Hofelt, 28 PittsbLegJNS 402.

S. C.—Wulbern v. Timmons, 55 S. C. 456, 33 SE 568; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

Tenn.—Rains v. Rainey, 11 Humphr 261.

Va.—Scott v. Cheatham, 78 Va. 82.

Ont.—Re Williamson, 39 Ont. L. 413, 12 OntWN 154, 36 DomLR 783; Parsons v. Gooding, 33 U. C. Q. B. 499; Douer v. Ross, 19 Grant Ch. (U. C.) 229.

"When claims are duly exhibited against an estate and the administrator is satisfied they are just, it becomes his duty to allow and classify them as presented, assigning them to the class designated by law, but he is not authorized to give one claim priority over another in its class in violation of the statute, nor one class priority over another, nor does the probate court have such power." Simon v. Pine Bluff Trust Co., 99 Ark. 523, 138 SW 986, 988.

[a] **A parol contract between the representative and a creditor** cannot operate to give the creditor a lien on the decedent's land so as to entitle him to any preference. Moyer v. Moyer, 17 Misc. 648, 40 NYS 772.

[b] **A personal collateral security given by the representative** to a creditor cannot give the latter any greater rights as to the real estate than he has without the security. Wyse v. Smith, 4 Gill & J. (Md.) 295.

[c] **In England** St. 32 & 33 Vict. c 46, which placed specialty and simple contract debts on the same footing in the distribution of decedents' estates, did not have the effect of enlarging the representative's right of preference among creditors of the same class, and under this act a simple contract debt cannot be paid in preference to the specialty debts when the estate is insolvent. In re Hankey, [1899] 1 Ch. 541 [refusing to foll Re Orsmond, 58 L. T. Rep. N. S. 24, which holds to the contrary]. See also In re Jones, 55 L. J. Ch. 350.

Liability for preferring one creditor of a class see infra § 1232.

26. Ala.—Scott v. Ware, 64 Ala. 174.

Ark.—Yonley v. Lavender, 27 Ark. 252 [aff 21 Wall. (U. S.) 276, 22 L. ed. 536].

Cal.—Vance v. Smith, 124 Cal. 219, 56 P 1031; McLean v. Crow, 88 Cal. 644, 26 P 596.

Ga.—Herrington v. Tolbert, 110 Ga. 528, 35 SE 687; Carter v. Penn, 79 Ga. 747, 4 SE 896; Turk v. Ross, 59 Ga. 378; Green v. Allen, 45 Ga. 205; Dupree v. Adkins, 43 Ga. 475; Davis v. Smith, 5 Ga. 274, 47 AmD 279; Bomgaux v. Bevan, Dudl. 110.

Ill.—Clingman v. Hopkie, 78 Ill. 152; Armstrong v. Cooper, 11 Ill. 560.

N. Y.—In re Fox, 92 N. Y. 93; Schmitz v. Langhaar, 88 N. Y. 503; Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46; Matter of Miner, 39 Misc. 605, 80 NYS 643, 3 Mills Surr. 377; Allen v. Bishop, 25 Wend. 414; Parker v. Gainer, 17 Wend. 559; St. John's Est., Tuck. Surr. 126.

Oh.—McDonald v. Aten, 1 Oh. St. 293.

Pa.—Strouse v. Lawrence, 160 Pa. 421, 28 A 930; Patterson's App., 96 Pa. 93; Prevost v. Nicholls, 4 Yeates 479; Wootering v. Stewart, 2 Yeates 483; Matter of Patterson, 1 Ashm. 336.

S. C.—Fraser v. Charleston, 23 S. C. 373; Hutchison v. Bates, 17 S. C. L. 111; Summers v. Tidmore, 12 S. C. L. 270; Tucker v. Condy, 28 S. C. Eq. 281.

Tenn.—Rains v. Rainey, 11 Humphr. 261; Mosier v. Zimmerman, 5 Humphr. 62.

Tex.—Buchanan v. Wagnon, 62 Tex. 375.

Wis.—Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

Ont.—Re Williamson, 39 Ont. L. 413, 12 OntWN 154, 36 DomLR 783; Taylor v. Brodie, 21 Grant Ch. (U. C.) 607.

[a] **Obligation of refund.**—Creditors who had recovered judgments against the representative and obtained payment in full were bound to refund the excess over their pro rata shares. Bank of British North America v. Mallory, 17 Grant Ch. (U. C.) 102.

[b] **A statute giving priority to judgments and executions** applies only to such judgments and executions as existed in the lifetime of decedent. Bomgaux v. Bevan, Dudl. (Ga.) 110. Preference of judgments generally see infra §§ 1184, 1187.

[c] **As between several judgments obtained against the representative** at different times and on claims of equal degree, their dates are immaterial; all the judgments share pro rata. Carter v. Penn, 79 Ga. 747, 4 SE 896. Compare Dupree v. Adkins, 43 Ga. 475 (judgments payable in order of seniority).

[d] **In England** the statute permits a priority to be thus acquired. In re Stubbs, 8 Ch. D. 154, 2 ERC 203; In re Williams, L. R. 15 Eq. 270, 2 ERC 200.

27. Colton v. Field, 131 Ill. 398, 22 NE 545; McDonald v. Aten, 1 Oh. St. 293; Wulbern v. Timmons, 55 S. C. 456, 33 SE 568; Rains v. Rainey, 11 Humphr. (Tenn.) 261. But compare Gish's App., 31 Pa. 277 (where a husband died insolvent leaving debts contracted partly prior to the statute which gave an allowance to the widow and children, and partly after such act, and the claim of the widow was opposed by certain creditors and disallowed, such creditors were entitled to the whole fund to the exclusion of the other creditors).

[a] **This rule has been applied where a creditor:** (1) Ascertained an overpayment by the representative. Wulbern v. Timmons, 55 S. C. 456, 33 SE 568. (2) Succeeded in setting aside a fraudulent assignment made by the debtor in his lifetime. Rains v. Rainey, 11 Humphr. (Tenn.) 261.

28. Dunlap v. McGhee, 98 Ill. 287; Home Ins. Co. v. Lyon, 3 Dem. Surr. (N. Y.) 69.

29. Gross v. Thornson, 286 Ill. 185, 121 NE 600; In re Casserly, 170 NYS 841.

pay them in full,[30] and if, by the common law, one of the claims enumerated in the statute as preferred was entitled to priority over the others, this priority is not displaced by reason of the fact that the statute mentions this claim after the others which it places in the same class.[31]

[§ 1160] **(b) As to General Assets—aa. Funeral Expenses.** Both by the common law and the modern statutes the proper expenses of decedent's funeral are given preference, in payment out of the assets, over all debts of the decedent,[32] independent of any promise by the representative to pay.[33]

Such expenses are preferred to debts due the United States[34] or, in England, to the crown,[35] debts of record, such as judgments,[36] claims secured by trust deeds,[37] the expenses of decedent's last illness,[38] and rents in arrear in decedent's lifetime;[39] and under some statutes they have priority over the expenses of administration,[40] while under others funeral and administration expenses stand on a parity.[41]

Advance by representative. Where an administrator has paid for funeral expenses an amount in excess of the personal assets, such amount should be refunded to him out of the proceeds of the realty in preference to all debts not specific liens thereon.[42]

Funeral expenses of decedent's family. In some jurisdictions the statutes giving preference to funeral expenses include expressly or by implication the funeral expenses of decedent's wife and children.[43]

This priority may be lost under some statutes by delay in asserting a claim.[44]

[§ 1161] **bb. Expenses of Administration.** Both at common law and under modern statutes, the expenses incident to and necessarily incurred in the administration of the estate, or more strictly speaking the claims of the representatives for reimbursement for their payment of such expenses, are entitled to be paid in preference to the debts of the decedent,[45] even though the estate is insufficient

30. Matter of Mt. Vernon Trust Co., 175 App. Div. 353, 161 NYS 1060 [aff 223 N. Y. 563 mem, 119 NE 1061 mem]; In re Casserly, 170 NYS 841; Ritter's Est., 11 Phila. (Pa.) 12.

31. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

32. Cal.—In re Magorty, 169 Cal. 163, 146 P 430.

Ga.—White v. Stephens, R. M. Charlt. 56; Warfield v. Young, 20 Ga. A. 328, 93 SE 28.

Ind.—Snyder v. Thieme, etc., Brewing Co., 173 Ind. 659, 90 NE 314, Ann Cas1912A 774; Hildebrand v. Kinney, 172 Ind. 447, 87 NE 832, 19 AnnCas 788 [rev (A.) 83 NE 379].

Iowa.—In re Lester, 169 Iowa 15, 150 NW 1033, AnnCas1917B 255; In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295; Hart v. Jewett, 11 Iowa 276.

Kan.—Nelson v. Schoonover, 89 Kan. 388, 131 P 147.

Ky.—Best v. Spooner, 4 KyL 602.

La.—Alter v. O'Brien, 31 La. Ann. 452; Halbert's Succ., 3 La. Ann. 436.

Me.—Phillips v. Phillips, 87 Me. 324, 32 A 963.

Mass.—Hayes v. Gill, 226 Mass. 388, 115 NE 492.

Mich.—Booth v. Radford, 57 Mich. 357, 24 NW 102.

Minn.—Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286.

Mo.—Walley v. Gentry, 68 Mo. A. 298.

N. J.—Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

N. Y.—Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Genet v. Willock, 93 App. Div. 588, 87 NYS 938; Matter of Kalbfleisch, 78 App. Div. 464, 79 NYS 651; Matter of Kipp, 70 App. Div. 567, 75 NYS 589, 10 NYAnnCas 456.

N. C.—Ray v. Honeycutt, 119 N. C. 510, 26 SE 127; Parker v. Lewis, 13 N. C. 21; Gregory v. Hooker, 8 N. C. 394, 9 AmD 646.

N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288.

Pa.—Maury's Est., 4 Pa. Dist. 752; Jessop's Est., 11 Kulp 39; Luton's Est., 10 Kulp 161; Pottsville Union Sav. Fund Assoc. v. Cartwright, 1 LegRec 171.

S. C.—Ex p. Worley, 49 S. C. 41, 26 SE 949; Salvo v. Schmidt, 29 S. C. L. 512.

Tenn.—Steger v. Frizzel, 2 Tenn. Ch. 369.

Tex.—McLane v. Paschal, 47 Tex. 365; Robertson v. Paul, 16 Tex. 472.

Vt.—Sawyer v. Hebard, 58 Vt. 375, 3 A 529; Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.

Wis.—Merrill v. Comstock, 154 Wis. 434, 143 NW 313.

Eng.—Sharp v. Lush, 10 Ch. D. 468; Rex v. Wade, 5 Price 621, 146 Reprint 713.

[a] **Reason for rule.** — "Society and the public health require the decent disposition of the bodies of the dead." Hildebrand v. Kinney, 172 Ind. 447, 451, 87 NE 832, 19 Ann Cas 788 [rev (A.) 83 NE 379].

[b] **Expenses for tombstones and monuments** have been considered preferred as within the general classification of funeral expenses. Nelson v. Schoonover, 89 Kan. 388, 131 P 147; Lurton's Est., 10 Kulp. (Pa.) 161.

33. Parker v. Lewis, 13 N. C. 21.

34. U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199; Postmaster-Gen. v. Robbins, 19 F. Cas. No. 11,-314, 1 Ware 165; U. S. v. Hahn, 37 Mo. A. 580.

35. Rex v. Wade, 5 Price 621, 146 Reprint 713.

36. Snyder v. Thieme, etc., Brewing Co., 173 Ind. 659, 90 NE 314, Ann Cas1912A 774 [rev (A.) 87 NE 155]; Holbert's Succ., 3 La. Ann. 436; Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411; Parker v. Lewis, 13 N. C. 21.

37. McLane v. Paschal, 47 Tex. 365.

38. Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

39. Ritter's Est., 11 Phila. (Pa.) 12; Salvo v. Schmidt, 29 S. C. L. 512.

40. Best v. Spooner, 4 KyL 602.

41. Snyder v. Thieme, etc., Brewing Co., (Ind. A.) 87 NE 155.

42. Clayton v. Somers, 27 N. J. Eq. 230; Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

43. Alter v. O'Brien, 31 La. Ann. 452; Sullivan v. Horner, 41 N. J. Eq. 299, 7 A 411.

44. Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951; Wright v. Wright, 70 N. J. Eq. 407, 62 A 487.

[a] **Illustration.**—A claim for funeral expenses, if legally exhibited against decedent's estate within a year after the granting of the first letters on the estate, is entitled to priority over all other claims, but, if not exhibited until after the expiration of a year and within two years, it is only allowable as a claim of the sixth class. Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951.

45. U. S.—U. S. v. Hunter, 26 F. Cas. No. 15,427, 5 Mason 229.

Colo.—U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

Ga.—Mapp v. Long, 62 Ga. 568.

Ill.—Peo. v. Hunter, 89 Ill. 392.

Ind.—Snyder v. Thieme, etc., Brewing Co., 173 Ind. 659, 90 NE 314, Ann Cas1912A 774; Taylor v. Wright, 93 Ind. 121; Durre v. Sturgeon, (A.) 122 NE 341.

Iowa.—In re Blackman, 143 Iowa 553, 120 NW 664; Wolfe v. Knapp, 127 Iowa 479, 103 NW 369; Hart v. Jewett, 11 Iowa 276.

Ky.—Best v. Spooner, 4 KyL 602.

La.—Finegan's Succ., 135 La. 473, 65 S 614; Sparrow's Succ., 44 La. Ann. 475, 10 S 882; Hautau's Succ., 32 La. Ann. 54; Lauve's Succ., 18 La. Ann. 721 [foll Friend v. Graham, 10 La. 438]; Holbert's Succ., 3 La. Ann. 436.

Minn.—Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286.

Mo.—Elstroth v. Young, 88 Mo. A. 418; U. S. v. Hahn, 37 Mo. A. 580.

N. Y.—Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Matter of Carnegie Trust Co., 166 App. Div. 280, 146 NYS 809; Matter of Klatte, 92 Misc. 651, 157 NYS 470.

Pa.—Semple's Est., 10 Pa. Dist. 605; France's Est., 16 WklyNC 350.

R. I.—Hazard v. Engs, 14 R. I. 5.

S. C.—Ex p. Worley, 49 S. C. 41, 26 SE 949.

Tex.—Manning v. Mayes, 79 Tex. 653, 15 SW 638; Robertson v. Paul, 16 Tex. 472; Stoughton Wagon Co. v. S. G. Dreyfus Co., (Civ. A.) 181 SW 703.

Va.—Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

Wash.—In re Blattner, 92 Wash. 48, 158 P 1015.

Wis.—Merrill v. Comstock, 154 Wis. 434, 143 NW 313; Ferguson v. Woods, 124 Wis. 544, 102 NW 1094.

[a] **Such expenses have priority over:** (1) Debts due the United States. U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199 (holding, however, that these costs do not include the costs and expenses of defending an action brought by the United States to enforce a claim that was prima facie just and ought to have been allowed and paid). (2) A judgment against decedent. Snyder v. Thieme, etc., Brewing Co., 173 Ind. 659, 90 NE 314, AnnCas1912A 774 [rev (A.) 87 NE 155]. (3) A judgment in favor of a creditor against the personal representative. Williams v. Robinson, 56 Tex. 347. (4) A claim secured by trust deed. McLane v. Paschal, 47 Tex. 365.

[b] **Costs in suits by creditors.**—(1) In England costs in creditors' suits have priority. Sanderson v. Stoddart, 32 Beav. 155, 55 Reprint 61; Newbegin v. Bell, 23 Beav. 386, 53 Reprint 152; Gaunt v. Taylor, 2 Hare 413, 24 EngCh 413, 67 Reprint 170; Barker v. Wardle, 2 Myl. & K. 818, 7 EngCh 818, 39 Reprint 1157; Larkins v. Paxton, 2 Myl. & K. 320, 7 EngCh 320, 39 Reprint 965; Loomes v. Stotherd, 1 Sim. & St. 458, 1 Eng. Ch 458, 57 Reprint 183. (2) In the United States there are several cases holding that costs thus recovered are preferred claims. Hautau's Succ., 32 La. Ann. 54; In re Casey, 2 Silv. Sup. 585, 6 NYS 608; Matter of Randell, 8

to pay the creditors in full.[46]

Administration expenses include expenditures in discovering and preserving assets,[47] attorney's fees incurred in connection with the administration of the estate,[48] costs recovered against the representative[49] in an action to recover assets,[50] to establish a claim against the estate,[51] or to try title to land,[52] and insurance premiums expended for the protection of the property;[53] and it has even been considered that expenditures in carrying on decedent's business may be regarded as expenses of administration.[54]

[§ 1162] **cc. Debts Due to Public or Sovereignty—(aa) To United States.** By virtue of acts of congress[55] debts due to the United States must be paid before all other debts of decedent.[56] The statutes giving this priority supersede and control all state laws so far as priorities of claims are concerned,[57] so that the absence of a similar provision in a state statute is immaterial;[58] but the state statutes usually recognize the priority of debts due the United States by including them among the preferred claims.[59]

[§ 1163] **(bb) To State, County, Etc.—aaa. In General.** The common law of England giving preference to debts due the crown[60] has in some states been declared to be in force so as to give priority to debts due the state, it being held that such debts have priority over the claims of citizens except as against antecedent liens,[61] which priority cannot be

NYS 652, 2 Conn. Surr. (N. Y.) 29; Shields v. Sullivan, 3 Dem. Surr. (N. Y.) 296. (3) But the contrary has been asserted on the ground that the costs are part of the judgment. Shute v. Shute, 5 Dem. Surr. (N. Y.) 1. (4) Such costs are not proper expenses of administration. U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199; Taylor v. Wright, 93 Ind. 121. (5) They do not even rank with the debt on which the creditor's judgment is founded but are postponed to debts of every degree incurred by the decedent in his lifetime. Hutchison v. Bates, 17 S. C. L. 111.

[c] **As against secured creditors.**—Court costs are allowed priority over secured creditors only where the administrator entitled to the costs does not have in his possession other sufficient unencumbered assets to pay the costs. Rodgers v. Sturgis Nat. Bank, (Tex. Civ. A.) 152 SW 1176.

[d] **Claim not allowed as necessary expenses.** — Under a statute ranking in the second class claims for necessary expenses in the preservation of the estate, the court has refused to allow as a claim of the second class a payment to a livery stable keeper of about one hundred and eighty-eight dollars for the release of two horses from his liveryman's lien, although their immediate use was necessary for the preservation of the estate, the evidence not showing the value of the horses. Richardson v. Kennedy, 74 Tex. 507, 12 SW 219.

[e] **Charges for benefit of lienholder.**—Charges of administration incurred for the benefit of the lienholder have preference over the lien, whether a lien of a vendor or of a mortgagee. Lauvee's Succ., 18 La. Ann. 721.

[f] **Expenses incurred by decedent as administrator.**—The expenses of administration which are preferred do not include the costs and expenses of settling an estate of which the decedent was the administrator. Hullett v. Hood, 109 Ala. 345, 10 S 419; Vansandt v. Weir, 109 Ala. 104, 19 S 424, 32 LRA 201.

46. In re Thompson, 41 Barb. (N. Y.) 237.

47. Garver v. Thoman, 15 Ariz. 38, 135 P 724.

48. Colo.—U. S. Fidelity, etc., Co. v. Peo., 44 Colo. 557, 98 P 828.

La.—Moise's Succ., 107 La. 717, 31 S 990; Well's Succ., 24 La. Ann. 162.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983.

N. Y.—In re Thompson, 41 Barb. 237 [aff 1 Redf. Surr. 490].

Pa.—In re Semple, 10 Pa. Dist. 605, 15 YorkLegRec 18.

Tex.—Callaghan v. Grenet, 66 Tex. 236, 18 SW 507; Williams v. Robinson, 56 Tex. 347.

Wis.—Ferguson v. Woods, 124 Wis. 544, 102 NW 1094.

[a] **Removal of administrator.**—A claim for attorney fees in an action for the benefit of the succession, such as the removal of an administrator, has preference over the debts of decedent. Friend v. Graham, 10 La. 438.

[b] **Fees of counsel employed by an independent executor** should be placed in the second class as expenses of administration. Callaghan v. Grenet, 66 Tex. 236, 18 SW 507.

[c] **Will contest.**—An executrix cannot be reimbursed out of the proceeds of the real estate, to the exclusion of creditors, for the expenses of administration, consisting mainly of the amount paid to attorneys employed by her in a contest over the will. In re Hatch, 182 N. Y. 320, 75 NE 153.

[d] **The fee of an attorney appointed to represent minor heirs and devisees** is not a part of the expenses of administration. In re Carpenter, 146 Cal. 661, 80 P 1072.

49. Matter of Carnegie Trust Co., 161 App. Div. 280, 146 NYS 809.

[a] **Compensation to an administrator** for the care and management of mortgaged chattels of the estate is not "court costs" within the rule that court costs are entitled to priority over the claim of a creditor. Rodgers v. Sturgis Nat. Bank, (Tex. Civ. A.) 152 SW 1176.

[b] **Costs paid on compromise.**—Costs in a suit by an administrator, on compromise with the debtor, without an order of court are not preferred. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131.

50. In re Mahoney, 37 Misc. 472, 75 NYS 1056, 2 Mills Surr. 559 [aff 88 App. Div. 140, 84 NYS 329]; Ferguson v. Woods, 124 Wis. 544, 102 NW 1094.

51. Matter of Randell, 8 NYS 652, 2 Conn. Surr. 29; Shields v. Sullivan, 3 Dem. Surr. (N. Y.) 296.

52. Manning v. Mayes, 79 Tex. 653, 15 SW 638.

53. Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075.

54. See infra § 1178.

55. U. S. Rev. St. §§ 3466, 3467.

56. Brent v. Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; U. S. v. North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308; U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523; U. S. v. Hahn, 37 Mo. A. 580; Com. v. Lewis, 6 Binn. (Pa.) 266; Gregory's Est., 11 Phila. (Pa.) 126.

[a] **Debts payable at a future day included.**—U. S. v. North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308.

[b] **Priority not affected by rule of marshaling assets.**—U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

[c] **Priority may be extended to debts contracted prior to** the passage of the Preference Act, as well as afterward. Com. v. Lewis, 6 Binn. (Pa.) 266.

[d] **Statute liberally construed.**—U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

[e] **A debt to the United States is not a lien** upon the property of decedent but has only a priority of payment. Postmaster Gen. v. Robbins, 19 F. Cas. No. 11,314, 1 Ware 163; U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199 [cit U. S. v. Fisher, 2 Cranch 358, 2 L. ed. 304].

[f] **The expenses of decedent's last illness** are a debt due from the deceased and claims due the United States have priority over them. Postmaster Gen. v. Robbins, 19 F. Cas. No. 11,314, 1 Ware 163; U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199.

[g] **Foreign contracts.** — The United States is not deprived of its priority by the circumstance that the contract was made in a foreign country with a person resident abroad. Harrison v. Sterry, 5 Cranch (U. S.) 289, 3 L. ed. 104.

[h] **Specific liens** are not postponed to debts due to the United States. Brent v. Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; U. S. v. Hahn, 37 Mo. A. 580.

[i] **Allowance and classification by the probate court** are not essential to justify the representative in paying a debt due the United States. U. S. v. Hahn, 37 Mo. A. 580.

Priority over widow's allowance see supra § 804.

57. Postmaster Gen. v. Robbins, 19 F. Cas. No. 11,314, 1 Ware 165; U. S. v. Backus, 24 F. Cas. No. 14,491, 6 McLean 443; U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523; U. S. v. Hahn, 37 Mo. A. 580; Com. v. Lewis, 6 Binn. (Pa.) 266.

"The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. . . . This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignities, respecting the dignity of debts. . . . But this is an objection to the constitution itself. The mischief suggested . . . is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends." U. S. v. Fisher, 2 Cranch (U. S.) 358, 396, 2 L. ed. 304.

58. U. S. v. Hahn, 37 Mo. A. 580.

59. Hart v. Jewett, 11 Iowa 276. And see the statutes.

60. See supra § 1153.

61. U. S.—American Bonding Co. v. Reynolds, 203 Fed. 356, 358 [cit Cyc].

Ga.—Robinson v. Darien Bank, 18 Ga. 65.

Ky.—Com. v. Logan, 1 Bibb 529.

Md.—Orem v. Wrightson, 51 Md. 34, 34 AmR 286; Smith v. State, 5 Gill 45; State v. State Bank, 6 Gill & J. 205, 26 AmD 561; Murray v. Ridley, 3 Harr. & M. 171; State v. Rogers, 2 Harr. & M. 198.

N. Y.—Matter of Niederstein, 154 App. Div. 238, 138 NYS 952.

taken away except by express statutory provisions.[62] In many states the statutes expressly give a preference to debts due the state or "the public,"[63] but such statutes apply only where the debt of the state and that of the individual are otherwise of equal degree and equally entitled to payment.[64] In the absence of a statute giving a preference to debts due to a county, such debts have no priority over the general debts of decedent,[65] and a debt to a school district has been held not to be entitled to a preference.[66]

[§ 1164] **bbb. What Debts Included—(aaa) In General.** In determining what debts are within the meaning of a statute giving priority to debts due the state or the public, the wording of the particular statute is of course controlling, and the settled rules of statutory construction must be followed.[67] It may, however, be laid down generally that in order to constitute a debt a public debt, it should, properly, be a debt due the government in its sovereign capacity.[68] The preference given by statute to a claim due the state is not affected by the fact that the state holds a mortgage as security.[69]

[§ 1165] **(bbb) Debts to Corporation Owned by State.** A debt due to a bank owned and controlled entirely by the state is not a debt due to the state or "the public" within the meaning of a general statute giving such debts a preference.[70] But it is competent for the legislature, by a special enactment, to give debts due to such corporations priority.[71]

[§ 1166] **(cc) Taxes and Assessments.** The statutes usually include taxes among the preferred debts of decedents,[72] but where the assessment is made after the death of decedent, the taxes are not preferred claims.[73] A statute giving a preference to taxes due the state has been held not to include taxes due to a county,[74] or a claim of a county for taxes collected by decedent, a collector of taxes, and not accounted for;[75] and it has also been held that a preference given to taxes does not include an assessment for a public improvement.[76] Where taxes are not provided for, they will fall under a general classification of "other demands," to be paid after judgments.[77]

[§ 1167] **dd. Expenses of Last Illness.** In the

[a] **Common-law preference denied.**—The common law on the point is not in force. The only priority to which the state is entitled is that afforded by the statute. Baxter v. Baxter, 23 S. C. 114; State v. Harris, 18 S. C. L. 598; Klinck v. Keckley, 11 S. C. Eq. 250; Public Account Comrs. v. Greenwood, 1 S. C. Eq. 450.

[b] **A judgment belonging to the state** has priority over a judgment in favor of an individual. Contee v. Chew, 1 Harr. & J. (Md.) 417.

[c] **A specialty debt due to a citizen** has been preferred to a simple contract debt due the commonwealth. Com. v. Logan, 1 Bibb (Ky.) 529.

62. Matter of Niederstein, 154 App. Div. 238, 138 NYS 952 (L. [1893] c 686, relating to order of payment of debts of a decedent, and providing that no preference be given one debt over another of the same class, does not abrogate the state's common-law right to a preference as to money held by decedent as an officer and due to it in a sovereign capacity).

63. Baxter v. Baxter, 23 S. C. 114. See the statutes.

[a] **Sheriff's bond.**—A bond executed to the state treasurer by a sheriff, conditioned for the faithful performance of his duties, is not a "debt due the public," under the act of 1798, so as to give a private person, aggrieved by the act of the sheriff and entitled to sue the bond, a preference over judgment and execution creditors of the sheriff. Dunlap v. Bynum, 4 S. C. Eq. 646.

[b] **In Pennsylvania** (1) debts due to the commonwealth are payable after all other debts. 1 Brightly's Purdon Dig. p 591. (2) But a judgment in favor of the commonwealth ranks with other judgments. Ramsey's App., 4 Watts 71.

64. Klinck v. Keckley, 11 S. C. Eq. 250; Dunlap v. Bynum, 4 S. C. Eq. 646; Public Accounts v. Greenwood, 1 S. C. Eq. 450.

65. Hargrove v. Lilly, 69 Ga. 326. See also Klinck v. Keckley, 11 S. C. Eq. 250 (where the court expressed doubt as to whether a judgment in favor of the poor commissioners was entitled to a preference as a debt due to the public).

[a] **Construction of statutes.** — (1) A statute giving priority to debts due the state does not include debts due a county. Hargrove v. Lilly, 69 Ga. 326. (2) But it seems that such debts are included in a statute giving priority to "debts due to the public." Baxter v. Baxter, 23 S. C. 114.

66. Rockwood v. Brookline School Dist., 70 N. H. 388, 47 A 704.

67. Baxter v. Baxter, 23 S. C. 114.

[a] **General terms used will not be limited.**—Baxter v. Baxter, 23 S. C. 114.

[b] **Liability as surety on county treasurer's bond.**—The liability of decedent as surety on the bond of a county treasurer who defaulted is a "debt due to the public" within the meaning of a statute preferring such debts. Baxter v. Baxter, 23 S. C. 114.

[c] **Taxes collected and retained by decedent.**—A statute which gives priority to taxes and levies assessed on a decedent prior to his death gives no lien or priority in favor of the state on the estate of a deceased defaulting sheriff for taxes collected and unaccounted for by him. Spillman v. Payne, 84 Va. 435, 4 SE 749. To like effect Hargrove v. Lilly, 69 Ga. 326.

68. State v. Harris, 18 S. C. L. 598; Klinck v. Keckley, 11 S. C. Eq. 250; Public Account Comrs. v. Greenwood, 1 S. C. Eq. 450; Leake v. Ferguson, 2 Gratt. (43 Va.) 419; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

69. Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

70. Georgia Cent. Bank v. Little, 11 Ga. 346; State Bank v. Gibbs, 14 S. C. L. 377; Fields v. Wheatley, 1 Sneed (Tenn.) 351.

[a] **Reason of rule.** — "When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." U. S. Bank v. Planter's Bank, 9 Wheat. (U. S.) 904, 907, 6 L. ed. 244.

71. State v. Dickson, 38 Ga. 171; Central Bank v. Little, 11 Ga. 346.

72. U. S.—U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199.

Ala.—Naftel v. Osborn, 96 Ala. 623, 12 S 182.

Del.—Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

Iowa.—Hart v. Jewett, 11 Iowa 276.

Md.—Bonaparte v. State, 63 Md. 465; Fulton v. Nicholson, 7 Md. 104.

Mo.—State v. Donaldson, 28 Mo. A. 190.

N. Y.—In re Babcock, 115 N. Y. 450, 22 NE 263 [aff 52 Hun 142, 4 NYS 903]; Mitchell v. Bowne, 63 HowPr 1; Coleman v. Coleman, 5 Redf. Surr. 524.

Eng.—In re Heywood, [1897] 2 Ch. 593.

[a] **Taxes prior to debts due United States.**—U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199.

[b] **A tax may be treated as a debt** for the purpose of classification and allowance. State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97.

[c] **What taxes within statute.**— Under a statute giving a preference to "taxes assessed upon the estate of the deceased previous to his death" an assessment so far completed before decedent's death that the name of the person described as owner cannot be changed or altered by the assessment officers is payable from his estate as a preferred claim in due course of administration. In re Babcock, 115 N. Y. 450, 22 NE 263 [aff 52 Hun 142, 4 NYS 903].

[d] **Parochial and local rates** are entitled to a preference in England by virtue of statutory provision. In re Heywood, [1897] 2 Ch. 593.

[e] **Assessment on life estate.**— Under a statute giving a preference to "taxes assessed on the estate of the deceased previous to his death," where an assessment was made during the decedent's lifetime on realty in which he had a life estate and the taxes remained unpaid at the time of his death, they were entitled to preferential payment out of his personal estate. Coleman v. Coleman, 5 Redf. Surr. (N. Y.) 524.

[f] **Statute not applicable to solvent estate.** — State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97.

73. Pryor v. Davis, 109 Ala. 117, 19 S 440; Graham v. Russell, 152 Ind. 186, 52 NE 806; In re Selleck, 111 N. Y. 284, 19 NE 66.

74. Hargrove v. Lilly, 69 Ga. 326.

75. Hargrove v. Lilly, 69 Ga. 326; Spillman v. Payne, 84 Va. 435, 4 SE 749.

76. Matter of Hun, 7 Misc. 409, 28 NYS 253 [aff 80 Hun 605 mem, 30 NYS 1132 mem]; Seabury v. Bowen, 3 Bradf. Surr. (N. Y.) 207.

[a] **A street assessment** is not entitled to preference unless it was a personal debt of decedent and not merely a charge on land. Matter of Hun, 7 Misc. 409, 28 NYS 253 [aff 80 Hun 605 mem, 30 NYS 1132 mem].

77. Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

absence of statute the expenses of decedent's last illness have no preference,[78] but in many jurisdictions statutes have been enacted giving a preference to such expenses, including the charges of physicians, bills for medicines, etc.,[79] all claims for such expenses being of equal degree.[80] Such a claim has been held entitled to preference over a judgment,[81] but is subsequent to the expenses of administration,[82] and debts due to the United States.[83] It must, of course, be shown that physician's services, for which a preference is claimed, were actually rendered.[84]

What constitutes last illness. The last illness within the meaning of a statute, giving preference to the expenses thereof, is the illness which terminated in the patient's death and the right to a preference is limited to services performed and expenses incurred during that illness,[85] but unless the period is designated by statute, no paricular period preceding death can be fixed as constituting the last illness, as the duration of such illness must vary considerably according to the nature of the disease and the condition of the patient.[86] Such a statute must, however, be liberally construed,[87] and the expression cannot be limited in meaning to the period during which decedent was in extremis;[88] but on the other hand it relates to the proximate, and not the remote cause of death, and a claim for medical attendance cannot be made to cover a long period during which the patient lingered, partially convalescent, the attendance being broken off during the convalescent period and then renewed on decedent's relapse, especially where there had been a change of physicians.[89]

Services to others than decedent. A statute placing among preferred debts of an estate a debt for "medical services within the twelve months preceding the decease" means services to the decedent only and not to his wife, child, or tenant.[90]

Money borrowed to pay expenses. A demand founded upon a note given by decedent to raise money to pay his doctor's bill cannot be classified as expenses of his last illness.[91]

[§ 1168] **ee. Wages of Servants, Etc.** Wages due to servants, employees, or laborers for a certain period prior to decedent's death are given a preference under some statutes [92] and such a statute has been held to give a right of preference to the

78. Grace v. Smith, 14 Hawaii 144.

79. Cal.—In re Magorty, 169 Cal. 163, 146 P 430.

Iowa.—In re Lester, 169 Iowa 15, 150 NW 1033, AnnCas1917B 255; In re Skillman, 146 Iowa 601, 125 NW 343, 140 AmSR 295; Wolfe v. Knapp, 127 Iowa 479, 103 NW 369; Hart v. Jewett, 11 Iowa 276.

Ky.—Green v. Teutschmann, 97 SW 7.

La.—Schmidt's Succ., 108 La. 293, 32 S 413; Spiro v. Leibenguth, 51 La. Ann. 152, 24 S 785; Haley's Succ., 50 La. Ann. 840, 24 S 285; McNeely v. McNeely, 50 La. Ann. 823, 24 S 338; Holbert's Succ., 3 La. Ann. 436.

Me.—Huse v. Brown, 8 Me. 167.

Mich.—Booth v. Radford, 57 Mich. 357, 24 NW 102.

N. Y.—Weiss v. Bader, 124 App. Div. 495, 108 NYS 920.

N. C.—Henderson v. McLain, 146 N. C. 329, 59 SE 873.

Pa.—Staggers' Est., 8 Pa. Super. 260, 43 WklyNC 79; Roop's Est., 22 Pa. Dist. 484; Liggett's Est., 13 Pa. Dist. 710, 30 Pa. Co. 400; Wasson's Est., 8 Pa. Dist. 480, 22 Pa. Co. 111, 15 Montg. Co. 26; Bossard's Est., 44 Pa. Co. 552; Liggett's Est., 13 Pa. Dist. 710, 30 Pa. Co. 400; Jones' Est., 2 Chest. Co. 302; In re Silvius, 3 LackLegN 84; Pottsville Union Sav. Fund Assoc. v. Cartwright, 1 LegRec 171.

S. C.—Ex p. Worley, 49 S. C. 41, 26 SE 949; McVoy v. Percival, 23 S. C. L. 337.

Wash.—Cunningham v. Lakin, 50 Wash. 394, 97 P 447.

[a] **No rule can be laid down as to what shall be allowed** as the expenses of the last illness. It includes, of course, the necessary medical attendance and nurse hire, and the degree of attention will vary with the nature of the disease and the situation of the patient. Percival v. McVoy, Dudley (S. C.) 337.

[b] **Services of a nurse are included.** — Green v. Teutschmann, (Ky.) 97 SW 7; Weiss v. Bader, 124 App. Div. 495, 108 NYS 920; Henderson v. McLain, 146 N. C. 329, 59 SE 873; Liggett's Est., 13 Pa. Dist. 710, 30 Pa. Co. 400; Larer's Est., 11 Pa. Dist. 72, 26 Pa. Co. 181; Larer's Est., 11 Pa. Dist. 72, 26 Pa. Co. 181; In re Silvius, 3 LackLegN (Pa.) 84; McVoy v. Percival, 23 S. C. L. 337.

[c] **The claim must be recorded** or it cannot rank as privileged. Elliott v. Elliott, 31 La. Ann. 31.

80. Bennett v. Ives, 30 Conn. 329.

81. Snyder v. Thieme, etc., Brewing Co., 173 Ind. 659, 90 NE 314, Ann Cas1912A 774.

82. France's Est., 16 WklyNC (Pa.) 350.

83. U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199; Postmaster Gen. v. Robbins, 19 F. Cas. No. 11,314, 1 Ware 165.

84. Spiro v. Leibenguth, 51 La. Ann. 152, 24 S 785.

85. Whitaker's Succ., 7 Rob. (La.) 91; Huse v. Brown, 8 Me. 167; Wasson's Est., 8 Pa. Dist. 480, 22 Pa. Co. 111, 15 Montg. Co. 26.

[a] **The illness after the patient is prostrated** and when services are constantly necessary is the last illness. Duckett's Est., 1 Chest. Co. (Pa.) 78.

86. Schmidt's Succ., 108 La. 293, 32 S 413; Huse v. Brown, 8 Me. 167; Staggers' Est., 8 Pa. Super. 260, 43 WklyNC 79; Wasson's Est., 8 Pa. Dist. 480, 22 Pa. Co. 111, 15 Montg. Co. 26; McVoy v. Percival, 23 S. C. L. 337.

[a] **Illustrations.** — A preference has been allowed for: (1) Medical attendance extending over a period of six months where decedent died of Bright's disease. Schmidt's Succ., 108 La. 293, 32 S 413. (2) Services by a physician extending over a period of one and one-half years preceding the patient's death. Staggers' Est., 8 Pa. Super. 260, 43 WklyNC 79.

[b] **It is a question for the jury** to determine the length of the period with respect to which the preference can be claimed. Huse v. Brown, 8 Me. 167.

87. Percival v. McVoy, 23 S. C. L. 337, 339 ("The court can lay down no rule or limitation for the duration of the last sickness of a man. . . . A wounded man may linger a long time in a helpless state, and chronic diseases and some cancers run through more time than a year. The Act concurs with the principles of christian civilization, and is remedial of a common want and necessity—attention and services during last sickness. We must, therefore, construe it liberally, and let it endure to its proper end, the full relief of the sick and the infirm").

88. McLean v. Crow, 88 Cal. 644, 26 P 596; Huse v. Brown, 8 Me. 167; Wasson's Est., 8 Pa. Dist. 480, 22 Pa. Co. 111, 15 Montg. Co. 26; McVoy v. Percival, 23 S. C. L. 337.

89. Matter of Reese, 2 Pearson (Pa.) 482 (where it appeared that decedent received a personal injury and called in a physician to attend him, and after partially recovering so as to attend to his business was again taken ill, and called in another physician, and died, and it was held that the claim of the first physician was not entitled to a preference under a statute, preferring claims for medical attendance during the last illness. If the statute were construed to cover such a claim it "might run over a long lifetime, as some persons are never in good health, but linger under the same disease from the cradle to the grave").

90. Baker v. Dawson, 131 N. C. 227, 32 SE 588. To same effect Spiro v. Leibenguth, 51 La. Ann. 152, 24 S 785.

91. Waverly Commercial State Bank v. Ross, 90 Kan. 423, 133 P 538.

92. Ala.—Hullett v. Hood, 109 Ala. 345, 19 S 419; Naftel v. Osborn, 96 Ala. 623, 12 S 182.

Hawaii.—Matter of Vida, 1 Hawaii 152.

Ill.—Chicago Title, etc., Co. v. McGlew, 193 Ill. A. 457, 61 NE 1018 [aff 90 Ill. A. 58].

Kan.—Cawood v. Wolfley, 56 Kan. 281, 43 P 236, 54 AmSR 590, 31 LRA 538.

La.—Finegan's Succ., 135 La. 473, 65 S 614.

Pa.—Martin's App., 33 Pa. 395; Boniface v. Scott, 3 Serg. & R. 351; Ex p. Meason, 5 Binn. 167; Kelly's Est., 40 Pa. Co. 434; Humes' Est., 27 Pa. Co. 169; Miller's Est., 1 Ashm. 323; Pottsville Union Sav. Fund Assoc. v. Cartwright, 1 LegRec 171; McKim's Est., 2 PaLJR 224, 3 PaLJ 502; Hotz's Est., 16 WklyNC 351.

Eng.—In re Heywood, [1897] 2 Ch. 593.

[a] **Such a claim is preferred to** debts due the state, judgments, and demands of the fifth class. Cawood v. Wolfley, 56 Kan. 281, 43 P 236, 54 AmSR 590, 31 LRA 538.

[b] **Mining employees.**—The statute providing for the security of claims due employees by mining operators creates by implication a lien in favor of the employees which survives the death of the employer. Everett v. Avery, 19 Md. 136.

[c] **Claims of illegitimate children and of their mother.**—Where the mother of illegitimate children allowed the father to have their services until they reached majority, in consideration of his agreement to bring them up and to provide a home for her at his death, neither her

claim of one to whom wages were due from decedent at the time of his death, although claimant had left decedent's services several months prior to his death.[93]

The term "servant" has been held to include a clerk in a store,[94] a barkeeper in a tavern,[95] and a person hired at a monthly salary, who resided in the house of his employer and whenever required assisted in the domestic labor of the family, although principally employed in aiding the decedent in his market and slaughterhouse,[96] but not to include farm laborers,[97] or persons employed in iron worked.[98]

The term "laborer" has been held not to include an overseer on a plantation unless he also works as a common day laborer.[99]

Inclusion of unpreferred claim. The fact that a servant lent money to her employer and included it in her claim for wages did not affect her statutory right of preference if the sums lent could be easily separated from the sums due for wages.[1]

Waiver of preference. The right of preference given to servants is waived by their acceptance from decedent of an obligation payable at a future day with interest.[2]

In the absence of statute, a claim for wages has no preference.[3]

[§ 1169] **ff. Rent.**[4] Among the claims preferred by the local statutes rent is frequently included.[5] In order to entitle a claim to preference the relation of landlord and tenant must have existed between the claimant and decedent,[6] although it need not have continued up to the time of decedent's death.[7] A claim for damages for refusal to perform an agreement to lease is not entitled to preference as a claim for rent.[8] Where the lease requires the lessee to pay taxes as part of the rent, such taxes may be allowed as a preferred claim,[9] and a covenant for payment for gas used on the premises has been held to render such payment a part of the rent.[10] So also a claim arising out of the lessee's agreement to repair has been held within the preference.[11] But amounts agreed to be paid for consumption of the property itself are not rent.[12] Where the preference is not exceeding one year's rent, the landlord is entitled to have his claim preferred for one year's rent, although that year is not the last year.[13]

Interest on rent preferred is not allowable as a preferred claim.[14]

[§ 1170] **gg. Claims Founded on Fiduciary Relations—(aa) In General.** Property which was held in trust by decedent may, if it can be traced, be reclaimed by the cestuis que trust, whose rights are, to this extent, superior to any rights of decedent's creditors.[15] But where the trust funds have been wasted by the trustee or can no longer be traced, the cestui que trust can claim only as a general creditor of the estate,[16] unless some statute

claim under the contract nor the claims of the children under an agreement by which they worked for the father after arriving at age and permitted him to hold their wages for them are preferred claims. Story v. Story, 61 SW 279, 62 SW 865, 22 KyL 1731, 1869.

93. Martin's App., 33 Pa. 395.

94. Cawood v. Wolfley, 56 Kan. 231, 282, 43 P 236, 54 AmSR 590, 31 LRA 538 ("Is a clerk a servant within the meaning of this language, and, if so, are the wages confined to those accruing during the last illness of the deceased? No direct authority is cited or known to us on the question. The legislature in more than one enactment has manifested a purpose to secure to all wage-earners their hire, and to prefer their claims to those of most other creditors. It is conceded that the term 'servant' in its usual acceptation, especially in the law, is broad enough to include a clerk; but it is argued that the word is here used in a restricted sense, and means only menial or household servants. We are loath to recognize any such classification in Kansas as menial servants. The word is broad enough to include a clerk and we think the legislature intended it should do so").

95. Boniface v. Scott, 3 Serg. & R. (Pa.) 351.

96. Miller's Est., 1 Ashm. (Pa.) 323.

97. Sollenberger's Est., 8 Pa. Dist. 626, 15 Montg. Co. 145; McKim's Est., 2 PaLJR 224, 3 PaLJ 502.

98. Ex p. Meason, 5 Binn. (Pa.) 167, 176 ("It is not to be forgotten, that although this act gives some preferences in payment, yet there is an evident intent pervading it, to lessen the number of these preferences, and to introduce equality as far as justice and convenience would permit. There is a great variety of persons employed in iron works, managers, colliers, wood-cutters, wagoners, and those whose business is out of doors, besides a numerous tribe engaged in melting, casting, and forging within. Of those persons the wages are different. Some are paid by the year, month, or week, and some by the job or piece, but all are unconnected with the domestic scene; all may be properly called workmen, and none are commonly called servants").

99. Rust v. Billingslea, 44 Ga. 306.

1. Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. A. 58].

2. Silver v. Williams, 17 Serg. & R. (Pa.) 292.

3. Moss v. Williams, 152 Iowa 686, 133 NW 120; Lehman v. Powe, 95 Miss. 446, 49 S 622.

[a] **No preference is created by** a statute providing that, when property is seized upon by the process of a court or placed in the hands of a receiver, trustee, or assignee, debts owing for labor shall be preferred. Moss v. Williams, 152 Iowa 686, 133 NW 120.

4. Lien for rent see infra § 1189.

5. Ala.—Naftel v. Osborn, 96 Ala. 623, 12 S 152.

Ga.—Wade v. Peacock, 121 Ga. 816, 49 SE 826.

Md.—Longwell v. Ridinger, 1 Gill 57.

Pa.—Greenough's App., 9 Pa. 18; Ferris' Est., 7 Pa. Dist. 425; Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536; Walker's Est., 6 Pa. Co. 515.

S. C.—McEwen v. Joy, 41 S. C. L. 33.

Eng.—In re Hastings, 6 Ch. D. 610.

[a] **Where preference will benefit estate.**—The surrogate may give to rents due or accruing on leases held by decedent at the time of his death a preference over claims of the fourth class, if it appears to the satisfaction of the surrogate that such a preference will benefit the estate. Hovey v. Smith, 1 Barb. (N. Y.) 372. To same effect Cooper v. Felter, 6 Lans. (N. Y.) 485; Harris v. Meyer, 3 Redf. Surr. (N. Y.) 450.

[b] **Rent due for a pew in a church** is not a preferred debt unless due on a lease of the pew for a term of years which is assets in the hands of the administrator, or unless giving the rent a preference would in some way benefit the personal estate of the decedent. Johnson v. Corbett, 11 Paige (N. Y.) 265.

[c] **Liability of cotenant under mining lease.**—A claim for money payable as rent by a cotenant, for the privilege of taking coal out of a mine at a certain sum per cubic yard, is a preferred debt. Greenough's App., 9 Pa. 18.

[d] **In England** the common-law preference to claims for rent was abolished by St. 32 & 33 Vict. c 46. In re Hastings, 6 Ch. D. 610.

[e] **Rent accruing after decedent's death** (1) is preferred. Longwell v. Ridinger, 1 Gill (Md.) 57; McEwen v. Joy, 41 S. C. L. 33. (2) Such rent is not preferred. Walker's Est., 6 Pa. Co. 515; McKim's Est., 2 PaLJR 224, 3 PaLJ 502; Kemp's Est., 14 PittsbLegJNS 82.

6. Ferris' Est., 7 Pa. Dist. 425; Kidd v. Boone, L. R. 12 Eq. 89.

[a] **The relation of innkeeper and guest** is not sufficient to entitle the former to priority as to his claim for rent of a room. Ferris' Est., 7 Pa. Dist. 425.

[b] **Entry and payment of rent** under and in accordance with an agreement to lease will entitle the lessor to claim a preference for subsequent rents. Kidd v. Boone, L. R. 12 Eq. 89.

[c] **A claim for use and occupation** is not preferred where the decedent entered under a void lease. Vincent v. Godson, 4 De G. M. & G. 546, 53 EngCh 428, 43 Reprint 620.

7. Vincent v. Godson, 4 De G. M. & G. 546, 53 EngCh 428, 43 Reprint 620; Newport v. Godfrey, 4 Mod. 44, 87 Reprint 252.

8. Talbot v. Shrewsbury, L. R. 16 Eq. 26.

9. Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536.

10. Fernwood Masonic Hall Assoc. v. Jones, 102 Pa. 307.

11. Kidd v. Boone, L. R. 12 Eq. 89.

12. Heckman's Est., 15 Pa. Co. 264 (right to consume brick clay).

13. Weltner's App., 63 Pa. 302; Martin's App., 33 Pa. 395; Parker's App., 5 Pa. 390; Richie v. McCauley, 4 Pa. 471; Ege v. Ege, 5 Watts (Pa.) 134; Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536.

14. Vandegriff's Est., 3 Pa. Dist. 421.

15. See supra § 359.

16. U. S.—Johnson v. Garner, 233 Fed. 756, 767 [quot Cyc].

entitles him to a preference.[17] Before the enactment of statutes abolishing the distinction between specialty and simple contract debts in administration,[18] a claim for a breach of trust committed by decedent in his lifetime ranked merely as a simple contract debt,[19] unless the breach of trust was also a breach of a bond or covenant executed by the trustee or fiduciary, in which case the claim ranked as a debt by specialty.[20]

Resulting trust arising from act of representative. It has been held that, where an executor collected money which in equity and good conscience belonged to a third person, and used such money to pay legitimate and preferred debts of the estate, the claim of the owner of such money for reimbursement was entitled to a preference.[21]

[§ 1171] **(bb) Statutes Giving Preference—aaa. In General.** In a number of states, the statutes give a preference to claims arising out of decedent's misconduct or neglect in fiduciary capacity,[22] whether as executor or administrator,[23] guardian,[24] or trustee.[25] But it has been considered that such a statute includes only a technical trust and not a trust created by implication of law.[26] A

Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440.

Ark.—Green v. Brooks, 25 Ark. 318.

Cal.—Lathrop v. Bampton, 31 Cal. 17, 89 AmD 141.

Ill.—Lennartz v. Popp, 118 Ill. A. 31.

Iowa.—Chappell v. Craig, 96 Iowa 273, 65 NW 146.

La.—Longbottom v. Babcock, 9 La. 44.

Mass.—Little v. Chadwick, 151 Mass. 109, 23 NE 1005, 7 LRA 570; Johnson v. Ames, 11 Pick. 173.

Mich.—Dodson v. McKelvey, 93 Mich. 263, 53 NW 517.

Mo.—Phillips v. Overfield, 100 Mo. 466, 13 SW 705; Raymuth Real Est., etc., Co. v. Robirson, 199 Mo. A. 515, 204 SW 276.

N. H.—Rockwood v. Brookline School Dist., 70 N. H. 388, 47 A 704.

N. J.—Quicksall v. Chew, (Ch.) 38 A 442. Contra Smith v. Combs, 49 N. J. Eq. 420, 24 A 9.

N. Y.—In re Fox, 92 N. Y. 93; Barlow v. Yeomans, 50 Barb. 187.

Pa.—Schneider's Est., 11 Phila. 71.

Va.—Watts v. Newberry, 107 Va. 233, 57 SE 657.

W. Va.—Johnson v. Johnson, 98 SE 812.

"Where the cestui que trust elects to hold the trustee personally responsible, or where that is his only remedy, as in the case here, and the trustee is dead, his position as to the estate of the trustee is that of a simple contract creditor with a naked claim for damages arising out of the breach of the trust." Lennartz v. Popp, 118 Ill. A. 31, 35.

[a] **This rule has been applied to:** (1) A claim of a ward against his guardian for negligent failure to collect money of the ward. Dodson v. McKelvey, 93 Mich. 263, 53 NW 517. (2) A claim against a life tenant for dissipation of personalty. Quicksall v. Chew, (N. J. Ch.) 38 A 442. (3) A claim for conversion of assets by an executor. In re Fox, 92 N. Y. 93; Barlow v. Yeomans, 50 Barb. (N. Y.) 187. (4) A claim against the treasurer of a school district for misappropriation of the funds of the district. Rockwood v. Brookline School Dist., 70 N. H. 388, 47 A 704.

Claims for trust funds as obligation of estate see supra § 894.

17. Johnson v. Garner, 233 Fed. 756, 767 [quot Cyc]. See infra § 1171.

18. See supra § 1156.

19. Burton v. Smith, 4 F. Cas. No. 2,219, 4 Wash. 522; Bateman v. Latham, 56 N. C. 35; Benbury v. Benbury, 22 N. C. 235; Rolain v. Darby, 6 S. C. Eq. 472; Vernon v. Vawdry, 2 Atk. 119, 26 Reprint 474; Cox v. Bateman, 2 Ves. 19, 28 Reprint 13. But see Stock v. Parker, 7 S. C. Eq. 376 [disappr Gadson v. Lord, 1 S. C. Eq. 208].

20. Burton v. Smith, 4 F. Cas. No. 2,219, 4 Wash. 522; Benbury v. Benbury, 22 N. C. 235; Rice v. Cannon, 8 S. C. Eq. 172; McDowell v. Caldwell, 7 S. C. Eq. 43, 16 AmD 635; Primrose v. Bromley, 1 Atk. 89, 26 Reprint 58 (covenant by assignee of bankrupt); Benson v. Benson, 1 P. Wms. 130, 24 Reprint 324.

21. Lathrop v. Brown, 65 Ga. 312.

22. Colo.—Central City First Nat. Bank v. Hummel, 14 Colo. 259, 23 P 986, 20 AmSR 257, 8 LRA 788.

Ga.—Rust v. Billingslea, 44 Ga. 306; Johnson v. Brady, 24 Ga. 131.

Ill.—Jarrett v. Johnson, 216 Ill. 212, 74 NE 756; Felsenthal v. Kline, 214 Ill. 121, 73 NE 428; Dieterman v. Ruppel, 200 Ill. 199, 65 NE 707; Eddy v. Peo., 187 Ill. 304, 58 NE 397; Ramsay v. Whitbeck, 183 Ill. 550, 56 NE 322; Tracy v. Hadden, 78 Ill. 30; Jarrett v. Johnson, 116 Ill. A. 592 [aff 216 Ill. 212, 74 NE 756].

Ky.—White v. Carrico, 2 Metc. 232.

Va.—Price v. Harrison, 31 Gratt. (72 Va.) 114; Tunstall v. Pollard, 11 Leigh (38 Va.) 1.

[a] **Fiduciary debts are preferred to:** (1) Judgments. Doody v. Green, 131 Ga. 568, 62 SE 984; Watson v. Watson, 1 Ga. 266. (2) The lien of a mortgage which does not convey the legal title, but merely creates a lien on the property. Lathrop v. Brown, 65 Ga. 312; Ragland v. Justices Inferior Ct., 10 Ga. 65.

[b] **The right of preference extends** not only to the right of payment from the personalty, but also to payment from the proceeds of the land of the trustee. Muldoon v. Crawford, 14 Bush (Ky.) 125.

23. Ga.—Johnson v. Brady, 24 Ga. 131.

Ill.—Jarrett v. Johnson, 216 Ill. 212, 74 NE 756; Fitzsimmons v. Cassell, 98 Ill. 332 [aff 6 Ill. A. 525].

S. C.—Godbold v. Godbold, 13 S. C. 601.

Va.—Tunstall v. Pollard, 11 Leigh (38 Va.) 1; Shearman v. Christian, 6 Rand. (27 Va.) 49.

W. Va.—Morris v. Westerman, 79 W. Va. 502, 92 SE 567.

[a] **Where one of two executors receives money due the estate,** which is not accounted for either by him in his lifetime or by his legal representative, the surviving executor may have the amount so received by his coexecutor allowed against the latter's estate as a sixth class claim. Fitzsimmons v. Cassell, 98 Ill. 332 [aff 6 Ill. A. 525].

[b] **Waste by husband of executrix.**—Where a man marries an executrix, administers the estate which she represents, and dies leaving her surviving, no judgment having been rendered against him in his lifetime for the waste committed, a claim founded on the waste committed by the husband does not constitute a debt due from him to the original estate, and in the administration of his own estate it is not entitled to a preference over his own debts. Henrico Justices v. Turner, 6 Leigh (33 Va.) 116. But compare Davis v. Harkness, 6 Ill. 173, 41 AmD 184 (where the court intimated that a debt due from the husband of an administratrix for property of the estate received by him, although not properly due from him as administrator, would still be given a preference as a debt due from the husband as administrator).

[c] **Claim against executor de son tort preferred.**—Hay v. Bennett, 153 Ill. 271, 38 NE 645.

24. U. S.—Black v. Scott, 3 F. Cas. No. 1,464, 2 Brock. 325 (construing Virginia statute).

Ga.—Doody v. Green, 131 Ga. 568, 62 SE 984; Ragland v. Justices Inferior Ct., 10 Ga. 65; Watson v. Watson, 1 Ga. 266.

Ill.—Perry v. Carmichael, 95 Ill. 519; Cruce v. Cruce, 21 Ill. 46.

Ky.—White v. Carrico, 2 Metc. 232; Curle v. Curle, 9 B. Mon. 309; Com. v. Barstow, 3 B. Mon. 290.

Va.—Smith v. Blackwell, 31 Gratt. (72 Va.) 291; Price v. Harrison, 31 Gratt. (72 Va.) 114.

[a] **Claim not preferred to widow's allowance.**—Cruce v. Cruce, 21 Ill. 46. See supra § 804.

[b] **Creditors of ward may be substituted to his rights.**—White v. Carrico, 2 Metc. (Ky.) 232.

[c] **Father acting as guardian without appointment.**—A claim by infants against their father's estate for funds of theirs received by him would be preferred as a claim due from him as a guardian, although he had never been appointed. Sellers v. Peo., 6 Ill. 183.

25. McCutchen v. Osborn, 61 Colo. 408, 158 P 136; Latimer v. Sayre, 45 Ga. 468; Felsenthal v. Kline, 214 Ill. 121, 73 NE 428; Svanoe v. Jurgens, 144 Ill. 507, 33 NE 955 [rev 44 Ill. A. 277]; Perry v. Carmichael, 95 Ill. 519; Wilson v. Kirby, 88 Ill. 566; Merchants' L. & T. Co. v. Hulette, 187 Ill. A. 161; In re Blattner, 92 Wash. 48, 158 P 1015.

[a] **Guardian does not include trustee.**—A statute preferring debts due as guardian does not include a debt due as trustee of infant cestuis que trust. Price v. Harrison, 31 Gratt. (72 Va.) 114.

26. Ga.—Southern Star Copper Lightning Rod Co. v. Cleghorn, 59 Ga. 782; Latimer v. Sayre, 45 Ga. 468.

Ill.—Felsenthal v. Kline, 214 Ill. 121, 73 NE 428; Shipherd v. Furness, 153 Ill. 590, 39 NE 1096 [aff 46 Ill. A. 319]; Svanoe v. Jurgens, 144 Ill. 507, 33 NE 955 [rev 44 Ill. A. 277]; Wilson v. Kirby, 88 Ill. 566; Weer v. Gand, 88 Ill. 490; Ford v. Stuart First Nat. Bank, 100 Ill. A. 70 [rev on other grounds 201 Ill. 120, 66 NE 316].

Iowa.—Chappell v. Craig, 96 Iowa 273, 65 NW 146.

Ky.—Fishback v. Green, 87 Ky. 107, 7 SW 881.

Pa.—In re Ruetschlin, 245 Pa. 473, 91 A 857.

Va.—Pope v. Prince, 105 Va. 209, 52 SE 1009.

[a] **There is no right of preference with respect to:** (1) A claim against the agent of a bank for money which he received from the sale of drafts belonging to the bank, but which he did not account for before his death. Svanoe v. Jurgens, 144 Ill. 507, 33 NE 955 [rev 44 Ill. A. 277]. (2) A claim against an agent for the balance due his principal from the proceeds of notes negotiated by the agent, such proceeds to be used by him in fitting up an hotel for his principal. Shipherd v. Furness, 153 Ill. 590, 39 NE 1096 [aff 46 Ill. A. 319]. (3) A claim against an agent arising out of his management of property intrusted to him. Weer v. Gand, 88 Ill. 490. (4) A claim against an attorney for money col-

statute preferring fiduciary debts is, however, only prospective in its operation, and has no application to the estate of a decedent dying before the passage of the act, although the estate had not been distributed at the time of the passage of the act.[27]

[§ 1172] **bbb. Claims against Foreign Fiduciaries.** It has been held that a statute giving a preference to claims arising out of a fiduciary relation applies only to the estates of fiduciaries appointed under the laws of that state, the debts of foreign fiduciaries being payable according to their ordinary dignity.[28] But there is also authority for the view that such a statute is applicable to the estate of a foreign executor who had never qualified in the state but died holding assets of his testator there.[29]

[§ 1173] **(cc) Subrogation to Preference.** It has been held that, where the claim of a person is entitled to preference on the distribution of a decedent's estate as a fiduciary debt, his creditors [29½] or a surety of decedent who is compelled to pay the claim [30] may be subrogated to his right and avail themselves of the preference.

[§ 1174] **(dd) Waiver of Preference.** The acceptance by the beneficiary of a note from the executor or trustee in payment of his indebtedness arising out of the trust is a waiver of the preference, and no preference can be given a note so taken, in the distribution of his estate.[31] But it is otherwise where a note or bond, although accepted, is not taken in payment of the indebtedness.[32]

[§ 1175] **hh. Claims for Provisions Furnished.** A preference is sometimes given to claims for provisions furnished to decedent or his family within a specified time prior to his death.[33]

[§ 1176] **ii. Liquidated Demands.** Under some statutes liquidated demands have preference over debts on open account,[34] a demand being liquidated whenever the amount due was agreed upon by the parties or fixed by operation of law.[35]

[§ 1177] **jj. Debts Incurred by Representative [36]—(aa) In Performing Decedent's Contracts.[37]** Debts incurred by decedent in his lifetime have priority over debts contracted by the personal representative in performing decedent's executory contracts.[38]

[§ 1178] **(bb) In Carrying on Decedent's Business.[39]** It has been considered that debts created by decedent in his lifetime have priority of payment out of his general estate over debts incurred by the representative in carrying on decedent's business pursuant to testamentary directions,[40] but there is also authority for the view that expenses incurred in lawfully carrying on decedent's business after his death may be preferred as expenses of administration.[41] It has also been held that, where

lected by him. Southern Star Copper Lightning Rod Co. v. Cleghorn, 59 Ga. 782; Smith v. Ellington, 14 Ga. 379. (5) A claim against an agister for selling cattle intrusted to him and appropriating the proceeds. Wilson v. Kirby, 88 Ill. 566. (6) A claim for money advanced for the purchase of tobacco under an agreement that the tobacco should be delivered to the lender and that he should have a lien thereon for the money advanced, the borrower having died before such delivery of the tobacco to the lender. Fishback v. Green, 87 Ky. 107, 7 SW 881. (7) A claim for money placed in an agent's hands for investment by him. Ford v. Stuart First Nat. Bank, 100 Ill. A. 70 [rev on other grounds 201 Ill. 120, 66 NE 316]. (8) A claim against a broker and loan agent to repay the deposits of customers in his hands for investment. Felsenthal v. Kline, 214 Ill. 121, 73 NE 428. (9) A claim against the guardian of an infant who has received the proceeds of a sale of the infant's real estate by a court commissioner. Pope v. Prince, 105 Va. 209, 52 SE 1009. (10) A claim for embezzled property. Doyle v. Murphy, 22 Ill. 502, 74 AmD 165.

[b] **An infant's claim against a constructive trustee,** holding a fund for his benefit, is not a preferred claim against the trustee's estate. Pope v. Prince, 105 Va. 209, 52 SE 1009.

[c] **A ward of a guardian de son tort** was not entitled to priority of payment of his claim against such guardian out of the guardian's estate. Watts v. Newberry, 107 Va. 233, 57 SE 657.

27. Price v. Harrison, 31 Gratt. (72 Va.) 114.

28. Caruthers v. Corbin, 38 Ga. 75.

29. Tunstall v. Pollard, 11 Leigh (38 Va.) 1.

29½. Pond v. Dougherty, 6 Cal. A. 686, 92 P 1035; White v. Carrico, 2 Metc. (Ky.) 232.

30. Muldoon v. Crawford, 14 Bush (Ky.) 125.

31. Lawton v. Fish, 51 Ga. 647; Coleman v. Davies, 45 Ga. 489; Mosley v. Floyd, 31 Ga. 564.

32. Latimer v. Sayre, 45 Ga. 468; Smith v. Blackwell, 31 Gratt. (72 Va.) 291; Yerby v. Lynch, 3 Gratt. (44 Va.) 460; Hamlin v. Atkinson, 6 Rand. (27 Va.) 574, 3 Gratt. (44 Va.) 482 note.

[a] **Illustration.**—Where a guardian on settlement with his ward executes bonds to the ward for the amount due him, the original indebtedness does not become merged or extinguished unless there is full and satisfactory evidence that this result was intended, therefore the bonds being for a fiduciary debt, the debt retains that character and is entitled to preference. Smith v. Blackwell, 31 Gratt. (72 Va.) 291.

33. Moise's Succ., 107 La. 717, 31 S 990; Duhe's Succ., 41 La. Ann. 209, 6 S 502.

34. Jasper County Bank v. Rainey, 144 Ga. 542, 87 SE 661; Kelley v. Terhune, 113 Ga. 365, 38 SE 839; Boyd v. Flournoy, 67 Ga. 575.

[a] **By "open accounts" is meant** those debts which are subject to future adjustment, and which may be reduced or modified by proof. Nisbet v. Lawson, 1 Ga. 275.

35. Cornett v. Fain, 33 Ga. 219; Hargroves v. Cooke, 15 Ga. 321; Nisbet v. Lawson, 1 Ga. 275; Furman v. Moore, 64 N. C. 358.

[a] **Liquidation need not be evidenced by writing.** — Anderson v. State, 2 Ga. 370.

[b] **Claim for money collected and retained.**—A claim against the estate of a deceased attorney for a certain sum of money collected and retained by him is a liquidated demand. Smith v. Ellington, 14 Ga. 379; Southern Star Copper Lightning Rod Co. v. Cleghorn, 59 Ga. 782.

[c] **Assent to account rendered.**—Where the debtor in his lifetime assented to the correctness of an account rendered to him, the account is a liquidated demand within the meaning of the statute. Columbus Third Nat. Bank v. Strauss, 135 Ga. 324, 69 SE 482; Kelley v. Terhune, 113 Ga. 365, 38 SE 839.

[d] **Entry in account book.**—(1) The entry by a factor to the credit of the principal of the value of the property consigned, and a subsequent sale of the property for cash, will render the claim for the proceeds a liquidated demand. McNulty v. Pruden, 62 Ga. 135. (2) But an account on the books of a firm in the handwriting of a deceased partner, stating his individual indebtedness to the firm, is not an account "settled" and "liquidated," the books never having been settled. Furman v. Moore, 64 N. C. 358.

[e] **An agreement to deliver one fifth of a future crop** creates a liquidated demand. Bartee v. Andrews, 18 Ga. 407.

[f] **A conditional promise by decedent in his lifetime to pay attorney's fees** would not entitle them to rank as liquidated demands, because included in a judgment rendered against the administrators in a suit after the death of decedent. Columbus Third Nat. Bank v. Strauss, 135 Ga. 324, 69 SE 482.

[g] **A written guaranty** to pay the future indebtedness of another on open account is not liquidated. Hargroves v. Cooke, 15 Ga. 321.

36. Expenses of administration see supra § 1161.

Funeral expenses see supra § 1160.

37. Performance of decedent's obligations by representative generally see supra § 472.

38. In re Allam, 199 Pa. 573, 49 A 252.

39. Engaging in business by representative generally see supra §§ 474–482.

40. U. S.—In re McAusland, 235 Fed. 173.

N. Y.—Willis v. Sharp, 115 N. Y. 396, 22 NE 149, 5 LRA 636 [rev 46 Hun 540].

Oh.—Rembold v. White, 28 Oh. Cir. Ct. 427.

Pa.—In re Allam, 199 Pa. 573, 49 A 252.

Tenn.—Morrow v. Morrow, 2 Tenn. Ch. 549.

Eng.—Cutbush v. Cutbush, 1 Beav. 184, 17 EngCh 184, 48 Reprint 910; Lucas v. Williams, 4 De G. F. & J. 436, 65 EngCh 339, 45 Reprint 1253 [rev on other grounds 3 Giffard 150, 66 Reprint 361]. But see infra note 41.

[a] **This is true, although** the will directs that all property shall be chargeable with the debts thus contracted by the representative. Morrow v. Morrow, 2 Tenn. Ch. 549.

41. Ala.—Naftel v. Osborn, 96 Ala. 623, 12 S 182.

Ky.—Miller v. Miller, 172 Ky. 519, 189 SW 417.

Miss.—Emanuel v. Norcum, 8 Miss. 150.

Tex.—Wagon Co. v. Dreyfus Co., (Civ. A.) 181 SW 703.

decedent's business was continued by his administrator, a creditor whose claim arose after the death of decedent is entitled in equity, upon showing the insolvency of the administrator and that the business into which his goods went was profitable to the estate, to have the profit applied to his debt, or, upon showing that the business was continued with the consent of all parties interested, to have the assets of the estate invested in it first used in payment of his debt.[42]

[§ 1179] **kk. Unmatured and Contingent Claims.** Between debts of the same class no distinction in dignity or priority exists by reason of the fact that one is due presently and another not due until a future day,[43] but a debt owing presently, although not yet due, retains its priority over debts of lower degree, and without providing for its payment the representative cannot lawfully pay debts of inferior dignity.[44] The existence of merely contingent debts does not, however, in the absence of express statute, prevent the representative from applying the assets to debts of inferior degree.[45]

[§ 1180] **ll. Resident and Nonresident Creditors.** In the absence of a statute so providing, resident creditors as such have no priority over nonresidents but both stand on a footing of equality according to the ordinary rank and dignity of their claims,[46] notwithstanding the assets in the domestic state are insufficient to pay all the creditors in full and in the state where the foreign creditors reside there are other assets upon which they can administer.[47]

[§ 1181] **mm. Time of Filing or Proving Claim.** Ordinarily all unpreferred claims exhibited and allowed within the general period limited for that purpose are payable pro rata without regard to the time at which they were presented,[48] but under the statutory system prevailing in some states debts not in the preferred classes have priority according to the time when they are exhibited or filed, those exhibited or filed within a certain period being placed in a class by themselves to be paid in priority to debts exhibited or filed thereafter.[49] The mere filing within the time limited is sufficient to give a claim its statutory rank, and proving or establishing the claim within such time is not necessary, provided that it is finally established within the time allowed for the proof of claims,[50] and it has been

Eng.—Dowse v. Gorton, [1891] A. C. 190; In re Brooke, [1894] 2 Ch. 600.

[a] **Debts contracted in making crops.**—(1) All debts contracted by an administrator, who is lawfully carrying on a farm and completing a crop growing at the time of the death of the intestate, are privileged claims on the income of the place, although not on other property; and a subsequent administrator is bound to pay such debts. But if the proceeds of the crop have been appropriated to the payment of debts due from decedent in his lifetime, or have been declared assets, then such creditor is entitled to payment out of any other fund of the estate. Emanuel v. Norcum, 8 Miss. 150. (2) Under a statute which provides that "any crop commenced by a decedent may be completed and gathered by the executor or administrator, and, the expenses of the plantation being deducted therefrom, is assets in his hands," the rent of land, taxes, the cost of completing, harvesting, and selling the crop, hauling, and the charge for preserving the property, are proper allowances to an administratrix before any creditor can claim payment out of the proceeds of the crop. Naftel v. Osborn, 96 Ala. 623, 12 S 182.

42. American Surety Co. v. McGuire, 54 Misc. 79, 103 NYS 753.

43. Gross v. Thornson, 286 Ill. 185, 121 NE 600; Cook v. Woodard, 5 Dem. Surr. (N. Y.) 97; Hutchinson v. Bates, 17 S. C. L. 111; Dunn v. Sublett, 14 Tex. 521. But compare Evans v. Norris, 2 N. C. 411, 412 ("An executor or administrator is bound to pay those debts that are already due, in preference to those not yet payable").

44. U. S. v. North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308; Dunn v. Sublett, 14 Tex. 521; Lemun v. Fooke, 3 Lev. 57, 83 Reprint 574; Atkinson v. Grey, 1 Smale & G. 577, 65 Reprint 253.

45. Delamothe v. Lanier, 4 N. C. 296; Dunlap v. Bynum, 4 S. C. Eq. 646; Dunn v. Sublett, 14 Tex. 521; Henderson v. Gilchrist, 17 Jur. 570.

46. Ark.—Yonley v. Lavender, 27 Ark. 252 [aff 21 Wall. (U. S.) 276, 22 L. ed. 536].

Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Miner v. Austin, 45 Iowa 221, 24 AmR 763.

Ky.—Grey v. Lewis, 79 Ky. 453.

Md.—Murray v. Ridley, 3 Harr. & M. 171.

Mass.—Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128.

N. H.—Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

N. C.—Findley v. Gidney, 75 N. C. 395.

Pa.—In re Miller, 3 Rawle 312, 24 AmD 345.

Tex.—Tyler v. Thompson, 44 Tex. 497, 23 AmR 600.

Vt.—Churchill v. Boyden, 17 Vt. 319.

Eng.—In re Klœbe, 28 Ch. D. 175; Reynolds v. Lewis, 29 L. J. Ch. 296.

Ont.—Milne v. Moore, 24 Ont. 456.

"We cannot think, however, that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." Dawes v. Head, 3 Pick. (Mass.) 128, 146.

[a] **Reason for rule.** — "If the creditors of the domicil may pursue the property of the debtor in his lifetime, in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government, on his decease. Even if by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated be thereby compelled to resort to the principal administration, where the debtor had his domicil, or to lose their debts, or a portion of them; this result is no other than might have been attained in the lifetime of the debtor, by his withdrawal of the property from their jurisdiction." Goodall v. Marshall, 11 N. H. 88, 95, 35 AmD 472.

[b] **Construction of statute.**—The object of the act of 1788, providing that, where an alien died indebted to citizens of that state, the claims of such citizens, although founded on simple contracts, were payable in the same manner as if liquidated by bond or other specialty, was to give citizens of the state a preference over foreigners in the administration of the estate of a deceased alien; but it was not intended that the debts of South Carolina citizens should be paid first to the total exclusion of foreign creditors. Mitchell v. Fayolle, 15 S. C. L. 28.

47. Findley v. Gidney, 75 N. C. 395; Tyler v. Thompson, 44 Tex. 497, 23 AmR 600.

48. Dunlap v. McGhee, 98 Ill. 287; Ramsay v. Ramsay, 97 Ill. A. 270.

49. Keith v. Parks, 31 Ark. 664; Phelps, etc., Co. v. Greenbaum, 87 Iowa 347, 54 NW 76; In re Wonn, 80 Iowa 750, 45 NW 1063; Chandler v. Hockett, 12 Iowa 269; Hart v. Jewett, 11 Iowa 276; Madison County Bank v. Suman, 79 Mo. 527; Buckhartt v. Helfrich, 77 Mo. 376; State Bank v. Tutt, 44 Mo. 366; Miller v. Janney, 15 Mo. 265; Walley v. Gentry, 68 Mo. A. 298; Jones v. Davis, 37 Mo. A. 69; Williams v. Penn, 12 Mo. A. 393; Converse v. Sorley, 39 Tex. 515; Bell v. Farmers', etc., Nat. Bank, 33 Tex. Civ. A. 408, 76 SW 798.

[a] **Judgments.**—Keith v. Parks, 31 Ark. 664; Cooley v. Smith, 17 Iowa 99; Madison County Bank v. Suman, 79 Mo. 527; State Bank v. Tutt, 44 Mo. 366; Converse v. Sorley, 39 Tex. 515; Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

[b] **Excuse for delay.**—A claim, although not filed within the statutory period of eighteen months, may nevertheless be given priority as a claim of the third class, that is, those filed within six months, if "peculiar circumstances entitle the claimant to equitable relief." Brewster v. Kendrick, 17 Iowa 479. See also Kells v. Lewis, 91 Iowa 128, 58 NW 1074 (refusing relief under the circumstances of the case).

[c] **Contingent claims.**—Where a claim has been filed as a contingent claim, and it appears by the register of claims that the claim has been allowed and established by the court as a claim of the third class, it must be presumed, in the absence of any other evidence, that it was allowed and established only as a contingent claim, and upon such showing alone it is proper for the court to overrule a motion for unconditional payment by the administrator. Blanchard v. Conger, 61 Iowa 153, 16 NW 59.

50. Smith v McFadden, 56 Iowa 482, 9 NW 350; Goodrich v. Conrad, 24 Iowa 254; Noble v. Morrey, 19 Iowa 509; Chandler v. Hackett, 12 Iowa 269.

held that valid claims presented to, and approved by, the representative within the statutory time are entitled to rank accordingly, although not formally filed, if, under the circumstances, other parties in interest are not prejudiced.[51]

[§ 1182] **(c) As to Encumbered Property.** Property which is subject to a lien or encumbrance can in a strict sense be considered assets of the estate only so far as its value exceeds the amount of the encumbrance,[52] and hence it follows that the rules of priority applicable in the case of general assets of the estate must be subject to considerable modification when applied to encumbered property,[53] although the excess after payment of the encumbrance will be applied according to the usual rules of priority.[54]

[§ 1183] **(d) As to Equitable Assets.** In the distribution of equitable assets, the courts of equity, applying the maxim that equality is equity, distribute such assets ratably among all creditors irrespective of the dignity of their debts;[55] and where a preferred creditor has received a portion of the legal assets, he is not entitled to share in the equitable assets until the inferior creditors have received from the equitable assets an equal portion of their respective debts.[56] The distinction between legal and equitable assets has, however, been abolished in a number of the states.[57]

[§ 1184] **(4) Liens—(a) Judgments and Decrees—aa. Priority as to General Assets—(aa) In General.** At common law and under some statutes, judgments rendered against decedent in his lifetime are preferred claims as against the general assets of the estate.[58] Some statutes preferring judgments contemplate that the judgments shall be subsisting liens at the debtor's death or at least be capable of being liens;[59] but in the absence of any such provision a judgment is entitled to preference, although it did not constitute a lien on the debtor's land at the time of his death or would not have constituted such a lien if the debtor had owned any land.[60] As a general rule in order for a judgment to be pre-

51. In re Wonn, 80 Iowa 750, 45 NW 1063.

52. See supra § 1182.

53. Finegan's Succ., 135 La. 473, 65 S 614.

Liens see infra §§ 1184–1190.

54. Wade's App., 29 Pa. 328; Ramsey's App., 4 Watts (Pa.) 71.

55. Backhouse v. Patton, 5 Pet. (U. S.) 160, 8 L. ed. 82; Law v. Law, 15 F. Cas. No. 8,128, 3 Cranch C. C. 324; Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 AmD 781; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 AmD 478; Pardo v. Bingham, L. R. 6 Eq. 485; Plunket v. Penson, 2 Atk. 290, 26 Reprint 577; Nash v. Bryant, 25 Beav. 533, 53 Reprint 741; Morrice v. Bank of England, Cas. t. Talb. 217, 25 Reprint 745; Shepherd v. Kent, Prec. Ch. 190, 24 Reprint 92, 2 Vern. Ch. 435, 23 Reprint 879; Cox's Case, 3 P. Wms. 341, 24 Reprint 1091; Walker v. Meager, 2 P. Wms. 550, 24 Reprint 857; Deg v. Deg, 2 P. Wms. 412, 24 Reprint 791; Fremoult v. Dedire, 1 P. Wms. 429, 24 Reprint 458; Solley v. Gower, 2 Vern. Ch. 61, 23 Reprint 649; Anonymous, 18 Ves. Jr. 258, 34 Reprint 315.

56. Wilder v. Keeler, 3 Paige (N. Y.) 166, 23 AmD 781; Morrice v. Bank of England, Cas. t. Talb. 217, 25 Reprint 745; Shepherd v. Kent, Prec. Ch. 190, 24 Reprint 92, 2 Vern. Ch. 435, 23 Reprint 879.

57. Titterington v. Hooker, 58 Mo. 593; Elstroth v. Young, 88 Mo. A. 418; Ramsey's App., 4 Watts (Pa.) 71; Pennsylvania Agricultural, etc., Bank v. Stambaugh, 13 Serg. & R. (Pa.) 299; Matter of Sperry, 1 Ashm. (Pa.) 347.

58. U. S.—Johnson v. Garner, 233 Fed. 756.

Ark.—Eddins v. Graddy, 28 Ark. 500; Tucker v. Yell, 25 Ark. 420.

Cal.—In re Smith, 122 Cal. 462, 55 P 249.

Ind.—Comer v. Light, 175 Ind. 367, 93 NE 660, 94 NE 325 [rev 92 NE 344]; Newcomer v. Wallace, 30 Ind. 216.

Kan.—Wolfe v. Robbins, 10 Kan. A. 222, 63 P 278.

Mo.—Tonnies v. McIntyre, 82 Mo. A. 268.

N. J.—Wright v. Wright, 70 N. J. Eq. 407, 62 A 487; Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618.

N. Y.—Bergmann v. Lord, 194 N. Y. 70, 86 NE 828; McNulty v. Hurd, 72 N. Y. 518 [mod 11 Hun 339]; Matter of Blackford, 35 App. Div. 330, 54 NYS 972; In re Curtis, 188 App. Div. 470, 176 NYS 841; Matter of Foster, 8 Misc. 344, 29 NYS 316, 1 Gibb. Surr. 82 [aff 84 Hun 610 mem, 32 NYS 1143 mem]; Hamed's Case, 4 AbbPr 270; Trust v. Harned, 4 Bradf. Surr. 213.

N. C.—Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

S. C.—Cook v. Jennings, 40 S. C. 204, 18 SE 640.

Eng.—Bereblock v. Read, Cro. Eliz. 734, 822, 78 Reprint 967, 1049; Robinson v. Tonge, 3 P. Wms. 398, 24 Reprint 1117.

Man.—Frontenac Loan Co. v. Morice, 3 Man. 462.

[a] **The preference thus given is absolute** and cannot be defeated by any inquiry into the cause of action on which the judgment was recovered. Matter of Blackford, 35 App. Div. 330, 54 NYS 972.

[b] **Judgment of justice of the peace.**—Whether a judgment rendered by a justice of the peace ranks with judgments rendered by courts of record depends upon whether under the local statutes the judgment is or can be made a judgment of record. Bettinger v. Ridgway, 3 F. Cas. No. 1,369, 4 Cranch C. C. 340 (construing Md. Acts [1798] c 101, in its application to the District of Columbia); Newcomer v. Beeler, 116 Md. 647, 82 A 460; Garrett v. Johnson, 29 N. C. 231; Scott v. Ramsay, 1 Binn. (Pa.) 221.

[c] **Where execution issued during decedent's lifetime,** the statute giving a preference to judgments does not apply. Wright v. Wright, 70 N. J. Eq. 407, 62 A 487.

[d] **Statute applicable only where funds in hands of personal representative.** — Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

[e] **A decree in equity** (1) adjudging that one person shall pay a sum of money to another is in its form, substance, and effect a judicial sentence, as much so as a judgment of a common-law court, and has always been regarded as standing in the same rank with judgments and possessing equal dignity and entitled to the same preference in the distribution of the assets of the estate of an insolvent decedent. In re Smith, 122 Cal. 462, 55 P 249; Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; Cook v. Jennings, 40 S. C. 204, 18 SE 640; Ex p. Farrars, 13 S. C. 254; Woddrop v. Ward, 3 S. C. Eq. 203; Smith v. Eyles, 2 Atk. 385, 26 Reprint 633; Shafto v. Powel, 3 Lev. 355, 83 Reprint 727; Darston v. Orford, Prec. Ch. 188, 24 Reprint 91; Bishop v. Godfrey, Prec. Ch. 179, 24 Reprint 87; Robinson v. Tonge, 3 P. Wms. 398, 24 Reprint 1117; Astley v. Powis, 1 Ves. 495, 27 Reprint 1164; Mildred v. Robinson, 19 Ves. Jr. 585, 34 Reprint 633. (2) "There is nothing more frequent in practice or better known, than that a decree of this court is equal to a judgment at law." Searle v. Lane, 2 Vern. Ch. 37, 88, 23 Reprint 634, 667. (3) A decree requiring a defendant to pay over money to a receiver is entitled to a preference equally with judgments. Tucker v. Yell, 25 Ark. 420.

[f] **In New Mexico** the statutes being silent as to the manner of distributing the assets of insolvent estates of decedents in payment of debts, the order of payment is to be determined by the civil laws of Spain and Mexico, which give no preference to judgments. Crenshaw v. Delgado, 1 N. M. 376.

59. Eddins v. Graddy, 28 Ark. 500; Tucker v. Yell, 25 Ark. 420; Williams v. Price, 21 Ga. 507; Wolfe v. Robbins, 10 Kan. A. 222, 63 P 278; In re Funk, 21 LancLRev (Pa.) 149; In re Fleming, 32 PittbsLegJNS (Pa.) 446.

[a] **A dormant judgment** (1) did not rank with other judgments under the statute of 1792, but was classed with "bonds and other obligations;" and its revival after the debtor's death did not alter its rank. Williams v. Price, 21 Ga. 507. (2) A judgment becoming dormant after the decedent's death is not entitled to preference as against a later judgment which had not become dormant, the estate not being shown to be insolvent. Colson v. Kennedy, 88 Ga. 174, 14 SE 119. (3) But judgments which were liens at the debtor's death but became dormant thereafter and which are revived before the assets are distributed operate by relation as of the date of decedent's death, and take rank as preferred claims accordingly. King v. Morris, 40 Ga. 63.

[b] **Property fraudulently assigned.** — A judgment recovered against a defendant after a fraudulent assignment of his property and before proceedings to set aside the assignment would not be entitled to any preference as to such property when recovered by the representative of the fraudulent vendor. Le Prince v. Guillemot, 18 S. C. Eq. 187.

[c] **A delivery bond judgment** is a lien on the land of the obligor so as to entitle it to a preference. Eddins v. Graddy, 28 Ark. 500.

60. Peters v. Holliday, 40 Mo. 544; Matter of Foster, 8 Misc. 344, 29 NYS 316, 1 Gibb. Surr. 82 [aff 84 Hun 610 mem, 32 NYS 1143 mem]; Hamed's Case, 4 AbbPr (N. Y.) 270; Ainslie v. Radcliff, 7 Paige (N. Y.) 439; Trust v. Harned, 4 Bradf. Surr. (N. Y.) 213; Galloway v. Bradfield, 86 N. C. 163.

[a] **The fact that a judgment lost its lien** on the land and has not been revived does not affect its classification for payment out of the general assets. Tonnies v. McIntyre, 82 Mo. A. 268.

ferred it must have been rendered against decedent in his lifetime,[61] and it is also sometimes required that the judgment shall have been docketed prior to the debtor's death.[62] The judgment or decree must be final,[63] and must not only ascertain that a certain sum of money is due but also order payment;[64] but formal defects in the judgment will not defeat its preferential right.[65] In a number of states the statutes have abolished the common-law priority of judgments over specialty and simple contract debts and made them all payable pro rata out of the general assets,[66] and such a provision does not impair the obligation of contracts, as applied to judgments recovered prior to the passage of the act, decedent dying after such passage.[67]

[§ 1185] **(bb) Foreign Judgments.** It is generally held that judgments of foreign countries[68] and sister states[69] are not entitled to the priority accorded domestic judgments, but rank merely as simple contract debts.

[§ 1186] **bb. Priority as to Property Subject to Lien.** Where the personal estate is insufficient, judgments existing in the debtor's lifetime are payable out of the proceeds of the land covered by them in priority to all unsecured debts,[70] but in order that a judgment may have this priority it must have been

61. Rutledge v. Simpson, 141 Mo. 290, 42 SW 820; James v. Beesly, 4 Redf. Surr. (N. Y.) 236; Bernes v. Weisser, 2 Bradf. Surr. (N. Y.) 212; Patterson's App., 96 Pa. 93; Reinig v. Hartman, 69 Wis. 28, 32 NW 639.

[a] **Judgment on day of death.**—Under a statute preferring judgments which constituted liens on defendant's property, a judgment entered after his death, but on the same day, is not entitled to a preference. Patterson's App., 96 Pa. 93.

[b] **Where the death occurs after the rendition of a verdict** (1) or the assessment of damages, and under the provisions of the statutes final judgment is entered against decedent after his death, the judgment so rendered is entitled to preference in the class with judgments rendered in the debtor's lifetime. Matter of Dunn, 5 Redf. Surr. (N. Y.) 27; Mills v. Jones, 31 S. C. L. 393; Dibble v. Taylor, 29 S. C L. 308, 42 AmD 368; Colebeck v. Peck, 2 Ld. Raym. 1280, 92 Reprint 340. (2) Such a judgment is entitled to preference as a judgment "docketed" against decedent. Matter of Dunn, 5 Redf. Surr. (N. Y.) 27.

[c] **A deficiency judgment in foreclosure rendered against the personal representative** (1) is not a preferred claim against the estate of the deceased mortgagor. James v. Beesly, 4 Redf. Surr. (N. Y.) 236; Reinig v. Hartman, 69 Wis. 28, 32 NW 639. (2) This is true, even though the action was pending at the time of the mortgagor's death. Reinig v. Hartman, 69 Wis. 28, 32 NW 639. See also Cook v. Jennings, 40 S. C. 204, 18 SE 640 (deficiency judgment rendered in defendant's lifetime but deficiency not ascertained until after his death). (3) But the judgment is nevertheless payable out of the personal estate. Mitchell v. Bowne, 63 HowPr (N. Y.) 1.

[d] **Judgment by confession.** — The death of decedent before the end of the term at which the judgment was confessed did not prevent its preference. Nichols v. Chapman, 9 Wend. (N. Y.) 452.

Effect of judgment against representative see supra §§ 1155, 1158.

62. Mitchell v. Mount, 19 AbbPr (N. Y.) 1; Clark's Case, 15 AbbPr (N. Y.) 227; Stevenson v. Weisser, 1 Bradf. Surr. (N. Y.) 343.

[a] **The statute refers only to** docketing in the court in which the judgment was rendered. Hamed's Case, 4 AbbPr (N. Y.) 270; Trust v. Harned, 4 Bradf. Surr. (N. Y.) 213.

63. Cal.—In re Smith, 122 Cal. 462, 55 P 249.

Mo.—Rutledge v. Simpson, 141 Mo. 290, 42 SW 820.

N. Y.—In re Curtis, 176 NYS 841 [aff 228 N. Y. 534 mem, 126 NE 904 mem].

S. C.—Ex p. Farrars, 13 S. C. 254; McIntosh v. Wright, 9 S. C. Eq. 385; Thomas v. McElwee, 34 S. C. L. 131.

Eng.—Wilson v. Dunsany, 18 Beav. 293, 52 Reprirt 115.

[a] **Where the death of a defendant occurs between interlocutory and final judgment,** the final judgment being entered up against his representative, the right to a preference does not exist. Thomas v. McElwee, 34 S. C. L. 131.

[b] **Judgment quod computet does not rank as a judgment.**—Smith v. Eyles, 2 Atk. 385, 26 Reprint 633; Searle v. Lane, 2 Freem. 103, 22 Reprint 1086, 2 Vern. Ch. 37, 88, 23 Reprint 634, 667.

[c] **Foreclosure decree.**—Where a simple decree of foreclosure is rendered against a debtor in his lifetime, but no sale is made thereunder, and no deficiency ascertained to exist until after his death, a claim for a deficiency reported after his death does not rank as a judgment. Cook v. Jennings, 40 S. C. 204, 18 SE 640.

[d] **An allowance of alimony pendente lite** in an action against a husband for permanent support of his wife is in the nature of a final judgment, and the claim for unpaid alimony is a preferred claim against his estate. In re Smith, 122 Cal. 462, 55 P 249; In re Curtis, 176 NYS 841 [aff 228 N. Y. 534 mem, 126 NE 904 mem].

[e] **A decretal order for payment of money** on which execution may issue is entitled to preference. Haskell v. Raoul, 6 S. C. Eq. 22.

64. In re Kehoe, Myr. Prob. (Cal.) 127; Rutledge v. Simpson, 141 Mo. 290, 42 SW 820; Ramsey's App., 4 Watts (Pa.) 71; Cook v. Jennings, 40 S. C. 204, 18 SE 640; Ex p. Farrars, 13 S. C. 254.

[a] **A decree settling the accounts of an executor or administrator** and showing a balance in his hands is not a judgment and is not entitled to preference as a judgment. In re Kehoe, Myr. Prob. (Cal.) 127.

65. Hardin v. Melton, 28 S. C. 38, 4 SE 805, 9 SE 423.

66. Hawaii.—Nathan v. Vida, 1 Hawaii 143.

Ill.—Clingman v. Hopkie, 78 Ill. 152; Turney v. Gates, 12 Ill. 141; Paschall v. Hailman, 9 Ill. 285.

Ky.—Place v. Oldham, 10 B. Mon. 400.

Miss.—Robertson v. Demoss, 23 Miss. 298.

N. C.—Jenkins v. Carter, 70 N. C. 500.

Pa.—Deichman's App., 2 Whart. 395, 30 AmD 271; Ramsey's Est., 1 LackLegRec 367.

Tenn. — Prewett v. Goodlett, 98 Tenn. 82, 38 SW 434.

[a] **Proceeds of realty and of personalty** are subject to different rules, there being a priority as to the former but not as to the latter. Mason's App., 89 Pa. 402.

[b] **Referee's fees** adjudged against the estate take no greater pro rata than the judgment of which they are a part. Cobb v. Rhea, 137 N. C. 295, 49 SE 161.

67. Place v. Oldham, 10 B. Mon. (Ky.) 400; Com. v. Lewis, 6 Binn. (Pa.) 266.

"The provision is a future one, operating prospectively, and not affecting an antecedent right. The rule of distribution is the remedy furnished by the law, on the occurrence of uncertain and subsequent events, namely the death of the party without payment, and the incapacity of his estate to discharge his debts. In such case the law steps in to provide a rule, founded either on principles of equity or public policy, which the legislature both of the province and state, have been in the habit of changing from time to time, according to the change of circumstances." Deichman's App., 2 Whart. (Pa.) 395, 397, 30 AmD 271.

68. In re Colt, 4 Watts & S. (Pa.) 314; Wilson v. Dunsany, 18 Beav. 293, 52 Reprint 115; Walker v. Witter, Dougl. (3d ed) 1; Dupleix v. De Roven, 2 Vern. Ch. 540, 23 Reprint 950.

[a] **Priority in assets transmitted from foreign state.**—Where a person died domiciled in Ireland, having property in both England and Ireland, an Irish judgment had priority over simple contract creditors in the administration of Irish property remitted to England for administration. Cook v. Gregson, 2 Drew. 286, 61 Reprint 729.

69. U. S.—McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177 (construing Georgia statute); Norton v. Stevens, 18 F. Cas. No. 10,353a, 1 Hayw. & H. 94 (construing Maryland statute).

Ark.—Green v. Brooks, 25 Ark. 318.

Md.—Brengle v. McClellan, 7 Gill & J. 434.

Mo.—Gainey v. Sexton, 29 Mo. 449; Harness v. Green, 20 Mo. 316.

N. Y.—Brown v. Public Admr., 2 Bradf. Surr. 103.

Pa.—Dean's Est., 26 Pa. Co. 367. Contra In re Colt, 4 Watts & S. 314, 315 ("I cannot bring myself to believe that a judgment rendered in a sister State is to be viewed, to all intents and purposes, as a foreign judgment. That it is something more than a debt by simple contract, must be conceded").

S. C.—Cameron v. Wurtz, 15 S. C. L. 278.

[a] **A state has power to give a preference to its own judgments** over the judgments of other states in the settlement of the estates of decedents. Harness v. Green, 20 Mo. 316.

70. Ga.—Hargrove v. Lilly, 69 Ga. 326.

Kan.—Wolfe v. Robbins, 10 Kan. A. 222, 63 P 278.

Miss. — Robertson v. Demoss, 23 Miss. 298.

Mo.—Bassett v. Slater, 81 Mo. 75; Finley v. Caldwell, 1 Mo. 512.

N. C.—Jerkins v. Carter, 70 N. C. 500.

Pa.—Mason's App., 89 Pa. 402; Wade's App., 29 Pa. 328; Ramsey's App., 4 Watts 71; O'Brien's Est., 19 Pa. Co. 467; Matter of Hocker, 2 Pearson 493, 14 Phila. 659; Ramsey's Est., 1 LackLegRec 367; In re Bryan, 4 Phila. 228.

S. C.—Baxter v. Baxter, 23 S. C. 114; Public Account Comrs. v. Greenwood, 1 S. C. Eq. 450.

W. Va.—Alderson v. Henderson, 5 W. Va. 182.

[a] **Rule applies to judgments by confession.**—Finley v. Caldwell, 1 Mo. 512.

[b] **To what claims preferred.**—

a lien on the land at the time of the debtor's death,[71] and proceedings thereafter to make it a lien are ineffectual to give it priority.[72]

[§ 1187] **cc. Priority Inter Sese.**[73] By statute in many states judgments and decrees are payable according to their priority in point of time, the oldest being paid first, the priority, being however, generally determined by the date of docketing or enrollment,[74] and under some statutes the judgment on which execution is first levied has priority.[75] In the absence of any statute governing the matter, judgments and decrees, regardless of their relative priorities in point of time, are payable pro rata on deficiency of assets.[76]

[§ 1188] **(b) Specific Liens—aa. Priority as to General Assets.** The common-law rule, which has been embodied in statutes in some jurisdictions, is that a mortgage is entitled to no preference out of the general assets merely by reason of the fact that it is a mortgage, but ranks as against the general assets according to the nature of the instrument which it was given to secure.[77] But in a few jurisdictions statutes have been enacted changing this rule, and giving to mortgages and other liens on land a preference in payment out of the general assets.[78]

[§ 1189] **bb. Priority as to Encumbered Property.** When the personal estate is insufficient, a specific lien binding decedent's land at the time of his death has priority as to the land bound thereby over all unsecured debts of decedent or claims against the estate and in distributing the proceeds of the land among creditors the holder of the lien is entitled to be paid first,[79] and the same rule applies to personalty subject to a specific lien, the lienor having priority over general creditors with respect thereto.[80] The most frequent application of the rule is in the case of land subject to a mort-

A judgment is entitled to payment out of the proceeds of the encumbered land, where the personal estate is insufficient, in priority to such preferred claims as: (1) The funeral expenses and the expense of decedent's last illness. Wade's App., 29 Pa. 328; Matter of Hocker, 2 Pearson (Pa.) 493, 14 Phila. 659; In re Bryan, 4 Phila. (Pa.) 228; Pottsville Union Sav. Fund v. Cartwright, 11 LancBar (Pa.) 136, 1 LegRec 171. (2) Claims arising out of fiduciary relations with decedent. Alderson v. Henderson, 5 W. Va. 182. (3) Debts due the state. Finley v. Caldwell, 1 Mo. 512; Baxter v. Baxter, 23 S. C. 114; Dunlap v. Bynum, 4 S. C. Eq. 646; Public Account Comrs. v. Greenwood, 1 S. C. Eq. 450. (4) The wages of miners, laborers, and mechanics. Wade's App., 29 Pa. 328.

[c] **Priority defeated by sale under trust deed.**—Pahlman v. Shumway, 24 Ill. 127.

71. Williams v. Price, 21 Ga. 507; Clingman v. Hopkie, 78 Ill. 152; Turney v. Gates, 12 Ill. 141; Robertson v. Demoss, 23 Miss. 298; Patterson's App., 96 Pa. 93; Matter of Patterson, 1 Ashm. (Pa.) 336.

[a] **Judgment entered on day of death.**—Where the death of the debtor and the entry of judgment occur on the same day, but the judgment is entered after the death, the judgment is not entitled to priority of payment out of the proceeds of the land. Patterson's App., 96 Pa. 93.

72. Williams v. Price, 21 Ga. 507; Clingman v. Hopkie, 78 Ill. 152; Robertson v. Demoss, 23 Miss. 298; Patterson's App., 96 Pa. 93; Matter of Patterson, 1 Ashm. (Pa.) 336.

73. See generally Judgments [23 Cyc 1377].

74. Cal.—Morton v. Adams, 124 Cal. 229, 56 P 1038, 71 AmSR 53.

Ga.—King v. Morris, 40 Ga. 63; Moore v. Dortic, Ga. Dec. Pt. II. 84.

Ind.—Comer v. Light, 175 Ind. 367, 93 NE 660, 94 NE 325.

N. Y.—Matter of Townsend, 83 Hun 200, 31 NYS 409; Matter of Foster, 8 Misc. 344, 29 NYS 316, 1 Gibb. Surr. 82 [aff 84 Hun 610 mem, 32 NYS 1143 mem]; Ainslie v. Radcliff, 7 Paige 439; Trust v. Harned, 4 Bradf. Surr. 213.

N. C.—Mauney v. Holmes, 87 N. C. 428; Galloway v. Bradfield, 86 N. C. 163.

Oh.—Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408.

S. C.—Klinck v. Keckley, 11 S. C. Eq. 250.

[a] **Judgment in favor of state.**—(1) Where a statute makes judgments payable in the order of their seniority, a senior judgment in favor of a citizen is prior to a junior judgment in favor of the state, although debts due the state are preferred by statute. Klink v. Keckley, 11 S. C. Eq. 250. (2) Aliter in Georgia. State v. Dickson, 38 Ga. 171.

[b] **Date of death governs.**—Priorities among judgment creditors are to be determined as they exist at the death of the debtor, and the liens remain unaffected by the lapse of time thereafter during which the creditor is deprived of an opportunity to enforce them by execution. Tarboro v. Pender, 153 N. C. 427, 69 SE 425, 636.

[c] **A judgment confessed on a note insufficiently stamped,** which had sufficient stamps subsequently affixed, must be postponed in distribution to judgments entered before the restamping of the note but after the entry of the judgment thereon. In re Aufdenhaus, 33 PittsLegJNS (Pa.) 70.

75. Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

76. Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; Ainslie v. Radcliff, 7 Paige (N. Y.) 439; McCausland v. O'Callaghan, [1904] 1 Ir. 376.

77. Cal.—In re McDougald, 146 Cal. 196, 79 P 875.

Iowa.—In re Brackey, 166 Iowa 109, 147 NW 188.

Ky.—Miller v. Miller, 172 Ky. 519, 189 SW 417; Woolley v. Johnson, 102 Ky. 155, 43 SW 678, 19 KyL 159.

La.—Baldwin v. Criswell, 14 La. 166.

Miss.—O'Brien v. Wilson, 86 Miss. 540, 38 S 509.

S. C.—Piester v. Piester, 22 S. C. 139, 53 AmR 711 [overr Edwards v. Sanders, 6 S. C. 316]; Tunno v. Happoldt, 13 S. C. L. 188; Kinard v. Young, 19 S. C. Eq. 247.

Tex.—Chandler v. Burdett, 20 Tex. 42.

Wash.—Denton v. Maple, 92 Wash. 290, 158 P 1001.

[a] **Meaning of "proceeds."**—Under a statute which provides that the preference given to a mortgage against a decedent's estate extends only to the "proceeds" of the property mortgaged, and that, if such proceeds are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate, the word "proceeds" does not include the rents of the property mortgaged accruing before sale, where the rents, issues, or profits of the property were not included in the mortgage. In re McDougald, 146 Cal. 196, 79 P 875.

78. Moore v. Dortic, Ga. Dec. Pt. II. 84; State v. Mason, 21 Ind. 171; Fry v. Lawson, 32 Ind. A. 264, 69 NE 1038; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

[a] **Statute not giving lien on general assets.**—Rogers v. State, 6 Ind. 31.

[b] **A vendor's lien** is not entitled to a preference under a statute giving a preference to mortgages. Kimmell v. Burns, 84 Ind. 370.

79. U. S.—Brent v. Washington Bank, 10 Pet. 596, 9 L. ed. 547; In re McAusland, 235 Fed. 173; U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

Cal.—In re Murray, 18 Cal. 686.

Del.—Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

Ida.—Hailey First Nat. Bank v. Glenn, 10 Ida. 224, 77 P 623, 109 AmSR 204.

Ind.—Ryker v. Vawter, 117 Ind. 425, 20 NE 294.

Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

Ky.—Miller v. Miller, 172 Ky. 519, 189 SW 417; Day v. Davis, 47 SW 769, 20 KyL 869; Milward v. Shields, 43 SW 184, 19 KyL 1076, 39 LRA 506.

La.—Rogers' Succ., 41 La. Ann. 400, 7 S 692; Markey's Succ., 22 La. Ann. 265.

Mo.—Finley v. Caldwell, 1 Mo. 512.

Or.—Shepard v. Saltzman, 34 Or. 40, 54 P 882.

Pa.—Wade's App., 29 Pa. 328; Boud's App., 2 Pennyp. 241; Pottsville Union Sav. Fund v. Cartwright, 11 LancBar 136, 1 LegRec 171.

S. C.—Shell v. Young, 32 S. C. 462, 11 SE 299; Baxter v. Baxter, 23 S. C. 114.

Tenn.—Fields v. Wheatley, 1 Sneed 351.

Va.—McCandlish v. Keen, 13 Gratt. (54 Va.) 615.

[a] **Mortgage to pay debts.**—Where the property of an estate is, in accordance with directions in the will, mortgaged to pay debts, such mortgage takes precedence of the debts of decedent. Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

[b] **The lien is not lost by failure to foreclose** before an administrator's sale of the property. Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

[c] **Where the personal representative has paid preferred claims,** he cannot obtain an allowance out of the proceeds of the encumbered land in priority to the encumbrance. Boud's App., 2 Pennyp. (Pa.) 241.

[d] **A claim of an orphan has,** under the act of 1799, priority over a mortgage not foreclosed in decedent's lifetime. Ragland v. Justices Inferior Ct., 10 Ga. 65.

[e] **In Texas** (1) the rule stated in the text obtains as to the lien of an unpaid vendor. Robertson v. Paul, 16 Tex. 472; Toullerton v. Manchke, 11 Tex. Civ. A. 148, 32 SW 238; Stell v. Lewis, 2 Tex. Unrep. Cas. 533. (2) But it has been held not to obtain with respect to other specific liens. McLane v. Paschal, 47 Tex. 365; Robertson v. Paul, 16 Tex. 472; Barnes v. Scottish-American Mortg. Co., 29 Tex. Civ. A. 443, 68 SW 529. (3) Mortgaged land and mortgaged chattels contribute ratably to pay the preferred debts. Barnes v. Scottish-American Mortg. Co., 29 Tex. Civ. A., 443, 68 SW 529.

80. Del.—Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

gage or deed of trust,[81] but it applies also in the case of a vendor's lien,[82] or the lien of a landlord for rent.[83] In accordance with the rule stated, it has been held that the proceeds of the encumbered property must be applied to the payment of the lien in priority to funeral expenses[84] or last sickness,[85] and of administering the estate,[86] debts due the United States[87] or the state[88] and taxes not constituting a prior lien on the land.[89] The rule is not affected by a statute providing that a decedent's real estate not subjected by his will to the payment of his debts shall be assets for the payment

Ind.—Blankenbaker v. Bank of Commerce, 85 Ind. 459 [dist Jenkins v. Jenkins, 63 Ind. 120].

Mont.—Horsfall v. Royles, 20 Mont. 495, 52 P 199.

Nebr.—Burleigh v. Palmer, 74 Nebr. 122, 103 NW 1068, 12 AnnCas 777.

S. C.—Sartor v. Newberry Land, etc., Co., 104 S. C. 184, 88 SE 467.

Tex.—Stafford v. Dunovant, (Civ. A.) 81 SW 65.

Wash.—Casey v. Ault, 4 Wash. 167, 29 P 1048.

[a] **The rule applies to:** (1) An attorney's lien. Blankenbaker v. Bank of Commerce, 85 Ind. 459 [dist Jenkins v. Jenkins, 63 Ind. 120]; Burleigh v. Palmer, 74 Nebr. 122, 103 NW 1068, 12 AnnCas 777. (2) A laborer's lien on logs. Casey v. Ault, 4 Wash. 167, 29 P 1048. (3) A lien obtained by a levy under execution. Dayett v. Willitts, 9 Del. Ch. 424, 74 A 689.

[b] **Order for use of live stock subject to lien.**—The portion of an order of the county court for operation by the administrators of the plantation of the estate, which authorizes them to use the "live stock" of the estate for such purpose, is not to be construed as a postponement of a creditor's right to enforcement of her lien existing on a portion of such live stock, no application to such court for an order for sale thereof having been made. Stafford v. Dunovant, (Tex. Civ. A.) 81 SW 65.

[c] **Chattel mortgage without change of possession.**—Property covered by a chattel mortgage, but of which decedent has retained possession until his death, passes into the custody of the law for administration, and the mortgagee is entitled to no preference over other creditors. Kater v. Steinruck, 40 Pa. 501; Heft's App., 5 Pa. Cas. 573, 9 A 87.

[d] **Abandonment of attachment lien.**—Pending a suit at law, in which defendant's land was attached, defendant died, and the suit was revived against his administrator. Judgment was entered for plaintiff. An execution was issued, and levy made on the land. Subsequently the property was released from the levy, and plaintiff proved his claim in the probate court against defendant's estate as an absolute claim, without anything to indicate an intention to retain his lien. This condition continued for over a year. It was held that there was an abandonment of the attachment levy placing plaintiff in the list of general creditors. Lafferty v. Lafferty, 139 Mich. 176, 102 NW 626.

81. Cal.—In re Murray, 18 Cal. 686.

Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

La.—Sorrels v. Stamper, 27 La. Ann. 630.

Mo.—Tucker v. Wells, 111 Mo. 399, 20 SW 114.

Oh.—Jacobs v. Jacobs, 7 OhS&CP 486.

Pa.—Rowe's Est., 11 Kulp 36.

S. C.—Baxter v. Baxter, 23 S. C. 114.

Tenn.—Fields v. Wheatley, 1 Sneed 351.

Tex.—Kiolbassa v. Raley, 1 Tex. Civ. A. 165, 23 SW 253.

Va.—McCandlish v. Keen, 13 Gratt. (54 Va.) 615.

[a] **New mortgages given by the heirs** in substitution of old mortgages, securing and continuing an indebtedness incurred by decedent, will be treated in the settlement of the estate as though given by decedent. Jacobs v. Jacobs, 7 OhS&CP 486.

[b] **Where an executor mortgages the decedent's real estate** under a valid provision of the will directing that the property be mortgaged and the debts paid with the proceeds, the mortgage so far as concerns the property covered thereby is a lien superior to other debts established against the estate. Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550; Sorrels v. Stamper, 27 La. Ann. 630; Gayle's Succ., 27 La. Ann. 547; Nice's App., 54 Pa. 200; Adams' App., 1 Penr. & W. (Pa.) 447. Contra McCandlish v. Keen, 13 Gratt. (54 Va.) 615.

82. Vallas' Succ., 128 La. 252, 54 S 788; Rogers' Succ., 41 La. Ann. 400, 7 S 692; Markey's Succ., 22 La. Ann. 265; Robertson v. Paul, 16 Tex. 472; Toullerton v. Manchke, 11 Tex. Civ. A. 148, 32 SW 238.

[a] **Recognizance to secure purchase money.**—Where decedent in his lifetime entered into a recognizance in the orphans' court to secure the purchase money of land purchased by him, the recognizance constituted a specific lien which on sale of the land to pay debts was entitled to priority of payment out of the proceeds. Ramsey's App., 4 Watts (Pa.) 71.

[b] **A decree in favor of an unpaid vendor,** fixing a lien on the land, gives him a right to priority. Hargrove v. Lilly, 69 Ga. 326.

[c] **Where vendor's liens have been abolished by statute,** the vendor of land is entitled to no priority in the distribution of any of the assets, but the debt takes rank not by its consideration but by the form in which decedent left it. Jones v. James, 56 Ga. 325.

[d] **Where a homestead association held property which it had acquired for decedent,** as security for advances made him, it could not have such property sold as if the property was absolutely owned by it for payment of its claim, but such property could be sold in the succession of decedent, subject to all the rights of the association, which rights would be transferred to the proceeds, it having a right thereto as a creditor with a vendor's privilege. Vallas' Succ., 128 La. 252, 54 S 788.

83. Lillard v. Noble, 159 Ill. 311, 42 NE 844 [aff 57 Ill. A. 27]; Ryan's Succ., 8 La. A. (Orleans) 205.

[a] **Distress for rent** (1) may be made after administration granted. Hovey v. Smith, 1 Barb. (N. Y.) 372. (2) But there can be no distress before administration granted. Hughs v. Lebre, 2 A. K. Marsh. (Ky.) 227.

[b] **Landlord appointed administrator.**—Acceptance by a landlord of letters of administration is a waiver of his right of distress. Hovey v. Smith, 1 Barb. (N. Y.) 372.

[c] **Waiver of lien.**—(1) Acceptance by the landlord of letters of administration on the estate of the lessee is not a waiver of his lien for rent. Lillard v. Noble, 159 Ill. 311, 42 NE 844. (2) Presentation and allowance of claim for rent are not a waiver of the lien. Lillard v. Noble, 159 Ill. 311, 42 NE 844.

84. Ryker v. Vawter, 117 Ind. 425, 20 NE 294; Milward v. Shields, 43 SW 184, 19 KyL 1076, 39 LRA 506 [overr Best v. Spooner, 4 KyL 602]; Ray v. Honeycutt, 119 N. C. 510, 26 SE 127; Barbee v. Green, 86 N. C. 158; Ward v. Jones, 44 N. C. 127; Parker v. Lewis, 13 N. C. 21; Wade's App., 29 Pa. 328; Boud's App., 2 Pennyp. (Pa.) 241.

[a] **A contrary rule** (1) obtains in Louisiana, where funeral charges have, under statute, a privilege on immovables where the movables are insufficient to satisfy the debt. Bauman v. Armbruster, 129 La. 191, 55 S 760; Alter v. O'Brien, 31 La. Ann. 452 (funeral expenses of debtor, or his wife and children, a privilege on real estate of community, when there is no other source from which those expenses can be paid); Devine's Succ., 4 Rob. (La.) 366. (2) But where a creditor for funeral expenses lost his recourse against movables by his remissness in not instituting proper legal proceedings, he cannot recoup the loss out of the proceeds of immovables specially mortgaged to another creditor of the decedent. Bauman v. Armbruster, 129 La. 191, 55 S 760.

85. Ryker v. Vawter, 117 Ind. 425, 20 NE 294; Boud's App., 2 Pennyp. (Pa.) 241; Pottsville Union Sav. Fund v. Cartwright, 11 LancBar (Pa.) 136, 1 LegRec 171.

86. Cal.—In re Murray, 18 Cal. 686.

Ind.—Ryker v. Vawter, 117 Ind. 425, 20 NE 294.

Iowa.—In re Blackman, 143 Iowa 553, 120 NW 664.

Ky.—Day v. Davis, 47 SW 769, 20 KyL 869.

Or.—Shepard v. Saltzman, 34 Or. 40, 54 P 882.

S. C.—Shell v. Young, 32 S. C. 462, 11 SE 299.

Alta.—Wright v. Beatty, 2 Alta. L. 89, 98 [quot Cyc].

[a] **Effect of statute.**—A statute giving priority to expenses of administration and expenses incurred in the management of the estate over other claims, except enumerated claims, does not authorize an administrator to use the proceeds of mortgaged chattels to cover the expenses incurred in the management thereof, where the unencumbered assets are sufficient. Rodgers v. Sturgis Nat. Bank, (Tex. Civ. A.) 152 SW 1176.

[b] **Availability of other funds.**—A special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests in preference to the expenses and charges of the administration only when there are other funds of the succession out of which such expenses may be paid. Patrick's Succ., 30 La. Ann. 1071.

87. Brent v. Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; U. S. v. Duncan, 25 F. Cas. No. 15,003, 4 McLean 607.

88. Finley v. Caldwell, 1 Mo. 512; Baxter v. Baxter, 23 S. C. 114; Dunlap v. Bynum, 4 S. C. Eq. 646; Public Accounts Comrs. v. Greenwood, 1 S. C. Eq. 450.

[a] **Contrary view.**—State v. Dickson, 38 Ga. 171.

89. Boud's App., 2 Pennyp. (Pa.) 241.

[a] **Subrogation of mortgagee.**—Taxes are a lien on the land and are entitled to priority of payment out of the proceeds of the mortgaged property, notwithstanding there is personalty in the hands of the representative, but when the taxes have been thus paid, the mortgagee will be subrogated to the rights of the state and county and be entitled to a preference in the personal estate according to his proper priority in the course of administration. Fulton v. Nicholson, 7 Md. 104.

of debts in the order in which personal estate is to be applied,[90] or directing a ratable division of the assets among creditors, the encumbered land not being general assets;[91] neither is the operation of the rule affected by a general testamentary charge of debts upon decedent's lands.[92] Statutes changing the common-law classification of debts and placing unsecured debts on a footing of equality do not affect a lien acquired under an execution before the debtor's death,[93] but it has been held that the privilege acquired by the creditor by the seizure of real property of the debtor under a fieri facias must be postponed, in case of the subsequent death of the debtor, to funeral and law charges, and expenses of the debtor's last illness.[94]

[§ 1190] **cc. Priority Inter Sese.**[95] The statutes sometimes provide that mortgages and other specific liens shall be paid according to their priority in point of time, the oldest being payable first.

[§ 1191] **(5) Proceedings for Classification.**[96] The classification of claims against a decedent's estate is a matter over which the probate court is often given original jurisdiction by statute.[97] The original jurisdiction thus conferred is held to be exclusive,[98] and the duty of the court to classify claims cannot be dispensed with by consent of the personal representative.[99] A fortiori any classification of debts by the personal representative is subject to revision by the probate court.[1] A creditor with a claim acknowledged by the executor cannot have it classed as privileged without making him a party.[2] The classification of a claim has been considered as a proceeding in rem, requiring a general notice as a jurisdictional fact.[3] Classification of claims is not a merely ministerial or clerical act but may involve the trial of a question of fact,[4] although formal pleadings are not necessary.[5] In passing upon and classifying claims against a decedent's estate the courts exercise equitable powers and regard substance rather than form.[6] A money judgment cannot be rendered in a proceeding to classify a claim.[7] If the statute does not require that the classification of a demand should be entered on the record at large, an indorsement of its class on the claim itself, and an entry on the abstract book, is sufficient to give the classification validity.[8] And it has been held that, since the statute fixes the class to which a claim belongs, a judgment allowing a claim need not specify the class in which the claim is to be placed, but a direction that the claim be paid in the due course of administration is sufficient.[9] While it has been considered that the classification of a claim by the probate court is not such a final judgment as to be conclusive,[10] the more general view is that such classification is a judicial act having the same force and effect as a judgment of any court of general jurisdiction.[11] An appeal from a judgment of classification is generally permitted.[12] It is within the jurisdiction of the court to correct an erroneous classification,[13] even at a subsequent term,[14] on due

90. McCandlish v. Keen, 13 Gratt. (54 Va.) 615.

91. Fields v. Wheatley, 1 Sneed (Tenn.) 351.

92. McCandlish v. Keen, 13 Gratt. (54 Va.) 615.

93. Hullett v. Hood, 109 Ala. 345, 19 S 419; Black v. Planters' Bank, 4 Humphr. (Tenn.) 367; Meyers v. Meyers, 19 Grant Ch. (U. C.) 185.

94. Holbert's Succ., 3 La. Ann. 436.

95. Moore v. Dortic, Ga. Dec. Pt. II. 84. And see the statutes.

96. Allowance or rejection of claims see supra §§ 1036–1077.

97. Tucker v. Yell, 25 Ark. 420; McLean v. Crow, 88 Cal. 644, 26 P 596; Porter v. Sweeney, 61 Tex. 213; Williams v. Robinson, 56 Tex. 347.

[a] **The county court has jurisdiction** to classify a judgment rendered by the circuit court on appeal from the county court, and left unclassified by the circuit court. McCall v. Lee, 24 Ill. A. 585 [aff 120 Ill. 261, 11 NE 522].

98. McLean v. Crow, 88 Cal. 644, 26 P 596; Porter v. Sweeney, 61 Tex. 213; Williams v. Robinson, 56 Tex. 347.

99. Allen v. Reilly, 62 Tex. Civ. A. 624, 131 SW 1152.

1. Tucker v. Yell, 25 Ark. 420; McLean v. Crow, 88 Cal. 644, 26 P 596.

2. Lilly's Succ., 6 Rob. (La.) 24.

3. In re Smith, 122 Cal. 462, 55 P 249; In re Bell, 70 Wash. 498, 127 P 100.

[a] **Requisites of notice.**—In the absence of an express statutory provision, an adjudication as to an alleged preference of a claim can be made only at the same time and under the same notice as is required upon settlement of the representative's accounts. In re Smith, 122 Cal. 462, 55 P 249.

[b] **Effect of actual notice and appearance.**—Where parties had actual notice of the time and place of a hearing of a petition for the classification of claims and an order for their payment as allowances to the widow of decedent, and they appeared and asked for a continuance and afterward stipulated for a hearing, they appeared generally, and could not object to an order on the ground that they had not received the notice provided for by statute. In re Bell, 70 Wash. 498, 127 P 100.

[c] **Jurisdiction not dependent on notice to all creditors.**—The court has jurisdiction to establish a claim as a preferred claim without notice to all creditors as required on final settlement, although it may be that the order will not bind creditors not having notice and not appearing at the hearing. In re Bell, 70 Wash. 498, 127 P 100.

4. Green v. Strother, 201 Mo. A. 418, 212 SW 399 (judgment rendered against deceased under wrong name).

5. Green v. Strother, 201 Mo. A. 418, 212 SW 399.

6. Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. A. 58]; McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585].

7. Green v. Strother, 201 Mo. A. 418, 212 SW 399.

8. Nelson v. Russell, 15 Mo. 356.

9. McCall v. Lee, 120 Ill. 261, 11 NE 522 [aff 24 Ill. A. 585].

10. McPherson v. Wolfley, 9 Kan. A. 67, 57 P 257.

11. Tucker v. Yell, 25 Ark. 420; Cossitt v. Biscoe, 12 Ark. 95; Donnell v. Wright, 147 Mo. 639, 49 SW 874; Miller v. Janney, 15 Mo. 265; Barber Asphalt Paving Co. v. Field, 132 Mo. A. 628, 97 SW 179; Cooper v. Duncan, 20 Mo. A. 355.

"Undoubtedly such a judgment unappealed from within the time allowed by law is a finality and is res adjudicata as to all issues properly belonging to the cause on which the judgment is founded." In re Perkins, 166 Mo. A. 170, 177, 148 SW 969.

[a] **The adjudication cannot be set aside in equity** on the ground that it was made under a mistake of law, but the party aggrieved is confined to his remedy by appeal or writ of error. Cooper v. Duncan, 20 Mo. A. 355.

12. McPherson v. Wolfley, 9 Kan. A. 67, 57 P 257; Zieschang v. Helmke, (Tex. Civ. A.) 84 SW 436.

[a] **An administrator is neither a necessary nor a proper party** to an appeal by creditors from a judgment of the county court classifying approved claims. Zieschang v. Helmke, (Tex. Civ. A.) 84 SW 436.

[b] **Evidence as to status of claim.**—Both the county court sitting in probate, and the district court on appeal, may, in classifying claims, hear evidence of a mistake in the terms of a written contract entered into by decedent, in order to determine what the real status of the claim arising out of the contract is, and, having heard such evidence, may grant the appropriate relief. Zieschang v. Helmke, (Tex. Civ. A.) 84 SW 346.

[c] **Scope of review.**—Where there is only one fund out of which claims can be paid, and it is insufficient to satisfy them, and in the contest in the county court among the respective claimants for priority of payment a judgment is rendered so classifying the claims as to give one nearly the entire fund, to the exclusion of the others, an appeal to the district court by one of the unsuccessful claimants ipso facto brings up the entire case, with its subject matter and all the parties contesting with one another for it. Zieschang v. Helmke, (Tex. Civ. A.) 84 SW 436.

[d] **Disposition of cause.**—The failure of the district court, on appeal from a judgment of the county court classifying claims, to pass upon the claim of one creditor, although based on the erroneous assumption that such creditor's rights were not before it, is not ground for a reversal of the judgment of the district court, where the action of the county court upon that claim was correct, and the effect was the same as if the district court had properly passed upon it. Zieschang v. Helmke, (Tex. Civ. A.) 84 SW 436.

13. Waverly Commercial State Bank v. Ross, 90 Kan. 423, 133 P 538; Jillett v. Union Nat. Bank, 56 Mo. 304; Hardcastle v. Archer, 36 Tex. Civ. A. 112, 81 SW 368.

[a] **If an improper classification is the result of a clerical error** of the judge, the proper remedy is by motion in the probate court for an order correcting the error nunc pro tunc, and in such a case equity will not interfere by injunction. Jillett v. Union Nat. Bank, 56 Mo. 304.

14. Ford v. Stuart First Nat. Bank, 100 Ill. A. 70.

application and notice,[15] and if fraud or mistake is shown to have affected the original classification the court may reëxamine the claim and place it in its proper class.[16] But as a change in the classification made by the probate court changes the force of the judgment as to all creditors in the prior classes, this should be done only where such facts exist as would authorize the court to modify or set aside its judgments in other respects.[17]

[§ 1192] **(6) Loss of Priority.** A creditor may by his laches lose his right to priority of payment.[18] But, under a statute classifying claims according to the time of their exhibition to the representative[19] and providing that actions commenced against the representative shall be considered demands legally exhibited from the time of serving the original process, a creditor who has begun an action against the representative does not lose his priority by taking a nonsuit.[20] It has been held that the statutory preference given to the wages of servants does not exist where the servants received from the debtor in his lifetime single bills payable at a future day with interest,[21] but this decision has been disapproved on the ground that the taking of a note bearing interest is not a discharge or waiver of the creditor's lien.[22] A mortgagee may abandon his security and share in the distribution of the general assets,[23] and it has been held that an administrator who claims a privilege on personal property sold to the succession, and who sells the real estate and personal property in bulk, without separate appraisement, loses his privilege.[24]

[§ 1193] **3. Claims of Executor or Administrator—a. Right to Retain Assets in Payment—(1) At Common Law—(a) In General.** It is a well settled rule of the common law that if a creditor becomes executor or administrator of his debtor's estate, he may retain so much of the assets in his hands as is sufficient to pay his debt, in preference to all other creditors of equal degree.[25] The reason generally assigned is that the representative cannot commence an action against himself, and if he was not permitted to retain assets for his debt he would be in a worse position than other creditors of the estate,[26] although it has also been considered that a retainer by the representative for his own debt is merely an exercise, in his own favor, of his power to prefer one creditor over another.[27]

[§ 1194] **(b) Who May Exercise Right.** The

15. Waverly Commercial State Bank v. Ross, 90 Kan. 423, 133 P 538.

16. Ford v. Stuart First Nat. Bank, 100 Ill. A. 70; Hardcastle v. Archer, 36 Tex. Civ. A. 112, 81 SW 368.

[a] **Illustration.**—Where an administrator held a vendor's lien note against the estate, and it was classified in the probate court as within the second class, on proceedings by the holder of another vendor's lien note while the administration was still pending, it was proper for the court to reclassify the administrator's claim and place it in the third class, the original classification of the claim of the administrator not having had the force and effect of a judgment which could be revised only on an appeal therefrom. Hardcastle v. Archer, 36 Tex. Civ. A. 112, 81 SW 368.

17. Cossitt v. Biscoe, 12 Ark. 95; Nelson v. Russell, 15 Mo. 356; Miller v. Janney, 15 Mo. 265.

18. Finegan's Succ., 135 La. 473, 65 S 614; Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951; Finney's App., 3 Pa. 312; Reakirt v. Fanagan, 6 Pa. Dist. 402, 40 WklyNC 375; Sartor v. Newberry Land, etc., Co., 104 S. C. 184, 88 SE 467.

19. Priority dependent on time of filing or proving claim see supra § 1181.

20. Tevis v. Tevis, 23 Mo. 256.

21. Silver v. Williams, 17 Serg. & R. (Pa.) 292.

22. Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, 61 NE 1018 [aff 90 Ill. A. 58].

23. Veloso v. Heredia, 33 Philippine 306 (he cannot afterward bring an action to foreclose).

24. Rogers' Succ., 41 La. Ann. 400, 7 S 692.

25. U. S.—Page v. Lloyd, 5 Pet. 304, 8 L. ed. 134.

Ala.—Trimble v. Farris, 78 Ala. 260; Miller v. Irby, 63 Ala. 477; Kirksey v. Kirksey, 41 Ala. 626; Milan v. Ragland, 19 Ala. 85; Hearrin v. Savage, 16 Ala. 286.

Conn.—Pitkin v. Pitkin, 8 Conn. 325.

Fla.—Sanderson v. Sanderson, 17 Fla. 820; Sealey v. Thomas, 6 Fla. 25.

Ky.—Payne v. Pusey, 8 Bush 564; Berry v. Graddy, 1 Metc. 553; Buckner v. Morris, 2 J. J. Marsh. 121; Saunders v. Saunders, 2 Litt. 314.

Md.—State v. Reigart, 1 Gill 1, 39 AmD 628.

Miss.—Fort v. Battle, 21 Miss. 133.

Mo.—Nelson v. Russell, 15 Mo. 356.

N. J.—Personette v. Personette, 35 N. J. Eq. 472; Dolman v. Cook, 14 N. J. Eq. 56.

N. Y.—Neilly v. Neilly, 89 N. Y. 352; Starbuck v. Farmers' L. & T. Co., 28 App. Div. 308, 51 NYS 8; Rogers v. Hosack, 18 Wend. 319 [rev 6 Paige 415]; Rogers v. Rogers, 3 Wend. 503, 20 AmD 716; Hosack v. Rogers, 6 Paige 415 [rev on the other grounds 18 Wend. 319]; Decker v. Miller, 2 Paige 149; In re Rogers, 1 Redf. Surr. 231; Treat v. Fortune, 2 Bradf. Surr. 116.

N. C.—Hassell v. Griffin, 55 N. C. 117; White v. Griffin, 47 N. C. 3; Chesson v. Chesson, 43 N. C. 141.

Oh.—Hall v. Pratt, 5 Oh. 72.

Pa.—Anderson v. Anderson, 183 Pa. 480, 38 A 1007; Sims v. Chew, 15 Serg. & R. 197; Ex p. Meason, 5 Binn. 167; Fett's Est., 39 Pa. Super. 246.

R. I.—Perkins v. Perkins, 11 R. I. 270.

S. C.—Ex p. Shackleford, 20 S. C. Eq. 275; Sebring v. Keith, 2 Hill 340.

Tenn.—Shields v. Alsup, 5 Lea 508; Harrison v. Henderson, 7 Heisk. 315; Smith v. Watkins, 8 Humphr. 331.

Va.—Shores v. Wares, 1 Rob. (40 Va.) 1.

Eng.—Hasluck v. Clark, [1899] 1 Q. B. 699 [dism app [1898] 2 Q. B. 28]; In re Belham, [1901] 2 Ch. 52; Davies v. Parry, [1899] 1 Ch. 602; In re Fludyer, [1898] 2 Ch. 562; In re Compton, 30 Ch. D. 15; Wilson v. Coxwell, 23 Ch. D. 764; Robinson v. Cumming, 2 Atk. 409, 26 Reprint 646; Adams v. Gale, 2 Atk. 106, 26 Reprint 466; Middleton v. Poole, 2 Coll. 246, 33 EngCh 246, 63 Reprint 719; Burge v. Brutton, 2 Hare 373, 24 EngCh 373, 67 Reprint 153; Fryer v. Gildridge, Hob. 10, 80 Reprint 160; Cock v. Cross, 2 Lev. 73, 83 Reprint 456; In re Langley, 68 L. J. Ch. 361; Potter v. Fowler, 6 L. J. Ch. 273; Wangford v. Wangford, 11 Mod. 38, 88 Reprint 869, 1 Salk. 299, 91 Reprint 265; Woodward v. Darcy, Plowd. 184, 75 Reprint 282; Nunn v. Barlow, 1 Sim. & St. 588, 1 EngCh 588, 57 Reprint 232; Winter v. Hicks, Taml. 475, 12 EngCh 475, 48 Reprint 189; Jacomb v. Harwood, 2 Ves. 265, 28 Reprint 172; Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394.

Ont.—Kline v. Kline, 3 Ch. Chamb. (U. C.) 161.

[a] **Receipt of assets necessary to exercise of right.**—The right of retainer, as the name itself implies, is applicable only to a fund which the legal representative has actually or constructively got into his possession. Jordan v. Hardie, 131 Ala. 72, 31 S 504; In re Rhoades, [1899] 2 Q. B. 347 [dism app [1899] 1 Q. B. 905]; Pulman v. Meadows, [1901] 1 Ch. 233; Lowe v. Peskett, 16 C. B. 500, 81 ECL 500, 139 Reprint 854; Richards v. Molony, 2 Ir. Ch. 1.

[b] **The provision in a creditor's administration bond** that he will pay all debts ratably and proportionately and according to the priority required by law does not deprive the creditor administrator of his right of retainer as against other debts of equal degree. Davies v. Parry, [1899] 1 Ch. 602; In re Belham, [1901] 2 Ch. 52 [dism app 84 L. T. Rep. N. S. 300].

26. U. S.—Page v. Lloyd, 5 Pet. 304, 8 L. ed. 134.

Fla.—Sanderson v. Sanderson, 17 Fla. 820.

N. Y.—Rogers v. Rogers, 3 Wend. 503, 20 AmD 716.

Pa.—Ex p. Meason, 5 Binn. 167.

R. I.—Perkins v. Se Ipsam, 11 R. I. 270.

Tenn.—Shields v. Alsup, 5 Lea 508.

Eng.—In re Ridley, [1904] 2 Ch. 774; In re Hayward, [1901] 1 Ch. 221 [appr In re Dunning, 54 L. J. Ch. 900]; In re Baker, 44 Ch. D. 262; In re Illidge, 24 Ch. D. 654, 27 Ch. D. 478; Wynch v. Grant, 2 Drew. 312, 61 Reprint 739; In re Dunning, 54 L. J. Ch. 900; Re Faithfull, 57 L. T. Rep. N. S. 14; Wangford v. Wangford, 11 Mod. 38, 88 Reprint 869, 1 Salk. 299, 91 Reprint 265; Chapman v. Turner, 9 Mod. 268, 88 Reprint 443; Solley v. Gower, 2 Vern. Ch. 61, 23 Reprint 649.

"The whole doctrine of retainer is based on the principle of advantage or benefit to the executor or administrator, given him as compensation for the legal disability to sue for his debt." Harrison v. Henderson, 7 Heisk. (Tenn.) 315, 330.

27. Talbot v. Frere, 9 Ch. D. 568, 570 ("The principle is, and always has been, one of preference, not of retainer. . . . An executor had a right to prefer one creditor to another as amongst creditors of equal degree. . . . It followed, therefore, that if he was a creditor he had a right to prefer himself to another creditor of equal degree; and this was called 'retainer' because he had the money in his own hands; but it was, in reality, the exercise of the right of preference in his own favor").

right of retainer may be exercised by an administrator as well as an executor,[28] and extends to a temporary or special administrator,[29] to an administrator de bonis non,[30] to each of several joint executors or administrators,[31] and to the representative of a deceased executor, where such representative represents the estate of the original testator.[32] But the right may be exercised only by the legal personal representative of the estate under administration,[33] and not by an executor named in the will who has renounced probate,[34] or a representative who has resigned,[35] or has been removed.[36]

An executor de son tort[37] cannot retain for his own debt,[38] even against a debt of inferior degree,[39] or although the rightful representative consents to the retainer.[40] But a subsequent grant of administration will validate prior acts and justify a retainer,[41] and if the distributees consent to an irregular administration, the persons so administering may, as against the distributees, retain an amount sufficient to discharge a debt due them by decedent in his lifetime.[42]

An administrator who is an undischarged bankrupt cannot retain a debt due to him from decedent's estate out of the assets received by him as administrator.[43]

[§ 1195] **(c) As to What Claims Right Exists.** A personal representative is entitled to retain for any valid claim held by him against the estate,[44] although his claim can be ascertained only by tak-

Common-law right of representative to prefer creditors see supra § 1154.

28. Re Belham, 84 L. T. Rep. N. S. 300 [app dism [1901] 2 Ch. 52].

29. Rattoon v. Overacker, 8 Johns. (N. Y.) 126; Kinard v. Young, 19 S. C. Eq. 247; Whitehead v. Sampson, Freem. 265, 89 Reprint 190; Vaughan v. Browne, Str. 1106, 93 Reprint 1061; Williamson v. Norwitch, Styles 337, 82 Reprint 757; Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394.

[a] **An administrator durante minoritate** may retain for a debt due to: (1) Himself. Briers v. Goddard, Hob. 250, 80 Reprint 396; Roskelley v. Godolphin, T. Raym. 483, 83 Reprint 252. (2) The infant in whose stead he was appointed. Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394.

[b] **Administrator durante dementia.**—Where administration is granted to another for the use of a lunatic, the administrator may retain for a debt due the lunatic. Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394.

30. Weeks v. Gore, 3 P. Wms. 184 note b.

31. State v. Reigart, 1 Gill (Md.) 1, 39 AmD 628; Decker v. Miller, 2 Paige (N. Y.) 149; Crowder v. Stewart, 16 Ch. D. 368; Sharman v. Rudd, 4 Jur. N. S. 527; Kent v. Pickering, 2 Keen 1, 15 EngCh 1, 48 Reprint 528; Jacomb v. Harwood, 2 Ves. 265, 28 Reprint 172.

[a] **Where the assets are insufficient to pay their claims in full,** coexecutors can retain only pro rata shares. Chapman v. Turner, 9 Mod. 268, 88 Reprint 443.

32. Lay v. Lay, 10 S. C. 208; In re Rhoades, [1899] 2 Q. B. 347; In re Compton, 30 Ch. D. 15; Hopton v. Dryden, Pre. Ch. 179, 24 Reprint 87; Croft v. Pyke, 3 P. Wms. 180, 24 Reprint 1020; Thomson v. Grant, 1 Russ. 540 note a, 46 EngCh 481, 38 Reprint 209.

[a] **Character of debt.**—The right of the executor of a deceased executor to retain exists whether the debt is: (1) due to himself in his individual capacity (In re Compton, 30 Ch. D. 15; Hopton v. Dryden, Prec. Ch. 179, 24 Reprint 87; Thomson v. Grant, 1 Russ. 540 note, 46 EngCh 481, 38 Reprint 209) or (2) due to the estate of the deceased executor (Lay v. Lay, 10 S. C. 208; Thomson v. Grant, supra).

[b] **An executor of one of several executors** cannot retain for a debt due from the original testator, because the surviving executors become the representatives of the original testator. In re Compton, 30 Ch. D. 15; Hopton v. Dryden, Prec. Ch. 179, 24 Reprint 87.

[c] **Limits of right.**—The right of an executor of an executor to retain for a debt due his testator from the original testator must be restricted to retainer from assets which came into the actual possession or under the actual control of his decedent, or which were paid into court during his lifetime. In re Compton, 30 Ch. D. 15 [restricting Wilson v. Coxwell, 23 Ch. D. 764].

33. In re Rhoades, [1899] 2 Q. B. 347; In re Compton, 30 Ch. D. 15.

34. Smith v. North, 13 Jur. 998.

35. Fort v. Battle, 21 Miss. 133.

36. Rutenic v. Hamaker, 40 Or. 444, 67 P 196.

37. Rights and liabilities of executor de son tort generally see infra §§ 2918–2921.

38. Ky.—McMeekin v. Hynes, 4 KyL 177.

La.—McGinnis's Succ., 18 La. Ann. 268.

Md.—Baumgartner v. Haas, 68 Md. 32, 11 A 588; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452.

Mass.—Carey v. Guillow, 105 Mass. 18, 7 AmR 494.

Miss.—Hardy v. Thomas, 23 Miss. 544, 57 AmD 152.

N. H.—Brown v. Leavitt, 26 N. H. 493.

N. C.—Turner v. Child, 12 N. C. 331, 17 AmD 555.

S. C.—Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139; Leach v. House, 17 S. C. L. 42; Kinard v. Young, 19 S. C. Eq. 247.

Tenn.—Winn v. Slaughter, 5 Heisk. 191; Hutchinson v. Fulghum, 4 Heisk. 550; Sharp v. Caldwell, 7 Humphr. 415; Partee v. Caughran, 9 Yerg. 460.

Va.—Shields v. Anderson, 3 Leigh (30 Va.) 729.

Eng.—Ayre v. Ayre, 1 Ch. Cas. 33, 22 Reprint 680; Coulter's Case, 5 Coke 30 a, 77 Reprint 98; Vernon v. Curtis, 2 H. Bl. 18, 126 Reprint 405; Prince v. Rowson, 1 Mod. 208, 86 Reprint 832; Baker v. Berisford, 1 Sid. 76, 82 Reprint 979; Vaughan v. Browne, Str. 1106, 93 Reprint 1061; Picard v. Brown, 6 T. R. 550, 101 Reprint 697; Alexander v. Lane, Yelv. 137, 80 Reprint 92.

[a] **Reason for rule.**—"The rule of the common law, which refuses to allow executors de son tort to retain for their own debts until the other creditors are paid, is based upon sound public policy. To allow it . . . would tend to encourage creditors to strive who should first take possession of the goods of the deceased, and would allow a creditor to take advantage of his own wrongful act by paying himself first." Baumgartner v. Haas, 68 Md. 32, 37, 11 A 588.

[b] **A creditor of a succession who secures possession** of the price for which land of the succession was sold cannot satisfy his claim therefrom. McGinnis' Succ., 18 La. Ann. 268.

39. Brown v. Leavitt, 26 N. H. 493; Leach v. House, 17 S. C. L. 42; Vernon v. Curtis, 2 H. Bl. 18, 126 Reprint 405; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 747 [aff 2 H. Bl. 18, 126 Reprint 405].

40. Brown v. Leavitt, 26 N. H. 493; Vernon v. Curtis, 2 H. Bl. 18, 126 Reprint 405.

41. Rattoon v. Overacker, 8 Johns. (N. Y.) 126; Kinard v. Young, 19 S. C. Eq. 247; Whitehead v. Sampson, Freem. 265, 89 Reprint 190; Vaughan v. Browne, Str. 1106, 93 Reprint 1061; Williamson v. Norwitch, Style 337, 82 Reprint 757.

42. Josey v. Rogers, 13 Ga. 478.

43. Wilson v. Wilson, [1911] 1 K. B. 327.

44. Ala.—Milam v. Ragland, 19 Ala. 85.

Ky.—Berry v. Graddy, 1 Metc. 553.

Md.—State v. Reigart, 1 Gill 1, 39 AmD 628.

N. J.—Personette v. Personette, 35 N. J. Eq. 472.

N. C.—Reynolds v. Putney, 8 N. C. 318.

S. C.—Relph v. Gist, 15 S. C. L. 267.

Tenn.—Wharton v. Marberry, 3 Sneed 603.

Eng.—In re Compton, 30 Ch. D. 15.

Ont.—Kline v. Kline, 3 Ch. Chamb. (U. C.) 161.

[a] **Equitable as well as legal debts** may be retained for. Kline v. Kline, 3 Ch. Chamb. (U. C.) 161.

[b] **Damages arising from the breach of a pecuniary contract** for which there is a certain measure may be retained. In re Compton, 30 Ch. D. 15 [foll Loane v. Casey, 2 W. Bl. 965, 96 Reprint 569].

[c] **Claim for indemnity or reimbursement.**—(1) Where an executor is surety for his testator and is compelled to pay the debt, he has a right of retainer in respect to his claim for reimbursement. Milam v. Ragland, 19 Ala. 85; In re Beavan [1913] 2 Ch. 595; Boyd v. Brooks, 34 Beav. 7, 55 Reprint 533 [aff 34 L. J. Ch. 605]; Bathurst v. De la Zouch, Dick. 460, 21 Reprint 348. (2) So also where the executor joined with a third person in a promissory note, on the faith of decedent's promise to indemnify him for any loss, and was compelled to pay the note, he was entitled to retain for such loss. Wildes v. Dudlow, L. R. 19 Eq. 198. (3) It has been held that an executor who is surety for his testator has a right of retainer by way of indemnity, although he has not paid, or been called upon to pay, the debt. Ferguson v. Gibson, L. R. 14 Eq. 379; In re Giles, [1896] 1 Ch. 956; In re Allen, [1896] 2 Ch. 345; Re Orme, 50 L. T. Rep. N. S. 51. (4) But the present rule is that before an executor has actually paid a debt of his testator in respect of which he is a surety, there is no debt in existence in respect of which he can exercise his right of retainer. In re Beaven, [1913] 2 Ch. 595 [foll In re Mitchell, [1913] 1 Ch. 201 and refusing to foll In re Giles, [1896] 1 Ch. 956].

[d] **Claim not due.**—Although a debt due from the intestate to the administrator may not have fallen due, the administrator may retain funds for the payment of it in preference to debts of an inferior grade. Relph v. Gist, 15 S. C. L. 267.

[e] **Claim acquired after decedent's death.**—(1) An administrator may retain assets to satisfy a debt due to him on a note of his intestate, indorsed to him after the death of his intestate, but prior to the grant of administration. Reynolds v. Putney, 8 N. C. 318. (2) But an executor has no right to retain for a debt

ing accounts in a court of equity,[45] but he cannot exercise the right of retainer as to his own claim for arbitrary damages, such as damages founded on tort.[46] A personal representative who is one of several joint creditors of decedent is entitled to retain for the whole debt;[47] and the administrator of a deceased partner has been allowed to retain a debt due to him by the firm out of the individual assets of his intestate, even as against an individual creditor of the intestate.[48] If the right to receive payment and the liability to pay are centered in the same personal representative, he has a right to retain for the debt,[49] although it is due to him as the representative of another estate,[50] as trustee for another,[51] even though it is due to another in trust for him.[52] The representative cannot retain for a claim due to other persons,[53] even though such other represents, as trustee, the same interests which the executor or administrator, as such, represents.[54] The right of an executor or administrator to retain from personal assets for a claim which was barred by the statute of limitations during decedent's lifetime has been both asserted[55] and denied.[56] Where the claim did not become barred until after the death of decedent, the representative may retain.[57]

[§ 1196] **(d) As against What Claims Right Exists.** While the representative is entitled to retain for his debt in preference to all other debts of equal or inferior dignity,[58] he cannot exercise the right so as to obtain a preference over debts of superior dignity.[59] Where a personal representative has claims against the estate both in his individual capacity and as representative of another estate, he cannot retain for the debt due to him in

proved by a creditor under a decree in an administration suit, and subsequently bequeathed by him to the executor. Jones v. Evans, 2 Ch. D. 420.

[f] **Claim unenforceable by reason of statute of frauds.**—An administrator cannot retain for a claim held by him against his intestate, which is not in writing as required by the statute of frauds. In re Rownson, 29 Ch. D. 358. Contra Berry v. Graddy, 1 Metc. (Ky.) 553.

[g] **Expenses of administration.**—Under the plea of plene administravit an administrator may prove the expenses of administration and show that he has retained money to that amount. Gillies v. Smither, 2 Stark. 528, 3 ECL 517.

[h] **Claim of wife against husband.**—Where a wife is appointed administratrix of her husband's estate, she may retain for money which she loaned her husband. State v. Reigart, 1 Gill (Md.) 1, 39 AmD 628; Personette v. Personette, 35 N. J. Eq. 472; In re Ambler, [1905] 1 Ch. 697; In re May, 45 Ch. D. 499.

45. Morris v. Morris, 4 Gratt. (45 Va.) 293; In re Morris, L. R. 10 Ch. 68; Kline v. Kline, 3 Ch. Chamb. (U. C.) 161. But see Tastet v. Shaw, 1 B. & Ald. 664, 106 Reprint 244 (claim of doubtful validity depending on partnership accounting).

46. Loane v. Casey, 2 W. Bl. 965, 96 Reprint 569.

47. Hosack v. Rogers, 6 Paige (N. Y.) 415 [rev on other grounds 18 Wend. 319]; In re Hubback, 29 Ch. D. 934; Crowder v. Stewart, 16 Ch. D. 368; Burge v. Brutton, 2 Hare 373, 24 EngCh 373, 67 Reprint 153.

48. Hassell v. Griffin, 55 N. C. 117; White v. Griffin, 47 N. C. 3.

49. In re Dunning, 54 L. J. Ch. 900; Re Faithfull, 57 L. T. Rep. N. S. 14; Thompson v. Thompson, 9 Price 464, 147 Reprint 152.

50. Ala.—Miller v. Irby, 63 Ala. 477; Kimball v. Moody, 27 Ala. 130.

N. J.—Shearman v. Cameron, 74 A 979.

N. C.—Chaffin v. Chaffin, 22 N. C. 255; Muse v. Sawyer, 4 N. C. 637.

Oh.—Thomas v. Chamberlain, 39 Oh. St. 112

Va.—Green v. Thompson, 84 Va. 376, 5 SE 507; Morrow v. Peyton, 8 Leigh (35 Va.) 54.

Eng.—Fox v. Garrett, 28 Beav. 16, 54 Reprint 271; Thompson v. Cooper, 1 Coll. 81, 28 EngCh 81, 63 Reprint 330; Wynch v. Grant, 2 Drew. 312, 61 Reprint 739; Fryer v. Gildridge, Hob. 10, 80 Reprint 160.

Ont.—Kline v. Kline, 3 Ch. Chamb. (U. C.) 161.

51. Miller v. Irby, 63 Ala. 477; Hosack v. Rogers, 6 Paige (N. Y.) 415 [rev on other grounds 18 Wend. 319]; Davies v. Parry, [1899] 1 Ch. 602; In re Barrett, 43 Ch. D. 70; Crowder v. Stewart, 16 Ch. D. 368; Sander v. Heathfield, L. R. 19 Eq. 21; Farley v. Briant, 3 A. & E. 839, 30 ECL 381, 111 Reprint 632; Fox v. Garrett, 28 Beav. 16, 54 Reprint 271; Plumer v. Marchant, 3 Burr. 1380, 97 Reprint 884; Croft v. Pyke, 3 P. Wms. 180, 24 Reprint 1020; Cockroft v. Black, 2 P. Wms. 298, 24 Reprint 738.

[a] **The administrator of a sole trustee** who has died insolvent is entitled, in respect of the trusteeship, which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debts due to the trust estate. Sander v. Heathfield, L. R. 19 Eq. 21; Re Faithfull, 57 L. T. Rep. N. S. 14.

[b] **Cotrustees.**—An executor may retain for a debt due to him as one of several cotrustees. In re Hubback, 29 Ch. D. 934.

52. Ferguson v. Gibson, L. R. 14 Eq. 379; Cockroft v. Black, 2 P. Wms. 298, 24 Reprint 738; Loomes v. Stotherd, 1 Sim. & St. 458, 1 EngCh 458, 57 Reprint 183; Roskelley v. Godolphin, T. Raym. 483, 83 Reprint 252; Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394; Loane v. Casey, 2 W. Bl. 965, 96 Reprint 569; Marriott v. Thompson, Willes 186, 125 Reprint 1123.

53. Pitkin v. Pitkin, 8 Conn. 325; In re Richards, [1901] 2 Ch. 399.

[a] **Illustration.**—A person to whom a grant of administration has been made as nominee of a creditor of an intestate cannot retain for a debt due to his principal, where the grant is not expressed to be for the use of his principal. In re Richards, [1901] 2 Ch. 399.

[b] **Claim assigned by executor.**—An executor cannot retain the amount of a debt due to him from the estate of his testator, where such debt has been duly assigned by him to a third person. Pitkin v. Pitkin, 8 Conn. 325.

[c] **Negotiable instrument transferred by executor.**—An executor cannot retain where the debt arises on a negotiable instrument which has been legally transferred by him. Lowe v. Peskett, 16 C. B. 500, 81 ECL 500, 139 Reprint 854.

54. In re Dunning, 54 L. J. Ch. 900 [foll In re Haywood, [1901] 1 Ch. 221]; Thompson v. Thompson, 9 Price 464, 147 Reprint 152.

55. Knight v. Godbolt, 7 Ala. 304; Payne v. Pusey, 8 Bush (Ky.) 564; Brown v. Greene, 181 Mass. 109, 63 NE 2, 92 AmSR 404; In re Rownson, 29 Ch. D. 358; Clinton v. Brophy, 10 Ir. Eq. 139; Coates v. Coates, 10 Jur. N. S. 532; Sharman v. Rudd, 4 Jur. N. S. 527; Hill v. Walker, 4 Kay & J. 166, 70 Reprint 69; Hopkinson v. Leach, Madd. Pr. (2d ed) 583; Stahlschmidt v. Lett, 1 Smale & G. 415, 65 Reprint 182.

[a] **Aliter with respect to proceeds of land.**—Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26; Dring v. Greetham, 23 L. J. Ch. 156.

56. Rogers v. Rogers, 3 Wend. (N. Y.) 503, 20 AmD 716; Farrow v. Nevin, 44 Or. 496, 75 P 711; Williams v. Williams, 15 Lea (Tenn.) 438; Byrn v. Fleming, 3 Head (Tenn.) 658; Wharton v. Marberry, 3 Sneed (Tenn.) 603; Batson v. Murrell, 10 Humphr. (Tenn.) 301, 51 AmD 707.

57. State v. Reigart, 1 Gill (Md.) 1, 39 AmD 628.

58. U. S.—Page v. Lloyd, 5 Pet. 304, 8 L. ed. 134.

Ala.—Trimble v. Farris, 78 Ala. 260; Miller v. Irby, 63 Ala. 477.

Ky.—Young v. Wickliffe, 7 Dana 447; Buckner v. Morris, 2 J. J. Marsh. 121.

N. J.—Dolman v. Cook, 14 N. J. Eq. 56.

N. Y.—Rogers v. Hosack, 18 Wend. 319; Decker v. Miller, 2 Paige 149.

Pa.—Ex p. Meason, 5 Binn. 167.

Va.—Morris v. Morris, 4 Gratt. (45 Va.) 293; Cookus v. Peyton, 1 Gratt. (42 Va.) 431; Shores v. Wares, 1 Rob. (40 Va.) 1; Shearman v. Christian, 9 Leigh (36 Va.) 571.

Eng.—In re Allen, [1896] 2 Ch. 345; Ferguson v. Gibson, L. R. 14 Eq. 379; Horne v. Shepherd, 3 Jur. N. S. 806.

59. U. S.—Page v. Lloyd, 5 Pet. 304, 8 L. ed. 134.

N. J.—Dolman v. Cook, 14 N. J. Eq. 56.

N. Y.—Treat v. Fortune, 2 Bradf. Surr. 116.

N. C.—Chaffin v. Chaffin, 22 N. C. 55; Evans v. Norris, 2 N. C. 411.

Pa.—Ex p. Meason, 5 Binn. 167.

Va.—Cookus v. Peyton, 1 Gratt. (42 Va.) 431.

Eng.—In re Rhoades, [1899] 2 Q. B. 347 [dism app [1899] 1 Q. B. 905]; In re Hankey, [1899] 1 Ch. 541; Wilson v. Coxwell, 23 Ch. D. 764; Walters v. Walters, 18 Ch. D. 182; Talbot v. Frere, 9 Ch. D. 568; Ferguson v. Gibson, L. R. 14 Eq. 379; Chandos v. Talbot, 2 P. Wms. 601, 24 Reprint 877.

[a] **Retainer without notice of claim of higher dignity.**—If an executor has fully administered the estate, and has retained a portion of the assets in payment of a debt due himself, without notice of a claim of higher dignity, such claim cannot be enforced against the portion of the assets retained by him. In re Fludyer, [1898] 2 Ch. 562. Contra Cookus v. Peyton, 1 Gratt. (42 Va.) 431.

[b] **Retainer must be for debt of highest dignity.**—Where a foreign administrator was a creditor of the intestate by specialty and also by simple contract, and received assets insufficient to discharge both debts, he must retain in satisfaction of the specialty debt, and he would be allowed to rank only as a simple contract creditor in respect to the assets in the hands of the domestic administrator. Johnson v. Ward, 2 L. J. Ch. O. S. 137.

his individual capacity in preference to the claim held by him as representative.[60]

[§ 1197] **(e) What Assets May Be Retained.** An executor or administrator may retain for his own debt out of any legal assets which come into his possession or control,[61] or into the hands of his coexecutor or coadministrator.[62] The doctrine of retainer, however, has no application to equitable assets,[63] and where the representative has retained part of his debt from the legal assets, he will not be allowed to share in the equitable assets until the other creditors have received a proportionate share.[64] While it has been considered that the representative may retain specific chattels, at a fair valuation, for his own claim against the estate,[65] there is also authority for the view that such a course is not permissible, but the representative should convert the assets into money,[66] unless the representative's claim largely exceeds the value of the testator's entire estate.[67] Of course the representative may claim and hold as his own any specific chattel held by decedent, but which belonged to him, and which he could have recovered in detinue from decedent.[68]

Assets in hands of receiver. The executor or administrator has no right of retainer out of assets collected by a receiver appointed in a creditor's suit,[69] although he may retain out of assets which were previously collected by himself.[70]

[§ 1198] **(f) Time for Exercise of Right.** It has been held that the representative must exercise the right of retainer, if at all, prior to the expiration of the time within which creditors are permitted to sue an executor or administrator.[71]

[§ 1199] **(g) Loss of Right.** A personal representative may lose his right to retain by acts on his part inconsistent with the existence of the right.[72] But a decree of administration, made in a creditor's suit, does not deprive the personal representative of his right of retainer,[73] although the assets out of which he seeks to retain come into his hands after the decree;[74] nor does the payment into court of money recovered on account of the estate prevent him from exercising his right of retainer.[75]

[§ 1200] **(h) Review by Court of Exercise of Right.** A payment by an executor or administra-

60. Chaffin v. Chaffin, 22 N. C. 255.

61. Fett's Est., 39 Pa. Super. 246; In re Rhoades, [1899] 2 Q. B. 347; In re Compton, 30 Ch. D. 15; Walters v. Walters, 18 Ch. D. 182.

[a] **Possession necessary.**—In re Jones, 31 Ch. D. 440.

[b] **Loss of possession.**—Where an executor allows real estate to pass from his possession and control by failing to register a caution within twelve months, in accordance with statutory requirements, his right of retainer is lost as to such assets. In re Starr, 2 Ont. L. 762.

[c] **Assets coming in after death of representative.**—The assertion by an executor in his lifetime of his right of retainer as against future assets of his testator will not bind assets which after his death fall into the testator's estate. In re Compton, 30 Ch. D. 15 [mod Wilson v. Coxwell, 23 Ch. D. 764].

62. Decker v. Miller, 2 Paige (N. Y.) 149 (holding, however, that an executor who is indebted to the estate may refuse to pay, out of such debt, a demand held against the estate by his coexecutor, until he is satisfied that the other assets are insufficient to discharge the claim of his coexecutor).

63. Dolman v. Cook, 14 N. J. Eq. 56; Harrison v. Henderson, 7 Heisk. (Tenn.) 315; In re Rhoades, [1899] 2 Q. B. 347 [dism app [1899] 1 Q. B. 905]; In re Williams, [1904] 1 Ch. 52; In re Hayward, [1901] 1 Ch. 221; In re Baker, 44 Ch. D. 262; In re Illidge, 27 Ch. D. 478, 24 Ch. D. 654; Walters v. Walters, 18 Ch. D. 182; Talbot v. Frere, 9 Ch. D. 568; In re Poole, 6 Ch. D. 739; Bain v. Sadler, L. R. 12 Eq. 570; Anonymous, 2 Ch. Cas. 54, 22 Reprint 843; Duignan v. Croome, 41 L. T. Rep. N. S. 672; Baily v. Ploughman, Mosely 95, 25 Reprint 291; Hopton v. Dryden, Prec. Ch. 179, 24 Reprint 87.

[a] **Where land is sold for the payment of debts** the proceeds are equitable assets, and the representative cannot retain therefrom for his own debt. Harrison v. Henderson, 7 Heisk. (Tenn.) 315; Walters v. Walters, 18 Ch. D. 182; Bain v. Sadler, L. R. 12 Eq. 570; Anonymous, 2 Ch. Cas. 54, 22 Reprint 843. Contra Hall v. Macdonald, 14 Sim. 1, 37 EngCh 1, 60 Reprint 256.

[b] **On a bill in equity to foreclose a mortgage,** it is doubtful whether the right of an executor to retain out of the funds of the estate in his hands, or from the amount due by him to the estate, sufficient to satisfy his claim against the estate, will be recognized where it would operate merely as a set-off. Dolman v. Cook, 14 N. J. Eq. 56.

64. Bain v. Sadler, L. R. 12 Eq. 570.

65. Miller v. Irby, 63 Ala. 477; Glenn v. Glenn, 41 Ala. 571; Kimball v. Moody, 27 Ala. 130; Muse v. Sawyer, 4 N. C. 637; Woodward v. Darcy, Plowd. 184, 75 Reprint 282; Yost v. Crombie, 8 U. C. C. P. 159.

66. Lindsay v. Lindsay, 1 S. C. Eq. 150; Harrison v. Henderson, 7 Heisk. (Tenn.) 315; In re Gilbert, [1898] 1 Q. B. 282; Smith v. Bakes, 20 Beav. 568, 52 Reprint 723; Chapman v. Turner, 9 Mod. 268, 88 Reprint 443.

67. In re Gilbert, [1897] 1 Q. B. 282.

68. Saunders v. Saunders, 2 Litt. (Ky.) 314.

69. In re Harrison, 32 Ch. D. 395; In re Jones, 31 Ch. D. 440 [foll In re Birt, 22 Ch. D. 604]; Richmond v. White, 12 Ch. D. 361; Davenport v. Moss, 14 L. T. Rep. N. S. 133.

70. Hosack v. Rogers, 6 Paige (N. Y.) 415 [rev on other grounds 18 Wend. 319]; In re Rhoades, [1899] 2 Q. B. 347; In re Harrison, 32 Ch. D. 395; In re Jones, 31 Ch. D. 440.

71. Williams v. Williams, 15 Lea (Tenn.) 438; Shields v. Alsup, 5 Lea (Tenn.) 508; Byrn v. Fleming, 3 Head (Tenn.) 658; Hamner v. Hamner, 3 Head (Tenn.) 398. But see Page v. Lloyd, 5 Pet. (U. S.) 304, 8 L. ed. 134.

Special statutes of limitation applicable to actions against executors or administrators see infra §§ 1925–1953.

72. Fort v. Bottle, 21 Miss. 133; Redman v. Turner, 65 N. C. 445; Cowper v. Cowper, 2 P. Wms. 720, 24 Reprint 930.

[a] **Illustration.**—An administrator will not be allowed to retain out of assets of his intestate the amount of a note payable to him as guardian, and on which his intestate was surety, where he has paid over to the maker of the note, who is insolvent, a claim against his intestate for a sum more than sufficient to have discharged the note. Redman v. Turner, 65 N. C. 445.

[b] **After a perfected accounting** by the executor the court will not open the account to permit the executor to assert his right of retainer. Cowper v. Cowper, 2 P. Wms. 720, 24 Reprint 930.

73. Davies v. Parry, [1899] 1 Ch. 602 [foll Nunn v. Barlow, 1 Sim. & St. 588, 1 EngCh 588, 57 Reprint 232]; In re Hankey, [1899] 1 Ch. 541; In re Hubback, 29 Ch. D. 934; Ex p. Campbell, 16 Ch. D. 198; Middleton v. Poole, 2 Coll. 246, 33 EngCh 246, 63 Reprint 719; Sharman v. Rudd, 4 Jur. N. S. 527; Re Orme, 50 L. T. Rep. N. S. 51; Nunn v. Barlow, 1 Sim. & St. 588, 1 EngCh 588, 57 Reprint 232.

[a] **Executor suing on behalf of himself and all other creditors.**—In the administration of a testator's estate, the right of an executor to retain for his debt is not affected by the circumstances that he is himself plaintiff, suing on behalf of himself and all other creditors, and that he has submitted to account in the ordinary form. Ex p. Campbell, 16 Ch. D. 198.

[b] **Form of bond.**—The right is not affected by the present form of a creditor's administration bond which provides for a due course of administration "ratably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid." Davies v. Parry, [1899] 1 Ch. 602 [foll Nunn v. Barlow, 1 Sim. & S. 588, 1 EngCh 588, 57 Reprint 232].

74. Davies v. Parry, [1899] 1 Ch. 602; Nunn v. Barlow, 1 Sim. & St. 588, 1 EngCh 588, 57 Reprint 232.

75. Hosack v. Rogers, 6 Paige (N. Y.) 415 [rev on other grounds 18 Wend. 319]; In re Compton, 30 Ch. D. 15; Richmond v. White, 12 Ch. D. 361; Tipping v. Power, 1 Hare 405, 23 EngCh 405, 66 Reprint 1090; In re Langley, 68 L. J. Ch. 361; Stahlschmidt v. Lett, 1 Smale & G. 415, 65 Reprint 182; Chissum v. Dewes, 5 Russ. 29, 5 EngCh 29, 38 Reprint 938; Hall v. Macdonald, 14 Sim. 1, 37 EngCh 1, 60 Reprint 256; Langton v. Higgs, 5 Sim. 228, 9 EngCh 228, 58 Reprint 322.

[a] **Payment by person other than representative.**—Where, in pursuance of an order made on motion of the residuary legatee, and in the presence of the executor, an insurance company pays into court money which forms a part of the assets of the estate, the executor is not thereby deprived of his right of retainer in priority to the costs of the suit and the debts of other creditors, since the payment into court by the insurance company is in substance a payment by the executor. Richmond v. White, 12 Ch. D. 34.

[b] **Priority over costs of suit.**—If the fund paid into court is insufficient to discharge the administrator's debt, his right of retainer will prevail against plaintiff's right to have the cost of the suit satisfied. Richmond v. White, 12 Ch. D. 361; Chissum v. Dewes, 5 Russ. 29, 5 EngCh 29, 38 Reprint 938.

tor of a debt to himself is always reviewable by the court.[76]

[§ 1201] **(2) Under Modern Statutes.** In England the right of retainer still exists as at common law,[77] but in the United States and Canada it has been considerably abridged by statutes,[78] some of which preclude its exercise where the estate is insolvent[79] or so as to secure to the representative more than the same pro rata proportion of his claim as other creditors whose claims are of equal rank receive,[80] and some of which preclude the representative from applying any part of the assets to his own claim until such claim has been allowed by the probate court,[81] or even flatly abolish the common-law rule in this respect.[82]

[§ 1202] **b. Presumption of Payment from Receipt of Assets.** At common law, as a consequence of the right of retainer, if a personal representative receives assets sufficient to pay a claim held by him against decedent, and which he may lawfully retain for that purpose, his retainer for his debt and its consequent extinguishment are conclusively presumed.[83] The mere fact that a creditor becomes the personal representative of his debtor does not, however, raise any presumption of the extinguishment of the debt;[84] but in order to have that effect there must be a receipt of assets by the personal representative sufficient to pay his debt, and which he may lawfully retain for that purpose.[85] No act on the part of the representative in applying the assets in payment of his debt is necessary in order to work an extinguishment thereof;[86] but by operation of law the property in the assets, to an amount sufficient to extinguish his debt, is vested in him, and his debt is paid,[87] and it is not in his discretion to keep alive or continue the debt or by any subsequent act to revive it.[88] This doctrine, being a consequence of the right of retainer, does not apply where the right of retainer has been abolished or materially modified by statute;[89] and under statutes which prevent the personal representative from disposing of tangible personal property except by sale under order of the probate court, the debt of the personal representative is not extinguished unless he receives money,[90] or has possession of other personal assets for a sufficient length of time to

76. Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

77. In re May, 45 Ch. D. 499; Crowder v. Stewart, 16 Ch. D. 368; Lee v. Nuttall, 12 Ch. D. 61; Olpherts v. Coryton, [1913] 1 Ir. 211 [applying In re Samson, [1906] 2 Ch. 584; In re Jennes, 53 Sol. J. 376, and refusing to foll Wilson v. Coxwell, 23 Ch. D. 764; In re Jones, 31 Ch. D. 440].

[a] **The representative's right was not** enlarged by Hinde Palmer Act (32 & 33 Vict c 46) abolishing the distinction between specialty and simple contract debts. In re Jones, 31 Ch. D. 440; Wilson v. Coxwell, 23 Ch. D. 764.

78. U. S.—In re Mossler Co., 239 Fed. 262, 152 CCA 250.

Ala.—Trimble v. Fariss, 78 Ala. 260; Miller v. Irby, 63 Ala. 477.

Cal.—In re Magorty, 169 Cal. 163, 146 P 430.

Ill.—Paschall v. Hailman, 9 Ill. 285.

La.—Bujac v. Loste, 12 La. Ann. 96.

N. J.—Dolman v. Cook, 14 N. J. Eq. 56.

Ont.—Kline v. Kline, 3 Ch. Chamb. (U. C.) 161.

[a] **Presumption that common law prevails in foreign state.**—In the absence of proof of the laws of a foreign state, the presumption is that the common law, giving preference to the claims of an executor over those of equal degree, prevails. Dix v. Hozier, 6 NYSt 745.

79. Ala.—Miller v. Irby, 63 Ala. 477; Smith v. Bryant, 60 Ala. 235; Kimball v. Moody, 27 Ala. 130; Shortridge v. Easley, 10 Ala. 520.

Fla.—Sanderson v. Sanderson, 17 Fla. 820; Sealey v. Thomas, 6 Fla. 25.

N. J.—In re Wiley, (Prerog.) 65 A 212.

S. C.—Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

Tenn.—Smith v. Watkins, 8 Humphr. 331.

Ont.—Re Ross, 29 Grant Ch. (U. C.) 385.

80. Ky.—Payne v. Pusey, 8 Bush 564; Berry v. Graddy, 1 Metc. 553.

Md.—Semmes v. Magruder, 10 Md. 242.

N. Y.—Matter of Gardner, 5 Redf. Surr. 14; Treat v. Fortune, 2 Bradf. Surr. 116.

Pa.—Ex p. Meason, 5 Binn. 167.

S. C.—Lenoir v. Winn, 4 S. C. Eq. 65 6 AmD 597.

Tenn.—Smith v. Watkins, 8 Humphr. 331.

[a] **As against a creditor who has not presented his claim** within the time allowed therefor the administrator is entitled to retain for his whole debt, although the assets are not enough to pay all. Sebring v. Keith, 20 S. C. L. 340.

81. Semmes v. Magruder, 10 Md. 242; Owens v. Collirson, 3 Gill & J. (Md.) 25; Neilley v. Neilley, 89 N. Y. 352; Kyle v. Kyle, 67 N. Y. 400; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Starbuck v. Farmers' L. & T. Co., 28 App. Div. 308, 51 NYS 8; Wilcox v. Smith, 26 Barb. (N. Y.) 316; Broome v. Van Hook, 1 Redf. Surr. (N. Y.) 444; In re Rogers, 1 Redf. Surr. (N. Y.) 231; Treat v. Fortune, 2 Bradf. Surr. (N. Y.) 116.

[a] **Interest on amount retained.**—An executor who retains any part of the assets in satisfaction of his disputed claim against the estate is chargeable with interest on the amount retained. Matter of Gardner, 5 Redf. Surr. (N. Y.) 14.

82. Nelson v. Russell, 15 Mo. 356.

83. U. S.—Page v. Lloyd, 5 Pet. 304, 8 L. ed. 134.

Ala.—Beadle v. Steele, 86 Ala. 413, 5 S 169; Trimble v. Fariss, 78 Ala. 260; Miller v. Irby, 63 Ala. 477.

Del.—Miller v. Miller, 5 Del. 333.

Fla.—Sealey v. Thomas, 6 Fla. 25.

N. C.—Muse v. Sawyer, 4 N. C. 637.

Oh.—Hall v. Pratt, 5 Oh. 72.

S. C.—Evans v. Evans, 1 S. C. Eq. 515; Johnson v. Brockelbank, 20 S. C. L. 353.

Eng.—Woodward v. Darcy, Plowd. 184, 75 Reprint 282.

[a] **Debts due to representative in fiduciary capacity.**—The presumption of extinguishment extends to debts due to the representative as: (1) Trustee. Miller v. Irby, 63 Ala. 477. (2) Representative of another estate. Miller v. Irby, 63 Ala. 477; Muse v. Sawyer, 4 N. C. 637; Thomas v. Chamberlain, 39 Oh. St. 112; Fryer v. Gildridge, Hob. 10, 80 Reprint 160; Wangford v. Wangford, 11 Mod. 38, 88 Reprint 869, 1 Salk. 299, 91 Reprint 265.

84. Muse v. Sawyer, 4 N. C. 637; Hall v. Pratt, 5 Oh. 72; Wangford v. Wangford, 11 Mod. 38, 88 Reprint 869, 1 Salk. 299, 91 Reprint 265.

85. Ala.—Dickie v. Dickie, 80 Ala. 57; Trimble v. Fariss, 78 Ala. 260; Miller v. Irby, 63 Ala. 477; Kimball v. Moody, 27 Ala. 130.

Fla.—Sealey v. Thomas, 6 Fla. 25.

Mass.—Bemis v. Call, 10 Allen 512.

N. Y.—Thomason v. Thompson, 2 Johns. 471.

N. C.—Chaffin v. Hanes, 15 N. C. 103; Muse v. Sawyer, 4 N. C. 637.

Oh.—Hall v. Pratt, 5 Oh. 72.

S. C.—Porter v. Cheesborough, 20 S. C. Eq. 275.

Eng.—Lowe v. Peskett, 16 C. B. 500, 81 ECL 500, 139 Reprint 854; Dorchester v. Webb, Cro. Car. 372, 79 Reprint 924; Wangford v. Wangford, 11 Mod. 38, 88 Reprint 869, 1 Salk. 299, 91 Reprint 265.

[a] **Reason for rule.**—"He cannot retain goods for part of his debt, and for the rest have an action against the heir, for he cannot apportion his debt, but he ought to retain goods for the whole, or have an action for the whole against the heir." Woodward v. Darcy, Plowd. 184, 185, 75 Reprint 282.

[b] **Receipt of assets insufficient to pay debt.**—If an executor, who is also a creditor, receives and disposes of property of the estate and dies before accounting therefor, the presumption of payment of his debt by retainer does not arise, unless the value of the property so received equaled the amount of the debt. Jordan v. Hardie, 131 Ala. 72, 31 S 504.

[c] **Death of representative before receiving assets.**—If an administrator dies without receiving assets, his debt is not presumed to have been extinguished. Hall v. Pratt, 5 Oh. 72.

86. Beadle v. Steele, 86 Ala. 413, 5 S 169; Miller v. Irby, 63 Ala. 477; Muse v. Sawyer, 4 N. C. 637; Woodward v. Darcy, Plowd. 184, 75 Reprint 282. But see supra § 1198.

87. Beadle v. Steele, 86 Ala. 413, 5 S 169; Trimble v. Fariss, 78 Ala. 260; Muse v. Sawyer, 4 N. C. 637; Woodward v. Darcy, Plowd. 184, 75 Reprint 282.

88. Beadle v. Steele, 86 Ala. 413, 5 S 169; Dickie v. Dickie, 80 Ala. 57; Miller v. Irby, 63 Ala. 477; Harkins v. Hughes, 60 Ala. 316; Prentice v. Dehon, 10 Allen (Mass.) 353; Chaffin v. Hanes, 15 N. C. 103.

89. Miller v. Irby, 63 Ala. 477; Sealey v. Thomas, 6 Fla. 25; Matter of Saunders, 4 Misc. 28, 23 NYS 829, Pow. Surr. (N. Y.) 336; Smith v. Watkins, 8 Humphr. (Tenn.) 331.

90. Miller v. Irby, 63 Ala. 477; Kimball v. Moody, 27 Ala. 130; Harrison v. Henderson, 7 Heisk. (Tenn.) 315 [overr Smith v. Watkins, 8 Humphr. (Tenn.) 331]; Ross v. Wharton, 10 Yerg. (Tenn.) 190.

[a] **Receipt of depreciated currency.**—A personal representative who is a creditor of decedent will not be permitted to receive depreciated currency in payment of debts due the estate, suffer it to become worthless in his hands, and then de-

enable him to convert them into money.[91] It has been held that the failure of the representative to apply for an order to sell the real estate of decedent to pay debts for such a length of time as to render him chargeable at the suit of other creditors will raise a presumption of the extinguishment of his own debt.[92] However, an executor who is an alleged creditor of his testator does not, by refraining from exercising his right of retainer, mislead a legatee in any way whereby an estoppel is raised against such creditor in his lifetime or his personal representative after his death.[93]

[§ 1203] **c. Secured Claims.** A personal representative whose claim against decedent's estate is secured is entitled to the benefit of his security.[94]

[§ 1204] **d. Set-Off and Counterclaim.** An executor or administrator indebted to the estate of his decedent will not be allowed to pay in full a claim that he holds against that estate, but will be required to offset the debt against his claim.[95]

[§ 1205] **4. Advances to Pay Claims**[96]**—a. Advances by Executor or Administrator—(1) In General.** Although the duty of a personal representative to serve the best interests of the estate does not impose upon him any obligation to advance money or use his own funds for that purpose,[97] it authorizes him to do so; and if, in good faith and for the benefit of the estate, he advances his own funds to pay debts or discharge contracts which are just charges against the estate, he is entitled to reimbursement.[98] And if with good reason the representative pays the just debts from his own means after the personalty is exhausted, he is entitled to repayment from the proceeds of decedent's lands which were originally liable for such debts,[99] although where he seeks to subject the real estate to

volve the whole loss on the distributees; but he must retain in payment of his own claim the same kind of money which he receives in payment of debts due the estate. Dickie v. Dickie, 80 Ala. 57.

91. Miller v. Irby, 63 Ala. 477.

[a] **The presumption may arise from** a retention of assets in specie for: (1) Six or seven years. Glenn v. Glenn, 41 Ala. 571. (2) Twelve years. Kimball v. Moody, 27 Ala. 130.

92. Trimble v. Fariss, 78 Ala. 260; Miller v. Irby, 63 Ala. 477; Kimball v. Moody, 27 Ala. 130.

93. O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

94. Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284; Kern v. Noble, 57 Ill. A. 27 [aff 159 Ill. 311, 42 NE 844].

95. Whipple v. Crocker, 6 Ill. A. 133; Pool v. Ellis, 64 Miss. 555, 1 S 725; Terhune v. Oldis, 44 N. J. Eq. 146, 14 A 638.

[a] **The liability of an administrator for assets wasted** should be applied in payment of a debt due to him to the intestate. Pool v. Ellis, 64 Miss. 555, 1 S 725.

Set-off of advances against debts see infra § 1209.

96. Loans or advances to estate as liabilities of estate see supra § 932.

97. Smith v. Goethe, 147 Cal. 725, 82 P 384.

98. U. S.—Manson v. Duncanson, 166 U. S. 533, 17 SCt 647, 41 L. ed. 1105; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Ala.—Martin v. Foster, 38 Ala. 688.

Ark.—Trimble v. James, 40 Ark. 393.

Cal.—Burnett v. Lyford, 93 Cal. 114, 28 P 855.

Conn.—Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385.

Kan.—Waverly Commercial State Bank v. Ross, 90 Kan. 423, 426, 133 P 538 [cit Cyc].

Ky.—Mitcherson v. Mercer, 6 J. J. Marsh. 381; Haddix v. Haddix, 5 Litt. 201; Trumbo v. Murphy, 13 Ky. Op. 528.

Md.—Dennis v. Dennis, 15 Md. 73; Edelen v. Edelen, 11 Md. 415.

Minn.—Bunnell v. Post, 25 Minn. 376.

Miss.—Slaton v. Alcorn, 51 Miss. 72; Short v. Porter, 44 Miss. 533; Woods v. Ridley, 27 Miss. 119; Reynolds v. Ingersoll, 19 Miss. 249, 49 AmD 57; Morris v. Lake, 17 Miss. 521, 48 AmD 724.

Mo.—Hill v. Buford, 9 Mo. 869.

N. J.—In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686]; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Ver Duin v. Ver Duin, 42 N. J. Eq. 325, 5 A 647; Pursel v. Pursel, 14 N. J. Eq. 514.

N. Y.—In re Bolton, 146 N. Y. 257, 40 NE 737; Stilwell v. Melrose, 15 Hun 378; Matter of Brown, 60 Misc. 35, 112 NYS 599, 6 Mills Surr. 486; Matter of Randell, 8 NYS 752, 2 Conn. Surr. 29; Livingston v. Newkirk, 3 Johns. Ch. 312.

N. C.—Morton v. Blades Lumber Co., 144 N. C. 31, 34, 56 SE 551 [cit Cyc); Chesson v. Chesson, 43 N. C. 141; Williams v. Williams, 17 N. C. 69, 22 AmD 729.

Oh.—Smith v. Hayward, 5 OhS&CP 462, 5 OhNP 501.

Pa.—In re Connolly, 198 Pa. 146, 48 A 489; In re Bentley, 196 Pa. 497, 46 A 898; In re Mustin, 188 Pa. 544, 41 A 618; Blank's App., 3 Grant 192; McCurdy's App., 5 Watts & S. 397; Galboesch's Est., 16 Pa. Dist. 259; Ruppel's Est., 32 PittsbLegJNS 233.

S. C.—Brooks v. Brooks, 12 S. C. 422; Douglas v. Fraser, 7 S. C. Eq. 105; Watts v. Watts, 7 S. C. Eq. 77.

Tenn.—Dalton v. Wolfe, 11 Heisk. 498.

Tex.—Dunson v. Payne, 44 Tex. 539; Gray v. Cockrell, 20 Tex. Civ. A. 324, 49 SW 247.

Wash.—Plath v. Mullins, 94 Wash. 154, 156, 161 P 1187 [cit Cyc].

Wis.—Gundry v. Henry, 65 Wis. 559, 27 NW 401.

Eng.—Banes' Case, 9 Coke 93b, 77 Reprint 869; Spackman v. Holbrook, 2 Giffard 198, 66 Reprint 83; Woodward v. Daroy, Plowd. 184, 75 Reprint 282.

"It is elementary law that for any money advanced by an executor or administrator of an estate he is entitled to reimbursement out of the estate." In re Gill, 199 N. Y. 155, 160, 92 NE 390.

[a] **A statute forbidding the purchase by an administrator of a claim against the estate** which he represents is inapplicable to a case where an administrator, for the purpose of protecting the estate against a sacrifice under the foreclosure of a mortgage, advances his own funds and takes an assignment of the mortgage to himself or a third person. Burnett v. Lyford, 93 Cal. 114, 28 P 855.

[b] **Payment of claims not presented or allowed.**—Where commissioners appointed to receive and adjust all claims against an estate regularly complete and file their report, the administrator is not entitled to an allowance in his account for payments made out of his own funds on claims which were never presented to the commissioners and allowed by them, although the claims so paid were valid against the estate, and would have been properly allowed by the commissioners had they been presented. Bunnel v. Post, 25 Minn. 376.

[c] **Necessity for accounting.**—An executor who claims for advances to the estate must establish his standing by settling an account. In re Bently, 196 Pa. 497, 46 A 898; Blank's App., 3 Grant (Pa.) 192.

[d] **Repayment by successor in the trust.**—Where an administrator de bonis non pays to his predecessor a sum of money which the latter advanced to satisfy a just demand against the estate, he is entitled to an allowance in his accounts for the sum so paid. Hearrin v. Savage, 16 Ala. 286.

[e] **Advances out of property of third person.**—The representative is also entitled to reimbursement for advances made out of property belonging to a third person where he is liable to account therefor to the owner. Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569 (administrator allowed reimbursement for advances made from funds held by him as guardian). See also Cordill v. McCullough, 20 La. Ann. 174 (owner entitled to reimbursement).

[f] **Expenditure of trust fund.**—Where an administrator expended for the benefit of the estate money collected on notes which constituted a trust fund for the widow of the intestate and his children, he may look to the estate for repayment. Dalton v. Wolfe, 11 Heisk. (Tenn.) 498.

[g] **Actual advance necessary.**—A personal representative who had not actually advanced money is not entitled to a lien for money which he intends to advance for property which the court has directed him to purchase. Plath v. Mullins, 94 Wash. 154, 161 P 1187.

99. U. S.—Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522 [reaff 1 How. 134, 11 L. ed. 75].

Ala.—McCullough v. Wise, 57 Ala. 623.

D. C.—Howard v. Howard, 38 App. 575.

Ky.—Doty v. Cox, 22 SW 321, 15 KyL 68; Taylor v. Taylor, 8 B. Mon. 419, 48 AmD 400.

Md.—State v. Graham, 115 Md. 520, 81 A 31.

Mo.—Roberts v. Bartlett, 26 Mo. A. 611.

N. J.—Liddel v. McVicar, 11 N. J. L. 44, 19 AmD 369; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Clayton v. Somers, 27 N. J. Eq. 230.

N. Y.—In re Bolton, 146 N. Y. 257, 40 NE 737; Livingston v. Newkirk, 3 Johns. Ch. 312.

N. C.—Denton v. Tyson, 118 N. C. 542, 24 SE 116; Turner v. Shuffler, 108 N. C. 642, 13 SE 243; Sanders v. Sanders, 17 N. C. 262; Williams v. Williams, 17 N. C. 69, 22 AmD 729.

Pa.—McKerrahan v. Crawford, 59 Pa. 390.

Tenn.—Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

Va.—Gaw v. Hoffman, 12 Gratt. (53 Va.) 628.

W. Va.—Surber v. Kent, 5 W. Va. 96.

[a] **A representative who is compelled to pay** debts in excess of the personalty may be reimbursed out of the real estate. Sanders v. Sanders, 17 N. C. 262.

[b] **Right to subject property charged by will with payment of**

reimburse him for his advances, he must show that the fund or property primarily chargeable with the debts has been faithfully administered and has proved inadequate.[1] The personal representative occupies, however, as to debts paid by him from his own funds, merely the position of the original creditors, and is entitled to no greater preference;[2] and in no case will he be allowed to make a profit for himself from the transaction.[3] Neither may he be reimbursed for payments which were made for his own benefit rather than for the benefit of the estate.[4]

[§ 1206] **(2) Retainer of Assets in Satisfaction.**[5] At common law, if an executor or administrator makes advances out of his own funds to the value of the personal assets of the estate, he may elect to apply those assets to reimburse himself, and by such election the assets become his own property;[6] but the statutes which in many states prevent the personal representative from disposing of personal property except by sale under order of the probate court[7] have abrogated the right of the personal representative to appropriate specific personal property in satisfaction of his advances.[8]

[§ 1207] **(3) Interest on Advances.** A charge of interest by a personal representative on advances made by him is not favored, and the circumstances offered to sustain it will be examined with scrupulous care,[9] and interest will not be allowed where funds amply sufficient to meet all claims against the estate were in the possession of the personal representative, or where the failure to obtain sufficient funds was due to his negligence in converting the assets of the estate into money.[10] On the other hand interest will be allowed where the advances were meritorious and beneficial, and the personal representative has been guilty of no neglect or delay in settling the estate.[11]

debts.—Where the executors pay a debt, or the creditor accepts their note in place of the note of the testator, so that the executors become the debtors and personally responsible to the creditor, the only effect is that the executors become the creditors of the estate instead of the original creditors, and they may resort to the fund set apart by the will for the payment of debts. Peter v. Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522 [reaff 1 How. 134, 11 L. ed. 75]. To same effect In re Lefevre, 200 Pa. 531, 50 A 185.

[c] **Representative acting in bad faith.**—Where an administrator, with knowledge that the personal estate is insolvent, pays debts of the intestate to a larger amount than the personal assets, for the purpose of making the heir his debtor and withdrawing the question of debt or no debt from the proper forum, he is entitled to no relief. Williams v. Williams, 17 N. C. 69, 22 AmD 729.

1. Dougherty v. Connolly, 61 N. J. Eq. 421, 48 A 777; Frary v. Booth, 37 Vt. 78; Street v. Street, 11 Leigh (38 Va.) 498.

[a] **Ex parte settlement not evidence against heirs.**—Street v. Street, 11 Leigh (38 Va.) 498.

[b] **Where an executor has personalty of the estate applicable** to the exoneration of real property from a mortgage executed by decedent, payment of the mortgage out of his own funds gives him no right to reimbursement out of the real estate. Dougherty v. Connolly, 61 N. J. Eq. 421, 48 A 777.

Insufficiency of personalty as prerequisite to sale of land for payment of debts see infra § 1449.

2. Ala.—Hearrin v. Savage, 16 Ala. 286.

Ky.—Miller v. Miller, 172 Ky. 519, 189 SW 417.

N. Y.—In re Randell, 8 NYS 652, 2 Conn. Surr. 29.

Pa.—In re Greiner, 2 Watts 414; Cooper's Est., 4 Pa. Super. 615; Smith's Est., 8 Pa. Co. 159.

Tenn.—Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

Ont.—Willis v. Willis, 20 Grant Ch. (U. C.) 396.

[a] **Payment of the funeral expenses** of decedent by an administrator out of his own money gives him a preferred claim against the estate chargeable on the land, and payable therefrom after such debts as are specific liens on the land. Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091.

3. Desha v. Desha, 11 KyL 405.

[a] **Payment in property.**—Where administrator paid a debt of the estate with his own property estimated above its actual value, he should be allowed credit for its actual value only. Amos v. Heatherby, 7 Dana (Ky.) 45.

Individual interest in transactions see supra §§ 559–561.

Purchase of claims against estate see supra § 936.

4. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131; Smith's Est., 8 Pa. Co. 159.

[a] **Illustration.**—Where an administratrix, for her own benefit, pays a mortgage lien to relieve personal property which had been valued and set apart to her as exempt, and there is no other personal property belonging to the estate, she cannot charge the estate with the amount so paid. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131.

5. Right of retainer generally see supra §§ 1193–1201.

6. Ky.—Mitcherson v. Mercer, 6 J. J. Marsh. 381; Haddix v. Haddix, 5 Litt. 201.

N. Y.—Livingston v. Newkirk, 3 Johns. Ch. 312.

N. C.—Chesson v. Chesson, 43 N. C. 141.

Eng.—Merchant v. Driver, 1 Saund. 307, 85 Reprint 422; Dyer 2a, 187b, 73 Reprint 4, 413.

Ont.—Yost v. Crombie, 8 U. C. C. P. 159.

[a] **Land directed by the will to be sold** (1) cannot be retained by the personal representative in satisfaction of his advances. Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312. (2) But he can apply the proceeds of the realty for this purpose. Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312; In re Bolton, 146 N. Y. 257, 40 NE 737.

[b] **Election to take chattel no evidence of payment of debts.**—Although an executor who has paid debts of the estate with his own money may sometimes elect to take a specific chattel in satisfaction, the mere election to take a chattel is not evidence that the executor has paid debts to the value thereof. Mitcherson v. Mercer, 6 J. J. Marsh. (Ky.) 381.

7. See supra § 719.

8. Gavin v. Carling, 55 Md. 530; Lindsay v. Lindsay, 1 S. C. Eq. 150.

[a] **Accordingly** (1) a personal representative cannot, by paying debts and legacies beyond the amount of cash received from sales, transfer to himself in his own right the title to any portion of the property of the decedent at its appraised value. Gavin v. Carling, 55 Md. 530; Dennis v. Dennis, 15 Md. 73; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Hall v. Griffith, 2 Harr. & J. (Md.) 483. (2) Nor can the orphans' court authorize such a transaction. Gavin v. Carling, 55 Md. 530. (3) But where a court of equity is called upon to pass a decree recognizing the correctness of this proposition, it will provide for the reimbursement of the representative out of decedent's property for all proper disbursements on account of the estate appearing to have been legally made by him. Dennis v. Dennis, 15 Md. 73.

9. Pettingill v. Pettingill, 60 Me. 411; Liddell v. McVicar, 11 N. J. L. 44, 19 AmD 369; Evarts v. Mason, 11 Vt. 122.

10. Md.—Billingslea v. Henry, 20 Md. 282.

Mass.—Storer v. Storer, 9 Mass. 37.

Mo.—McPike v. McPike, 111 Mo. 216, 20 SW 12; Booker v. Armstrong, 93 Mo. 49, 4 SW 727.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—In re Hawley, 185 N. Y. 566, 77 NE 1188 [aff 108 App. Div. 185, 96 NYS 61].

S. C.—McGougan v. Hall, 21 S. C. 600.

Vt.—Evarts v. Nason, 11 Vt. 122; Rix v. Smith, 8 Vt. 365.

Eng.—Lewis v. Lewis, 13 Beav. 82, 51 Reprint 32.

[a] **This rule has been applied** where the executor permitted all the assets of the estate to go to the hands of the legatees without providing for outstanding debts. McGougan v. Hall, 21 S. C. 600.

[b] **Where the executor has a life estate in the residuum** of the estate, he is not entitled to interest on money advanced by him to pay debts of the testator, as under his life tenancy he has had the use of the property of the estate, which was subject to the discharge of the debts. Brooks v. Brooks, 12 S. C. 422.

[c] **Interest on costs paid by an executor** pending a suit regarding the estate will not be allowed. Lewis v. Lewis, 13 Beav. 82, 51 Reprint 32; Gordon v. Trail, 8 Price 416, 146 Reprint 1248.

11. Ark.—Trimble v. James, 40 Ark. 393.

Ga.—Crawford v. Tibble, 69 Ga. 519.

Me.—Pettingill v. Pettingill, 60 Me. 411.

Md.—Billingslea v. Henry, 20 Md. 282.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—Stilwell v. Melrose, 15 Hun 378; Mann v. Lawrence, 3 Bradf. Surr. 424.

N. C.—Morton v. Blades Lumber Co., 144 N. C. 31, 34, 56 SE 551 [cit Cyc].

Pa.—Callaghan v. Hall, 1 Serg. & R. 241; In re Hobson, 25 PittsbLegJ NS 456.

Vt.—Rix v. Smith, 8 Vt. 365.

Va.—Jones v. Williams, 2 Call (6 Va.) 102.

Eng.—Finch v. Pescott, L. R. 17 Eq. 554; Small v. Wing, 5 Bro. P. C. 66, 2 Reprint 537; Biggar v. Eastwood, L. R. 15 Ir. 219.

Compound interest will not be allowed on advances made by a personal representative.[12]

[§ 1208] **(4) Effect of Limitations.** The statute of limitations does not begin to run against the claim of an administrator or executor for advances made to pay debts of the estate until he has stated his account.[13] But the payment by the representative out of his own funds of debts against the estate will not prolong the lien of such debts upon the real estate of the decedent, beyond the statutory period, in favor of the representative.[14] It has also been held that if the representative pays a claim which was barred by limitations at the time of payment he cannot be reimbursed from the estate.[15]

An agreement by the heirs that the representative shall receive reimbursement out of the proceeds of the real estate for his advances may prevent the running of the statute of limitations against such advances, so far as the heirs and persons claiming under them are concerned.[16]

[§ 1209] **(5) Set-Off of Advances against Debts.** On a settlement of the accounts of an executor or administrator, advances made by him for the estate should be set off against amounts found to be due from him to the estate.[17]

[§ 1210] **b. Advances by Third Persons.** Advances by third persons to the representative for the purpose of paying the debts of an estate ordinarily create only a personal liability on the part of the representative;[18] but, in cases where the representative is entitled to reimbursement from the estate for the debts paid by him, equity will subrogate the person advancing the money to the rights of the representative and allow him to be repaid directly from the estate,[19] but only to the extent that the money advanced has been actually used in the payment of debts for which the estate was legally bound.[20] While payments by third persons directly to creditors of an estate are not favored,[21] reimbursement will generally be allowed where the payments are made in good faith and for the benefit of the estate, especially where they are made by the widow, or an heir or distributee, intending thereby to avoid the expense of administration.[22]

[§ 1211] **5. Interest on Claims—a. When Allowed—(1) In General.** Interest is not allowable from a decedent's estate, where from the nature of the claim no interest is due; and the claims of creditors with whom settlement is made in the ordinary course of administration are usually dealt with on the footing they occupied in this respect at the date of decedent's death.[23] Claims bearing interest by

Ont.—Menzies v. Ridley, 2 Grant Ch. 544.

[a] **This rule has been applied:** (1) Where the advances were to pay interest-bearing debts. Stilwell v. Melrose, 15 Hun (N. Y.) 378. (2) Where the money advanced was expended for taxes, necessary expenses and repairs, and debts carrying interest. Mann v. Lawrence, 3 Bradf. Surr. (N. Y.) 424. (3) Where an executor, having no assets from the estate, advanced his own money to redeem land of the testator mortgaged for less than its value and to prevent a foreclosure. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

12. Trimble v. James, 40 Ark. 393; In re Walker, 3 Rawle (Pa.) 243.

13. Nowell v. Bragdon, 14 Me. 320; In re Bentley, 196 Pa. 497, 46 A 898.

14. In re Young, 144 Mich. 663, 108 NW 88; Battersby v. Castor, 181 Pa. 555, 37 A 572; Merkel's Est., 154 Pa. 285, 26 A 428; Demmy's App., 43 Pa. 155; Loomis' App., 29 Pa. 237; McCurdy's App., 5 Watts & S. (Pa.) 397; Aurand's Est., 22 Pa. Dist. 343; Villee's Est., 2 Pa. Dist. 74.

15. Ames v. Jackson, 115 Mass. 508; Dickinson v. Arms, 8 Pick. (Mass.) 394.

[a] **Where no injury has resulted** to the legatees or others interested in the estate, the representative may be allowed credit for the payment, but the amount of the allowance should be reduced in so far as such persons have been prejudiced. Forward v. Forward, 6 Allen (Mass.) 494.

16. Wallace's App., 5 Pa. 103.

17. Hall v. Griffith, 2 Harr. & J. (Md.) 482; Dreisbach's App., 17 Pa. 120; Falconer v. Powe, 8 S. C. Eq. 150.

Set-off with respect to claims of representative generally see supra § 1204.

18. Matter of Brown, 207 Ill. A. 536; Dalton v. Wolfe, 11 Heisk. (Tenn.) 498.

Borrowing money by representative see supra § 488.

[a] **Right to recover from representative.**—Where a widow, in ignorance of her rights, sold exempt property, and delivered the proceeds to the administrator, who used them to pay debts, she could recover them from the administrator. Dalton v. Wolfe, 11 Heisk. (Tenn.) 498.

19. Ill.—Matter of Brown, 207 Ill. A. 536.

Miss.—Short v. Porter, 44 Miss. 533; Woods v. Ridley, 27 Miss. 119.

N. J.—Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; De Concillio v. Brownrigg, 51 N. J. Eq. 532, 25 A 383.

N. Y.—Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Johnson v. Kellogg, 8 NYSt 413.

N. C.—Heart v. Bryan, 17 N. C. 147.

Pa.—In re Donnelly, 246 Pa. 308, 92 A 306.

[a] **A surety on a note given by an executor** in renewal of a note of decedent, after being compelled to pay the note, is entitled to be substituted to the claim of the executor and the creditor against the assets of the estate, and there being a balance due the executor from the estate by reason of the payment of the debt by the surety, the surety is entitled to such balance in preference to a subsequent assignee of the executor. Heart v. Bryan, 17 N. C. 147.

[b] **Priority of claim.** — Where money was advanced to executors in good faith by parties interested in the estate to preserve it from loss, they were entitled to priority of payment over general creditors. In re Donnelly, 246 Pa. 308, 92 A 306.

Power of representative with respect to borrowing money see supra § 488.

20. Woods v. Ridley, 27 Miss. 119; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; De Concillio v. Brownrigg, 51 N. J. Eq. 532, 25 A 383.

[a] **Money used to pay representative's own debts.** — Where a creditor of an estate advanced money to the administrator to pay off certain claims, the creditor cannot claim to be reimbursed from the estate as to a portion of the sum advanced which the administrator used for individual purposes, although the agreement was that it was all to be used for the estate. But where the money advanced was mixed with other funds from which the administrator paid some individual claims, it should be treated as a trust fund in determining the rights of the creditor as against the estate for the money advanced, and payments of individual claims should be assumed to have been made from individual funds. Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

21. Falls v. Jones, 107 Mo. A. 357, 81 SW 455 (one paying, without authority, to the mortgagee, after the death of the mortgagor, the balance due on the mortgage debt, cannot recover the sum so paid from the mortgagor's estate).

22. Ala.—Jenks v. Terrell, 73 Ala. 238.

Ark.—Brearley v. Norris, 23 Ark. 166.

Ind.—Owen Creek Presb. Church v. Taggart, 44 Ind. A. 393, 89 NE 406, 408.

Mo.—Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951.

N. Y.—Chase v. Barrett, 4 Paige 148.

"An heir, devisee, or legatee has a right to pay debts against the ancestor or testator for the purpose of protecting their interest in the property of the decedent, and equity will keep the debt alive for their benefit." Owen Creek Presb. Church v. Taggart, supra.

[a] **Advances to pay funeral expenses.**—A third person who is not a mere interloper may lawfully incur expenses for the proper interment of decedent's body and recover the expense thereof, provided such expense was reasonable. Cape Girardeau Bell Tel. Co. v. Hamil, 160 Mo. A. 521, 140 SW 951.

23. Cal.—In re Selby, Myr. Prob. 125.

La.—Durnford's Succ., 1 La. Ann. 92.

Pa.—McDonald's Est., 13 Pa. Dist. 483.

S. C.—Hursey v. Surles, 91 S. C. 284, 74 SE 618.

Ont.—Re Kirkpatrick, 10 Ont. Pr. 4.

[a] **Illustration.**—Where claimant and decedent had advanced money which was used by decedent in a joint enterprise, and there had been mutual accounts between the parties which had not been adjusted before decedent's death, interest on the claim against decedent's estate was not recoverable. In re Gibson, 228 Pa. 409, 77 A 627.

[b] **A demand for services** rendered decedent in his lifetime, pursuant to his contract to pay therefor, is not an interest-bearing demand, and in an action for the services, brought against decedent's executors, a charge allowing interest from the date of decedent's death is erroneous. Hursey v. Surles, 91 S. C. 284, 74 SE 618.

[c] **Interest is never allowed on**

their terms should be paid with interest accruing before and after decedent's death, according to their tenor;[24] but interest is not usually allowed on unliquidated claims,[25] although it has been held that such claims bear interest from the time they are due and payable.[26]

[§ 1212] **(2) Necessity and Effect of Demand.** A demand on the representative within a specified time after his appointment is sometimes made a prerequisite to the recovery of interest accruing after the death of decedent,[27] and such a demand sometimes has the effect of starting the running of interest although the claim was not, theretofore, of an interest-bearing nature.[28] It has been held that a claim based on decedent's failure to comply with his agreement to devise and bequeath certain property to claimant in consideration of claimant's performing services for him, being a claim for liquidated amounts fixed by an express contract to be paid on decedent's death, draws interest from the time claimant filed his pleading to be made a party to an action to settle the estate of decedent, in which he set up his claim.[29]

[§ 1213] **(3) Effect of Presentation or Allowance.** Interest is sometimes allowed from the time of presentation [30] or allowance [31] of a claim, at the rate prescribed for judgments, although the original demand did not bear interest.[32]

[§ 1214] **(4) Agreement by Representative to Pay Interest.** An executor or administrator may agree to pay interest on a claim so as to bind himself personally, but the estate will not be bound by the agreement.[33]

[§ 1215] **b. Computation of Interest — (1)** **Interest on advances by representative** see supra § 1207.

24. Brownson v. Baker, 11 La. 409; Reber's Est., 143 Pa. 308, 22 A 880; Mauck's Est., 24 Pa. Dist. 572; Dickinson's Est., 14 Pa. Dist. 4; Nelson v. Christensen, 169 Wis. 373, 172 NW 741.

"Interest was an incident of the debt and until the debt had been paid must continue to run." In re Bebout, 33 PittsbLegJNS (Pa.) 279.

[a] **Claims against insolvent estates** are within the rule. Fiddler's Est., 14 Pa. Dist. 359.

25. Matter of Totten, 137 App. Div. 273, 121 NYS 942; Pursell v. Fry, 19 Hun (N. Y.) 595; In re Merchant, 6 NYS 875; Greenawalt's Est., 9 LancBar (Pa.) 50.

[a] **Claim liquidated by agreement with representative.**—Elder's App., 94 Pa. 461.

26. Parker v. Parker, 33 Ala. 459; Anderson v. Birdsall, 19 La. 441; Newel v. Keith, 11 Vt. 214.

27. McCann v. Bell, 79 Ky. 112; Guill v. Corinth Deposit Bank, 68 SW 870, 24 KyL 482; Jones v. Louisville Sav., etc., Co., 58 SW 534, 22 KyL 570.

[a] **Claims not due.**—The demand required by the statute applies to claims due and bearing interest at the death of decedent or at the time of the appointment of his personal representative, and as to claims that are not due at these dates the statute has no application until they mature. Kentucky Title Co. v. English, 50 SW 968, 20 KyL 2024; Pepper v. Harper, 47 SW 620, 20 KyL 837.

[b] **Where there is no representative** upon whom demand may be made, demand is excused. Tatum v. Gibbs, 41 SW 565, 19 KyL 695.

[c] **Waiver of demand.**—Demand may be waived by the representative where other persons interested in the estate are not prejudiced thereby. Cox v. Higgenbotham, 79 SW 1079, 25 KyL 1057; Botts v. Utley, 12 KyL 555; Croninger v. Marthen, 7 KyL 599 (a request by an executor that creditors should postpone collection of their demands to enable him to pay without a sale of the real estate, accompanied by an assurance that their claims should be paid in full, amounted to a waiver of the demand necessary to the allowance of interest where the executor was the only other creditor of the estate, which was insolvent).

[d] **Partial payment before demand.**—(1) A personal representative by merely making a payment upon a claim before it is verified does not waive his right to require, as a condition precedent to a recovery of interest accruing after the debtor's death, that the claim be verified and the payment of the balance due thereon be demanded within a year from the time of his qualification. Jett v. Cockrill, 85 Ky. 348, 3 SW 422, 9 KyL 16. (2) Nor does a part payment of interest operate as a waiver of demand. Davis v. Banta, 4 KyL 368.

[e] **Reference to commissioner.**—Where a representative within one year from his appointment files a petition in equity for a settlement of the estate of his decedent, and the case is referred to a commissioner to audit claims against the estate, a demand by a creditor is not necessary in order to entitle him to interest. Richardson v. Banta, 23 SW 350, 15 KyL 348; Hamilton v. Tarlton, 3 KyL 471.

[f] **The statute authorizes the same proceedings against a curator** for the collection of a debt due from decedent as are authorized to be had against an executor or administrator. Moran v. Hammer, 58 SW 988, 22 KyL 831.

28. Cal.—Pico v. Stevens, 18 Cal. 376.

La.—Yarborough's Succ., 16 La. Ann. 258.

Mich.—Shepherd v. Shepherd, 108 Mich. 82, 65 NW 580.

Mo.—Harwood v. Larramore, 50 Mo. 414; Jackson v. Byrne, 130 App. Div. 364, 114 NYS 888. Contra Pursell v. Fry, 19 Hun 595.

Wash.—Pelton v. Smith, 50 Wash. 459, 97 P 460.

[a] **Demand of administrator pendente lite.**—A creditor whose claim is allowed is entitled to interest thereon from the date of the demand of payment of the administrator pendente lite. Ryans v. Hospes, 167 Mo. 342, 67 SW 285.

[b] **A claim established by judgment against the estate** on a quantum meruit for services rendered bears interest from the time of presentation. White v. Deering, (Cal. A.) 179 P 401.

[c] **Interest may be recovered, although not called for in the statement** of the claim presented to the administrator. Harwood v. Larramore, 50 Mo. 414. Contra Aguirre v. Packard, 14 Cal. 171, 73 AmD 645.

29. Cline v. Waters, 90 SW 231, 28 KyL 679.

30. White v. Deering, (Cal. A.) 179 P 401; Jackson v. Byrne, 130 App. Div. 364, 114 NYS 888; Tyndall v. Van Auken, 106 App. Div. 238, 94 NYS 269.

[a] **If an administrator rejects** (1) a legal claim and claimant afterward sues and recovers a judgment thereon, he is entitled to interest on his claim from the time of its presentation to the administrator. Kennedy's Est., 94 Cal. 22, 29 P 412; Pico v. Stevens, 18 Cal. 376. See also Nelson v. Christensen, 169 Wis 373, 172 NW 741 (from date of disallowance). (2) But the probate court cannot, in ordering the judgment to be paid, allow such interest, where the same is not included in the judgment recovered, since the probate court can base its order only on the transcript of the judgment. Kennedy's Est., 94 Cal. 22, 29 P 412.

31. Beatty v. Snouffer, 164 Iowa 746, 146 NW 844; Mowry v. Peck, 2 R. I. 60. See also Wallace's Est., 13 Pa. Dist. 155 (where the representative was allowed interest paid on a claim which had been compromised, although interest was not specificially awarded by the auditor). And see cases infra next note. But compare In re Selby, Myr. Prob. (Cal.) 125 (the allowance of a claim by the executor and the probate judge is not a judgment of a court, so as to bear interest until the claim has passed the final accounting and settlement and been ordered paid).

[a] **The report of commissioners upon the estate of a deceased insolvent** is in the nature of a judgment ascertaining the sums which were due from the decedent at the time of his death, and from and after that time interest is allowable on such claims as upon a judgment. Mowry v. Peck, 2 R. I. 260. But see Bowers v. Hammond, 139 Mass. 360, 31 NE 729 (claim continues to bear interest at contract rate only).

[b] **Allowance set aside but claim subsequently established.**—A claim for a balance owing by decedent should draw interest at the legal rate from the date of its allowance, which was with the approval of the administratrix, even though the allowance was, on the petition of an interested party, subsequently set aside, the claim being later established. Beatty v. Snouffer, 164 Iowa 746, 146 NW 844.

[c] **When balance ascertained.**—Under a statute providing that interest shall run on an account after the balance is ascertained, a claim for funeral expenses bears interest after its allowance. In re Cummins, 143 Cal. 525, 77 P 479.

32. In re Cummins, 143 Cal 525, 77 P 479; Glenn's Est., 74 Cal. 567, 16 P 396; Wheeler v. Dawson, 63 Ill. 54; Wainwright's Est., 13 Phila. (Pa.) 336; Finley v. Carothers, 9 Tex. 517, 60 AmD 179.

33. Fairfield v. Bonner, 20 S. C. L. 468; Pinckney v. Singleton, 20 S. C. L. 343. See also Staples v. Staples, 85 Va. 76, 7 SE 199 (where a note made by an executor for the amount of the principal and accrued interest of a debt due by the estate was allowed to run two years, when the interest then due was added and the whole embraced in a judgment confessed by the executor, the estate should be charged only with the principal sum originally due and simple interest at legal rate, the executor having no authority to bind the estate to pay compound interest).

Contracts of representative generally see supra § 483.

Period of Computation. Where claims are paid in the ordinary course of administration, interest is computed up to the time of payment.[34] It has been held that on a sale of land under order of court for the payment of debts, interest on the debts payable out of the proceeds of the sale should be computed only up to the day of sale[35] or confirmation of the sale,[36] although creditors are entitled to their proportionate shares of the interest earned by the fund arising from the sale;[37] but it has also been considered that the rule of computing interest up to the date of payment applies in such case.[38] Where an executrix recovered judgment on a vendor's lien note and bought in the land on execution sale, and the debt evidenced by the note in fact belonged to a person other than testator, but the true creditor had had it made out to testator to secure a debt, it was held that the executrix, in accounting to the true debtor for the money due him, should pay interest from the date when she purchased the land.[39] On a decree against a decedent's estate to recover property, or the avails thereof, fraudulently obtained from her husband under continued concealment of a former and existing marriage, an award of interest from the date of her death was sufficiently favorable to the estate.[40]

Judgment against the representative. A statute providing that the amount of interest to be paid on a judgment against an executor or administrator shall be determined by the orphans' court, changes, so far as personal representatives are concerned, the ordinary rule that judgments carry interest from their rendition.[41]

[§ 1216] **(2) Rate.** Interest on claims against estates under administration is usually allowed at the contract rate,[42] or, in the absence of contract, at the legal rate.[43] In some jurisdictions, however, statutes prescribe a different rule as to insolvent estates,[44] or limit the interest allowable against decedent's estate to a smaller rate than would be permitted against living persons.[45]

Directions in the will for the payment of interest on a debt of the testator at a rate in excess of the legal rate entitle the creditor to interest at that rate as against the legatees.[46]

[§ 1217] **(3) Compound Interest.** Compound interest is not generally allowed in the absence of a special agreement to pay the same.[47]

[§ 1218] **c. Preference of Interest on Preferred Claims.** It has been held that the interest accruing on a preferred claim, being a mere incident of the claim, is also preferred,[48] but there is also

34. Conn.—Green v. Abbot, 2 Root 242.

La.—Brownson v. Baker, 11 La. 409; Andrews v. Withers, 6 La. 360.

Mass.—In re Richmond, 2 Pick. 567.

N. Y.—Matter of Saunders, 4 Misc. 28, 23 NYS 829, Pow. Surr. 336.

Pa.—Wissel's App., 4 Pennyp. 236.

[a] **Where the estate is insolvent** interest can be computed only to decedent's death. Keebler's Est., 4 Pa. Dist. 346.

[b] **The homologation of a provisional account,** filed by an administrator, in which he seeks authority to pay out of the funds of the succession the interest-bearing debts therein recognized up to the date of the filing of the account, does not cut off a creditor from demanding interest accruing on his claim after the filing of the account up to the date of the actual payment thereof. Howell's Succ., 121 La. 955, 46 S 933.

[c] **Debt due representative.**—(1) Whenever an administrator is in funds, a debt due to himself must be regarded as paid, and can no longer draw interest. Sebring v. Keith, 20 S. C. L. 340. (2) But a personal representative cannot be prevented from charging interest up to the time of final settlement, where he has no right to retain any part of the assets in payment of his claim until it has been allowed by the surrogate on final accounting. Matter of Sanders, 4 Misc. 28, 23 NYS 829, Pow. Surr. 336 [aff sub nom. Matter of Petrie, 82 Hun 62, 31 NYS 65]. (3) The personal representative cannot, however, prolong the running of interest on his claim by delaying the settlement of the estate, and he will be allowed interest only for the period within which by the exercise of due diligence he might have settled the estate. In re Richmond, 2 Pick. (Mass.) 567.

[d] **Secured claims.**—Where a debt due to the personal representative is secured and he realizes from his security a sum sufficient to pay his debt, he is not entitled to interest thereafter. Matter of Babcock, 9 NYS 554, 2 Conn. Surr. 82; Rainow's Est., 4 Kulp (Pa.) 153.

35. Ellicott v. Ellicott, 6 Gill & J. (Md.) 35; Ketran's Est., 24 Pa. Dist. 1087.

36. Stultzfoos' App., 3 Penr. & W. (Pa.) 265; O'Hara's Est., 4 Leg Gaz (Pa.) 130.

[a] **Interest on liens.**—(1) On a sale of land of an insolvent estate for the payment of debts, interest on liens on the property sold ceases on the day of the confirmation of the sale. Yeatman's App., 102 Pa. 297 [rev 1 Chest. Co. 508]; Ramsey's App., 4 Watts (Pa.) 71; Stultzfoos' App., 3 Penr. & W. (Pa.) 265; Sollenberger's Est., 8 Pa. Dist. 626; Smith's Est., 2 Chest. Co. (Pa.) 212; Lang's Est., 1 Chest. Co. (Pa.) 287; Dutton v. Horne, 1 Del. Co. (Pa.) 33; In re O'Hara, 4 LegGaz (Pa.) 130. (2) Nor will interest accruing after the confirmation of the sale be allowed to the lien creditor as a claim payable from the personal estate. In re Wilson, 1 Chest. Co. (Pa.) 60. (3) But where the estate is solvent and the sale is made on motion of the personal representative for the purpose of paying debts and legacies, interest should be allowed for the time elapsing between the day of confirmation and the day of payment. Yeatman's App., 102 Pa. 297 [rev 1 Chest. Co. 508, and dist Ramsey's App., 4 Watts (Pa.) 71].

37. Ellicott v. Ellicott, 6 Gill & J. (Md.) 35; Campbell's Est., 22 Pa. Super. 430; Lang's Est., 1 Chest. Co. (Pa.) 287.

38. Zeigler v. Creditors, 49 La. Ann. 144, 21 S 666; Brownson v. Baker, 11 La. 409.

39. Laughlin v. Boughner, 84 SW 300, 27 KyL 19.

40. Batty v. Greene, 206 Mass. 561, 92 NE 715, 138 AmSR 407.

41. In re Skeer, 253 Pa. 497, 98 A 703.

42. Desorme's Succ., 10 Rob. (La.) 474; Bowers v. Hammond, 139 Mass. 360, 31 NE 729.

[a] **A statute limiting** the rate of interest on claims after allowance to that allowed on judgments applies only to claims against insolvent estates. Richardson v. Diss, 127 Cal. 58, 59 P 197.

[b] **The allowance of a claim** against an estate represented to be insolvent but which subsequently proves to be solvent, by the commissions appointed to audit and allow claims against insolvent estates, is not a judgment, and the claim thus allowed continues to bear interest at the rate specified in the original contract and not at the rate allowed by statute on judgments. Bowers v. Hammond, 139 Mass. 360, 31 NE 729.

43. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Desorme's Succ., 10 Rob. (La.) 474; Gillet v. Rachal, 9 Rob. (La.) 276; Radcliffe v. Chaves, 15 N. M. 258, 110 P 699.

44. Richardson v. Diss, 127 Cal. 58, 59 P 197; Ellis v. Polhemus, 27 Cal. 350.

[a] **A mortgage debt** is within the provisions of the statute which allows only ten per cent interest on claims against an insolvent estate after the date of issuance of letters of administration, although the rate of interest specified in the mortgage is more than ten per cent. Ellis v. Polhemus, 27 Cal. 350.

45. Snelling v. Atchison, 13 Ky. Op. 1057.

46. Watson v. McClanahan, 13 Ala. 57.

47. Anderson v. Northrop, 44 Fla. 472, 33 S 419; Desorme's Succ., 10 Rob. (La.) 474; Tillson v. Holloway, 98 Nebr. 509, 153 NW 545; Hosack v. Rogers, 9 Paige (N. Y.) 461.

[a] **Under the right of retainer** an executor has no authority to make a rest in a debt due to himself on the day he took out letters testamentary, so as to charge interest upon the interest then due. Hosack v. Rogers, 9 Paige (N. Y.) 461.

[b] **When allowed.**—A resident of New York devised to his children land situated in a foreign country. The part of the land encumbered by a mortgage was insufficient to pay the mortgage debt. The entire land was sold by the executrix, the widow, and the creditor was paid, and a balance was received by the executrix and by her executor and used in the business of testator conducted by the executrix and her executor, as desired by testator and the executrix. The sale by the executrix was made in good faith to protect the interests of the children. She had used her own money in the business which had become profitable. It was held that a judgment in favor of the children against the estate of the executrix for the amount of the balance, with simple interest on the amount received by the executrix, and with compound interest with annual rests on the amount received by her executor, was a proper disposition of the rights of the parties. Farrell v. Farrell, 142 App. Div. 605, 127 NYS 764 [rev on other grounds 205 N. Y. 450, 98 NE 857].

48. Eddy v. Peo., 187 Ill. 304, 58 NE 297 [rev 88 Ill. A. 265]. See also Shultz's App., 11 Serg. & R. (Pa.) 182 (where the estate was insufficient

authority for the view that a statutory preference extends to the claim only, and the interest thereon is not preferred but must share ratably with unpreferred claims.[49]

[§ 1219] **6. Time of Payment.** It is the duty of a personal representative to pay off claims against an estate as speedily as possible, consistent with the rights and interests of all the parties interested;[50] and he should not retain amounts that he has collected for the estate and allow interest to accumulate on claims.[51] Payment may, however, properly be suspended pending litigation over a claim of the estate against the creditor.[52] As a general rule a claim against the estate is not payable by his personal representative until after the expiration of the period allowed creditors for presenting their claims has expired,[53] and until such claim has been established by a court of competent jurisdiction or its payment duly authorized by the probate court.[54] And it has been held that the probate court has no power to order the payment of a debt from the estate until the settlement of the administrator's account.[55] It is sometimes provided by statute that the estate must be settled and claims paid before the expiration of a certain time.[56] Under the general authority conferred upon a personal representative to preserve the estate, he has the power to make a valid contract with a creditor extending the time of payment of a claim owing by the estate, provided that the claim is not already barred by the statute of nonclaim and that the contract is for the benefit of the estate.[57] If the payment of debts is unreasonably delayed while the estate is solvent, and afterward it becomes insolvent, the personal representative is liable to the creditors.[58]

Testamentary provisions postponing the time of settlement and distribution cannot postpone the right of creditors to compel payment of their demands.[59]

[§ 1220] **7. Mode and Sufficiency of Payment —a. In General.** What facts are sufficient to constitute the payment of a claim depends upon the circumstances of the particular case,[60] taking into consideration the intent of the parties,[61] as well as the other elements necessary to constitute a valid payment generally.[62] An award by the probate court to a creditor of the amount of his claim out of funds adjudged to be in the hands of a personal representative is not the equivalent in law of the actual payment of the claim,[63] and if such creditor, by reason of the personal representative's insolvency, fails to receive payment of the sum awarded to him, he is entitled to come in and share in a subsequently raised fund of the estate.[64]

[§ 1221] **b. Medium of Payment.** The court may require a personal representative to pay a debt in the kind of money which he has received as property of the estate.[65] Although a personal represen-

to pay both specialty and simple contract debts, the specialty creditors were entitled to interest up to the time of the apportionment of the assets).

49. U. S. Fidelity, etc., Co. v. Carnegie Trust Co., 161 App. Div. 435, 146 NYS 804 [aff 213 N. Y. 629 mem, 107 NE 1087 mem]. See also Vandegriff's Est., 3 Pa. Dist. 421, 422 (where an auditor held that interest on rent was not entitled to share in the preference accorded to rent, and on exceptions to his report the court said: "The court has no doubt upon any question raised by the exceptions save one, namely, the question of interest on the rent preferred, and while we have been unable to find any authority for the allowance of interest as a portion of a preferred claim for rent, we are not entirely clear on this point. We are not convinced that the auditor was wrong in his decision").

50. Cal.—In re Magorty, 169 Cal. 163, 146 P 430.

Iowa.—Hart v. Jewett, 17 Iowa 234.

Ky.—Pope v. Wickliffe, 7 T. B. Mon. 412.

La.—Union Bank v. McDonough, 7 La. Ann. 231.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. Y.—Matter of Miner, 39 Misc. 605, 80 NYS 643, 3 Mills Surr. 377.

S. C.—Farys v. Farys, 5 S. C. Eq. 261.

Eng.—Nicholls v. Judson, 2 Atk. 300, 26 Reprint 583.

Ont.—McPhadden v. Bacon, 13 Grant Ch. (U. C.) 591.

[a] **A statute prohibiting actions** against an executor within six months after probate of the will does not prohibit payment of debts within such time. Pope v. Wickliffe, 7 T. B. Mon. (Ky.) 412.

51. Hoss' Succ., 42 La. Ann. 1022, 8 S 833.

52. Teaf's Est., 7 Pa. Co. 463.

53. Lewis v. Houston, 7 Blackf. (Ind.) 335; Harmon v. Sweet, 221 Mass. 587, 109 NE 942; Dullard v. Hardy, 47 Mo. 403; Nichols v. Chapman, 9 Wend. (N. Y.) 452.

54. See infra § 1229.

55. In re Spanier, 120 Cal. 698, 53 P 357; In re Hope, 106 Cal. 153, 39 P 523.

56. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449; Pratt v. Houghtaling, 45 Mich. 457, 8 NW 72 (where a widow, after being made executrix, remarries and an administrator de bonis non is appointed, the interim between her disqualification and the new appointment may be added to the four years and six months allowed by law for the payment of claims against the estate).

[a] **Presumption as to claims paid after time limited.**—Where claims were paid after the time for payment, the presumption is that the delay was at the request of the executor, and he is not liable as for an illegal payment. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Duration and termination of authority of representative see supra § 251 et seq.

57. North v. Walker, 66 Mo. 453 [aff 2 Mo. A. 174]; Smarr v. McMaster, 35 Mo. 349.

58. Smith v. Slaughter, 3 Heisk. (Tenn.) 565.

59. Miller v. Miller, 172 Ky. 519, 189 SW 417.

60. See cases infra this section.

61. Golding v. McCall, 5 Ga. A. 545, 63 SE 706; Fett's Est., 39 Pa. Super. 246; Waddell v. Waddell, (Tenn. Ch. A.) 42 SW 46.

[a] **Thus** where an heir makes a conveyance of certain property coming to him from the estate to one having a claim against the estate, which conveyance is not intended or accepted as a payment of such claim, the estate is not discharged. Waddell v. Waddell, (Tenn. Ch. A.) 42 SW 46.

[b] **Advance to be refunded.**—Where an administrator advanced to a creditor of the estate the amount of his debt, the creditor agreeing to refund the amount to the administrator upon the final settlement of the estate, the advance was not a payment by the administrator of the debt, but was simply a loan to be refunded on the final settlement of the estate. Golding v. McCall, 5 Ga. A. 545, 63 SE 706.

62. See Payment [30 Cyc 1173].

[a] **Rule applied.** — It appeared that a trust company issued a certificate of deposit payable one year after date, bearing interest, in which it was recited that the depositor had deposited a stated sum of money, and that "the above deposit is not subject to check, and is transferable only on the books of the company on the return of this certificate." The depositor owed his wife the exact sum stated in the certificate, being the proceeds of land which he had sold for her. After the depositor's death, his widow, who was one of his executors, presented the certificate on the day it became due, and received a new certificate in which it was recited that she, one of the executors of decedent, had deposited the same sum of money as the amount of the old certificate, payable one year afterward to herself on return of the certificate. She indorsed the certificate in her own name as one of the executors. In each of the five succeeding years she returned the certificate delivered to her in the preceding year, and received a new one in the same form. On the certificates after the first one she simply indorsed them with her own name, excepting in one instance. A witness testified that at the time the old certificate was surrendered the widow directed the officer of the trust company "to fix it in her name," and gave to him as a reason "so that she could get it." This witness was an executor of the widow, and did not include the last certificate in the inventory of her estate. It was held that the facts shown were sufficient to sustain a finding that the widow had appropriated all of the assets to satisfy the debt due to her. Fett's Est., 39 Pa. Super. 246.

63. Pomeroy's App., 127 Pa. 492, 18 A 4, 4 LRA 367.

64. Pomeroy's App., 127 Pa. 492, 18 A 4, 4 LRA 367.

65. Magraw v. McGlynn, 26 Cal. 420. See also In re Dem, 39 Cal. 70 (where executors selling property of the estate for the payment of debts made the sale for and received pay-

tative's settlement in depreciated currency is set aside as null and void, yet such creditors as received depreciated currency willingly in discharge of their debts will not be allowed to revive their claims against the estate, and, the estate being insolvent, the pro rata dividends to which such creditors would, if paid in legal currency, be entitled are to be allowed to the personal representative as credits.[66] Where a personal representative, out of depreciated currency collected by him in the course of his administration, pays specie debts of his decedent, in the settlement of his account he should be credited with the debts so paid at their nominal amount;[67] but when he advances his own depreciated currency in payment of debts he must account to the estate for the difference between the nominal and real value of such currency.[68] It is no objection that certain payments and allowances were not met and discharged as they accrued, in depreciated money, but were allowed against the estate on a basis of money current at the time of the settlement, when it is shown that the estate benefited thereby.[69] The rule of law that a creditor is paid his debt when he becomes executor of his debtor's estate and as such receives assets applicable to such debt does not apply when the assets so received are depreciated currency,[70] unless the creditor is willing to receive it in payment.[71]

[§ 1222] **c. Giving of Note by Personal Representative.** A promissory note given by a personal representative for a debt of his decedent is neither a payment nor an extinguishment of such debt,[72] unless it is shown that the parties intended that it should operate as such.[73]

[§ 1223] **d. Assignment of Note Due Decedent.** A personal representative has authority to assign bills and notes due to decedent in satisfaction of debts due by him,[74] but he has no power by assignment or otherwise to appropriate them to the payment of the debt of one creditor to the exclusion of others of equal or higher rank.[75] If a creditor accepts notes and obligations in favor of an estate as collateral security to collect and apply to his debt and fails to collect or to show good reason for his failure, he will be charged with the amount of such notes and obligations, and if this amount is equal to his claim against the estate such claim is extinguished.[76]

[§ 1224] **e. Transfer of Assets—(1) In General.** An agreement under which a creditor who has purchased certain of decedent's property pays for it by giving credit upon an account which he claims against the estate has been held binding upon both the representative and the creditor,[77] and it has been held that creditors, who have obtained the possession of any property through the transfer thereof in their favor by the administrator of the estate, must be considered as the legitimate owners of the property ceded or transferred, so long as the cession or transfer of the same is not annulled by an express judicial declaration made in a proper action brought on the ground of some vice or defect tending to nullify the same.[78] So also where executors were given full power to manage the estate "as fully and completely as if they were owners absolutely and in fee simple" and to do "all and everything else which in their opinion may be proper to do for the benefit of said estate," and an agreement was entered into between the executors, legatees, and creditors, by which certain property was to be turned over to a creditor, and this agreement was held valid and the executors borrowed money under it to pay other creditors, and it appeared that all other outstanding debts had been paid and that the agreement was beneficial to the estate, the creditor who received the property could not object that no merchantable title could be given to him until a final settlement and that the executors had no power under the will to enter into the agreement.[79] But it has also been held that a power to sell does not include a power to give in payment,[80] and that, until the rendition of an account and the classification of the debts of the estate, the personal representative cannot, even under an order of the court, transfer an asset of the estate to a creditor in payment of his debt.[81]

[§ 1225] **(2) Rights of Creditors When Assets Improperly Transferred.** Creditors may follow and recover assets of the estate which have been improperly transferred by the personal representative,[82] where they are acquired from him by persons with knowledge of his trust and of his disregard of its obligation.[83]

[§ 1226] **f. Set-Off.**[84] Any debt or demand which constitutes a legal set-off for or against a party in his lifetime, if still subsisting at the time of his death, will constitute a good set-off for or against his personal representative;[85] and a personal representative should not pay a debt due by the estate which he represents to a person who is himself indebted to the estate, without first having set off the debt due to the estate against that due

ment in legal tender notes, it was error for the probate court to order payment in gold coin).

66. Trammel v. Philleo, 33 Tex. 395.

67. Moss v. Morrman, 24 Gratt. (65 Va.) 97.

68. Caruthers v. Corbin, 38 Ga. 75.

69. Cummings v. Bradley, 57 Ala. 224.

70. Crawford v. Crawford, 17 S. C. 521.

71. Crawford v. Crawford, 17 S. C. 521.

72. Taylor v. Perry, 48 Ala. 240; Woods v. Ridley, 27 Miss. 119; Douglas v. Fraser, 7 S. C. Eq. 105; Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

[a] **Rule applies to note signed in representative capacity.**—Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

[b] **The creditor may at his election** hold the executor primarily liable or proceed by bill against the estate. Woods v. Ridley, 27 Miss. 119.

73. Glenn v. Smith, 2 Gill & J. (Md.) 493, 20 AmD 452; Yerger v. Foote, 48 Miss. 62; Glenn v. Burrows, 37 Hun (N. Y.) 602; James v. Hackley, 16 Johns. (N. Y.) 273; McClure v. Askew, 26 S. C. Eq. 162.

74. Marshall County v. Hana, 57 Iowa 372, 10 NW 745.

[a] **Assignment of notes not belonging to decedent.**—Where negotiable notes were received by a feme covert for certain property which she had previously purchased of her husband, on whose death such notes were not claimed by his administrators, nor included in their account, but were given by the widow in part payment to a creditor of herself and husband, with a stipulation that the claim was to be paid out of future funds pro rata, it was held that the auditors could not add the amount of such notes to the account and then deduct it from the aforesaid creditor's dividend, but it must be deducted from said creditor's claim, and the residue paid pro rata. In re Leech, 27 Pa. 318.

75. Whittaker v. Wright, 35 Ark. 511; Payne v. Flournoy, 29 Ark. 500.

76. Lile's Succ., 24 La. Ann. 550.

77. Neely v. Blair, 157 Pa. 417, 27 A 777.

78. Ortiga v. Enage, 18 Philippine 345.

79. In re Worthington, 5 OhS&CP 524, 5 OhNP 63.

80. Durham v. Oddie, 1 Mart. N. S. (La.) 444, 14 AmD 190.

81. Snider v. Cutliff, 30 La. Ann. 1195.

82. Russell v. Walker, 9 S. C. Eq. 229.

83. Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955.

84. **With respect to claims of representative** see supra § 1204.

85. Severson v. Langland, (Iowa) 78 NW 206; Ely v. Com., 5 Dana (Ky.) 398; Austin v. Homes, 23 N. C. 399.

[a] **Cancellation of creditors' notes.**—A claim against an estate may be paid by the cancellation of notes due by the creditor to the estate. Severson v. Langland, (Iowa) 78 NW 206.

by the estate,[86] although his failure to insist on the set-off does not bar the right of the estate with respect to the claim which should have been set off.[87] In determining what are proper set-offs between personal representatives and claimants against the estate, the rule requiring mutuality of debts or demands has been applied;[88] but it has also been held that a personal representative may accept claims against the estate in discharge of claims accruing after decedent's death, and is entitled to set off the one against the other,[89] and that an administrator who has sold property of decedent to a creditor of the estate may set off the price against the pro rata dividend of such creditor upon the distribution of the funds of the estate.[90]

A legacy to a creditor cannot be set off against his claim where it does not appear that the legacy was given in satisfaction of the debt.[91]

[§ 1227] **g. Compromise.**[92] As a general rule a personal representative may effect the settlement of claims against the estate by compromising them, and should be allowed any sums paid out by him in so doing if he has acted in good faith and with the care and judgment of a man of ordinary prudence and sagacity.[93] But a compromise by the personal representative of a claim due by the estate will not be enforced in equity unless it is shown to be to the interest of the estate and a proper one for such representative to make.[94] Under some statutes authority from the court is necessary to authorize the representative to make a compromise,[95] or the court is given authority to authorize such action on the part of the representative.[96]

[§ 1228] **8. Application of Payments.**[97] The doctrine that, where a debtor makes a payment, he may, if he chooses, direct its application, that if he does not direct, the creditor may elect as to the application, and that if a payment has been made and neither party has elected as to the application, the court will direct the application to those debts which have the poorest security, applies when a payment is made by a personal representative to a creditor of his decedent.[98] Payments made by the executor of an insolvent estate go in reduction of the principal and interest then due, and where such payments exceed the interest due at their date, the excess must be applied on the principal.[99] Where a payment is objected to because one of the items is outlawed, but it appears that other items of the claim exceed the payment for which claimant receipted in full, the entire payment may be applied on the items justly due.[1]

[§ 1229] **9. Payment before Allowance or Order.**[2] Ordinarily, the personal representative is not authorized to pay a claim against the estate until it has been allowed,[3] and under some statutes he should

86. Green v. Fagan, 15 Ala. 335; Hyman v. Rollins, 70 Miss. 412, 12 S 339; Tell City Furniture Co. v. Stiles, 60 Miss. 849; Moorhead's App., 32 Pa. 297.

87. Morton v. Bailey, 2 Ill. 213, 27 AmD 767.

88. Ark.—Bishop v. Dillard, 49 Ark. 285, 5 SW 341; Bizzell v. Stone, 12 Ark. 378.

Ga.—Golding v. McCall, 5 Ga. A. 545, 63 SE 706.

N. H.—Mathewson v. Strafford Bank, 45 N. H. 104.

N. Y.—Dudley v. Griswold, 2 Bradf. Surr. 24.

Pa.—Carter's App., 10 Pa. 144.

[a] **Thus** (1) an executor cannot set off a debt due him individually against a demand upon him as executor. Dudley v. Griswold, 2 Bradf. Surr. (N. Y.) 24. (2) An executor sued in his official capacity may set off only those claims which his testator might have pleaded and which are due to his estate. Carter's App., 10 Pa. 114; Cotton's Est., 6 Pa. Dist. 205.

89. Dickenson v. McDermott, 13 Tex. 248.

90. Grier's App., 25 Pa. 352.

91. Morton v. Daugherty, 12 Ky. Op. 116.

92. Compromise of claims in favor of estate see supra §§ 451–456.

93. Conn.—Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

Ga.—Home Mixture Guano Co. v. Woolfolk, 148 Ga. 567, 97 SE 637.

Ind.—Fender v. Phillips, 59 Ind. A. 85, 108 NE 971, 974 [cit Cyc].

Ky.—Petry v. Petry, 142 Ky. 564, 134 SW 922.

Mass.—Cook v. Richardson, 178 Mass. 125, 59 NE 675; Newell v. West, 149 Mass. 520, 21 NE 954.

N. J.—Meeker v. Vanderveer, 15 N. J. L. 392; Heisler v. Sharp, 44 N. J. Eq. 167, 14 A 624 [aff 45 N. J. Eq. 367 mem, 19 A 621 mem]; Rogers v. Hand, 39 N. J. Eq. 270.

N. Y.—Scully v. McGrath, 201 N. Y. 61, 94 NE 195 [rev 136 App. Div. 905, 120 NYS 1145]; Matter of Baruth, 62 Misc. 596, 116 NYS 1125, 7 Mills Surr. 129.

Oh.—In re Worthington, 5 OhS&CP 524, 5 OhNP 63.

Pa.—Bruner's App., 57 Pa. 46.

S. D.—Norman v. Miller, 40 S. D. 399, 167 NW 391.

Utah.—Dunn v. Wallingford, 47 Utah 491, 155 P 347.

Va.—Lake v. Pattie, 116 Va. 130, 81 SE 78.

Ont.—Re Robbins, 23 Grant Ch. (U. C.) 162.

"It is the policy of the law and duty of the courts, to prevent vexatious litigation involving decedents' estates and to protect such estates from the payment of unnecessary costs." Petry v. Petry, 142 Ky. 564, 572, 134 SW 922.

[a] **Assessments of a stockholder's liability** against an estate of a deceased person ordered by a court, one accruing within the time allowed for presenting claims against the estate and one after that time, were "doubtful or disputed claims" within a statute authorizing the compromise of such claims. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

[b] **A transfer of assets** of the estate by an administrator in his official capacity by way of compromise of a pending suit against him in his representative capacity is a violation of a statute prohibiting a private sale by executors or administrators. Bogan v. Camp, 30 Ala. 276.

[c] **Right to complete compromise made by decedent.**—If a debtor has compromised with his creditors, payments to be made at a future day, and the debtor dies before all the payments are made, his personal representatives have the right to complete the payments contemplated by the compromise and release his estate from the payment of the debts in full, in conformity with the terms of the compromise. Matter of Leslie, 10 Daly (N. Y.) 76.

[d] **Estoppel.**—An executor who, for a sufficient consideration, has entered into a compromise agreement with a claimant against the estate, is estopped to repudiate anything conceded thereby. Tod v. Terry, 26 Mo. A. 598.

[e] **Contrary view.**—As an administrator has no power to settle a demand against the estate of his intestate, a claimant is not bound by a settlement entered into with the administrator. In re Hensley, 121 Mo. A. 695, 97 SW 645.

94. Hazlett v. Burge, 22 Iowa 531; Pullin v. Smith, 106 Ky. 418, 50 SW 833, 20 KyL 1993; Hunt v. Moore, 2 Pa. 105.

95. Lucich v. Medin, 3 Nev. 93, 93 AmD 376.

96. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935; Badders v. O'Brien, 114 Md. 451, 79 A 917; Matter of Gilman, 92 App. Div. 462, 87 NYS 128 [aff 178 N. Y. 606 mem, 70 NE 1103 mem]; Matter of Bronson, 69 App. Div. 487, 74 NYS 1052.

[a] **In the absence of statute** the surrogate has no authority to authorize the compromise of a claim against the estate. Matter of Farley, 15 NYSt 727.

[b] **Where an administratrix had made an illegal private transfer** of a policy on her intestate's life, it was not necessary for her to set aside an order approving the transfer in order that she might obtain an order from the ordinary allowing her to compromise the claim on the policy as a disputed and doubtful claim. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935.

97. See generally Payment [30 Cyc 1227].

98. Backhouse v. Patten, 5 Pet. (U. S.) 160, 8 L. ed. 82; Cresson's Est., 3 Pa. Co. 419; Putnam v. Russell, 17 Vt. 54, 42 AmD 478.

99. Lowentraut v. Jackson, (N. J.) 81 A 743.

1. Matter of Milligan, 112 App. Div. 373, 98 NYS 480.

2. Allowance of claims see supra §§ 1036–1077.

3. Ill.—Walker v. Diehl, 79 Ill. 473.

Ind.—Ditton v. Hart, 175 Ind. 585, 95 NE 119; Wysong v. Nealis, 13 Ind. A. 165, 41 NE 388.

Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.

Mo.—Dockery v. Sparks, 192 SW 86.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. Y.—Matter of Burr, 48 Misc. 56, 96 NYS 225, 5 Mills Surr. 67 [rev on other grounds 118 App. Div. 482, 104 NYS 29].

N. D.—Eltcn v. Lamb, 33 N. D. 388, 157 NW 288.

Tex.—Lockhart v. White, 18 Tex. 102.

Vt.—Clark v. Clark, 21 Vt. 490.

[a] **Person appointed administra-**

not pay a claim until its payment is expressly ordered by the court.[4] If he pays any claim whatever without due authority, he acts at his peril,[5] but he will generally be credited on his accounting with any claim paid by him, even without authority, upon his showing that it was a proper claim against the estate.[6]

[§ 1230] **10. Improper Payments**[7]**—a. In General.** A personal representative will not as a general rule be allowed credit for the payment of a claim which is not a proper charge upon the estate, and if he pays such a claim out of assets of the estate he commits a devastavit.[8] But this rule is not applied with such strictness as to deny credit

tor after paying debts.—One appointed administrator after taking charge of an estate and paying debts of decedent is not entitled over the objection of the heirs to credit in the final settlement for the debts paid. Dockery v. Sparks, 170 Mo. A. 651, 157 SW 365.

[b] **However,** (1) where testator owed an indebtedness secured by bonds, the executor was justified in paying the same, without allowance by the commissioner, in order to obtain the bonds to sell for the benefit of the estate. Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759. (2) So also under a statute providing that, whenever any will shall empower executors as to the payment of debts, the directions of the will shall be followed, and under the general principles applicable to express trusts, the statute of limitations is no bar to the payment of unprobated claims in carrying out a will creating an express trust for the payment of debts. Gordon v. McDougall, 84 Miss. 715, 37 S 298, 5 LRANS 355.

4. Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 228, 131 SW 949 [cit Cyc]; Whittaker v. Wright, 35 Ark. 511; Payne v. Flournoy, 29 Ark. 500.

Cal.—In re Spanier, 120 Cal. 698, 53 P 357; In re Fernandez, 119 Cal. 579, 51 P 851; In re Titcomb, Myr. Prob. 55.

Kan.—Young v. Scott, 59 Kan. 621, 54 P 670.

La.—Price's Succ., 35 La. Ann. 905; Lobit v. Castille, 14 La. Ann. 779; Beatty v. McCleod, 11 La. Ann. 76; Kenner v. Duncan, 3 Mart. N. S. 563.

Oh.—National Surety Co. v. Haughton, 32 Oh. Cir. Ct. 138.

[a] **Duty of court to order payment.**—Where a tableau of distribution, filed by the executor, has been advertised and published in the manner required by law, after the expiration of the delay given by such notice, if no opposition is made the law makes it the duty of the judge to grant an order authorizing the executor to pay the creditors according to his tableau. Minvielle's Succ., 12 La. Ann. 72.

[b] **Turning over notes.**—An executor has no power as such before final settlement to turn over to a creditor of the estate notes held by the estate without an order from the probate court, and a person holding notes so turned over does not have a valid title to them upon which to sue the maker. National Surety Co. v. Haughton, 32 Oh. Cir. Ct. 138.

[c] **Executor may pay taxes without order.**—State v. Packard, 250 Mo. 686, 157 SW 598.

5. Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949; Whittaker v. Wright, 35 Ark. 511; Payne v. Flournoy, 29 Ark. 500; McPaxton v. Dickson, 15 Ark. 41.

Cal.—In re Fernandez, 119 Cal. 579, 51 P 851.

Ill.—Walker v. Diehl, 79 Ill. 473; Atherton v. Hughes, 156 Ill. A. 215; Lynch v. Hickey, 13 Ill. A. 139.

Ind.—Ditton v. Hart, 175 Ind. 585, 95 NE 119.

Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.

La.—Price's Succ., 35 La. Ann. 905; Robson's Succ., 19 La. Ann. 97.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

Minn.—Bunnell v. Post, 25 Minn. 376.

Miss.—Roberts v. Rogers, 28 Miss. 152, 61 AmD 542.

Mo.—Dockery v. Sparks, 192 SW 86 [aff 170 Mo. A. 651, 157 SW 365]; Judson v. Bennett, 233 Mo. 607, 136 SW 681; Langston v. Canterbury, 173 Mo. 122, 73 SW 151 [dist McPike v. McPike, 111 Mo. 216, 20 SW 12; Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457]; Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

Nebr.—Huebner v. Sesseman, 38 Nebr. 78, 56 NW 697; Johnson v. Pulver, 1 Nebr. (Unoff.) 290, 95 NW 697.

Oh.—National Surety Co. v. Haughton, 32 Oh. Cir. Ct. 138.

Utah.—In re Hansen, 184 P 197.

"In case the administrator pays a claim that has not been filed and allowed as provided, he does so at his peril." Ditton v. Hart, 175 Ind. 585, 594, 95 NE 119.

[a] **Personal representative must prove claim.**—Where a personal representative pays a claim before it is authorized by the court, he takes the risk of proving it and getting it allowed the same as any other creditor. Millard v. Harris, 119 Ill. 185, 10 NE 387 [aff 17 Ill. A. 512]; Walker v. Diehl, 79 Ill. 473; Roberts v. Rogers, 28 Miss. 152, 61 AmD 542.

[b] **Where a succession is insolvent,** an administrator, on being removed, cannot claim credit for debts of the succession which he has paid without judicial order or authority. Chaffe v. Farmer, 36 La. Ann. 813.

[c] **The enforcement of penalties** for the failure of a representative to obtain a proper order to pay a claim is a matter within the sound discretion of the court. Mt. Carmel Church v. Farrelly, 34 La. Ann. 533.

6. Cal.—In re Fernandez, 119 Cal. 579, 51 P 851; In re Galland, 92 Cal. 293, 28 P 287.

Ill.—Atherton v. Hughes, 156 Ill. A. 215; Hapke v. Peo., 29 Ill. A. 546.

Ind.—Wysong v. Nealis, 13 Ind. A. 165, 41 NE 388.

Iowa.—In re Pennock, 122 Iowa 622, 98 NW 480.

Kan.—Young v. Scott, 59 Kan. 621, 54 P 670.

Ky.—Rothschild v. Wald, 12 KyL 685.

La.—Depas v. Riez, 2 La. Ann. 30; Rouly v. Berard, 11 Rob. 478; Williams' Succ., 7 Rob. 46; McCombs v. Dunbar, 3 La. 517.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

N. D.—Patrick v. Austin, 20 N. D. 261, 127 NW 109.

Pa.—Geiger's Est., 12 WklyNC 439.

Tex.—Lockhart v. White, 18 Tex. 102.

Utah.—In re Hansen, 184 P 197.

Vt.—Richardson v. Merrill, 32 Vt. 27.

Va.—Kee v. Kee, 2 Gratt. (43 Va.) 116.

W. Va.—Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

Wis.—King v. Whiton, 15 Wis. 684.

"Especially would that be true as to heirs and devisees. Such conduct on the part of the executors, however, might present quite an important question as between creditors, and as between themselves and creditors, where the assets are insufficient to pay all obligations of the estate. But where the assets are ample to pay all the legal demands existing against the estate, and none but such have been in fact paid by the executors, then the heirs and devisees are not injured and have no legal grounds for complaint." Judson v. Bennett, 233 Mo. 607, 646, 136 SW 681.

[a] **Thus** where a personal representative makes payments on claims not presented and allowed, he will be allowed credit for payments made before the expiration of the statutory period for filing claims but not for those made thereafter. Hapke v. Peo., 29 Ill. A. 546.

[b] **Payment not voluntary.**—Payment made by an executor or administrator without an order of court, although made at the peril of such executor or administrator, is not a voluntary payment within the meaning of the law, and a third party from whom such executor or administrator seeks to recover, for the benefit of the estate, the amount so paid, cannot successfully interpose the defense of voluntary payment. Haines v. Thompson, 129 Ill. A. 436.

[c] **An executor who has paid an unverified claim** in good faith will be protected if the claim was justly due. Patrick v. Austin, 20 N. D. 261, 127 NW 109.

[d] **Ratification equivalent to prior order.**—Geiger's Est., 12 Wkly NC (Pa.) 439; King v. Whiton, 15 Wis. 684.

[e] **Enforceable claim allowed.**—An administrator is entitled to an allowance in his account for any claim paid by him which could have been enforced against him either in law or at equity. Richardson v. Merrill, 32 Vt. 27.

[f] **Not necessary to await suit.**—When a debt is not barred by statute an administrator may pay it if confessedly just and due, without waiting to be sued, and ordinarily when he has funds it is his duty to do so and to credit himself with such payment in his settlement. Van Winkle v. Blackford, 33 W. Va. 573, 1 SE 26.

[g] **Not necessary to sue for settlement before paying.**—Where an estate is solvent, an administrator is not compelled, under penalty of being charged with a devastavit, to sue for the settlement of the estate before paying debts. Rothschild v. Wald, 12 KyL 685.

7. In case of insolvency see infra § 1797.

8. Ala.—Teague v. Corbitt, 57 Ala. 529; Harris v. Parker, 41 Ala. 604.

Cal.—In re Kennedy, 120 Cal. 458, 52 P 820; Moore's Est., 96 Cal. 522, 31 P 584.

Conn.—Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

Ga.—Sapp v. Williamson, 128 Ga. 743, 58 SE 447.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Leon v. Leon, 56 Ill. A. 153.

Ind.—State v. Lemonds, 29 Ind. 437.

Iowa.—Kintz v. Schoentgen, 84 NW 679.

Ky.—Hannen v. Harrod, 99 SW 976, 30 KyL 976; Story v. Harrison, 11 Ky. Op. 669.

Md.—Fletcher v. Elosser, 126 Md. 244, 94 A 776.

Mass.—Phillips v. Frye, 14 Allen 36; Ripley v. Sampson, 10 Pick. 371.

Miss.—Cole v. Leake, 27 Miss. 767.

Nebr.—Herman v. Beck, 68 Nebr. 566, 94 NW 512.

N. J.—Stark v. Hunton, 3 N. J. Eq. 300.

N. Y.—Poughkeepsie Bank v. Hazbrouck, 6 N. Y. 216; Matter of Saunders, 4 Misc. 28, 23 NYS 829, Pow. Surr. 336; Matter of Peyser, 5 Dem. Surr. 244.

Okl.—Vinson v. Cook, 184 P 97.

Pa.—In re Locher, 219 Pa. 46, 67

for payments made in good faith on claims which the representative, without negligence, supposed to be proper, even though it is subsequently ascertained that payment might have been successfully resisted, or the claim reduced in amount.[9] If a personal representative pays funds of the estate to persons who are not entitled to receive them he will not be protected.[10] Where a paper purporting to be a consent decree in a case in which an administrator was a party was inoperative because the court was without jurisdiction to render it, but operative as an agreement to which the administrator had assented, the heirs of the estate were not concluded by the paper, as an agreement, from calling the administrator to an accounting for any matter therein which charged the estate with claims for which it was not chargeable, or which provided for a distribution of the assets of the estate in any manner other than provided by law.[11]

A testamentary direction as to the amounts to be paid to certain creditors does not render payments in excess of such amounts improper where it appears that the amounts actually paid were justly due.[12]

Persons who receive money from an administrator in payment of supposed claims against the estate can be held guilty of a tort in receiving the money only in case of an actual fraudulent intent to appropriate moneys of the estate to a purpose which they know, or as reasonable men ought to know, is unlawful.[13]

[§ 1231] **b. Payment Out of Order of Priority —(1) In General.** Where a personal representative having notice of claims of superior degree[14]

A 954; Hottenstein's App., 2 Grant 301; Hibberd v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Rowe's Est., 11 Kulp 32; Bolick's Est., 2 LegRec 187.

R. I.—Carney v. Hawkins, 34 R. I. 297, 83 A 327.

S. C.—Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878.

Tenn.—Jones v. Ward, 10 Yerg. 160.

Vt.—French v. Winsor, 24 Vt. 402.

Va.—Sheldon v. Armstead, 7 Gratt. (48 Va.) 264.

Wash.—In re Johnston, 181 P 209.

W. Va.—Hale v. White, 47 W. Va. 700, 35 SE 884.

Ont.—Re Williams, 27 Ont. 405.

[a] **Duty to resist unfounded claims.**—While it is the duty of a personal representative to pay all the valid claims, it is also his duty to defend the estate which he represents against unfounded claims. Teague v. Corbitt, 57 Ala. 529; Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935; Ray v. Moore, 24 Ind. A. 480, 56 NE 937; Herman v. Beck, 68 Nebr. 566, 94 NW 512; Hale v. White, 47 W. Va. 700, 35 SE 884.

[b] **If action or suit is brought** by claimant, it is the legal duty of the personal representative to make proper defense thereto, under penalty of being charged with any loss occasioned by his negligence or failure to do so. Hanna v. Galford, 55 W. Va. 160, 47 SE 359.

[c] **Mere negligence in the defense of a suit** will not render an administrator liable unless it appears that the defense ought to have prevailed. Head v. Perry, 1 T. B. Mon. (Ky.) 253.

[d] **Gaming debts.** — A personal representative should not be allowed for a payment of a claim which appears on its face to have been for money lost at gaming. Carter v. Cutting, 5 Munf. (19 Va.) 223. But compare Coffee v. Ruffin, 4 Coldw. (Tenn.) 487 (no notice of the illegality).

[e] **Usurious debts.**—A personal representative should be denied credit in his account for usurious claims paid by him, if he has notice of their usurious character. Smith v. Britton, 2 Patt. & H. (Va.) 124.

[f] **Liability for payment of excess of interest.**—In re Dunne, 58 Cal. 543; Ellicott v. Ellicott, 6 Gill & J. (Md.) 35; Cole v. Leake, 27 Miss. 767.

[g] **Liability for interest on sums paid on improper claims.**—Clement's App., 49 Conn. 519; Jones v. Ward, 10 Yerg. (Tenn.) 160.

9. Ill.—Richardson v. Ranson, 99 Ill. A. 258.

Mo.—Scudder v. Ames, 142 Mo. 187, 43 SW 659.

N. Y.—In re Frazer, 92 N. Y. 239; Matter of Title Guarantee, etc., Co., 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542 mem, 80 NE 1121 mem].

N. C.—Powell v. Meyers, 21 N. C. 502.

S. C.—Wise v. Hardin, 5 S. C. 325.

Tenn.—Coffee v. Ruffin, 4 Coldw. 487.

Va.—Kee v. Kee, 2 Gratt. (43 Va.) 116.

[a] **Illustration.** — An executor, exercising his honest judgment in believing that a claim of a physician for treatment of testator in his last illness is proper, is not personally liable for the amount of the claim paid by him, although he erred in his judgment, and the claim should have been for a less sum. Matter of Title Guarantee, etc., Co., 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542 mem, 80 NE 1121 mem].

[b] **Where decedent gave a note for a gambling debt,** which note the personal representative paid without knowledge, at the time of such payment, of the illegal character of the consideration, credit should be allowed for such payment. Coffee v. Ruffin, 4 Coldw. (Tenn.) 487.

[c] **Illegal taxes.**—A personal representative is not chargeable for the payment of taxes levied under an ordinance which is afterward held void, if in making such payment he exercised the decree of care which cautious persons employ in their own business. Scudder v. Ames, 142 Mo. 187, 43 SW 659.

[d] **A judgment confessed by a personal representative** is prima facie fair and just, and, in the absence of any proof that it is otherwise, if he pays it such payment should be allowed him on his settlement. Powell v. Myers, 21 N. C. 502.

[e] **Judgment confessed by decedent.**—An administrator cannot question the validity of a judgment confessed by his intestate, upon any ground for which the intestate himself could not have questioned it; as for instance mere inadequacy of consideration, or that it was intended as a fraud upon creditors; nor, it seems, can his creditors question it if the estate is sufficient for the payment of debts. Wise v. Hardin, 5 S. C. 325.

[f] **Equity may afford relief** to a personal representative who through some inadvertence has overpaid a claim. Richardson v. Ranson, 99 Ill. A. 258.

10. Cal.—In re Cummins, 143 Cal. 525, 77 P 479.

Ga.—Davis v. Bagley, 40 Ga. 181, 2 AmR 570.

Ill.—In re Graves, 242 Ill. 212, 89 NE 978.

N. Y.—Matter of Ellis, 78 Misc. 589, 139 NYS 1011; Matter of Van Buren, 19 Misc. 373, 44 NYS 357, 2 Gibb. Surr. 1.

Pa.—Van Voorhis' App., 8 Pa. Cas. 374, 11 A 233.

Wash.—In re Sullivan, 36 Wash. 217, 78 P 945.

[a] **Assigned claim.**—Where, after the allowance of a claim, claimant assigned it, giving notice of the assignment to the administrator, the latter had no right to pay it to the assignor. In re Cummins, 143 Cal. 525, 77 P 479.

[b] **Payment to contesting heir.**—Executors have no authority to pay an heir who received nothing by the will a sum out of the estate in consideration of her agreement not to contest the will, and such payment is no part of the expenses of administration. In re Graves, 242 Ill. 212, 217, 89 NE 978 ("Executors have no authority to make a payment of the character of that made in this case. The payment was made by virtue of the agreement among the residuary legatees and was no part of the expenses of administration").

[c] **Payment of judgment in favor of person not entitled thereto.**—If a judgment for a debt properly due from the estate is recovered by a person not entitled thereto, the personal representative will be protected in paying it out of the personal estate; but such judgment forms no ground for a claim of the personal representative against the heirs, as for money disbursed by him for the benefit of the estate, beyond the personal assets he has received. Newsom v. Newsom, 38 N. C. 411.

11. Sapp v. Williamson, 128 Ga. 743, 58 SE 447.

12. Beecher v. Barber, 20 NYSt 136, 6 Dem. Surr. 129.

13. Miles v. Pike Min. Co., 124 Wis. 278, 102 NW 555.

14. Ky.—Place v. Oldham, 10 B. Mon. 400; Hutchcraft v. Tilford, 5 Dana 353; Logan v. Troutman, 3 A. K. Marsh. 66.

Md.—Webster v. Hammond, 3 Harr. & M. 131.

N. C.—Brown v. Lone, 3 N. C. 159.

Va.—Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

Eng.—Hall v. Tapper, 3 B. & Ad. 655, 23 ECL 289, 110 Reprint 239.

[a] **Exhibition of a bond** to the administrator before letters of administration are taken out is sufficient notice. Brown v. Lone, 3 N. C. 159.

[b] **Notice need not be by institution of a suit.**—Webster v. Hammond, 3 Harr. & M. (Md.) 131; Brown v. Lone, 3 N. C. 159.

[c] **Constructive notice of debts of record.**—(1) The executor is bound at common law to take notice of debts of record. Place v. Oldham, 10 B. Mon. (Ky.) 400; Stephens v. Barnett, 7 Dana (Ky.) 257; Hutchcraft v. Tilford, 5 Dana (Ky.) 353; Webster v. Hammond, 3 Harr. & M. (Md.) 131; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488; Mayo v. Bentley, 4 Call (8 Va.) 528. (2) This rule is applicable to judgments. Com. v. Barstow, 3 B. Mon. (Ky.) 290; Stephens v. Barnett, 7 Dana (Ky.) 257; Garrett v. Johnson, 29 N. C. 231 (judgment of justice of the peace); Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488; Mayo v. Bentley,

pays claims of an inferior degree and there are not funds remaining sufficient to pay such superior claims he commits a devastavit [15] and is personally liable to the preferred creditor for the deficiency,[16] even though the payment was made through an honest mistake.[17] But no devastavit is committed when the right to priority accrued after the payment complained of.[18]

If the representative had no notice, actual or constructive, of the claims entitled to preference he incurs no personal liability by reason of paying debts of inferior dignity,[19] unless the representative voluntarily avoided the means of knowledge,[20] or the payment was so precipitate that the preferred creditor did not have the opportunity to which he was entitled to make his claim known.[21]

Contingent or unmatured claims. If the claim of higher degree is merely contingent, the common-law rule is that even if the representative has notice of such a claim he may exhaust the assets in paying debts of inferior degree without incurring any liability to the holder of the contingent claim, although the claim subsequently becomes due by the happening of the contingency,[22] but it is otherwise where the claim of higher degree is not contingent but merely payable at a future day.[23]

If the representative reserves assets to pay the superior claims, the payment of debts of inferior dignity is not a devastavit,[24] although the assets reserved are lost, if no blame for such loss can be imputed to the personal representative.[25]

[§ 1232] **(2) Preferring One Creditor of Class.**[26] Under the modern statutes in the United States and Canada if the personal representative pays one debt of a class to the exclusion of others of the same class he commits a devastavit or renders himself personally liable for the deficiency, if any, resulting therefrom,[27] although he is entitled to credit to the extent of such creditor's pro rata share.[28]

4 Call (8 Va.) 528; Hall v. Tapper, 3 B. & Ad. 655, 23 ECL 289, 110 Reprint 239; Fuller v. Redmon, 26 Beav. 600, 53 Reprint 1030; Waller v. Turner, 10 Jur. N. S. 147; Landon v. Ferguson, 3 Russ. 349, 3 EngCh 349, 38 Reprint 607; Searle v. Lane, 2 Vern. Ch. 37, 88, 23 Reprint 634, 667 (decree in equity).

15. Ga.—Bon.gaux v. Bevan, Dudl. 110.

Ind.—State v. Mason, 21 Ind. 171.

Ky.—Place v. Oldham, 10 B. Mon. 400; Stephens v. Barnett, 7 Dana 257; Cochran v. Davis, 5 Litt. 118; Logan v. Trautman, 3 A. K. Marsh. 66.

N. C.—Howell v. Reams, 73 N. C. 391; Laws v. Thompson, 49 N. C. 104; Moye v. Albritton, 42 N. C. 62; Garrett v. Johnson, 29 N. C. 231.

N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288.

S. C.—Swift v. Miles, 23 S. C. Eq. 147.

[a] **It is the duty of an executor to plead** the existence of a superior debt of which he has notice, and his failure to do so renders him liable to the same extent that his payment of the inferior debt would have done. Davis v. Smith, 5 Ga. 274, 48 AmD 279; Hutchcraft v. Tilford, 5 Dana (Ky.) 353.

16. Ala.—Hullett v. Hood, 109 Ala. 345, 19 S 419; Pryor v. Davis, 109 Ala. 117, 19 S 440; Jackson v. Wood, 108 Ala. 209, 19 S 312; Byrd v. Jones, 84 Ala. 336, 4 S 375; Clark v. Guard, 73 Ala. 456; McNeill v. McNeill, 36 Ala. 109, 76 AmD 320.

Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1103].

Ind.—Cunningham v. Cunningham, 94 Ind. 557; State v. Brown, 80 Ind. 425.

Ky.—Place v. Oldham, 10 B. Mon. 400; Stephens v. Barnett, 7 Dana 257; Hutchcraft v. Tilford, 5 Dana 353; Jeeter v. Durham, 6 J. J. Marsh. 228; Logan v. Troutman, 3 A. K. Marsh. 66.

Md.—Webster v. Hammond, 3 Harr. & M. 131.

Mass.—Cobb v. Muzzey, 13 Gray 57.

Miss.—Gay v. Lemle, 32 Miss. 309; Randolph v. Singleton, 20 Miss. 439; Black v. Barton, 14 Miss. 239; Harris v. Fisher, 13 Miss. 74.

Mo.—Bassett v. Slater, 81 Mo. 75.

N. Y.—Smith v. Cornell, 111 N. Y. 554, 19 NE 271; In re Mahoney, 37 Misc. 472, 75 NYS 1056, 2 Mill's Surr. 559 [aff 88 App. Div. 140, 84 NYS 329]; Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179, 1 Gibb. Surr. 516; St. John's Est., Tuck. Surr. 126.

N. C.—Valentine v. Britton, 127 N. C. 57, 37 SE 74; Coggins v. Flythe, 113 N. C. 102, 18 SE 96; Moye v. Albritton, 42 N. C. 62; McNair v. Ragland, 16 N. C. 516; Roundtree v. Sawyer, 15 N. C. 44; Brown v. Lone, 3 N. C. 159.

N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288.

S. C.—Huger v. Dawson, 37 S. C. L. 328; Swift v. Miles, 19 S. C. Eq. 147; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

Tex.—Clifford v. Campbell, 65 Tex. 243; Evans v. Taylor, 60 Tex. 422.

Va.—McCormick v. Wright, 79 Va. 524; Mimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

Eng.—In re Hankey, [1899] 1 Ch. 541; Searle v. Lane, 2 Vern. Ch. 37, 23 Reprint 634; 2 Blackstone Comm. p 511.

Ont.—Hutchinson v. Edmison, 11 Grant Ch. (U. C.) 477.

[a] **Payment out of order without order of court.**—An administrator pays at his own risk demands of one class in advance of their proper order, and without an order of court. Dullard v. Hardy, 47 Mo. 403; Schoeneich v. Reed, 8 Mo. A. 356.

[b] **A judgment quando** does not alter the dignity of the debt or charge the representative with assets. Hence, where a creditor obtains a judgment quando on an open account, the representative is not protected in paying the judgment after notice of an outstanding debt of higher degree. Roundtree v. Sawyer, 15 N. C. 44.

[c] **Setting aside assignment of assets to creditors of lower degree.**—Frontenac Loan Co. v. Morice, 3 Man. 462.

[d] **Subrogation to rights of creditors paid.**—The representative is entitled to be subrogated to the rights of the creditors whose claims he has paid and to receive the shares to which they would have been entitled had they not been paid in full. Hullett v. Hood, 109 Ala. 345, 19 S 419.

[e] **A creditor who is not injured** by payment out of order, as where the assets of the estate would be exhausted by the payment of claims having priority over his, has no cause of action. Gwinn v. Trotter, 112 Ga. 703, 38 SE 49.

17. Moye v. Albritton, 42 N. C. 62.

18. Coltraine v. Spurgin, 31 N. C. 52.

19. U. S.—U. S. v. Fisher, 2 Cranch 358, 390 note, 2 L. ed. 304; U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199; U. S. v. Ricketts, 27 F. Cas. No. 16,159, 2 Cranch C. C. 553.

Ky.—Com. v. Barstow, 3 B. Mon. 290; Hutchcraft v. Tilford, 5 Dana 353; Pope v. Wickliffe, 7 T. B. Mon. 412.

Mo.—Simonds v. Pettibone, 3 Mo. 330.

N. J.—Miller v. Harrison, 34 N. J. Eq. 374.

N. C.—Delamothe v. Lanier, 4 N. C. 296.

Va.—Mayo v. Bentley, 4 Call (8 Va.) 528.

Eng.—In re Fludyer, [1898] 2 Ch. 562; Hawkins v. Day, Ambl. 160, 27 Reprint 107, Dick. 155, 21 Reprint 228; Clough v. French, 2 Coll. 277, 33 EngCh 277, 63 Reprint 733; Matter of Le Geyt, 3 De G. J. & S. 570, 68 EngCh 570, 46 Reprint 757; Bettenson v. Winder, Dick. 468, 21 Reprint 351; Harman v. Harman, 2 Show. 492, 89 Reprint 1060.

20. Hutchinson v. Edmison, 11 Grant Ch. (U. C.) 477.

21. McCoy v. Jack, 47 W. Va. 201, 34 SE 991; Hutchinson v. Edmison, 11 Grant Ch. (U. C.) 477. See also Searle v. Lane, 2 Vern. Ch. 37, 88, 23 Reprint 634, 667 (where the payment was in fact precipitate, but the order holding the representative liable was not based on that ground).

22. Delamothe v. Lanier, 4 N. C. 296; Hawkins v. Day, Ambl. 160, 27 Reprint 107, Dick. 155, 21 Reprint 228; Henderson v. Gilchrist, 17 Jur. 570; Wildridge v. McKane, 1 Molloy 122; Norman v. Baldry, 6 Sim. 621, 9 EngCh 621, 58 Reprint 726.

Reservation of assets under statute see infra § 1257.

23. Atkinson v. Grey, 1 Smale & G. 577, 65 Reprint 253.

24. Braxton v. Winslow, 4 Call (8 Va.) 308.

25. Hinton v. Kennedy, 3 S. C. 459.

26. Right of representative to give preference:

At common law see supra § 1154.

Under modern statutes see supra § 1157.

27. Ala.—Jackson v. Wood, 108 Ala. 209, 19 S 312.

Ga.—Bomgaux v. Bevan, Dudl. 110.

Miss.—Gay v. Lemle, 32 Miss. 309.

Oh.—In re Wakefield, 5 OhS&CP 395, 7 OhNP 562.

Pa.—In re Moran, 261 Pa. 269, 104 A 585.

Ont.—Taylor v. Brodie, 21 Grant Ch. (U. C.) 607; Doner v. Ross, 19 Grant Ch. (U. C.) 229; Parsons v. Gooding, 33 U. C. Q. B. 499.

[a] **An administrator cannot, within twelve months after his qualification,** pay one debt in full, or in excess of its ratable share of assets over another of the same class, either with or without notice of such other debt; and if he does he is personally liable to the omitted creditor for his share of money applied in such payment. If such payment is made after twelve months he is not liable unless he had notice of the other debt. McCoy v. Jack, 47 W. Va. 201, 34 SE 991.

28. Hullett v. Hood, 109 Ala. 345, 19 S 419; Jackson v. Wood, 108 Ala. 209, 19 S 312; Taylor's Est., 4 Pa. Dist. 691, 17 Pa. Co. 166; Walker v. Kerr, 7 Tex. Civ. A. 498, 27 SW 299.

[a] **The representative can have credit only for** the share to which the overpaid creditor was entitled,

[§ 1233] **c. Payment Out of Funds Not Belonging to Estate.**[29] Funds which have been trust funds in the hands of a decedent remain the property of the cestui que trust and cannot be held liable for decedent's debts,[30] and where an executor wrongfully makes payment of debts of the estate out of trust funds not primarily liable therefor, the beneficiary can be reimbursed to the extent of such misappropriation out of the property primarily liable, if it or its proceeds still exist.[31] If money is collected by a personal representative and improperly appropriated to the payment of the debts of his decedent under a mistaken belief as to his right to do so, and without collusion with the heirs, he becomes individually liable therefor, and land descending to the heirs cannot be subjected to its repayment.[32] Where a personal representative under a misconception that certain moneys coming to his hands are assets of the estate pays a portion of the creditors of a certain class a dividend on the amount of their claims, and it afterward turns out that such moneys are not assets, and there is nothing left to pay any of the claims of this class, a court of equity will not require the personal representative to pay the same pro rata share on the claims of other creditors of this class.[33]

[§ 1234] **d. Payment under Authority of Court.** A personal representative will be protected in the payment of a claim which has been duly allowed or ordered paid by the court, although such claim was not a proper one for payment,[34] or although it should not have been paid in full,[35] unless it is made to appear that such allowance of the claim or order for the payment thereof was obtained through his collusion or bad faith,[36] or that the court was without authority to make the order relied on for protection.[37]

[§ 1235] **e. Recovery Back of Payment Made through Mistake or Improperly.** Where an administrator pays a claim regularly filed, in ignorance of the fact that it has been already paid by a sale under execution levied on property of a codebtor of the intestate, and on the final settlement of the estate is allowed a credit for such payment, an administrator de bonis non may recover back the money so paid from the party to whom it was paid, in an action for money had and received.[38] Administrators have been held entitled to recover from a surrogate the amount paid him as an attorney's fee for representing them, with which their accounts had been surcharged.[39]

[§ 1236] **11. Liability for Failure to Pay Claims —a. In General.** A personal representative's failure to pay a claim, which it is his duty to pay, may render him personally liable therefor,[40] and it has been held that, where an administrator's statutory liability for claims has once attached, the creditor's right becomes absolute against him and his estate,

Jackson v. Wood, 108 Ala. 209, 19 S 312.

29. Property available for payment generally see infra §§ 1260–1264.

30. See supra § 359.

31. Milly v. Harrison, 7 Coldw. (Tenn.) 191.

32. Story v. Harrison, 4 KyL 54.

33. Pinneo v. Goodspeed, 120 Ill. 524, 12 NE 196 [aff 22 Ill. A. 50].

34. Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 228, 131 SW 949 [cit Cyc].

D. C.—Hunt v. Russ, 18 D. C. 527.

Iowa.—Buttschaw v. Miller, 72 Iowa 225, 33 NW 642.

Ky.—Story v. Story, 62 SW 865, 22 KyL 1869.

La.—Baldwin v. Carleton, 2 Rob. 54.

Md.—Garrison v. Hill, 81 Md. 206, 31 A 794; Owens v. Collinson, 3 Gill & J. 25; Conner v. Ogle, 4 Md. Ch. 425.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

Nev.—In re Millenovich, 5 Nev. 161.

S. C.—Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878.

Tex.—Cameron v. Morris, 83 Tex. 14, 18 SW 422.

[a] **Knowledge of representative as to defenses.**—The fact that a claim is duly verified and passed by the court does not relieve the personal representative from the duty of defending against it if he knows of any defense; but if he knows of none he may safely pay it and it will be allowed as a credit in his account. Hunt v. Russ, 18 D. C. 527.

[b] **An ex parte petition of an administrator,** erroneously stating that a lien exists on certain assets, and asking permission to apply the assets to the satisfaction of the alleged lien, is not a proceeding to test the validity of a claim of lien within the meaning of the statute, which provides that the person claiming to have a lien on any property of a decedent may be made a party to a proceeding by the administrator to test the validity of such claim to a lien, and an order of the chancellor entered on such petition directing the payment of the claim does not protect the administrator in making such payment. O'Brien v. Wilson, 86 Miss. 540, 38 S 509.

35. Hancock v. Chapman, 170 Ky. 99, 185 SW 813; Thomson v. Taylor, 71 N. Y. 217.

36. U. S.—Dodd v. Ghiselin, 27 Fed. 405.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41]; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228]; Turner v. Turner, 21 Ill. A. 427.

Md.—Garrison v. Hill, 81 Md. 206, 31 A 794.

Miss.—O'Brien v. Wilson, 86 Miss. 540, 38 S 509.

Mo.—Garr v. Harding, 37 Mo. A. 24.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

37. In re Kennedy, 120 Cal. 458, 52 P 820.

38. Walker v. Mock, 39 Ala. 568.

39. Merrill v. Parsons, 166 App. Div. 972, 151 NYS 794.

40. Ill.—Mortimer v. Potter, 213 Ill. 178, 72 NE 817 [aff 114 Ill. A. 422].

Ky.—Jeeter v. Durham, 6 J. J. Marsh. 228.

La.—Lobit v. Castille, 14 La. Ann. 779; Waters v. Wilson, 3 Mart. N. S. 135.

Mass.—New York Security Bank v. Callahan, 220 Mass. 84, 107 NE 385.

Mich.—Palm's App., 44 Mich. 637, 7 NW 200.

Minn.—Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246; Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 NW 286.

Mo.—Schwecke v. Mathias, 8 Mo. A. 569.

N. H.—New Hampshire Strafford Bank v. Mellen, Smith 385; Benedict v. Ferguson, 15 App. Div. 96, 44 NYS 307.

R. I.—Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

S. C.—Farys v. Farys, 5 S. C. Eq. 261.

Vt.—Orange County Bank v. Kidder, 20 Vt. 519.

Ont.—McPhadden v. Bacon, 13 Grant Ch. (U. C.) 591, 595.

"It is a wholesome lesson to teach Executors, that if having assets of the estate out of which debts can be paid, they neglect to make such payment and allow the lands to be sold, they may be made liable for any loss occasioned thereby." McPhadden v. Bacon, supra.

[a] **Illustration.**—Where an executor, knowing of the existence of a claim against his decedent on account of his being a stockholder in a national bank, distributes his entire estate, he is, ultimately, personally liable to the receiver for such national bank. Mortimer v. Potter, 213 Ill. 178, 72 NE 817 [aff 114 Ill. A. 422].

[b] **An administrator is personally liable for the expenses of decedent's funeral** where he has in his hands assets sufficient to pay the same. Benedict v. Ferguson, 15 App. Div. 96, 44 NYS 307.

[c] **Where a personal representative is indebted to the estate,** and instead of applying the amount of the debt to the payment of claims permits the land to be sold to satisfy creditors, he commits a devastavit and is liable to the heirs and devisees for the full amount of the injury they sustain by the sale. Farys v. Farys, 5 S. C. Eq. 261. See also McPhadden v. Bacon, 13 Grant Ch. (U. C.) 591 (indebtedness of co-executor).

[d] **Failure to subject realty to payment of debts.**—An administrator is guilty of waste where he fails to cause the real estate of his decedent to be applied to the payment of his debts, when the personal property is insufficient. New Hampshire Strafford Bank v. Mellen, Smith (N. H.) 385.

[e] **Liability for tax.**—The individual property of a personal representative may be taken for a tax imposed on him in his representative capacity, when no property of the estate can be found. In re McMahon, 66 HowPr (N. Y.) 190.

[f] **When liability accrues.**—Personal representatives are not personally liable to the creditors for their claims until after a decree has been made by the probate court for the distribution of the assets among the creditors, and the expiration of the time limited for payment. Orange County Bank v. Kidder, 20 Vt. 519.

Failure or refusal to pay claims

whether the claim could, or could not, have been enforced against decedent's estate.[41] The representative's liability is, however, limited to the amount of assets which would have been applicable to the payment of debts and would have been so applied if the representative had properly and faithfully performed his duties.[42]

[§ 1237] **b. Interest or Costs.** A personal representative having assets of the estate in his hands is chargeable individually with interest[43] or costs[44] accruing because of his failure to pay at the proper time claims against the estate which it was his duty to pay.

[§ 1238] **c. Penalty for Failure to Pay.** A personal representative who fails to pay a claim when so ordered is, by statute in some jurisdictions, subject to a penalty.[45]

[§ 1239] **12. Proceedings to Enforce Payment —a. Proceedings in Probate Court—(1) Jurisdiction.** Probate courts generally have jurisdiction to order the payment of the duly allowed or established claims of creditors;[46] but the issues involved may be such as to bring the case within the exclusive jurisdiction of a court of equity.[47]

[§ 1240] **(2) Nature and Form of Proceedings.** A claim against a decedent cannot be enforced in a summary proceeding by rule to show cause,[48] unless such a proceeding is authorized by statute.[49] But special proceedings for enforcing the payment of claims are sometimes provided by statute.[50] It has been held that, where a claimant neglects to take advantage of the means provided by statute for satisfying his claim, he has no remedy at law or in equity.[51] Although a judgment of allowance of a claim is not a complete and effective judgment until an order on the representative to pay is obtained, a proceeding to obtain such an order is not an action on the judgment of allowance.[52]

as breach of administration bond see infra §§ 2579, 2580.

41. Palm's App., 44 Mich. 637, 7 NW 200.

42. U. S.—Smith v. Chapman, 93 U. S. 41, 23 L. ed. 795; Dickson v. Wilkinson, 3 How. 57, 11 L. ed. 491; Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Siglar v. Haywood, 8 Wheat. 675, 5 L. ed. 713; Fairfax v. Fairfax, 5 Cranch 19, 3 L. ed. 24.

Ala.—Skinner v. Frierson, 8 Ala. 915; State Bank v. Hooks, 2 Port. 271.

Conn.—Davis v. Weed, 44 Conn. 569, 7 F. Cas. No. 3,658.

Ga.—Whiddon v. Williams, 98 Ga. 310, 24 SE 437; Hendricks v. Mitchell, 37 Ga. 230; Justices Irwin County Inferior Ct. v. Sloan, 7 Ga. 31.

Ind.—Phipps v. Addison, 7 Blackf. 375.

Ky.—Botts v. Fitzpatrick, 5 B. Mon. 397; Rucker v. Wadlington, 5 J. J. Marsh. 238; Miller v. Towles, 4 J. J. Marsh. 255; Lair v. Miller, 2 Litt. 66.

La.—Comstock's Succ., 44 La. Ann. 427, 10 S 850; Morgan's Succ., 23 La. Ann. 290.

Me.—Brown v. Whitmore, 71 Me. 65.

Mass.—Newcomb v. Goss, 1 Metc. 333; Hapgood v. Houghton, 10 Pick. 154.

Mich.—Basom v. Taylor, 39 Mich. 682.

Miss.—Byrd v. Holloway, 14 Miss. 199.

N. J.—O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999; Sindle v. Kiersted, 3 N. J. L. 484; Baracliff v. Griscom, 1 N. J. L. 224.

N. Y.—Brown v. King, 63 Hun 158, 17 NYS 678; Troy Bank v. Topping, 13 Wend. 557; Peo. v. Judges, 4 Cow. 445.

Or.—Brenner v. Alexander, 16 Or. 349, 19 P 9, 8 AmSR 301.

Pa.—Hussey v. White, 10 Serg. & R. 346.

R. I.—Carver v. Wells, 17 R. I. 688, 24 A 466.

S. C.—Trimmier v. Thomson, 19 S. C. 247.

Tenn.—Simons v. Page, 96 Tenn. 718, 36 SW 843; Boyd v. Johnston, 89 Tenn. 284, 14 SW 804; Apperson v. Harris, 7 Lea 323; Mosier v. Zimmerman, 5 Humphr. 62; Nixons v. Bullock, 9 Yerg. 414; Massingale v. Jones, 3 Hayw. 36.

Va.—Snead v. Coleman, 7 Gratt. (48 Va.) 300, 56 AmD 112; Mason v. Peter, 1 Munf. (15 Va.) 437.

W. Va.—Gay v. Skeen, 36 W. Va. 582, 15 SE 64.

Eng.—Ramsden v. Jackson, 1 Atk. 292, 26 Reprint 187; Rees v. Morgan, 5 B. & Ad. 1035, 27 ECL 434, 110 Reprint 1075; Gorton v. Gregory, 3 B. & S. 90, 113 ECL 90, 122 Reprint 35; Noell v. Nelson, 2 Saund. 226, 85 Reprint 1020; Hancocke v. Prowd, 1 Saund. 336 note 10, 85 Reprint 482; Harman v. Harman, 2 Show. 492, 89 Reprint 1060; Erving v. Peters, 3 T. R. 685, 100 Reprint 803, 9 ERC 330.

43. Md.—Scott v. Dorsey, 1 Harr. & J. 227.

Mass.—Forward v. Forward, 6 Allen 494.

Mo.—In re Motier, 7 Mo. A. 514.

N. Y.—Willcox v. Smith, 26 Barb. 316; In re Goetschius, 2 Misc. 278, 23 NYS 970, 1 Pow. Surr. 371.

Pa.—In re Forry, 246 Pa. 448, 92 A 697; Callaghan v. Hall, 1 Serg. & R. 241.

Tex.—Finley v. Carothers, 9 Tex. 517, 60 AmD 179.

N. S.—Cullen v. McNeil, 42 N. S. 346.

44. Callaghan v. Hall, 1 Serg. & R. (Pa.) 241; Davis v. Davis, 11 S. C. Eq. 377.

45. Minvielle's Succ., 12 La. Ann. 72; Van Hook v. Letchford, 35 Tex. 598.

46. Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Ill.—Horn v. Sayer, 184 Ill. A. 326.

La.—Erwin v. Lowry, 1 La. Ann. 276.

Mo.—Ferguson v. Carson, 9 Mo. A. 497.

N. Y.—Matter of Rabell, 175 App. Div. 345, 162 NYS 218.

Pa.—Bull's App., 24 Pa. 286; In re Kittera, 17 Pa. 416.

Tex.—Porter v. Sweeney, 61 Tex. 213.

[a] **Where a final settlement has been set aside,** the probate court becomes repossessed of the administration of the estate, and is the proper tribunal in which to enforce a demand allowed against the estate. Ferguson v. Carson, 9 Mo. A. 497.

[b] **Transfer to superior court.—** The superior court has jurisdiction of an action commenced before the clerk to compel an administrator to account and to pay a judgment, and transferred by the clerk to the court. Oldham v. Rieger, 145 N. C. 254, 58 SE 1091.

[c] **Void decree.—**Where, pending an appeal from the appointment of an executor, preferred creditors filed claims against the estate, a decree of the probate court ordering the claims paid, when the executor had not passed on them or requested the advice of the court as to payment, was void and should be quashed. Clarke v. Richmond Prob. Ct., 29 R. I. 37, 69 A 4; Miller v. Pettit, 16 N. J. L. 421 (except where estate insolvent).

[d] **Jurisdiction denied.—**Miniggio v. Hutchins, 43 App. (D. C.) 117.

47. Sinnickson v. Perkins, 137 Ill. A. 10 [aff 231 Ill. 492, 83 NE 194] (where property has been placed in the hands of trustees to indemnify guarantors, and payments are made by the trustees on the principal note which reduced proportionally the sum to be paid by the guarantors, the right of a deceased guarantor to contribution or apportionment of payments on the principal note since the allowance of the claim against his estate cannot be adjudicated by the probate court in a proceeding before such court to make the administrator show cause why the claim as allowed had not been paid, as it is not within the equitable power or jurisdiction of such court to determine the rights and liabilities of the numerous parties interested in the administration of the trust, even though proceedings were instituted for that purpose).

48. Atkinson v. Ricks, 140 N. C. 418, 53 SE 230; Thurman v. Morgan, 79 Va. 367.

49. See cases infra this note.

[a] **A creditor in whose favor a judgment has been rendered** against the personal representative for a sum of money may proceed summarily by rule to enforce its payment. Maraist v. Guilbeau, 30 La. Ann. 1089; Dubuch v. Wildermuth, 3 La. Ann. 407.

[b] **Creditor cannot proceed before homologation of account.—**Jamison's Succ., 108 La. 279, 32 S 381.

50. Iowa.—Hart v. Jewett, 17 Iowa 234.

La.—Wells v. Honeycutt, 138 La. 20, 69 S 859.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

N. Y.—In re Miles, 170 N. Y. 75, 62 NE 1084 [rev 61 App. Div. 562, 71 NYS 71]; Willis v. Sharp, 115 N. Y. 396, 22 NE 149, 5 LRA 636 [rev 46 Hun 540]; Matter of Walker, 70 App. Div. 263, 74 NYS 971; Matter of Stevenson, 77 Hun 203, 28 NYS 362; Matter of Miller, 70 Hun 61, 23 NYS 1104; Ruthven v. Patten, 1 Rob. 416, 2 AbbPrNS 121; Matter of Miner, 39 Misc. 605, 80 NYS 643; Matter of Hitchler, 21 Misc. 417, 47 NYS 1069; Kenny v. Geoghegan, 9 NYCiv Proc 378; Mitchell v. Mount, 19 Abb Pr 1; Sellis' Case, 4 AbbPr 272; Matter of Mills, 11 HowPr 126; Kidd v. Chapman, 2 Barb. Ch. 414; In re Coit, 3 Dem. Surr. 58; Babcock v. Lillis, 4 Bradf. Surr. 218; Campbell v. Bruen, 1 Bradf. Surr. 224.

Pa.—Baker's Est., 21 Pa. Dist. 177.

R. I.—Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

[a] **Proceeding with respect to funeral expenses.—**Matter of Kalbfleisch, 78 App. Div. 464, 79 NYS 651; Matter of Kipp, 70 App. Div. 567, 75 NYS 589.

[b] **Enforcement of attorney's lien.—**Matter of Smith, 111 App. Div. 23, 97 NYS 171, 35 NYCivProc 314, 18 NYAnnCas 55.

51. Winegar v. Newland, 44 Mich. 367, 6 NW 841.

52. Gutierrez v. Scholle, 12 N. M. 328, 78 P 50 ("This proceeding is in no sense an action on the judgments of allowance. It was an application simply to the probate court to direct the administrator to distribute the funds in his hands as such to defendant as a creditor of the estate, as is authorized by Laws 1901, p. 155,

[§ 1241] **(3) Conditions Precedent.** Where a debt was established by a judgment against one in his lifetime, it is not necessary to establish the debt after his death by a new adjudication on the judgment before taking proceedings to enforce payment.[53]

[§ 1242] **(4) Set-Off.** In proceedings to compel an administrator to pay an allowed claim against the estate, the court of probate has jurisdiction to allow and enforce a set-off.[54]

[§ 1243] **(5) Who May Proceed for Payment.** A creditor, within the meaning of a statute allowing a petition for the payment of a claim to be presented by a creditor, is a person to whom decedent was indebted during his lifetime[55] or an assignee of such person.[56] On an application by the assignee of a claim against an estate for the payment thereof, a contention that the assignment was to secure another person, and that the applicant is not the real party in interest, is of no avail to the estate.[57] One claiming against an estate for breach of a contract made by decedent cannot, until he becomes a judgment creditor, interfere with property in the hands of the executor.[58]

[§ 1244] **(6) Notice.** Unless required by statute no notice is necessary to authorize a probate court to decree payment of debts and distribution of assets among creditors.[59]

[§ 1245] **(7) Issues and Proof.** Where on motion to pay a demand against a decedent's estate, previously allowed and assigned to a designated class, the administrator tenders only the issue of payment, the validity of the judgment allowing and classifying the demand is not in issue, either in the probate court or on appeal.[60] Insufficiency of assets being a matter of defense, the petitioner cannot be defeated because of a failure to prove that the assets are sufficient to pay all claims in full.[61]

[§ 1246] **(8) Hearing and Determination.** Where in an action to compel an administrator to account and to pay a judgment against his intestate, limitations were pleaded, the court should first determine that issue, and should not order an account and settlement unless it found against the plea.[62] Where the claim is founded on a tort of decedent, and the representative has failed to disallow it and liability has thus become fixed, the case is properly remitted for new trial to determine whether the amount claimed is reasonable.[63] The proceeding is properly dismissed without prejudice where there is pending an accounting in which all the rights of the parties may be determined.[64]

[§ 1247] **(9) Judgment, Decree, or Order—(a) In General.** A decree for the payment of a claim should determine the amount to be paid,[65] the person to whom it is payable,[66] and all other questions concerning the claim.[67] Where, in proceeding in a surrogate's court to determine and enforce the lien of attorneys for services in the settlement of an estate, no services were shown to have been rendered for the executor, as legatee under the will, or for him individually, as apart from the services the amount of which were proper expenditures from the estate, the surrogate's court, ordering that the amount found due the attorneys was a lien on the assets could not order that they have execution against the executor individually, that being in effect a judgment against the executor individually.[68]

[§ 1248] **(b) Time for Making.** The court has as much power to make an order for a dividend on a day subsequent to that on which an order settling the account of an administrator is passed as it has on the day the account is settled,[69] but it cannot order the personal representatives of decedent to make any payments before there has been any statement of account.[70]

[§ 1249] **(c) Entry.** Where an order for a dividend is made on the same day that an order is made settling the account of an administrator, the order for a dividend is properly included in the same entry in the minutes with the order settling the account, and immediately following.[71]

[§ 1250] **(d) Effect.** A final decree directing executors to pay a certain sum to themselves as trustees is conclusive as to assets in proceedings for contempt;[72] but if a representative's account on a settlement before the county court shows that he has no cash, but only property in his hands, and the court makes an order that all demands of a particular class be paid, it is upon the implied condition that funds sufficient for that purpose first come into his hands; and a creditor of that class who sues out a scire facias to compel payment of his demand must show that the property has been converted into cash.[73]

[§ 1251] **(e) Enforcement.** Where imprisonment for debt has been abolished, a final decree against a personal representative for the payment of a debt due from his decedent cannot be enforced by attachment and sequestration.[74] The remedy where there are no funds in the hands of the repre-

c. 81, § 26. This order was necessary to render the former judgments of allowance effective. Until the order to distribute was made in this case, there was no obligation to pay on the part of the administrator. There was no complete and effective judgment until that time. This was true, even before the act of 1901, supra. While no procedure of this kind was heretofore specifically provided by statute, the administrator has always been required to account to the probate court, and we know of no provision of law requiring him to pay creditors until so directed by the probate court. It follows that neither was there a complete judgment against which the statute of limitations would begin to run until, at least, the order to pay was obtained").

53. McNulty v. Hurd, 72 N. Y. 518 [mod 11 Hun 339]; Matter of Lyman, 60 Hun 82, 14 NYS 198, 20 NYCivProc 421 [aff 128 N. Y. 614, 28 NE 252]; Oldham v. Rieger, 145 N. C. 254, 58 SE 1091.

54. In re Bell, 168 Cal. 253, 141 P 1179 (jurisdiction of superior court, as court of probate, not affected by the fact that it could not award judgment for excess).

55. Hall v. Dusenbury, 38 Hun (N. Y.) 125 [aff 4 Dem. Surr. 181].

56. Matter of Morderno, 63 Hun 261, 17 NYS 781, 22 NYCivProc 72, 28 AbbNCas 57.

57. In re Cummins, 143 Cal. 525, 77 P 479.

58. Rogers v. Schram, 161 Mich. 278, 126 NW 423.

59. In re McDougald, 143 Cal. 476, 77 P 443; Lanier v. Irvine, 24 Minn. 116.

60. Dooley v. Ryan, 153 Mo. A. 669, 134 SW 30.

61. Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

62. Oldham v. Rieger, 145 N. C. 254, 58 SE 1091.

63. Hicks v. Wilbur, 38 R. I. 268, 94 A 872.

64. Matter of Belden, 90 Misc. 247, 152 NYS 723.

65. Orser's Est., 4 NYCivProc 129.

66. Orser's Est., 4 NYCivProc 129; In re Forry, 241 Pa. 354, 88 A 677.

[a] **Illustration.**—A decree directing the administrator to pay the holders of decedent's notes specified in certain depositions is void for uncertainty where the holders are not identified with any certainty in the petition, depositions, or decree. In re Forry, 241 Pa. 354, 88 A 677.

67. Orser's Est., 4 NYCivProc 129.

68. Matter of Smith, 111 App. Div. 23, 97 NYS 171, 35 NYCivProc 314, 18 NYAnnCas 55.

69. In re McDougald, 143 Cal. 476, 77 P 443.

70. In re Graham, 218 Pa. 357, 67 A 462.

71. In re McDougald, 143 Cal. 476, 77 P 443.

72. Matter of Scheuer, 161 App. Div. 525, 146 NYS 707.

73. Polk v. Farar, 12 Mo. 356.

74. Hosack v. Rogers, 11 Paige (N. Y.) 603.

sentative belonging to the estate of decedent which can be reached is by execution against the individual property of the personal representative, if he has wasted the estate which came into his hands.[75]

[§ 1252] **(f) Setting Aside.** Where a personal representative with full knowledge of the facts has neglected to prosecute an appeal directly from an order for the payment of claims, as authorized by the statute, he cannot be relieved from the order on an application for its vacation.[76]

[§ 1253] **(10) Review.** Orders directing the payment of claims against the estate of decedents are generally appealable,[77] and an order of the probate court dismissing a petition to have the personal representative show cause why a claim that has been allowed shall not be paid has also been held to be appealable.[78]

[§ 1254] **b. Proceedings in Equity—(1) In General.** A court of equity will not enforce a claim against a fund alleged to be held by the executrix in trust for the payment of debts until the claim is established against the estate.[79]

[§ 1255] **(2) Creditors' Suits.**[80] The creditor of a deceased debtor, like any other creditor, may resort to equity for the purpose of reaching assets for the payment of his claim.[81] The general rule that a creditor must obtain a judgment on his claim before he can maintain a creditor's suit[82] has been held applicable to a creditor of the estate of a decedent,[83] but it has also been held that the creditor is not obliged to obtain a judgment at law before he can avail himself of his remedy.[84]

[§ 1256] **c. Execution.** It has been held that, where a judgment has been obtained against a personal representative, who without paying the judgment proceeds to distribute all decedent's property among his legal distributees, the judgment creditor may levy his execution on any of the property distributed;[85] that when a claim is filed and allowed against an estate it becomes a judgment, and the creditor may have execution thereon, but the execution must follow the judgment and two separate and distinct claims should not be included in one execution;[86] that where in the prosecution of a claim a lien has been acquired by attachment against a defendant who dies pending the suit, plaintiff may, on obtaining judgment against the personal representative have execution against the property so attached, whether or not commissioners have been appointed to hear claims against the estate;[87] and that a judgment creditor is not entitled to an execution against the funds of an estate without first obtaining permission from the surrogate for execution to issue,[88] but a surrogate's order permitting a judgment creditor to issue an execution against the representative is, except on appeal therefrom, conclusive evidence of assets applicable to the judgment.[89] A constitutional provision conferring upon probate courts exclusive jurisdiction over decedents' estates, has been held to abrogate a statute authorizing the issuance of execution for the enforcement of judgments against executors and administrators as such, which necessitated that such a judgment should be revived against a successor before execution could issue against him, and vested in the court exclusive power to enforce claims against estates.[90]

[§ 1257] **13. Reservation of Assets.**[91] Execu-

75. Hosack v. Rogers, 11 Paige (N. Y.) 603.

76. Weadock v. Ray, 111 Wis. 489, 87 NW 477.

77. Stuttmeister v. San Francisco Super. Ct., 72 Cal. 487, 14 P 35; Bennett v. Bennett, 102 Ind. 86, 1 NE 199. See also Appeal and Error § 406 et seq. But compare Webb v. Stillman, 26 Kan. 371 (an order directing the payment of a claim already allowed is not a final order and is not appealable).

78. In re McKinley, 49 Cal. 152.

79. Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134].

80. See generally Creditors' Suits 15 C. J. p 1376.

81. U. S.—Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075; Johnson v. Powers, 13 Fed. 315.

Ala.—Houston v. Blackman, 66 Ala. 559, 41 AmR 756.

D. C.—Plumb v. Bateman, 2 App. 156.

Ill.—White v. Russell, 79 Ill. 155.

Mo.—Beck v. Krembs, (A.) 213 SW 487.

N. Y.—Everingham v. Vanderbilt, 51 HowPr 177 [aff 12 Hun 75].

N. C.—Stephens v. Harris, 41 N. C. 57.

Oh.—Lauer v. Smith, 24 Oh. Cir. Ct. 47.

S. C.—Spoon v. Smith, 36 S. C. 588, 15 SE 800.

Wis.—Allen v. McRae, 91 Wis. 226, 64 NW 889.

[a] **A creditor may follow the assets** in the hands of legatees and other persons claiming as volunteers or fraudulent alienees of an unfaithful and insolvent representative; and such a volunteer is not protected by the fact that the representative had sufficient assets to pay all the debts, if he has not wasted them. Barnawell v. Threadgill, 56 N. C. 50.

[b] **Property fraudulently disposed of by debtor.**—(1) Where a debtor in his lifetime made a fraudulent disposition of his property, equity will entertain a bill filed by a creditor and subject such property to the payment of the debts of the decedent. White v. Russell, 79 Ill. 155. But see Caswell v. Caswell, 28 Me. 232 (a creditor of an insolvent estate cannot maintain an action to recover property conveyed by a decedent to defraud his creditors). (2) The court will entertain a bill filed by a simple contract creditor of a deceased debtor averring a deficiency of legal assets to satisfy his demand and asking that property fraudulently conveyed by the debtor while in life be subjected to the payment thereof. Houston v. Blackman, 66 Ala. 559, 41 AmR 756; Jenkins v. Lockard, 66 Ala. 377; Pharis v. Leachman, 20 Ala. 662. (3) But such a bill will not be entertained unless a deficiency of legal assets is alleged. Sharp v. Sharp, 76 Ala. 312; State Bank v. Ellis, 30 Ala. 478. (4) If a decedent in his lifetime conveyed any part of his real estate with intent to defraud his creditors, his personal representative, on their application and their paying or securing to be paid certain costs, is bound to bring an action for the recovery of the property so conveyed. Messmer v. Jenkins, 61 Cal. 151. Property disposed of by decedent as assets generally see supra §§ 365–368.

[c] **Where the claim of a judgment creditor of decedent was not paid** by the executor, although presented, and the legacies were by agreement between the legatees and the executor not paid to the legatees, but placed in trust for them, the creditor could follow such fund and impress it with the lien of his judgment. New York v. U. S. Trust Co., 78 App. Div. 366, 79 NYS 1010 [aff 35 Misc. 639, 72 NYS 121, and aff 178 N. Y. 551 mem, 70 NE 1097 mem].

[d] **Statutory authority** is sometimes given to creditors to sue to reach real estate or other assets not inventoried. Allen v. McRae, 91 Wis. 226, 64 NW 889; German Bank v. Leyser, 50 Wis. 258, 6 NW 809.

[e] **Jurisdiction of creditors' bills** is in the superior and not in the probate court. Wadsworth v. Davis, 63 N. C. 251.

[f] **Personal representative a necessary party.**—Abraham v. Hall, 59 Ala. 386.

[g] **Necessity for showing representative and sureties irresponsible.**—A creditor of a decedent has no right to follow the personal estate of decedent into the hands of a third person to whom it is alleged that the representative has paid it in his own wrong, without showing that the representative and his sureties are irresponsible. Jackson v. Forrest, 2 Barb. Ch. (N. Y.) 576.

[h] **Suit to prevent misapplication.**—A creditor has the right to pursue the assets of an estate whenever he has reason to apprehend their misapplication by the personal representative, either voluntarily or by coercion of execution in satisfaction of his own debts. Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617.

82. See Creditors' Suits §§ 16–38.

83. Caswell v. Caswell, 28 Me. 232.

84. Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075; Johnson v. Powers, 13 Fed. 315; Jenkins v. Lockard, 66 Ala. 377; Halfman v. Ellison, 51 Ala. 543; Watts v. Gayle, 20 Ala. 817; Everingham v. Vanderbilt, 51 HowPr (N. Y.) 177.

85. Harmon v. Sweet, 221 Mass. 587, 109 NE 942; Van Houten v. Reily, 14 Miss. 440.

86. Cohen v. Menard, 31 Ill. A. 503 [aff 136 Ill. 130, 24 NE 604].

87. Smith v. Jones, 15 Mich. 281.

88. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46.

89. Matter of Weil, 110 App. Div. 67, 96 NYS 1017.

90. Brown v. Nelms, 86 Ark. 368, 112 SW 373.

91. **On distribution of estate** see infra § 1423.

tors and administrators are very generally required by statute to reserve a portion of the assets for the payment of claims which are contingent, or as to which suits are pending, or which are not yet due.[92] So also a court of equity has power, in cases where there is a clear debt to be paid or duty to be performed at a future day, to order that sufficient assets for the discharge of it be retained and secured by the personal representative, before the distribution of the estate,[93] and a surrogate has power to direct an administrator, on his accounting, to retain the amount of a disputed claim, where the claimant failed to sue because of the nonresidence of the administrator, and his refusal to make a voluntary appearance.[94] But on entering a final decree on an administrator's accounting, the surrogate will not direct him to retain the amount of a disputed claim, which claimant has made no effort to enforce.[95] Where a claim was presented to an administrator for payment by a minor claimant within twelve months after she arrived at age, as authorized by statute, it was no defense to the administrator's liability that, although he had received sufficient assets to pay the claim, he had distributed the same in good faith without notice of the claim.[96]

[§ 1258] **14. Liability of Creditor to Refund.** At common law a creditor who had received his just debt in good faith from a personal representative could not be compelled to refund any part of it,[97] even though preferred debts of the estate remained unpaid;[98] but according to the rule which now generally obtains, when a personal representative under an honest belief that the estate is solvent pays a creditor in excess of his pro rata distributive share, he may upon its being ascertained that the estate is really insolvent recover the overpayment from the creditor.[99] There can be no such recov-

92. Cal.—In re Sigourney, 61 Cal. 71.

Me.—Greene v. Dyer, 32 Me. 460.

Md.—Pole v. Simmons, 49 Md. 14; Ing v. Baltimore Assoc., etc., 21 Md. 426.

Mass.—Cobb v. Kempton, 154 Mass. 266, 28 NE 264; Hammond v. Granger, 131 Mass. 351.

Nev.—Pruett v. Caddigan, 176 P 787.

N. H.—Wheeler v. Joslin, 63 N. H. 164.

N. Y.—Matter of Kucielski, 49 Misc. 404, 99 NYS 828, 5 Mills Surr. 288; In re Henshaw, 37 Misc. 536, 75 NYS 1047, 2 Mills Surr. 572; In re Trustlow, 37 Misc. 189, 74 NYS 944, 2 Mills Surr. 494; Hallett v. Hare, 5 Paige 315; Field v. Field, 2 Redf. Surr. 106.

Pa.—Black's Est., 12 Pa. Dist. 720; Douglass' Est., 10 Pa. Dist. 479, 25 Pa. Co. 566; Bumm's Est., 8 Pa. Dist. 191; Boys' Est., 1 Pa. Co. 66.

R. I.—Bowler v. Emery, 29 R. I. 310, 70 A 7.

Wash.—Sharp v. Sharp, 180 P 580.

[a] **Retaining a sum to pay tax.**—Where the validity of a tax against a decedent's estate is in question upon a final accounting, the decree should provide for the retention of the amount of tax. Matter of Kenworthy, 63 Hun 165, 17 NYS 655.

[b] **Conditional subscription.** — Where, after subscribing to an endowment fund on condition that a certain other sum should be raised, the promisor died, it was proper to order the executors of the promisor to retain the amount of the subscription during a reasonable time and, if the other subscriptions were obtained within six months after the making of the order, to authorize payment of the subscription. In re Converse, 240 Pa. 458, 87 A 849.

[c] **Such a statute is not applicable to:** (1) A matured mortgage indebtedness against an estate before foreclosure. In re McDougald, 146 Cal. 196, 79 P 875. (2) A claim on decedent's agreement to pay persons a certain sum on a certain day of each year of their lives. Miller v. Miller, 171 Cal. 269, 152 P 728 (the nature of the claim is such that the court could not determine what it would be in amount if established or absolute).

[d] **A "contingent claim"** as the expression is used in such statutes, does not include: (1) The obligation of a surety on a guardian's bond. Pruett v. Caddigan, (Nev.) 176 P 787. (2) A claim of the surviving partner against the estate of a deceased partner. Sharp v. Sharp, (Utah) 180 P 580.

[e] **Covenants in lease.**—Where a lessor, since deceased, covenants to pay her lessee "for the building remaining on the premises at the expiration of the term," it does not make her a debtor to the lessee until the term has actually expired, and where she dies before that time the court has no authority on the judicial settlement of the accounts of her administrators to require them to retain in their hands the probable amount of their claim under a statute authorizing such act "where an admitted debt of the decedent is not yet due." In re Henshaw, 37 Misc. 536, 75 NYS 1047, 2 Mills Surr. 572.

[f] **Reservation of money to apply on canceled contract.**—An administrator cannot retain money remaining in his hands unadministered to apply on a contract made for the sale of land to decedent, where the contract has been annulled and canceled by the vendors; he would thus benefit the heirs seeking enforcement of the contract, at the expense of the creditors of the estate. Harmon v. Durham, 3 Wend. (N. Y.) 367.

[g] **Reservation a matter for discretion of court.**—Bennett's Est., 132 Pa. 201, 19 A 58; Fitzpatrick's Est., 14 WklyNC (Pa.) 472.

93. Miller v. Miller, 171 Cal. 269, 152 P 728; Petrie v. Voorhees, 18 N. J. Eq. 285.

94. Matter of Rasch, 26 Misc. 459, 55 NYS 434, 28 NYCivProc 98, 2 Gibb. Surr. 562.

95. Matter of Rasch, 26 Misc. 459, 55 NYS 434, 28 NYCivProc 98, 2 Gibb. Surr. 562.

96. Daniel v. Baldwin, 148 Ala. 292, 40 S 421.

97. Ind.—Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270.

Ky.—Lawson v. Hansborough, 10 B. Mon. 147.

Mass.—Walker v. Hill, 17 Mass. 380.

Nev.—Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 353.

Pa.—Carson v. McFarland, 2 Rawle 118, 19 AmD 627; Yocum v. Commercial Nat. Bank, 8 Pa. Dist. 631.

Tenn.—Johnson v. Molsbee, 5 Lea 444.

Va.—Findlay v. Trigg, 83 Va. 539, 3 SE 142.

Eng.—Dillon v. Burton, 3 Ridg. P. C. 101.

Ont.—Doner v. Ross, 19 Grant Ch. (U. C.) 229.

98. Whitted v. Nash, 66 N. C. 590; Staples v. Staples, 85 Va. 76, 7 SE 199; Findlay v. Trigg, 83 Va. 539, 3 SE 142; Hodges v. Waddington, 2 Vent. 360, 86 Reprint 485.

99. Ala.—Walker v. Mock, 39 Ala. 568.

Ark.—Boles v. Jessup, 57 Ark. 469, 21 SW 880.

Cal.—Lathrop v. Bampton, 31 Cal. 17, 89 AmD 141.

Conn.—Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285.

Ga.—McFarlin v. Ringer, 51 Ga. 363.

Ill.—Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565 [rev on other grounds 23 Ill. A. 482].

Ind.—East v. Ferguson, 59 Ind. 169; Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270.

Ky.—Moore v. Moore, 88 Ky. 683, 11 SW 780, 11 KyL 210; Masonic's Sav. Bank v. Bang, 10 SW 633, 10 KyL 743.

La.—Coughlin's Succ., 35 La. Ann. 343; Debreuil's Succ., 12 Rob. 507.

Me.—Morris v. Porter, 87 Me. 510, 33 A 15.

Mass.—Heard v Drake, 4 Gray 514; Colegrove v. Robinson, 11 Metc. 238; Bliss v. Lee, 17 Pick. 33; Walker v. Bradley, 3 Pick. 261; Walker v. Hill, 17 Mass. 380.

N. Y.—Woodruff v. H. B. Claflin Co., 198 N. Y. 470, 91 NE 1103, 28 LRANS 440, 19 AnnCas 791 [rev 133 App. Div. 874, 118 NYS 48]; Hoppenstedt v. Amy, 174 NYS 742.

Oh.—Rogers v. Weaver, 5 Oh. 536, Wright 174.

Or.—Thorson v. Hooper, 57 Or. 75, 79, 109 P 388; Ferchen v. Arndt, 26 Or. 121, 37 P 161, 46 AmSR 603, 29 LRA 664.

Tenn.—Johnson v. Molsbee, 5 Lea 444.

Ont.—Chamberlen v. Clark, 9 Ont. A. 273 [dism app 1 Ont. 135].

"At common law, a creditor who had received more than a pro rata share of an intestate's estate could not be compelled to refund any part of it. . . . This ancient rule has been held applicable, in some instances in this country. Reason and the weight of authority support the principle that whenever such a creditor obtains from a personal representative of a decedent's estate, under a mistake of fact, a sum of money on account of his demand, which, ex aequo et bono, he ought not to retain, it may be secured in an action instituted for that purpose. . . . Recoveries are had in such cases by administrators in actions at law without invoking the doctrine of following trust funds, a relief which is available only to a cestui que trust in a court of chancery when the property can be identified." Thorson v. Hooper, supra.

[a] **Form of action.**—(1) The personal representative may recover the overpayment in an action for money had and received for the use of the estate (Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565 [rev 23 Ill. A. 486 (foll Beaird v. Wolf, 19 Ill. A. 36; Foskett v. Wolf, 19 Ill. A. 33)]), and (2) after his final settlement, for his own use (Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565 [rev 23 Ill. A. 486]; Rogers v. Weaver, 5 Oh. 536, Wright 174).

[b] **When proof of insolvency at time of payment unnecessary.**—It is not necessary to aver or prove, in

ery, however, where the creditor receiving payment has been prejudiced by the representative's failure to comply with the law, bad faith, or negligence,[1] where there were sufficient funds on hand, at the time when a claim was paid, to pay all other claims of equal or superior dignity, and the estate subsequently became insufficient through the fault of the representative,[2] where the representative pays a claim with full knowledge of all surrounding conditions, including the insolvency of the estate,[3] or where the payment was made on the personal authority of the representative rather than as a debt of the estate,[4] as in the case of payments to the representative's attorney[5] or payments made in the course of an unauthorized continuance of decedent's business.[6] Neither can the overpaid creditor be compelled to refund at the suit of other creditors, as the remedy of the latter is upon the bond of the representative.[7] Where a claim to beneficial ownership of a deposit in decedent's name was made in good faith, and the administratrix transferred funds to claimant in satisfaction thereof, there was no devastavit by claimant.[8] Where, owing to an erroneous computation as to the amount of the claim of a creditor, a personal representative has made an overpayment, he may maintain an action in his representative capacity to recover the amount overpaid,[9] and where plaintiff in a creditor's suit turns out to have been overpaid, the court has jurisdiction to order him to refund such overpayment.[10] But where a note constituting a just debt has been allowed and paid by the representative, although not presented within the time limited for presentation, all the parties believing presentation unnecessary because the note was not due when decedent died, equity will not allow a recovery against those to whom the payment was made.[11] A personal representative who on competent advice pays a claim bona fide made against the estate of his decedent, cannot afterward, upon further advice taken, recover the amount of the claim so paid upon the suggestion that the payment was made under a mistake of law.[12] Money paid out of the assets of an intestate's estate that is solvent, by one who afterward becomes administrator, in discharge of a bona fide indebtedness of the estate which the administrator would have been bound to pay in due course of administration, cannot be recovered by him.[13]

An agreement by a creditor to refund, in case the estate proves insolvent, the amount received by him in excess of the dividend to which he is entitled, is based on a sufficient consideration and may be enforced.[14] Where claimants on receiving a payment on account, agreed to hold the representative

an action to recover the excess paid an unpreferred creditor long before a final settlement of the estate, that the estate was insolvent when the debt was paid. Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270.

[c] **Setting off improper payment.**—Where through a mistake of fact, a personal representative makes a payment on a claim of a class to which there are no funds of the estate applicable, claimant should be charged with such payment when a claim for which there are assets applicable is paid him. Pinneo v. Goodspeed, 120 Ill. 524, 12 NE 196 [aff 22 Ill. A. 50].

[d] **Mistake of fact or law.**—An administrator having been garnished in a suit in which the attorney for the estate represented the creditor, judgment was recovered in favor of the creditor, on which an execution was issued and placed in the hands of a sheriff for service, who notified the administrator that he had an order from the county court directing payment out of the funds of the estate. The administrator thereupon consulted the attorney for the estate without knowledge that he also represented the creditor and was advised to pay the money, which he did. No such order had been in fact issued by the county court, and the attempt by garnishment, in the absence of a statute authorizing it to hold the administrator and subject the assets in his hands to the debt, was invalid. The administrator under such circumstances paid the money under a mistake of fact, and was entitled to recover it; but if the attorney acted in good faith when he advised the administrator that such an order, if issued, was valid and should be complied with, the money was then paid under a mistake of law, and was not recoverable. Thorson v. Hooper, 57 Or. 75, 109 P 388.

[e] **Defenses.**—It is no defense to an action to recover the excess paid an unpreferred creditor that the claims which reduced the estate to insolvency were not filed until more than fifteen months after the payment of his claim, although before final settlement of the estate; or that there was no finding that the estate had been finally settled as insolvent and that the final dividend had not been ascertained and decreed, where the evidence showed that the estate had been left open for the purpose of prosecuting actions to recover excess payments and the court's findings showed the aggregate indebtedness and assets, and the per cent that could ratably be paid. Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270.

[f] **Recovery limited to amount of excess.**—A recovery of the entire amount paid to the creditors cannot be had, but the recovery will be limited to the difference between the amount paid and the pro rata share which the creditor would have been entitled to receive. Morris v. Porter, 87 Me. 510, 33 A 15.

[g] **Imputed knowledge.**—Where the amount paid to certain children from the estate of their deceased father was received by them as creditors of their father's estate, and not as heirs, they were not bound by the father's knowledge of a claim against him which was not presented as a claim against his estate, in a suit to compel such children to refund for the benefit of such creditor. Hill v. Mayes, 117 Ky. 877, 79 SW 276, 25 KyL 2023.

[h] **Payment by debtor of estate.**—The fact that the payment is made by a debtor of the estate at the request of the administrator is immaterial. The administrator is as much entitled to recover in such case as if he had received the money and paid it out himself. Heard v. Drake, 4 Gray (Mass.) 514 [dist Austin v. Henshaw, 7 Pick. (Mass.) 46].

[i] **As between mortgage creditors** the burden of contribution is upon the junior mortgagee. Hautau's Succ., 32 La. Ann. 54; Marc's Succ., 29 La. Ann. 412; Rousseau's Succ., 23 La. Ann. 1; O'Laughlin's Succ., 18 La. Ann. 142.

[j] **Payment in another jurisdiction.**—A curator of an insolvent estate cannot recover from a creditor of decedent, who has collected his claim from the representative of the estate in another jurisdiction, the amount so collected, for the purpose of enabling equal distribution among all creditors. Schneller v. Vance, 8 La. 506, 28 AmD 140.

[k] **If the representative incurred no liability to other creditors** on account of the overpayment, as where it was made after the time limited by law for the presentation of claims, he is not entitled to recover. Colegrove v. Robinson, 11 Metc. (Mass.) 238.

[l] **If there was no mistake of fact** in paying more than the pro rata share to which the creditor was entitled, the executor or administrator cannot recover it back from him. Beardsley v. Marsteller, 120 Ind. 319, 22 NE 315; Egbert v. Rush, 7 Ind. 706.

[m] **Under the Ontario statute** (1) where it appears that one creditor has received more than his pro rata share, he will be ordered to refund at the instance of other creditors. Chamberlen v. Clark, 9 Ont. A. 273 [aff 1 Ont. 135]. (2) But it seems that a personal representative cannot maintain an action to recover the excess so paid. See Leitch v. Molson's Bank, 27 Ont. 621 (where new claims were presented after the statutory time).

1. Brooking v. Farmers' Bank, 83 Ky. 431 [expl and dist Lawson v. Hansborough, 10 B. Mon. (Ky.) 147].
2. Foster's Succ., 4 La. Ann. 497.
3. Scott v. Morris, 131 Ill. A. 605 (payment deemed voluntary).
4. See infra notes 5, 6.
5. State v. Jefferson County Fifth Judicial Dist. Ct., 53 Mont. 210, 162 P 1053; In re Sullivan, 36 Wash. 217, 78 P 945.
6. Donnelly v. Alden, 229 Mass. 109, 118 NE 298.
7. Johnson v. Molsbee, 5 Lea (Tenn.) 444.
8. Scully v. McGrath, 201 N. Y. 61, 94 NE 195 [rev 136 App. Div. 905, 120 NYS 1145].
9. Grimes v. Blake, 16 Ind. 160.
10. Graves v. Wright, 2 Dr. & War. 77.
11. Rhodes v. Driver, 108 Ark. 80, 157 SW 147, AnnCas1915B 258.
12. Merrill v. Parsons, 166 App. Div. 972, 151 NYS 794; Mayhew v. Stone, 26 Can. S. C. 58.
13. Rainwater v. Harris, 51 Ark. 401, 11 SW 583, 3 LRA 845.
14. Beardsley v. Marsteller, 120 Ind. 319, 22 NE 315 [foll Wheeler v. Hawkins, 116 Ind. 515, 19 NE 470].

[a] **Agreement by one of several joint creditors.**—Where one of several creditors holding a joint claim against a decedent's estate at the time of receiving payments on the claim from the administrator on condition that, in case of insolvency of the estate, a refund would be made to the administrator accordingly was acting for himself as well as the other creditors, the administrator on

harmless "in case said estate does not pay enough on settlement, to cover the above amount, on the claims we hold against said estate," and the claims held by such claimants were subsequently rejected, the representative was entitled to recover back the money paid.[15]

Refunding bond. Where the executors of a contractor paid the profits of a contract to his nephew, who claimed them, taking a bond to secure payment of any claims against the estate arising from the contract, the bond was sufficient to protect the estate against a judgment for personal injury caused in performing the contract, although that claim was not mentioned in the bond.[16]

[§ 1259] **15. Release by Creditors.** A person having a claim against an estate may by express agreement release it,[17] and if the agreement is in writing, in construing it, the primary consideration is to arrive at the intention of the parties thereto.[18] A receipt given to a personal representative for the payment of a claim against an estate is not conclusive evidence of payment, and where payment has not in fact been made, the estate is still liable, notwithstanding the receipt;[19] but such a receipt is prima facie evidence of payment;[20] and it has been held that where a personal representative makes a settlement with a creditor by a payment pro rata upon his claim, taking a receipt in full, such receipt is conclusive unless it is shown that it was obtained by fraud, or through mistake, or upon some condition.[21]

[§ 1260] **16. Property Available for Payment**[22] **—a. In General.** As a general rule all of the property of a decedent of whatever character is liable for the payment of his debts,[23] and where trustees with power of sale under a will conveyed the property before the administration was closed, the grantee took title subject to administration to the same extent as the grantee of a devisee,[24] and hence could not acquire title by adverse possession as against the administrator with the will annexed, so as to relieve the property from the demands of administration.[25] The debts of a decedent are charges upon the corpus of his estate and not merely upon the income,[26] although it may in certain cases be proper to apply the income to the payment

the subsequent ascertainment that the estate was insolvent had the option of proceeding against the creditors either separately or jointly, and a contention in an action by the administrator to recover a portion of the sum paid on account of the insolvency of the estate that the complaint against the creditor to whom payment was made was insufficient because the other creditors were not made parties defendant was without merit. Wright v. Jordan, 71 Ind. 1.

15. Gorman v. Nairne, 12 Ala. 338.

16. Dunfee v. Dunfee, 145 App. Div. 108, 129 NYS 142 (holding also that executors suing on such bond were not bound to prove the validity of the nephew's claim as strictly as he would have had to do in suing to recover from the executors).

17. Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308; Winslow v. Leland, 128 Ill. 304, 24 NE 588; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Horne v. McRae, 53 S. C. 51, 30 SE 701.

[a] **Illustration.**—Where one having a claim against an estate entered into an agreement with the heirs, one of whom was also administrator, whereby claimant agreed to accept a stipulated consideration in full settlement of all claims "against the estate, heirs or administrators," the release was valid as to any claim against the administrator, although he was not an express party in his official capacity. Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

[b] **Covenant in favor of one of two representatives.**—Where there is a joint decree against the executors of two persons and a creditor receives a moiety of the debt from the representatives of one of them, a covenant not to levy the residue of the decree upon the estate of that one does not discharge the representatives of the other, although a release would have operated to discharge both executors. Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

[c] **Circumstances not showing release.**—Glenn v. Froman, 13 KyL 540.

18. In re Bleakley, Myr. Prob. (Cal.) 235; Colton v. Field, 131 Ill. 398, 22 NE 545 [rev 28 Ill. A. 354]; Johnson v. Taylor, (R. I.) 73 A 307; Horne v. McRae, 53 S. C. 51, 30 SE 701.

[a] **Waiver of all claim in excess of a certain amount.**—A stipulation in writing indorsed on a claim by which a claimant waives any claim against the estate beyond a certain sum constitutes a waiver of interest on that sum. In re Bleakley, Myr. Prob. (Cal.) 235.

[b] **Agreement not releasing claim.**—Where in partition between heirs, an agreement was filed whereby one of them and her husband, who also signed it, were to have one fifth of the estate, "both real and personal, after showing up the contents of such estate," for which they relinquished their claim "to all the rest of the estate" to the remaining heirs, there was no relinquishment of the husband's claim against the estate for services rendered decedent. Horne v. McRae, 53 S. C. 51, 30 SE 701.

[c] **Release in full a mere receipt.**—Where claimant executed a release "in full payment for all claims of said estate," without reading or having the same read to her, on the administrator representing that it was only a receipt to enable him to show the heirs what articles of personal property he had turned over to claimant, comprising articles which intestate had given to claimant in his lifetime, such release was no defense to a claim for services rendered by claimant to intestate. Johnson v. Taylor, (R. I.) 73 A 307.

19. Shropshire v. Long, 68 Iowa 537, 27 NW 737.

[a] **Where attorneys gave an administrator their receipt** for money which they had not in fact received, and he obtained credit on such receipt in his account, they thereby discharged the estate and must look to the administrator personally. Taylor v. McCall, 71 Ala. 52.

20. McCreeliss v. Hinkle, 17 Ala. 459.

21. Miller v. Harrison, 34 N. J. Eq. 374; Adriance v. Crews, 38 Tex. 148.

22. **Assets of estate** see supra §§ 317–372.

23. U. S.—U. S. v. Drennen, 25 F. Cas. No. 14,992, Hempst. 320.

Ala.—Maybury v. Brady, 67 Ala. 147.

Ark.—Bob v. Powers, 19 Ark. 424.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; In re Darley, 188 Ill. A. 229 [aff 266 Ill. 542, 107 NE 798].

Ky.—Rogers v. Farrar, 6 T. B. Mon. 421; Mason County v. Lee, 1 T. B. Mon. 247; Thompson v. Bailey, 1 KyL 321.

Md.—Prince de Bearn v. Winans, 111 Md. 434, 74 A 626.

Mass.—Loring v. Wilson, 174 Mass. 132, 54 NE 502.

Mich.—Henze v. Rogatzky, 199 Mich. 558, 165 NW 629.

N. Y.—Smith v. Cornell, 113 N. Y. 320, 21 NE 140 [aff 52 N. Y. Super. 499]; Matter of Shanley, 95 Misc. 427, 160 NYS 733.

N. D.—Brudevold v. Waldorf, 37 N. D. 516, 164 NW 154.

Pa.—Habecker's Est., 43 Pa. Super. 91; Tomlinson's Est., 20 Pa. Dist. 263.

S. C.—Lawton v. Hunt, 25 S. C. Eq. 233.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[a] **Balance of insurance policy assigned as security.**—Where the balance of a sum paid on a policy of insurance on the life of a decedent which had been assigned as security has been paid over by the pledgee to the administrator, the money must be used by the administrator to pay the debts of decedent, and should not be paid to his minor children at the direction of the creditor. Harrisburg Nat. Bank v. Hiester, 2 Pearson (Pa.) 253.

[b] **Stock held by an administrator of surety.**—An administrator of a surety, having bank-stock certificates in his hands as such administrator when the principal debtor becomes insolvent, may and should apply on the debt for which decedent is bound as surety the value of the stock and any dividends thereon remaining in his hands. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[c] **Legal assets primarily liable.**—Before a creditor having a judgment against an intestate can seek satisfaction out of purely equitable assets in the hands of a stranger, he must make it appear that the estate is otherwise insufficient. Jones v. McCleod, 61 Ga. 602.

[d] **A specific fund** cannot be subjected to the payment of the claim of a single creditor until it has been judicially determined in the manner required by statute that there are no other debts for which the fund is liable. Hancock v. Chapman, 170 Ky. 99, 185 SW 813.

[e] **Debts are not a lien** upon the property, unless expressly charged thereon. Hines v. Spruill, 22 N. C. 93.

24. Blair v. Hazzard, 158 Cal. 721, 112 P 298.

25. Blair v. Hazzard, 158 Cal. 721, 112 P 298.

26. Bonney v. Haydock, 40 N. J. Eq. 513, 4 A 766; Smith v. Barham,

of debts and expenses in preference to the corpus.[27] Where a widow as a creditor of her husband's estate claimed a bank deposit standing in plaintiff's name, representing the income of certain land deeded by her husband to his children, with a reservation of the rents and revenues for life, which were deposited in plaintiff's name to defraud the husband's creditors, plaintiff's right to such deposit did not depend on whether the conveyances of the property and the surrender of possession thereof to plaintiff were or were not made to defraud the husband's creditors, but on whether the husband reserved to himself, at the time he deeded the land to his children, the rents and revenues from the land after the execution of the deeds.[28] Where a father deeded property to trustees to be held by them during the lifetime of his daughter, and the interest and increase to be applied to her use, and gave her the privilege of disposing of the body of the property by will, such property cannot be subjected to the payment of the daughter's debts at her death.[29]

Community property. Where a community is unliquidated and owes debts, the administration of the estate of the husband involves that of the community, and hence community property may be validly sold by the administrator of the husband's succession for the payment of community debts.[30] Where the expenses of administration are of a general nature, they should be charged pro rata on the community property and separate estate; but expenses which attach specifically to particular pieces of estate are to be charged against such pieces.[31]

Peculiar circumstances or statutory provisions may render it proper that a particular part of a decedent's estate shall be first applied to payment of his debts.[32]

[§ 1261] **b. Real and Personal Property—(1) In General.** The common-law rule was that the real estate of a decedent could not be subjected to payment of his debts unless such debts were specifically charged thereon by his will;[33] but under the modern law of administration the rule is otherwise, and the whole estate, real as well as personal, is subject to the payment of debts,[34] and the rule in

17 N. C. 420, 25 AmD 721; Vanderford's App., (Pa.) 12 A 491; Gillam v. Caldwell, 32 S. C. Eq. 73.

[a] **Illustration.**—In case of a residuary bequest to one for life, with remainder over, the whole is subject to the immediate payment of debts, and the executor should sell immediately, instead of waiting for the debts to be paid out of the profits. Smith v. Barham, 17 N. C. 420, 25 AmD 721.

[b] **Where the testator has not appropriated any particular fund** for the payment of debts and has disposed of both the fee and the income, the fee is primarily liable for the payment of the debts. Duncan v. Tobin, 13 S. C. Eq. 161.

[c] **As between a life tenant and a remainderman,** where a testator does not direct the fund out of which his debts are to be paid, they are chargeable, not on the income, but on the corpus of the estate as it existed at the testator's demise. Gillam v. Caldwell, 32 S. C. Eq. 73.

[d] **Interest on a debt of testator** accruing after his death is payable out of the corpus of the estate where the income is bequeathed to the widow. Anspach's Est., 16 Pa. Dist. 176.

[e] **Counsel fees as against annuitant.**—The court has a right to refuse to charge, against the income of the estate in which a widow appears to be interested as an annuitant, the counsel fees paid by its executor on a successful suit brought by him against the widow to recover assets of the estate, but may allow a counsel fee payable out of the corpus in the matter of exceptions. Bonney v. Haydock, 40 N. J. Eq. 513, 4 A 766.

27. De Peyster v. Clarkson, 2 Wend. (N. Y.) 77; Hawley v. James, 5 Paige (N. Y.) 318 [rev on other grounds 16 Wend. 61]; Manigault v. Holmes, 8 S. C. Eq. 283; In re Dawson, 75 L. J. Ch. 201.

[a] **Current expenses.**—The income of property in the hands of an executor is the primary fund for payment of current expenses, and a person seeking to charge the capital for a debt contracted by the executor must show that the debt was necessary, that the executor has no funds of the estate, and that the executor is insolvent. Manigault v. Holmes, 8 S. C. Eq. 283.

28. McCormick v. National Bank of Commerce, (Tex. Civ. A.) 106 SW 747.

29. Prince de Bearn v. Winans, 111 Md. 434, 74 A 626.

30. Le Blanc's Succ., 142 La. 27, 76 S 223, LRA1017F 1137; Oriol v. Herndon 38 La. Ann. 759.

31. In re Patton, Myr. Prob. (Cal.) 241.

32. See infra this note.

[a] **Illustration.**—A testator, while managing his factory building upon his land, had contracted certain debts for coal supplied to him by complainants in carrying on his factory business. By his will he directed the business to be continued after his death under the management of his son, and appointed him, with two others, his executors. His son and his executors continued the business after his death, and contracted debts for coal furnished the factory by complainants to carry on the business. That the latter debts, the executors having defaulted in their payment, were under well-settled principles chargeable, in equity, as liens against the land, but that the debts contracted by the testator for the coal furnished before his death were payable out of the general assets of his estate, for the collection of which complainants have an adequate remedy at law. Paul v. Wilson, 79 N. J. Eq. 204, 81 A 835.

[b] **General estate before property subject to appointment.**—Testator created a trust in a share of real property in favor of his daughter F and provided that, upon the death of the survivor of his two daughters, the share should go to F's appointees by deed or by will, or, in default of such appointment, to her heirs. F by her will created a trust covering all property subject to her disposal by will to continue during her grandniece's life, with remainder to the grandniece's issue. Although as to F's creditors and purchaser she became the owner of the fee of the share devised by testator under her power of appointment, in the absence of any question raised by a creditor or purchaser arising out of such relation, she having died, her debts should be paid out of her own general estate, and not out of the estate over which she had power of appointment, the amount of her debts being small as compared with her estate, which consisted wholly of personalty. Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59 [aff 120 App. Div. 347, 104 NYS 1092].

[c] **Intestate estate first.**—Under the statutes which provide that, if testator by his will designates the estate to be appropriated for the payment of debts and administration expenses, they must be paid out of the appropriated estate so far as it is sufficient, and that, if the estate appropriated is insufficient, any portion of the estate not disposed of by will must be appropriated for that purpose, where a testator disposes of only part of his estate by will, and makes no provision for the payment of debts and expenses, they must be paid out of the intestate estate. In re Travers, 145 Cal. 508, 78 P 1058.

[d] **Property specifically devised or bequeathed** belongs to the class of property to be resorted to last for the payment of debts. In re Bragg, 166 Cal. 103, 134 P 1140.

33. Ill.—Peo. v. Brooks, 123 Ill. 246, 14 NE 39.

Ky.—Rogers v. Farrar, 6 T. B. Mon. 421.

Mass.—Hays v. Jackson, 6 Mass. 149.

Mo.—Sauer v. Griffin, 67 Mo. 654; State v. Pohl, 30 Mo. A. 321; State v. Miller, 18 Mo. A. 41.

N. H.—Ticknor v. Harris, 14 N. H. 272, 40 AmD 186.

N. J.—New Jersey Ins. Co. v. Meeker, 37 N. J. L. 282.

Eng.—Plunket v. Penson, 2 Atk. 292, 26 Reprint 577; Wilson v. Knubley, 7 East 128, 103 Reprint 49; Plasket v. Beeby, 4 East 485, 102 Reprint 917.

34. U. S.—In re McAusland, 235 Fed. 173; U. S. v. Drennen, 25 F. Cas. No. 14,992, Hempst. 320; Davis v. Weed, 7 F. Cas. No. 3,658, 44 Conn. 569.

Ala.—Baldwin v. Alexander, 145 Ala. 186, 40 S 391; Scott v. Ware, 64 Ala. 174.

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Cal.—Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

Ill.—Hurlbut v. Talbot, 273 Ill. 356, 112 NE 697; Schaeffer v. Ardery, 241 Ill. 27, 89 NE 294; Ryan v. Jones, 15 Ill. 1; Vansyckle v. Richardson, 13 Ill. 171; Lewis v. McGraw, 19 Ill. A. 313.

Ind.—Stone v. Elliott, 182 Ind. 454, 106 NE 710; Baker v. Griffitt, 83 Ind. 411; Moncrief v. Moncrief, 73 Ind. 587; Pell v. Farquar, 3 Blackf. 331; Moore v. State, (A.) 84 NE 161.

Kan.—Smith v. Kibbe, 178 P 427.

Ky.—Muldoon v. Crawford, 14 Bush 125; Chambers v. Davis, 17 B. Mon. 526; Shehan v. Barnett, 6 T. B. Mon. 592; Monroe v. Wilson, 6 T. B. Mon. 122; Rearden v. Searcy, 3 A. K. Marsh. 539.

La.—Finegan's Succ., 135 La. 473, 65 S 614.

Md.—Cornish v. Willson, 6 Gill 299; Gibson v. McCormick, 10 Gill & J. 65.

Mass.—In re Lee, 18 Pick. 285.

Mo.—Doneghy v. Robinson, 210 SW 655; Titterington v. Hooker, 58 Mo. 593; Elstroth v. Dickmeyer, 88 Mo. A. 418.

N. J.—Hattersley v. Bissett, 52

this respect is not affected by the fact that the personalty was originally sufficient to pay the debts, but has been lost or become depreciated in value by reason of the wrongful or negligent acts or omissions of the personal representative.[35] With regard to what constitutes realty and what personalty, it may be laid down as a general rule that no part of an estate is personal property which was not such at the death of the owner,[36] although of course this rule may be affected by testamentary provisions by which realty is converted into personalty.[37]

[§ 1262] **(2) Primary Liability of Personalty.**

N. J. Eq. 693, 30 A 86; Shearing v. Delany, 11 N. J. Eq. 317; Jersey City First Nat. Bank v. Tobin, (Ch.) 107 A. 592.

N. Y.—In re Reed, 214 N. Y. 383, 108 NE 565; In re Roberts, 214 N. Y. 369, 108 NE 562; Glacius v. Fogel, 88 N. Y. 434 [aff 25 Hun 227]; Ring v. Wooley, 155 App. Div. 817, 140 NYS 648; Powell v. Harrison, 88 App. Div. 228, 85 NYS 452 [app dism 178 N. Y. 567 mem, 70 NE 1108 mem]; Stuart v. Kissam, 11 Barb. 271; Platt v. Platt, 4 NYSt 631.

N. C.—Hines v. Spruill, 22 N. C. 93.

Oh.—Piatt v. St. Clair, 6 Oh. 227, Wright 261; Wanzer v. Wanzer, 2 Oh. Dec. (Reprint) 323, 2 WestL Month 426.

Pa.—Herron v. Stevenson, 259 Pa. 354, 102 A 1049; Woodrow's Est., 144 Pa. 198, 22 A 810; Chilcott's App., 134 Pa. 240, 19 A 850; Smith v. Seaton, 117 Pa. 382, 11 A 661, 2 AmSR 668; Blank's App., 3 Grant 192; Bailey v. Bowman, 6 Watts & S. 118; Shorman v. Reading Farmers' Bank, 5 Watts & S. 373; Steel v. Henry, 9 Watts 523; Quigley v. Beatty, 4 Watts 13; Penn v. Hamilton, 2 Watts 53; Trevor v. Ellenberger, 2 Penr. & W. 94; Hannum v. Spear, 1 Yeates 553; Morris v. Griffith, 1 Yeates 189; Morris v. McConnaughy, 2 Dall. 189, 1 L. ed. 343; Klein's Est., 2 Pa. Dist. 813, 14 Pa. Co. 94; Burgard's Est., 26 Pa. Co. 177; DeWitt v. Lehigh Valley R. Co., 25 Pa. Co. 505; Benner's Est., 2 Chest. Co. 233; McKeown's Est., 13 Phila. 339, 8 Wkly NC 343; Monro's Est., 9 Phila. 309.

S. C.—Galphin v. McKinney, 6 S. C. Eq. 280.

Tenn.—Maxwell v. Smith, 86 Tenn. 539, 8 SW 340; Morrow v. Morrow, 2 Tenn. Ch. 549.

Tex.—Hamm v. Hutchins, 19 Tex. Civ. A. 209, 46 SW 873.

Va.—Murphy v. Carter, 23 Gratt. (64 Va.) 477; McCandlish v. Keen, 13 Gratt. (54 Va.) 615; Baylor v. Dejarnette, 13 Gratt. (54 Va.) 152.

Ont.—Re Hopkins, 32 Ont. 315.

"By the policy of our law, all property, real and personal, upon the decease of the owner, is made liable for the payment of his debts, and no testamentary disposition which he can make, can exempt either species of property from that liability, when the whole is necessary." In re Lee, 18 Pick. (Mass.) 285, 288.

[a] **Real estate is legal "assets"** for the payment of a decedent's debts after the personalty is exhausted. Best v. Spooner, 4 KyL 602.

[b] **The legislature has power to subject the lands** of a person to the payment of his debts, to the exclusion of the personal property. Watkins v. Holmon, 16 Pet. (U. S.) 25, 10 L. ed. 873.

[c] **Land cannot be applied until widow's dower assigned.**—Hill v. Mitchell, 5 Ark, 608.

[d] **A direction by testator that all his debts be duly paid** charges such debts on the real estate. McKinley v. Coe, 66 N. J. Eq. 70, 57 A 1030.

[e] **Sale of realty necessary.**—Real estate is not assets for the payment of the debts of a decedent until it has been sold and the proceeds received by the administrator. Vaughn v. Deloatch, 65 N. C. 378. Sales under order of court see infra §§ 1438–1741.

[f] **Although the time has expired within which creditors can apply for a sale** of real estate to pay debts, yet, if there is a deficiency in the personal estate, debts and funeral expenses are payable out of the surplus proceeds of real estate previously sold on foreclosure. Matter of Callaghan, 69 Hun 161, 23 NYS 378.

[g] **The proceeds of a sale of mortgaged property** under executory process outside the succession are bound to contribute to the costs of administration, where there is no other fund available, and to the payment of privileged claims, such as that of a widow in necessitous circumstances and the claims of the last illness and funeral of the mortgagor. Finegan's Succ., 135 La. 473, 65 S 614.

[h] **Debts incurred in connection with realty.**—Where an executor deposited proceeds of a sale of realty under a power of sale, in his own name, and used part of the proceeds for payment of taxes and for repairs on his individual realty, and his executors sold the realty, the proceeds of such sale is chargeable with the amount so appropriated by decedent executor, in favor of the estate of which he was executor, the amount paid for taxes with interest at six per cent from the time of payment to date of sale of the land, and the amount disbursed for repairs without interest. Mattery of Clark, 69 Misc. 527, 127 NYS 888, 8 Mills Surr. 7 (holding, also, that disbursements made by the executor from such deposit for coal and electric light for tenants and for fire insurance of his individual realty are chargeable to the income from such realty and not to the proceeds of the sale thereof, the estate of which he was executor standing only as an unsecured creditor).

[i] **Promise to pay out of personalty.**—Where for a valuable consideration one promises to pay a debt out of his personal estate at his death, without a specific limitation to that estate alone, if the personal estate proves insufficient, the real estate may be resorted to. Judy v. Louderman, 48 Oh. St. 562, 29 NE 181.

[j] **Consent of representative to sale by heir.**—An administrator cannot, by consenting to the sale of land by the heir, divest the creditor of his right to have his debt made out of such land, although it might create an estoppel against him, if the right of creditors was not affected. Moncrief v. Moncrief, 73 Ind. 587.

[k] **Selection of particular tract.**—A general creditor, asserting no lien upon any portion of decedent's land, cannot select a particular tract, and subject it to the payment of his debt. Hundley v. Taylor, 25 SW 887, 15 KyL 808.

[l] **Where funds used for benefit of realty.**—Where an executor who is also a trustee under the will has used funds in his hands to keep down the interest upon encumbrances upon a portion of the trust property and for repairs of the same instead of applying such funds in payment of the debts, equity will charge such premises in favor of the creditors to the extent of the amount so laid out upon them. Ferris v. Van Vechten, 9 Hun (N. Y.) 12.

[m] **Where an executor who is sole devisee under a will sells** decedent's lands as devisee, he receives the proceeds as executor and must apply the same to the payment of decedent's debts if the personal estate is insufficient for that purpose. Hocking Valley R. Co. v. White, 87 Oh. St. 413, 101 NE 354, AnnCas1914A 190.

[n] **Lien of debts on realty.**—Matter of Clark, 69 Misc. 527, 127 NYS 888; Cooper's Est., 206 Pa. 628, 56 A 67, 98 AmSR 759; In re Emerick, 172 Pa. 191, 33 A 550; Bailey v. Bowman, 6 Watts & S. (Pa.) 118; Shorman v. Farmers' Bank, 5 Watts & S. (Pa.) 373; Steel v. Henry, 9 Watts (Pa.) 523; Quigley v. Beatty, 4 Watts (Pa.) 13; Penn v. Hamilton, 2 Watts (Pa.) 53; Trevor v. Ellenberger, 2 Penr. & W. (Pa.) 94; Benner's Est., 2 Chest. Co. (Pa.) 233; Schreck's Est., 2 Kulp (Pa.) 166.

[o] **Debts of a decedent are not necessarily a charge** on his land, since they may be barred by limitations or the land be exempt from debt. Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79.

[p] **When contribution pro rata proper.**—McLearn v. Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 558; Farnum v. Bascom, 122 Mass. 282; Wootering v. Stewart, 2 Yeates (Pa.) 483.

[q] **Remedy of heir.**—If, by the fault of the executor or administrator in not collecting personal estate, or in not applying it to the payment of debts, lands are taken from the heir or devisee, the representative is liable to the person injured in an action of waste. Mitchel v. Lunt, 4 Mass. 654.

[r] **Debts contracted by an administrator** are never a charge upon the lands of his intestate. Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79.

35. Cavitt v. Beall Hardware, etc., Co., (Tex. Civ. A.) 204 SW 798.

36. Winants v. Terhune, 15 N. J. Eq. 185.

[a] **Money arising from a sale of realty** is equitable assets. Cloudas v. Adams, 4 Dana (Ky.) 603.

[b] **Direction to sell to pay specified debts.**—Where an executor was ordered by a will to sell real estate to pay debts for which the testator was surety, and after such payment the balance was to be given to a daughter-in-law, the proceeds of the sale after payment of such debts was not personal property applicable to the payment of debts of the estate before a resort could be had to the realty. Winants v. Terhune, 15 N. J. Eq. 185.

[c] **Direction to sell lands and invest proceeds.**—Where a will authorized the executor to sell testator's lands and invest the proceeds in securities, or purchase other lands therewith, and provided that such proceeds should always be considered as real estate, creditors of the deceased could not subject the proceeds to payment of their claims as personal property, but could follow them only in equity. Mayer v. McCune, 59 How Pr (N. Y.) 78.

[d] **A judicial sale of decedent's realty** will not convert it into personalty, and an application to the supreme court by a creditor for payment of the surplus must be founded on an order of the surrogate for the sale of such realty, and payment of the applicant's demand. Hoey v. Kinney, 10 AbbPr (N. Y.) 400.

[e] **Where real estate is appropriated under the right of eminent domain,** the damages assessed thereafter are personal property, and hence liable in the first instance for debts. Hays' Est., 12 PittsbLegJNS (Pa.) 311.

37. See generally Wills [40 Cyc 2065–2076].

The general rule as to the order in which a decedent's property is liable for the payment of his debts is that the personal estate must be first applied, and then the realty,[38] and the application of the rule in a particular case is not prevented by the fact that it will result in depriving legatees of

38. U. S.—Cook v. Cook, 34 Fed. 249; Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308; Corbet v. Johnson, 6 F. Cas. No. 3,218, 1 Brock. 77.

Ala.—Pitts v. Campbell, 173 Ala. 604, 55 S 500; Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79; Baldwin v. Alexander, 145 Ala. 186, 40 S 391; Steiner v. Steiner Land, etc., Co., 120 Ala. 128, 26 S 494; Stovall v. Clay, 108 Ala. 105, 20 S 387; Banks v. Speers, 97 Ala. 560, 11 S 841; Hooper v. Hardie, 80 Ala. 114; Sharp v. Sharp, 76 Ala. 312; Maybury v. Grady, 67 Ala. 147; Steele v. Steele, 64 Ala. 439, 38 AmR 15; Scott v. Ware, 64 Ala. 174; Quarles v. Grigsby, 31 Ala. 172; Darrington v. Borland, 3 Port 9.

Ark.—Doke v. Benton County Lumber Co., 114 Ark. 1, 169 SW 327, 52 LRANS 870.

Colo.—Whitsett v. Kershow, 4 Colo. 419.

Conn.—Beard's App., 78 Conn. 481, 62 A 704; Griswold v. Bigelow, 6 Conn. 258.

Del.—In re Sutton, 97 A 624; Miller v. Cooch, 5 Del. Ch. 161; Grose v. McMullen, 2 Del. Ch. 227.

D. C.—Dahlgren v. National Sav., etc., Co., 41 App. 201.

Fla.—Hays v. McNealy, 16 Fla. 409.

Ga.—Fretwell v. Fretwell, 114 Ga. 303, 40 SE 298.

Hawaii.—Ena v. Ena, 18 Hawaii 588.

Ill.—Young v. Wittenmyre, 123 Ill. 303, 14 NE 869; Hoffman v. Wilding, 85 Ill. 453; Peo. v. Phelps, 78 Ill. 147; Harris v. Douglas, 64 Ill. 466; Clinefelter v. Ayres, 16 Ill. 329; In re Hempfling, 188 Ill. A. 542; Richardson v. Richardson, 87 Ill. A. 354.

Ind.—Honsucker v. Smith, 49 Ind. 114; Newcomer v. Wallace, 30 Ind. 216; Clarke v. Henshaw, 30 Ind. 144; Scott v. Morrison, 5 Ind. 551; Roberts v. Dimmett, 45 Ind. A. 566, 89 NE 496; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

Iowa.—In re Pitt, 153 Iowa 269, 133 NW 660; Wilts v. Wilts, 151 Iowa 149, 130 NW 906; Milburn v. East, 128 Iowa 101, 102 NW 1116; Valley Nat. Bank v. Crosby, 108 Iowa 651, 79 NW 383; Toerring v. Lamp, 77 Iowa 488, 42 NW 378.

Kan.—Smith v. Kibbe, 178 P 427.

Ky.—Bradley v. Bays, 161 Ky. 103, 170 SW 504; Morehead v. France, 153 Ky. 44, 154 SW 378; Porter v. Ford, 7 SW 29, 9 KyL 703; Alexander v. Waller, 6 Bush 330; Chambers v. Davis, 15 B. Mon. 522; Hall v. Sayre, 10 B. Mon. 46; Buford v. McKee, 3 B. Mon. 224; Buckner v. Morris, 7 J. J. Marsh. 648; McCampbell v. McCampbell, 5 Litt. 92, 15 AmD 48; Best v. Spooner, 4 KyL 602.

La.—Finegan's Succ., 135 La. 473, 65 S 614.

Me.—Morse v. Hayden, 82 Me. 227, 19 A 443; Baker v. Bean, 74 Me. 17; Hanson v. Hanson, 70 Me. 508.

Md.—Constable v. Camp, 87 Md. 173, 39 A 807; Macgill v. Hyatt, 80 Md. 253, 30 A 710; Dugan v. Hollins, 11 Md. 41; Magruder v. Carroll, 4 Md. 335; Cornish v. Willson, 6 Gill 299; Stevens v. Gregg, 10 Gill & J. 143; Wyse v. Smith, 4 Gill & J. 295; Hoye v. Brewer, 3 Gill & J. 153; Hammond v. Hammond, 2 Bland 306.

Mass.—Seaver v. Lewis, 14 Mass. 83; Hays v. Jackson, 6 Mass. 149; Fairfield v. Fairfield, 15 Gray 596; Broadwell v. Broadwell, 4 Metc. 290.

Mich.—Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559; Allen v. Conklin, 112 Mich. 74, 70 NW 339.

Miss.—Anderson v. Newman, 60 Miss. 532; Foley v. McDonald, 46 Miss. 238; Stigler v. Porter, 42 Miss. 449.

Mo.—Pearce v. Calhoun, 59 Mo. 271; Stokes v. O'Fallon, 2 Mo. 32.

Nebr.—Schade v. Connor, 84 Nebr. 51, 120 NW 1012.

N. H.—Tilton v. Tilton, 41 N. H. 479; Probate Judge v. Brooks, 5 N. H. 82.

N. J.—Bird v. Hawkins, 58 N. J. Eq. 229, 42 A 588; Ford v. Westervelt, 55 N. J. Eq. 485, 40 A 26; Hattersley v. Bissett, 52 N. J. Eq. 693, 30 A 86; Morris v. Higbie, (Ch.) 27 A 438; Whitehead v. Gibbons, 10 N. J. Eq. 230.

N. Y.—Bevan v. Cooper, 72 N. Y. 317; Russell v. Russell, 36 N. Y. 581, 93 AmD 540; Duck v. McGrath, 160 App. Div. 482, 145 NYS 1033 [aff 212 N. Y. 600 mem, 106 NE 1032 mem]; Stuart v. Kissam, 11 Barb. 271; Matter of Steele, 98 Misc. 180, 162 NYS 718; Matter of King, 97 Misc. 528, 163 NYS 405; Matter of Barker, 27 Misc. 395, 58 NYS 868; Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179, 1 Gibb. Surr. 516; In re Rhodes, 178 NYS 782; U. S. Equitable L. Assur. Soc. v. Wilds, 184 App. Div. 435, 171 NYS 505 [aff 175 NYS 901 mem]; Matter of Willard, 9 NYS 555, 2 Conn. Surr. 112; Topping's Est., 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187; Topping's Est., 29 NYS 211, 18 NYCivProc 115; Nagle v. McGinniss, 49 HowPr 193; Bloom v. Burdick, 1 Hill 130, 37 AmD 299; Hawley v. James, 16 Wend. 61 [rev 5 Paige 318]; Rogers v. Rogers, 3 Wend. 503, 20 AmD 716; Hoes v. Van Hoesen, 1 Barb. Ch. 379 [aff 1 N. Y. 120]; Livingston v. Newkirk, 3 Johns. Ch. 312; McKay v. Green, 3 Johns. Ch. 56; Matter of Noyes, 3 Dem. Surr. 369; Griswold v. Griswold, 4 Bradf. Surr. 216; Seabury v. Bowen, 3 Bradf. Surr. 207; Taylor v. Taylor, 3 Bradf. Surr. 54.

N. C.—North Carolina Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47; Mahoney v. Stewart, 123 N. C. 106, 31 SE 384; Blount v. Pritchard, 88 N. C. 445; Knight v. Knight, 59 N. C. 134; Shaw v. McBride, 56 N. C. 173; Graham v. Little, 40 N. C. 407; Carney v. Coffield, 4 N. C. 140.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Oh.—Piatt v. St. Clair, 6 Oh. 227, Wright 261; P. C., etc., R. Co. v. Schmidt, 8 Oh. Cir. Ct. 355, 4 Oh. Cir. Dec. 535.

Pa.—Sunday's App., 131 Pa. 584, 18 A 931; Risk's App., 110 Pa. 171, 1 A 85; Mason's App., 89 Pa. 402; Eavenson's App., 84 Pa. 172; Foster's App., 74 Pa. 391, 15 AmR 553; Kinter's App., 62 Pa. 318; Ramsey's App., 4 Watts 71; In re Walker, 3 Rawle 229; Todd v. Todd, 1 Serg. & R. 453; Peters' Est., 16 Pa. Super. 462; Greenberg's Est., 22 Pa. Dist. 1055, 41 Pa. Co. 517; Renz's Est., 8 Pa. Dist. 328; Crowley's Est., 7 Pa. Dist. 322; Alter's Est., 4 Pa. Co. 558, 19 Phila. 9; Mansell's Est., 1 Pars. Eq. Cas. 367; Lane's Est., 1 Del. Co. 334; Ramsey's Est., 1 LegRec 367; McKeown's Est., 13 Phila. 339, 8 WklyNC 343.

R. I.—Gould v. Winthrop, 5 R. I. 319.

S. C.—Lanier v. Griffin, 11 S. C. 565; Farmer v. Spell, 32 S. C. Eq. 541; Lloyd v. Lloyd, 31 S. C. Eq. 469; Hull v. Hull, 24 S. C. Eq. 65; North v. Valk, 13 S. C. Eq. 212; Warley v. Warley, 8 S. C. Eq. 397; Hall v. Hall, 7 S. C. Eq. 269.

Tenn.—Ford v. Cottrell, 207 SW 734; Whitmore v. Rascoe, 112 Tenn. 621, 85 SW 860; Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204; Boring v. Jobe, (Ch. A.) 53 SW 763; Morrow v. Morrow, 2 Tenn. Ch. 549.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798; Blinn v. McDonald, (Civ. A.) 38 SW 384; Byrd v. Ellis, (Civ. A.) 35 SW 1070; Brown v. Fleming, (Commn. A.) 212 SW 483.

Va.—Swann v. Housman, 90 Va 816, 20 SE 830; Elliott v. George, 23 Gratt. (64 Va.) 780; Foster v. Crenshaw, 3 Munf. (17 Va.) 514; Mason v. Peter, 1 Munf. (15 Va.) 437; Cary v. Macon, 4 Call (8 Va.) 605.

W. Va.—Mathews v. Tyree, 53 W. Va. 298, 44 SE 526; Laidley v. Kline, 8 W. Va. 218.

Wis.—In re Stark, 149 Wis. 631, 134 NW 389; McGonigal v. Colter, 32 Wis. 614.

Eng.—Powis v. Corbet, 3 Atk. 556, 26 Reprint 1120; Lanoy v. Athol, 2 Atk. 446, 26 Reprint 668; Palmer v. Mason, 1 Atk. 505, 26 Reprint 319; Ancaster v. Mayer, 1 Bro. Ch. 454, 28 Reprint 1237, 18 ERC 177; Barry v. Harding, 7 Ir. Eq. 313, 1 J. & L. 475; Chaplin v. Chaplin, 3 P. Wms. 365, 24 Reprint 1103; Reeves v. Newenham, 2 Ridg. P. C. 11; Cope v. Cope, 2 Salk. 449, 91 Reprint 389; Brummel v. Prothero, 3 Ves. Jr. 111, 30 Reprint 921.

Ont.—Re McGarry, 18 Ont. L. 524, 13 OntWR 982, 14 OntWR 244; Re Hopkins, 32 Ont. 315.

"It is a well-settled principle, that in the administration of assets the personal estate is the natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted before the real estate can be made liable." Sutherland v. Harrison, 86 Ill. 363, 365 [quot Schade v. Connor, 84 Nebr. 51, 56, 120 NW 1012]. To same effect Baldwin v. Alexander, 145 Ala. 186, 40 S 391; Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59 [aff 120 App. Div. 347, 104 NYS 1092 (aff 52 Misc. 407, 102 NYS 137)].

[a] **An antenuptial contract** is a charge on the personal estate and real estate is not subject to it. Pitkin v. Peet, 108 Iowa 480, 79 NW 272.

[b] **The cost of improvements to the real estate** which are necessary and proper to adapt the premises to the requirements of business, and which result in an increased income to the widow, is properly charged and allowed out of the personal estate. Culp's Est., 5 Phila. (Pa.) 97.

[c] **When income of realty properly applicable.**—Where personal estate is insufficient, and during the contest over the probate of the will the income of the realty has accumulated as a fund in the executors' hands, and there are controversies between legatees and devisees, the debts may be paid from the fund, and the legatees and devisees be left to settle their disputes before a competent tribunal. Skidmore v. Romaine, 2 Bradf. Surr. (N. Y.) 122.

[d] **Foreign assets.**—An action in one state by a judgment creditor of an insolvent corporation organized in that state against the widow and the sole heir of a deceased stockholder to enforce his personal liability to the extent of the value of land in such state inherited by the widow cannot be defeated by showing that there are personal assets of decedent's estate in another state sufficient to pay plaintiff's claim. Cooper v. Ives, 62 Kan. 395, 63 P 434.

[e] **Obligation of support charged on land.**—Where a deed made by a father to his son in pursuance to a previous agreement recited that "for, and in consideration of two hundred dollars, and the faithful maintenance" of the grantor's wife, the grantor "hath given and granted unto the said" grantee "a certain tract of land, to have and to hold," etc., the maintenance of the grantor's wife was not a charge upon the personalty of the estate of the grantee, decedent, in the hands of his administrator, but a charge upon the land sold in the hands of the grantee's heirs. Laxton v. Tilly, 66 N. C. 327.

[f] **Agreements between administrator and creditors.**—An administra-

participation in the estate.[39]

Liens on realty. It is very generally considered that, even though a debt is secured by a mortgage or other lien on land, if it is a personal debt of decedent, it is to be paid primarily out of the personalty,[40] although the personalty cannot be applied to relieve land of a lien which does not involve any debt of decedent.[41]

Taxes or assessments on realty, if assessed or becoming due before decedent's death, are payable primarily from the personalty,[42] but those accruing subsequently are a charge on the land.[43]

[§ 1263] **c. Rents of Realty.** Rents of real estate accruing subsequent to the death of a decedent are regarded as realty rather than as personalty,[44] and hence are not primarily liable for the payment of debts;[45] but they may, like the realty itself, be made subject to decedent's debts where the personalty is insufficient,[46] and under appropriate circumstances it may be proper to apply the rents to the payment of debts instead of selling the realty itself for this purpose.[47] Where an administraor acquired title to certain property belonging to the estate, subject to certain liens, it was his duty as administrator to apply the rents accruing from the property of the estate on its debts.[48]

[§ 1264] **d. Marshaling Assets.**[49] Ordinarily proceedings to marshal assets of a decedent's estate

tor cannot make a valid agreement with a creditor of the estate that part of the claim shall be charged against the land. In re Jenkins, 3 Dem. Surr. (N. Y.) 551

[g] **Where a will disposing of both realty and personalty was contested,** the expenses of the contest and those of administration were chargeable against the personal estate, although, under a failure of the will to have disposed of it, one half of the personal estate would have passed to the next of kin. Matter of Ogden, 41 Misc. 158, 83 NYS 977, 4 Mills Surr. 1.

[h] **A claim for expenses for having a will probated** is not a liability against the real estate, except where the land has to be sold for payment of debts. Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.

[i] **Taxes.**—Where testator directed the payment of all his funeral expenses and debts out of his personal estate, the balance of which he gave to his wife, together with a life estate in certain land, the personal estate was liable for taxes assessed against the real and personal estate and unpaid at the time of testator's death, as taxes, while not "debts," strictly speaking, are obligations or liabilities. Penn v. Penn, 120 Ky. 557, 87 SW 306, 27 KyL 946.

[j] **In a contest between the sureties** on the general bond of an administrator and the sureties on a bond given on procuring an order for the sale of real estate, the sureties on the general bond are entitled to insist that payments of debts by the administrator shall first be credited to his liability before any part can be applied as credits to the fund arising from the sale of real estate, the personal estate being the primary fund for the payment of debts. Moore v. State, (Ind. A.) 84 NE 161.

[k] **A judgment creditor** whose judgment was obtained in decedent's lifetime "was not compelled to look to the real estate as merely a secondary fund for payment, but had the right to look upon the estate, real and personal, as equally liable." Suckley v. Rotchford, 12 Gratt. (53 Va.) 60, 68, 65 AmD 240.

[l] **Under the California statute** there is no priority or distinction between realty and personalty as regards payment of debts. In re Pavert, 177 Cal. 353, 170 P 827; Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90; Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

39. Dunshee v. Dunshee, 263 Ill. 188, 104 NE 1100 [aff 182 Ill. A. 599].

40. Conn.—Beard's App., 78 Conn. 481, 62 A 704.

Ill.—Peo. v. Phelps, 78 Ill. 147.

Ind.—Newcomer v. Wallace, 30 Ind. 216; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069. Contra Kirkpatrick v. Caldwell, 32 Ind. 299.

Iowa.—In re Brackey, 166 Iowa 109, 147 NW 188.

Kan.—Smith v. Kibbe, 178 P 427.

Md.—Lansdale v. Ghequiere, 4 Harr. & J. 257.

Mass.—Creesy v. Willis, 159 Mass. 249, 34 NE 265; Plimpton v. Fuller, 11 Allen 139.

Nebr.—Schade v. Connor, 84 Nebr. 51, 120 NW 1012.

N. J.—Monoghan v. Collins, (Ch.) 72 A 109.

N. C.—Mahoney v. Stewart, 123 N. C. 106, 31 SE 384 [foll Pate v. Oliver, 104 N. C. 458, 10 SE 709, and dist Moore v. Dunn, 92 N. C. 63].

Pa.—Lennig's App., 52 Pa. 135; Peters' Est., 16 Pa. Super. 462; Greenberg's Est., 22 Pa. Dist. 1055, 41 Pa. Co. 517; Burton's Est., 3 Pa. Dist. 755, 15 Pa. Co. 367; Mansel's Est., 1 Pars. Eq. Cas. 367; Matter of Mason, 1 Pars. Eq. Cas. 129; Lane's Est., 1 Del. Co. 334.

S. C.—Henagan v. Harllee, 31 S. C. Eq. 285.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798.

Va.—Dandridge v. Minge, 4 Rand. (25 Va.) 397.

N. S.—Millard v. Gregoire, 47 N. S. 78, 11 DomLR 539.

[a] **Interest** on a mortgage is subject to the same rule. In re Dalton, (Iowa) 168 NW 332; Sunday's App., 131 Pa. 584, 18 A 931.

[b] **A widow who joined her husband in mortgages,** under which she received no consideration, signing them merely to cover her inchoate interest in his lands, is entitled, before her vested interest as a widow in the one-third part of the land can be touched, to have exhausted in payment of the mortgages the husband's personal estate, not required to pay claims expressly preferred by statute, and the proceeds from the sale of the remaining two thirds, which does not descend to her. Home Nat. Bank v. People's State Bank, 49 Ind. A. 13, 96 NE 710.

[c] **Claim not filed.**—Where intestate died indebted to a bank on a demand note secured by a mortgage on real estate, the heirs were entitled to have intestate's personal assets applied as far as possible by the administrator in payment of such note and mortgage, to the exoneration of the land, although the note was not filed as a claim against the estate, and no demand was made by the holder for payment out of the personal estate. Beard's App., 78 Conn. 481, 62 A 704.

[d] **Vendor's lien on homestead.**—An administrator has no right without an order of court to apply the general assets of the estate to the discharge of a debt secured by a vendor's lien upon the homestead set apart to decedent's family. Mullins v. Yarborough, 44 Tex. 14.

[e] **Contrary view.**—Haggerty's Succ., 27 La. Ann. 667; In re Swan, 54 Mo. A. 17; Johnson v. Corbett, 11 Paige (N. Y.) 265; Cornwell v. Deck, 2 Redf. Surr. (N. Y.) 87.

41. See supra § 876.

[a] **Contract by subsequent purchaser to pay mortgage.**—Where one purchases land, giving a mortgage for part of the price, and thereafter sells the land, and the purchaser assumes the mortgage, and the original purchaser dies, and the mortgagee obtains judgment against decedent's estate, proceedings may be suspended for enforcing such judgment, and the mortgagee ordered to sell the mortgaged premises before coming in on the personalty. Gould's Est., 6 Wkly NC (Pa.) 562.

[b] **Where a married woman gives a mortgage** or a judgment to secure the purchase money of real estate conveyed to her, it may be enforced against the land on the equitable principle that she cannot hold the price and retain the land; but it is not such a personal obligation as will entitle the holder to participate in the distribution of the assets of her estate in the hands of her administrator. Sawtelle's App., 84 Pa. 306.

42. Matter of Noyes, 3 Dem. Surr. (N. Y.) 369; Griswold v. Griswold, 4 Bradf. Surr. (N. Y.) 216; Seabury v. Bowen, 3 Bradf. Surr. (N. Y.) 207; Alter's Est., 4 Pa. Co. 558, 19 Phila. 9; Pugh v. Russell, 27 Gratt. (68 Va.) 789. But compare Boring v. Jobe, (Tenn. Ch. A.) 53 SW 763 (where taxes have become a lien on realty, which has descended to the heirs, by reason of an administrator's failure to pay them, they may be enforced against such realty, although sufficient personal assets have come into the hands of the administrator, and there has been devastavit by him).

43. Griswold v. Griswold, 4 Bradf. Surr. (N. Y.) 216; Piatt v. St. Clair, Wright (Oh.) 526.

44. In re Woodworth, 31 Cal. 595; Indianapolis First Nat. Bank No. 2,556 v. Hanna, 12 Ind. A. 240, 39 NE 1054; Robb's App., 41 Pa. 45; Draper v. Barnes, 12 R. I. 156.

45. Richardson v. Richardson, 87 Ill. A. 354; Parnham v. Weeks, (Iowa) 170 NW 750; Zoellner v. Zoellner, 53 Mich. 620, 19 NW 556; Robb's App., 41 Pa. 45.

[a] **Heirs may authorize** the administrator to collect rents and apply them on the debts of the decedent; yet such payment will not inure to the benefit of any creditors not paid, unless it is proved that the payment was to be a pure gift to all the creditors, or that those who are not so paid have suffered some loss by the arrangement. Giblin's Est., 2 Kulp (Pa.) 292.

46. Ala.—Pharis v. Leachman, 20 Ala. 662.

Cal.—In re De Bernal, 165 Cal. 223, 131 P 375, AnnCas1914D 26.

Ind.—Indianapolis First Nat. Bank No. 2,556 v. Hanna, 12 Ind. A. 240, 39 NE 1054.

Iowa.—Parnham v. Weeks, 170 NW 750.

Ky.—Thompson v. Bailey, 1 KyL 321.

N. Y.—Glacius v. Fogel, 88 N. Y. 434 [aff 25 Hun 227].

Tex.—Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

Va.—McCandlish v. Edloe, 3 Gratt. (44 Va.) 330.

47. See infra § 1454.

48. Smith v. Goethe, 147 Cal. 725, 82 P 384.

49. See generally Marshaling Assets and Securities [26 Cyc 927].

are necessary only in case decedent died testate, in which case questions arise as to primary liability as between property disposed of and that undisposed of by the will, and also as between property which is the subject of a general gift and that which is specifically devised or bequeathed.[50] When such proceedings are had,[51] they are, with certain modifications necessarily resulting from the nature of the case, governed by practically the same rules as apply in the case of the ordinary proceedings for marshaling assets.[52]

[§ 1265] **e. Effect of Testamentary Provisions.** The general rules with respect to what property is available for the payment of debts are subject to the power of a testator to direct, by his will, what property shall be used, or shall constitute the primary fund, for this purpose, and when such testamentary directions are given they must be followed so far as this is possible without detriment to the rights of creditors.[53]

XI. DISTRIBUTION OF ESTATE

[§ 1266] **A. Authority and Duty to Make—1. In General.** It is the right and duty of a personal representative, upon the settlement of his decedent's estate, and after payment of debts, to make distribution of decedent's property, in the manner directed by the will,[54] as in the payment of legacies;[55] or in case of intestacy, or as to property not disposed of by the will, in the manner prescribed by law,[56]

50. See Wills [40 Cyc 2065–2076].

51. See cases infra note 52.

"As applied to the settlement of estates the doctrine may be defined to be such an arrangement of the different funds under administration as will enable all parties having equities therein to receive their due proportions notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds." Farmers' L. & T., etc., Co. v. Kip, 192 N. Y. 266, 283, 85 NE 59 [aff 120 App. Div. 347, 104 NYS 1092 (aff 52 Misc. 407, 102 NYS 137)].

[a] **In Missouri** the equitable doctrine as to marshaling of assets for payment of debts of a decedent has no application since the enactment of the statute of administration. Titterington v. Hooker, 58 Mo. 593; Elstroth v. Dickmeyer, 88 Mo. A. 418; McAllister v. Williams, 23 Mo. A. 286.

52. Colo.—New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

Ga.—Stephens v. James, 77 Ga. 139, 3 SE 160; Jordan v. Brown, 72 Ga. 495; Coleman v. Franklin, 26 Ga. 368; Macon, etc., R. Co. v. Parker, 9 Ga. 377.

Mass.—Tod v. Mitchell, 228 Mass. 541, 117 NE 899.

N. Y.—Farmers' L. & T. Co. v. Kip, 192 N. Y. 266, 85 NE 59.

Oh.—Matoon v. Clapp, 8 Oh. 248.

Pa.—Saffin's Est., 12 Pa. Dist. 99, 28 Pa. Co. 38; Fendrich's Est., 21 LancLRev 233; Brubaker's Est., 17 LancLRev 390.

S. C.—Still v. Wood, 85 S. C. 562, 67 SE 910.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798.

Va.—Pugh v. Russell, 27 Gratt. (68 Va.) 789.

W. Va.—American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920.

Eng.—In re Kempster, [1906] 1 Ch. 446.

[a] **Who entitled to demand marshaling.**—Where a testatrix devised certain realty to her husband for life, with power to appoint the remainder, and also other realty to him in fee, and he granted and encumbered the devise in fee to such an extent that, if it was first sold to pay testatrix's debts, his grantees and encumbrancers would be damaged, they were entitled to a marshaling of the assets of the estate. New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

[b] **Parties.**—In suits to marshal the assets of a decedent, his legal representative or his creditors can alone maintain the action, and necessarily the heirs at law are the parties defendant. Still v. Wood, 85 S. C. 562, 67 SE 910.

[c] **Complaint amounting to bill to marshal.**—In an action by executors against devisees and legatees, a complaint alleging the insufficiency of the personal property to pay debts, the commencement of a suit by one creditor, and asking that creditors be called in to establish their claims, that the land be sold to aid in paying the debts, and that the balance, if any, be divided, was in effect a bill to marshal the estate, and a devisee and legatee might properly set up in her answer a debt due her from the testator. Sherwood v. McLaurin, 96 S. C. 348, 80 SE 609.

General rules of marshaling see Marshaling Assets and Securities [26 Cyc 929].

53. See Wills [40 Cyc 2065–2076].

54. Ala.—Colbert v. Daniel, 32 Ala. 314.

Ark.—Parker v. Wilson, 98 Ark. 553, 136 SW 981.

Cal.—In re Cronin, Myr. Prob. 252.

Conn.—Lyman v. Parsons, 26 Conn. 493.

D. C.—Moore v. Moore, 47 App. 23.

Ill.—Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, 70 NE 593.

N. Y.—Kellogg v. White, 103 Misc. 167, 169 NYS 989; Gabryszak v. Gabryszak, 136 NYS 270.

N. C.—Johnson v. Johnson, 108 N. C. 619, 13 SE 183.

Oh.—Ratliff v. Warner, 32 Oh. St. 334.

Pa.—Beck's App., 116 Pa. 547, 9 A 942; Callahan's Est., 5 LackLegN 105.

Utah.—Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

Can.—Lionais v. Molson's Bank, 10 Can. S. C. 526.

[a] **On the failure of a trust** provided for in the will distribution may be decreed in accordance with the testator's intention as expressed in the will. In re Levinson, 98 Cal. 654, 33 P 726.

[b] **Exercise of discretion.**—Where, in a division of an estate under the terms of a will, the executors were vested with certain discretion, and there were three methods possible, by one of which so large an amount of cash would be needed to equalize the shares as would exhaust the personalty, by another the least possible amount of cash would be required, and by a third a middle ground was possible, that the executors adopted the third was not an abuse of discretion justifying the interference of the court. Clark v. Goodridge, 52 Misc. 239, 103 NYS 36.

[c] **Retention at interest by executor.**—A verbal agreement by an executor with a minor heir, whereby he obtained permission to retain and use the amount of a legacy at a settled rate of interest, will be set aside as fraudulent and void, where the executor was in failing financial circumstances at the time, which fact was withheld from and unknown to the legatee. Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

55. Ga.—George Veneer, etc., Co. v. Stevens, 97 SE 524.

Ind.—Gould v. Steyer, 75 Ind. 50.

Md.—Hindman v. State, 61 Md. 471.

N. H.—Parker v. Cowell, 16 N. H. 149.

N. Y.—Prattsville Reformed Dutch Church v. Brandow, 52 Barb. 228; Frost v. Frost, 4 Edw. 733.

N. C.—Johnson v. Johnson, 108 N. C. 619, 13 SE 183.

Pa.—McDowell's Est., 8 Del. Co. 172, 17 Montg. Co. 43.

Tenn.—Lockart v. Northington, 1 Sneed 318.

N. S.—Cullen v. McNeil, 42 N. S. 346.

[a] **Where an executor has funds in his hands in excess** of the amount required to pay all legacies to fall due on the death of testator's widow, it is his duty to give bond as trustee of a fund sufficient to pay such legacies, have the funds transferred to him in that capacity, and use the balance in the payment of legacies due. Brown v. Ferren, 73 N. H. 6, 58 A 870.

[b] **The probate court has no power to relieve an executor of a duty** imposed upon him by the will in respect to a legacy. Hindman v. State, 61 Md. 471.

[c] **The investment of a fund for the benefit of minor legatees** must be made by the executor where the will so directs. Hindman v. State, 61 Md. 471.

[d] **An improper bequest** imposes no duty or obligation on the executor. Wickham v. Bath, L. R. 1 Eq. 17.

[e] **A bequest on a contingency** cannot be paid or delivered by the executor until the contingency has happened. Paige v. Sessions, 4 How. (U. S.) 122, 11 L. ed. 903; Price v. Sessions, 3 How. (U. S.) 624, 11 L. ed. 755.

[f] **The testator may give the executor an option** whether or not he will pay a legacy. Brown's Est., 19 Pa. Co. 229.

56. U. S.—Christianson v. King County, 203 Fed. 894, 122 CCA 188 [aff 239 U. S. 356, 36 SCt 114, 60 L. ed. 327].

Ala.—Harrison v. Harrison, 9 Ala. 470.

Ind.—Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960.

Mo.—State v. Burnes, 129 Mo. A. 474, 107 SW 1094.

N. Y.—In re Maccaffil, 57 Misc. 264, 107 NYS 1115, 6 Mills Surr. 293 [aff 127 App. Div. 21, 111 NYS 315].

Pa.—Abrahims' Est., 3 Pa. Co. 379.

S. C.—Quarles v. Garrett, 4 S. C. Eq. 145.

Va.—Bliss v. Spencer, 99 SE 593, 599 [cit Cyc].

Eng.—In re Rendell, [1901] 1 Ch. 230.

Man.—Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

N. S.—McDonald's Est., 2 N. S. 123.

[a] **Will disposing of real estate only.**—The executor appointed in a will disposing of real estate only, leaving the personalty undisposed of, has the right to administer the personalty by paying the debts and distributing the balance among the next of kin entitled to it by law. In re Maccaffil, 57 Misc. 264, 107 NYS 1115, 6 Mills Surr. 293 [aff 127 App. Div. 21, 111 NYS 315].

[b] **Personal property bequeathed to executors for a purpose which fails** must be distributed by them

upon an order of the court.[57] But it is no part of his duty to partition or convey among heirs or devisees the real estate of his decedent[58] or to pay legacies charged on the land,[59] unless he is empowered by the will to do so,[60] or unless the statute places real estate in the same situation as personal property with respect to passing to the personal representative.[61] The representative cannot be compelled to distribute or pay over intestate property until an order or decree of distribution has been made by the proper court,[62] but if there is a balance in his hands which is properly distributable, it is his duty to apply for an order of distribution within a reasonable time.[63] The power of making distribution cannot be delegated by the personal representatives to another.[64] Where a testatrix gave property in trust for a daughter, with remainder to her children, but there was no one to take the remainder so that the property was to be distributed as in case of intestacy, and part of the trust fund had been paid to the trustee, while part was still in the possession of the executor, and income from the fund was still unpaid and had to be separated from the principal, it was held that the whole fund should be placed in the hands of the trustee and be distributed by him instead of being distributed by the executor.[65]

A surviving executor has the duty of completing the distribution of the estate upon the death of his coexecutor.[66]

[§ 1267] 2. **Termination of Authority.** The termination of a representative's authority as such deprives him of all power of further distribution,[67] and it is his duty thereafter to turn over the funds

among the next of kin. McDonald's Est., 2 N. S. 123.

[c] **The power of distribution is not barred by:** (1) The filing by the distributees of a bill to prevent the execution of an order of sale. Harrison v. Harrison, 9 Ala. 470. (2) Failure of the administrator to make a sale of personal estate. Harrison v. Harrison, 9 Ala. 470. (3) Nor does an outstanding and undetermined claim of the widow to her share of the real estate prevent the administrator from paying to the children and distributees the sums respectively due them. Quarles v. Garrett, 4 S. C. Eq. 145.

[d] **Administrator of absentee.**—Where administration had been granted on the estate of a person who had been absent and had not been heard of for twenty-five years, the administrator could not be compelled to make distribution without positive proof of the death of the absentee, even though an auditor, whose report had been confirmed absolutely, had reported in favor of distribution. Beck's Est., 4 Pa. Dist. 222, 15 Pa. Co. 564.

[e] **Same person administrator of two estates.**—Where the same person is administrator of two connected estates, and has in his hands funds of one estate, the right of distribution of which could not be affected by the other, he will be required to distribute such funds without regard to the other estate. Breckenridge v. Floyd, 7 Dana (Ky.) 456.

[f] **A personal representative cannot** take the property at an appraised value and divide it arbitrarily among the heirs. Hampton's Case, 17 Serg. & R. (Pa.) 144.

[g] **"If the parties make a division which they approve of,** and the executor or administrator is willing to take the risk of having the property in his hands so divided, it is as valid as one made under the sanction of the statute. The aim of the law has been attained and a fair division had." Bidwell v. Beckwith, 86 Conn. 462, 471, 85 A 682 [appr Merwin's App., 75 Conn. 33, 40, 52 A 484; Dickinson's App., 54 Conn. 224, 6 A 422].

[h] **"Where all the parties entitled agree that they do not want the estate divided,** the administrator should hand it over to them undistributed and undivided. See the language of Lord Cairns in Cooper v. Cooper, L. R. 7 H. L. 53; Blake v. Bayne, [1908] A. C. 371." Lumbers v. Montgomery, 22 Man. 735, 741.

[i] **Distributee wrongfully retaining property of estate.**—Payment to a distributee cannot be refused because he is retaining certain personal property alleged to belong to the estate. Homeyard's Est., 13 Pa. Dist. 259.

57. Ind.—Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960.

Mass.—Parker v. Kuckens, 7 Allen 509.

N. H.—Wood v. Stone, 39 N. H. 572.

N. J.—In re Eakin, 20 N. J. Eq. 481.

N. Y.—Matter of Smith, 40 Misc. 331, 81 NYS 1035, 3 Mills Surr. 485.

Pa.—Homeyard's Est., 13 Pa. Dist. 259; Rankin's Est., 5 Pa. Co. 603; Abrahims' Est., 3 Pa. Co. 379.

S. C.—Sturgineger v. Hannah, 11 S. C. L. 147.

Wash.—Drasdo v. Jobst, 39 Wash. 425, 81 P 857.

[a] **After an order for distribution** (1) it is the duty of the personal representative to hold the funds in his hands subject to the order of the court, and to pay them to such parties as the court may direct; and further than this he has no standing in court or before an auditor respecting the distribution of the funds in his hands. Michael's Est., 5 Pa. Co. 321. (2) In the case of a decree of distribution, directing an administrator to pay money into the treasury of the commonwealth, it is his duty to make the payment without any demand upon him. Leland v. Kingsbury, 24 Pick. (Mass.) 315.

[b] **A distribution by both of two administrators** may be ordered where on an accounting by one of them the parties stipulated that the other should also account in the same proceeding, and thereupon the proceedings were consolidated. Matter of Smith, 40 Misc. 331, 81 NYS 1035, 3 Mills Surr. 485.

[c] **A public administrator** may be ordered by the probate court to distribute the balance of an estate among the next of kin of the intestate. Parker v. Kuckens, 7 Allen (Mass.) 509.

[d] **Distributers** may be appointed by the probate court to complete a selection of part of the estate which the widow was allowed to make under the will, where she died before completing the selection, but such selection cannot be made by the executor. Walker v. Upson, 74 Conn. 128, 49 A 904.

[e] **A second husband** acting as administrator of his deceased wife's estate is entitled only to one third of her share in property which she held as administratrix of her former husband, and may be compelled to make distribution accordingly. Sturgineger v. Hannah, 11 S. C. L. 147.

[f] **Order of distribution authorized only in case of intestacy.**—In re Eakin, 20 N. J. Eq. 481.

Order for distribution see infra §§ 1389–1407.

58. Gay v. Gay, 29 Ga. 549; Smith v. McCormick, 46 Ind. 135; Geddes' Succ., 36 La. Ann. 963; Miller's Succ., 28 La. Ann. 316; Huey v. Huey, Mann. Unrep. Cas. (La.) 264; Kachlein's App., 5 Pa. 95. See also Harris v. Ingalls, 74 N. H. 35, 37, 64 A 727 ("As the real estate is not needed for the payment of debts, expenses of administration, and legacies, it should be divided among the legatees, or should pass to them in common, immediately upon the settlement of the executor's account. The executors have no authority to hold possession of and manage it after this event").

59. Robinson v. McIver, 63 N. C. 645; Conard's App., 33 Pa. 47.

60. Johnson v. Johnson, 108 N. C. 619, 13 SE 183; Conrad's App., 33 Pa. 47.

61. Haden v. Sims, 127 Ga. 717, 56 SE 989; Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295 (discussing English and Canadian statutes).

[a] **If the administration has continued during the existence of the widow's dower,** upon the falling in of the dower estate, the administrator may, under the statute, take possession of the land if for no other purpose than to distribute it among the heirs at law. Haden v. Sims, 127 Ga. 717, 56 SE 989.

62. U. S.—U. S. v. Coxe, 18 How. 100, 15 L. ed. 299.

Ark.—McPaxton v. Dickson, 15 Ark. 41.

Ill.—Neubrecht v. Santmeyer, 50 Ill. 74.

Me.—Hanscom v. Marston, 82 Me. 288, 19 A 460.

Mass.—Choate v. Jacobs, 136 Mass. 297.

N. H.—Hurlburt v. Wheeler, 40 N. H. 73.

N. J.—Ordinary v. Smith, 15 N. J. L. 92.

N. Y.—Matter of Smith, 1 Misc. 269, 22 NYS 1067, Pow. Surr. 271.

S. C.—Edgefield Dist. Ordinary v. Martin, 3 S. C. L. 552.

Vt.—Probate Ct. v. Kimball, 42 Vt. 320.

Eng.—Canterbury v. Tappen, 8 B. & C. 151, 15 ECL 82, 108 Reprint 1000; Canterbury v. Robertson, 1 Cromp. & M. 690, 149 Reprint 576.

Order or decree for distribution see infra §§ 1389–1407.

63. Sanford v. Thorp, 45 Conn. 241; Wood v. Donaldson, 87 Mo. A. 1.

64. Williamson v. Robinson, 134 Iowa 345, 111 NW 1012; Matter of Harper, 95 Misc. 464, 158 NYS 1000.

[a] **Where an administrator paid to the surrogate** upon the judicial settlement of his accounts the sum found remaining in his hands, to be distributed to the heirs, the surrogate received the money for the purpose of distribution in his indivdual capacity as agent of the administrator, and the latter was accordingly responsible for such money. Matter of Te Culver, 22 Misc. 217, 49 NYS 820, 2 Gibb. Surr. 316.

65. Ford v. Wilson, 10 Del. Ch. 124, 85 A 1073.

66. In re Steencken, 51 App. Div. 417, 64 NYS 660, 30 NYCivProc 329.

67. Babin v. D'Astugue, 7 Mart.

to his successor.[68]

[§ 1268] **3. Administrator Pendente Lite.** An administrator pendente lite is an officer of the court and holds the property only until the suit terminates, and he is therefore under no obligation to distribute the assets of the estate;[69] but he will not be compelled to refund, where he has made distribution according to law.[70]

[§ 1269] **4. Distribution of Money Recovered on Representative's Bond.** Money recovered by way of penalty on the bond of the executor or administrator must in some states be distributed by the judge of probate.[71] It must go to the heirs on whose share it has accrued.[72]

[§ 1270] **5. Security for Payment of Legacy, or Payment into Court.** A court of equity may intervene at the instance of a pecuniary legatee to require security for the payment of a legacy in the future, whether vested or contingent,[73] where there is danger that the principal of the legacy will be wasted or lost;[74] or else to order the fund to be paid by the representative into court.[75]

[§ 1271] **6. Request for Directions.**[76] The personal representative has the right to maintain a petition or bill at any time after his qualification[77] for directions from the court as to the application or distribution of funds of the estate which are in his hands, where he is in doubt as to how they should properly be distributed,[78] as where there is a dispute as to who is entitled to the same,[79] or there is reason to believe that a legacy made by the testator is invalid.[80] But where the division of a fund is not to be made until the expiration of a given term, the court will not undertake to instruct until such term has expired.[81] Nor will the court give instructions in advance as to the disposition of a balance after settlement of the estate, but will determine any questions arising with respect thereto when the accounts are allowed.[82]

[§ 1272] **7. Admission of, or Charging with, Assets.** Where one receives money in his capacity as personal representative, he cannot withhold it from distribution on the ground that it is not a part of the estate,[83] and if he admits that he has sufficient assets in his hands to satisfy legatees or distributees, a judgment or decree may be rendered against him accordingly.[84] It has been held that, where the executors pay a judgment fixing them with assets, they cannot afterward recover the amount thus paid out of the estate of their testator, the judgment against them being personal.[85] After the entry of a decree charging the representative with sufficient assets to pay all legacies, the legatees are remitted entirely to the personal responsibility of the representative, and unless they seasonably assert their rights they stand in no better position than other creditors.[86] A statute which prevents an executor, who has neglected to enter a rule to limit creditors or to proceed thereon according to law, that is, take a decree to bar creditors and settle the estate, from pleading want of assets in abatement in a suit for a legacy, unless a suit brought within a year from the grant of probate is pending on a claim against the estate, will not permit a recovery of a legacy out of such personal representative beyond assets available for its payment.[87]

Estoppel. Where testator after making two pecuniary legacies, devised the remainder of his estate to executors in trust, to pay the income of a certain fund to his daughter for life, and out of the income, derived from the remainder to pay the annuities to his daughter and daughter-in-law and apply a sum to the use of his grandson during minority and, although there was no income to pay

N. S. (La.) 615; Connelly's App., 1 Grant (Pa.) 366.

[a] **He cannot surrender the estate to a person claiming it as heir** without proof of the heirship. Babin v. D'Astugue, 7 Mart. N. S. (La.) 615.

68. Connelly's App., 1 Grant (Pa.) 366.

69. Lilly v. Menke, 126 Mo. 190, 28 SW 643, 994; In re Loughran, 257 Pa. 534, 101 A 817; Winpenny's Est., 11 Phila. (Pa.) 20.

70. Bradford's Case, 1 Browne (Pa.) 87.

71. Ordinary v. Barcalow, 36 N. J. L. 15.

72. In re Dimmick, 111 La. 655, 35 S 801.

73. Randle v. Carter, 62 Ala. 95; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614; Nott v. Love, 3 Hayw. (Tenn.) 13.

[a] **The legatee's right to relief in such cases depends on** the existence of assets liable for the satisfaction of the legacy, which it is the executor's duty to hold for its payment, when due. Randle v. Carter, 62 Ala. 95.

74. Howard v. Howard, 16 N. J. Eq. 486; Lindsay's Est., 10 WklyNC (Pa.) 36; Higginson v. Fabre, 3 S. C. Eq. 89; Hopkins v. Wainwright, 1 S. C. Eq. 302.

75. Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614.

76. Supervision and guidance of courts generally see supra § 393.

77. Gordon v. Groesbeck, 1 Oh. Cir. Ct. 320, 1 Oh. Cir. Dec. 176.

78. Ga.—Hamberger v. Easter, 57 Ga. 71.

Ky.—Fraser v. Page, 82 Ky. 73.

Mass.—Hills v. Putnam, 152 Mass. 123, 25 NE 40; Putnam v. Collamore, 109 Mass. 509; Stevens v. Warren, 101 Mass. 564.

N. H.—Gafney v. Kenison, 64 N. H. 354, 10 A 706.

N. J.—Dunn v. Campbell, 47 N. J. Eq. 4, 9 A 1099.

N. Y.—Bryant v. Thompson, 128 N. Y. 426, 28 NE 522, 13 LRA 745 [rev 14 NYS 386].

Oh.—Noble v. Martin, 4 Oh. Cir. Ct. 365, 2 Oh. Cir. Dec. 598.

[a] **Want of parties defendant** does not render such a bill defective if the numerous claimants of the fund, representing every possible interest, are fully represented before the court by those having similar interests. Hills v. Putnam, 152 Mass. 123, 25 NE 40.

[b] **An appeal** (1) from the judgment in such a case may be taken by persons interested in the estate who are adversely affected by the decision. Fraser v. Page, 82 Ky. 73; Noble v. Martin, 4 Oh. Cir. Ct. 365, 2 Oh. Cir. Dec. 598. (2) But executors and trustees, who have sought direction as to which of two persons is entitled to a fund in their hands as trustees, have no right to appeal from a judgment which has been acquiesced in by both claimants of the fund, both of whom are sui juris. Bryant v. Thompson, 128 N. Y. 426, 28 NE 522, 13 LRA 745 [rev 14 NYS 386].

[c] **Where the executor has an adequate remedy by way of defense,** he cannot maintain such a bill. Dodge v. Morse, 129 Mass. 423 (where there is no doubt as to the person entitled to the fund, but there is some question as to the right of a trustee to receive it without giving bond, the executor cannot maintain such a bill, as he has an adequate remedy by way of defense to any suit that might be brought against him by the trustee without having given bond).

79. Perrine v. Reed, 155 Ill. A. 213; Bryant v. Thompson, 128 N. Y. 426, 28 NE 522, 13 LRA 745.

80. Gordon v. Groesbeck, 1 Oh. Cir. Ct. 320, 1 Oh. Cir. Dec. 176; Casey's Est., 12 Pa. Dist. 15, 28 Pa. Co. 81, 19 Montg. Co. 135.

81. Gafney v. Kenison, 64 N. H. 354, 10 A 706; Nagle v. Conard, 79 N. J. Eq. 124, 81 A 841 [aff 80 N. J. Eq. 252, 87 A 1119].

82. Allen v. Allen, 217 Mass. 338, 104 NE 727.

83. State v. Ramsey County Dist. Ct., 114 Minn. 364, 131 NW 381; Sain v. Bailey, 90 N. C. 566.

84. Stebbins v. Smith, 4 Pick. (Mass.) 97; Smith v. Smith, 4 Paige (N. Y.) 271; Buchanan v. Buchanan, 35 S. C. L. 63; Sharpe v. Lockwood, 78 Va. 24.

[a] **A bond to pay debts and legacies** given by an executor is a conclusive admission of sufficient assets. Stebbins v. Smith, 4 Pick. (Mass.) 97.

[b] **Overpayment under a mistake as to the value of the assets** is not such an admission of assets as should bind the executor or administrator to make a like overpayment to the other legatees or distributees. Anderson v. Piercy, 20 W. Va. 282.

[c] **Representative's charge to himself or admission controlled by other evidence.**—Hills v. Putnam, 152 Mass. 123, 25 NE 40.

85. Perkins v. Berry, 103 N. C. 131, 9 SE 621.

86. Bellows v. Sowles, 53 Fed. 325.

[a] **Where an executor serves without giving bond with sureties,** under a request in the will, and becomes insolvent after a decree of distribution, the heirs or distributees who have not seasonably guarded against this condition of things stand in no better position than his other creditors for enforcing their claims. Bellows v. Sowles, 53 Fed. 325.

87. O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

the annuities or the sum allowed the grandson, the executors paid moneys as annuities and allowance to the grandson and sought to charge these payments against the corpus of the estate needed to pay the legacies and create the trust fund for the daughter, they were estopped to deny that they had received income from which to make the payments, and were not entitled to allowance for the payments as against the corpus of the estate.[88]

Collateral inheritance tax. In determining the amount of money in the hands of executors available for the payment of a legacy, the amount of the collateral inheritance tax to which the legacy is subject should be excluded.[89]

Expense of tombstone. The court should not take into consideration the amount which might be required for the erection of tombstones provided for by the will, where the executors have power to resort to the real estate if necessary to obtain funds for this purpose.[90]

[§ 1273] **B. Priority of Debts over Legacies, Devises, and Distributive Shares.** In the settlement of a decedent's estate his debts are to be paid in preference to all legacies, devises, or distributive shares,[91] even though the result is entirely to defeat the rights of decedent's heirs or distributees

88. In re Woolsey, 68 N. J. Eq. 763, 62 A 686.

89. In re Chesney, 1 Cal. A. 30, 81 P 679 (such tax is neither an expense of administration nor a charge on decedent's general estate, but a tax on the right of succession which is to be deducted from the amount payable to the legatee in satisfaction of the legacy).

90. In re Chesney, 1 Cal. A. 30, 81 P 679.

91. U. S.—Sibley v. Simonton, 20 Fed. 784.

Ala.—Dean v. Portis, 11 Ala. 104; Leavens v. Butler, 8 Port. 380.

Ark.—Haynes v. Bessellieu, 25 Ark. 499.

Cal.—In re Washburn, 148 Cal. 64, 82 P 671; In re Koppikus, 1 Cal. A. 88, 81 P 733.

Colo.—Hanna v. Palmer, 6 Colo. 156, 45 AmR 524.

Conn.—Reed v. Reed, 80 Conn. 411, 68 A 852; Winslow v. Parkhurst, 1 Root 268.

Ga.—Ferguson v. Ferguson, 51 Ga. 340; McIntosh v. Hambleton, 35 Ga. 94, 89 AmD 276.

Ill.—Richardson v. Ranson, 99 Ill. A. 258; Sherman v. Saylor, 36 Ill. A. 356.

Ind.—Rogers v. State, 26 Ind. A. 144, 59 NE 334; Murphy v. Busick, 22 Ind. A. 247, 53 NE 475, 72 AmSR 304.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332; Security F. Ins. Co. v. Hansen, 104 Iowa 264, 73 NW 596; In re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218 [quot Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754].

Kan.—Fletcher v. Wormington, 24 Kan. 259.

Ky.—Reaves v. Baker, 112 SW 609, 33 KyL 1004; Hurst v. Davidson, 116 Ky. 351, 76 SW 37, 25 KyL 555; Atchison v. Atchison, 106 Ky. 190, 50 SW 26, 20 KyL 1755; Drake v. Ellman, 80 Ky. 434; Smith v. Vertrees, 2 Bush 63; Caleb v. Field, 9 Dana 346; Hammon v. Pearl, 6 T. B. Mon. 410; Worthington v. Smith, 12 Ky. Op. 711.

La.—Henderson's Succ., 113 La. 101, 36 S 904; Wilson v. Wilson, 107 La. 139, 31 S 643; Aronstein's Succ., 51 La. Ann. 1052, 25 S 932; Bachemin's Succ., 19 La. Ann. 488; Union Bank v. McDonogh, 7 La. Ann. 231; Preston v. Humphreys, 5 Rob. 299; Porter's Succ., 5 Rob. 96; Bainbridge v. Clay, 3 Mart. N. S. 671; McKenzie v. Havard, 12 Mart. 101.

Me.—Hamlin v. Mansfield, 88 Me. 131, 33 A 788.

Md.—Constable v. Camp, 87 Md. 173, 39 A 807; Buchanan v. Pue, 6 Gill 112.

Mass.—Vinton v. Pratt, 228 Mass. 468, 117 NE 919, LRA1918D 343; Hale v. Herring, 208 Mass. 319, 94 NE 396; O'Donnell v. Barbey, 129 Mass. 453; Wyman v. Brigden, 4 Mass. 150; Fay v. Haven, 3 Metc. 109; Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick 128.

Mich.—Henze v. Rogatzky, 199 Mich. 558, 165 NW 629; In re Fox, 159 Mich. 420, 124 NW 60, 154 Mich. 5, 117 NW 558; Osmun v. Oakland Cir. Judge, 107 Mich. 27, 64 NW 949; Willard v. Van Leeuwen, 56 Mich. 15, 22 NW 185; Larzelere v. Starkweather, 38 Mich. 96; Miller v. Stepper, 32 Mich. 194.

Miss.—Savings, etc., Assoc. v. Tartt, 81 Miss. 276, 32 S 115.

Mo.—Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365; Wood v. Donaldson, 87 Mo. A. 1; Eoff v. Tompkins, 2 Mo. A. 464 [aff 66 Mo. 225].

N. J.—Lloyd v. Rowe, 20 N. J. L. 680; O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999; Salaun v. Hartshorne, 52 N. J. Eq. 739, 30 A 181; Coddington v. Bispham, 36 N. J. Eq. 574; Blauvelt v. Winkle, 29 N. J. Eq. 111; Northrup v. Roe, 10 N. J. L. J. 334.

N. Y.—In re Powers, 124 N. Y. 361, 26 NE 940 [aff 11 NYS 396]; Wilkes v. Harper, 1 N. Y. 586 [aff 2 Barb. Ch. 338]; Hallock v. Hallock, 79 App. Div. 508, 80 NYS 61; In re Keef, 43 Hun 98; Harrison v. Peck, 56 Barb. 251; White v. Kane, 51 N. Y. Super. 295, 7 NYCivProc 267, 1 HowPrNS 382; New York v. U. S. Trust Co., 35 Misc. 639, 72 NYS 121 [aff 78 App. Div. 366, 79 NYS 1010 (aff 178 N. Y. 551 mem, 70 NE 1097 mem)]; Matter of Jones, 28 Misc. 338, 59 NYS 893, 1 Mills Surr. 150.

N. C.—Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007; Pullen v. Hutchins, 67 N. C. 428; Rogers v. Hinton, 63 N. C. 78.

N. D.—Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754; Joy v. Elton, 9 N. D. 428, 83 NW 875.

Pa.—Chilcott's App., 134 Pa. 240, 19 A 850; In re McCracken, 29 Pa. 426; Loomis' App., 29 Pa. 237; Hoover v. Hoover, 5 Pa. 351; Thomas v. Riegel, 5 Rawle 266; De Witt v. Lehigh Valley R. Co., 21 Pa. Super. 10; Seip's Est., 1 Pa. Dist. 26, 11 Pa. Co. 27; Hulse's Est., 12 Phila. 130.

Philippine.—Riosa v. Valenciano, 20 Philippine 170.

Porto Rico.—Vidal's Est., 19 Porto Rico 604.

R. I.—Hammett v. Wright, 103 A 796.

S. C.—Swift v. Miles, 23 S. C. Eq. 147; Porter v. Cheeseborough, 17 S. C. Eq. 496; Carnes v. Smith, 2 S. C. Eq. 299.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Tenn.—Ford v. Cottrell, 207 SW 734; Pearson v. Gillenwaters, 99 Tenn. 462, 42 SW 199;Evans v. Beaumont, 16 Lea 713.

Tex.—Clark v. Woods Nat. Bank, 52 Tex. Civ. A. 38, 113 SW 335; Wade v. Freese, (Civ. A.) 71 SW 69.

Utah.—In re Thorn, 24 Utah 209, 67 P 22.

Va.—Leake v. Leake, 75 Va. 792.

Wis.—In re Scheftel, 141 Wis. 307, 124 NW 301; Pym v. Pym, 118 Wis. 662, 96 NW 429.

Eng.—Batthyany v. Walford, 36 Ch. D. 269; Bradbury v. Morgan, 1 H. & C. 249, 158 Reprint 877; Wheatley v. Lane, 1 Saund. 216, 85 Reprint 228; Sollers v. Lawrence, Willes 413, 125 Reprint 1243.

"Debts must be paid before the assets can be distributed to the heirs, legatees and devisees, without regard to the place of residence of the creditors." In re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218 [quot Dow v. Lillie, 26 N. D. 512, 526, 144 NW 1082, LRA1915D 754].

[a] **"A testator cannot by will relieve** his land or other property from liability for his debts, nor can he by such will provide for the payment of one creditor to the exclusion of other creditors whose debts are by our statute placed in the same class." Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

[b] **The residuary fund** of an estate must bear the burden of all debts, not otherwise provided for, before it can be distributed to the residuary legatees. In re McCracken, 29 Ga. 426; McGlaughlin v. McGlaughlin, 24 Pa. 20.

[c] **Debts, within the meaning of this rule,** include: (1) Expenses of last illness and funeral, charges of administration, widow's allowance, costs, and interest. Dean's Succ., 33 La. Ann. 867; In re Casey, 2 Silv. Sup. 585, 6 NYS 608; In re Thorn, 24 Utah 209, 67 P 22. (2) A voluntary bond executed by the testator during his life in consideration of love and affection. Gordon v. Small, 53 Md. 550; Hales v. Cox, 32 Beav. 118, 55 Reprint 46; Jones v. Powell, 1 Eq. Cas. Abr. 84, 21 Reprint 896; Cox v. Barnard, 8 Hare 310, 32 EngCh 319, 68 Reprint 379; Lomas v. Wright, 2 Myl. & K. 769, 7 EngCh 769, 39 Reprint 1138; Dawson v. Kearston, 3 Smale & G. 186, 65 Reprint 617. (3) But they do not include claims not admitted to be due, nor sued for, under the statute of March 25, 1828, § 16. Graves v. Routh, 4 La. Ann. 126.

[d] **Specific legacies** as well as others are subject to the rule subordinating them to the payment of debts. Constable v. Camp, 87 Md. 173, 39 A 807; Davies v. Nicholson, 2 De G. & J. 693, 59 EngCh 543, 44 Reprint 1158; Spode & Smith, 3 Russ. 511, 3 EngCh 511, 38 Reprint 667.

[e] **The lands of a decedent,** like his goods, are assets for payment of debts, and the right of succession has respect only to so much of the estate as remains after payment of debts. Horner v. Hasbrouck, 41 Pa. 169.

[f] **Mortgaged real estate** may be distributed among the heirs or devisees subject to the mortgage, where the mortgagee waives all recourse against any other portion of the estate to satisfy his claim. In re Hinckley, Myr. Prob. (Cal.) 189.

[g] **A subsequent judgment creditor's rights** are inferior to those of a distributee where the distribution is made without fraud. Justices Baker County Inferior Ct. v. Moreland, 20 Ga. 145.

[h] **Where a testator makes a bequest in the form of a direction for the payment of notes** made in favor of the beneficiary and payable after death, the amount of such notes cannot be allowed as claims against the estate, for the right of the beneficiary is based upon a bequest and not an indebtedness of the decedent.

or the beneficiaries under his will,[92] and notwithstanding the fact that the deficiency of assets has resulted from a devastavit of the personal representative.[93] It follows that the right of a legatee or distributee to his legacy or distributive share is suspended until all debts and liabilities of the estate have been satisfied,[94] or until the suspension is removed by the assent of the personal representative, where he is satisfied that the estate is solvent,[95] or by lapse of the time allowed for settlement of the estate.[96] And even though a legatee or distributee may compel satisfaction or distribution after the lapse of the statutory period for paying debts, the rights of legal creditors must be fully protected before such satisfaction or distribution will be ordered.[97]

[§ 1274] **C. Assent to Legacy or Devise—1. In General.** At law a legacy does not vest in the legatee, so as to be subject to his debts[98] or to be enforceable by him,[99] until it is assented to by the personal representative, at least until the lapse of the time allowed by law for settlement of the estate,[1] or until it may be seen with reasonable certainty that the legacy will not be needed to pay claims of a higher rank,[2] unless the legacy is charged on the land.[3] In equity, however, the executor is considered as a trustee and may be compelled to give his assent if he refuses it without just cause,[4] unless a condition precedent required of the legatee has not been complied with or non-

and a judgment for the claim would give it preference over bequests. In re Sexton, 162 Ill. A. 214, 222 [aff 253 Ill. 528, 97 NE 1061].

[i] **Where minor heirs are creditors** of the estate of the parent, they cannot on coming of age compete with other creditors before accounting for the movable property and revenues which came into their possession through their tutrix, and which, if consumed for their benefit, would extinguish the debt. Lemmon v. Clark, 36 La. Ann. 744.

[j] **Although an executor is unable to plead want of assets in** abatement, in a suit for the recovery of a legacy, when he has not taken a rule to limit creditors and proceeded thereon according to law, such neglect does not require payment of the legacy, and of the debt due, when there are not sufficient assets of the estate to pay both. O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

92. Leavens v. Butler, 8 Port. (Ala.) 380; Gresham v. Baugh, 66 Ga. 189; Hamlin v. Mansfield, 88 Me. 131, 33 A 788. See also supra note 91.

93. Moncrief v. Moncrief, 73 Ind. 587, 591 ("If this allegation means that the plaintiff was guilty of a devastavit, still, as between the heir or devisee and the creditor, the loss must fall on the former, and not the latter. . . . The creditors of the estate might perhaps maintain an action for a devastavit against the executor and his sureties upon his bond; but they can not be driven to that remedy for the collection of their debts. Our attention has been called to the case of Pell v. Farquar, 3 Blackf. 331, in which it was said that, 'if an administrator consent to the sale, by heirs, of the real estate of the intestate, he divests himself of any right, which he might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property.' This proposition, we are satisfied, is founded in error, inasmuch as the consent of the administrator to the sale of the land, by the heir, could not divest the creditor, in the case supposed, of his right to have his debt made out of the land, and this right may be worked out by an order for the sale of the land made on the petition of the administrator as well as on the petition of the creditor. The case above cited, upon the point stated, must be overruled"). See also supra note 91.

94. See supra note 91.

95. Jackson v. Rowell, 87 Ala. 685, 6 S 95, 4 LRA 637; Refeld v. Bellette, 14 Ark. 148; Anderson v. Irvine, 6 B. Mon. (Ky.) 231; In re Cain, 17 NYS 11 [aff 135 N. Y. 649 mem, 32 NE 647 mem].

[a] **Presumption of consent.**— Munsell v. Bartlett, 6 J. J. Marsh. (Ky.) 20.

[b] **That the time to present claims has not expired** does not justify a refusal by executors having sufficient funds in their possession to make a payment on account of a legacy more than one year after their appointment, where they have been dilatory in publishing notice to creditors, unless they can point out with certainty the existence of claims which may be made against the estate, and which may impair the legatee's right. In re Cain, 17 NYS 11.

Assent to legacy or devise see infra §§ 1274–1278.

96. Ala.—Daniel v. Baldwin, 148 Ala. 292, 40 S 421; Jackson v. Rowell, 87 Ala. 685, 6 S 95, 4 LRA 637.

Ark.—Refeld v. Bellette, 14 Ark. 148.

Md.—Mitchell v. Mitchell, 1 Gill 66; Coward v. State, 7 Gill & J. 475.

Mass.—Sturtevant v. Sturtevant, 4 Allen 122.

Miss.—Grant v. Spann, 33 Miss. 134; Murdock v. Washburn, 9 Miss. 546.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

[a] **Illustration.**—Where the record of the administration of an estate showed that on September 6, 1877, there were a large number of creditors whose claims had been established against the estate, and that the estate was insolvent, but none of the creditors appeared or contested the administrator's accounts, although duly notified, and for over twenty-five years such creditors remained inactive, and acquiesced in the action of the administrator, and did not join in a suit by heirs to compel a settlement of the estate, in which a large sum was found to be due from the administrator, a judgment directing that such sum should be paid to the heirs was proper. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

97. Grant v. Spann, 33 Miss. 134; O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999; In re Hawgood, 37 S. D. 565, 159 NW 117.

Reservation of assets see infra § 1423.

98. Suggs v. Sapp, 20 Ga. 100.

99. U. S.—McClanahan v. Davis, 8 How. 170, 12 L. ed. 1033.

Ala.—Bonner v. Young, 68 Ala. 35; Upchurch v. Norsworthy, 12 Ala. 532.

Ark.—Ross v. Davis, 17 Ark. 113; Carter v. Cantrell, 16 Ark. 154; Refeld v. Billette, 14 Ark. 148.

Conn.—Johnson v. Connecticut Bank, 21 Conn. 148.

Fla.—Lott v. Meacham, 4 Fla. 144.

Ga.—Phillips v. Smith, 119 Ga. 556, 46 SE 640; Suggs v. Sapp, 20 Ga. 100.

Ind.—Jennings v. Sturdevant, 140 Ind. 641, 40 NE 61; Highnote v. White, 67 Ind. 596; Crist v. Crist, 1 Ind. 570, 50 AmD 481.

Ky.—Nancy v. Snell, 6 Dana 148.

Md.—Wilson v. Rine, 1 Harr. & J. 138; Lark v. Linstead, 2 Md. Ch. 162.

Mass.—Osgood v. Foster, 5 Allen 560.

Mich.—Wheeler v. Hatheway, 54 Mich. 547, 20 NW 579.

N. Y.—Hudson v. Reeve, 1 Barb. 89; Tole v. Hardy, 6 Cow. 333.

N. C.—Wooten v. Jarman, 52 N. C. 238; James v. Masters, 7 N. C. 110.

S. C.—Adams v. Rees, 43 S. C. L. 116; Lenoir v. Sylvester, 17 S. C. L. 632; Moore v. Barry, 17 S. C. L. 504; Cannon v. Ulmer, 8 S. C. Eq. 204.

Tenn.—Finch v. Rogers, 11 Humphr. 559.

Va.—Nelson v. Cornwell, 11 Gratt. (52 Va.) 724; Smith v. Townes, 4 Munf. (18 Va.) 191; Hairston v. Hall, 3 Call (7 Va.) 218.

Eng.—Northey v. Northey, 2 Atk. 77, 9 Mod. 270, 26 Reprint 447, 9 Mod. 270, 88 Reprint 445; Duppa v. Mayo, 1 Saund. 278 note 5, 85 Reprint 364.

Ont.—Archer v. Severn, 12 Ont. 615.

[a] **Forgiving a debt by will** is in the nature of a legacy, and must be assented to by the executor before the debt is extinguished. Cheshire v. Cheshire, 19 N. C. 254.

[b] **Trover will not lie against an executor** for the conversion of a legacy to which he has never assented. Adams v. Rees, 43 S. C. L. 116.

[c] **Trespass or trover may be maintained by the executor,** against a legatee, who takes possession of the legacy without the executor's assent. Crist v. Crist, 1 Ind. 570, 50 AmD 481; Wilson v. Rine, 1 Harr. & J. (Md.) 138.

[d] **A specific legacy** (1) "belonged to the legatee at once upon death, and could not become subject to the custody or administration of the executor, unless needed to defray debts or expenses of administration." Matter of Stoiber, 103 Misc. 654, 655, 170 NYS 897. (2) Where the testator, after making his will containing a specific bequest to the legatee, placed her in possession of the property, the title did not vest absolutely so as to prevent the property from being assets, and to render the assent of the executor unnecessary. Bothwell v. Dobbs, 59 Ga. 787.

[e] **Different rule under statute.**— Under the statute a legatee may maintain an action at law for his legacy without the assent of the executor, and the executor's only defense is that the property is necessary for the payment of debts or that a final settlement has been made. Magee v. Gregg, 19 Miss. 70; Worten v. Howard, 10 Miss. 527, 41 AmD 607.

1. Ross v. Davis, 17 Ark. 113.

2. Suggs v. Sapp, 20 Ga. 100; Finch v. Rogers, 11 Humphr. (Tenn.) 559.

3. Jennings v. Sturdevant, 140 Ind. 641, 40 NE 61; Tole v. Hardy, 6 Cow. (N. Y.) 333.

4. U. S.—Fenwick v. Chapman, 9 Pet. 461, 9 L. ed. 193 [aff 5 F. Cas. No. 2,604, 4 Cranch C. C. 431].

Ala.—Bonner v. Young, 68 Ala. 35; Millsap v. Stanley, 50 Ala. 319; Vaughan v. Vaughan, 30 Ala. 329.

Ga.—Johnson v. Porter, 115 Ga. 401, 41 SE 644; Lester v. Stephens, 113 Ga. 495, 39 SE 109.

Ind.—Crist v. Crist, 1 Ind. 570, 50 AmD 481.

Md.—Lark v. Linstead, 2 Md. Ch. 162.

N. Y.—Orth v. Kaesche, 165 App. Div. 513, 150 NYS 957; Decouche v. Savetier, 3 Johns. Ch. 190, 8 AmD 478.

S. C.—Price v. Nesbit, 10 S. C. Eq.

compliance excused.[5] The executor's assent to a devise of real property is sometimes required by statute.[6]

[§ 1275] **2. Acts of Assent and Presumptions.** The representative's assent need not be in writing,[7] nor is possession of a legacy by an executor necessary to his assent to it.[8] Assent may be express or implied, and may be either shown by direct proof or inferred from circumstances consistent with the intent to surrender the legal title and control to the donee,[9] as where a considerable length of time has elapsed,[10] or where the donee has been in possession for some time with the consent, express or implied, of the representative,[11] and the same rule applies where the testamentary gift is to the representative.[12]

445; Stuart v. Carson, 1 S. C. Eq. 500.

Eng.—Northey v. Northey, 2 Atk. 77, 26 Reprint 447, 9 Mod. 270, 88 Reprint 445.

Ont.—Archer v. Severn, 12 Ont. 615.

[a] **Assent is not necessary in equity** to complete the legatee's title, and he may recover his legacy in that forum without the previous assent of the executor. Bonner v. Young, 68 Ala. 35.

5. Vaughan v. Vaughan, 30 Ala. 329 (where a selection by a legatee is annexed as a condition precedent to his right to the legacy, it must be made, and the notice thereof given, before filing the bill, unless it is prevented by the executor).

6. Northrop v. Columbian Lumber Co., 186 Fed. 770, 108 CCA 640.

[a] **The purpose of such a requirement** is to keep the property subject to the testator's debts. Northrop v. Columbia Lumber Co., 186 Fed. 770, 108 CCA 640.

7. Griffith v. Roseborough, 52 N. C. 520.

8. Spruill v. Spruill, 6 N. C. 175.

9. U. S.—McClanahan v. Davis, 8 How. 170, 12 L. ed. 1033.

Ala.—Whorton v. Moragne, 62 Ala. 201; Murphree v. Singleton, 37 Ala. 412; Cox v. McKinney, 32 Ala. 461; George v. Goldsby, 23 Ala. 326.

Ga.—Johnson v. Thomas, 144 Ga. 69, 86 SE 236; Toombs v. Spratlin, 127 Ga. 766, 57 SE 59; Phillips v. Smith, 119 Ga. 556, 46 SE 640; King v. Skellie, 79 Ga. 147, 3 SE 614.

Ind.—Crist v. Crist, 1 Ind. 570, 1 AmR 481.

Ky.—Nancy v. Snell, 6 Dana 148; Pirtle v. Cowan, 4 Dana 302; Simrall v. Graham, 1 Dana 574.

Md.—Sloan v. Sloan, 117 Md. 141, 83 A 38.

N. Y.—Matter of McCarthy, 47 NYS 1127, 26 NYCivProc 397; Wheeler v. Lester, 1 Bradf. Surr. 293.

N. C.—Edney v. Bryson, 47 N. C. 365; Rea v. Rhodes, 40 N. C. 148; Buffaloe v. Baugh, 34 N. C. 201; Merritt v. Windley, 14 N. C. 399.

Pa.—Page's App., 71 Pa. 402.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc]; Green v. Iredell, 31 S. C. 588, 10 SE 545; Thompson v. Schmidt, 21 S. C. L. 156; Harley v. Bates, 4 S. C. L. 419.

Tenn.—Finch v. Rogers, 11 Humphr. 559; Chester v. Greer, 5 Humphr. 26.

Va.—Lynch v. Thomas, 3 Leigh (30 Va.) 682; Royall v. Eppes, 2 Munf. (16 Va.) 479.

Eng.—Doe v. Mabberley, 6 C. & P. 126, 25 ECL 354; Tudor v. Guest, 27 L. J. Exch. 395; Elliott v. Elliott, 9 M. & W. 23, 152 Reprint 11; Barnard v. Pumfrett, 5 Myl. & C. 63, 46 EngCh 57, 41 Reprint 295; Austin v. Beddoe, 41 WklyRep 619; Hawkins v. Williams, 10 WklyRep 692.

Ont.—Honsberger v. Honsberger, 5 U. C. Q. B. O. S. 479.

[a] **Illustrations.**—(1) Assent will be implied where a person applies to the executor to purchase the legacy and the executor refers him to the legatee, or where the executor purchases or offers to purchase the legacy. Pirtle v. Cowan, 4 Dana (Ky.) 302. (2) Where it appears from an agreed statement of facts that an estate was kept together by the executor who qualified, from the testator's death in 1861 until November, 1866, and used as directed in the testator's will, providing that all the property should be kept together and used as testator had used it during the life of his wife, she to have the privilege with the consent of his executors of giving portions to the children as they became of age or married, to be accounted for in the final division, and that the youngest children not educated should be educated in a plain and substantial manner and such education not charged to them, and it also appeared from a petition filed by the executor in 1866 that the widow was living on the place during the time mentioned, "under the will," the assent of the executor to the legacy is sufficiently shown. Toombs v. Spratlin, 127 Ga. 766, 57 SE 59.

[b] **Retaining legacy in trust for absent legatee.**—An executor assents to a legacy to an absent legatee by holding it in trust for him under an order of court. Buffaloe v. Baugh, 34 N. C. 201.

[c] **An admission** by an executor in an account that the estate is subject to distribution is an admission that all debts of testator are paid and amounts to an assent to the bequest. Sloan v. Sloan, 117 Md. 141, 83 A 38.

[d] **Setting apart of property.**—Where executors are put in charge of a special fund for a legatee, to manage for his benefit, the legatee's right to the product of such fund may be inferred from setting it apart for him. Page's App., 71 Pa. 402.

[e] **The burden of overcoming the presumption of assent** is on the party denying it. Phillips v. Smith, 119 Ga. 556, 46 SE 640.

[f] **To repel the presumption of assent,** the record of the orphans' court in another state may be used as prima facie evidence, but only prima facie, of outstanding debts against the estate. Nancy v. Snell, 6 Dana (Ky.) 148.

10. Northrop v. Columbian Lumber Co., 186 Fed. 770, 778, 108 CCA 640; Phillips v. Smith, 119 Ga. 556, 46 SE 640; Flemister v. Flemister, 83 Ga. 79, 9 SE 724; Coleman v. Lane, 26 Ga. 515; Wheeler v. Hatheway, 54 Mich. 547, 20 NW 579.

"If, from the lapse of time, a presumption was created that there were no debts, no reason would exist for withholding the vesting of the devise, nor for refusing to permit the devisee to sue, and the consent of the executor might be presumed." Northrop v. Columbian Lumber Co., supra.

[a] **One year from the granting of letters** testamentary may be sufficient. Wheeler v. Hatheway, 54 Mich. 547, 20 NW 579.

11. U. S.—McClanahan v. Davis, 8 How. 170, 10 L. ed. 1033; Schley v. Collis, 47 Fed. 250, 13 LRA 567.

Ala.—Whorton v. Moragne, 62 Ala. 201.

Ark.—Refeld v. Bellette, 14 Ark. 148.

Conn.—Johnson v. Connecticut Bank, 21 Conn. 148.

Ga.—Thaggard v. Crawford, 112 Ga. 326, 37 SE 367; Vaughan v. Howard, 75 Ga. 285; Parker v. Chambers, 24 Ga. 518; Jordan v. Thornton, 7 Ga. 517.

Mass.—Andrews v. Hunneman, 6 Pick. 126.

Miss.—Hall v. Hall, 27 Miss. 458.

N. H.—Haven v. Haven, 69 N. H. 204, 39 A 972.

N. C.—Gums v. Capehart, 58 N. C. 242; Propst v. Roseman, 49 N. C. 130; Lillard v. Reynolds, 25 N. C. 366; Lewis v. Smith, 23 N. C. 145; White v. White, 20 N. C. 536.

S. C.—Green v. Iredell, 31 S. C. 588, 10 SE 545.

Tenn.—Squires v. Old, 7 Humphr. 454.

Va.—Lowry v. Mountjoy, 6 Call (10 Va.) 55.

Ont.—Teahon v. Leamy, 21 U. C. Q. B. 216.

[a] **Assent of the executor may be presumed where:** (1) The legatee had possession during the lifetime of the executor. Lowry v. Mountjoy, 6 Call (10 Va.) 55. (2) A life tenant has been in possession for thirty-nine years. Almand v. Almand, 141 Ga. 372, 81 SE 228. (3) The executor has been discharged and the legatee has been in possession of the property bequeathed for about ten years afterward. Vaughan v. Howard, 75 Ga. 285.

12. Ala.—Murphree v. Singleton, 37 Ala. 412; Walker v. Walker, 26 Ala. 262; Gantt v. Phillips, 23 Ala. 275.

Ga.—Shipp v. Gibbs, 88 Ga. 184, 14 SE 196; Vanzant v. Bigham, 76 Ga. 759; Thursby v. Myers, 57 Ga. 155; Parker v. Chambers, 24 Ga. 518.

Ky.—Adie v. Cornwell, 3 T. B. Mon. 276.

Md.—Kopp v. Herrman, 82 Md. 339, 33 A 646.

N. Y.—Hudson v. Reeve, 1 Barb. 89.

N. C.—Hearne v. Kevan, 37 N. C. 34; Lewis v. Smith, 20 N. C. 471; Jones v. Zollicoffer, 4 N. C. 645, 7 AmD 708.

S. C.—Stuart v. Carson, 1 S. C. Eq. 500.

Tenn.—Chester v. Greer, 5 Humphr. 26.

Va.—Frazer v. Bebill, 11 Gratt. (42 Va.) 9.

Eng.—Fenton v. Clegg, 9 Exch. 680, 156 Reprint 292, 12 ERC 1; Doe v. Sturges, 7 Taunt. 217, 2 ECL 333, 129 Reprint 87.

[a] **The executor's assent to a gift to himself will be presumed where he:** (1) Uses the property as his own for a considerable time. Camp v. Coleman, 36 Ala. 163; Hearne v. Kevan, 37 N. C. 34. (2) Makes a sale or transfer thereof. Murphree v. Singleton, 37 Ala. 412. (3) Is in possession of the personal estate of the testator. Stuart v. Carson, 1 S. C. Eq. 500. (4) Divides the fund with another legatee. Frazer v. Bevill, 11 Gratt. (52 Va.) 9.

[b] **Equivocal acts** will not raise a presumption of assent. Doe v. Sturges, 7 Taunt. 217, 2 ECL 333, 129 Reprint 87.

[c] **A widow qualifying as executrix and taking possession of the estate** thereby vests in herself legal title to a legacy bequeathed to her unless she expressly dissents from the will. Gantt v. Phillips, 23 Ala. 275.

[d] **A division of the estate** by executors who are residuary legatees is a reciprocal assent by them that each should take his legacy. Drayton v. Drayton, 1 S. C. Eq. 557.

[e] **Assent of coexecutor of donee.**—Whorton v. Moragne, 62 Ala. 201.

Delivery of a specific legacy to the legatee is, of course, equivalent to an assent.[13]

Assent to part of legacy. An executor may assent to a part of a legacy without assenting to all, as where several different articles are bequeathed,[14] and an assent to a residuary bequest as regards a part of the residue is not an assent to the balance.[15]

Slight expressions or equivocal acts of the representative will not amount to an assent,[16] and it has been considered that where there is a deficiency of assets an assent should not be implied, but there must be an expressed assent because of the great prejudice which might otherwise result to the representative.[17]

It is a question of fact for the jury whether or not there has been an assent.[18]

[§ 1276] **3. Time for Assent.** An executor may lawfully assent to a specific legacy before the debts of the estate are paid,[19] although such assent is void as to creditors.[20] Under the common-law rule that an executor acquires his authority entirely from the will,[21] he may assent to a legacy before probate of the will or his own qualification,[22] except where he is a nonresident,[23] or refuses or neglects to accept office.[24] But under the doctrine that an executor, like an administrator, derives his authority from the probate court he cannot assent until he has qualified according to law.[25]

[§ 1277] **4. Operation and Effect—a. In General.** Assent to a legacy or devise, properly given, is usually irrevocable,[26] even though it may leave insufficient assets to pay debts[27] and operates to divest the representative of all title in or control over the property embraced in the legacy or devise assented to,[28] and to vest a complete legal title in

13. U. S.—McClanahan v. Davis, 8 How. 170, 12 L. ed. 1033.
Fla.—Lott v. Meacham, 4 Fla. 144.
Miss.—Hall v. Hall, 27 Miss. 458.
N. C.—Edney v. Bryson, 47 N. C. 365; Rea v. Rhodes, 40 N. C. 148.
Va.—Frazer v. Bevill, 11 Gratt. (52 Va.) 9; Lynch v. Thomas, 3 Leigh (30 Va.) 682.

14. Elliott v. Elliott, 9 M. & W. 23, 152 Reprint 11.

15. Austin v. Beddoe, 41 WklyRep 619.

16. U. S.—Sherman v. Jerome, 120 U. S. 319, 7 SCt 577, 30 L. ed. 680.
Ala.—George v. Goldsby, 23 Ala. 326.
Ga.—Johnson v. Thomas, 144 Ga. 69, 86 SE 236.
N. C.—Burkhead v. Colson, 22 N. C. 77.
Tenn.—Martin v. Peck, 2 Yerg. 298.
Eng.—Thorne v. Thorne, [1893] 3 Ch. 196; Doe v. Sturges, 7 Taunt. 217, 2 ECL 333, 129 Reprint 87.

[a] **Mere setting apart of certain property by the executor** amounts to nothing more than a mental determination and does not bind the estate. Sherman v. Jerome, 120 U. S. 319, 7 SCt 577, 30 L. ed. 680.

[b] **General payments** to or for the benefit of a legatee are not sufficient to raise an inference that the executor has assented to the legacy, in the absence of representations on the subject by the executor to the legatee. Thorne v. Thorne, [1893] 3 Ch. 196.

17. Wheeler v. Lester, 1 Bradf. Surr. (N. Y.) 293; Southward v. Milward, 8 Vin. Abr. 176.

18. Merritt v. Windley, 14 N. C. 399; Mason v. Farnell, 12 M. & W. 674, 152 Reprint 1369; Elliott v. Elliott, 9 M. & W. 23, 152 Reprint 11; Barnard v. Pumfrett, 5 Myl. & C. 63, 46 EngCh 57, 41 Reprint 295; Richardson v. Gifford, 3 N. & M. 325.

19. Edney v. Bryson, 47 N. C. 365; Thompson v. Schmidt, 21 S. C. L. 156.

20. Pullen v. Hutchins, 67 N. C. 428.

21. Source of powers of executor see supra § 4.

22. Ky.—Aleck v. Tevis, 4 Dana 242; Gordon v. Woods, 4 Bibb 476.
N. Y.—Matter of Lown, 165 App. Div. 552, 151 NYS 171 [aff 216 N. Y. 725 mem, 111 NE 1090 mem].
N. C.—Gums v. Capehart, 58 N. C. 242.
S. C.—Thompson v. Schmidt, 21 S. C. L. 156.
Eng.—Johnson v. Warwick, 17 C. B. 516, 84 ECL 516, 139 Reprint 1176.

[a] **An assent by an executor who dies without proving the will** becomes operative on administration afterward being taken out with the will annexed. Johnson v. Warwick, 17 C. B. 516, 84 ECL 516, 139 Reprint 1176.

23. Gums v. Capehart, 58 N. C. 242; Hairston v. Hairston, 55 N. C. 123; Stamps v. Moore, 47 N. C. 80.

24. White v. White, 20 N. C. 536.

25. Gardner v. Gantt, 19 Ala. 666; Martin v. Peck, 2 Yerg. (Tenn.) 298.

[a] **Where the legatee was put in possession** by the testator, and there are other assets sufficient for the payment of debts, the executor may assent to such legacy even before he proves the will. Finch v. Rogers, 11 Humphr. (Tenn.) 559.

26. U. S.—Fenwick v. Chapman, 9 Pet. 461, 9 L. ed. 193 [aff 5 F. Cas. No. 2,604, 4 Cranch C. C. 431].
Ark.—Ross v. Davis, 17 Ark. 113.
Ga.—Watkins v. Gilmore, 121 Ga. 488, 49 SE 598.
Ky.—Nancy v. Snell, 6 Dana 148.
Mich.—Eberstein v. Camp, 37 Mich. 176.
N. Y.—Matter of Warren, 148 App. Div. 525, 133 NYS 145; Buck v. Kelly, 178 NYS 676; Matter of McCarthy, 47 NYS 1127, 26 NYCivProc 397.
Eng.—Foley v. Burnell, 4 Bro. P. C. 34, 2 Reprint 23.

"When he assents to the title of the legatee, thereby conceding that it is not necessary to use it for the purpose of administration, such assent is irrevocable, and the title of the legatee becomes complete." Matter of Warren, 148 App. Div. 525, 133 NYS 145.

[a] **An executor who had delivered a specific legacy** cannot withdraw his assent arbitrarily. Eberstein v. Camp, 37 Mich. 176.

27. Ark.—Ross v. Davis, 17 Ark. 113.
Ga.—Watkins v. Gilmore, 121 Ga. 488, 49 SE 598.
Ky.—Nancy v. Snell, 6 Dana 148.
N. Y.—Onondaga Trust, etc., Co. v. Price, 87 N. Y. 542.
S. C.—Nunn v. Owens, 33 S. C. L. 101.
Eng.—Noel v. Robinson, 1 Vern. Ch. 453, 460, 23 Reprint 580, 585.

[a] **An assent to a specific legacy** is unexceptionable where the executor retains enough from the estate to pay the testator's debts. Nunn v. Owens, 33 S. C. L. 101.

[b] **Legacy to executor.**—"In case of deficiency of assets to pay the debts, the executor cannot prudently or properly give such assent, and the specific legacy is subject to application thereon in behalf of creditors. And as such was the situation of the estate in question, the appellant, as executor, could not by his assent divest himself of the property in that relation in behalf of himself individually. Spode v. Smith, 3 Russ. 511, 3 EngCh 511, 38 Reprint 667. And although by reason of the bequest to him he may not be chargeable with the income from the property, he must as executor account for the property as it came to him on the death of the testator and as of that time. It would seem to follow that, for the purposes of the administration of the estate, this property must be treated as part of the assets of the estate of the deceased, and, as such, subject to the jurisdiction of the probate court; and, consequently, the executor in respect to it is also subject to the order of that court." Matter of Pye, 18 App. Div. 306, 308, 46 NYS 350 [aff 154 N. Y. 773 mem, 49 NE 1103 mem].

[c] **On the other hand** it has been held that an executor may retract his assent if given (1) upon a reasonable ground for considering the assets sufficient for all demands, where they prove deficient in consequence of unknown debts unexpectedly claimed (Nelson v. Cornwell, 11 Gratt. (52 Va.) 724) (2) if the assent has not been completed by possession (Wheeler v. Lester, 1 Bradf. Surr. (N. Y.) 293; Chamberlain v. Chamberlain, 1 Ch. Cas. 256, 22 Reprint 788).

[d] **The only remedy of creditors** is to follow the property in a court of equity. Rea v. Rhodes, 40 N. C. 148. Liability of legatees for debts of testator generally see Wills [40 Cyc 2060].

28. Ala.—Whorton v. Moragne, 62 Ala. 201; Harkins v. Hughes, 60 Ala. 316.
Ark.—Ross v. Davis, 17 Ark. 113.
Ga.—Watkins v. Gilmore, 121 Ga. 488, 49 SE 598; People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 SE 20; Jourdan v. Miller, 41 Ga. 51.
N. Y.—Matter of Pye, 18 App. Div. 306, 46 NYS 350 [aff 154 N. Y. 773 mem, 49 NE 1103 mem].
N. C.—Lillard v. Raynolds, 25 N. C. 366.
S. C.—Nunn v. Owens, 33 S. C. L. 101; Alexander v. Williams, 20 S. C. L. 522; McMullin v. Brown, 11 S. C. Eq. 457; Fronty v. Godard, 8 S. C. Eq. 517.
Tenn.—Lyon v. Vick, 6 Yerg. 42.
Eng.—Foley v. Burnell, 4 Bro. P. C. 34, 2 Reprint 23; Bychall v. Bradford, 6 Madd. 235, 56 Reprint 1081.

"By assenting to the devises the executors lost all control and interest in the land. If there were unpaid creditors, they might follow the land into the hands of the devisees or have their remedy against the executors personally for assenting to the devises before paying the debts." Watkins v. Gilmore, 121 Ga. 488, 490, 49 SE 598.

[a] **Application of rule.**—Where an executor has assented to a devise, and the ordinary without authority has granted thereafter an order of sale, the executor, having no right or title to the land, cannot recover it from the remainderman or a third party, whether the latter has good title or not. Watkins v. Gilmore, 121 Ga. 488, 49 SE 598.

[b] **The property ceases to be assets** when the executor assents to a specific legacy. Matter of Pye, 18 App. Div. 306, 46 NYS 350 [aff 154 N. Y. 773 mem, 49 NE 1103 mem].

the legatee or devisee,[29] free from an execution subsequently obtained against the executor,[30] but subject to rights acquired by third persons in the bequeathed property before the executor assented.[31] An assent to a legacy can operate in favor of the real legatee only.[32]

[§ 1278] **b. Where Gift Is of Particular Estate with Remainder over.** An executor's assent to a legacy or devise of an estate for life or other particular estate amounts to an assent to the legacy or devise in remainder,[33] although the personal representative himself is the legatee or devisee of the particular estate,[34] unless the assent is restricted to

29. Ark.—Ross v. Davis, 17 Ark. 113.

Ga.—Watkins v. Gilmore, 121 Ga. 488, 49 SE 598; Phillips v. Smith, 119 Ga. 556, 46 SE 640; People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 SE 20; Harris v. Cale, 114 Ga. 295, 40 SE 271.

Ky.—Anderson v. Irvine, 6 B. Mon. 231; Nancy v. Snell, 6 Dana 148; Pirtle v. Cowan, 4 Dana 302.

Mich.—Eberstein v. Camp, 37 Mich. 176.

N. Y.—In re Warren, 148 App. Div. 525, 133 NYS 145; Blood v. Kane, 130 N. Y. 514, 29 NE 994, 15 LRA 490; Onondaga Trust, etc., Co. v. Price, 87 N. Y. 542; Matter of Warren, 148 App. Div. 525, 133 NYS 145; Hudson v. Reeve, 1 Barb. 89.

N. C.—Gums v. Capehart, 58 N. C. 242; Rea v. Rhodes, 40 N. C. 148; Alston v. Foster, 16 N. C. 337; Burnett v. Roberts, 15 N. C. 81.

Pa.—Hanbest's Est., 12 Phila. 72.

S. C.—Nunn v. Owens, 33 S. C. L. 101; Alexander v. Williams, 20 S. C. L. 522; McMullin v. Brown, 11 S. C. Eq. 457.

Tenn.—Martin v. Peck, 2 Yerg. 298.

Eng.—Williams v. Lee, 3 Atk. 223, 26 Reprint 930; Doe v. Guy, 3 East 120, 102 Reprint 543.

"The assent of the executors perfected the inchoate title of the devisees." Watkins v. Gilmore, 121 Ga. 488, 490, 49 SE 598.

[a] **A legatee may maintain an action for the recovery** of a legacy after the executor has assented thereto. People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 SE 20.

[b] **Replevin lies against an executor** who arbitrarily revokes his assent to a legatee's possession of specific legacies and resumes control thereof. Eberstein v. Camp, 37 Mich. 176.

[c] **Rule applies where executor is legatee.**—Hudson v. Reeve, 1 Barb. (N. Y.) 89; Hanbest's Est., 12 Phila. (Pa.) 72.

[d] **An assent to a pecuniary legacy** is a contract to pay it, enforceable by a proper proceeding. Hendrick v. Mayfield, 74 N. C. 626; Dunham v. Elford, 34 S. C. Eq. 190, 94 AmD 162.

[e] **An assent to the bequest of an equitable interest** does not vest the legal title in the legatee. Merritt v. Windley, 14 N. C. 399.

[f] **Title against creditors.**—The possession of a legacy by a legatee for four years after assent of the executor will confer title against the creditors of the testator. Alexander v. Williams, 20 S. C. L. 522.

[g] **Land cannot be sold to pay debts.**—Where under the executor's assent to a devise for life with remainder over the remainderman after the death of the life tenant becomes entitled to possession, the land is no longer any part of the estate of testator, nor subject to sale to pay debts of the estate. Watkins v. Gilmore, 121 Ga. 488, 49 SE 598.

[h] **An assent to a devise in remainder** may prevent a due administration of the estate for the payment of debts, or force creditors to collect their claims by seeking an abatement of such devise. Harris v. Cole, 114 Ga. 295, 40 SE 271.

30. Ala.—Whorton v. Moragne, 62 Ala. 201.

N. C.—Alston v. Foster, 16 N. C. 337.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113; Nunn v. Owens, 33 S. C. L. 101; Alexander v. Williams, 20 S. C. L. 522; McMullin v. Brown, 11 S. C. Eq. 457; Fronty v. Godard, 8 S. C. Eq. 517.

Tenn.—Lyon v. Vick, 6 Yerg. 42.

Va.—Randolph v. Randolph, 6 Rand. (27 Va.) 194; Sampson v. Bryce, 5 Munf. (19 Va.) 175; Burnley v. Lambert, 1 Wash. (1 Va.) 308.

[a] **A bona fide assent, without collusion with the legatee to defraud creditors,** vests the legacy in the legatee beyond the control of the executor or any creditor who has to reach the property through an execution against the executor; and after assent a sale under such an execution is void. Alexander v. Williams, 2 Hill (S. C.) 522.

[b] **Rule applies where executor is legatee.**—Whorton v. Moragne, 62 Ala. 201.

31. Brock v. Sims, 28 S. C. L. 49; Moore v. Barry, 17 S. C. L. 504 (although the legatee is an infant).

32. In re West, [1909] 2 Ch. 180 [applying Saunders' Case, 5 Coke 12 A, 77 Reprint 66; Graysbrook v. Fox, 1 Plowd. 275, 75 Reprint 419 and dist Jervis v. Wolferstan, L. R. 18 Eq. 18; Gittins v. Steele, 1 Swanst. 199, 36 Reprint 356] (where specific shares bequeathed to A were duly transferred to A by the executors after the probate of the will and assent to the legacy, but some years later a codicil was discovered revoking the bequest to A and giving the shares to B, without, however, changing the executors; and the original probate was revoked and a fresh probate, including the new codicil, was granted to the same executors, the specific legacy having in fact been assented to, the legal title with the right to sue for the legacy at common law vested in B, the actual legatee at the testator's death, and he could, therefore, recover both the shares and the mesne income from A).

33. U. S.—McClanahan v. Davis, 8 How. 170, 12 L. ed. 1033.

Ala.—Hemphill v. Moody, 64 Ala. 468; Harkins v. Hughes, 60 Ala. 316; Thrasher v. Ingram, 32 Ala. 645; Gibson v. Land, 27 Ala. 117.

Fla.—Lott v. Meacham, 4 Fla. 144.

Ga.—Moore v. Turner, 148 Ga. 77, 95 SE 965; Almand v. Almand, 141 Ga. 372, 81 SE 228; Toombs v. Spratlin, 127 Ga. 766, 57 SE 59; Watkins v. Gilmore, 121 Ga. 488, 49 SE 598; Harris v. Cole, 114 Ga. 295, 40 SE 271; King v. Skellie, 79 Ga. 147, 3 SE 614; Akin v. Akin, 78 Ga. 24, 1 SE 267; Vanzant v. Bigham, 76 Ga. 759; McGlawn v. Lowe, 74 Ga. 34; Gay v. Gay, 29 Ga. 549; Perkins v. Brown, 29 Ga. 412; Coleman v. Lane, 26 Ga. 515; Parker v. Chambers, 24 Ga. 518; Jordan v. Thornton, 7 Ga. 517.

Ky.—Simrall v. Graham, 1 Dana 574; Boone v. Dykes, 3 T. B. Mon. 529; Adie v. Cornwell, 3 T. B. Mon. 276.

Miss.—Hall v. Hall, 27 Miss. 458.

N. C.—McKoy v. Guirkin, 102 N. C. 21, 8 SE 776; Windley v. Gaylord, 52 N. C. 55; Hotchkiss v. Thomas, 51 N. C. 537; Rea v. Rhodes, 40 N. C. 148; Robertson v. Houlder, 37 N. C. 341; Hearne v. Kevan, 37 N. C. 34; Saunders v. Gatlin, 21 N. C. 86; Lewis v. Smith, 20 N. C. 471; Conner v. Satchwell, 20 N. C. 202; Smith v. Barham, 17 N. C. 420, 25 AmD 721; Alston v. Foster, 16 N. C. 337; Burnett v. Roberts, 15 N. C. 81; Ingrams v. Terry, 9 N. C. 122; James v. Master, 7 N. C. 110.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113; Finley v. Hunter, 19 S. C. Eq. 208.

Tenn. — Finch v. Rogers, 11 Humphr. 559.

Va.—Frazer v. Bevill, 11 Gratt. (52 Va.) 9; Lynch v. Thomas, 3 Leigh (30 Va.) 682; Bishop v. Bishop, 2 Leigh (29 Va.) 484.

Eng.—Stevenson v. Liverpool, L. R. 10 Q. B. 81; Foley v. Burnell, 4 Bro. P. C. 34, 2 Reprint 23; Adams v. Peirce, 3 P. Wms. 11, 24 Reprint 948; Webster v. Johnson, 3 Wkly. Rep. 60.

"The assent of the executors perfected the title of both the life tenant and the remaindermen, and, at the termination of the life estate the remaindermen were entitled to take immediate possession." Watkins v. Gilmore, 121 Ga. 488, 490, 49 SE 598.

[a] **Illustration.**—Where a will provided for keeping the testator's property together during the wife's life, she to have the privileges, with the consent of the executors, of giving certain sums to the children as they became of age or married, and at her death for its division equally among the children, assent of the executor to the life estate or use operated as an assent to the remainder also. Toombs v. Spratlin, 127 Ga. 766, 57 SE 59.

[b] **The assent of one of several executors** is sufficient to vest both the particular estate and the remainder over. Boone v. Dyks, 3 T. B. Mon. (Ky.) 529; Adie v. Cornwell, 3 T. B. Mon. (Ky.) 276.

[c] **An administrator de bonis non cannot recover from a remainderman** a legacy which has vested in him by the assent of the executor to the original bequest. Windley v. Gaylord, 52 N. C. 55; Etheridge v. Bell, 27 N. C. 87.

[d] **If the remainder over is a contingent one,** (1) the assent to the particular estate is qualified as to the remainder, and becomes absolute upon the happening of the contingency (Gay v. Gay, 29 Ga. 549; Acheson v. McCombs, 38 N. C. 554; Conner v. Satchwell, 20 N. C. 202), (2) unless the interest in the property during the interval between the termination of the particular estate and the happening of the contingency is not disposed of by the will (Nixon v. Robbins, 24 Ala. 663).

[e] **Adjustment of claims in remainder.**—The successive beneficiaries in interest in such case must adjust their several claims among themselves without the further intervention of the personal representative. McKoy v. Guirkin, 102 N. C. 21, 8 SE 776.

34. Ala.—Camp v. Coleman, 36 Ala. 163; Gantt v. Phillips, 23 Ala. 275.

Ga.—Shipp v. Gibbs, 88 Ga. 184, 14 SE 196.

Ky.—Adie v. Cornwall, 3 T. B. Mon. 276.

Md.—Kopp v. Herrman, 82 Md. 339, 33 A 646.

N. C.—Hearne v. Kevan, 37 N. C. 34; Jones v. Zollicoffer, 4 N. C. 645, 7 AmD 708.

[a] **The mere taking of possession** of a chattel by an executrix who is given a life estate therein by the will is not an assent to a further bequest of the chattel in remainder. Richards v. Browne, 3

one estate alone,[35] or unless the executor has some trust or duty to perform after the expiration of the particular estate.[36] Conversely, an assent to a bequest in remainder has been held to imply an assent to the bequest of the preceding particular estate.[37]

[§ 1279] **D. Executor or Administrator as Legatee or Distributee—1. Title, Rights, and Liabilities in General.** When an executor is also legatee or distributee no formal act is necessary to vest title to the legacy or distributive share in him as an individual,[38] any act on his part showing an intention to retain assets in payment being sufficient.[39] But he cannot, without an order of court,[40] or a settlement or agreement with his colegatees or codistributees,[41] retain his legacy or share from the assets of the estate to the exclusion of or in preference to other legatees, distributees, or creditors,[42] as by applying it to debts due by him to the estate.[43] Nor can he transfer to himself, as legatee or distributee, property belonging to the estate before he has settled his administration account and paid the debts and prior legacies due from the estate,[44] his duty to dispose of the estate according to the will not being affected by the fact that, as a beneficiary, he claims the right to spend the principal.[45] Where, however, testator left personalty to his wife, who was also appointed executrix, to have the income for life, with "the right to use the principal if she would need it," she was entitled as executrix to pay to herself as legatee the personalty bequeathed to her, to invest the same and use the income and the principal if she needed it, the residuary legatees being only entitled to the remainder.[46] Where a surviving husband is his wife's administrator, it is immaterial in which capacity he settles for a distributable part of a personal estate to which his wife was entitled.[47]

Selection of investments in satisfaction of legacy or distributive share. Where an executor or administrator claims the right to pay himself his legacy or distributive share in advance of any distribution to him, and selects investments of the testator, he is not at liberty to take them at their appraised value unless this is more than the market value.[48]

Where executors have retained more than their share of the residuary estate, of which a part is given to them by the will, they are not jointly and severally liable to repay the excess, but each is liable for what he received for himself in excess of what he was actually entitled to, with interest on such amount.[49]

Where an administrator is indebted to the estate, the amount due him as heir should be a credit on the amount due from him as administrator,[50] but the rule permitting a set-off of a share of a distributee as against a debt owing by him to the estate will not be applied, so as to work immediately as of the time of decedent's death, if such application

Bing. N. Cas. 492, 32 ECL 230, 132 Reprint 500.

35. Hotchkiss v. Thomas, 51 N. C. 537; Robertson v. Houlder, 37 N. C. 341.

36. Nixon v. Robbins, 24 Ala. 663; McGlawn v. Lowe, 74 Ga. 34; Gay v. Gay, 29 Ga. 549; McKoy v. Guirkin, 102 N. C. 21, 8 SE 776; Acheson v. McCombs, 38 N. C. 554; Lewis v. Smith, 20 N. C. 471; Allen v. Watson, 5 N. C. 189; Lenoir v. Sylvester, 17 S. C. L. 632.

37. King v. Skellie, 79 Ga. 147, 3 NE 614.

38. Ga.—Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

N. Y.—In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683]; Blood v. Kane, 130 N. Y. 514, 29 NE 294, 15 LRA 490.

Pa.—Berry's Est., 8 Pa. Dist. 50.

S. C.—Stuart v. Carson, 1 S. C. Eq. 500.

Wis.—Golder v. Littlejohn, 30 Wis. 344.

[a] **One of two executors,** who is a legatee, has the same right as his coexecutor to the receipt, control, and disposition of the funds of the estate including the legacy to him. Matter of Rossell, 126 App. Div. 607, 110 NYS 706, 121 App. Div. 381, 105 NYS 1098.

[b] **Possession by a coexecutor of personal chattels bequeathed to the widow,** who is also one of the executors, immediately vests in her as legatee, that of the executors as such being divested. Golder v. Littlejohn, 30 Wis. 344.

[c] **Allowance of bequest by court.**—The allowance of a credit by the probate court in the account of the executors, of whom the widow is one, of a certain amount for "personal property bequeathed to the widow," does not operate to vest that amount absolutely in the widow, so that it cannot be reclaimed by the surviving executor after her death, where it does not appear that the construction of the will was in question. Vreeland v. Westervelt, 45 N. J. Eq. 572, 17 A 695.

39. Williams v. Cobb, 219 Fed. 663, 134 CCA 217 [aff 242 U. S. 307, 37 SCt 115, 61 L. ed. 325]; Boone v. Dyke, 3 T. B. Mon. (Ky.) 529; Hanbest's Est., 12 Phila. (Pa.) 72; In re Richardson, [1896] 1 Ch. 512.

[a] **A deposit in his individual name by an executor,** who is also legatee, of rents which he had collected is legitimate proof of an intention to retain them in part payment of his legacy. Henbest's Est., 12 Phila. (Pa.) 72.

40. Cutliff v. Boyd, 72 Ga. 302.

41. Cutliff v. Boyd, 72 Ga. 302; Hitchcock v. Merrick, 15 Wis. 522.

[a] **An assignment of assets by coexecutors** to an executor who is also residuary legatee gives him a good title thereto under the will and assignment together. Hitchcock v. Merritt, 15 Wis. 522.

42. Ga.—McMillan v. Toombs, 79 Ga. 143, 4 SE 16.

Ky.—Beauchamp v. Handley, 1 B. Mon. 135.

La.—Burbank's Succ., 126 La. 9, 52 S 175; Cordeviolle's Succ., 24 La. Ann. 319.

N. Y.—Matter of Van Houten, 18 App. Div. 301, 46 NYS 190.

N. C.—Little v. Hager, 67 N. C. 135.

Pa.—Com. v. Cochran, 146 Pa. 223, 23 A 203.

S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; Atcheson v. Robertson, 25 S. C. Eq. 39; Gadsden v. Lord, 1 S. C. Eq. 208.

[a] **Illustrations.**—(1) Where an executor, who is also codevisee with another of land held by title bond, recovers judgment on such bond, he holds the judgment as trustee for his codevisee, and if he afterward acquires the land, with the proceeds of the judgment, the codevisee or his assignee will be entitled to the same interest in the land as the executor. Beauchamp v. Handley, 1 B. Mon. (Ky.) 135. (2) An executrix who is also an heir cannot as heir retain the purchase money of certain property in her possession until distribution. Cordeviolle's Succ., 24 La. Ann. 319.

[b] **Commissions earned by an administrator** are regarded as costs, and not as a portion of distributive share of heir who is also administrator of estate; hence administrator's application of commissions to his personal use does not work inequality in distribution. Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

43. Breitling v. Clarke, 49 Ala. 450; Cutliff v. Boyd, 72 Ga. 302.

44. Reed v. Reed, 80 Conn. 401, 68 A 849; Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. (D. C.) 406; Sinnott v. Kenaday, 14 App. (D. C.) 1 [aff 179 U. S. 606, 21 SCt 233, 45 L. ed. 339]; Matter of Van Houten, 18 App. Div. 301, 46 NYS 190; Matter of Burdick, 79 Misc. 167, 140 NYS 582; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401.

[a] **This is true even though** he is sole residuary legatee or distributee. Lewis v. Ewing, 18 Pa. 313.

[b] **An executor may retain as his own any specific chattel of his own** held by his testator which came into his hands as executor, and which he might have recovered in an action at law, were he not executor. Saunders v. Saunders, 2 Litt. (Ky.) 314.

[c] **Duty to account.**—An executrix was bound to proceed to a final accounting as soon as she reasonably could, and to then apply for an order of distribution, although she had under the will the life use of the entire fund. Reed v. Reed, 80 Conn. 401, 68 A 849.

45. Reed v. Reed, 80 Conn. 401, 68 A 849.

46. Matter of Trelease, 115 App. Div. 654, 100 NYS 1051 [aff 49 Misc. 205, 96 NYS 318] (the wife was entitled to the exclusive custody of the fund as against her coexecutor).

47. Ford v. Wilson, 10 Del. Ch. 124, 85 A 1073.

48. Hart's Est., 10 Pa. Dist. 421, 426, 25 Pa. Co. 401 ("The executor can pay himself no more than the court would award to him upon a proper settlement of his account. And if he has taken securities instead of cash, while he may be allowed to retain them, he must do so at their market value at the time he took them, either in full or part payment of his legacy or share").

49. Boys' Home v. Lewis, 5 Ont WR 39.

50. Dorger v. Woodward, 27 Oh. Cir. Ct. 123.

Debts due from representative as assets see supra §§ 459, 460.

would operate to the detriment of the estate, and cannot be invoked to protect the administrator, who is a distributee, against his debt to the estate.[51] Where a wife has signed notes as surety for her husband, he cannot sell her real estate and pay the notes and then inherit as personal property the claim of the estate against him on the notes, but he must account to the heirs who would have inherited a portion of such real estate.[52] A decree upon final accounting, charging decedent's estate with his debt as administrator of his wife's estate and directing payment thereof to a daughter as sole heir of the wife, overlooking decedent's interest in his wife's property, is erroneous.[53]

Divesting of gift. Where testator devised all his property to his widow for life, or until remarriage, in which event her life estate was to terminate, and she was to receive absolutely a specified sum and the balance was to be equally divided between her and certain heirs, and she was appointed executrix and subsequently discharged after making a report that debts were paid, and thereafter she sold real estate belonging to testator, and subsequently remarried, it was held that after remarriage she held the amount received from the sale, not in an individual, but in a representative, capacity.[54]

[§ 1280] **2. Residuary or Sole Legatee Acting as Executor.** An executor who is also residuary legatee acquires full title to the residuary assets only when all debts, charges, and legacies are paid [55] and he is judicially determined to be the sole or residuary legatee.[56] It has been held that this is true notwithstanding he has given the bond permitted by statute in such cases for the payment of debts and legacies,[57] but there is also authority for the view that he acquires title as an individual to the personal estate on his filing such bond.[58]

[§ 1281] **E. Time for Distribution [59]—1. In General.** At common law an executor or administrator was allowed one year within which to settle the estate and make distribution,[60] but the time is now ordinarily fixed by statute;[61] and the general rule is that distribution should not be made until after the payment of all debts and final settlement of the representative's account,[62] or until after the expiration of the statutory period for the

Set-off and counterclaim with respect to claims of executor or administrator against estate as creditor see supra § 1204.

51. In re Loheide, 17 Cal. A. 475, 120 P 56.

52. Peo. v. Rardin, 171 Ill. A. 226.

53. Matter of McKinnon, 182 App. Div. 277, 169 NYS 416.

54. Peters v. Snavely-Ashton, (Iowa) 120 NW 1048.

55. D. C.—Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. 406.

N. H.—Seavey v. Roberts, 63 N. H. 621, 3 A 634.

N. Y.—In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683]; Blood v. Kane, 130 N. Y. 514, 29 NE 994, 15 LRA 490; Drake v. Paige, 127 N. Y. 562, 28 NE 407 [aff 52 Hun 292, 5 NYS 466].

S. C.—Buerhaus v. De Saussure, 41 S. C. 457, 20 SE 64, 19 SE 926.

Eng.—Harding v. Harding, 16 L. J. Ch. 179.

Can.—Cameron v. Harper, 21 Can. S. C. 273.

[a] **A devastavit committed by one of several residuary legatees who is also an executor** prevents him from taking any of the residue until such loss is made good. Buerhaus v. De Saussure, 41 S. C. 457, 20 SE 64, 19 SE 926.

[b] **Where no bond was given** for the payment of debts and legacies the estate of the deceased executor, who was also residuary legatee, is not liable for an unpaid legacy. Seavey v. Roberts, 63 N. H. 621, 3 A 634.

56. Jones v. Roberts, 84 Wis. 465, 54 NW 917.

57. Collins v. Collins, 140 Mass. 502, 5 NE 632; Jenkins v. Wood, 140 Mass. 66, 2 NE 780; Jones v. Richardson, 5 Metc. (Mass.) 247; Gore v. Brazier, 3 Mass. 523, 3 AmD 182; Evans v. Foster, 80 Wis. 509, 50 NW 410, 14 LRA 117. But see Cole's Will, 52 Wis. 591, 9 NW 664 (where an executrix and sole legatee named in the will gives such bond, title to the whole estate passes to her and the administration is ended; but she is liable upon such bond for the costs awarded out of the estate to contestants).

[a] **The acceptance of a devise by a residuary legatee and executrix,** subject to the lien of a legacy to another person, renders her personally liable to pay such legacy, although the will exempts her from giving bond. Evans v. Foster, 80 Wis. 509, 50 NW 410, 14 LRA 117.

Withdrawal of estate from administration by giving bond for payment of debts and legacies see supra § 26.

58. Richardson v. Bailey, 69 N. H. 384, 41 A 263, 76 AmSR 176; Mercer v. Pike, 58 N. H. 286; Batchelder v. Russell, 10 N. H. 39.

59. Delay in making or failure to make distribution generally see infra §§ 1346, 1347.

Testamentary provisions affecting time for payment of legacies see Wills [40 Cyc 2091].

60. U. S.—Sullivan v. Winthrop, 23 F. Cas. No. 13,600, 1 Sumn. 1.

Hawaii.—Matter of Wilder, 9 Hawaii 492.

Ind.—Foltz v. Hart, 84 Ind. 56; State v. Crossley, 69 Ind. 203.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

La.—Lafon v. Gravier, 1 Mart. N. S. 243.

Me.—Nickels v. Nichols, 105 A 386.

Md.—White v. Donnell, 3 Md. Ch. 526.

Mass.—Gilbert v. Bachelder, 223 Mass. 329, 111 NE 956; Fitch v. Randall, 163 Mass. 381, 40 NE 182; Kent v. Dunham, 106 Mass. 586; Roth v. Emerson, 105 Mass. 431; Brooks v. Lynde, 7 Allen 64; Miller v. Congdon, 14 Gray 114.

Miss.—Wheeler v. Brem, 33 Miss. 126.

Nebr.—In re Knight, 135 NW 379.

N. H.—Rice v. Boston Port, etc., Aid. Soc., 56 N. H. 191.

N. J.—In re Diehl, 88 N. J. Eq. 310, 102 A 738; Ashton v. Wilkinson, 53 N. J. Eq. 6, 30 A 895 [aff 53 N. J. Eq. 227, 35 A 1130]; Coddington v. Bispham, 36 N. J. Eq. 224 [aff 36 N. J. Eq. 574]; Clayton v. Somers, 27 N. J. Eq. 230.

N. Y.—Burtis v. Dodge, 1 Barb. Ch. 77; Miller v. Philip, 5 Paige 573; Lawrence v. Embree, 3 Bradf. Surr. 364.

Pa.—Jones' App., 3 Grant 169; Bunting's Est., 14 Pa. Dist. 7, 31 Pa. Co. 128; James v. Fennicle, 21 Pa. Co. 91; King's Est., 11 Phila. 26.

R. I.—Spencer's Pet., 16 R. I. 25, 12 A 124.

Va.—Bliss v. Spencer, 99 SE 593.

Wis.—In re Brandon, 164 Wis. 387, 160 NW 177.

Eng.—Lord v. Lord, L. R. 2 Ch. 782; Hues v. Jackson, 2 Eq. Rep. 462; Brooke v. Lewis, 6 Madd. 358, 56 Reprint 1128; Benson v. Maude, 6 Madd. 15, 56 Reprint 994; Laundy v. Williams, 2 P. Wms. 478, 24 Reprint 823; Pearson v. Pearson, 1 Sch. & Lef. 10; Wood v. Penoyer, 13 Ves. Jr. 325, 33 Reprint 316; Hill v. Chapman, 1 Ves. Jr. 405, 30 Reprint 408.

Ont.—Re Holland, 3 Ont. L. 406, 1 OntWR 73.

61. See the statutes.

62. Ala.—Horton v. Averett, 20 Ala. 719; Thrash v. Sumwalt, 5 Ala. 13.

Cal.—In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965; In re Sheid, 122 Cal. 528, 55 P 328, 129 Cal. 172, 61 P 920; Smith v. Westerfield, 88 Cal. 374, 26 P 206; In re Pritchett, 51 Cal. 568, 52 Cal. 94.

D. C.—Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. 406.

Ill.—Freilich v. Freilich, 198 Ill. A. 420.

Iowa.—Linton v. Crosby, 61 Iowa 401, 16 NW 342.

La.—Miguez v. Delcambre, 125 La. 176, 51 S 108.

Mass.—Browne v. Doolittle, 151 Mass. 595, 25 NE 23.

Mich.—In re Lambie, 112 Mich. 118, 70 NW 442.

Miss. — Thornton v. Glover, 25 Miss. 132.

Mo.—Clarke v. Sinks, 144 Mo. 448, 46 SW 199.

N. H.—Harris v. Ingalls, 74 N. H. 35, 64 A 727.

N. J.—Wade v. Potter, 14 N. J. L. 278.

N. Y.—Matter of D'Adamo, 94 Misc. 1, 157 NYS 374; Robinson v. Adams, 30 Misc. 537, 63 NYS 816 [mod on other grounds 81 App. Div. 20, 80 NYS 1098 (aff 179 N. Y. 558 mem, 71 NE 1139 mem)]; In re Senn, 164 NYS 399.

Pa.—Reimel's Est., 23 Pa. Dist. 675; Harvey's Est., 11 Pa. Dist. 83, 26 Pa. Co. 500; Kern's Est., 4 Pa. Dist. 73; Mazurie's Est., 33 LegInt 256.

Philippine.—Villanueva v. Chavez, 24 Philippine 170; Escuin v. Escuin, 11 Philippine 332.

Va.—Bliss v. Spencer, 99 SE 593.

[a] **The widow** of an intestate cannot come into court for her distributive share before the settlement of her husband's estate. Wade v. Potter, 14 N. J. L. 278.

[b] **An executor's account must be filed, audited, and confirmed** before the distribution of any part of the estate can be ordered. Hanbest's Est., 12 Phila. (Pa.) 31; In re Reinheimer, 11 Phila. (Pa.) 160.

[c] **Pending the judicial settlement of an account,** payment of legacies or other claims will not be ordered without some very good reason. In re Harris, 1 NYCivProc 162; In re Harding, 24 Pa. 189 (exceptions to probate accounts should be disposed of before the fund is re-

filing of claims and settling the estate.[63] Nevertheless it is the duty of the representative to make distribution as soon as is consistent with the rights of creditors and his own safety;[64] and where it is made apparent that there are more assets on hand than will be necessary for the payment of debts and expenses of administration, the court may direct distribution before the time ordinarily allowed for settlement of estates has elapsed,[65] or, under such circumstances, the representative may pay over legacies or distributive shares in advance of such time,[66] taking a refunding bond from those who are thus paid.[67] Distribution should not ordinarily be attempted prior to a grant of administration.[68]

[§ 1282] **2. Partial Distribution.** It is a well-settled general rule, which is established by statute in some jurisdictions, that an executor or administrator may be allowed or ordered to make a partial distribution before final settlement of his accounts or the expiration of the statutory period, where it can be made without prejudice to the rights of creditors and other persons interested,[69] although where this is done it is usual to require those to whom payments are made to give bond or other security to refund in case it shall subsequently appear

ferred to an auditor for distribution).

[d] **Refusal to file account.**— Where an estate has been settled, excepting a claim by the executors, which cannot be adjusted until they file their final account which they refuse to do in obedience to an order of the probate court, and the persons entitled to the estate have adjusted matters between themselves, they are entitled to an order assigning the property to them and discharging the executors. In re Lambie, 112 Mich. 118, 70 NW 442.

[e] **A decree of final distribution cannot** be had until the settlement of final accounts of the executors. In re Spreckels, 165 Cal. 597, 133 P 289.

[f] **If a creditor consents to distribution,** administration is terminated as to him. Barton v. Burbank, 114 La. 224, 38 S 150.

Priority of debts over legacies, devises, and distributive shares see supra § 1273.

63. Ala.—Jackson v. Rowell, 87 Ala. 685, 6 S 95, 4 LRA 637; Ward v. Oates, 42 Ala. 225; Harrison v. Harrison, 9 Ala. 470.

Ark.—McDearman v. Martin, 38 Ark. 261.

Cal.—In re Sheid, 122 Cal. 528, 55 P 328, 129 Cal. 172, 61 P 920; Smith v. Westerfield, 88 Cal. 374, 26 P 206; Letellier's Est., 74 Cal. 311, 15 P 847; In re Mayhew, 4 Cal. A. 162, 87 P 417.

D. C.—Sinnott v. Kenaday, 12 App. 115.

Ga.—Williams v. Lancaster, 113 Ga. 1020, 39 SE 471.

Ill.—Haskins v. Martin, 103 Ill. A. 115.

Ind.—Fleece v. Jones, 71 Ind. 340.

Ky.—Com. v. Hammond, 10 B. Mon. 62.

La.—Toy's Succ., 14 La. Ann. 536.

Me.—Nickels v. Nichols, 105 A 386.

Md.—Yakel v. Yakel, 96 Md. 240.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

Miss.—Packwood v. Elliott, 43 Miss. 504; Young v. Ross, 31 Miss. 556; Fort v. Battle, 21 Miss. 133.

Mo.—Harter v. Petty, 266 Mo. 296, 181 SW 39; Clarke v. Sinks, 144 Mo. 448, 46 SW 199.

Mont.—In re McFarland, 10 Mont. 586, 27 P 389.

N. H.—Cotton v. Fletcher, 77 N. H. 216, 90 A 510, AnnCas1915A 1225.

N. Y.—Flatauer v. Loser, 211 N. Y. 15, 104 NE 1123; In re Lansing, 37 Misc. 177, 74 NYS 945, 2 Mills Surr. 480; Matter of Lawson, 36 Misc. 96, 72 NYS 645, 2 Mills Surr. 345; Matter of Bronner, 30 Misc. 31, 62 NYS 1003, 1 Mills Surr. 418.

Pa.—Edgar v. Shields, 1 Grant 361; Weisbroud's Est., 22 Pa. Dist. 177, 40 Pa. Co. 661; Rosar's Est., 21 Pa. Dist. 302.

R. I.—Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 77 A 98, AnnCas1912B 237; Steere v. Wood, 15 R. I. 199, 2 A 551.

[a] **An executor is not subject to garnishment** for the distributive share of an heir until the expiration of twelve months after his appointment. Selman v. Milliken, 28 Ga. 366.

[b] **It is the representative's duty to apply for an order** of distribution after the time for presenting claims has expired and he has filed a report showing a cash balance in his hands belonging to the heirs. Haskins v. Martin, 103 Ill. A. 115.

[c] **Where an executor refuses to pay a legacy upon demand** after the expiration of the statutory period, an action to recover it may be maintained at once without waiting for the judicial settlement of his account. Bernardston Cong. Unitarian Soc. v. Hale, 29 App. Div. 396, 51 NYS 704. Delay in or failure to make distribution generally see infra §§ 1346, 1347.

[d] **The dismissal of a petition for distribution** filed prior to the expiration of the time allowed for filing claims should be without prejudice to the right to renew it at the proper time. Sinnott v. Kenaday, 12 App. (D. C.) 115.

64. Cal.—In re Huntoon, 174 Cal. 282, 163 P 52.

D. C.—Sinnott v. Kenaday, 12 App. 115; Sterrett v. National Safe Deposit, etc., Co., 10 App. 131.

Hawaii. — Matter of Kaiu, 17 Hawaii 514.

Ky.—Stratton v. Wilson, 168 Ky. 699, 182 SW 858.

La.—Geddes' Succ., 36 La. Ann. 963; Hasley's Succ., 27 La. Ann. 586.

Md.—Alexander v. Stewart, 8 Gill & J. 226.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. Y.—Matter of Brooklyn Trust Co., 179 App. Div. 262, 166 NYS 513 [mod 92 Misc. 695, 157 NYS 671]; Matter of D'Adamo, 94 Misc. 1, 157 NYS 374; Matter of Kent, 92 Misc. 113, 155 NYS 383; In re Senn, 164 NYS 399.

Pa.—Piper's Est., 28 Pa. Co. 589; Wilvert's Est., 11 Pa. Dist. 660, 26 Pa. Co. 644, 5 Dauph. Co. 161.

Va.—Bliss v. Spencer, 99 SE 593, 599.

"The true policy of the law . . . would seem to favor a reasonably prompt distribution among those entitled under the statute of distributions, rather than a holding of the estate by the fiduciary for the year." Bliss v. Spencer, supra.

[a] **An estate is "ready to be distributed"** when its resources have been gathered and marshaled so that their extent and nature are known and its expenses and obligations have been ascertained, and it is not necessary that it should be wholly reduced to money. Matter of Snedeker, 61 Misc. 216, 114 NYS 936, 1 NYCivProc NS 108, 7 Mills Surr. 23.

65. McDearman v. Martin, 38 Ark. 261; Reynolds v. Peo., 55 Ill. 328.

[a] **Where there are no unsatisfied debts or charges superior to the right of the widow** as distributee, a decree directing the executors to pay a specified sum to the widow renouncing the provision made for her in her husband's will is not open to the objection that it was prematurely made because of the condition of the administration of the estate. Showalter v. Showalter, 107 Va. 713, 60 SE 48.

66. U. S.—Sullivan v. Winthrop, 23 F. Cas. No. 13,600, 1 Sumn. 1.

Md.—Evans v. Iglehart, 6 Gill & J. 171.

N. J.—Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586.

S. C.—Wright v. Wright, 7 S. C. Eq. 185; Watts v. Watts, 7 S. C. Eq. 77.

Eng.—Angerstein v. Martin, Turn. & R. 232, 12 EngCh 232, 37 Reprint 1087; Garthshore v. Chalie, 10 Ves. Jr. 1, 32 Reprint 743.

Ont.—Re Holland, 3 Ont. L. 406, 1 OntWR 73.

[a] **A residuary legatee may insist** that before the end of the first year after testator's death the executor shall, if possible, convert the assets into money, pay the debts, funeral and testamentary expenses, and hand over the clear residue to him. Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586.

67. See infra §§ 1295–1304.

68. Cargile v. Harrison, 9 B. Mon. (Ky.) 518; Garner v. Lansford, 20 Miss. 558. But see Ross v. Ross, 4 Ch. Chamb. (U. C.) 27 (where, the amount of the legacy being small, an order for its payment without letters of administration was made).

[a] **Where the probate of a will is set aside,** the probate court cannot at the same time order distribution, but new and suitable letters should first be taken out. Garner v. Lansford, 20 Miss. 558.

69. Ala.—Sankey v. Elsberry, 10 Ala. 455.

Ark.—Parker v. Wilson, 98 Ark. 553, 136 SW 981.

Cal.—In re Hinkel, 176 Cal. 563, 169 P 70; In re Huntoon, 74 Cal. 282, 163 P 52; In re Broome, 162 Cal. 258, 122 P 470; In re Hale, 121 Cal. 125, 53 P 429; In re Painter, 115 Cal. 635, 47 P 700; In re Crocker, 105 Cal. 368, 38 P 954; In re Levinson, 98 Cal. 654, 33 P 726; Roberts' Est., 67 Cal. 349, 7 P 733.

D. C.—Hutchins v. Hutchins, 41 App. 122; Sterrett v. National Safe Deposit, etc., Co., 10 App. 131; McLane v. Cropper, 5 App. 276.

Ill.—Curts v. Brooks, 71 Ill. 125; Reynolds v. Peo., 55 Ill. 328; Mumper v. Murphy, 212 Ill. A. 52; Murdock v. Murdock, 111 Ill. A. 375 [aff 219 Ill. 123, 76 NE 57].

Ind.—Chapell v. Shuee, 117 Ind. 481, 20 NE 417; Lilly v. Stahl, 5 Ind. 447.

Ky.—Stratton v. Wilson, 168 Ky. 699, 182 SW 858; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

Md.—Clarke v. Sandrock, 113 Md. 422, 77 A 644.

Mass.—Sturtevant v. Wentworth, 226 Mass. 459, 115 NE 927.

Mich.—Michigan Trust Co. v. McNamara, 167 Mich. 406, 132 NW 1078.

Miss.—Anderson v. Gregg, 44 Miss. 170.

Mont.—In re Fleming, 38 Mont. 57, 98 P 648; State v. Second Judicial Dist. Ct., 34 Mont. 345, 86 P 268; In re Phillips, 18 Mont. 311, 45 P 222.

N. Y.—Gilman v. Gilman, 63 N. Y. 41 [aff 4 Hun 69, 6 Thomps. & C. 211]; Matter of Ockerhausen, 57 Hun 590, 10 NYS 928; Barnes v. Barnes, 13 Hun 233; Keteltas v. Green, 9 Hun 599; Matter of Kent, 92 Misc. 113, 155 NYS 383; Matter of Robinson, 75 Misc. 75, 134 NYS 863, 8 Mills Surr.

that they have received more than they were entitled to.[70] But where proceedings are pending which suspend the functions of the representative, or where his right to distribute does not exist, partial distribution should not be decreed or enforced.[71]

[§ 1283] **3. Paying Over Rents.** An administratrix is bound presently to pay over to the committee of an incompetent legatee accruing rents to which the incompetent is entitled under the will, and is not justified in waiting until she has submitted an annual accounting and procured its approval by the surrogate before making such payment.[72]

[§ 1284] **4. Before Probate of Will.** Although an executor cannot be compelled to pay legacies before probate of the will or his qualification as executor,[73] his subsequent qualification relates back by construction to the death of his testator and validates a payment so made.[74]

[§ 1285] **5. Before Decree of Distribution.** Ordinarily a representative cannot be compelled to pay a distributive share before an order or decree of distribution;[75] but where all debts that have been allowed have been paid and the time for presenting others has expired, it is his duty to turn over the residue to heirs and distributees,[76] and he may properly do so without waiting for an order of the probate court.[77]

536; Hoyt v. Jackson, 1 Dem. Surr. 553.

N. C.—Grogan v. Ashe, 156 N. C. 286, 72 SE 372.

Oh.—Disney v. Hawes, 9 Oh. Dec. (Reprint) 406, 12 CincLBul 322; In re Isherwood, 5 OhS&CP 143, 7 Oh NP 332.

Pa.—Gable's App., 40 Pa. 231; Flintham v. Forsythe, 9 Serg. & R. 133; Melville's Est., 25 Pa. Dist. 5; Blinn's Est., 21 Pa. Dist. 428; Harvey's Est., 11 Pa. Dist. 83, 26 Pa. Co. 500; Bohrer's Est., 7 Pa. Dist. 307, 21 Pa. Co. 129; Neal's Est., 14 Wkly NC 258. But compare Seitzinger's Est., 2 Woodw. 348 (court cannot, in advance of account, make partial distribution in favor of a single legatee).

Va.—Bliss v. Spencer, 99 SE 593; Showalter v. Showalter, 107 Va. 713, 60 SE 48.

Eng.—In re Richardson, [1896] 1 Ch. 512.

[a] **Illustrations.—(1)** Where, by will, executors are made trustees pending a judicial settlement of their accounts, where delay is probable, an order should be made for distribution of accumulated income. Matter of Robinson, 75 Misc. 75, 134 NYS 863, 8 Mills Surr. 536. (2) Where a testator bequeathed a legacy to his wife in lieu of dower, and there was delay in probating the will, the surrogate was authorized to order payment of such portion of the legacy as was necessary for the widow's maintenance, provided the assets were more than sufficient to pay the debts, and a satisfactory indemnity bond was given. Seymour v. Butler, 3 Bradf. Surr. (N. Y.) 193.

[b] **After an order of sale** a petition for partial distribution may be granted. State v. Second Judicial Dist. Ct., 34 Mont. 345, 86 P 268.

[c] **The pendency of a suit by an executrix in her personal capacity** against herself in her representative capacity for money paid for funeral expenses is not a proper ground of objection to an order for partial distribution where it has already been decided that such action cannot be maintained. In re Phillips, 18 Mont. 311, 45 P 222.

[d] **Pending an appeal as to part of an estate,** the other part may, on order of the court, be distributed by the administrator. Sterrett v. National Safe Deposit, etc., Co., 10 App. (D. C.) 131.

[e] **Appeal from probate.**—Partial distribution may be ordered during the pendency of a nonsuspensive appeal from an order admitting the will to probate. Cropper v. McLane, 6 App. (D. C.) 119.

[f] **Advancements necessary for support.—(1)** A statute providing for an advancement by executors of part of legacies, when adjudged by the court to be "necessary for support," uses the word "necessary" in a relative sense, having references to the station in society of the beneficiary, her former mode of life, and the estate to which she has been accustomed and will ultimately be entitled. Lockwood v. Lockwood, 3 Redf. Surr. (N. Y.) 330. (2) An application by a married woman as legatee under a will for an advance payment on the legacy will be denied, where the moving papers do not show that petitioner's husband has not sufficient means to support and maintain her, and it does not appear that the income which she receives from the estate is insufficient to support her, and no fund out of which the advancement can be made is indefeasibly vested in her. Matter of Kohler, 91 Misc. 462, 154 NYS 958.

[g] **Indebtedness of estate. —** A statute authorizing partial distribution where "the estate is but little indebted" uses the words quoted relatively and as referring to a condition of things in which the debts are small as compared with the value of the estate, and not absolutely, so as to require the estate to be but little indebted regardless of its value. In re Crocker, 105 Cal. 368, 38 P 954 [foll In re Hinkle, 176 Cal. 563, 169 P 70].

[h] **A surplus of "one-third"** required by statute in order to authorize a surrogate to decree payment to a legatee or distributee prior to the regular time for distribution is to be estimated by excluding the amount of the petitioner's claim and payments already made. Tuttle v. Heidermann, 5 Redf. Surr. (N. Y.) 199.

[i] **A special administrator has the right to appeal** from a decree directing advancement to the widow under authority of a statute authorizing advancements out of the share which she would utimately be entitled to receive. Sturtevant v. Wentworth, 226 Mass. 459, 115 NE 927.

[j] **Partial distribution in favor of a dowress** out of the personal estate of her deceased husband should not be ordered until the accounts of the executor are made up and the commissioners proceed to make division. Chaires v. Shepard, 7 Fla. 77.

[k] **Residuary legatees** are not within the application of the New York statute on this point. Lockwood v. Lockwood, 3 Redf. Surr. (N. Y.) 330.

70. See infra § 1295.

71. In re Welch, 106 Cal. 427, 39 P 805; In re McGowan, 28 Hun (N. Y.) 246; Neal's Est., 14 WklyNC (Pa.) 258.

[a] **While the estate is in the hands of a special administrator** appointed pending proceedings to remove the general administrator, a partial distribution cannot be decreed. In re Welch, 106 Cal. 427, 39 P 805.

[b] **Where the audit of a representative's account is continued pending a new trial** involving a contest of the will, a petition by certain legatees for partial distribution should be dismissed. Neal's Est., 14 WklyNC (Pa.) 258.

[c] **A decree of partial distribution of real property** is improper, where the court has ordered such property to be sold to pay debts and the expenses of administration, and the fact that such order is suspended by an appeal does not justify a distribution which would defeat the order of sale if it should be affirmed. In re Freud, 134 Cal. 333, 66 P 476.

[d] **Proceedings to revoke probate.**—Under a statute providing that after service on an executor or administrator with the will annexed of a citation to show cause why probate of the will should not be revoked, he must suspend acts that he has been expressly allowed to perform by order of the surrogate, the surrogate cannot order, after service of such citation, a portion of the estate to be divided among the legatees. In re McGowan, 28 Hun (N. Y.) 246.

72. Matter of Cowen, 105 App. Div. 596, 94 NYS 303.

73. State v. Judge New Orleans Prob. Ct., 4 Rob. (La.) 42; Ward v. Bowen, 2 Sneed (Tenn.) 58.

[a] **No suit by attachment or otherwise** can be brought against an executor before the probate of the will or his qualification as executor to reach a legacy bequeathed by the will. Ward v. Bowen, 2 Sneed (Tenn.) 58.

74. Pinkham v. Grant, 78 Me. 158, 3 A 179.

75. Ill.—Neubrecht v. Santmeyer, 50 Ill. 74.

Me.—Palmer v. Palmer, 112 Me. 156, 91 A 284; Hawes v. Williams, 92 Me. 483, 43 A 101.

Mass.—Cathaway v. Bowles, 136 Mass. 54.

Miss.—Thornton v. Glover, 25 Miss. 132.

N. J.—Ordinary v. Smith, 15 N. J. L. 92; Sayre v. Sayre, 16 N. J. Eq. 505.

Pa.—Reimel's Est., 23 Pa. Dist. 675.

Eng.—Canterbury v. Tappen, 8 B. & C. 151, 15 ECL 82, 108 Reprint 1000; Canterbury v. Robertson, 1 Cromp. & M. 690, 149 Reprint 576.

76. Brown v. Forsche, 43 Mich. 492, 5 NW 1011.

77. Conn.—State v. Whitehouse, 75 Conn. 410, 53 A 897.

Mass.—Palmer v. Whitney, 166 Mass. 306, 44 NE 229.

Mich.—Brown v. Forsche, 43 Mich. 492, 5 NW 1011.

Minn.—Krause v. Krause, 81 Minn. 484, 84 NW 332.

Mo.—Clarke v. Sinks, 144 Mo. 448, 46 SW 199; State v. Morton, 18 Mo. 53; State v. Rankin, 4 Mo. 426.

N. Y.—Belasco v. Klaw, 48 Misc. 597, 97 NYS 712.

Pa. — Catherwood v. Guarantee Trust, etc., Co., 252 Pa. 466, 97 A 703.

Vt.—In re Scott, 36 Vt. 297.

Wash.—Griffin v. Warburton, 23 Wash. 231, 62 P 765.

Man.—Re Freedy, 23 Man. 763, 13 DomLR 832, 25 WestLR 378.

[§ 1286] **6. Allowing Time for Conversion of Assets into Money.** Where a will provides for the payment of pecuniary legacies out of the proceeds of a sale of property, a reasonable time will be allowed for the conversion of the assets into a fund for the payment of such legacies.[78]

[§ 1287] **7. Suspending or Withholding Distribution.** Distribution may be suspended or withheld pending the determination of disputes affecting the distribution,[79] the determination of the right to and the amount of uncollected assets,[80] or the determination of a suit in which garnishment or other suitable process has been issued against the representative for a claim against the distributee,[81] even though a decree for payment has been rendered[82] or the money has been paid into court,[83] or where distribution cannot be immediately had without prejudice to the estate.[84] But an objection to distribution on the ground that litigation involving property of the estate is pending is not sustainable where it appears from the record that whatever litigation there has been concerning the estate has been finally determined.[85] Where the statute prescribes a time at which distribution "must" be made, distribution at such time cannot be denied because the time within which a minor or nonresident may contest the will has not expired.[86]

The necessity of retaining funds for a particular purpose furnishes no occasion or excuse for delaying the settlement of the balance of the estate, and the payment of the legacies which are due, there being sufficient funds for the payment of all legacies, whether due or not.[87]

Proof of necessity for keeping estate open. If a necessity exists for keeping the estate open beyond the time that ordinarily might be considered reasonable, this should be made to appear by the accounts, statements, and exhibits which it is the duty of the representative to make to the court which appointed him.[88]

Payment into court. Statutes sometimes provide a method by which, where distribution is postponed, the executor or administrator may pay the court the amount in his hands and thus relieve himself and his surety from all further liability in respect to the sum so paid in.[89]

[§ 1288] **8. Effect of Representative's Death before Distribution.** Where an executor or administrator dies after settling his accounts, showing funds in his hands belonging to legatees or dis-

78. Matter of Schabacker, 46 Misc. 219, 94 NYS 80.

79. Cal.—Matter of Ricaud, 57 Cal. 421.

Minn.—In re Kittson, 45 Minn. 197, 48 NW 419.

N. J.—Smith v. Smith, 72 N. J. Eq. 777, 65 A 869.

N. Y.—Gibbons v. Shepard, 2 Dem. Surr. 247.

Pa.—Levy's Est., 18 Pa. Dist. 237; Alexander's Est., 13 Pa. Dist. 459; Brooke's Est., 13 Pa. Dist. 29, 29 Pa. Co. 466; Harvey's Est., 11 Pa. Dist. 83, 26 Pa. Co. 500; Rorke's Est., 10 Pa. Dist. 754; Kern's Est., 5 Pa. Dist. 117; Keel's Est., 1 Pa. Dist. 457; Alburger's Est., 22 Pa. Co. 271; Craig's Est., 11 Kulp 205; Wistar's Est., 13 Phila. 242; Hulse's Est., 12 Phila. 150.

[a] **Pending a dispute as to the person entitled,** distribution may be withheld. Gibbons v. Shepard, 2 Dem. Surr. (N. Y.) 247.

[b] **Pending a search for additional heirs,** distribution may be stayed. Stevens' Est., 20 Pa. Dist. 337.

[c] **Pending the contest of a will** the surrogate has no jurisdiction to order the payment of a portion of a legacy or distributive shares. Riegelman v. Riegelman, 4 Redf. Surr. (N. Y.) 492.

[d] **Effect of appeals from probate.**—Where an order of the orphans' court, admitting a will to probate was suspended by appeals, the executor had one year from the day certified copies of the decrees of the appellate courts were filed with the surrogate and probate adjudged by him within which to pay the legacies. Smith v. Smith, 72 N. J. Eq. 777, 65 A 869.

[e] **Claim of lost will.**—Distribution will not be stayed because one of the next of kin testified on the trial of the caveat that he was informed and believed that the intestate left a valid will, although it cannot be found. Sterrett v. National Safe Deposit, etc., Co., 10 App. (D. C.) 131.

[f] **The pendency of an action brought against decedent in his lifetime** (1) may be ground for suspending distribution. Helb's Est., 16 Pa. Dist. 986. (2) But where a suit commenced in 1878, resulted in a verdict for fifty cents against the testator in 1885, a year before his death, and it appeared that plaintiff's writ of error would not be argued before January, 1889, the court refused, in March, 1888, to grant a stay of distribution pending the determination of the suit. Gallagher's Est., 5 Pa. Co. 214, 215 ("In view of this great delay, no reasonable cause appears to warrant a postponement of either the whole or a part of the fund").

[g] **Where actions are pending against an executor** for amounts exceeding the assets in his hands, the court will not order payment of legacies, although a year has elapsed since the probate of the will. Matter of Brewster, 3 NYS 556, 1 Conn. Surr. 172.

[h] **Where one comes into an orphans' court with a claim** which he should have prosecuted in a court of general equity jurisdiction, settlement and distribution of the estate should be suspended for only such time as is sufficient to permit him to file a bill and prosecute it with diligence to final hearing. In re Fulton, 200 Pa. 545, 50 A 187.

[i] **Indebtedness to estate.** — A legacy presently payable cannot be set off in equity against a debt of the legatee to the estate, not yet due. Hayes v. Hayes, 2 Del. Ch. 191, 73 AmD 709. But compare Sproul's App., 105 Pa. 442 (where a testator was a surety on an administration bond given by a legatee, the fact that such legatee was in default as administrator was a reason for withholding payment of the legacy until the contingent liability of the testator's estate for the legatee's default was discharged, although it was no reason for a refusal to allow interest to accrue upon such legacy).

[j] **Possibility of foreign creditors.**—A legatee to whom property situated in a foreign country is bequeathed cannot arrest distribution on the ground that there may be creditors in the foreign country, there being a presumtion to contrary. Matter of Columbia Trust Co., 186 App. Div. 377, 174 NYS 576.

80. In re Ricaud, 57 Cal. 421; Anderson v. Gregg, 44 Miss. 170; In re Ockerhausen, 15 NYS 510; In re O'Connor, 12 Man. 325.

[a] **When the assets consist of choses in action uncollected,** a final settlement and distribution cannot be made unless the distributees will consent to receive the notes or other evidences of debt, or unless the administrator has by negligence made himself liable for them. Anderson v. Gregg, 44 Miss. 170.

[b] **Where collection is improbable,** and there is a large amount of money on hand after paying all of decedent's debts, a final settlement and distribution should be made; and where there are infant distributees the unpaid claims should pass to their guardian, who can assert their rights thereto. Bellinger v. Ingalls, 21 Or. 191, 27 P 1038.

[c] **The court has discretion** to grant or refuse the order, and, when executors are doing their best to realize the assets and are in no default, the application should be refused. In re O'Connor, 12 Man. 325.

81. Ky.—Miller v. Simpson, 2 SW 171.

Mont.—In re Davis, 27 Mont. 490, 71 P 757.

N. J.—Bolton v. Stretch, 30 N. J. Eq. 536.

N. Y.—Sherwood v. Judd, 3 Bradf. Surr. 419.

Pa.—Cotton's Est., 6 Pa. Dist. 268; Boys' Est., 1 Pa. Co. 66; Godshalk's Est., 20 Montg. Co. 118; Millard's Est., 9 PittsbLegJNS 189.

[a] **False process or false notice of process** will not avail against the executor or administrator who notwithstanding makes payment to the distributee as he was ordinarily bound to make it. Bolton v. Stretch, 30 N. J. Eq. 536.

82. Sherwood v. Judd, 3 Bradf. Surr. (N. Y.) 419.

83. Millard's Est., 9 PittsbLegJNS (Pa.) 189.

84. Christian's Est., 2 Pa. Dist. 489, 13 Pa. Co. 283; Drasdo v. Jobst, 39 Wash. 425, 81 P 857.

[a] **Illustration.**—Where an executor has in his hands securities of fluctuating value and they cannot be sold without prejudice to the estate, distribution will not immediately be ordered. Christian's Est., 2 Pa. Dist. 489, 13 Pa. Co. 283.

[b] **Where property remains unsold** after every effort has been made to sell it, and a forced sale will result in loss, payment can only be awarded of the actual cash balance, anything beyond that being suspended until sale has been made. Harvey's Est., 11 Pa. Dist. 83, 26 Pa. Co. 500.

85. Drasdo v. Jobst, 39 Wash. 425, 81 P 857.

86. In re Pritchett, 52 Cal. 94 [foll In re Hinkle, 176 Cal. 563, 169 P 70].

87. Brown v. Ferren, 73 N. H. 6, 58 A 870; Re Kean, 12 OntWN 15.

88. Willis v. Berry, 104 La. 114, 28 S 888.

89. In re Caldwell, 8 Del. Ch. 358, 68 A 525.

tributees, the latter may commence proceedings to recover the amount to which they are entitled without waiting until the personal representative of such deceased executor or administrator has settled his account in the probate court,[90] although it is otherwise if he dies without settling such an account.[91] It has also been held that, where the executor or administrator has died, there can be no legal distribution until the appointment of a general administrator de bonis non.[92]

[§ 1289] **F. Presumptions as to Distribution.** After the lapse of a considerable period from the time within which a representative is required to settle his accounts, it will be presumed that they have been settled and the balance distributed,[93] and the representative cannot thereafter be compelled to make a distribution, unless he has made some admission or done some act to remove the bar created by the presumption,[94] or the presumption is overcome by other evidence.[95] There is no presumption that a check given to a third person for an amount equal to the executor's share as a legatee is in payment of the legacy.[96]

[§ 1290] **G. Receipt or Release**[97]**—1. Right to Require.** The personal representative may require a receipt or release as a condition precedent to the payment of the amount due on a legacy or distributive share,[98] but he cannot require the legatee or distributee to pay the costs of such release.[99]

Where a legacy is in the hands of the court, a receipt or release from the legatee is not necessary to authorize payment.[1]

[§ 1291] **2. Requisites to Validity—a. In General.** In order that such acquittances may be valid as against the legatee or distributee, the latter must have had full knowledge of all the circumstances with respect to his rights in the distribution.[2] It is not essential to the validity of a receipt and release by beneficiaries under a will that the instrument describe real estate or mention the name of a grantee.[3] But in case of an allotment to a devisee or legatee, the receipt should be in substance

90. Richardson v. Richardson, 9 Pa. 428; Kernell v. Crutcher, (Tenn. Ch. A.) 61 SW 1045; Moore v. George, 10 Leigh (37 Va.) 228.

[a] **Upon the settlement of a joint administration account by two executors** and the subsequent death of one of them, an action may be maintained against the personal representative of the deceased executor to recover a legacy under the will of his testator, upon the allegation and proof that funds came into the hands of such deceased executor separately. Doebler v. Snavely, 5 Watts (Pa.) 225.

[b] **Distributees who are guilty of great delay and laches** in asserting their claim against a solvent administrator in his lifetime must produce clear and undoubted proof of their claim when it is presented against his estate. Kernell v. Crutcher, (Tenn. Ch. A.) 61 SW 1045.

91. Curtiss v. Curtiss, 65 Cal. 572, 5 P 578; Whiteside v. Whiteside, 20 Pa. 473.

[a] **Where an executrix who is also a legatee** dies without making any report, her accounts must be adjusted by a court of equity before distribution can be ordered. Curtiss v. Curtiss, 65 Cal. 572, 4 Pa. 578.

92. In re Davis, 175 Cal. 198, 165 P 525 [foll In re Welch, 106 Cal. 427, 39 P 805] (an order for distribution was beyond the jurisdiction of the court, although a special administrator to collect assets had been appointed).

93. Ala.—Worley v. High, 40 Ala. 171; Austin v. Jordan, 35 Ala. 642; Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Barnett v. Tarrence, 23 Ala. 463; Gantt v. Phillips, 23 Ala. 275; Rhodes v. Turner, 21 Ala. 210.

N. J.—White River Village Cong. Church v. Benedict, 59 N. J. Eq. 136, 44 A 878 [aff 62 N. J. Eq. 812, 48 A 1117].

N. Y.—In re Bedell, 1 NYS 287.

N. C.—Cox v. Brower, 114 N. C. 422, 19 SE 365.

Pa.—Wilkinson's Est., 1 Pars. Eq. Cas. 170; Ingraham v. Cox, 1 PaLJR 464.

S. C.—Sager v. Warley, 14 S. C. Eq. 26.

Tex.—Marks v. Hill, 46 Tex. 345.

[a] **An administrator of a deceased distributee or legatee** (1) is subject to this presumption (Sager v. Warley, 14 S. C. Eq. 26), (2) although there may have been an interval of several years between the death of the legatee or distributee and the appointment of his administrator (Cox v. Brower, 114 N. C. 422, 19 SE 365).

[b] **Ignorance of a legacy** by the legatee does not preclude the presumption of payment arising from the lapse of twenty years, as against a purchaser of land under the will, where the executor had ample personal assets to pay the legacy, and the purchaser did not know that the assets were not so applied. White River Village Cong. Church v. Benedict, 59 N. J. Eq. 136, 44 A 878 [aff 62 N. J. Eq. 812, 48 A 1117].

[c] **Even though the beneficiary is under disability,** a lapse of twenty years from the time when an executor or administrator may be cited to a final settlement raises a presumption of settlement and payment. McCartney v. Bone, 40 Ala. 533. But compare Brown v. McCall, 21 S. C. L. 335 (where the distributee was an infant for twenty years after the date of the administration bond, and instituted proceedings against the administrator within seven years after coming of age the presumption will not arise).

[d] **The presumption would not arise from a lapse of:** (1) Seven years. Strohm's App., 23 Pa. 351. (2) Twelve or fifteen years. Bird v. Graham, 21 N. C. 168.

94. McCartney v. Bone, 40 Ala. 533.

95. Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Hodges v. Stuart Lumber Co., 128 Ga. 733, 58 SE 354; Hubley's App., 19 Pa. 138; Winston v. Street, 2 Patt. & H. (Va.) 169.

[a] **The pendency of a suit against the representative** within twenty years excludes such presumption. Winston v. Street, 2 Patt. & H. (Va.) 169.

[b] **Filing of an account for a final settlement within twenty years,** upon which a decree has been rendered, does not rebut the presumption. McCartney v. Bone, 40 Ala. 533.

96. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.

97. Releases generally see Release [34 Cyc 1039].

98. Del.—Ford v. Wilson, 10 Del. Ch. 124, 85 A 1073.

D. C.—Sterrett v. National Safe Deposit, etc., Co., 10 App. 131.

N. Y.—Smyley's Est., 18 NYS 960.

N. C.—Johnson v. Johnson, 108 N. C. 619, 13 SE 183.

Eng.—In re Fortune, Ir. R. 4 Eq. 351.

[a] **A legatee for life** may be required, as a condition precedent to the executor's assenting to or delivering the legacy to him, to sign an inventory of the chattels admitting their reception, and that he is entitled to have them only for life, after which they belong to the remainderman. Howell v. Howell, 38 N. C. 522.

[b] **A receipt for a monthly allowance, as in lieu of dower,** cannot be required of a widow by the executor as a condition precedent to the paying of such allowance, where the order therefor contains no provision that it shall be so received, although she agreed for a valuable consideration prior to the obtaining of the order that it should be in lieu of dower. In re Dekum, 28 Or. 97, 41 P 159.

[c] **Payment to attorneys of the distributees with instructions to procure releases** before paying over does not justify the distributees in proceeding against such attorneys, in disregard of the condition precedent of payment. Smyley's Est., 18 NYS 266.

[d] **Requiring receipt from testamentary trustee.**—An executor is entitled to require a release from a testamentary trustee in making final settlement before paying over the amount to which the trustee is entitled. Ford v. Wilson, 10 Del. Ch. 124, 85 A 1073.

[e] **A receipt as "in full" is not demandable by the executor** if the receipt given covers the amount actually received. Godfrey v. Getchell 46 Me. 537.

99. In re Fortune, Ir. R. 4 Eq. 351

1. Re Robinson, 17 Ont. L. 568, 13 OntWR 208.

2. Michoud v. Girod, 4 How. (U. S.) 503, 11 L. ed. 1076; Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 716; Arthur v. Nelson, 1 Dem. Surr. (N. Y.) 337.

[a] **Where information was withheld by the executor,** such acquittances are not binding. Michoud v. Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

[b] **Misunderstanding of representations.**—A release given by heirs without consideration will be set aside where it was given under a mistaken belief that the estate was insolvent and was induced by a misunderstanding of representations made to them by the widow. Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 716.

3. Koenig v. Koenig, 92 Kan. 761, 142 P 261 (where a release in the following form was held sufficient: "$200.00 Augusta, Kans., May 31, 1910. Received of Edward Koenig, Albert Koenig, executors of the estate of Frederick Koenig, Two Hundred Dollars in full payment of my distributive share of the estate of Frederick Koenig in consideration of which we hereby release all claim

and form as referred to in the will.[4]

[§ 1292] **b. Receipt or Release by Married Woman.** In the absence of a statute providing otherwise, a receipt or release given by a married woman should also be executed by her husband,[5] except where it is for a legacy bequeathed to her separate use.[6]

[§ 1293] **3. Construction, Operation, and Effect.** Unless the legatee or distributee is estopped,[7] a receipt or release is open to explanation or impeachment,[8] as by showing that it was obtained through fraud and misrepresentations,[9] or for an inadequate consideration,[10] and is binding only for the amount actually received[11] or mentioned therein.[12] But in the absence of such impeachment or explanation a receipt or release in full discharges the representative from further liability as representative to the legatee or distributee.[13] A receipt is evidence that an account was rendered by the executor or administrator and settled and its charges allowed,[14] and that the legatee or distributee had notice of the settlement and might have appealed.[15] Where a mother entitled to a distributive share in the estate of a son executed to another son, who was administrator, a receipt therefor without receiving it, in order that he might settle his accounts as administrator, the mother thereby changed her claim to a personal debt against the son.[16]

[§ 1294] **4. Representative as Legatee or Distributee.** Where the representative is also a legatee or distributee, he should execute and file a receipt in all respects like those required from other legatees or distributees.[17]

[§ 1295] **H. Security and Refunding Bond**[18]**— 1. Necessity of Refunding Bond or other Indemnity.** A number of jurisdictions, a legatee or dis-

under the will of the said Frederick Koenig").

4. Johnson v. Johnson, 108 N. C. 619, 13 SE 183.

5. Lawson's App. 23 Pa. 85; Barrett's Est., 14 PittsbLegJNS (Pa.) 53.

6. Guild v. Peck, 11 Paige (N. Y.) 475 (receipt of feme covert for legacy bequeathed to her separate use a good discharge to executor).

7. Tunnell v. Burton, 4 Del. Ch. 382; In re Koehnken, 25 Oh. Cir. Ct. 245; In re Koehnken, 1 Oh. Cir. Ct. N. S. 126, 25 Oh. Cir. Ct. 245; English's Est., 16 WklyNC (Pa.) 511.

[a] **Laches.**—One may be hindered in setting aside the effect of a release by his own laches, as in permitting without objection a bona fide distribution in accordance with the release. Richer's Est., 23 PittsbLeg JNS (Pa.) 131.

[b] **Circumstances not raising estoppel.**—(1) The receipt by a legatee from the administrators of collateral given by him for a debt due the testator does not estop him to dispute a receipt taken by such administrators for his share of the estate as having been paid by its application to such debts. Cowen v. Adams, 78 Fed. 536, 24 CCA 198 [aff 174 U. S. 800, 19 SCt 873, 43 L. ed. 1188]. (2) A receipt given by a widow for a certain sum, "Amount due me in full in the estate of . . . deceased, under the will annexed, and in lieu of widow's award," did not estop her to claim that she received the money, not as a bequest under the will, but in lieu of the articles enumerated by statute as the widow's award. Ross v. Smith, 47 Ill. A. 197.

8. U. S.—Cowen v. Adams, 78 Fed. 536, 24 CCA 198 [aff 174 U. S. 800 mem, 19 SCt 873 mem, 43 L. ed. 1188 mem].

Ill.—Ross v. Smith, 47 Ill. A. 197.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

N. Y.—Colburn v. Lansing, 46 Barb. 37; Arthur v. Nelson, 1 Dem. Surr. 337; Wilcox v. McCarthy, 3 Bradf. Surr. 284.

N. D.—Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008, 1012 [cit Cyc].

Oh.—In re Koehnken, 1 Oh. Cir. Ct. N. S. 126, 25 Oh. Cir. Ct. 245.

Pa.—Horton's App., 38 Pa. 294.

Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

[a] **A receipt is not conclusive as to payment** to the distributee by whom it was given. In re Koehnken, 1 Oh. Cir. Ct. N. S. 126, 25 Oh. Cir. Ct. 245.

[b] **Showing purpose and consideration.**—It is competent for parties to a receipt to show for what purpose it was given, to what fund it referred, and to inquire into the consideration, so far at least as it may be explained by parol. Colburn v. Lansing, 46 Barb. (N. Y.) 37.

[c] **Pleading and proof.**—On a bill to set aside a release the administrator cannot plead the release in bar of a discovery of the amount of the estate at the time of such release; but he should by proper negative averments in his plea deny the allegations of fraud, etc., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill, in avoidance of such release. Bolton v. Gardner, 3 Paige (N. Y.) 273.

9. Sargent v. Mundy, 194 Ill. A. 111; Pennington v. L'Hommedieu, 7 N. J. Eq. 343; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008; Berryhill's App., 35 Pa. 245.

10. Pennington v. L'Hommedieu, 7 N. J. Eq. 343.

[a] **Construction.**—A release from all claims for one's "share in the estate," given for an inadequate consideration, applies to one's share in personal estate only and not to the land besides, which he shared in inheritance. Harris v. Dinkins, 4 S. C. Eq. 60.

11. Ark.—Ambleton v. Dyer, 53 Ark. 224, 13 SW 926.

Cal.—In re Sarment, 123 Cal. 331, 55 P 1015.

N. Y.—Dakin v. Demming, 6 Paige 95.

Oh.—In re Koehnken, 25 Oh. Cir. Ct. 245.

Pa.—In re Watson, 189 Pa. 150, 42 A 5; Wilson's Est., 59 Pa. Super. 358.

Tenn.—McHaney v. McNeilly, 10 Heisk. 535.

Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

[a] **Receipt "on compromise."**—A receipt given by a distributee for a sum "on compromise in full of all claims and demands against the estate" will not prevent the recovery of whatever balance may be actually due. Horton's App., 38 Pa. 294.

[b] **A receipt for a specific amount of money in full** of a legatee's share of the estate is not binding as to any residue coming to him. Clifft v. Wade, 51 Tex. 14. See also Wilson's Est., 59 Pa. Super. 358 (where interest on legacy was not paid).

[c] **As evidence of payment.**—A voucher showing a receipt of payment of a certain balance is prima facie evidence that no more was unpaid at that time, and throws upon the contestant the burden of showing the contrary. In re Sarment, 123 Cal. 331, 55 P 1015; Dakin v. Demming, 6 Paige (N. Y.) 95.

[d] **The administrator will continue liable for any balance due** until barred by the statute of limitations. In re Koehnken, 25 Oh. Cir. Ct. 245.

[e] **A release given by a guardian** on the payment of a less sum than is due the minor, on a settlement of the estate, is inoperative except for the money actually paid to the guardian. Witman's App., 28 Pa. 376.

12. Lyman v. Clark, 9 Mass. 235.

13. Ala.—Pearson v. Darrington, 32 Ala. 227.

Iowa.—Kinney v. Newbold, 115 Iowa 145, 88 NW 328.

Kan.—Koenig v. Koenig, 92 Kan. 761, 142 P 261, 363 [cit Cyc].

Ky. — Hessig v. Hessig, 131 Ky. 514, 115 SW 748.

N. H.—Lovett v. Morey, 66 N. H. 273, 20 A 283.

N. J.—Dodson v. Sevars, 52 N. J. Eq. 611, 30 A 477 [aff 53 N. J. Eq. 347, 33 A 388, rev on other grounds 53 N. J. Eq. 633, 33 A 1059].

N. Y.—Matter of Murphy, 80 App. Div. 238, 80 NYS 530.

Va.—Mason v. Jones, 26 Gratt. (67 Va.) 271.

[a] **A receipt "in full for the legacy"** will be presumed to be intended by the legatee to discharge land devised subject to the payment of the legacy. Schanck v. Arrowsmith, 9 N. J. Eq. 314.

[b] **A release acquiesced in for more than fifteen years** may be sustained as an accord and satisfaction where given by a residuary legatee for a valuable consideration when the estate was unsettled and its value uncertain. Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004.

[c] **An interest held by an executor as testamentary trustee** for the releasor is not released by a release to him as executor of every interest the releasor possesses in the estate. Dority v. Dority, 40 App. Div. 236, 57 NYS 1073.

[d] **Where the general guardian of an infant settles** with executors or personal representatives for a legacy or distributive share of the estate due to his ward, the settlement is so far conclusive upon the infant when he arrives at full age, as to throw upon him the burden of showing that there was error in the account upon which such settlement was made. Dakin v. Demming, 6 Paige (N. Y.) 95.

[e] **A receipt from a legatee acknowledging payment of a legacy, "when paid,"** does not discharge the estate from the legacy. Durling v. Neigh, 15 Serg. & R. (Pa.) 114.

14. De Coux v. Plantevignes, 10 La. 503 (receipt by heirs for balance).

[a] **An auditor,** to whom an executor's account has been referred to audit and resettle, is not bound by a release given to the executor by a residuary legatee, expressing satisfaction with the account. Bloom's App., 15 Pa. 403.

15. Cammer v. Hayeth, 10 Ind. 528.

16. Hessig v. Hessig, 131 Ky. 514, 115 SW 748.

17. Johnson v. Johnson, 108 N. C. 619, 13 SE 183

18. **Enforcement of liability on bond** see infra §§ 1431–1437.

tributee[19] may be required, as a condition precedent to his being paid his legacy or distributive share or a portion thereof, to give to the personal representative a refunding bond or other indemnity for the return of money paid to him, if this becomes necessary for the payment of debts or legacies,[20] or to equalize distributive shares.[21] In some jurisdictions a bond or indemnity may be required even though there had been a decree of distribution,[22] and it is considered that the court in ordering payment or distribution should direct the representative to require such bond or other indemnity.[23] But it has also been held that a final decree of distribution will protect the representative whether or not

19. [a] **A creditor of an estate is not a "distributee"** within the meaning of a statute requiring distributees to give a refunding bond before they can compel the personal representative to pay their distributive shares; and such creditor cannot be required to give a refunding bond before he can compel the representative to pay his claim. Wolf v. Griffin, 13 Ill. A. 559.

20. U. S.—Kirkpatrick v. Gibson, 14 F. Cas. No. 7,848, 2 Brock. 388.

Ala.—Johnston v. Fort, 30 Ala. 78.

Cal.—In re Mitchell, 121 Cal. 391, 53 P 810; In re Hale, 121 Cal. 125, 53 P 429; In re Crocker, 105 Cal. 368, 38 P 954.

Colo.—Oles v. Macky, 58 Colo. 295, 144 P 891.

Del.—State v. Rodney, 1 Houst. 442.

D. C.—Hutchins v. Hutchins, 41 App. 122.

Fla.—Sanderson v. Sanderson, 17 Fla. 820.

Ill.—Klicka v. Klicka, 105 Ill. A. 369.

Ind.—Chapell v. Shuee, 117 Ind. 481, 20 NE 417; Hayes v. Matlock, 27 Ind. 49; Tapley v. McGee, 6 Ind. 56; Mazelin v. Rouyer, 8 Ind. A. 27, 35 NE 303.

Ky.—Fleming v. Jones, 12 Bush 503; Wilkinson v. Rosser, 104 SW 1019, 31 KyL 1262; Smith v. Smith, 1 Ky. Op. 302.

Miss.—Packwood v. Elliott, 43 Miss. 504; Allison v. Abrams, 40 Miss. 747; Mundy v. Calvert, 40 Miss. 181; French v. Davis, 38 Miss. 167; Richmond v. Delay, 34 Miss. 83; Maxwell v. Craft, 32 Miss. 307; Cannon v. Benson, 26 Miss. 395; Keith v. Jolly, 26 Miss. 131; Crosby v. Covington, 24 Miss. 619; Gammage v. Noble, 24 Miss. 150; Murdock v. Washburn, 9 Miss. 546; Carmichael v. Browder, 4 Miss. 252.

Mo.—In re Pound, 166 Mo. 419, 66 SW 273 [dist State v. Stephenson, 12 Mo. 178]; State v. Stephenson, 12 Mo. 178.

Mont.—In re Phillips, 18 Mont. 311, 45 P 222.

N. H.—Chandler v. Batchelder, 61 N. H. 370.

N. J.—Ordinary v. White, 43 N. J. L. 22; Cowell v. Oxford, 6 N. J. L. 432; Coddington v. Bispham, 36 N. J. Eq. 224; Vanderpool v. Vanderpool, 3 N. J. Eq. 120; Kepplemann v. Kepplemann, (Ch.) 105 A 140.

N. Y.—Barnes v. Barnes, 13 Hun 233; Haebler v. John Eichler Brewing Co., 25 Misc. 576, 55 NYS 1071 [aff 42 App. Div. 95, 58 NYS 894].

N. C.—Ingrams v. Terry, 9 N. C. 122.

Pa.—Robins' Est., 180 Pa. 630, 37 A 121; Schaeffer's App., 119 Pa. 640, 13 A 507; Simpson's App., 109 Pa. 383; Jones' App., 99 Pa. 124; Musser v. Oliver, 21 Pa. 362; Edgar v. Shields, 1 Grant 361; Dougherty v. Snyder, 15 Serg. & R. 84, 16 AmD 520; Rastaetter's Est., 15 Pa. Super. 549; Levy's Est., 18 Pa. Dist. 237; Jennings' Est., 16 Pa. Dist. 252, 34 Pa. Co. 604; Hoffman's Est., 10 Pa. Dist. 758, 26 Pa. Co 239; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466; Pierson's Est., 5 Pa. Dist. 424, 18 Pa. Co. 220; Sterling's Est., 3 PittsbLegJNS 505.

R. I.—Steere v. Wood, 15 R. I. 199, 2 A 551.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Tenn.—Willeford v. Watson, 12 Heisk. 476; Morris v. Morris, 9 Heisk. 814; Molloy v. Elam, Meigs 590.

Tex.—Stephenson v. McFaddin, 42 Tex. 322.

Va.—Roots v. Webb, 4 Munf. (18 Va.) 77; Sheppard v. Starke, 3 Munf. (17 Va.) 29; Clay v. Williams, 2 Munf. (16 Va.) 105, 5 AmD 453.

Wash.—Noble v. Whitten, 34 Wash. 507, 76 P 95.

W. Va.—McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 SE 378.

[a] **Indemnity against liability for an inheritance tax** may be required by an executor from heirs whose distributive shares are subject to such tax. Fitzpatrick's Est., 8 Pa. Dist. 726; Ryan's Est., 9 Pa. Dist. 339.

[b] **A showing that there are debts** against the estate is not necessary to authorize the court to require a bond. Wilkinson v. Rosser, 104 SW 1019, 31 KyL 1262.

[c] **There are but two methods** by which distribution of decedents' estates can be made so as to protect administrators: First, distribution by the court or by an auditor appointed for that purpose; second, distribution of the residue, after deducting known claims, under the direction of the court, and taking refunding bonds approved by the court from the distributees. Jones' Est., 11 PittsbLegJ NS (Pa.) 375.

[d] **Where a suit is pending against the estate,** which is not being actively prosecuted, distribution will be ordered on the distributees giving refunding bonds. Alexander's Est., 13 Pa. Dist. 459.

[e] **Actions for legacies or distributive shares.**—(1) It is sometimes provided by statute that no suit at law for a legacy or distributive share shall be instituted against a representative until security is given or tendered to refund in case of a deficiency of assets. Killen v. Adams, 1 Del. Ch. 184; Cowell v. Oxford, 6 N. J. L. 432. (2) But such a statute does not control a suit in equity. Killen v. Adams, 1 Del. Ch. 184; Wilson v. Fisher, 5 N. J. Eq. 493. (3) Where a representative holds money as a trustee, a legatee entitled thereto may maintain an action therefor without giving a refunding bond. Betts v. Van Dyke, 40 N. J. Eq. 149.

[f] **In Louisiana** (1) the only condition which an executor can impose on an heir before delivering possession of the estate to him is that the latter shall advance a sum sufficient to pay movable or particular legacies. Fisk's Succ., 3 La. Ann. 705; Carraby's Succ., 3 Rob. 349; Milne's Succ., 2 Rob. 382. (2) The right of demanding security from such heirs before taking possession is in creditors of the estate only. Fisk's Succ., 3 La. Ann. 705. (3) A legatee's right to his legacy becomes absolute on his giving bond. Burbank's Succ., 126 La. 9, 52 S 175. (4) The curator of a vacant succession cannot require security from the heirs and legatees for amounts due to creditors other than the state before delivering possession to the succession, where the heirs and legatees are not residents of Louisiana or citizens of any other state. George's Succ., 4 La. Ann. 223.

[g] **Distribution by auditor.**—A refunding bond which an executor is entitled to demand from the heirs can be demanded where the executor makes distribution, but not where distribution is made by an auditor and confirmed by the court. Barlet's Est., 3 Kulp (Pa.) 241.

[h] **An executor of a lessee of** a leasehold interest is entitled to be indemnified against the eventual breaches of the covenants, either by a retainer in court of a part of the assets, or by security of the legatees or distributees to refund. Brewer v. Pocock, 23 Beav. 310, 53 Reprint 122; Dean v. Allen, 20 Beav. 1, 52 Reprint 502; Dobson v. Carpenter, 12 Beav. 370, 50 Reprint 1103; Vernon v. Egmont, 1 Bligh N. S. 554, 4 Reprint 979; Fletcher v. Stevenson, 3 Hare 360, 67 Reprint 420; Hickling v. Boyer, 3 Macn. & G. 635, 42 Reprint 404; Cochrane v. Robinson, 11 Sim. 378, 34 EngCh 378, 59 Reprint 919.

[i] **The practice has fallen into disuse** in a few jurisdictions. Davis v. Vansands, 7 F. Cas. No. 3,655, 45 Conn. 600; Griswold v. Bigelow, 6 Conn. 258; Noel v. Robinson, 2 Ch. Cas. 145, 22 Reprint 887, 2 Ch. Rep. 248, 21 Reprint 670, 2 Vent. 358, 86 Reprint 484, 1 Vern. Ch. 90, 23 Reprint 334; March v. Russell, 3 Myl. & C. 31, 14 EngCh 31, 40 Reprint 836.

21. Tapley v. McGee, 6 Ind. 56; Meaher's Est., 10 Pa. Co. 221.

[a] **Upon the presumption of death of some of the distributees** by reason of their absence, it is proper to require security for the refunding of such amount as the absentees will be entitled to in case of their afterward appearing. Meaher's Est., 10 Pa. Co. 221.

22. Murdock v. Washburn, 9 Miss. 546; Walden v. Payne, 2 Wash. (2 Va.) 1.

23. Ala.—Johnston v. Fort, 30 Ala. 78.

Colo.—Oles v. Macky, 58 Colo. 295, 144 P 891.

Ind.—Hayes v. Matlock, 27 Ind. 49; Tapley v. McGee, 6 Ind. 56; Mazelin v. Rouyer, 8 Ind. A. 27, 35 NE 303.

Ky.—Mountjoy v. Pearce, 4 Metc. 97; Overstreet v. Potts, 4 Dana 138; Duncan v. Mizner, 4 J. J. Marsh. 443; Shirley v. Mitchell, 3 J. J. Marsh. 684; Neely v. Neely, 1 Litt. 292; Prewett v. Prewett, 4 Bibb 266.

Mass.—Browne v. Doolittle, 151 Mass. 595, 25 NE 23; Atherton v. Corliss, 101 Mass. 40.

Minn.—Olson v. Fish, 75 Minn. 228, 77 NW 818.

N. Y.—Barnes v. Barnes, 13 Hun 233; In re Austin, 2 NYS 875; Jones' Est., 1 NYS 751, 15 NYCivProo 45.

Oh.—Disney v. Hawes, 9 Oh. Dec. (Reprint) 406, 12 CincLBul 322; In re Isherwood, 5 OhS&CP 143, 7 ChNP 332.

S. C.—Brown v. Cattell, 1 S. C. Eq. 112.

Va.—McRae v. Brooks, 6 Munf. (20 Va.) 157; Rootes v. Webb, 4 Munf. (18 Va.) 77; Stovall v. Woodson, 2 Munf. (16 Va.) 303.

[a] **Laches of the representative** may estop him from objecting to a decree on the ground that the execution of a refunding bond is not therein required. Harman v. Davis, 30 Gratt. (71 Va.) 461.

[b] **Contrary view.**—It is not necessary that a decree directing distribution before final settlement should require a refunding bond, as the law directs that a party shall not have the benefit of such decree until he has executed and delivered such bond. Mundy v. Calvert, 40 Miss. 181; French v. Davis, 38 Miss. 167.

he has taken refunding bonds from the legatees or distributees.[24] It has been held that a refunding bond is necessary even where there are sufficient assets to satisfy all demands against the estate,[25] but it has also been considered that such a bond may be dispensed with where there are circumstances within the knowledge of the court sufficient to justify it in so doing,[26] as for example where sufficient time has elapsed to raise a presumption that there are no outstanding debts.[27] The requirement of bonds of indemnity is sometimes limited to cases where distribution is made before the expiration of the time allowed for filing claims against the estate,[28] and after the lapse of the statutory period the representative may be compelled by an order of court to make distribution without a refunding bond,[29] if it appears that the debts which have been allowed have been paid or secured,[30] and there are no outstanding debts,[31] or the court is satisfied that no injury can result to the estate,[32] or if the decree reserves from distribution sufficient other property to pay all contested claims.[33]

Distribution of estate of absentee presumed dead. Provision is sometimes made by statute for a bond, upon the distribution of the estate of a person who has been absent and unheard of for so long a time as to raise a presumption of his death,[34] conditioned for a refunding of the amount received, with interest, in case the supposed decedent shall prove to be in fact alive.[35] But in a case where the supposed decedent had been absent and unheard from for forty years, his estate was distributed without requiring bond.[36]

Effect of testamentary provisions. Where the will directs the executor on the happening of certain contingencies to pay over legacies given subject to provisions for gifts to other persons, he may, on the death of such persons leaving no issue, pay over such legacies on the happening of the contingencies, without requiring the legatees to give security.[37]

24. In re Piper, 208 Pa. 636, 57 A 1118 [aff on op below 12 Pa. Dist. 443, 28 Pa. Co. 589]; Ferguson v. Yard, 164 Pa. 586, 30 A 517; Charlton's App., 88 Pa. 476; Stewart's App., 86 Pa. 149; Stecher v. Com., 6 Whart. 60; McAvoy's Est., 8 Pa. Dist. 233; Pierson's Est., 5 Pa. Dist. 424, 18 Pa. Co. 220; Woodward's Est., 2 Chest. Co. 9; Clark's Est., 1 Kulp 32; Gunkel's Est., 6 LancLRev 217; Altinger's Est., 42 LegInt 56. But see Simpson's App., 109 Pa. 383 (a distributee to whom a balance in the hands of an administrator was awarded by the orphans' court, on the adjudication of an account filed within one year from the grant of letters of administration, is not entitled to payment of such award without giving a refunding bond).

[a] **Reason for and discussion of rule.**—"Distribution by the orphans' court of a balance shown by the account of an executor or administrator is a quasi proceeding in rem, binding upon the whole world, and especially binding those who are actually parties or, but for their own act or laches, might have been. The Act of April 13, 1840, P. L. 319 provides that distribution may be upon the application of any legatee, heir, or other person interested; and at the hearing, each legatee, heir, or creditor has the right to contest the claim of the others . . . and to deny his right to participate. The decree, like the decree of any other court, not only concludes all parties, but it cannot be impeached collaterally; and hence, where, in such proceeding, distribution is awarded to a legatee or distributee, or where the court approves a previous distribution, made voluntarily . . . Gormley's Est., 154 Pa. 378, 25 A 814, the executor or administrator has no right to demand a refunding bond, and, as a necessary consequence, cannot be made liable for not having done so. Creditors who do not choose to come into the orphans' court have the right to stay out. They may, if they prefer, sue in another forum; but if they do they lose all claim to the fund distributed, and cannot be heard to complain that the rights which they failed to assert were not protected or provided for. Hammett's App., 83 Pa. 392. Volenti non fit injuria. Of course, where the account is filed before the expiration of the time given to creditors to present their claims, its adjudication, within that period . . . will not protect the executor or administrator who does not require refunding bonds; and so as in Jones' App., 99 Pa. 124, where an account blending distribution and administration is simply confirmed without affirmative action by the court without regard to the distributive payments; in the former case, the award of distribution is in plain disregard of the right given to creditors by the act of assembly, and in the latter, creditors have not had the opportunity to be heard which is afforded where the account comes regularly before the court for distribution as well as confirmation." In re Piper, 208 Pa. 636, 638, 57 A 1118.

[b] **Representative not entitled to require bond.**—If an account has been filed by the representative a year from the grant of letters testamentary, an adjudication awarding distribution is after confirmation mandatory, and the representative cannot refuse compliance on the ground that no bond has been given. Pierson's Est., 5 Pa. Dist. 424; Moorehead's Est., 11 PittsbLegJNS (Pa.) 291; Lejee's Est., 5 Pa. Dist. 311.

[c] **Bond not a prerequisite to action.**—The giving of such a bond is not a prerequisite to the bringing of an action against the representative to recover a distributive share of the balance shown by such account. Baughman v. Kunkle, 8 Watts (Pa.) 483.

25. Sherman v. Saylor, 36 Ill. A. 356.

26. Chambers v. Wright, 52 Ala. 444; Ziegler's Est., 19 Pa. Dist. 876; Palmer's Est., 2 Chest. Co. (Pa.) 453; Irwin's Est., 2 Chest. Co. (Pa.) 452; Woodward's Est., 2 Chest. Co. (Pa.) 9; Murgitroyde v. Cleary, 16 Lea (Tenn.) 539.

[a] **Illustrations.**—(1) It is not erroneous to decree an heir his share of a particular fund in the hands of an administrator without exacting a refunding bond, when the administrator shows by his answer no reason why it is improper, and it appears that the estate is solvent and that all the other heirs have received their share, and there is no allegation of outstanding indebtedness. Chambers v. Wright, 52 Ala. 444. (2) A refunding bond for the value of assets transferred by an executor under direction of court will not be required where a bond conditioned for the return of the assets in specie has already been given. Christian's Est., 13 Pa. Co. 415.

[b] **In a proper case and on satisfactory proof** that there are unpaid debts owing the estate, chancery has jurisdiction to distribute the assets among those entitled without requiring refunding bonds. Murgitroyde v. Cleary, 16 Lea (Tenn.) 539.

27. Roberts v. Dale, 7 B. Mon. (Ky.) 199; Baughman v. Kunkle, 8 Watts (Pa.) 483; Lejee's Est., 5 Pa. Dist. 311, 18 Pa. Co. 200; Thompson's Est., 2 Chest. Co. (Pa.) 452.

28. Ala.—Chambers v. Wright, 52 Ala. 444.

Cal.—In re Hinkel, 176 Cal. 563, 169 P 70; In re Mitchell, 121 Cal. 391, 53 P 810; In re Hale, 121 Cal. 125, 53 P 429; In re Crocker, 105 Cal. 368, 38 P 954; In re Levinson, 98 Cal. 654, 33 P 726.

Fla.—Sanderson v. Sanderson, 17 Fla. 820.

Ill.—Klicka v. Klicka, 105 Ill. A. 369; Sherman v. Saylor, 36 Ill. A. 356; Graffenreid v. Kundert, 34 Ill. A. 483; Grafenreid v. Kundert, 23 Ill. A. 440.

Miss.—Keith v. Jolly, 26 Miss. 131; Fort v. Battle, 21 Miss. 133.

Mo.—In re Pound, 166 Mo. 419, 66 SW 273.

Pa.—In re Piper, 208 Pa. 636, 57 A 1118 [aff on op below 12 Pa. Dist. 443, 28 Pa. Co. 589]; Pierson's Est., 5 Pa. Dist. 424, 18 Pa. Co. 220; Lepee's Est., 5 Pa. Dist. 311, 18 Pa. Co. 200; Piper's Est., 28 Pa. Co. 589.

R. I.—Steere v. Wood, 15 R. I. 199, 2 A 551.

29. In re Hinkel, 176 Cal. 563, 169 P 70; State v. Stephenson, 12 Mo. 178.

30. In re Mitchell, 121 Cal. 391, 53 P 810; In re Hale, 121 Cal. 125, 53 P 429; In re Chesney, 1 Cal. A. 30, 81 P 679; In re Pound, 166 Mo. 419, 66 SW 273.

[a] **Estoppel.**—Where an executor, within two years after the date of his letters, without an order of the court, and without requiring any refunding bond, distributes sums to the legatees, he cannot refuse to comply with a subsequent order of distribution because no refunding bond had been given, it appearing that the debts are paid. In re Pound, 166 Mo. 419, 66 SW 273.

31. Chambers v. Wright, 52 Ala. 444; Murgitroyde v. Cleary, 16 Lea (Tenn.) 539.

32. In re Crocker, 105 Cal. 368; 38 P 954; In re Levinson, 98 Cal. 654, 33 P 726.

[a] **It is discretionary with the court** to grant an application for immediate payment of a legacy without requiring a refunding bond, if the executors have ample funds in their hands to pay all outstanding claims. In re Chesney, 1 Cal. A. 30, 81 P 679.

33. In re Crocker, 105 Cal. 368, 38 P 954.

34. See Death §§ 5–19.

35. De Frane's Est., 23 Pa. Dist. 613; Glentworth's Est., 17 Pa. Dist. 292; McCann's Est., 14 Pa. Dist. 316, 31 Pa. Co. 535; Smith v. Fidelity, etc., Co., 21 LancLRev (Pa.) 321.

36. Sherwood's Est., 22 Pa. Dist. 1017.

37. Fairmont Trust Co. v. Arnett, 74 W. Va. 127, 81 SE 733.

Where it has become impossible to give a bond, it may, it has been held, be dispensed with.[38]

An administrator improperly appointed cannot claim a refunding bond before he will be compelled to pay over to the persons rightfully entitled thereto assets of the intestate that may have come into his hands.[39]

[§ 1296] **2. From Whom Bond May Be Required —a. In General.** A refunding bond may be required of a trustee [40] or guardian [41] of a distributee, the administrator of a deceased distributee,[42] the assignee of a legacy or distributive share,[43] or a creditor of a legatee or distributee seeking to subject the latter's legacy or distributive share in the hands of the representative to his own claim.[44] But it has been held that one entitled to receive a legacy under a distributive devise declaring a trust cannot be required to give a refunding bond;[45] and that where a legatee for life with remainder to his children disappeared more than seven years before the testator's death, he is presumed to be dead, and his child takes under the will and not through him, and where the absence, unheard from, has continued for twenty-one years, the corpus of the fund, and all accumulations, are properly awarded to the child without requiring a refunding bond.[46]

[§ 1297] **b. Donee of Particular Estate.** A legatee or devisee or tenant of a particular estate, with remainder over, is usually not required to give a refunding or forthcoming bond upon the delivery of the legacy or devise to him, for its delivery at the end of his particular estate,[47] unless there is an express statutory provision requiring it,[48] or unless there is danger of his wasting, secreting, or removing the property,[49] as where the legacy is one of money or stocks.[50]

[§ 1298] **3. Waiver of Right to Require Bond.**[51] A representative may waive his right to require a refunding bond,[52] but his intention to waive his rights in this respect must be very clear.[53]

[§ 1299] **4. Amount of Bond.** The penal amount of the refunding bond is usually within the discre-

38. Weir v. Peo., 78 Ill. 192; Peo. v. Admire, 39 Ill. 251.

39. McChord v. Fisher, 13 B. Mon. (Ky.) 193.

40. Simpson's App., 109 Pa. 383.

41. Chandler v. Morrison, 123 Ind. 254, 23 NE 160; Keith v. Jolly, 26 Miss. 131.

42. Maxwell v. Craft, 32 Miss. 307 (the administrator of a deceased distributee may give a refunding bond so as to entitle him to receive his intestate's share of the estate).

43. Blackerby v. Holton, 5 Dana (Ky.) 520; Kavanaugh v. Thacker, 2 Dana (Ky.) 137; Davis v. Newton, 6 Metc. (Mass.) 537.

44. Sparks v. De la Guerra, 14 Cal. 108; Fitchett v. Dolbee, 3 Del. 267.

45. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

46. Finger's Est., 21 Pa. Dist. 424. To same affect Miller v. Beates, 3 Serg. & R. (Pa.) 490, 8 AmD 658.

47. Mass.—Taggard v. Piper, 118 Mass. 315; Fiske v. Cobb, 6 Gray 144; Homer v. Shelton, 2 Metc. 194.

Mich.—Woolfitt v. Preston, 203 Mich. 502, 169 NW 838 [cit Cyc].

N. J.—In re Ryerson, 26 N. J. Eq. 43.

N. Y.—Matter of Hamlin, 141 App. Div. 318, 126 NYS 396.

N. C.—Hodge v. Hodge, 72 N. C. 616; Williams v. Cotton, 56 N. C. 395; Apple v. Allen, 56 N. C. 120; Pelham v. Taylor, 54 N. C. 121, 59 AmD 605; Bullock v. Bullock, 17 N. C. 307.

Pa.—Meyer's Est., 20 Pa. Dist. 238 [aff 232 Pa. 89, 81 A 145, 36 LRANS 205, AnnCas1912C 1240].

Va.—Hawthorne v. Beckwith, 89 Va. 786, 17 SE 241; Raney v. Heath, 2 Patt. & H. 206.

[a] **Discretion.**—(1) Under some statutes whether security shall be required from a legatee for life or years lies within the discretion of the executor (In re Ryerson, 26 N. J. Eq. 43; Matter of Hamlin, 141 App. Div. 318, 126 NYS 396), or (2) the probate court (Fisher v. Kreebel, 1 LegChron (Pa.) 113).

[b] **Testamentary provisions.**—(1) Security should be required where the will shows a clear intention that the corpus of the estate should remain entire, and that the legatee of the particular estate should have merely a usufructuary interest therein. Livingston v. Murray, 68 N. Y. 485; Tyson v. Blake, 22 N. Y. 558; Montfort v. Montfort, 24 Hun (N. Y.) 120; Matter of Fernbacher, 17 AbbN Cas (N. Y.) 339, 4 Dem. Surr. 227. (2) Unless the will clearly discloses that it was contrary to testator's intent, money will not be paid to a life tenant unless the life tenant gives security, notwithstanding he may be perfectly responsible and there is no showing that there is danger of the money being wasted. Pratt v. Skiff, (Ill.) 124 NE 534. (3) But where the will indicates an intention to intrust to the life beneficiary the full possession and control of the estate, the executor, in surrendering possession, need not require security unless there are special circumstances rendering such a course hazardous. Matter of Rowland, 153 App. Div. 327, 137 NYS 1010; Matter of Fernbacher, 17 Abb NCas (N. Y.) 339, 4 Dem. Surr. 227).

[c] **Where security would interfere with** the legatee's use of the property and with a power of alienation given him by will, it will not be required. Teller's Est., 15 Pa. Dist. 53.

[d] **A widow** (1) is not bound to give security upon the delivery to her of property bequeathed to her by her husband for life (Straub's App., 1 Pa 86; In re Brinton, 7 Watts (Pa.) 203) (2) unless she holds as testamentary trustee (Kelsey v. Van Camp, 3 Dem. Surr. (N. Y.) 530).

[e] **An inventory** of chattels specifically bequeathed, and not necessarily consumed in the use, is usually required from the first taker, and is generally sufficient. Dodson v. Sevars, 52 N. J. Eq. 611, 30 A 477 [aff 53 N. J. Eq. 347, 33 A 388, rev on other grounds 53 N. J. Eq. 633, 33 A 1059]; Covenhoven v. Shuler, 2 Paige (N. Y.) 122, 21 AmD 73; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334, 9 AmD 306.

[f] **Residuary funds** if given for life only, should not be paid without security. In re Hillis, 178 NYS 348 [foll In re McDougall, 141 N. Y. 21, 35 NE 961].

[g] **Right of survivorship among legatees.**—Where a specific bequest of stock is made to two legatees, with a right of survivorship, no security can be exacted from them on delivery of the stock. Matter of Stoiber, 103 Misc. 654, 170 NYS 897.

48. Conn.—Security Co. v. Pratt, 65 Conn. 161, 32 A 396.

Ky.—Wilkinson v. Rosser, 104 SW 1019, 31 KyL 1262.

La.—Cardona's Succ., 14 La. Ann. 356.

N. J.—Brokaw v. Emens, 84 N. J. Eq. 389, 93 A 200; In re Van Wagoner, (Prerog.) 97 A 893.

Pa.—Culbertson's App., 76 Pa. 145; Green's App., 42 Pa. 25; Duval's App., 38 Pa. 112; Clevenstine's App., 15 Pa. 495; In re Feiser, 1 Walk. 256; Kinnard v. Kinnard, 5 Watts 108; Wale's Est., 11 Phila. 156.

[a] **Executor liable for failure to require security.**—Mehrer's Est., 20 Pa. Dist. 653.

49. Conn.—Langworthy v. Chadwick, 13 Conn. 42; Hudson v. Wadsworth, 8 Conn. 348.

Ill.—Burnett v. Lester, 53 Ill. 325.

Mass.—Taggard v. Piper, 118 Mass. 315; Fiske v. Cobb, 6 Gray 144; Homer v. Shelton, 2 Metc. 194.

N. J.—In re Ryerson, 26 N. J. Eq. 43; Howard v. Howard, 16 N. J. Eq. 486.

N. C.—Cheshire v. Cheshire, 37 N. C. 569.

S. C.—Swan v. Ligan, 6 S. C. Eq. 227.

Va.—Hawthorne v. Beckwith, 89 Va. 786, 17 SE 241; Mortimer v. Moffatt, 4 Hen. & M. (14 Va.) 503.

Eng.—Foley v. Burnell, 1 Bro. Ch. 274, 28 Reprint 1125; Conduitt v. Soane, 1 Coll. 285, 28 EngCh 285, 63 Reprint 421; Raney v. Heath, 2 Patt. & H. 206.

[a] **A nonresident legatee** should be required to give security. Clarke v. Terry 34 Conn. 176.

[b] **Formal waiver.**—Security is not required where those entitled in remainder waive such security by a writing filed of record. Culbertson's App., 76 Pa. 145.

50. Ala.—Mason v. Pate, 34 Ala. 379.

Ky.—McDaniel v. Clemens, 11 Ky. Op. 96.

Miss.—Hardin v. Osborne, 43 Miss. 532.

N. Y.—Matter of Weatherbee, 101 Misc. 522, 167 NYS 701.

Pa.—Kinnard v. Kinnard, 5 Watts 108; Eichelberger v. Barnetz, 17 Serg. & R. 293.

S. C.—Shackleford v. Buchanan, 1 S. C. Eq. 570.

Va.—Hawthorne v. Beckwith, 89 Va. 786, 17 SE 241.

51. Waiver by remainderman see supra § 1297 note 49 [b].

52. Harrison v. Mundy, 13 S. C. Eq. 34; Nelson v. Cornwell, 11 Gratt. (52 Va.) 724.

[a] **The voluntary payment of a legacy** to one who is by will required to give a bond and return it on the happening of a certain event waives the right to require such bond or to compel repayment of the money. Harrison v. Mundy, 13 S. C. Eq. 34.

53. Howell v. Johnston, 49 N. C. 502; Nelson v. Cornwell, 11 Gratt. (52 Va.) 724.

[a] **Waiver is not shown by:** (1) Assent by executor to a legacy. Nelson v. Cornwell, 11 Gratt. (52 Va.) 724. (2) Assent to the possession of a legacy on condition that a refunding bond be given. Howell v. Johnston, 49 N. C. 502.

tion of the court[54] or representative.[55]

[§ 1300] **5. Approval of Bond.** In order that such bonds may protect the representative, they must be approved by the probate court[56] at the time or after the final order to deliver the property is made.[57]

[§ 1301] **6. Effect of Giving Bond.** Refunding bonds stand as to creditors in place of the assets distributed, and of the representative's responsibility, and operate to exonerate the representative from all liability for such assets and to protect him against the claims of creditors.[58] As to third persons it operates as an indemnity against claims against the estate,[59] and not against creditors of the legatees or distributees.[60] Recitals therein are subject to the ordinary rules of construction.[61] Where the executors of a contractor paid the profits of a contract to his nephew who claimed them on the ground that the contract had been performed by decedent for his benefit, taking a bond to secure the payment of any claims against the estate arising from the contract, the bond was sufficient to protect the estate with respect to a judgment for personal injuries caused in performing the contract, although that claim was not mentioned in the bond.[62]

[§ 1302] **7. Death of Distributee after Execution of Bond but before Payment.** Where a distributee dies pending the proceedings for a distribution, payment may be made to his executor on a refunding bond executed by the distributee before his death.[63]

[§ 1303] **8. Effect of Failure to Require Bond in Order of Distribution.** While the failure of the court to require a bond on ordering distribution may be erroneous,[64] it does not render the decree of distribution void;[65] and the failure of a decree in favor of the legatees against the executor to require a refunding bond has been held not even ground for reversal.[66]

[§ 1304] **9. Effect of Failure to Give Bond.** The failure of the legatee or distributee to give or tender a refunding bond may be pleaded as a defense in an action for his legacy or distributive share[67] or it may constitute a ground for recovering the legacy or distributive share where this was delivered on condition that a bond be given.[68] So also if a refunding bond is not given when properly required, a sufficient part of the assets may be retained and set apart as security,[69] and it has been held that, where a legatee for life or years is properly required to give security and fails to do so, only the income of the legacy should be paid to him by the executor.[70] It is the duty of the representative upon such failure to invest the fund in the manner prescribed by statute[71] and not to pay it into court.[72] If the executor or administrator makes a voluntary payment to a legatee or distributee without taking a bond according to the statute, he is personally liable to creditors who may be prejudiced by the payment.[73] But it has been held that, where payment is made under an agreement with the legatees and distributees by which they are to protect the representative from loss, the for-

54. Kirkpatrick v. Gibson, 14 F. Cas. No. 7,848, 2 Brock. 388.

55. Badger v. Daniel, 79 N. C. 372 (an executor has fulfilled the requirements of the statute if the aggregate penalties of such bonds are in his just discretion sufficient to meet the outstanding debts of the estate).

56. Jones' Est., 1 NYS 751, 15 NY CivProc 45; Robins' Est., 180 Pa. 630, 37 A 121; Edgar v. Shields, 1 Grant (Pa.) 361; Woodward's Est., 2 Chest. Co. (Pa.) 9.

57. Harrison v. Harrison, 9 Ala. 470.

58. Ill.—Murdock v. Murdock, 111 Ill. A. 375 [aff 219 Ill. 123, 76 NE 57].

Mass.—Browne v. Doolittle, 151 Mass. 595, 25 NE 23 [cit Atherton v. Corless, 101 Mass. 40].

Miss.—Fonte v. Horton, 36 Miss. 350.

N. C.—Badger v. Daniel, 79 N. C. 372.

Pa.—Schaeffer's App., 119 Pa. 640, 13 A 507; Piper's Est., 28 Pa. Co. 589.

Tenn.—Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

[a] **A bond filed by the committee** of the property of an incompetent person, where it has been fixed and approved by the court, is sufficient to protect the executors in paying over a share of the estate to the committee. Wright v. Hayden, 31 Miss. 116, 63 NYS 796.

[b] **A plea of plene administravit** is a good defense to the representative in an action against him by a creditor of the estate after the taking of such bond. Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

59. Desmond v. Fisher, 152 Mass. 521, 25 NE 968.

60. Desmond v. Fisher, 152 Mass. 521, 25 NE 968.

61. Fonte v. Horton, 36 Miss. 350; Hoffman's Est., 10 Pa. Dist. 758, 26 Pa. Co. 239.

[a] **Illustration.**—A recital in a bond, given upon the receipt of a specific legacy, that the executor was discharged from all claim and liability on account of the legacy does not discharge him from accounting for hire received by him before the legacy was delivered, but not paid over. Fonte v. Horton, 36 Miss. 350.

62. Dunfee v. Dunfee, 145 App. Div. 108, 129 NYS 142 [aff 205 N. Y. 543 mem, 98 NE 1102 mem].

63. Murdock v. Murdock, 111 Ill. A. 375 [aff 219 Ill. 123, 76 NE 57].

64. McRae v. Brooks, 6 Munf. (20 Va.) 157; Rootes v. Webb, 4 Munf. (18 Va.) 77; Stovall v. Woodson, 2 Munf. (16 Va.) 303.

65. Chapell v. Shuee, 117 Ind. 481, 20 NE 417; In re Pound, 166 Mo. 419, 66 SW 273; Ferguson v. Yard, 164 Pa. 586, 30 A 517.

[a] **The executor or administrator cannot refuse to obey** a decree of distribution on the ground that the court did not require a refunding bond. He is fully protected by the decree. Ferguson v. Yard, 164 Pa. 586, 30 A 517; Pierson's Est., 5 Pa. Dist. 424, 18 Pa. Co. 220. But compare Walden v. Payne, 2 Wash. (2 Va.) 1 (an executor is not bound by an order directing a division of the estate among the distributees without reserving enough to pay the debts or without taking refunding bonds).

66. Handly v. Snodgrass, 9 Leigh (36 Va.) 484.

67. Cowell v. Oxford, 6 N. J. L. 432; Logan v. Richardson, 1 Pa. 372 [overr Chandler v. Lamborne, 2 PaLJR 124, 3 PaLJ 367].

[a] **Such objection must be by plea in abatement.**—Cowell v. Oxford, 6 N. J. L. 432.

68. Howell v. Johnston, 49 N. C. 502.

69. Matter of Kucielski, 49 Misc. 404, 99 NYS 828, 5 Mills Surr. 288; Matter of Rasch, 26 Misc. 459, 55 NYS 434, 28 NYCivProc 98, 2 Gibb. Surr. 562; Fitzpatrick's Est., 8 Pa. Dist. 726, 9 Pa. Dist. 88; Brewer v. Pocock, 23 Beav. 310, 53 Reprint 122; Dobson v. Carpenter, 12 Beav. 370, 50 Reprint 1103.

[a] **The ground for such practice** is that of indemnity to the executor, rather than the protection of persons having contingent claims against the estate. In re Nixon, [1904] 1 Ch. 638.

[b] **Liability on leases held by testator.**—The court will not set aside any part of the assets of an estate to indemnify executors against possible liabilities which may arise in respect of leases formerly held by the testator, unless there is privity of estate between the executors and the lessors. In re Nixon, [1904] 1 Ch. 638.

[c] **An executory contract** by which decedent, as lessor, might at a future time have become liable to his lessee for buildings erected on the land by the latter is not within the terms of the statute authorizing a retainer of assets. In re Henshaw, 37 Misc. 536, 75 NYS 1047, 2 Mills Surr. 572.

70. Mason v. Pate, 34 Ala. 379; Clarke v. Terry, 34 Conn. 176.

71. Bahnert's Est., 12 Phila. (Pa.) 27, 4 WklyNC 360.

[a] **Approval of security.**—The fund should be put at interest on security approved by the orphans' court. In re Koch, 5 Rawle (Pa.) 338.

72. Bahnert's Est., 12 Phila. (Pa.) 27, 4 WklyNC 360.

73. Musser v. Oliver, 21 Pa. 362; Rastaetter's Est., 15 Pa. Super. 549; Haggerty's Est., 13 Pa. Dist. 663, 29 Pa. Co. 57; Boring v. Jobe, (Tenn. Ch. A.) 53 SW 763; Turk v. Hevener, 49 W. Va. 204, 38 SE 476.

[a] **Subsequent confirmation of the account** of an executor who has voluntarily paid a legacy without taking a refunding bond does not relieve him from liability to the creditors for the amount of the payment. Robins' Est., 180 Pa. 630, 37 A 121 [mod 4 Pa. Dist. 277].

[b] **A probability of ultimate loss,** if the administrator had retained the property instead of distributing it, does not affect his liability to creditors. Morrison v. Lavell, 81 Va.

mer may be compelled to make restitution at the suit of creditors.[74]

[§ 1305] **I. Advances and Disbursements by Representative—1. In General.** Advances and disbursements made by the representative for the benefit of legatees or distributees of the estate are to be reimbursed from their respective portions of the estate;[75] and they should be specially adjusted by the representative, aside from his ordinary administration accounts, by way of an offset to the amount due from the estate in his hands to the legatee or distributee,[76] or to the assignee of the legatee or distributee.[77]

If the legacy or distributive share lapses in interest after the advances have been made, the representative may recover the advances by an action in his own right as for money had and received.[78]

[§ 1306] **2. Advances Pursuant to Testamentary Directions.** Where a will provided that testator's entire estate be kept together for five years and handled by his executors as if testator was living, and that his wife should have one-half interest in the residue, and that the executors should allow his wife funds from the estate during the progress of settlement to live as she had theretofore lived and to carry on certain charities, payments made to the wife by the executors during the settlement of the estate for her maintenance and the charities were chargeable to the estate, and not to her distributive share therein.[79]

[§ 1307] **3. Amount of Advances.** The amount of advances to be made should be limited to the actual interest of the beneficiary of the estate at the time the advances are made.[80]

519 (where the administrator delivered the decedent's slaves to the distributees without taking refunding bonds, he was not relieved of liability to creditors by the fact that the slaves might have been lost by emancipation if he had retained them).

74. Clinton's Est., 9 Pa. Dist. 455, 24 Pa. Co. 218.

75. U. S.—McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134].

Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30; Dickie v. Dickie, 80 Ala. 57; Hunter v. Law, 68 Ala. 365; Watson v. McClanahan, 13 Ala. 57; Parker v. McGaha, 11 Ala. 521; Willis v. Willis, 9 Ala. 330.

Ark.—Martin v. Campbell, 35 Ark. 137.

Cal.—Moore's Est., 96 Cal. 522, 31 P 584; Rose's Est., 80 Cal. 166, 22 P 86; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

Ill.—Blake v. Peo., 161 Ill. 74, 43 NE 590.

Ind.—Greene v. Brown, 38 NE 519.

Ky.—Churchill v. Akin, 5 Dana 475; Triggs v. Daniel, 2 Bibb 301.

La.—Sparrow's Succ., 42 La. Ann. 500, 7 S 611, 44 La. Ann. 475, 10 S 882; Beatty v. Dufief, 11 La. Ann. 74; Broadaway's Succ., 3 La. Ann. 591.

Miss.—Kelly v. Davis, 37 Miss. 76.

N. J.—Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336.

N. Y.—King v. Talbot, 40 N. Y. 76, 92; Matter of Rogers, 10 App. Div. 593, 42 NYS 133; Matter of McKay, 33 Misc. 520, 68 NYS 925.

Pa.—Good's Est., 150 Pa. 301, 24 A 624; Brennan's Est., 65 Pa. 16; Ogden's Est., 13 Pa. Dist. 693; Hart's Est., 9 Pa. Dist. 274; Hosfield's Est., 4 Pa. Co. 257; McGeary's Est., 16 PittsbLegJ 404; Cavett's Est., 33 PittsbLegJNS 301.

S. C.—Johnson v. Henagan, 11 S. C. 93.

Tex.—Lee v. Smith, 18 Tex. 141.

Va.—Jackson v. Jackson, 1 Gratt. (42 Va.) 143.

Eng.—Re Moore, 45 L. T. Rep. N. S. 466.

[a] **Illustration.**—Where the son of a decedent during his lifetime received from his mother, who was administratrix, far more than his share of the income from the estate, which was still undivided, the excess may be charged against income accruing after his death, in reduction of the amount which would otherwise be payable to his heirs. Nivens v. Nivens, 133 Fed. 39, 66 CCA 145 [rev 4 Ind. T. 574, 76 SW 114].

[b] **Where portions of a decedent's estate are sold** by order of court to provide support for certain heirs, such heirs are chargeable with proceeds of the sale and interest. Lee v. Smith, 18 Tex. 141.

[c] **Legacies paid to persons who were also distributees pending a contest of the will** will be considered as advancements on the distributive shares of such persons. Kelly v. Davis, 37 Miss. 76.

[d] **Counsel fees** paid from a decedent's estate upon a petition of legatees which stated that counsel had been managing their interests are properly directed to be borne by such legatees, where they consented to the order directing the same to be charged to their distributive shares, without reserving any right to apply to have it finally charged to the estate. McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. Ed. 369 [aff 20 App. (D. C.) 134].

[e] **Minor legatees or distributees.**—(1) Advances made to the guardian of infant legatees or distributees may be charged against their shares of the estate. Sparrow's Succ., 42 La. Ann. 500, 7 S 611, 44 La. Ann. 475, 10 S 882; Black's Est., Tuck. Surr. (N. Y.) 145. (2) But it is otherwise as to advances made to the minor while he was without a guardian (Standley v. Langley, 25 Miss. 252; Jones v. Coon, 13 Miss. 751), or (3) payments made by the executor or administrator for the benefit of the minor (Black's Est., Tuck. Surr. (N. Y.) 145; Lee v. Brown, 4 Ves. Jr. 362, 31 Reprint 184), (4) unless such payments are ratified by the infant after attaining his majority (Lee v. Brown, 4 Ves. Jr. 362, 31 Reprint 184), or (5) authorized by an order of court (Matter of Spencer, 1 De G. M. & G. 311, 50 EngCh 239, 42 Reprint 572; Lee v. Brown, 4 Ves. Jr. 362, 31 Reprint 184). (6) Nor can there be any such charge where the advances consist of maintenance furnished to the minor children by their mother, who is also administratrix, and who has also received the benefit of their services. In re Gossner, 6 Whart. (Pa.) 401; Francis' Est., 5 Kulp (Pa.) 17. (7) But reimbursement may be allowed, in equity, for advances which were made in good faith and are such disbursements as would have been approved had they been made by guardian. Munden v. Bailey, 70 Ala. 63; Montgomery v. Givhan, 24 Ala. 568; Martin v. Campbell, 35 Ark. 137; Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336.

[f] **Credit on the representative's account** cannot be allowed for advancements made to legatee or distributee. See supra § 526.

76. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30; Cawlfield v. Brown, 45 Ala. 552; Parker v. McGaha, 11 Ala. 521; Willis v. Willis, 9 Ala. 330.

La.—Sparrow's Succ., 42 La. Ann. 500, 7 S 611, 44 La. Ann. 475, 10 S 882.

Mass.—Mattoon v. Cowing, 13 Gray 387.

Mich.—Greene v. Mallary, 86 NW 541.

N. C.—Young v. Kennedy, 95 N. C. 265, 100 N. C. 393, 6 SE 392.

Pa.—Hambright's Est., 169 Pa. 57, 32 A 60.

Va.—Boyd v. Townes, 79 Va. 118.

Wis.—Lyle v. Williams, 65 Wis. 231, 26 NW 448.

[a] **This rule has been applied** to: (1) Advances to the widow. Parker v. McGaha, 11 Ala. 521. But compare Lyon v. Lyon, 43 N. C. 201 (an advance to a widow not directed by the probate court cannot be set off against her distributive share on an accounting in equity, although the failure to direct the allowance was caused by mutual mistake as to the law). (2) Advances to the committee of an insane widow for her support. Hambright's Est., 169 Pa. 57, 32 A 60. (3) The amount of a valid judgment against a distributee which has been paid by the executor. Boyd v. Townes, 79 Va. 118. (4) Board (Howard v. Rutherford, 149 Ala. 661, 43 S 30; Willis v. Willis, 9 Ala. 330) and (5) clothing (Willis v. Willis, 9 Ala. 330) furnished to distributees.

[b] **Advancements made in the lifetime of a testator** cannot be included in such set-off. Cawlfield v. Brown, 45 Ala. 552.

[c] **Advances of money** cannot be set off against the distributive share of one who having released the administrator from all pecuniary demands is entitled only to a distributive share of the personalty remaining in specie. Pearson v. Darrington, 32 Ala. 227.

77. Jenkinson v. New York Finance Co., 79 N. J. Eq. 247, 82 A 36; Wallston v. Braswell, 54 N. C. 137.

78. Lawrence v. Carter, 16 Pick. (Mass.) 12.

79. In re Taylor, 239 Pa. 153, 86 A 708.

80. Tanner v. Davidson, 3 Bibb (Ky.) 456; Chester County Hospital v. Hayden, 83 Md. 104, 34 A 877; Hoyt v. Jackson, 1 Dem. Surr. (N. Y.) 553; Lockwood v. Lockwood, 3 Redf. Surr. (N. Y.) 330.

[a] **Advances to one entitled to a life interest** in a fund should not exceed the amount of income earned by that fund during the period of advancement. Chester County Hospital v. Hayden, 83 Md. 104, 34 A 877.

[b] **Advances for maintenance and education** of a minor child (1) should not exceed the interest on such child's distributive share. Tanner v. Davidson, 3 Bibb. (Ky.) 456. (2) Nor can reimbursement be allowed for advances beyond what was reasonably necessary for the support of the infants. Henning v. Conner, 2 Bibb (Ky.) 188.

[c] **The legal rate of interest** on a trust fund is not a test of its income, for the purpose of computing the proportion of the legacy which may be advanced, since the actual income from such fund may be greater or less than the legal rate. Hoyt v. Jackson, 1 Dem. Surr. (N. Y.) 553.

[§ 1308] **4. Interest on Advances.** Where the circumstances indicate that advances were made as a partial distribution, as where the representative had income in hand not bearing interest, no interest should be charged thereon against the legatee or distributee,[81] but where the representative is charged with interest on the funds in his hands, the advances should be treated as loans, and interest charged thereon, for the double purpose of reimbursing the representative for the interest which has been charged against him and of equalizing distributive shares.[82] It has also been held that interest on advances should be allowed the representative where he makes them before the legacy or distributive share is due.[83] If a note or other evidence of indebtedness is taken for the advance, it is merely a loan and should bear interest.[84]

[§ 1309] **5. Advances by Executor or Administrator Individually.** An executor is not bound to pay out of his individual means after exhausting or nearly exhausting the funds applicable from the estate for advancement.[85] Where, however, the representative makes advances or disbursements from his own funds for the benefit of legatees or distributees, he becomes subrogated to their rights,[86] and is entitled to credit therefor, as a charge against their legacies or distributive shares, upon final settlement of the estate;[87] or after the legacy or distributive share is due he may reimburse himself from funds in his hands subject to its payment.[88] Where an executrix had no personalty in her hands, and the one source from which money could be obtained to pay a legacy was from payments to be made by a devisee, and the executrix could not enforce such payment, and the devisee made no payment, and whether he would make one was doubtful, and the executrix paid the legacy out of her own funds, and the legatee quitclaimed her rights in the estate with knowledge of the facts, the transaction was not within the rule that a transaction between an executrix and a beneficiary will be closely scrutinized.[89]

[§ 1310] **6. Lien for Advances.** The representative's advances or disbursements on behalf of a legatee or distributee constitute a lien upon his share or interest in the estate,[90] but it cannot be enforced until the estate is ready for distribution.[91]

[§ 1311] **7. Expenses Incurred by Representative.** Expenses bona fide and prudently incurred by the representative for the benefit of legatees or distributees may be duly set off against the legacies or distributive shares concerned therein,[92] or an action for contribution may be maintained against the legatee or distributee therefor after final distribu-

81. Thorn v. Garner, 113 N. Y. 198, 21 NE 149 [mod 42 Hun 507]; King v. Talbot, 40 N. Y. 76; Matter of Brundage, 101 Misc. 528, 167 NYS 694; Brooks v. Hanna, 19 Oh. Cir. Ct. 216, 10 Oh. Cir. Dec. 480.

[a] **Payments on account of income to which the beneficiary is entitled** do not constitute advances on which interest is chargeable. Matter of Brundage, 101 Misc. 528, 167 NYS 694.

82. King v. Talbot, 40 N. Y. 76; Brooks v. Hanna, 19 Oh. Cir. Ct. 216, 10 Oh. Cir. Dec. 480; Jenkins' Est., 4 Kulp (Pa.) 46; Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917, 44 S. C. 95, 21 SE 800.

83. Black v. Keenan, 5 Dana (Ky.) 570.

84. Brooks v. Hanna, 19 Oh. Cir. Ct. 216, 10 Oh. Cir. Dec. 480.

85. Fonda v. Penfield, 46 Barb (N. Y.) 503.

86. Tickel v. Quinn, 1 Dem. Surr. (N. Y.) 425; Gaw v. Huffman, 12 Gratt. (53 Va.) 628; Whidden v. McDonald, 47 N. S. 26, 9 DomLR 686.

87. Cal.—Elizalde v. Murphy, 163 Cal. 681, 126 P 978.

Kan.—Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

Ky.—Black v. Keenan, 5 Dana 570.

Mo.—Scott v. Crews, 72 Mo. 261.

N. J.—Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336.

N. Y.—Tickel v. Quinn, 1 Dem. Surr. 425; Broome v. Van Hook, 1 Redf. Surr. 444.

Pa.—Pettit's App., 39 Pa. 324.

[a] **Where the assets are insufficient to pay legacies in full,** and the executor by advances to the legatees from his own fund becomes subrogated to their right, he is entitled to be credited only with their pro rata share from the assets available for distribution at the time of the accounting. Tickel v. Quinn, 1 Dem. Surr. (N. Y.) 425.

[b] **The purchase of a ward's interest by the executor from the guardian** will be deemed a payment on account of the ward's claim for which the executor will be entitled to credit. Black v. Keenan, 5 Dana (Ky.) 570.

[c] **Charges made against infants for moneys paid and expended for their benefit** (1) during administration of an estate have been held not allowable to an administrator where there has been no guardian of the infants. Black's Est., Tuck. Surr. (N. Y.) 145. (2) But it has also been held that, where an administrator pays money in good faith for the purchase of necessities for the support of helpless minor children of the intestate at a time when they have no guardian, and the purchases are such as a guardian would have made if one had been appointed, the administrator cannot be made to respond again in an action by the guardian thereafter appointed. Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

[d] **Payments made by ancillary administrator for a distributee** cannot be set off by the domiciliary administrator against the distributee's claim to a share of the fund in course of domiciliary administration, where it does not appear that the ancillary administration has ever been settled, or whether there are any outstanding debts, or that the ancillary administrator has filed a cross bill for that purpose. Chambers v. Wright, 52 Ala. 444.

88. Ala.—Horton v. Hill, 138 Ala. 625, 36 S 465.

Md.—Chester County Hospital v. Hayden, 83 Md. 104, 34 A 877.

N. J.—Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336; Snyder v. Warbasse, 11 N. J. Eq. 463.

S. C.—Johnson v. Henagan, 11 S. C. 93; Lay v. Lay, 10 S. C. 208; Watts v. Watts, 7 S. C. Eq. 77.

Eng.—Livesey v. Livesey, 3 Russ. 287, 3 EngCh 287, 38 Reprint 583.

[a] **Illustration.**—Where an executor has made advances and has become surety in considerable sums for a legatee, and the legatee dies insolvent, the executor may retain such sums from the amount of the legacy, although there was no express understanding to that effect at the time of making the advances. Smith v. Huger, 1 S. C. Eq. 247.

[b] **Upon the death of a representative** before reimbursing himself for such advances, like relief may be claimed by: (1) His personal representative for the benefit of his estate. Lay v. Lay, 10 S. C. 208. (2) His coexecutor. Smith v. Huger, 1 S. C. Eq. 247.

[c] **The rents and profits of a testamentary trust estate** are not chargeable with cash advances made by the executor after his final account has been allowed and an order of distribution of the trust estate has been made, even though the account as allowed shows that the trust estate is indebted to him for such advances, and the court has transferred the property subject to the charge. Black v. Herring, (Md.) 30 A 917.

89. Stapleton v. Haight, 135 Iowa 564, 113 NW 351.

90. Ind.—Greene v. Brown, 38 NE 519.

Mass.—Haskell v. Hill, 169 Mass. 124, 47 NE 586.

N. J.—Hammond v. Cronkright, 47 N. J. Eq. 447, 20 A 847.

Eng.—Ex p. Makins, 6 Jur. 468.

N. S.—Whidden v. McDonald, 47 N. S. 26, 9 DomLR 686.

91. Greene v. Brown, (Ind.) 38 NE 519; Haskell v. Hill, 169 Mass. 124, 47 NE 586.

92. Ky.—Miller v. Simpson, 2 SW 171.

Mass.—Eliott v. Sparrell, 114 Mass. 404.

Miss.—Kelly v. Davis, 37 Miss. 76.

N. Y.—Farquharson v. Nugent, 6 Dem. Surr. 296.

Pa.—Ammon's App., 63 Pa. 284; Mackey's App., 10 Pa. Cas. 107, 13 A 464.

Wash.—In re Murphy, 30 Wash. 9, 70 P 109.

Wis.—Ludington v. Patton, 121 Wis. 649, 99 NW 614.

N. B.—In re Anning, 34 N. B. 308.

[a] **This rule has been applied to** the payment of: (1) Taxes. Farquharson v. Nugent, 6 Dem. Surr. (N. Y.) 296. See also Williams v. Herrick, 18 R. I. 120, 25 A 1099 (taxes paid by the representative and charged to his account may be deducted from the income when he pays it to the life tenant). (2) Insurance. Ludington v. Patton, 121 Wis. 649, 99 NW 614.

[b] **Counsel fees and expenses of suit,** incurred by the representative in contesting or defending a will (1) may be deducted from the shares of persons interested therein. Miller v. Simpson, (Ky.) 2 SW 171; Kelly v. Davis, 37 Miss. 76. (2) But he is not entitled to set off against the distributive share of a legatee expenses incurred in the successful defense of a suit in another state, brought against the executor individually by such legatee, to recover his legacy. In re Roberts, 163 Pa. 408, 30 A 213.

[c] **Where a representative fails to invest** a pecuniary legacy until the legatee becomes of age, he

tion.[93] But expenditures made for the benefit of the estate should be paid out of the property of the estate before it is distributed, and cannot be charged in a distribution of the estate as a lien on the heirs' interests therein.[94]

[§ 1312] **J. Mode and Sufficiency of Payment or Distribution.**[95]—**1. In General.** Unless a particular mode of paying a legatee or distributee is expressly prescribed by the will[96] or by statute,[97] payment may in general be made to him in any manner which gives him his due proportion of the estate,[98] and which shows an absolute payment.[99] Usually the payment should be made in money,[1] although with the consent of parties interested it may be made in other kinds of personalty.[2] A credit on a distributive share of the price of property

should have no allowance for taxes paid on such legacy. Eliott v. Sparrell, 114 Mass. 404.

93. Liability to refund on deficiency of assets generally see infra §§ 1424-1437.

94. Huston v. Becker, 15 Wash. 586, 47 P 10 (a court exercising probate jurisdiction has no power to direct the distribution of a decedent's estate to the heirs charged with a lien in favor of the administrator on account of money expended by him for the benefit of the estate).

95. Executor or administrator as legatee or distributee see supra §§ 1279, 1280.

96. Russell v. Kearney, 27 Ga. 96 (where the will requires the executor to divide the property into shares before distributing it to the legatees, and he delivers property to a legatee without making such division, he will be guilty of a devastavit as to other legatees, unless they acquiesce therein).

97. McKee v. McKee, 48 Ga. 332.

98. Johnson v. Bell, 71 Ala. 258; Hatt v. Green, 180 Mich. 383, 147 NW 593; Matter of Tobin, 16 NYS 462, Pow. Surr. 5; Banks v. Taylor, 10 AbbPr (N. Y.) 199; In re Fischer, 189 Pa. 179, 42 A 8; In re Watson, 189 Pa. 150, 42 A 5.

[a] **Discretion of executors.**—Where, in a division of an estate under the terms of a will, the executors were vested with certain discretion, and there were three methods possible, by one of which so large an amount of cash would be needed to equalize the shares as would exhaust the personalty, by another the least possible amount of cash would be required, and by a third a middle ground was possible, the adoption by the executors of the third method was not an abuse of discretion justifying the interference of the court. Clark v. Goodridge, 52 Misc. 239, 103 NYS 36.

[b] **Method avoiding inequality should be adopted.**—Where two equally convenient methods of distribution can be adopted by executors, but one would result in an unequal and inequitable distribution, while the other will result in an equal and equitable division, the latter method should be adopted. Wynkoop's Est., 53 Pa. Super. 472.

[c] **Payment of taxes and expenses of repairs** on the real property made by administrators on the order of the heir, who was one of the next of kin, is a payment to such person as one of the next of kin. Banks v. Taylor, 10 AbbPr (N. Y.) 199.

[d] **A conveyance by an executor of his private property to a devisee** as part payment of the latter's share in the estate is a valid payment binding on the devisee. In re Fischer, 189 Pa. 179, 42 A 8.

[e] **Payment of appraised value of land.**—Where testator bequeathed to his grandchildren certain lots, or the value thereof, the value to be taken when the oldest child arrived at the age of twenty-one years, and paid to the children, respectively, as they arrived at the age of twenty-one, the executors by paying to the oldest child his proportionate share of the appraisal value of the land thereby elected to keep the lands and to treat the appraised valuation as fixing the amount of the trust fund. Hatt v. Green, 180 Mich. 383, 147 NW 593.

99. Bryant v. Householder, 71 Ind. 349.

[a] **An agreement by one authorized to receive a legacy** for his principal with the executor to account to his principal for an indebtedness due by him, the agent, to the executor as so much of the legacy, without the principal's assent, is not a payment of the legacy by the executor. Benoist v. Poirer, 10 S. C. Eq. 217.

[b] **Circumstances not showing payment.**—On the issue whether a legacy had been paid to a legatee in a will bequeathing five hundred dollars to the legatee and providing that on her death childless the gift should go to a third person, it was shown that the will bequeathed three thousand three hundred dollars in pecuniary legacies, and devised realty, and provided for the distribution of the residue. An inventory and account of sales filed by the executors in 1861, the year of testator's death, showed thirteen thousand dollars, and the report of commissioners showed that in 1863 there was in the hands of executors fourteen thousand dollars due the legatees, and receipts from two other legatees in 1868, acknowledging receipt of a smaller amount than their legacies "in full," were shown. It was held that there was no evidence of payment of the five hundred dollars to the legatee sufficient to charge her estate, on her death in 1903 without leaving children, in favor of the third person. Outlaw v. Garner, 139 N. C. 190, 51 SE 925.

[c] **Estoppel.**—A representative may be estopped to deny that a payment is absolute where by his acts he has led others to believe that it was absolute, and they would otherwise be prejudiced. Garrett v. Hamburg Bank, 20 S. C. Eq. 66.

1. Ala.—Ward v. Oates, 42 Ala. 225.

D. C.—Moore v. Moore, 47 App. 23.

Ky.—Mimms v. Lawrence, 91 SW 715, 28 KyL 1317.

Mich.—Michigan Home Missionary Soc. v. Corning, 164 Mich. 395, 129 NW 686.

N. H.—Bartlett v. Hill, 69 N. H. 197, 45 A 144.

N. Y.—Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027].

S. C.—Graveley v. Graveley, 25 S. C. 1, 60 AmR 478.

Va.—Yates v. Salle, Wythe 163.

[a] **A bequest of money** (1) is payable in coin, and not in paper currency (Graveley v. Graveley, 25 S. C. 1, 60 AmR 478), (2) unless the latter payment is authorized by statute (Yates v. Salle, Wythe (Va.) 163).

[b] **Where the assets consist partly of gold and partly of currency,** each distributee should be decreed his share of each kind of money, distinguishing between them. Lowry v. Newsom, 51 Ala. 570.

[c] **Bequest of amount to be invested by trustees.**—Where testatrix bequeathed to trustees five thousand dollars in trust to be kept and invested according to their best judgment, the income to be paid to complainant society, the provision contemplated a permanent investment by the trustees, and hence they were entitled to payment of the legacy by the executors in cash, and not in securities belonging to the estate. Michigan Home Missionary Soc. v. Corning, 164 Mich. 395, 129 NW 686.

[d] **Turning over note.**—Where testator provided that each of his children should receive an equal part of his estate for life, with remainder to the children of such child, the portion of testator's daughter not to be subject to the debts, contracts, liabilities, or control of her husband, the turning over by the representatives of testator's estate to his daughter and her husband of the note of the insolvent husband is not a payment to her of the amount of the note, so as to make her estate liable to her children therefor. Mimms v. Lawrence, 91 SW 715, 28 KyL 1317.

[e] **A husband's share** in the personal property of his deceased wife remaining after the payment of debts and expenses of administration is in the absence of agreement or order of the court payable in money. Bartlett v. Hill, 69 N. H. 197, 45 A 144.

[f] **A payment in depreciated currency** (1) that is, Confederate money, has been held void (Thompson v. Perryman, 45 Ala. 619; Purdie v. Jones, 32 Gratt. (73 Va.) 827) (2) where the legacy was payable in good money (Stark v. Lipscomb, 29 Gratt. (70 Va.) 322). (3) But the representative has been allowed credit for the value of such currency paid by him at a time when it passed as lawful money (Williams v. Williams, 79 N. C. 411) (4) and he was required by the legatee to make payment (Evans v. Smith, 84 N. C. 146). (5) Where the representative received a fund in Confederate money and made payments to distributees out of what he thus received, it would be unjust to scale the amount received by him without applying the same scale to the payments made out of the fund. Depriest v. Patterson, 94 N. C. 519.

2. Ala.—Ward v. Oates, 42 Ala. 225.

Del.—State v. Conrad, 15 Del. 417, 41 A 77.

Ga.—Collier v. Collier, 137 Ga. 658, 74 SE 275, AnnCas1913A 1110.

La.—Le Blanc v. Bertant, 16 La. Ann. 294.

Mich.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

N. H.—Stevens v. Meserve, 73 N. H. 293, 61 A 420, 111 AmSR 612.

N. J.—Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586.

N. Y.—Villard v. Villard, 219 N. Y. 482, 114 NE 789 [aff 166 App. Div. 203, 151 NYS 1027].

S. C.—Muldrow v. Mixon, 89 S. C. 551, 72 SE 466.

Tenn.—Kennedy v. Williams, 7 Humphr. 50.

Eng.—In re Nickels, [1898] 1 Ch. 630.

[a] **The guardian of a minor heir** is authorized to accept from the executor, as part of his ward's estate, a chose in action instead of cash. Stevens v. Meserve, 73 N. H. 293, 61 A 420, 111 AmSR 612.

[b] **A debt to the succession** not yet due is capable of partition among distributees. Le Blanc v. Bertant, 16 La. Ann. 294.

[c] **Acceptance of property at agreed valuation.**—A beneficiary under a will, having taken a piano at a valuation agreed upon with the other beneficiary, and having kept it for two years, is properly chargeable in the administrator's accounts with that amount. Muldrow v. Mixson, 89 S. C. 551, 72 SE 466.

[d] **A contract with executors**

purchased by the distributee at the administrator's sale has been considered a valid payment.[3] A deposit in bank to a distributee's credit without notification thereof does not constitute a good payment,[4] nor is a distributive share paid merely by purchasing a bank draft for the amount thereof and sending it to the distributee, who proceeded with due diligence to collect it, where the bank failed in the meantime and the draft was not paid;[5] but the investment of money in the name of a legatee has been held a payment of the legacy, pro tanto, so as to vest the title in him and pass to him the right to the accruing interest.[6] Where the widow of a decedent, who was left with small children, continued to conduct the farm and business of her husband, and, after paying his debts, raised and educated her children, and during the lifetime of a son, who was dissolute, gave him money largely in excess of the amount to which he was legally or equitably entitled from the estate, which had not been divided, his widow, who was his only heir, was not entitled to require his mother, as administratrix of the estate, to account to her for his proportionate share of the income received after his death.[7]

Installment payments. Payment may sometimes be made by installments,[8] but a legatee is not bound to accept a partial payment of his legacy in the absence of an order of court directing such payment.[9]

Retention by representative as agent. The legatee may authorize the representative to retain the money as his debtor, in which case there is a valid distribution and the representative is liable only in his personal capacity.[10]

Where a bequest was made of the income of mining stock to certain persons for life, with remainder over to certain churches, the stock may be held by the executor until the distribution of the estate, he paying the dividends as directed by the will, or the court may appoint a trustee to hold it and collect and disburse the dividends during the lives of the life tenants, and after their death to deliver it to the remaindermen, or it may be turned over to the life tenants on their executing an approved bond to the remaindermen for the forthcoming of the property at the termination of the life estates.[11]

[§ 1313] **2. Distribution in Kind—a. In General.** A distribution in kind is authorized where a conversion of the property into money is not necessary to the administration of the estate,[12] or demanded by the parties interested,[13] and the rights of the parties can be equitably adjusted.[14] Lega-

whereby a legatee receives property in severalty for relinquishment of his interest in the estate is not without consideration, although disproportion between values may be considered in passing on the bona fides of the transaction. Collier v. Collier, 137 Ga. 658, 74 SE 275, AnnCas1913A 1110.

[e] **Payment, partly in cash and partly by note,** is a sufficient payment, if received as such by the legatee, to give rise to a right of action on a bond of indemnity given to the executor. Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

[f] **Agreement beyond power of executor.**—Where testator gave his property to his children equally, and appointed an executor, and provided that no court should take any further action over the estate than the probate of the will and the return and approval of an inventory, the executor had no authority to enter into an oral agreement with one of the children whereby the latter agreed to take certain personal property of an agreed value as his share in the testator's estate by virtue of the will. Johnson v. Short, 43 Tex. Civ. A. 128, 94 SW 1082.

Distribution in kind see infra §§ 1313–1315.

3. Wilson v. Randall, 37 Ala. 74, 76 AmD 347.

4. Rainwater v. Hummell, 79 Iowa 571, 44 NW 814; Scott v. Fox, 14 Md. 388.

5. State v. Wagers, 47 Mo. A. 431.

6. Sullivan v. Winthrop, 23 F. Cas. No. 13,600, 1 Sumn. 1.

[a] **Investment by order of court.**—An investment by an executor, of the amount of a legacy, in compliance with an order of court, and the allowance of the amount in settlement of his account, discharges the executor from all liability therefor. Siechrist v. Bose, 87 Md. 284, 39 A 745.

7. Nivens v. Nivens, 133 Fed. 39, 66 CCA 145 [rev 4 Ind. T. 574, 76 SW 114].

8. Bowles v. Drayton, 1 S. C. Eq. 489, 1 AmD 689.

[a] **Charging the sums paid** to the legatees on a partial distribution of a decedent's estate against their legacies, instead of against their share in the residuary estate, is not objectionable as stopping the running of interest on the legacies to the disadvantage of such legatees, because the sum paid on such distribution to one entitled to share only in such residuary estate necessarily is charged against his share thereof. McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134].

9. Welch v. Adams, 152 Mass. 74, 25 NE 34, 9 LRA 244.

10. In re Bussman, 176 NYS 505; Krogman's Est., 14 Pa. Co. 567.

11. Wilkinson v. Rosser, 104 SW 1019, 31 KyL 1262.

12. Ala.—Ward v. Oates, 42 Ala. 225.

Ga.—Rogers v. Dickey, 117 Ga. 819, 45 SE 71.

Ill.—Waterman v. Alden, 115 Ill. 83, 3 NE 505.

Ky.—Huston v. Dorsey, 1 Ky. Op. 217.

Me.—Rose v. O'Brien, 50 Me. 188.

Md.—Evans v. Iglehart, 6 Gill & J. 171.

N. H.—Stevens v. Meserve, 73 N. H. 293, 61 A 420, 111 AmSR 612.

N. Y.—Osgood v. Franklin, 2 Johns. Ch. 1, 7 AmD 513 [aff 14 Johns. 527].

Pa.—Maffet's Est., 8 Kulp 184.

W. Va.—Casto v. Kintzel, 27 W. Va. 750.

Man.—Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

[a] **The records of the probate court ordering such distribution are sufficient muniments of title** without any formal transfer of the several parts distributed. Rose v. O'Brien, 50 Me. 188.

[b] **A conveyance of real estate** (1) may constitute a good payment. French v. Baker, 95 Ga. 715, 22 SE 652. (2) This is true, although a third person is in possession holding adversely. French v. Baker, 95 Ga. 715, 22 SE 652. (3) But the right to take the land instead of the proceeds cannot be claimed after a sale by the executor under a power. Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 AmD 513.

[c] **Money for which the representative has become liable** by his negligence or misconduct cannot be decreed to a distributee as his distributive share, under a statute allowing the court to decree distribution of chattels in specie or of money. Ward v. Oates, 42 Ala. 225.

13. State v. Ewing, 264 Mo. 331, 174 SW 382; In re Brooks, 249 Pa. 66, 94 A 478; Meagher's Est., 22 Pa. Dist. 823; Smyth's Est., 21 Pa. Dist. 656; Buck's Est., 10 Pa. Dist. 331, 25 Pa. Co. 264; Maffett's Est., 8 Kulp (Pa.) 184; Muldrow v. Mixon, 89 S. C. 551, 72 SE 466.

[a] **An election by distributees** is sometimes provided for by statute. State v. Ewing, 264 Mo. 331, 174 SW 382.

[b] **Consent of a remainderman,** having no present right to his share, will not authorize a distribution in specie. Matter of Holzworth, 166 App. Div. 150, 151 NYS 1072 [aff 215 N. Y. 700 mem, 109 NE 1079 mem].

14. Ala.—Lowry v. Newsom, 51 Ala. 570.

Ida.—Harris v. Coates, 8 Ida. 491, 69 P 475.

Ky.—Wood v. Wood, 1 Metc. 512.

Md.—Hoffman v. Hoffman, 88 Md. 60, 40 A 712; Evans v. Iglehart, 6 Gill & J. 171.

Mo.—Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

Nebr.—Cowherd v. Kitchen, 57 Nebr. 426, 77 NW 1107.

N. H.—Stevens v. Meserve, 73 N. H. 293, 61 A 420, 111 AmSR 612.

N. Y.—Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 87 App. Div. 609 mem, 83 NYS 1117 mem (aff 178 N. Y. 554 mem, 71 NE 1140 mem)].

N. C.—Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007; Hester v. Hester, 38 N. C. 9.

Pa.—In re Reed, 82 Pa. 428; Yerkes' Est., 8 Pa. Dist. 36.

S. C.—Gillett v. Powell, 17 S. C. Eq. 142.

Va.—Hunter v. Lawrence, 11 Gratt. (52 Va.) 111, 62 AmD 640.

Eng.—In re Nickels, [1898] 1 Ch. 630.

[a] **Equality in distribution.**—(1) The distributees must be equally dealt with in making distribution in kind. Lowry v. Newsom, 51 Ala. 570; Mercer v. Glass, 25 SW 114, 15 KyL 710; Williams v. Holmes, 9 Md. 281; Gillett v. Powell, 17 S. C. Eq. 142. (2) But an exactly equal distribution in kind need not be made. The shares of the distributees may be equalized by payments in money. Williams v. Holmes, 9 Md. 281. (3) If, on final settlement of the accounts, the assets are partly gold and partly currency, each distributee should have his fair share of each kind. Lowry v. Newsom, 51 Ala. 570.

[b] **Fixing value of property by**

cies out of an estate over which testatrix had the power of appointment should be paid in kind.[15] In a case where the estate consisted almost entirely of wild prairie land, and the administrator was entitled to one third and four other heirs to one sixth each, it was held that it was the duty of the administrator to sell the land and distribute the proceeds, and he had no right, without the consent of the other next of kin, to distribute the estate by conveying to each of them an undivided one-sixth interest in the land.[16]

[§ 1314] **b. Stocks, Bonds, Notes, and Other Securities.** A payment or distribution in kind of stocks, bonds, notes, or other securities may be made[17] where the parties interested consent thereto,[18] and a sale is not necessary for purposes of administration,[19] or where it appears that a conversion of the securities into money would cause a loss,[20] or that the equities in the case justify such a distribution.[21]

Mode of transfer. Ordinarily a transfer of such securities in payment of the legacy or distributive share should be by proper indorsement or assignment,[22] although it has been held that a parol transfer is sufficient.[23]

The effect of such a distribution is to discharge the representative from liability for such assets and to give to the legatee or distributee who receives the securities the right to maintain or defend suits with respect thereto.[24] But where the representations made by the personal representative have induced legatees or distributees to accept corporate stock, they are not precluded from asking a money distribution when it subsequently appears that it is worthless.[25]

If investments made by the executor are disallowed, a legatee or distributee who has received the securities should return them upon receiving payment in money.[26]

[§ 1315] **c. Specific Legacy.** A specific legacy should be delivered in kind to the legatee entitled thereto,[27] unless such legacy is needed to satisfy

agreement.—No rule of law precludes adult beneficiaries of the estate from agreeing as to the reasonable value of property distributed in kind in making a just division of the assets and for purposes of the settlement of the account of the personal representative. Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58.

15. Harrison v. Denny, 113 Md. 509, 77 A 837.

16. Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

17. Conn.—Williams v. Taylor, 81 Conn. 90, 70 A 643.

Ill.—McClory v. Towne, 202 Ill. A. 185.

Mass.—Safe Deposit, etc., Co. v. Reed, 118 NE 333.

Mo.—State v. Ewing, 264 Mo. 331, 174 SW 382.

N. Y.—Lane v. Albertson, 78 App. Div. 607, 79 NYS 947.

Pa.—In re Brooks, 249 Pa. 66, 94 A 478.

[a] **Benefit to some legatees and detriment to others.**—Where a sale of stock would not be for the best interest of the estate, except to benefit two of the three legatees to the extent that it injured the third, the stock should not be sold, but should be distributed equally among the legatees. Williams v. Taylor, 81 Conn. 90, 70 A 643.

[b] **Effect of prohibition in articles of association.**—Payment of a legacy in shares of stock is not within a provision in the articles of the association, prohibiting a member from selling and transferring his shares without first offering the same for sale to the association, or, if it declines the option, to a member thereof. Lane v. Albertson, 78 App. Div. 607, 79 NYS 947.

[c] **The fair market value** at the time of the transfer should govern in such a distribution. Safe Deposit, etc., Co. v. Reed, (Mass.) 118 NE 333.

[d] **Where some of the heirs are minors,** a distribution in kind of securities should not be ordered, although the minors are represented by guardians. Reynolds v. Reynolds, 11 Ala. 1023.

18. Ga.—Dillard v. Ellington, 57 Ga. 567.

Ill.—McClory v. Towne, 202 Ill. A. 185.

Ky.—Wood v. Wood, 1 Metc. 512; Smith v. Broyles, 15 B. Mon. 461.

La.—Mandeville v. Arnoudt, 9 Rob. 447.

Me.—Hurley v. Hewett, 89 Me. 100, 35 A 1026.

Miss.—Murff v. Frazier, 41 Miss. 408.

N. J.—Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586; Wilson v. Fisher, 5 N. J. Eq. 493.

N. Y.—Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; King v. Talbot, 50 Barb. 453 [mod on other grounds 40 N. Y. 76].

N. C.—Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007; Hester v. Hester, 38 N. C. 9.

Pa.—Reed's Est., 82 Pa. 428; Brown's Est., 8 Phila. 197; Park's Est., 4 Pa. Co. 560.

Eng.—In re Richardson, [1896] 1 Ch. 512; In re Lepine, [1892] 1 Ch. 210; Re Brooks, 76 L. T. Rep. N. S. 771; Re Tredwell, 65 L. T. Rep. N. S. 742; Barclay v. Owen, 60 L. T. Rep. N. S. 220.

[a] **Right of legatee to distribution in kind.**—(1) If a residuary legatee is willing to take his share in kind, he is entitled to do so; and the executors cannot refuse to make distribution on the ground that they have been unable to convert the securities into cash. Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; In re Reed, 82 Pa. 428. (2) Payment in kind, of property consisting of certificates of corporate stock, cannot be refused by executors who are also legatees for fear that the other legatees may not agree with them as to the proper management of the corporation. McDowell's Est., 8 Del. Co. (Pa.) 172, 17 Montg. Co. 43.

[b] **Rule applies to property held for conversion under directions in will.**—The legatee, residuary or other, may, in satisfaction of his legacy, consent to accept securities from the executors, whether held by them for conversion under the general rule for settlement or under special directions of the will. Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586.

[c] **Where the parties do not agree** (1) it is proper to order a sale. Re Harris, 33 Ont. L. 83, 7 OntWN 597, 22 DomLR 381. (2) Especially is this true where some of the notes, accounts, and other choses are good, while others are doubtful, and still others desperate. Waterman v. Alden, 115 Ill. 83, 3 NE 505.

19. In re Fisher, 128 Iowa 626, 104 NW 1023; Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007.

20. Lane v. Albertson, 78 App. Div. 607, 79 NYS 947; Matter of Thompson, 41 Misc. 420, 84 NYS 1111 [aff 178 N. Y. 554, 71 NE 1140].

[a] **Illustration.**—Where, on an accounting by an administratrix, it appeared that the estate held a controlling interest in the stock of a corporation, and it was agreed by the parties that it was not advisable to sell the stock, it was proper to order a distribution thereof whereby the management of the corporation passed into the hands of the guardian and relatives of an infant daughter of the intestate, there being no showing that these persons were not capable of managing the corporation. In re Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537, 78 NE 1112].

21. Waterman v. Alden, 115 Ill. 83, 3 NE 505; Johnson v. Beauchamp, 5 Dana (Ky.) 70; Lehigh's Est., 11 Pa. Dist. 176; Guerrant v. Johnson, 4 Munf. (18 Va.) 360.

[a] **Illustration.**—Where the estate consists of stocks which are not collectable, and which can be realized upon only by a sale, or of government securities that will not become due in many years, or of notes or bonds amply secured on real estate, and which are of equal value, the sale of which is not necessary for the administration of the estate, the court may order such stocks or securities to be preserved and distributed in kind. Waterman v. Alden, 115 Ill. 83, 3 NE 505.

[b] **Where an executor has loaned the funds as required by the will,** and has done so honestly and with due discretion, the legatees should be required to take the securities or their proceeds. Johnson v. Beauchamp, 5 Dana (Ky.) 70.

22. Hester v. Hester, 38 N. C. 9; Davidson v. Moore, 14 S. C. 251.

23. Mitchell v. Mitchell, 1 Gill (Md.) 66.

24. Ala.—Clark v. Moses, 50 Ala. 326.

Ga.—Dillard v Ellington, 57 Ga. 567.

Ky.—Smith v. Broyles, 15 B. Mon. 461.

Md.—Sloan v. Sloan, 117 Md. 141, 83 A 38.

Mich.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

Pa.—Reed's Est., 82 Pa. 428.

S. C.—Darrel v. Eden, 3 S. C. Eq. 241, 4 AmD 613.

[a] **Personal liability may rest upon the representative,** however, upon his own individual guarantee or assurance of the safety of the security. Graffenreid v. Kundert, 23 Ill. A. 440, 31 Ill. A. 394.

25. Roberts v. Weimer, 227 Ill. 138, 81 NE 40.

26. In re Niles, 113 N. Y. 547, 21 NE 687.

27. Ala.—Nelson v. Beck, 54 Ala. 329.

La.—D'Aunoy's Succ., 3 La. Ann. 36.

Md.—Woods v. Fuller, 61 Md. 457.

Mo.—Landis v. Eppstein, 82 Mo. 99.

debts,[28] or unless the will provides for its investment and the delivery of the proceeds by way of income to the legatee.[29] Where a note is bequeathed in equal shares to two persons who refuse to take it jointly, the executor may effect distribution by taking two new notes, each for one half of the amount, payable to each of the legatees.[30] Where an executor holds certificates of stock which, under a will, are bequeathed to a person to go to another if he dies "without leaving a family," and where in a suit for an accounting it is decreed that the executor shall turn over to the legatee the property bequeathed, to be held under the will, the executor has a right, before surrendering the certificate, to indorse thereon memoranda to the effect that they are held by the legatee under the terms of the will.[31] Where the property is situated in a foreign country, the executor is not bound to transport it to testator's domicile.[32]

[§ 1316] **3. Note or Bond of Executor or Administrator.** The acceptance by a legatee or distributee of the note or bond of the executor or administrator for the amount of his legacy or distributive share extinguishes his claim to the latter.[33]

[§ 1317] **4. Retaining Indebtedness Due by Legatee or Distributee—a. In General.** As a general rule an executor or administrator has the right to and should retain from a legacy or distributive share the amount of any indebtedness which may be due to the estate by the legatee or distributee,[34] and this rule applies as against an assignee

N. J.—Hayes v. Berden, 47 N. J. Eq. 567, 21 A 339 [aff 45 N. J. Eq. 461, 17 A 634].

N. Y.—Matter of Stoiber, 103 Misc. 654, 170 NYS 897.

Pa.—Robinson's Est., 24 Pa. Co. 588.

[a] **A refusal to deliver a specific legacy is not justified by** the remote contingency of a contest against the validity of the will. Robinson's Est., 24 Pa. Co. 588.

[b] **A specific legacy of a certain sum in depreciated currency,** Confederate notes or bonds, after ascertaining its pecuniary value at the time it becomes due and payable, should be paid out of the general assets of the estate, liable to be applied to the payment of general legacies, either in whole or pro rata in proportion to the sufficiency of such assets. Harper v. Bibb, 47 Ala. 547.

[c] **Distribution by court.**—Where, under a will, there must be a distribution of specific articles, the executors are entitled to avail themselves of the statute providing for such distribution by the court so as to relieve the executors from liability thereunder. Hoffman v. Hoffman, 88 Md. 60, 40 A 712.

[d] **Discretion of executor.**—Where a testatrix bequeathed to each legatee one or more bonds "of the face value of $1,000," and a few bonds were appraised at more than face value, while the others were appraised at less than face value, the matter of the distribution was discretionary with the executor; and in the absence of an abuse of such discretion a legatee receiving bonds appraised at less than face value had no ground of complaint. Mayo v. Whedon, 47 App. (D. C.) 138.

28. Hayes v. Berdan, 47 N. J. Eq. 567, 21 A 339 [aff 45 N. J. Eq. 461, 17 A 634]; Matter of Stoiber, 103 Misc. 654, 170 NYS 897; Robinson's Est., 24 Pa. Co. 588.

29. Watrous v. Smith, 7 Hun (N. Y.) 544.

30. Davis v. Crandall, 101 N. Y. 311, 4 NE 721.

31. De Loney v. Hull, 128 Ga. 778, 58 SE 349.

32. Matter of Columbia Trust Co., 186 App. Div. 377, 174 NYS 576.

33. Mosley v. Floyd, 31 Ga. 564; Stewart's App., 3 Watts & S. (Pa.) 476; Hall v. Hurford, 2 PaLJR 291; McTeer v. Ferguson, 1 S. C. L. 112. But compare Fraser v. Hext, 21 S. C. Eq. 250 (although a settlement between the representative and a distributee is prima facie conclusive as to the amount due, a note given thereon is not payment or satisfaction, in the absence of any definite agreement or understanding to that effect between the parties).

[a] **Accepting the note of one of two executors** as security for the payment of a legacy, thereby extending the time of payment, discharges the other executor. Mosley v. Floyd, 31 Ga. 564.

[b] **Where the widow agrees to accept the note of an administrator** upon her husband's estate for her distributive share and to forbear the collection thereof for one year, she thereby suspends her remedy in the orphans' court for distribution, but may maintain a common-law action in the common pleas on the administrator's promise to give such note. Ament v. Sarver, 2 Grant (Pa.) 34.

Payment otherwise than in money generally see Payment [30 Cyc 1187].

34. U. S. — Cowen v. Adams, 78 Fed. 536, 24 CCA 198, 80 Fed. 448, 25 CCA 547 [aff 174 U. S. 800 mem, 19 SCt 873 mem, 43 L. ed. 1188 mem].

Ala.—Noble v. Tait, 140 Ala. 469, 37 S 278; Caldwell v. Caldwell, 121 Ala. 598, 25 S 825; Nelson v. Murfee, 69 Ala. 598; Miller v. Irby, 63 Ala. 477; Goodman v. Benham, 16 Ala. 625.

Cal.—In re Angle, 148 Cal. 102, 82 P 668.

Ga.—Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

Ill.—White v. Lewis, 201 Ill. A. 105; Esmond v. Esmond, 154 Ill. A. 357; Egan v. Clark, 87 Ill. A. 246.

Ind.—New v. New, 127 Ind. 576, 27 NE 154; Fiscus v. Fiscus, 127 Ind. 283, 26 NE 831; Barnett v. Thomas, 36 Ind. A. 441, 75 NE 868, 114 AmSR 385.

Iowa.—Wick v. Hickey, 103 NW 469; Bowen v. Evans, 70 Iowa 368, 30 NW 638.

Kan.—Holden v. Spier, 65 Kan. 412, 70 P 348.

Ky.—Davis v. Creech, 180 Ky. 804, 203 SW 714; Ball v. Townsend, Litt. Sel. Cas. 325.

La.—Kernan's Succ., 105 La. 592, 30 S 239.

Me.—Webb v. Fuller, 85 Me. 443, 27 A 346, 22 LRA 177.

Md.—Nalle v. Safe Deposit, etc., Co., 120 Md. 187, 87 A 770; Hemsley v. Hollingsworth, 119 Md. 431, 87 A 506; Hoffman v. Hoffman, 88 Md. 60, 40 A 712, 90 Md. 123, 44 A 1012.

Mass.—Haskell v. Hill, 169 Mass. 124, 47 NE 586; Nickerson v. Chase, 122 Mass. 296; Blackler v. Boott, 114 Mass. 24.

Mich. — Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559; In re Mallary, 127 Mich. 119, 86 NW 541, 89 NW 348.

Minn. — Christians v. Christians, 108 Minn. 157, 121 NW 633.

Miss.—Fonte v. Horton, 36 Miss. 350; McGee v. Ford, 13 Miss. 769; Mahon v. Bower, 2 Miss. 275.

Mo.—Trabue v. Henderson, 180 Mo. 616, 79 SW 451; Hopkins v. Thompson, 73 Mo. A. 401.

N. J.—Hill v. Bloom, 41 N. J. Eq. 276, 7 A 438; Denise v. Denise, 37 N. J. Eq. 163; Brokaw v. Hudson, 27 N. J. Eq. 135; Voorhees v. Voorhees, 18 N. J. Eq. 223; Snyder v. Warbasse, 11 N. J. Eq. 463; Batton v. Allen, 5 N. J. Eq. 99, 43 AmD 630.

N. Y. — Matter of Braunsdorf, 2 App. Div. 73, 37 NYS 229 [aff 13 Misc. 666, 35 NYS 298]; In re Bogart, 28 Hun 466; Wright v. Austin, 56 Barb. 13; Close v. Van Husen, 19 Barb. 505; Matter of Stacey, 89 Misc. 88, 152 NYS 717; Matter of Robinson, 45 Misc. 551, 92 NYS 967, 4 Mills Surr. 428; In re Knibbs, 45 Misc. 83, 91 NYS 697, 4 Mills Surr. 390 [mod on other grounds 108 App. Div. 134, 96 NYS 40]; Bogert's Est., 41 Misc. 598, 85 NYS 291, 4 Mills Surr. 94; Matter of Warner, 39 Misc. 432, 79 NYS 363, 3 Mills Surr. 349; In re Schmidt, 58 NYS 595; Clarke v. Bogardus, 12 Wend. 67, 2 Edw. 387; Smith v. Kearney, 2 Barb. Ch. 533; Livingston v. Newkirk, 3 Johns. Ch. 312; Howland v. Heckscher, 3 Sandf. Ch. 526; Smith v. Murray, 1 Dem. Surr. 34.

N. C.—Johnston v. Cutchin, 133 N. C. 119, 45 SE 522; Ramsour v. Thompson, 65 N. C. 628; Allen v. Smitherman, 41 N. C. 341.

N. D.—Stenson v. H. S. Halvorson Co., 28 N. D. 151, 147 NW 800, LRA 1915A 1179, AnnCas1916D 1289.

Oh.—Lambright v. Lambright, 74 Oh. St. 198, 78 NE 265, 6 AnnCas 807; Tobias v. Richardson, 26 Oh. Cir. Ct. 81; Woodruff v. Snowden, 10 OhS&CP 123, 7 OhNP 520; In re Ellis, 5 OhS&CP 330, 5 OhNP 207.

Pa.—Dull's Est., 137 Pa. 116, 20 A 419; Girard L. Ins., etc., Co. v. Wilson, 57 Pa. 182; Strong v. Bass, 35 Pa. 333; Dreisbach's App., 17 Pa. 120; Dunn v. American Philosophical Soc., 2 Pa. 75; Earnest v. Earnest, 5 Rawle 213; In re Bower, 12 Pa. Dist. 59; Eckes' Est., 8 Pa. Dist. 252, 22 Pa. Co. 287; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466.

R. I.—In re Fisher, 19 R. I. 53, 31 A 579; Armour v. Kendall, 15 R. I. 193, 2 A 311.

S. C.—Kennedy v. Badgett, 19 S. C. 591; Godbold v. Godbold, 13 S. C. 601.

Vt.—Tinkham v. Smith, 56 Vt. 187.

Eng.—In re Binns, [1896] 2 Ch. 584; In re Watson, [1896] 1 Ch. 925; In re Taylor, [1894] 1 Ch. 671; In re Eyton, 45 Ch. D. 458; Coates v. Coates, 33 Beav. 249, 55 Reprint 363; Willes v. Greenhill, 29 Beav. 376, 54 Reprint 673 [aff 4 De G. F. & J. 147, 45 Reprint 1139]; Smith v. Smith, 3 Giffard 263, 66 Reprint 408; Courtenay v. Williams, 3 Hare 539, 25 Eng Ch 539, 67 Reprint 494; Ranking v. Barnard, 5 Madd. 32, 56 Reprint 806; Currie v. Goold, 2 Madd. 163, 56 Reprint 295; Cherry v. Boultbee, 4 Myl. & C. 442, 18 EngCh 442, 41 Reprint 171; Jeffs v. Wood, 2 P. Wms. 128, 24 Reprint 668; Elibank v. Montolieu, 5 Ves. Jr. 737, 31 Reprint 832, 12 ERC 767; Aston v. Pye, 5 Ves. Jr. 350 note, 31 Reprint 628; Sims v. Doughty, 5 Ves. Jr. 243, 31 Reprint 567.

Ont.—Re Holland, 3 Ont. L. 406, 1 OntWR 73; Bain v. Malcolm, 13 Ont. 444.

Newfoundl.—McLea v. McLea, 6 Newfoundl. 37.

"The doctrine is founded upon principle as well as upon authority. It is, in fact, the collection of a debt due the estate. Personal estate is assets in the hands of the administrator. He is required by law to convert personal property into money; to collect all debts due the estate

of the legatee or distributee,[35] or a person otherwise succeeding to his interest,[36] and also against a representative who is a legatee or distributee.[37] The application of the rule is not dependent upon the insolvency of the person beneficially entitled,[38] or affected by such insolvency,[39] or by the circumstance that the debt was not created until after the death of decedent.[40]

from all debtors, including heirs. The heir has no title or claim to personal estate except a distributive share in the surplus after payment of debts and expenses of administration." Marvin v. Bowlby, 142 Mich. 245, 255, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559.

"An administrator or executor has the right and it is his duty, in the due administration of his trust, to retain out of the distributive share of an heir or legatee, and to hold and set off against the claim of a creditor indebted to the estate, an amount, if so much there be, as shall equal the indebtedness of such heir, legatee or creditor to the estate." Lambright v. Lambright, 74 Oh. St. 198, 205, 78 NE 265, 6 AnnCas 807.

[a] **Devastavit** cannot be charged against an administrator for refusing to pay a distributive share, where he holds claims against the distributee to an amount greater than his share. Sayre v. Lewis, 5 B. Mon. (Ky.) 90.

[b] **If a debt is lost by negligently failing to retain it** from a bequest to the debtor, the executor is liable. Shearer's Est., 13 Montg. Co. (Pa.) 98.

[c] **The amount which may be retained may be limited by will** to less than the amount of the indebtedness. In re Cummings, 120 Iowa 421, 94 NW 1117.

[d] **A surety on a bond given by a distributee** to the estate may in equity compel the administrator to apply the distributee's share toward the satisfaction of the bond. Allen v. Smitherton, 41 N. C. 341.

[e] **Disputed claims** of the estate against a legatee are not the subject of retainer. West v. Smith, 8 How. (U. S.) 402, 12 L. ed. 1130 (a claim for the rent of land formerly owned by the testator could not be set off against a legacy, where the legatee was in possession of the land under an adverse claim of title, and no facts were shown on which the rents would be directly recoverable at law).

[f] **An executor, as trustee under the will,** cannot retain the income of a trust created for the debtor's benefit. Voorhees v. Voorhees, 18 N. J. Eq. 223; Matter of Bogert, 41 Misc. 598, 85 NYS 291, 4 Mills Surr. 94.

[g] **Foreign attachment** cannot be maintained against an administrator, as trustee, by a distributee who owes him debts exceeding the amount of his distributive share, even if before contracting such debts he executed to the administrator an assignment of such share in fraud of creditors. Nickerson v. Chase, 122 Mass. 296; Henshaw v. Whitney, 11 Gray (Mass.) 223.

[h] **The rights of remaindermen** cannot be affected by the existence of an indebtedness from the life tenant to decedent. In re Brackey, 166 Iowa 109, 147 NW 188.

[i] **A debt barred by limitations** cannot be set off against a legacy to the debtor. Kimball v. Scribner, 174 App. Div. 845, 161 NYS 511.

[j] **Notes given for the price of slaves** purchased by the heirs at a probate sale cannot be charged against such heirs. Tauzin's Succ., 21 La. Ann. 536.

[k] **A debt due from the husband** (1) of a legatee or distributee cannot be deducted from her legacy or distributive share. Litsey v. Phelps, 5 KyL 513, 12 Ky. Op. 383; Thibodaux's Succ., 10 La. Ann. 653; Haage's App., 17 Pa. 181; Tiernan's Est., 14 PittsbLegJNS (Pa.) 185. (2) It may be set up by cross bill, before final distribution, that the distributive share should not be paid on the ground that the husband's marital rights had attached and that he was indebted to the estate in a greater sum than such share. Crutchfield v. Patten, 44 Ga. 65.

[l] **The question of the obligation of heirs to** collate money paid to them by consent of coheirs prior to the appointment of the executor may be left by the executor to the heirs for settlement. Pon's Succ., 142 La. 721, 77 S 515, AnnCas1918D 939.

[m] **The probate court has authority to determine the amount** due from a distributee of an estate in course of administration, and to authorize the executors to deduct the amount of such indebtedness from the share of such distributee. Esmond v. Esmond, 154 Ill. A. 357; Holden v. Spier, 65 Kan. 412, 70 P 348; Matter of Robinson, 42 Misc. 169, 85 NYS 1087, 4 Mills Surr. 127.

[n] **The surrogate cannot judicially determine** whether a legacy shall be paid, on request of the executor and in the absence of suit to compel payment, where executors hold a note of the legatee to the amount of the legacy. Matter of Harper, 95 Misc. 464, 158 NYS 1000.

Effect of devise or bequest to debtor generally see Wills [40 Cyc 1889–1892].

35. Ala.—Goodman v. Benham, 16 Ala. 625.

Ga.—Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

Iowa.—Wick v. Hickey, 103 NW 469.

N. Y.—Smith v. Kearney, 2 Barb. Ch. 533.

Pa.—Dull's Est., 137 Pa. 116, 20 A 119; Strong v. Bass, 35 Pa. 333; Romig v. Erdman, 5 Whart. 112, 34 AmD 533; Keim v. Muhlenberg, 7 Watts 79; Landmesser's Est., 13 Pa. Super. 467; Rust's Est., 14 Pa. Dist. 317; Hart's Est., 9 Pa. Dist. 274, 23 Pa. Co. 641; Heister's Est., 26 Pa. Co. 49, 18 Montg. Co. 33.

Wash. — Boyer v. Robinson, 26 Wash. 117, 66 P 119.

Eng.—Ranking v. Barnard, 5 Madd. 32, 56 Reprint 806.

36. Denise v. Denise, 37 N. J. Eq. 163; Snyder v. Warbasse, 11 N. J. Eq. 463; In re De Haven, 207 Pa. 147, 152, 56 A 402, 404 [rev in part 5 Dauph. Co. 233, 7 Dauph. Co. 219]; Girard L. Ins., etc., Co. v. Wilson, 57 Pa. 182; Earnest v. Earnest, 5 Rawle (Pa.) 213.

[a] **Retainer against next of kin of deceased distributee. —** A child who claims his father's share of his deceased grandfather's estate takes it subject to the deduction of any debts due from the father to the grandfather's estate. Snyder v. Warbasse, 11 N. J. Eq. 463; Girard L. Ins., etc., Co. v. Wilson, 57 Pa. 182; Earnest v. Earnest, 5 Rawle (Pa.) 213.

[b] **Substituted legatees.—**(1) A substituted legatee takes subject to the equities existing against the primary legatee, and therefore if the primary legatee was indebted to the testator the substituted legatee can take only the excess of the legacy over the debt. Denise v. Denise, 37 N. J. Eq. 163. (2) So where a testator gives to his legatee a share of his estate but directs a deduction from such share of any debt owing to him by the legatee, and by a codicil directs that the share which by his will he had given to the legatee shall go to the legatee's son, the son takes the share subject to deduction of his father's debts to testator. De Haven's Est., 207 Pa. 147, 152, 56 A 402, 404 [rev in part 5 Dauph. Co. 233, 7 Dauph. Co. 219].

[c] **A direct bequest by a grandfather to his grandchild** is not subject to any deduction on acount of a debt from the father of the legatee to the testator. Thatcher v. Cannon, 6 Bush (Ky.) 541.

37. Cal.—Sanchez v. Forster, 133 Cal. 614, 65 P 1077.

Md.—Linthicum v. Polk, 93 Md. 84, 48 A 842; Hoffman v. Armstrong, 90 Md. 123, 44 A 1012; Gosnell v. Flack, 76 Md. 423, 25 A 411, 18 LRA 158.

N. J.—Young v. Schelly, (Ch.) 21 A 1049.

N. C.—Grant v. Edwards, 92 N. C. 447.

R. I.—Henry v. Fiske, 11 R. I. 318.

Eng.—Sims v. Doughty, 5 Ves. Jr. 243, 31 Reprint 567.

[a] **Illustration.—**Where an administrator who is also an heir owes the estate more than the value of his distributive share, he should account for such share as a payment on the debt, and if he fails to do so the amount may be collected of his bondsmen. Sanchez v. Forster, 133 Cal. 614, 65 P 1077.

[b] **Indebtedness arising from official misconduct.—**The amount in which an executor who is also a legatee misapplies the funds of the estate may be deducted from his legacy. Young v. Schelly, (N. J. Ch.) 21 A 1049; Grant v. Edwards, 92 N. C. 447.

[c] **One executor may retain from the legacy of his coexecutor** the amount due by the latter for a devastavit. Sims v. Doughty, 5 Ves. Jr. 243, 31 Reprint 567.

38. In re Angle, 148 Cal. 102, 82 P 668.

39. Wick v. Hickey, (Iowa) 103 NW 469; Hoffman v. Armstrong, 90 Md. 123, 44 A 1012; Lambright v. Lambright, 74 Oh. St. 198, 78 NE 265, 6 AnnCas 807; In re Watson, [1896] 1 Ch. 925.

[a] **As against the trustee of an insolvent legatee,** the right of retainer may be exercised. Hoffman v. Armstrong, 90 Md. 123, 44 A 1012.

[b] **The fact that the debtor legatee had become a bankrupt** after the testator's death does not preclude the executor from retaining the amount of the debt. Wick v. Hickey, (Iowa) 103 NW 469; In re Watson, [1896] 1 Ch. 925; Bousfield v. Lawford, 1 De G. J. & S. 459, 66 EngCh 356, 46 Reprint 182.

[c] **If the bankruptcy occurred during the testator's lifetime** the executor cannot retain a debt due from the bankrupt to the testator, because the executor was never entitled to more than a dividend on the debt. In re Hodgson, 9 Ch. D. 673; Cherry v. Boultbee, 4 Myl. & C. 442, 18 Eng Ch 442, 41 Reprint 171.

40. Ind.—New v. New, 127 Ind. 576, 27 NE 154.

Ky.—Brand v. Brand, 109 Ky. 721, 60 SW 704, 22 KyL 1366.

Md.—Hoffman v. Armstrong, 90 Md. 123, 44 A 1012.

Mass.—Haskell v. Hill, 169 Mass. 124, 47 NE 586.

Miss.—McGee v. Ford, 13 Miss. 769.

Mo.—Hopkins v. Thompson, 73 Mo. A. 401.

N. J.—Young v. Schelly, 21 A 1049.

N. C.—Grant v. Edwards, 92 N. C. 447.

Oh.—Lambright v. Lambright, 74 Oh. St. 198, 205, 78 NE 265, 6 AnnCas 807.

"This right and duty exists whether the heir, legatee or creditor was indebted to decedent at the time of his death or contracted a liability

Such a retainer is not a set-off, although it is sometimes termed such, but is an exercise of the right of the representative to apply the funds in his hand to the payment of a debt due from the distributee to the estate.[41]

Interest. The right of retainer applies to both principal and interest,[42] but it is usually considered that interest should not be charged for the time after decedent's death unless the representative is charged with interest in his final settlement.[43]

Realty or proceeds thereof. It has been asserted that the right to retain for indebtedness exists even though the fund to be distribtued arose from the sale of real estate of decedent;[44] but it has also been held that, where an heir is indebted to the estate of his ancestor, neither the heir's distributive share of the real estate of such ancestor nor the proceeds of a sale thereof in the hands of the administrator is chargeable with such indebtedness, but the debt must be collected in the same manner as other debts due the estate.[45]

[§ 1318] **b. Debt Due to Executor or Administrator Individually.** In some jurisdictions a debt due to the personal representative individually by a legatee or distributee may be set off against his legacy or distributive share on a distribution of the estate to the beneficiaries,[46] but in other jurisdic-

to the estate thereafter, in either event the right of the heir or legatee to participate in the distribution of the estate, or of the creditor to be paid his claim, is subject and subordinate to the debt of such distributee or creditor to the estate, and the latter, in so far as there are assets in the hands of the administrator applicable thereto, must first be paid and satisfied." Lambright v. Lambright, supra.

[a] **There may be a retainer where** the legatee or distributee: (1) Borrows money of the estate from the executor or administrator. New v. New, 127 Ind. 576, 27 NE 154; Haskell v. Hill, 169 Mass. 124, 47 NE 586. (2) Buys property of the estate at a sale thereof by the executor or administrator. McGee v. Ford, 13 Miss. 769; Mahon v. Bower, 2 Miss. 275. (3) So also a debt due the representative through the satisfaction by him of the liability of decedent as surety for the distributee is subject to retainer. Hopkins v. Thompson, 73 Mo. A. 401; Ramson v. Thompson, 65 N. C. 628.

[b] **Marital liability of husband.**—A married man being liable at common law for the funeral expenses and physician's bill of his wife, the amount of such indebtedness may be retained out of his share in her estate. Brand v. Brand, 109 Ky. 721, 60 SW 704, 22 KyL 1366.

41. Fiscus v. Fiscus, 127 Ind. 283, 26 NE 831; Holden v. Spier, 65 Kan. 412, 418, 70 P 348 [quot In re Lietman, 149 Mo. 112; 120, 50 SW 307, 73 AmSR 374]; Webb v. Fuller, 85 Me. 443, 27 A 346, 22 LRA 177; Dingle v. Coppen, [1899] 1 Ch. 726; Cherry v. Boultbee, 4 Myl. & C. 442, 18 EngCh 442, 41 Reprint 171.

"It is not the technical right of set-off in actions at law. It is rather called in the old cases the right of retainer. It is an equitable right of its own nature, and not at all dependent upon any statute." Webb v. Fuller, 85 Me. 443, 445, 27 A 346, 22 LRA 177.

"This right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee, until the latter has discharged the obligation which he owes to the estate." Holmes v. McPheeters, 149 Ind. 587, 590, 49 NE 452.

"It matters not by what name the proceeding is called, whether retainer, advancement, set-off, or assets in the hands of the legatee; the practical result is the same, and it rests upon wholesome principles of right and justice which can be administered in probate courts without the aid of a court of conscience." Holden v. Spier, supra [quot In re Lietman, supra].

42. Matter of Downs, 39 Misc. 621, 80 NYS 659, 3 Mills Surr. 397.

[a] **Rate.**—Where a father lent money to his children, and provided that the sums advanced should, with fixed interest, be deducted from their shares, the father's executors cannot charge a higher rate of interest than he fixed. Matter of Lown, 165 App. Div. 552, 151 NYS 171 [aff 216 N. Y. 725 mem, 111 NE 1090 mem].

43. Ala. — Munden v. Bailey, 70 Ala. 63.

N. Y.—Matter of Lown, 165 App. Div. 552, 151 NYS 171 [aff 216 N. Y. 725 mem, 111 NE 1090 mem]; Haskin v. Teller, 3 Redf. Surr. 316.

N. C.—Smith v. Smith, 101 N. C. 461, 8 SE 128, 131, 133.

Oh.—Tobias v. Richardson, 26 Oh. Cir. Ct. 81.

S. C.—McClendon v. Gomillon, 23 S. C. L. 48.

44. Ala. — Nelson v. Murfee, 69 Ala. 598.

Ind.—Fiscus v. Moore, 121 Ind. 547, 23 NE 362, 7 LRA 235 [mod Ball v. Green, 90 Ind. 75]; Barnett v. Thomas, 36 Ind. A. 441, 75 NE 868, 114 AmSR 385.

Mo.—Hopkins v. Thompson, 73 Mo. A. 401.

N. Y.—Close v. Van Husen, 19 Barb. 505. But see infra note 45.

Oh.—Keever v. Hunter, 62 Oh. St. 616, 57 NE 454; Woodruff v. Woodruff, 23 Oh. Cir. Ct. 408.

Pa.—Hartman's Est., 12 Pa. Super. 69; Heister's Est., 26 Pa. Co. 49, 18 Montg. Co. 33.

Wash. — Boyer v. Robinson, 26 Wash. 117, 66 P 119.

Newfoundl.—McLea v. McLea, 6 Newfoundl. 37.

[a] **Priority of right.**—(1) The personal representative is entitled to retain the share of an heir or distributee in such moneys in payment of a debt which the latter owes to the estate as against the claim of a judgment creditor of such heir or distributee. Nelson v. Murfee, 69 Ala. 598. (2) He has a right to subject lands of his intestate to the payment of a debt due by the heir to the estate in preference to the claims of a purchaser from the heir and also to the lien of a creditor of the heir attaching to the land on the death of the ancestor. Streety v. McCurdy, 104 Ala. 493, 16 S 686.

[b] **Equalization of shares of legatees or distributees.** — (1) Where some of the legatees or distributees have been voluntarily overpaid their shares, or are otherwise indebted to the estate, the right of retainer out of the proceeds of a sale of the real estate may be exercised if necessary to secure equalization of their shares. Tobias v. Richardson, 26 Oh. Cir. Ct. 81; Githens' Est., 10 Pa. Dist. 375; Wittmann's Est., 9 Pa. Dist. 47. Contra Cockrill v. Lindon, 43 SW 451, 19 KyL 1379. (2) In equalizing distribution on account of overpayments made to a legatee the fact that the only fund out of which the excess can be retained is the proceeds of real estate is of no consequence. A devisee who takes real or personal property in contravention of a will, and so disappoints another devisee, shall have nothing under the will until compensation is made to the disappointed devisee. Landmesser's Est., 13 Pa. Super. 467.

[c] **Devisee of specific realty.** — The indebtedness of a devisee of specific realty is not, without judgment and levy by the executor, a charge upon or set-off against the realty so specifically devised. Woodruff v. Snowden, 10 OhS&CP 123, 7 OhNP 520.

45. Mass. — Jones v. Treadwell, 169 Mass. 430, 48 NE 339.

Mich. — Marvin v. Bowlby, 142 Mich. 245, 255, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559.

N. J.—La Foy v. La Foy, 43 N. J. Eq. 206, 10 A 266, 3 AmSR 302.

N. Y.—Smith v. Kearney, 2 Barb. Ch. 533.

S. C.—Sartor v. Beaty, 25 S. C. 293. "The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification. It has been held repeatedly, not only that no sale of real estate can be made except for this purpose, but also that only so much of the real estate can be sold as may be necessary for that purpose, and that, where because of the indivisibility of real estate the whole must be sold, the surplus by the doctrine of equitable conversion is considered as real estate, and as such goes to the heirs." Marvin v. Bowlby, supra [foll Broas v. Broas, 153 Mich. 310, 116 NW 1077].

[a] **Effect of statute.**—A statute empowering the probate court to apply a debt toward the payment of a legacy or of a distributive share has reference only to such shares as are, or have become in the course of administration, personal property or estate. Jones v. Treadwell, 169 Mass. 430, 48 NE 339.

[b] **"There is one recognized exception** to the general rule above stated. Indebtedness of the heir to the estate which may be held as an advancement may be considered in the division of the real estate among heirs." Marvin v. Bowlby, 142 Mich. 245, 256, 105 NW 751, 113 AmSR 573, 4 LRANS 189, 7 AnnCas 559.

46. N. Y.—Dubois v. Dubois, 6 Cow. 494.

Tenn.—Fay v. Reager, 2 Sneed 200.

Va.—Preston v. Davis, 102 Va. 178, 45 SE 865.

W. Va.—Hooper v. Hooper, 32 W. Va. 526, 9 SE 937.

Eng.—Dingle v. Coppen, [1899] 1 Ch. 726.

[a] **This rule applies** even against an attaching creditor of the legatee. Fay v. Reager, 2 Sneed (Tenn.) 200.

[b] **In equity** a debt due an administrator individually from a distributee may be allowed as a payment on that distributee's share of the estate. Preston v. Davis, 102 Va. 178, 45 SE 865.

[c] **A decree for distribution**

tions it is held otherwise,[47] unless the distributee consents,[48] or unless the debt is one for advances or disbursements by the representative.[49]

[§ 1319] **c. Retainer from Specific Personal Property.** Specific personal property awarded to a distributee[50] or a specific legacy[51] is not subject to the representative's right of retainer so long as there are general assets.[52]

[§ 1320] **5. Application of Payments.**[53] In accordance with the rule that debts must be paid before legacies or distributive shares, payments to a legatee or distributee should be applied to debts due from the estate to the legatee or distributee before being applied to the legacy or distributive share,[54] and to accrued interest on such debts[55] or distributive shares[56] before application to the principal.

[§ 1321] **6. Notice and Tender.** The representative should notify legatees or distributees of his readiness to pay over,[57] and if from any cause he is uncertain who such legatees or distributees are he should institute proceedings to ascertain them.[58] After giving such notice the representative need not make a tender of the amount of the legacy or distributive share to one who is capable of asserting his rights,[59] especially where acceptance of a previous tender has been refused.[60] The personal representative is not required to notify creditors of the distributees before making distribution.[61]

[§ 1322] **7. To Whom Payment Should Be Made**[62]**—a. In General.** Payment should be made to the person entitled to receive the legacy or distributive share,[63] or to his properly authorized rep-

changes the character of the claim for the legacy or distributive share into one against the representative personally, and, in an action of debt on the decree the representative may set off a demand due to him in his own right. Dubois v. Dubois, 6 Cow. (N. Y.) 494.

[d] **On an accounting between an administrator and a distributee,** the amount found to be due the distributee by a commissioner to whom the accounting has been referred is properly credited on a judgment owing to the administrator by the distributee, as of the date when the commissioner closed his account, and not as of the date of the decree. Kent v. Kent, (Va.) 34 SE 32.

[e] **A debt due by a guardian** in his individual capacity to the representative cannot be set off against the ward's distributive share, decreed to be paid to the guardian. Shriver v. Garrison, 30 W. Va. 456, 4 SE 660.

47. Ala.—Bondurant v. Thompson, 15 Ala. 202; Kidd v. Porter, 13 Ala. 91.

Ky.—Smith v. Smith, 1 Ky. Op. 302.

Pa.—Colestock's App., 4 Walk. 334; Bradshaw's App., 3 Grant 109; Gallen's Est., 25 Pa. Co. 265.

S. C.—Richbourg v. Richbourg, 5 S. C. Eq. 168.

Wash.—McLaughlin v. Barnes, 12 Wash. 373, 41 P 62.

[a] **Where the whole estate is in the hands of a receiver,** the administrator cannot retain out of the fund the amount of a debt owing to him by a distributee. Jarboe v. McLane, 1 Ky. Op. 474.

[b] **An assignment of the representative's claim** after a decree of distribution does not prevent the court from compelling him to pay to the distributee her share on the ground that the representative has been garnished in a suit by the assignee against the distributee on the claim assigned. McLaughlin v. Barnes, 12 Wash. 373, 41 P 62.

[c] **A contract for payment out of the debtor's share** in the estate of which the creditor is administrator would change the rule. Horton v. Hill, 138 Ala. 625, 36 S 465.

48. Kidd v. Porter, 13 Ala. 91.

49. Smith v. Huger, 1 S. C. Eq. 247 (where an executor advances money and becomes bound for a legatee for sundry debts, and the latter dies insolvent, the executor may retain out of his legacy sufficient to indemnify him).

Advances and disbursements by representative see supra §§ 1305–1311.

50. Rose v. O'Brien, 50 Me. 188.

51. Fonte v. Horton, 36 Miss. 350; Clarke v. Cotton, 17 N. C. 51; In re Taylor, [1894] 1 Ch. 671.

[a] **The probate court will order the delivery of a specific legacy** and will leave the executor to avail himself of his set-off by getting an injunction to stay the delivery. Fonte v. Horton, 36 Miss. 350.

52. Clarke v. Cotton, 17 N. C. 51.

53. See generally Payment [30 Cyc 1227].

54. Coco's Succ., 32 La. Ann. 325; Ordinary v. McCullom, 34 S. C. L. 494; Atkins v. Atkins, 71 Vt. 422, 45 A 1037.

[a] **Restitution of dowry** is a debt of the estate to which payment must be applied before application to the widow's distributive share. Coco's Succ., 32 La. Ann. 325.

[b] **Voluntary payments to a guardian** received by him on account of debts due to his ward as distributee of both real and personal estate may be applied pro rata to both debts. Ordinary v. McCullom, 34 S. C. L. 494.

[c] **Where the testator's life insurance** collected by his representatives is decreed to be paid by them to the beneficiary in the policy, who is also a legatee under the will, general payments made by the representative to such beneficiary and legatee should be first applied to extinguish the indebtedness for the amount collected on the policy. Atkins v. Atkins, 71 Vt. 422, 45 A 1037.

[d] **Where the decedent was also guardian of a distributee,** any sum paid to the latter by the representative will be presumed to be on account of his distributive share, particularly where the personal representative denies the fact of the guardianship, or that anything was due on that account. Latham v. Wilcox, 99 N. C. 367, 6 SE 711.

Priorities see supra §§ 1151–1265.

55. Morton v. Church Home for Females, etc., 70 SW 841, 24 KyL 1122; Coco's Succ., 32 La. Ann. 325; Geddis v. Irvine, 5 Pa. 508.

[a] **A specific legacy is a "debt"** from the time it is due within the meaning of a statute, which provides that partial payments on interest-bearing "debts" shall be first applied to the deduction of accrued interest. Morton v. Church Home for Females, etc., 70 SW 841, 24 KyL 1122.

56. Schnell v. Schroder, 8 S. C. Eq. 334. But see Cary v. Macon, 4 Call (8 Va.) 605 (where a husband gives a receipt for two hundred pounds in part of a bequest to his wife the payment should be applied to the principal and not to the interest).

57. Tilton v. American Bible Soc., 60 N. H. 377, 49 AmR 321; Wilcox v. McCarthy, 3 Bradf. Surr. (N. Y.) 284; Walthour v. Walthour, 2 Grant (Pa.) 102; Brown v. Brown, 75 S. C. 25, 54 SE 838.

[a] **Sufficiency of notice.** — The fact that a notice of proposed distribution of an estate is styled to decedent's "heirs at law," instead of "devisees or legatees," does not affect its validity. Brown v. Brown, 75 S. C. 25, 54 SE 838.

58. Tilton v. American Bible Soc., 60 N. H. 377, 49 AmR 321.

59. Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77.

[a] **An executor is not bound to search out a legatee,** but it is sufficient if he is always ready, when called on, to pay the legacy. Thompson v. Youngblood, 1 S. C. L. 248.

60. Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77.

61. American Agricultural Chemical Co. v. Scrimger, 130 Md. 389, 100 A 774, LRA1917F 394.

62. Effect of payment to wrong person see infra § 1335.

63. Cal. — Bryant v. McIntosh, 3 Cal. A. 95, 84 P 440.

Ga.—McAfee v. Flanders, 138 Ga. 403, 75 SE 319; Lamar v. Harris, 121 Ga. 285, 48 SE 932.

Ind.—State v. Taggart, 88 Ind. 269.

Mass. — Newcomb v. Williams, 9 Metc. 525.

Miss.—Christman v. Christman, 108 Miss. 37, 66 S 285.

Mo.—Banks v. McCarty, 5 Mo. 1.

N. Y.—In re Altman, 155 NYS 507 [aff 217 N. Y. 680 mem, 112 NE 1059 mem]. Compare Elliott v. Lewis, 3 Edw. 40 (the distributive share of two sons of a first husband of decedent should be paid to the second husband to whom they are indebted).

Pa.—Brooke's Est., 13 Pa. Dist. 29, 29 Pa. Co. 466; Philadelphia v. Brennan, 5 Pa. Dist. 116, 18 Pa. Co. 59.

Tenn.—Stewart v. Glenn, 3 Heisk. 581.

Wash.—In re Cooper, 95 Wash. 351, 163 P 935.

Eng.—Cooper v. Thornton, 3 Bro. Ch. 186, 29 Reprint 479.

[a] **Dividends.** — Where testator bequeathed stock in trust for his daughter, and the trustee was also an executor and the will directed that the executor should hold the stock, with other shares disposed of by the will, until a fixed time, paying the dividends "to each of the legatees annually," it was held that the executor should pay the dividends directly to the beneficiaries. Lamar v. Harris, 121 Ga. 285, 48 SE 932.

[b] **Responsibility of finding distributee rests with representative.**— The function of the court is ended when it has ascertained the name and the share of the distributee; the responsibility of finding the distributee rests with the accountant. Brooke's Est., 13 Pa. Dist. 29, 29 Pa. Co. 466.

[c] **A legacy to a certain person for himself and others** is properly paid to such person. Cooper v. Thornton, 3 Bro. Ch. 186, 29 Reprint 479 (legacy to one "to be divided between himself and his family"); Robinson v. Tickell, 8 Ves. Jr. 142, 7 Reports 5, 32 Reprint 307 (legacy to one "for her and her children's use").

[d] **Payment to clerk of court improper.**—A statute authorizing the payment by an administrator of money to the clerk for distribution, having been enacted for the convenience of the administrator, he cannot relieve himself from the obligation imposed by the acceptance

resentative[64] or assignee,[65] unless payment to a third person is directed by the legatee or distributee.[66] Ordinarily the court has no jurisdiction to order the funds of the estate paid into court, in the absence of statutory authority, and such payment will not relieve the representative of liability for any loss;[67] but if the persons entitled refuse to accept the amount found due them, the representative may be ordered to pay the amount into court and receive his discharge.[68]

[§ 1323] **b. Where Persons Entitled Deceased.**[69] The share of a deceased legatee or distributee is generally payable to his duly qualified representative,[70] although if no administration is had upon his estate, or creditors are in nowise prejudiced, it may be paid directly to his heirs or distributees.[71]

[§ 1324] **c. Where Persons Entitled Unknown**

of his trust by making the payment to the clerk, and the validity of a subsequent order for distribution is unaffected by such payment. Mefford v. Lamkin 38 Ind. A. 33, 77 NE 960, 76 NE 1024. See also Stewart v. Glenn, 3 Heisk. (Tenn.) 581 (construing statute).

Persons entitled to:
Distributive shares see Descent and Distribution §§ 25–110.
Legacies or devises see Wills [40 Cyc 1051–1063, 1445 et seq].

64. Jacks v. Adair, 31 Ark. 616; Williams v. Cushing, 34 Me. 370; Whiteside's Est., 8 Pa. Dist. 274.

[a] **Counsel** appearing before an auditing judge for a distributee has authority to receive the amount awarded. Payment direct to the client is irregular and improper. Whiteside's Est., 8 Pa. Dist. 274.

[b] **Where an auditor is asked to indicate** the person to receive the share of one of the legatees, but no particular person is indicated to him, he cannot be convicted of error in distributing the share to "the trustee appointed, or hereafter to be appointed," of the legatee mentioned. Garman's Est., 32 Pa. Super. 494.

65. La.—Webre's Succ., 35 La. Ann. 266.

Mass.—New York Security Bank v. Callahan, 220 Mass. 84, 107 NE 385.

N. J.—Stewart v. Fallon, (Ch.) 58 A 96.

N. Y.—Sayles v. Best, 140 N. Y. 368, 35 NE 636 [aff 20 NYS 951]; Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627, 55 NE 1096].

Pa.—Dickinson's Est., 4 Pa. Dist. 777.

[a] **Payment to legatee after notice of assignment.**—A payment to a legatee after notice of an assignment of his interest is at the risk of the personal representative; and he is not entitled to credit therefor on the assignment being sustained. Stewart v. Fallon, (N. J. Ch.) 58 A 96.

[b] **Payment to a pretended assignee,** in bad faith or without due heed, will not protect the representative. Dorsheimer v. Rorback, 23 N. J. Eq. 46 [aff 25 N. J. Eq. 516].

[c] **The grantee of an heir apparent** cannot be paid the interest of such heir which was conveyed to him before the decedent's death. In re Ryder, 141 Cal. 366, 74 P 993.

[d] **The probate court has no jurisdiction to determine the validity** of an equitable assignment among the heirs. The remedy is by bill in equity. Crockett v. Sibley, 73 N. H. 322, 61 A 469.

66. Spear v. Banks, 125 Ala. 227, 27 S 979; Watson v. McClanahan, 13 Ala. 57; Cartmel v. Rench, 2 J. J. Marsh. (Ky.) 118; Matter of Ryder, 41 App. Div. 247, 58 NYS 635; Matter of Mount, 27 Misc. 411, 59 NYS 176, 1 Mills Surr. 89; In re Stephens, 64 NYS 990.

[a] **Illustration.**—An executor, at the request of several persons to whom certain property had been bequeathed, sold the property and took a note for the price. The legatees were indebted to the purchaser and the executor indorsed the amount of the debt on the note. It was held that the transaction operated as a payment to the legatees, the executor having acted as their agent. Cartmel v. Rench, 2 J. J. Marsh. (Ky.) 118.

[b] **Payment to a creditor of the legatee** by the direction of the legatee is good. Watson v. McClanahan, 13 Ala. 57.

[c] **Burden of proof.**—The burden of proving that a payment made to a third person was authorized is upon the legal representative. Matter of Phillips, 12 Hawaii 284.

67. In re Sarment, 123 Cal. 331, 55 P 1015; Reed v. Reed, 74 SW 207, 24 KyL 2438; Matter of Sackett, 38 Misc. 463, 77 NYS 1030, 3 Mills Surr. 210; Matter of Te Culver, 22 Misc. 217, 49 NYS 820, 2 Gibb. Surr. 316.

[a] **An executor is entitled to discharge the duties of his trust,** and he should not be required to surrender the estate committed to his charge by paying the funds into court before distribution is ordered, unless for grave reasons. Reed v. Reed, 74 SW 207, 24 KyL 2438.

68. Garman's Est., 32 Pa. Super. 494; Lupher's Est., 26 Pa. Co. 172; Gready's Est., 14 Phila. (Pa.) 259; Rhode Island Hospital Trust Co. v. Warwick, 29 R. I. 393, 71 A 644; James v. Craighead, (Tex. Civ. A.) 69 SW 241.

[a] **On the refusal of successive town councils to accept a legacy** to them, to be held in perpetual trust for keeping in repair the testator's burial lot, the executor will be permitted to pay the fund into the registry of the court, in order that he may settle his account and that opportunity may be afforded to the town council within a reasonable time to accept the legacy. Rhode Island Hospital Trust Co. v. Warwick, 29 R. I. 393, 71 A 644.

[b] **Payment must be to clerk.**—An order directing an administrator to pay money into court is not complied with by a payment made to the judge. It must be made to the county clerk, who alone has the right to receive and is the custodian of money paid into the probate court under its orders. James v. Craighead, (Tex. Civ. A.) 69 SW 241.

69. Where death presumed from absence see infra § 1324.

70. Ala.—McConico v. Cannon, 25 Ala. 462.

Conn.—Cooley v. Pigott, 84 Conn. 323, 80 A 92; Kingsbury v. Scovill, 26 Conn. 349.

Iowa.—Moore v. Gordon, 24 Iowa 158.

Me.—Grant v. Bodwell, 78 Me. 460, 7 A 12.

Mass.—Newcomb v. Williams, 9 Metc. 525; Foster v. Fifield, 20 Pick. 67.

Mo.—Hanenkamp v. Borgmier, 32 Mo. 569; Rouggley v. Teichmann, 10 Mo. A. 257.

N. H.—McAllister v. Hayes, 76 N. H. 108, 79 A 726.

N. Y.—Walter v. Walter, 133 App. Div. 893, 118 NYS 268; Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627, 55 NE 1096].

Oh.—Banning v. Gotshall, 62 Oh. St. 210, 56 NE 1030.

Pa.—Anderson v. Anderson, 183 Pa. 480, 38 A 1007; Bergdoll's Est., 11 Pa. Dist. 701, 699; Schrack's Est., 9 Pa. Dist. 149; Sweed's Est., 10 Pa. Co. 463; Stokes' Est., 3 Pa. Co. 193; Witmer's Est., 19 LancLRev 324.

Tenn. — Puckett v. James, 2 Humphr. 565.

Eng.—Cooper v. Cooper, L. R. 7 H. L. 53, 25 ERC 555; Bailey v. Hammond, 7 Ves. Jr. 590, 32 Reprint 237.

Ont.—Uffner v. Lewis, 27 Ont. A. 242.

"If Thompson is living, he is entitled to receive the fund. If he has died since Mrs. Bradley's death, his heirs at law are not his legal representatives in the sense in which that term was used by the Court of Probate in its order. That court could not properly undertake to distribute Thompson's estate as a part of the settlement of Mrs. Bradley's. The fund would have to pass to Thompson's administrator or executor for the purpose of distribution, and would be subject to the expense of settling his estate. In the settlement of his estate the Court of Probate would ascertain who are his legal heirs. General Statutes, § 394. The 'legal representative' or 'personal representative' of a deceased person, as the term is ordinarily used, is his executor or administrator. 2 Jarman on Wills (6th Ed.) p. 117. It was in this sense that the court used it in the order in question. None of the heirs at law, therefore, had any claim upon the fund under the order of the Court of Probate." Cooley v. Pigott, 84 Conn. 323, 325, 80 A 92.

[a] **Administrator ad litem.** — Where there is no general administration an administrator ad litem may be appointed to receive payment. Keith v. McCord, 140 Ala. 402, 37 S 267.

71. Ala.—Johnson v. Longmire, 39 Ala. 143.

Cal.—McClellan v. Downey, 63 Cal. 520.

Conn.—Ward v. Ives, 75 Conn. 598, 54 A 730.

Mich.—In re Sprague, 125 Mich. 357, 84 NW 293.

Miss.—Maxwell v. Craft, 32 Miss. 307.

Mo.—Rouggley v. Tiechmann, 10 Mo. A. 257.

N. Y.—Matter of Losee, 46 Misc. 363, 94 NYS 1082, 4 Mills Surr. 483 [aff 119 App. Div. 107, 104 NYS 1132]; Matter of Maybee, 40 Misc. 518, 82 NYS 809, 3 Mills Surr. 543. But see Matter of Lane, 20 NYS 78, 2 Conn. Surr. 266 (where there is a sum to be distributed to an estate, of which no administrator has been appointed, there is no person to whom the share can be decreed to be paid, and in such case the administrator must hold it until someone entitled to receive it shall appear, when it will be the subject of further accounting).

Pa.—Schrack's Est., 9 Pa. Dist. 149; Sweed's Est., 10 Pa. Co. 463; Ogden's Est., 9 Kulp 412; Beck's Est., 16 LancLRev 215.

Va.—Robertson v. Gillenwaters, 85 Va. 116, 7 SE 371.

[a] **Illustration.** — Where a distributee dies before receiving his distributive share, leaving the same heirs as the intestate, owing no debts, and owning no property but his distributive share of the intestate's estate, distribution of his estate should be made directly to the heirs and not to the administrator. Maxwell v. Craft, 32 Miss. 307.

[b] **Where a widow dies pending the distribution of her husband's estate** consisting only of community property, the decree distributing his estate may direct a payment of the widow's interest to her heirs, none of her creditors objecting. McClellan v. Downey, 63 Cal. 520.

or Absent. In cases where there are unknown[72] or absent and unheard-from[73] legatees or distributees it becomes the duty of the personal representative to invest the fund[74] or pay it into court[75] or into the county or state treasury,[76] according to the statute, for the benefit of whoever may subsequently establish a legal right to it.[77] Where decedent was a foreigner, and his next of kin reside in the country of his nativity, the administrator has been allowed to turn over the balance of the estate to the consul general of decedent's country.[78] Where the absence of the person entitled has been so prolonged as to raise a presumption of his death, and an administrator of his estate has been appointed, payment should be to such administrator,[79] or, it has been held, a distribution to the heirs of the absentee may be decreed where his absence, unheard from, long antedated the death of the decedent,[80] or, if the absentee left no heirs, his share may be divided among the other heirs on their executing a refunding bond to indemnify the representative against the claim of such absent heir.[81]

[§ 1325] **d. Where Persons Entitled under Disability—(1) Infants.** As a general rule a bequest to, or the distributive share of, a minor, when due, can be legally paid only to his properly accredited and qualified guardian,[82] but if there is no properly qualified general guardian it may be paid into

72. [a] **A distributee is not "unknown"** within the meaning of a statute providing for the payment to the state treasurer of a distributive share, where the person entitled thereto is unknown, where the distributee is an estate of which no administrator has been appointed. Matter of Lane, 20 NYS 78, 2 Conn. Surr. 266.

73. [a] **Presumption of death of legatee or distributee.**—An absent or unknown legatee or distributee will not be presumed to be dead for the purpose of distributing his share in the estate, unless the circumstances of the case are such that his not having been heard of for a long period of years cannot be accounted for without assuming his death. Dunn v. Travis, 56 App. Div. 317, 67 NYS 743.

74. Walthour v. Walthour, 2 Grant (Pa.) 102; Miles' Est., 2 Pa. Dist. 103, 12 Pa. Co. 383; Vogdes' Est., 6 Pa. Co. 441, 23 WklyNC (Pa.) 471; Lyon v. Magagno, 7 Gratt. (48 Va.) 377. But see Waggener v. Hardin, 2 B. Mon. (Ky.) 153 (administrators might make a valid allotment of the slaves of their intestate in the absence of a part of the distributees, and an allotment thus made could not be canceled, so as to reinvest the administrator with the legal title, after the slaves had passed into the bona fide possession of a third person).

75. Matter of Morgan, 1 Misc. 71, 22 NYS 1064, Pow. Surr. 123; Moore v. Eure, 101 N. C. 11, 7 SE 471, 9 AmSR 17; Gable's App., 40 Pa. 231; Eroch's Est., 1 Kulp (Pa.) 81; Vogdes' Est., 6 Pa. Co. 441, 23 WklyNC (Pa.) 471; Lyon v. Magagno, 7 Gratt. (48 Va.) 377.

[a] **A legacy to an infant who dies before it is payable,** and for whom no administrator has been appointed, will be ordered to be paid into court for the benefit of whoever may establish a legal right to it. Matter of Morgan, 1 Misc. 71, 22 NYS 1064, Pow. Surr. 123.

[b] **In England** under the present practice, where it is doubtful to whom a legacy is payable, the better course is not by payment into court under the Trustee Relief Act, but by an administrative summons waiving accounts simply for the purpose of obtaining the decision of the judge, or, after taking out such summons, where both parties agree by submitting a statement of facts in the nature of a special case for the opinion of the judge. In re Birkett, 9 Ch. D. 576.

76. State v. Taggart, 88 Ind. 269; Fuhrer v. State, 55 Ind. 150; Dorr v. Com., 1 Mass. 293; In re Bomino, 83 Mo. 433; Kinneally v. Peo., 98 App. Div. 192, 90 NYS 587; Peo. v. Maltbie, 102 Misc. 575, 169 NYS 339 [aff 184 App. Div. 743, 172 NYS 483]; Matter of Beaver, 62 Misc. 155, 116 NYS 424, 4 Mills Surr. 74; Matter of Culver, 22 Misc. 217, 49 NYS 820; In re Hochhalter, 106 Misc. 419, 176 NYS 264; Matter of Hammer, 105 Misc. 721, 174 NYS 887; Matter of Lane, 20 NYS 78, 2 Conn. Surr. 266.

[a] **Payment to clerk of court as ex officio treasurer of district.**—In re McIntyre, 1 Alaska 73.

[b] **Payment to the surrogate does not discharge** the representative. Matter of Sackett, 38 Misc. 463, 77 NYS 1030, 3 Mills Surr. 210.

77. In re Brown, 187 Ill. A. 109; Kinneally v. Peo., 98 App. Div. 192, 90 NYS 587; Matter of Morgan, 1 Misc. 71, 22 NYS 1064, Pow. Surr. 123; In re Ziegler, 25 Pa. Co. 611, 18 LancLRev 401; Re Ashman, 15 Ont. L. 42, 10 OntWR 250.

[a] **Money paid into the city treasury by a public administrator** may be obtained by any person entitled thereto, whether in his own right or an assignee, by means of a special proceeding instituted by petition in the surrogate's court. Matter of Conway, 5 Dem. Surr. (N. Y.) 290.

[b] **Jurisdiction to determine the right** to a legacy or distributive share which has been paid into the state treasury because the person entitled thereto was unknown, is in the supreme court or the surrogate's court having jurisdiction of the settlement of the estate. Kinneally v. Peo., 98 App. Div. 192, 90 NYS 587.

[c] **Where the evidence is insufficient to determine whether a legatee is alive or dead,** or whether he left issue entitled to his share, the remainder of the estate may be distributed and the share of such legatee deposited with the controller, until proper proof can be made. Dunn v. Travis, 56 App. Div. 317, 67 NYS 743.

78. Matter of Baldasarro, 92 Misc. 627, 156 NYS 175; Matter of Davenport, 43 Misc. 573, 89 NYS 537, 4 Mills Surr. 327.

79. Ziegler's Est., 25 Pa. Co. 611, 18 LancLRev 401.

80. Morrison's Est., 12 Montg. Co. (Pa.) 121; Burns v. Ford, 17 S. C. L. 507.

81. Norman v. Cunningham, 5 Gratt. (46 Va.) 63. See also McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455 (where it was held, however, that the facts were not sufficient to raise a presumption of death).

82. Conn. — State v. Whitehouse, 75 Conn. 410, 53 A 897.

Del.—Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.

Fla.—Moore v. Hamilton, 4 Fla. 112.

Ky.—Edmonds v. Morrison, 5 Dana 223; Thrasher v. Lewis, 13 KyL 926.

Mass.—Gardiner v. Thorndike, 183 Mass. 81, 66 NE 633.

Mo.—Landis v. Eppstein, 82 Mo. 99; Henry v. State, 9 Mo. 778.

N. H.—Stevens v. Meserve, 73 N. H. 293, 61 A 420, 111 AmSR 612.

N. J.—Rogers v. Traphagen, 42 N. J. Eq. 421, 11 A 336.

N. Y.—Davis v. Crandall, 101 N. Y. 311, 4 NE 721; Genet v. Tallmadge, 1 Johns. Ch. 3; Hoyt v. Hilton, 2 Edw. 202; Toler v. Landon, 3 Dem. Surr. 337; Matter of Moody, 2 Dem. Surr. 624.

N. C.—Walker v. Kelly, 7 N. C. 265.

Oh.—Banning v. Gotshall, 62 Oh. St. 210, 56 NE 1030.

Pa.—In re Gitt, 203 Pa. 263, 52 A 251; Senseman's App., 21 Pa. 331; Buck's Est., 10 Pa. Dist. 330, 25 Pa. Co. 259; Beishlag's Est., 7 Pa. Dist. 127, 20 Pa. Co. 583.

R. I.—Cook v. First Universalist Church, 23 R. I. 62, 49 A 389.

S. C.—Crenshaw v. Crenshaw, 25 S. C. Eq. 14; Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72.

Tex.—McAdams v. Wilson, (Civ. A.) 164 SW 59.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Va.—Hannah v. Boyd, 25 Gratt. (66 Va.) 692.

Ont.—Re Carter, 20 Ont. L. 127, 14 OntWR 1244; Huggins v. Law, 14 Ont. A. 383 [rev 11 Ont. 565].

[a] **A guardian ad litem** may be directed to receive the minor's legacy where the amount thereof is too small to pay the expense of having a guardian appointed. Cook v. First Universalist Church, 23 R. I. 62, 49 A 389.

[b] **A foreign guardian** (1) may receive his ward's legacy or distributive share in a domestic jurisdiction, without securing a domestic appointment, where it appears that he has properly qualified in the foreign jurisdiction and that there are no domestic debts chargeable against the funds. State v. Whitehouse, 75 Conn. 410, 53 A 897; Gardiner v. Thorndike, 183 Mass. 81, 66 NE 633; Banning v. Gotshall, 62 Oh. St. 210, 56 NE 1030; Buck's Est., 10 Pa. Dist. 330, 25 Pa. Co. 259. Contra Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153. (2) Where an award was properly made payable to the guardian of minors, without the attention of the auditing judge being called to the fact that the guardian was a nonresident, as were also his wards, it was held that there was no necessity for any alteration in the adjudication, but it was incumbent upon the executor when called upon to make payment to suggest that the guardian was a foreign guardian, in which case he would not be ordered to pay over until the foreign guardian had complied with the requirements of the statute. Buck's Est., supra.

[c] **A testamentary guardian** cannot receive a minor's legacy or distributive share under some statutes; but in default of a general guardian the money must be paid into court. Sackett's Est., Tuck Surr. (N. Y.) 84.

[d] **An order of the probate court is a necessary prerequisite,** under some statutes (1) to the payment of an infant's distributive share to his general guardian. Lowman v. Elmira, etc., R. Co., 85 Hun 188, 32 NYS 579 [aff 154 N. Y. 765 mem, 49 NE 1099 mem]; Willcox v. Smith, 26 Barb. (N. Y.) 316. (2) But the probate court cannot direct the legacy to be applied to the support or education of the infant legatee. Matter of Patton, 7 Misc. 377, 28 NYS 160, 1 Gibb. Surr. 23.

[e] **Payment to a guardian indi-**

court [83] or to the county or city treasurer,[84] as provided by statute. It should not be paid to the minor's parents as such,[85] or to the minor individually,[86] or to a third person as agent or attorney for the minor.[87] But an administrator who pays money in good faith to purchase necessaries for helpless minor children of intestate when they have no guardian, where the purchases are such as a guardian would have made, cannot be made to respond again in an action by a guardian thereafter appointed.[88]

[§ 1326] **(2) Insane Persons.** The legacy or distributive share of an insane person is properly paid to the committee of his property.[89]

[§ 1327] **(3) Married Women.** At common law the husband might generally receive the legacy or distributive share of his wife by virtue of his marital rights in her personalty;[90] but under the modern statutes the rule is otherwise; the wife is entitled to receive payment in her own right,[91] and a payment of her legacy or distributive share to her husband will not bind her unless she has authorized or ratified it.[92]

[§ 1328] **8. Equalization of Payments.** An equalization of payments is proper where it becomes apparent that some of the beneficiaries have received more than others whose rights are the same.[93]

[§ 1329] **K. Payment of Annuities [94]—1. Duties of Executors in General.** An executor not expressly charged under the will has no concern with bequests of annuities charged upon the land,[95] but as to annuities charged upon personal estate in his hands, or upon property under his control generally, the executor may be ordered to make periodical payments,[96]

vidually is improper; it should be to him in his fiduciary capacity. Edwards v. Williams, 39 S. C. 86, 17 SE 457.

[f] **Payment to an illegally appointed guardian** will not exonerate the executor unless the ward adopts his act. Edmonds v. Morrison, 5 Dana (Ky.) 223.

[g] **A guardian for a minor under twelve years** has no authority to receive her distributive share after she attains that age. Campbell v. English, Wright (Oh.) 119.

[h] **An illegal arrangement between guardian and administrator** in reference to the payment of the minor's distributive share, although consummated, does not relieve the administrator from personal liability to the administrator of the minor for the latter's share. Asberry v. Asberry, 33 Gratt. (74 Va.) 463.

[i] **The acceptance of a claim due the estate as part of the minor's legacy or distributive share** cannot be made by the guardian under a statute permitting an adult legatee or distributee to accept such claim. Bescher v. State, 63 Ind. 302.

[j] **Until a legacy is payable** (1) the executor cannot relieve himself of responsibility as executor by paying it over to the guardian of the legatee. Branch v. Holcraft, 14 Ind. 237; Hinkley v. Probate Judge, 45 Mich. 343, 7 NW 907; Swope v. Chambers, 2 Gratt. (43 Va.) 319. (2) If the executor is also guardian, he cannot, before the legacy is payable, elect to hold it as guardian so as to relieve his sureties as executor and charge his sureties as guardian. Swope v. Chambers, 2 Gratt. (43 Va.) 319.

[k] **Appointment of executor as guardian.**—The funds in the hands of an independent executor, which belonged to an infant devisee, were transferred by operation of law to him as guardian of the infant upon his appointment as such, so that no act was necessary to transfer them. McAdams v. Wilson, (Tex. Civ. A.) 164 SW 59.

83. Toler v. Landon, 3 Dem. Surr. (N. Y.) 337; McCloskey v. Reid, 4 Bradf. Surr. (N. Y.) 334; Re Mercer, 26 Ont. L. 427, 3 OntWN 1292, 22 OntWR 217, 4 DomLR 589; Re Laughlin, 2 OntWR 1140; Re Parr, 11 Ont. Pr. 301.

[a] **Legacy capable of investment.**—The New York statute making this provision contemplates such payment into court only when the subject matter of the legacy is capable of investment for the infant's benefit. Toler v. Landon, 3 Dem. Surr. 337.

[b] **If the general guardian fails to give security** which is required as a condition for the payment to him of a legacy given to his ward, the personal representative will be directed to pay it into the surrogate's court as if there were no guardian. Toler v. Landon, 3 Dem. Surr. (N. Y.) 337.

84. Lowman v. Elmira, etc., R. Co., 85 Hun 188, 32 NYS 579 [aff 154 N. Y. 765 mem, 49 NE 1099 mem]; Matter of Hammer, 105 Misc. 721, 174 NYS 887.

85. Ala.—Nelson v. Beck, 54 Ala. 329; Lang v. Pettus, 11 Ala. 37.

Del.—Slaughter v. Slaughter, 12 Del. 482, 32 A 857; Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.

Ga.—Williams v. Adams, 94 Ga. 270, 21 SE 526.

Ill.—Perry v. Carmichael, 95 Ill. 519.

Mass.—Miles v. Boyden, 3 Pick. 213.

N. J.—McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498].

N. Y.—In re Hobson, 131 N. Y. 575, 30 NE 63; Furman v. Coe, 1 Cai. Cas. 96; Whitlock v. Whitlock, 1 Dem. Surr. 160.

S. C.—Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72; Cannon v. Ulmer, 8 S. C. Eq. 204.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Eng.—Rotheram v. Fanshaw, 3 Atk. 628, 26 Reprint 1161; Dagley v. Tolferry, 1 P. Wms. 285, 24 Reprint 391; Horrel v. Waldron, 1 Vern. Ch. 26, 23 Reprint 281.

[a] **Where the widow is colegatee with her only child,** who lives with her, it is not devastavit for the executor to deliver the legacy (a slave) to her. Villard v. Robert, 20 S. C. Eq. 393.

[b] **A legacy to an infant for mourning** may be ordered to be paid to his father, he undertaking to apply it for the benefit of the infant. Ker v. Ruxton, 16 Jur. 491.

86. Mass.—Newcomb v. Williams, 9 Metc. 525.

Miss.—Quinn v. Moss, 20 Miss. 365.

N. Y.—In re Sustentation Fund of Reformed Episcopal Church, 98 Misc. 145, 163 NYS 1042.

Pa.—Allison's Est., 11 Pa. Co. 18.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Eng.—Philips v. Paget, 2 Atk. 80, 26 Reprint 449; Davies v. Austen, 3 Bro. Ch. 178, 29 Reprint 475, 1 Ves. Jr. 247, 30 Reprint 325.

Ont.—Re Robertson, 17 Ont. L. 568, 13 OntWR 208.

87. Tapley v. McGee, 6 Ind. 56; Decrow v. Moody, 73 Me. 100.

88. Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

89. Newcomb v. Williams, 9 Metc. (Mass.) 525; Wright v. Hayden, 31 Misc. 116, 63 NYS 796.

[a] **Where the appointment of the committee is void,** payment to him affords no protection to the administrator. Nanny v. Payne, 9 KyL 815.

90. Ala.—Montgomery v. Givhan, 24 Ala. 568.

Miss.—McGee v. Ford, 13 Miss. 769; Wade v. Grimes, 8 Miss. 425; Lowry v. Houston, 4 Miss. 394.

Mo.—Banks v. McCarty, 5 Mo. 1.

S. C.—Ex p. Stephens, 12 S. C. L. 87; Heath v. Heath, 11 S. C. Eq. 100; Cannon v. Ulmer, 8 S. C. Eq. 204.

Eng.—Stephens v. Totty, 1 Cro. Eliz. 908, 78 Reprint 1130; Green v. Otte, 1 Sim. & St. 250, 1 EngCh 250, 57 Reprint 100; Palmer v. Trevor, 1 Vern. Ch. 261, 23 Reprint 456.

[a] **A legacy for a wife's "sole and separate use"** (1) cannot be paid to the husband, but the wife should appear in court and elect whether to be paid or to have the fund secured for her sole use and benefit. Gest v. Williams, 4 Del. Ch. 55. (2) The corpus of a legacy given to a married woman "for her sole and separate use" could not be paid to her during coverture, but could only be paid to a trustee legally appointed. West v. Cauthen, 9 S. C. 45.

91. Bunger v. Petty, (Ky.) 23 SW 961; Anderson v. Gregg, 44 Miss. 170; Abrahims' Est., 3 Pa. Co. 379.

92. Nevius v. Gourley, 95 Ill. 206; Crawford v. Redus, 54 Miss. 700; Anderson v. Gregg, 44 Miss. 170.

93. Barret v. Gwyn, 88 SW 1096, 28 KyL 101 (where a will directed testator's residuary estate to be divided into equal portions and held in trust for testator's brothers and sisters, the share of each to be paid after the death of such brother or sister to his or her children, and after a portion of their shares had been paid to the descendants of four of the legatees, the executor became insolvent, and part of the estate was thereby lost, the loss was to be borne by the whole estate and not wholly by the shares which had not been paid, and hence, in making further payments from assets in process of collection, no payments should be made to those beneficiaries who had received partial payments until the payments to those who had received none of the principal should equal the amounts which had been paid to those who had received partial payments).

94. Annuities generally see Annuities 3 C. J. p 199.

95. Henry v. Barrett, 6 Allen (Mass.) 500; Robinson v. McIver, 63 N. C. 645; Stewart's App., 110 Pa. 410, 6 A 321; Hocker's Est., 13 Phila. (Pa.) 292.

[a] **No action lies against an executor** for an annuity given in a will, and which by the terms of the will is to be paid by the devisees therein. Pool v. Pool, 1 Dane Abr. (Mass.) 576.

96. Eichelberger's Est., 170 Pa. 242, 32 A 605.

[a] **The present value of an annuity in money** cannot be ordered to be paid to the devisee of an annuity for life in making equality of distribution among heirs and devisees of an estate left undevised. Bowles v. Winchester, 13 Bush (Ky.) 1.

[b] **Payment of fund into court.**—Where an annuity is charged upon the personal estate, a court of equity may direct the payment of the fund into court, although there is no danger of waste. Morgan v. Pope, 7 Coldw. (Tenn.) 541.

[c] **Annuity not deducted from**

or settle arrears,[97] or to give security for the payment of future installments,[98] or for restoring the principal to the general legatees on the annuitant's death.[99] Where an executor, in good faith, applied the funds of an estate pro rata in paying annuities, and during six years the widow made no claim that her annuity was entitled to preference, and did not complain until the executor brought suit for the construction of the will, she should be deemed to have acquiesced in the course pursued by the executor, and could not then claim that she was entitled to preferred payment.[1]

Setting apart funds. An executor is also charged with the duty of setting apart and investing a fund with which to raise an annuity provided for by the will, where the will fails to designate such fund or to specify who shall invest it,[2] and it is for him to determine the amount necessary to be set apart for this purpose.[3] He should set apart an amount sufficient in his judgment, in view of present and probable future conditions, to produce such income;[4] and if an excess of income is produced therefrom, it should be distributed among the legatees.[5] Where the executor sets apart from the estate a sufficient sum to meet an annuity, he never parts with the title, and even if it is considered a trust fund for the benefit of the annuitant it must be returned to the executor for administration when the trust terminates.[6]

Where discretionary powers are conferred upon executors respecting the manner of securing or paying annuities, the court will not interfere with the exercise of such discretion in good faith.[7]

[§ 1330] **2. Increase or Reduction of Annuity.** The executor may have power under the provisions of the will to increase the annuity at his discretion;[8] but the annuity cannot be reduced thereafter under such power.[9] A release executed by an annuitant to part of the executors does not operate to reduce the annuity, but only to discharge the released executors from liability.[10] If the will vests the executors with discretion to increase an annuity, they may increase it temporarily only and the court has no power to compel them to continue the increased annuity.[11]

[§ 1331] **L. Effect of Payment or Distribution in General—1. Conclusiveness and Effect in General.** A payment or distribution properly made and receipted for is binding on the representative,[12] un-

wages.—Where a will provided for the payment of an annuity to the testator's servant in consideration of faithful services, and also directed that reasonable wages be paid to such servant as long as he remained in the employ of the testator's daughter, it was held that a decree upon the accounting of the executors, authorizing the annuity to be deducted from the servant's wages, was erroneous. In re Tracy, 179 N. Y. 501, 72 NE 519 [rev 87 App. Div. 215, 83 NYS 1049].

97. Humphrey v. Conger, 7 App. (D. C.) 23; Colwell's Est., 4 Pa. Co. 381.

98. In re Michener, 225 Pa. 66, 73 A 1059; Weisbrod's Est., 22 Pa. Dist. 177, 40 Pa. Co. 661; Colwell's Est., 4 Pa. Co. 381.

99. Merrill v. Wooster, 99 Me. 460, 59 A 596; Love v. Love, 3 Hayw. (Tenn.) 13.

1. Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759 (the widow could not complain of the act of an executor in leaving an unpaid arrearage on her annuity and making payments on other annuities, where the property of the estate was sufficient to pay, with interest on deferred payments, the entire arrearages due all the annuitants, including her).

2. Ill.—Leslie v. Moser, 163 Ill. 502, 45 NE 417 [rev 62 Ill. A. 555].

Me.—Merrill v. Wooster, 99 Me. 460, 59 A 596.

Md.—Hindman v. State, 61 Md. 471.

Mass.—Cummings v. Cummings, 146 Mass. 501, 16 NE 401; Treadwell v. Cordis, 5 Gray 341; Nash v. Cutler, 19 Pick. 67.

N. H.—Harris v. Ingalls, 74 N. H. 35, 64 A 727; Healey v. Toppan, 45 N. H. 243, 86 AmD 159; Claggett v. Hardy, 3 N. H. 147.

N. Y.—Morse v. Tilden, 74 App. Div. 132, 77 NYS 505 [mod and aff 35 Misc. 560, 72 NYS 30]; Gott v. Cook, 7 Paige 521; Matter of Tilford, 5 Dem. Surr. 524; Cocks v. Barlow, 5 Redf. Surr. 406; Ex p. McComb, 4 Bradf. Surr. 151.

Pa.—Rhodes' Est., 11 Phila. 133.

Tenn.—Love v. Love, 3 Hayw. 13.

Eng.—Harbin v. Masterman, [1896] 1 Ch. 351; Stanway v. Styles, 2 Eq. Cas. Abr. 246, 22 Reprint 209; Fryer v. Buttar, 8 Sim. 442, 8 EngCh 442, 59 Reprint 175.

Alta.—Re Aldridge, 9 Alta. L. 512, 28 DomLR 531, 34 WestLR 546, 10 WestWkly 701.

Ont.—In re Cameron, 2 Ont. L. 756.

[a] **Where no decree or award has been made in favor of the annuitant,** an executor cannot be peremptorily ordered to pay an annuity; but where he fails to comply with a previous order directing the investment of a fund for the annuitant as directed by the will, he will be again ordered to set apart and invest the fund. Vautier's Est., 14 Phila. (Pa.) 259.

[b] **Liability for failure to set apart fund.**—If executors are directed to pay an annuity and fail to set apart a fund to produce it, they will be liable for breach of their official duty. Hall v. Cushing, 9 Pick. (Mass.) 395; Prescott v. Pitts, 9 Mass. 376.

3. Morse v. Tilden, 35 Misc. 560, 72 NYS 30 [mod on other grounds 74 App. Div. 132, 77 NYS 505].

4. Md.—Perkins v. Emory, 55 Md. 27; Buchanan v. Deshon, 1 Harr. & G. 280.

N. J.—Collins v. Wardell, 63 N. J. Eq. 371, 52 A 708 [rev on other grounds 65 N. J. Eq. 366, 54 A 417].

N. Y.—Matter of Sproule, 42 Misc. 448, 87 NYS 432, 4 Mills Surr. 165.

Pa.—In re Edwards, 209 Pa. 19, 57 A 1117; Hanbest's Est., 5 Pa. Dist. 691, 18 Pa. Co. 534; Rhodes' Est., 11 Phila. 133; Mullen's Est., 14 WklyNC 144.

Eng.—Wentworth v. Wentworth, [1900] A. C. 163.

Ont.—Paterson v. McMaster, 11 Grant Ch. (U. C.) 337.

[a] **Estoppel to object to the sufficiency of an appropriation for an annuity** does not result from the annuitant's petitioning the probate court to compel the executors to account for arrears and to reinvest a portion of the fund, and by his receiving checks for interest, where at the time of such acts the appropriation did not appear to be insufficient. Merritt v. Merritt, 48 N. J. Eq. 1, 21 A 128 [aff 51 N. J. Eq. 638, 30 A 429].

5. Morse v. Tilden, 35 Misc. 560, 72 NYS 30 [mod on other grounds 74 App. Div. 132, 77 NYS 505].

6. Merrill v. Wooster, 99 Me. 460, 59 A 596.

7. Cal.—Elmer v. Gray, 73 Cal. 283, 14 P 862.

N. Y.—Mason v. Jones, 3 Edw. 497.

Pa.—Young's Est., 4 Pa. Dist. 293.

Utah.—Allen v. Barnes, 5 Utah 100, 12 P 912.

Eng.—Burrell v. Delevante, 30 Beav. 550, 54 Reprint 1003.

[a] **Executors acting as guardians of legatee.**—Where a will directed the executors to pay to or expend for an annuitant such further sums as they might deem proper, if necessary for her care and comfort, it was held that the executors, who were also guardians of the residuary legatee, were vested with discretion to increase the annuity even after the estate had been distributed. Elmer v. Gray, 73 Cal. 283, 14 P 862.

[b] **Setting apart or payment from general estate.**—Where the will authorized the executors to invest such sums as, in their discretion, they deemed necessary to secure payment of annuities, provided for in the will, and that whenever any fund set apart or provided for that purpose ceased to be needed, it should be disposed of in the manner provided for in respect to the residuary estate, the annuities could be paid out of the general estate or by the setting apart of specific sums. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 NYS 168 [aff 118 App. Div. 678, 103 NYS 770, 190 N. Y. 557, 83 NE 1132].

8. Mason v. Mason, 4 Sandf. Ch. (N. Y.) 623; Hospital for Sick Children v. Chute, 3 Ont. L. 590, 1 OntWR 321.

[a] **Where the executor has exercised his discretion** and fixed the limit of the annuity, neither a subsequent administrator nor the court acting on the fund can increase it beyond that limit. Case v. Towle, 2 Sandf. Ch. (N. Y.) 426.

9. Mason v. Mason, 4 Sandf. Ch. (N. Y.) 623 (although the increase was made in the belief that it was revocable).

10. Cocks v. Haviland, 7 NYS 870, 871.

11. Mason v. Jones, 3 Edw. (N. Y.) 497.

12. Ala.—Harkins v. Hughes, 60 Ala. 316.

Ky.—Larue v. White, 8 Dana 45; Conrad v. Cleaveland, 1 Ky. Op. 165.

N. Y.—Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 NE 480.

Pa.—Tintle v. Fulmer, 4 LancLRev 361.

S. C.—Rosborough v. Rutland, 2 S. C. 378.

[a] **Release from executor's debt.**—In the absence of special circumstances rebutting the presumption of negligence, an executor who voluntarily distributes property charged with his own debt thereby releases the property from the charge. Harkins v. Hughes, 60 Ala. 316.

less it can be successfully impeached for fraud,[13] mistake,[14] or improper means used in procuring it.[15] It is also binding on the legatee or distributee who accepts the payment or distribution,[16] unless it was made through fraud[17] or mutual mistake;[18] and estops him from claiming as his own, adversely to the estate, property included in the distribution,[19] from assailing the intervening rights of third persons,[20] or from objecting to the representative's course of distribution, however irregular,[21] at least unless he first restores to the representative what he has received.[22] A distribution vests in the legatees or distributees full and complete title to the property which they have received,[23] even though the transfer was not previously authorized,[24] where it was subsequently approved by the probate court.[25] The amount paid to an heir or legatee on the first annual settlement of an administrator is not evidence as to what her interest will amount to after final settlement and order of distribution.[26] Where a person as his mother's heir had an interest in five parcels of land left by the mother's intestate father who left three heirs, and two of the parcels were set off to the mother's heirs and the rest to the other heirs of her father, the distribution confirmed his interest in the two parcels set off to his mother's heirs and destroyed his interest in the other three.[27] Where a will directed that a portion of the estate be held by a trustee to pay the income to a devisee during her life with remainder to her heirs, and in making distribution in the probate court, the distributors consulted the devisee and her son, and no appeal was taken from the distribution, and there was no agreement that the son took any interest, save such as he took by the will, and the devisee and her son supposed and claimed subsequently that the son had a remainder, and testator stated to the son that he had a remainder, it was held that the son as a matter of law having taken no interest under the will, he obtained no interest by the distribution.[28]

A legatee is chargeable with knowledge of the conditions attached to the bequest and of the matters incident to the due course of administration, and cannot plead ignorance in seeking to avoid a deed quitclaiming her rights in the estate of the testator in consideration of receiving a payment of her legacy.[29]

[§ 1332] **2. Rights and Liabilities of Representative after Payment or Distribution—a. In General.** After full payment or distribution the representative is released from further liability, for acts done in his representative capacity, to the legatees or distributees,[30] or to their creditors;[31]

13. Larue v. White, 8 Dana (Ky.) 45; Hutchin's Est., 17 Pa. Dist. 648.

14. Larue v. White, 8 Dana (Ky.) 45; Hammond v. Hammond, 169 Mass. 82, 47 NE 535.

[a] **Retention to make good payment through mistake.**—Where executors have by mistake made payments to a legatee from the income of the estate, which should have been made from the principal, they are entitled to retain money from the proper fund to make such payments good. Hammond v. Hammond, 169 Mass. 82, 47 NE 535.

[b] **The report of an auditor** without the vouchers to sustain it is not sufficient to outweigh the admission of the executor against his interest and show that the settlement was not made understandingly, or is not conclusive. Larue v. White, 8 Dana (Ky.) 45.

15. Larue v. White, 8 Dana (Ky.) 45.

16. Ky.—Petry v. Petry, 142 Ky. 564, 134 SW 922; Hopson v. Com., 7 Bush 644.

Mass.—Little v. Little, 161 Mass. 188, 36 NE 795.

Miss.—Fort v. Battle, 21 Miss. 133.

N. Y.—Slack v. Wiggin, 1 Dem. Surr. 568.

Pa.—In re Markle, 187 Pa. 639, 41 A 304.

S. C.—Sager v. Warley, 14 S. C. Eq. 26.

[a] **The acceptance of a partial payment** does not preclude a suit for the balance. Marshall v. Moseley, 21 N. Y. 280.

[b] **Settlement with remainderman.**—A life tenant under a will, who is also the executrix therein, may discharge a pecuniary obligation to mature after her death to a remainderman, and the latter, accepting the payment, cannot insist that the executrix shall again account for the amount when making a final settlement. Wheaton v. Pope, 91 Minn. 299, 97 NW 1046.

17. Potter's App., 56 Conn. 1, 12 A 513, 7 AmSR 272.

18. Speight v. Gatling, 17 N. C. 5; Maldaner v. Beurhaus, 108 Wis. 25, 84 NW 25. But compare Hopson v. Com., 7 Bush (Ky.) 644 (relief denied although mistake mutual).

[a] **Legatees may maintain a bill for redistribution** where the distribution was made and accepted through mutual mistake. Maldaner v. Beurhaus, 108 Wis. 25, 84 NW 25.

19. Downey v. Moriarty, 81 Conn. 442, 71 A 581; Patterson v. Dushane, 137 Pa. 23, 20 A 538.

20. McLeod v. Johnson, 28 Miss. 374.

21. McLeod v. Johnson, 28 Miss. 374; Fort v. Battle, 21 Miss. 133; Wilson's App., 4 Pennyp. (Pa.) 432; Sager v. Warley, 14 S. C. Eq. 26; Smith v. Jarnagin, 1 Tenn. Cas. 79, Thomps. Cas. 135.

[a] **A sale of decedent's business interests** made by the representative in good faith and for which the purchaser's bond is taken cannot be impeached by a distributee after he has participated in the distribution of the sums collected on such bond. Wilson's App., 4 Pennyp. (Pa.) 432.

[b] **Long lapse of time** strengthens the situation as against reopening a division of the estate, notwithstanding irregularities. Smith v. Jarnagin, 1 Tenn. Cas. 79, Thomps. Cas. 135.

22. Birks v. McNeill, (Iowa) 170 NW 485; McLeod v. Johnson, 28 Miss. 374.

23. Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485].

[a] **The "delivery" of land** of a decedent by his administrators to the guardian of decedent's heirs has no effect on the rights of creditors of the decedent's estate, even though the delivery is with the assent and concurrence of the creditors. Baker v. Griffitt, 83 Ind. 411.

Improper, erroneous, or premature payment or distribution see infra §§ 1334–1345.

24. Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485].

25. Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485].

26. Elam v. Bond, 169 Mo. A. 584, 154 SW 880.

27. Downey v. Moriarty, 81 Conn. 442, 71 A 581.

28. Gerard v. Ives, 78 Conn. 485, 62 A 607.

29. Stapleton v. Haight, 135 Iowa 564, 113 NW 351.

30. Ala.—Carroll v. Moore, 7 Ala. 615.

Ind.—Ray v. Doughty, 4 Blackf. 115.

Iowa.—Birks v. McNeill, 170 NW 485.

Ky.—Mitchell v. Miller, 6 Dana 79; Mountjoy v. Hinkston, Litt. Sel. Cas. 214.

Me.—In re Mudgett, 103 Me. 367, 370, 69 A 575 [cit Cyc].

N. Y.—In re Quinn, 9 NYS 550.

Oh.—Barkaloo v. Emerick, 18 Oh. 268.

S. C.—Sager v. Warley, 14 S. C. Eq. 26; Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72.

Vt.—Beardsley v. Knight, 10 Vt. 185, 33 AmD 193.

Wis.—Blakely v. Carter, 70 Wis. 540, 36 NW 329.

Eng.—Knatchbull v. Fearnhead, 3 Myl. & C. 122, 14 EngCh 122, 40 Reprint 871.

[a] **An executor who has turned over testator's business to the legatees** cannot be called on by a devisee to account for the legatees' failure to comply with a provision of the will which directed them to apply one third of the net profits annually to the payment of a mortgage on the land devised to her. In re Quinn, 9 NYS 550.

[b] **Where a will is subsequently discovered and proved,** the executor cannot compel the administrator, who has bona fide and duly distributed, to account for such property, but proceedings should rather be against the distributees themselves. Barkaloo v. Emerick, 18 Oh. 268.

[c] **Where the heirs refuse to accept a certain note and mortgage** as part of their shares and money is given to them instead, the representative becomes absolute owner of such note and mortgage, and the heirs to whom it is delivered, without assignment or intent to transfer, cannot sue upon it. Blakely v. Carter, 70 Wis. 540, 36 NW 329.

[d] **On proof of distribution** the representative is entitled to have satisfaction entered. Carroll v. Moore, 7 Ala. 615.

[e] **A decree directing payment** of a balance in the executor's hands in execution of trusts in the will is not a payment so as to discharge him or so as to exonerate the fund distributable and charge the person to whom it is payable; nothing short of actual payment or some act of the distributee to its prejudice will exonerate the fund. Clapp v. Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes 281, 27 HowPr 600 note [aff 38 Barb. 661].

31. Mosely v. McGough, 69 Ga. 748; Evans v. Robinson, 5 B. Mon. (Ky.) 589.

[a] **Garnishment process served afterward** on the executor or administrator by a creditor of the distributee comes too late. Mosely v. McGough, 69 Ga. 748.

and where such distribution is in accordance with a final decree the representative is entitled to his discharge.[32] After distribution he is precluded from thereafter exercising control, as representative, over the property distributed,[33] and if assets fully set apart remain in his possession, he holds them as agent or bailee of the legatee or distributee and not as representative.[34] Where a distributee is entitled to recover his share either from the personal representative or from a third person who has received the same and recovers it by action against the personal representative, the latter is subrogated to the distributee's rights against such third person.[35]

[§ 1333] **b. Delivery to Life Tenant or Remainderman.** Delivery to a legatee or tenant for life amounts also to a delivery to the remainderman and in general discharges the representative from any further duty or liability with respect to the legacy,[36] except where it was his duty to invest the fund and pay over the income only to the legatee for life,[37] and in such case the remainderman is not guilty of laches in not claiming the fund until after the death of the life tenant, although he is aware that the representative has failed to invest the fund as directed by the will and has paid over the principal to the life tenant.[38] Where an executor who is also tenant for life surrendered his estate to the remaindermen, and a division is made among them by their consent, they cannot afterward complain of the surrender of the life estate as a devastavit.[39]

[§ 1334] **M. Improper, Erroneous, or Premature Payment or Distribution—1. In General.** A representative is personally responsible to the aggrieved person for an improper or erroneous payment or distribution,[40] unless the latter is estopped

32. Nason v. Los Angeles County Super. Ct., (Cal. A.) 179 P 454 (even though time to appeal from decree of distribution has not expired).

33. La.—Barton v. Burbank, 114 La. 224, 38 S 150.

Miss.—Murdock v. Washburn, 9 Miss. 546.

N. Y.—In re Herrick, 12 NYS 105 [aff 131 N. Y. 239, 30 NE 130, 27 AmSR 586].

Pa.—Hart's Est., 12 Pa. Dist. 47; Hart's Est., 28 Pa. Co. 126.

S. C.—McCants v. Bee, 6 S. C. Eq. 383, 16 AmD 610.

Tex.—Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203; Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

Va.—Hunter v. Lawrence, 11 Gratt. (52 Va.) 111, 62 AmD 640.

[a] **Independent executors.**—When representatives empowered to act independently of the probate court distribute any portion of the estate and deliver possession to heirs or devisees, they lose all control over it, and cannot thereafter administer it for benefit of creditors. Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

[b] **The representative cannot sell assets** after finally delivering them to the residuary legatee or distributee. McCants v. Bee, 6 S. C. Eq. 383, 16 AmD 610.

[c] **A purchase back with funds of the estate** of property distributed is made at the representative's own risk; and he must be held personally liable for any loss thereon. In re Herrick, 12 NYS 105.

[d] **Close of succession.**—Where an administrator, who is also one of the heirs, delivers possession of all the property of the succession to the widow and the heirs with the consent of a particular creditor, as to him the administration is terminated and the succession closed. Barton v. Burbank, 114 La. 224, 38 S 150.

34. Harkins v. Hughes, 60 Ala. 316; Birks v. McNeill, (Iowa) 170 NW 485; Woodruff v. Young, 31 Hun (N. Y.) 420; Soley's Est., 11 Phila. (Pa.) 144.

[a] **Property returned to one of two coexecutors** to hold cannot be recovered from the other. Soley's Est., 11 Phila. (Pa.) 144.

35. Stayner v. Bower, 42 Oh. St. 314 (where a husband had received property from his wife's father as advancements on her share of her father's estate, she was entitled on the latter's death, when her distributive share was ascertained, to compel her husband to account, or to collect her share in full from the administrator; and where the administrator paid in full, he was subrogated to her rights against her husband).

36. Ala.—Hunter v. Green, 22 Ala. 329.

Ga.—Bates v. Woolfolk, 5 Ga. 329.

La.—Piffet's Succ., 39 La. Ann. 466, 1 S 889; Samuels v. Brownlee, 36 La. Ann. 228.

Md.—Foley v. Syer, 121 Md. 79, 88 A 38.

Mass.—Lynde v. Estabrook, 7 Allen 68.

Miss.—Lusk v. Swayze, 35 Miss. 155; Andrews v. Brumfield, 32 Miss. 107; Probate Judge v. Alexander, 31 Miss. 297.

N. H.—Weeks v. Jewett, 45 N. H. 540.

N. J.—Dodson v. Sevars, 52 N. J. Eq. 611, 30 A 477 [aff 53 N. J. Eq. 347, 33 A 388, rev on other grounds 53 N. J. Eq. 633, 34 A 7, 51 AmSR 641].

N. Y.—Matter of Hamlin, 141 App. Div. 318, 126 NYS 396.

N. C.—McKoy v. Guirkin, 102 N. C. 21, 8 SE 776.

Oh.—Posegate v. South, 46 Oh. St. 391, 21 NE 641; Flickinger v. Saum, 40 Oh. St. 591; Ratliff v. Warner, 32 Oh. St. 334.

Tex.—Blackwell v. Blackwell, (Civ. A.) 23 SW 31.

[a] **Even if there is no limitation over** on a bequest for life, payment or delivery to the legatee for life operates as a final and complete administration. Bates v. Woolfolk, 5 Ga. 329; Andrews v. Brumfield, 32 Miss. 107.

[b] **After the death of the tenant for life,** the executor, who has delivered over to him property given by the will, cannot maintain an action against a third person to recover the property for the parties entitled to it under the will. Weeks v. Jewett, 45 N. H. 540.

[c] **Executrix as life tenant.**—(1) The wife of a testator to whom he devised all of his property, real and personal, for her natural life to be used and enjoyed by her as if owned in fee simple, and who was named as executrix, settled an account in the orphans' court in which she charged herself with the inventory of the personal estate, and with debts collected, and credited herself with sums paid out and commissions, the account then reciting that the balance of the estate as therein specified bequeathed to her under the will was retained by her, subject to the provisions of the will. It was held that the account amounted to a distribution of the assets of the estate to the wife for life, and she thereafter held as legatee, and not as executrix, and hence there were no unadministered assets which upon her death would support administration de bonis non, or for which the administrator de bonis non could be required to account. Sydnor v. Graves, 119 Md. 321, 86 A 341. (2) But in another case where a husband gave all of his property to his wife for life, then to surviving heirs, and made his wife executrix, and on the death of the wife a daughter was appointed administratrix of the wife and also administratrix cum testamento annexo of the husband, it was held that where the inventory and account of the wife fairly represented the amount of the estate which she had received under the will, it was proper for her as administratrix of the wife to turn over such estate to herself as administratrix cum testamento annexo of the husband. Howell v. Steelman, 81 N. J. Eq. 212, 86 A 399.

37. Mercer v. Glass, 25 SW 114, 15 KyL 710; Wooten v. Burch, 2 Md. Ch. 190; Jones v. Simmons, 42 N. C. 178.

38. Montgomery's App., 77 Pa. 370.

39. Garrett v. Garrett, 20 S. C. Eq. 96.

40. Ala.—Hemphill v. Moody, 62 Ala. 510.

D. C.—Moore v. Moore, 47 App. 23.

Md.—Hindman v. State, 61 Md. 471; Hanson v. Worthington, 12 Md. 418.

Mass.—New York Security Bank v. Callahan, 220 Mass. 84, 107 NE 385.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

N. J.—In re Van Wagoner, (Prerog.) 97 A 893; In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686]; Thiefes v. Mason, 55 N. J. Eq. 456, 37 A 455; Ashhurst v. Field, 26 N. J. Eq. 1 [aff 29 N. J. Eq. 625].

N. Y.—Bayley v. Bayley, 141 App. Div. 243, 126 NYS 102; Riley v. Ryan, 103 App. Div. 176, 93 NYS 386; Matter of Baker, 57 App. Div. 44, 68 NYS 44; In re Kean, 178 NYS 60.

N. C.—Fisher v. Ritchey, 64 N. C. 172.

Pa.—Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Taylor's Est., 4 Pa. Dist. 691, 17 Pa. Co. 166; Robins' Est., 4 Pa. Dist. 277 [mod on other grounds 180 Pa. 630, 37 A 121].

S. C.—Boone v. Durand, 1 S. C. Eq. 588.

W. Va.—George v. Brown, 99 SE 509; American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920.

Ont.—Stewart v. Snyder, 27 Ont. A. 423 [dism app 30 Ont. 110].

[a] **Where an executor does not prove the will** but disposes of the personal estate otherwise than as directed by the will, he is responsible to the legatee for conversion, as is also his executor or administrator, but the latter is not responsible to the administrator with the will annexed of the first testator. Thiefes v. Mason, 55 N. J. Eq. 456, 37 A 455.

[b] **Poverty of a legatee** does not exonerate the executor from liability for making him a payment unauthorized by the will to the injury of

from objecting thereto,[41] and credit on the representative's accounts for improper payments may be denied.[42] The fact that the representative has accounted to one legatee or distributee for less than his legacy or distributive share does not give to another a greater interest in the residue than he was previously entitled to.[43] An action to hold the administrator liable for wrongfully distributing the assets of the estate is not inconsistent with the recovery of such assets or their value from the distributee.[44]

Where an administrator pendente lite pays a legacy to a person entitled to it, which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, if the estate was able and liable to pay after all prior charges were provided for.[45]

[§ 1335] **2. Payment to Wrong Person.**[46] Where an executor or administrator distributes to the wrong person or omits one entitled to share he may be compelled to pay again to the one rightfully entitled,[47] notwithstanding he made the distribution in good faith,[48] acting upon his own judgment or upon the judgment of his counsel.[49]

Assignment of interest of legatee. Where certain executors made payments of income on behalf of a legatee after notice of the assignment of such income to secure money advanced to the legatee, and such income was insufficient to satisfy the debt secured, the executors were not entitled to credit for the amount paid the legatee.[50] So also where executors and trustees charged with the payment of legacies had written notice of the assignment of a legacy, but, instead of turning it over to their successor in the trust at the time of the substitution, one of them a very short time thereafter formally notified the successor of the assignment, the notice inured to the benefit of the assignee, and imposed on the successor the duty of ascertaining the facts by reasonable inquiry, and making the alleged assignee a party to the accounting in its settlement of the trust.[51]

Extent of accounting. Where the assets are distributed between the parties whom the representative understands are entitled to share therein, but by mistake no provision is made for an unknown heir, the distribution should be regarded as a family settlement, and only so much be required to be accounted for as is necessary to satisfy the claim of such heir.[52] Where an administrator of the estate of complainant's daughter made certain distributive payments, etc., to the daughter's husband before notice that the fund in fact belonged to complainant, and not to the daughter's estate, the administrator was only liable for the property remaining in his hands after allowing him such costs and expenses as he was entitled to and payments made to the husband by way of partial distribution.[53]

other legatees interested. Wallis v. Cowell, 25 N. C. 323.

[c] **Yielding negligently to a process of court** and turning over a distributive share without appearing and contesting the proceedings may render the representative personally liable. Fisher v. Ritchey, 64 N. C. 172.

41. Ala.—Colbert v. Daniel, 32 Ala. 314.
Conn.—Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.
Ky.—Hopson v. Com., 7 Bush 644.
Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.
N. Y.—Matter of Turfler, 1 Misc. 58, 23 NYS 135, Pow. Surr. 389.
N. C.—Wallis v. Cowell, 25 N. C. 323.
Oh.—Brent v. First, 41 Oh. St. 436.
Pa.—Rankin's Est., 27 PittsbLegJ 45.
S. C.—Garrett v. Garrett, 1 S. C. Eq. 96.

[a] **Where the beneficiaries under a will all approve** of a division otherwise than provided for by the will, such distribution is valid, and the executor is protected against any inequity. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

[b] **Payment of a contingent legacy to the guardian of a minor** does not estop a surviving residuary legatee thereafter entitled to the legacy from maintaining an action against the executor to enforce his interest, although he had notice and was present at the settlement of the executor's account. Cowdin v. Perry, 11 Pick. (Mass.) 503.

42. Hemphill v. Moody, 62 Ala. 510; Ashhurst v. Field, 26 N. J. Eq. 1 [aff 29 N. J. Eq. 625].

43. Montgomery v. Givhan, 24 Ala. 568.

44. Bayley v. Bayley, 141 App. Div. 243, 126 NYS 102.

45. Steelman v. Wheaton, 72 N. J. Eq. 626, 66 A 195 [aff 73 N. J. Eq. 743, 70 A 1102].

46. To whom payment should be made see supra §§ 1322–1327.

47. Cal.—In re Cummins, 143 Cal. 525, 77 P 479; In re Kennedy, 120 Cal. 458, 52 P 820; Bryant v. McIntosh, 3 Cal. A. 95, 84 P 440.
Conn.—State v. Whitehouse, 75 Conn. 410, 53 A 897.
D. C.—Moore v. Moore, 47 App. 23.
Hawaii.—Matter of Phillips, 12 Hawaii 284.
Ind.—Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960.
Iowa.—Kintz v. Schoentgen, 84 NW 679.
Ky.—Keiningham v. Keiningham, 71 SW 497, 24 KyL 1330.
Mass.—Cowdin v. Perry, 11 Pick. 503.
Mich.—Richardson v. Richardson, 100 Mich. 364, 59 NW 178.
Miss.—Garner v. Lansford, 20 Miss. 558.
Mont.—Kirk v. Baker, 26 Mont. 190, 66 P 942.
Nebr.—Boales v. Ferguson, 55 Nebr. 565, 76 NW 18.
N. J.—Stewart v. Fallon, (Ch.) 58 A 96.
N. Y.—Seger v. Farmers' L. & T. Co., 103 App. Div. 39, 92 NYS 629; Matter of Robertson, 51 App. Div. 117, 64 NYS 385 [aff 165 N. Y. 675, 59 NE 1120]; Lawrence v. Brinkerhoff, 2 NYLegObs 122.
N. C.—Wade v. Dick, 36 N. C. 313.
Oh.—Banning v. Gotshall, 62 Oh. St. 210, 56 NE 1030; Negley v. Gard, 20 Oh. 310; In re Koehnken, 25 Oh. Cir. Ct. 245; Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540.
Pa.—In re Starr, 190 Pa. 162, 42 A 530; Baer's Est., 9 Pa. Super. 492, 43 WklyNC 469. But see Sutter's Est., 5 Pa. Co. 591 (representative protected under act of 1840).
S. C.—Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.
Tenn.—Faver v. Parker, 101 Tenn. 141, 46 SW 453.
Va.—Laurason v. Davenport, 2 Call (6 Va.) 95.
Eng.—In re Timmis, [1902] 1 Ch. 176.

[a] **This rule has been applied:** (1) To a distribution to an unauthorized representative of a deceased distributee. Baer's Est., 9 Pa. Super. 492, 43 WklyNC 469. (2) To a representative of an heir who distributed among the latter's legatees funds which such heir had received as attorney in fact of his coheirs. Richardson v. Richardson, 100 Mich. 364, 59 NW 178. (3) So also where executors of an estate paid the balance due to certain heirs under the decree of distribution to one who pretended to be the heirs' attorney and who was also acting as attorney for the executors, which payment was in direct violation of an understanding between them that the money should be paid directly to such distributees, the payment was wrongful, and the heirs were entitled to recover the same from the executors. Bryant v. McIntosh, 3 Cal. A. 95, 84 P 440.

[b] **Ignorance of the existence of the persons omitted** (1) does not relieve the administrator from liability to them for their shares. Campbell v. Reed, 24 Pa. 498; Laurason v. Davenport, 2 Call (6 Va.) 95. (2) He is bound to make diligent inquiry after such persons, especially where he has knowledge of their having removed to a distant part of the state years before. Campbell v. Reed, 24 Pa. 498.

[c] **The proceeds of milk of dairy farms,** received by an executor under contracts of the testator, represent earnings of the personal estate, and, when they are paid to the devisees of the farms, the executor's account will be surcharged therewith. Matter of Ellis, 78 Misc. 589, 139 NYS 1011.

[d] **An administrator who pays the share of a distributee on his order** takes the risk of the genuineness and validity thereof, and in a hearing on the allowance of an account it must be determined by the court passing thereon whether payments made on the order are to be allowed or not. If the order is found to be valid, and the administrator to have paid thereon according to the terms of the order all that was due to the assignor, the payments should be allowed. Palmer v. Whitney, 166 Mass. 306, 44 NE 229.

[e] **A statute permitting payment to the clerk of the court** does not relieve the administrator from liability for the act of the clerk in paying out the money to the wrong person. Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960.

48. Wade v. Dick, 36 N. C. 313.

49. Wade v. Dick, 36 N. C. 313.

50. Stewart v. Fallon, (N. J. Ch.) 58 A 96.

51. Seger v. Farmers' L. & T. Co., 103 App. Div. 39, 92 NYS 629.

52. Matter of McDonough, 132 App. Div. 614, 117 NYS 258.

53. Mayer v. McCracken, 245 Ill. 551, 92 NE 355.

A decree in favor of a distributee who has been erroneously excluded from distribution should be first granted against the distributees respectively for the share of each, and then against the administrators for what they do not pay, and should be estimated upon the value of the property at the time of division, when he was excluded.[54]

Ultimate receipt of property by persons entitled. Where an administrator allowed a person not entitled to share in the distribution, it was held, in determining his liability, that the rightful heirs should be held to account for so much of the fruits of the administrator's unlawful disbursement of trust funds as came to them, by way of gift or inheritance, from the person to whom he improperly gave recognition as an heir.[55]

The representative cannot recover payments voluntarily made to a wrong person, not under a mistake of fact, but under a mistake of law.[56]

[§ 1336] **3. Payment under Will Subsequently Declared Invalid.** An executor who comes into possession of property under a will duly authenticated and proved, and parts with it to one having a right under the will to demand it, cannot be held liable to other heirs therefor, if the will is afterward proved invalid or void,[57] unless he had notice of a contest of the will at the time of the payment.[58] But the one receiving such property may be sued by other distributees for the difference between the amount to which he is entitled and the amount so received;[59] or if he is also a creditor of the estate the representative is entitled to credit for the amount so received in a settlement with him.[60] It has also been held that an executor who has paid money to a legatee under a will subsequently set aside may recover back such money from the legatee.[61]

[§ 1337] **4. Payment of Legacy Subsequently Invalidated by Legatee's Contest of Will.** Where a testator bequeathed a certain legacy upon condition that it should be forfeited if the legatee in any way contested the will, and after the executrix had paid the legacy the legatee brought an action to have the will declared void, it was held that the executrix could recover back the amount so paid.[62]

[§ 1338] **5. Distribution Prior to Discovery of Will.** An administrator who acts with reasonable diligence to ascertain whether a will exists, and does not think, and has no reasonable ground to think, that a will exists, may safely distribute the estate as intestate, and is not liable to the beneficiaries under a will subsequently discovered and probated.[63]

[§ 1339] **6. Payment before Order or Decree for Distribution.**[64] Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril,[65] although the representative acted in good

54. Powell v. Powell, 9 Dana (Ky.) 12.

55. Rusk v. Hill, 117 Ga. 722, 45 SE 42.

56. Phillips v. McConica, 59 Oh. St. 1, 51 NE 445, 69 AmSR 753.

57. Le Baron v. Fauntleroy, 2 Fla. 276; Home for Poor Catholic Men v. Coleman, 122 Ky. 544, 555, 92 SW 342, 29 KyL 75; Poag v. Carroll, 23 S. C. L. 1.

"By section 3848, Ky. Stats. 1903, it is provided that when 'the will under which he (executor) acted shall be declared invalid . . . all . . . lawful acts done by such executor . . . shall remain valid and effectual. . . .' The money paid the bishop of Cork was so paid as directed by the will to execute which Amiss was appointed. Certainly an act done as directed by the will until it is set aside is lawful, in the meaning of the statute. In other words, it means any act done which would have been lawful if the will had not been invalidated, is to be treated as lawful when done before it is invalidated. If that was not the purpose of the statute, it would be meaningless. While the whole will was not declared invalid, the clause in question was, and the reason and purpose of the enactment of the statute applies in the one as in the other case. Acts done by the executor after the probate of the will and before it is invalidated are binding, and are not affected by the nullification of the will. Jones v. Jones, 14 B. Mon. (Ky.) 464; Woods v. Nelson, 9 B. Mon. (Ky.) 600. A court of competent jurisdiction probates the will, and the will and order of probate authorizes the executor to act as it were for the testator. And it is essential to the safety of the community, and but giving due respect to the authority of judicial proceedings, that the lawful acts done under a will before it is invalidated, should be treated as valid." Home for Poor Catholic Men v. Coleman, supra.

[a] **Payments without order of court** to special legatees under a will subsequently annulled will not be recognized. Heffner's Succ., 49 La. Ann. 407, 21 S 905.

[b] **Liability for insurance and use of property.**—Where an executor anticipates the law and turns over property in payment of a specific legacy, which is afterward declared void, he must answer for the insurance collected for an injury to the property by fire; but he should not be charged for the use of the property when it has not been damaged thereby. Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423.

58. Kelly v. Davis, 37 Miss. 76. See also Smith v. Stockbridge, 39 Md. 640 (where a will which has been admitted to probate has been declared void by the court of appeals, a partial distribution made under an administration with the will annexed is void).

59. Le Baron v. Fauntleroy, 2 Fla. 276.

60. Wood v. Nelson, 10 B. Mon. (Ky.) 229.

61. Haldan v. Beatty, 40 U. C. Q. B. 110.

62. Kelley v. Winslow, 73 Misc. 642, 131 NYS 65 (the payment of the legacy did not defeat the condition, and after the breach the parties were in the same position which they would have occupied if the legacy had not been paid and the executrix is entitled to recover back money improperly paid).

63. Bliss v. Spencer, (Va.) 99 SE 593 (the rule is the same whether the administrator withheld distribution until the expiration of a year from the granting of his letters or made distribution prior to that time).

64. Order or decree for distribution generally see infra §§ 1389–1407.

65. Ala.—Dean v. Portis, 11 Ala. 104.

Ark.—McPaxton v. Dickinson, 15 Ark. 41.

Conn.—Day v. Webler, 105 A 618; Phelp v. Swan, Kirby 428.

Ind.—Fleece v. Jones, 71 Ind. 340.

Ky.—Johnson v. Fuquay, 1 Dana 514.

La.—Robson's Succ., 19 La. Ann. 97; Beatty v. Dufief, 11 La. Ann. 74.

Md.—Hoffman v. Hoffman, 88 Md. 60, 40 A 712; Biays v. Roberts, 68 Md. 510, 13 A 366.

Mass.—Palmer v. Whitney, 166 Mass. 306, 44 NE 229; Defriez v. Coffin, 155 Mass. 203, 29 NE 516; Welch v. Adams, 152 Mass. 74, 25 NE 34, 9 LRA 244.

Minn.—Whitney v. Pinney, 51 Minn. 146, 53 NW 198.

Miss.—Lowry v. McMillan, 35 Miss. 147, 72 AmD 119.

Mo.—North v. Priest, 81 Mo. 561; Bassett v. Slater, 81 Mo. 75.

Mont.—Kirk v. Baker, 26 Mont. 190, 66 P 942.

Nebr.—In re Craig, 101 Nebr. 439, 163 NW 765; Boales v. Ferguson, 55 Nebr. 565, 76 NW 18.

N. Y.—Matter of McCarthy, 47 NYS 1127, 26 NYCivProc 397; Glacius v. Fogel, 4 Redf. Surr. 516.

N. C.—Reeves v. Bell, 47 N. C. 254; McNair v. Ragland, 16 N. C. 516.

Pa.—In re Kramer, 255 Pa. 595, 100 A 447; Campbell v. Reed, 24 Pa. 498; Carter v. Trueman, 7 Pa. 315; Swearingen v. Pendleton, 4 Serg. & R. 389; Robins' Est., 4 Pa. Dist. 277 [mod on other grounds 180 Pa. 630, 37 A 121]; In re Kiser, 34 PittsbLegJ NS 147.

R. I.—Kenyon v. Kenyon, 31 R. I. 270, 76 A 798.

Va.—Kippen v. Carr, 4 Munf. (18 Va.) 119.

W. Va.—McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 SE 378.

Eng.—Pearson v. Archdeaken, 1 Alc. & N. 23; Hawkins v. Day, Ambl. 160, 27 Reprint 107, Dick. 155, 21 Reprint 228; Newcastle, etc., Banking Co. v. Hymers, 22 Beav. 367, 52 Reprint 1149; Simmons v. Bolland, 3 Meriv. 547, 36 Reprint 210.

[a] **Payments without an order of court are irregular** and not binding, unless shown to have liberated the estate from a legal charge. Beatty v. Dufief, 11 La. Ann. 74.

[b] **A mere formal division** of property without a legal warrant therefor and without delivery confers no title upon the distributees and the representative may successfully defend an action brought for its recovery by one to whom he has assigned a share. Dearman v. Radcliffe, 5 Ala. 192.

[c] **Payment to the surrogate before a decree settling the representative's accounts** of an amount due a distributee is not a good payment to the latter, and the representative may be compelled to pay again upon

faith in making such payments,[66] and in ignorance of the existence of any debt or claim against the estate.[67] Such distribution is, however, perfectly legal,[68] and divests the personal representative of title to the property delivered to the legatee or distributee.[69] Furthermore the representative may be entitled to credit for the payments made, if they are correct and not more than the recipient's distributive share,[70] and will be protected by a subsequent decree authorizing such payments,[71] or allowing an account in which such payments are stated.[72]

[§ 1340] **7. Payment under Order of Court.** A payment or distribution in good faith in accordance with an order or decree of court will generally protect a representative and release him from further liability,[73] although the order or decree is subsequently reversed,[74] unless it merely orders distribution without determining the persons entitled or their shares,[75] or does not dispose of the whole estate.[76] But he is not protected if he makes payment or distribution in bad faith under an order which is void,[77] or which orders distribution before the payment of debts,[78] or which has been obtained by him in bad faith.[79] It has also been held that the representative is not protected where such payment or distribution is made before the time for appealing from the order has expired,[80] although there is, on the other hand, authority for the view that an administrator will be protected in a distribution made in good faith before any stay is had or appeal taken, although it was made before the time for appealing had expired.[81]

the failure of the surrogate to account for the amount paid him. Matter of Te Culver, 22 Misc. 217, 49 NYS 820, 2 Gibb. Surr. 316.

66. McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498] (voluntary payment of part of an infant's legacy to the father, for the latter's expense in supporting the child).

67. Cookus v. Peyton, 1 Gratt. (42 Va.) 431; Hill v. Gomme, 1 Beav. 540, 17 EngCh 540, 48 Reprint 1050; Chelsea Water-Works Co. v. Cowper, 1 Esp. 275; Smith v. Day, 2 M. & W. 684, 150 Reprint 931; Knatchbull v. Fearnhead, 3 Myl. & C. 122, 14 Eng Ch 122, 40 Reprint 871; Norman v. Baldry, 6 Sim. 621, 9 EngCh 621, 58 Reprint 726.

[a] **This rule is modified in England** (1) by a statute authorizing executors and administrators to advertise for creditors, and providing that after such advertisement they may "distribute the Assets of the Testator or Intestate, or any Part thereof, amongst the Parties entitled thereto, having regard to the Claims of which such Executor or Administrator has then Notice, and shall not be liable for the Assets or any Part thereof so distributed to any Person of whose Claim such Executor or Administrator shall not have had Notice at the Time of Distribution of the said Assets, or a Part thereof, as the Case may be." St. 22 & 23 Vict. c 35, § 29. (2) Under this statute it is held that an executor who has distributed the assets of his testator, after issuing advertisements and taking the steps pointed out by the act, will have the same protection as if he had administered the estate under a decree of the court; and if he should have retained any legacies as trustee after appropriating them for the benefit of the cestui que trust, he will no longer be under any liability qua executor. Clegg v. Rowland, L. R. 3 Eq. 368; Hunter v. Young, 4 Ex. D. 256. (3) But an executor with notice of a claim against his testator's estate is not discharged by the fact that the person entitled to make the claim has failed to send in particulars in answer to the statutory advertisement. In re Land Credit Co., 21 WklyRep 135.

68. Ark.—Parker v. Wilson, 98 Ark. 553, 136 SW 981 [stay of judgment granted 99 Ark. 344, 137 SW 926, AnnCas1913B 84].

Cal.—Pratt v. Pratt, (A.) 184 P 956.

D. C.—Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. 406.

Ill.—Mayer v. McCracken, 245 Ill. 551, 92 NE 355.

Tex.—Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

Wis.—Williams v. Ely, 13 Wis. 1.

[a] **Illustration.**—Where an administrator of complainant's daughter had reasonable cause to believe that a fund in his hands belonged to the estate which was solvent, the administrator, before notice that the fund was claimed by complainant, was authorized to make partial distribution payments to the daughter's husband without an order of probate court. Mayer v. McCracken, 245 Ill. 551, 92 NE 355.

[b] **A representative may at his own risk assign a mortgage** belonging to the estate to one of the heirs by way of advance before a decree of distribution, and in the absence of fraud or collusion or insufficiency of assets the assignee may maintain a suit to foreclose the mortgage. Williams v. Ely, 13 Wis. 1.

[c] **Executors with power to act independently** of the probate court have the legal right, independent of any judicial decree, to relinquish their administrative authority over any part of the estate, and whether a consent decree, in a suit against them, distributing the estate, is one which they or the heirs can be compelled to observe or not, it embodies an agreement as binding as a judgment to the same effect, in passing their possessory rights as executors, and, although more comprehensive than the agreement itself, it is a judicial construction thereof and must be regarded as having received their full assent as entered. Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

[d] **Where administration unnecessary.**—One who was guardian of testatrix's children, and was also appointed administrator of her estate when there was no necessity for administration, there being no debts and all of the property being devised to another in trust for the children, was not bound to procure an order of the probate court directing him to turn the property over to the trustee in order to authorize him to do so, and the fact that he turned it over at various times, instead of all at one time, would not make him liable. Parker v. Wilson, 98 Ark. 553, 136 SW 981 [stay of judgment granted, 99 Ark. 344, 137 SW 926, AnnCas1913B 84].

69. Burnes v. Burnes, 137 Fed. 781, 70 CCA 357; Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. (D. C.) 406.

[a] **Payment by administrator to himself as distributee.**—An administrator who has in his hands money resulting from a suit by him for damages for the alleged negligent killing of his wife may pay it over to himself, as the sole distributee, without obtaining an order of the probate court to do so; and, having done so, there are no funds in his hands, in fact or in contemplation of law, subject to attachment or garnishment on a judgment against him individually. Miller-Shoemaker Real Est. Co. v. Sturgeon, 31 App. (D. C.) 406.

70. Palmer v. Whitney, 166 Mass. 306, 44 NE 229; Donaldson v. Raborg, 28 Md. 34; Young v. Thresher, 48 Mo. A. 327; Sutter's Est., 5 Pa. Co. 591.

"It is a common practice, when the distributees are known and their shares undisputed, to pay them what is due without a decree of distribution, and to credit the payments in the final account. When such payments are made, and are credited in the account, and the distributees assent to the account, or have notice of it and make no objection to the allowance of it, or are heard upon the allowance of it, and their objections are overruled, we see no reason why the account should not be allowed. If the distributees have actually received all they are entitled to, they ought not to be heard to complain that the formality of obtaining a decree of distribution has been omitted. An administrator distributing the property without a decree of distribution incurs the risk that there may be disributees who are not bound by the allowance of his account; but if he is willing to take this risk, the distributees who have received all they are entitled to cannot complain of the procedure." Palmer v. Whitney, 166 Mass. 306, 309, 44 NE 229.

71. Charlton's App., 88 Pa. 476.

Effect of decree for distribution generally see infra §§ 1400, 1401.

72. Rhines v. Wentworth, 209 Mass. 585, 95 NE 951.

73. Carter v. Skillman, 108 Va. 204, 60 SE 775.

Order or decree for distribution generally see infra §§ 1389–1407.

74. Frazer v. Page, 5 KyL 790; Charlton's App., 88 Pa. 476; Stewart's App., 86 Pa. 149.

75. Garner v. Lansford, 20 Miss. 558; Boales v. Ferguson, 55 Nebr. 565, 76 NW 18; Wade v. Dick, 36 N. C. 313.

76. Schooler v. Stark, 73 Mo. A. 301; In re Hawgood, 37 S. D. 565, 159 NW 117.

[a] **Illustration.**—Where an order of distribution made by the circuit court on appeal did not include or refer to a special fund, the distribution of which by the probate court was not included, payment to the distributees in accordance with the judgment of the circuit court will not release the executor from liability to account for such special fund. Schooler v. Stark, 73 Mo. A. 301.

77. Pearson v. Darrington, 32 Ala. 227; Sapp v. Williamson, 128 Ga. 743, 58 SE 447.

78. McMahon v. Jones, 14 AbbN Cas (N. Y.) 406, 67 HowPr 113; McNair v. Ragland, 16 N. C. 516; Lewis v. Richardson, 40 S. C. L. 382.

[a] **This is true although** the decree provides for a forthcoming bond on which the representative has his remedy. Lewis v. Richardson, 40 S. C. L. 382.

Payment or distribution before debts are paid generally see infra § 1341.

79. O'Neil's App., 55 Conn. 409, 11 A 857 (where an administratrix procured an order of distribution and knowingly omitted a distributee therefrom, a payment thereunder was not made in good faith, and that the administratrix was liable for such distributee's share on reversal of the order).

80. Coulter v. Lyda, 102 Mo. A. 401, 76 SW 72.

81. Ernst v. Freeman, 129 Mich. 271, 88 NW 636.

[§ 1341] **8. Payment or Distribution before Debts Are Paid.** The debts of a decedent being entitled to priority over legacies and distributive shares,[82] a representative who makes distribution to legatees or distributees without taking a refunding bond[83] before the payment of debts is guilty of a devastavit, and personally liable to unpaid creditors prejudiced thereby, who present or give notice of their claims within the time prescribed by statute,[84] although he was ignorant of the existence of such claims at the time of such distribution,[85] or has subsequently settled his accounts

82. See supra § 1273.

83. Ky.—Dye v. Claunch, 5 J. J. Marsh. 659; Hooser v. Hooser, 3 KyL 796.

N. C.—Reeves v. Bell, 47 N. C. 254.

Pa.—Robins' Est., 180 Pa. 630, 37 A 121 [mod 4 Pa. Dist. 277]; Transue's Est., 141 Pa. 170, 21 A 502; Jones' App., 99 Pa. 124; Sidle v. Anderson, 45 Pa. 464; Musser v. Oliver, 21 Pa. 362; Rastaetter's Est., 15 Pa. Super. 549; Dougherty v. Snyder, 15 Serg. & R. 84, 16 AmD 520.

Tenn.—Rice v. Hunt, 7 Lea 33; Boring v. Jobe, (Ch. A.) 53 SW 763.

Va.—Beverly v. Rhodes, 86 Va. 415, 10 SE 572; Morrison v. Lavell, 81 Va. 519; Edmunds v. Scott, 78 Va. 720; Lewis v. Overby, 31 Gratt. (72 Va.) 601.

W. Va.—McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 SE 378.

[a] **An erroneous belief that a debt was satisfied,** which belief was not authorized by the conduct of the creditor, does not relieve the representative from liability to such creditor, where he distributed the estate without taking a refunding bond. Hooser v. Hooser, 3 KyL 796.

[b] **A creditor's refusal to accept certain funds** in payment of his claim relieves the representative from liability for turning over such funds to the legatees without taking a refunding bond. Ramsay v. Hanner, 64 N. C. 668.

[c] **A creditor** who tells an executor to settle with a distributee "without regard to my account" does not exonerate the executor from taking bonds from the distributees and holding assets until all the debts of which he had notice are satisfied. Dye v. Claunch, 5 J. J. Marsh. (Ky.) 659.

[d] **Laches of the creditor** will not bar his right against a representative who has made distribution without taking a refunding bond. Robins' Est., 180 Pa. 630, 37 A 121 [mod 4 Pa. Dist. 277]; Jones' App., 99 Pa. 124; Montgomery's App., 92 Pa. 202, 37 AmR 670; Musser v. Oliver, 21 Pa. 362; Rastaetter's Est., 15 Pa. Super. 549.

[e] **Subsequent confirmation of the representative's account** of his voluntary payment to legatees or distributees does not protect him against creditors where he has taken no refunding bond. Robins' Est., 180 Pa. 630, 37 A 121 [mod 4 Pa. Dist. 277].

[f] **One acting as trustee** and not in the capacity of an administrator is not guilty of devastavit for making distribution without taking refunding bonds. Transue's Est., 141 Pa. 170, 21 A 502 (so holding as to administrators appointed by the court in partition proceedings to sell realty and pay the debts of the estate, as they act as trustees and not as administrators).

[g] **Contrary view.**—Failure to take a refunding bond is not of itself sufficient ground for holding the administrator guilty of a devastavit, especially where the statute requiring such bond has practically fallen into disuse. Davis v. Van Sands, 7 F. Cas. No. 3,655, 45 Conn. 600.

Security or refunding bond see supra §§ 1295–1304.

84. Ala.—Daniel v. Baldwin, 148 Ala. 292, 40 S 421; Handley v. Heflin, 84 Ala. 600, 4 S 725; Whitfield v. Woolf, 51 Ala. 202; Feagan v. Kendall, 43 Ala. 628; Williamson v. Mason, 18 Ala. 87; Dean v. Portis, 11 Ala. 104; Thrash v. Sunwalt, 5 Ala. 13.

Conn.—Phelps v. Swan, Kirby 428.

Ga.—Lanier v. Huguley, 91 Ga. 791, 18 SE 39; Sharp v. Bonner, 86 Ga. 418; McIntosh v. Hambleton, 35 Ga. 94, 89 AmD 276.

Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108]; Potter v. Mortimer, 114 Ill. A. 422 [aff 213 Ill. 178, 72 NE 817].

Ind.—Fleece v. Jones, 71 Ind. 340; Ray v. Doughty, 4 Blackf. 115.

Ky.—Johnson v. Fuquay, 1 Dana 514; Jeeter v. Durham, 6 J. J. Marsh. 228; Hooser v. Hooser, 11 Ky. Op. 651.

Md.—Rawlings v. Adams, 7 Md. 26; Steuart v. Carr, 6 Gill 430; Cornish v. Willson, 6 Gill 299.

Mo.—Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365; North v. Priest, 81 Mo. 561 [aff 9 Mo. A. 586].

N. Y.—In re Gall, 182 N. Y. 270, 74 NE 875; Carter v. Board of Education, 68 Hun 435, 23 NYS 95 [aff 144 N. Y. 621, 39 NE 628]; Matter of Swart, 2 Silv. Sup. 585, 6 NYS 608; Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179, 1 Gibb. Surr. 516; McMahon v. Jones, 14 AbbNCas 406, 67 HowPr 113; McMahon v. Sullivan, 14 AbbNCas 405, 67 HowPr 152; Glacius v. Fogel, 4 Redf. Surr. 516; Clayton v. Wardell, 2 Bradf. Surr. 1.

N. C.—McKinder v. Littlejohn, 23 N. C. 66; McNair v. Ragland, 16 N. C. 516.

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156; Western Reserve Bank v. McIntire, 40 Oh. St. 528.

Pa.—Thomas v. Riegel, 5 Rawle 266; Swearinger v. Pendleton, 4 Serg. & R. 389; Rastaetter's Est., 15 Pa. Super. 549.

Philippine.—Villanueva v. Chavez, 24 Philippine 170.

S. C.—Graves v. Spoon, 18 S. C. 386; Crane v. Moses, 13 S. C. 561; Cochran v. Cochran, 2 S. C. Eq. 521; Trescot v. Trescot, 6 S. C. Eq. 417.

Tenn.—Davis v. Jackson, (Ch. A.) 39 SW 1067.

Va.—Lewis v. Mason, 84 Va. 731, 10 SE 529; Morrison v. Lavell, 81 Va. 519; Edmunds v. Scott, 78 Va. 720; Lewis v. Overby, 31 Gratt. (72 Va.) 601; Cookus v. Peyton, 1 Gratt. (42 Va.) 431; Davis v. Newman, 2 Rob. (41 Va.) 664, 40 AmD 764; Kippen v. Carr, 4 Munf. (18 Va.) 119.

W. Va.—George v. Brown, 99 SE 509.

Wis.—In re Scheftel, 141 Wis. 307, 124 NW 301.

Eng.—In re Birch, 27 Ch. D. 622; Jewsbury v. Mummery, L. R. 8 C. P. 56; Scottish Equitable L. Assur. Soc. v. Beatty, L. R. 29 Ir. 290; Hawkins v. Day, Ambl. 160, 27 Reprint 107, Dick. 155, 21 Reprint 228; Newcastle, etc., Banking Co. v. Hymers, 22 Beav. 367, 52 Reprint 1149; Davis v. Blackwell, 9 Bing. 5, 23 ECL 461, 131 Reprint 516; Richards v. Browne, 3 Bing. N. Cas. 493, 32 ECL 230, 132 Reprint 500; In re Lindsey, Ir. R. 8 Eq. 61; Jefferys v. Jefferys, 24 L. T. Rep. N. S. 177; Knatchbull v. Fearnhead, 3 Myl. & C. 122, 14 EngCh 122, 40 Reprint 871.

Ont.—Clarkson v. McLean, 42 Ont. L. 1; Stewart v. Snyder, 27 Ont. A. 423 [dism app 30 Ont. 110].

[a] **This rule has been applied:** (1) Where the distribution was made on the advice of counsel and a probate judge. James v. West, 67 Oh. St. 28, 65 NE 156. (2) Where there was a premature order of the court for distribution which the representative did not oppose. McNeir v. Ragland, 16 N. C. 516. (3) Where the representative procured an erroneous dismissal of the claim, order of distribution, and discharge. Villaneuva v. Chavez, 24 Philippine 170. (4) Where the creditor had given the testator what purported to be a release and which the executor bona fide believed to be valid, although the creditor did not question the validity of the release until after the executor had paid the legacy. Jefferys v. Jefferys, 24 L. T. Rep. N. S. 177.

[b] **A testamentary provision** that legacies be paid "as soon as practicable" does not change the liability of the representative in this respect. Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365.

[c] **A distribution by agreement** among the persons entitled does not relieve the representative from liability for debts left unpaid. Long v. Mitchell, 63 Ga. 769; Drayton v. Drayton, 1 S. C. Eq. 557.

[d] **That a debt is secured by a mortgage on real estate** does not justify the payment of legacies before ascertaining the existence of assets sufficient to pay all debts, and in case of a judgment for a deficiency on a foreclosure and a sale of the mortgaged premises the judgment creditor may compel the executor to account. Glacius v. Fogel, 4 Redf. Surr. (N. Y.) 516.

[e] **Contingent liabilities** are within the rule. Pearson v. Archdeaken, 1 Alc. & N. 23.

[f] **Liability for interest.**—(1) The representative is liable for interest on the amount prematurely distributed (Cookus v. Peyton, 1 Gratt. (42 Va.) 431) (2) from the time of distribution (Cochran v. Cochran, 2 S. C. Eq. 521), or (3) from a date one year later than the date of the testamentary letters (Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540). (4) He is only liable for the amount distributed without interest (McKinzie v. Smith, 3 N. C. 372) (5) where by reason of such distribution he has been compelled to borrow money to pay debts and is not allowed credit for interest paid on the money so borrowed (Matter of Oosterhoudt, 15 Misc. 566, 38 NYS 179, 1 Gibb. Surr. 516).

[g] **Property improperly distributed is to be estimated,** in an action by a creditor against the executor, as assets in his hands, at its increased value and not as it was when received or distributed. Mason County Justices v. Lee, 1 T. B. Mon. (Ky.) 247.

[h] **The fact that the assets turned over to the legatee would have been lost if retained** by the executor is immaterial as regards his liability to creditors. Morrison v. Lavell, 81 Va. 519 (where the executor turned over slaves who were subsequently emancipated by the federal government).

[i] **Distribution by an executor to himself** as devisee or heir at law with notice of an outstanding debt against his testator does not give him a title free from the ordinary legal lien of a judgment de bonis testatoris subsequently rendered against him in favor of the creditor. McMillan v. Toombs, 79 Ga. 143, 4 SE 16.

85. Ala.—Whetstone v. McQueen, 137 Ala. 301, 34 S 229; Whitfield v. Woolf, 51 Ala. 202.

Ky.—Johnson v. Fuquay, 1 Dana 514.

Pa.—Swearinger v. Pendleton, 4 Serg. & R. 389.

and been discharged;[86] and he cannot relieve himself from liability by proof that his coexecutor had received assets sufficient to pay all debts.[87] Where, however, the representative has given notice to creditors to present their claims, a distribution made in ignorance of the existence of claims which are not presented within the time prescribed for such presentation subjects him to no liability to the holders of such claims.[88] It has been held that the representative incurs no liability where he retains assets sufficient to pay all claims,[89] but there is also authority for the view that if the assets so retained are lost, or become insufficient, the representative is liable to creditors even though such loss or decrease in value was not due to any fault or negligence on his part.[90] The representative is not liable to a creditor who consented to the distribution,[91] or misled him so as to induce him to pay out the assets to legatees or distributees.[92]

[§ 1342] 9. **Overpayment.** Where the representative pays to one legatee or distributee more than is due him, the amount of the overpayment is, in legal contemplation, still in his hands as assets which he must pay over to the persons entitled thereto,[93] and an order for immediate payment to an unpaid legatee may be made without waiting until the executor has recovered from other legatees the excess paid to them.[94] If, however, the error or inequality has occurred on partial distribution, it may be rectified on a subsequent or final distribution,[95] and the excess may be retained from the future income or shares of the ones so overpaid.[96]

Va.—Lewis v. Overby, 31 Gratt. (72 Va.) 601; Cookus v. Peyton, 1 Gratt. (42 Va.) 431.

W. Va.—McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 SE 378.

Eng.—Hawkins v. Day, Ambl. 160, 27 Reprint 107, Dick. 155, 21 Reprint 228; Newcastle, etc., Banking Co. v. Hymers, 22 Beav. 367, 52 Reprint 1149; Hill v. Gomme, 1 Beav. 540, 17 EngCh 540, 48 Reprint 1050 [aff 5 Myl. & C. 250, 46 EngCh 227, 41 Reprint 366]; Davis v. Blackwell, 9 Bing. 5, 23 ECL 461, 131 Reprint 516; Jefferys v. Jefferys, 24 L. T. Rep. N. S. 177; Knatchbull v. Fearnhead, 3 Myl. & C. 122, 14 EngCh 122, 40 Reprint 871; Smith v. Day, 2 M. & W. 684, 150 Reprint 931; Norman v. Baldry, 6 Sim. 621, 9 EngCh 621, 58 Reprint 726.

[a] **Contrary view.**—Where an administrator, without negligence, makes payments to legatees in ignorance of outstanding claims of creditors, and with assets then sufficient to pay all debts. Graves v. Spoon, 18 S. C. 386.

86. Long v. Mitchell, 63 Ga. 769; Whitney v. Pinney, 51 Minn. 146, 53 NW 198; Thomas v. Riegel, 5 Rawle (Pa.) 266; Culbertson's Est., 20 Pa. Dist. 1081; Villanueva v. Chavez, 24 Philippine 170.

[a] **A final decree allowing an administrator's account** is no defense to an action against the administrator on a judgment rendered in an action pending at the time of such decree, where he held in his hands funds sufficient to pay any judgment that might be rendered against him in such action, and his petition for the decree failed to disclose the pending action. Whitney v. Pinney, 51 Minn. 146, 53 NW 198.

87. Whitfield v. Woolf, 51 Ala. 202.

88. Md.—Glenn v. Smith, 17 Md. 260; Rawlings v. Adams, 7 Md. 26.

Mich.—Brown v. Forsche, 43 Mich. 492, 5 NW 1011.

N. Y.—Erwin v. Loper, 43 N. Y. 521; Rivarz v. Patterson, 59 Misc. 263, 112 NYS 250.

N. C.—Mallard v. Patterson, 108 N. C. 255, 13 SE 93.

S. C.—Crane v. Moses, 13 S. C. 561.

Eng.—Clegg v. Rowland, L. R. 3 Eq. 368; Davis v. Blackwell, 9 Bing. 5, 23 ECL 461, 131 Reprint 516.

[a] **This is true although** the legacy for which the money was paid was void. O'Connor v. Gifford, 117 N. Y. 275, 22 NE 1036 [aff 3 NYS 337 (rev 3 NYS 207, 6 Dem. Surr. 71)].

[b] **If the representative has actual** notice of the claim, he is liable therefor, although the creditor fails to send in particulars of it in answer to an advertisement for creditors. In re Land Credit Co., 21 Wkly. Rep. 135.

89. Anderson v. Irvine, 7 B. Mon. (Ky.) 209; Rothschild v. Wald, 12 KyL 685; Mustin's Est., 8 Pa. Dist. 180; Graves v. Spoon, 18 S. C. 386.

90. Lanier v. Huguley, 91 Ga. 791, 18 SE 39 (depreciation of corporate stock); McIntosh v. Hambleton, 35 Ga. 94, 89 AmD 276 (emancipation of slaves).

91. Barton v. Burbank, 114 La. 224, 38 S 150.

92. Miller v. Harrison, 34 N. J. Eq. 374; In re Birch, 27 Ch. D. 622; Jewsbury v. Mummery, L. R. 8 C. P. 56; Richards v. Browne, 3 Bing. N. Cas. 493, 32 ECL 230, 132 Reprint 500.

[a] **Conduct held insufficient to relieve executor from liability.**—The fact that a creditor wrote to an executor that he looked to him personally for payment of his claim on account of his previous conduct in the administration of the estate will not preclude him from claiming that the executor became personally liable therefor by his subsequent payment of legacies. Richards v. Browne, 3 Bing. N. Cas. 493, 32 ECL 230, 132 Reprint 500.

93. U. S.—Falls Bridge Turnp. Co. v. Adams, 8 F. Cas. No. 4,630, 1 Hayw. & H. 95; Moffit v. Varden, 17 F. Cas. No. 9,689, 5 Cranch C. C. 658.

Ala.—Sellers v. Smith, 11 Ala. 264.

Conn.—Gray v. Goddard, 90 Conn. 561, 98 A 126.

Me.—Smith v. Lambert, 30 Me. 137.

Md.—Maddox v. State, 4 Harr. & J. 539.

N. H.—Griswold v. Chandler, 5 N. H. 492.

N. J.—McKnight v. Walsh, 24 N. J. Eq. 498 [aff 23 N. J. Eq. 136].

N. Y.—In re Hodgman, 140 N. Y. 421, 35 NE 660; In re Underhill, 117 N. Y. 471, 22 NE 1120 [aff 6 NYS 133]; Adair v. Brimmer, 74 N. Y. 539; Matter of Saltus, 3 Abb. Dec. 243, 3 Keyes 500; Martin v. Kilbride, 176 App. Div. 790, 163 NYS 318; Matter of Robertson, 51 App. Div. 117, 64 NYS 385 [aff 165 N. Y. 675 mem, 59 NE 1129 mem]; Johnson v. Weir, 34 Misc. 683, 70 NYS 1020; In re Vena, 170 NYS 291.

N. C.—Sanders v. Jones, 43 N. C. 246.

Oh.—Rogers v. Weaver, 5 Oh. 536; Abbott v. Cole, 5 Oh. 86.

Pa.—Mayberry's App., 33 Pa. 258; Ihmsen's Est., 12 PittsbLegJNS 218; Kiser's Est., 34 PittsbLegJNS 147.

S. C.—Whitlock v. Whitlock, 34 S. C. Eq. 165; Stephenson v. Axson, 8 S. C. Eq. 274.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Tenn.—Hatcher v. Royster, 14 Lea 222; Rice v. Hunt, 7 Lea 33.

Vt.—Spaulding v. Wakefield, 53 Vt. 660, 38 AmR 709.

Va.—Gallego v. Atty. Gen., 3 Leigh (30 Va.) 450, 24 AmD 650.

W. Va.—Turk v. Hevener, 49 W. Va. 204, 38 SE 476.

Ont.—Re McIntyre, 7 Ont. L. 548, 3 OntWR 258; Uffner v. Lewis, 27 Ont. A. 242.

"An overpayment made by the executor to any person entitled to a distributive share does not in any way diminish the amount of the estate which the law says is in the executor's hands for distribution. The law does not recognize any such overpayment, and does not, therefore, permit the executor to credit himself with the amount of the excess. In legal contemplation the sum is in the hands of the executor as assets of the estate which he must pay over to the parties entitled thereto." In re Underhill, 117 N. Y. 471, 475, 22 NE 1120.

[a] **Illustration.**—Where testator gave his wife one thousand dollars and the remainder of his estate to his brother, and testator and his wife had an account in a bank in their joint names, in which each deposited, having independent sources of revenue, and after his death she drew out the balance, there being no proof as to how much belonged to each, the presumption was that each owned half, and, the executors having paid the legacy of one thousand dollars without retaining the brother's half interest therefrom, a decree should be made providing that the executors should execute an assignment to the brother of such interest, to be held by him to his own use, but that the executor would not be charged personally therewith. In re Tobin, 16 NYS 462, Pow. Surr. 5.

[b] **It is waste and culpable negligence** for an executor to deliver to legatees, in payment of one thousand dollars each, three bonds of the estate of that face value, but actually worth twelve hundred dollars each in the market, and he is liable to the estate for the loss, even though they were appraised at par. Spaulding v. Wakefield, 53 Vt. 660, 38 AmR 709.

[c] **Collection of excess.**—An order directing executors who had overpaid certain legatees to pay the balance due to other legatees when they had collected the amounts overpaid created an absolute obligation on the part of the executors to collect the sums overpaid within a reasonable time. Adams v. Turner, 12 S. C. 594.

[d] **A decree allowing an executor's account,** in which he has credited himself with money paid to a legatee beyond his just proportion, furnishes no protection to the executor for making such payment. Smith v. Lambert, 30 Me. 137.

[e] **The representative of a deceased executor** cannot recover from the latter's successor in the administration the amount of overpayments made by the executor where the circumstances do not permit of a fair readjustment. Laird v. Moore, 27 Pa. 67.

94. Matter of Robertson, 51 App. Div. 117, 64 NYS 385 [aff 165 N. Y. 675, 59 NE 1129].

Liability of legatee or distributee to refund see infra §§ 1343, 1344.

95. In re Reed, 237 Pa. 125, 85 A 138; Evans' Est., 24 Pa. Dist. 185; Leavens' Est., 65 Wis. 440, 27 NW 324; Barber v. Clark, 20 Ont. 522 [aff on op below 18 Ont. A. 435].

96. In re Reed, 237 Pa. 125, 85 A

Of course the fact that the representative has made an overpayment to one legatee or distributee does not bind him to make like payments to others.[97]

If an overpayment is made under an order of court, the representative cannot be held liable for the amount thereof.[98]

[§ 1343] **10. Liability of Legatee or Distributee to Refund—a. In General.** Repayment of the amount wrongfully paid a legatee or distributee under a mistake of fact may be enforced against him as a personal obligation in a suit by the personal representative,[99] notwithstanding the fact that he has made a final settlement of his accounts.[1] But it is otherwise where such payment is made under a mistake of law,[2] unless recovery is necessary for the payment of debts of the estate.[3] If the representative refuses or fails to apply the remedy [4] or is insolvent, the other legatees or distributees may sue in equity to compel a repayment.[5] This remedy, however, may be barred by the statute of

138; Grim's App., 109 Pa. 391, 1 A 212 [aff 9 Pa. Co. 523]; Vanderford's App., (Pa.) 12 A 491; Githen's Est., 10 Pa. Dist. 375, 25 Pa. Co. 608; Richardson's Est., 12 Phila. (Pa.) 32.

97. Anderson v. Piercy, 20 W. Va. 282.

98. Harris v. Starkey, 176 Mass. 445, 57 NE 698, 79 AmSR 322; Young v. Thrasher, 48 Mo. A. 327.

99. U. S.—Moffit v. Varden, 17 F. Cas. No. 9,689, 5 Cranch C. C. 658; Washington v. Washington, 29 F. Cas. No. 17,236, 3 Cranch C. C. 77.

Ala.—Sellers v. Smith, 11 Ala. 264.

Conn.—Northrop v. Graves, 19 Conn. 548, 50 AmD 264.

Ga.—Echols v. Almon, 77 Ga. 330, 1 SE 269.

Ind.—Stokes v. Goodykoontz, 126 Ind. 535, 26 NE 391.

Ky.—Whitney v. Whitney, 5 Dana 327; McCampbell v. McCampbell, 5 Litt. 92, 15 AmD 48.

La.—Beatty v. Dufief, 11 La. Ann. 74.

Md.—Buchanan v. Pue, 6 Gill 112.

N. Y.—Matter of Robertson, 51 App. Div. 117, 64 NYS 385 [aff 165 N. Y. 675, 59 NE 1129]; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162]; Martin v. Kilbride, 176 App. Div. 790, 163 NYS 318; Williamson v. Williamson, 6 Paige 298.

N. C.—Sprinkle v. Holston, 146 N. C. 258, 59 SE 680; Cavinett v. Maryland Fidelity, etc., Co., 140 N. C. 58, 52 SE 265.

Pa.—Grim's Est., 147 Pa. 190, 23 A 802, 803; Palmer's Est., 23 Pa. Dist. 1015; Sutter's Est., 5 Pa. Co. 591. But compare Bomgardner v. Blatt, 35 Pa. Super. 361 (where an executor voluntarily, but by mistake, makes an overpayment to a distributee, he cannot thereafter recover from the distributee the excess paid, if it appears that the mistake did not arise from any statement or representation of the distributee, or from any artifice on his part, and that there was no promise or agreement on the part of the distributee to repay).

S. C.—Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64.

Vt.—French v. Winsor, 36 Vt. 412.

Va.—Gallego v. Atty.-Gen., 3 Leigh (30 Va.) 450, 24 AmD 650.

Wis.—Ludington v. Patton, 121 Wis. 649, 99 NW 614.

Eng.—Peterson v. Peterson, L. R. 3 Eq. 111.

Ont.—Uffner v. Lewis, 27 Ont. A. 242; Barber v. Clark, 20 Ont. 522 [aff on op below 18 Ont. A. 435]; Haldan v. Beatty, 40 U. C. Q. B. 110.

[a] **Illustration.**—Where the representative of a decedent brought an action against his heirs and creditors for the purpose of settling his estate, and a third person became a party and presented a claim against the estate, and being defeated in such action such person executed a supersedeas bond, and subsequently the court directed the commissioner and receiver to turn over the funds of the estate to a trustee for the heirs of decedent, the court, on the motion of the third person, was authorized to direct the trustee and the heirs to return to the court's receiver a specified part of the fund, on being satisfied that there was not enough of the estate under the control of the court to pay the debts. Cline v. Waters, 90 SW 231, 28 KyL 679.

[b] **A note given by the representative in payment** in lieu of cash or property may be scaled to the true amount of the legacy or distributive share where it appears that it had been made for more than the amount due. Barnes v. Stephenson, 22 Ga. 209.

[c] **Moneys paid under an erroneous decree of distribution,** being assets of the estate, are properly recoverable in an action at law. Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

[d] **The assignment of a mortgage in payment of a legacy less in amount than the nominal amount of the mortgage** does not make the legatee responsible for the nominal excess, where he has with proper diligence and in good faith sold the property under a decree of foreclosure for less than the amount of his legacy. Hammond v. Lewis, 1 How. (U. S.) 14, 11 L. ed. 30.

[e] **Interest** (1) on the excess may be charged against the one overpaid. Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64; Ludington v. Patton, 121 Wis. 649, 99 NW 614; Boys' Home v. Lewis, 5 Ont. L. 684 [rev 3 Ont. L. 208]; Davidson v. Booner, 17 Grant Ch. (U. C.) 509. (2) Interest runs from the time the demand for restitution is made. Grim's Est., 147 Pa. 190, 23 A 802, 803. (3) Where a legatee receives a portion of the estate before being entitled thereto, he is liable to the estate for interest lost thereon through the premature payment. Matter of Bielby, 91 Misc. 353, 155 NYS 133.

[f] **Priority.**—Upon the death of an overpaid distributee, the claim for repayment of the excess will not take precedence over the claims of creditors of such distributee. Williams v. McCardell, 14 S. C. 219.

[g] **The burden of proving that the amount received was excessive** is upon the person requiring the money to be refunded. Peterson v. Peterson, L. R. 3 Eq. 111.

[h] **Defenses based on the representative's wrongdoing** in distributing such excess cannot be set up in an action therefor. Lawyers' Surety Co. v. Reinach, 23 Misc. 242, 51 NYS 162 [aff 25 Misc. 150, 54 NYS 205].

[i] **Set-off.**—As a representative's right of action for restitution in such case is in his representative capacity, a claim against him individually cannot be set off against the claim for restitution. Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162]. See also Stevens v. Goodell, 3 Metc. (Mass.) 34 (amount due from former executor cannot be set off in action by administrator de bonis non).

[j] **Extent of liability.**—Where an administrator, who was also one of the distributees of the estate, wrongfully paid therefrom money in excess of the amount to which he and his brother were entitled to a certain person for the purchase of certain stock for the benefit of himself and his brother, and such person had knowledge that the money so paid belonged to the estate, he was liable, in the absence of debts against the estate, to return to the administrator de bonis non only the excess over the amounts to which the administrator and his brother were entitled as distributees. Caviness v. Maryland Fidelity, etc., Co., 140 N. C. 58, 52 SE 265.

[k] **Liability not a charge on realty.**—The liability to repay does not constitute a charge upon such party's share in decedent's land. Wilcoxen v. Donnelly, 90 N. C. 245.

[l] **Relief in equity.**—Where, by mistake as to the condition of the estate, the executor pays to a legatee more than his share, or if by some unforeseen cause, for which the executor is not responsible and which clearly could not reasonably have been anticipated, it turns out on a final settlement that he has overpaid some of the legatees, the executor, after making good to the other legatees their share, may have relief in equity against the overpaid legatees. Sprinkle v. Holton, 146 N. C. 258, 59 SE 680.

[m] **Liability of life legatee to refund.**—Moss v. Cohen, 158 N. Y. 240, 53 NE 8 [rev 15 Misc. 108, 36 NYS 265].

[n] **An administrator de bonis non** can recover the amount improperly distributed. Stevens v. Goodell, 3 Metc. (Mass.) 34.

1. Sellers v. Smith, 11 Ala. 264; New York Security Bank v. Callahan, 220 Mass. 84, 107 NE 385.

[a] **An executor who fails to open his account** because of final distribution has no right of action against distributees for contribution. Blair v. Blair, 97 App. Div. 507, 90 NYS 190.

[b] **After the executor's discharge** he cannot procure a direction, in an action by a devisee for partition, that enough of the proceeds to pay his claim against the devisee who has been overpaid be paid into the surrogate's court, the time having elapsed within which a distribution of the proceeds would be stayed in the interest of creditors, and the surrogate's decree not having been opened. Johnson v. Weir, 34 Misc. 683, 70 NYS 1020, 36 Misc. 737, 74 NYS 358 [aff 72 App. Div. 325, 76 NYS 76].

2. Phillips v. McConica, 59 Oh. St. 1, 51 NE 445, 69 AmSR 753; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466; Shriver v. Garrison, 30 W. Va. 456, 4 SE 660; Rogers v. Ingham, 3 Ch. D. 351.

3. Shriver v. Garrison, 30 W. Va. 456, 4 SE 660.

Liability to refund on deficiency of assets see infra §§ 1424–1437.

4. Miller v. Stark, 29 S. C. 325, 7 SE 501.

5. Miss.—Wallace v. Latham, 52 Miss. 291.

N. Y.—Buffalo Loan, etc., Safe Deposit Co. v. Leonard, 154 N. Y. 141, 47 NE 966 [aff 9 App. Div. 384, 41 NYS 294].

Pa.—Palmer's Est., 23 Pa. Dist. 1015.

S. C.—Miller v. Stark, 29 S. C. 325, 7 SE 501; Lyles v. Lyles, 10 S. C. Eq. 76.

Tex.—Gray v. Cockrell, 20 Tex. Civ. A. 324, 49 SW 247.

limitations,[6] which begins to run from the time the overpayments were made,[7] and not from the time they were discovered.[8] A proceeding to compel restitution by a legatee cannot be engrafted upon the proceedings before an auditing judge in the settlement and adjustment of the representative's account.[9]

[§ 1344] **b. Restitution on Reversal of Decree.** Upon the reversal of a decree of distribution the parties are in the same position as if no decree had been rendered, and the personal representative is entitled to restitution of all the property distributed under such decree, or its value,[10] including any part thereof which has been assigned or transferred by the distributee.[11]

[§ 1345] **11. Waiver, Estoppel, or Ratification.** A distributee or surviving spouse may waive objections to a distribution on the ground that it was premature,[12] or may be estopped to object.[13] So also the beneficiaries may so ratify a payment made before an order or decree of court as to preclude objection on their part.[14]

[§ 1346] **N. Delay in or Failure to Make Payment or Distribution**[15]**—1. Liability of Representative in General.** An executor or administrator may be held chargeable for a loss occurring through his unreasonable delay in distributing, or failure to distribute, or to apply for an order of distribution,[16] or to make payment to those entitled,[17] unless the latter have also been guilty of negligence

Va. — Gallego v. Atty.-Gen., 3 Leigh (30 Va.) 450, 24 AmD 650.

Eng.—Orr v. Kaines, 2 Ves. 194, 28 Reprint 125.

Ont.—Uffner v. Lewis, 5 Ont. L. 684, 27 Ont. A. 242, 2 OntWR 441.

[a] **The superior court of chancery has not jurisdiction** of a bill by a person alleging himself to be a distributee, whose claims have been overlooked or disregarded in the distribution in the probate court, against one of the distributees to recover from him a ratable proportion of the estate, as the proper remedy is in the probate court. Gaines v. Smiley, 15 Miss. 53, 45 AmD 295.

[b] **A deficiency of assets is shown in an action by legatees** to recover of another legatee an overpayment of a legacy, where it appears from the complaint, as well as from a settlement in the probate court exhibited therewith, that the executor held assets amounting to fourteen thousand three hundred and forty-one dollars to be equally divided among ten legatees, and that defendant received two thousand one hundred and seventy-eight dollars. Miller v. Stark, 29 S. C. 325, 7 SE 501.

[c] **The husband of a distributee is not estopped** to recover from the other distributees his interest in his wife's distributive share, by the fact that he administers on the original estate. Gray v. Cockrell, 20 Tex. Civ. A. 324, 49 SW 247.

6. Shelburne v. Robinson, 8 Ill. 597; Reading v. Reading, 6 N. J. L. 186; Montgomery's App., 92 Pa. 202, 37 AmR 670; Schriver v. Garrison, 30 W. Va. 456, 4 SE 660.

7. Reading v. Reading, 6 N. J. L. 186; Ferguson v. Yard, 164 Pa. 586, 30 A 517; Montgomery's App., 92 Pa. 202, 37 AmR 670.

[a] **A judgment in administration proceedings** makes a fresh starting point in favor of legatees who were not served therein. Uffner v. Lewis, 27 Ont. A. 242.

8. Montgomery's App., 92 Pa. 202, 37 AmR 670; Shriver v. Garrison, 30 W. Va. 456, 4 SE 660.

[a] **Illustration.**—An administrator suing in a court of equity to recover money alleged to have been paid in ignorance of a material fact, to a distributee in excess of what he was entitled to, cannot avoid the bar of the statute of limitations on the ground that the mistake was not discovered until after the statutory limitation for the commencement of the action had expired, if it appears that he was informed of such other facts as would be sufficient to put him upon such inquiry as would have led to the discovery of such material fact before such cause of action was barred. Shriver v. Garrison, 30 W. Va. 456, 4 SE 660.

9. Clinton's Est., 9 Pa. Dist. 455, 456, 24 Pa. Co. 218 ("such legatee is in no sense in court as an accounting party").

10. Ashton v. Heggerty, 130 Cal. 516, 62 P 934; Ashton v. Heydenfeldt, 127 Cal. 442, 59 P 759; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624; Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

[a] **Executors can maintain an action against a devisee** for the restitution of property constituting assets of the estate delivered over by them under a decree of distribution subsequently reversed, although such property was not "actually delivered," but was used by them, with the consent and under the direction of the legatee, to discharge her debts. Ashton v. Heydenfeldt, 127 Cal. 442, 59 P 759.

[b] **Where the estate consists of corporate stock** (1) which is delivered and transferred on the books of the corporation to distributees pending an appeal from the decree of distribution, which is subsequently reversed, the representative is upon such reversal entitled to the stock. Ashton v. Zeila Min. Co., 134 Cal. 408, 60 P 494; Ashton v. Heggerty, 130 Cal. 516, 62 P 934; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624. (2) He may sue to recover the dividends thereon, notwithstanding others appear as owners on the books of the corporation. Ashton v. Zeila Min. Co., 134 Cal. 408, 60 P 494.

[c] **Jurisdiction.** — The superior court has power to compel the delivery of property received by defendant under a decree of distribution, which is reversed, even though the property is of such a character that it cannot be seized under a writ of replevin. Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624; Heydenfeldt v. San Francisco Super. Ct., 117 Cal. 348, 49 P 210.

[d] **Action at law proper.** — Moneys paid by an administratrix under an erroneous decree of distribution, being assets of the estate, are properly recoverable in an action at law. Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

[e] **Defenses.**—It is no defense: (1) That the property sought to be recovered was not subject to an outstanding mortgage, owing to the existence of which the decree of distribution was reversed. Ashton v. Heggerty, 130 Cal. 516, 62 P 934. (2) That the distributee is the owner of the property involved in the proceeding. Heydenfeldt v. San Francisco Super. Ct., 117 Cal. 348, 49 P 210.

[f] **Set-off against representative.**—Where an administratrix paid moneys of an estate under an erroneous decree of distribution, the right of action for their recovery is not in her personal, but in her representative, character. Hence, in such action, a claim against plaintiff individually cannot be set off. Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

11. Ashton v. Zeila Min. Co., 134 Cal. 408, 66 P 494.

[a] **Illustration.**—Where a decree of distribution was reversed on the ground that a claim of a creditor which was a lien on certain unproductive property of the estate had not been paid, the executors were entitled to recover a portion of the estate from an assignee of one of the heirs to whom it had been distributed, although the property held by such assignee was productive property, and not covered by the creditor's lien, as the reversal of the decree put the parties in the same position as if no decree had been rendered. Ashton v. Heggerty, 130 Cal. 516, 62 P 934.

[b] **Consideration for assignment.**—It is immaterial whether or not a consideration was given for the assignment. Ashton v. Heggerty, 130 Cal. 516, 62 P 934.

12. McReynolds v. Jones, 30 Ala. 101 (where a widow after dissenting from her husband's will makes application for a division of slaves belonging to the estate, she cannot afterward have the division set aside because it was made before the lapse of eighteen months from the grant of administration).

13. McReynolds v. Jones, 30 Ala. 101; In re Levinson, 98 Cal. 654, 33 P 726; Sager v. Warley, 14 S. C. Eq. 26.

[a] **Assent to unequal division.**—By law, an administrator is bound to make equal distribution, and to deliver to each distributee his equal share of the estate; and if he withholds from one the whole or any part of his full share, it is no excuse that he has delivered it to another; no more than an undue application of the assets in the payment of debts would justify the neglect of any particular creditor; but if the distributees accept the shares awarded to them they are bound thereby although the division was unequal. Sager v. Warley, 14 S. C. Eq. 26.

14. Fauber v. Keim, 88 Nebr. 379, 129 NW 538.

[a] **Illustration.** — An executor should not distribute the estate without an order of court after notice, but if he prorates the assets among all the legatees upon the assumption that the bequests are all in the same class, and the legatees not under disability, retain their dividends for ten years with knowledge of the facts and without complaint, they ratify the transaction, and the executor will be also held to the theory upon which he distributed the estate. Fauber v. Keim, 88 Nebr. 379, 129 NW 538.

15. As breach of administration bond see infra §§ 2584, 2585.

16. Sanford v. Thorp, 45 Conn. 241.

17. U. S.—Pulliam v. Pulliam, 10 Fed. 23.

Ala.—Myers v. Myers, 33 Ala. 85.

Cal.—St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

Ky.—Com. v. Heaveren, 2 B. Mon. 126.

La.—Moorhead v. Thompson, 1 La. 281.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

Mo.—Clarke v. Sinks, 144 Mo. 448,

to which the loss may be attributed,[18] as where they have delayed to demand payment until after the loss occurred,[19] or unless he is otherwise excused from such delay or failure.[20] If there has been an order of distribution the distributees may sue the representative for a devastavit [21] or they may apply for an order of court compelling distribution.[22]

Election of distributees. When a representative keeps an estate together without authority, distributees may elect to take the profits or to charge him with rent.[23]

[§ 1347] **2. Effect of Death of Representative.** Upon the death of a representative who has neglected or failed to pay a legacy or distributive share, his representative is liable to the legatee or distributee, provided sufficient assets come to his hands from the original estate, or from the estate of such deceased representative.[24] The person entitled may elect either to present the sum due him as a claim against the deceased representative's estate [25] or to proceed upon the deceased representative's bond.[26]

[§ 1348] **O. Liability for Interest on Legacies or Distributive Shares [27]—1. Failure to Pay or Delay in Paying Over.** Where a representative unreasonably retains in his hands without sufficient cause the amount of a legacy or distributive share, he is usually held liable to the person entitled for interest thereon from the time when payment should have been made.[28] But where the delay is a rea-

46 SW 199; State v. Grigsby, 92 Mo. 419, 5 SW 39; State v. Thornton, 56 Mo. 325; State v. Matson, 44 Mo. 305.

N. J.—In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686].

N. Y.—Remington v. Walker, 99 N. Y. 626, 1 NE 305.

N. C.—Sprinkle v. Holton, 146 N. C. 258, 59 SE 680.

Oh.—In re Koehnken, 29 Oh. Cir. Ct. 724.

[a] **Illustration.**—Where on judicial settlement with administrators a certain sum was found due, and the administrators gave their check to the surrogate, who gave a receipt therefor, but no final decree was made, nor the money ever distributed to the heirs, the administrators were liable to the heirs for such sum. Matter of Te Culver, 22 Misc. 217, 49 NYS 820, 2 Gibb. Surr. 316.

[b] **Extent of liability.**—(1) An executor neglecting to execute the trusts of a will is not absolutely liable for the legacy, but only to the extent of what he actually receives, unless there has been supine negligence on his part. Pulliam v. Pulliam, 10 Fed. 23. (2) Where an executrix has wrongfully refused to pay over a legacy to a distributee, she is chargeable in her individual capacity both with interest and costs of a suit by the legatee to recover the same. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864. (3) A legatee is entitled to recover damages equal to the legacy against an executor who has violated his covenant to pay the legacy. Com. v. Heaveren, 2 B. Mon. (Ky.) 126.

[c] **Mere neglect to pay the balance of a legacy** does not render the executor personally liable, unless he claims to be himself entitled thereto, or is proved guilty of some illegal conduct in the premises. Hurlbut v. Durant, 21 Hun (N. Y.) 481.

[d] **The orphans' court has no jurisdiction** to adjudicate as to the liability of executors as accountants for neglect to make payment of legacies at the proper time. In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686].

18. Fitzsimons v. Fitzsimons, 1 S. C. 400 (although a representative detained a legacy until some time after the debts were or should have been paid, and until a portion of the legacy was lost by an inevitable accident, as the loss occurred after a bill for an account by the legatee against the representative had reached a stage that enabled the legatee to obtain such orders of court as would have prevented the loss, the representative was not liable to account therefor).

19. Roberts v. Summers, 47 Ga. 434; Thompson v. Youngblood, 1 S. C. L. 248.

[a] **An executor is not bound to search out a legatee,** and the latter must bear the loss occasioned by the depreciation of money in the hands of the executor which he has always been ready to pay over. Thompson v. Youngblood, 1 S. C. L. 248.

20. In re Sylvar, 1 Cal. A. 35, 81 P 663; Haskins v. Martin, 103 Ill. A. 115; Marshall v. Hitchcock, 3 Redf. Surr. (N. Y.) 461; Haltiwanger v. Windhorn, 44 S. C. 413, 22 SE 446.

[a] **Pendency of litigation.** — Where, on the hearing of an application to settle an administrator's third account, it appeared that the administrator had paid a dividend to creditors, as ordered by the court, and had obeyed all of the court's orders in the estate, that every item of the account was correct, and that there was still undisposed of at the hearing property of the appraised value of twenty-seven hundred and fifty dollars, the fact that the estate had been pending several years, during which there had been litigation which was appealed to the supreme court, did not establish that the administrator had willfully or negligently caused the delay. In re Sylvar, 1 Cal. A. 35, 81 P 663.

[b] **The burden of showing an excuse** for not making a distribution within the legal time is on the administrator. Haskins v. Martin, 103 Ill. A. 115.

[c] **A representative is not excused** for failing to make distribution: (1) By the distributees' obtaining an injunction preventing a sale advertised by him for the purpose of dividing the estate, where the sale would have been void if made. Harrison v. Harrison, 39 Ala. 489. (2) By the fact that one of the distributees is a minor, where he had a guardian. Henry v. State, 9 Mo. 778. (3) By the fact that persons claiming to be assignees of a distributee have made demand on the representative for the distributive share, although payment to an actual assignee may excuse him. Marshall v. Hitchcock, 3 Redf. Surr. (N. Y.) 461. (4) By the fact that the funds of the estate were mingled with the assets of a firm of which he was a member. In re Taylor, Myr. Prob. (Cal.) 160.

[d] **Attachment as garnishee no excuse.**—Lex's App., 97 Pa. 289.

21. Neubrecht v. Santmeyer, 50 Ill. 74.

22. Neubrecht v. Santmeyer, 50 Ill. 74; Brown's Est., 13 Pa. Co. 413.

[a] **Illustration.** — Where it appears, five months after the confirmation of the adjudication on an executor's account showing a sum due the guardian of minors, that he has made no effort to pay even a part thereof he will, on demand of the guardian, be ordered to pay at once. Brown's Est., 13 Pa. Co. 413.

23. Hinson v. Williamson, 74 Ala. 180; Harrison v. Harrison, 39 Ala. 489.

24. Windsor v. Bell, 61 Ga. 671; Moore v. Smith, 5 N. J. Eq. 649 [aff 4 N. J. Eq. 485].

25. Tracey v. Hadden, 78 Ill. 30.

26. Tracey v. Hadden, 78 Ill. 30.

Actions on administration bonds generally see infra §§ 2600–2669.

27. Interest on legacy as against estate of testator see Wills [40 Cyc 2093–2107].

28. U. S.—Stewart v. Barcroft, 23 F. Cas. No. 13,422, 1 Hayw. & H. 41.

Ark.—Atkins v. Guice, 21 Ark. 164.

Cal.—St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; Clary's Est., 112 Cal. 292, 44 P 569.

Conn.—State v. Culhane, 78 Conn. 622, 63 A 636; Colt v. Colt, 33 Conn. 270; Rowland v. Isaacs, 15 Conn. 115.

Fla.—Amos v. Campbell, 9 Fla. 187.

Ga.—Binion v. Miller, 27 Ga. 78; Hamilton v. Reese, 18 Ga. 8; Kenan v. Hall, 8 Ga. 417; Fall v. Simmons, 6 Ga. 265.

Ill.—Leischner v. Kaiser, 156 Ill. A. 123; Rimelin v. Peo., 147 Ill. A. 28; McDonald v. Peo., 123 Ill. A. 346 [aff 222 Ill. 325, 78 NE 609]; Cox v. Cox, 53 Ill. A. 84.

Iowa.—In re Lackie, 171 NW 679.

Ky.—Moore v. Beauchamp, 4 B. Mon. 71; Dicken v. Dicken, Ky. Dec. 173.

La.—Mann's Succ., 4 La. Ann. 28.

Me.—Nickels v. Nichols, 105 A 386; Decrow v. Moody, 73 Me. 100.

Md.—Kennedy v. Dickey, 99 Md. 295, 57 A 621; Graham v. Whitridge, 99 Md. 248, 57 A 609, 58 A 36, 66 LRA 408; Mickle v. Cross, 10 Md. 352; Thomas v. Frederick County School, 9 Gill & J. 115.

Mass.—Claflin v. Holmes, 202 Mass. 157, 88 NE 664; Eliott v. Sparrell, 114 Mass. 404.

Minn.—Sprague v. Stroud, 114 Minn. 64, 129 NW 1053.

Miss.—Banks v. Machen, 40 Miss. 256; Cole v. Leake, 27 Miss. 767.

Mo.—State v. Ewing, 264 Mo. 331, 174 SW 382; Henry v. State, 9 Mo. 778; Berkmeir v. Peters, 111 Mo. A. 717, 86 SW 598.

Nebr.—In re Bullion, 87 Nebr. 700, 128 NW 32, 31 LRANS 350.

N. J.—German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 63 A 835 [aff 72 N. J. Eq. 954, 67 A 23]; Craig v. Manning, 8 N. J. Eq. 806.

N. Y.—Matter of Garrabrant, 178 App. Div. 23, 165 NYS 139; Matter of Driskel, 100 App. Div. 171, 91 NYS 273; Matter of Bielby, 91 Misc. 353, 145 NYS 133; Hallett v. Hare, 5 Paige 315.

N. C.—Johnson v. Person, 16 N. C. 368.

Pa.—In re Skeer, 253 Pa. 497, 98 A 703; Witman's App., 28 Pa. 376; Bitzer v. Hahn, 14 Serg. & R. 232; Wilson's Est., 59 Pa. Super. 358; Bear's Est., 9 Pa. Super. 492, 43 Wkly NC 469; Melville's Est., 25 Pa. Dist. 5; Wilvert's Est., 11 Pa. Dist. 660, 26 Pa. Co. 644, 5 Dauph. Co. 161; Fow's Est., 14 Pa. Co. 648; Vogdes' Est., 6 Pa. Co. 441, 23 WklyNC 471; Lana v. Kech, 11 LegInt 31.

R. I.—Almy v. Newport Probate Ct., 18 R. I. 612, 30 A 458.

sonable one, under the circumstances,[29] as where he is doubtful as to the proper disposition of the fund and brings it into court and asks the court's directions,[30] or where the delay is caused by the fault of the person entitled to receive the funds, as by failing to make a demand or to receive it after notice of readiness to pay over,[31] or by failure to tender a refunding bond[32] the representative is not liable for interest on the fund unless he received interest on it,[33] or derived a benefit from its use,[34] or the money was so invested that the representative might have received interest without incurring an unreasonable hazard.[35]

Time from which interest runs. In the absence of special circumstances interest will generally begin to run against the representative on the expiration

S. C.—Brown v. Brown, 75 S. C. 25, 54 SE 838; Lowman v. Lowman, 69 S. C. 543, 48 SE 536; Nettles v. McCown, 5 S. C. 43; McCaw v. Blewitt, 8 S. C. Eq. 98.

Tenn.—Connell v. Furgason, 5 Coldw. 401.

Tex.—Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

Va.—Preston v. Davis, 102 Va. 178, 45 SE 865; Bourne v. Mechan, 1 Gratt. (42 Va.) 292.

Wis.—Ludington v. Patton, 121 Wis. 649, 99 NW 614; Evans v. Foster, 80 Wis. 509, 50 NW 410, 14 LRA 117.

Eng.—Blogg v. Johnson, L. R. 2 Ch. 225; Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Donovan v. Needham, 9 Beav. 164, 50 Reprint 306; Re Jones, 49 L. T. Rep. N. S. 91; Churchill v. Speake, 1 Vern. Ch. 251, 23 Reprint 448; Ashburnham v. Thompson, 13 Ves. Jr. 402, 33 Reprint 345; Longmore v. Broom, 7 Ves. Jr. 124, 32 Reprint 51.

N. S.—Cullen v. McNeil, 42 N. S. 346.

Ont.—Uffner v. Lewis, 5 Ont. L. 684, 2 OntWR 441; Boys' Home v. Lewis, 4 Ont. 18; Down v. Kennedy, 10 OntWR 627.

Newfoundl.—Purchase v. Pitman, 8 Newfoundl. 469.

[a] **Illustrations.**—(1) Where a legacy was left by a husband to his children on condition that his widow should be entitled to the income from the principal for life, its retention after the death of the widow by the executor of the widow's estate, into which the fund had passed during administration of testator's estate, entitles the beneficiaries to interest thereon. Matter of Driskel, 100 App. Div. 171, 91 NYS 273. (2) Where the mandate of the supreme court declared plaintiff entitled to a one-seventh interest in a mortgage, and expressly provided that she should have the property which would have come to her in the regular course of the administration of her husband's estate in specie, or its equivalent in money, she was entitled to one seventh of the value of the mortgage at the close of the executorship of her husband's estate, with interest from that time down to the final closing of the account. Ludington v. Patton, 121 Wis. 649, 99 NW 614.

[b] **Misappropriation of the fund** to the representative's own use renders him personally liable for interest until paid. Clary's Est., 112 Cal. 292, 44 P 569; Connell v. Furgason, 5 Coldw. (Tenn.) 401.

[c] **Unreasonably appealing from a decree in favor of a distributee** renders the representative liable for interest. Hallett v. Hare, 5 Paige (N. Y.) 315.

[d] **Interest pending a controversy** in relation to the title to a sum due a distributee, but retained in the representative's hands, may be charged against the latter, where he does not apply to the court for permission to deposit, or dispose of the sum, so as to prevent the further accumulation of interest. Thomas v. Frederick County School, 9 Gill & J. (Md.) 115.

[e] **Liability in excess of balance on hand.**—A legatee whose legacy is wrongfully withheld from her after all the debts of the estate have been fully paid and the larger part of other legacies have also been paid, is entitled to recover interest on her legacy from the executor, although a judgment for the legacy, with interest, will be in excess of the balance in the executor's hands at the time of his last settlement. Berkmeir v. Peters, 111 Mo. A. 717, 86 SW 598.

29. Ga.—Allen v. Hardee, 30 Ga. 463; Springer v. Oliver, 21 Ga. 517.

Ind.—Fletcher v. Nicholson, 45 Ind. A. 375, 90 NE 910.

Mass.—Phelps v. Fitch, 178 Mass. 442, 59 NE 1031.

N. J.—In re Doremus, 33 N. J. Eq. 234.

N. Y.—Matter of Schweibert, 25 Misc. 464, 55 NYS 649.

N. C.—Spruill v. Cannon, 22 N. C. 400.

Pa.—In re Skeer, 253 Pa. 497, 98 A 703.

S. C.—Frierson v. Graham, 7 Rich. Eq. 95.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Va.—Cary v. Macon, 4 Call. (8 Va.) 605.

[a] **Illustration.**—Parties entitled to shares of a residuary estate under an agreement compromising a will contest are not entitled to interest on their shares after the expiration of one year from the death of the testator, where there is no claim that the money was wrongfully detained by the executor. Phelps v. Fitch, 178 Mass. 442, 59 NE 1031.

[b] **Delay may be excused where it was caused by:** (1) The pendency of litigation. Kerr's Est., 35 Pa. Super. 350. (2) The existence of a state of war. Dromgoole v. Smith, 78 Va. 665. (3) The absence of the persons entitled. Fletcher v. Nicholson, 45 Ind. A. 375, 90 NE 910; In re Doremus, 33 N. J. Eq. 234; Clarke v. Canfield, 15 N. J. Eq. 119. (4) Awaiting the appointment of an administrator of a deceased legatee or distributee. Bear's Est., 9 Pa. Super. 493, 43 WklyNC 469; Frierson v. Graham, 28 S. C. Eq. 95.

[c] **Where a legatee or distributee is an infant,** the representative is not chargeable with interest while awaiting the appointment of a guardian, and notice thereof. Matter of Schweibert, 25 Misc. 464, 55 NYS 649; Spruill v. Cannon, 22 N. C. 400; Lieber's Est., 5 Pa. Dist. 187, 17 Pa. Co. 557; Sparhawk v. Buell, 9 Vt. 41; Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

[d] **Where a legacy is left to one in trust, and the trustee refuses to act,** the executor is not bound to pay the legacy until a new trustee has been appointed by the chancery court, and is not chargeable with interest therefor until after the decree. Johnson v. Mitchell, 1 Rand. (22 Va.) 209.

[e] **Delay is not excused by** the fact that the surplus available for payment of a legacy consisted mainly of real estate which the executor, who was also residuary legatee and devisee, desired to hold for better prices. German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 63 A 835 [aff 72 N. J. Eq. 954, 67 A 23].

30. Ga.—Rogers v. Bottsford, 44 Ga. 652.

Ky.—Moore v. Beauchamp, 4 B. Mon. 71.

Md.—Thomas v. Frederick County School, 9 Gill & J. 115.

Tenn.—Turney v. Williams, 7 Yerg. 172.

Tex.—Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

Va.—Sharpe v. Rockwood, 78 Va. 24.

31. Cal.—In re Blake, 137 Cal. 429, 70 P 303.

Ind.—Fletcher v. Nicholson, 45 Ind. A. 375, 90 NE 910.

Ky.—Vance v. Vance, 5 T. B. Mon. 521.

Mass.—Phelps v. Fitch, 178 Mass. 442, 59 NE 1031.

N. Y.—Holley v. S. G., 4 Edw. 284.

S. C.—Riddle v. Riddle, 26 S. C. Eq. 31; McAlister v. Brice, 16 S. C. Eq. 275.

[a] **Thus** (1) interest will not be allowed, previous to the filing of their bill, on the shares of the distributees who are admitted after the settlement of the estate by the administrator. Payne v. Harris, 22 S. C. Eq. 39. (2) So also, where a distributee of an estate failed to obtain his share at once because of his own negligence in failing to communicate with members of his family, and the administrator advertised for him in various newspapers without success, the distributee was not entitled to interest on his share. Fletcher v. Nicholson, 45 Ind. A. 375, 90 NE 910.

[b] **Contrary view.**—An executor, who is the residuary legatee, is bound to pay interest on legacies left by his testator, although no demand has been made for them for fourteen years, although during all that time the legatees have been dead, and there has been no administration on their estate, and although the executor did not know, and had no means of knowing, whether they were alive or dead, or where they resided in their lifetime. Bourne v. Mecham, 1 Gratt. (42 Va.) 292.

32. Vance v. Vance, 5 T. B. Mon. (Ky.) 521; Webb v. Conn, Litt. Sel. Cas. (Ky.) 475. But see Patterson v. Nichol, 6 Watts (Pa.) 379, 31 AmD 473 (in an action to recover the distributive share of an intestate plaintiff is entitled to recover interest, although no refunding bond was tendered until long after the death of the intestate).

33. Conn.—Colt v. Colt, 33 Conn. 270.

Ga.—Rogers v. Bottsford, 44 Ga. 652.

Ky.—Webb v. Conn, Litt. Sel. Cas. 475.

N. J.—In re Doremus, 33 N. J. Eq. 234.

N. Y.—Matter of Garrabrant, 178 App. Div. 23, 165 NYS 139; Matter of Schweibert, 25 Misc. 464, 55 NYS 649.

Pa.—Ward's Est., 3 Pa. Co. 224.

S. C.—McAlister v. Brice, 16 S. C. Eq. 275.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

[a] **Illustration.**—Where an executrix, who was also life tenant of the residue of the estate, retained legacies in her possession with the permission of the legatees, it was her duty to charge herself with all interest received upon the balance of the personal estate; and this, added to the principal of the estate, would form the fund out of which the legacies, with interest, would be paid. Ward's Est., 3 Pa. Co. 224.

34. Vance v. Vance, 5 T. B. Mon. (Ky.) 521; In re Doremus, 33 N. J. Eq. 234; Clarke v. Canfield, 15 N. J. Eq. 119.

35. Matter of Schweibert, 25 Misc. 464, 55 NYS 649; Sparhawk v. Buell, 9 Vt. 41.

of a year from the death of decedent,[36] and where an order or decree for distribution is made, interest usually runs from the date thereof, even though the person entitled to the award makes no demand therefor.[37] Where an executor wrongfully refuses to pay a legacy, interest will be allowed thereon from the date of the filing of the petition in the probate court requesting such payment.[38] In a case where a mandate of the supreme court awarded to the widow the benefits that would have come to her had she taken under the statute as of the time such benefits would in that event have reached her in possession, and required her to account for money or property received by her "as of the time of the receipt thereof," it was held that she should have been allowed interest from the time she should have received the principal of her property had she taken under the statute.[39]

Simple or compound interest. Only simple interest will be allowed against a representative where he has been merely negligent[40] or the distributee has been dilatory in calling him to account,[41] but where the failure to pay over is due to active misconduct on the part of the representative, he may be charged with compound interest.[42] It has been said, however, that the compounding of interest is warranted only in extreme cases.[43]

A payment to a legatee, out of a balance in the hands of the representative, on which interest runs, must be credited as of the time when payment was made.[44]

[§ 1349] **2. After Tender of Payment.** Where the representative makes tender of what he may rightly pay or distribute at the time, interest on the sum tendered cannot be claimed by the legatee or distributee refusing or unreasonably delaying to receive the same,[45] unless after such tender and refusal the representative misappropriates the fund.[46] But where a demand for a legacy is made after its tender and refusal and the executor then refuses to pay, he is chargeable with interest from that time.[47]

[§ 1350] **3. Failure to Invest Share.**[48] Where by the terms of the will, by order of court, or otherwise, it becomes the duty of the representative to invest the funds of a legatee or distributee in his hands, he will be chargeable with interest thereon if he negligently delays or fails to do so.[49]

36. Nickels v. Nichols, (Me.) 105 A 386; Lyford v. McFetridge, 228 Mass. 285, 117 NE 589; Claflin v. Holmes, 202 Mass. 157, 88 NE 664; Matter of Juilliard, 103 Misc. 178, 169 NYS 1079; Lowman v. Lowman, 69 S. C. 543, 544, 48 SE 536.

"It is true the plaintiff was only required to pay debts as soon as it could be conveniently done, but he was not made the arbitrary judge of what was convenient time. In the absence of proof of special difficulty or complication, the law regards one year a sufficient period to collect assets and pay debts. Here the assets were in the hands of the executor, and the liabilities of the estate small and furnishing no real ground for dispute. The plaintiff testifies he could not raise the money to settle his liability, but does not speak of any effort he made to do so. On the contrary, he refused to borrow money when offered to him for the purpose of settling up the estate. He has all the time had the possession and use of the land devised to him. The charge of interest is plainly just and equitable, and it was properly not limited to the time when the plaintiff was offered the loan of money to settle the estate." Lowman v. Lowman, supra.

[a] **Source of legacy.**—The fact that a part of the money from which a pecuniary legacy was to be paid was to be derived from the fund appointed in trust to testator's executors under a will did not change the character of the legacy, nor the time when it became payable, and the legatee was entitled to interest on the legacy after a year from the testator's death. Claflin v. Holmes, 202 Mass. 157, 88 NE 664.

[b] **The fact that a legatee contested the will,** which delayed its probate, is no defense to her right to recover interest on her unpaid legacy after one year from the date of testator's death. Claflin v. Holmes, 202 Mass. 157, 88 NE 664.

37. Randolph v. Peo., 40 Ill. A 174; State v. Babb, 77 Mo. A. 277; McRae v. Malloy, 87 N. C. 196.

38. State v. Lamb, 174 Mo. A. 360, 160 SW 55.

39. Ludington v. Patton, 121 Wis. 649, 99 NW 614.

40. Binion v. Miller, 27 Ga. 78; Stimson v. Rountree, 51 Ind. A. 207, 99 NE 439.

41. Amos v. Campbell, 9 Fla. 187.

42. Clary's Est., 112 Cal. 292, 44 P 569; Hamilton v. Reese, 18 Ga. 8; Kenan v. Hall, 8 Ga. 417; Fall v. Simmons, 6 Ga. 265.

[a] **Misappropriation** of the fund warrants a charge of compound interest. Clary's Est., 112 Cal. 292, 44 P 569.

43. Stimson v. Rountree, 51 Ind. A. 207, 99 NE 439.

44. In re Johnston, (Wash.) 181 P 209.

45. Mickle v. Cross, 10 Md. 352; Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77; McAlister v. Brice, 16 S. C. Eq. 275; Cary v. Macon, 4 Call (8 Va.) 605.

[a] **A conditional tender** will not avail to prevent the running of interest. Leischner v. Kaiser, 156 Ill. A. 123.

[b] **A deposit of the amount of a legacy in bank,** to the knowledge of one of the trustees subsequently appointed, and to whom it is to be transferred upon their executing a certain agreement and giving a receipt, does not constitute a conditional tender of the money to the trustees, so as to relieve the executor from paying interest on the legacy from that time. In re Blake, 137 Cal. 429, 70 P 303.

46. Goodwin's Est., 22 Pa. Super. 469 (where an executor, having in his hands the requisite amount, makes an offer of payment, which offer is refused, but does not subsequently keep the tender good by retaining in his hands an amount sufficient to make the payment, but uses the money for other purposes, he will be liable for interest when he finally makes payment).

47. Chestnut v. Strong, 11 S. C. Eq. 146.

48. Liability for interest on funds of estates because of failure to invest generally see supra § 496.

49. Cal.—Moore's Est., 95 Cal. 34, 30 P 106.

Iowa.—In re Lackie, 171 NW 679.

Ky.—Smith v. Lampton, 8 Dana 69.

Md.—Darne v. Catlett, 6 Harr. & J. 475.

Mass.—Eliott v. Sparrell, 114 Mass. 404.

N. J.—Halsted v. Meeker, 18 N. J. Eq. 136; Frey v. Demarest, 17 N. J. Eq. 71; King v. Berry, 3 N. J. Eq. 261.

N. Y.—Remington v. Walker, 99 N. Y. 626, 1 NE 305.

Pa.—Huston's App., 9 Watts 472; Miles' Est., 12 Pa. Co. 383.

R. I.—Almy v. Newport Prob. Ct., 18 R. I. 612, 30 A 458.

Va.—Sharpe v. Rockwood, 78 Va. 24.

Eng.—Williams v. Powell, 15 Beav. 461, 51 Reprint 616; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 Ch. 659, 43 Reprint 737; Re Jones, 49 L. T. Rep N. S. 91.

[a] **Liability to residuary legatees.**—An order directing an investment for specific legatees imposes no duty upon the representative to make such investment for the benefit of the residuary estate, and consequently he will not be liable to residuary legatees for interest on the fund, although it has never been invested. Miller's App., 127 Pa. 95, 17 A 866.

[b] **Compound interest** (1) may be charged against the representative where his delay or negligence amounts to a violation of his trust (Darne v. Catlett, 6 Harr. & J. (Md.) 475; Salisbury v. Colt, 27 N. J. Eq. 492; Atty.-Gen. v. Alford, 4 De G. M. & G. 843, 53 EngCh 659, 43 Reprint 737; Gilroy v. Stephen, 51 L. J. Ch. 834), (2) as where without authority he loans the funds to his coexecutor on inadequate security (Perrine v. Petty, 34 N. J. Eq. 193) (3) or where he appropriates the fund to his own use or in some way derives a profit therefrom (Darne v. Catlett, 6 Harr. & J. (Md.) 475).

[c] **The fact that the delay was for the interest of the residuary legatee** does not excuse a failure to separate and invest a specific legatee's interest. Fowler v. Colt, 25 N. J. Eq. 202 [aff 27 N. J. Eq. 492].

[d] **Ignorance of the persons entitled** or their places of residence does not relieve the representative from liability for interest, where he lets the fund lie idle in his hands. Almy v. Newport Prob. Ct., 18 R. I. 612, 30 A 458.

[e] **An administrator is not entitled to a diminution in the legal rate of interest** upon funds retained in his hands uninvested, on the ground that it would have been difficult to invest in his neighborhood small sums except at less than the legal rate. Frey v. Demarest, 17 N. J. Eq. 71.

[f] **Where the representative is liable to be called upon at any time for payment** of the legacy or distributive share, and there are no directions under the will or statute, nor by order of court, to put the fund out at interest, he will not be required to pay interest thereon, unless it is made to appear that he

[§ 1351] **4. Erroneous or Improper Payments.** Where a representative makes erroneous or improper payments, he is liable for interest thereon from the time of such payments,[50] unless they were made in good faith under a mistake of fact, and the representative has acquired no benefit therefrom.[51]

[§ 1352] **P. Proceedings for Payment or Distribution—1. Who May Institute Proceedings—a. Persons Beneficially Interested.** Persons beneficially interested in the estate in the hands of the representative, as legatees or distributees, or as heirs or devisees where the representative has the duty of distributing realty or the proceeds thereof, have the right to institute proceedings for distribution.[52] A widow is entitled to compel distribution of her deceased husband's estate in all respects like a distributee,[53] and a petition for distribution may also be filed by a widower who has elected to take against his wife's will.[54]

[§ 1353] **b. Assignees of Persons Beneficially Interested.**[55] It has been considered that an assignee or purchaser of a legacy or distributive share cannot file an original petition for the distribution of the estate, or the payment of such legacy or share,[56] unless such right is given by statute,[57] for the reason that an assignment or pledge of a distributive share is not enforceable by a probate court.[58] But on the other hand, in a case where the only assets belonging to the estate of a deceased wife were the proceeds of the sale of certain timber, it was held that the assignee of the husband, who was entitled to a share thereof, could maintain a bill for the distribution of the fund in the hands of the administrator.[59]

[§ 1354] **c. Personal Representative.** The personal representative should apply for a final distribution when the time for presenting claims has expired and he has filed his report showing a balance in his hands for distribution;[60] but he is not entitled to petition for a partial distribution under

has mingled the trust fund with his own moneys, or that he has used it in such a way as to make it produce interest. Lake v. Park, 19 N. J. L. 103; Frey v. Demarest, 17 N. J. Eq. 71; Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77.

50. Ala.—Moody v. Hemphill, 71 Ala. 169.

Cal.—Moore's Est., 95 Cal. 34, 30 P 106.

Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108].

Iowa.—McClure v. Brown, 56 Iowa 768, 9 NW 906.

N. J.—Van Houten v. Post, 32 N. J. Eq. 709 [rev on other grounds 33 N. J. Eq. 344].

N. Y.—Lawrence v. Brinckerhoff, 2 NYLegObs 122; McLoskey v. Reid, 4 Bradf. Surr. 334.

Pa.—Melville's Est., 25 Pa. Dist. 5.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

[a] **The rule has been applied** to payment of legacy barred by lapse of time. Moody v. Hemphill, 71 Ala. 169.

51. U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108]; McKnight v. Walsh, 24 N. J. Eq. 498 [aff 23 N. J. Eq. 136].

[a] **Illustration.**—An executor is not liable for interest on the excess of an annual allowance paid to a beneficiary under the will, where he paid such excess in good faith by mistake as to his discretionary power under the will and had no use or benefit of such excess. McKnight v. Walsh, 24 N. J. Eq. 498 [aff 23 N. J. Eq. 136].

52. Cal.—Bell v. Wilson, 159 Cal. 57, 112 P 1100; Alcorn v. Gieseke, 158 Cal. 396, 111 P 98; St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; Le Mesnager v. Variel, 144 Cal. 463, 77 P 988, 103 AmSR 91; Alcorn v. Buschke, 133 Cal. 655, 66 P 15; In re Crocker, 105 Cal. 368, 38 P 954; In re Letellier, 74 Cal. 311, 15 P 847.

Ga.—Wheeler v. Horne, 136 Ga. 486, 71 SE 901.

Ind.—Conner v. Hawkins, 8 Blackf. 236.

Ky.—Baugh v. Baugh, 159 Ky. 320, 167 SW 124.

Miss.—Temple v. Hammock, 52 Miss. 360; Crowder v. Shackelford, 35 Miss. 321; Benoit v. Brill, 15 Miss. 32.

Mo.—Brown v. Glover, 158 Mo. A. 396, 138 SW 105.

Mont.—In re Davis, 27 Mont. 490, 71 P 757.

Nev.—In re Foley, 24 Nev. 197, 51 P 834, 52 P 649.

N. J.—Blair v. Scribner, 67 N. J. Eq. 583, 60 A 211; Sayre v. Sayre, 16 N. J. Eq. 505; Exton v. Zule, 14 N. J. Eq. 501.

N. Y.—Matter of Broderick, 163 App. Div. 91, 148 NYS 541; Koenig v. Wagener, 126 App. Div. 772, 111 NYS 116; Matter of Underhill, 35 App. Div. 434, 54 NYS 967 [aff 158 N. Y. 721 mem, 53 NE 1133 mem]; Matter of Moran, 58 Misc. 488, 111 NYS 640, 6 Mills Surr. 397.

Pa.—Baker's App., 59 Pa. 313; Abrahims' Est., 3 Pa. Co. 379.

Tex.—Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

[a] **The fact that a distributee is a nonresident** does not preclude him from recovering his share from the executor or administrator. Bell v. Wilson, 159 Cal. 57, 112 P 1100.

[b] **Where the contest of a will is settled by agreement** of the parties, which agreement is subsequently confirmed by a decree fixing their shares, such parties and their assigns, although not heirs or legatees named in the will, have a right to petition for a partial distribution under a statute authorizing such distribution on petition of an heir, devisee, or legatee. In re Davis, 27 Mont. 490, 71 P 757.

[c] **Heirs are not estopped** to petition for distribution by reason of an agreement for partial partition on a stipulated basis whereby they agreed to give aid to prevent overthrowing of the will. In re Hinkel, 176 Cal. 563, 169 P 70.

[d] **A charitable corporation** which is beneficially interested under testator's will, is entitled to petition for distribution, whether it is the residuary legatee or merely the beneficiary of property devised in trust for it. In re Friedman, 171 Cal. 431, 153 P 918.

[e] **A foreign sovereign** who has the title to the estate of a foreign legatee can recover the legacy in the New York courts, although his title is only for the purpose of distribution among the heirs. Sultan of Turkey v. Tiryakian, 213 N. Y. 429, 108 NE 72 [aff 162 App. Div. 613, 147 NYS 978].

[f] **The next of kin of a deceased legatee** cannot maintain a petition for such legatee's share. Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627 mem, 55 NE 1096 mem].

[g] **Heirs or next of kin who have conveyed to other persons all their interest** in the real and personal estate of the intestate are not entitled against the wish of their grantee to a decree for the assignment and distribution of real estate held by the administrator under his foreclosure of a mortgage thereof to the intestate. Stevens v. Palmer, 15 Gray (Mass.) 505.

[h] **Testamentary trusts.**—A statute giving a right of action to a distributee against the administrator for his share does not apply to a trust fund created by the sale of land by an administrator with the will annexed, the proceeds of which he is directed by a will to distribute, the only right of action which he has in such case being to compel execution of the trust and an accounting for a reasonable part of the money collected. McRoberts v. Carneal, (Ky.) 44 SW 442.

[i] **Determination as to right of petitioner.**—Rev. Codes §§ 7670–7672, providing for the determination of the rights of persons to an estate and as to distribution thereof, are exclusive, and the district court cannot determine whether petitioner is an heir of decedent, whether she is entitled to a distributive share, and, if so, the amount thereof in a proceeding under § 7669, authorizing proceedings for a partial distribution, the provision of that section that any heir, devisee, or legatee may petition for a distribution of the share of the estate to which he is entitled meaning that any heir, etc., shown by the record to be such, and whose right to inherit is not questioned, may petition for a distribution of his share. In re Fleming, 38 Mont. 57, 98 P 648.

53. Grant v. Spann, 33 Miss. 134.

[a] **A widow who has dissented from her husband's will** cannot petition the probate court, after the expiration of eighteen months from the probate of the will, for her distributive share; nor can her administrator. Johnston v. Fort, 30 Ala. 78.

54. McGrath v. Quinn, 218 Mass. 27, 105 NE 555.

55. Intervention by assignee of person beneficially interested see infra § 1365.

56. Smith v. Hall, 20 Ala. 777; Graham v. Abercrombie, 8 Ala. 552; Coram v. Davis, 209 Mass. 229, 95 NE 298; Matter of Wood, 38 Misc. (N. Y.) 64, 76 NYS 967, 3 Mills Surr. 94; In re Brewster, 3 NYS 556, 1 Conn. Surr. (N. Y.) 172; Tilden v. Dows, 3 Dem. Surr. (N. Y.) 240; Peyser v. Wendt, 2 Dem. Surr. (N. Y.) 221.

[a] **A purchaser at a sheriff's sale of a devisee's undivided interest** in land cannot petition a probate court for a distribution of the proceeds of sale under a statute which allows devisees, legatees, and distributees to have a distribution. Smith v. Hall, 20 Ala. 777.

[b] **An assignee of a specific legacy** may sue the executor at law for the chattel bequeathed. Matter of Egan, 89 App. Div. 565, 85 NYS 663.

57. In re McGaw, 88 N. J. Eq. 288, 101 A 421.

58. Coram v. Davis, 209 Mass. 229, 95 NE 298.

59. McIntosh v. Rutland, 88 Miss. 718, 41 S 372.

60. U. S.—Christianson v. King

a statute allowing a legatee or distributee to do so;[61] nor has he a right to apply for a division of lands devised,[62] unless the will invests him with powers and duties with respect to land which he would not ordinarily have.[63]

[§ 1355] **2. Nature of Proceeding.** The proceeding to obtain a decree of distribution is not in the nature of a suit between party and party in which one seeks to recover a right withheld by the other; but is analogous in its character to a proceeding in rem, in which a decision between the parties before the court settles the rights of all parties to the property in question.[64]

[§ 1356] **3. Mode or Form of Proceeding.** The mode or form of proceeding for the recovery of a legacy or distributive share is generally regulated by statute,[65] the usual form being an application or petition[66] for an order of distribution[67] or for an order directing payment of a particular legacy,[68] although under some statutes an action at law may be maintained for the recovery of a legacy or distributive share.[69] One who is part owner of a note as beneficiary under a will has the remedies of compelling the administrator to sue, or, where the other owners refuse to join as plaintiffs, of suing in equity making them the defendants, bringing whole controversy before the court in one suit.[70] It has been held that a petition in the orphans' court for a rule to show cause why real estate of a decedent should not be turned over by the executors to a beneficiary under the will should be dismissed for want of jurisdiction.[71] Although the statutes make the civil rules of practice and procedure applicable to probate matters, the rules will not be applied as strictly in such matters as petitions for distribution.[72]

[§ 1357] **4. Conditions Precedent.** Although a refunding bond may be required before distribution is made,[73] the execution of such a bond is not necessary in order to entitle one to maintain a bill to compel distribution,[74] nor is it necessary to file such a bond with the petition.[75] But it has been held that an offer to give a refunding bond is necessary, where it is not averred and proved that the estate has been settled or that there will remain a balance after settlement.[76] Demand of and refusal by the representative are conditions precedent to an action at law for a legacy, and must be alleged and proved,[77] but an heir may maintain an action to recover his distributive share of the estate without a probate order for distribution.[78]

[§ 1358] **5. Time for Proceeding—a. Premature Proceedings.** In some states an action for a distributive share may be brought any time after the expiration of one year from the time of the qualification of the representative.[79] It has been held, however, that an action to recover an alleged distributive share is premature when it is brought before final settlement of the estate or an order of distribution,[80] and although the statute author-

County, 203 Fed. 894, 122 CCA 188 [aff 239 U. S. 356, 36 SCt 114, 60 L. ed. 327].
Cal.—In re Ross, 182 P 755.
Conn.—Sanford v. Thorp, 45 Conn. 241; Davenport v. Richards, 16 Conn. 310.
Ill.—Haskins v. Martin, 103 Ill. A. 115.
Kan.—Holden v. Spier, 65 Kan. 412, 70 P 348.
Md.—Jones v. Jones, 36 Md. 459.
Miss.—Nabors v. McKay, 27 Miss. 799.
N. J.—Sayre v. Sayre, 16 N. J. Eq. 505; Exton v. Zule, 14 N. J. Eq. 501.
R. I.—West Greenwich Probate Ct. v. Carr, 20 R. I. 592, 40 A 844.

[a] **That the administrator has no interest in disputes between claimants** does not affect his right to petition for distribution. In re Ross, (Cal.) 182 P 755.

[b] **Where legatees are unable to give refunding bonds,** the personal representative is the proper party to bring a bill seeking the direction of a court of chancery as to payment of their legacies to them. Goodman v. Palmer, 137 Tenn. 556, 195 SW 165.

61. Alcorn v. Gieseke, 158 Cal. 396, 111 P 98; Alcorn v. Buschke, 133 Cal. 655, 66 P 15; Letellier's Est., 74 Cal. 311, 15 P 847.

62. Temple v. Hammock, 52 Miss. 360.

63. Shiner v. Shiner, 90 Tex. 414, 38 SW 1126.

64. Cal.—Crew v. Pratt, 119 Cal. 139, 51 P 38; Hill v. Lawler, 116 Cal. 359, 48 P 323; Warren v. Ellis, (A.) 179 P 544.
Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.
Mass.—Cleaveland v. Draper, 194 Mass. 118, 80 NE 227; Loring v. Steineman, 1 Metc. 204.
Mich.—In re Brown, 198 Mich. 544, 165 NW 929.
N. J.—Exton v. Zule, 14 N. J. Eq. 501.
Pa.—Bicking's App., 2 Brewst. 202.
Utah.—Snyder v. Murdock, 26 Utah 233, 238, 73 P 22.
Vt.—Sparhawk v. Buell, 9 Vt. 41.
Wis.—In re McNaughton, 138 Wis. 179, 118 NW 997, 120 NW 288.

But compare Evans v. Evans, (Ala.) 76 S 95, 96 ("The final settlement of any trust is essentially a proceeding in personam as to the conclusion of the property rights of the cestui que trust or the distributee").

[a] **In Pennsylvania** proceedings for distribution in the orphans' court are conducted upon the principles and practice which regulate an administration suit in the chancery courts of England. Bicking's App., 2 Brewst. (Pa.) 202; Woodward's Est., 2 Chest. Co. (Pa.) 9.

65. Mack's App., 71 Conn. 122, 41 A 242; Gray v. Swerer, 47 Ind. A. 384, 94 NE 725; Matter of Hunt, 110 App. Div. 533, 97 NYS 403; Elpe's Est., 22 Pa. Dist. 416.

[a] **Statutory proceeding the only proper one.**—Matter of Hunt, 110 App. Div. 533, 97 NYS 403.

[b] **The proper practice to ascertain heirs and distributees** is to apply for an order of distribution, or an order to hand over the estate without distribution, of which orders the ascertainment of heirs and distributees is an incident. Mack's App., 71 Conn. 122, 41 A 242.

[c] **Determination of ownership of bequest.**—Code Civ. Proc. § 2740, under which a proceeding may be brought to determine to whom a bequest belongs, applies only to unknown owners. Matter of Sustentation Fund of Reformed Episcopal Church, 98 Misc. 145, 163 NYS 1042.

66. In re Caldwell, 8 Del. Ch. 358, 68 A 525; Matter of Moran, 58 Misc. 488, 111 NYS 640, 6 Mills Surr. 397.

[a] **Where money has been paid into court** under a statute for relief of executors, a petition by parties claiming the fund is a proper mode of obtaining distribution. In re Caldwell, 8 Del. Ch. 358, 68 A 525.

67. Mack's App., 71 Conn. 122, 41 A 242; Crowder v. Shackelford, 35 Miss. 321; Hartman's Est., 20 Pa. Dist. 912; Carter v. Frahm, 31 S. D. 379, 141 NW 370.

[a] **A child's share payable to decedent's widow** is obtained by petition to the probate court on final settlement. Howard v. Strode, 242 Mo. 210, 146 SW 792, AnnCas1913C 1057.

68. Matter of Robinson, 156 App. Div. 363, 141 NYS 470; Matter of Underhill, 35 App. Div. 434, 54 NYS 967 [aff 158 N. Y. 721, 53 NE 1133].

69. Lathrop v. Merrill, 207 Mass. 6, 92 NE 1019; Beers v. Strong, 128 App. Div. 20, 112 NYS 382.

70. Jensen v. Gamble, 191 Mich. 233, 157 NW 440.

71. In re Todd, 253 Pa. 622, 98 A 778.

72. Gray v. Swerer, 47 Ind. A. 384, 94 NE 725.

73. See supra § 1295.

74. Kavanaugh v. Thacker, 2 Dana (Ky.) 137 (the purchaser of a distributee's interest need not execute a refunding bond in order to maintain a bill in his own name to compel distribution, although the court should require a bond before payment is made).

75. Richmond v. Delay, 34 Miss. 83; Keith v. Jolly, 26 Miss. 131.

76. Sparks v. De la Guerra, 14 Cal. 108 (neither a legatee nor his creditors can maintain a bill against executors to recover a legacy, without an averment and proof that the estate has been settled, or that there will remain a balance after settlement, or an offer to give a refunding bond to abide the settlement).

77. Beers v. Strong, 128 App. Div. 20, 112 NYS 382.

78. State v. Culhane, 78 Conn. 622, 63 A 636.

79. In re Mayhew, 4 Cal. A. 162, 87 P 417; Wheeler v. Horne, 136 Ga. 486, 71 SE 901.

[a] **Probate of supplement to will.**—A legatee is entitled to file his petition at any time after the lapse of one year from the issuance of letters testamentary, although after the issuance of the letters a supplement to the will was filed and probated as a part thereof. In re Mayhew, 4 Cal. A. 162, 87 P 417.

80. Northwestern Inv. Co. v. Palmer, 113 Me. 395, 94 A 481; Elam v. Bond, 169 Mo. A. 584, 154 SW 880; In re Parkes, (Wash.) 178 P 830.

izes a legatee to recover his legacy in an action at law, a legatee cannot recover in an action of contract against the executors unless the legacy is then payable.[81] Where the statute authorizes an action to recover a distributive share after a year from the granting of letters testamentary or of administration, an action by decedent's widow to recover her interest in the estate, brought within three months after the granting of letters, is premature.[82]

A Court of chancery will not give directions concerning the distribution of a testamentary fund until the time for distribution arrives,[83] and it has been held that the rule that an action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained in the probate court also prevails in equity in the absence of other and compelling reasons.[84]

[§ 1359] **b. Limitations.** By analogy to the statute of limitations a proceeding in the probate court to compel the payment of a legacy or distributive share should be instituted within the time in which suits of the same character are required to be commenced in courts of common law or of equity,[85] and it has been held that in such cases the statute begins to run at the time of final settlement of the representative's account,[86] or of the order of court directing distribution.[87] But as against a proceeding by subsequently discovered heirs to obtain an order for the payment to them of moneys paid into the state treasury by the administrator under an order of the probate court because there were no known heirs, limitation begins to run only from the date of publication by the administrator of the special notice required by statute to be given the unknown heirs.[88] Where bequests of a fund are not payable until the death of a life tenant, who is custodian of the fund, and a proceeding is begun within a year after his death to compel his administrator to account for and pay over the same to the administratrix de bonis non with the will annexed of the original testator, such proceeding is not barred in six years after the original executor could have been made to account to the legatees;[89] but the limitation applicable to such a proceeding is ten years from the appointment of an administrator of the custodian's estate, and the appointment of the petitioner as administratrix.[90] Where, on the final settlement of the account of an executor, one who claimed that he was the legatee intended in a certain legacy in the will appeared and claimed the legacy, a contention by the executor that limitations had run against claimant, because he could not be considered as named in the will owing to the fact that it would require extrinsic evidence to enable the court to recognize him as the legatee, was of no avail.[91] Where the settlement of the estate of a testator is justifiably delayed through a number of years, owing to the nature of the property and liabilities of the testator, limitation does not run against the claims of residuary legatees to their respective shares during the time of such delay.[92]

[§ 1360] **c. Laches.** Laches has been held no defense to the claim of a distributee of an estate, under an award by the orphans' court against an administrator, who had wrongfuly paid claimant's share to a person having no authority to receive it.[93] So also, in a case where testator's daughter made demand upon the executor within a reasonable time for the payment of an annuity due under the will, and he declined payment, assuring her that a delay in settling the estate was not only unavoidable, but beneficial to all parties interested, her claim was not barred by laches because she took no legal steps to collect it for about twenty-seven years after probate, the estate having been in the meantime under the control of the court, and the available property not more than enough to pay the estate's debts.[94]

[§ 1361] **6. Defenses.** In an action by an heir at law for his distributitve share, the administrator may plead and prove debts due by the estate and thus protect himself and creditors;[95] and the fact that the assets are insufficient to pay all legacies in full may be available as part of the defense on a petition against the executors on a claim for a legacy which they have refused to pay.[96] Where an administrator files an account in which he blends the estate of his own intestate with the estate of a decedent of whom his intestate was executor, and the account shows a balance in his hands for dis-

81. Pierce v. Loomis, 224 Mass. 226, 112 NE 1027.

82. Flatauer v. Loser, 211 N. Y. 15, 104 NE 1123 [rev 156 App. Div. 591, 141 NYS 951].

83. Nagle v. Conrad, 79 N. J. Eq. 124, 81 A 841 [aff 80 N. J. Eq. 252, 253, 86 A 1103, 87 A 1119].

84. Palmer v. Palmer, 112 Me. 156, 91 A 284.

85. Ala.—McCartney v. Bone, 40 Ala. 533.

Ill.—Edwards v. Harness, 87 Ill. A. 471.

Minn.—Davis v. Townsend, 45 Minn. 523, 48 NW 405.

N. Y.—Clock v. Chadeagne, 10 Hun 97; Matter of Toms, 84 Misc. 312, 147 NYS 550; McCartee v. Camel, 1 Barb. Ch. 455.

Oh.—Duhme v. Mehner, 5 OhS&CP 107, 3 OhNP 266.

Pa.—Davies' Est., 60 Pa. Super. 360.

Va.—Lyon v. Magagnos, 7 Gratt. (48 Va.) 377.

Eng.—In re Rowe, 58 L. J. Ch. 703.

[a] **Illustration.**—Where the accounts of an executor were judicially settled in 1882, but no special guardian was appointed for an infant legatee, on whom citation had been served by publication, her right to demand payment of her legacy began when she attained majority, but a proceeding brought twenty years after that period in the surrogate's court is barred by limitation. Matter of Cooper, 51 Misc. 381, 101 NYS 283, 37 NYCivProc 309, 5 Mills Surr. 495.

[b] **Circumstances not taking case out of statute.**—(1) A proceeding to obtain a distributive share will not be taken out of the statute by reason of the fact that within six years the administrator furnished to each of the next of kin an account showing an indebtedness to him in which he credited himself with disbursements incurred within the six years. Matter of Miller, 15 Misc. 556, 37 NYS 1129, 26 NYCivProc 13, 1 Gibb. Surr. 506. (2) The bar created by the presumption of a settlement after the lapse of twenty years from the time when an administrator could be called on to make distribution of the estate is not removed by the fact that within twenty years he filed an account for a final settlement, on which a decree was rendered. McCartney v. Bone, 40 Ala. 533.

[c] **Burden of proving new promise.**—Where a distributee sues the personal representative of the administrator to recover his distributive share and defendant pleads the statute of limitation, the burden of proof is on plaintiff to prove a new promise by the administrator within the limit of the statute. Edwards v. Harness, 87 Ill. A. 471.

86. Koenig v. Wagener, 126 App. Div. 772, 111 NYS 116; Bernardston Cong. Unitarian Soc. v. Hale, 29 App. Div. 396, 51 NYS 704. Contra Matter of Cooper, 51 Misc. 381, 101 NYS 283, 37 NYCivProc 309, 5 Mills Surr. 495.

87. Matter of Gall, 42 App. Div. 255, 59 NYS 254; Smith v. Moore, 102 Va. 260, 46 SE 326.

88. In re Bomino, 83 Mo. 433.

89. Matter of Post, 30 Misc. 551, 64 NYS 369, 1 Mills Surr. 479.

90. Matter of Post, 30 Misc. 551, 64 NYS 369, 1 Mills Surr. 479.

91. Reformed Presb. Church. v. McMillan, 31 Wash. 643, 72 P 502 (if the claimant was not described he had no right to the legacy, while if he was described, he stood on the same footing as any other named legatee).

92. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

93. Bears' Est., 9 Pa. Super. 492, 43 WklyNC 469 (the trust relation of an administrator continues until payment has been legally made).

94. Willcox v. Willcox, 106 Va. 626, 56 SE 588.

95. Wheeler v. Horne, 136 Ga. 486, 71 SE 901.

96. J. Elwood Lee Co. v. Grace Hospital, 206 Fed. 994 (such insufficiency is not ground for dismissal).

tribution, and no objection is made to the account or to the irregular blending of the two estates, the administrator cannot set up his own irregularity, when the distributees seek to enforce the payment of the money which the administrator has acknowledged that he received.[97] The fact that a will makes the distribution of the income a duty of the executors does not, where such distribution is mandatory, unless all executors and trustees concur in deferring it, preclude the probate court from ordering the distribution by a collector acting as administrator pending the probate of the will.[98]

[§ 1362] **7. Jurisdiction.** Jurisdiction of proceedings for the distribution of an estate or for the payment of a legacy or distributive share is usually conferred by statute upon the probate court or the court exercising probate jurisdiction,[99] within such limits as may be imposed by the statute conferring jurisdiction.[1] Under some statutes the probate court has exclusive primary jurisdiction in such pro-

97. Gross' Est., 36 Pa. Super. 54.

98. Hutchins v. Hutchins, 41 App. (D. C.) 122.

99. U. S.—Canfield v. Canfield, 118 Fed. 1, 55 CCA 169.

Cal.—In re Ross, 182 P 755; Miller v. Pitman, 182 P 50; In re Sheid, 129 Cal. 172, 61 P 920.

Conn.—Eliot's App., 74 Conn. 586, 51 A 558; Mack's App., 71 Conn. 122, 41 A 242; State v. Blake, 69 Conn. 64, 36 A 1019; Clement v. Brainard, 46 Conn. 174.

Ill.—Reynolds v. Peo., 55 Ill. 328.

Ind.—Chappell v. Shuee, 117 Ind. 481, 20 NE 417; Fickle v. Snepp, 97 Ind. 289, 49 AmR 449.

Iowa.—Duffy v. Duffy, 114 Iowa 581, 87 NW 500; Leacox v. Griffith, 76 Iowa 89, 40 NW 109.

Kan.—Lewis v. Woodrum, 76 Kan. 384, 92 P 306; Holden v. Spier, 65 Kan. 412, 70 P 348; Keith v. Guthrie, 59 Kan. 200, 52 P 435; Proctor v. Dicklow, 57 Kan. 119, 45 P 86.

La.—Flournoy v. Flournoy, 29 La. Ann. 737.

Me.—Healey v. Cole, 95 Me. 272, 49 A 1065.

Md.—Blackburn v. Craufurd, 22 Md. 447; Williams v. Holmes, 9 Md. 281.

Mass.—Pierce v. Prescott, 128 Mass. 140.

Mich.—Wessborg v. Merrill, 195 Mich. 556, 162 NW 102; Michigan Trust Co. v. McNamara, 167 Mich. 406, 132 NW 1078; Byrne v. Hume, 84 Mich. 185, 47 NW 679, 86 Mich. 546, 49 NW 576; Langrick v. Gospel, 48 Mich. 185, 12 NW 38.

Minn.—Fiske v. Lawton, 124 Minn. 85, 144 NW 455; Schmidt v. Stark, 61 Minn. 91, 63 NW 255.

Miss.—Hoover v. Brem, 43 Miss. 603; Wells v. Mitchell, 39 Miss. 800.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289; Darneal v. Reeves, 25 Mo. 295.

N. J.—Wyckoff v. O'Niel, 71 N. J. Eq. 681, 63 A 982.

N. Y.—Matter of Underhill, 35 App. Div. 434, 54 NYS 967 [aff 158 N. Y. 721 mem, 53 NE 1133 mem]; Lyon's Est., 1 Misc. 447, 23 NYS 146, Pow. Surr. 411; Stagg v. Jackson, 2 Barb. Ch. 86 [aff 1 N. Y. 206]; Bloodgood v. Bruen, 2 Bradf. Surr. 8.

N. C.—Moore v. Rankin, 172 N. C. 599, 90 SE 759; Hendrick v. Mayfield, 74 N. C. 626; Johnston v. Davis, 70 N. C. 581; Bell v. Davis, 70 N. C. 330; Kennon v. Blanson, 16 N. C. 64.

Oh.—McLaughlin v. McLaughlin, 4 Oh. St. 508, 64 AmD 603; Trumpler v. Royer, 95 Oh. St. 194, 115 NE 1018; Disney v. Hawes, 9 Oh. Dec. (Reprint) 406, 12 CincLBul 322; Smith v. Harker, 6 Oh. Dec. (Reprint) 1014, 9 AmLRec 488; Guiou v. Guiou, 5 Oh. Dec. (Reprint) 205, 3 AmLRec 475; In re Isherwood, 5 OhS&CP 143, 7 OhNP 332.

Pa.—Kelly's App., 77 Pa. 232; Musleman's App., 65 Pa. 480; Ashford v. Ewing, 25 Pa. 213; Rittenhouse v. Levering, 6 Watts & S. 190; Dewald v. Berkheiser, 19 Pa. Super. 570; Peterson's Est., 29 Pa. Co. 28, 34 PittsbLegJNS 298; Fabel's Est., 27 Pa. Co. 620; Neill's Est., 3 Pa. Co. 197, 19 WklyNC 380; Ingersoll's Est., 11 Phila. 69.

Tenn.—Stewart v. Glenn, 3 Heisk. 581.

Tex.—Shiner v. Shiner, 90 Tex. 414, 38 SW 1126.

Utah.—Snyder v. Murdock, 26 Utah 233, 73 P 22.

Vt.—Keeler v. Keeler, 39 Vt. 550.

Va.—Carter v. Skillman, 108 Va. 204, 60 SE 775.

Wash.—Reformed Presb. Church of North America v. McMillan, 31 Wash. 643, 72 P 502.

Wis.—In re Kane, 168 NW 402; In re Hess, 97 Wis. 244, 72 NW 638.

N. S.—McDonald's Est., 2 N. S. 123.

[a] **The orphans' court has plenary power** in controlling the settlement and distribution of the estates of decedent's testate or intestate, and in determining all questions arising therein. Wyckoff v. O'Neil, 71 N. J. Eq. 681, 63 A 982; In re King, 215 Pa. 59, 64 A 324; Britain's Est., 28 Pa. Super. 144.

[b] **The clerk of the superior court** has by statute, in North Carolina, probate jurisdiction of such matters, and the superior court has no jurisdiction on petition, motion, or summary order to direct the disposition of money paid into the office of such clerk by executors or administrators. Ex p. Cassidey, 95 N. C. 225.

[c] **Where infants interested.**—The probate court may exercise such jurisdiction even though the parties interested are infants, for whom such court has no authority to appoint a guardian ad litem. Williams v. Holmes, 9 Md. 281.

[d] **Proceedings by after discovered heirs.**—The probate court has jurisdiction to order payment from the state treasury to subsequently discovered heirs of money paid in under its order because there were no known heirs, notwithstanding the statute of escheats, giving the circuit court jurisdiction where there are no known heirs. In re Bomino, 83 Mo. 433.

[e] **The pendency of a controversy as to the ownership of the property** does not affect the jurisdiction of the probate court to enter an order of distribution subject to the pending suit. In re Richards, 133 Cal. 524, 65 P 1034.

[f] **Where litigation concerning estate finally settled.**—Where whatever litigation there had been concerning an estate had been finally determined, and two appeals taken had been disposed of, an objection to the jurisdiction of the court to render a decree of final distribution by reason of unsettled litigation was unsustainable. Drasdo v. Jobst, 39 Wash. 425, 81 P 857.

[g] **Fund consisting in part of proceeds of realty.**—Where part of the funds in the hands of the executor and trustee of decedent consists of rents and from his real estate, the surrogate's court has jurisdiction to determine the widow's rights in the realty in order to make distribution. Matter of McKinley, 66 Misc. 126, 122 NYS 807, 7 Mills Surr. 387.

[h] **Retention of jurisdiction.**—The children of a decedent petitioned the court for an order for the sale of realty to pay debts, and thereby preserve the personalty. The court entered a decree directing a sale of the realty, and appointed a commissioner to make the sale. The commissioner made a report that he had made a sale, and a decree confirming the sale and directing the administrator to charge himself with the proceeds and account for the same in due course of administration in paying the debts was made. At a subsequent term a petition was filed praying for the distribution of the personal estate. The court entered a decree reciting that the cause had been retained for further decrees, and directing that the same be referred to a person named, to take testimony as to the value of the property and the amount advanced to the distributees, etc. At a subsequent term such person filed his report, to which was attached the administrator's account, showing the receipts of the administrator. The court entered a decree confirming the report of the administrator and for the distribution of the estate. It was held that in view of the recitals in the second decree rendered, the cause was retained after the rendition of the first decree for further orders and decrees, and the court had jurisdiction to enter the decree confirming the administrator's report. Settle v. Settle, 141 N. C. 553, 54 SE 445.

[i] **Money not received by representative as such.**—Money received by the representative from the estate of a deceased brother of the testator and to which the heirs are entitled is not within the jurisdiction of the probate court and can be recovered by the heirs from the representative only by a suit in a court of ordinary jurisdiction. Kemp v. Kemp, 11 La. 19.

1. Ala.—Pearson v. Darrington, 32 Ala. 227; Harrison v. Harrison, 9 Ala. 470.

Ill.—Reynolds v. Peo., 55 Ill. 328; Piggott v. Ramey, 2 Ill. 145.

N. J.—Wyckoff v. O'Niel, 71 N. J. Eq. 681, 63 A 982; Swain v. Smith, 61 N. J. Eq. 590, 47 A 509; In re Eakin, 20 N. J. Eq. 481.

N. Y.—Matter of Hunt, 110 App. Div. 533, 97 NYS 403.

Pa.—In re Ludwick, 255 Pa. 548, 100 A 448; Dundas' App., 73 Pa. 474 [rev 8 Phila. 598]; Shore's Est., 14 Phila. 321; Hopkins' Est., 11 Phila. 42.

[a] **Illustrations.**—(1) The surrogate's court may not on a judicial settlement of the accounts of a testamentary trustee order a partial distribution of the assets, the statute making no provision therefor, and providing that such court must exercise its jurisdiction in the cases and manner prescribed by statute. Matter of Hunt, 110 App. Div. 533, 97 NYS 403. (2) Where the statute directs payment and distribution of an estate to creditors, legatees, next of kin, husband and wife of decedent, or their assigns, and provides for the determination by the decree to whom a debt, claim, or distributive share is payable, claimants other than those having legal titles will not be recognized, but those claiming interests adversely to such titles, on grounds of equity, will be remitted to other tribunals. Matter of Lattan, 42 Misc. 467, 87 NYS 246, 4 Mills Surr. 190.

ceedings,[2] and an action cannot be maintained against the representative for the recovery of a distributive share,[3] although his account exhibiting a specific balance against him has been settled and confirmed in the probate court.[4] Under other statutes courts of equity have jurisdiction ancillary to that of the probate court, the former taking jurisdiction usually where there are special circumstances in respect to which the probate court cannot take jurisdiction, or cannot give adequate relief;[5] while under still others courts of equity exercise a concurrent jurisdiction therein, although such courts will not usually take jurisdiction unless the probate court cannot afford adequate relief.[6] When a chancery court is duly resorted to to enforce payment of distributive shares in behalf of legatees or distributees and jurisdiction is taken, the court may proceed to determine the amount for distribution, and thus fix the compensation payable to the administrator and his solicitor, determining questions of

2. Ark.—Carpenter v. Hazel, 128 Ark. 416, 194 SW 225; Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

Conn.—Gray v. Goddard, 90 Conn. 561, 98 A 126; State v. Blake, 69 Conn. 64, 36 A 1019; Clement v. Brainard, 46 Conn. 174.

Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.

Ill.—Hesley v. Shaw, 120 Ill. A. 92.

Kan.—Keith v. Guthrie, 59 Kan. 200, 52 P 435.

Mass.—Norton v. Lilley, 210 Mass. 214, 96 NE 351; Fletcher v. Fletcher, 191 Mass. 211, 77 NE 758; Flynn v. Flynn, 183 Mass. 365, 67 NE 314; Putney v. Fletcher, 148 Mass. 247, 19 NE 370; Cummings v. Cummings, 143 Mass. 340, 9 NE 730.

Mich.—Wessborg v. Merrill, 195 Mich. 556, 162 NW 102.

Mont.—Ryan v. Kinney, 2 Mont. 454.

Nebr.—In re Manning, 83 Nebr. 417, 119 NW 672.

N. C.—Hendrick v. Mayfield, 74 N. C. 626; Heilig v. Foard, 64 N. C. 710; Hunt v. Sneed, 64 N. C. 176.

Pa.—Gotwald v. Small, 242 Pa. 239, 88 A 1015; Kelly's App., 77 Pa. 232; Mussleman's App., 65 Pa. 480; Black v. Black, 34 Pa. 354; Ashford v. Ewing, 25 Pa. 213; Whitside v. Whitside, 20 Pa. 473; Dewald v. Berkheiser, 19 Pa. Super. 570; Barber v. Ross, 2 Pa. Dist. 263; Peterson's Est., 29 Pa. Co. 28, 34 PittsbLegJNS 298; Bayley's Est., 23 Pa. Co. 49.

[a] **The district court has no original jurisdiction** to distribute the funds of a decedent's estate. In re Manning, 83 Nebr. 417, 119 NW 672, 85 Nebr. 60, 122 NW 711.

3. Gotwald v. Small, 242 Pa. 239, 88 A 1015; Ashford v. Ewing, 25 Pa. 213.

[a] **In Georgia** an heir at law may bring an action in the superior court, against the administrator of an estate, for his distributive share therein. Wheeler v. Horne, 136 Ga. 486, 71 SE 901.

4. Ashford v. Ewing, 25 Pa. 213.

5. Cal.—Toland v. Earl, 129 Cal. 148, 61 P 917, 79 AmSR 100.

Md.—Lee v. Price, 12 Md. 253.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

Oh.—McLaughlin v. McLaughlin, 4 Oh. St. 508, 64 AmD 603.

Tex.—Hill v. Townsend, 24 Tex. 575.

W. Va.—Lynch v. Armstrong, 81 W. Va. 134, 94 SE 24.

[a] **Illustration.** — The district court has jurisdiction of a suit by the distributees against the administrator, in which it appears that administration has been pending during twelve years, that during the last three years the administrator has claimed the property as his own and has sold part, that the debts are all paid, and that the administrator's bond is worthless, although it does not appear that the estate has been settled in the probate court. Hill v. Townsend, 24 Tex. 575.

[b] **Showing necessary to give equity jurisdiction.**—In order to give courts of equity jurisdiction to superintend the settlement of an estate or to distribute the legacies at the instance and request of the executor, he must show some special circumstance, such as a trust devolved upon him by the will, and about which he is doubtful, or at least something more than the mere payment over of a legacy after the debts of decedent are paid. Woods v. Fuller, 61 Md. 457.

[c] **Where there is no embarrassment as to the proper mode of administering** the estate, the fact that the parties differ as to the distribution which shall be made of the residue does not authorize a suit in equity by the administrator to have the probate court instructed as to what distribution should be made. Toland v. Earl, 129 Cal. 148, 61 P 914, 79 AmSR 100.

[d] **When the order of distribution is made,** the powers of the probate court are exhausted and it has no jurisdiction to entertain a petition brought to enforce the collection of the amount awarded to the distributee as a debt against the administrator. McLaughlin v. McLaughlin, 4 Oh. St. 508, 64 AmD 603.

[e] **Interpretation of will.**—Jurisdiction will be entertained of a suit in equity against an executrix and widow for the sale of land and division of the proceeds among the heirs, without dower to the widow, where there are no disputed questions of fact, the real question being the interpretation of the will and no objection to the jurisdiction is made. Taylor v. Leesnitzer, 37 App. (D. C.) 356.

[f] **Effect of issues as to fact or validity of conveyance.**—A statute authorizing a court of probate to order distribution, although some of the heirs, legatees, or devisees have conveyed their shares, applies only where no question arises on the distribution as to the conveyances having been made; and, where the fact of conveyance is disputed or its validity is in issue, the question is not within probate jurisdiction. "matters of probate" including the determination of the persons succeeding to the estate, either as heir, devisee, or legatee, the amount to which each is entitled, and the construction of the will, but not including a determination of claims against heirs or devisees for their portion arising subsequent to decedent's death. In re Howe, 161 Cal. 152, 118 P 515.

[g] **Conflicting claims under judgment, execution, and assignment.**—Where, in probate proceedings for the distribution of the estate of a decedent, there were conflicting claims to the interest of the surviving husband of decedent, one party claiming under an execution sale of the husband's interest, another claiming as a judgment creditor of the husband, and another claiming under an assignment prior to the execution sale, the court must remit claimants to a court of competent jurisdiction to determine the conflicting claims. In re Howe, 161 Cal. 152, 118 P 515.

[h] **Determination as to character of legacy.**—Under statutes declaring that the judge of probate has jurisdiction of all matters relating to the settlement of estates, and providing that when, on the settlement of any account of an administrator or executor, there appears to remain in his hands property not necessary for the payment of debts and expenses of administration, nor specifically bequeathed, the judge shall determine who are entitled to the estate, and their respective shares therein under the will or according to law, it is not necessary that the question whether a legacy was specific or demonstrative should have been determined as a preliminary question by a court of equity, and not upon appeal by the supreme court of probate. Stilphen's App., 100 Me. 146, 60 A 888, 4 AnnCas 158.

[i] **Where it is the duty of the executor to select** from the stocks and bonds left by testator a sufficient amount to make up deficiencies in funds bequeathed in trust, his failure to do so entitles the beneficiary to relief in equity. Blair v. Scribner, 67 N. J. Eq. 583, 60 A 211.

[j] **Objection not ousting probate jurisdiction.**—Where, on an application of an assignee of decedent's widow for a partial distribution of the estate, the petitioner simply demanded a certain sum from the amount shown by the executor's account to be in his hands, which included the profits of a certain business operated by the executor, but which was closed prior to the proceedings in question, an objection that the superior court sitting in probate had no jurisdiction of a controversy between the executor and the petitioner as to the profits of such business was unfounded. In re Straus, 144 Cal. 553, 77 P 1122.

[k] **The superior court in Ohio** by virtue of its chancery powers has jurisdiction of an action by one or more heirs: (1) To compel distribution. Cadwallader v. Longley, 1 Disn. (Oh.) 497, 12 Oh. Dec. (Reprint) 756. (2) To compel the payment of legacies by the executor. Guiou v. Guiou, 5 Oh. Dec. (Reprint) 205, 3 AmLRec 475.

6. Harland v. Person, 93 Ala. 273, 9 S 379; Harrison v. Harrison, 9 Ala. 470; Calhoun v. King, 5 Ala. 523; Sinnott v. Kenaday, 14 App. (D. C.) 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339]; Matter of Robinson, 156 App. Div. 363, 141 NYS 470.

[a] **Illustration.**—A bill in equity may be filed by a legatee for the recovery of his legacy whether the executor has assented thereto or not, although he might also enforce his claim, after the executor has assented by proceedings in the probate court. Millsap v. Stanley, 50 Ala. 319.

[b] **Where the estate consists of corporate stock,** which has been allotted to the widow as administratrix, and a suit in equity is brought by certain of the heirs to set aside as fraudulent a transfer of other corporate stock by the corporation to a third person and to determine complainants' rights in the stock and for other relief, all the parties being before the court, it can enter a decree requiring the widow to convey to each of the heirs his proper share in the stock allotted to her as administratrix. Jones v. Green, 129 Mich. 203, 88 NW 1047, 95 AmSR 433.

[c] **Probate jurisdiction purely statutory.**—The jurisdiction of the prerogative court, over accounts of executors at least, is wholly statutory, and except by statute it has no authority to order distribution by executors under a will, such distribution being wholly a matter of chancery jurisdiction. Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612.

the amount of costs, charges, etc., properly to be deducted.[7]

Court of domicile of decedent. The distribution of personal property must be under the authority of the court where decedent was domiciled, in the state or country where the principal administration was granted.[8]

As between different courts of probate the court in which administration was granted has exclusive jurisdiction to decree distribution.[9]

The res over which the court acquires jurisdiction in a proceeding for final distribution of the property of an estate is the entire remaining property of the estate, and not merely that specifically enumerated in the petition, and it is the duty of the court to distribute all to the persons entitled thereto.[10]

Presumption of jurisdiction. Where the court has general jurisdiction of the subject matter, jurisdiction of a particular case will be presumed to exist, where no facts depriving the court of jurisdiction appear.[11]

Where an executor has assented to a pecuniary legacy, it becomes a debt to be recovered in the court having jurisdiction of actions to recover ordinary debts rather than in the court of probate jurisdiction.[12]

[§ 1363] **8. Process or Notice.** In order to warrant an order for distribution, notice of the proceedings therefor must be given, in the manner prescribed by statute[13] or by the court,[14] to the personal representative,[15] and to all distributees, legatees, or other persons interested in the distribution,[16] unless the persons who are entitled to notice

7. Goodman v. Palmer, 137 Tenn. 556, 195 SW 165.

8. Healey v. Cole, 95 Me. 272, 49 A 1065; Jennison v. Hapgood, 10 Pick. (Mass.) 77; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Hutton v. Hutton, 40 N. J. Eq. 461, 2 A 280. But compare Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381 (on application to a court of equity in this country for a decree of distribution according to the lex domicilii of the estate of a deceased person domiciled abroad, the court has authority to decree distribution; and it is incumbent on those opposed thereto to show that such a decree will work injustice or public mischief).

9. Dakin v. Hudson, 6 Cow. (N. Y.) 221; Foster v. Wilber, 1 Paige (N. Y.) 537; Seymour v. Seymour, 4 Johns. Ch. (N. Y.) 409; Wright v. New York M. E. Church Corp., Hoffm. (N. Y.) 202.

10. Humphry v. Los Angeles Protestant Episcopal Church, 154 Cal. 170, 97 P 187.

11. Chapell v. Shuee, 117 Ind. 481, 20 NE 417 (although a complaint by the administrator and distributees of an intestate for a distribution of assets does not aver that the latter was domiciled or died possessed of property in, or was an inhabitant of, the state, or that administration was granted in the state, judgment for plaintiffs will not be arrested for that reason).

12. Sloan v. Sloan, 117 Md. 141, 83 A 38; Hendrick v. Mayfield, 74 N. C. 626; McFarland v. McKay, 74 N. C. 258; Miller v. Burnest, 65 N. C. 67.

Effect of assent generally see supra § 1277.

13. U. S.—Christianson v. King County, 203 Fed. 894, 122 CCA 188 [aff 239 U. S. 356, 36 SCt 114, 60 L. ed. 327]; Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558.

Cal.—In re Mitchell, 126 Cal. 248, 58 P 549; Asher v. Yorba, 125 Cal. 513, 58 P 137; Daly v. Pennie, 86 Cal. 552, 25 P 67, 21 AmSR 61; In re Jessup, 81 Cal. 408, 21 Pa. 976, 22 Pa. 742, 1028, 6 LRA 594.

Ind.—Glessner v. Clark, 140 Ind. 427, 39 NE 544.

Kan.—Scruggs v. Scruggs, 69 Kan. 487, 77 P 269.

La.—Millaudon v. Cajus, 6 La. 222; Harkins' Succ., 2 La. Ann. 923.

Md.—Wilson v. McCarty, 55 Md. 277.

Mich.—Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547.

Minn.—Greenwood v. Murray, 28 Minn. 120, 9 NW 629.

Miss.—Mundy v. Calvert, 40 Miss. 181.

Mo.—State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618; Lilly v. Menke, 126 Mo. 190, 28 SW 643, 994; State v. Burnes, 129 Mo. A. 474, 107 SW 1094; Baker v. Lumpee, 91 Mo. A. 560.

Mont.—In re Peterson, 49 Mont. 96, 140 P 237, AnnCas1916A 716.

N. J.—Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612; Adams v. Adams, 46 N. J. Eq. 298, 19 A 14.

N. Y.—In re Plum, 169 NYS 875.

Oh.—Matter of Cloud, 7 Oh. Cir. Ct. 67, 3 Oh. Cir. Dec. 666.

Tex.—Porter v. Sweeney, 61 Tex. 213.

Wash.—In re Hoscheid, 78 Wash. 309, 139 P 61; Teynor v. Heible, 74 Wash. 222, 133 P 1, 46 LRANS 1033.

Ont.—Re Ashman, 15 Ont. L. 42, 10 OntWR 250.

[a] **Personal notice** is not necessary; notice by publication is sufficient. Miller v. Pitman, (Cal.) 182 P 50; Daly v. Pennie, 86 Cal. 552, 25 P 67, 21 AmSR 61; Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547; In re Ostlund, 57 Wash. 359, 106 P 1116, 135 AmSR 990; Re Ashman, 15 Ont. L. 42, 10 OntWR 250.

[b] **Period of notice.**—In re Peterson, 49 Mont. 96, 140 P 237, AnnCas 1916A 716; In re Hoscheid, 78 Wash. 309, 139 P 61.

[c] **Proof of notice.**—Where a decree recites due service of notice by publication, or by posting, such recital is sufficient to prove such service as against a collateral attack. Crew v. Pratt, 119 Cal. 139, 51 P 38.

[d] **Notice will be presumed,** (1) where no claim of lack of notice is advanced. Daly v. Pennie, 86 Cal. 552, 25 P 67, 21 AmSR 61; Miller v. Pitman, (Cal.) 182 P 50. (2) The fact that the affidavit of the posting of the notice was made on the day of the posting is no objection to the jurisdiction of the court to order distribution, the presumption being that the notice remained posted during the statutory period. Crew v. Pratt, 119 Cal. 139, 51 P 38.

[e] **Except on direct attack** failure to give the statutory notice does not invalidate the distribution. Barrette v. Whitney, 36 Utah 574, 106 P 522, 37 LRANS 368.

14. Lamson v. Knowles, 170 Mass. 295, 49 NE 440; Schaeffner's App., 41 Wis. 260.

[a] **The court may prescribe** what notice shall be given where the statute does not do so. Schaeffner's App., 41 Wis. 260.

15. Ala.—Brazeale v. Brazeale, 9 Ala. 491.

Ark.—Ex p. Pearce, 44 Ark. 509.

Cal.—Letellier's Est., 74 Cal. 311, 15 P 847.

Ill.—Reynolds v. Peo., 55 Ill. 328.

Iowa.—Huey v. Huey, 26 Iowa 525.

Mo.—State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618.

N. Y.—Kerrigan v. Kerrigan, 2 Redf. Surr. 517.

[a] **Requisites of citation.**—(1) A citation to an administrator to show cause why judgment and execution should not be awarded against him for the distributive share of one in an estate must set out the previous proceedings had in the settlement of the estate. Welch v. Walker, 4 Port. (Ala.) 120. (2) The citation issued by a county court at the instance of one of the heirs of the estate to an administrator to show cause why an order should not be made requiring him to make partial distribution to the heirs should run in the name of the people. Reynolds v. Peo., 55 Ill. 328.

[b] **Where an executor is a resident of another state,** notice to him of an application to pay over a distributive share, and an order by the court to that effect, are binding upon him in such other state. Huey v. Huey, 26 Iowa 525.

[c] **Written notice not necessary.**—A statute requiring written notice of an application for distribution applies only to notice to persons entitled to share in the distribution, and not to an executor. State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618.

[d] **Notice to the representative's attorney** was sufficient on proceedings to set aside an order denying a petition for partial distribution, where at the hearing of such petition the executors appeared and it was admitted that due notice was given to them and all parties interested. In re Mitchell, 121 Cal. 391, 53 P 810.

[e] **Where the essential requisites have been complied with by the distributees** on an application for partial distribution, there is no necessity for a notice to the administrator before a final decree can be rendered. Harrison v. Meadors, 41 Ala. 274.

[f] **Service of citation upon an administrator to render an account** gives the court jurisdiction over his person, and any action of the court thereafter in ordering distribution of money in his hands is within the jurisdiction of the court and not void. Ex p. Pearce, 44 Ark. 509.

[g] **Service of citation upon the husband of an administratrix** is sufficient to support a final settlement of the administration. Kavanaugh v. Thompson, 16 Ala. 817.

16. U. S.—Christianson v. King County, 203 Fed. 894, 122 CCA 188 [aff 239 U. S. 356, 36 SCt 114, 60 L. ed. 327]; Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558.

Ala.—Gardner v. Gardner, 42 Ala. 161; Hollis v. Caughman, 22 Ala. 478; Harrison v. Harrison, 9 Ala. 470; Watson v. May, 8 Ala. 177.

Ark.—Neal v. Robertson, 55 Ark. 79, 17 SW 582.

Cal.—In re Grider, 21 P 532; Abila v. Burnett, 33 Cal. 658.

Ill.—Long v. Thompson, 60 Ill. 27.

Ind.—Glessner v. Clark, 140 Ind. 427, 39 NE 544.

Iowa.—Aschan v. McDermott, 164 Iowa 750, 145 NW 524.

La.—Couder's Succ., 47 La. Ann. 810, 17 S 317; Broussard v. Robin, 8 La. Ann. 478.

Md.—Shriver v. State, 65 Md. 278,

appear in the proceeding for distribution and waive notice.[17]

Notice of settlement of accounts is not, according to some authorities, sufficient to support a decree of distribution, but actual notice of the application for such decree must be given to the parties interested;[18] but it has also been held that in order for a decree of distribution to be binding upon persons claiming a share in such distribution as heirs, or otherwise, it is unnecessary for the representative to give any notice other than that of final settlement.[19]

The effect of giving the statutory notice is to charge all the world with notice of the proceedings.[20]

Removal of the representative after notice has been given and the appointment of another in his place does not destroy the efficacy of the notice.[21]

Effect of order adjudging default. Under a statute providing that, on the filing of a petition to ascertain the interest of persons in an estate being administered, the court shall direct service of notice to all persons interested to appear at a certain time and place, and shall also make an order "establishing proof of the service of said notice," and after the expiration of the time limited for appearance shall "enter an order adjudging default of all persons for not appearing, who shall not have appeared as aforesaid," an order so adjudging default, but adding that it is without prejudice to the rights of persons who have petitions for distribution therein, does not, by such additional matter, deprive the court of jurisdiction.[22]

[§ 1364] **9. Parties—a. In General.** All the legatees may join in a petition for distribution,[23] or a petition for partial distribution may be presented by several legatees and distributees.[24] Necessary parties to a proceeding for distribution are in general the personal representatives of decedent,[25] the legatees or distributees,[26] or their personal rep-

4 A 679; Wilson v. McCarty, 55 Md. 277.

Mass.—Lamson v. Knowles, 170 Mass. 295, 49 NE 440; Browne v. Doolittle, 151 Mass. 595, 25 NE 23; Smith v. Rice, 11 Mass. 507.

Minn.—Greenwood v. Murray, 28 Minn. 120, 9 NW 629; Wood v. Myrick, 16 Minn. 494.

Miss.—Mundy v. Calvert, 40 Miss. 181; Pringle v. Hunt, 31 Miss. 351.

Mo.—State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618; Lilly v. Menke, 126 Mo. 190, 28 SW 643, 994; State v. St. Gemme, 31 Mo. 230; Baker v. Lumpee, 91 Mo. A. 560.

Mont.—In re McFarland, 10 Mont. 586, 27 P 389.

N. J.—Adams v. Adams, 46 N. J. Eq. 298, 19 A 14; Exton v. Zule, 14 N. J. Eq. 501.

N. Y.—Matter of Schuessler, 49 Misc. 203, 98 NYS 939, 5 Mills Surr. 220; In re Plum, 169 NYS 875.

Or.—State v. O'Day, 41 Or. 495, 69 P 542.

Pa.—Purviance v. Com., 17 Serg. & R. 31; Woodward's Est., 2 Chest. Co. 9; Cochran's Est., 14 PittsbLeg JNS 338.

S. C.—Brown v. Brown, 75 S. C. 25, 54 SE 838.

Tex.—Porter v. Sweeney, 61 Tex. 213; Johns v. Northcutt, 49 Tex. 444.

Vt.—Lenehan v. Spaulding, 57 Vt. 115; Ex p. Robinson, 1 D. Chipm. 357.

Wash.—McGowan v. Smith, 22 Wash. 625, 61 P 713.

Wis.—Leavens' Est., 65 Wis. 440, 27 NW 324; Schæffner's App., 41 Wis. 260; Ruth v. Oberbrunner, 40 Wis. 238; Bresee v. Stiles, 22 Wis. 120.

Ont.—Uffner v. Lewis, 27 Ont. A. 242.

[a] **Notice required in all cases.**—State v. Burnes, 129 Mo. A. 474, 107 SW 1094.

[b] **Discretion of surrogate.**—Where the executor's account shows that there is a surplus distributable to persons interested who have not been cited, it is discretionary with the surrogate to cite them. In re Rainforth, 37 Misc. 660, 76 NYS 314, 3 Mills. Surr. 26.

[c] **Notice held sufficient.**—Where a distributee was given two months' notice of a motion for the distribution, and filed no exception to the scheme of settlement, and was heard by attorney, who did not verbally or in writing present any objections to the decree, an exception that the distributee had no opportunity to be heard will be overruled. Brown v. Brown, 75 S. C. 25, 54 SE 838.

[d] **General notice or citation sufficient.**—Watson v. May, 8 Ala. 177 (general citation to persons having adverse interest); Porter v. Sweeney, 61 Tex. 213 (probate courts may, upon the mere general notices required by statute, make needful orders for settlement and distribution, without actual intervention of all the parties in interest); Re Ashman, 15 Ont. L. 42, 10 OntWR 250 (notice to "all creditors and others having claims against the estate").

[e] **Notice to infants.**—(1) An infant daughter of decedent must be given notice. Neal v. Robertson, 55 Ark. 79, 17 SW 587. (2) In making an order of distribution of funds derived from a sale of certain real estate belonging to a decedent's estate in the hands of a guardian, it is not necessary that notice of the application for distribution shall be served on the minors or that they shall be represented by a guardian ad litem, their representation by general guardian being sufficient unless the guardian's action is adverse in its nature to their interest. Aschan v. McDermott, 164 Iowa 750, 145 NW 524.

[f] **A false recital of notice** in a decree of distribution will not save it, but it is a nullity as to distributees not served with process or appearing. In re Grider, (Cal.) 21 P 532.

[g] **Intervention of all parties not necessary.**—If the proceedings on distribution have been regularly conducted, and the notices required by law have been given, these notices amount in law to service upon all the parties in interest, and the court may proceed to make needful orders for distribution without actual intervention of all the parties in interest. Woodward's Est., 2 Chest. Co. (Pa.) 9; Porter v. Sweeney, 61 Tex. 213.

[h] **Notice to attorney-general.**—A statute requiring that, when the persons entitled to a legacy or distributive share are unknown, the decree must direct that the amount be paid into the treasury of the state for the benefit of whomsoever may be entitled, to be ascertained by a proceeding in the court on notice to the attorney-general, does not require notice to the attorney-general of a reference in the surrogate's court to take proof of the rights of the claimants, by which reference it was determined that part of the next of kin of decedent were unknown and unascertainable, pursuant to which finding the money was deposited in the state treasury. Matter of Davenport, 142 App. Div. 41, 126 NYS 693.

[i] **Passing account without notice.**—Passing an administrator's account cannot be regarded as a final distribution of the estate by the orphans' court, where it does not appear that any meeting of the distributees was appointed, or any notice of an intended meeting given, or that a distributee whose share had been placed in bank and for which credit is claimed by the administrator had ever received it or assented to the distribution thus made. Scott v. Fox, 14 Md. 388.

17. Gardner v. Gardner, 42 Ala. 161; Hollis v. Caughman, 22 Ala. 478; Smith v. Smith, 21 Ala. 761; Crew v. Pratt, 119 Cal. 139, 51 P 38; In re Jessup, 81 Cal. 408, 21 P 976, 22 P 742, 1028, 6 LRA 594; In re Grider, (Cal.) 21 P 532; Exton v. Zule, 14 N. J. Eq. 501; Kerrigan v. Kerrigan, 2 Redf. Surr. (N. Y.) 517.

18. Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612; Adams v. Adams, 46 N. J. Eq. 298, 19 A 14.

19. Scruggs v. Scruggs, 69 Kan. 487, 77 P 269.

20. Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.

21. State v. O'Day, 41 Or. 495, 69 P 542.

22. In re Sutro, 143 Cal. 487, 77 P 402.

23. Baker's App., 59 Pa. 313.

24. In re Crocker, 105 Cal. 368, 38 P 954.

25. Ala.—Ward v. Oates, 42 Ala. 225.

Ark.—Norwood v. Holliman, 27 Ark. 445.

Ill.—Hopper v. Ferguson, 23 Ill. 438.

Ky.—Cargile v. Harrison, 9 B. Mon. 518; Haden v. Haden, 7 J. J. Marsh. 168.

Miss.—Shattuck v. Young, 2 Sm. & M. 30; Porter v. Porter, 7 How. 106, 40 AmD 55.

N. Y.—Cocks v. Haviland, 5 Dem. Surr. 11.

Pa.—Baker's App., 59 Pa. 313.

Man.—Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

[a] **The fact that one of several coexecutors is insolvent and has no assets in his hands** makes it none the less necessary to make him a party to a special proceeding to enforce payment of arrears of an annuity. Cocks v. Haviland, 5 Dem. Surr. (N. Y.) 11.

[b] **Representative in individual capacity.**—There is no reason why an administrator should not be added and remain a party in his personal capacity to proceedings for distribution. Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

[c] **Proceeding after final settlement.**—An executor or administrator is not a necessary party to a proceeding by legatees after final settlement to procure a division of property remaining in his hands for distribution. Pringle v. Hunt, 31 Miss. 351.

26. Ala.—Boyett v. Kerr, 7 Ala. 9.

resentatives,[27] and all other persons interested in the distribution and as to whom the representative will not be protected, if a decree is rendered without their being made parties.[28]

Disability of distributees. If any of the distributees are infants they may be represented by their general guardian;[29] but in case there is no competent general guardian, or he fails to attend after notice, a guardian ad litem should be appointed to represent them.[30] An incompetent distributee for whom no guardian has been appointed cannot petition by attorney for partial distribution.[31] A petition for the distributive share of a married woman must be presented in the joint names of such married woman and her husband, and not in the name of the husband alone.[32]

Proceeding to set aside family settlement. The mother's estate and her children by a second marriage are necessary parties defendant to a bill which seeks to set aside for fraud a family settlement made between the mother and the children of the first marriage, to annul the title which apparently flowed therefrom, to avoid collaterally decrees of the Porto Rican courts concerning it, and to set aside, as simulated and fraudulent, the sales made in virtue of the title apparently vested by the settlement, where such bill, although alleging that the property transferred to the mother by such settlement was acquired by the husband by inheritance, contains no averment concerning the property allotted to the daughters which tends to rebut the legal presumption of community as to the property acquired during marriage, which the bill seeks to administer and distribute.[33]

[§ 1365] **b. Intervention.** Persons claiming through decedent, as creditor, legatee, or distributee may be permitted to intervene in the hearing of a petition for distribution,[34] by filing some pleading or

Ark.—Morris v. Virden, 57 Ark. 232, 21 SW 223; Neal v. Robertson, 55 Ark. 79, 17 SW 587; Norwood v. Holliman, 27 Ark. 445.

Ky.—Johnson v. Beauchamp, 5 Dana 70; Cargile v. Harrison, 9 B. Mon. 518.

La.—Bothick's Succ., 109 La. 1, 33 S 47.

Miss.—Murff v. Frazier, 41 Miss. 408; Porter v. Porter, 8 Miss. 106, 40 AmD 55.

Nev.—Royce v. Hampton, 16 Nev. 25.

N. Y.—Clock v. Chadeagne, 10 Hun 97.

N. C.—Williams v. Williams, 74 N. C. 1.

Tenn.—Stewart v. Glenn, 3 Heisk. 581.

Va.—Sheppard v. Starke, 3 Munf. 29.

[a] **A petition by one of several distributees** without making the co-distributees parties is not sufficient to give the court power to order distribution. Murff v. Frazier, 41 Miss. 408; Williams v. Williams, 74 N. C. 1 (where one only of ten distributees sued the administrators without making the others parties, the court could not render a decree of distribution, and could do no more than adjudicate the rights of plaintiff and the administrators). But compare J. Elwood Lee Co. v. Grace Hospital, 206 Fed. 994 (where the amount available for legacies has been ascertained, the fact that the assets of a decedent's estate, administration of which is proceeding in a probate court, are insufficient to pay all legacies in full, does not require the other legatees to be made parties to a proceeding in a federal court against the executors for a legacy which they have refused to pay); Ward v. Oates, 42 Ala. 225 (in a proceeding for partial distribution by one of several distributees, others besides the administrator are not indispensable parties); Benoit v. Brill, 15 Miss. 32 (at the expiration of the time fixed by statute, any one of several distributees may petition the probate court for his share, without joining his codistributees; and the court will compel the distribution upon the petitioner's filing a sufficient bond).

[b] **A petition for the division of the personal property** need not make all the distributees parties to it. Pringle v. Hunt, 31 Miss. 351.

[c] **An action against the executor alone** to recover a legacy is sometimes authorized by statute. Hughes v. Hiscox, 105 Misc. 521, 174 NYS 564.

[d] **Where the petitioner claims to be the sole heir** and regularly pursues the course required by statute in giving notice, etc., he is not guilty of fraud upon the court because he does not state the names of other parties who claim to be heirs of the estate. Royce v. Hampton, 16 Nev. 25.

[e] **Where the decree of distribution is not made upon the petition of the administrator,** he is not bound to notify the court that there are other parties besides the petitioner who claim to be heirs of the estate. Royce v. Hampton, 16 Nev. 25.

27. McMullen v. Brazelton, 81 Ala. 442, 1 S 778; Thomas v. Dumas, 30 Ala. 83; McConico v. Cannon, 25 Ala. 462; Hall v. Andrews, 17 Ala. 40; Boyett v. Kerr, 7 Ala. 9; Morris v. Virden, 57 Ark. 232, 21 SW 223; Sheppard v. Starke, 3 Munf. (17 Va.) 29.

28. N. J.—O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

N. Y.—Riggs v. Cragg, 89 N. Y. 479 [rev 26 Hun 89]; Matter of Schuessler, 49 Misc. 203, 98 NYS 939, 5 Mills Surr. 220; Neaves v. Neaves, 2 Dem. Surr. 230.

Pa.—Woodward's Est., 2 Chest. Co. 9.

Va.—Triplett v. Woodward, 98 Va. 187, 35 SE 455; Sheppard v. Starke, 3 Munf. (17 Va.) 29.

W. Va.—Lynch v. Armstrong, 81 W. Va. 134, 94 SE 24.

[a] **Creditors.**—Beekman v. Vanderveer, 3 Dem. Surr. (N. Y.) 221; Woodward's Est., 2 Chest. Co. (Pa.) 9; Triplett v. Woodward, 98 Va. 187, 35 SE 455.

[b] **Adverse claimant.** — Equity will not distribute to legatees a fund in the executor's hands in the face of an adverse claim against the estate which would consume the fund, without affording claimant an opportunity to be heard. O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999.

[c] **The husband of a legatee** is not a proper party to a bill by an administrator with the will annexed for distribution of the estate. Triplett v. Woodward, 98 Va. 187, 35 SE 455.

[d] **The appointment of an attorney for absent heirs** is essential only in case a necessity therefor is shown during a pending administration of a succession. Kellogg's Succ., 51 La. Ann. 1304, 26 S 262; Burnside's Succ., 35 La. Ann. 708.

[e] **A widow who was in community with her deceased husband** is not a proper party to an action by the heirs against the executors to compel them to pay over funds in their possession, since, not being one of the heirs, she has nothing to claim of the executors and no account to settle with them. Kemp v. Kemp, 11 La. 19.

29. Smith v. Smith, 21 Ala. 761; Sankey v. Sankey, 6 Ala. 607; Gammage v. Noble, 24 Miss. 150.

30. Ala.—Thompson v. Perryman, 45 Ala. 619; Morgan v. Morgan, 35 Ala. 303; King v. Collins, 21 Ala. 363 [overr Parks v. Stonum, 8 Ala. 752]; Sankey v. Sankey, 6 Ala. 607.

Ky.—Rupard v. Rupard's Admr., 1 Ky. Op. 28.

Mich.—Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547.

Miss.—Conwill v. Conwill, 61 Miss. 202; Mundy v. Calvert, 40 Miss. 181; Cason v. Cason, 31 Miss. 578.

Wash.—Horton v. Barto, 57 Wash. 477, 482, 107 P 191, 193, 131 AmSR 999 [cit Cyc].

[a] **Petition signed by attorney.** —Where a petition for partial distribution was signed by the local attorney of an infant legatee, but subsequently the legatee, on becoming of age, participated in the proceeding, and the executor appeared in response to the notice given and filed his formal resistance to the petition, and on the day set for hearing appeared and consented in open court to the decree, the executor waived any informalities in the proceedings, and could not attack the decree as entered by the court without acquiring jurisdiction. Peo. v. Dates, 29 Cal. A. 260, 155 P 112.

[b] **The effect of failure to appoint a guardian ad litem** is to render the proceedings voidable, but it does not render them void. Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547.

[c] **Where the infant heirs are not necessary parties** such an appointment is unnecessary. Rupard v. Rupard's Admr., 1 Ky. Op. 28.

31. In re Davis, 27 Mont. 490, 71 P 757.

32. Smith v. Hopper, 20 Ala. 245; Westervelt v. Gregg, 1 Barb. Ch. (N. Y.) 469.

33. Garzot v. Rios De Rubio, 209 U. S. 283, 28 SCt 548, 52 L. ed. 794.

34. In re Crooks, 125 Cal. 459, 58 P 89; Braman's App., 89 Pa. 78; McBride's App., 72 Pa. 480; Fry's Est., 4 Dauph. Co. (Pa.) 72.

[a] **Mortgagee may intervene.**—In re Crook, 125 Cal. 459, 58 P 89.

[b] **One claiming adversely,** and not as a distributee or creditor, has no standing to be heard in a proceeding for distribution. Hamor's Est., 1 Chest. Co. (Pa.) 319.

[c] **A surviving husband** who claims certain property in the possession of the executors of the will of his deceased wife as community property to which he is entitled cannot have his claim of ownership determined upon a proceeding for the distribution of his wife's estate. Rowland's Est., 74 Cal. 523, 16 P 315, 5 AmSR 464.

[d] **An order denying the application of one having no direct or contingent interest in the fund, to intervene** in proceedings to compel an executor to pay over a legacy is in the court's discretion; it involves no substantial right and so is not reviewable. In re Halsey, 93 N. Y. 48.

statement as to the grounds upon which they claim a right to be heard.[35] So also an assignee or purchaser of a legacy or distributive share has been held to be entitled to come in by petition on final distribution and claim the assignor's legacy or share.[36] But purchasers of land of a devisee pending administration are not entitled to intervene in an application by the administrator to distribute the funds in his hands, the interests of such purchasers being subject to the administration.[37]

[§ 1366] **10. Appearance.** In proceedings for an order to distribute the net residue of the estate to the sole distributee, who is a nonresident of the country, appearance may be by guardian, solicitor, or agent,[38] and the beneficiary need not personally appear for the purpose of establishing his identity as the beneficiary described in the will.[39] Where an executrix appeared and contested a petition by legatees for partial distribution in her capacity as executrix only, such appearance did not entitle her to claim rights in such proceeding which she possessed only as devisee, as to which she should be considered as having made default.[40]

[§ 1367] **11. Right to Object to Distribution.** One who claims that the estate was held by decedent in trust for claimant and others, and claims under the trust a definite portion of the estate, and makes no claim that decedent confused the trust funds with his individual funds so as to render them not susceptible of identification, is not a creditor of the estate in such sense as to be entitled to object to distribution.[41] Where, on petition for the distribution of an estate, the court found on sufficient evidence that objector had no interest in the estate, he had no standing to object that the findings did not authorize the distribution of the estate to the executors as trustees, etc.[42]

[§ 1368] **12. Pleadings — a. Application or Petition—(1) In General.** A petition for distribution has been held to be necessary to confer jurisdiction of distribution proceedings.[43] Formal and technical pleadings are not, however, usually required in proceedings for distribution,[44] although a prima facie case should be made out,[45] and it must be shown that complainants are legatees or distributees.[46] The affidavit or petition should state the essential facts required to be established for the relief prayed for,[47] and should conclude with a prayer for the relief sought;[48] but it has been held not necessary to describe specifically the property to be distributed,[49] or even to show that there are assets in the hands of the executors applicable to

35. In re Crook, 125 Cal. 459, 58 P 89.

36. In re Burton, 93 Cal. 459, 29 P 36; Balch v. Zentmeyer, 11 Gill & J. (Md.) 267. But compare In re Blackinton, 29 Ida. 310, 158 P 492 (grantee of heir cannot question procedure for distribution).

37. Hallam v. Moore, (Tex. Civ. A.) 126 SW 908.

38. Clarke v. Sandrock, 113 Md. 422, 77 A 644.

39. Clarke v. Sandrock, 113 Md. 422, 77 A 644.

40. In re Murphy, 145 Cal. 464, 78 P 960.

41. In re Dutard, 147 Cal. 253, 81 P 519 (holding also that the fact that claimant adds a claim for an accounting and settlement of the account of decedent as administrator of an estate of which claimant was also administrator does not change the character of the claim so as to make claimant a creditor, within the property law).

42. In re Walker, 148 Cal. 162, 82 P 770.

43. Carter v. Frahm, 31 S. D. 379, 141 NW 370.

44. Cal.—In re Murphy, 145 Cal. 464, 78 P 960.

Ind.—Spray v. Bertram, 165 Ind. 13, 74 NE 502.

La.—Calhoun v. McKnight, 39 La. Ann. 325, 1 S 612.

Me.—Walker v. Bradbury, 15 Me. 207.

Miss.—Anderson v. Gregg, 44 Miss. 170; Mundy v. Calvert, 40 Miss. 181; French v. Davis, 38 Miss. 167.

N. Y.—Clock v. Chadeagne, 10 Hun 97.

[a] **Written petition not essential.**—Walker v. Bradbury, 15 Me. 207.

[b] **An affidavit which fully states the facts,** filed with a notice of a motion to require the administrator to pay a legacy, is a sufficient "petition" to authorize a citation. In re Dunscomb, 10 NYS 247.

[c] **The report of an administrator, and an exception thereto** challenging the distribution on the basis of charging exceptors with advancements, and as a reason for the objection alleging a contract claimed to make consideration of the advancements improper, raise an issue, putting exceptors to proof of existence of the contract, without any plea of non est factum by the administrator. Spray v. Bertram, 165 Ind. 13, 74 NE 502.

[d] **Presentation as claim against estate.**—A claim for the allowance of a legacy may be presented in the court having probate jurisdiction as a claim against the estate, but if the payment of all debts is not alleged, some reason for appealing to the court for the establishment of the legacy must be shown, and also some wrong on the part of the administrator. Fickle v. Snepp, 97 Ind. 289, 49 AmR 449.

[e] **Misnumbering petition.**—The fact that the clerk filed a petition for distribution under a different number from the other papers in the estate is immaterial, there being but one estate. In re Sheid, 129 Cal. 172, 61 P 920.

[f] **A cross bill is unnecessary** on a petition for the distribution, as it is competent for an administrator, without formality, to show cause in any intelligible manner why a decree for distribution should not be made. French v. Davis, 38 Miss. 167.

45. Jones v. Folsom, 143 Ga. 23, 84 SE 68, LRA1915D 1122; Brinton's Est., 29 Pa. Co. 107, 108, 109, 21 Lanc LRev 76.

"Attention is called to a carelessness in the preparation of petitions asking for distribution. . . . At a recent term of court twenty six out of fifty uncontested cases were not legally made out until the court, at considerable trouble, had hunted up counsel representing the several estates and procured the necessary proofs. We presume that members of the bar know what is necessary to make out a prima facie case, and feel that they should not presume on the court." Brinton's Est., supra.

46. Hopkins v. Claybrook, 5 J. J. Marsh. (Ky.) 234.

47. Ala.—McRae v. Pegues, 4 Ala. 158.

Ark.—Norwood v. Holliman, 27 Ark. 445.

Cal.—In re Levinson, 98 Cal. 654, 33 P 726.

Ga.—Bellerby v. Thomas, 105 Ga. 477, 30 SE 425.

Ind.—Coulter v. Bradley, 163 Ind. 311, 71 NE 903; Chapell v. Shuee, 117 Ind. 481, 20 NE 417; Roberts v. Huddleston, 93 Ind. 173.

Ky.—Wilson v. Hunt, 6 B. Mon. 379.

Minn.—In re Kittson, 45 Minn. 197, 48 NW 419.

Miss.—French v. Davis, 38 Miss. 167; Cole v. Leake, 27 Miss. 767; Crosby v. Covington, 24 Miss. 619.

N. Y.—In re Macaulay, 94 N. Y. 574; Baylis v. Swartwout, 4 Redf. Surr. 395.

S. D.—Carter v. Frahm, 31 S. D. 379, 141 NW 370.

Tex.—Turner v. Clark, 18 Tex. Civ. A. 606, 46 SW 381.

Vt.—In re Peck, 87 Vt. 194, 88 A 568.

[a] **Allegation of grant of administration.**—It is unnecessary to allege that administration of the estate was granted by the same court in which the petition is filed. Hargroves v. Thompson, 31 Miss. 211.

[b] **An application for the ascertainment of persons entitled to participate** in the distribution of funds of the testator's estate is unnecessary in a petition for distribution, as such ascertainment is a mere incident to a decree for distribution. Chase v. Benedict, 72 Conn. 322, 44 A 507.

48. Cal.—Cook's Est., 77 Cal. 220, 17 P 923, 19 P 431, 11 AmSR 267, 1 LRA 567.

Me.—Hurley v. Hewett, 89 Me. 100, 35 A 1026.

Miss.—Garner v. Lansford, 20 Miss. 558.

Pa.—In re Morrison, 183 Pa. 155, 38 A 895.

S. D.—Carter v. Frahm, 31 S. D. 379, 141 NW 370.

[a] **Illustration.**—A petition by an administrator which alleges that he has fully administered the estate, paid the debts and expenses of administration, and which prays for the fixing of a time and place for the examination and allowance of his account, is a petition only for final settlement, and the county court has no jurisdiction to distribute the estate. Carter v. Frahm, 31 S. D. 379, 141 NW 370.

[b] **Implication from prayer.**—A distribution in kind may be ordered, although the prayer of the petition calls for such distribution only by implication. Hurley v. Hewett, 89 Me. 100, 35 A 1026.

49. Humphrey v. Los Angeles Protestant Episcopal Church, 154 Cal. 170, 97 P 187. But compare Burke v. Maguire, 154 Cal. 456, 98 P 21 (where a complaint against the estate of an executrix for the balance of a legacy merely alleged that there came into the possession of the executrix the sum of forty thousand dollars in money and ten thousand dollars in notes and mortgages belonging to the testator's estate, and that plaintiff did not know of or discover that the testator was the owner of such property, or that the executrix had come into possession of it, until after

the payment of the legacy claimed by petitioner.[50] It is improper to include in a petition for final distribution a prayer for an accounting against one who is alleged to have come into possession of property of an estate and not to have accounted for it.[51] Any requirements of a statute [52] or rule of court [53] with respect to the application or petition should, of course, be substantially complied with. If the suit is brought by an administrator and sole distributee, an allegation that decedent died in the county where suit was brought does not give the court jurisdiction, the complaint failing to allege where decedent was domiciled at the time of his death.[54] A bill by an administrator with the will annexed for distribution according to the provisions of the will is not rendered multifarious by the joinder of legatees who were also debtors and creditors of the estate, with a prayer for a settlement of their accounts, and for a surrender by one of them of papers which he held as agent of testator.[55] An application by a legatee who is a married woman for an advance payment on her legacy must show that her husband has not sufficient means to support her.[56]

[§ 1369] **(2) Description of Parties.** A petition by devisees and legatees for partial distribution is not defective because it describes petitioners as "heirs at law." [57] A petition for a legacy, against the administrator of the testator, need not describe him as administrator with the will annexed, or show in what manner he became administrator, it being sufficient if it describes him as administrator.[58]

[§ 1370] **(3) Joinder of Claims with Respect to Different Estates.** Where estates are connected, as where one of decedents was a distributee of another, and the same person is administrator of both, distributees entitled to a portion of each of the estates may unite both claims in the same bill against the administrator.[59]

[§ 1371] **(4) Filing of Petition.** A statutory requirement of the filing of the petition or complaint has been held to be directory only so that a failure to file within the time prescribed by the statute does not deprive the court of jurisdiction.[60]

[§ 1372] **(5) Filing Refunding Bond with Petition.** A petitioner for distribution before final settlement is not required to file a refunding bond with his petition, but it is sufficient if the petition contains an offer to execute one.[61]

[§ 1373] **(6) Effect of Petition as Transfer of Interest.** Where three sons of testatrix mentioned in the residuary clause of her will petitioned for distribution alleging that the residue vested in them as a matter of law, and a son, who was not a residuary legatee, answered, asserting intestacy as to one fourth of the estate to which a deceased son would have been entitled had he lived, and asked that it be distributed in shares of one fifth each to the four surviving sons and to the grandson, and the latter on the same day filed a petition declaring his understanding of testatrix's intent to be that the whole residue should go to his three remaining uncles named in the residuary clause and asked that distribution be made to them, it was held that this instrument constituted an effective transfer of all the grandson's interest, and the court should have distributed the residue accordingly.[62]

[§ 1374] **b. Demurrer.** A demurrer to the petition will be sustained where the petition does not state facts sufficient to warrant the relief sought,[63] or where it shows that it was filed less than a year

her death, and does not otherwise state conditions excusing a timely discovery of the facts, it is defective and uncertain as to the description of the property alleged to have been concealed, especially the notes and mortgages and is subject to demurrer on that ground).

50. Coulter v. Bradley, 163 Ind. 311, 71 NE 903. But compare Brown v. Glover, 158 Mo. A. 396, 138 SW 105 (a petition by a legatee to whom testator had made an advancement which the will provided should be deducted from petitioner's share, asking merely that, when distribution is ordered, petitioner's share shall be set off without charging him with the amount of the advancement, on the ground that he had paid the advancement before testator's death, but failing to allege either that there were any funds in the estate to distribute, or that the estate is in condition for distribution, was premature and unsustainable, either as a petition for distribution or a proceeding in equity).

51. Cook's Est., 77 Cal. 220, 17 P 923, 19 P 431, 11 AmSR 267, 1 LRA 567.

52. Ford v. Garner, 49 Ala. 601; In re Murphy, 145 Cal. 464, 78 P 960; Staton v. Byron, 105 SW 928, 32 KyL 246; In re Macaulay, 94 N. Y. 574.

[a] **Amount of debts and nature and value of property.**—Where plaintiffs alleged that the personal property amounted to "$——," and was more than sufficient to pay all the indebtedness, that certain individuals were claiming to be creditors, but that plaintiffs did not know who were creditors, the petition was sufficient under Civ. Code Prac. § 429, providing that the amount of decedent's debts and the nature and value of the property, since the failure to name the value of the personal estate by filling the blank was an oversight which defendants could have cured by motion, and the requirement regarding a statement of debts, being for the benefit of creditors, was satisfied by the allegation that the personal estate was more than sufficient to pay all indebtedness. Staton v. Byron, 105 SW 928, 32 KyL 246.

[b] **Stating name of distributee.**—A petition for distribution which described a minor heir as "Matilda Gravitt's child, whose name is unknown" did not comply with Rev. Code § 2222, requiring that the petition either state the name or show that the distributee has no name. Ford v. Garner, 49 Ala. 601.

[c] **Averring presentation.**—Under Code Civ. Proc. § 1493, requiring demands against an estate, founded upon contract, to be presented for allowance, and § 1500, providing that no action shall be maintained on any claim against an estate unless the claim is first presented, except in the case of an action brought to enforce a mortgage, a complaint against an estate sounding in contract, and not within the exception, which does not aver that the claim has been presented to the administrator fails to state a cause of action, and, where a testator willed a certain sum to certain beneficiaries of whom plaintiff was one, but there were not sufficient funds to pay the legacies in full, and on final accounting, B, the executrix, was directed to pay the sum in her hands to trustees upon their giving bonds, etc., but the trustees never qualified, and B held the funds until her death, a complaint in an action against her administrator for a share of the legacy under the distribution is founded on contract, and within the rule. Burke v. Maguire, 154 Cal. 456, 98 P 21.

[d] **Use of language of statute sufficient.**—A petition by legatees for the partial distribution of an estate, in the exact language of the statute, declaring "that said estate is but little indebted; and that the shares and legacies of your petitioners may now be allowed to them without loss to creditors of the estate," is sufficient as against the executor. In re Murphy, 145 Cal. 464, 78 P 960.

[e] **A verification to a petition** to the surrogate court to compel an executor to pay a legacy to petitioner, stating that petitioner "knows the contents thereof, and that the same are true," is a compliance with the provision of the code requiring the affidavit to state that the contents are true to the knowledge of deponent. In re Macauley, 94 N. Y. 574.

53. McClelland's Est., 3 Pa. Dist. 759, 15 Pa. Co. 375; Brinton's Est., 29 Pa. Co. 107, 21 LancLRev 76.

54. Minkler v. Woodruff, 12 Nebr. 267, 11 NW 296.

55. Triplett v. Woodward, 98 Va. 187, 35 SE 455.

56. Matter of Kohler, 91 Misc. 462, 154 NYS 958.

57. In re Crocker, 105 Cal. 368, 38 P 954.

58. Quinn v. Moss, 20 Miss. 365.

59. Breckinridge v. Floyd, 7 Dana (Ky.) 456.

60. In re Sutro, 143 Cal. 487, 77 P 402.

61. Norwood v. Holliman, 27 Ark. 445; Richmond v. Delay, 34 Miss. 83; Keith v. Jolly, 26 Miss. 131; Crosby v. Covington, 24 Miss. 619.

62. In re Haynes, 165 Cal. 568, 133 P 277, AnnCas1915A 926.

63. Norwood v. Holliman, 27 Ark. 445.

after the grant of letters of administration;[64] but a demurrer to the whole petition will not be sustained if it is good as to any part of the relief prayed for.[65] Where, in an action brought by one of the devisees for a sale of the land of the testator and a division of the proceeds, the widow of one of the devisees who claimed the greater part of the property, and who had been in possession of the land for a number of years after the court decided that she and her children were not entitled to have their interests set apart and a homestead allowed them out of it, because the real estate had been converted into personalty by the provisions of the will, filed an amended pleading, in which she alleged that she was the widow of one of the devisees named, alleged that he left surviving him five infant children who had resided with her, that her husband had left no property or provisions for her and the children, except two horses, one cow, one wagon, and some household goods not worth exceeding two hundred dollars, and a part interest in a legacy, and asked that seven hundred and thirty dollars be set aside out of the legacy to supply the deficiency in the property on hand at the death of her husband, a demurrer to the item of seven hundred and thirty dollars was properly sustained, as it was impossible to determine the amount she was entitled to, the value of the household goods not being alleged.[66]

[§ 1375] **c. Waiver of Formal Objections to Petition.** Where an administrator filed a petition asking distribution of the entire estate to himself, but on the hearing stipulated with the other claimants that the matter should be submitted to the court on an agreed statement of facts, he thereby waived the filing of formal written objections to his petition.[67]

[§ 1376] **d. Plea or Answer.** An answer or plea may be filed to the petition setting up a denial or substantial defense to the facts stated therein.[68] If a lack of jurisdiction of the court to act upon the petition is relied on, facts showing such lack of jurisdiction must be alleged in the answer,[69] and it has been held that an opposition to distribution must state that there is an unsatisfied liability of a certain and definite amount or nature.[70] A plea or answer merely alleging that the representative does not know who the heirs are is insufficient,[71] and it has been held that in order to justify the dismissal of a petition for a legacy or distributive share, the answer must be duly verified, must set forth facts which cast a doubt on the petitioner's claim and must deny the validity and legality of the claim.[72] In a suit to compel an executor to pay a legacy, an answer setting up that plaintiff's ward was not entitled to a legacy from her grandfather's estate which was left to her father, who died before the grandfather, because of the father's indebtedness to the grandfather, is in the nature of a plea in confession and avoidance, and admits the right to the legacy except for the defense.[73]

[§ 1377] **e. Reply.** A reply may be filed to the answer or plea.[74]

[§ 1378] **13. Issues.** Only the issues made by the pleadings are to be tried.[75] The probate court has no power to determine claims of third persons against the distributees.[76] On the trial in that court of the claim of an assignee of the widow for her distributive share in the estate, the administrator cannot attack the consideration for the assignment.[77] Questions of title to the property[78] or the validity of claims in the representative's hands as assets of the estate[79] are not proper for consideration in distribution proceedings. Neither is it proper to consider claims between the executor and a devisee arising out of a partnership between them.[80] In a proceeding for partial distribution, the question whether all the property, or only the separate property of decedent, was embraced in an agreement between the widow and the heirs for a distribution of the estate is not properly before the court.[81] A statute authorizing contests arising out of the community property in a proceeding for distribution has been held to apply only to cases of intestacy.[82]

[§ 1379] **14. Evidence.** In a suit to recover a legacy to a legatee who was a subject of a foreign country and resided in that country at her death, it will not be presumed that there are creditors of the foreign legatee in the state where such writ is brought.[83] Where commissioners appointed by a court under a power in a will to value the property, to determine whether a daughter's share was materially less than that of a son, were empowered by the court, not only to value, but also to divide, the estate, their division, setting aside a part of the residuary estate to the daughter, without objection by the executors, must be presumed to have been adopted by them and made their act.[84] In a proceeding by a legatee or distributee for his legacy or distributive share the burden is on him to prove his title and all other facts necessary to entitle him

64. Young v. Ross, 31 Miss. 556

65. Wells v. Mitchell, 39 Miss. 800; Cole v. Leake, 27 Miss. 767.

66. Porter v. Porter, 135 Ky. 813, 123 SW 302.

67. In re Davidson, 21 Cal. A. 118, 131 P 67.

68. Packwood v. Elliott, 43 Miss. 504; Matter of Feeks, 6 NYSt 60.

[a] **Right to file verified answer.** —Where, upon a verified petition being filed by a legatee, a citation is issued by the surrogate to the executors to show cause why they should not be decreed to pay a certain sum to the legatee, it is error to refuse to allow the executors to file a verified answer. Matter of Feeks, 6 NY St 60.

69. Chapell v. Shuee, 117 Ind. 481, 20 NE 417.

70. In re Halleck, Myr. Prob. (Cal.) 46.

71. Conner v. Hawkins, 8 Blackf. (Ind.) 236.

72. In re Macaulay, 94 N. Y. 574; Hurlburt v. Durant, 88 N. Y. 121, 2 NYCivProc 115; Matter of Dunn, 39 App. Div. 510, 57 NYS 444, 29 NYCiv Proc 243; Matter of Muller, 25 App. Div. 269, 50 NYS 786; Matter of Waterford Y. M. C. A., 22 App. Div. 325, 47 NYS 354; Matter of Alexander, 83 Hun 147, 31 NYS 411; Brown v. Phelps, 48 Hun 219 [aff 113 N. Y. 658, 21 NE 415]; Matter of McClouth, 9 Misc. 385, 30 NYS 274, 1 Gibb. Surr. 122; In re Phalen, 5 NYS 43.

[a] **An answer is not sufficient for this purpose where** it merely: (1) Denies the validity or legality of the petitioner's claim. In re Macaulay, 94 N. Y. 574. (2) Denies that there is money in his hands with which to pay the claim. Brown v. Phelps, 48 Hun 219 [aff 113 N. Y. 658, 21 NE 415]. (3) Or where it merely avers that "the petitioner's legacy is not yet payable by the terms of the will." Steinele v. Oechsler, 5 Redf. Surr. (N. Y.) 312.

73. State v. Lamb, 174 Mo. A. 360, 160 SW 55.

74. Conner v. Hawkins, 8 Blackf. (Ind.) 236; Quinn v. Moss, 20 Miss. 365.

[a] **Accordingly** a suit for distribution should not be dismissed upon objections to the answer or plea being overruled, but the petitioners should be permitted to reply. Conner v. Hawkins, 8 Blackf. (Ind.) 236.

75. In re Peck, 87 Vt. 194, 88 A 568.

76. In re Winnegar, 118 Mo. A. 445, 94 SW 833.

77. Matter of Farley, 91 Misc. 185, 155 NYS 63.

78. Cone's App., 68 Conn. 84, 35 A 781; Homer's App., 35 Conn. 113; McBride's App., 72 Pa. 480; Moore's Est., 8 Pa. Dist. 399, 22 Pa. Co. 591.

79. Cone's App., 68 Conn. 84, 35 A 781.

80. In re Wentz, 225 Pa. 566, 74 A 424.

81. In re Foley, 24 Nev. 197, 51 P 834, 52 P 649.

82. In re Wenks, 171 Cal. 607, 154 P 24.

83. Sultan of Turkey v. Tiryakian, 213 N. Y. 429, 108 NE 72 [aff 162 App. Div. 613, 147 NYS 978].

84. Whitfield v. Miles, 101 Miss. 734, 58 S 8.

to recover,[85] unless such proof is waived;[86] and, conversely, the burden is on the representative to prove payment, settlement, or any other matter of defense relied upon by him.[87] The representative may introduce evidence only as to such matters as he has set up as a defense.[88] The general rules of evidence[89] are to be applied in determining the admissibility of evidence which is offered,[90] and the weight and sufficiency of that which is admitted.[91]

[§ 1380] **15. Proceedings of Auditor or Commissioner.** In some states auditors or commissioners may be appointed to examine the representative's accounts, and make an allotment of the estate in the hands of the representative among the persons entitled to the same.[92] The duty or power of such auditors or commissioners is to ascertain and report the shares of distributees,[93] in doing which a majority of them may act.[94] They may consider evidence in reference to claims against decedent,[95] construe instruments,[96] and make allowances and give credit to the representative for disbursements made after settlement in the probate court;[97] but they have no title whatever to, or right to possession of, the estate either before or after division made,[98] nor have they power to review proceedings of the probate court, or to alter or restate an account which has been settled in that court,[99] or, it has been held, to make distribution, that duty being upon the administrator according to their report,[1] although power to make distribution is sometimes conferred on such officers.[2] Their report is subject to exception,[3] and it is only after its confirma-

85. Ala.—Hall v. Wilson, 14 Ala. 295.
Cal.—In re Painter, 115 Cal. 635, 47 P 700.
Md.—Dronenburg v. Harris, 108 Md. 597, 71 A 81.
N. Y.—Matter of Lown, 165 App. Div. 552, 151 NYS 171; Matter of Kohler, 91 Misc. 462, 154 NYS 958; Matter of Day, 86 Misc. 131, 149 NYS 221; Robinson v. Adams, 30 Misc. 537, 63 NYS 816 [mod on other grounds 81 App. Div. 20, 80 NYS 1098 (aff 179 N. Y. 558 mem, 71 NE 1139 mem)].
Pa.—Clement's Est., 13 Pa. Co. 129.
Wyo.—Emelle v. Skinner, 20 Wyo. 507, 126 P 397.
Ont.—McCarthy v. McCarthy, 7 OntWR 749.

[a] **A petitioner for partial distribution,** whether there is opposition or not, must show that the estate is but little indebted, that the applicant is entitled to the share asked for, and what, when the expenses are paid, such share will amount to. In re Painter, 115 Cal. 635, 47 P 700.

86. Hall v. Wilson, 14 Ala. 295.

87. Young v. Cook, 30 Miss. 320; Baldwin's Est., 33 PittsbLegJNS 399; Kellogg v. Stroud, 166 Wis. 12, 163 NW 261.

88. Bradley v. Byrd, 20 Miss. 269 (where the administrator in his answer resisted the distributee's claim solely on the ground that the commissioners had possession of the property and should make distribution, he cannot on the hearing show a delivery of his share to the distributees).

89. See Evidence 22 C. J. p 1.

90. Cal.—In re Spreckels, 165 Cal. 597, 133 P 289.
Ga.—Crawford v. Clark, 110 Ga. 729, 36 SE 404.
Md.—Dronenburg v. Harris, 108 Md. 597, 71 A 81.
Mass.—Pierce v. Loomis, 224 Mass. 226, 112 NE 1027.
Mo.—Perdue v. Perdue, 107 Mo. A. 500, 81 SW 633.
Vt.—In re Peck, 87 Vt. 194, 88 A 568.

[a] **The verified return of the testator's executor** approved and ordered to record by the court of ordinary having jurisdiction over the estate, and duly recorded, which shows a payment to all the legatees, including a money bequest to the husband of the life tenant, is admissible as prima facie evidence of such latter payment in a suit by an executory legatee, upon the death of the life tenant without leaving children, to recover such money from the administrator of the husband, he being a party in interest and connected with the testator's estate, and the approval and recording of such return under the order of the court of ordinary being a judgment de bene esse which affects him. Crawford v. Clark, 110 Ga. 729, 36 SE 404.

91. Cal.—In re Marshall, 176 Cal. 784, 169 P 672; In re Huntoon, 174 Cal. 282, 163 P 52; In re Strous, 144 Cal. 553, 77 P 1122; Pratt v. Pratt, (A.) 184 P 956.
Ill.—Dunham v. Stephens, 205 Ill. A. 27.
Md.—Clarke v. Sandrock, 113 Md. 422, 77 A 644.
Minn.—Sprague v. Stroud, 114 Minn. 64, 129 NW 1053.
N. Y.—Beers v. Strong, 128 App. Div. 20, 112 NYS 382.
Pa.—Gross's Est., 9 Pa. Dist. 76.
Tex.—Gallaspie v. Hardy, (Civ. A.) 196 SW 592.

92. Ala.—Chambers v. Perry, 17 Ala. 726.
Ky.—Roberts v. Dale, 7 B. Mon. 199; Williams v. Williams, 3 Litt. 40.
Miss.—Bradley v. Byrd, 20 Miss. 269.
N. J.—Meeker v. Vanderveer, 15 N. J. L. 392.
Pa.—In re Kittera, 17 Pa. 416; Haggerty's Est., 13 Pa. Dist. 663, 29 Pa. Co. 57; Mullen's Est., 9 Pa. Dist. 87; Peterson's Est., 29 Pa. Co. 28, 34 PittsbLegJNS 298; Heitler's Est., 3 AmLReg 487 note.

[a] **If an examination of accounts and calculation is necessary** to ascertain the amount of each share a master should be appointed; and in the case of complicated accounts the omission to refer it would, it seems, be ground of reversal. Roberts v. Dale, 7 B. Mon. (Ky.) 199.

[b] **Right to nominate.**—The statute does not contemplate "that when one opposes the right of another to participate in a distribution, he shall have the power to nominate an auditor of his own choosing by a mere assertion to the court that the other was not legally entitled to share in the same." Best's Est., 19 Pa. Dist. 337, 338.

[c] **The order appointing such commissioners** to divide the land described to heirs ought to state that it was made on the application of the heirs, or some of them. Williams v. Williams, 3 Litt. (Ky.) 40.

93. Bradley v. Byrd, 20 Miss. 269; Heyer's App., 34 Pa. 183.

[a] **Separate accounts of coexecutors cannot be combined** by the auditor appointed to report distribution, as the executors, by filing separate accounts, have no joint duty of distribution. Heyer's App., 34 Pa. 183.

94. Chambers v. Perry, 17 Ala. 726.

95. Dobbins v. McGonigal, 20 WklyNC (Pa.) 21.

96. Krout's Est., 26 Pa. Dist. 509; Simon's Est., 9 Pa. Dist. 59.

[a] **Illustration.**—An auditor appointed by the orphans' court to distribute the proceeds of a sale of realty belonging to an intestate, among his heirs, has power to inquire into and to pass upon the validity of a deed whereby the share of one of the heirs in the realty is assigned to a stranger. McGettrick's App., 98 Pa. 9.

[b] **The report of an auditor construing a legacy** and awarding a sum to each of testator's grandchildren who were then minors is not conclusive on the grandchildren as to the share of one who died before the legacy was payable. In re Grothe, 237 Pa. 262, 85 A 141.

97. Meeker v. Vandeveer, 15 N. J. L. 392.

98. Bradley v. Byrd, 20 Miss. 269.

99. Meeker v. Vandeveer, 15 N. J. L. 392; Wither's App., 16 Pa. 151.

[a] **Auditor confined to decree.**—An auditor to whom the account of an administrator, as confirmed by the orphans' court, has been referred for a distribution of the balance, is confined to the decree of the orphans' court, and cannot go behind it for the purpose of increasing the sum there ascertained by the addition of interest. Wither's App., 16 Pa. 151.

1. Bradley v. Byrd, 20 Miss. 269.

2. Whitfield v. Miles, 101 Miss. 734, 58 S 8; In re Kelley, 250 Pa. 172, 95 A 400; In re Grothe, 237 Pa. 262, 85 A 141.

[a] **Adoption by executors of division by commissioners.**—Where commissioners appointed by a court under a power in the will to value the property, to determine whether a daughter's share was materially less than that of a son, were empowered by the court, not only to value but also to divide the estate, their division, setting aside a part of the residuary estate to the daughter, without objection by the executors, must be presumed to have been adopted by them and made their act. Whitfield v. Miles, 101 Miss. 734, 58 S 8.

[b] **Effect of distribution by auditor.**—A distribution by an auditor of funds in the hands of an administrator, confirmed by court, was conclusive only as to the fund he was appointed to distribute, and an attempt to make an award out of the proceeds of real estate not sold was beyond his power. In re Grothe, 237 Pa. 262, 85 A 141.

[c] **The failure of an auditor further to distribute** a trust fund among those legally entitled thereto was not error, although he could properly have done so, where the award did not conclude or prejudice any one having a standing to dispute a claim upon the fund. In re Kelley, 250 Pa. 172, 95 A 400.

3. Harrison v. Harrison, 9 Ala. 470; Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289; Frymeyer's Est., 17 LancLRev (Pa.) 401.

[a] **Who may except.**—(1) An executor, who is an active trustee of an estate created under a will, is authorized to file exceptions to the report of the auditor distributing the estate. Frymeyer's Est., 17 LancL Rev (Pa.) 401. (2) Any one to whom an equal share in a decedent's estate has been awarded on a distribution thereof by an auditor in the orphans' court has a right, being interested in the amount of the fund, to except to the findings of the auditor and to have his exceptions considered by

tion by the probate court that a final order to deliver up the property can be made.[4] Findings of fact made by the auditor are conclusive where clear error is not apparent,[5] but a mistake in their report may be corrected by the court and relief granted accordingly.[6] Where distribution of a decedent's estate has been made promptly at the end of the year from the death of decedent by an auditor among collateral kin, and shortly thereafter a child who was born in a distant state where he always resided appears as the heir, and by his guardian demands that the confirmation of the auditor's report is set aside and the discharge of the administrator and his bondsman be revoked, and an agreement is made among the parties to this effect, and to recommit the question of distribution to the auditor, the administrator cannot complain of a decree directly against him, before every available remedy has been exhausted against the collateral kin among whom the estate had been distributed.[7]

[§ 1381] **16. Examination and Settlement of Accounts.** On a petition for distribution of all the assets, a settlement of the representative's entire accounts may be ordered and needful corrections made,[8] and it has been held error to make a decree for distribution without ordering an account of the amount, character, and condition of the estate in the representative's hands.[9] But in the absence of statute permitting this, the probate court may not fix the value of property for the purpose of distribution,[10] and it is irregular in the distribution proceeding to surcharge the representative with interest thereby increasing the balance against him beyond that indicated by the accounts as confirmed.[11] Persons, who have no right to inherit the property which they claim, cannot inquire into the methods followed in settling the succession.[12]

Waiver of account. Where, after a will had been duly probated, the executrix, both by assignment and under the will, acquired the right to have the entire residue distributed to her absolutely, and, after the time for filing claims had expired, she filed a petition for distribution containing a detailed description of all the property of the estate, and alleging that she had filed no accounts, as executrix, because she was entitled to have the whole of the residue distributed to her, such statement constituted a waiver of an account, and it was therefore proper for the court, after due notice to direct distribution without requiring the executrix to file an account.[13]

[§ 1382] **17. Appraisal of Estate.** Where it is necessary to a just and equitable distribution,[14] distributers appointed by the probate court may revalue the property to be distributed,[15] or appraisers may be appointed for that purpose on petition of the representative.[16] The mode of such appraisement must be strictly in accordance with the terms of the statute giving the probate court power to order it,[17] and the appraisal may be set aside for gross mistake by the appraisers in calculating the value of certain parts of the estate, although no actual misconduct or fraud is imputed to them.[18]

[§ 1383] **18. Hearing and Determination—a. In General.** Before issuing an order of distribution the court should hear and determine all questions relating to the rights of the parties;[19] and as incidental thereto, may in general exercise all powers and decide all questions necessary to a correct distribution of the estate.[20] It should in general ascertain and declare what is to be dis-

the court. Bracken's Est., 138 Pa. 104, 22 A 20. (3) The informant in escheat proceedings has no right to except where the representative of the commonwealth is satisfied by the conclusion of the auditing judge that there has been no escheat. Burns' Est., 11 Pa. Dist. 363.

[b] **Exceptions will be dismissed where** the auditing judge's conclusions as to validity of an assignment of exceptant's interest in the estate is sustained by the evidence. Waddington's Est., 8 Pa. Dist. 613.

4. Harrison v. Harrison, 9 Ala. 470; Smith v. Sweringen, 26 Mo. 551; Whelen's App., 70 Pa. 410.

[a] **A decree of confirmation may be opened and corrected** even for a mistake of law where it appears that one of the legatees or distributees has not had proper knowledge of his rights, although vigilant in his search, that necessary information has been refused or withheld, or that undue advantage has been taken of circumstances whereby his will was coerced. Whelen's App., 70 Pa. 410.

5. Christman's Est., 11 Pa. Dist. 363; Finley's Est., 11 Pa. Dist. 289.

6. Smith v. Sweringen, 26 Mo. 551; Trickett's Est., 22 Pa. Co. 558.

[a] **Where an auditor appointed to audit and settle an administration account also reported a distribution of the fund,** and such part of his report is set aside, the court may decree distribution, on the facts reported by him. Drysdale's App., 14 Pa. 531.

7. Shultz's Est., 46 Pa. Super. 546.

8. In re Spreckels, 165 Cal. 597, 133 P 289; In re Willey, 140 Cal. 238, 73 P 998; Humphrey v. Conger, 7 App. (D. C.) 23; Murdock v. Murdock, 111 Ill. A. 375 [aff 219 Ill. 123, 76 NE 57]; Crowder v. Shackelford, 35 Miss. 321; Billingslea v. Young, 33 Miss. 95. But compare Burbank's Succ., 126 La. 9, 52 S 175 (although the statute imposes on the executor the obligation to file an account, it does not impose on the parties the expense of a settlement in court when they can effect one out of court).

[a] **The court may compel** the representative in such a proceeding to make an inventory and settle his accounts. Humphrey v. Conger, 7 App. (D. C.) 23; McWillie v. Van Vacter, 35 Miss. 428, 72 AmD 127; Billingslea v. Young, 33 Miss. 95.

9. Ford v. Ford, 117 Ill. A. 502; Mundy v. Calvert, 40 Miss. 181.

[a] **Illustration.** — An order entered directing the administratrix to pay to a foreign guardian the distributive share of his ward is improper where it does not appear that an account had been filed and such order does not ascertain and fix the amount of such distributive share. Ford v. Ford, 117 Ill. A. 502.

10. Matter of Hunt, 110 App. Div. 533, 97 NYS 403.

11. Heyer's App., 34 Pa. 183.

12. Cunningham v. Lawson, 111 La. 1024, 36 S 107.

13. Middlecoff v. San Joaquin County Super. Ct., 149 Cal. 94, 84 P 764.

14. Platt v. Platt, 42 Conn. 330; Hurley v. Hewett, 89 Me. 100, 35 A 1026.

[a] **Appraisers need not be appointed where** the distribution can be executed with mathematical certainty without the aid of appraisers. Hurley v. Hewett, 89 Me. 100, 34 A 1026.

15. Platt v. Platt, 42 Conn. 330; Davenport v. Richards, 16 Conn. 310.

16. Hurley v. Hewett, 89 Me. 100, 35 A 1026; Rogers v. Cruger, 7 Johns. (N. Y.) 557.

[a] **No appointment without statutory authority.**—The orphans' court having merely limited jurisdiction, and no statute authorizing it to appoint appraisers to set apart a claimant's interest in a testator's realty, jurisdiction to make the appointment cannot be conferred even by an express provision in the will concurred in by the parties claiming thereunder. Peterson's Est., 13 Phila. (Pa.) 265.

17. Messinger v. Kintner, 4 Binn. (Pa.) 97.

18. Rogers v. Cruger, 7 Johns. (N. Y.) 557.

19. U. S.—Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558.

Cal.—In re Haynes, 165 Cal. 568, 133 P 277, AnnCas1915A 926; In re Painter, 115 Cal. 635, 47 P 700.

N. J.—Exton v. Zule, 14 N. J. Eq. 501.

N. Y.—In re Gray, 111 N. Y. 404, 18 NE 719 [aff 42 Hun 411]; Orser's Est., 4 NYCivProc 129.

Pa.—Lehigh's Est., 11 Pa. Dist. 176.

Wash.—In re Parkes, 178 P 830.

[a] **Even though the petitioner's claims are not opposed** there should be a hearing and determination. In re Painter, 115 Cal. 635, 47 P 700.

[b] **The report of a referee confirmed by the supreme court** cannot be disregarded by the surrogate in ordering distribution. In re Gray, 111 N. Y. 404, 18 NE 719 [aff 42 Hun 411].

[c] **Discretion as to issues.**—An issue upon questions arising on distribution in the orphans' court is not of right, but is a matter of discretion. Alexander's Est., 8 Kulp (Pa.) 402.

[d] **An issue as to the incompetency of an heir to make an assignment** of his interest in the estate by reason of the drinking habit will be refused on distribution unless there is evidence of his actual incompetency at the time the assignment was made because of existing drunkenness or insanity. Alexander's Est., 8 Kulp (Pa.) 402.

20. Cal.—Crew v. Pratt, 119 Cal. 139, 51 P 38.

tributed;[21] who are entitled to share in the distribution,[22] and what each is entitled to receive;[23]

Kan.—Proctor v. Dicklow, 57 Kan. 119, 45 P 86.

Miss.—McWillie v. Van Vacter, 35 Miss. 428, 72 AmD 127.

Mo.—Brown v. Glover, 158 Mo. A. 396, 138 SW 105.

N. Y.—Riggs v. Cragg, 89 N. Y. 479, 11 AbbNCas 401 [rev 26 Hun 89]; Kager v. Brenneman, 47 App. Div. 63, 62 NYS 339; Matter of Halsted, 41 Misc. 606, 85 NYS 301, 4 Mills Surr. 102; Matter of George, 3 NYS 426, 1 Conn. Surr. 241; Matter of Kick, 11 NYSt 688; Matter of Collyer, 4 Dem. Surr. 24; Du Bois v. Brown, 65 HowPr 461, 1 Dem. Surr. 317.

Oh.—Armstrong v. Grandin, 39 Oh. St. 368.

Pa.—Williamson's App., 94 Pa. 231; Otterson v. Gallagher, 88 Pa. 355; Dundas' App., 73 Pa. 474 [rev 8 Phila. 598]; Souder's App., 57 Pa. 498; McCaul's Est., 12 Pa. Dist. 769; Moore's Est., 8 Pa. Dist. 399, 22 Pa. Co. 591.

W. Va.—Lynch v. Armstrong, 81 W. Va. 134, 94 SE 24.

[a] **Thus** a surrogate has jurisdiction: (1) To determine whether money belonging to the estate has been used by the executor to purchase real property. Kager v. Brenneman, 47 App. Div. 63, 62 NYS 339. (2) To decide as to the validity of a trust where a distribution of the estate cannot be had without such determination. Matter of George, 3 NYS 426, 1 Conn. Surr. 241. (3) To determine whether an advancement required by the will to be charged against a legatee had been paid before testator's death, and was therefore not chargeable against the legatee as a part of his share of the estate. Brown v. Glover, 158 Mo. A. 396, 138 SW 105.

[b] **Ordering distribution subject to conflicting claims.**—Where the opposition of a creditor of a distributee charged that an assignment of a distributive share of proceeds of a sale directed by a will was to defraud creditors, it was proper for the court not to decide that question but to order the distribution subject to the conflicting claims and to allow the parties to determine their rights in a proper action for that purpose. In re Gamble, 166 Cal. 253, 135 P 970.

[c] **On the other hand** it has been held: (1) That the probate court has no power to determine whether an alleged settlement between an executor and residuary legatee is valid. Hanscom v. Marston, 82 Me. 288, 19 A 460. (2) That the ordinary is not authorized to decide difficult questions. Cook v. Weaver, 77 Ga. 9. (3) That the county court has only power to order the payment of a distributive share or legacy readily ascertained by simple calculation, without complication or plausible dispute, and without issue or litigation. Bowers v. Lester, 2 Heisk. (Tenn.) 456. (4) That the orphans' court in proceedings for an order directing the executor to distribute the net residue of the estate to the sole distributee may not inquire into the merits of claims disputed by the sole distributee. Clark v. Sandrock, 113 Md. 422, 77 A 644. (5) That the power of a surrogate to decree distribution according to the respective rights of claimants under the statute does not include the power to pass upon disputed rights. Giles' Est., 11 AbbNCas (N. Y.) 57, 1 Dem. Surr. 97; Greene v. Day, 1 Dem. Surr. (N. Y.) 45. (6) That the surrogate has jurisdiction of a petition for a decree directing the payment of a legacy only where the identity of the legatee and the amount or validity of the legacy are not denied in the answer. Fiester v. Shepard, 92 N. Y. 251 [aff 26 Hun 183]; Hurlburt v. Durant, 88 N. Y. 121; In re Hedding M. E. Church, 35 Hun (N. Y.) 315; In re Cutchogue Cong. Church, 13 NYS 140; Cuthbert v. Jacobson, 2 Dem. Surr. (N. Y.) 134 (the denial need not be formal, but it is sufficient if the answer alleges facts inconsistent with the right claimed); Mumford v. Coddington, 1 Dem. Surr. (N. Y.) 27 (where to an application for the payment of a legacy the executor answers that he has paid it to an assignee of the legatee, the validity of the applicant's claim is sufficiently denied to justify the surrogate in dismissing the petition for want of jurisdiction). (7) So that in proceedings for a special accounting of an executor and to enforce payment of a legacy, the surrogate has jurisdiction only where the right to the legacy is undisputed. Riggs v. Cragg, 89 N. Y. 479, 11 AbbNCas 401 [rev 26 Hun 89].

21. Cal.—Burdick's Est., 112 Cal. 387, 44 P 734.

Conn.—Dickinson's App., 54 Conn. 224, 6 A 422.

Ky.—Breckinridge. v. Floyd, 7 Dana 456.

Md.—Pole v. Simmons, 45 Md. 246.

Tex.—Hartwell v. Jackson, 7 Tex. 576.

Vt.—Davis v. Flint, 67 Vt. 485, 32 A 473; Adams v. Adams, 16 Vt. 228; Ex p. Robinson, 1 D. Chipm. (Vt.) 357.

[a] **Mistake as to amount.**—An order for the distribution of a certain amount as the balance left on the settlement of an administration account, and an acceptance of a distribution made under the order, where by mistake the amount was not large enough, are not necessarily erroneous, but the distribution may be good so far as it goes, and a further order of distribution made for what remains. Dickinson's App., 54 Conn. 224, 6 A 422.

[b] **An indivisible chose in action which is already in litigation** should not be partially distributed. In re Colton, 164 Cal. 1, 127 P 643.

22. Cal.—In re Spreckels, 165 Cal. 597, 133 P 289; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247; Crew v. Pratt, 119 Cal. 139, 51 P 38; William Hill Co. v. Lawler, 116 Cal. 359, 48 P 323; In re Painter, 115 Cal. 635, 47 P 700; In re Jessup, 81 Cal. 408, 21 P 976, 22 P 742, 1028, 6 LRA 594; Oxarart's Est., 78 Cal. 109, 20 P 367.

Conn.—Mack's App., 71 Conn. 122, 41 A 242; Davenport v. Richards, 16 Conn. 310.

Kan.—Proctor v. Dicklow, 57 Kan. 119, 45 P 86.

Md.—Alexander v. Leakin, 72 Md. 199, 19 A 532; Pole v. Simmons, 45 Md. 246; Blackburn v. Craufurd, 22 Md. 447.

Mass.—Pierce v. Prescott, 128 Mass. 140; Loring v. Steineman, 1 Metc. 204.

Miss.—Lowry v. McMillan, 35 Miss. 147, 72 AmD 119.

Nev.—In re Foley, 24 Nev. 197, 51 P 834, 52 P 649.

N. Y.—Matter of Sudds, 75 App. Div. 612, 77 NYS 413; Matter of Halsted, 41 Misc. 606, 85 NYS 301, 4 Mills Surr. 102; York's Est., 6 NYCiv Proc 245, 1 HowPrNS 16, 3 Dem. Surr. 187; Orser's Est., 4 NYCivProc 129.

Pa.—In re Clement, 160 Pa. 391, 28 A 932.

Tex.—Hudgins v. Leggett, 84 Tex. 207, 19 SW 387.

Vt.—Davis v. Flint, 67 Vt. 485, 32 A 473; Keeler v. Keeler, 39 Vt. 550; Adams v. Adams, 16 Vt. 228; Ex p. Robinson, 1 D. Chipm. 357.

Wash. — Reformed Presbyterian Church of North America v. McMillan, 31 Wash. 643, 72 P 502.

W. Va.—Lynch v. Armstrong, 81 W. Va. 134, 94 SE 24.

[a] **Contest of right.**—(1) The personal representative is entitled on proceedings for distribution to contest the title of any one who claims an interest in the final distribution of the estate. Watson v. May, 8 Ala. 177; Babin v. D'Astugue, 7 Mart. N. S. (La.) 615 (although the executor's term has expired, he has the right to contest the claims of persons pretending to be the legal heirs). (2) But he cannot contest the claim of one heir against another in a contest between the heirs to determine to whom distribution should be made, to which proceeding he is made a formal party. Roach v. Coffey, 73 Cal. 281, 14 P 840. (3) Nor can he contest the rights of legatees under the will upon a rule upon the commissioner to show cause why he has not turned over money to one of them. Key v. Griffin, 18 S. C. Eq. 67.

[b] **Assignments or pledges not considered.**—The probate court, in making orders of distribution of an estate, does not concern itself with assignments or pledges of distributive shares, or with the enforcement of equitable liens thereon, but such questions must be determined in a court of equity. Coram v. Davis, 209 Mass. 229, 95 NE 298.

[c] **The right of a grantee** of an heir, devisee, or legatee cannot be determined upon a proceeding for partial distribution, but the distribution should be suspended until his rights are determined on final distribution or in some other appropriate proceeding. In re Foley, 24 Nev. 197, 291, 51 P 834, 52 P 649, 1134, 53 P 8.

[d] **Legatee of first testator.**—The power conferred upon the surrogate's court to compel an executor of a deceased executor to account for unadministered assets of the first estate in his hands and to pay and deliver the same to the surrogate's court, or to his successor in office, or to "such other person as is authorized by law to receive the same" does not require the surrogate to direct payment or delivery to a legatee under the will of the first testator. In re Moehring, 154 N. Y. 423, 48 NE 818.

[e] **The usual and better course is** to confirm the account, stating the balance subject to distribution, and ascertain the distributees, if a matter of doubt, by a proceeding at law. Purviance v. Com., 17 Serg. & R. (Pa.) 31.

[f] **Pendency of a petition in the proceeding in the nature of an action to determine the heirship** does not justify denial of the petition for final distribution, where the claim could have as readily been determined in the proceedings for distribution. In re Ross, (Cal.) 182 P 755.

[g] **The validity of a bequest** cannot be determined by the probate court, but only by a court of law or equity. State v. Warren, 28 Md. 338.

[h] **Where no fund for distribution** exists, the court should not hear and determine the claims of distributees. Snyder's Est., 15 Pa. Co. 253.

[i] **On the other hand,** a general order of distribution exhausts the power of the court, and it has no power to determine the persons to whom distribution is to be made and the amount going to each. Cadiz First Nat. Bank v. Beebe, 62 Oh. St. 41, 56 NE 485. See also Hanscom v. Marston, 82 Me. 28, 19 A 460 (the probate court has no power to determine who takes the residuum of an estate under a will).

23. Cal.—Crew v. Pratt, 119 Cal. 139, 51 P 38; William Hill Co. v. Lawler, 116 Cal. 359, 48 P 323; In re Painter, 115 Cal. 635, 47 P 700; In re Hinckley, 58 Cal. 457.

and in order to do so the court may hear evidence,[24] and, where this is necessary, construe the will[25] or, with some qualification, other instruments bearing on such questions.[26] Where a trustee under a will claims that the securities which the executors intend to turn over are, even if authorized, insufficient, the court should, before directing the investments to be turned over, inquire into and determine their sufficiency as investments of the trust funds.[27] Where, on the application of heirs, an administratrix was required to account for certain notes as part of the estate, and the court found that the notes belonged to the administratrix individually, pending the disposition of an appeal therefrom, it was proper to deny an application for a final report and distribution.[28] The court, on petition of distributees and over the objection of creditors, will not arrest the course of administration, charge the assets with a lien for unpaid debts, legacies, and expenses, discharge the administrator, and direct distribution, where the money necessary to pay debts, legacies, and expenses of administration is not proffered in court, and the only offer to pay the same is "on the decree of distribution being granted," and not as a condition thereof.[29] Where a company sought to have the distribution of part of an estate made to it under a deed absolute in form, and it was established that its claim was false and its deed simply a mortgage, it was improper, in a decree distributing such interest to another, apparently to recognize the company's rights by making the distribution subject to any rights which the company might have by way of any mortgage.[30] The court can only determine the respective interests of the parties in such title as decedent had at his death, and cannot adjudicate equities between devisees and persons acquiring rights in the property during decedent's lifetime, and hence can-

Ga.—Cook v. Weaver, 77 Ga. 9.

Kan.—Holden v. Spier, 65 Kan. 412, 70 P 348.

Md.—Pole v. Simmons, 45 Md. 246.

Mont.—In re Davis, 27 Mont. 490, 71 P 757.

N. H.—Crockett v. Sibley, 73 N. H. 322, 61 A 469.

N. Y.—Matter of Kohler, 91 Misc. 462, 154 NYS 958; Matter of Halsted, 41 Misc. 606, 85 NYS 301, 4 Mills Surr. 102; Orser's Est., 4 NYCivProc 129.

Tenn.—Bowers v. Lester, 2 Heisk. 456.

Vt.—Davis v. Flint, 67 Vt. 485, 32 A 473; Keeler v. Keeler, 39 Vt. 550; Adams v. Adams, 16 Vt. 228; Ex p. Robinson, 1 D. Chipm. 357.

[a] **The mere pendency of a proceeding for an adjudication of heirship** is not ground for compelling a continuance of a petition for distribution, as the question of heirship may be determined on the hearing of the latter petition. Oxarart's Est., 78 Cal. 109, 20 P 367.

[b] **The court may defer distribution** and direct suit to be brought to determine the extent of the applicant's interest. In re Painter, 115 Cal. 635, 47 P 700.

[c] **Character of interests.**—The court may determine whether interests under a will are in present enjoyment or merely contingent, and whether they are legal or equitable. In re Hinckley, 58 Cal. 457.

[d] **Where rights determined by suit in equity.**—Where, in a suit in equity, the rights of the parties are determined under a contract for the distribution of the estate between the heirs, on a final settlement the probate court must make a decree of distribution in accordance with the views of the court of equity. Crockett v. Sibley, 73 N. H. 322, 61 A 469.

[e] **Effect of future interest.**—An interest in property created by a will is to be adjudicated and distributed by the decree of distribution, and the fact that there is a future interest in respect to the time of enjoyment is immaterial. Hardy v. Mayhew, 158 Cal. 95, 110 P 113, 139 AmSR 73.

[f] **Rights of distributees in another estate not determined.**—Christman v. Christman, 108 Miss. 37, 66 S 285.

[g] **Contrary view.**—Cadiz First Nat. Bank v. Beebe, 62 Oh. St. 41, 56 NE 485 (set out supra note 30).

24. In re Painter, 115 Cal. 635, 47 P 700; Cook v. Weaver, 77 Ga. 9; Pole v. Simmons, 45 Md. 246; Exton v. Zule, 14 N. J. Eq. 501.

25. Cal.—Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247; In re Fitzgerald, 161 Cal. 319, 119 P 96, 49 LRANS 615; In re Willey, 56 P 550; Goad v. Montgomery, 119 Cal. 552, 51 P 681, 63 AmSR 145; Crew v. Pratt, 119 Cal. 139, 51 P 38.

Conn.—Mack's App., 71 Conn. 122, 41 A 242.

Iowa.—Covert v. Sebern, 73 Iowa 564, 35 NW 636.

Md.—Pole v. Simmons, 45 Md. 246.

Mich.—Byrne v. Hume, 84 Mich. 185, 47 NW 679, 86 Mich. 546, 49 NW 576; Glover v. Reid, 80 Mich. 228, 45 NW 91.

Minn.—Eddy v. Kelly, 72 Minn. 32, 74 NW 1020.

N. J.—Adams v. Adams, 46 N. J. Eq. 298, 19 A 14; Hill v. Bloom, 41 N. J. Eq. 276, 7 A 438.

N. Y.—Garlock v. Vandevort, 128 N. Y. 374, 28 NE 599 [aff 12 NYS 955 (aff 5 NYS 737)]; Purdy v. Hayt, 92 N. Y. 446; In re Verplanck, 91 N. Y. 439 [aff 27 Hun 609]; Riggs v. Cragg, 89 N. Y. 479, 11 AbbNCas 401 [rev 26 Hun 89, and dist Bevan v. Cooper, 72 N. Y. 317 (rev 7 Hun 117)]; Matter of Hamilton, 76 Hun 200, 27 NYS 813; Matter of Vandevort, 62 Hun 612, 17 NYS 316; Matter of French, 52 Hun 303, 5 NYS 249; Matter of McCahill, 29 Misc. 450, 61 NYS 1071, 1 Mills Surr. 315; Matter of Havens, 8 Misc. 574, 29 NYS 1085, 24 NYCivProc 68, 1 Gibb. Surr. 88; Matter of Kick, 11 NYSt 688.

Or.—In re John, 30 Or. 494, 47 P 341, 50 P 226, 36 LRA 242.

Vt.—Ward v. Underhill Cong. Church, 66 Vt. 490, 29 A 770; Keeler v. Keeler, 39 Vt. 550.

Wash.—Bayer v. Bayer, 83 Wash. 430, 145 P 433; Webster v. Seattle Trust Co., 7 Wash. 642, 33 P 970, 35 P 1082.

Wis.—Schaeffner's App., 41 Wis. 260; Brook v. Chappell, 34 Wis. 405.

[a] **Extent of construction.**—(1) The orphans' court, in fixing the decree of distribution by executors, has power to construe the will so far as necessary to determine to whom the distribution or payment is to be made. Hill v. Bloom, 41 N. J. Eq. 276, 7 A 438. (2) The probate court may determine the validity of a bequest only so far as is necessary on a controversy clearly within its statutory jurisdiction; and it may grant distribution on the ground of intestacy resulting from an invalid bequest only when the invalidity is plainly apparent on the fact of the bequest. Mack's App., 71 Conn. 122, 41 A 242.

[b] **The orphans' court has authority to construe a will only on special proceedings** instituted on the application of some party in interest, bringing every person interested into court; and a decree directing an administrator with the will annexed to distribute money according to the terms of a will is not a decree construing the will. Stevens v. Dewey, 55 N. J. Eq. 232, 36 A 825; Adams v. Adams, 46 N. J. Eq. 298, 19 A 14.

[c] **The probate court may determine what kind of an interest,** whether absolute or for life, a particular legatee takes. Ward v. Underhill Cong. Church, 66 Vt. 490, 29 A 770.

[d] **Whether a condition against contest of the will has been violated** by a legatee is a question which properly arises in distribution proceedings. In re Bergland, 177 Cal. 227, 170 P 400.

[e] **Where a will purported to create a trust** of the residue of testator's property after the termination of the widow's life estate, it was incumbent upon the court on final distribution to determine whether the trust was valid and to declare the terms thereof, and to select the trustees and make distribution to them, as well as determine what other persons had rights in the distributable property of the estate and the nature of their interest. Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247.

[f] **Effect of construction.**—The construction placed upon the will in such proceeding is res judicata unless appealed from. Byrne v. Hume, 84 Mich. 185, 47 NW 679, 86 Mich. 546, 49 NW 576.

[g] **Contrary view.**—Cook v. Weaver, 77 Ga. 9 (ordinary not authorized to construe intricate bequests); Towers v. Lester, 2 Heisk. (Tenn.) 456.

26. Pole v. Simmons, 45 Md. 246; Matter of Jones, 3 Misc. 586, 24 NYS 706, Pow. Surr. 454; Winkle v. Winkle, 8 Or. 193.

[a] **The validity of an antenuptial contract** may be passed upon by the probate court, in determining the distributive rights of the parties thereunder. Matter of Jones, 3 Misc. 586, 24 NYS 706, Pow. Surr. 454; Winkle v. Winkle, 8 Or. 193.

[b] **A deed** on which a claim to land by part of the heirs is based cannot be construed by the probate court, as questions arising on deeds are determinable only in courts of common law. In re Willey, (Cal.) 56 P 550; Proctor v. Atkyns, 1 Mass. 321.

[c] **An instrument disposing of or releasing a legacy or distributive share** cannot be passed upon by the probate court upon the final settlement of the accounts of the representative. In re U. S. Trust Co., 175 N. Y. 304, 67 NE 614 [aff 80 App. Div. 77, 80 NYS 475]; In re Randall, 152 N. Y. 508, 46 NE 945 [rev 80 Hun 229, 29 NYS 1019]; Sanders v. Soutter, 126 N. Y. 193, 27 NE 263; In re Wagner, 119 N. Y. 28, 23 NE 200.

27. Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586.

28. Smith v. Smith, 133 Iowa 142, 109 NW 196.

29. In re Washburn, 148 Cal. 64, 82 P 671.

30. In re Lyon, 163 Cal. 803, 127 P 75.

not deprive a lessee from decedent of her rights under the lease, although the lessee is executrix under the will, and as such a party to the probate proceedings.[31] The pendency of appeals, one from parts of an order settling the administrator's account, and the other by a claimant whose claim was denied, does not warrant the denial of the petition for final distribution, even though the court might properly, in the exercise of its discretion, have continued hearings in the proceedings for distribution pending determination of the appeals.[32]

[§ 1384] **b. Advancements to, and Indebtedness of, Legatee or Distributee.** In determining the amount of a distributive share, the probate court may settle all questions of advancements,[33] and in some jurisdictions may inquire into and determine the indebtedness of the distributee to the estate and order a deduction of the same from his share.[34] But the probate court cannot adjudge that a distributee is indebted to the estate in excess of his share therein,[35] nor can it consider questions as to the validity or extent of the indebtedness of a legatee or distributee to the representative personally,[36] or to third persons.[37]

[§ 1385] **c. Power to Decree Distribution to Assignee.** In some jurisdictions the probate court has power, in ordering distribution, to decree the share of a legatee or distributee to his assignee;[38] but in other jurisdictions this power is denied,[39] except where the assignment is undisputed,[40] and the legatee or distributee consents to payment to the assignee.[41]

[§ 1386] **d. Findings.** In proceedings for an order for payment of a legacy, a finding that testator did not intend to give anything to plaintiff is not merely a conclusion of fact derived from facts previously found, but a finding of testator's intent, the ultimate fact in issue.[42] The fact that, in proceedings for distribution to which decedent's widow was a party, decedent's sisters alleged that the estate was interested in certain property held by decedent and his wife as tenants in common, has been held not to require a finding on that question, since the ultimate fact for the court's determination was the value of the estate.[43] If no error was committed prejudicial to appellants from an order affirming the probate court's distribution of a decedent's estate, the question of decedent's domicile is settled by the court's finding.[44]

[§ 1387] **e. Dismissal.** A petition for distribution filed before the time for filing claims against the estate has expired should be dismissed without prejudice to the right to renew it at the proper time.[45] A petition for a legacy or distributive share should be dismissed where it appears that there is no money or other personal property of the estate applicable to the payment of the petitioner's claim which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction out of the estate.[46] So also, where the answer of executors in response to a petition for distribution of income

31. Triba v. Lass, 146 Wis. 202, 131 NW 357.

32. In re Ross, (Cal.) 182 P 755.

33. Lamotte v. Martin, 52 La. Ann. 864, 27 S 291; Labauve's Est., 39 La. Ann. 388, 1 S 830; Brown v. Glover, 158 Mo. A. 396, 138 SW 105; Springer's App., 29 Pa. 208; Ex p. Robinson, 1 D. Chipm. (Vt.) 357. But compare Floyd v. Floyd, 7 B. Mon. (Ky.) 290 (where a testator leaves undevised estate, the court cannot of its own motion direct an account of advancements with a view to equalizing the distribution of the estate).

34. Kan.—Holden v. Spier, 65 Kan. 412, 70 P 348.

Mass.—Jones v. Treadwell, 169 Mass. 430, 48 NE 339. Contra Hancock v. Hubbard, 19 Pick. 167.

Mo.—Lietman v. Lietman, 149 Mo. 112, 50 SW 307, 73 AmSR 374 [overr Ford v. Talmage, 36 Mo. A. 65].

N. D.—Stenson v. H. S. Halvorson Co., 28 N. D. 151, 147 NW 800, LRA 1915A 1179, AnnCas1916D 1289.

Pa.—Springer's App., 29 Pa. 208; Fogg v. Carroll, 18 Pa. Co. 434.

[a] **In an action at law to recover a legacy,** the executor cannot set off an indebtedness of the legatee to decedent on notes barred by the statute of limitations. Kimball v. Scribner, 174 App. Div. 845, 161 NYS 511.

[b] **Contrary view.**—Bondurant v. Thompson, 15 Ala. 202; Kidd v. Porter, 13 Ala. 91; Hayes v. Hayes, 11 KyL 441; Matter of Colwell, 15 NYSt 742; Rudd v. Rudd, 4 Dem. Surr. (N. Y.) 335.

35. Springer's App., 29 Pa. 208.

36. Matter of Peaslee, 81 Hun (N. Y.) 597, 30 NYS 1028; Carter's App., 10 Pa. 144; Bradshaw's App., 3 Grant (Pa.) 109; Cotton's Est., 6 Pa. Dist. 268, 19 Pa. Co. 313, 13 Montg. Co. 156; Seigfried's Est., 1 Woodw. (Pa.) 77.

37. Martinovich v. Marsicano, 137 Cal. 354, 70 P 459; Matter of Redfield, 71 Hun 344, 25 NYS 3; Carter's App., 10 Pa. 144.

[a] **The process of distribution cannot be interrupted by the interposition of claims** against the shares of distributees unless those shares have passed by assignment, or have been attached in the hands of the executor or other legal custodian. Carter's App., 10 Pa. 144; Ottinger's Est., 4 Pa. Dist. 711, 17 Pa. Co. 244; Ditsche's Est., 13 Phila. (Pa.) 288; Robinson's Est., 12 Phila. (Pa.) 170; Matter of Landis, 2 Phila. (Pa.) 217.

38. Shephard v. Clark, 38 Ill. A. 66; Lex's App., 97 Pa. 289; Otterson v. Gallagher, 88 Pa. 355; Dundas' App., 73 Pa. 474; Selleck v. Mathews, 41 S. C. L. 26.

[a] **In New York** (1) under L. (1910) c 576, a surrogate has jurisdiction on a judicial accounting to determine the validity of assignments of the interests of legatees. Matter of Thornburgh, 72 Misc. 619, 132 NYS 268, 8 Mills Surr. 262. (2) Prior to 1910 this power did not exist. Matter of Thornburgh, 72 Misc. 619, 132 NYS 268, 8 Mills Surr. 262. (3) The surrogate formerly had power upon a final accounting to decree payment of a legacy or distributive share to an assignee of the legatee or distributee only where the rights of the parties were undisputed. Matter of Redfield, 71 Hun 344, 25 NYS 3; Matter of Brewster, 3 NYS 556, 1 Conn. Surr. (N. Y.) 172; Tilden v. Dows, 3 Dem. Surr. (N. Y.) 240; Peyser v. Wendt, 2 Dem. Surr. (N. Y.) 221. (4) But where the validity of the assignment was disputed, and the legacy or distributive share was claimed by different persons, resort must be had to a court of equity to settle the dispute. In re Randall, 152 N. Y. 508, 46 NE 945 [rev 80 Hun 229, 29 NYS 1019]; Matter of Cook, 68 Hun 280, 22 NYS 969; Matter of Lattan, 42 Misc. 467, 87 NYS 246; In re Brown, 3 NYCivProc 39, 1 Dem. Surr. 136; Hitchcock v. Marshall, 2 Redf. Surr. (N. Y.) 174; Decker v. Morton, 1 Redf. Surr. (N. Y.) 477. Contra Matter of McCabe, 18 NYS 715, 28 AbbNCas 59. (5) The surrogate should hold in abeyance his decree of distribution, so far at least as concerned the interest to which the assignment refers, until the party's rights could be determined in equity. In re Brown, 3 NYCivProc 39, 1 Dem. Surr. 136.

39. Cal.—In re Gamble, 166 Cal. 253, 135 P 970.

Me.—In re Cote, 98 Me. 415, 57 A 584; Knowlton v. Johnson, 46 Me. 489.

Miss.—Portevant v. Neylaus, 38 Miss. 104; Locke v. Williams, 36 Miss. 187; Dixon v. Houston, 35 Miss. 636; Hill v. Hardy, 34 Miss. 289.

Mont.—In re Davis, 27 Mont. 490, 71 P 757.

N. H.—Wood v. Stone, 39 N. H. 572.

N. J.—In re McGaw, 88 N. J. Eq. 288, 101 A 421.

Or.—Harington v. La Rocque, 13 Or. 344, 10 P 498.

Tex.—State Nat. Bank v. Trevins, (Civ. A.) 215 SW 989.

40. In re Blackinton, 29 Ida. 310, 158 P 492; Johnson v. Jones, 47 Mo. A. 237; In re Davis, 27 Mont. 490, 71 P 757; Wood v. Stone, 39 N. H. 572.

[a] **Illustration.**—Where the assignment has been recognized by the court and is not disputed by the assignor, neither the administrator nor another distributee is interested or has a right to object to payment to the assignee. In re Davis, 27 Mont. 490, 71 P 757.

41. Johnson v. Jones, 47 Mo. A. 237.

42. William Small Memorial Home for Aged Women v. Collins, 97 Kan. 87, 154 P 274.

43. In re Shirey, 167 Cal. 193, 138 P 994.

44. In re Crane, (Mich.) 172 NW 584.

45. Sinnott v. Kenaday, 12 App. (D. C.) 115.

46. Matter of Alexander, 83 Hun 147, 31 NYS 411; Matter of Storm, 7 Misc. 383, 28 NYS 394.

[a] **The dismissal should be without prejudice** to a subsequent action for an accounting. Matter of Storm, 7 Misc. 383, 28 NYS 394.

shows the payment of income for taxes and other expenses, the petition must be dismissed.[47] A petition filed in the names of the widow and other distributees cannot be dismissed on the motion of the widow alone.[48] The fact that the assets of a decedent's estate, administration of which is pending in the probate court, are insufficient to pay all legacies in full affords no reason for a federal court dismissing, or declining to proceed on, a petition against the executors on a claim for a legacy which they have refused to pay, where the amount available for legacies has been ascertained.[49] It has been held that, although the court would be authorized to dismiss a petition for distributive shares of intestate's estate, where such petition contained jurisdictional facts necessary to compel the filing of an account, the matter would be disposed of accordingly, more than a year having elapsed since the grant of letters, and no notice having been given to creditors.[50]

[§ 1388] **19. New Trial.** The parties opposing the granting of a decree of distribution may make a motion for a new trial where the decree directs the distribution.[51] Where a petitioner for final distribution alleged that the only heirs of deceased were herself and certain children of a deceased half-brother of deceased, and subsequently two other petitions were filed in which the petitioners alleged that they were entitled to the estate, but not denying in terms any allegation of the first petitioner, and the court held against the original petitioner, an issue of fact was made and determined so that a motion for a new trial was authorized.[52]

[§ 1389] **20. Order or Decree for Distribution —a. In General.** Distribution of an estate on final settlement is properly made by a single decree assigning to each distributee separately his distributive share,[53] and it is not a valid objection to the decree that it was made in favor of parties who were not applicants therefor,[54] or whose shares have been satisfied or released.[55] The decree should generally specify the several distributees by name and relationship,[56] specify the property and amount to be paid or delivered to each distributee,[57] and make

47. Matter of Robinson, 156 App. Div. 363, 141 NYS 470.

48. Green v. Fagan, 15 Ala. 335.

49. J. Elwood Lee Co. v. Grace Hospital, 206 Fed. 994.

50. In re Kuehn, 169 NYS 876.

51. In re Davis, 27 Mont. 236, 70 P 721.

52. Carter v. Waste, 159 Cal. 23, 112 P 727.

53. King v. Brown, 108 Ala. 68, 18 S 935; Sayre v. Sayre, 16 N. J. Eq. 505.

[a] **A separate decree** cannot be made at the instance of each of claimants. Sayre v. Sayre, 16 N. J. Eq. 505.

[b] **Where the executors file separate accounts,** a joint distribution is improper. Evangelical Assoc.'s App., 35 Pa. 316.

54. Caldwell v. Kinkead, 1 B. Mon. (Ky.) 228; Sayre v. Sayre, 16 N. J. Eq. 505.

55. Sayre v. Sayre, 16 N. J. Eq. 505.

56. Ark.—Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

Cal.—Miller v. Pitman, 182 P 50; Bell v. Wilson, 159 Cal. 57, 112 P 1100; In re Crooks, 125 Cal. 459, 58 P 89; Goad v. Montgomery, 119 Cal. 552, 51 P 681, 63 AmSR 145.

Fla.—Bradley v. Raulerson, 66 Fla. 601, 64 S 237.

Me.—Grant v. Bodwell, 78 Me. 460, 7 A 12.

Mass.—Loring v. Steineman, 1 Metc. 204.

Pa.—Purviance v. Com., 17 Serg. & R. 31.

[a] **The distributive share of a married woman** (1) should be decreed in favor of herself alone. King v. Brown, 108 Ala. 68, 18 S 935. (2) Under prior statutes a decree for the wife's distributive share was required to be rendered in favor of the husband and wife for the use of the wife. Moody v. Hemphill, 75 Ala. 268; Harrison v. Meadors, 41 Ala. 274; Roberson v. Roberson, 21 Ala. 273; Green v. Fagan, 15 Ala. 335; Petty v. Wafford, 11 Ala. 143; Blackwell v. Vastbinder, 6 Ala. 218. (3) An allotment by the orphans' court to the husband of a distributee passes the title to her, her husband taking only such interest as is provided for by statute. Davis v. Patton, 19 Md. 120.

[b] **A decree in favor of an infant distributee** should be in his name by his guardian if he has one, but if it is in his name alone without the intervention of a guardian it is not reversible on error. Thompson v. Perryman, 45 Ala. 619; Morgan v. Morgan, 35 Ala. 303; Green v. Fagan, 15 Ala. 335.

[c] **An interlocutory decree awarding a distributive share to a trustee,** until proceedings shall be taken to determine the mental capacity of the distributee, may be made under some circumstances. Harker's Est., 176 Pa. 19, 34 A 927.

[d] **Where the court found that there was no valid gift** of intestate's property as claimed, the decree properly directed distribution of the estate after payment of debts to decedent's next of kin. Matter of Heldmann, 151 App. Div. 234, 135 NYS 143.

[e] **Investigation as to nonresidence of distributee.**—The court in making a decree of distribution need not investigate whether a distributee is a nonresident or whether he has a resident agent. Bell v. Wilson, 159 Cal. 57, 112 P 1100.

[f] **Failure to name the heirs is a mere irregularity,** and does not render the decree void and subject to collateral attack. Jewell v. Pierce, 120 Cal. 79, 52 P 132.

[g] **Decree void for uncertainty.** —Where a decree of the orphans' court in the adjudication of an estate directed the administrators to pay the holders of decedent's notes specified in certain depositions, and where the holders were not identified with any certainty in the petition, depositions, or decree, the decree was void for uncertainty. In re Forry, 241 Pa. 354, 88 A 677.

[h] **Different rule under statute.**— (1) The only order of distribution authorized is a general order to the representative to distribute the funds remaining in his hands according to law. Cadiz First Nat. Bank v. Beebe, 62 Oh. St. 41, 56 NE 465; Armstrong v. Grandin, 39 Oh. St. 368; Cox v. John, 32 Oh. St. 532; Swearingen v. Morris, 14 Oh. St. 424; In re Ullman, 31 Oh. Cir. Ct. 370. (2) An order designating or naming the distributees is not authorized and will not debar any one interested in the distribution from asserting his or her interest therein. Armstrong v. Grandin, 39 Oh. St. 368.

57. Ala.—Sankey v. Sankey, 8 Ala. 601; Davis v. Davis, 6 Ala. 611.

Cal.—Miller v. Pitman, 182 P 50; Bell v. Wilson, 159 Cal. 57, 112 P 1100; In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965; Goad v. Montgomery, 119 Cal. 552, 51 P 681, 63 AmSR 145.

Ill.—Ford v. Ford, 117 Ill. A. 502.

Iowa.—Foteaux v. Lepage, 6 Iowa 123.

Ky.—Roberts v. Dale, 7 B. Mon. 199; White v. White, 3 Dana 374; Banton v. Campbell, 2 Dana 421; Neely v. Neely, 1 Litt. 292.

La.—Varion v. Rousant, 12 Mart. 112.

Me.—Grant v. Bodwell, 78 Me. 460, 7 A 12.

Mass.—Case v. Clark, 220 Mass. 344, 107 NE 936.

Vt.—Ex p. Robinson, 1 D. Chipm. 357.

[a] **Where an administrator who is also the husband of one of the distributees** is sued by the distributees for the estate left in his hands, his wife's share should be deducted from the aggregate, and the decree in favor of the others should be for the balance only. Singleton v. Singleton, 5 Dana (Ky.) 87.

[b] **Construction of decree.**—A final decree finding certain heirs owners in fee "of all the real property hereinbefore described, and of all the real property of which the said testator died seised, whether the same is described in the inventory herein or not," was not intended to cover the homestead, but only the property described, and such property as might perhaps have been unintentionally omitted from the inventory. Fraser v. Farmers', etc., Sav. Bank, 89 Minn. 482, 95 NW 307.

[c] **Where an equal division cannot be made,** a decree cannot be rendered and execution awarded against those receiving more than their share, in favor of the others, for the balance. Teat v. Lee, 8 Port. (Ala.) 507.

[d] **The decree should direct payment by the administrator individually** and not as administrator. Matter of Monell, 28 Misc. 308, 59 NYS 981, 1 Mills Surr. 147.

[e] **Provision for deduction of inheritance tax.**—(1) Where the decree of distribution of an estate fixes the amount "less the amount of the inheritance tax as required by law," but does not fix the amount of such tax, nor expressly adjudicate that any tax should be deducted, the distributees who are not within the collateral inheritance tax law are entitled to the entire estate without any deduction under the decree. Wirringer v. Morgan, 12 Cal. A. 26, 106 P 425. (2) Where the unpaid legacies and claims against the succession are known, and the only dispute is over the proper amount to allow inheritance taxes and fees, the court should order the executors to retain an amount sufficient to pay the claims as made and the legacies and the highest possible amount that may be due for taxes, and then put the heirs in possession of the remainder of the property. Burbank's Succ., 126 La. 9, 52 S 175.

[f] **Failure to take collateral in-**

a positive and conclusive disposition[58] of all the property or assets among all the parties entitled thereto.[59] Where land is to be divided, it should be described or designated by the decree sufficiently for identification.[60] The decree must of course conform to the will of the testator,[61] or, in case of intestacy, to the statute of descent.[62] Where the orders or decrees in a partial distribution were wholly unauthorized and void, final distribution should be decreed as though no partial distribution had ever been made,[63] and where the validity of a conveyance by an heir is disputed, distribution should be decreed as though no such conveyance had been made.[64] Where the interest of a legatee has been attached, it is proper to stay payment of his share until the action against him has been determined.[65] Where a will vests the title in fee in testatrix's children, subject to a trust, and to the possession of the trustees for the trust period, the decree of distribution in the matter of the estate should distribute such title in fee, subject to said trust, to the children.[66] Where testatrix bequeathed a pecuniary legacy to a certain person for life, and, after her death, to her daughters who should then be alive, or, if any were dead leaving issue, to such issue, the children taking the share of the parent, the court on distribution should make such orders and decrees as are necessary for the preservation of the principal of the fund and the payment of the income only to the legatee during her life.[67] A minute order made by the court in proceedings to distribute an estate, stating that the court was of the opinion that half of the estate, subject to testamentary distribution and to the court's jurisdiction, should be equally divided among decedent's children, and ordering that a decree of final distribution be prepared accordingly, has been held not intended as a decree of distribution.[68] A decree ordering an executor to pay over a certain amount of money in his hands as executor cannot make such sum a lien on real estate and give complainant execution therefor, when the prayer of the bill does not ask for such lien or execution.[69]

[§ 1390] **b. Decree Based on Presumption of Death.** A decree for distribution upon the presumption of the death of an ancestor arising from his absence should include an adjudication on the effect of such absence and should rest the order of distribution thereon.[70]

[§ 1391] **c. Entry of Decree.** The decree of

heritance tax into account.—An order for distribution of an estate is not erroneous as failing to take into account the collateral inheritance tax, since, theoretically, such tax must come from the distributee of the estate and out of his share, and the administrator is required to withhold the amount thereof. In re Carroll, 149 Iowa 617, 128 NW 929.

[g] **Anticipatory payments.**—Where all parties interested in a fund appear, an executor or trustee may receive directions for anticipatory payments, but not so where there is a contingency as to the person or persons who may be entitled to the fund. Wadsworth v. Baldwin, 79 N. J. Eq. 274, 82 A 326.

[h] **Return of deeds to land.**—Where two brothers interested in equal parts with other brothers and sisters in their father's estate deeded their interest in the property to a third brother, and, after the death of the third brother, induced his widow to return the deeds to them, the deeds not having been recorded, the consideration for one of them not having been paid, and the consideration for the other being returned to the widow, in an action by another brother and sister for the sale of the land and the division of the proceeds, the two brothers who deeded their interest should not have been relieved from their contract of sale, the deeds by them being sufficient, but that the court should have decreed that the consideration for such deeds should be paid them out of the amount of the proceeds which descended to the deceased brother who had purchased their interest. Porter v. Porter, 135 Ky. 813, 123 SW 302.

[i] **Failure to designate the proportions is a mere irregularity** which does not render the decree void and subject to collateral attack. Jewell v. Pierce, 120 Cal. 79, 52 P 132.

58. In re Garrity, 108 Cal. 463, 38 P 628, 41 P 485; McLane v. Cropper, 5 App. (D. C.) 276; Fleming's Est., 10 Pa. Dist. 259, 25 Pa. Co. 269.

[a] **A decree of distribution should not be made contingent** upon the future establishment of conditions inserted in a proviso. In re Garrity, 108 Cal. 463, 38 P 628, 41 P 485.

[b] **Reference to will.**—Where the decree of distribution of the estate of a testator omitted a clause in the will as to a devise over, but by reference to the will embodied the entire will in it, the omission was of no consequence. In re Blake, 157 Cal. 448, 108 P 287.

59. Ala.—Hollis v. Caughman, 22 Ala. 478.

La.—Bothick's Succ., 109 La. 1, 33 S 47.

Mass.—Case v. Clark, 220 Mass. 344, 107 NE 936.

Minn.—Robinson v. Thomson, 137 Minn. 446, 163 NW 786.

N. Y.—Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

Tex.—Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

[a] **Illustration.**—Where a rule for distribution is made absolute by a judgment which does not distribute the fund among all the heirs, it will be annulled. Bothick's Succ., 109 La. 1, 33 S 47.

[b] **A decree is not final, unless** it makes distribution of all the assets found to be in the hands of the executor or administrator among all the parties who appear by the record to be interested in the estate. Hollis v. Caughman, 22 Ala. 478.

[c] **Distribution directly to distributees.**—Where an administrator did not question the court's authority to discharge him from all other liability in connection with the estate, except as to certain specified claims which he was then prosecuting, exclusive of the estate's interest in a trust fund, and he was so discharged by consent of all parties in interest, he was not entitled to have the estate's interest in the trust fund thereafter paid over to him for distribution among the distributees, etc., but the court properly directed distribution to them direct. Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

[d] **Provision for commissions, expenses, and future disbursements.**—In an accounting by an administratrix, the court should provide for the payment of commissions, expenses, and all necessary future disbursements, and so should not order a balance of cash to be distributed until the final winding up of the estate. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

60. Jones v. Minogue, 29 Ark. 637; Bates v. Howard, 105 Cal. 173, 38 P 715; Smith v. Biscailuz, 83 Cal. 344, 21 P 15, 23 P 314; Green v. Hardy, 24 Me. 453.

[a] **A general description** of the land is sufficient, upon a collateral attack, to include omitted lands which may be shown by evidence to have in fact belonged to decedent at the time of his death. Smith v. Biscailuz, 83 Cal. 344, 21 P 15, 23 P 314.

[b] **Absolute accuracy not essential.**—The description is not required to be so specific that the land can be identified without the aid of extrinsic evidence, nor is it material that the description is false in part, if what remains is sufficient for the purpose of identification. Wheeler v. Bolton, 66 Cal. 83, 4 P 981.

61. In re Ewer, 177 Cal. 660, 171 P 683; Robinson v. Thomson, 137 Minn. 446, 163 NW 786.

[a] **Incorporating will in decree.**—In making a decree of distribution, a court may incorporate therein, by express terms or by apt reference, the will, or an agreement between the heirs. Horton v. Winbigler, 175 Cal. 149, 165 P 423.

62. Glover v. Brown, (Ida.) 184 P 649.

63. In re Hawgood, 37 S. D. 565, 159 NW 117.

64. In re Blackinton, 29 Ida. 310, 158 P 492.

65. Cotton's Est., 6 Pa. Dist. 268, 19 Pa. Co. 442, 13 Montg. Co. 156.

66. In re Reith, 144 Cal. 314, 77 P 942.

67. Grogan v. Ashe, 156 N. C. 286, 72 SE 372.

68. In re Spreckels, 165 Cal. 597, 133 P 289.

69. Reichert v. Carr, 183 Ill. A. 99.

70. In re Morrison, 183 Pa. 155, 38 A 895 (where an administrator has been appointed for one, under the act of June 24, 1885, on presumption of death from absence for seven years from his last known place of domicile, and money has been paid to the guardian of the supposed decedent's infant son, the decree in a proceeding by the son, after coming of age, to have the money paid to him without security, because of his father's absence, unheard from, for over twenty years, should include an adjudication on the effect of the father's prolonged absence, and rest thereon the order for payment of the money, but will not be reversed because, to understand the decree, and find the conclusion of the court that

distribution should be entered on the record in the prescribed manner.[71]

[§ 1392] **d. Setting Aside, Correcting, and Modifying—(1) Power of Court—(a) In General.** Ordinarily the probate court has entire control of its decrees until the end of the term at which they are entered, and during that term may, for sufficient cause, set aside, amend, or modify a decree of distribution,[72] although property has been distributed in pursuance of it,[73] and the distributees have given receipts reciting that the property has been delivered in compliance with the order and is received in satisfaction thereof.[74] After the end of the term, however, the only remedy is usually by appeal,[75] except where the decree was rendered through mistake, inadvertence, surprise, or fraud,[76] in which case, according to the weight of authority, upon a proper application or motion by some person interested,[77] and upon due notice to all in-

death is presumed from the absence, it is necessary to treat the entire opinion as part of the decree, it appearing that no harm can come therefrom).

71. Blackwell v. Meneese, 5 Stew. & P. (Ala.) 397; In re Spreckels, 165 Cal. 597, 133 P 289; State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618; Debrell v. Ponton, 22 Tex. 686, 27 Tex. 623.

[a] **Delay in entering the decree does not render it invalid,** where when entered it appears in its proper place on the record, and as of the day of rendition. State v. Henderson, 164 Mo. 347, 64 SW 138, 86 AmSR 618.

[b] **Nunc pro tunc entry.**—A decree ascertaining the amount of a distributive share and giving judgment thereon cannot be entered nunc pro tunc upon proceedings had upon the final settlement. Blackwell v. Meneese, 5 Stew. & P. (Ala.) 397.

[c] **A statement of distribution** of certain property, approved by the judge of the county court and entered on the records of the court, but not entered as a decree, is evidence of a partition of the property, but is not conclusive upon creditors of a distributee. Debrell v. Ponton, 22 Tex. 686, 27 Tex. 623.

72. Cal.—Brownell v. Yolo County Super. Ct., 157 Cal. 703, 109 P 91; Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049.

Ill.—Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400]; Thornley v. Kershaw, 109 Ill. A. 113 [aff 204 Ill. 266, 68 NE 482].

Minn.—Savela v. Erickson, 138 Minn. 93, 163 NW 1029.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

N. Y.—Matter of Hoes, 119 App. Div. 288, 104 NYS 529.

Pa.—Flomerfelt's Est., 19 Pa. Dist. 453.

[a] **Notice** to heirs and distributees of a motion on behalf of the executor to set aside such an order is not necessary. Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400].

73. Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289; Matter of Hoes, 119 App. Div. 288, 104 NYS 529.

74. Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

75. Ala.—Emerson v. Heard, 81 Ala. 443, 1 S 197; Crothers v. Ross, 15 Ala. 800; Key v. Vaughn, 15 Ala. 497.

Cal.—Crane v. Los Angeles County Super. Ct., (A.) 183 P 606; Warren v. Ellis, (A.) 179 P 544; Nason v. Los Angeles County Super. Ct., (A.) 179 P 454; Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291.

Conn.—Massey v. Foote, 92 Conn. 25, 101 A 499; State v. Blake, 69 Conn. 64, 36 A 1019.

Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.

Iowa.—Aschan v. McDermott, 164 Iowa 750, 145 NW 524.

Me.—Stilpen's App., 100 Me. 146, 60 A 888, 4 AnnCas 158.

Mass.—Parker v. Townsend Nat. Bank, 121 Mass. 565.

Minn.—Leighton v. Bruce, 132 Minn. 176, 156 NW 285.

N. D.—Moore v. Palmer, 174 NW 93.

Pa.—Christian's Est., 2 Pa. Dist. 579, 13 Pa. Co. 415.

Utah.—Moyes v. Agee, 178 P 753.

Wash.—Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314; Krohn v. Hirsch, 81 Wash. 222, 142 P 647.

[a] **Illustration.**—An order denying a petition for partial distribution is not vacated merely by a subsequent order granting the petition, since it is final so far as the hearing on the petition is concerned, and is appealable. In re Mitchell, 126 Cal. 248, 58 P 549.

[b] **Order cannot be set aside in vacation.**—Where the district court, sitting in probate, had jurisdiction of the subject matter and parties when it passed an order directing distribution of the proceeds of a sale of certain land of decedent's estate, the order directing such distribution was possessed of all of the attributes of a judgment, and was binding on all parties affected by it over whom the court had jurisdiction, and could not be thereafter set aside by an order of the judge in vacation on the ground that he had been misled as to the heirship of one of the parties when he made the order. Aschan v. McDermott, 164 Iowa 750, 145 NW 524.

[c] **Effect of confirmation without exception.**—Where an adjudication directing distribution of securities in the hands of an executor is confirmed without exception, the matter passes beyond the power of the court, and can be modified only by a proceeding for review, with citation to all parties to be affected. Christian's Est., 2 Pa. Dist. 579, 13 Pa. Co. 415.

[d] **A bill in equity is not the proper proceeding** to set aside such a decree, and distribution being entirely within the jurisdiction of the probate court, the decree can be set aside only upon an appeal to the superior court. Bissell v. Bissell, 24 Conn. 241.

[e] **A motion to amend nunc pro tunc** cannot be maintained after the close of the term at which the decree was rendered to correct or modify such decree. Browder v. Faulkner, 82 Ala. 257, 3 S 30; Emerson v. Heard, 81 Ala. 443, 1 S 197.

76. See cases infra notes 77–81.

[a] **Improvidence.**—An order upon an executor to pay over will be vacated where it appears to have been improvidently issued, and it is shown that, instead of anything being due from the executor, the estate owes him. Well's Est., 14 Phila. (Pa.) 318.

[b] **Letting in creditor.**—A decree of distribution will be opened to let in a creditor of decedent who had no actual notice of the audit and exercised due diligence, where the executor and distributee are the same person. Cochran's Est., 14 PittsbLeg JNS (Pa.) 338.

[c] **A schedule of distribution inconsistent with the will** will be corrected on exception where it appears that it was made unwittingly by the auditing judge, his attention not being called to the provisions of an obscure will, and where the exceptants did not appear before him. Trickett's Est., 8 Pa. Dist. 398, 22 Pa. Co. 558.

[d] **Extrinsic character of fraud or mistake.**—A decree of distribution will not be set aside unless fraud or mistake on account of which relief is prayed is extrinsic or collateral to matter which was tried by court. McGavin v. San Francisco Protestant Orphan Asylum Soc., 34 Cal. A. 168, 167 P 182.

[e] **Nature of fraud.**—Fraud of the executrix, relied on as a ground for setting aside a decree of distribution, must relate to preventing claimant from appearing and setting up her claim. Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314.

[f] **The fact that a decree is based on false testimony** presented at the hearing is no ground for setting it aside on motion. Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291.

[g] **Negligence of persons interested.**—In the absence of fraud, a decree of distribution will not be set aside because by mistake of the executor's attorney alone it provides for payment of a charitable bequest, contrary to a statute making such a bequest void where testator dies within thirty days of making will, the parties interested knowing that the bequest is void, but negligently failing to follow the proceedings and object to the decree. McGavin v. San Francisco Protestant Orphan Asylum Soc., 34 Cal. A. 168, 167 P 182.

77. Cal.—In re Ingram, 78 Cal. 586, 21 P 435, 12 AmSR 80.

Ind.—Glessner v. Clark, 140 Ind. 427, 39 NE 544.

La.—Cunningham v. Lawson, 111 La. 1024, 36 S 107.

Me.—In re Cote, 98 Me. 415, 57 A 584.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

Pa.—Palmer's Est., 23 Pa. Dist. 1015; Sower's Est., 16 Pa. Dist. 224. Compare Cochran's Est., 14 Pittsb LegJNS 338 (holding that the act of March 29, 1832, § 19, requiring notice to be given of claims against a decedent within a year, did not apply to a proceeding to open a decree of distribution and let in a claimant).

Tex.—Wade v. Freese, (Civ. A.) 71 SW 69.

Wash.—State v. Walla Walla County Super. Ct., 13 Wash. 25, 42 P 630.

Wis.—Leavens' Est., 65 Wis. 440, 27 NW 324.

[a] **Successor of administrator.**—An order, made on the hearing of a partial account for distribution, may be set aside on the application of one appointed administrator as successor to the administrator, on the hearing of whose account the order was granted. Glessner v. Clark, 140 Ind. 427, 39 NE 544.

[b] **The holder of a lien** on land which was erroneously awarded to the widow by the county court is entitled to have such order set aside in the court where the administration proceedings are pending. Wade v. Freese, (Tex. Civ. A.) 71 SW 69.

[c] **A person claiming to be entitled to a share** of the estate may proceed by petition in the county court to have an order set aside, although being a minor when the original probate proceedings were had he was not represented therein by guardian or otherwise. Leavens' Est., 65 Wis. 440, 27 NW 324.

terested parties,[78] the probate court may set aside, amend, or modify the decree,[79] provided, in some jurisdictions, the decree has not been acted upon,[80] or it may be modified or set aside by a bill in equity.[81] A decree in equity determining the rights of the distributees and ordering the appointment

[d] **Person not interested.** — A petitioner who is neither a creditor, nor one of the next of kin, nor an assignee, has no standing in court for the opening of a decree and for payment to him. Smith v. Baylis, 3 Dem. Surr. (N. Y.) 567.

78. Ala.—Thomas v. Dumas, 30 Ala. 83.

Cal.—In re Ingram, 78 Cal. 586, 21 P 435, 12 AmSR 80.

Me.—In re Cote, 98 Me. 415, 57 A 584.

Mo.—Aull v. St. Louis Trust Co., 149 Mo. 1, 50 SW 289.

N. Y.—Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

Vt.—Stone v. Peasley, 28 Vt. 716.

[a] **Sufficiency of notice.**—The notice of the hearing of a motion to vacate an order denying a petition for partial distribution, and of an application for an order granting such petition, which is served upon the executors only, without any posting of notice to acquire jurisdiction of all legatees and creditors, is insufficient to give jurisdiction to make either order. In re Mitchell, 126 Cal. 248, 58 P 549.

[b] **Recital of notice.**—A recital in the order vacating the decree that all persons interested "were duly served with due notice" of the motion to vacate is conclusive of that fact in a proceeding to review the order on certiorari. De Pedrorena v. San Diego County Super. Ct., 80 Cal. 144, 22 P 71.

[c] **Notice may be waived** by appearance and opposing the opening of the decree. Booth's Est., 20 Pa. Co. 248.

79. Cal.—Brownell v. Yolo County Super. Ct., 157 Cal. 703, 109 P 91; Bacon v. Bacon, 150 Cal. 477, 89 P 317; In re Ross, 140 Cal. 282, 73 P 976; Crane v. Los Angeles County Super. Ct., (A.) 183 P 606; Warren v. Ellis, (A.) 179 P 544.

Ida.—In re Blackinton, 29 Ida. 310, 158 P 492.

Ill.—Long v. Thompson, 60 Ill. 27.

Me.—In re Cote, 98 Me. 415, 57 A 584.

Mass.—Jones v. Jones, 223 Mass. 540, 112 NE 224; Cleaveland v. Draper, 194 Mass. 118, 80 NE 227; Parker v. Townsend Nat. Bank, 121 Mass. 565.

Minn.—Savela v. Erickson, 138 Minn. 93, 163 NW 1029; Leighton v. Bruce, 132 Minn. 176, 156 NW 285.

N. Y.—Engelson v. Mitchell, 88 App. Div. 504, 85 NYS 103; Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162]; Matter of Gilman, 7 NYSt 321; Smith v. Baylis, 4 Dem. Surr. 30.

N. D.—Moore v. Palmer, 174 NW 93.

Pa.—Palmer's Est., 23 Pa. Dist. 1015; Kelly's Est., 22 Pa. Dist. 79; Sower's Est., 16 Pa. Dist. 224; Brooke's Est., 10 Pa. Dist. 447; Fleming's Est., 10 Pa. Dist. 259, 25 Pa. Co. 269; Claghorn's Est., 10 Pa. Dist. 91; Yung's Est., 9 Pa. Dist. 476; Martin's Est., 7 Pa. Dist. 408, 21 Pa. Co. 145; Larkin's Est., 6 Pa. Dist. 766; Cotton's Est., 6 Pa. Dist. 268, 19 Pa. Co. 442, 13 Montg. Co. 156; Lafferty's Est., 6 Pa. Dist. 22, 19 Pa. Co. 127; Steinman's Est., 5 Pa. Dist. 346; White's Est., 1 Pa. Dist. 508, 12 Pa. Co. 93; Wells' Est., 14 Phila. 318.

S. D.—Paul v. Paul, 170 NW 658; In re Loevinger, 40 S. D. 450, 167 NW 726.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189.

Wis.—Creamer v. Ingalls, 89 Wis. 112, 61 NW 82; Beem v. Kimberly, 72 Wis. 343, 39 NW 542; Leavens' Est., 65 Wis. 440, 27 NW 324.

[a] **Illustration.**—Where a probate court improperly made an order for the distribution of money in the hands of an administrator, without notice to those entitled thereto, there having been no final settlement of the administration, and nothing done under the order of distribution, the whole matter was in fieri and it was competent for the probate court on notice to the administrator to set aside such order at a subsequent term. Long v. Thompson, 60 Ill. 27.

[b] **Motion to vacate the proper remedy.**—A party aggrieved by the alleged fraudulent acts of an administrator, whereby an order of court was made distributing an estate among parties not entitled thereto, should seek his redress by first petitioning the court to vacate such order of distribution; and in such a proceeding it is proper to make the beneficiaries under the fraudulent administration defendants. Leavens' Est., 65 Wis. 440, 27 NW 324.

[c] **Amendment for benefit of newly discovered distributees.**—The surrogate has power to amend or modify a decree of distribution for the benefit of newly discovered distributees who were not parties to the original proceedings. Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162].

[d] **Proceedings.** — The orphans' court may set aside, amend, or modify such a decree upon a simple petition, or it may treat such petition as in effect and substance a bill of review. Keyser's Est., 6 Pa. Dist. 181, 19 Pa. Co. 364.

[e] **Circumstances under which relief denied.**—One of the next of kin sued the surety on the administrator's bond to recover her distributive share, as established by a decree settling the administrator's account, and the surety, who was not cited on the accounting, applied to open the decree, claiming that the administrator had conveyed certain real estate to the distributee, and that she had given a receipt in satisfaction of her share in the estate, and a waiver of citation in the settlement of his account before a proceeding to call him to account which resulted in the decree in question. It appeared that the conveyance was as security for such share and that after giving the receipt the administrator filed his account, showing an amount for distribution corresponding with the decree entered. Where no collusion between the administrator and the distributee was alleged, and there was no allegation that the whole of the share in question had been paid, and the administrator has no property from which any part of the amount awarded can be collected, the application to open the decree would be denied. Matter of Haight, 50 Misc. 238, 100 NYS 488, 5 Mills Surr. 376.

[f] **Mistake of law not sufficient.**—Where all interested in a decree of distribution are represented by attorneys at the hearing, and the decree was by consent of all, one interested cannot thereafter have it reopened because of his attorney's mistake in the law governing distribution. Matter of Schlosser, 63 Misc. 163, 116 NYS 794 [aff 136 App. Div. 898 mem, 120 NYS 1145 mem].

[g] **Where a guaranty of collection and distribution is given** by the executor to legatees upon distribution of assets in kind to them, and a final accounting is had and decree entered, resort must be had, if the assets are insufficient, to the guaranty and not to opening the decree. Redmond v. Ely, 2 Bradf. Surr. (N. Y.) 175.

80. Ill.—Kinne v. Schumacher, 65 Ill. A. 342.

La.—Atkinson v. Rodney, 35 La. Ann. 313.

Me.—In re Cote, 98 Me. 415, 57 A 584.

Pa.—In re Bear, 162 Pa. 547, 29 A 856; Keim's App., 125 Pa. 480, 17 A 463; Miller's Est., 4 Pa. Dist. 407; White's Est., 1 Pa. Dist. 508.

Wash. — State v. Walla Walla County Super. Ct., 13 Wash. 25, 42 P 630.

[a] **A petition to set aside the order is too late** if brought after an actual payment in accordance with the decree has been made. Keim's App., 125 Pa. 480, 17 A 463; Miller's Est., 4 Pa. Dist. 407; White's Est., 1 Pa. Dist. 508.

[b] **Contrary rule.**—A decree of distribution can be revised after the executor has distributed the estate as ordered, so as to enable one entitled who was omitted to recover his share from those to whom the estate has been distributed. Harris v. Starkey, 176 Mass. 445, 57 NE 698, 79 AmSR 322.

81. U. S.—Sullivan v. Andoe, 6 Fed. 641, 4 Hughes 290.

Ala.—Evans v. Evans, 76 S 95.

Cal.—Bacon v. Bacon, 150 Cal. 477, 89 P 317; Sohler v. Sohler, 135 Cal. 323, 67 P 282, 87 AmSR 98; Langdon v. Blackburn, 109 Cal. 19, 41 P 814; Buckley v. San Francisco Super. Ct., 102 Cal. 6, 36 P 360, 41 AmSR 135; Wingerter v. Wingerter, 71 Cal. 105, 11 P 853; Baker v. O'Riordan, 65 Cal. 368, 4 P 232; Dean v. Santa Barbara County Super. Ct., 63 Cal. 473; In re Hudson, 63 Cal. 454.

Mich.—Ewing v. Lamphere, 147 Mich. 659, 111 NW 187, 118 AmSR 563.

Minn.—Robinson v. Thomson, 137 Minn. 446, 163 NW 786.

N. D.—Fischer v. Dolwig, 29 N. D. 561, 151 NW 431.

Wis.—Maldaner v. Beurhaus, 108 Wis. 25, 84 NW 25.

[a] **Mistake alone sufficient.**—Relief may be given in equity against a decree of distribution which was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party. Bacon v. Bacon, 150 Cal. 477, 89 P 317.

[b] **Alien distributees may maintain a bill in equity in the federal court** to set aside a decree of distribution of the probate court procured by fraud in this country. Sullivan v. Andoe, 6 Fed. 641, 4 Hughes 290.

[c] **Misjoinder of parties.**—Where executors distributed the residuum of the estate among the legatees, and thereafter it was discovered that securities assigned certain legatees were forgeries, and such legatees filed a bill in equity for a reapportionment, there was no misjoinder of parties complainant, since the distribution was a single transaction affecting all parties. Maldaner v. Beurhaus, 108 Wis. 25, 84 NW 25.

[d] **Circumstances not amounting to fraud.**—Where a woman who has cohabited with decedent for thirty years and been recognized by him as his wife, and the five sons whom she has borne him and whom decedent has recognized as such, prosecute their claim to his property and fail to disclose that there was no legal marriage, this does not constitute such a fraud on the orphans' court as will render void a decree of distribution in their favor. Rice v. Braden, 243 Pa. 141, 89 A 877.

of commissioners to make partition cannot be amended, except upon rehearing or bill of review.[82] Where the orphans' court enters a final decree of adjudication and distribution, and in a different proceeding enters a final decree in escheat, it cannot, subsequently at the instance of relatives of decedent, open the decree of distribution and order restitution of money by the state without having previously vacated the final decree of escheat.[83]

[§ 1393] **(b) Upon Discovery of New Assets.** Where some property has not been administered in probate proceedings and the fact is not discovered until a final decree of distribution has been entered, the final decree should not, for this reason, be set aside on the application of a creditor or party interested, but the proper remedy is under the statute providing for the subsequent issue of letters testamentary whenever other property is discovered.[84]

[§ 1394] **(2) Time for Application.** An application or petition to set aside or amend a decree of distribution may be barred by lapse of the time, if any, prescribed by statute,[85] or in equity by laches.[86]

[§ 1395] **(3) Parties to Application.** The persons to whom an estate has been distributed under an order of distribution are proper parties to proceedings to set such order aside,[87] even though the court has no power to order such parties to make restitution.[88] Persons having no interest or rights under the order of distribution are not proper parties to the application.[89]

[§ 1396] **(4) Mode and Form of Application.** It has been held that a petition to set aside a decree of distribution must allege fraud and that the money sought to be recovered has not been paid out to the distributees mentioned in the decree,[90] and that in order to set aside or vacate a final decree of distribution on ground of mistake, it is necessary to bring an action directly for that purpose.[91] A new petition by an administrator for an order of distribution in which he sets forth the undisputed facts in regard to the persons entitled to distributive shares and the amount to be distributed, and which differs entirely from the former petition and decree, must be regarded as containing by necessary implication so clear a prayer for the revocation of the previous decree as to have the effect of such an application.[92] Where the complaint, in an action to set aside a decree of distribution, alleges appointment of the administrator and rendition of the decree, it will be presumed that the petition for the administrator's appointment alleged the proper jurisdictional facts.[93]

[§ 1397] **(5) Effect of Setting Aside.** After a decree of distribution by the probate court has been annulled under the power of the court, an action brought to recover a distributive share under the decree cannot be maintained.[94]

[§ 1398] **(6) Amended Decree.** A decree of distribution, made to correct a former decree, in which, through mistake, certain heirs of testator, who as such were entitled to a share of his estate, were not named, properly provided for the protection of the administrator in reference to payments made under the first decree, and that the new decree should take effect only to establish the rights of the persons omitted to their distributive shares in the estate.[95]

[§ 1399] **(7) Rights of Third Persons.** In order to set aside a final decree of the probate court, assigning real property to the heirs on the ground

82. Ansley v. Robinson, 16 Ala. 793.

83. In re Alton, 220 Pa. 258, 69 A 902.

84. Chandler v. Kootenai County Prob. Ct., 26 Ida. 173, 141 P 635.

85. Cal.—De Pedrorena v. San Diego County Super. Ct., 80 Cal. 144, 22 P 71; In re Hudson, 63 Cal. 454.
N. J.—Exton v. Zule, 14 N. J. Eq. 501.
N. D.—Fischer v. Dolwig, 29 N. D. 561, 151 NW 431.
Pa.—Robins' Est., 4 Pa. Dist. 277, 16 Pa. Co. 375.
Wash.—Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314.

[a] **Time from which statute runs.**—The signing and filing of a formal order is a taking thereof within the meaning of a statute authorizing the court to relieve a party from a judgment or order taken against him, provided the application is made within a specified time after the taking. Brownell v. Yolo County Super. Ct., 157 Cal. 703, 109 P 91.

[b] **Lapse of time not raising bar.**—An administratrix was served with notice of a claim within six months after the granting of letters, but did not reject it, and no proceedings were taken to have the claim passed upon under the statute, but a distribution of the estate was made, in which there was no mention of the claim, the administratrix alleging on oath that her daughter, an infant, was the only creditor. The claimant had no notice of the proceedings, but began an action at law against the administratrix for the payment of his claim, which she contested for over five years, and which finally resulted in a judgment in claimant's favor. In the meantime the administratrix had exhausted the estate. It was held that a proceeding by the creditor to procure a modification of the decree of distribution, brought eight years and one month after the grant of administration, was not barred by limitations. In re Gall, 182 N. Y. 270, 74 NE 875 [mod 101 App. Div. 609, 92 NYS 1124].

86. U. S.—Sullivan v. Andoe, 6 Fed. 641, 4 Hughes 290.
Ala.—Slatter v. Glover, 14 Ala. 648, 48 AmD 118.
Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.
Ill.—Starrett v. Keating, 61 Ill. A. 189.
Minn.—Leighton v. Bruce, 132 Minn. 176, 156 NW 285.
Nev.—Royce v. Hampton, 16 Nev. 25.
Pa.—Hoban's App., 102 Pa. 404; Kelly's Est., 37 Pa. Super. 320; Newbold's Est., 19 Pa. Dist. 523.
Wis.—Maldaner v. Beurhaus, 108 Wis. 25, 84 NW 25.

[a] **Laches not imputed to child.**—Want of diligence in ascertaining the rights of a minor in an ancestor's estate is not to be imputed to a child of tender years when moving to set aside a decree. In re Ross, 140 Cal. 282, 73 P 976.

[b] **Circumstances not showing laches.**—Yung's Est., 9 Pa. Dist. 476; Paul v. Paul, (S. D.) 170 NW 658; Beem v. Kimberly, 72 Wis. 343, 39 NW 542.

87. In re Gall, 182 N. Y. 270, 74 NE 875 [mod 101 App. Div. 609, 92 NYS 1124]; Leavens' Est., 65 Wis. 440, 27 NW 324.

88. In re Gall, 182 N. Y. 270, 74 NE 875 [mod 101 App. Div. 609, 92 NYS 1124]; Leavens' Est., 65 Wis. 440, 27 NW 324.

89. Matter of Losee, 46 Misc. 363, 94 NYS 1082, 4 Mills Surr. 483 [aff 104 NYS 1132 mem].

[a] **Illustration.**—It appeared that the next of kin of a son, who were also next of kin of his father, who died in 1896, leaving no estate and no debts, on final acounting made no mention of an illegitimate son of the father, and the estate was divided between the next of kin without administration on the estate of the father. Such illegitimate son had obtained an assignment of the father's share of the deceased's sons estate several months before the father's death, and left a will making his wife sole legatee and executrix, and in 1900 the decree of distribution on the son's estate was opened to let in parties for a hearing. In 1902 letters of administration were granted the wife on the father's estate, but an application to turn over the whole estate to her was refused. The son, whose estate was being administered, had disappeared in 1889 under circumstances showing an intent to commit suicide. It was held that the wife had no rights as executrix in the proceeding to open the decree of distribution, her testator not being properly a party to the accounting in 1898 and the validity of the assignment of his father's interest in the son's estate being questioned. Matter of Losee, 46 Misc. 363, 94 NYS 1082, 4 Mills Surr. 483 [aff 104 NYS 1132 mem] (holding that a decree opening proceedings in the son's estate not having been made until after the death of his father, neither his representatives nor assignees had any standing in court).

90. In re Bear, 162 Pa. 547, 29 A 856; Miller's Est., 4 Pa. Dist. 407; White's Est., 1 Pa. Dist. 508.

91. Knight v. Harrison, (N. D.) 174 NW 632.

92. In re Cote, 98 Me. 415, 57 A 584.

93. Fischer v. Dolwig, 29 N. D. 561, 151 NW 431 (complaint not demurrable for failure to allege facts showing jurisdiction of court).

94. Drew v. Provost, 98 Me. 422, 57 A 587.

95. Cleaveland v. Draper, 194 Mass. 118, 80 NE 227.

that it was obtained by fraud as against a stranger to the record who purchased the property from one of the distributees, such purchaser must be connected by actual or constructive notice with the fraud.[96]

[§ 1400] **e. Operation and Effect—(1) In General.** A decree of distribution, if properly made after due notice, is in its nature final, and unless set aside for fraud, etc.,[97] or appealed from within the time limited by law,[98] it concludes the rights of all parties interested in the estate.[99] It is not conclusive, however, in some jurisdictions, upon per-

96. St. Paul Gaslight Co. v. Kenny, 97 Minn. 150, 106 NW 344.

97. Setting aside, correcting and modifying decree of distribution see supra §§ 1392–1399.

98. Appeal see infra §§ 1408–1421.

99. U. S.—Alexander v. Fidelity Trust Co., 238 Fed. 938 [rev on other grounds 243 Fed. 162, 156 CCA 28]; Christianson v. King County, 203 Fed. 894, 122 CCA 188 [aff 196 Fed. 791, and aff 239 U. S. 356, 36 SCt 114, 60 L. ed. 327]; Goodrich v. Ferris, 145 Fed. 844 [writ of error dism 214 U. S. 71, 29 SCt 580, 53 L. ed. 914].

Ala.—Lee v. Lee, 196 Ala. 522, 72 S 24; Cousins v. Jackson, 49 Ala. 236; Watson v. Hutto, 27 Ala. 513; Sankey v. Sankey, 18 Ala. 713; Harrison v. Pool, 16 Ala. 167; Landreth v. Landreth, 12 Ala. 640.

Ark.—Wilson v. Harris, 13 Ark. 559.

Cal.—Miller v. Pitman, 182 P 50; Broome v. Broome, 178 P 525; In re Ewer, 177 Cal. 660, 171 P 683; In re Hartenbower, 176 Cal. 400, 168 P 560; In re Yorba, 176 Cal. 166, 167 P 854; Drexler v. Washington Dev. Co., 172 Cal. 758, 159 P 166; In re Schmierer, 168 Cal. 747, 145 P 99; Cooley v. Miller, 168 Cal. 120, 142 P 83; Wills v. Wills, 166 Cal. 529, 137 P 249; O'Brien v. Nelson, 164 Cal. 573, 129 P 985; Archer v. Harvey, 164 Cal. 274, 128 P 410; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247; Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049; St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; In re Murphy, 145 Cal. 464, 78 P 960; Kauffman v. Gries, 141 Cal. 295, 74 P 846; Martinevich v. Marsicano, 137 Cal. 354, 70 P 459; McKenzie v. Budd, 125 Cal. 600, 58 P 199; Cunha v. Hughes, 122 Cal. 111, 54 P 535, 68 AmSR 27; Jewell v. Pierce, 120 Cal. 79, 52 P 132; In re Trescony, 119 Cal. 568, 51 P 951; Goad v. Montgomery, 119 Cal. 552, 51 P 681, 63 AmSR 145; Goldtree v. Allison, 119 Cal. 344, 51 P 561; Crew v. Pratt, 119 Cal. 139, 51 P 38; William Hill Co. v. Lawler, 116 Cal. 359, 48 P 323; Hinckley v. Stebbins, 3 Cal. Unrep. Cas. 478, 29 P 52; Chever v. Ching Hong Poy, 82 Cal. 68, 22 P 1081; Freeman v. Rahm, 58 Cal. 111; Irwin v. Backus, 25 Cal. 214, 85 AmD 125; Beltran v. Hynes, (A.) 180 P 540; Warren v. Ellis, (A.) 179 P 544; Furman v. Brewer, (A.) 177 P 495; Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291; McGavin v. San Francisco Protestant Orphan Asylum Soc., 34 Cal. A. 168, 167 P 182.

Conn.—Pigott v. Donovan, 91 Conn. 444, 99 A 1047; State v. Blake, 69 Conn. 64, 36 A 1019; Kellogg v. Johnson, 38 Conn. 269; Gates v. Treat, 17 Conn. 388.

Ga.—Atkinson v. McDonald, 74 Ga. 350.

Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.

Ill.—Strawn v. Jacksonville Female Academy, 240 Ill. 111, 88 NE 460; Tinker v. Babcock, 204 Ill. 571, 68 NE 445 [aff 107 Ill. A. 78]; Paullissen v. Loock, 38 Ill. A. 510; Peo. v. Brooks, 22 Ill. A. 594.

Iowa.—Aschan v. McDermott, 164 Iowa 750, 145 NW 524; Prouty v. Matheson, 107 Iowa 259, 77 NW 1039.

Kan.—Lewis v. Woodrum, 76 Kan. 384, 92 P 306; Keith v. Guthrie, 59 Kan. 200, 52 P 435; Proctor v. Dicklow, 57 Kan. 119, 45 P 86.

Ky.—Abell v. Collins, 178 Ky. 18, 198 SW 223; Benton v. Campbell, 2 Dana 421.

Md.—Blackburn v. Craufurd, 22 Md. 447.

Mass.—Torrey v. Pond, 102 Mass. 355; Loring v. Steineman, 1 Metc. 204.

Mich.—Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547; Byrne v. Hume, 86 Mich. 546, 49 NW 576.

Minn.—Rickert v. Wardell, 142 Minn. 96, 170 NW 915; Wellner v. Eckstein, 105 Minn. 444, 117 NW 830; Chadbourne v. Hartz, 93 Minn. 233, 101 NW 68; Eddy v. Kelly, 72 Minn. 32, 74 NW 1020; Ladd v. Weiskopf, 62 Minn. 29, 64 NW 99; Greenwood v. Murray, 26 Minn. 259, 2 NW 945.

Mo.—Tapley v. McPike, 50 Mo. 589; Einstein v. Strother, (A.) 182 SW 122.

Mont.—Ryan v. Kinney, 2 Mont. 454.

Nev.—McNabb v. Wixom, 7 Nev. 163.

N. H.—Probate Judge v. Robins, 5 N. H. 246.

N. J.—Sayre v. Sayre, 16 N. J. Eq. 505; Exton v. Zule, 14 N. J. Eq. 501.

N. Y.—In re Stilwell, 139 N. Y. 337, 34 NE 777; In re Underhill, 117 N. Y. 471, 22 NE 1120; Hull v. Hull, 172 App. Div. 287, 158 NYS 743 [mod on other grounds 225 N. Y. 342, 122 NE 252]; Brown v. Wheeler, 53 App. Div. 6, 65 NYS 436; Kager v. Brenneman, 47 App. Div. 63, 62 NYS 339; Foulks v. Foulks, 57 Hun 591, 10 NYS 785; Baggott v. Boulger, 9 N. Y. Super. 160; Armstrong v. Stone, 64 Misc. 504, 118 NYS 998; Matter of Halsted, 41 Misc. 606, 85 NYS 301, 4 Mills Surr. 102.

N. D.—Knight v. Harrison, 174 NW 632; Fischer v. Dolwig, 29 N. D. 561, 151 NW 431; Stenson v. H. S. Halvorson Co., 28 N. D. 151, 147 NW 800, LRA1915A 1179, AnnCas1916D 1289; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

Pa.—In re McKinney, 260 Pa. 123, 103 A 590; In re White, 254 Pa. 98, 98 A 785; In re White, 249 Pa. 115, 94 A 470; Rice v. Braden, 243 Pa. 141, 89 A 877; Ferguson v. Yard, 164 Pa. 586, 30 A 517; Otterson v. Gallagher, 88 Pa. 355; Springer's App., 29 Pa. 208; Bradshaw's App., 3 Grant 109; Metzger's Est., 49 Pa. Super. 406; Stahl's Est., 25 Pa. Super. 402; Friday's Est., 22 Pa. Dist. 736; Lambert's Est., 22 Pa. Dist. 587; Reynold's Est., 13 Pa. Dist. 604, 29 Pa. Co. 369; McCaul's Est., 12 Pa. Dist. 769; Piper's Est., 12 Pa. Dist. 443, 28 Pa. Co. 589; Pepper's Est., 2 Pa. Dist. 533; Woodward's Est., 2 Chest. Co. 9; Clark's Est., 1 Kulp 32; Ziegler's Est., 19 LancLRev 358, 16 YorkLeg Rec 79; Rhodes v. Rhodes, 31 Pittsb LegJNS 163.

S. C.—Hurt v. Hurt, 27 S. C. Eq. 114; McClure v. Miller, 8 S. C. Eq. 107, 21 AmD 522.

S. D.—Thompson v. Lake Madison Chautauqua Assoc., 170 NW 578.

Tex.—Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821; Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203.

Utah.—Moyes v. Agee, 178 P 753; Snyder v. Murdock, 26 Utah 233, 73 P 22.

Vt.—Sparrow v. Watson, 87 Vt. 366, 89 A 468; Tryon v. Tryon, 16 Vt. 313; Georgia Dist. Prob. Ct. v. Vanduzer, 13 Vt. 135; Sparhawk v. Buell, 9 Vt. 41.

Wash.—Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314; Bayer v. Bayer, 83 Wash. 430, 145 P 433; Krohn v. Hirsch, 81 Wash. 222, 142 P 647; In re Goss, 73 Wash. 330, 132 P 409; In re Ostlund, 57 Wash. 359, 106 P 1116, 135 AmSR 990.

Wis.—Schæffner's App., 41 Wis. 260.

[a] **The order or decree is binding upon:** (1) All having notices thereof. Lewis v. Woodrum, 76 Kan. 384, 92 P 306. (2) All parties who had a right and an opportunity to be heard. Rice v. Braden, 243 Pa. 141, 89 A 877. (3) All creditors and others who had an opportunity to be heard. Tinker v. Babcock, 204 Ill. 571, 68 NE 445 [aff 107 Ill. A. 78]. (4) All parties interested as to everything necessarily involved in it. Eddy v. Kelly, 72 Minn. 32, 74 NW 1020. (5) All persons interested whether then in being or not. Ladd v. Weiskopf, 62 Minn. 29, 64 NW 99, 69 LRA 785. (6) Each party to the special proceeding who was duly cited. Matter of Halsted, 41 Misc. 606, 85 NYS 301, 4 Mills Surr. 102. (7) A distributee residing out of the state, but within the United States, properly made a party to the proceedings for distribution and duly notified in the manner prescribed by statute of the pendency and object of the proceedings, is concluded by the decree for distribution, unless he petitions for a rehearing within two years, although the decree excludes him altogether from a share of the estate to which he was entitled and although he had no actual notice of the pendency of the suit. Hurt v. Hurt, 27 S. C. Eq. 114.

[b] **The order or decree is conclusive as to:** (1) The construction of the will. In re Fitzgerald, 161 Cal. 319, 119 P 96, 49 LRANS 615. (2) The fund, items, and matters covered by and properly included therein. In re Evans, 42 Utah 282, 130 P 217, 22 Utah 366, 62 P 913, 83 AmSR 794, 53 LRA 952. (3) The amount of assets in the hands of the representative for distribution. Judge Limestone County Ct. v. Coulter, 3 Stew. & P. (Ala.) 348; In re Snyder, 34 Hun (N. Y.) 302; Matter of Monell, 28 Misc. 308, 59 NYS 981, 1 Mills Surr. 147; McFarland's Est., 1 Phila. (Pa.) 378. (4) The absence of an heir. Lenehan v. Spaulding, 57 Vt. 115. (5) The amount of each share. Cousins v. Jackson, 49 Ala. 236; Probate Judge v. Robins, 5 N. H. 246; Sayre v. Sayre, 16 N. J. Eq. 505; Burd v. McGregor, 2 Grant (Pa.) 353. (6) The party entitled to receive each share. Sayre v. Sayre, 16 N. J. Eq. 505. (7) The state's right to an escheat. In re McClellan, 31 S. D. 641, 141 NW 965. (8) A decree of distribution that the estate of testator be decreed to his widow in fee, rendered on the petition of the executors, conclusively adjudges that the widow takes the estate freed from any trust in favor of an executor claimed to have been created by the will. Wills v. Wills, 166 Cal. 529, 137 P 249.

[c] **That all the distributees are living** is incidentally but not conclusively determined by the decree of distribution; and the contrary may be set up elsewhere. Eans v. Sawyer, 27 Tex. 448 [foll Sawyer v. Boyle, 21 Tex. 28].

[d] **Approval of settlement in another court.** — An order discharging an administratrix, and approving a settlement made by her in an action in another court, whereby she acquired the interest of another legatee, concludes the validity of the settlement and precludes legatees who were parties to the administration from attacking it. In re Goss, 73 Wash. 330, 132 P 409.

[e] **A purchaser claiming title from an heir under a decree of dis-**

sons interested who received no notice of the proceedings and had no opportunity to be heard therein,[1] or upon one who claims adversely to the estate,[2] or where it makes a distribution unauthorized by law.[3] A decree on the first account of an executor is, as to residuary legatees, conclusive only as to the fund then being distributed,[4] and does not determine that all subsequent distributions must be made upon the same theory.[5] A decree distributing the estate of a testator is not conclusive against the right of an adopted child of the testator to enforce an oral agreement whereby the testator was to make him his heir.[6]

As muniment of title. The order or decree is a muniment of title of the highest value,[7] and operates to vest in each distributee an absolute right and title to the property assigned to him,[8] subject to any outstanding title in the hands of a third

tribution is chargeable with notice of everything appearing on the face of the judgment roll in the probate proceeding, and is not an innocent purchaser without notice of want of jurisdiction of the county court to appoint an administrator and to order a distribution as against heirs not appearing. Carter v. Frahm, 31 S. D. 379, 141 NW 370.

[f] **A decree of distribution will protect an innocent purchaser** or a stranger buying property under it. Tapley v. McPike, 50 Mo. 589.

[g] **A decree annulling a will,** made after the distribution of the estate, upon the application of one of several heirs, does not render the decree of distribution void. It is valid and binding as to subsequent bona fide purchasers from the distributee. Thompson v. Samson, 64 Cal. 330, 30 P 980.

[h] **Notice of account or decree.**— An allegation of want of actual notice of the settlement of the account of an executor or administrator, or of the decree of distribution, is unavailing where it appears that the notice provided by the act of assembly has been given. Ferguson v. Yard, 164 Pa. 586, 30 A 517.

[i] **Effect of error in decree.**—An administration proceeding, or the decree of final settlement, was not void because the court erroneously held that all the property was community property and distributed it to the surviving husband's grantee; but such error should have been corrected by motion for a new trial, or an appeal, and, in the absence of such proceedings for a review, the decree was final and conclusive. O'Brien v. Nelson, 164 Cal. 573, 129 P 985.

[j] **The decree is not conclusive as to** (1) the fact of payment of debts or distributive shares. Sayre v. Sayre, 16 N. J. Eq. 505 (the question whether an administrator has actually paid a claim under the order of distribution or not can be properly tried only by a suit); Sparhawk v. Buell, 9 Vt. 41. (2) A decree of distribution denying execution purchasers' petition that a share in an estate be distributed to them is not conclusive that they acquired no title at the execution sale. Shirran v. Dallas, 21 Cal. A. 405, 132 P 454, 462. (3) A decree that a party outside of the state, and served only by publication, is not an heir, and distributing personalty, affects only the personalty, and is not binding as to heirship in action by him for realty. Moser v. Osborn, 284 Ill. 141, 119 NE 924.

1. Ala.—Wright v. Phillips, 56 Ala. 69.

Cal.—Archer v. Harvey, 164 Cal. 274, 128 P 410.

Ga.—Park v. Mullins, 124 Ga. 1072, 53 SE 568.

Ida.—Coats v. Harris, 9 Ida. 458, 75 P 243.

Ill.—Dickinson v. Belden, 268 Ill. 105, 108 NE 1011.

La.—Roche v. Armbruster, 7 La. A. (Orleans) 476.

Md.—Blackburn v. Craufurd, 22 Md. 447.

Minn.—Backdahl v. Grand Lodge A. O. U. W., 46 Minn. 61, 48 NW 454.

Miss.—Conwill v. Conwill, 61 Miss. 202; Porter v. Porter, 8 Miss. 106, 40 AmD 55.

Mo.—Deweese v. Yost, 161 Mo. A. 10, 143 SW 72.

N. Y.—Pfister v. Writer, 33 Misc. 701, 68 NYS 976.

Pa.—In re White, 163 Pa. 388, 30 A 192.

S. D.—Carter v. Frahm, 31 S. D. 379, 141 NW 370.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189.

Va.—Turk v. Ritchie, 104 Va. 587, 52 SE 339.

Wash.—Teynor v. Heible, 74 Wash. 222, 133 P 1, 46 LRANS 1033.

Wis.—Van Matre v. Swank, 147 Wis. 93, 131 NW 982, 132 NW 904; Ruth v. Oberbrunner, 40 Wis. 238.

[a] **Illustrations.**— (1) A surrogate's decree directing executors to pay over the residuary estate, rendered before the period of distribution has arrived, and without the knowledge or consent of parties who are entitled to a share in such estate, is not a bar to an equitable action by them against the executors for an accounting. Pfister v. Writer, 33 Misc. 701, 68 NYS 976. (2) A decree in chancery against an administrator in favor of one of the distributees for his share of a specific fund does not conclude other distributees not parties to the suit from relief against the decree on the ground that he has received more than his proper share of the estate, including assets in a foreign jurisdiction, and is insolvent. Wright v. Phillips, 56 Ala. 69.

[b] **A decree of distribution is not evidence as against strangers** that the persons to whom the estate is assigned are heirs of the decedent. Backdahl v. Grand Lodge A. O. U. W., 46 Minn. 61, 48 NW 454.

[c] **Infant without guardian.**— A decree of distribution on final settlement is not conclusive on a minor for whom no guardian was appointed. Conwill v. Conwill, 61 Miss. 202.

2. Alexander v. Fidelity Trust Co., 238 Fed. 938 [rev on other grounds 243 Fed. 162, 156 CCA 28]; Rogers v. Schlotterback, 167 Cal. 35, 138 P 728; In re Willey, (Cal.) 56 P 550; Finnerty v. Pennie, 100 Cal. 404, 34 P 869; Chever v. Ching Hong Poy, 82 Cal. 68, 22 P 1081; Barnard v. Wilson, 74 Cal. 512, 16 P 307; Bath v. Valdez, 70 Cal. 350, 11 P 724; Shirran v. Dallas, 21 Cal. A. 405, 132 P 454, 462; Coats v. Harris, 9 Ida. 458, 75 P 243; Oliver v. Smith, 94 Miss. 879, 49 S 1.

[a] **A legatee** under a will who claims certain property in the hands of the executor in his own right and adversely to the estate is not concluded by a decree attempting to distribute such property or afterward asserting his adverse claim against his distributee. Rowland's Est., 74 Cal. 523, 16 P 315, 5 AmSR 464.

[b] **A decree of distribution will not defeat an action** of one not an heir and not a party to the proceedings settling the estate. Coats v. Harris, 9 Ida. 458, 75 P 243.

[c] **The right to payment of probated claims** cannot be affected by a decree for distribution among heirs, and as to such claims the estate remains unadministered; and the fact that claimant is also administrator, who filed his final account, is immaterial, as such account and petition for its allowance were filed in a representative capacity, and the decree, in which debts were inadvertently overlooked, is not final against the creditor. Oliver v. Smith, 94 Miss. 879, 49 S 1.

3. Cal.—Martinovich v. Marsicano, 137 Cal. 354, 70 P 459.

Md.—Hindman v. State, 61 Md. 471.

Minn.—St. Paul Gaslight Co. v. Kenny, 97 Minn. 150, 106 NW 344.

N. Y.—Harbeck v. Harbeck, 87 Misc. 420, 149 NYS 791.

Oh.—Armstrong v. Grandin, 39 Oh. St. 368.

[a] **Illustration.**—A probate court has no authority to award a distributee's share to his judgment creditor, and hence the decree awarding the share to one to whom it was conveyed is not res judicata of the judgment creditor's right to enforce the lien of his judgment against such share. Martinovich v. Marsicano, 137 Cal. 354, 70 P 459.

4. Stahl's Est., 25 Pa. Super. 402.

5. Stahl's Est., 25 Pa. Super. 402.

6. Rogers v. Schlotterback, 167 Cal. 35, 138 P 728.

7. Broome v. Broome, (Cal.) 178 P 525; Blair v. Hazzard, 158 Cal. 721, 112 P 298; Drexler v. Washington Dev. Co., 172 Cal. 758, 159 P 166; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

[a] **Inconsistency with will.**—"The decree is, of course, the conclusive muniment of the plaintiff's title, and it controls any language of the will inconsistent therewith." Drexler v. Washington Dev. Co., 172 Cal. 758, 760, 159 P 166.

8. Ala.—Bean v. Welsh, 17 Ala. 770.

Cal.—Parker v. Bower, 172 Cal. 436, 156 P 869; Victoria Hospital Assoc. v. All Persons, etc., 169 Cal. 455, 147 P 124; Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049; In re Garraud, 36 Cal. 277; French v. Phelps, 20 Cal. A. 101, 128 P 772; Wirminger v. Morgan, 12 Cal. A. 26, 106 P 425.

Minn.—State v. Ramsey County Prob. Ct., 84 Minn. 289, 87 NW 783; Schmidt v. Stark, 61 Minn. 91, 63 NW 255; Greenwood v. Murray, 26 Minn. 259, 2 NW 945.

Pa.—Nowacki's Est., 22 Pa. Dist. 250.

S. D.—Thompson v. Lake Madison Chautauqua Assoc., 170 NW 578.

Tex.—Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

Vt.—Sparrow v. Watson, 87 Vt. 366, 89 A 468; Tryon v. Tryon, 16 Vt. 313.

Wash.—Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

[a] **Although a decree of distribution does not create title** in the distributees, it is a solemn adjudication of who has acquired the title of deceased, and, if rendered on due process of law, is final and conclusive on that question. In re Ostlund, 57 Wash. 359, 106 P 1116, 135 AmSR 990.

[b] **"No title originates from** a decree of distribution of the county court. Such decree has no other effect than to release the title of which the heirs become vested, on the death of the ancestor, from the conditions of administration to which it was subject, and to furnish the heir with legal evidence of such release." Jacquish v. Deming, 40 S. D. 265, 167 NW 157.

[c] **It is the duty of the executor or administrator to deliver the property** distributed to the distributees, taking their receipt therefor, unless the decree expressly provides otherwise, the right of the legatee being finally and conclusively established by the decree of distribution. St

person;[9] and a subsequent order directing a different disposition is without authority and void.[10]

As to personal liability of representative. The decree operates to render the representative personally liable for the balance adjudged to be in his hands,[11] and to protect him if he makes distribution in accordance therewith,[12] except of course in cases where the order or decree of distribution is

Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

[d] **Lands omitted from particular description.**—A decree of final distribution which distributed to plaintiff "the residue of said estate hereinafter particularly described, and any other property not now known or discovered which may belong to said estate or in which said estate may have an interest," passed title to plaintiff to lands owned by the estate, although omitted from the particular description. Humphrey v. Los Angeles Protestant Episcopal Church, 154 Cal. 170, 97 P 187.

[e] **An assignment of real property in a decree of distribution** to a party named, "to have and to hold the same unto her, her heirs and assigns, forever," is an assignment of an estate in fee, although the will under which the decree is made gives the distributee the residue of testator's estate to be used "during her natural life" the same as testator might do if empowered to dispose of the same absolutely. Tidd v. Rines, 26 Minn. 201, 2 NW 497.

[f] **Where a legatee accepts the legacy under a distribution decree declaring a trust,** the executrix having no supervisory powers over the performance of the trust is not entitled to require an agreement from the distributee to perform the trust as a condition precedent to payment of the legacy. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

[g] **When the representative has received his share as distributee under a decree** of the probate court, such property is no longer liable to a judgment rendered against him as representative. Ferguson v. Yard, 164 Pa. 586, 30 A 517.

[h] **Conditional decree.** — Even though a decree of distribution of real estate may have been conditional and the condition may not have been performed, such real estate cannot be subjected to the lien of a judgment when the petition therefor fails to state facts showing that there is not sufficient personal property in the hands of the executor to satisfy the claim, and that a sale of the real estate is necessary for the purpose of paying debts of the estate. Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

[i] **A decree in terms distributing the residue** (1) known or hereafter known or discovered passes title to land omitted from the particular description. Heydenfeldt v. Osmont, (Cal.) 175 P 1. (2) Such a decree is sufficient to pass title to whatever interest by reversion or otherwise deceased had at the time of his death in property to which he had executed a conveyance. Victoria Hospital Assoc. v. All Persons, etc., 169 Cal. 455, 147 P 124.

[j] **Merger of assignment in decree.**—Whatever interest is acquired by the assignee of an heir of his interest in the estate is merged in the decree of distribution, so that the assignee's title is referable to the decree, and not to the assignment. Hopkins v. White, 20 Cal. A. 234, 128 P 780.

[k] **A decree distributing to an heir or legatee a claim against one indebted to the decedent,** while a judgment sufficient to pass title to the distributee, is not a judgment against the debtor for the money or property due on the claim on which the heir or legatee could sue, as assignee. Lapique v. Plummer, 168 Cal. 310, 142 P 1079.

[l] **Succession not closed.** — A judgment recognizing heirs, and decreeing that they are entitled to receive the estate from the executrix, does not close the succession or authorize the heirs to partition the property. Landry's Succ., 117 La. 193, 41 S 490.

9. Victoria Hospital Assoc. v. All Persons, etc., 169 Cal. 455, 147 P 124; In re Richards, 133 Cal. 524, 65 P 1034; Shirran v. Dallas, 21 Cal. A. 405, 132 P 454, 462.

10. In re Garraud, 36 Cal. 277; Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

11. U. S.—Fraser v. Cole, 214 Fed. 556, 131 CCA 556.

Cal.—St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

N. Y.—Matter of Monell, 28 Misc. 308, 59 NYS 981, 1 Mills Surr. 147.

N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445.

N. D.—Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

Pa.—Shultz's Est., 46 Pa. Super. 546.

[a] **A distributee named in the decree can sue** the executor or administrator or his bondsman for the share assigned by such decree. Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008.

[b] **Propriety of decree directly against representative.**—Where distribution has been made promptly at the end of the year from the death of decedent by an auditor among collateral kin, and shortly thereafter a boy thirteen years old who was born in a distant state where he always resided appears as the heir of the decedent, and by his guardian demands that the confirmation of the auditor's report be set aside and the discharge of the administrator and his bondsman be revoked, and an agreement is made among the parties to this effect, and to recommit the question of distribution to the auditor, the administrator cannot complain of a decree directly against him, before every available remedy has been exhausted against the collateral kin among whom the estate had been distributed. Shultz's Est., 46 Pa. Super. 546.

[c] **Judgment against representative.**—Where an executrix wrongfully refused to pay over a legacy distributed to the legatee by the distribution decree in trust for certain purposes, it was not proper that the judgment in favor of the legatee and against the executrix personally for the recovery of the legacy should declare the conditions on which plaintiff held the fund. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

[d] **Decree not a payment.** — A provision in a surrogate's decree that the executor pay over the balance in his hands in execution of the trusts in the will is not a payment, so as to discharge him or to exonerate the fund distributable, and charge the person to whom it is made payable. Such a decree gives to the distributee a remedy against the executor personally for his proportion of the fund found to be in the executor's hands; but this remedy is cumulative, not impairing at all his remedy against the fund itself, which can be exonerated by nothing short of actual payment or some act of the distributee to its prejudice. Clapp v. Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes 281, 27 HowPr 600 note [aff 38 Barb. 661]. And see infra § 2481.

12. U. S.—Alexander v. Bryan, 110 U. S. 414, 4 SCt 107, 28 L. ed. 195.

Cal.—In re Friedman, 171 Cal. 431, 153 P 918; St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; In re Bell, 131 Cal. 1, 63 P 81; Freeman v. Rahm, 58 Cal. 111.

Colo.—Wilson v. Regents State Univ., 46 Colo. 100, 102 P 1088.

Conn.—Gray v. Goddard, 90 Conn. 561, 98 A 126; Cooley v. Piggott, 84 Conn. 323, 80 A 92; Merwin's App., 75 Conn. 33, 52 A 484; Chamberlain's App., 70 Conn. 363, 39 A 734, 41 LRA 204; Haven's App., 69 Conn. 684, 38 A 795; Kellogg v. Johnson, 38 Conn. 269.

Ill.—Strawn v. Jacksonville Female Academy, 240 Ill. 111, 88 NE 460.

Kan.—Miller v. Baker, 9 Kan. A. 883, 58 P 1002.

Ky.—Home for Poor Catholic Men v. Coleman, 122 Ky. 544, 92 SW 342, 29 KyL 75; Fraser v. Page, 82 Ky. 73; Story v. Story, 62 SW 865, 22 KyL 1869, 61 SW 279, 22 KyL 1731; Vandergrit v. Cone, 37 SW 60, 18 KyL 454.

La.—Baron v. Baum, 46 La. Ann. 1101, 15 S 364; Girod v. Crossman, 11 La. Ann. 497.

Md.—Garrett v. Kerney, 107 Md. 501, 68 A 1051.

Mass.—Cleaveland v. Draper, 194 Mass. 118, 80 NE 227; Harris v. Starkey, 176 Mass. 445, 57 NE 698, 79 AmSR 322; Lamson v. Knowles, 170 Mass. 295, 49 NE 440; Palmer v. Whitney, 166 Mass. 306, 44 NE 229; Loring v. Steineman, 1 Metc. 204.

Mich.—Ernst v. Freeman, 129 Mich. 271, 88 NW 636.

Minn.—Kraus v. Kraus, 81 Minn. 484, 84 NW 332.

Miss.—Lowry v. McMillan, 35 Miss. 147, 72 AmD 119.

Mo.—Young v. Thrasher, 48 Mo. A. 327.

N. J.—Sayre v. Sayre, 16 N. J. Eq. 505.

N. Y.—Rosen v. Ward, 96 App. Div. 262, 89 NYS 148; Matter of Farmers' L. & T. Co., 99 Misc. 420, 163 NYS 961 [mod on other grounds 181 App. Div. 642, 168 NYS 952].

Pa.—In re Piper, 208 Pa. 636, 57 A 1118 [aff 12 Pa. Dist. 443, 28 Pa. Co. 589]; Ferguson v. Yard, 164 Pa. 586, 30 A 517; Charlton's App., 88 Pa. 476; Stewart's App., 86 Pa. 149; In re Koch, 4 Rawle 268; Mays' Est., 25 Pa. Super. 267; Piper's Est., 12 Pa. Dist. 443, 28 Pa. Co. 589; Pierson's Est., 5 Pa. Dist. 424, 18 Pa. Co. 220; Robins' Est., 4 Pa. Dist. 277, 16 Pa. Co. 375; Woodward's Est., 2 Chest. Co. 9; Sutter's Est., 23 WklyNC 68.

Tex.—Johnson v. Wilcox, 53 Tex. 413.

Va.—Carter v. Skillman, 108 Va. 204, 60 SE 775.

Wash.—In re Ostlund, 57 Wash. 359, 106 P 1116, 135 AmSR 990.

Wis.—Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

Eng.—England v. Tredegar, L. R. 1 Eq. 344; Addams v. Ferick, 26 Beav. 384, 53 Reprint 946; Waller v. Barrett, 24 Beav. 413, 53 Reprint 417; Dean v. Allen, 20 Beav. 1, 52 Reprint 502; Smith v. Smith, 1 Dr. & Sm. 384, 62 Reprint 426; Dodson v. Sammell, 1 Dr. & Sm. 575, 62 Reprint 498; Williams v. Headland, 4 Giffard 505, 66 Reprint 806; Bennett v. Lytton, 2 Johns. & H. 155, 70 Reprint 1010; Knatchbull v. Fearnhead, 3 Myl. & C. 122, 14 EngCh 122, 40 Reprint 871.

[a] **This is true, even though** the distribution was made under a judicial construction of a will which afterward turned out to be erroneous. Fraser v. Page, 82 Ky. 73.

[b] **Will void as to children not provided for.**—Although a will was void under the statute as to children not named or provided for, a decree of distribution assigning the whole property to testatrix's husband was final and conclusive, after the time for appeal had expired, it not appearing that the court lacked jurisdiction,

void.[13] But as it is the duty of an executor to pay personal taxes assessed against him on account of the personalty of his testator without an order of probate court, a judgment of a probate court discharging him as executor on ordering final distribution is no bar to a personal action by a state for taxes so assessed.[14]

[§ 1401] **(2) Lien.** A decree making distribution subject to a certain claim against the estate, as may be done in some jurisdictions, creates a lien on the estate in the hands of the distributee to the amount of such claim,[15] and an allotment to one distributee subject to a payment to another distributee to equalize the division creates a lien on the property allotted the first distributee to the amount of such payment.[16] The court cannot decree distribution subject to a lien of the representative for his compensation[17] or for money expended by him for the benefit of the estate[18] as such amounts should be paid out of the estate before distribution. A decree on a bill for directions, not fixing the amount due by the executor, but directing him to pay off an estate when collected to certain general legatees after retaining a certain sum in his hands to pay counsel fees and allowances to himself and another sum for a specific legatee, is not such a final decree in money as to constitute a lien upon the property from the date of its rendition in favor of such general legatees.[19]

[§ 1402] **(3) Presumption in Favor of Decree.** The rule that presumptions in favor of the regularity of proceedings resulting in a judgment will be indulged will be applied to a decree of distribution of an estate,[20] and so it is presumed that the evidence on which an order for decree of distribution was based was in all respects competent and sufficient.[21]

[§ 1403] **f. Construction of Decree.** The general principles applicable to the construction of judgments[22] are to be applied in construing an order or decree of distribution.[23] Where an order of distribution is susceptible of two constructions, one

or that there was fraud. In re Ostlund, 57 Wash. 359, 106 P 1116, 135 AmSR 990.

[c] **Where no order for a stay of the decree is had** on appeal taken, the administrator will be protected if he makes distribution in good faith in accordance with the decree, although the time for appealing has not expired. Ernst v. Freeman, 129 Mich. 271, 88 NW 636.

[d] **Subsequent opening of decree.**—Where an administrator in pursuance of a decree has paid over money to a distributee without notice of a bill of review he will be protected against loss should the court subsequently open and change the decree. Stewart's App., 86 Pa. 149.

[e] **Informality.**—A former resident of Ireland, after living here for more than thirty-five years, died, leaving one who was apparently his widow, and some relatives. There was nothing to suggest to any one that he had a lawful wife and child in Ireland who were not aware of his death in time to assert their claims. A question arose as to who was entitled to the remainder of his estate after his supposed widow's portion was set apart, and the administrator adopted the method prescribed by Code Pub. Gen. L. art 93 § 142, to have the rights of the parties judicially determined. All requirements of the statute were complied with. All persons who apparently had claims on the estate appeared in response to the statutory notice. There was no question as to who the collateral relations were, and the only doubt was as to whether two who claimed to be children of deceased were such as the law would recognize. Pending the proceeding, the claimants agreed in court on a settlement of the controversy between themselves. The administrator gave his consent subject to the approval of the court, which appeared to have been verbally expressed. A claim by an attorney for services in effecting such settlement was allowed, and accounts of the administrator and his successor referring to the agreement and the distribution pursuant thereto were allowed, and expressly approved by the court. It was held that the distribution was made "under the direction and control" of the court as the law requires, and the administrators were not liable to account to the lawful wife and child because the court did not pass a more formal order, as it was requested to do. Garrett v. Kerney, 107 Md. 501, 68 A 1051.

[f] **The remedy of a party deprived of his rights by the decree** is not against the administrator, but against the distributees who have wrongfully received the estate. In their favor, as against the rightful claimant, the decree does not operate. Sayre v. Sayre, 16 N. J. Eq. 505; Exton v. Zule, 14 N. J. Eq. 501.

Payment under order of court generally see supra § 1340.

13. Cal.—In re Bell, 142 Cal. 97, 75 P 679; Matter of Spanier, 120 Cal. 698, 53 P 357; In re Kennedy, 120 Cal. 458, 52 P 820.

Miss.—O'Brien v. Wilson, 86 Miss. 540, 38 S 509.

Mo.—Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

N. Y.—In re Killan, 172 N. Y. 547, 65 NE 561, 63 LRA 95 [rev 66 App. Div. 312, 72 NYS 714]; Johnson v. Weir, 34 Misc. 683, 70 NYS 1020; Matter of Lancaster, 28 Misc. 595, 59 NYS 1022.

Tenn.—Faver v. Parker, 101 Tenn. 141, 46 SW 453.

Wash.—In re Sullivan, 36 Wash. 217, 78 P 945.

Ont.—Uffner v. Lewis, 27 Ont. A. 242.

14. State v. Packard, 250 Mo. 686, 157 SW 598.

15. Finnerty v. Pennie, 100 Cal. 404, 34 P 869 (where a lien in favor of the administrator was thus created).

16. Gregory v. Hooker, 8 N. C. 394, 9 AmD 646.

17. In re Sour, 17 Wash. 675, 50 P 587.

18. Huston v. Becker, 15 Wash. 586, 47 P 10.

19. Hamberger v. Easter, 57 Ga. 71.

20. French v. Phelps, 20 Cal. A. 101, 128 P 772; Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314.

21. French v. Phelps, 20 Cal. A. 101, 128 P 772.

22. See Judgments [23 Cyc 1101].

23. See cases infra this note.

[a] **Illustrations.**—(1) A decree, distributing realty to a widow "as her sole property and estate," restraining her from the disposition and sale of the property, and adjudging the remainder of the estate, real, personal, and mixed, to be distributed to the widow as her sole and separate estate, cut off the right of any children to the remainder therein after her death, and was in effect an adjudication that there were no children or possibility of any, and gave her an absolute fee simple estate in the property, free from any restraint on alienation. Drexler v. Washington Dev. Co., 172 Cal. 758, 159 P 166. (2) Where a decree of distribution gave testatrix's husband a sum of money for his use during his life, and on his death such sum to certain other persons, and on appeal the decree was modified so as to give him such sum for his use during his life, and on his death the unused portion to the remaindermen, the husband took a life interest with power to use during his life as much of the principal as he deemed proper for his own use, but he had no power to dispose of any of the corpus by gift. Hardy v. Mayhew, 158 Cal. 95, 110 P 113, 139 AmSR 73. (3) Where a devise for the use of a devisee for life, with remainder to her heirs, was void under the statute against perpetuities in so far as the attempted disposition of the remainder was concerned, and a distribution under the will assigned certain property in trust for plaintiff's mother, the devisee, for life, and "then after her decease to her lawful heirs forever," plaintiff acquired no vested estate in such property as "heir" of his mother during her life, although such a distribution in so far as it related to the remainder is regarded as a distribution of intestate property, since plaintiff during the life of his mother was not her heir, and the distribution was only operative with reference to definitely ascertained persons in existence sufficiently described and capable of taking, except so far as it permits substitution in case of death of one otherwise entitled to share. Gerard v. Beecher, 80 Conn. 363, 68 A 438, 15 LRANS 900. (4) A decree of distribution adjudging that land be set over to a devisee, her heirs and assigns, as provided in the terms of the will, the same to be to her, and her heirs and assigns forever, is an adjudication that the devisee received a fee simple. Thompson v. Lake Madison Chautauqua Assoc., (S. D.) 170 NW 578. (5) Where a decree distributes, in general terms, all the land to which decedent had title, the rights of the heirs are not limited by a description of the land by metes and bounds in the decree. Marcone v. McDowell, (Cal.) 173 P 465. (6) In a suit by children of a first marriage of a decedent against his executors for the community interest which they claimed to have inherited from their deceased mother, a consent decree provided for the entire division of all property claimed or owned by decedent, both in his own right and as a member of both communities, and adjudged that described land be set apart to each distributee, and that all the right, title, and interest which the decedent's estate and the other parties therein, or either of them, had in it, should be vested in the distributee named, his heirs and assigns in fee simple forever; that the personalty belonging to the estate of decedent and the estate of his first wife should be set apart and vested in the second wife and the children of the second marriage; and that the property partitioned to plaintiffs was in full satisfaction of their interest

of which would render it legal and operative, while the other would render it illegal and void, the former must be adopted.[24] The decree should be construed so as to be consistent with the will if this is possible;[25] all the words should be given effect, and none treated as redundant unless such construction is unavoidable.[26] An absolute and unequivocal final decree of distribution is not made ambiguous by a recital that the distribution is according to the will;[27] and where the final decree of distribution necessarily construes the will and is not ambiguous or made subject to the will, the will cannot be resorted to in order to modify or affect it.[28]

[§ 1404] **g. Collateral Attack on Decree.** As a general rule an order or decree of distribution is not subject to collateral attack,[29] but it has been held otherwise as to a decree made without the notice prescribed by statute.[30]

[§ 1405] **h. Enforcement of Decree.** A decree of distribution may be enforced by an execution against the property of the representative, in the same manner as a judgment at law,[31] by a suit on

in the estate of their parents, except certain property in another state. Some of the property awarded to plaintiffs consisted of lands which belonged to the separate estate of decedent in which their mother had no interest. It was held that the decree finally distributed all the property of the estate subject to administration in the state, as well as the interest inherited by plaintiffs from their mother. Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203. (7) A judgment assigning all the property devised according to the provisions of the will, and assigning the homestead to the two minor children of testator in equal shares, subject to the life use thereof by his widow, "in accordance with the provisions of said will," does not transfer title to the homestead, or in any way alter the disposition thereof made by the will. Rowley v. Rowley, 143 Wis. 325, 127 NW 1002.

24. Armstrong v. Grandin, 39 Oh. St. 368.

25. In re Ewer, 177 Cal. 660, 171 P 683.

26. Parker v. Bower, 172 Cal. 436, 156 P 869.

[a] **Illustration.**—A decree of distribution of property, giving to the widow an undivided half interest in fee simple in lands and "a life estate in the remaining undivided one-half . . . to have and to hold, during her natural life, and full power to sell and dispose of the same as in her discretion may seem advisable, and the residue and remainder in said undivided one-half interest after the termination of said life estate" to go to other heirs, creates a fee simple in the widow in all the land granted upon exercise of the power to dispose, the clause requiring such construction to avoid redundancy, and such construction being the natural grammatical effect of the words used. Parker v. Bower, 172 Cal. 436, 156 P 869.

27. Long v. Willsey, 132 Minn. 316, 156 NW 349.

28. Long v. Willsey, 132 Minn. 316, 156 NW 349.

[a] **It is only when by apt language a will is incorporated** in a decree of distribution that resort may be had to the will to determine the distributees and their rights, and in all other cases the decree alone determines the rights of the parties. Wills v. Wills, 166 Cal. 529, 137 P 249.

29. U. S.—Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036; C. A. Burton Mach. Co. v. Davies, 205 Fed. 141, 123 CCA 373; Hiller v. Ladd, 85 Fed. 703, 29 CCA 394.

Ala.—Calhoun v. Whittle, 56 Ala. 138; Thompson v. Perryman, 45 Ala. 619.

Cal.—Miller v. Pitman, 182 P 50; Heydenfeldt v. Osmont, 175 P 1; Sweinhart v. Plant Inv. Co., 172 P 386; Davis v. Seavey, 163 P 35; In re Schmierer, 168 Cal. 747, 145 P 99; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247; In re Walker, 160 Cal. 547, 117 P 510, 36 LRANS 89; Humphry v. Los Angeles Protestant Episcopal Church, 154 Cal. 170, 97 P 187; Todhunter v. Klemmer, 134 Cal. 60, 66 P 75; McKenzie v. Budd, 125 Cal. 600, 58 P 199; Williams v. Marx, 124 Cal. 22, 56 P 603; Cunha v. Hughes, 122 Cal. 111, 54 P 535, 68 AmSR 27; Jewell v. Pierce, 120 Cal. 79, 52 P 132; In re Trescony, 119 Cal. 568, 51 P 951; Crew v. Pratt, 119 Cal. 139, 51 P 38; Hill v. Lawler, 116 Cal. 360, 48 P 323; Burdick's Est., 112 Cal. 387, 44 P 734; Warren v. Ellis, (A.) 179 P 544; Hopkins v. White, 20 Cal. A. 234, 128 P 780; French v. Phelps, 20 Cal. A. 101, 128 P 772.

Conn.—Gates v. Treat, 17 Conn. 388.

Kan.—Keith v. Guthrie, 59 Kan. 200, 52 P 435.

La.—Fendler v. Daigre, 19 La. Ann. 190.

Md.—Blackburn v. Craufurd, 22 Md. 447.

Mass.—Pierce v. Prescott, 128 Mass. 140.

Mich.—Calhoun v. Cracknell, 202 Mich. 430, 168 NW 547.

Minn.—Wood v. Myrick, 16 Minn. 494.

Mo.—Harter v. Petty, 266 Mo. 296, 181 SW 39; State v. Donegan, 83 Mo. 374; Einstein v. Strother, (A.) 182 SW 122.

Mont.—Ryan v. Kinney, 2 Mont. 454.

N. H.—Probate Judge v. Robins, 5 N. H. 246.

N. Y.—Hull v. Hull, 172 App. Div. 287, 158 NYS 743 [mod on other grounds 225 N. Y. 342, 122 NE 252].

N. D.—Knight v. Harrison, 174 NW 632; Stenson v. H. S. Halvorson Co., 28 N. D. 151, 147 NW 800, LRA1915A 1179, AnnCas1916D 1289.

Oh.—In re Hess, 33 Oh. Cir. Ct. 449.

Okl.—Gray v. McKnight, 183 P 489.

Pa.—In re Metzger, 242 Pa. 69, 88 A 915; Jennings' Est., 38 Pa. Super. 522; Piper's Est., 12 Pa. Dist. 443, 28 Pa. Co. 589; Woodward's Est., 2 Chest. Co. 9.

S. D.—Redwater Land, etc., Co. v. Reed, 26 S. D. 466, 128 NW 702.

Utah.—Kurtz v. Ogden Canyon Sanitarium Co., 37 Utah 313, 108 P 14; Barrette v. Whitney, 36 Utah 574, 106 P 522, 37 LRANS 368.

Vt.—Sparrow v. Watson, 87 Vt. 366, 89 A 468; Georgia Dist. Prob. Ct. v. Van Duzer, 13 Vt. 135.

Wash.—Davis v. Seavey, 95 Wash. 57, 163 P 35, AnnCas1918D 314; Meeker v. Waddle, 83 Wash. 628, 145 P 967; Alaska Banking, etc., Co. v. Noyes, 64 Wash. 672, 117 P 492.

Eng.—Spencer v. Williams, L. R. 2 P 230; Barrs v. Jackson, 1 Phil. 582, 19 EngCh 582, 41 Reprint 754; Allen v. Dundas, 3 T. R. 125, 100 Reprint 490.

[a] **Illustrations.**—(1) The court having jurisdiction of all the heirs and of the subject matter, an order of distribution is not subject to collateral attack on the ground that the provision therein appointing one of the distributees as trustee for the other heirs for the foreclosure of a mortgage held by the estate, was in excess of the court's power. Kurtz v. Ogden Canyon Sanitarium Co., 37 Utah 313, 108 P 14. (2) A decree distributing the proceeds of an heir's interest in an estate to an assignee is conclusive in an action to have the assignment set aside as in fraud of the assignor's creditors, such action being a collateral attack on the decree. Hopkins v. White, 20 Cal. A. 234, 128 P 780.

[b] **Not subject to collateral attack on ground of fraud.**—Georgia Dist. Prob. Ct. v. Van Duzer, 13 Vt. 135. Contra Meeker v. Waddle, 83 Wash. 628, 145 P 967.

[c] **The failure of the decree to name the heirs** of the testator and the proportions in which they should take does not render it void or subject to collateral attack. Jewell v. Pierce, 120 Cal. 79, 52 P 132.

[d] **Failure to require bond from life tenant.** — Although a decree against an administrator, directing payment of a bequest to a legatee who is only a tenant for life, without requiring a suitable bond for the protection of the interests of the remaindermen, is erroneous, yet, if the administrator takes no steps to correct or reverse it, he cannot collaterally impeach it, or claim any advantage from the error when sued on the decree. Calhoun v. Whittle, 56 Ala. 138.

[e] **Proceedings amounting to direct attack.**—Weyant v. Utah Sav., etc., Co., (Utah) 182 P 189.

30. Teynor v. Heible, 74 Wash. 222, 133 P 1, 46 LRANS 1033 (where the decree of distribution recites that the court finds from the affidavits on file that due service was made, while affidavits show service by publication only, which service is insufficient under the statute, the court, as against a collateral attack on the decree, will not presume that a proper personal service was had so as to confer jurisdiction).

31. Ala.—Browder v. Faulkner, 82 Ala. 257, 3 S 30; Thompson v. Perryman, 45 Ala. 619.

Miss.—Isom v. McGehee, 45 Miss. 712; Torrence v. Kerr, 27 Miss. 786.

N. Y.—Koenig v. Wagener, 126 App. Div. 772, 111 NYS 116; Peyser v. Wendt, 2 Dem. Surr. 221; Joel v. Ritterman, 5 Redf. Surr. 136; Sherwood v. Judd, 3 Bradf. Surr. 419.

N. C.—Ellison v. Andrews, 34 N. C. 188.

Oh.—McLaughlin v. McLaughlin, 4 Oh. St. 508, 64 AmD 603.

Or.—Rostel v. Morat, 19 Or. 181, 23 P 900.

Pa.—In re McIntosh, 158 Pa. 525, 27 A 1042; Philadelphia v. Brennan, 18 Pa. Co. 59.

[a] **Execution, and not contempt proceedings,** is the proper method of enforcing a decree for money in probate proceedings. Rostel v. Morat, 19 Or. 181, 23 P 900.

[b] **Separate executions.** — Where several legatees or distributees obtain a decree against the representative, the decree is several and each is entitled to a separate execution for each share. Ellison v. Andrews, 34 N. C. 188.

[c] **An order for execution issuing in favor of an infant distributee** without the intervention of a guardian is erroneous. Green v. Fagan, 15 Ala. 335.

[d] **Execution by an administrator de bonis non.**—Where a decree is made in a probate court in favor of several plaintiffs on a petition for a legacy, one of whom is the executor

his administration bond,[32] or if necessary by reason of the representative's refusal or failure to comply with the decree after a demand, by proceedings for contempt.[33] An action will also lie upon a decree of distribution.[34]

[§ 1406] **i. Restraining Enforcement of Decree.** Upon a showing of fraud in procuring the decree or other grounds of equitable relief, an injunction may be granted restraining proceedings to enforce the decree;[35] and it has also been held that a temporary injunction will be issued to restrain execution to compel an executor to pay the distributive share due the estate of a distributee where the executor has a disputed claim against that estate and the bond of the administratrix is not sufficient to protect his claim, it appearing that the next of kin of that estate are insolvent.[36] But as the distribution of estates is greatly favored an injunction will not be granted where adequate relief can otherwise be obtained by the petitioner.[37]

[§ 1407] **j. Order for Partial Distribution.**[38] A decree for partial distribution can be rendered only upon an application therefor,[39] and can only be made in favor of those who join in such application,[40] except where the application is made by the administrator himself.[41] A separate decree should be rendered in favor of each distributee who applies for it.[42] The decree should specify the sum

of a deceased legatee, and his executor dies before satisfaction or execution sued out, the right to the legacy of the deceased legatee vests in the administrator de bonis non, but he is not entitled to have execution until he has made himself a party either by scire facias or according to the course of the courts of equity. Ellison v. Andrews, 34 N. C. 188.

[e] **Notice or application.**—Such execution may run against the representative personally without notice to him or application to the surrogate. Peyser v. Wendt, 2 Dem. Surr. (N. Y.) 221.

[f] **A rule to show cause** must issue before execution can be issued. In re McIntosh, 158 Pa. 525, 27 A 1042.

[g] **Form of citation.**—A citation to an administrator calling upon him to show cause why judgment and execution should not be awarded against him for the distributive share of one in the estate must set out the previous proceedings had in the settlement of the estate. Welch v. Walker, 4 Port. (Ala.) 120.

[h] **A decree in favor of several distributees jointly** does not authorize the issuance of execution. Browder v. Faulkner, 82 Ala. 257, 3 S 30.

[i] **In New Jersey** no execution can be issued on a decree of distribution. Bayley v. Bayley, 71 N. J. Eq. 9, 63 A 11.

32. See infra §§ 2584, 2585.

33. Cal.—Clary's Est., 112 Cal. 292, 44 P 569; Melone v. Davis, 67 Cal. 279, 7 P 703; Ex p. Cohn, 55 Cal. 193; Ex p. Smith, 53 Cal. 204.

Ga.—Everett v. Sparks, 107 Ga. 48, 32 SE 878, 73 AmSR 107.

Ill.—Randolph v. Peo., 130 Ill. 533, 22 NE 615 [rev 26 Ill. A. 241]; Piggott v. Ramey, 2 Ill. 145.

Minn.—State v. Ramsey County Dist. Ct., 114 Minn. 364, 131 NW 381.

Miss.—Torrence v. Kerr, 27 Miss. 786; Vertner v. Martin, 10 Sm. & M. 103; Moore v. Adams County Probate Judge, Walk. 310.

N. Y.—In re Snyder, 103 N. Y. 178, 8 NE 479 [aff 34 Hun 302]; Matter of Holmes, 79 App. Div. 267, 79 NYS 687 [aff 176 N. Y. 604 mem, 68 NE 1118 mem]; Matter of Waring, 1 App. Div. 29, 36 NYS 529; Matter of Isaacs, 103 Misc. 184, 169 NYS 1066; Matter of Monell, 28 Misc. 1308, 59 NYS 981, 1 Mills Surr. 147; Matter of Kurtzman, 2 NYSt 655; Peo. v. Marshall, 7 AbbNCas 380; Rugg v. Jenks, 4 Dem. Surr. 105; Doran v. Dempsey, 1 Bradf. Surr. 490.

Or.—Rostel v. Morat, 19 Or. 181, 23 P 900.

Pa.—Bichsel's Est., 22 Pa. Dist. 192; Hartman's Est., 20 Pa. Dist. 912.

Wash.—McLaughlin v. Barnes, 12 Wash. 373, 41 P 62.

[a] **The probate court may enforce** an order or decree other than one for the payment of money by punishing the party for contempt. Rostel v. Morat, 19 Or. 181, 23 P 900.

[b] **This is only an additional remedy** to that of execution. Sherwood v. Judd, 3 Bradf. Surr. (N. Y.) 419.

[c] **The demand** (1) provided for by the statute can neither be dispensed with nor waived. Blake v. Peo., 161 Ill. 74, 43 NE 590; Haines v. Peo., 97 Ill. 161; Von Kettler v. Johnson, 57 Ill. 109. (2) But it need not definitely state the amount due. Randolph v. Peo., 40 Ill. A. 174.

[d] **The executor may show cause against his commitment** on return of the attachment. Saltus v. Saltus, 2 Lans. (N. Y.) 9.

[e] **Credit should be allowed the representative in such proceedings for moneys paid by him** to a distributee on account of his legacy prior to the making of the decree and for which through his inadvertence he was not credited in his final account. Matter of Schweibert, 25 Misc. 464, 55 NYS 649.

[f] **A plea of insolvency and want of property** of his own or belonging to the estate is no defense to an executor on an attachment against him for failure to pay a sum decreed on his final settlement. In re Snyder, 103 N. Y. 178, 8 NE 479 [aff 34 Hun 302]; Joel v. Ritterman, 5 Redf. Surr. (N. Y.) 136.

[g] **An appeal lies** to the circuit court from an order of the county court directing an administrator to pay over a specified sum of money on a claim allowed against an estate, within a given time, and the costs of the proceeding, and providing for his imprisonment in case of his failure to make such payment. Such order is a final judgment, as much as if an execution had been awarded. The manner of enforcing payment, whether by execution or attachment, does not affect the character of the order or decree. Randolph v. Peo., 130 Ill. 533, 22 NE 615.

[h] **Effect of appeal.**—An attachment will not be granted against the personal representative for failure to obey the decree of distribution, where he has appealed from the decree and filed a bond as required by statute. Matter of Espie, 3 Redf. Surr. (N. Y.) 270. Compare Matter of Holmes, 79 App. Div. 267, 79 NYS 687 [aff 176 N. Y. 604 mem, 68 NE 1118 mem] (where an executor, on appealing from a final decree directing him to pay certain legacies, gave the undertaking for costs required by Code Civ. Proc. § 2577, but not the undertaking required by § 2578 for staying execution, the respondents could enforce the decree, as if it had not been appealed from, and were not limited to enforcing it by execution).

[i] **Only matters occurring subsequent to an order** to pay can be set up as defenses against an attachment for failure to comply with such order. Brown's Est., 23 Pa. Dist. 984.

34. Koenig v. Wagner, 126 App. Div. 772, 111 NYS 116 (where, upon the final accounting by an administrator, a decree was rendered by the surrogate ordering distribution and awarding a specified sum to decedent's wife, the administrator of such wife after her death could maintain an action against the administrator of the husband upon the decree of the surrogate to enforce the provision that the payment is made to the wife, although he would have a more summary and efficient remedy to enforce the decree under the statute authorizing the enforcement of such decree by the issuance of execution. Such action was not between the original parties to the settlement in the surrogate's court so as to require leave of court as a prerequisite).

35. Blackburn v. Craufurd, 22 Md. 447; Fairley v. Thompson, 34 Miss. 101; Schlesinger v. Schlesinger, 157 App. Div. 633, 142 NYS 729; Nowachi's Est., 22 Pa. Dist. 250; Hamilton's Est., 4 Pa. Dist. 231, 16 Pa. Co. 319; Kern's Est., 17 Pa. Co. 437. But compare Keith v. Guthrie, 59 Kan. 200, 52 P 435 (the decree cannot be collaterally attacked by injunction proceedings to restrain its enforcement).

[a] **Where residuary legatees take advantage of a mistake in the executor's inventory,** by joining in their petition for distribution other parties without their consent and imposing a fraud upon the court, the executor may obtain an injunction to stay proceedings under the decree. Fairly v. Thompson, 34 Miss. 101.

[b] **Pleading.** — An administrator cannot enjoin the execution of a decree for distribution, on the ground that before his final settlement he had paid off and discharged the amounts due defendants as distributees, in the absence of any averment in his bill that such payments were not examined and allowed or rejected on his formal accounting. Gaillard v. Thomas, 61 Miss. 166.

36. Schlesinger v. Schlesinger, 157 App. Div. 633, 142 NYS 729.

37. Bates' Est., 5 OhS&CP 545, 7 OhNP 625 (the probate court will not enjoin the distribution of a decedent's estate at the suit of his successor in title to the property on the ground that he holds a bond by which title is guaranteed, and therefore has a claim which will arise if title proves defective, as he has an adequate remedy at law).

38. When partial distribution may be made see supra § 1282.

39. Bludworth v. White, 42 Ala. 662 (where a probate court, upon application, appointed a day for an administrator to make final settlement, but turned it into a partial distribution, without any application for that purpose, either by the administrator or the distributees, and a decree was rendered in favor of the latter for their distributive shares the proceeding was without authority of law, and the decree void).

40. Harrison v. Meadors, 41 Ala. 274.

41. Harrison v. Meadors, 41 Ala. 274.

42. Harrison v. Meadors, 41 Ala. 274.

[a] **If a joint decree is rendered** against the administrator, in favor of the several distributees, for the sums ascertained to be due to them respectively and a decree for the wife's distributive share is rendered in favor of the husband, "in right of the wife, and for her use," these are

to be paid to each legatee, and the amount of the collateral inheritance tax to be deducted therefrom, and previous payments made by the executor to the legatees, and not disputed by the latter, should also be deducted.[43] Such a decree is conclusive only as to the funds then distributed,[44] and does not estop the distributee to assert that the representative had then other funds in his hands.[45] But it is a complete protection to the executor for whatever he may do by way of disposition of the property within its terms.[46] Where an estate has ample funds over and above all possible demands on its moneys to pay sums due under an agreement between the heirs for a distribution, a sum due an heir may be decreed to be paid upon a decree of partial distribution, although the recital of the agreement is to the effect that such sum shall be paid "upon the distribution of the estate."[47]

[§ 1408] **21. Review—a. In General.** An appeal from an order or decree of distribution is regulated entirely by statute,[48] but as a general rule an appeal will lie from a final order or decree of distribution or payment,[49] and under some statutes appeals are allowed from other orders or decrees in distribution proceedings.[50] Under some statutes a review is had by writ of error[51] or bill or review.[52]

Where the probate court refuses to entertain a petition for a share in the distribution, the remedy is not by writ of error but by certiorari,[53] or mandamus.[54]

[§ 1409] **b. Who May Appeal—(1) In General.** As a general rule the right to appeal from an order or decree in distribution proceedings is given to any party aggrieved thereby,[55] and may be exer-

mere irregularities, which will be considered on error as amended. Harrison v. Meadors, 41 Ala. 274.

43. In re Mitchell, 121 Cal. 391, 53 P 810.

44. In re Kellerman, 242 Pa. 3, 88 A 865; In re Grothe, 237 Pa. 262, 85 A 141; In re Reed, 237 Pa. 125, 85 A 138; Kline's App., 86 Pa. 363; Lafferty's Est., 19 Pa. Dist. 504; Marriner's Est., 16 Pa. Dist. 7; Pepper's Est., 13 Pa. Co. 407; Guenther's App., 4 WklyNC (Pa.) 41; Turk v. Ritchie, 104 Va. 587, 52 SE 339.

45. State v. Berning, 6 Mo. A. 105.

46. In re Mackey, 46 Colo. 100, 102 P 1088.

47. In re Broome, 162 Cal. 258, 122 P 470.

48. Keith v. Guthrie, 59 Kan. 200, 52 P 435; Proctor v. Dicklow, 57 Kan. 119, 45 P 86; In re Davis, 27 Mont. 235, 10 P 421. See also the statutes, and generally Appeal and Error § 406 et seq.

[a] **Provisions relating to appeals in civil actions** are expressly applied to probate proceedings under some statutes. In re Davis, 27 Mont. 235, 70 P 721.

49. U. S.—Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.

Ala.—Sherard v. Sherard, 33 Ala. 488; May v. May, 28 Ala. 141; McConico v. Cannon, 25 Ala. 462; Crothers v. Ross, 17 Ala. 816; Andrews v. Hall, 15 Ala. 85; Ex p. Harrison, 7 Ala. 736.

Ark.—Williams v. Bowen, 116 Ark. 266, 170 SW 221.

Cal.—In re Delaney, 110 Cal. 563, 42 P 981; Daly v. Pennie, 86 Cal. 552, 25 P 67, 21 AmSR 61; Bates v. Ryberg, 40 Cal. 463.

Ida.—Connolly v. Kootenai County Prob. Ct., 25 Ida. 35, 136 P 205.

Ill.—Strawn v. Jacksonville Female Academy, 240 Ill. 111, 88 NE 460.

Ind.—Wood v. Wood, 51 Ind. 141.

Minn.—Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 NW 973.

Mo.—Branson v. Branson, 102 Mo. 613, 15 SW 74.

Mont.—In re Klein, 35 Mont. 185, 88 P 798; In re Kelly, 31 Mont. 356, 78 P 579, 79 P 244; In re McFarland, 10 Mont. 445, 26 P 185.

Nebr.—Merrick v. Kennedy, 46 Nebr. 264, 64 NW 989.

R. I.—Jeter v. Moore, 17 R. I. 85, 20 A 230.

S. C.—Verdier v. Verdier, 12 Rich. Eq. 138.

S. D.—Calhoun v. Bryant, 28 S. D. 266, 133 NW 266.

Vt.—Essex Dist. Prob. Ct. v. May, 52 Vt. 182.

[a] **Appeal the only remedy.**—Where a final decree of distribution is erroneous as to the law or the facts, it is appealable and the error is not ground for relief in equity against the decree. Daly v. Pennie, 86 Cal. 552, 25 P 67, 21 AmSR 61.

[b] **Leave to appeal** is sometimes required. Williams v. Bowen, 116 Ark. 266, 170 SW 221.

50. Ala.—May v. May, 28 Ala. 141.

Cal.—In re Mitchell, 121 Cal. 391, 53 P 810.

Conn.—Wordin's App., 64 Conn. 40, 29 A 238.

Mass.—Sturtevant v. Wentworth, 226 Mass. 459, 115 NE 927.

Mo.—Branson v. Branson, 102 Mo. 613, 15 SW 74.

Mont.—In re Davis, 27 Mont. 235, 70 P 721.

Nebr.—Morton v. Morton, 62 Nebr. 420, 87 NW 182.

S. D.—Calhoun v. Bryant, 28 S. D. 266, 133 NW 266.

[a] **An appeal will lie from:** (1) "All orders making distribution," without regard to when they are made. Branson v. Branson, 102 Mo. 613, 15 SW 74. (2) The final decree of the probate court confirming and accepting the report of persons appointed to make a division or distribution of the estate. May v. May, 28 Ala. 141; Wordin's App., 64 Conn. 40, 29 A 238; Webster v. Merriam, 9 Conn. 225. But see Strong v. Strong, 8 Conn. 408 (whether division according to will not within appellate jurisdiction of superior court). (3) An order denying and dismissing a petition for distribution on the ground that the petitioner is not an heir or devisee. Morton v. Morton, 62 Nebr. 420, 87 NW 182. (4) An order setting aside a decree of final distribution. Calhoun v. Bryant, 28 S. D. 266, 133 NW 266. (5) An order of partial distribution. In re Mitchell, 121 Cal. 391, 53 P 810; Fisher's Est., 75 Cal. 523, 17 P 640. (6) An order denying a motion for a new trial in such proceedings. In re Davis, 27 Mont. 235, 70 P 721.

[b] **Uniting an order settling an account and a decree of distribution** at the same time and in the same paper under one signature of the judge does not affect the right of appeal from either of these orders. In re Delaney, 110 Cal. 563, 42 P 981.

[c] **An appeal does not lie from:** (1) An order refusing to set aside or postpone a decree of final distribution. Burdick's Est., 112 Cal. 387, 44 P 734; Wiard's Est., 83 Cal. 619, 24 P 45; Lutz's Est., 67 Cal. 457, 8 P 39; In re Dean, 62 Cal. 613; In re Calahan, 60 Cal. 232; Wood v. Wood, 51 Ind. 141. (2) An order or rule directing the residue of the estate to be paid into the treasury or court to be distributed under the court's direction. Young v. Smith, 15 Pet. (U. S.) 287, 10 L. ed. 741; Gosslins v. Her Heirs, 2 La. 141.

[d] **An opinion of the probate court as to the rights of the distributees** is not appealable, unless there is an order of distribution. Dyer v. Carr, 18 Mo. 246.

51. Shiffer's App., 4 Pennyp. (Pa.) 512.

52. In re Chappell, (Pa.) 107 A 846; In re White, 249 Pa. 115, 94 A 470.

[a] **Effect of distribution.**—(1) A bill of review will not be allowed where payment has been actually made in pursuance of the decree before application for the bill of review. In re White, 249 Pa. 115, 94 A 470; Woodward's Est., 2 Chest. Co. (Pa.) 9. (2) But a distribution which has not changed the actual custody of the fund, so that it remains intact and under the control of the court, is not a distribution which prevents a review. Collins' Est., 10 Pa. Dist. 249.

53. Fowler v. Trewhit, 10 Ala. 622.

54. Ex p. Jones, 1 Ala. 15.

55. Ala.—Ex p. Jones, 1 Ala. 15.

Cal.—In re Spreckels, 165 Cal. 597, 133 P 289; In re Crooks, 125 Cal. 459, 58 P 89; In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965.

Colo.—Oles v. Macky, 58 Colo. 295, 144 P 891.

Me.—Tillson v. Small, 80 Me. 90, 13 A 402.

Minn.—Casey v. Brabec, 111 Minn. 43, 126 NW 401, 137 AmSR 531.

Miss.—Porter v. Porter, 7 How. 106, 40 AmD 55.

Mont.—In re Davis, 27 Mont. 235, 70 P 721.

Nebr.—Merrick v. Kennedy, 46 Nebr. 264, 64 NW 989.

N. Y.—Bryant v. Thompson, 128 N. Y. 426, 28 NE 522, 13 LRA 745; Matter of Coe, 55 App. Div. 270, 66 NYS 784.

Pa.—Shiffer's App., 4 Pennyp. 512; Adam's Est., 10 Pa. Dist. 296, 25 Pa. Co. 256; Woodward's Est., 2 Chest. Co. 9.

Utah.—Barrette v. Whitney, 36 Utah 574, 106 P 522, 37 LRANS 368.

Vt.—Stevens v. Joyal, 48 Vt. 291.

[a] **Appellant must be injuriously affected.**—(1) In order to enable a party to appeal from a final order of distribution he must have been injuriously affected by such order. Merrick v. Kennedy, 46 Nebr. 264, 64 NW 989. To same effect Casey v. Brabec, 111 Minn. 43, 126 NW 401, 137 AmSR 531. (2) A legatee is not prejudiced because property in which he has no interest is improperly distributed by the final decree. In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965; Adams' Est., 10 Pa. Dist. 296, 25 Pa. Co. 256. (3) Where an infant testamentary beneficiary received her share in the estate, another beneficiary could not complain, the procedure not defeating the purpose of testator. U. S. Fidelity, etc., Co. v. State, 110 Miss. 16, 69 S 1007.

[b] **Whether or not the parties are "aggrieved"** within the meaning of the statute is a question to be determined after a hearing upon the merits and not on a motion to dismiss.

cised by a legatee, devisee, or distributee,[56] or the surviving spouse of decedent.[57] It has also been held that under a statute providing that no decree affecting title to realty made in probate proceedings shall be void for want of notice where the executor or administrator was appointed on statutory notice, and no objection to any subsequent order can be taken by a person claiming under decedent on account of want of notice except by direct application to the probate court, or on appeal, one may attack a consent decree of final distribution rendered without notice and without his appearing in court by applying to the probate court and showing his interest in the estate, and thus prosecute an appeal, although only parties to the record may as a general rule appeal.[58] But a judgment of distribution will not be disturbed on appeal at the instance of a person not interested in the estate.[59]

[§ 1410] **(2) Personal Representative.** As a general rule a personal representative cannot appeal from an order of final distribution,[60] unless he is a party in interest,[61] or acts as representative of all the parties,[62] or takes his appeal in the interest of the estate as such.[63] Where the order is of such a nature that his obedience to it might subject him to a personal liability, he is held to be a party interested and may appeal;[64] and upon this ground it is generally held that the representative is such a party in interest as to enable him to appeal from an order of partial distribution.[65]

[§ 1411] **c. Taking and Perfecting Appeal— (1) Time for Taking.** The appeal must be taken

the appeal. In re Davis, 27 Mont. 235, 70 P 721.

[c] **One claiming under a gift causa mortis** is not affected by decrees of the probate court charging the administrator with the property, and ordering it to be distributed among the next of kin, and therefore cannot appeal from such decrees, although he appeared and produced witnesses in that court. Lewis v. Bolitho, 6 Gray (Mass.) 137.

[d] **An objection that appellant has not sufficient interest** in the subject matter to entitle him to appeal from a decree of distribution in the probate court must be made in the county court before issue joined and trial begun, otherwise it will be too late. Stevens v. Joyal, 48 Vt. 291.

56. Cal.—In re Colton, 164 Cal. 1, 127 P 643; In re Williams, 122 Cal. 76, 54 P 386; Bates v. Ryberg, 40 Cal. 463.

Conn.—Lake's App., 32 Conn. 331.

La.—Allen's Succ., 48 La. Ann. 1036, 20 S 193, 55 AmSR 295.

Mont.—In re Klein, 35 Mont. 185, 88 P 798.

N. Y.—Bullard's Est., 4 NYCivProc 284.

Vt.—Harris v. Harris, 79 Vt. 22, 64 A 75.

[a] **Devisee who did not appear at hearing.**—One claiming as devisee in opposition to a petitioner claiming as sole heir of property not disposed of by the will is entitled to a bill of exceptions in case of a decree in favor of the petitioner, although she did not appear at the hearing of the petition. In re Benner, 155 Cal. 153, 99 P 715.

57. Sherard v. Sherard, 33 Ala. 488; Tillson v. Small, 80 Me. 90, 13 A 402; Messersmith v. Messersmith, 264 Mo. 610, 175 SW 914.

[a] **A widow, as executrix** of her deceased husband's estate, is not prejudiced by an order of partial distribution, where the sum left in her hands, after payment to the legatees, is sufficient to cover the expenses of administration, the amount devised to her as widow, and an amount for a reasonable family allowance. In re Phillips, 18 Mont. 311, 45 P 222.

58. Barrette v. Whitney, 36 Utah 574, 106 P 522, 37 LRANS 368.

59. In re Spreckels, 165 Cal. 597, 133 P 289; In re Blythe, 110 Cal. 231, 756, 65 P 965.

60. Cal.—In re Ayer, 175 Cal. 187, 165 P 528; In re Murphy, 145 Cal. 464, 78 P 960; In re Williams, 122 Cal. 76, 54 P 386; In re Welch, 106 Cal. 427, 39 P 805; Merrifield v. Longmire, 66 Cal. 180, 4 P 1176; Marrey's Est., 65 Cal. 287, 3 P 896; In re Wright, 49 Cal. 550; Bates v. Ryberg, 40 Cal. 463; In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965.

La.—Marks' Succ., 108 La. 685, 32 S 958. But compare Baumgarden's Succ., 35 La. Ann. 127.

Mont.—In re Dewar, 10 Mont. 422, 25 P 1025. But compare In re Klein, 35 Mont. 185, 88 P 798 (an executor and legatees may appeal from so much of an order as adjudges that certain persons are entitled to share in the estate of the testator).

Nebr.—In re Craig, 101 Nebr. 439, 163 NW 765; Merrick v. Kennedy, 46 Nebr. 264, 64 NW 989.

N. H.—Hills v. Baker, 59 N. H. 514.

N. Y.—Matter of Coe, 55 App. Div. 270, 66 NYS 784.

Pa.—Stineman's App., 34 Pa. 394; Sharp's App., 3 Grant 260; Wallace's Est., 40 Pa. Super. 595; Blaney's Est., 37 Pa. Super. 76; Garman's Est., 32 Pa. Super. 494; Godwin's Est., 22 Pa. Super. 469; Fuhrman's Est., 21 Pa. Super. 27; Bradley's Est., 5 Pa. Co. 572; Gallagher's App., 6 WklyNC 457.

Vt.—In re Vincent, 84 Vt. 89, 90, 78 A 714; In re Clark, 79 Vt. 62, 64 A 331, 118 AmSR 938; Hemmenway v. Corey, 16 Vt. 225.

"This relation [executor] neither gives him any legal right, nor places him under any legal liability, which may be enlarged or diminished by the decree of distribution. It follows that he has no such interest as is necessary by statute to the right of appeal." In re Vincent, supra.

[a] **Where the administrator's account has been confirmed,** he has no such interest in the estate as will enable him to appeal from an order to pay over the balance in his hands. Gallagher's App., 89 Pa. 29.

[b] **Contrary view.**—"It was the duty of the administrator to appeal if there was reasonable ground to believe that the court had fallen into an error in its judgment and order of distribution." Ruch v. Biery, 110 Ind. 444, 447, 11 NE 312 [foll Keener v. Grubb, 44 Ind. A. 564, 89 NE 896].

[c] **Where the representative is made a party to the decree for the purpose of taking an appeal** he may appeal from a decree for final distribution. McConico v. Cannon, 25 Ala. 462.

61. See cases infra this note.

[a] **Illustration.**—Where, on an application by legatees for a partial distribution, the executrix raised an issue as to the sufficiency of the petition to show sufficient assets to pay the legacies without loss to creditors, both the power of the executrix to comply with an order directing such distribution and the petitioners' right to an immediate distribution were involved, on both of which questions the executrix was interested, personally and on behalf of creditors, and hence was entitled to appeal therefrom. In re Murphy, 145 Cal. 464, 78 P 960.

[b] **If the record shows that the executor is one of the distributees,** an appeal by him will be considered as if made by a party interested. Blaney's Est., 37 Pa. Super. 76.

[c] **Circumstances not showing interest.**—Where a final account of executors shows an amount ready for distribution, and pending oppositions cannot reduce it, and time has passed for filing further oppositions, the executors have no interest sufficient to maintain an appeal from an order directing distribution. Marks' Succ., 108 La. 685, 32 S 958.

62. Ruch v. Biery, 110 Ind. 444, 11 NE 312; Allen's Succ., 48 La. Ann. 1036, 20 S 193, 55 AmSR 295; Messersmith v. Messersmith, 264 Mo. 610, 175 SW 914; In re Koch, 4 Rawle (Pa.) 268.

[a] **Executor may appeal for purpose of getting proper construction of will.**—Bennett v. Bennett, 282 Ill. 266, 118 NE 391 [rev 202 Ill. A. 364].

63. Graf's Succ., 125 La. 197, 51 S 115; In re Craig, 101 Nebr. 439, 163 NW 765.

[a] **Illustration.**—The administrator of an estate, some of the heirs of which are nonresidents, defendant in a proceeding by the widow of the decedent, the result of which is to have certain real estate, inventoried as belonging to the succession, although standing in the name of the widow, decreed to belong to the widow, can appeal from such judgment for the benefit of the estate, although there is an attorney for absent heirs who does not appeal. Graf's Succ., 125 La. 197, 51 S 115.

64. Ala.—Crothers v. Ross, 17 Ala. 816.

Ark.—Morris v. Virden, 57 Ark. 232, 21 SW 223.

Cal.—In re Welch, 106 Cal. 427, 39 P 805.

Conn.—Hewitt's App., 58 Conn. 223, 20 A 453.

La.—Reems' Succ., 134 La. 1033, 64 S 898; Allen's Succ., 48 La. Ann. 1036, 20 S 193, 55 AmSR 295.

Pa.—Godwin's Est., 22 Pa. Super. 469.

Wash.—In re Sullivan, 48 Wash. 631, 94 P 483, 95 P 71.

[a] **Illustration.**—An administrator may appeal from a decree ordering a distribution to guard against the error of a distribution without some ample provision for all known obligations of the estate. In re Sullivan, 48 Wash. 631, 94 P 483, 95 P 71.

[b] **Where there is a contention respecting the amount which the executor should pay** to the parties entitled, and the decree requires a payment beyond his liability, he is aggrieved thereby and has a right to appeal. Godwin's Est., 22 Pa. Super. 469.

[c] **Where the decree of distribution excludes decedent's widow** from participating therein, the administrator is injured thereby and is therefore entitled to appeal from such decree notwithstanding he has omitted to file a statement containing a list of the distributees of the estate as required by statute, where such facts otherwise appear on the record. Crothers v. Ross, 17 Ala. 816.

65. Harrison v. Meadors, 41 Ala. 274; McAllister v. Thompson, 32 Ala. 497; Johnson v. Fort, 30 Ala. 78; In re Colton, 164 Cal. 1, 127 P 643; In re Mitchell, 121 Cal. 391, 53 P 810; In re Welch, 106 Cal. 427, 39 P 805; In re Kelley, 63 Cal. 106; In re Phillips, 18 Mont. 311, 45 P 222; In re McFarland, 10 Mont. 445, 26 P 185; Jeter v. Moore, 17 R. I. 85, 20 A 230.

within the time allowed therefor by statute.[66] An appeal from an order for distribution before the entry at large in the minutes of a decree describing the property distributed is premature and must be dismissed.[67]

[§ 1412] **(2) Notice of Appeal.** Under a statute providing that on appeal from a decree assigning the residue of an estate appellant shall serve written notice on the adverse party or attorney, notice of such appeal served on the executor is sufficient.[68] Where an order settling the executor's account and a decree of distribution are rendered at the same time, an appeal from an order settling the account will not be dismissed because the notice of appeal therefrom was not served upon any other party than the executor;[69] and, where the order settling the account is reversed, it necessarily vacates the decree of distribution, and in such case the appeal from the decree will not be dismissed for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution.[70]

[§ 1413] **(3) Petition for Review.** Some liberality should be exercised with respect to the form of a petition for review made by a nonresident after an adjudication has become absolute, and defects may be cured by amendment.[71]

[§ 1414] **(4) Appeal Bond.** Under some statutes appellants are required to execute a bond,[72] the effect of which is to stay proceedings on the judgment or decree appealed from,[73] so far as may be necessary for the protection of the interests of the appealing parties.[74]

[§ 1415] **(5) Bill of Exceptions.** Usually the record on appeal from a judgment of distribution, in the nature of a judgment roll, will be sufficient without a bill of exceptions,[75] but where the determination depended wholly or in part on the facts established by the evidence, so much of the evidence as is pertinent may be embodied in a bill of exceptions.[76]

[§ 1416] **d. Parties to Appeal.** All the parties interested in the distribution must be made parties where one party appeals from the order of distribution.[77] But where the appeal is from an order denying a new trial to one who had petitioned as heir for his distributive share of the estate, beneficiaries under the will who did not appear and resist the petition are not necessary parties to the appeal.[78]

[§ 1417] **e. Joinder or Consolidation of Appeals.** The general rule that two or more separate judgments, decrees, or orders cannot be brought up for appellate review by one writ of error or appeal[78½] applies to decrees of distribution.[79] But it is no objection to an appeal taken by an administrator, both from an order of the district court sustaining objection to a final account and also from an order entering a decree of distribution, that thereby two separate actions have been united in one appeal, as such orders are not actions in a legal sense.[80] Where the legal issues involved on an appeal from a decree directing executors to turn over a sum of money to the residuary legatee are the same as those involved on an appeal from a decree entered in the matter of the intermediate accountings of the executors, the proper and logical method is for the parties to unite in presenting one set of appeal papers and have all questions litigated at one time.[81]

[§ 1418] **f. Effect of Appeal.** A probate decree appealed from remains in full force until reversed[82] but appeals from an order denying a petition for partial distribution of an estate suspend the court's power to distribute the estate pending the appeal.[83] Where, on a petition for partial distribution to legatees, the other legatees and devisees did not appear at the hearing, or in any manner object to the order in favor of petitioners, but an appeal was taken by the executrix in her representative capacity only on the ground that the petition was insufficient in respect to its statements as to the condition and value of the estate and the amount of the debts, the order of distribution became final in so far as it allowed the legacies.[84]

[§ 1419] **g. Abandonment of Appeal.** The fact that persons who had appealed from a decree denying partial distribution, in which proceeding they had claimed under the will, asserted a claim as heirs on a subsequent application for a final distribution in the event the will was invalid, was not an election to claim as heirs so as to operate as an

66. Ala.—Cawlfield v. Brown, 45 Ala. 552; Thomas v. Dumas, 30 Ala. 83.

Cal.—Westerfield's Est., 96 Cal. 113, 30 P 1104; Wiard's Est., 83 Cal. 619, 24 P 45; In re Grider, 81 Cal. 571, 22 P 908; Fisher's Est., 75 Cal. 523, 17 P 640; Burton's Est., 64 Cal. 428, 1 P 702; Harland's Est., 64 Cal. 379, 1 P 159.

Conn.—State v. Blake, 69 Conn. 64, 36 A 1019.

Ky.—Merriweather v. Sebree, 2 Bush 232.

Me.—Chase v. Bates, 81 Me. 182, 16 A 542.

Mont.—In re McFarland, 10 Mont. 445, 26 P 185.

Pa.—Yung's Est., 9 Pa. Dist. 476; Clothier's Est., 4 Pa. Co. 214.

[a] **Extension of time.**—Some statutes authorize the allowance of an appeal to a person who without fault or error has failed to take his appeal within the time required by law, if justice requires a revision of the decree. Chase v. Bates, 81 Me. 182, 16 A 542 (holding, however, that appellant's petition should be dismissed for insufficiency where no reasons are alleged for his laches, nor any diligence shown when the fact became known to him, nor any particular shown in which the decree required revision).

67. In re Sheid, 122 Cal. 528, 55 P 328.

68. Rong v. Haller, 106 Minn. 454, 119 NW 405.

69. In re Delaney, 110 Cal. 563, 42 P 981.

70. In re Delaney, 110 Cal. 563, 42 P 981.

71. Sock's Est., 9 Pa. Dist. 101.

72. In re Schedel, 69 Cal. 241, 10 P 334; In re Kavanagh, 9 NYS 443; Matter of Espie, 3 Redf. Surr. (N. Y.) 270; Newhard's Est., 9 Pa. Dist. 764.

[a] **The quantum of security** to be taken by the orphans' court upon an appeal from a decree of distribution is a matter within its discretion and is not necessarily to be measured by the quantum of the estate. In re Koch, 4 Rawle (Pa.) 268.

[b] **Bond may be filed nunc pro tunc.**—Womack's Est., 25 Pa. Dist. 301.

[c] **On an appeal by an administrator or executor** no bond is necessary, and a motion to dismiss such appeal for want of a bond, because there are other appellants unnecessarily joined, will not be entertained. Ruch v. Biery, 110 Ind. 444, 11 NE 312.

73. In re Schedel, 69 Cal. 241, 10 P 334; Matter of Espie, 3 Redf. Surr. (N. Y.) 270; Womack's Est., 25 Pa. Dist. 301.

74. In re Kavanagh, 9 NYS 443; Bullard's Est., 4 NYCivProc 284.

75. In re Benner, 155 Cal. 153, 99 P 715.

76. In re Benner, 155 Cal. 153, 99 P 715.

77. Billinslea v. Abercrombie, 2 Stew. & P. (Ala.) 24.

78. In re Ryer, 110 Cal. 556, 42 P 1082.

78½. See Appeal and Error § 108.

79. Sampson's Est., 22 Pa. Super. 93 (where a decree of the orphans' court directs distribution in five equal parts among the testator's children, three of the children cannot take a joint appeal and procure a review of the decree below on their distinct individual claims).

80. In re Dewar, 10 Mont. 422, 25 P 1025.

81. In re Harkness, 176 NYS 347.

82. Dickinson's App., 54 Conn. 224, 6 A 422 (that the probate court ought properly to be advised as to the action of the appellate court, although a judgment affirming the decree is not necessary).

83. In re Spreckels, 165 Cal. 597, 133 P 289.

84. In re Murphy, 145 Cal. 464, 78 P 960.

abandonment of their appeal from the decree in the partial distribution proceedings.[85]

[§ 1420] **h. Review and Disposition of Cause.**[86] As a general rule the appellate court will review and adjudicate only such questions as were properly raised in the lower court and which appear on the record,[87] and in the absence of proper pleadings and proof may dismiss the appeal.[88] Under some statutes the appellate court proceeds as though the proceedings had been originally instituted in that court.[89] Where an item of a will creating a charitable trust is made a part of the decree of distribution, such item may be considered, on appeal from such decree, for the purpose of determining the intention of the testatrix, although the decree is conclusive on the trustee as to the extent of his rights.[90] Where questions affecting the separate and community estate of testator have been determined in the course of the administration of the estate and in special proceedings for that purpose, findings made on an application for distribution which merely recite the ultimate facts so previously found are not reviewable on appeal from the distribution decree.[91] A judgment or decree of distribution will not be disturbed on appeal for errors not seriously affecting the justice and equality of the distribution,[92] or for insufficiency of evidence where it warrants the findings on which the decree appealed from was predicated.[93] But failure to require security from legatees to whom distribution is made may constitute an abuse of discretion as will warrant a reversal.[94] On an appeal from a decree ordering the personalty of an estate, excepting cash, and the realty to be turned over to the distributees, the decree will be modified so as to make the realty subject to the charge of any final settlement expenses if the funds collected by the administrator shall become inadequate for that purpose, where it is doubtful whether the funds are ample for all purposes of final settlement.[95] Where the orphans' court has entered a decree in exact accordance with the judgment and opinion of the appellate court, such decree will not be reversed on a second appeal, because there was filed in the orphans' court, after the decree was entered, a record from another state showing that one of the distributees had been adjudicated a lunatic; but the appellate court will affirm the decree and direct that the share of the lunatic shall be paid over to the latter's committee upon proof to the orphans' court

85. In re Spreckels, 165 Cal. 597, 133 P 289.

86. Restitution on reversal of decree see supra § 1344.

87. Ala.—Petty v. Wafford, 11 Ala. 143; Sankey v. Elsberry, 10 Ala. 455.
Cal.—Scarboro's Est., 70 Cal. 147, 11 P 563.
Md.—Nalle v. Safe Deposit, etc., Co., 120 Md. 187, 87 A 770.
Miss.—Hargroves v. Thompson, 31 Miss. 211.
Nev.—In re Hartung, 39 Nev. 200, 155 P 353, 159 P 864.
Pa.—Moyer's Est., 141 Pa. 125, 21 A 504; Hosfeld's Est., 4 Pa. Co. 257; Clothier's Est., 4 Pa. Co. 214.
Vt.—In re Peck, 87 Vt. 194, 88 A 568.
But compare Knutsen v. Krook, 111 Minn. 352, 127 NW 11, 20 Ann Cas 852 (the validity of a demand for the whole or part of an estate allowed by the probate court, although no appeal from an order allowing it was taken, may be determined on appeal from the final decree of the probate court).

[a] **Illustrations.**—(1) On appeal by distributees from a decree of distribution under which they were awarded nothing because of advances charged against their shares under the will, the only question the court of appeals will consider is the identity of the charges and the proof submitted to support them. Nalle v. Safe Deposit, etc., Co., 120 Md. 187, 87 A 770. (2) Where the administrator fails to require those claiming distribution to propound their interest, he will not be heard, on error, to complain that their interest is not shown by the record. Petty v. Wafford, 11 Ala. 143.

[b] **Error apparent by decree.**—Where it appears by the decree of final settlement that the widow has been excluded from all participation, the error will not be considered as waived, but may be revised at the instance of the administrator, although no exception was at the time taken to the action of the court below. Crothers v. Ross, 17 Ala. 816.

[c] **An appeal by one in his representative capacity** does not bring up for review matters affecting his personal share of the estate as distributee or legatee. In re Phillips, 18 Mont. 311, 45 P 222.

88. In re Crooks, 125 Cal. 459, 58 P 89; Hoffman's Est., 37 Pa. Super. 548; Beck's Est., 4 Pa. Co. 385.

[a] **Illustration.**—An appeal by a mortgagee from the decree of distribution, the record upon which merely shows an offer of the mortgage in evidence, unaccompanied by a pleading or statement of facts, or by any showing that the mortgage debt was not paid, and does not show that the mortgagee is an aggrieved party, must be dismissed. In re Crooks, 125 Cal. 459, 58 P 89.

[b] **A contention that a motion for a new trial does not lie** in proceedings for the distribution, because all the facts alleged in the petition were admitted by defendants, is a sufficient reason for affirming an order denying a new trial on the hearing but no reason for dismissal of the appeal. In re Davis, 27 Mont. 235, 70 P 721.

89. Webster v. Merriam, 9 Conn. 225; In re Peck, 87 Vt. 194, 88 A 568 (holding, however, that the questions of fact involved should be defined by proper pleadings).

[a] **Evidence.**—On appeal from a decree accepting the return of distributers it is competent for the appellants to show that the distribution is unequal and unjust. Webster v. Merriam, 9 Conn. 225.

[b] **In Illinois** the practice is the same as on appeals from justices of the peace to the circuit court. Cort v. Massie, 171 Ill. A. 123 (where an order, showing the final report of an executrix, orders payment of legacies and that the owner of a life estate in a legacy shall give bond to protect the remainderman, the order as to the bond is so connected with the order as to payment that, on an appeal from a refusal to vacate the order as to the bond, the rights of the legatee concerning the legacy may be considered, and that, where the appeal is by a legatee from an order showing a final account, directing payment of legacies and requiring the legatee to give bond to protect a remainderman, it is error for the court to reverse the order as if it were a course of review, and it should render a final judgment directing payment of the legacy on terms that will protect the remainderman).

90. In re Merchant, 143 Cal. 537, 77 P 475.

91. Drasdo v. Jobst, 39 Wash. 425, 81 P 857.

92. Ala.—Hearne v. Harbison, 9 Ala. 731.
Ark.—McClelland v. Lowry, 21 Ark. 452.
Cal.—In re Dutard, 147 Cal. 253, 81 P 519.
Conn.—Canfield v. Bostwick, 21 Conn. 550.
Ind.—Spray v. Bertam, 165 Ind. 13, 74 NE 502.
Ky.—Williamson v. Williamson, 6 B. Mon. 307.
Mich.—In re Crane, 172 NW 584.
Pa.—Garman's Est., 32 Pa. Super. 494.

[a] **Illustrations.**—(1) A decree of distribution under a statute authorizing such a decree where the estate is but little indebted, and the share of the applicant for the decree may be allowed to him without loss to the creditors, cannot be disturbed on appeal where at the time of the presentation of the petition the time for filing claims had expired, and all allowed claims had been paid, with the exception of those of a certain claimant, which had made arrangements for the payment of its claims by the petitioning distributee, and had joined in the petition. In re Dutard, 147 Cal. 253, 81 P 519. (2) It is no ground for setting aside a decree of distribution on appeal that an additional inventory exhibited in the course of administration was not signed by the appraisers and that the appraisers had placed no valuation upon the property contained in it, the only items therein complained of being property which sold for two dollars, the avails of which were duly applied. Canfield v. Bostwick, 21 Conn. 550. (3) The overruling of an exception to the report of an administrator cannot be disturbed on appeal, in the absence of the evidence as to the existence of the contract asserted by the exception to make the distribution improper, although the alleged contract is in the transcript, where the ruling may have been on the insufficiency of the evidence to establish the contract, and not on its effect. Spray v. Bertram, 165 Ind. 13, 74 NE 502.

[b] **Where facts have been found, and the discretion of an auditor properly exercised,** and his report has been confirmed by the orphans' court, the appellate court will not interefere. Garman's Est., 32 Pa. Super. 494.

93. In re Kelley, 63 Cal. 106; Patterson's Est., 166 Pa. 119, 30 A 1020; Garman's Est., 32 Pa. Super. 494; Mullen's Est., 9 Pa. Dist. 87; Drinkhouse's Est., 11 Pa. Co. 144; Hosfeld's Est., 4 Pa. Co. 257.

94. Oles v. Macky, 58 Colo. 295, 144 P 891.

95. In re Sullivan, 48 Wash. 631,

that the committee had entered a proper bond.[96]

Where proof of heirship of foreign heirs is insufficient, but it appears that further testimony might be offered, the cause may be remanded for retrial on that issue.[97]

When questions of fact have not been determined before a decree of distribution, and are essential to a proper distribution should the lower court's view of the law be incorrect, the decree will be vacated, and the record remitted for further proceedings, with leave to take testimony.[98]

Where only one of several persons interested has taken an appeal, which results in a modification of the judgment, but it is manifest that other persons having an interest the same as appellant are necessarily affected in the same way and to the same extent by the modification, the benefit of the order of modification may not be confined to the appellant alone, but must be awarded to such others of those similarly situated as ask to be placed on the same footing.[99]

When two appeals are taken by different heirs from final decree of distribution, and are based on the same record and heard together, the court should adjudicate the entire matter of settlement of the estate in one judgment.[1]

[§ 1421] **i. Liability for Frivolous Appeal.** An executor who takes a frivolous appeal from an order directing a partial distribution of the estate may be held personally liable in damages for the delay occasioned thereby.[2]

[§ 1422] **22. Costs and Attorneys' Fees.** The allowance of reasonable costs and attorney's fees incurred either by the representative or the claimants in ascertaining the fund for distribution, bringing it into court, determining the rights of parties thereto, and making distribution, is largely within the discretion of the court;[3] and although as a general rule they should be allowed out of the general fund before distribution is decreed,[4] yet where they are unnecessarily caused or increased by the acts of the representative or claimants, they may be charged against the representative individu-

94 P 483, 95 P 71.

96. Lefever's Est., 41 Pa. Super. 289.

97. In re Peterson, 22 N. D. 480, 134 NW 751.

98. In re Glading, 254 Pa. 480, 99 A 62.

99. In re Union Trust Co., 219 N. Y. 537, 114 NE 1048 [mod 170 App. Div. 176, 156 NYS 32, and dist St. John v. Andrews Inst., 192 N. Y. 382, 85 NE 143].

1. In re Blackinton, 29 Ida. 310, 158 P 492.

2. In re Straus, 144 Cal. 553, 559, 77 P 1122 ("None of the points presented by appellant have any merit, and his appeal in this matter we deem frivolous. Its only tendency has been to further delay the right of the respondent under the partial distribution to enjoy the benefit of the testator's estate, the general distribution of which the appellant, without excuse or justification, had theretofore unnecessarily and inexcusably delayed for upwards of seven years, and he should be made responsible in damages for the additional delay in distribution which he has by this appeal occassioned").

3. Colo.—Church v. Eggleston, 3 Colo. A. 239, 32 P 984.

Mass.—Bailey v. Smith, 214 Mass. 114, 101 NE 62.

N. M.—Perea v. Harrison, 7 N. M. 666, 41 P 529.

N. C.—Ryden v. Jones, 10 N. C. 24.

Pa.—Lusk's Est., 150 Pa. 517, 24 A 595; Garman's Est., 32 Pa. Super. 494; Neill's Est., 3 Pa. Co. 197, 19 WklyNC 380.

Wis.—McMayon v. Snyder, 117 Wis. 463, 94 NW 351.

N. S.—McDonald's Est., 2 N. S. 123.

[a] **Where the costs are chargeable against the fund,** the court has the power to fix the allowance for solicitors' fees without taking proof as to the value of the services rendered. Perea v. Harrison, 7 N. M. 666, 41 P 529.

[b] **The amount of allowance made to counsel** in a proceeding involving the distribution of a testamentary trust rests in the sound discretion of the probate court. Bailey v. Smith, 214 Mass. 114, 101 NE 62.

[c] **Rules of chancery practice govern.**—The imposition of costs in proceedings against an executor for a distribution of the estate among the distributees is governed by the rules of chancery practice. Ryden v. Jones, 10 N. C. 24.

[d] **Stenographer's fees.**—In re Pearson, 8 North. Co. (Pa.) 23.

[e] **Costs to successful party.**—On affirmance by the district court of a decree of distribution on appeal by an executor, respondent is entitled to costs. Casey v. Brabec, 111 Minn. 43, 126 NW 401, 137 AmSR 531.

[f] **Statutory costs not allowable.**—On determining an appeal from a judgment of the county court making a final distribution, it was error for the circuit court to award any other than the statutory costs. McMahon v. Snyder, 117 Wis. 463, 94 NW 351.

4. U. S.—Ex p. Plitt, 19 F. Cas. No. 11,228, 2 Wall. Jr. 453.

Ala.—Mitchell v. Mitchell, 8 Ala. 414.

Cal.—In re Lux, 134 Cal. 3, 66 P 30.

Colo.—Church v. Eggleston, 3 Colo. A. 239, 32 P 984.

Ill.—Bennett v. Bennett, 282 Ill. 266, 118 NE 391 [rev 202 Ill. A. 364].

Ky.—Thirlwell v. Campbell, 11 Bush 163.

Mass.—Abbott v. Bradstreet, 3 Allen 587.

N. J.—In re Shedaker, 74 N. J. Eq. 802, 70 A 659.

N. Y.—Lee v. Lee, 39 Barb. 172.

Pa.—In re Rees, 246 Pa. 188, 92 A 126; Lusk's Est., 150 Pa. 517, 24 A 595; Geissinger's App., 17 A 222; Wilson's App., 3 Walk. 216; Bergdoll's Est., 27 Pa. Co. 358; Neill's Est., 3 Pa. Co. 197, 19 WklyNC 380; Walter's Est., 2 Chest. Co. 159.

Wash.—Sloan v. West, 63 Wash. 623, 116 P 272.

Eng.—Hilliard v. Fulford, 4 Ch. D. 389.

[a] **Illustration.**—In proceedings to obtain a share in the estate, it is error to tax costs against the administrators personally, where there is nothing to show that they precipitated the contest, or were responsible for it, or exceeded their official duties; and the fact that they were nephews of the decedent should be disregarded. Church v. Eggleston, 3 Colo. A. 239, 32 P 984.

[b] **Classes of costs.**—A fund in the hands of an administrator upon which a decree of the court acts for the purpose of distribution is liable to three classes of charges: (1) The necessary expenses of ascertaining it and reducing it into possesion; (2) a reasonable compensation for its safekeeping and supervision; and (3) the expenses of ascertaining the proper distributees and making distribution among them. Ex p. Plitt, 19 F. Cas. No. 11,228, 2 Wall. Jr. (U. S.) 453.

[c] **"Legal costs"** within the meaning of a statute relating to the distribution of estates has been construed to cover all the legal charges or expenses which prior to the passage of that act were payable out of the trust fund for distribution. Lane's Est., 3 Pa. Dist. 162.

[d] **The fees of an attorney** (1) although he was employed by a particular legatee or distributee, may be charged against the general fund where the services rendered by him inure to the benefit of all interested in the production and protection of such fund. Foster v. Foster, 126 Ala. 257, 28 S 624; Thirlwell v. Campwell, 11 Bush (Ky.) 163; In re Shedaker, (N. J.) 70 A 659; Neill's Est., 3 Pa. Co. 197, 19 WklyNC (Pa.) 380; McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134]; Ex p. Plitt, 19 F. Cas. No. 11,228, 2 Wall. Jr. 453. (2) But it is otherwise where his services are merely for the benefit or protection of his client, the others interested being represented by counsel of their own (McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134]; Foster v. Foster, 126 Ala. 257, 28 S 624; Evatt v. Mier, 114 Ark. 84, 169 SW 817, LRA1916C 759; In re Walden, 174 Cal. 776, 164 P 639; Bailey v. Barclay, 109 Ky. 636, 60 SW 376, 22 KyL 1244; Thirlwell v. Campbell, 11 Bush (Ky.) 163; Sims v. Birdsong, 59 SW 649, 22 KyL 1049), (3) where an allowance of the attorney's fee is not requested (Cook v. Jennings, 40 S. C. 204, 18 SE 640). (4) Where the owner of property joined in a petition for the appointment of an administrator and acquiesced in the administration on the property as the community property of himself and decedent until proceedings for distribution were commenced, when he filed a petition claiming the property as his own, which claim the court, proceeding as a chancellor, sustained, it was proper to award compensation to the administrator, his counsel and the guardian ad litem, although there was no claim therefor in the answer to the petition filed in the distribution proceedings. Sloan v. West, 63 Wash. 623, 116 P 272. (5) Counsel fees will be awarded out of the estate only to the successful party, and not to both of the contesting parties. Lee v. Lee, 39 Barb. (N. Y.) 172. (6) The compensation of an attorney appointed to represent nonresident heirs may be allowed out of the estate, to be charged on distribution to the heir represented by him, but the court cannot fix the compensation of the attorney in advance, he must wait until final distribution. In re Lux, 134 Cal. 3, 66 P 30.

[e] **Costs ex parte.**—On a petition for a distributive share of an

ally,[5] or against the claimant causing them,[6] as the case may be.

[§ 1423] **Q. Reservation of Assets.** Before making distribution of the whole or part of an estate, the personal representative is entitled or may be ordered to retain in his hands sufficient assets to meet contingent or disputed legacies,[7] or claims against the estate which are disputed or not yet due,[8] or are likely to arise in the future.[9] The amount to be reserved is fixed by law or the court's just discretion, considering the circumstances.[10] If it becomes unnecessary to dispose of such assets for

estate, when some of the heirs were not responsible for the resulting contest, costs should not be taxed against the estate as a whole, and claimants if successful should not be assessed with cost. Church v. Eggleston, 3 Colo. A. 239, 32 P 984.

[f] **Charge against residue.**—"The costs of the settlement of an estate are necessarily a charge against the residue." Smyth's Est., 21 Pa. Dist. 656, 657.

5. Evatt v. Miller, 114 Ark. 84, 169 SW 817, LRA1916C 759; Church v. Eggleston, 3 Colo. A. 239, 32 P 984; In re McFarland, 10 Mont. 586, 27 P 389; Osburn's App., 130 Pa. 359, 18 A 897; Witman's App., 28 Pa. 376; Axtell's App., 3 Pa. Cas. 488, 6 A 560; Walter's Est., 2 Chest. Co. (Pa.) 159.

[a] **Thus** executors are liable for costs incurred by litigating matters before auditors for distribution which have been adjudicated. In re Brinton, 10 Pa. 408.

[b] **Where the executors have failed to make a division** of an estate as directed by the supreme court, they should be charged with the costs of the proceedings to compel them to make such division. Osburn's App., 130 Pa. 359, 18 A 897.

[c] **Where an executor unjustly and for his own advantage resists payment** of a legacy, he is liable for the costs of a citation to render an account and subsequent proceedings to compel payment of the legacy. Witman's App., 28 Pa. 376.

[d] **Questions for court.**—Where in an action against an executor for a legacy he pleads want of assets, and an accounting is had before auditors, the question whether the executor was negligent in not paying the legacy or any part of it, so as to render him personally liable for the costs of the suit, is a question for the court upon the facts of the case as reported by the auditors. Meeker v. Arrowsmith, 16 N. J. L. 227.

[e] **When not charged against representative.**—An executor will not be charged with costs of litigating a demand of the devisees for interest on a trust fund, where the demand included more than the devisees were entitled to receive, although the general rule is that an executor must pay costs when he pays interest. Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 AmD 504.

[f] **Attorney's fees.** — Where an executor fails to pay over income to the beneficiary under the will for more than two years, and the beneficiary is compelled to sue to compel payment, his attorney is entitled to costs. Matter of Bass, 57 Misc. 531, 109 NYS 1084, 6 Mills Surr. 326.

6. Miss.—French v. Davis, 38 Miss. 167.

N. C.—Darden v. Maget, 18 N. C. 498.

Pa.—Evan's Est., 155 Pa. 646, 26 A 739; Lusk's Est., 150 Pa. 517, 24 A 595; Eckes' Est., 8 Pa. Dist. 252, 22 Pa. Co. 287; Johns' Est., 2 Chest. Co. 281; McCloskey's Est., 12 Phila. 74.

Tex.—Fowler v. Evans, 26 Tex. 636.

Wis.—In re Kirkendall, 43 Wis. 167.

Eng.—Hilliard v. Fulford, 4 Ch. D. 389.

N. S.—McDonald's Est., 2 N. S. 123.

[a] **Illustration.**—On the distribution of testator's estate among the various persons entitled after the death of the life tenant, if an audit is rendered necessary by attachments or assignments of certain distributive shares, it is proper that the costs of such audit be imposed on the shares so attached or assigned, rather than on the whole fund. Evans' Est., 155 Pa. 646, 26 A 739.

[b] **Where legatees voluntarily appear** in an ex parte proceeding instituted by an executor for an order appointing commissioners to divide his testator's estate among the legatees and oppose the confirmation of the report of the commissioners, no steps being taken to bring in the legatees as parties, the court cannot award costs against them. Darden v. Maget, 18 N. C. 498.

7. Md.—Clarke v. Sandrock, 113 Md. 422, 77 A 644; Ing v. Baltimore Assoc., 21 Md. 426.

N. J.—Petrie v. Voorhees, 18 N. J. Eq. 285.

N. Y.—Auburn Theological Seminary v. Cole, 20 Barb. 321; In re Denike, 3 Silv. Sup. 291, 6 NYS 450; Matter of Driskel, 100 App. Div. 171, 91 NYS 273.

N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445.

Pa.—In re Bertin, 245 Pa. 256, 91 A 669; Lathrop's Est., 14 Pa. Co. 245.

Eng.—In re Hall, [1903] 2 Ch. 226.

[a] **Thus** the personal representative is allowed to retain a fund in his hands if exposed to a suit for a devastavit to those entitled under a will on the principle of quia timet. Sims v. Chew, 15 Serg. & R. (Pa.) 197.

[b] **Partial distribution.**—In permitting a partial distribution of an estate, a share in which is claimed by one whose right as a legatee under the will has not been determined, if, in the opinion of the court enough of the estate would not remain after the proposed distribution to satisfy the claim, it should order a sufficient sum to be set apart and invested under the direction of the court to abide the event. Gable's App., 40 Pa. 231.

8. Cal.—In re Gird, 157 Cal. 534, 109 P 499, 137 AmSR 131; In re Straus, 144 Cal. 533, 77 P 1122.

Iowa.—Linton v. Crosby, 61 Iowa 401, 16 NW 342.

La.—Pehan's Succ., 5 La. Ann. 304; George's Succ., 4 La. Ann. 223.

Md.—Clarke v. Sandrock, 113 Md. 422, 77 A 644.

Mo.—Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365.

N. Y.—Hoyt v. Bonnett, 50 N. Y. 538; Matter of Kucielski, 49 Misc. 404, 99 NYS 828, 5 Mills Surr. 288; Field v. Field, 2 Redf. Surr. 160.

Pa.—Douglass' Est., 10 Pa. Dist. 479, 23 Pa. Co. 566; Pickering's Est., 4 Pa. Dist. 263, 16 Pa. Co. 359; Christian's Est., 2 Pa. Dist. 489, 13 Pa. Co. 283.

Eng.—Johnson v. Mills, 1 Ves. 282, 27 Reprint 1033.

[a] **It is the duty of an administrator** to reserve enough money to pay the debts before paying residuary devisees. Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365.

[b] **The reservation can be only for claims against the estate,** and not for those against the representative personally. Field v. Field, 2 Redf. Surr. (N. Y.) 160.

[c] **Discretion of court.**—The retention of assets to meet an unliquidated demand against the estate is not the right of the executor, but rests in the discretion of the probate court. Ing v. Baltimore Assoc., 21 Md. 426.

[d] **Where a claimant makes no effort to enforce his claim** (1) which is disputed, the probate court, on entering a final decree on an administrator's accounting, will not direct him to retain the amount of the disputed claim. Matter of Rasch, 26 Misc. 459, 55 NYS 434, 28 NYCivProc 98. (2) But it is otherwise if the claimant makes an effort and his failure to sue was because of the nonresidence of the administrator, and his refusal to make a voluntary appearance. Matter of Rasch, 26 Misc. 459, 55 NYS 434, 28 NYCivProc 98, 2 Gibb. Surr. 562.

[e] **Nature of claim.** — Executors are not bound, in distributing their testator's estate, to retain assets in their hands to meet a liability of which they have notice unless the liability amounts to a debt. Whittaker v. Kershaw, 45 Ch. D. 320.

[f] **Taxes.**—A representative who pays legacies, when he should reserve the money for taxes, cannot have relief from the courts. McMahon v. Sullivan, 14 AbbNCas (N. Y.) 405.

[g] **Transfer tax.**—(1) Where an appeal is pending to determine the liability of an estate for a transfer tax, a fund will be reserved for the payment of the tax in case such liability is finally established. Matter of Kucielski, 49 Misc. 404, 99 NYS 828, 5 Mills Surr. 288. (2) Where a decision imposing a tax on a legacy is disputed, the auditor may direct that the legatee give security to the accountant or that the accountant retain a sum sufficient to defray the tax. Fitzpatrick's Est., 9 Pa. Dist. 88.

[h] **Alternative order pending appeal.**—When the decision of the commissioner of internal revenue imposing a tax on a legacy is in dispute, and the accountant wishes to make distribution without payment of the legacy tax, the auditing judge may make an alternative order that the legatee secure the accountant in case the decision of the commissioner is sustained, or, failing that, that the accountant retain a fund sufficient to defray the tax, if it shall be finally held to be demandable. Fitzpatrick's Est., 9 Pa. Dist. 88.

[i] **Delay in filing claim.**—A creditor is not entitled to an order requiring an executor to retain sufficient assets to satisfy a claim which was not filed until after the estate in the executor's hands was fully administered. Thompson v. De Visser, 219 Mass. 40, 106 NE 548.

[j] **No admission of validity of a claim is implied** from a retainer of assets sufficient to pay it should it be established. Pole v. Simmons, 49 Md. 14.

9. In re Gird, 157 Cal. 534, 108 P 499, 137 AmSR 131; Peters v. Clendenin, 12 Mo. A. 521; Field v. Field, 2 Redf. Surr. (N. Y.) 160; Grogan v. Ashe, 156 N. C. 286, 72 SE 372.

[a] **An order of distribution on an annual settlement** should leave a margin in the representative's hands for later expenses. Peters v. Clendenin, 12 Mo. A. 521.

[b] **Anticipated costs of litigation** on a claim cannot be reserved for under a statute providing for the reservation of assets to meet claims against the estate. Field v. Field, 2 Redf. Surr. (N. Y.) 160.

[c] **Claim held not "contingent."**—Bowler v. Emery, 29 R. I. 310, 70 A 7.

10. In re Straus, 144 Cal. 553, 77 P 1122; Linton's Succ., 31 La. Ann. 130; Grigg's Est., 11 Phila. (Pa.) 23.

[a] **Illustration.**—An executor in filing his account has no right to reserve an amount in blank for discharging the necessary remaining expenses of closing the succession as

the purpose for which they were reserved, the representative must account for them as assets of the estate to the person entitled to receive them.[11]

Where the representative has given bond to pay debts and legacies, a retention or reservation of assets is not permissible.[12]

[§ 1424] **R. Liability to Refund on Deficiency of Assets[13]—1. In Absence of Refunding Bond or Other Indemnity—a. In General.** As a general rule, in the absence of a statute, where a personal representative makes voluntary distribution of a balance or settles legacies in full, he cannot maintain an action at law against the distributees or legatees to compel a refunding upon an insufficiency of assets in his hands for debts or claims,[14] except where a special promise to refund has been made,[15] or a refunding bond has been given.[16] Nor in the absence of a statute has the probate court jurisdiction to compel a legatee or distributee to refund.[17] Equity, however, will usually give relief and compel the legatee or distributee to refund his pro rata share of the deficiency, in proportion to the amount he has received from the estate,[18] al-

the law fixes the amount. Linton's Succ., 31 La. Ann. 130.

[b] **Amount proper to be reserved.**—Defendant was appointed executor of an estate which was appraised at four thousand one hundred and eighteen dollars and seventy-eight cents. After his appointment the executor managed the testator's business for a year, and finally closed it, realizing for the benefit of the estate a profit of six thousand eight hundred dollars. No account was filed until some eight years after letters were granted, when on citation the executor filed an account showing a balance in his hands, after payment of debts, of three thousand three hundred and seventeen dollars and ninety-eight cents, which he had had in his possession for nearly seven years. It was held that since the executor's commissions, if allowed on the entire amount passing through his hands, could not have exceeded eight hundred and thirty-five dollars and twelve cents, and the only attorney's fees allowable were such as were authorized for the probate of the will, notice to creditors, and preparing an inventory and the appraisement and an account and exhibit, it was not error to find that a distribution of one thousand and five hundred dollars to the widow's assignee would leave sufficient money to pay the executor's commissions, a reasonable attorney's fee, and charges of closing the estate, and to order the executor to make such payment. In re Straus, 144 Cal. 553, 77 P 1122.

11. Wells v. Mitchell, 39 Miss. 800; Thompson v. Thompson, 70 App. Div. 242, 75 NYS 401.

[a] **Reservation on partial voluntary settlement.**—If, in a partial voluntary settlement between an executor and the heir, funds are left in the hands of the former to pay certain legacies in the will which are illegal, the funds so retained continue to be assets in his hands, and on his failure to pay the illegal legacies he will be liable to account for them to the heir. Wells v. Mitchell, 39 Miss. 800.

12. In re Pope, 83 Nebr. 723, 120 NW 191; Bowler v. Emery, 29 R. I. 310, 70 A 7.

13. Liability of heirs or distributees for debts of intestate see Descent and Distribution §§ 271, 332.

Liability of legatees and devisees for debts of testator see Wills [40 Cyc 2060 et seq].

14. U. S.—Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485].

Fla.—Clifton v. Clifton, 54 Fla. 535, 45 S 458 [quot Cyc].

Ind.—Egbert v. Rush, 7 Ind. 706.

Md.—Somervell v. Somervell, 3 Gill 276, 43 AmD 340; Turner v. Egerton, 1 Gill & J. 430, 19 AmD 235.

Miss.—Turner v. Chambers, 10 Sm. & M. 308, 48 AmD 751.

N. Y.—In re Hodgman, 140 N. Y. 421, 35 NE 660 [aff 69 Hun 484, 23 NYS 725]; Blair v. Blair, 97 App. Div. 507, 90 NYS 190 [rev 42 Misc. 79, 85 NYS 722]; Underhill v. Rodwell, 18 App. Div. 361, 46 NYS 22.

N. C.—Sprinkle v. Holton, 146 N. C. 258, 59 SE 680.

Pa.—Miller v. Hulme, 126 Pa. 277, 17 A 587; Montgomery's App., 92 Pa. 202, 37 AmR 670; Weiser's App., 18 Pa. 423; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466.

W. Va.—Anderson v. Piercy, 20 W. Va. 282.

Eng.—Johnson v. Johnson, 3 B. & P. 162, 127 Reprint 89; Coppin v. Coppin, 2 P. Wms. 291, 24 Reprint 735; Orr v. Kaines, 2 Ves. 194, 28 Reprint 125.

N. S.—Re Ryerson, 29 N. S. 81.

"If an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a court of common law would not entertain an action for money had and received against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied." Johnson v. Johnson, 3 B. & P. 162, 169, 127 Reprint 89.

[a] **Void legacies.**—The rule does not apply to payment of legacies which are subsequently declared void by the courts, and in such cases the legatees will be compelled to refund, and will not be relieved by the fact that the executor would be protected from personal liability for such payment. Carter v. Board of Education, 68 Hun 435, 23 NYS 95 [aff 144 N. Y. 621, 39 NE 628].

[b] **Right of mortgagees.**—Land was conveyed subject to a mortgage by the mortgagor, and the interest thereon was paid by the obligor for more than thirty years after the mortgage became due, and for some three years after the death of the obligor his executors voluntarily paid legacies without taking refunding bonds, and no claim was made on the mortgage bond at the audit of the executor's account. It was held that the mortgagees could not recover either from the legatees or the executors a deficiency resulting on a subsequent sale of the property to pay the mortgage. In re Piper, 208 Pa. 636, 57 A 1118.

[c] **Liability of one legatee to another.**—A legatee who has received no more than his legal share of the estate is not liable to account to another legatee, who, by reason of the devastavit of the executor, fails to receive his full share, but the remedy is against the executor. Sprinkle v. Holton, 146 N. C. 258, 59 SE 680.

15. Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [quot Cyc]; Gibbs v. Clagett, 2 Gill & J. (Md.) 14; Norwood v. O'Neal, 112 N. C. 127, 16 SE 759.

16. Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [quot Cyc].

Liabilities and actions on refunding bond or other indemnity see infra §§ 1431–1437.

17. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560; Lang v. Stringer, 144 N. Y. 275, 39 NE 363 [rev 67 Hun 107, 22 NYS 44]; In re Underhill, 117 N. Y. 471, 22 NE 1120; Lang v. Howell, 21 NYS 102, 29 AbbNCas 117. 1 Pow. Surr. 243; Piper's Est., 12 Pa. Dist. 443, 28 Pa. Co. 589; Hand's Est., 11 Pa. Dist. 148; Stough's Est., 10 Pa. Dist. 547; Clinton's Est., 9 Pa. Dist. 455, 24 Pa. Co. 218; Geisz v. Geisz, 7 Pa. Dist. 615, 21 Pa. Co. 466; Wheeler's Est., 4 Pa. Dist. 265, 16 Pa. Co. 483, 36 WklyNC 296; Leavens' Est., 65 Wis. 440, 27 NW 324.

[a] **Where a decree of distribution is set aside** the orphans' court has power to direct restitution of amounts paid pursuant to such decree. Elliott's Est., 18 Pa. Co. 205; Stough's Est., 10 Pa. Dist. 547.

18. Fla.—Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [quot Cyc].

Ill.—Cutright v. Stanford, 81 Ill. 240; Union Trust Co. v. Shoemaker, 172 Ill. A. 365 [aff 258 Ill. 564, 101 NE 1050].

Md.—Zollickoffer v. Seth, 44 Md. 359.

N. Y.—Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [app dism 211 N. Y. 531 mem, 105 NE 1081 mem].

N. C.—Sprinkle v. Holton, 146 N. C. 258, 59 SE 680.

W. Va.—American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920; McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884.

Eng.—Johnson v. Johnson, 3 B. & P. 162, 127 Reprint 89; Doe v. Gray, 3 East 120, 102 Reprint 543.

[a] **A residuary legatee,** who, before the winding up of the estate, receives money on account, must refund the money if it is thereafter determined that it is needed for the payment of debts. Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [dism of app den 211 N. Y. 531 mem, 105 NE 1081 mem].

[b] **Where an executor assents to the title of a specific legatee,** the legatee is liable to respond to the executor if the result proves that the property is necessary for the payment of debts or expenses of administration. Matter of Warren, 148 App. Div. 525, 133 NYS 145.

[c] **Omission of unknown heir.**—Where the assets of certain estates were distributed between the parties whom the executrix understood were entitled to share therein, but by mistake no provision was made for an unknown heir, the distribution should be regarded as a family settlement, and only so much be required to be accounted for as was necessary to satisfy the claim of such heir. Matter of McDonough, 132 App. Div. 614, 117 NYS 258.

[d] **Liability for interest or income.**—(1) A legatee or distributee, when called upon to refund, will not be charged with interest prior to the demand (Fripp v. Talbird, 1 Hill Eq. (S. C.) 142) (2) unless he is entitled to other funds making interest in the hands of the court (Gittins v. Steele, 1 Swanst. 199, 36 Reprint 356). (3) Nor is he liable for any intermediate income. Jervis v. Wolferstan, L. R. 18 Eq. 18, 2 ERC 165. (4) But a residuary legatee, receiving the estate or any part of it from the executor, with a knowledge that the other legacies have not been paid or provided for, may be required to refund, with interest, to the same extent to which the execu-

though no refunding bond has been given,[19] where the representative acted in good faith and with due care and diligence in making the payments or distribution, honestly believing the assets sufficient, and the deficiency was caused by no fault on his part,[20] as where he was compelled to make payment or distribution under an order of court,[21] or where the legatees or distributees were guilty of fraud or misrepresentation in procuring the payment or distribution.[22] But equity will not grant relief if the assets were originally sufficient, and the deficiency is caused by the representative's neglect, waste, or bad faith.[23] Where the personal representative brought an action against the heirs and

tor is liable to the other legatees. Stephenson v. Axson, 8 S. C. Eq. 269.

[e] **Lien upon devised land for contribution.**—Equity will not decree a lien upon devised land, for the purchase price paid on its sale by an executor to enforce a decree of the probate court for contribution by the devisee toward the payment of the testator's debts, even though the money was used by the executor for that purpose, such sale being void. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

19. Ala.—Alexander v. Fisher, 18 Ala. 374.

Fla.—Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [quot Cyc].

Ill.—Cutright v. Stanford, 81 Ill. 240.

Ind.—Smith v. Smith, 76 Ind. 236.

Ky.—Hooser v. Hooser, 3 KyL 796, 11 Ky. Op. 651.

N. J.—Harris v. White, 5 N. J. L. 495.

N. C.—Pullen v. Hutchins, 67 N. C. 428; Stack v. Williams, 56 N. C. 13; Marsh v. Scarboro, 17 N. C. 551, 27 AmD 248.

Pa.—Saeger v. Wilson, 4 Watts & S. 501.

W. Va.—American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920.

20. Ala.—Moore v. Lesueur, 33 Ala. 237; Alexander v. Fisher, 18 Ala. 374; Sellers v. Smith, 11 Ala. 264.

Ark.—Ross v. Davis, 17 Ark. 113.

Conn.—Bidwell v. Beckwith, 86 Conn. 462, 85 A 682; Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285; Northrop v. Graves, 19 Conn. 548, 50 AmD 264.

Fla.—Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [quot Cyc].

Ill.—Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565; Cutright v. Sanford, 81 Ill. 240.

Ind.—Stokes v. Goodykoontz, 126 Ind. 535, 26 NE 391; Smith v. Smith, 76 Ind. 236.

Ky.—Moore v. Moore, 88 Ky. 683, 11 SW 780; Caldwell v. Kinkead, 1 B. Mon. 228.

La.—Beatty v. Dufief, 11 La. Ann. 74.

Md.—Zollickoffer v. Seth, 44 Md. 359; Buchanan v. Pue, 6 Gill 112; Somervell v. Somervell, 3 Gill 276, 43 AmD 340; Turner v. Egerton, 1 Gill & J. 430, 19 AmD 235.

Mass.—Walker v. Hill, 17 Mass. 380; Sheldon v. Kirkland, 8 Gray 531.

Mich.—Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

Nebr.—Brinkworth v. Hazlett, 64 Nebr. 592, 90 NW 537.

N. J.—Harris v. White, 5 N. J. L. 422; Lutjen v. Lutjen, 63 N. J. Eq. 391, 51 A 790 [rev on other grounds 64 N. J. Eq. 773, 63 A 625].

N. Y.—In re Hodgman, 140 N. Y. 421, 35 NE 660 [aff 69 Hun 484, 23 NYS 725]; Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 NYS 205 [aff 23 Misc. 242, 51 NYS 162]; Harvard College v. Quinn, 3 Redf. Surr. 514.

N. C.—Sprinkle v. Holton, 146 N. C. 258, 59 SE 680; Lowery v. Perry, 85 N. C. 131; Bumpass v. Chambers, 77 N. C. 357; Donnell v. Cooke, 63 N. C. 227; Lambert v. Hobson, 56 N. C. 424; Alexander v. Fox, 55 N. C. 106, 62 AmD 211; Marsh v. Scarboro, 17 N. C. 551, 27 AmD 248.

Oh.—Rogers v. Weaver, 5 Oh. 536; Ward v. Ward, 12 Oh. Cir. Dec. 59.

Pa.—Good's Est., 150 Pa. 301, 24 A 624.

Tenn.—Robinson v. Rutherford County Ct., 8 Humphr. 374.

Vt.—French v. Winsor, 36 Vt. 412.

Va.—Lewis v. Overby, 31 Gratt. (72 Va.) 601; Davis v. Newman, 2 Rob. (41 Va.) 664, 40 AmD 764; Gallego v. Atty.-Gen., 3 Leigh (30 Va.) 450, 24 AmD 650; Miller v. Rice, 1 Rand. (22 Va.) 438; Bower v. Glendening, 4 Munf. (18 Va.) 219.

Wash.—Burnley v. Lambert, 1 Wash. 308.

W. Va.—McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884; McEndree v. Morgan, 31 W. Va. 521, 8 SE 285; Shriver v. Garrison, 30 W. Va. 456, 4 SE 660; Anderson v. Piercy, 20 W. Va. 282.

Eng.—Whittaker v. Kershaw, 45 Ch. D. 320; Jervis v. Wolferstan, L. R. 18 Eq. 18; Nelthorp v. Hill, 1 Ch. Cas. 136, 22 Reprint 730; Davis v. Davis, Dick. 32, 21 Reprint 178; Doe v. Guy, 3 East 120, 102 Reprint 543; Rowe v. Thorpe, 1 Jur. 771; Edwards v. Freeman, 2 P. Wms. 435, 24 Reprint 803; Anonymous, 1 P. Wms. 495, 24 Reprint 487.

[a] **Illustrations.**—(1) An administrator, against whom a judgment was recovered after he had delivered over the property of his intestate to the distributees, may recover from them each the ratable part of such debt, when it appears that the intestate was only surety for the debt recovered, and that at the time of such delivery the principal was solvent; but the solvent distributees will not be required to pay the ratable parts of the insolvent ones. Clark v. Williams, 70 N. C. 679. (2) Where, without fraud or collusion, a decree is rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees for contribution to satisfy such decree, without first paying the money himself, or appealing from the decree against him, although requested and advised to do so. Bower v. Glendening, 4 Munf. (18 Va.) 219.

[b] **A mistake of fact** only will entitle the executor or administrator to recover an overpayment in some jurisdictions. Stokes v. Goodykoontz, 126 Ind. 535, 26 NE 391; Egbert v. Rush, 7 Ind. 706; Shriver v. Garrison, 30 W. Va. 456, 4 SE 660.

[c] **A mistake either of law or fact** is sufficient to authorize the recovery of an overpayment. Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285.

[d] **Notice of a remote contingent liability** on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice and the liability afterward ripens into a debt, he will be entitled to call on the residuary legatees to refund. Jervis v. Wolferstah, L. R. 18 Eq. 18, 2 ERC 165.

[e] **An order of a probate court authorizing the compromise of certain claims** accruing after distribution was a determination of the existence thereof, and it made no difference that authority had not yet been given to the receiver, with whom such compromise was made, by the court, and the executor could at once compel the beneficiaries to repay an amount sufficient to cover the amount agreed on. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

[f] **An executor who receives money as residuary legatee** cannot maintain a bill in equity against a specific legatee to compel him to refund pro rata money paid to him in satisfaction of his legacy, on account of expenses incurred subsequently to the payment of such legacy, where it appears that he has received as residuary legatee more than the entire amount of the expenses so incurred. White v. Easters, 38 Ala. 154.

[g] **Liability as between life tenant and remainderman.**—Where the life tenant and the remainderman of an estate mutually entered into a distribution of the estate, the life tenant being the executor of the estate, each should pay his proportion of an after accruing claim, regardless of which had the real estate. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

[h] **Special circumstances must be shown.**—In order to compel a refunding in such cases the representative must allege and prove special circumstances showing that he was in no default in not completing the settlement before making the payment or distribution. Lowery v. Perry, 85 N. C. 131; Bumpass v. Chambers, 77 N. C. 357; Donnell v. Cooke, 63 N. C. 227; Lambert v. Hobson, 56 N. C. 424; Alexander v. Fox, 55 N. C. 106, 62 AmD 211; Marsh v. Scarboro, 17 N. C. 551, 27 AmD 248.

[i] **Basis of suit.**—The claim which can furnish a basis for an action to compel a legatee or distributee to refund must be allowed in the probate court or established by proper proceedings elsewhere, as a liability of the estate involved. White v. Hepp, 6 Mart. (La.) 704; Brinkworth v. Hazlett, 64 Nebr. 592, 90 NE 537; Whittaker v. Kershaw, 45 Ch. D. 320.

[j] **Evidence** warranting a finding that a settlement between the executor and a beneficiary of the estate was a distribution and not a sale. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

21. Davis v. Vansands, 7 F. Cas. No. 3,655, 45 Conn. 600; Lang v. Stringer, 144 N. Y. 275, 39 NE 363 [rev 67 Hun 107, 22 NYS 447]; Stack v. Williams, 56 N. C. 13; Noel v. Robinson, 2 Ch. Cas. 145, 22 Reprint 887, 2 Ch. Rep. 248, 21 Reprint 670, 2 Vent. 358, 86 Reprint 484, 1 Vern. 90, 23 Reprint 334; Coppin v. Coppin, 2 P. Wms. 291, 24 Reprint 735; Newman v. Barton, 2 Vern. Ch. 205, 23 Reprint 733.

22. White's Est., 1 Pa. Dist. 508; Gallen's Est., 8 Pa. Co. 37; Stephenson v. Axson, 8 S. C. Eq. 274.

23. Ala.—Moore v. Lesueur, 33 Ala. 237.

Ga.—Demere v. Scranton, 8 Ga. 43.

Ky.—Lawson v. Hansborough, 10 B. Mon. 147.

Mich.—Breining v. Schneider, 46 Mich. 385, 9 NW 441.

N. Y.—In re Hodgman, 140 N. Y. 421, 35 NE 660 [aff 69 Hun 484, 23 NYS 725]; Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [dism of app den 211 N. Y. 531 mem, 105 NE 1081 mem]; Lupton v. Lupton, 2 Johns Ch. 614.

N. C.—Sprinkle v. Holton, 146 N. C. 258, 59 SE 680; Donnell v. Cooke, 63 N. C. 227.

S. C.—Ex p. Boyd, 29 S. C. Eq. 166; McLure v. Askew, 26 S. C. Eq. 162.

W. Va.—McEndree v. Morgan, 31 W. Va. 521, 8 SE 285.

Eng.—Whittaker v. Kershaw, 45 Ch. D. 320; Jervis v. Wolferstan, L. R. 18 Eq. 18, 2 ERC 165; Peterson v. Peterson, L. R. 3 Eq. 111; Anonymous, 1 P. Wms. 495, 24 Reprint 487.

[a] **Notice of outstanding claims** at the time when an administrator voluntarily distributed the assets in his hands will bar his right to call on the distributees for contribution. Moore v. Lesueur, 33 Ala. 237.

creditors for the purpose of settling his estate, and a third person became a party and presented a claim against the estate, and such third person was defeated in his action and executed a supersedeas bond, and subsequently the court directed the commissioner and receiver to turn over the funds of the estate to a trustee for the heirs of decedent, it was held that the court, on the motion of the third person, was authorized to direct the trustee and the heirs to return to the court's receiver a specified part of the fund, on it being satisfied that there was not enough of the estate under the control of the court to pay the debts.[24]

[§ 1425] **b. Proceedings to Enforce Liability—(1) Joint or Several Proceedings.** Under a statute providing for proceedings at law or in equity for contribution, it has been held that such proceeding if, at law, must be against the parties liable to contribution severally,[25] but, if in equity, may be against them jointly.[26]

[§ 1426] **(2) Time to Sue and Limitations.** While laches or lapse of time may bar the representative's suit in equity for a refunding,[27] it has been held that limitations do not commence to run against a bill by him for refunding from a distributee on a deficiency of assets to pay debts, until the discovery by the administrator of such deficiency, where he has been diligent in the premises.[28]

[§ 1427] **(3) Defenses.** Where the probate court upon due application has authorized the settlement of claims and no appeal has been taken from its order, one taking under the will, who had actual notice of the application for leave to settle, cannot set up a defense thereto in an action against him by the executor for contribution.[29]

[§ 1428] **(4) Parties.** In a suit in equity against a distributee for contribution, all distributees within the jurisdiction of the court should be made parties,[30] except those who have refunded their respective portions of the deficiency.[31] Unsatisfied creditors may be made parties to a bill for restitution against a residuary legatee who is also a devisee of land charged with the payment of debts,[32] but not where the devise of a residuary legatee and the residuary bequest are not charged with the payment of the testator's debts.[33] Where all the distributees are not within the jurisdiction of the court, the representative may sue such of them as are within the reach of the court's process,[34] and if all of them are nonresidents, he can attach such property in the state as is subject to an attachment in equity.[35]

[§ 1429] **(5) Evidence.** In a suit to compel a residuary legatee to refund an advance made to him, a refunding bond executed by him but not sued on, is admissible to show the prepayment and acceptance of the advance.[36]

[§ 1430] **(6) Judgment or Decree.** It has been held that a decree against several distributees for a refunding should not be several, but should be joint, requiring each to pay pro rata.[37] A decree for contribution by devisees and legatees in payment of debts and other liabilities of the estate is no more than a personal judgment, enforceable by execution.[38]

[§ 1431] **2. Liability on Refunding Bond or Other Indemnity—a. In General.** The liability of a legatee or distributee upon a refunding bond or other written indemnity depends of course upon the conditions of the instrument and varies accordingly,[39] his usual liability being only for his pro rata share of the deficiency of assets to pay subsequent-

[b] **Where the debt due is that of the representative himself,** his own knowledge of the debt or claim when he paid the legatee or distributee hinders his remedy to obtain a refund. Lang v. Howell, 21 NYS 102, 29 AbbNCas 117, Pow. Surr. 243.

[c] **Waste of coexecutor.**—If a legacy to an executor be of equal grade with those of other legatees, and because of the waste of a coexecutor who has died the assets are insufficient to pay all the legacies, the executor can only retain his due proportion of his legacy. Atcheson v. Robertson, 25 S. C. Eq. 39.

24. Cline v. Waters, 90 SW 231, 28 KyL 679.

25. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

26. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

27. Drayton v. Drayton, 1 S. C. Eq. 557; Robertson v. Archer, 5 Rand. (26 Va.) 319.

28. Clifton v. Clifton, 54 Fla. 535, 45 S 458.

29. Bidwell v. Beckwith, 86 Conn. 462, 85 A 682.

30. McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884.

31. Alexander v. Fisher, 18 Ala. 374.

32. Caldwell v. Kinkead, 1 B. Mon. (Ky.) 228.

33. Caldwell v. Kinkead, 1 B. Mon. (Ky.) 228.

34. McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884.

35. McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884.

36. Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [dism of app den 211 N. Y. 531 mem, 105 NE 1081 mem].

37. Cutright v. Stanford, 81 Ill. 240.

38. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

39. Mass.—Stone v. Bancroft, 108 Mass. 98.

Mich.—Hatheway v. Weeks, 34 Mich. 237.

Mo.—Callaway v. Title Guaranty, etc., Co., 132 Mo. A. 466, 111 SW 905.

N. Y.—Springsteen v. Samson, 32 N. Y. 703.

N. C.—Lowery v. Perry, 85 N. C. 131.

Pa.—Allwein v. Werntz, 7 Pa. Cas. 44, 9 A 925.

W. Va.—Fairmont Trust Co. v. Arnett, 74 W. Va. 127, 81 SE 733.

[a] **Legal costs and charges against an estate** afterward incurred in the settlement of it are within the terms of a bond reciting that the distributees would save the administrator harmless from all "debts, dues, demands and claims now due, or to grow due hereafter." Springsteen v. Samson, 32 N. Y. 703.

[b] **A sum allowed by the probate court to the administrator as commissions** is a "claim against the estate," within the bond given him on his turning over most of the estate to the heir, conditioned that the heir shall refund to the administrator such sums as may be necessary to pay "any and all claims that may be finally allowed against the estate, together with all necessary costs and expenses in defending the same, so that the said [administrator] shall be held harmless from loss or damage," it not being necessary that the claim be one of such nature as to require and be capable of defense. Callaway v. Title Guaranty, etc., Co., 132 Mo. A. 466, 111 SW 905 (recovery might be had where a claim of the administrator for commissions was allowed, although when the bond was given it was not expected such an item for commissions would arise, and the administrator had made a void agreement with the heir to act for less than his lawful commissions).

[c] **Claims of legatees** are demands against the estate covered by the condition of a refunding bond, to secure the repayment of a sum paid in distribution, "to discharge any debt or demand against the estate where executors shall not have other assets to pay." Allwein v. Werntz, 7 Pa. Cas. 44, 9 A 925.

[d] **A writing of indemnity other than a bond may be duly enforced,** (1) whether under seal or not, the benefit conferred by the early receipt of money furnishing a sufficient consideration for the promise. Lowery v. Perry, 85 N. C. 131. (2) But an action upon a promise by a distributee to indemnify an administrator for any advance made in excess of his share is not maintainable where the administrator has resigned without an allowance for the sum advanced in his final account and his successor has paid to the distributee such an amount that the distributive share exceeds that sum. Stone v. Bancroft, 108 Mass. 98.

[e] **A promise to refund** given to an administrator by one to whom he paid his distributive share gives no cause of action to those who are rightly entitled to the money so paid, and the money can be recovered only by the administrator to whom the promise was made. Norwood v. O'Neal, 112 N. C. 127, 16 SE 759.

[f] **The value of the estate is no defense** to a residuary legatee who has given the usual bond to pay all debts and legacies and has taken the estate and enjoyed it, when called upon to pay the outstanding legacies or debts, on the ground that the estate is less valuable than he had supposed; and he cannot claim his release on a surrender of the assets. Hatheway v. Weeks, 34 Mich. 237.

ly discovered debts of the estate,[40] not exceeding the value of property which the legatee or distributee has received from the estate without interest.[41]

[§ 1432] **b. Enforcement of Liability—(1) Right of Action.** The right to maintain an action on a refunding bond depends upon the terms of the statute providing therefor. It has been held that such action may be maintained by the creditors themselves,[42] or by the representative for their benefit;[43] but the representative cannot recover for his own use, by an action on the refunding bond, the amount paid to a legatee or distributee.[44]

[§ 1433] **(2) Summary Remedy by Scire Facias.** Scire facias, after a decree on a probate petition, issues on the refunding bond as a summary remedy at the instance of a creditor, under some statutes.[45]

[§ 1434] **(3) Conditions Precedent.** Whether there is a deficiency of assets and the extent thereof can be determined only by a settlement in the probate court,[46] and therefore until such settlement has been made the obligor in the bond cannot be held liable thereon.[47] Under a statute providing that if distributees of an estate are required to repay an amount distributed to them before final settlement a citation to show cause shall first issue, and, after hearing an order directing payment, an action may be maintained by the executor or administrator on the distributees' bonds if the money is not paid within the time allowed, an order settling and allowing an administrator's account, and distributing the estate subject to the distributees' bonds, is not a judgment against the sureties, but before they can be finally concluded they have a right to be heard in a regular action to which they are parties.[48] To entitle one whose estate has been distributed under a presumption of death and intestacy to recover of the surety on the bond given by a distributee it is not necessary that he first proceed against the administrator by demand or suit,[49] or that the order directing the distribution of the estate be first set aside and vacated.[50]

[§ 1435] **(4) Time to Sue and Limitations.** An action on a refunding bond is not premature if brought after suit begun against the obligee and after proceeds of the estate in his hands, including the bond, are ordered to be turned over to the administrator and after the money has been demanded and refused.[51] The statute of limitations begins to run against an action on such a bond from the discovery of the deficiency of the assets and not from the date of the bond.[52]

[§ 1436] **(5) Pleading.** In an action of debt by the representative on a refunding bond, he should aver and prove facts showing a breach of the conditions of the bond, as that he has given notice of debts to the legatee or distributee, that he had not or has not assets to pay such debts, that he has made a request for a return of so much of the legacy or distributive share as is necessary to discharge those debts in due proportion, and that the amount requested is unpaid;[53] and should demand judgment for the exact amount of the claim upon such legatee or distributee and no more.[54]

[§ 1437] **(6) Evidence.** Where to a scire facias upon a refunding bond defendant pleads that the debt recovered against the administrator was not justly due, and that the administrator fraudulently and collusively with plaintiff confessed the judgment, the burden of proof lies on defendant to verify his plea by proof of the fraud, otherwise judgment must be rendered against him on the scire facias.[55] Executors who sue on a bond which was taken from decedent's nephew on paying to

40. Desmond v. Fisher, 152 Mass. 521, 25 NE 968; Lloyd v. Rowe, 20 N. J. L. 680; Johnston v. Howell, 57 N. C. 87.

[a] **No liability for commissions and expenses.**—A refunding bond conditioned for repayment by a legatee of so much as should be necessary to pay debts which the executor had no assets to meet entitles the executor to recover only for payment of subsequently discovered debts, and not for a balance due to the executor for commissions and expenses of administration, which were not named in the condition of the bond. Lloyd v. Rowe, 20 N. J. L. 680.

[b] **A debt due by a legatee to outside parties** is not covered by such bond, and if paid by the representative under an attachment of the legatee's interest cannot be recovered by the representative in an action against the legatee on the bond. Desmond v. Fisher, 152 Mass. 521, 25 NE 968.

[c] **The extent of recovery from a specific legatee** is the value of the specific legacy, where it consists of property, at the time of delivery, with interest thereon and not the increased value. Ross v. Davis, 17 Ark. 113.

41. Fletcher v. Faust, 22 Ga. 559; Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [dism of app den 211 N. Y. 531 mem, 105 NE 1081 mem]; McKinzie v. Smith, 3 N. C. 372.

[a] **Right to discovery of amount received from the estate.**—In an action on a refunding bond given by distributees, the sureties, if any, are entitled to discovery as to the amount that each of such distributees received from the estate. Fletcher v. Faust, 22 Ga. 559.

[b] **If a legatee has expressly agreed to pay interest** by the terms of the refunding bond, he is liable therefor. Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [dism of app den 211 N. Y. 531 mem, 105 NE 1081 mem].

42. Schaeffer's App., 119 Pa. 640, 13 A 507 (creditors have no remedy in case of a deficiency of assets except upon such bond).

43. Ark.—Ross v. Davis, 17 Ark. 113.

Ind.—Chandler v. Morrison, 123 Ind. 254, 23 NE 160.

N. J.—Lloyd v. Rowe, 20 N. J. L. 680.

N. Y.—Clark v. Truslow, 161 App. Div. 675, 146 NYS 750 [app dism 211 N. Y. 531 mem, 105 NE 1081 mem].

N. C.—Henderson v. McAleer, 27 N. C. 632.

[a] **Right of action in administrator only.**—Where one claiming as a distributee, upon receiving a certain sum from the administrator, gave to the administrator a receipt for such sum, "in full of his interest in said estate," in which receipt he stipulated that "should any lawful claim come against said estate," he would "refund his proportionate part of said lawful claim," it was held that no cause of action accrued to those who were rightfully entitled to the amount, but that the money could be recovered only by the administrator. Norwood v. O'Neal, 112 N. C. 127, 16 SE 759.

44. Henderson v. McAleer, 27 N. C. 632.

[a] **No action lies at law for the benefit of the administrator** under Code § 2316 et seq, the bond being by the express terms of the act for the benefit of creditors of the estate, and the remedy of the administrator, upon recovery of judgment against him, being in equity. Robinson v. Rutherford County Ct., 8 Humphr. (Tenn.) 374.

45. Jenkins v. Wood, 144 Mass. 238, 10 NE 818; Chatham v. Boykin, 6 N. C. 301; Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

[a] **Where a plea of fully administered is found in favor of the representative,** a summary remedy by scire facias is provided for which may be resorted to by the creditor. Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

46. Neal v. Maxwell, 40 Miss. 726; Ratliff v. Davis, 38 Miss. 107.

47. Neal v. Maxwell, 40 Miss. 726.

[a] **Accordingly,** a court of equity will not, where a refunding bond has been given, set off against a claim of the obligor in the bond his pro rata share of a debt established against the estate, until a deficiency of assets and his consequent liability to refund has been established by the probate court. Ratliff v. Davis, 38 Miss. 107.

48. Noble v. Whitten, 34 Wash. 507, 76 P 95.

49. Beggs v. Chicago Bonding, etc., Co., 207 Ill. A. 621.

50. Beggs v. Chicago Bonding, etc., Co., 207 Ill. A. 621.

51. Chandler v. Morrison, 123 Ind. 254, 23 NE 160.

52. Clifton v. Clifton, 54 Fla. 535, 537, 45 S 458 [cit Cyc]; Salisbury v. Black, 6 Harr. & J. (Md.) 293, 14 AmD 279.

53. Chandler v. Morrison, 123 Ind. 254, 23 NE 160; Lloyd v. Rowe, 20 N. J. L. 680; Smith v. Fidelity, etc., Co., 21 LancLRev (Pa.) 321; Moss v. Moss, 4 Hen. & M. (14 Va.) 293.

[a] **The general averment "that the executor had not and hath not other assets to pay"** is sufficient; and it is not necessary to aver that there were no other legacies to abate. Lloyd v. Rowe, 20 N. J. L. 680.

54. Lowery v. Perry, 85 N. C. 131.

55. Chatham v. Boykin, 6 N. C. 301.

him profits of a contract claimed to have been performed by decedent for the nephew's benefit to secure payment of any claim against the estate arising from the contract are not bound to prove the validity of the nephew's claim as strictly as he would have to do if he was suing to recover against the executors.[56]

XII. SALES UNDER ORDER OF COURT[57]

[§ 1438] **A. In General; Statutory Provisions.** While at common law the real estate of a decedent was not subject to his debts,[58] nor was the personal representative authorized to sell it in the absence of some testamentary provision authorizing him to do so,[59] statutes have been universally enacted providing for a sale of the realty by an executor or administrator by the license of and under the supervision of the courts when the circumstances of the case render such a course necessary.[60] In order for a sale to be authorized under such a statute it must be shown that the circumstances are such as are contemplated by the statute,[61] and in obtaining an order for sale and making the sale, the statutory method of procedure must be complied with.[62] With regard to personalty, modern statutes, as has been

56. Dunfee v. Dunfee, 145 App. Div. 108, 129 NYS 142.

57. [a] **A mortgage** is in effect a sale. Wallace v. Grant, 27 Wash. 130, 67 P 578. Hence no distinction will be made here between proceedings for sale and proceedings to mortgage the realty unless such distinction becomes necessary.

Cross references:

Judicial sales generally see Judicial Sales [24 Cyc 1].

Sale of personalty under testamentary authority or common-law power see supra § § 716–752.

Sale of realty under testamentary authority see supra §§ 636–688.

58. See supra §§ 328, 1261.

59. See supra § 630.

60. U. S.—Davis v. Gains, 104 U. S. 386, 26 L. ed. 757.

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Woods v. Legg, 91 Ala. 511, 8 S 342; Hall v. Hall, 47 Ala. 290; King v. Kent, 29 Ala. 542; Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

Cal.—Packer's Est., 125 Cal. 396, 58 P 59, 73 AmSR 58.

Conn.—Phelan v. Elbin, 84 Conn. 208, 79 A 187.

Ga.—Harwell v. Foster, 102 Ga. 38, 28 SE 967; Wellborn v. Rogers, 24 Ga. 558.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Therens v. Therens, 267 Ill. 592, 108 NE 712.

Ind.—Barton v. Kimmerley, 165 Ind. 609, 76 NE 250, 112 AmSR 252.

Ky.—Buddeke v. Clay, 12 Ky. Op. 335.

Me.—Nowell v. Nowell, 8 Me. 220.

Md.—Alexander v. Fidelity, etc., Co., 108 Md. 541, 70 A 209; Waring v. Waring, 2 Bland 673.

Mass.—Crouch v. Eveleth, 12 Mass. 503; Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—In re Rodgers, 192 Mich. 156, 160 NW 753.

Miss.—Hargrove v. Baskin, 50 Miss. 194; Adams v. Harris, 47 Miss. 144.

Mo.—Gannett v. Leonard, 47 Mo. 205.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645; State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Bridgewater v. Brookfield, 3 Cow. 299.

N. C.—Waugh v. Blevins, 68 N. C. 167.

Or.—In re Noon, 49 Or. 286, 88 P 673, 90 P 673.

Pa.—Com. v. Wing, 253 Pa. 226, 97 A 1072; Freker v. Berg, 193 Pa. 442, 44 A 580; Kiskaddon v. Dodds, 21 Pa. Super 351; Fox's Est., 18 Pa. Co. 114.

Philippine.—Gutierrez v. Ramirez, 27 Philippine 281.

S. C.—Perry v. Brown, 17 S. C. L. 45.

Tenn.—Dulles v. Read, 6 Yerg. 53.

Tex.—Templeton v. Ferguson, 89 Tex. 47, 33 SW 329; Bartley v. Harris, 70 Tex. 181, 7 SW 797; Williams v. San Saba County, 59 Tex. 442; Jones v. Gilliam, (Civ. A.) 199 SW 694.

Wash.—Wallace v. Grant, 27 Wash. 130, 67 P 578.

Eng.—Tulloch v. Tulloch, L. R. 3 Eq. 574; Curtis v. Price, 12 Ves. Jr. 89, 33 Reprint 35; Holme v. Stanley, 8 Ves. Jr. 2, 32 Reprint 249.

Ont.—Yost v. Adams, 13 Ont. A. 129, 8 Ont. 411; In re Booth, 6 OntWR 503.

See also Constitutional Law §§ 514, 516.

[a] **Statutes not retroactive.**—Packer's Est., 125 Cal. 396, 58 P 59, 73 AmSR 58; Babbit v. Doe, 4 Ind. 355; Johnson v. Futrell, 86 N. C. 122; In re Noon, 49 Or. 286, 88 P 673, 90 P 673.

[b] **A private or special act** (1) authorizing such sale for the payment of debts is constitutional, where it contains the usual provisions of a general statute for the same purpose. Florentine v. Barton, 2 Wall. 210, 17 L. ed. 783; Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873; Dubois v. McLean, 7 F. Cas. No. 4,107, 4 McLean 486; Shehan v. Barnett, 6 T. B. Mon. (Ky.) 592; Kibby v. Chitwood, 4 T. B. Mon. (Ky.) 91, 16 AmD 143; Gannett v. Leonard, 47 Mo. 205. (2) A special statute authorizing an administrator to sell merely for purposes of speculation has been held unconstitutional, as in derogation of the rights of the heirs which became vested on the death of the ancestor. Brenham v. Story, 39 Cal. 179.

[c] **A statute providing that the representative shall not be required to sell** any property other than that of a perishable nature does not prohibit the probate court from ordering a sale of the property of an estate on the petition or application of the administrator. Alexander v. Maverick, 18 Tex. 179, 67 AmD 693.

[d] **Lien created by proceedings for sale.**—Proceedings by the representative to sell realty to pay debts create a lien superior to any that may thereafter attach against the estate at the instance of creditors of an heir. Carter v. Carter, 4 KyL 718.

[e] **In the absence of statute chancery has not jurisdiction** to decree the sale of lands at suit of a creditor, unless he has some specific lien thereon or right therein. It is only by virtue of the statute making such real estate assets that it may be sold for creditors. McPike v. Wells, 54 Miss. 136.

[f] **Independent administration.**—Under Remington & B. Code § 1444, authorizing the administration of estates, where the will so provides without the intervention of the court, after the filing of an inventory and an adjudication that the estate is solvent, upon a showing of the fact of solvency, the estate passes from the immediate jurisdiction of the court, and, unless it resumes jurisdiction because of the executor's failure faithfully to execute his trust, as provided therein, it cannot authorize a sale of the testator's real or personal property by the executor. Fulmer v. Gable, 73 Wash. 684, 132 P 641.

61. Ala.—Creel v. Creel, 167 Ala. 599, 52 S 902; Kirkbride v. Kelly, 167 Ala. 570, 52 S 660.

Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

Cal.—In re Rawitzer, 175 Cal. 585, 166 P 581.

Ky.—Gardner v. Craddock, 4 Bush 370.

Mo.—State v. Holtcamp, 245 Mo. 655, 151 SW 153; Bompart v. Lucas, 21 Mo. 598.

N. Y.—In re Reed, 214 N. Y. 383, 108 NE 565 [rev 159 App. Div. 931, 144 NYS 1142]; In re Roberts, 214 N. Y. 369, 108 NE 562 [aff 162 App. Div. 922, 146 NYS 1110].

N. C.—Powell v. Felton, 33 N. C. 469.

Pa.—Krug's Est., 13 YorkLegRec 95.

[a] **A power to authorize an exchange should be exercised with extreme caution,** and where all the parties in interest except the petitioner are adverse to such exchange and show good reasons for their opposition, it should not be ordered. Miller's Est., 16 Pa. Co. 449.

[b] **Statutory conditions the same whether representative or creditor applies for sale.**—Matter of Meagley, 39 App. Div. 83, 56 NYS 503.

[c] **Delay in applying for letters** of administration may under statute preclude a sale of realty, the title to which has passed to a bona fide purchaser. Fonda v. Chapman, 23 Hun (N. Y.) 119.

When sale authorized see infra §§ 1439–1459.

62. Ala.—Roy v. Roy, 159 Ala. 555, 48 S 793.

Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

Cal.—Wills v. Pauly, 116 Cal. 575, 48 P 709.

Ill.—Dicus v. Scherer, 277 Ill. 168, 115 NE 161.

Ind.—Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

N. Y.—Duryea v. Mackey, 151 N. Y. 204, 45 NE 458; Long v. Long, 142 N. Y. 545, 37 NE 486; Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292; Kingsland v. Murray, 133 N. Y. 170, 30 NE 845; Moser v. Cochrane, 107 N. Y. 35, 13 NE 442; Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672]; Matter of Meagley, 39 App. Div. 83, 56 NYS 503.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791.

Tex. — Thompson v. Dodge, (Civ. A.) 210 SW 586.

Ont.—In re Booth, 6 OntWR 503.

"The jurisdiction of the Surrogate's Court to entertain such a proceeding is statutory, and must be exercised in the manner and according to the procedure prescribed in the statute." Matter of Pirie, 133 App. Div. 431, 432, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672].

[a] **In the chancery court** as well

seen, sometimes curtail the representative's common-law power of sale, and require him to obtain an order of court authorizing a sale.[63]

[§ 1439] **B. When Authorized—1. In General.** The court may usually direct the sale of personal property which is of a perishable nature, or a sale of which is necessary for its preservation,[64] and in some jurisdictions a sale of either realty or personalty may be authorized or directed where this is necessary for the general purpose of administration or where it is apparent that such course is for the best interest of the estate.[65] But in order to justify an order for the sale of realty it must be shown that the sale is necessary for some authorized purpose.[66] It has been held that a sale of realty may be ordered to provide the support to which

as in the probate court the statutory requirements with respect to the sale of realty must be complied with. Roy v. Roy, 159 Ala. 555, 48 S 793.

[b] **Where one of the joint purchasers of real estate dies,** a proceeding to sell the lands to equalize the payments does not fall within the rules applicable to cases of sale for partition and for the payment of debts, in relation to the necessary proof, account, etc. Rankin v. Black, 1 Head (Tenn.) 650.

[c] **Statute not validating irregular proceeding.**—A statute which provides that, when the estate of a decedent who left a widow and children does not exceed fifteen hundred dollars, the court shall set apart the whole estate to the widow and children, subject only to certain expenses, does not validate an administrator's sale of land by order of the court to pay such expenses, without following the proceedings prescribed by statute, although the whole estate of which the land is a part has been set aside to the widow and children. Wills v. Pauly, 116 Cal. 575, 48 P 709.

Manner and conduct of sale see infra § 1578–1583.

Proceedings for sale see infra §§ 1486–1556.

63. See supra § 719.

64. Adkinson v. Wright, 46 Ala. 598; In re Rawitzer, 175 Cal. 585, 166 P 581; In re Fisher, 128 Iowa 626, 104 NW 1013; Joslin v. Caughlin, 26 Miss. 134.

[a] **Duty to apply for leave to sell; fluctuating stocks.**—"It may be conceded that an executor, finding himself in possession of property of a perishable nature, or of property which was likely to depreciate in value unless immediately disposed of, would be chargeable with the duty of appearing forthwith before the court with an application for leave to sell; and, for that matter, it would seem to be the part of ordinary business prudence to so proceed, even though the statute book contained no requirement in terms on the subject. But by the expression, 'likely to depreciate in value,' as used in the statute, nothing more was meant, as we think, than some permanent loss to the property in whole or in part. Most certainly it was not intended thereby to require under penalty of personal liability an immediate sale of all property subject to fluctuations in market value, and solely because thereof. Indeed, by inexorable law of the world of commerce, every species of personal property which is the subject of barter and sale is held to respond to the frequent, if not daily, fluctuation in market values; and, if an executor were bound at his peril to guard against such, there would be as much reason in holding him to a liability for selling too soon as there would be in mulcting him in damages for having held too long. In any event, the subject cannot be governed by a hard and fast rule. Reasonable business prudence is all that is required at the hands of one managing an estate." In re Fisher, 128 Iowa 626, 629, 104 NW 1023.

[b] **The probate court has no right to direct the sale of property bequeathed unless** this is necessary for the preservation of it. Joslin v. Caughlin, 26 Miss. 134.

65. Cal.—In re Leonis, 138 Cal. 194, 71 P 171.

Conn.—Candee v. Candee, 87 Conn. 85, 86 A 758.

Ill.—Johnson v. Buck, 220 Ill. 226, 77 NE 163.

La.—Pool's Succ., 14 La. Ann. 677.

Me.—In re Snow, 96 Me. 570, 53 A 116.

Md.—Crawford v. Blackburn, 19 Md. 40.

Mich.—In re Rodgers, 192 Mich. 156, 160 NW 753.

Minn.—Kelly v. Slack, 93 Minn. 489, 101 NW 797; Deppe v. Ford, 89 Minn. 253, 94 NW 679.

Miss.—Joslin v. Caughlin, 26 Miss. 134.

N. Y.—Matter of Titus, 86 Misc. 375, 148 NYS 359 [rev on other grounds 170 App. Div. 764, 156 NYS 509]; In re Rich, 2 NYS 176; Matter of Cogswell, 4 Redf. Surr. 241.

N. C.—McMillan v. Reeves, 102 N. C. 550, 9 SE 449; Hinton v. Powell, 54 N. C. 230.

Pa.—Freker v. Berg, 193 Pa. 442, 44 A 580; Gamble's Est., 9 Pa. Dist. 691; Schrack's Est., 9 Pa. Dist. 149; McAlpin's Est., 1 Phila. 440; Rhoades' Est., 4 WklyNC 527.

S. C.—Harris v. Harris, 86 S. C. 409, 68 SE 628.

Tex.—Gillenwaters v. Scott, 62 Tex. 670.

[a] **Illustrations.**—(1) The court has power to order a sale of real estate held by executors in a will directing them to collect the rents thereof, and divide the same among testator's wife and children, until the youngest child should reach maturity, and then to sell the land and divide the proceeds among the wife and children, and to order a reinvestment of the proceeds, after careful investigation, so that the rights of the remaindermen may be fully protected. Harris v. Harris, 86 S. C. 409, 68 SE 628. (2) A sale of real estate has also been allowed on the sole ground that there would be a great deal of litigation and expense necessary in order to recover it for the estate. Poor v. Boyce, 12 Tex. 440.

[b] **Land of little value.**—If the value of the land is so little that the whole would not produce more than the expenses of administration, a sale should not be ordered. In re Cook, 137 Cal. 184, 69 P 968.

[c] **Sale of notes and accounts.**—Where notes and accounts due the succession are numerous and small in amount, and constitute, as it were, a mass of bad debts, the discretion of the judge of probate in ordering their sale at public auction will be considered as legally and properly exercised. Pool's Succ., 14 La. Ann. 677.

[d] **Pending a contest** over the probate of a will or the grant of letters of administration, the person in whose charge the personalty has been placed will be generally allowed to sell that portion of the assets which may be necessary for the preservation and benefit of the estate. Public Administrator v. Burdell, 4 Bradf. Surr. (N. Y.) 252.

[e] **Unreasonable withholding of consent.**—Where the price offered for real estate is advantageous, and the rights of the only objecting party in interest, if he has any, will not be affected by the sale, the withholding of his consent is unreasonable and a sale will be ordered, since an unreasonable withholding of consent is one of the grounds upon which a sale may be decreed under the act of April 27, 1855 § 5. Goddard's Est., 9 Pa. Dist. 703.

[f] **Estates of deceased soldiers; consent of heirs.**—Harris v. Graves, 26 Tex. 577.

[g] **When sale of judgment not proper.**—Where several persons, as heirs and legal representatives, are the owners in indivision of a judgment from which a devolutive appeal is pending, the sale of the judgment will not be ordered to effect a partition, on the application of one of the coöwners, opposed by the others, when it does not appear that the administrator has made any effort to execute the judgment, especially in a case where the sale would inure to the benefit of one only of the coproprietors, and to the detriment of the others. Rochereau v. Maignan, 32 La. Ann. 45.

[h] **When order of sale properly refused.**—It is the duty of the administrator to ascertain the nature and extent of the assets before he attempts to sell them by an indefinite description of the rights and interests of the succession in lands and debts, and an order of sale under such description will be refused, although the sale has been advised by a family meeting, for if decedent had no rights the sale would be a fraud upon the purchasers, while if he had rights the vagueness of their description would necessarily operate to the injury of the minor heirs. Boudreaux's Succ., 6 La. Ann. 78.

66. Ala.—King v. Gilreath, 154 Ala. 129, 45 S 89; Johnson v. Porterfield, 150 Ala. 532, 43 S 228; Pettit v. Pettit, 32 Ala. 288; Bishop v. Hampton, 15 Ala. 761; Couch v. Campbell, 6 Port. 262; Lee v. Campbell, 6 Port. 249; Wyman v. Campbell, 6 Port. 219, 31 AmD 677; Wiley v. White, 3 Stew. & P. 355; Wiley v. White, 2 Stew. 331.

Ark—Adamson v. Parker, 74 Ark. 168, 85 SW 239; Bryan v. Craig, 64 Ark. 438, 44 SW 348.

Cal.—In re Rawitzer, 175 Cal. 585, 166 P 581; Janes v. Throckmorton, 57 Cal. 368; Haynes v. Meeks, 20 Cal. 288; Townsend v. Gordon, 19 Cal. 188.

Del.—Vincent v. Platt, 5 Harr. 164.

D. C.—Marfield v. McMurdy, 25 App. 342.

Ga.—Sturtevant v. Robinson, 133 Ga. 564, 66 SE 890.

Ill.—Goetz v. Wenzel, 177 Ill. A. 484.

Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198; Ramey v. McCain, 51 Ind. 496; Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

La.—Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987.

Me.—In re Snow, 96 Me. 570, 53 A 116; Gross v. Howard, 52 Me. 192.

Mich.—In re Rodgers, 192 Mich. 156, 160 NW 753; Eberstein v. Oswalt, 47 Mich. 254, 10 NW 360.

Miss.—Currie v. Stewart, 27 Miss. 52, 61 AmD 500; Laughman v. Thompson, 14 Miss. 259.

Mo.—Waldermeyer v. Loebig, 183 Mo. 363, 81 SW 904; Bompart v. Lucas, 21 Mo. 598; Jarvis v. Russick, 12 Mo. 63.

N. H.—Harris v. Ingalls, 74 N. H. 35, 64 A 727.

the widow and children are entitled under statute in case the personalty is insufficient.[67]

Discretion of court. It has been held that the granting of a license to sell real estate is within the discretion of the court, to be exercised on equitable principles.[68]

[§ 1440] **2. For Payment of Debts—a. In General.** The most usual object for which the statutes authorize the court to order a sale of decedent's realty is for the payment of his debts,[69] but the

N. J.—Pierson v. Garrison, (Ch.) 91 A 829.

N. Y.—Matter of Foley, 39 App. Div. 248, 57 NYS 131; Corwin v. Merritt, 3 Barb. 341; Peo. v. Corlies, 3 N. Y. Super. 229; Bloom v. Burdick, 1 Hill 130, 37 AmD 299.

Oh.—Newcomb v. Smith, 5 Oh. 447; Longley v. Sewell, 4 OhS&CP 1, 2 OhNP 376.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791; Wright v. Edwards, 10 Or. 298.

Pa.—Woolman's Est., 6 Pa. Dist. 205, 19 Pa. Co. 281.

Tex. — Withers v. Patterson, 27 Tex. 491, 86 AmD 643; Flanagan v. Pierce, 27 Tex. 78.

Wis.—Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

Eng.—Brookfield v. Bradley, Jac. 632, 4 EngCh 632, 37 Reprint 989.

Ont.—Byer v. Grove, 2 Ont. L. 754.

[a] **Illustrations.**—(1) The court is not authorized to decree a sale, except to pay debts or for the purpose of partition, when by report of the commissioners in partition it is shown that the land cannot be equitably divided. Flanagan v. Pierce, 27 Tex. 78. (2) Where the probate court directed the administrator to borrow money to complete a building, and to execute a trust deed on the premises, the work not being of the character contemplated by the statute authorizing the employment of labor to preserve the estate, the trust deed was void, and was properly canceled. Waldermeyer v. Loebig, 183 Mo. 363, 81 SW 904. (3) A court of ordinary has no power to order a resident administrator to sell an undivided interest in an estate belonging to a nonresident ward for settlement with a foreign guardian. Sturtevant v. Robinson, 133 Ga. 564, 66 SE 890. (4) Where a foreign will is ordered registered and executed by a Louisiana court at the instance of a foreign executor, without his being recognized as executor, an order obtained by him for the sale of property specifically bequeathed, on a petition alleging that the succession owed no debts, is void. Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987. (5) A petition to sell land to pay the widow's award is properly dismissed where the land was devised to the widow for life, with remainder in fee to her daughter, who was appointed executrix, and the evidence shows that the widow collected rents and paid taxes with the intention of accepting the provisions of the will until more than seven years after the testator's death and does not support a charge that the executrix and an attorney fraudulently represented that the award would be collected to induce the widow to allow the seven years to run. Goetz v. Wenzel, 177 Ill. A. 484.

[b] **Sale to maintain children and improve property.**—A sale of an intestate's real estate, made by an administrator upon a joint application with guardians, not to pay debts, but to maintain children and improve the property, is not valid. Newcomb v. Smith, 5 Oh. 447.

[c] **Law in force at time of decedent's death governs.**—The court has no power to order the sale of real property after the title has vested in the heirs, except for the purposes provided by the law in force at the time of the death of the ancestor. In re Roach, 139 Cal. 17, 72 P 393; Packer's Est., 125 Cal. 396, 58 P 59, 73 AmSR 58.

[d] **A license to accept an advantageous offer** for the purchase of real estate can be granted to the executor only where the court could under the statute grant a license to sell at auction to pay debts or legacies. In re Snow, 96 Me. 570, 53 A 116.

[e] **The court may properly defer the sale** of realty for the payment of debts where the life tenant objects to the sale and the creditors express a willingness to wait pending arrangements for a mortgage, and it is alleged that a present sale would result in the sacrifice of the property. Woolman's Est., 6 Pa. Dist. 205.

Where sale authorized see infra §§ 1439–1459.

67. Ill.—Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

Ind.—Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

Iowa.—Newans v. Newans, 79 Iowa 32, 44 NW 213.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

Tex.—Wilkin v. Simmons, (Civ. A.) 151 SW 1145.

But compare Newcomb v. Smith, 5 Oh. 447 (set out supra note 66 [b]).

[a] **Family allowances are debts** within the meaning of the statute, for which real estate may be sold. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

[b] **In Pennsylvania** (1) it has been held that the court may order a sale of real estate to pay debts, maintain and educate children, etc., but not for the purpose of giving to the widow her statutory allowance. Lyman v. Byam, 38 Pa. 475. But see Heyer's Est., 8 Kulp (Pa.) 107 (orphans' court has jurisdiction to order sale of real estate for payment of widow's exemption). (2) Where a widow elects to take her statutory allowance in real estate, such allowance becomes, after the confirmation of the report of the appraisers that the land cannot be divided without injury, a charge on it, and the orphans' court has power to enforce payment of the charge by a decree that it be made out of the lands by sale. Greenawalt's Est., 16 Pa. Super. 263. Allowance to surviving wife, husband, or children generally see supra §§ 758–874.

Necessity of insufficiency of personalty see infra §§ 1449–1453.

68. Conn.—Candee v. Candee, 87 Conn. 85, 86 A 758.

Me.—Nowell v. Nowell, 8 Me. 220.

Mass.—Livermore v. Haven, 23 Pick. 116; In re Allen, 15 Mass. 58; Scott v. Hancock, 13 Mass. 162.

Pa.—Lukens' Est., 10 Pa. Dist. 118; Himelspark's Est., 8 Pa. Dist. 327; Wright v. Taylor, 26 Pa. Co. 369, 32 PittsbLegJNS 361.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

[a] **Where amount could be raised by mortgage.**—The court is not bound to refuse an order of sale whenever it appears that the required amount of money can be raised by mortgage. In re Newlove, 142 Cal. 377, 75 P 1083.

[b] **Depression in market value of real estate.**—It is not a good ground of objection to an application by an administrator for leave to sell lands for the purpose of paying debts, that the market is depressed, and that for this reason the property will not sell for its full value. Jackson v. Warthen, 111 Ga. 834, 36 SE 214.

69. U. S.—Florentine v. Barton, 2 Wall. 210, 17 L. ed. 783; Davis v. Van Sands, 7 F. Cas. No. 3,655, 45 Conn. 600.

Ala.—Rainey v. McQueen, 121 Ala. 191, 25 S 920; Price v. Wilkinson, 10 Ala. 172; Leavens v. Butler, 8 Port. 380.

Ark.—Turner v. Turner, 216 SW 44; Mays v. Rogers, 52 Ark. 320, 12 SW 579.

Cal.—In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; In re Brannan, 5 Cal. Unrep. Cas. 882, 51 P 320.

Conn.—Mathewson v. Wakelee, 83 Conn. 75, 75 A 93; Griswold v. Bigelow, 6 Conn. 258.

D. C.—Richardson v. Penicks, 1 App. 261.

Ga.—Williams v. O'Neal, 119 Ga. 175, 45 SE 978; Phillips v. James, 115 Ga. 425, 41 SE 663; Knapp v. Harris, 60 A 398; Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

Ill.—Dicus v. Scherer, 277 Ill. 168, 115 NE 161; Hurlbut v. Talbot, 273 Ill. 356, 112 NE 697; Sutton v. Read, 176 Ill. 69, 51 NE 801; Moline Water Power, etc., Co. v. Webster, 26 Ill. 233; Virgin v. Virgin, 91 Ill. A. 188 [aff 189 Ill. 144, 59 NE 586].

Ind.—Warrum v. White, 171 Ind. 574, 86 NE 959; Jarrell v. Brubaker, 150 Ind. 260, 49 NE 1050; Maitlen v. Maitlen, 44 Ind. A. 559, 89 NE 966.

Iowa.—Conger v. Cook, 56 Iowa 117, 8 NW 782.

Ky.—Rothchild v. Wallace, 155 Ky. 676, 160 SW 170; Pierce v. Marrs, 153 Ky. 748, 156 SW 404.

La.—Barry's Succ., 130 La. 401, 58 S 20; Trahan's Succ., 118 La. 762, 43 S 400; Delaneuville v. Duhe, 114 La. 62, 38 S 20; Wilson v. Wilson, 109 La. 1075, 34 S 94; McLean's Succ., 12 La. Ann. 222; Union Bank v. McDonogh, 7 La. Ann. 231.

Me.—In re Snow, 96 Me. 570, 53 A 116.

Md.—Cornish v. Wilson, 6 Gill 299; Collinson v. Owens, 6 Gill & J. 4; Carnan v. Turner, 6 Harr. & J. 65; Corrie v. Clarke, 1 Bland 85 note.

Mass.—Lindsey v. Fabens, 189 Mass. 329, 75 NE 623; Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23; In re Allen, 15 Mass. 58; Dean v. Dean, 3 Mass. 258; Palmer v. Palmer, 13 Gray 326.

Mich.—Rasor v. Mott, 196 Mich. 445, 163 NW 38; Barris v. Emmons, 173 Mich. 590, 139 NW 872.

Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.

Miss.—Powell v. Warmack, 76 S 504; Brickell v. Lightcap, 115 Miss. 417, 76 S 489; Williams v. Ratcliff, 42 Miss. 145.

Mo.—St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 SW 359; Keene v. Wyatt, 160 Mo. 1, 60 SW 1037, 63 SW 116; Howell v. Jump, 140 Mo. 441, 41 SW 976; Blair v. Marks, 27 Mo. 579; Bompart v. Lucas, 21 Mo. 598; Derge v. Hill, 103 Mo. A. 281, 77 SW 105.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409; Miller v. Hanna, 89 Nebr. 224, 131 NW 226, AnnCas1912C 573; W. J. Perry Live Stock Commn. Co. v. Biggs, 3 Nebr. (Unoff.) 654, 94 NW 712.

N. J.—Skillman v. Van Peld, 1 N. J. Eq. 511.

N. M. — Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292; Matter of Doyle, 180 App. Div. 398, 167 NYS 827; Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 NYS 632;

sale should be ordered to be made for the payment of the debts generally and not merely for the payment of a single debt.[70] The death of the owner of lands does not give his personal representatives or his creditors such an interest in his real estate as precludes the legislature from repealing the laws authorizing sales to be made by executors or administrators for the payment of debts.[71]

The fact that an administrator has wasted assets sufficient to pay the debts will not deprive creditors of the right to resort to other assets unadministered for the payment of their debts and to procure a sale of decedent's land.[72]

[§ 1441] **b. Existence and Validity of Debts—(1) In General.** In order to authorize a sale of land to pay debts, the existence of valid and legally enforceable debts of the estate must be shown.[73] A sale should not be ordered where the alleged

Matter of Foley, 39 App. Div. 248, 57 NYS 131; Matter of Meagley, 39 App. Div. 83, 56 NYS 503; Matter of Cutter, 104 Misc. 694, 172 NYS 293; Matter of Williams, 1 Misc. 35, 22 NYS 906, Pow. Surr. 284; In re Doyle, 180 App. Div. 398, 167 NYS 827; Ferguson v. Broome, 1 Bradf. Surr. 10.

N. C.—Glover v. Flowers, 101 N. C. 134, 7 SE 579, 95 N. C. 57.

Oh.—Bateman v. Morris, 7 OhS&CP 287, 4 OhNP 397.

Or.—In re Houck, 23 Or. 10, 17 P 461.

Pa.—Lyman v. Byam, 38 Pa. 475; Kearn's Est., 19 Pa. Dist. 506, 38 Pa. Co. 30; Walker's Est., 23 Pa. Co. 657; Green's Est., 1 Del. Co. 521; Johnson's Est., 30 PittsbLegJNS 365; Ziegler v. Schall, 17 YorkLegRec 190.

Tenn.—Erck v. Erck, 107 Tenn. 77, 63 SW 1122; Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Tex.—Lee v. Henderson, 75 Tex. 190, 12 SW 981.

Utah.—Cain v. Young, 1 Utah 361.

W. Va.—American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920; Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

Eng.—Price v. Price, 15 Sim. 484, 38 EngCh 484, 60 Reprint 707.

[a] **A debt due to the representative** (1) may be sufficient to authorize a sale of realty for payment thereof. In re Reynolds, 195 Pa. 225, 45 A 726. (2) If the personal property is insufficient to pay the debts, and the administrator bona fide and under proper circumstances advances money to pay them, the court may order a sale of real estate to reimburse him. Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

[b] **Claim of sureties on administration bond.**—Where application is made by an administrator for an order to sell real estate to pay a claim held by the sureties on his official bond, the court may, if it appears from his accounts that he is indebted to the estate, refuse to make the order, if such sale will injure other creditors, or, where the estate is solvent, if it will injure the heirs. Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

[c] **Sale to obtain money for payment of taxes allowed.**—Sales v. Cosgrove, 25 SW 594, 15 KyL 791; Welsh v. Perkins, 8 Oh. 52.

[d] **Equitable demands** may be proved on the application to sell the real estate of an intestate to pay his debts, and if the claim is an equitable lien on a portion of the real estate, and not secured by judgment or mortgage, or expressly charged on the lot, the court may order it to be paid out of the proceeds of the real estate. Renwick v. Renwick, 1 Bradf. Surr. (N. Y.) 234.

[e] **The fact that a person's claim as heir is barred** does not affect the right of the representative to sell the land to pay a debt of the claimant regularly established against the estate. Sutton v. Read, 176 Ill. 69, 51 NE 801.

[f] **Although debts are directed to be paid out of rents and profits** by the will, the court will decree a sale if it is necessary. Berry v. Askham, 2 Vern. Ch. 26, 23 Reprint 627.

[g] **The advice of a family meeting is not necessary** to authorize a sale of real estate to pay debts. Irwin v. Flynn, 110 La. 829, 34 S 794; Childs v. Lockett, 107 La. 270, 31 S 751; Fluker's Succ., 32 La. Ann. 292; Davidson v. Davidson, 28 La. Ann. 269; Kiser's Succ., 22 La. Ann. 175; Carter v. McManus, 15 La. Ann. 676.

[h] **Effect of partition.**—A mere order for partition does not withdraw the property designated in it from the jurisdiction of the probate court so as to prevent a sale of the land in further administration for the purpose of paying debts. But it is otherwise if such partition is made and approved. The making of a partial partition does not, however, deprive the probate court of the right to order a sale in due course of administration of land not included in the actual partition. Lee v. Henderson, 75 Tex. 190, 12 SW 981.

[i] **The occupation of an intestate's real estate by one of his two administrators,** who is also one of the heirs, without paying or charging himself with debts, is not of itself a bar to granting a petition to sell real estate for the payment of debts. Palmer v. Palmer, 13 Gray (Mass.) 326.

[j] **The fact that the administrator's bond has been reduced** by order of the probate court upon the assumption that all the lands belonging to the estate have been partitioned and delivered to the heirs does not affect the status of lands not in fact partitioned or deprive the court of power to order a sale of such lands. Lee v. Henderson, 75 Tex. 190, 12 SW 981.

[k] **Effect of suit against representative alone.**—A creditor who sues the representative alone without joining or making the heirs parties to the suit does not thereby release the real estate from the lien of his debt or claim, if any there was, so as to deprive the court of power to order a sale for payment of such debt. Murphy's App., 8 Watts & S. (Pa.) 165 [foll Weaver's App., 19 Pa. 416].

[l] **A final decree discharging the administrator discharges** the lien of creditors on real estate which might have been previously sold to pay debts. State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033.

[m] **Sale cannot be made to effect compromise of disputed claim.** — Bompart v. Lucas, 21 Mo. 598.

70. Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949; Spears' Succ., 28 La. Ann. 804; Taylor v. Hanford, 11 N. J. L. 341.

71. See Constitutional Law § 516.

[a] **Sale after repeal.** — Where proceedings for a sale of real estate of an intestate to pay debts were commenced before the repeal of the act authorizing such sale, and the administrators, notwithstanding the repeal, sold the land and appropriated the proceeds to pay the debts, the sale was void. Hamilton Bank v. Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496. See also Perry v. Clarkson, 16 Oh. 571 (where the order of sale was passed after the repeal).

[b] **An order to sell is not a "suit or prosecution pending,"** within the exception of a general repealing act providing that any depending suit or prosecution may be carried on to final judgment, and executed agreeably to the repealed laws under which it may have been begun. Davis v. Livingston, 6 Oh. 225; Ludlow v. Wade, 5 Oh. 494.

72. Brown v. Nelms, 86 Ark. 368, 112 SW 373.

73. Ala.—Munden v. Bailey, 70 Ala. 63.

Ark.—Stuckey v. Stephens, 115 Ark. 572, 171 SW 908, AnnCas1917A 133.

Ga.—McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178.

Ill.—Dorman v. Tost, 13 Ill. 127; McKnelly v. Conley, 210 Ill. A. 609.

Kan.—Coulson v. Wing, 42 Kan. 507, 22 P 570, 16 AmSR 503.

Ky.—Row v. Bach, 115 SW 806.

La.—Barry's Succ., 130 La. 401, 58 S 20; Leverich's Succ., 47 La. Ann. 1665, 18 S 700.

Me.—Lebroke v. Damon, 89 Me. 113, 35 A 1028; Gross v. Howard, 52 Me. 192.

Md.—Worthington v. Worthington, 112 Md. 135, 76 A 46.

Mass.—Lamson v. Schutt, 4 Allen 359.

Miss.—Hargrove v. Baskin, 50 Miss. 194.

Mo.—Wilson v. Wilson, 255 Mo. 528, 164 SW 561.

Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409.

N. H.—Tilton v. Tilton, 41 N. H. 479.

N. J.—Morris v. Dorsey, 77 N. J. Eq. 460, 77 A 44 [aff 80 N. J. Eq. 555, 85 A 1134].

N. Y.—Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672].

Or.—In re Webster, 74 Or. 489, 145 P 1063.

Pa.—Titlow's Est., 13 Pa. Co. 445; Kurtz's Est., 16 LancLRev 205.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

Tex.—Hamblin v. Warnecke, 31 Tex. 91.

"The existence of a debt is one of the facts essential to confer jurisdiction." Matter of Pirie, 133 App. Div. 431, 432, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672].

[a] **If demands against an estate have been adjusted** by mutual agreement to the satisfaction of the persons interested a sale of real estate should not be ordered to pay them. Tilton v. Tilton, 41 N. H. 479.

[b] **A gift of the donor's note** in her lifetime, without consideration, was not such a "debt" against her estate as would justify the sale of her real estate to pay it. Dacy v. Goll, 242 Ill. 606, 90 NE 179.

[c] **A legacy** given in consideration of services rendered by the legatee to the testator, under an agreement made before the services were rendered that compensation should be made in that manner, is not a debt for which real estate may be sold. Markley's Est., 20 Phila. (Pa.) 175.

[d] **Claim for maintenance of children.**—A claim of an administratrix who is also the mother of the decedent's infant children, for their maintenance, is not a claim against decedent for which his real estate may be sold. Woodruff v. Cook, 2 Edw. (N. Y.) 259.

[e] **Debts of married woman.** — The probate court has no jurisdiction to order the sale of lands in which a married woman had a separate estate, to pay debts contracted during her coverture. Boston v. Murray, 94 Mo. 175, 7 SW 273 [foll Davis v. Smith, 75 Mo. 219].

[f] **Debts and funeral expenses of**

debts are fraudulent,[74] in anticipation of an indebtedness which is not valid and subsisting at the time, and may never exist,[75] or for raising a fund to meet claims which are contested and doubtful,[76] although the representative's rejection of a claim does not deprive the probate court of power to order a sale of realty to pay such claim.[77] The allowance of a claim by the court of probate sufficiently establishes its validity to authorize an order for a sale of realty for payment thereof,[78] and where there are valid and subsisting claims against the estate, errors or irregularity in the allowance of such claims will not vitiate a sale for their payment.[79]

[§ 1442] **(2) Debts Barred by Limitations or Nonclaim.** A license should not be granted to sell lands for the payment of debts already barred by the statutes of limitations or nonclaim,[80] or for the

wife.—The orphans' court may not order a sale of the real estate of a testator to pay the debts and funeral expenses of his wife, notwithstanding his will, devising his estate to his wife for life and at her death and the payment of the wife's debts and funeral expenses to a daughter. Morris v. Dorsey, 77 N. J. Eq. 460, 77 A 44 [aff 80 N. J. Eq. 555, 85 A 1134].

[g] **Advances to infant distributees.**—An administrator who has made advances to the infant distributees in excess of their share of the personal assets is not entitled to have the land sold for his reimbursement. Munden v. Bailey, 70 Ala. 63.

[h] **Debts of a devisee for life** are not debts for the payment of which real estate may be sold, although the will directs payment of debts. Morris v. Dorsey, 77 N. J. Eq. 460, 77 A 44 [aff 80 N. J. Eq. 555, 85 A 1134].

[i] **Expenses of lunacy proceeding.**—The expenses of a lunacy proceeding which were allowed against the lunatic's estate were not a debt for which a sale of his real estate could be ordered. Young's Est., 8 Pa. Co. 4.

[j] **Breach by heirs of decedent's contract to sell real estate.**—A claim for unliquidated damages for breach by decedent's heirs of a contract to sell real estate entered into by him during his lifetime is not a debt for which his real estate can be sold. McGaw v. Gortner, 96 Md. 489, 54 A 133.

[k] **False claims.**—Where a proceeding instituted in behalf of decedent's widow for the sale of his real estate for the payment of debts is founded upon false claims fraudulently made for the purpose of procuring the sale of such lands, a sale made thereunder to the widow is void. Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584.

[l] **The costs of an action against decedent's surviving partner** are not a debt of the decedent for which his real estate may be sold. Matter of Stowell, 15 Misc. 533, 37 NYS 1127, 25 NYCivProc 316.

[m] **A bond for title** is prima facie a claim for land, and its approval by the probate judge and the administrator does not convert it into a money claim against the estate for the amount of the penalty, and hence an order to sell property for the payment of such claim is properly refused. Gregory v. Hughes, 20 Tex. 345.

[n] **Advances of representative to pay for public land.**—Where the head of a family made entry upon public land and died before final proof, and after her death her administrator advanced the money and paid the government for the land, and obtained a patent to it for her heirs, and subsequently obtained an order from the probate court to sell the land to repay him, the money so advanced was not a lien upon the land, and no title thereto passed by a sale under such order. Coulson v. Wing, 42 Kan. 507, 22 P 570, 16 AmSR 503; Black v. Dressell, 20 Kan. 153.

[o] **Taxes accruing after death** of the owner will not justify an administration sale of land. In re Webster, 74 Or. 489, 145 P 1063.

[p] **Proof of payment of part** of the indebtedness of the estate will not defeat an order of sale. Green v. Cannady, 71 S. C. 317, 51 SE 92.

[q] **If any part of the indebtedness alleged is found to be due** the chancellor has jurisdiction to order a sale of part of the property to pay it. McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178.

[r] **Where certain accounts were transferred to the administrator** by the creditors, this was not a release which prevented them from looking to the land for the balance due them after the personalty was exhausted. Wheeler v. Floyd, 24 S. C. 413.

[s] **Judgment against representative.**—Where a judgment was to the knowledge of the heirs recovered against an administratrix on a note indorsed by her decedent, an attorney assuming to represent the heirs stipulating for an entry of the judgment after ninety days, the heirs were not bound by such judgment, and were not estopped from disputing the claim in a proceeding for sale of decedent's lands to pay such claim. Matter of Neufeld, 50 Misc. 215, 100 NYS 444, 5 Mills Surr. 352.

[t] **Judgment confessed by representative.**—Where a judgment has been confessed by an administratrix on claims well founded, the heirs must show in opposition to a rule by the judgment creditors for a sale of the property that the confession by the administratrix was made to their injury, and that their rights of defense against the claims were waived by the confession. Decuir's Succ., 22 La. Ann. 371.

Proof and contest of claims in proceedings for sale see infra §§ 1519–1525.

74. Hunter v. French, 86 Ind. 320; Matter of Catlin, 57 Misc. 269, 109 NYS 542, 6 Mills Surr. 298; Lynn's Est., 2 LehighValLR (Pa.) 231.

[a] **This rule has been applied** to a judgment fraudulently obtained against decedent's estate. Matter of Catlin, 57 Misc. 269, 109 NYS 542, 6 Mills Surr. 298.

[b] **Illegal arrangement as to payment.** — Where an arrangement was made between an administrator and others by which the land belonging to the estate was to be bought in at the administrator's sale by a certain person, and taken by the administrator's children in payment of a claim held by them against the estate, it was held that, although the arrangement was illegal, and the children could claim no right to the land thereunder, yet their claim was not extinguished, and a new sale to pay it should be ordered. Matthews v. Matthews, (Miss.) 1 S 741.

75. Kremer v. Bull, 26 SW 1099, 16 KyL 183; Fasig's Est., 1 Woodw. (Pa.) 213.

76. Fasig's Est., 1 Woodw. (Pa.) 213.

77. In re Roberts, 214 N. Y. 369, 108 NE 562 [aff 162 App. Div. 922, 146 NYS 1110].

78. Milburn v. East, 128 Iowa 101, 102 NW 1116.

[a] **The allowance of claims in a court without jurisdiction** over the claims or the land is not a basis for a sale. Hughes v. Griswold, 6 Mo. 245.

79. Brown v. Nelms, 86 Ark. 368, 112 SW 373.

80. U. S.—Chewitt v. Moran, 17 Fed. 820.

Ala.—Little v. Marx, 145 Ala. 620, 39 S 517; Warren v. Hearne, 82 Ala. 554, 2 S 491; Bond v. Smith, 2 Ala. 660.

Del.—Cohen v. Tuff, 27 Del. 188, 86 A 833, AnnCas1917C 596 [aff 26 Del. 404, 84 A 946].

Ill.—Rice v. Davies, 201 Ill. A. 165; Mayberry v. Moore, 137 Ill. A. 40.

Ind.—Riser v. Snoddy, 7 Ind. 442, 65 AmD 740.

Kan.—Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239.

Me.—Nowell v. Nowell, 8 Me. 220.

Md.—Collinson v. Owens, 6 Gill & J. 4.

Mass.—Robinson v. Hodge, 117 Mass. 222; Tarbell v. Parker, 106 Mass. 347; Heath v. Wells, 5 Pick. 140, 16 AmD 383 [dist Leverett v. Harris, 7 Mass. 292]; In re Richmond, 2 Pick. 567; Thompson v. Brown, 16 Mass. 172; Wellman v. Lawrence, 15 Mass. 326; In re Allen, 15 Mass. 58; Brown v. Anderson, 13 Mass. 201; Scott v. Hancock, 13 Mass. 162; Perkins v. Fairfield, 11 Mass. 227; Baxter v. Penniman, 8 Mass. 133; Lamson v. Schutt, 4 Allen 359.

Mich.—Hoffman v. Beard, 32 Mich. 218; In re Godfrey, 4 Mich. 308; Howard v. Moore, 2 Mich. 226; Campau v. Gillett, 1 Mich. 416, 53 AmD 73.

Minn.—In re Ackerman, 33 Minn. 54, 21 NW 852.

Miss.—Nagle v. Ball, 71 Miss. 330, 13 S 929; Ales v. Plant, 61 Miss. 259; Yandell v. Pugh, 53 Miss. 295; Ferguson v. Scott, 49 Miss. 500; Moody v. Harper, 38 Miss. 599.

N. H.—Hall v. Woodman, 49 N. H. 295; Hodgdon v. White, 11 N. H. 208.

N. Y.—Butler v. Johnson, 111 N. Y. 204, 18 NE 643 [aff 41 Hun 206]; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581; Mooers v. White, 6 Johns. Ch. 360; Mead v. Jenkins, 4 Redf. Surr. 369.

N. C.—Bevers v. Park, 88 N. C. 456.

Pa.—Smith v. Wildman, 194 Pa. 294, 45 A 136, 178 Pa. 245, 35 A 1047, 36 LRA 834, 56 AmSR 760; In re Cake, 157 Pa. 457, 27 A 773; Oliver's App., 101 Pa. 299; Demmy's App., 43 Pa. 155; Shorman v. Reading Farmers' Bank, 5 Watts & S. 373; Seitzinger v. Fisher, 1 Watts & S. 293; Pry's App., 8 Watts 253; Meskill's Est., 8 Pa. Dist. 52; Moyer's Est., 11 Pa. Co. 528; Bile's Est., 2 Brewst. 609; McCormick's Est., 4 Kulp 15; Schreck's Est., 2 Kulp 166; Pray v. Brock, 1 PaLJR 354.

S. C.—Brock v. Kirkpatrick, 60 S. C. 322, 38 SE 779, 85 AmSR 847.

Tenn. — Batson v. Murrell, 10 Humphr. 301, 51 AmD 707.

[a] **If the debt is apparently barred** the administrator applying for a sale must show some fact taking it out of the operation of the statute. Gilchrist v. Rea, 9 Paige (N. Y.) 66.

[b] **Claim of representative.**—It is error to grant an application of an administrator to sell lands to pay debts due the administrator, where the administrator does not establish a compliance with the statute providing that a claim held by the personal representative which accrued prior to the grant of letters must be presented within twelve months of the grant of letters, by filing them,

reimbursement of a representative who has paid such claim;[81] but where the proceedings for a sale are instituted before the claim has become barred, and the effect thereof is to interrupt the period of prescription, a sale may be ordered after the time when, but for such proceedings, the claim would have been barred.[82] It has also been held that where land was sold by an administrator under order of the court to pay a mortgage thereon, the objection that the sale was without authority because the notes and mortgage had never been filed as a claim against the estate was without merit, since such failure was excused by the application of the administrator for authority to sell.[83]

[§ 1443] **c. Debts Created after Death of Decedent—(1) In General.** As a general rule a sale of realty can be authorized only for the payment of debts which were in existence at the time of decedent's death.[84]

[§ 1444] **(2) Expenses of Administration.** In accordance with the rule just stated the right to order a sale for the payment of the expenses of administration has been very generally denied,[85]

verified by affidavit, in the office of the probate judge, as provided by Code § 133. Little v. Marx, 145 Ala. 620, 39 S 517.

[c] **A judgment** (1) is not barred by the statute because recovered some two years prior to the filing of the petition for license to sell. Lebroke v. Damon, 89 Me. 113, 35 A 1028. (2) But the rule has been applied to a judgment the lien of which has expired (Matthews v. Peterson, 150 N. C. 134, 63 SE 721), and (3) which has not been revived (Pry's App., 8 Watts (Pa.) 253).

[d] **Payment of interest on mortgage.**—Where on a bill in equity to subject real estate in the hands of heirs to the payment of decedent's debts it appeared that the debt was secured by mortgage, that the interest on the mortgage had been regularly paid by the mortgagor during his lifetime, and by his administrator after his death until the estate was settled and turned over to the heirs, that the mortgage was thereupon foreclosed and the property sold, and that the claim was for a deficiency upon such sale, the failure of the mortgagee to prove her claim before the commissioners did not constitute laches sufficient to bar the claim, since the payment of interest by the administrator led the mortgagee to believe that the mortgage would be assumed by the administrator and the heirs of the estate. Chewitt v. Moran, 17 Fed. 820.

[e] **Heirs can plead limitations** (1) against debts, to pay which the administrator petitions to sell land, as fully as they could plead it against the creditors. Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Warren v. Hearne, 82 Ala. 554, 2 S 491; Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581; Matthews v. Peterson, 150 N. C. 134, 63 SE 721; Brock v. Kirkpatrick, 60 S. C. 322, 38 SE 779, 85 AmSR 847. (2) "The proceeding is in effect a suit by the creditors against the heirs, claiming satisfaction out of the estate which has descended to them for a debt due from the ancestor. It does not therefore rest with the administrator to say whether the bar of the statute of limitations shall be interposed or not; he is placed in an antagonist position to the heir, and cannot therefore make any admission which shall prejudice him. His power to meddle with the real estate is derived entirely from the statute; it is a special authority derived from the order of the Court on proof of the allegation of the petition, and confers no power further than is necessary to execute the trust with which he is clothed for the benefit of the creditors. It is true, that while acting within his appropriate sphere, as the representative of the deceased, he may decline to interpose the bar of the statute to defeat a just claim; but when he lays down his character of representative of the deceased, and becomes a party litigant on behalf of the creditors, against the heirs, it would be a strange anomaly if he should be allowed to dictate the defence." Bond v. Smith, 2 Ala. 660, 663. To same effect May v. Parham, 68 Ala. 253; Fretwell v. McLemore, 52 Ala. 124; Thrash v. Sumwalt, 5 Ala. 13; McBroom v. Governor, 6 Port. (Ala.) 32; Riser v. Snoddy, 7 Ind. 442, 65 AmD 740; Skidmore v. Romaine, 2 Bradf. Surr. (N. Y.) 122; Bevers v. Park, 88 N. C. 456.

[f] **Judgment creditors of a devisee** may plead the statute although the devisee himself does not appear. Raynor v. Gordon, 23 Hun (N. Y.) 264.

[g] **A bona fide purchaser from a devisee** of a judgment defendant being under statute not "in any manner affected" by the lien of the judgment after being lost, being revived by scire facias so that the land cannot be reached by proceedings directly on the judgment, it for the same reason cannot be reached by an order of the orphans' court to sell lands to pay the judgment of the deceased judgment defendant. Cohen v. Tuff, 27 Del. 188, 86 A 833, AnnCas1917C 596 [aff 26 Del. 404, 84 A 946].

[h] **A fraudulent grantee of a decedent** may plead the statute of limitations against a debt for the payment of which a sale of the land fraudulently conveyed is asked. Syme v. Riddle, 88 N. C. 463.

Debts barred by limitations as liabilities of estate see supra §§ 906–921.

Effect of failure to present as barring claim see supra § 1020.

81. Gilchrist v. Rea, 9 Paige (N. Y.) 66; Rowe's Est., 11 Kulp (Pa.) 36.

82. Deans v. Wilcoxon, 25 Fla. 980, 7 S 163; Porter v. Hornsby, 32 La. Ann. 337.

83. Mead v. Mead, 39 Iowa 28.

84. U. S.—Dubois v. McLean, 7 F. Cas. No. 4,107, 4 McLean 486.

Ala.—Beadle v. Steele, 86 Ala. 413, 5 S 169; Owens v. Childs, 58 Ala. 113.

Ark.—Mays v. Rogers, 52 Ark. 320, 12 SW 579.

Ill.—Walker v. Diehl, 79 Ill. 473; Fitzgerald v. Glancy, 49 Ill. 465.

La.—Burton v. Brugier, 30 La. Ann. 478.

Md.—McGaw v. Gortner, 96 Md. 489, 54 A 133; Carey v. Dennis, 13 Md. 1.

Mass.—Dean v. Dean, 3 Mass. 258.

Miss.—Moore v. Ware, 51 Miss. 206; Hollman v. Bennett, 4 Miss. 322.

Mo.—U. S. Presbyterian Church v. McElhinney, 61 Mo. 540; Sturgeon v. Schaumburg, 40 Mo. 482, 93 AmD 311; Farrar v. Dean, 24 Mo. 16; Aubuchon v. Lory, 23 Mo. 99.

Md.—Carnan v. Turner, 6 Harr. & J. 65.

N. Y.—Wood v. Byington, 2 Barb. Ch. 387; Matter of Catlin, 57 Misc. 269, 109 NYS 542, 6 Mills Surr. 298; Matter of Quatlander, 29 Misc. 566, 61 NYS 1064, 1 Mills Surr. 358; Ball v. Miller, 17 HowPr 300.

Or.—In re Webster, 74 Or. 489, 145 P 1063.

Pa.—Van Dusen's Est., 11 Pa. Co. 201.

Ont.—Janson v. Clyde, 31 Ont. 579.

[a] **Contrary view.**—Long v. Landman, 118 Mich. 174, 76 NW 374 (statute authorizing mortgage to pay "the debts against the estate of any deceased person").

Claims arising after decedent's death as liabilities of estate see supra §§ 922–934.

85. Ala.—Bolen v. Hoven, 143 Ala. 652, 39 S 379; Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26; Garrett v. Garrett, 64 Ala. 263; Owens v. Childs, 58 Ala. 113; McMekin v. Bobo, 12 Ala. 268.

Ark.—Shell v. Young, 78 Ark. 479, 95 SW 798; Collins v. Paepcke-Leicht Lumber Co., 74 Ark. 81, 84 SW 1044; Mays v. Rogers, 52 Ark. 320, 12 SW 579.

Ill.—Walker v. Diehl, 79 Ill. 473; Fitzgerald v. Glancy, 49 Ill. 465.

Mass.—Drinkwater v. Drinkwater, 4 Mass. 354; Dean v. Dean, 3 Mass. 258.

Miss.—Moore v. Ware, 51 Miss. 206.

Mo.—Howell v. Jump, 140 Mo. 441, 41 SW 976; Farrar v. Dean, 24 Mo. 16.

N. Y.—In re Hatch, 182 N. Y. 320, 75 NE 153; Matter of Quatlander, 29 Misc. 566, 61 NYS 1064, 1 Mills Surr. 358; Fitch v. Witbeck, 2 Barb. Ch. 161; Kavanagh v. Wilson, 5 Redf. Surr. 43; Cornwall's Est., Tuck. Surr. 250.

Oh.—Carr v. Hull, 65 Oh. St. 394, 62 NE 439, 87 AmSR 623, 58 LRA 641.

Eng.—Lees v. Lees, L. R. 15 Eq. 151.

N. S.—Granger v. O'Neill, 31 N. S. 462.

[a] **Real estate cannot be sold to pay:** (1) The cost of probate of a nuncupative will. McMekin v. Bobo, 12 Ala. 268. (2) A debt contracted by the representative. Bolen v. Hoven, 143 Ala. 652, 39 S 379. (3) The compensation of the representative. Beadle v. Steele, 86 Ala. 413, 5 S 169; Moore v. Ware, 51 Miss. 206; Hollman v. Bennett, 44 Miss. 322; Carr v. Hull, 65 Oh. St. 394, 62 NE 439, 87 AmSR 623. (4) Expenses of litigation undertaken by the administrator at his own instance only, to dispossess an occupant of lands and purchase them himself. Owens v. Childs, 58 Ala. 113. (5) The costs of a suit in which judgment was obtained against the representative, even though the suit was originally commenced against decedent. In re Hatch, 182 N. Y. 320, 75 NE 153; Matter of Foley, 39 App. Div. 248, 57 NYS 131; Sanford v. Granger, 12 Barb. (N. Y.) 392; Matter of Stowell, 15 Misc. 533, 37 NYS 1127, 25 NYCiv Proc 316, 1 Gibb. Surr. 492; Hurd v. Callahan, 9 AbbNCas (N. Y.) 374, 5 Redf. Surr. 393; Wood v. Byington, 2 Barb. Ch. (N. Y.) 387; Burnham v. Harrison, 3 Redf. Surr. (N. Y.) 345; Carr v. Hull, 65 Oh. St. 394, 62 NE 439, 87 AmSR 623, 58 LRA 641.

[b] **On the other hand** in a case where a chancery decree in favor of an administrator and guardian awarded an allowance of six hundred dollars for his services and authorized him to hold the property belonging to the estate until the further order of the court, the entire estate being still before the court, it was held that the chancery court was authorized to order a sale of the real estate on a sufficient showing that the personalty was not sufficient to pay the administrator, and that it would be to the interest of the estate to sell the property or a portion thereof. Johnson v. Porterfield, 150 Ala. 532, 43 S 228.

Administration expenses as liabilities of estate see supra § 933.

especially where there are no debts of decedent,[86] or where the assets of the estate were sufficient to pay such costs but have been otherwise disposed of by the representative.[87] Under some statutes, however, a sale for this purpose is allowed;[88] and it is very generally recognized that where a sale is properly made for the payment of debts, the proceeds may be used for payment of the expenses of administration,[89] from which it results that such a sale is valid, even though only enough to pay expenses of administration is realized therefrom.[90]

[§ 1445] **(3) Funeral Expenses.** The statutes frequently permit a sale of real estate for payment of decedent's funeral expenses,[91] and the same rule has been extended to the cost of a monument.[92]

[§ 1446] **(4) Inheritance Taxes.** The court of probate jurisdiction is sometimes authorized by statute to order a sale of decedent's realty to pay an inheritance tax.[93]

[§ 1447] **d. Secured Debts.** The fact that a debt is secured is no reason why the representative may not be authorized to sell realty for the purpose of paying such debt;[94] and it has been held that realty may be sold for the purpose of paying liens thereon,[95] although the view also is taken that a sale for this purpose is not a part of the administration of the estate or within the powers of a court of probate jurisdiction.[96]

86. Collins v. Paepcke-Leicht Lumber Co., 74 Ark. 81, 84 SW 1044; Mays v. Rogers, 52 Ark. 320, 12 SW 579.

[a] **Where all the debts of a testator have been paid** by a devisee, and only a small amount of the cost of administration remains unpaid, and there is no showing that funds cannot be realized from rents of the real estate to pay such debts, a sale of real estate cannot be ordered. Adamson v. Parker, 74 Ark. 168, 85 SW 239.

87. Randolph v. Prowers, 21 Colo. A. 541, 122 P 804.

88. Cal.—In re Hoppikus, 1 Cal. A. 84, 81 P 732; In re Roach, 139 Cal. 17, 72 P 393; In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; Ashton v. Heydenfeldt, 127 Cal. 442, 59 P 759; Matter of Couts, 87 Cal. 480, 25 P 685; In re Bentz, 36 Cal. 687; Abila v. Burnett, 33 Cal. 658.

Ind.—Falley v. Gribling, 128 Ind. 110, 26 NE 794; Dunning v. Driver, 25 Ind. 269; Maris v. Wolfe, 46 Ind. A. 416, 92 NE 661.

La.—Trahan's Succ., 118 La. 762, 43 S 400.

Me.—Stevens v. Burgess, 61 Me. 89; Smith v. Dutton, 16 Me. 308; Nowell v. Nowell, 8 Me. 220.

Md.—Griffith v. Frederick County Bank, 6 Gill & J. 424.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

N. J.—Personette v. Johnson, 40 N. J. Eq. 173.

Or.—In re Houck, 23 Or. 10, 17 P 461.

Pa.—In re Reynold, 195 Pa. 225, 45 A 726; Demmy's App., 43 Pa. 155; Cobaugh's App., 24 Pa. 143; Lutton's Est., 17 Pa. Super. 342 [aff 10 Kulp 161]; Mayer's Est., 16 Pa. Dist. 120; Kautz's Est., 11 Pa. Co. 322; Honeywell's Est., 9 Kulp 340; Turner's Est., 20 LancLRev 38.

Utah.—In re Thorn, 24 Utah 209, 67 P 22.

Wash.—Ackerson v. Orchard, 7 Wash. 377, 34 P 1106, 35 P 605.

See also Tilton v. Tilton, 41 N. H. 479 (where the court, although refusing a license to sell to pay the expenses of administration, did so upon the ground that the expenses had been settled and adjusted by mutual agreement of the parties and there was nothing to show that the agreement was not a valid and binding one, fairly and understandingly made, and the opinion leaves room for an inference that under proper circumstances a sale for such purpose might be allowed).

[a] **Realty may be sold to pay representative's compensation.**—Personette v. Johnson, 40 N. J. Eq. 173; In re Reynold, 195 Pa. 225, 45 A 726.

[b] **Sale after expiration of lien of debts.**—As such expenses are not debts of decedent, and hence the law limiting the lien of his debts does not apply to them, a sale for their payment may be decreed after the expiration of the lien of the debts of decedent. In re Reynold, 195 Pa. 225, 45 A 726; Demmy's App., 43 Pa. 155; Cobaugh's App., 24 Pa. 143.

[c] **Sale cannot be ordered until account filed.**—Honeywell's Est., 9 Kulp (Pa.) 340; Grice's Est., 11 Phila. (Pa.) 107.

89. See infra § 1730.

90. Howell v. Jump, 140 Mo. 441, 41 SW 976.

91. Iowa.—Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

N. Y.—In re Hatch, 182 N. Y. 320, 75 NE 153; Matter of Quatlander, 29 Misc., 566, 61 NYS 1064, 1 Mills Surr. 358; Matter of Corwin, 10 Misc. 196, 31 NYS 426, 1 Gibb. Surr. 167; King's Est., 10 NYCivProc 175.

Pa.—Hunsicker's Est., 61 Pa. Super. 9; Lutton's Est., 17 Pa. Super. 342 [aff 10 Kulp 161]; Hudson's Est., 15 Pa. Dist. 490; Fisher's Est., 16 Lanc LRev 333, 29 PittsbLegJNS 168.

R. I.—Johnson's Pet., 15 R. I. 438, 8 A 248.

Tenn.—Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204.

Utah.—In re Thorn, 24 Utah 209, 67 P 22.

Wash.—In re Smith, 25 Wash. 539, 66 P 93.

Ont.—Re Way, 6 Ont. L. 614.

[a] **Date of administration.**—Funeral expenses are a debt of decedent, and not merely a part of the expenses of the administration; and hence, under the statute providing that no real estate of a deceased person shall be liable for his debts unless letters of administration are granted within six years from the date of his death, the court has no power to order a sale of such realty to pay funeral expenses, letters not having been so issued. In re Smith, 25 Wash. 539, 66 P 93.

Funeral expenses as liabilities of estate see supra §§ 924–928.

92. In re Chesney, 1 Cal. A. 30, 81 P 679; Mullinnix v. Brown, 151 Iowa 468, 131 NW 671; Laird v. Arnold, 42 Hun (N. Y.) 136; Owens v. Bloomer, 14 Hun (N. Y.) 296; In re Williams, 165 NYS 716.

[a] **Exhumation and cremation of body.**—A sale may be had to defray the cost of the burial of decedent and the erection of a monument over the grave, in accordance with a direction contained in the will, although subsequent to the burial the body was exhumed and cremated and the ashes were not returned to the grave. In re Koppikus, 1 Cal. A. 84, 81 P 732; Matter of Pfohl, 20 Misc. 627, 46 NYS 1086.

Tombstones and monuments as liabilities of estate see supra § 929.

93. Richardson v. Lane, (Mass.) 126 NE 44.

94. Cal.—In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; In re Marden, Myr. Prob. 184.

Ind.—Denton v. Arnold, 151 Ind. 188, 51 NE 240.

Iowa.—Mead v. Mead, 39 Iowa 28.

Ky.—Underwood v. Cartwright, 47 SW 580, 20 KyL 809.

Md.—Gibson v. McCormick, 10 Gill & J. 65.

Mich.—In re Lambie, 94 Mich. 489, 54 NW 173.

Mo.—Day v. Graham, 97 Mo. 398, 11 SW 55; Cargile v. Fernald, 63 Mo. 304.

N. Y.—Matter of Goetzmann, 96 Misc. 377, 160 NYS 503; Mooers v. White, 6 Johns. Ch. 360.

Tex.—Hurley v. Barnard, 48 Tex. 83.

[a] **Mortgage not made by decedent.**—A mortgage upon land belonging to the estate of a deceased person, although not given by decedent, and not therefore a personal debt, is a debt against the estate within the meaning of a statute which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of decedent "for the purpose of paying the debts against the estate." In re Lambie, 94 Mich. 489, 54 NW 173.

[b] **Mortgage debt having priority over dower interest.**—A sale to satisfy a mortgage debt which has priority over the dower interest of the widow of decedent is expressly authorized by statute. Denton v. Arnold, 151 Ind. 188, 51 NE 240.

[c] **The holder of a deficiency judgment** may enforce its payment by a sale of realty where the personalty is insufficient. In re Doyle, 180 App. Div. 398, 167 NYS 827.

[d] **When sale improper.**—(1) A license to sell has been refused where it appeared that the only debt due was secured by a mortgage, that the mortgagee was in possession, that four years had elapsed, that there was no judgment for the debt, and that the heirs offered to save the administrators harmless. Etheridge v. Bell, 27 N. C. 87. (2) The probate court has no power to order a sale of land where the only debts are secured by mortgage on the land, even though the mortgagees consent that their liens may be discharged by such sale. Kautz's Est., 11 Pa. Co. 322.

[e] **Statutory provision for sale subject to mortgage.**—(1) Where it is provided by statute that a sale of real estate shall be subject to any mortgage thereon existing at the death of the intestate, land cannot be sold to satisfy such indebtedness. Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433. (2) As a mortgage would not be discharged by the sale it is not such a debt as authorizes the court to order a sale. Grice's Est., 11 Phila. (Pa.) 107, 2 WklyNC 211 [aff 4 WklyNC 208].

[f] **Interest** payable on a mortgage on decedent's estate, and falling due five years after his death, is not a debt of decedent, to pay which realty belonging to his estate will be ordered sold. Matter of Pfohl, 20 Misc. 627, 46 NYS 1086, 2 Gibbs. Surr. 230.

Secured claims as liabilities of estate see supra § 876.

95. In re Freud, 131 Cal. 667, 63 P 1080, 82 AmSR 407; Fry v. Lawson, 32 Ind. A. 364, 69 NE 1038.

96. Gamboa v. Floranza, 12 Philippine 191; Sayles v. Steere, 37 R. I. 411, 93 A 34.

[§ 1448] **e. Maturity of Debts.** Where there are outstanding valid debts of the estate, it is not necessary that such debts should be due at the time when the order of sale is asked, or the sale made,[97] although it has been held that a sale should not be ordered for taxes assessed, but not yet due.[98]

[§ 1449] **f. Insufficiency of Personalty**[99]**—(1) In General.** The personal property of a decedent being the primary fund for the payment of his debts,[1] it is well established as a general rule that realty cannot be sold for this purpose unless or until it is made to appear that the personalty is insufficient,[2] or unless it clearly appears from the will that the testator meant to charge the debts

97. Ala.—Bolen v. Hoven, 143 Ala. 652, 39 S 379.
Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600.
Md.—Carey v. Dennis, 13 Md. 1.
N. Y.—Wilcox's Est., 11 NYCivProc 115; Mooers v. White, 6 Johns. Ch. 360.
Tex.—Hurley v. Barnard, 48 Tex. 83.
Unmatured claims as liabilities of estate see supra § 898.
98. Holburn v. Pfanmiller, 114 Ky. 831, 71 SW 940, 24 KyL 1613.
99. Determination as to see infra §§ 1526–1528.
1. See supra § 1261.
2. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308; Corbet v. Johnson, 6 F. Cas. No. 3,218, 1 Brock. 77.
Ala.—Johnson v. Porterfield, 150 Ala. 532, 43 S 228; Little v. Marx, 145 Ala. 620, 39 S 517; Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Miller v. Mayer, 124 Ala. 434, 26 S 892; Garner v. Toney, 107 Ala. 352, 18 S 161; Banks v. Speers, 97 Ala. 560, 11 S 841; Sharp v. Sharp, 76 Ala. 312; May v. Parham, 68 Ala. 253; Lee v. Downey, 68 Ala. 98; Garrett v. Bruner, 59 Ala. 513; Owens v. Childs, 58 Ala. 113.
Ark.—Adamson v. Parker, 74 Ark. 168, 85 SW 239; Ambleton v. Dyer, 53 Ark. 224, 13 SW 926.
Ariz.—Costello v. Cunningham, 16 Ariz. 447, 147 P 701.
Cal.—In re Roach, 139 Cal. 17, 72 P 393; Stuart v. Allen, 16 Cal. 473, 76 AmD 551.
Colo.—Randolph v. Prowers, 21 Colo. A. 541, 122 P 804.
Conn.—Griswold v. Bigelow, 6 Conn. 258; Brown v. Lanman, 1 Conn. 467.
D. C.—Dahlgren v. National Sav., etc., Co., 41 App. 201; Richardson v. Penicks, 1 App. 261.
Fla.—Anderson v. Northrop, 30 Fla. 612, 12 S 318; Sloan v. Sloan, 25 Fla. 53, 5 S 603; Hays v. McNealy, 16 Fla. 409.
Ill.—Dicus v. Scherer, 277 Ill. 168, 115 NE 161; Vansyckle v. Richardson, 13 Ill. 171; Rowland v. Swope, 39 Ill. A. 514.
Ind.—Ditton v. Hart, 175 Ind. 585, 95 NE 119; Moore v. Moore, 155 Ind. 261, 57 NE 242; Fiscus v. Moore, 121 Ind. 547, 23 NE 362, 7 LRA 235; La Plante v. Convery, 98 Ind. 499; Hunsucker v. Smith, 49 Ind. 114; Edwards v. Haverstick, 47 Ind. 138; Newcomer v. Wallace, 30 Ind. 216; Gearhart v. Gearhart, (A.) 119 NE 217; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.
Iowa.—In re Pitts, 153 Iowa 269, 133 NW 660; Conger v. Cook, 56 Iowa 117, 8 NW 782.
Kan.—Sturgeon v. Culver, 87 Kan. 404, 124 P 419, AnnCas1913E 341.
Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748; Carter v. Crow, 130 Ky. 41, 112 SW 1098; Auxier v. Clarke, 82 SW 605, 26 KyL 890; Chambers v. Davis, 15 B. Mon. 122; Trumbo v. Sorrency, 3 T. B. Mon. 284, 16 AmD 103; Davidson v. Marcum, 89 SW 703, 28 KyL 562; Courts v. Courts, 6 KyL 512.
La.—Leverich's Succ., 47 La. Ann. 1665, 18 S 700; Phelan v. Bird, 20 La. Ann. 355.
Me.—In re Snow, 96 Me. 570, 53 A 116; Stevens v. Burgess, 61 Me. 89.
Md.—Constable v. Camp, 87 Md. 173, 39 A 807; Macgill v. Hyatt, 80 Md. 253, 30 A 710; Griffith v. Frederick County Bank, 6 Gill & J. 424; Collinson v. Owens, 6 Gill & J. 4; Carnan v. Turner, 6 Harr. & J. 65; Tyson v. Hollingsworth, 1 Harr. & J. 469.
Mass.—Palmer v. Palmer, 13 Gray 326.
Mich.—Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 4 LRANS 189, 113 AmSR 574, 7 AnnCas 559; Beniteau v. Dodsley, 88 Mich. 152, 50 NW 110; Ireland v. Miller, 71 Mich. 119, 39 NW 16.
Minn.—State v. Ramsey County Prob. Ct., 25 Minn. 22.
Miss.—Gordon v. James, 86 Miss. 719, 39 S 18, 1 LRANS 461; Anderson v. Newman, 60 Miss. 532; Hargrove v. Baskin, 50 Miss. 194; Foley v. McDonald, 46 Miss. 238; Stigler v. Porter, 42 Miss. 449; Evans v. Fisher, 40 Miss. 643; Turner v. Ellis, 24 Miss. 173; McCoy v. Nichols, 5 Miss. 31.
Mo.—Blickensderfer v. Hanna, 231 Mo. 93, 132 SW 678; Langston v. Canterbury, 173 Mo. 122, 73 SW 151; Merritt v. Merritt, 62 Mo. 150; Pearce v. Calhoun, 59 Mo. 271.
Nebr.—In re Sasse, 93 Nebr. 640, 141 NW 1026.
N. H.—Tilton v. Tilton, 41 N. H. 479.
N. J.—Taylor v. Hanford, 11 N. J. L. 341; Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; State v. Conover, 9 N. J. L. 338; In re Fritz, 83 N. J. Eq. 610, 91 A 1017; Paul v. Wilson, 79 N. J. Eq. 204, 81 A 835; In re Whitaker, 72 N. J. Eq. 362, 65 A 124; Ford v. Westervelt, 55 N. J. Eq. 485, 40 A 26.
N. Y.—Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292; Kingsland v. Murray, 133 N. Y. 170, 30 NE 845; Russell v. Russell, 36 N. Y. 581, 93 AmD 540; Matter of Meagley, 39 App. Div. 83, 56 NYS 503; Moore v. Moore, 14 Barb. 27 [aff 3 Abb. Dec. 303]; Corwin v. Merritt, 3 Barb. 341; Matter of Catlin, 57 Misc. 269, 109 NYS 542, 6 Mills Surr. 298; Matter of Georgi, 21 Misc. 419, 47 NYS 1061, 2 Gibb. Surr. 274; Moyer v. Moyer, 17 Misc. 648, 40 NYS 772; Matter of Plopper, 15 Misc. 202, 37 NYS 33, 1 Gibb. Surr. 439; U. S. Equitable L. Assur. Soc. v. Wilds, 184 App. Div. 435, 171 NYS 505 [aff 175 NYS 901 mem]; Topping's Est., 29 NYS 211, 18 NYCivProc 115; Bloom v. Burdick, 1 Hill 130, 37 AmD 299; Wambaugh v. Gates, 11 Paige 505; Matter of Hemiup, 3 Paige 305; Thompson v. Brown, 4 Johns. Ch. 619; McKay v. Green, 3 Johns. Ch. 56; Taylor v. Taylor, 3 Bradf. Surr. 54; Ferguson v. Broome, 1 Bradf. Surr. 10.
N. C.—Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007; Clement v. Cozart, 107 N. C. 695, 12 SE 254; Sanderson v. Overman, 98 N. C. 235, 3 SE 502; Syme v. Badger, 96 N. C. 197, 2 SE 61; Speer v. James, 94 N. C. 417; Lilly v. Wooley, 94 N. C. 412; Blount v. Pritchard, 88 N. C. 445; Shields v. McDowell, 82 N. C. 137; Ballard v. Kilpatrick, 71 N. C. 281; Bland v. Hartsoe, 65 N. C. 204; Wiley v. Wiley, 63 N. C. 182.
Oh.—Carr v. Hull, 65 Oh. St. 394, 62 NE 439, 87 AmSR 623, 58 LRA 641; Faran v. Robinson, 17 Oh. St. 242. 93 AmD 617; Welsh v. Perkins, 8 Oh. 52; Snider v. Graham, 14 Oh. Cir. Ct. 386, 8 Oh. Cir. Dec. 3; Baen v. Weller, 12 OhS&CP 128.
Or.—Smith v. Whiting, 55 Or. 393, 106 P 791; In re Noon, 49 Or. 286, 88 P 673, 90 P 673; In re Houck, 23 Or. 10, 17 P 461; Wright v. Edwards, 10 Or. 298.
Pa.—Hilton's App., 9 A 434; Risk's App., 110 Pa. 171, 1 A 85; Pry's App., 8 Watts 253; Ramsey's App., 4 Watts 71; Walker's Est., 3 Rawle 229; Truby v. Steele, 45 Pa. Super. 152; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Miller's Est., 18 LancLRev 53; Berluchy's Est., 1 LegRec 225; Kitchenman's Est., 15 Phila. 519; Eddy's Est., 12 Phila. 118; Grice's Est., 11 Phila. 107, 2 WklyNC 211 [aff 4 WklyNC 208]; Kelly's Est., 11 Phila. 100; Fasig's Est., 1 Woodw. 213.
R. I.—Sayles v. Steere, 37 R. I. 411, 93 A 34; Wood v. Hammond, 16 R. I. 98, 17 A 324, 18 A 198.
S. C.—Dyson v. Jones, 65 S. C. 308, 43 SE 667; McNamee v. Waterbury, 4 S. C. 156; Bird v. Houze, 17 S. C. Eq. 250.
Tenn.—Bashaw v. Temple, 115 Tenn. 596, 91 SW 202; Nashville Trust Co. v. Carr, (Ch. A.) 62 SW 204; Maxwell v. Smith, 86 Tenn. 539, 8 SW 340; Whitmore v. Johnson, 10 Humphr. 610; Callender v. Turpin, (Ch. A.) 61 SW 1057; Boring v. Jobe, (Ch. A.) 53 SW 763; Woodfin v. Anderson, 2 Tenn. Ch. 331.
Tex.—Minter v. Burnett, 90 Tex. 245, 38 SW 350; Fortune v. Killebrew, 70 Tex. 437, 7 SW 759; Cavitt v. Beall Hardware, etc., Impl. Co., (Civ. A.) 204 SW 798.
Utah.—Needham v. Salt Lake City, 7 Utah 319, 26 P 920.
Va.—Kirby v. Booker, 122 Va. 291, 94 SE 775; Elliott v. George, 23 Gratt. (64 Va.) 780; Foster v. Crenshaw, 3 Munf. (17 Va.) 514; Garnett v. Macon, 10 F. Cas. No. 5,245, 6 Call (10 Va.) 308.
Wash.—In re Bryant, 38 Wash. 337, 80 P 555; Wallace v. Grant, 27 Wash. 130, 67 P 578.
W. Va.—George v. Brown, 99 SE 509; American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920; Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930; Crawford v. Turner, 58 W. Va. 600, 52 SE 716, 112 AmSR 1014; Miller v. Mitchell, 58 W. Va. 431, 52 SE 478; McConaughey v. Bennett, 50 W. Va. 172, 40 SE 540; Sommerville v. Sommerville, 26 W. Va. 479; Bierne v. Brown, 10 W. Va. 748; Laidley v. Kline, 8 W. Va. 218; Martin v. Rellehan, 3 W. Va. 480.
Eng.—Birch v. Glover, 4 Madd. 376, 56 Reprint 743; Bailie v. Jackson, 10 Sim. 167, 16 EngCh 167, 59 Reprint 576; Curtis v. Price, 12 Ves. Jr. 105, 33 Reprint 35.
N. B.—Matter of Welch, 36 N. B. 628; Trites v. Humphreys, 2 N. B. Eq. 1.

[a] **Reason for rule.**—"The law intends that the real estate of the decedent shall, so far as possible, be preserved for the use of his heirs." Ditton v. Hart, 175 Ind. 585, 594, 95 NE 119.

[b] **The court has no jurisdiction to order** a sale of realty until a deficiency of personalty appears. Davidson v. Marcum, 89 SW 703, 28 KyL 562; Auxier v. Clarke, 82 SW 605, 28 KyL 890; In re Sasse, 93 Nebr. 640, 141 NW 1026.

[c] **Insufficiency to pay the uncontested claims is a sufficient showing,** although other claims are contested. Rose's Est., 17 Pa. Co. 514.

[d] **Error in schedule of debts.**—An order of sale will not be set aside for error in the schedule of debts, if sufficient indebtedness remains to require a sale to pay them. Paxson's Est., 13 Pa. Dist. 78, 29 Pa. Co. 427.

[e] **Uncollected and doubtful demands** (1) should not be reckoned in estimating the sufficiency of the personalty, but only personal property actually in the hands of the representative. Bridge v. Swain, 3 Redf.

upon his real estate;[3] and it is not permissible to transfer personal effects and moneys by distribution to the heirs and then resort to the land to pay debts on the allegation that there is no personal estate.[4] Conversely, when it is ascertained that the personalty of decedent is insufficient to pay his debts, and there are lands to which he had title, it is the clear duty of the representative to proceed for the sale of such lands.[5]

Statutes changing rule. It is competent for the law-making power to alter the rule under discussion, and accordingly there are sometimes found statutes which authorize a sale of a decedent's realty for payment of his debts, even though his personalty would be sufficient for this purpose.[6]

[§ 1450] **(2) Insufficiency Due to Fault of Representative.** Where the assets were originally sufficient to pay the debts, but they have been lost, wasted, or distributed by the representative in violation of his duty, the resulting insufficiency

Surr. (N. Y.) 487. (2) Where the only personal property belonging to a decedent's estate was a disputed claim of doubtful value, there was no abuse of discretion in ordering a sale of real estate to pay debts and expenses. In re Pavert, 177 Cal. 353, 170 P 827. (3) It is no ground of opposition to the granting of an order of sale of real estate that there is a litigated claim held by the estate against the grantee of a devisee who claims that there is nothing due. In re Schroeder, Myr. Prob. (Cal.) 7.

[f] **Compelling application of personalty not inventoried.**—Persons interested may proceed against an administrator who is seeking to sell the real estate for the payment of debts, to compel him to apply to their payment, personal property belonging to the estate which he has failed to inventory as assets. Duffield v. Walden, 102 Iowa 676, 72 NW 278.

[g] **Life insurance claimed by widow.**—Where the only personalty of the succession was a life insurance policy, and this had been adjudged to belong to the widow, who was administering the estate as tutrix, she could obtain leave to sell the real estate for the payment of debts. Leverich's Succ., 47 La. Ann. 1665, 18 S 700.

[h] **Leasehold premises** containing the tomb of decedent need not be disposed of before resorting to the realty to pay debts. Skidmore v. Romaine, 2 Bradf. Surr. (N. Y.) 122.

[i] **Deficiency of immediately available personalty.**—A charge upon real estate in aid of the personal will be made available for the satisfaction of creditors by a sale, although there is personal estate outstanding, if it is not immediately applicable. Clanmorris v. Bingham, 1 Molloy 514.

[j] **Averment of sufficiency in answer.**—Where an answer avers that, on the disposal of exceptions to the account of one of the petitioners, who was the administrator of decedent and whose letters have been vacated, there will be sufficient personal property to pay all of decedent's just debts, an order to sell real estate in payment of debts will not be granted at the instance of judgment creditors. Miller's Est., 18 LancLRev (Pa.) 53.

[k] **Admission of insufficiency.**—Where real estate is charged with the payment of debts if the personalty is insufficient, a sale will not be decreed until the master reports that the personalty is insufficient, even though insufficiency is admitted by: (1) The executors. Owen v. Pugh, 3 L. J. Ch. O. S. 194. (2) Infant devisees. Birch v. Glover, 4 Madd. 376, 56 Reprint 743.

[l] **All personal assets need not be reduced to possession** by the representative before resort can be had to the realty. Brown v. Fleming, (Tex. Commn. A.) 212 SW 483.

[m] **It is not necessary that the representative should have pleaded plene administravit** in suits against him by creditors of the estate in order to enable him to maintain a bill to reach realty descended and sell it for the satisfaction of judgments recovered against him. See Henry v. Mills, 1 Lea (Tenn.) 144, 150 ("It is not necessary, however, to lay down a positive rule on this subject").

[n] **Prospect of assets.**—The court in probate did not abuse its discretion in denying an application for the sale of real property specifically devised for the payment of debts, although there was no money in the hands of the executor, and no other property immediately available for their payment, where several actions were pending on causes of action in favor of the estate in one of which a judgment had been recovered for a large amount, a new trial had been denied, and it did not appear that the judgment could not be collected if affirmed. In re Bragg, 166 Cal. 103, 134 P 1140.

[o] **The representative's failure to make an inventory or advertise for creditors** does not preclude a sale where the debts have been determined by the court. Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

[p] **The enforcement of a statutory lien** on land is not dependent upon the insufficiency of the personalty to pay the claim. Simpson v. Bockius, 77 N. J. Eq. 339, 78 A 758.

3. In re Hempfling, 188 Ill. A. 542; Globe Mercantile Co. v. Perkeypile, (Ind.) 125 NE 29; Rositzke v. Meyer, 95 Misc. 356, 159 NYS 464 [aff 176 App. Div. 193, 162 NYS 613]; Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007.

[a] **Will not exonerating personalty.**—Where a testator bequeathed all corporate stock of which he might be possessed to a trust company, in trust to pay the income to his wife for life, and at her death, to his daughter for life, and the corpus of the trust fund on the termination of the trust was disposed of absolutely by a later clause in the will, and testator's real property, over which the executors were given a general power of sale, was sufficient to pay his debts, it was held that the stock, in the absence of express direction, was not exonerated from payment of debts. Matter of Bergen, 56 Misc. 92, 106 NYS 1038, 6 Mills Surr. 237 [aff 125 App. Div. 929 mem, 110 NYS 1146 mem].

4. Nation v. Green, (Ind. A.) 114 NE 895; Kennedy's Succ., 2 La. A. (Orleans) 65; Foley v. McDonald, 46 Miss. 238; Snider v. Graham, 14 Oh. Cir. Ct. 386, 8 Oh. Cir. Dec. 3.

5. Cal.—In re Pavert, 177 Cal. 353, 170 P 827.

Conn.—Pitkin v. Pitkin, 7 Conn. 315.

Ill.—Virgin v. Virgin, 91 Ill. A. 188 [aff 189 Ill. 144, 59 NE 586].

Ind.—Indiana Natural Gas, etc., Co. v. Elliott, 57 Ind. A. 705, 107 NE 104; Stone v. Elliott, 182 Ind. 454, 106 NE 710, 101 NE 309.

N. Y.—Matter of Kinn, 136 App. Div. 852, 122 NYS 26; Matter of Gill, 42 Misc. 457, 87 NYS 252, 101 App. Div. 607, 91 NYS 1095, 4 Mills Surr. 176 [aff 101 App. Div. 607 mem, 91 NYS 1095 mem (rev on other grounds 183 N. Y. 347, 76 NE 274)].

Oh.—Stout v. Stout, 82 Oh. St. 358, 363, 92 NE 465, 137 AmSR 785.

Pa.—Rose's Est., 17 Pa. Co. 514.

"Upon it being ascertained that the personalty is insufficient to pay the debts, the procedure provided by sections 6136 to 6174, Revised Statute, operates upon the res as well as upon the parties interested, and gives to the administrator the absolute right to subject the lands in the way prescribed unless advantage is taken by those interested by the interposition of a bond. The first section above cited in absolute terms requires the executor or administrator so soon as he shall ascertain that the personal estate will be insufficient to pay all the debts, etc., to apply to the probate or common pleas court for authority to sell the real estate, and then follow, in subsequent sections, minute provisions for the proper conduct of such sales. This absolute requirement is not abridged by any clause of any of the sections following. It is true, as urged by counsel for plaintiffs in error, that provision is made by sections 6173 and 6174 for the appropriation to the payment of debts of the proceeds arising from sales in partition proceedings where deficiency of assets is found to exist, but this falls very far short of a provision supplanting an application by the administrator for an order to sell by a suit by the heirs in partition. Indeed, the last clause of the last cited section distinctly neutralizes the proposition claimed. That clause is: 'Provided, that nothing herein contained shall be so construed as to prohibit any executor or administrator from proceeding to sell land belonging to such estate to pay any debts, when the same has been sold on partition or otherwise, or the proceeds of such sale fully distributed.' It is inconceivable to ascribe to the lawmakers a purpose to authorize a suit in partition by heirs the result of which would be to simply complicate the affairs of the estate, while at the same time the administrator is given authority, as is given by the clause above quoted, to sell to pay debts notwithstanding the sale in partition and the proceeds of the sale fully distributed." Stout v. Stout, supra.

Compelling application for sale see infra § 1461.

6. U. S.—Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873.

Cal.—In re Pavert, 177 Cal. 353, 170 P 827.

Conn.—Candee v. Candee, 87 Conn. 85, 86 A 758.

Miss.—Brickell v. Lightcap, 115 Miss. 417, 76 S 489.

N. Y.—Rositzke v. Meyer, 95 Misc. 356, 159 NYS 464 [aff 176 App. Div. 193, 162 NYS 613].

"As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents, and the conveyance of real estate; to define the rights of debtor and creditor is their common duty. . . . No doubt is entertained, that the legislature of a state have power to subject the lands of a deceased person to execution, in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature." Watkins v. Holman, 16 Pet. (U. S.) 25, 63, 10 L. ed. 873.

[a] **Discretionary power** is sometimes vested in the court of probate to order a sale of decedent's real estate to pay debts, whether or not there is sufficient personalty. Candee v. Candee, 87 Conn. 85, 86 A 758.

of assets does not of itself warrant a sale of the realty;[7] but the remedy is primarily upon the bond of the executor or administrator.[8] The real estate is not, however, according to the better opinion, relieved from ultimate liability, and if the creditors have not been at fault and remedies upon the representative's bond or in pursuit or recovery of the personal assets fail to furnish full redress, a sale of the real estate may be ordered at the instance of creditors for payment of the debts.[9] In this connection it has been held that the land should not have been sold until all other remedies have been exhausted;[10] but there is also authority for the view that the creditor is not bound to exhaust his remedies against the representative and his bondsmen before resorting to the realty,[11] and a fortiori the creditor is not required to go through the form of pursuing a remedy which it is apparent would result in no substantial relief.[12]

[§ 1451] **(3) Insufficiency Due to Depreciation and Losses.** Where the personal property, although originally sufficient for the payment of debts, has become insufficient after the death of the testator, by reason of depreciation or losses for which neither the personal representatives nor the creditors are responsible, the real estate may be sold.[13]

[§ 1452] **(4) Necessity for Actual Application of Personalty.** In some states no order for a sale of realty can properly be made until so much of the personal estate as has come into the representative's hands has been actually applied to the payment of the debts,[14] but in others mere proof of

7. Ala.—Speer v. Banks, 114 Ala. 323, 21 S 834; Banks v. Speers, 103 Ala. 436, 16 S 25.

Fla.—Anderson v. Northrop, 30 Fla. 612, 12 S 318; Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Rowland v. Swope, 39 Ill. A. 514.

Mich.—Ireland v. Miller, 71 Mich. 119, 39 NW 16.

Miss.—Hargrove v. Baskin, 50 Miss. 194.

Mo.—Merritt v. Merritt, 62 Mo. 150.

N. Y.—Kingsland v. Murray, 133 N. Y. 170, 30 NE 845; Matter of Meagley, 39 App. Div. 83, 56 NYS 503; In re Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163 [dist In re Bingham, 127 N. Y. 296, 27 NE 1055].

Pa.—Pry's App., 8 Watts 253; Stifler's Est., 8 Pa. Dist. 400, 23 Pa. Co. 24; Wright v. Taylor, 26 Pa. Co. 369, 32 PittsbLegJNS 361; Berluchy's Est., 1 LegRec 225; Kelly's Est., 11 Phila. 100.

S. C.—Bird v. Houze, 17 S. C. Eq. 250.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Boring v. Jobe, (Ch. A.) 53 SW 763.

Tex.—Brown v. Fleming, (Commn. A.) 212 SW 483.

"If the decedent, at the time of his death, left sufficient personal property which could have been applied to the payment of his debts and funeral expenses, in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditors is for them to enforce their personal responsibility, and they cannot in that case cause the real estate to be sold under the statutes referred to." Kingsland v. Murray, 133 N. Y. 170, 30 NE 845.

"It is not enough for the court to find that there has been a sufficiency of personal assets left by the decedent, but at the time of filing the petition such assets have been wasted either by the petitioning administrator or executor, or by their predecessors in office. The heirs are not to be held as sureties for the faithful performance by the administrator of his duties, nor should their right be dependent upon his integrity or negligence." Rowland v. Swope, 39 Ill. A. 514, 516.

Second sale on misapplication of proceeds of first sale see infra § 1645.

8. Ala.—Banks v. Speers, 103 Ala. 436, 16 S 25.

Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

Md.—Wyse v. Smith, 4 Gill & J. 295.

Miss.—Turner v. Ellis, 24 Miss. 173.

Mo.—Merritt v. Merritt, 62 Mo. 150.

N. C.—Lilly v. Wooley, 94 N. C. 412; Carlton v. Byers, 70 N. C. 691; Latham v. Bell, 69 N. C. 135.

"The law is well settled that when an administrator has in his hands assets of his decedent arising from personal property or from the sale of real estate sufficient to pay the indebtedness of the estate, and he commits the devastavit or through his negligence or mismanagement of the estate the fund is lost, the heir may defeat, by reason of these facts, further resort to the sale of real estate to make good such loss, but the remedy of the creditors is against the administrator upon his bond." Atherton v. Hughes, 249 Ill. 317, 328, 94 NE 546.

Liability on administration bonds generally see infra §§ 2533–2669.

9. Ala.—Banks v. Speers, 103 Ala. 436, 16 S 25; May v. Parham, 68 Ala. 253; Ledyard v. Johnston, 16 Ala. 548.

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Cal.—Haynes v. Meeks, 20 Cal. 288.

Fla.—Anderson v. Northrop, 30 Fla. 612, 12 S 318.

Ill.—Young v. Wittenmyre, 123 Ill. 303, 14 NE 869 [rev 22 Ill. A. 496]; Rowland v. Swope, 39 Ill. A. 514.

Ind.—Globe Mercantile Co. v. Perkeypile, 125 NE 29; Moore v. Moore, 155 Ind. 261, 57 NE 242; Nettleton v. Dixon, 2 Ind. 446.

Iowa.—Conger v. Cook, 56 Iowa 117, 8 NW 782.

Mich.—Roscoe v. McDonald, 91 Mich. 270, 51 NW 939; Ireland v. Miller, 71 Mich. 119, 39 NW 16.

Miss.—Phelps v. Harris, 61 Miss. 705; Hargrove v. Baskin, 50 Miss. 194; Foley v. McDonald, 46 Miss. 238; Hollman v. Bennett, 44 Miss. 322; Stigler v. Porter, 42 Miss. 449; Evans v. Fisher, 40 Miss. 643; Turner v. Ellis, 24 Miss. 173.

Mo.—Merritt v. Merritt, 62 Mo. 150.

N. Y.—Kingsland v. Murray, 133 N. Y. 170, 30 NE 845; In re Bingham, 127 N. Y. 296, 27 NE 1055.

N. C.—Clement v. Cozart, 107 N. C. 695, 12 SE 254; Carlton v. Byers, 70 N. C. 691; Latham v. Bell, 69 N. C. 135; Wiley v. Wiley, 61 N. C. 131.

S. C.—Bird v. Houze, Speers Eq. 250.

Tenn.—Jones v. Douglass, 1 Tenn. Ch. 631. But compare Bennett v. Coldwell, 8 Baxt. 483, 487 ("If the administratrix has wasted the estate, and both she and her securities upon her administration bond are insolvent, the land of the heir cannot be made liable. The loss in such case must fall upon the creditor. The law does not make the heirs securities for the administrator, nor make their rights dependent upon the integrity or negligence of the administrator").

Tex.—Cavitt v. Beall Hardware, etc., Impl. Co., (Civ. A.) 204 SW 798.

[a] **Failure of representative to pay his own indebtedness to estate.**—That a debt is due from an executor or administrator, sufficient in amount to satisfy the indebtedness of the estate, is no answer to an application to sell, if the representative has never been able to pay since his appointment. Campbell v. Drais, 125 Cal. 253, 57 P 994.

[b] **Loss of equity against land by delay.**—Where a creditor delayed prosecuting his remedy against the executor until the personal property passed into the hands of the devisee's husband who wasted it, and released the executor, such creditor forfeited his equity against the land. Buford v. McKee, 3 B. Mon. (Ky.) 224.

10. Stigler v. Porter, 42 Miss. 449; Paine v. Pendleton, 32 Miss. 320; Lilly v. Wooley, 94 N. C. 412; Latham v. Bell, 69 N. C. 135.

[a] **An estate for years,** being a chattel interest descending to the personal representatives of decedent, and not to his heirs, may be sold to pay debts, upon an insufficiency of personalty resulting from waste, before exhausting remedies against the personal representatives and sureties. Webster v. Parker, 42 Miss. 465.

11. Corbet v. Johnson, 6 F. Cas. No. 3,218, 1 Brock. 77; Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678; Brown v. Fleming, (Tex. Commn. A.) 212 SW 483.

12. Brittain v. Dickson, 104 N. C. 547, 10 SE 701 (where it appears that a former administrator died insolvent, and that his estate has ever since been insolvent, and his bond as administrator has been lost, and his sureties are unknown, the administrator de bonis non need not sue the former administrator's administrator for funds misappropriated by him before applying for a license to sell land to pay debts).

13. Evans v. Fisher, 40 Miss. 643; Lilly v. Wooley, 94 N. C. 412; Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

14. Fla.—Sloan v. Sloan, 25 Fla. 53, 5 S 603; Hays v. McNealy, 16 Fla. 409.

Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748; Auxier v. Clarke, 82 SW 605, 26 KyL 890.

Miss.—Gordon v. James, 86 Miss. 719, 39 S 18, 1 LRANS 461.

N. J.—In re Whitaker, 72 N. J. Eq. 362, 65 A 124; Stiers v. Stiers, 20 N. J. L. 52; State v. Conover, 9 N. J. L. 338; Bray v. Neill, 21 N. J. Eq. 343.

Oh.—Kummer v. Lake, 13 OhS&CP 491, 13 OhNPNS 209.

Or.—In re Noon, 49 Or. 286, 88 P 673, 90 P 673.

Wash.—Wallace v. Grant, 27 Wash. 130, 67 P 578.

W. Va.—Sommerville v. Sommerville, 26 W. Va. 479; Bierne v. Brown, 10 W. Va. 748; Martin v. Rellehan, 3 W. Va. 480.

an insufficiency of personalty is enough;[15] and it has even been held that the representative is not obliged to delay a sale of real estate until claims which more than exhaust the personal estate have been filed, if such valid claims exist.[16]

[§ 1453] **(5) Existence of Sufficient Personalty in Another State.** Where administration is taken out in a state in which there are creditors of decedent and real estate owned by him, the fact that he left sufficient personalty in another state to pay all his debts is no objection to an order for the sale of such realty,[17] unless the same person qualified as the representative in both jurisdictions, and distributed the personalty in the jurisdiction where it was situate, without paying the creditors in the other jurisdiction.[18]

[§ 1454] **g. Sufficiency of Rents and Profits.** Aside from express statute or testamentary direction, it is usually considered that the court ought not to order the sale of lands which have descended to heirs or devisees, where the rents and profits thereof will satisfy within a reasonable time, the debts which the personalty is insufficient to pay.[19]

[§ 1455] **h. Account of Administration.** It is not usually considered necessary that an account of the administration should be rendered and a final adjudication be had upon it before the court can make an order for a sale of real estate,[20] although there is some authority for the view that an accounting is necessary,[21] at least where the sale is sought for the purpose of providing funds to pay expenses of administration.[22]

Where an accounting is pending, an order of sale may properly be delayed until an adjudication upon the account, for such adjudication furnishes the best method of ascertaining that there is a necessity for the sale.[23]

[§ 1456] **i. Effect of Promise to Pay Out of Personalty.** Where one promises, for a valuable consideration, to pay a debt out of his personal estate at his decease, without a specific limitation to that estate alone, and the personal estate is insufficient to pay the debt, the realty may be resorted to.[24]

[§ 1457] **3. For Payment of Legacies.** The court has no inherent authority to order a sale of decedent's real estate for the payment of a legacy, even though the personal fund has been exhausted;[25] and this has been held to be true even though the legacy in question was given pursuant to tes-

15. Ala.—Curtis v. Hunt, 158 Ala. 78, 48 S 598.
Cal.—Richardson v. Musser, 54 Cal. 196.
Kan.—Randel v. Randel, 64 Kan. 254, 67 P 837.
N. Y.—Matter of Kinn, 136 App. Div. 852, 122 NYS 26; Richmond v. Foote, 3 Lans. 244; Moore v. Moore, 14 Barb. 27 [aff 3 Abb. Dec. 303]; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163, 2 Gibb. Surr. 506; Matter of Georgi, 21 Misc. 419, 47 NYS 1061, 2 Gibb. Surr. 274. Contra Corwin v. Merritt, 3 Barb. 341.
N. C.—Blount v. Pritchard, 88 N. C. 445 [appr Shields v. McDowell, 82 N. C. 137; Finger v. Finger, 64 N. C. 183, and dist Bland v. Hartsoe, 65 N. C. 204; Wiley v. Wiley, 63 N. C. 182; Graham v. Little, 40 N. C. 407].
Pa.—Walker's App., 1 Grant 431.
R. I.—Read v. Gardner, 30 R. I. 485, 76 A 177; Wood v. Hammond, 16 R. I. 98, 17 A 324, 18 A 198.
Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844; Maxwell v. Smith, 86 Tenn. 539, 8 SW 340; Doherty v. Choate, 16 Lea 192. Contra Kindell v. Titus, 9 Heisk. 727; Dulles v. Read, 6 Yerg. 53.
"The concessions of counsel upon the hearing, upon the petition, conclusively show that there were valid claims largely in excess of the personal property, and this of itself is sufficient to warrant the decree of sale, provided the proceedings have been in conformity with the provisions of the statute, as does not seem to be open to question in this case." Matter of Kinn, 136 App. Div. 852, 122 NYS 26.
[a] **Where the personalty has been appraised** and is known to be insufficient to pay the debts of decedent, the representative may at once apply for an order to sell the realty and need not wait until the debts are allowed. Randel v. Randel, 64 Kan. 254, 67 P 837.
[b] **If the personalty is not immediately available,** a sale of real estate need not be delayed to pay debts in excess of the personalty. Doherty v. Choate, 16 Lea (Tenn.) 192.

16. Ditton v. Hart, 175 Ind. 585, 95 NE 119.

17. Lawrence's App., 49 Conn. 411; Cooper v. Ives, 62 Kan. 395, 63 P 434; Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581.

18. Young v. Wittenmyre, 123 Ill. 303, 14 NE 869 [rev 22 Ill. A. 496]; Livermore v. Haven, 23 Pick. (Mass.) 116.
Insufficiency due to fault of representative see supra § 1450.

19. Ark.—Adamson v. Parker, 74 Ark. 168, 85 SW 239.
Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748.
La.—Savage v. Williams, 15 La. Ann. 250.
N. J.—Trimmer v. Todd, (Ch.) 28 A 581.
Oh.—White v. Turpin, 16 Oh. St. 270.
Pa.—Kearns's Est., 19 Pa. Dist. 506, 38 Pa. Co. 30; Pennock's Trust Est., 2 Phila. 143. But compare Klein's Est., 2 Pa. Dist. 813, 14 Pa. Co. 94 (rents not applicable to debts without consent of devisees)
R. I.—Sayles v. Steere, 37 R. I. 411, 93 A 34.
Va.—Tennent v. Pattons, 6 Leigh (33 Va.) 196. See also Wilder v. Chambliss, 6 Munf. (20 Va.) 432 (such is the rule where there is no specific lien or encumbrance on the land for such debts).
Eng.—Rowe v. Beavis, Dick. 178, 21 Reprint 237.
[a] **Illustration.**—Where lots belonging to an estate were subject to a street improvement lien, the lots should not be ordered sold, but the administrator cum testamento annexo should be directed to apply the rents to the payment of such liens if that would pay the claims within a reasonable time. Hessig v. Hessig, 131 Ky. 514, 115 SW 748.
[b] **A sale of land to pay a mortgage thereon** is unauthorized, where the mortgagees in possession are applying the rental on the mortgage debt, and are willing to accept payment in that manner. Sayles v. Steere, 37 R. I. 411, 93 A 34.
[c] **Where the debts cannot be satisfied within a reasonable time** out of the rents and profits, a sale should be ordered. Lawton v. Hunt, 23 S. C. Eq. 1.
Rents of realty as assets for payment of debts see supra § 1263.

20. Cal.—Abila v. Burnett, 33 Cal. 658.
Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.
La.—Tabor's Succ., 33 La. Ann. 343.
Mass.—Palmer v. Palmer, 13 Gray 326.
Mo.—Brown v. Woody, 22 Mo. A. 253.
N. Y.—Aliter under earlier statute. Mead v. Jenkins, 95 N. Y. 31 [aff 29 Hun 253, 27 Hun 570]; Forbes v. Halsey, 26 N. Y. 53; Schneider v. McFarland, 4 Barb. 139 [aff 2 N. Y. 459]; Matter of Plopper, 15 Misc. 202, 37 NYS 33, 1 Gibb. Surr. 439; Matter of Howard, 11 Misc. 224, 32 NYS 1098, 1 Gibb. Surr. 214; In re Merchant, 6 NYS 875; Skidmore v. Romaine, 2 Bradf. Surr. 122.
Pa.—Weaver's App., 19 Pa. 416. Aliter under earlier statute. Fox v. Winters, 4 Rawle 174; In re Rhoads, 3 Rawle 420; Huckle v. Phillips, 2 Serg. & R. 4.
Tenn.—Gilchrist v. Cannon, 1 Coldw. 581; Crippen v. Crippen, 1 Head 128.
Vt.—Maeck v. Sinclear, 10 Vt. 103.
[a] **"The object of the filing of these accounts,** lists, and inventories manifestly is to apprise the court of the condition of the estate, and to make it appear that the personal estate is exhausted, and that it is necessary to resort to the real estate to pay the petitioner's demand. Where this otherwise appears from the record, it is manifest that no prejudice results from the failure of the petitioner to coerce the administrator by attachment into a performance of his duty in this regard. Here the record conclusively shows that the personal estate was exhausted." Brown v. Woody, 22 Mo. A. 253, 259.
[b] **A creditor's application** need not be preceded by or predicated upon account of administration or tableau of distribution. Tabor's Succ., 33 La. Ann. 343.
[c] **No person other than the representative** can apply until the administration account has been finally settled showing a deficiency of personal assets. Freno's Est., 11 Phila. (Pa.) 42.

21. Beckham v. Duncan, (Va.) 9 SE 1002; Simmons v. Lyles, 27 Gratt. (68 Va.) 922; Hart v. Hart, 31 W. Va. 688, 8 SE 562; Laidly v. Kline, 8 W. Va. 218; Martin v. Rellehan, 3 W. Va. 480.

22. Honeywell's Est., 9 Kulp (Pa.) 340; Grice's Est., 11 Phila. (Pa.) 107.

23. Palmer v. Palmer, 13 Gray (Mass.) 326; Rosenfield's Est., 10 NY CivProc 201, 5 Dem. Surr. 251.

24. Judy v. Louderman, 48 Oh. St. 562, 29 NE 181.

25. Ala.—Scott v. Ware, 64 Ala. 174; Price v. Wilkinson, 10 Ala. 172.
Conn.—Wattles v. Hyde, 9 Conn. 10; Goodwin v. Chaffee, 4 Conn. 163.

tator's promise to compensate by will for services rendered during his lifetime.[26] But where legacies are charged on land by the will, the land may be ordered sold for their payment;[27] and the same is true where the will evidences the testator's intent that the legacies should be paid from the land if necessary, even though there be no express charge thereon.[28] In a case where a judgment was recovered against an executor for the amount of a legacy, it was held that an order declaring the judgment a lien on the land belonging to the estate was insufficient to afford complete relief, so that an order requiring a sale of the land to pay such legacy was proper.[29]

Statutes authorizing the sale of realty to pay legacies when the personalty is insufficient for this purpose have been exacted in some jurisdictions.[30]

[§ 1458] **4. For Distribution.** In many jurisdictions the court has power to authorize a sale of decedent's real property for the purpose of partition and distribution, where it is not susceptible of a division in kind, or the parties in interest will not consent to an adjustment;[31] but it has been held that a right to subject the land to sale for the purpose of equalizing a previous distribution of the personal estate among the legatees cannot arise either from the fact of the unequal distribution or from a verbal agreement between the parties,[32] and also that a sale of realty to equalize advancements cannot be ordered before the personalty is exhausted.[33] Neither is a sale authorized merely for the purpose of preventing a partition.[34]

[§ 1459] **5. Effect of Testamentary Provisions.** As a general rule, the court should not order a sale of property when there is a power of sale in the will under which the representative may act,[35] but

Del.—Rambo v. Rumer, 4 Del. Ch. 9.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Md.—Harrison v. Denny, 113 Md. 509, 77 A 837.

N. J.—Morris v. Dorsey, 77 N. J. Eq. 460, 77 A 44 [aff 80 N. J. Eq. 555, 85 A 1134]; In re Whitaker, 72 N. J. Eq. 362, 65 A 124; Skillman v. Van Pelt, 1 N. J. Eq. 511.

N. Y.—Clark v. Halligan, 158 App. Div. 33, 142 NYS 980.

N. C.—State Baptist Female Univ. v. Borden, 132 N. C. 476, 44 SE 47, 1007.

Pa.—Torrance v. Torrance, 53 Pa. 505; Dunn's Est., 8 Pa. Dist. 289.

N. S.—In re Runciman, 38 N. S. 89.

[a] **The orphans' court has no power to marshal assets** to secure the payment of pecuniary legacies by directing a sale of lands to pay debts. Price v. Wilkinson, 10 Ala. 172.

[b] **Pendency of appeal from construction of will.**—It is error to decree a sale of property to pay legacies pending an appeal from a decree construing a will by legatees who are largely interested. Harrison v. Denny, 113 Md. 509, 77 A 837.

26. Markley's Est., 10 Pa. Co. 551.

27. Conn.—Wattles v. Hyde, 9 Conn. 10.

Ind.—American Cannel Coal Co. v. Clemens, 132 Ind. 163, 31 NE 786.

Ky.—Kremer v. Fidelity Trust, etc., Co., 29 SW 634, 16 KyL 559; Huston v. Dorsey, 1 Ky. Op. 217.

Mich.—In re More, 179 Mich. 237, 146 NW 319.

N. Y.—Matter of Goetzmann, 96 Misc. 377, 160 NYS 503; Matter of Noe, 94 Misc. 60, 157 NYS 681; Brennan v. Adler, 180 NYS 359.

N. C.—Devereux v. Devereux, 81 N. C. 12.

Pa.—In re Douty, 196 Pa. 432, 46 A 483; In re Marcy, 22 Pa. 140; Cresson's Est., 3 Phila. 270.

R. I.—Stoughton v. Liscomb, 39 R. I. 489, 98 A 183.

Eng.—Walters v. Jackson, 12 Sim. 278, 35 EngCh 236, 59 Reprint 1138.

[a] **Personalty must be applied before land sold.**—Devereux v. Devereux, 81 N. C. 12.

[b] **It is the duty of the executor to sell land charged** or to collect the legacy from the devisee or his assigns. In re More, 179 Mich. 237, 146 NW 319.

[c] **Realty may be sold to repay advances** made by trustees to pay to the widow an annuity for which the will made the estate liable. Kremer v. Fidelity Trust, etc., Co., 29 SW 634, 16 KyL 559.

[d] **Where money is given to be raised out of profits,** and the profits will not raise it in a convenient time, the court will decree a sale. Heycock v. Heycock, 1 Vern. Ch. 256, 23 Reprint 452. Contra Ridout v. Plymouth, 2 Atk. 105, 26 Reprint 465.

28. Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Barrios' Succ., 135 La. 241, 65 S 229.

29. Stimson v. Rountree, 51 Ind. A. 207, 99 NE 439.

30. Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Kelly v. Slack, 93 Minn. 489, 101 NW 797; Probate Judge v. Kimball, 12 N. H. 165.

31. Ala.—Griffith v. Rudisill, 141 Ala. 200, 37 S 83; Thomas v. Caldwell, 136 Ala. 518, 34 S 949; Washington v. Bogart, 119 Ala. 377, 24 S 245; Brown v. Mize, 119 Ala. 10, 24 S 453; Rice v. Drennen, 75 Ala. 335; Pettit v. Pettit, 32 Ala. 288; Field v. Goldsby, 28 Ala. 218, 65 AmD 341; Hamlet v. Johnson, 26 Ala. 557; Teat v. Lee, 8 Port. 507.

Conn.—Candee v. Candee, 87 Conn. 85, 86 A 758.

Fla.—Wilson v. Matheson, 17 Fla. 630.

Ga.—Gann v. Runyan, 134 Ga. 49, 67 SE 435; Callaway v. Irvin, 123 Ga. 344, 51 SE 477; Finch v. Du Bignon, 117 Ga. 113, 43 SE 423; Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

Ky.—Oldham v. McElroy, 134 Ky. 454, 121 SW 414; Foley v. Graham, 110 SW 838, 33 KyL 627; Cromwell v. Mason, 2 Bush 439; Zehnder v. Schoenbachler, 70 SW 278, 24 KyL 947. Contra Robinson v. Redman, 2 Duv. 82.

La.—Wilson v. Wilson, 109 La. 1075, 34 S 94.

Md.—Woelfel v. Evans, 74 Md. 346, 22 A 71.

Mich.—Norman v. Olney, 64 Mich. 553, 31 NW 555.

Minn.—Kelly v. Slack, 93 Minn. 489, 101 NW 797.

Mo.—State v. Holtcamp, 245 Mo. 655, 151 SW 153.

N. H.—French v. Lawrence, 76 N. H. 234, 81 A 705.

Oh.—Stout v. Stout, 82 Oh. St. 358, 92 NE 465, 137 AmSR 785.

Pa.—In re Douty, 196 Pa. 432, 46 A 483; Gregg's App., 20 Pa. 148; Gross's Est., 26 Pa. Co. 219, 18 Montg. Co. 122.

Tenn.—Fulton v. Davidson, 3 Heisk. 614.

Tex.—Flanagan v. Pierce, 27 Tex. 78; Littlefield v. Tinsley, 26 Tex. 353.

W. Va.—McSwegin v. Howard, 66 W. Va. 570, 66 SE 694.

Man.—Lumbers v. Montgomery, 22 Man. 735, 8 DomLR 699, 22 WestLR 634, 3 WestWkly 295.

Ont.—Re Harris, 33 Ont. L. 83, 7 OntWN 597, 22 DomLR 381.

[a] **Thus** a sale may be ordered where the land is incapable of division without injury and one of the heirs is a minor. Cromwell v. Mason, 2 Bush (Ky.) 439.

[b] **Right to sell for debts superior to right to sell for partition.**—Stout v. Stout, 82 Oh. St. 358, 92 NE 465, 137 AmSR 785.

[c] **It is only when all the heirs refuse to take the land at an appraised value** that a sale for purposes of distribution may be ordered. Gregg's App., 20 Pa. 148.

[d] **Sale for partition not proper until after expiration of period of administration.**—Anderson v. Lockhart, 2 Tex. Unrep. Cas. 63.

[e] **Opposition of parties in interest.**—With only one heir out of four praying for distribution and the other three protesting, a sale cannot be directed for the purpose of distribution under a statute which requires a request for an order of sale by all parties in interest. Krug's Est., 9 Pa. Dist. 239.

[f] **The fact that the heirs have agreed to dispense with administration** and to deal with the land as their own is no answer to an application by an administrator to sell the land for division and distribution. Rice v. Drennen, 75 Ala. 335.

[g] **Jurisdiction continues until complete distribution made.**—Woelfel v. Evans, 24 Md. 346, 22 A 71.

[h] **When petition denied.**—A petition of an administratrix for an order to sell land for distribution will be denied when there are minor distributees and no one interested in the distribution desires it to be made. Avery v. Avery, 47 Ala. 505.

[i] **Where the estate can be divided in kind** as well as by making a sale, and the ordinary fails to take the proper steps to bring this about, the executor will be enjoined from selling for the purpose of distribution. McCook v. Pond, 72 Ga. 150.

[j] **Decree ordering sale before all devisees entitled to take ascertained erroneous.**—Williams v. Hassell, 73 N. C. 174.

[k] **Where land is devised and the executors assent** to the devise, the probate court is without jurisdiction to order a sale for the purpose of division on the application of an executor or to hold the executor responsible for the money received from the sale made under such order. Whorton v. Moragne, 62 Ala. 201.

[l] **In the case of an implied conversion by the testator** commingling real estate and personalty and bequeathing the shares the court has no power to order a sale by the executor. Krug's Est., 9 Pa. Dist. 239.

[m] **Estoppel of heirs.**—Where the heirs requested and procured the administrator to make a sale of land for the purpose of making distribution, their title passes to the purchaser by estoppel, and a stranger to the proceeding, particularly after a considerable lapse of time, cannot impeach it. Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364 [foll Delk v. Punchard, 64 Tex. 360].

32. Hudson v. Gray, 58 Miss. 882.

33. Shaw v. Grimes, (Ky.) 218 SW 447.

34. State v. Holtcamp, 245 Mo. 655, 151 SW 153.

35. Ala.—Snow v. Bray, 73 S 542; Wilson v. Holt, 83 Ala. 528, 3 S

circumstances may arise under which a sale by order of court may be proper notwithstanding the fact that the will confers such a power.[36] A testamentary provision for the raising of a fund to pay debts by the hire of certain property has been held not to preclude a sale of such property under order of court where this was necessary for the payment of debts;[37] but in an English case where a testator directed money to be raised for the purposes of his will by mortgage of part of his real estate, the court declined to direct a sale, although the master found that the money could be more advantageously raised in that way.[38] Where a testator directs that his debts are paid from the sales of his unproductive property, an order directing the executor to sell property, a part of which is productive, will not be reversed on appeal, where the sale is not for payment of debts alone, but for payment of taxes and large expenses of administration.[39]

Courts of equity have power to authorize the conversion of realty contrary to the provisions of a will, and differing from the purpose and plans of

321, 3 AmSR 768; Whorton v. Moragne, 62 Ala. 201; Arnett v. Bailey, 60 Ala. 435; Wilson v. Armstrong, 42 Ala. 168, 94 AmD 635; McCollum v. McCollum, 33 Ala. 711.

Ky.—Morehead v. France, 153 Ky. 44, 154 SW 378.

N. Y.—Personeni v. Goodale, 199 N. Y. 323, 92 NE 754; Matter of Noe, 94 Misc. 60, 157 NYS 681; Foersch v. Schmitt, 55 Misc. 608, 106 NYS 935; Matter of Rowley, 38 Misc. 622, 78 NYS 215, 3 Mills Surr. 263; Hesdra's Est., 20 NYS 79, 2 Conn. Surr. 514; Rosenfield's Est., 10 NYCiv Proc 201, 5 Dem. Surr. 251; Matter of Davids, 5 Dem. Surr. 14; Dennis v. Jones, 1 Dem. Surr. 80; Clark v. Clark, 3 Bradf. Surr. 32.

N. C.—Wiley v. Wiley, 61 N. C. 131.

Pa.—Selfridge's App., 9 Watts & S. 55; Ludy's Est., 25 Pa. Dist. 345; Mulley's Est., 10 Kulp 523; In re Cobleigh, 8 LackLegN 107; Whitaker's Est., 14 Phila. 254.

Ont.—Re Doak, 12 OntWN 43.

"All of the statutes relating to the sale of the real property of a decedent for the payment of his debts have been passed to provide a way, where one does not otherwise exist, to enable general creditors to secure payment of their claims out of such property when there is an insufficient amount of personal assets. It is not intended that such statutes shall take the place of adequate testamentary provision. If the necessity for the proceeding does not exist, jurisdiction under the statutes does not exist, or at least should not be exercised. The statutes do not contemplate the exercise of jurisdiction to sell the real property of a decedent when prior to the commencement of the proceeding there has been a sale under a valid power contained in the will. It does not matter in such case whether the power of sale is imperative or discretionary." Personeni v. Goodale, 199 N. Y. 323, 325, 92 NE 754.

[a] **Illustration.**—Under a will directing the executor on the death of the life tenants to sell the land without restrictions as to the manner of sale, the chancellor properly refused to direct the executor as to how the land should be sold. Morehead v. France, 153 Ky. 44, 154 SW 378.

[b] **Terms of will.**—The power of the court to order a sale is affected by the provisions of the will only when it expressly gives power to the executor to sell "without application to the Orphans' Court." Brooks v. Bergner, 83 Md. 352, 35 A 98.

[c] **Implied power.**—Under a statute providing that before the surrogate can make a decree of sale he must find that the property "is not subject to a valid power of sale for the payment of" the debts the surrogate cannot make a decree of sale if there is an actual and valid power, although it is implied and not express. Coogan v. Ockershausen, 55 N. Y. Super. 286, 18 NYSt 366 [aff 11 NYCivProc 315].

[d] **Referring sale to power.**—Where a trust deed with power of sale was probated as part of a will, and the trustee who was also sole executor obtained an order of sale which was invalid and sold the land five years thereafter, executing a deed as executor but not reporting the sale to the probate court, the sale should be referred to the power in the deed, and not to the order of the court. Matthews v. McDade, 72 Ala. 377. To same effect Purser v. Short, 58 Ill. 477.

[e] **If land is expressly charged with debts** (1) or is devised subject to the payment of debts a license to sell will not be granted. Davis v. Hoover, 112 Ind. 423, 14 NE 468; Smith v. Coup, 6 Dem. Surr. (N. Y.) 45; Rosenfield's Est., 10 NYCivProc 201, 5 Dem. Surr. 251. (2) But if the lands so charged are not sufficient to pay the debts the court may order other lands to be sold. Kinney v. Knoebel, 51 Ill. 112; Duncan v. Gainey, 108 Ind. 579, 9 NE 470.

[f] **The manner of the exercise of the discretion** vested in executors by a testamentary power to sell and convert property into cash may be reviewed by the courts on behalf of the interested parties. Matter of Vom Saal, 82 Misc. 531, 145 NYS 307.

[g] **A contrary view** appears to be entertained in New Hampshire. Harris v. Ingalls, 74 N. H. 339, 344, 68 A 34 ("The plaintiffs, by virtue of their office, as executors of the will, have authority to sell the real estate situated in this state. While no license from the court for the purpose is necessary in the absence of a statute requiring it (Going v. Emery, 16 Pick. (Mass.) 107, 26 AmD 645), it seems advisable, in view of the statutory provision on the subject in this state, that the plaintiffs should procure a license for making the sale of the land situated here. P. S., c 194, s. 15").

Testamentary power to sell realty see supra §§ 636–688.

36. Ala.—Johnson v. Porterfield, 150 Ala. 532, 43 S 228.

Ill.—Ross v. Harney, 139 Ill. A. 513.

Ky.—Crane v. Crane, 105 SW 370, 32 KyL 82; Beatty v. Wilson, 12 Ky. Op. 22.

Miss.—U. S. Fidelity, etc., Co. v. State, 110 Miss. 16, 69 S 1007.

N. Y.—Matter of Richmond, 168 N. Y. 385, 61 NE 647 [aff 62 App. Div. 624, 71 NYS 1147]; Matter of Vom Saal, 82 Misc. 531, 145 NYS 307; In re Duffy, 18 NYS 724.

Pa.—McFarland's App., 37 Pa. 300; Loughery's Est., 12 Pa. Dist. 386, 28 Pa. Co. 632; Shaffer's Est., 1 Woodw. 387.

S. C.—Harris v. Harris, 86 S. C. 409, 68 SE 628.

Va.—Sproul v. Hunter, 122 Va. 102, 94 SE 179.

[a] **Such a course may be proper:** (1) Where it is manifestly for the interest of minors that lands devised to them should be sold before the period assigned in the will for its sale. Schaffer's Est., 1 Woodw. (Pa.) 387. (2) Where, by the terms of a will, the executors have no power to sell until after the debts are paid. In re Karge, 18 NYS 724. (3) Where a will gives a general authority to sell, without expressly naming the executors, and there is a controversy as to their right to sell, and they are trustees for legatees interested in the sale. McFarland's App., 37 Pa. 300. (4) Where the power of sale is void or payment of the debts as directed in the will is impracticable. In re Richmond, 168 N. Y. 385, 61 NE 647 [aff 62 App. Div. 624, 71 NYS 1147]. (5) Where the executors are disqualified or refuse to act. O'Donaghue v. Smith, 184 N. Y. 365, 77 NE 621 [aff 85 App. Div. 324, 83 NYS 398]. (6) Where the estate is taken out of the executor's hands. Crane v. Crane, 105 SW 370, 32 KyL 82. (7) Where a will directs the sale of land without providing who shall sell, and the administrator with the will annexed would not have such power. Durham v. Clay, 142 Ky. 96, 134 SW 153. (8) Where, after decree finding that an estate was indebted to the administrator and guardian, he filed a bill for the sale of real estate to pay such indebtedness, which was in no manner based on decedent's will, but proceeded on the court's jurisdiction to order a sale to satisfy the prior decree, the fact that the will authorized the executor to sell the lands did not deprive the court of jurisdiction. Johnson v. Porterfield, 150 Ala. 532, 43 S 228.

[b] **Where compliance with testamentary directions would cause sacrifice of property.**—Where executors filed a bill, alleging that under the will it was their duty to sell certain town lots to pay the debts and that no such sale could be effected without a great sacrifice of the property and that there were other salable lands and asking advice as to the manner in which the trust could be performed, a court of chancery could afford relief and a sale of such lands under its decree was valid. Bridges v. Rice, 99 Ill. 414.

[c] **Unproductive real estate** may be ordered to be sold even when the executors have been given power to sell when they think it best for the interest of the estate. In re Rogers, 185 Pa. 428, 39 A 1109; Marvine v. Drexel, 68 Pa. 362; Carey's Est., 9 Kulp (Pa.) 336.

[d] **Where the power of sale is discretionary** (1) and not enforceable by creditors, they are entitled to petition the surrogate for an order of sale for the payment of debts. Personeni v. Goodale, 199 N. Y. 323, 92 NE 754 [rev 132 App. Div. 928, 118 NYS 1135]; Parker v. Beer, 173 N. Y. 332, 66 NE 3 [aff 65 App. Div. 598, 72 NYS 955]; Matter of Johnson, 18 App. Div. 371, 46 NYS 53; Matter of Heroy, 67 Hun 13, 21 NYS 685, 23 NYCivProc 128. (2) But the court is not authorized to interfere with the discretion of the executor as to making a sale at the instance of heirs or legatees (Greer v. McBeth, 33 S. C. Eq. 254) (3) save in exceptional instances (Bullock's Est., 9 Pa. Dist. 690).

37. Johnson v. De Laperriere, 136 Ga. 554, 71 SE 874; Shaw v. McBride, 56 N. C. 173.

38. Drake v. Whitmore, 5 De G. & Sm. 619, 64 Reprint 1269.

39. In re Heydenfeldt, 127 Cal. 456, 59 P 839.

the testator, where such conversion is necessary for the preservation of the estate, but not merely to further a better plan than that prescribed by the testator.[40]

A testator cannot prevent a sale of land to pay his debts by provisions in his will inconsistent with such sale.[41]

Direction for gradual settlement of firm business. Where a deceased partner's will provided that the business of the firm should be settled gradually, so as to not injure the estate or prejudice the surviving partner, a delay of five years in the settlement of the firm affairs by the surviving partner did not justify an order directing the deceased's executors to sell the deceased's interest in the firm, there being no evidence that the decedent's executors or legatees were dissatisfied with the management of the estate.[42]

[§ 1460] **C. Who May Apply for Sale—1. Executor or Administrator—a. In General.** The executor or administrator has usually the right, and in a proper case, such as a deficiency of personalty, it is his duty to apply for an order or license for the sale of the real property of his decedent.[43] Indeed some cases have gone to the extent of holding that the executor or administrator is the only

40. Johnson v. Buck, 220 Ill. 226, 77 NE 163.

41. Ga.—Johnson v. De Laperriere, 136 Ga. 554, 71 SE 874.

Kan.—Nelson v. Schoonover, 89 Kan. 388, 131 P 147.

Ky.—Reaves v. Baker, 112 SW 609, 33 KyL 1004.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

Pa.—In re Acklin, 237 Pa. 528, 85 A 862.

But compare Hughes v. Mulanax, (Tex. Civ. A.) 157 SW 217 [decided in conformity to answers to cert questions 105 Tex. 576, 153 SW 299] (holding that in view of Rev. St. [1895] art 2007, relating to the disposition of decedents' property, a testator may, under art 1991, so frame his will as to deprive his executor or the probate court of the power to sell his property until that provision in the will is annulled, but holding also that a will which at the beginning directed the executor to pay debts did not prohibit the executor, under order of court, to sell the testator's land for that purpose, even though subsequent clauses directed the executor not to sell it).

[a] **Illustrations.**—(1) A debtor cannot, by devising his lands to one for life, with remainder to parties not in esse, prevent their sale for payment of his debts until all are born who may by possibility take under the will. Carraway v. Lassiter, 139 N. C. 145, 51 SE 968. (2) A testamentary direction to the executor to sell real estate and distribute the proceeds does not oust the court of jurisdiction to order a sale to pay debts. In re Acklin, 237 Pa. 528, 85 A 862. (3) Where a testator directed that his debts should be paid out of his personal property, "as my executors can best spare, and if he [they] cannot spare a sufficiency of said property, then from the yearly income arising from the proceeds of my land," and after giving specific legacies to two of his daughters, directed that all of his property should be kept together until his youngest child should become of age, "and, in case of my daughters, until they marry and my wife should die, and that my family be supported out of the proceeds of the same, and if there is any balance left after their support, that it be equally divided between my children," such testamentary disposition did not deprive the court of ordinary of jurisdiction to pass an order authorizing a sale of certain of the testator's real estate, after due citation, upon application of the executors, alleging that it was necessary to sell such real estate for the purpose of paying debts and defraying the expenses of administration. Johnson v. De Laperriere, 136 Ga. 554, 71 SE 874. (4) A desire, expressed by a testator in her will, that when her estate could afford it fifty dollars a year should be paid to a church out of the rent of certain real estate, did not prevent a sale of such real estate for the payment of the testator's debts; the rights of the church attaching to the surplus of the proceeds of the sale. Rothchild v. Wallace, 155 Ky. 676, 160 SW 170. (5) Where a wife wills her property to her husband under an agreement founded upon a valuable consideration, such property is subject to sale by the executor in so far as is necessary for the payment of valid demands against the estate and costs of administration. Nelson v. Schoonover, 89 Kan. 388, 131 P 147.

42. In re Auerbach, 23 Utah 529, 65 P 488.

43. U. S.—Quinton v. Neville, 152 Fed. 879, 81 CCA 673; Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69.

Ala.—Bolen v. Hoven, 143 Ala. 652, 39 S 379; Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48; Matheson v. Hearin, 29 Ala. 210.

Cal.—In re Roach, 139 Cal. 17, 72 P 393; Cout's Est., 87 Cal. 480, 25 P 685.

Ill.—Frackelton v. Masters, 249 Ill. 30, 94 NE 124; Majorowicz v. Payson, 153 Ill. 484, 39 NE 127; Virgin v. Virgin, 91 Ill. A. 188 [aff 189 Ill. 144, 59 NE 586].

Ind.—Jarrell v. Brubaker, 150 Ind. 260, 49 NE 1050; Bennett v. Gaddis, 79 Ind. 347; Moncrief v. Moncrief, 73 Ind. 587.

Ky.—Huser v. Smith, 1 KyL 56.

La.—Irwin v. Flynn, 110 La. 829, 34 S 794; Savage v. Williams, 15 La. Ann. 250; Riehlman's Succ., 4 La. A. (Orleans) 400; Kennedy's Succ., 2 La. A. (Orleans) 65.

Md.—Murray v. Conley, 124 Md. 218, 92 A 476.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

Miss.—Nabors v. McKay, 27 Miss. 799.

Mo.—Grayson v. Weddle, 63 Mo. 523.

N. Y.—Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261, 54 NYS 555]; Matter of O'Brien, 39 App. Div. 321, 56 NYS 925.

N. C.—Tarboro v. Pender, 153 N. C. 427, 69 SE 425; Clement v. Cozart, 109 N. C. 173, 13 SE 862; Wilson v. Pearson, 102 N. C. 290, 9 SE 707; Wilson v. Bynum, 92 N. C. 717; Sinclair v. McBryde, 88 N. C. 438; Ballard v. Kilpatrick, 71 N. C. 281; Pelletier v. Saunders, 67 N. C. 261.

Oh.—Rheinfrank v. Hurr, 98 Oh. St. 439, 121 NE 645; In re Cavagna, 11 OhS&CP 725, 8 OhNP 557.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791; Levy v. Riley, 4 Or. 392.

Pa.—Kearns' Est., 19 Pa. Dist. 506, 38 Pa. Co. 30; Weidner's Est., 18 Pa. Dist. 955; Walker's Est., 23 Pa. Co. 657; Heyer's Est., 8 Kulp 107; Kitchenman's Est., 15 Phila. 519.

R. I.—West Greenwich Probate Ct. v. Carr, 20 R. I. 592, 40 A 844.

S. C.—Shaw v. Barksdale, 25 S. C. 204; Scruggs v. Foot, 19 S. C. 274; McNamee v. Waterbury, 4 S. C. 156.

Tenn.—Livingston v. Noe, 1 Lea 55.

Tex.—Lee v. King, 21 Tex. 577; Allen v. Clark, 21 Tex. 404; Alexander v. Maverick, 18 Tex. 179, 67 AmD 693 [expl Miller v. Miller, 10 Tex. 319]; Miller v. Miller, 10 Tex. 319; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735; Waterman Lumber, etc., Co. v. Robbins, (Commn. A.) 206 SW 825.

W. Va.—Shahan v. Shahan, 48 W. Va. 447, 37 SE 552, 86 AmSR 68; Reinhardt v. Reinhardt, 21 W. Va. 76.

N. B.—Trites v. Humphreys, 2 N. B. Eq. 1.

[a] **A natural tutor,** having the right of administration ex officio, may apply. Elizardi v. Kelly, 2 La. A. (Orleans) 279.

[b] **Application by attorney of executor sufficient.**—Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69.

[c] **A judgment debtor's administrator** is the proper party to sell the homestead lands for distribution among judgment creditors. Tarboro v. Pender, 153 N. C. 427, 69 SE 425.

[d] **Person acting as administrator without authority.**—A sale of the real estate under an order of the probate court granted upon the application of a person assuming to act as administrator de bonis non, but whose appointment was void because there was no vacancy, has been held void. Sitzman v. Pacquette, 13 Wis. 291; Humes v. Cox, 1 Pinn. (Wis.) 551.

[e] **The appointment of an administrator de bonis non without the will annexed,** although decedent left a will, is not a fatal objection to his petition for an order for the sale of land, where at the time of his appointment nothing remained to be done under the will. Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 246].

[f] **An executor who is also the residuary legatee,** and who as such has given a bond conditioned to pay debts and legacies, cannot obtain a license to sell the real estate of his testator for the payment of debts and charges of administration. Thayer v. Winchester, 133 Mass. 447.

[g] **A demand upon the administrator to sell is not a prerequisite** to his right to petition for or the power of the court to order a sale. In re Roach, 139 Cal. 17, 72 P 393.

[h] **Estoppel.**—Where the administrator joins the heirs in a petition to sell land for partition, admitting that he has personal assets sufficient to pay the debts, he cannot afterward subject the land itself to the payment of the debts. Livingston v. Noe, 1 Lea (Tenn.) 55.

[i] **The administrator's consent to a sale of the land by the heirs** does not divest the creditor of his right to have his debt made out of the land, nor estop the administrator from procuring an order of sale to pay such creditor. Moore v. Moore, 155 Ind. 261, 57 NE 242; Baker v. Griffitt, 83 Ind. 411; Moncrief v. Moncrief, 73 Ind. 587.

[j] **Duration of right.**—A statute which authorizes either the personal representative or a creditor to bring suit to sell the real estate, and provides that if the personal representative does not sue within six months after his qualification, then the creditor may sue, precludes the representative from suing after the six months have elapsed. Reinhardt v. Reinhardt, 21 W. Va. 76.

[k] **A special administrator** cannot apply for a sale of land. Long v. Burnett, 13 Iowa 28, 81 AmD 420.

[l] **Statute establishing contrary rule.**—Peirce v. Graham, 85 Va. 227, 7 SE 189.

person who can apply for a sale for the payment of debts [44] and that the court has no power to order a sale, except on his application.[45] On the other hand it has been held that the representative cannot apply for a sale in order to effect a more equal distribution among heirs,[46] or for a sale of land charged with the payment of legacies.[47]

[§ 1461] **b. Compelling Application.**[48] If the representative fails to apply without undue delay for authority to convert the real estate into assets to pay debts, he may be compelled to discharge this duty at the instance of any creditor,[49] and it has been held that the representative can neither defend against a proceeding to compel him to make application for the sale of realty,[50] nor appeal from the order therein.[51] It has been held, however, that the representative cannot be compelled to proceed to sell property fraudulently conveyed by decedent.[52] Where the evidence fails to establish any debts of the estate, a proceeding to compel the representative to sell realty should be dismissed.[53]

Jurisdiction to compel corepresentative to join in application. A court of equity has no jurisdiction to compel a corepresentative to join in a petition to the probate court for leave to sell real estate;[54] the petitioner, if aggrieved, must seek his remedy in the probate court.[55]

[§ 1462] **2. Creditors.** As a general rule creditors have the right to apply for an order directing the sale of decedent's realty for the payment of debts, especially when the representative neglects or refuses to do so,[56] although it has been held that

44. Swope v. Swope, 173 Ala. 157, 55 S 418, AnnCas1914A 937; Bolen v. Hoven, 143 Ala. 652, 39 S 379; Henley v. Johnson, 134 Ala. 646, 32 S 1009, 92 AmSR 48; Rheinfrank v. Hurr, 98 Oh. St. 439, 121 NE 645; Levy v. Riley, 4 Or. 392. But see infra §§ 1462, 1463.

[a] **An heir** cannot maintain a bill for the sale of the intestate's real estate to pay debts. Swope v. Swope, 173 Ala. 157, 55 S 418, AnnCas 1914A 937 (infant heir by next friend); Kirkbride v. Kelly, 167 Ala. 570, 52 S 660.

45. Pratt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69; Bolen v. Hoven, 143 Ala. 652, 39 S 379.

46. Bishop v. Hampton, 15 Ala. 761; McCain v. McCain, 12 Ala. 510; Huckaby v. Huckaby, 134 La. 107, 63 S 755; Byrnes v. Byrnes, 115 La. 275, 38 S 991; Dumestre's Succ., 40 La. Ann. 571, 4 S 328; Washington v. McCaughan, 34 Miss. 304.

47. Littleton's App., 93 Pa. 177; Field's App., 36 Pa. 11.

48. Compelling exercise of power of sale under will see supra § 640.

49. Ill.—Kamerer v. Kamerer, 281 Ill. 587, 117 NE 1027.

Kan.—Stratton v. McCandliss, 32 Kan. 512, 4 P 1018.

Miss.—Ferguson v. Scott, 49 Miss. 500.

N. Y.—Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731.

N. C.—Hobbs v. Cashwell, 152 N. C. 183, 67 SE 495; Harrington v. Hatton, 129 N. C. 146, 39 SE 780; Baker v. Carter, 127 N. C. 92, 37 SE 81; Clement v. Cozart, 109 N. C. 173, 13 SE 862, 112 N. C. 412; Tuck v. Walker, 106 N. C. 285, 11 SE 183; Sinclair v. McBryde, 88 N. C. 438; Pelletier v. Saunders, 67 N. C. 261; Fike v. Green, 64 N. C. 665.

Pa.—Lukens' Est., 10 Pa. Dist. 118; Kitchenman's Est., 15 Phila. 519.

Tenn.—Bird v. Key, 8 Baxt. 366.

[a] **Proceedings must be in conformity to statute.**—Hutchinson's Est., 10 Pa. Co. 592.

[b] **The proper motion** is that the personal representative show cause why he should not apply for a sale. Titlow's Est., 2 Pa. Dist. 512, 13 Pa. Co. 445.

[c] **Indemnity to representative.**—Where the testator's interest is merely reversionary and contingent and possibly of trifling value, the administratrix should not be compelled to institute proceedings without indemnity, since the sale might not bring enough to pay costs and expenses. Kamerer v. Kamerer, 281 Ill. 587, 117 NE 1027 (the same is true as to an heir's interest, which is of trifling value, and which it is sought to have the administrator sell for payment of the heirs' debts).

[d] **Time for proceeding.**—(1) No definite rule can be laid down as to the time within which a creditor must initiate proceedings to compel a personal representative to proceed to subject realty to the payment of debts. Ferguson v. Scott, 49 Miss. 500. (2) A creditor may at any time institute such proceedings and require the personal representative to show cause why he should not be ordered to sell the real estate, and the statute expressly prohibits him from assigning as cause "that the time within which he is allowed to sell the same has expired." Ferguson v. Broome, 1 Bradf. Surr. (N. Y.) 10.

[e] **A single creditor** may proceed by action in the superior court to compel the personal representative to sell the debtor's land to pay debts. Yarborough v. Moore, 151 N. C. 116, 65 SE 763.

[f] **A foreign creditor** may file a bill against the personal representative to compel him to obtain an order to sell real estate, although there is realty in the state where such creditor resides. Bird v. Key, 8 Baxt. (Tenn.) 366.

[g] **Parties to proceeding.**—In an action by a creditor of the estate to compel the executor to sell real estate to pay debts, the devisee of the real estate is a necessary party, and where he was a nonresident, and was made a party defendant, but was never legally served with process, and did not appear, a judgment in plaintiff's favor must be reversed. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694.

[h] **If there is not enough money in the estate to pay the costs,** the representative will not be required to advance them, but if a creditor is willing to advance the costs or indemnify the representative, he will be ordered to proceed. Kitchenman's Est., 15 Phila. (Pa.) 519.

[i] **Dismissal of a creditor's petition for an accounting** with the statement that the proceeding was barred by limitations is not a bar to the maintenance of an action by the creditor to compel the executor to sell real estate to pay the debt. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694.

50. Lane v. Thorn, 103 Ill. A. 215.

51. McCollister v. Greene County Nat. Bank, 171 Ill. 608, 49 NE 734; Lane v. Thorn, 103 Ill. A. 215.

[a] **The reason of the rule is** that the representative has no interest in the matter. McCollister v. Greene County Nat. Bank, 171 Ill. 608, 49 NE 734.

52. Bottorff v. Covert, 90 Ind. 508; Harrington v. Hatton, 129 N. C. 146, 39 SE 780.

53. Worthington v. Worthington, 112 Md. 135, 76 A 46.

54. Southwick v. Morrell, 121 Mass. 520.

55. Southwick v. Morrell, 121 Mass. 520.

56. Ala.—Banks v. Speers, 103 Ala. 436, 16 S 25; Fitzpatrick v. Edgar, 5 Ala. 499.

Ark.—Brown v. Hanauer, 48 Ark. 277, 3 SW 27; Williamson v. Furbush, 31 Ark. 539.

Cal.—Roach's Est., 139 Cal. 17, 72 P 393; Cout's Est., 87 Cal. 480, 25 P 685; Haynes v. Meeks, 20 Cal. 288.

Fla.—Anderson v. Northrup, 30 Fla. 612, 12 S 318.

Ill.—Kamerer v. Kamerer, 281 Ill. 587, 117 NE 1027; Young v. Wittenmyre, 122 Ill. 303, 14 NE 869 [rev 22 Ill. A. 496]; Rowland v. Swope, 39 Ill. A. 514.

Ind.—Whisnand v. Small, 65 Ind. 120; Nettleton v. Dixon, 2 Ind. 446.

Kan.—Stratton v. McCandliss, 32 Kan. 512, 4 P 1018.

La.—Winn's Succ., 30 La. Ann. 702; Jones v. Morgan, 6 La. Ann. 630; Dubuch v. Wildermuth, 3 La. Ann. 407; Porter's Succ., 5 Rob. 96.

Md.—McGaw v. Gortner, 96 Md. 489, 54 A 133.

Mich.—Roscoe v. McDonald, 91 Mich. 270, 51 NW 939; Ireland v. Miller, 71 Mich. 119, 39 NW 16.

Miss.—Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549; Allen v. Hillman, 69 Miss. 225, 13 S 871; Hargrove v. Baskin, 50 Miss. 194; Hollman v. Bennett, 44 Miss. 322; Evans v. Fisher, 40 Miss. 643.

Mo.—Merritt v. Merritt, 62 Mo. 150.

N. J.—Simpson v. Bockius, 77 N. J. Eq. 339, 78 A 758.

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Kingsland v. Murray, 133 N. Y. 170, 30 NE 845; In re Bingham, 127 N. Y. 296, 27 NE 1055; Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672]; Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261, 54 NYS 555]; Van Orden v. Krouse, 89 Hun 1, 34 NYS 1004; Matter of Buffalo State Hospital, 47 Misc. 33, 95 NYS 209, 4 Mills Surr. 577; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCiv Proc 220, 2 Gibb. Surr. 581; Matter of Corwin, 10 Misc. 196, 31 NYS 426, 1 Gibb. Surr. 167; In re Levy, 166 NYS 1083.

N. C.—Yarborough v. Moore, 151 N. C. 116, 65 SE 763; Clement v. Cozart, 109 N. C. 173, 13 SE 862; Wilson v. Pearson, 102 N. C. 290, 9 SE 707; Wilson v. Bynum, 92 N. C. 717; Balard v. Kilpatrick, 71 N. C. 281; Pelletier v. Saunders, 67 N. C. 261; Wiley v. Wiley, 61 N. C. 131.

Pa.—Erie Dime Sav., etc., Co. v. Vincent, 105 Pa. 315; Lukens' Est., 10 Pa. Dist. 118; Martin's Est., 6 Pa. Dist. 58, 19 Pa. Co. 209; Johnson's Est., 30 PittsbLegJNS 365.

S. C.—Hand v. Kelly, 102 S. C. 151, 86 SE 382; Shaw v. Barksdale, 25 S. C. 204; Scruggs v. Foot, 19 S. C. 274; McNamee v. Waterbury, 4 S. C. 156; Bird v. Houze, 17 S. C. Eq. 250.

Tenn.—Bird v. Key, 8 Baxt. 366; Dulles v. Read, 6 Yerg. 53; Harris v. Thomas, (Ch. A.) 52 SW 706; Blount County Bank v. Smith, (Ch. A.) 48 SW 296; Jones v. Douglass, 1

a creditor has this right only after his debt has been acknowledged,[57] or his claim registered after being probated and allowed.[58]

A demand on the representative has been held not a prerequisite to the exercise by a creditor of his rights in the premises.[59]

The petitioning creditor obtains no preference over other creditors whose claims are of equal dignity.[60]

Creditors may lose their rights in this respect by a lack of diligence in enforcing them or by waiving them and trying to secure payment in other ways.[61]

[§ 1463] 3. **Other Persons Interested in Estate.** In some jurisdictions any person who is in-

Tenn. Ch. 631; Owen v. Beard, 3 Tenn. Civ. A. 82.

Tex.—Danzey v. Swinney, 7 Tex. 617.

Va.—Peirce v. Graham, 85 Va. 227, 7 SE 189.

Wash.—Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

W. Va.—McConaughey v. Bennett, 50 W. Va. 172, 40 SE 540; Reinhardt v. Reinhardt, 21 W. Va. 76.

Wis.—Richter v. Leiby, 99 Wis. 512, 75 NW 82.

[a] **Such an application may be made by:** (1) The widow when money is due her from the estate. Martin's Est., 6 Pa. Dist. 58, 19 Pa. Co. 209. (2) One whose claim against the executor for services to the estate has been allowed by the court. Cout's Est., 87 Cal. 480, 25 P 685. (3) A state hospital, for the treatment of the indigent insane, having a claim against decedent. Matter of Buffalo State Hospital, 47 Misc. 33, 95 NYS 209, 4 Mills Surr. 577. (4) Where a mortgagor gave to an attorney money to pay the mortgage, and the party receiving it converted it to his own use, and for years continued to pay interest to the mortgagee, he became the attorney of the mortgagor, and having misapplied it became indebted to him in the amount thereof, and, on the death of both, the executors of the mortgagors were creditors and entitled to maintain a proceeding for the sale of the agent's real estate to pay the debt. Matter of Lowerre, 48 Misc. 317, 96 NYS 764, 35 NYCivProc 259, 5 Mills Surr. 135.

[b] **A prima facie showing** that one has a claim against the estate is sufficient to enable him to maintain a proceeding for a sale of the real estate. Martin's Est., 6 Pa. Dist. 58, 19 Pa. Co. 209.

[c] **Creditors "other than by mortgage."**—Under a statute providing that a creditor other than a "creditor by a mortgage" may petition for disposition of decedent's realty, creditors whose claim was secured by a second mortgage at time of decedent's death, but who lost their security by reason of foreclosure of the first mortgage, were other than "creditors by a mortgage," entitled to relief. Matter of Ries, 182 App. Div. 296, 169 NYS 426.

[d] **Creditors living in another state** may proceed in Tennessee to have lands situated in the latter state sold to satisfy their debt notwithstanding there is property of decedent in the state where the creditors live. Bird v. Key, 8 Baxt. (Tenn.) 366.

[e] **Mortgage creditors** of a succession, although it is insolvent, are not bound to wait. They may require a sale of the mortgaged property for cash, provided its appraised value is obtained, and their wish must always prevail over that of the other creditors. Ogden's Succ., 10 Rob. (La.) 457; Porter's Succ., 5 Rob. (La.) 96.

[f] **Legacy in payment for services.**—An agreement by decedent to compensate a certain person for services to be rendered, by a legacy, does not constitute such person a creditor entitled to ask for the sale of lands for payment where such legacy has been made. Markley's Est., 20 Phila. (Pa.) 175.

[g] **A creditor who has assigned his interest** in a debt against decedent cannot institute proceedings in his own name for the sale of land, but the assignee, who is the real creditor, must institute the proceedings in his own name. Butler v. Emmett, 8 Paige (N. Y.) 12.

[h] **A judgment creditor** (1) whose judgment is a subsisting lien upon the real estate as against the heirs at law cannot institute proceedings before the surrogate to compel a sale of the real estate for the satisfaction of the judgment. Butler v. Emmett, 8 Paige (N. Y.) 12. (2) A judgment creditor is not entitled to file a petition in chancery for the sale of personal property belonging to decedent's estate, his remedy at law by levy being adequate and complete. Howell v. Randle, 171 Ala. 451, 54 S 563 (holding, however, that where an administrator joined in the request of a judgment creditor of decedent for a sale of personal property to pay debts, the petition would not be dismissed for lack of the judgment creditor's capacity to sue).

[i] **One whose claim is for funeral expenses** is not a "creditor of the decedent," and therefore cannot maintain a proceeding for the sale of decedent's land to pay debts. Van Orden v. Krouse, 89 Hun 1, 34 NYS 1004; Matter of Corwin, 10 Misc. 196, 31 NYS 426, 1 Gibb. Surr. 167.

[j] **Claim not constituting debt.**—Where a husband and wife contracted to give plaintiffs an option for six months on a certain tract of land lying outside the state, and within six months, but after the death of the husband, plaintiff elected to buy, but the wife and heirs of the husband refused to convey, it was held that as plaintiffs had not elected to buy during the husband's life, their claim for damages for refusal to convey was not a debt due from the husband, entitling them to sue for a sale of reality to pay debts under the statute. McGaw v. Gortner, 96 Md. 489, 54 A 133.

[k] **Protection of unsecured creditors.**—A petition for the sale of realty will be granted to protect the rights of the unsecured creditors, although the petitioners represent but a small proportion of the total indebtedness, and the executors will be directed to sell sufficient of the real estate to pay the balance due them, notwithstanding the executors have made every effort to sell at private sale, unless an agreement is filed, signed by all parties, that the lien of all the unsecured debts may be continued. Lukens' Est., 10 Pa. Dist. 118.

[l] **Creditors of the executor.**—While an executor is entitled to reimburse himself by a sale of real estate, for money borrowed and used by him in paying claims against the estate, his creditor has no such right. Smith v. Hayward, 5 OhS&CP 462, 5 OhNP 501.

[m] **A receiver may be appointed** to take charge of, put in marketable condition, and sell, timber belonging to the estate lying on the lands of a stranger, subject to his purchase money lien, at the instance of creditors, when the personal representative has refused so to do. Buskirk v. Peck, 57 W. Va. 360, 50 SE 432.

[n] **Effect of bond for payment of debts.**—The statutory right of creditors to have the real property sold for payment of their claims by proceedings in the probate court is not destroyed nor affected by the executor's giving a bond as residuary legatee for payment of debts and legacies. Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 NW 34.

[o] **Time for proceeding.** — A creditor may institute a suit for the sale of realty if the personal representative fails to institute such a suit within six months after his qualification. Reinhardt v. Reinhardt, 21 W. Va. 76.

[p] **Chancery has no inherent jurisdiction** to decree a sale of land at the suit of a creditor unless he has some specific lien thereon, or it is specifically burdened by the testator with the debts. McPike v. Wells, 54 Miss. 136.

[q] **A clerk of court** cannot grant an order of sale on application of a creditor. Mason v. Fuller, 12 La. Ann. 68.

57. Winn's Succ., 30 La. Ann. 702.

58. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549.

[a] **A creditor who has not obtained both an allowance** of his claim by the administrator and an approval by the probate judge cannot maintain a proceeding in the probate court for the sale of land; and it seems that a proceeding commenced before such approval cannot be cured by a subsequent approval. Danzey v. Swinney, 7 Tex. 617.

[b] **Appeal from allowance.**—A creditor whose claim has been allowed may bring an action, under the statute, to subject real estate or other assets not inventoried to sale, although an appeal has been taken from the allowance of his claim. Richter v. Leiby, 99 Wis. 512, 75 NW 82.

59. Roach's Est., 139 Cal. 17, 72 P 393.

60. Sinclair v. McBryde, 88 N. C. 438.

61. D. C.—Glenn v. Sothoron, 4 App. 125.

Ill.—Digby v. Weber, 149 Ill. A. 487.

Miss.—Phelps v. Harris, 61 Miss. 705.

N. Y.—In re Bingham, 127 N. Y. 296, 27 NE 1055.

Pa.—Honeywell's Est., 9 Kulp 340.

[a] **When right not lost.**—A decedent owed a certain amount for which a creditor held collateral. The account of the administrator recognized the claim as valid but stated that the creditor had agreed to compromise for half the amount of the claim if the collateral could be made available, otherwise his claim to be for the full amount. Pursuant to a decree, stating the creditor's claim at the amount agreed on for compromise, and directing a pro rata distribution of the assets, the creditor received payment on account of his claim and gave a receipt for his "distributive share" of his "claim against said estate." The collateral failed to realize enough to pay the amount due the creditor. It was held that neither the decree of distribution nor the receipt given by the creditor estopped him from resorting to the real estate for the collection of the whole amount remaining due him upon the full amount of his claim. Mead v. Jenkins, 38 Hun 340 [aff 109 N. Y. 661 mem, 17 NE 868].

[b] **Loss of right to enforce claim against part of land.**—Where the creditor who petitions for leave to sell land omits certain land of decedent from his notice of lis pendens, and thus, under the statute, loses his right to enforce his claim against such land, the remaining land should be released from liability in proportion to the value of the omitted land. In re Bingham, 127 N. Y. 296, 27 NE 1055.

terested in the estate may apply for an order of sale in case the executor or administrator fails to make application therefor;[62] accordingly it has been held that in a proper case application may be made by the heirs,[63] the legatees,[64] or the widow.[65] It has been held that a suit to sell realty for the purpose of paying debts and saving the personalty from the demands of creditors for the benefit of the estate can be instituted only by one who as heir, devisee, or purchaser has an interest in the real estate proposed to be sold, and also an interest in the personal estate which it is proposed to save by the sale.[66] While the guardian of a minor may duly apply for a license to sell land in a suitable case, this standing is not so readily accorded to a mere guardian ad litem.[67] Where a will provided that a certain attorney should be retained in the settlement of the estate, he was not entitled to prepare and file a petition for sale of decedent's realty and to have it signed by the executor against the latter's wishes.[68]

[§ 1464] **D. Property or Interests Subject to Sale**[69]**—1. In General.** As a general rule under the statutes all a decedent's real estate may be sold for the payment of his debts,[70] and this includes lands acquired by the estate after decedent's death.[71] Where decedent had the right under his father's will to purchase the interests of other remaindermen in land in which decedent had a remainder, within a certain time after the life tenant's death, and decedent elected by his will to purchase the interest of a deceased remainderman, the representatives of such remainderman being made defendants, decedent's administrators in proceedings

62. Cal.—Couts' Est., 87 Cal. 480, 25 P 685.

Mo.—Stark v. Kirchgraber, 186 Mo. 633, 85 SW 868, 105 AmSR 629.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

Pa.—King's Est., 14 Pa. Dist. 332.

Wash.—Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

[a] **An administrator as next friend of his infant ward** cannot prosecute a suit chiefly against himself both as administrator and as guardian for the sale of lands of the estate. Swope v. Swope, 173 Ala. 157, 55 S 418, AnnCas1914A 937.

63. Shriver v. Lynn, 2 How. (U. S.) 43, 11 L. ed. 172; Johnson's Est., 30 PittsbLegJNS (Pa.) 365; Price v. Price, 15 Sim. 484, 38 EngCh 484, 60 Reprint 707.

[a] **Concurrence of all the heirs** (1) in the application for a sale is sometimes required. Krug's Est., 9 Pa. Dist. 239. (2) But, on the other hand, power is sometimes given to order a sale on the application of only a part of the heirs. Shriver v. Lynn, 2 How. (U. S.) 43, 11 L. ed. 172.

[b] **A proceeding to sell for payment of debts** cannot be maintained by: (1) An heir. Kirkbride v. Kelly, 167 Ala. 570, 52 S 660. (2) The purchaser of the interest of an heir. Stark v. Kirchgraber, 186 Mo. 633, 85 SW 868, 105 AmSR 629.

64. McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516; Cassady's Est., 13 Phila. (Pa.) 383; Rodney v. Rodney, 16 Sim. 307, 39 EngCh 307, 60 Reprint 892.

[a] **Proceedings to sell land to pay legacies charged thereon** must be by the legatees. Littleton's App., 93 Pa. 177; Field's App., 36 Pa. 11.

65. King v. Kent, 29 Ala. 542; Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847; Matter of O'Neill, 49 Misc. 285, 99 NYS 237, 5 Mills Surr. 240; Heyer's Est., 8 Kulp (Pa.) 107. But compare Hull v. Hull, 26 W. Va. 1 (widow cannot bring suit in chancery to have all lands of deceased husband sold and out of the proceeds to have her dower paid and the residue paid to creditors of her husband).

[a] **Sale to pay widow's award.**—The widow is entitled to ask that decedent's real estate other than the homestead be sold to pay the widow's award. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

[b] **Widow as executrix.**—Where an executrix who was also the widow of testator, and to whom all his property had been devised for her own use and ultimately for that of her children, paid the debts and funeral expenses of testator, she had the right to enforce a lien for such debts against the realty of testator where the personalty was insufficient to pay them, although she failed to procure the assignment of such debts to her. Matter of O'Brien, 39 App. Div. 321, 56 NYS 925.

[c] **A widow who claims as a creditor** may ask a sale. Martin's Est., 6 Pa. Dist. 58.

[d] **A widow whose dower has been assigned** her cannot demand a sale of the lands for payment of the debts of others. Lawrence v. Brown, 5 N. Y. 394.

[e] **Estoppel.**—A widow, by procuring the estate of her deceased husband to be settled as insolvent, accepting all the assets in lieu of her widow's award, and later conveying the real estate to one and assigning her allowance as an award to another, estops herself and also her assignee from having the real estate sold to pay the award. Brown v. Morgan, 84 Ill. A. 233.

66. Waring v. Waring, 2 Bland (Md.) 673.

67. Darby v. Anglin, 4 Hayw. (Tenn.) 244.

68. Lochary v. Corrigan, 132 Md. 371, 103 A 1006.

69. **Sale of realty under testamentary authority** see supra § 649.

70. U. S.—Elliott v. Shuler, 50 Fed. 454.

Ala.—Spence v. Parker, 57 Ala. 196.

Cal.—Byrne's Est., 112 Cal. 176, 44 P 467.

Conn.—Rockwell v. Sheldon, 2 Day 305.

Del.—In re Wheeler, 101 A 865.

Ga.—Lester v. Toole, 20 Ga. A. 381, 93 SE 55.

Ill.—Kamerer v. Kamerer, 281 Ill. 587, 117 NE 1027; Stillman v. Young, 16 Ill. 318.

La.—Lange's Succ., 46 La. Ann. 1017, 15 S 404.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

Mo.—Jackson v. Magruder, 51 Mo. 55.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

N. J.—Incandescent Light, etc., Co. v. Stevenson, 83 N. J. Eq. 482, 91 A 802.

N. Y.—Smith v. Blood, 106 App. Div. 317, 94 NYS 667.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

Tenn.—Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

Tex.—Edmiston v. Long, 17 Tex. 135.

Vt.—Wetmore, etc., Co. v. Bertoli, 87 Vt. 257, 88 A 898.

Ont.—Re Hopkins, 32 Ont. 315.

"That the debts shall be paid is the injunction of the law. . . . If, then, the debts of the estate appear to exceed in amount the available means at hand, it may fairly be said to appear that a sale is necessary; and, if real estate is to be sold, the court or judge may properly consult the recitals of the petition as to the condition of the real estate to determine whether all or only a portion should be sold, and, if only a portion, then what particular portion." Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 283, 99 P 847, 129 AmSR 645.

[a] **The heirs have only a residuary interest** in the real property of their ancestor, and it is considered as belonging to his estate for the purpose of a sale to pay his debts. Lange's Succ., 46 La. Ann. 1017, 15 S 404; Smith's Succ., 9 La. Ann. 107.

[b] **Interests of minors.**—The right of a court of probate or equity to order a sale of a decedent's real estate, where the statute gives due authority, is not affected by the fact that a minor is interested in the property as heir or devisee. Lange's Succ., 46 La. Ann. 1017, 15 S 404; Leverett v. Harris, 7 Mass. 292. See also Whitman v. Fisher, 74 Ill. 147 (such power exists only when expressly given by statute).

[c] **Real property purchased with pension money** is not exempt after the death of the pensioner and may be sold for the payment of his debts. Smith v. Blood, 106 App. Div. 317, 94 NYS 667.

[d] **Land omitted from original inventory.**—It is no objection to an administrator's deed that the original inventory did not contain the land conveyed, it being presumed that a supplementary inventory containing the land was filed as authorized by the statute. Jamison v. Dooley, 34 Tex. Civ. A. 428, 79 SW 91 [aff 98 Tex. 206, 82 SW 780].

[e] **Escheated lands.**—The orphans' court has no authority to order a sale of lands which have escheated to the state. Van Kleek v. O'Hanlon, 21 N. J. L. 582 [aff 20 N. J. L. 31]. But compare Evans v. Brown, 5 Beav. 114, 49 Reprint 520 (as against the lord claiming by escheat, land is assets for payment of debts).

[f] **Mines or interests in mines** belonging to the estate may be sold. Byrne's Est., 112 Cal. 176, 44 P 467.

[g] **Where part of land has been aliened by heirs.**—Where lands descended are divided among the heirs, and some of the shares are aliened to bona fide purchasers before application is made to sell lands to pay debts of the estate, the unsold shares are liable not merely for their ratable proportion but for the entire indebtedness of the estate. The proper adjustment among the heirs is matter for separate suit. Maxwell v. Smith, 86 Tenn. 539, 8 SW 340.

[h] **Where a valid sale has been made under order of court,** so as to divest both heirs and creditors of any further claim, any order made afterward to sell the same land would not have the support of a rightful jurisdiction. Lindsay v. Jaffray, 55 Tex. 626. To same effect Brockenborough v. Melton, 55 Tex. 493.

71. Matter of Haig, 3 NYS 285, 14 NYCivProc 357, 6 Dem. Surr. 454.

to sell the estate to satisfy debts could consummate his election to purchase by paying the stipulated price out of the estate, and then sell the land for debts together with the rest of the estate, it being unnecessary to institute a separate proceeding to vest title in themselves.[72] A proceeding by judgment creditors for the sale of real property for the payment of debts has been held proper, although decedent's real property had previously been sold in partition by his heirs, the proceeds of the partition sale standing in place of the land.[73] A bond held by a decedent at his death, although not yet due, is liable to be sold under a decree in equity to raise funds for the payment of his debts.[74]

[§ 1465] **2. Reversions or Remainders.** An estate in reversion or remainder may be decreed to be sold for the payment of debts.[75]

[§ 1466] **3. Interest as Cotenant.** Where a decedent and others were cotenants of property, and decedent's interest survives his death, such interest may be sold in the course of administration of his estate.[76] But no more than decedent's interest can pass by such a sale,[77] and if the property is divisible, it should be partitioned and the sale made of the portion set off to decedent's estate.[78] Where the rule of survivorship deprives decedent of all interest at his death, nothing remains which can be sold as a part of his estate.[79]

[§ 1467] **4. Inchoate or Equitable Titles or Interests—a. In General.** An inchoate or equitable title in decedent passing to his heirs or devisees may be sold under a decree of the probate court.[80] Thus the court may order the sale of property which was held in trust for decedent,[81] or his interest as purchaser in an executory contract of sale.[82] But where there is at most a slight or merely an ap-

72. Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73.

73. Griswold v. McDonald, 81 Misc. 376, 143 NYS 341.

74. Grose v. McMullen, 2 Del. Ch. 227.

[a] **Indemnity bond.**—The probate court has no jurisdiction to make an order authorizing an administrator to assign a bond of indemnity given to his decedent as sheriff to indemnify him against claims of a third person to property levied on. McDermott v. Mitchell, 53 Cal. 616.

75. Ark.—Killough v. Hinton, 54 Ark. 65, 14 SW 1092, 26 AmSR 19.

Ga.—Smith v. Samuels, 133 Ga. 790, 66 SE 1086.

Ill.—Kamerer v. Kamerer, 281 Ill. 587, 117 NE 1027.

Ky.—Trumbo v. Sorrency, 3 T. B. Mon. 284, 16 AmD 103; Buddeke v. Clay, 12 Ky. Op. 335.

Miss.—Williams v. Ratcliff, 42 Miss. 145.

[a] **Illustration.**—Where a person who owned and was in possession of land sold the fee to another, but before the deed was recorded deeded a life estate in the same land to others, the second deed being recorded before the first, and such life tenants took possession, the administrator of the first grantee could, under order of court, sell the remainder estate which was all the interest he claimed that intestate had in the land, although the life tenants were in possession. Smith v. Samuels, 133 Ga. 790, 66 SE 1086.

76. Ala.—Roulston v. Washington, 79 Ala. 529; Spence v. Parker, 57 Ala. 196.

Ga.—King v. Cabaniss, 81 Ga. 661, 7 SE 620.

Ky.—Greer v. Greer, 12 SW 152.

La.—Lange's Succ., 46 La. Ann. 1017, 15 S 404.

Oh.—Ewing v. Higby, 7 Oh. 198, 28 AmD 633.

S. C.—Brennan v. Hill, 31 S. C. L. 599 note; Gates v. Irick, 31 S. C. L. 593.

Va.—Ryan v. McLeod, 32 Gratt. (73 Va.) 367.

[a] **If the amount of decedent's interest is uncertain** it must be ascertained before an order of sale for the payment of his debts can be made. Ryan v. McLeod, 32 Gratt. (73 Va.) 367.

[b] **If the decedent owned an undivided half** of a tract of land and the administrator sold a specified half of the tract, whatever interest the heirs had in the part sold passed by the sale. King v. Cabaniss, 81 Ga. 661, 7 SE 620.

[c] **Undivided interest covered by specific devise.**—The orphans' court has no authority to direct the sale of an undivided interest that has been devised to a particular person, for the relief of other devisees. Hemphill v. Pry, 188 Pa. 243, 41 A 530.

[d] **A sale of a deceased partner's interest** in partnership lands cannot be ordered before the partnership debts have been paid and the accounts between the partners adjusted, although the surviving partner makes the application as administrator of the deceased partner. Roulston v. Washington, 79 Ala. 529.

[e] **The personal property of a deceased partner** which is in the possession of the surviving partner, and constitutes a part of the firm property, cannot be sold by decedent's executors under order of court. Auerbach's Est., 23 Utah 529, 65 P 488, 90 AmSR 685.

77. McCormick's App., 57 Pa. 54, 98 AmD 191.

[a] **A sale of partnership real estate** for payment of a deceased partner's debts passes only his interest in the property, although the legal title was in him alone. McCormick's App., 57 Pa. 54, 98 AmD 191.

78. Greer v. Greer, (Ky.) 12 SW 152.

79. Walker's Est., 1 Del. Co. (Pa.) 384.

80. Ala.—Jones v. Woodstock Iron Co., 95 Ala. 551, 10 S 635; Roulston v. Washington, 79 Ala. 529; Spence v. Parker, 57 Ala. 196; Inman v. Gibbs, 47 Ala. 305; Vaughan v. Holmes, 22 Ala. 593; Jennings v. Jenkins, 9 Ala. 285; Evans v. Mathews, 8 Ala. 99; Perkins v. Winter, 7 Ala. 855.

Ga.—Streetman v. Streetman, 133 Ga. 760, 66 SE 883.

Ill.—Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76.

Ind.—Jarrell v. Brubaker, 150 Ind. 260, 49 NE 1050.

Ky.—Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73; Peebles v. Watts, 9 Dana 102, 33 AmD 531.

Mich.—Woods v. Monroe, 17 Mich. 238; Baxter v. Robinson, 11 Mich. 520.

Mo.—Howell v. Jump, 140 Mo. 441, 41 SW 976; Hand v. Motter, 73 Mo. 457; Jackson v. Magruder, 51 Mo. 55; Valle v. Bryan, 19 Mo. 423.

N. Y.—Richmond v. Foote, 3 Lans. 244; Foersch v. Schmitt, 55 Misc. 608, 106 NYS 935.

Oh.—Biggs v. Bickel, 12 Oh. St. 49; Avery v. Dufrees, 9 Oh. 145.

Pa.—Horner's App., 56 Pa. 405.

Wis.—Allen v. McRae, 91 Wis. 226, 64 NW 889.

[a] **Illustration.**—The equitable title of one who had bought and paid for land, but had not received a deed at the time of his death, may be sold by his executor or administrator under an order of court. Howell v. Jump, 140 Mo. 441, 41 SW 976.

[b] **Redemption from execution sale by third person.**—The failure of an administrator to redeem property sold under execution sale and the redemption thereof by one who had no power to redeem does not preclude the administrator from obtaining an order to sell such property to pay the debts of his decedent. Jarrell v. Brubaker, 150 Ind. 260, 49 NE 1050.

[c] **It has been held otherwise** under a statute authorizing the sale of real estate of which decedent "died seized." Livingston v. Livingston, 3 Johns. Ch. (N. Y.) 148.

81. See cases infra this note.

[a] **A resulting trust may be sold** under a statute which provides that all the right, title, and interest which decedent had in the premises sold, at the time of his death, shall pass to a purchaser under an administration sale. Valle v. Bryan, 19 Mo. 423.

[b] **Land conveyed by decedent in trust.**—Where a debtor had conveyed land in trust for the payment of certain debts, the equitable interest of the grantor in such lands in the hands of the trustee was real estate which could be sold under an order of court for the payment of debts. Biggs v. Bickel, 12 Oh. St. 49.

82. Ala.—Inman v. Gibbs, 47 Ala. 305.

Ill.—Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76.

Mich.—Baxter v. Robinson, 11 Mich. 520, 522.

Nebr.—Cutler v. Meeker, 71 Nebr. 732, 99 NW 514, 8 AnnCas 951; Hovorka v. Havlik, 68 Nebr. 14, 93 NW 990, 110 AmSR 387.

N. Y.—Richmond v. Foote, 3 Lans. 244.

"An executory contract for the purchase of land is regarded in the light of real estate, so far as to give the administrator no right to dispose of such a contract, which he would not have to dispose of the land itself, had it been conveyed to his intestate during life." Baxter v. Robinson, supra.

[a] **Illustration.**—Where intestate purchased and was in possession of certain real estate under a bond for title at the time of his death, not having paid the purchase price in full, his interest in the property was subject to sale for the payment of debts. Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76.

[b] **A parol contract** for the purchase of land, which has been taken out of the statute of frauds, by part performance, is subject to sale for payment of the purchaser's debts. Richmond v. Foote, 3 Lans. (N. Y.) 244.

[c] **Inchoate right of purchaser at probate sale.**—Where a sale of lands under an order of the probate court had been made and confirmed, the purchaser, although he had not paid the purchase money, had an interest in the land which, on his death, the court could order to be sold for the payment of his debts. Inman v. Gibbs, 47 Ala. 305.

[d] **Where the administrator pays the balance of the purchase price** of property and takes a conveyance in the name of the heirs, the court has no jurisdiction subsequently to order a sale of the land. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 S 635.

[e] **A penal bond to make title on the performance of certain conditions**

parent equity, and no really valuable interest in decedent or his heirs, the court should refuse to order a sale.[83]

[§ 1468] **b. Interests in Public Lands.** As a rule the right to perfect a decedent's inchoate title to or interest in public land goes to his heirs, and the executor or administrator cannot sell under order of court the patent, or the lands which have been patented, to the heirs.[84] There is, however, some authority for a contrary view,[85] and where decedent's right to the land became complete before his death, although a patent had not actually been issued, his interest in the land, or the certificate evidencing it, may be sold for his debts.[86]

[§ 1469] **5. Leased Property and Leasehold Estates.** The fact that realty is leased for a certain period does not preclude its sale,[87] although such sale must, of course, be subject to the lease;[88] and conversely, a leasehold estate of decedent may be sold to pay debts.[89] It has also been held that the

by the obligee does not create an equitable interest in the land which the probate court on the death of the obligee can order to be sold for the payment of his debts. Thus where a person who claimed to have a right of entry under the preëmption laws of the United States executed a bond to decedent in the penal sum of ten thousand dollars binding himself, on condition that decedent would establish the claim and pay to the United States the purchase money for the land, to deliver to decedent, his heirs, and assigns a good and sufficient deed of all his right and title to one half of such land, it was held that decedent did not take such an estate or interest in the land as could be sold by order of the orphans', court, although the condition of the bond was performed by decedent. Brown v. Chambers, 12 Ala. 697.

[f] **A purchaser at a sheriff's sale** who dies before taking a deed acquires no such interest in the premises as can be the subject of an administrator's sale. Blodgett v. Perry, 97 Mo. 263, 10 SW 891, 10 AmSR 307.

[g] **Rescission of contract.**—If an executory contract for the sale of land is rescinded for nonpayment of the purchase money after the death of the purchaser, his interest ceases and no sale can be ordered for the payment of his debts, although his heir, whom he left in possession of the land, obtained a deed to it from the vendor after the rescission. Goodwin v. Nelin, 2 Abb. Dec. (N. Y.) 258, 4 Transcr. A. 369, 35 HowPr 402.

[h] **On the other hand** it has been held that a statute authorizing the orphans' court to order the sale of lands, tenements, hereditaments, or real estate of a decedent, if necessary to pay his debts, did not include an equitable interest under a contract of sale. Hendrickson v. Hendrickson, 41 N. J. Eq. 375 [aff 42 N. J. Eq. 657, 9 A 742].

83. Ala.—Vaughan v. Holmes, 22 Ala. 593; Mounger v. Barks, 17 Ala. 48; Brown v. Chambers, 12 Ala. 697.

Kan.—Amos v. Livingston, 26 Kan. 106.

Mass.—Caverly v. Eastman, 142 Mass. 4, 7 NE 33.

N. Y.—Goodwin v. Nelin, 2 Abb. Dec. 258, 4 Transcr. A. 369, 35 HowPr 402.

Oh.—Tiernan v. Beam, 2 Oh. 383, 15 AmD 557.

Tenn.—Milligan v. Humbard, 11 Heisk. 137.

[a] **Illustration.**—The seizin of a person in possession of land under a title bond which chancery has refused specifically to execute is not such as to entitle his executor or administrator to sell it for payment of debts. Milligan v. Humbard, 11 Heisk. (Tenn.) 137.

[b] **A sale of the "right to redeem"** from a mortgage conveys nothing to the purchaser, since it is a sale of a mere personal privilege, and not of an interest in land subject to sale for the payment of decedent's debts. Rainey v. McQueen, 121 Ala. 121, 25 S 920.

84. U. S.—Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228.

Ala.—Burns v. Hamilton, 33 Ala. 210, 70 AmD 570; Cothran v. McCoy, 33 Ala. 65; Johnson v. Collins, 12 Ala. 322.

Cal.—Wittenbrock v. Wheadon, 128 Cal. 150, 160 P 664, 79 AmSR 32; Hartley v. Brown, 46 Cal. 201; Grover v. Hawley, 5 Cal. 485.

Ida.—Council Impr. Co. v. Draper, 16 Ida. 541, 102 P 7.

Ind.—Hawkins v. Johnson, 4 Blackf. 21.

Kan.—Haas v. Wilson, 97 Kan. 176, 154 P 1018; Byerly v. Eadie, 95 Kan. 400, 148 P 757, 96 Kan. 137, 150 P 523; Coulson v. Wing, 42 Kan. 507, 22 P 570, 16 AmSR 503; Rogers v. Clemmans, 26 Kan. 522.

La.—Stanbrough v. Wilson, 13 La. Ann. 494; Dean v. Wade, 8 La. Ann. 85.

N. D.—Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679.

Or.—Haun v. Martin, 48 Or. 304, 86 P 371.

Tex.—East v. Dugan, 79 Tex. 329, 15 SW 273; Turner v. Hart, 10 Tex. 438.

Wash.—Towner v. Rodegeb, 33 Wash. 153, 74 P 50, 99 AmSR 936.

Wyo.—Demars v. Hickey, 13 Wyo. 371, 80 P 521, 81 P 705; Demars v. Hickey, 13 Wyo. 371, 80 P 521, 81 P 705.

[a] **The administrator has no right to obtain a patent** in order to sell the land for the payment of debts, and a contract to advance money to him in order that he may procure the patent is void. Cothran v. McCoy, 33 Ala. 65.

[b] **Where heirs of a deceased entryman make final proof** and procure title from the government, the probate court has no power to sell such real estate, and the administrator of the deceased entryman cannot convey any title. Council Impr. Co. v. Draper, 16 Ida. 541, 102 P 7.

[c] **On the death of a timber culture claimant** before performing the conditions precedent to obtaining title, his interest terminates and passes by direct grant to his heirs as substituted beneficiaries of the government, the county court has no jurisdiction of the claim, and cannot authorize the administrator to borrow money thereon for the purpose of purchasing the land from the government, nor can it afterward authorize the sale of the property to pay the mortgage, and other indebtedness of decedent. Haun v. Martin, 48 Or. 304, 86 P 371.

[d] **A conditional headright certificate** cannot be sold under order of court for the grantee's debts. Turner v. Hart, 10 Tex. 438.

[e] **Where no certificate filed.**—When it appears after the sale of land by order of court that no certificate severing the land from the public domain was located or filed thereon until eight months after the sale, the purchaser acquires no title. Harwood v. Wylie, 70 Tex. 538, 7 SW 789.

[f] **Improvements made by a preemptioner** on the land are chattels real, which pass to his personal representative, and not to his heirs. Pelham v. Wilson, 4 Ark. 289.

85. Prevo v. Walters, 5 Ill. 35; Hawkins v. Hulburd, 10 Oh. 178; Moore v. Moore, 11 Humphr. (Tenn.) 512; Jackson v. Astor, 1 Pinn. (Wis.) 137, 39 AmD 281.

86. U. S.—Strodes v. Patton, 23 F. Cas. No. 13, 538, 1 Brock. 228.

Cal.—McDonald v. Burton, 68 Cal. 445, 9 P 714.

Ill.—Prevo v. Walters, 5 Ill. 35.

Mich.—Louden v. Martindale, 109 Mich. 235, 67 NW 133; Woods v. Monroe, 17 Mich. 238.

Nebr.—Cutler v. Meeker, 71 Nebr. 732, 99 NW 514, 8 AnnCas 951; Hovorka v. Havlik, 68 Nebr. 14, 93 NW 990, 110 AmSR 387.

Oh.—Avery v. Dufrees, 9 Oh. 145.

Tex.—Lubbock v. Binnes, 20 Tex. Civ. A. 407, 50 SW 584.

Wis.—Jackson v. Astor, 1 Pinn. 137, 39 AmD 281.

[a] **This rule has been applied to:** (1) Headright certificates. Soye v. Maverick, 18 Tex. 100; Moody v. Looscan, (Tex. Civ. A.) 44 SW 621. (2) Final settlement certificates. Strodes v. Patton, 23 F. Cas. No. 13,538, 1 Brock. 228.

[b] **If a land claim has been confirmed** (1) by act of congress it may be sold for the payment of the debts of the claimant, although he dies before the patent issues. Jackson v. Astor, 1 Pinn. (Wis.) 137, 39 AmD 281. (2) Where a decedent purchased a ranch, the vendor's title to which was derived from a Mexican grant, and instituted a proceeding to have the grant confirmed by the United States government, and pending this proceeding he died and it was continued in the name of his widow and children as his heirs, and the grant was finally confirmed, and they were so described in the order of substitution, in the decree of confirmation, and in the patent from the United States, the patent inured to the benefit of the estate and the land was subject to sale for the payment of decedent's debts. McDonald v. Burton, 68 Cal. 445, 9 P 714.

[c] **Fraudulent certificates.**—Land located under a fraudulent certificate cannot be sold by an administrator. Roehl v. Pleasants, 31 Tex. 45, 98 AmD 514.

[d] **The land itself is not the subject of sale until** a location and survey under the certificate have been made. Harwood v. Wylie, 70 Tex. 538, 7 SW 789; Odell v. Kennedy, 26 Tex. Civ. A. 439, 64 SW 802; Lubbock v. Binns, 20 Tex. Civ. A. 407, 50 SW 584.

[e] **Where the land has been located and patented,** and the proceedings had in the probate court concerning the sale and conveyance indicate that the property intended to be sold, and which was sold, was land, an objection that the property sold was the certificate and not the land is untenable. Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

87. In re Brannan, 5 Cal. Unrep. Cas. 882, 51 P 320.

[a] **Where the lease gives the lessee an option to purchase** at the end of the term, the property cannot be sold during the term to pay debts of the deceased landlord. Magruder v. Hornot, 110 La. 585, 34 S 696.

88. In re Brannan, 5 Cal. Unrep. Cas. 882, 51 P 320.

89. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

court may, in settling an estate, direct a sale of a mineral leasehold separate from a sale of the fee, if that course would be more advantageous to the estate.[90] Under a statute providing that specific legacies should not be sold in any case unless it becomes necessary to pay debts, where a sale of a leasehold for twenty years specifically devised, by the administrator de bonis non, to pay debts, was void, he could not again sell it after the devisee had conveyed her interest therein, unless it was thereafter needed to pay debts.[91]

[§ 1470] **6. Vendor's Liens.** A vendor's lien is not an asset which is the subject of sale to pay debts.[92]

[§ 1471] **7. Franchises.** The right to the use of a franchise is the property of the grantee, and it may be sold for the payment of his debts where the use continues for the public good as originally designed by the grant.[93]

[§ 1472] **8. Crops and Products of Realty.** It has been held that a crop upon decedent's estate may be decreed to be sold in such manner as may seem reasonable and the interest of the estate may require,[94] but that oil produced from wells sunk in real estate of decedent cannot be sold for the payment of debts, but the proper remedy is a sale of the land itself.[95]

[§ 1473] **9. Fixtures.** The orphans' court has no power to decree a separation of fixtures from the realty and a sale of the fixtures as personalty.[96]

[§ 1474] **10. Lands Devised by Decedent.** The fact that realty has been devised by decedent does not deprive the court of jurisdiction to order a sale thereof,[97] although a different rule is sometimes established by statute, under which the remedy, in case the devisee has taken possession of the land devised, is by execution for his contribution toward payment of debts.[98]

[§ 1475] **11. Lands Conveyed by Heir or Devisee.** In some states a bona fide sale and conveyance of land belonging to a decedent by the heir or devisee is held to give the purchaser a title thereto superior to the rights of decedent's creditors, whose sole remedy thereafter is an action against the heir or devisee for payment of the debt;[99] but under the general policy of modern legislation the land of a decedent remains subject to a lien or a cloud upon the title pending the full administration of his estate or for a fixed period, and it remains during such time liable to be sold for the payment of the decedent's debts or such claims as the statute may have included notwithstanding any sale by the heir or devisee.[1]

[§ 1476] **12. Property Not Owned by Dece-**

90. Baker v. Royal Lead, etc., Co. 107 SW 704, 707, 32 KyL 982 ("The right of an owner of a fee to lease or sell and convey the mineral right in the property absolutely, while retaining the fee in himself or disposing thereof to others, is now well recognized. An authority directly in point upon this question is the case of Ames v. Ames, 160 Ill. 600, 43 NE 593, wherein the court says: 'The right of the owners of land to convey the coal and mineral rights underlying the land, and reserve the surface absolutely in fee, has long been recognized. When such conveyance is made, two separate estates exist, and each is distinct. Each may be conveyed by deed, each may be devised under a will; each will pass to the heir under the statute of descent, and each is subject to taxation. . . . Two separate estates and interests being in existence, in principle there can be no difficulty in recognizing titles. If these two separate interests and titles were united in one person . . . the owner would have a right, to sever the two estates by deed or devise. Where the owner would have that right there is no inherent difficulty in a court of chancery severing the two estates in a partition proceeding, where it is rendered necessary in the interest of justice, and decreeing the dominant estate to one and the servient estate to another.' It will thus be seen that under the authority of the opinion from which we have just quoted the learned chancellor was fully justified in directing a sale of the leasehold separate and apart from the sale of the fee, if by so doing a more advantageous sale could be made for the benefit of the estate").

91. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

92. O'Connor v. Vineyard, 91 Tex. 488, 44 SW 485.

93. Leonard v. Baylen St. Wharf Co., 59 Fla. 547, 52 S 718, 31 LRANS 636.

94. Horn v. Grayson, 7 Port. (Ala.) 270.

95. Johnson's Est., 30 PittsbLegJ NS (Pa.) 365.

96. Walter's Est., 10 Kulp (Pa.) 221.

97. U. S.—Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542.

Ala.—Pearson v. Darrington, 32 Ala. 227; King v. Kent, 29 Ala. 542.

Conn.—Brainerd v. Cowdrey, 16 Conn. 498.

Ga.—Hall v. Ewing, 101 SE 807.

Ind.—Bennett v. Gaddis, 79 Ind. 347; Moncrief v. Moncrief, 73 Ind. 587.

Ky.—Frazer v. Fidelity, etc., Co., 89 SW 134, 28 KyL 127.

Mo.—Shaw v. Nicholay, 30 Mo. 99; Carson v. Walker, 16 Mo. 68.

N. H.—Prescott v. Walker, 16 N. H. 340.

N. Y.—Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632.

Pa.—Bloodhart's Est., 2 Pa. Co. 476.

Tenn.—Scales v. Curfman, (Ch. A.) 53 SW 755.

[a] **The interest of the sole devisee** of a deceased executor may be sold to satisfy a judgment against the estate of the executor, and the devisee cannot require that the same shall be rented and the proceeds applied to the satisfaction of the judgment. Frazer v. Fidelity, etc., Co., 89 SW 134, 28 KyL 127.

[b] **A devisee on condition that the devisee pay the testator's debts** does not prevent the administrator from obtaining leave to sell real estate on the personalty proving insufficient. Bennett v. Gaddis, 79 Ind. 347.

[c] **If the land was devised to two persons,** and on a deficiency of personal estate the administrator sells that only which was devised to one of them, the sale is not illegal, if the other devisee has paid his proportion of the deficiency. Prescott v. Walker, 16 N. H. 340.

[d] **Improvements of devisee.**— Where a devisee of a mill has added thereto machines and appliances with the intent and purpose of making them permanently a part thereof, and they have been made and used as a permanent part thereof, and are adapted to the purpose thereof, they may be sold as part thereof for the benefit of decedent's creditors. Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632.

98. Atwood v. Frost, 51 Mich. 360, 16 NW 685, 59 Mich. 409, 26 NW 655.

99. Ala.—Beadle v. Steele, 86 Ala. 413, 5 S 169; Bell v. Craig, 52 Ala. 215.

Ga.—Shipp v. Gibbs, 88 Ga. 184, 14 SE 196.

Ill.—Ryan v. Jones, 15 Ill. 1.

Miss.—Westbrook v. Munger, 64 Miss. 575, 1 S 750.

S. C.—Stackhouse v. Wheeler, 17 S. C. 91.

Tenn.—Smith v. Thomas, 14 Lea 324.

1. U. S.—Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873.

Ark.—Howell v. Duke, 40 Ark. 102.

Colo.—New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

Conn.—Davis v. Vansands, 45 Conn. 600, 7 Cas. No. 3,655; Griswold v. Bigelow, 6 Conn. 258.

Ind.—Smith v. Gorham, 119 Ind. 436, 21 NE 1096; Baker v. Griffitt, 83 Ind. 411; Weakley v. Conradt, 56 Ind. 430.

Kan.—Rippe v. Weiters, 96 Kan. 738, 739, 153 P 536 [cit Cyc].

Ky.—Alderson v. Alderson, 83 SW 1129, 26 KyL 1260.

Mass.—Willard v. Nason, 5 Mass. 240; Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Flood v. Strong, 108 Mich. 561, 66 NW 473; Armstrong v. Loomis, 97 Mich. 577, 56 NW 938; Ireland v. Miller, 71 Mich. 119, 39 NW 16.

N. J.—Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; Warwick v. Hunt, 11 N. J. L. 1; Cooper v. Cooper, 5 N. J. Eq. 498; Skillman v. Van Pelt, 1 N. J. Eq. 511.

N. Y.—Dodge v. Stevens, 105 N. Y. 585, 12 NE 759 [rev 40 Hun 443]; Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632; Jewett v. Keenholts, 16 Barb. 193; Hyde v. Tanner, 1 Barb. 75; Griswold v. McDonald, 81 Misc. 376, 143 NYS 341; Matter of Doyle, 180 App. Div. 398, 167 NYS 827.

N. C.—Murchison v. Whitted, 87 N. C. 465; Donoho v. Patterson, 70 N. C. 649.

Oh.—Sidener v. Hawes, 37 Oh. St. 532; Faran v. Robinson, 17 Oh. St. 242, 93 AmD 617; Stiver v. Stiver, 8 Oh. 217; In re Seitz, 31 Oh. Cir. Ct. 32.

Pa.—Mohler's App., 8 Pa. 26.

R. I.—Johnson's Petitioner, 15 R. I. 438, 8 A 248; Mowry v. Robinson, 12 R. I. 152.

Tex.—Edmiston v. Long, 17 Tex. 135; Glover v. Coit, 36 Tex. Civ. A. 104, 81 SW 136.

Utah.—Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 101 P 586.

[a] **A previous partition sale** does not divest the surrogate of power to order a sale to pay decedent's debts within three years after the

dent at Time of Death.[2] The probate court has ordinarily no jurisdiction to order a sale of land to which decedent had no title whatever at the date of his death,[3] and whether such sale is through fraud or mistake it is void and must be set aside.[4] But land which a decedent has in his lifetime conveyed in fraud of creditors may, as a general rule, be reached and made available by sale for the payment of creditors, the proceeding usually involving a judicial inquiry into the question of fraud as well as the necessity of resorting to the land,[5] although a sale will not be ordered where it would interfere

granting of letters of administration. Hall v. Partridge, 10 HowPr (N. Y.) 188.

[b] **Sale after time limited.**—(1) Land aliened by an heir after the time limited cannot be sold by the administrator to pay the ancestor's debts. Murchison v. Whitted, 87 N. C. 465; Badger v. Daniel, 79 N. C. 372. (2) Nor can the administrator sell land aliened by the heir within such time if the alienee, after the time has elapsed, has conveyed to a purchaser for value and without notice. Murchison v. Whitted, 87 N. C. 465.

2. Land acquired by estate after decedent's death see supra § 1464, text and note 71.

Property held or claimed adversely see infra § 1478.

3. See cases infra note 4.

"A decree in such a case could not, and would not, be conclusive or res adjudicata against the owner of such property unless he became a party to the proceeding and participated in the litigation and allowed the judgment to become final under the statute. In such case he might be estopped raising the same question." Douglas v. Douglas, 22 Ida. 336, 347, 125 P 796.

[a] **Condemnation during decedent's lifetime.**—The probate court cannot direct a sale of decedent's right, title, and interest in an entire tract of land, part of which had been taken by condemnation, and decedent's claim for damages does not pass to the purchaser at such a sale. In re Southern New England R. Co., 39 R. I. 468, 98 A 99.

[b] **Separate property of married woman.**—The county court had no jurisdiction to order a sale of the separate property of a married woman, who predeceased her husband, as a part of the administration of the husband's estate. Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386.

[c] **Sale instigated by true owner.**—The rule stated in the text has been applied, although the widow who was the true owner, supposed the property belonged to her husband's estate and instigated the sale. Paul v. Squibb, 12 Pa. 296.

[d] **Although the petition prays the sale of an entire tract** if it is found by the court that the decedent owned part only of the tract it should have that part only appraised and sold. Ewing v. Higby, 7 Oh. 198, 28 AmD 633 (where the prayer was for the sale of an entire tract, but subsequently one fourth thereof was decreed to another person, and thereafter the court received the appraisement of an undivided three quarters of the tract only, and, reciting it, ordered all to be sold, this showed that the court meant all appraised, all belonging to the heirs after deducting the fourth interest of the other person).

[e] **Conveyance not recorded until after grantor's death.**—Although a conveyance of land made in trust to secure an existing debt and future advances is not recorded until after the grantor's death, the title vests in the grantee as against creditors of decedent who did not attach the property during his life; and the land cannot be sold for the payment of decedent's debts. Edwards v. Barnes, 167 Mass. 205, 45 NE 351.

[f] **Property as to which decedent had power of appointment.**—Where the real estate was placed in the hands of a trustee to be conveyed to decedent's appointee or in failure of an appointment to her heirs at law, and she died without making an appointment, it was held that as she had no legal title to the property it could not be sold in the ordinary course of administration, under a license, for the payment of her debts. Coverdale v. Aldrich, 19 Pick. (Mass.) 391.

[g] **Proof sufficient to show ownership.**—On an application for the sale of lands to pay debts, proof of decedent's continuous occupancy, with open acts of ownership for more than twenty years, is sufficient proof of ownership in the absence of evidence that he did not enter or hold of his own right. Meadows v. Meadows, 78 Ala. 240.

4. U. S.—Elliott v. Shuler, 50 Fed. 454.

Ala.—Bishop v. Blair, 36 Ala. 80.

Ida.—Douglas v. Douglas, 22 Ida. 336, 125 P 796.

Ind.—Edwards v. Beall, 75 Ind. 401.

La.—Sicard v. Schwab, 112 La. 475, 36 S 500; Beckham v. Henderson, 23 La. Ann. 446; Cresse v. Marigny, 4 Mart. 50.

Mass.—Edwards v. Barnes, 167 Mass. 205, 45 NE 351.

Miss.—Ives v. Pierson, Freem. 220.

Oh.—Ewing v. Higby, 7 Oh. 198, 28 AmD 633.

Pa.—Paul v. Squibb, 12 Pa. 296.

R. I.—In re Southern New England R. Co., 39 R. I. 468, 98 A 99.

Tex.—Miller v. Rogers, 49 Tex. 398; Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386.

[a] **Illustration.**—A mother, who had inherited from her husband an undivided one third of a farm in fee simple, contracted with her children and grandchildren, who had inherited an undivided two thirds of the farm, the children to give the mother their interest during her life, or as long as she remained a widow, she to have the profits for her support and the improvement of the farm, and to pay all demands that might come against the estate, taxes, etc., and at her death or remarriage the farm, together with its appurtenances, was to "revert" to the legal heirs equally. It was held that inasmuch as the two-thirds interest of the children and grandchildren was theirs in fee simple, subject to the mother's life interest under the contract, the word "revert," if used solely in connection with that portion, would be unnecessary, and the parties' intention was that the farm as a whole should revert to the legal heirs equally, the word "revert" being used in the sense of "go" or "pass," and hence the mother's one-third interest could not after her death be sold to pay debts of her estate. Warrum v. White, 171 Ind. 574, 86 NE 959.

[b] **Land belonging to representative.**—In order to set aside a sale of lands belonging to the administrator on the ground that they were included in the conveyance by mistake, it must be shown that the parties did not intend the deed to operate as a conveyance in the personal as well as representative capacity of the administrator. Donabo v. Smith, 50 Iowa 218.

5. U. S.—Byrd v. Hall, 227 Fed. 537, 142 CCA 169 [aff 211 Fed. 182].

Ga.—Hill v. Hill, 101 SE 121.

Ind.—Bushnell v. Bushnell, 88 Ind. 403.

Iowa.—Harlin v. Stevenson, 30 Iowa 371.

Kan.—McGuire v. Davis, 95 Kan. 486, 490, 148 P 755 [cit Cyc]; Powers v. Scharling, 76 Kan. 855, 859, 92 P 1099 [cit Cyc].

Me.—Brown v. Whitmore, 71 Me. 65; Westcott v. McDonald, 22 Me. 402.

Mass.—Dunbar v. Kelly, 189 Mass. 390, 75 NE 740; Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23; Willard v. Nason, 5 Mass. 240; Drinkwater v. Drinkwater, 4 Mass. 354.

Mich.—Barris v. Emmons, 172 Mich. 590, 139 NW 872.

Mo.—St. Francis Hill Co. v. Sugg, 169 Mo. 130, 69 SW 359.

N. H.—Kingsbury v. Wild, 3 N. H. 30.

N. C.—Harrington v. Hatton, 129 N. C. 146, 39 SE 780; Clement v. Cozart, 109 N. C. 173, 13 SE 862; Mannix v. Ihrie, 76 N. C. 299; Waugh v. Blevins, 68 N. C. 167; Rhem v. Tull, 35 N. C. 57.

Oh.—Spoors v. Coen, 44 Oh. St. 497, 9 NE 132; Lowman v. Sewall, 16 Oh. Cir. Ct. 466, 9 Oh. Cir. Dec. 177 [rev on other grounds 4 OhS&CP 1, 2 Oh NP 376]; Beebe v. Canda, 18 Oh. Cir. Ct. N. S. 104; Baen v. Weller, 12 OhS&CP 128; Webster v. Ballard, 4 Oh. Dec. (Reprint) 419, 2 ClevLRep 137; Longley v. Sewell, 4 OhS&CP 1, 2 OhNP 376 [rev on other grounds 16 Oh. Cir. Ct. 466, 9 Oh. Cir. Dec. 177].

Wis.—Allen v. McRae, 91 Wis. 226, 64 NW 889.

[a] **This rule has been applied** to land bought with decedent's money, but the title to which was taken in the name of a third person. Bushnell v. Bushnell, 88 Ind. 403; Allen v. McRae, 91 Wis. 226, 64 NW 889. But compare Rhem v. Tull, 35 N. C. 57 (statute not permitting sale of land under such circumstances).

[b] **Either actual or constructive fraud sufficient.**—A license to sell is permitted under the statute, whether such conveyance was merely fraudulent as to creditors or made with actual premeditated fraud. Westcott v. McDonald, 22 Me. 402.

[c] **It is only by operation of the statute** that an administrator, upon recovery of property fraudulently conveyed by decedent, may transmit the title of decedent as if a fraudulent conveyance had not been made. Stockwell v. Shalit, 204 Mass. 270, 90 NE 570.

[d] **Voluntary conveyance to widow.**—An administrator de bonis non is entitled to an order for the sale of land voluntarily conveyed by decedent to his widow for life, which is necessary to pay debts, although the widow is the principal creditor. Barris v. Emmons, 172 Mich. 590, 139 NW 872.

[e] **Where creditors procure the setting aside** of a deed of decedent on the ground that it is fraudulent as against them, the administrator may treat the property thus uncovered as assets of the estate and sell the same under order of court. Byrd v. Hall, 227 Fed. 537, 142 CCA 169; St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 SW 359 [dist Zoll v. Soper, 75 Mo. 460; Hall v. Callahan, 66 Mo. 316; George v. Williamson, 26 Mo. 190, 72 AmD 203]. But see Schultz's Succ., 39 La. Ann. 505, 2 S 47 (setting aside of conveyance does not reinvest succession with such title as a purchaser from the admiinstrator will be compelled to accept).

[f] **Proceedings by representative.**—The administrator cannot, in a petition to sell real estate to pay debts, have a conveyance by his intestate set aside as in fraud of creditors.

with the rights of innocent purchasers.[6]

[§ 1477] **13. Land Held by Decedent in Trust.** The court should not order a sale of property held by decedent merely in trust and not in his own right.[7]

[§ 1478] **14. Property Held or Claimed Adversely to Decedent.** The court should not order a sale of property which is held by a person claiming a title adverse to decedent,[8] but the representative must first recover possession.[9] So also, if there is a clear outstanding legal title adverse to the estate, the court may refuse an order of sale,[10] although if there is reasonable cause for doubt, the proper course is to permit the sale and let the question be tested by the court having jurisdiction of the subject matter.[11] When at the time of his death the legal title to real estate was in decedent, his personal representative may rightfully treat it as his property, and if necessary for the payment of debts petition for its sale, and whoever challenges his right to sell may fairly be charged with the burden of proof;[12] but on the other hand, when the legal title was not in decedent, and the representative seeks to subject to the payment of decedent's debts property which apparently belongs to another, the burden of proving that decedent had an interest in such property is upon the representative.[13]

There can be no disseizin of the representative so as to prevent him from selling under an order of court, because, strictly speaking, he had no seizin.[14]

Sifford v. Cutler, 244 Ill. 234, 91 NE 428, 135 AmSR 326, 18 AnnCas 36.

[g] **Where the personal estate is sufficient** to pay all debts and charges, except for certain debts secured by a mortgage on decedent's lands, there is no occasion for and no right in the administrator to subject to the payment of such mortgage debts other lands conveyed by his intestate during his lifetime, on the allegation of fraud as against creditors. McCall v. Pixley, 48 Oh. St. 379, 27 NE 887.

[h] **Where the widow and administratrix had joined** her deceased husband in a simulated transfer of property subject to a certain mortgage to a nominal buyer, who formally recognized the mortgage in the transfer, she could not afterward have the property sold as a part of her husband's succession, to the prejudice of the mortgage creditor. Tabary's Succ., 31 La. Ann. 409.

[i] **Sale for full value.**—Where decedent, against whom docketed judgments existed, sold land at its value, the probate court has no power to order a sale of such land by the personal representative to pay the claims of the judgment creditors. Heck v. Williams, 79 N. C. 437.

[j] **Resort must be had to a court of chancery** to perfect and clear the title. McLane v. Johnson, 43 Vt. 48.

Trial of title of decedent and adverse claims to property generally see infra § 1529.

6. Harrington v. Hatton, 129 N. C. 146, 39 SE 780.

7. Robison v. Codman, 20 F. Cas. No. 11,970, 1 Sumn. 121; Newell v. Montgomery, 129 Ill. 58, 21 NE 508 [aff 30 Ill. A. 48]; Coverdale v. Aldrich, 19 Pick. (Mass.) 391.

[a] **Administration for payment of mortgage.**—In order to enable A to raise the purchase price of land which he had agreed to buy of several cotenants, they conveyed to B, one of their number, under a parol trust to procure a loan of the required amount, and then to convey to A subject to the mortgage. B procured the loan but died before executing a deed to A. It was held that the land was subject to administration and sale as B's estate for the purpose of paying the mortgage debt, although all the other tenants, who were her heirs, and conveyed to A, also an heir, in accordance with the original agreement. Cooper v. Loughlin, 75 Tex. 524, 13 SW 37.

8. Ga.—Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Thrift v. Baker, 144 Ga. 508, 87 SE 676; Walker v. Steffes, 139 Ga. 520, 77 SE 580; Simmons v. Defoe, 138 Ga. 534, 75 SE 626; Harris v. Cole, 114 Ga. 295, 40 SE 271; Lowe v. Bivins, 112 Ga. 341, 37 SE 374; Hall v. Armor, 68 Ga. 449; Weitman v. Thiot, 64 Ga. 11. But compare Finch v. Du Bignon, 117 Ga. 113, 43 SE 423 (adverse possession no defense to an application for leave to sell).

La.—Guillory v. Latour, 138 La. 142, 70 S 66. But compare Mercier v. Sterlin, 5 La. 472 (where possession of third person illegal).

Me.—Walker v. Follett, 105 Me. 201, 205, 73 A 1092; Thorndike v. Barrett, 2 Me. 312.

Md.—Tongue v. Morton, 6 Harr. & J. 21.

N. Y.—Libby v. Christy, 1 Redf. Surr. 465.

But compare Barney v. Cuttler, 1 Root (Conn.) 489 (possession of fraudulent grantee of decedent); Knowles v. Blodgett, 15 R. I. 463, 8 A 691, 2 AmSR 913 (where decedent died seized of the land in question).

"The real estate in question is not in the custody or control of the appellant but in that of third parties who hold under recorded deeds, and we can find no such power given to administrators de bonis non by statute as is claimed here. The appellant asks for license to sell ten thousand dollars' worth of real estate standing in the name of third parties in order to pay a legacy of one thousand dollars. This is far beyond his domain. If the title is to be attacked it should be by the party in interest, the Kittery Parish, and the remedy should be sought by bill in equity." Walker v. Follett, supra.

[a] **Possession of heirs.**—Where the heirs of an intestate, on his death, enter into possession of land which he owned, such possession is in their own right and is adverse to that of an administrator subsequently appointed, within a statute providing that an administrator must first recover possession before he can sell the property of his intestate held adversely by a third person. Davitte v. Southern R. Co. 108 Ga. 665, 34 SE 327.

[b] **Court will rather direct bringing of suit to test title.**—Libby v. Christy, 1 Redf. Surr. (N. Y.) 465.

[c] **Burden of proof.**—One who asserts that such adverse possession existed when sale was made is under the burden of proving that fact affirmatively. Harris v. Cole, 114 Ga. 295, 40 SE 271.

[d] **Joinder of occupants; estoppel.**—If the land is occupied by third persons they must be made parties to the proceeding, and if they fail to set up any claim that they may have, they are estopped afterward to assert it against the purchaser at the sale. Bowers v. Block, 129 Ill. 424, 21 NE 807.

9. Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Walker v. Steffes, 139 Ga. 520, 77 SE 580; Lowe v. Bivins, 112 Ga. 341, 37 SE 374; Davitte v. Southern R. Co., 108 Ga. 665, 34 SE 327; Heard v. Phillips, 101 Ga. 691, 31 SE 216, 44 LRA 369; Hall v. Armor, 68 Ga. 449.

10. Public Admr. v. Burdell, 4 Bradf. Surr. (N. Y.) 252.

11. Ark.—Grider v. Apperson, 38 Ark. 388.

Cal.—In re Newlove, 142 Cal. 377, 75 P 1083.

Kan.—Powers v. Scharling, 76 Kan. 855, 92 P 1099; Randel v. Randel, 64 Kan. 254, 67 P 837.

La.—Rapides Lumber Co. v. Hartiens, 111 La. 793, 35 S 910.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

Nebr.—Martin v. Bond, 64 Nebr. 868, 90 NW 910.

N. J.—Podesta v. Binns, (Eq.) 60 A 815.

N. Y.—Public Admr. v. Burdell, 4 Bradf. Surr. 252.

Pa.—Walker's Est., 23 Pa. Co. 657; Bloodheart's Est., 2 Pa. Co. 476.

Tex.—Evans v. Ashe, 50 Tex. Civ. A. 54, 108 SW 398, 1190; Hamm v. Hutchins, 19 Tex. Civ. A. 209, 46 SW 873.

"The fact that there were conflicting claims to the land, if in fact there were such conflicting claims, at the time of the sale by the administrator of Perkins, did not affect the right of the administrator to sell." Evans v. Ashe, 50 Tex. Civ. A. 54, 68, 108 SW 398, 1190.

[a] **If the sale would be made at a disadvantage** by reason of a controversy over the title, it is proper to stay further proceedings until the parties have had an opportunity of determining the title in a court of competent jurisdiction; but if the creditors insist upon selling all of the interest of decedent after proper time has been allowed for instituting a suit to determine the title in another court, the sale will be ordered. Hewitt v. Hewitt, 3 Bradf. Surr. (N. Y.) 265.

[b] **The orphans' court cannot try title** (1) to land in a proceeding for a sale to pay debts, so far as to conclude third persons who may have an interest in it adverse to the estate. Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; Swackhamer v. Kline, 25 N. J. Eq. 503. (2) But this does not mean that the court may not ascertain the real estate of which decedent died seized, so far as to enable it to inform purchasers what the administrator is ordered to sell. This power is necessarily implied in the duty cast upon the court by statute "to hear and examine the allegations and proofs of the executor or administrator and other persons interested," and in the power to order sale of all or part of decedent's lands, according to the exigency of the case. Whether decedent actually owned what the court orders to be sold is a question which purchasers may afterward be compelled to settle in other tribunals. Robison v. Furman, 47 N. J. Eq. 307, 20 A 898.

[c] **Suit to enjoin sale.**—A person, although in possession of land and claiming ownership, has no right to enjoin a probate sale of the premises on the ground that the succession has no title. Rapids Lumber Co. v. Hartiens, 111 La. 793, 35 S 910.

12. Amos v. Livingston, 26 Kan. 106.

13. Amos v. Livingston, 26 Kan. 106.

14. Knowles v. Blodgett, 15 R. I. 463, 8 A 691, 2 AmSR 913 ("An administrator, as such, does not have the estate; he has no seizin, and therefore cannot be disseized. He has only a power given him by statute, to be exercised for certain pur-

A disseizin of the heir or devisee does not affect the liability of the land to be sold for the debts of the ancestor or testator.[15]

[§ 1479] **15. Homestead.** The court cannot decree a sale of the homestead for the payment of a decedent's debts,[16] unless it is made to appear that the debt for which the sale is ordered accrued before the homestead right was acquired by decedent,[17] or is one as against which the homestead is

poses in a certain manner, and if the decedent die seized, to hold that the power can be defeated by any subsequent disseizin would be to hold that the statute itself could be so defeated, which, it seems to us, would be not only against public policy, but absurd." See also Barney v. Cuttler, 1 Root (Conn.) 489 (executors and administrator, selling under an order of court, are not within either the letter or the reason of the statute providing that a conveyance of lands of which the grantor has been disseized shall be void).

15. Leavens v. Butler, 8 Port. (Ala.) 380; Willard v. Nason, 5 Mass. 240; Drinkwater v. Drinkwater, 4 Mass. 354.

16. Ark.—Turner v. Turner, 216 SW 44; Johnson v. Taylor, 215 SW 162; Neeley v. Martin, 126 Ark. 1, 189 SW 182; Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810; Ex p. Tipton, 123 Ark. 389, 185 SW 798; Martin v. Conner, 115 Ark. 359, 171 SW 125; Griffin v. Dunn, 79 Ark. 408, 96 SW 190; Miller v. Davis, 69 Ark. 1, 64 SW 97, 68 SW 23, 86 AmSR 167; Bond v. Montgomery, 56 Ark. 563, 20 SW 525, 35 AmSR 119; Burgett v. Apperson, 52 Ark. 313, 12 SW 559; Nichols v. Shearon, 49 Ark. 75, 4 SW 167; McCloy v. Arnett, 47 Ark. 445, 2 SW 71; Altheimer v. Davis, 37 Ark. 316; Booth v. Goodwin, 29 Ark. 633.

Ill.—Reinhardt v. Seaman, 208 Ill. 448, 69 NE 487; Peo. v. Lanham, 189 Ill. 326, 59 NE 610 [rev 91 Ill. A. 101]; Mueller v. Conrad, 178 Ill. 276, 52 NE 1031; Oettinger v. Specht, 162 Ill. 179, 44 NE 399; Hartman v. Schultz, 101 Ill. 437; In re Brown, 204 Ill. A. 596. But compare Virgin v. Virgin, 91 Ill. A. 188 [aff 189 Ill. 144, 59 NE 586] (assent of widow).

Iowa.—Porter v. Perkins, 125 Iowa 55, 99 NW 160.

Minn.—In re Zien, 134 NW 498.

Miss.—Marx v. Haley, 92 Miss. 113, 45 S 612; Smith v. Wells, 46 Miss. 64.

Mo.—Lewis v. Barnes, 272 Mo. 377, 199 SW 212; Armor v. Lewis, 252 Mo. 568, 161 SW 251. Contra Wright v. Hetherlin, 209 SW 871.

Nebr.—Foltz v. Maxwell, 100 Nebr. 713, 161 NW 254; Johnston v. Frank, 97 Nebr. 190, 149 NW 409; Judson v. Creighton, 88 Nebr. 37, 128 NW 651; Holz v. Burling, 84 Nebr. 211, 120 NW 954; Holmes v. Mason, 80 Nebr. 448, 454, 114 NW 606, 115 NW 770; Brandon v. Jensen, 74 Nebr. 569, 104 NW 1054 [foll Tindall v. Peterson, 71 Nebr. 160, 98 NW 688, 99 NW 659, 8 AnnCas 721]; Bixby v. Jewell, 72 Nebr. 755, 101 NW 1026; Tindall v. Peterson, 71 Nebr. 160, 98 NW 688, 99 NW 659, 8 AnnCas 721.

N. C.—Gamble v. Watterson, 83 N. C. 573; Hinsdale v. Williams, 75 N. C. 430.

Oh.—Wehrle v. Wehrle, 39 Oh. St. 365; Bliss v. Fuhrman, 6 Oh. Cir. Ct. 203, 3 Oh. Cir. Dec. 416.

S. C.—Smith v. Moore, 109 S. C. 196, 95 SE 351.

Tex.—Yarboro v. Brewster, 38 Tex. 397; Cummins v. Denton, 1 Tex. Unrep. Cas. 181; Trammell v. Neal, 1 Tex. Unrep. Cas. 51; Wilkins v. Briggs, 48 Tex. Civ. A. 596, 107 SW 135; Dignowity v. Baumblatt, 38 Tex. Civ. A. 363, 85 SW 834 [cit Childers v. Henderson, 76 Tex. 664, 13 SW 481].

Utah.—Cain v. Young, 1 Utah, 361.

Wis.—Howe v. McGivern, 25 Wis. 525.

"The probate court has no jurisdiction to order the sale of the homestead for the payment of the ordinary debts of the estate." Miller v. Davis, 69 Ark. 1, 2, 64 SW 97, 68 SW 23, 86 AmSR 167. To same effect Griffin v. Dunn, 79 Ark. 408, 96 SW 190.

[a] **During minority of decedent's children** the homestead cannot be sold to pay debts. Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810.

[b] **Abandonment of the homestead by the widow** does not affect the rights of the minor children, so as to permit its sale for payment of deceased's debts during the minority of any of his children. Martin v. Conner, 115 Ark. 359, 171 SW 125.

[c] **An order for a sale of the homestead is not void,** although it is erroneous, and it cannot be attacked even by direct proceedings, the remedy being by appeal. Sigmond v. Bebber, 104 Iowa 431, 73 NW 1027.

[d] **Effect of order of sale.**—Where the head of a family dies after his property has been set apart as a homestead for the use of his family, but before termination of the homestead, the administrator on his estate, as against beneficiaries of the homestead remaining in possession, does not by virtue of an order of the court of ordinary, directing sale of the homestead property for the purpose of paying debts and for distribution, acquire a present right of entry. Craddock v. Kelly, 129 Ga. 818, 60 SE 193.

[e] **Will not intending sale of homestead.**—Where testator devised his homestead to his wife for life, remainder over to his grandchildren, and the rest of the property not being sufficient to pay his debts, and the homestead property being worth more than the amount allowed for an undeclared homestead, the executor petitioned for the sale of the entire homestead, to pay, out of the excess, the remaining indebtedness, upon a construction of the will, testator did not intend a sale of the homestead to preserve the remainder interests, and the remainder interest only should be sold, upon suitable bond by the wife that the proceeds thereof would satisfy the debts. Marx v. Haley, 92 Miss. 113, 45 S 612.

[f] **Setting off homestead; allowance in lieu of.**—On a proceeding by an administrator to sell land to pay debts, the widow, if the owner of a homestead, is entitled to have it set off by metes and bounds, but is not entitled in lieu thereof to an allowance of five hundred dollars. Bliss v. Fuhrman, 6 Oh. Cir. Ct. 203, 3 Oh. Cir. Dec. 416.

[g] **After the period of exemption has expired** (1) the land reverts to the estate and may then be ordered to be sold, Taylor v. Thorn, 29 Oh. St. 569. (2) And at the expiration of that period the executor or administrator is entitled to an order of sale, if there are existing debts, and the purchaser at the first sale will be subrogated to the rights of creditors whose claims were satisfied with the money paid by him. Wehrle v. Wehrle, 39 Oh. St. 365.

[h] **Increase in value of homestead.**—Where a homestead was worth less than one thousand dollars at the death of the owner, but increased in value so that for several years prior to the death of the widow it was worth more than one thousand dollars, creditors were not barred from enforcing their claims against such excess on the death of the widow because they failed to proceed to sell such excess prior to her death. Atherton v. Hughes, 249 Ill. 317, 94 NE 546 [rev 156 Ill. A. 215].

[i] **Creditors have been held justified in delaying** an attempt to sell land occupied by decedent's widow as her homestead until the termination of her homestead right, although twenty-seven years elapsed. Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 246].

[j] **Estoppel to object.**—Where a sale of the homestead to pay debts is duly ordered and is in all respects regular and made to an innocent purchaser who makes valuable improvements with knowledge of the children and heirs, who acquiesce therein for more than five years after becoming of legal age, such knowledge and acquiescence will estop them to maintain action to establish this interest in the property. Foltz v. Maxwell, 100 Nebr. 713, 161 NW 254.

[k] **Lands contiguous to the homestead may be sold.**—In re Zien, (Minn.) 134 NW 498.

17. U. S.—Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

Ga.—Phillips v. James, 115 Ga. 425, 41 SE 663.

Ill.—Claffy v. Farrell, 196 Ill. A. 239.

Mo.—Wright v. Hetherlin, 209 SW 871; Armor v. Lewis, 252 Mo. 568, 161 SW 251; Kelsay v. Frazier, 78 Mo. 111; Daudt v. Harmon, 16 Mo. A. 203.

N. C.—Gamble v. Watterson, 83 N. C. 573.

Wis.—Howe v. McGivern, 25 Wis. 525.

[a] **The burden of proof** is on one claiming under an administrator's deed of a homestead to show that the debt for payment of which it was sold was contracted before the homestead right was acquired. Kelsay v. Frazier, 78 Mo. 111.

[b] **When unconditional sale proper.**—Where the debts contracted by decedent before the adoption of the homestead exemption law exceed the value of the personalty an unconditional sale should be ordered, and it is error to discriminate in the order of sale between debts incurred before and after the passage of the homestead law, as such discrimination, if exercised at all, must be exercised when the proceeds of the land sold are brought into court for distribution. Gamble v. Watterson, 83 N. C. 573.

[c] **It must appear from the records** of the probate court that the order was to sell for a debt that accrued before the homestead was acquired in order to divest heirs of their homestead rights by an administrator's sale. Daudt v. Harmon, 16 Mo. A. 203; Howe v. McGivern, 25 Wis. 525.

[d] **Jurisdiction of probate court in case of mortgage.** — The probate court cannot make an order of sale of the homestead of a deceased husband to satisfy a valid mortgage executed before the declaration of homestead. His remedy is in the district court. In re Orr, 29 Cal. 101.

[e] **Presumption.**—Where a sale of a homestead is decreed it will be presumed that it was for an antecedent debt, such decree being entitled to the same presumptions in its favor as a judgment of a court of general jurisdiction. Phillips v. James, 115 Ga. 425, 41 SE 663; Murphy v. De France, 105 Mo. 53 [overr Daudt v. Harmon, 16 Mo. A. 203].

not exempt.[18] It has been asserted, however, that the land may be sold subject to the homestead right,[19] although this has also been denied.[20] There is also authority for the view that, where the land occupied as a homestead exceeds the value of the statutory homestead, and the situation is such that the dwelling house and the grounds on which it stands to the value of the exemption cannot be set aside, equity has jurisdiction, on application of the representative, to direct a sale of the entire tract and from the proceeds set apart the value of the exemption.[21] Where the value of the homestead exceeds the amount which is exempt and the property cannot be divided, the statutes sometimes permit a sale of the entire property, giving to the person entitled to the homestead the value thereof out of the proceeds.[22]

[§ 1480] **16. Encumbered Property.** As a general rule the court has power to order a sale of property which is mortgaged or otherwise encumbered, subject to the encumbrance,[23] even though, in case of a mortgage, an action for foreclosure is pending,[24] unless the personal representative is made a party to the foreclosure proceeding.[25] In some jurisdictions a sale may be ordered free of the lien of such encumbrances, provision being made for their payment out of the proceeds.[26] The authorities differ as to whether or not the personal representative may proceed to clear the title of the property before selling. Some, construing strictly the powers given him in reference to the real estate, hold that he cannot involve the estate in litigation for the purpose of removing encumbrances, but that he must sell the property as he finds it;[27] while others hold that the order of sale divests the title of the heir and invests the personal representative with the title so far as to enable him to remove encumbrances, in order that the sale may be made for the best interests of the creditors and the estate.[28]

18. Miller v. Davis, 69 Ark. 1, 64 SW 97, 68 SW 23, 86 AmSR 167; Huffstedler v. Kibler, 67 Ark. 239, 54 SW 210; Fudge v. Fudge, 23 Kan. 416; Lewis v. Barnes, 272 Mo. 377, 199 SW 212; Bixby v. Jewell, 72 Nebr. 755, 101 NW 1026.

[a] **A sale to pay purchase money** is authorized. Fudge v. Fudge, 23 Kan. 416; Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861.

19. Ga.—Williams v. O'Neal, 119 Ga. 175, 45 SE 978.

Ky.—Holburn v. Pfanmiller, 114 Ky. 831, 71 SW 940.

Mo.—Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746; Keene v. Wyatt, 160 Mo. 1, 60 SW 1037, 63 SW 116; Derge v. Hill, 103 Mo. A. 281, 77 SW 105.

Nebr.—W. J. Perry Live Stock Commn. Co. v. Biggs, 4 Nebr. (Unoff.) 440, 94 NW 712.

Tenn.—Lunsford v. Jarrett, 2 Lea 579.

[a] **The value of the homestead above the exemption** is liable for the satisfaction of claims allowed against the estate where title was in decedent at the time of his death. W. J. Perry Live Stock Commn. Co. v. Biggs, 4 Nebr. (Unoff.) 440, 94 NW 712.

20. Oettinger v. Specht, 162 Ill. 179, 44 NE 399; Hartman v. Schultz, 101 Ill. 437; Claffy v. Farrell, 196 Ill. A. 65; Hinsdale v. Williams, 75 N. C. 430.

21. Wardell v. Wardell, 71 Nebr. 774, 99 NW 674.

22. Reminger v. Joblonski, 271 Ill. 71, 110 NE 903.

[a] **Where the widow consents in writing to the sale** it is not void, although the proceeds amount to less than the value of the exemption. Sheahan v. Madigan, 275 Ill. 372, 114 NE 135.

23. Ala.—Rainey v. McQueen, 121 Ala. 191, 25 S 920; Bolling v. Jones, 67 Ala. 508; Duval v. Planters', etc., Bank, 10 Ala. 636; Perkins v. Winter, 7 Ala. 855.

Ill.—Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76; Kenley v. Bryan, 110 Ill. 652; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Le Moyne v. Quimby, 70 Ill. 399; Phelps v. Funkhouser, 39 Ill. 401.

Kan.—Fudge v. Fudge, 23 Kan. 416.

Mass.—Robinson v. Cogswell, 192 Mass. 79, 78 NE 389; Burt v. Ricker, 6 Allen 77.

Miss.—Williams v. Stratton, 18 Miss. 418.

Mo.—Hand v. Motter, 73 Mo. 457; Jackson v. Magruder, 51 Mo. 55.

N. Y.—Matter of Doyle, 180 App. Div. 398, 167 NYS 827.

Oh.—Bateman v. Morris, 7 OhS&CP 287, 4 OhNP 397.

Pa.—Fitzimmons' App., 40 Pa. 422.

S. C.—Shaw v. Barksdale, 25 S. C. 204.

Tex.—Texas Loan Agency v. Dingee, 33 Tex. Civ. A. 118, 75 SW 866; Henry v. Drought, 10 Tex. Civ. A. 379, 30 SW 584.

Wash. — Ryan v. Fergusson, 3 Wash. 356, 28 P 910.

W. Va.—Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

Eng.—Bolton v. Stannard, 4 Jur. N. S. 576.

[a] **Although the value of the equity is nominal** a sale must be ordered where a proper case is shown. Matter of Doyle, 180 App. Div. 398, 167 NYS 827. Contra McFaddin v. Ferrell, 128 Ill. A. 167.

[b] **Such a decree can only be made in a creditor's suit,** and an implied power of sale in the executor, arising from a direction in the will to pay debts, will not enable the court to direct the sale of the mortgaged estate, if it cannot make a decree for foreclosure. Bolton v. Stannard, 4 Jur. N. S. 576.

[c] **Payment of encumbrances with funds raised on new mortgage.**—Where an executor and devisee paid off mortgages on the real estate devised to him with funds raised by new mortgages and the assets proved insufficient to pay the debts of the estate, the surrogate had no power to direct the sale of the real estate for the payment of the debts subject to the amounts which would have been due on the original mortgages if not paid. Jackson v. Holladay, 3 Redf. Surr. (N. Y.) 379.

[d] **Pledged property.**—A sale of a savings bank book delivered to a third person by a deceased creditor as security for a debt will not be decreed. Boynton v. Payrow, 67 Me. 587.

[e] **Funeral expenses** are not included in the "debts" for which encumbered property may be sold. Pierson v. Garrison, (N. J. Ch.) 91 A 829.

[f] **Mortgages executed by the heir** on the property descended do not affect a proceeding to sell the property for the payment of the ancestor's debts. The only right of the mortgagees is against the surplus proceeds. Escarraguell's Succ., 36 La. Ann. 155.

24. Bateman v. Morris, 7 OhS&CP 287, 4 OhNP 397; Fitzimmons' App., 40 Pa. 422; Shaw v. Barksdale, 25 S. C. 204; Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

[a] **If the mortgaged premises have been sold** under a decree of foreclosure, a sale by the mortgagor's administrator in a proceeding before the surrogate, commenced after a lis pendens was filed in the foreclosure suit, will be enjoined. The land having been already sold, another sale is unnecessary. The administrator should set up his rights, if any, to the surplus. Breevort v. McJimsey, 1 Edw. (N. Y.) 551.

25. Bateman v. Morris, 7 OhS&CP 287, 4 OhNP 397.

26. Ill.—Virgin v. Virgin, 91 Ill. A. 188 [aff 189 Ill. 144, 59 NE 586].

Ky.—Callebs v. Ruble, 172 Ky. 113, 188 SW 1096.

La.—Kennedy's Succ., 2 La. A. (Orleans) 65.

Pa.—Ihmsen's Est., 12 PittsbLegJ NS 218.

W. Va.—Shahan v. Shahan, 48 W. Va. 447, 37 SE 552, 86 AmSR 68.

[a] **Payment of liens not yet due** will not be precipitated without the consent of the holders. Callebs v. Ruble, 172 Ky. 113, 188 SW 1096.

[b] **Consent of mortgagee to sale free of mortgage.**—(1) In a creditors' suit for the administration of real estate subject to a mortgage having priority to the claims of creditors a sale of the estate free from the mortgage cannot be directed without the consent of the mortgagee whether he is a party to the suit or not. If, however, the mortgagee is a party to the suit the direction will not be made in the common alternative form that the property shall be sold free from his security if he concurs in the sale and subject to it if he does not concur, but the court will require him to elect at once whether he will concur or not. Wickenden v. Rayson, 6 De G. M. & G. 210, 55 EngCh 165, 43 Reprint 1212. (2) Where a borrower executed a deed of trust to secure the payment of the debt, and subsequently died before the debt was paid, and the holder of the loan deed consented for the administrator to sell the fee simple title to the land at public outcry, and this consent was made public by the auctioneer at the time the land was exposed for sale, and the administrator had previously been granted leave by the ordinary to sell the land, and the property was put up and after considerable bidding was knocked off to plaintiff at a sum stated, and afterward, although the purchase price was tendered by plaintiff, the tender being a continuous one, the administrator refused to make a deed to the land, but prepared to have it resold, it was held that the purchaser at the administrator's sale could maintain an action to require the administrator to make her a deed, and to compel the holder of the loan deed to cancel his evidence of indebtedness. Mallard v. Curran, 123 Ga. 872, 51 SE 712.

27. Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Le Moyne v. Quimby, 70 Ill. 399; Phelps v. Funkhouser, 39 Ill. 401; Erck v. Erck, 107 Tenn. 77, 63 SW 1122.

28. Clark v. Seagraves, 186 Mass. 430, 71 NE 813; Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23; Williams v. Stratton, 18 Miss. 418; Ryan v. Ferguson, 3 Wash. 356, 28 P 910.

[§ 1481] **17. Lands Subject to Interest of Surviving Spouse.** As a general rule the reversionary interest in land subject to the widow's dower may be sold for payment of decedent's debts before the dower interest has expired, although the dower itself cannot be defeated;[29] but under some statutes the rule is somewhat different as to the statutory interest which the widow takes in her deceased husband's estate.[30] The curtesy estate has been considered to be subject to be defeated by the necessity for a sale of the land to pay the debts of decedent,[31] although there is also authority for the contrary view.[32] It has been considered that the property may be sold free of the husband's curtesy,[33] provided, but not unless, he consents thereto,[34] and if he does not consent, the property may be sold subject to his curtesy.[35]

[§ 1482] **18. Marshaling.** In determining what land shall be sold, where a sale of all is not necessary, or in fixing the order in which the various parcels shall be sold, where it is doubtful whether or not a sale of all is necessary, the doctrine of marshaling assets, with certain modifications and extensions rendered necessary by the circumstances of the case, is usually held applicable.[36]

[§ 1483] **E. Amount to Be Sold—1. In General.**

[a] **A bill in equity may be maintained** by an executor or administrator to discharge a mortgage on the real estate of his decedent, before selling it under an order of court. Mason v. Daly, 117 Mass. 403.

[b] **It is in the discretion of the court** to direct the executor or administrator to redeem mortgaged property or to order him to sell subject to the mortgage. Ryan v. Fergusson, 3 Wash. 356, 28 P 910.

29. Ark.—Shell v. Young, 78 Ark. 479, 95 SW 798; Killough v. Hinton, 54 Ark. 65, 14 SW 1092, 26 AmSR 19.

Del.—Doe v. Wright, 7 Del. 49.

Ga.—Sutton v. Ford, 144 Ga. 587, 87 SE 799, LRA1918D 561, AnnCas 1918A 106.

Ill.—Oettinger v. Specht, 162 Ill. 179, 44 NE 399; Kenley v. Bryan, 110 Ill. 652.

Mass.—Leverett v. Armstrong, 15 Mass. 26.

N. Y.—Maples v. Howe, 3 Barb. Ch. 611.

[a] **Assignment of dower before sale.**—When the widow is a defendant in a suit brought to subject the realty of a decedent to the payment of his debts, and she has not elected to take the value of her dower in money, her dower should be assigned before an out-and-out sale of the realty is decreed. McKittrick v. McKittrick, 43 W. Va. 117, 27 SE 303. See also Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930 (error to decree the sale of land subject to dower, instead of assigning dower therefrom).

[b] **Payment to widow to release dower.**—An administrator cannot, as a matter of law, recover from an estate the sum he has paid the widow to release her right of dower in lands sold by him under a probate license; the statute does not empower him to make any such arrangement, and under the license the purchaser can buy only the interest of the estate. Needham v. Belote, 39 Mich. 487.

Effect of sale as divesting dower right see infra § 1691.

30. See cases infra this note.

[a] **Sale for debts cannot be ordered:** (1) Lewis v. Watkins, 150 Ind. 108, 49 NE 944; Bumb v. Gard, 107 Ind. 575, 8 NE 713; Hutchinson v. Lemcke, 107 Ind. 121, 8 NE 71 (aliter prior to statute of 1852); Compton v. Pruitt, 88 Ind. 171; Armstrong v. Cavitt, 78 Ind. 476. (2) Where decedent leaves children by a former marriage and a childless second wife the court is without jurisdiction to order the sale of more than two thirds of decedent's realty as the fee to one third vests in such wife as against creditors. Stone v. Elliott, (Ind.) 101 NE 309. (3) If the widow's interest is sold for the purpose of paying a debt secured by mortgage on the land, she is entitled as against creditors to be reimbursed for the full value of her share out of the personal assets of the estate. Lewis v. Watkins, 150 Ind. 108, 19 NE 944.

[b] **Widow's third subject to sale for payment of debts.** — Scott v. Wells, 55 Minn. 274, 56 NW 828.

[c] **Dower in leasehold not subject to sale for debts.** — Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

31. Berluchy's Est., 1 LegRec (Pa.) 225; Bennett v. Camp, 54 Vt. 36.

[a] **Where the husband's interest is subject to a mortgage executed by the wife** to secure the purchase price, the whole property may be sold to pay the mortgage debt. Globe Mercantile Co. v. Perkeypile, (Ind.) 125 NE 29.

32. Casler v. Gray, 159 Mo. 588, 60 SW 1032.

33. Clark v. Harlan, Oh. Prob. 106.

34. Pirmann v. Gerhold, 5 OhS& CP 414, Oh. Prob. 142.

35. Pirmann v. Gerhold, 5 OhS& CP 414, Oh. Prob. 142.

36. Ala.—Matheson v. Hearin, 29 Ala. 210; Couch v. Campbell, 6 Port. 262.

Ark.—Howell v. Duke, 40 Ark. 102.

Cal.—In re Bragg, 166 Cal. 103, 134 P 1140.

Colo.—New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

Md.—Spencer v. Pearce, 10 Gill & J. 294.

Mass.—Hays v. Jackson, 6 Mass. 149.

Mont.—In re Tuohy, 33 Mont. 230, 83 P 486.

N. Y.—Eddy v. Traver, 6 Paige 521, 31 AmD 261.

N. C.—Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 SE 346.

Pa.—Taylor's Est., 4 Pa. Dist. 477, 16 Pa. Co. 529.

Tenn.—Erck v. Erck, 107 Tenn. 77, 63 SW 1122.

Va.—Gwinner v. Michael, 103 Va. 268, 48 SE 895.

Wash.—In re Bryant, 38 Wash. 337, 80 P 555.

Ont.—Re Hopkins, 32 Ont. 315.

See generally Marshaling Assets and Securities [26 Cyc 927].

[a] **Illustrations.**—(1) Where a testator directed his debts to be paid, made a specific devise of certain lands, and gave over the residuum, and died seized of real estate acquired after making the will and which did not pass thereby, upon the application of executors for license to sell real estate for the payment of debts the lands not included in the specific devise and which would otherwise fall into the residuum should be sold first and the after-acquired lands next. Hays v. Jackson, 6 Mass. 149. (2) Where lands are sold to satisfy the debts of the devisee, such lands being subject to the charge of certain legacies not yet due, the purchasers thereof are substituted to the right of the lien creditors making the sale and entitled to demand that such charge is made upon those parcels upon which the liens of the selling creditors attached last and so on in inverse order of their creation. In re Cowden, 1 Pa. 267. (3) Under a statute requiring the property of testator to be resorted to for the payment of debts "in the following order: 1. The property which is expressly appropriated by the will for the payment of the debts. 2. Property not disposed of by will. 3. Property which is devised or bequeathed to a residuary legatee. 4. Property which is not specifically devised or bequeathed. 5. All other property ratably," and a statute requiring the other real estate belonging to testator to be sold before resorting to real estate which has been devised and not charged with the payment of debts, property belonging to the first four enumerated classes must be sold before resorting to property specifically devised; but, if it is insufficient, property specifically devised must then be resorted to ratably to pay testator's debts, regardless of the nature of the devise, whether made for a valuable consideration or for charitable purposes, and notwithstanding equities existing in favor of certain devisees which might entitle them to a conveyance of the land devised to them. In re Tuohy, 33 Mont. 230, 83 P 486. (4) The court will reserve, to be sold the last, the mansion house in which the widow lives, especially where she has taken it in lieu of dower. Taylor's Est., 4 Pa. Dist. 477, 16 Pa. Co. 529.

[b] **Conveyance by heir.**—(1) The purchaser of land from the heir is entitled, on a petition by the administrator to sell lands to pay debts, to have the unsold land first applied thereto. Howell v. Duke, 40 Ark. 102. (2) Where an heir has conveyed a part of the real estate which descended to him, before the debts of the decedent are paid, the surrogate may direct the land still belonging to the heir to be sold first for the payment of such debts so as to protect the equitable rights of the purchaser. Eddy v. Traver, 6 Paige (N. Y.) 521, 31 AmD 261.

[c] **Application by creditor claiming purchase money.**—Where land is decreed to be sold for the payment of decedent's debts upon the application of a creditor whose claim is for the purchase money of certain land bought by such debtor, the land so purchased should be first sold. Spencer v. Pearce, 10 Gill & J. (Md.) 294.

[d] **Devised and undevised lands.**—(1) Undevised lands should be ordered sold for the payment of debts before those specifically devised; but the surrogate has no power to order the money to be raised out of an undevised remainder, although the clear intent of the statute is that the devised life estate shall be exonerated. Pelletreau v. Smith, 30 Barb. (N. Y.) 494. (2) Where a testator devised only a part of his estate, and as to this gave a life estate to his wife with remainder over, in selling property to pay debts the undevised property should be sold first, then, in case more was needed, the devised property subject to the life estate, and last the life estate. Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 SE 346. (3) Where a will gave a devisee an interest in a lot, and it became necessary to make a sale of real estate to pay debts of decedent, a decree ordering a sale of real es-

eral. Where a decedent's lands are in separate lots or parcels, or are otherwise easily capable of separation, a probate decree for a sale to pay debts should as a general rule be limited to so much as will satisfy the valid debts,[37] but a sale cannot be held erroneous because of the absence of proof as to the indivisibility of the land sold, where the entire proceeds of the sale were insufficient to discharge the debt.[38] The court is usually allowed an ample discretion as to decreeing the sale of the whole or any part of a decedent's realty as may be deemed suitable or as the best interest of the estate may require, the scope and expression of its license to sell, determining the rights of all concerned in the premises,[39] and a sale of more land than is necessary to pay debts may be ordered if the court deems that a sale of a smaller quantity will be prejudicial to the heirs or devisees,[40] or a sale of all the real estate may be ordered in a proper case,[41] as where the estate is indivisible without impairing its value,[42] or for any other reason a sale of the whole

tate, but providing that the lot in question should not be sold until the balance of the estate had become exhausted, was in conformity with the code. In re Bryant, 38 Wash. 337, 80 P 555. (4) Where devisees were parties to a suit in which the lands specifically devised to them were sold to pay debts of testator, and they made no objection, and did not ask to have the lands not devised sold first, but stood by, and saw the court, which had complete jurisdiction, dispose of the entire matter and enter a final decree, they had no equities. Gwinner v. Michael, 103 Va. 268, 48 SE 895.

[e] **Interest of estate.**—Where in a proceeding to sell land, consisting of vacant lots and an undivided interest in a storehouse to pay debts, it appeared that the vacant lots were insufficient to pay the debts and that it was to the interest of the estate to sell the undivided interest instead of the vacant lots, it was not error so to order. Erck v. Erck, 107 Tenn. 77, 63 SW 1122.

[f] **Unsalability as "exhaustion" of property.**—Where an order for the sale of real estate to pay debts ordered that the administrator should not sell certain lots until the balance of the estate "has been exhausted, and unless it shall become necessary to sell the same to raise the said sum," and the administrator for more than six months offered property other than the lots for sale, but was not able to sell sufficient thereof to raise the sum required, and the statute required that any sale by the administrator must be made within six months from the date fixed by him when he will commence receiving bids, it was proper to sell the lots in question, the other property having been "exhausted" within the meaning of the order. In re Bryan, 38 Wash. 337, 80 P 555.

37. U. S. — Santana Live-stock, etc., Co. v. Pendleton, 81 Fed. 784, 26 CCA 608.

Cal.—In re Newlove, 142 Cal. 377, 75 P 1083; In re Roach, 139 Cal. 17, 72 P 393; In re Cook, 137 Cal. 184, 69 P 968.

Conn.—Cole v. Jerman, 77 Conn. 374, 59 A 425; Lockwood v. Sturdevant, 6 Conn. 373.

Ill.—Harris v. Hogle, 37 Ill. 150, 87 AmD 243; McKnelly v. Conley, 210 Ill. A. 609.

Ind.—Fralich v. Moore, 123 Ind. 75, 24 NE 232; Newcomer v. Wallace, 30 Ind. 216; Black v. Meek, 1 Ind. 180, Smith 131.

Ky.—Auxier v. Auxier, 180 Ky. 518, 203 SW 310; Todd v. First Nat. Bank, 173 Ky. 60, 190 SW 468; Barry v. Fain, 172 Ky. 309, 189 SW 220; Catlin v. U. S. Fidelity, etc., Co., 137 Ky. 208, 125 SW 297; Auxier v. Clarke, 82 SW 605, 26 KyL 890; Elliott v. Fowler, 112 Ky. 376, 65 SW 849, 23 KyL 1676; Gill v. Givin, 4 Metc. 197.

La.—Dumestre's Succ., 40 La. Ann. 571, 4 S 328.

Me.—In re Snow, 96 Me. 570, 53 A 116; Wakefield v. Campbell, 20 Me. 393, 37 AmD 60.

Md.—Constable v. Camp, 87 Md. 173, 39 A 807.

Mass.—Litchfield v. Cudworth, 15 Pick. 23.

Mich. — Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559.

Miss.—Champion v. Cayce, 54 Miss. 695.

Mo.—Priest v. Spier, 96 Mo. 111, 9 SW 12.

N. H.—Adams v. Morrison, 4 N. H. 166, 17 AmD 406.

N. J.—Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; In re Whitaker, 72 N. J. Eq. 362, 65 A 124.

N. Y.—Matter of Georgi, 21 Misc. 419, 47 NYS 1061, 2 Gibb. Surr. 274.

Oh.—Ewing v. Higby, 7 Oh. 198, 28 AmD 633.

Pa.—Bailey's App., 2 Grant 225.

R. I.—Sayles v. Steere, 37 R. I. 411, 93 A 34.

S. C.—Clyburn v. Reynolds, 31 S. C. 91, 9 SE 973.

Tenn.—Crippen v. Crippen, 1 Head 128.

Tex.—Wells v. Mills, 22 Tex. 302; Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

Va.—Peirce v. Graham, 85 Va. 227, 7 SE 189.

"It was not competent for the court in a settlement case alone to have sold any more of the lands descended than was necessary to pay the balance of decedent's debts after the personalty had been exhausted." Catlin v. U. S. Fidelity, etc., Co., 137 Ky. 208, 212, 125 SW 297.

[a] **Illustration.**—On a proceeding to sell land to pay debts, it appeared that testatrix died seized of real estate to the value of five thousand six hundred dollars; that the debts unpaid amounted to one thousand two hundred and eighty-seven dollars and thirty-seven cents; that, if a specified legacy could be applied, they would be reduced to two hundred and eighty-seven dollars and thirty-seven cents; and that the sale of any two houses would raise the whole of the unpaid debts, and of any one house would raise the debts after application of the legacy. It was held that the court should have directed the sale of such houses as would have been sufficient, and no more, and an order to sell all the houses belonging to testatrix was erroneous, there being no evidence that the sale of any one or two of them would diminish the value of the others. In re Whitaker, 72 N. J. Eq. 362, 65 A 124.

[b] **A sale of enough to pay incidental charges** attending the sale may be authorized. Dean v. Dean, 3 Mass. 258.

[c] **The title of a purchaser** for value is not affected by the fact that the proceeds of sale exceed decedent's debts. Comstock v. Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34. But compare Louisville Banking Co. v. Pranger, 68 SW 632, 24 KyL 408 (a judicial sale of lands to pay debts is void, as to infant heirs, where more land is sold than is necessary to pay the debts of the ancestor, unless the property is indivisible).

[d] **Misapplication of proceeds.**—If enough land has been sold to pay all the debts, but some of the creditors who were parties to the proceeding were not paid, in consequence of the misappropriation of the proceeds of the sale, they cannot have other portions of the estate sold, because they should have seen to it that the proceeds were properly applied. Clyburn v. Reynolds, 31 S. C. 91, 9 SE 973.

38. Pierce v. Marrs, 153 Ky. 748, 156 SW 404.

39. Conn.—Buel's App., 60 Conn. 63, 22 A 488.

Ga.—Wellborn v. Rogers, 24 Ga. 558.

Ill.—Bowles v. Rouse, 8 Ill. 409.

Ind.—Black v. Meek, Smith 131.

Ky.—Foley v. Graham, 110 SW 838, 33 KyL 627; Turner v. Turner, 33 SW 1102, 17 KyL 1203.

La.—Zuffle's Succ., 6 La. A. (Orleans) 257.

Mass.—Tenney v. Poor, 14 Gray 500, 77 AmD 340; Sewell v. Raymond, 7 Metc. 454.

Mich.—Norman v. Olney, 64 Mich. 553, 31 NW 555.

N. J.—State v. Conover, 9 N. J. L. 338.

N. Y.—In re Dolan, 88 N. Y. 309.

N. C.—Tillett v. Aydlett, 90 N. C. 551.

Or.—Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

Pa.—Stiver's App., 56 Pa. 9.

Vt.—In re Reynolds, 89 Vt. 224, 95 A 498.

N. S.—Phinney v. Clark, 27 N. S. 384.

[a] **Abuse of discretion not available to purchasers.**—In re Dolan, 88 N. Y. 309.

40. In re Dolan, 88 N. Y. 309.

41. Johnson v. Porterfield, 150 Ala. 532, 43 S 228; In re Newlove, 142 Cal. 377, 75 P 1083; Wilson v. Wilson, 109 La. 1075, 34 S 94; In re Reynolds, 89 Vt. 224, 95 A 498.

[a] **Illustration.**—The entire estate may be sold in order to effect a partition and thereby enable the administrator of the succession to realize the funds necessary to pay debts, where it is not susceptible of division in kind. Wilson v. Wilson, 109 La. 1075, 34 S 94.

[b] **Uncontroverted allegation of necessity for selling all realty.**—Where an administrator's petition to sell real estate alleged that it was necessary to sell the real estate in order to satisfy the previous decree of the court, and the objector did not controvert such allegation, nor show that a sale of a portion of it would be sufficient, and there was no proof that a part of the real estate less than the whole would probably produce an amount sufficient to satisfy the decree, it was no objection that the court ordered that all the real estate be sold. Johnson v. Porterfield, 150 Ala. 532, 43 S 228.

42. Cal.—In re Newlove, 142 Cal. 377, 75 P 1083.

Ind.—Black v. Meek, 1 Ind. 180.

Ky.—Oldham v. McElroy, 134 Ky. 454, 121 SW 414; Foley v. Graham, 110 SW 838, 33 KyL 627; Louisville Banking Co. v. Pranger, 68 SW 632, 24 KyL 408.

Me.—In re Snow, 96 Me. 570, 53 A 116.

Mich.—Marvin v. Bowlby, 142 Mich. 245, 105 NW 751, 113 AmSR 574, 4 LRANS 189, 7 AnnCas 559.

Minn.—Kelly v. Slack, 93 Minn. 489, 101 NW 797.

[a] **How indivisibility to be established.**—It is not necessary that the indivisibility of real property be established in a suit to settle a decedent's estate wherein the sale of real property is sought to pay debts, by proof other than such as may be

is for the best interests of the estate.[43] But it has been held error to license an executor to sell so much real estate as he may deem for the best interests of the estate.[44] If the representative sells more than he was authorized to sell by the order or license of the court the sale is void.[45]

[§ 1484] **2. Entire Interest of Decedent.** Upon a sale of land by an executor or administrator for the payment of the debts, all decedent's interest therein should be sold, subject only to encumbrances existing at the time of his death,[46] and where decedent owned the entire estate, an undivided or partial interest therein cannot be sold.[47]

[§ 1485] **F. Payment or Security to Prevent Sale.** The heirs or legatees, or those interested in the estate, have ordinarily a right to furnish the necessary money for the payment of decedent's debts and thus remove the cloud upon their title to the land arising out of its liability to be sold for the debts;[48] and in some states it is considered that no decree of sale for the payment of debts should be made without giving them a reasonable opportunity to pay the debts and thus avoid a sale.[49] The heirs or devisees may also, under some statutes, prevent a sale of the realty by giving a bond for the payment of debts,[50] and it is held that the giving of

furnished by the pleadings and exhibits, as a prerequisite to a sale of the real property as a whole, nor must it be established as a prerequisite that the sale of the real property as a whole would be to the interest of the infant heir. Foley v. Graham, 110 SW 828, 33 KyL 627.

[b] **Evidence establishing indivisibility.**—A finding by the probate court that the estate in question could not be equitably divided among the heirs and distributees, and it was not for the advantage of all parties concerned to sell an undivided two-thirds interest to pay the legacies, was justified by evidence that an undivided interest in real estate in Minneapolis, in which the property was situated, would not command a ready market, and would result in a sacrifice of the property; that it would not not sell for as much in undivided lots as if sold as a whole. Kelly v. Slack, 93 Minn. 489, 101 NW 797.

[c] **Findings showing indivisibility.**—(1) Where the court, in determining whether all of a decedent's land should be sold, found that, "owing to the uncertainty of the distribution of the oil, and as to its location, quantity, and quality in said real estate, it is impossible to make a fair and equitable partition of the entire tract," and that "the water on said parcel of land is limited to two places, which renders it impracticable to make an equitable partition of said tract," it was a necessary implication from such findings that a remainder after the sale of any part would be impossible of partition. In re Newlove, 142 Cal. 377, 75 P 1083. (2) A finding and evidence that the residue of a decedent's real estate could not be partitioned after a sale of a part is sufficient to sustain an order to sell the whole, without aid from a finding that a sale of a part would injure the residue. In re Newlove, 142 Cal. 377, 75 P 1083.

[d] **The rights of infants should be protected** where a sale of more land than is necessary to pay debts is ordered, because of the land being indivisible. Carter v. Crowe, 130 Ky. 41, 112 SW 1098.

43. In re Newlove, 142 Cal. 377, 75 P 1083; Turner v. Turner, 33 SW 1102, 17 KyL 1203; Kelly v. Slack, 93 Minn. 489, 101 NW 797.

[a] **Question of fact for court.**—Whether it would be for the advantage, benefit, and best interests of the estate, or of those interested therein, to order a sale of all the real estate or of only a part is a question of fact to be determined by the trial court upon the evidence before it in reference thereto. In re Stewart, 1 Cal. A. 57, 81 P 728.

44. Morris v. Hogle, 37 Ill. 150, 87 AmD 243.

45. Conn.—Cole v. Jerman, 77 Conn. 374, 59 A 425; Lockwood v. Sturdevant, 6 Conn. 373.

Me.—Wakefield v. Campbell, 20 Me. 393, 37 AmD 60.

Mass.—Gregson v. Tuson, 153 Mass. 325, 26 NE 874; Litchfield v. Cudworth, 15 Pick. 23.

N. H.—Adams v. Morrison, 4 N. H. 166, 17 AmD 406.

Pa.—In re Smith, 188 Pa. 222, 41 A 542.

Tex.—Wells v. Mills, 22 Tex. 302.

[a] **Adjoining strip properly sold with farm.**—An executor, having had his petition to sell the "M farm" of deceased granted, properly included in his sale thereof, by the acre, a small strip, outside the old surveys to the M farm, but title to which was acquired by the owner of that farm, by adverse possession, by including it with and occupying it as part of that farm. In re Smith, 188 Pa. 222, 41 A 542.

[b] **When a sufficient quantity has been sold** to realize the amount required to pay the debts, the authority of the administrator is exhausted and he cannot thereafter proceed under the order to sell other lands. Wells v. Mills, 22 Tex. 302.

46. La.—Le Boeuf v. Webre, 40 La. Ann. 380, 4 S 223.

Me.—Hasty v. Johnson, 3 Me. 282.

Mich.—Hewitt v. Durant, 78 Mich. 186, 44 NW 318; Daly's App., 47 Mich. 443, 11 NW 262; Eberstein v. Oswalt, 47 Mich. 254, 10 NW 360.

N. H.—Braley v. Simonds, 61 N. H. 269.

N. Y.—Pelletreau v. Smith, 30 Barb. 494.

Tex.—Kalteyer v. Wipff, (Civ. A.) 49 SW 1055.

[a] **Encumbrances created after death of decedent.**—The court cannot order a sale subject to encumbrances created after the death of decedent. The entire interest owned by him at the time of his death must be sold. Hewitt v. Durant, 78 Mich. 186, 44 NW 318.

[b] **Protection of life estate.**—Less than decedent's entire interest cannot be sold to protect a life estate created by the will of decedent, however equitable such an arrangement might be. Pelletreau v. Smith, 30 Barb. (N. Y.) 494.

[c] **Nothing passes** by a sale pursuant to a license of court, as of decedent's equity of redemption in lands, where he died seized of the unencumbered fee. Braley v. Simonds, 61 N. H. 369.

47. Le Boeuf v. Webre, 40 La. Ann. 380, 4 S 223; Eberstein v. Oswalt, 47 Mich. 254, 10 NW 360.

[a] **The principle has been applied** where an administrator bought an undivided interest of some of the heirs in decedent's real property, and transferred part of it to the same heirs, thereby withdrawing it from the estate. Daly's App., 47 Mich. 443, 11 NW 262.

48. Ill.—Bozza v. Rowe, 30 Ill. 198, 83 AmD 184.

Ind.—Davis v. Kendall, 161 Ind. 412, 68 NE 894.

La.—Hearsey v. Bates, 36 La. Ann. 300.

N. H.—Prescott v. Walker, 16 N. H. 340.

Oh.—Corey v. Hayes, 13 Oh. Cir. Ct. 185, 7 Oh. Cir. Dec. 272.

Pa.—Sager v. Mead, 171 Pa. 349, 33 A 355.

Va.—Menefee v. Marge, 4 SE 726.

W. Va.—Hart v. Hart, 31 W. Va. 688, 8 SE 562.

[a] **Payment by heir or devisee of his share of debts.**—(1) Where a testator devised all his real estate to his two sons in severalty, and upon the executor's obtaining leave to sell real estate to pay debts, one of the sons paid his half of the debts, the executor's action in selling only such real estate as had been devised to the other son was proper. Prescott v. Walker, 16 N. H. 340. (2) Where partition had been made of land between the heirs, and a part of the heirs had sold their shares, and the creditors of the ancestor instituted proceedings to subject the land to the payment of debts, the heirs who had not sold their land were not entitled to pay their ratable portions of the debt and retain the land discharged therefrom, nor was an heir who had sold his land for more than his ratable share of the debt entitled to be discharged from liability on payment of such ratable share. Hinton v. Whitehurst, 73 N. C. 157.

[b] **Conditional tender.**—A tender of the debt by the heirs, coupled with a condition that the creditors assign the debt to them, will not prevent an order of sale. Weill v. Clark, 9 Or. 387.

[c] **The mere payment to an executor** by a devisee of the amount of decedent's debts will not discharge the land from the lien of creditors' claims. Hunt v. Moore, 2 Pa. 105.

[d] **A mere license to enter land and cut and remove the trees** as purchaser thereof gives no such interest in the land as entitles one to pay the deceased seller's debts, so as to prevent the sale of the land for paying debts of the estate. Fletcher v. Livingston, 153 Mass. 388, 26 NE 1001.

49. In re Rawitzer, 175 Cal. 585, 166 P 581; Woolman's Est., 6 Pa. Dist. 205, 19 Pa. Co. 281; Menefee v. Marge, (Va.) 4 SE 726; Hart v. Hart, 31 W. Va. 688, 8 SE 562.

50. Ind.—Davis v. Kendall, 161 Ind. 412, 68 NE 894; Nation v. Green, (A.) 114 NE 895.

Iowa.—Seery v. Murray, 107 Iowa 384, 77 NW 1058; In re Bagger, 78 Iowa 171, 42 NW 639.

Kan.—Bond v. New York Fidelity, etc., Co., 103 Kan. 281, 173 P 294.

Mass.—Studley v. Josselyn, 5 Allen 118.

Mich.—Dexter v. Gordon, 136 Mich. 235, 98 NW 1016.

N. H.—Jenness v. Robinson, 10 N. H. 215.

N. J.—In re Pitcher, 61 N. J. Eq. 614, 47 A 277.

Oh.—Stout v. Stout, 82 Oh. St. 358, 92 NE 465, 137 AmSR 785; Davisson v. Burgess, 31 Oh. St. 78.

Pa.—Single's App., 3 Brewst. 160.

[a] **All need not give bond.**—It is not essential that all the heirs or devisees should give such bond. Jenness v. Robinson, 10 N. H. 215.

[b] **A widow,** having a dower interest in the real estate of her deceased husband, is sufficiently interested in the estate to entitle her,

such a bond is the only method by which the heirs can prevent a sale of the land when the personalty is insufficient to pay debts.[51]

An offer in a pleading to pay the debts, or of judgment that the pleader give bond for their payment, is not equivalent to actual payment of the debts or giving bond, and is insufficient to prevent a sale.[52]

Only sales for the payment of debts can be prevented by giving bond,[53] and such bond cannot defeat a sale to carry out the will of the testator or to make partition.[54]

[§ 1486] **G. Proceedings for Sale—1. In General.** A sale can ordinarily be ordered only in an appropriate proceeding for that purpose in which the statutory requirements are complied with and such an order is asked;[55] and an instrument executed by an heir, authorizing the executor or administrator to sell the land of the heirs in connection with one or more of the heirs of such estate, to give the bond provided for by statute to obviate a sale of such real estate to pay debts, etc., by the administrator, and, having in good faith given such bond, and, as required by the conditions thereof, paid to the administrator the aggregate amount of the valid debts of decedent and the charges of administration, is not to be regarded as a mere volunteer, but is entitled to be subrogated to the rights of the administrator and fully reimbursed from a fund arising from the sale of such real estate in a proceeding in partition by the heirs. Corey v. Hayes, 13 Oh. Cir. Ct. 185, 7 Oh. Cir. Dec. 272.

[c] **Where an executor who is also residuary legatee** gives bond for the payment of debts and legacies, a sale of realty for payment of debts cannot properly be ordered. Thayer v. Winchester, 133 Mass. 447. Contra Lefferty v. People's Sav. Bank, 76 Mich. 35, 43 NW 34.

[d] **A bond given after an order of sale has been made** is valid and enforceable, although the statute provides only for a bond before such an order, the effect of which is to prevent the making of the order. Davisson v. Burgess, 31 Oh. St. 78.

[e] **Rescinding order of sale.**—Where the heirs give security to pay the debts, it is a proper exercise of the discretion of the court to rescind an order of sale of the real estate for the payment of such debts. Single's App., 3 Brewst. (Pa.) 160.

[f] **The bond need not strictly conform to the statute,** provided it supplies in good season the needful security for dispensing with the sale. Davisson v. Burgess, 31 Oh. St. 78.

[g] **When condition broken.**—The condition of such a bond is broken when it is ascertained by an account settled in the probate court that debts have been found due from the estate, and that the goods, chattels, and personal assets of the deceased are insufficient for their payment, but not earlier. Studley v. Josselyn, 5 Allen (Mass.) 118.

[h] **Offer not in conformity to statute.**—Where the personal estate amounted to two hundred and sixty dollars and the claims filed were about one hundred and twenty-seven dollars and over eleven hundred dollars in notes made by decedent directly to his widow who was the administratrix, and on application by the administratrix for leave to sell land the heirs offered to give bond to pay all the debts except the notes, an order for sale was proper since the orphans' court could not determine the validity of the claims on an application for leave to sell the land, and the offer of the heirs was not in conformity with the statute. In re Pitcher, 61 N. J. Eq. 614, 47 A 277.

[i] **When statute not applicable.**—The statute providing that any person interested in a decedent's estate may prevent a sale of it by giving a bond to pay all demands against the estate to the extent of the value of the property does not apply to an action by an administrator with the will annexed to recover assets alleged to have been unlawfully seized by a devisee. Seery v. Murray, 107 Iowa 384, 77 NW 1058.

51. Stout v. Stout, 82 Oh. St. 358, 92 NE 465, 137 AmSR 785.

52. Davis v. Kendall, 161 Ind. 412, 68 NE 894; Green v. Cannady, 71 S. C. 317, 51 SE 92.

53. See cases supra note 50.

54. Seery v. Murray, 107 Iowa 384, 77 NW 1058; Clarity v. Sheridan, 91 Iowa 304, 59 NW 52; In re Bagger, 78 Iowa 171, 42 NW 639; McLeod v. Butts, 89 Kan. 785, 132 P 1174; Dexter v. Gordon, 136 Mich. 235, 98 NW 1016.

[a] **Illustration.**—The statute providing that no license to sell real estate for payment of debts shall be granted if any of the persons interested in the estate give bond conditioned to pay the debts, etc., has no application to a sale of land pursuant to a power given to testator's widow in the will to dispose of the land absolutely for her use and benefit. Dexter v. Gordon, 136 Mich. 235, 98 NW 1016.

[b] **Where the will directs a sale.**—A will having directed the sale of real property for division among the heirs, they cannot deprive the court of jurisdiction to order a sale by offering to furnish a bond to pay debts. McLeod v. Butts, 89 Kan. 785, 132 P 1174.

55. U. S.—Trimble v. Rice, 204 Fed. 407, 122 CCA 658.

Ala.—Howell v. Randle, 171 Ala. 451, 54 S 563; Kirkbride v. Kelly, 167 Ala. 570, 52 S 660; Hardwick v. Hardwick, 164 Ala. 390, 51 S 389; Roy v. Roy, 159 Ala. 555, 48 S 793.

Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

Colo.—Filmore v. Reithman, 6 Colo. 120.

Fla.—Price v. Winter, 15 Fla. 66.

Ill.—Majorowicz v. Payson, 153 Ill. 484, 39 NE 127; Boccck v. Leet, 210 Ill. A. 402; Rowden v. Meissinger, 164 Ill. A. 125.

Ky.—Tobb v. Wortham, 89 SW 191, 28 KyL 260.

La.—Spears' Succ., 28 La. Ann. 804.

Mass.—Dunbar v. Kelly, 189 Mass. 390, 75 NE 740; Knox v. Jenks, 7 Mass. 488.

Mich.—Woods v. Monroe, 17 Mich. 238.

Miss.—Weeks v. Thrasher, 52 Miss. 142.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store, 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

N. H.—Lebanon Sav. Bank. v. Waterman, 65 N. H. 68, 17 A 577.

N. Y.—In re Reed, 214 N. Y. 383, 108 NE 565; In re Roberts, 214 N. Y. 369, 108 NE 562 [aff 162 App. Div. 922 mem, 146 NYS 1110 mem]; Personeni v. Goodale, 199 N. Y. 323, 92 NE 754; Duryea v. Mackey, 151 N. Y. 204, 45 NE 458; Long v. Long, 142 N. Y. 545, 37 NE 486; Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292; Kingsland v. Murray, 133 N. Y. 170, 30 NE 845.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983.

Tex.—Finch v. Edmonson, 9 Tex. 504.

Wash.—Wallace v. Grant, 27 Wash. 130, 67 P 578.

"The proceeding to sell a decedent's real property to pay his debts is statutory. When resort to the real property of a decedent for the payment of his debts is sought by his creditors it can only be had by virtue of the statute and the prescribed statutory proceedings must be strictly pursued." Personeni v. Goodale, 199 N. Y. 323, 332, 92 NE 754.

[a] **Illustrations.**—(1) A bill by an administrator, in the interest of two of the creditors, which did not make the widow and heirs parties, and which was not signed by the administrator, nor verified by him, and did not show the condition of the estate or amount of claims, but sought to set aside as fraudulent a conveyance made by his intestate, could not be treated as a petition for the sale of the intestate's land, but was merely a possessory action, and therefore could not be maintained by the administrator. Majorowicz v. Payson, 153 Ill. 484, 39 NE 127. (2) Under Civ. Code Pract. §§ 428–430, authorizing the bringing of an action for the settlement of a decedent's estate, requiring the petition in such an action to state the amount of decedent's debts and the nature and value of his property, empowering the court to order a sale of so much of the real property as may be necessary for the payment of the debts in case the personal estate is insufficient, and providing that the court shall make an order for the creditors of decedent to appear before a commissioner and prove their claims, it was error for the court to direct a sale of a decedent's lands to pay debts, where the petition, while alleging that the personal estate was insufficient to pay the indebtedness and that decedent owed at the time of her death several thousand dollars, did not state the amount of the personal estate and did not make any of the creditors parties to the action, and the court made no order of reference to a commissioner before whom the creditors might prove their claims, and no claims, purged of usury, set-off, and discount as required by the statute, were filed by the creditors. Tabb v. Wortham, 89 SW 191, 28 Ky. 260. (3) The power of the court on the hearing of a petition by executors for an order authorizing them to apply a dividend on stock belonging to the estate for the payment of debts is limited to the granting or denying of the prayer of the petition, and a reiteration of a prior order to sell real estate to pay debts when personal property not specially bequeathed was available is ineffectual. In re Noon, 49 Or. 286, 88 P 673, 90 P 673.

[b] **It is essential to the validity of the sale** that the court should so far conform to the statute regulating the proceedings as to acquire jurisdiction of the subject matter and the parties. Price v. Winter, 15 Fla. 66.

[c] **Strict compliance with the statutory requirements** is necessary so far as such requirements relate to the absolute prerequisites of the sale, although errors or defects that go to the form and not to the substance may be disregarded. In re Mahoney, 34 Hun (N. Y.) 501.

[d] **On accounting** (1) by an executor or administrator the probate court has no incidental power of ordering a sale of realty for the payment of debts and will not consider the alleged invalidity of a conveyance by the residuary legatee. O'Connor v. Gifford, 3 NYS 207, 6 Dem. Surr. 71. See also Picard v. Montross, (Miss.) 17 S 375 (final report in accounting not such a bill or petition as to justify a decree for sale of land). (2) But statutes sometimes confer authority upon the court to make an order of sale in connection with the representative's accounts, making it appear that the personal estate is insufficient to pay the debts.

ministrator to sell certain land "under the direction of the court," does not dispense with the necessity of observing all the statutory requirements.[56] But it has been held that irregularities in probate proceedings for an administrator's sale, not going to the jurisdiction of the court, cannot be reviewed where not inquired into within the time limited by law, or within such time as the rights of those who complain should be asserted under equitable principles.[57] Where the administrator commenced proceedings for the sale of real estate, all of the orders made are in the proceeding, as such proceeding consists of all orders and things done by the court, from the filing of the petition to the confirmation of the sale and delivery of the deed.[58]

Transfer of administration to chancery court. A statute providing for sales of personal property by the personal representatives, under orders of the probate court, does not govern in such proceedings in the chancery court in cases where the administration of an estate has been transferred, but such proceedings are controlled by a chancery rule authorizing the chancellor to order the sale of any personal property in the hands of a receiver, executor, or administrator within its jurisdiction.[59]

[§ 1487] **2. Nature and Form of Proceedings.** While an application to the probate court by the executor or administrator for leave to sell the lands of the estate is very generally regarded as a proceeding in rem,[60] there is also authority for the view that the proceeding is not in rem but in its nature adversary.[61] It has been held that a proceeding by an executor or administrator to sell land for the payment of debts is not a chancery proceeding,[62] although it must be in all respects according to the practice of a court of chancery.[63] There is also, however, authority for the view that the proceeding is equitable in its nature.[64]

[§ 1488] **3. Joinder of Proceedings.** A proceeding to sell real estate for the payment of debts may be joined with a statutory proceeding to sell so that the widow's interest can be set apart, but before making such sale the interest of the widow should be ascertained so that her rights at the sale can be protected without putting her under the burden of protecting incidentally the rights of the creditors.[65]

[§ 1489] **4. Time for Proceeding[66]—a. In**

Day v. Graham, 97 Mo. 398, 11 SW 55.

[e] **In a suit to construe a will** of real estate, and to carry the trusts thereof into execution, the court has power, if necessary, to direct a sale or mortgage of a sufficient part of the property for the purpose of raising the taxed costs of the suit, although some of plaintiffs are infants. St. 15 & 16 Vict. c 86 § 55, gives power to direct a sale before the hearing in those cases only in which the court could under the old practice have given such direction at the hearing. Mandeno v. Mandeno, Kay appendix ii.

[f] **Filing of title papers.**—Ky. Civ. Code § 492, requiring title papers to be filed in certain actions, is not applicable to an action to procure a sale of an intestate's interest in lands, to pay his debts and for distribution to the heirs. Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

[g] **Renewal of order of sale.**—Where an order for the administrator's sale of real property had been duly published and once renewed, the entry of an order of sale at a subsequent term which recited that the previous order of publication had been duly published amounted to a second renewal of the order of sale, and no application or order of publication was necessary. Hicks v. Watson, 258 Mo. 425, 167 SW 533.

[h] **Proceedings to sell an equitable title** in fee should be the same as if the title were a legal one. Woods v. Monroe, 17 Mich. 238.

[i] **Proceeding to sell realty fraudulently conveyed by decedent.**—Longley v. Sewell, 4 OhS&CP 1, 2 OhNP 376.

[j] **On the other hand** it has been held that in a suit by administrators to settle an estate, consolidated with a suit by creditors to have certain alleged preferences declared an assignment for the benefit of decedent's creditors, certain lienholders being made parties and their liens set up, a sale of the land could be ordered, although such lienholders had not filed their answers and set up their liens when judgment was entered, under Civ. Code Pract. § 692, requiring plaintiff in an action to enforce a lien to make other lienholders defendants, and permitting a judgment of sale to satisfy all the liens, although such defendants failed to assert their claims, but providing that they shall not be allowed to withdraw or receive any of the proceeds until they have shown their right thereto by answering and cross petition. Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73.

56. Hartley v. Croze, 38 Minn. 325, 37 NW 449.

57. Entiat Delta Orchards Co. v. Unknown Heirs of Saska, 99 Wash. 84, 168 P 1130.

58. Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152.

59. Howell v. Randle, 171 Ala. 451, 54 S 563.

60. U. S.—Florentine v. Barton, 2 Wall. 210, 17 L. ed. 783; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Hastings v. Granberry, 11 F. Cas. No. 6,200, 3 Cranch C. C. 319.

Ala.—Johnson v. Gartman, 173 Ala. 290, 55 S 906; Howell v. Hughes, 168 Ala. 460, 53 S 105; Neville v. Kenney, 125 Ala. 149, 28 S 452, 82 AmSR 230; Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Goodwin v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21; Davis v. Tarver, 65 Ala. 98; Garrett v. Bruner, 59 Ala. 513; Pettus v. McClannahan, 52 Ala. 55; De Bardelaben v. Stoudenmire, 48 Ala. 643; Spragins v. Taylor, 48 Ala. 520; Satcher v. Satcher, 41 Ala. 26, 91 AmD 498; Wyman v. Campbell, 6 Port 219, 31 AmD 677.

Ark.—Adams v. Thomas, 44 Ark. 267; Sturdy v. Jacoway, 19 Ark. 499; Rogers v. Wilson, 13 Ark. 507; Ex p. Marr, 12 Ark. 84; Adamson v. Cummins, 10 Ark. 541.

Nebr.—Miller v. Hanna, 89 Nebr. 224, 131 NW 226, AnnCas1912C 573; Brusha v. Phipps, 86 Nebr. 822, 126 NW 856; McClay v. Foxworthy, 18 Nebr. 295, 298, 25 NW 86.

N. J.—Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584.

N. D.—Shane v. Peoples, 25 N. D. 188, 141 NW 737.

S. C.—McLaurin v. Rion, 24 S. C. 407.

Tex.—Crawford v. McDonald, 88 Tex. 626, 33 SW 325; Heath v. Layne, 62 Tex. 686; Murchison v. White, 54 Tex. 78; George v. Watson, 19 Tex. 354.

Va.—Allon v. Hoffman, 83 Va. 129, 137, 28 SE 602.

Wash.—Ryan v. Fergusson, 3 Wash. 356, 28 P 910.

"There can also be no question that the proceedings leading up to the sale of the real estate by the administrator are proceedings in rem." Shane v. Peoples, 25 N. D. 188, 194, 141 NW 737.

[a] **Jurisdiction over persons of heirs not necessary.**—Hastings v. Granberry, 11 F. Cas. No. 6,200, 3 Cranch C. C. 319 (holding, however, that under Md. Acts [1786] c 45 § 8, a sale could not be made of the interest of a nonresident infant in lands). But compare Sheldon v. Tucker, 3 R. I. 98 (bill dismissed because all persons interested before the court).

[b] **When collaterally assailed** the proceeding is regarded as in rem. Garrett v. Brunner, 59 Ala. 513.

[c] **If the heirs or devisees contest the application** it then assumes the further character of a suit in personam. Davis v. Tarver, 65 Ala. 98; Garrett v. Bruner, 59 Ala. 513 (if the regularity of the proceeding is presented on error or by appeal).

61. Iowa.—Good v. Norley, 28 Iowa 188.

Mo.—Shields v. Ashley, 16 Mo. 471.

N. Y.—Schneider v. McFarland, 2 N. Y. 459 [aff 4 Barb. 139].

Oh.—Holloway v. Stuart, 19 Oh. St. 472; Tidd v. Bloch, 26 Oh. Cir. Ct. 113. Contra Sheldon v. Newton, 3 Oh. St. 494 (under earlier statute).

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983; Fiske v. Kellogg, 3 Or. 503.

62. Moffitt v. Moffitt, 69 Ill. 641; Moline Water Power, etc., Co. v. Webster, 26 Ill. 233; Rixby v. Jewell, 72 Nebr. 755, 101 NW 1026; Benson v. Cilley, 8 Oh. St. 604.

"An application to the district court by an administrator to sell real estate is not a suit in equity but a special statutory proceeding." Bixby v. Jewell, supra.

63. Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Larsh v. McClelland, 194 Ill. A. 38; Whitmore v. Johnson, 10 Humphr. (Tenn.) 610.

64. Bashaw v. Temple, 115 Tenn. 596, 91 SW 202 (a suit in a chancery court to subject real estate of decedent to the payment of debts, authorized by Shannon's Code §§ 4070, 4072, is maintainable, although the property of the estate is less than one thousand dollars in value).

[a] **In North Carolina,** where a petition for the sale of real estate alleges that the purpose of the sale is to provide a fund to pay debts and preserve the personalty, the clerk has no power to order the sale of the land under the proceeding provided by Revisal (1905) § 68, but relief must be had in a court having general equity jurisdiction. Settle v. Settle, 141 N. C. 553, 54 SE 445.

65. Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

66. Necessity for actual application of personalty see supra § 1452.

General. It has been held premature to decree a sale of the realty before adjudicating the claims of creditors and their respective priorities in order to ascertain the precise amount chargeable upon such realty,[67] or to decree a sale of the whole of the land in satisfaction of claims of creditors before dower has been assigned to the widow in kind, or it is ascertained that it cannot be so assigned and a money compensation to the widow in lieu of dower has been ascertained.[68] But where it is clear that the personalty is insufficient to pay the debts, the representative is not obliged to wait until all claims have been filed before instituting proceedings to sell realty;[69] and where the question whether an administrator has committed a devastavit can be determined only by suit, a creditor of the estate is not required to postpone making an application for a sale of realty to satisfy the debt, until litigation over the question of devastavit is determined by the court of last resort.[70] As the law favors the speedy and orderly settlement of estates, an heir will not be suffered to interfere with such speedy and orderly settlement by a hasty suit in partition;[71] but the partition suit, if commenced, will be superseded by, and subject to, the proceedings of the administrator on his cross petition praying for the sale of lands to pay debts.[72] A probate court does not lose jurisdiction to order the sale of land for the payment of debts, if the order is made within the period to which the time for the payment of claims may properly be extended, although the extension may not have been actually made;[73] and it has also been held that the orphans' court has jurisdiction to decree the sale of the real estate to pay the expenses of the administration of the estate after the expiration of the lien of decedent's debts.[74] The court cannot, as a rule, order or license a sale after the succession has been actually closed and the executor or administrator has been discharged;[75] but a probate license to sell or mortgage real estate is not necessarily void because granted after the expiration of the statutory time allowed for closing up the estate, if it has not been closed up in fact and if the will contemplates that it shall remain in the hands of the executor for a longer period.[76]

[§ 1490] **b. Statutes of Limitation.**[77] The general statutes of limitation do not as a rule apply to an application for the sale of a decedent's real estate,[78] although a contrary view has been asserted;[79] and it has also been held that the court should not license a sale of land to pay debts against an estate after the legal remedy for their recovery has been barred by lapse of time.[80] In some jurisdictions,—An action by an executor or administrator to sell lands fraudulently conveyed by his testator or intestate in his lifetime must be commenced within five years after the death of decedent. Bushnell v. Bushnell, 88 Ind. 403.

80. Del.—Cohen v. Tuff, 27 Del. 188, 86 A 833, AnnCas1917C 596 [aff 26 Del. 404, 84 A 946].

Ga.—Smith v. Roberts, 141 Ga. 841, 82 SE 242.

Kan.—Thomas v. Williams, 80 Kan. 632, 634, 103 P 772, 25 LRANS 1034 [quot Cyc].

Mass.—Tarbell v. Parker, 106 Mass. 347. But compare Cooper v. Robinson, 2 Cush. 184 [foll Hudson v. Hulbert, 15 Pick. 423; In re Richmond, 2 Pick. 567; In re Allen, 15 Mass. 58] (license to sell may be granted more than four years after grant of administration).

Mich.—Hoffman v. Beard, 32 Mich. 218; In re Godfrey, 4 Mich. 308.

N. Y.—Carman v. Brown, 4 Dem. Surr. 96.

Pa.—Hook v. McCune, 6 Pa. Dist. 611; Turner's Est., 27 Pa. Co. 372; Moyer's Est., 11 Pa. Co. 528.

Wash.—Scammon v. Ward, 1 Wash. 179, 23 P 439.

[a] **When debts have been proved within the time limited,** a sale for their payment may be ordered after the expiration of such time. Edmunds v. Rockwell, 125 Mass. 363.

[b] **Where an administrator neglected to give notice of his appointment,** a license to him to sell real estate for the payment of debts was valid, although granted more than four years after his appointment, that being the time limited for the bringing of actions against him. Hudson v. Hulbert, 15 Pick. (Mass.) 423.

[c] **Effect of statute limiting suits against heirs.**—A petitioner to the surrogate's court for the sale of a decedent's land to satisfy a judgment is not, upon the objection of the statute of limitations against his claims, entitled to the benefit of 2 N. Y. Rev. St. p 109 § 53, prohibiting the bringing of suits against heirs or devisees to charge them with a decedent's debts within the three years from the grant of letters, as this section of the statute applies to actions in the supreme court only. Mead v. Jenkins, 4 Redf. Surr. (N. Y.) 369.

[d] **Statutory limitation of time to institute proceedings for sale.**—A

67. Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; Simmons v. Lyles, 27 Gratt. (68 Va.) 922; Buchanan v. Clark, 10 Gratt. (51 Va.) 164; Cralle v. Meem, 8 Gratt. (49 Va.) 496.

68. Simmons v. Lyles, 27 Gratt. (68 Va.) 922; White v. White, 16 Gratt. (57 Va.) 264, 80 AmD 706.

69. Nation v. Green, (Ind. A.) 114 NE 895.

70. Brown v. Fleming, (Tex. A.) 212 SW 483.

71. Myers v. Myers, 29 Oh. Cir. Ct. 396.

72. Myers v. Myers, 29 Oh. Cir. Ct. 396 (when the sale of lands of an ancestor is necessary to pay debts of his estate, the filing of a suit in partition does not prevent the administrator from proceeding to sell the lands, and on filing his certificate from the probate court in accordance with the statute, in the court of common pleas where such partition suit is pending, he is entitled to an immediate order of sale, the necessity for such sale not being contested; and, without filing such certificate, he may appear in such partition suit, and on his cross petition obtain such order of sale without waiting for the expiration of the year from the ancestor's death).

73. Pratt v. Houghtaling, 45 Mich. 457, 8 NW 72.

74. Truby v. Steele, 45 Pa. Super. 152.

75. Servier v. Gordon, 25 La. Ann. 231; Hoffman v. Beard, 32 Mich. 218.

[a] **Where the heirs have been put in possession** after partition among themselves, an order to sell succession property cannot be granted. Servier v. Gordon, 25 La. Ann. 231.

[b] **Expiration of time before sale can be made.**—Where a license to sell was granted within four years and six months from the appointment of the original administrator, the fact that more than that period would elapse before the sale could be made thereunder did not deprive the court of jurisdiction. In re Beniteau, 88 Mich. 152, 50 NW 110 (where the court said that Hoffman v. Beard, 32 Mich. 218, has been substantially overruled and is not good law).

76. Church v. Holcomb, 45 Mich. 29, 7 NW 167; Larzelere v. Starkweather, 38 Mich. 96 [dist Hoffman v. Beard, 32 Mich. 218].

77. See generally Limitations of Actions [25 Cyc 963].

78. Cal.—Arguello's Est., 85 Cal. 151, 24 P 641.

Ill.—Peo. v. Lanham, 189 Ill. 326, 59 NE 610 [rev 91 Ill. A. 101]; McCollister v. King, 10 Ill. A. 243.

Iowa.—McCrary v. Tasker, 41 Iowa 255.

Mont.—In re Tuohy, 33 Mont. 230, 83 P 486.

N. Y.—Skidmore v. Romaine, 2 Bradf. Surr. 122.

Tenn.—Henry v. Mills, 1 Lea 144.

[a] **The doctrine of laches rather than of legal limitations** governs such an application. Peo. v. Lanham, 189 Ill. 326, 59 NE 610 [rev 91 Ill. A. 101].

[b] **Purpose of sale as governing consideration.**—(1) The right of an executor or administrator to obtain an order of sale for the payment of debts as against the heirs is wholly unaffected by the statute of limitations. Lafferty v. Shinn, 38 Oh. St. 46 [foll Taylor v. Thorn, 29 Oh. St. 569]. (2) The lapse of six years from the time the right to payment of a legacy accrues and the deficiency of personal assets is ascertained constitutes a bar to an action by an administrator de bonis non with the will annexed to sell the real estate for the payment of the legacy. Longley v. Stump, 9 Oh. Dec. (Reprint) 234, 11 CincLBul 247.

[c] **Continuation of original proceedings.**—Where an administrator obtained leave to sell land to pay debts, but for good reasons no sale was made for four years, and the administrator then again petitioned for leave to sell, the second petition could be considered a continuation of the proceedings had under the first petition, and statutes of limitation were in no way applicable. In re Montgomery, 60 Cal. 645 (where the court refused to decide whether the statute would have been applicable in any event).

79. Scherer v. Ingerman, 110 Ind. 428, 11 NE 8, 12 NE 304; Thomas v. Williams, 80 Kan. 632, 634, 103 P 772, 25 LRANS 1034 [quot Cyc].

[a] **A statute fixing a limitation for all actions** not limited by any other statute applies to a proceeding to sell a decedent's real estate. Witz v. Dale, 129 Ind. 120, 27 NE 498; Falley v. Gribbling, 128 Ind. 110, 26 NE 794; Scherer v. Ingerman, 100 Ind. 428, 11 NE 8, 12 NE 304; Cole v. Lafontaine, 84 Ind. 446.

[b] **Fraudulent conveyance by decedent.**—

dictions there have, however, been enacted particular statutes of limitation with reference to the time within which application must be made for an order or license to sell,[81] which statutes as a rule begin to run from the time of the appointment or qualification of the executor or administrator.[82]

statute, which provides that a creditor may institute a proceeding to sell realty within three years after the issue of letters of administration, does not extend the statute of limitations indefinitely, so that such proceedings may be instituted within that time, regardless of the period that has elapsed before admiinistration was granted. Church v. Olendorf, 49 Hun 439, 3 NYS 557.

[e] **A statute limiting the lien of unsecured debts** of a decedent is not like a statute of limitation which may or may not be pleaded, but it raises an absolute bar to any right to collect out of the real estate unless action was brought or the claim filed, except by the consent of the heirs. Hoover's Est., 9 Kulp (Pa.) 126.

[f] **Where the lien of debts upon real estate has expired** (1) by reason of the five-year limitation prescribed by the act of Febr. 24, 1834, the orphans' court has no jurisdiction to direct the executor or administrator to sell the real estate for the payment of such debts. Smith v. Wildman, 178 Pa. 245, 35 A 1047, 56 AmSR 760, 36 LRA 834. (2) An adjudication confirming the account of an executor does not create a lien on the real estate if the lien of the debt was lost by lapse of time before the account was filed. Battersby v. Castor, 181 Pa. 555, 37 A 572. (3) The limitation under the statute referred to does not, however, apply to the sale of real estate where any one of the debts for which it is ordered as a payment is "secured by mortgage or judgment"; but in such case the orphans' court has jurisdiction to order a sale more than five years after the decease, and the purchaser thereat takes a valid title. Bindley's App., 69 Pa. 295.

[g] **Expiration of judgment lien.**—The power to sell the real estate to pay debts, reduced to judgments, may not be exercised after the expiration of twenty years from the time the judgments became due and payable. Tuff v. Cohen, 26 Del. 404, 84 A 946.

[h] **Application within time limited for presentation of claims.**—Where the owner of a mortgage on lands of a decedent applies to the probate court to have the mortgage redeemed out of the personal assets of the estate, or, in the alternative, to have the land sold and the proceeds applied on the debt, and any deficiency remaining, after exhausting the land, satisfied out of decedent's other estate, he must apply within the year allowed for presentation of claims against the estate. Scammon v. Ward, 1 Wash. 179, 23 P 439.

[i] **The time within which action cannot be brought against the heirs** is not to be included in computing the elapsed period. Mead v. Jenkins, 95 N. Y. 31 [aff 27 Hun 570, 29 Hun 253].

81. Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Iowa.—In re Brigham, 144 Iowa 71, 120 NW 1054.

Mass.—Grant v. Crowley, 217 Mass. 552, 105 NE 625.

Mich.—McDaniels v. Walker, 44 Mich. 83, 6 NW 112.

Minn.—Mowry v. McQueen, 80 Minn. 385, 83 NW 348.

Mo.—Austin v. Shipman, 160 Mo. A. 206, 141 SW 425.

N. Y.—Slocum v. English, 62 N. Y. 494 [aff 2 Hun 78, 4 Thomps. & C. 266]; Church v. Olendorf, 49 Hun 439, 3 NYS 557; Matter of Van Vleck, 32 Misc. 419, 66 NYS 727; Matter of Topping, 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187; Fitch v. Witbeck, 2 Barb. Ch. 161; U. S. Life Ins. Co. v. Jordan, 5 Redf. Surr. 207; Mead v. Jenkins, 4 Redf. Surr. 369; Ferguson v. Broome, 1 Bradf. Surr. 10; Cornwall's Est., Tuck. Surr. 250.

N. C.—Matthews v. Peterson, 150 N. C. 132, 63 SE 722.

Pa.—Bartley's Est., 6 Pa. Dist. 436, 19 Pa. Co. 599.

W. Va.—Reinhardt v. Reinhardt, 21 W. Va. 76.

Wis.—Fisk v. Jenewein, 75 Wis. 254, 43 NW 950, 44 NW 515.

Ont.—Re Martin, 3 Ont. L. 284; In re Starr, 2 Ont. L. 762; Byer v. Grove, 2 Ont. L. 754; Ianson v. Clyde, 31 Ont. 579.

[a] **Effect of order in another state enjoining proceedings against estate.**—An order by a court in one state enjoining creditors of a decedent from proceeding against the estate otherwise than by proving their demands before certain commissioners did not restrain a creditor from legally enforcing his claim against the estate out of real property belonging to it and situated in another state so as to prevent the running of limitations against a proceeding for that purpose during the period in which the order was in force. Mowry v. McQueen, 80 Minn. 385, 83 NW 348.

[b] **Revesting of title in heir.**—A statute requiring an application for sale to be made within three years after the grant of letters if the heir or devisee has aliened the land applies even though the title has meanwhile revested in the heir. Dodge v. Stevens, 105 N. Y. 585, 12 NE 759 [rev 40 Hun 443].

[c] **Limitation applicable only in favor of bona fide purchasers for value.**—Mead v. Jenkins, 95 N. Y. 31 [aff 27 Hun 570, 29 Hun 253]; Mead v. Jenkins, 4 Redf. Surr. (N. Y.) 369.

[d] **A debt in judgment at the time of decedent's death** is not within the statute requiring action within two years after death to sell realty, but realty may be ordered sold for the payment of such a debt, even though a number of years (in the case at bar nineteen) have elapsed since the death of decedent. Hoover's Est., 9 Kulp (Pa.) 126.

[e] **Limitation applicable only to creditors.**—Reinhardt v. Reinhardt, 21 W. Va. 76.

[f] **Limitation not applicable to sale for payment of legacies or distribution.**—Brennan v. Adler, 180 NYS 359.

[g] **Repealed statute.**—L. (1879) c 18 (St. [1894] § 4598), authorizing a sale to be made within one year after the making of the order or within such further time, not exceeding two years, as might be allowed by the judge of probate, operated to repeal L. (1876) c 37 § 3, so far as the latter limited the time within which the real estate of a deceased person might be sold for payment of debts to three years from the date of death. Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

[h] **The time that an action was pending** against the executor for the debt for which a sale is asked is not included in the three years within which the statute requires the application for an order of sale to be made. In re Bingham, 127 N. Y. 296, 27 NE 1055.

[i] **The fact that property may increase in value** does not excuse an administrator postponing long beyond statutory time application for an order to sell to pay claims. In re Brigham, 144 Iowa 71, 120 NW 1054.

[j] **Statute directory only.**—Kirby Dig. § 224, requiring executors and administrators to make final settlement of their administration within three years from the date of letters, is directory only, and does not divest the probate court of jurisdiction to complete administration after that time, and under the statute providing generally that if the personal estate will be insufficient to pay the debts the executor or administrator may apply to the court for a sale of real estate, the court may order a sale of land for the payment of debts after the expiration of three years, seven years being the shortest period of delay which will bar the right to such a sale, in the absence of circumstances excusing the delay. Brown v. Nelms, 86 Ark. 368, 112 SW 373.

[k] **Statute not retrospective.**—In the absence of administration on the estate of an owner of land, who died in 1863, his debts would not be barred by L. (1909) p 102 § 1, prescribing a limitation of ten years for enforcing debts by sale of the lands of a debtor who "shall" die, where there is no administration, the section being wholly prospective; nor, under § 2 providing that, as to such persons who "have died" more than ten years before the act took effect, the limitation against enforcing his debts by sale of his lands should be two years from the taking effect of the act, would the defense of limitations be available in a suit begun in June, 1910. Austin v. Shipman, 160 Mo. A. 206, 141 SW 425.

[l] **A decree denying** an executor's application to sell realty because it was not instituted within the time limited after the grant of letters is a bar to a subsequent application, on the ground that an amendment of the law extended the time indefinitely. In re Engel, 179 NYS 556.

82. Cummings v. Lynn, 121 Iowa 344, 96 NW 857; In re Bingham, 127 N. Y. 296, 27 NE 1055; In re Dodge, 105 N. Y. 585, 12 NE 759; Slocum v. English, 62 N. Y. 494 [aff 2 Hun 78, 4 Thomps. & C. 266]; Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632; Matter of Eychner, 65 Misc. 86, 120 NYS 1110, 7 Mills Surr. 300; Hughes v. Golden, 44 Misc. 128, 89 NYS 765; Early v. Korn, 89 NYS 392; Fitch v. Witbeck, 2 Barb. Ch. (N. Y.) 161; Butler v. Emmett, 8 Paige, (N. Y.) 12; U. S. Life Ins. Co. v. Jordan, 5 Redf. Surr. (N. Y.) 207; Mead v. Jenkins, 4 Redf. Surr. (N. Y.) 369; Ferguson v. Broome, 1 Bradf. Surr. (N. Y.) 10; Cornwall's Est., Tuck. Surr. (N. Y.) 250; Whitesides v. Barber, 24 S. C. 373.

[a] **Statute runs from original grant.**—The statute begins to run from the time of the original granting of letters of administration, and not, in case of a change of administrators, from the time of granting letters to the one who made the sale. Slocum v. English, 62 N. Y. 494 [aff 4 Thomps. & C. 266].

[b] **Lapse of time before the granting of letters of administration** (1) does not impair the right of the administrator to sell the property to pay the funeral expenses under Code Civ. Proc. § 2750, authorizing such a proceeding at any time within three years after letters were issued, where the application is brought within such time. Matter of Eychner, 65 Misc. 86, 120 NYS 1110, 7 Mills Surr. 300. (2) Until letters are granted or a will is admitted to probate, the court has no authority to order a sale of land to pay debts. Whitesides v. Barber, 24 S. C. 373.

[c] **Limitation of time within which administration can be granted.**—Where the time within which the original administration can be granted is limited by statute, the realty cannot be subjected to the payment

The filing of a petition within the time limited gives the court jurisdiction, although the citation is not returnable until after the expiration of that period,[83] or even though the citation is not issued until after the expiration of such time.[84] A fortiori, where the sale has been ordered, made, and confirmed within the time allowed by statute, it cannot be avoided because the statutory period expired before full consummation of the sale by payment of the purchase money and delivery of the deed.[85]

[§ 1491] **c. Reasonable Time and Laches.** Apart from statute an application for an order or license to sell must be made within a reasonable time,[86] and the right to obtain an order or license to sell may be lost by laches or delaying without excuse for an unreasonable time to make the proper application to the court.[87] But even a delay for a considerable length of time will not result in a loss of the right where such delay is excused or a good reason therefor is shown.[88] What is a reasonable time must be determined by the court, in its sound

of debts by administration granted after the expiration of the statutory period. Cummings v. Lynn, 121 Iowa 344, 96 NW 857.

83. Matter of Topping, 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187.

84. Matter of Van Vleck, 32 Misc. 419, 66 NYS 727, 1 Mills Surr. 606 (where the citation did not issue for nearly four years).

85. Golden's Est., 56 Pa. Super. 300.

86. U. S.—Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398.

Ark.—Mayo v. Mayo, 79 Ark. 570, 96 SW 165; James v. Gibson, 73 Ark. 440, 84 SW 485; Black v. Robinson, 70 Ark. 185, 68 SW 489; Brogan v. Brogan, 63 Ark. 405, 39 SW 58, 58 AmSR 124; Roth v. Holland, 56 Ark. 633, 20 SW 521, 35 AmSR 126; Killough v. Hinton, 54 Ark. 65, 14 SW 1092, 26 AmSR 19; Brown v. Hanauer, 48 Ark. 277, 3 SW 27; Graves v. Pinchback, 47 Ark. 470, 1 SW 682; Mays v. Rogers, 37 Ark. 155.

Cal.—Arguello's Est., 85 Cal. 151, 24 P 641; Wingerter v. Wingerter, 71 Cal. 105, 11 P 853; In re Crosby, 55 Cal. 574.

Conn.—Wooster v. Hunts Lyman Iron Co., 38 Conn. 256; Griswold v. Bigelow, 6 Conn. 258.

Ill.—Frier v. Lowe, 232 Ill. 622, 83 NE 1083; Graham v. Brock, 212 Ill. 579, 72 NE 825, 103 AmSR 248; McKean v. Vick, 108 Ill. 373; Bishop v. O'Conner, 69 Ill. 431; Wolf v. Ogden, 66 Ill. 224; Bursen v. Goodspeed, 60 Ill. 277; Myer v. McDougal, 47 Ill. 278; Rosenthal v. Renick, 44 Ill. 202; Unknown Heirs v. Baker, 23 Ill. 484; McCoy v. Morrow, 18 Ill. 519, 68 AmD 578; Dorman v. Lane, 6 Ill. 143; Digby v. Weber, 149 Ill. A. 487; Wachsmuth v. Penn. Mut. L. Ins. Co., 147 Ill. A. 510 [aff 241 Ill. 409, 89 NE 787, 132 AmSR 226, 26 LRANS 411]; Thomas v. Waters, 122 Ill. A. 434.

Iowa.—Plummer v. Kennington, 149 Iowa 419, 128 NW 552; Milburn v. East, 128 Iowa 101, 102 NW 1116; Schlarb v. Holderbaum, 80 Iowa 394, 45 NW 1051; Creswell v. Slack, 68 Iowa 110, 26 NW 42; Wilson v. Stanton, 58 Iowa 404, 10 NW 792; McCrary v. Tasker, 41 Iowa 255 [foll Waters v. Tasker, 41 Iowa 263; Waters v. Crossen, 41 Iowa 261].

Kan.—Thomas v. Williams, 80 Kan. 632, 635, 103 P 772, 25 LRANS 1304 [cit Cyc].

Me.—Smith v. Dutton, 16 Me. 308; Nowell v. Bragdon, 14 Me. 320; Nowell v. Nowell, 8 Me. 220.

Minn.—State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033; Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

Miss.—Yandell v. Pugh, 53 Miss, 295; Ferguson v. Scott, 49 Miss. 500.

Mo.—Gunby v. Brown, 86 Mo. 253; Derge v. Hill, 103 Mo. A. 281, 77 SW 105; Barlow v. Clark, 67 Mo. A. 340; Weinerth v. Trendley, 39 Mo. A. 333.

N. H.—Hatch v. Kelly, 63 N. H. 29; Hall v. Woodman, 49 N. H. 295.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—In re Engel, 179 NYS 556; Mooers v. White, 6 Johns. Ch. 360.

Pa.—Bindley's App., 69 Pa. 295.

R. I.—West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844; Mowry v. Robinson, 12 R. I. 152.

S. C.—Gregory v. Rhoden, 24 S. C. 90.

Tenn.—Carrigan v. Rowell, 96 Tenn. 185, 34 SW 4; Raht v. Meek, 89 Tenn. 274, 17 SW 777.

[a] **Character of rule.**—The rule is not an application, strictly, of the equitable doctrine of laches, for it lacks some of the elements of that doctrine; nor of the statute of limitation, although it is applied in cases at law as well as in equity; but it is sui generis. rather an application of the statutory period of limitation to the equitable doctrine of laches in part, so as to prevent the abuse by creditors of the right to enforce demands against the lands of a decedent after unreasonable delay. James v. Gibson, 73 Ark. 440, 84 SW 485.

[b] **Where a testator's realty is impliedly converted into personalty by his will.** lapse of time will not exempt it from liability for debts in default of sufficient personal assets. Mustin's Est., 8 Pa. Dist. 180.

[c] **While realty in hands of heirs.**—Courts of equity may authorize the sale of a decedent's realty for his debts at any time while such realty remains in the hands of his heirs. Mowry v. Robinson, 12 R. I. 152.

[d] **The decision of the probate court** that the delay in applying for an administrator's sale was not unreasonable is conclusive when collaterally assailed. Howell v. Jump, 140 Mo. 441, 41 SW 976.

[e] **If a sale is ordered,** its validity is not affected by the fact that the application was not made within a reasonable time, although it would have been properly denied on that ground. Jackson v. Robinson, 4 Wend. (N. Y.) 436.

87. Ala.—Bozeman v. Bozeman, 83 Ala. 416, 3 S 784, 82 Ala. 389, 2 S 732.

Ark.—James v. Gibson, 73 Ark. 440, 84 SW 485; Brogan v. Brogan, 63 Ark. 405, 39 SW 58, 58 AmSR 124; Mays v. Rogers, 37 Ark. 155.

Cal.—Wingerter v. Wingerter, 71 Cal. 105, 11 P 853; In re Crosby, 55 Cal. 574.

Del.—Cohen v. Tuff, 27 Del. 188, 86 A 833, AnnCas1917C 596.

Ill.—Hurlbut v. Talbot, 273 Ill. 356, 112 NE 697; Hurlbut v. Talbot, 273 Ill. 299, 112 NE 693; Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Frier v. Lowe, 232 Ill. 622, 83 NE 1083; Graham v. Brock, 212 Ill. 579, 72 NE 825, 103 AmSR 248; McKean v. Vick, 108 Ill. 373; Furlong v. Riley, 103 Ill. 628; Reed v. Colby, 89 Ill. 104; Wolf v. Ogden, 66 Ill. 224; Langworthy v. Baker, 23 Ill. 484; Larsh v. McClelland, 194 Ill. A. 38; Goetz v. Wenzel, 177 Ill. A. 484; In re Gordon, 174 Ill. A. 427; McCollister v. King, 10 Ill. A. 243.

Iowa.—Flora v. Brown, 159 Iowa 253, 140 NW 364; In re Brigham, 144 Iowa 71, 120 NW 1054; Cresswell v. Slack, 68 Iowa 110, 26 NW 42; McCrary v. Tasker, 41 Iowa 255 [foll Waters v. Tasker, 41 Iowa 263, Waters v. Crossen, 41 Iowa 261].

Me.—Smith v. Dutton, 16 Me. 308; Nowell v. Nowell, 8 Me. 220.

Mass.—Abbott v. Downs, 168 Mass. 481, 47 NE 94.

Mich.—In re Godfrey, 4 Mich. 308.

Minn.—State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033.

Miss.—Ferguson v. Scott, 49 Miss. 500.

N. H.—Hatch v. Kelly, 63 N. H. 29, Hall v. Woodman, 49 N. H. 295.

N. Y.—Jackson v. Robinson, 4 Wend. 436; Ferguson v. Broome, 1 Bradf. Surr. 10.

Pa.—Hunt's App., 4 Pa. Cas. 514, 7 A 594; Young's Est., 8 Pa. Co. 4; Battersby v. Castor, 6 Pa. Dist. 73, 19 Pa. Co. 108.

S. C.—Gregory v. Rhoden, 24 S. C. 90.

[a] **The reason of the rule is** that "this charge upon the real estate is not a perpetual one, which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate." Mays v. Rogers, 37 Ark. 155, 159 [quot Mayo v. Mayo, 79 Ark. 570, 575, 96 SW 165].

[b] **Circumstances not showing laches.**—Abbott v. Downs, 168 Mass. 481, 47 NE 94.

88. Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373; Mayo v. Mayo, 79 Ark. 570, 96 SW 165; Brogan v. Brogan, 63 Ark. 405, 39 SW 405, 58 AmSR 124; Killough v. Hinton, 54 Ark. 65, 14 SW 1092, 26 AmSR 19.

Cal.—Arguello's Est., 85 Cal. 151, 64 P 641.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Judd v. Ross, 146 Ill. 40, 34 NE 531; Bursen v. Goodspeed, 60 Ill. 277; Moore v. Ellsworth, 51 Ill. 308; In re Brown, 204 Ill. A. 596; Dyer v. Hall, 201 Ill. A. 183; Turner v. Fell, 142 Ill. A. 458.

Ind.—Nettleton v. Dixon, 2 Ind. 446.

Iowa.—Milburn v. East, 128 Iowa 101, 102 NW 1116; Reed v. Reed, 94 Iowa 569, 63 NW 329; Schlab v. Holderbaum, 80 Iowa 394, 45 NW 1051; Conger v. Cook, 56 Iowa 117, 8 NW 782.

Ky.—Boyd v. Emmons, 103 Ky. 393, 45 SW 364, 20 KyL 107.

Mass.—Palmer v. Palmer, 13 Gray 326; Cooper v. Robinson, 2 Cush. 184; In re Richmond, 2 Pick. 567.

Mich.—Flood v. Strong, 108 Mich. 561, 56 NW 473.

Miss.—Yandell v. Pugh, 53 Miss. 295.

Mo.—Macey v. Stark, 116 Mo. 481, 21 SW 1088 [foll Macey v. Pitillo, 21 SW 1094]; Barlow v. Clark, 67 Mo. A. 340.

N. Y.—Matter of Howard, 11 Misc. 224, 32 NYS 1098, 1 Gibb. Surr. 214; Mooers v. White, 6 Johns. Ch. 360.

Or.—In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

Pa.—Paschall's Est., 14 Phila. 242.

[a] **Circumstances excusing delay.**—Mayo v. Mayo, 79 Ark. 570, 96 SW 165; McCollister v. King, 10 Ill. A. 243 (promise by heirs to pay debts after termination of life estate); Milburn v. East, 128 Iowa 101, 102 NW 1116 (lack of knowledge of decedent's ownership of land, conveyances being unrecorded); Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

[b] **Circumstances not excusing delay.**—Brogan v. Brogan, 63 Ark. 405, 39 SW 58, 58 AmSR 124; Graham v. Brock, 212 Ill. 579, 72 NE 825, 103 AmSR 248; In re Gordon, 174 Ill. A. 427.

discretion, under the circumstances of each case,[89] but according to a number of cases the statute of limitations furnishes a proper analogy.[90] It has also been held that in the absence of peculiar circumstances excusing delay, the application should be made within the time allowed for the filing and allowance of claims.[91] Where the land is subject to dower and homestead interests, which substantially represent its entire value, a delay until the termination of such interests is not regarded as laches.[92] Where claims were presented to an executor soon after letters were issued to him, and, most of them being rejected, litigation arose, in which the principal ones were declared groundless, and the executor, about a year after the termination of the litigation, applied for an order authorizing the sale of lands to pay the debts which were declared valid, devisees who, desiring that the property of the estate should not be sold, encouraged the executor to lease the land, in order to raise money to pay the debts and avoid a sale of such land, and took part in proceedings instituted to enable such leases to be made, were estopped to assert that the debts found to be due from the estate should not be paid, because of laches of the executor in making his application for the sale of land to pay such debts.[93]

Where the representative is also an heir, a delay which will bar the right to sell land as against another heir may not result in the loss of the right to sell as to his own interest.[94]

Delay in prosecuting proceedings which have been commenced may warrant a dismissal of the proceedings,[95] although it has been held otherwise where no injury resulted to the heirs.[96]

[§ 1492] **5. Jurisdiction.** The probate court has no inherent authority to order a sale of decedent's real estate, but such authority is a special and limited one derived from statutes which designate the special cases for its exercise and the provisions of which must be strictly complied with throughout the entire proceeding.[97] As a general rule the statutes confer jurisdiction with regard to ordering a sale of realty upon the probate court or the court vested with jurisdiction of the administration of estates,[98] and this jurisdiction is ordinarily ex-

89. Ark.—Mays v. Rogers, 37 Ark. 155.
Ill.—Dorman v. Lane, 6 Ill. 143.
Iowa.—McCrary v. Tasker, 41 Iowa 255.
Mich.—In re Godfrey, 4 Mich. 308.
Mo.—Gunby v. Brown, 86 Mo. 253.
N. Y.—Mooers v. White, 6 Johns. Ch. 360.
Or.—In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

[a] **No inflexible rule can be adopted** by a court fixing the time within which application should be made for an order to sell land to pay decedent's debts after the extinguishment of homestead encumbrance therein. Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 246].

[b] **As a general rule.**—(1) An application of an executor to sell real estate for the payment of debts will not be sustained unless made within eighteen months from the time he gives notice of his appointment, unless the peculiar circumstances of the case are such as to make the duty of a court of equity to depart from this general rule, and under such circumstances the application must be made within a reasonable time. McCrary v. Tasker, 41 Iowa 255 [foll Waters v. Tasker, 41 Iowa 263; Waters v. Crossen, 41 Iowa 261]. (2) Ordinarily one year is a reasonable time. Mooers v. White, 6 Johns. Ch. (N. Y.) 360. (3) After the expiration of one year from the final settlement of the accounts of an intestate in the court of probate by the administrator, no application on the part of such administrator to sell the real estate to satisfy debts still due will be sustained, except the circumstances of the particular case are of such a peculiar character as to make it the duty of a court of equity to depart from this general rule. Dorman v. Lane, 6 Ill. 143.

[c] **Delay not barring right.**—The lapse of seven months between the death of a widow occupying a homestead and the filing of a petition by the administrator de bonis non of her husband, for an order of sale, during which time nothing was done to mislead purchasers or lead them into the belief that the creditors did not intend to enforce their claims against the premises, did not bar their right. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

[d] **Delay barring right.**— James v. Gibson, 73 Ark. 440, 84 SW 485 (fourteen years); Black v. Robinson, 70 Ark. 185, 68 SW 489 (seven years); Digby v. Webber, 149 Ill. A. 487 (twenty-seven years); Gunby v. Brown, 86 Mo. 253 (twelve years).

90. U. S.—Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398.
Ala.—Taylor v. Crook, 136 Ala. 354, 34 S 905, 96 AmSR 26.
Ark.—James v. Gibson, 73 Ark. 440, 84 SW 485.
Conn.—Wooster v. Hunts Lyman Iron Co., 38 Conn. 256.
Ill.—Hurlbut v. Talbot, 273 Ill. 299, 112 NE 693; White v. Horn, 224 Ill. 238, 79 NE 629, 115 AmSR 155 [aff 127 Ill. A. 222]; Graham v. Brock, 212 Ill. 579, 72 NE 825, 103 AmSR 248; Peo. v. Lanham, 189 Ill. 326, 59 NE 610 [rev 91 Ill. A. 101]; Judd v. Ross, 146 Ill. 40, 34 NE 631; McKean v. Vick, 108 Ill. 373; Furlong v. Riley, 103 Ill. 628; Reed v. Colby, 89 Ill. 104; Bishop v. O'Conner, 69 Ill. 431; Wolf v. Ogden, 66 Ill. 224; Bursen v. Goodspeed, 60 Ill. 277; Moore v. Ellsworth, 51 Ill. 308; Myer v. McDougal, 47 Ill. 278; Rosenthal v. Renick, 44 Ill. 202; McCoy v. Morrow, 18 Ill. 519, 68 AmD 578; Larsh v. McClelland, 194 Ill. A. 38; Goetz v. Wenzel, 177 Ill. A. 484; In re Gordon, 174 Ill. A. 427; Cruttenden v. Finlay, 123 Ill. A. 523; Brown v. Morgan, 84 Ill. A. 233.
Minn.—State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033.

91. Milburn v. East, 128 Iowa 101, 102 NW 1116.

92. Turner v. Turner, (Ark.) 216 SW 44; Howe v. Brown, 287 Ill. 532, 123 NE 46; Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 46] (occupation of land by widow as homestead); In re Brown, 204 Ill. A. 596; Brown v. Burley, 168 Ill. A. 114; Miller v. Hammond, 126 Ill. A. 267; Thomas v. Waters, 122 Ill. A. 434.

[a] **A delay of four years after the extinguishment of a homestead encumbrance** in land does not bar application for an order to sell the land for debts, where the land is held by one who was not induced to purchase through the delay, but who bought before the application could be made. Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 246].

93. In re Tuohy, 33 Mont. 230, 83 P 486.

94. Black v. Robinson, 70 Ark. 185, 68 SW 489 (delay for more than seven years after the grant of letters of administration before attempting to subject the lands to the payment of his debts, without excuse other than that the lands were subject to overflow, is such laches as will bar an application to sell the interest of an infant heir; but it is otherwise as to the interest of an heir who was an administrator during six years, and was chiefly responsible for the delay).

95. Matter of Braker, 48 App. Div. 443, 62 NYS 859; Allen v. Sanford, 8 NYS 182.

96. Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

97. Ala.—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Bolen v. Hoven, 143 Ala. 652, 39 S 379; Robertson v. Bradford, 70 Ala. 385; Wyman v. Campbell, 6 Port. 219, 31 AmD 677. See also Hall v. Chapman, 35 Ala. 553 (sale of personalty).
Cal.—Haynes v. Meeks, 20 Cal. 288; Gregory v. McPherson, 13 Cal. 562.
Fla.—Sloan v. Sloan, 25 Fla. 53, 5 S 603; Hays v. McNealy, 16 Fla. 409.
Ill.—Bennett v. Whitman, 22 Ill. 448.
Ind.—Seward v. Clark, 67 Ind. 289.
La.—Spears' Succ., 28 La. Ann. 804; Richard v. Deuel, 11 Rob. 508; Ogden's Succ., 10 Rob. 457; Poultney v. Cecil, 8 La. 321.
Mich.—In re Rodgers, 192 Mich. 156, 160 NW 753.
Minn.—Hartley v. Croze, 38 Minn. 325, 37 NW 449.
Miss.—Washington v. McCaughan, 34 Miss. 304.
N. J.—Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.
N. Y.—Personeni v. Goodale, 199 N. Y. 323, 92 NE 754; Clark v. Halligan, 158 App. Div. 33, 142 NYS 980.
Oh.—Ludlow v. Johnston, 3 Oh. 553, 17 AmD 609.
Tenn.—Cross v. Bloomer, 6 Baxt. 74; Linnville v. Darby, 1 Baxt. 306.
Tex.—Groesbeck v. Bodman, 73 Tex. 287, 11 SW 322.

[a] **The jurisdiction of the county court,** under the law authorizing the sale by that tribunal of the property of decedents for partition, etc., is limited alone to the making and completion of the sale, and after such sale has been completed by the confirmation of the report, if any matters of equity exist, or should arise, entitling the purchaser to be relieved against the payment of the purchase money, resort must be had to a court of equity. Bond v. Clay, 2 Head (Tenn.) 379.

98. U. S.—May v. Logan County, 30 Fed. 250.
Ala.—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465.
Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102.
Colo.—New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.
Del.—Rambo v. Rumer, 4 Del. Ch. 9.
Fla.—Hays v. McNealy, 16 Fla. 409.
Ga.—McGowan v. Lufburrow, 82

clusive in the first instance,[99] although under some | statutes it is concurrent with that of courts of

Ga. 523, 9 SE 427, 14 AmSR 178; Knapp v. Harris, 60 Ga. 398.

Ill.—Smith v. Hileman, 2 Ill. 323; Swayer v. Weiners, 182 Ill. A. 651.

Kan.—Stratton v. McCandliss, 32 Kan. 512, 4 P 1018.

La.—Davie v. Scriber, 38 La. Ann. 651.

Me.—LeBroke v. Damon, 89 Me. 113, 35 A 1028.

Md.—Woelfel v. Evans, 74 Md. 346, 22 A 71; Young v. Twigg, 27 Md. 620; Williams v. Holmes, 9 Md. 281.

Mass.—Robinson v. Cogswell, 192 Mass. 79, 78 NE 389; Lindsey v. Fabens, 189 Mass. 329, 75 NE 623.

Mich.—In re Rodgers, 192 Mich. 156, 160 NW 753.

Mo.—Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496; Priest v. Spier, 96 Mo. 111, 9 SW 12.

N. H.—Lebanon Sav. Bank. v. Waterman, 65 N. H. 88, 17 A 577.

N. Y.—Kingsland v. Murray, 133 N. Y. 170, 30 NE 845 [aff 60 Hun 116, 14 NYS 495]; Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672].

N. C.—Wood v. Skinner, 79 N. C. 92; Pelletier v. Saunders, 67 N. C. 261.

Oh.—Dalton v. Davis, 18 Oh. Cir. Ct. 878, 6 Oh. Cir. Dec. 133.

Or.—Russell v. Lewis, 3 Or. 280.

Pa.—Miskimins' App., 114 Pa. 530, 6 A 743; Hunsicker's Est., 61 Pa. Super. 9; Norris v. Farrell, 11 Phila. 271; Cresson's Est., 3 Phila. 270.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393; Shaw v. Barksdale, 25 S. C. 204; Whitesides v. Barber, 24 S. C. 373; Scruggs v. Foot, 19 S. C. 274; McNamee v. Waterbury, 4 S. C. 156.

Tenn.—Erck v. Erck, 107 Tenn. 77, 63 SW 1122; Davis v. Davis, 87 Tenn. 200, 10 SW 363.

Tex.—Lauraine v. Ashe, 191 SW 563; Rogers v. Kennard, 54 Tex. 30.

Wash.—Ritchie v. Trumbull, 89 Wash. 389, 154 P 816.

Wis.—Reynolds v. Schmidt, 20 Wis. 374.

N. S.—Phinney v. Clark, 27 N. S. 384.

[a] **Constitutionality of statutes.**—A constitutional provision conferring on the probate court jurisdiction in all matters testamentary and of administration is not contravened by a statute: (1) Authorizing that court to order a sale of decedent's land where the sale will benefit the heirs and creditors. Tucker v. Harris, 13 Ga. 1, 58 AmD 488. (2) Authorizing the sale of lands belonging to heirs, some of whom are minors, and a division of the proceeds among those entitled. Harrington v. Wofford, 46 Miss. 31.

[b] **The power of the probate court cannot be directed or controlled** in a proceeding in the supreme court to construe the will. Robinson v. Cogswell, 192 Mass. 79, 78 NE 389.

[c] **The jurisdiction of the court of a particular county** as to a particular estate is a question of fact to be determined by that court, and its determination is conclusive and cannot be questioned in a collateral proceeding. Bostwick v. Skinner, 80 Ill. 147.

[d] **Jurisdiction of clerk.**—(1) Under Acts (1882) No. 43, the absence of the judge from the parish vested jurisdiction in the clerk to grant orders for the sale of succession property to pay debts. Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583. (2) Whether the clerk of the superior court, in the exercise of his probate jurisdiction, has jurisdiction to entertain an action by administrators to sell lands of their intestate is immaterial after the action is removed into the superior court before the judge; for, the parties all being represented, and as the superior court would have had jurisdiction of such an action originally brought before it, the proceedings become coram judice, and a sale thereunder is valid. McMillan v. Reeves, 102 N. C. 550, 9 SE 449.

[e] **A jurisdictional limit as to amount involved** with respect to the court exercising probate jurisdiction does not apply to proceedings to sell property of a decedent, and hence jurisdiction exists, although the value of the property exceeds the jurisdictional amount. New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799; Chambers v. Watson, 17 S. C. L. 511.

[f] **What statute applicable.**—Code Pract. art 990 provides that it shall be the duty of the several judges of probate upon application of a creditor or any creditor of a vacant estate to cause so much of the property as may be necessary to pay the debts of the estate to be offered for sale, but this article does not contemplate sales of succession property made at the instance of succession representatives, which must, under Acts (1855) No. 56, be ordered by clerks of the district courts, and clerks of the district courts have also power to order the sale of succession property at the instance of creditors. Davie v. Scriber, 38 La. Ann. 651.

[g] **Where debts are charged on the real estate** by the will, the surrogate court has no jurisdiction to order a sale for their payment, since that duty devolves on another court. Smith v. Coup, 6 Dem. Surr. 45, 19 NYSt 898.

[h] **Land fraudulently conveyed by decedent.**—(1) An administrator desiring to sell real estate which his intestate conveyed away in his lifetime in fraud of creditors may either bring ejectment in the court of common pleas for the recovery of the land at the time of filing a suit in the probate court to sell the land, or, in one action in the court of common pleas, seek to avoid the conveyance and pray for a sale of the land; and by an election to pursue his remedy in the common pleas, he ousts the probate court of its jurisdiction. Longley v. Sewell, 4 OhS&CP 1, 2 Oh NP 376. (2) But where, in an action by an administrator to set aside conveyances made by his intestate as fraudulent, in a court of competent jurisdiction, such court decides that such conveyances were fraudulent, and should be set aside, but does not proceed further to order a sale of such property to pay debts of the estate, the administrator may then apply to the probate court to have such property sold to pay debts, since, a nullity of the conveyance having been judicially decreed, the proceeding is not one to set aside the conveyance, and to subject the land to the payment of debts, which, when coupled in one action, must be by Rev. St. §§ 6139, 6140, brought only in the common pleas. Lowman v. Sewall, 16 Oh. Cir. Ct. 466, 9 Oh. Cir. Dec. 177.

[i] **Consent to exercise of jurisdiction in vacation.**—Under Acts (1865–1866) p 221, declaring under what circumstances the judge may, in vacation, give direction in a case where it has become impossible to carry out the provisions of a will, the jurisdiction depends on the consent in writing of all persons in interest who are sui juris, under Civ. Code § 4855; and if a feme covert is a beneficiary under a will probated prior to the Married Woman's Act of 1866, and her husband has taken no steps to enforce his marital rights with respect to the devise made by the testator, her written consent that the judge may entertain jurisdiction of a petition for direction is essential to the validity of an order passed in vacation, authorizing the executor to sell the property of the estate. Callaway v. Irvin, 123 Ga. 344, 51 SE 477.

99. Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102.

Del.—Rambo v. Rumer, 4 Del. Ch. 9.

Ill.—Rowden v. Meisinger, 164 Ill. A. 125.

La.—Sevier v. Gordon, 23 La. Ann. 212.

Me.—Lebroke v. Damon, 89 Me. 113, 35 A 1028.

Mass.—Robinson v. Cogswell, 192 Mass. 79, 78 NE 389.

Mo.—Scott v. Royston, 223 Mo. 568, 123 SW 454; Priest v. Spier, 96 Mo. 111, 9 SW 12; Goellner v. Goellner, (A.) 178 SW 229; Butler v. Roer, 163 Mo. A. 283, 146 SW 811.

N. H.—Lebanon Sav. Bank v. Waterman, 65 N. H. 88, 17 A 577; Jenness v. Robinson, 10 N. H. 215.

N. J.—Carroll v. Baxter, 65 N. J. L. 478, 47 A 507.

N. Y.—Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292.

Or.—Russell v. Lewis, 3 Or. 380.

Pa.—Miskimins' App., 114 Pa. 530, 6 A 743; Norris v. Farrell, 11 Phila. 271.

Tenn.—Harness v. Hughett, 117 Tenn. 489, 97 SW 68.

Tex.—Lauraine v. Ashe, 191 SW 563; Rogers v. Kennard, 54 Tex. 30; Goldstein v. Susholtz, (Civ. A.) 105 SW 219.

Wis.—Reynolds v. Schmidt, 20 Wis. 374. See also Morgan v. Hammett, 23 Wis. 30 (the circuit court has no jurisdiction to license an administrator to sell real estate to pay debts unless the county judge is disqualified to act).

N. B.—Matter of Welch, 36 N. B. 628.

[a] **Sale or mortgage.**—It is also within the exclusive jurisdiction of the orphans' court having jurisdiction of the accounts of an executor or administrator to determine whether money should be raised by sale or mortgage of the real estate. Spencer v. Jennings, 114 Pa. 618, 8 A 2.

[b] **Disqualification of judge of court of probate jurisdiction.**—(1) Where on an application to the court of common pleas in which the administration of testator's estate was pending for the sale of land to pay debts, the judge was disqualified, and thereupon certified the cause to the circuit court as authorized by statute, such court had jurisdiction to order a sale. Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496. (2) Where by reason of a supposed but not actual disqualification of the county judge a license for an administrator's sale of real estate was issued by the circuit judge, such order of sale was coram non judice, and the sale made thereunder absolutely void. Morgan v. Hammett, 23 Wis. 30.

[c] **Foreclosure of mortgage.**—A district court which has regularly acquired jurisdiction of a suit against an administrator to foreclose a mortgage can decree a sale of the mortgaged premises; but where the claim has been presented to the administrator and probate court, and been allowed, the mortgagee cannot go into the district court for an order of sale. Belloc v. Rogers, 9 Cal. 123.

[d] **Appeal from removal of administrator.**—On an appeal to the district court from an order of the county court removing an administrator, the district court acquires no jurisdiction to order a sale of the property of the estate. Levy v. Moody, (Tex. Civ. A.) 87 SW 205.

[e] **A vendor's lien when established in the district court** as against the estate must be collected through the probate court, and a failure to pursue such remedy results in a loss of the debt. Wall v. Club Land, etc., Co., (Tex. Civ. A.) 88 SW 534 [rev on other grounds 92 SW 984].

equity or other courts of law.[1] In the absence of statute vesting jurisdiction to order sales in the courts of probate, or in a case where such statutes do not apply, the jurisdiction for this purpose rests in the courts of equity,[2] and in a number of states the statutes have provided for the exercise of such jurisdiction by courts of equity.[3] Where the court which has ordered a sale is one which under the statute could properly have taken jurisdiction for that purpose, the presumption is always in favor of the court actually having had jurisdiction.[4] Where the court has acquired jurisdiction, it is not ousted of such jurisdiction by a cross bill of the widow for dower and the proceedings had thereunder.[5] Where jurisdiction is conferred only upon the probate court of the county where the will has been proved or administration granted, it follows that no court can take jurisdiction until a will has been proved or administration granted,[6] and it has also been held that the probate court has no authority to order a sale until there has been a grant of regular administration upon the estate, and an order directing a sale by a special administrator is void.[7]

Land outside county of administration. As a general rule the court of the county where the letters testamentary or of administration were granted and where the administration is pending has the exclusive power to order a sale of decedent's realty regardless of whether or not the land is situated within such county, if it is within the state;[8] but there are also decisions in which it has been held

1. U. S.—Smythe v. Henry, 41 Fed. 705; Jones v. Lamar, 34 Fed. 454 [app dism 149 U. S. 777 mem, 13 SCt 1048 mem, 37 L. ed. 958 mem].
Ala.—Hardwick v. Hardwick, 164 Ala. 390, 51 S 389.
Fla.—Hays v. McNealy, 16 Fla. 409.
Ga.—McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178; Knapp v. Harris, 60 Ga. 398.
Iowa.—Waples v. Marsh, 19 Iowa 381.
N. J.—Simpson v. Bockius, 77 N. J. Eq. 339, 78 A 758.
N. Y.—Rositzke v. Meyer, 95 Misc. 356, 159 NYS 464 [aff 176 App. Div. 193, 162 NYS 613].
N. C.—Johnson v. Futrell, 86 N. C. 122.
Oh.—Tidd v. Bloch, 26 Oh. Cir. Ct. 113.
Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.
S. C.—Shaw v. Barksdale, 25 S. C. 204.
Tenn.—Bashaw v. Temple, 115 Tenn. 596, 91 SW 202; Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Connell v. Walker, 6 Lea 709; Kindell v. Titus, 9 Heisk. 727; Fleming v. Talliafer, 4 Heisk. 352; Waddell v. Waddell, (Ch. A.) 42 SW 46.
2. Ala.—Jordan v. Hardie, 131 Ala. 72, 31 S 504; Wilson v. Crook, 17 Ala. 59.
D. C.—Richardson v. Penicks, 1 App. 261; Creswell v. Kennedy, 10 D. C. 78 [aff 101 U. S. 641, 25 L. ed. 1074].
Md.—Young v. Twigg, 27 Md. 620; Wyse v. Smith, 4 Gill & J. 295; Tyson v. Hollingsworth, 1 Harr. & J. 469.
N. J.—Skillman v. Van Pelt, 1 N. J. Eq. 511.
N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445; Williams v. Williams, 17 N. C. 69, 22 AmD 729.
Oh.—Piatt v. St. Clair, 6 Oh. 227, Wright 261.
[a] **Equity may have jurisdiction under special circumstances,** as when a construction of the will is necessary, a matter not within the jurisdiction of the probate court. Jordan v. Hardie, 131 Ala. 72, 31 S 504.
[b] **Breach of condition attached to devise.**—The orphans' court cannot decree a sale by executors of land devised on breach of a condition attached to the devise that the devisees pay a certain sum to the executors within a stated time, as the only remedy in such case is by a bill in the chancery court. Skillman v. Van Pelt, 1 N. J. Eq. 511.
[c] **Jurisdiction of equity inherent and not dependent upon statute.**—Smythe v. Henry, 41 Fed. 705; Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Britain v. Cowen, 5 Humphr, (Tenn.) 315; Waddell v. Waddell, (Tenn. Ch. A.) 42 SW 46 (the jurisdiction of the chancery court to decree a sale of real estate for payment of debts will not be defeated on the ground that the bill is not filed in the district where the land lies, if the court has jurisdiction on general chancery principles, independent of the special jurisdiction conferred by statute). Contra Springfield v. Hurt, 15 Fed. 307; Huffstedler v. Kibler, 67 Ark. 239, 54 SW 210; Whitman v. Fisher, 74 Ill. 147 (court of equity); McPike v. Wells, 54 Miss. 136; Hogan v. Kavanaugh, 138 N. Y. 417, 34 NE 292; Letson v. Evans, 33 Misc. 437, 68 NYS 421.
[d] **When the sale could be effected by proceedings in the probate court** under the statute, a court of equity will not entertain a bill by an executor to sell for payment of debts. Leslie v. Willey, Wright (Oh.) 147.
[e] **Sale for payment of legacies.**—The court of chancery can decree the legacies to be a charge on the land and order its sale for their payment if the devisees do not pay them, but in such case the order of sale would be only in execution of an authority which the court on a construction of the will finds to be given thereby, and such sale cannot be ordered upon a bill filed by the executor unless all of the devisees are made parties and submit themselves to the decree of the court. Rambo v. Rumer, 4 Del. Ch. 9.
3. U. S.—Smythe v. Henry, 41 Fed. 705.
Ala.—Johnson v. Porterfield, 150 Ala. 532, 43 S 228.
D. C.—Richardson v. Penicks, 1 App. 261.
Ga.—McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178.
Ky.—Rodgers v. Rodgers, 31 SW 139; Holburn v. Pfanmiller, 114 Ky. 831, 71 SW 940.
Md.—Wyse v. Smith, 4 Gill & J. 295; Tyson v. Hollingsworth, 1 Harr. & J. 469.
Miss.—Gordon v. James, 86 Miss. 719, 39 S 18, 1 LRANS 461.
N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445; Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.
Tenn.—Bashaw v. Temple, 115 Tenn. 596, 91 SW 202; Waddell v. Waddell, (Ch. A.) 42 SW 46; Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Davis v. Davis, 87 Tenn. 200, 10 SW 363; Harris v. Thomas, (Ch. A.) 52 SW 706.
Va.—Leavell v. Smith, 99 Va. 374, 38 SE 202.
Wis.—German Bank v. Leyser, 50 Wis. 258, 6 NW 809.
N. B.—Trites v. Humphreys, 2 N. B. Eq. 1.
4. Nantahala Marble, etc., Co. v. Thomas, 76 Fed. 59; Cassell v. Joseph, 184 Ill. 378, 56 NE 413; Robb v. Howell, 180 Ill. 177, 54 NE 324; Swearengen v. Gulick, 67 Ill. 208.
5. Swearengen v. Gulick, 67 Ill. 208.
6. Whitesides v. Barber, 24 S. C. 373.
7. Long v. Burnett, 13 Iowa 28, 81 AmD 420.
8. Ala.—Calloway v. Kirkland, 50 Ala. 401.
Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Gordon v. Howell, 35 Ark. 381.
Cal.—In re Scott, 15 Cal. 220.
Ga.—Hawks v. Smith, 141 Ga. 422, 81 SE 200.
Ill.—Doe v. Hileman, 2 Ill. 323.
Ind.—Vail v. Rinehart, 105 Ind. 6, 4 NE 218; Ex p. Shockley, 14 Ind. 413; Daniels v. Bruce, (A.) 93 NE 675.
Iowa.—Van Horn v. Ford, 16 Iowa 578.
Ky.—De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597; Walker v. Yowell, 94 Ky. 205, 21 SW 873, 14 SW 829; Girty v. Logan, 6 Bush 8.
La.—Alexander v. Bourdier, 43 La. Ann. 321, 8 S 876; Wisdom v. Parker, 31 La. Ann. 52; Chaney v. Gray, 7 Rob. 144; State v. Jean Baptiste Parish Prob. Judge St., 17 La. 500.
Md.—Cain v. Miller, 117 Md. 45, 82 A 1055.
Nebr.—Stack v. Royce, 34 Nebr. 833, 52 NW 675; Dietrichs v. Lincoln, etc., R. Co., 14 Nebr. 355, 15 NW 728.
N. Y.—Long v. Olmsted, 3 Dem. Surr. 581.
Oh.—Avery v. Dufrees, 9 Oh. 145; Avery v. Pugh, 9 Oh. 67. Aliter under earlier statute. Davis v. Livingston 6 Oh. 225; Ludlow v. McBride, 3 Oh. 240.
Pa.—Burkhardt's Est., 6 Pa. Co. 374 [aff 1 Mon. 474].
Wis.—Reynolds v. Schmidt, 20 Wis. 374.
[a] **A change of venue** is not authorized. Daniels v. Bruce, (Ind. A.) 93 NE 675.
[b] **The orphans' court of the city of Baltimore** has jurisdiction to order the sale of land lying in the county which belonged to an intestate who resided in the city. Cain v. Miller, 117 Md. 45, 82 A 1055.
[c] **Division of powers.**—If the real estate is situated in another county, the court of the county where the administration is pending has power merely to authorize the executor or administrator to raise from the real estate so situated such sum of money as is necessary, designating the amount; and the orphans' court of the county where the real estate is situated, upon presentation of such decree and proper application, has the power to make the order of sale of mortgage of so much and such part of the land as will in its opinion be necessary to raise the sum specified. Under this form of procedure the orphans' court of the county having jurisdiction of the accounts has the exclusive power to pass upon the propriety of a sale or mortgage of decedent's land and the orphans' court of the county where the land is situated, being presumed to know what part and how much of the land it is necessary and expedient to sell to raise the sum specified, has jurisdiction actually to order the sale, but such jurisdiction is wholly dependent upon the decree of the court having jurisdiction of the account. Spencer v. Jennings, 114 Pa. 618, 8 A 2, 123 Pa. 184, 16 A 426; Lane v. Nelson, 79

that the application must be made to the court of the county in which the land is situated,[9] and it has also been held that the courts of the county where letters were granted and of the county where the land is situated have concurrent jurisdiction.[10]

Land in another state. A probate court of one state has no jurisdiction to order a sale of land, situated in another state.[11]

[§ 1493] **6. Parties—a. In General.** It has been said that a proceeding for the sale of a decedent's property should ordinarily be adversary and not ex parte,[12] although it may be ex parte when the representative and the heirs join in a petition to sell land for assets.[13] Where there are two or more executors or administrators, all should join in a petition for an order to sell lands,[14] or if all do not join, the record should show why some have failed to join in the application.[15] If the application for a sale is made by a person other than the personal representative, the personal representative must at all events be made a party to the proceedings,[16] but the administrator and an heir cannot be joined as complainants in a bill against the other heirs to sell lands of the intestate to pay debts, the interest of the administrator and the heir being antagonistic.[17] The heirs and devisees are, as a general rule, considered necessary parties to a proceeding to sell land, whether for the payment of debts, or for distribution,[18] for the reason that the title of an heir or devisee cannot be divested by

Pa. 407 (under the act of March 29, 1832).

[d] **The rule has been held inapplicable** to a sale of a single tract in which decedent and minors were jointly interested, the sale being asked because the land was indivisible. Goldsmith v. Hieatt, 90 SW 259, 28 KyL 741.

9. U. S.—Nantahala Marble, etc., Co. v. Thomas, 76 Fed. 59.

Ga.—Hawks v. Smith, 141 Ga. 422, 81 SE 200.

Ind.—Jones v. Levi, 72 Ind. 586; Williamson v. Miles, 25 Ind. 55.

Ky.—Goldsmith v. Hieatt, 90 SW 259, 28 KyL 741.

La.—Alexander v. Bourdier, 43 La. Ann. 321, 8 S 876; Chaney v. Gray, 7 Rob. 144; Pierce's Case, 9 Mart. 461.

N. J.—Pittenger v. Pittenger, 3 N. J. Eq. 156; Hopkins v. Meier, (Ch.) 19 A 264.

N. C.—Ellis v. Adderton, 88 N. C. 472.

[a] **Any county.**—Proceedings may be taken in any of the counties in which decedent had lands. Nanthala Marble, etc., Co. v. Thomas, 76 Fed. 59.

10. Williamson v. Miles, 25 Ind. 55 [foll Jones v. Levi, 72 Ind. 586].

11. U. S.—Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542.

Ala.—Leavens v. Butler, 8 Port. 380.

Colo.—Peo. v. Parker, 54 Colo. 604, 132 P 56.

Md.—Seldner v. Katz, 96 Md. 212, 53 A 931.

Oh.—Nowler v. Coit, 1 Oh. 519, 13 AmD 640.

[a] **Valid order.**—An order of a probate court in Kansas, administering the estate of a deceased devisee, authorizing an assignment of the devisee's interest in an estate in process of administration in California, is not objectionable as an attempt by the Kansas court to administer on lands in California which constituted a part of the devise. Phelps v. Grady, 168 Cal. 73, 141 P 926.

[b] **The legislature has power to confirm** the title of purchasers of land within the state sold under a license from a probate court of another state. Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542.

12. Gladson v. Whitney, 9 Iowa 267; Wright v. Steed, 10 La. Ann. 238.

13. Harris v. Brown, 123 N. C. 419, 31 SE 877.

14. Hannum v. Day, 105 Mass. 33; Personette v. Johnson, 40 N. J. Eq. 532, 4 A 778; Fitch v. Witbeck, 2 Barb. (N. Y.) 161.

[a] **Contrary view.**—Jackson v. Robinson, 4 Wend. (N. Y.) 436.

15. Personette v. Johnson, 40 N. J. Eq. 532, 4 A 778.

16. U. S.—U. S. Bank v. Ritchie, 8 Pet. 128, 8 L. ed. 890; Allen v. Simons, 1 F. Cas. No. 237, 1 Curt. 122.

D. C.—Plumb v. Bateman, 2 App. 156.

Ill.—McDowell v. Cochran, 11 Ill. 31.

Ind.—Stone v. Elliott, 182 Ind. 454, 461, 106 NE 710 [cit Cyc].

Iowa.—Postlewait v. Howes, 3 Iowa 365.

Ky.—Perry v. Seitz, 2 Duv. 122; Robertson v. McDaniel, 5 J. J. Marsh. 11.

La.—Wright v. Steed, 10 La. Ann. 238.

Md.—Lynn v. Gephart, 27 Md. 547; Piper v. Tuck, 26 Md. 208; Carey v. Dennis, 13 Md. 1; Baltimore v. Chase, 2 Gill & J. 376; David v. Grahame, 2 Harr. & G. 94; Tyler v. Bowie, 4 Harr. & J. 333; Hammond v. Hammond, 2 Bland 306.

Okl.—In re McCann, 51 Okl. 187, 151 P 887.

Pa.—Roessler's Est., 5 Pa. Dist. 776, 19 Pa. Co. 161.

Tenn.—Wright v. Thornton, 87 Tenn. 74, 9 SW 429.

Va.—Catron v. Bostic, 123 Va. 355, 96 SE 945.

Eng.—Knight v. Knight, 3 P. Wms. 331, 24 Reprint 1088.

[a] **Resignation of representative.**—A decree for a sale rendered on the application of creditors is void where the administrator, by reason of his previous resignation, which has been accepted, is not before the court in his representative capacity at the time of its rendition. Wright v. Thornton, 87 Tenn. 74, 9 SW 429.

[b] **Where there are no personal assets,** and hence there is no qualified executor or administrator, a creditor's bill to subject realty to the payment of debts may be maintained without the presence of an executor or administrator. Plumb v. Bateman, 2 App. (D. C.) 156; Birely v. Staley, 5 Gill & J. (Md.) 432, 25 AmD 303.

[c] **Foreign administrators.**—Although there are administrators who have been duly qualified and entered upon the performance of their duties and taken possession of the personal assets in the state of their qualification, there is no administration of which a court of another state can take judicial cognizance on a creditor's bill for the sale of realty, but it will be assumed for the purpose of such suit that there are no executors or administrators. The rule that a court of equity cannot proceed with a creditor's bill against the real estate until the executor or administrator of the personalty is made a party to the suit means an executor qualified or an administrator appointed within the jurisdiction who can be reached by the process of the court. Plumb v. Bateman, 2 App. (D. C.) 156.

17. Kirkbride v. Kelly, 167 Ala. 570, 52 S 660.

18. U. S.—Sprague v. Litherberry, 22 F. Cas. No. 13,251, 4 McLean 442 (stating Ohio law).

Ala.—Davis v. Tarver, 65 Ala. 98.

Cal.—In re Simmons, 43 Cal. 543.

Fla.—Wilson v. Fridenburg, 19 Fla. 461, 21 Fla. 386; Young v. McKinnie, 5 Fla. 542.

Ida.—Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152.

Ill.—Dicus v. Scherer, 277 Ill. 168, 115 NE 161; Burr v. Bloemer, 174 Ill. 638, 51 NE 821; Robertson v. Wheeler, 162 Ill. 566, 44 NE 870; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Gibson v. Roll, 27 Ill. 88, 81 AmD 219 [overr In re Sturms, 25 Ill. 390]; Hopkins v. McCann, 19 Ill. 113; Eaton v. Bryan, 18 Ill. 525; Stone v. Wood, 16 Ill. 177; Waschow v. Waschow, 155 Ill. A. 167. Contra Swearengen v. Gulick, 67 Ill. 208.

Ind.—Wood v. Wood, 150 Ind. 600, 50 NE 573; Sherry v. Denn, 8 Blackf. 542.

Iowa.—In re Pitts, 153 Iowa 269, 133 NW 660; Gladson v. Whitney, 9 Iowa 267.

Ky.—Messmore v. Stone, 13 Ky. Op. 304.

La.—Misner v. Fulshire, 21 La. Ann. 282.

Md.—Bowen v. Gent, 54 Md. 555; Hammond v. Hammond, 2 Bland 306.

Miss.—Powell v. Warmack, 76 S 504; Hargrove v. Baskin, 50 Miss. 194; Winston v. McLendon, 43 Miss. 254.

Nebr.—Holmes v. Columbia Nat. Bank, 7 Nebr. (Unoff.) 893, 97 NW 26.

N. Y.—Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731; Jenkins v. Young, 35 Hun 569.

N. C.—McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Dickens v. Long, 109 N. C. 165, 13 SE 841; Thompson v. Cox, 53 N. C. 311; Davis v. Howcott, 21 N. C. 460.

Oh.—Adams v. Jeffries, 12 Oh. 253, 40 AmD 477.

Or.—Fiske v. Kellogg, 3 Or. 503.

Pa.—Mustin's Est., 8 Pa. Dist. 180; Clark's Est., 7 Pa. Co. 308.

Porto Rico.—Martinez v. Registrar of Property, 15 Porto Rico 66.

S. C.—McLaurin v. Rion, 24 S. C. 407; Moore v. Smith, 24 S. C. 316; Leroy v. Charleston, 20 S. C. 71.

Tenn.—Jordan v. Maney, 10 Lea 135; Shields v. Alsup, 5 Lea 508; Bennett v. Kennedy, 3 Head 674; Elliott v. Cochran, 2 Sneed 468; Hinkle v. Shadden, 2 Swan 46; Frazier v. Pankey, 1 Swan 75; Estes v. Johnson, 10 Humphr. 223; Green v. Shaver, 3 Humphr. 139.

Va.—Hudgin v. Hudgin, 6 Gratt. (47 Va.) 320, 52 AmD 124.

W. Va.—Kilbreth v. Roots, 33 W. Va. 600, 11 SE 21.

[a] **Existence of heirs presumed.**—Gladson v. Whitney, 9 Iowa 267.

[b] **Devisees should be made parties by name.**—Kilbreth v. Roots, 33 W. Va. 600, 11 SE 21.

[c] **Infant heirs** (1) are necessary parties. Fiske v. Kellogg, 3 Or. 503. (2) But an infant heir who has conveyed away his interest in the land is not a necessary party, for, although his deed is voidable at his election after attaining his majority, it is not void. Scruggs v. Foot, 19 S. C. 274.

[d] **Heirs of deceased heir.**—On an application by an administrator for the sale of lands for the payment of debts, the fact that one of the heirs had died does not authorize the appointment of an administrator ad litem to represent the estate of such heir; but the heirs of said deceased heir, as successors in title to the real estate, are the proper representatives of the interest which re-

the proceedings, unless he is made a party,[19] although there is also authority for the view that the heirs or devisees are not necessary parties.[20] The widow of decedent is also a necessary party in some jurisdictions,[21] although in other jurisdictions a contrary view has been asserted.[22] A mortgagee of the land is not a necessary party to the proceedings,[23] nor is a creditor or a person supposed to have a claim against the estate,[24] or a creditor of an

sided in their predecessor, and they should be made parties to the proceeding. Poole v. Daughdrill, 129 Ala. 208, 30 S 579.

[e] **Life tenant and remainderman.**—If testator devised land to a daughter for life with remainder to the daughter's minor child, both were necessary parties to an action to sell the land to pay testatrix's debts. Reaves v. Baker, 112 SW 609, 33 KyL 1004.

[f] **Contingent remaindermen** (1) in esse and within the jurisdiction of the court are necessary parties. Farr v. Gilreath, 23 S. C. 502. But compare Brickell v. Lightcap, 115 Miss. 417, 76 S 489 (neither cestui que trust nor contingent remaindermen entitled to be summoned). (2) Contingent remaindermen under the ancestor's will are not necessary parties to a petition to require the administratrix of an heir to sell the reversionary interest of such heir in the ancestor's estate to pay the heir's debts. Brown v. Kamerer, 276 Ill. 69, 114 NE 544.

[g] **Where trustees for infant remaindermen are parties,** it is not necessary that the infants be joined. Markle's Est., 5 Pa. Dist. 47, 17 Pa. Co. 337.

[h] **Beneficiaries under will set aside.**—Where infants were beneficiaries under a will which had been set aside in the circuit court, a petition by the administratrix, afterward appointed, to sell the decedent's real property for the payment of debts, properly included them as parties defendant, this being a proceeding in rem, and not one to obtain a personal judgment against the infants. Ditton v. Hart, 175 Ind. 585, 95 NE 119.

[i] **The decree is not binding upon** an infant heir who was not made a party as to the extent of his interest. Young v. McKinnie, 5 Fla. 542.

[j] **Omission of one heir does not render sale void.**—The failure to make one of the heirs a party does not render the sale void or open to collateral attack by him. Neville v. Kenney, 125 Ala. 149, 28 S 452, 82 AmSR 230.

[k] **Omission cured by failure to object.**—The omission to make the heirs parties was cured by their failure to make objections before the sale. Misner v. Fulshire, 21 La. Ann. 282.

[l] **Where a will has worked an equitable conversion** by directing land to be sold by the trustee, and the proceeds invested, a sale is valid, although infant distributees are not made parties to the suit therefor, and although the petition sought a sale on an incorrect theory, sufficient cause for sale having been alleged, and general relief prayed for. Sloan v. Baltimore Safe-Deposit, etc., Co., 73 Md. 239, 20 A 922.

[m] **If the lands have been devised** the devisees are the only necessary parties defendant, and an heir of the testator, having no interest in the lands, is not a necessary party. Williams v. Williams, 49 Ala. 439; Pennsylvania Co. for Ins. on Lines, etc. v. Bauerle, 143 Ill. 459, 33 NE 166.

[n] **Entry of appearance by administrator for heirs.**—The written consent of the heirs, neither attested nor acknowledged, to a sale of decedent's property, does not authorize the administrator to enter an appearance for them in an action by him to sell the property, especially when he is interested in a lien debt against the estate. Jenkins v. Crofton, 9 SW 406, 10 KyL 456.

[o] **Death of heir who was a party.**—Where the administrator and the heirs have joined in a petition to sell, the death of one of the petitioners will not vitiate the title of the purchasers, although he left minor heirs who were not made parties. Harris v. Brown, 123 N. C. 419, 31 SE 877.

[p] **Where lands are specifically charged with the payment of debts** by the will of the decedent, the heirs are not necessary parties to proceedings by creditors for the purpose of making their debts out of the real estate. Smith v. Wyckoff, 11 Paige (N. Y.) 49.

[q] **Contingent interest.**—The interest devised is too remote to make a devisee a necessary party to a suit for subjecting the property to the payment of testator's debts where it is contingent on both testator's children dying without issue and a failure of the executrix to sell the property as she is authorized by the will to do. New v. Bass, 92 Va. 383, 23 SE 747.

[r] **Property fraudulently conveyed.**—In an action by the creditors to sell property transferred without consideration by intestate, where the heirs at law are made parties to the action, the donees of the property to be sold are not necessary parties to the proceedings to subject the lands to payment of the debts of intestate, but are proper parties, and it would be consistent with the purpose of juridical sales to have them before the court before the order of sale is made, in order that an undisputed title may be offered, and the highest possible price may be obtained for the property. Hobbs v. Cashwell, 152 N. C. 183, 67 SE 495.

[s] **A purchaser from the heirs** prior to the commencement of a proceeding by the administrator for a sale to pay debts must be made a party to the proceeding in order that his rights may be cut off. Robertson v. Wheeler, (Ill.) 44 NE 870.

[t] **Presumption of authority of counsel to act for heirs not served.**—Where the record shows that all the heirs were represented by counsel, and the authority of the counsel to act for those not served with process is not disputed, such power will be assumed for the purpose of sustaining the jurisdiction of the court to order a sale. McMillen v. Reeves, 102 N. C. 550, 9 SE 449.

[u] **Attorney for heirs absent or not represented.**—(1) In a proceeding for the sale of real estate the probate court should appoint an attorney for heirs not represented. In re Simmons, 43 Cal. 543. (2) But a judgment ordering a sale at the suit of the curator, without the appointment of an attorney to represent the absent heirs, is not a nullity. Gibson v. Foster, 2 La. Ann. 503. (3) Nor, where an attorney for absent heirs was regularly appointed, does the fact that such attorney absented himself from the state during the entire conclusion of the proceedings for the settlement of the estate render a sale of the lands under order of the probate court invalid. Porter v. Hornsby, 32 La. Ann. 337. (4) So also the failure of an administrator to obtain an order of court for the sale of succession property, contradictorily with an attorney of absent heirs, is a mere irregularity and will not render the sale null and void, nor affect the purchaser. Herriman v. Janney, 31 La. Ann. 276.

[v] **Where the will gave executors power to sell,** but one of them refused to convey without order of court, a conveyance thereafter made in accordance with decree of court is not subject to attack, because devisees of the testator were not parties to the proceeding, for, the executor having joined in the conveyance, they needed no authority to render it valid. Virginia, etc., Coal Co. v. Charles, 251 Fed. 83 [aff 254 Fed. 379, 165 CCA 599].

[w] **As against an unborn heir,** a decree of sale in a suit by an administrator to subject lands to the payment of debts is not void, although such unborn heir was never made a direct party. Boal v. Wood, 70 W. Va. 383, 73 SE 978, 42 LRANS 439.

19. Burr v. Bloemer, 174 Ill. 638, 51 NE 821; Card v. Finch, 142 N. C. 140, 54 SE 1009; Dickens v. Long, 109 N. C. 165, 13 SE 841.

[a] **Remedy of heir not made party.**—If one of the heirs is not named in the petition or is not made a party to the proceedings, he may apply to be made a party in order that he may sue out an appeal, and having this remedy it cannot be said that he is deprived of his property without due process of law. Lyons v. Hamner, 84 Ala. 197, 4 S 26, 5 AmSR 363.

20. Telfair v. Stead, 2 Cranch (U. S.) 407, 2 L. ed. 320 (practice and law of Georgia); Irwin v. Flynn, 110 La. 829, 34 S 749; Tertron v. Comeau, 28 La. Ann. 633; Weaver's App., 19 Pa. 416; Murphy's App., 8 Watts & S. (Pa.) 165. See also In re Bradley, 6 Ont. L. 397, 2 OntWR 711 (where heirs were not easily accessible).

[a] **Title of purchaser good against heir subsequently making himself known.** — Where, by legal proceedings fairly conducted for a debt of the common ancestor of the parties, property has been judicially sold, the purchaser acquires a good title against an heir who subsequently makes himself known. Wherry v. Bell, 2 Rob. (La.) 225.

21. Wood v. Wood, 150 Ind. 600, 50 NE 573; Simonton v. Brown, 72 N. C. 46; Catron v. Bostic, 123 Va. 355, 96 SE 845.

[a] **Effect of sale where widow not a party.**—The sale of a whole tract of land to pay debts, made under proceedings to which the widow was not a party, passes to the purchaser no interest in her dower right therein. Kent v. Taggart, 68 Ind. 163.

22. In re Smith, 43 Or. 595, 73 P 336, 75 P 133; Weaver's App., 19 Pa. 416; Murphy's App., 8 Watts & S. (Pa.) 165.

23. Claffy v. Farrell, 196 Ill. A. 239; Matter of Haig, 3 NYS 285, 6 Dem. Surr. 454; Holloway v. Stuart, 19 Oh. St. 472; Defrees v. Greenbaum, 11 Oh. St. 486. But compare Hart v. Hart, 31 W. Va. 688, 8 SE 562 (trustee under trust deed should be joined).

[a] **Aliter if sale free from lien is sought.**—Nation v. Green, (Ind. A.) 114 NE 895.

24. Ill.—Rice v. Davies, 201 Ill. A. 165; Lewis v. De Graw, 19 Ill. A. 313.

Ky.—Costigan v. Truesdell, 119 Ky. 70, 83 SW 98, 115 AmSR 241, 26 KyL 971; Tabb v. Wortham, 89 SW 191, 23 KyL 260.

N. C.—Thompson v. Cox, 53 N. C. 311.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

Va.—Catron v. Bostic, 123 Va. 355, 96 SE 845

[a] **Where land specifically charged with payment of debts.**—In a bill by a creditor of a testator's estate to obtain payment out of land specifically charged by the testator

heir.[25] Where, in a proceeding to sell land to pay debts, the widow of a deceased son and heir is made a party as such, it is not necessary to the validity of the sale that she should also be made a party as administratrix of her husband's estate.[26] When the administrator of a devisee brings an action to sell the real estate acquired by the devise to pay his debts, a creditor of the original testator is neither a necessary nor a proper party defendant.[27] A person claiming land under a deed of a former administrator is not interested in the estate so as to entitle him to interfere in proceedings by a subsequent administrator to sell the land for the payment of debts.[28] A mortgagor who has parted with his title to the land mortgaged, and is not in possession thereof, is not a necessary party to a proceeding brought by the executor of the purchaser to obtain an order to sell the land for the payment of debts.[29] Any person interested in the property whose sale is sought may become a party to the proceedings on proper showing of his interest,[30] but a creditor of the estate cannot become a party plaintiff in proceedings by the representative to sell real estate to pay debts.[31] Where a wife devised certain realty to her husband for life, and other realty in fee, and after her death he conveyed and encumbered the devise in fee to such an extent that, if it was first sold, his encumbrancers and grantees would be damaged, they were proper parties defendant to a petition by the executor to sell realty to pay debts.[32] Purchasers of real estate from the widow of the owner are not proper parties to a proceeding to sell it in the administration in the owner's estate.[33] It has been held that a trust company which has possession of personal property belonging to decedent's estate is properly made a party in a petition by the administrator to sell decedent's real estate for the payment of debts.[34] Proceedings in the orphans' court against lands charged with legacies should be by the legatees themselves and the executor is not a proper party,[35] but the fact that the executor is made a party does not avoid the proceedings for want of jurisdiction, if the legatees are in fact parties.[36] In proceedings by executors to sell land under an order of the court, where four claimants intervened, asserting title to an interest in the land, and three of them voluntarily dismissed themselves from the case, the executors cannot complain of an amendment striking such claimants as parties, the executors not being prejudiced by such withdrawal.[37] Where decedent contracted to devise her realty to certain persons, and after her death, she having made such a will, her executor petitioned the probate court for leave to sell the realty to pay an inheritance tax on the devise, although the treasurer and receiver-general might have been made a party, failure to join him as such was not reversible error, the assessment of the tax commissioner having been made, and the time for appeal having expired.[38]

[§ 1494] **b. Guardian of Infant.** It is usually required that an infant heir or devisee of the land of which a sale is sought shall have a regular guardian, or else a guardian ad litem, to represent his interest,[39] but there is authority for the view that, if such infant has been duly cited, the nonap-

with debts, all the creditors whose debts are charged upon the land and are still due should be made parties, if they are named in the will; but, if the names of other creditors cannot be ascertained by the complainant, he may in the first instance allege that fact in excuse. Smith v. Wyckoff, 11 Paige (N. Y.) 49.

[b] **Person failing to establish claim.**—A sale of a decedent's real estate to pay debts in an action for the settlement of the estate was not invalidated by reason of the fact that a party claiming to be a creditor was not made a party to the proceedings, where he failed to establish his claim. Costigan v. Truesdell, 119 Ky. 70, 83 SW 98, 26 KyL 971, 115 AmSR 241.

25. Nichols v. Lee, 16 Colo. 147, 26 P 157; Globe Mercantile Co. v. Perkeypile, (Ind.) 125 NE 29. But compare In re Townsend, 203 N. Y. 522, 96 NE 1105 (under Code Civ. Proc. § 2752, requiring citation, in proceedings to sell decedent's land to pay debts to be issued to the "husband or wife and of all the heirs and devisees of the decedent, and also every other person claiming under them, or either of them," such a proceeding was defective for failure to make parties the judgment creditors of the heirs at law of deceased).

[a] **Creditors of an heir may intervene** in such proceedings if they so desire. Nichols v. Lee, 16 Colo. 147, 26 P 157.

26. Wood v. Wood, 150 Ind. 600, 50 NE 573.

27. Smith v. Hayward, 5 OhS&CP 462, 4 OhNP 501.

28. Shields v. Ashley, 16 Mo. 471.

29. Denison Univ. v. Manning, 65 Oh. St. 138, 61 NE 706.

30. Ark.—Ex p. Marr, 12 Ark. 84.

Cal.—In re Rawitzer, 175 Cal. 585, 166 P 581.

Colo.—New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

Ga.—McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178.

Ill.—Newell v. Montgomery, 129 Ill. 58, 21 NE 508.

Ind.—Globe Mercantile Co. v. Perkeypile, 125 NE 29.

Miss.—Moody v. Harper, 38 Miss. 599.

N. C.—Battle v. Duncan, 90 N. C. 546; Gibson v. Pitts, 69 N. C. 155.

Oh.—Clark v. Harlan, Oh. Prob. 106.

[a] **This rule has been applied to:** (1) Minors as contingent remaindermen. McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178. (2) The husband, in proceedings for the sale of his deceased wife's estate, where his curtesy is at issue. Clark v. Harlan, Oh. Prob. 106. (3) Persons claiming adverse title to the land. Doan v. Biteley, 49 Oh. St. 588, 32 NE 600. But compare Shields v. Ashley, 16 Mo. 471 (under a statute declaring that the deed given in pursuance to such a sale should convey to the purchaser only the right, title, and interest which the deceased had in the real estate at the time of his death, a person claiming a title superior to the decedent was not a proper party and had not even the right to interfere and resist the order of sale).

[b] **A nonresident executor and trustee** having a vested interest in the property and being charged with the duty of protecting it from unnecessary claims and expenses may in his capacity as trustee oppose a petition for sale by an administrator with the will annexed. In re Rawitzer, 175 Cal. 585, 166 P 581.

31. Strickland v. Strickland, 129 N. C. 84, 39 SE 735; Rawls v. Carter, 119 N. C. 596, 26 SE 154; Dickey v. Dickey, 118 N. C. 956, 24 SE 715.

32. New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799.

33. Nix v. Mayer, (Tex.) 2 SW 819.

34. Ditton v. Hart, 175 Ind. 585, 95 NE 119.

35. Littleton's App., 93 Pa. 177; Field's App., 36 Pa. 11.

36. Littleton's App., 93 Pa. 177.

37. McCraw v. Webb, 134 Ga. 579, 69 SE 324.

38. Richardson v. Lane, (Mass.) 126 NW 44.

39. Ala.—Craig v. McGehee, 16 Ala. 41.

Cal.—Townsend v. Tallant, 33 Cal. 45, 91 AmD 617.

Fla.—Price v. Winter, 15 Fla. 66.

Ga.—McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178.

Ind.—Comparet v. Randall, 4 Ind. 55; Timmons v. Timmons, 3 Ind. 251, 6 Ind. 8.

Iowa.—Bickel v. Erskine, 43 Iowa 213.

Ky.—Hulsewede v. Churchman, 111 Ky. 51, 63 SW 1, 23 KyL 487; Vowles v. Buckman, 6 Dana 466; Thornton v. Thornton, 64 SW 524, 23 KyL 930; Gardner v. Letcher, 29 SW 868, 16 KyL 778; Davidson v. Davidson, 1 KyL 360, 10 Ky. Op. 828.

Miss.—Rule v. Broach, 58 Miss. 552; Billups v. Brander, 56 Miss. 495; Winston v. McLendon, 43 Miss. 254.

N. Y.—Sheldon v. Wright, 5 N. Y. 497 [aff 7 Barb. 39]; Schneider v. McFarland, 2 N. Y. 459 [aff 4 Barb. 139]; In re Mahoney, 34 Hun 501; Richmond v. Foote, 3 Lans. 244; Havens v. Sherman, 42 Barb. 636; Ackley v. Dygert, 33 Barb. 176; Corwin v. Merritt, 3 Barb. 341; Bloom v. Burdick, 1 Hill 130, 37 AmD 299.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968; Hyman v. Jarnigan, 65 N. C. 96.

Oh.—Biggs v. Bickel, 12 Oh. St. 49

Or.—Fiske v. Kellogg, 3 Or. 503.

S. C.—Tinley v. Robertson, 17 S. C. 435.

Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

W. Va.—Hart v. Hart, 31 W. Va. 688, 8 SE 562.

[a] **This is true whether or not the petition shows** that an heir interested is a minor. Ackley v. Dygert, 33 Barb. (N. Y.) 176.

[b] **Appointment and appearance of guardian sufficient.**—(1) An order of sale is not void, although the name of a minor child does not ap-

pointment of a guardian to represent his interests, although an irregularity of which immediate advantage may be taken, is not of itself to be deemed a defect sufficient to invalidate the sale and prevent title from vesting in the purchaser.[40] A fortiori, where in a suit by the curator for the settlement of the estate of a decedent, all the infants interested were properly served with process, failure to name one of the infants in the order appointing a guardian ad litem, who answered for all the infants, did not render a judgment directing a sale void as to the infant omitted.[41]

[§ 1495] **c. Effect of Failure to Join Necessary Parties.** As a general rule a failure to join a necessary party to the proceedings to sell land renders the proceeding and the sale void, at least as to the interest of such party,[42] although where the proceeding is regarded as strictly in rem it has been held that such an omission goes only to the regularity of the proceeding and not to the jurisdiction of the court, and while it may cause the decree to be reversed on appeal or error, or set aside on direct attack, does not render the decree or the sale thereunder void or open to collateral attack.[43]

[§ 1496] **7. Petition or Other Application—a. Necessity.** In respect to the subject matter the jurisdiction of the probate court to order a sale of a decedent's real estate attaches upon the filing of a petition or application containing the jurisdictional allegations,[44] and as a general rule the filing

pear in the record, if the record shows the appointment and appearance of a guardian ad litem for all the minor heirs. Snevely v. Lowe, 18 Oh. 368. (2) Infants are bound where represented by guardian ad litem, although they are not served with summons, notice, or other paper. Rollins v. Brown, 37 S. C. 345, 16 SE 44 (proceedings instituted and completed before adoption of code of procedure).

[c] **An order appointing a special guardian nunc pro tunc** will not cure an omission to appoint one in the first instance. In re Mahoney, 34 Hun (N. Y.) 501.

[d] **Failure to serve notice of application for guardian.**—Failure to serve notice on certain infants of an application for the appointment of a special guardian for them, as required by statute where a petition for a sale of real property for the payment of debts was duly presented, and all parties interested including such infants were regularly cited, and the decree directing the sale and the order confirming it and directing its execution were properly made, does not affect the title of a purchaser at such sale, since the statute provides that his title is not affected by such omissions, errors, or irregularities. Fenn's Est., 8 NYCivProc 206.

[e] **Sufficiency of affidavit to authorize appointment.**—Robinson v. Clark, 34 SW 1083, 17 KyL 1401.

[f] **Appearance by administrator.**—Where land was sold to pay debts under a decree of court on the petition of the administrator, and two heirs who were minors appeared by the administrator as their next friend, the sale was void, as against the minors, their interest being antagonistic to that of the administrator. O'Conner v. Carver, 12 Heisk. (Tenn.) 436. But compare Harris v. Brown, 123 N. C. 419, 31 SE 877 (while it is irregular for the administrator to represent a minor heir as guardian in a proceeding to sell land for assets, yet where there is no suggestion of any unfair advantage having been taken in the sale, confirmation, or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser).

[g] **Where statutory guardian not a party but guardian ad litem appointed.**—Where, in a proceeding by an administrator to sell real estate, a guardian ad litem was appointed for an infant defendant, although no affidavit was filed showing that such infant had no statutory guardian residing in the state, as required by statute, and at the sale the statutory guardian became the purchaser, the sale should be set aside as the statutory guardian was not a party to the proceeding and it was reasonable to believe that the irregularity would materially affect the salable value of the property. Catlett v. Catlett, 72 SW 781, 24 KyL 1986.

[h] **Appearance of guardian without answer.**—Where on application by an administratrix for permission to sell land notice was properly served upon the infant heir and upon her guardian, and the guardian appeared, the court thereupon acquired jurisdiction to order the sale, although no answer was filed by the guardian, notwithstanding a statutory provision that "no judgment can be rendered against an infant until after a defense by a guardian." Bickel v. Erskine, 43 Iowa 213.

40. U. S.—Parker v. Kane, 22 How. 1, 16 L. ed. 286 (a Wisconsin case).

Cal.—Thomas v. Parker, 97 Cal. 456, 32 P 562.

Ill.—Gage v. Schroder, 73 Ill. 44; Barnett v. Wolf, 70 Ill. 76. Contra Whitney v. Porter, 23 Ill. 445; Herdman v. Short, 18 Ill. 59.

Ind.—Clark v. Hillis, 134 Ill. 421, 34 NE 13.

Iowa.—Myers v. Davis, 47 Iowa 325.

Ky.—Oliver v. Park, 101 Ky. 1, 39 SW 423, 19 KyL 179.

Mass.—Holmes v. Beal, 9 Cush. 223.

Mo.—Overton v. Johnson, 17 Mo. 442.

Nebr.—McClay v. Foxworthy, 18 Nebr. 295, 25 NW 86.

N. H.—Boody v. Emerson, 17 N. H. 577.

Pa.—Elliot v. Elliot, 5 Binn. 1.

Wis.—Sitzman v. Pacquette, 13 Wis. 291.

41. Ison v. Halcomb, 136 Ky. 523, 124 SW 813.

42. U. S.—Trimble v. Rice, 204 Fed. 407, 122 CCA 658.

Ill.—Burr v. Bloemer, 107 Ill. 638, 51 NE 821.

Ky.—Roy v. Allen, 118 SW 981; Messmore v. Stone, 13 Ky. Op. 304.

Md.—Bowen v. Gent, 54 Md. 555.

N. Y.—Jenkins v. Young, 35 Hun 569.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009; McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Dickens v. Long, 109 N. C. 165, 13 SE 841; Harrison v. Harrison, 106 N. C. 282, 11 SE 356; Perry v. Adams, 98 N. C. 167, 3 SE 729, 2 AmSR 326; Stancill v. Gay, 92 N. C. 462; Shields v. Allen, 77 N. C. 375.

Or.—Fiske v. Kellogg, 3 Or. 503.

S. C.—Whitesides v. Barber, 24 S. C. 373; Moore v. Smith, 24 S. C. 316.

Tenn.—Shields v. Alsup, 5 Lea 508; Bennett v. Kennerly, 3 Head 674; Estes v. Johnson, 10 Humphr. 223.

Va.—Hudgin v. Hudgin, 6 Gratt (47 Va.) 320, 52 AmD 124.

[a] **There can arise no presumption of jurisdiction** of the persons of the heirs having been obtained where the record does not show that they were made parties and the proceeding does not purport to be anything more than an ex parte proceeding by the administrator. Moore v. Smith, 24 S. C. 316.

[b] **Making widow party by amendment.**—Where land which had been assigned to a widow as dower was sold under order of court for payment of the husband's debts in a proceeding to which the widow was not made a party, the sale was void as to her, and a subsequent amendment of the original proceedings by which she was made a party could not give validity to a deed executed thereunder. Simonton v. Brown, 72 N. C. 46.

43. Haynes v. Simpson, 143 Ala. 554, 39 S 352; Neville v. Kinney, 125 Ala. 149, 28 S 452, 82 AmSR 230; Lyons v. Hamner, 84 Ala. 197, 4 S 26, 5 AmSR 363; Dudley v. Browning, 79 W. Va. 331, 90 SE 878.

Collateral attack generally see infra §§ 1655, 1656.

44. Ala.—Moore v. Cottingham, 113 Ala. 148, 30 S 994, 59 AmSR 100; Doe v. Hardy, 52 Ala. 291; Pettus v. McClannahan, 52 Ala. 55; De Bardeleben v. Stoudenmire, 48 Ala. 643; Spragins v. Taylor, 48 Ala. 520; Warnock v. Thomas, 48 Ala. 463; Satcher v. Satcher, 41 Ala. 26, 91 AmD 498; Duval v. McLoskey, 1 Ala. 708; Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

Cal.—Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

Ga.—Coggins v. Griswold, 64 Ga. 323.

Ill.—Bostwick v. Skinner, 80 Ill. 147; Duffin v. Abbott, 48 Ill. 17; Wight v. Wallbaum, 39 Ill. 554; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Gibson v. Roll, 30 Ill. 172, 83 AmD 181, 27 Ill. 88, 81 AmSR 219; Fitzgibbon v. Lake, 29 Ill. 165, 81 AmD 302; Young v. Lorain, 11 Ill. 624, 52 AmD 463.

Iowa.—Long v. Burnett, 13 Iowa 28, 81 AmD 420.

N. Y.—Jackson v. Irwin, 10 Wend. 441; Farrington v. King, 1 Bradf. Surr. 182.

Or.—Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

Va.—Cox v. Thomas, 9 Gratt. (50 Va.) 323.

[a] **Prayers for sale of different properties in same application.**—In the same application there may be a prayer to sell cultivated land, wild land, and personalty, and at the proper time an order may be passed granting leave to sell each. Coggins v. Griswold, 64 Ga. 323.

[b] **Truth of statements immaterial.**—The jurisdiction rests upon the averments of the petition and not upon their proof, and so far as the question of jurisdiction is concerned it is immaterial whether the statements of the petition are true or not. Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

[c] **Prayer for sale of too much land.**—The fact that the petition for the sale of land specially devised prays for the sale of too much does not affect the court's jurisdiction to order the sale. Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

of a petition or formal application of this complete character is a necessary prerequisite to the exercise of the power of the court to order or license a sale,[45] although it has also been held that, where on a settlement of the accounts of the representative it appears that the personal estate is insufficient to pay the debts, the court is authorized to make an order of sale of its own motion.[46]

[§ 1497] **b. Requirements—(1) In General.** The petition or other application for a sale must be in writing[47] and should aver all the facts requisite for giving jurisdiction in the case, or required by statute to be set forth.[48] If there is a will, this must be alleged,[49] and it has also been held necessary to show whether the widow elected to take thereunder or dissented therefrom,[50] what were the provisions of the will as to real estate,[51] and that such will does not contain a power to sell for the payment of debts;[52] but a petition for the sale of property specially devised need not set out the pro-

45. Ala.—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Hardwick v. Hardwick, 164 Ala. 390, 51 S 389; Robertson v. Bradford, 73 Ala. 116, 70 Ala. 385; Langford v. Dunklin, 71 Ala. 594; Tyson v. Brown, 64 Ala. 244; Jay v. Stein, 49 Ala. 514; Hine v. Hussey, 45 Ala. 496.

Cal.—Pryor v. Downey, 50 Cal. 388, 19 AmR 656.

Ida.—Ethell v. Nichols, 1 Ida. 741.

Ill.—Harding v. Le Moyne, 114 Ill. 65, 29 NE 188; Monahon v. Vandyke, 27 Ill. 154.

Iowa.—Myers v. Davis, 47 Iowa 325; Hilton v. Budgett, 43 Iowa 684; Long v. Burnett, 13 Iowa 28, 81 AmD 420; Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Miss.—Picard v. Montross, 17 S 375.

Mo.—State v. Holtcamp, 245 Mo. 655, 151 SW 153; Teverbaugh v. Hawkins, 82 Mo. 180.

Mont.—State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489 (lease).

N. J.—Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584.

Oh.—Lafferty v. Shinn, 38 Oh. St. 46.

Or.—Wright v. Edwards, 10 Or. 298.

Tex.—Finch v. Edmonson, 9 Tex. 504.

[a] **Verified petition instead of affidavit.**—An administrator's application to be allowed to mortgage realty, although in the form of a verified petition stating the requisite facts, pursuant to Hill L. Annot. § 1078 subd 2, and not on affidavit, as required by L. (1898) p 34, was sufficient to confer jurisdiction on the county court, and therefore the order authorizing the mortgage of the property was not subject to collateral attack. Lawrey v. Sterling, 41 Or. 518, 69 P 460.

[b] **Cross petition in action for partition.**—Where, in an action for partition of real estate brought by heirs, the administrator by answer and cross petition sets forth the necessity of selling the real estate to pay debts, he is entitled to an order of sale. Lafferty v. Shinn, 38 Oh. St. 46.

[c] **The final report of an administrator** after legal summons to the heirs to appear and contest his account is not such a bill or petition as to justify a court to decree the sale of land to pay expenses and charges against decedent's estate. Picard v. Montross, (Miss.) 17 S 375.

[d] **Land purchased but not paid for by decedent** in his lifetime may be sold by the representative for the payment of the purchase price without a petition or appraisement. Garrett v. Bicknell, 64 Mo. 404.

[e] **Although a sale of land is not the primary purpose** of a bill filed by an administrator against the heirs of his intestate, and although there is no specific prayer of the bill for the sale of the land, yet, if the attainment of the justice of the case makes a sale necessary, the court may order it. Whitley v. Davis, 1 Swan (Tenn.) 333.

[f] **No petition is required** in proceedings to sell land for payment of debts. Emerson v. Ross, 17 Fla. 122.

[g] **Creditor may proceed summarily by rule.**—Dubuch v. Wildermuth, 3 La. Ann. 407.

46. Day v. Graham, 97 Mo. 398, 11 SW 55; Teverbaugh v. Hawkins, 82 Mo. 180.

47. Townsend v. Steel, 85 Ala. 580, 5 S 351; Reynolds v. Kirkland, 44 Ala. 312; Alabama Conference M. E. Church South v. Price, 42 Ala. 39.

[a] **An order to sell perishable property** may be made on an oral application; but it is the better practice to require the application to be made in writing and verified by oath. Adkinson v. Wright, 46 Ala. 598.

48. Ala.—Wilson v. Holt, 83 Ala. 528, 3 S 321, 3 AmSR 768; Meadows v. Meadows, 73 Ala. 356; Arnett v. Bailey, 60 Ala. 435; Hall v. Hall, 47 Ala. 290; Harris v. Parker, 41 Ala. 604.

Cal.—Byrne's Est., 112 Cal. 176, 44 P 467.

Colo.—Randolph v. Prowers, 21 Colo. A. 541, 122 P 804.

Ill.—Bree v. Bree, 51 Ill. 367; Lynch v. Hickey, 13 Ill. A. 139.

Ind.—Warrum v. White, 171 Ind. 574, 86 NE 959; Renner v. Ross, 111 Ind. 269, 12 NE 508; Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876.

Ky.—Tabb v. Wortham, 89 SW 191, 28 KyL 260.

La.—Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583.

Mass.—Richardson v. Lane, 126 NE 44.

Mich.—Cahill v. Bassett, 66 Mich. 407, 33 NW 722.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

N. J.—In re Godfrey, 72 N. J. Eq. 351, 65 A 202.

N. Y.—Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672]; Ackley v. Dygert, 33 Barb. 176.

Or.—Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

Pa.—In re Crawford, 221 Pa. 131, 70 A 582; Heffner's App., 119 Pa. 462, 13 A 314; Torrance v. Torrance, 53 Pa. 505.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

Tex.—Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

Va.—Catron v. Bostic, 123 Va. 355, 96 SE 845.

Wash.—Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

[a] **A petition by a creditor** must set out the facts required by statute to be shown in a petition by an executor or administrator. Allen v. Sanford, 5 Silv. Sup. 208, 8 NYS 182; Mead v. Sherwood, 4 Redf. Surr. (N. Y.) 352; Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

[b] **The amount due or to become due upon the family allowance** should be stated; but where the sale was not ordered to pay a family allowance, the failure of the petition to make such statement did not render it objectionable on appeal, since it would be presumed that there was nothing due on such allowance. In re Levy, 141 Cal. 639, 75 P 317.

[c] **Reference to former petition.**—Where a petition for the sale of land is insufficient, but refers to a former petition, which was sufficient to confer jurisdiction, the court can regard the two as constituting one petition. Friedman v. Shamblin, 117 Ala. 454, 23 S 821.

[d] **Mines or mining interests.**—A tract of land of which a mineral patent had been issued and of which decedent was the owner in fee simple and upon which no mining had been done for a series of years cannot be summarily sold as a mine or mining interest, but can be sold under a petition stating the facts required for the sale of real estate. Byrne's Est., 112 Cal. 176, 44 P 467.

[e] **Absence or recusation of judge.**—Under a statute jurisdiction in the clerk to grant orders for sale of succession property to pay debts on the absence of the judge from the parish the affidavit should show the absence or recusation of the judge. Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583.

[f] **Stating the statutory grounds disjunctively** does not invalidate the petition. Inman v. Gibbs, 47 Ala. 305.

[g] **Petitions held sufficient.**—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Garrow v. Toxey, 171 Ala. 644, 54 S 556; Moore v. Cottingham, 113 Ala. 148, 20 S 994, 59 AmSR 100; Smith v. Brannon, 99 Ala. 445, 12 S 422; In re Roach, 139 Cal. 17, 82 P 393; Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413; Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876; Richardson v. Lane, (Mass.) 126 NE 44; Cahill v. Bassett, 66 Mich. 407, 33 NW 722; Scott v. Royston, 223 Mo. 568, 123 SW 454; Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818; Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

[h] **Petitions held insufficient.**—Warrum v. White, 171 Ind. 574, 86 NE 959; Row v. Back, (Ky.) 115 SW 806; Ackley v. Dygert, 33 Barb. (N. Y.) 176; Heffner's App., 119 Pa. 462, 13 A 314; Torrance v. Torrance, 53 Pa. 505.

[i] **Failure to object waives** insufficiency of the petition. Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

49. See cases infra this note and notes 50–52.

[a] **The will should be filed,** on petition by an executor and devisee to sell land in which he and infant heirs took interests under the will. Conrad v. Conrad, 152 Ky. 422, 153 SW 740.

50. Meadows v. Meadows, 73 Ala. 356; Archibald v. Long, 144 Ind. 451, 43 NE 439.

[a] **Such a showing is necessary where** it appears that the only claim against the estate is that of the widow for the statutory allowance. Renner v. Ross, 111 Ind. 269, 12 NE 508.

51. Allen v. Sanford, 5 Silv. Sup. 208, 8 NYS 182.

52. Wilson v. Holt, 83 Ala. 528, 3 S 321, 3 AmSR 768; Arnett v. Bailey, 60 Ala. 435; Brock v. Frank, 51 Ala. 85; Hall v. Hall, 47 Ala. 290; McCollum v. McCollum, 33 Ala. 711.

[a] **Reason for rule.**—"When a petition in the probate court for the sale of the lands of a decedent for the payment of his debts shows the existence of a will, it is indispensable that it negative the existence of a power of sale in the will, for that, under the statute, is the only contingency in which the court has

bated will.[53] When the proceeding to sell real estate is instituted by a creditor, his standing as such must be averred and shown,[54] and a petition by the administrator should allege the estimated expense of administration.[55] But facts not essential or not required by statute to be set out need not be averred.[56] Thus there is no need of averring that decedent died intestate[57] or that the estate is insolvent.[58] Neither is it necessary that an administrator's petition for leave to sell realty should state how he was appointed,[59] that he was appointed by a court having power,[60] or the date of the issuance of letters;[61] but it is sufficient to state generally that he is the administrator.[62] An allegation that the premises were fraudulently conveyed is also unnecessary.[63] A creditor's petition for a sale of realty to pay debts need not allege that the executor or administrator refused to act in the matter,[64] nor is it necessary that the petition of an administrator de bonis non to sell land for the payment of debts should allege that petitioner has exhausted his remedy on the bond of the former administrator.[65] It is not an objection to the petition that it asks only for a sale instead of for permission to mortgage, lease, or sell, where it appears from the petition itself that a mortgage or lease would fail to accomplish the purpose intended.[66] An application by executors for the sale of land embracing both wild and cultivated land, one to be sold at public and the other at private sale, has been held not invalid, where the citation used in each case was published.[67] A substantial compliance with the statutory requirements as to what a petition for the sale of property shall contain is sufficient,[68] and defects, irregularities, or omissions not amounting to a failure to show jurisdictional facts do not deprive the court of jurisdiction or render the judgment subject to collateral attack, although they may be cause for reversal,[69] but the failure of an application for an order of the probate court for the sale of a decedent's land to allege facts giving the court jurisdiction renders void an order issued thereon or a sale made in pursuance of such order.[70] If either of two petitions for an administrator's sale was sufficient to sustain an order, the sale will be upheld where both appeared to have been pending when the sale was ordered.[71] It has been held no objection to an administrator's petition for leave to sell real estate that it was in the form of a bill in chancery.[72] An executor cannot, in his petition to sell real estate, tender an issue on a claim which has not been filed and the validity of which is disputed by the heirs or beneficiaries, especially where the executor himself is interested in the claim.[73]

[§ 1498] **(2) Averments as to Heirs or Devisees.** It is commonly required that the petition shall name and describe the heirs or devisees,[74] and

power and jurisdiction to order a sale." Howell v. Hughes, 168 Ala. 460, 467, 53 S 105 [dist Arnett v. Bailey, 60 Ala. 435; Mosely v. Tuthill, 45 Ala. 621, 6 AmR 710].

[b] **Where the petition refers to the will,** which is of record, and makes the will a part of the petition, and the will contains no such power, this supplies an averment, omitted from the petition as to the lack of power. Arnett v. Bailey, 60 Ala. 435; Matter of Haig, 3 NYS 285, 6 Dem. Surr. 454.

53. Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

54. Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

55. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

56. Ala.—Alvarez v. Warner, 77 S 344.

Fla.—Deans v. Wilcoxon, 18 Fla. 531.

Ill.—Moffitt v. Moffitt, 69 Ill. 641.

Ind.—Whisnand v. Small, 65 Ind. 120.

N. Y.—In re Bingham, 127 N. Y. 296, 27 NE 1055 [aff 10 NYS 325].

N. C.—Monger v. Kelly, 115 N. C. 294, 20 SE 374.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

[a] **Illustration.**—A petition by a creditor for leave to sell or mortgage the land filed more than three years after the issue of letters testamentary need not aver that it is founded on a debt which was in controversy in an action brought by such creditor against the executors during said three years, although such fact must be proved in order to give the surrogate jurisdiction of the proceeding. In re Bingham, 127 N. Y. 296, 27 NE 1055 [aff 10 NYS 325].

57. Deans v. Wilcoxon, 18 Fla. 531.

58. Deans v. Wilcoxon, 18 Fla. 531.

59. Moffitt v. Moffitt, 69 Ill. 641.

60. Moffitt v. Moffitt, 69 Ill. 641.

61. In re Haig, 3 NYS 285, 6 Dem. Surr. 454 (where it shows that the proceeding was commenced within three years thereafter).

62. Moffitt v. Moffitt, 69 Ill. 641; In re Haig, 3 NYS 285, 6 Dem. Surr. 454.

63. Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

64. Whisnand v. Small, 65 Ind. 120.

65. Monger v. Kelly, 115 N. C. 294, 20 SE 374.

66. In re Dolan, 88 N. Y. 309 [rev 26 Hun 46].

67. Coggins v. Griswold, 64 Ga. 323.

68. Ala.—De Bardelaben v. Stoudenmire, 48 Ala. 643; Harris v. Parker, 41 Ala. 604.

Cal.—In re Heydenfeldt, 127 Cal. 456, 59 P 839; Burris v. Kennedy, 108 Cal. 331, 41 P 458; Burris v. Adams, 96 Cal. 664, 31 P 565; Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 116; Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 460, 131 P 413 [cit Cyc].

Ill.—Lynch v. Hickey, 13 Ill. A. 139.

Ind.—Globe Mercantile Co. v. Perkeypile, 125 NE 29.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

[a] **No form being prescribed,** a substantial compliance with the statutory requirements is sufficient. Hobson v. Ewan, 62 Ill. 146.

69. Ala.—Howell v. Hughes, 168 Ala. 460, 53 S 105; Poole v. Daughdrill, 129 Ala. 208, 30 S 579; Satcher v. Satcher, 41 Ala. 26, 91 AmD 498.

Ark.—Adams v. Thomas, 44 Ark. 267.

Cal.—Burris v. Kennedy, 108 Cal. 331, 41 P 458; Townsend v. Gordon, 19 Cal. 188.

Colo.—Kavanagh v. Hamilton, 53 Colo. 157, 171, 125 P 512, AnnCas 1914B 76 [cit Cyc].

Ky.—Pierce v. Marrs, 153 Ky. 748, 156 SW 404.

Mo.—Smith v. Black, 231 Mo. 681, 132 SW 1129.

Tex.—Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852. See also Danzey v. Swinney, 7 Tex. 617 (exceptions to a petition or application for an order to sell land ought not to be sustained merely because it fails to set out all the facts necessary to entitle the party to relief, but if the facts and exhibits set out in the petition or application show prima facie that the party is not entitled to relief, the court may properly dismiss the proceeding at once).

Wash.—Ackerson v. Orchard, 7 Wash. 377, 34 P 1106, 35 P 605.

Wis.—Reynolds v. Schmidt, 20 Wis. 374.

[a] **Illustration.**—Where a sworn appraisement and inventory showing the condition of the estate was made before sale, a failure to attach to the application for sale an exhibit showing the condition of the estate, and what debts had been allowed, would not invalidate the sale. Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852.

[b] **A proceeding by a sheriff** for the sale of land belonging to a decedent upon whose estate no administration has been had is not erroneous because the original petition, which was amended, averred that it was brought by the sheriff as curator. Pierce v. Marrs, 153 Ky. 748, 156 SW 404.

[c] **Omission to file inventories, etc.**—The filing in the probate court of a petition by an administrator for the sale of real estate to pay debts gives the court jurisdiction over the real estate, and the omission of the administrator to file with the petition the inventory, appraisement, lists, and accounts of the estate, as required by the statute, does not deprive the court of jurisdiction or render the sale void. Smith v. Black, 231 Mo. 681, 132 SW 1129.

70. Robertson v. Bradford, 73 Ala. 116; De Bardelaben v. Stoudenmire, 48 Ala. 643; Wright v. Edwards, 10 Or. 298.

71. Garrow v. Toxey, 171 Ala. 644, 54 S 556.

72. Bowles v. Rouse, 8 Ill. 409.

73. Nation v. Green, (Ind. A.) 114 NE 895.

74. Ala.—Poole v. Daughdrill, 129 Ala. 208, 30 S 579; Townsend v. Steel, 85 Ala. 580, 5 S 351; Bingham

show whether any of them, and if so which, are infants, married women, lunatics, or otherwise under any disability.[75] A petition giving the degree of the relationship of the heirs and not setting forth the proportionate interest of each has been held to be sufficient.[76] Where the statute requires the petition to state the residence of the heirs or devisees, it is not sufficient to state the "address" of nonresident heirs who are to be served by publication.[77] Where the statute positively requires the petition to name and describe the heirs, an omission to comply with this requirement is jurisdictional and renders the decree void,[78] but where such statements are not required by the statute, their omission does not invalidate the decree, although the better practice is that these matters should be set forth.[79] The failure of a petition to allege, as required by statute, that the persons named as devisees and legatees therein were the only heirs, did not render the order of sale fatally defective where the required statement appeared in the order.[80]

[§ 1499] **(3) Averments as to Necessity and Purpose of Sale.** The petition or application must set forth the necessity for,[81] and the object or pur-

v. Jones, 84 Ala. 202, 4 S 409; Bozeman v. Bozeman, 82 Ala. 389, 2 S 732; McCorkle v. Rhea, 75 Ala. 213; Hall v. Hall, 47 Ala. 290; Hoard v. Hoard, 41 Ala. 590; Blann v. Grant, 6 Ala. 110.

Cal.—In re Levy, 141 Cal. 639, 75 P 317; In re Roach, 139 Cal. 17, 72 P 393.

Ind.—Rapp v. Matthias, 35 Ind. 332.

N. Y.—Jenkins v. Young, 35 Hun 569; Ackley v. Dygert, 33 Barb. 176; Allen v. Sanford, 5 Silv. Sup. 208, 8 NYS 182; Matter of O'Neill, 49 Misc. 285, 99 NYS 237, 5 Mills Surr. 240; John's Est., 18 NYS 172, 21 NYCiv Proc 326; Mead v. Sherwood, 4 Redf. Surr. 352.

Or.—Marks v. Wilson, 72 Or. 5, 143 P 906; Smith v. Whiting, 55 Or. 393, 106 P 791.

W. Va.—Underwood v. Underwood, 22 W. Va. 303.

[a] **Failure to allege christian names and ages of infants.**—A petition for a sale for the purpose of making an equitable division among the heirs which does not allege the christian names and the ages of the infant heirs, although the name of their guardian is set forth, is fatally defective, and will not support an order of sale. Hoard v. Hoard, 41 Ala. 590.

[b] **Error in name.**—The fact that a minor heir was wrongly named in the petition and order did not affect the jurisdiction of the court, it appearing that she was rightly named in the summons. McCormack v. Kimmel, 4 Ill. A. 121.

[c] **An averment that the names of heirs are unknown** is not sufficient, although their place of residence is given. Noles v. Noles, 40 Ala. 576.

[d] **A petition showing that there are heirs whose names are not given** is fatally defective upon demurrer, although it states that the names of such heirs are unknown to the petitioner, and shows that he has used all reasonable diligence to ascertain them. Bingham v. Jones, 84 Ala. 202, 4 S 409.

[e] **Submission to court as to which of persons named are heirs.**—On an application by an administrator for an order to sell lands, on the ground that they cannot be equitably divided without a sale, a petition stating that there are children of two marriages, giving their names, ages, etc., and submitting to the court the question whether all of them are entitled to share in the lands, or only the children of the last marriage, is sufficient to give the court jurisdiction, and the court may decree a sale, without deciding who are heirs. Eatman v. Eatman, 83 Ala. 478, 3 S 850.

[f] **Requirement extends to widow.**—Underwood v. Underwood, 22 W. Va. 303.

[g] **Statement on information and belief.**—An application by an administrator to sell lands which avers that certain persons named are the heirs to the best of the petitioner's knowledge, information, and belief is sufficient. Townsend v. Steel, 85 Ala. 580, 5 S 351; Greenblatt v. Hermann, 144 N. Y. 13, 38 NE 966 [rev 69 Hun 298, 23 NYS 565].

[h] **Statement of lack of knowledge.**—An application by a widow which alleges that the names and number of heirs at law of the deceased are not known, and that she does not know of any persons claiming to be such, is insufficient to enable the court to order the sale, where there is no statement that any effort has been made to ascertain the heirs, nor as to whom the heirs were of whom petitioner heard many years ago. Matter of O'Neill, 49 Misc. 285, 99 NYS 237, 5 Mills Surr. 240.

[i] **Where a person is mentioned as a deceased heir,** it should be stated who succeeded as heirs to her title. Poole v. Daughdrill, 129 Ala. 208, 30 S 759.

75. Poole v. Daughdrill, 129 Ala. 208, 30 S 579; Bozeman v. Bozeman, 82 Ala. 389, 2 S 732; Page v. Matthews, 41 Ala. 719; Cloud v. Barton, 14 Ala. 347; Griffin v. Griffin, 3 Ala. 623; Mead v. Sherwood, 4 Redf. Surr. (N. Y.) 352.

[a] **Illustration.**—A petition averring that two of the distributees of the estate are married women, but not stating the ages, severally, of the husbands and wives, and averring that four others of the distributees are minors, and in no way showing whether the wives and husbands are minors, is fatally defective. Page v. Matthews, 41 Ala. 719.

[b] **Mode of objecting.**—Objections that the bill was defective because it did not state which of the parties were married women, and because a minor child should have been made a party, should be raised by demurrer or some pleading or motion by the parties affected thereby. Johnson v. Porterfield, 150 Ala. 532, 43 S 828.

[c] **It is not a jurisdictional defect** that the petition fails to state: (1) Which heirs are of full age. Field v. Goldsby, 28 Ala. 218, 65 AmD 341. (2) Which heirs are married women. Curtis v. Hunt, 158 Ala. 78, 48 S 598.

76. Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

77. Smith v. Whiting, 55 Or. 393, 106 P 791.

78. McCorkle v. Rhea, 75 Ala. 213; Matter of Slater, 17 Misc. 474, 41 NYS 534, 1 Gibb. Surr. 8; In re Johns, 18 NYS 172, 21 NYCivProc 326.

79. Hobson v. Ewan, 62 Ill. 146; Morris v. Hogle, 37 Ill. 150, 87 AmD 243; Stow v. Kimball, 28 Ill. 93; Gibson v. Roll, 27 Ill. 88, 81 AmD 219 [overr In re Sturms, 25 Ill. 390].

"Sound and judicious practice no doubt requires that the names of the heirs and devisees, and their grantees, if known, should be inserted in the petition, but the statute has not prescribed it, and we must not hold the proceeding void for the want of it." Stow v. Kimball, 28 Ill. 93, 107 [expl Turney v. Turney, 24 Ill. 625].

80. In re Levy, 141 Cal. 639, 75 P 317.

81. Ala.—Alvarez v. Warner, 77 S 344; Sermon v. Black, 79 Ala. 507; Sharp v. Sharp, 76 Ala. 312; Robertson v. Bradford, 70 Ala. 385; Hall v. Hall, 47 Ala. 290; Hall v. Chapman, 35 Ala. 553; Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89.

Cal.—Kertchem v. George, 78 Cal. 597, 21 P 372; In re Rose, 63 Cal. 346; Haynes v. Meeks, 20 Cal. 288.

Ill.—Johnson v. Buck, 220 Ill. 226, 77 NE 163.

La.—Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583.

Me.—In re Snow, 96 Me. 570, 53 A 116.

N. Y.—Ackley v. Dygert, 33 Barb. 176.

Tex.—Gillenwaters v. Scott, 62 Tex. 670; Texas Land, etc. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

[a] **Liability to waste or perishable nature.**—Under the statute authorizing the sale of the personal property, when liable to waste or when it is of a perishable nature, an averment that the property is "of a character liable to waste, or be consumed by fire" is sufficient. Harris v. Parker, 41 Ala. 604.

[b] **Necessity for payment of debts.**—An application which shows on its face that a sale is necessary for the purpose of paying the debts of the estate is sufficient. Hatcher v. Clifton, 33 Ala. 301.

[c] **A petition which merely shows that the sale will be advantageous** to the estate, without showing any of the statutory reasons therefor, as that it is necessary to pay debts, is defective. Gillenwaters v. Scott, 62 Tex. 670.

[d] **Necessity for sale of whole.**—To authorize a sale of the real estate where the debts amount to less than the value of the whole, it must be alleged in the petition that the residue would be greatly depreciated by a sale of less than the whole. In re Snow, 96 Me. 570, 53 A 116.

[e] **Insufficient allegation of benefit to estate.**—A statute providing for the sale of land to pay debts when it was "more beneficial to the estate to sell the lands than slaves" was not complied with by a petition alleging that it was "more to the interest of all the parties to sell the house and lots than the personal estate." Robertson v. Bradford, 70 Ala. 385.

[f] **Certainty of allegations.**—A petition is sufficient where it alleges: (1) That the "opinion and belief" of the representative is necessary to sell for the payment of debts. Reynolds v. Kirkland, 44 Ala. 312 (collateral attack). (2) That it would "probably" take all the slaves of the estate to pay the debts. King v. Kent, 29 Ala. 542 (collateral attack). (3) Necessary facts on information and belief of petitioner, a creditor, without stating the grounds of his information, or alleging diligent inquiry to ascertain the truth of the facts stated. In re Merchant, 6 NYS 875. (4) A petition by an executor stating only that he "believes" a sale to be necessary is insufficient. Hall v. Hall, 47 Ala. 290.

[g] **Failure to show attempt to rent property.**—Where a bill for sale of real estate contrary to the provisions of a will alleged that the

pose of,[82] the sale. Where a sale for the payment of debts is sought, the petition must aver the existence and amount of debts,[83] and, it has been asserted, the allowance of claims against the estate;[84]

homestead was occupied by one of the devisees without rent, and that a two story brick store building, which had been rented for one thousand dollars a year, has been vacant more than three months, during which testator died, but there was no allegation of any effort made to rent the same, nor were any facts stated justifying a conclusion that it could not be rented, the bill did not state facts justifying a sale of the property for the purpose of conserving the interests of a minor devisee. Johnson v. Buck, 220 Ill. 226, 77 NE 163.

82. Alvarez v. Warner, (Ala.) 77 S 344; Ikelheimer v. Chapman, 32 Ala. 676; Scott v. Royston, 223 Mo. 568, 123 SW 454.

[a] **Petition sufficiently stating purpose.**—A petition by the widow and adult children and the guardian of minor children, which alleges decedent's death, his indebtedness, and the widow's inability to manage, pay the taxes on the homestead, and which prays for the sale of a part of the homestead to pay the indebtedness, etc., is a petition for the sale of the real estate to pay debts. Scott v. Royston, 223 Mo. 568, 123 SW 454.

[b] **A joinder of different grounds of sale,** as for partition and payment of debts, in the same bill or petition will not affect the validity of the sale, although the practice is irregular. Kindell v. Titus, 9 Heisk. (Tenn.) 727.

[c] **Statement not invalidating petition.**—Where the petition for a sale of land to pay debts shows on its face that there is not enough personal property to pay the alleged debts and the prayer is confined to leave to sell to pay debts and charges of administration, the petition is not rendered void because of a statement therein that "in petitioning to sell all the real estate of said deceased, he [the petitioner] does it with a view to the distribution of the balance over and above the amount necessary to pay the debts." Norman v. Olney, 64 Mich. 553, 31 NW 555.

83. Ala.—Alvarez v. Warner, 77 S 344.

Cal.—In re Roach, 139 Cal. 17, 72 P 393.

Colo.—Bateman v. Reitler, 19 Colo. 547, 36 P 548.

Ga.—Laramore v. Dudley, 145 Ga. 102, 88 SE 682.

Ill.—Moffitt v. Moffitt, 69 Ill. 641; Rice v. Davies, 201 Ill. A. 165.

Ind.—Jackson v. Weaver, 98 Ind. 307; Rapp v. Matthias, 35 Ind. 332.

Iowa.—Gladson v. Whitney, 9 Iowa 267; Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Ky.—Carter v. Crow, 130 Ky. 41, 112 SW 1098; Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

La.—Simonin v. Czarnowski, 47 La. Ann. 1334, 17 S 847.

Minn.—State v. Ramsey County Prob. Ct., 19 Minn. 117.

Mo.—McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730, 131 AmSR 561.

N. Y.—Ackley v. Dygert, 33 Barb. 176; Gilchrist v. Rea, 9 Paige 66.

N. C.—Blount v. Pritchard, 88 N. C. 445.

Pa.—In re Crawford, 221 Pa. 131, 70 A 582.

Tenn.—Linnville v. Darby, 1 Baxt. 306.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

Utah.—Needham v. Salt Lake City, 7 Utah 319, 26 P 920.

[a] **The amount of claims allowed** should be stated. Lynch v. Hickey, 13 Ill. A. 139.

[b] **Sufficient allegation.**—An allegation "that there are debts now standing against said estate, which have been allowed, to the amount of —— dollars, and that there are no assets in petitioner's hands, the personal property being all exhausted, wherewith to pay said debts, without selling real estate," is sufficient. Moffitt v. Moffitt, 69 Ill. 641.

[c] **Failure to specify how debt incurred.**—A petition which shows a claim allowed against the estate, without specifying whether the debt was incurred as surety or principal, is sufficient in that respect after verdict. Jackson v. Weaver, 98 Ind. 307.

[d] **Petition several years after the death of decedent.**—On an application by an administrator for an order of the surrogate for a sale of real estate to pay debts, after a lapse of several years from the death of the debtor, the petition must show that such debts have been recently discovered, and, if six years have elapsed, that they are not barred by the statute. Gilchrist v. Rea, 9 Paige (N. Y.) 66.

[e] **Failure of the petition to state all the claims** does not render the judgment subject to collateral attack. Myers v. Davis, 47 Iowa 325.

[f] **A particular description of each debt is not necessary** (1) but a statement of the aggregate amount of the debts is sufficient. Collins v. Farnworth, 8 Blackf. (Ind.) 575; State v. Ramsey County Prob. Ct., 19 Minn. 117 [foll Spencer v. Sheehan, 19 Minn. 338]; Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184; Cooley v. Cooley, (Tenn. Ch. A.) 37 SW 1028. (2) "It would have been more regular, as well as more proper, to have set out each specific debt, and to whom due, but as there was no exception, and an aggregate of indebtedness was ascertained over the amount of assets, which showed the necessity of the sale of a greater amount of the land than was then decreed to be sold to satisfy the same, we do not think the case should be reversed on this account." Doherty v. Choate, 16 Lea (Tenn.) 192, 199.

[g] **These requirements are directory only:** (1) Jackson v. Houston, 84 Tex. 622, 19 SW 799; Kleinecke v. Woodward, 42 Tex. 311. (2) A failure to conform to them is not sufficient to invalidate a sale made under the authority of the probate court having jurisdiction of the estate. Jackson v. Houston, 84 Tex. 622, 19 SW 799. (3) So an administrator's petition, not demurred to below, to sell realty to pay a judgment against the estate, was sufficient, where it alleged that there was no personalty, and that the cost of administration was a certain sum, although it did not allege that a claim was ever filed against the estate or presented to the administrator. Maris v. Wolfe, 46 Ind. A. 416, 92 NE 661.

[h] **Statement of amount not necessary.**—The existence of debts should be alleged but it is not necessary to state the amount. Cotton v. Holloway, 96 Ala. 544, 12 S 172 [mod Quarles v. Campbell, 72 Ala. 64, and overr Abernathy v. O'Reilly, 90 Ala. 495, 7 S 919].

[i] **Claims to be presented.**—It is unnecessary to set out an estimate of the amount of just claims to be presented, where all claims not filed are barred because more than one year has expired between the date of the granting of letters of administration and the filing of the petition. Rice v. Davies, 201 Ill. A. 165.

[j] **Failure to show mortgage.**—A petition which sets out all the facts showing the indebtedness to the petitioner is sufficient to confer jurisdiction, although it does not show a mortgage against the property and does not name the mortgagees as parties. Matter of Ibert, 48 App. Div. 510, 62 NYS 1051.

[k] **Overstatement of debts.**—A sale is not vitiated by the fact that the application therefor set forth a larger amount of debts as being due than really existed, where the sale was necessary to pay the actual debts. Simonin v. Czarnowski, 47 La. Ann. 1334, 17 S 847.

[l] **Petition by creditor.**—Under a statute requiring the petition of a creditor for the sale of the real estate to set forth, as nearly as the petitioner can on diligent inquiry ascertain them, the debts and names of creditors, the amount of funeral expenses, and to whom due, jurisdiction is acquired by the statement of a debt due the petitioner, and if he has no knowledge on the subject of the funeral expenses he need make no allusion to them. In re German Bank, 39 Hun (N. Y.) 181.

[m] **In a petition to sell for the family allowance and future expenses** of administration, where the prior accounts of the administrator have been settled, an averment that there are no debts or expenses accrued and unpaid is a sufficient statement of the debts, expenses, and charges of administration. Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101.

[n] **The filing of a list of debts,** for the payment of which succession property is to be ordered sold, is necessary only in case the order of sale is to be made by the clerk or his chief deputy and not by the judge himself. Thibodaux v. Barrow, 129 La. 395, 56 S 339.

[o] **Mode of objecting.**—A motion at the close of the trial, to the effect that the petition does not state facts enough to make a case for the sale of decedent's real property to pay a debt, does not raise the question of the sufficiency of the petition to establish the debt, the inference to be drawn from the objection being that petitioner had a claim, but not such as would authorize a sale of real property to pay it. In re Pirie, 198 N. Y. 209, 91 NE 587, 19 AnnCas 672 [aff 133 App. Div. 431, 117 NYS 753] (holding also that neither a motion at the opening of the trial to dismiss a petition by a creditor on the ground that it appeared that limitations had run, nor a motion after the trial that it was affirmatively shown that limitations had run against the claim, raised the question of the sufficiency of the petition to establish the existence of a debt).

84. Nenninger v. Fietsam, 29 Ill. A. 648; Lynch v. Hickey, 13 Ill. A. 139; Henry v. Drought, 10 Tex. Civ. A. 379, 30 SW 584.

[a] **Notes secured by trust deed.**—An application for an order of sale which states that the notes evidencing petitioner's claim are secured by a trust deed, describing such deed and notes, and that the claim had been allowed by the administrator, is sufficient, without setting forth the instruments verbatim, and need not allege that the trust deed was allowed by the administrator and approved by the court. Henry v. Drought, 10 Tex. Civ. A. 379, 30 SW 584.

[b] **Discrepancy held not fatal.**—The discrepancy in a petition to sell land to pay debts between an averment that the claims sought to be satisfied were allowable in 1871 and the executor's account, filed as an exhibit showing such allowance, and a list of claims, also filed as an exhibit, showing that most of the claims were allowed in 1877, six years after decedent's death, is not fatal, it not appearing that any

and it must also be shown that a sale is necessary for their payment.[85] A further requirement is sometimes found that the petition shall name all the known creditors.[86] If land is to be sold, the insufficiency of the personalty and the necessity of resorting to the realty for payment of the debts must also be made to appear,[87] although it has been held that if these facts are necessarily inferred from the averments in the petition, the failure of the petition to state them affirmatively does not impair its validity.[88] It is also usually required that the amount and value of the personal estate shall be made to appear,[89] and it is sometimes required that the application of the personalty shall

claims allowed in 1877 were not filed within the statutory period and kept alive so that limitations did not run against them. Frier v. Lowe, 232 Ill. 622, 83 NE 1083 [rev 119 Ill. A. 246].

85. In re Snow, 96 Me. 570, 53 A 116.

[a] **Prayer for sale of too much land.**—The fact that an executrix in a petition for the sale of land specially devised prays for the sale of more land than is required to pay the debts does not affect the jurisdiction of the court to order the sale. Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

86. Underwood v. Underwood, 22 W. Va. 303. See also Linnville v. Darby, 1 Baxt. (Tenn.) 306 (petition must specify debts or the names of creditors).

87. Ala.—Curtis v. Hunt, 158 Ala. 78, 48 S 598; Peavy v. Griffin, 152 Ala. 256, 44 S 400; Moore v. Cottingham, 113 Ala. 148, 20 S 994, 59 AmSR 100; Quarles v. Campbell, 72 Ala. 64; May v. Parham, 68 Ala. 253.

Cal.—Haynes v. Meeks, 20 Cal. 288; Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

Colo.—Bateman v. Reitler, 19 Colo. 547, 36 P 548.

Ill.—Moffitt v. Moffitt, 69 Ill. 641.

Ind.—Ditton v. Hart, 175 Ind. 585, 95 NE 119; Renner v. Ross, 111 Ind. 269, 12 NE 508; Rapp v. Matthias, 35 Ind. 332; Fry v. Lawson, 32 Ind. A. 364, 69 NE 1038.

Iowa.—Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Ky.—Row v. Back, 115 SW 806; Carter v. Crow, 130 Ky. 41, 112 SW 1098.

Me.—In re Snow, 96 Me. 570, 53 A 116.

Md.—Gibson v. McCormick, 10 Gill & J. 65; Griffith v. Frederick County Bank, 6 Gill & J. 424; Hammond v. Hammond, 2 Bland 306.

Mich.—Beniteau v. Dodsley, 88 Mich. 152, 50 NW 110.

N. Y.—Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672]; Ackley v. Dygert, 33 Barb. 176.

N. C.—Clement v. Cozart, 107 N. C. 695, 705, 12 SE 254, 257; Blount v. Pritchard, 88 N. C. 445; Wiley v. Wiley, 63 N. C. 182.

Or.—Marks v. Wilson, 72 Or. 5, 143 P 906.

Pa.—O'Brian v. Wiggins, 10 Kulp 125.

Utah.—Needham v. Salt Lake City, 7 Utah 319, 26 P 920.

[a] **Statement of facts showing necessity.**—The necessity for the sale is not a matter for the executor or administrator to determine, but is a conclusion which the court itself must draw from the facts stated, and the petition must furnish the materials for its judgment. The insufficiency of the personalty must be shown by a statement of the facts as to its amount and disposition and as to the outstanding debts and charges, and the necessity for the sale of the whole or some portion of the real property by a description of all the real property of which decedent died seized and a statement of its condition and value as required by statute. Haynes v. Meeks, 20 Cal. 288.

[b] **If there is no personalty,** its existence should be clearly negatived, and an averment simply that there are no tangible assets wherefrom payment can be made is not sufficient. Gladson v. Whitney, 9 Iowa 267.

[c] **Failure to show validity of payments reducing personalty.**—An administrator's petition to sell real estate to pay debts which shows that there are unpaid claims established against the estate which the personalty is insufficient to pay is not subject to demurrer because it fails to show that certain payments for which he claims credit were legal and valid, although, if such payments were stricken out, the personalty would be sufficient to pay all established claims against the estate. Conger v. Cook, 56 Iowa 117, 8 NW 782.

[d] **A petition by an administrator de bonis non** which alleges that there are just debts and charges against the estate, and that no personalty came into his hands is sufficient without also alleging that there is an insufficiency of personal assets in the original administrator's hands. Beniteau v. Dodsley, 88 Mich. 152, 50 NW 110.

[e] **Petition in former proceeding showing insufficiency.**—Where a petition to the orphans' court to sell decedent's real estate at private sale was defective in not alleging that the personal estate was not sufficient to pay decedent's debts, a prior petition by an administrator to sell the real estate at public sale, on which no order of sale was effected, was not admissible in evidence, since the fact that the court in some prior proceeding had jurisdiction to sell the property, which it did not exercise, in no way tended to show that it had jurisdiction in a subsequent proceeding. O'Brian v. Wiggins, 10 Kulp (Pa.) 125.

[f] **Following language of statute.**—"The petition for the sale of the land averred that the personal property of the estate was insufficient for the payment of the debts of the deceased, and that the sale of the land was necessary for that purpose. In averment the petition substantially followed the language of the statute. Code 1896, § 156. In Cotton v. Holloway, 96 Ala. 544, 12 S 172, the averment in the petition as to insufficiency of personal property and the necessity to sell the land for the payment of debts was the same as in the case before us, and it was there held, on collateral attack of the decree of the court, that the averments were sufficient to confer jurisdiction." Peavy v. Griffin, 152 Ala. 256, 258, 44 S 400, 401.

[g] **Petitions held sufficient.**—Garrow v. Toxey, 171 Ala. 644, 54 S 556; In re Bentz, 36 Cal. 687; Stanley v. Noble, 59 Iowa 666, 13 NW 839; Morrow v. Weed, 4 Iowa 77, 66 AmD 122; Gibson v. McCormick, 10 Gill & J. (Md.) 65; Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818.

[h] **In a proceeding by a creditor,** such an allegation is not necessary. Tessier v. Wyse, 3 Bland (Md.) 28, 44 ("It clearly lays with the heir only to allege and shew that fact [existence of sufficient personalty] for his own benefit").

88. Ala.—Meadows v. Meadows, 73 Ala. 356.

Cal.—In re Bentz, 36 Cal. 687; Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Colo.—Bateman v. Reitler, 19 Colo. 547, 36 P 548.

Iowa.—Little v. Sinnett, 7 Iowa 324.

Ky.—Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73.

[a] **Illustrations.**—(1) Where the application by an administrator to sell decedent's land to pay debts avers the amount of the debts, and that there is personalty, the omission to aver the inference that a sale of the land is necessary is not fatal. Meadows v. Meadows, 73 Ala. 356. (2) Where the petition alleged that the value of the personal estate was not more than fifty dollars and that the debts and expenses of administration to be paid would amount to four hundred and forty dollars this was sufficient. In re Bentz, 36 Cal. 687. (3) A petition for leave to sell real estate, describing certain lands, and averring that such lands were all the property of the deceased (a nonresident) in such county, so far as known, and that the debts and charges amounted at least to a sum certain, sufficiently averred that the personalty was insufficient. Little v. Sinnett, 7 Iowa 324.

89. Cal.—Gregory v. Taber, 19 Cal. 397, 79 AmD 219; Gregory v. McPherson, 13 Cal. 562.

Ind.—Rapp v. Matthias, 35 Ind. 332.

Ky.—Row v. Back, 115 SW 806; Carter v. Crow, 130 Ky. 41, 112 SW 1098; Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

N. Y.—Richmond v. Foote, 3 Lans. 244; Ackley v. Dygert, 33 Barb. 176.

N. C.—McNeill v. McBryde, 112 N. C. 408, 16 SE 841.

Pa.—O'Brian v. Wiggins, 10 Kulp 125.

[a] **Illustration.** — A petition merely alleging that the personal estate "is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration" is demurrable, as not complying with the statute requiring the petition to set forth "the value of the personal estate of the intestate and the application thereof." McNeill v. McBryde, 112 N. C. 408, 16 SE 841.

[b] **The filing of an account** of personal property, at or about the date of the filing of the petition, does not supply the place of a statement of such property in the petition, unless the account is especially referred to therein. Gregory v. Taber, 19 Cal. 397, 79 AmD 219.

[c] **Sufficient statement.**—A petition of an administrator to sell real estate for the payment of debts, stating that "the amount of personal property which has come to his hands as appraised by the inventory is," etc., sufficiently states the amount of personal property which actually came into his hands, as required by statute. Richmond v. Foote, 3 Lans. (N. Y.) 244.

[d] **Petition must show an inventory.**—Ackley v. Dygert, 33 Barb. (N. Y.) 176.

[e] **A true and correct inventory and appraisement** of all the personal property must be exhibited to the court. O'Brian v. Wiggins, 10 Kulp (Pa.) 125.

[f] **Reference to inventory.**—A petition which states that the inventory on file contains a full description of the personal estate and refers to such inventory and makes it a part of the petition is sufficient. In re Bentz, 36 Cal. 687; Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

[g] **Inaccuracies and omissions.**—Although a petition sets forth inaccurately the personal property, or omits valuable portions thereof, yet if it purports on its face to set forth the whole of it, and the amount, if any, undisposed of, the order of sale made thereon cannot be attacked. Haynes v. Meeks, 20 Cal. 288.

[h] **The fact that there has been a previous administrator** does not relieve the second administrator from

be shown.[90] Where the statute requires the actual exhaustion of the personalty in the payment of debts before a sale of realty is authorized,[91] such exhaustion must be made to appear by the petition,[92] but otherwise it is sufficient if the petition shows merely that the personalty is insufficient.[93] Where a sale of land for partition is asked for, the petition must show that it cannot be fairly divided.[94]

[§ 1500] **(4) Averments as to Realty.** As a general rule the statutes require that a petition for the sale of land of a decedent to pay debts shall contain a description of the land a sale of which is sought, which must be accurate and specific, or at least describe the land with sufficient certainty to identify it,[95] and it is also required in some states that the petition shall show the condition[96] and

the necessity of a compliance to the extent of his ability with the statutory requirements as to a statement of the personal property in a petition for a sale of the realty. He must show not merely the personal property which has come into his possession since his appointment but also to the extent of his ability that which came into the hands of his predecessor. Haynes v. Meeks, 20 Cal. 288.

[i] **When omission not fatal.**—In an action to sell decedent's interest in land to pay his debts, on the ground of deficiency of personalty, an omission to state in the petition the amount of personalty is not fatal where the petition also prays for the sale, on the ground of indivisibility, for apportionment among the heirs. Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

[j] **Where the records of the surrogate's court show** the amount of personalty which came into the hands of the administrator such amount need not be set forth in a petition by the administrator for leave to sell realty for the payment of debts. Forbes v. Halsey, 26 N. Y. 53. To same effect Jackson v. Crawfords, 12 Wend. (N. Y.) 533.

[k] **Statement of value of personalty not necessary.**—Cotton v. Holloway, 96 Ala. 544, 12 S 172 [overr Abernathy v. O'Reilly, 90 Ala. 495, 7 S 919].

90. Gladson v. Whitney, 9 Iowa 267; Ackley v. Dygert, 33 Barb. (N. Y.) 176.

[a] **Sufficiency of petition.**—(1) Under a statute requiring a petition by an administrator for a sale of realty to pay debts to state the amount of personalty that has come into petitioner's hands, the application thereof, and the amount which may yet be realized, a petition stating that the amount of personalty was insufficient to pay debts, that the amount which had come into petitioner's hands was ten dollars, that he had proceeded with reasonable diligence in converting the personalty into money and applying it to the debts, and that the only indebtedness of decedent was petitioner's claim, amounting to one thousand five hundred and fifty-nine dollars, was sufficient, although it did not state specifically what application had been made of the personalty, or the amount which might yet be realized. Matter of Williams, 1 Misc. 35, 22 NYS 906, 1 Pow. Surr. 284. (2) An administrator's petition to sell real estate to pay debts, stating the amount of the personal assets received, and "that it is still in my hands unpaid and unapplied," sufficiently shows the application of the personal estate as required by statute. Richmond v. Foote, 3 Lans. (N. Y.) 244.

91. See supra § 1452.

92. Kindell v. Titus, 9 Heisk. (Tenn.) 727; Wallace v. Grant, 27 Wash. 130, 67 P 578.

[a] **Petition showing that personalty not exhausted.**—A petition stating merely that petitioner had sold "all the personal property of said estates that in his judgment is advisable to sell at the present time" was insufficient to authorize a mortgage of decedent's property. Wallace v. Grant, 27 Wash. 130, 67 P 578.

[b] **Exhaustion of "available" personalty.**—An allegation that "all personal property available" has been exhausted implies that there is personal property not yet applied to the payment of debts. Marks v. Wilson, 72 Or. 5, 143 P 906.

93. Richardson v. Musser, 54 Cal. 196.

94. Warnock v. Thomas, 48 Ala. 463; Pierce v. Marrs, 153 Ky. 748, 156 SW 404; Carter v. Crow, 130 Ky. 41, 112 SW 1098; Flanagan v. Pierce, 27 Tex. 78.

[a] **An allegation that land cannot be divided "fairly"** is sufficient under a statute providing for a sale when the land cannot be divided equitably. Warnock v. Thomas, 48 Ala. 463. See also Satcher v. Satcher, 41 Ala. 26, 9 AmD 498 (allegation that land could not be "fairly, beneficially, and equitably divided" is sufficient).

[b] **Averment held sufficient.**—An averment in the petition of an executor that "the said real estate cannot be advantageously divided among the numerous devisees of said testator" is sufficient under a statute which provides for a sale of property jointly owned if "the property cannot be divided without materially impairing its value or the value of the plaintiff's interest therein," when taken with other averments in the petition which show that, as a matter of fact, the property cannot be divided without materially impairing its value. Zehnder v. Schoenbachler, 70 SW 278, 24 KyL 947.

[c] **Insufficient allegation.**—An allegation in a petition that the sale is sought "to enable the administrator to settle up said estate and satisfy all the heirs" is not sufficient. Flanagan v. Pierce, 27 Tex. 78.

95. Ala.—Alvarez v. Warner, 77 S 344; Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48; Austin v. Willis, 90 Ala. 421, 8 S 94; Gilchrist v. Shackelford, 72 Ala. 7; De Bardelaben v. Stoudenmire, 48 Ala. 643; Smith v. Flournoy, 47 Ala. 345.

Cal.—In re Cook, 137 Cal. 184, 69 P 968; Haynes v. Meeks, 20 Cal. 288; Townsend v. Gordon, 19 Cal. 188.

Ind.—Rapp v. Matthias, 35 Ind. 332.

Mo.—Roberts v. Thomason, 174 Mo. 378, 74 SW 624.

N. Y.—Ackley v. Dygert, 33 Barb. 176.

Tex.—Wilkin v. Simmons, (Civ. A.) 151 SW 1145.

Wash.—Hazelton v. Bogardus, 8 Wash. 102, 35 P 602.

[a] **Effect of failure to describe land.**—(1) A deed based on a sale by an administrator on a petition to the probate court that does not describe the land, and on an order in response to such petition also failing to describe the land, is void. Roberts v. Thomason, 174 Mo. 378, 74 SW 624. (2) Where, in a suit by the curator for the settlement of the estate of decedent, the petition alleged that he did not know the debts or the boundaries of the land, and the report of the commissioners to report the debts and the boundary of the land which gave the debts and the boundary of the land was confirmed, a judgment directing a sale of the land described therein by metes and bounds as in the survey filed by the commissioner was not void because the land was not described in the petition. Ison v. Halcomb, 136 Ky. 523, 124 SW 813.

[b] **Sale of equity of redemption.**—An administrator's sale of a deceased mortgagor's equity of redemption is invalid if the petition to the probate court for leave to sell does not correctly describe the land. Rainey v. McQueen, 121 Ala. 191, 25 S 920.

[c] **Where power of sale given by will.**—The fact that the bill did not set out and describe the property of the testator is not fatal to the jurisdiction to decree a sale, where the will vested the executors with the widest discretion as to selling the property, and the application was by them to the chancellor for aid in the execution of their trust. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

[d] **An imperfect description** in the petition, which is true so far as it goes, and which may have been amended in the probate court or perfected by the aid of facts judicially known to the courts, is not fatal to the validity of the proceedings. Smith v. Flournoy, 47 Ala. 345.

[e] **The petition may refer to the inventory** (1) for a description of the real estate and the condition and value thereof and both may be considered together. Wilson v. Hastings, 66 Cal. 243, 5 P 217; Stuart v. Allen, 16 Cal. 473, 76 AmD 551. (2) But where a petition contains no description of the real estate or its condition, or the value and the reference to the inventory is for greater certainty, this is insufficient to incorporate the inventory with the petition and cure the omission to describe the realty. Wilson v. Hastings, 66 Cal. 243, 5 P 217.

[f] **Descriptions held sufficient.**—Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101; Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145.

[g] **Descriptions held insufficient.**—Rucker v. Tennessee Coal, etc., R. Co., 176 Ala. 456, 58 S 465; Little v. Marx, 145 Ala. 620, 39 S 517; Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48 (failure to indicate with accuracy the section, township, and range in which lands located); Gilchrist v. Shackelford, 72 Ala. 7; Wilson v. Hastings, 66 Cal. 243, 5 P 217; Hazelton v. Bogardus, 8 Wash. 102, 35 P 602 (sale void where petition for and order of sale describe land as located in a certain township and county, when there is no such township in that county, and there is nothing, aside from such description, to indicate any certain piece of land).

96. In re Levy, 141 Cal. 639, 75 P 317; In re Cook, 137 Cal. 184, 69 P 968; In re Devincenzi, 119 Cal. 498, 51 P 845; Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101; In re Boland, 55 Cal. 310; Gregory v. Taber, 19 Cal. 397, 79 AmD 219; Spencer v. Sheehan, 19 Minn. 338; Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

[a] **Statements held sufficient.**—In re Levy, 141 Cal. 639, 75 P 317; In re Devincenzi, 119 Cal. 498, 51 P 845 ("fair"); Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101 ("unimproved").

value[97] of the land, and whether or not it is occupied, and if occupied, the names of the occupants.[98] It has also been required that the petition shall show whether decedent had any other real estate than that described therein,[99] and even that it shall describe all the lands of decedent.[1] It should also be alleged that the land sought to be sold lies within the jurisdiction of the court.[2] The petition must show that decedent had some title to, or interest in, the land sought to be sold,[3] and it is sometimes required that it shall show what this title or interest is.[4] But on the other hand it has been held that the representative's petition for leave to sell includes any interest which the decedent had in the lands described,[5] and hence the petition need not set out

[b] **Statement held insufficient.**—An allegation that decedent died seized of certain described real estate, less right of way of Northern Pacific Railway Company and parcel set apart for school ground, and appraised at two thousand dollars, was too indefinite as a statement of the condition of the real estate. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

[c] **Negative averments.**—A petition for leave to sell real estate need not show that it is not cultivated, improved, or built upon, or that it has no water power or other natural advantages. Spencer v. Sheehan, 19 Minn. 338.

[d] **Objection cannot be first raised on appeal.**—Where no objection was urged at the trial that the petition did not contain a proper statement of the condition of the property such objection cannot be considered upon appeal, but the petition must be treated as properly describing such condition. Baum v. Roper, 132 Cal. 42, 64 P 128.

97. In re Levy, 141 Cal. 639, 75 P 317; In re Cook, 137 Cal. 184, 69 P 968; In re Devincenzi, 119 Cal. 498, 51 P 845; Silverman v. Gundelfinger, 82 Cal. 548, 23 P 12; Gregory v. Taber, 19 Cal. 397, 79 AmD 219; Rapp v. Matthias, 35 Ind. 332; Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645; Matter of McGee, 5 App. Div. 527, 38 NYS 1062.

[a] **A creditor's petition** must state the value of the premises sought to be ordered applied to his debt. Mead v. Sherwood, 4 Redf. Surr. (N. Y.) 352.

[b] **Where several parcels lie together,** the petition need not state the value of each parcel separately. Matter of McGee, 5 App. Div. 527, 38 NYS 1062; Matter of Georgi, 35 Misc. (N. Y.) 685, 72 NYS 431, 2 Mills Surr. 315.

[c] **Reference to schedule annexed to petition sufficient.**—Silverman v. Gundelfinger, 82 Cal. 548, 23 P 12; Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101.

[d] **Statement of appraised value.**—(1) Where a petition stated that the value of the land was set forth in a schedule attached to the petition, an objection that the values so set forth were the appraised values, and not the present values, was not available on general demurrer. In re Levy, 141 Cal. 639, 75 P 317. (2) Where an appraisement of the real estate had been made less than a year prior to the presentation of a petition to sell it to pay debts, an allegation that decedent died seized of certain described real estate, less railroad right of way and parcel set apart for school ground, and appraised at the sum of two thousand dollars, sufficiently indicated that the property to be sold had been appraised at two thousand dollars, and was a sufficient statement of present value. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

[e] **Requirement not jurisdictional.**—(1) Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645. (2) "Section 1537 of the Code of Civil Procedure enumerates the several matters and things necessary to be stated in the verified petition by the administrator for the sale of real estate, among which is, that he shall state 'the condition and value thereof.' It is further provided in that section that if any of the matters enumerated cannot be ascertained, they must be stated in the petition, but a failure to set forth the facts so enumerated will not invalidate the subsequent proceedings if the defect be supplied by the proofs at the hearing and the general facts showing that such sale is necessary, or that such sale is for the advantage, benefit, and best interest of the estate and those interested therein, be stated in the decree. We regard the case of Burris v. Kennedy, 108 Cal. 331, 41 P 458, as being decisive of the question presented. If it be admitted, as claimed by respondents, that some of the expressions in that opinion were not necessary to a determination of the case, the fact remains, however, that the reasoning employed by the distinguished justice who in that opinion spoke for the court is most convincing. It is there held that no sale is invalid on account of the omission to state in the petition any of the matters enumerated, provided the general facts showing that a sale is necessary are proven and found; that the necessity for a sale is the prime factor for consideration; that the question of value can throw no light upon such question of necessity; that, at most, it is a matter required to be stated to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary; that a petition setting forth the facts showing the necessity for a sale and a decree thereon imports a finding of their truth, and that evidence to that effect was given at the hearing; and it must follow that a like intendment exists in relation to those matters about which the court should take testimony that it might intelligently exercise a discretion as to the amount of property which should be ordered sold under the circumstances of the case, for it is manifest that the statement of value could only be important in connection with the exercise of such discretion." Dane v. Layne, 10 Cal. A. 366, 370, 101 P 1067.

[f] **Insufficient statement.**—A petition alleging merely that the land "is unimproved desert land," and "is chiefly valuable for the possibility that it may contain petroleum," without either stating its value or that its value could not be ascertained, and which is unaided by any direct finding of value, is substantially defective as against a direct attack upon appeal from the order of sale. In re Cook, 137 Cal. 184, 69 P 968.

98. Ackley v. Dygert, 33 Barb. (N. Y.) 176; Matter of Slater, 17 Misc. 474, 41 NYS 534, 1 Gibb. Surr. 8.

[a] **A creditor's petition** must state who are the occupants of the premises sought to be ordered applied to his debt. Mead v. Sherwood, 4 Redf. Surr. (N. Y.) 352.

99. Allen v. Sanford, 5 Silv. Sup. 208, 8 NYS 182.

1. McNitt v. Turner, 16 Wall (U. S.) 352, 21 L. ed. 341; In re Levy, 141 Cal. 639, 75 P 317; Wilson v. Hastings, 66 Cal. 243, 5 P 217; In re Faulkner, 10 NYS 325 [mod on other grounds 127 N. Y. 296, 27 NE 1055]; Eddy's Est., 12 Phila. (Pa.) 118.

[a] **An omission to describe one tract** of land owned by testator, of which the petitioners neither knew nor could have known by diligent inquiry, does not render a creditor's petition fatally defective. In re Faulkner, 57 Hun 586, 10 NYS 325.

[b] **Reference to inventory.**—Where an inventory, referred to as part of the petition, does not contain a sufficient description of all decedent's real property to identify it, it will be insufficient as a basis for such an order of sale, although it correctly describes the parcel to be sold. Wilson v. Hastings, 66 Cal. 243, 5 P 217.

[c] **Where the answer states that certain real estate is omitted** from the schedule attached to the petition, and there is no replication, the petition to sell must be dismissed under a statute requiring that on an application for a sale the representative shall exhibit to the court "a full and correct statement of all the real estate of such decedent." In re Eddy, 12 Phila. (Pa.) 55.

[d] **A statement of the real estate which decedent died "leaving"** is a sufficient compliance with a statute requiring the petition to state what real estate the decedent "may have died seized of." McNitt v. Turner, 16 Wall. (U. S.) 352, 21 L. ed. 341.

2. Williams v. Williams, 49 Ala. 439.

[a] **Judicial knowledge aiding petition.**—If the lands are so described in the petition that the court, aided by its judicial knowledge of the surveys of the public lands, must know that they are situated in the county, this is sufficient to support the jurisdiction of the court. Money v. Turnipseed, 50 Ala. 499.

[b] **Description leaving no difficulty in identification.**—If such a description is given as will leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of sale has been made. De Bardelaben v. Stoudenmire, 48 Ala. 643.

3. Elliott v. Shuler, 50 Fed. 454; Pettit v. Pettit, 32 Ala. 288; Heffner's App., 119 Pa. 462, 13 A 314.

[a] **That decedent died seized of the land** must be made to appear. Williams v. Williams, 49 Ala. 439.

[b] **Petition held sufficient.**—A petition which averred that decedent "died seized and possessed of the following described real estate, to wit: Certain interest and rights, not definitely known to your petitioner in and to about forty-eight tracts of land," etc., sufficiently showed that decedent had a legal or equitable interest in the lands sought to be sold. Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48.

[c] **Descendible estate.**—An allegation that intestate at the time of his death was entitled to a vested remainder in fee of the residence place in which his widow, defendant, has a life estate, is sufficient as an allegation of an estate in the intestate "which by law would descend to his heirs," with a statute making them liable for the payment of his debts. Elliott v. Shuler, 50 Fed. (U. S.) 454.

4. Taylor v. Stephens, (Ind. A.) 72 NE 609, (A.) 74 NE 12; Rapp v. Matthias, 35 Ind. 332.

[a] **An averment that decedent was the owner in fee simple** is sufficient; it is not necessary to set out his title any more specifically. Jackson v. Weaver, 98 Ind. 307.

5. Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

the precise character of decedent's interest,[6] or the encumbrances to which the premises are subject.[7] Statements as to the real estate need not be made positively and unqualifiedly to give jurisdiction,[8] and in some jurisdictions a failure of the petition to describe or sufficiently to describe the land is not fatal to the petition.[9]

[§ 1501] **(5) Signing and Verification.** The petition or application should ordinarily be signed by the executor or administrator[10] and verified by his oath or affidavit.[11] The lack of verification is not, however, a jurisdictional defect,[12] but a mere irregularity which is not ground for collateral attack.[13]

[§ 1502] **c. Filing.** The petition must be filed in the court having jurisdiction to order a sale.[14] The time for filing is regulated by statutes or local practice varying somewhat in the different jurisdictions.[15]

[§ 1503] **d. Amendment.** The court may allow an amendment of the petition,[16] but omissions constituting a jurisdictional defect cannot be supplied by amendment.[17] Where the petition fails to give the names of the heirs, an amendment of this defect should not be allowed without notice to the heirs.[18] The filing of an amended petition to sell real estate to pay debts amounts to a dismissal of all petitions previously filed, and such amended petition is to be considered as an original petition.[19] If by reason of an amendment a contestant is embarrassed in his defense or the condition of the case is so changed as to render new pleas or further evidence necessary, the court on his application should postpone a further hearing of the case, and give him time to file new pleas and take further evidence.[20]

[§ 1504] **e. Curing of Defects.** Defects, omissions, or other irregularities in the petition may be cured by the order, the finding, or by the other papers on the record;[21] but where the petition is

6. Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

7. Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23. See also Spencer v. Sheehan, 19 Minn. 338 (petition need not show that there are no encumbrances).

8. In re German Bank, 39 Hun (N. Y.) 181.

9. Cal.—Burris v. Kennedy, 108 Cal. 331, 41 P 458.

Ga.—Coggins v. Griswold, 64 Ga. 323.

Kan.—Bryan v. Bauder, 23 Kan. 95.

Ky.—Ison v. Halcomb, 136 Ky. 523, 124 SW 813; McNew v. Martin, 60 SW 412, 22 KyL 1275.

Mass.—Yeomans v. Brown, 8 Metc. 51 (statute providing that petition "may" set forth value, description, and condition of the land not imperative).

Mich.—Woods v. Monroe, 17 Mich. 238 (holding that a license to an administrator to sell lands of the intestate is not void because the petition therefor did not describe one of the lots to be sold; the other lots being fully described, and, as to the one lot, a supplemental order being afterward made and appended to the original license directing the administrator to sell it).

10. Spragins v. Taylor, 48 Ala. 520 (holding, however, that it was sufficient where the application was signed by the executor "by his attorney").

11. Ala.—Reynolds v. Kirkland, 44 Ala. 312; Alabama Conference M. E. Church South v. Price, 42 Ala. 39.

Cal.—In re Boland, 55 Cal. 310.

Ind.—Weed v. Edmonds, 4 Ind. 468.

Mo.—Wilkerson v. Allen, 67 Mo. 502.

N. Y.—Richmond v. Foote, 3 Lans. 244.

Tenn.—Crippen v. Crippen, 1 Head 128.

[a] **Verification may be made before any officer authorized to administer oaths.**—Richmond v. Foote, 3 Lans. (N. Y.) 244.

[b] **A failure to comply strictly with the statutory requirments** as to the affidavit will not render the sale void. Wilkerson v. Allen, 67 Mo. 502.

[c] **Where certain schedules were annexed** to and made part of the petition of an administrator to sell land, a verification placed before the schedules was not improper. Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101.

[d] **Waiver.**—The verification by an administrator of a petition to sell land for the payment of debts as required by statute will be presumed to be waived by a party who appears and contests the petition. Weed v. Edmonds, 4 Ind. 468.

[e] **Verification by attorney** of a petition to subject the real estate of a decedent to the payment of his debts was sufficient. In re Reed, 214 N. Y. 383, 108 NE 565.

12. Myers v. Davis, 47 Iowa 325 (where the court said that this would be true if the statute required verification, which it did not).

13. Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

14. Stack v. Royce, 34 Nebr. 833, 52 NW 675; Wood v. Skinner, 79 N. C. 92.

[a] **The petition must be filed in the office of the clerk** of the district court of the county in which administration was granted. Stack v. Royce, 34 Nebr. 833, 52 NW 675.

15. McGowan v. Lufburrow, 82 Ga. 523, 9 SE 427, 14 AmSR 178; Shoemate v. Lockridge, 53 Ill. 503; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304; Morris v. Hogle, 37 Ill. 150, 87 AmD 243; Gibson v. Roll, 30 Ill. 172, 83 AmD 181; Turney v. Turney, 24 Ill. 625; Rice v. Cleghorn, 21 Ind. 80; Shepherd v. Fisher, 17 Ind. 229.

16. Brown v. Powell, 45 Ala. 149; In re Gordon, 174 Ill. A. 427; Matter of Ibert, 48 App. Div. 510, 62 NYS 1051; Matter of Miller, 2 App. Div. 615, 37 NYS 447.

[a] **Bringing in new parties.**—Under a statute providing that if it appears to the surrogate that any person claiming an interest is not named in the petition, the citation must also be directed to him, the omission to name, in a petition for the sale of real estate, one claiming an interest under the heirs of the decedent, is not fatal, but the petition may be amended or supplemental citation issued. Matter of Wheeler, 48 Misc. 323, 96 NYS 762, 5 Mills Surr. 141. But compare Crabtree v. Niblett, 11 Humphr. (Tenn.) 488 (omission to make heirs parties not curable by amendment).

[b] **Adding names of creditors.**—The names of creditors of the estate, not known at the time of filing the petition, may be subsequently added. In re Faulkner, 10 NYS 325 [mod on other grounds 127 N. Y. 296, 27 NE 1055].

[c] **Setting up mortgage.**—A surrogate has power to allow the amendment of a petition by setting up a mortgage executed by the heirs of the decedent, and to issue a supplemental citation bringing in the mortgagees as parties, although the statute of limitations has run against the institution of a new proceeding. Matter of Ibert, 48 App. Div. 510, 62 NYS 1051.

[d] **Amendment after death of representative.**—Where, after the order confirming an administrator's sale to pay debts and the order to make title, the administrator dies, the probate court has no authority to entertain a motion by the purchaser to make an amendment of the pleadings, so as to include another tract alleged to have been omitted by mistake. Stafford v. Harris, 72 N. C. 198.

[e] **Amendment of description after sale.**—(1) Where a mistake has been made in the description of a decedent's lands sold under a probate decree, whether in the petition, order, or other proceedings, the court ordering the sale has authority to correct it on the application of the purchaser or anyone claiming under him. Brown v. Williams, 87 Ala. 353, 6 S 111; Lee v. Williams, 85 Ala. 189, 3 S 718. (2) But the personal representative is not authorized to file such an application, he being only a party defendant to it. Lee v. Williams, 85 Ala. 189, 3 S 718.

[f] **Amendment as to property included on parol evidence.**—Where the petition, order of sale, confirmation of sale, and order to make title is for a single tract of land identified and made certain by boundaries and description, the pleadings cannot be amended at the instance of the purchaser and on parol evidence so as to include another distinct tract of land claimed to have been omitted by mistake. Stafford v. Harris, 72 N. C. 198.

17. Dennis v. Jones, 1 Dem. Surr. (N. Y.) 80; Crabtree v. Niblett, 11 Humphr. (Tenn.) 488.

18. Turney v. Turney, 24 Ill. 625.

19. In re Gordon, 174 Ill. A. 427.

20. Brown v. Powell, 45 Ala. 149. See also Gharky v. Werner, 66 Cal. 388, 5 P 676 (where a petition for a sale of realty is amended at the hearing by adding another parcel to the lands described, it must be treated as a new petition, and proceedings had de novo).

21. Cal.—Arguello's Est., 85 Cal. 151, 24 P 641.

Ill.—Frier v. Lowe, 232 Ill. 622, 83 NE 1083.

Ind.—Jackson v. Weaver, 98 Ind. 307.

Mich.—Brown v. Hannah, 152 Mich. 33, 115 NW 980.

Pa.—West v. Cochran, 104 Pa. 482.

Wis.—Reynolds v. Schmidt, 20 Wis. 374.

[a] **On a direct attack** on the sufficiency of a petition for a sale of real estate for payment of debts, by appeal from the order of sale, the order will not supply deficiencies of the petition under a statute providing that a failure to set forth facts in the petition will not invalidate the subsequent proceedings if the de-

insufficient to give the court jurisdiction or authorize a decree of sale, the defects cannot be cured by inserting the necessary statements in the order.[22]

[§ 1505] **f. Collateral Attack on Sufficiency.** The sufficiency of the petition is a matter to be determined by the court to which it is presented, and, while it may be investigated there and on appeal, it cannot be questioned collaterally.[23]

[§ 1506] **8. Citation or Notice—a. Necessity.** In the absence of any statutory requirement, notice of proceedings for a sale of a decedent's realty is not necessary,[24] but it is usually required that a citation or notice of the application to sell shall be issued or given to the heirs and devisees of the decedent, and others interested in the estate,[25] and it is by service or publication of the required citation or notice that jurisdiction of the persons of those interested is acquired.[26] The court cannot, at the hearing, abandon the case presented by the

fect is supplied by proofs and the facts are stated in the petition, this availing only on collateral attack. In re Cook, 137 Cal. 184, 69 P 968.

22. Cloud v. Barton, 14 Ala. 347; Gregory v. Taber, 19 Cal. 397, 79 AmD 219.

23. Ala.—Crowder v. Doe, 193 Ala. 470, 68 S 1005; King v. Gilreath, 154 Ala. 129, 45 S 89.

Colo.—Kavanagh v. Hamilton, 53 Colo. 157, 171, 125 P 512, AnnCas 1914B 76 [cit Cyc].

Ill.—Bradley v. Droue, 187 Ill. 175, 58 NE 304, 78 AmSR 214.

Iowa.—Myers v. Davis, 47 Iowa 325; Hilton v. Budgett, 43 Iowa 684; Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Minn.—Smith v. Barr, 83 Minn. 354, 86 NW 342; Rumrill v. St. Albans First Nat. Bank, 28 Minn. 202, 9 NW 731; Montour v. Purdy, 11 Minn. 384, 88 AmD 88.

Mo.—Smith v. Black, 231 Mo. 681, 132 SW 1129.

Nebr.—Trumble v. Williams, 18 Nebr. 144, 24 NW 716.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

Tex.—Gillenwaters v. Scott, 62 Tex. 670; Poor v. Boyce, 12 Tex. 440; Daimwood v. Driscoll, (Civ. A.) 151 SW 621.

Wash.—Jones v. Seattle Brick, etc., Co., 56 Wash. 166, 105 P 238.

24. La.—Granger v. Hebert, 121 La. 1045, 46 S 1012; Irwin v. Flynn, 110 La. 829, 34 S 794; Lehmann's Succ., 41 La. Ann. 987, 7 S 33; Hood's Succ., 33 La. Ann. 466; Tertrou v. Comeau, 28 La. Ann. 633; Carter v. McManus, 15 La. Ann. 676; Leonard v. Fluker, 4 Rob. 148. Contra Bowles' Succ., 3 Rob. 35.

Pa.—Irwin v. Guthrie, 198 Pa. 267, 47 A 992; In re Smith, 188 Pa. 222, 41 A 542; West Hickory Min. Assoc. v. Reed, 80 Pa. 38; Stiver's App., 56 Pa. 9; Wall's App., 31 Pa. 62; Weaver's App., 19 Pa. 416; Murphy's App., 8 Watts & S. 165.

R. I.—Butler v. Butler, 10 R. I. 501 [foll Luther v. Martin, 10 R. I. 503 note].

Tex.—George v. Watson, 19 Tex. 354.

Wash.—Ryan v. Fergusson, 3 Wash. 356, 28 P 910.

[a] **The public notice of the sale is sufficient,** as those interested can then be heard at any time before confirmation. Wall's App., 31 Pa. 62; Weaver's App., 19 Pa. 416.

[b] **Mortgage creditors** are entitled to notice of any application by the executor to sell the mortgaged property. French v. Prieur, 6 Rob. (La.) 299.

25. Ala.—Roy v. Roy, 159 Ala. 555, 48 S 793; Summersett v. Summersett, 40 Ala. 596, 91 AmD 494; Field v. Goldsby, 28 Ala. 218, 65 AmD 341; Doe v. Riley, 28 Ala. 164, 65 AmD 334; Wiley v. White, 3 Stew. & P. 355.

Ark.—Gregg v. Gregg, 33 Ark. 89; Rogers v. Wilson, 13 Ark. 507.

Cal.—Campbell v. Drais, 125 Cal. 253, 57 P 994; Beckett v. Selover, 7 Cal. 215, 68 AmD 237.

Conn.—Dorrance v. Raynsford, 67 Conn. 1, 34 A 706, 52 AmSR 266.

Del.—In re Sutton, 97 A 624.

Fla.—Emerson v. Ross, 17 Fla. 122.

Ga.—Fussell v. Dennard, 118 Ga. 270, 45 SE 247; Davis v. Howard, 56 Ga. 430.

Ill.—Rathje v. Waterlohn, 270 Ill. 640, 110 NE 816; Marshall v. Rose, 86 Ill. 374; Fell v. Young, 63 Ill. 106; Gibson v. Roll, 27 Ill. 88, 81 AmD 219; Herdman v. Short, 18 Ill. 59; In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712].

Ind.—Martin v. Neal, 125 Ind. 547, 25 NE 813; Helms v. Love, 41 Ind. 210; Hawkins v. Hawkins, 28 Ind. 66.

Iowa.—Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

Kan.—Graden v. Mais, 77 Kan. 702, 95 P 412, 127 AmSR 456.

Ky.—Fraize v. Walls, 180 Ky. 168, 202 SW 310; Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

Mass.—Giles v. Kenney, 221 Mass. 262, 108 NE 940; Nazro v. Long, 179 Mass. 451, 61 NE 43; Walker v. Fuller, 147 Mass. 489, 18 NE 400. Contra In re Rulluff, 1 Mass. 240 (construing St. c 32 § 1).

Miss.—Picard v. Montross, 17 S 375; McPike v. Wells, 54 Miss. 136; Root v. McFerrin, 37 Miss. 17, 75 AmD 49; Gwin v. McCarroll, 9 Miss. 351; Campbell v. Brown, 7 Miss. 106.

Mo.—State v. Holtcamp, 245 Mo. 655, 151 SW 153; Hill v. Taylor, 99 Mo. A. 524, 74 SW 9.

Nebr.—Holmes v. Columbia Nat. Bank, 4 Nebr. (Unoff.) 893, 97 NW 26.

N. H.—Flanders v. George, 55 N. H. 486; French v. Hoyt, 6 N. H. 370, 25 AmD 464.

N. Y.—Corwin v. Merritt, 3 Barb. 341; Matter of Smart, 93 Misc. 402, 157 NYS 143; Matter of Slater, 17 Misc. 474, 41 NYS 534, 1 Gibb. Surr. 8; John's Est., 18 NYS 172, 21 NY CivProc 326; Fenn's Est., 8 NYCiv Proc 206, 3 Dem. Surr. 341.

Oh.—Benson v. Cilley, 8 Oh. St. 604.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983; Marks v. Wilson, 72 Or. 5, 143 P 906; Smith v. Whiting, 55 Or. 393, 106 P 791.

Pa.—Lafferty's Est., 14 Pa. Dist. 6; Mustin's Est., 8 Pa. Dist. 180.

Philippine.—Gamboa v. Floranza, 12 Philippine 191.

Vt.—Harrington v. Gage, 6 Vt. 532.

Va.—Menefee v. Marge, 4 SE 726.

Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

Wis.—Humes v. Cox, 1 Pinn. 551.

[a] **An order of notice is necessary,** although the application is made by the mother of minor heirs for whom no guardians have been appointed, and although the estate is supposed to be insolvent. French v. Hoyt, 6 N. H. 370, 25 AmD 464.

[b] **Notice to distributees.**—(1) An application for a sale of personalty for the payment of debts need not be upon notice to the distributees. Smith v. Chew, 35 Miss. 153; Hutchins v. Brooks, 31 Miss. 430. (2) But when a sale is to be made for distribution, notice to the distributees is necessary and must be affirmatively shown by the record. Hutchins v. Brooks, 31 Miss. 430; Joslin v. Caughlin, 26 Miss. 134.

[c] **Before minor beneficiaries can be divested** of their title, it is necessary that the probate court acquire jurisdiction over their persons by service on their guardian, or the appointment of a guardian ad litem for them, if they have no guardian. Ball v. Clothier, 34 Wash. 299, 75 P 1099.

[d] **Notice necessary, although not required by statute.**—State v. Holtcamp, 245 Mo. 655, 151 SW 153.

[e] **An application to mortgage or lease** the land must be upon notice, the same as an application to sell. Martin v. Neal, 125 Ind. 547, 25 NE 813.

[f] **Constructive notice.**—An order for sale of real estate should not be set aside on the ground that the heirs had no knowledge of the filing of the petition for sale, where the estate had been long pending in court and the heirs had the constructive notice provided by statute. In re Leonis, 138 Cal. 194, 71 P 171.

[g] **Time of issuing citation.**—A statute requiring the citation, when issued upon the petition, to be served within sixty days thereafter, does not render the proceeding null for failure to issue the citation promptly on the filing of the petition. Matter of Van Vleck, 32 Misc. 419, 66 NYS 727, 1 Mills Surr. 606.

[h] **Notice for second hearing.**—After a reversal of an order granting a nonsuit and dismissing a petition for an order requiring the executrix to sell real estate, it is not necessary upon a second hearing again to give the statutory notice, but the court is at liberty to hear and dispose of the petition upon such notice as may be provided by its general rules or as it may deem reasonable in the particular case. In re Couts, 100 Cal. 400, 34 P 865.

[i] **Second sale.**—A probate court acquiring jurisdiction, refusing to approve an administrator's sale of real estate, may at a subsequent term order a sale without notice to the persons interested. Brown v. Marshall, 241 Mo. 707, 145 SW 810. See also Cahill v. Bassett, 66 Mich. 407, 33 NW 722 (where the court was equally divided as to whether a new notice was required for a new sale).

[j] **Agreement for sale upon reasonable notice.**—Where an agreement provided that a sale, which must be made in the course of administration, should be made upon reasonable notice, no legal requisites were dispensed with, and whatever was ordinarily essential to such a sale continued to be so. Halleck v. Moss, 17 Cal. 339.

[k] **Order on annual settlement.**—(1) An order for a sale of land may be made by the court without notice to the heirs on an annual settlement of the accounts of the executor or administrator, where it appears that the personal property is insufficient to pay the debts. Hutchinson v. Shelley, 133 Mo. 400, 34 SW 838; Day v. Graham, 97 Mo. 398, 11 SW 55; Teverbaugh v. Hawkins, 82 Mo. 180; Patee v. Mowry, 59 Mo. 161. (2) But otherwise notice is necessary. Hutchinson v. Shelley, 133 Mo. 400, 34 SW 838; Teverbaugh v. Hawkins, 82 Mo. 180.

[l] **Land fraudulently conveyed.**—Notice to the heirs is not necessary where the proceeding is to recover, and sell for the payment of debts, land fraudulently conveyed by decedent in his lifetime. Harrington v. Gage, 6 Vt. 532.

Persons entitled to notice see infra § 1507.

26. Harper v. Wisner, 126 Ark. 443, 190 SW 569; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Gibson v. Roll, 30 Ill. 172, 83 AmD 181; Albright

petition and order the sale for another object, as such sale would be without notice;[27] and so also, where after the rendition of a judgment of sale an amended petition was filed, reciting that the land had been incorrectly described in the petition and judgment, and setting out a correct description, and the descriptions were materially different, land embraced in the first being omitted from the second, and land not embraced in the first being included in the second, the making of an order amending the judgment of sale, and ordering a sale of the newly described land in accordance with the terms of the original judgment, without any summons ever issuing on the amended petition, or any report from the guardian or guardian ad litem of infant defendants ever being made thereon until after the sale was confirmed, was error.[28] But a notice by an administrator of an intention to apply for an order to sell lands for the payment of debts may be used by his successor as administrator of the same estate, in case the first administrator fails to effect a sale;[29] and it has been held that, where an executor files a petition in the proper court for license to sell real property, and the heirs and devisees sign a waiver of notice and enter an appearance, or are duly served with notice, such notice will continue until the debts mentioned in the petition are paid by the sale of the real property described therein, and a purchaser under a renewed license issued on such petition, who has paid the purchase price, such price being applied to the payment of the debts against the estate of the testator, and the sale having been confirmed and a deed made to such purchaser, may rely upon the title so acquired as against a collateral attack by the heirs and devisees of such testator.[30] Where, in an action to settle an estate and sell realty to pay debts, the administrator with will annexed joined in the prayer for the sale, process on his answer and cross petition was unnecessary.[31]

Want of notice as jurisdictional. As a general rule, a failure to give notice or to give proper notice is held to be jurisdictional and to render the order of sale and the sale thereunder nullities, at least as to the interest of persons not notified;[32] but in a few jurisdictions the courts, regarding the

v. Bangs, 72 Kan. 435, 438, 83 P 1030, 115 AmSR 219 [cit Cyc]; Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

27. Williams v. Childress, 25 Miss. 78.

28. Robinson v. Clark, 34 SW 1083, 17 KyL 1401.

29. Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

30. Seymour v. Ricketts, 21 Nebr. 240, 31 NW 781.

31. Rothchild v. Wallace, 155 Ky. 676, 160 SW 170.

32. Cal.—Burris v. Kennedy, 108 Cal. 331, 41 P 458. See also Halleck v. Moss, 17 Cal. 339 (a sale on insufficient notice is "at lease voidable if not absolutely void").

Conn.—Dorrance v. Raynsford, 67 Conn. 1, 34 A 706, 52 AmSR 266.

Ga.—Callaway v. Irvin, 123 Ga. 344, 51 SE 477.

Ill.—Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221; Burr v. Bloemer, 174 Ill. 638, 51 NE 821; Fell v. Young, 63 Ill. 106; Donlin v. Hettinger, 57 Ill. 348; Botsford v. O'Conner, 57 Ill. 72; Clark v. Thompson, 47 Ill. 25, 95 AmD 457; Goudy v. Hall, 30 Ill. 109; Gibson v. Roll, 27 Ill. 88, 81 AmD 219; Whitney v. Porter, 23 Ill. 445; Herdman v. Short, 18 Ill. 59.

Ind.—Edwards v. Baker, 145 Ind. 281, 44 NE 467; Martin v. Neal, 125 Ind. 547, 25 NE 813; Wetherill v. Harris, 67 Ind. 452; Hawkins v. Hawkins, 28 Ind. 66; Guy v. Pierson, 21 Ind. 18; Gerrard v. Johnson, 12 Ind. 636; Doe v. Bowen, 8 Ind. 197, 65 AmD 758; Martin v. Starr, 7 Ind. 224; Doe v. Anderson, 5 Ind. 33; Babbitt v. Doe, 4 Ind. 355; Wort v. Finley, 8 Blackf. 335; Bliss v. Wilson, 4 Blackf. 169. See also Piatt v. Dawes, 10 Ind. 60 (lease).

Iowa.—Myers v. Davis, 47 Iowa 325; Good v. Norley, 28 Iowa 188 [foll Boyles v. Boyles, 37 Iowa 592]. But compare Spurgin v. Bowers, 82 Iowa 187, 47 NW 1029 (failure to serve notice on person claiming under an heir). Contra Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Kan.—Graden v. Mais, 77 Kan. 702, 95 P 412, 127 AmSR 456; Thompson v. Burge, 60 Kan. 549, 57 P 110, 72 AmSR 369; Chicago, etc., R. Co. v. Cook, 43 Kan. 83, 22 P 988; Rogers v. Clemmans, 26 Kan. 522; Mickel v. Hicks, 19 Kan. 578, 21 AmR 161.

Miss.—Hendricks v. Pugh, 57 Miss. 157; McPike v. Wells, 54 Miss. 136; Winston v. McLendon, 43 Miss. 254; Martin v. Williams, 42 Miss. 210, 97 AmD 456; Hamilton v. Lockhart, 41 Miss. 460; Root v. McFerrin, 37 Miss. 17, 75 AmD 49; Commercial Bank v. Doe, 17 Miss. 613; Planters' Bank v. Johnson, 15 Miss. 449; Laughman v. Thompson, 14 Miss. 259; Gwin v. McCarroll, 9 Miss. 351; Puckett v. McDonald, 7 Miss. 269; Campbell v. Brown, 7 Miss. 106, 230; Vick v. Vicksburg, 2 Miss. 379, 31 AmD 167.

Mo.—Jackson v. Johnson, 248 Mo. 680, 154 SW 759; Desloge v. Tucker, 196 Mo. 587, 94 SW 283; Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746; Young v. Downey, 145 Mo. 250, 46 SW 1086, 68 AmSR 568, 150 Mo. 317, 51 SW 751; Hutchinson v. Shelley, 133 Mo. 400, 34 SW 838; Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417; Teverbaugh v. Hawkins, 82 Mo. 180; Valle v. Fleming, 19 Mo. 454, 61 AmD 566; Hill v. Taylor, 99 Mo. A. 524, 74 SW 9.

N. H.—French v. Hoyt, 6 N. H. 370, 25 AmD 464.

N. J.—Bray v. Neill, 21 N. J. Eq. 343.

N. Y.—Sheldon v. Wright, 5 N. Y. 497; Schneider v. McFarland, 2 N. Y. 459 [aff 4 Barb. 139]; Matter of Georgi, 44 App. Div. 180, 60 NYS 772 [aff 162 N. Y. 660 mem, 57 NE 1110 mem]; Jenkins v. Young, 35 Hun 569; Corwin v. Merritt, 3 Barb. 341; Matter of Slater, 17 Misc. 474, 41 NYS 534, 1 Gibb. Surr. 8; John's Est., 18 NYS 172, 21 NYCivProc 326; Bloom v. Burdick, 1 Hill 130, 37 AmD 299.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009; McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Harrison v. Harrison, 106 N. C. 282, 11 SE 356; Perry v. Adams, 98 N. C. 167, 3 SE 729, 2 AmSR 326.

Oh.—Holloway v. Stuart, 19 Oh. St. 472; Biggs v. Bickel, 12 Oh. St. 49; Benson v. Cilley, 8 Oh. St. 604; Sheldon v. Newton, 3 Oh. St. 494. Aliter under earlier statute. Snevely v. Lowe, 18 Oh. 368; Lewis v. Lewis, 15 Oh. 715; Robb v. Irwin, 15 Oh. 689; Adams v. Jeffries, 12 Oh. 253, 40 AmD 477; Ewing v. Higby, 7 Oh. 198, 28 AmD 633; Ewing v. Hollister, 7 Oh. Pt. II. 138.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983; Smith v. Whiting, 55 Or. 393, 106 P 791; Fiske v. Kellogg, 3 Or. 503.

S. C.—Rice v. Bamberg, 68 S. C. 184, 46 SE 1009; Whitesides v. Barber, 24 S. C. 373.

Tenn.—Linnville v. Darby, 1 Baxt. 306; Taylor v. Walker, 1 Heisk. 734.

Va.—Menefee v. Marge, 4 SE 726.

Wis.—Blodgett v. Hitt, 29 Wis. 169; Gibbs v. Shaw, 17 Wis. 197, 84 AmD 737.

See Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 464, 131 P 413 ("The county court was without jurisdiction, under our statute to try the case on the first day of the term unless respondents were served at least ten days prior thereto. If the service was in fact on the 29th, then the officer's return and the recitals in the order are untrue, the judgment was voidable, and the district court on direct attack could declare it void. It could, however, do this only upon evidence clearly establishing the untruthfulness of the record").

[a] **Failure to give personal notice to resident heirs.**—An order for an administrator's sale to pay debts is void if personal notice was not served on resident heirs as required by statute, notice merely by publication being insufficient. Jackson v. Johnson, 248 Mo. 680, 154 SW 759.

[b] **An order for the mortgaging and leasing of land** is void where made without notice, although notice was given of a previous application to sell. Baker v. Edwards, 156 Ind. 53, 59 NE 174; Martin v. Neal, 125 Ind. 547, 25 NE 813.

[c] **Omission to give statutory notice cannot be cured.**—Hutchinson v. Shelley, 133 Mo. 400, 34 SW 838 (by a subsequent notice); In re Mahoney, 34 Hun (N. Y.) 501.

[d] **Service of notice upon infant heirs only,** where the statute requires service on the guardians or persons having control of infants, is insufficient to confer jurisdiction. Whitney v. Porter, 23 Ill. 445.

[e] **Effect of appointment of guardian ad litem.**—Where there has been no service of summons on a minor defendant, the appointment of a guardian ad litem does not give the court jurisdiction of his person. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310.

[f] **A notice to the husband of a legatee** of an application by the executors for an order to sell real estate is not sufficient, under the requirements for original notice (Code § 3514), to give the court jurisdiction to enter a decree denying his rights in his deceased wife's share under the will. Blain v. Dean, 160 Iowa 708, 142 NW 418.

[g] **Title of purchaser valid except as against heir not notified.**—Menefee v. Marge, (Va.) 4 SE 726.

[h] **An omission to serve the notice on a tenant** who occupied a portion of the premises did not affect the validity of the purchaser's title except as to the tenant, and as to him only during the continuance of

proceeding to sell as being strictly in rem, look upon a failure to give notice as a mere irregularity which does not render the judgment void.[33]

[§ 1507] **b. Persons Entitled to Notice.** The heirs[34] and devisees[35] of decedent are the persons primarily entitled to notice. In some jurisdictions it is required that a notice, citation, summons, or order to show cause shall be served on infant heirs as well as adult, in order to obtain jurisdiction of their persons,[36] and the widow has also been held entitled to notice.[37] Under some statutes persons in occupation of premises of which a sale is desired are entitled to notice.[38] The executor or administrator must be cited on an application by a creditor for a sale of decedent's realty to pay debts.[39] Land charged with legacies may be sold for the payment of debts without service of the order to show cause upon the legatees.[40] Creditors of the decedent are not usually entitled to notice,[41] although this is sometimes required[42] where a notice to present claims has not been published,[43] nor are persons claiming adversely to, or under title derived

his lease. Rigney v. Coles, 6 Bosw. (N. Y.) 479.

[i] **Statute under which sale made must govern.**—Where a sale appearing upon the record to have been made under the section of the statute providing for the payment of debts was void for want of the notice required by that section, it could not be sustained as having been made under other sections, which provided for a sale for other ends, and which required no notice. Valle v. Fleming, 19 Mo. 454, 61 AmD 566.

[j] **Failure to cite unnecessary parties** named in the petition is not fatal. Griswold v. McDonald, 81 Misc. 376, 143 NYS 341.

33. U. S.—Grignon v. Astor, 2 How. 319, 11 L. ed. 283.

Ala.—Howell v. Hughes, 168 Ala. 460, 53 S 105; Neville v. Kenney, 125 Ala. 149, 28 S 452, 82 AmSR 230; Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Lyons v. Hamner, 84 Ala. 197, 4 S 26, 5 AmSR 363; Field v. Goldsby, 28 Ala. 218, 65 AmD 341; Doe v. Riley, 28 Ala. 164, 65 AmD 334; Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Montgomery v. Johnson, 31 Ark. 74; Rogers v. Wilson, 13 Ark. 507.

Ky.—Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

La.—Wright v. Steed, 10 La. Ann. 238.

Pa.—Yeakel's Est., 22 Pa. Dist. 617.

S. D.—Blackman v. Mulhall, 19 S. D. 534, 104 NW 250.

Tex.—Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852; Heath v. Layne, 62 Tex. 686; Hurley v. Barnard, 48 Tex. 83; George v. Watson, 19 Tex. 354. Aliter under act of 1846. Littlefield v. Tinsley, 26 Tex. 353; Finch v. Edmonson, 9 Tex. 504.

Wash.—Ryan v. Fergusson, 3 Wash. 356, 28 P 910.

"Since the decision of Wyman v. Campbell, 6 Port. (Ala.) 219, 31 AmD 677, this court has uniformly held to the doctrine that proceedings in the probate court for the sale of lands of an estate for the payment of the debts of the deceased owner are in the nature of proceedings in rem; that jurisdiction attaches when a petition stating a statutory ground for the order of sale is regularly filed and recognized by the order of the court, though parties in interest may not be personally notified of the pendency of the proceedings." Howell v. Hughes, 168 Ala. 460, 466, 53 S 105.

[a] **A sale of realty in the Indian Territory** by an administratrix upon petition therefor filed, but without the notice of the application required by statute, and the petition being deficient in form, is not void where the sale has been confirmed, however erroneous it may be. Steele v. Kelley, 32 Okl. 547, 122 P 934.

[b] **Sale for division.**—In order to sustain an order for the sale of a decedent's lands for equitable division, the record must affirmatively show that the resident heirs of full age had the statutory notice or that they appeared. Summersett v. Summersett, 40 Ala. 596, 91 AmD 494.

34. Ala.—Page v. Matthews, 41 Ala. 719.

Ind.—Martin v. Neal, 125 Ind. 547, 25 NE 813.

Ky.—Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

Miss.—Campbell v. Brown, 7 Miss. 106.

Mo.—State v. Holtcamp, 245 Mo. 655, 151 SW 153; Thompson v. Pinnell, 237 Mo. 545, 141 SW 605.

Nebr.—Holmes v. Columbia Nat. Bank, 4 Nebr. (Unoff.) 893, 97 NW 26.

N. Y.—In re Dolan, 88 N. Y. 309.

Or.—Marks v. Wilson, 72 Or. 5, 143 P 906.

[a] **If any of the heirs are married women,** the citation must be served on their husbands as well as on them. Page v. Matthews, 41 Ala. 719.

[b] **If an heir of decedent dies after notice given him** of the commencement by the administrator of proceedings to sell real estate to pay debts of the estate, and a sale thereafter takes place without any further notice, or any suggestion of the death of such heir, and is affirmed, such sale is valid, and the heirs of such heir cannot attack its validity. Palmerton v. Hoop, 131 Ind. 23, 30 NE 874.

35. Flanders v. George, 55 N. H. 486; In re Dolan, 88 N. Y. 309.

[a] **Remaindermen** under the will are entitled to notice. Flanders v. George, 55 N. H. 486.

[b] **Executors and devisees in trust who have not qualified.**—Persons nominated as executors and to whom certain devises were made in trust are not entitled to notice where they have not qualified and letters testamentary have issued to the other executors, especially where the will itself directed that only such directors as qualified should be deemed executors. In re Dolan, 88 N. Y. 309.

[c] **The wife of a devisee** is not entitled to notice of a petition for license to sell the land devised for the payment of debts, legacies, and charges of administration. Harrington v. Harrington, 13 Gray (Mass.) 513, 74 AmD 648.

[d] **Legatees** are not included within the meaning of the words "devisees" as used in the statute providing for notice. Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

36. Ill.—Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310.

Ind.—Guy v. Pierson, 21 Ind. 18; Martin v. Starr, 7 Ind. 224; Doe v. Anderson, 5 Ind. 33.

Ky.—Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

Miss.—Winston v. McLendon, 43 Miss. 254.

N. Y.—Pinckney v. Smith, 26 Hun 524.

N. C.—Harrison v. Harrison, 106 N. C. 282, 11 SE 356; Perry v. Adams, 98 N. C. 167, 3 SE 729, 2 AmSR 326; Shields v. Allen, 77 N. C. 375.

Pa.—King's Est., 18 Pa. Dist. 1027.

Tenn.—Linville v. Darby, 1 Baxt. 306; Taylor v. Walker, 1 Heisk. 734; Wheatley v. Harvey, 1 Swan 484.

[a] **Contrary view.**—Price v. Winter, 15 Fla. 66.

[b] **Notice before appointment of special guardian.**—(1) An infant defendant must be served with the order to show cause before a special guardian can be appointed for him. Pinckney v. Smith, 26 Hun (N. Y.) 524. (2) The appointment of a guardian ad litem before service on minors is a nullity. Linnville v. Darby, 1 Baxt. (Tenn.) 306; Taylor v. Walker, 1 Heisk. (Tenn.) 754; Wheatley v. Harvey, 1 Swan (Tenn.) 484.

[c] **Merely citing the guardian ad litem** (1) appointed to represent the infant is not sufficient. Guy v. Pierson, 21 Ind. 18; Doe v. Anderson, 5 Ind. 33. But see Doe v. Harvey, 5 Blackf. (Ind.) 487 (holding service of notice on the general guardian of infant heirs sufficient). (2) A decree of sale rendered merely upon the answer or appearance of a guardian ad litem, without jurisdiction of the persons of the minor heirs being acquired by summons or notice, has been held void. Clark v. Thompson, 47 Ill. 25, 95 AmD 457; Johnson v. Cobb, 29 S. C. 372, 7 SE 601. Contra Sprague v. Litherberry, 22 F. Cas. No. 13,251, 4 McLean 442; Stuart v. Allen, 16 Cal. 473, 76 AmD 551; Rollins v. Brown, 37 S. C. 345, 16 SE 44 [foll Walker v. Veno, 6 S. C. 459; Bulow v. Witte, 3 S. C. 308].

[d] **The general guardian of infant defendants is the proper person** upon whom service of process against such infants should be made. Chambers v. Penland, 78 N. C. 53.

37. Martin v. Neal, 125 Ind. 547, 25 NE 813; Helms v. Love, 41 Ind. 210; In re Dolan, 88 N. Y. 309.

[a] **Devisees of the widow** are not, as such, concluded by an order of sale, where they were made parties and notified only as the children and heirs at law of the original decedent; but the sale is void as to the widow's interest. Elliott v. Frakes, 71 Ind. 412.

38. In re Dolan, 88 N. Y. 309.

39. Kammerrer v. Ziegler, 1 Dem. Surr. (N. Y.) 177; Mustin's Est., 8 Pa. Dist. 180; Titlow's Est., 2 Pa. Dist. 512, 13 Pa. Co. 445. But compare Griswold v. McDonald, 81 Misc. 376, 143 NYS 341 (Code Civ. Proc. § 2754 which requires that in proceedings for the sale of real property of a decedent to pay debts the surrogate "must issue a citation according to the prayer of the petition," requires merely that the surrogate issue citation to all the necessary parties whose rights may be affected and to any others he may deem proper, and not to persons having no interest in the suit, although they are named in the petition; and hence, where the only real parties in interest were the heirs, devisees, and creditors, failure to issue citation to the administrator, occupants, and one who had been a lienor was not fatal to the surrogate's jurisdiction, although these persons were named in the petition).

40. In re Dolan, 88 N. Y. 309 [rev 26 Hun 46].

41. Thompson v. Cox, 53 N. C. 311.

42. Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 1119.

43. In re Reed, 214 N. Y. 383, 108 NE 565; Matter of Georgi, 44 App. Div. 180, 60 NYS 772 [aff 162 N. Y. 660 mem, 57 NE 1110 mem]; Matter of Anderson, 95 Misc. 79, 160 NYS 509; Matter of Slater, 17 Misc. 474, 41 NYS 534, 1 Gibb. Surr. 8; Kammerrer v. Ziegler, 1 Dem. Surr. (N. Y.) 177.

independently of, decedent.[44] It has also been held that mortgagees of the property are not entitled to notice.[45] A purchaser from the heir has been held not entitled to be served with notice of the petition to sell, where an examination of the record would have shown him that the property was subject to be sold for decedent's debts, that there were debts unpaid, and that an administrator had been appointed for the very purpose of subjecting the land to their payment.[46] But it has also been held that, in a proceeding by a creditor under the statute to dispose of a decedent's real estate for the payment of debts, citation must issue to one who has purchased the property at a sale in partition proceedings among the heirs.[47] Where plaintiff in an action against an heir attached certain real estate in which the heir had an interest, and thereafter plaintiff recovered judgment against the heir on his claim, it was held that he was a party interested in a proceeding by the administrator for the sale of the decedent's lands to pay debts, and was entitled to notice.[48]

[§ 1508] **c. Form and Requisites.** Where the statute does not declare what the notice shall contain, it is for the court to determine whether the statements thereof are sufficient,[49] but where the statute provides that notice shall be given in such form and manner as the court shall prescribe, no mere constructive notice will be sufficient, unless it is given in the form and manner prescribed by the court.[50] As a general rule where the notice gives information that at a specified time and place the executor or administrator will apply for authority to sell the whole of the real estate, or so much as is necessary for the purpose stated, this is sufficient for all practical purposes,[51] and in determining the sufficiency of a notice the courts should consider whether a reasonable person in the exercise of his ordinary faculties would on reading the notice be apprised by it in what court and at what time the petition would be presented.[52] It has been held not to be necessary that the citation or order to show cause should specifically name the heirs, devisees, or persons interested, but a general direction "to all persons interested" is sufficient,[53] and where the widow is the petitioner and the whole proceeding is at her instance, it is not necessary that her name should appear in the citation.[54] It has also been held that, where the parties named in the citation have been served, the omission of the Christian names of some of them and the failure to give the individual names of others of them composing business firms is not fatal, but the defect may be cured by amendment.[55] But on the other hand a published notice "to whom it may concern" has been held insufficient, the heirs being named in the petition.[56] The citation or notice need not specifically describe the property to be sold,[57] or specify the day in the term of court specified when the application will be made.[58] Where the statute requiring a minute book to be kept of probate proceedings does not require that an order made in open court shall be signed by the judge, the signature of the judge's name made by the clerk to an order to show cause why real estate should not be sold to pay debts written at length in the order book is surplusage, and the entry is sufficient evidence of the order.[59] Under a statute requiring citation to issue to heirs and devisees mentioned in a petition to sell realty for decedent's debts to appear at the term therein mentioned not less than ten days after service of citation to show cause against an order of sale, a citation directing appearance to be made on the day of which the publication of service is completed gives less than the required time for appearance, and is not suf-

44. Walker v. Fuller, 147 Mass. 489, 18 NE 400; Shields v. Ashley, 16 Mo. 471.

[a] **A disseizor in possession** is not entitled to notice. Yoemans v. Brown, 8 Metc. (Mass.) 51.

45. Kennedy's Succ., 2 La. A. (Orleans) 65.

46. Dolton v. Nelson, 7 F. Cas. No. 3,976, 3 Dill. 469.

47. Kammerrer v. Ziegler, 1 Dem. Surr. (N. Y.) 177.

48. Mullin v. White, 134 Iowa 681, 112 NW 164.

49. Nixon v. Lehman, 137 Ga. 516, 73 SE 747; Gibson v. Roll, 27 Ill. 88, 81 AmD 219; Blain v. Dean, 160 Iowa 708, 142 NW 418.

50. Mickel v. Hicks, 19 Kan. 578, 21 AmR 161; Matter of Smart, 93 Misc. 402, 157 NYS 143.

51. Ga.—Nixon v. Lehman, 137 Ga. 516, 73 SE 747.

Ill.—Hobson v. Ewan, 62 Ill. 146; Gibson v. Roll, 27 Ill. 88, 81 AmD 219.

Mo.—Macey v. Stark, 116 Mo. 481, 21 SW 1088 [foll Macey v. Pitillo, 21 SW 1094].

N. Y.—Rigney v. Coles, 19 N. Y. Super. 479.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983.

[a] **Forms of notices** held sufficient. Nixon v. Lehman, 137 Ga. 516, 73 SE 747; Hobson v. Ewan, 62 Ill. 146; Gibson v. Roll, 27 Ill. 88, 81 AmD 219; Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983.

[b] **Form of order to show cause** held sufficient. Rigney v. Coles, 19 N. Y. Super. 479.

[c] **Slight discrepancy in stating name of decedent.**—The sale of land for the payment of debts is not void because the order to show cause and the notice given by publication pursuant thereto are entitled, "In the matter of the estate of W. M. Macey, deceased," instead of "William M. Macey," where it appears that the estate was as well known by the one designation as the other, and that no interested party was misled thereby. Macey v. Stark, 116 Mo. 481, 21 SW 1088 [foll Macey v. Pitillo, 21 SW 1094].

[d] **Failure to state that assignment of dower and homestead will be asked.**—Under a statute providing that whenever application is made to a county court for leave to sell real estate for payment of debts, and it appears that there is a dower or homestead interest in land sought to be sold, such court may, in the same proceeding, on the petition of the executor or administrator, or the person entitled to dower and homestead, cause the same to be assigned, there is no error in proceeding to judgment, although the summons simply states that defendants are required to answer a petition "that prays that the court will order and direct a sale of real estate of said deceased for payment of debts," while the administrator's petition asks that homestead and dower be assigned and set off. Oettinger v. Specht, 162 Ill. 179, 44 NE 399.

52. Finch v. Sink, 46 Ill. 169, 92 AmD 246; Johnson v. Clark, 18 Kan. 157; Rigney v. Coles, 19 N. Y. Super. 479.

[a] **Notices held sufficient.**—Finch v. Sink, 46 Ill. 169, 92 AmD 246; Jeffries v. Decker, 42 Ill. 519; Moore v. Neil, 39 Ill. 256, 89 AmD 303; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Johnson v. Clark, 18 Kan. 157; Ridney v. Coles, 19 N. Y. Super. 479.

53. Ill.—Gibson v. Roll, 27 Ill. 88, 81 AmD 219.

Kan.—Taylor v. Hosick, 13 Kan. 518.

Minn. — Spencer v. Sheehan, 19 Minn. 338.

Nebr.—Stack v. Royce, 34 Nebr. 833, 52 NW 675.

Wash.—Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523.

See also Foley v. McDonald, 46 Miss. 238 (notice addressed "to the nonresident heirs").

[a] **In Illinois** (1) it was formerly not necessary to insert the names of the persons interested. Gibson v. Roll, 27 Ill. 88, 81 AmD 219; Bowles v. Rouse, 8 Ill. 409. (2) This has been changed by statute. Rev. St. (1889) c 3 § 103.

54. Matter of McGee, 5 App. Div. 527, 38 NYS 1062.

55. Matter of Georgi, 35 Misc. 685, 72 NYS 431, 2 Mills Surr. 315.

56. Gregory v. Keenan, 256 Fed. 949.

57. In re Roach, 139 Cal. 17, 72 P 393 (it is sufficient if reference is made in the order to show cause to the petition on file in which the description fully appears).

58. Madden v. Cooper, 47 Ill. 359; Finch v. Sink, 46 Ill. 169, 92 AmD 246; Goudy v. Hall, 36 Ill. 313, 87 AmD 217.

[a] **If the heirs wish to resist** the application they can take a rule on the administrator to file his petition by a certain day, if they are inconvenienced by his delay. Finch v. Sink, 46 Ill. 169, 92 AmD 246.

59. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

ficient.[60] Under a statute providing that the original notice must inform defendant of the nature of the cause to be heard and the relief demanded, a notice that the executors of a will will present a petition for leave to sell the real estate, directed to the husband of testator's daughter who had died after the will went into effect, is not sufficient to give the court jurisdiction to enter a decree denying the rights of the husband in his wife's share under the will.[61]

[§ 1509] **d. Personal Service.** It is often required that the summons, citation, notice, or order to show cause shall be personally served on those interested within the jurisdiction[62] a designated time before the hearing of the application,[63] but the legislature has power to dispense with personal notice to heirs and allow notice by publication merely,[64] even in cases where the heirs are residents of the county where the land is situated or the administration is pending.[65] Under some statutes it has been held optional with the representative whether notice shall be given by personal service or by publication, either mode sufficing,[66] and personal service has also been held to dispense with a statutory requirement of publication.[67] Where the service of a notice has been adjudged sufficient by the court to which it was returnable, the court will be presumed to have acquired jurisdiction thereby.[68] An admission of service may be sufficient,[69] except in the case of infants.[70]

[§ 1510] **e. Publication.** Publication of the notice of an application for a sale, or of the citation or summons thereon, or the order to show cause against the sale, is often provided for[71] in lieu of personal service,[72] and this is the usual mode of giving notice in the case of nonresident heirs or devisees.[73] An order of publication is usually necessary,[74] and such order is commonly based upon an affidavit showing the facts necessary to warrant the giving of notice in this manner.[75] The requirements of the statute or order of court under which

60. Smith v. Whiting, 55 Or. 393, 106 P 791.

61. Blain v. Dean, 160 Iowa 708, 142 NW 418.

62. Ala.—Summersett v. Summersett, 40 Ala. 596, 91 AmD 494.

Colo.—Vance v. Maroney, 4 Colo. 47.

Ga.—Park v. Mullins, 124 Ga. 1072, 53 SE 568.

Ill.—Oettinger v. Specht, 162 Ill. 179, 44 NE 399.

Iowa.—Myers v. Davis, 47 Iowa 325.

Miss.—Wells v. Smith, 44 Miss. 296.

Mo.—Jackson v. Johnson, 248 Mo. 680, 154 SW 759; Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791.

[a] **Publication insufficient.**—In a suit by an administrator against an heir to recover land of the estate in his possession, for the purpose of distribution, when the evidence relied on to establish that it was necessary for the administrator to have possession for the purpose of distribution is an order of sale for the purpose of distribution granted by the ordinary, the heir may attack such order by showing that no personal notice of the application for such order had been served upon him, and this is true notwithstanding it appears that the order was passed after the usual citation has been published according to the law. Park v. Mullins, 124 Ga. 1072, 53 SE 568.

[b] **Service of guardian.**—An order for the sale of an intestate's land to pay his debts is not binding on a minor having a guardian in the state unless the guardian is served with process. Wells v. Smith, 44 Miss. 296.

[c] **The parties served are sufficiently identified** where the notice names specifically the persons to whom it is addressed and the return states that the petition and notice were served upon the widow and minor heirs therein named. Myers v. Davis, 47 Iowa 325.

[d] **Efforts to serve writ.**—Under statutes requiring an administrator's sale to conform to a chancery sale, and declaring that notice by publication shall not dispense with the usual exertion of the sheriff to serve the writ, a return of non est inventus, made before the return day, will not support the notice of sale. Vance v. Maroney, 4 Colo. 47.

[e] **Service by reading the summons** to defendant is sufficient. Oettinger v. Specht, 162 Ill. 179, 44 NE 399.

[f] **Personal service cannot be proved by parol testimony.**—Smith v. Whiting, 55 Or. 393, 106 P 791.

[g] **Insufficient service.**—(1) Service of summons in a proceeding against minor heirs to sell real estate to pay debts, by delivering a copy of the summons for the minors to their mother, who is also their guardian, and is the creditor for whose benefit the proceeding is instituted, does not give the court jurisdiction. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310. To same effect Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221. (2) In a proceeding by an administrator to sell land to pay debts service cannot be made on a defendant by copy of the bill as in chancery. In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712].

63. Summersett v. Summersett, 40 Ala. 596, 91 AmD 494; Pinckney v. Smith, 26 Hun (N. Y.) 524.

[a] **Adjourned hearing.**—An order to show cause was issued, returnable on April 26, but was not served on an infant heir. On the return day of the order a special guardian was appointed for the infant, who admitted service of the citation for the infant. The proof was then taken and the proceedings adjourned to May 10. On April 26 a copy of the order, returnable on that day, was taken, the return day was erased, and the new adjourned day inserted, and the order was then served upon the infant, but no new order to show cause was entered or made. It was held that the sale was invalid because the infant, when the proof was taken, had not been served with process and had no legal guardian, and the order served upon him was not in fact an order and was too late to be of service. Pinckney v. Smith, 26 Hun (N. Y.) 524.

64. Mullinnix v. Brown, 151 Iowa 468, 131 NW 671; Fudge v. Fudge, 23 Kan. 416; Fleming v. Bale, 23 Kan. 88.

65. Fudge v. Fudge, 23 Kan. 416 (under a statute providing that "the court shall require notice of the petition, and of the time and place of hearing the same, to be given for such length of time and in such manner as the court may see proper," notice given by publication pursuant to the order of the court was sufficient, although the heirs were all residents of the county in which the proceedings were had and the land situated).

66. Hobson v. Ewan, 62 Ill. 146; Gibson v. Roll, 27 Ill. 88, 81 AmD 219; In re Marks, 81 Or. 632, 160 P 540.

67. Harris v. Ransom, 24 Miss. 504.

68. Thorp v. Brenneman, 41 Iowa 251.

69. Robison v. Furman, 47 N. J. Eq. 307, 20 A 898 (if, on the return of a rule to show cause in the orphans' court why land should not be sold, proctors appear on behalf of all the parties interested and admit due and legal service of the rule, that is sufficient evidence of proper service).

70. Whitesides v. Barber, 24 S. C. 373; Finley v. Robertson, 17 S. C. 435.

71. Ark.—Harper v. Wisner, 126 Ark. 443, 190 SW 569.

Cal.—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Ill.—Rice v. Davies, 201 Ill. A. 165.

Iowa.—Casey v. Stewart, 60 Iowa 160, 14 NW 225.

Minn.—Spencer v. Sheehan, 19 Minn. 338.

Mo.—Desloge v. Tucker, 196 Mo. 587, 94 SW 283; Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417.

N. Y.—Matter of Smart, 93 Misc. 402, 157 NYS 143.

Or.—In re Marks, 81 Or. 632, 160 P 540.

See also supra § 1509.

[a] **Under a statute providing for such notice as the court may prescribe,** a notice by publication may be prescribed and is lawful. Casey v. Stewart, 60 Iowa 160, 14 NW 225; Lees v. Wetmore, 58 Iowa 170, 12 NW 238.

[b] **Publication as to some and personal service as to others** may confer jurisdiction. In re Marks, 81 Or. 632, 160 P 540.

72. Davis v. Howard, 56 Ga. 430; Thomas v. Parker, 97 Cal. 456, 32 P 562; In re Marks, 81 Or. 632, 160 P 540; Smith v. Whiting, 55 Or. 393, 106 P 791.

73. Field v. Goldsby, 28 Ala. 218, 65 AmD 341; Rice v. Davies, 201 Ill. A. 165; Ross v. McGrath, 86 SW 555, 27 KyL 723; Sellers v. Talby, 33 Miss. 582.

74. Foley v. McDonald, 46 Miss. 238; Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417; In re Reed, 218 N. Y. 711, 113 NE 254 [rev 171 App. Div. 21, 156 NYS 944]; Matter of Smart, 93 Misc. 402, 157 NYS 143.

75. Rowand v. Carroll, 81 Ill. 224.

[a] **Affidavit of nonresidence may be on information and belief.**—Rowand v. Carroll, 81 Ill. 224.

[b] **Caption.**—An affidavit filed in a proceeding by an executor or administrator for an order to sell land to pay debts, to authorize the publication of notice, need not be entitled in the case. If it states the necessary facts and is filed in the case, even if not entitled at all, and without any caption, it may be sustained. Harris v. Lester, 80 Ill. 307.

[c] **Where the statute is silent as to who shall make the affidavit** to

publication is made must be complied with[76] as to the length of time during which the publication shall be continued,[77] the time when publication shall begin and end,[78] the paper or papers in which the publication is to be made,[79] and the number of insertions.[80] A requirement that publication shall be made a certain number of weeks consecutively is satisfied by the publication of the prescribed number of times at weekly intervals before the hearing;[81] but the full notice prescribed must be given, that is to say, the first publication must be made the prescribed number of weeks prior to the hearing.[82] After the completion of the publication of the order to show cause for the time prescribed by statute, the court can proceed at once at the time named in the order,[83] and the fact that the publication of the notice is continued beyond the time when the application was to be made does not in any way affect the legality of the notice.[84] It has been held that compliance with the statutory requirements must be shown affirmatively by the representative or the person claiming title under the order of the court.[85]

[§ 1511] **f. Posting.** It is sometimes required by statute that notice of an application to sell realty shall be posted,[86] and a statute giving to the

authorize publication, there is no force in an objection that it is made by a person other than the administrator. Rowand v. Carroll, 81 Ill. 224.

76. Sheldon v. Wright, 7 Barb. 39 [aff 5 N. Y. 497]; Matter of Reed, 177 App. Div. 76, 164 NYS 37.

77. Sellers v. Talby, 33 Miss. 582; Norton v. Reed, 253 Mo. 236, 161 SW 842 [foll Young v. Downey, 145 Mo. 250, 46 SW 1086, 68 AmSR 568 (overr Cruzen v. Stephens, 123 Mo. 337, 27 SW 557, 45 AmSR 549)]; Sibley v. Waffle, 16 N. Y. 180; Sheldon v. Wright, 7 Barb. 39 [aff 5 N. Y. 497].

[a] **Publication for the time fixed by law is sufficient,** although an interlocutory decree of the probate court required publication for a greater length of time. Sellers v. Talby, 33 Miss. 582.

[b] **Validity of order.**—Under a statute directing that publication shall be for not less than four weeks, or for such further time as court may direct, an order directing publication of citation for not less than ten weeks is valid, although the dates for publication allow only eight weeks. Finley v. Morrison, 87 Or. 160, 169 P 781.

[c] **Where publication was not for the required time** (1) the sale is void. Norton v. Reed, 253 Mo. 236, 161 SW 842 [foll Young v. Downey, 145 Mo. 250, 46 SW 1086, 68 AmSR 568 (overr Cruzen v. Stephens, 123 Mo. 337, 27 SW 557, 45 AmSR 549)]. (2) Contra Blackman v. Mulhall, 19 S. D. 534, 104 NW 250 (such defect does not render the sale void or affect its validity in a collateral proceeding).

78. Sheldon v. Wright, 5 N. Y. 497; Zech's Est., 15 Pa. Co. 622.

[a] **Construction of statutes.**—(1) A statute requiring notice to be published four weeks in some newspaper before the term of court, does not require the publication for the four weeks immediately preceding the term of court. Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746. (2) Under a statute requiring the rule to show cause to be published "for six weeks successively once in each week before the return-day," it is not necessary that the publication should be made in the six weeks next preceding the return day. Robinson v. Furman, 47 N. J. Eq. 307, 20 A 898.

[b] **Lapse of time between last publication and return day.**—Proceedings will not be dismissed on the ground that eight full days did not elapse between the date of the last publication and the date when the citation was made returnable. Matter of Denton, 40 Misc. 326, 81 NYS 1031 [aff 86 App. Div. 359, 83 NYS 778].

79. Townsend v. Tallant, 33 Cal. 45, 91 AmD 617; Stow v. Kimball, 28 Ill. 93.

[a] **Nearest newspaper.** — Any newspaper printed at the county seat answers the intention of a statute requiring a notice of the sale of estate and property to be published in the nearest newspaper. Stow v. Kimball, 28 Ill. 93.

[b] **Direction of court or judge.**—Publication may be made in such newspaper in the county as the court or judge shall direct, for the number of successive weeks required by the statute, although such paper is published weekly only, and other papers are published daily in the same county. In re O'Sullivan, 84 Cal. 444, 24 P 281.

[c] **Petition to sell land outside of county where administration pending.**—Where an estate was being administered in D county and a petition of the administrator asked for leave to sell lands situated in R county, together with lands situated in D county, it was unnecessary that the notice of the petition to sell should be given in a newspaper published in R county. Gavin v. Grayvon, 41 Ind. 559.

[d] **Failure to designate paper in order.**—A publication of a notice for the required time in one newspaper of the county is sufficient as against collateral attack, although the court, in the order, designated no newspaper, especially where the court accepted the publication as a compliance with its order. Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678.

80. Townsend v. Tallant, 33 Cal. 45, 91 AmD 617.

[a] **The discontinuance of the paper** at the end of three weeks does not dispense with the necessity of further publication where notice of an administrator's petition to sell land has been ordered to be published "four successive weeks" in a certain paper, except in the event of personal service or written assent to the sale by all persons interested in the estate. Townsend v. Tallant, 33 Cal. 45, 91 AmD 617.

81. Madden v. Cooper, 47 Ill. 359; Dayton v. Mintzer, 22 Minn. 393; Matter of Reed, 171 App. Div. 21, 156 NYS 944 [rev on other grounds 218 N. Y. 711 mem, 113 NE 254].

[a] **Publication once a week in daily paper.**—A statute requiring that notice of an order to show cause why leave to sell shall not be granted to an administrator shall be published for four weeks in a newspaper printed in the county is complied with by a publication once a week for four successive weeks, although the newspaper in which publication is made is published daily. Rigney v. Coles, 19 N. Y. Super. 479.

82. Madden v. Cooper, 47 Ill. 359; Gibson v. Roll, 30 Ill. 172, 83 AmD 181; Monahon v. Vandyke, 27 Ill. 154; Young v. Downey, 145 Mo. 250, 46 SW 1086, 150 Mo. 317, 51 SW 751 [overr Cruzer v. Stephens, 123 Mo. 337, 27 SW 557, 45 AmSR 549].

[a] **Lapse of prescribed time before hearing sufficient.** — Under a statute requiring the first publication to be six weeks before the day the petition should be presented, it is not necessary that six weeks should intervene between the first day of publication of notice and the first day of the term in which the application is made, but only that six weeks should intervene between the first day of publication and the day upon which an application is made for an order to sell. Madden v. Cooper, 47 Ill. 359.

[b] **Delay in presenting petition.**—If notice of an application to sell lands is not published for six full weeks before the day therein specified as the time when the petition will be presented, parties are not bound to take notice of such application; and although the petition is not in fact presented until a later day than the one fixed by the notice, nor until after the six weeks required by the statute has expired, yet that fact will not cure the defect. Gibson v. Roll, 30 Ill. 172, 83 AmD 181.

[c] **On the other hand** it has been held that an order of notice of the hearing by the probate court of an administrator's petition to sell land requiring the notice to be published in a designated weekly paper "two consecutive weeks," although the hearing was to be had eleven days after the order was made, should be construed to mean "two consecutive times," that is to say, in the next two issues, the court laying stress upon the fact that the order did not require the notice to be published "for" two consecutive weeks. Fleming v. Bale, 23 Kan. 88. To like effect Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983.

83. In re Roach, 139 Cal. 17, 72 P 393 (it is not necessary that thirty days should elapse after the completed publication before the court has jurisdiction of the persons interested in the estate, even though some of such persons reside in Ireland).

[a] **Publication confers jurisdiction.**—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

84. Nixon v. Lehman, 137 Ga. 516, 73 SE 747.

85. Finch v. Sink, 46 Ill. 169, 92 AmD 246; Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031; Sheldon v. Wright, 7 Barb. 39 [aff 5 N. Y. 497]; Reynolds v. Schmidt, 20 Wis. 374.

[a] **An affidavit of publication made by the "proprietor"** of the paper in which the order was published is sufficient. Reynolds v. Schmidt, 20 Wis. 374.

[b] **Evidence independent of record.**—It is proper, as against a collateral attack, to show by competent evidence, independently of the record, that the publication was in fact made in strict accordance with the requirements of the order of the court. Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

[c] **Objection to printer's certificate of publication cannot be raised in collateral proceeding.**—Finch v. Sink, 46 Ill. 169, 92 AmD 246.

86. Matlock v. Livingston, 17 Miss. 489; Planters' Bank v. Johnson, 15 Miss. 449.

[a] **Posting in addition to publication** is required, and if posting is omitted the proceedings are not saved by the fact that publication was made. Matlock v. Livingston, 17 Miss. 489; Planter's Bank v. Johnson, 15 Miss. 449.

court or judge power to direct what notice shall be given may authorize a direction for notice by posting with respect to an interested party whose residence is unknown.[87]

[§ 1512] **g. Return.**[88] The full notice required by statute must be given, and if the citation or summons is made returnable in a less time than that required by statute, there is want of jurisdiction which is fatal to the validity of the proceedings;[89] but the fact that the order to show cause was made returnable one day later than the time prescribed by statute has been held to be a mere irregularity which will not avoid the sale.[90] A summons to heirs, directing them to appear on a past day and show cause why realty should not be sold for the payment of debts, confers no jurisdiction.[91] The application to sell real estate must be made at the term or date specified in the notice published or the order to show cause; otherwise the order will not be binding for want of notice.[92]

[§ 1513] **h. Waiver and Curing of Errors.** Errors or irregularities in the notice may be cured by the appearance of those interested,[93] or by the confirmation of the sale,[94] and even an omission to issue summons or give notice may be waived.[95] So also heirs who, with knowledge of defects in the service of the citation in a proceeding by the administrator to sell land to pay debts, accept their distributive shares of the proceeds of the sale, are estopped to question its validity.[96] But it has been held that, under a statute requiring notice of an application by administrators for an order authorizing the sale of lands to be publicly given, appearance in such a proceeding does not waive a failure to give notice.[97] Where an order to show cause is properly published, a failure, in issuing the order, to designate the paper in which the publication shall be made, as required by statute, is cured by the order of court confirming the sale.[98] Under some statutes adults may waive the notice by filing their assent to the sale in writing,[99] and guardians may assent in like manner for their wards,[1] but it has been held that infant heirs cannot personally come into court and waive citation and consent to the decree.[2]

[§ 1514] **i. Presumptions; Collateral Attack.** According to the weight of authority it is to be presumed that there was such service or appearance as conferred upon the court, in which the proceedings were brought, jurisdiction of the persons of those interested,[3] where the record is silent

87. Mullinnix v. Brown, 151 Iowa 468, 131 NW. 671 (an order for such notice is at most defective only, and a judgment ordering a sale is not void for lack of notice).

88. [a] **To what term summons returnable.** — Sloan v. Strickler, 12 Colo. 179, 20 P 611.

89. Colo. — Sloan v. Strickler, 12 Colo. 179, 20 P 611.

Ill.—Monahon v. Vandyke, 27 Ill. 154.

N. J.—Bray v. Neill, 21 N. J. Eq. 343.

N. Y.—Stilwell v. Swarthout, 81 N. Y. 109; Havens v. Sherman, 42 Barb. 636.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791.

[a] **The right of an infant defendant to set up the error** on appeal could not be waived by failure to take an objection before the surrogate. Stilwell v. Swarthout, 81 N. Y. 109.

[b] **Expiration of time before hearing sufficient.**—Under a statute providing that if, in proceedings for the sale of land to pay debts, a notice to nonresidents is not first published at least sixty days before the return day of the summons, the cause shall stand continued until the next term, a decree can be rendered after the lapse of sixty days from the first publication of the notice, although that time had not expired when the term at which the decree is rendered began. Sloan v. Strickler, 12 Colo. 179, 20 P 611.

90. O'Connor v. Huggins, 1 NYS 377 [aff 113 N. Y. 511, 21 NE 184, and dist Stilwell v. Swarthout, 81 N. Y. 109].

91. Hendricks v. Pugh, 57 Miss. 157.

92. Morris v. Hogle, 37 Ill. 150, 87 AmD 243; Turney v. Turney, 24 Ill. 625. But compare Rigney v. Coles, 19 N. Y. Super. 479 (although the order to show cause required the parties to appear on August 30, and the order to sell was made September 2, and did not recite that the proceedings were formally adjourned during the intermediate time, the order of sale was not for that cause presumptively invalid, and even though it was shown that no adjournments were entered in the surrogate's book of minutes, the proceedings would not be impaired if it was proved that they were in fact continued by adjournments).

[a] **Nunc pro tunc order.**—Where the order to show cause was returnable on April 4, and the proofs were made and a decree for a sale entered on that day, but on April 11 another decree for a sale was made, reciting that the decree theretofore made had been vacated for error, a sale under the second decree was valid. Burris v. Kennedy, 108 Cal. 331, 41 P 458, 38 P 971.

93. Bowles v. Rouse, 8 Ill. 409; Butler v. Emmett, 8 Paige (N. Y.) 12; Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

[a] **Illustration.**—An irregularity in giving notice to the heir at law is cured by a subsequent petition of such heir, to the surrogate, for an order to confirm the sales made under the former order, and to authorize the administrator to give deeds to the purchasers and to receive the purchase-money bid upon such sales. Butler v. Emmett, 8 Paige (N. Y.) 12.

94. Dayton v. Mintzer, 22 Minn. 393 (no appeal being taken therefrom); Steele v. Kelley, 32 Okl. 547, 122 P 934.

95. Greer v. Greer, 12 SW 152, 11 KyL 380; Segal v. Eagle Bldg. Co., 31 Oh. Cir. Ct. 519.

[a] **Illustration.**—Where after a sale under order of court of a decedent's land to pay his debts, an heir makes a claim of ownership to one of the lots, and on an application to set aside the order of sale the issue of ownership is made and tried, the objection that no summons was issued on the amended petition, which asked for the sale of that lot, is waived. Greer v. Greer, 12 SW 152, 11 KyL 380.

[b] **The guardian of incompetent heirs** may waive the defect arising from an omission of a summons. Segal v. Eagle Bldg. Co., 31 Oh. Cir. Ct. 519. Contra Doe v. Anderson, 5 Ind. 33.

96. Browne v. Coleman, (Or.) 125 P 278.

97. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

98. Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523.

99. Smock v. Reichwine, 117 Ind. 194, 19 NE 776.

[a] **Waiver as guardian merely.**—Where a writing containing a waiver of notice and consent to the sale is signed by the widow as guardian of the minor heirs, but not in her own right, a sale made without notice of the application does not pass the widow's interest in the real estate to a purchaser. Helms v. Love, 41 Ind. 210.

1. Smock v. Reichwine, 117 Ind. 194, 19 NE 776; Jones v. Levi, 72 Ind. 586.

[a] **Contrary view.**—Campbell v. Drais, 125 Cal. 253, 57 P 994; Doe v. Anderson, 5 Ind. 33.

2. Winston v. McLendon, 43 Miss. 254.

3. Fla.—Wilson v. Matheson, 17 Fla. 630.

Ga.—Coggins v. Griswold, 64 Ga. 323.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46; Donlin v. Hettinger, 57 Ill. 348.

Ind.—Clark v. Hillis, 134 Ind. 421, 34 NE 13; Hawkins v. Hawkins, 28 Ind. 66; Hawkins v. Ragan, 20 Ind. 193; Doe v. Harvey, 3 Ind. 104.

Kan.—Mickel v. Hicks, 19 Kan. 578, 27 AmR 161.

Ky.—Ross v. McGrath, 86 SW 555, 27 KyL 723; Jones v. Edwards, 78 Ky. 6.

Mo.—Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

N. C.—Yarborough v. Moore, 151 N. C. 116, 65 SE 763.

[a] **Propriety of service by publication.**—Where the statute authorizes publication only when the heirs or devisees are nonresidents, and requires personal service of resident heirs or devisees, it will be presumed, where notice was given by publication only and the residence of heirs or devisees does not appear, that they were nonresidents. Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

[b] **Absence of notice from files.**—Where it appears expressly that notice was given by publication and posting of the pendency of the proceeding, the absence from the files of the notice will not defeat the presumption that it was the proper notice. Clark v. Hillis, 134 Ind. 421, 34 NE 13.

[c] **Presence of heir at residence.**—Where a warning order was made against one of the heirs, who was a nonresident, three days after the affidavit of nonresidence was filed, there was no presumption, in the absence of some showing to the contrary, that such person, who was a resident of Chicago, was there on the day the affidavit was filed, and in the state on the day the warning order was issued, so as to render it bad for delay, but the presumption would be that he was at his place of resi-

on the subject of notice[4] or does not affirmatively state facts negativing the conclusion that notice was given,[5] and the regularity of the notice cannot be collaterally questioned.[6] But in some jurisdictions it is held that the giving of the notice required must affirmatively appear by the record in order to sustain the jurisdiction of the court.[7] Recitals in a decree for the sale of land as to service of process and proof of publication are prima facie true,[8] although in a proceeding to vacate the decree they are not conclusive, but may be contradicted.[9] In a collateral proceeding, however, it is sufficient that the decree recites that due notice was given; such a finding is conclusive and can be rebutted only by evidence in the record and not by extraneous proof,[10] and the judgment of the court that the notice was sufficient is binding on all parties interested, unless an appeal is taken.[11] But if the record shows service which is insufficient and fails to show that the court found that it had jurisdiction, the presumption is rebutted and it must be held that the court acted upon insufficient notice.[12]

[§ 1515] **9. Objections and Exceptions.** An application for a sale of real property of a decedent may be opposed by persons who are interested in the land, such as the heirs and devisees,[13] or by the personal representative, where

dence. Ross v. McGrath, 86 SW 555, 27 KyL 723.

[d] **Where the original judgment roll is lost or destroyed,** but the rough minute docket of the court shows that a petition to sell land for assets was filed, and the other dockets show memoranda of an order for publication for nonresident defendants, that an order of sale was made, a report of sale filed, and a judgment of confirmation rendered, there is a presumption that the publication was made as ordered, and proper proof of it filed before the judgment of sale was entered. Everett v. Newton, 118 N. C. 919, 23 SE 961.

4. Clark v. Hillis, 134 Ind. 421, 43 NE 13; Martin v. Starr, 7 Ind. 224.

[a] **On error** the reviewing court cannot indulge a presumption that the requisite steps were taken to bring the parties within the jurisdiction of the court, but the record must show affirmatively either the service of notice or the presence of defendants in court. Martin v. Starr, 7 Ind. 224.

5. Gerrard v. Johnson, 12 Ind. 636; Yarborough v. Moore, 151 N. C. 116, 65 SE 763.

6. Berrian v. Rogers, 43 Fed. 467; Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746; Griswold v. McDonald, 81 Misc. 376, 143 NYS 341; Daimwood v. Driscoll, (Tex. Civ. A.) 151 SW 621.

[a] **Rule applies in ejectment against purchaser.** — Berrian v. Rogers, 43 Fed. 467.

7. Root v. McFerrin, 37 Miss. 17, 75 AmD 49; Kempe v. Pintard, 32 Miss. 324; Commercial Bank v. Doe, 17 Miss. 613; Planters' Bank v. Johnson, 15 Miss. 449; Laughman v. Thompson, 14 Miss. 259; Gwin v. McCarroll, 9 Miss. 351; Puckett v. McDonald, 7 Miss. 269; Campbell v. Brown, 7 Miss. 106, 230; Smith v. Whiting, 55 Or. 393, 106 P 791. Contra Russell v. Lewis, 3 Or. 380.

[a] **Illustration.**—While the county court is a court of general jurisdiction, yet in ordering the sale of realty for debts, in serving interested nonresident parties with notice by publication, it acts under a special statutory authority not according to the common law, and no presumption of jurisdiction arises, but facts showing a proper service sufficient to give jurisdiction must appear upon the record. Smith v. Whiting, 55 Or. 393, 106 P 791.

[b] **Parol evidence is inadmissible** to supply an omission of the record in this respect. Root v. McFerrin, 37 Miss. 17, 75 AmD 49.

[c] **Distinction between sales of realty and of personalty.**—In case of a sale of real estate the record must show that all the proceedings were regular, and that the citations were published according to law; but a sale of a chattel will be valid, even though the record does not show that citations were published according to law; and this is true, although it be a lease for ninety-nine years which is sold. Dillingham v. Jenkins, 15 Miss. 479.

8. Comstock v. Crawford, 3 Wall. (U. S.) 397, 18 L. ed. 34; Sivley v. Summers, 57 Miss. 712; Commercial Bank v. Doe, 17 Miss. 613; Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

9. Sivley v. Summers, 57 Miss. 712.

10. Ala.—Goodwin v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21.

Ill.—Andrews v. Bernhardi, 87 Ill. 365; Barnett v. Wolff, 70 Ill. 76; Hobson v. Ewan, 62 Ill. 146. Contra Goudy v. Hall, 30 Ill. 109 (if notice was not given proceedings are absolutely void).

Iowa.—Myers v. Davis, 47 Iowa 325; Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Miss.—Shannon v. Summers, 86 Miss. 619, 38 S 345; Sivley v. Summers, 57 Miss. 712.

N. Y.—Sheldon v. Wright, 5 N. Y. 497.

N. C.—Morrison v. Craven, 120 N. C. 327, 26 SE 940; Sledge v. Elliott, 116 N. C. 712, 21 SE 797; Edwards v. Moore, 99 N. C. 1, 5 SE 13.

S. C.—Turner v. Malone, 24 S. C. 398 [exp] and dist Bragg v. Thompson, 19 S. C. 572; Finley v. Robertson, 17 S. C. 435; Lyles v. Bolles, 8 S. C. 258; Gregg v. Bigham, 19 S. C. L. 299, 26 AmD 181].

Tex.—Texas Land, etc., Co. v. Dunovant, 30 Tex. Civ. A. 560, 87 SW 208.

[a] **Illustration.**—Where defendant in an action to recover land set up title under a decree of the court in which the premises had been sold to make assets, and the record showed that plaintiffs had accepted service of the summons in the proceeding in which the decree was made, the record could not be collaterally attacked by evidence that the acceptance of service was made by one who had no authority. Edwards v. Moore, 99 N. C. 1, 5 SE 13.

[b] **Where the service is insufficient only in the manner of making it,** a question of jurisdiction is raised which the court must decide, and if it does so erroneously the judgment, although voidable, is binding until reversed and corrected on appeal, and is not void or subject to collateral attack. Myers v. Davis, 47 Iowa 325.

[c] **It is only on collateral attack** that recitals in an order and judgment authorizing administrators to sell land to pay debts that notice was given as required by statute are evidence of such notice. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

11. Stanley v. Noble, 59 Iowa 666, 13 NW 839 [foll Shawhan v. Loffer, 24 Iowa 217]; Lees v. Wetmore, 58 Iowa 170, 12 NW 238; Morrow v. Weed, 4 Iowa 77, 66 AmD 122; Thomas v. Le Baron, 8 Metc. (Mass.) 355; Desloge v. Tucker, 196 Mo. 587, 94 SW 283; Richards v. Skiff, 8 Oh. St. 586.

[a] **Record showing finding that notice sufficient.**—Where the record of a proceeding in the court of common pleas to subject lands to the payment of debts upon the petition of the administrator sets out that it was "shown to the court that due notice had been given to the defendants," this language imports a finding that the notice which the law requires under the circumstances has been regularly given. Richards v. Skiff, 8 Oh. St. 586.

12. Donlin v. Hettinger, 57 Ill. 348; Clark v. Thompson, 47 Ill. 25, 95 AmD 457; Card v. Finch, 142 N. C. 140, 54 SE 1009.

13. Ala.—Howell v. Randle, 171 Ala. 451, 54 S 563; Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Warren v. Hearne, 82 Ala. 554, 2 S 491.

Cal.—In re Steward, 1 Cal. A. 57, 81 P 728.

Ga.—Grant v. Noel, 118 Ga. 258, 45 SE 279.

Kan.—Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239.

Miss.—Paine v. Pendleton, 32 Miss. 320.

N. Y.—Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581.

N. C.—Barnes v. Fort, 169 N. C. 431, 86 SE 340 [foll Best v. Best, 161 N. C. 513, 77 SE 762]; Matthews v. Peterson, 150 N. C. 134, 63 SE 721; Person v. Montgomery, 120 N. C. 111, 26 SE 645.

Pa.—Reeser's Est., 4 Pa. Co. 417.

S. C.—Brock v. Kirkpatrick, 60 S. C. 322, 38 SE 779, 85 AmSR 847.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798.

[a] **Objection may be made by:** (1) Any heir. Grant v. Noel, 118 Ga. 258, 45 SE 279. (2) Heirs or persons claiming under them. Richardson v. Judah, 2 Bradf. Surr. (N. Y.) 157. (3) Husband, wife, heirs, devisees, and persons claiming under them. Matter of Campbell, 66 App. Div. 478, 73 NYS 290 [aff 170 N. Y. 84, 62 NE 1070]. (4) Persons showing a prima facie interest in the land. Paine v. Pendleton, 32 Miss. 320. (5) A grantee of an heir. In re Steward, 1 Cal. A. 57, 81 P 728 (on an application by an administrator, an objection at the hearing to the introduction in evidence of a deed to one who appeared in opposition to the order, on the ground that it did not appear that such person's grantor had any interest in the estate, was fully overcome by the averment in the administrator's petition that the grantor was the husband of the deceased). (6) A purchaser of the interest of some of the heirs. Cavitt v. Beall Hardware, etc., Co., (Tex. Civ. A.) 204 SW 798. (7) A purchaser from the widow and heirs. Speer v. Banks, 114 Ala. 323, 21 S 834.

[b] **Purchaser of homestead.** — Where a homestead occupied by decedent at the time of his death did not exceed in area and value the limit allowed by law as exempt, and he left no minor children, a purchaser of such homestead from the widow was a person interested in

a sale to pay debts is sought by a creditor,[14] but not by persons who have no interest such as will be affected by a sale.[15] Either the heirs or devisees,[16] or the personal representative[17] may become estopped to oppose or object to a sale of the land.

Manner and time of objection. The mode of objection, whether more or less formal, depends upon local statute or procedure.[18] Failure to comply with a statute requiring an application by administrators for leave to sell land for payment of debts to show the estimated expenses of the administration and give a list of all the property on hand liable for the payment of debts, etc., can be taken advantage of only by exceptions made at the proper time.[19]

Nature of objection. Any objections or exceptions which legitimately tend to oppose the conclusion that a sale should be made may be raised and considered.[20] Thus it may be set up in opposition that the sale has not been asked within the time limited by statute for the procurement of a sale,[21] or the heirs may contest the exhaustion of

the estate who might contest an application for the sale of lands to pay debts, although at the time of the purchase such property had not been set apart to the widow as a homestead. Newell v. Johns, 128 Ala. 584, 29 S 609.

[c] **The attorney for absent heirs need not formally oppose** the curator's application for a sale. It is sufficient if, when notified of the petition, he indorses on it his approval. Michel v. Michel, 11 La. 149.

[d] **Notice to other heirs.**—Where an heir objects to an application of the administrator to sell land, he need not give notice to any of the other heirs. Grant v. Noel, 118 Ga. 258, 45 SE 279.

14. Harrison v. Taylor, 43 SW 723, 19 KyL 1191; Walsh's Est., 28 Pa. Co. 193.

[a] **Allowance of time to file reply.**—Where in an action by an executor a defendant puts in an answer and counterclaim seeking a sale of the testator's land to pay his debts, the executor should be allowed a reasonable time to file a reply. Harrison v. Taylor, 43 SW 723, 19 KyL 1191.

15. In re Reed, 3 Cal. A. 142, 85 P 155; Simmons v. Defoe, 138 Ga. 534, 75 SE 626; Shields v. Ashley, 16 Mo. 471; Richardson v. Judah, 2 Bradf. Surr. (N. Y.) 157.

[a] **Creditors.**—Although creditors may be made parties, it is only for the purpose of presenting and proving their debts and contesting other claims, and they cannot be allowed to interpose an answer or file objections for the purpose of contesting the necessity of the proceedings or of making a defense to them. Matter of Campbell, 66 App. Div. 478, 73 NYS 290 [aff 170 N. Y. 84, 62 NE 1070]. Compare Jackson v. Warthen, 111 Ga. 834, 36 SE 214 (where a caveat filed by a creditor was considered).

[b] **A person claiming paramount title** to a decedent's real estate has no right to appear in proceedings brought by the administrator and resist an order for sale of the property to pay decedent's debts, since such proceeding cannot affect claimant's interest. Shields v. Ashley, 16 Mo. 471.

[c] **A purchaser at a prior sale,** set aside by the court, cannot raise an objection. In re Reed, 3 Cal. A. 142, 85 P 155.

[d] **Second husband of widow.**—Where intestate went into possession of land after paying part of the price and died, leaving a widow, who, with two minor grandchildren, continued to reside on the premises, her second husband, who married her two years after intestate's death and then occupied the premises, had no right, by reason of such marriage, to prevent a sale of the property by the administrator. Simmons v. Defoe, 138 Ga. 534, 75 SE 626.

[e] **A foreign executor** of the will of a nonresident decedent cannot act as such in California, and cannot maintain in a court in that representative capacity any opposition to a sale proposed by an administrator with the will annexed appointed within the state. In re Rawitzer, 175 Cal. 585, 166 P 581.

16. Black v. Robinson, 70 Ark. 185, 68 SW 489; Van Bibber v. Julian, 81 Mo. 618; Buntyn v. Holmes, 9 Lea (Tenn.) 319; Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930.

[a] **An heir who was administrator of the estate for several years** and was responsible to a considerable extent for the failure to sell lands to pay debts cannot object to an application to sell for that purpose by the administrator de bonis non on the ground that there has been unreasonable delay. Black v. Robinson, 70 Ark. 185, 68 SW 489.

[b] **Contract of infant heir.**—A contract between an infant heir at law and a creditor of decedent's estate, by which the former conveys by deed of trust a tract of land in payment of the debt, taking the creditor's receipt, and specifying therein that the contract is subject to ratification by the infant on attaining his majority, being disaffirmed by him after attaining his majority, does not estop him from setting up the statute of limitations in defense to an application by the creditor, as administrator of the estate, for an order to sell the lands for the payment of the debt. Warren v. Hearne, 82 Ala. 554, 2 S 491.

[c] **Objection by devisees who signed petition.**—Where the devisees who signed the petition for an order to mortgage the real estate present, promptly after the order is granted, a petition asking for a revocation of the order, setting forth that they signed the first petition under a misapprehension and misunderstanding of their rights, they will not be precluded from obtaining redress if they have any bona fide rights in the premises. Kurtz's Est., 16 LancLRev (Pa.) 205.

17. Wood v. McChesney, 40 Barb. (N. Y.) 417; Buntyn v. Holmes, 9 Lea (Tenn.) 319; Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930.

18. Ala.—Howell v. Randle, 171 Ala. 451, 54 S 563.

Ga.—Beach v. Lott, 132 Ga. 70, 63 SE 627.

Ind.—Taylor v. Stephens, (A.) 72 NE 609, (A.) 74 NE 12.

Iowa.—Conger v. Cook, 56 Iowa 117, 8 NW 782.

Ky.—Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928.

Miss.—Paine v. Pendleton, 32 Miss. 320.

N. Y.—In re Pirie, 198 N. Y. 209, 91 NE 587, 19 AnnCas 672 [aff 133 App. Div. 431, 117 NYS 753, and rearg den 199 N. Y. 524 mem, 91 NE 1144 mem].

N. C.—Wilson v. Pearson, 102 N. C. 290, 9 SE 707.

Pa.—Steffy's App., 76 Pa. 94.

[a] **Answer.** — Although an answer to a petition in equity for the sale of personal property to pay a judgment against a decedent's estate is objectionable in so far as it applies for affirmative relief, it may nevertheless be available as an answer to the bill. Howell v. Randle, 171 Ala. 451, 54 S 563.

[b] **Oral answer.**—A rule to show cause should not issue on a mere answer ore tenus to a petition by executors for authority to sell real estate to pay debts, since the proceedings of the orphans' court should have the substance of equitable form, by petition, answer, and replication, in which the requisites making the case should appear. Steffy's App., 76 Pa. 94.

[c] **No formal answer is requisite,** but objections and exceptions are sufficient if made in such form that the court is enabled to inquire into their sufficiency or correctness. Paine v. Pendleton, 32 Miss. 320.

[d] **Written exceptions.**—The objection that a claim against a decedent is barred by limitations, as a ground for refusing to order a sale of land to pay debts, must be made in the circuit court by written exceptions, and, on such exceptions being filed, the claimant must be allowed a reasonable time to take proof, if he so desires. Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928.

[e] **Motions.**—Neither a motion at the opening of the trial to dismiss a petition by a creditor for the sale of decedent's real estate to pay debts, on the ground that it appeared that limitations had run, nor a motion after the trial that it was affirmatively shown that limitations had run against the claim, raised the question of the sufficiency of the petition to establish the existence of a debt. In re Pirie, 198 N. Y. 209, 91 NE 587, 19 AnnCas 672 [aff 133 App. Div. 431, 117 NYS 753, and rearg den 199 N. Y. 524 mem, 91 NE 1144 mem].

[f] **If a needless or illegal purpose for sale is added to a proper one,** objection should be, not by demurrer, but by motion to strike out the objectionable portion. Conger v. Cook, 56 Iowa 117, 8 NW 782.

[g] **An objection as to the right of creditors to bring an action** to determine whether there had been a devastavit, and to subject the real estate to the payment of their debts, can be taken advantage of only by demurrer, as the alleged want of authority appears on the face of the proceedings. Wilson v. Pearson, 102 N. C. 290, 9 SE 707.

19. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

20. Little v. Marx, 145 Ala. 620, 39 S 517; Finch v. Du Bignon, 117 Ga. 113, 43 SE 423; Woolman's Est., 6 Pa. Dist. 205, 19 Pa. Co. 281.

[a] **Denial of necessity.**—Where an administrator applies for leave to sell the lands for the necessary purposes of paying debts and for distribution, it is error to strike on demurrer a ground of caveat filed by the heirs at law, denying that any necessity for the sale exists, although it appears that there are debts due by the estate. Finch v. Du Bignon, 117 Ga. 113, 43 SE 423.

[b] **Postponement of sale.**—A sale of real estate may be postponed by the court when the life tenant objects to the sale, and where creditors express a willingness to wait, pending arrangements looking toward a mortgage of the same, it being alleged that a present sale would result in a probable sacrifice of the property. Woolman's Est., 6 Pa. Dist. 205, 19 Pa. Co. 281.

21. Cole v. Lafontaine, 84 Ind. 446; Proctor v. Proctor, 105 N. C. 222, 10 SE 1036.

the personalty,[22] or seek a proper application of personalty which the administrator wrongfully refuses to inventory.[23] A denial of the existence, justness, or validity of the debts for the payment of which a sale is asked is also a good ground for objection.[24] But only such objections or exceptions are admissible by way of opposing the sale as meet fairly the issue whether a sale should be ordered, without interposing collateral issues which are immaterial to the question whether a sale should be ordered or should be determined in different proceedings.[25] Where land was mortgaged in several parcels to different persons, the mortgagee of one parcel has a right upon application by the administrators for an order authorizing the sale of all the land for the payment of debts to require that the sale of lands other than that covered by his mortgage should be properly and regularly ordered.[26]

Practice on overruling demurrer. Where, in a special proceeding to make real estate assets instituted before a superior court clerk in North Carolina, there was a demurrer filed to the complaint, it was error for the judge, after overruling the demurrer, to direct that an order issue to plaintiff to sell the land, but the decision of the judge should be transmitted to the clerk with leave for defendant to answer before the clerk if so advised.[27]

[§ 1516] **10. Interference of Other Proceedings Involving Land.** A suspension of proceedings for a sale by the probate court while other litigation

[a] **Sufficiency of answer.**—An answer pleading that "no cause of action to have the lands sold had accrued within the period of fifteen years next preceding the filing of the petition," was good under a statute requiring such petition to be filed within fifteen years, but an answer that "the cause of action mentioned in the petition did not occur within six years" was bad, as not showing whether the cause of action was one to which the six year limitation applied. Cole v. Lafontaine, 84 Ind. 446.

[b] **New trial for failure to consider plea.**—Where heirs, in their answer to a proceeding by an administrator to obtain a license to sell land for the payment of debts, plead that the action was not brought within the time prescribed by law, and the court below fails to consider the merits of the plea, and there is some evidence to sustain it, a new trial will be granted. Proctor v. Proctor, 105 N. C. 222, 10 SE 1036.

22. Matter of Topping, 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187; Shields v. Alsup, 5 Lea (Tenn.) 508.

[a] **A grantee of the heir** may show that personal property other than that contained in the inventory of the estate is available for that purpose, although the inventory was made by the heir. Topping's Est., 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187.

[b] **How settlement of accounts contested.**—Where after settlement of his accounts the administrator files a bill to sell land for the payment of debts, the heirs may contest the settlement by answer as well as by cross bill or original bill. Shields v. Alsup, 5 Lea (Tenn.) 508.

Determination as to sufficiency of personalty see infra §§ 1526-1528.

23. Duffield v. Walden, 102 Iowa 676, 72 NW 278.

24. Ala.—Alvarez v. Warner, 77 S 344; Little v. Marx, 145 Ala. 620, 39 S 517.

Iowa.—McDermott v. McDermott, 138 Iowa 351, 116 NW 122.

Ky.—Spradlin v. Stanley, 124 Ky. 701, 99 SW 965, 30 KyL 928.

La.—Lehman v. Worley, 40 La. Ann. 620, 4 S 573.

N. Y.—Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581.

N. C.—Barnes v. Fort, 169 N. C. 431, 86 SE 340; Person v. Montgomery, 120 N. C. 111, 26 SE 645.

Okl.—In re Jameson, 182 P 518.

Tenn.—Shields v. Alsup, 5 Lea 508.

[a] **Illustration.**—Where a judgment creditor petitioned in chancery for the sale of personal property belonging to the estate of his debtor, and the administrator joined in the petition, a cross bill by heirs alleging that the judgment had been obtained by collusion between the administrator and the creditor, and praying that it be declared void, and for a reference, was not demurrable as introducing matter not germane to the petition. Howell v. Randle, 171 Ala. 451, 54 S 563.

[b] **General allegations of fraud.**—Where a petition was filed by an administrator to sell land to satisfy a judgment against him, an answer by the heirs which alleged merely in general terms that there had been fraud and collusion without stating the facts constituting fraud was insufficient to present any issue. Best v. Best, 161 N. C. 513, 77 SE 762.

[c] **The heir must prove that the debts do not exist** in order to prevent a sale for the payment of debts. A mere allegation to that effect is insufficient. Lehman v. Worley, 40 La. Ann. 620, 4 S 573.

[d] **Formal pleadings not necessary.**—In a proceeding to sell lands for the payment of debts, formal pleadings are not contemplated, and the answer of the heir or devisee is sufficient if it in terms denies the existence of the debts for the payment of which a sale of the land is sought. Little v. Marx, 145 Ala. 620, 39 S 517.

[e] **Limitations pleaded in time.**—In proceedings for the sale of property to pay debts, an heir filed a resistance, alleging that the property was the homestead of her father, and that the claim had not been allowed against the estate of the decedent, her mother. The heir subsequently filed an amendment, pleading limitations. The latter issue was accepted by the applicant, and was tried without any objection from him. It was held that limitations were not pleaded too late. McDermott v. McDermott, 128 Iowa 351, 116 NW 122.

Proof and contest of claims see infra §§ 1519–1525.

25. Ala.—Brown v. Powell, 45 Ala. 149.

Cal.—In re Brannan, 5 Cal. Unrep. Cas. 882, 51 P 320; Dorsey's Est., 75 Cal. 258, 17 P 209.

Ga.—Jackson v. Warthen, 111 Ga. 834, 36 SE 214.

Ill.—Brown v. Kamerer, 276 Ill. 69, 114 NE 544; Dauel v. Arnold, 201 Ill. 570, 66 NE 846 [aff 103 Ill. A. 298].

Ind.—Riser v. Snoddy, 7 Ind. 442, 65 AmD 740.

Mo.—Trent v. Trent, 24 Mo. 307.

Nebr.—Waldow v. Beemer, 45 Nebr. 626, 63 NW 918.

N. J.—In re Devine, 62 N. J. Eq. 703, 49 A 138.

N. C.—Stainback v. Harris, 115 N. C. 100, 20 SE 277; Proctor v. Proctor, 105 N. C. 222, 10 SE 1036.

Or.—In re Houck, 23 Or. 10, 17 P 461.

Pa.—Wright v. Taylor, 26 Pa. Co. 369.

Tenn.—Pea v. Waggoner, 5 Hayw. 242.

[a] **Illustrations.**—(1) In an application by an administrator to sell the lands for distribution among the heirs, because they could not be equitably divided, etc., a plea that certain of the heirs had received advancements to the amount of their distributive shares or interests in the estate, and that by excluding the heirs so advanced the lands could be equitably divided among the remaining heirs, was bad on demurrer. Brown v. Powell, 45 Ala. 149. (2) An objection that, on account of the depreciated value of testator's property, a sale thereof would be to the damage of the residuary legatees cannot be interposed against a petition for an order directing the executrix to sell, as the objection can be considered only when the sale comes up for confirmation. In re Brannan, (Cal.) 51 P 320. (3) In an action by an administrator to subject lands in possession of the heirs to the payment of a judgment on a claim against decedent, the fact that the administrator made no defense to the action on the claim is no defense. Stainback v. Harris, 115 N. C. 100, 20 SE 277.

[b] **Depression of market.**—It is not a good ground of objection to an application by an administrator for leave to sell lands or stock in an incorporated company for the purpose of paying debts that the market is depressed, and that for this reason the property will not sell for its full value. Jackson v. Warthen, 111 Ga. 834, 36 SE 214.

[c] **Attack on title of decedent.**—(1) When a sale for the payment of debts is asked no person can intervene and contest the title of the decedent. In re Devine, 62 N. J. Eq. 703, 49 A 138; Swackhamer v. Kline, 25 N. J. Eq. 503. (2) While the probate court could not adjudicate title to the property, it could determine whether a dispute as to title was a sufficient cloud to cause the property to be sold at a sacrifice and refuse the application if it so decided, and, where others claimed title to the property sought to be sold, under a deed which, on its face, tended strongly to support their claim, the application was properly denied. In re Wood, 138 Mo. A. 258, 120 SW 635.

[d] **The invalidity or irregularity of the representative's appointment** does not furnish a ground of resistance to an application by him to sell real estate. Riser v. Snoddy, 7 Ind. 442, 65 AmD 740; Waldow v. Beemer, 45 Nebr. 626, 63 NW 918.

[e] **Value of property.**—Where a petition for the sale of testator's real estate stated that the value thereof was set forth in a schedule attached to the petition, an objection that the values so set forth were the appraised values, and not the present values, was not available on general demurrer. In re Levy, 141 Cal. 639, 75 P 317.

26. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

27. Jones v. Hemphill, 77 N. C. 42.

is in progress may sometimes be proper;[28] but ordinarily a sale may be ordered and made for the payment of debts notwithstanding the pendency of proceedings for partition[29] or to foreclose a mortgage,[30] the proceedings of a family meeting,[31] or a previous levy of execution on the land.[32]

[§ 1517] **11. Evidence.** The burden of proof as to the necessity for a sale rests upon the personal representative when the application is made by him,[33] and he must show such necessity regardless of whether or not there is a contest over the application.[34] It is also incumbent upon him to show that the land sought to be sold is such an asset of the estate that it may be sold.[35] Where the application is made by a creditor, the burden of proof rests upon him.[36] Since a family allowance is a charge against the estate, where a petition for a sale of real estate to pay debts assumed to state the full amount of all such charges, it should be presumed either that there was no family allowance, or, if made, that it was included in the charges enumerated.[37] Under a statute providing that in applications to the probate court for the sale of land the deed shall be sufficient evidence of title to authorize the court to proceed and hear the application, in a proceeding in the probate court for the sale of land, it was error to exclude as evidence a deed showing title in the intestate to an undivided half interest in the land at the time of his death.[38]

[§ 1518] **12. Hearing and Determination in General.**[39] As a general rule, before an order for the sale of property is made, there should be a hearing on the application therefor,[40] although there is to be found statutory authority for the practice of granting the order of sale ex parte, leaving persons interested in the estate, who question the necessity for a sale, to petition for a revocation of the license to sell, on which petition a hearing is had.[41] On the hearing of a petition for the sale of land to pay debts, the court should hear proof of the allegations of the petition and make inquiry as to the necessity of the sale,[42] and also, it has been held, as to the proper manner, terms, and con-

28. Grider v. Apperson, 38 Ark. 388; Himelspark's Est., 8 Pa. Dist. 327.

29. Brown's Succ., 23 La. Ann. 308; Rice v. Dickerman, 47 Minn. 527, 50 NW 698.

30. Fitzimmons' App., 40 Pa. 422. See also Shaw v. Barksdale, 25 S. C. 204 (proceeding to foreclose mortgage given by devisee).

[a] **Where the land has been sold in foreclosure proceedings** (1) in another court, a proceeding instituted in the surrogate's court to procure a sale thereof for a debt should be kept alive until the validity of the foreclosure can be attacked elsewhere. Knickerbocker v. Decker, 4 Dem. Surr. (N. Y.) 128. (2) The court in which a foreclosure and sale has been had will restrain an administrator from proceeding with an application to a surrogate for leave to sell the real estate for payment of debts. Breevort v. McJimsey, 1 Edw. (N. Y.) 551.

31. Munday v. Kaufman, 48 La. Ann. 591, 19 S 619.

32. Clarkson v. Beardsley, 45 Conn. 196; Patrick's Succ., 25 La. Ann. 154; Bossier v. Kennedy, 19 La. Ann. 107.

33. Mayer v. Kornegay, 163 Ala. 371, 375, 50 S 880, 136 AmSR 79; Garrett v. Bruner, 59 Ala. 513.

"The burden of proof is upon the administrator to show the necessity, or to bring himself within the conditions or provisions of the statute. While it is shown by the statement of facts that 'the estate of decedent owes debts,' it is not shown that the debts are such as to be a charge upon the lands. They may have been incurred by the administrator, or may be barred by the statute of limitations. It is not shown that they are a charge upon the lands." Mayer v. Kornegay, supra.

34. Garrett v. Bruner, 59 Ala. 513.

35. Robinson v. Martin, 103 Miss. 733, 60 S 769.

36. May v. Parham, 68 Ala. 253 (on an allegation by the creditor in a bill to subject realty to the payment of his claim, that the personalty had been wasted and that the administrators and his sureties were insolvent, the burden of showing the insolvency is upon him, and the admission by the administrator in his answer would not be evidence against the devisees).

37. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

38. Hunt v. Curtis, 151 Ala. 507, 44 S 54 (holding also that, where a petition for the sale of land belonging to the estate of E gave his name as "J. L. G. E.," the fact that the initial "G." did not appear in the deed offered in evidence to prove title did not render it inadmissible).

39. **Cross references:**
Determination as to sufficiency of personalty see infra §§ 1526–1528.
Dismissal or discontinuance see infra § 1530.
Order or decree see infra §§ 1532–1541.
Proof and contest of claim see infra §§ 1519–1525.
Relief granted see infra § 1531.
Trial of title of decedent and adverse claims to property see infra § 1529.

40. See cases infra this section.

41. Re Chisholm, 50 N. S. 341.

[a] **Nature of hearing.**—Such hearing is in the nature of a rehearing and the judge is not confined to the evidence which was before the registrar on the ex parte application. Re Chisholm, 50 N. S. 341.

42. U. S.—U. S. Bank v. Ritchie, 8 Pet. 128, 8 L. ed. 890.

Ala.—Crowder v. Doe, 193 Ala. 470, 68 S 1005.

Cal.—In re Newlove, 142 Cal. 377, 75 P 1083.

Ind.—Martin v. Starr, 7 Ind. 224.

Ky.—Tabb v. Wortham, 89 SW 191, 28 KyL 260.

Nebr.—Trumble v. Williams, 18 Nebr. 144, 24 NW 716.

N. H.—Hodgdon v. White, 11 N. H. 208.

N. J.—Smith v. Smith, 27 N. J. Eq. 445.

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Barnett v. Kincaid, 2 Lans. 320.

N. C.—Wood v. Skinner, 79 N. C. 92.

[a] **Parties interested have a right to be heard** either before the application is made, or afterward, when the court fixes a time to hear them. Randall v. Gray, 80 N. J. Eq. 13, 83 A 482.

[b] **All the jurisdictional facts must be proved** as alleged unless they are admitted. Williams v. Williams, 49 Ala. 439.

[c] **In an action against infant heirs** to procure a sale of land to pay debts, the court cannot take the allegations as confessed, but they must be supported by proof. Tabb v. Wortham, 89 SW 191, 28 KyL 260.

[d] **Depositions.**—Under a statute providing that, on application to sell a decedent's real estate, depositions shall be filed as to the facts stated in the application and the necessity of the sale, no affidavit is required setting forth the cause for taking the depositions. Bozeman v. Bozeman, 83 Ala. 416, 3 S 784.

[e] **Agreed statement of facts.**—When a petition to the orphans' court for the sale of land for the payment of legacies alleges matters of fact as to which the court should have been informed and the matters are in the knowledge of the parties, the court, to avoid expense, may permit the parties to embody them in an agreement and file it; otherwise the court will appoint an auditor. Harris' Est., 2 C. Pl. (Pa.) 17.

[f] **Trial in superior court.**—Where, on petition to sell real estate in the probate court, issues of fact are raised, the trial thereof should be transferred to the superior court in term time. Wood v. Skinner, 79 N. C. 92.

[g] **Where the allegations of the petition are not denied,** the petitioners need not prove the same before an order of sale can be issued. In re Brannan, (Cal.) 51 P 220. But compare Martin v. Starr, 7 Ind. 224, 226 ("Though the infants, by their guardian, may have consented to the sale of the land for the purpose mentioned in the bill, still it was error to render a decree against them without proof. There should have been proof adduced in the same manner as if the petition had been denied").

[h] **Consideration of cross complaint.**—The circuit court may, in connection with application of an administrator to sell property to pay debts, consider a cross complaint showing reason why the interest of one heir should be sold first, and may mold its order accordingly. Galvin v. Britton, 151 Ind. 1, 49 NE 1064.

[i] **Insolvent estate.**—In New Jersey it has been held that, when an application is made to an orphans' court for an order to sell lands for the payment of debts on the ground that the personal estate is insufficient, under the statute applicable to such cases, and upon the return of the rule to show cause issued thereon, it appears that the personal and real estate are, and are known to the administrator to be, together insufficient to satisfy the debts claimed, the orphans' court may decline to make the order of sale because the application should have been made under the provisions of the statute relating to insolvent estates, especially where the proofs justify an inference that the administrator acted in bad faith in making the application. In re Godfrey, 72 N. J. Eq. 351, 354, 65 A 202 ("The election by the administrator to proceed under section 82 et seq., rather than under section 99 et seq., was matter of serious importance to the heir-at-law acquiring title to the lands by descent").

ditions of sale;[43] but matters purely collateral to the petition for sale should not be heard or passed upon,[44] nor need the court, on application by an administrator to sell real estate to pay debts, inquire whether the land to be sold is a homestead before issuing the order for the sale.[45] The court has jurisdiction to settle an account between the devisees and the legatees before ordering a sale for the payment of an unpaid legacy,[46] and it has been held error to decree the renting or selling of land before taking an account of the liens thereon and settling the priorities of creditors.[47] When debts are charged on settled real estate, the court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate than to those whose interests are more remote.[48] It has been held that, where the representative has petitioned for an order to sell real estate to pay debts, an order directing him to mortgage such real estate is invalid.[49]

Trial by court or jury; reference. The court has jurisdiction to try any question of fact properly arising in a proceeding to sell realty,[50] and while it may in some jurisdictions afford the parties a trial by jury when the nature of the issues entitles them to a jury trial or renders it appropriate,[51] issues of law are to be decided by the court.[52] It is usually a matter of discretion with the court either to investigate the facts or to order a reference,[53] but a reference should not be had where it would be a mere form and involve useless expense.[54]

Time of hearing. The hearing may be had and an order of sale made at a special term appointed for that purpose when such special terms are authorized by statute,[55] and under some statutes the chancellor may decree a sale at chambers where the necessity of the sale is not denied.[56] After the presentation of the petition the court may fix a subsequent date for the hearing of proofs or other action in the case,[57] and it has been held that, where the cause is not disposed of at one term, it stands continued as of course to the next term, and it is not necessary that an order of continuance should be entered.[58]

Findings. The findings or conclusions of law must be consistent with the findings of fact.[59] A finding that the character of the property is such that it cannot be beneficially partitioned among the heirs and distributees, and that it is for their best interests that the same be sold and the proceeds divided, is conclusive, unless it is inconsistent with facts specially set forth.[60] A finding that the allegations of the petition are true, and that the lands are liable as assets for the payment of debts of the estate, cannot be construed as a finding that the lands are liable for the payment of purchase money.[61]

[§ 1519] **13. Proof and Contest of Claims—a. In General.** Where a sale is asked for the payment of debts, it must be shown that there are existing debts against the estate for the payment of which the sale is necessary,[62] especially where the insuf-

43. Haywood v. Haywood, 80 N. C. 42.

44. Cal.—Theller v. Such, 57 Cal. 447.

Ill.—Bennett v. Whitman, 22 Ill. 448.

Mont.—In re Tuohy, 33 Mont. 230, 83 P 486.

N. J.—Smith v. Smith, 27 N. J. Eq. 445.

N. Y.—Matter of Cole, 85 Misc. 630, 148 NYS 1099.

N. C.—Clement v. Foster, 71 N. C. 36.

Pa.—Smith's Est., 177 Pa. 17, 35 A 339.

[a] **The necessity for the sale is the only question** which can be examined into. Smith v. Smith, 27 N. J. Eq. 445.

[b] **The court should not pass on:** (1) The general power of an executor. Bennett v. Whitman, 22 Ill. 448. (2) The validity of a codicil. Smith's Est., 177 Pa. 17, 35 A 339. (3) The value of real property. Matter of Doyle, 180 App. Div. 398, 167 NYS 827. (4) A dispute of heirs or representatives with third persons. Theller v. Such, 57 Cal. 447. (5) Questions of trespass, boundary, etc., not affecting the parties to the application. Clement v. Foster, 71 N. C. 36. (6) The title of decedent and adverse claims to the property. See infra § 1529.

45. Randel v. Randel, 64 Kan. 254, 67 P 837.

46. Jenkins v. Jenkins, 7 Pa. 246.

47. Daingerfield v. Smith, 83 Va. 81, 1 SE 599; Kendrick v. Whitney, 28 Gratt. (69 Va.) 646; Simmons v. Lyles, 27 Gratt. (68 Va.) 922; Hart v. Hart, 31 W. Va. 688, 8 SE 562.

48. Metcalfe v. Hutchinson, 1 Ch. D. 591.

49. Edwards v. Baker, 145 Ind. 281, 44 NE 467; Martin v. Neal, 125 Ind. 547, 25 NE 813; Cahill v. Bassett, 66 Mich. 407, 33 NW 722.

50. Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592; Doan v. Biteley, 49 Oh. St. 588, 32 NE 600.

[a] **Illustration.**—Where it appeared from the pleadings that the decedent had, prior to his death, entered into a contract with another for the sale of part of his real estate, under which certain vested rights were claimed, it was proper for the court to dispose of the question so presented. Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

51. Jones v. Hemphill, 77 N. C. 42; Doan v. Biteley, 49 Oh. St. 588, 32 NE 600.

52. Jones v. Hemphill, 77 N. C. 42.

[a] **It is improper to transfer the cause to the trial docket** where no issue of fact is raised. Brandon v. Phelps, 77 N. C. 44.

53. Harlammert v. Moody, 26 SW 2, 15 KyL 839; Matter of Walker, 43 Misc. 475, 89 NYS 459, 4 Mills Surr. 280; Matter of Lichtenstein, 16 Misc. 667, 39 NYS 174, 25 NYCivProc 301, 1 Gibb. Surr. 499; Sanderson v. Overman, 98 N. C. 235, 3 SE 502; Thompson v. Joyner, 71 N. C. 369; Lucas' App., 53 Pa. 414; Fitzsimmons' App., 40 Pa. 422.

[a] **A sale should not be ordered pending a reference** to a commissioner to state an account of the personal assets in the hands of an administrator and before a confirmation of the report of such commissioner. Thompson v. Joyner, 71 N. C. 369.

[b] **It is the administrator's duty to apply for an auditor.**—Lucas' App., 53 Pa. 404.

54. Bloom v. Cate, 7 Lea (Tenn.) 471.

55. Roach v. Gunter, 42 Ala. 239.

56. Blake v. Black, 84 Ga. 392, 11 SE 494; Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 NW 982.

[a] **Filing order granted at chambers.**—An order or license to an administrator to sell real estate of an intestate, granted by a judge sitting at chambers, must be filed in the office of the clerk of the district court of the county in which letters of administration are issued, before the administrator is empowered and authorized to sell such real estate. Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 NW 982.

57. Gibson v. Roll, 30 Ill. 172, 83 AmD 181.

58. Duval v. McLoskey, 1 Ala. 708.

59. Henry v. Central Trust Co., 40 Ind. A. 369, 82 NE 120 (where the court made findings of facts that decedent died leaving a widow and children and grandchild, that he died seized of certain real estate, including that involved in the controversy, all of which was liable to be sold to pay debts, except certain lands which were subject to the rights of the widow under an antenuptial contract, that the personal estate was insufficient to satisfy the debts, that the claims of two heirs at law to a certain lot of the land in controversy were false and unfounded, since they had purchased and improved it with money borrowed from decedent, and conveyed it to him in satisfaction of a part of this indebtedness, the remainder of which was unpaid, that they were insolvent and had no property subject to execution, except as heirs in the estate, and that the lot ought to be sold to pay debts, conclusions of law that the real estate described in the petition ought to be sold at private sale for not less than the appraised value thereof to pay liabilities, and the petitioner ought to recover costs of the two heirs, were justified).

60. Candee v. Candee, 87 Conn. 85, 86 A 758.

61. Fry v. Lawson, 32 Ind. A. 364, 69 NE 1038.

62. Ala.—Kornegay v. Mayer, 135 Ala. 141, 33 S 36.

Ill.—Walker v. Diehl, 79 Ill. 473.

Ind.—Daniels v. Bruce, 176 Ind. 151, 95 NE 569.

Iowa.—Babbett v. Connolly, 153 Iowa 607, 133 NW 1060.

Kan.—Strom v. Wood, 100 Kan. 556, 164 P 1100.

Ky.—Bennett v. Owen, 183 Ky. 233, 208 SW 815.

Md.—Kent v. Waters, 18 Md. 53.

ficiency of the personalty is denied.[63] Under some statutes the surrogate or probate court has jurisdiction, in a proceeding to sell land, instituted by the representative, to adjudicate upon the validity of claims against the estate,[64] and disputes and controversies in regard to claims ought generally to be settled before a license to sell is granted.[65]

Where the undisputed claims exceed the value of the personal estate, an error in ruling as to the validity of another debt is harmless, in the absence of any objection to selling all the lands when part would be enough.[66]

[§ 1520] **b. Who May Contest Claims.** The heirs or devisees, being the persons whose interests would immediately be affected by a sale of realty to pay debts, are entitled to dispute the claims against the estate for the payment of which a sale is asked,[67] and judgment creditors of a devisee have

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Raynor v. Gordon, 23 Hun 264; Corwin v. Merritt, 3 Barb. 341.

N. C.—Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

Pa.—In re Vogel, 3 LancLRev 218.

Va.—Menefee v. Marge, 4 SE 726; Daingerfield v. Smith, 83 Va. 81, 1 SE 599; Kendrick v. Whitney, 28 Gratt. (69 Va.) 646; Simmons v. Lyles, 27 Gratt. (68 Va.) 922.

W. Va.—Hart v. Hart, 31 W. Va. 688, 8 SE 562.

[a] **The interest of an heir in real estate cannot be sold until** the liability has been adjudicated and the amount judicially determined and an option given to the heir to pay without sale. Menefee v. Marge, (Va.) 4 SE 826.

[b] **Allowance of claims.**—It has been held that a sale cannot properly be ordered for the payment of debts unless they have been presented to the court and proved and allowed. Walker v. Diehl, 79 Ill. 473. But compare Grayson v. Weddle, 63 Mo. 523 (where, by inadvertence, the debt shown by a mortgage note had not, at the date of an order made by the probate court for the sale of the mortgaged property, been allowed, but it was allowed before the sale, the want of allowance before making the order was a mere irregularity which would not affect the title of a purchaser at the sale).

[c] **Allowance by a circuit court to an executor and his attorney** on the executor's resignation are reviewable in a proceeding by the administrator de bonis non to sell real estate to pay debts, especially when minor heirs and purchasers from other heirs are parties, and their lands are to be subjected to sale to pay such allowances. Daniels v. Bruce, 176 Ind. 151, 95 NE 569.

[d] **Effect of failure to answer.**—Where, in a case of sale of real estate to pay debts, the court ordered the petition of a claimant to be set down for hearing on a future day fixed, a copy having been first served on the parties in interest, and no answer to the petition was filed, and it was sent to an auditor to state the claim, the statements in the petition were not therefore to be taken pro confesso, but a trial on the merits might be had. Kent v. Waters, 18 Md. 53.

[e] **A demand by a creditor of payment from the representative** is not indispensable where the representative has not in his hands sufficient assets to pay the debts and institutes an action for a settlement, which has been referred to a commissioner to audit and report upon claims filed and proved by creditors as provided by statute. Orr v. Orr, 10 SW 640, 10 KyL 755.

[f] **Discretion of court in refusing issue.**—In re Ike, 200 Pa. 202, 49 A 791.

[g] **Extent of proof.**—(1) "It is not essential that the debts should all be proved at the first hearing." Barnett v. Kincaid, 2 Lans. (N. Y.) 320, 322. (2) It is not necessary to ascertain who are the creditors and the amount of each claim, but it is sufficient to show that a sale of the real estate is necessary to pay debts. Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114. (3) It is not necessary to the validity of a license granted to an executor by the probate court to sell real estate for the payment of debts that the amount of debts should have been previously ascertained by judgment against the executor or by commission of insolvency. Tenney v. Poor, 14 Gray (Mass.) 500, 77 AmD 340.

63. Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060; Hammond v. Hammond, 2 Bland (Md.) 306.

[a] **The proper procedure** in such case is to take an account of the personalty and require the creditors to file vouchers of their claims. Hammond v. Hammond, 2 Bland (Md.) 306 (this is true even though insufficiency of personalty is to some extent admitted or established).

64. In re Bingham, 127 N. Y. 296, 27 NE 1055; In re Haxtun, 102 N. Y. 157, 6 NE 111 [rev 33 Hun 364]; Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3; Turner v. Amsdell, 3 Dem. Surr. (N. Y.) 19; Borntraeger v. Borntraeger, 7 Oh. Dec. (Reprint) 551, 3 CincLBul 891; Sherwood v. McLaurin, 96 S. C. 348, 80 SE 609.

[a] **The probate court has jurisdiction to determine the equities** between parties and the priorities of liens. Borntraeger v. Borntraeger, 7 Oh. Dec. (Reprint) 551, 32 CincLBul 891.

[b] **Claims disputed or rejected by representative** may be decided upon. In re Haxtum, 102 N. Y. 157, 6 NE 111 [rev 33 Hun 364]; Matter of Pirie, 133 App. Div. 431, 117 NYS 753 [aff 198 N. Y. 209, 91 NE 587, 19 AnnCas 672]; Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3; Matter of Williams, 1 Misc. 35, 22 NYS 906, Pow. Surr. 284; Peo. v. Westbrook, 61 HowPr (N. Y.) 138 [aff 25 Hun 192 (app dism 89 N. Y. 152)]. Contra Matter of Glann, 2 Redf. Surr. (N. Y.) 75 (the authority of the surrogate is limited to claims resisted by the heirs or devisees).

[c] **Claims against two estates.**—A petition was filed in the probate court by the administratrix of T to sell the real estate in aid of personal assets. On the death of the wife of T the petition was amended to show that fact, and an answer to the petition was filed by the administrator of the estate of the wife alleging that his intestate left only a small personal estate, that a claim for funeral expenses had been allowed, and that a claim of the administratrix of T against the estate had not been allowed, and asking the court for such relief as seemed proper. It was held that the answer would be construed as in legal effect a petition to sell the interests of his intestate, in aid of the personal assets of her estate, especially where this construction was placed upon it by the parties themselves in the probate court. Hence the probate court had jurisdiction to determine the claims against both estates. Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

[d] **Contrary view.**—(1) The orphans' court has no power, except in the case of insolvent estates, to determine as to the validity of the claims of creditors of the estate upon an application for an order for the sale of decedent's lands for the payment of debts. In re Pitcher, 61 N. J. Eq. 614, 47 A 277; Doll v. Cash, 61 N. J. Eq. 108, 47 A 1059; Partridge v. Partridge, 46 N. J. Eq. 434, 19 A 662, 47 N. J. Eq. 601, 22 A 1075; Smith v. Smith, 27 N. J. Eq. 445; Vreeland v. Schoonmaker, 16 N. J. Eq. 512. (2) The remedy of the heir or other persons interested is by filing his requisition to disallow the claims, and when that is done the proceedings for sale must stop until such claims have been adjudicated by the proper tribunal. Pirmann v. Gerhold, 5 OhS&CP 414, Oh. Prob. 142.

65. Ala.—Little v. Marx, 145 Ala. 620, 39 S 517.

Ky.—Bennett v. Owen, 183 Ky. 233, 208 SW 815.

N. C.—Person v. Montgomery, 120 N. C. 111, 26 SE 645; Brittain v. Dickson, 104 N. C. 547, 10 SE 701; Smith v. Brown, 99 N. C. 377, 6 SE 667.

Va.—New v. Bass, 92 Va. 383, 23 SE 747.

W. Va.—Carter v. Carter, 98 SE 296.

[a] **Proof and allowance of claims after decree, but before sale, sufficient.**—Little v. Sinnett, 7 Iowa 324.

66. Curtis v. Hunt, 158 Ala. 78, 48 S 598.

67. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

Ala.—Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Warren v. Hearne, 82 Ala. 554, 2 S 491; Trimble v. Fariss, 78 Ala. 260; Gayle v. Johnston, 72 Ala. 254, 47 AmR 405; Davis v. Tarver, 65 Ala. 98; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Garrett v. Bruner, 59 Ala. 513; Bond v. Smith, 2 Ala. 660.

Cal.—In re Schroeder, 45 Cal. 304; Beckett v. Selover, 7 Cal. 215, 68 AmD 237.

Ill.—Marshall v. Rose, 86 Ill. 374; Moline Water Power, etc., Co. v. Webster, 26 Ill. 233; Stone v. Wood, 16 Ill. 177; Askins v. Hott, 188 Ill. A. 235.

Ind.—O'Haleran v. O'Haleran, 115 Ind. 493, 17 NE 917; Scherer v. Ingerman, 110 Ind. 428, 11 NE 8, 12 NE 304; Cole v. Lafontaine, 84 Ind. 446; Riser v. Snoddy, 7 Ind. 442, 65 AmD 740; Timmons v. Gochenour, (A.) 117 NE 279.

Md.—McMechen v. Chase, 1 Bland 85 note.

Miss.—Champion v. Cayce, 54 Miss. 695.

Mo.—Callahan v. Griswold, 9 Mo. 784.

N. H.—Nichols v. Day, 32 N. H. 133, 64 AmD 358.

N. Y.—Hopkins v. Van Valkenburgh, 16 Hun 3; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581; In re Hearman, 11 NYS 905, 20 NYCivProc'8; Mooers v. White, 6 Johns. Ch. 360; Colson v. Brainard, 1 Redf. Surr. 324; Skidmore v. Romaine, 2 Bradf. Surr. 122.

N. C.—McNair v. Cooper, 174 N. C. 566, 94 SE 98; Matthews v. Peterson, 150 N. C. 134, 63 SE 721; Person v. Montgomery, 120 N. C. 111, 26 SE 645; Speer v. James, 94 N. C. 417.

Pa.—Dean's App., 87 Pa. 24; Murphy's App., 8 Watts & S. 165; Luton's Est., 10 Kulp 161; Clark's Est., 19 Phila. 218.

Tenn.—Stephenson v. Yandle, 3 Hayw. 109.

[a] **Reopening case.**—Where the evidence in support of a claim litigated by the devisees has been closed and the case submitted for decision, the surrogate has no power to reopen the case and receive new testimony without notice to the devisees or their attorney. In re Hearman, 11 NYS 905, 20 NYCivProc 8.

been held entitled to set up the statute of limitations, although the devisee himself did not appear.[68] It has also been held that the representative may in such proceedings contest claims,[69] and even a person to whom decedent conveyed land in fraud of creditors has been allowed to plead the statute of limitations in proceedings by the administrator to sell the land conveyed to pay outlawed debts.[70] But such claims cannot be contested by a person who would in no instance be affected by a determination as to their validity.[71]

[§ 1521] **c. Defenses.** The heirs or devisees may contest the validity and legality of any debts,[72] and may make any defense against the supposed debts which decedent could have made if living, or which the personal representative could make if the creditors were suing him at law.[73] Any fact which will show the nonexistence or extinguishment of debts is available as a defense,[74] and hence the heirs, devisees, or other persons entitled to contest claims may plead the statutes of nonclaim[75] or limitations[76] against any of the debts set up.

[§ 1522] **d. Reference and Report.** A reference and report as to the existence of debts is not necessary where allegations of the answer that all debts have been paid are not denied,[77] or where the pleadings allege, without contradiction, that decedent's debts are greater than the value of his estate and the rights of infants are not involved.[78] The report of a commissioner that in his judgment certain claims have been proved according to law is not sufficient to support a judgment directing a sale of decedent's real estate, to satisfy it, but, before any such sale is ordered, the validity of the claims should be passed upon by the court.[79]

[§ 1523] **e. Effect of Allowance or Rejection of Claim.** The real parties to the controversy in a proceeding to sell land for the payment of debts, whether instituted by the representative or by creditors, are the creditors on the one hand and the heirs or devisees on the other,[80] and the representative's admission of a claim against the estate does not bind the heirs or devisees.[81] Neither does the fact that a claim against the estate has been presented and allowed preclude the heir from contesting such claim,[82] but whether or not a claim has been allowed by the representative, it is treated the same and must be proved and established before the surrogate by common-law proof.[83] An allowance of the claim does, however, establish prima facie the existence of the debt,[84] and its due presentment.[85] The adjudication, on an application to sell real estate to pay debts of claims which were probated on the adjustment day, is conclusive on a subsequent

68. Raynor v. Gordon, 23 Hun (N. Y.) 264.

69. Bolt v. Dawkins, 16 S. C. 198.

[a] **The representative, when a creditor,** may object to the validity or dispute the present existence of a claim presented by another person. Winsmith v. Winsmith, 15 S. C. 611.

70. Syme v. Riddle, 88 N. C. 463.

71. Halbert v. Turner, 233 Ill. 531, 84 NE 704. See also Pirmann v. Gerhold, 5 OhS&P 414, Oh. Prob. 142 (holding that this would be true if the probate court had jurisdiction to determine the validity of claims against the estate, but denying such jurisdiction).

[a] **Illustration.**—Where the decree in a suit by an administrator to sell real estate subject to a mortgage to pay claims allowed against the estate made the claims of the mortgagee a prior lien to be first paid from the proceeds, the mortgagee could not complain that the amount allowed on other claims against the estate was unreasonable. Halbert v. Turner, 233 Ill. 531, 535, 84 NE 704 ("That is a question which does not concern the appellant, since he is a mere lienholder and his claims were made prior liens, to be first satisfied by the sale. He is not entitled to question the disposition of the balance of the proceeds").

72. Beckett v. Selover, 7 Cal. 215, 68 AmD 237; Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3; Matthews v. Peterson, 150 N. C. 134, 63 SE 721; Dean's App., 87 Pa. 24; Murphy's App., 8 Watts & S. (Pa.) 165; Clarke's Est., 19 Phila. (Pa.) 218.

73. Warren v. Hearne, 82 Ala. 554, 2 S 491; Gayle v. Johnston, 72 Ala. 254, 47 AmR 405; Davis v. Tarver, 65 Ala. 98; Garrett v. Garrett, 64 Ala. 263; Bond v. Smith, 2 Ala. 660; Dorman v. Lane, 6 Ill. 143; In re Roberts, 214 N. Y. 369, 108 NE 562 [aff 162 App. Div. 922 mem, 146 NYS 1110 mem].

[a] **Equitable as well as legal defenses** may be set up. Matter of Renwick, 2 Bradf. Surr. (N. Y.) 80.

74. Alvarez v. Warner, (Ala.) 77 S 344; Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Warren v. Hearne, 82 Ala. 554, 2 S 491; Trimble v. Fariss, 78 Ala. 260; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581.

[a] **Demand of estate against judgment creditor.**—An unliquidated demand held among the assets of an estate against a judgment creditor of the estate cannot be set up to defeat his application for an order to sell property for the payment of his judgment. Brown v. Roberts, 21 La. Ann. 508.

75. Kornegay v. Mayer, 135 Ala. 141, 33 S 36.

76. Ala.—Warren v. Hearne, 82 Ala. 554, 2 S 491; Gayle v. Johnston, 72 Ala. 254, 47 AmR 405; Bond v. Smith, 2 Ala. 660.

Ind.—Riser v. Snoddy, 7 Ind. 442, 65 AmD 740.

Miss.—Champion v. Cayce, 54 Miss. 695.

N. Y.—Raynor v. Gordon, 23 Hun 264; Hopkins v. Van Valkenburgh, 16 Hun 3; Matter of Knapp, 25 Misc. 133, 54 NYS 927, 28 NYCivProc 220, 2 Gibb. Surr. 581; Mead v. Jenkins, 4 Redf. Surr. 369; Skidmore v. Romaine, 2 Bradf. Surr. 122; Renwick v. Renwick, 1 Bradf. Surr. 234.

N. C.—Matthews v. Peterson, 150 N. C. 134, 63 SE 721; Person v. Montgomery, 120 N. C. 111, 26 SE 645; Speer v. James, 94 N. C. 417; Bevers v. Park, 88 N. C. 456.

S. C.—Bolt v. Dawkins, 16 S. C. 198.

[a] **Effect of objection.**—If some of the heirs set up the statute of limitations against a particular debt, and the objection is sustained, the court will not confine its operation to such part only of the debt as would fall on the heirs setting it up, but it reaches the whole debt. Renwick v. Renwick, 1 Bradf. Surr. (N. Y.) 234.

[b] **Averment as to character of debts.**—One who contests a proceeding to sell land for the payment of debts, on the ground that such debts are barred by the three years' statute of limitations provided for open accounts, need not aver that the debts are open accounts. Gayle v. Johnston, 72 Ala. 254, 47 AmD 405.

[c] **When defense not admissible.**—Where an heir took a fraudulent conveyance from his ancestor and thereby prevented the creditors from proceeding to cause the land to be sold as the decedent's until after the statute of limitations had run, he could not avail himself of the bar of the statute to defeat such proceedings, taken after they had procured the conveyance to be adjudged void. Jennings v. Jones, 2 Redf. Surr. (N. Y.) 95.

[d] **General statute of limitations applicable to real actions no defense.**—Henry v. Mills, 1 Lea (Tenn.) 144.

77. Row v. Back, (Ky.) 115 SW 806.

78. Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73.

79. Carter v. Crow, 130 Ky. 41, 112 SW 1098.

80. Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3.

81. Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3; Mead v. Jenkins, 4 Redf. Surr. (N. Y.) 369.

82. Cal.—Becket v. Selover, 7 Cal. 215, 68 AmD 237.

Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Moline Water Power, etc., Co. v. Webster, 26 Ill. 233; Askins v. Hott, 188 Ill. A. 235.

Ind.—O'Haleran v. O'Haleran, 115 Ind. 493, 17 NE 917; Scherer v. Ingerman, 110 Ind. 428, 11 NE 8, 12 NE 304; Cole v. Lafontaine, 84 Ind. 446; Timmons v. Gochenour, (A.) 117 NE 279.

N. Y.—Matter of Pfohl, 20 Misc. 627, 46 NYS 1086, 2 Gibb. Surr. 230.

Tenn.—Woodfin v. Anderson, 2 Tenn. Ch. 331.

[a] **The approval by the county court of the report of an administrator** of a sale of real estate to pay debts, in which report he took credit for amounts paid out on mortgages which were not allowable as claims against the estate, does not bind heirs on a subsequent application to sell real estate to pay debts. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

83. Nation v. Green, (Ind. A.) 114 NE 895; Turner v. Amsdell, 3 Dem. Surr. (N. Y.) 19.

84. Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Askins v. Hott, 188 Ill. A. 235.

Ind.—Jackson v. Weaver, 98 Ind. 307.

Iowa.—Milburn v. East, 128 Iowa 101, 102 NW 1116.

Kan.—McLeod v. Butts, 89 Kan. 785, 132 P 1174; Thomas v. Williams, 80 Kan. 632, 103 P 772, 25 LRANS 1304.

Md.—McLaughlin v. McGee, 131 Md. 156, 101 A 682.

85. Thomas v. Williams, 80 Kan. 632, 103 P 772, 25 LRANS 1304.

similar application.[86] The fact that a claim has been rejected by the representative does not deprive the surrogate of jurisdiction to determine its validity.[87]

[§ 1524] **f. Effect of Judgment against Representative.** A judgment against the representative conclusively establishes the indebtedness on which it was based, as against him[88] and also against heirs or devisees who were parties to the proceeding in which it was rendered.[89] But it does not preclude heirs or devisees who were not parties or privies to the proceeding in which it was rendered from contesting the claim on which it was based,[90] although it is, even as against them, prima facie evidence of the validity and amount of the claim.[91]

[§ 1525] **g. Evidence.** In an application by the representative to sell land for the payment of debts, the burden of proving the insufficiency of personal assets and the existence of debts chargeable upon the lands rests upon the personal representative,[92] and the heirs, by setting up the statute of nonclaim, do not assume the burden of proving that defense, but the representative is regarded as holding the affirmative of the issue, and to maintain it is bound to prove the due filing or presentment of the claim.[93] The general rules of evidence[94] are to be applied in determining the admissibility of the evidence adduced to prove or disprove the existence of debts,[95] and the weight and sufficiency of the evidence which has been admitted.[96] It is not necessary that the existence of debts should be proved by disinterested witnesses,[97] but the creditors themselves may testify thereto.[98] Neither is a finding of indebtedness by commissioners necessary, as the existence of debts may be proved by other evidence.[99] It is not necessary that depositions be used to prove debts but they may be proved by evidence adduced in the ordinary mode.[1] A judgment rendered against decedent in his lifetime is conclusive evidence of the existence of a liability at the time, not only against the personal representative, but also against the heirs.[2] Admissions cannot be evidence of indebtedness where the persons by whom they were made had no power to bind those against whom they are sought to be used.[3] It is sufficient for an executrix, seeking to sell property of the estate, to swear to an account presented to her, showing debts and the necessity to sell property, and she need not appear in court and be cross-examined with reference thereto.[4]

[§ 1526] **14. Determination as to Sufficiency of Personalty—a. In General.** Leave to sell land for the payment of a decedent's debts ought not to be granted without proof that the personalty is insufficient to meet the lawful claims upon the estate,[5] and a determination of the extent of the deficiency

86. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

87. In re Haxtun, 102 N. Y. 157, 6 NE 111 [rev 33 Hun 364]; Hopkins v. Van Valkenburgh, 16 Hun (N. Y.) 3; In re Merchant, 6 NYS 875.

88. Wood v. Byington, 2 Barb. Ch. (N. Y.) 387.

89. Stone v. Wood, 16 Ill. 177; Smith v. Gorham, 119 Ind. 436, 21 NE 1096; Nichols v. Day, 32 N. H. 133, 64 AmD 358.

90. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

Cal.—In re Schroeder, 46 Cal. 304.

Ill.—Stone v. Wood, 16 Ill. 177; Poiset v. Townsend, 166 Ill. A. 384.

Ind.—Scherer v. Ingerman, 110 Ind. 428, 11 NE 8, 12 NE 304.

Mo.—Callahan v. Griswold, 9 Mo. 784.

N. H.—Nichols v. Day, 32 N. H. 133, 64 AmD 358.

N. Y.—Matter of Neufeld, 50 Misc. 215, 100 NYS 444, 5 Mills Surr. 352; Wood v. Byington, 2 Barb. Ch. 387; Kavanagh v. Wilson, 5 Redf. Surr. 43; Colson v. Brainard, 1 Redf. Surr. 324.

Pa.—Dean's App., 87 Pa. 24; Luton's Est., 10 Kulp 161.

Tenn.—Woodfin v. Anderson, 2 Tenn. Ch. 331.

[a] **Heirs may show fraud on part of representative in suffering judgment.**—Callahan v. Griswold, 9 Mo. 784; Nichols v. Day, 32 N. H. 133, 64 AmD 358.

[b] **Questioning widow's award.**—On a petition by an administrator for the sale of real estate, the heirs and devisees may question the justice of the order approving the appraiser's award to the widow, as they may any other claim allowed against the estate; and thereupon the county court may refer the estimate back to the same or other appraisers, but it has no power otherwise to fix another value of her award. Marshall v. Rose, 86 Ill. 374.

[c] **Where the executor was also residuary devisee** and a creditor recovered a verdict in an action at law against him as executor, fixing the amount of the debt, but no judgment was entered thereon for the reason that there were no personal assets in the hands of the executor, and the creditor then filed a bill against the same person as residuary devisee to subject the real estate to the satisfaction of his claim, defendant in the latter bill was not concluded by the verdict rendered in the action against him as executor, nor was it evidence against him. Keefe v. Malone, 10 D. C. 236.

[d] **Limitation of rule.**—(1) The heir cannot contest debts on which judgment has been recovered against the representative except on the ground of fraud or collusion between the representative and the creditor. Person v. Montgomery, 120 N. C. 111, 26 SE 645; Tilley v. Bivins, 112 N. C. 348, 16 SE 759; Long v. Oxford, 108 N. C. 280, 13 SE 112; Proctor v. Proctor, 105 N. C. 222, 10 SE 1036; Speer v. James, 94 N. C. 417. (2) Where the findings of the court negative the allegations that the judgment was thus obtained, the heir is bound by the judgment. Long v. Oxford, 108 N. C. 280, 13 SE 112; Proctor v. Proctor, 105 N. C. 222, 10 SE 1036.

91. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call (10 Va.) 308.

Cal.—In re Schroeder, 46 Cal. 304.

Ill.—Stone v. Wood, 16 Ill. 177.

Ind.—Smith v. Gorham, 119 Ind. 436, 21 NE 1096; Scherer v. Ingerman, 110 Ind. 428, 11 NE 8, 12 NE 304.

N. H.—Nichols v. Day, 32 N. H. 133, 64 AmD 358.

N. Y.—Colson v. Brainard, 1 Redf. Surr. 324.

Pa.—Schmidt's Est., 5 Pa. Dist. 17, 17 Pa. Co. 314.

92. Ala.—Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Davis v. Tarver, 65 Ala. 98; Garrett v. Garrett, 64 Ala. 263; Garrett v. Bruner, 59 Ala. 513.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46.

Ind.—Nation v. Green, (A.) 114 NE 895.

Kan.—Strom v. Wood, 100 Kan. 556, 164 P 1100.

Ky.—Tabb v. Wortham, 89 SW 191, 28 KyL 260.

[a] **On the other hand** it has been held that, where the administrator admits the validity of a claim, the burden of disproving it is on the one attacking it. Matter of Le Baron, 6 NYCivProc 62, 3 Dem. Surr. 37, 67 HowPr 346.

[b] **Creditors are sometimes required to prove their claims.**—Gibson v. McCormick, 10 Gill & J. (Md.) 65; Hammond v. Hammond, 2 Bland (Md.) 306.

93. Kornegay v. Mayer, 135 Ala. 141, 33 S 36.

94. See Evidence 22 C. J. p 1.

95. Lassiter v. Upchurch, 107 N. C. 411, 12 SE 63; Erck v. Erck, 107 Tenn. 77, 63 SW 1122; Henry v. Drought, 10 Tex. Civ. A. 379, 30 SW 584.

96. Howe v. Brown, 287 Ill. 532, 123 NE 46; Rullman v. Winterling, 101 Md. 35, 60 A 468; Wilson v. Brown, 134 N. C. 400, 46 SE 762; Blanton v. Mayes, 72 Tex. 417, 10 SW 452.

97. Miller v. Mayer, 124 Ala. 434, 26 S 892.

98. Alford v. Alford, 96 Ala. 385, 11 S 316; Chamberlin v. Chamberlin, 4 Allen (Mass.) 184.

99. Cahill v. Bassett, 66 Mich. 407, 33 NW 722.

1. Hunt v. Curtis, 151 Ala. 507, 44 S 54; Poole v. Daughdrill, 129 Ala. 208, 30 S 579 [overr Quarles v. Campbell, 72 Ala. 64].

2. Wood v. Byington, 2 Barb. Ch. (N. Y.) 387 (a decretal order made in a chancery suit during the life of defendant, establishing a partnership between him and complainant and directing an account, is conclusive evidence that the right of complainant to call defendant to account was not barred by the lapse of time or otherwise at the time that the order was made, against the heirs of such defendant as well as against his personal representatives, in a proceeding before the surrogate for the sale of deceased's real estate for the payment of his debts; and this, notwithstanding the fact that such suit abated after such order by the death of defendant).

3. See cases infra this note.

[a] **The rule has been applied** to admissions by: (1) The administrator. Chamberlin v. Chamberlin, 4 Allen (Mass.) 184. (2) The heirs. Kornegay v. Mayer, 135 Ala. 141, 33 S 36. (3) The guardian ad litem of an infant defendant. Hooper v. Hardie, 80 Ala. 114.

4. Balovich's Succ., 130 La. 1043, 58 S 873.

5. Ala.—Little v. Marx, 145 Ala. 620, 39 S 517.

Ill.—Howe v. Brown, 287 Ill. 532, 123 NE 46.

of personalty,[6] even though the application for a sale is not resisted by the heirs or devisees.[7] It has been considered that it should also appear upon an application by the executor or administrator that he has proceeded with due and reasonable diligence in pursuing the personal assets and converting and applying them to the purposes of administration.[8]

[§ 1527] **b. Inventory, Appraisal, or Account.** While it is sometimes required by statute that an inventory and appraisement of the personal estate be exhibited to the court on an application for a sale of realty to pay debts,[9] and it has been held error to decree a sale for this purpose until the administration accounts have been settled and the amounts and priorities of all debts ascertained,[10] the more general rule is that the filing of an inventory, appraisal, schedule, or account is not usually essential to the jurisdiction of the court to order a sale of realty for the payment of debts where it otherwise appears that the personal assets are insufficient.[11] So also, where it appeared that the personal property was insufficient to pay debts, it was held no objection to an order for the sale of real estate for that purpose that an appeal from the executrix's account was pending and remained undetermined.[12] Allowances by a circuit court to an executor and his attorney on the executor's resignation are reviewable in a proceeding by the administrator de bonis non to sell real estate to pay debts, especially when minor heirs and purchasers from other heirs are parties, and their lands are to be subjected to sale to pay such allowances.[13]

Where land is to be sold for division of the proceeds, an appraisal of the land is not necessary.[14]

[§ 1528] **c. Evidence.** The burden of proof rests upon the representative, when the application for a sale of realty to pay debts is made by him, to show that the personalty is actually insufficient

Ky.—Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73.

N. J.—Taylor v. Hanford, 11 N. J. L. 341; Bray v. Neill, 21 N. J. Eq. 343; In re Fritz, 83 N. J. Eq. 610, 91 A 1017.

N. Y.—Matter of Catlin, 57 Misc. 269, 109 NYS 542, 6 Mills Surr. 298; In re Lichtenstein, 16 Misc. 667, 39 NYS 174, 25 NYCivProc 301.

N. C.—Person v. Montgomery, 120 N. C. 111, 26 SE 645.

Or.—In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

Pa.—Spencer v. Jennings, 123 Pa. 184, 16 A 426; Stiver's App., 56 Pa. 9.

R. I.—Sayles v. Steere, 37 R. I. 411, 93 A 34.

Tenn.—Wade v. Fisher, 10 Heisk. 490.

Tex.—Cavitt v. Beall Hardware, etc., Co., (Civ. A.) 204 SW 798.

W. Va.—Miller v. Mitchell, 58 W. Va. 431, 52 SE 478.

[a] **Where it is admitted** (1) by objections to an administrator's petition that the only property of the estate in the state is the realty, the objectors cannot on appeal complain that it was not proved that the personal property had been exhausted. In re Smith, 43 Or. 595, 73 P 336, 75 P 133. (2) The real property may be sold where the pleadings allege, without contradiction, that decedent's debts are greater than the value of the estate, although there has been no reference to a commissioner, or report of the necessity of sale, since, where the rights of infants are not involved, a reference and report are not essential to the validity of the sale. Union Trust, etc., Co. v. Marshall, 130 Ky. 206, 113 SW 73; Pierce v. Marrs, 153 Ky. 748, 156 SW 404.

[b] **Proof that there is personalty available** for payment of debts should be received. Cavitt v. Beall Hardware, etc., Co., (Tex. Civ. A.) 204 SW 798.

[c] **Insufficiency of personalty must be determined by referee.**—Matter of Van Vleck, 32 Misc. 419, 66 NYS 727, 1 Mills Surr. 606.

[d] **A report of the clerk or master** (1) that the personalty is insufficient is necessary. Reid v. Huff, 9 Humphr. (Tenn.) 345; Frazier v. Pankey, 1 Swan (Tenn.) 75. (2) Such report must be confirmed before the sale is ordered. Frazier v. Pankey, supra (a report made and confirmed after the sale will not validate it). (3) A settlement made by the representative with the clerk of the county court is prima facie evidence in his favor, and when accurate and not excepted to may constitute the basis of a master's report so as to authorize the chancellor to direct the sale of slaves to pay the debts of the estate. Curd v. Bonner, 4 Coldw. (Tenn.) 632. (4) A report of the assets of the estate drawn by the clerk without the submission of testimony, but by adopting an exhibit to an unsworn bill, purporting to lump the amount of the assets and the debts, and containing no particulars as to the value of the assets or as to the names of the creditors and the value of their respective claims, is not such a report as will authorize a decree for the sale of the property of the estate to pay the debts. Wade v. Fisher, 10 Heisk. (Tenn.) 490.

[e] **The filing of a list of the debts,** for the payment of which succession property is to be ordered sold, is required only in case the order for the sale is to be made by the clerk or his chief deputy, and not by the judge himself. Thibodaux v. Barrow, 129 La. 395, 56 S 339.

[f] **A proceeding to sell land will not be deferred** until the disposal of a pending proceeding against an heir alleging that he had personal property belonging to estate, where heir answered that he had no personal assets belonging to estate. Howe v. Brown, 287 Ill. 532, 123 NE 46.

6. Bray v. Neill, 21 N. J. Eq. 343; Miller v. Mitchell, 58 W. Va. 431, 52 SE 478.

[a] **Foreclosure of mortgage.**—Where, after the death of the grantor, it is necessary to invoke equity jurisdiction to foreclose a mortgage on specific real estate, the court should require the personal estate in the hands of the administrator to be first ascertained and determine how much of it is applicable to the mortgage debt and should require it to be so applied before a decree of sale of the land in satisfaction thereof. Miller v. Mitchell, 58 W. Va. 431, 52 SE 478.

7. In re Lichtenstein, 16 Misc. 667, 39 NYS 174, 25 NYCivProc 301, 1 Gibb. Surr. 449; Schilb v. Moon, 65 W. Va. 564, 64 SE 739.

8. Bray v. Neill, 21 N. J. Eq. 343; Matter of Kingsland, 60 Hun 116, 14 NYS 495, 20 NYCivProc 357 [rev 9 NYS 447, 18 NYCivProc 115, 2 Conn. Surr. 187]; Farrington v. King, 1 Bradf. Surr. (N. Y.) 182.

[a] **The court should ascertain and decide** whether the personal estate which came to the hands of the applicant has been applied to the payment of debts. Bray v. Neill, 21 N. J. Eq. 343.

[b] **On an application by an administrator de bonis non** for leave to sell land for the payment of debts, he must show that his predecessor showed the same diligence as would have been required of him had he been appointed administrator in the first instance. Matter of Kingsland, 60 Hun 116, 14 NYS 495, 20 NYCiv Proc 357 [rev 9 NYS 447, 18 NYCiv Proc 115, 2 Conn. Surr. 187].

Necessity for actual application of personalty see supra § 1452.

9. Walker's App., 1 Grant (Pa.) 431.

[a] **Filing not essential.**—Although the filing of such inventory and appraisement is the better practice, yet all that is required under the statute is the exhibition thereof to the court. Stiver's App., 56 Pa. 9; Thomas' Est., 3 WklyNC 96.

[b] **Amendment.**—(1) Where the schedule and appraisement is imperfect and insufficient, it may be amended. Walker's App., 1 Grant (Pa.) 431. (2) This may be done even after the sale. Kennedy v. Wachsmuth, 12 Serg. & R. 171, 14 AmD 676.

10. Ford v. Walsworth, 15 Wend. (N. Y.) 449, 450; Hart v. Hart, 31 W. Va. 688, 8 SE 562.

"The omission to present to the surrogate an account of the personal estate and of the debts of the intestate, was a fatal defect in the proceedings." Ford v. Walsworth, supra.

[a] **Death of debtor pending suit.**—Where, pending a suit to subject land to a judgment, the debtor dies and his heirs are made parties, the suit becomes one to sell the land of the heirs for the debt of decedent, and, before a sale is decreed, the accounts of the administrator must be settled, and any unadministered assets administered in relief of the realty. Schlib v. Moon, 65 W. Va. 564, 64 SE 739.

11. Nichols v. Lee, 16 Colo. 147, 26 P 157; Shoemate v. Lockridge, 53 Ill. 503; Turner v. Fell, 142 Ill. A. 458; Eldridge v. McMackin, 37 Miss. 72; Grayson v. Weddle, 63 Mo. 523; Mount v. Valle, 19 Mo. 621; Overton v. Johnson, 17 Mo. 442; Brown v. Woody, 22 Mo. A. 253.

"It is urged that the administrator de bonis non did not file a just and true account. Having shown that the personal estate was exhausted, this was excused." Turner v. Fell, supra.

[a] **Omission does not render sale void.**—Although an administrator's account of the personal estate and debts is required by statute to be exhibited on oath before a citation to show cause why an administrator's sale of land to pay debts shall not be made, its omission does not render a decree of sale void. Learned v. Matthews, 40 Miss. 210.

[b] **A creditor desiring a sale** of real estate under order of a probate court is not obliged to exhibit a list of debts and inventory of the effects of the estate. That duty devolves on the administrator. Grayson v. Weddle, 63 Mo. 523.

12. Read v. Gardner, 30 R. I. 485, 76 A 177.

13. Daniels v. Bruce, 176 Ind. 151, 701, 95 NE 569, 577.

14. Lisle v. Lisle, 183 Ky. 656, 210 SW 496.

to pay the debts.[15] Where the county court was without power to order real estate sold disencumbered of mortgages, the presumption on a subsequent application for sale of real estate is that, at the prior sale, only the interest of the decedent in the property was sold, so that the administrator had no right to apply the proceeds to satisfy the mortgages.[16] The fact that the administrator's account as allowed showed a balance in his hands does not raise a presumption that the subsequent sale of land belonging to the estate was not necessary to pay the debts.[17] Proof that the administrator had received profits from the estate more than sufficient to pay the debts is admissible.[18] Where an administrator de bonis non neglects to cite his predecessor for the purpose of showing administration of personal assets and that they were not sufficient to pay debts, such previous administrator may be cited on petition of any creditor having an interest in such sale.[19]

Mode of proof. It is sometimes required that the insufficiency of the personalty be shown by depositions[20] of disinterested witnesses[21] who must state facts within their own knowledge.[22] But the contestant may controvert by oral evidence the statements in the application[23] or the depositions.[24]

[§ 1529] **15. Trial of Title of Decedent and Adverse Claims to Property.** It has frequently been asserted that the court cannot, in a proceeding to sell lands for the payment of debts, decide upon the validity of the title of decedent or adjudicate on adverse claims to the property held or asserted by other persons,[25] except in so far as any doubt as to the title may bear upon the expediency of the sale.[26] But it has also been held that, without trying the absolute title, the surrogate may determine the probable ownership,[27] and in a few states the courts are held to have power to try title in such a proceeding, either by virtue of express statute or by the construction placed on statutes not expressly giving the right.[28]

15. Mayer v. Kornegay, 103 Ala. 371, 50 S 880, 136 AmSR 79; Garrett v. Garrett, 64 Ala. 263; Sayles v. Steere, 37 R. I. 411, 93 A 34.

[a] **Evidence showing insufficiency.**—Garner v. Toney, 107 Ala. 352, 18 S 161; In re Newlove, 142 Cal. 377, 75 P 1083; Ditton v. Hart, 175 Ind. 585, 95 NE 119; Matter of Plopper, 15 Misc. 202, 37 NYS 33, 1 Gibb. Surr. 439.

[b] **Evidence not showing insufficiency.**—White River Village Cong. Church v. Benedict, 62 N. J. Eq. 812, 48 A 1117 [aff 59 N. J. Eq. 136, 44 A 878]; Sanford v. Granger, 12 Barb. (N. Y.) 392; Matter of Meagley, 39 App. Div. 83, 56 NYS 503; Sayles v. Steere, 37 R. I. 411, 93 A 34.

[c] **Evidence insufficient to show agreement** of one entitled to half the real estate to pay half the expenses of administration. Randolph v. Prowers, 21 Colo. A. 541, 122 P 804.

16. Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Matter of Welch, 36 N. B. 628.

17. Read v. Gardner, 30 R. I. 485, 76 A 177; Jacocks v. Paterson, 18 R. I. 751, 30 A 795.

18. Dorman v. Lane, 6 Ill. 143.

19. Woodfin v. Anderson, 2 Tenn. Ch. 331.

20. Little v. Marx, 145 Ala. 620, 39 S 517; Garrett v. Bruner, 59 Ala. 513; Hill v. Hill, 9 Ala. 793.

[a] **Proof must be filed and recorded.**—Little v. Marx, 145 Ala. 620, 39 S 517.

[b] **A decree of insolvency of a decedent's estate** by a court of competent jurisdiction makes a prima facie case of necessity for a sale of the lands, dispensing with the necessity of taking depositions as in chancery cases, and substituting the decree for proof of the existence of debts and of the insufficiency of personal assets. Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48.

21. Little v. Marx, 145 Ala. 620, 39 S 517; Quarles v. Campbell, 72 Ala. 64.

[a] **It need not be shown affirmatively** that the witnesses are disinterested, since that will be presumed in the absence of proof to the contrary. Quarles v. Campbell, 72 Ala. 64.

[b] **One witness sufficient.**—Although the statute requires the deposition of "witnesses," the fact that the necessity was shown by the deposition of one witness only does not render the sale void. Thompson v. Boswell, 97 Ala. 570, 12 S 809 [overr Stevenson v. Murray, 87 Ala. 442, 6 S 301].

22. Quarles v. Campbell, 72 Ala. 64 (it is not sufficient that the witnesses state that in their opinion there is no way of paying decedent's debts other than by a sale of his realty).

23. Garrett v. Bruner, 59 Ala. 513.

24. Garner v. Toney, 107 Ala. 352, 18 S 161.

25. Cal.—In re Steward, 1 Cal. A. 57, 81 P 728.

Kan.—Byerly v. Padie, 95 Kan. 400, 404, 148 P 757 [cit Cyc]; Powers v. Scharling, 76 Kan. 855, 858, 92 P 1099 [cit Cyc]; Cooper v. Armstrong, 3 Kan. 78.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23; Walker v. Fuller, 147 Mass. 489, 18 NE 400.

Miss.—Gill v. Shirley, 55 Miss. 814.

Mo.—Shields v. Ashley, 16 Mo. 471; In re Wood, 138 Mo. A. 258, 120 SW 635.

Mont.—In re Tuohy, 33 Mont. 230, 83 P 486.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

N. Y.—Libby v. Christy, 1 Redf. Surr. 465; Hewitt v. Hewitt, 3 Bradf. Surr. 265.

Pa.—Bodder's Est., 30 Pa. Co. 417.

Tex.—Fryckberg v. Scott, (Civ. A.) 218 SW 21.

[a] **The district court on appeal** from the probate court has no greater power. Cooper v. Armstrong, 3 Kan. 78.

[b] **The court should not make a finding** as to title on an application to sell land for payment of debts. In re Tuohy, 33 Mont. 230, 83 P 486.

[c] **Admission of deed not determination of claim.**—Where, on an application by an administrator for a sale of lands of the estate, the application was opposed by one claiming as grantee of an heir, the admission of her deed in evidence did not involve the determination of any adverse claim to the property. In re Steward, 1 Cal. A. 57, 81 P 728.

26. Walker v. Fuller, 147 Mass. 489, 18 NE 400; In re Wood, 138 Mo. A. 258, 120 SW 635.

"We do not sanction the argument of the executors that the probate court had no discretion to exercise, but was bound to order a sale on application therefor in proper form. Though that court could not adjudicaate the issue of title, it did have authority to determine whether or not an existing dispute over the subject of title was of sufficient gravity to cause the property to be sacrificed if sold before the settlement of the dispute and, solving that question in the affirmative, to refuse the application. The rule in such cases thus is stated in Woerner on The American Law of Administration, Vol. II, p. 1128. 'Nor can the title of the deceased to the land proposed to be sold be passed on. . . . If it appear that the title is disputed and that by reason thereof the sale would be made under disadvantageous circumstances, it is proper to stay proceedings until the title may be ascertained in a court of competent jurisdiction.' In Valle v. Bryan, 19 Mo. 423, Judge Scott said: 'It is bad policy . . . to order sales where there is a doubt about the title of the land ordered to be sold when that doubt may be easily removed by a suit.' And in Trent's Adm'r v. Trent, 24 Mo. 307, the Supreme Court, speaking again through Judge Scott, said: 'This court has discountenanced the practice of selling real estate where the title is in such a condition as must produce a sacrifice and when it can be made clear before the sale.' Under such circumstances, the proceedings should be delayed until the title can be relieved from embarrassment. These authorities show jurisdiction in the probate court to refuse the application, on the ground that 'there is a doubt as to decedent's title.' And there can be no question of the wisdom of the ruling of that court. To force a sale of the land while the objectors were asserting that they owned it in fee simple and were resting their claim on the terms of a deed that, to say the least, on its face strongly aids the claim, could not result otherwise than in the sacrifice of the property. The estate would get nothing out of it and if the executors are right in their claim that the testatrix died seized of a fee simple estate, the speculative and venturesome purchaser, and not her creditors and legatees, would profit by the sale." In re Wood, 138 Mo. A. 258, 263, 120 SW 635.

27. Libby v. Christy, 1 Redf. Surr. (N. Y.) 465.

28. Ga.—Hull v. Watkins, 134 Ga. 779, 68 SE 506; McCraw v. Webb, 134 Ga. 579, 68 SE 324; Evans v. Brown, 80 Ga. 656, 6 SE 280; Martin v. McConnell, 29 Ga. 204; Falls v. Griffith, 25 Ga. 72.

Ill.—Schottler v. Quinlan, 263 Ill. 637, 105 NE 710; Hoyt v. Northrup, 256 Ill. 604, 100 NE 164; Clayton v. Clayton, 250 Ill. 433, 95 NY 480; Cunningham v. Daugherty, 220 Ill. 45, 77 NE 95. Aliter prior to the act of June 15, 1887. Newell v. Montgomery, 129 Ill. 58, 21 NE 508 [aff 30 Ill. A. 48]; Beebe v. Saulter, 87 Ill. 518; Le Moyne v. Quimby, 70 Ill. 399; Shoemate v. Lockridge, 53 Ill. 503; Gridley v. Watson, 53 Ill. 186; Cutter v. Thompson, 51 Ill. 390; Phelps v. Funkhouser, 39 Ill. 401; Smith v. McConnell, 17 Ill. 135, 63 AmD 340.

Ind.—Gavin v. Graydon, 41 Ind. 559.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592; Perry v. Peterson, 98 N. C. 63, 3 SE 834. See also Straughan v. Tysor, 124 N. C. 229, 32 SE 557 (where title was passed on, no question as to power of court being raised).

[§ 1530] **16. Dismissal or Discontinuance.** An application for an order to sell or to mortgage real estate to pay debts, after jurisdiction of the parties is acquired, can be dismissed only by an order to that effect,[29] and where the insufficiency of personalty imposed on the representative a duty, under the statute, to apply for an order for sale of realty, he has no right to dismiss the proceeding,[30] and after a hearing has been had, the debts proved, and an order of sale made, the administrator cannot at his option discontinue the proceeding,[31] but the creditors may insist upon its further prosecution, and apply, as may be necessary, for reviving or speeding the proceedings.[32] Where an administrator presented a petition to the orphans' court asking authority to sell land alleged to be the property of his intestate, it was proper for the court to dismiss such petition when it was made to appear by those interested that the intestate had but a life estate in the premises,[33] but the fact that an executor or administrator has been removed after a petition to sell lands to pay debts has been filed is no reason why the proceedings should be dismissed,[34] it being sufficient that it is delayed until a properly qualified executor or administrator shall be found to proceed.[35] On an application to sell land for payment of debts, it being admitted that there are no personal assets, a judgment of dismissal on the merits is conclusive against the validity of the claims asserted as debts, and is a bar to another petition by the administrator for the same purpose, there being no evidence of change in the status of the estate.[36] Where the representative petitions for a sale of realty to pay debts, and the defendants, heirs of decedent, file a cross complaint to quiet title to the real estate, a decree dismissing plaintiff's petition, but failing to quiet title, is in effect an adjudication that plaintiff had no claim against such real estate.[37]

[§ 1531] **17. Relief Granted.** Where the petition in a suit by heirs to sell land to pay debts did not ask for an accounting and distribution of debts owed the estate by the widow and administrator, or for the determination of the ownership of notes claimed by one of the heirs, the judgment properly left those matters open for a subsequent adjudication.[38] On an executor's petition to sell land there can be no order of sale in favor of a mortgagee on his mortgage in the nature of a foreclosure.[39] If, in a suit to sell a decedent's lands, one not a party, against whom no relief is sought, claiming to be an assignee of an oral contract of sale by decedent to another part of his land, intervenes, setting up the oral contract, praying for specific execution, the court is without jurisdiction to decree such specific performance against infant heirs and defendants not parties.[40]

[§ 1532] **18. Order or Decree of Sale—a. Necessity.** Where there is no power of sale given by will, or where in the case of personalty the representative is without power to sell without the sanction of the court, it is absolutely necessary to the making of a valid sale of a decedent's property by his personal representative that there should be an order or decree of the proper court directing or authorizing such sale;[41] and it has been held that a

S. C.—Gates v. Irick, 31 S. C. L. 593.

[a] **An order of sale should not be made until** an issue as to the title to the land has been tried and disposed of. Perry v. Peterson, 98 N. C. 63, 3 SE 834.

[b] **The court may determine** the validity of a quitclaim deed from one heir to another, and the validity of an attachment lien. Clayton v. Clayton, 250 Ill. 433, 95 NE 480.

[c] **The burden of proof** as to decedent's title to the land, where this is denied, is on the representative. Howe v. Brown, 287 Ill. 532, 123 NE 46.

[d] **Presumption from possession.**—On a claim interposed by a third person to an administrator's sale of real estate, it is not erroneous to charge that, if decedent died in possession of the real estate, such possession would be sufficient to raise a presumption of title. Rexford v. Bleckley, 131 Ga. 678, 63 SE 337.

[e] **Possession of land in the administrator** being admitted, and claimant thereto having assumed the burden of proof and failed to carry it, there was no error in directing a verdict against him. Dumas v. Barron, 130 Ga. 736, 61 SE 710.

[f] **Admissibility of evidence.**—In a proceeding by an administrator to sell land, in which decedent's widow filed a claim to the land by virtue of a certain deed, testimony that claimant had told witness that she wished that the administrator would let it stay as the will was, which will provided that claimant should have the land for life, was admissible on the question as to whether or not claimant held title to the land only to secure a debt, the testimony being susceptible of a meaning tending to show that she preferred a life estate in the land to the interest she obtained under the deed. Wadsworth v. Wadsworth, 134 Ga. 816, 68 SE 649.

[g] **Sufficiency of evidence.**—Parol evidence that, some thirty years before the interposition and trial of a claim to real estate sought to be sold by an administrator, decedent made a deed to claimant, his son, with no production of the deed or proof of its terms, except a statement that when it was made a bond for title was mentioned, whereby decedent had secured his son against loss on notes executed by the son to creditors of decedent, and that decedent asked the draftsman to make it "so as to sustain" the son from all loss, but with no evidence that the son ever suffered any loss or that the danger thereof still existed and with no possession in him, was not sufficient to show ownership of the land by him, and to prove that the land was not subject to sale by the administrator of decedent. Dumas v. Barron, 130 Ga. 736, 61 SE 710.

[h] **Filing of affidavit of claim.**—A claim affivadit to prevent an administrator's sale of land should be filed in the court of ordinary, and be transmitted under § 4631 to the superior court. Beach v. Lott, 132 Ga. 70, 63 SE 627.

[i] **Damages for delay caused by interposition of claim.**—(1) A claim interposed to an administrator's sale for the purpose of delay only renders claimant liable to damages as a claim interposed to an execution sale, to be calculated upon the basis of the value of the property claimed. Rexford v. Bleckley, 131 Ga. 678, 63 SE 337. (2) Where the court is about to dismiss a claim case against an administrator advertising land for sale, for failure of claimant to prosecute, it is allowable for the administrator to have the case submitted to the jury, to assess damages as in cases where the claim is submitted for trial to the jury. Crawford v. Crawford, 139 Ga. 68, 76 SE 564.

29. Raven v. Norton, 2 Dem. Surr. (N. Y.) 110.

30. Daniels v. Bruce, 176 Ind. 151, 159, 95 NE 569 ("Such a proceeding cannot be subject to the control of the executor or administrator as to whether it shall be begun, continued to the end, or abandoned. That control must necessarily rest with the court. To hold otherwise would be to say that the servant was greater than the master. It follows, then, that the court did not err in refusing to permit the dismissal, and that whether appellant's motion therefor was timely is immaterial").

31. Farrington v. King, 1 Bradf. Surr. (N. Y.) 182.

32. Raven v. Norton, 2 Dem. Surr. (N. Y.) 110; Farrington v. King, 1 Bradf. Surr. (N. Y.) 182.

33. Grim's App., 1 Grant (Pa.) 209.

34. Steele v. Steele, 89 Ill. 51.

35. Steele v. Steele, 89 Ill. 51.

36. McCalley v. Robinson, 70 Ala. 432.

37. Smith v. Linton Trust Co., (Ind. A.) 121 NE 92.

38. Row v. Back, (Ky.) 115 SW 806.

39. Harlan v. Roberts, 2 Oh. Dec. (Reprint) 473, 3 WestLMonth 202.

40. Chapman v. Branch, 72 W. Va. 54, 78 SE 235.

41. U. S.—Gaines v. New Orleans, 6 Wall. 642, 18 L. ed. 950.

Ala.—Woods v. Legg, 91 Ala. 511, 8 S 342; Gilchrist v. Shackelford, 72 Ala. 7.

Ark.—Bryan v. Craig, 64 Ark. 438, 44 SW 348.

Ga.—Hall v. Davis, 122 Ga. 252, 50 SE 106; Waller v. Hogan, 114 Ga. 383, 40 SE 254; Groover v. King, 46 Ga. 101.

Ind.—Bell v. Shaffer, 154 Ind. 413, 56 NE 217.

Ky.—Clore v. Clore, 184 Ky. 83, 89, 211 SW 208.

La.—Balovich's Succ., 128 La. 69, 54 S 474; Robert v. Brown, 14 La. Ann. 597.

Md.—Fuhrman v. Fuhrman, 115 Md. 436, 80 A 1082.

Mass.—Gregson v. Tuson, 153 Mass. 325, 26 NE 874.

Minn.—Hanson v. Ingwaldson, 77

failure of the record to show an order of sale is a fatal defect and incapable of being supplied by anything else, whether consisting of a notice of sale, a report of sale, an approval of the sale, or the representative's deed.[42]

[§ 1533] **b. Time of Making.** Where the probate court has acquired jurisdiction to determine a petition for a sale of decedent's land to pay debts, jurisdiction is not lost by lapse of the term, and an order of sale is not invalid because made at a term subsequent to the one at which the petition was first presented.[43]

[§ 1534] **c. Form and Requisites—(1) In General.** The order of sale should be based upon the petition presented,[44] and must be made by the court and evidenced by the records.[45] It should show the existence of the necessary jurisdictional facts,[46] the giving of notice to persons interested, where this is necessary,[47] and the necessity for the sale.[48] It is not necessary that it should set out the proceedings upon which it is founded,[49] and it has also been held unnecessary that the court should find and state in its judgment the amount of the debts.[50] Neither is it essential that the order should recite that the rents of the realty are insufficient to pay the debts.[51] Some statutes require that the order or decree shall fix the terms and conditions,[52]

Minn. 533, 80 NW 702, 77 AmSR 692.
Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072; Evans v. Snyder, 64 Mo. 516 [foll Melton v. Fitch, 125 Mo. 281, 28 SW 612; Greene v. Holt, 76 Mo. 677].
N. Y.—Monroe v. Musica, 166 App. Div. 929, 151 NYS 504.
N. C.—McNeill v. Fuller, 121 N. C. 209, 28 SE 299.
Oh.—Goforth v. Longworth, 4 Oh. 129, 19 AmD 588; Newcomb v. Smith, Wright 208.
Or.—Smith v. Whiting, 55 Or. 393, 106 P 791; Levy v. Riley, 4 Or. 392.
S. C.—Hunter v. Hunter, 58 S. C. 382, 36 SE 734, 79 AmSR 845.
Tex.—Matula v. Freytag, 101 Tex. 357, 107 SW 536; Coy v. Gaye, (Civ. A.) 84 SW 441.

[a] **When order of sale presumed.**—(1) After possession and use of a Texas land certificate for sixty years from its unimpeached transfer by an administrator, and twenty-five years' continued use and possession of the lands patented thereunder, improving them and paying taxes thereon, an order of court for the sale of the land, referred to in the transfer, will be presumed. Massenberg v. Denison, 107 Fed. 18, 46 CCA 120. (2) Under the rule that a fiduciary is presumed faithfully to have performed his trust, it will not be presumed, in the absence of a contrary showing, that an administrator transferred property of the estate without an order of the orphans' court, contrary to statute. Fuhrman v. Fuhrman, 115 Md. 436, 80 A 1082.

[b] **Where the record shows only that certain preliminary steps were taken** leading up to a judgment or order of sale, it cannot be inferred that such a judgment or order was rendered. Hunter v. Hunter, 58 S. C. 382, 36 SE 734, 79 AmSR 845.

[c] **Conveyance under defective order cannot be aided in equity.**—Tiernan v. Deam, 2 Oh. 383, 15 AmD 557.

[d] **Effect of recital in order appointing executor.**—Where an order admitting a will to probate and appointing an executor recited that the will provided that no further action should be taken by the court other than the probate of the will, the appointment of the executor, and the filing and approving of the inventory and list of claims, the recital was not a part of the judgment, and no adjudication of the executor's rights to dispose of the land of the estate without an order of court. Gray v. Russell, 41 Tex. Civ. A. 526, 91 SW 235.

42. Robert v. Brown, 14 La. Ann. 597; Evans v. Snyder, 64 Mo. 516; Goforth v. Longworth, 4 Oh. 129, 19 AmD 588; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

[a] **Illustration.**—Where an order directing an administrator to sell land was not shown by any probate record or recital, nor by anything tending to show a confirmation of the sale, its existence could not be presumed. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

[b] **A commission to sell property issued by the clerk** will not supply the place of the necessary order for sale; nor will it be inferred from such commission that a decree of sale existed, although it recites that it was issued in pursuance of the order of the district court. Robert v. Brown, 14 La. Ann. 597.

43. Brown v. Nelms, 86 Ark. 368, 112 SW 373.

44. Ark.—Mays v. Rogers, 37 Ark. 155.
Ill.—Akin v. Akin, 268 Ill. 324, 109 NE 268.
Ky.—Row v. Back, 115 SW 806.
Mass.—Verry v. McClellan, 6 Gray 535, 66 AmD 423.
Or.—In re Noon, 49 Or. 286, 88 P 673, 90 P 673.
W. Va.—Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930.

[a] **Amount of land to be sold.**—(1) An order of the probate court directing the sale of more land for the payment of debts than is prayed for in the petition is erroneous. Mays v. Rogers, 37 Ark. 155. (2) Where the petition prayed for a license to sell a specific portion of the real estate, and after publication of a notice to show cause why license should not be granted to sell "the whole of the real estate," a license to sell "the whole of the real estate" was granted, such license was irregular and void. Verry v. McClellan, 6 Gray (Mass.) 535, 66 AmD 423.

[b] **On the other hand** it has been held that, where the statute does not control the court as to its order of sale by the desire or prayer of the representative, and the petition states the jurisdictional facts, the court has jurisdiction to order the sale of a lot described in the petition, but the sale of which was not petitioned for, and the sale under such order cannot be collaterally attacked on the ground that the petition was to sell other real estate. Baum v. Roper, 132 Cal. 42, 64 P 128.

45. Tarver v. Barber, 138 Ga. 607, 75 SE 603; Evans v. Snyder, 64 Mo. 516; Newcomb v. Smith, Wright (Oh.) 208.

[a] **Illustration.**—A petition to sell with "allowed" written upon it by an associate judge is not an order of sale. Newcomb v. Smith, Wright (Oh.) 208.

[b] **The making and loss of an order will not be presumed** if the minutes show no order. Newcomb v. Smith, Wright (Oh.) 208.

46. Ala.—Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89.
Ark.—Flowers v. Reece, 92 Ark. 611, 123 SW 773.
Fla.—Sloan v. Sloan, 25 Fla. 53, 5 S 603.
Ga.—Callaway v. Irvin, 123 Ga. 344, 51 SE 477.
S. C.—Gardner v. Cheatham, 37 S. C. 73, 16 SE 368.
Utah.—Needham v. Salt Lake City, 7 Utah 319, 26 P 920.

[a] **Order sufficiently showing jurisdictional facts.**—Flowers v. Reece, 92 Ark. 611, 123 SW 773.

47. Ala.—Summersett v. Summersett, 40 Ala. 596, 91 AmD 494.
Ill.—Bowen v. Bond, 80 Ill. 351.
Miss.—Puckett v. McDonald, 7 Miss. 269.
N. Y.—Sibley v. Waffle, 16 N. Y. 180.
N. C.—Card v Finch, 142 N. C. 140, 54 SE 1009.

[a] **Form of order sufficiently showing service of notice.**—Bowen v. Bond, 80 Ill. 351.

[b] **Recital held insufficient.**—A recital in an order that it was made upon proof of due publication of the order to show cause was nothing more than a statement by the surrogate that he had acquired jurisdiction of the parties; and his adjudging that he had jurisdiction, without stating that he found from evidence that the facts existed which conferred it, was not sufficient. Sibley v. Waffle, 16 N. Y. 180. To same effect Card v. Finch, 142 N. C. 140, 54 SE 1009.

[c] **Order not showing compliance with statutory requirement of posting.**—Planters' Bank v. Johnson, 15 Miss. 449.

48. U. S.—Richmond Cedar Works v. Stringfellow, 236 Fed. 264.
Ala.—Wilson v. Armstrong, 42 Ala. 168, 94 AmD 635.
Conn.—Wattles v. Hyde, 9 Conn. 10.
Tenn.—Young v. Young, 12 Lea 335.
Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68.

[a] **Order for sale of realty for payment of debts must show insufficiency of personalty.**—Wattles v. Hyde, 9 Conn. 10.

[b] **Order must show liabilities of estate, names of creditors, and amount of assets.**—Young v. Young, 12 Lea (Tenn.) 335; Starkey v. Hammer, 1 Baxt. (Tenn.) 438.

[c] **The debts or expenses of administration need not be particularized** in the order for sale. In re Roach, 139 Cal. 17, 72 P 393.

[d] **The omission of the word "sell"** is not fatal where the decree, as a whole, authorizes a sale. Saunders v. Terry, 116 Va. 495, 82 SE 68.

[e] **The use of the Latin phrase "venditioni exponas"** in the record is not fatally objectionable. Richmond Cedar Works v. Stringfellow, 236 Fed. 264.

49. Williams v. O'Neal, 119 Ga. 175, 45 SE 978.

50. Johnson v. Porterfield, 150 Ala. 532, 43 S 228; Rhodes v. Bell, 230 Mo. 138, 130 SW 465. But see supra note 48.

51. Johnson v. Porterfield, 150 Ala. 532, 43 S 228 (there being no showing that any rents had been collected).

52. Ill.—Moline Water Power, etc., Co. v. Webster, 26 Ill. 233.
Ky.—Underwood v Cartwright, 47 SW 580, 20 KyL 809.
Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.
N. C.—Sledge v. Elliott, 116 N. C. 712, 21 SE 797.
Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

time,[53] and place [54] of sale. A decree for the sale of land to pay debts should state whether a sale of the whole or only a part is necessary,[55] and when the debts of an estate are small in comparison with the assets, which consist of specific articles, the order of sale should designate with as much certainty as possible what articles are to be sold.[56] The order should ordinarily specify the sum which the court has adjudged to be necessary to be raised by a sale of land,[57] although this has been held unnecessary where the property, although represented to be more than sufficient to pay the debts, is so situated that a part cannot be sold without injury to those interested.[58] It is the better practice for the court in all cases where there are several distinct parcels of property, to insert in its order a direction that the sale cease when the amount required has been obtained;[59] but the omission of such a direction does not invalidate the order or the sales made in pursuance of it.[60] A judgment directing a sale of the real estate to pay debts must make necessary provision to protect the interest of infant heirs in the proceeds of the sale, over the sum required to pay the debts,[61] otherwise a sale in excess of the amount necessary to pay debts will be void, even though the real estate is indivisible.[62] It has been held that the order of sale should make application of the assets in the hands of the personal representatives and decree to the several creditors of decedent the sums ascertained to be due to them respectively and fix the order in which they are to be paid.[63] Where the statute simply requires the court to order the sale, it is not necessary to state in the order by whom the sale is to be made.[64] Statutory restrictions as to price to be obtained from the sale need not be specified in the order, if the court does not intend to impose any other restrictions,[65] but the court may fix an upset price.[66] It is not necessary for the order to state what interest decedent had in the land to be sold,[67] and the fact that the order directs a sale and conveyance of the right, title, and interest which decedent had at the time of his death furnishes no reason for a purchaser refusing to take a deed in the absence of proof of any defect of title or of a failure to show that good title.[68] But under a statute providing that when the homestead of deceased is part only of a tract of land, the whole of which was subject to a mortgage, etc., the order of sale shall direct that the entire estate or interest, including the interest of the mortgagee, is so sold, etc., an order of sale which does not provide that the entire estate or interest, including the interest of the mortgagee, is sold is invalid.[69] An order of sale will not be invalidated by a merely clerical error as to the date of the hearing.[70] Under a statute giving the court power to grant an administrator "license" to sell real estate to procure assets, an order granting one license to sell if, in the settlement of the estate, it should be found necessary, is not void as being a conditional judgment, or as attempting to vest the administrator with judicial power,[71] and it has been held that an order of the orphans' court requiring an executor to sell so much of the personalty of the testator as would satisfy all debts, claims, and commissions against the estate, should not be reversed on the ground that it was too general and vested too much discretion in the executor.[72] The au-

[a] **Requirement mandatory.**—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

[b] **Terms prescribed in former order as governing.**—(1) Where an order for the sale of several tracts prescribed the terms of sale, a subsequent order for the sale of other property was held to have intended the sale to be upon the terms prescribed in the former order. Sledge v. Elliott, 116 N. C. 712, 21 SE 797. (2) A former judgment of sale fixing the terms and conditions, which was ignored by the court and the parties, did not dispense with such provisions in the judgment under which the sale was made. Underwood v. Cartwright, 47 SW 580, 20 KyL 809.

[c] **Error not cured by petition.**—An order directing an administrator's sale of a leasehold, but failing to authorize a private sale, at which the leasehold was sold, was not cured, so as to validate such sale, by the fact that the petition asked for a private sale. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

[d] **A direction to sell on such terms as the law provides** is proper, where the terms of sale are affected by statute. Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922.

53. Title Guaranty, etc., Co. v. Holverson, 95 Ga. 707, 22 SE 533 (holding, however, that a sale actually made within thirty days from the date of the order, as required by statute, was not void because the order did not require the sale to be made within such time). But compare Yerger v. Ferguson, 55 Miss. 190 (under a statute empowering the probate court merely to decree the sale of the estate of a decedent, it had no discretion as to when the sale should be made or reported).

[a] **Where the evidence shows a great depreciation in the value of corporate stock** owned by the estate, an order for its sale to pay debts should provide that the executors should not be required to sell until a more favorable opportunity. Matter of Bergen, 56 Misc. 92, 106 NYS 1038, 6 Mills Surr. 237 [aff 125 App. Div. 929 mem, 110 NYS 1146 mem].

54. Bozeman v. Bozeman, 82 Ala. 389, 2 S 732; Brown v. Brown, 41 Ala. 215.

55. Griffith v. Philips, 9 Lea (Tenn.) 417; In re Streiff, 146 Wis. 230, 131 NW 358.

[a] **A failure to do this is a mere irregularity** which does not invalidate the decree or render the sale void. Griffith v. Philips, 9 Lea (Tenn.) 417.

56. Lowe v. Lowe, 6 Md. 347.

57. Furman v. Furman, 45 N. J. Eq. 744, 18 A 194 [rev on other grounds 47 N. J. Eq. 307, 20 A 898].

58. Merrill v. Harris, 26 N. H. 142, 57 AmD 359.

59. In re Spriggs, 20 Cal. 121. See also Richardson v. Butler, 82 Cal. 174, 23 P 9, 16 AmSR 101 (where it appeared from the petition of an administrator to sell land that the amount necessary to be raised was between ten thousand and eleven thousand dollars, and the property consisted of several lots and parcels, a provision that the sale should cease when an amount not less than ten thousand dollars, and not more than eleven thousand dollars, should be obtained, did not invalidate the order of sale).

60. In re Spriggs, 20 Cal. 121.

61. Carter v. Crow, 130 Ky. 41, 112 SW 1098.

62. Carter v. Crow, 130 Ky. 41, 112 SW 1098.

63. Hart v. Hart, 31 W. Va. 688, 8 SE 562 [foll Kanawha Valley Bank v. Wilson, 25 W. Va. 242].

64. Crawford v. McDonald, 88 Tex. 626, 33 SW 325 (where a sale was asked by a creditor, the sale was not rendered void by a direction in the order that the sale is made by "petitioner" instead of by the executor, where this appeared to have been a clerical mistake and the sale was in fact made by the executor).

65. Lappin v. Mumford, 14 Kan. 9.

[a] **Illustration.**—Omission by the probate court to fix the lowest price at which corporate stock belonging to the estate may be sold at private sale does not invalidate a sale made in all other respects in conformity with the statute without collusion or fraud and at the market price. Burch v. Cincinnati Trust Co., 33 Oh. Cir. Ct. 358.

[b] **An order for the sale of mortgaged property** for cash need not embody a condition of law that its appraised value is obtained. Porter's Succ., 5 Rob. (La.) 96.

66. See infra § 1584.

67. Bowles v. Rouse, 8 Ill. 409.

68. In re Dolan, 88 N. Y. 309 [rev 26 Hun 46].

69. In re Streiff, 146 Wis. 230, 131 NW 358.

70. Brown v. Hannah, 152 Mich. 33, 115 NW 980 (where the caption of the order of hearing of the application by the administrator for a license to sell land of the estate recited, as published, that the session of the court was Jan. 26, 1906, while the actual date of the session was in 1907, the discrepancy was obviously a clerical error, and was properly disregarded).

71. Sledge v. Elliott, 116 N. C. 712, 21 SE 797.

72. Lowe v. Lowe, 6 Md. 347 (if, under such authority, the executrix should attempt to sell property much beyond the necessity of the case or should act in any manner oppressively to the legatees, they might obtain relief by making application to the orphans' court to stop the sale altogether or to limit the extent of it, or relief might be obtained by injunction from a court of equity).

thority of the court has been held to extend to entering an order directing an executor to make a lease of his decedent's lands for a term and rental specified in the order and to be not limited to a statement of the minimum sum which the executor may receive, leaving it discretionary with him as to whether he will carry out an agreement entered into prior to the making of the petition.[73] Where decedent had delivered, in escrow, a deed of the property to his son, the decree in an administrator's suit to set aside the conveyance should provide that it may be satisfied by the payment of debts and costs.[74] Where the court has authority to decide a question of title,[75] a decree finding that deceased died "having claim or title to the premises sought to be sold" is sufficient, although it does not find the actual title of which he died seized.[76]

[§ 1535] **(2) Description of Property.** The order or decree should describe the property to be sold with sufficient definiteness and completeness certainly to identify it,[77] and if it does not contain such a description, a purchaser is justified in refusing to comply with his bid.[78] But it has been held that the order of sale and the sale thereunder are not void because the description of the property in the order is imperfect,[79] or even because the order contains no description whatever of the property,[80] where it is apparent that the property sold is that of which a sale was asked and intended.[81] The description in the order may be aided by other portions of the probate record,[82] and where a deed to a portion of the premises has been given under a prior order of sale, a subsequent order for the sale of the entire tract which makes no reference to the former sale is good as to the land which had not been previously sold.[83] Where the description in the order is indefinite, but is made certain by the recitals therein, the sale is valid,[84] but where the description is definite and certain and clearly identifies land which decedent never owned, the sale is void.[85] The rule that when a deed of conveyance contains a general description which is definite and certain in itself and is followed by a particular description, the latter description will not limit or restrict the grant, which is clear and unambiguous by the general description, has been applied to an order of a probate court directing the sale of real property.[86] Where an original order directing an administrator to sell land fully describes the land, it is unnecessary to set forth a full description in a continuing order.[87] It has been held that, where it is not, or may not be, necessary to sell all the land covered by the order of sale, it is not necessary that the order should direct what specific portion thereof is to be sold.[88]

[§ 1536] **(3) Signature.** It has been held not necessary to the validity of a decree for the sale of land that it should be signed,[89] and that the signature of the judge to the probate minutes is not essential to the validity of the order.[90]

[§ 1537] **d. Second Order of Sale.** Where, after a final judgment for the sale of land, the court,

73. State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

74. Brown v. Keiser, 182 Mich. 432, 148 NW 731 (even though delivery in escrow not sufficiently approved).

75. See supra § 1529.

76. Rice v. Davies, 201 Ill. A. 165.

77. Ala.—Gayle v. Singleton, 1 Stew. 566.

Ark.—Bouldin v. Jennings, 92 Ark. 299, 122 SW 639.

Ga.—Hayes v. Dickson, 148 Ga. 700, 98 SE 345; Walton v. Busby, 144 Ga. 45, 85 SE 1054; Harden v. Sutton, 143 Ga. 727, 85 SE 874; Davis v. Harden, 143 Ga. 98, 84 SE 426; Parks v. Hailey, 142 Ga. 391, 83 SE 100; Davie v. McDaniel, 47 Ga. 195.

Ill.—Tilton v. Pearson, 67 Ill. A. 372.

Ky.—Speyer v. McNamara, 144 Ky. 774, 139 SW 1092; Bartlett v. Gray, 4 KyL 615; Trumbo v. Murphy, 13 Ky. Op. 528.

N. C.—Blythe v. Hoots, 72 N. C. 575.

Tex.—Wilkin v. Owens, 102 Tex. 197, 114 SW 104, 115 SW 1174, 117 SW 425, 132 AmSR 867; Davis v. Touchstone, 45 Tex. 490.

Wis.—Humes v. Cox, 1 Pinn. 551.

[a] **A license to sell real estate** as well as the order of court granting it should describe the lands to be sold. Humes v. Cox, 1 Pinn (Wis.) 551.

[b] **Descriptions held sufficient.**—Howe v. Brown, 287 Ill. 532, 123 NE 46; Macmanus v. Orkney, 91 Tex. 27, 40 SW 715 [rev (Civ. A.) 39 SW 614]; Davis v. Touchstone, 45 Tex. 490; Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145; Boslet v. Thomas, 35 Tex. Civ. A. 144, 80 SW 115; Grant v. Hill, (Tex. Civ. A.) 44 SW 1027.

[c] **Descriptions held insufficient.**—Bouldin v. Jennings, 92 Ark. 299, 122 SW 639; Tilton v. Pearson, 67 Ill. A. 372; Trumbo v. Murphy, 13 Ky. Op. 528; Blythe v. Hoots, 72 N. C. 575.

78. Tilton v. Pearson, 67 Ill. A. 372.

79. Copelan v. Kimbrough, (Ga.) 102 SE 162; Hall v. Ewing, (Ga.) 101 SE 807; Hayes v. Dickson, 148 Ga. 700, 98 SE 345; Bunger v. Grimm, 142 Ga. 448, 83 SE 200, AnnCas1916C 173; Tarver v. Barber, 138 Ga. 607, 75 SE 603; Merritt v. Jones, 136 Ga. 618, 71 SE 1092; Davie v. McDaniel, 47 Ga. 195; Howe v. Brown, 287 Ill. 532, 123 NE 46; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304; McDyer v. Scaggs, 13 Ky. Op. 597; Holman v. Houston Oil Co., (Tex. Civ. A.) 174 SW 886; Norwood v. Snell, (Tex. Civ. A.) 69 SW 642.

80. Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810; Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Davis v. Touchstone, 45 Tex. 490; Wells v. Polk, 36 Tex. 120; Wells v. Mills, 22 Tex. 302; Norwood v. Snell, (Tex. Civ. A.) 69 SW 642 [rev on other grounds 95 Tex. 582, 68 SW 773].

[a] **Executors vested with discretion.**—The fact that the decree does not define the particular property to be sold does not invalidate it, where the will vested the executors with the widest discretion as to selling his property, and the application was by them to the chancellor for aid in the execution of their trust. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

81. Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810; Merritt v. Jones, 136 Ga. 618, 71 SE 1092; Howe v. Brown, 287 Ill. 532, 123 NE 46; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304; Rice v. Davies, 201 Ill. A. 165.

[a] **Illustration.**—Where the application of an administrator and the order of sale granted pursuant thereto, described a tract of land lying in the county of Randolph, containing two hundred and two and a half acres more or less, such order was legal authority to the administrator to sell an improved lot of land in Randolph county of a given number, belonging to the intestate at her death, where such lot was the only land owned by her at her death in that county. Merritt v. Jones, 136 Ga. 618, 71 SE 1092.

82. Montgomery v. Johnson, 31 Ark. 74; Crawford v. McDonald, 88 Tex. 626, 33 SW 325; Davis v. Touchstone, 45 Tex. 490; Ferguson v. Templeton, (Tex. Civ. A.) 32 SW 148.

[a] **Reference to petition.**—Where an order omitted to describe the land, but referred to the petition, in which the quantity, interest, and title of decedent, and the former ownership of the land, with the fact that it was the only land owned by him, were set out, the order identified the land with sufficient certainty. Montgomery v. Johnson, 31 Ark. 74.

83. Hicks v. Watson, 258 Mo. 425, 167 SW 533.

84. Buntin v. Root, 66 Minn. 454, 69 NW 330.

85. Hanson v. Ingwaldson, 77 Minn. 533, 80 NW 702, 77 AmSR 692 [dist Buntin v. Root, 66 Minn. 454, 69 NW 330].

[a] **Subsequent correction.**—Where an administrator's sale was void because of a misdescription of the land sold, a subsequent order purporting to correct the order of license and the other records, so as to describe the land intended to be sold, was also void. Hanson v. Ingwaldson, 77 Minn. 533, 80 NW 702, 77 AmSR 692.

86. Middleton v. Wharton, 41 Minn. 266, 43 NW 4.

87. Rhodes v. Bell, 230 Mo. 138, 130 SW 465.

88. Yeomans v. Brown, 8 Metc. (Mass.) 51; Kingsbury v. Wild, 3 N. H. 30. But compare Graham v. Hawkins, 38 Tex. 628 (order for sale of so much land lying in Robertson county, and west of the Trinity river, as would pay the debts, amounting to some fifteen hundred dollars, void for uncertainty).

[a] **An order in general form** directing a sale of so much of the land as shall be necessary to pay debts and incidental expenses is sufficient. Norton v. Norton, 5 Cush. (Mass.) 524.

89. Tarver v. Barber, 138 Ga. 607, 75 SE 603; Sledge v. Elliott, 116 N. C. 712, 21 SE 797.

[a] **Entry on minutes signed by judge.**—An order authorizing an administrator to sell lands belonging to his intestate, entered on the minutes of the court of ordinary, which are signed by the ordinary, is valid, although the order was not signed. Tarver v. Barber, 138 Ga. 607, 75 SE 603; Floyd v. Ricketson, 129 Ga. 668, 59 SE 909.

90. Norwood v. Snell, 95 Tex. 582, 68 SW 773 [rev (Civ. A.) 69 SW 642].

at a subsequent term, and without any supplemental proceedings, entered another and apparently original judgment ordering a sale of the land on different terms, it was held that the second judgment was void,[91] but where the first order of sale was not a final judgment, but an interlocutory order subject to be vacated, set aside, modified, or changed on petition or motion until the real estate was sold under such order, the sale confirmed, and until the end of the term of court at which such sale was confirmed, a second order procured on an amended petition was held valid and binding.[92]

[§ 1538] **e. Operation and Effect.** An order of sale by a probate court is an adjudication that all the facts exist which are necessary to give the court jurisdiction,[93] and is conclusive as to the necessity of the sale,[94] and even though the order may be erroneous, if all the necessary parties were before the court it is not void.[95] The order or decree is binding on all of the parties to the proceeding[96] and their privies,[97] but is not binding on or conclusive against other persons.[98] Where a decree ascertained certain debts against an estate, and decreed that the land is sold for their payment, and for the benefit of children devisees of decedent as his will directed, and no error is assigned for the allowance of debts, or declaration of the rights of the children claiming under the will, the fact that all the debts have been paid by some of the children does not affect the rights of the devisees to have the land sold for their benefit.[99] When the court has jurisdiction an order granting leave to sell real estate is valid whether passed on good reason or without reason.[1] Mere irregularities in proceedings leading up to a decree for sale are not sufficient to avoid the decree upon the ground of want of jurisdiction.[2] The validity of an order directing the sale to pay debts is not affected by the fact that the probate court granted a rehearing of the demands allowed, after the order directing the sale.[3]

Favorable presumptions. The usual presumptions in favor of an order of court exist in the case of an order for the sale of a decedent's property,[4]

91. Bethel v. Bethel, 6 Bush (Ky.) 65, 99 AmD 655.

92. Hall v. Price, 141 Ind. 576, 40 NE 1084.

93. Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Thompson v. Pinnell, (Mo.) 199 SW 1011; Dudley v. Browning, 79 W. Va. 331, 90 SE 878.

94. Ala.—Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79; Doe v. Riley, 28 Ala. 164, 65 AmD 334.

Ark.—Long v. Hoffman, 103 Ark. 574, 148 SW 245.

Cal.—In re Bazzuro, 141 Cal. 71, 118 P 434.

Colo.—Bateman v. Reitler, 19 Colo. 547, 36 P 548.

Ga.—Davie v. McDaniel, 47 Ga. 195; McDade v. Burch, 7 Ga. 559, 50 AmD 407.

Ind.—Stone v. Elliott, 182 Ind. 454, 106 NE 710; Thomas v. Thompson, 149 Ind. 391, 49 NE 268; Tarplee v. Capp, 25 Ind. A. 56, 56 NE 270.

La.—Thibodaux v. Barrow, 129 La. 395, 56 S 339; Granger v. Hebert, 121 La. 1045, 46 S 1012; Irwin v. Flynn, 110 La. 829, 34 S 794; Baslar's Succ., 5 La. A. (Orleans) 199.

Mo.—Grayson v. Weddle, 63 Mo. 523.

N. H.—Merrill v. Harris, 26 N. H. 142, 57 AmD 359.

S. C.—Earle v. Earle, 33 S. C. 498, 12 SE 164.

Tenn.—Thomson v. Blanchard, 2 Lea 528.

But compare Snyder v. Snyder, 6 Binn. (Pa.) 483, 6 AmD 493 (a sale by order of the orphans' court is not conclusive until reversed on appeal but may be questioned in ejectment).

[a] **On the hearing on the return** of sale the question of the right of the representative to sell is not open for litigation. In re Bazzuro, 141 Cal. 71, 118 P 434.

[b] **Order prima facie evidence of necessity.**—Cochran v. Bugg, 131 Ga. 588, 63 SE 1048; Park v. Mullins, 124 Ga. 1072, 53 SE 568.

95. Dennis v. Alves, 132 Ky. 345, 113 SW 483 [reh den 117 SW 287].

[a] **Illustration.** — A judgment which directs a deed to the purchaser before the expiration of time for redemption, although erroneous, is not void. Disman v. Flippin, (Ky.) 116 SW 740.

96. Ala.—Chardavoyne v. Lynch, 82 Ala. 376, 3 S 98.

Cal.—In re Leonis, 138 Cal. 194, 71 P 171.

Ga.—Fordham v. Duggan, 147 Ga. 610, 95 SE 3.

Ill.—Judd v. Ross, 146 Ill. 40, 34 NE 631; In re Dyer, 201 Ill. A. 183.

Ind.—Bumb v. Gard, 107 Ind. 575, 8 NE 713.

Ky.—Ramey v. Frances, 169 Ky. 469, 184 SW 380; Little v. Cardwell, 122 SW 799.

La.—Perrin's Succ., 1 La. A. (Orleans) 76.

N. C.—Pinnell v. Burroughs, 172 N. C. 182, 90 SE 218; Best v. Best, 161 N. C. 513, 77 SE 762; Ward v. Lowndes, 96 N. C. 367, 2 SE 591.

S. C.—Dyson v. Jones, 65 S. C. 308, 43 SE 667; Culler v. Crim, 52 S. C. 574, 30 SE 635.

Tenn.—Thomson v. Blanchard, 2 Lea 528.

Tex.—Brown v. Fleming, (A.) 212 SW 483.

W. Va.—Trail v. Trail, 56 W. Va. 594, 49 SE 431.

Wis.—Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

[a] **The heirs** are bound by the judgment, unless they show that it was obtained by fraud and collusion. Best v. Best, 161 N. C. 513, 77 SE 762.

[b] **Infant parties.**—A decree of the probate court ordering sale of intestate's land for the payment of debts is as conclusive on infants properly represented by a guardian ad litem as on adults. Chardavoyne v. Lynch, 82 Ala. 376, 3 S 98.

[c] **Same person in different capacities.**—(1) Where the vendor of land is the heir of the purchaser, and as heir is made a party to an administrator's petition to sell for the payment of debts, the adjudication will not preclude him from proceeding to enforce his vendor's lien. Lord v. Wilcox, 99 Ind. 491. (2) Heirs inheriting two thirds of their land from their mother and one third from their father are not estopped to bring an action against their father's administrator to restrain him from selling such land by the fact that they have been made parties to the petition to sell, as the court had no jurisdiction over that inherited from their mother. Goldsberry v. Gentry, 92 Ind. 193.

[d] **Joinder of widow as petitioner.**—Where a petition for the sale of land belonging to a decedent's estate names both the administrator and the widow as petitioners, the latter, although not named in the summons or in the order of sale, is bound by the decree in the case as a party thereto, whether she actually joined in the petition or not, except in a direct proceeding to vacate it. Brittain v. Mull, 99 N. C. 483, 6 SE 382.

[e] **In the absence of fraud,** all parties to the proceeding are bound. Dyson v. Jones, 65 S. C. 308, 43 SE 667.

97. Ky.—Carney v. Yocum, 176 Ky. 173, 195 SW 482.

La.—Thomas' Succ., 1 La. A. (Orleans) 124.

Md.—Boulden v. Lanahan, 29 Md. 200.

N. Y.—Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 NYS 632.

Tenn.—Thomson v. Blanchard, 2 Lea 528.

98. Ga.—Hughes v. Treadaway, 116 Ga. 663, 42 SE 1035.

Ky.—Carney v. Yocum, 176 Ky. 173, 195 SW 482.

Md.—Collinson v. Owens, 6 Gill & J. 4; Tongue v. Morton, 6 Harr. & J. 21.

Mass.—Giles v. Kenney, 221 Mass. 262, 108 NE 940.

Nebr.—Holmes v. Columbia Nat. Bank, 4 Nebr. (Unoff.) 893, 97 NW 26.

N. J.—Everitt v. Williams, 45 N. J. L. 140.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009; Latta v. Russ, 53 N. C. 111.

Pa.—Schmidt's Est., 5 Pa. Dist. 17, 17 Pa. Co. 314.

W. Va.—Chapman v. Branch, 72 W. Va. 54, 78 SE 235.

[a] **Illustration.**—On an administrator's petition for sale of land to pay debts opposed by claimants of part of the land, heirs were not parties in the sense that judgment, merely denying a sale of the land, would conclude their title or interest. Davis v. Davis, 157 Ky. 530, 163 SW 468.

99. McSwegin v. Howard, 66 W. Va. 570, 66 SE 694.

1. Doe v. Roe, 30 Ga. 961; Perkins v. Fairfield, 11 Mass. 227.

2. Gartman v. Lightner, 160 Ala. 202, 49 S 412.

3. Wilson v. Wilson, 255 Mo. 528, 164 SW 561.

4. Cal.—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ga.—Copelan v. Kimbrough, 102 SE 162; Hall v. Ewing, 101 SE 807.

Ky.—Reaves v. Baker, 112 SW 609, 33 KyL 1004.

Md.—Lowe v. Lowe, 6 Md. 347.

Miss.—Hutchins v. Brooke, 31 Miss. 430; Laughman v. Thompson, 14 Miss. 259.

Mo.—Hicks v. Watson, 258 Mo. 425, 167 SW 533.

N. C.—Yarborough v. Moore, 151 N. C. 116, 65 SE 763.

Tex.—Heard v. Vineyard, (Commn. A.) 212 SW 489; Waterman Lumber, etc., Co. v. Robbins, (Commn. A.) 206 SW 825.

and it will be presumed that the order or decree was made upon a proper showing,[5] at least after the time for taking an appeal has passed.[6]

Recital as to notice. Recitals that notice was given as required by statute are sufficient to sustain the jurisdiction of the court on collateral attack,[7] but it has been held that they are evidence of such notice only when the attack is collateral.[8]

As to insufficiency of personalty. An order of sale, being conclusive as to the necessity of the sale,[9] is conclusive as to the insufficiency of the personalty and the necessity of resorting to the realty.[10]

As to existence and validity of claims. An order of sale, being conclusive as to the necessity of the sale,[11] is conclusive as to the existence and validity of debts or claims against the estate;[12] but as such adjudication is only between the personal representative and the heirs or devisees, it establishes the existence of valid debts only as an element of necessity for the sale, and is not a conclusive adjudication as to the existence or validity of particular debts either in favor of or against creditors, they not being parties to the proceeding,[13] nor is it evidence for the representative, on settlement, of the validity of any claims.[14] So also in a suit to establish a claim and for a sale of the property of the estate to pay the claim and distribute the balance of the proceeds, a decree for the sale of the property without making any reference to the claim, rendered on the agreement of the parties that all questions as to the allowance of the claim were to be reserved to be disposed of in the distribution of the proceeds, and that the decree should not affect the validity of the claim, does not preclude the allowance of the claim out of the proceeds.[15] Sometimes, under statute, if a creditor fails to present his claim before a decree on a report of debts allowing it and subjecting lands to their payment, such decree bars him from claiming participation in the proceeds of such land until such decreed debts are satisfied.[16]

Affecting title. A sale of real estate under a valid order passes the title of decedent.[17] An order for the sale of realty invests the personal representative with the legal title thereto so far as to enable him to remove encumbrances thereon by bill in equity and have the title perfected, so that the order of sale may be carried out for the best interests of the estate and of the creditors.[18] An application by an administrator for leave to sell property at private sale does not involve the issue of ownership and hence does not estop him from subsequently suing to recover part of the proceeds of the sale on the ground that he was a part owner of the property.[19] Where an administratrix ob-

Va.—Gwinner v. Michael, 103 Va. 268, 48 SE 895.

Wash.—Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16; McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

[a] **Illustration.**—A minor remainderman having been properly represented by guardian ad litem, as to his interest, the judgment ordering a sale is presumed to have been proper, in the absence of a showing to the contrary. Reaves v. Baker, 112 SW 609, 33 KyL 1004.

[b] **Presumption of jurisdiction.**—Where the record does not affirmatively show that infant defendants were not summoned and appeared before the court, merely being silent on that question, it will be presumed on collateral proceedings that they were summoned, and that the court would not have rendered a judgment of sale unless they were properly before the court. Dennis v. Alves, 132 Ky. 345, 113 SW 483 [reh den 117 SW 287].

[c] **Void and voidable decrees.**—A decree of sale is void, if the want of jurisdiction appears on an inspection of the record, but is voidable only and good until set aside, where such want of jurisdiction can be discovered only by evidence aliunde the record. Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

[d] **Presumption on motion to set aside.**—Since service of process by reading it to a minor is good, unless he is under fourteen years of age, where the record shows service of process by reading it to certain infants, and it does not appear that they were under fourteen years old, it will be presumed on motion many years later to set aside the decree of sale that they were over such age, and that the process was properly served. Yarborough v. Moore, 151 N. C. 116, 65 SE 763.

5. Ark.—Hoshall v. Brown, 102 Ark. 114, 143 SW 1081; Jackson v. Gorman, 70 Ark. 88, 66 SW 346.

Cal.—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Conn.—Shelton v. Hadlock, 62 Conn. 143, 25 A 483.

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

Ga.—Williams v. O'Neal, 119 Ga. 175, 45 SE 978.

La.—Irwin v. Flynn, 110 La. 829, 34 S 794.

Mo.—Hicks v. Watson, 258 Mo. 425, 167 SW 533.

S. D.—Blackman v. Mulhall, 19 S. D. 534, 104 NW 250.

Tex.—Waterman Lumber, etc., Co. v. Robbins, (Commn. A.) 206 SW 825; Wilkin v. Simmons, (Civ. A.) 151 SW 1145.

Va.—Gwinner v. Michael, 103 Va. 268, 48 SE 895.

Wis.—Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

[a] **Estoppel to attack regularity of proceedings.**—Where, on an administrator's application to mortgage real estate to raise money necessary to pay debts, one of the heirs appeared by attorney and contested the application, which was granted, and thereafter such heir assented to the approval of the administrator's final account, and accepted the partition of the estate which gave her the mortgaged property subject to the mortgage, she was estopped from questioning the regularity of the proceedings by which such mortgage was authorized. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

6. Jackson v. Gorman, 70 Ark. 88, 66 SW 346.

7. Shannon v. Summers, 86 Miss. 619, 38 S 345.

Collateral attack generally see infra § 1541.

8. Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413; Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

[a] **A decree of sale to pay debts is voidable** and subject to be set aside as to children of the decedent not served with process, although the record recites such services. Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

9. See supra text and note 94.

10. Ala.—Chardavoyne v. Lynch, 82 Ala. 376, 3 S 98.

Ark.—Long v. Hoffman, 103 Ark. 574, 148 SW 245.

Cal.—In re Leonis, 138 Cal. 194, 71 P 171; In re Spriggs, 20 Cal. 121.

Md.—Mackubin v. Brown, 1 Bland 410.

N. J.—Everitt v. Williams, 45 N. J. L. 140.

Tenn.—Thomson v. Blanchard, 2 Lea 528.

[a] **If the decree is that the petition for sale is not granted,** this is conclusive that the personal assets are then sufficient for the payment of debts. But the decree has relation solely to the status of the estate in this respect at the time of its rendition and not to its status at some subsequent time when new facts may have occurred changing it. Ford v. Ford, 68 Ala. 141.

11. See supra text and note 94.

12. Ala.—Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185; Chardavoyne v. Lynch, 82 Ala. 376, 3 S 98.

Ill.—Judd v. Ross, 146 Ill. 40, 34 NE 631.

La.—Thibodaux v. Barrow, 129 La. 395, 56 S 339.

Me.—Simpson v. Norton, 45 Me. 281.

N. Y.—Matter of Gardner, 5 Redf. Surr. 14.

Pa.—Grubb v. Galloway, 203 Pa. 236, 52 A 176, 93 AmSR 764; Stewart v. Madden, 153 Pa. 445, 25 A 803, 34 AmSR 713.

Tex.—Heard v. Vineyard, (Commn. A.) 212 SW 489.

[a] **An order validating an executor's claim** against the estate, made in a proceeding to sell real estate, is conclusive upon the estate, either in a proceeding specially instituted for proof of such claim or on a final accounting. Matter of Gardner, 5 Redf. Surr. (N. Y.) 14.

13. Everitt v. Williams, 45 N. J. L. 140; Latta v. Russ, 53 N. C. 111; Schmidt's Est., 5 Pa. Dist. 17, 17 Pa. Co. 314. But compare Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852 (where the application for order of sale set out a claim and asked that a land certificate be sold for the purpose of paying the debt, and the court granted the order of sale, it was tantamount to an allowance of the claim by the administrator, and an approval by the court).

14. Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185.

15. Houck v. Houck, 112 Md. 122, 76 A 581.

16. Trail v. Trail, 56 W. Va. 594, 49 SE 431.

17. Doe v. Roe, 30 Ga. 961; Perkins v. Fairfield, 11 Mass. 227. See generally infra § 1696.

18. Williams v. Stratton, 18 Miss. 418.

19. Price v. Edwards, (N. C.) 101 SE 33.

tained an ordinary's order granting leave to sell all the lands in a named county, except the widow's dower estate, under which the administratrix sold the lands in controversy, the order of sale was admissible in a subsequent suit involving the title, although, after the general grant of authority, it undertook to describe the lands, and did not do so correctly.[20] Where, in a suit by a creditor to sell lands for the payment of debts, judgment was rendered directing the land to be sold, and at the time of such rendition a cross petition alleging title to the land in cross petitioner, and praying that title be adjudged in him, was on file before the court, the judgment necessarily adjudged that cross petitioner had no title, although his name was not mentioned therein.[21]

Affecting setting aside of homestead. The mere fact that an order has been made by the probate court for the sale of the real estate of the intestate does not prevent the court from setting it aside as a homestead for the widow.[22] A failure to set off the homestead of the widow and children on a sale of the property by the probate court to pay debts of the estate was a mere irregularity, which, while it might have been urged on appeal from a decree of the probate court or writ of error to reverse it, was not a jurisdictional defect, and did not constitute a valid objection to the probate court's decree in a collateral proceeding.[23]

Effecting equitable conversion. In England it has been held that an absolute order for the sale of real estate operates as a conversion of such real estate into personalty from the date of the order.[24]

Construction of order. Where it is necessary, the application for a sale may be looked to for the proper interpretation and understanding of the order made by the court upon such application.[25] An order or decree of sale authorizes the sale of all the property properly embraced within its scope,[26] but cannot be extended so as to authorize the sale of other property.[27] A license to "sell" realty imports that the whole title to any estate disposed of is to be parted with for an equivalent in money and not that such estate is to be encumbered for money,[28] and an order authorizing an administrator to borrow money on the real estate is an authority to mortgage it,[29] but not to confess judgment.[30] Under a statute providing that the court may prescribe the maximum period of a loan ordered to be negotiated by an administrator, an order to execute a mortgage therefor payable on or before two years from the date must be regarded as fixing the maximum period only.[31] An order for the sale of land to discharge it of liens, providing that, if the proceeds are insufficient to discharge the mortgage debt, the deficiency shall, upon the order of court, be paid out of the assets applicable thereto in the hands of the administrator, does not adjudicate the priorities of different creditors in the fund.[32] A recital in the order of sale that "it is more advantageous to sell the land" does not show that the sale was ordered for the reason that it would be advantageous to the estate.[33] An order directing the executor to mortgage or sell the property, and containing nothing indicating that the procedure is to be otherwise than as prescribed by law, should be construed to require the executor to take the statutory steps preparatory to sale.[34]

Retrospective effect. It has been held that an order for the sale of the intestate's real estate by the administrator cannot have a retrospective effect, so as to legalize a sale made prior to the order,[35] nor can it validate a prior contract by the representative to sell certain land at a fixed price, the conveyance to be made when the representative has obtained the permission of the court, so as to authorize a conveyance thereunder.[36]

Enforcement after lapse of time. In the absence of a statute on the subject, but by analogy to the statutes of limitations, relating to liens of judgments, a petition to enforce the execution of an order for the sale of the realty of a decedent to pay debts has been held to be barred after the

20. Tarver v. Barber, 138 Ga. 607, 75 SE 603.

21. Little v. Cardwell, (Ky.) 122 SW 799.

22. In re Smith, 51 Cal. 563.

23. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

24. Fauntleroy v. Beebe, [1911] 2 Ch. 257, AnnCas1912A 506.

25. Farris v. Gilbert, 50 Tex. 350; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891.

26. See cases infra this note.

[a] **Illustrations.**—(1) An order to sell six hundred acres of land, or so much as is necessary to pay debts, to be taken from one-half league and labor owned by the estate, authorizes the sale of so much of the half league and labor as may be required, although more than six hundred acres. Santana Live-Stock, etc., Co. v. Pendleton, 81 Fed. 784, 26 CCA 608. (2) A general order of sale extends to all of decedent's property known to the court at the time of making such order, although not contained in the inventory or record. Rockwell v. Sheldon, 2 Day (Conn.) 305. (3) An order to sell all the real estate in a certain county covers every interest in land in that county, whether in possession or expectancy. Oliver v. Powell, 114 Ga. 592, 40 SE 826. (4) Where an order was for the sale of a reversion after the expiration of a widow's dower, and before the sale took place the widow died, the order constituted authority to sell the fee. Adams v. Adams, 113 Ga. 824, 39 SE 291. (5) A decree or order for the sale of "real estate described in the petition" justifies the sale of all the real estate so described. Stow v. Kimball, 28 Ill. 93. (6) A decree directing the sale of the lands and mills belonging to the estate authorizes the sale of any such real estate and mills within the jurisdiction of the court. Monk v. Horne, 38 Miss. 100, 75 AmD 94.

27. Ark.—Ousler v. Robinson, 72 Ark. 339, 80 SW 227.

Cal.—Janes v. Throckmorton, 57 Cal. 368.

Ky.—Speyer v. McNamara, 144 Ky. 774, 139 SW 1092, 145 Ky. 300, 139 SW 1183.

Mo.—Melton v. Fitch, 125 Mo. 281, 28 SW 612 [foll Greene v. Holt, 76 Mo. 677; Evans v. Snyder, 64 Mo. 516].

Tex.—Wilkin v. Owens, (Civ. A.) 110 SW 552 [rev on other grounds 102 Tex. 197, 114 SW 104, 115 SW 1174, 117 SW 425, 132 AmSR 867].

[a] **Illustration.**—A decedent's interest in land under covenant by which the covenantor, after paying debts of decedent from the sales of the land, is to convey a proportion of the balance to decedent, cannot be sold under an order directing the sale of the personalty of decedent. Janes v. Throckmorton, 57 Cal. 368.

[b] **Dower interest.**—Where an administratrix, on presenting an application for an order to sell land to pay debts, represented that, after setting aside her dower, there would remain three hundred and twenty acres subject to the payment of debts, and the court thereupon ordered that, after setting apart the dower, the administratrix should be allowed to have the lands of the estate appraised, and to sell them at private sale for not less than two thirds the appraised value, the administratrix had no power to sell the reversion in the land assigned to her as dower. Ousler v. Robinson, 72 Ark. 339, 80 SW 227.

[c] **Sale of land not described in order void.**—Melton v. Fitch, 125 Mo. 281, 28 SW 612 [foll Greene v. Holt, 76 Mo. 677; Evans v. Snyder, 64 Mo. 516].

28. Brown v. Van Duzee, 44 Vt. 529.

29. Barger v. Cassidy, 4 Phila. (Pa.) 324.

30. Barger v. Cassidy, 4 Phila. (Pa.) 324.

31. Fast v. Steele, 127 Cal. 202, 59 P 585.

32. Ryker v. Vawter, 117 Ind. 425, 20 NE 294.

33. Louder v. Schluter, 78 Tex. 103, 14 SW 205, 207.

34. In re Ferguson, 102 Wash. 148, 172 P 813.

35. Ludlow v. Park, 4 Oh. 5; Contra Rowe v. Henderson Naval Stores Co., 143 Ga. 756, 85 SE 917.

36. Bauman v. Goldthorpe, 129 App. Div. 19, 113 NYS 136.

lapse of twenty years from the time of its entry, unless a good reason for a delay is shown.[37]

Revocation.[38] Where, after the granting of a license to sell realty, but before a sale thereunder, the law giving the court jurisdiction to grant such license was repealed, this revoked the license, and a subsequent sale thereunder was void.[39] An order authorizing the administrator to lease property to pay debts is not a revocation of a previous order authorizing a sale for the same purpose, as both powers may stand together.[40]

[§ 1539] **f. Amendment or Vacation.** An order of a court of probate jurisdiction granting to the representative leave to sell cannot be vacated, rescinded, or revoked by that court, except in the same manner as other judgments, upon notice to the administrator, and for good cause shown.[41] Where the order or decree of sale is void, as where the court acted without jurisdiction in making the same, it may be vacated or set aside, even at a subsequent term,[42] and fraud in obtaining the order has also been considered a sufficient ground for setting it aside;[43] but where the court had jurisdiction, the order of sale will not be set aside at a subsequent term merely because errors or irregularities have intervened in the proceedings, or the order itself is erroneous.[44] After a decree of sale has been executed the probate court has no power to set aside the decree.[45] It seems, however, that the order or decree of sale is open to amendment or correction at all times until it has been acted upon and a sale made thereunder and confirmed.[46] It has been held that, where an account and adjudication show that an award based thereon is to be paid out of the proceeds of sale of real estate sold for the payment of debts, the decree of the court may, fifteen years thereafter, be amended to show that fact, and a surety on the bond of the administrator has no standing to complain of such amendment.[47] It has also been held that a defendant who was served by publication only had the legal right to have an order of sale made upon default set aside upon his mere motion therefor at any time before the sale and within two years after the order was made.[48] The practice of permitting the validity of an ex parte order of sale in a succession proceeding by an executor or to pay debts to be assailed by rule has been recognized.[49] A person who is not in-

37. White v. Horn, 224 Ill. 238, 115 AmSR 155, 79 NE 629 (a petition which alleges that the land was encumbent by dower rights, and was swamp land in a drainage district and of little value, and that the lands had recently become valuable, does not show an excuse for the delay).

38. Amendment or vacation see infra § 1539.

39. Campau v. Gillett, 1 Mich. 416, 53 AmD 73.

40. Jackson v. Irwin, 10 Wend. (N. Y.) 441.

41. Whitaker v. Smith, 33 Ga. 237; In re Marks, 81 Or. 632, 160 P 540.

[a] **A mortgagee who has received no notice** of the proceedings for sale may have the order vacated if he acts promptly. McCall's Succ., 140 La. 88, 72 S 818.

[b] **Necessary parties.**—(1) An administrator is a necessary party to a motion to set aside a judgment of the court of ordinary authorizing a sale of land by him. Whitley Grocery Co. v. Jones, 128 Ga. 791, 58 SE 623. (2) A purchaser of land from one who bought it at a commissioner's sale of decedent's lands to pay debts is a necessary party to a motion to vacate the order for sale. Ramey v. Francis, 169 Ky. 469, 189 SW 380.

[c] **In order to set aside an order of sale to pay debts** the heir must show that there were no debts. Barry's Succ., 130 La. 401, 58 S 20.

[d] **Filing answer in proceedings for sale.**—Petitioners who seek the vacation of an order for a sale of realty should file, with their petition, their answer in the proceeding for sale, failing in which relief will be denied. In re Marks, 81 Or. 632, 160 P 540.

[e] **Where the court of ordinary is a court of inferior jurisdiction,** the ordinary has authority to revoke his permission to an executor to sell real estate, where such permission was given under a mistake of facts, as it is essential to a court of inferior jurisdiction that it have power to revise and correct its proceedings before they are finally completed and decided on by the superior courts. Radford v. Westcott, 1 S. C. Eq. 596.

[f] **Insufficient grounds.**—(1) An order decreeing and approving sale of land to pay debts will not be set aside because the claim was fraudulent and the action collusive, it not appearing that the court was deceived thereby. McDonald v. McDaniel, 242 Mo. 172, 145 SW 452. (2) An order directing a sale of the real estate to pay debts, made pending a suit for its partition, will not be set aside on the ground that, if the partition suit had proceeded, defects in the title might have been cleared up and a better price obtained, in the absence of any showing that the real estate would have brought more at partition sale than under an order of the probate court; a partition suit ordinarily not serving the purpose of a suit to quiet title. Mullinix v. Brown, 151 Iowa 468, 131 NW 671. (3) The failure of the commissioner to offer part of the land of a decedent for sale first and of the court to confirm his report of sale do not justify vacating the order for sale. Ramey v. Francis, 169 Ky. 469, 184 SW 380.

42. Ala.—De Bardelaben v. Stoudenmire, 48 Ala. 643; Summersett v. Summersett, 40 Ala. 596, 91 AmD 494.

Hawaii.—Matter of Kamaipiialii, 19 Hawaii 163.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009.

Tex.—Wall v. Clark, 19 Tex. 321.

W. Va.—Hull v. Hamilton, 8 W. Va. 43.

[a] **Property not belonging to estate.**—Where at a subsequent term, while the proceeding is still in fieri, it is shown that the property does not belong to the estate, the order of sale should be revoked. Wall v. Clark, 19 Tex. 321.

[b] **A claim that the property was in custodia legis** at the time an order of sale was made at the instance of the administrator of the succession of a deceased husband, set up as a ground for revoking the order, is not sustained, where it appears merely that an order of seizure and sale was previously issued and executed against the widow in her individual capacity as owner of the property. Morere v. Preston, 34 La. Ann. 873.

43. May v. Vaughn, 91 SW 273, 28 KyL 1088; Child v. Clark, 231 Mass. 3, 120 NE 77.

44. Ala.—King v. Gilreath, 162 Ala. 113, 49 S 860; Gartman v. Lightner, 160 Ala. 202, 49 S 412; Carter v. Waugh, 42 Ala. 452 [foll Satcher v. Satcher, 41 Ala. 26, 91 AmD 498].

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Ky.—Ramey v. Francis, 169 Ky. 469, 184 SW 380.

Mont.—State v. Second Judicial Dist. Co., 24 Mont. 1, 60 P 489.

Tex.—Wall v. Clark, 19 Tex. 321.

[a] **The court has no power to revoke** an order directing the executor to lease land to a certain person at a fixed sum against the objection of the person designated as the lessee, where he has complied with the conditions of the order, even though the executor has subsequently had a more favorable offer. State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

45. Crombie v. Engle, 19 N. J. L. 82.

46. Mo.—Rhodes v. Bell, 230 Mo. 138, 130 SW 465.

Mont.—State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

N. Y.—Sheldon v. Wright, 7 Barb. 39 [aff 5 N. Y. 497].

N. C.—Maxwell v. Blair, 95 N. C. 317.

Pa.—Updike's Est., 18 Pa. Dist. 982.

[a] **Nunc pro tunc order.** — (1) Where an interlocutory judgment for sale should have contained a direction that the sale be made free from the lien of decedent's debts, and the sale was made free from such lien, the court has power to amend the judgment by the entry of an ex parte order nunc pro tunc inserting the direction. Palmer v. Terwilliger, 95 App. Div. 35, 88 NYS 526. (2) The defect in an order of sale which did not provide that the entire estate or interest, including the interest of the mortgagee, be sold could not be cured by order nunc pro tunc by inserting the words "to sell the entire estate and interest in said premises, including the interest of the mortgagee" after the land had been advertised for sale and sold, and after objection made to such sale. In re Streiff, 146 Wis. 230, 131 NW 358.

[b] **Modification.**—The court may modify an order of sale made by itself so as to authorize property which has been ordered to be sold at private sale to be sold at a public sale. Rhodes v. Bell, 230 Mo. 138, 130 SW 465.

[c] **Amount of rental.**—The court has power to modify an order previously made as to the amount of rental of property authorized to be leased, where the executor and lessee have agreed thereto. State v. Second Judicial Dist. Ct., 24 Mont. 1, 60 P 489.

47. Dalton's Est., 33 Pa. Super. 210 (if the surety is aggrieved by laches he may raise that question in the suit on the bond based on the amended decree).

48. Huston v. Huston, 29 Iowa 347.

49. McCall's Succ., 140 La. 88, 72 S 818; Thompson's Succ., 42 La. Ann. 118, 7 S 477.

terested in the estate so as to entitle him to become a party to the proceedings for sale has no standing in court to apply to have the order of sale set aside.[50] Where an administrator has been discharged, the judgment discharging him must be reopened before a motion to set aside a judgment authorizing a sale of land by him can be entertained.[51]

The proper course for a mortgagee to pursue on sale of property to pay the debt under a void judgment in proceedings in which the mortgagee was a party defendant, which sale brought less than the mortgage debt, interest, and costs, and destroyed the mortgage lien, is to move to set aside the judgment, and, on the overruling of the motion, to appeal therefrom.[52]

[§ 1540] **g. Staying Execution of Order.** Under a statute providing that an application for partial distribution may be made at any time after the lapse of one year from the issuance of letters, the court has power, after an order of sale has been granted, to grant a petition for partial distribution and stay the execution of the order of sale.[53]

[§ 1541] **h. Collateral Attack.** The order or decree of sale is not subject to collateral attack,[54] unless it is absolutely void.[55]

[§ 1542] **19. Essentials to Be Shown of Record.** It has been held necessary to the validity of a sale that the order of sale should appear of record;[56] and the record should show affirmatively a compliance with all the requirements of the statute un-

50. Shields v. Ashley, 16 Mo. 471.

51. Whitley Grocery Co. v. Jones, 128 Ga. 791, 58 SE 623 (although the purchasers at an administrator's sale of land and those holding under them, and also the person who had formerly been the administrator, but to whom letters of dismission had been granted, were made parties to a motion to set aside the judgment authorizing the sale by him, this would not obviate the effect of the grant of the letters of dismission, or the absence of the administrator, as such, on whose application the judgment was rendered).

52. Roy v. Allen, (Ky.) 118 SW 981.

53. State v. Second Judicial Dist. Ct., 34 Mont. 349, 86 P 270.

54. U. S.—Doran v. Kennedy, 237 U. S. 362, 35 SCt 615, 59 L. ed. 996 [aff 122 Minn. 1, 141 NW 851]; Richmond Cedar Works v. Stringfellow, 236 Fed. 264.

Ala.—Alvarez v. Warner, 77 S 344.

Ark.—Hoshall v. Brown, 102 Ark. 114, 143 SW 1081; Flowers v. Reece, 92 Ark. 611, 123 SW 773.

Cal.—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Ga.—Copelan v. Kimbrough, 102 SE 162; Laramore v. Dudley, 145 Ga. 102, 88 SE 682.

Ill. — Wandschneider v. Wandschneider, 282 Ill. 286, 118 NE 486; Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

Ind.—Indiana Natural Gas, etc., Co. v. Elliott, 57 Ind. A. 705, 107 NE 104; Stone v. Elliott, 182 Ind. 454, 106 NE 710, 101 NE 309; Ault v. Clark, 62 Ind. A. 55, 112 NE 843.

Iowa.—Rice v. Bolton, 126 Iowa 654, 100 NW 634, 102 NW 509.

Ky.—Bentley v. Stewart, 180 Ky. 23, 201 SW 978; Smith v. Hardesty, 83 SW 646, 26 KyL 1266.

Mo.—Bickensderffer v. Hanna, 231 Mo. 93, 132 SW 678; Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

N. Y.—Smith v. Blood, 106 App. Div. 317, 94 NYS 667.

N. C.—Harris v. Bennett, 160 N. C. 339, 76 SE 217.

Oh.—In re Seitz, 31 Oh. Cir. Ct. 32.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; Howe v. Kern, 63 Or. 487, 125 P 834, 128 P 818; Smith v. Whiting, 55 Or. 393, 106 P 791.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

S. D.—Blackman v. Mulhall, 19 S. D. 534, 104 NW 250; Phillips v. Phillips, 13 S. D. 231, 83 NW 94.

Tex.—Wilkin v. Simmons, (Civ. A.) 151 SW 1145; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891; Heard v. Vineyard, (Commn. A.) 212 SW 489; Brown v. Fleming, (Commn. A.) 212 SW 483.

Wash.—Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16. See also McKenna v. Cosgrove, 41 Wash. 332, 83 P 240 (on a collateral attack on an order for a sale of real estate by an administrator, the fact that there was other real estate not specifically devised which should have been sold first for the satisfaction of debts was not established by the mere fact that the executrix, the administrator's predecessor, had included certain other real estate in an inventory filed by her).

W. Va.—Dudley v. Browning, 79 W. Va. 331, 90 SE 878.

"It is not necessary for us to decide whether or not the order of sale was improvidently made or extravagantly executed to the waste of the plaintiff's patrimony. All we determine is that, on the face of the record as discussed before us, the county court had jurisdiction of the subject-matter and all of the persons interested, and being unfettered as to specific devises, because all the land was in one way or the other so devised, that tribunal had the power to decide rightly or wrongly, in either of which cases its decree is immune from this collateral attack." Howe v. Kern, 63 Or. 487, 504, 125 P 834, 128 P 818.

[a] **County courts,** in ordering the sale of realty to pay a decedent's debt, are courts of general jurisdiction, so that their orders in such proceedings can only be collaterally impeached where want of jurisdiction affirmatively appears on the face of the record. Smith v. Whiting, 55 Or. 393, 106 P 791.

[b] **For mere irregularity** a judgment in a special proceeding for sale of a decedent's lands to pay his debts can be attacked only directly by motion in the original cause, and not by action to quiet title. Harris v. Bennett, 160 N. C. 339, 76 SE 217.

[c] **An objection to a failure to issue citation** to a person who, although named in the petition, is not a necessary party in proceedings for the sale of a decedent's real property to pay debts, cannot be raised in a collateral proceeding to enforce a surrogate's decree. Griswold v. McDonald, 81 Misc. 376, 143 NYS 341.

[d] **Fraud.**—Where an administrator was appointed, and sold land of the estate under order of court, and afterward a will of decedent was admitted to probate, fraud in procurement of the order for sale and notice of the purchaser may be available in proper proceedings to set aside the order and sale; but such fraud and notice will not avail for such purpose upon a mere collateral attack in an ejectment suit by persons claiming as legatees, especially where the ordinary appointed as executor the person previously appointed administrator, but denied a separate application or revocation of the grant of administration. Martin v. Dix, 134 Ga. 481, 68 SE 80.

[e] **An action in ejectment** to recover land claimed by defendant under an administrator's sale is a collateral attack upon the order of sale, and, if the court had jurisdiction of the person and subject matter, the sale cannot be so attacked, notwithstanding subsequent irregularities, but such irregularities can be taken advantage of only by a direct proceeding for that purpose. Smith v. Whiting, 55 Or. 393, 106 P 791.

55. Ky.—Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

Nebr. — Tindall v. Peterson, 71 Nebr. 160, 98 NW 688, 99 NW 659, 8 AnnCas 721.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; Smith v. Whiting, 55 Or. 393, 106 P 791.

Tex.—Wade v. Scott, (Civ. A.) 145 SW 675.

[a] **Illustration.**—In trespass to try title, where it appeared that plaintiffs' ancestor was supporting and maintaining plaintiffs, her heirs, who were constituent members of her family, and the inventory in the administration of her estate showed only the property involved, and that it was a homestead, proceedings of the probate court directing a sale were not immune from collateral attack. Ross v. Martin, (Tex. Civ. A.) 128 SW 718.

[b] **Jurisdiction may be inquired into** in an action to determine title to the realty sold. Johnson v. Brewn, (Mo.) 210 SW 55.

[c] **Who may set up invalidity.**—Where a judgment ordering the sale of lands to pay a mortgage debt is void because of failure to summon the infant defendants, the invalidity can be asserted by the mortgagee, who was a defendant, where the sale under the judgment destroyed his lien and realized less than the debt, interest, and costs, and it was not shown that the failure to serve the infants was his fault. Roy v. Allen, (Ky.) 118 SW 981.

[d] **Appearance must be shown by record.**—In a collateral attack on an order for the sale of land for a decedent's debts, the voluntary appearance of a defendant not personally served, as required, cannot be shown by parol, but must be shown by the record. Smith v. Whiting, 55 Or. 393, 106 P 791.

56. Groover v. King, 46 Ga. 101; Evans v. Snyder, 64 Mo. 516; Goforth v. Longworth, 4 Oh. 129, 19 AmD 588.

[a] **Contrary view.** — Egan v. Grece, 79 Mich. 629, 45 NW 74. See also Baeder v. Jennings, 40 Fed. 199 [writ of error dism 154 U. S. 506 mem, 14 SCt 1156 mem, 38 L. ed. 1075] (a recital in an administrator's deed of an order of sale is sufficient presumptive proof, forty or fifty years after the date of the deed, of such an order, the possession being conformable to the deed).

der which the sale was decreed,[57] such as that an application showing a statutory ground for the sale has been made by a proper person,[58] that a citation was published or notice given as required by statute,[59] that there was a necessity for the sale,[60] and that the court heard satisfactory proof on the subject.[61] It has been held that inasmuch as probate jurisdiction to order the sale of a decedent's land for purposes of administration is derived wholly from statute, jurisdiction in any case should appear of record.[62] Where a district judge at chambers grants a license to an executor or administrator to sell real estate, the record of the proceedings must be made in the district court having jurisdiction to hear and determine the application; that is, in the court of the county in which the administration was granted.[63]

[§ 1543] **20. Appraisal of Property to Be Sold.** It is a frequent statutory requirement that realty of a decedent shall be appraised before it is sold,[64] and such requirement is often accompanied by the prohibition against the sale for less than a certain proportion of the appraised value.[65] The records of the court need not show that an appraisement has been made in order for the sale to be valid,[66] nor is it incumbent on one claiming under the sale to prove such fact.[67] Irregularity in the appraisement will not invalidate the sale,[68] and an appraisement sworn to by two out of three appraisers has been held valid.[69] So also it has been held that an appraisement is sufficient, although not signed by the appraisers, if it is attached to their affidavit of qualification, following immediately after the affidavit, and commencing "we appraise as follows."[70] The probate court may correct an error in the description of land appraised for sale,[71] or reject an improper appraisement,[72] and it is also within the discretion of the court to order a re-examination and reappraisement of the property at any time before the sale.[73]

[§ 1544] **21. Review**[74]**—a. In General.** An order directing or refusing to direct a sale of a

57. Akin v. Akin, 268 Ill. 324, 109 NE 268; Martin v. Williams, 42 Miss. 210, 97 AmD 456; Gelstrop v. Moore, 26 Miss. 206, 59 AmD 254; Planters' Bank v. Johnson, 15 Miss. 449; Lowry v. McDonald, Sm. & M. Ch. (Miss.) 620; Crisman v. Beasley, Sm. & M. Ch. (Miss.) 561.

58. Landford v. Dunklin, 71 Ala. 594 (personal representative).

[a] **In order to uphold an administrator's sale of a land certificate** the application to sell need not appear in the proceedings. Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984 [foll Robertson v. Johnson, 57 Tex. 62; Alexander v. Maverick, 18 Tex. 179, 67 AmD 693].

59. Root v. McFerrin, 37 Miss. 17, 75 AmD 49; Kempe v. Pintard, 32 Miss. 324; Planters' Bank v. Johnson, 15 Miss. 449; Laughman v. Thompson, 14 Miss. 259; Card v. Finch, 142 N. C. 140, 54 SE 1009; Gibbs v. Shaw, 17 Wis. 197, 84 AmD 737.

[a] **Insufficient statement.** — A statement in the license, that it appeared to the judge "that the notice had been published" in a certain newspaper, is not sufficient evidence of due publication. Gibbs v. Shaw, 17 Wis. 197, 84 AmD 737.

60. Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89; McMekin v. Bobo, 12 Ala. 268; Whitmore v. Johnson, 10 Humphr. (Tenn.) 610; Clapp v. Beardsley, 1 Aik. (Vt.) 168.

[a] **The facts necessary to authorize** the sale must appear of record, or the decree of sale will be void and confer no title upon a purchaser. Whitmore v. Johnson, 10 Humphr. (Tenn.) 610.

[b] **A naked license** to an administrator to sell real estate of the intestate will not support a title derived from the administrator's sale, but it must appear, either from the license or from the probate records, that such facts existed as would warrant the granting of the license. Clapp v. Beardsley, 1 Aik. (Vt.) 168.

61. Fridley v. Murphy, 25 Ill. 146. But compare Sidener v. Hawes, 37 Oh. St. 532 (an order for the sale of real estate to pay debts will not be reversed for want of a journal entry showing that the statements of the petition were found to be true).

62. Goodwyn v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21; Tyson v. Brown, 64 Ala. 244; Pettit v. Pettit, 32 Ala. 288; Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89; McCartney v. Calhoun, 11 Ala. 110; Guy v. Pierson, 21 Ind. 18; Wright v. Edwards, 10 Or. 298; Hilton's App., (Pa.) 9 A 434. Contra Wood v. Crawford, 18 Ga. 526 [foll Perkins v. Attaway, 14 Ga. 27; Tucker v. Harris, 13 Ga. 1, 58 AmD 488].

[a] **Jurisdiction cannot be presumed from facts of sale.**—Tyson v. Brown, 64 Ala. 244.

[b] **Showing of jurisdiction will not be supplied by intendment.** — Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89.

[c] **Failure to name heirs.**—In a proceeding by an administrator for an order to sell lands, if the record fails to name the heirs otherwise than by the general designation "heirs," the proceeding will be void as to them, and there can arise no presumption that the court acquired jurisdiction over any persons other than those named. Guy v. Pierson, 21 Ind. 18.

63. Stack v. Royce, 34 Nebr. 833, 52 NW 675.

64. Ark.—Bell v. Green, 38 Ark. 78.

Ind.—Rice v. Cleghorn, 21 Ind. 80; Maple v. Shoyer, 1 Blackf. 561.

Kan.—Fudge v. Fudge, 23 Kan. 416.

Ky.—Lisle v. Lisle, 183 Ky. 656, 210 SW 496; Vivion v. Vivion, 50 SW 984, 21 KyL 103.

La.—Curley's Succ., 18 La. Ann. 728; Johnson v. Hamilton, 2 La. Ann. 206.

Mo.—Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572; McVey v. McVey, 51 Mo. 406.

N. Y. — Matter of Goldfarb, 93 Misc. 401, 157 NYS 137.

S. D.—In re Ketcham, 171 NW 764.

Tex.—Jemison v. Gaston, 21 Tex. 266.

[a] **The purpose of such a provision** is to advise the court of the value of the estate and to assist it in exercising its judicial discretion in approving or disapproving the sale, and also to furnish prima facie evidence of value and of the good faith of the personal representative and the purchaser. Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572; Matter of Goldfarb, 93 Misc. 401, 157 NYS 137.

[b] **Heirs cannot waive appraisal without consent of creditors.**—Cantrill v. Perry, 7 KyL 446, 13 Ky. Op. 807.

[c] **Time for making appraisement.**—(1) The appraisement should be made on obtaining the order of sale and before offering the property for sale. Bell v. Green, 38 Ark. 78. (2) The practice is to make the appraisement after the order of sale has been obtained, but it is merely an irregularity to cause it to be made before the order of sale. Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572.

[d] **Effect of failure to have appraisal made.**—(1) The fact that a personal representative fails to have land appraised before selling it, as required by statute, does not render the sale void if it is confirmed by the court. It can be set aside only by appeal from the order of confirmation or by a direct proceeding for that purpose, and cannot be impeached in a collateral proceeding. Bell v. Green, 38 Ark. 78; Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572. (2) A sale of real estate without appraisement is null and void and the purchaser is not bound to comply with his bid. Curley's Succ., 18 La. Ann. 728.

[e] **It is the administrator's duty to aid** the commissioners in the appraisement of such land by revealing everything that in any way bears upon the appraisement, even though such revelation may be against his individual interest. In re Ketcham, (S. D.) 171 NW 764.

[f] **The statute applies only to** coercive sales and not to sales for division of the proceeds. Lisle v. Lisle, 183 Ky. 656, 210 SW 496.

[g] **Under the Spanish law** an appraisement was not necessary to the validity of a representative's sale. McNair v. Hunt, 5 Mo. 300.

65. Lacroix v. Crane, 133 La. 227, 62 S 657.

[a] **Sale for two thirds of appraised value.**—Kirby Dig. § 200 does not prohibit a sale of lands for two thirds of their appraised value within twelve months after an administrator has offered them for sale under an order of court. Long v. Hoffman, 103 Ark. 574, 148 SW 245.

66. Jemison v. Gaston, 21 Tex. 266.

67. Jemison v. Gaston, 21 Tex. 266.

Essentials to be shown of record generally see supra § 1542.

68. Rice v. Cleghorn, 21 Ind. 80; Lalanne v. Moreau, 13 La. 431; Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572; Johnson v. Beazley, 65 Mo. 250, 27 AmR 276; Bobb v. Barnum, 59 Mo. 394; Moore v. Wingate, 53 Mo. 398; McVey v. McVey, 51 Mo. 406.

69. Johnson v. Beazley, 65 Mo. 250, 27 AmR 276; Moore v. Wingate, 53 Mo. 398.

70. McVey v. McVey, 51 Mo. 406.

71. Lasure v. Carter, 5 Ind. 498.

72. In re Ketcham, (S. D.) 171 NW 764 (appraisement at from five to ten dollars per acre below true value).

73. Webb v. Keller, 39 La. Ann. 55, 1 S 423; Hood's Succ., 33 La. Ann. 466.

74. See generally Appeal and Error 3 C. J. p 256.

Effect on bona fide purchaser of reversal of order of sale see infra § 1703.

decedent's realty is generally considered subject to review by appeal,[75] by writ of error,[76] or by a bill of review,[77] depending upon the practice of the particular jurisdiction.[78] But such an order cannot be reviewed by certiorari.[79] An appeal lies from a judgment of the probate court, rendered on a rule against a personal representative to show cause why the sale of certain property should not be stopped,[80] and an heir at law may appeal from a decision of the surrogate, made in proceedings for the sale of real estate for debts, adjudging certain claims to be valid against decedent and his estate.[81] An appeal does not lie from an order of the probate court directing a personal representative to proceed with the sale of real estate under a previous order directing such sale,[82] an order refusing to set aside a previous order for the sale of decedent's property,[83] or an order directing a personal representative to file a petition to sell real estate.[84] An order to a personal representative to execute a lease of certain realty has been held not to be a final judgment in a special proceeding from which an appeal will lie.[85]

[§ 1545] **b. Persons Entitled to Review.** In order to entitle a person to a review, he must have an interest in the subject matter of the proceedings,[86] must be aggrieved by the judgment or order complained of,[87] and, unless it is otherwise provided by statutory or constitutional provisions,[88] must have been a party to the proceeding below, or be a legal representative of, or a person in privity with, a party.[89] Where an administrator with the will annexed had been endeavoring to sell testator's real estate for more than twelve years without success, when on obtaining a satisfactory offer he obtained an order directing a sale, and petitioner, one of the distributees, made no objection to the order for more than a year after notice that the sale would be made, and for more than three months after notice that the sale had been made, during which time the purchaser was in possession, making valuable improvements, and changing his position on the faith of his purchase, it was held that the petitioner was precluded by laches from thereafter obterest. The appeal must be prosecuted by the successor of the original representative. Nason v. Smith, 13 Vt. 170.

[c] **A purchaser of realty from the heir of a decedent** may appeal from a decree authorizing the sale of such realty. Mowry v. Robinson, 12 R. I. 152.

[d] **A creditor** may appeal from an order for the sale of land. Redman v. Adams, 88 Mo. A. 534. Contra Henry v. Estey, 13 Gray (Mass.) 336.

87. Iowa. — Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

Md.—Johns v. Caldwell, 60 Md. 259.

Mich.—In re Rodgers, 160 NW 753.

Miss.—Moore v. Brady, 11 S 723.

N. J.—Parker v. Reynolds, 32 N. J. Eq. 290; Swackhamer v. Kline, 25 N. J. Eq. 503; In re Divine, (Prerog.) 46 A 649.

Pa.—Patterson's App., 16 A 38; In re Everman, 67 Pa. 335.

[a] **A devisee** may be a party aggrieved so as to be entitled to appeal. Swackhamer v. Kline, 25 N. J. Eq. 503.

[b] **An administrator pendente lite** is not a person aggrieved and cannot appeal. Johns v. Caldwell, 60 Md. 259.

[c] **Circumstances precluding complaint by heir.**—An heir who accepts due and legal service of notice of the application of the administrator to sell real estate to pay debts, and who waives time of service and asks that the order be granted, may not complain of an order directing a sale. Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

88. Allen v. Smith, 80 Me. 486, 15 A 62.

89. Arnett v. McCain, 47 Ark. 411, 1 SW 873; Guy v. Pierson, 21 Ind. 18; Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

[a] **Remedy of person not served with notice.**—The remedy, if any, of a person interested in the real estate of a decedent who is not served with notice of an application for leave to sell to pay debts, is to apply for a hearing or a reopening of the case; and as a general rule one properly served with notice may not complain that another interested was not properly served. Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

[b] **Personal and representative capacity.**—An executor who was a party below in his representative capacity only cannot challenge conclusions of law favorable to the estate but adverse to him individually. Nation v. Green, (Ind. A.) 114 NE 895.

75. Ala. — Gartman v. Lightner, 160 Ala. 202, 49 S 412; Spence v. Parker, 57 Ala. 196 (aliter under earlier statute); Devany v. Devany, 25 Ala. 722.

Cal.—In re Loyd, 175 Cal. 699, 167 P 157; In re Levy, 141 Cal. 639, 75 P 317; In re Leonis, 138 Cal. 194, 71 P 171; In re Corwin, 61 Cal. 160.

Ill.—Steele v. Steele, 89 Ill. 51; Lewis v. Flowree, 32 Ill. A. 314.

Ind.—Simpson v. Pearson, 31 Ind. 1, 99 AmD 577 [dist Love v. Mikals, 12 Ind. 439]; Nation v. Green, (A.) 114 NE 895.

La.—State v. Lazarus, 37 La. Ann. 830.

Mich.—In re Rodgers, 160 NW 753.

Minn.—In re Wilson, 97 NW 647.

Mo.—Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678; Desloge v. Tucker, 196 Mo. 587, 94 SW 283; Ferguson v. Carson, 86 Mo. 673 [aff 9 Mo. A. 497].

N. J.—Carrell v. Baxter, 65 N. J. L. 478, 47 A 507; In re Devine, 62 N. J. Eq. 703, 49 A 138.

Tex. — Harrison v. Oberthier, 40 Tex. 385; Brown v. Fleming, (Commn. A.) 212 SW 483.

"An appeal will lie from a decree of sale of the probate court before or after a sale and confirmation under the decree." Gartman v. Lightner, 160 Ala. 202, 206, 49 S 412.

[a] **Practice on appeal.** — A proceeding to sell land of a decedent to make assets is a proceeding under the decedent's act, and appeals from orders made in such proceedings are governed by that act and not by the general practice act. Bollenbacher v. Whisnand, 148 Ind. 377, 47 NE 706; Beaty v. Voris, 138 Ind. 265, 37 NE 785; Galentine v. Wood, 137 Ind. 532, 35 NE 901; Rinehart v. Vail, 103 Ind. 159, 2 NE 330; Seward v. Clark, 67 Ind. 289 [overr Hamlyn v. Nesbit, 37 Ind. 284]; Nation v. Green, (Ind. A.) 114 NE 895.

[b] **Order setting aside confirmation.**—An order of the superior court, annulling and setting aside a former order confirming the sale of realty, is an order "against directing a sale" and is appealable. In re West, 162 Cal. 352, 122 P 953.

[c] **Sale to pay legacies.**—Where parties have been recognized by formal decree of court as legatees of a succession, no appeal will lie from a subsequent judgment on a rule taken by them or on application of the personal representative ordering him to sell property enough to pay the legacies. State v. Judge New Orleans Second Dist. Ct., 22 La. Ann. 200.

[d] **Order of sale not appealable.**—Steinbarger v. Steinbarger, 19 Oh. 166; Webster v. Ballard, 4 Oh. Dec. (Reprint) 419, 2 ClevLR 137; Snodgrass' App., 96 Pa. 420 [overr Hess' App., 1 Watts 255]; Robinson v. Glancy, 69 Pa. 89 [dist Robinson's App., 62 Pa. 213] (an appeal lies only from the decree confirming the sale); Grim's Est., 33 Pa. Super. 587.

76. New York L. Ins. Co. v. Brown, 32 Colo. 365, 76 P 799; Vance v. Rockwell, 3 Colo. 240; Oettinger v. Specht, 162 Ill. 179, 44 NE 399; Lynn v. Lynn, 160 Ill. 307, 43 NE 482; Fitzgerald v. Glancy, 49 Ill. 465; Poessnecker v. Entenmann, 64 Nebr. 409, 89 NW 1033.

[a] **Writ of error the only remedy.**—A final order made in a proceeding by a representative for leave to sell real estate is reviewable only by petition in error and not by appeal. Poessnecker v. Entenmann, 64 Nebr. 409, 89 NW 1033.

77. U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890; Peirce v. Graham, 85 Va. 227, 7 SE 189.

[a] **Contrary view.**—Indianapolis First Nat. Bank No. 2,556 v. Hanna, 12 Ind. A. 240, 39 NE 1054.

78. See the statutes; and generally Appeal and Error § 406 et seq; Equity § 886.

79. In re Wilson, (Minn.) 97 NW 647 (holding that an order of sale is reviewable only by appeal); Carroll v. Baxter, 65 N. J. L. 478, 47 A 507; In re Devine, 62 N. J. Eq. 703, 49 A 138.

80. State v. Judge New Orleans Second Dist. Ct., 22 La. Ann. 200.

81. Owens v. Bloomer, 14 Hun (N. Y.) 296.

82. In re Martin, 56 Cal. 208.

83. In re Smith, 51 Cal. 563.

84. Lane v. Thorn, 103 Ill. A. 215.

85. In re Tuohy, 23 Mont. 305, 58 P 722.

86. Ark.—Ex p. Marr, 12 Ark. 84.

Me.—Allen v. Smith, 80 Me. 486, 15 A 62.

Mass.—Giles v. Kenney, 221 Mass. 262, 108 NE 940.

Mo.—Redman v. Adams, 88 Mo. A. 534.

N. C.—Watkins v. Pemberton, 47 N. C. 174.

Or.—In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

Pa.—Everman's App., 67 Pa. 335.

R. I.—Mowry v. Robinson, 12 R. I. 152.

Vt.—Nason v. Smith, 13 Vt. 170.

[a] **An administrator** has an appealable interest in an order dismissing a petition for license to sell realty. In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

[b] **The representative of a representative** has not an appealable in-

taining leave to appeal from the order directing a sale.[90]

[§ 1546] **c. Time for Taking Appeal.** A statute limiting to thirty days the time for taking an appeal from an order of probate on any issue as to the insolvency of an estate or the allowance of any claim against it, has been held not to apply to an application by personal representatives for the sale of real estate to pay debts, which negatives the issue of insolvency.[91]

[§ 1547] **d. Notice of Appeal.** An appeal is ordinarily taken by the service of a notice of appeal.[92]

[§ 1548] **e. Parties.** The personal representative must be made a party to an appeal taken in proceedings for a sale of decedent's land,[93] and where the appeal is taken by creditors, heirs who appeared in the court below and contested the claims of such creditors must be made parties.[94] Legatees who appeared below as adverse parties are proper parties to an appeal by a representative from an order refusing leave to sell.[95] A lienholder whose lien is ordered first paid from the proceeds of sale is a necessary party to an appeal from an order directing a sale of land,[96] but it has been held that a devisee, taking an appeal from such an order, need not join as an appellant a codefendant who had filed an undisputed claim against the estate which was ordered to be first paid out of the proceeds.[97] A person who is not a necessary or even a proper party to a proceeding to sell realty to pay debts is not a necessary party to an appeal taken in such a proceeding.[98]

[§ 1549] **f. Reservation and Presentation of Grounds of Review.** The general rules as to raising questions which it is desired to have reviewed, as to making objections and reserving exceptions in the court below, and as to presenting matters for review in the record on appeal[99] are usually held applicable to appeal from the action of the court with reference to ordering a sale;[1] but it has been held that the fact that creditors having liens on part of the land did not object to the sale of the property in bulk did not prevent them from urging on appeal that there was no evidence authorizing such a sale,[2] and that the failure of lien creditors to object in the lower court to an order authorizing the sale of real estate to pay debts does not prevent them from objecting on appeal that the record fails to show that notice of the application for the order of sale was given as required by law, and that there was no evidence showing any necessity for the sale.[3]

[§ 1550] **g. Record.** Although the appeal record in a proceeding to sell land to pay debts does not contain the evidence taken by the commissioner upon reference to determine the amount of the indebtedness, the statement in his report that proof was taken will be accepted as true, nothing appearing to the contrary.[4]

[§ 1551] **h. Effect of Appeal.** An appeal from a decree authorizing a sale of realty suspends the operation of such decree from the time when it is taken, and no action can be legally had under such decree during the pendency of the appeal;[5] and it has been held that pending such an appeal the personal representative has no right to an order authorizing him to rent the land.[6]

[§ 1552] **i. Abandonment of Appeal.** Failure to docket an appeal until nearly two years after it was taken has been regarded as an abandonment of the appeal.[7]

[§ 1553] **j. Presumptions.** The usual presumption that an order or decree is correct until the contrary is made affirmatively to appear will be indulged by the appellate court in favor of an order made in proceedings to sell property of a decedent.[8]

[§ 1554] **k. Scope of Review.** Where an order for the sale of land recites that certain claims against the estate have been allowed and approved, an appellate court will not go back of such order to determine whether any claims had been

90. In re O'Hara, 127 Wis. 258, 106 NW 848.

91. Curtis v. Hunt, 158 Ala. 78, 48 S 598.

92. In re Rawitzer, 175 Cal. 585, 166 P 581.

[a] **Effect of notice.** — Where a foreign executor and trustee opposed in both capacities a petition by the administrator with the will annexed for a sale of lands, a notice of appeal which characterized defendant as executor could be considered an appeal in any capacity in which he was entitled to take an appeal. In re Rawitzer, 175 Cal. 585, 166 P 581.

93. Beaty v. Voris, 138 Ind. 265, 37 NE 785; In re McCann, 51 Okl. 187, 151 P 887.

94. Patterson v. Hamilton, 26 Hun (N. Y.) 665.

95. Findlay v. Whitmire, 15 Ga. 534.

96. Nation v. Green, (Ind. A.) 114 NE 895.

97. Nation v. Green, (Ind. A.) 114 NE 895, 901 ("We agree with appellants' contention that the sections of statute supra under which this appeal is prosecuted made it unnecessary to join S. as an appellant if such would be her proper status in the appeal if made a party thereto").

98. In re Smith, 43 Or. 595, 73 P 336, 75 P 133.

99. See Appeal and Error §§ 580–950.

1. Knerr v. McDonald, 30 Ind. A. 660, 66 NE 773; Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 327, 13 KyL 366; Hill v. Taylor, 99 Mo. A. 524, 74 SW 9; Henry v. Drought, 10 Tex. Civ. A. 379, 30 SW 584.

[a] **Waiver of objections.**—In re Levy, 141 Cal. 639, 75 P 317; Saxon v. Cain, 19 Nebr. 488, 26 NW 385; Brooks v. Brooks, 97 N. C. 136, 1 SE 487.

2. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

3. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

4. Row v. Back, (Ky.) 115 SW 806.

5. Ark.—Burgett v. Apperson, 52 Ark. 213, 12 SW 559.

La.—Smelser v. Blanchard, 15 La. Ann. 254.

Mass.—Daley v. Francis, 153 Mass. 8, 26 NE 132; Gale v. Nickerson, 144 Mass. 415, 11 NE 714.

N. C.—Lictie v. Chappell, 11 N. C. 347, 16 SE 171.

Pa.—Titlow's Est., 2 Pa. Dist. 512, 13 Pa. Co. 445.

"While the appeal from the Probate Court did not bring to this court the whole case, and did not invalidate anything there done under the decree prior to the appeal if the decree was finally affirmed by this court, yet it brought here the whole question, including both law and fact, whether the decree was wrong for any of the reasons assigned by the appellants, and suspended its operation until the determination of the appeal by this court." Tyndale v. Stanwood, 186 Mass. 59, 61, 71 NE 83.

[a] **Accordingly** (1) if a sale is made the purchaser gets no title. Francis v. Daley, 150 Mass. 381, 23 NE 218. (2) When a sale is made pending an appeal the probate court cannot make an order confirming the sale and directing title to be made to the purchaser. Lictie v. Chappell, 11 N. C. 347, 16 SE 171.

6. Herring v. Harris, 45 Miss. 62, 65 ("The application for an order to rent the lands is of itself tantamount to the averment that the execution of the decree of sale is suspended, if not by supersedeas, at least by the voluntary action of the administrator, as a matter of prudence, to await the adjudication of this court upon the questions presented by the appeal").

7. Love v. Love, 139 N. C. 363, 51 SE 1024 (under such circumstances a sale of the land pending the appeal was not void).

8. Ala.—Poole v. Daughdrill, 129 Ala. 208, 30 S 579 [overr Quarles v. Campbell, 72 Ala. 64].

Cal.—In re Roach, 139 Cal. 17, 72 P 393.

Fla.—Deans v. Wilcoxson, 25 Fla. 980, 7 S 163.

Ill.—Dauel v. Arnold, 201 Ill. 570, 66 NE 846.

Ind.—Jackson v. Weaver, 98 Ind. 307.

Ky.—Row v. Back, 115 SW 806; Reaves v. Baker, 112 SW 609, 33 KyL 1004.

Md.—Lowe v. Lowe, 6 Md. 347.

Nebr.—Saxon v. Cain, 19 Nebr. 488, 26 NW 385.

R. I.—Jacocks v. Patterson, 18 R. I. 751, 30 A 795.

But compare In re Snow, 96 Me. 570, 573, 53 A 116 ("In order to justify a decree licensing an executor or administrator to sell real estate of the deceased, it must be averred and proved that such sale is neces-

authenticated, allowed, and approved;[9] nor will the discretion of the lower court be reviewed on appeal unless an abuse thereof appears.[10] The decision on a question whether it would be for the advantage, benefit, and best interests of a decedent's estate to order a sale of several parcels of real estate, or only of one, is, so far as it depends upon inferences to be drawn from the situation of the property or of the parties interested, not open to review.[11] It has been held that the appellate court has no jurisdiction on such an appeal to determine what credits should be allowed or disallowed to the administrator and what unsecured claims should be paid by him,[12] but has jurisdiction to determine the rights of a surety company which executed the bond for the residuary legatee on her appointment as executrix.[13]

[§ 1555] **1. Disposition of Cause—(1) In General.** The appellate court has no greater power in the matter of a sale than the court in which the proceedings were instituted.[14] The action of the court below will not be disturbed because of error which was not prejudicial.[15] Where there was an affirmative showing that it was impracticable to sell the real estate otherwise than in a body, and there was no opposing evidence, an order directing a sale of the whole of the real estate, instead of a part only, should not be disturbed.[16] Where the reversionary interest of a decedent was decreed to be sold, and it was to the interest of all concerned that the property was sold clear of the widow's interest, to which she consented, the cause will be remanded for a new decree according to the adjudicated rights of the parties.[17] Where the probate court denies a personal representative leave to sell, and, on appeal, the circuit court reverses this order and grants leave, it should enter the proper judgment itself instead of directing the probate court to enter it.[18] Where a decree authorizing a sale of land found merely that decedent owned the land and made no findings as to his wife's interest, which was the real issue, and the evidence was not set out in the record, the decree could not be sustained.[19] Where, on appeal from denial of an application for an order directing an administrator to sell realty, no summons in error is served on the administrator or appearance or waiver entered, and the case-made is not served on him, and time for correcting it has expired, the appeal will be dismissed.[20]

[§ 1556] **(2) Effect of Sale on Decision of Appellate Court.** The fact that a sale has been actually made under the decree appealed from will not affect the decision of the appellate court.[21]

[§ 1557] **H. Enjoining Sale.**[22] An injunction against an administration sale will be granted where the proper grounds appear.[23] One who was not notified of the proceedings may enjoin a sale which would be detrimental to his interests,[24] but a mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a preference over him.[25] A person who has no interest in an estate cannot enjoin a sale of the property thereof.[26] It has been held that an injunction will not be granted in favor of one who alleges that he

sary to pay debts, or expenses of sale and administration; or that a sale of some portion of the real estate is necessary for these purposes, and that, by a partial sale, the residue would be greatly depreciated. Revised Statutes, c. 71, § 1, items 1 and 3. Gross v. Harvard, 52 Me. 195. The decree is not evidence of these facts. The party seeking the decree or to have the decree affirmed, must prove them").

9. McKee v. Simpson, 36 Fed. 248.

10. Cal.—In re Stewart, 1 Cal. A. 57, 81 P 728.

Ind.—Black v. Meek, 1 Ind. 180, Smith 131.

Iowa.—Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

Md.—Crawford v. Blackman, 19 Md. 40.

Nebr.—In re Parker, 72 Nebr. 601, 602, 101 NW 233.

N. Y.—Barnett v. Kincaid, 2 Lans. 320; Moore v. Moore, 14 Barb. 27 [aff 3 Abb. Dec. 303, 21 HowPr 211].

N. C.—Lovinier v. Pearce, 70 N. C. 167.

Or.—In re Marks, 81 Or. 632, 160 P 540.

"The principal duty of the district court in such cases is to conserve the estate of the decedent, and, in our opinion, its orders and judgments to that end ought rarely to be disturbed, and never unless they appear to have been mistakenly made, or disclose an abuse of discretion unjustly injurious to a party in interest." In re Parker, supra.

[a] **Illustration.**—The determination as to whether a sale of a decedent's real estate is inadvisable, owing to the pendency of a suit involving a small part of the tract in question, is a matter largely within the discretion of the court to which application is made. In re Newlove, 142 Cal. 377, 75 P 1083.

11. In re Steward, 1 Cal. A. 57, 81 P 728.

12. Tidd v. Bloch, 26 Oh. Cir. Ct. 113 (the probate court has exclusive jurisdiction to settle accounts).

13. Tidd v. Bloch, 26 Oh. Cir. Ct. 113.

14. Brown v. Fleming, (Tex. Commn. A.) 212 SW 483.

15. In re Tuohy, 33 Mont. 230, 83 P 486 (the act of the court in making an immaterial finding, wholly outside the purview of an application pending before it for the sale of a decedent's lands to pay debts, is not prejudicial to the parties of the application).

16. Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

17. Rullman v. Winterling, 101 Md. 35, 60 A 468.

18. Daly's App., 47 Mich. 443, 11 NW 262.

19. Akin v. Akin, 268 Ill. 324, 109 NE 268.

20. In re McCann, 51 Okl. 187, 151 P 887.

21. Gross v. Howard, 52 Me. 192; Nowell v. Nowell, 8 Me. 220.

22. **Injunctions generally** see Injunctions [22 Cyc 724].

23. Ark.—Rogers v. Wilson, 13 Ark. 507.

Fla.—Keathley v. Sewell, 62 Fla. 510, 56 S 414.

Ga.—Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Simmons v. Crumbley, 84 Ga. 495, 10 SE 1090; Powell v. Hammond, 81 Ga. 567, 8 SE 426; Chappell v. Akin, 39 Ga. 177; Johns v. Johns, 23 Ga. 31.

La.—Bienvenu v. Parker, 30 La. Ann. 160.

Mich.—Thayer v. Lane, Harr. 247.

Mo.—Penn v. Penn, 39 Mo. A. 282.

N. J.—Doll v. Cash, 61 N. J. Eq. 108, 47 A 1059; Hoboken First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 A 461 [rev on other grounds 52 N. J. Eq. 545, 31 A 717].

Tex.—Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

[a] **Such relief will be granted:** (1) Where the conduct of the personal representative in forcing the sale is so far oppressive and unwarranted as to be inequitable, and claimant, being an infant, is unable to protect himself. Doll v. Cash, 61 N. J. Eq. 108, 47 A 1059. (2) Where the sale is for the purpose of satisfying a void judgment. Bienvenu v. Parker, 30 La. Ann. 160. (3) Where improper claims which have been allowed by reason of fraud and collusion on the part of the personal representative. Penn v. Penn, 39 Mo. A. 282. (4) Where an administrator de bonis non bought up debts and judgments against the estate for about one tenth of their face value, and then filed a petition with the county judge for the sale of the real estate of decedent, and to be allowed to bid for such real estate, and to become a purchaser thereof, and to apply the proceeds to the judgments and other demands, and where it appeared that three days after the filing of such petition, and without notice an order was made for the sale of such realty according to the prayer of the petition, upon a bill filed in the circuit court to enjoin such sale, the circuit judge committed no reversible error in granting such injunction under his constitutional supervisory power, although the bill may have been defective, because all the parties in interest were not at the time parties in the bill. Keathley v. Sewell, 62 Fla. 510, 56 S 414.

[b] **Petition sufficient against general demurrer.** — Crawford v. Crawford, 139 Ga. 535, 77 SE 826.

[c] **It is not a sufficient ground** for enjoining a sale of property to pay debts that the notary who took an inventory of the succession failed to cite the tutor of minor heirs. Ducote v. Bordelon, 24 La. Ann. 145.

24. Swan v. Thompson, 36 Mo. A. 155.

25. Wells v. Wells, 25 La. Ann. 194.

26. Field v. Mathison, 3 Rob. (La.) 38.

is in possession of the land as owner and that decedent had no title thereto,[27] but the preponderance of authority supports the view that one claiming title adverse to decedent may seek relief by injunction against the sale.[28] It is usually considered that persons who can obtain adequate relief in the probate court by a contest of an application for a sale of decedent's realty must pursue that remedy and cannot maintain a bill in equity to enjoin the proposed sale,[29] but there is also authority for the view that equity may afford relief by setting aside a fraudulent judgment of sale and restraining proceedings attempted thereunder, although complainants might urge their objections in opposition to approval of the report of sale.[30]

[§ 1558] **I. Authority to Sell**[31]**—1. In General.** In many states the representative is the proper person to make the sale and the court cannot, so long as he is willing and competent to act,[32] appoint a stranger to make the sale,[33] and a sale made by a person so appointed is void and conveys no title.[34] In making a sale under order of court, an executor or administrator acts in his representative, and not in his individual capacity.[35] If two or more executors have qualified they should execute the duties of their office relative to the sale in their joint capacity, and if one alone acts in the sale and in the execution of a deed of the land in question no title passes,[36] but where the order directs the sale to be made by one of several administrators, a sale made according to the order is valid.[37] Under some statutes the sale is made by commissioners appointed by the court;[38] and it has been held that the devisee and not the executor should be directed to sell land for the payment of a legacy charged thereon where the lien of debts has expired.[39] An administrator or other person appointed to sell can sell only as he is authorized,[40] he being an officer or agent of the court in making the sale,[41] and if he has exceeded the scope of his authority in making

27. Seymour v. Bourgeat, 12 La. 123 [foll Rapides Lumber Co. v. Hartiens, 111 La. 793, 35 S 910] (if decedent had no title the purchaser will acquire none, and complainant's rights will not be affected by the sale).

28. Norman v. Pugh, 75 Ark. 52, 86 SW 833; Bevill v. Smith, 25 Fla. 209, 6 S 62; Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Moody v. Harper, 38 Miss. 599.

[a] **Illustration.**—A person in possession of land, and claiming it by a purchase at a sheriff's sale, made under a judgment rendered against a decedent, is not a proper party defendant to a proceeding in the probate court to sell the land for the payment of debts, and hence has no opportunity to contest it in that court; but if a sale of the land is ordered by the probate court to pay a debt barred by the statute of limitations he may enjoin it in equity. Moody v. Harper, 38 Miss. 599.

[b] **Necessary averments; parties.**—An averment of possession in the complainant is essential to a bill brought by one claiming the legal title to land to enjoin a sale by a commissioner under order of the court upon the ground that the sale will cast a cloud upon his title, and the personal representative is a necessary party to such a will. Bevill v. Smith, 25 Fla. 209, 6 S 62.

[c] **Incidental relief to defendants.**—Where plaintiff sued to enjoin an administrator from selling property to pay a fraudulent claim, alleging title to the property as an evidence of his right to sue, and defendants were admitted to the suit on the ground that they had become owners of the alleged fraudulent claim, and as an additional defense or cross complaint alleged that plaintiff was not the owner of the property, and set forth title in themselves, and plaintiff was in possession, the court of chancery, having rightfully assumed jurisdiction, would incidentally quiet defendants' title on their establishing it, and award them possession of the premises, and render a decree against plaintiff for the amount of rents collected by him, without remitting defendants to an action at law. Norman v. Pugh, 75 Ark. 52, 86 SW 833.

29. Creel v. Creel, 167 Ala. 599, 52 S 902; Speers v. Banks, 114 Ala. 323, 21 S 834 [overr Banks v. Speers, 103 Ala. 436, 16 S 25]; Laramore v. Dudley, 145 Ga. 102, 88 SE 682; Bailey v. Ross, 68 Ga. 735; Johnson v. Holliday, 68 Ga. 81; Sprague v. West, 127 Mass. 471.

30. Penn v. Penn, 39 Mo. A. 282.

31. **Who may exercise testamentary power to sell realty** see supra §§ 647, 648.

32. Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261, 54 NYS 555]; Taylor's App., 119 Pa. 297, 12 A 222; Weidner's Est., 18 Pa. Dist. 955; Boughman's Est., 4 LancBar (Pa.) Oct. 5, 1892.

[a] **If the representative refuses to act,** a freeholder can be designated by the surrogate to make the sale. Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261, 54 NYS 555].

33. Swan v. Wheeler, 4 Day (Conn.) 137; Crouch v. Eveleth, 12 Mass. 503; Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731; Weidner's Est., 18 Pa. Dist. 955.

[a] **A direction that the real estate is sold through the referee** is improper where there was no finding that the executor was unfit or incapable of executing the power of sale. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731.

34. Ind.—State v. Younts, 89 Ind. 313; Whisnand v. Small, 65 Ind. 120.

Mass.—Crouch v. Eveleth, 12 Mass. 503.

Miss.—Alcorn v. State, 57 Miss. 273.

Mo.—Jarvis v. Russick, 12 Mo. 63; Brown v. Woody, 22 Mo. A. 253.

Or.—Levy v. Riley, 4 Or. 392.

[a] **A deed of commissioners who are heirs** conveys all their interest to the purchaser, although the court exceeded its jurisdiction in appointing commissioners to sell. Berger v. Arnold, (Tex. Civ. A.) 24 SW 527.

35. Beeson v. Pierce, 51 Ind. A. 201, 98 NE 380.

36. Gregory v. McPherson, 13 Cal. 562; Blythe v. Hoots, 72 N. C. 575; Kreider's Est., 17 LancLRev (Pa.) 201.

[a] **Setting aside sale.**—If the order directs a sale to be made by the executor and executrix, a sale by the executor alone, who received all the purchase money and had his report of sale confirmed, may be set aside. Blythe v. Hoots, 72 N. C. 575.

[b] **On the other hand** it has been held that the heirs could not avoid a sale of land because the license to sell was granted to part only of the executors, especially as one of the appointees under the will, the widow, had refused to take under the will and joined in making the report of sale and in giving the deed. Melms v. Pfister, 59 Wis. 186, 18 NW 255.

37. Bickle v. Young, 3 Serg. & R. (Pa.) 234.

38. Ky.—Penn v. Rhoades, 124 Ky. 798, 100 SW 288; Rodgers v. Rodgers, 31 SW 139.

La.—Cronan v. McDonogh, 12 La. Ann. 269.

Md.—Simpson v. Bailey, 80 Md. 421, 30 A 622.

Miss.—Alcorn v. State, 57 Miss. 273.

N. C.—Harris v. Brown, 123 N. C. 419, 31 SE 877; Roberts v. Roberts, 65 N. C. 27.

W. Va.—Ellett v. Reid, 25 W. Va. 550.

[a] **The sale should be made by an auctioneer appointed by the court** (1) and he must be authorized in writing to make the sale or title to the land will not pass by his adjudication. Cronan v. McDonogh, 12 La. Ann. 269. (2) Death of the executor before a sale by the auctioneer does not invalidate the sale. Massey's Succ., 46 La. Ann. 126, 15 S 6.

[b] **Administrator may act as commissioner or trustee to sell.**—Simpson v. Burley, 80 Md. 421, 30 A 622; Harris v. Brown, 123 N. C. 419, 31 SE 877. See also Lafiton v. Doiron, 12 La. Ann. 164 (the representative may act as auctioneer).

[c] **The court may remove commissioners** as well as appoint them. Stone v. Latham, 68 N. C. 421.

39. Dunn's Est., 8 Pa. Dist. 289.

40. Conn.—Seymour v. Seymour, 22 Conn. 272.

La.—Hawkins v. Brown, 7 La. 417; Elliott v. Labarre, 2 La. 326.

N. H.—Braley v. Simonds, 61 N. H. 369.

N. Y.—In re Lawrence, 1 Redf. Surr. 310.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

[a] **Illustration.**—Where an application by an administrator asked for an order to sell the unsold lots belonging to an estate situated in a certain county known as the north half of the town of P, patented to decedent, and the order of sale authorized the sale of so much of the real estate belonging to the estate situated in the town of P as was necessary for certain purposes, the order constituted no authority for the sale of a parcel of land lying outside of but adjoining the town of P. Wilkin v. Owens, (Tex. Civ. A.) 110 SW 552.

[b] **Sale of less land than designated in order not void.**—Seymour v. Seymour, 22 Conn. 272.

41. Pryor v. Davis, 109 Ala. 117, 19 S 440; Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678; Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

[a] **The court is the vendor,** not the representative, and the representative's only agency is that of an officer or special agent designated by the law for special purposes and clothed with a special trust. Pryor v. Davis, 109 Ala. 117, 19 S 440; Cruikshank v. Luttrell, 67 Ala. 318.

the sale, the fact that he acted in good faith and on the advice of counsel is immaterial.[42] An administrator who is unable to make a sale except by a transaction which amounts only to a change in the form of a mortgage debt forming the basis of the petition to sell must take an order allowing him to remortgage the property.[43]

[§ 1559] **2. Administrator De Bonis Non or Special Administrator.** A sale by an administrator de bonis non who has obtained an order of court authorizing the sale passes a good title to the purchaser,[44] and an administrator de bonis non may execute an order granted to his predecessor to sell land and thus pass a good title.[45] It has been held that the probate court cannot authorize a special administrator to sell land,[46] but there is also authority for the contrary view,[47] although it is held that an order granting such authority to a temporary administrator does not authorize a sale by him after he has been appointed permanent administrator.[48]

[§ 1560] **3. Agent, Sheriff, or Other Officer.** It has been held that, as the order of court which directs the sale of lands usually prescribes particularly as to how the sale should be conducted, there is no special personal confidence reposed in the judgment and discretion of the personal representative, and therefore he may have the sale conducted by his agent and the title will pass,[49] but other authorities maintain that the authority given to sell lands is a personal trust which cannot be delegated to another[50] and that, although the administrator may employ an auctioneer to make the sale,[51] he must himself be present and superintend and control the sale.[52] Where the personal representative is charged by law with the duty of selling the real estate, this power cannot be conferred upon the sheriff[53] or a commissioner appointed by the probate court.[54] But under some statutes the sheriff may make the sale.[55]

[§ 1561] **4. Oath.** A personal representative who is authorized to sell real estate of his decedent is usually required to take an oath prescribed by statute,[56] and it has been held that if he neglects to take such oath prior to the sale, the sale is invalid, and no title passes to the purchaser by a deed executed pursuant thereto, and no estoppel is created thereby.[57]

[§ 1562] **5. Special Bond for Sale**[58]**—a. Requirement of.** Statutes usually provide that a personal representative who makes the sale must give a special bond for the faithful application of the proceeds.[59] Under some statutes, however, no special bond is required, where the representative is

42. Pryor v. Davis, 109 Ala. 117, 19 S 440.

43. Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

44. Harris v. Cole, 114 Ga. 295, 40 SE 271; Waterman Lumber, etc., Co. v. Robbins, (Tex.) 206 SW 825; Willis v. Ferguson, 59 Tex. 172.

45. Gress Lumber Co. v. Leitner, 91 Ga. 810, 18 SE 62; Baker v. Bradsby, 23 Ill. 632; Albright v. Bangs, 72 Kan. 435, 438, 83 P 1030, 115 AmSR 219 [cit Cyc]. See also Deans v. Wilcoxon, 25 Fla. 980, 7 S 152 (administrator de bonis non might consummate an incomplete sale made by his predecessor).

46. Long v. Burnett, 13 Iowa 28, 81 AmD 420.

47. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

48. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

49. Sturdy v. Jacoway, 19 Ark. 499; Scales v. Chambers, 113 Ga. 920, 39 SE 396; Cheever v. Hora, 22 Ga. 600; Lewis v. Reed, 11 Ind. 239.

[a] **Auctioneer to sell or agent to negotiate.**—If the administrator is authorized to sell at a public sale he may employ an auctioneer, and if he sell at a private sale he can appoint an agent to negotiate the sale within the limit fixed by the court, which sale he may approve and report for ratification. Lewis v. Reed, 11 Ind. 239.

50. See cases infra notes 51, 52.

51. Kellogg v. Wilson, 89 Ill. 357; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Landry v. Laplos, 113 La. 697, 37 S 606; Trouilly's Succ., 52 La. Ann. 276, 26 S 851; Rabasse's Succ., 51 La. Ann. 590, 25 S 326; Vandever v. Baker, 13 Pa. 121; Schwartz's Est., 12 Phila. (Pa.) 71.

52. Ill.—Kellogg v. Wilson, 89 Ill. 357; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Taylor v. Hopkins, 40 Ill. 442.

La.—Landry v. Laplos, 113 La. 697, 37 S 606.

Nebr.—Levara v. McNeny, 98 NW 679.

N. J.—Hicks v. Willis, 41 N. J. Eq. 515. 7 A 507.

Tex.—Harris v. Shafer, (Civ. A.) 21 SW 110.

See also Noland v. Noland, 12 Bush (Ky.) 426 (sale by auctioneer in absence of commissioner appointed to execute the order of sale invalid).

[a] **Sale by agent not ground for collateral attack.**—Although it may be a ground for refusing to confirm the sale that it was made by the agent of the administrator, and not by the administrator personally, yet this fact will not render the sale void on collateral attack. Harris v. Shafer, (Tex. Civ. A.) 21 SW 110.

53. Jarvis v. Russick, 12 Mo. 63; Heath v. Garrett, 46 Tex. 23. But compare Nora's Succ., 2 La. Ann. 229 (a statute authorizing a succession sale to be made by an auctioneer does not prevent the court from directing a sale by court officers such as the sheriff).

54. Rose v. Newman, 26 Tex. 131, 80 AmD 646.

55. Union Bank v. Powell, 3 Fla. 175, 52 AmD 367; Dobard v. Bayhi, 36 La. Ann. 134; Fontelieu's Succ., 28 La. Ann. 638.

56. Fowle v. Coe, 63 Me. 245; Campbell v. Knights, 26 Me. 224, 45 AmD 107; Parker v. Nichols, 7 Pick. (Mass.) 111; Norman v. Olney, 64 Mich. 553, 31 NW 555; Buntin v. Root, 66 Minn. 454, 69 NW 330; Hugo v. Miller, 50 Minn. 105, 52 NW 381.

[a] **Form of oath.**—Hugo v. Miller, 50 Minn. 105, 52 NW 381.

[b] **Substantial compliance with statutory requirements as to form of oath necessary.**—Hugo v. Miller, 50 Minn. 105, 52 NW 381.

[c] **Time for taking oath.**—Fowle v. Coe, 63 Me. 245; Blood v. Hayman, 13 Metc. (Mass.) 231; Parker v. Nichols, 7 Pick. (Mass.) 111.

[d] **An administrator licensed to mortgage** the property of his intestate is not required to take a special oath before acting. Griffin v. Johnson, 37 Mich. 87.

57. Campbell v. Knights, 26 Me. 224, 45 AmD 107.

58. **Administration bond generally** see supra §§ 189–230.

59. U. S.—Bright v. Boyd, 4 F. Cas. No. 1,875, 1 Story 478.

Ala.—Pettit v. Pettit, 32 Ala. 288; Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

Cal.—Slater v. McAvoy, 123 Cal. 437, 56 P 49; Burris v. Kennedy, 108 Cal. 331, 41 P 458; In re Arguello, 50 Cal. 308.

Del.—Vincent v. Platt, 5 Del. 164.

Fla.—Bushnell v. Krum, 32 Fla. 62, 13 S 591.

Ill.—Frothingham v. Petty, 197 Ill. 418, 64 NE 270; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345]; Stoff v. McGinn, 178 Ill. 46, 52 NE 1048.

Ind.—Clark v. Hillis, 134 Ind. 421, 34 NE 13; Worgang v. Clipp, 21 Ind. 119, 83 AmD 343; Foster v. Birch, 14 Ind. 445; Warwick v. State, 5 Ind. 350; Salyer v. State, 5 Ind. 202; Cullen v. State, 28 Ind. A. 335, 62 NE 759; Rogers v. State, 26 Ind. A. 144, 59 NE 334.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Kan.—Higgins v. Reed, 48 Kan. 272, 29 P 389.

Ky.—Mobberly v. Johnson, 78 Ky. 273.

Me.—In re Snow, 96 Me. 570, 53 A 116; Snow v. Russell, 93 Me. 362, 45 A 305, 74 AmSR 350; Austin v. Austin, 50 Me. 74, 79 AmD 597; Paine v. Paulk, 39 Me. 15; Hasty v. Johnson, 3 Me. 282.

Mich.—White v. Schaberg, 131 Mich. 319, 91 NW 168; Norman v. Olney, 64 Mich. 553, 31 NW 555; Drake v. Kinsell, 38 Mich. 232.

Minn.—Babcock v. Cobb, 11 Minn. 347.

Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Rucker v. Dyer, 44 Miss. 591; Currie v. Stewart, 26 Miss. 646, 61 AmD 500.

Nebr.—Melcher v. Schluter, 5 Nebr. (Unoff.) 445, 98 NW 1082; McClay v. Foxworthy, 18 Nebr. 295, 25 NW 86.

N. J.—Ordinary v. Cooley, 30 N. J. L. 179, 271.

N. Y.—Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261, 54 NYS 555]; Matter of Georgi, 21 Misc. 419, 47 NYS 1061, 2 Gibb. Surr. 274; Holmes v. Cock, 2 Barb. Ch. 426; Jackson v. Holladay, 3 Redf. Surr. 379.

Pa.—Sawyers v. Hicks, 6 Watts 76; Stewart v. Moody, 4 Watts 169.

Tex.—Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984.

Va.—Corbell v. Zeluff, 12 Gratt. (53 Va.) 226.

Wis.—Sitzman v. Pacquette, 13 Wis. 291.

[a] **Location of land immaterial.**—When it is necessary to sell land under the provisions of a will, such bond must be given regardless of whether the land lies within or without the state where the estate is being administered. Peo. v. Huffman,

authorized to sell no more land than is needed for the payment of debts,[60] while under other statutes the rule is that a bond must be required where more land than is necessary for the payment of debts is to be sold, but may or may not be required, according as to whether the judge deems it necessary, where only enough land to pay the debts is to be sold.[61] There are also found statutes which leave the whole matter of requiring a bond to the discretion of the court.[62]

[§ 1563] **b. Time for Giving.** Although the statute requires that a bond is given before the sale is "ordered or made," a bond given after the order has been made, but before it has issued and before the sale has taken place, is valid,[63] and a sale is not void if a bond is given before the confirmation of the sale.[64] Where the court was authorized to grant leave to an administrator to sell and convey the decedent's real estate on such terms as the court might deem expedient, having first required of the administrator a new bond with security conditioned to perform the decree of the court and to account for the proceeds of the sale, and the statute further provided that if the administrator should refuse or neglect to give the bond for two months after passage of the statute, or if the court should deem it proper to appoint some other person to make the sale, it should have authority to do so, there was a substantial compliance with the statute where the administrator gave the bond after two months had expired, and the court then made a decree authorizing the administrator to sell, and the bond was valid.[65]

[§ 1564] **c. Amount.** The amount of the penalty of the bond is usually indicated by statute, being determined with relation to the value of the property or the amount which will probably be realized on the sale.[66] After appraisal of the property and before its sale the court may approve a bond in a less penalty than was required in the order of sale.[67]

[§ 1565] **d. Obligee.** A bond should run to the obligee designated by the statute,[68] and not to the heirs of decedent.[69] A bond payable to the county judge who granted the license to sell is valid, although the land sold is situated in another county.[70]

[§ 1566] **e. Form and Requisites.** Conditions prescribed by the statute must be inserted in the bond,[71] but the absence of a seal opposite the signatures of the obligors in the bond will not invalidate the sale.[72] A variance between the order of sale and the bond as to the amount to be produced by the sale will not invalidate the sale,[73] nor will this effect follow from the fact that the bond recites the first decree of sale, which has been set aside, instead of a later decree under which the sale was made.[74]

[§ 1567] **f. Approval.** Where the statute requires that the bond shall be approved in writing by the judge, it will be presumed, where the contrary does not appear, and the case discloses that all other steps were taken with strictness and accuracy, that the statute was complied with in this respect.[75] Where an administrator applied for leave to sell lands to pay debts, and the court required him to give bond, the obligee in the bond being the judge of a district court and the bond being approved by the clerk, a sale thereunder was not void because the bond was not approved.[76]

[§ 1568] **g. Presumption as to Giving of Bond.** After a great lapse of time it will be presumed, for the purpose of supporting the sale, that the bond was given.[77]

[§ 1569] **h. Effect of Failure to Give Bond.** According to some authorities an omission to give the bond required by statute renders the sale void,[78]

182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345].

[b] **Where the court making the order to sell had no jurisdiction,** such a bond is void. Pettit v. Pettit, 32 Ala. 288.

[c] **Bond when realty mortgaged by representative.**—Griffin v. Johnson, 37 Mich. 87; Fox v. Lipe, 24 Wend. (N. Y.) 164.

[d] **Proof that bond not given.**—In an action to recover real estate so sold, and to remove the cloud created by the sale, the fact that no bond was given may be proved by showing that the record is silent as to such bond, and by testimony of the administrator that none was executed. Babcock v. Cobb, 11 Minn. 347.

[e] **Retrospective operation of statute.**—A statute requiring such a bond applies to all sales made after it took effect, although the license to sell was granted previously. Babcock v. Cobb, 11 Minn. 347.

[f] **Testamentary provision dispensing with bond.**—Where a will directs that the executors shall not be obliged to give security, the court of probate should not require such executors, on application for leave to sell real estate to pay debts, to give security, unless it shall see from its own knowledge or from the suggestion of creditors or legatees that fraud may be practiced, or that the personal estate will not be sufficient to discharge the debts. Wood v. Stewart, 120 Ill. A. 34 (a petition by one neither a legatee nor a creditor will not confer jurisdiction to require security).

60. Bennett v. Overing, 16 Gray (Mass.) 267; Tenney v. Poor, 14 Gray (Mass.) 500, 77 AmD 340; Norman v. Olney, 64 Mich. 553, 31 NW 555; Drake v. Kinsell, 38 Mich. 232; Melcher v. Schluter, 5 Nebr. (Unoff.) 445, 98 NW 1082; McClay v. Foxworthy, 18 Nebr. 295, 25 NW 86.

[a] **Within the principle of the statute** which requires a sale bond only when more realty than is needed for the payment of debts is ordered to be sold, it is not a fatal defect that an administrator, on receiving a license to sell, gave no bond to account for the surplus proceeds, where the property brought no more than was needed for the payment of the debts. Drake v. Kinsell, 38 Mich. 232.

[b] **Sufficiency of general bond.**—The court will require an additional bond only when the penalty of or the sureties on the general bond are insufficient. Wade v. Graham, 4 Oh. 126.

61. Thompson v. Thompson, 105 SW 1185, 32 KyL 319; Norman v. Olney, 64 Mich. 553, 31 NW 555; Drake v. Kinsell, 38 Mich. 232; McClay v. Foxworthy, 18 Nebr. 295, 25 NW 86.

[a] **Protection of infant's share in surplus.**—(1) When land is sold for the payment of debts, and brings more than the amount of the debts, a bond should be taken to protect an infant's interest in the surplus, but where there is no surplus for the infant, a bond is not necessary. Thompson v. Thompson, 105 SW 1185, 32 KyL 319. (2) No bond is required before the sale, but the share of the purchase money due the infant remains a lien on the land until the infant is of age, or the bond required by statute is executed. Oldham v. McElroy, 134 Ky. 454, 121 SW 414; Foley v. Graham, 110 SW 838, 33 KyL 627.

62. Salyer v. State, 5 Ind. 202; Higgins v. Reed, 48 Kan. 272, 29 P 389.

63. Grenawalt's App., 37 Pa. 95.

64. Thorn's App., 35 Pa. 47.

65. Corbell v. Zeluff, 12 Gratt. (53 Va.) 226.

66. In re Arguello, 50 Cal. 308; In re Winona Bridge R. Co., 51 Minn. 97, 52 NW 1079; Jackson v. Holladay, 3 Redf. Surr. (N. Y.) 379; Fitzimmons' App., 40 Pa. 422; Tarr's Est., 1 Pa. Co. 229.

67. Hamilton v. Winona Bridge R. Co., 51 Minn. 97, 52 NW 1079.

68. Bushnell v. Krum, 32 Fla. 62, 13 S 591 (governor of state and his successors in office).

69. Bushnell v. Krum, 32 Fla. 62, 13 S 591; Robinson's App., 62 Pa. 213.

70. Sitzman v. Pacquette, 13 Wis. 291.

71. Williamson v. Williamson, 11 Miss. 715, 41 AmD 636.

72. Buntin v. Root, 66 Minn. 454, 69 NW 330.

73. Purrington v. Dunning, 11 Me. 174.

74. Burris v. Kennedy, 108 Cal. 331, 41 P 458.

75. Austin v. Austin, 50 Me. 74, 79 AmD 597.

76. Melcher v. Schluter, 5 Nebr. (Unoff.) 445, 98 NW 1082.

77. Stevenson v. McReary, 20 Miss. 9, 51 AmD 102; Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984.

78. Clay v. Field, 115 U. S. 260, 6 SCt 36, 29 L. ed. 375; Bright v. Boyd, 4 F. Cas. No. 1,875, 1 Story 478; In re Snow, 96 Me. 570, 53 A 116; Snow v. Russell, 93 Me. 362, 45 A 305, 74 AmSR 350; Babcock v. Cobb, 11 Minn. 347; Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Heth v. Wilson, 55 Miss. 587; Rucker v. Dyer, 44 Miss. 591; Washington v.

but there is also authority for the view that such failure is a mere irregularity which does not invalidate the sale, especially where no one is injured by the omission.[79]

[§ 1570] **i. Liability on Bond**[80]**—(1) In General.** The special bond given for the sale is in the nature of an additional security,[81] and creates a liability, not for the general administration of the estate, but only with reference to the sale.[82] A failure to distribute the proceeds of a sale of real estate according to the direction of the probate court is a breach of the sale bond and not of the general administration bond.[83] The bond creates a continuing liability and is not exhausted by the first sale under the order.[84] A bond conditioned for the faithful payment and application of the purchase money according to the final decree creates no liability until there is a decree directing payment and application.[85] The sureties are liable for interest upon the proceeds of the sale from the time the administrator received them.[86] The bond protects assets of the estate only for the benefit of those who are entitled to the proceeds of sale,[87] and hence the sureties are not liable for the representative's failure to return to the purchaser the proceeds of a void sale.[88] Where the probate court has directed to whom the proceeds of a sale of real estate shall be distributed, and the order is not appealed from, the refusal of the administratrix to distribute the share to which one of the distributees is entitled to his administratrix, because such distributee mortgaged his interest in the land in his lifetime, is a breach of the sale bond.[89] It has been held that the bond covers only the surplus after paying debts.[90] A bond given voluntarily without a statute requiring it imposes no liability,[91] but where a sale was made without an order and a bond given under a subsequent order taking cognizance of the sale, the sureties are liable.[92]

[§ 1571] **(2) Release of Sureties.** Returning property unsold for want of bidders does not discharge sureties from liability, but they continue liable on a subsequent sale,[93] even though the terms of sale may be altered.[94] Where an administrator is appointed commissioner to make the sale, he will not be held to have constructively paid to himself as administrator the moneys received by him as commissioner so as to relieve the sureties on the sale bond.[95] A general statute providing for the release of sureties on their own application has been held not to apply to the special bond given on a sale of real estate.[96] Where, under the statute the bond ceases to be operative at the end of a fixed period from the date of the license to sell, if no sale has been made within such time, no subsequent act of the representative can create any liability thereunder.[97]

[§ 1572] **(3) Enforcement of Liability.** The sureties on a sale bond may be sued thereon without first bringing an action against the principal.[98] In an action by creditors, a complaint which alleges as breaches the failure of the administrator, on demand of the creditors, to apply the proceeds to the payment of debts, and the failure to comply with the order of the court requiring payment thereof into court, and which shows that the administrator withheld proceeds after his removal as administrator, is sufficient without alleging what the administrator did with the proceeds, and without showing that the creditors were injured.[99] In an action on a bond given for the sole purpose of securing proper distribution of the proceeds of sale of real estate for the payment of debts, a statement of claim which fails to aver that an award made by the orphans' court and claimed by plaintiff was a portion of the proceeds of such sale is insufficient to support a summary judgment.[1] In an action by creditors, findings that the administrator on demand of the creditors failed to apply the proceeds to the payment of the creditors, and failed to comply with the order requiring him to pay the proceeds into court, and that he withheld the proceeds after his removal as administrator, are sufficient on which to predicate a judgment on the bond.[2] Where it appeared that the administrator withheld the proceeds, and that the administrator was the principal in an obligation to which decedent was a surety, and the court allowed the ad-

McCaughan, 34 Miss. 304; Cohea v. State, 34 Miss. 179; Currie v. Stewart, 26 Miss. 646, 27 Miss. 52, 61 AmD 500; Stevenson v. McReary, 20 Miss. 9, 51 AmD 102; Williamson v. Williamson, 11 Miss. 715, 41 AmD 636.

79. Ala.—Wyman v. Campbell, 6 Port. 219, 31 AmD 677 [overr Wiley v. White, 3 Stew. & P. 355].

Ill.—Frothingham v. Petty, 197 Ill. 418, 64 NE 270; Stoff v. McGinn, 178 Ill. 46, 52 NE 1048.

Ind.—Clark v. Hillis, 134 Ind. 421, 34 NE 13; Foster v. Birch, 14 Ind. 445.

Mass.—Perkins v. Fairfield, 11 Mass. 227.

Mich.—Norman v. Olney, 64 Mich. 553, 31 NW 555.

Pa.—Dixcy v. Laning, 49 Pa. 143; Lockhart v. John, 7 Pa. 137.

[a] **Reason for rule.—**"A bond is only required to secure the heirs against the misappropriation of the sale money." Foster v. Birch, 14 Ind. 445, 447 [appr Jones v. French, 92 Ind. 138].

[b] **If no bond was required by the order of sale,** the title of an innocent purchaser is not affected by the fact that none was given. Norman v. Olney, 64 Mich. 553, 31 NW 555; Drake v. Kinsell, 38 Mich. 232.

80. Liability on administration bonds generally see infra §§ 2533–2669.

81. Salyers v. Ross, 15 Ind. 130; Durfee v. Joslyn, 92 Mich. 211, 52 NW 626.

[a] **The general administration bond must be first exhausted** before an action can be maintained on the special bond. Salyers v. Ross, 15 Ind. 130; Salyer v. State, 5 Ind. 202. Contra White v. Schaberg, 131 Mich. 319, 91 NW 168.

82. Burtch v. State, 17 Ind. 506; Durfee v. Joslyn, 92 Mich. 211, 52 NW 626; Com. v. Wing, 253 Pa. 226, 97 A 1072; Com. v. Winters, 4 Wkly NC (Pa.) 346; Mann v. Everts, 64 Wis. 372, 25 NW 209.

[a] **The bond does not cover counsel fees** incurred in a proceeding to compel the administrator to account for the proceeds. Mann v. Everts, 64 Wis. 372, 25 NW 209.

83. State v. Donahue, 82 Conn. 308, 73 A 763, 135 AmSR 273.

84. Sawyers v. Hicks, 6 Watts (Pa.) 76.

85. Pettit v. Pettit, 32 Ala. 288.

86. Durfee v. Joslyn, 101 Mich. 551, 60 NW 39.

87. Peo. v. Parker, 54 Colo. 604, 132 P 56.

88. Peo. v. Parker, 54 Colo. 604, 132 P 56 (sale of land in another state).

89. State v. Donahue, 82 Conn. 308, 73 A 763, 135 AmSR 273 (the probate court has no jurisdiction in the administration proceedings to inquire into the equities existing between such distributees of the estate and the mortgagee, notwithstanding the foreclosure).

90. Bennett v. Overing, 16 Gray (Mass.) 267. But compare Fay v. Valentine, 8 Pick. (Mass.) 526 (construing earlier statute).

91. Hughlett v. Hughlett, 5 Humphr. (Tenn.) 453.

92. Fleece v. Jones, 71 Ind. 340.

93. Sawyers v. Hicks, 6 Watts (Pa.) 76.

94. Sawyer v. Hicks, 6 Watts (Pa.) 76.

95. Brandon v. Mason, 1 Lea (Tenn.) 615.

96. Matter of Lawyers' Surety Co., 25 Misc. 136, 54 NYS 926, 2 Gibb. Surr. 576.

97. Miller v. Messervey, 107 Me. 158, 77 A 697.

98. Stewart v. Moody, 4 Watts (Pa.) 169.

99. Moore v. State, 43 Ind. A. 387, 84 NE 161 (the acts of the administrator amounted to a conversion, giving the creditors a right to sue and recover the amount of the fund in the hands of the administrator at the time of the commencement of the action with interest and penalty).

1. Com. v. Magee, 24 Pa. Super. 329.

2. Moore v. State, 43 Ind. A. 387, 84 NE 161 (special findings that the administrator received proceeds of sales of real estate, that the court

ministrator for his services a sum less than the amount of such obligation, the court properly provided that the sum allowed for services should not be allowed as a credit to the administrator in his account, but should be paid by him on the indebtedness of the estate.[3]

Where an additional bond was given after real estate had been converted into money, which was in the hands of the administrator to carry out the provisions of the will, it being apparent that the object of the bond was to provide additional security for the preservation of the fund so raised, and the sureties being charged by the probate proceedings with knowledge of the receipt by the administrator of such fund, and the purposes for which it was being held, the sureties could not say, when sued on the bond, that the fund consisted of the proceeds of a sale of real estate which the court had improperly sanctioned.[4]

[§ 1573] **J. Notice of Sale**[5]**—1. In General.** It is usually required that notice of the proposed sale be given to interested persons,[6] and in some jurisdictions a sale of real property without the required notice is held void.[7] It has been held that if the representative actually gave the notice required by law, the fact that the court ordering the sale did not require notice to be given does not invalidate the sale.[8] Where the period of notice is prescribed by statute,[9] it has been held that if the notice falls short of the requirements of the statute the sale is absolutely void;[10] but it has also been held that if the order of sale is a general one and does not prescribe the length of notice, the fact that the sale was had under a notice short of the statutory period does not affect the title of the purchaser,[11] although if the order fixes the length of notice to be given it must be strictly complied with or the sale will be invalidated.[12] Under the old chancery practice a reasonable notice of sale was all that was necessary.[13]

[§ 1574] **2. Publication.**[14] The statutes generally provide that the sale shall be advertised in a newspaper for a designated period before the sale.[15] The length of the period of publication and the number of insertions during the period is usually fixed by statute,[16] as also is the length

ordered him to pay the proceeds to the clerk of the court to be applied to the payment of debts, that the creditors had previously obtained an allowance of their claims, that the administrator failed to comply with the order of the court, or to pay the creditors, that he was afterward removed by order of the court, and that he had in his hands at the time of his removal a specified amount derived from the sale of real estate, which amount he withheld, show that the funds received from the sale of real estate were not paid into court, or to the creditors, or to the administrator's successor).

3. Moore v. State, 43 Ind. A. 387, 84 NE 161.

4. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

5. Notice of application for sale see supra §§ 1506–1514.

6. U. S.—Simmons v. Saul, 138 U. S. 439, 11 SCt 369, 34 L. ed. 1054.

Ga.—Whitehurst v. Mason, 140 Ga. 148, 78 SE 938.

Ill.—Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

Iowa.—Yoder v. Kalona Sav. Bank, 142 Iowa 219, 119 NW 147; Thornton v. Mulquinne, 12 Iowa 549, 79 AmD 548.

Mass.—Thomas v. Le Baron, 8 Metc. 355.

Minn.—Cater v. Steeves, 95 Minn. 225, 103 NW 885.

Mo.—Hicks v. Watson, 258 Mo. 425, 167 SW 533; Bank v. Morrison, (A.) 204 SW 1119.

N. J.—Parker v. Allen, (Ch.) 4 A 300.

N. Y.—Matter of Georgi, 44 App. Div. 180, 60 NYS 772 [aff 162 N. Y. 660 mem, 57 NE 1110 mem].

N. C.—McNeill v. Fuller, 121 N. C. 209, 28 SE 299.

Tex.—Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

[a] **Court cannot authorize private sale without notice.**—Fussell v. Dennard, 118 Ga. 270, 45 SE 247.

[b] **No authority to sell until notice given.**—Where an order of license for an administrator's sale directed that notice of the terms of the sale of land to be sold at private sale were to be given by publication, as set forth in the order, the administratrix had no authority to make the sale until the notice was given. Cater v. Steeves, 95 Minn. 225, 103 NW 885.

[c] **Statutory penalty for failure to give notice.**—Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

[d] **Return day of order of publication.**—Under a statute which changed the time for the holding of the April term of the probate court to the first Monday of April, and directed that all writs, process, and notices returnable to such court next after the taking effect of the act should be made returnable to the first term of the county court held for the transaction of probate business, an order for publication of notice of sale of real estate, being a substituted process for the sale of real estate, was "process and notice," and the clerk properly changed the return day of an order of publication made before passage of the act so as to conform the same thereto. Rhodes v. Bell, 230 Mo. 138, 130 SW 465.

[e] **Jurisdiction to determine the sufficiency of the advertisement** of sale and the power to compel the administrator to make a complete advertisement is possessed by the orphans' court. Parker v. Allen, (N. J. Ch.) 4 A 300.

[f] **When realty is sold upon an annual settlement of accounts,** where personalty is insufficient to pay debts, the settlement itself appears as a notice and renders other notice unnecessary. Patee v. Mowry, 59 Mo. 161.

[g] **Sale by commissioners for distribution.**—A statute requiring a personal representative to give notice of the time and place of sale does not apply to sales made by commissioners appointed by the court to sell land for distribution. Field v. Goldsby, 28 Ala. 218, 65 AmD 341.

7. Ala.—Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

La.—Curley's Succ., 18 La. Ann. 728.

Minn.—Cater v. Steeves, 95 Minn. 225, 103 NW 885.

Miss.—Matlock v. Livingston, 17 Miss. 489.

Mo.—Norton v. Reed, 253 Mo. 236, 161 SW 842; Bank v. Morrison, (A.) 204 SW 1119.

Or.—Browne v. Coleman, 62 Or. 454, 125 P 278.

[a] **The administrator's failure to readvertise property for an adjourned sale** does not render the sale void. Botsford v. O'Conner, 57 Ill. 72.

[b] **Sale of personalty.**—The bare omission to give the required notice for the sale of personalty does not impair the title of the purchaser. James v. Dixon, 21 Mo. 538. But compare Halleck v. Moss, 17 Cal. 339 (a sale of personalty on insufficient notice is at least voidable if not actually void).

8. Lawrence's App., 49 Conn. 411; Clark v. Hillis, 134 Ind. 421, 34 NE 13.

[a] **Contrary view.**—Graden v. Mais, 77 Kan. 702, 95 P 412, 127 AmSR 456. See also Matlock v. Livingston, 17 Miss. 489 (failure to direct posting of notices rendered proceedings defective).

9. Length of notice by publication see infra § 1574.

10. Curley's Succ., 18 La. Ann. 728; Zech's Est., 4 Pa. Dist. 250, 15 Pa. Co. 622, 1 LackLegN 142; Zech's Est., 15 Pa. Co. 622.

11. Sowards v. Pritchett, 37 Ill. 517 (holding, however, that short notice coupled with other irregularities or inadequacy of price may be sufficient grounds for setting aside the sale).

12. Bryan v. Hinman, 5 Day (Conn.) 211; Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

13. Darrington v. Borland, 3 Port. (Ala.) 9.

14. Proof of publication see infra § 1577.

15. Hellman v. Merz, 112 Cal. 661, 44 P 1079; Lawrence's App., 49 Conn. 411; Hautau's Succ., 32 La. Ann. 54; Dayton v. Mintzer, 22 Minn. 393.

[a] **Publication in more than one newspaper.**—A statute providing for the publication of notice of sale in "a daily paper" does not authorize publication in more than one paper. Hautau's Succ., 32 La. Ann. 54.

[b] **Ratification of unadvertised sale.**—A purchaser at a succession sale made to pay debts, which had not been advertised as required by law, cannot be forced to accept a subsequent ratification thereof tendered by the heirs, who have never been put in possession, as the succession is the real vendor, and the unpaid creditors are parties in interest. Gairnes' Succ., 121 La. 223, 46 S 217.

16. Cal.—Hellman v. Merz, 112 Cal. 661, 44 P 1079; In re O'Sullivan, 84 Cal. 444, 24 P 281; Dorsey's Est., 75 Cal. 258, 17 P 209; Cunningham's Est., 73 Cal. 558, 15 P 136; In re Osgood, Myr. Prob. 153.

Ga.—King v. Cabaniss, 81 Ga. 661, 7 SE 620.

Mass.—Frothingham v. March, 1 Mass. 247.

Minn.—Hartley v. Croze, 38 Minn. 325, 37 NW 449; Wilson v. Thompson, 26 Minn. 299, 3 NW 699; Dayton v. Mintzer, 22 Minn. 393.

N. J.—Tappan v. Dayton, 51 N. J. Eq. 260, 28 A 1.

Pa.—Zech's Est., 4 Pa. Dist. 250, 15 Pa. Co. 622, 1 LackLegN 142.

R. I.—In re Harris, 14 R. I. 637.

[a] **The publication must be continuous** in the same paper during the entire period prescribed by law. Townsend v. Tallant, 33 Cal. 45, 91 AmD 617.

of time which may or must elapse between the last publication and the day of sale,[17] and the number of newspapers in which publication must be made.[18] The court has usually the power to designate the paper or papers in which the notice shall be published.[19] It has been held that a statutory provision that the notice must be published a certain number of weeks successively is satisfied if the publication appears at weekly intervals for the number of weeks prescribed;[20] but there is also authority for the view that a statute providing for four weeks' publication requires twenty-eight full days' notice.[21] If there is an actual compliance with the law with regard to publication, the sale is valid, notwithstanding the order of the court as to the publication did not conform to the statute in its requirements.[22]

[§ 1575] **3. Posting.**[23] It is sometimes required either in lieu of, or in addition to, the publication of notice, that notices shall be posted up[24] in public places, by which is meant such places as are likely to give notice to the public.[25] The requirements of the statute as to posting should be followed,[26] although a departure from the letter of the statute will not invalidate the sale where the spirit was complied with and no detriment resulted.[27]

[§ 1576] **4. Form and Contents of Notice.** The notice must be published in the English language,[28] and must give the information required by the statute.[29] The notice should state the time of the sale,[30] with sufficient certainty to leave no doubt as to when the sale will occur,[31] and also the place where the sale is to be held.[32] But it has been held that the notice need not state the conditions of the sale,[33] or at least an omission to state the conditions is a mere irregularity.[34] A purchaser may avoid the sale if there has been a misleading mistake in the description of the property in the advertisement or notice;[35] but it is otherwise where, although there were mistakes or omissions in the description of the property, it was such that there would be no difficulty in ascertaining what land was meant.[36] The fact that the notice did not contain the signature of the commissioner who was

[b] **Number of insertions.**—Under a statute which requires that notice of the time and place of sale shall be published in a newspaper for "three weeks successively next before such sale," it is sufficient if there are three publications at the rate of one a week on regular publication days, separated by intervals of a week, although the paper is published daily. Dayton v. Mintzer, 22 Minn. 393. To similar effect In re O'Sullivan, 84 Cal. 444, 24 P 281.

17. Hellman v. Merz, 112 Cal. 661, 44 P 1079; Hartley v. Croze, 38 Minn. 325, 37 NW 449; Wilson v. Thompson, 26 Minn. 299, 3 NW 699; Tappan v. Dayton, 51 N. J. Eq. 260, 28 A 1.

[a] **"The purpose of the requirement** that the publication should fit closely upon the sale is obviously to keep freshly in the public mind the pendency of the sale, and the mischief of the omission to publish within the last week may be twofold, in permitting the sale to be lost sight of and, possibly, in impressing intending purchasers with the belief that it has been abandoned." Tappan v. Dayton, 51 N. J. Eq. 260, 265, 28 A 1.

18. Hautau's Succ., 32 La. Ann. 54 (if an administrator publishes in more newspapers than the statute allows he cannot be credited with the disbursements caused by the extra publication).

19. In re O'Sullivan, 84 Cal. 444, 24 P 281; Lawrence's App., 49 Conn. 411; Adolph's Est., 11 Phila. (Pa.) 157; Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523.

[a] **Clerk may make selection pursuant to rule giving him such power.**—Adolph's Est., 11 Phila. (Pa.) 157.

[b] **A weekly newspaper of general circulation** is proper medium for publication of notice. In re O'Sullivan, 84 Cal. 444, 24 P 281.

20. Morrow v. Weed, 4 Iowa 77, 66 AmD 122; Dayton v. Mintzer, 22 Minn. 393; In re Harris, 14 R. I. 637.

[a] **Nonissuance of newspaper.**—If the newspaper in which the notice was published is not issued in one of the weeks during the thirty day period required, the sale is not vitiated. Etie v. Cade, 4 La. 383.

21. Norton v. Reed, 253 Mo. 236, 161 SW 842.

22. Lawrence's App., 49 Conn. 411; Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523.

[a] **Failure to designate** (1) by the order of sale the paper in which the notice shall be published, as required by the statute, is a mere irregularity which is cured by an order confirming the sale. Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523. (2) If the notice is actually published in a daily paper circulating in the district as required by law the sale is valid, although the order merely directed publication "in a newspaper published in the county." Lawrence's App., 49 Conn. 411.

23. Proof of posting see infra § 1577.

24. Cal.—In re O'Sullivan, 84 Cal. 444, 24 P 281.

Mass.—Frothingham v. March, 1 Mass. 247.

Mich.—Averill v. Jackson City Bank, 114 Mich. 20, 72 NW 15.

Minn.—Hugo v. Miller, 50 Minn. 105, 52 NW 381; Hartley v. Croze, 38 Minn. 325, 37 NW 449.

N. Y.—Matter of McFeeley, 2 Redf. Surr. 541.

Wis.—McCrubb v. Bray, 36 Wis. 333.

[a] **Notice by posting in absence of order for publication.**—Under a statute requiring notice of sale of personalty to be given by posting in three public places or by publication if the judge so orders, the notice must be given by posting in the absence of an order of the judge to publish. Halleck v. Moss, 17 Cal. 339.

25. Sowards v. Pritchett, 37 Ill. 517; McKnelly v. Conley, 210 Ill. A. 609; Etie v. Cade, 4 La. 383.

[a] **Affixing notice to church or courthouse door sufficient.**—Etie v. Cade, 4 La. 383.

26. Matter of McFeeley, 2 Redf. Surr. (N. Y.) 541 (where a notice of sale is not posted in the ward of the city where the property is situated as required by law, the sale is void).

27. Averill v. Jackson City Bank, 114 Mich. 20, 72 NW 15 (the sale is valid, although the statute requires posting in three of the most public places in the ward where the land is situated and the notices were not posted in the ward, where they were posted in three of the most public places in the city, and notice was also given by newspaper publication, and the sale was open and notorious and full value was realized).

28. Tappan v. Dayton, 51 N. J. Eq. 260, 28 A 1 (although the general reading matter of the newspaper in which it appears is in a foreign language).

29. Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793; Hicks v. Watson, 258 Mo. 425, 167 SW 533.

[a] **Illustration.**—A notice which does not state the time or place of sale or that the land will be sold at public vendue to the highest bidder, as required by statute, is of no legal effect. Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793.

[b] **Compliance with statute sufficient.**—Where the order of publication notified "all persons interested in the estate" of the facts required by statute, which was the only notice then required by law, there is no force in a contention that certain heirs were not mentioned or notified in the proceedings. Hicks v. Watson, 258 Mo. 425, 167 SW 533.

30. Trousdale v. Trousdale, 35 Tex. 756; Blodgett v. Hitt, 29 Wis. 169.

[a] **It is erroneous to confirm** a sale where the published advertisement designated a different day of sale from that on which the sale was actually made. Trousdale v. Trousdale, 35 Tex. 756.

31. Little v. Sinnett, 7 Iowa 324; Wellman v. Lawrence, 15 Mass. 326.

[a] **Sufficient notice.**—A notice which was dated June 4, 1847, which fixed the time of the sale as "on the 26th of June next" was sufficient notice of the sale on the 26th of June, 1847. Little v. Sinnett, 7 Iowa 324.

[b] **Insufficient notice.**—Where a sale was advertised for Friday the seventeenth, whereas Friday was the sixteenth, and the mistake was not corrected until the last publication made on the date of the sale, the sale could be avoided. Wellman v. Lawrence, 15 Mass. 326.

32. Little v. Sinnett, 7 Iowa 324; Hartley v. Croze, 38 Minn. 325, 37 NW 449; Blodgett v. Hitt, 29 Wis. 169.

[a] **Merely naming the town** (1) in which the sale is to be made is not a sufficient compliance with this requirement. Hartley v. Croze, 38 Minn. 325, 37 NW 449 (sale void because of insufficiency of notice). (2) Where the notice named the town where the sale would be made, the failure to designate any particular place in the town did not render the notice void or invalidate the sale, where it did not appear that any mistake occurred or that an unusual or improper place was adopted. Little v. Sinnett, 7 Iowa 324, 335 ("We might doubt whether the same rule, in this respect, is to be applied to a small village, which might be to a large city, whose population equalled a county, or even a State").

33. Paine v. Fox, 16 Miss. 129.

34. Brubaker v. Jones, 23 Kan. 411.

35. Doyle v. Whitridge, 97 Md. 711, 55 A 459; Veihdorfer's Est., 26 Pa. Co. 317.

36. Wylly v. Gazan, 69 Ga. 506;

directed to sell the land does not affect the validity of the sale.[37] If an heir is not sufficiently named in the notice the sale is not binding on him and he may attack the proceedings collaterally.[38]

[§ 1577] **5. Proof of Publication or Posting.** It is usually required that due proof shall be made of the giving of notice of the sale in a proper manner,[39] although it has been held that proof of advertisement according to law and the order of the court will not be required after the lapse of a long period.[40] A recital in a decree of confirmation that it appears to the court that due notice of sale had been given is sufficient proof, in the absence of anything contradicting it, of posting the notices of sale;[41] and where there was no affidavit of posting in due form legally made and in evidence, but the administrator in his report of sale stated, under oath, that he posted notices, and the report was duly confirmed, the evidence of posting was sufficient.[42] But an affidavit of posting made and filed in the probate court ten years after the sale, without the consent of that court, is not legal evidence.[43] The fact that the judge before whom proof of publication of a notice for the sale was taken did not sign the blank jurat attached to the publisher's affidavit will not invalidate the proof of publication.[44] Under a statute requiring that the affidavit of publication of an order of the probate court for the sale of land be made by the "printer" of the paper in which the insertion was made, an affidavit by the "proprietor" has been held sufficient.[45] If the affidavit of publication was insufficient, a bidder at a private sale may refuse to comply with his bid and may recover his deposit, and an amended affidavit filed after the hearing of the action to recover the deposit cannot obviate the defect or defeat the action.[46]

[§ 1578] **K. Manner and Conduct of Sale**[47]—**1. In General.** In making a sale the executor or administrator must comply with every essential requirement of the statute which authorized the sale or no title will pass,[48] and, where the manner of selling is directed by the court, its directions must also be strictly followed.[49] The representative is bound to show a sound discretion in conducting the sale, so as to realize as much as possible,[50] and as the responsibility of preventing a sacrifice of the property is on him and he can therefore refuse to consummate the sale if the property does not bring its fair market value,[51] or if the sale might be set aside by the court on the ground of unfairness.[52] The representative must give all persons who desire to bid at the sale ample opportunity to do so.[53] The mere substitution of one bidder for

Abshire v. Lege, 133 La. 254, 62 S 667; Wadsworth's Succ., 2 La. Ann. 966; New England Hospital v. Sohrer, 115 Mass. 50; In re Winona Bridge R. Co., 51 Minn. 97, 52 NW 1079.

[a] **Description held sufficient.**—Where the order of sale described the land as the east half of a certain city lot, with the improvements and buildings thereon, and the notice referred to the order of sale, and described the property as the "eastern half or three-quarters" of said lot, being of certain dimensions, "more or less," and the part of the lot to be sold had been inclosed for many years, the description in the notice was sufficient. Wylly v. Gazan, 69 Ga. 506.

37. Allsop v. Owensboro Deposit Bank, 69 SW 1102, 24 KyL 762.

38. Clark v. Hillis, 134 Ind. 421, 34 NE 13.

39. Sowards v. Pritchett, 37 Ill. 517; Thornton v. Mulquinne, 12 Iowa 549, 79 AmD 548; Woods v. Monroe, 17 Mich. 238.

[a] **Proof of posting.**—Proof must be given that the places where the notices were posted were public places; and it is not sufficient to show merely that the notices were posted at a schoolhouse or on a road, as the court will not presume that these are public places within the meaning of the statute. Sowards v. Pritchett, 37 Ill. 517. Compare Hugo v. Miller, 50 Minn. 105, 52 NW 381 (where the affidavit of posting was that the affiant, administrator, "posted three copies of the notice in three of the most public places in the village of Duluth, within which village the land above described is, in St. Louis county and state of Minnesota; that the three most public places were as follows, to wit, one copy posted in a conspicuous place in the United States post office, one in a conspicuous place in the office of the village justice of said village, and one in a conspicuous place on a lamp post at the intersection of Superior street (the main street in said village) and First avenue east," and objection was made to this affidavit on the ground that the places of posting the notices were stated to be in three of the most public places in the village of Duluth, not in three of the most public places in the county, as required by statute; but the court having found that such places were three of the most public places in the county, and confirmed the sale, its determination could not be collaterally attacked).

[b] **The want of proof** that notice of the sale was given as required by law is fatal to a title derived from an administrator's sale. Thornton v. Mulquinne, 12 Iowa 549, 79 AmD 548.

40. Blair v. Marks, 27 Mo. 579; Vasquez v. Richardson, 19 Mo. 96.

41. Yerger v. Ferguson, 55 Miss. 190. To same effect Woods v. Monroe, 17 Mich. 238.

42. Woods v. Monroe, 17 Mich. 238.

43. Woods v. Monroe, 17 Mich. 238.

44. Norton v. Reed, 253 Mo. 236, 161 SW 842.

45. Reynolds v. Schmidt, 20 Wis. 374.

46. Hellman v. Merz, 112 Cal. 661, 44 P 1079.

47. Sale of personalty under testamentary authority or common-law power see supra § 731.

Sale of realty under testamentary authority see supra § 652.

48. Ala.—King v. Gilreath, 154 Ala. 129, 45 S 89; Wyman v. Campbell, 6 Port. 219, 31 AmD 677; Wiley v. White, 3 Stew. & P. 355.

Colo.—Filmore v. Reithman, 6 Colo. 120; Vance v. Maroney, 4 Colo. 47.

Conn.—Lockwood v. Sturdevant, 6 Conn. 373.

Ga.—Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

Ill.—Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

Ind.—Martin v. Densford, 3 Blackf. 295.

La.—Elliott v. Labarre, 2 La. 326.

Mo.—Tutt v. Zenir, 51 Mo. 431.

Mont.—Broadwater v. Richards, 4 Mont. 80, 2 P 546.

N. Y.—Berger v. Duff, 4 Johns. Ch. 368.

Pa.—Veihdorfer's Est., 26 Pa. Co. 317.

[a] **As to mere matters of form,** a substantial compliance with the statute is all that is necessary to make the sale valid. Tutt v. Zenir, 51 Mo. 431.

[b] **Preliminary offering of rents and profits.**—Under the statute the fee simple of the real estate cannot be sold until the rents and profits for a term of years defined in the statute have been first offered for sale, the fee simple being allowed to be sold only in case the rents and profits of the term of years are insufficient. Martin v. Densford, 3 Blackf. (Ind.) 295. Sufficiency of rents and profits to pay debts see supra § 1454.

49. Ill.—Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

Ky.—Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

Md.—Glenn v. Wootten, 3 Md. Ch. 514.

Mont.—Broadwater v. Richards, 4 Mont. 52, 80, 2 P 544, 546.

Va.—Tennent v. Pattons, 6 Leigh 196.

[a] **The presumption is** that the officer conducting the sale complied with the instructions of the court. Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

[b] **After the trustee has once offered the property** in the market in the mode prescribed by the decree and has been unable to sell it he may dispose of it in a different mode, and then it is for the court to say whether it will ratify the sale or not. Glenn v. Wootten, 3 Md. Ch. 514.

50. In re Ketcham, (S. D.) 171 NW 764.

51. Rogers v. Dickey, 117 Ga. 819, 45 SE 71; Matter of Vom Saal, 82 Misc. 531, 145 NYS 307.

[a] **Crier cannot complete sale over protest of administrator.**—Scales v. Chambers, 113 Ga. 920, 39 SE 396.

52. In re Lawrence, 1 Redf. Surr. (N. Y.) 310.

53. Scales v. Chambers, 113 Ga. 920, 39 SE 396; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319; Fairfax v. Muse, 4 Munf. (18 Va.) 124.

[a] **Evidence.**—Under an issue whether the crier had knocked off property without giving the persons at the sale a fair opportunity to bid, it was competent to show by one person that but for the premature termination of the sale he would have run the property up higher. Scales v. Chambers, 113 Ga. 920, 39 SE 396.

[b] **The fact that limitation of time for further bidding was proclaimed,** which limitation was afterward repeatedly done away with and the sale kept open, is not a ground for setting aside the sale, as the only effect must have been to quicken and excite the bidders. Fairfax v. Muse, 4 Munf. (18 Va.) 124.

[c] **The fact that the day of the**

another who fails to comply with the terms of sale cannot affect the validity of the sale.[54] A purchaser may avoid the sale for a material misrepresentation made thereat.[55] The possession of a land certificate by the representative at the time of the sale thereof is not necessary to the validity of the sale where the certificate had become identified with a location and would therefore be naturally in the surveyor's office.[56] In a case where a will indicated an intention to have land sold and the proceeds divided among the beneficiaries, and the estate was taken out of an executor's hands and placed in the custody of the master commissioner of the court, it was held not error, upon proper application, to order the master commissioner to sell the land and distribute the proceeds, instead of resorting to the statutory method of sale.[57]

Discretion of commissioner. The commissioner, in executing a judgment of sale of decedent's land, is the court's agent in advertising and selling, and he has a discretion in matters connected with the sale where the judgment does not specifically direct the course he shall pursue.[58]

[§ 1579] **2. Time of Sale.**[59] If the time of sale is prescribed by statute, it must be made accordingly, and a sale made at any other time is without authority.[60] A sale under a license after the expiration of the time prescribed by statute within which such sale shall be made is void,[61] and where the order fixes a time limit for a private sale, a sale made after such time has expired is void.[62] If no time is fixed either by law or by the order granting the license to sell, the sale must be made within the time that the license is operative.[63] The court can, however, usually extend the time within which the sale may be made,[64] and a statute which limits the life of a license to sell realty to a certain period does not limit the power of the probate court to grant a second license.[65] It is sometimes required that the sale shall be made while the court is in session, and a sale at any other time is void.[66] Where the order gives a general power to sell, without restriction as to time, a clause requiring a report at the next term does not limit the exercise of the power to that term.[67] It has been considered that, where the statute limits the

sale was cloudy and occasionally rainy is not ground for setting aside the sale where a considerable number of persons were present and bid on the land, and it does not appear with certainty that any person who would have bid for the land was prevented from attending. Fairfax v. Muse, 4 Munf. (18 Va.) 124.

54. Halleck v. Guy, 9 Cal. 181, 70 AmD 643 (the order directing the sale and the order confirming it gave vitality to the purchase).

55. Doyle v. Whitridge, 97 Md. 711, 55 A 459 (a misrepresentation by the auctioneer at a sale of a ground rent that a certain responsible firm was the tenant, whereas the leasehold had been sold by them, released the purchaser, although the misrepresentation was innocently made).

Fraud as ground for annulling sale generally see infra §1671.

56. Corley v. Anderson, 5 Tex. Civ. A. 213, 23 SW 839.

57. Crane v. Crane, 105 SW 370, 32 KyL 82.

58. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

59. Sale of personalty under testamentary authority or common-law power see supra § 730.

Sale of realty under testamentary authority see supra § 651.

60. Tippett v. Mize, 30 Tex. 361, 94 AmD 313; In re Bryant, 38 Wash. 337, 80 P 555.

[a] **Court may order sale in summer time.**—Lehman v. Worley, 40 La. Ann. 620, 4 S 573.

[b] **An omission of the order to direct** that the sale be made within sixty days after the order, as required by statute, does not affect the validity of the sale if it is actually made within the sixty days. Title Guarantee, etc., Co. v. Holverson, 95 Ga. 707, 22 SE 533.

61. Miller v. Meservey, 107 Me. 158, 77 A 697; Mason v. Ham, 36 Me. 573; Chadbourne v. Rackliff, 30 Me. 354; Campau v. Gillett, 1 Mich. 416, 53 AmD 73; Bowker's Est., 12 Phila. (Pa.) 161; Mackin v. Hobbs, 116 Wis. 528, 93 NW 462.

[a] **Computation of time.**—Where, on appeal from an order of license to an administrator to sell real estate, the order was directed to be modified, which was done, the two years within which a sale must be made should be computed from the modification. Mackin v. Hobbs, 116 Wis. 528, 93 NW 462.

[b] **The orphans' court has power to confirm** an executor's sale of land to pay debts made more than five years after the date of the order of sale. Bowker's Est., 12 Phila. (Pa.) 161 (under the act of April 13, 1854).

62. Wofford v. Martin, (Mo.) 183 SW 603.

63. Ill.—Bowen v. Bond, 80 Ill. 351.

Me.—Mason v. Ham, 36 Me. 573; Chadbourne v. Rackliff, 30 Me. 354; Marr v. Boothby, 19 Me. 150.

Mass.—Wellman v. Lawrence, 15 Mass. 326; Macy v. Raymond, 9 Pick. 285.

Mich.—Howard v. Moore, 2 Mich. 226.

Wash.—In re Bryant, 38 Wash. 337, 80 P 555.

[a] **Representative should report at next term of court.**—Bowen v. Bond, 80 Ill. 351.

[b] **Delivery of deed after expiration of license.**—(1) A sale made while the license is still in force is not vitiated by the fact that the deed was not delivered until afterward. Jewett v. Jewett, 10 Gray (Mass.) 31; Cooper v. Robinson, 2 Cush. (Mass.) 184; Osman v. Traphagen, 23 Mich. 80; Howard v. Moore, 2 Mich. 226. (2) Formerly the rule was otherwise in Massachusetts. Macy v. Raymond, 9 Pick. (Mass.) 285. (3) In Maine the earlier rule in Massachusetts, holding that the deed must be delivered within the period that the license is in force, has been followed. Poor v. Larrabee, 58 Me. 543; Mason v. Ham, 36 Me. 573; Marr v. Hobson, 22 Me. 321; Marr v. Boothby, 19 Me. 150. (4) But if the deed is executed and delivered within the proper time, it may be acknowledged afterward. Poor v. Larrabee, 58 Me. 543.

64. Minn.—Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

N. Y.—Matter of Bergen, 56 Misc. 92, 106 NYS 1038, 6 Mills Surr. 237 [aff 125 App. Div. 929 mem, 110 NYS 1146 mem].

Pa.—Woolman's Est., 6 Pa. Dist. 205, 19 Pa. Co. 281.

Tex.—Vineyard v. Heard, (Civ. A.) 167 SW 22.

Wis.—Mackin v. Hobbs, 116 Wis. 528, 93 NW 462.

Compare Campbell v. Metcalf, 33 R. I. 453, 82 A 285 (a new license is necessary).

[a] **Postponement until a more favorable opportunity** for selling is proper. Matter of Bergen, 56 Misc. 92, 106 NYS 1038, 6 Mills Surr. 237 [aff 125 App. Div. 929 mem, 110 NYS 1146 mem].

[b] **Time of granting extension.**—An extension of time within which to sell realty may be granted by the county court, although the year within which the original license was to be exercised had expired, for the discretion of the court may, under the statute, be exercised any time within the two-year limit therein fixed; but an application by the administrator for an extension of time to sell the realty to pay the expenses of administration after all debts and legacies have been paid is too late, when made eight years after the grant of letters, if there is no excuse for the delay except during two and one-half years of the time. Mackin v. Hobbs, 116 Wis. 528, 93 NW 462.

[c] **Order postponing sale may be made in vacation.**—Vineyard v. Heard, (Tex. Civ. A.) 167 SW 22.

[d] **Before the return of the order,** there is no need of an application for an extension. Snider's Est., 1 Del. Co. (Pa.) 163.

[e] **Indorsement of extension.**—An extension of time may be made by an order entered of record and indorsed on the certified copy of the original order, but such indorsement is not essential to the validity of the order extending the time of sale, because the authority to sell is derived from the order, and not from the indorsement. Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

[f] **Confirmation** of a sale made after the term to which the order of sale was returnable is tantamount to a continuance of the order, and the sale is valid. Klingensmith v. Bean, 2 Watts (Pa.) 486, 27 AmD 328.

65. Harrison v. Harrison, 67 Minn. 520, 70 NW 802.

66. Mobley v. Nave, 67 Mo. 546.

[a] **Session of probate and common pleas court.**—The "probate and common pleas court" of Jackson county is none the less a probate court because it has common-pleas business added to its probate business; and an administrator's sale of land in Jackson county, made while such court was in session for the transaction of probate business, is valid, under the statute requiring such sale to be made during the session of the circuit, probate, or county court, although the order under which the sale was made directed a sale during the session of the "court of common pleas of Jackson county." Macey v. Pitillo, (Mo.) 21 SW 1094; Macey v. Stark, 116 Mo. 481, 21 SW 1088.

67. Bowen v. Bond, 80 Ill. 351.

time within which actions may be brought against the representative after the grant of letters, the time in which a license to sell may be exercised is not necessarily limited to the same period.[68] An administrator must sell perishable property promptly after receiving the order, or in case of deterioration he will be chargeable with its value at the time it should have been sold,[69] but it has been held that an administrator, having an order for the sale of all the personal property is not liable for failing to make an opportune sale, no liability attaching for mere error of judgment.[70] Although an order of sale may have been obtained in apt time, a delay of twenty-three years, unexplained, in proceeding to compel the administrator to carry out such order, constitutes laches which will bar subsequent proceedings for that purpose, notwithstanding the existence of a dower interest in the lands to be sold.[71]

Hour of sale. The hours of the day within which a sale may be made are sometimes fixed by statute.[72] It has been held no ground for setting aside a sale of real estate in the country that it was advertised to begin at eleven o'clock in the forenoon.[73]

[§ 1580] **3. Place of Sale.** The sale is sometimes required to be made in the county in which the land is situated,[74] or, in the alternative, in that county or the county in which the administration is pending,[75] and a sale made elsewhere will not pass title;[76] but in the absence of statute the place of sale is discretionary with the court and the administrator.[77] The place within the county where the sale shall be made is sometimes prescribed by statute, either absolutely or by fixing a place at which the sale shall be made unless the court orders some other place,[78] but it is also sometimes left entirely to the discretion of the representative and the court by which the sale has been ordered.[79]

[§ 1581] **4. Sale in Bulk or in Parcels.** Under the old chancery practice land consisting of several tracts should be sold, each parcel separately,[80] and under some statutes, where a piece of real property which is to be sold is susceptible of division, it is required to be divided and sold in parcels,[81] although it may be said generally that whether the sale should be in bulk or in parcels is a matter to be determined in each individual case according to the character and situation of the property and the interest of the estate.[82] Where the petition is for the sale of mortgaged land to pay debts, the court may order a sale as a whole or in parts.[83]

68. Cooper v. Robinson, 2 Cush. (Mass.) 184. But compare Wellman v. Lawrence, 15 Mass. 326, 330 ("We should not, then, have licensed this administrator, at the time he made the sale; and there is no ground, on which the sale can be justified, which would not have rendered it equally fitting to have granted a license at that time").

69. Steele v. Knox, 10 Ala. 608.

70. In re Ring, 132 Iowa 216, 109 NW 710.

71. Horn v. White, 127 Ill. A. 222 [aff 224 Ill. 238, 79 NE 629, 115 AmSR 155].

72. Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753 (between the hours of ten o'clock in the forenoon and five o'clock in the afternoon).

73. Metz's Est., 14 YorkLegRec (Pa.) 136.

74. Calloway v. Kirkland, 50 Ala. 401.

[a] **If an entire tract lies in two counties,** the sale may be in either county, and the probate court administering the estate must designate which. Calloway v. Kirkland, 50 Ala. 401.

75. Patterson v. Lemon, 50 Ga. 231.

[a] **The court has a discretion** to determine in which county the sale shall be made. Patterson v. Lemon, 50 Ga. 231.

[b] **In the absence of a provision in the order** directing a sale in the county where the land lies, the sale should be made in the county where the administration is pending. Heard v. Sheffield, 136 Ga. 730, 71 SE 1118.

76. Power v. Shingler, 137 Ga. 157, 72 SE 1094.

77. Van Horn v. Ford, 16 Iowa 578.

78. Stark v. Osborn, 221 Fed. 557, 137 CCA 259; Warner v. Hill, (Ga.) 100 SE 393; Ladd v. Craig, 94 Miss. 659, 47 S 777; Neill v. Keese, 5 Tex. 23, 51 AmD 746.

[a] **If the court designates no place** for the sale it must be at the place designated by the statute or it will be void. Peters v. Caton, 6 Tex. 554.

[b] **Sufficiency of designation.—** Where, upon a petition for leave to sell land, "at the late residence of the deceased," the court granted leave to sell "according to law," a sale at such residence was valid, as the order considered with reference to the petition must be understood as granting the prayer of the petition. Jemison v. Gaston, 21 Tex. 266.

[c] **Where a county courthouse had been burned,** and no permanent place had been rented for court purposes, an administrator's sale at the side of the burned courthouse was not void because subsequent terms of superior court, by order of judge, were held in a public school building "until suitable provision has been made," and when the court was not in session at the time of such sale, and its clerk, the ordinary, and sheriff all had their offices in another building. Brantley v. Clifton, (Ga. A.) 101 SE 919.

[d] **The presumption,** after a lapse of more than sixty years, is that a sale at a place other than that designated by statute was made pursuant to an order designating the place where the sale was made. Stark v. Osborn, 221 Fed. 557, 137 CCA 259.

[e] **A sale of a land certificate** need not be made at the courthouse door of the county in which the land on which the certificate was issued is situate, since before the issuance of a patent the interest of the owner is but a chattel interest, and may be sold as other personal property. Melton v. Turner, 38 Tex. 81.

79. Van Horn v. Ford, 16 Iowa 578.

80. Kenley v. Bryan, 110 Ill. 652.

[a] **Time for objection.—**The objection that two distinct tracts were sold as one without first having been offered separately is a good ground for impeaching the report of sale, but not for impeaching the sale years afterward by a bill in equity. Kenley v. Bryan, 110 Ill. 652.

81. Quinton v. Neville, 154 Fed. 432, 83 CCA 252; Truxillo's Succ., 24 La. Ann. 453; Shannon v. Summers, 86 Miss. 619, 38 S 345; McCampbell v. Durst, 73 Tex. 410, 11 SW 380.

[a] **Illustration.—**The sale by an administrator of an entire half section of land in a body, excepting and reserving the homestead exemption and widow's dower, which were not judicially ascertained and fixed, in order to pay debts of decedent, is void, under a constitutional provision requiring all land sold in pursuance of decrees of court to be divided into tracts not to exceed one hundred and sixty acres. Shannon v. Summers, 86 Miss. 619, 38 S 345.

[b] **Statute directory merely.—** McCampbell v. Durst, 73 Tex. 410, 11 SW 380.

[c] **Where lots are sufficiently designated by the map of the United States survey** and the sale was made in portions easily ascertainable, the objection that there was no division and sale by lots will be disregarded. Walker v. Kimbrough, 27 La. Ann. 558.

[d] **Mode of division.—**It was a proper exercise of the court's discretion to refuse, without the consent of the administrator, to direct that the property be platted into a city subdivision, before sale, and to require that the land be surveyed and subdivided into parcels containing not less than five or more than ten acres. Quinton v. Neville, 154 Fed. 432, 83 CCA 252.

82. Osman v. Traphagan, 23 Mich. 80, 84; Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

"The regulation to sell in parcels is a wise one, but it ought not to be considered so fundamental as to make its non-observance in every case absolutely fatal to the title under all circumstances. The situation of landed property is infinitely varied. In many instances blocks and other bodies of land are subdivided into contiguous lots or parcels by arbitrary lines, and the parts are so situated in reference to each other as naturally to lead to proceedings respecting separate or distinct parcels as though they were one. The chances for error through mistake or inadvertence in such a matter are very great. . . . The only safe and practicable course is to treat the omission to sell in parcels as a mere irregularity which cannot be resorted to, to invalidate the sale when attacked collaterally." Osman v. Traphagan, supra.

[a] **An order to sell the lands of the estate in bulk is erroneous unless** based on evidence showing that such a sale will be for the best interests of the estate. Where several parcels of the land are covered by mortgages, an equitable distribution of the proceeds between the lien creditors cannot be made with any degree of certainty, where the sale is in bulk, unless the several parcels are shown to be of equal value per acre. Texas Land, etc., Co. v. Dunovant, 38 Tex. Civ. A. 560, 87 SW 208.

83. Jenkins' Est., 3 Pa. Co. 620 (if

Although the order of sale describes the land as one parcel, the representative may sell it in several lots if in his judgment it will be for the interest of the estate.[84] Under a statute providing that the court may order the representative to sell so much of decedent's lands as is necessary to pay his debts, the court may order the sale of such lands in lots with streets laid out thereon, if a sale in that manner appears advantageous;[85] but a statute providing that the owner of land may plat the same and lay out streets thereon has been held not to authorize an administrator to make the plat for the purposes of selling in parcels where he is licensed by the court to sell the land.[86] An objection to a sale of separate parcels en masse is one which must be made in apt time,[87] and it must be shown that the land brought less than it would have brought if divided.[88]

Where there are two distinct orders of sale, the representative cannot sell the land to which they relate as one tract.[89]

[§ 1582] **5. Public or Private Sale.**[90] As a general rule a sale under order of court should be at public auction,[91] and under some statutes a private sale is absolutely void;[92] but under others, although a public sale is the proper mode, a private sale is not void.[93] Under still other statutes the sale may be public or private as the court in its discretion may direct.[94] If the statute does not direct that the sale shall be at public auction a private sale is authorized.[95] It has been held that an administrator with the will annexed, upon whom power of sale of real estate has been conferred by the court, may sell at private sale at his discretion,[96] and also that, although a private sale has been ordered, the probate court has jurisdiction to confirm a public sale.[97] Where the decree authorized a public sale, and the property is sold at a sacrifice at private sale, the sale is properly annulled.[98] It has been held that, where the statute does not prescribe the mode of sale, and the administrator applies for leave to sell at a private sale, and the order is silent as to the mode of sale, directing only that it be according to law, a private sale passes the title;[99] but it has also been considered that, where a probate order directing an administrator to sell a leasehold belonging to the estate to pay debts did not contain a direction to sell at private sale, it would be construed to require a public sale, especially where the lease itself provided that, in case of default by the lessee or his legal representatives or assigns in the payment of rent, the lease might be sold at public auction after two weeks' published notice.[1]

the land is sold in parts the court may order that each part shall be subject to such portion of the mortgage as the mortgagee and the administrator shall agree on).

84. Delaplaine v. Lawrence, 3 N. Y, 301, 304.

"The whole tenor of the act relating to these sales, evidently contemplates proceedings similar to those which take place upon other judicial sales. In all such sales, it is the well known duty of the officer conducting them, to sell the property in such parcels as shall be best calculated to secure the greatest aggregate amount. . . . It was for him to determine, in the first instance, to what extent the property was susceptible of judicious division. Nothing short of palpable error or gross abuse of his discretion would justify the surrogate in arresting the sale upon this ground." Delaplaine v. Lawrence, 3 N. Y. 301, 304.

[a] **It is no objection that the order does not direct** the property (a village plot) to be sold in parcels. The administrator may sell in parcels, and it is his duty to do so, although the order does not so direct. Jackson v. Irwin, 10 Wend. (N. Y.) 441.

85. Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566.

86. Peo. v. Board of Public Works, 41 Mich. 724, 725, 49 NW 924.

87. Williams v. Rhodes, 81 Ill. 571.

88. Williams v. Rhodes, 81 Ill. 571.

89. Sander's Est., 18 Montg. Co. (Pa.) 117.

90. Sale of personalty under testamentary authority or common-law power see supra § 731.

Sale of realty under testamentary authority see supra § 652.

91. U. S.—Simmons v. Saul, 138 U. S. 439, 11 SCt 369, 34 L. ed. 1054.

Ark.—Gibbs v. Singfield, 115 Ark. 385, 171 SW 144.

Cal.—Dorsey's Est., 75 Cal. 258, 17 P 209.

Ga.—Downing Lumber Co. v. Medlin, 136 Ga. 665, 72 SE 22; Sturtevant v. Robinson, 133 Ga. 564, 66 SE 890; Cobbins v. Griswold, 64 Ga. 323.

Ill.—Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

Iowa.—Thornton v. Mulquinne, 12 Iowa 549, 79 AmD 548.

N. Y.—Jackson v. Irwin, 10 Wend. 441.

Pa.—Jacoby v. McMahon, 25 Pittsb LegJNS 446. See also Kiskaddon v. Dodds, 21 Pa. Super. 351 (stating law prior to act of May 9, 1889 [Pamph. L. p 182]).

[a] **The orphans' court has no jurisdiction to order** a private sale of a decedent's real estate to pay his debts. Jacoby v. McMahon, 25 Pittsb LegJNS (Pa.) 446.

[b] **Personalty** must be sold at public sale. Whitehurst v. Mason, 140 Ga. 148, 78 SE 938.

[c] **Statute not retroactive.**—A private sale made by virtue of an order obtained under a statute which did not require a public sale is valid, although the property was not sold until after the enactment of a statute which required a public sale. Jackson v. Irwin, 10 Wend. (N. Y.) 441.

[d] **The administrator cannot object** to having the property sold at public auction on the ground that the private sale would be most beneficial to the estate and the creditors thereof. Dorsey's Est., 75 Cal. 258, 17 P 209.

[e] **Exceptions** to the rule requiring public sale are recognized in the case of wild and uncultivated land and crops carried to market. Downing Lumber Co. v. Medlin, 136 Ga. 665, 72 SE 22; Sturtevant v. Robinson, 133 Ga. 564, 66 SE 890; Coggins v. Griswold, 64 Ga. 323.

92. Shaffey v. Davis Colliery Co., 219 Fed. 465, 135 CCA 177 (rule in West Virginia); Burney v. Ludeling, 47 La. Ann. 73, 16 S 507; Worten v. Howard, 10 Miss. 527, 41 AmD 607; Jackson v. Irwin, 10 Wend. (N. Y.) 441; Herrick v. Grow, 5 Wend. (N. Y.) 579.

[a] **Defect not curable.**—Where a private sale was illegally made, the purchaser's title could not be confirmed by a subsequent administration sale, because it was not a bona fide proceeding to pay the debts of the succession. Burney v. Ludeling, 47 La. Ann. 73, 16 S 507.

93. Apel v. Kelsey, 52 Ark. 341, 12 SW 703, 30 AmSR 183; Burris v. Kennedy, 108 Cal. 331, 41 P 458. See also Harris v. Parker, 41 Ala. 604 (sale of personalty); Truby v. Steele, 45 Pa. Super. 152 (a private sale, although irregular, may be cured by statute).

94. Cal.—Dorsey's Est., 75 Cal. 258, 17 P 209.

Conn.—Lawrence's App., 49 Conn. 411.

Mich.—Klatt v. Wayne Prob. Judge, 159 Mich. 203, 123 NW 542.

Mo.—Hand v. Motter, 73 Mo. 457.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

Oh.—Burch v. Cincinnati Trust Co., 33 Oh. Cir. Ct. 358.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Pa.—In re Smith, 188 Pa. 222, 41 A 542 [foll Stevenson v. Scott, 188 Pa. 234, 41 A 533]; O'Brian v. Wiggins, 14 Pa. Super. 37.

[a] **The court may order in the alternative** a public or private sale of a decedent's real estate to pay debts. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645. To same effect Lawrence's App., 49 Conn. 411; In re Smith, 188 Pa. 222, 41 A 542.

[b] **Personalty** (1) cannot be sold at private sale, unless this is authorized by the court. State v. Dickson, 213 Mo. 66, 111 SW 817. (2) A sale of a stock of goods may be ordered to be private and the stock may be closed out in the regular course of business. In re Osburn, 36 Or. 8, 58 P 521 (for this purpose the administrator may incur the necessary expense of lighting, clerkhire, etc.).

95. Dexter v. Harris, 7 F. Cas. No. 3,862, 2 Mason 531.

96. Bull v. Bal, 17 N. M. 466, 130 P 251.

97. Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678.

98. Pierce v. Graham, 85 Va. 227, 7 SE 189 (especially as it appeared that the purchaser had full knowledge of all the circumstances).

99. Hand v. Motter, 73 Mo. 457.

1. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 460, 125 SW 486, 20 AnnCas 1072 ("It will be observed that the order does not require or direct a private sale, nor does it 'prescribe' the terms thereof.' Under sections 112 and 113, the administrator can sell all perishable property and all other personal property of the estate necessary to pay debts or legacies, without an order of court, at public sale, but in no case can he sell any of it at private

A statute authorizing an administrator to sell insolvent evidences of debt at public auction upon obtaining an order of sale from the clerk does not deprive him of his common-law right to sell them at private sale.[2]

[§ 1583] **6. Adjournment.** Under an order of court empowering the representative to sell property on a day specified, he may adjourn the sale in the exercise of a sound discretion,[3] and without statutory authority,[4] and he will not be liable for a loss caused thereby.[5] A confirmation of a report stating the adjournment and the reasons therefor is a judgment by the court that in its opinion the representative exercised a wise discretion in adjourning the sale, and this judgment is final and conclusive until impeached and set aside in a direct proceeding.[6] A statute requiring a certain number of days' notice of the time and place of the sale of real estate does not prevent the representative from adjourning the sale to a day less remote from the day originally fixed than the period of notice prescribed in the statute.[7] An adjournment from the court house door where the sale was advertised to be held to another place in the county, near the land in question, is a mere irregularity cured by confirmation of the sale.[8]

[§ 1584] **L. Terms and Conditions[9]—1. In General.** The representative can make no terms for the sale which are not warranted by statute or order of court,[10] and if he attaches an unauthorized condition the purchaser is not bound to pay the bid.[11] But it has been held that the failure of the administrator to fix the terms of sale in accordance with the statute does not render the sale void, so as to subject it to collateral attack.[12] The representative has the right under a decree to sell land for cash to demand a deposit as a guaranty that the bidder will consummate the purchase if the court approves the sale.[13] It has been considered proper to leave the terms of sale to the discretion of the representative.[14]

The court may fix an upset price in an order au-

---

sale except upon application and an order of court, directing a private sale, and prescribing the terms thereof. . . . The direction of the statute is that the order shall 'prescribe the terms thereof.' Those words are an essential part of the statute, as important as any other, and the statute has been held to be mandatory. The order does not direct that the leasehold be sold at private sale. It simply directs the administrator to 'sell the said leasehold property.' Such an order, without specific direction to sell at private sale, should be considered an order to sell at public sale; and especially should such an order be so considered in this case, since the lease itself provides that in case of default by the lessee or his legal representatives or assigns in the payment of the rents, the lease may be sold at 'public auction,' after 'two weeks' notice' in some newspaper").

2. Odell v. House, 144 N. C. 647, 57 SE 395.

3. Ga.—Bean v. Kirkpatrick, 105 Ga. 476, 30 SE 426.

Ill.—Thornton v. Boyden, 31 Ill. 200; Phelps v. Conover, 25 Ill. 309.

Me.—Fowle v. Coe, 63 Me. 245.

Mass.—Norris v. Howe, 15 Mass. 175.

Mich.—Beaubien v. Poupard, Harr. 206.

Mo.—Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572.

N. J.—Hicks v. Willis, 41 N. J. Eq. 515, 7 A 507.

N. Y.—In re Lawrence, 1 Redf. Surr. 310.

Pa.—Slocum's Est., 14 Pa. Dist. 39.

S. C.—Lamb v. Lamb, 17 S. C. Eq. 289, 40 AmD 618.

Wis.—Sitzman v. Pacquette, 13 Wis. 291.

"It might often occur, from the extremity of the weather, or from other unavoidable causes, that no bidders would appear at the time and place appointed, by an administrator, for the sale of the estate of his intestate. In such case, it would be his duty to adjourn the sale." Norris v. Howe, 15 Mass. 175, 176.

[a] **Circumstances warranting adjournment.**—(1) A storm, the absence of bidders, or other like circumstances would not only warrant but require a postponement. Lamb v. Lamb, 17 S. C. Eq. 289, 40 AmD 618. (2) A combination of bidders to affect the sale is good ground for postponement. In re Lawrence, 1 Redf. Surr. (N. Y.) 310. (3) The fact that the widow of a testator has spread false reports as to the title being subject to her dower and thus embarrassed the sale of the realty attempted by the administrator or that it is probable that she will do so again is not good cause to suspend the sale. In re Lawrence, 1 Redf. Surr. (N. Y.) 310.

[b] **An adjournment by an attorney or agent of the executor** in his absence is sufficient, the act being ministerial and therefore not beyond his power as executor or trustee to delegate. Hicks v. Willis, 41 N. J. Eq. 515, 7 A 507.

4. Norris v. Howe, 15 Mass. 175.

5. Lamb v. Lamb, 17 S. C. Eq. 289, 40 AmD 618.

6. Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572.

7. In re Gillespie, 10 Watts (Pa.) 300.

8. Thompson v. Burge, 60 Kan. 549, 57 P 110, 72 AmSR 369.

Effect of confirmation generally see infra § 1642.

9. Sale of personalty under testamentary authority or common-law power see supra § 734.

Sale of realty under testamentary authority see supra § 653.

10. Ala.—King v. Gilreath, 154 Ala. 129, 45 S 89; Cruikshank v. Luttrell, 67 Ala. 318.

Ga.—Reed v. Aubrey, 91 Ga. 435, 17 SE 1022, 44 AmSR 49.

Ill.—Selb v. Montague, 102 Ill. 446; Foote v. Overman, 22 Ill. A. 181.

La.—Smesler v. Blanchard, 15 La. Ann. 254.

Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588.

Pa.—Randolph's App., 5 Pa. 242; Bailey's App., 2 Grant 225.

S. C.—McMaster v. Arthur, 33 S. C. 512, 12 SE 308; Witherspoon v. Witherspoon, 33 S. C. 223, 11 SE 704.

Tex.—Hamilton v. Pleasants, 31 Tex. 638, 98 AmD 551; Jones v. Gilliam, (Civ. A.) 199 SW 694.

"The administrator is but the agent of the vendor, the court, and he is powerless to alter as against the heir, whose title is to be divested, the terms and conditions of the sale. Such is the general rule and from it there should be countenanced no serious departure." King v. Gilreath, 154 Ala. 129, 134, 45 S 89.

[a] **The representative cannot:** (1) Add a condition that the purchaser shall discharge the widow's dower and right of homestead. Selb v. Montague, 102 Ill. 446. (2) Bind personal estate by a statement at the sale of the realty that taxes due and constituting a lien thereon at the time of the sale will be paid by the estate. Sexton v. Sikking, 90 Ill. A. 667. (3) Require the purchaser to buy other property than that of decedent. Savage v. Williams, 15 La. Ann. 250.

[b] **A restriction of the quantity of land to less than that advertised** to be sold, the restriction having been publicly proclaimed, binds the purchasers so that they cannot compel a conveyance of the whole amount advertised, whether they heard the proclamation or not. Lee v. Hester, 20 Ga. 588.

[c] **Representation that sale made for Confederate money.**—As the law did not warrant a sale for Confederate money, a declaration of the representative at the time of sale that it was made for such money did not operate as a fraud upon the purchaser. Hamilton v. Pleasants, 31 Tex. 638, 98 AmD 551.

[d] **Agreement to allow purchaser credit for individual debt.**—A sale of realty under an agreement with the purchaser to allow him credit for an individual debt, which agreement is not disclosed at the sale or to the court which confirms it, is void. Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588. But compare Heath v. Layne, 62 Tex. 686 (sale merely voidable in such case).

[e] **An apparent exception** to this is where property is subject to an easement which was not mentioned in the proceeding for a sale. In such a case the administrator may make the sale subject to the easement. Overdeer v. Updegraff, 69 Pa. 110.

11. McMaster v. Arthur, 33 S. C. 512, 12 SE 308; Witherspoon v. Witherspoon, 33 S. C. 223, 11 SE 704.

[a] **This rule has been applied** where the master announced at the sale when notice was given of the claim of a homestead that the land was to be sold subject to the claim, which was not stated in the order of sale. McMaster v. Arthur, 33 S. C. 512, 12 SE 308.

[b] **A purchaser who was not present at the sale** and did not hear the announcement of the conditions attached and who was kept out of possession over a year by reason of misunderstanding as to the terms could not be subjected to an enforcement of an original condition. Witherspoon v. Witherspoon, 33 S. C. 223, 11 SE 704.

[c] **Statements of the auctioneer** varying from, or adding to, the printed conditions or the description of the property to be sold cannot be insisted on by either the representative or the purchaser. Layton v. Hennen, 3 La. Ann. 1.

12. Halbert v. Martin, (Tex. Civ. A.) 30 SW 388.

13. Mueller v. Conrad, 178 Ill. 276, 52 NE 1031; Allen v. Shepard, 87 Ill. 314.

14. Matter of Goldfarb, 93 Misc. 401, 402, 157 NYS 137 ("I am inclined to think that the terms upon which a sale of real estate in this city [New York] may be made, or the procedure

thorizing the administrator to sell personal assets at auction.[15]

[§ 1585] **2. Cash or Credit.** Unless restricted by statute, the court may order the property to be sold for cash or on credit,[16] or partly for cash and partly on credit.[17] If, however, the sale is not made in accordance with the directions of the order, it may not be absolutely void,[18] but its validity may depend on the subsequent ratification of the heirs or devisees, or in a proper case on its confirmation by the court.[19] In some jurisdictions it is held that it is the representative's duty to sell for cash[20] unless the order directs him to sell on credit,[21] or unless all the creditors consent to a sale on credit,[22] and that if loss follows his breach of duty, he will be held liable;[23] but the rule elsewhere is to sell on credit[24] or that whether the sale shall be for cash or on credit is within the discretion of the representative, to be exercised wisely for the best interests of the estate.[25] Another view is that the first offering should be for cash, and if the property fails to bring its appraised value, a sale on credit is authorized.[26] The period of credit is sometimes fixed by statute,[27] and sometimes left to the sound discretion of the probate court.[28] Where the personal representative extends the time of payment he is liable for any resulting loss.[29] The failure of the representative to take security for deferred payments as required by statute or order of court has been held not to render his deed a nullity where the facts have been reported to the court and the sale has been approved notwithstanding,[30] but it has also been considered that, where the order requires the sale to be made on good and sufficient security and the statute gives the representative no power to extend credit for more than one year, a sale is void where the representative sells on a credit of ten years and takes the individual note of the purchaser without security.[31]

Interest on deferred payments. It has been held that, where the terms of a succession sale did not provide for the making of notes with a specified rate of interest, only five per cent can be allowed on the purchase price.[32]

[§ 1586] **3. When Property Mortgaged.** Under some statutes, where the property is mortgaged, all that can be sold is the fee subject to the mortgage,[33] and the representative cannot require as a condition of the sale that the purchaser shall discharge the mortgage,[34] nor can he himself remove the encumbrance with a view to a better price when he shall offer the property for sale under an order of court.[35] The more general view, however, is that

to be followed in effecting a sale, should be left to the discretion of the representative of the estate, and it is only where exceptional circumstances exist that the surrogate should exercise the power conferred upon him by section 2685 of the Code of Civil Procedure, and authorize a sale in a particular manner or for a specified price").

15. Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

16. Darrington v. Borland, 3 Port. (Ala.) 9; Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753; Fitzimmons' App., 40 Pa. 422; Baily's App., 32 Pa. 40.

17. Ala.—Howison v. Oakley, 118 Ala. 215, 23 S 810; Griffin v. Griffin, 3 Ala. 623.

Ga.—Spence v. Dasher, 63 Ga. 430.

Ill.—Moffitt v. Moffitt, 69 Ill. 641; Reynolds v. Wilson, 15 Ill. 394, 60 AmD 753.

Ind.—Citizens St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 Am SR 445, 12 LRA 498.

Ky.—Underwood v. Cartwright, 47 SW 589.

La.—Lacroix's Succ., 30 La. Ann. 924.

Pa.—Gordon's App., 93 Pa. 361; Fitzimmons' App., 40 Pa. 422; Baily's App., 32 Pa. 40, 2 Grant 225.

[a] **On the adjudicatee's failure to pay the first installment,** a personal judgment for the whole price ordered in the supreme court should be for cash. McClelland v. Bideman, 5 La. Ann. 563.

[b] **Amount of cash to be demanded.** — The administrator should not encumber the sale by requiring a greater proportion of the price to be paid in cash than the needs of the estate require. Savage v. Williams, 15 La. Ann. 250.

18. Harris v. Parker, 41 Ala. 604; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

[a] **Contrary view.** — Smelser v. Blanchard, 15 La. Ann. 254.

19. McCully v. Chapman, 58 Ala. 325.

20. King v. Gilreath, 154 Ala. 129, 45 S 89; Foster v. Thomas, 21 Conn. 285.

21. Foster v. Thomas, 21 Conn. 285; Richards v. Adamson, 43 Iowa 248; Matter of Fagan, 86 Misc. 144, 149 NYS 217; Maples v. Howe, 3 Barb. Ch. (N. Y.) 611.

22. Maples v. Howe, 3 Barb. Ch. (N. Y.) 611.

23. Conn.—Foster v. Thomas, 21 Conn. 285.

Ga.—Crosby v. Lovett, 143 Ga. 483, 85 SE 317.

Iowa.—Richards v. Adamson, 43 Iowa 248.

Mich.—In re Palmer, 1 Dougl. 422.

Pa.—In re Dillebaugh, 4 Watts 177; Henninger v. Boyer, 10 Pa. Co. 506.

[a] **If the representative accepts a note and mortgage** in part payment he cannot recover from the estate the expenses of foreclosure. Richards v. Adamson, 43 Iowa 248.

24. Wood v. Wheeler, 11 Tex. 122.

[a] **Sale for cash a mere irregularity.**—Cassels v. Gibson, (Tex. Civ. A.) 27 SW 725.

[b] **Sale of homestead.** — When realty in which there is a homestead exemption is ordered to be sold, the terms of the sale not being prescribed, the sale should be for cash to the amount of the exemption and the balance on the same credit as is usual on sales of lands for the satisfaction of creditors. Wood v. Wheeler, 11 Tex. 122.

25. Spence v. Dasher, 63 Ga. 430 (whether the representative has abused his discretion is a question for the jury).

26. Lacroix's Succ., 30 La. Ann. 924.

[a] **It is not imperatively required that** the first offering is for cash. Wright v. Cumming, 19 La. Ann. 353.

[b] **It is only when the creditors so demand** that the sale need be for cash. Hood's Succ., 33 La. Ann. 466; Norton v. Citizens' Bank, 28 La. Ann. 354.

[c] **Part cash and part credit.**— The fact that the property has been sold for one-half cash and the balance on a credit of twelve months does not vitiate the title. Lacroix's Succ., 30 La. Ann. 924.

27. Brown v. Brown, 41 Ala. 215; Moffitt v. Moffitt, 69 Ill. 641; Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

[a] **The statutory period is applicable only where decree gives no directions** as to the sale; and it is not error for the decree of sale to order a longer or different credit to be given. Moffitt v. Moffitt, 69 Ill. 641.

28. Grider v. Apperson, 38 Ark. 388; Moffitt v. Moffitt, 69 Ill. 641; Bailey's App., 32 Pa. 40, 2 Grant 225.

[a] **One year** is the proper period of credit. Baily's App., 32 Pa. 40, 2 Grant 225.

29. Kelley v. Helmkamp, 40 Ill. A. 35.

30. Wilkerson v. Allen, 67 Mo. 502; Miller v. Anders, 21 Tex. Civ. A. 72, 51 SW 897.

[a] **Statutory requirement of mortgage.**—An agreement for judgment for the price of land sold and for the foreclosure of a lien has the same effect as a mortgage to secure the purchase price which the statute requires, and the action of the administrator in waiving a mortgage to secure deferred payments on sale and of electing to enforce the contract on sale on foreclosure is binding on the estate and heirs. Miller v. Anders, 21 Tex. Civ. A. 72, 51 SW 897.

31. Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

32. Balovich's Succ., 130 La. 1043, 58 S 873.

33. Selb v. Montague, 102 Ill. 446; Phelps v. Funkhouser, 39 Ill. 401; Robinson v. Cogswell, 192 Mass. 79, 78 NE 389; In re Vasek, 97 Nebr. 617, 150 NW 1004.

[a] **Mortgage securing claim barred by limitations.**—Where a claim against an estate secured by a mortgage on real estate was barred by limitations, it was an encumbrance on the real estate subject to which it should be sold, if necessary, to pay the debts. Robinson v. Cogswell, 192 Mass. 79, 78 NE 389.

[b] **Credit to representative for payment of liens.**—An administrator, who, in selling mortgaged land for the payment of debts, pays prior liens in good faith out of the proceeds of the sale, and complies with an order of the court to take a first mortgage for a portion of the unpaid purchase price, is entitled in his final account to credit for the amount thus paid, where the land sold for its full value, and the sale was approved and confirmed by the court, although the statute requires such sales to be made subject to existing liens. In re Vasek, 97 Nebr. 617, 150 NW 1004.

34. Selb v. Montague, 102 Ill. 446.

35. Phelps v. Funkhouser, 39 Ill. 401.

a sale may be directed free of the encumbrance, provision being made for payment thereof from the proceeds of sale,[36] or the representative may make an agreement with the purchaser that the latter shall discharge the mortgage debt.[37] A general order to sell encumbered lands is not sufficient to authorize a sale free from encumbrances,[38] even though a statute authorizes such a sale under certain circumstances,[39] but the order of sale may be amended nunc pro tunc in a proper case so as to authorize a sale already made as free from encumbrances.[40] It has been held that a probate court which has not acquired jurisdiction over mortgaged property of a succession by an omission or commission or laches of the mortgage creditor, whose contract contains the pact de non alienando, has no authority to order the sale of the property affected to him on the terms of part cash and part credit, after appraisement, as he is entitled to demand a sale for cash, and without appraisement.[41] But a creditor of an estate, whose debt operates as a judicial mortgage, and is in a twelve months' bond executed by the deceased, cannot cause the property of the succession to be sold for cash, without the benefit of appraisement, to satisfy his claim.[42]

[§ 1587] **M. Who May Purchase**[43]**—1. In General.** If a person making a bid in the names of others complies with the bid and takes title in their names, it is no concern of the heirs whether the person who actually made the bid was authorized to use the names in which the bid was made.[44] The creditors of the estate cannot object to the substitution by a court of equity of one person in place of another as purchaser of the property sold, if the person so substituted in place of the original purchaser is responsible and ready to comply in all respects with the terms of sale.[45]

[§ 1588] **2. Widow or Heirs of Decedent.** Property of a decedent sold under order of court may be purchased by either the widow[46] or an heir.[47]

[§ 1589] **3. Guardian of Decedent's Children.** A guardian of decedent's children has no right to purchase the property of decedent at a sale by the executor or administrator under order of court,[48] but it is usually considered that if such guardian does purchase the sale is voidable only and not absolutely void.[49]

[§ 1590] **4. Executor or Administrator—a. General Rule.** It is well established as a general rule that, where property of a decedent is sold under order of the court the executor or administrator cannot lawfully become the purchaser;[50] and in the application of this rule it is immaterial whether he purchases directly or indirectly through the medium of an agent or third person who purchases ostensibly for himself but really for the executor

36. Ga.—Mallard v. Curran, 123 Ga. 872, 51 SE 712.
Md.—McLaughlin v. Barnum, 31 Md. 425.
Minn.—Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.
N. J.—Voorhees' App., 57 N. J. Eq. 291, 42 A 567.
Pa.—Donat's Est., 6 Pa. Dist. 78, 15 Pa. Co. 379.

37. Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792; Matter of Georgi, 35 Misc. 685, 72 NYS 431, 2 Mills Surr. 315; Ohio Sav., etc., Co. v. Weber, 21 Oh. Cir. Ct. N. S. 130; Duncan v. Fish, 1 Aik. (Vt.) 231.
[a] **Security for discharge.**—Where an administrator sells land encumbered by a mortgage it is his duty to take security from the purchaser that the latter will discharge the mortgage. Duncan v. Fish, 1 Aik. (Vt.) 231.
[b] **If the mortgagee is the purchaser** the representative should exact of him a discharge of the debt constituting the encumbrance. Duncan v. Fish, 1 Aik. (Vt.) 231.

38. Voorhees' App., 57 N. J. Eq. 291, 42 A 567.

39. Voorhees' App., 57 N. J. Eq. 291, 42 A 567.

40. Voorhees' App., 57 N. J. Eq. 291, 42 A 567.

41. Thompson's Succ., 42 La. Ann. 118, 7 S 477.

42. Boyd's Succ., 13 La. Ann. 439.

43. Sale of personalty under testamentary authority or common-law power see supra §§ 735–743.
Sale of realty under testamentary authority see supra §§ 655–665.

44. Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

45. Farmers' Bank v. Clarke, 28 Md. 145.

46. Sheahan v. Madigan, 275 Ill. 372, 114 NE 135; Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847; Wood v. Bott, 56 Miss. 128.

47. Aubuchon v. Aubuchon, 133 Mo. 260, 34 SW 569; Baker v. Mancill, 2 LancLRev (Pa.) 373; Re Cuerrier, 2 OntWN 1014, 19 OntWR 19.
[a] **An order may be made allowing** executors to sell lands to the son of the testator, less the amount of a mortgage on it paid by him, and of which he holds an assignment. Re Cuerrier, 2 OntWN 1014, 19 OntWR 19.
[b] **Purchase by one of several heirs.**—The equitable principle that a cotenant will not be permitted to purchase an outstanding title or encumbrance for his exclusive benefit and to set it up against the cotenant, but that such purchase inures to the benefit of all who are willing to contribute their just proportion of the expense, does not apply to the purchase of land by one of the heirs at a sale under order of court. Aubuchon v. Aubuchon, 133 Mo. 260, 34 SW 569.

48. Culberhouse v. Shirey, 42 Ark. 25; Charles v. Daniels, 140 Ky. 379, 131 SW 42; Smith v. Krause, etc., Lumber Co., 125 La. 703, 709, 51 S 693; Mann v. McDonald, 10 Humphr. (Tenn.) 275.
"The tutor . . . is charged with the care of the person of the minor and with the obligation of administering his property and of representing him in all civil matters, and he is, expressly prohibited, either personally or through another, from buying or leasing the property of his ward." Smith v. Krause, etc., Lumber Co., supra.
[a] **Authority from judge to purchase.**—The natural tutrix of minor heirs, if authorized by the judge, may purchase at the sale of the property of the deceased insolvent whose succession is being administered by syndics. McCarty v. Steam Cotton Press Co., 5 La. 16.
[b] **Undertutor.**—"As undertutors are not interdicted from buying property in which minors to whom they are appointed may have an eventual interest, it follows that the question whether such a purchase, made by an undertutor in a particular case is valid or invalid will depend upon the circumstances of the case rather than upon the mere official relationship of minor and undertutor. In the instant case, we are of opinion, for the reasons stated, that no facts are alleged in the petition which, if taken as true, would authorize the conclusion that the sale of the succession property was even voidable, and still less, void, because made to John B. Smith, who was undertutor of one of the minor heirs of the de cujus." Smith v. Krause, etc., Lumber Co., 125 La. 703, 710, 51 S 693.

49. Spencer v. Milliken, 12 Ky. Op. 97; Egan v. Greece, 79 Mich. 629, 45 NW 74; Taylor v. Brown, 55 Mich. 482, 21 NW 901; Bostwick v. Atkins, 3 N. Y. 53.
[a] **Waiver of objections.**—Where a sale was beneficial to the ward, and he was present at the sale, and instead of repudiating it he suffered eighteen years to elapse after he became of age without impeaching the conveyance, during which time the title passed to innocent third persons, he must be deemed to have waived any objection to the sale and to have affirmed it. Bostwick v. Atkins, 3 N. Y. 53.

50. U. S.—Price v. Morris, 19 F. Cas. No. 11,414, 5 McLean 4.
Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Cottingham v. Moore, 128 Ala. 209, 30 S 784; McMillan v. Rushing, 80 Ala. 402; Fielder v. Childs, 73 Ala. 567; Daniel v. Stough, 73 Ala. 379; Foxworth v. White, 72 Ala. 224; James v. James, 55 Ala. 525; Frazer v. Lee, 42 Ala. 25; Payne v. Turner, 36 Ala. 623; Calloway v. Gilmer, 36 Ala. 354; Charles v. Dubose, 29 Ala. 367; Montgomery v. Givhan, 24 Ala. 568.
Ark.—Eagle v. Terrell, 95 Ark. 434, 437, 130 SW 550 [quot Cyc]; Pine Bluff Bank v. Levi, 90 Ark. 166, 118 SW 250; Montgomery v. Black, 75 Ark. 184, 86 SW 1006; Bland v. Fleeman, 58 Ark. 84, 23 SW 4; McLeod v. Griffis, 45 Ark. 505; Culberhouse v. Shirey, 42 Ark. 25; Mock v. Pleasants, 34 Ark. 63; Wright v. Campbell, 27 Ark. 637.
Cal.—O'Connor v. Flynn, 57 Cal. 293; Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.
Conn.—Cole v. Jerman, 77 Conn. 374, 59 A 425.
Del.—Wheeler's Est., 101 A 865.
Ga.—De Vaughn v. Griffith, 101 SE 794; Wallace v. Wallace, 142 Ga. 408, 83 SE 113; Griffin v. Stephens, 119 Ga. 138, 46 SE 66; Lowery v. Idleson, 117 Ga. 778, 45 SE 51; Moore v. Carey, 116 Ga. 28, 42 SE 258; Pirkle v. Cooper, 113 Ga. 828, 39 SE 289; James v. Kelley, 107 Ga. 446, 33 SE 425, 73 AmSR 135; Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252; Grubbs v. McGlawn, 39 Ga. 672; Bond v. Watson, 22 Ga. 637; Worthy v. Johnson, 8 Ga. 234, 52 AmD 399.
Hawaii.—Matter of Turner, 1 Hawaii 476.

or administrator.[51] There is all the more reason for the application of this rule where the sale is taint-

Ill.—Mancinelli v. De Bartolo, 268 Ill. 198, 108 NE 1015; Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; O'Connor v. Mahoney, 159 Ill. 69, 42 NE 378; Lagger v. Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 NE 946; Williams v. Rhodes, 81 Ill. 571; Nelson v. Hayner, 66 Ill. 487; Coat v. Coat, 63 Ill. 73; Williams v. Walker, 62 Ill. 517; Kruse v. Steffens, 47 Ill. 112; Miles v. Wheeler, 43 Ill. 123; Lockwood v. Mills, 39 Ill. 602.

Ind.—Fisher v. Bush, 133 Ind. 315, 32 NE 924; Morgan v. Wattles, 69 Ind. 260; Murphy v. Teter, 56 Ind. 545; Potter v. Smith, 36 Ind. 231; Shaw v. Swift, 1 Ind. 565, Smith 398.

Iowa.—Walker v. Walker, 127 Iowa 77, 102 NW 435.

Ky.—Harrod v. Harrod, 167 Ky. 308, 180 SW 797; Spurlock v. Spurlock, 161 Ky. 248, 170 SW 605; Conrad v. Conrad, 152 Ky. 422, 153 SW 740; Baker v. Lane, 118 SW 963; Handlin v. Davis, 81 Ky. 34; Darcus v. Crump, 6 B. Mon. 363; Rogers v. Burbridge, 7 KyL 42, 48, 13 Ky. Op. 517.

La.—Tucker v. Benedict, 114 La. 203, 38 S 142; Porter v. Depeyster, 18 La. 351; Scott v. Gorton, 14 La. 115, 33 AmD 578; Macarty v. Bond, 9 La. 351.

Me.—Decker v. Decker, 74 Me. 465.

Mass.—Litchfield v. Cudworth, 15 Pick. 23.

Mich.—Otis v. Kennedy, 107 Mich. 312, 65 NW 219; Dwight v. Blackmar, 2 Mich. 330, 57 AmD 130; Beaubien v. Poupard, Harr. 206.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420; Temples v. Cain, 60 Miss. 478; McGowan v. McGowan, 48 Miss. 553; Bland v. Muncaster, 24 Miss. 62, 57 AmD 162.

Mo.—Gilmore v. Thomas, 252 Mo. 147, 158 SW 577; Clark v. Drake, 63 Mo. 354.

Nev.—In re Millenovich, 5 Nev. 161.

N. H.—Hoitt v. Webb, 36 N. H. 158; Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

N. J.—In re Frey, 73 N. J. Eq. 346, 67 A 192; Den v. Wright, 7 N. J. L. 175, 11 AmD 546; Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657; Bassett v. Shoemaker, 46 N. J. Eq. 538, 19 Am SR 435; Smith v. Drake, 23 N. J. Eq. 302; Huston v. Cassedy, 13 N. J. Eq. 228; Culver v. Culver, 11 N. J. Eq. 215; Mulford v. Minch, 11 N. J. Eq. 16, 64 AmD 472; Obert v. Obert, 10 N. J. Eq. 98 [aff 12 N. J. Eq. 423]; Scott v. Gamble, 9 N. J. Eq. 218; Mulford v. Bowen, 8 N. J. Eq. 751, 9 N. J. Eq. 797; Williamson v. Johnson, 5 N. J. Eq. 537.

N. Y.—Terwilliger v. Brown, 44 N. Y. 237; Davoue v. Fanning, 2 Johns. Ch. 252.

N. C.—Tayloe v. Tayloe, 108 N. C. 69, 12 SE 836; Shearin v. Hunter, 72 N. C. 493; Fronberger v. Lewis, 70 N. C. 456; Roberts v. Roberts, 65 N. C. 27.

Oh.—Caldwell v. Caldwell, 45 Oh. St. 512, 15 NE 297; Piatt v. Longworth, 27 Oh. St. 159; Barrington v. Alexander, 6 Oh. St. 189; Sheldon v. Newton, 3 Oh. St. 494; Fox v. Keister, 9 OhS&CP 316, 6 OhNP 327.

Okl.—Turner v. Turner, 34 Okl. 284, 125 P 730.

Pa.—Musselman v. Eshleman, 10 Pa. 394, 51 AmD 493; Chronister v. Bushey, 7 Watts & S. 152; Matter of Wallington, 1 Ashm. 307.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc]; Edmonds v. Crenshaw, 6 S. C. Eq. 252; Teague v. Dunlap, 5 S. C. Eq. 97; Perry v. Dixon, 4 S. C. Eq. 504 note.

S. D.—In re Ketcham, 171 NW 764.

Tex.—Fortune v. Killebrew, 70 Tex. 437, 7 SW 759; Fisher v. Wood, 65 Tex. 199; Hamblin v. Warnecke, 31 Tex. 91; Hardy v. De Leon, 5 Tex. 211; Wipff v. Heder, 6 Tex. Civ. A. 685, 26 SW 118.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88.

Va.—Davies v. Hughes, 86 Va. 909, 11 SE 488; Hudson v. Hudson, 5 Munf. (19 Va.) 180.

Wash.—Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

Can.—McDonald v. McDonald, 21 Can. S. C. 201.

[a] **A purchase by a coexecutor** may be avoided by the heirs or devisees, although the purchaser had nothing to do with procuring the order of sale, but the petition was presented, the bond given, and the sale made by another executor. Beeson v. Beeson, 9 Pa. 279. To same effect Greene v. Holt, 76 Mo. 677.

[b] **The fact that the sale has been confirmed** by the court does not prevent its being afterward set aside by reason of the representative's being the purchaser. McMillan v. Rushing, 80 Ala. 402. But compare Baldwin v. Dalton, 168 Mo. 20, 67 SW 599 (where administrator bought for more than appraised value, and sale was duly approved by court, he will not be charged as trustee for heirs with profit on resale, no unfair advantage having been taken).

[c] **Taking place of delinquent bidder.**—If the purchaser to whom the land is struck off fails to comply with the terms of his purchase, the property should again be offered for sale. To permit the administrator to substitute himself for a delinquent purchaser would enable him to defeat all genuine competition by receiving the bid of an irresponsible man, and afterward turn it to his own account by voluntarily assuming the place of such bidder, thus acquiring any advantage which the ownership of the property might confer. Barrington v. Alexander, 6 Oh. St. 189.

[d] **Statute permitting purchase.**—Huger v. Huger, 30 S. C. Eq. 217.

51. U. S.—Gray v. Quicksilver Min. Co., 68 Fed. 677.

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Cottingham v. Moore, 128 Ala. 209, 30 S 784; Foxworth v. White, 72 Ala. 224; Harris v. Parker, 41 Ala. 604.

Ark.—Pine Bluff Bank v. Levi, 90 Ark. 166, 118 SW 250; Woodard v. Jaggers, 48 Ark. 248, 2 SW 851; McGauhey v. Brown, 46 Ark. 25.

Cal.—Guerrero v. Ballerino, 48 Cal. 118; Scott v. Umbarger, 41 Cal. 410; Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Colo.—French v. Woodruff, 25 Colo. 339, 54 P 1015.

Ga.—Moore v. Carey, 116 Ga. 28, 42 SE 258; Reed v. Aubrey, 91 Ga. 435, 17 SE 1022, 44 AmSR 49; Ridgeway v. Ridgeway, 84 Ga. 25, 10 SE 495; Houston v. Bryan, 78 Ga. 181, 1 SE 252, 6 AmSR 252; Bond v. Watson, 22 Ga. 637.

Ill.—Mancinelli v. De Bartolo, 268 Ill. 198, 108 NE 1015; Rittenhouse v. Smith, 255 Ill. 493, 99 NE 657; Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Miller v. Rich, 204 Ill. 444, 68 NE 488; Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095; Mettler v. Warner, 156 Ill. A 31; Ebelmesser v. Ebelmesser, 99 Ill. 541; Kruse v. Steffens, 47 Ill. 112; Miles v. Wheeler, 43 Ill. 123; Lockwood v. Mills, 39 Ill. 602; McConnel v. Gibson, 12 Ill. 128; Thorp v. McCullum, 6 Ill. 614; Elting v. Biggsville First Nat. Bank, 68 Ill. A. 204 [aff 173 Ill. 368, 50 NE 1095]; Thorp v. McCullum, 6 Ill. 614.

Ind.—Shaw v. Swift, 1 Ind. 565.

Iowa.—Walker v. Walker, 127 Iowa 77, 102 NW 435; Read v. Howe, 39 Iowa 553.

Ky.—Spurlock v. Spurlock, 161 Ky. 248, 170 SW 605 [quot Cyc].

La.—Ambrose v. Marsh, 27 La. Ann. 241.

Md.—Singstack v. Harding, 4 Harr. & J. 186, 7 AmD 669; Conway v. Green, 1 Harr. & J. 151.

Mass.—Manning v. Mulrey, 192 Mass. 547, 78 NE 551; Blood v. Hayman, 13 Metc. 231.

Mich.—Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25; Sheldon v. Rice, 30 Mich. 296, 18 AmR 136.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420; Shannon v. Summers, 86 Miss. 619, 38 S 345; Matthews v. Matthews, 1 S 741; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319; Baines v. McGee, 9 Miss. 208.

Mo.—Biedenstein v. Schoenlau, 178 SW 54; Gilmore v. Thomas, 252 Mo. 147, 158 SW 577; Pearson v. Murray, 230 Mo. 162, 130 SW 21; Clark v. Drake, 63 Mo. 354.

Nebr.—Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 NW 982.

N. J.—In re Frey, 73 N. J. Eq. 346, 67 A 192; Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657; Smith v. Drake, 23 N. J. Eq. 302; Skillman v. Skillman, 15 N. J. Eq. 388; Winter v. Geroe, 5 N. J. Eq. 319 [rev on other grounds 5 N. J. Eq. 655].

N. Y.—Terwilliger v. Brown, 59 Barb. 9 [aff 44 N. Y. 237]; Stiles v. Burch, 5 Paige 132; Woodruff v. Cook, 2 Edw. 259.

N. C.—McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Joyner v. Conyers, 59 N. C. 78.

Oh.—Piatt v. Longworth, 27 Oh. St. 159; Riddle v. Roll, 24 Oh. St. 572 [aff 5 Oh. Dec. (Reprint) 232, 3 AmL Rec 648]; Glass v. Greathouse, 20 Oh. 503.

Or.—Loomis v. Rosenthal, 34 Or. 585, 57 P 55.

Pa.—Chronister v. Bushey, 7 Watts & S. 152; Brittain's Est., 28 Pa. Super. 144 [aff 12 LuzLegReg 219]; Henninger v. Boyer, 10 Pa. Co. 506; Matter of Wallington, 1 Ashm. 307.

S. C.—Edmonds v. Crenshaw, 6 S. C. Eq. 252.

Tex.—Byars v. Thompson, 80 Tex. 468, 15 SW 1087; Fisher v. Wood, 65 Tex. 199.

Utah.—Haight v. Pearson, 11 Utah 51, 39 P 479.

Va.—Bailey v. Robinson, 1 Gratt. (42 Va.) 4, 42 AmD 540.

Wash.—Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

Wis.—Gibson v. Gibson, 102 Wis. 501, 78 NW 917; Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899.

"The law forbids an administrator to purchase at his own sale, whether the purchase is in his own name or the name of another for his use." Lagger v. Mutual Union Loan, etc., Assoc., 146 Ill. 283, 294, 33 NE 946 [quot Rittenhouse v. Smith, 255 Ill. 493, 99 NE 657].

[a] **"No principle is more firmly established** in the equity jurisprudence of this country, than that a purchase by a trustee, for his own benefit, at a sale of the trust property, is voidable at the option of the cestui que trust, and will be set aside, if application for that purpose be made in a reasonable time; and it makes no difference in the application of the rule, whether the purchase be direct or indirect, in person or through an agent, or by the medium of a person who subsequently reconveys to the trustee." Calloway v. Gilmer, 36 Ala. 354, 357.

[b] **An administrator may not establish any title** to land sold under an order of the probate court by virtue of the fact that he as administrator was the real purchaser, or furnished the puchase money to a third person who purchased the property. Pearson v. Murray, 230 Mo. 162, 130 SW 21.

[c] **Agreement to purchase for decedent's children.**—An administratrix of her deceased husband did not acquire an interest in land sold by her,

ed with fraud or unfairness;[52] but it is not necessary that this should be the case, for the sale may as a rule be avoided merely because the executor or administrator purchased, even though it was fairly made and the price realized was an adequate one.[53] The rule is based on considerations of policy which forbid a fiduciary from deriving any personal benefit from his dealings with the estate committed to his care,[54] and hence applies where the representative purchases as the agent of another[55] with a view to making a profit out of the transaction,[56] or where he derives a benefit from the sale[57] by acquiring an interest in the property, either jointly with,[58] or in the right of,[59] a third person.

[§ 1591] **b. Limitations of Rule.** The representative may, it has been held, purchase at his own sale if he bids fairly with the knowledge and consent of the next of kin who have at the time full knowledge of the condition of the estate and the value of the property;[60] and if the sale is made not by a representative but by a commissioner appointed to sell, or some other person not acting under the orders of the representative, the representative may properly become a purchaser.[61] Again, if the representative has an interest in the estate, it may be necessary for him to purchase for his own protection, and consequently it is held that in such case a purchase by him will be upheld if the sale is fairly conducted.[62]

The representative may purchase from the pur-

such as would render the sale voidable, where she agreed with the purchaser that he should hold the title until the children of decedent became of age and then convey to them, and the heirs of the purchaser after his death conveyed the property to the administratrix individually in order that she might mortgage it for the payment of charges against it. Larzelere v. Starkweather, 38 Mich. 96.

52. Chaffe v. Farmer, 34 La. Ann. 1017; Manning v. Mulrey, 192 Mass. 547, 78 NE 551; Stitt v. Stitt, 205 Mo. 155, 103 SW 547; Hudson v. Hudson, 5 Munf. (19 Va.) 180.

[a] **Facts showing fraud.**—An administrator, while guardian of one of the minor heirs of the intestate, rendered the estate insolvent, and obtained an order for the sale of real estate. The real estate was inventoried at twenty-seven hundred dollars, but was sold by the administrator for five hundred dollars to a person who shortly thereafter conveyed it to the administrator for a recited consideration of the same amount. No money was in fact paid, either by the administrator or by the purchaser. The administrator charged himself in his account with five hundred dollars as the proceeds of the sale, and was allowed payments and charges to the amount of twelve hundred forty-five dollars forty-four cents, leaving a balance due him of seven hundred dollars forty-four cents. It was held that such facts were sufficient to warrant a finding that the sale of the real estate was a fraud on the rights of such minor heir. Manning v. Mulrey, 192 Mass. 547, 78 NE 551.

53. Ala.—Daniel v. Stough, 73 Ala. 379; Charles v. Dubose, 29 Ala. 367; McCartney v. Calhoun, 17 Ala. 301.

Ill.—Rittenhouse v. Smith, 255 Ill. 493, 99 NE 657; Miller v. Rich, 204 Ill. 444, 68 NE 488; Miles v. Wheeler, 43 Ill. 123; Mettler v. Warner, 156 Ill. A. 31 [aff 249 Ill. 341, 94 NE 522].

N. Y.—Le Comte's Est., 8 NYSt 784.

N. C.—Shute v. Austin, 120 N. C. 440, 27 SE 90. Contra Clark v. Clark, 65 N. C. 655.

Tex.—Wipff v. Heder, 6 Tex. Civ. A. 685, 26 SW 118.

Wash.—Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539.

[a] **Distinction between rule at law and in equity.**—In equity the rule is as stated in the text, but at law a showing of fraud is necessary to invalidate the sale. Lockwood v. Mills, 39 Ill. 602.

[b] **Contrary view.**—Stallings v. Foreman, 11 S. C. Eq. 401.

54. U. S.—Shakeley v. Taylor, 21 F. Cas. No. 15,698, 1 Bond 142.

Ala.—James v. James, 55 Ala. 525.

Ark.—Gibson v. Herriott, 55 Ark. 85, 17 SW 589, 29 AmSR 17.

Colo.—French v. Woodruff, 25 Colo. 339, 54 P 1015.

Ga.—Lowery v. Idleson, 117 Ga. 778, 45 SE 51.

Ill.—Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Miller v. Rich, 204 Ill. 444, 68 NE 488.

Nebr.—Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 NW 982.

N. J.—Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657.

"The above rule is well established, and rests on the self-evident proposition that the interests of the buyer and seller of the same property are necessarily antagonistic, and hence the law will not permit a trustee to occupy inconsistent positions, either in respect to the beneficiaries or the subject matter of the trust." Rittenhouse v. Smith, 255 Ill. 493, 99 NE 657.

"The object of the rule is to protect the cestui que trust against fraud and injustice, and to remove from persons holding such relations all inducements and temptations to speculate upon or control, for their own benefit, property held by them in trust or confidence." Gibson v. Herriott, 55 Ark. 85, 91, 17 SW 589, 29 AmSR 17. To same effect James v. James, 55 Ala. 525.

55. Neda v. Fontenot, 2 La. Ann. 782; Clark v. Drake, 63 Mo. 354; Remick v. Butterfield, 31 N. H. 70, 64 AmD 316; Piatt v. Longworth, 27 Oh. St. 159.

56. Wingate v. Herschauer, 42 Iowa 506; Willis v. Berry, 104 La. 114, 28 S 888; Neda v. Fontenot, 2 La. Ann. 782; Clark v. Drake, 63 Mo. 354; Piatt v. Longworth, 27 Oh. St. 159.

57. Moore v. Carey, 116 Ga. 28, 42 SE 258; Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

58. McMillan v. Rushing, 80 Ala. 402; Griffith v. Maxfield, 63 Ark. 548, 39 SW 852; Willis v. Berry, 104 La. 114, 28 S 888; Haymond v. Hyer, 80 W. Va. 594, 92 SE 854, LRA1918B 1.

[a] **A purchase by a firm of which the representative is a member** may be avoided. Griffith v. Maxfield, 63 Ark. 548, 39 SW 852; Willis v. Berry, 104 La. 114, 28 S 888; Harrod v. Norris, 11 Mart. (La.) 297, 13 AmD 350. But compare Leeper's App., (Pa.) 14 A 331 (sale not void where no fraud practiced).

[b] **Purchase by partner of representative at sale to satisfy claim of partnership.**—An administrator is not a person interested in the purchase, within this rule, from the facts that the firm of which he is a member has a claim against the estate, which is one of the claims to satisfy which the land is sold, and that the land was bought by another member of the firm; and the sale is valid in the absence of fraud or collusion. Griffith v. Maxfield, 66 Ark. 513, 51 SW 832.

[c] **A sale to a bank of which the representative is a stockholder and officer** is voidable. Crawford County Bank v. Bolton, 87 Ark. 142, 147, 112 SW 398 ("A stockholder, and more especially the cashier, who is largely responsible for its success, is interested in the financial prosperity of a bank. Whether the interest is large or small is of no moment; for what would appeal to the cupidity of one man would be no temptation to another. The rule is that the executor or administrator stands in a fiduciary relation to those interested in the estate. It is his duty to conduct the sale and to report to the court any fraud or collusion in bidding or any other facts or circumstances that would warrant the court in not confirming the sale. The rule stands 'upon one great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity'").

[d] **Right of third person.**—(1) If a third person unites with the executor or administrator in purchasing at the sale, it is voidable alike as to him and as to the executor or administrator, for, having joined with the executor or administrator in the commission of an act violative of his duty, and against the policy of the law, such third person must share the consequence. McMillan v. Rushing, 80 Ala. 402. (2) If another person is interested in the bid of the executor, a court of equity will not set aside the sale as to the other person in a case where the sale was by commissioners for full value and there was no fraud in fact. Price v. Winter, 15 Fla. 66.

59. Calloway v. Gilmer, 36 Ala. 354; McGaughey v. Brown, 46 Ark. 25.

60. Wetumpka Bank v. Walkley, 169 Ala. 648, 53 S 830; Baker v. Lane, (Ky.) 118 SW 963; Lyon v. Lyon, 43 N. C. 201; Hannum's App., 1 Chest. Co. (Pa.) 362.

[a] **Evidence.**—An administrator who purchased at a sale under decree of court must prove facts necessary to estop the adult heirs from contesting the validity of the purchase, which is not done where he fails to show that they consented to the sale or purchase. Baker v. Lane, (Ky.) 118 SW 963.

61. U. S.—Dexter v. Harris, 7 F. Cas. No. 3,862, 2 Mason 531.

Del.—Wheeler's Est., 101 A 865.

Mo.—Charleville v. Chouteau, 18 Mo. 492.

N. C.—Tomlinson v. Detestatius, 3 N. C. 284.

Pa.—Connor v. Gibbons, 228 Pa. 617, 77 A 1009.

Tenn.—Cooley v. Cooley, (Ch. A.) 37 SW 1028.

N. S.—Power v. Foster, 34 N. S. 479.

[a] **Purchase at undervalue.**—In such case a purchase by the representative for less than the actual value of the property may be allowed to stand. Tomlinson v. Detestatius, 3 N. C. 284.

62. Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Wetumpka Bank v. Walkley, 169 Ala. 648, 53 S 830; Cottingham v. Moore, 128 Ala. 209, 30 S 784; Penny v. Jackson, 85 Ala. 67, 4 S 720; Frazer v. Lee, 42 Ala. 25; Payne v. Turner, 36 Ala. 623; McCartney v. Calhoun, 17 Ala. 301; McLane v. Spence, 6 Ala. 894; Brannan v. Oliver, 2 Stew. 47, 19 AmD 39.

Del.—Wheeler's Est., 101 A 865.

Ky.—Conrad v. Conrad, 152 Ky.

chaser at the sale under order of court and acquire a good title by such purchase if the sale was fairly conducted and there was no understanding at the time of the sale that the representative should share in, or receive the benefit of, the purchase.[63] The mere fact of the representative's subsequent purchase does not warrant a presumption of fraud,[64] but such a transaction is always open to the suspicion that it was only an indirect purchase by the representative at his own sale, and every presumption of indirection must be repelled by clear and convincing evidence.[65] Until the sale is confirmed it is incomplete, and a purchase by the executor or administrator from the purchaser before confirmation is within the prohibition against purchasing at his own sale.[66]

The rule is applicable only to persons who are in fact personal representatives of a decedent, and not to one who, being entitled to administer, procured the appointment of a third person,[67] or who, although appointed administrator or nominated as executor, did not qualify or enter on the duties of the office.[68] So also, where a personal representative has resigned, a purchase by him from his successor in office is not objectionable in the absence of fraud or collusion.[69]

Statutes authorizing a purchase by the representative at a sale of his decedent's property under order of court are sometimes found.[70]

[§ 1592] **c. Effect of Unauthorized Purchase—(1) In General.** A purchase of property of the estate by an executor or administrator at a sale under order of court, while universally considered to be highly improper, is usually held to be merely voidable at the election of the persons interested, and not void;[71] and even statutes providing that

422, 426, 153 SW 740 [cit Cyc]; Disman v. Flippin, 116 SW 740.

La.—Friedlander v. Friedman, 81 S 879; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Davidson v. Davidson, 28 La. Ann. 269; Kellar v. Blanchard, 21 La. Ann. 38; Vanwinkle v. Matta, 16 La. Ann. 325; Pagett v. Curtis, 15 La. Ann. 451; Aicard v. Daly, 7 La. Ann. 612; Fristoe v. Burke, 5 La. Ann. 657; Porter v. Depeyster, 18 La. 351; McLean's Succ., 2 La. A. (Orleans) 9.

N. Y.—La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146 [aff 198 N. Y. 591 mem, 92 NYS 1089 mem]; New York Cent., etc., R. Co. v. Cottle, 175 NYS 178.

N. C.—Howell v. Tyler, 91 N. C. 207; Froneberger v. Lewis, 79 N. C. 426.

Okl.—Turner v. Turner, 34 Okl. 284, 125 P 730, 734 [cit Cyc].

Wash.—Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

"Executors and administrators, who have an interest in the property sold, may purchase at a sale of the property of the estate, provided there is no unfairness, and the property is exposed for sale under the ordinary mode, and under such circumstances as will command the best price." Wetumpka Bank v. Walkley, 169 Ala. 648, 652, 53 S 830.

[a] **Illustration.**—An administrator, so far as the rights of other heirs are concerned, could purchase the property of the succession at a sheriff's sale under order of the court to pay debts, where prior to the sale he had bought out the interests of two of the heirs with subrogation to their rights. Blum v. Haas, 125 La. 18, 51 S 53.

[b] **An administratrix who is survivor of the community** may purchase. Friedlander v. Friedman, (La.) 81 S 879.

[c] **A representative who is a judgment creditor** of the decedent, and who holds an execution lien, has such an interest in the land that he may become a purchaser, if the sale is fair and properly conducted and for an adequate price. Cottingham v. Moore, 128 Ala. 209, 30 S 784.

[d] **The administrator should report the facts** to the court. Stewart v. Baldwin, 86 Wash. 63, 149 P 662.

[e] **Fraud.**—Where an executor who is also a legatee appoints one agent to sell, and another to buy, the purchase will be set aside for fraud. Britton v. Johnson, 11 S. C. Eq. 430.

63. U. S.—Shakeley v. Taylor, 21 F. Cas. No. 12,698, 1 Bond 142.

Ala.—Foxworth v. White, 72 Ala. 224; James v. James, 55 Ala. 525.

Ark.—West v. Waddill, 33 Ark. 575.

Cal.—Burris v. Adams, 96 Cal. 664, 31 P 565; O'Conner v. Flynn, 57 Cal. 293.

Ill.—Abernathie v. Rich, 256 Ill. 166, 99 NE 883.

Iowa.—Welch v. McGrath, 59 Iowa 519, 10 NW 810, 13 NW 638.

Mich.—Louden v. Martindale, 109 Mich. 235, 67 NW 133.

Mo.—Gilmore v. Thomas, 252 Mo. 147, 158 SW 577.

Nev.—In re Millenovich, 5 Nev. 161.

N. J.—Wortman v. Skinner, 12 N. J. Eq. 358.

N. C.—Turner v. Shuffler, 108 N. C. 642, 13 SE 243.

Or.—Loomis v. Rosenthal, 34 Or. 585, 57 P 55.

Pa.—Armor v. Cochrane, 66 Pa. 308; Painter v. Henderson, 7 Pa. 48.

S. C.—Britton v. Lewis, 29 S. C. Eq. 271.

Tex.—Berryman v. McDonald, 49 Tex. Civ. A. 81, 107 SW 944; Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922.

"An administrator is not precluded from ordinary business transactions with his fellow-citizens, concerning property, or its proceeds, bought at a sale which he has conducted, provided there was no express or implied understanding at the time of the purchase, that the administrator should share the benefit. Such dealings may be evidence to raise the suspicion of fraud; and, taken in connection with other circumstances, may establish it; but they are not conclusive, nor, standing alone, sufficient." West v. Waddill, 33 Ark. 575, 385.

[a] **Illustrations.**—(1) A sale to the administratrix's mother and a reconveyance to the administratrix the same day is not necessarily invalid, but will be upheld if made in good faith. Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25. (2) Where the purchaser received a deed and gave his note in payment, and subsequently the administrators sued him on the note, recovered judgment, and issued an execution, under which the land was sold, a purchase by one of the administrators at the execution sale was valid. Shakeley v. Taylor, 21 F. Cas. No. 12,698, 1 Bond 142.

64. Vasquez v. Richardson, 19 Mo. 96; Sumner v. Sessoms, 94 N. C. 371.

65. Foxworth v. White, 72 Ala. 224; James v. James, 55 Ala. 525.

66. Bland v. Fleeman, 58 Ark. 84, 23 SW 4; O'Conner v. Flynn, 57 Cal. 293; Ridgeway v. Ridgeway, 84 Ga. 25, 10 SE 495; Terwilliger v. Brown, 44 N. Y. 237. But compare Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25 (set out supra note 63).

67. Gray v. Quicksilver Min. Co., 68 Fed. 677 (where an employee of a corporation which was a creditor of decedent applied for and obtained letters of administration at the instance of the corporation, all the expenses being paid by it, the corporation could lawfully purchase at a sale of decedent's real estate for the payment of debts).

68. Grayson v. Weddle, 63 Mo. 523; Valentine v. Duryea, 37 Hun (N. Y.) 427.

69. Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400.

70. Biedenstein v. Schoenlau, (Mo.) 178 SW 54; Vann v. Calcasieu Trust, etc., Bank, (Tex. Civ. A.) 204 SW 1062.

[a] **The effect of such a statute** is to remove any presumption of fraud from such a purchase, but it does not prevent a court of equity from investigating the question of fraud. Vann v. Calcasieu Trust, etc., Bank, (Tex. Civ. A.) 204 SW 1062 (statute permitting representative who is mortgagee to purchase).

[b] **Representative cannot purchase for less than appraised value.**—Biedenstein v. Schoenlau, (Mo.) 178 SW 54.

71. U. S.—Hoyt v. Latham, 143 U. S. 553, 12 SCt 568, 36 L. ed. 259 [rev 14 Fed. 433, 4 McCrary 587].

Ala.—Randolph v. Vails, 180 Ala. 82, 60 S 159; Cottingham v. Moore, 128 Ala. 209, 30 S 784; Fielder v. Childs, 73 Ala. 567; Harris v. Parker, 41 Ala. 604; Charles v. Dubose, 29 Ala. 367.

Ark.—Stuckey v. Lockard, 87 Ark. 232, 112 SW 747; Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398; Montgomery v. Black, 75 Ark. 184, 86 SW 1006; Gibson v. Herriott, 55 Ark. 85, 17 SW 589, 29 AmSR 17; McGaughey v. Brown, 46 Ark. 25.

Cal.—Burris v. Kennedy, 108 Cal. 331, 41 P 458; Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Colo.—French v. Woodruff, 25 Colo. 339, 54 P 1015.

Del.—Wheeler's Est., 101 A 865, 867 [cit Cyc].

Ga.—De Vaughn v. Griffith, 101 SE 794; Wallace v. Wallace, 142 Ga. 408, 83 SE 113; Webb v. Deadwyler, 142 Ga. 422, 83 SE 99; Wallace v. Wallace, 142 Ga. 408, 83 SE 113; James v. Little, 135 Ga. 672, 70 SE 251; Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666; Lowery v. Idleson, 117 Ga. 778, 45 SE 51; Smith v. Granberry, 39 Ga. 381, 99 AmD 464; Newton v. Roe, 33 Ga. 163; Shine v. Redwine, 30 Ga. 780; Mercer v. Newsom, 23 Ga. 151.

Hawaii.—Matter of Turner, 1 Hawaii 476.

Ill.—Mancinelli v. De Bartolo, 268 Ill. 198, 108 NE 1015; Verdun v. Barr, 253 Ill. 120, 97 NE 239; Stobaugh v. Irons, 243 Ill. 55, 90 NE 272; Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Sloan v. Graham, 85 Ill. 26; Williams v. Rhodes, 81 Ill. 571.

Ind.—Comegys v. Emerick, 134 Ind. 148, 33 NE 899, 39 AmSR 245; Morgan v. Wattles, 69 Ind. 260; Murphy v. Teter, 56 Ind. 545; Carter v. Lee, 51 Ind. 292; Rice v. Cleghorn, 21 Ind. 80; Shaw v. Swift, 1 Ind. 565.

such sales are void have been construed to mean simply that they are voidable.[72] There are, it is true, a number of cases in which such purchases have been characterized by the court as "void,"[73] but a careful consideration of such cases will usually lead to the conclusion that the use of this term is an inadvertence, and that the court did not intend to use it in its strictly accurate meaning.[74]

[§ 1593] **(2) Title Held by Representative.** A purchase by the representative not being void,[75] it follows that until the sale is actually set aside the legal title remains in the representative.[76] He holds the title, however, as a trustee for those whom he represents.[77]

[§ 1594] **d. Ratification.** Since a sale at which the representative purchases is merely voidable, and not void,[78] interested persons have the right to elect whether they will have the sale set aside or ratify it and hold the representative as trustee for the purchase price.[79] In this connection it has

Ky.—Harrod v. Harrod, 167 Ky. 308, 180 SW 797; Spurlock v. Spurlock, 161 Ky. 248, 170 SW 605; Dennis v. Alves, 117 SW 287 [reh den 132 Ky. 345, 113 SW 483]; McGary v. McGary, 105 SW 891, 32 KyL 314.

La.—Hicks v. Weems, 14 La. Ann. 629; Ross v. Ross, 3 La. Ann. 533.

Mass.—Ives v. Ashley, 97 Mass. 198; Harrington v. Brown, 5 Pick. 519.

Miss.—Temples v. Cain, 60 Miss. 478; Bland v. Muncaster, 24 Miss. 62, 57 AmD 162; Baines v. McGee, 9 Miss. 208.

Mo.—Mitchell v. McMullen, 59 Mo. 252.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630.

N. H.—Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

N. J.—Den v. Newark India Rubber Co., 24 N. J. L. 467; Den v. McKnight, 11 N. J. L. 385.

N. Y.—Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261; Pease v. Creque, 15 NYWklyDig 15; Ward v. Smith, 3 Sandf. Ch. 592.

N. C.—Froneberger v. Lewis, 70 N. C. 456.

Okl.—Chastain v. Pender, 52 Okl. 133, 152 P 833, 835 [quot Cyc].

Pa.—Pennock's App., 14 Pa. 446, 53 AmD 561; Beeson v. Beeson, 9 Pa. 279; Shellahamer v. Wade, 25 Pa. Co. 252.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539; Gibson v. Gibson, 102 Wis. 501, 78 NW 917; Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899; Martin v. Morris, 62 Wis. 418, 22 NW 525; McCrubb v. Bray, 36 Wis. 333.

"The rule is firmly established, both by the text writers and the adjudicated cases, that a purchase by an executor or administrator at his own sale is not void, but is voidable at the election of those who may be interested in the estate." Crawford County Bank v. Bolton, 87 Ark. 142, 146, 112 SW 398.

[a] **One of several administrators may bid** at a sale of realty made by them under order of court subject in the event of a sale to him to disaffirmance by the heirs or creditors. Pennock's App., 14 Pa. 446, 53 AmD 561.

[b] **Surcharging executors as the proper course.**—Where executors indirectly purchased the business and plant of a firm of which testator was a member at a sale made by themselves, but it appeared that the property had been disposed of and that the goodwill would probably not bring an adequate price on the second sale, it was held that the sale would not be set aside, but the executors would be surcharged with the difference between the amount realized at the sale and the value of the property and goodwill as shown by the inventory. Matter of Bach, 12 NYS 712, 2 Conn. Surr. 490.

[c] **Circumstances under which sale void.**—(1) Where the administrator of a succession in which he had no interest as an heir obtained from the deputy clerk of the district court, who had no authority to give it, an order to sell the property of the succession, and a commission issued authorizing the administrator as such to make the sale, and acting as auctioneer he adjudicated the property to himself individually for one thousand and twenty dollars, and this sale was the only attempted act of the administrator, and on the day of his purchase he sold the same property at private sale to a third person for over four thousand dollars, the sale was an absolute nullity. Tucker v. Benedict, 114 La. 203, 38 S 142 (the heirs were not estopped to assert their claim as against subsequent purchasers). (2) If the representative becomes the purchaser of his decedent's land under an order of court granted by the probate court on his petition, without notice to the heirs of the proceedings after the sale, a deed executed under the proceedings will be void on collateral attack. Allison v. Allison, 114 Ala. 393, 21 S 1008 [reaff Bolling v. Smith, 108 Ala. 411, 19 S 370].

[d] **As to minor heirs** the sale is said to be void, although it is only voidable as to those not under any disability. Gibson v. Herriott, 55 Ark. 85, 17 SW 589, 29 AmSR 17.

72. Cal.—Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Minn.—White v. Iselin, 26 Minn. 487, 5 NW 359.

Nebr.—Veeder v. McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 NW 982.

Oh.—Terrill v. Auchauer, 14 Oh. St. 80.

Wis.—Keilly v. Severson, 149 Wis. 251, 255, 135 NW 875; Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899; McCrubb v. Bray, 36 Wis. 333.

See also Hoffman v. Harrington, 28 Mich. 90 (where the court was equally divided as to whether the word "void" in such a statutory provision should be construed as void or as voidable).

"In further discussing the case it must be appreciated that the word 'void,' as used in the statute, means voidable. Until a sale made in violation of it be set aside in a proper action, the purchaser is vested with the legal title to the land and he cannot be divested thereof except in such proper action brought within a proper time by a person entitled to challenge, efficiently, the validity of the sale." Keilly v. Severson, supra.

[a] **Contrary view.**—Terwilliger v. Brown, 44 N. Y. 237; Forbes v. Halsey, 26 N. Y. 53.

73. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076.

Ala.—Cottingham v. Moore, 128 Ala. 209, 30 S 784.

Cal.—Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Kan.—Branner v. Nichols, 61 Kan. 356, 59 P 633.

La.—Carroll v. Cockerham, 38 La. Ann. 813; Scott v. Gorton, 15 La. 115, 33 AmD 578.

Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588.

Mo.—State v. American Surety Co., 191 Mo. A. 191, 177 SW 1074.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630.

N. Y.—Forbes v. Halsey, 26 N. Y. 53.

Oh.—Caldwell v. Caldwell, 45 Oh. St. 512, 15 NE 297.

Tex.—Hardy v. De Leon, 5 Tex. 211; Wipff v. Heder, 6 Tex. Civ. A. 685, 26 SW 118.

Wis.—Gibson v. Gibson, 102 Wis. 501, 78 NW 917.

74. See for example Houlihan v. Fogarty, 162 Mich. 492, 127 NW 793 (where the court said: "This court in construing this statute [3 Comp. L. § 9095] has held that such a purchase is void, where the title has not passed to a bona fide purchaser without notice, before the sale is impeached. Otis v. Kennedy, 107 Mich. 312, 65 N. W. 219, and cases cited. See, also, Litchfield v. Tunnicliff, 118 Mich. 383, 76 N. W. 760." The inaccuracy of the use of the term "void" in this connection clearly appears when it is considered that if the sale was void in a strict technical sense, even a bona fide purchaser from the representative, without notice, could acquire no title which would be protected as against the heirs).

75. See supra § 1592.

76. Fielder v. Childs, 73 Ala. 567; Montgomery v. Givhan, 24 Ala. 568; McLane v. Spence, 6 Ala. 894; Boyd v. Blankman, 29 Cal. 19, 87 AmD 146; Wheeler's Est., (Del.) 101 A 865; Highsmith v. Whitehurst, 120 N. C. 123, 26 SE 917.

77. Ark.—Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398.

Ky.—Harrod v. Harrod, 167 Ky. 308, 180 SW 797; Conrad v. Conrad, 152 Ky. 422, 153 SW 740; Baker v. Lane, 118 SW 963.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420.

N. C.—Joyner v. Conyers, 59 N. C. 78.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539.

Can.—McDonald v. McDonald, 21 Can. S. C. 201.

[a] **Reason for the rule.**—"However innocent the purchase may be in the given case, it is poisonous in its consequences." Crawford County Bank v. Bolton, 87 Ark. 142, 146, 112 SW 398, 401.

[b] **This is true even though** the representative owned a life estate in part of the land, and owned solely a tract sold with the testator's land. Conrad v. Conrad, 152 Ky. 422, 153 SW 740.

[c] **Time for action for accounting as to profits.**—A statute prohibiting an action for the recovery of any estate sold by an executor or administrator unless begun within five years after the sale does not bar a recovery of profits which an executor or administrator has made from his dealing with the property of the estate, and a beneficiary affirming a sale to an administrator may, after the expiration of five years after the sale, compel an accounting of the profits of the transaction. In re McClear, 147 Wis. 60, 132 NW 539.

[d] **When representative not liable for profits.**—Where an executor pays a full and fair price at a sale of land of the estate, where there was competitive bidding, and there is no evidence to warrant a conclusion that any advantage was taken or profit acquired by the executor by and through any use or abuse of his trust, such executor cannot be held liable to the estate for the price realized at a subsequent resale, when by the course of events the property had increased in value. Blackmon v. Blackmon, (S. C.) 101 SE 827.

78. See infra § 1592.

79. U. S.—Littell v. Hackley, 126 Fed. 309, 61 CCA 295 [certiorari den

been held that each of the persons interested has an individual election, and a ratification by some of the heirs or devisees will not preclude a repudiation by the others.[80] The election must, however, be a single one as to all of the land sold, the persons interested not being entitled to affirm the sale as to a part of the land and disaffirm it as to the remainder.[81]

Time for election. The right to have the sale set aside must be exercised within a reasonable time after the irregular purchase has become known to the person seeking its avoidance, as acquiescence in the sale for a long time will create a presumption of ratification.[82]

A ratification may be effected by acts done by the persons interested with knowledge of the facts,[83] such as an acceptance of their share of the purchase money;[84] and it has also been held that the sale is ratified where a decree settling the final accounts of the representative, which includes the proceeds of the sale, is made without objection, the court and the beneficiaries having full knowledge of the facts.[85] So also where a party in interest requested the executor to purchase at the sale, his heirs are estopped to question the validity of the sale.[86] But the discharge of the administrator and his sureties, without the rendition of an account, although with the consent of the heirs, does not estop them from suing to recover the land.[87]

When ratification by creditors binds heirs. If the creditors have assented to a purchase by the administrator at his own sale, and the whole estate is sufficient in amount to pay only about fifty per cent of the debts, the heirs cannot have the sale set aside.[88]

[§ 1595] **e. Leave of Court to Bid.** The court may, in its discretion, grant to the representative leave to bid or purchase at his own sale,[89] and in all cases where it may be proper for the representative to become the purchaser, he should, for his own protection, obtain such permission from the court.[90] Where the court allows an administrator

194 U. S. 635, 24 SCt 858, 48 L. ed. 1160].

Ala.—McCartney v. Calhoun, 17 Ala. 301.

Ark.—Stuckey v. Lockard, 87 Ark. 232, 239, 112 SW 747 [quot Cyc]; Woodard v. Jaggers, 48 Ark. 248, 2 SW 851.

Cal.—Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

Ga.—James v. Little, 135 Ga. 672, 70 SE 251; Newton v. Roe, 33 Ga. 163.

Ill.—Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].

Ind.—Comegys v. Emerick, 134 Ind. 148, 33 NE 899, 39 AmSR 245; Doe v. Harvey, 3 Ind. 104.

La.—Wood v. Nicholls, 33 La. Ann. 744; Prothro v. Prothro, 33 La. Ann. 598; Longbottom v. Babcock, 9 La. 44.

Me.—Decker v. Decker, 74 Me. 465.

Md.—Williams v. Marshall, 4 Gill & J. 376.

Mass.—Jenison v. Hapgood, 7 Pick. 1, 19 AmD 258, 10 Pick. 77.

N. H.—Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

N. J.—Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657.

N. Y.—Ward v. Smith, 3 Sandf. Ch. 592.

N. C.—Froneberger v. Lewis, 79 N. C. 426; Roberts v. Roberts, 65 N. C. 27.

Pa.—Grim's App., 105 Pa. 375.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539.

[a] **The heirs and their assignees** have an election to avoid or affirm the sale. Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

[b] **If the purchasing representative is insolvent,** a court of chancery will set aside the sale not only as against him but as against purchasers under him with notice. McHartney v. Calhoun, 17 Ala. 301.

80. Litchfield v. Cudworth, 15 Pick. (Mass.) 23, 31; Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

"The heirs therefore, or their assignees, have an election to avoid or confirm the sale. And in doing this, they are not bound to act jointly. Each one has an individual election. If the affirmance of the sale by some, and the avoidance of it by others, will produce great inconvenience on the final settlement of the estate, it will fall, where it ought, upon the administrator, who has violated his trust and by his wrongful act caused the embarrassment." Litchfield v. Cudworth, supra.

[a] **Contrary view.**—"The verdict is attacked because it sets the sale aside entirely and not merely as to some of the heirs. It was argued that the sale could be annulled as to those heirs only who rightfully exercised the election to set it aside. All of the heirs before the court when the verdict was returned estabished their right to have the sale declared void. There could be no such thing as a partial annulment of it." Pirkle v. Cooper, 113 Ga. 828, 832, 39 SE 289.

81. Jenison v. Hapgood, 10 Pick. (Mass.) 77.

82. Ark.—Stuckey v. Lockard, 87 Ark. 232, 112 SW 747; Griffin v. Caldwell, 72 Ark. 451, 81 SW 611.

Ga.—Word v. Davis, 107 Ga. 780, 33 SE 691; Fuller v. Little, 59 Ga. 338; Newton v. Roe, 33 Ga. 163.

Ill.—Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Sloan v. Graham, 85 Ill. 26; Williams v. Rhodes, 81 Ill. 571.

Kan.—Branner v. Nichols, 61 Kan. 356, 59 P 633.

Ky.—Spurlock v. Spurlock, 161 Ky. 248, 170 SW 605; Prewitt v. Morgan, 119 SW 174; Johnson v. Poff, 109 Ky. 396, 59 SW 325, 22 KyL 950.

La.—Blum v. Haas, 125 La. 18, 51 S 53.

Md.—Williams v. Marshall, 4 Gill & J. 376.

N. J.—Smith v. Drake, 23 N. J. Eq. 302.

N. Y.—Geyer v. Snyder, 69 Hun 115, 23 NYS 200 [aff 140 N. Y. 394, 35 NE 784].

Pa.—Bauer's Est., 12 Pa. Co. 77; Taggot v. Reilly, 3 Phila. 196.

Tenn.—Fennell v. Loague, 107 Tenn. 239, 63 SW 1121.

[a] **The length of time** which must elapse before acquiescence will be inferred is not the same in all cases, but depends in each case on the particular facts and circumstances involved. Johnson v. Poff, 109 Ky. 396, 59 SW 325; Smith v. Drake, 23 N. J. Eq. 302.

[b] **After the lapse of three years** a sale by the administrator indirectly to himself may be set aside on the application of any creditor of the estate. Hannum's App., 1 Chest. Co. (Pa.) 362; Worth's Est., 1 Chest. Co. (Pa.) 297.

[c] **The period of acquiescence is only to be computed from** the time when the injured party acquired, or ought, in the ordinary course of affairs, to have acquired, a knowledge of the fraud. Miles v. Wheeler, 43 Ill. 123; Branner v. Nichols, 61 Kan. 356, 59 P 633.

[d] **Burden of proving acquiescence.**—Where acquiescence by the heirs is alleged to sustain a sale by an administrator to himself, the burden of proof is on the party making the allegation. Miles v. Wheeler, 43 Ill. 123.

83. Moore v. Carey, 116 Ga. 28, 42 SE 258, 119 Ga. 91, 45 SE 976.

84. Cal.—Boyd v. Blankman, 29 Cal. 19, 87 AmD 146.

La.—Wood v. Nicholls, 33 La. Ann. 744.

Miss.—Jones v. Smith, 33 Miss. 215; Scott v. Freeland, 15 Miss. 409, 45 AmD 310.

N. J.—Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657.

N. Y.—Rhodes v. Caswell, 41 App. Div. 229, 58 NYS 470.

Oh.—Terrill v. Auchauer, 14 Oh. St. 80.

Pa.—Beeson v. Beeson, 9 Pa. 279; Bruch v. Lantz, 2 Rawle 392, 21 AmD 458.

[a] **Receipt by guardian.**—A guardian has no authority to consent that the property of his ward may be purchased by the administrator, in this irregular way; and the receipt by him of the ward's proportionate amount of the proceeds will not estop the latter from having the sale set aside. Acts of the ward on reaching majority may, however, constitute ratification. Moore v. Carey, 116 Ga. 28, 42 SE 258, 119 Ga. 91, 45 SE 976.

85. Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630; Rhodes v. Caswell, 41 App. Div. 229, 58 NYS 470.

86. McGary v. McGary, 105 SW 891, 32 KyL 314.

87. Tucker v. Benedict, 114 La. 203, 38 S 142.

88. Highsmith v. Whitehurst, 120 N. C. 123, 26 SE 917.

89. In re Patterson, (N. J.) 20 A 486; In re McPherran, 212 Pa. 425, 61 A 954; Markle's Est., 1 Pa. Dist. 54, 11 Pa. Co. 13, 29 WklyNC 479; Hacker's Est., 7 Pa. Co. 202.

[a] **Discretion not reviewable when no abuse shown.**—In re McPherran, 212 Pa. 425, 61 A 954.

90. In re Patterson, (N. J. Ch.) 20 A 486; Froneberger v. Lewis, 79 N. C. 426; Armor v. Cochrane, 66 Pa. 308; Hannum's App., 1 Chest. Co. (Pa.) 362.

[a] **The proper method to obtain the necessary leave** (1) of court is not by petition, but by a bill to which all persons interested should be made parties. In re Patterson, (N. J. Ch.) 20 A 486. (2) The application should show that the representative's sureties are willing that the request should be granted. Lewis' Est., 1 Chest. Co. (Pa.) 313.

to purchase at his own sale, and the sale is confirmed, he is not responsible to the estate for any profits which he may thereafter realize on the transaction.[91]

[§ 1596] **f. Refunding of Purchase Money.** The representative is entitled to have the purchase money which he has paid refunded to him where the sale to him is set aside or he is held as a trustee for the persons interested in the property.[92]

[§ 1597] **5. Relative of Representative.** A sale to a near relative, or the husband or wife, of the personal representative may usually be avoided.[93] But it has been considered that near relationship between the representative and the purchaser does not compel an inference of fraud, but is merely a circumstance to be carefully considered with the other circumstances in the case,[94] and that an administrator did not, by entering into an agreement with his brother that the latter should bid in land at the administrator's sale, become a purchaser within the inhibition of the statute.[95]

[§ 1598] **6. Attorney of Representative.** A sale of realty to the attorney of the representative who obtained the order of sale may be set aside as against public policy.[96]

[§ 1599] **7. Judge, Appraiser, or Commissioner.** A purchase by the judge who ordered the sale,[97] by the person who appraised the lands,[98] or by one of the commissioners appointed to make the sale[99] is objectionable. But the fact that one tract of land was purchased by the probate judge does not invalidate a deed for another and different tract sold to another person at the same sale, although both purchases were included in the same report to the probate court.[1]

[§ 1600] **N. Bids and Offers—1. In General.** A bid must be unconditional in order to be entitled to any consideration.[2] An agreement made by the representative, before obtaining an order of sale, to accept a certain price for land of the estate is not necessarily fraudulent if the sale is subsequently made in pursuance of the forms and requirements of law.[3] The representative offering land for sale at public outcry has the right to withdraw the offer of the land at any time before the hammer falls,[4] but on the acceptance of a bid both the bidder and the commissioner making the sale become bound.[5] If land is advertised as containing about a certain number of acres but is described by metes and bounds and a purchaser bids a round sum for the land, he cannot be held for a greater amount than the price bid, although it is subsequently discovered that the tract contains a considerable number of acres more than advertised.[6] So also where ten acres was ordered set apart and sold, a person making an offer for ten acres described by him acquired no rights in the ten acres subsequently set apart, which did not coincide with the land described in his offer.[7] Where land was knocked down at a certain bid and two persons claimed the bid and the land was immediately re-offered by order of the executors and was knocked

91. In re McPherran, 212 Pa. 425, 61 A 954.

92. Charles v. Daniels, 140 Ky. 379, 131 SW 42; Highsmith v. Whitehurst, 120 N. C. 123, 23 SE 917; Roll v. Riddle, 5 Oh. Dec. (Reprint) 232, 3 AmLRec 648.

[a] **Interest** on the purchase money may be allowed. Howe v. Riddle, 5 Oh. Dec. (Reprint) 232, 3 AmLRec 648.

[b] **Lien on land.**—An administrator who in good faith brought an action to have the land sold to settle the estate, and who paid out of his own means the price at the sale, and who also paid out as administrator, on account of the funeral expenses of decedent, a certain sum, was, on avoidance of the sale, entitled to a lien on the land for the sums so paid subject to the homestead right of an infant child of decedent. Baker v. Lane, (Ky.) 118 SW 963.

93. Ark.—Woodard v. Jaggers, 48 Ark. 248, 2 SW 851.

Ga.—Fairburn Banking Co. v. Summerlin, 144 Ga. 31, 85 SE 1007; Broadhurst v. Hill, 137 Ga. 833, 74 SE 422; Lowery v. Idleson, 117 Ga. 778, 45 SE 51; Moore v. Carey, 116 Ga. 28, 42 SE 258.

La.—Scott v. Gorton, 14 La. 111, 33 AmD 576.

Mo.—State v. American Surety Co., 191 Mo. A. 191, 177 SW 1074.

Okl.—Chastain v. Pender, 52 Okl. 133, 152 P 833, 835 [quot Cyc].

Pa.—Dundas' App., 64 Pa. 325; Schaefer's Est., 10 Pa. Co. 100; Kreider's Est., 17 LancLRev 201.

[a] **Sale to wife of representative may be ratified.**—Chastain v. Pender, 52 Okl. 133, 152 P 833.

[b] **Contrary view.**—Crawford v. Gray, 131 Ind. 53, 30 NE 885 (wife of one of the executors may, in absence of fraud or collusion, bid and become the purchaser); Louden v. Martindale, 109 Mich. 235, 67 NW 133 (a purchase by the administratrix was not shown merely by the fact that her husband bid off the property at the sale made by her, at a low price, and about five months later conveyed it to her, it appearing that the sale was open and pursuant to the legal and usual advertisement).

94. Fairburn Banking Co. v. Summerlin, 144 Ga. 31, 85 SE 1007; Cain v. McGeenty, 41 Minn. 194, 42 NW 933.

95. Turner v. Turner, 34 Okl. 284, 125 P 730.

96. Pine Bluff Bank v. Levi, 90 Ark. 166, 118 SW 250; West v. Waddill, 33 Ark. 575.

[a] **A purchase by the law partner of the representative's attorney** will not be set aside, unless bad faith or fraud is clearly shown, where the separate business of each lawyer was unaffected by the partnership and the purchaser had nothing to do with the affairs of the estate for the administrator of which his partner was the attorney, and held himself aloof from all dealings with the administrator. Gibson v. Gossom, 65 Ark. 631, 47 SW 237.

97. Livingston v. Cochran, 33 Ark. 294; Scott v. Calvit, 2 La. 69; Woods v. Monroe, 17 Mich. 238.

[a] **Sale voidable only.**— (1) A purchase by the probate judge is not absolutely void but merely voidable at the instance of those interested in the estate. Scott v. Calvit, 2 La. 69. (2) The fact that the land sold at an administrator's sale was deeded by the purchaser to a judge of probate is not such notice of fraud or wrong as would preclude any other person from becoming a bona fide purchaser, although the deed was by mistake made to bear date before the confirmation of the sale. Woods v. Munroe, 17 Mich. 238. But compare Livingston v. Cochran, 33 Ark. 294 (purchaser of bid of probate judge with knowledge that he was judge and had made the order of sale is not an innocent purchaser).

98. Brown v. Nelms, 86 Ark. 368, 112 SW 373; Dane v. Layne, 10 Cal. A. 366, 101 P 1067; Armstrong v. Huston, 8 Oh. 552.

[a] **Sale voidable only.**—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

[b] **Confirmation does not validate sale.**—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

99. Saltmarsh v. Veene, 4 Port. (Ala.) 283, 30 AmD 525; Penn v. Rhoades, 124 Ky. 798, 100 SW 288, 30 KyL 997; Price v. Thompson, 84 Ky. 219, 1 SW 408.

[a] **"The rule is a wise one,** and should be enforced. Commissioners and trustees have frequent opportunities to advance their own interest at the expense of those whom they represent. The temptation sometimes is great, and, if permitted to purchase under such circumstances, either directly or indirectly, injustice and injury, in the majority of cases, would be the result; therefore, it is the policy of the law to prohibit it altogether by declaring their purchase void." Penn v. Rhoades, 124 Ky. 798, 803, 100 SW 288, 30 KyL 997.

1. Bacon v. Morrison, 57 Mo. 68.

2. In re Bradley, 168 Cal. 655, 144 P 136.

3. Cal.—Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

Ill.—Goodbody v. Goodbody, 95 Ill. 456.

La.—Brown v. Jacobs, 24 La. Ann. 526.

Mich.—Norman v. Olney, 64 Mich. 553, 31 NW 555.

N. C.—Coffin v. Cook, 106 N. C. 376, 11 SE 371.

4. Tillman v. Dunman, 114 Ga. 406, 40 SE 244, 88 AmSR 28, 57 LRA 784; Bean v. Kirkpatrick, 105 Ga. 476, 30 SE 426.

[a] **Collusive withdrawal of property from sale.**—Although the withdrawal is the result of collusion between the representative and another for the purpose of transferring the property by private sale, the person who made the last and highest bid before the withdrawal cannot insist upon the right to take the land as a purchaser. Tillman v. Dunman, 114 Ga. 406, 40 SE 244, 88 AmSR 28, 57 LRA 784 (although the fraud of the representative would be open to inquiry by legatees and creditors, it was not open to inquiry at the instance of a stranger).

5. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

6. Dalton v. Rust, 22 Tex. 133.

7. Foust v. Kuykendall, 160 N. C. 332, 76 SE 82.

down to one of such bidders at a higher price than his previous bid, he became liable to complete his contract at his last bid.[8] If a purchaser files a written bid and the sale is confirmed according to the bid, he cannot have the confirmation vacated and be released on the ground that the terms of the bid vary from the order and notice of sale.[9]

[§ 1601] **2. Chilling Bidding.** An agreement or combination whereby the bidding for the property is restricted or prevented is fraudulent and is ground for setting aside the sale.[10] But where the bid of one of the alleged conspirators has been accepted, but the representative has successfully resisted attempts to compel him to complete the sale, and on a resale the property brings less than the amount of such bid, the representative cannot recover from the alleged conspirators the difference between such bid and the amount subsequently obtained for the property.[11]

[§ 1602] **3. Puffing.** The employment of a puffer by a person interested in the estate, merely to raise the price at the sale, is a fraud on the purchaser, which entitles him to be relieved from his purchase,[12] although the officer in charge of the sale had no knowledge of the arrangement for puffing.[13] The mere fact that the representative bid at the sale is not, however, a ground for objection by the other bidders if his bid was made in good faith and for the purpose of obtaining the property for himself;[14] nor is the fact that persons entitled to the proceeds of land sold by an executor under order of court engaged a third person to buy at the sale and run the price up to a specified amount, with the understanding that if it was knocked down to him they would take it off his hands, a ground for setting the sale aside.[15] Neither can the purchaser rescind because a person interested in the estate had employed a person obnoxious to the bidders to compete for the purchase, where the administrator was not inculpated in the transaction.[16]

[§ 1603] **O. Payment or Recovery of Purchase Money**[17]**—1. In General.** If property is sold to several jointly, each purchaser is liable individually for the entire amount of the consideration.[18] If the administrator purchases property of the succession and gives his note therefor payable to his agent for the use of the succession, a valid obligation is created, the real obligees being the heirs and creditors of the succession.[19] If a person buys property with the understanding that he is to discharge claims against the estate, his obligation, if inchoate, is made perfect against him the moment he proceeds to avail himself of his rights.[20] Ordinarily a purchaser is not entitled to deduct from the price the value of improvements put on the land by third persons whom he may possibly be compelled to remunerate.[21] A sale to pay unpaid probated debts is not rendered void because the court, after the sale, permitted the widow, who purchased the land, to apply her unpaid allowance for dower in personalty to the payment of the purchase price.[22] If a purchaser deposits the price with a notary he takes the risk of loss unless the executor is formally put in default or expressly or impliedly consents to the deposit.[23] If the property is purchased by the husband of one of the heirs, and he retains her share of the proceeds, she cannot avoid the sale on the ground of nonpayment of her portion of the proceeds.[24] Where the proceeds are directed to be divided among testator's children, the administrator is entitled to receive the money in preference to a judgment creditor of one of the children.[25] The rights of a bona fide purchaser of a note given to heirs for the price of land sold at partition sale are paramount to the rights of an administrator seeking to subject the note to the payment of the ancestor's debts as assets of the estate.[26] Where the purchaser was required to make provision for a certain cash payment and to execute bonds for the residue of the purchase price, and the cash payment was made by an order given by a third person for an amount in excess of the cash payment required, the excess could not be applied to satisfaction of the bonds in the absence of an agreement to that effect between the purchaser and the commissioner making the sale.[27]

[§ 1604] **2. To Whom Payment Made.** As a general rule the purchase price should be paid to the executor or administrator,[28] although it has

8. Warehime v. Graf, 83 Md. 98, 34 A 364.

9. In re Otis, Myr. Prob. (Cal.) 222.

10. Chaffe v. Meyer, 34 La. Ann. 1031; Grant v. Lloyd, 20 Miss. 191.

[a] **Contract not fraudulent.**—Where two attorneys representing allowed claims against the estate of a decedent in excess of the value of certain land, constituting the whole estate, agreed that as between themselves all the allowances should be of equal rank, and that upon a sale of the land one of them should buy it for the use of all creditors "pro rata," unless some other person should bid enough to pay the debts, the contract was not fraudulent, as preventing competition, and a purchase pursuant to its terms was valid. Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861.

[b] **Laches.**—The right to have the sale set aside on the ground of fraud on the part of the purchaser in preventing persons from bidding against him may of course be lost by laches. Kellogg v. Wilson, 89 Ill. 357 (after a delay of eight years the sale would not be set aside except upon clear proof).

Fraud as ground for setting aside generally see infra § 1671.

11. Allen v. Curry, 146 Ga. 244, 91 SE 70.

12. Robinson v. Robinson, 11 Bush. (Ky.) 174; Backenstoss v. Stahler, 33 Pa. 251, 75 AmD 592; Pennock's App., 14 Pa. 446, 53 AmD 561.

[a] **Time for objection.**—The purchaser should make his objection before the sale is confirmed; for after confirmation and the delivery of the deed and possession thereunder the objection comes too late. Backenstoss v. Stahler, 33 Pa. 251, 75 AmD 592.

[b] **Waiver of right to avoid purchase.**—A purchaser who has full knowledge that a puffer has been employed and nevertheless gives his notes for the purchase money waives his right to have his purchase annulled. Robinson v. Robinson, 11 Bush (Ky.) 174.

Fraud as ground for setting aside sale generally see infra § 1671.

13. Dively's Est., 1 LancLRev (Pa.) 359.

14. Riggs v. Schweitzer, 170 Pa. 549, 33 A 116; Pennock's App., 14 Pa. 446, 53 AmD 561.

15. McMillan v. Harris, 110 Ga. 72, 35 SE 334, 78 AmSR 93, 48 LRA 345.

16. East v. Wood, 62 Ala. 313.

17. Sale of personalty under testamentary authority or common-law power see supra § 745.

Sale of realty under testamentary authority see supra §§ 669–673.

18. Markle's Est., 5 Pa. Dist. 348 (the remedy of one who is forced to pay more than his share is contribution from his copurchasers).

19. Mouton v. Beauchamp, 10 La. Ann. 666 (the representative cannot disavow the sale and resist payment of the note without tendering back the property).

20. Decuir v. Ferrior, McG. (La.) 205.

21. Rutherford v. Martin, 3 Mart. N. S. (La.) 63.

22. Washington v. Govan, 73 Ark. 612, 84 SW 792 (such permission was at most an error in the distribution of the proceeds of the sale which could not affect the jurisdiction of the court to make the sale).

23. O'Keefe's Succ., 12 La. Ann. 246 (where the notary absconded with the price).

24. Huguet v. Bates, 32 La. 454.

25. Allison v. Wilson, 13 Serg. & R. (Pa.) 330.

26. Rowecamp v. Meyer, 6 Oh. Dec. (Reprint) 1128, 10 AmLRec 566.

27. Sipe v. Taylor, 106 Va. 231, 55 SE 542.

28. Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

Authority and duty of representative with respect to collection of assets generally see supra §§ 423–462.

been held that, where the sale was made for the payment of debts, a payment to a creditor was valid.[29]

[§ 1605] **3. Time for Payment.** The purchaser is under no obligation to pay the purchase price until confirmation of the sale,[30] but although the terms of sale contemplated a period of credit in whole or in part, actual payment before such period matures may fairly be accepted by the representative.[31]

[§ 1606] **4. Medium of Payment.** As a general rule the representative can receive nothing but money in payment for his decedent's property,[32] and, if he accepts depreciated currency, he is accountable for the full value in standard money, although he acted in good faith.[33] Notes taken by an executor for property sold to pay debts are not assets until they are due and collected.[34]

[§ 1607] **5. When Property Sold Is Encumbered.**[35] As a rule the purchaser takes the property subject to fixed encumbrances thereon, and his bid is therefore considered, and the amount thereof must be paid, without reference to the encumbrances.[36] A different rule is, however, sometimes recognized,[37] and where it was a part of the terms of sale that an existing encumbrance was to be released or paid off, the purchaser is entitled to the benefit of the agreement in this respect.[38]

[§ 1608] **6. Purchase by Heir, Distributee, Etc.** If a purchaser at the sale is a beneficiary of the estate, a deduction or offset as to the price may sometimes be conveniently made;[39] but a retention of the price or any part thereof is not permissible as against the immediate right of creditors to be paid from the net proceeds of the sale.[40] It has been considered that a distributee purchasing at the administrator's sale cannot enjoin the collection of his bonds for the purchase money until his distributive share is determined and set off against the bond;[41] but heirs are sometimes permitted, by statute, to purchase property of the estate to the extent of their proportionate shares thereof, without obligation to pay the purchase money until a liquidation is had by which it is ascertained what balance there is in their favor or against them.[42]

[§ 1609] **7. Purchase by Person Holding Claim**

29. Oliver v. Bry, 7 La. Ann. 590.

[a] **By agreement with the administrator** the purchaser may discharge his note given for the price of the property by paying the amount of it to the creditors of the estate. Pittman v. Pittman, 59 Miss. 203.

30. See infra § 1631.

31. Halleck v. Guy, 9 Cal. 181, 70 AmD 643; Brown v. Jacobs, 24 La. Ann. 526; Gwynn v. Dorsey, 4 Gill & J. (Md.) 453.

[a] **Discount to purchaser.**—Halleck v. Guy, 9 Cal. 181, 70 AmD 643; Canonge's Succ., 1 La. Ann. 212.

32. Ill.—Doe v. Hileman, 2 Ill. 323.

Ind.—Chandler v. Schoonover, 14 Ind. 324.

Iowa.—Richards v. Adamson, 43 Iowa 248.

La.—Scott v. Scott, 42 La. Ann. 766, 7 S 716.

Pa.—Mitchell's Est., 1 LegGaz 74.

[a] **The court has no authority to direct** a sale to be made for anything but legal currency. Doe v. Hileman, 2 Ill. 323 (the court had no authority to direct payment in notes of a state bank, but a sale under such an order was not void but merely voidable).

[b] **A mortgage note of a third person** cannot be taken in payment. Richards v. Adamson, 43 Iowa 248.

[c] **A bond** on which decedent was surety cannot be used in payment under an arrangement between the purchaser of the land and the holder of the bond, pursuant to which part of the land is conveyed to the holder of the bond as a consideration, thus securing the remainder of the property to the purchaser without any payment. Scott v. Scott, 42 La. Ann. 766, 7 S 716. But compare Nosworthy v. Blizzard, 53 Ga. 668 (where the purchaser gave the value of the land, but paid for it in other property, and the administrator was a creditor of the estate to the amount of such value, and received such property in payment of his claim, the purchaser was entitled to protection in equity to the extent that his purchase was of value to the estate).

33. Brewer v. Vanarsdale, 6 Dana (Ky.) 204. And see cases infra this note.

[a] **Receipt of Confederate currency.**—Stewart v. Lee, 56 Ala. 53; Hudgens v. Cameron, 50 Ala. 379; Clark v. Bernstein, 49 Ala. 596; Kitchell v. Jackson, 44 Ala. 302; Brown v. Jacobs, 24 La. Ann. 526; Martin v. Singleton, 23 La. Ann. 551; De Saussure v. McClenaghan, 6 S. C. 33; Trammel v. Philleo, 33 Tex. 395; Poague v. Greenlee, 22 Gratt. (63 Va.) 724.

[b] **Waiver of objection.**—If currency is received by distributees at its nominal value with full knowledge of the transaction, they will not be permitted to disavow their deliberate act after a period of several years. Brewer v. Vanarsdale, 6 Dana (Ky.) 204.

34. McKay v. Flowers, 44 N. C. 211; Henninger v. Boyer, 10 Pa. Co. 506. But compare Bellerby v. Thomas, 105 Ga. 477, 30 SE 425 (where a person buys land at an administrator's sale, pays a part of the price in cash, and delivers to the administrator a note for the balance, under an agreement that the note will be paid upon demand if it becomes necessary for the administrator to have the cash for the purpose of distribution, such note, in a proceeding to marshal the assets of the estate, may be regarded as cash in the administrator's hands, so far, at least, as to warrant a judgment against the maker for such portion of the amount of the note as may be requisite for the administration of the estate).

35. Purchase by encumbrancer see infra § 1609.

Terms and conditions of sale when property encumbered see supra § 1586.

36. Weakley v. Gurley, 60 Ala. 399; Dull v. Slater, 31 Pa. Super. 488; Crosson's Est., 6 Pa. Co. 414, 22 WklyNC 226 [aff 125 Pa. 380, 17 A 423].

[a] **Payment in discharge of dower.**—Where lands are sold to pay debts of the estate, and the purchaser, pursuant to an agreement with the widow, pays her a sum in discharge of dower, he is not entitled to abate his bid to the extent of the payment. Weakley v. Gurley, 60 Ala. 399.

[b] **Circumstances under which rule not applicable.**—Where the auctioneer announced that the property was subject to a mortgage, that the amount due thereon was unascertained, and that to enable buyers to bid intelligently and know exactly what they were paying for the property, he would cry the sale as if there was no such mortgage, the purchaser might deduct the balance due on the mortgage from the amount of his bid. Crosson's Est., 6 Pa. Co. 414, 22 WklyNC 226 [aff 125 Pa. 380, 17 A 423].

37. See cases infra this note.

[a] **In Louisiana** (1) the purchaser is entitled to retain in his hands out of the price the amount required to satisfy privileged debts in special hypothecation to which the property was sold subject. Leverich's Succ., 47 La. Ann. 1665, 18 S 700; Triche's Succ., 29 La. Ann. 384; Bradford v. Dortch, 13 La. 79. (2) Deduction of the amount of a tax lien from the amount of the purchase money is also allowable. Moore v. Moore, 22 La. 226.

38. May v. Taylor, 27 Tex. 125.

39. Kenley v. Bryan, 110 Ill. 652; Mason v. Bemiss, 38 La. Ann. 935; Markle's Est., 5 Pa. Dist. 47, 17 Pa. Co. 337; Parker's Est., 2 Pa. Dist. 525, 13 Pa. Co. 453; Markle's Est., 1 Pa. Dist. 54, 11 Pa. Co. 13, 29 Wkly NC 479.

[a] **The father of minor legatees** cannot, on purchasing, retain the price because entitled to receive the legacy for them and to enjoy the usufruct thereof during marriage. His debt to the estate is personal, and his claim to the legacy is in autre droit. Gorton v. Gorton, 12 La. 476.

[b] **The husband of decedent's daughter,** not being an heir of decedent, must, when he has contracted with the administrator for purchases, pay the full amount whether or not there are sufficient funds in the administrator's hands to pay the debts of the deceased. Fluker v. Kent, 27 La. Ann. 37.

40. Washington v. Govan, 73 Ark. 612, 84 SW 792; Mason v. Bemiss, 38 La. Ann. 935; Harris v. Harris, 12 La. Ann. 10.

[a] **Illustration.**—If heirs purchase so large a portion of an estate that there is not enough due from other persons to pay the debts, they can be forced by the administrator to pay such portions as are over their estimated shares of the succession. Patrick v. Bryan, 6 La. Ann. 699.

41. Hickerson v. Helm, 2 Rob. (41 Va.) 628.

42. Fluker v. Kent, 27 La. Ann. 37; Mavor v. Armant, 14 La. Ann. 181; Marionneaux v. Marionneaux, 12 Rob. (La.) 666; McLean's Succ., 2 La. A. (Orleans) 9.

[a] **Liability for interest.**—The purchasing heir must, even from a period anterior to the partition, pay interest when stipulated for as part of the price; otherwise his position would be more favorable than that of the rest. Marionneaux v. Marionneaux, 12 Rob. (La.) 666. See also Aguillard's Succ., 13 La. Ann. 97 (heirs are chargeable with the interest stipulated in their notes from maturity until the day of the for-

against Estate or Representative. A simple contract creditor of an estate, who purchases property of the estate, cannot, as a general rule, deduct the amount of his claim from the amount of the price due from him,[43] and the representative cannot ordinarily make a binding agreement with the creditor to allow a credit on his claim in payment of the price.[44] A set-off in such case is open to the objection of lack of mutuality,[45] and to the further and more serious objection that in this way the person to whom the set-off was allowed would obtain an advantage over other creditors of the estate.[46] But under circumstances where the purchasing creditor would obtain no preference a set-off is sometimes allowed[47] and an agreement therefor enforced.[48] A mortgagee or other lienor who becomes purchaser at the sale and is entitled as lienor to receive part of the proceeds of the sale may set off the amount of his lien against the amount of his bid.[49] A purchaser cannot set off an amount paid by him for taxes which have accrued subsequent to the death of decedent and prior to the sale, for the representative is not obliged to pay taxes on land accruing after decedent's death, and the purchaser takes the land subject to any lien thereon for taxes due.[50] The right of set-off or of retaining out of the purchase price, where it exists, is subject to the duty of paying expenses,

mation of the mass of the estate for partition).

43. Ala.—Walker v. Tyson, 52 Ala. 593.

Ark.—Bishop v. Dillard, 49 Ark. 285, 5 SW 341.

Ill.—Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847; Harding v. Shepard, 107 Ill. 264.

La.—Childs v. Lockett, 107 La. 270, 31 S 751; Pendarvis v. Wall, 14 La. Ann. 449; Green v. Davis, 7 Mart. N. S. 238.

Md.—Schwallenberg v. Jennings, 43 Md. 554.

Miss.—Mellen v. Boarman, 21 Miss. 100; Cotton v. Parker, Sm. & M. Ch. 191.

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. Y.—Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273.

Pa.—Irwin v. Guthrie, 198 Pa. 267, 47 A 992; Becker v. Espenshade, 8 Pa. Dist. 525.

Tex.—Hall v. Hall, 11 Tex. 526; Perry v. Blakely, 5 Tex. Civ. A. 331, 23 SW 804.

W. Va.—Ellett v. Reid, 25 W. Va. 550.

[a] **A provision in the decree of sale** giving the creditor a right to bid upon the property and pay that bid in the amount of the claim which the estate owes him is erroneous. Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

[b] **The purchaser cannot buy up claims** against the estate after it is declared insolvent and offset them against the demand of the representative for the purchase money. Cotton v. Parker, Sm. & M. Ch. (Miss.) 191.

44. Bishop v. Dillard, 49 Ark. 285, 5 SW 341; Rindge v. Oliphint, 62 Tex. 682.

45. Moody v. Shaw, 85 Ind. 88; Dayhuff v. Dayhuff, 27 Ind. 158; Mellen v. Boarman, 21 Miss. 100.

46. Ala.—King v. Gilreath, 154 Ala. 129, 45 S 89.

Md.—Schwallenberg v. Jennings, 43 Md. 554.

N. M.—Albuquerque First Nat. Bank v. Lee, 8 N. M. 589, 45 P 1114.

N. C.—Pate v. Oliver, 104 N. C. 458, 10 SE 709; Brandon v. Allison, 66 N. C. 532.

Pa.—Singerly v. Swain, 33 Pa. 102, 75 AmD 581.

Tex.—Hall v. Hall, 11 Tex. 526.

"One of the prime reasons why some of the courts in other jurisdictions hold that the claim of the purchasing creditor may not be set off against the sum bid by him is that a preference might or would be accorded him over other creditors of the estate." King v. Gilreath, 154 Ala. 129, 134, 45 S 89.

47. Ala.—King v. Gilreath, 154 Ala. 129, 135, 45 S 89 [cit Cyc].

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Ky.—Dickinson v. Chism, 2 T. B. Mon. 144.

La.—Johns v. Race, 48 La. Ann. 1170, 20 S 660.

Mo.—In re Albert, 80 Mo. A. 557.

N. C.—Brandon v. Allison, 66 N. C. 532; Norton v. Edwards, 66 N. C. 367.

Tex.—Hall v. Hall, 11 Tex. 526.

W. Va.—Ellett v. Reid, 25 W. Va. 550.

"Nor did the fact that payment was made by credit on the probated claim of the purchasers, instead of payment in money, invalidate the sale. Only creditors who were prevented from obtaining satisfaction of their probated claims on account of the excessive payment to Stone & Tyler could complain of this, and their remedy, if any, was against the administrator. The sale was reported to the probate court and duly confirmed, and it does not appear that the interests of any other creditor were prejudiced by this method of accounting for the purchase price of the land." Brown v. Nelms, 86 Ark. 368, 395, 112 SW 373.

[a] **If the purchaser is the sole creditor of the estate** (1) a set-off may be allowed. In re Albert, 80 Mo. A. 557; Hall v. Hall, 11 Tex. 526. (2) "Being the sole creditor of the insolvent estate, the proceeds of the sale, less the costs of administration (which were provided for in the instance at hand), go to him, his debt being in excess of the purchasing bid. No other person is interested, nor the rights of another involved. And the bid sum being at or above the fair value of the property, confirmation by the court was validly effective to complete, upon the credit on the debt being allowed and entered and the cost of administration paid and the conveyance made, the transfer of the legal title from the heir to the purchaser. It would have been, in this case, an wholly useless formality to require the actual payment of the bid sum to the administrator whose almost immediate duty it would have been to return it, less the costs, and fees, to the purchasing creditor." King v. Gilreath, 154 Ala. 129, 134, 45 S 89.

[b] **If there is no debt of superior or equal dignity** to that offered in set-off, a set-off is proper. Ransom v. McClees, 64 N. C. 17.

[c] **As against the heirs** a set-off may be allowed to a purchaser who is a creditor of such heirs. Johns v. Race, 48 La. Ann. 1170, 20 S 660.

[d] **Where the sale is made for the purpose of partition,** the purchaser, being a creditor of the estate, may set off the amount of his claim against the purchase money. Johns v. Race, 48 La. Ann. 1170, 20 S 660.

[e] **A claim which has not been admitted** by the administrator or otherwise established cannot be set off against the price of property purchased by the claimant. He must establish his claim in an appropriate proceeding. Schwallenberg v. Jennings, 43 Md. 554.

48. Norton v. Edwards, 66 N. C. 367 [dist Brandon v. Allison, 66 N. C. 532].

49. Cal.—In re Turner, 128 Cal. 388, 60 P 967.

Ga.—McDaniel v. Hooks, 30 Ga. 981.

La.—Bellow's Succ., 108 La. 477, 32 S 618; Tertrou v. Durand, 30 La. Ann. 1108.

Pa.—Irwin v. Guthrie, 198 Pa. 267, 47 A 992; Singerly v. Swain, 33 Pa. 102, 75 AmD 581.

Tex.—Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

[a] **An agreement to allow such a set-off** is proper. McDaniel v. Hooks, 30 Ga. 981.

[b] **The holder of a lien claim for whose benefit the land is sold** may of course retain. Bacon v. McNutt, 3 Mart. N. S. (La.) 129; Huddleston v. Kepmner, (Tex. Civ. A.) 28 SW 236.

[c] **Where this right is given to the lienor by statute** it is necessary for him to pursue his right according to the terms of the statute. In re Turner, 128 Cal. 388, 60 P 967; Singerly v. Swain, 33 Pa. 102, 75 AmD 581.

[d] **Necessity for bond.**—A mortgage creditor who purchases at a succession sale of property on which a mortgage is a lien may retain the amount of his mortgage out of the price on executing a bond with security in favor of the representative for a sum to be fixed by court, conditioned that he will pay such sums as may be ascertained on the settlement of the succession to be payable, in preference to him out of the proceeds of the property so purchased by him up to the amount of his bid. Bellow's Succ., 108 La. 477, 32 S 618; Tertrou v. Durand, 30 La. Ann. 1108.

[e] **Vendor's lien.**—Under a statute by which the purchaser of land of a decedent which has not been paid for takes subject to the vendor's lien for the purchase money, the vendor himself, upon becoming a purchaser, stands upon the same footing as a stranger, and must pay the amount of his bid without deducting his claim; for, as he purchased at sale only the right, title, and interest of decedent, his bid for the land was in effect the amount of his lien as well as the amount of his bid. Ross v. Julian, 70 Mo. 209.

[f] **Where a mortgagee waives his lien** by failure to present it and obtain its allowance as a claim against the estate, if he purchases the property at the sale he cannot set off the amount against the purchase price. In re Turner, 128 Cal. 388, 60 P 967.

50. Henderson v. Whitinger, 56 Ind. 131.

[a] **The mere promise by the representative** to allow the purchaser a set-off for taxes paid by him at the request of the representative is not sufficient to bind the estate, in the absence of facts which show a right to charge the estate or that a consideration for the promise arose prior to decedent's death. Moody v. Shaw, 85 Ind. 88.

commissions, or legal costs.[51] A discharge of the personal debt of the representative to the purchaser in consideration for the property is unauthorized,[52] and the sale may be set aside or the purchaser held liable for the purchase money,[53] but if with full knowledge of the facts the persons interested in the estate elect to charge the administrator with the amount in his account, they cannot afterward revoke their election and proceed in equity against the purchaser.[54]

[§ 1610] **8. Security for Purchase Money—a. In General.** Where the sale is on credit, such security as the statute requires or authorizes should be taken,[55] and the court cannot authorize, nor can the representative demand, security of a different character.[56] If the sureties on notes offered have all the qualifications required by statute, the representative cannot arbitrarily reject the notes, but if his decision as to the sufficiency of the sureties was made in good faith and with due caution it should stand.[57] The insertion of a condition in the bond that no property other than that purchased shall be levied on for the payment of the bond is beyond the power of an administrator who has been directed to sell real estate and to secure the purchase money by a bond and mortgage.[58] The interest of the heirs in a recognizance given for the price is several and not joint, and the liability of the recognizors is to each of the heirs severally and not jointly.[59] A surety is not discharged for irregularities in the sale if they did not render the same an absolute nullity and have to all appearances been cured;[60] nor will it avail him as a defense to an action on a note given for the price that he became surety in the expectation that the administrator would perform his duty to the estate by also taking mortgage security required by law and by the order of sale.[61] Where a bond and mortgage given for the price are assigned to a creditor of the estate in satisfaction of his claim, they are not extinguished by operation of law, but the assignee may enforce the mortgage.[62]

[§ 1611] **b. Vendor's Lien.** In equity[63] and sometimes under statute[64] land sold under a valid[65] order of court passes to the purchaser subject to a vendor's lien. The taking of security for the purchase price does not, unless it is so agreed, affect the right to enforce the lien against the land.[66] The representative has no authority to release the vendor's lien.[67] A person not the purchaser who pays the purchase price may be subrogated to the lien.[68] The lien may be enforced against a voluntary transferee[69] or against a purchaser with notice.[70] But the purchaser's vendee who buys a part of the property is entitled to have his land exonerated to the extent of the value of the land yet remaining in his vendor,[71] and if the heirs release the first purchaser they waive the lien to that extent against the land of the purchaser's vendee.[72] Where, under the statute, a conveyance cannot be ordered until the whole of the purchase money has been paid, a decree confirming the sale and directing a conveyance extinguishes the lien or at least casts upon the heirs seeking to enforce a vendor's lien the burden of showing nonpayment.[73] If the lien is once extinguished it cannot be revived by a subsequent transaction between the parties.[74] Laches may extinguish the right to enforce a vendor's lien on the land.[75]

[§ 1612] **9. Rights and Liabilities on Failure or Refusal of Bidder to Complete Purchase.** As an incident to its right to order the sale of real prop-

51. Becker v. Espenshade, 8 Pa. Dist. 525; Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

[a] **What are "legal costs."**—Where land is sold to a lien creditor for less than the amount of his lien, the "legal costs" which he must pay in cash include the administrator's commission on the purchase money, and that two and one-half per cent is the proper rate for the commission. Becker v. Espenshade, 8 Pa. Dist. 525.

52. Nunn v. Norris, 58 Ala. 202; Chandler v. Schoonover, 14 Ind. 324.

53. Chandler v. Schoonover, 14 Ind. 324.

54. Nunn v. Norris, 58 Ala. 202.

55. See cases infra this note.

[a] **Nature of bond.**—The bond contemplated by the act of 1839 to be given to the ordinary by an executor who purchases at his own sale is not a money bond but a bond conditioned to account to the parties interested for the purchase money and interest when the property sold for its value or, if it is sold for less, to account for its actual value. State v. Baskin, 32 S. C. L. 35.

[b] **The giving of separate purchase bonds by two purchasers** when the land was sold as a whole and the fact that the commissioner making the sale allowed the purchasers to divide the land does not invalidate the sale if each bond was proportioned to the value of the obligor's share of the land. Rodgers v. Rodgers, 31 SW 139, 17 KyL 358.

[c] **The taking of mortgage security** for the price is not authorized by Hartley Dig. arts 1016, 1023, 1039. Hall v. Hall, 11 Tex. 526.

56. Howison v. Oakley, 118 Ala. 215, 23 S 810.

57. Hamilton v. Bonham, 20 Oh. Cir. Ct. 252.

58. Sage v. Nock, 4 PaLJ 518.

59. Phillips v. Cannon, 4 Del. Ch. 58.

60. Quinn's Succ., 34 La. Ann. 878.

61. Wornell v. Williams, 19 Tex. 180.

62. Clowney v. Cathcart, 2 S. C. 395.

63. Ala.—Strange v. Keenan, 8 Ala. 816.

Ga.—Cook v. Cook, 67 Ga. 381. See also McClure v. Williams, 58 Ga. 494 (sale before vendor's lien abolished).

La.—Scott v. Scott, 42 La. Ann. 766, 7 S 716; Jones v. Read, 1 La. Ann. 200.

Mo.—Thomas v. Bridges, 73 Mo. 530.

N. C.—Mast v. Raper, 81 N. C. 330.

[a] **Retaining title as security.**—Where it is agreed that the title of personalty shall remain in the administrator as security for what might be due to him from the purchaser, the administrator may enforce his right as against an execution of a creditor of the purchaser. Napier v. Wightman, 17 S. C. Eq. 357.

64. Gardner v. Kelso, 80 Ala. 497, 2 S 680; Elliott v. Connell, 13 Miss. 91; Hise v. Geiger, 7 Watts & S. (Pa.) 273.

65. See Hamilton v. Lockhart, 41 Miss. 460 (sale under void order can give rise to no lien for purchase money).

66. Strange v. Keenan, 8 Ala. 816; Hoggatt v. Wade, 18 Miss. 143; Hise v. Geiger, 7 Watts & S. (Pa.) 273.

[a] **The fact that the heirs charged the administrator who was the purchaser** with the price did not constitute an election to rely on the liability of his sureties on the bond for the price, so as to prevent them from enforcing payment out of the land. Bogart v. Bell, 112 Ala. 412, 20 S 511.

67. Wood v. Sullens, 44 Ala. 686; Elliott v. Connell, 13 Miss. 91.

68. Stabler v. Spencer, 64 Ala. 496; Rather v. Young, 56 Ala. 94; Thomas v. Bridges, 73 Mo. 530; Mast v. Raper, 81 N. C. 330.

[a] **Illustrations.**—(1) Where the administrator charged himself with the unpaid purchase money he may be allowed to enforce the vendor's lien on the land sold. Rather v. Young, 56 Ala. 94. (2) Where the administrator has been held liable for a credit allowed to the purchaser, he may enforce the lien to the amount of the credit against the land. Thomas v. Bridges, 73 Mo. 530. (3) Where the administrator who was one of the heirs took the purchaser's unpaid note as a part of his distributive share, he was subrogated to the lien. Stabler v. Spencer, 64 Ala. 496. (4) A surety on the purchaser's note may be subrogated to the right of enforcement of the lien against the land. Mast v. Raper, 81 N. C. 330.

69. Thomas v. Bridges, 73 Mo. 530.

70. Strange v. Keenan, 8 Ala. 816; Hoggatt v. Wade, 18 Miss. 143; Miller v. Helm, 10 Miss. 687.

[a] **What is sufficient notice.**—(1) A deed of the land by the administrator which shows that the land belonged to the estate, that he sold under order of court, and that part of the purchase money had not become due is sufficient to charge the grantee of the purchaser with notice of the lien for the purchase money. Hoggatt v. Wade, 18 Miss. 143. (2) A mortgage thus created by statute is itself constructive notice of its existence. Miller v. Helm, 10 Miss. 687.

71. Dugger v. Tayloe, 60 Ala. 504.

72. Dugger v. Taylor, 60 Ala. 504.

73. Wood v. Stanley, 78 Ala. 348; Sims v. Sampey, 64 Ala. 230.

74. Sims v. Sampey, 64 Ala. 230.

75. Wood v. Stanley, 78 Ala. 348 (bill to enforce lien, filed after lapse of nine years, cannot be enforced).

erty, the court may enforce the remedies provided by law against a bidder who refuses to comply with his bid,[76] and may compel the purchaser to perform his contract.[77] The purchaser, however, cannot be compelled to carry out his contract if the decree[78] or proceedings thereon[79] are insufficient to transfer a good title,[80] or if there have been misrepresentations as to the terms of sale,[81] or the property is not as advertised.[82] It has also been held that, where the purchaser fails to comply with the terms of his contract, the representative may treat the property bid off by such purchaser as unsold,[83] or if the highest bidder refuses to comply with his bid, it is not wrong to allow the sale to be returned as made to the next highest bidder.[84] Whether a loss by destruction of the property occurring between the date of sale and the confirmation thereof is to be borne by the purchaser or the estate depends upon the view taken by the courts of the particular jurisdiction as to the time when the purchase is complete.[85] If the purchaser refuses to comply with his bid on the ground that the property

76. Mercer v. Sager, 129 Ga. 123, 58 SE 1037; Bobb's Succ., 27 La. Ann. 344; Lewis v. Casenave, 6 La. 437; Podesta v. Moody, 69 N. J. Eq. 468, 60 A 939.

77. Cal.—In re Leonis, 138 Cal. 194, 71 P 171.

Ga.—Mercer v. Sager, 129 Ga. 123, 58 SE 1037; Keen v. McAfee, 116 Ga. 728, 42 SE 1022.

Ida.—Jones v. Broadbent, 21 Ida. 555, 123 P 476.

Ky.—Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

La.—Mannessier's Succ., 44 La. Ann. 803, 11 S 139; Raguet v. Barron, 6 Mart. N. S. 659.

Mich.—Stebbins v. Field, 43 Mich. 333, 5 NW 394.

Miss.—Mount v. Brown, 33 Miss. 566, 69 AmD 362; McLaurin v. Parker, 24 Miss. 509.

Nebr.—Maul v. Hellman, 39 Nebr. 322, 58 NW 112.

N. J.—Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

N. C.—Hudson v. Coble, 97 N. C. 260, 1 SE 688.

"This he may be compelled to do by rule, and by process of contempt." Blakeley v. Hughes, 140 Ky. 174, 176, 130 SW 1067.

[a] **Rule to show cause is a proper mode** of proceeding to compel the purchaser to complete his purchase. Haggerty's Succ., 28 La. Ann. 87.

[b] **The court ordering the sale** has all the powers of a court of equity in regard to the subject, and may make an order requiring the purchaser to complete his purchase. Hudson v. Coble, 97 N. C. 260, 1 SE 688. See also Lund v. Baccich, 134 La. 410, 415, 64 S 226 ("Defendants, after they had become adjudicatees, declined to accept and sign the deed. They refused to complete the sale. They had substantially bound themselves to sign this deed. It was an obligation on their part to sign, but, owing to their refusal, it remains an incomplete act in the settlement of the succession. The court had sufficient jurisdiction to assert its authority. By becoming adjudicatees, the defendants had made themselves parties to the proceedings; they rendered themselves subject to the court's authority to compel them to do that which they had bound themselves to do or show reasons to justify their conduct. Jurisdiction continues until the sale is completed and the deed signed. Until then, the court having probate jurisdiction has authority to compel obedience regarding the signing of the auctioneer's deed or to order that the property be resold. The following authority is in point: Landry v. Connely, 4 Rob. 127").

[c] **Presumption as to propriety of action of court.**—Where a purchaser appealed to the prerogative court from an order that he complete his purchase, in a suit by him in chancery to set aside the order for sale, etc., the chancery court will not assume that the orphans' court did not do right, or, if it was in error, that the prerogative court will not do right. Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

[d] **If another bidder is substituted upon the refusal of the first bidder** to comply with his bid, the second bidder can be compelled to comply with his contract. Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

[e] **Contrary view.** — Gram v. O'Gara Coal Co., 156 Ill. A. 228 (the court has jurisdiction only to order a resale at the bidder's risk).

78. Tilton v. Pearson, 67 Ill. A. 372; Michel's Succ., 20 La. Ann. 233.

[a] **Order of sale suspended.**—A sale of property of a succession made after the order authorizing the sale was suspended by a new order is a nullity and the purchaser is not obliged to carry out the contract. Michel's Succ., 20 La. Ann. 233.

[b] **The rightfulness of the recusation of a judge** of the court from which the order of sale issued cannot be put at issue in a rule to compel the purchaser at a succession sale to comply with his bid. Lacroix's Succ., 30 La. Ann. 924.

79. Weber's Succ., 16 La. Ann. 420 (where, however, the court said that it was a different thing if the purchaser complied voluntarily with the terms of the sale and went into possession).

[a] **Mere irregularities in the sale** do not create a cloud upon the title and will not relieve the purchaser from his bid, for he is protected by the decree under which the sale was made and by his right to restitution in case of loss or injury. Byrne's Succ., 38 La. Ann. 518.

[b] **The purchaser cannot object to the title because** the widow does not sign the act of sale or because the auctioneer and notary refuse to furnish the title for examination. Merrick v. North, 28 La. Ann. 878.

[c] **Proof showing nonexistence of alleged cloud on title.**—Where a purchaser of real property at a succession sale refused to accept the title on the ground that one A had an undivided interest in the land by inheritance from a minor who had owned the land in common with decedent, but the proof showed that the alleged undivided interest was transferred to decedent by the minor's parent during her lifetime, and that consequently no title by inheritance passed at her death, the purchaser was properly required to accept the title. Mannessier's Succ., 44 La. Ann. 803, 11 S 139.

[d] **Incorrect statement as to title in notice of sale.**—The purchaser cannot refuse to pay on the ground that the notice of sale stated a good title whereas the title was not good, where the sale was stated in the notice as a probate sale, for the purchaser was bound to examine the title himself. Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

80. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89; Hellman v. Merz, 112 Cal. 661, 44 P 1079; Tilton v. Pearson, 67 Ill. A. 372; Nash's Succ., 48 La. Ann. 1573, 21 S 254; Doyle v. Whitridge, 97 Md. 711, 55 A 459.

[a] **Purchaser in possession.**—The purchaser should not be allowed to remain in possession, and at the same time set up the invalidity of the sale by which he acquired that possession. Before defendant can make this defense, if he can make the defense at all, he should surrender the land. Keen v. McAfee, 116 Ga. 728, 42 SE 1022.

81. Kingsbery v. Love, 95 Ga. 543, 22 SE 617; Matter of Anderson, 95 Misc. 79, 160 NYS 509.

[a] **Illustration.**—If the purchaser has been misled by the administrator to believe that his bid would be for the land free from encumbrances, he cannot be forced to complete his purchase and pay for the land subject to encumbrances. Kingsbery v. Love, 95 Ga. 543, 22 SE 617.

[b] **If the advertised terms of the sale are varied by an announcement** made on the day of the sale, it must be shown by clear and convincing evidence that the purchaser had actual knowledge of the altered terms before he made his bid, if he is to be held liable for the deficiency on resale. Daniel v. Jackson, 53 Ga. 87.

[c] **Failure of the administrator to comply with an agreement** made with the purchaser to apply the purchase money to the payment of encumbrances does not justify the purchaser in refusing to comply with his bid, where the order of sale provided that the land should be sold subject to encumbrances. Maul v. Hellman, 39 Nebr. 322, 58 NW 112.

Fraud as ground for setting aside sale generally see infra § 1671.

82. Keily v. Saunders, 236 Pa. 593, 85 A 9 (purchaser will not be compelled to take a lot three feet less in frontage than the width advertised, and three feet more in distance from a cross street).

83. Meek v. Beaver, 25 Ind. A. 576, 58 NE 730. But compare Blakeley v. Hughes, 140 Ky. 174, 175, 130 SW 1067 ("The accepted bidder acquires certain rights, and there attaches to him certain liabilities upon the acceptance of his bid, which the commissioner is not at liberty to disregard or release. In every instance it is the court that makes the sale. The commissioner's action is the vehicle through which the court offers the property to bidders, and by which the best bid is brought to the court. Whether the bid will be accepted so as to become a binding transaction upon the parties, the litigants acting through the court as vendor, and the highest and best bidder as purchaser, is for the court to decide. There may attach at intervals in the course of the proceedings legal rights and liabilities which the court alone must determine. The parties to the action, in whose behalf the sale is being made, are entitled, as a legal right, to have the highest and best bid at the sale reported to them, that is, to the court, for action upon it. After such bid is made, and the bid accepted by the commissioner as the highest and best bid, the bidder is not at liberty to alone withdraw his offer, nor could the commissioner allow him to do so").

84. Stiver's App., 56 Pa. 9.

85. See cases infra this note.

[a] **Loss falling on purchaser.**—Since the purchaser is to be regarded as the owner of the land from the date of purchase, he must bear the loss, if any occurs, during the time

is subject to an encumbrance he cannot, after the encumbrance has been discharged, compel a conveyance upon a tender of the amount of his bid.[86] Where a second sale is ordered and is made and approved by the court before confirmation of the first sale, and before giving the purchaser thereat an opportunity on confirmation to take the property at his bid, the bidder at the first sale is released from all liability.[87]

[§ 1613] **10. Proceedings to Recover Purchase Money—a. Right of Action.** The fact that a statute provides for a resale in case the successful bidder defaults does not preclude a right of action for the amount of the bid, for the statutory remedy is merely cumulative.[88] Where land has been purchased by a surety of the representative, and the representative has, without authority, extended credit to the purchaser and neglected to collect the purchase money, without taking any security therefor, and the surety has quitclaimed the land to another, the heirs are entitled to recover the purchase money from the surety.[89] Under statutes permitting the assertion by cross petition of any claim against persons not parties arising out of the same subject matter, it appears that a defendant in an action by the administrator for the purchase money may litigate a cause of action between himself and the administrator in his individual capacity.[90]

[§ 1614] **b. Defenses.** That the sale was void for want of authority and that consequently the consideration for the purchase had failed is a good defense to an action for the purchase money,[91] but the purchaser is estopped from showing the illegality of a sale so long as he retains the property purchased,[92] and if the sale has been validated through ratification, the purchaser cannot, when sued for the price, urge the danger of eviction because of informality.[93] It is a good defense that the sale was not advertised as required by law,[94] or that a person entitled to notice of the proceedings was not cited,[95] but mere irregularities in the sale constitute no defense.[96] The purchaser cannot repudiate his bid because of a defective title or no title at all in decedent when there is no fraud or misrepresentation by the administrator;[97] and it is even held that fraudulent misrepresentations by an administrator as to the title or the encumbrances upon the land sold are no defense to his suit for the purchase money.[98] But it has been held that if the purchaser was induced to bid by the promise of the administrator not to enforce payment for a part of the land when held adversely to the estate, until possession of such part could be given, such promise is binding, and payment of the purchase money for that part cannot be enforced if possession cannot be delivered.[99] Where property is sold to pay debts, the purchaser cannot set up invalidity of decedent's will.[1] A mutual mistake of law has been held to be a good defense where there was full knowledge of all the facts and plaintiff could not in good conscience receive the money sued for.[2] To an action for the purchase price of property purchased at an adminis-

necessarily intervening between the sale and the confirmation. Thomas v. Caldwell, 136 Ala. 518, 34 S 949.

[b] **Loss falling on estate.**— Where confirmation of the sale was delayed until a fire had occurred, the widow and heirs, through whose agency and at whose instance the delay had taken place, could not thereafter insist that the sale is confirmed and the purchaser compelled to take the property. Demmy's App., 43 Pa. 155 [foll Ex p. Minor, 11 Ves. Jr. 559, 32 Reprint 1205].

86. Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144.

87. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

88. Dawson v. Miller, 20 Tex. 171, 70 AmD 380.

89. Mercer v. Hudgins, 145 Ga. 289, 88 SE 966.

90. Phillips v. Keifer, 2 Metc. (Ky.) 478 (the purchaser may proceed by cross petition against one of the administrators who claims part of the property as his own and denies that the purchaser has acquired any right to it at his purchase in order to recover of the administrator in his individual character for an illegal conversion of the property).

91. Beene v. Collenberger, 38 Ala. 647; Laughman v. Thompson, 14 Miss. 259; Campbell v. Brown, 7 Miss. 230; Gwin v. McCarroll, 9 Miss. 351; Zufall v. Peyton, 26 Okl. 808, 110 P 773, 29 LRANS 740; Vance v. Davenport, 45 S. C. L. 517.

[a] **Even after judgment is recovered nil dicit** against the purchaser, he will be relieved from liability if he afterward discovers that the sale was void. Miller v. Palmer, 55 Miss. 323.

[b] **Lack of record of order.**—The invalidity of a probate sale of the property of a succession, resulting from the nonexistence of any order therefor in the records of the parish where it was made, is one of which the heirs alone can avail themselves and is no defense to an action against the purchaser for the purchase money. Blanchard v. Maureau, 3 La. Ann. 128.

92. McCully v. Chapman, 58 Ala. 325; Harbin v. Levy, 6 Ala. 399; Keen v. McAfee, 116 Ga. 728, 42 SE 1022.

93. Stephenson v. Addison, 17 La. 454.

94. Gairnes' Succ., 121 La. 223, 225, 46 S 217 ("If the title conveyed by the judicial sale be bad, we do not think that the adjudicatee can be forced to accept a subsequent ratification of the void or voidable title").

95. Matter of Anderson, 95 Misc. 79, 160 NYS 509.

96. Byrne's Succ., 38 La. Ann. 518.

97. Ala.—Bolling v. Jones, 67 Ala. 508; Bland v. Bowie, 53 Ala. 152.

Cal.—Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

Ga.—Mercer v. Sager, 129 Ga. 123, 58 SE 1037; Keen v. McAfee, 116 Ga. 728, 42 SE 1022; Jones v. Warnock, 67 Ga. 484; Colbert v. Moore, 64 Ga. 502.

Ill.—Tilley v. Bridges, 105 Ill. 336.

La.—Merrick v. North, 28 La. Ann. 878.

Miss.—Mellen v. Boarman, 21 Miss. 100.

N. J.—Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

Pa.—Fahrig v. Schimpff, 199 Pa. 423, 49 A 237, 85 AmSR 796.

Tex.—Altgelt v. Mernitz, 37 Tex. Civ. A. 397, 83 SW 891.

"The purchaser at an administrator's sale cannot defend against the payment of the purchase-money, upon the ground that a paramount title is outstanding in another, by reason of which his purchase will be ineffective. It is only where he fails to get the title which is proposed to be sold that he may defend against the purchase price; and a sale by an administrator only purports to be of so much of the estate as by law is made assets for the payment of debts. If by the sale, therefore, the homestead right of the widow was defeated, the purchaser must pay the purchase price, because he gets the land. If the sale was ineffective to convey the homestead right, he is liable for the full amount of his bid, because the homestead right is in the nature of a paramount oustanding title, of which he should have taken notice at his peril." Cummings v. Johnson, 65 Miss. 342, 347, 4 S 541.

[a] **The existence of an encumbrance** (1) does not constitute a defense to a suit for purchase money. The purchaser can demand nothing more than a bond of indemnity against future disturbance. Jones v. Read, 1 La. Ann. 200. (2) The existence of a mortgage on the property constitutes no defense where the mortgage was to be paid out of the purchase price, and the purchaser has been tendered a title free from all encumbrances. Lund v. Baccich, 134 La. 410, 64 S 226.

[b] **The surrogate may relieve** the purchaser of his bid where the title is found to be defective. In re Lynch, 33 Hun (N. Y.) 309, 67 HowPr 436 [rev 2 Dem. Surr. 610].

Rule caveat emptor applicable to purchaser see infra § 1697.

98. Ala.—Culli v. House, 133 Ala. 304, 32 S 254.

Del.—Wheeler's Est., 101 A 865.

Ind.—Riley v. Kepler, 94 Ind. 308.

Miss.—McLaurin v. Parker, 24 Miss. 509.

Pa.—Dull v. Slater, 31 Pa. Super. 488.

[a] **Misrepresentations by the administrator as to the quantity** of land to be sold are no defense to an action against the bidder for damages for failure to keep his bid good. Culli v. House, 133 Ala. 304, 32 S 254.

[b] **The making of false representations is the representative's individual tort** for which he is individually liable. Riley v. Kepler, 94 Ind. 308.

[c] **If the purchaser was not misled** by any false or fraudulent representations they constitute no defense in his behalf. McLaurin v. Parker, 24 Miss. 509.

99. Wright v. Underwood, (Ky.) 6 SW 437.

1. Balovich's Succ., 130 La. 1043, 58 S 873.

2. Holmes v. Holmes, 140 Ga. 217, 78 SE 903.

trator's sale, the plea of ne unques administrator is bad, for the making of the contract of sale admitted the representative capacity of plaintiff.[3] It is no defense to an action for the purchase money that the representative was interested in the purchase and the sale is therefore voidable at the instance of the heirs and creditors who may have been injured thereby.[4] An agreement by the commissioners authorized to sell the land or by the representative, by which only an individual obligation is incurred, cannot be urged in defense of an action for the purchase money.[5] If a purchaser objects to a deed because not in the proper form he should make the objection at the time the deed is tendered;[6] it cannot be raised in defense to an action for deficiency on resale for failure to pay purchase money.[7] It has been held that legatees who purchase, but do not comply with the terms of sale, cannot afterward plead the statute of limitations when called upon for payment, although they may have had four years' peaceable possession, because the decree for sale is substantially a judgment against the purchaser for the purchase money.[8]

[§ 1615] **c. Time for Bringing Action.** An action to recover the purchase money may be brought before the expiration of the time of credit allowed by the terms of the sale if the purchaser has failed to comply with the terms.[9]

[§ 1616] **d. Jurisdiction.** If a stranger to the succession withholds the price of property purchased at the sale, an action for the price can be brought only before a court of ordinary jurisdiction;[10] but if a legatee and universal heir retains the price of property adjudicated to him until his share shall be fixed by the partition, his rights must be settled contradictorily with the other heirs under the direction of the probate court whose decree must fix the portion coming to each.[11] When the representative is before the court to which he has reported a sale and by which the sale has been confirmed, and the homologation of his accounts is pending, the parish court has no jurisdiction at the suit of creditors of the succession to compel the purchaser of the property sold to pay the adjudicated price or to decree the property as still belonging to the succession.[12] If the purchaser attempts to set off a judgment which was originally entered in another county and which was transferred to the county where the sale was made, the issue, whether the consideration for the judgment has failed or not, can be tried only in the court having jurisdiction of the sale.[13]

[§ 1617] **e. Parties.** An action for damages for default of a bidder for land sold under order of court for partition among heirs may be properly brought in the name of the heirs, inasmuch as the legal title is in them and they are entitled to the proceeds of the sale and also to anything recovered for breach of the contract.[14] But an unpaid legatee who is not the legal representative cannot collect notes given for real property of the estate sold under order of court by foreclosing the lien for the purchase money.[15] An administrator de bonis non has the right to enforce the payment of the purchase money for property sold by his predecessor,[16] unless there has been a rescission or resale by the order of court,[17] for his predecessor cannot maintain such an action after removal.[18] In a suit to obtain the unpaid purchase price out of the land sold, the heirs are necessary parties in order that the court may convey a good title to the purchaser under its decree.[19] If to an action for the price of land sold the defense is that the sale was invalid and the title remained in the heirs, the heirs must be made parties.[20] A mortgagee entitled to share in the proceeds of property sold and not paid for may by an hypothecary action enforce his claim against the purchaser, when the administrator, although notified of the proceeding, does not object and no creditor claims a preference on the price.[21] To a suit for the purchase price against the successful bidder at a resale, the defaulting bidder at the first sale is not a necessary party, although he may be a proper party.[22]

[§ 1618] **f. Pleadings.** The complaint must allege that the sale was confirmed for until confirmed it is not complete or binding and confers no right on the purchaser.[23] In an action for damages against the defaulting bidder, it is not necessary

3. Harbin v. Levi, 6 Ala. 399; Lehmann's Succ., 41 La. Ann. 987, 7 S 33.

4. McAnulty v. Hodges, 33 Miss. 579.

[a] **Purchase through intermediary.**—Where property was purchased by a third person for one of the executors to whom it was delivered, the purchaser is liable on his note for the purchase price, the other creditor not knowing of or consenting to the arrangement. Bagby v. Hudson, 11 KyL 581.

5. Jennings v. Jenkins, 9 Ala. 285; Dees v. Tildon, 2 La. Ann. 412.

[a] **Obligation to make title.**—If commissioners authorized by the court to sell land make sale of it in that capacity and execute their individual bonds, with condition to make title when the purchase money is paid, the execution of such a bond is a collateral matter, which is binding, if at all, upon them individually, and it is therefore no defense in an action upon the notes for the purchase money that upon a tender of the money they refused to make a title. Jennings v. Jenkins, 9 Ala. 285.

[b] **Deduction for deficiency.**—Where the purchaser at a sale per aversionem is sued for the price, there being minor heirs, he cannot prove an agreement with the representative and the heirs of age, deducting from the price a certain sum for an alleged deficiency in the quantity; for such an agreement would be an obligation personal to the representative and the adult heirs. Dees v. Tildon, 2 La. Ann. 412.

6. Stryker v. Vanderbilt, 27 N. J. L. 68.

7. Stryker v. Vanderbilt, 27 N. J. L. 68.

8. Coburn v. Magwood, 12 S. C. Eq. 187.

9. Mount v. Brown, 33 Miss. 566, 69 AmD 362; Peebles v. Overton, 6 N. C. 384.

[a] **Reason for rule.**—The action is not one to recover upon the contract of purchase, but for a failure of duty to comply with the terms of the contract and therefore the right of action becomes complete as soon as defendant refuses to do his duty. Mount v. Brown, 33 Miss. 566, 69 AmD 362.

[b] **Illustration.** — Where the terms of the sale were twelve months' credit by giving bond with approved security and the purchaser refused to pay the money or give a bond, a right of action arose immediately. Peebles v. Overton, 6 N. C. 384.

[c] **Assumpsit will not lie** in case the purchaser fails to pay cash or put up his bond, although action for tort might. Kibby v. Chitwood, 2 T. B. Mon. (Ky.) 104.

10. Carraby's Succ., 3 Rob. (La.) 349.

11. Carraby's Succ., 3 Rob. (La.) 349.

12. Swan v. Gayle, 29 La. Ann. 574.

13. Gordon's App., 93 Pa. 361.

14. Howison v. Oakley, 118 Ala. 215, 23 S 810.

15. Crane v. Warfield, (Ark.) 15 SW 609.

16. Cruikshank v. Luttrell, 67 Ala. 318; Harbin v. Levi, 6 Ala. 399; Chandler v. Schoonover, 14 Ind. 324.

17. Cruikshank v. Luttrell, 67 Ala. 318.

18. Harbin v. Levi, 6 Ala. 399.

19. McDonald v. McMahon, 66 Ala. 115; Wallace v. Nichols, 56 Ala. 321.

20. Claiborne v. Yoeman, 15 Tex. 44.

21. King v. Hicky, 2 La. Ann. 367.

22. Taylor v. Hosick, 13 Kan. 518.

23. Cruikshank v. Luttrell, 67 Ala. 318; Bell v. Green, 38 Ark. 78; Stout v. Philippi Mfg., etc., Co., 41 W. Va. 339, 23 SE 571, 56 AmSR 843.

"The court was the real vendor, and the administrator was its mere agent to conduct the negotiations, whose acts were subject to confirma-

to aver that there was a resale.[24] In an action for loss due to a default of the bidder and the necessary resale it is not necessary to allege that the first sale was fairly conducted.[25] The damages against a defaulting bidder being composed of two distinct items, namely (1) the difference between the bid at the first sale and the amount paid at the resale, and (2) the necessary expenses incurred by reason of the resale, a complaint claiming both items is not demurrable because it fails to show that plaintiff is entitled to recover one of them if it contains sufficient allegations to justify a recovery of the other.[26]

Of defendant. A plea of fraudulent representations by the representative is defective if it does not aver that the representations, however false and fraudulent, were relied on in the purchase by defendant and actually deceived him.[27] If the defense is offered that a sale by executors was without authority, the plea should allege that the sale was not authorized by either an order of court or the provisions of the will.[28] A plea in avoidance of liability for the purchase money which alleges that the administrator has refused to let the purchaser into possession or to execute a deed has been held defective in not setting out the contract under which defendant purchased and how that has been violated by plaintiff.[29]

[§ 1619] **g. Evidence.** There is no presumption in an action for the purchase price that the sale has been confirmed.[30] As against the heirs at law seeking to enforce a vendor's lien against the administrator who purchased, a court of equity will not presume payment of the debt by the administrator to himself, although he reported the sale to the court and it was confirmed and he afterward charged himself with the amount in an annual settlement but in fact never paid it.[31] The burden rests upon the representative to show his appointment and proper authority to make the sale.[32] The admissibility and sufficiency[33] of evidence in such actions are governed by the general rules on the subject.[34]

[§ 1620] **h. Trial.** Questions of fact arising in an action for a deficiency resulting from a resale are for the jury.[35]

[§ 1621] **i. Judgment and Enforcement Thereof.** Where an executrix sues an adjudicatee to compel acceptance of title, a judgment by default against the adjudicatee will be set aside where it appears that the executrix in confirming the default failed to introduce in evidence the order of sale in the succession proceeding, such order being the basis of the adjudicatee's title and a necessary basis of the judgment compelling him to accept it.[36] If an administrator relies on the bond and personal security of a distributee for purchases at a sale of his intestate's personalty and takes no assignment of or lien upon her share of the land, he is not entitled to any higher rights as to that interest than any other creditor; and if suit has been prosecuted, and a judgment obtained on the bond, a prior judgment against the distributee will be entitled to be first satisfied out of such interest.[37]

[§ 1622] **11. Resale and Recovery of Difference in Price.** The probate court has authority to order a new sale if the purchaser at the first sale fails to comply with his bid.[38] If a resale is necessary on account of the wrongful default of the successful bidder, it will be at the defaulting bidder's risk and he will be liable for any loss resulting from the difference of the prices in the two sales,[39] and

tion by the court. Until the bid was accepted by the court, the purchase was incomplete, the bid was a mere proposition to purchase, and did not, therefore, amount to a contract on which any liability could be incurred." Howison v. Oakley, 118 Ala. 215, 23 S 810.

Necessity for confirmation see infra § 1631.

24. Howison v. Oakley, 118 Ala. 215, 23 S 810.

25. Howison v. Oakley, 118 Ala. 215, 23 S 810 (fraud, collusion, or unfairness in the sale is a matter of defense to be specially pleaded).

26. Howison v. Oakley, 118 Ala. 215, 23 S 810.

[a] **How defect taken advantage of.**—The defect should be taken advantage of by motion to strike out, by objection to the evidence by which it is sought to prove such damages, or by request for appropriate instructions to the jury. Howison v. Oakley, 118 Ala. 215, 23 S 810.

27. Wooldridge v. Womack, 1 Tex. A. Civ. Cas. § 338.

28. Keen v. McAfee, 116 Ga. 728, 42 SE 1022.

29. Matthews v. Evans, 9 Ala. 643.

30. Walker v. Jessup, 43 Ark. 163; Bell v. Green, 38 Ark. 78.

31. Knight v. Blanton, 51 Ala. 333.

32. Humphries v. Loomis, 18 Oh. Cir. Ct. N. S. 529.

33. Lund v. Baccich, 134 La. 410, 64 S 226 (evidence held to show that land in question was not cut by a bayou, and was not public land as claimed by defendant).

34. See Evidence 22 C. J. p 1.

35. Brantley v. Clifton, (Ga. A.) 101 SE 919 (where administrator's first sale of land occurred on first Tuesday in December, 1917, which was Dec. 4, and purchaser, either on the 5th or 6th, refused to comply with his bid, and it was possible to advertise a resale in time for a sale on the first Tuesday in January, 1918, but it was advertised in January, 1918, and resale had on first Tuesday in February, 1918, whether under all the facts it was practicable to have advertised in time for a resale on first Tuesday in January, and if so whether there was unreasonable delay in beginning advertising, was for the jury).

36. Balovich's Succ., 128 La. 69, 54 S 474.

37. Pendergrass v. Pendergrass, 26 S. C. 19, 1 SE 45.

38. Matter of Long, 5 Cal. A. 684, 91 P 169; Roberts v. Smith, 137 Ga. 30, 72 SE 410; Landry v. Connely, 4 Rob. (La.) 127; Greffet v. Willman, 114 Mo. 106, 21 SW 459.

[a] **Remedy by resale is not exclusive,** but an action may be brought against the purchaser to compel him to consummate the purchase and pay the purchase price. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89; Roberts v. Smith, 137 Ga. 30, 72 SE 410; Landry v. Connely, 4 Rob. (La.) 127.

[b] **Circumstances warranting resale.**—Decedent's property was bid in March 6, on condition that the bidder be furnished a certificate showing clear title, and the bid was confirmed. On July 20, motion was made to set aside the sale and order a resale for the bidder's neglect to pay the balance, the hearing of the motion being continued to August 10 at the bidder's request, and he stating that he could not then raise the money. Title had been accepted in June, and a tender of the deed and a demand for the balance of the purchase price were admitted. It was held that there was no abuse of discretion in ordering a resale. In re Long, 5 Cal. A. 684, 91 P 169.

39. U. S.—Shaw v. Shaw, 21 F. Cas. No. 12,724, 4 Cranch C. C. 715.

Ala.—Howison v. Oakley, 118 Ala. 215, 23 S 810; Hutton v. Williams, 35 Ala. 503, 76 AmD 297; Lamkin v. Crawford, 8 Ala. 153.

Ga.—Allen v. Curry, 146 Ga. 244, 91 SE 70; Smith v. Roberts, 141 Ga. 841, 82 SE 242; Gay v. Parish, 138 Ga. 399, 75 SE 323; Phillips v. James, 115 Ga. 425, 41 SE 663; Wells v. Harper, 81 Ga. 194, 6 SE 913, 12 AmSR 310; Sproull v. Seay, 76 Ga. 27; Nally v. Nally, 74 Ga. 669, 58 AmR 458; Alexander v. Herring, 54 Ga. 200.

Ill.—Gram v. O'Gara Coal Co., 156 Ill. A. 228.

Ky.—Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

La.—Smith v. Kinney, 30 La. Ann. 332; Bray v. Bray, 16 La. 352.

Md.—Schwallenberg v. Jennings, 43 Md. 554.

Mass.—Cobb v. Wood, 8 Cush. 228.

Miss.—Mount v. Brown, 33 Miss. 566, 69 AmD 362.

Mo.—Greffet v. Willman, 114 Mo. 106, 21 SW 459.

N. H.—Wilson v. Bergin, 28 N. H. 96.

Pa.—Banes v. Gordon, 9 Pa. 426.

Tex.—Sypert v. McCowen, 28 Tex. 635; Dawson v. Miller, 20 Tex. 171, 70 AmD 380; Akin v. Horn, 2 Tex. A. Civ. Cas. § 8.

"It appears to be just, that sales by administrators should have the protection of the same rules which apply to sales at public auction by individuals; and no reason can be perceived, why they should be placed in a worse position. They are a part of the administration of justice of the country, and it would appear that every security known to the law should be thrown around them. The rule has been long sanctioned, in regard to public sales, that where the vendee becomes bound for the purchase, as by having the article struck off to him as the highest bidder, and refuses to complete the purchase, the vendor may resell and hold the pur-

this has been held to be true even though the statute, which provides for a resale in case of such default, omits to prescribe that the resale shall be at the defaulting bidder's risk.[40] He is also liable for the expenses of the second sale.[41]

Fixing liability in general. The successful bidder at the first sale must be put in default before any liability for deficiency on the resale can arise,[42] and if the advertised terms of sale were varied by an announcement made on the day of sale, and the purchaser fails to comply with his bid, he cannot be held liable for the difference on a resale, unless it is clearly shown that he had actual knowledge of the altered terms before he made his bid.[43]

Confirmation of first sale. In order to charge the defaulting purchaser with the loss due to his default, it is not necessary that the first sale should have been confirmed,[44] unless the statute establishes such a requirement.[45]

New order of sale. It has been held that no new order for the resale is necessary in order to charge the defaulting purchaser,[46] but there is also authority for the view that such purchaser cannot be held liable for a deficiency on a resale made without an order of court therefor.[47]

Notice of resale. It is not necessary that the notice of resale shall state that the original bidder will be held liable for any difference in the price.[48] If the court orders a resale on account of fraud, the order may be without notice to the fraudulent purchaser;[49] but under a statute which provides that, when it is made to appear to the court that the sureties of the purchaser are insufficient the sale must not be confirmed until the purchaser gives security to the satisfaction of the court, and if such security is not given the sale must be vacated as to the purchaser thus failing, it is a condition precedent to the first purchaser's liability for his default that he should have notice of the finding of the court that his security is insufficient and that he be given an opportunity to furnish security satisfactory to the court.[50]

Promptness of resale. To hold the defaulting bidder liable for the deficiency, it is necessary that the second sale should be made as soon as practicable,[51] or at least within a reasonable time,[52] but

chaser responsible, in case of a deficiency of the purchase-money upon the resale, for the difference between the two sales." Mount v. Brown, 33 Miss. 566, 567, 69 AmD 362.

[a] **An order annulling a confirmation** of a sale, because of the refusal of the purchaser to complete the purchase, and directing a resale does not rescind the contract so as to preclude a recovery for any deficiency on the resale. Banes v. Gordon, 9 Pa. 426.

[b] **Where the representative is the successful bidder,** having been authorized to purchase, and he refuses to complete the purchase, he is liable for a deficiency on a resale. Matter of Meyer, 177 Pa. 450, 35 A 669.

[c] **The commissioner may annex to the terms of sale a condition of resale** at the purchaser's risk in case of a failure to comply with his bid, although the court did not so order. Shaw v. Shaw, 21 F. Cas. No. 12,724, 4 Cranch C. C. 715.

[d] **The full difference** between the amount bid on the first and second sales respectively may be recovered, although the amount bid at the second sale is sufficient to pay all of the decedent's debts and the charges of administration. Cobb v. Wood, 8 Cush. (Mass.) 228.

[e] **Damages.**—A defaulting bidder is sometimes made liable by statutes for damages in addition to the deficiency. Sypert v. McCowen, 28 Tex. 635; Akin v. Horn, 2 Tex. A. Civ. Cas. § 8.

[f] **Proceeding by rule.**—Where the highest bidder at a sale of decedent's land fails to comply with the judgment of sale, and that fact is reported to the court, the court on the motion of the parties may have the sale confirmed, so that when a resale is ordered, and a resale produces a less price than the first, the purchaser in the first may be proceeded against by rule at the instance of the parties to make up the loss. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

[g] **Jurisdiction.**—(1) The probate court has no jurisdiction of an action to recover the deficiency. Bray v. Bray, 16 La. 352. (2) The orphans' court has no jurisdiction to compel the defaulting bidder at a sale not authorized by it to make good the deficiency on resale, where, although some of the parties are minors, the others are sui juris. Claypoole's Est., 3 Pa. Dist. 455 ("Clearly we have no jurisdiction over those of full age, and as the remedy is a joint one, which cannot well be severed, the proceedings should be in a court that can take jurisdiction of all concerned"). (3) It is by no means clear that the orphans' court, upon the adjudication of an executor's account, has jurisdiction to set off against the share of a distributee the difference between his bid at an executor's sale of the property and the amount obtained at a resale rendered necessary by his failure to comply with his bid. But in any event where such distributee, upon failure to comply with his bid, agrees to a resale by the executor without notice to him, and the executor after refusing two offers made for the property at private sale resells it at public sale to a codistributee, who made one of the offers at private sale and for a less amount than the private bid, the court will not, on application of the codistributees, deduct from the share of the first named distributee the difference between his bid and the amount for which the property was finally sold. Morgan's Est., 11 Pa. Co. 152.

[h] **If property is resold for a higher price** than at the original sale the defaulting bidder is entitled to whatever balance remains of the proceeds of the resale after deducting the proper costs, expenses, and interest. Mealey v. Page, 41 Md. 172. See also Blakeley v. Hughes, 140 Ky. 174, 176, 130 SW 1067 ("A correlative right of his in that event is to receive the difference, if there should be a gain in price on a resale").

40. Thomas v. Caldwell, 136 Ala. 518, 34 S 949; Howison v. Oakley, 118 Ala. 215, 23 S 810.

[a] **A condition implied.**—The right to sell at the risk of the purchaser where he wrongfully refuses to perform is a condition implied by law in every judicial sale, and express statutory authority therefor is not essential. Thomas v. Caldwell, 136 Ala. 518, 34 S 949.

[b] **Contrary view.**—A defaulting bidder is not liable on an implied contract for a deficiency arising from a resale, there being no statutes creating such liability. He is liable in an action for his breach of contract, and the measure of damages is the loss due to his default, and the jury may or may not find that the difference in the two prices is the proper measure of damages. McGuinness v. Whalen, 16 R. I. 558, 18 A 158, 27 AmSR 763.

41. Thomas v. Caldwell, 136 Ala. 518, 34 S 949; Howison v. Oakley, 118 Ala. 215, 23 S 810.

42. Skolfield v. Rhodes, 10 Rob. (La.) 128; Perkins v. Dickson, 1 Rob. (La.) 413.

[a] **Tender of a transfer by the representative** to the purchaser of stock is not necessary to put the latter in default. Harris v. Harris, 12 La. Ann. 10.

43. Daniel v. Jackson, 53 Ga. 87.

44. Shaw v. Shaw, 21 F. Cas. No. 12,724, 4 Cranch C. C. 715; Culli v. House, 133 Ala. 304, 32 S 254.

Necessity for confirmation generally see infra § 1631.

45. Bradbury v. Reed, 23 Tex. 258.

46. Jones v. Hoss, 29 La. Ann. 564; Harris v. Harris, 12 La. Ann. 10; Duncan v. Armant, 3 La. Ann. 84; Short v. Ramsey, 18 Tex. 397.

47. Greenwalt v. McClure, 7 Ill. A. 152, 155 ("The order of resale on failure to pay the purchase money, or show cause therefor, should direct the property to be resold at the bidder's risk and expense").

48. Gay v. Parish, 138 Ga. 399, 75 SE 323.

49. Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

50. Howison v. Oakley, 118 Ala. 215, 23 S 810.

51. Howison v. Oakley, 118 Ala. 215, 23 S 810; Saunders v. Bell, 56 Ga. 442; Brantley v. Clifton, (Ga. A.) 101 SE 919; Duncan v. Armant, 3 La. Ann. 84.

[a] **On same day.**—(1) "The administrator cannot delay an unreasonable time, so as to speculate at the risk of the purchaser; nor, on the other hand, is there any cast-iron rule that he should resell the property on the same day." Roberts v. Smith, 137 Ga. 30, 33, 72 SE 410. (2) If the bidder on the day of sale refuses to comply before the crowd disperses and the hours of sale terminate, that day is the proper time to resell; if that cannot be done, just as soon as the property can be readvertised, after notice of refusal to comply with the terms of the sale. Saunders v. Bell, 56 Ga. 442.

[b] **The second sale need not be advertised for more than ten days,** providing the customary notice is given within that time. Duncan v. Armant, 3 La. Ann. 84.

[c] **A delay at the bidder's request** does not discharge his liability. Sproull v. Seay, 74 Ga. 676.

52. Roberts v. Smith, 137 Ga. 30, 72 SE 410; Short v. Ramsey, 18 Tex. 397.

[a] **What is a reasonable time** depends upon the circumstances of each case. Short v. Ramsey, 18 Tex. 397 (a delay from January to the follow-

a delay caused by the delinquent bidder will not discharge him.[53]

Waiver or discharge from liability. The parties or the court may elect to waive not only specific performance by the widow at the first sale,[54] but also the claim for damages against him for breach of his undertaking.[55] If the administrator releases the bidder, the latter cannot afterward be charged with the deficiency upon the resale;[56] and if the representative puts the purchaser in possession and receives a part of the purchase money, he loses the right given him by statute to resell the land at the purchaser's risk.[57] A private sale under leave of court does not operate as a waiver of the original contract with the first purchaser.[58]

Change of conditions and terms. The representative must not clog the second sale with any conditions different from those of the first which are likely to lower the price, if the purchaser at the first sale is to be held liable for loss accruing from the second sale;[59] but a defaulting bidder is not discharged from liability by a mere alteration of the terms of the sale prescribed by the court.[60] The fact that the bidder at the second attempt to sell defaulted does not relieve the first defaulter from his liability, which continues up to the time the final sale is completed, when the measure of damages for which he is liable is determined.[61]

Acquiescence or ratification by defaulting bidder. A defaulting bidder who privately agrees to buy or lease from the second purchaser acquiesces in the judgment divesting his title,[62] and an heir in default on his bid ratifies a second sale and renounces all rights under the first adjudication, where he accepts his portion of the estate, including notes given for the purchase price by the second purchaser.[63]

[§ 1623] **12. Equitable Relief of Purchaser.** Equity will give relief against a judgment for purchase money if the decree of sale was invalid.[64] If part of the land mentioned in the decree of sale was not decedent's property, but a sale was effected upon the administrator's promise that he would not enforce payment for that part of the land until the purchaser had possession under a good title, the promise may be enforced by a court of equity.[65] Where, after a judicial sale under order of the orphans' court, the purchaser was tendered a deed, and an offer was made to pay off mortgages executed by the heirs which would vest in the purchaser a fee simple, he could not thereafter maintain a suit in chancery to be relieved from his bid.[66] Neither will a purchaser be relieved of liability because he was under the impression at the time of the bidding that a different tract of land was being offered for sale, where neither the administrator nor any other party interested in the sale was responsible for such erroneous impression and the purchaser could have avoided his mistake by the exercise of the slightest diligence.[67] A bill brought years after the sale to enjoin, because the sale was not confirmed, the collection of the purchase money of property, which became valueless in the purchaser's hands, will not lie.[68] If an injunction is asked on the ground that the purchaser has a valid set-off [69] mutuality must be shown.[70] A purchaser, as a simple debtor, cannot enjoin the execution of a judgment for the purchase money on the ground that the administration bond is insufficient, for it is immaterial to him whether the bond is good or not.[71] Where a surety in an administrator's bond becomes purchaser he will not be relieved in equity from the payment of the purchase money on the ground that the administrator is insolvent, there being no charge of a misapplication of assets.[72]

[§ 1624] **P. Report or Return—1. Necessity.** Where, under the statutes, the order or decree of sale is final, it appears that no report is necessary to validate the title acquired by the purchaser;[73] but where the order or decree is merely interlocutory, title depends upon a report and confirmation.[74]

ing October, if unexplained, is such a delay as will discharge the first bidder from all liability to make good any difference in price).

[b] **It is for the jury to say** what is a reasonable time. Roberts v. Smith, 137 Ga. 30, 72 SE 410.

53. Sproull v. Seay, 74 Ga. 676.

54. Blakeley v. Hughes, 140 Ky. 174, 176, 130 SW 1067 ("The right to coerce his compliance may be waived by the parties and the court, and he be required in lieu of specific performance to pay the difference, should there be any loss, between his bid and the sum realized on a resale of the property").

55. Blakeley v. Hughes, 140 Ky. 174, 176, 130 SW 1067 ("they may elect to have the property resold at their own hazard, that is, they may take the chance of getting more on a resale, and take it all, but, if they should receive less they alone must bear the loss").

56. Reynolds v. Dismuke, 48 Ala. 209.

57. Penn v. Willingham, 84 Ga. 360, 10 SE 1085 (his remedy then is a suit for the unpaid balance).

58. Meek v. Spencer, 8 Ind. 118.

59. Banes v. Gordon, 9 Pa. 426 [foll Paul v. Shallcross, 2 Rawle 326].

60. Singerly v. Swain, 33 Pa. 102, 75 AmD 581 (where the court directed that the purchaser at the subsequent sale should be required to pay down one thonsand dollars, instead of fifty dollars as before).

61. Sproull v. Seay, 76 Ga. 27, 74 Ga. 676.

62. Landry v. Connely, 4 Rob. (La.) 127.

63. Skolfield v. Rhodes, 10 Rob. (La.) 128.

64. Waggener v. Lyles, 29 Ark. 47; Dickinson v. Chism, 2 T. B. Mon. (Ky.) 144; Miller v. Palmer, 55 Miss. 323; Lowry v. McDonald, Sm. & M. Ch. (Miss.) 620; Bartee v. Tompkins, 4 Sneed (Tenn.) 623.

[a] **Relief may be granted although** the application for relief was made several years afterward and judgment was recovered nil dicit and the purchaser might have pleaded failure of consideration, if he had investigated the state of his title, for he will not be regarded as negligent if he in good faith relied upon the validity of the proceedings and had no notice of the defects in his title. Miller v. Palmer, 55 Miss. 323.

[b] **Plaintiff will be compelled to do equity** by restoring possession to the heirs and accounting for the rents and profits. Miller v. Palmer, 55 Miss. 323.

65. Wright v. Underwood, 6 SW 437, 9 KyL 712.

66. Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

67. Roberts v. Smith, 137 Ga. 30, 72 SE 410.

68. Queener v. Trew, 6 Heisk. (Tenn.) 59.

69. See Dickinson v. Chism, 2 T. B. Mon. (Ky.) 140 (if injunction is prayed on the ground of a set-off, a bill which does not allege that there are no other demands against the estate entitled to precedence over the set-off claimed is not demurrable, but the defense must be made by answer).

70. Wharton v. Jones, 49 Ala. 102 (the purchaser of land could not enjoin a judgment at law on notes for the purchase money upon the ground that he held powers of attorney from the widow and guardian of some of the infant distributees authorizing him to receive and receipt for their distributive shares of the estate).

71. Wharton v. Jones, 49 Ala. 102.

72. Marsh v. Bennett, 7 Miss. 215.

73. Wyman v. Campbell, 6 Port. (Ala.) 219, 31 AmD 677; Bryan v. Hinman, 5 Day (Conn.) 211; Moore v. Neil, 39 Ill. 256, 89 AmD 303; Stow v. Kimball, 28 Ill. 93; Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184. See also Hazelwood v. Christman, (Tenn. Ch. A.) 62 SW 39 (where the clerk had not reported a sale).

74. Ala.—Lowe v. Guice, 69 Ala. 80; Smith v. Wert, 64 Ala. 341; Fore v. McKenzie, 58 Ala. 115; Hutton v. Williams, 35 Ala. 503, 76 AmD 297; Perkins v. Winter, 7 Ala. 855; Cummings v. McCullough, 5 Ala. 324; Lightfoot v. Doe, 1 Ala. 475.

Ark.—Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810.

Colo.—Ryan v. Geigel, 39 Colo. 355, 89 P 775.

Ida.—State v. Cunningham, 6 Ida. 113, 53 P 451.

Ky.—Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

N. J.—Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566.

N. Y.—Kelley's Est., 1 AbbNCas 102; Matter of McFeeley, 2 Redf. Surr. 541.

N. C.—Joyner v. Futrell, 136 N. C. 301, 48 SE 649.

If the representative refuses to report the sale for confirmation, the remedy of the purchaser is by motion for a rule to compel a report.[75]

[§ 1625] **2. Time for Making.** The report of the sale is generally required to be made to the court at the next term after the sale,[76] but it has been held that, although the statute requires a report to be filed on or before the first day of the term succeeding the sale, a failure to file a report in time will not deprive the court of jurisdiction with respect to the sale, but the report may be filed later and approved by the court, on notice to the parties in interest.[77] A report of sale made after the representative has made a final settlement of the estate and been discharged is an absolute nullity.[78]

[§ 1626] **3. Form and Contents.** Where the deed is required to be made in strict conformity with the order of confirmation, the report must state the name of the true purchaser;[79] but where a deed may be made to the actual purchaser, although not named in the order, the report is not conclusive as to his identity.[80] The report should show that the sale was conducted in compliance with the statute,[81] but the same particularity of description is not required in a report of sale as is necessary in a deed.[82] If the land can be identified and it appears that it was actually sold and paid for, the sale is not subject to collateral attack,[83] and the administrator may make a sufficient deed as against the heirs, or a court of equity, on his failure to do so, may vest the title in a bona fide purchaser.[84] Where the sale has been of property subject to encumbrances the return should show either that the administrator has sold merely the equity of redemption and taken security from the purchaser to pay the encumbrances and hold the estate harmless, or else that the sale has been free from encumbrances and that they have been paid off with the proceeds.[85] The report should correctly show the consideration or purchase price,[86] but a recital of payment of the price is not necessary to the validity of the title transferred.[87] The fact that the report was made by only one of two administrators does not affect the validity of the sale.[88] There is a substantial compliance with a statutory requirement that the representative make report of sale where his deed is indorsed as examined and approved by the probate judge, and there is an order of the court that it approved the deed and confirmed the sale.[89]

[§ 1627] **4. Verification.** In the absence of a statutory requirement, the report of sale of real property need not be verified,[90] and, although a statute requires a verification, the omission thereof is a mere irregularity which does not render the sale void.[91]

[§ 1628] **5. Amendment.** An amendment of the return will not be made at the instance of a stranger to the proceedings,[92] or after confirmation of the sale and execution of a deed to the purchaser,[93] or without notice to the purchaser;[94] but if an executor has knowledge before confirmation of the sale that the property has brought an inadequate price, it is his duty to have his return amended and to have the sale set aside and a new one made for the benefit of the estate.[95]

[§ 1629] **6. Report as Notice.** Under a statute providing that deeds shall take effect as to all subsequent purchasers without notice, only after recording, a decree for the sale of land and the administrator's report does not amount to constructive notice of an unrecorded administrator's deed, as against a subsequent bona fide purchaser from the heir.[96]

[§ 1630] **7. Report as Evidence.** In an action of ejectment the report of sale made by an administrator is competent evidence to show what land has been sold, its price, and the name of the purchaser, although the report may be insufficient to authorize the granting of an order to make title.[97]

Pa.—Colvin's Est., 27 Pa. Co. 513, 33 PittsbLegJNS 282.

Tex.—Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757; Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219.

[a] **A recital of the return in the order of confirmation** is sufficient proof that there was a report of sale. Day Land, etc., Co. v. New York, etc., Land Co., (Tex. Civ. A.) 25 SW 1089.

Necessity for confirmation see infra § 1631.

75. Mason v. Osgood, 64 N. C. 467.

76. Colo.—Ryan v. Geigel, 39 Colo. 355, 89 P 775.

Miss.—Johnson v. Cooper, 56 Miss. 608.

Mo.—Wilkerson v. Allen, 67 Mo. 502; Sims v. Gray, 66 Mo. 613; Strouse v. Drennan, 41 Mo. 289; Speck v. Wohlien, 22 Mo. 310.

N. Y.—Delaplaine v. Lawrence, 3 N. Y. 301.

Pa.—Sankey's App., 55 Pa. 491; Colvin's Est., 27 Pa. Co. 513, 33 PittsbLegJNS 282.

77. Verdue v. Barr, 253 Ill. 120, 97 NE 239.

78. Melton v. Fitch, 125 Mo. 281, 28 SW 612; Garner v. Tucker, 61 Mo. 427.

79. Larason v. Lambert, 13 N. J. L. 182.

80. Dodd v. Templeman, 76 Tex. 57, 15 SW 187 (where it was shown that the real purchaser was the administrator).

81. Martin v. Densford, 3 Blackf. (Ind.) 295 (where the rents and profits for a certain period must be first offered for sale before the fee can be sold, the report of sale of the fee must show that the rents and profits were first offered).

82. Calvert v. Alexander, 8 SW 696, 10 KyL 119; Gilbert v. Cooksey, 69 Mo. 42; Evans v. Ashe, 50 Tex. Civ. A. 54, 108 SW 398, 1190; Pendleton v. Shaw, 18 Tex. Civ. A. 439, 44 SW 1002.

[a] **A full description by metes and bounds** of the land sold need not be set forth in the report. Calvert v. Alexander, 8 SW 696, 10 KyL 119.

[b] **A mistake in the description by government subdivisions** will not control other descriptive particulars which identify the land with certainty. Montgomery v. Johnson, 31 Ark. 74.

83. Harris v. Dunn, (Tex. Civ. A.) 45 SW 731.

84. Gilbert v. Cooksey, 69 Mo. 42.

85. Duncan v. Fish, 1 Aik. (Vt.) 231.

86. Martin v. Densford, 3 Blackf. (Ind.) 295; Sizemore v. Wedge, 20 La. Ann. 124.

[a] **If the price for which the land sold can be ascertained** with certainty from the report an objection that a definite price does appear by the report cannot be sustained. Sizemore v. Wedge, 20 La. Ann. 124 (where two tracts of land were sold under the same order on the same day and at the same time, and the procès verbal specified that the whole property brought the sum of four thousand dollars and one piece thereof brought the sum of one thousand five hundred dollars, the amount which the other piece of land brought was thus fixed with certainty).

[b] **A report stating that the property was sold for cash** is not fraudulent by reason of the fact that instead of cash the administrator received from the widow a receipt for the amount of her adjudged award against the estate, which amount she had in good faith bid at the sale. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

[c] **The return is not conclusive** in the settlement of the administration account as to the amount of the proceeds of the sale. Diehl's App., 33 Pa. 406.

87. Wood v. Montgomery, 60 Ala. 500.

88. Doe v. Harvey, 5 Blackf. (Ind.) 487.

89. Kulbeth v. Drew County Timber Co., 125 Ark. 291, 188 SW 810.

90. Hargus v. Bowen, 46 Miss. 72; Sheldon v. Wright, 5 N. Y. 497 [aff 7 Barb. 39].

91. Higgins v. Reed, 48 Kan. 272, 29 P 389.

92. Diehl's App., 33 Pa. 406.

93. Diehl's App., 33 Pa. 406.

94. Fritz's Est., 14 Phila. (Pa.) 260.

95. Sheridan's Est., 10 Kulp (Pa.) 157.

96. Anthony v. Wheeler, 130 Ill. 128, 22 NE 494, 17 AmSR 281.

97. Webb v. Ballard, 97 Ala. 584, 12 S 106. See Ejectment § 232.

[§ 1631] **Q. Confirmation**[98]**—1. Necessity.** Sales of a decedent's property under order of court are usually made subject to the approval of the court,[99] so that until confirmation the title of the heirs is not divested,[1] and the sale remains incomplete and the purchaser acquires no title,[2] but has nothing more than a mere equity.[3] The highest bidder at a sale is not a purchaser and is not entitled to possession until confirmation,[4] nor is he under any legal obligation to pay the amount bid until the sale has been confirmed.[5] Conversely confirmation is a condition precedent to the exercise by the executor of the right to convey title.[6] It is usually considered that confirmation will not be presumed but must be affirmatively shown,[7] although a presumption of confirmation has been indulged after a long period of years where the sale was reported to the court and, on the same day, the presiding judge took the acknowledgment of the administrator's deed,[8] and where the represen-

98. Sale of personalty under testamentary authority or common-law power see supra § 748.

Sale of realty under testamentary authority see supra § 654.

99. Ala.—Comer v. Hart, 79 Ala. 389; Bland v. Bowie, 53 Ala. 152; Wallace v. Hall, 19 Ala. 367; Bonner v. Greenlee, 6 Ala. 411; Lightfoot v. Doe, 1 Ala. 475.

Ark.—Jones v. Temple, 126 Ark. 86, 189 SW 847; Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Bell v. Green, 38 Ark. 78; Halliburton v. Sumner, 27 Ark. 460.

Cal.—Horton v. Jack, 115 Cal. 29, 46 P 920; Dennis v. Winter, 63 Cal. 16.

Fla.—Knox v. Spratt, 19 Fla. 817.

Ida.—Peo. v. Cunningham, 6 Ida. 113, 53 P 451.

Ind.—Williams v. Perrin, 73 Ind. 57.

Md.—Harlan v. Brown, 2 Gill 475, 41 AmD 436.

Miss.—Jordan v. Bobbitt, 91 Miss. 1, 64, 45 S 311 [cit Cyc]; Maynard v. Cocke, 18 S 374; Learned v. Matthews, 40 Miss. 210; Smith v. Denson, 10 Miss. 326.

Mo.—Henry v. McKerlie, 78 Mo. 416.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 853, 129 AmSR 645 [cit Cyc].

N. J. Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

N. C.—Joyner v. Futrell, 136 N. C. 301, 48 SE 649; Mason v. Osgood, 64 N. C. 467.

Pa.—Greenough v. Small, 137 Pa. 132, 20 A 553, 21 AmSR 859; Armstrong's App., 68 Pa. 409; Brown's App., 68 Pa. 53; In re Hamilton, 51 Pa. 58; Demmy's App., 43 Pa. 155; Bickley v. Biddle, 33 Pa. 276; Farabee's Est., 29 Pa. Co. 334.

Tenn.—Wheatley v. Harvey, 1 Swan 484; Hirshfield v. Davis, 43 Tex. 155; Littlefield v. Tinsley, 26 Tex. 353; Neill v. Cody, 26 Tex. 286; Yerby v. Hill, 16 Tex. 377; Davis v. Stewart, 4 Tex. 223; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

Wash.—Cunningham v. Richardson, 68 Wash. 24, 122 P 368.

[a] **Reason for rule.**—"A sale of land by order of the orphans' court, whether for payment of debts, in partition, or under the act of April 18, 1853, is a sale by the court, through an agent, an executor, administrator, guardian or trustee. The purchaser's offer by his bid, provisionally accepted by the agent, is in law but an offer to the court, and the sale is not complete until the court has signified acceptance by confirming the sale. Until such confirmation, the court may decline the offer, and direct a resale, if this is required by justice or by the interests of the estate." Brittain's Est., 28 Pa. Super. 144, 147. To same effect Demmy's App., 43 Pa. 155 [quot In re Brennan, 220 Pa. 232, 69 A 678, 16 LRANS 859].

[b] **Whether realty or personalty is sold,** confirmation is necessary. Williams v. Perrin, 73 Ind. 57.

[c] **The court of chancery will not decree the specific performance of an agreement to sell** land, made by an administratrix under a power of sale from the orphans' court, where the sale has not been confirmed by the orphans' court, since a decree for specific performance would be inefficient and unenforceable. Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

[d] **Statute not retroactive.**—(1) A statute requiring confirmation of an executor's sale does not apply to sales made before it went into effect. Harlan v. Brown, 2 Gill (Md.) 475, 41 AmD 436. (2) A sale after the enactment of such a statute is valid without any confirmation if the order of sale was made previous to the enactment. Fox v. Lipe, 24 Wend. (N. Y.) 164.

[e] **Mortgage.**—Confirmation of the act of the representative in mortgaging the property of decedent for his debts is necessary and a mortgage founded on the decree of confirmation cannot be impeached in collateral proceedings. Morgan's App., 11 Pa. 271, 4 A 506. Contra Peo. v. Cunningham, 6 Ida. 113, 53 P 451.

[f] **Confirmation not necessary.**—(1) Moffitt v. Moffitt, 69 Ill. 641; Moore v. Neil, 39 Ill. 256, 89 AmD 303; Stow v. Kimball, 28 Ill. 93; Matter of Stewart, 71 Misc. 640, 130 NYS 1058, 8 Mills Surr. 134. (2) Aliter under earlier statute. Stilwell v. Swarthout, 81 N. Y. 109; Rea v. McEachron, 13 Wend. (N. Y.) 465, 28 AmD 471.

1. Ala.—Snow v. Bray, 73 S 542; Wallace v. Hall, 19 Ala. 367.

Ark.—Jones v. Temple, 126 Ark. 86, 189 SW 847.

Miss.—Jordan v. Bobbitt, 91 Miss. 1, 63, 45 S 311 [cit Cyc].

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717; Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 853, 129 AmSR 645 [cit Cyc].

N. Y.—Rea v. McEachron, 13 Wend. 465, 28 AmD 471.

Pa.—In re Crawford, 221 Pa. 131, 70 A 582; In re Brennan, 220 Pa. 232, 69 A 678, 16 LRANS 859; Greenough v. Small, 137 Pa. 132, 20 A 553, 21 AmSR 859; Demmy's App., 43 Pa. 155.

Tex.—Douthit v. Southern, (Civ. A.) 155 SW 315; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757; Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219.

[a] **The heir may recover possession,** although the purchase money has been paid and possession given. Greenough v. Small, 137 Pa. 132, 20 A 553, 21 AmSR 859.

[b] **An heir's interest in land is not subject to execution** where before levy it has been sold at administrator's sale, the proceeds paid into court, and the heirs have consented to confirmation, although the sale has not actually been confirmed. Cunningham v. Richardson, 68 Wash. 24, 122 P 368.

2. Ala.—Snow v. Bray, 73 S 542; Howison v. Oakley, 118 Ala. 215, 23 S 810; Comer v. Hart, 79 Ala. 389; Cruikshank v. Luttrell, 67 Ala. 318; Bland v. Bowie, 53 Ala. 152.

Ark.—Jones v. Temple, 126 Ark. 86, 189 SW 847; Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Bell v. Green, 38 Ark. 78; Halliburton v. Sumner, 27 Ark. 460.

Cal.—In re Leonis, 138 Cal. 194, 71 P 171; Horton v. Jack, 115 Cal. 29, 46 P 920; Dennis v. Winter, 63 Cal. 16.

Ida.—State v. Cunningham, 6 Ida. 113, 53 P 451.

Ind.—Williams v. Perrin, 73 Ind. 57.

Miss.—Maynard v. Cocke, 18 S 374; Pool v. Ellis, 64 Miss. 555, 1 S 725; Brooks v. Kelly, 63 Miss. 616; Fearing v. Shafner, 62 Miss. 791; State v. Cox, 62 Miss. 786.

Mo.—Henry v. McKerlie, 78 Mo. 416.

N. J.—Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; Ryan v. Wilson, 64 N. J. Eq. 797, 52 A 993, 53 A 1039.

N. C.—Joyner v. Futrell, 136 N. C. 301, 48 SE 649; Mason v. Osgood, 64 N. C. 467.

Pa.—Greenough v. Small, 137 Pa. 132, 20 A 553, 21 AmSR 859.

S. C.—Crotwell v. Boozer, 1 S. C. 271.

Tenn.—Geisler v. Mauk, (Ch. A.) 48 SW 344.

Tex.—Hirshfield v. Davis, 43 Tex. 155; Littlefield v. Tinsley, 26 Tex. 353; Neill v. Cody, 26 Tex. 286; Yerby v. Hill, 16 Tex. 377; Davis v. Stewart, 4 Tex. 223; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757; Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219; Fishback v. Page, 17 Tex. Civ. A. 183, 43 SW 317. See also Harris v. Brower, 3 Tex. Civ. A. 649, 22 SW 758 (title does not pass to the purchaser unless it is shown that he is entitled to confirmation by virtue of his compliance with the statute in all essential particulars).

[a] **The sale is not fully consummated until** it is ratified by the court. Beeson v. Pierce, 51 Ind. A. 201, 98 NE 380.

3. Peo. v. Cunningham, 6 Ida. 113, 53 P 451; Littlefield v. Tinsley, 26 Tex. 353; Neill v. Cody, 26 Tex. 286.

4. Williams v. Perrin, 73 Ind. 571; Maynard v. Cocke, (Miss.) 18 S 374; Brooks v. Kelly, 63 Miss. 616; Rea v. McEachron, 13 Wend. (N. Y.) 465, 28 AmD 471; Crotwell v. Boozer, 1 S. C. 271.

[a] **If the order of sale of personalty requires a report and confirmation** the contract of purchase cannot operate to confer a vested right upon the purchaser until the confirmation is had. Williams v. Perrin, 73 Ind. 57. Contra Moffitt v. Moffitt, 69 Ill. 641; Watt v. Scott, 3 Watts (Pa.) 79.

[b] **The remedy of the purchaser** is by application to chancery for confirmation. Rea v. McEachron, 13 Wend. (N. Y.) 465, 28 AmD 471; Matter of Hemiup, 3 Paige (N. Y.) 305.

[c] **Purchaser in possession before confirmation a mere intruder.**—Pool v. Ellis, 64 Miss. 555, 1 S 725.

5. Pool v. Ellis, 64 Miss. 555, 1 S 725; State v. Cox, 62 Miss. 786; Bickley v. Biddle, 33 Pa. 276; Littlefield v. Tinsley, 26 Tex. 353; Neill v. Cody, 26 Tex. 286 [appr Bradbury v. Reed, 23 Tex. 258]; Dowling v. Duke, 20 Tex. 181.

[a] **Effect of premature payment.**—A payment before confirmation is not binding on the estate or the heirs at law. The executor or administrator will hold the money, in such case, as a mere depository of the purchaser, and if it is wasted or misappropriated by him the purchaser must bear the loss. But if it is used in the payment of debts of decedent, the purchaser will be subrogated to the rights of the creditor so paid. Pool v. Ellis, 64 Miss. 555, 1 S 725.

6. Joyner v. Futrell, 136 N. C. 301, 48 SE 649.

7. Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Learned v. Matthews, 40 Miss. 210; Crotwell v. Boozer, 1 S. C. 271.

8. Stark v. Osborn, 221 Fed. 557, 137 CCA 259.

tative had accounted for the precise sum for which the land had been sold.[9]

[§ 1632] **2. Jurisdiction to Confirm.** The court which ordered a sale may confirm a sale, although it was not made in accordance with the order,[10] but it cannot, by the decree of confirmation, include in the sale property rights which were not sold.[11] The fact that after a sale to pay debts was ordered, but before it was made, the heirs, one of whom was the executrix, entered into a contract to settle the debts of the estate without a sale of the property, which contract was not brought to the notice of the purchaser or of the court until after the sale was confirmed and the deed approved, did not deprive the court of jurisdiction to confirm the sale.[12] The authority of the court to act in confirming a sale will be presumed, unless a lack of authority is clearly made to appear.[13] Where executors, without power to carry on the business of their decedent, have done so, the surrogate's court has no jurisdiction, on application by the executors' assignee for the benefit of creditors, to approve his sale of decedent's realty.[14]

[§ 1633] **3. Time for Confirmation.** The fact that the sale is confirmed at a term or time different from that prescribed by law does not render the sale void but merely voidable,[15] whether the confirmation is premature[16] or delayed.[17] It has been held that mere lapse of time without any intervention of the rights of third persons will not prevent a confirmation of the sale under order of court;[18] but it has also been considered that a sale to pay debts cannot be confirmed after the debts have ceased to be liens by reason of lapse of time.[19]

[§ 1634] **4. Notice of Application.** It has been held that while notice of an application for confirmation of the sale is desirable and proper[20] it is not essential.[21] Other views are that, where the purchaser makes application for confirmation of a sale, notice to the personal representative is essential,[22] but the heirs need not be notified;[23] that notice to the heirs is not necessary when the application is made by the personal representative,[24] unless the personal representative is the purchaser, in which case notice to the heirs is essential;[25] and that notice to the heirs is necessary after the functions of the representative have ceased.[26] Where the purchaser at a foreclosure sale of a vendor's lien on the land also took an assignment of the debt secured by the lien, as well as of an unsecured debt against testator's estate, and afterward testator's adult devisees instituted a proceeding against the minor devisees for a sale of testator's other land not subject to the vendor's lien, claiming that the proceeds of sale be distributed after the payment of testator's debts, and the land was ordered sold, and the proceeding for such sale was then consolidated with the vendor's lien suit, it was held that the purchaser at the foreclosure of the vendor's lien was entitled to notice of an application for the confirmation of the sale ordered in the proceeding between the devisees.[27]

[§ 1635] **5. Parties.** Persons who have no interest in the property are not necessary parties to a proceeding for confirmation.[28]

[§ 1636] **6. Objections to Confirmation—a. In General.** On some grounds at least the order of sale may, by the more general rule, be impeached by the heirs or other interested persons upon the return of the report of sale for confirmation.[29] An

9. Agan v. Shannon, 103 Mo. 661, 15 SW 757.

10. Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678 (public sale may be confirmed, although private sale ordered).

11. Chapman v. Branch, 72 W. Va. 54, 78 SE 235 (where the court authorized a commissioner appointed to sell to offer first the mineral and mineral rights in land, and, if the proceeds were insufficient, then to sell the whole estate, and the commissioner sold the mineral and mineral rights for sufficient to pay debts).

12. Lake v. Hathaway, 75 Kan. 391, 89 P 666.

13. Jerrue v. Los Angeles County Super. Ct., 7 Cal. A. 717, 95 P 906.

14. Matter of Praetz, 87 Misc. 128, 150 NYS 221.

15. Murray v. Purdy, 66 Mo. 606.

16. Kretsinger v. Brown, 165 Fed. 612, 91 CCA 450 [certiorari den 214 U. S. 527, 29 SCt 704, 53 L. ed. 1068]; Custer v. Holler, 160 Ind. 505, 67 NE 228; Henry v. McKerlie, 78 Mo. 416; Sims v. Gray, 66 Mo. 613; Johnson v. Beazley, 65 Mo. 250, 27 AmR 276. But compare Mitchell v. Bliss, 47 Mo. 353 (where confirmation was at the same term as the sale, instead of the next term after the sale as required by statute, the sale could not be sustained).

17. Ala.—Doe v. McLoskey, 1 Ala. 708.

Ill.—Verdun v. Barr, 253 Ill. 120, 97 NE 239.

Miss.—Johnson v. Cooper, 56 Miss. 608.

Mo.—Wilcoxon v. Osborn, 77 Mo. 621.

Pa.—Colvin's Est., 27 Pa. Co. 513, 33 PittsbLegJNS 282.

Tex.—Brown v. Hobbs, 19 Tex. 167.

[a] **Necessity for notice.**—Unless the sale is reported at the first term after the sale no valid confirmation can be decreed without previous notice to parties whose interests are to be affected by the sale. Learned v. Matthews, 40 Miss. 210.

[b] **Confirmation at an adjourned term instead of at a regular term** will not vitiate the sale. Wilkerson v. Allen, 67 Mo. 502; Sankey's App., 55 Pa. 491 [foll Klingensmith v. Bean, 2 Watts (Pa.) 486, 27 AmD 328] (confirmation after a term had intervened is tantamount to a continuance of the order of sale and should be held good even upon appeal). Contra Castleman v. Relfe, 50 Mo. 583; State v. Towl, 48 Mo. 148; Speck v. Wohlien, 22 Mo. 310.

18. Hazlewood v. Chrisman, (Tenn. Ch. A.) 62 SW 39.

[a] **The statute of limitations** relative to claims against an estate does not apply to the confirmation of a sale for the payment of decedent's debts. Hazlewood v. Chrisman, (Tenn. Ch. A.) 62 SW 39.

19. In re Crawford, 221 Pa. 131, 70 A 582.

[a] **The consent of the heirs** to the confirmation of the sale will not give the court power to confirm it. In re Crawford, 221 Pa. 131, 70 A 582.

20. Stradley v. King, 84 N. C. 635.

21. Brusha v. Phipps, 86 Nebr. 822, 126 NW 856; Blue v. Blue, 79 N. C. 69.

[a] **Statute not applicable to administration sale.**—The statute providing for the confirmation of sales under execution or order of sale in vacation on ten days' notice to adverse parties does not apply to an administrator's sale of real estate under license to pay debts. Such a sale may be confirmed by the district judge in vacation at chambers without such notice. Brusha v. Phipps, 86 Nebr. 822, 126 NW 856.

22. Dugger v. Tayloe, 60 Ala. 504 [overr 46 Ala. 320].

23. Dugger v. Tayloe, 60 Ala. 504 [overr 46 Ala. 320].

24. Moore v. Cottingham, 113 Ala. 148, 20 S 994, 59 AmSR 100; May v. Marks, 74 Ala. 249.

25. Smith v. Lusk, 119 Ala. 394, 24 S 256; Bolling v. Smith, 108 Ala. 411, 19 S 370; Ligon v. Ligon, 84 Ala. 555, 4 S 405.

26. Anderson v. Bradley, 66 Ala. 263.

27. Patterson v. Eakin, 87 Va. 49, 12 SE 144 (holding that the purchaser at the foreclosure sale was an adverse party to the purchaser at the sale ordered in the proceedings between the devisees within the meaning of the statute, which empowers the circuit judge, on notice to the "adverse party" or his counsel, to confirm a sale of land made under a decree in a chancery cause).

28. Harl v. Vairin, 175 Ky. 468, 194 SW 546 (heirs, where testatrix directed the property to be sold and the proceeds distributed, the heirs taking no interest in the land under such circumstances).

29. Cal.—In re Bazzuro, 161 Cal. 71, 118 P 434.

Ida.—In re Christensen, 15 Ida. 692, 99 P 829.

Mo.—Fenix v. Fenix, 80 Mo. 27.

Pa.—Golden's Est., 22 Pa. Dist. 247.

Utah.—In re Gibbs, 4 Utah 97, 6 P 525.

[a] **Any person interested in the estate** may file objections to confirmation of the sale, and the issues formed by the return and the objections present the issues to be tried by the probate court. In re Christensen, 15 Ida. 692, 99 P 829.

[b] **An infant interested in the property** of a decedent may object to the confirmation of an administration sale of the real property upon the ground of inadequacy of price, even though the infant's claim of title to such property caused the low

objection to confirmation may be based upon the ground that the petition on which the sale was ordered,[30] or the proceeding in which the order of sale was made,[31] was defective in some matter going to the jurisdiction or that the person making objection had no prior opportunity to be heard.[32] A person interested in the estate may object to the confirmation on the ground that the sureties on the bond of the purchaser are insolvent;[33] and the court will of course refuse to confirm a sale by an administrator where fraud is made to appear.[34] The effect of statute may, however, be to require the court to confirm the sale in spite of irregularities in the conduct thereof, if compliance with certain essential conditions is made to appear.[35] The object of a hearing upon confirmation not being to settle title to the land in question but to transmit title unencumbered, the court cannot and ought not to confirm a sale if the title in decedent is doubtful and the sale is opposed by an adverse claimant.[36] Where, on a sale for payment of debts, two tracts are sold, and it appears that the amount realized on the sale of the first is sufficient to pay all the debts which had been allowed and the expenses of administration, it is proper to refuse to confirm the sale of the second tract.[37]

[§ 1637] **b. Inadequacy of Price.**[38] Inadequacy of price is an element proper for consideration when a sale is attacked on other grounds, and will aid in preventing confirmation.[39] Even standing alone, inadequacy of price may be sufficient to prevent confirmation,[40] although when only inadequacy

price. In re Bazzuro, 161 Cal. 71, 118 P 434.

[c] **Heirs may object on the ground** (1) that there were no debts which the personalty of the estate could not satisfy. Fenix v. Fenix, 80 Mo. 27. (2) The heirs will be permitted to show either that the debts had been paid, that their lien had been lost, or that there was no necessity to raise the money to pay debts. Weaver's App., 19 Pa. 416.

[d] **Heirs cannot raise the objection** that the representative had not settled the administration account prior to the order of sale. Weaver's App., 19 Pa. 416.

[e] **Purchase of devisee not entitled to object.**—Yeakel s Est., 22 Pa. Dist. 617.

30. Kelley's Est., 1 AbbNCas (N. Y.) 102 (a statute amendment curing defects in titles under such sales applies only where the sale is collaterally questioned, and not to a direct proceeding).

31. Miller v. Hanna, 89 Nebr. 224, 131 NW 226, AnnCas1912C 573; Bostwick v. Atkins, 3 N. Y. 53 [disappr Matter of Hemiup, 3 Paige (N. Y.) 305]; Marcom v. Wyatt, 117 N. C. 129, 23 SE 169. But compare Allen v. Shepard, 87 Ill. 314 (the court cannot go behind the order of sale or even revise it on motion to confirm, the matters before the court on that motion relating solely to the transactions which took place in the attempt to execute the order and make the sale).

[a] **Presumption that the order of sale was regularly issued.**—Wadsworth's Succ., 2 La. Ann. 966.

[b] **Formal defects or irregularities.**—That matters which are formal have been disregarded in the proceedings to sell land will not prevent the confirmation if there has been no fraud and it appears to be plainly to the interest of all concerned that the sale is confirmed. Howerton v. Sexton, 90 N. C. 581.

32. Norris v. Callahan, 59 Miss. 140; Matter of Praetz, 87 Misc. 128, 150 NYS 221; In re Gibbs, 4 Utah 97, 6 P 525.

[a] **Duty to make timely objections.**—(1) Persons summoned to answer the petition to sell should then present their defense, for they will not be permitted to remain silent and, after a sale is made and reported, come in and show cause against a decree for a sale. Norris v. Callahan, 59 Miss. 140. To same effect Harl v. Vairin, 175 Ky. 468, 194 SW 546. (2) Third persons, who were not made parties cannot object for the first time on the hearing of a motion to confirm the sale, where they have not moved to be allowed to become parties, or to file answers. Marcom v. Wyatt, 117 N. C. 129, 23 SE 169.

[b] **That personal notice was not given minor heirs** (1) of the application to sell the land is not a valid objection, for public notice of the sale is sufficient and those interested can be heard at any time before confirmation. Weaver's App., 19 Pa. 416. (2) But if the infant heirs are without a guardian, the court should not confirm the sale until a guardian has been appointed. Albright's Est., 6 LackLegN (Pa.) 108.

[c] **A minor may have a remedy** against a decree prejudicial to his interest by an original bill brought within a year after attaining majority. Norris v. Callahan, 59 Miss. 140; Mayo v. Clancy, 57 Miss. 674; Sledge v. Boon, 57 Miss. 222.

33. In re Arguello, 50 Cal. 308.

34. Ala.—Fore v. McKenzie, 58 Ala. 115.

Cal.—In re Bradley, 168 Cal. 655, 144 P 136.

Ind.—Chaney v. Wood, (A.) 115 NE 333.

Md.—Biddison v. Aaron, 102 Md. 156, 62 A 523.

Miss.—Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

[a] **The purchaser may oppose confirmation** on the ground of fraud. Fore v. McKenzie, 58 Ala. 115.

35. Meadows v. Meadows, 81 Ala. 451, 1 S 29; In re Leonis, 138 Cal. 194, 71 P 171.

36. Swafford v. Howard, 50 SW 43, 20 KyL 1793; Renneberg's Succ., 15 La. Ann. 661; Hower's App., 55 Pa. 337.

[a] **Where the widow claims a resulting trust** in the land as bought with her money, it is not error to confirm the sale against her remonstrance, for the court has no power to order a sale of any more than decedent's interest in the land which alone passes to the purchaser. Kline's App., 39 Pa. 463.

37. McKnelly v. Conley, 210 Ill. A. 609.

38. As ground for attack after confirmation see infra § 1670.

39. Ark.—Burgett v. Apperson, 52 Ark. 213, 12 SW 559.

Cal.—In re Bazzuro, 161 Cal. 71, 118 P 434.

Ga.—Black v. Elrod, 146 Ga. 692, 92 SE 62.

Ky.—Underwood v. Cartwright, 47 SW 580, 20 KyL 809.

Miss.—Pearson v. Moreland, 15 Miss. 609, 45 AmD 319.

N. Y.—Campbell's Est., Tuck. Surr. 240.

Oh.—Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400.

S. C.—State v. Burnside, 33 S. C. 276, 11 SE 787.

Tenn.—Click v. Burris, 6 Heisk. 539.

[a] **If irregularities or fraud in the proceedings have caused the inadequacy** (1) of price the sale will not be confirmed. Planters' Bank v. Neely, 8 Miss. 80, 40 AmD 51; State v. Burnside, 33 S. C. 276, 11 SE 787. (2) But the personal representatives may be chargeable with the loss in such cases. Brown v. Reed, 56 Oh. St. 264, 46 NE 982; Meyer's Est., 177 Pa. 450, 35 A 669. (3) In such case one who will thereby be protected cannot object to the sale. Hazlett's Est., 137 Pa. 587, 21 A 804.

40. Ala.—Hendrix v. Francis, 83 S 66; Field v. Gamble, 47 Ala. 443; Kitchell v. Jackson, 44 Ala. 302.

Cal.—Perkins v. Gridley, 50 Cal. 97; In re Reed, 3 Cal. A. 142, 85 P 155.

Ill.—Allen v. Shepard, 87 Ill. 314.

Ind.—Williams v. Perrin, 73 Ind. 57.

Ky.—Durrett v. Bradford, 58 SW 540, 22 KyL 623.

La.—Tabary's Succ., 31 La. Ann. 409.

Mo.—Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

Nebr.—Rohlff v. Snyder, 73 Nebr. 524, 103 NW 49.

N. J.—Ryan v. Wilson, 64 N. J. Eq. 797, 53 A 1039 [aff (Prerog.) 52 A 993].

N. Y.—Kain v. Masterton, 16 N. Y. 174; Horton v. Horton, 2 Bradf. Surr. 200.

Pa.—McBride's Est., 9 Pa. Dist. 216, 23 Pa. Co. 544; Kreider's Est., 17 LancLRev 201; Metz's Est., 14 York LegRec 136.

Tex.—Wright v. McNatt, 49 Tex. 425; Hardin v. Smith, 49 Tex. 420; Lee v. Benzes, (Civ. A.) 209 SW 768; Vann v. Calcasieu Trust, etc., Bank, (Civ. A.) 204 SW 1062; James v. Nease, (Civ. A.) 69 SW 110.

Va.—Terry v. Cole, 80 Va. 695.

[a] **Illustration.**—Where an administrator sold land under an order for a private sale for about half what it was worth, and for less than would pay debts and legacies, and the heirs were interested in a surplus, which would have arisen at a sale for the full value, the probate court should not have confirmed the sale. Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

[b] **Rule applies to sale for payment of legacies.**—Terry v. Cole, 80 Va. 695.

[c] **A right reserved by the decree** of sale to refuse confirmation unless the court deems the price realized adequate may, of course, be exercised. Durrett v. Bradford, 58 SW 540, 22 KyL 623.

[d] **Where there was a cloud upon title** to real property, which might have been removed by suit, and the property when sold to pay expenses of administration brought less than one sixth of its real value, confirmation of the sale without an attempt to clear the title was an abuse of discretion. In re Bazzuro, 161 Cal. 71, 118 P 434.

[e] **A resale is necessary** when confirmation is refused for this reason. The court cannot accept a new bid. Field v. Gamble, 47 Ala. 443.

[f] **A statute providing for confirmation of the sale if "fairly" made** authorizes the court to refuse confirmation for inadequacy of price, and the decision of the county judge may be reviewed. Hirshfield v. Davis, 43 Tex. 155.

[g] **Sale of homestead.**—Refusal to confirm a sale, under an order, in a suit by a creditor to settle testator's estate is proper, all the property, consisting of a small tract of land left to the widow and occupied by her and the minor children, being sold for less than testator's debts, and the widow, who obtained her means for buying subsequent to the sale, offer-

of price is relied on there must be clear and satisfactory proof of the inadequacy claimed;[41] and it has been held that the inadequacy must be so gross as to raise a presumption of fraud in order to prevent confirmation,[42] and that confirmation should not be refused because of inadequacy of price, unless it appears that a higher price could probably be realized on a second sale.[43]

[§ 1638] **7. Evidence.** The usual rules of evidence[44] are governed with respect to the burden of proof[45] and the admissibility[46] and sufficiency[47] of evidence in confirmation proceedings.

[§ 1639] **8. Hearing and Determination.** The court has implied power to order a hearing on the report or return of sale as to the propriety of confirmation.[48] When the question of the confirmation or setting aside of a sale of land comes before the probate court, much is left to its discretion.[49] The court should confirm the sale where it appears that it was fair and that the sum bid was a reasonable and fair price for the property,[50] but it is proper to refuse confirmation when the court does not consider that the sale has been made fairly or in conformity to law.[51] After the sale to one purchaser

ing to pay enough to cover all debts and costs, and the home thus being saved for the widow and children. Mitchell v. Odewalt, 112 SW 612, 33 KyL 1007.

[h] **Sale of land in which infant interested.**—Where land in which a minor's interest was devised to trustees was ordered sold for cash to conserve such interest, and all of the interests in the property were appraised at twenty-one thousand two hundred dollars, and were sold to the trustees for sixteen thousand dollars, they merely receipting for their own shares and the share of the minor without making any cash payment, it was held that such sale having taken place within thirty days after the property was appraised, an order confirming it was contrary to the interest of the minor, and unsustainable. Johnson v. Bick, 220 Ill. 226, 77 NE 163.

[i] **The Louisiana statute** (1) requiring an appraisal within twelve months before a sale of a minor's lands renders the sale invalid, if on its first offering it brings less than the appraised value. Tabary's Succ., 31 La. Ann. 409. (2) Where it is sold in three parcels, the purchaser of one cannot be compelled to comply with his bid until sales of the others demonstrate that the aggregate price makes up the appraised value. Landreaux v. Bel, 5 La. 434. (3) A sale may be made at less than the appraised value when it is for the purpose of paying debts (Fontelieu's Succ., 28 La. Ann. 638; Norton v. Citizens' Bank, 28 La. Ann. 354; Carter v. McManus, 15 La. Ann. 641; Haner's Succ., 5 La. Ann. 437; Valderes v. Bird, 10 Rob. 396; Hutchiss v. Dodd, 13 La. 84), (4) or on a second offer on twelve months' credit (Campbell v. Owens, 32 La. Ann. 265; Lewis v. Labauve, 13 La. Ann. 382; Fritz's Succ., 12 La. Ann. 368), or (5) where the terms of sale are fixed by creditors and a family meeting (Towles v. Weeks, 7 La. 312). (6) The adjudication may be made at two thirds of the appraisement, unless the sale has been demanded by creditors. Hood's Succ., 33 La. Ann. 466. (7) Sales at less than the appraisal are not necessarily void. Herrmann v. Fontelieu, 29 La. Ann. 502; Davidson v. Davidson, 28 La. Ann, 269; Stoltz's Succ., 28 La. Ann. 175.

41. McGregor v. Jensen, 18 Ida. 320, 109 P 729; Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

[a] **Illustration.**—It is not sufficient to show that the sale was for less than half the value fixed by real estate dealers. Allen v. Shepard, 87 Ill. 314.

42. Calvert v. Alexander, 8 SW 696, 10 KyL 119; Farmers' Bank v. Clarke, 28 Md. 145; Ryan v. Wilson, 64 N. J. Eq. 797, 52 A 993, 53 A 1039; Farrow v. Farrow, 88 S. C. 333, 344, 70 SE 459; Ex p. Cooley, 69 S. C. 143, 48 SE 92; Ex p. Alexander, 35 S. C. 409, 14 SE 854; Young v. Teague, 8 S. C. Eq. 13.

"The rule is well settled that mere inadequacy of price, unaccompanied by other circumstances which should invoke the exercise of the Court's discretion, is not sufficient, unless, perhaps, it is so great as to raise a presumption of fraud or to shock the conscience of the Court. Inadequacy of price coupled with other circumstances tending to cause it, or with any unfairness or impropriety in the sale, may be sufficient, even though neither, standing alone, would be. But the accompanying circumstance should be such as would of itself tend to call for the exercise of the Court's discretion. Certainly the mere negligence of an intending bidder would have no such effect." Farrow v. Farrow, supra.

43. Cal.—Perkins v. Gridley, 50 Cal. 97; Griffin v. Warner, 48 Cal. 383.

Ill.—Allen v. Shepard, 87 Ill. 314.

N. J.—Ryan v. Wilson, 64 N. J. Eq. 797, 52 A 993, 53 A 1039.

N. Y.—Kain v. Masterton, 16 N. Y. 174; Horton v. Horton, 2 Bradf. Surr. 200.

Pa.—Waddington's Est., 7 Pa. Dist. 499; Herr's Est., 2 Pa. Dist. 737, 12 Pa. Co. 622; Snyder's Est., 30 Pa. Co. 614; Breese's Est., 2 Kulp 62; Behring's Est., 14 PittsbLegJNS 156.

Reopening sale on advance bid see infra § 1640.

44. See Evidence 22 C. J. p 1.

45. Montgomery v. All the World, 23 La. Ann. 239; Herr's Est., 2 Pa. Dist. 737, 12 Pa. Co. 622.

[a] **A party opposing** a monition asking to have the title obtained at a succession sale confirmed is for all legal purposes plaintiff in the action and must establish his averments by proof. Montgomery v. All the World, 23 La. Ann. 239.

46. Jacks v. Adamson, 56 Oh. St. 397, 47 NE 48, 60 AmSR 749 (on the hearing of a motion for an order confirming nunc pro tunc a sale made several years before the court may resort to all sources of information which are competent under the general rules of evidence, including the testimony of the administrator and the probate judge).

47. In re Scott, 172 Cal. 485, 157 P 242; McGregor v. Jensen, 18 Ida. 320, 109 P 729.

[a] **Evidence sustaining confirmation.**—McGregor v. Jensen, 18 Ida. 320, 109 P 729.

48. State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

49. Cal.—In re Scott, 172 Cal. 485, 157 P 242; Eatman v. Eatman, 83 Ala. 478, 3 S 850; Bland v. Bowie, 53 Ala. 152. See also Roy v. O'Neill, 168 Ala. 354, 52 S 946 (applying the same rule to the chancellor where the administration is in equity).

La.—Hebrard's Succ., 18 La. Ann. 485.

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

N. Y.—Matter of Bridgeport Brass Co., 77 Misc. 69, 137 NYS 418, 9 Mills Surr. 319 [aff 155 App. Div. 910 mem, 140 NYS 1111 mem].

N. C.—Henry v. Hilliard, 170 N. C. 578, 87 SE 509.

Pa.—Briel's App., 24 Pa. 511.

S. C.—Farrow v. Farrow, 88 S. C. 333, 342, 70 SE 459.

Tex.—Davis v. Stewart, 4 Tex. 223.

"While it is true that the confirmation of a sale under an order of Court is within the discretion of the Court making the order, still that discretion is not an arbitrary or capricious one, but it is one which must be exercised in accordance with settled legal principles. If it appears that it has not been so exercised, the error may be corrected as for an abuse of descretion, which does not necessarily imply any improper motive or intentional wrong, but merely that the exercise of the discretion was, under the circumstances, manifestly contrary to reason and justice, or the settled principles of law, or the practice of the Court. The policy of the law is to sustain judicial sales, when fairly made." Farrow v. Farrow, supra.

[a] **If no terms of sale have been prescribed in the order** it is in the discretion of the court either to confirm the terms on which the sale was made or to rescind it altogether. Briel's App., 24 Pa. 511.

[b] **When an indispensable necessity for the sale appears** and no objection on account of irregularity or illegality in the order of sale was made at or previous to the sale, the purchaser is entitled to have the sale homologated. Hebrard's Succ., 18 La. Ann. 485.

50. Meadows v. Meadows, 81 Ala. 451, 1 S 29; McGregor v. Jensen, 18 Ida. 320, 109 P 729; In re Christensen, 15 Ida. 692, 99 P 829; Blakeley v. Hughes, 140 Ky. 174, 176, 130 SW 1067; Farrow v. Farrow, 88 S. C. 333, 70 SE 459.

"The highest and best bidder is entitled, if the sale has been conducted in the manner directed by law and the judgment of sale, to have the sale reported and confirmed, so that by his compliance with the subsequent conditions he may obtain the title and other rights resulting from such sale." Blakeley v. Hughes, supra.

[a] **The court can consider only three questions** on an application for confirmation of a sale, namely: First, whether the sale was fair; second, whether the price was adequate; third, whether the sureties of the purchaser are sufficient. Meadows v. Meadows, 81 Ala. 451, 1 S 29.

51. Ala.—Howison v. Oakley, 118 Ala. 215, 23 S 810; Cruikshank v. Luttrell, 67 Ala. 318.

Ky.—Underwood v. Cartwright, 47 SW 580.

Md.—Biddison v. Aaron, 102 Md. 156, 62 A 523; Doyle v. Whitridge, 97 Md. 711, 55 A 459.

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

Nebr.—Miller v. Hanna, 89 Nebr. 224, 131 NW 226, AnnCas1912C 573.

N. J.—Ryan v. Wilson, 64 N. J. Eq. 797, 52 A 993, 53 A 1039.

Pa.—Veihdorfer's Est., 26 Pa. Co. 317.

Tex.—Davis v. Stewart, 4 Tex. 223.

[a] **Illustration.**—Where it appears to the district court that the order authorizing the sale does not comply with the statute, and is void for any reason, it is his duty to refuse to confirm the sale made thereunder. Miller v. Hanna, 89 Nebr. 224, 131 NW 226, AnnCas1912C 573.

[b] **Rule applies to sale of per-**

has been confirmed, the court may, with the purchaser's consent, order the sale confirmed in the name of a different purchaser;[52] but where a sale of land has been confirmed and final settlement has been made and approved and remains in force, the court cannot, years afterward, approve another report of sale presented to it;[53] and therefore a deed given pursuant to such approval conveys no title.[54] If it is discovered after the sale that the estate did not own full title to the land as had been represented, the court may approve an adjustment made by the administrator with the purchaser whereby the estate received more than the appraisal value of the land, and the order of approval is conclusive unless appealed from.[55] Where the administratrix of an insolvent excepts to a second sale of his land under a judgment of sale, on the ground that it deprives her of the right to proceed against the purchaser at the first sale under the judgment, the court should not confirm the second sale until the administratrix and the other parties waive their right to proceed against the purchaser at the first sale, and it is error to confirm the second sale, and thus put it out of the power of the parties to have the first sale confirmed, so as to hold the first purchaser liable.[56]

When land is purchased by the representative,[57] his application for an order of conveyance of the title is regarded as made in his capacity of purchaser instead of in his representative character, and notice to the heirs is essential to the validity of the order, and when the notice has not been given the probate court acquires no jurisdiction to adjudicate the question of the payment of the purchase money or to order a conveyance to the purchaser.[58]

Death of interested party. The death of the purchaser will not prevent confirmation of the sale and the vesting of title in his heirs,[59] but if the administrator, being sole plaintiff in the proceeding, dies before confirmation, the suit abates and a subsequent confirmation without a revival is void.[60] If an heir dies after notice of proceedings to sell and a sale thereafter takes place without further notice or any suggestion of the death of the heir and is confirmed, the sale is valid and not subject to attack by the heirs of the deceased heir.[61]

[§ 1640] **9. Reopening Sale on Advance Bid.**[62] The practice of English chancery courts formerly allowed as of course the opening of the biddings before the report of sale was confirmed upon an offer of at least ten per cent advance, payment of costs, and bringing the money into court;[63] but this practice has been strongly disapproved,[64] and is now abolished by express statute.[65] In the United States the practice of opening the sale on an advance bid before confirmation has been followed in some states,[66] but it is usually considered that no advance bid, however large, will suffice to open the sale after confirmation.[67] A reopening of the sale is sometimes especially provided for by statute when it can be shown not only that a higher offer has been made but also that the first sale was at a price disproportionate to the value of the property,[68] and under such a provision both the disproportion between the true value and the price, and the fact that an increased bid can be had, must appear.[69] It is necessary.—Breese's Est., 2 Kulp (Pa.) 62.

[g] **Conditional advance bid.**—On a return of sale of realty the county court cannot accept an increased bid of ten per cent above that bid at the sale, conditioned upon the title being satisfactory to the bidder. In re Standwaitie, (Okl.) 175 P 542.

67. Roy v. O'Neill, 168 Ala. 354, 52 S 946; Boyd v. Smith, 127 Md. 359, 96 A 526; Click v. Burris, 6 Heisk. (Tenn.) 539; Houston v. Aycock, 5 Sneed (Tenn.) 406, 73 AmD 131. But compare Mann v. McDonald, 10 Humphr. (Tenn.) 275 (where an advance of fifty per cent was offered after confirmation but at the same term, and the supreme court said that it was not prepared to hold that the chancellor erred in the exercise of his discretion in opening the biddings).

68. See the statutes.

69. In re Bradley, 168 Cal. 655, 144 P 136; In re Leonis, 138 Cal. 194, 71 P 171; McGregor v. Jensen, 18 Ida. 320, 109 P 729; Kain v. Masterton, 16 N. Y. 174; Horton v. Horton, 2 Bradf. Surr. (N. Y.) 200; Frey's App., 5 Pa. Cas. 265, 8 A 585.

[a] **Discretion.**—(1) The determination of these facts rests in the discretion of the surrogate. Delaplaine v. Lawrence, 3 N. Y. 301. See also Frey's App., 5 Pa. Cas. 265, 8 A 585 (as to discretion of trial court). (2) "The 'discretion' there referred to, of course, is a legal discretion; but before the court can exercise that discretion, an offer by a responsible person of ten per cent. more than that named in the return must be made. The provisions of that section clearly contemplate that the offer there referred to must be made in the probate court at the time of the hearing of the confirmation, and not a long time after said hearing and after an appeal has been taken to the district court. And there must be evidence showing that the proceedings were unfair and that the sum bid was 'disproportionate' to the value of the claim at the time the bid was made." McGregor v. Jensen, 18 Ida. 320, 325, 109 P 729.

sonalty.—State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

52. Davis v. Touchstone, 45 Tex. 490.

53. Garner v. Tucker, 61 Mo. 427.

54. Garner v. Tucker, 61 Mo. 427.

55. In re Hesche, 73 Mo. A. 612.

56. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

57. See supra §§ 1590–1596.

58. Bolling v. Smith, 108 Ala. 411, 19 S 370 [foll Allison v. Allison, 114 Ala. 393, 21 S 1008].

[a] **That the heirs were before the court on a final settlement** of the accounts of the administrator, immediately after which, but in a separate proceeding, the court confirmed a sale of land by the administrator to himself, cannot be construed as a notice to the heirs of the latter proceeding. Washington v. Bogart, 119 Ala. 377, 24 S 245.

59. Hazlewood v. Chrisman, (Tenn. Ch. A.) 62 SW 39.

60. Wheatley v. Harvey, 1 Swan (Tenn.) 484.

61. Palmer v. Hoop, 131 Ind. 23, 30 NE 874.

62. See generally Judicial Sales [24 Cyc 42].

63. Ringler's Est., 1 Woodw. (Pa.) 214; Mann v. McDonald, 10 Humphr. (Tenn.) 275.

64. Andrews v. Emerson, 7 Ves. Jr. 420, 32 Reprint 170.

65. St. 30 & 31 Vict. c 48 § 6.

66. Cal.—In re Bradley, 168 Cal. 655, 144 P 136; In re Reed, 3 Cal. A. 142, 85 P 155.

Ida.—McGregor v. Jensen, 18 Ida. 320, 109 P 729.

Ky.—Spinks v. Raison, 144 Ky. 539, 139 SW 811.

Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 42 Mont. 182, 111 P 717.

Nebr.—Rohlff v. Snyder, 73 Nebr. 524, 103 NW 49.

Pa.—Brown's App., 68 Pa. 53; Hepting's Est., 1 LancLRev 45; McRee's Est., 6 Phila. 75; Sharpe's Est., 4 Pa LJR 162; Metz's Est., 14 YorkLegRec 136; Heck's Est., 16 Pa. Dist. 516; McBride's Est., 9 Pa. Dist. 216, 23 Pa. Co. 544; Herr's Est., 2 Pa. Dist. 737, 12 Pa. Co. 622; Snyder's Est., 30 Pa. Co. 614; Snyder's Est., 29 Pa. Co. 465. Contra Ringler's Est., 1 Woodw. 214.

Tenn.—Click v. Burris, 6 Heisk. 539.

[a] **Biddings may be reopened for no other reason** than an offer of more than ten per cent advance. Geisler v. Mauk, (Tenn. Ch. A.) 48 SW 344.

[b] **Circumstances under which resale proper.**—Where in a suit by an executrix for settlement of the estate property was ordered sold by a mortgagee, the sale to be advertised for fifteen days at the courthouse door and three other public places, and the courthouse was being repaired and the entrance blocked, and the notice was moved before the end of the fifteen days and the other three notices were placed on trees on the square in which the property stood, and neither the executrix nor her attorney knew the sale was to be had on the day ordered until the morning of that day and she was prevented by sickness from being present, on motion by her, with an offer of an advance bid of about thirty per cent above that for which the property was sold, the court did not abuse its discretion in ordering a resale. Spinks v. Raison, 144 Ky. 539, 139 SW 811.

[c] **It is not an abuse of discretion** to refuse confirmation because of an offer at the hearing of ten per cent in excess of the price bid at the sale, besides the expenses of a resale. State v. Silver Bow County Dist. Ct., 42 Mont. 182, 111 P 717.

[d] **An advance offer by the original purchaser** may warrant opening the sale. In re Reed, 3 Cal. A. 142, 85 P 155.

[e] **Offer must be of at least ten per cent over first sale.**—Herr's Est., 2 Pa. Dist. 737, 12 Pa. Co. 622; Dimock's Est., 3 PaLJR 317, 5 PaLJ 262 (including costs); Murphy's Est., 11 WklyNC (Pa.) 419.

[f] **Advance bid must be in writ-**

sary that the additional value should have inhered in the property at the time of the sale,[70] and if the full market value at the time of sale was realized, the reason why the market value was low at that time is immaterial.[71] It is within the discretion of the court either to order a new sale or to accept the advance bid.[72]

[§ 1641] **10. Form and Requisites of Confirmation.** No formal order[73] or precise form of words[74] confirming the sale of land is necessary. The court's approval is a sufficient confirmation,[75] and anything which expresses the approbation of the court is sufficient.[76] An order of confirmation is not void because it refers to a day subsequent to its own date as the day on which the land was ordered sold,[77] or fails properly to describe the land if the description appears in other parts of the proceedings.[78] But it has been held that, where an order approving an administrator's sale of land contained no description of the land, the sale was invalid.[79] The order will not be held void for failing to show that proof was heard upon the question of the sufficiency of the price given for the land sold.[80] It is sometimes required that an order confirming a sale of real estate should direct that a proper conveyance be made when the purchaser complies with the terms of sale.[81] Failure to confirm the commissioners' report and ordering a resale are equivalent to setting aside the sale.[82]

[§ 1642] **11. Effect of Confirmation or Refusal to Confirm.** The order of confirmation cures irregularities in the previous proceedings,[83] such as failure to have the land viewed by disinterested householders of the county wherein it lies,[84] or failure to make any attempt to advertise the sale,[85] or the insufficiency of the publication of a notice of

70. In re Leonis, 138 Cal. 194, 71 P 171; McGregor v. Jensen, 18 Ida. 320, 109 P 729; Kain v. Masterton, 16 N. Y. 174; McRee's Est., 6 Phila. (Pa.) 75.

71. Boyd v. Wyly, 124 U. S. 98, 8 SCt 364, 31 L. ed. 369 [aff 18 Fed. 355]; In re Burton, 105 Cal. 353, 38 P 952.

72. In re Bradley, 168 Cal. 655, 144 P 136; In re Griffith, 127 Cal. 543, 59 P 988; Griffin v. Warner, 48 Cal. 383.

[a] **The court may receive as many bids as may be made** and upon a consideration of the whole determine whether to accept the highest bid or order a new sale. It is not limited to the alternative of accepting the first offer that may be made or ordering a new sale. In re Griffith, 127 Cal. 543, 59 P 988.

73. Carey v. West, 139 Mo. 146, 40 SW 661; Lang's Est., 1 Chest. Co. (Pa.) 287.

[a] **Entry of confirmation nisi** is intended to indicate that the sale is confirmed, unless exceptions shall be filed thereto within such time as the court in the exercise of a proper discretion may permit. Lang's Est., 1 Chest. Co. (Pa.) 287.

74. Worthington v. McRoberts, 9 Ala. 297.

75. Sanford v. Lewis, 167 Ky. 459, 180 SW 776; Pendleton v. Shaw, 18 Tex. Civ. A. 439, 44 SW 1002.

[a] **Decision and the findings of court need not be in writing.**—In re Gibbs, 4 Utah 97, 6 P 525.

76. Worthington v. McRoberts, 9 Ala. 297; Livingston v. Cochran, 33 Ark. 294; Grayson v. Weddle, 63 Mo. 523; Turner v. Pope, (Tex. Civ. A.) 137 SW 420; Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922.

[a] **Any recognition of the sale** by acts appearing of record is sufficient proof of the approval of the court. Grayson v. Weddle, 63 Mo. 523; Jones v. Manly, 58 Mo. 559; Simmons v. Blanchard, 46 Tex. 266; Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757; Pendleton v. Shaw, 18 Tex. Civ. A. 439, 44 SW 1002.

[b] **An order directing an administrator to give a deed** of land sold under a previous order is a virtual confirmation of the sale. Livingston v. Cochran, 33 Ark. 294.

[c] **An entry in the minutes** of the court may suffice as a confirmation, where no further sale was ordered and no objection raised, and the purchase price was paid and possession taken by the purchaser. Corley v. Anderson, 5 Tex. Civ. A. 213, 23 SW 839.

[d] **An indorsement of confirmation on the return** of the sale was sufficient, although the clerk neglected to enter it on the minutes. Such omission on the part of the clerk was a mere clerical oversight which should not be allowed to prejudice the purchaser. Moody v. Butler, 63 Tex. 210.

[e] **A certificate of acknowledgment** of an administrator's deed, taken before the judge of the court that ordered the sale, and signed by such judge, acting officially, reciting the acknowledgment of the deed, and declaring, "It is therefore decreed that the foregoing deed be according to law," is a sufficient confirmation of the sale by the court. Turner v. Pope, (Tex. Civ. A.) 137 SW 420.

[f] **Approval can be gathered from whole record.**—Carey v. West, 139 Mo. 146, 40 SW 661.

[g] **Approval of the final account** of an administrator and his discharge is substantially a confirmation of the sale by him. Ferguson v. Templeton, (Tex. Civ. A.) 32 SW 148. Contra In re Delaney, 49 Cal. 76.

[h] **A clause in a decree of distribution confirming and approving all acts of the executor** is not a confirmation of the sale by him. In re Delaney, 49 Cal. 76.

77. Barton v. Davidson, (Tex. Civ. A.) 45 SW 400.

78. Crawford v. McDonald, 88 Tex. 626, 33 SW 325.

79. Wilkin v. Owens, 102 Tex. 197, 114 SW 104, 115 SW 1174, 117 SW 425, 132 AmSR 867 [rev (Civ. A.) 110 SW 552].

[a] **Amendment nunc pro tunc.**—Where an order of the probate court directing the sale of land belonging to the estate of a decedent described the land to be sold as a "part of N. W. ¼ of the N. E. ¼ of Sec. 34, township 17, R. 1 E.," and the order approving the report of the sale described the land in the same terms, the order did not describe any land, and the court was without authority to amend the order approving the sale nunc pro tunc by inserting an accurate description of the land sold. Bouldin v. Jennings, 92 Ark. 299, 122 SW 639.

80. Captain v. Stubbs, 68 Tex. 222, 4 SW 467.

81. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

82. Duval v. Planters', etc., Bank, 10 Ala. 636.

83. Ala.—McDonald v. Berry, 90 Ala. 464, 7 S 838; Ford v. Ford, 68 Ala. 141; Jennings v. Jenkins, 9 Ala. 285.

Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102.

Ill.—Cunningham v. Daugherty, 220 Ill. 45, 77 NE 95; Kelly v. Donlin, 70 Ill. 378.

Kan.—Lake v. Hathaway, 75 Kan. 391, 89 P 666; Thompson v. Burge, 60 Kan. 549, 57 P 110, 72 AmSR 369.

Ky.—Hamilton v. Hamilton, 51 SW 170, 21 KyL 260.

La.—Lafon v. Phillips, 2 Mart. N. S. 225.

Md.—Anderson v. Anderson, 89 Md. 1, 42 A 207.

Minn.—Dayton v. Mintzer, 22 Minn. 393.

Mo.—Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678; Tutt v. Boyer, 51 Mo. 425.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 285, 99 P 847, 129 AmSR 645 [cit Cyc].

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

Pa.—Jacob's App., 23 Pa. 477.

R. I.—Andrews v. Goff, 17 R. I. 205, 21 A 347.

Tenn.—Ridgely v. Bennett, 13 Lea 206.

Tex.—Altgelt v. Mernitz, 37 Tex. Civ. A. 397, 83 SW 891; Ferguson v. Templeton, (Civ. A.) 32 SW 148; Fishback v. Page, 17 Tex. Civ. A. 183, 43 SW 317.

[a] **Illustration.**—Where the return showed that the property was sold for cash, and for more than its appraised value, and after full hearing the district court confirmed the sale, the failure of the order of sale to describe the terms and conditions on which the sale was to be made as required by statute was cured. Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.

[b] **Confirmation of sale made without order.**—Although the representative has no power to sell land except under order of court, a sale made without an order but approved and confirmed by the court is as valid and efficacious as if it had been made under the required order. Hamilton v. Hamilton, 51 SW 170, 21 KyL 260. See also Donnelly v. Byers, 234 Pa. 339, 83 A 296 (statutory power to confirm sale made without order).

[c] **Consent to confirmation** by defendants after notice of sale in an action to sell land for assets cures all irregularities in the preliminary proceedings. Chambers v. Penland, 78 N. C. 53. Contra Strickland v. Strickland, 129 N. C. 34, 39 SE 735.

[d] **Order passes only on acts of representative in making sale.**—Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792; Dawson v. Holmes, 30 Minn. 107, 14 NW 462.

[e] **On the other hand,** it has been held that, where there is no statute directing that an administrator make a report to the court of a sale of personal property at private sale, or empowering the probate court to approve or confirm such a sale, the court's approval and confirmation thereof add nothing to its validity and do not cure any defects in the order authorizing it. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072.

84. Apel v. Kelsey, 47 Ark. 413, 2 SW 102.

85. Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Ferguson v. Templeton, (Tex. Civ. A.) 32 SW 148.

the hearing upon the petition for the sale.[86] It also passes the equitable title to an innocent purchaser,[87] and entitles him to a deed on payment or tender of payment.[88] But confirmation cannot impart validity to a void sale;[89] and where an order of publication is essential to give the probate court jurisdiction to order a sale of decedent's land, the lack of the order is an omission not curable by the order of confirmation.[90] A confirmation of a sale on the administrator's false report that the purchaser has made the required cash payment does not divest the title of the heirs,[91] and the land remains bound for the payment of the purchase money even in the hands of bona fide purchasers.[92] A recital in the decree of confirmation that the purchase money has been paid is conclusive upon the administrator in any proceeding against him by the creditors or distributees of the estate,[93] but not as between the administrator and purchaser,[94] or as against a subsequent administrator, when seeking to enforce a vendor's lien on the land.[95] It has been held that after confirmation, the purchaser cannot contest the proceedings in the orphans' court when sued in a common-law court for the purchase money,[96] but there is also authority for the view that an order confirming an administratrix's sale of assets pursuant to an order of sale is not an adjudication against the purchaser, but is only sufficient to constitute a prima facie case in an action against the bidder.[97] An order made on confirmation of an administrator's sale, permitting the administrator individually to join in the conveyances of land sold, is unnecessary and not conclusive as to the administrator's interest.[98] An order confirming an administratrix's illegal sale of a claim on a policy on the life of her intestate has been held not an adjudication by a court of competent jurisdiction as to the validity of the transfer, which the agent of the insurer had previously procured by fraud to be made to him individually.[99] Ordinarily, after confirmation of the sale of land, the executors cannot be surcharged with any alleged deficiency of price while the confirmation remains unreversed;[1] but where a sale was made in violation of the trust of the executor, his liability for the resulting loss was not affected by the fact that he filed a report of the sale and the same was approved by the court.[2] If a state court having general jurisdiction of the estate confirms a sale of any of the assets, the order of confirmation is conclusive upon a federal court upon the questions of the legality of the sale under the state statutes and of the right to sell the property in question under the order of sale granted.[3] If a sale by an administrator to the widow of the deceased owner is set aside, such widow becomes entitled to payment of the claims which become liquidated and discharged as the result of the purchase by her.[4]

Collateral attack. A judgment confirming a public sale is not subject to collateral attack, although the order of sale directed a private sale,[5] nor is a decree confirming a sale subject to collateral attack, because it treated unpaid taxes on the realty levied after decedent's death as debts within the statute, or because notice was not given.[6]

[§ 1643] **12. Entry upon Record or Registration of Confirmation.** The approval of the court should be shown by the record;[7] but it is sufficient if the approval can be gathered from the record,[8] and a formal entry of approval is not necessary.[9] In a few jurisdictions the order of confirmation must be registered or recorded, to be notice to third persons without actual or other constructive notice.[10]

[a] **It will be presumed from the confirmation** of the sale, in the absence of anything in the record, that the representative complied with the order of the court as to notice and time of sale. Ferguson v. Templeton, (Tex. Civ. A.) 32 SW 148.

86. Thompson v. Burge, 60 Kan. 549, 57 P 110, 72 AmSR 369; Dayton v. Mintzer, 22 Minn. 393.

87. Lake v. Hathaway, 75 Kan. 391, 89 P 666.

88. Lake v. Hathaway, 75 Kan. 391, 89 P 666.

89. Ala.—Cruikshank v. Littrell, 67 Ala. 318.

Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373; Collins v. Paepcke-Leicht Lumber Co., 74 Ark. 81, 84 SW 1044.

Ida.—State v. Cunningham, 6 Ida. 113, 53 P 451.

Ind.—Bell v. Shaffer, 154 Ind. 413, 56 NE 217.

Ky.—Bethel v. Bethel, 6 Bush 65, 99 AmD 655.

La.—Robert v. Brown, 14 La. Ann. 597.

Minn.—Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

Mo.—Cunningham v. Anderson, 107 Mo. 371, 17 SW 792, 28 AmSR 417; Farrar v. Dean, 24 Mo. 16.

Tex.—Fishback v. Page, 17 Tex. Civ. A. 183, 186, 43 SW 317.

Wis.—Chase v. Ross, 36 Wis. 267.

[a] **Lack of jurisdiction.**—(1) An order of confirmation cannot render valid an order of sale which it was not within the jurisdiction of the court to make. Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792. (2) But if a decree of confirmation is made in the court of the county in which the letters were issued, want of jurisdiction is not to be presumed from the mere omission to set forth in the claim or in the appraisement that the decedent died or was domiciled at the time of his death within the commonwealth. Greenawalt's Est., 16 Pa. Super. 263.

[b] **A sale for expenses of administration,** where there are no debts, is without jurisdiction, and, the defect being jurisdictional, is not cured by confirmation of the sale by the probate court. Collins v. Paepcke-Leicht Lumber Co., 74 Ark. 81, 84 SW 1044.

90. Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417; Wilkin v. Owens, (Tex. Civ. A.) 110 SW 552 [rev on other grounds 102 Tex. 197, 114 SW 104, 115 SW 1174, 117 SW 425, 132 AmSR 867].

91. Wallace v. Nichols, 56 Ala. 321.

92. Wallace v. Nichols, 56 Ala. 321.

93. See cases infra note 94.

94. Golden's Est., 22 Pa. Dist. 247; Wiley v. Lashlee, 8 Humphr. (Tenn.) 717.

95. Hudgens v. Cameron, 50 Ala. 379.

96. Richter v. Fitzsimmons, 4 Watts (Pa.) 251.

97. Jerrue v. Los Angeles County Super. Ct., 7 Cal. A. 717, 95 P 906.

98. In re Metcalf, 143 Iowa 310, 120 NW 104.

99. Empire L. Ins. Co. v. Mason, 140 Ga. 141, 78 SE 935.

1. Dundas' Est., 18 Phila. (Pa.) 79.

2. Wilbanks v. Crosno, 112 Ill. A. 503.

3. May v. Mercer County, 30 Fed. (U. S.) 246 (sale of right of action for infringement of patent).

4. Duckworth v. Francis, 154 Ill. A. 300.

5. Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678.

6. Kretsinger v. Brown, 165 Fed. 612, 91 CCA 450 [certiorari den 214 U. S. 527, 29 SCt 704, 53 L. ed. 1068].

7. Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Starr v. Willoughby, 218 Ill. 485, 75 NE 1029, 2 LRANS 623; Valle v. Fleming, 19 Mo. 454, 61 AmD 566; Neill v. Cody, 26 Tex. 286.

[a] **Entry of reasons for confirming or rejecting unnecessary.**—Davis v. Stewart, 4 Tex. 223.

8. Loyd v. Waller, 74 Fed. (U. S.) 601, 20 CCA 548; Carey v. West, 139 Mo. 146, 40 SW 661; Agan v. Shannon, 103 Mo. 661, 15 SW 757; Camden v. Plane, 91 Mo. 117, 4 SW 86; Moore v. Davis, 85 Mo. 464; Henry v. McKerlie, 78 Mo. 416; Gilbert v. Cooksey, 69 Mo. 42; Long v. Joplin Min., etc., Co., 68 Mo. 422; Grayson v. Weddle, 63 Mo. 523; Jones v. Manly, 58 Mo. 559.

"There was no formal entry of the approval on the record proper of the court, nor is it necessary that there should have been; the approval is sufficiently shown by the entry on the judge's minutes, especially when taken in connection with the further facts that the approval is recited in the administrator's deed, the acknowledgment of which was taken in open court by the judge thereof on the same day that the entry was made on the minutes, and in his second annual settlement the administrator charges himself with the amount of the purchase money. It is sufficient if the approval can be gathered from the whole record." Camden v. Plain, 91 Mo. 117, 130, 4 SW 86.

9. Grayson v. Weddle, 63 Mo. 523.

10. Lyons v. Cenas, 22 La. Ann. 113; Allen v. Atchison, 26 Tex. 616.

[a] **The recording of a procès verbal of sale in the parish where the property lies** is notice to third persons. Wright v. Cummings, 19 La. Ann. 353.

[b] **The omission to record a procès verbal in the parish where**

[§ 1644] **13. Review.** The approval[11] or disapproval[12] of the sale of land is a final judgment from which an appeal can be taken. Persons who have appeared in the proceedings and whose rights have been affected by the order of confirmation or refusal to confirm may appeal therefrom,[13] and are entitled to notice on appeal by others;[14] and persons interested may appear by leave of court and appeal, even though not originally parties.[15] Parties to the proceeding for confirmation are necessary parties to an appeal from the order or decree made therein,[16] and the purchaser is a necessary party to an appeal by the heirs from an order of confirmation.[17] Where there has been a failure on the part of the probate court to set apart for the use of minor children the property exempt from forced sale and the property has been sold by order of court, it is not error, upon certiorari, to revise and correct the proceedings in the probate court, to join the administrator and the purchaser of the property at the probate sale.[18]

Scope of review. It has been held that on appeal from the order of confirmation of a sale of land, no question can be raised as to the legality of the appointment of the administrator,[19] the propriety and legality of the order directing the sale to be made,[20] or the justice and legality of the debts allowed against the estate.[21] But it has also been held that, where no appeal was taken from an order of sale, on appeal from the order of confirmation, a question as to the jurisdiction to make the order of sale for matter not appearing on the face of the record might be raised.[22] The objection that the property sold for less than its appraised value must be specially pleaded, in order to be considered on appeal from the judgment confirming the sale.[23] As the matter of confirming or refusing to confirm a sale is within the discretion of the probate court, its action in the premises will not be disturbed on appeal unless an abuse of discretion is shown.[24] Neither will an order of confirmation be reversed for mere irregularities in the proceedings.[25]

Hearing de novo. Sometimes, under statute, a hearing de novo is had on appeal from the order made in confirmation proceedings.[26]

[§ 1645] **R. Second Sale—1. In General.** Where the proceeds of realty ordered to be sold for the payment of claims against an estate are insufficient for that purpose, the court may make another order directing the sale of more realty.[27] But this cannot be done until the proceeds obtained from the first sale have been exhausted,[28] and it has been held that, where a sum sufficient to pay claims was realized at the sale but such sum has been lost or misapplied by the representative, a sale of other realty to pay the claims cannot be ordered.[29] Where a sale of realty has failed for lack of bidders, or because of the insufficiency of the amount bid, such realty may be again offered for sale,[30] and where the court vacates or refuses to

the succession lies will not render the sale void. Wright v. Cummings, 19 La. Ann. 353.

11. In re Christensen, 15 Ida. 692, 99 P 829; Tutt v. Boyer, 51 Mo. 425; Wolff v. Wohlien, 32 Mo. 124; Wilson v. Brown, 21 Mo. 410; In re Hesche, 73 Mo. A. 612; In re Maslowski, 261 Pa. 484, 104 A 675; Lee v. Benzes, (Tex. Civ. A.) 209 SW 768.

12. In re Leonis, 138 Cal. 194, 71 P 171; Hirshfield v. Davis, 43 Tex. 155. But compare Wolff v. Wohlien, 32 Mo. 124 (an order of the circuit court in a trial de novo of an order of the probate court disapproving a report of sale is not a final order from which an appeal will lie).

13. Carter v. Crow, 130 Ky. 41, 112 SW 1098; Warehime v. Graf, 83 Md. 98, 34 A 364; Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

[a] **Executors** empowered by will to sell land and directed to hold part of the proceeds as a trust fund and to distribute the residue may appeal from an order refusing to confirm the sale and directing a resale. Warehime v. Graf, 83 Md. 98, 24 A 364.

[b] **The purchaser** has the right to appeal from a judgment confirming the report of sale. Carter v. Crow, 130 Ky. 41, 112 SW 1098.

[c] **Waiver of right to appeal.**— (1) An administrator who procures a sale and the confirmation thereof waives his right to have the order confirming the sale reviewed by proceedings in error. Saxon v. Cain, 19 Nebr. 488, 26 NW 385. (2) A purchaser who did not appeal from an order setting aside a sale of land to him cannot appeal from the order of resale. In re Boland, 55 Cal. 310.

14. In re Bell, 125 Cal. 539, 58 P 153; Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152; Stone v. Myrtle, 148 Ky. 57, 146 SW 20.

[a] **The heirs** of an intestate are pecuniarily interested in all his property, and entitled to their day in court in all the proceedings affecting the title to such property and the sale thereof, and are adverse parties, so as to be entitled to notice on appeal from the confirmation of the sale. Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152.

[b] **Where the guardian ad litem of minor heirs has appeared** in a proceeding commenced by the administrator to sell real estate belonging to his intestate, and consented to the sale, and the purchaser files his objections to the confirmation of such sale, and such objections are overruled by the court and the sale confirmed, and the purchaser appeals from such order of confirmation, the guardian ad litem is an adverse party thereto and must be served with the notice of appeal. Reed v. Stewart, 12 Ida. 699, 87 P 1002, 1152.

15. Kitchell v. Irby, 42 Ala. 447; Warehime v. Graf, 83 Md. 98, 34 A 364; Harrell v. Traweek, 49 Tex. Civ. A. 417, 108 SW 1021.

[a] **An administrator de bonis non** appointed after the sale, who contests the order of confirmation has an interest in the lands of the estate, in so far that he might rent them out or apply for an order of sale, and is therefore entitled to appeal. Kitchell v. Irby, 42 Ala. 447.

16. Kitchell v. Irby, 42 Ala. 447; England v. McLaughlin, 35 Ala. 590.

17. Stone v. Myrtle, 148 Ky. 57, 146 SW 20.

18. Connell v. Chandler, 11 Tex. 249.

19. Allen v. Shepard, 87 Ill. 314.

20. Allen v. Shepard, 87 Ill. 314; Norris v. Callahan, 59 Miss. 140.

21. Allen v. Shepard, 87 Ill. 314.

22. Desloge v. Tucker, 196 Mo. 587, 94 SW 283.

23. Michel v. Michel, 11 La. 149.

24. Ala.—Eatman v. Eatman, 83 Ala. 478, 3 S 850.

Cal.—Jerrue v. Los Angeles County Super. Ct., 7 Cal. A. 717, 95 P 906.

Ida.—McGregor v. Jensen, 18 Ida. 320, 109 P 729.

Miss.—Heard v. Whitehead, 41 Miss. 404.

N. C.—Henry v. Hilliard, 170 N. C. 578, 87 SE 509.

S. C.—Farrow v. Farrow, 88 S. C. 333, 70 SE 459.

Tex.—Wells v. Mills, 22 Tex. 302.

25. McDonald v. Hutton, 8 N. J. Eq. 473; Ridgely v. Bennett, 13 Lea (Tenn.) 206.

[a] **This rule has been applied** where there was a failure to give notice of the application for an order of sale. McDonald v. Hutton, 8 N. J. Eq. 473.

26. Harrell v. Traweek, 49 Tex. Civ. A. 417, 108 SW 1021.

[a] **Accordingly** it was error to refuse to consider the objections filed by the executors to the confirmation of the sale, although they had failed to perfect an appeal from the order of the county court confirming the same. Harrell v. Traweek, 49 Tex. Civ. A. 417, 108 SW 1021.

27. Learned v. Matthews, 40 Miss. 210; Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; Huckle v. Phillips, 2 Serg. & R. (Pa.) 4.

28. Brown v. Rose, 6 Blackf. (Ind.) 69.

29. Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Stifler's Est., 8 Pa. Dist. 400, 23 Pa. Co. 24 [foll Hanna's App., 31 Pa. 53]; Clyburn v. Reynolds, 31 S. C. 91, 9 SE 973.

[a] **This rule has been applied** in case of a loss through failure of the bank in which the representative deposited the proceeds of the sale. Pry's App., 8 Watts (Pa.) 253.

[b] **Claimants who were parties** to the proceeding in which the sale was ordered could not, where proceeds amply sufficient to pay their claims had been realized but had been misapplied, ask that other portions of the real estate be subjected to the payment of their claims. Clyburn v. Reynolds, 31 S. C. 91, 9 SE 973.

Insufficiency of personalty resulting from fault of representative see supra § 1450.

30. Long v. Hoffman, 103 Ark. 574, 148 SW 245; Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583; Campbell v. Owens, 32 La. Ann. 265; Farrington v. King, 1 Bradf. Surr. (N. Y.) 182.

[a] **Interval before second sale.**— It is not necessary to wait twelve months before making a second offer of the property if the second sale brings two thirds of the appraised value. Long v. Hoffman, 103 Ark. 574, 148 SW 245.

confirm a sale, a resale of the property is proper.[31] Where a sale of the homestead of an intestate was made without an appraisement, as required by statute, and the widow, as administratrix, not knowing that she had no right so to do, bid in the property, and subsequently, believing that these two defects invalidated her title, she brought an action, making her infant children and their guardian parties defendant, and asking a resale, and the infant defendants answered admitting the allegations of the petition, and joining in the prayer for resale, and at the resale the property brought considerably more than at the first sale, it was held that the second sale was valid.[32]

[§ 1646] **2. New Proceedings.** Where a sale of additional realty becomes necessary, new proceedings should be instituted, new notice given to the parties interested, and another order of sale obtained;[33] but where for any reason an attempted sale has failed, entirely new proceedings are not necessary to enable the personal representative again to offer the same property for sale.[34] Accordingly, where a sale is set aside and a resale ordered, the order of resale is sufficient if it merely directs the execution of the former order, without itself ordering the sale, describing the land, and prescribing the terms of sale.[35]

[§ 1647] **S. Annulling Sales after Confirmation —1. In General.** As a general rule it is too late to make objections to a sale under order of the court, after confirmation, payment of the purchase money, and delivery of a deed;[36] but there are exceptions to this rule, and the court may, when equity requires it, review its adjudication and revoke the confirmation.[37]

[§ 1648] **2. Right to Attack Sale**[38]**—a. In General.** Only persons in interest have any standing to invoke the aid either of the court of equity or the court of probate to set aside the sale.[39] The regularity of a sale or of the proceedings whereon

[b] When resale under order improper.—Where the representative returned the property unsold because of lack of bidders, due to the existence of an easement, and there was a judgment and execution under which the property could be sold free of the easement, the court properly refused to grant a rule on the representative to compel him to apply for a renewal of the order of sale, thus leaving the property to be sold under the execution. Gamble v. Woods, 53 Pa. 158.

31. Roy v. O'Neill, 168 Ala. 354, 52 S 946 (on vacating a sale of lands for distribution, a chancellor could not direct a conveyance to heirs making a better offer, but was only empowered to order another sale).

32. Grunewald v. Cox, 103 SW 275, 31 KyL 674.

33. Conn.—Cole v. Jerman, 77 Conn. 374, 59 A 425.

Ill.—Cromine v. Tharp, 42 Ill. 120 [dist Stow v. Kimball, 28 Ill. 93].

Ind.—Martin v. Neal, 125 Ind. 547, 25 NE 813.

Ky.—Robinson v. Clark, 34 SW 1033, 17 KyL 1401.

Mo.—Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417.

N. Y.—Ackley v. Dygert, 33 Barb. 176; Gilchrist v. Rea, 9 Paige 66; Butler v. Emmett, 8 Paige 12.

[a] **A new notice is necessary** for the sale of land excluded from sale by the first order. Cunningham v. Anderson, 107 Mo. 371, 17 SW 972, 28 AmSR 417.

[b] **Second sale for subsequently discovered debts.**—Where a surrogate has made an order for a sale of a part of the real estate for the payment of debts that were then ascertained, he is not authorized to make another order for the sale of another portion of the estate to pay debts alleged to have been subsequently discovered until the executor making the application has made out and filed an account of such new debts and has complied with the provisions of the statute as on an original application. Gilchrist v. Rea, 9 Paige (N. Y.) 66.

[c] **License to mortgage.**—If, after an order for a sale of realty has been obtained, it is desired to obtain a license to mortgage such realty, a new notice must be given, or the order granting the license to mortgage will be void. Martin v. Neal, 125 Ind. 547, 25 NE 813.

34. Burgett v. Apperson, 52 Ark. 213, 12 SW 559; Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583; Brown v. Marshall, 241 Mo. 707, 145 SW 810; Trumbel v. Williams, 18 Nebr. 144, 24 NW 716.

[a] **Illustration.**—Where a license to sell realty granted to the original representative has been of no avail by reason of want of bidders, there is no necessity for a second petition filed by his successor, but the first petition is sufficient to authorize the court to issue him a license to sell. Trumbel v. Williams, 18 Nebr. 144, 24 NW 716.

[b] **Service of notice of the application** sustains proceedings until the debts are paid or the land described is all sold, and the license may be renewed without repeating the service. Seymour v. Ricketts, 21 Nebr. 240, 31 NW 781.

[c] **The commissioner appointed to sell** land may, where there are no bidders, order a resale without further directions from the court, or, where the highest bidder is known by him to be insolvent, he may disregard the bid and recry the property. Blakeley v. Hughes, 140 Ky. 174, 130 SW 1067.

[d] **Where realty fails to bring the required price** at the first offering, no additional order of court is required to authorize the personal representative to resell it. Burgett v. Apperson, 52 Ark. 213, 12 SW 559 (it is only necessary for the court to provide for the execution of the judgment previously entered by directing that the land shall be offered for sale to the highest bidder at the end of twelve months after the first offering, and on a day fixed for that purpose); Campbell v. Owens, 32 La. Ann. 265.

[e] **Land repurchased by personal representative.**—Where land sold to pay debts is repurchased by the personal representative for the estate, a second order to sell it need not be founded on a new order to show cause why the land should not be sold. Stowe v. Banks, 123 Mo. 672, 27 SW 347.

35. Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

36. Dorsey v. Connerly, 77 Ark. 516, 92 SW 771; Therens v. Therens, 267 Ill. 592, 108 NE 712 [aff 189 Ill. A. 314]; Matter of Bridgeport Brass Co., 77 Misc. 69, 137 NYS 418, 9 Mills Surr. 319 [aff 155 App. Div. 910 mem, 140 NYS 1111 mem]; Brittain's Est., 28 Pa. Super. 144.

[a] **Court cannot relieve purchaser.**—After sale to pay debts, the surrogate has no jurisdiction of a motion by the purchaser to be relieved from the purchase on refusal of the administrator to convey. Matter of Bridgeport Brass Co., 77 Misc. 69, 137 NYS 418, 9 Mills Surr. 319 [aff 155 App. Div. 910 mem, 140 NYS 1111 mem].

[b] **Where earnest money paid.**—Where lands have been sold to pay debts, and the administrator has received earnest money, the surrogate has no jurisdiction to set aside such sale, and direct a resale and return of the money. Matter of Brown, 79 Misc. 675, 141 NYS 318.

37. Brittain's Est., 28 Pa. Super. 144; Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694; Ennis v. Cator, (Tex. Civ. A.) 174 SW 947.

38. Sale of personalty under testamentary authority or common-law power see supra § 750.

Sale of realty under testamentary authority see supra § 685.

39. Ark.—Montgomery v. Black, 75 Ark. 184, 86 SW 1006.

Ga.—Hamilton v. Cargile, 127 Ga. 762, 56 SE 1022; Ardis v. Smith, 52 Ga. 102.

Ill.—Elting v. Biggsville First Nat. Bank, 68 Ill. A. 204 [aff 173 Ill. 368, 50 NE 1095].

Ind.—Murphy v. Teter, 56 Ind. 545.

Ky.—Penn v. Rhoades, 124 Ky. 798, 100 SW 288; Mouser v. Bogwell, 76 SW 826, 25 KyL 1032.

La.—Waterhouse v. Bourke, 14 La. Ann. 358.

Me.—Webster v. Calden, 53 Me. 203.

Mass. — Harrington v. Brown, 5 Pick. 519.

Miss.—Baines v. McGee, 9 Miss. 208.

N. Y.—Matter of Wood, 70 App. Div. 321, 75 NYS 272.

Tex.—Byars v. Thompson, 80 Tex. 468, 15 SW 1087; Pearson v. Burditt, 26 Tex. 157, 80 AmD 649; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

Wash.—Terry v. Clothier, 1 Wash. 475, 25 P 673.

Wis.—Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899.

But compare Williams v. Williams, 170 Ala. 143, 54 S 107 (a sale under a decree of the probate court for division between alleged joint owners claiming as heirs of the deceased owner does not preclude one not a party to the proceedings from questioning the validity of the sale).

[a] **Persons desiring to make an advance bid** have no such interest as to entitle them to have a sale set aside on the ground of fraud. Terry v. Clothier, 1 Wash. 475, 25 P 673.

[b] **A bailor of property sold as that of a bailee** may not attack the sale if he has sustained no injury. Waterhouse v. Bourke, 14 La. Ann. 358.

[c] **Where heirs request and procure a sale** of the decedent's land for the purpose of closing the affairs of the administration, their title passes to the purchaser by estoppel, and a stranger to the proceedings, especially after long lapse of time, cannot impeach the sale. Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

it is founded may be called in question by heirs or devisees,[40] by legatees or distributees,[41] or by creditors whose rights have been prejudiced;[42] but not by persons claiming adversely to the heirs or devisees.[43] Purchasers cannot complain of matters not injurious to their rights.[44] An administrator de bonis non may apply to set aside a void sale of land made by his predecessor,[45] or may impeach his predecessor's sale on the ground of fraudulent collusion with the purchaser;[46] but the representative who made the sale cannot impeach the validity of the proceedings instituted and conducted by himself.[47] Where administration is revoked upon discovery and probate of a will, after the administrator has sold property, the executor is bound by the sale,[48] although the legatees may attack it.[49] Where the widow and the heir mortgaged their interests in the real estate and used the proceeds for the support of the family, the income from the property of the estate and the proceeds of the mortgages being sufficient for the purpose, a sale of the mortgaged premises by the widow as executrix to pay family allowance is in fraud of the rights of the mortgagees, and they are entitled to relief against such sale.[50] Where land of an intestate has been sold under a judgment against one of the heirs and purchased by the judgment creditor, the latter has such an interest in the land as entitles him to maintain a proceeding to set aside a sale of the land to pay debts of the deceased, alleged to have been wrongfully allowed against decedent's estate,[51] but a judgment creditor of an heir cannot levy upon land formerly belonging to the estate, but held by a voidable title, because of a purchase by the ad-

40. Cal.—In re Johnson, 7 Cal. A. 436, 94 P 592.

Ga.—Webb v. Deadwyler, 142 Ga. 422, 83 SE 99; Broadhurst v. Hill, 137 Ga. 833, 74 SE 422.

Ill.—Verdun v. Barr, 253 Ill. 120, 97 NE 239.

Ky.—Callebs v. Ruble, 172 Ky. 113, 188 SW 1096.

La.—Randall v. State Bank, 17 La. 273.

Mass.—Lindsey v. Fabens, 189 Mass. 329, 75 NE 623.

Mo.—Jones v. Carter, 56 Mo. 403.

N. H.—Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

But compare Seward v. Clark, 67 Ind. 289 (in the absence of fraud or mistake infant heirs are bound by the proceedings and cannot by appealing after attaining their majority annul the sale).

[a] **When representative refuses to act.**—Heirs may file a bill to set aside a sale when the administrator on application has refused to do so. Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

[b] **Each may sue at law for his own share** when the sale is void. Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

[c] **The guardian of infant heirs** may sue to set aside the sale. In re Johnson, 7 Cal. A. 436, 94 P 592; Roll v. Stum, 46 SW 223, 20 KyL 661.

[d] **Remainderman.**—Where the probate court authorized the sale for the payment of debts of land of a decedent devised to his widow for life, the fee of which passed as undevised property to his heirs, and a sale was made and a deed executed to the purchaser, who took possession, the deed conveyed the title to the land, and if valid gave the purchaser a title paramount to both life estate and estate in remainder, and if invalid the wrong was then committed against both, entitling the remaindermen to proceed to have it avoided without waiting for the death of the life tenant. Lindsey v. Fabens, 189 Mass. 329, 75 NE 623. To same effect Verdun v. Barr, 253 Ill. 120, 97 NE 239.

[e] **An outstanding homestead estate,** which prevents immediate recovery of the land by an heir, does not preclude from suing to set aside an administration sale of such land. McMeen v. Grant, 268 Ill. 64, 108 NE 677.

[f] **Forced heirs having only a residuary interest** may not attack a sale for irregularities not affecting them. Brown v. Jacobs, 24 La. Ann. 526.

[g] **Heirs taking subject to an estate by curtesy** are not prejudiced by and cannot complain of a mortgage authorized by the court to secure a debt of the ancestor and made payable on the death of the husband. Corbett's Est., 10 Pa. Dist. 59.

[h] **A devisee not made a party** to a proceeding for the sale of a testator's realty to pay debts has no right to move the court to set aside the judgment directing the sale, he having no status in court, and no wrong having been done him. Card v. Finch, 142 N. C. 140, 54 SE 1009.

[i] **Insufficiency of assets.**—(1) Heirs cannot complain of a sale for full value when the assets, including proceeds of the sale, are insufficient to pay the debts. Highsmith v. Whitehurst, 120 N. C. 123, 26 NE 917; Trahan v. Simon, 51 La. Ann. 809, 25 S 374; Matter of Wood, 70 App. Div. 321, 75 NYS 272. (2) But a report of insolvency will not alone constitute a defense to an action by heirs, as it is not conclusive of the final insolvency of the estate. Grant v. Lloyd, 20 Miss. 191.

[j] **Pending the administration,** heirs may not maintain a writ of entry against one holding under a void sale, because under the statute the administrator's right of possession continues throughout the administration. Bergin v. McFarland, 26 N. H. 533.

41. Ky.—Penn v. Rhoades, 124 Ky. 798, 100 SW 288, 30 KyL 997.

La.—Stanbrough v. McClellan, 36 La. Ann. 234.

Miss.—Bland v. Muncaster, 24 Miss. 62, 57 AmD 162.

Mo.—Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

S. C.—Price v. Nesbit, 10 S. C. Eq. 445.

[a] **Residuary legatees** may attack the sale. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

42. Cal.—In re Devincenzi, 119 498, 51 P 845.

Ga.—Webb v. Deadwyler, 142 Ga. 422, 83 SE 99; Grubbs v. McGlawn, 39 Ga. 672 [overr Mercer v. Newsom, 23 Ga. 151].

Ill.—Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].

Ky.—Roy v. Allen, 118 SW 981.

La.—Thompson's Succ., 42 La. Ann. 118, 7 S 477.

Miss.—Prestidge v. Pendleton, 24 Miss. 80; Murphy v. Clark, 9 Miss. 221.

Pa.—Golden's Est., 56 Pa. Super. 300.

Tex.—Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

[a] **Mortgagee may attack sale.**—Roy v. Allen, (Ky.) 118 SW 981 (where his lien is destroyed thereby); Thompson's Succ., 42 La. Ann. 118, 7 S 477.

[b] **The fact that a creditor has a remedy on the administrator's bond** does not preclude him from vacating a sale to the administrator himself. In re Devincenzi, 119 Cal. 498, 51 P 845; Prestidge v. Pendleton, 24 Miss. 80; Murphy v. Clark, 9 Miss. 221; Hannum's App., 1 Chest. Co. (Pa.) 362.

[c] **If a sale is absolutely void** the creditor may attack it without showing any injury to himself. Macarty v. Bond, 9 La. 351.

[d] **Where the proceeds are sufficient to pay all debts,** a creditor may not attack the sale. Bland v. Muncaster, 24 Miss. 62, 57 AmD 162; Patterson v. Eakin, 87 Va. 49, 12 SE 144.

[e] **Creditors not permitted to attack sale.**—Thompson v. Cox. 53 N. C. 311.

43. Ill.—Wimberly v. Hurst, 33 Ill. 166, 83 AmD 295.

La.—Tabarry's Succ., 30 La. Ann. 187.

Me.—Purrington v. Dunning, 11 Me. 174.

Mass.—Knox v. Jenks, 7 Mass. 488.

Pa.—Bean's App., 2 Walk. 512.

44. Harrington v. Williams, 173 Ky. 575, 191 SW 273; Dull v. Slater, 31 Pa. Super. 488; Cralle v. Meem, 8 Gratt. (49 Va.) 496.

[a] **Premature sale.**—Purchasers cannot have a sale set aside, although prematurely made, if it was beneficial to infant heirs and consented to by the adult heirs. Cralle v. Meem, 8 Gratt. (49 Va.) 496.

[b] **Where there have been two sales,** one claiming as purchaser under the first cannot complain of irregularities in the proceedings on the second sale. Sullivan v. Berry, 83 Ky. 198, 4 AmSR 147; In re Gillespie, 10 Watts (Pa.) 300.

[c] **Waiver or loss of right.**—Where the administrators in making a sale under order of court agreed before the sale that the purchasers might examine the title through a case stated before they should be required to accept a deed and pay the purchase money, and the purchaser, relying on the agreement, paid a portion of the purchase money and allowed a sale to be confirmed, the purchaser could not have a decree entered setting aside the sale and order repayment of the money for insufficiency of title, where no action had been taken by either party as to the case stated. In re Hostetter, 222 Pa. 197, 70 A 1006.

45. Smitha v. Flournoy, 47 Ala. 345.

46. Pearson v. Burditt, 26 Tex. 157, 80 AmD 649.

Fraud as ground for setting aside sale generally see infra § 1671.

47. Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549.

48. Price v. Nesbit, 10 S. C. Eq. 445.

49. Price v. Nesbit, 10 S. C. Eq. 445.

50. Santa Rosa Sav. Bank v. Schell, 142 Cal. 505, 76 P 250; Curtis v. Schell, 129 Cal. 208, 61 P 951, 79 AmSR 107.

51. Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

ministratrix at her own sale.[52]

[§ 1649] **b. Estoppel—(1) In General.** One who might otherwise successfully attack a sale may be estopped from so doing, the principles governing such estoppel being practically the same as those applying to estoppel generally.[53] Thus one will not be heard to object to the regularity of proceedings had on his own application,[54] instigation,[55] or consent,[56] or which he has aided in carrying into effect.[57] Neither will one be heard to complain of defects for the existence of which he is himself responsible.[58]

Assertion of title or claim. A person may estop himself from attacking the proceedings or particular features thereof by himself asserting title thereunder,[59] and an heir cannot take advantage of the acts of one claiming to be administrator in establishing a land certificate, which was supposed to have been lost to the estate, and then contest its sale on the ground that the administrator was not lawfully appointed.[60] It has been held that a party to the proceeding who fails to set up an adverse claim to the property is estopped in pais, although the court could not in that proceeding adjudicate his claim.[61]

Where one is interested in two capacities, he is usually held to be estopped in one by his acts in the other.[62]

Presence and conduct at sale. One may be estopped by being present at the sale and so conducting himself thereat as to induce another to purchase,[63] as for instance declaring that the purchaser would get good title;[64] but mere presence at the sale, without affirmative acts inducing any one to purchase, will not usually work an estoppel,[65] although it has been held that a widow cannot object to a sale because it was made without her consent where she was present thereat and purchased part of the property,[66] nor can one who was present at the sale make an objection based upon lack of notice.[67]

Doctrine of res judicata. The ordinary principles of res judicata apply to proceedings for the sale of a decedent's property and proceedings attacking such sale, and parties thereto are concluded by determinations made in such proceedings,[68] even

52. Williams v. J. P. Williams Co., 122 Ga. 178, 50 SE 52, 106 AmSR 100.

53. Williams v. Wood, 60 Ind. A. 69, 107 NE 683; Roberts v. Roberts, 180 Ky. 629, 203 SW 523; Harl v. Vairin, 175 Ky. 468, 194 SW 546; McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 AmD 642. See also Estoppel 21 C. J. p 1052.

[a] **No injury resulting.**—The erroneous belief by the heirs of the holder of a headright certificate, that a transfer of the certificate by the administratrix of the holder under order of the probate court was valid, and subsequent acquiescence for a time, has been held not sufficient to estop such heirs to assert title to the land, where the transferees did not take possession of the land, and did nothing to their injury in reliance on such acquiescence. Broocks v. Payne, 58 Tex. Civ. A. 513, 124 SW 463.

[b] **Effect of fraud.**—A purchaser who was induced to purchase by false representation as to the width of a street on which the property faced is not estopped to recind the sale by reason of the fact that the administrator has, with the purchaser's knowledge and consent, paid out the purchase money in the payment of liens on the property. Greiling v. Watermolen, 128 Wis. 440, 107 NW 339.

54. Evans v. Mathews, 8 Ala. 99; Ions v. Harbison, 112 Cal. 260, 44 P 572; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Mardis v. Mardis, 13 La. Ann. 236; Saulet v. Ogilvie, 11 La. 282.

55. Pepper v. Zahnsinger, 94 Ind. 88. See also cases infra note 56.

[a] **If the widow actively instigates** the sale of her interest and accepts the proceeds, she will be estopped. Pepper v. Zahnsinger, 94 Ind. 88.

[b] **Merely requesting the administrator to sell** without accepting the proceeds will not work an estoppel against the widow. Roberts v. Lindley, 121 Ind. 56, 22 NE 967.

56. Ala.—Jennings v. Jenkins, 9 Ala. 285.

Ind.—Myers v. Boyd, 144 Ind. 496, 43 NE 567; Pepper v. Zahnsinger, 94 Ind. 88.

La.—Black Bayou Oil Co. v. Pyron, 129 La. 117, 55 S 733.

Pa.—In re Simmonds, 19 Pa. 439.

Tex.—James v. Corker, 30 Tex. 617; Grande v. Chaves, 15 Tex. 550; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

[a] **Illustration.**—Where a widower participated in the administrator's sale of his wife's real estate, encumbered by a mortgage in which he had joined, and tried to induce a person to raise a bid, and also procured the appointment of the administrator, permitted the petition to sell the real estate to go by default, receipted to the administrator for the surplus of the proceeds arising from the sale of other real estate described in the petition, and sold under the same order and terms as the real estate embraced in the mortgage, he was estopped from challenging the validity of the sale of the mortgaged real estate. Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876.

[b] **Setting up infancy.**—An heir cannot attack a sale on the ground that he was a minor not represented, when he had, in a petition to be recognized as heir, averred that he was of full age. Chandler v. Hough, 7 La. Ann. 440.

[c] **When acquiescence presumed.**—In an action by major heirs to recover property sold by the tutrix of minor heirs acting without authority, plaintiffs will be presumed to have acquiesced in the order of sale, where they neither allege nor prove that they were absent when the succession was opened, or ignorant that the succession owed the debt for which the property was sold, or of the sale, or that there were other means by which the debt could have been paid, or that the price obtained was inadequate. Deshotels v. Lafleur, 134 La. 1052, 54 S 905.

57. Ga. — Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

Ind.—Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876.

Mass. — Jennison v. Hapgood, 10 Pick. 77.

Miss.—Pool v. Ellis, 64 Miss. 555, 1 S 725.

N. Y.—Butler v. Emmett, 8 Paige 12.

N. C.—Chambers v. Penland, 78 N. C. 53.

[a] **Illustrations.**—(1) Where the parties thought a sale was illegal and the purchaser purchased again at a second sale, he could not assert that the first sale was legal. Pool v. Ellis, 64 Miss. 555, 1 S 725. (2) Where a succession owed debts to creditors who were pressing for payment, requiring a sale of land to raise funds to pay the debts, and complainant owning an oil lease on part of the land encumbered with a mortgage, with full knowledge of the proceedings, made no offer to furnish the administratrix with money with which to pay the succession debts, but suffered the sale to take place, complainant was not entitled to maintain a suit to vacate the sale on the ground that the administratrix's real motive in selling the land was to relieve the succession of the lease. Black Bayou Oil Co. v. Pyron, 129 La. 117, 55 S 733.

[b] **Irregularities are cured** by defendants coming in after the sale and consenting to confirmation. Chambers v. Penland, 78 N. C. 53.

58. Bennallack v. Richards, 125 Cal. 427, 58 P 65; McGary v. McGary, 105 SW 891, 32 KyL 314; In re Finn, (Wash.) 173 P 449.

[a] **An objection based on lack of confirmation** cannot be raised by the executor, as it was his duty to procure confirmation. Bennallack v. Richards, 125 Cal. 427, 58 P 65.

59. Doe v. Wright, 7 Del. 49; McChesney v. Daly, 7 La. Ann. 613; Aicard v. Daly, 7 La. Ann. 612; Allen v. Atchison, 26 Tex. 616.

60. Giddings v. Steele, 28 Tex. 732, 91 AmD 336.

61. Harding v. Le Moyne, 114 Ill. 65, 29 NE 188.

62. Beniteau v. Dodsley, 88 Mich. 152, 50 NW 110; Beeson v. Beeson, 9 Pa. 279; Dubose v. James, 16 S. C. 55. But compare Owen v. Slatter, 26 Ala. 547, 62 AmD 745 (widow who was also administratrix was not estopped from claiming dower by failing to announce at the sale that the land was to be sold subject to her dower).

63. Favill v. Roberts, 50 N. Y. 222 [aff 3 Lans. 14]; Browne v. Coleman, 62 Or. 454, 459, 125 P 278.

"If the conduct of the parties was such as to lead purchasers to believe that they recognized it as a genuine sale, and to induce them to purchase where otherwise they would not have purchased, or if, after the sale has been made, they, with knowledge of the facts, accept their proportion of the money obtained by the purchase, an estoppel may arise which may be as effective in equity to bar their right as if a regular valid sale had taken place in the first instance." Browne v. Coleman, supra.

64. Williamson v. Ross, 33 Ala. 509.

[a] **A husband stating at the sale that the title is good** estops both himself and his wife from asserting her undisclosed interest. McCaa v. Woolf, 42 Ala. 389.

65. Allen v. Kallam, 69 Ala. 442; Owen v. Slatter, 26 Ala. 547, 62 AmD 745.

66. Davidson v. Silliman, 24 La. Ann. 225.

67. Adams v. Howard, 110 N. C. 15, 14 SE 648.

68. Conn.—Seymour v. Seymour, 22 Conn. 272.

with regard to questions not litigated but which there was an opportunity to litigate.[69] Where an administrator's sale of land was void, the fact that the heirs received and disposed of the remainder of the estate without protesting against the invalid sale did not estop them from afterward asserting the invalidity of the sale.[70]

Failure to appear and contest. A party to the proceeding is not estopped to attack the validity of the sale for defects in the service of the citation merely because of failure to appear and contest the proceedings;[71] but it has been held that no relief should be afforded to heirs who were in the parish where the judgment ordering the sale was made and where it was effected, and suffered the sale to be executed without opposition.[72]

[§ 1650] **(2) Acceptance and Retention of Proceeds of Property.**[73] One who has knowingly accepted and retained the purchase money or a part thereof is thereby estopped from afterward attacking the sale or asserting title to the land,[74] provided that, at the time when he received such money, he knew of the facts rendering the sale invalid,[75] and that what was received was proceeds

La.—Sicard v. Gumbel, 112 La. 483, 36 S 502; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549.

Mo.—Long v. Joplin Min., etc., Co., 68 Mo. 422.

N. Y.—Rhodes v. Caswell, 41 App. Div. 229, 58 NYS 470.

N. C.—Ward v. Lowndes, 96 N. C. 367, 2 SE 591; Wilson v. Leigh, 39 N. C. 97.

Wash.—Dooly v. Russell, 10 Wash. 195, 38 P 1000.

[a] **Remaindermen represented by trustees** are bound by the record. Rhodes v. Caswell, 41 App. Div. 229, 58 NYS 470.

[b] **The parties entitled to distribution** of the purchase money are concluded by the settlement of the administrator's account and estopped thereby from attacking the sale on the ground that the purchase money was not paid. Long v. Joplin Min., etc., Co., 68 Mo. 422.

69. Ind. — Gavin v. Graydon, 41 Ind. 559.

La.—Putnam v. Davidson, 3 La. Ann. 266.

N. C.—Morrisett v. Ferebee, 120 N. C. 6, 26 SE 628.

Pa.—Jacoby v. McMahon, 174 Pa. 133, 34 A 286, 189 Pa. 1, 41 A 1119.

S. C.—Culler v. Crim, 52 S. C. 574, 30 SE 635; Hodge v. Fabian, 31 S. C. 212, 9 SE 820, 17 AmSR 25.

Tenn.—Posey v. Eaton, 9 Lea 500.

[a] **A purchaser** who neglects to set up his sale of the property to a third person in a suit to set aside the sale will not be permitted to set it up in a subsequent suit to recover the property or its value. Putnam v. Davidson, 3 La. Ann. 266.

[b] **Agreement for purchase by representative.**—Where one interested in an estate requested and expressly agreed that the administrator thereof should purchase the land at a sale of the property to settle the estate, which sale was made and confirmed, the heirs of the person so consenting could not, after his death, attack the sale as void. McGary v. McGary, 105 SW 891, 32 KyL 314.

70. Wilkin v. Owens, 102 Tex. 197, 114 SW 104, 115 SW 1174, 117 SW 425, 132 AmSR 867 [rev (Civ. A.) 110 SW 552]; Schnabel v. McNeill, (Civ. A.) 110 SW 558 [aff 102 Tex. 196, 114 SW 108].

71. Browne v. Coleman, 62 Or. 454, 460, 125 P 278 ("We do not think such an estoppel arises from mere failure to appear and contest the proceeding in the county court in the first instance. The law provides the method by which a party may be brought into court, and, if this method is not followed, he is under no legal or moral obligation to voluntarily submit himself to the jurisdiction. He may stay out of court and allow the moving party and purchasers under the sale to proceed at their peril. The record is always available to a purchaser, and, in the absence of any affirmative act by the heir tending to mislead the purchaser, he is not chargeable with constructive fraud merely because he does not seek out such purchaser and warn him of defects in the proceedings. The heirs and widow in this case did nothing to mislead the plaintiff and his copurchaser. They simply declined to appear, and the purchasers, without examining the record, bought the property. It is true that they paid full price for it, and, no doubt, thought the sale valid, but this fact can make no difference as to the validity of the sale").

72. Estrade v. Kaack, 126 La. 26, 52 S 181. To same effect Perrin's Succ., 1 La. A. (Orleans) 76.

73. Reimbursement of purchaser for purchase money and improvements when sale avoided see infra §§ 1683–1686.

74. U. S.—Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 432.

Ala.—Smith v. Lusk, 119 Ala. 394, 24 S 256.

Ga.—Carey v. Moore, 119 Ga. 92, 45 SE 998; Moore v. Carey, 116 Ga. 28, 42 SE 376. But compare Nosworthy v. Blizzard, 53 Ga. 668 (a purchaser does not get title by estoppel, but is merely entitled to reimbursement to the extent that he has added to the trust estate).

Ind.—Myers v. Boyd, 144 Ind. 496, 43 NE 567; Axton v. Carter, 141 Ind. 672, 39 NE 546; Wilmore v. Stetler, 137 Ind. 127, 34 NE 357, 36 NE 856, 45 AmSR 169; Palmerton v. Hoop, 131 Ind. 23, 30 NE 874; Bumb v. Gard, 107 Ind. 575, 8 NE 713; Elliott v. Frakes, 71 Ind. 412.

Iowa.—Deford v. Mercer, 24 Iowa 118, 92 AmD 460; Pursley v. Hays, 17 Iowa 310.

Kan.—Powers v. Scharling, 76 Kan. 855, 92 P 1099; Crane v. Lowe, 59 Kan. 606, 54 P 666.

La.—Estrade v. Kaack, 126 La. 26, 52 S 181; Beard v. Cash, 32 La. Ann. 121; Tilsen v. Haine, 27 La. Ann. 228; McCulloch v. Weaver, 14 La. Ann. 33; In re Dickson, 6 La. Ann. 754.

Miss.—Wilie v. Brooks, 45 Miss. 542; Jones v. Smith, 33 Miss. 215; Lee v. Gardiner, 26 Miss. 521; Scott v. Freeland, 15 Miss. 409, 45 AmD 310.

Mo.—Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496.

Nebr.—Mote v. Kleen, 83 Nebr. 585, 119 NW 1125, 131 AmSR 654; Staats v. Wilson, 76 Nebr. 204, 107 NW 230, 109 NW 379, 124 AmSR 806; Wamsley v. Crook, 3 Nebr. 344.

N. Y.—Matter of Brown, 79 Misc. 675, 141 NYS 318; In re Place, 1 Redf. Surr. 276.

Or.—Browne v. Coleman, 62 Or. 454, 125 P 278.

Pa.—Jacoby v. McMahon, 174 Pa. 133, 34 A 286; Sager v. Mead, 171 Pa. 349, 33 A 355; Cameron v. Coy, 165 Pa. 290, 30 A 843; Beeson v. Beeson, 9 Pa. 279; Bruch v. Lantz, 2 Rawle 392, 21 AmD 458; Fink v. Miller, 19 Pa. Super. 556.

Philippine.—De Aldecoa v. Fortis, 27 Philippine 392.

Tex.—Vineyard v. Heard, (Civ. A.) 167 SW 22.

Wash.—Cunningham v. Richardson, 68 Wash. 24, 122 P 368.

[a] **Participation in the proceeds of a bond** given for the purchase money estops distributees from charging the administrator with liability for improperly selling. Wilson's App., 4 Pennyp. (Pa.) 432.

[b] **The death of one of the heirs** before payment of the price does not affect the estoppel, where the remaining heirs receive their own interest and that of the decedent. Wilmore v. Stetler, 137 Ind. 127, 34 NE 357, 36 NE 856, 45 AmSR 169.

[c] **Receipt by trustee ratifies voidable sale.**—Rhodes v. Caswell, 41 App. Div. 229, 58 NYS 470.

[d] **A receipt of the purchase money by the administrator** and its use to pay debts creates an equitable estoppel against the heir. Robertson v. Bradford, 73 Ala. 116.

[e] **The purchaser may by a bill in equity divest the title of heirs** who have knowingly retained the purchase money. Smith v. Lusk, 119 394, 24 S 256.

[f] **A creditor** receiving the purchase money forfeits no rights as to priority of payment. The receipt of the money merely prevents the following of the land. New Orleans Gaslight, etc., Co. v. Webb, 2 La. Ann. 526.

[g] **Merely charging the purchase money against the purchaser's claim** as a distributee of the estate does not estop the heirs. Sweeney v. Warren, 127 N. Y. 426, 28 NE 413, 24 AmSR 468.

[h] **Sale of widow's share.**—(1) The court is without authority to sell the widow's share, an order for such sale is void, and the widow is not estopped from asserting her title by accepting a part of the proceeds of the sale as a portion of her distributive share of the estate. Compton v. Pruitt, 88 Ind. 171; Hanlon v. Waterbury, 31 Ind. 168. (2) Children who have accepted the proceeds of the sale of their own interest are not estopped from asserting their title to the widow's interest after her death. Elliott v. Frakes, 71 Ind. 412; Fry v. Lawson, 32 Ind. A. 364, 69 NE 1038.

[i] **If the sale was void** (1) the estoppel will not be recognized at law but will be enforced in equity. Oden v. Dupuy, 99 Ala. 36, 11 S 419, 12 S 605; Wilson v. Holt, 83 Ala. 528, 3 S 321, 3 AmSR 768; Robertson v. Bradford, 73 Ala. 116; Casey v. Morgan, 67 Ala. 441; Bell v. Craig, 52 Ala. 215; Williamson v. Ross, 33 Ala. 509; Price v. Wilkinson, 10 Ala. 172. (2) The executrix cannot ratify a sale void for want of a valid order by accepting the purchase money. Smelser v. Blanchard, 15 La. Ann. 254.

[j] **If the money was received for the purpose of tendering it back** and not for retention, the estoppel does not arise. Moore v. Carey, 116 Ga. 28, 42 SE 376.

[k] **Estoppel does not operate in favor of purchaser taking with notice of defect.**—Campbell v. Drais, 125 Cal. 253, 57 P 994.

75. Harmon v. Smith, 38 Fed. 482; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304; Powers v. Scharling, 76 Kan. 855, 859, 92 P 1099 [quot Cyc]; Estrade v. Kaack, 126 La. 26, 30, 52 S 181.

"We have every reason to infer that the heirs received due notice of

of the sale.[76] Distribution of the purchase money to persons under disability does not estop them unless such distribution is ratified upon removal of the disability,[77] and it has been held that even the receipt of money and expression of satisfaction at the sale after reaching majority will not estop one who was an infant when the sale was made.[78] Estoppel has also been held to arise from bringing suit for the purchase money[79] and recovering judgment therefor.[80]

[§ 1651] **(3) Retention of Property Purchased.** The purchaser cannot, while he retains possession of the property, resist payment of the purchase money, or otherwise repudiate the burdens arising from the purchase because of defects in the sale or proceedings leading up thereto.[81]

[§ 1652] **(4) Ratification.** Heirs of full age may bind themselves by an express ratification of an irregular sale, and will not be thereafter heard to question its validity,[82] but persons under disability cannot ratify.[83] If in a bill to avoid a voidable sale and for other purposes plaintiff amends by striking out the prayer to set aside the sale, he thereby affirms the sale.[84]

[§ 1653] **3. Time within Which Sale May Be Annulled—a. Statutes of Limitations.**[85] Where a proceeding attacking a sale by an executor or administrator falls within the provisions of a general statute of limitations, the ordinary rules of construction of such statutes of course apply,[86] and a purchaser may be protected by his adverse possession for the statutory period.[87] There are, however, in many jurisdictions, special statutes expressly limiting the time within which executor's or administrator's sales may be attacked.[88] Such statutes have been held to apply to sales which are

the tableau of distribution, which included the price of the property now claimed by the heirs. If they knew (we infer that they knew) that part of the amount distributed, as made to appear by the tableau homologated, was the proceeds of this sale, they have scant ground upon which to stand to recover judgment." Estrade v. Kaack, supra.

76. McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Powers v. Scharling, 76 Kan. 855, 859, 92 P 1099 [quot Cyc]; Spencer v. Jennings, 139 Pa. 198, 21 A 73.

77. Willie v. Brooks, 45 Miss. 542; Valle v. Fleming, 19 Mo. 454, 61 AmD 566. But compare Milner v. Vandivere, 86 Ga. 540, 12 SE 879 (where property was sold to provide year's support for widow and minor children).

[a] **They must refund money or have it charged upon land.**—Willie v. Brooks, 45 Miss. 542.

[b] **A married woman** is estopped by receiving the proceeds of the sale, but she is not estopped by her husband's receipt of them without her consent. Kempe v. Pintard, 32 Miss. 324. To same effect George v. Safe Deposit, etc., Co., 234 Pa. 300, 83 A 294.

78. Ackley v. Dygert, 33 Barb. (N. Y.) 176 (where no one has been influenced by the declaration of the heir to buy the land or to do any other act by which he would be prejudiced were the heir allowed to assert title to the property).

79. Lathrop v. Doty, 82 Iowa 272, 47 NW 1089; Ogden v. Ogden, 1 SW 665, 8 KyL 416; Johnson v. Perkins, 1 Baxt. (Tenn.) 367.

80. Johnson v. Perkins, 1 Baxt. (Tenn.) 367; Miller v. Anders, 21 Tex. Civ. A. 72, 51 SW 897.

[a] **Obtaining judgment against administrator for proceeds of sale.**—Heirs at law who bring an administrator to an accounting, and obtain against him a judgment, in part based upon the proceeds of land sold by him, thereby ratify the sale of the property, and cannot afterward assert its invalidity. Battle v. Wright, 116 Ga. 218, 42 SE 347.

81. Ala.—Martin v. Truss, 50 Ala. 95; Hickson v. Lingold, 47 Ala. 449; Duncan v. Stewart, 25 Ala. 408, 60 AmD 527; Worthington v. McRoberts, 7 Ala. 814, 9 Ala. 297; Lankin v. Reese, 7 Ala. 170; Harbin v. Levi, 6 Ala. 399.

Ark.—Branstetter v. Branstetter, 115 Ark. 154, 170 SW 989.

La.—Dupleix v. Deblieux, 26 La. Ann. 218; Collins v. Hollier, 13 La. Ann. 585; Aicard v. Daly, 7 La. Ann. 612.

Miss.—Martin v. Tarver, 43 Miss. 517; Whitworth v. Carver, 43 Miss. 61; Bohannon v. Madison, 31 Miss. 348; Joslin v. Caughlin, 27 Miss. 852.

Mo.—Adair v. Adair, 78 Mo. 630.

Tex.—Byars v. Thompson, 80 Tex. 468, 15 SW 1087; Claiborne v. Yoeman, 15 Tex. 44; Perry v. Booth, 7 Tex. 493.

[a] **Where a firm buys property,** one who afterward enters it as a partner is bound by the conditions of the sale and must carry them out. Allen v. Atchison, 26 Tex. 616.

[b] **The reason given for the rule** is that if the sale is void the property is unadministered assets and the administrator is therefore chargeable therewith, and the purchaser cannot retain the property without indemnifying him. Therefore the rule does not apply to real estate for which the administrator is not responsible. Washington v. McCaughan, 34 Miss. 304.

[c] **Void sale.**—(1) There was no estoppel, although the purchaser had not suffered eviction, if the sale was absolutely void. Wiley v. White, 3 Stew. & P. (Ala.) 355, 2 Stew. 331. (2) Although no title passed, payment cannot be resisted if the purchaser is about to receive title from another source. Lee v. White, 4 Stew. & P. (Ala.) 178.

82. U. S.—Mills v. Mills, 57 Fed. 873.

Ala.—McCully v. Chapman, 58 Ala. 325.

Ga.—Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

Ill.—Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180.

Oh.—Dunlap v. Mitchell, 10 Oh. 117.

Wis.—O'Dell v. Rogers, 44 Wis. 136.

[a] **Compelling election.**—If the sale was in excess of the administrator's authority the purchaser may compel creditors and heirs to elect its ratification or rescission. McCully v. Chapman, 58 Ala. 325.

[b] **Facts not amounting to ratification.**—Where, pending a suit to set a sale aside, an amendment is made praying for an accounting and a money judgment, and an agreement made with other claimants that the land be sold subject to a determination of their respective rights, such amendment is not a ratification of the sale and the rights of plaintiff should be transferred to the fund realized. Carmichael v. Foster, 69 Ga. 372.

[c] **Void sales** cannot be ratified by relation or so as to bind anyone not a party to the ratification. Scott v. Gorton, 14 La. 115, 33 AmD 578.

83. See cases infra this note.

[a] **This rule applies to:** (1) Infants. Longworth v. Goforth, Wright (Oh.) 192. (2) Married women. Mitchell v. Dunlap, 10 Oh. 117.

84. Smith v. Worthington, 53 Fed. 977, 4 CCA 130.

85. Limitations generally see Limitations of Actions [25 Cyc 963].

Sale of realty under testamentary authority see supra § 686.

86. Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554; Kerlec v. New Orleans Land Co., 130 La. 111, 57 S 647; Kleinecke v. Woodward, 42 Tex. 311.

[a] **A purchase by the administrator** is not voidable on the ground of actual fraud but on the ground of public policy, and a suit to set aside such a sale is not within a statute limiting actions for relief or against fraud, nor is it an action for the recovery of real property. Potter v. Smith, 36 Ind. 231.

[b] **Suit regarded as bill of review.**—(1) A suit to set aside a sale on the ground of fraud is in substance a bill of review and is barred by a two years' statute relating to bills of review and writs of error. Murchison v. White, 54 Tex. 78. (2) But such an action may be brought within a year after plaintiff becomes of age, although eighteen years after the order attacked. Kalteyer v. Wipff, 92 Tex. 673, 52 SW 63.

[c] **Statute not applicable.**—Chancery Act § 19, giving a defendant not served three years within which to vacate a decree against him, is not applicable to a petition by an administratrix to sell land for the payment of debts. In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712].

[d] **General statute of limitations not applicable.**—In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712].

87. McMichael v. Craig, 105 Ala. 382, 16 S 823; Davidson v. Koehler, 76 Ind. 398; McCullough v. Minor, 2 La. Ann. 466; Jones v. Billstein, 28 Wis. 221.

[a] **Even though the proceedings were void,** he may be so protected. McMichael v. Craig, 105 Ala. 382, 16 S 883.

88. U. S.—Clay v. Field, 115 U. S. 260, 6 SCt 36, 29 L. ed. 375; Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615 (Utah statute).

Cal.—Dennis v. Bint, 122 Cal. 39, 68 AmSR 17; Staples v. Connor, 79 Cal. 14, 21 P 380; Tatum v. Iowa Water Co., 34 Cal. A. 55, 166 P 817.

Ind.—Barton v. Kimmerley, 165 Ind. 609, 76 NE 250, 112 AmSR 252; Armstrong v. Hufty, 156 Ind. 606, 55 NE 443, 60 NE 1080; Palmerton v. Hoop, 131 Ind. 23, 30 NE 874; Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876; Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

Kan.—Byerly v. Eadie, 95 Kan. 400, 148 P 757; O'Keefe v. Behrens, 73 Kan. 469, 85 P 555, 8 LRANS 354, 9 AnnCas 867.

La.—Thibodaux v. Barrow, 129 La. 395, 56 S 339; Landry v. Laplos, 113 La. 697, 37 S 606; Sicard v. Gumbel, 112 La. 483, 36 S 502.

Mich.—Chandler v. Clark, 151 Mich. 159, 115 NW 65; Watson v. Lion Brewing Co., 61 Mich. 595, 28 NW 726.

Minn.—Hanson v. Nygaard, 105 Minn. 30, 117 NW 235, 127 AmSR

void [89] as well as to those which are merely irregular and voidable;[90] but other statutes limiting the time for attacking administration sales have been regarded inapplicable to void sales.[91] A statute barring attacks on sales already made in two years from the passage of the act has been held good,[92] and it has even been held that a statute expressed in general terms applies to sales already made, at least where time remains after the passage of the act to commence the action.[93] As to the time when the statutes of limitation begin to run the rules in the several states vary.[94] The running of the statute is not usually prevented by the fact that the administration has not been closed,[95] or that dower has not been assigned to the widow, when she is not in possession;[96] neither will ignorance of the facts suspend the statute when there was no concealment and the facts were readily ascertainable,[97] unless the failure to discover the facts is satisfactorily explained,[98] or unless fraud is relied on, in which case the time runs from the discovery of the fraud.[99]

[§ 1654] **b. Effect of Laches.** Apart from any statute limiting the time within which proceedings to set aside a sale must be instituted, the rule is that such proceedings must be brought within a reasonable time, to be determined by the facts of each particular case.[1] Accordingly one may lose

523; Streeter v. Wilkinson, 24 Minn. 288.

Miss.—Jordan v. Bobbitt, 91 Miss. 1, 45 S 311; Shannon v. Summers, 86 Miss. 619, 38 S 345.

Nebr.—Brandon v. Jensen, 74 Nebr. 569, 104 NW 1054.

Wis.—Keilly v. Severson, 149 Wis. 251, 135 NW 875; Jones v. Billstein, 28 Wis. 221.

[a] **It is competent for the legislature to provide** a reasonable limit within which such sales may be attacked for omissions or irregularities in the proceedings. Rice v. Dickerman, 47 Minn. 527, 50 NW 698.

[b] **Construction and effect of statutes.**—Clay v. Field, 115 U. S. 260, 6 SCt 36, 29 L. ed. 375 (Mississippi statute); Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735 (California statute); Kerlec v. New Orleans Land Co., 130 La. 111, 57 S 647; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Webb v. Keller, 39 La. Ann. 55, 1 S 423; Valderes v. Bird, 10 Rob. (La.) 396; Egan v. Grece, 79 Mich. 629, 45 NW 74; Watson v. Lion Brewing Co., 61 Mich. 595, 28 NW 726; Shapley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Summers v. Brady, 56 Miss. 10; Hall v. Wells, 54 Miss. 289; Morgan v. Hazlehurst Lodge, 53 Miss. 665; Betts v. Shotton, 27 Wis. 667.

[c] **Where the administrator was himself the purchaser,** the statute does not begin to run until the right to sue accrues to the heirs. Gray v. Quicksilver Min. Co., 68 Fed. 677.

[d] **The Spanish laws** formerly prevailing within the Louisiana Purchase prevented an attack after four years. McNair v. Hunt, 5 Mo. 300.

89. U. S.—Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735 [aff 16 F. Cas. No. 9,393, 3 Sawy. 206] (California statute).

Cal.—Ganahl v. Soher, 68 Cal. 95, 8 P 650; Harlan v. Peck, 33 Cal. 515, 91 AmD 653; Tatum v. Iowa Water Co., 34 Cal. A. 55, 166 P 817.

Ind.—Barton v. Kimmerley, 165 Ind. 609, 76 NE 250, 112 AmSR 252; Hawley v. Zigerly, 135 Ind. 248, 34 NE 219; Davidson v. Bates, 111 Ind. 391, 12 NE 687; White v. Clawson, 79 Ind. 188; Vail v. Halton, 14 Ind. 344; Vancleave v. Milliken, 13 Ind. 105; Hampton v. Murphy, 45 Ind. A. 513, 86 NE 436, 88 NE 876.

Kan.—O'Keefe v. Behrens, 73 Kan. 469, 85 P 555, 8 LRANS 354, 9 Ann Cas 867.

Mass.—Holmes v. Beal, 9 Cush. 223.

Mich.—Kammerer v. Morlock, 125 Mich. 320, 84 NW 319; Toll v. Wright, 37 Mich. 93.

Minn.—Rice v. Dickerman, 47 Minn. 527, 50 NW 698; Spencer v. Sheehan, 19 Minn. 338.

Tex.—Baker v. De Zavalla, 1 Tex. Unrep. Cas. 621.

[a] **Such a statute is not applicable:** (1) Where the sale is void and the purchaser has never been in possession. Gage v. Downey, 94 Cal. 241, 29 P 635. (2) Where the sale was made by one appointed as public administrator, who, without taking oath or giving bond, assumed the administration. Staples v. Connor, 79 Cal. 14, 21 P 380.

90. Axton v. Carter, 141 Ind. 672, 39 NE 546; Thibodaux v. Barrow, 129 La. 395, 56 S 339; Landry v. Laplos, 113 La. 697, 37 S 606; Pearson v. Burditt, 26 Tex. 157, 80 AmD 649.

[a] **Sales to the representative himself** are within the statutes. Axton v. Carter, 141 Ind. 672, 39 NE 546; Fisher v. Bush, 133 Ind. 315, 32 NE 924.

91. Iowa.—Boyles v. Boyles, 37 Iowa 592.

La.—Lacroix v. Crane, 113 La. 227, 62 S 657.

Me.—Chadbourne v. Rackliff, 30 Me. 354.

Mich.—Toll v. Wright, 37 Mich. 93; Millar v. Babcock, 29 Mich. 526.

Nebr.—Holmes v. Mason, 80 Nebr. 448, 114 NW 606 [reh den 80 Nebr. 454, 115 NW 770]; Brandon v. Jensen, 74 Nebr. 569, 104 NW 1054.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 983 [foll Martin v. White, 53 Or. 319, 100 P 290].

92. Rice v. Dickerman, 47 Minn. 527, 50 NW 698; Streeter v. Wilkinson, 24 Minn. 288.

93. Beal v. Nason, 14 Me. 344. But see Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 AmD 372 (statute applicable only to sales made subsequent to its enactment).

94. See cases infra this note.

[a] **In California** Code Civ. Proc. § 1573 provides that an action for the recovery of real estate sold by the administrator must be commenced within three years after the settlement of his final account, and it is held that the statute commences to run at the expiration of a reasonable time for obtaining a settlement after the estate is in condition to be closed. Dennis v. Bint, 122 Cal. 39, 54 P 378, 68 AmSR 17.

[b] **In Indiana** the special statute does not begin to run until the sale is confirmed, but the general statute relating to actions to recover possession of real estate begins to run, when the sale is void, from the time the purchaser takes possession under his certificate. L'Hommedieu v. Cincinnati, etc., R. Co., 120 Ind. 435, 22 NE 125.

[c] **The Kansas statute** saves the right of minor heirs for a period of two years after the disability of infancy has been removed. Thompson v. Burge, 60 Kan. 549, 57 P 1101, 72 AmSR 369.

[d] **In Wisconsin** the right of action of the heirs accrues as soon as the grantee in the representative's deed goes into possession, and the commencement of the running of the statute is not postponed until the settlement of the estate. Jones v. Billstein, 28 Wis. 221 [foll Jones v. Lathrop, 28 Wis. 339].

95. Bland v. Fleeman, 58 Ark. 84, 23 SW 4; Burney v. Ludeling, 41 La. Ann. 627, 6 S 248.

96. Agan v. Shannon, 103 Mo. 661, 15 SW 757.

97. Bland v. Fleeman, 58 Ark. 84, 25 SW 4; McGauhey v. Brown, 46 Ark. 25; Dennis v. Bint, 122 Cal. 39, 54 P 378, 68 AmSR 17; White v. Moss, 67 Ga. 89.

98. Dennis v. Bint, 122 Cal. 39, 54 P 378, 68 AmSR 17.

99. Cowin v. Toole, 31 Iowa 513.

1. U. S.—Balkham v. Woodstock Iron Co., 154 U. S. 177, 14 SCt 1010, 38 L. ed. 953 [aff 43 Fed. 648, 11 LRA 230]; Stark v. Osborn, 221 Fed. 557, 137 CCA 259; Eames v. Manly, 117 Fed. 387, 54 CCA 561.

Ala.—Rainey v. McQueen, 121 Ala. 191, 25 S 920; James v. James, 55 Ala. 525.

Ark.—Stuckey v. Lockard, 87 Ark. 232, 112 SW 747; Griffin v. Caldwell, 72 Ark. 451, 81 SW 611.

Cal.—Rountree v. Montague, 30 Cal. A. 170, 157 P 623.

Ga.—Broadhurst v. Hill, 137 Ga. 833, 74 SE 422; Word v. Davis, 107 Ga. 780, 33 SE 691; Etheredge v. Slayton, 94 Ga. 496, 19 SE 818, 99 Ga. 138, 25 SE 24; Candler v. Clarke, 90 Ga. 550, 16 SE 645; Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Grubbs v. McGlawn, 39 Ga. 672; Smith v. Granberry, 39 Ga. 381, 99 AmD 464; Newton v. Roe, 33 Ga. 163; Flanders v. Flanders, 23 Ga. 249, 68 AmD 523; Beckham v. Newton, 21 Ga. 187; Peterman v. Watkins, 19 Ga. 153.

Ill.—Wandschneider v. Wandschneider, 282 Ill. 286, 118 NE 486; McMeen v. Grant, 268 Ill. 64, 108 NE 677; Therens v. Therens, 267 Ill. 592, 108 NE 712; Stobaugh v. Irons, 243 Ill. 55, 90 NE 272; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180; Cassell v. Joseph, 184 Ill. 378, 56 NE 413; Robb v. Howell, 180 Ill. 177, 54 NE 324; Goodbody v. Goodbody, 95 Ill. 456; Kellogg v. Wilson, 89 Ill. 357; Sloan v. Graham, 85 Ill. 26.

Ind.—Shaw v. Swift, 1 Ind. 565.

Ky.—Spurlock v. Spurlock, 161 Ky. 248, 170 SW 605.

La.—Blum v. Haas, 125 La. 18, 51 S 53.

Mass.—Ives v. Ashley, 97 Mass. 198.

Mich.—Egan v. Grece, 79 Mich. 629, 45 NW 74.

Nebr.—Foltz v. Maxwell, 100 Nebr. 713, 161 NW 254.

N. J.—Smith v. Drake, 23 N. J. Eq. 302.

N. Y.—Geyer v. Snyder, 69 Hun 115, 22 NYS 200 [aff 140 N. Y. 394, 35 NE 784].

N. C.—Harris v. Brown, 123 N. C. 419, 31 SE 877.

Oh.—Brickman v. Shale, 30 Oh. Cir. Ct. 372.

Or.—Loomis v. Rosenthal, 34 Or. 585, 57 P 55.

Pa.—Irwin v. Guthrie, 198 Pa. 267, 47 A 992; Jacoby v. McMahon, 189 Pa. 1, 41 A 1119; Grindrod's Est., 140 Pa. 161, 21 A 259; Fink v. Miller, 19 Pa. Super. 556.

Tenn.—Haynes v. Swann, 6 Heisk. 560.

Tex.—Whittaker v. Thayer, 101 Tex. 456, 108 SE 1157.

Wash.—Lewis v. Hill, 61 Wash. 304, 112 P 373.

"The proceeding of administration

by his own laches the right to attach a sale, as by remaining silent until the rights of third persons have intervened,[2] until the rights of creditors have been lost by lapse of time,[3] or until the purchaser has made valuable improvements on the land.[4] So also one may be estopped by remaining silent for a long time and receiving benefits from the sale,[5] and it has been held that, although it was improper for the probate court to order a sale of a homestead without protecting the interest of minor children, the sale would not be set aside at the suit of the children commenced after they had reached their majority, and after their homestead rights had ceased.[6]

[§ 1655] **4. Collateral Attack**[7]**—a. In General.** A void order of sale is open to collateral attack.[8]

was in the nature of a proceeding in rem, and in a sense the appellants were parties thereto. Everything they now complain of appeared upon the public records. There was no fraud, no deception, no concealment, nor were the matters of which complaint is made of such a character that they would ordinarily remain secret. Under these circumstances it is a misapplication of terms to say that the grounds of action were discovered years after they arose and appeared upon the records of the court. Discovery as employed in a statute or equitable rule of limitations and knowledge are not convertible terms, nor does the former mean the result of a resort at leisure to known sources of information. The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches. The grounds of attack against the validity of the orders of sale and the executor's deeds were matters of record. They had notice of the pendency of the administration proceedings sufficient to excite their attention and to put them on guard as to the course thereof. Under these circumstances they must be deemed to have had actual knowledge of what the records showed." Williamson v. Beardsley, 137 Fed. (U. S.) 467, 470, 69 CCA 615.

[a] **Delay held unreasonable.**—The following periods of delay have been held so unreasonable as to preclude relief: (1) Four years. Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056; Lewis v. Hill, 61 Wash. 304, 112 P 373. (2) A little less than five years. Williams v. Rhodes, 81 Ill. 571. (3) Five years. Thibodaux v. Barrow, 129 La. 395, 56 S 339. (4) Seven years. Slayton v. Etheredge, 99 Ga. 138, 25 SE 24; Etheredge v. Slayton, 94 Ga. 496, 19 SE 818; Candler v. Clarke, 90 Ga. 550, 16 SE 645. See also Lundy v. Lundy, 141 Ga. 387, 81 SE 129 (seven years sufficient as to persons sui juris during the entire period, but not as to infants who sued within seven years after attaining majority). (5) Thirteen years. Fuller v. Little, 59 Ga. 338; Geyer v. Snyder, 69 Hun 115, 23 NYS 200 [aff 140 N. Y. 394, 35 NE 784]. (6) Eighteen years after the admission of the will to probate, nearly six and one-half years from the entry of the orders on which in part the orders of sale were based, and more than four and one-half years after the order of sale in one case and five years in the other. Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615 (attack by nonresidents). (7) Nineteen years. Goodbody v. Goodbody, 95 Ill. 456. (8) Twenty years. Stobaugh v. Irons, 243 Ill. 55, 90 NE 272; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180. (9) Twenty-two years. Blum v. Haas, 125 La. 18, 51 S 53. (10) Twenty-four years. Newton v. Roe, 33 Ga. 163. (11) Twenty-five years. Verdun v. Barr, 253 Ill. 120, 97 NE 239. (12) Twenty-six years. Egan v. Grece, 79 Mich. 629, 45 NW 74. (13) Twenty-eight years. Lindsey v. Fabens, 189 Mass. 329, 75 NE 623. (14) Thirty years. Brickman v. Shale, 30 Oh. Cir. Ct. 372. (15) Thirty-years after the sale and seven years after an infant heir attained his majority. McMeen v. Grant, 268 Ill. 64, 108 NE 677. (16) Nearly thirty-two years. Griffin v. Caldwell, 72 Ark. 451, 81 SW 611.

[b] **Delay not sufficient to defeat right.**—(1) A delay of six years is not unreasonable, where some of the heirs were nonresidents, some were invalids, and the others minors, and the facts were not discovered until a few days before the suit was commenced. Ingalls v. Rowell, 149 Ill. 163, 36 NE 1016. (2) Nineteen years' delay is not fatal where a life estate existed for sixteen years, and a remainderman was under disability and knew nothing as to the nature of the sale for several years after his estate fell in. Kiskaddon v. Dodds, 21 Pa. Super. 351.

[c] **When lapse of time will not mature title.**—Mere lapse of time will not mature title in a purchaser of a land certificate where he did not pay the price or give security therefor, where there has been no confirmation and the certificate has not been located. Harris v. Brower, 3 Tex. Civ. A. 649, 22 SW 758.

[d] **The analogy of the statute of limitations** (1) will be followed. Candler v. Clarke, 90 Ga. 550, 16 SE 645; Musselman v. Eshleman, 10 Pa. 394, 51 AmD 493. (2) Where lapse of time is relied upon it must be pleaded and based on some statute of limitations. Morgan v. Wattles, 69 Ind. 260.

[e] **Infants** notified of the proceedings are not estopped by acquiescence for several years where they have taken no benefits. Harrison v. Harrison, 106 N. C. 282, 11 SE 356.

[f] **Ignorance of the law will not excuse delay.**—Word v. Davis, 107 Ga. 780, 33 SE 691.

2. U. S.—Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615.

Ark.—Griffin v. Caldwell, 72 Ark. 451, 81 SW 611.

Ga.—Lundy v. Lundy, 141 Ga. 387, 81 SE 129; Jones v. Rountree, 96 Ga. 230, 23 SE 311; Fuller v. Little, 59 Ga. 338.

Ill.—Verdun v. Barr. 253 Ill. 120, 97 NE 239; Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056.

Ky.—Disman v. Flippin, 116 SW 740.

La.—Massey's Succ., 46 La. Ann. 126, 15 S 6; Benedict v. Bonnot, 39 La. Ann. 972, 3 S 223.

Mass.—Lindsey v. Fabens, 189 Mass. 329, 75 NE 623.

Mo.—Robbins v. Boulware, 190 Mo. 33, 88 SW 674, 109 AmSR 746.

N. C.—Hawkins v. Simmons, 41 N. C. 16.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

Tex.—Halbert v. Carroll, (Civ. A.) 25 SW 1102.

3. Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861.

4. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 S 635; McMeen v. Grant, 268 Ill. 64, 108 NE 677; Evans v. Snyder, 64 Mo. 516; In re Gillespie, 10 Watts (Pa.) 300.

[a] **Person under disability.**—(1) A married woman who received no purchase money is not estopped by permitting the purchaser to make improvements. Throckmorton v. Pence, 121 Mo. 50, 25 SW 843. (2) The same is true with respect to an infant. Jones v. Woodstock Iron Co., 95 Ala. 551, 10 S 635.

[b] **Where the representative becomes the purchaser** (1) an heir is not estopped by permitting him to make improvements. Potter v. Smith, 36 Ind. 231. (2) But in such case the representative is to be compensated for his improvements. Smith v. Drake, 23 N. J. Eq. 302.

5. Davis v. Evans, 62 Ala. 401; Garrett v. Lynch, 45 Ala. 204; Jacoby v. McMahon, 174 Pa. 133, 34 A 286; Sager v. Mead, 171 Pa. 349, 33 A 355; Hudson v. Jurnigan, 39 Tex. 579.

Accepting and retaining benefits generally see supra § 1650.

6. Denk v. Fiel, 249 Ill. 424, 94 NE 672 (where a widow refuses to allow decedent's children to live with her on the homestead after the death of the father, the remedy of the children who have attained their majority is an action for damages against the widow, and not an action to set aside a probate sale of the homestead to pay decedent's debts, although such sale was made during the minority of the children).

7. Sale made after termination of authority of representative see infra § 1659.

8. Ala.—Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.

Ark.—Smith v. Pinnell, 107 Ark. 185, 154 SW 497.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ind.—Guy v. Pierson, 21 Ind. 18.

Iowa.—Long v. Burnett, 13 Iowa 28, 81 AmD 420.

Ky.—Bennett v. Owen, 183 Ky. 233, 208 SW 815; Fraize v. Walls, 180 Ky. 168, 202 SW 310.

Minn.—Cater v. Steeves, 95 Minn. 225, 103 NW 885.

Mo.—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072; Stark v. Kirchgraber, 186 Mo. 633, 85 SW 868, 105 AmSR 629.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009; Carraway v. Lassiter, 139 N. C. 145, 54 SE 968.

N. D.—Shane v. Peoples, 25 N. D. 188, 141 NW 737.

Tex.—Ross v. Martin, (Civ. A.) 128 SW 718.

[a] **This rule has been applied.**—(1) Where necessary parties were not cited. Card v. Finch, 142 N. C. 140, 54 SE 1009. (2) Where the homestead was sold. Ross v. Martin, (Tex. Civ. A.) 128 SW 718. (3) Where a special administrator was licensed to sell, although there was no authority to grant such power to a special administrator. Long v. Burnett, 13 Iowa 28, 81 AmD 420. (4) Where the application for the sale was not made by a "creditor or other person interested in the estate" as required by the statute. Stark v. Kirchgraber, 186 Mo. 633, 85 SW 868, 105 AmSR 629.

[b] **Where no notice was given an attaching creditor of an heir's interest** in the land of his ancestor of a proceeding by the latter's administrator to sell the land to pay debts, such creditor was entitled to attack the administrator's sale collaterally in a suit to subject the land to the creditor's judgment. Mullin v. White, 134 Iowa 681, 112 NW 164.

[c] **A defect of jurisdiction apparent on the face of the record** will sustain an action to vacate the proceedings. Guy v. Pierson, 21 Ind. 18.

[d] **Whenever the records of a probate court are silent** or wanting in material particulars as to the essentials of a valid sale of real estate, the same may be attacked in a collateral action. Cater v. Steeves, 95 Minn. 225, 103 NW 885.

[e] **A purchaser claiming under a conveyance by an heir is not estopped**

If, however, the jurisdiction of the court has properly attached, the order of sale is not void, whatever may be the errors and irregularities in the proceedings,[9] and the general rule is that there can be no collateral attack on such an order except for want of jurisdiction.[10] Furthermore it has been

from denying the validity of a subsequent sale of lands of the decedent in proceedings void for want of jurisdiction. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.

[f] **Requisites of petition.**—In a collateral attack on a county court judgment and administrator's sale thereunder, the petition should state not only that plaintiff was not served with notice, but also that the judgment record does not show such service. Shane v. Peoples, 25 N. D. 188, 141 NW 737.

[g] **Fraud.**—Even where fraud is alleged in the presentation of an administrator's petition to sell land, a sale thereunder will not be set aside on collateral attack without an allegation and proof that the purchaser at such sale was a party to the fraud. Shane v. Peoples, 25 N. D. 188, 141 NW 737.

9. U. S.—Kretsinger v. Brown, 165 Fed. 612, 91 CCA 450 [certiorari den 214 U. S. 527, 29 SCt 704, 53 L. ed. 1068].

Ala.—Conniff v. McFarlin, 178 Ala. 160, 59 S 472; Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465; De Bardelaben v. Stoudenmire, 48 Ala. 643; Spragins v. Taylor, 48 Ala. 520; Satcher v. Satcher, 41 Ala. 26, 91 AmD 498; Perkins v. Winter, 7 Ala. 855; Wyman v. Campbell, 6 Port. 219, 31 AmD 677.

Ariz.—Otero v. Otero, 11 Ariz. 260, 90 P 601.

Ark.—Branstetter v. Branstetter, 115 Ark. 154, 170 SW 989; Apel v. Kelsey, 47 Ark. 413, 2 SW 102.

Cal.—Stuart v. Allen, 16 Cal. 473, 76 AmD 551; Tatum v. Iowa Water Co., 34 Cal. A. 55, 166 P 817.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Fla.—Price v. Winter, 15 Fla. 66.

Ga.—Fordham v. Duggan, 147 Ga. 610, 95 SE 3; Martin v. Dix, 134 Ga. 481, 68 SE 80; Coggins v. Griswold, 64 Ga. 323.

Ill.—Sheahan v. Madigan, 275 Ill. 372, 114 NE 135; Harris v. Lester, 80 Ill. 307.

Iowa.—Cheney v. McColloch, 104 Iowa 183, 73 NW 580; Morrow v. Weed, 4 Iowa 77, 66 AmD 122.

Kan.—Lake v. Hathaway, 75 Kan. 391, 89 P 666; Fleming v. Bale, 23 Kan. 88.

Ky.—Fraize v. Walls, 180 Ky. 168, 202 SW 310; Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

La.—Hibernia Bank, etc., Co. v. Whitney, 122 La. 890, 48 S 314.

Mo.—Smith v. Black, 231 Mo. 681, 132 SW 1129.

Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 290, 99 P 847, 129 AmSR 645 [cit Cyc].

N. C.—Rackley v. Roberts, 147 N. C. 201, 60 SE 975; McIver v. Stephens, 101 N. C. 255, 7 SE 695.

N. D.—Cathro v. McArthur, 30 N. D. 337, 339, 152 NW 686 [cit Cyc].

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; Smith v. Whiting, 55 Or. 393, 106 P 791.

S. D.—Richelson v. Mariette, 34 S. D. 573, 149 NW 553, AnnCas1917A 883; Blackman v. Mulhall, 19 S. D. 534, 104 NW 250.

Tenn.—Ridgely v. Bennett, 13 Lea 210; Norville v. Coble, 1 Lea 465.

Tex.—Daimwood v. Driscoll, (Civ. A.) 151 SW 621; Stephenson v. Wiess, (Civ. A.) 145 SW 287.

Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68.

Wash.—Furth v. U. S. Mortgage, etc., Co., 13 Wash. 73, 42 P 523.

"It appears from the record that the County Court of Austin County had jurisdiction to grant the letters of administration to De Cordova and also to order the sale of the land. Such orders of the county court are not subject to collateral attack." Holland v. Nance, 102 Tex. 177, 185, 114 SW 346 [rev (Civ. A.) 107 SW 102]. To same effect Crawford v. McDonald, 88 Tex. 626, 33 SW 325; Martin v. Robinson, 67 Tex. 368, 3 SW 550.

[a] **Requisites to jurisdiction.**—(1) The sole requisite to establish jurisdiction and protect an order of sale from collateral attack is the presenting of a petition setting forth a statutory ground for the sale. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; De Bardelaben v. Stoudenmire, 48 Ala. 643; Watson v. Collins, 37 Ala. 587; Doe v. Riley, 28 Ala. 164, 65 AmD 334; Perkins v. Winter, 7 Ala. 855. (2) Where, however, minors are interested, there must be proof of the necessity of the sale by deposition, as in chancery proceedings. Thompson v. Boswell, 97 Ala. 570, 12 S 809. (3) But the want of such proof has been held to be a mere irregularity. Field v. Goldsby, 28 Ala. 218, 65 AmD 341. (4) Incompetency of the witnesses so examined cannot be proved to defeat the sale if the order of sale contains a recital of proper proof. Kent v. Mansel, 101 Ala. 334, 14 S 489.

[b] **The existence of an actual unpaid probated indebtedness** gives the probate court jurisdiction to sell lands, and pass a title which will be valid as against collateral attack. Washington v. Govan, 73 Ark. 612, 84 SW 792.

[c] **Where a tract of land has lost its homestead character,** and becomes a part of the assets of the deceased owner's estate, the heirs of the owner cannot attack in a collateral action the proceedings for the sale thereof for the payment of debts. Dignowity v. Baumblatt, 38 Tex. Civ. A. 363, 85 SW 834.

[d] **Irregularities not rendering sale void.**—(1) Failure to make an heir a party. Haynes v. Simpson, 143 Ala. 554, 39 S 352. (2) That the sale was not for a purpose authorized by law. Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145. (3) A delay of fourteen years after the grant of letters of administration in making application for an order to sell land to pay debts, where the rights of innocent parties have intervened. Kelley v. Laconia Levee Dist., 74 Ark. 202, 85 SW 249, 87 SW 638. (4) The fact that ten years elapsed during which no order was made by a probate court in the administration of a decedent's estate before the order of sale. Boslet v. Thomas, 35 Tex. Civ. A. 144, 80 SW 115. (5) The lack of proof of an entry in the record books of the probate court of an order of sale, if there is some paper filed in such court indicating that the sale has been approved. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

10. U. S.—Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34; Shaffey v. Davis Colliery Co., 219 Fed. 465, 135 CCA 177 [aff 204 Fed. 337]; Seefeld v. Duffer, 179 Fed. 214; 103 CCA 32 [certiorari den 220 U. S. 616, 31 SCt 720, 55 L. ed. 611]; McCants v. Peninsular Land Co., 68 Fed. 66, 15 CCA 225; Garrett v. Boeing, 68 Fed. 51, 15 CCA 209; May v. Logan County, 30 Fed. 250.

Ala.—Alvarez v. Warner, 77 S 344; Lee v. Lee, 196 Ala. 522, 72 S 24; Crowder v. Doe, 193 Ala. 470, 68 S 1005; Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465; King v. Gilreath, 154 Ala. 129, 45 S 89; Haynes v. Simpson, 143 Ala. 554, 39 S 352; Moore v. Cottingham, 113 Ala. 148, 20 S 994, 59 AmSR 100; Hatcher v. Clifton, 33 Ala. 301; King v. Kent, 29 Ala. 542; Cox v. Davis, 17 Ala. 714, 52 AmD 199.

Ark.—Washington v. Govan, 73 Ark. 612, 84 SW 792; George v. Norris, 23 Ark. 121; Sturdy v. Jacoway, 19 Ark. 499.

Cal.—Burris v. Kennedy, 108 Cal. 331, 41 P 458; Halleck v. Moss, 22 Cal. 266; Haynes v. Meeks, 20 Cal. 288; In re Spriggs, 20 Cal. 121; Rountree v. Montague, 30 Cal. A. 170, 157 P 623; Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Colo.—Kavanagh v. Hamilton, 53 Colo. 157, 171, 125 P 512, AnnCas 1914B 76 [cit Cyc].

Conn.—Brown v. Lanman, 1 Conn. 467; Richardson v. Frink, 2 Root 270.

Del.—Roach v. Martin, 1 Harr. 548, 28 AmD 546; Martin v. Roach, 1 Harr. 477; Van Dyke v. Johns, 1 Del. Ch. 93, 12 AmD 76.

Ga.—Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666; McDade v. Burch, 7 Ga. 559, 50 AmD 407.

Ill.—Sheahan v. Madigan, 275 Ill. 372, 114 NE 135; Frothingham v. Petty, 197 Ill. 418, 64 NE 270; Bradley v. Droue, 187 Ill. 175, 58 NE 304, 79 AmSR 214; Bostwick v. Skinner, 80 Ill. 147; Moffitt v. Moffitt, 69 Ill. 641; Wimberly v. Hurst, 33 Ill. 166, 83 AmD 295; Stow. v. Kimball, 28 Ill. 93; Iverson v. Loberg, 26 Ill. 179, 79 AmD 364.

Ind.—Watkins v. Lewis, 153 Ind. 648, 55 NE 83; Denton v. Arnold, 151 Ind. 188, 51 NE 240; Pepper v. Zahnsinger, 94 Ind. 88; Gavin v. Graydon, 41 Ind. 559; Williams v. Sharp, 2 Ind. 101.

Iowa.—Cheney v. McColloch, 104 Iowa 183, 73 NW 580.

Kan.—J. B. Watkins Land Mortg. Co. v. Mullen, 62 Kan. 1, 61 P 385, 84 AmSR 372.

Ky.—Fraize v. Walls, 180 Ky. 168, 202 SW 310; Muldrow v. Fox, 2 Dana 74; Smith v. Hardesty, 83 SW 646, 26 KyL 1266.

La.—Anger's Succ., 38 La. Ann. 492; Barbee v. Perkins, 23 La. Ann. 331.

Me.—Maddocks v. Keene, 114 Me. 469, 96 A 785; Lebroke v. Damon, 89 Me. 113, 35 A 1028.

Mass.—Thayer v. Winchester, 133 Mass. 447; Perkins v. Fairfield, 11 Mass. 227.

Mich.—Long v. Landman, 118 Mich. 174, 76 NW 374; Howard v. Moore, 2 Mich. 226.

Mo.—Blickensderffer v. Hanna, 231 Mo. 93, 132 SW 678.

Nebr.—Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

N. H.—Merrill v. Harris, 26 N. H. 142, 57 AmD 359.

N. Y.—Forbes v. Halsey, 26 N. Y. 53; Jackson v. Crawfords, 12 Wend. 533; Jackson v. Robinson, 4 Wend. 436.

N. C.—Harris v. Bennett, 160 N. C. 339, 76 SE 217; Barefoot v. Musselwhite, 153 N. C. 208, 69 SE 71; Tyson v. Belcher, 102 N. C. 112, 9 SE 634; Ward v. Lowndes, 96 N. C. 367, 2 SE 591.

N. D.—Cathro v. McArthur, 30 N. D. 337, 152 NW 686.

Oh.—Calkins v. Johnston, 20 Oh. St. 539; Benson v. Cilley, 8 Oh. St. 604; Richards v. Skiff, 8 Oh. St. 586; Cadwallader v. Evans, 1 Disn. 385, 12 Oh. Dec. (Reprint) 811.

Or.—Stadelman v. Miner, 83 Or. 348, 155 P 708, 163 P 585, 993; Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; Davis v. Magnes, 58 Or. 69, 113 P 1; Smith v. Whiting, 55 Or. 393, 106 P 791.

Pa.—Dixcy v. Laning, 49 Pa. 143; Unangst v. Kraemer, 8 Watts & S. 391; Fox v. Winters, 4 Rawle 174; McPherson v. Cunliff, 11 Serg. & R. 422, 14 AmD 642; Dull v. Slater, 31 Pa. Super. 488.

S. C.—Gates v. Irick, 2 Rich. 593.

S. D.—Richelson v. Mariette, 34 S. D. 573, 149 NW 553, AnnCas1917A 883.

considered that jurisdiction will be conclusively presumed unless the record itself negatives its existence.[11] A stranger to the title may raise no objection not going to the jurisdiction,[12] as the title of the purchaser can be affected by no other defect.[13] The sale itself is likewise protected from collateral attack unless the proceedings are void, either for want of jurisdiction or from a failure to comply with some statutory provision expressly made essential to the validity of the sale.[14] Thus, where an order confirming a sale of real estate to pay debts recites that the sale was legally made and fairly conducted, it must be presumed on collateral attack that the probate court had before it proof showing that the provisions of the statute, including the requirement of the publication of the notice in the proper county, had been complied with.[15] And it seems that a sale cannot be collaterally attacked because not made by the person licensed to make it, the confirmation curing the defect, at least where the sale was under color of authority.[16]

[§ 1656] **b. What Attacks Are Collateral.** All attacks of an indirect nature are collateral;[17] and

Tex.—Holland v. Nance, 102 Tex. 177, 114 SW 346; Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852; George v. Watson, 19 Tex. 354; Burdett v. Sisbee, 15 Tex. 604; Wilkin v. Simmons, (Civ. A.) 151 SW 1145; Salas v. Munday, 59 Tex. Civ. A. 407, 125 SW 633; Spikes v. Howard, 51 Tex. Civ. A. 389, 111 SW 792; Dignowity v. Baumblatt, 38 Tex. Civ. A. 363, 85 SW 834.

Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68; Peirce v. Graham, 85 Va. 227, 7 SE 189.

Wis.—Jackson v. Astor, 1 Pinn. 137, 39 AmD 281.

11. Verdun v. Barr, 253 Ill. 120, 97 NE 239; Shane v. Peoples, 25 N. D. 188, 141 NW 737; Salas v. Mundy, 59 Tex. Civ. A. 407, 125 SW 633; Saunders v. Terry, 116 Va. 495, 82 SE 68.

[a] **Illustrations.**—(1) Upon collateral attack on an executor's sale of real estate to pay debts, where the executor failed to file a report of the sale before the first day of the term of court next succeeding the sale, and there was sufficient time between filing the report and confirmation of the sale for notice to be given to the parties in interest, it will be presumed that such notice was given. Verdun v. Barr, 253 Ill. 120, 97 NE 239. (2) While probate courts may not sell lands of a deceased person without the citation directed by statute on collateral attack it will be presumed that due service was obtained. Daimwood v. Driscoll, (Tex. Civ. A.) 151 SW 621.

[b] **Presumption that issues passed on.**—In a collateral attack on county court proceedings connected with an administrator's sale, the presumption is that the county court passed upon a question of heirship, where the petition in the county court stated that the petitioner was the sole and only heir at law. Shane v. Peoples, 25 N. D. 188, 141 NW 737.

12. U. S.—Ballance v. Forsyth, 13 How. 18, 14 L. ed. 32 [aff 9 F. Cas. No. 4,951, 6 McLean 562]; Burnham v. Hewey, 4 F. Cas. No. 2,175, 1 Hask. 372.

Ala.—Doe v. Riley, 28 Ala. 164, 65 AmD 334.

Ark.—Montgomery v. Johnson, 31 Ark. 74; Thorn v. Ingram, 25 Ark. 52.

Cal.—Zilmer v. Gerichten, 111 Cal. 73, 43 P 408; Dennis v. Winter, 63 Cal. 16; Halleck v. Moss, 22 Cal. 266.

Me.—Maddocks v. Keene, 114 Me. 469, 96 A 785.

Nebr.—Trumble v. Williams, 18 Nebr. 144, 24 NW 716.

N. Y.—Rigney v. Coles, 6 Bosw. 479.

N. C.—Overton v. Crawford, 52 N. C. 415, 78 AmD 244.

Pa.—Iddings v. Cairn, 2 Grant 88.

Tex.—Baker v. De Zavalla, 1 Tex. Unrep. Cas. 621.

13. Ala.—Clark v. Bernstein, 49 Ala. 596; Spragins v. Taylor, 48 Ala. 520; Warnock v. Thomas, 48 Ala. 463.

Ark.—Bennett v. Owen, 13 Ark. 177.

Fla.—Price v. Winter, 15 Fla. 66.

Ill.—Moore v. Neil, 39 Ill. 256, 89 AmD 303; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Stow v. Kimball, 28 Ill. 93.

La.—Gurney's Succ., 14 La. Ann. 622.

Protection of bona fide purchasers against defective proceedings see infra § 1703.

14. U. S.—Nash v. Williams, 20 Wall. 226, 22 L. ed. 254.

Ala.—Conniff v. McFarlin, 178 Ala. 160, 59 S 472; Cobb v. Garner, 105 Ala. 467, 17 S 47, 53 AmSR 136; Collins v. Johnson, 45 Ala. 548.

Ark.—Branstetter v. Branstetter, 115 Ark. 154, 170 SW 989; Long v. Hoffman, 103 Ark. 574, 148 SW 245; Kelley v. Laconia Levee Dist. 74 Ark. 202, 85 SW 249, 87 SW 638; Washington v. Govan, 73 Ark. 612, 84 SW 792; Sturdy v. Jacoway, 19 Ark. 499.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ind.—Hoover v. Malen, 83 Ind. 195.

Kan.—Lake v. Hathaway, 75 Kan. 391, 89 P 666; Clevenger v. Figley, 68 Kan. 699, 75 P 1001; Thompson v. Burge, 60 Kan. 549, 57 P 110, 72 AmSR 369; Bryan v. Bauder, 23 Kan. 95; Fleming v. Bale, 23 Kan. 88.

Ky.—McDyer v. Scaggs, 7 KyL 222, 13 Ky. Op. 597.

Mich.—Brown v. Hannah, 152 Mich. 33, 115 NW 980; Upton v. Gerber, 136 Mich. 72, 98 NW 854.

Minn.—Doran v. Kennedy, 122 Minn. 1, 141 NW 851.

Miss.—Johnson v. Cooper, 56 Miss. 608.

Mo.—Higbee v. Billick, 244 Mo. 411, 148 SW 879; Smith v. Black, 231 Mo. 681, 132 SW 1129; Rogers v. Johnson, 125 Mo. 202, 28 SW 635; Presbyterian Church v. McElhinney, 61 Mo. 540; Rugle v. Webster, 55 Mo. 246; Tutt v. Boyer, 51 Mo. 425.

N. J.—Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; Den v. Newark India-Rubber Co., 24 N. J. L. 467.

N. C.—Barefoot v. Musselwhite, 153 N. C. 208, 69 SE 71.

Pa.—Iddings v. Cairns, 2 Grant 88; Dull v. Slater, 31 Pa. Super. 488.

Tex.—Whittaker v. Thayer, 101 Tex. 456, 108 SW 1157; Crawford v. McDonald, 88 Tex. 626, 33 SW 325; Moody v. Butler, 63 Tex. 210; Peterson v. Lowry, 48 Tex. 408; Baker v. De Zavalla, 1 Tex. Unrep. Cas. 621; Daimwood v. Driscoll, (Civ. A.) 151 SW 621; Berryman v. McDonald, 49 Tex. Civ. A. 81, 107 SW 944; Dignowity v. Baumblatt, 38 Tex. Civ. A. 363, 85 SW 834; Boslet v. Thomas, 35 Tex. Civ. A. 144, 80 SW 115.

[a] **The sale itself vests title** and no advantage can be taken collaterally of any defect in the deed. Sturdy v. Jacoway, 19 Ark. 499.

[b] **Where the sale has been confirmed** and the purchaser has paid the price, gone into possession, and made improvements, it cannot be collaterally attacked. Johnson v. Cooper, 56 Miss. 608.

[c] **A failure to enter the confirmation on the minutes** will not open the sale to collateral attack when an indorsement of confirmation appears on the return. Moody v. Butler, 63 Tex. 210.

[d] **A recital in the record of payment** of the purchase price cannot be contradicted. May v. Marks, 74 Ala. 249.

[e] **The using of different baptismal names** in different parts of the record will not avoid the sale when it is plain that the same person was intended. Webb v. Sellers, 27 Tex. 423.

[f] **A sale to the representative himself,** either directly or indirectly, cannot be collaterally attacked. Hoover v. Malen, 83 Ind. 195; Temples v. Cain, 60 Miss. 478; Sumner v. Sessoms, 94 N. C. 371; Beeson v. Beeson, 9 Pa. 279; Dodd v. Templeman, 76 Tex. 57, 13 SW 187; Rutherford v. Stamper, 60 Tex. 447.

[g] **Conveyance to representative by purchaser.**—The fact that on the day an administrator sold land belonging to the estate the purchaser reconveyed it to the administrator in his individual capacity is insufficient to vacate the sale in a collateral proceeding, although it is competent to explain the absence of an order confirming the sale. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

[h] **Sale subject to homestead right.**—The sale of all of several lots, subject to the widow's homestead rights, when only one of the lots is subject thereto, is an irregularity which does not invalidate the sale on a collateral attack. Brown v. Hannah, 152 Mich. 33, 115 NW 980.

[i] **The fact that the deed recites a cash consideration** will not subject the sale to collateral attack, although the statute when in force required all sales of land to be on credit. Berryman v. McDonald, 49 Tex. Civ. A. 81, 107 SW 944.

[j] **A sale of government land to which the decedent had an equitable title,** but to which he had not yet received a patent, to pay decedent's debts, could not be attacked in a collateral action to quiet title, on the ground that the probate court improperly ordered it sold. Doran v. Kennedy, 122 Minn. 1, 141 NW 851.

[k] **Sale of property not belonging to estate.**—An order directing the administration of the estate of one person does not authorize the sale of property of another decedent, and such a sale is void. Woodyard v. Threlkeld, 1 A. K. Marsh. (Ky.) 10.

15. Blackman v. Mulhall, 19 S. D. 534, 104 NW 250. To like effect Phillips v. Denton, 158 N. C. 299, 73 SE 1006; McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

16. See cases infra this note.

[a] **This rule has been applied to:** (1) A sale by one of two administrators, the other refusing to act in the matter. Osman v. Traphagen, 23 Mich. 80. (2) A sale by an administrator's agent. Harris v. Shafer, (Tex. Civ. A.) 21 SW 110.

17. Ala.—Price v. Wilkinson, 10 Ala. 172.

Cal.—Dane v. Layne, 10 Cal. A. 366, 101 P 1067.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.

Ky.—Fraize v. Walls, 180 Ky. 168, 202 SW 310.

La.—Gross' Succ., 4 La. A. (Orleans) 383.

N. D.—Shane v. Peoples, 25 N. D. 188, 141 NW 737.

Or.—Smith v. Whiting, 55 Or. 393, 106 P 791.

Pa.—Markle's Est., 11 Pa. Co. 13.

Tex.—Wright v. McNatt, 49 Tex. 425.

Wash.—Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16.

even bills in equity to set aside a sale have been said to be collateral attacks,[18] or to amount to collateral attacks so far as the purchaser is concerned.[19] A cross bill attacking the sale in a suit to quiet title to the land is a collateral attack,[20] and a bill to impress the land with a trust involves a collateral attack which cannot be sustained where jurisdiction existed.[21] So also an attempt to have an administrator's sale and the decree authorizing and ratifying it declared void is a collateral attack upon such sale and decree,[22] even though made in the form of an action to quiet title.[23] But where plaintiff in an action to quiet title claims under an administration sale, a claim of defendant that the land sold was not that described in plaintiff's complaint is not a collateral attack on the order of sale.[24]

[§ 1657] **5. Grounds for Annulling Sales**[25]**—a. In General.** Where a statute specifies the grounds on which a sale of the property under order of court may be avoided, such a sale can be attacked only on the statutory grounds.[26] The pendency of litigation in regard to the title of land of a decedent and the issuance of a devisavit vel non do not constitute ground for setting aside a judgment of sale, and sale thereunder,[27] but can only be considered in a separate action attacking the sale for fraud by showing that the purchaser was cognizant of the facts and took some unfair advantage of them.[28]

[§ 1658] **b. Want of Authority of Executor or Administrator—(1) Defective Appointment.** Where one is recognized as executor or administrator by the court and licensed to make a sale, the general rule is that the regularity of his appointment cannot be questioned in another proceeding, this rule being based to a certain extent upon the ground that the granting of the license to sell includes an adjudication of the authority of the person applying as representative for the license.[29] There is, however, authority for the view that if the representative was not lawfully appointed the sale is void,[30] and it has also been held that if the record of the probate proceedings does not on its face show facts authorizing a grant of administration, the letters are absolutely void, and so is a sale made in the course of such void administration.[31] The same result follows when the court has granted administration to a person incompetent to be appointed,[32] and also where the sale is made by one who has not qualified, although appointed.[33] Heirs may collaterally attack a sale made by an administrator fraudulently appointed when the purchaser was a party to or had notice of the fraud.[34]

[§ 1659] **(2) Termination of Authority.** While a sale made after an estate has been actually closed

18. Clark v. Bernstein, 49 Ala. 596; Spragins v. Taylor, 48 Ala. 520; Price v. Winter, 15 Fla. 66; Moore v. Neil, 39 Ill. 256, 89 AmD 303; Gurney's Succ., 14 La. Ann. 622.

[a] **Equity will not set aside** an administrator's deed where there was jurisdiction and no fraud. Covington v. Chamblin, 156 Mo. 574, 57 SW 728.

19. Bradley v. Droue, 187 Ill. 175, 58 NE 304, 79 AmSR 214; Moore v. Neil, 39 Ill. 256, 89 AmD 303.

20. Friedman v. Shamblin, 117 Ala. 454, 23 S 821.

21. Garrett v. Boeing, 68 Fed. 51, 15 CCA 209.

22. Shane v. Peoples, 25 N. D. 188, 141 NW 737.

23. Shane v. Peoples, 25 N. D. 188, 141 NW 737.

24. Ault v. Clark, 62 Ind. A. 55, 112 NE 843.

25. Sale of personalty under testamentary authority or common-law power see supra § 750.

Sale of realty under testamentary authority see supra § 684.

26. Costigan v. Truesdell, 119 Ky. 70, 83 SW 98, 115 AmSR 241, 26 KyL 971; Kincaid v. Tutt, 88 Ky. 392, 11 SW 297; Bean v. Haffendorfer, 84 Ky. 685, 2 SW 556, 3 SW 138; Yocum v. Foreman, 14 Bush (Ky.) 494; Dawson v. Litsey, 10 Bush (Ky.) 408; Megowan v. Pennebaker, 3 Metc. (Ky.) 501; Carpenter v. Strother, 16 B. Mon. (Ky.) 289; Thompson v. Brownlie, 76 SW 172, 25 KyL 622; Upton v. Gerber, 136 Mich. 72, 98 NW 854; Coon v. Fry, 6 Mich. 506; Howard v. Moore, 2 Mich. 226; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 AmD 41.

"Except upon the grounds stated in section 518, Civ. Code Prac., the court was without power to set aside the sale after it had been confirmed." Costigan v. Truesdell, 119 Ky. 70, 83 SW 98, 26 KyL 971, 115 AmSR 241.

27. Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

28. Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.

29. Ala.—Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524; May v. Marks, 74 Ala. 249; Landford v. Dunklin, 71 Ala. 494.

Ill.—Wandschneider v. Wandschneider, 282 Ill. 286, 118 NE 485; Hobson v. Ewan, 62 Ill. 146; Schnell v. Chicago, 38 Ill. 382, 87 AmD 304.

Iowa.—Little v. Sinnett, 7 Iowa 324.

La.—Ford v. Mills, 46 La. Ann. 331, 14 S 845; Lehmann's Succ., 41 La. Ann. 987, 7 S 33; Webb v. Keller, 39 La. Ann. 55, 1 S 423; Michael v. Michael, 11 La. 149.

Mich.—Woods v. Monroe, 17 Mich. 238.

Minn.—Hanson v. Nygaard, 105 Minn. 30, 38, 117 NW 235, 127 AmSR 523 [cit Cyc].

Miss.—Ragland v. Green, 22 Miss. 194.

Mo.—Macey v. Stark, 116 Mo. 481, 21 SW 1088; Valle v. Fleming, 19 Mo. 454, 61 AmD 566.

Pa.—Grove's Est., 2 Woodw. 182.

S. C.—Benson v. Rice, 11 S. C. L. 577.

Tenn.—Posey v. Eaton, 9 Lea 500.

Tex.—Rindge v. Oliphint, 62 Tex. 682; Dancy v. Stricklinge, 15 Tex. 557, 65 AmD 179; Grande v. Herrera, 15 Tex. 533; Poor v. Boyce, 12 Tex. 440; Halbert v. Martin, (Civ. A.) 30 SW 388; Evans v. Martin, 6 Tex. Civ. A. 331, 25 SW 688; Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984.

[a] **Subsequent revocation of appointment.**—A sale is not open to attack if made by one while acting as administrator under an appointment by the court, although the court afterward revokes the appointment for error in making it. Benson v. Rice, 11 S. C. L. 577.

[b] **In a suit to quiet title** based upon an administrator's sale, the heirs cannot question the regularity of the appointment of one who was administrator de facto and was licensed to sell by a probate court having jurisdiction, if he gave a bond, took the oath, gave notice of the sale, and the sale was confirmed. Woods v. Monroe, 17 Mich. 238.

[c] **Appointment by another court in same state.**—The sale cannot be defeated on collateral attack because another court in the same state had appointed another administrator, the appointment of the one making the sale being regular on its face. Posey v. Eaton, 9 Lea (Tenn.) 500.

[d] **The rule is otherwise where** there is evidence of the existence of another lawful administrator. Allen v. Kellam, 69 Ala. 442.

30. Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69; Pryor v. Downey, 50 Cal. 388, 19 AmR 656; Chase v. Ross, 36 Wis. 267; Frederick v. Pacquette, 19 Wis. 591; Sitzman v. Pacquette, 13 Wis. 291.

31. Seaverns v. Gerke, 21 F. Cas. No. 12,595, 3 Sawy. 353; Daniel v. Sapp, 20 Ga. 514; Haug v. Primeau, 98 Mich. 91, 57 NW 25; Templeton v. Falls Land, etc., Co., 77 Tex. 55, 13 SW 964; Paul v. Willis, 69 Tex. 261, 7 SW 357; Withers v. Patterson, 27 Tex. 491, 86 AmD 643; Wardrup v. Jones, 23 Tex. 489; Hurt v. Horton, 12 Tex. 285; Roy v. Whitaker, (Tex. Civ. A.) 50 SW 491.

[a] **Where there was no record of the appointment** and it was made by a judge having no authority, a sale was void. Seaverns v. Gerke, 21 F. Cas. No. 12,595, 3 Sawy. 353.

[b] **Heirs who answer in the proceedings for the sale,** without objection to the authority of the administrator, are bound by the order, but those served constructively and who do not appear are not bound. Hurtley v. Glover, 56 S. C. 69, 33 SE 796.

[c] **Failure to show residence of decedent or presentation of claims.**—Where the record failed to show whether decedent was a resident of the county or had property there, or whether any claim against the estate was presented, the sale was held good against collateral attack. Flenner v. Walker, 5 Tex. Civ. A. 145, 23 SW 1029.

32. See cases infra this note.

[a] **Where the court appointed an infant** as executrix, the appointment and sale thereunder were held void. Knox v. Nobel, 77 Hun 230, 28 NYS 355; Continental Trust Co. v. Nobel, 10 Misc. 325, 30 NYS 994.

33. Casanave v. Spear, 23 La. Ann. 519; McLean v. Houston, 2 Heisk. (Tenn.) 37.

[a] **This rule has been applied** where the appointment and the order to sell were made at the same time and the appointee made the sale without qualifying as administrator. Casanave v. Spear, 23 La. Ann. 519.

[b] **The mere silence of the record as to the giving of a bond** does not impeach the power of the administrator. Moody v. Butler, 63 Tex. 210.

34. Daniel v. Sapp, 20 Ga. 514; McMahan v. Rice, 16 Tex. 335.

is void,[35] and the termination of the authority of the executor or administrator would seem on the same principle to render invalid any subsequent sale made by him,[36] yet it has been held that a sale made while he is still acting and recognized as representative cannot be impeached, at least collaterally.[37]

[§ 1660] **c. Defects in Proceedings Prior to Order—(1) As to Jurisdiction.** Where a lack of jurisdiction in the court to order a sale of real estate to pay debts appears, the sale can be attacked in an action brought for that purpose.[38]

[§ 1661] **(2) As to Parties.** It has been held that the failure to name the heirs or others interested as parties in the proceedings for the sale, while it may constitute an irregularity, does not render the order void,[39] and a fortiori a purchaser is not entitled to avoid his purchase for failure to join as parties persons whose claim of title is barred by the statute of limitations.[40] While infant heirs should be represented by a guardian ad litem, a defect in the proceedings in this respect has been held not to defeat the jurisdiction,[41] but there is also authority for the contrary view.[42] It has also been held that a judgment ordering the sale of lands to pay his debts was invalid where it was rendered in a suit in which decedent's children were represented by a guardian ad litem whose appointment was void, because of failure to summon the infants or some of them,[43] and that a sale was void as to an infant where a guardian ad litem was appointed but never accepted or acted, the clerk of the court signing in his name, without his knowledge, an acceptance of service of the citation.[44] A sale may be set aside because heirs of decedent were not made parties,[45] and those who were not parties, who never had a day in court, and whose rights were injured, may collaterally assail a decree of sale for fraud.[46]

[§ 1662] **(3) As to Notice of Application.** The necessity of the service of citation, summons, or other form of notice on heirs and others interested in the estate in order to confer jurisdiction depends upon the legislation of the state in which the proceedings are had, and the rulings vary, it being held in some states that a failure to comply with a statute requiring and regulating notice renders the sale void and open to collateral attack,[47] while in others it is held that in a collateral proceeding there can be no inquiry as to whether any notice or sufficient notice was given.[48] It has even been held that a lack of notice of the application will not warrant setting aside the sale in direct proceedings for that purpose, unless it is shown that

35. Hoffman v. Beard, 32 Mich. 218.

[a] **There can be no collateral attack if the estate is actually still open,** notwithstanding the fact that it ought to have been closed. Church v. Holcomb, 45 Mich. 29, 7 NW 167.

36. See cases infra this note.

[a] **Thus** sales have been held void where made by: (1) An administrator after he had been removed by the operation of a statute. Levy v. Riley, 4 Or. 392. (2) An administratrix after her letters had abated by her marriage. Rumph v. Truelove, 66 Ga. 480.

37. Farley v. Dunklin, 76 Ala. 530; Green v. Shreveport Baptist Church, 27 La. Ann. 563; Warren v. Carter, 92 Mo. 288, 5 SW 42; Alexander v. Maverick, 18 Tex. 179, 67 AmD 693; Soye v. McCallister, 18 Tex. 80, 67 AmD 689.

[a] **The order is an adjudication that the administrator's authority continued** and all parties are estopped from showing the contrary. Farley v. Dunklin, 76 Ala. 530; May v. Marks, 74 Ala. 249.

[b] **An order to a public administrator to turn over the estate** to a successor does not avoid a sale thereafter made where there has been no discharge of record. Warren v. Carter, 92 Mo 288, 5 SW 42.

[c] **The fact that no inventory was filed for more than seven years** does not sustain a finding that the administration had lapsed where the court afterward exercised jurisdiction over the estate by approving the inventory, making an order of sale, and confirming the sale. Harris v. Shafer, (Tex. Civ. A.) 21 SW 110.

[d] **The birth of a child which has the effect of revoking a will** does not render void a sale thereafter made by the executor while he was still acting as such. Green v. Shreveport Baptist Church, 27 La. Ann. 563.

38. Johnson v. Brewn, (Mo.) 210 SW 55; Personeni v. Goodale, 199 N. Y. 323, 92 NE 754 [rev 132 App. Div. 928 mem. 118 NYS 1135 mem].

39. Ala.—Lyons v. Hamner, 84 Ala. 197, 4 S 26, 5 AmSR 363; Duval v. McLoskey, 1 Ala. 708.

Ga.—Dean v. Central Cotton Press Co., 64 Ga. 670.

Ill.—Harris v. Lester, 80 Ill. 307.

Ky.—Callebs v. Ruble, 172 Ky. 113, 188 SW 1096.

Tenn.—Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68.

But compare Matter of Slater, 17 Misc. (N. Y.) 474, 41 NYS 534, 1 Gibb. Surr. 8 (the naming of heirs in the petition is jurisdictional, and a purchaser may apply to the surrogate to be relieved from his purchase, when the heirs are not named).

[a] **Unborn devisee.**—The executor represents a devisee, unborn at the time of the proceeding, and such devisee cannot afterward collaterally attack the sale as a stranger to the proceedings. Dean v. Central Cotton Press Co., 64 Ga. 670.

[b] **A mistake in the name of a minor heir** in the petition is of no effect where she was rightly named in the summons and a guardian ad litem appointed. McCormack v. Kimmel, 4 Ill. A. 121.

40. Harrington v. Williams, 173 Ky. 575, 191 SW 273.

41. Jenkins v. Young, 43 Hun (N. Y.) 194. See also Killough v. Warren, (Tenn. Ch. A.) 58 SW 898 (a sale is not void because no guardian ad litem was appointed until after proof as to debts and assets, where one was appointed and answered before decree).

42. O'Dell v. Rogers, 44 Wis. 136.

[a] **Failure to appoint guardian in proceedings for probate of will.**—A sale cannot be avoided because there was no guardian ad litem appointed on the probate of the will, where the infant took title by descent and not under the will. Melms v. Pfister, 59 Wis. 186, 18 NW 255.

43. Roy v. Allen, (Ky.) 118 SW 981.

44. Johnson v. Johnson, 40 Ala. 247.

45. Dickens v. Long, 109 N. C. 165, 13 SE 841.

46. Sager v. Mead, 164 Pa. 125, 30 A 284.

47. Cal.—Campbell v. Drais, 125 Cal. 253, 57 P 994; Townsend v. Tallant, 33 Cal. 45, 91 AmD 617.

Ga.—Clements v. Henderson, 4 Ga. 148, 48 AmD 216.

Ind.—Doe v. Anderson, 5 Ind. 33.

Kan.—Rogers v. Clemmans, 26 Kan. 522; Mickel v. Hicks, 19 Kan. 578, 27 AmR 161.

Ky.—Spencer v. Milliken, 12 Ky. Op. 97.

Or.—Browne v. Coleman, 62 Or. 454, 125 P 278.

[a] **Personal notice** is not inherently essential and the legislature may provide for service by publication. Fudge v. Fudge, 23 Kan. 416.

[b] **Where the administrator was also guardian of the sole heir,** his written assent to the order without notice to the heir was sufficient. Jones v. Levi, 72 Ind. 586.

[c] **Service only on the general guardian** of minor heirs, and not on the heirs themselves, is an irregularity, but does not render the sale void. Doe v. Harvey, 5 Blackf. (Ind.) 487. See also Thompson v. Doe, 8 Blackf. (Ind.) 336 (where a guardian ad litem was appointed and answered, admitting the allegations of the petition, and it was held that the order of sale was erroneous but not void. Although it does not clearly appear from the report, the inference is that the infants were not served).

[d] **One served with notice cannot attack the sale** on the ground that others interested were not served. Farris v. Hoskins, 63 SW 577, 23 KyL 596.

48. U. S.—Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Garrett v. Boeing, 68 Fed. 51, 15 CCA 209; Berrian v. Rogers, 43 Fed. 467.

Ala.—Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Field v. Goldsby, 28 Ala. 218, 65 AmD 341.

Iowa.—Mullinnix v. Brown, 151 Iowa 468, 131 NW 671.

Mont.—Kirk v. Baker, 26 Mont. 190, 66 P 942.

Nebr.—Haight v. Hayes, 3 Nebr. (Unoff.) 587, 92 NW 297.

N. C.—Rackley v. Roberts, 147 N. C. 201, 60 SE 975.

Pa.—McPherson v. Cunliff, 11 Serg. & R. 422, 14 AmD 642.

Tex.—Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852; Heath v. Layne, 62 Tex. 686; Hurley v. Barnard, 48 Tex. 83; George v. Watson, 19 Tex. 354.

[a] **It is for the court granting the license to determine the sufficiency** of the notice and there can be no collateral attack based on a defective notice or defective service. Stanley v. Noble, 59 Iowa 666, 13 NW 839; Myers v. Davis, 47 Iowa 325; Haight v. Hayes, 3 Nebr. (Unoff.) 587, 92 NW 297; McGlawhorn v. Worthington, 98 N. C. 199, 3 SE 633.

actual fraud was committed,[49] or there is some other ground of acknowledged equity jurisdiction.[50] A recital in the record of due service cannot be impeached in another proceeding,[51] unless falsified by the record itself.[52] According to some authorities an affirmative showing by the record as to notice is necessary to the validity of the sale;[53] but it has also been held that if the record is silent as to notice, regularity will be presumed.[54]

[§ 1663] **(4) As to Petition.**[55] It has been held that the sale is void if the petition does not state all facts essential to the jurisdiction;[56] but, as a general rule, when the court has acted on the petition and ordered the sale, the petition will be liberally construed in an attack on the sale itself, and sustained in spite of informalities or statements merely defective.[57]

[§ 1664] **d. Improper Order—(1) Want of Sufficient Cause.** A purchaser is not bound to inquire as to the truth of the allegations upon which the order to sell was granted.[58] The order is a judgment that the circumstances existed rendering a sale necessary,[59] and no collateral attack can be based on the ground that there was in fact no such necessity.[60] The rule excludes collateral inquiry as to the existence of debts,[61] the exhaustion of per-

49. Steele v. Kelley, 32 Okl. 547, 122 P 934 (where the petition also was defective).

50. Steele v. Kelley, 32 Okl. 547, 122 P 934.

51. Ala. — Goodwin v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ill.—Bradley v. Drone, 187 Ill. 175, 58 NE 304, 79 AmSR 214; Andrews v. Bernhardi, 87 Ill. 365; Harris v. Lester, 80 Ill. 307.

Iowa.—Lees v. Wetmore, 58 Iowa 170, 12 NW 238.

N. C.—Morrison v. Craven, 120 N. C. 327, 26 SE 940. But compare Card v. Finch, 142 N. C. 140, 54 SE 1009 (ejectment by a devisee not made a party to proceedings for sale sustained).

[a] **A recital of acknowledgment of service** is within the rule. Edwards v. Moore, 99 N. C. 1, 5 SE 13.

[b] **The proper remedy** for irregularity is a motion to set aside the sale. Rackley v. Roberts, 147 N. C. 201, 60 SE 975.

[c] **An insufficient publisher's certificate** appearing in the record does not overcome a finding of due notice. Barnett v. Wolf, 70 Ill. 76.

52. Goodwin v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21; Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413; Stevens v. Durrett, 49 Miss. 411; Gilmore v. Taylor, 5 Or. 89.

[a] **If the record discloses that there was no citation** (1) the sale is void. Stevens v. Durrett, 49 Miss. 411. (2) A recital of jurisdictional facts in the order will not prevail as against affirmative evidence of want of jurisdiction in other parts of the record. Gilmore v. Taylor, 5 Or. 89.

53. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310; Gibbs v. Shaw, 17 Wis. 197, 84 AmD 737.

54. Jones v. Edwards, 78 Ky. 6; Farris v. Hoskins, 63 SW 577, 23 KyL 596; Smith v. Denson, 10 Miss. 326; Coffin v. Cook, 106 N. C. 376, 11 SE 371.

[a] **Illustration.**—Where a warning order was made against one of the heirs, who was a nonresident, three days after the affidavit of nonresidence was filed, there was no presumption, in the absence of some showing to the contrary, that such person, who was a resident of Chicago, was there on the day the affidavit was filed, and in the state on the day the warning order was issued, so as to render it bad for delay, but the presumption would be that he was at his place of residence. Ross v. McGrath, 86 SW 555, 27 KyL 723.

[b] **Presumption on appeal.** — If the report of sale shows due notice and the record is otherwise silent regularity will be presumed even on appeal in the original case. Allsop v. Owensboro Deposit Bank, 60 SW 1102, 24 KyL 762.

55. Collateral attack on sufficiency of petition generally see supra § 1505.

Necessity for petition see supra § 1496.

56. Cates v. Cates, 41 SW 276, 19 KyL 602; Wright v. Edwards, 10 Or. 298; Linnville v. Darby, 1 Baxt. (Tenn.) 306.

[a] **Where the petition specifies no debt and names no creditor,** the sale is void. Linnville v. Darby, 1 Baxt. (Tenn.) 306.

57. Ala.—Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Bolling v. Smith, 79 Ala. 535; Pollard v. Hanrick, 74 Ala. 334; Bibb v. Bishop Cobbs Orphan Home, 61 Ala. 326.

Colo.—Bateman v. Reitler, 19 Colo. 547, 36 P 548.

Ill.—Frothingham v. Petty, 197 Ill. 418, 64 NE 270.

Ind.—Denton v. Arnold, 151 Ind. 188, 51 NE 240.

Md.—Simpson v. Bailey, 80 Md. 421, 30 A 622.

Mich.—Coon v. Fry, 6 Mich. 506.

Mo.—Stowe v. Banks, 123 Mo. 672, 27 SW 347; Bray v. Adams, 114 Mo. 486, 21 SW 853; Garner v. Tucker, 61 Mo. 427; Overton v. Johnson, 17 Mo. 442.

N. Y.—Schneider v. McFarland, 2 N. Y. 459 [aff 4 Barb. 139].

N. C.—Stradley v. King, 84 N. C. 635.

N. D.—Cathro v. McArthur, 30 N. D. 337, 152 NW 686.

Okl.—Steele v. Kelley, 32 Okl. 547, 122 P 934.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

S. C.—Clyburn v. Reynolds, 31 S. C. 91, 9 SE 973.

Tenn. — Puckett v. Wynns, 132 Tenn. 513, 178 SW 1184.

Tex.—Gillenwaters v. Scott, 62 Tex. 670; Howard v. Bennett, 13 Tex. 309; Poor v. Boyce, 12 Tex. 440.

Wis.—Melms v. Pfister, 59 Wis. 186, 18 NW 255.

[a] **Averments which would be bad on demurrer** as not being direct and positive may protect the petition from collateral attack. Wright v. Ware, 50 Ala. 549; King v. Kent, 29 Ala. 542; Doe v. Riley, 28 Ala. 164, 65 AmD 334.

[b] **Lack of verification** of the application for an order of sale is not available on collateral attack. Coon v. Fry, 6 Mich. 506; Stradley v. King, 84 N. C. 635.

[c] **An insufficient verification** would be a good objection before the surrogate or on appeal but not on collateral attack. Sheldon v. Wright, 5 N. Y. 497 [aff 7 Barb. 39].

[d] **An objection to the confirmation of the sale** is a collateral attack within the meaning of this rule. Matter of Devincenzi, 119 Cal. 498, 51 P 845.

58. Long v. Landman, 118 Mich. 174, 76 NW 374; Wolf v. Robinson, 20 Mo. 459; Walsh's Est., 28 Pa. Co. 193.

59. Macey v. Pitillo, (Mo.) 21 SW 1094; Macey v. Stark, 116 Mo. 481, 21 SW 1088.

60. Ala.—Wyatt v. Steele, 26 Ala. 639.

Ark.—Smith v. Pinnell, 107 Ark. 185, 154 SW 497.

Mich. — Long v. Landman, 118 Mich. 174, 76 NW 374; Griffin v. Johnson, 37 Mich. 87.

Mo.—Macey v. Pitillo, 21 SW 1094; Macey v. Stark, 116 Mo. 481, 21 SW 1088.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

Tex.—Wilkin v. Simmons, (Civ. A.) 151 SW 1145; Johnson v. Weatherford, 31 Tex. Civ. A. 180, 71 SW 789.

Vt.—Doolittle v. Holton, 28 Vt. 819, 67 AmD 745.

[a] **Illustration.**—Where the probate court found that a claim in favor of a decedent in the nature of a trust could not be realized in money or property under the existing laws, and ordered that the claim be put up at auction and sold, such sale will not be vacated in chancery, in the absence of any showing of fraud in the procurement of the order of sale or in the sale itself. Dorsey v. Connerly, 77 Ark. 516, 92 SW 771.

[b] **Proof by depositions.** — The recitals in the decree are conclusive of the fact that proof was taken by depositions in the manner required by law. Goodwin v. Sims, 86 Ala. 102, 5 S 587, 11 AmSR 21; Bibb v. Bishop Cobbs Orphan Home, 61 Ala. 326.

[c] **A sale to satisfy an allowance to a widow** is absolutely void, where the widow had already been assigned a homestead, as beyond the power of the court. Newcomb v. Newcomb, 38 Tex. 561.

61. Ala.—Cobb v. Garner, 105 Ala. 467, 17 S 47, 53 AmSR 136.

Cal.—McCauley v. Harvey, 49 Cal. 497.

Conn. — Shelton v. Hadlock, 62 Conn. 143, 25 A 483; Brewster v. Denison, 1 Root 231.

Ga.—Fordham v. Duggan, 147 Ga. 610, 95 SE 3; Adams v. Adams, 113 Ga. 824, 39 SE 291.

Ill.—Hobson v. Ewan, 62 Ill. 146; Stow v. Kimball, 28 Ill. 93.

Iowa.—Little v. Sinnett, 7 Iowa 324.

La.—Thibodaux v. Barrow, 129 La. 395, 56 S 339; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 539.

Minn.—Curran v. Kuby, 37 Minn. 330, 33 NW 907.

Mo.—Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861.

Nebr.—Haight v. Hayes, 3 Nebr. (Unoff.) 587, 92 NW 297.

Or.—Lawrey v. Sterling, 41 Or. 518, 69 P 460.

Pa.—Grubb v. Galloway, 203 Pa. 236, 52 A 176, 93 AmSR 764. Contra Smith v. Wildman, 194 Pa. 294, 45 A 136 [reaff 178 Pa. 245, 35 A 1047, 56 AmSR 760, 36 LRA 834].

S. C.—Green v. Cannady, 71 S. C. 317, 51 SE 92.

Tex.—Daimwood v. Driscoll, (Civ. A.) 151 SW 621; Salas v. Mundy, 59 Tex. Civ. A. 407, 125 SW 633; Looney v. Linney, (Civ. A.) 21 SW 409.

Va.—Lawson v. Moorman, 85 Va. 880, 9 SE 150.

[a] **Statute of limitations.** — There can be no collateral attack on the ground that the sale was for a debt barred by the statute of limitations, although fraud and collusion are generally alleged. Cobb v. Garner, 105 Ala. 467, 17 S 47, 53 AmSR 136.

sonalty,[62] or the necessity of selling as much land as was ordered sold.[63] It is even held that, where the court might under some circumstances exercise jurisdiction over particular land, a sale cannot be collaterally attacked because the land ordered sold was not subject to sale to satisfy the debts.[64] Where the order purports to have been made on a statutory ground it may not be attacked as being in fact based upon some other ground not authorized by statute.[65]

[§ 1665] **(2) Errors or Irregularities.** Errors or irregularities in the order or decree of sale do not render the sale void or open to collateral attack.[66]

[§ 1666] **e. Defects in Proceedings after Order—(1) Representative's Oath and Bond.** Statutes are generally mandatory, and a failure to comply with them is fatal on collateral attack, in so far as they require an executor or administrator about to make a sale to take a special oath[67] or give bond to account for the proceeds,[68] although it has been held otherwise with respect to failure to give a bond where the proceeds of the sale have been actually and properly distributed.[69]

Order dispensing with bond. A sale has been held void for want of a bond, although the order excused the executor from giving a bond.[70] Under a statute permitting a collateral attack where the administrator did not give a bond "in case a bond was required upon granting the license," it has been held that the requirement referred to was that of the license and not of the law, and that the sale was valid without a bond, where the license required none, although it should have required one.[71]

[§ 1667] **(2) Notice of Sale.** The failure to give proper notice of the time and place of sale is generally a mere irregularity which is not cognizable collaterally,[72] the adjudication of the probate court being conclusive.[73] But it has been held that the facts that the advertisement did not specify

[b] **Dispensing with supervision of court.**—Where a special mode of procedure is provided where the testator wishes to dispense with the supervision of the county court, such method must be pursued strictly, and a sale cannot be made except on claims established in the manner provided. Carroll v. Carroll, 20 Tex. 731.

62. Ala.—Foxworth v. White, 72 Ala. 224.
Conn.—Brown v. Lanman, 1 Conn. 467.
Ind.—Jones v. French, 92 Ind. 138.
Mass.—Leverett v. Harris, 7 Mass. 292.
Mich.—Long v. Landman, 118 Mich. 174, 76 NW 374.
N. Y.—Wood v. McChesney, 40 Barb. 417.
Pa.—Snyder v. Markel, 8 Watts 416.
Tenn.—Kindell v. Titus, 9 Heisk. 727.
Wash.—McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

[a] **Improvident order not void.**—An order to sell realty before the settlement of the account of personal property, although improvident, is not void. Snyder v. Markel, 8 Watts (Pa.) 416.

[b] **Exhaustion of personal assets must appear** somewhere in the proceedings or the sale will be void. Sloan v. Sloan, 25 Fla. 53, 5 S 603.

63. Boyd v. Blankman, 29 Cal. 19, 87 AmD 146; Lehmann's Succ., 41 La. Ann. 987, 7 S 33; Allen v. Ashley School Fund, 102 Mass. 262; Hodges v. Fabian, 31 S. C. 212, 9 SE 820, 17 AmSR 25.

[a] **A purchaser cannot object to taking title** (1) on the ground that the property sold for more than the debts (Lehmann's Succ., 41 La. Ann. 987, 7 S 33), (2) at least where the disproportion is not great (In re Haaf, 52 La. Ann. 249, 26 S 834).

64. Ions v. Harbison, 112 Cal. 260, 44 P 572; Showers v. Robinson, 43 Mich. 502, 5 NW 988; Drake v. Kinsell, 38 Mich. 232; Overton v. Johnson, 17 Mo. 442; Flenner v. Walker, 5 Tex. Civ. A. 145, 23 SW 1029.

[a] **Although a will directs the debts to be paid out of the personal estate,** the court having jurisdiction to reserve personalty can order the sale of real estate. Such an order, although erroneous in view of the will, is not open to collateral attack. Overton v. Johnson, 17 Mo. 442.

[b] **Where the evidence leaves it doubtful** whether a decedent whose land was sold belonged to a class of persons exempt from administration by creditors, a sale to satisfy debts will be sustained against collateral attack. Flenner v. Walker, 5 Tex. Civ. A. 145, 23 SW 1029.

[c] **An order for the sale of property which the petitioner asks not to be sold,** but which is described in the petition, is not void. Baum v. Roper, 132 Cal. 42, 64 P 128.

65. Casseday v. Norris, 49 Tex. 613; Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145; Woodhouse v. Fillbates, 77 Va. 317.

66. Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.
Cal.—Fast v. Steele, 127 Cal. 202, 59 P 585.
Colo.—Kavanagh v. Hamilton, 53 Colo. 157, 171, 125 P 512, AnnCas 1914B 76 [cit Cyc].
Ga.—Merritt v. Jones, 136 Ga. 618, 71 SE 1092.
Ill.—Doe v. Hileman, 2 Ill. 323.
Kan.—Lake v. Hathaway, 75 Kan. 391, 89 P 666.
Ky.—Disman v. Flippin, 116 SW 740.
La.—Peyroux v. Peyroux, 24 La. Ann. 175.
Md.—Simpson v. Bailey, 80 Md. 421, 30 A 622.
Mont.—Plains Land, etc., Co. v. Lynch, 38 Mont. 271, 99 P 847, 129 AmSR 645.
N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968.
Tex.—Farris v. Gilbert, 50 Tex. 350.
Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68.

[a] **A sale is not void because** the order of sale: (1) Directs the administrator to take payment in state bank notes instead of legal currency. Doe v. Hileman, 2 Ill. 323. (2) Is in the alternative to sell for cash or on deferred payments. Fleming v. Bale, 23 Kan. 88. (3) Improperly describes the land, the defect being cured by the order of confirmation and acquiescence. Corley v. Goll, 8 Tex. Civ. A. 184, 27 SW 819. (4) Does not describe the property at all. Wells v. Polk, 36 Tex. 120. (5) Directs a conveyance before the expiration of the time for redemption. Disman v. Flippin, (Ky.) 116 SW 740. (6) Neither is the order of sale void because it fails to set off a homestead right. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847; Bradley v. Drone, 187 Ill. 175, 58 NE 304. (7) Title passes, although the order directed one of two executors to sell, if the court confirms the sale. Corley v. Anderson, 5 Tex. Civ. A. 213, 23 SW 839. (8) Title passes, although the order directs the administrator to sell instead of a trustee, where the administrator might be appointed trustee. Simpson v. Bailey, 80 Md. 421, 30 A 622. (9) An order to mortgage land is not void because it fails to direct the administrator as required by statute to execute a note. Fast v. Steele, 127 Cal. 202, 59 P 585. (10) A mortgage is not void because the order therefor directs it to be given for the payment of specified claims instead of payment of all claims ratably. Stambach v. Emerson, 139 Cal. 282, 72 P 991, 69 P 856.

67. Campbell v. Knights, 26 Me. 224, 45 AmD 107; Howard v. Moore, 2 Mich. 226.

[a] **Delay as to oath.**—The sale is void if the oath is not taken until after fixing the time and place of sale. Parker v. Nichols, 7 Pick. (Mass.) 111.

[b] **Parol evidence** may be received to show that an oath which appears by the record to have been taken after sale was in fact taken in due time. Norman v. Olney, 64 Mich. 553, 31 NW 555. See also Fowle v. Coe, 63 Me. 245 (certificate of magistrate who took oath that it was administered before the sale was advertised).

Oath of representative with respect to sale see supra § 1561.

68. Snow v. Russell, 93 Me. 362, 45 A 305, 74 AmSR 350; Howard v. Moore, 2 Mich. 226.

[a] **Amount of penalty.**—Where a bond was given, objection to the sale cannot be made collaterally on the ground that the penalty was too small. Richmond v. Foote, 3 Lans. (N. Y.) 244.

Special bond for sale see supra §§ 1562–1572.

69. Jones v. French, 92 Ind. 138; Dequindre v. Williams, 31 Ind. 444; Foster v. Birch, 14 Ind. 445.

70. Snow v. Russell, 93 Me. 362, 45 A 305, 74 AmSR 350.

71. Norman v. Olney, 64 Mich. 553, 31 NW 555.

72. Ala.—Matheson v. Hearin, 29 Ala. 210; Doe v. Riley, 28 Ala. 164, 65 AmD 334.
Ark.—Apel v. Kelsey, 47 Ark. 413, 2 SW 102.
Ga.—Merritt v. Jones, 136 Ga. 618, 71 SE 1092.
Ill.—Moffitt v. Moffitt, 69 Ill. 641.
Mo.—Melton v. Fitch, 125 Mo. 281, 28 SW 612; McNair v. Hunt, 5 Mo. 300.
Pa.—Carroll's Est., 1 LackLegRec 142.
Tex.—Daimwood v. Driscoll, (Civ. A.) 151 SW 621.

[a] **Irregularities in the notice** will not invalidate the sale. Apel v. Kelsey, 47 Ark. 413, 2 SW 102; Carroll's Est., 1 LackLegRec (Pa.) 142.

[b] **Statute may make notice essential to validity of sale.**—Doe v. Roe, 4 Ga. 148, 48 AmD 216; Howard v. Moore, 2 Mich. 226.

[c] **"Where insufficiency of price is established,** the court will seize hold of slight circumstances or irregularity, such as imperfect description, want of proper advertisement, etc., to set aside the sale." Myer's Est., 9 Pa. Co. 439.

73. Richardson v. Butler, 82 Cal.

clearly the inherent quality of the property, and that it sold at a low price can be considered in ascertaining whether the sale was bona fide.[74]

[§ 1668] **(3) Sale and Report.** As a general rule irregularity in conducting the sale itself or in the subsequent proceedings do not render the sale void or subject to collateral attack.[75] Thus the sale is not void because several parcels are sold in bulk under one bid,[76] or because an affidavit required by law of the administrator that he was not the purchaser was not made within the time required by law;[77] nor will a sale be set aside because the auctioneer cried a bid for the purchaser,[78] because the property was conveyed to a creditor in satisfaction of his claim,[79] or because the sale was made for cash whereas the law required a sale on credit.[80] It has been held, however, that, where a sale was made on credit, but was falsely reported to the court as having been made for cash, it might be set aside on direct attack.[81] If there was an actual public sale, it cannot be avoided because of an unauthorized contract to sell to the purchaser at the price which he afterward bid.[82]

Errors in the report of sale which work no injury will not justify setting it aside.[83]

Lack of notice of confirmation. A sale for more than sufficient to pay all the debts should not be set aside, after it has been absolutely confirmed, on the petition of a creditor who does not allege that he was prejudiced thereby, simply because such creditor had no notice of the confirmation of the same.[84]

Sale of land not included in order. The representative is absolutely without authority to sell any land not included within the terms of the order, and such a sale will be set aside.[85] And it has been held that, where the order directs the sale of two tracts separately, the smaller one first, and it turns out that the sale of the smaller one was void, the subsequent sale of the larger must be set aside as unauthorized.[86]

[§ 1669] **f. Default of Purchaser.** It has been held that a sale may be set aside because of failure of the purchaser to comply with his bid;[87] but there is also authority for the view that nonpayment of the purchase money does not render the sale void so as to be subject to collateral attack.[88]

[§ 1670] **g. Inadequacy of Price.**[89] After confirmation a sale cannot be attacked for inadequacy of price alone by a bill in equity[90] or collaterally;[91]

174, 23 P 9, 16 AmSR 101; Hugo v. Miller, 50 Minn. 105, 52 NW 381; Cooper's Est., 17 Pa. Dist. 881.

74. Owen v. Owen, 88 N. J. Eq. 353, 102 A 812.

75. Halleck v. Moss, 22 Cal. 266; Kennedy's Succ., 2 La. A. (Orleans) 65.

[a] **Oral directions given by the judge** who ordered the mortgage of property cannot prejudice the mortgagee, at least where it is not shown that he knew of them. Fast v. Steele, 127 Cal. 202, 59 P 585.

[b] **Unless the price was inadequate,** the sale will not be set aside for irregularity. Grove's Est., 2 Woodw. (Pa.) 182.

76. Cowins v. Tool, 36 Iowa 82; Osman v. Traphagen, 23 Mich. 80.

77. Vasquez v. Richardson, 19 Mo. 96.

78. James v. Kelley, 107 Ga. 446, 33 SE 425, 73 AmSR 135.

79. Perry v. Blakey, 5 Tex. Civ. A. 331, 23 SW 804.

80. Cassels v. Gibson, (Tex. Civ. A.) 27 SW 725.

81. Wipff v. Heder, 6 Tex. Civ. A. 685, 26 SW 118.

82. Stuart v. Allen, 16 Cal. 473, 76 AmD 551.

83. Doe v. Riley, 28 Ala. 164, 65 AmD 334; Macey v. Stark, 116 Mo. 481, 21 SW 1088.

[a] **This rule has been applied to:** (1) Indefiniteness in description of land, it appearing nevertheless that the proper land was sold. Doe v. Riley, 28 Ala. 164, 65 AmD 334. (2) A misrecital of the date of a revival order. Macey v. Pitillo, (Mo.) 21 SW 1094.

84. Patterson v. Eakin, 87 Va. 49, 12 SE 144.

85. Nichols v. Little, 115 Ga. 600, 41 SE 991; Ludlow v. Park, 4 Oh. 5.

[a] **Differences in descriptions.**—(1) A sale will not be set aside because of a slight difference between the description of the land in the petition and judgment and in the deed, where it is admitted that the deed covers the land in controversy. Kalteyer v. Wipff, (Tex. Civ. A.) 49 SW 1055. (2) A sale is not void because the land sold comprises a greater number of acres than is recited in the proceedings. McIver v. Stephens, 101 N. C. 255, 7 SE 695.

86. Hewitt v. Durant, 78 Mich. 186, 44 NW 318.

87. Ennis v. Cator, (Tex. Civ. A.) 174 SW 947, 949 ("It would be a strange doctrine indeed which would deny the administrator the right to have the order of confirmation revoked at a subsequent term of the court upon a showing that the proposed purchaser had failed from any cause in vacation to accept the deed and consummate the deal. This would cloud the title to realty belonging to the estate of decedents, resulting in confusion and uncertainty, and be a prolific source of litigation").

[a] **Motion before confirmation.**—A sale may be set aside on motion if the purchase price is not paid and the sale has not been confirmed. McSwean v. Faulks, 46 Ala. 610.

88. Simonin v. Czarnowski, 47 La. Ann. 1334, 17 S 847; Golden's Est., 56 Pa. Super. 300; Giddings v. Steele, 28 Tex. 732, 91 AmD 336. See also Evans v. Singletary, 63 N. C. 205 (where it was intimated that relief might be had in equity).

[a] **The remedy is against the administrator** for the unpaid amount. Giddings v. Steele, 28 Tex. 732, 91 AmD 336.

[b] **Credit of claim of purchaser.**—A sale is not void where the purchaser receives a credit of his own claim upon the purchase price, because he was not a creditor to as great an amount as he asserted. Simonin v. Czarnowski, 47 La. Ann. 1334, 17 S 847.

[c] **The sale of the land of infant heirs to their mother** is null if for less than the appraised value, and open to collateral attack. Pipkin v. Doiron, 14 La. 294.

89. As ground for refusing confirmation see supra § 1637.

90. Ala.—Roy v. O'Neill, 168 Ala. 354, 52 S 946; Lowe v. Guice, 69 Ala. 80.

Ill.—Kimball v. Lincoln, 99 Ill. 578 [aff 7 Ill. A. 470]; Burns v. Myers, 191 Ill. A. 518.

Ky.—Costigan v. Truesdell, 119 Ky. 70, 83 SW 98, 26 KyL 971, 115 AmSR 241; Auxier v. Clarke, 82 SW 605; Vivion v. Vivion, 50 SW 984.

N. J.—Owen v. Owen, 88 N. J. Eq. 353, 102 A 812.

N. C.—Williams v. Johnson, 112 N. C. 424, 17 SE 496, 34 AmSR 513, 21 LRA 848.

Pa.—In re Acklin, 237 Pa. 528, 85 A 862.

Tenn.—Fennell v. Loague, 107 Tenn. 239, 63 SW 1121.

Va.—Patterson v. Eakin, 87 Va. 49, 12 SE 144.

Wash.—Sharp v. Greene, 22 Wash. 677, 62 P 147.

[a] **Illustration.**—Where the estimated value of a decedent's property was from six thousand to six thousand five hundred dollars, and it was subject to a homestead estate of the value of one thousand dollars, and also to an indebtedness of three thousand three hundred dollars, a sale for one thousand four hundred dollars, the title acquired being subject to the debt, dower, and homestead, could not be avoided on the ground of inadequacy of purchase price. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

[b] **The decree of confirmation imports** that the court did inquire into and determine that the lands were not sold for greatly less than their real value. The fact may be otherwise, but it is not open to contest by the parties having the opportunity to be heard before the court, unless fraud can be charged to their adversaries in procuring the decree, or unless it is shown that the decree was the result of accident, without fault or negligence on their part. Lowe v. Guice, 69 Ala. 80.

[c] **Two years after a sale** of real estate to pay debts has been made, a party in interest cannot have the sale set aside for inadequacy of price. In re Acklin, 237 Pa. 528, 85 A 862.

[d] **Where the court fixes a minimum price,** a sale for more than that price will not be deemed inadequate. Fennell v. Loague, 107 Tenn. 239, 63 SW 1121.

[e] **A sale for more than the appraised value** will not be set aside. In re Finn, (Wash.) 178 P 449.

[f] **On the other hand** it has been held that under a statute providing that the court may in its discretion relieve a party from judgment taken against him through his mistake, inadvertence, or excusable neglect, relief may be had in proceedings on an application by the guardian of a minor child of a decedent to be relieved from an order confirming a sale by the executrix of certain shares of stock belonging to decedent's estate, on the ground of the disproportionateness of the price received to the value of the stock. In re Johnson, 7 Cal. A. 436, 94 P 592.

91. Ala.—Conniff v. McFarlin, 178 Ala. 160, 59 S 472.

Ill.—Sheahan v. Madigan, 275 Ill. 372, 114 NE 135.

but inadequacy of price is a circumstance to be considered when other grounds are alleged as bearing upon the fairness of the sale;[92] and it has been considered that, where the inadequacy of price is so gross as to amount to fraud, the sale may be set aside even after the title has passed.[93] A sale is void where it was made in violation of a statutory prohibition of a sale at first offering for less than a certain proportion of the appraised value.[94]

[§ 1671] **h. Fraud.** Fraud in the sale renders it voidable but not absolutely void,[95] and it is usually held that in a collateral proceeding, such as ejectment by the heirs, such fraud cannot be shown, but that a bill in equity or other proceeding having the direct object of setting aside the sale must be resorted to,[96] it being well established that a court of equity may set aside such a sale for fraud.[97] Where the facts were known and appeared in the confirmation proceedings the judgment of confirmation estops one there represented from making a subsequent attack,[98] but a confirmed sale will be set aside where the parties injured by fraud proceed promptly after obtaining information of the facts.[99] Charges of fraud must be clear and distinct.[1] Fraud in the sale will not be presumed [2] or inferred from slight or indecisive circumstances.[3] The courts will,

Me.—Fowle v. Coe, 63 Me. 245; Webster v. Calden, 53 Me. 203.

N. C.—Sumner v. Sessoms, 94 N. C. 371.

S. C.—Blackmon v. Blackmon, 101 SE 827.

Tex.—Capt v. Stubbs, 68 Tex. 222, 4 SW 467.

92. Ala.—Payne v. Turner, 36 Ala. 623; McLane v. Spence, 6 Ala. 894.

Ark.—Neel v. Carson, 47 Ark. 421, 2 SW 107.

Ga.—Black v. Elrod, 146 Ga. 692, 92 SE 62.

Ky.—Callebs v. Ruble, 172 Ky. 113, 188 SW 1096; Spinks v. Raison, 144 Ky. 539, 139 SW 811.

Mo.—Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

Pa.—Cobleigh's Est., 23 Pa. Super. 271 [rev 8 LackLegN 107]; Grew's Est., 31 Pa. Co. 530; Snyder's Est., 29 Pa. Co. 465; Myer's Est., 9 Pa. Co. 439; Hacker's Est., 7 Pa. Co. 202.

See also Gray v. Quicksilver Min. Co., 68 Fed. (U. S.) 677 (where the court refused to interfere because the fraud charged had not been proved).

93. Owen v. Owen, 88 N. J. Eq. 353, 102 A 812; Maxwell v. Burns, (Tenn. Ch. A.) 59 SW 1067; Lee v. Benzes, (Tex. Civ. A.) 209 SW 768.

[a] **This rule has been applied where** property worth one hundred and fifty dollars was sold for one dollar. Maxwell v. Burns, (Tenn. Ch. A.) 59 SW 1067.

94. Huckaby v. Huckaby, 134 La. 107, 63 S 755; Lacroix v. Crane, 133 La. 227, 62 S 657; Thibodeaux v. Thibodeaux, 112 La. 906, 36 S 800.

[a] **The sale of the land of infant heirs to their mother** is null if for less than the appraised value, and open to collateral attack. Pipkin v. Doiron, 14 La. 294.

95. Ill.—Rathje v. Waterlohn, 270 Ill. 640, 110 NE 816.

Ind.—Palmerton v. Hoop, 131 Ind. 23, 30 NE 874.

Kan.—Fincke v. Bundrick, 72 Kan. 182, 83 P 403, 4 LRANS 820.

Or.—Bowsman v. Anderson, 62 Or. 431, 123 P 1092, 125 P 270.

Tex.—McCampbell v. Durst, 15 Tex. Civ. A. 522, 40 SW 315.

96. Ala.—Fore v. McKenzie, 58 Ala. 115; Bland v. Bowie, 53 Ala. 152.

Ill.—Myer v. McDougal, 47 Ill. 278.

N. H.—Blanchard v. Webster, 62 N. H. 467.

N. Y.—Atkins v. Kinnan, 20 Wend. 241, 32 AmD 534.

N. D.—Shane v. Peoples, 25 N. D. 188, 196, 141 NW 737 [cit Cyc].

Tex.—Shirley v. Warfield, 12 Tex. Civ. A. 449, 34 SW 390.

[a] **Contrary view.** — Rhoades v. Selin, 20 F. Cas. No. 11,740, 4 Wash. C. C. 715; Decuir v. Lejeune, 15 La. Ann. 569.

97. U. S.—Moore v. Smith, 182 Fed. 540, 105 CCA 78 [certiorari den 219 U. S. 587, 31 SCt 471, 55 L. ed. 347].

Ala.—Tillman v. Thomas, 87 Ala. 321, 6 S 151, 13 AmSR 42.

Ark.—Dorsey v. Connerly, 77 Ark. 516, 92 SW 771; Neel v. Carson, 47 Ark. 421, 2 SW 107; Adams v. Toomer, 44 Ark. 271.

Cal.—Santa Rosa Sav. Bank v. Schell, 142 Cal. 505, 76 P 250; Bergin v. Haight, 99 Cal. 52, 33 P 760; In re Johnson, 7 Cal. A. 436, 94 P 592.

Ill.—Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221.

Kan.—McAdow v. Boten, 67 Kan. 136, 72 P 529.

Ky.—Penn v. Rhoades, 124 Ky. 798, 100 SW 288, 30 KyL 997; Roll v. Stum, 46 SW 223, 20 KyL 661.

Mass.—Oberlin College v. Fowler, 10 Allen 545.

Miss.—Shannon v. Summers, 86 Miss. 619, 38 S 345.

N. J.—Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584.

N. Y.—Woodruff v. Cook, 2 Edw. 259.

N. C.—Morrow v. Cole, 132 N. C. 678, 44 SE 370; Murray v. Southerland, 125 N. C. 175, 34 SE 270.

Or.—Bowsman v. Anderson, 62 Or. 431, 123 P 1092, 125 P 270.

Tex.—Vann v. Calcasieu Trust, etc., Bank, (Civ. A.) 204 SW 1062; McCampbell v. Durst, 15 Tex. Civ. A. 522, 40 SW 315.

Wash.—Wilson v. McMillan, 48 Wash. 378, 93 P 529; McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

"Fraud or its equivalent, whether upon the court or a party or one so situated as to be held in law an adversary, is sufficient to warrant relief." In re Johnson, 7 Cal. A. 436, 439, 94 P 592.

[a] **Illustration. —** Where one falsely claims to be a creditor and procures the appointment of an administrator, and purchases land belonging to decedent's minor son, on making it appear to the probate court that the land belongs to decedent's estate, the sale will be set aside in equity at the suit of the son. Bowsman v. Anderson, 62 Or. 431, 123 P 1092, 125 P 270.

[b] **Irregularity amounting to fraud.**—There is an irregularity in the obtaining of an order confirming a sale of real estate in probate proceedings, approximating constructive fraud on the estate, so as to authorize the setting aside thereof, where, pending objections by the heirs to confirmation of the sale, accompanied by an offer of a third person to bid ten per cent advance in case of resale, this offer was withdrawn and confirmation obtained by the purchaser, without notice to the executor or heirs when higher bids were available. Wilson v. McMillan, 48 Wash. 378, 93 P 529.

98. Fordham v. Duggan, 147 Ga. 610, 95 SE 3; Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861; Gordon v. Gordon, 55 N. H. 399.

[a] **Where facts constituting alleged fraud in issue.**—A bill to impeach a sale for fraud will not lie when the facts constituting the fraud were directly in issue in the probate proceedings and must have been there determined. Gordon v. Gordon, 55 N. H. 399.

99. Johnson v. Waters, 111 U. S. 640, 4 SCt 619, 28 L. ed. 547; Moore v. Smith, 182 Fed. 540, 105 CCA 78 [certiorari den 219 U. S. 587, 31 SCt 471, 55 L. ed. 347]; In re Johnson, 7 Cal. A. 436, 94 P 592; McAdow v. Boten, 67 Kan. 136, 72 P 529; Corbett's Est., 10 Pa. Dist. 59, 31 Pittsb LegJNS 101; Wiltberger's Est., 4 Pa. Co. 184; Albright's Est., 6 LackLegN 108; Armington's Est., 1 Phila. 444.

[a] **Where a mere volunteer instituted probate proceedings,** ostensibly to pay debts, but in reality to get title to land through the sale, and effected his purpose, a purchaser from the heirs was permitted to have the deed and sale set aside. Bergin v. Haight, 99 Cal. 52, 33 P 760.

1. Williamson v. Beardsley, 137 Fed. 467, 469, 69 CCA 615; McDermott's Succ., 51 La. Ann. 173, 24 S 787.

"The mere use, by the pleader, of the terms 'fraudulent' and 'fraudulently' signifies nothing." Williamson v. Beardsley, supra.

2. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Price v. Nesbit, 10 S. C. Eq. 445; Coulson v. Coulson, 5 Wis. 79. But compare Barnawell v. Threadgill, 56 N. C. 50 (one standing in a confidential relation to an intemperate executor must show good faith in acquiring property of the estate).

3. U. S.—Williamson v. Beardsley, 137 Fed. 467, 69 CCA 615.

Ga.—James v. Kelley, 107 Ga. 446, 33 SE 425, 73 AmSR 135.

Ill.—Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

Iowa.—Trimble v. Marshall, 66 Iowa 233, 23 NW 645.

Kan.—Fudge v. Fudge, 23 Kan. 416.

La.—Thibodaux v. Barrow, 129 La. 395, 56 S 339.

Md.—Scott v. Burch, 6 Harr. & J. 67.

Mich.—Hoyt v. Fleming, 202 Mich. 660, 168 NW 1027.

Minn.—Smith v. Barr, 83 Minn. 354, 86 NW 342.

Mo.—Keene v. Wyatt, 160 Mo. 1, 60 SW 1037, 63 SW 116.

Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409.

N. C.—Morrow v. Cile, 132 N. C. 678, 44 SE 370.

Or.—Loomis v. Rosenthal, 34 Or. 585, 57 P 55.

Tex.—Kellum v. Smith, 18 Tex. 835.

[a] **"A misconception of power or authority,** unaccompanied by corrupt or improper motive, is not fraud. When the executor applied for the orders of sale of the property he stated the condition of the estate and his previous conduct of its affairs truthfully and in most commendable detail. Everything that he did was reported to and met with the judicial sanction of the state court in which the estate was being administered; and upon the showing which he made—and it is not claimed that it was false in fact—the court ordered the property to be sold. The sales were made, reported to, and confirmed by the court, and the deeds were duly executed. If it were true that the sales were irregular or even void, it does not follow that the executor was guilty of fraud." Williamson v. Beardsley, 137 Fed. 467, 469, 69 CCA 615.

[b] **The test of fraud** is conditions and values at the time when

however, interfere where the sale, although nominally to pay debts, was designed merely to divest the title of the heirs,[4] or where there was a scheme to buy in the land at an inadequate price,[5] or to use any artifice or device to prevent competition in the bidding.[6] It is a constructive fraud, warranting the setting aside of the sale, for the representative to obtain an order to sell land to pay debts on the ground of insufficiency of personalty while he holds notes which he claims as his own but which belong to the estate.[7] But it is not fraudulent for the administrator to agree to sell the property for a certain sum in case no greater sum should be bid at the sale,[8] although it would be fraudulent to agree to sell at a fixed price without regard to the amount of the bid.[9] A sale for the payment of debts is not rendered fraudulent or invalidated by the fact that the purchaser bought the land for the purpose of perfecting his title under a conveyance from the widow.[10] One who is induced to purchase city lots from an administrator by the latter's false representation as to the width of the streets on which the lots front is entitled to a rescission of the sale without proof of actual damages.[11] One cannot complain unless his interests are injuriously affected.[12]

Participation by the purchaser in the fraud of the executor or administrator making the sale, or notice of such fraud at the time of his purchase, has been held to be necessary to authorize setting aside the sale,[13] but there is also authority for the view that fraud on the part of the representative is sufficient, even though the purchaser was ignorant thereof.[14]

[§ 1672] **i. Mistake.**[15] The ordinary principles of equity apply where it is sought to set aside a sale for mistake.[16] The purchaser may be relieved where an excusable mistake of fact caused him to purchase,[17] but a sale will not be set aside for mistake except at the instance of one injuriously affected.[18]

[§ 1673] **6. Proceedings**[19]**—a. Forum and Form of Remedy.** The jurisdiction to order a sale

the sale was made. Hoyt v. Fleming, 202 Mich. 660, 168 NW 1027.

[c] **The evidence must be substantial.**—Keene v. Wyatt, 160 Mo. 1, 60 SW 1037, 63 SW 116; Kellum v. Smith, 18 Tex. 835.

[d] **Circumstances not sufficient to establish fraud.**—Comstock v. Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34; Gray v. Quicksilver Min. Co., 68 Fed. 677; James v. Kelley, 107 Ga. 446, 33 SE 425, 73 AmSR 135; Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847; Myer v. McDougal, 47 Ill. 278; Beavers v. Rennels, 122 Ill. A. 483; Trimble v. Marshall, 66 Iowa 233, 23 NW 645; Fudge v. Fudge, 23 Kan. 416; Thibodaux v. Barrow, 129 La. 395, 56 S 339; McDermott's Succ., 51 La. Ann. 173, 24 S 787; Scott v. Burch, 6 Harr. & J. (Md.) 67; Kammerer v. Morlock, 125 Mich. 320, 84 NW 319; Egan v. Grece, 79 Mich. 629, 45 NW 74; Smith v. Barr, 83 Minn. 354, 86 NW 342; Cain v. McGeenty, 41 Minn. 194, 42 NW 933; McDonald v. McDaniel, 242 Mo. 172, 145 SW 452; Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861; Overton v. Webster, 26 Mo. 332; Coffin v. Cook, 106 N. C. 376, 11 SE 371; Ward v. Lowndes, 96 N. C. 367, 2 SE 591.

[e] **Fraud may be inferred** where the administrator was the sole creditor and the proceeds of the sale were just equal to the debt and expenses. Humes v. Cox, 1 Pinn. (Wis.) 551.

4. Ga.—Dees v. Freeman, 87 Ga. 588, 13 SE 747.

La.—Decuir v. Lejeune, 15 La. Ann. 569.

Mo.—Hull v. Voorhis, 45 Mo. 555.

Pa.—Kinzer v. Mitchell, 8 Pa. 64; Cooper's Est., 17 Pa. Dist. 881.

S. C.—McGuire v. McGowan, 4 S. C. Eq. 486.

Tenn.—Bennett v. Kennerly, 3 Head 674.

Tex.—Thompson v. Dodge, (Civ. A.) 210 SW 586; McCampbell v. Durst, 15 Tex. Civ. A. 522, 40 SW 315.

[a] **Where the real purpose was to divest the property of its dotal character** and enable the husband purchasing more readily to deal with it, the sale was held void. Decuir v. Lejeune, 15 La. Ann. 569.

5. McQueen v. McDaniel, 38 SW 880, 18 KyL 954; Manning v. Mulrey, 192 Mass. 547, 78 NE 551; Kreider's Est., 17 LancLRev (Pa.) 201; Daly v. Brown. 39 Can. S. C. 122.

[a] **Collusion** between the administrator and the purchaser to effect a sale for less than the salable value of the land is a ground for setting it aside. McQueen v. McDaniel, 38 SW 880, 18 KyL 954.

6. Ingalls v. Rowell, 149 Ill. 163, 36 NE 1016; Anderson v. Pedigo, 126 Ind. 564, 26 NE 397; Jones v. French, 92 Ind. 138, 140; Grant v. Lloyd, 20 Misc. 191; Cobleigh's Est., 23 Pa. Super. 271 [rev 8 LackLegN 107]; Kreider's Est., 17 LancLRev (Pa.) 201.

"It is gross fraud for an administrator to collude with a purchaser and by false statements prevent competing bids." Jones v. French, supra.

[a] **Agreement between several that one shall buy for all.**—(1) It is not fraudulent for the attorneys for the creditors, whose claims exceed the value of the decedent's real estate, the only property available for the payment of debts, to agree between themselves that they will not bid against each other, but that one shall buy the land for the benefit of all, unless some one else bids enough to pay all the debts. Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861. (2) The case of an attempt to prevent intending purchasers from bidding is distinguishable from a case where several persons desiring to obtain distinct portions of a tract of land about to be sold at auction agree that one of their number shall bid for the benefit of all, and in case he succeeds in making the purchase, shall divide the land according to their agreement. It is also distinguishable from those cases where one is deputed to bid as the agent of another, with specific directions as to how and how much he shall bid. Arrangements of this kind, entered into before the sale, are held to promote rather than stifle competition. Ingalls v. Rowell, 149 Ill. 163, 36 NE 1016.

7. In re McBride, 7 N. J. L. 73.

8. Hunt v. Frost, 4 Cush. (Mass.) 54 (such an agreement amounts to no more than a stipulation on the part of the administrator to offer the property for sale at auction at the agreed price, and, if no one should bid more, to sell it at that price to the person with whom he made the agreement).

9. Hunt v. Frost, 4 Cush. (Mass.) 54.

[a] **A sale at the agreed price may be upheld where** such price was in fact liberal and no bid equal to the amount agreed on was made at the sale. Goodbody v. Goodbody, 95 Ill. 456.

10. Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 471, 131 P. 413 ("Dodson's intent in bidding in the property, does not make the sale fraudulent, and is immaterial. The intent with which one bids at a public sale, ordinarily at least, cannot invalidate the sale").

11. Greiling v. Watermolen, 128 Wis. 440, 107 NW 339.

12. Lander v. Abrahamson, 34 Nebr. 553, 52 NW 571.

[a] **A good defense to the proceedings must be shown** in order to justify the setting aside of a fraudulent confirmation. Lander v. Abrahamson, 34 Nebr. 553, 52 NW 571.

[b] **Heirs of an insolvent estate** have such an interest as entitles them to the setting aside of a sale made for the purpose of defrauding creditors. McCampbell v. Durst, 15 Tex. Civ. A. 522, 40 SW 315.

[c] **Where an administrator was proceeding for his own personal ends** and not for the advantage of the estate in seeking to annul a sale, relief was refused. Cushing v. Harmonson, 26 La. Ann. 214.

13. Adams v. Thomas, 44 Ark. 267; Cascaden v. Cascaden, 140 Pa. 140, 21 A 259; McCown v. Foster, 33 Tex. 241; Staples v. Staples, 24 Gratt. (65 Va.) 225.

14. Fincke v. Bundrick, 72 Kan. 182, 83 P 403, 4 LRANS 820 (sale to surety of representative under order fraudulently procured by representative).

15. Sale of property not belonging to decedent see supra § 1476.

16. Roberts v. Smith, 137 Ga. 30, 72 SE 410; Davis v. Cureton, 70 N. C. 667.

[a] **Where the purchaser bought separately two parcels,** the purchase of one being the inducement to the purchase of the other, and confirmation was refused as to one parcel, the confirmation as to the other would be set aside. Davis v. Cureton, 70 N. C. 667.

Mistake as ground of equity jurisdiction see Equity §§ 62–69.

17. Biddison v. Aaron, 102 Md. 156, 62 A 523 (sale of a lot and building situated thereon will be set aside at the instance of the purchaser, where it did not include a tract of land and one-story building situated to the rear of the premises conveyed, which were used as a part of such premises, and which the purchaser, who had known the property for years, and had known that the one-story building was used as a part of the building conveyed, had reason to believe was included in the sale, and which was essential to the reasonable enjoyment of the premises for the purpose contemplated by the purchaser, and the fact that the purchaser did not ask for information as to the one-story building is immaterial, where the administrators would have been unable to give such information).

18. Lamkin v. Reese, 7 Ala. 170; In re Behring, 31 PittsbLegJ (Pa.) 156.

19. Sale of realty under testamentary authority see supra § 686.

of decedent's property is special and ceases with the order of confirmation, so that thereafter the court granting a license has no power, by virtue of its jurisdiction previously existing, to revise its proceedings, and set the sale aside,[20] at least after the expiration of the term at which the order of confirmation was made.[21] Exceptions to this rule have, however, been asserted in cases where the purchasers did not pay the purchase money[22] or the representative was himself the purchaser and the circumstances were such as to afford grounds for a suspicion of fraud,[23] as also in cases of want of jurisdiction, fraud, or mistake,[24] or generally where the sale was absolutely void as distinguished from voidable.[25] After the jurisdiction of the probate court ceases, a bill in equity, or in the code states an action in the nature thereof, will lie, and is necessary in order to vacate a voidable sale.[26] The necessity of bringing in new parties may also require resort to such an independent proceeding.[27] Equity will also take jurisdiction under proper allegations to impress a trust on the property in the hands of the purchaser, without directly attacking his legal title,[28] or when, because of there being no law requiring confirmation, no opportunity was afforded to test the validity of the sale at law.[29] Where equity has taken over the administration of an estate on a bill filed for that purpose it will on supplemental bill set aside a sale made under order of the orphans' court after such transfer of the administration.[30] If the sale is absolutely void persons interested may so treat it, and courts of law will disregard it, so that generally no equitable relief is required and none will be given against void sales.[31] A defective sale may sometimes be in effect avoided by defending proceedings brought by the purchaser to confirm his title.[32] The purchaser at a voidable sale may maintain a bill to

20. Ala.—Duval v. McLoskey, 1 Ala. 708.

Ill.—Stettauer v. Chicago Title, etc., Co., 62 Ill. A. 31.

Minn.—State v. Sibley County Prob. Ct., 33 Minn. 94, 22 NW 10; State v. Ramsey County Prob. Ct., 19 Minn. 117.

Miss.—Grant v. Lloyd, 20 Miss. 191.

N. J.—Crombie v. Engle, 19 N. J. L. 82.

N. Y.—Matter of Brown, 79 Misc. 675, 141 NYS 318.

N. C.—Rawls v. Carter, 119 N. C. 596, 26 SE 154; McLaurin v. McLaurin, 106 N. C. 331, 10 SE 1056; Peterson v. Vann, 83 N. C. 118; Evans v. Singletary, 63 N. C. 205; Thompson v. Cox, 53 N. C. 311. Contra Lovinier v. Pearce, 70 N. C. 167; Hyman v. Jarnigan, 65 N. C. 96.

Pa.—Brittain's Est., 28 Pa. Super. 144 [aff 12 LuzLeg 219]; Farrabee's Est., 13 Pa. Dist. 789, 29 Pa. Co. 334; Bodder's Est., 13 Pa. Dist. 471, 30 Pa. Co. 417, 14 Pa. Dist. 53, 31 Pa. Co. 46; Walsh's Est., 12 Pa. Dist. 218, 28 Pa. Co. 193, 19 Montg. Co. 133; Grew's Est., 31 Pa. Co. 530; Albright's Est., 6 LackLegN 108; Behring's Est., 31 PittsbLegJNS 156.

[a] **Until confirmation** the jurisdiction of the court of probate continues and is exclusive, even after twenty years. Hart v. Hart, 39 Miss. 221, 77 AmD 668.

[b] **Where an order of confirmation was invalid** because entered pending an appeal from the order of sale, a motion to set aside the sale in the probate court was proper. Lictie v. Chappell, 111 N. C. 347, 16 SE 171.

[c] **Motion to set aside, followed by appearance and answer, may be treated as independent action.**—Stradley v. King, 84 N. C. 635.

21. Duval v. McLoskey, 1 Ala. 708; Stettauer v. Chicago Title, etc., Co., 62 Ill. A. 31; Turnbull v. Endicott, 11 Miss. 302; Planters Bank v. Neely, 8 Miss. 80, 40 AmD 51.

22. Taylor v. Hosick, 13 Kan. 518.

23. Myer's Est., 9 Pa. Co. 439.

24. Matter of Corbett, 10 Pa. Dist. 59, 60, 31 PittsbLegJNS 101: ("It may be stated as a general rule that the Orphans' Court has power to alter, revise, revoke or amend its judgments upon cause being shown at any time during the term at which the original judgment was entered, and that after the term has passed it has no such power. But to this general rule there are exceptions. On the one hand, the rights of innocent third parties may intervene in such a way that no relief can be given even if the term has not passed; while, on the other hand, the judgment entered may, for want of jurisdiction, or by reason of fraud, mistake, or misapprehension, be vacated or amended, although the term has passed").

[a] **The time within which the orphans' court may set aside** a sale made under its order is limited to ten years after the sale. Grindrod's Est., 140 Pa. 161, 21 A 259.

25. Bland v. Bowie, 53 Ala. 152, 160 ("It is well settled on authority that the court of probate, or any other court of record, whether of general or limited jurisdiction, may, on a proper application, vacate any final order or decree, void on its face, at any time subsequent to its rendition; but not for matters dehors the record, except in the event of the death of either party, when the order was made, or the judgment or decree rendered. If the judgment is not void on its face, and both parties were living at its rendition, the court cannot at a subsequent term vacate or alter it. The correction of clerical misprisions is then the extent of its authority").

26. Ala.—Fielder v. Childs, 73 Ala. 567; Mosely v. Tuthill, 45 Ala. 621, 6 AmR 710.

Ark.—Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398.

Ga.—Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

Ill.—Mettler v. Warner, 249 Ill. 341, 94 NE 522.

Iowa.—Walker v. Walker, 127 Iowa 77, 102 NW 435.

Me.—Decker v. Decker, 74 Me. 465.

Mass.—Yeackel v. Litchfield, 13 Allen 417, 90 AmD 207.

Mich.—Beaubien v. Poupard, Harr. 206.

Miss.—Smith v. Chew, 35 Miss. 153.

N. J.—Runyon v. Newark India-Rubber Co., 24 N. J. L. 467; Howell v. Sebring, 14 N. J. Eq. 84.

N. C.—McLaurin v. McLaurin, 106 N. C. 331, 10 SE 1056; Peterson v. Vann, 83 N. C. 118.

Oh.—Caldwell v. Caldwell, 45 Oh. St. 512, 15 NE 297; Baker v. Lamkin, 11 Oh. Cir. Ct. 103, 5 Oh. Cir. Dec. 54.

Tex.—Dobbin v. Bryan, 5 Tex. 276; Ennis v. Cator, (Civ. A.) 174 SW 947.

"Courts of law have no power to set aside a sale because the administrator was interested in the purchase. This is for the reason that the sale is not void, but merely voidable at the election of the beneficial owners of the estate; and if they seek to set it aside, they must observe the maxim of 'he who seeks equity must do equity.' The doctrine of granting relief upon terms or conditions imposed is not known at law, but is purely a creature of equity." Crawford County Bank v. Bolton, 87 Ark. 142, 147, 112 SW 398.

[a] **Equity has inherent jurisdiction** to set aside, on the ground of fraud, the orders and decrees of a court of probate. West v. Waddill, 33 Ark. 575.

[b] **Equity will not enjoin the enforcement of a judgment at law** based on the title made through the sale where there was no obstacle to contesting the validity of the sale in the action at law. Lieby v. Ludlow, 4 Oh. 469.

[c] **No equity jurisdiction except in case of fraud.**—A court of equity has no jurisdiction to set aside a sale made and confirmed by order of the probate court except for fraud in procuring the judgment. Baker v. Lamkin, 11 Oh. Cir. Ct. 103, 5 Oh. Cir. Dec. 54.

[d] **In Louisiana** (1) it seems that a direct action in a court of ordinary jurisdiction is always necessary. Anger's Succ., 38 La. Ann. 492; Fields v. Gagne, 31 La. Ann. 182; Violett v. Fairchild, 6 La. Ann. 193. (2) But such a court cannot set aside a sale because of the invalidity of the administrator's appointment. The court of probate must first remove the administrator. McCombs v. Dunbar, 3 La. 517. (3) The order of sale and proceedings leading thereto must be attacked in the court ordering the sale, but subsequent proceedings may be brought in the court of the administrator's domicile. Woods v. Woods, 13 La. Ann. 189.

[e] **In Nebraska,** where the license to sell is obtained in a court of general jurisdiction at law and in equity, it has been said that the proper remedy after confirmation is by petition in the original proceedings, and the petition must be positively verified. Lander v. Abrahamson, 34 Nebr. 553, 52 NW 571.

27. Herrmann v. Fontelieu, 29 La. Ann. 502; Everett v. McKinney, 7 La. 375; Cassanova v. Acosta, 1 La. 179; Saunders v. Howard, 51 Tex. 23.

28. Baines v. McGee, 9 Miss. 208; Caldwell v. Caldwell, 45 Oh. St. 512, 15 NE 297; Fisher v. Wood, 65 Tex. 199; Bauman v. Chambers, 17 Tex. Civ. A. 242, 42 SW 564.

[a] **Equity will enforce the claims of distributees** against the purchaser, the power of the probate court not being adequate. Baines v. McGee, 9 Miss. 208.

29. Payne v. Turner, 36 Ala. 623.

30. Pearson v. Darrington, 32 Ala. 227.

31. State Bank v. White, 23 Mo. 342, 66 AmD 671; Mawhorter v. Armstrong, 16 Oh. 188.

32. Quick v. Goodwin, 19 Ind. 438; Casanave v. Spear, 23 La. Ann. 519; Bauman v. Chambers, 17 Tex. Civ. A. 242, 42 SW 564.

[a] **Demurring to a bill by the purchasers** to restrain an action at law and reform their deed is not an election to disaffirm a sale to the administrators and does not present for adjudication the right of the heirs to vacate such sale. Thorp v. McCullum, 6 Ill. 614.

compel the heir to elect whether he will ratify or disaffirm.[33]

[§ 1674] **b. Parties.** In a suit to set aside an executor's or administrator's sale the principles of equity control as to the parties.[34] The heirs or devisees must be made parties,[35] as must also the executor or administrator[36] and all other parties to the sale.[37] The purchaser must be brought in as a party[38] and all who have since acquired interests in the property should also be made parties.[39] Those also must be brought in whose rights would be affected by a determination of the matters involved.[40] Creditors are not generally necessary parties[41] but a creditor who instituted the proceedings leading to the sale must be made a party to a bill to set it aside.[42] Where the administrator indirectly purchased, neither his creditors, not his assignee for creditors, are proper parties,[43] nor is the person through whom the representative effected his purchase a necessary party.[44] On an objection to the issuance of a deed to a purchaser, on the ground that the purchaser had agreed to take title in the name of his mother for the benefit of her minor grandchildren, it is not necessary that the mother is made a party.[45]

[§ 1675] **c. Notice.** The purchaser is entitled to notice of a proceeding to set aside the sale,[46] and it has been held that a creditor of decedent has such an interest in a decree confirming a sale that he is entitled to notice of and an opportunity to be heard on the administrator's application to vacate it.[47]

[§ 1676] **d. Pleadings.** The pleadings in a proceeding to set aside a sale must have the substantial requisites of equity pleadings.[48] The bill, petition, or complaint must specify the defects relied on,[49] and its allegations must be positive and direct,[50] and must be of specific facts, not general conclusions.[51] The extent of plaintiff's interest must be stated with certainty,[52] and plaintiff must, when necessary in order to disclose an unquestionable right, plead exceptions and negative facts.[53]

33. Bland v. Bowie, 53 Ala. 152.

34. Hooey v. Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762.

Parties in equity generally see Equity §§ 253–356.

35. Hooey v. Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762; Daniel v. Stough, 73 Ala. 379; Benson v. Benson, 97 Mo. A. 460, 71 SW 360; Estill v. Deckerd, 4 Baxt. (Tenn.) 497.

[a] **Illustration.**—Equitable owners attacking the sale as void and seeking to establish a trust must bring in heirs in whom, on the theory that the sale was void, the legal title remains. Estill v. Deckerd, 4 Baxt. (Tenn.) 497.

36. Wandschneider v. Wandschneider, 282 Ill. 286, 118 NE 486; Herrmann v. Fontelieu, 29 La. Ann. 502.

37. Davis v. Spicer, (Ky.) 128 SW 294; Burney v. Ludeling, 41 La. Ann. 627, 6 S 248.

38. Ga.—Fordham v. Duggan, 147 Ga. 610, 95 SE 3.

Ky.—Carter v. Crow, 130 Ky. 41, 112 SW 1098.

La.—Herrmann v. Fontelieu, 29 La. Ann. 502; Everett v. McKinney, 7 La. 375; McCombs v. Dunbar, 3 La. 517; Casanova v. Acosta, 1 La. 179.

Mo.—Rusk v. Thompson, 170 Mo. A. 76, 156 SW 64.

Tex.—Saunders v. Howard, 51 Tex. 23.

39. Sterlin v. Gros, 5 La. 100; Saunders v. Howard, 51 Tex. 23.

40. Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861 (an heir attacking a sale and asserting a homestead right must bring in the widow and other heirs interested in the assignment of the homestead).

41. Vincent v. Phillips, 47 La. Ann. 1216, 17 S 786. But compare Golden's Est., 56 Pa. Super. 300 (set out infra § 1675, text and note 47.

42. Hooey v. Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762; Benson v. Benson, 97 Mo. A. 460, 71 SW 360.

43. Hannum's App., 1 Chest. Co. (Pa.) 362.

44. Barnard v. Keathley, 230 Mo. 209, 130 SW 306.

45. Davis v. Spicer, (Ky.) 128 SW 294.

46. Rusk v. Thompson, 170 Mo. A. 76, 156 SW 64; Orais v. Escano, 14 Philippine 208.

"The purchaser had a right to believe that the court had complied with the law and that she had, therefore, obtained a good title. Whether she had obtained a good title or not she certainly was entitled to notice before any action was taken by the court by which she should be deprived of her title." Orais v. Escano, 14 Philippine 208, 212.

47. Golden's Est., 56 Pa. Super. 300.

48. Equity pleadings generally see Equity §§ 374–668.

49. Deams v. Wilcoxon, 25 Fla. 980, 7 S 163; Smith v. Krause, etc., Lumber Co., 125 La. 703, 51 S 693; Gormley v. Palmes, 13 La. Ann. 213; Leonard v. Cameron, 39 Miss. 419.

50. Ala.—Garrett v. Lynch, 45 Ala. 204.

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

Ga.—Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

Ky.—Harrod v. Harrod, 167 Ky. 308, 180 SW 797.

La.—Thomas' Succ., 1 La. A. (Orleans) 124.

Pa.—Snyder's Est., 30 Pa. Co. 614.

Tex.—Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

[a] **Insufficient allegations.**— (1) An allegation that plaintiff caused search to be made in the office of the probate court and no record or any evidence could be found that the administrator had ever applied to said court for the sale of the lands is not an averment that no order of sale had been made. Garrett v. Lynch, 45 Ala. 204. (2) In a suit brought before confirmation an allegation that the purchasers intended to make no payment other than a credit on the claim to satisfy which the sale was made is insufficient to show that the sale was not for cash, as the court will not presume that the administrator will violate the law or the probate court confirm an illegal purchase. Deans v. Wilcoxon, 25 Fla. 980, 7 S 163. (3) Where all the heirs made quitclaim deeds covering their respective interests in the real estate, to a purchaser from the administrators, and one of them sought to cancel the entire transaction and compel the property to be redelivered to the administrator, the allegation of the existence of some debts is too vague and indefinite to affect the question, and the case made is that of a single heir, who desires to set aside a sale and have the whole property returned to the administrators substantially for the benefit of all the heirs, in spite of the fact that they appear to have made quitclaim deeds of their interest, and not to desire a restoration. Anderson v. Goodwin, 125 Ga. 663, 54 SE 679. (4) Under a statute requiring the administration to be "in the county where decedent resided if he had a fixed domicile or residence in the republic," a bill attacking a sale on the ground that the administration in R county was without jurisdiction and alleging that the last place of residence of the deceased was in L county, where he resided at the time of his death, was bad for not alleging that L county was his permanent or fixed residence or that he had a fixed domicile or residence in the republic. George v. Watson, 19 Tex. 354.

[b] **Complaints held sufficient.**— (1) A complaint which alleges that the sale was made pursuant to the county court's decree, that the administrator executed his deed for the property, and that several years elapsed between the time of the sale and the bringing of the suit, sufficiently alleges the final disposition of the matter of the sale in the county court, where the statute requires that a report of the sale shall be made at the term of court next succeeding the sale, and that a conveyance shall not be made until after the sale is approved. Ryan v. Geigel, 39 Colo. 355, 89 P 775. (2) A petition alleging that the judgment of sale was procured by the administrator for his benefit on consent of the petitioners obtained by fraudulently representing to them that the sale was for their benefit, and that the administrator thereby secured lands of the estate for a nominal sum, states a good cause of action. Harrod v. Harrod, 167 Ky. 308, 180 SW 797.

51. Burris v. Adams, 96 Cal. 664, 31 P 565 [dist Jones v. Hanna, 81 Cal. 507, 22 P 883]; Beavers v. Rennels, 122 Ill. A. 483; Denton v. Arnold, 151 Ind. 188, 51 NE 240.

[a] **Showing what record discloses.**—Where the recitals of the record as to service of process are conclusive, a complaint seeking to set aside a sale for want of service must allege not merely that there was no service, but what the record discloses as to service. Denton v. Arnold, 151 Ind. 188, 51 NE 240 [foll Bailey v. Rinker, 146 Ind. 129, 45 NE 38].

52. Fisher v. Bush, 133 Ind. 315, 32 NE 924.

53. Rice v. Bolton, 126 Iowa 654, 100 NW 634, 102 NW 509; Oliver v. Park, 101 Ky. 1, 39 SW 423, 19 KyL 179; Dickens v. Long, 109 N. C. 165, 13 SE 841.

[a] **Illustrations.**—(1) Where the record discloses an appearance by attorney, one seeking to avoid the sale for want of notice must deny the attorney's authority to appear for him. Oliver v. Park, 101 Ky. 1, 39 SW 493, 19 KyL 179. (2) Plaintiff must show that he is within an exception to a statute of limitations which the bill would show to be otherwise applicable. Back v. Combs, 96 Ky. 522, 29 SW 852, 16 KyL 613. (3) A plaintiff claiming the land as an exempt homestead must negative the exceptions in the statute creating

A bill to set aside a sale for fraud must charge the purchaser with notice of the fraud.[54] In the absence of a special exception attacking the sufficiency of the petition to set aside a sale on the ground that facts were pleaded showing that the running of the statute of limitations had not been suspended during its apparent operation, a general allegation in the petition that the claims for the payment of which the land was sold were barred, is sufficient to admit proof of such fact.[55] There should in general be an offer in pleading to restore the purchase money.[56]

[§ 1677] **e. Evidence—(1) Presumptions and Burden of Proof—(a) As to Jurisdiction, Etc.** The presumptions are strongly in favor of the validity of sales. It is often held that jurisdiction will be presumed from the fact that the court made the order,[57] but in some states it is held that on a collateral attack one claiming under the sale must show affirmatively the jurisdictional facts.[58] A finding or recital in the record is sufficient to raise a presumption of jurisdiction,[59] but no presumption of jurisdiction can be indulged if the record affirmatively discloses facts contrary thereto.[60] Not only jurisdiction but the fact that proceedings were had and a license granted will be presumed if the deed so recites and there has been long possession thereunder.[61] Indeed long and undisturbed possession alone creates a presumption of the validity of the sale,[62] and the legal inference from an allegation that property was sold more than forty years ago, in a succession, is that it was sold to pay debts.[63] No presumption will be indulged contrary to the record in order to sustain a sale, as by presuming that it was in fact made under an execution or a power in the will when the record discloses that it was made under an order of court and was void thereunder.[64] If, however, the property was personalty and might have been sold without an order, the sale is not invalidated because an order was obtained.[65]

[§ 1678] **(b) As to Regularity of Proceedings.** The existence and regularity of steps in the proceedings, not jurisdictional, but sometimes essential to perfect title in the purchaser, will almost uniformly be presumed where the record is merely silent,[66] and especially is this true where the rec-

the exemption. Dickens v. Long, 109 N. C. 165, 13 SE 841.

[b] **Accuracy of description of lands.**—On a suit to set aside a sale the description of the lands in the order of sale must be presumed to have exemplified what was intended, in the absence of an allegation to the contrary. Rice v. Bolton, 126 Iowa 654, 100 NW 634 [mod on reh 126 Iowa 654, 102 NW 509].

54. Duffy v. Mellick, 42 N. J. Eq. 117, 7 A 341; Shane v. Peoples, 25 N. D. 188, 196, 141 NW 737 [cit Cyc]; Cascaden v. Cascaden, 140 Pa. 140, 21 A 259; George v. Watson, 19 Tex. 354.

[a] **A subsequent purchaser** must be charged in the bill with notice of the fraud. George v. Watson, 19 Tex. 354.

55. Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679.

56. Gormley v. Palmes, 13 La. Ann. 213; Shane v. Peoples, 25 N. D. 188, 141 NW 737.

Necessity of offer or tender of purchase money generally see infra § 1684.

57. U. S.—Grignon v. Astor, 2 How. 319, 11 L. ed. 283.

Ark.—Blevins v. Case, 66 Ark. 416, 51 SW 65.

Ind.—Denton v. Arnold, 151 Ind. 188, 51 NE 240; Sims v. Gay, 109 Ind. 501, 9 NE 120; Doe v. Harvey, 3 Ind. 104; Horner v. Doe, 1 Ind. 130, 48 AmD 355.

Ky.—Dennis v. Alves, 132 Ky. 345, 113 SW 483.

Miss.—Root v. McFerrin, 37 Miss. 17, 75 AmD 49.

Mo.—Murphy v. De France, 105 Mo. 53, 15 SW 949, 16 SW 861 [overr Daudt v. Harmon, 16 Mo. A. 203].

N. Y.—Wood v. McChesney, 40 Barb. 417.

N. D.—Shane v. Peoples, 25 N. D. 188, 141 NW 737.

Oh.—Sheldon v. Newton, 3 Oh. St. 494.

Tex.—Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852; Mills v. Herndon, 77 Tex. 89, 13 SW 854; Tom v. Sayers, 64 Tex. 339.

Wash.—Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16.

[a] **The statutory power of the court being sufficient** to authorize it to order the sale, the order cannot be impeached collaterally for lack of jurisdiction. Grignon v. Astor, 2 How. (U. S.) 319, 11 L. ed. 283; Allen v. Lyons, 1 F. Cas. No. 227, 2 Wash. 475.

[b] **Where the jurisdictional facts appear** on the record, the same presumption arises in favor of the judgment as arises in favor of courts of general jurisdiction. Root v. McFerrin, 37 Miss. 17, 75 AmD 49.

[c] **After many years' possession** under the purchase such a presumption will be indulged. Moore v. Greene, 19 How. 69, 15 L. ed. 533 [aff 17 F. Cas. No. 9,763, 2 Curt. 202].

58. Reddick v. Long, 124 Ala. 260, 27 S 402; Shelton v. Hadlock, 62 Conn. 143, 25 A 483; Doe v. Roe, 4 Ga. 148, 48 AmD 216; Fell v. Young, 63 Ill. 106.

59. Ill.—Kilgour v. Gockley, 83 Ill. 109; Moore v. Neil, 39 Ill. 256, 89 AmD 303.

Ind.—Clark v. Hillis, 134 Ind. 421, 34 NE 13.

Iowa.—Little v. Sinnett, 7 Iowa 324.

La.—Grevemberg v. Bradford, 44 La. Ann. 400, 10 S 786.

Mass.—Thomas v. Le Baron, 8 Metc. 355.

N. C.—Pinnell v. Burroughs, 168 N. C. 315, 84 SE 364.

Tex.—Perry v. Blakey, 5 Tex. Civ. A. 331, 23 SW 804.

[a] **It is sufficient if the record recites notice,** but if it does not, none will be presumed from the fact that no order was made until thirty years had elapsed. Thomas v. Le Baron, 8 Metc. (Mass.) 355.

[b] **Absence of the notice from the files** will not defeat the presumption that it was a proper one where the record discloses that there was notice by publication and posting. Clark v. Hillis, 134 Ind. 421, 34 NE 13.

60. Donlin v. Hettinger, 57 Ill. 348; Guy v. Pierson, 21 Ind. 18; Doe v. Anderson, 5 Ind. 33; Babbitt v. Doe, 4 Ind. 355; Moore v. Smith, 24 S. C. 316.

[a] **Thus** where the administration record does not disclose the existence of any heirs and the order of sale was made the day the application was filed, notice to the heirs cannot be presumed. Doe v. Bowen, 8 Ind. 197, 65 AmD 758.

[b] **Service of notice.**—Where the recital of service showed that the service was defective, and the order was set aside and a new order made without any new adjudication as to service, and no other service appeared, it was presumed that the second order was based on the service mentioned in the first, and that the court failed to acquire jurisdiction. Donlin v. Hettinger, 57 Ill. 348.

[c] **A voluntary appearance has been presumed,** although the record showed that there had been no service of notice. Gerrard v. Johnson, 12 Ind. 636.

61. Massenburg v. Denison, 71 Fed. 618, 18 CCA 280; Baker v. Prewitt, 64 Ala. 551; Doolittle v. Holton, 28 Vt. 819, 67 AmD 745. See also Stevenson v. McReary, 20 Miss. 9, 51 AmD 102 (where there was incomplete evidence of the probate proceedings).

[a] **Such presumption has been indulged:** (1) After fifty-five years' possession. Massenburg v. Denison, 71 Fed. 618, 18 CCA 280. (2) After a lapse of fifty years the probate proceedings being lost. Starr v. Brewer, 58 Vt. 24, 3 A 479.

62. Ala.—Lay v. Lawson, 23 Ala. 377.

Ga.—Newton v. Roe, 33 Ga. 163.

Mass.—Gray v. Gardner, 3 Mass. 399.

Miss.—Stevenson v. McReary, 20 Miss. 9, 51 AmD 102.

N. C.—Morris v. House, 125 N. C. 550, 34 SE 712.

Tex.—Sypert v. McCowen, 28 Tex. 635.

[a] **Illustration.**—Where the purchase money was paid and an informal deed made by the administrator and the probate records destroyed, the report and confirmation of sale were presumed after nineteen years. Smith v. Wert, 64 Ala. 34.

63. Smith v. Krause, etc., Lumber Co., 125 La. 703, 51 S 693.

64. Jay v. Stein, 49 Ala. 514; Wilson v. Armstrong, 42 Ala. 168, 94 AmD 635; Alabama Conference M. E. Church South v. Price, 42 Ala. 39; Smith v. Krause, etc., Lumber Co., 125 La. 703, 51 S 693; Rice v. Bamberg, 59 S. C. 498, 38 SE 209; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

65. Horner's App., 56 Pa. 405.

66. Ga.—Coggins v. Griswold, 64 Ga. 323.

Ill.—Verdun v. Barr, 253 Ill. 120, 97 NE 239.

Iowa.—Rice v. Bolton, 126 Iowa 654, 100 NW 634, 102 NW 509; Lees v. Wetmore, 58 Iowa 170, 12 NW 238; Long v. Burnett, 13 Iowa 28, 81 AmD 420.

Mich.—Wheelock v. Lake, 117 Mich. 11, 75 NW 140.

Miss.—Hutchins v. Brooks, 31 Miss. 430.

Mo.—Hicks v. Watson, 258 Mo. 425, 167 SW 533; McNair v. Hunt, 5 Mo. 300.

N. Y.—Rigney v. Coles, 19 N. Y. Super. 479.

N. C.—Phillips v. Denton, 158 N. C. 299, 73 SE 1006.

N. D.—Shane v. Peoples, 25 N. D. 188, 141 NW 737.

ords are in whole or in part lost.[67] So a record defective in some particular may be aided by a finding, recital, or allegation in another part from which the court will presume the existence of the missing element.[68] But where the record discloses an insufficient order of confirmation, the existence of another and sufficient order will not be presumed.[69] The general rule that persons acting in an official capacity are presumed to have properly performed their duties[70] applies to administration sales.[71] A prima facie case is made by the purchaser by production of an order of sale, order of confirmation, and deed; all other steps will be presumed,[72] and the burden is then on the party impeaching the sale to show that it was not made legally.[73] One who seeks to set aside the sale for fraud has the burden of proving his contention.[74] A sale to the administratrix's mother and a reconveyance to the administratrix the same day create a prima facie, but not a conclusive, presumption of fraud in an action to set aside the sale.[75]

[§ 1679] **(2) Admissibility.** The construction of the order of sale must be determined by the court from an inspection of the record itself,[76] but parol evidence, based on data in the deed, may be received to identify the land conveyed.[77] Where the statute protects a sale from attack if certain conditions are complied with, and the price "duly accounted for," the account can be shown only by the probate records.[78] Where fraud is charged, parol evidence may be received to contradict the official appraisement as to the value of the property,[79] and parties to the deed may testify to facts in support of the charge of fraud, although they contradict recitals in the deed.[80] Where certain of the heirs residing in the county testified that they had never been served with notice of the application to sell, defendant, to rebut such testimony, was entitled to prove by the sheriff the contents, in substance, of the process served by him, after showing diligent and unavailing search for the papers showing a return of service of notices by him on all plaintiffs or their representatives who lived in the county.[81]

[§ 1680] **(3) Weight and Sufficiency.** Evidence in support of allegations invalidating the sale must be clear and strong;[82] but slight evidence, especially after a long lapse of time ac-

Tenn.—Sanders v. Guille, (Ch. A.) 37 SW 999.

Tex.—Templeton v. Ferguson, 89 Tex. 47, 33 SW 329 [aff (Civ. A.) 32 SW 148]; Daimwood v. Driscoll, (Civ. A.) 151 SW 621; Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891; Harris v. Shafer, (Civ. A.) 21 SW 110.

[a] **Same presumption as in case of courts of general jurisdiction.**—When there is a petition presented by an administrator all further proceedings have the same presumptions of regularity which attach to judgments of courts of general jurisdiction. Long v. Burnett, 13 Iowa 28, 81 AmD 420.

[b] **Notice.**—On collateral attack on an executor's sale where the executor failed to file a report of the sale as required by statute, before the first day of the term of court next succeeding the sale, and there was sufficient time between filing the report and confirmation of the sale for notice to be given to the parties in interest, it will be presumed that such notice was given. Verdun v. Barr, 253 Ill. 120, 97 NE 239.

[c] **After ten years an order of confirmation will be presumed** in collateral proceedings, although none is found of record. Mott v. Ft. Edward Waterworks Co., 79 App. Div. 179, 79 NYS 1100.

[d] **Where the order of confirmation did not identify the land** sold to each purchaser, it was presumed that the confirmation related to the lands conveyed by the deeds which had been previously executed. Perry v. Blakey, 5 Tex. Civ. A. 331, 23 SW 804.

[e] **Inventory.**—A decree of sale and subsequent proceedings afford no evidence that an inventory had been previously made. Goodwin v. Sheldon, 1 Day (Conn.) 312.

67. Wyatt v. Scott, 33 Ala. 313; Johnson v. McDyer, 9 SW 778, 11 KyL 29; Bray v. Adams, 114 Mo. 486, 21 SW 853; Rowdon v. Brown, 91 Mo. 429, 4 SW 129; Morris v. House, 125 N. C. 550, 34 SE 712.

[a] **After twenty years** regularity will be presumed, the records having been loosely kept at the time of the sale. Wyatt v. Scott, 33 Ala. 313.

68. See cases infra this note.

[a] **Illustrations.**—(1) Where a petition did not aver the value of the property, it will be presumed on collateral attack that its value was stated in an inventory referred to in the petition as on file. Burris v. Kennedy, 4 Cal. Unrep. Cas. 936, 38 P 971. (2) Where the petition alleged the existence of debts, this will be presumed, although the record does not elsewhere affirmatively show it. McCamant v. Roberts, 80 Tex. 316, 15 SW 580.

69. Blakey v. Perry, 15 Tex. Civ. A. 26, 38 SW 374; Pace v. Fishback, 10 Tex. Civ. A. 450, 31 SW 424.

70. See Evidence § 69.

71. U. S.—Santana Live-Stock, etc., Co. v. Pendleton, 81 Fed. 784, 26 CCA 608.

Iowa.—Brown v. Butters, 40 Iowa 544.

La.—Higgins v. Carbajal, 123 La. 733, 49 S 489.

Me.—Austin v. Austin, 50 Me. 74, 79 AmD 597.

Miss.—Powell v. Warmack, 76 S 504.

Mo.—Price v. Springfield Real-Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595.

N. Y.—Demarest v. Wynkoop, 3 Johns. Ch. 129, 8 AmD 467.

Or.—Russell v. Lewis, 3 Or. 380.

Pa.—Fink v. Miller, 19 Pa. Super. 556.

Tenn.—Griffith v. Philips, 9 Lea 417.

Tex.—Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984.

[a] **Illustrations.**—It will be presumed: (1) That the sale was for not less than the required proportion of the appraised value. Brown v. Butters, 40 Iowa 544. (2) That a bond was executed before making the sale. Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984. (3) That an administrator had paid the necessary proportion of the appraised value to render his purchase legal, and that an administrator who was a judge of the court did not participate in the proceedings. Price v. Springfield Real-Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595. (4) Payment of the purchase money will be presumed from the fact of confirmation. Griffith v. Philips, 9 Lea (Tenn.) 417. (5) The approval of a bond may be presumed from its filing. Austin v. Austin, 50 Me. 74, 79 AmD 597. (6) The making of a deed will be presumed when the order of confirmation shows that a sale bill had been filed, because a deed should have been made in the course of the administrator's duties. Long v. Joplin Min., etc., Co., 68 Mo. 422. (7) Where on the face of the record the order of sale was made a day before the time fixed in the order to show cause, it is presumed that there was a mistake in making up the record, rather than that the order was made before the return day. Russell v. Lewis, 3 Or. 380. (8) Where a sale was regular, but the deed was dated nineteen years after the sale, it was proper to presume that a deed was made at the time of the sale and lost, and that the one produced was executed to take its place. Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 AmD 467.

72. Hawkins v. Ragan, 20 Ind. 193; Harris v. Ransom, 24 Miss. 504; Young v. Downey, 145 Mo. 250, 46 SW 1086; Agan v. Shannon, 103 Mo. 661, 15 SW 757; Price v. Springfield Real-Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595; McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

73. Hoyt v. Fleming, 202 Mich. 660, 168 NW 1027; Harris v. Ransom, 24 Miss. 504.

74. Johnston v. Frank, 97 Nebr. 190, 149 NW 409.

75. Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25.

76. Wyatt v. Steele, 26 Ala. 639; Hayes v. Dickson, 148 Ga. 700, 98 SE 345; Bowen v. Gaskins, 144 Ga. 1, 85 SE 1007.

77. Doe v. Riley, 28 Ala. 164, 65 AmD 334.

Sufficiency of description in writing to admit parol evidence generally see Evidence § 1690.

78. Jewett v. Jewett, 10 Gray (Mass.) 31.

79. Herrimann v. Janney, 31 La. Ann. 276.

80. Kifer v. Brenneman, 1 Pa. 452; McCampbell v. Durst, 73 Tex. 410, 11 SW 380.

81. Thompson v. Pinnell, 237 Mo. 545, 141 SW 605.

82. Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ill.—Wilson v. Kellogg, 77 Ill. 47; Burns v. Myers, 191 Ill. A. 518.

La.—Higgins v. Carbajal, 123 La. 733, 49 S 489; St. Amant v. Tessier, 47 La. Ann. 177, 16 S 737; Calhoun v. McKnight, 44 La. Ann. 575, 10 S 783.

Md.—Goldsborough v. Ringgold, 1 Md. Ch. 239.

Mich.—Hoyt v. Fleming, 202 Mich. 660, 168 NW 1027.

Minn.—Babcock v. Cobb, 11 Minn. 347.

Miss.—Powell v. Warmack, 76 S 504; Saunders v. Sorrell, 65 Miss. 288, 3 S 661.

Mo.—Thompson v. Pinnell, 199 SW 1011; Thompson v. Pinnell, 237 Mo. 545, 141 SW 605.

companied by possession of the purchaser or those claiming under him, may be sufficient to sustain the sale.[83] After the lapse of years recitals of jurisdictional facts in the deed are prima facie evidence thereof,[84] but recitals giving reasons why the property sold for so little create suspicion as to the fairness of the sale.[85] Reference is made in the note to a number of cases in which the courts have passed upon the sufficiency of evidence adduced in support or contravention of particular contentions.[86]

[§ 1681] **f. Trial or Hearing.** There should be a hearing on the issues raised by the pleadings,[87] and where a jury trial is had the instructions must correctly advise them as to the governing principles and their duties.[88]

[§ 1682] **g. Decree; Relief Granted.** It is proper to set aside the sale where the court is not satisfied that it was made fairly and in conformity to law.[89] If another court has exclusive jurisdiction to license sales, a court of equity may on avoiding a sale decree possession and remove all obstacles to a resale, but it cannot itself order one.[90] A new license may be obtained if necessary,[91] but if the defect was in the sale alone the license should not be vacated and a new license is unnecessary.[92] Under some circumstances the defect can be cured only by a resale;[93] and it has been considered that the sale should not be set aside when a resale is impractical and the price realized at the original sale was adequate.[94] In the case of sales by administrators to themselves the proper course has sometimes been declared to be to order a resale, and if on such resale more is not bid than was paid by the administrator on the first sale, then to confirm the first,[95] although it has also been held that under such circumstances the sale should not be set aside, but the purchaser should be declared a trustee for the heirs or devisees.[96] Where land was sold in parcels to different purchasers, under an alleged irregular judgment, the sale cannot be set aside as to one parcel at the instance of certain

Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409.
N. J.—Owen v. Owen, 88 N. J. Eq. 353, 102 A 812.
Pa.—Sager v. Mead, 171 Pa. 349, 33 A 355; Potts v. Wright, 82 Pa. 498.
Wash.—Hipkins v. Estes, 51 Wash. 1, 97 P 1089; McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

[a] **Absence of citation and bond.**—(1) Testimony of a judge that he had examined the records of the court without finding a citation essential to the jurisdiction is not sufficient to defeat the sale. Gibson v. Foster, 2 La. Ann. 503. (2) But such testimony as to failing to find a bond, together with the testimony of the administrator that none was given, is sufficient to defeat the sale. Babcock v. Cobb, 11 Minn. 347.

83. Ill.—Cunningham v. Daugherty, 220 Ill. 45, 77 NE 95.
Mass.—Thomas v. Le Baron, 8 Metc. 355.
Mo.—Baker v. Henry, 63 Mo. 517.
Nebr.—Johnston v. Frank, 97 Nebr. 190, 149 NW 409.
N. C.—Turner v. Sheffler, 108 N. C. 642, 13 SE 243.
Pa.—Huckle v. Phillips, 2 Serg. & R. 4.

[a] **Illustrations.**—(1) After twenty four years a certificate of the judge recorded with the grant of the license, that the administrator had taken the oath, is sufficient evidence of the fact. Thomas v. Le Baron, 8 Metc. (Mass.) 355. (2) Where the report of sale was found among the papers of a deceased clerk, but not with other probate papers, and the courthouse had been destroyed by fire, and the records moved from place to place, the filing was sufficiently proved. Baker v. Henry, 63 Mo. 517.

[b] **A finding of a referee** in a suit to set aside a sale that it was made in good faith will not be reversed if there is any evidence to warrant it. Turner v. Suffler, 108 N. C. 642, 13 SE 243.

[c] **Secondary evidence.**—Where records were loosely kept and many years have elapsed, letters of administration need not be produced if there is secondary evidence that they were granted. Huckle v. Phillips, 2 Serg. & R. (Pa.) 4.

84. Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Doe v. Roe, 4 Ga. 148, 48 AmD 216.

85. Grant v. Lloyd, 20 Miss. 191.

86. See cases infra this note.

[a] **Adequacy of price.**—Ryan v. Geigel, 25 Colo. A. 122, 136 P 804 (sale for full market value); Sager v. Mead, 171 Pa. 349, 33 A 355.

[b] **Character of land.**—W. J. Downing Lumber Co. v. Medlin, 136 Ga. 665, 72 SE 22 (that tracts of land involved were not "wild, uncultivated" land, when administrators made private sales thereof under orders of the court of ordinary).

[c] **False representation.**—Greiling v. Watermolen, 128 Wis. 440, 107 NW 339 (as to width of street in diagram of property).

[d] **Fraud.**—Wilson v. Kellogg, 77 Ill. 47; Calhoun v. McKnight, 44 La. Ann. 575, 10 S 783; Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25 (absence of fraud in sale made by administratrix to her mother, who reconveyed the property to the administratrix on the same day); Barnard v. Keathley, 230 Mo. 209, 130 SW 306; Smith v. Smith, 45 Mont. 535, 125 P 987 (that the executor and the guardian of certain heirs dealt at arms length and in good faith); Baldridge v. Smith, (Okl.) 184 P 153; Potts v. Wright, 82 Pa. 498; Vann v. Calcasieu Trust, etc., Bank, (Tex. Civ. A.) 204 SW 1062 (in purchase by administrator who immediately resold at a profit).

[e] **Inaccuracy of survey on which sale made.**—Goldsborough v. Ringgold, 1 Md. Ch. 239.

[f] **Knowledge.**—Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 NE 1056 (of heirs that one of the executors furnished nearly half of the purchase money); Sanders v. Sorrell, 65 Miss. 288, 3 S 661 (purchaser's knowledge of fraud).

[g] **Nonpayment of purchase money.**—St. Ament v. Tessier, 47 La. Ann. 177, 16 S 737.

[h] **Person who paid purchase price.**—West v. Burgie, 75 Ark. 516, 88 SW 557, 5 AnnCas 706.

[i] **Service of process.**—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

[j] **Use of proceeds for benefit of estate.**—Bolen v. Hoven, 150 Ala. 448, 43 S 736.

87. Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551 (where in a suit by minor heirs of an intestate to set aside an administrator's sale, it was alleged that defendants procured the assignment of a mortgage by the intestate to the administrator, pursuant to which the administrator sold the land to defendants under the power of sale therein for a sum much less than its value, that such sale was collusive, and that defendants acquired the land with notice, plaintiffs were entitled, on a denial of the allegations, to a trial on the issues, and a judgment of nonsuit was erroneous).

88. Walton v. Busby, 144 Ga. 45, 85 SE 1054 (in a suit by heirs to recover lands sold by the executor because the order of sale was void for insufficiency of the description of the property, where the purchaser set up that the estate received the benefit from the proceeds, a charge that if the sale was necessary and the price paid was the value of the land which was received by the estate, verdict should be for purchaser was erroneous).

89. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

90. Forniquet v. Forstall, 34 Miss. 87.

91. Moody v. Moody, 11 Me. 247.

92. McMillan v. Rushing, 80 Ala. 402; Robbins v. Wolcott, 27 Conn. 234.

93. Roy v. O'Neill, 168 Ala. 354, 52 S 946; Greer v. Greer, 12 SW 152, 11 KyL 380; Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 SE 346.

[a] **Illustrations.**—(1) Where land is sold in which there was an undivided interest not subject to sale, the court must order a resale; it cannot cure the error by compelling the owner of such interest to accept a portion of the purchase money. Greer v. Greer, 12 SW 152, 11 KyL 380. (2) The court cannot impart validity to a sale which was ineffectual to divest the heirs' title by imposing conditions upon compliance with which it will be confirmed, but a new sale must be ordered. Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588. (3) Where a sale was made on an agreement which made it in effect a mortgage to pay decedent's debts, those not bound by the agreement are entitled to a resale according to law. Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 SE 346.

94. De Aldecoa v. Fortis, 27 Philippine 392.

95. Burnett v. Eaton, 29 N. J. Eq. 466; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252.

[a] **Consideration of improvements.**—A resale may be ordered on condition that if the property should not bring the amount of the original purchase, together with the value of the improvements, the first sale should be confirmed. Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252.

[b] **The fact that the debts of the estate have been fully paid** is no objection to a resale, as the administrator, not being able to recover back the money so paid, will be subrogated to the rights of the creditors. Wheeler v. Wheeler, 1 Conn. 51; Wilson v. Bergin, 28 N. H. 96.

96. Chapman v. Sims, 53 Miss. 154. "It will not be necessary, however, for the deeds to be canceled. It will simply be necessary for the court to decree the land to be held in trust and order its sale or partition." Meyer v. Meyer, 106 Miss. 638, 645, 64 S 420.

of the heirs, and not as to the others.[97] It has been held that if proceedings in the county court to sell were void on account of the administrator's fraud, of which subsequent purchasers had knowledge, the district court could only declare such purchasers constructive trustees and compel a reconveyance, and could not set aside the county court proceedings and conveyances thereunder.[98] The effect of a decree annulling an administrator's sale is to revest title in the heirs or devisees, subject as before to administration.[99] Children of a decedent entitled to homestead rights cannot in an equitable action brought by them to set aside a sale of the land to pay debts claim damages on the ground that their mother deprived them of the use of the homestead, where that fact does not appear on the face of the record of the probate proceedings for the sale.[1] A refusal to set aside the sale is proper, although the proceedings were voidable, where the purchaser was entitled, in equity, to the property, and could have compelled plaintiff's ancestor, if alive, to deed the property to him.[2]

[§ 1683] 7. **Settlement with Purchaser When Sale Avoided**[3]**—a. Reimbursement for Purchase Money—(1) Right of Purchaser.** The general rule is that when an administration sale is set aside at the instance of an heir, the purchaser is entitled to a return of the purchase money paid by him and used for the payment of decedent's debts or distributed among those entitled to the land,[4] even though the sale was absolutely void.[5] But, except to the extent that the money was so used, the purchaser has no equity against the heirs for reimbursement.[6] It has been held that no equity for repayment arises in favor of one who purchases mala fides,[7] but other courts have considered that the purchaser's bad faith in making the purchase did not defeat his rights in this respect.[8] Where distinctions between law and equity are observed, no notice can be taken of the purchaser's equity in an action of ejectment to recover the land,[9] but where the heir is required to go into equity to establish his title or possession, repayment will be enforced.[10] That the probate court may on vacating a sale adjust the rights of the purchaser has been both asserted[11] and denied.[12] Where the land has been recovered without repayment, an action will lie to recover back the purchase money from the estate.[13]

[§ 1684] **(2) Necessity of Offer or Tender by**

97. Lanier v. Heilig, 149 N. C. 384, 63 SE 69.

98. Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

99. U. S.—Smith v. Billing, 22 F. Cas. No. 13,014, 3 Cranch C. C. 355.

Ga.—Lowery v. Idelson, 117 Ga. 778, 45 SE 51.

Mo.—Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

Tenn.—Crabtree v. Niblett, 11 Humphr. 488.

Tex.—Fisher v. Wood, 65 Tex. 199.

[a] **Property must be left in hands of administrator.** — Where property has been sold by an administrator, and for want of proper parties the sale is rescinded, it cannot be taken from the administrator, but must be left in his hands to be administered according to law. Savage v. Williams, 15 La. Ann. 250.

[b] **Judgment in ejectment obtained by purchaser.**—Where, pending an appeal from a decree setting aside a sale, the purchaser recovered in ejectment against an adverse claimant, the benefits of the purchaser's judgment inured to the heirs on affirmance of their decree. Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

[c] **Charging with penalty.** — Where a sale is set aside as fraudulent and the administrator charged under a penal statute with the appraised value of the goods, he is not thereby vested with title in his own right. Smith v. Billing, 22 F. Cas. No. 13,014, 3 Cranch C. C. 355.

[d] **Necessity of further administration.**—Where the bill by the heirs prayed a recovery of the rents and the value of personalty also sold, the administrator cannot complain of a decree in accordance with such prayers if he made no showing of necessity for further administration. Lowery v. Idelson, 117 Ga. 778, 45 SE 51.

1. Denk v. Fiel, 249 Ill. 424, 94 NE 672.

2. Branstetter v. Branstetter, 115 Ark. 989, 170 SW 989.

3. Sale of realty under testamentary authority see supra § 687.

Sale of personalty under testamentary authority or common-law power see supra § 749.

4. Ala.—Ellis v. Ellis, 84 Ala. 348, 4 S 868; Wilson v. Holt, 83 Ala. 528, 3 S 321, 3 AmSR 768; Robertson v. Bradford, 73 Ala. 116.

Ark.—Neel v. Carson, 47 Ark. 421, 2 SW 107.

Ind.—Fisher v. Bush, 133 Ind. 315, 32 NE 924; Chaney v. Wood, (A.) 115 NE 333.

Ky.—Davidson v. Marcum, 89 SW 703, 28 KyL 562.

La.—Riddick v. Sepulvedo, 82 S 677; Beard v. Cash, 32 La. Ann. 121.

Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Gaines v. Kennedy, 53 Miss. 103; Grant v. Lloyd, 20 Miss. 191.

Mo.—Schafer v. Causey, 76 Mo. 365 [aff 8 Mo. A. 142]; Patillo v. Martin, 107 Mo. A. 653, 83 SW 1010.

Nebr.—Holmes v. Columbia Nat. Bank, 97 NW 26.

N. Y.—John's Est., 18 NYS 172, 21 NYCivProc 326.

N. C.—Card v. Finch, 142 N. C. 140, 54 SE 1009; Highsmith v. Whitehurst, 120 N. C. 123, 26 SE 917; Shields v. Allen, 77 N. C. 375.

Okl.—Chastain v. Pender, 52 Okl. 133, 152 P 833.

Tex.—Halsey v. Jones, 86 Tex. 488, 25 SW 696 [foll Millican v. McNeill, 102 Tex. 189, 114 SW 106, 132 AmSR 863, 21 LRANS 60, 20 AnnCas 74]; Mayes v. Blanton, 67 Tex. 245, 3 SW 40; Brockenborough v. Melton, 55 Tex. 493.

Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

Wis.—Winslow v. Crowell, 32 Wis. 639; Blodgett v. Hitt, 29 Wis. 169.

"Where money paid for the property of a decedent has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering, the sum thus beneficially used to extinguish the ancestor's obligation." Sharkey v. Bankston, 30 La. Ann. 891, 894.

[a] **Even a fraudulent purchaser** is entitled to a return of so much of the purchase money paid by him as has been applied to the decedent's debts. Neel v. Carson, 47 Ark. 421, 2 SW 107.

[b] **Interest on the purchase money** "is chargeable to the heirs only from the time at which it was applied to the payment of the charges against the estate." Millican v. McNeill, 102 Tex. 189, 193, 114 SW 106, 132 AmSR 863, 21 LRANS 60, 20 AnnCas 74.

5. Ill.—Duckworth v. Francis, 154 Ill. A. 300.

Miss.—Hill v. Billingsly, 53 Miss. 111; Gaines v. Kennedy, 53 Miss. 103.

Mo.—Schafer v. Causey, 76 Mo. 365; Mobley v. Nave, 67 Mo. 546.

Or.—Browne v. Coleman, 62 Or. 454, 125 P 278.

Tenn.—Martin v. Turner, 2 Heisk. 384.

Tex.—Millican v. McNeill, 102 Tex. 189, 114 SW 106, 132 AmSR 863, 21 LRANS 60, 20 AnnCas 74; Halsey v. Jones, 86 Tex. 488, 25 SW 696; Stephenson v. Marsalis, 11 Tex. Civ. A. 162, 33 SW 383.

[a] **The court cannot create a lien** in favor of the purchaser at a void sale. Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560; Beall v. Price, 13 Oh. 368, 42 AmD 204; Lieby v. Ludlow, 4 Oh. 469; Nowler v. Coit, 1 Oh. 519, 13 AmD 640.

[b] **The heirs are not liable to refund money** paid to the administrator by the purchaser at a void sale. Nowler v. Coit, 1 Oh. 519, 13 AmD 640.

[c] **Contrary view.** — Beene v. Collenberger, 38 Ala. 647, 650 (purchase of personalty by one with notice of facts rendering such void, "Money voluntarily paid, under circumstances like the present, can not be recovered back"). See also Beall v. Price, 13 Oh. 368, 377, 42 AmD 204 ("I do not see why the doctrine of caveat emptor does not apply. It is the common case of failure of title in a purchaser at a judicial sale").

6. Riddick v. Sepulvedo, (La.) 82 S 677; Jayne v. Boisgerard, 39 Miss. 796.

7. Meyer v. Farmer, 36 La. Ann. 785; Forniquet v. Forstall, 34 Miss. 87.

8. Neel v. Carson, 47 Ark. 421, 2 SW 107; Fisher v. Bush, 133 Ind. 315, 32 NE 924; Obert v. Obert, 12 N. J. Eq. 423.

9. Stevens v. Durrett, 49 Miss. 411.

10. Obert v. Obert, 12 N. J. Eq. 423.

11. Matter of Lynch, 67 HowPr (N. Y.) 436 (a surrogate may order the executor to refund).

12. Eichelberger v. Hawthorne, 33 Md. 588 (the orphans' court has no authority to adjust the rights of the purchaser; he must be remitted to equity).

13. Cal.—Schlicker v. Hemenway, 110 Cal. 579, 42 P 1063, 52 AmSR 116.

Ill.—Dorman v. Laine, 6 Ill. 143.

Miss.—Stevens v. Durrett, 49 Miss. 411.

N. Y.—Mertens v. Roche, 39 App. Div. 398, 57 NYS 349.

Va.—Hudgin v. Hudgin, 6 Gratt. (47 Va.) 320, 52 AmD 124.

[a] **Persons liable.** — (1) Where the executors have turned over the

Plaintiff. As a general rule equity imposes an obligation on the heir seeking to set aside a sale to tender back the purchase money as a condition of obtaining relief, where it has been applied in payment of the liabilities of the estate.[14] It has been held, however, that a tender or offer to refund is not necessary where the sale is an absolute nullity,[15] where it does not appear that the purchase money has been paid or applied to the benefit of the estate,[16] where the rents and profits received by the purchaser exceed the amount of his disbursements,[17] or where it appears that the purchaser paid nothing out of his own funds.[18] It has also been held that in ejectment by remaindermen against a transferee of the purchaser at an invalid administrator's sale, it is not a condition precedent to recovery that plaintiffs offer to restore that part of the price received by them in ignorance of the source from which it was derived.[19]

[§ 1685] **(3) Method and Extent of Reimbursement.** The equity of the purchaser arises from the employment of the money for the benefit of the estate, and accordingly it is sometimes held that his right is one of subrogation to those of the creditors who have been paid out of the purchase money,[20] or to have his payment charged as a lien on the land;[21] but actual repayment to the extent at least of benefits received by the estate is the usual requirement,[22] and, according to a number of authorities, the entire purchase money should be

money to the residuary legatee and have no assets in their hands, although there has been no judicial settlement, the action should be brought against the legatee. Mertens v. Roche, 39 App. Div. 398, 57 NYS 349. (2) As an unauthorized sale confers no right on the administrator to receive the money as administrator, he is not liable to the purchaser therefor in his representative capacity unless it be shown that he has actually accounted to the estate for such money. Schlicker v. Hemenway, 110 Cal. 579, 42 P 1063, 52 AmSR 116.

14. U. S.—Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757.

Ark.—Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398.

Ind.—Shepherd v. Fisher, 17 Ind. 229.

La.—Hibernia Bank, etc., Co. v. Whitney, 122 La. 890, 48 S 314; Beard v. Cash, 32 La. Ann. 121; Sharkey v. Bankston, 30 La. Ann. 891.

Miss.—Cole v. Johnson, 53 Miss. 94; Short v. Porter, 44 Miss. 533.

Nebr.—Holmes v. Columbia Nat. Bank, 4 Nebr. (Unoff.) 893, 97 NW 26.

Pa.—In re Smith, 188 Pa. 222, 41 A 542.

"There was tender due by plaintiff, is another proposition presented by the defense. The difficulty in requiring a preceding tender grows out of the fact that the amount sometimes is not known; the extent of benefit received is not established. In a number of cases it has been held that tender must be made. In a few cases it has been held that plaintiff does not have to make a tender, as it may be claimed by reconvention. The amount being known in this case, no such difficulty arises. The amount should be tendered. It is a matter of equity, and the purpose is to protect the purchaser in the matter of his claim if he loses his title." Hibernia Bank, etc., Co. v. Whitney, 122 La. 890, 896, 48 S 314.

[a] **Insufficient plea.**—In ejectment by a remainderman against a transferee of the purchaser at an invalid administrator's sale, an answer averring that "petitioners cannot retain said purchase money and recover said land, and they have at no time restored or offered to restore said purchase money, with interest," is insufficient as setting up an estoppel, and not good as a plea for an equitable accounting. Hawks v. Smith, 141 Ga. 422, 81 SE 200.

15. Milner v. Vandivere, 86 Ga. 540, 12 SE 879; Burney v. Ludeling, 41 La. Ann. 627, 6 S 248; Wood v. Nicholls, 33 La. Ann. 744; Broocks v. Payne, 58 Tex. Civ. A. 513, 124 SW 463.

[a] **Illustration.**—The heirs of a holder of a headright certificate transferred by an invalid deed of the administratrix of the holder are not required to return the consideration paid for the transfer, as a condition precedent to asserting the invalidity of such transfer. Broocks v. Payne, 58 Tex. Civ. A. 513, 124 SW 463.

[b] **The purchaser may make his claim in reconvention** in case of absolute nullity. Hibernia Bank, etc., Co. v. Whitney, 122 La. 890, 48 S 314.

16. Fishback v. Paige, 17 Tex. Civ. A. 183, 43 SW 317.

17. Cole v. Boyd, 68 Nebr. 146, 93 NW 1003.

18. Shaw v. Swift, Smith (Ind.) 398.

19. Hawks v. Smith, 141 Ga. 422, 81 SE 200.

20. Ark.—Brown v. Nelms, 86 Ark. 368, 112 SW 373.

Conn.—Wheeler v. Wheeler, 1 Conn. 51.

Ind.—Baker v. Edwards, 156 Ind. 53, 59 NE 174; Duncan v. Gainey, 108 Ind. 579, 9 NE 470; Jones v. French, 92 Ind. 138.

Ky.—Charles v. Daniels, 140 Ky. 379, 131 SW 42; Louisville Banking Co. v. Pranger, 68 SW 632, 24 KyL 408.

Me.—Moody v. Moody, 11 Me. 247.

Md.—Young v. Twigg, 27 Md. 620.

Miss.—Pool v. Ellis, 64 Miss. 555, 1 S 725; Weaver v. Norwood, 59 Miss. 665; Hill v. Billingsly, 53 Miss. 111; Gaines v. Kennedy, 53 Miss. 103; Short v. Porter, 44 Miss. 533; Lee v. Gardiner, 26 Miss. 521.

N. H.—Willson v. Bergin, 28 N. H. 96.

N. C.—Perry v. Adams, 98 N. C. 167, 3 SE 729, 2 AmSR 326.

Pa.—Wylie's Est., 7 Pa. Dist. 748.

Tenn.—Caldwell v. Palmer, 6 Lea 652; Bennett v. Coldwell, 8 Baxt. 483; Starkey v. Hammer, 1 Baxt. 438; Martin v. Turner, 2 Heisk. 384; Campbell v. Bryant, 2 Tenn. Cas. 146.

Va.—Hudgin v. Hudgin, 6 Gratt. (47 Va.) 320, 52 AmD 124.

Wis.—Blodgett v. Hitt, 29 Wis. 169.

[a] **On the other hand** it has been denied that the doctrine of subrogation applies to such a case. Bishop v. O'Conner, 69 Ill. 431 [dist Kinney v. Knoebel, 51 Ill. 112; McConnel v. Smith, 39 Ill. 279].

21. Ill.—Ebelmesser v. Ebelmesser, 99 Ill. 541.

Ind.—Baker v. Martin, 156 Ind. 53, 59 NE 174; Stults v. Brown, 112 Ind. 370, 14 NE 230, 2 AmSR 190; Jones v. French, 92 Ind. 138.

Ky.—Charles v. Daniels, 140 Ky. 379, 131 SW 42; Daniels v. Daniels, 86 SW 1116, 27 KyL 882.

Miss.—Grant v. Lloyd, 20 Miss. 191.

Or.—Stadelman v. Miner, 155 P 708.

Tenn.—Martin v. Turner, 2 Heisk. 384.

Wis.—Blodgett v. Hitt, 29 Wis. 169.

[a] **Estate or funds chargeable.**—(1) The amount due the purchaser will be charged against the land and must be paid before the heir is entitled to possession. Gaines v. Kennedy, 53 Miss. 103; Blodgett v. Hitt, 29 Wis. 169 (the purchaser may set up the claim as an equitable defense in ejectment by the heir). (2) The purchaser is entitled to reimbursement out of the first moneys arising from a resale. Potter v. Smith, 36 Ind. 231.

[b] **Items of credit and debit.**—The purchaser is entitled to a lien for the balance found after crediting him with the amount of the purchase money applied to the payment of debts, with interest, repairs, and reasonable improvements, and charging him with rents and profits. Ebelmesser v. Ebelmesser, 99 Ill. 541.

[c] **Necessity of filing claim of lien.**—The claim on account of purchase money paid, although a lien, is a claim against the estate which must be filed as provided by statute. Stults v. Forst, 135 Ind. 297, 34 NE 1125.

[d] **Priority of lien.**—A purchaser entitled to subrogation to the rights of creditors who were paid with the purchase money does not acquire any priority of lien over other debts of the same class. Duncan v. Gainey, 108 Ind. 579, 9 NE 470.

[e] **Land of infant heirs.**—Where minor children, the owners of land which was the separate estate of their deceased mother, were not parties to a judgment directing that the land be sold in the administration of their father's estate, such heirs, being non sui juris, were not responsible for such unauthorized sale, even though the proceeds were applied to their benefit, and hence land belonging to such heirs other than that receiving the benefit could not be subjected to an equitable lien in favor of the purchaser for the price paid, on the sale being set aside. Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386.

[f] **Purchase by representative.**—An administrator, who in good faith brought an action to have the land sold to settle the estate, and paid out of his own means the price at the sale, and also paid out as administrator funeral expenses of decedent, was, on avoidance of the sale, entitled to a lien on the land for the sums, subject to the homestead right of an infant child. Baker v. Lane, (Ky.) 118 SW 963.

22. Ark.—Neel v. Carson, 47 Ark. 421, 2 SW 107.

Ind.—Fisher v. Bush, 133 Ind. 315, 32 NE 924.

Miss.—Gaines v. Kennedy, 53 Miss. 103; Jayne v. Boisgerard, 39 Miss. 796.

N. J.—Merselis v. Vreeland, 8 N. J. Eq. 575.

Oh.—Roll v. Riddle, 5 Oh. Dec. (Reprint) 232, 3 AmLRec 648 [aff 24 Oh. St. 572].

Or.—Brown v. Coleman, 62 Or. 454, 125 P 278.

Tenn.—Caldwell v. Palmer, 6 Lea 652.

Wash.—Ball v. Clothier, 34 Wash. 299, 314, 75 P 1099.

"The land was purchased from the estate in good faith by the appellants and their predecessors in interest, and the purchase price thereof was paid into the estate, and used in the administration thereof, and these respondents received the benefit. They should not, under such circumstances, be permitted to avoid the sale without repaying the purchase price." Ball v. Clothier, supra.

repaid.[23] So where the purchase money is sufficient to pay all the debts and leave a surplus for the heirs, it must be repaid in full,[24] and it is also held that the purchaser is entitled to repayment of money applied to the satisfaction of the debts of the heir or devisee who seeks to avoid the sale.[25] It has been held that interest should be allowed,[26] and the purchaser should be reimbursed for taxes paid by him,[27] and other reasonable and proper disbursements made in maintaining the property,[28] as well as auctioneer's fees[29] and costs of examining the title,[30] which he has paid, and that costs allowed to the executor should not be deducted from the amount to be repaid.[31]

[§ 1686] **b. Reimbursement for Improvements.**[32] A purchaser in good faith is entitled, when the sale is avoided, to credit or reimbursement for improvements made by him,[33] not at their cost or separate value, but to the extent to which they have enhanced the value of the property.[34] It is sometimes held that the value of improvements is allowed only as a set-off against rents and profits, and that the allowance cannot exceed the amount of such rents and profits.[35] Where an administrator purchased the land and made improvements thereon, which were paid out of the rents, it was held that he was not, on avoidance of the sale, entitled to anything on account of the improvements as against the heirs.[36] It has also been held that a court, setting aside a deed to an administratrix and guardian of infant heirs, purchasing land in a suit by her to settle the estate and sell the land after the allotment of dower to her, may not allow her the cost of improvements made on the part of the land assigned to her as dower.[37]

[§ 1687] **c. Liability for Rents and Profits.** The purchaser should be charged with the rents and profits of the land during the period of his possession.[38] But a court setting aside a deed to an administratrix and guardian of infant heirs, made

[a] **A payment before confirmation is voluntary** and the purchaser must bear the loss if the administrator misappropriates the money. He will not be subrogated to the rights of the administrator as an individual creditor until the debts due from the intestate to the administrator have been first applied to the claims of the estate against the administrator for the funds misappropriated. Pool v. Ellis, 64 Miss. 555, 1 S 725.

[b] **Where the payment was in Confederate money,** the purchaser was entitled to reimbursement to the extent to which such money was used in discharging decedent's debts. Martin v. Turner, 2 Heisk. (Tenn.) 384.

23. Miss.—Ragland v. Green, 22 Miss. 194.
Mo.—Schafer v. Causey, 76 Mo. 365; Mobley v. Nave, 67 Mo. 546.
N. J.—Obert v. Obert, 12 N. J. Eq. 423.
Tex.—Halsey v. Jones, 86 Tex. 488, 25 SW 696; Stephenson v. Marsalis, 11 Tex. Civ. A. 162, 33 SW 383.
Wis.—Blodgett v. Hitt, 29 Wis. 169.

24. Smith v. Knoebel, 82 Ill. 392.

25. Beeson v. Beeson, 9 Pa. 279.

26. Brown v. Nelms, 86 Ark. 368, 112 SW 373; Smith v. Knoebel, 82 Ill. 392; Schafer v. Causey, 76 Mo. 365; Mobley v. Nave, 67 Mo. 546; Obert v. Obert, 12 N. J. Eq. 423.

27. McDonald v. Kenney, 101 Ark. 9, 140 SW 999; Brown v. Nelms, 86 Ark. 368, 112 SW 373; Smith v. Knoebel, 82 Ill. 392; Schafer v. Causey, 76 Mo. 365; Patillo v. Martin, 107 Mo. A. 653, 83 SW 1010; Ball v. Clothier, 34 Wash. 299, 75 P 1099 [foll Packwood v. Briggs, 25 Wash. 530, 65 P 846].

28. Ark.—Neels v. Carson, 47 Ark. 421, 2 SW 107.
Ill.—Ebelmesser v. Ebelmesser, 99 Ill. 541; Coat v. Coat, 63 Ill. 73; Kruse v. Steffens, 47 Ill. 112; Miles v. Wheeler, 43 Ill. 123.
Ky.—Davidson v. Marcum, 89 SW 703, 28 KyL 562; Betram v. Ross, 66 SW 638, 23 KyL 1927.
La.—Oriol v. Moss, 38 La. Ann. 770.
Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588.
Mo.—Schafer v. Causey, 76 Mo. 365 [aff 8 Mo. A. 142]; Patillo v. Martin, 107 Mo. A. 653, 83 SW 1010.
N. Y.—John's Est., 18 NYS 172, 21 NYCivProc 326.
Oh.—Longworth v. Wolfington, 6 Oh. 9; Nowler v. Coit, 1 Oh. 519, 13 AmD 640.
Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

Reimbursement for improvements see infra § 1686.

29. In re John, 18 NYS 172, 21 NYCivProc 326; Campbell's Est., Tuck. Surr. (N. Y.) 240.

30. In re John, 18 NYS 172, 21 NYCivProc 326. Contra Campbell's Est., Tuck. Surr. (N. Y.) 240.

31. Thomas' Est., 4 Kulp (Pa.) 445.

32. See generally Improvements [22 Cyc 1].

33. Ark.—McDonald v. Kenney, 101 Ark. 9, 140 SW 999.
Ill.—Ebelmesser v. Ebelmesser, 99 Ill. 541; Smith v. Knoebel, 82 Ill. 392.
Md.—Gavin v. Carling, 55 Md. 530.
Miss.—Grant v. Lloyd, 20 Miss. 191.
Mo.—Patillo v. Martin, 107 Mo. A. 653, 83 SW 1010.
N. J.—Smith v. Drake, 23 N. J. Eq. 302.
Oh.—Barrington v. Alexander, 6 Oh. St. 189; Longworth v. Wolfington, 6 Oh. 9.
Tenn.—Starkey v. Hammer, 1 Baxt. 438.
Tex.—Burdett v. Silsbee, 15 Tex. 604; Anderson v. Lockhart, 2 Tex. Unrep. Cas. 63.

[a] **Credit for improvements has been allowed:** (1) Where the sale was void. Burdett v. Silsbee, 15 Tex. 604; Anderson v. Lockhart, 2 Tex. Unrep. Cas. 63. (2) Where the representative purchased at his own sale. Miller v. Rich, 204 Ill. 444, 68 NE 488; Ebelmesser v. Ebelmesser, 99 Ill. 541; Smith v. Drake, 23 N. J. Eq. 302; Mulford v. Minch, 11 N. J. Eq. 16, 64 AmD 472; Barrington v. Alexander, 6 Oh. St. 189; Wipff v. Heder, 6 Tex. Civ. A. 685, 26 SW 118. (3) Where the sale was set aside for fraud. Grant v. Lloyd, 20 Miss. 191.

[b] **A mortgagee from one holding under a void decree** transferring the property of a decedent is entitled to the benefit of improvements made by the mortgagor, deducting therefrom their proportion of taxes, insurance, and other burdens. Gavin v. Carling, 55 Md. 530.

[c] **A purchaser who has been guilty of actual fraud** will not be allowed anything for improvements. Mulford v. Minch, 11 N. J. Eq. 16, 64 AmD 472.

[d] **No allowance can be made for improvements not paid for** by the purchaser and for which he is not liable. Burks v. Vaughan, (Ark.) 19 SW 754.

[e] **If the property is sold as litigious property,** the purchaser cannot claim the increased value in case of eviction. Gravier v. Gravier, 3 Mart. N. S. (La.) 206.

[f] **A certificate of purchase** issued to the purchaser at a void probate sale is not "color of title" within the meaning of the Betterment Act. Johnson v. Taylor, (Ark.) 215 SW 162.

34. Lagger v. Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 NE 946; Smith v. Drake, 23 N. J. Eq. 302; Starkey v. Hammer, 1 Baxt. (Tenn.) 438.

[a] **The credit should be for proper and lasting improvements** which have enhanced the value of the land, but not for unreasonable, expensive, or unsuitable improvements. Ebelmesser v. Ebelmesser, 99 Ill. 541.

35. Cal.—Huse v. Den, 85 Cal. 390, 24 P 790, 20 AmSR 232.
Ky.—Charles v. Daniels, 140 Ky. 379, 131 SW 42.
Miss.—Grant v. Lloyd, 20 Miss. 191; Williamson v. Williamson, 11 Miss. 715, 41 AmD 636.
Tenn.—Starkey v. Hammer, 1 Baxt. 438.
Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

36. Baker v. Lane, (Ky.) 118 SW 963.

37. Daniels v. Charles, 154 Ky. 232, 157 SW 32.

38. Ark.—McDonald v. Kenney, 101 Ark. 9, 140 SW 999; Brown v. Nelms, 86 Ark. 368, 112 SW 373; Burks v. Vaughan, 19 SW 754; Neel v. Carson, 47 Ark. 421, 2 SW 107.
Ill.—Ebelmesser v. Ebelmesser, 99 Ill. 541; Smith v. Knoebel, 82 Ill. 392; Coat v. Coat, 63 Ill. 73; Kruse v. Steffens, 47 Ill. 112; Miles v. Wheeler, 43 Ill. 123.
Ind.—Shaw v. Swift, Smith 398.
Iowa.—Rice v. Bolton, 126 Iowa 654, 100 NW 634, 102 NW 509.
Ky.—Charles v. Daniels, 140 Ky. 379, 131 SW 421; Davidson v. Marcum, 89 SW 703, 28 KyL 562; Bertram v. Ross, 66 SW 638, 23 KyL 1927.
Miss.—Sharpley v. Plant, 79 Miss. 175, 28 S 799, 89 AmSR 588; Grant v. Lloyd, 20 Miss. 191.
N. Y.—In re Ver Valen, 24 NYS 133, 1 Pow. Surr. 435.
Pa.—Dilworth's App., 108 Pa. 92.
Tex.—Kalteyer v. Wipff, (Civ. A.) 49 SW 1055.
Va.—Hudgin v. Hudgin, 6 Gratt. (47 Va.) 320, 52 AmD 124.

[a] **If an heir purchases at an invalid sale** and collects rents, and the sale is afterward set aside at the suit of another heir who is adjudged entitled to a share of the rents so collected, the amount thus due the latter should be charged as a lien on the interest of the purchasing heir in the land. Kalteyer v. Wipff, (Tex. Civ. A.) 49 SW 1055.

[b] **Liability of purchaser at foreclosure.**—Where the purchaser at an administration sale executed a mortgage on the land prior to the institution of proceedings to set aside the sale, and after the commencement of such proceedings, to which the purchaser and his mortgagee were made parties, the land was sold under foreclosure of the mortgage, and the purchaser at foreclosure was in possession when the administration

in a suit by her to settle the estate and sell the land after the allotment of dower to her, may not charge her with rent in favor of infant children occupying the land with her and deriving their support from the cultivation thereof, although she is not entitled to compensation for the support of the children.[39]

Direction for payment to heir. A purchaser cannot complain that he is directed to pay the rents and profits to the heir instead of the executor, where under the will it was the duty of the executor to pay them to the heir.[40]

If the purchaser has sold the premises and made a profit thereby, he will be required to account for the amount so made.[41]

[§ 1688] **d. Liability of Purchaser Who Assumes Mortgage.** A purchaser at an administrator's sale who assumes a mortgage does not incur any obligation to an heir who repudiates the sale on the ground that the property was decedent's homestead.[42]

[§ 1689] **T. Operation and Effect of Sale[43]—1. Sale Judicial.** A sale of land by an executor or administrator under order of court is in the nature of a judicial sale, and has in general the same force and effect as any other judicial sale.[44]

[§ 1690] **2. Divesting of Titles and Liens—a. Title of Heirs or Devisees.** A sale by an executor or administrator to pay debts divests the title of the heirs or devisees,[45] even though there were irregularities in connection therewith,[46] but does not prevent them from setting up an after-acquired title.[47] Such a sale also divests the land of the lien of a legacy charged thereon.[48] The relation-

sale was set aside, the heirs of the decedent were entitled to have the use of the land set off against the interest on the mortgage debt. Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

39. Daniels v. Charles, 154 Ky. 232, 157 SW 32.

40. Borders v. Murphy, 125 Ill. 577, 18 NE 739.

41. In re Ver Valen, 24 NYS 133, 1 Pow. Surr. 435; Dilworth's App., 108 Pa. 92; Sheetz's Est., 2 Woodw. (Pa.) 407.

42. Holz v. Burling, 84 Nebr. 211, 120 NW 954, 122 NW 681.

43. Sale of personalty under testamentary authority or common-law power see supra § 747.

Sale of realty under testamentary authority see supra § 679.

44. U. S.—Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381; Davis v. Martin, 113 Fed. 6, 51 CCA 27.

Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440; McCully v. Chapman, 58 Ala. 325; Bland v. Bowie, 53 Ala. 152; Worthington v. McRoberts, 9 Ala. 297.

Cal.—Halleck v. Guy, 9 Cal. 181, 70 AmD 643; Matter of Long, 5 Cal. A. 684, 91 P 169.

Colo.—Ryan v. Geigel, 39 Colo. 355, 89 P 775.

Fla.—Price v. Winter, 15 Fla. 66.

Ga.—Green v. Freeman, 126 Ga. 274, 278, 55 SE 45, 7 AnnCas 1069 [cit Cyc]; Harwell v. Foster, 102 Ga. 38, 28 SE 967.

Hawaii.—Unauna v. Armstrong, 3 Hawaii 705.

Ill.—Kipping v. Demint, 184 Ill. 165, 56 NE 330, 75 AmSR 164.

Ind.—Stone v. Elliott, 101 NE 309; Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

Ky.—Roberts v. Roberts, 180 Ky. 629, 203 SW 523; McGary v. McGary, 105 SW 891, 32 KyL 314.

La.—Irwin v. Flynn, 110 La. 829, 34 S 794; Lalanne v. Moreau, 13 La. 431; Howard v. Zeyer, 18 La. Ann. 407; Woniger v. Falletta, 8 La. A. (Orleans) 280.

Miss.—Maynard v. Cocke, 18 S 374.

Mo.—Rhodes v. Bell, 230 Mo. 138, 130 SW 465; Noland v. Barrett, 122 Mo. 181, 26 SW 692, 43 AmSR 572.

Nebr.—Maul v. Hellman, 39 Nebr. 322, 58 NW 112.

N. J.—Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

N. Y.—Delaplaine v. Lawrence, 3 N. Y. 301.

N. C.—Mason v. Osgood, 64 N. C. 467.

Or.—Stadelman v. Miner, 155 P 708.

Pa.—Bickley v. Biddle, 33 Pa. 276; Vandever v. Baker, 13 Pa. 121; Moore v. Shultz, 13 Pa. 98, 53 AmD 446; Bloodhart's Est., 2 Pa. Co. 476.

S. D.—Spencer v. Lyman, 27 S. D. 471, 481, 131 NW 802 [cit Cyc]; Shutz v. Tidrick, 26 S. D. 505, 128 NW 811.

Tex.—Lynch v. Baxter, 4 Tex. 431, 51 AmD 735.

Va.—Sproul v. Hunter, 122 Va. 102, 94 SE 179.

See also Judicial Sales [24 Cyc 61].

"Sales of lands, under the decree of the Court of Probate, are essentially judicial." Pryor v. Davis, 109 Ala. 117, 124, 19 S 440.

"An administrator's sale of real estate, under the orders of a probate court, in those states which require such sales to be reported to the court for its approval or rejection is a judicial sale." Noland v. Barrett, 122 Mo. 181, 189, 26 SW 692, 43 AmSR 572.

[a] **A decree ordering a sale is in rem** and analogous to a decree of foreclosure of a mortgage, so that it may be enforced after seven years instead of being governed by analogy to the limitation of judgments at law. Kipping v. Demint, 184 Ill. 165, 56 NE 330, 75 AmSR 164.

[b] **Contrary view.**—McGuinness v. Whalen, 16 R. I. 558, 560, 18 A 158, 27 AmSR 763 ("An administrator's sale, however, under our statutes, is not a judicial sale, as was decided by Judge Story in Smith v. Arnold, 22 F. Cas. No. 13,004, 5 Mason 414").

Effect of judicial sale generally see Judicial Sales [24 Cyc 61].

45. U. S.—Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 440.

Ga.—Copelan v. Kimbrough, 102 SE 162; Merritt v. Jones, 136 Ga. 618, 71 SE 1092; Cook v. Cook, 67 Ga. 381.

Ill.—Sheahan v. Madigan, 275 Ill. 372, 114 NE 135; Cunningham v. Daugherty, 220 Ill. 45, 77 NE 95.

Ind.—Mortimer v. Kessler, 58 Ind. A. 198, 107 NE 34.

Ky.—Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

La.—Brewer v. Wright, 130 La. 491, 58 S 160; Riehlman's Succ., 4 La. A. (Orleans) 400.

Mass.—Lindsey v. Fabens, 189 Mass. 329, 75 NE 623.

Mo.—Higbee v. Billick, 244 Mo. 411, 148 SW 879; Grant v. Hathaway, 215 Mo. 141, 114 SW 609, 15 AnnCas 567.

Oh.—Miami Exporting Co. v. Holly, Wright 226.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

Pa.—George v. Pittsburgh Safe Deposit, etc., Co., 234 Pa. 300, 83 A 294.

Tex.—Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922; Dignowity v. Baumblatt, 38 Tex. Civ. A. 363, 85 SW 834.

Va.—Gwinner v. Michael, 103 Va. 268, 48 SE 895.

Wash.—McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

[a] **This is true although** the deed purports to convey more than the heirs own. King v. Cabaniss, 81 Ga. 661, 7 SE 620.

[b] **If the decedent owned an undivided interest** in land, and the administrator sold a specific part of it, the sale passes whatever interest the heirs had in the specific part sold. King v. Cabaniss, 81 Ga. 661, 7 SE 620.

[c] **If one of several heirs purchases,** the title so acquired does not inure to the benefit of the others, but vests exclusively in him. Aubuchon v. Aubuchon, 133 Mo. 260, 34 SW 569.

[d] **Where devisees were parties** to a suit in which the lands specifically devised were sold to pay debts, there was a presumption in favor of the propriety of selling the lands specifically devised, since the devisees were either guilty of negligence in failing to protect their own interests, or else it was necessary to sell such lands. Gwinner v. Michael, 103 Va. 268, 48 SE 895.

[e] **Right depending on adverse possession.**—A sale and delivery of possession, rightful or wrongful, will divest a right of the heirs depending entirely on continued adverse possession. Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421.

[f] **If a widow takes under the will** her interest is divested by a sale for debts. Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496.

[g] **A lease** by the administrator under statutory authority passes the term, and a devisee cannot maintain ejectment against the lessee. Eoff v. Thompkins, 66 Mo. 225. To same effect Ex p. Barker, 127 Ala. 203, 28 S 574.

[h] **No right of redemption exists.**—In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712]; Maxwell v. Smith, 86 Tenn. 539, 8 SW 340; Love v. Williams, 2 Lea (Tenn.) 226.

[i] **Minor heirs are not bound** (1) by a sale of realty belonging to the estate, at the instance of their tutrix acting as administratrix, unless the sale is made on the advice of a family meeting duly homologated pursuant to statute. Deshotels v. Lafleur, 134 La. 1052, 64 S 905. (2) The failure to record, as provided by statute, a will made by an heir of land does not relieve a purchaser of the land from taking notice of the interest of a minor devisee named therein, where the will has been duly probated in the county in which the land is situated, testator's title being such that a purchaser would be required to notice it. Horton v. Barto, 57 Wash. 477, 107 P 191, 135 AmSR 999.

46. Merritt v. Jones, 136 Ga. 618, 71 SE 1092.

47. Flenner v. Travellers' Ins. Co., 89 Ind. 164; Flenner v. Benson, 89 Ind. 108.

48. Lombaert's App., 99 Pa. 580; McLanahan v. McLanahan, 1 Penr. & W. (Pa.) 96, 21 AmD 363; Barnet v. Washebaugh, 16 Serg. & R. (Pa.) 410.

[a] **Conditional sale.**—The lien of the legacy will be divested in spite of a written condition of sale, not in the order, by which the legacies

ship of mortgagor and mortgagee may, however, be created between the heir and a creditor purchasing, by an agreement at the time of sale or prior thereto that the property shall be held as security for the debt and to convey upon its payment,[49] and a purchaser may also charge himself as trustee for heirs by a prior agreement to hold as such in case he purchases.[50]

A misdescription in the deed by which an administrator sought to convey land pursuant to a proceeding to subject it to sale for the purpose of paying the debts cannot be taken advantage of by an heir of the deceased owner.[51]

Where the heirs or devisees are not made parties to the proceeding in which land of decedent is sold, they are, according to some authorities, not divested of their title so as to be precluded from asserting it in another proceeding.[52]

[§ 1691] **b. Dower or Curtesy Rights.**[53] As a widow's dower is not usually subject to the general debts of the husband,[54] her right to dower, or to a statutory estate in the nature thereof, is not usually divested by an administration sale,[55] although under some statutes the rule is otherwise.[56] Statutes

were to remain charges, the purchaser having no actual notice of the condition. Randolph's App., 5 Pa. 242.

49. Williams v. Williams, 85 N. C. 313; Nickson v. Toney, 3 Head (Tenn.) 655.

[a] **Right to enforce agreement.**—Where, after a sale which was voidable by the heirs, an agreement was made with the adult heirs to convey to all upon payment of their proportionate shares of the debt, the consideration inured to the benefit of the minor heirs and they were entitled specifically to enforce the agreement. Williams v. Williams, 85 N. C. 313.

[b] **The court has no power to make such a contract** for the benefit of the heirs where the statute requires an absolute sale. Bentley v. Stewart, 180 Ky. 23, 201 SW 978.

50. Christy v. Christy, 176 Pa. 421, 35 A 245 (holding, however, that the trust attached only to the interest which passed by the sale and not to an interest which the purchaser already held in the lands).

51. Cunningham v. Dougherty, 121 Ill. A. 395 [aff 220 Ill. 45, 77 NE 95].

52. U. S.—Trimble v. Rice, 204 Fed. 407, 122 CCA 658.

Ill.—Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310.

Ky.—Hatfield v. Richmond, 161 Ky. 352, 170 SW 951; Penn v. Rhoades, 124 Ky. 798, 100 SW 288, 30 KyL 997.

La.—Deshotels v. Lafleur, 134 La. 1052, 64 S 905.

N. C.—Hobbs v. Cashwell, 152 N. C. 183, 67 SE 495; Card v. Finch, 142 N. C. 140, 54 SE 1009.

S. C.—Rice v. Bamberg, 68 S. C. 184, 46 SE 1009.

Wash.—Horton v. Barton, 57 Wash. 477, 107 P 191, 135 AmSR 999.

[a] **Illustrations.** — (1) Where land in controversy was devised to testator's sons for life, remainder to their legitimate children, a sale thereof by the executor to pay debts after the sons had been put in possession, in which no jurisdiction was acquired of existing remaindermen, did not bar their rights in the property. Trimble v. Rice, 204 Fed. 407, 122 CCA 658. (2) Where a husband devised certain property to his wife for life, with remainder to his children, and the wife renounced under the will, and homestead and dower were set apart to her, and thereafter the property was sold to pay debts on the petition of the wife as executrix, in which proceedings the children were not made parties, the wife had no interest in the property so sold, and when thereafter one of the children died, and the mother inherited one half of his interest in the land and died, such interest of the surviving child was not affected by the sale to pay debts. Rice v. Bamberg, 68 S. C. 184, 46 SE 1009. (3) Where a testator devised land to his widow for life, with remainder to devisees named, and in proceedings to sell the land for the payment of the testator's debts, the widow was made a party, but the devisees were omitted, the devisees were not bound by the judgment directing a sale, on the ground that the widow represented them in the proceedings, especially where she had dissented from the will and did not own as a devisee any estate which would be affected by the will. Card v. Finch, 142 N. C. 140, 54 SE 1009 (the facts that testator owed debts and his land was liable for their payment, and the land sold pursuant to the decree brought a fair price, and the proceeds were properly applied did not defeat the right of the devisees collaterally to attack the decree, and to recover the land subject to the right of the purchaser to repayment of the amount which he had expended, for which the land was liable).

[b] **Minor heir.**—(1) Where land belonging to an estate is sold to pay debts, but a minor heir is not legally summoned, a subsequent warranty deed from the widow, who was the purchaser, is not binding upon the minor, even though she is his mother, and he not estopped to claim his interest in the land. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310. (2) The acquiescence of the creditors and the major heirs in an administration by the tutrix of minor heirs does not enlarge her powers as to the minors nor remove the restrictions relating to the alienation of their immovable property. Deshotels v. Lafleur, 134 La. 1052, 64 S 905.

[c] **The fact that the heirs resided in the vicinity** of lands from the time of an administrator's sale, and during subsequent transactions and sales thereof, does not estop them from claiming the land on the ground of fraud in the administrator's sale, where they were in no position to know the title to the land and were not parties to any of the transactions. Penn v. Rhoades, 124 Ky. 798, 100 SW 288, 30 KyL 997.

53. Right to sell land which is subject to interest of surviving spouse see supra § 1481.

54. See Dower § 103.

55. Ala.—Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524.

Ark.—Shell v. Young, 78 Ark. 479, 95 SW 798; Webb v. Smith, 40 Ark. 17; Livingston v. Cochran, 33 Ark. 294.

Ga.—Knight v. Wood, 146 Ga. 752, 92 SE 281.

Ind.—Stone v. Elliott, 101 NE 309; Clark v. Deutsch, 101 Ind. 491; Wimberg v. Schwegeman, 97 Ind. 528; Pepper v. Zahnsinger, 94 Ind. 88; Matthews v. Pate, 93 Ind. 443; Nutter v. Hawkins, 93 Ind. 260; Flenner v. Travellers' Ins. Co., 89 Ind. 164; Flenner v. Benson, 89 Ind. 108; Compton v. Pruitt, 88 Ind. 171; Hendrix v. McBeth, 87 Ind. 287; Armstrong v. Cavitt, 78 Ind. 476; Elliott v. Frakes, 71 Ind. 412.

Md.—Waring v. Waring, 2 Bland 673.

Mass.—Hale v. Munn, 4 Gray 132.

Mich.—Rasor v. Mott, 196 Mich. 445, 163 NW 38.

Miss.—Cummings v. Johnson, 65 Miss. 342, 4 S 541.

Mo.—Casteel v. Potter, 176 Mo. 76, 75 SW 597.

Nebr.—Motley v. Motley, 53 Nebr. 375, 73 NW 738, 68 AmSR 608.

N. J.—Pittenger v. Pittenger, 3 N. J. Eq. 156.

N. C.—Atlantic Trust, etc., Co. v. Stone, 176 N. C. 270, 97 SE 8.

Or.—Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; In re Smith, 43 Or. 595, 73 P 336, 75 P 133; Whiteaker v. Belt, 25 Or. 490, 36 P 534; House v. Fowle, 22 Or. 303, 29 P 890.

Pa.—Vandever v. Baker, 13 Pa. 121; Gross' Est., 26 Pa. Co. 219, 18 Montg. Co. 122; Allen's Est., 1 LegChron 102; Bauer v. Karstein, 16 Phila. 120.

Wis.—Mowry v. McQueen, 80 Minn. 385, 83 NW 348 (construing Wisconsin law).

"The sale is simply inoperative, so far as the widow's dower is concerned, as it is an interest in the land superior to the claims of creditors, and the purchaser simply took subject to the right of the widow's dower, which may be set aside against the purchaser as well as the heirs and creditors. Livingston v. Cochran, 33 Ark. 306; Well v. Smith, 40 Ark. 17." Shell v. Young, 78 Ark. 479, 481, 95 SW 798.

[a] **The widow's dower cannot be included in the sale** by an amendment of the petition after the order and the sale. Bell v. Shaffer, 154 Ind. 413, 56 NE 217.

[b] **Where no written consent filed.**—The widow's right of dower does not pass by the sale without her written consent, filed in the office of the judge of probate, although the dower right is not mentioned in the proceeding. Clancy v. Stephens, 92 Ala. 577, 9 S 522, 524.

[c] **If the administrator of the husband was also the administrator of the widow,** her interest, being a fee simple in a certain part of her husband's real estate, does not pass by the sale where it does not appear that the administrator, in making the sale, acted otherwise than as administrator of the husband. Elliott v. Frakes, 90 Ind. 389.

[d] **Even though the widow herself was the administratrix** and made the sale as such, her right of dower is not divested by the sale. Sip v. Lawback, 17 N. J. L. 442.

[e] **Notice of dower right.**—Where the record discloses that decedent left a widow, it is notice to the purchaser of her dower right. Motley v. Motley, 53 Nebr. 375, 73 NW 738, 68 AmSR 608.

[f] **Payments to the widow** in satisfaction of her dower right, pursuant to an agreement between her and the purchaser, will not be deducted from the amount of the purchaser's bid. Weakley v. Gurley, 60 Ala. 399.

[g] **The statute of limitations** runs against a widow's claim for dower from the time that the purchaser enters into possession in hostility thereto. Livingston v. Cochran, 33 Ark. 294.

56. Scott v. Wells, 55 Minn. 274, 56 NW 828; Mount v. Valle, 19 Mo. 621.

sometimes permit the land to be sold free from dower, and the widow compensated from the proceeds of the sale,[57] and where the purchasers at a sale by an administrator under order of the court of land devised to the intestate's widow have paid in cash the adequate value of the property in reliance upon the probate proceedings, and they are not void, the purchasers take the land from the estate free from any charge in favor of the widow.[58] If the widow is a party to the proceedings leading to the sale, the decree is an adjudication against her unless it assigns dower or reserves her rights.[59] A sale to satisfy a debt to which the dower estate is subject discharges dower,[60] and where a widow purchases all her deceased husband's property, her dower interest becomes merged in the fee thus acquired.[61] Questions sometimes arising between the purchaser and the heirs after the death of the widow as to the right to land assigned as dower must be determined from the description in the record and in the deed.[62]

An estate by the curtesy is an encumbrance subject to which a sale will be made.[63]

[§ 1692] **c. Encumbrances.**[64] Under some statutes administration sales are made subject to encumbrances on the land which existed at the time of decedent's death, which remain charges thereon,[65] while under others the property is sold free

57. Ill.—Virgin v. Virgin, 189 Ill. 144, 59 NE 586 [aff 91 Ill. A. 188].
Md.—Williams' Case, 3 Bland 186.
N. J.—Schmitt v. Willis, 40 N. J. Eq. 515, 4 A 767.
N. C.—Atlantic Trust, etc., Co. v. Stone, 176 N. C. 270, 97 SE 8.
Pa.—Zook's App., 54 Pa. 486.
Tenn.—Rainey v. Biggart, 4 Lea 501.

[a] **With the consent of the widow** this course may be pursued. Williams' Case, 3 Bland (Md.) 186.

[b] **Proceeds representing dower interest.**—Where a sale was made to pay debts, subject to the payment of the widow's dower yearly during her life, and the purchaser retained one third of the purchase price, secured by mortgage, the proceeds of the sale represented the entire interest of decedent in the land, the purchaser being merely accountable to the widow for her dower. Zook's App., 54 Pa. 486.

[c] **Rights of widow as to proceeds.**—A conveyance having been made by an administrator in pursuance of a decree in fulfillment of a contract made by decedent, the widow releasing dower is entitled to one third of the price of the land. In re Drenkle, 3 Pa. 377.

[d] **A subsequent purchaser** is not personally liable for the proportion of purchase money representing the dower interest unless he assumes its payment. Unangst v. Kraemer, 8 Watts & S. (Pa.) 391.

[e] **Apportionment of expenses of sale.**—Where the widow consented to a sale of lands for assets by his administrator, although she is entitled to the value of her dower interest from the proceeds, she must be content with the ascertainment of the valve of her dower, as to lands sold, out of net proceeds, being justly chargeable with the ratable part of the expense of the sale. Atlantic Trust, etc., Co. v. Stone, 176 N. C. 270, 97 SE 8.

58. McKenna v. Cosgrove, 41 Wash. 332, 83 P 240.

59. Ill.—Doane v. Walker, 101 Ill. 628.
Iowa.—In re Pennock, 122 Iowa 622, 98 NW 480; Olmsted v. Blair, 45 Iowa 42; Garvin v. Hatcher, 39 Iowa 685.
Ky.—Oldham v. McElroy, 134 Ky. 454, 121 SW 414.
Md.—Gardiner v. Miles, 5 Gill 94.
Pa.—Neff's App., 21 Pa. 243.

[a] **A petition for sale in which the widow joins** should state the purpose to have the land sold free of dower, if that is desired. Gross' Est., 26 Pa. Co. 219, 18 Montg. Co. 122.

[b] **Election.**—Under the act of April 26, 1850, providing that the widow of an insolvent decedent might retain either real or personal property to the value of three hundred dollars, the widow cannot claim real estate sold under order of court, where no election to retain either real or personal estate was made before the sale. Neff's App., 21 Pa. 243.

[c] **Estoppel.**—(1) Where the widow is made a party to an application to sell the entire real estate for the purpose of paying the debts and makes no appearance but consents to the sale, she is estopped both by the decree and her conduct from claiming a distributive share in the land or the proceeds. In re Pennock, 122 Iowa 622, 98 NW 480. (2) The widow may be estopped by her failure to claim dower to assert a claim therefor against the purchaser. Oldham v. McElroy, 134 Ky. 454, 121 SW 414. (3) If the widow fails to interpose her right of quarantine she cannot set it up against the purchaser. Doane v. Walker, 101 Ill. 628.

[d] **The widow's estate is not divested** if the petition did not expressly ask that it is sold, and if she, in consenting to the sale, did not expressly designate such interest. Irey v. Mater, 134 Ind. 238, 33 NE 1018.

[e] **Widow not bound by default judgment.**—Compton v. Pruitt, 88 Ind. 171.

60. Mead v. Mead, 39 Iowa 28; St. Clair v. Morris, 9 Oh. 15, 34 AmD 415.

61. Reinhardt v. Seaman, 208 Ill. 448, 69 NE 847.

62. See cases infra this note.

[a] **A sale by bounds of the real estate not assigned** as dower does not pass the reversion of that assigned. Kempton v. Swift, 2 Metc. (Mass.) 70.

[b] **If the sale was not of the entire real estate** of decedent the purchaser takes the reversion after the dower estate. Costly v. Tarver, 38 Ala. 107.

[c] **A sale subject to the widow's life estate** does not pass the interest of children who under the statutes took the land upon her debt. Flenner v. Travellers' Ins. Co., 89 Ind. 164.

[d] **A sale of land "except the dower"** (1) passes the reversion. Moody v. West, 12 Ind. 399. (2) The same is true of a sale of a described tract "less or except the widow's dower described as follows," and describing the land set apart. Austin v. Willis, 90 Ala. 421, 8 S 94.

63. Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

64. **Sale of encumbered property** see supra § 1480.

65. Ala.—Perkins v. Winter, 7 Ala. 855; Doe v. McLoskey, 1 Ala. 708.
Ill.—Kenley v. Bryan, 110 Ill. 652; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Shoemate v. Lockridge, 53 Ill. 503; Cutter v. Thompson, 51 Ill. 390; Phelps v. Funkhouser, 39 Ill. 401; McConnell v. Smith, 39 Ill. 279; Walden v. Gridley, 36 Ill. 523; Smith v. McConnell, 17 Ill. 135, 63 AmD 340.
Ind.—Bell v. Shaffer, 154 Ind. 413, 56 NE 217; Moody v. Shaw, 85 Ind. 88; McCallam v. Pleasants, 67 Ind. 542; Henderson v. Whitinger, 56 Ind. 131; Martin v. Beasley, 49 Ind. 280; Globe Mercantile Co. v. Perkeypile, (A.) 121 NE 844.
Iowa.—Sullivan v. Leckie, 60 Iowa 326, 14 NW 355.
Md.—Ellicott v. Ellicott, 6 Gill & J. 35.
Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.
Mich.—Stebbens v. Field, 43 Mich. 333, 5 NW 394.
Minn.—Fleming v. McCutcheon, 85 Minn. 152, 88 NW 433.
Mo.—Jackson v. Magruder, 51 Mo. 55.
N. J.—Voorhees' App., 57 N. J. Eq. 291, 42 A 567; Cool v. Higgins, 23 N. J. Eq. 308.
N. Y.—Monroe v. Musica, 166 App. Div. 929, 151 NYS 504 [aff 217 N. Y. 630 mem, 111 NE 1092 mem]; Matter of Haig, 3 NYS 285, 14 NYCiv Proc 357, 6 Dem. Surr. 454.
Pa.—Crosson's App., 125 Pa. 380, 17 A 423; Miller's Est., 9 Pa. Dist. 510; Wylie's Est., 7 Pa. Dist. 748; Steen's Est., 4 Pa. Dist. 700, 17 Pa. Co. 201; Kautz's Est., 11 Pa. Co. 322; Crosson's Est., 6 Pa. Co. 14; Lewis' Est., 16 Phila. 367; Grice's Est., 11 Phila. 107.
W. Va.—Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.
Wis.—Edgerton v. Schneider, 26 Wis. 385.

[a] **Sales subject to liens unless ordered otherwise.**—(1) Under the statute authorizing the court to order the sale either subject to liens or for their payment, the sale will be subject to liens unless otherwise ordered (Martin v. Beasley, 49 Ind. 280) (2) and so appearing by the record (Crum v. Meeks, 128 Ind. 360, 27 NE 722).

[b] **A mortgagee cannot be required to come into chancery** under proceedings for the sale of a decedent's real estate and seek payment of his claim out of the proceeds of sale, but may rely on his mortgage. Ellicott v. Ellicott, 6 Gill & J. (Md.) 35.

[c] **The purchaser takes subject to all arrears** of interest and to arrears of a ground rent. Lewis' Est., 16 Phila. (Pa.) 367; Terry's Est., 13 Phila. (Pa.) 298.

[d] **The purchaser takes subject to the mortgage,** (1) although the debt is improperly included in the schedule of debts for the payment of which the sale was ordered (Penn Square Bldg. Assoc.'s App., 81* Pa. 330; Metz's Est., 1 LegRec (Pa.) 274), (2) and in spite of agreements between administrator and purchaser (Fish's Est., 16 Phila. (Pa.) 373).

[e] **Agreement with purchaser as to discharge of encumbrances.**—An agreement made by the administrator with the purchaser that the amount of a mortgage on the land sold should be paid out of the purchase money does not affect the lien of the mortgage, but the purchaser takes subject to it, where it was not referred to it in the petition or order of sale and the mortgagee was not made a party to the proceeding to sell. Crum v. Meeks, 128 Ind. 360, 27 NE 722.

[f] **Failure of purchaser to give bond to pay liens.**—On a sale subject to liens the purchaser takes subject thereto, although he fails to give a bond, as required by statute, conditioned that he will pay them. Massey v. Jerauld, 101 Ind. 270.

[g] **If the administrator pays a**

of encumbrances, the lien of which is transferred from the land to the proceeds.[66] It is held, however, that there can be no such divesting of a vendor's lien, with which the land was charged when it came into the hands of decedent,[67] or of a mortgage executed by decedent's predecessor in title, securing a debt which was not, and did not become, a debt of decedent.[68] But it is otherwise where the mortgage debt, although not contracted by decedent, was assumed by him as a personal obligation in connection with his purchase of the land, and was included in the schedule of his debts for payment of which the sale is made.[69] A sale for the purpose of paying liens discharges all liens, although the proceeds are insufficient to pay the debts secured,[70] but the sale is subject to liens when made for purposes of distribution and not to pay debts.[71] In order that existing liens on the land may be divested by the sale it is considered necessary that the lienholders shall be parties to the proceedings leading up thereto.[72] A purchaser or mortgagee under license of the court cannot be subjected to a claim against the estate interposed after the sale or mortgage.[73]

[§ 1693] **d. Leasehold Interest.** The interest of a lessee is not divested by a sale for the payment of debts of the deceased lessor, although such lessee waived the issuance and service of a citation and consented to the sale of the property, where no direction was made for the sale of the right or interest of such lessee.[74]

[§ 1694] **e. Rights of Purchasers from and Creditors of Heirs and Devisees.** An administration sale under order of court will divest the title of a purchaser from the heir or devisee of the land,[75] as well as the lien of mortgages given by the heir

mortgage after the sale he is subrogated to the rights of the mortgagee against the land. Greenwell v. Heritage, 71 Mo. 459; Welton v. Hull, 50 Mo. 296.

[h] **The mortgagee may waive** the benefit of a statutory provision for the retention of the mortgage lien. Hagan's Est., 33 PittsbLegJNS (Pa.) 49 (where the sale was represented by the trustee to be free of liens).

[i] **Where a portion of mortgaged premises is sold,** the residue remaining to the heirs must be first resorted to to satisfy the mortgage before proceeding against that sold. Moore v. Chandler, 59 Ill. 466.

[j] **Judgment liens acquired after commencement of the proceedings** to sell land may be divested by the sale. Globe Mercantile Co. v. Perkeypile, (Ind. A.) 121 NE 844.

66. U. S.—Davis v. Martin, 113 Fed. 6, 51 CCA 27.

Ga.—Hollinshed v. Woodard, 124 Ga. 721, 52 SE 815; Rhett v. Georgia Land, etc., Co., 64 Ga. 521; Newson v. Carlton, 59 Ga. 516; McDaniel v. Edwards, 56 Ga. 444; Stallings v. Ivey, 49 Ga. 274; Carhart v. Vann, 46 Ga. 389.

Ind.—Massey v. Jerauld, 101 Ind. 270; Moody v. Shaw, 85 Ind. 88; McCallam v. Pleasants, 67 Ind. 542.

Ky.—Underwood v. Cartwright, 47 SW 580, 20 KyL 809.

La.—Childs v. Lockett, 107 La. 270, 31 S 751.

Mass.—Abby v. Fuller, 8 Metc. 36.

Minn.—Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792.

N. J.—Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333; Voorhees v. Bailey, 59 N. J. Eq. 292, 44 A 657; Voorhees's App., 57 N. J. Eq. 291, 42 A 567.

Oh.—Stone v. Strong, 42 Oh. St. 53; Defrees v. Greenham, 11 Oh. St. 486; Miami Exporting Co. v. Holly, Wright 226.

Pa.—Cadmus v. Jackson, 52 Pa. 295; Crawford v. Crawford, 2 Watts 339; McPherson v. Cunliff, 11 Serg. & R. 422, 14 AmD 642; O'Brian v. Wiggins, 14 Pa. Super. 37; Roop's Est., 22 Pa. Dist. 484; Pittsburgh v. Hughes, 13 Pa. Co. 535; Sheridan's Est., 10 Kulp 225; Bentzel v. Wambaugh, 14 YorkLegRec 141.

S. C.—Cromer v. Boinest, 27 S. C. 436, 3 SE 849.

W. Va.—Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

[a] **Mortgages** (1) may be thus divested. Davis v. Martin, 113 Fed. 6, 51 CCA 27 (construing law of Louisiana); Newson v. Carlton, 59 Ga. 516; Underwood v. Cartwright, 47 SW 580, 20 KyL 809; Condon's Succ., 28 La. Ann. 755; Harper v. Linman, 26 La. Ann. 690; Wooley v. Russ, 24 La. Ann. 482; Michel v. Delaporte, 14 La. Ann. 91; Ynogoso's Succ., 13 La. Ann. 559; Lewis v. Labauve, 13 La. Ann. 382; Aicard v. Daly, 7 La. Ann. 612; Leverich v. Prieur, 8 Rob. 97; French v. Prieur, 6 Rob. 299; Williams v. State Bank, 17 La. 378; Taylor v. Crain, 16 La. 290; Hoey v. Cunningham, 14 La. 86; Lelanne v. Moreau, 13 La. 431; Zacharie v. Prieur, 9 La. 197; Joyce v. Poydras de la Lane, 6 La. 277; De Ende v. Moore, 2 Mart. N. S. (La.) 336; Lafon v. Phillips, 2 Mart. N. S. (La.) 225; Defrees v. Greenham, 11 Oh. St. 486; Whitely v. Weber, 2 Oh. Cir. Ct. 336; Cadmus v. Jackson, 52 Pa. 295. (2) It is a proper method of reaching the equity of redemption in order to make assets to sell the land with notice that the mortgage will be first paid out of the proceeds and so to apply the proceeds. Abby v. Fuller, 8 Metc. (Mass.) 36. (3) But the sale may be made expressly subject to mortgages. Hebert v. Doussan, 8 La. Ann. 267; Grayson v. Mayo, 2 La. Ann. 927.

[b] **A tax lien** (1) may be thus divested. Herrington v. Tolbert, 110 Ga. 528, 35 SE 687. See also Smith v. Cornell, 111 N. Y. 554, 19 NE 271 [rev 51 N. Y. Super. 354] (where an heir purchased at a sale made by a trustee to satisfy dower, and afterward it was adjudged that trusts created by the will were void, and that he took as heir, the executor was not relieved from the statutory duty of paying taxes assessed previous to testator's death, although the dower sale was nominally subject to unpaid taxes); Henry v. Horstick, 9 Watts (Pa.) 412 (taxes which are not charges upon the land but which the purchaser has been compelled to pay to avoid distress of personal property upon the land may, it seems, be recovered back from the heirs, but the administrator is not liable therefor). Contra Sexton v. Sikking, 90 Ill. A. 667; Steen's Est., 4 Pa. Dist. 700, 17 Pa. Co. 201; Brotherlin's Est., 15 Pa. Co. 251 (unseated lands). (2) The purchaser is chargeable with taxes from the time rents accrue. Merrick v. North, 28 La. Ann. 878.

[c] **Claim under trust deed not presented for allowance.**—Under a statute providing that a mortgage or lien creditor of a decedent whose claim has been allowed or established by suit may obtain an order from the probate court for the sale of the mortgaged property by applying in writing and citing the administrator, all claims against a decedent's estate must be asserted in the probate court, whether secured or not, and although the lien is for the purchase price, so that one purchasing land from an administrator, acting under the approval of the probate court, would have a good title as against one claiming under a deed of trust, executed by decedent, where the trust deed claimant had never presented his claim to the probate court. Degetau v. Mayer, (Tex. Civ. A.) 145 SW 1054.

67. Bradford v. Dortch, 13 La. 79; Delassus v. Poston, 19 Mo. 425; Mountcastle v. Moore, 11 Heisk. (Tenn.) 481.

68. Field's Succ., 3 Rob. (La.) 5; Offutt v. Hendsley, 9 La. 1; Swindler v. Peyroux, 5 La. 468; Johnston v. Bell, 6 Mart. N. S. (La.) 384; Metz's Est., 1 LegRec (Pa.) 274; Stallman's Est., 6 Phila. (Pa.) 389.

69. Moore v. Shultz, 13 Pa. 98, 53 AmD 446 [appr Cadmus v. Jackson, 52 Pa. 295].

70. Foltz v. Peters, 16 Ind. 244; West v. Townsend, 12 Ind. 434.

71. Carhart v. Vann, 46 Ga. 389; Moore v. Wright, 35 S. C. Eq. 132. Contra Bentzel v. Wambaugh, 14 YorkLegRec (Pa.) 141 (construing statute of June 12, 1893).

[a] **Charge by will.**—On a sale for distribution the purchaser takes subject to a charge by will to support an heir, but on a sale to pay debts the rule is otherwise. Bell v. Watkins, 104 Ga. 345, 30 SE 756.

[b] **General debts.**—A partition sale within two years from the time administration was granted does not discharge the land from the general debts of the estate. Wilson's App., 45 Pa. 435; Miller's Est., 9 Pa. Dist. 510.

72. Underwood v. Cartwright, 47 SW 580, 20 KyL 809; Holloway v. Stuart, 19 Oh. St. 472; Cromer v. Boinest, 27 S. C. 436, 3 SE 849.

73. Ury v. Bush, 85 Iowa 698, 52 NW 666.

74. Milligan v. Gabbett, 101 Misc. 253, 167 NYS 558.

75. Ala.—Nelson v. Murfee, 69 Ala. 598.

Colo.—Nichols v. Lee, 16 Colo. 147, 26 P 157.

Mo.—Long v. Joplin Min., etc., Co., 68 Mo. 422.

N. J.—Warwick v. Hunt, 11 N. J. L. 1.

Tex.—Word v. Colley, (Civ. A.) 173 SW 629.

Utah.—Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 101 P 586.

[a] **Estate of purchaser at sale.**—One who purchases at an administration sale acquires an equitable estate in the land which constitutes a defense in ejectment by the grantee of heirs with notice. Long v. Joplin Min., etc., Co., 68 Mo. 422.

[b] **Reconveyance to grantor of ancestor.**—Where one tenant in common conveyed his half interest in the land to the other, and, after the death of the latter, his heirs reconveyed the same half interest to the grantor for the expressed reason that there was no valid consideration for

or devisee[76] or of judgments against him.[77] Title acquired under condemnation proceedings against the heirs is, however, superior to that acquired by a purchaser under a subsequent sale by an administrator.[78]

Improvements. A purchaser from the heir or devisee is not entitled to a lien for improvements made by him when his estate is divested by a sale to pay the debts of decedent.[79]

If the sale does not take place within the period fixed by statute the estate of purchasers from the heir will not be divested.[80]

Satisfaction of liens by purchaser. A purchaser from the heir is entitled to reimbursement for money paid by him in satisfaction of liens or encumbrances on the property which existed at the time of decedent's death.[81]

[§ 1695] 3. **Effect of Recognizing Lien.** The sale of an equity in mortgaged premises belonging to an intestate under a general license of the probate court does not establish the validity of the mortgage.[82]

[§ 1696] 4. **Title and Rights of Purchaser**[83]—a. **In General.** The purchaser at a sale by an executor or administrator under order of court takes such title as decedent had at the time of his death,[84] and nothing more,[85] and hence, if decedent had no

the former conveyance, a subsequent sale of the land under order of court to pay decedent's debts passed only his one-half interest therein. Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 440.

76. Myers v. Pierce, 86 Ga. 786, 12 SE 978; Escarraguell's Succ., 36 La. Ann. 155; Pigneguy's Succ., 12 Rob. (La.) 450; Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192; Steel's App., 86 Pa. 222.

77. McDaniel v. Edwards, 56 Ga. 444; Yoder v. Kalona Sav. Bank, 142 Iowa 219, 119 NW 147; Horner v. Hasbrouck, 41 Pa. 169; Keckeley v. Moore, 21 S. C. Eq. 21.

[a] **Enforcement of judgment against debtor's share of proceeds.**—The lien of a judgment against the heir may be enforced against any share of the proceeds of the sale to which the heir would be entitled. Sears v. Mack, 2 Bradf. Surr. (N. Y.) 394.

[b] **The title of a purchaser at an execution sale** on a judgment against the heir will be divested of title by a subsequent sale to pay the ancestor's debts. Horner v. Hasbrouck, 41 Pa. 169. But compare Loudon v. Robertson, 5 Blackf. (Ind.) 276 (where the court was, apparently, of the contrary view, although the case was decided on other grounds).

[c] **A sale for the benefit of the heirs** and not to pay debts will not affect the title acquired by a purchaser at execution sale on a judgment against the heir. Swift v. Kenison, 39 Vt. 473. But compare McDaniel v. Edwards, 56 Ga. 444 (sale for distribution under order of court discharges lien of judgment against devisee).

[d] **A fortiori,** a creditor of an heir, who has secured no lien on the heir's interest in the land cannot assert an interest therein as against the purchaser. Yeaton v. Barnhart, 78 Or. 249, 150 P 742, 152 P 1192.

78. Kane v. Kansas City, etc., R. Co., 112 Mo. 34, 20 SW 532.

79. Moore v. Moore, 155 Ind. 261, 57 NE 242; In re Doyle, 167 NYS 827; Simpson v. Gibbes, 1 S. C. Eq. 145; Hurn v. Keller, 79 Va. 415.

[a] **One who buys pending proceedings** looking to the sale of land and makes improvements thereon under the belief that it will not be necessary to sell the land does so at his own risk and is not entitled to compensation for the improvements in case the land is afterward sold under the order. Hurn v. Keller, 79 Va. 415.

80. Warwick v. Hunt, 11 N. J. L. 1; Bockover v. Ayres, 22 N. J. Eq. 13; Hyde v. Tanner, 1 Barb. (N. Y.) 75.

81. In re Doyle, 167 NYS 827.

82. Marsh v. Marsh, 78 Vt. 399, 63 A 159.

83. Sale of personalty under testamentary authority or common-law power see supra § 749.

Sale of realty under testamentary authority see supra §§ 680–682.

84. U. S.—Byrd v. Hall, 227 Fed. 537, 142 CCA 169 [aff 211 Fed. 182].

Cal.—In re Clanton, 171 Cal. 381, 153 P 459.

Colo.—Payne v. Peo., 173 P 397.

Ga.—Knight v. Wood, 146 Ga. 752, 92 SE 281; Bunger v. Grimm, 142 Ga. 448, 83 SE 200, AnnCas1916C 173.

Ill.—Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76.

La.—New Orleans v. Lumber Co., 82 S 588.

Oh.—Avery v. Dufrees, 9 Oh. 145.

Pa.—Bodder's Est., 13 Pa. Dist. 470, 30 Pa. Co. 417; Wylie's Est., 7 Pa. Dist. 748.

Tex.—McBride v. Loomis, (Commn. A.) 212 SW 480; Word v. Colley (Civ. A.) 173 SW 629; Vineyard v. Heard, (Civ. A.) 167 SW 22; Cole v. Lewis, (Civ. A.) 159 SW 180.

W. Va.—Dudley v. Browning, 79 W. Va. 331, 90 SE 878.

[a] **Sale of equitable title.**—(1) Where property of which intestate was the equitable owner was sold by his administrator to pay debts, the purchaser at the sale acquired merely the rights of the intestate and his heirs to a conveyance from the vendor on making payment of the balance of the price. Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76. (2) Where an equitable title is sold, and the heirs afterward acquire the legal title, they hold it in trust for the purchaser. Avery v. Dufrees, 9 Oh. 145.

[b] **Right to rely on record title.**—"We know of no law that does not permit the purchaser at an administrator's sale to rely upon the title of the deceased at the time of his death as shown by the records of the county where the land lies, when such land is unoccupied as in this case, and no rights of minors or incompetent persons are involved, to the same extent any purchaser may so rely." Golden v. Pilchuck Tribe No. 42 I. O. R. M., 71 Wash. 581, 590, 129 P 93.

[c] **Purchaser's title does not emanate from government.**—New Orleans v. Union Lumber Co., (La.) 82 S 588.

85. U. S.—Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 440; O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106 [aff 140 Fed. 854, 72 CCA 645, 4 LRANS 919].

Ala.—Denman v. Payne, 152 Ala. 342, 44 S 635; Lindsay v. Cooper, 94 Ala. 170, 11 S 325, 33 AmSR 105, 16 LRA 813.

Ark.—Hornor v. Jarrett, 99 Ark. 154, 137 SW 820.

Cal.—Gutter v. Dallamore, 144 Cal. 665, 79 P 383.

Ga.—Keen v. McAfee, 116 Ga. 728, 42 SE 1022; Howell v. James Lumber Co., 102 Ga. 595, 27 SE 699; McDaniel v. Edwards, 56 Ga. 444.

Ill.—Fitzgerrell v. Turner, 223 Ill. 322, 79 NE 76; Walden v. Gridley, 36 Ill. 523.

Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

Iowa.—Stephens v. Boyd, 157 Iowa 570, 138 NW 389, 392 [cit Cyc].

Ky.—Mouser v. Bagwell, 76 SW 826, 25 KyL 1032.

La.—Sicard v. Schwab, 112 La. 475, 36 S 500; Rapides Lumber Co. v. Hartiens, 111 La. 793, 35 S 910; Howard v. Zeyer, 18 La. Ann. 407.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

Miss.—Cummings v. Johnson, 65 Miss. 342, 4 S 541.

Mo.—Shields v. Ashley, 16 Mo. 471.

N. H.—Lahey v. Broderick, 72 N. H. 180, 55 A 354.

N. Y.—In re Dolan, 88 N. Y. 309; Van Vleck v. Enos, 88 Hun 348, 34 NYS 754; Milligan v. Gabbett, 101 Misc. 253, 167 NYS 558.

N. D.—Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679.

Pa.—Bickley v. Biddle, 33 Pa. 276; Sackett v. Twining, 18 Pa. 199, 57 AmD 599; Bodder's Est., 13 Pa. Dist. 470, 30 Pa. Co. 417; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Walker's Est., 23 Pa. Co. 657; Bloodhart's Est., 2 Pa. Co. 476; Bean's App., 2 Walk. 512; Rush's Est., 1 Phila. 404; Vogel's Est., 3 LancLRev 218.

S. C.—McLaurin v. Rion, 24 S. C. 407.

Tenn.—Francisco v. Billingsley, (Ch. A.) 48 SW 323.

Tex.—Hanrick v. Gurley, 93 Tex. 458, 54 SW 347, 56 SW 330; O'Connor v. Vineyard, 91 Tex. 488, 44 SW 485; Guilford v. Love, 49 Tex. 715; Nesbitt v. Richardson, 14 Tex. 656; Cole v. Lewis, (Civ. A.) 159 SW 180; Newton v. Easterwood, (Civ. A.) 154 SW 646; Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. A. 186, 123 SW 1162; Altgelt v. Mernitz, 37 Tex. Civ. A. 397, 83 SW 891.

Wash.—Golden v. Pilchuck Tribe No. 42 I. O. R. M., 71 Wash. 581, 129 P 93; Matson v. Johnson, 48 Wash. 256, 93 P 324, 125 AmSR 924; Towner v. Rodegeb, 33 Wash. 153, 74 P 50, 99 AmSR 936.

Wyo.—Demars v. Hickey, 13 Wyo. 371, 80 P 521, 81 P 705.

[a] **Land conveyed to decedent as security.**—If the only interest which decedent had in the land was as mortgagee, the purchaser acquires only that interest. Van Vleck v. Enos, 88 Hun 348, 34 NYS 754.

[b] **The possession of one under a bond for title given by decedent** is adverse to a purchaser at an administrator's sale, and the sale is therefore void. Heard v. Phillips, 101 Ga. 691, 31 SE 216, 44 LRA 369.

[c] **The representative cannot by any reservation or exception in his deed,** whether made in pursuance of an order of court or not, create a new right or interest in the land conveyed. Blankenship v. Whaley, 124 Cal. 300, 57 P 79.

[d] **Purchase of interest of partner.**—A purchaser at an administrator's sale of a deceased partner's interest in land acquires only the interest of the decedent in the land on a settlement of the partnership affairs, the proceeds of the sale belonging to the estate of the deceased partner. Hartnett v. Stillwell, 121 Ga. 386, 49 SE 276, 104 AmSR 151.

[e] **If the representative has individual rights** (1) in the land sold, these do not pass to the purchaser

title the purchaser takes none,[86] even though the real owner was a party to the proceeding,[87] while if decedent was estopped to claim title, the purchaser is also estopped.[88] The purchaser takes subject to the obligations under which decedent held the property,[89] and easements to which the property was subject.[90] The title cannot be given effect by relation to the date of a lien which was discharged from the proceeds of the sale.[91] No land or interest will pass except that stated in the petition[92] and included in the order,[93] and none except that actually sold.[94] One who buys land for a specific price cannot afterward be heard to contend that what he bought included and carried back to him any portion of the money he expressly agreed to pay.[95] Easements and necessary incidents to the enjoyment of property will pass with it,[96] as

(Dickerson v. Campbell, 32 Mo. 544; Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679) (2) unless the circumstances are such as to estop the representative (Cooper v. Lindsay, 109 Ala. 338, 19 S 379).

[f] **A conveyance of land which decedent was forbidden to transfer** may create an equity entitling the purchaser to hold against the heirs until it is satisfied. Maxson v. Jennings, 19 Tex. Civ. A. 700, 48 SW 781.

86. Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679; McLaurin v. Rion, 24 S. C. 407; Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386; Matson v. Johnson, 48 Wash. 256, 93 P 324, 125 AmSR 924.

[a] **Where a testator had executed a deed** of land to certain minors, although it was not acknowledged nor filed for record in the auditor's office, but had been filed in the office of the clerk of the superior court with decedent's will, a grantee under an executor's deed of the land made by order of court was not a bona fide purchaser. Matson v. Johnson, 48 Wash. 256, 93 P 324, 125 AmSR 924.

[b] **Where county records showed** that land in controversy was the separate property of a married woman, who predeceased her husband, a purchaser of the land at a sale by the husband's administrator was charged with notice that the land did not belong to the husband's estate, and was not therefore a purchaser in good faith. Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386.

87. Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679; McLaurin v. Rion, 24 S. C. 407.

88. Cooper v. Lindsay, 109 Ala. 338, 19 S 379; Hill v. Blackwelder, 113 Ill. 283.

89. Cal.—In re Clanton, 171 Cal. 381, 153 P 459.

Ga.—Howell v. James Lumber Co., 102 Ga. 595, 27 SE 699.

La.—Stanbrough v. Evans, 2 La. Ann. 474.

N. Y.—Van Vleck v. Enos, 88 Hun 348, 34 NYS 754.

Tex.—Herrington v. Williams, 31 Tex. 448.

[a] **Illustrations.**—(1) One purchasing with notice where decedent had a deed absolute, but intended as security, holds only as security. Van Vleck v. Enos, 88 Hun 348, 34 NYS 754. (2) One buying mortgaged chattels must comply with a promise of decedent to produce them whenever required by the mortgagee. Stanbrough v. Evans, 2 La. Ann. 474.

[b] **Where decedent in his lifetime had granted timber** to another, the purchaser at an administrator's sale took the land charged with the right of the third person to the timber. Howell v. James Lumber Co., 102 Ga. 595, 27 SE 699.

[c] **Where an equitable title is sold,** the purchaser takes it subject to all existing equities. Herrington v. Williams, 31 Tex. 448.

Effect of sale in divesting encumbrances see supra § 1692.

90. Overdeer v. Updegraff, 69 Pa. 110 (where an order directed the sale of a lot but made no mention of an easement for an alley to which it was subject, but the sale was made subject to the easement, the purchaser took subject to such easement).

91. Meyers v. Farquharson, 46 Cal. 190; Cadmus v. Jackson, 52 Pa. 295.

92. Austin v. Willis, 90 Ala. 421, 8 S 94; Fielder v. Childs, 73 Ala. 567.

[a] **Discrepancy not a "mistake in description."**—The fact that land is sold which is not embraced in the petition to sell, or in the decree of confirmation, is not a "mistake in description" within Code (1906) § 2072 (Annot. Code [1892] § 1897), providing that any mistake in describing land of decedent sold, etc., in any part of the proceedings, may be corrected on petition of the purchaser. Pearson v. Caldwell, 93 Miss. 637, 47 S 436.

93. Crane v. Guthrie, 47 Iowa 542; Hanson v. Ingwaldson, 77 Minn. 533, 80 NW 702, 77 AmSR 692; Greene v. Holt, 76 Mo. 677; Page v. Fishback, 10 Tex. Civ. A. 450, 31 SW 424.

[a] **Thus,** where it was supposed that a decedent held only an equity of redemption, and this only was ordered sold and was sold, and it turned out that decedent had an absolute unencumbered title, nothing passed by the sale. Crane v. Guthrie, 47 Iowa 542.

[b] **Construction of order**—An administrator, in order to facilitate a compromise agreement between the heirs, applied for an order to sell "all the accounts, notes, choses in action, claims, and judgments now in the hands of the administrator," due and owing by any and all parties, etc. These consisted of a quantity of old accounts and claims supposed to be uncollectable which the administrator sold for fifty dollars. The purchaser had no knowledge that the estate was interested as a beneficiary in a trust fund in question to the extent of about three thousand dollars, which trust at the time of the sale remained unadministered by the trustee, and had not been inventoried. It was held that property "in the hands of" the administrator did not include anything that might be reduced to the administrator's possession thereafter, but meant only property then in his actual possession or in such condition that actual possession was legally with the person described as holding it, and that, there being no intention to include the estate's interest in such fund, it did not pass by the assignment. Routledge v. Elmendorf, 54 Tex. Civ. A. 174, 116 SW 156.

[c] **On the other hand** (1) where an order merely authorized a sale of patent rights, and with them there were sold certain accrued claims arising therefrom, the confirmation of the sale, as made, was equivalent to a previous order directing it. May v. Logan County, 30 Fed. 250. (2) So also, where an administrator was authorized to sell six hundred and forty acres out of a survey, his sale of a greater quantity would not necessarily be void, but the purchaser became an owner in common with decedent's legal representatives, and as such could hold the entire tract as against third persons. Milwee v. Phelps, 53 Tex. Civ. A. 195, 115 SW 891.

94. Johnson v. Oldham, 126 Ala. 309, 28 S 487, 85 AmSR 30; Lattimer v. Gulf Refining Co., (La.) 83 S 543; Messick v. Mayer, 52 La. Ann. 1161, 27 S 815; Pontalba v. Copland, 3 La. Ann. 86; Hamilton v. Hamilton, 6 Mart. N. S. (La.) 143; Hege v. Hege, 1 Penr. & W. (Pa.) 83; Williams v. Bradley, 7 Heisk (Tenn.) 54.

[a] **Tract larger than was supposed.**—Where a tract supposed to contain one hundred acres was sold at a certain price per acre, the purchaser took only one hundred acres, although it was subsequently ascertained that the tract contained more. Williams v. Bradley, 7 Heisk. (Tenn.) 54.

[b] **Contemporaneous interpretation of statute.**—The estate sold is to be determined by the interpretation given to the statute creating it at the time of the sale and not by a different interpretation thereafter given it by the courts. Myers v. Boyd, 144 Ind. 496, 43 NE 567.

[c] **The deed is to be construed in connection with** the will, the decree, and the report of sale. Francisco v. Billingsley, (Tenn. Ch. A.) 48 SW 323.

[d] **Conclusiveness of terms of deed or decree.**—(1) Where all of a certain tract of land which decedent owned at his death was ordered sold and was sold and the description in the deed by courses and distances did not include all, the purchasers nevertheless took the entire tract sold. McGhee v. Hoyt, 106 Pa. 516. (2) The confirmation of a report passes title to the entire property sold, although the decree vesting title does so only as to part. Killough v. Warren, (Tenn. Ch. A.) 58 SW 898; Williams v. Clark, (Tenn. Ch. A.) 51 SW 130. (3) Where property was put up as of an unknown quantity and was afterward, and before adjudication, described as having a known quantity, the positive description in the deed will control. Macarty v. Foucher, 12 Mart. (La.) 114.

[e] **Idem sonans.**—Where a land certificate issued to Willis A Forris and was sold as that of Willis A. Farris, which was the name of the decedent, the title passed, it being evident that the same person was intended. Lyne v. Sanford, 82 Tex. 58, 19 SW 847, 27 AmSR 852.

[f] **Where two tracts are sold with overlapping descriptions,** the purchaser first in point of time takes the portion sold twice. Cherry v. Stein, 11 Md. 1.

95. Dull v. Slater, 31 Pa. Super. 488 (where land is sold at an orphans' court sale charged with a sum of money, the interest of which was payable to the decedent's mother during her life, and the principal after her death to the heirs of decedent's father, who died intestate, and the purchaser agrees that the charge shall remain as theretofore, the purchaser cannot, after the widow's death, claim that he is not liable to pay any portion of the fund to the heirs at law of the decedent as whose estate the land was sold).

96. See cases infra this note.

[a] **This rule has been applied to:** (1) The right to use a dam to its full capacity. Maguire v. Baker, 57 Ga. 109. (2) The right to occupy land for the purpose of finishing the

will also fixtures;[97] and it seems that the order of sale of an inchoate title will carry the title so far as it is perfected at the time of the sale.[98] It is also considered that the purchaser takes free of an outstanding equity of which he is not chargeable with notice.[99] Where an executor conveyed estate land to his son with the understanding that the son was later to reconvey to him, and the son did not pay, or agree to pay, anything for the land, but the purchase price was paid by the executor, and the deed because of a misdescription did not convey the legal title, it was held that the son had no equitable interest in the land.[1]

[§ 1697] **b. Rule Caveat Emptor.** The rule caveat emptor applies to sales of decedent's property under order of court,[2] and after the sale has been confirmed[3] the purchaser has, ordinarily, no right to complain because of defects in quantity,[4]

tanning of hides thereon which were sold, together with bark and tools necessary for the process. Palmer v. Petty, 21 La. Ann. 176. (3) The right to the unimpeded flow of an artificial watercourse extending through the land. Brakely v. Sharp, 10 N. J. Eq. 206.

97. Parks v. Hailey, 142 Ga. 391, 83 SE 100; Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632.

[a] **Illustration.**—Machinery and appliances affixed to mill property by an executor as devisee under the will, with the intent that they should form a part of the permanent structure, become a part therof and pass by the sale. Richmond v. Freemans Nat. Bank, 86 App. Div. 152, 83 NYS 632.

98. Peevy v. Hurt, 32 Tex. 146; Lubbock v. Binns, 20 Tex. Civ. A. 407, 50 SW 584.

[a] **This rule has been applied** to land certificates located or patented after the order of sale. Moody v. Looscan, (Tex. Civ. A.) 44 SW 621.

[b] **Conveyance in consideration of location of certificate.**—Where a conveyance by an administrator of a portion of the land in consideration of the location of the certificate passes the interest of the heirs. Halbert v. De Bode, 15 Tex. Civ. A. 615, 40 SW 1011.

99. Higbee v. Billick, 244 Mo. 411, 427, 148 SW 879 ("It is insisted that the plaintiff, a purchaser at an administrator's sale, bought as if at an execution sale subject to the doctrine of caveat emptor and took subject to all defendant's equities. Contra, it is argued for plaintiff that the sale was a judicial sale and that something is due to that fact as distinguished from an execution sale. Generally, and somewhat loosely speaking, courts have dealt with execution sales as judicial sale; but in strictness there may be a difference, as pointed out by our brother Gantt in Noland v. Barrett, 122 Mo. 181, 189, 26 SW 692, 43 AmSR 572. The sale in hand was clearly a judicial sale stricti juris. It was specifically ordered by the court. It was made pursuant to judicial authority. It was approved by the court prior to the execution of the deed, and, to crown all, the very deed was ordered by the court. But we think it unprofitable to be drawn into an exposition of the law in the above regard; for even in an execution sale the purchaser gets title through his sheriff's deed as against a deed by the execution debtor unrecorded at the time. Vance v. Corrigan, 78 Mo., loc., Cit. 95, 86; Harrison Mach. Works v. Bowers, 200 Mo. 219, 231, 232, 92 SW 185, 98 SW 539. At very best defendant's released deed of trust could not stand on a better foot than an unrecorded deed").

1. Gilmore v. Thomas, 252 Mo. 147, 158 SW 577.

2. Ala.—Denman v. Payne, 152 Ala. 342, 44 S 635; Culli v. House, 133 Ala. 304, 32 S 254; Bolling v. Jones, 67 Ala. 508; Corbitt v. Dawkins, 54 Ala. 282; Beene v. Collenberger, 38 Ala. 647; Watson v. Collins, 37 Ala. 587; Burns v. Hamilton, 33 Ala. 210, 70 AmD 570; Worthington v. McRoberts, 9 Ala. 297; Perkins v. Winter, 7 Ala. 855.

Ark.—Bennett v. Owen, 13 Ark. 177.

Cal.—Miller v. Gray, 136 Cal. 261, 68 P 770; Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

Colo.—Payne v. Peo., 173 P 397.

Del.—In re Wheeler, 101 A 865; In re Donaghy, 80 A 721.

Ga.—McKinnon v. Sheffield, 99 SE 855; Mercer v. Sager, 129 Ga. 123, 58 SE 1037; Keen v. McAfee, 116 Ga. 728, 42 SE 1022; Wells v. Harper, 81 Ga. 194, 6 SE 913, 12 AmSR 310; Jones v. Warnock, 67 Ga. 484; Colbert v. Moore, 64 Ga. 502.

Ill.—Shup v. Calvert, 174 Ill. 500, 51 NE 828; Robertson v. Wheeler, 162 Ill. 566, 44 NE 870; Tilley v. Bridges, 105 Ill. 336 [aff 11 Ill. A. 353]; Bond v. Ramsey, 89 Ill. 29; Bishop v. O'Conner, 69 Ill. 431; Fell v. Young, 63 Ill. 106; Donlin v. Hettinger, 57 Ill. 348; McConnell v. Smith, 39 Ill. 279; Walden v. Gridley, 36 Ill. 523; Letcher v. Morrison, 27 Ill. 209; Bingham v. Maxcy, 15 Ill. 295; Sexton v. Sikking, 90 Ill. A. 667.

Ind.—Loudon v. Robertson, 5 Blackf. 276.

Iowa.—Hale v. Marquette, 69 Iowa 376, 28 NW 647.

Kan.—Headrick v. Yount, 22 Kan. 344.

La.—Pintard v. Deyris, 3 Mart. N. S. 32.

Mass.—Tyndale v. Stanwood, 182 Mass. 534, 66 NE 23.

Mich.—Frost v. Atwood, 73 Mich. 67, 41 NW 96, 16 AmSR 560.

Miss.—Storm v. Smith, 43 Miss. 497; Cogan v. Frisby, 36 Miss. 178; Hutchins v. Brooks, 31 Miss. 430; Cabaniss v. Clark, 31 Miss. 423; George v. Bean, 30 Miss. 147; Joslin v. Caughlin, 26 Miss. 134.

Mo.—Johnson v. Brewn, 210 SW 55; Throckmorton v. Pence, 121 Mo. 50, 25 SW 843; Estes v. Alexander, 90 Mo. 453, 2 SW 414; Foley v. Boulware, 86 Mo. A. 674.

Nebr.—Motley v. Motley, 53 Nebr. 375, 73 NW 738, 68 AmSR 608.

N. J.—Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

N. C.—Ellis v. Adderton, 88 N. C. 472; Parker v. Leathers, 55 N. C. 249.

N. D.—Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 NW 233, 66 AmSR 679.

Oh.—Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540; Holloway v. Stuart, 19 Oh. St. 472.

Pa.—Smith v. Wildman, 178 Pa. 245, 35 A 1047, 56 AmSR 760, 36 LRA 834; Bickley v. Biddle, 33 Pa. 276; Sackett v. Twining, 18 Pa. 199, 57 AmD 599; Vandever v. Baker, 13 Pa. 121; King v. Gunnison, 4 Pa. 171; Kennedy's App., 4 Pa. 149; Fox v. Mensch, 3 Watts & S. 444; Bashore v. Whisler, 3 Watts 490; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Bodder's Est., 14 Pa. Dist. 53, 31 Pa. Co. 46; Bodder's Est., 13 Pa. Dist. 470, 30 Pa. Co. 417.

Tex.—Ward v. Williams, 45 Tex. 617; Doxey v. Burns, 37 Tex. 719; Herrington v. Williams, 31 Tex. 448; Walton v. Reager, 20 Tex. 103; Thompson v. Munger, 15 Tex. 523, 65 AmD 176; Williams v. McDonald, 13 Tex. 322; Edmondson v. Hart, 9 Tex. 554; Leach v. Millard, 9 Tex. 551; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735; Hawpe v. Smith, 25 Tex. Suppl. 448; Roberts v. Holland, 63 Tex. Civ. A. 587, 134 SW 810; Club Land, etc., Co. v. Dallas County, 26 Tex. Civ. A. 449, 64 SW 872 [rev in part on other grounds 95 Tex. 200, 66 SW 294].

Utah.—Moyle v. Thomas, 46 Utah 542, 151 P 361.

Va.—Brock v. Philips, 2 Wash. 68.

Wash.—Golden v. Pilchuck Tribe No. 42 I. O. R. M., 71 Wash. 581, 129 P 93; Horton v. Barto, 57 Wash. 477, 107 P 191, 135 AmSR 999; Matson v. Johnson, 48 Wash. 256, 93 P 324, 125 AmSR 924; Towner v. Rodegeb, 33 Wash. 153, 74 P 50, 99 AmSR 936; Wallace v. Grant, 27 Wash. 130, 67 P 578.

"The purchaser must take care—he buys at his own risk, as to quality, quantity, and title. In the absence of fraud or misrepresentation, the law casts on him the duty of inquiry and examination as to the thing, and the right and interest he purchases." Corbitt v. Dawkins, 54 Ala. 282, 284.

[a] **The purchaser has no right to rely on any representations** by the executor or administrator in regard to the title, but he must inquire for himself. Culli v. House, 133 Ala. 304, 32 S 254; Fore v. McKenzie, 58 Ala. 115; Estes v. Alexander, 90 Mo. 453, 2 SW 414; Motley v. Motley, 53 Nebr. 375, 73 NW 738, 68 AmSR 608; Fahrig v. Schimpff, 199 Pa. 423, 49 A 237, 85 AmSR 796; Walton v. Reager, 20 Tex. 103; Hawpe v. Smith, 25 Tex. Suppl. 448; Club Land, etc., Co. v. Dallas County, 26 Tex. Civ. A. 449, 64 SW 872 [rev on other grounds 95 Tex. 200, 66 SW 294].

[b] **False representations** made by the administrator at the sale that the property was unencumbered constitute an individual tort for which he is individually liable, but affords no defense to an action on notes given for the purchase money. Riley v. Kepler, 94 Ind. 308.

[c] **A sale by a public administrator,** in executing an order of the probate court, is a judicial sale at which a purchaser buys at his peril. Estes v. Alexander, 90 Mo. 453, 2 SW 414.

[d] **Scope of rule.**—It is undoubtedly true that the rule caveat emptor applies to orphans' court sales no less than to sales by the sheriff under execution, but purchasers are entitled to the protection of the court if application for relief is made before rights have intervened. Bodder's Est., 13 Pa. Dist. 471, 30 Pa. Co. 417, 14 Pa. Dist. 53, 31 Pa. Co. 46.

3. Ga.—Keen v. McAfee, 116 Ga. 728, 42 SE 1022.

Kan.—Headrick v. Yount, 22 Kan. 344.

Mo.—Estes v. Alexander, 90 Mo. 453, 2 SW 414; Foley v. Boulware, 86 Mo. A. 674.

N. J.—Podesta v. Binns, 69 N. J. Eq. 387, 60 A 815.

Oh.—Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540.

4. Perkins v. Winter, 7 Ala. 855; Greer v. McDonald, 141 Ga. 309, 80 SE 1002; Sackett v. Twining, 18 Pa. 199, 57 AmD 599.

[a] **Mistake.**—Where the executor and bidder both believed that a building was entirely on the lot sold, and it turned out to be in part on other land, the sale was rescinded as being based on a mutual mistake as to the condition of the property. McKay v. Coleman, 85 Mich. 60, 48 NW 203.

[b] **On the other hand** (1) it has been held that a purchaser may claim a diminution in the price for deficiency in the quantity (Davenport v. Fortier, 3 Mart. N. S. (La.) 695) and (2) that the fact that a

quality,[5] or title,[6] at least where the circumstances were such that he had notice of,[7] or could with reasonable diligence have discovered,[8] the defects.

[§ 1698] **c. Warranty**[9]**—(1) None as against Estate.** On a sale of a decedent's property under order of court there is no implied warranty, either of title or quality;[10] and it is generally held that the representative is without authority to make an express warranty which will bind the estate.[11]

[§ 1699] **(2) Personal Liability of Representative.** A covenant of warranty actually made by the representative will bind him personally,[12] but no

purchaser at an execution sale saw the premises does not prevent him from demanding a conveyance of a lot of the full width advertised where decedent owned an adjoining lot, and a simple inspection would not have disclosed a discrepancy in the frontage (Keily v. Saunders, 236 Pa. 593, 85 A 9).

[c] **Recovery of excess payment.**—Where land ordered sold for payment of debts was sold by a commissioner at a certain price per acre, and the purchaser, under representations by the commissioner that the tract contained a certain number of acres, paid for ninety-six acres more than the tract actually contained, the purchaser was entitled to recover the excess paid from the distributees of the estate. Peacock v. Barnes, 139 N. C. 196, 51 SE 926.

5. Bingham v. Maxcy, 15 Ill. 295; Parker v. Leathers, 55 N. C. 249; Edmondson v. Hart, 9 Tex. 554.

6. Ala.—Bolling v. Jones, 67 Ala. 508; Fore v. McKenzie, 58 Ala. 115; Corbitt v. Dawkins, 54 Ala. 282.

Ark.—Zeigler v. Daniel, 128 Ark. 403, 194 SW 246; Bennett v. Owen, 13 Ark. 177.

Colo.—Payne v. Peo., 173 P 397.

Del.—In re Wheeler, 101 A 865.

Ga.—Keen v. McAfee, 116 Ga. 728, 42 SE 1022; Jones v. Warnock, 67 Ga. 484; Colbert v. Moore, 64 Ga. 502.

Ill.—Shup v. Calvert, 174 Ill. 500, 51 NE 828; Tilley v. Bridges, 105 Ill. 336 [aff 11 Ill. A. 353]; Walden v. Gridley, 36 Ill. 523.

Ind.—Loudon v. Robertson, 5 Blackf. 276.

Iowa.—Stephens v. Boyd, 157 Iowa 570, 138 NW 389, 392 [cit Cyc].

Kan.—Headrick v. Yount, 22 Kan. 344.

Me.—Joyce v. Ryan, 4 Me. 101.

Miss.—Cummings v. Johnson, 65 Miss. 342, 4 S 541; Cogan v. Frisby, 36 Miss. 178; Cabaniss v. Clark, 31 Miss. 423; Joslin v. Caughlin, 26 Miss. 134.

Mo.—Delassus v. Poston, 21 Mo. 543.

N. C.—Hobbs v. Cashwell, 152 N. C. 183, 67 SE 495.

Oh.—Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540.

Pa.—Bickley v. Biddle, 33 Pa. 276; King v. Gunnison, 4 Pa. 171; Fox v. Mensch, 3 Watts & S. 444; Bashore v. Whisler, 3 Watts 490.

Tex.—Ward v. Williams, 45 Tex. 617; Thompson v. Munger, 15 Tex. 523, 65 AmD 176; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735; Hawpe v. Smith, 25 Tex. Suppl. 448; Vivion v. Nicholson, 54 Tex. Civ. A. 43, 116 SW 386.

Utah.—Moyle v. Thomas, 46 Utah 542, 151 P 361, 364 [cit Cyc].

Vt.—Marsh v. Marsh, 78 Vt. 399, 63 A 159.

Va.—Brock v. Philips, 2 Wash. 68.

"While a court which authorized a judicial sale may feel justified in relieving a bidder from compliance with the terms of sale where it is clear that title to the property sold would not pass to the purchaser, still the court would not be justified in so doing when clearly the legal title would pass subject to some alleged outstanding equities which might or might not exist, or be enforceable." In re Wheeler, (Del.) 101 A 865, 867.

[a] **Recovering back price.**—A purchaser evicted under a superior title cannot maintain assumpsit for the purchase money; his only resort is to such covenants as may be in his deed. Joyce v. Ryan, 4 Me. 101.

[b] **Reimbursement from estate.**—One who buys land subject to a lien under which it is afterward sold has no right to receive from the proceeds what he had paid the administrator. Delassus v. Poston, 21 Mo. 543.

[c] **The purchaser cannot complain in a collateral proceeding** that he did not acquire the entire interest of decedent. Watson v. Collins, 37 Ala. 587; Worthington v. McRoberts, 9 Ala. 297; Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540; Brock v. Philips, 2 Wash. (2 Va.) 68.

[d] **On the other hand** there are cases holding that the purchaser cannot be compelled to accept a defective title. Nash's Succ., 48 La. Ann. 1573, 21 S 254; White's Succ., 9 La. Ann. 232; Monaghan v. Small, 6 S. C. 177.

7. Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 440; Ellis v. Adderton, 88 N. C. 472.

[a] **Circumstances amounting to notice.**—Where a tenant in common conveyed his interest to his cotenant, but, the consideration not having been paid, the latter's heirs reconveyed the property, such deed of reconveyance was not void, but at most was voidable only, and was therefore notice to a purchaser at an administrator's sale of the lands owned by such cotenant. Gilbert v. Hopkins, 204 Fed. 196, 122 CCA 440.

8. Zeigler v. Daniel, 128 Ark. 403, 194 SW 246; Rowe v. Gaskins, 148 Ga. 817, 98 SE 493.

Protection of bona fide purchaser against defects in decedent's title see infra § 1704.

9. Effect of covenants in deed see infra § 1727.

10. Cal.—Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

Colo.—Payne v. Peo., 173 P 397.

Miss.—Ware v. Houghton, 41 Miss. 370, 93 AmD 258; Joslin v. Caughlin, 26 Miss. 134.

N. Y.—Oldfield v. Vassar College, 68 App. Div. 272, 73 NYS 1112.

S. C.—Prescott v. Holmes, 28 S. C. Eq. 9.

Tex.—Williams v. McDonald, 13 Tex. 322.

[a] **No implied warranty of genuineness of security sold.**—Oldfield v. Vassar College, 68 App. Div. 272, 73 NYS 1112.

[b] **There may be an implied warranty of title** but none of quality. George v. Bean, 30 Miss. 147.

[c] **It has been held otherwise** in Louisiana, where the sale imports full legal warranty. Gautreaux v. Boote, 10 La. Ann. 137.

11. Ala.—Denman v. Payne, 152 Ala. 342, 44 S 635; Pryor v. Davis, 109 Ala. 117, 19 S 440; Fore v. McKenzie, 58 Ala. 115; Burns v. Hamilton, 33 Ala. 210, 70 AmD 570; Perkins v. Winter, 7 Ala. 855.

Colo.—Payne v. Peo., 173 P 397.

Ga.—Colbert v. Moore, 64 Ga. 502.

Ill.—Shup v. Calvert, 174 Ill. 500, 51 NE 828; Tilley v. Bridges, 105 Ill. 336 [aff 11 Ill. A. 353]; McManus v. Keith, 49 Ill. 388; Sexton v. Sikking, 90 Ill. A. 667.

Ind.—Martin v. Beasley, 49 Ind. 280; Beeson v. Pierce, 51 Ind. A. 201, 98 NE 380.

Iowa.—Hale v. Marquette, 69 Iowa 376, 28 NW 647.

Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.

Miss.—Hutchins v. Brooks, 31 Miss. 430; Mellen v. Boarman, 21 Miss. 100.

N. J.—Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

Oh.—Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540; Dunlap v. Robinson, 12 Oh. St. 530; Lockwood v. Gilson, 12 Oh. St. 526.

Pa.—Whiteside v. Flora, 27 Pa. Co. 25, 8 Del. Co. 459, 19 LancLRev 299.

S. C.—O'Neall v. Abney, 18 S. C. L. 317.

Tex.—Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [mod 26 Tex. Civ. A. 449, 64 SW 872]; Nesbitt v. Richardson, 14 Tex. 656; Williams v. McDonald, 13 Tex. 322; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735.

Utah.—Moyle v. Thomas, 46 Utah 542, 151 P 361, 364 [cit Cyc].

Vt.—Prounty v. Mather, 49 Vt. 415.

[a] **Reason for rule.**—"The representations, agreements, and warranties of the personal representative are vanities, since he is but the agent, with law-limited powers, of the court." Denman v. Payne, 152 Ala. 342, 345, 44 S 635.

[b] **Illustration.**—The administrator cannot bind the estate by an agreement to hold the purchaser liable only for what he should realize on a resale. Fahrig v. Schimpff, 199 Pa. 423, 49 A 237, 85 AmSR 796.

[c] **Representations made at the sale by an administrator** may constitute a fraud on the purchaser but not a warranty. Mellen v. Boarman, 21 Miss. 100.

[d] **The estate is not liable for misrepresentations** made as to the title by the executor to the purchaser at the executor's sale. Beeson v. Pierce, 51 Ind. A. 201, 98 NE 380.

[e] **An administrator de bonis non cannot be charged** on a warranty made by the first administrator. O'Neall v. Abney, 18 S. C. L. 317.

[f] **It has been held otherwise** as to a warranty as to quality of personal property. Craddock v. Stewart, 6 Ala. 77; O'Neal v. Abney, 18 S. C. L. 317. See also Magoffin v. Stringer, 13 La. 370 (where an executor's statement that he did not warrant slaves sold against certain vices was held to proclude the defense in an action on a promissory note given for a slave that he had a certain vice which was known to decedent in his lifetime).

12. Ga.—Aven v. Beckom, 11 Ga. 1.

Ill.—Vincent v. Morrison, 1 Ill. 227.

Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.

Oh.—Arnold v. Donaldson, 46 Oh. St. 73, 18 NE 540; Lockwood v. Gilson, 12 Oh. St. 526; Fisher v. Fisher, 33 Oh. Cir. Ct. 525, 15 Oh. Cir. Ct. N. S. 273.

Pa.—Kauffelt v. Leber, 9 Watts & S. 93.

Vt.—Prouty v. Mather, 49 Vt. 415.

[a] **Illustration.**—An administrator is personally liable on a warranty that property was sound, so far as the office of administrator authorized him to warrant. Aven v. Beckom, 11 Ga. 1.

[b] **Covenant to warrant as executors are bound to do.**—An executor is not bound in any way by a covenant to warrant "as executors are bound by law to do" because they were not bound by law to do so at all. Day v. Brown, 2 Oh. 345.

[c] **Covenant as representative.**—(1) A covenant made expressly by the grantor in his capacity as administrator binds him personally. Sumner v. Williams, 8 Mass. 162, 5

personal covenant of any nature whatsoever on the part of the executor or administrator will be implied.[13]

[§ 1700] **d. Protection of Bona Fide Purchasers**[14]**—(1) In General.** A person may be an innocent purchaser at a sale by an executor or administrator and be entitled to protection as such,[15] and a subsequent vendee of the purchaser, who takes in good faith and without notice, may be protected,[16] although the sale could not stand as between the original purchaser and the heirs of decedent.[17] Where under a description said to be susceptible of double construction, a purchaser at a succession sale accepts a certain tract of land as being the land described, and sells the same, his taking possession of another tract as the land described will be held to be in bad faith as to a purchaser who had acquired such other tract by description admitting of but one construction.[18]

[§ 1701] **(2) Fraud on Purchaser.** The rule that fraud vitiates everything generally prevails as against the rule of caveat emptor to the extent that a sale induced by the fraudulent misrepresentations of the administrator will be set aside,[19] but it is well settled that such misrepresentations do not render the estate liable in damages, but only the administrator individually,[20] and, according to a number of authorities, such misrepresentations cannot be urged as a defense in an action for the price,[21] although other authorities assert the contrary view.[22] The mere silence of the representative as to a known defect of title,[23] or the expression of an opinion as to the effect of facts known to the purchaser,[24] is not a fraud which will vitiate the

AmD 83. (2) Where the administrator recited that he did not bind himself personally but made covenants in his representative capacity, he was not bound in either capacity. Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [mod 26 Tex. Civ. A. 449, 64 SW 872]. To same effect Thayer v. Wendell, 23 F. Cas. No. 13,873, 1 Gall. 37. (3) A covenant to warrant to the extent of assets, and if the land should be lost by any prior claim to refund the purchase money with interest, imposes no liability on the executor individually or beyond the assets in his hands at the time of eviction. Manifee v. Morrison, 1 Dana (Ky.) 208. (4) Where an administrator, acting under a void order of court, sold a lot belonging to the estate and covenanted as administrator with the purchaser, "his heirs and legal representatives to warrant and forever defend this title to the aforesaid lot against the claim or claims of any and all persons lawfully claiming or to claim the same or any part thereof to the extent that I am bound to do according to law as such administrator and no further," and the administrator in his individual capacity held a life estate in one sixth of the lot, the life estate passed to the purchaser by the deed of the administrator. Millican v. McNeill, 102 Tex. 189, 114 SW 106, 132 AmSR 863, 21 LRANS 60, 20 AnnCas 74.

[d] **A covenant in a deed by an administratrix, who is also the widow,** against her own acts, refers to her acts in her representative capacity and does not estop her from claiming dower. Wright v. De Groff, 14 Mich. 164.

13. Miller v. Mechanics, etc., Ins. Co., 8 La. A. (Orleans) 67; Mockbee v. Gardiner, 2 Harr. & G. (Md.) 176; Shontz v. Brown, 27 Pa. 123; Mathews v. Allen, 6 Tex. 330.

[a] **Thus** the usual implications in the words "grant, bargain, and sell" do not apply to an administrator's deed. Shontz v. Brown, 27 Pa. 123.

14. Sale of personalty under testamentary authority or common-law power see supra § 749.

Sale of realty under testamentary authority see supra § 682.

15. Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69; Hatcher v. Brunt, 89 Misc. 530, 153 NYS 707; White v. Frank, 91 Tex. 66, 40 SW 962; Lumpkin v. Adams, 74 Tex. 96, 11 SW 1070; Holmes v. Johns, 56 Tex. 41; Taylor v. Harrison, 47 Tex. 454, 26 AmR 304; Love v. Berry, 22 Tex. 371; Louisiana, etc., Co. v. Southern Pine Lumber Co., (Tex. Civ. A.) 171 SW 537; Jackson v. Berliner, (Tex. Civ. A.) 127 SW 1160.

[a] **Who entitled to protection.**—Where, in payment of land bought at an executor's sale by a lien creditor, the latter credited his claim against the estate for the amount due on it, and gave the additional consideration in cash, which was used by the executor to pay off other debts, it constituted the vendee a purchaser for value. Jackson v. Berliner, (Tex. Civ. A.) 127 SW 1160.

16. Bell v. Lafosse, 126 La. 528, 52 S 687; Nelson v. Bridge, 39 Tex. Civ. A. 283, 87 SW 885.

17. Bell v. Lafosse, 126 La. 528, 52 S 687.

[a] **The rule applies to a mortgagee** of the purchaser. But where the property is sold under foreclosure after the commencement of proceedings to set aside the sale, to which the purchaser and the mortgagee have been made parties, the equity of the purchaser at the foreclosure sale extends only to the amount of the mortgage debt and interest thereon. Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

[b] **Warranty deed.**—Where an innocent vendee for value from the purchaser at the sale receives a warranty deed from such purchaser, he is not charged with notice of outstanding equities, unless there was something in his chain of title or in the general situation to put him on inquiry, although the purchaser at the administrator's sale was not a purchaser for value by reason of having credited the amount of his bid on a debt against the estate. Nelson v. Bridge, 39 Tex. Civ. A. 283, 87 SW 885 (where land owned by a nonresident was sold to pay debts in spite of the testator's will, a copy of which was filed and proved in the state, such will was not within the chain of title of a subsequent purchaser, so as to charge him with notice of outstanding equities).

[c] **When rule not applicable.**—The doctrine that, although a sale may be voidable as against an original purchaser, bona fide purchasers may acquire title which cannot be set aside, is not applicable to an equitable proceeding by original purchasers at an administrator's sale to correct mistake in deed. Broadhurst v. Hill, 137 Ga. 833, 74 SE 422.

[d] **Notice.**—Where an administrator's deed of land sold to pay debts described the kind of record, the number of the volume, and the page wherein the order of the court was entered, by virtue of which the administrator was authorized to execute the deed in question, as required by statute, and such deed, if examined, would have disclosed that the administrator sold only twelve acres of land, more or less, and a subsequent purchaser afterward discovered that the description therein covered more than three times that amount of land, such purchaser was chargeable with notice thereof, and of the right of the administrator to correct the mistake. Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

18. Railsbach v. Leonard, 118 La. 916, 43 S 548.

19. Ala.—Atwood v. Wright, 29 Ala. 346.

Ga.—Holmes v. Holmes, 140 Ga. 217, 78 SE 903.

Ind.—Chaney v. Wood, (A.) 115 NE 333.

Miss.—Mellen v. Boarman, 21 Miss. 100.

Oh.—Fisher v. Fisher, 33 Oh. Cir. Ct. 525, 15 Oh. Cir. Ct. N. S. 273.

Pa.—Tubbs' Est., 4 Pa. Dist. 325; Bodder's Est., 14 Pa. Dist. 53, 31 Pa. Co. 46; Bodder's Est., (No. 2) 13 Pa. Dist. 471, 30 Pa. Co. 417; Veihdorfer's Est., 26 Pa. Co. 317.

Tex.—Coombs v. Lane, 17 Tex. 280; Able v. Chandler, 12 Tex. 88, 62 AmD 518; Crayton v. Munger, 9 Tex. 285.

[a] **Statements of the administrator and his attorney** misleading the purchaser may be a ground of relief. De Haven's App., 106 Pa. 612, 2 Del. Co. 209.

[b] **A misrepresentation as to the value** of woodland, made to one who had not seen the property, is a defense to an action for not making good the bid. Stewart v. Dougherty, 1 PittsbLegJNS (Pa.) 233.

[c] **Misrepresentation as to title.**—Where the purchase was induced by misrepresentations and unauthorized promises concerning the title, the sale will be set aside on application made before confirmation. De Haven's App., 106 Pa. 612, 2 Del. Co. 209.

[d] **A sale will be set aside before confirmation, but not after,** where the administrator stated that decedent owned the whole tract when he only owned one half. Porter's Est., 3 LuzLegReg (Pa.) 47.

[e] **A misrepresentation made after the sale** and at the time of the delivery of the deed will not avoid the sale. Kirkland v. Wade, 61 Ga. 478.

[f] **A statement made in good faith by the executor** as to the title is no ground for relief. Wells v. Harper, 81 Ga. 194, 6 SE 913, 12 AmSR 310.

[g] **Declarations of the crier,** misleading the purchaser, may be a ground of relief. Atwood v. Wright, 29 Ala. 346; Vandever v. Baker, 13 Pa. 121.

20. Ind.—West v. Wright, 98 Ind. 335; Beeson v. Pierce, 51 Ind. A. 201, 98 NE 380.

Minn.—Fritz v. McGill, 31 Minn. 536, 18 NW 753.

Mo.—Richardson v. Palmer, 24 Mo. A. 480.

Oh.—Dunlap v. Robinson, 12 Oh. St. 530.

Tex.—Able v. Chandler, 12 Tex. 88, 62 AmD 518.

21. Brown v. Evans, 15 Kan. 88; Westfall v. Dungan, 14 Oh. St. 276; Vandever v. Baker, 13 Pa. 121.

22. Atwood v. Wright, 29 Ala. 346; Rice v. Richardson, 3 Ala. 428; Rice v. Burnet, 39 Tex. 177.

23. Hutchins v. Brooks, 31 Miss. 430; Ward v. Williams, 45 Tex. 617; Thompson v. Munger, 15 Tex. 523, 65 AmD 176.

24. Walton v. Reager, 20 Tex. 103.

sale. A sale will bind the purchaser notwithstanding it was induced by the fraud of a legatee or distributee, the purchaser's remedy being personal against the person guilty of the fraud;[25] and the same is true where misrepresentations are made by a third person without collusion of the administrator.[26] Where a member of a law firm having charge of the settlement of a succession purchases land belonging to a succession at a sale provoked presumably by him or his firm, he is estopped to set up the title so acquired as against an innocent purchaser of the same land, at a subsequent sale similarly provoked.[27]

[§ 1702] **(3) Fraud on Others.** Although a sale is fraudulent as against the heirs or others interested in the property, the title of a purchaser in good faith and without notice of the fraud will not be affected;[28] nor will that of a subsequent purchaser in good faith from the vendee, although the latter may have been a party to the fraud.[29] A subsequent purchaser with notice will take a good title if the original purchaser was without notice.[30] Even if the sale is set aside the rights of a bona fide purchaser will be protected.[31]

[§ 1703] **(4) Defective Proceedings.** A bona fide purchaser will be protected against a divestiture of his title by reason of a defect in the proceedings under which he bought,[32] provided the court had jurisdiction,[33] and the order or decree in terms authorized the sale.[34] The purchaser is not

25. Robinson v. Bright, 3 Metc. (Ky.) 30; Williams v. McCormack, 7 Humphr. (Tenn.) 308.

26. Pool v. Hodnett, 18 Ala. 752 (statement made by holder of superior title).

27. Railsbach v. Leonard, 118 La. 916, 43 S 548.

28. U. S.—Dexter v. Harris, 7 F. Cas. No. 3,862, 2 Mason 531.

Ark.—Adams v. Thomas, 44 Ark. 267.

Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ga.—Broadhurst v. Hill, 137 Ga. 833, 74 SE 422 (rule recognized but held not applicable).

Mo.—Pipkin v. Casey, 13 Mo. 347.

Pa.—Cascaden v. Cascaden, 140 Pa. 140, 21 A 259.

Tex.—McCown v. Foster, 33 Tex. 241.

29. Colo.—Pinnacle Gold Min. Co. v. Popst, 54 Colo. 451, 131 P 413.

Ind.—Hawkins v. Ragan, 20 Ind. 193.

Iowa.—Read v. Howe, 39 Iowa 553.

La.—Morrill v. Carr, 2 La. Ann. 807.

Mass.—Robbins v. Bates, 4 Cush. 104; Blood v. Hayman, 13 Metc. 231.

Mich.—King v. Nunn, 99 Mich. 590, 58 NW 636.

N. J.—Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584.

N. C.—Morrow v. Cole, 132 N. C. 678, 44 SE 370; Fowler v. Poor, 93 N. C. 466.

Tex.—Halbert v. Young, 6 SW 747; Martin v. Robinson, 67 Tex. 368, 3 SW 550.

[a] **Illustration.**—A subsequent purchaser is not chargeable with notice of fraud in that the property was sold to the judge of probate, where the deed to the judge was dated before he confirmed the sale. Woods v. Monroe, 17 Mich. 238.

[b] **A mortgagee of the purchaser** is not charged with notice of the fraud, although the fraud is disclosed on the face of the proceedings leading to the sale. Lawson v. Acton, 57 N. J. Eq. 107, 40 A 584. See also Van Horn v. Ford, 16 Iowa 578 (demurrer presenting similar question was overruled reserving question for determination on final hearing).

[c] **One who purchases at an execution sale on a judgment against the vendee** at the administrator's sale is not a bona fide purchaser without notice. Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.

[d] **A conveyance to the executor by the purchaser** is not alone notice that the executor was interested at the time of the sale. Otis v. Kennedy, 107 Mich. 312, 65 NW 219. But see Veeder v. McKinley-Lanning Loan, etc., Co., 61 Nebr. 892, 86 NW 982 (where there were other circumstances tending to impart notice).

[e] **When chargeable with notice.**—A vendee of the purchaser is chargeable with notice of fraud in the sale, where he knew that the sale was made to pay an individual indebtedness of the agent of the administrator to the purchaser, and a near relative of the infant beneficiaries of the estate told him that any one who bought the land was buying a lawsuit. Tillman v. Thomas, 87 Ala. 321, 6 S 151, 13 AmSR 42.

[f] **Erroneous issue.**—It was error to submit to the jury an issue as to whether the purchaser took title "with knowledge of the rights of the plaintiff in said land," because that might mean merely knowledge of his past interest and not knowledge of the fraud. Morrow v. Cole, 132 N. C. 678, 44 SE 370.

30. Perry v. Peterson, 98 N. C. 63, 3 SE 834; Pullian v. Byrd, 21 S. C. Eq. 134.

31. Hatfield v. Richmond, 161 Ky. 352, 170 SW 951; Wylie's Est., 7 Pa. Dist. 748.

[a] **Illustration.**—Where a sale subject to a mortgage was set aside because improvidently made, a resale should be without prejudice to the right of the purchaser to subrogation to the rights of the mortgagee in so far as he had made payments on the mortgage. Wylie's Est., 7 Pa. Dist. 748.

32. U. S.—Gregory v. Keenan, 256 Fed. 949.

Ga.—Merritt v. Jones, 136 Ga. 618, 71 SE 1092.

Iowa.—Herdlicka v. Evans, 165 Iowa 207, 145 NW 84.

La.—Barry's Succ., 130 La. 401, 58 S 20.

N. D.—Cathro v. McArthur, 30 N. D. 337, 152 NW 686.

Wash.—Jones v. Seattle Brick, etc., Co., 56 Wash. 166, 105 P 238.

See also cases infra notes 33, 34.

[a] **This rule has been applied:** (1) Where the sale was made after a caveat to the will had been filed, but no order had been made suspending the proceedings. Carraway v. Lassiter, 139 N. C. 145, 51 SE 968. (2) Where a part of the indebtedness of the estate had been paid or tendered to prevent a sale in aid of assets, but no notice of tender was given at the sale. Green v. Cannaday, 71 S. C. 317, 51 SE 92. (3) Where the heirs of the testator, one of whom was the executrix, entered into a contract to settle the debts of the estate without a sale, but such contract was not brought to the notice of the purchaser or to the court until after the sale was confirmed and the deed approved. Lake v. Hathaway, 75 Kan. 391, 89 P 666. (4) Where it was alleged that the succession owed no debts, that the administration was unnecessary, and that the property was sold without the consent of a family meeting. Granger v. Hebert, 121 La. 1045, 46 S 1012. (5) Where a third person was jointly liable with decedent for the debts for which the sale was made. Rothchild v. Wallace, 155 Ky. 676, 160 SW 170. (6) Where the sale was made during the pendency of a rule to annul the appointment of the administrator, of which rule the purchaser had no notice. Thomas' Succ., 114 La. 693, 38 S 519. (7) A bona fide purchaser has nothing to do with the question whether the executor sold more than was required to pay debts. Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583.

[b] **A mistaken execution of the order of sale** may create an equity in favor of the purchaser. Gress Lumber Co. v. Leitner, 91 Ga. 810, 18 SE 62 (where the timber on the land was sold separately from the land itself, the purchaser of the timber, having paid the price bid, acquired an equity which was enforceable against a subsequent purchaser of the land, affected with notice, whether or not the order of sale, as a strict matter of law, authorized a separate sale of the timber).

33. U. S.—Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34.

Conn.—Bryan v. Hinman, 5 Day 211.

Ga.—Leggett v. Peterson, 122 Ga. 182, 50 SE 51; Venable v. Veal, 112 Ga. 677, 137 SE 887; Chancey v. Henry, 89 Ga. 123, 14 SE 885.

Ill.—Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310; Goodbody v. Goodbody, 95 Ill. 456; Bowen v. Bond, 80 Ill. 351; Moore v. Neil, 39 Ill. 256, 89 AmD 303.

Ind.—Denton v. Arnold, 151 Ind. 188, 51 NE 240.

La.—Hibernia Bank, etc., Co. v. Whitney, 130 La. 817, 58 S 583; Barry's Succ., 130 La. 401, 58 S 20; Thibodaux v. Barrow, 129 La. 395, 56 S 339; Thomas' Succ., 114 La. 693, 38 S 519; Wisdom v. Parker, 31 La. Ann. 52.

Mo.—Wolf v. Robinson, 20 Mo. 459.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968; Fowler v. Poor, 93 N. C. 466.

Tex.—Edwards v. Halbert, 64 Tex. 667.

Wash.—Ackerson v. Orchard, 7 Wash. 377, 34 P 1106, 35 P 605.

[a] **Where the court was without jurisdiction,** the sale is void and the purchaser is not protected. Stone v. Elliott, (Ind.) 101 NE 309; Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 SW 486, 20 AnnCas 1072; Scott v. Royston, 223 Mo. 568, 123 SW 454; Smith v. Whiting, 55 Or. 393, 106 P 791; Ball v. Clothier, 34 Wash. 299, 75 P 1099.

[b] **Where the record shows lack of jurisdiction,** the order of sale is no protection to the purchaser. Templeton v. Falls Land, etc., Co., 77 Tex. 55, 13 SW 964; McNally v. Haynes, 59 Tex. 583.

[c] **Erroneous exercise of jurisdiction.**—As a court of chancery has power under some circumstances to authorize the sale of a decedent's land, a purchaser at a sale under its decree will take title, although it should not have assumed jurisdiction to order the sale in the particular case. Shoemate v. Lockridge, 53 Ill. 503.

34. U. S.—Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381 [rev 24 F. Cas. No. 14,080, 3 Cranch C. C. 123]; Smith v. McIntire, 83 Fed. 456.

bound to go behind the order to ascertain if it was regularly granted,[35] or to investigate as to whether the directions of the law as to the manner of the sale were in all respects complied with,[36] although it has been considered that a purchaser is chargeable with notice of defects which appear in any part of the record of the proceedings in which the sale is had,[37] and a recital in the deed may be sufficient to put the purchaser on notice.[38] A bona fide purchaser's title will not be defeated by a subsequent reversal of the order or decree of sale.[39] A sale by an executor acting under a will duly probated passes title to a bona fide purchaser, although the will is subsequently set aside,[40] and a purchaser from the purchaser at the sale takes good title, although the administration is afterward revoked.[41]

[§ 1704] **(5) Defects in Decedent's Title.** The purchaser does not act entirely at his peril even as regards the title of decedent. Acting upon the doctrine that the rule of caveat emptor charges a purchaser only with those things which he might discover with reasonable diligence,[42] it is held that he will take the property free from latent equities and secret trusts,[43] and that purchasers at administration sales are within the protection of the recording acts as against unrecorded deeds.[44] It has

Ind.—Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

Ky.—Dennis v. Alves, 132 Ky. 345, 113 SW 483.

La.—Thibodeaux v. Barrow, 129 La. 395, 56 S 339; Granger v. Herbert, 121 La. 1045, 46 S 1012; Irwin v. Flynn, 110 La. 829, 34 S 794; Belard v. Gebelin, 47 La. Ann. 162, 16 S 739; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Webb v. Keller, 39 La. Ann. 55, 1 S 423; Macias' Succ., 36 La. Ann. 444; Duckworth v. Vaughan, 27 La. Ann. 599; Green v. Shreveport Baptist Church, 27 La. Ann. 563; Mitchell v. Lee, 23 La. Ann. 630; Woods v. Lee, 21 La. Ann. 505; Sizemoré v. Wedge, 20 La. Ann. 124; Wright v. Cummings, 19 La. Ann. 353; Beale v. Waldon, 11 Rob. 67; Valderes v. Bird, 10 Rob. 396; Rhodes v. Union Bank, 7 Rob. 63; Ball v. Ball, 15 La. 173; Graham v. Gibson, 14 La. 146; Lalanne v. Moreau, 13 La. 431; Poultney v. Cecil, 8 La. 321; Pintard v. Deyris, 3 Mart. N. S. 32; Hogan's Succ., 5 La. A. (Orleans) 267.

N. C.—Fowler v. Poor, 93 N. C. 466.

Tex.—Rindge v. Oliphint, 62 Tex. 682; Alexander v. Maverick, 18 Tex. 179; Dancy v. Stricklinge, 15 Tex. 557, 65 AmD 179; Bartlett v. Cocke, 15 Tex. 471; Poor v. Boyce, 12 Tex. 440; Nelson v. Bridge, 39 Tex. Civ. A. 283, 87 SW 885.

Wash.—Cunningham v. Richardson, 68 Wash. 24, 122 P 368.

[a] **The purchaser is bound to know the law,** and he takes no title to personalty sold at private sale without an order which the law requires to authorize such sale. Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.

[b] **A purchaser under a voidable order** takes title until the order is set aside. Hatfield v. Richmond, 161 Ky. 352, 170 SW 951.

35. U. S.—Florentine v. Bartmon, 2 Wall. 210, 17 L. ed. 783; Grignon v. Astor, 2 How 219; Davis v. Martin, 113 Fed. 6, 51 CCA 27.

Ill.—Stow v. Kimball, 28 Ill. 93; McCormack v. Kimmel, 4 Ill, A. 121.

La.—Balovich's Succ., 130 La. 1043; 58 S 873; Kerlec v. New Orleans Land Co., 130 La. 111, 57 S 647; Thibodaux v. Barrow, 129 La. 395, 56 S 339; Hoffman v. Hunter, 127 La. 673, 53 S 903; Irwin v. Flynn, 110 La. 829, 34 S 794; Belard v. Gebelin, 47 La. Ann. 162, 16 S 739; Lehmann's Succ., 41 La. Ann. 987, 7 S 33; Linman v. Riggins, 40 La. Ann. 761, 5 S 49, 8 AmSR 549; Webb v. Keller, 39 La. Ann. 55, 1 S 423; Macias' Succ., 36 La. Ann. 444; Porter v. Hornsby, 32 La. Ann. 337; Duckworth v. Vaughan, 27 La. Ann. 599; Sizemore v. Wedge, 20 La. Ann. 124.

Mich.—Griffin v. Johnson, 37 Mich. 87.

N. C.—Carraway v. Lassiter, 139 N. C. 145, 51 SE 968; Fowler v. Poor, 93 N. C. 466.

Oh.—Sheldon v. Newton, 3 Oh. St. 494.

Tex.—Rindge v. Oliphint, 62 Tex. 682; Peterson v. Lowry, 48 Tex. 408; George v. Watson, 19 Tex. 354; Alexander v. Maverick, 18 Tex. 179, 67 AmD 693; Dancy v. Stricklinge, 15 Tex. 557, 65 AmD 179; Bartlett v. Cocke, 15 Tex. 471; Poor v. Boyce, 12 Tex. 440; Daimwood v. Driscoll, (Civ. A.) 151 SW 621; Ferguson v. Templeton, (Civ. A.) 32 SW 148.

"The purchaser might with safety rely upon that judgment, followed by the approval of the proceedings before the payment of his money by the resident judge of the district. That the purchaser is only required to see that the court has jurisdiction of the person and the subject matter is for his protection, in the absence of fraud, is settled by abundant authority." Carraway v. Lassiter, 139 N. C. 145, 155, 51 SE 968 [foll Williams v. Johnson, 112 N. C. 424, 17 SE 496, 34 AmSR 513, 21 LRA 848].

[a] **The only inquiry a purchaser is bound to make** as to the authority of an executor or administrator to sell is as to the orders of the court and the statutes of the state. Hamilton v. Pleasants, 31 Tex. 638, 98 AmD 551.

36. Gress Lumber Co. v. Leitner, 91 Ga. 810, 18 SE 62; Patterson v. Lemon, 50 Ga. 231; Goodbody v. Goodbody, 95 Ill. 456; Pleasants v. Dunkin, 47 Tex. 343.

37. Fisher v. Bush, 133 Ind. 315, 32 NE 924; Perry v. Peterson, 98 N. C. 63, 3 SE 834; McNally v. Haynes, 59 Tex. 583.

[a] **An identity of name** between the administrator's attorney appearing of record and the purchaser at the sale was sufficient to put subsequent purchasers on inquiry as to whether the attorney was the purchaser. Fisher v. Bush, 133 Ind. 315, 32 NE 924.

[b] **Limits of rule.**—The purchaser is chargeable with notice from the record of the proceedings ordering the sale but not from the general administration record. McNally v. Haynes, 59 Tex. 583.

38. Groover v. King, 46 Ga. 101 (a recital in a deed dated December 3; that leave to sell was granted in November is notice that there was not the required forty days' advertisement of the sale).

39. Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Goudy v. Hall, 36 Ill. 313, 87 AmD 217; Holly v. Gibbons, 177 N. Y. 401, 69 NE 731 [amending remittitur 176 N. Y. 520, 68 NE 889, 98 AmSR 694]; Irwin v. Jeffers, 3 Oh. St. 389. But compare Wheeler v. Wheeler, 1 Conn. 51 (where it is said that the reversal of the order of sale rendered the sale void).

[a] **Sale of more land than necessary.**—Where a judgment directing a sale of more land than was necessary to pay the debts was void as to the interest of infants and was therefore reversed, such reversal did not affect the title of the purchaser of a tract which it was necessary to sell to pay debts. Todd v. First Nat. Bank, 173 Ky. 60, 190 SW 468.

40. Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Lehmann's Succ., 41 La. Ann. 987, 7 S 33; Mathis v. Gerantz, 11 La. Ann. 3.

[a] **A purchaser in bad faith is not protected.**—Mathis v. Gerantz, 11 La. Ann. 3.

41. Halbert v. Young, (Tex.) 6 SW 747.

42. Love v. Berry, 22 Tex. 371; Cheveral v. Bowman, 2 Tex. A. Civ. Cas. § 114.

43. Cal.—Blankenship v. Whaley, 124 Cal. 300, 57 P 79.

Ga.—Hartnett v. Stillwell, 121 Ga. 386, 49 SE 276, 104 AmSR 151.

N. H.—Lahey v. Broderick, 72 N. H. 180, 55 A 354.

N. Y.—Hatcher v. Brunt, 89 Misc. 530, 153 NYS 707.

Pa.—Rupp's App., 100 Pa. 531; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Lumpkin v. Adams, 74 Tex. 96, 11 SW 1070; Keen v. Case, 22 Tex. 412; Love v. Berry, 22 Tex. 371; Dalton v. Rust, 22 Tex. 133; Nelson v. Bridge, 39 Tex. Civ. A. 283, 87 SW 885; Cheveral v. Bowman, 2 Tex. A. Civ. Cas. § 114.

[a] **Illustration.**—Where title to land was taken in the individual names of partners, an innocent purchaser at the sale of a deceased partner's interest by his administrator will take such interest unencumbered by the secret equity of the partnership. Hartnett v. Stillwell, 121 Ga. 386, 49 SE 276, 104 AmSR 151.

44. Fla.—Emerson v. Ross, 17 Fla. 122.

La.—McDuffie v. Walker, 125 La. 152, 51 S 100.

N. Y.—Barto v. Tompkins County Nat. Bank, 15 Hun 11.

Pa.—Banks v. Ammon, 27 Pa. 172.

S. D.—Shutz v. Tidrick, 26 S. D. 505, 128 NW 811.

Tex.—Taylor v. Harrison, 47 Tex. 454, 26 AmR 304; Jackson v. Berliner, (Civ. A.) 127 SW 1160.

Wash.—Golden v. Pilchuck Tribe No. 42 I. O. R. M., 71 Wash. 581, 129 P 93.

[a] **Purchaser takes free from defects not apparent on face of land records.**—Banks v. Ammon, 27 Pa. 172.

[b] **Possession of alienee.**—Where real estate is inventoried and sold by order of court as the property of the succession, the title acquired by the adjudicatee will take precedence of an unrecorded title emanating from decedent, although the holder of such title be in possession, and although the adjudicatee might by inquiry have informed himself of its existence. McDuffie v. Walker, 125 La. 152, 51 S 100.

[c] **Bona fide purchasers.**—One who takes under an administrator's deed "all the right, title and interest" of the estate is a bona fide purchaser within the meaning of the recording acts. White v. Dupree, 91 Tex. 66, 40 SW 962 [rev (Civ. A.) 39 SW 988].

[d] **Where the purchaser was the clerk of the court** in which proceedings were pending to determine an adverse claim to the land, he was charged with notice of such claim. Dickerson v. Campbell, 32 Mo. 544.

[e] **Contrary view.**—Lindsay v. Cooper, 94 Ala. 170, 178, 11 S 325, 33 AmSR 105, 16 LRA 813 ("The purchaser buys at his peril; he takes upon himself the risks of any outstanding rights that could have been asserted against the decedent; and if by reason of the existence of such rights, whether known or not, or discoverable or not, he takes nothing by his purchase, he can not complain. Perkins v. Winter, 7 Ala. 855; Burns v. Hamilton, 33 Ala. 210, 70 AmD 570; Bland v. Bowie, 53 Ala. 152; Fore v. McKenzie, 58 Ala. 115; Lovelace v.

also been held that the purchaser will not be compelled to pay his money and take a title substantially defective unless the sale was made of an estate or interest short of the entire title, and so mentioned in the decree or clearly to be implied from the nature of the sale.[45] Again a distinction has been made that, where a particular piece of land is sold under an order of court, a good title is deemed to be offered and a purchaser will not be compelled to complete his purchase by the payment of the price if it appears that a good title cannot be made;[46] but it is otherwise where the sale is ordered merely of the estate of a person named in the land.[47] A purchaser has been held relieved from his bid on discovery of a defect in title before confirmation,[48] and the sale has been set aside for such defect.[49] In another case the sale was set aside on the ground that the petition stated seizin in fee, when decedent in fact only owned an undivided half.[50] Again, where all parties knew all the facts, and were acting under a mutual mistake of law, and believed that the purchaser would be invested with a good title to the whole of the property sold, when in fact an interest in the property would not pass, the purchaser was held relievable from his bid upon discovery of the mistake.[51]

The fact that decedent's title is not of record has been held sufficient to put the purchaser on inquiry.[52]

[§ 1705] **(6) Curative Statutes.** In a number of states statutes have been enacted for the protection of the title of purchasers in good faith against defects in the proceedings.[53] These generally cure merely those defects which do not concern jurisdictional steps,[54] and it is usually held that they cannot constitutionally operate to give effect to a sale which is void for want of jurisdiction.[55] But in this respect the rule must be borne in mind that the proceeding is generally held to be one in rem, and that the authority of the legislature is very broad in declaring what shall be necessary to invoke the power of the court; therefor it is said that whatever the legislature need not in the first instance have required it may waive by a curative act.[56] Within these limits statutes may be made retroactive, so as to perfect titles under sales made before their passage.[57]

[§ 1706] **e. Estoppel to Dispute Title.** A creditor of the estate who accepts payment of his claim out of the proceeds of a sale of real estate to pay debts, with knowledge of the facts, cannot deny the purchaser's title on the ground that the tes-

Webb, 62 Ala. 271. There are some expressions to be found in opinions handed down here, indicative of a doubt in the minds of the writers as to 'whether the rule of caveat emptor, which applies to judicial sales, will go further than to cover those defects which may be disclosed by an examination of the chain of title; or, at least, whether it would cover such secret equities as no ordinary diligence could discover.' Wilson v. Holt, 83 Ala. 539, 3 Am. St. Rep. 768. We do not share in this doubt. To give that limitation to the doctrine of caveat emptor, would be to emasculate it altogether. To hold that the purchaser at an administrator's sale made under an order of the court of probate need only look out for defects disclosed by the proceeding in which the order is entered, and by the muniments of the intestate's chain of title, would be to put such purchaser upon the footing of a vendee from an individual, and to strip the fact that he buys at a judicial sale of all significance whatever; thus destroying the doctrine that he buys at his peril, and takes, not the estate the record and paper muniments indicate the intestate held, as would a vendee at private sale, but the interest only which was so held in point of extraneous fact. We cannot subscribe to the limitation suggested; but, on the contrary, adhere to the broad doctrine announced in the authorities cited, that the purchaser at such sale gets only such right, interest, or estate as resided in the intestate, the apparent title being qualified and limited by every fact or circumstance, whether in pais or of record, which would have constituted an outstanding equity against the decedent in his life-time").

45. Edney v. Edney, 80 N. C. 81.

46. Shields v. Allen, 77 N. C. 375.

47. Shields v. Allen, 77 N. C. 375.

48. King's Est., 2 LehighValLR 229.

49. Tubbs' Est., 4 Pa. Dist. 325, 7 Kulp 483; Walker's Est., 1 Del. Co. (Pa.) 384.

50. Lerch's Est., 2 LehighValLR (Pa.) 348.

51. Holmes v. Holmes, 140 Ga. 217, 78 SE 903.

52. Zeigler v. Daniel, 128 Ark. 403, 194 SW 246.

53. Cal.—Coppinger v. Rice, 33 Cal. 408.

Ill.—Harris v. Lester, 80 Ill. 307; Botsford v. O'Conner, 57 Ill. 72.

Ind.—Custer v. Holler, 160 Ind. 505, 67 NE 228; Rice v. Cleghorn, 21 Ind. 80; Babbitt v. Doe, 4 Ind. 355.

La.—Allen v. Cutliff, 23 La. Ann. 614.

Mass.—Nazro v. Long, 179 Mass. 451, 61 NE 43; Gregson v. Tuson, 153 Mass. 325, 26 NE 874.

Mich.—Upton v. Gerber, 136 Mich. 72, 98 NW 854; Norman v. Olney, 64 Mich. 553, 31 NW 555; Hoffman v. Harrington, 28 Mich. 90; Osman v. Traphagen, 23 Mich. 80; Woods v. Monroe, 17 Mich. 238; Coon v. Fry, 6 Mich. 506; Howard v. Moore, 2 Mich. 226; Palmer v. Oakley, 2 Dougl. 433, 47 AmD 41.

Minn.—Cater v. Steeves, 95 Minn. 225, 103 NW 885; Buntin v. Root, 66 Minn. 454, 69 NW 330; Hartley v. Croze, 38 Minn. 25, 37 NW 449.

Nebr.—Haight v. Hayes, 92 NW 297.

N. Y.—Smith v. Blood, 106 App. Div. 317, 94 NYS 667.

Or.—Mitchell v. Campbell, 19 Or. 198, 24 P 455.

Pa.—Kiskaddon v. Dodds, 21 Pa. Super. 351.

Tex.—Simpson v. Johnson, (Civ. A.) 44 SW 1076.

Wash.—Ball v. Clothier, 34 Wash. 299, 75 P 1099.

Wis.—Chase v. Ross, 36 Wis. 267; Reynolds v. Schmidt, 20 Wis. 374.

[a] **If the proceedings are regular on their face** the title will be protected, although they were conducted and the sale made by one having no authority from the executors. Allen v. Cutliff, 23 La. Ann. 614.

[b] **Sales not within curative act.**—An act curing defects in sales will not be construed as applying to estates which never fell within the operation of the probate acts of the state, the estate having been administered under another system of law. Coppenger v. Rice, 33 Cal. 408.

54. U. S.—Seaverns v. Gerke, 21 F. Cas. No. 12,595, 3 Sawy. 353.

Ala.—Brown v. Williams, 87 Ala. 353, 6 S 111.

Ind.—Lucas v. Tucker, 17 Ind. 41.

Kan.—Rogers v. Clemmens, 26 Kan. 522.

La.—Morton v. Reynolds, 4 Rob. 26.

N. Y.—Wilson v. White, 109 N. Y. 59, 15 NE 749, 4 AmSR 420; Stilwell v. Swarthout, 81 N. Y. 109.

N. C.—Perry v. Adams, 98 N. C. 167, 3 SE 729, 2 AmSR 326 note; Gulley v. Macy, 86 N. C. 721.

55. Robertson v. Bradford, 70 Ala. 385; Gulley v. Macy, 86 N. C. 721; Stadelman v. Miner, (Or.) 155 P 708; Browne v. Coleman, 62 Or. 454, 125 P 278; Ball v. Clothier, 34 Wash. 299, 75 P 1099. But see Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542 (where the court sustained the power of the legislature of Rhode Island by special act to validate a sale made of land in Rhode Island under an order of a probate court in New Hampshire).

[a] **An act curing defects in proceedings against infants, idiots, and lunatics** will not be construed as giving effect as against such persons to proceedings which would be void against a defendant sui juris. Gulley v. Macy, 86 N. C. 721.

56. Iowa.—Smith v. Callaghan, 66 Iowa 552, 24 NW 50.

N. C.—Ward v. Lowndes, 96 N. C. 367, 2 SE 591.

Or.—Mitchell v. Campbell, 19 Or. 198, 24 P 455.

Pa.—Kiskaddon v. Dodds, 21 Pa. Super. 351.

Wash.—Ackerson v. Orchard, 7 Wash. 377, 34 P 1106, 35 P 605.

Wis.—Reynolds v. Schmidt, 20 Wis. 374.

[a] **Thus** a statute is valid which protects sales where the proceeding was begun before the clerk as judge of probate instead of in the superior court. Ward v. Lowndes, 96 N. C. 367, 2 SE 591; Herring v. Outlaw, 70 N. C. 334; Bell v. King, 70 N. C. 330.

[b] **Even the failure to file a petition** may be cured by a retrospective statute. Ackerson v. Orchard, 7 Wash. 377, 34 P 1106, 35 P 605.

57. Brown v. Williams, 87 Ala. 353, 6 S 111; Mitchell v. Campbell, 19 Or. 198, 24 P 455; Kiskaddon v. Dodds, 21 Pa. Super. 351.

[a] **Action commenced before curative statute enacted.**—A statute passed to validate private sales of real estate which were invalid under a former statute cures a defect in the title of the purchaser, although suit was begun by a person claiming an interest in the real estate before the validating act was passed. Kiskaddon v. Dodds, 21 Pa. Super. 351.

tator before his death had conveyed the land to such creditor.[58]

[§ 1707] **f. Effect of Lien for Inheritance Tax.** Where the proceeds of real estate sold by an executor are in court, or will be paid into court, and are subject to the order of the court, the title to the real estate is not defective, although the state has a lien thereon to secure it in the amount of an inheritance tax due to it, since the proceeds may be subjected to the payment of such tax.[59]

[§ 1708] **g. Retention by Representative of Possession of Personalty Sold.** Although the purchaser of personalty leaves the same with the administrator as bailee, his title is superior to that of one who subsequently purchases such property at an unauthorized sale made under a void chattel mortgage.[60]

[§ 1709] **5. When Title Passes—a. In General.** For some purposes the title is held to pass at the time of the sale,[61] but generally title does not vest until confirmation,[62] and compliance by the purchaser with the terms of the sale;[63] and many authorities hold that the title does not completely vest until a conveyance has been executed under a decree directing it.[64] It is held in some cases that when title does pass it relates back to the date of the sale,[65] or even to the date of decedent's death,[66] but it cannot relate back so as to charge the purchaser with taxes accruing between decedent's death and the sale.[67]

[§ 1710] **b. As to Rents and Profits.** The purchaser is generally entitled to the rents and profits of the land sold from the time when he became entitled to possession,[68] his right in this respect being ordinarily fixed by the time of confirmation and not by the time of sale.[69] Under statutes, however, the purchaser, after confirmation, is sometimes entitled to rents accruing from the day of sale,[70] and from such a rule it follows that the purchaser cannot be held liable for rents and profits between the time of the sale and the time of confirmation.[71] It is sometimes held that the purchaser takes all payments falling due after confirmation,[72] and sometimes that there should be an apportionment between the heirs and purchaser of rent inuring before and after confirmation.[73] An express reservation from the sale of rents or crops to mature may be enforced,[74] and it has been held that growing crops sold by the heirs of decedent while the proceedings for a sale were pending but before

58. Powers v. Scharling, 76 Kan. 855, 92 P 1099.

59. Mandel v. Fidelity Trust Co., 128 Ky. 239, 107 SW 775, 32 KyL 1104.

60. Richley v. Childs, 114 Ill. A. 173.

61. Hogan's Succ., 5 La. A. (Orleans) 267; Holmes' App., 108 Pa. 23; Polk v. Pledge, 5 Coldw. (Tenn.) 384; Edwards v. Gill, 5 Tex. Civ. A. 203, 23 SW 742.

[a] **Judgments entered against the purchaser** after the sale but before confirmation are liens on his interest. Holmes' App., 108 Pa. 23; Colvin's Est., 27 Pa. Co. 513, 33 Pittbs LegJNS 282.

[b] **A purchaser of slaves** was held liable for the purchase money, although slavery was abolished between the time of the sale and of the confirmation thereof. Polk v. Pledge, 5 Coldw. (Tenn.) 384.

[c] **Where a land certificate was sold before location,** a confirmation after location and patent carried the title to the land, as title to the certificate passed upon the sale. Edwards v. Gill, 5 Tex. Civ. A. 203, 23 SW 742.

[d] **The purchaser acquires an inceptive interest** (1) in the property sold as soon as it is struck off to him at the sale. Holmes' App., 108 Pa. 23. (2) He thereby becomes entitled to have the sale confirmed, if there is no valid reason within the law why it should not be confirmed. In re Leonis, 138 Cal. 194, 71 P 171 [cit Dunn v. Dunn, 137 Cal. 51, 69 P 847].

62. Ark.—Halliburton v. Sumner, 27 Ark. 460.

Cal.—Horton v. Jack, 115 Cal. 29, 46 P 920.

Ill.—Foote v. Overman, 22 Ill. A. 181.

Ind.—Bellows v. McGinnis, 17 Ind. 64.

Ky.—Ball v. Covington First Nat. Bank, 80 Ky. 501; Norris v. Williams, 65 SW 439, 23 KyL 1497.

Pa.—Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Law's Est., 7 Pa. Co. 605.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844; Hyder v. O'Brien, (Ch. A.) 48 SW 262.

Necessity for confirmation generally see infra § 1631.

63. Ala.—Gardner v. Kelso, 80 Ala. 497, 2 S 680; Cruikshank v. Luttrell, 67 Ala. 318; Dugger v. Tayloe, 60 Ala. 504 [aff 121 U. S. 286, 7 SCt 895, 30 L. ed. 946]; Ketchum v. Creagh, 53 Ala. 224.

Cal.—In re Bell, 125 Cal. 539, 58 P 153.

Ga.—Bagley v. Stephens, 78 Ga. 304, 2 SE 545.

Ind.—Citizens St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

Ky.—McNew v. Williams, 36 SW 687, 18 KyL 364.

Mo.—Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399.

Pa.—Erb v. Erb, 9 Watts & S. 147; Walsh's Est., 28 Pa. Co. 193.

Tex.—Ennis v. Cator, (Civ. A.) 174 SW 947; Harris v. Brower, 3 Tex. Civ. A. 649, 22 SW 758.

[a] **Where confirmation is not required,** title vests in the purchaser on such compliance. Citizens' St. R. Co. v. Robbins, 128 Ind. 449, 26 NE 116, 25 AmSR 445, 12 LRA 498.

[b] **A purchaser entering before paying the price,** without permission of the executor, is an intruder. Bagley v. Stephens, 78 Ga. 304, 2 SE 545.

[c] **On such compliance the purchaser is entitled to** possession of the premises and to a conveyance of the legal title. Norris v. Williams, 65 SW 439, 23 KyL 1497; Long v. Joplin Min., etc., Co., 68 Mo. 422; Hyder v. O'Brien, (Tenn. Ch. A.) 48 SW 262.

[d] **A mortgage made after the sale was confirmed,** but before the purchase money was paid, was valid where the purchaser allowed a third person thereafter to pay the purchase money and take the deed. Harris v. Bryant, 83 N. C. 568.

64. See infra § 1714.

65. Halliburton v. Sumner, 27 Ark. 460; Cunningham v. Richardson, 68 Wash. 24, 122 P 368.

[a] **Recovery for trespass before confirmation.**—After confirmation the purchaser may recover for a trespass committed between the sale and the confirmation. Bellows v. McGinnis, 17 Ind. 64. To same effect Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Colvin's Est., 27 Pa. Co. 513, 33 PittsbLeg JNS 282.

[b] **A lease made by the administrator after the sale** is divested by the confirmation. Halliburton v. Sumner, 27 Ark. 460.

66. Gutter v. Dallamore, 144 Cal. 665, 79 P 383 (where the interest of an heir in land belonging to an estate was mortgaged pending administration, and the land was sold under order of the court in probate proceedings, the purchaser's title related back to the time of the death of the deceased owner, and conveyed her title as it then existed, freed from the mortgage, under Code Civ. Proc. § 1555, providing that conveyances so made shall convey all the right, title, interest, and estate of the deceased in the premises at the time of his death).

67. Le Moyne v. Harding, 132 Ill. 23, 23 NE 414 [aff 31 Ill. A. 624].

68. Ill.—Foote v. Overman, 22 Ill. A. 181.

Ky.—Norris v. Williams, 65 SW 439, 23 KyL 1497; Ball v. Covington First Nat. Bank, 80 Ky. 501.

La.—Lapene v. Badeaux, 36 La. Ann. 194.

Mo.—Page v. Culver, 55 Mo. A. 606.

Pa.—Law's Est., 7 Pa. Co. 605; Engle v. Conrad, 12 Montg. Co. 36.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844; Hyder v. O'Brien, (Ch. A.) 48 SW 262.

[a] **Widow and heirs entitled to rents until delivery of deed.**—Law's Est., 7 Pa. Co. 605; Strange v. Austin, 7 Pa. Co. 128; Engle v. Conrad, 12 Montg. Co. (Pa.) 76.

[b] **Purchaser not entitled to rents and profits until payment of price.**—Lapene v. Badeaux, 36 La. Ann. 194.

69. Ill.—Foote v. Overman, 22 Ill. A. 181.

Ky.—Ball v. Covington First Nat. Bank, 80 Ky. 501; Norris v. Williams, 65 SW 439, 23 KyL 1497; Cass v. Smith, 7 KyL 291, 298, 305, 13 Ky. Op. 613; Breckinridge v. Carrico, 3 KyL 533, 11 Ky. Op. 405; Elliott v. Bush, 3 KyL 466, 11 Ky. Op. 354.

Mo.—Page v. Culver, 55 Mo. A. 606.

N. Y.—Lyons v. Dorf, 49 Misc. 652, 98 NYS 843.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

[a] **A purchaser is not entitled to rents pending an appeal** from an order of confirmation, as his right accrues only on final confirmation. Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

70. Lynch v. Doordon, 25 Del. 120, 78 A 297.

71. Caulk v. Caulk, 8 Del. 81.

72. Foote v. Overman, 22 Ill. A. 181; Page v. Culver, 55 Mo. A. 606.

73. Norris v. Williams, 65 SW 439, 23 KyL 1497.

74. Broadwell v. Sammons, 69 SW 1084, 24 KyL 814; Backenstoss v. Stahler, 33 Pa. 251, 75 AmD 592; Marys v. Anderson, 24 Pa. 272.

the actual sale do not pass to the purchaser.[75] But there is, on the other hand, authority for the view that on the death of a debtor his debts become a lien on his real estate, and anyone who plants crops thereon after his death does so at the risk of loss by a sale to satisfy such lien.[76]

[§ 1711] **6. Proceedings to Perfect Rights of Purchaser—a. To Obtain Deed.** The probate court has sometimes power to compel the representative to make a proper conveyance to the purchaser,[77] and where this power exists equity cannot interfere except when, because of accident, mistake, or similar cause, there can be no relief in the probate court.[78] Where the probate court cannot compel the representative to convey, the remedy of the purchaser is by a suit for specific performance of the contract of sale,[79] but such a suit cannot avail the purchaser to obtain title where the sale itself was defective.[80]

Mandamus has been held a proper remedy to compel the execution of a conveyance.[81]

Damages against estate. In a suit to compel an administrator to make a deed to a purchaser at his sale under order of the court, on an allegation that he refused to do so and intended to make a resale, the estate cannot be charged with damages to the purchaser for the alleged misconduct of the administrator in refusing to make the deed.[82]

[§ 1712] **b. To Obtain Possession.** Where the sale was made in pursuance of a decree in equity, the court will by writ of assistance place the purchaser in possession, if possession is withheld by parties to the suit,[83] but not where the land is held adversely to the title of the heirs or devisees.[84] One not a party may be dispossessed through a rule against him to show cause.[85] The purchaser may maintain ejectment;[86] but he cannot maintain summary proceedings to dispossess persons found in possession of the premises without showing that the relation of landlord and tenant exists.[87] Where there are several purchasers of different tracts, and a mistake in describing the tracts affecting all, all the purchasers must be parties to an action by one for the purpose of establishing his right to possession of the tract purchased.[88]

[§ 1713] **7. Redemption.** There is no right of redemption from a sale of a decedent's land under order of court for payment of his debts.[89]

[§ 1714] **U. Conveyance**[90]**—1. Necessity.** It is usual for statutes as to administration sales of the realty of decedents to provide for the execution of a conveyance to the purchasers, when certain conditions have been complied with,[91] and it is very generally considered that the purchaser does not become vested with the complete title until a proper conveyance has been executed.[92] There is,

75. Barrett v. Choen, 119 Ind. 56, 20 NE 145, 21 NE 322, 12 AmSR 363; Pearson v. Gillenwaters, 99 Tenn. 446, 12 SW 9, 63 AmSR 844. See also Norris v. Williams, 139 Ky. 422, 65 SW 439, 23 KyL 1497 (judicial sales are peculiarly within the discretion of the chancellor, and he has a broad discretion in protecting those who by their industry have growing crops on the land).

76. Jewett v. Keenholts, 16 Barb. (N. Y.) 193.

77. Ala.—Anderson v. Bradley, 66 Ala. 263.

Cal.—In re Lewis, 39 Cal. 306.

Ga.—Mallard v. Curran, 123 Ga. 872, 51 SE 712; Peterman v. Watkins, 19 Ga. 153.

Kan.—Gridley v. Phillips, 5 Kan. 349.

N. C.—Long v. Jarratt, 94 N. C. 443; Mason v. Osgood, 64 N. C. 467.

[a] **Who may apply for order to convey.**—An application for an order to convey may be made by the purchaser, or by his heirs or any person claiming under him, or by the executor or administrator who made the sale. Ligon v. Ligon, 84 Ala. 555, 4 S 405.

[b] **Notice of application.**—(1) If the application for the order of conveyance is made by the purchaser notice must be given to the personal representative (Dugger v. Tayloe, 60 Ala. 504 [overr Dugger v. Tayloe, 46 Ala. 320]), and (2) to the heirs (Anderson v. Bradly, 66 Ala. 263). (3) When the personal representative as such makes the application, notice to the heirs is not necessary. Ligon v. Ligon, 84 Ala. 555, 4 S 405. (4) When land is bought by the personal representative himself the application is to be regarded as made by him individually as purchaser and notice to the heirs is necessary. Bogart v. Bell, 112 Ala. 412, 20 S 511; Bolling v. Smith, 108 Ala. 411, 19 S 370; Ligon v. Ligon, 84 Ala. 555, 4 S 405.

[c] **The execution of a new deed** to correct the description of the property may de directed. Gomez v. Gomez, 155 Ala. 158, 45 S 637.

78. Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69; Garrett v. Lynch, 45 Ala. 204; Broadhurst v. Hill, 137 Ga. 833, 74 SE 422.

[a] **Equity will aid** (1) where, because of accident or mistake, the executor's deed has failed to convey a good legal title. Piatt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69. (2) Equity will direct a conveyance where the records of the probate court have been lost and cannot be replaced. Garrett v. Lynch, 45 Ala. 204.

[b] **Equity will not interfere unless** those having power to rectify the mistake refuse to do so. Lamkin v. Reese, 7 Ala. 170.

79. Mallard v. Curran, 123 Ga. 872, 51 SE 712; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759; Pittenger v. Pittenger, 3 N. J. Eq. 156; Wolfe v. Lynch, 2 Dem. Surr. (N. Y.) 610.

[a] **Heirs are not necessary or proper parties** to such a suit. Campbell v. Hough, (N. J. Ch.) 68 A 759.

[b] **Heirs cannot be compelled to convey by such a suit.**—Speck v. Wohlien, 22 Mo. 310.

80. Bright v. Boyd, 4 F. Cas. No. 1,875, 1 Story 478; Sebastian v. Johnson, 72 Ill. 282, 22 AmR 144; Gilmore v. Thomas, 252 Mo. 147, 158 SW 577.

[a] **Effect of appeal.**—An irregular sale will not be enforced while it is still open to review by appeal, although the judgment, if unappealed from, would be conclusive. Young v. Rathbone, 16 N. J. Eq. 224, 84 AmD 151.

[b] **Where a statute provides for the rectifying of certain irregularities,** no power exists except with regard to those specified. Matter of Hemiup, 2 Paige (N. Y.) 316.

81. State v. Cunningham, 6 Ida. 113, 53 P 451; State v. Burnside, 33 S. C. 276, 11 SE 787.

82. Mallard v. Curran, 123 Ga. 872, 51 SE 712.

83. Nutwell v. Nutwell, 47 Md. 35; Jones v. Hooper, 50 Miss. 510.

Writ of assistance generally see Assistance, Writ of 5 C. J. p 1315.

84. Harding v. Le Moyne, 114 Ill. 65, 29 NE 188; Marcom v. Wyatt, 117 N. C. 129, 23 SE 169.

[a] **Although one claiming adversely and in possession was a party** to the suit, he may not be dispossessed in that proceeding, because the court was there without jurisdiction to determine adverse claims. Harding v. Le Moyne, 114 Ill. 65, 29 NE 188.

[b] **Parties obtaining title subsequent to the decree** may set it up in answer to the application. Nutwell v. Nutwell, 47 Md. 35.

85. Paxton v. Rucker, 15 W. Va. 547.

86. Knox v. Jenks, 7 Mass. 488; Willard v. Nason, 5 Mass. 240; Jackson v. Robinson, 4 Wend. (N. Y.) 436.

87. Milligan v. Gabbett, 101 Misc. 253, 167 NYS 558.

88. Gauthier v. Desbony, 5 La. Ann. 139; Sigler v. Gauthier, 5 La. Ann. 138.

89. In re Therens, 189 Ill. A. 314 [aff 267 Ill. 592, 108 NE 712].

90. Deeds generally see Deeds 18 C. J. p 135.

Sale of personalty under testamentary authority or common-law power see supra § 744.

Sale of realty under testamentary authority see supra §§ 666–668.

91. Landford v. Dunklin, 71 Ala. 594; Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756; El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]; Burgess v. Millican, 50 Tex. 397.

92. U. S.—Nantahala Marble, etc., Co. v. Thomas, 76 Fed. 59.

Ala.—Snow v. Bray, 73 S 542; Comer v. Hart, 79 Ala. 389; Watson v. Martin, 75 Ala. 506; Landford v. Dunklin, 71 Ala. 594; Cruikshank v. Luttrell, 67 Ala. 318; Bibb v. Bishop Cobbs Orphan Home, 61 Ala. 326; Dugger v. Tayloe, 60 Ala. 504 [aff 121 U. S. 286, 7 SCt 895, 30 L. ed. 946]; Van Hoose v. Bush, 54 Ala. 342; Doe v. Hardy, 52 Ala. 291; Wallace v. Hall, 19 Ala. 367; Perkins v. Winter, 7 Ala. 855; Bonner v. Greenlee, 6 Ala. 411; Cummings v. McCullough, 5 Ala. 324; Lightfoot v. Doe, 1 Ala. 475.

Miss.—Jelks v. Barrett, 52 Miss. 315.

Mo.—Grant v. Hathaway, 215 Mo. 141, 114 SW 609, 15 AnnCas 567; Wohlien v. Speck, 18 Mo. 561.

Pa.—Emerick's Est., 172 Pa. 191, 33 A 550; Greenough v. Small, 137 Pa. 132, 20 A 553, 21 AmSR 859; Strange v. Austin, 134 Pa. 96, 19 A 492; Overdeer v. Updegraff, 69 Pa.

however, authority for the view that title passes when the sale is made and confirmed,[93] and that the deed is merely evidence of the title;[94] and statutory provisions are sometimes such that adjudication properly made and recorded carries a complete title to the purchaser without the necessity for any deed.[95] Even though a deed is necessary to pass the legal title, a purchaser who has complied with the terms of sale, which sale has been confirmed, has an equitable title.[96]

[§ 1715] **2. Authority to Convey—a. In General.** When the authority to execute such a conveyance is regulated by statute, as it generally is, the personal representative has no right to execute it, or the purchaser to demand its execution, until the statutory requirements are complied with.[97] It is usually required that, before a deed is executed, the sale shall be confirmed by the court,[98] and the purchase money paid,[99] or the terms of sale complied with,[1] and an order of court directing the execution of the conveyance is sometimes necessary.[2]

110; Biggert's Est., 20 Pa. 17; Erb v. Erb, 9 Watts & S. 147; Leshey v. Gardner, 3 Watts & S. 314, 38 AmD 764; Morris v. Fahey, 66 Pa. Super. 81; Behrens v. Mountz, 37 Pa. Super. 326; Tomlinson v. Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 31 Pa. Co. 81; Hepting's Est., 1 LancLRev 45; McRee's Est., 6 Phila. 75.

Tex.—Sypert v. McCowen, 28 Tex. 635; Ennis v. Cator, (Civ. A.) 174 SW 947; Douthit v. Southern, (Civ. A.) 155 SW 315; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

See also Gridley v. Phillips, 5 Kan. 349 (it is necessary that a deed should have been executed or some equitable proceeding had in order to vest the title to the land in the purchaser).

"The sale, even after confirmation, does not divest the title of the heirs of the decedent, for it remains in the power of the court until a deed has been executed and delivered." Demmy's App., 43 Pa. 155, 168 [quot In re Brennan, 220 Pa. 232, 235, 69 A 678, 16 LRANS 859].

[a] **Deed contemplated, although not expressly provided for.**—Shontz v. Brown, 27 Pa. 123.

[b] **The title of the heirs is not divested** (1) until a conveyance has been executed and delivered. Grant v. Hathaway, 215 Mo. 141, 114 SW 609, 15 AnnCas 567; Simpson's Est., 39 Pa. Super. 382; Behrens v. Mountz, 37 Pa. Super. 326. (2) If the heirs or devisee died before a conveyance is made the title to the land sold, according to the rule stated in the text, will descend to his heirs as real estate. Overdeer v. Updegraff, 69 Pa. 110.

[c] **The title to land sold on credit** under order of the probate court for distribution is not divested out of the heir until a conveyance is executed under order of the court, after ascertaining that the entire purchase money has been paid. The purchaser at such a sale takes but an inchoate equity which on full payment of the purchase money ripens into a perfect equity, entitling him to a conveyance under order of the court or a resort to equity to divest the title of the heirs. Ketchum v. Creagh, 53 Ala. 224.

[d] **The title remains in the heirs as security** for the purchase money until a conveyance is made pursuant to an order by which the payment of the purchase money is judicially ascertained. Bogart v. Bell, 112 Ala. 412, 20 S 511.

[e] **Where land sold is not included in the deed,** nothing but an equity in such land vests in the purchaser. Nantahala Marble, etc., Co. v. Thomas, 76 Fed. 59.

[f] **This rule does not prevent the title being good without a deed,** if the money is paid and the purchaser goes into possession by consent. Frick Coke Co. v. Laughead, 203 Pa. 168, 52 A 172.

[g] **Conveyance of land certificate.**—(1) An administrator who has under license from the probate court sold for the payment of the intestate's debts a part paid land certificate left by him and his interest in the lands therein described may after confirmation of such sale properly assign such certificate to the purchaser thereof, such assignment being necessary to meet the requirements of the land office. Louden v. Martindale, 109 Mich. 235, 67 NW 133. (2) In Texas it has been held that since a land certificate is regarded as personalty and the title of personalty vests in the purchaser upon the making of an order confirming an administrator's sale, a written conveyance of such certificate is not necessary, but, it being a fixed custom to make a written conveyance thereof, the title, under the circumstances, would vest in the grantee in the administrator's conveyance. McKee v. Simpson, 36 Fed. 248.

[h] **Sale by a referee in aid of power in a will.**—Where the decree under which property is sold by a referee is made in aid of a power of sale contained in a will, and to carry out its provisions the referee's deed to the purchaser conveys a marketable title, a deed from the executor is unnecessary. Strauss v. Benheim, 28 Misc. 660, 59 NYS 1054.

93. Sturdy v. Jacoway, 19 Ark. 499; McNew v. Williams, 36 SW 687, 18 KyL 364; Miami Exporting Co. v. Holly, Wright (Oh.) 227. See also supra § 1709.

94. Rock v. Heald, 27 Tex. 523.

95. Jones v. Read, 1 La. Ann. 200; Rousseau v. Tête, 6 Rob. 471; Faulk v. Pinnell, 6 Rob. 26; Gorton v. Gorton, 12 La. 476; Berthoud v. Uhruh, 9 La. 180; Babin v. Winchester, 7 La. 460; Marigny v. Nivet, 2 La. 498; Hopkins v. Peretz, 3 Mart. 590.

96. Pearson v. Murray, 230 Mo. 162, 130 SW 21; Long v. Joplin Min., etc., Co., 68 Mo. 422; McBee v. Johnson, 45 Tex. 634; Sypert v. McCowen, 28 Tex. 635; Rock v. Heald, 27 Tex. 523; Bartlett v. Cocke, 15 Tex. 471; Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145; Edwards v. Gates, (Tex. Civ. A.) 120 SW 585; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

"When the sale by an administrator or curator under an order of the court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment, by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale." Henry v. McKerlie, 78 Mo. 416, 428 [dist Wohlien v. Speck, 18 Mo. 561, and quot Sherwood v. Baker, 105 Mo. 472, 10 SW 938, 24 AmSR 399].

97. Akin v. Horn, 2 Tex. A. Civ. Cas. § 8.

98. Strange v. Austin, 134 Pa. 96, 19 A 492; Leshey v. Gardner, 3 Watts & S. (Pa.) 314, 38 AmD 764; Burgess v. Millican, 50 Tex. 397.

[a] **A deed executed prior to confirmation** of the sale, although unauthorized, will take effect on confirmation. El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]. To same effect Verdun v. Barr, 253 Ill. 120, 97 NE 239; Wilkin v. Simmons, (Tex. Civ. A.) 151 SW 1145.

Necessity for confirmation generally see supra § 1631.

99. Ala.—Bogart v. Bell, 112 Ala. 412, 20 S 511; Landford v. Dunkin, 71 Ala. 594; Corbitt v. Chenny, 52 Ala. 480.

Kan.—Cockins v. McCurdy, 40 Kan. 758, 20 P 470.

Mo.—Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756.

N. C.—Hyman v. Jarnigan, 65 N. C. 96.

Pa.—Strange v. Austin, 134 Pa. 96, 19 A 492.

Tex.—Sypert v. McCowen, 28 Tex. 635; Jones v. Gilliam, (Civ. A.) 199 SW 694.

[a] **Representative's failure to account for proceeds no objection to deed.**—Decker v. Decker, 74 Me. 465.

1. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

[a] **If the sale was on credit** a deed should not be executed until the purchaser has given his note for the balance due. Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

[b] **Proceedings perfecting sale.**—Where a sale was confirmed but the administrator declined to deliver the deed because of the refusal of the purchaser to execute a mortgage to secure a note given for the purchase money, and subsequently, by agreement, the administrator recovered judgment against the purchaser for the amount bid, and foreclosure of the lien on the land, the purchaser was entitled to delivery of the deed, as the subsequent proceedings perfected the sale. Miller v. Anders, 21 Tex. Civ. A. 72, 51 SW 897.

2. Landford v. Dunklin, 71 Ala. 594; Nelson v. Murfee, 69 Ala. 598; Cruikshank v. Luttrell, 67 Ala. 318; Tyson v. Brown, 64 Ala. 244; McCully v. Chapman, 58 Ala. 325; Van Hoose v. Bush, 54 Ala. 342; Ketchum v. Creagh, 53 Ala. 224; Doe v. Hardy, 52 Ala. 291; Hutton v. Williams, 35 Ala. 503, 76 AmD 297; Wallace v. Hall, 19 Ala. 367; Perkins v. Winter, 7 Ala. 855; Bonner v. Greenlee, 6 Ala. 411; Cummings v. McCullough, 5 Ala. 324; Lightfoot v. Doe, 1 Ala. 475; In re Leonis, 138 Cal. 194, 71 P 171; Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353, 47 A 566; Jones v. Gilliam, (Tex. Civ. A.) 199 SW 694.

"Without the order of the court to execute the conveyance, the personal representative has no authority to execute a conveyance which will pass the title. The court is the vendor, not the personal representative, and may in its discretion appoint some other person than the representative to execute the conveyance. . . . It is settled by a long line of decisions in this court that under a sale of lands made in pursuance of an order or decree of the court of probate, the title of the heirs or devisees is not divested until a conveyance is executed by the order of the court. A conveyance executed without such order, in a court of law, is wholly inoperative." Landford v. Dunklin, 71 Ala. 594, 606.

[a] **Either personal representative or purchaser may apply for order for conveyance.**—Anderson v. Bradley, 66 Ala. 263; Dugger v. Tayloe, 60 Ala. 504; Van Hoose v. Bush, 54 Ala. 342.

[b] **Effect of failure to obtain order.**—(1) Where the purchase money was paid, a conveyance to the purchaser is not void because the rep-

[§ 1716] **b. Who Has Authority.** The personal representative is generally the person authorized to execute the conveyance,[3] but other persons are sometimes authorized to execute it.[4]

Administrator de bonis non. It is usually considered that if an executor or administrator dies, or his official character is terminated, after he has made a sale, an administrator de bonis non may execute a deed to the purchaser, by virtue of his authority to take up the administration at the point where his predecessor left off,[5] although a contrary view has also been expressed.[6]

Agent of executor or administrator. The execution of the deed is an act which must be performed by the executor or administrator personally, and cannot be delegated to an agent or attorney.[7]

If the administratrix is a married woman it is not necessary that her husband should join with her in the execution of a deed of the real estate of her decedent sold by her under an order of court.[8]

[§ 1717] **c. Duration of Authority.** As a general rule there is no prescribed period within which such a conveyance must be executed, but it may be executed at any time so long as the order authorizing its execution continues in force.[9] So long as a personal representative has not resigned or been discharged or removed he may execute a valid conveyance, even though he has made his final settlement;[10] and it has been considered that, if this is necessary to protect the rights of the purchaser, the representative may, after the termination of his office, execute a conveyance for land sold, and the purchase money of which was paid, during his administration,[11] although there is also authority for the view that after his resignation, removal, or discharge, his authority ceases and he cannot execute a valid conveyance, even though the land was sold before he ceased to act as personal representative.[12] If before the expiration of his office he executes an imperfect deed he may make the proper corrections in it at any time.[13]

[§ 1718] **d. Extent of Authority.** Unless it is otherwise provided in the order of sale the representative is authorized to convey only an estate in fee.[14] Necessarily, however, only such title as decedent had can be conveyed,[15] and no title passes to land not described in the order of sale.[16]

[§ 1719] **3. To Whom Conveyance Made.** The

resentative did not obtain an order to make title before executing such conveyance, this being a mere irregularity. Wood v. Montgomery, 60 Ala. 500. (2) A conveyance made without an order of court does not divest the title of the heirs or devisees, and they may maintain ejectment notwithstanding such conveyance. Doe v. Hardy, 52 Ala. 291.

[c] **Reference to record of order.**—The administrator's deed must describe the kind of record, the number of the volume, and the page wherein the order or judgment of the court is entered, by virtue of which the administrator is authorized to execute the particular deed. Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

[d] **Formal order not always necessary.**—Joyner v. Futrell, 136 N. C. 301, 48 SE 649.

[e] **As against a stranger** a deed to the purchaser will not be held void because the payment of the purchase money was not reported to the court and an order obtained for the execution of the deed. Wood v. Montgomery, 60 Ala. 500.

3. Ill.—Huls v. Buntin, 47 Ill. 396.
Mich.—Osman v. Traphagen, 23 Mich. 80.
Miss.—Davis v. Brandon, 2 Miss. 154.
Mo.—Howell v. Sherwood, 242 Mo. 513, 147 SW 810; Blair v. Marks, 27 Mo. 579.
Tex.—Burgess v. Millican, 50 Tex. 397.
Wis.—Chase v. Ross, 36 Wis. 267.

[a] **When a sale is made by several personal representatives,** all must join in the conveyance in order to pass title. Greene v. Holt, 76 Mo. 677. Compare Wortman v. Skinner, 12 N. J. Eq. 358 (where two administrators sold land under order of court, but only one executed the deed, equity will enjoin the heirs from prosecuting ejectment to recover back the land because of such irregularity).

4. Pollard v. Hanrick, 74 Ala. 334; Landford v. Dunklin, 71 Ala. 594; Hutton v. Williams, 35 Ala. 503, 76 AmD 297; Greene v. Holt, 76 Mo. 677.

[a] **In case of a purchase by the representative** the deed should be executed by: (1) The clerk of the court. Greene v. Holt, 76 Mo. 677. (2) A commissioner appointed by the court for the purpose. Snow v. Bray, (Ala.) 73 S 542; Bogart v. Bell, 112 Ala. 412, 20 S 511; Bolling v. Smith, 108 Ala. 411, 19 S 370.

[b] **If the court, without authority, appoints commissioners to sell,** a deed by them is effectual to pass their title to the land sold, they being the heirs of decedent. Having received the purchase money, they are estopped from setting up any claim to the land which they sold and conveyed as commissioners. Berger v. Arnold, (Tex. Civ. A.) 24 SW 527.

5. Ala.—Greene v. Scarborough, 49 Ala. 137.
Ga.—Goodwynne v. Bellerby, 116 Ga. 901, 43 SE 275 [dist Oglesby v. Gilmore, 5 Ga. 56]; Peterman v. Watkins, 19 Ga. 153; Thomas v. Harwick, 1 Ga. 78.
Ill.—Baker v. Bradsby, 23 Ill. 632.
Kan.—Gridley v. Phillips, 5 Kan. 349.
Pa.—Irwin v. Guthrie, 198 Pa. 267, 47 A 992.

[a] **A special order to the administrator de bonis non** is unnecessary. Peterman v. Watkins, 19 Ga. 153.

[b] **An administrator de bonis non cannot be appointed for the sole purpose** of correcting a defective deed executed by his predecessor, or to execute a deed which his predecessor had neglected to execute. Long v. Joplin Min., etc., Co., 68 Mo. 422; Grayson v. Weddle, 63 Mo. 523.

6. Davis v. Brandon, 2 Miss. 154.
7. Gridley v. Phillips, 5 Kan. 349.
8. Huls v. Buntin, 47 Ill. 396, 399 ("When the law authorizes a married woman to act as an administratrix, it necessarily clothes her with power to perform all acts necessary to a complete performance of all the duties of the position. An administratrix is not only authorized, but required, when necessary, to petition the court for leave to sell real estate to pay debts, and when leave is granted, the law imposes the duty of making the sale; and it is not so unreasonable as to require the performance of the duty, and still leave it in the power of a person wholly disconnected with the trust to frustrate the requirements of the law").
9. Moody v. Hamilton, 22 Fla. 309; Osman v. Traphagen, 23 Mich. 80; Howard v. Moore, 2 Mich. 226; Robb v. Mann, 11 Pa. 300, 51 AmD 551.

[a] **The postponement of the delivery of the deed** beyond the time specified in the conditions of sale, in consequence of objections being made to the confirmation of the sale, does not release the purchaser. Robb v. Mann, 11 Pa. 300, 51 AmD 551.

[b] **Limitation of time.**—(1) In Maine a deed made after more than one year has elapsed since the license to sell was granted by the probate court is void. Mason v. Ham, 36 Me. 573; Marr v. Hobson, 22 Me. 321; Marr v. Boothby, 19 Me. 150. (2) But a deed executed and delivered within one year from the date of the license to sell, although not acknowledged within the year, passes title. Poor v. Larrabee, 58 Me. 543. (3) In Massachusetts the same rule as to the time for executing such a deed formerly prevailed. Macy v. Raymond, 9 Pick. 285. (4) But this rule has been modified by a statute providing that a sale of realty by personal representative under a license shall be valid as against any person claiming under the deceased, although the deed is not delivered within a year, if certain conditions are complied with and the price duly accounted for. See Jewett v. Jewett, 10 Gray 31; Cooper v. Robinson, 2 Cush. 184.

10. Wilkerson v. Allen, 67 Mo. 502; Garner v. Tucker, 61 Mo. 427; Rugle v. Webster, 55 Mo. 246; McVey v. McVey, 51 Mo. 406.

[a] **The authority of a public administrator** to convey land belonging to an estate which he is administering, and sold by him under an order of court, is not terminated by an order that he turn over to his successor in office all the money and effects belonging to such estate, where it does not appear that he has made a final settlement or been discharged. Warren v. Carter, 92 Mo. 288, 5 SW 42.

11. Bartlett v. Cocke, 15 Tex. 471.
12. Owens v. Covan, 7 B. Mon. (Ky.) 152; Elstner v. Fife, 32 Oh. St. 358.
13. Rugle v. Webster, 55 Mo. 246.
14. Iseman v. McMillan, 36 S. C. 27, 15 SE 336.
15. Nesbitt v. Richards, 14 Tex. 656.
16. Greene v. Holt, 76 Mo. 677. See generally supra § 1538.

[a] **Presumption against intent to exceed authority.**—Where a deed made by an administrator recited the authority given by the ordinary of the county to sell at public outcry the land covered by the deed, "with the exception of all the granite on said lot of land," but in the granting clause failed to make reference to the granite, it will be presumed that the administrator did not undertake to exceed his authority, and that there was no intention to pass title to the granite. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666.

conveyance is generally made to the purchaser, and it has been held that, when the decree confirming the sale orders a conveyance to be made to the purchaser, it must be made to the person who really purchased the land at the sale and to him only.[17] But the more generally accepted view is that the conveyance may be made to the assignee of the purchaser,[18] or to such person as the purchaser may indicate.[19] Where the property of a decedent is reported as sold to one "as administrator," a subsequent deed vesting him personally with the title is not in accordance with the master's report of sale, and such purchaser will be held as trustee of the estate.[20]

[§ 1720] 4. **Form, Contents, and Execution—a. In General.** The conveyance must be adapted to conveying the estate which is the subject matter of the sale made.[21] Authority to sell and convey must appear on the face of the instrument,[22] but it is not necessary to set out the order of sale at length[23] unless this is required by statute,[24] nor is it necessary to recite the reasons on which the order of sale was based.[25] The deed must contain any recitals required by statute,[26] and should state the consideration of the sale,[27] but it is not necessary to state the amount of the nominal bid, where it was agreed between the purchaser and the administrator before the sale that the amount of any encumbrances on the land should be deducted from the amount which the purchaser should bid.[28] It has been held that the conveyance need not recite that the sale was by auction,[29] that the grantee was the highest bidder,[30] or that the sale was confirmed;[31] and even where the statute requires a

17. Larason v. Lambert, 13 N. J. L. 182; Thompson v. Rogers, 67 Pa. 39.

18. Ala.—Pruitt v. Holly, 73 Ala. 369; Anderson v. Bradley, 66 Ala. 263.

Cal.—Halleck v. Guy, 9 Cal. 181, 70 AmD 643.

Ill.—Hobson v. Ewan, 62 Ill. 146.

N. C.—White v. Jones, 88 N. C. 166.

Oh.—Ewing v. Higby, 7 Oh. 198, 28 AmD 633.

[a] **In Alabama** (1) it has been provided by statute (Code [1886] § 2124) that the court shall upon application order a conveyance made to the purchaser or his heirs or any other person holding under him directly or derivatively who has paid the purchase money. Webb v. Ballard, 90 Ala. 357, 7 S 443 (one who holds possession under the purchaser by an exchange void under the statute of frauds did not hold under the purchaser within the meaning of this statute and the court could not properly order a conveyance made to him); Anderson v. Bradly, 66 Ala. 263. (2) Under an earlier statute a conveyance could be made only to the original purchaser at the sale. Pruitt v. Holly, 73 Ala. 369; Anderson v. Bradley, 66 Ala. 263.

19. McKee v. Simpson, 36 Fed. 248; West v. Burgie, 75 Ark. 516, 88 SW 557, 5 AnnCas 706; Coffin v. Cook, 106 N. C. 376, 11 SE 371; Ward v. Lounds, 96 N. C. 367, 2 SE 591.

[a] **Illustration.**—The validity of an executor's sale of land is not affected by the fact that the deed was made to the husband of the successful bidder at her request, even though the purchase price was paid by the wife. West v. Burgie, 75 Ark. 516, 88 SW 557, 5 AnnCas 706.

20. Taylor v. Walker, 1 Heisk. (Tenn.) 734.

21. Mitchell v. Hazen, 4 Conn. 495, 10 AmD 169; Wood v. Mistretta, 20 Tex. Civ. A. 326, 49 SW 236, 50 SW 135.

[a] **A deed of release** is not a proper form. Griswold v. Bigelow, 6 Conn. 258.

22. Conn.—Watson v. Watson, 10 Conn. 77; Lockwood v. Sturdevant, 6 Conn. 373; Griswold v. Bigelow, 6 Conn. 258.

Ga.—Brown v. Madden, 141 Ga. 419, 81 SE 196.

Ill.—Moffitt v. Moffitt, 69 Ill. 641.

N. C.—Phillips v. Denton, 158 N. C. 299, 73 SE 1006; Coffin v. Cook, 106 N. C. 376, 11 SE 371.

Tex.—Williams v. Cessna, 43 Tex. Civ. A. 315, 95 SW 1106; Odell v. Kennedy, 26 Tex. Civ. A. 439, 64 SW 802.

Va.—Saunders v. Terry, 116 Va. 495, 82 SE 68.

"It is an established principle, that the authority, by virtue of which an administrator is empowered to sell and convey estate, must appear on the deed of conveyance, and with such certainty, that the act done, shall visibly be warranted by the power conferred. . . . And although in some cases, it has been held, that the authority need not be referred to, when the act done is of such a nature, that it can have no operation, unless by virtue of the power, . . . yet this principle has never been supposed applicable to the conveyances made by executors and administrators." Lockwood v. Sturdevant, 6 Conn. 373, 386.

[a] **A deed of an administrator de bonis non,** based on a sale made by the original administrator, is void, where it does not recite a petition for such deed, and where it is based on a report of sale by the administrator de bonis non, and not by the administrator. Jackson v. Johnson, 248 Mo. 680, 154 SW 769.

[b] **A mere recital** in the deed that an order to sell was granted is not sufficient, although the law does not require that the order or a certified copy of it shall be attached to the deed. Brown v. Madden, 141 Ga. 419, 81 SE 196.

[c] **A formal recital is not necessary** if the authority to sell and convey appears from what is contained in the deed. Sapp v. Cline, 131 Ga. 433, 62 SE 529; Phillips v. Denton, 158 N. C. 299, 73 SE 1006; Coffin v. Cook, 106 N. C. 376, 11 SE 371.

[d] **A supplemental order** which does not affect the power to sell given by the original order, and does not relate to the substance of the original order, but only modifies it as to the credit to be given, need not be referred to in the administrator's deed. A reference to the original order is sufficient. Moffitt v. Moffitt, 69 Ill. 641. To same effect El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev on other grounds (Civ. A.) 71 SW 799]; Odell v. Kennedy, 26 Tex. Civ. A. 439, 64 SW 802.

[e] **Amendment.**—An administrator will be allowed and compelled in a court of equity to amend a deed made by him on a sale made by order of court, by inserting a recital of such order, as required by statute. Thorp v. McCullum, 6 Ill. 614.

[f] **A mistake in the recital** of the order of sale will not vitiate the deed if the order was sufficient. Jones v. Taylor, 7 Tex. 240, 56 AmD 48.

[g] **Showings held sufficient.**—(1) A certified copy of an administrator's deed executed in 1848 recited that the probate court had ordered the administrators to sell land sufficient to liquidate the debts of the estate; that certain named appraisers had been appointed and had appraised the property to be of the value of $—— per acre, amounting to $——, that the administrator, after due notice, offered the lands at public sale; and that the grantee bid for such land in a certain sum, etc. The deed and probate records were destroyed by fire. In trespass to try title to the property, the son of the decedent testified that his father died about 1845; that the estate was administered by the administrators named, and was closed prior to 1849; that the league from which the land was sold for the purpose of paying community debts was community property; and that the grantee was the purchaser of some of it. It was held that the authority of the administrator to sell the land was conclusively shown. Williams v. Cessna, 43 Tex. Civ. A. 315, 95 SW 1106. (2) The recital of authority is sufficient where it is in the following form: "I, Anne Bliss, of East-Windsor, executrix of the last will and testament of Ebenezer Bliss, of said East-Windsor, for and in consideration . . . do, by these presents, and in conformity to an order of the honorable court of probate of the district of Hartford, dated the 24th day of March, 1786, me thereto directing and empowering, give, grant, bargain," etc. Watson v. Watson, 10 Conn. 77.

[h] **Showing held insufficient.**—A recital in an administrator's deed that at the ——— term of court an order and decree to sell land had been made, followed by a recital that the grantor was appointed administrator of the estate of L on Dec. 19, 1840, which was the date of the issuance of letters of temporary administration, is insufficient to raise a presumption that an order had been granted to the grantor as permanent administrator authorizing him to sell land. Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

23. Ga.—Brown v. Redwyne, 16 Ga. 67.

Ill.—Thorp v. McCullum, 6 Ill. 614.

Ind.—Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

N. J.—Stryker v. Vanderbilt, 27 N. J. L. 68.

Tex.—Jones v. Tailor, 7 Tex. 240, 56 AmD 48.

Vt.—Langdon v. Strong, 2 Vt. 234.

24. Doe v. Hileman, 2 Ill. 323; Stryker v. Vanderbilt, 27 N. J. L. 68; Sheldon v. Wright, 5 N. Y. 497 [aff 7 Barb. 39]; Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 32 AmD 534.

25. Watson v. Watson, 10 Conn. 77 [disappr Lockwood v. Sturdevant, 6 Conn. 373].

26. Bowen v. Gaskins, 144 Ga. 1, 85 SE 1007; Jackson v. Johnson, 248 Mo. 680, 154 SW 759; Bray v. Adams, 114 Mo. 486, 21 SW 853; Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756. But compare Stryker v. Vanderbilt, 27 N. J. L. 68 (provisions prescribing what should be recited in deed merely directory).

[a] **The law in force when the sale was made governs** with respect to the recitals which the deed should contain. Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756.

27. Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756.

28. Stebbins v. Field, 43 Mich. 333, 5 NW 394.

29. Kingsbury v. Wild, 3 N. H. 30.

30. Kingsbury v. Wild, 3 N. H. 30.

31. Thompson v. Pinnell, 237 Mo. 545, 141 SW 605; Knowlton v. Smith, 36 Mo. 507, 88 AmD 152.

recital of confirmation, the omission of such recital does not render the deed a nullity but merely deprives it of its character as prima facie evidence of the regularity of the proceedings.[32] It is not essential that the deed be signed as executor, administrator, or commissioner, provided the capacity in which the grantor conveys appears in any other part of the instrument.[33]

Mere informalities or technical defects will not ordinarily invalidate the deed.[34] Thus the conveyance is not invalidated by a mistake in the technical designation of the grantor, as where an administrator is described as executor[35] or vice versa,[36] because the grantor, who should sign as commissioner, signs as administrator,[37] or because of the lack of a seal.[38] Neither is the validity of the deed affected by a mistake therein as to the date of the sale,[39] or a misrecital as to the purposes of the sale[40] or as to the date of the license to sell if it contains a recital of other facts which show that the sale was made under the true license.[41] So also a deed may be valid, although it uses the words "probate judge" instead of "probate court,"[42] and an erroneous recital as to the time and place of the sale may be disregarded, where the law does not require those facts to be stated in the deed.[43] Where the county in which the administration was pending was divided, and the court which ordered and confirmed the sale improperly transferred the proceeding to the new county, and the court of that county made the deed, it is nevertheless valid as against the heirs of the decedent, although the court of the new county had no jurisdiction.[44]

There is a presumption in favor of the validity and correctness of the deed, especially after the lapse of a considerable time.[45]

[§ 1721] **b. Description of Property.** The property sold must be so described that it may be certainly identified and its boundaries ascertained,[46] as otherwise the conveyance will be void

32. El Paso v. Ft. Dearborn Nat. Bank, 99 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799].

33. Kingsbury v. Wild, 3 N. H. 30; McLean v. Patterson, 84 N. C. 427; Odell v. Kennedy, 26 Tex. Civ. A. 439, 64 SW 802; Chase v. Whiting, 30 Wis. 544.

34. Ga.—Copelan v. Kimbrough, 102 SE 162.

Ind.—Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

Kan.—Young v. Walker, 26 Kan. 242; Brubaker v. Jones, 23 Kan. 411.

Md.—Connaughton v. Bernard, 84 Md. 577, 36 A 265.

Mo.—Johnson v. Beazley, 65 Mo. 250, 27 AmR 276.

N. J.—Wortman v. Skinner, 12 N. J. Eq. 358.

Oh.—Piatt v. St. Clair, 7 Oh. Pt. II 165.

[a] **Illustration.**—Where an administrator, pursuant to an order authorizing a private sale of land, leaves blanks in the deed for the names of the grantee and the instrument is afterward filled out by the attorney of the heirs of the estate without the knowledge of the purchaser, the deed will pass title. Bowen v. Gaskins, 144 Ga. 1, 85 SE 1007.

[b] **Purchaser may have deed reformed in equity.**—Piatt v. St. Clair, 7 Oh. Pt. II, 165.

35. Mobberly v. Johnson, 78 Ky. 273.

36. Copper v. Robinson, 2 Cush. (Mass.) 184.

37. McLean v. Patterson, 84 N. C. 427.

38. Snider v. Coleman, 72 Mo. 568 (an administrator's deed which is informal for the want of a seal or because not properly acknowledged is sufficient to vest an equitable title in the grantee, which will constitute a good defense to an action of ejectment brought by the heirs of the deceased against one claiming under it).

[a] **Defect cured by new deed.**—Where the commissioner making the sale failed to affix his seal, he could afterward execute a deed in proper form without a further order of the court. Moody v. Hamilton, 22 Fla. 298.

39. Garner v. Tucker, 61 Mo. 427.

40. Shell v. Young, 78 Ark. 479, 95 SW 798 (the fact that a deed recites that the sale was to pay the debts does not show that the sale was to pay the expenses of administration so as to render the deed void).

41. Thomas v. Le Baron, 8 Metc. (Mass.) 355.

42. Brubaker v. Jones, 23 Kan. 411.

43. Price v. Springfield Real-Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595.

44. McNew v. Williams, 36 SW 687, 18 KyL 364.

45. Price v. Springfield Real-Est. Assoc., 101 Mo. 107, 14 SW 57, 20 AmSR 595; Starr v. Brewer, 58 Vt. 24, 3 A 479; Cairns v. Horsman, 35 N. B. 436.

[a] **Presumption as to inventory.**—An administrator's deed is not subject to impeachment because the land conveyed did not appear in the original inventory of the decedent's estate, but it will be presumed that a supplementary inventory was filed as provided by statute. Jamison v. Dooley, 34 Tex. Civ. A. 428, 79 SW 91.

46. U. S.—Nantahala Marble, etc., Co. v. Thomas, 106 Fed. 379, 45 CCA 337.

Ala.—Carter v. Beck, 40 Ala. 599.

Ga.—Hayes v. Dickson, 148 Ga. 700, 98 SE 345.

Ill.—Borders v. Hodges, 154 Ill. 498, 39 NE 597.

Ind.—Pierce v. Vansell, 35 Ind. A. 525, 74 NE 554.

Me.—Jameson v. Balmer, 20 Me. 425.

Md.—Bay v. Posner, 29 A 11.

Mo.—Greene v. Holt, 76 Mo. 677.

N. Y.—Laub v. Buckmiller, 17 N. Y. 620.

Tex.—El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]; Waterhouse v. Gallup, (Civ. A.) 178 SW 773; Golden v. Walker, (Civ. A.) 153 SW 683; Evans v. Ashe, 50 Tex. Civ. A. 54, 108 SW 398, 1190.

Utah.—Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 101 P 586.

Vt.—Starr v. Brewer, 58 Vt. 24, 3 A 479.

[a] **Where a deed contains two descriptions,** one applicable to land to which decedent had title and the other to land which he did not own, the former will be taken as the true description and the latter rejected as false. Bray v. Adams, 114 Mo. 486, 21 SW 853.

[b] **The quantity of land is stated by way of description** and is not a matter of covenant. Carter v. Beck, 40 Ala. 599.

[c] **Only the property described in the deed passes.**—Bromberg v. Yukers, 108 Ala. 577, 19 S 49.

[d] **Construction of descriptive clause.**—Wells v. Dillard, 93 Ga. 682, 20 SE 263; Bay v. Posner, (Md.) 29 A 11; Waterhouse v. Gallup, (Tex. Civ. A.) 178 SW 773; Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 101 P 586; Starr v. Brewer, 58 Vt. 24, 3 A 479.

[e] **The words "more or less"** should be construed with reference to the particular circumstances under and in relation to which they are used. Bromberg v. Yukers, 108 Ala. 577, 19 S 49.

[f] **Clerical error.**—The figures "2,031" in the order of confirmation of sale and the administrator's deed will be considered a clerical error, where the application and order for sale were for two thousand and eighty-one acres. Waterhouse v. Gallup, (Tex. Civ. A.) 178 SW 773.

[g] **Correction of errors in description.**—(1) Where a purchaser of land at an administrator's sale pays the purchase money, and it is applied in the discharge of the debts of the decedent, but the land is not correctly described in the deed executed by the administrator, an assignee of the purchaser will be entitled to a decree in equity correcting the error and divesting the legal title to the land out of the heirs of the decedent and vesting it in him. Grayson v. Weddle, 80 Mo. 39, 63 Mo. 523. (2) Where petitioner in good faith purchased a lot at an administrator's sale under order of court, believing that she was purchasing the whole of the lot, and the auctioneer conducting the sale publicly announced that there was an error in the advertisement of the sale, but that the administrator was selling, and the purchaser would get a deed to the whole lot, and the sale was confirmed, and the administrator executed a deed, describing, however, only a part of the lot, and petitioner was thereafter put in possession of the whole lot, but subsequently discovered the mistake in the description, petitioner was entitled to have the proceedings corrected, so as to conform to the proper description, and to have the administrator ad litem execute a new deed conveying the lot according to the corrected description. Gomez v. Gomez, 155 Ala. 158, 45 S 637. (3) A statute providing that if any mistake shall be made in the description of land, either in the petition, decree, or other part of the proceedings, the same may be corrected by the court on the petition of the purchaser or his assigns, does not warrant relief where land is sold which is not embraced in the petition for the sale, or in the decree of confirmation, where the claim or relief is based upon the mere idea of the administrator and his attorneys that such land was embraced in a particular lot which was the property of the decedent and was in fact sold. "We think that a correctible mistake under the statute must be pointed to in some way in the petition or decree, and cannot be

for uncertainty.[47] The description of the property in the conveyance should follow that which appears in the petition by which a sale is asked and the order by which it is authorized or directed.[48] The deed may properly refer to other accessible documents or records for more specific description or identification.[49]

[§ 1722] **5. Presumption as to Execution and Delivery.** Where an administrator petitioned for the sale of real estate to pay debts, and an order of sale was duly made, and a sale was regularly and formally had and reported to and approved by the court, and the administrator in the report of sale and in the final settlement acknowledged the receipt of the purchase price, the presumption will be indulged that the administrator performed his duty and made a deed and delivered it to the purchaser.[50]

[§ 1723] **6. Approval.** The statutes sometimes require approval of the deed by the court.[51] Approval indorsed on a deed executed pursuant to a special statute is sufficient where it refers to the statute.[52]

[§ 1724] **7. Acknowledgment.** The conveyance must be acknowledged in the manner prescribed by statute in order to pass a complete title,[53] but it has been held that a deed which is not properly acknowledged is sufficient to vest an equitable title in the grantee which will constitute a good defense to an action of ejectment by the heirs of decedent.[54] An acknowledgment may be valid notwithstanding a misrecital therein,[55] and defective acknowledgments may be cured by statute.[56]

[§ 1725] **8. Recording.** The conveyance should be recorded;[57] but failure to record the deed does not affect the title as between the purchaser and the estate[58] or the heirs of decedent,[59] nor does the failure of a purchaser at an administrator's sale to record his deed within twelve months from its date postpone his rights to those of a judgment creditor who obtains judgment before record.[60]

[§ 1726] **9. Construction,[61] Operation, and Effect—a. In General.** Where an administrator's deed recited the authority given by the ordinary to sell the land covered by the deed, with the exception of the granite on such lot, but in the granting clause failed to refer to the granite, it will be presumed that there was no intent to pass title to the granite.[62] Where an executor sells and conveys by deed timber on a tract of land, and the grantees cut the timber, and thereafter the executor conveys the same land to another person without reserving the timber, but reciting that the testator had sold the land in his lifetime by a verbal agreement to another person who had sold it to the grantee in the second deed, neither the omission to reserve the timber in the second deed nor the recital therein will give the second grantee title to the timber as against the first grantee of the executor.[63] An administrator's deed of a certain number of acres in a survey in which the estate owns several tracts, embracing more, does not convey all the estate owns therein, because the administrator thought it owned no more than was sold.[64] A conveyance made by an executor under order of court cannot be construed to be his act as executor, where on its face it appears as his individual conveyance.[65] Where a sale is illegal the representative's deed executed pursuant thereto is not sufficient to pass title.[66]

[§ 1727] **b. Effect of Covenants.** The estate is not bound by any covenant contained in such a

supplied by the general belief." Pearson v. Caldwell, 93 Miss. 637, 643, 47 S 436.

[h] **Descriptions held sufficient.**—Hayes v. Dickson, 148 Ga. 700, 98 SE 345; Phillips v. Denton, 158 N. C. 299, 73 SE 1006; El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev on other grounds (Civ. A.) 71 SW 799]; Golden v. Walker, (Tex. Civ. A.) 153 SW 683; Berryman v. Biddle, 48 Tex. Civ. A. 624, 107 SW 922; Saunders v. Terry, 116 Va. 495, 82 SE 68.

[i] **Descriptions held insufficient.**—Borders v. Hodges, 154 Ill. 498, 39 NE 597; Jones v. Carter, 56 Mo. 403; Harris v. Shafer, 86 Tex. 314, 23 SW 979, 24 SW 263.

47. Borders v. Hodges, 154 Ill. 498, 39 NE 597; Jones v. Carter, 56 Mo. 403; Phillips v. Denton, 158 N. C. 299, 73 SE 1006; Harris v. Shafer, 86 Tex. 314, 23 SW 979, 24 SW 263.

48. Bromberg v. Yukers, 108 Ala. 577, 19 S 49; Blackwell v. Townsend, 91 Ky. 609, 16 SW 587, 13 KyL 291; Boslet v. Thomas, 35 Tex. Civ. A. 144, 80 SW 115; Chapman v. Branch, 72 W. Va. 54, 78 SE 235.

[a] **Description in petition and order controls.**—Where an administrator's deed refers to the petition and order of sale and also contains a description of the land, which varies from that contained in the petition and order, the former description will yield to the latter as against the heirs of decedent. Agan v. Shannon, 103 Mo. 661, 15 SW 757.

[b] **Variance in descriptions.**—In proceedings to sell land of a decedent, the description of the land in the petition and administrator's deed gave the field notes, but the order of sale did not. The petition described the land as being covered by patent No. 249, which was the proper number, but the order of sale and administrator's deed described it as No. 248. The field notes showed that the property was the same as that covered by patent No. 249. It was error, in trespass to try title, to exclude the deed and order because of the variance, it being for the court to determine whether the land in controversy was that intended to be sold. Minor v. Lumpkin, (Tex. Civ. A.) 29 SW 800.

[c] **Presumption in case of variance.**—It will be presumed that the administrator committed a clerical error in inserting a wrong description of land in his report of sale and deed, where the description differs from that contained in the order of sale. Agan v. Shannon, 103 Mo. 661, 15 SW 757.

49. See cases infra this note.

[a] **Reference may be made to:** (1) The petition for sale. Foster v. Bowman, 55 Iowa 237, 7 NW 513. (2) The petition and order of sale. Agan v. Shannon, 103 Mo. 661, 15 SW 757. (3) A mortgage. Pitts v. Farnum, 8 Cush. (Mass.) 41. (4) Proceedings for assignment of dower. Kempton v. Swift, 2 Metc. (Mass.) 70. (5) A report of sales made by the administrator to the court and to a plot of lots sold, accompanying it. Orrick v. Bower, 29 Mo. 210. (6) Maps, land certificates, etc. Kerlicks v. Keystone Land, etc., Co., (Tex. Civ. A.) 21 SW 623.

50. Pearson v. Murray, 230 Mo. 162, 130 SW 21.

51. Leshey v. Gardner, 3 Watts & S. (Pa.) 314, 38 AmD 764; Morton v. Sloan, 11 Humphr. (Tenn.) 278.

52. King v. Merritt, 67 Mich. 194, 34 NW 689.

53. Campbell v. Laclede Gas Light Co., 84 Mo. 352.

[a] **The acknowledgment must conform to the general law** on the subject where the statute making it the duty of the administrator to execute, acknowledge, and deliver the deed does not state what the certificate of acknowledgment shall set forth. Hughes v. McDivitt, 102 Mo. 77, 14 SW 660, 15 SW 756.

54. Snider v. Coleman, 72 Mo. 568.

55. Agan v. Shannon, 103 Mo. 661, 15 SW 757 [overr Lincoln v. Thompson, 75 Mo. 613].

56. Cupp v. Welch, 50 Ark. 294, 7 SW 139.

57. Harrington v. Gage, 6 Vt. 532 (it is necessary to have the proceedings and order of sale as well as the conveyance recorded).

[a] **When record becomes effective.**—A conveyance of land sold by a personal representative becomes effective as against third persons from the time of its filing with the proper officer, and not from the time when it is actually recorded. Davis v. Martin, 113 Fed. 6, 51 CCA 27.

[b] **Not necessary to record a deed referred to.**—Where one deed makes reference to another the two are to be considered as one and the deed so referred to need not be recorded. Agan v. Shannon, 103 Mo. 661, 15 SW 757.

58. Gaiennie v. Gaiennie, 24 La. Ann. 79.

59. Harrington v. Gage, 6 Vt. 532.

60. Davie v. McDaniel, 47 Ga. 195.

61. Construction of descriptive clauses see supra § 1721 note 46 [d].

62. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666.

63. Olfsheskey v. Graham, 46 Pa. Super. 523.

64. Waterhouse v. Gallup, (Tex. Civ. A.) 178 SW 773.

65. Armor v. Frey, 253 Mo. 447, 161 SW 829.

66. Hawks v. Smith, 141 Ga. 422, 81 SE 200.

conveyance,[67] whether of warranty[68] or quiet enjoyment.[69] It has been considered that the executor or administrator will be held to respond personally to the full scope of such a covenant, although he describes himself as executor or administrator,[70] but there is also authority for the view that a covenant in the deed which refers to the representative capacity of the grantor is not binding upon him personally.[71]

[§ 1728] **c. Conveyance as Evidence.** A personal representative's conveyance of his decedent's land made without authority is a nullity and no evidence of title in the grantee.[72] To support his title under a deed from the representative it is necessary for the grantee to show that the grantor had a valid power to sell and that such power was exercised in the manner required by law,[73] and, in the absence of statute, proof of authority other than a recital thereof in the conveyance is necessary.[74] A fortiori an administrator's deed, not reciting that there was any public sale, or that it was made in accordance with the order of the ordinary, should not be admitted in evidence as a muniment of title, without the aid of other evidence to show that the land was in fact sold at public sale.[75] Due authority having, however, been shown, the recitals in the conveyance of the acts required by law to be done in making the sale will be considered as prima facie evidence of their having been done as therein recited.[76] Under some statutes recitals in such a conveyance are themselves evidence of the facts recited,[77] and constitute prima facie evidence of title.[78] An administrator's deed, however, is only presumptive evidence of the regularity of the proceedings prior to the sale.[79] It is sometimes made necessary, in order that an administrator's deed be admissible as a muniment of title, that it should be accompanied by the order of sale,[80] but the deed, accompanied by the order, is admissible as a muniment of title without production of the letters of administration.[81] A deed of conveyance executed by commissioners under an order of the orphans' court to the purchaser at their sale is admissible as evidence of the conveyance.[82] A conveyance by

67. Conn.—Coe v. Talcott, 5 Day 88.
Ill.—Vincent v. Morrison, 1 Ill. 227.
Iowa.—Hale v. Marquette, 69 Iowa 376, 28 NW 647.
Me.—Mason v. Ham, 36 Me. 573.
Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.
N. C.—Godley v. Taylor, 14 N. C. 178.
Oh.—Dunlap v. Robinson, 12 Oh. St. 530.
Pa.—Whiteside v. Flora, 27 Pa. Co. 25, 8 Del. Co. 459, 19 LancLRev 299.
Tex.—Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [rev in part on other grounds 26 Tex. Civ. A. 449, 64 SW 872].
Vt.—Prouty v. Mather, 49 Vt. 415; Brown v. VanDuzee, 44 Vt. 529.
Wis.—Mabie v. Matteson, 17 Wis. 1.

68. Belden v. Seymour, 8 Conn. 19; Worthy v. Johnson, 8 Ga. 236, 52 AmD 399; Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [mod 26 Tex. Civ. A. 449, 64 SW 872]; Nesbitt v. Richardson, 14 Tex. 656; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735; Prouty v. Mather, 49 Vt. 415.

No warranty as against estate see supra § 1698.

69. Osborne v. McMillan, 50 N. C. 109; Mabie v. Matteson, 17 Wis. 1.

70. Conn.—Belden v. Seymour, 8 Conn. 19; Mitchell v. Hazen, 4 Conn. 495, 10 AmD 169.
Ga.—Baxter v. Camp, 126 Ga. 354, 54 SE 1036; Worthy v. Johnson, 8 Ga. 236, 52 AmD 399.
Ill.—Vincent v. Morrison, 1 Ill. 227.
Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.
Miss.—Magee v. Mellon, 23 Miss. 585.
Vt.—Prouty v. Mather, 49 Vt. 415.

Personal liability of representative on warranty generally see supra § 1699.

71. Iowa.—Hale v. Marquette, 69 Iowa 376, 28 NW 647.
Mich.—Wright v. De Groff, 14 Mich. 164.
Oh.—Day v. Brown, 2 Oh. 345.
Pa.—Shontz v. Brown, 27 Pa. 123.
Tex.—Dallas County v. Club Land, etc., Co., 95 Tex. 200, 66 SW 294 [rev 26 Tex. Civ. A. 449]; Nesbitt v. Richardson, 14 Tex. 656; Lynch v. Baxter, 4 Tex. 431, 51 AmD 735.
Va.—Grantland v. Wight, 5 Munf. (19 Va.) 295.

72. Dawson v. Parham, 47 Ark. 215, 1 SW 72.

73. Cal.—White v. Moses, 21 Cal. 43.
Conn.—Dorrence v. Raynsford, 67 Conn. 1, 34 A 706, 52 AmSR 266.
Ga.—Dowdy v. McArthur, 94 Ga. 577, 21 SE 148.
Iowa.—Thornton v. Mulquinne, 12 Iowa 549, 79 AmD 548.
La.—Lanfear v. Harper, 13 La. Ann. 548.
N. B.—Johnson v. Calnan, 38 N. B. 52.

[a] **Proof of license to sell necessary.**—Johnson v. Calnan, 38 N. B. 52.

74. Bryan v. Morris, 143 Ga. 70, 84 SE 120; Waller v. Hogan, 114 Ga. 383, 40 SE 254; Roberts v. Martin, 70 Ga. 196; Davie v. McDaniel, 47 Ga. 195; Doe v. Henderson, 4 Ga. 148, 48 AmD 216; Taylor v. Lawrence, 148 Ill. 388, 36 NE 74.

[a] **Recitals a circumstance tending to show order of sale.**—The recitals in a deed made by the administrator conveying land by him as such are relevant only as tending to show that in making the sale he did not undertake to act independently of leave from the court of ordinary, but that the court had passed an order granting leave to sell. While the recitals afford no direct evidence of the truth of the facts recited, the making of them is a circumstance which the jury may take into consideration in connection with the other facts as tending to establish this fact. Attaway v. Carswell, 89 Ga. 343, 14 SE 472.

75. Sapp v. Cline, 131 Ga. 433, 62 SE 529.

76. Floyd v. Ricketson, 129 Ga. 668, 59 SE 909; Roberts v. Martin, 70 Ga. 196; Davie v. McDaniel, 47 Ga. 195; Doe v. Henderson, 4 Ga. 148, 48 AmD 216; Rust v. Rutherford, 101 Kan. 495, 167 P 1056; Pinnell v. Burroughs, 172 N. C. 182, 90 SE 218; Pinnell v. Burroughs, 168 N. C. 315, 84 SE 364.

77. Ark.—Cupp v. Welch, 50 Ark. 294, 7 SW 139.
Ga.—Floyd v. Ricketson, 129 Ga. 668, 59 SE 909.
Kan.—Rust v. Rutherford, 101 Kan. 495, 167 P 1056.
Mich.—Wheelock v. Lake, 117 Mich. 11, 75 NW 140; Egan v. Grece, 79 Mich. 629 (after the lapse of ten years).
Mo.—Howell v. Sherwood, 242 Mo. 513, 147 SW 810; Thompson v. Pinnell, 237 Mo. 545, 141 SW 605; Bray v. Adams, 114 Mo. 486, 21 SW 853; Campbell v. Laclede Gas Light Co., 84 Mo. 352; Camden v. Plain, 91 Mo. 117, 4 SW 86; Johnson v. Beazley, 65 Mo. 250, 27 AmR 276; Knowlton v. Smith, 36 Mo. 507, 88 AmD 152.
N. C.—Pinnell v. Burroughs, 172 N. C. 182, 90 SE 218.
Wis.—Hoffman v. Wheelock, 62 Wis. 434, 22 NW 713, 716; Chase v. Whiting, 30 Wis. 544.
"Nor was there any merit in the objection to the deed, that it did not appear therefrom that the sale was advertised for the requisite number of days required by law and in the official organ of Coffee county. The deed recited that the administrator, 'having complied with all the requistins [requisites?] of the law,' etc. 'A recital in an administrator's deed, of a compliance with all of the requisites of the law necessary to be done after the order of sale is granted, is prima facie evidence that these requisites were complied with.'" Floyd v. Ricketson, 129 Ga. 668, 675, 59 SE 909.

[a] **A recital of appointment** of the grantor as administrator is prima facie evidence thereof. Johnson v. Beazley, 65 Mo. 250, 27 AmR 276; Chase v. Whiting, 30 Wis. 544.

[b] **Statute not applicable to deed of executor or administrator.**—The New Jersey statute of 1864, providing that deeds executed by officers or auditors in attachment, acting in pursuance of a decree, judgment, execution, or order of court, duly acknowledged, shall be prima facie evidence of the recitals therein, did not include those executed by an administrator or executor under an order of court. Reader v. Jennings, 40 Fed. 199 [app dism 154 U. S. 506 mem, 14 SCt 1156 mem, 38 L. ed. 1075 mem].

[c] **A recital of confirmation** (1) is, under the statute, prima facie evidence that there was an order of sale and that all the provisions of the law were complied with in executing such order. El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]. (2) Under an earlier statute the recitals in a deed were not sufficient to show an order of sale, but they were prima facie evidence that all the requisites of the law were complied with in making the sale. White v. Jones, 67 Tex. 638, 4 SW 161; Tucker v. Murphy, 66 Tex. 355, 1 SW 76; Terrell v. Martin, 64 Tex. 121; Jones v. Taylor, 7 Tex. 240, 56 AmD 48.

78. Honor v. Jarrett, 99 Ark. 154, 137 SW 820.

79. Chase v. Ross, 36 Wis. 267.

80. Hilton, etc., Lumber Co., v. Alwood, 141 Ga. 653, 81 SE 1119.

81. Bunger v. Grimm, 142 Ga. 448, 83 SE 200, AnnCas1916C 173.

82. Doe v. Riley, 28 Ala. 164, 65 AmD 334 (the deed is admissible in behalf of a remote purchaser when sued by the intestate's heir, and although the description in it does not correspond with the description of the

a representative who sold under order of court is not evidence of decedent's ownership of the property conveyed.[83]

[§ 1729] **10. Mortgage.** A mortgage given by the personal representative should in its provisions accord with the order or license under which it is executed,[84] and should not contain unauthorized provisions.[85] Such a mortgage is not void because of mere irregularities.[86] A reference to the order of the court and a recital of the execution of the mortgage pursuant to such order, with other similar recitals, is sufficient to show that the mortgage was executed by the mortgagor as personal representative in pursuance of law and the court's order, and not in a personal capacity.[87]

[§ 1730] **V. Disposition of Proceeds**[88]**—1. In General.** The proceeds of land sold for the payment of debts of a decedent are assets for that purpose and are as a general rule to be applied in the same manner as the proceeds of personalty.[89] But an administrator cannot apply the proceeds of a sale of his intestate's property in payment of his own debts.[90] The debts should be paid in the order of their priority,[91] and the administrator

land sued for and described in the petition and order of sale, yet if it embraces any portion of the land sold a general objection to it may be overruled).

83. McBride v. Loomis, (Tex. Commn. A.) 212 SW 480.

84. In re Vedder, 122 Mich. 439, 81 NW 356.

85. See cases infra this note.

[a] **Stipulation as to attorney's fees.**—(1) An order of court authorizing a personal representative to execute a trust deed does not authorize a stipulation therein for the payment of attorney's fees in case of foreclosure. Pershing v. Wolf, 6 Colo. A. 410, 40 P 856. (2) The inserting of an attorney's fee in the mortgage "could not invalidate the mortgage, and could only give rise to a claim for a reduction of the amount due upon it." Griffin v. Johnson, 37 Mich. 87, 91.

[b] **Clause waiving valuation and appraisement laws.**—Under the statute providing that a mortgage executed by the personal representative under the authority of the court shall be as valid as if executed by the deceased in his lifetime, a mortgage executed under order of court and approved by the court has been held valid, although it contained a clause waiving the valuation and appraisement laws. Smith v. Eels, 27 Ind. A. 321, 61 NE 200.

86. Griffin v. Johnson, 37 Mich. 87.

87. Thomas v. Parker, 97 Cal. 456, 32 P 562.

88. **Sale of personalty under testamentary authority or common-law power** see supra § 746.

Sale of realty under testamentary authority see supra § 676.

89. Ala.—Pearson v. Darrington, 32 Ala. 227.

Conn.—Phelan v. Elbin, 84 Conn. 208, 79 A 187.

Ga.—Wood v. Dozier, 142 Ga. 538, 83 SE 133.

Ill.—Cruce v. Cruce, 21 Ill. 46; Vansyckle v. Richardson, 13 Ill. 171.

Ind.—McNaughtin v. Lamb, 2 Ind. 642; Globe Mercantile Co. v. Perkeypile, (A.) 121 NE 844.

Md.—Dent v. Maddox, 4 Md. 522; Cornish v. Willson, 6 Gill 299.

Mass.—Norton v. Norton, 5 Cush. 524.

Miss.—Lee v. Gardner, 26 Miss. 521.

Mo.—Ritchey v. Withers, 72 Mo. 556.

N. J.—Haines v. Price, 20 N. J. L. 480; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 A 333.

N. Y.—Lichtenberg v. Lichtenberg, 156 App. Div. 532, 141 NYS 356; Bloodgood v. Bruen, 2 Bradf. Surr. 8 [rev on other grounds 8 N. Y. 362].

N. C.—Thompson v. Cox, 53 N. C. 311.

Pa.—In re Wohlsen, 104 A 869; Ramsey's App., 4 Watts 71; Pennsylvania Agricultural, etc., Bank v. Stambaugh, 13 Serg. & R. 299; Taylor's Est., 7 Pa. Dist. 305; Crosson's Est., 6 Pa. Co. 14; Fisher's Est., 29 PittsbLegJNS 168.

Tenn.—Rhinehart v. Murray, 15 Lea 469.

Tex.—Peevy v. Hurt, 32 Tex. 146.

Va.—Williams v. Williams, 11 Gratt. (52 Va.) 95.

But compare Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949 (holding that an order of the probate court granting a petition of the administrator asking for an order for the sale of land to pay debts of particular creditors, as provided for in the will of decedent, and directing the administrator to sell at public auction and make report of the sale, and an order affirming the sale and approving the deed to the purchaser, entered on the administrator reporting the sale, but without reporting payment to such creditors, do not direct the administrator to pay such creditors, and a payment to them is at his peril).

[a] **General creditors must be postponed** to the necessary burdens of administration; and so far the proceeds of the sale of real estate are like the other assets. Elstroth v. Young, 88 Mo. A. 418.

[b] **Proceeds used exclusively for paying debts.**—Where the court has ordered the sale of lands of the deceased to pay debts, it has no power to appropriate the proceeds to make good a deficiency in the widow's allowance, to reimburse the administrator for improvements put upon the land, or for any other purpose than to pay debts. Ritchey v. Withers, 72 Mo. 556.

[c] **Payment of unliquidated damages for breach of agreement.**—In the distribution of the proceeds arising from the sale of the real estate, a specialty creditor, whose claim is for unliquidated damages on articles of agreement, for a breach before the distribution, is entitled to be paid, although the covenants were not broken at the time of the death of decedent. Stultzfoos' App., 3 Penr. & W. (Pa.) 265.

[d] **Payment of debt due personal representative.** — Williams v. Williams, 11 Gratt. (52 Va.) 95.

[e] **Proceeds of realty fraudulently conveyed by decedent.** — The proceeds of a sale by an administrator of real estate conveyed by his intestate with intent to defraud creditors are applicable to the payment of all creditors alike, although such conveyance was void only as against persons who were creditors at the time it was made. Norton v. Norton, 5 Cush. (Mass.) 524.

[f] **Proceeds of land subject to a resulting trust.**—Where land of a decedent which was subject to a resulting trust in favor of another for a part of the money provided by the latter for its purchase was sold under order of court to a bona fide purchaser ignorant of the trust, the purchaser took a good title to the property as against the cestui que trust, but such cestui que trust as against decedent's creditors was entitled to such a proportionate part of the proceeds as the amount contributed by him bore to the whole purchase price paid by the decedent. Rupp's App., 100 Pa. 531.

[g] **Surplus after paying debts for which sale made.**—Where land is sold to pay certain debts and there is a surplus realized, it may be impounded and applied to the payment of the claim of a judgment creditor who was not a party to the proceedings for the sale of the land. Rhinehart v. Murray, 83 Tenn. 469.

[h] **Limitation as to time of payment of debts out of proceeds.**—(1) In Pennsylvania, for a certain statutory period after a decedent's death, his debts are a lien on his realty, and when such lien is discharged by an order of court for a sale for the payment of debts the rights of creditors are transferred from the land to the proceeds of the sale. McKeown's Est., 8 WklyNC (Pa.) 343. (2) The debt must be one which is susceptible of enforcement; not a debt barred by the statute of limitations, or it cannot be paid out of the proceeds. Chapman's App., 122 Pa. 331, 15 A 460 [rev 3 Pa. Co. 534]; In re Yorks, 110 Pa. 69, 1 A 162, 2 A 65 [overr McClintic's App., 1 Pa. Cas. 251, 1 A 573]. (3) If the lien of a debt has expired at the time of the sale it cannot participate in the proceeds. Emerick's Est., 172 Pa. 191, 33 A 550; In re Cake, 157 Pa. 457, 27 A 773; Williamson's Est., (Pa.) 17 A 8; In re Shoop, 1 LegGaz (Pa.) 71. See also Kittera's Est., 17 Pa. 416 (debts whose lien continued entitled to preference). (4) When a debt of a decedent is a lien on his real estate and not barred by the statute of limitations at the confirmation of the sale thereof by order of the court for the payment of debts, the lien of the debt is turned upon the fund, and the creditor's right to participate is not affected by a subsequent delay in distribution. Arndt's App., 117 Pa. 120, 11 A 633 [dist Crosson's Est., 6 Pa. Co. 14, 22 WklyNC 226]; Sheridan's Est., 10 Kulp (Pa.) 225.

[i] **Improper application.**—Where an executor voluntarily and without authority applied a part of the proceeds derived from the sale of testator's realty on a judgment obtained against one legatee, his account should be surcharged with the amount so paid. Matter of Van de Walker, 79 Misc. 661, 141 NYS 325.

[j] **Rule affected by agreement.**—Where a will provided that after the payment of debts there should be set apart from the estate four thousand dollars, to pay the income to the testator's widow for life, and, there being an insufficiency of personal estate to set apart such sum without a sale of real estate, the widow, who was one of the executors, agreed with the other that three thousand dollars of the personal estate should remain in the executor's note, and that he was to pay her the income on one thousand dollars' worth of the real estate, which should remain invested therein, in order to prevent a present sale of the real estate, the executors were not entitled to pay to the widow an amount out of the principal of the avails of the subsequent sale of the real estate, in order to make up the full income of four thousand dollars to which she was entitled, but which she had not received. Matter of Hawley, 108 App. Div. 185, 96 NYS 61 [aff 185 N. Y. 566 mem, 77 NE 1188 mem].

90. Chandler v. Schoonover, 14 Ind. 324.

91. Campbell's Est., 22 Pa. Super. 430.

can only pay out the proceeds ratably among all the creditors, and if he pays one creditor more than his share, such creditor holds the excess in trust for other creditors.[92] An order of sale of realty is not without jurisdiction because the proceeds were used to pay a mortgage debt upon the property, which had not been probated, where there were other debts which had been duly probated.[93] Where land is sold to pay a fraudulent claim, the proceeds belong to the heirs.[94] Where an administrator procured an order to sell without actual notice given to the widow, and the land was sold for less than the amount necessary to cover the widow's allowance for a year's support, and there was no other property out of which such support could be paid, the widow was entitled to recover the amount for which the land was sold from the administrator.[95]

Payment of administration costs and other charges.[96] The expenses of administration may, according to some authorities, be paid out of the proceeds of realty sold for the payment of debts;[97] but there is also authority for the contrary view.[98] The costs of judgment on a debt due by decedent may be paid out of such proceeds.[99] Where proceedings had been instituted in another court to determine the inheritance tax, the probate court could not acquire, in proceedings to sell real estate, jurisdiction to decree the payment of such tax out of the proceeds of the sale of certain tracts.[1]

Where land not sold to pay debts. Where land is not sold for the payment of debts but for partition, the proceeds thereof are not assets for the payment of debts,[2] without an order making them applicable for that purpose.[3]

Surplus on foreclosure. Where real estate of a decedent was sold under a judgment of foreclosure more than three years after grant of letters to his executrix, the property was not liable for the payment of decedent's debts, under a statute providing for the sale of realty to pay debts within three years, and the surplus money could be distributed in the usual manner without being paid into the surrogate's court.[4]

Special provision for the disposition of proceeds of a sale is sometimes made by statute.[5]

[§ 1731] **2. Satisfaction of Mortgages and Other Liens.**[6] Where mortgages or other liens are divested by the sale, the proceeds of such sale should be first applied to the satisfaction of such liens in the order of their priority and the residue to the payment of the other debts of decedent in due course of administration,[7] but an administrator who satisfies a mortgage debt on the land out of the

[a] **Debts established by different decrees.**—Debts established and recited in the first decree have a priority over those established by supplementary decree, when there is not enough to pay all. Kenyon v. Talbot, 2 Dem. Surr. (N. Y.) 548.

Classification and priorities of debts see supra §§ 1152–1192.

92. Ewing v. Maury, 3 Lea (Tenn.) 381.

93. Long v. Hoffman, 103 Ark. 574, 148 SW 245.

94. Whitlock v. McClusky, 91 Ill. 582.

95. Clark v. English, 36 Tex. Civ. A. 502, 82 SW 325.

96. Costs and expenses of the sale see infra § 1732.

97. Youenes' Succ., 28 La. Ann. 499; Brazer v. Dean, 15 Mass. 183; Matter of Liscomb, 60 Misc. 647, 113 NYS 941, 6 Mills Surr. 598. See also Elstroth v. Young, 88 Mo. A. 418 (recognizing rule). But see Elstroth v. Young, 94 Mo. A. 351, 68 SW 100 (proceeds of sale under order of probate court, pursuant to Rev. St. [1899] c 1 art 8, cannot be used for the purpose of making good deficiencies in the expenses of administration).

[a] **Where there are no personal assets,** the proper expenses of administration are payable from the proceeds of a sale of decedent's land to pay debts and funeral expenses, and a fund arising on foreclosure against decedent's real estate is to be so used, under Code Civ. Proc. § 2799. Matter of Liscomb, 60 Misc. 647, 113 NYS 941, 6 Mills Surr. 598.

[b] **The administrator is entitled to take out** his commission, taxes paid by him, and expenses of administration, including reasonable compensation for necessary legal assistance whether in the matter of the sale or other matters arising out of his duties. Elstroth v. Young, 88 Mo. A. 418.

[c] **Reimbursement at expense of creditors not permitted.**—An executrix cannot be reimbursed out of the proceeds of the real estate, to the exclusion of creditors, for the expenses of administration, consisting mainly of the amount paid to attorneys employed by her in a contest over the will. In re Hatch, 182 N. Y. 320, 75 NE 153 [rev 97 App. Div. 496, 90 NYS 33].

98. Sherman v. Millard, 27 Oh. Cir. Ct. 175; In re Kennedy, 1 Lack LegN (Pa.) 135; Stell v. Lewis, 2 Tex. Unrep. Cas. 533.

99. Long v. Oxford, 108 N. C. 280, 13 SE 112.

1. Nation v. Green, (Ind. A.) 114 NE 895.

2. Hunter v. Law, 68 Ala. 365; Johnston v. Union Bank, 37 Miss. 526; Kerr's Est., 4 Phila. (Pa.) 182. But compare Dees v. Tildon, 2 La. Ann. 412, 413 ("The sale was only a preliminary step towards a partition. From its proceeds are to be deducted the debts and charges, and the residue is to be divided among the heirs").

3. Johnston v. Union Bank, 37 Miss. 526; Langham v. Darby, 13 Mo. 553. But compare Dickerson v. Wilcoxon, 99 N. C. 535, 6 SE 774 (where land has been sold at the instance of devisees and the proceeds turned over to the personal representative, they may be subjected to the payment of a judgment debt of the decedent without a special proceeding brought for that purpose).

4. Reynolds v. Britton, 56 Misc. 67, 106 NYS 937.

5. Houston v. Houston, 16 Del. 270, 43 A 95; Finegan's Succ., 135 La. 473, 65 S 614; Lichtenberg v. Lichtenberg, 156 App. Div. 532, 141 NYS 356; In re Summers, 37 Misc. 575, 75 NYS 1050, 2 Mills Surr. 598; Matter of Woodard, 13 NYS 161; Wilcox's Est., 11 NYCivProc 115; Cook v. Woodard, 5 Dem. Surr. (N. Y.) 97; Shute v. Shute, 5 Dem. Surr. (N. Y.) 1; Long v. Olmsted, 3 Dem. Surr. (N. Y.) 581; Smith v. Meakin, 5 NYCivProc 421, 2 Dem. Surr. 129; Matter of Renwick, 2 Bradf. Surr. (N. Y.) 80; Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408; Stone v. Strong, 42 Oh. St. 53; Sherman v. Millard, 27 Oh. Cir. Ct. 175; Jones v. Allen, 8 OhS&CP 338, 6 OhNP 518.

6. Sale of encumbered property generally see supra § 1480.

7. Cal.—In re Clanton, 171 Cal. 381, 153 P 459; Gutter v. Dallamore, 144 Cal. 665, 79 P 383; In re Murray, 18 Cal. 686.

Ga.—Moughon v. Masterson, 140 Ga. 699, 79 SE 561; McClure v. Williams, 58 Ga. 494; Atkinson v. Keith, 50 Ga. 577; Stallings v. Ivey, 49 Ga. 274; Carhart v. Vann, 46 Ga. 389; Sims v. Ferrill, 45 Ga. 585.

Ill.—Bayless v. Peo., 56 Ill. A. 55.

Ind.—Ryker v. Vawter, 117 Ind. 425, 20 NE 294; Perry v. Borton, 25 Ind. 274.

Iowa.—Trowbridge v. Sypher, 55 Iowa 352, 7 NW 567.

Kan.—Brown v. Evans, 15 Kan. 88.

Ky.—Mandel v. Fidelity Trust Co., 128 Ky. 239, 107 SW 775, 32 KyL 1104.

La.—Rhea's Est., 33 La. Ann. 369; Robinson's Succ., 23 La. Ann. 17; Tureaud v. Gex, 21 La. Ann. 253; Ynogoso's Succ., 13 La. Ann. 559; Dejean's Succ., 8 La. Ann. 505; Zacharie v. Prieur, 9 La. 197; Kennedy's Succ., 2 La. A. (Orleans) 65.

Mass.—Church v. Savage, 7 Cush. 440.

Mo.—Peters v. Holliday, 40 Mo. 544; Trent v. Trent, 24 Mo. 307.

N. Y.—Matter of McGee, 65 App. Div. 460, 73 NYS 64.

N. C.—Tarboro v. Pender, 153 N. C. 427, 69 SE 425, 636; Pate v. Oliver, 104 N. C. 458, 10 SE 709.

Oh.—Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408; Holloway v. Stuart, 19 Oh. St. 472; Defrees v. Greenham, 11 Oh. St. 486; Miami Exporting Co. v. Holly, Wright 226; Sherman v. Millard, 27 Oh. Cir. Ct. 175.

Pa.—Arndt's App., 117 Pa. 120, 11 A 633; In re Ross, 9 Pa. 17; Girard v. McDermott, 5 Serg. & R. 128; Maury's Est., 4 Pa. Dist. 752; Teaf's Est., 7 Pa. Co. 463; Matter of Hocker, 2 Pearson 493, 14 Phila. 659; Marsh v. Haldeman, 2 PaLJR 234, 3 PaLJ 512; Sheridan's Est., 10 Kulp 225; Rowe's Est., 11 Kulp 36.

S. C.—Shell v. Young, 32 S. C. 462, 11 SE 299.

Tex.—Cole v. Lewis, (Civ. A.) 159 SW 180; Clark v. English, 36 Tex. Civ. A. 502, 82 SW 325; Barnes v. Scottish-American Mortg. Co., 29 Tex. Civ. A. 443, 68 SW 529; Toullerton v. Manchke, 11 Tex. Civ. A. 148, 32 SW 238.

W. Va.—Shahan v. Shahan, 48 W. Va. 477, 37 SE 552, 86 AmSR 68.

[a] **This rule has been applied** with respect to: (1) A vendor's lien. Stallings v. Ivey, 49 Ga. 274; Toullerton v. Manchke, 11 Tex. Civ. A. 148, 32 SW 238. (2) An unrecorded mortgage. Kirkpatrick v. Caldwell, 32 Ind. 299; McBrayer v. Harrill, 152

proceeds of a sale thereof had under order of court, without taking an assignment of the mortgage as a condition to payment thereof, is not entitled to credit for such payment.[8] Liens which are not divested by a sale are not to be satisfied out of the proceeds,[9] and so where the administrator of a chattel mortgagor, under order of court, sold the interest of the mortgagor, the mortgagee was not entitled to maintain a bill praying that the money is decreed to be held in trust for the payment of complainant's debt,[10] the purchaser, if affected by notice, having taken the property subject to the rights of the mortgagee, and, even in case the property had been destroyed, the remedy being an action at law.[11] Where, pending administration, the administrator, by authority of the court, executed a mortgage and credited the estate with the amount thereof, and one tract was thereafter sold to a third person, and the other set aside as a probate homestead for the minor children, and the mortgagee demanded the payment of a certain portion of the mortgage debt before releasing the tract sold, which sum the administrator paid, he was held to be entitled to a credit for such payment, although it was a greater sum than such tract was liable for in proportion to its value.[12] Where in a foreclosure suit, for the protection of a third person, a part of the land was ordered first sold, and thereafter the judgment debtor gave a mortgage for an unsecured indebtedness and the amount of the judgment, which the mortgagee paid, taking a transfer thereof, and after the debtor's death the mortgagee had the property sold by the administrator for more than the amount of the judgment, it was held that equity would apply the proceeds in the manner decreed in the foreclosure, and hence the part of the land to be sold last was free from any lien.[13]

[§ 1732] **3. Payment of Costs and Expenses of Sale.** The costs and expenses of a sale of the realty of a decedent are generally to be paid out of the proceeds of the sale[14] before any other

N. C. 712, 68 SE 204. (3) A judgment lien which was in force at the time of the commencement of the suit to compel a sale of the homestead for the payment of liens. Tarboro v. Pender, 153 N. C. 427, 69 SE 425, 636. (4) Taxes constituting a lien on the land. Trowbridge v. Sypher, 55 Iowa 352, 7 NW 567; Brown v. Evans, 15 Kan. 88; Mandel v. Fidelity Trust Co., 128 Ky. 239, 107 SW 775, 32 KyL 1104. But compare Fessenden's App., 77 Me. 98 (taxes assessed on real estate prior to its sale for the payment of debts are chargeable to the rents of the land accruing after the testator's decease rather than to the proceeds of sale received by the executor).

[b] **The costs of foreclosing a mortgage** upon the realty of a decedent are payable out of the proceeds of such land when it is sold by the personal representative. Connecticut Mut. L. Ins. Co. v. Hobbs, 14 Ind. A. 681, 43 NE 452.

[c] **Time of acquiring lien.**—The liens which are to be discharged before the debts of general creditors are to be paid are such liens as existed at the death of the intestate and not such as were afterward acquired by judgment or execution. Slaughter v. Slaughter, 8 B. Mon. (Ky.) 482.

[d] **Distribution not subject to collateral attack.**—Where the proceeds were applied to the payment of the mortgage, the distribution cannot be collaterally questioned, and the money paid cannot be recovered back. Jackson v. Dickerson, 5 Phila. (Pa.) 356.

[e] **Reimbursement of taxes paid.**—Where personal property set apart to the widow as exempt had been levied on for taxes, and the widow was compelled to pay taxes to secure the property thus set apart to her, she is entitled to be reimbursed out of the proceeds of mortgaged land on which the taxes were a lien. Nesbit v. Wood, 56 SW 714, 22 KyL 127.

[f] **A judgment which has lost its lien** when the land is sold cannot participate in the distribution of the fund raised by the sale. Matter of McGee, 65 App. Div. 460, 73 NYS 64; Williamson's App., (Pa.) 17 A 8.

[g] **Proof of satisfaction of judgment.**—An auditor appointed to distribute the proceeds of the sale may receive testimony to show that a judgment against decedent was paid or satisfied before such sale. McCormick v. McGonigar, 4 Pa. Super. 408.

[h] **Mortgagee of heir's interest.**—Where a son mortgaged his interest in decedent's property, which by will was not to be distributed until the youngest child should reach majority, and turned the proceeds of the loan over to the executrix for the support of the family, and plaintiff afterward foreclosed the mortgage and bid in the son's interest in the property, plaintiff could reach the proceeds of a subsequent sale of all decedent's real property under order of the probate court, procured by false representations of the executrix that moneys received by her had been insufficient to support the family, in pursuance of an intention on her part to defraud plaintiff and other mortgagees similarly situated. Santa Rosa Sav. Bank v. Schell, 142 Cal. 505, 76 P 250.

[i] **Debts not due.**—Where an immediate sale of lands of decedent to satisfy all lien debts is ordered, and some such debts are not due, their payment will not be precipitated except upon consent of the holder. Callebs v. Ruble, 172 Ky. 113, 188 SW 1096.

8. Denman v. Payne, 152 Ala. 342, 44 S 635.

9. Ala.—Dothan Nat. Bank v. Crawford, 164 Ala. 310, 50 S 936.
Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546.
Nebr.—Maul v. Hellman, 39 Nebr. 322, 58 NW 112.
N. J.—Cools v. Higgins, 23 N. J. Eq. 308; Bockover v. Ayres, 22 N. J. Eq. 13.
Pa.—Tubb's Est., 161 Pa. 252, 28 A 1109; Penn Square Bldg. Assoc. App., 81 Pa. 330; Steen's Est., 4 Pa. Dist. 700, 17 Pa. Co. 201; Brotherlin's Est., 15 Pa. Co. 251; Steger's Est., 11 Phila. 158.
Vt.—Swift v. Kennison, 39 Vt. 473.

[a] **Rights of purchaser.**—Where the order recited that the land was to be sold subject to encumbrances, the purchaser cannot refuse to complete the sale because the administrator refused to apply the proceeds to discharge the encumbrances as he promised. Maul v. Hellman, 39 Nebr. 322, 58 NW 112.

10. Dothan Nat. Bank v. Crawford, 164 Ala. 310, 50 S 936.

11. Dothan Nat. Bank v. Crawford, 164 Ala. 310, 50 S 936.

12. In re Shively, 145 Cal. 400, 78 P 869 (so holding on the ground that Code Civ. Proc. § 1465, which provides that when no homestead has been selected the court must select one for the minor children makes it the duty of the court to set apart a homestead from the unencumbered estate, and authorizes the court to allow the proceeds of such sale to be applied on the mortgage which encumbered the homestead at the time it was set aside).

13. Cole v. Lewis, (Tex. Civ. A.) 159 SW 180.

14. Ala.—Bolen v. Hoven, 150 Ala. 448, 43 S 736.
Cal.—In re Murray, 18 Cal. 686.
Conn.—Canfield v. Bostwick, 21 Conn. 550.
Del.—Houston v. Houston, 16 Del. 270, 43 A 95.
Ga.—Wimberly v. Brown, 42 Ga. 604.
Ky.—Mason County v. Lee, 1 T. B. Mon. 247.
La.—Haile's Succ., 52 La. Ann. 1529, 27 S 967; Negueloua's Succ., 52 La. Ann, 1495, 27 S 962; Ruthenberg v. Helberg, 43 La. Ann. 410, 9 S 99; Blanco's Succ., 4 La. A. (Orleans) 229.
Mo.—Elstroth v. Young, 88 Mo. A. 418.
N. J.—Brown v. Brown, 72 N. J. Eq. 667, 65 A 739.
N. Y.—Higbie v. Westlake, 14 N. Y. 281; Wilcox v. Quinby, 20 NYS 5; Matter of Matthewson, 3 NYS 660, 1 Conn. Surr. 157, 9 NYS 290, 1 Conn. Surr. 254; Cook v. Woodard, 5 Dem. Surr. 97.
Oh.—Sherman v. Millard, 27 Oh. Cir. Ct. 175.
Pa.—Bayle's Est., 12 Pa. Dist. 73, 28 Pa. Co. 125, 19 Montg. Co. 134; Burgard's Est., 26 Pa. Co. 177; Teaf's Est., 7 Pa. Co. 463; Kitchenman's Est., 15 Phila. 519.
S. C.—Glenn v. Gerald, 64 S. C. 236, 42 SE 155.
Tex.—Greer v. Riley, 92 Tex. 699, 53 SW 578; Stell v. Lewis, 2 Tex. Unrep. Cas. 533.

[a] **Compensation of representative.**—A percentage on the proceeds of sale may be allowed to the personal representative as compensation for his services as to the sale. Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326; Becker v. Espenshade, 8 Pa. Dist. 525.

[b] **Broker's commissions** for selling may be paid where the employment of a broker was reasonably necessary. Jarvis v. Drew, (Tex. Civ. A.) 215 SW 970.

[c] **Auctioneer's fees** for selling may be paid. Ibos' Succ., 144 La. 813, 81 S 326 (claim reduced from two and one-half to two per cent of proceeds, and reduction made on account of rebate received by auctioneer from advertising charge).

[d] **Counsel fees** (1) may be paid out of the proceeds. Wimberly v. Brown, 42 Ga. 604; Matter of McGee, 65 App. Div. 460, 73 NYS 64; Jenning's Est., 10 Pa. Dist. 90; Dundas' App., 7 Pa. Cas. 629, 12 A 485; Glenn v. Gerald, 64 S. C. 236, 42 SE 155. See also Bayle's Est., 12 Pa.

charge or debt of any kind whatever is paid.[15]

[§ 1733] **4. Disposition of Surplus.** Where a sale for the payment of debts results in a surplus over the amount required for this purpose, such surplus proceeds are distributed as real estate,[16] and the persons beneficially entitled to the personal estate have no rights therein.[17] Such proceeds are subject to the widow's dower right,[18] but the surplus cannot be applied to the payment of a judgment against the personal representative in favor of the widow for an unpaid balance of her year's allowance.[19]

A debt due the estate from the heir may be retained out of his distributive share of the surplus proceeds of real estate sold to pay debts.[20]

Payment of lien against portion of heir. If, at the time of the sale, there are liens by mortgage, judgment, or decree, against the portions of any of the heirs, it is equitable that on a claim filed such liens should be admitted as a valid charge against the shares of the heirs in the surplus.[21]

Procedure to recover surplus from representative. While money acquired by the personal representative from the sale of lands, for the payment of debts, and remaining in his hands for distribution after paying the debts, will be treated as having the qualities of land for certain purposes of administration and succession, for all other purposes it is only money in the hands of the administrator,[22] and any process or procedure to get it out of his hands must necessarily be that which is adapted to the recovery of money as money.[23]

Land fraudulently conveyed by decedent. If an administrator sells land by license of court to pay debts of his intestate, after recovering it from one to whom the intestate conveyed it in fraud of his creditors but for a valuable consideration, a surplus of the proceeds, remaining after paying the debts, belongs to the fraudulent grantee as against the heirs of the intestate.[24]

Where decedent had a life estate in the land, with remainder to another, subject to payment of the life tenant's debts and funeral expenses, the surplus proceeds of sale belong to the remainderman.[25]

[§ 1734] **5. By Whom Proceeds Received and Distributed.** It is sometimes provided by statute that the proceeds of a sale shall be received by the personal representative and applied like other as-

Dist. 73, 28 Pa. Co. 125, 19 Montg. Co. 134 ("The fee demanded by the counsel who appeared for the estate was not objected to at the audit, and in default of any testimony as to the character or value of the services, we are unable to say that it was excessive. Against the fund, however, which comprised the proceeds of sale of decedent's real estate, a claim for fees by another counsel was presented, founded upon services rendered in attempting to open and set aside the judgment of the lien creditor in the Common Pleas. The effort was fruitless, and the plaintiff obtained judgment in a sum which the fund for distribution is inadequate to pay. The claim comes before us as a simple debt due by the estate, and not as an allowance to the accountant, who would probably find it difficult to show why two counsel were employed in the matter. Such a debt even if established, would not be a lien upon the fund"). Contra Miller v. Swan, 10 KyL 1015; Markey's Succ., 22 La. Ann. 265. (2) Counsel fees are not entitled to priority over a valid mortgage lien covering the premises sold. Day v. Davis, 47 SW 769, 20 KyL 869.

[e] **Time when allowance made.**—An allowance for the expenses of a sale of real estate cannot be made until the sale has been had and the fund for their payment secured. Jennings's Est., 10 Pa. Dist. 90.

[f] **Retention of proceeds until costs adjusted.**—Where an executrix sued to marshal assets and prove claims, in which the court directed a master to sell lands and pay the proceeds, less expenses of sale to the executrix, and she claimed that the master had retained a greater sum than was allowable under the order, an application for an order requiring the master to pay the balance to the executrix was properly continued until the costs were adjusted. Lockwood v. Lockwood, 73 S. C. 18, 52 SE 735.

[g] **Unnecessary expenses not allowed out of proceeds.**—Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Matter of McGee, 65 App. Div. 460, 73 NYS 64 (extra advertising consisting of handbills, circulars, etc., in absence of agreement of all parties concerned that such expense should be incurred or an order of court sanctioning the expenditure).

15. Negueloua's Succ., 52 La. Ann. 1495, 27 S 962; Markey's Succ., 22 La. Ann. 265; Blanco's Succ., 4 La. A. (Orleans) 229; Stone v. Strong, 42 Oh. St. 53; Lockwood v. Lockwood, 73 S. C. 18, 52 SE 735; Greer v. Riley, 92 Tex. 699, 53 SW 578.

[a] **Where a lienholder becomes the purchaser,** although he has the right to have the amount due him applied on his bid, he must, in any event, pay a sum sufficient to cover all legal costs payable out of the proceeds. Becker v. Espenshade, 8 Pa. Dist. 525.

16. Ala.—Bolen v. Hoven, 150 Ala. 448, 43 S 736; Williamson v. Mason, 23 Ala. 488.

Ark.—Kitchens v. Jones, 87 Ark. 502, 113 SW 29, 128 AmSR 36, 19 LRANS 723.

Conn.—State v. Donahue, 82 Conn. 308, 73 A 763, 135 AmSR 273.

Del.—In re Ward, 95 A 350.

Ill.—Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403; Peo. v. Rardin, 171 Ill. A. 226; Clifford v. Gridley, 113 Ill. A. 164.

Ind.—Ball v. Green, 90 Ind. 75.

Ky.—Thompson v. Thompson, 105 SW 1185, 32 KyL 319.

Mass.—Bartlett v. Moore, 124 NE 275; Allen v. Ashley School Fund, 102 Mass. 262.

Minn.—Kolars v. Brown, 108 Minn. 60, 121 NW 229, 133 AmSR 410.

Mo.—Warfield v. Hume, 91 Mo. A. 541; Elstroth v. Young, 88 Mo. A. 418.

N. J.—Lerch v. Oberly, 18 N. J. Eq. 575; Oberly v. Lerch, 18 N. J. Eq. 436.

N. Y.—In re Hatch, 182 N. Y. 320, 75 NE 153; Davis v. Davis, 4 Redf. Surr. 355; Sears v. Mack, 2 Bradf. Surr. 394 [aff 17 N. Y. 445].

N. C.—Denton v. Tyson, 118 N. C. 542, 24 SE 116; Sloan v. Mendenhall, 60 N. C. 553; Latta v. Russ, 53 N. C. 111.

Oh.—Griswold v. Frink, 22 Oh. St. 79; Sherman v. Millard, 27 Oh. Cir. Ct. 175.

Pa.—Bindley's App., 69 Pa. 295; Grenawalt's App., 37 Pa. 95; Pennell's App., 20 Pa. 515; Fowler's Est., 20 Pa. Dist. 377; Stifler's Est., 8 Pa. Dist. 400, 23 Pa. Co. 24; Holbrook's Est., 1 Pa. Dist. 259; Wale's Est., 11 Phila. 156.

R. I.—Tillinghast v. Holbrook, 7 R. I. 230.

Tenn.—Read v. Bostick, 6 Humphr. 321.

Wis.—Tyron v. Farnsworth, 30 Wis. 577.

Ont.—Re Steacy, 39 Ont. L. 548, 12 OntWN 230.

[a] **Surplus proceeds of sale to satisfy lien.**—Lichtenberg v. Lichtenberg, 156 App. Div. 532, 141 NYS 356; Powell v. Harrison, 88 App. Div. 228, 85 NYS 452 [app dism 178 N. Y. 567 mem, 70 NE 1108 mem]; Washington L. Ins. Co. v. Clark, 79 App. Div. 160, 79 NYS 610; Matter of Callaghan, 69 Hun 161, 23 NYS 378; Matter of Stilwell, 68 Hun 406, 23 NYS 65 [aff 139 N. Y. 337, 34 NE 777]; White v. Poillon, 25 Hun 69; Di Lorenzo v. Dragone, 25 Misc. 26, 54 NYS 420, 28 NYCivProc 102; Matter of Coutant, 24 Misc. 350, 53 NYS 713; Matter of Solomon, 4 Redf. Surr. 509.

[b] **Lien of infant heirs.**—Where land in which infants are interested is sold to pay debts of the ancestor, a lien is retained by law on the land for the infant's share, for the excess above the intestate debts until a bond is executed on behalf of the infants. Oldham v. McElroy, 134 Ky. 454, 121 SW 414.

17. Griswold v. Frink, 22 Oh. St. 79 (the widow is not entitled to any part of the surplus in her capacity as one of the distributees of his personal estate).

18. Dent v. Maddox, 4 Md. 522.

19. Denton v. Tyson, 118 N. C. 542, 24 SE 116.

20. Barnett v. Thomas, 36 Ind. A. 441, 75 NE 868, 114 AmSR 385.

Retaining indebtedness due by legatee or distributee see supra § 1317.

21. Phelan v. Elbin, 84 Conn. 208, 79 A 187; Ball v. Green, 90 Ind. 75; Kolars v. Brown, 108 Minn. 60, 121 NW 229, 133 AmSR 410; Sears v. Mack, 2 Bradf. Surr. 394 [aff 17 N. Y. 445].

[a] **Rule applied to judgment against heir.**—Kolars v. Brown, 108 Minn. 60, 121 NW 229, 133 AmSR 410.

22. Nelson v. Murfee, 69 Ala. 598.

23. Nelson v. Murfee, 69 Ala. 598.

24. Allen v. Ashley School Fund, 102 Mass. 262.

25. Winnegar v. Coates, 126 Mo. A. 650, 105 SW 664; In re Winnegar, 118 Mo. A. 445, 94 SW 833.

[a] **The probate court has no jurisdiction of a contest** between the administrator of a deceased wife, to whom land had been conveyed for life with remainder to the husband subject to her debts, and the husband, as to the ownership of the surplus of the proceeds on a sale of the land to pay the wife's debts remaining after discharging them. In re Winnegar, 118 Mo. A. 445, 94 SW 833.

sets,[26] while other statutes provide that they shall be paid into court.[27] Where a trustee appointed to sell real estate on a creditor's bill for a settlement of the estate died after the sale and before the purchase money had been paid, it was held that it was proper to direct the purchaser to pay the purchase money to the creditors entitled to it under the bill.[28] Such proceeds are usually distributed by the court or under its order.[29]

[§ 1735] **6. Duty of Purchaser as to Application of Proceeds.** Where land of a decedent is sold or mortgaged under an order of court, the purchaser or mortgagee is under no duty to see to the application of the proceeds, and his rights are not affected by a misapplication thereof.[30] But one to whom property has been mortgaged under order of court must show that the estate, by the administrator, was actually the recipient of the money in order to ask that the estate be estopped to plead illegality of the mortgage.[31]

[§ 1736] **W. Liability of Representative**[32]**—1. In General.** Any liability of an executor or administrator on account of sales made by him must arise either from receipt of the purchase money, a failure to execute his duties in the manner required by law, or negligence or misconduct in their performance. There is no liability beyond this, although the representative may have erred in judgment.[33] Where, however, an executors' sale of personal property, through a breach of trust by one of the executors, results in a loss to the estate, the liability of such executors for such loss is not discharged by the mere fact that such sale was reported to the court and by it approved.[34] Where an administrator sells at judicial sale land to which his intestate had no title, and the purchaser is ignorant as to the title, an action will lie against the administrator in his individual capacity for the amount paid and the administrator cannot escape liability by virtue of the doctrine of caveat emptor.[35]

[§ 1737] **2. For Purchase Money—a. In General.** The executor or administrator exercising good faith is responsible in general for moneys actually received by him as proceeds of the sale, and for no more,[36] and so, where the proceeds of sale have been paid to the heirs by order of court, the

26. Cruce v. Cruce, 21 Ill. 46; Minor v. Barker, 26 La. Ann. 160; Thompson v. Cox, 53 N. C. 311.

[a] **Where a succession is not in debt,** the tutor of the minor heirs may administer and may receive the proceeds of a probate sale of personalty of the succession or authorize any other person to receive them for him; and a payment made by a purchaser to a person so authorized will release him. Martin v. Dupre, 1 La. Ann. 239.

[b] **An auctioneer** (1) is not the person to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily. Minor v. Barker, 26 La. Ann. 160. (2) The creditor of a succession cannot demand that the auctioneer, who has sold property of the succession, shall pay over the proceeds of the property. Only the one charged with the administration of the succession is empowered to make such demand. Dowler's Succ., 29 La. Ann. 437.

27. Moore v. State, 43 Ind. A. 387, 84 NE 161; Matter of McGee, 65 App. Div. 460, 73 NYS 64; Matter of Van de Walker, 79 Misc. 661, 141 NYS 325; Matter of Bradley, 25 Misc. 261, 54 NYS 555.

28. Coombs v. Jordan, 3 Bland (Md.) 284, 22 AmD 236.

29. Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

Md.—Dent v. Maddox, 4 Md. 522.

Miss.—Beeks v. Rye, 77 Miss. 358, 27 S 635.

N. Y.—Matter of Lesourd, 27 Misc. 414, 59 NYS 371, 1 Mills Surr. 92.

N. C.—Moore v. Ingram, 91 N. C. 376.

Pa.—McClurg's Est., 4 Pa. Dist. 655; Barber v. Ross, 13 Pa. Co. 613; In re Kennedy, 1 LackLegN 135.

S. C.—Lockwood v. Lockwood, 73 S. C. 18, 52 SE 735.

Tenn.—Fulton v. Davidson, 3 Heisk. 614.

Va.—Penn v. Tucker, 114 Va. 669, 77 SE 473.

[a] **Proceeds of a sale under order of court in aid of a will** must be distributed under the order of the court. Brandon v. Mason, 1 Lea (Tenn.) 615.

[b] **Rights of claimants determined by court.**—In the distribution of the fund for the payment of debts, the orphans' court has jurisdiction to determine the rights of all claimants thereto. Grove's App., 103 Pa. 562.

[c] **Order not warranting distribution.**—An order directing an executor to sell lands as directed by the will, and that the remainder is distributed after payment of costs and solicitor's fee, in accordance with the interests of defendants as shown in the executor's petition for the sale, is an interlocutory order, and does not warrant distribution of the proceeds of the sale. Beeks v. Rye, 77 Miss. 358, 27 S 635.

[d] **Finality of decree.**—Where, during the administration of an estate which was indebted to judgment creditors, the court directed a sale of property subject to homestead, and required that the receiver invest the fund for the benefit of the infants during their minority, and that on the termination of the homestead estate the principal should be applied to the judgment, after which the decree was removed from the docket, with leave to reinstate it at any time within three years, the decree was not final, and the principal sum having been deposited in a bank, and remaining until the termination of the homestead without ever having been applied to the judgment, its subsequent disposition was subject to further order of the court. Penn v. Tucker, 114 Va. 669, 77 SE 473.

[e] **Appealability of order of court.**—A decree of the court of common pleas which does not distribute the whole fund raised upon the sale of real estate is not final; and in case a creditor is not satisfied with the partial appropriation of the fund, he must wait until a decree is made distributing the entire fund, when he may appeal, and have redress for any error committed in such partial appropriation. Stultzfoos' App., 3 Penr. & W. (Pa.) 265.

[f] **Clerk of superior court.**—The jurisdiction to direct the application of the proceeds is exclusively in the clerk of the superior court, and an order made by a judge of such court in term time as to such proceeds is extrajudicial. Moore v. Ingram, 91 N. C. 376.

30. U. S.—Garnett v. Macon, 10 F. Cas. No. 5,245, 2 Brock. 185, 6 Call. (10 Va.) 308; Greenway v. Roberts, 10 F. Cas. No. 5,790, 2 Cranch. C. C. 246.

Ind.—Globe Mercantile Co. v. Perkeypile, 125 NE 29.

Iowa.—Lees v. Whetmore, 58 Iowa 170, 12 NW 238.

Md.—Coombs v. Jordan, 3 Bland 284, 28 AmD 236.

Mo.—Howell v. Jump, 140 Mo. 441, 41 SW 976.

Oh.—Holloway v. Stuart, 19 Oh. St. 472; Defrees v. Greenham, 11 Oh. St. 486; Muskingum Bank v. Carpenter, 7 Oh. 21, 28 AmD 616.

Pa.—Dixey v. Laning, 49 Pa. 143; McCartney's Est., 2 Pa. Co. 202, 18 WklyNC 51.

S. C.—Spencer v. Godfrey, 8 S. C. Eq. 468.

Tex.—Blanton v. Mayes, 72 Tex. 417, 10 SW 452.

Va.—Meeks v. Thompson, 8 Gratt. (49 Va.) 134, 56 AmD 134.

Wash.—Wallace v. Grant, 27 Wash. 130, 67 P 578.

31. Wallace v. Grant, 27 Wash. 130, 67 P 578.

32. Liability on warranty see supra § 1699.

Sale of personalty under testamentary authority or common-law power see supra § 752.

Sale of realty under testamentary authority see supra § 688.

33. Gale v. O'Connor, 43 La. Ann. 717, 9 S 557; In re Conser, 40 Or. 138, 66 P 607; In re Worcester, 60 Vt. 420, 15 A 336; Clarke v. Johnson, 164 Wis. 461, 160 NW 180.

[a] **Sale for less than appraised value.**—An executor acting in good faith is not responsible for selling a note and mortgage at less than its appraised value, the testimony as to its actual value being conflicting. In re Conser, 40 Or. 138, 66 P 607.

[b] **A public administrator** cannot be proceeded against as a wrongdoer because of his making a sale brought about by a conspiracy in which he did not participate. Gale v. O'Connor, 43 La. Ann. 717, 9 S 557.

34. Wilbanks v. Crosno, 112 Ill. A. 503.

35. Fisher v. Fisher, 33 Oh. Cir. Ct. 525 [aff 86 Oh. St. 337 mem, 99 NE 1126 mem].

36. See cases infra this note.

[a] **Sale to claimant in satisfaction of claim.**—The administrator is not chargeable with the proceeds of a sale on credit to a claimant in satisfaction of his claim. Mason v. Rodgers, 83 Tex. 389, 18 SW 811.

[b] **The administrator was liable only in Confederate money,** when he had received such money at a time when it was the only currency of the state. Herron's Succ., 32 La. Ann. 835.

[c] **Where an agent of the executrix had received the purchase money** and had been appointed to succeed her upon her death, the presumption was the money was still in his possession, and her estate was not liable therefor. Coussy v. Vivant, 12 La. Ann. 44.

[d] **Receipt by coexecutor.** — Where one of two executors obtained the order and sold, he was held liable for the proceeds, although his

representative is not liable.[37] But a representative who reports a sale for cash is bound by his report, and cannot escape liability by proving that the sale was on credit.[38] A commissioner to sell, who deposited the purchase money in a solvent bank, has been held not liable when the bank became insolvent at the close of the Civil War.[39] The representative is liable in his representative capacity only for what he receives in that capacity,[40] and the proceeds of a void sale do not become assets with which the representative is chargeable in his representative capacity,[41] although he is chargeable with rents and profits for the time during which the purchaser retains the land.[42] The representative is of course liable for an improper disbursement of the proceeds,[43] and may be charged with interest because of failure to distribute the proceeds at the proper time.[44] Until there has been an accounting in the probate court the right of action for the proceeds is in the administrator de bonis non and not in the heirs.[45]

An action by heirs for the proceeds is personal and not in the nature of a revendication.[46]

[§ 1738] **b. Failure to Collect.** The personal representative making the sale is liable for any loss resulting from a failure to realize the purchase price, if he has disregarded the requirements of law or of the order of sale, as by extending credit without authority[47] or, where authorized to sell on credit, if he has omitted to take security as required by law or the order of sale;[48] and he is also chargeable with the depreciation of currency received without authority.[49] Independent of express directions, it is negligence charging the representative for any resulting loss if he extends credit without requiring security by mortgage or by some means other than the personal obligation of the purchaser.[50] The representative may also render himself liable by negligence in not proceeding to collect the purchase money.[51] But he is not liable for the deficiency or failure of securities taken by him if they were taken in good faith and without negligence.[52]

[§ 1739] **3. For Negligence or Misconduct in Selling.** The representative will be chargeable with a loss which results from his failure in any substantial respect to follow the requirements of the law as to the manner of making the sale[53] or his

coexecutor received part. Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72.

[e] **Presumption of receipt of payment.**—After twelve years it will be conclusively presumed that a trustee selling land received payment and he will be accountable therefor. Maddox v. Dent, 4 Md. Ch. 543.

[f] **The statute of limitations** begins to run against the heirs only from the time the administrator actually receives the money. Boswell v. Underwood, 84 Ga. 79, 10 SE 595.

[g] **An administrator de bonis non is liable only** for what came into his hands. Dray v. Bloch, 27 Or. 549, 41 P 660.

[h] **Sale of encumbered land.**—Where land was sold subject to a mortgage, but the amount of the mortgage could not be ascertained, and bids were taken without considering the mortgage, with an agreement that the amount due thereon should be deducted from the price, and this was done, the administrator was not chargeable with the amount allowed to the purchaser on account of the mortgage; but he was chargeable with accrued interest and state taxes which he deducted from the bid. Crosson's Est., 6 Pa. Co. 14, 22 WklyNC 226 [aff 125 Pa. 380, 17 A 423].

37. In re Vandervoort, 1 Redf. Surr. (N. Y.) 270.

38. Davis' App., 14 Pa. 371.

39. Thomson v. Brooke, 76 Va. 160.

40. Abby v. Fuller, 8 Metc. (Mass.) 36; Diehl's App., 33 Pa. 406. But compare In re Moyer, 1 Pearson (Pa.) 407 (administrator charged with the whole purchase price, where by mistake the sale had been made discharged of encumbrances, in violation of the order, and the administrator had paid the mortgage out of the purchase money).

[a] **Illustration.**—Where the land was sold with notice that the proceeds would be first applied to discharge the mortgage, and this was done, only the value of the equity came into the administrator's hands as assets, and he was not answerable to the estate for the amount of the mortgage which he paid. Abby v. Fuller, 8 Metc. (Mass.) 36.

41. Pettit v. Pettit, 32 Ala. 288; Brandon v. Brown, 106 Ill. 519.

[a] **Illustration.** — An executor need not account for proceeds of a sale where the legatees recovered the land in ejectment and the executor returned the money to the purchaser. Brandon v. Brown, 106 Ill. 519.

42. Anderson v. McGowan, 42 Ala. 280.

43. See cases infra this note.

[a] **The representative may be held liable for:** (1) Attorney's fees chargeable upon the fund, where he disbursed the fund without waiting for the approval of his account. Clark's App., 93 Pa. 369. (2) A lien, to meet which he should have withheld sufficient funds. Cramp's App., 81 Pa. 90 [rev 8 Phila. 204].

[b] **An accounting may be compelled** where the administrator does not pay the proceeds into court, as required by statute. Matter of Bradley, 25 Misc. 261, 54 NYS 555.

44. Mades v. Miller, 2 App. (D. C.) 455.

45. Neagle v. Hall, 115 N. C. 415, 20 SE 516.

46. Bennett v. Alexander, 15 La. Ann. 469.

47. Kelley v. Helmkamp, 40 Ill. A. 35; Richards v. Adamson, 43 Iowa 248; In re Dillebaugh, 4 Watts (Pa.) 1835.

48. James v. Faulk, 54 Ala. 184; Payne v. Pippey, 49 Ala. 599; Betts v. Blackwell, 2 Stew. & P. (Ala.) 373; Roberts v. Adams, 2 S. C. 337; Lamb v. Lamb, 17 S. C. Eq. 239, 40 AmD 618; Massey v. Cureton, 15 S. C. Eq. 181; Peay v. Fleming, 11 S. C. Eq. 97; Stukes v. Collins, 4 S. C. Eq. 207.

[a] **The representative cannot discharge himself** by showing: (1) That his disregard was disclosed by his report of sale, and that the sale was confirmed. James v. Faulk, 54 Ala. 184. (2) That stay laws and military orders prevented the collection. Roberts v. Adams, 2 S. C. 337.

[b] **On an order requiring sureties to be taken,** an administrator becomes responsible if he takes sureties who are nonresidents of the state. Roberts v. Adams, 2 S. C. 337. Contra Shields v. Jones, 68 N. C. 488.

49. Brewer v. Vanarsdale, 6 Dana (Ky.) 204; Williams v. Campbell, 46 Miss. 57.

50. Bowen v. Shay, 105 Ill. 132; In re Palmer, 1 Dougl. (Mich.) 422; King v. King, 3 Johns. Ch. (N. Y.) 552; Roseman v. Pless, 65 N. C. 374.

[a] **Waiver of vendor's lien.**—The administrator is liable for a resulting loss if he waives the vendor's lien for purchase money by taking indorsed notes, although the indorsers were in good credit and reputed to be responsible, and although a higher price was obtained than if there had been a sale for cash. In re Palmer, 1 Dougl. (Mich.) 422.

51. Beeman's Succ., 47 La. Ann. 1355, 17 S 820; Dent v. Maddox, 4 Md. 522 [aff as to this point 4 Md. Ch. 543]; Kennedy's App., 4 Pa. 149; Carpenter v. Stowe, 75 Vt. 114, 53 A 360.

[a] **Illustrations.**—(1) Where the purchaser refused to take a life estate sold, without a conveyance from the remainderman, whom the administrator agreed to compensate out of the purchase money, the administrator is liable for the whole purchase price, as he could have compelled the purchaser to perform his bid. Kennedy's App., 4 Pa. 149. (2) Where the administrator took a bag represented by the purchaser to contain the full amount, and he counted it one or two days later, found it short, and said nothing to the purchaser, he is held liable for the full price. Carpenter v. Stowe, 75 Vt. 114, 53 A 360.

[b] **On a sale free from encumbrances,** where the purchaser refused to comply with his bid because of encumbrances, some of which were not paid until after the time for completing the sale, the administrator was not liable for the purchase price, as it was his duty merely to resell. Wanzer v. Eldridge, 33 N. J. Eq. 511.

[c] **Where a master made the sale** and there was a loss through the neglect of the master to seek payment, the executor is not responsible. Thompson v. Wagner, 3 S. C. Eq. 94.

[d] **Slight delay in suing.**—An administrator does not render himself liable by allowing one term of court to pass before suing. Gwynn v. Dorsey, 4 Gill & J. (Md.) 453. See also Davis v. Marcum, 57 N. C. 189 (delay of one month in suing on bond).

52. Gordon v. Gibbs, 11 Miss. 473; Davis v. Yerby, Sm. & M. Ch. (Miss.) 508; Shields v. Jones, 68 N. C. 488; Davis v. Marcum, 57 N. C. 189.

53. Ill.—Wilbanks v. Crosno, 112 Ill. A. 503.

Ind.—Sparrow v. Kelso, 92 Ind. 514.

La.—Fontenet v. Debaillon, 8 La. Ann. 509.

Mich.—Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Mo.—In re Glover, 127 Mo. 153, 29 SW 982.

Pa.—Schwartz's Est., 12 Phila. 71.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

[a] **Illustrations.**—(1) A repre-

failure to exercise ordinary skill, prudence, and caution in making the sale,[54] and he must also bear a loss occasioned by unreasonably and improperly delaying the sale.[55] He may render himself liable by knowingly selling for a grossly inadequate price.[56] An administrator who knowingly and fraudulently obtains an order and sells land when no necessity therefor exists will be charged with the value of the land at the time that suit is brought for an accounting,[57] while if the sale is set aside the administrator will be charged personally with the costs of such proceedings.[58]

[§ 1740] **4. For Purchasing at His Own Sale.** An executor or administrator who purchases the property at a sale under order of the court is, unless the heirs or devisees recover the land itself,[59] as they are entitled to do in case they elect to have the sale set aside,[60] chargeable with the full value of the land[61] at the time of the sale,[62] or perhaps at the time of the suit.[63] If he has resold he is chargeable with all the profits realized on the resale.[64] It must, however, be shown in order to so charge the representative that he was interested at the time of the sale.[65] As to such interest the report of the representative showing himself to be the purchaser is conclusive against him,[66] but the record is not conclusive in his favor.[67] Where personal property of an estate is sold at a private sale pursuant to an order of the court, and is purchased by a person with a fund in which one of

sentative who sells without giving the required notice, at less than the appraised value, will be charged with such value. Morton v. Johnston, 124 Mich. 561, 83 NW 369. (2) An administrator authorized to sell notes for their face value with accrued interest, who sells them for less, should be charged with the full amount. In re Glover, 127 Mo. 153, 29 SW 982. (3) An administrator selling without giving notice of a mortgage is liable for the expense of reselling. Schwartz's Est., 12 Phila. (Pa.) 71.

[b] **A failure to take bond to indemnify against liens** (1) subject to which the sale was made renders the representative liable. Sparrow v. Kelso, 92 Ind. 514. (2) But it is otherwise where the purchaser is solvent, because he is liable without a bond and there is no loss. State v. Kelso, 94 Ind. 587.

[c] **Failure to resell,** where the purchaser fails to comply with the terms, renders the representative liable. Fontenet v. Debaillon, 8 La. Ann. 509.

[d] **Sale irrespective of appraisal.**—(1) The administrator is liable for the difference between the appraised value of movables and the sum for which they were sold, if the sale was improperly made irrespective of the appraisal. Richmond's Succ., 35 La. Ann. 858. (2) There is no such liability where the sale was for full value. Lee's Succ., 4 La. Ann. 578.

54. In re Seidman, 261 Pa. 540, 104 A 799.

55. Goodbear v. Gary, 1 La. Ann. 240; In re Gorman, 50 Mo. 179; Bland v. Hartsoe, 65 N. C. 204.

[a] **Delay in good faith.**—The administrators are not chargeable with loss occasioned by refusing an offer and selling later for a less price, where they acted on competent advice and the property depreciated in consequence of a general financial depression which intervened. Sunday's App., 131 Pa. 584, 18 A 931.

[b] **Injunction as excuse for delay.**—A personal representative is not guilty of laches for delay in selling land, where it appears that the delay was caused by injunction proceedings and by frequent disapprovals of attempted sales by the probate court. Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

56. Montgomery v. Black, 75 Ark. 184, 86 SW 1006; Hautau's Succ., 32 La. Ann. 54; Matter of Weed, 81 Misc. 386, 143 NYS 349; Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

[a] **Illustration.**—An administrator is liable for the value of a half interest which he sold for one hundred and ten dollars, having bought the other half for himself at about the same time for fifteen hundred dollars. Matter of Johnston, 74 Hun 618, 26 NYS 966 [aff 144 N. Y. 563, 39 NE 643].

Estoppel of heir who participated see infra § 1741.

57. Ark.—Stuckey v. Lockard, 87 Ark. 232, 112 SW 747.

Cal.—Richardson v. Sage, 57 Cal. 212.

Ga.—Bell v. Bell, 20 Ga. 250.

N. Y.—Hart v. Ten Eyck, 2 Johns. Ch. 62.

S. C.—Farys v. Farys, 5 S. C. Eq. 261.

[a] **An executor who concurs with his coexecutor** in obtaining a sale without necessity and in obtaining its confirmation is liable for a loss occasioned by the failure of his coexecutor to record a mortgage for the purchase money. Bailey v. Boyce, 26 S. C. Eq. 187.

[b] **Gross negligence or fraud** must appear in order to fix such liability. Richardson v. Sage, 57 Cal. 212.

58. Loomis' App., 29 Pa. 237; Hurt v. Horton, 12 Tex. 285.

59. Miller v. Binion, 33 Ga. 33; Chapman v. Sims, 53 Miss. 154.

60. See supra § 1590.

61. Ala.—Ward v. Oates, 42 Ala. 225.

Ga.—Chandler v. Clarke, 90 Ga. 550, 16 SE 645.

Iowa.—Walker v. Walker, 127 Iowa 77, 102 NW 435.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

N. J.—Huston v. Cassidy, 14 N. J. Eq. 320.

N. C.—Lord v. Blount, 25 N. C. 516; Britton v. Browne, 4 N. C. 332.

Pa.—Wallington's Est., 1 Ashm. 307.

S. C.—Gee v. Hicks, 9 S. C. Eq. 5.

Va.—Bailey v. Robinson, 1 Gratt. (42 Va.) 4, 42 AmD 540.

[a] **How value ascertained.**—The value must be ascertained, not by conjecture of witnesses, but by reselling the land with a proper upset price. Bailey v. Robinson, 1 Gratt. (42 Va.) 4, 42 AmD 540.

[b] **A doubt as to value** should be resolved in favor of the heirs. Huston v. Cassidy, 14 N. J. Eq. 320.

[c] **An administrator purchasing jointly with another** is responsible for the entire price, and a distributee may sue for his share. Ward v. Oates, 42 Ala. 225.

[d] **Where two administrators bought,** and one received the money as guardian for minor heirs, the fact that he wasted it was no defense in an action against the other for the value. Chandler v. Clarke, 90 Ga. 550, 16 SE 645.

[e] **Interest.**—Where wild lands were sold by the executor and bought in by himself, and the heirs elected to consider him as the purchaser, but no profit had accrued to him from the lands, and frequent taxes had been paid by him, and the lands were unsalable, and the title to some of the parcels doubtful, he should be charged with only simple interest. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

[f] **Where an agent made the sale** and became interested in the purchase, the administratrix would be chargeable with the full value of the land unless she called the agent to account. Currier v. Green, 2 N. H. 225.

[g] **Where the purchase was by the representative's wife** and there was no actual fraud, the representative is not subject to such liability. Armstrong's App., 68 Pa. 409.

62. Huston v. Cassedy, 13 N. J. Eq. 228; Glass v. Greathouse, 20 Oh. 503.

63. Shine v. Redwine, 30 Ga. 780.

64. Ala.—Pearson v. Darrington, 32 Ala. 227.

Ark.—Ambleton v. Dyer, 53 Ark. 224, 13 SW 926.

Ind.—Brackenridge v. Holland, 2 Blackf. 377, 20 AmD 123.

Ky.—Goodridge v. Fitch, 9 B. Mon. 562.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

N. C.—Grant v. Hughes, 99 N. C. 375, 6 SE 572, 96 N. C. 177, 2 SE 339; Ford v. Blount, 25 N. C. 516.

Pa.—Hacker's Est., 7 Pa. Co. 202, 24 WklyNC 318; Deal's Est., 3 Pa. Co. 383.

Vt.—Hapgood v. Jennison, 2 Vt. 294.

[a] **Resale for more than actual value.**—Where an administrator, through the agency of another, became the purchaser of lands of the decedent sold by himself under a license from the court, for the sum of five hundred dollars, and afterward sold the land upon a long credit for one thousand dollars, which was well secured, he should be charged with the price for which he resold the land, although it had been found that the actual value of the land was seven hundred and fifty dollars. Grant v. Hughes, 99 N. C. 375, 6 SE 572 [mod on reh 96 N. C. 177, 2 SE 339].

[b] **Uncertainty as to amount of profits.**—If, owing to the conduct of the executor or administrator who has purchased real property of the decedent at a sale under order of the court, any uncertainty exists as to the amount of the profits made by him on such purchase and a subsequent resale, he will be chargeable with the largest amount which from the circumstances he can be presumed to have realized. Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 AmD 123.

[c] **Adjustment where several lots purchased.**—An administrator cannot be compelled to account for profits on lots resold without allowing him for the remaining lots which were worth less than he paid for them. Hapgood v. Jennison, 2 Vt. 294.

[d] **Hiring slaves.**—An administratrix who sets up slaves of the estate to be hired publicly, then hires them herself at a much reduced price, and then hires them out to other persons at an advanced price, will be held to account for the advanced price, or, if that cannot be ascertained, for reasonable hire. Cross v. Cross, 4 Gratt. (45 Va.) 257.

65. Smith v. Worthington, 53 Fed. 977, 4 CCA 130; Baldwin v. Dalton, 168 Mo. 20, 67 SW 599.

66. James v. James, 55 Ala. 525.

67. Grant v. Hughes, 96 N. C. 177, 2 SE 339.

the executors has a half interest, the entire loss sustained by the estate by reason of the sale of such property at the price at which it was sold should be charged to the executors.[68]

[§ 1741] **5. Estoppel.** Persons interested in the land or proceeds may be estopped from asserting a liability against the representative where they agreed that the sale should be made in the manner in which he proceeded.[69]

XIII. INSOLVENT ESTATES

[§ 1742] **A. In General.** The executor or administrator of an insolvent estate represents the general creditors and holds the property of the estate in trust for them.[70] It is his duty to represent the estate as insolvent and to invoke the action of the probate court accordingly, that the assets may be administered for the general benefit of creditors,[71] and where the estate is actually insolvent, he cannot take it out of the insolvent course of administration by his mere agreement.[72]

[§ 1743] **B. What Law Governs.**[73] The administration of an insolvent estate is governed by the law of the place where the estate is situated.[74] But this rule does not deprive a citizen of another state of a right to bring his suit against the administrator in the federal court.[75]

[§ 1744] **C. Insolvency Proceedings—1. Jurisdiction—a. Probate Court.** Ordinarily the administration and settlement of an estate declared insolvent should be carried out and concluded in the probate court.[76] The power of that court in such cases is governed wholly by statute,[77] but is usually sufficiently large to enable it to adjudicate on all matters in reference to the insolvency; and therefore proceedings in the probate court by the administrator will not be enjoined unless it is clear that the facts relied on for the injunction cannot be adjudicated in that court.[78] The probate jurisdiction attaches upon receiving the representatives' report or representation of insolvency, and thenceforward the executor or administrator is considered the actor and is held to notice of subsequent proceedings.[79]

[§ 1745] **b. Courts of Equity.** A court of equity may have jurisdiction where there are conflicting interests or some question of special equitable cognizance is involved.[80] A statute providing that the county courts shall have concurrent jurisdiction with the chancery and circuit courts to sell real estate of decedents, and that the mode of procedure in the county courts shall conform to the regulations for the conduct of similar cases in the chancery and circuit courts, has been held not to repeal by implication the special system of legislation contained in the code for the administration of insolvent estates, and not to interfere with the jurisdiction of the subject as distributed between the chancery and the county courts.[81]

[§ 1746] **2. Grounds for Declaration of Insolvency.** It has been held that a declaration of insolvency should be based on the insufficiency of the personal estate to pay the debts,[82] but it has also been asserted that the insolvency should be estimated upon the value of the whole estate both real and personal.[83] The executor or administrator should not represent the estate insolvent unless he has good reason to believe it so;[84] nor ought the probate judge to allow such a representation and proceed with the estate as insolvent, unless he also on examination has good reason to believe it to be so.[85] The assets need not have been reduced to money but it is sufficient that the representative, from a fair estimate of their value, believes the estate to be insolvent,[86] and an estate is prima facie insolvent where evidences of debt filed against it exceed in amount its available as-

68. Wilbanks v. Crosno, 112 Ill. A. 503.

69. Schroeder's Est., 2 Woodw. (Pa.) 290; Moore v. Woodson, 53 Tex. Civ. A. 588, 116 SW 608.

[a] **An heir who as joint administrator actively participated** in a sale of the property is estopped from claiming any damages against his coadministrator because of the inadequacy of the price for which the property was sold, although other heirs, in a suit against the administrators, obtained a judgment fixing the liability to the estate for the wrongful sale. Moore v. Woodson, 53 Tex. Civ. A. 588, 116 SW 608.

70. Hughes v. Menefee, 29 Mo. A. 192; Shallcross v. Eastburn, 24 Pa. Dist. 558.

71. McGehee v. Lomax, 49 Ala. 131; Yandell v. Pugh, 53 Miss. 295; McMahon v. Weart, (N. J. Ch.) 35 A 444; In re Barr, 4 Newfoundl. 715.

[a] **An administrator de bonis non** has the duty of declaring and administering the estate as insolvent upon the failure of the administrator in chief to do so. Lambeth v. Garber, 6 Ala. 870; Yandell v. Pugh, 63 Miss. 295.

72. Janes' App., 89 Pa. 54.

73. As to administration generally see supra § 54.

74. Moorehead v. Diemer, 2 Baxt. (Tenn.) 153; Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581. See supra § 54.

75. Hunt v. Danfort, 12 F. Cas. No. 6,887, 2 Curt. 592.

76. Shackelford v. Bankhead, 72 Ala. 476; Clark v. Eubank, 65 Ala. 245; McBroom v. McBroom, 19 Ala. 173; Boston Fourth Nat. Bank v. Mead, 214 Mass. 549, 102 NE 69; Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 NYS 48 [rev on other grounds 198 N. Y. 470, 91 NE 1103, 28 LRANS 440, 19 AnnCas 791].

[a] **Probate jurisdiction exclusive under statute.**—Boston Fourth Nat. Bank v. Mead, 214 Mass. 549, 102 NE 69.

77. Weaver v. Weaver, 23 Ala. 789; Steele v. Weaver, 20 Ala. 540; Boggs v. Mobile Branch Bank, 12 Ala. 494; Martin v. Baldwin, 7 Ala. 923; Ives' App., 28 Conn. 416; Bacon v. Thorp, 27 Conn. 251; Miller v. Pettit, 16 N. J. L. 421; McMahon v. Weart, (N. J. Ch.) 35 A 444; Fleming v. Talliafer, 4 Heisk. (Tenn.) 352; Smith v. Brady, 7 Yerg. (Tenn.) 447.

78. Koch v. Feick, 81 N. J. Eq. 120, 86 A 67; McMahon v. Weart, (N. J. Ch) 35 A 444.

79. Hayes v. Collier, 47 Ala. 726; Watts v. Gayle, 20 Ala. 817; Crothers v. Ross, 17 Ala. 816; Clarke v. West, 5 Ala. 117.

[a] **Want of actual notice to creditors** is not fatal. Hine v. Hussey, 45 Ala. 496.

80. Ala.—Clark v. Head, 75 Ala. 373; Shackelford v. Bankhead, 72 Ala. 476; Gayle v. Singleton, 1 Stew. 566.

Ga.—Jeter v. Barnard, 42 Ga. 43.

Md.—Willinger v. Baltimore German Bank, 132 Md. 237, 103 A 433.

R. I.—Williams v. Starkweather, 22 R. I. 501, 48 A 669.

S. C.—Thomson v. Palmer, 24 S. C. Eq. 139.

See also Equity § 97 et seq.

[a] **Such jurisdiction exists** (1) where there is a homestead controversy involving questions of fraud. Corr v. Shackelford, 68 Ala. 241. (2) Where the creditors are numerous, a court of equity may take jurisdiction. Thomson v. Palmer, 24 S. C. Eq. 139 (bill to enjoin creditors from suing at law). (3) Where the mortgagee of property belonging to an insolvent estate files his bill to foreclose and the lien on the mortgage has been lost by lapse of time, chancery will take jurisdiction to call in all the creditors of the estate and make distribution among them. Gayle v.Singleton, 1 Stew. (Ala.) 566.

[b] **Special grounds of equitable jurisdiction must be disclosed.**—Where executors have reported to the probate court that their testator's estate was insolvent, a creditor's bill seeking to remove the estate into a court of equity for administration must disclose some special ground of equity. Pollock v. Haigler, 195 Ala. 522, 70 S 258.

81. Key v. Harris, 116 Tenn. 161, 82 SW 235, 8 AnnCas 200.

82. Byrne v. McDow, 23 Ala. 404; Woods v. McCann, 3 Ala. 61; Fleming v. Talliafer, 4 Heisk. (Tenn.) 352; Blount County Bank v. Smith, (Tenn. Ch. A.) 48 SW 296.

83. Saunders v. Planters' Bank, 10 Miss. 287 (an order to sell the realty need not be obtained before the estate is declared insolvent).

84. Walker v. Hill, 17 Mass. 380.

85. Walker v. Hill, 17 Mass. 380.

86. Neibert v. Withers, Sm. & M. Ch. (Miss.) 599.

sets, although some of the claims are disputed.[87] Where an estate solvent in fact is declared and administered as insolvent, the proceedings, if not fraudulent, are nevertheless valid and binding, and there is no remedy against the executor or administrator personally.[88]

[§ 1747] **3. Representation of Insolvency—a. In General.** The representation of insolvency should show to the court that the estate appears to the executor or administrator to be insolvent,[89] should be in the name of all the executors or administrators, where there are more than one,[90] although it may be sufficient when signed and verified by one alone,[91] and should be filed in the office or court prescribed by statute.[92] It is immaterial whether the representation is made by the original executor or administrator or by his successor in trust.[93]

[§ 1748] **b. Time of Making.** The estate should be represented insolvent within the time prescribed by statute, if any there be.[94] In the absence of statute there is no particular limitation of time;[95] but the representative is on the one hand entitled to a reasonable time in which to determine whether or not the estate is insolvent,[96] while on the other hand he must make his representation of insolvency within a reasonable time.[97] When a litigated claim against the estate is about to result in judgment for the creditor, and there is doubt as to the solvency of the estate, the proper time for representation of insolvency is before judgment.[98]

[§ 1749] **4. Notice.** Under some statutes creditors are the only persons to whom notice of the proceedings for a decree of insolvency is required.[99]

[§ 1750] **5. Right to Oppose Representation.** Next of kin who are entitled to the estate if claims against it are barred may question and oppose the representative's application to have the estate declared insolvent.[1] Persons who do not claim as creditors, but merely seek to enforce a trust in their favor against decedent, cannot move for an injunction to restrain proceedings by the executor to have the estate declared insolvent, where the statute entitles "creditors" only to such relief.[2]

[§ 1751] **6. Hearing and Determination.** In determining insolvency all valid claims presented against the estate should be considered,[3] and also the assets or resources of the estate,[4] and the representative's prudence or conduct in administering.[5] The court has power to adjudicate on all questions raised in reference to the insolvency,[6] but it is not proper to adjudicate finally upon the correctness or validity of claims or payments that may be incidentally involved;[7] nor should the same strictness and fullness of proof as to their validity be required as when they are up for final adjudication on their merits in an appropriate proceeding for that purpose.[8]

[§ 1752] **7. Decree.** A decree of insolvency merely ascertains, as between the personal representative and the creditors, the existing status of the estate, and is binding on both the executor or administrator and the creditors,[9] and not subject to collateral attack,[10] except for fraud[11] or want of jurisdiction;[12] or unless the attacking creditor's right of action did not accrue until after final settlement.[13] A failure to make the surety of the administratrix a party to a proceeding by her for an accounting authorizes the surrogate in his discretion to entertain the application of the surety

87. Life Assoc. of America v. Neville, 72 Ala. 517.

88. Ticknor v. Harris, 14 N. H. 272, 40 AmD 186; Probate Judge v. Brooks, 5 N. H. 82.

89. Shackleford v. King, 24 Ala. 158; Barker v. Wendell, 17 N. H. 159.

[a] **Representation held sufficient.**—A representation that "the estate being greatly involved makes it necessary to represent the same insolvent" and begging "leave so to represent the same" is representing it insolvent. Barker v. Wendell, 17 N. H. 159.

[b] **If decedent was a member of a partnership** the extent of his interest therein and the liabilities of the firm should be shown. Raines v. Raines, 30 Ala. 425.

[c] **Filing a full statement** of such claims "as come to his knowledge" is sometimes required of the representative. McDowell v. Jones, 58 Ala. 25.

90. Steele v. Weaver, 20 Ala. 540; Hutchinson v. Newbold, 45 N. J. Eq. 698, 17 A 691.

91. Steele v. Weaver, 20 Ala. 540.

92. See cases infra this note.

[a] **Where filed.**—(1) A written suggestion of insolvency must be filed in the office of the judge of the county court in which letters testamentary or administration have been granted. Holliday v. McKinne, 22 Fla. 153. (2) It is competent for an administrator to file his petition in the county court; he is not required to file in the quarterly court of the presiding justice. Graves v. Cook, 12 B. Mon. (Ky.) 122.

93. Quackenbush v. Campbell, Walk. (Mich.) 525.

94. Parker v. Whiting, 7 Miss. 352; Williams v. Starkweather, 22 R. I. 501, 38 A 669; McGowan v. Peabody, 20 R. I. 582, 40 A 758; Strong v. Luther, 20 R. I. 317, 38 A 1054.

95. Hullett v. Hood, 109 Ala. 345, 19 S 419; Quackenbush v. Campbell, Walk. (Mich.) 525; Von Arx v. Wemple, 43 N. J. L. 154.

[a] **Representative may report insolvency immediately after appointment.**—Hullett v. Hood, 109 Ala. 345, 19 S 419.

96. Barber v. Collins, 18 R. I. 760, 30 A 796; Pierce v. Allen, 12 R. I. 510.

97. Daniel v. Lowe, 7 Heisk. (Tenn.) 361.

98. Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

99. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.

1. McMahon v. Weart, (N. J. Ch.) 35 A 444.

2. Koch v. Feick, 81 N. J. Eq. 120, 86 A 67.

3. Nicholas v. Sands, 136 Ala. 267, 33 S 815; Saunders v. Planters' Bank, 10 Miss. 287; In re McMahon, [1900] 1 Ch. 173.

[a] **Costs** accruing in the ordinary course of administration are proper to be proved. Nicholas v. Sands, 136 Ala. 267, 33 S 815; Hatchett v. Corbow, 59 Ala. 516.

[b] **Claims barred by limitations** will not be considered. Haby v. Fuos, (Tex. Civ. A.) 25 SW 1121.

4. Feagan v. Kendall, 43 Ala. 628.

[a] **Liability of representative for negligence.**—The amount chargeable to the executor or administrator for his own failure to use proper diligence to collect debts due the estate is an asset in his hands, and must be reckoned as such in considering the question of the solvency or insolvency of the estate. Feagan v. Kendall, 43 Ala. 628.

5. Weakley v. Gurley, 60 Ala. 399; Furlow v. Tillman, 21 Ga. 150; Bramblet v. Webb, 19 Miss. 438; Williams v. Starkweather, 22 R. I. 501, 38 A 669.

[a] **Depreciation due to representative's fault.**—Depreciation in the value of the estate, which is due to the representative's fault, should hinder him in procuring an award of insolvency from the court on his representation. Weakley v. Gurley, 60 Ala. 399; Bramblet v. Webb, 19 Miss. 438.

6. Allein v. Sharp, 7 Gill & J. (Md.) 96; McMahon v. Weart, (N. J. Ch.) 35 A 444.

[a] **A suit by agreement between an administrator and creditor** to have the estate settled as insolvent should be rejected at the creditor's cost on his failure to prove his claim. McClure v. Enoch, 7 KyL 830.

7. See cases infra note 8.

8. Willis v. Rand, 41 Ala. 198; Raines v. Raines, 30 Ala. 425; Greenwood v. McGilvray, 120 Mass. 516.

9. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465; McMillan v. Rushing, 80 Ala. 402; Randle v. Carter, 62 Ala. 95; McGehee v. Lomax, 49 Ala. 131; Moody v. Davis, 67 N. H. 300, 38 A 464.

[a] **The omission of creditors to file their claims** against an estate duly declared insolvent cannot annul the decree of insolvency. McCuan v. Turrentine, 48 Ala. 68.

[b] **An administrator cannot object** to the regularity of an order declaring an estate insolvent, made upon his own report. McLaughlin v. Nelms, 9 Ala. 925.

10. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 NYS 48 [rev on other grounds 198 N. Y. 470, 91 NE 1103, 28 LRANS 440, 19 AnnCas 791].

11. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Byrne v. McDow, 23 Ala. 404.

12. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Greenlaw v. Pettit, 87 Tenn. 467, 11 SW 357.

[a] **A decree rendered upon a compromise between creditors** without notice to the executor is absolutely void. Greenlaw v. Pettit, 87 Tenn. 467, 11 SW 357.

13. Bacon v. Thorp, 27 Conn. 251.

to open and amend the decree adjudging the insolvency of the estate and determining the percentage which it is able to pay on its indebtedness, which proceeding is an independent one, and not a mere step in the accounting.[14]

[§ 1753] **8. Review.** An appeal from a decree of a probate judge decreeing or refusing to decree insolvency should be taken within the time prescribed by statute,[15] and upon objections urged in the lower court.[16] The appellate court may order the cause to be remitted with directions for a further hearing.[17] A mere inaccurate instruction constitutes no ground for reversal, when the inaccuracy is not such as would unduly influence the jury.[18]

[§ 1754] **D. Estoppel to Assert Insolvency.** An executor or administrator who makes no attempt to declare the estate insolvent within the statutory period is estopped subsequently to assert its insolvency in proceedings by a creditor under a statute making the representative liable to creditors, where he neglects or refuses to raise money out of the estate or to pay over what he has in his hands to the creditors.[19]

[§ 1755] **E. Effect of Representation or Declaration of Insolvency—1. In General.** The effect of filing and advertising a report or representation of insolvency is to preclude the bringing of any suit against the executor or administrator upon claims due from the estate, to preclude any creditor from thereafter acquiring or perfecting a lien, and to require all persons to present their claims in the insolvency proceedings.[20] But until the executor or administrator has taken such steps common-law courts have no notice of the insolvency, and executions against the estate cannot be restrained.[21] The institution of insolvency proceedings does not suspend in favor of creditors the special statute of limitations with reference to actions against executors or administrators nor relieve them from their obligation to commence proceedings either at law or before commissioners within the time limited,[22] nor does it prolong the representative's right to resort to the real estate for the payment of debts.[23] The effect of a decree adjudging the estate to be insolvent is to transfer to the probate court the jurisdiction of all claims against the estate, so that the administration may proceed in conformity with the insolvent legislation.[24] The property passes into the custody of the law for administration on the basis of insolvency, notwithstanding prior and premature dispositions of such property, unless the proceeds of such transactions may serve fairly as a substitute,[25] and notwithstanding a prior attachment of the property.[26] But an order directing that the further administration of an estate should be conducted in the manner provided for the administration of insolvent estates is not retroactive, so as to render the administrator's previous unauthorized management of the intestate's real estate an administrative act for which he is bound to account to the probate court.[27] In the absence of statute the decree of insolvency does not affect the rights of heirs, next of kin, legatees, or devisees, nor is it evidence against them of any fact ascertained by it,[28] nor is its validity affected by their not being made parties to the proceedings.[29] Neither does a decree of insolvency in the orphans' court apply to trust funds held by decedent at his death, so as to deprive the cestui que trust of his property therein.[30] An adjudication of insolvency does not ipso facto terminate the authority of an executor or administrator who has previously qualified,[31] but where the creditors have elected an administrator, the effect is to revoke any former grant of letters on the estate.[32]

[§ 1756] **2. On Pending Actions.** In some jurisdictions the declaration of insolvency abates or discontinues all suits against the executor or administrator for the collection of claims against the estate, the creditors being remitted to proof of their claims before the judge or commissioners in

14. Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 NYS 48 [rev on other grounds 198 N. Y. 470, 91 NE 1103, 28 LRANS 440, 19 AnnCas 791] (such an application is the remedy of the surety).

15. Banks v. McDougald, 29 Ala. 75; Black v. Black, 20 Ala. 401.

16. Bristow v. McClelland, 122 Ind. 64, 22 NE 299.

17. Buckman v. Phelps, 6 Mass. 448.

18. Nicholas v. Sands, 136 Ala. 267, 33 S 815.

19. Williams v. Starkweather, 28 R. I. 145, 66 A 67.

20. Ryan v. Lyons, (Mass.) 99 NE 169; Rogers v. Rosenstock, 117 Miss. 144, 77 S 958; Bashaw v. Temple, 115 Tenn. 596, 91 SW 202; Spencer v. Goodlett, 104 Tenn. 648, 58 SW 322; Woods v. Woods, 99 Tenn. 50, 41 SW 345; Bates v. Elrod, 13 Lea (Tenn.) 156; Henderson v. McGhee, 6 Heisk. (Tenn.) 55; Wessell v. Gross, (Tenn. Ch. A.) 57 SW 372; Sellars v. Brown, (Tenn. Ch. A.) 46 SW 335; Raht v. Warren, 5 Tenn. Civ. A. 115.

No action on claim after representation of insolvency see infra § 1783.

21. Wyman v. Fox, 55 Me. 523; Dibble v. Woodhull, 24 N. J. L. 618; Bonner v. Bonner, 7 Humphr. (Tenn.) 436.

[a] **Execution on a judgment against the administrator** may be levied on real estate fraudulently conveyed where the administrator, in defending the action against his intestate, neglects to suggest insolvency on the record. Wyman v. Fox, 55 Me. 523.

22. Aiken v. Morse, 104 Mass. 277.

23. Aiken v. Morse, 104 Mass. 277.

24. McEachin v. Reid, 40 Ala. 410; Powe v. Sterrett, 16 Ala. 339; Edwards v. Gibbs, 11 Ala. 292; Hill v. Treat, 67 Me. 501; Brown v. Staples, 28 Me. 497, 48 AmD 504; Moody v. Davis, 67 N. H. 300, 38 A 464.

[a] **A decree of insolvency pending appeal** to ascertain to whom a note secured by a mortgage on the insolvent estate should be paid does not suspend the action of the court in granting a decree, or the right of the successful litigant to the sale of the mortgaged premises to pay the debt. Cannon v. Kinney, Sm. & M. Ch. (Miss.) 555.

[b] **Decree as evidence.**—Byrne v. McDow, 23 Ala. 404.

25. Fitzpatrick v. Alford, 134 Ga. 529, 68 SE 102; Hill v. Treat, 67 Me. 501; Heft's App., 19 WklyNC (Pa.) 302.

[a] **Illustration.** — A creditor claiming under a bill of sale sued the administrator and creditors, alleged to be asserting claims against cotton and mules, seeking to have the rights of the parties decreed. One defendant, alleged to have a claim to cotton as a buyer, demurred to the petition. Before determination of the demurrer the administrator was ordered to sell the mules. Later the demurrer was sustained and demurrant dismissed from the case after which a decree was taken between parties remaining in the litigation. Afterward, but before distribution of the fund from the sale under the decree, the administrator brought suit to marshal the assets of the estate, alleged to be insolvent, making creditors of decedent parties, including those claiming under the former decree, and the party who had been dismissed from the former suit, and asked for an injunction. It was held that an interlocutory order, granting an injunction as to other funds but excepting from the injunction the complainants in the former proceedings, and directing the fund from the sale to be paid to them in accordance with the former decree, was erroneous. Fitzpatrick v. Alford, 134 Ga. 529, 68 SE 102.

26. Belfast Sav. Bank v. Lancey, 93 Me. 422, 45 A 523, 74 AmSR 361.

27. Ayers v. Laighton, 73 N. H. 487, 63 A 43.

28. McMillan v. Rushing, 80 Ala. 402 (such was the rule prior to the act of Dec. 4, 1878); Randle v. Carter, 62 Ala. 95.

[a] **Where the statute does not require notice** of proceedings for a decree of insolvency to be given to any persons except creditors, the creditors are the only persons bound by such decree, and a decree does not divest an heir's title to the lands of an estate. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.

29. Randle v. Carter, 62 Ala. 95.

30. Koch v. Feick, 81 N. J. Eq. 120, 86 A 67.

31. Julian v. Woolbert, (Ala.) 81 S 32; Clay v. Gurley, 62 Ala. 14.

32. Julian v. Woolbert, (Ala.) 81 S 32.

insolvency.[33] But in other jurisdictions a pending suit may proceed to judgment so as to ascertain the amount due,[34] or in order better to preserve the litigant's rights in case the estate does not prove eventually insolvent[35] or the insolvency proceedings become defeated by the fault of the executor or administrator himself,[36] or the claim in question is disallowed by the commissioners;[37] and the same is true where the action is not one merely against the estate.[38]

Attachments may be dissolved by the institution of insolvency proceedings.[39]

[§ 1757] **3. On Judgments and Executions.** Where judgment was obtained before the representation of insolvency, its status, as establishing a valid claim against the estate, is not affected by the subsequent adjudication of insolvency,[40] and where a judgment was obtained and execution issued thereon before decedent's death, a report of insolvency does not cut off the lien of the judgment creditor.[41] If before or at the time of entry of a judgment against the estate, the personal representative declares the estate to be insolvent, the judgment can be allowed only as a pro rata claim against the estate, and no execution can issue thereon,[42] nor can a suit on the judgment be maintained against the personal representative.[43] Even where execution has issued, a declaration of insolvency will destroy the lien of the judgment and cause the execution to be set aside,[44] but where there has been an actual levy under an execution against the representative, a subsequent representation and adjudication of insolvency does not, it has been held, defeat the lien of the execution on the property levied on.[45]

[§ 1758] **4. On Prior Payment of Claims.**[46] An executor or administrator who without authority, although in good faith, distributes or pays out moneys of the estate voluntarily in the belief that it is solvent must generally bear the consequences of his mistake if it afterward proves insolvent,[47] although in his final accounting he may be allowed so much as would have been received under the insolvency proceedings by the person to whom the payment was made.[48] Neither can he recover back any part of the sums so paid,[49] except by virtue of some statutory provision,[50] or under an agreement to refund.[51] The amount previously paid by the executor or administrator to a creditor toward his pro rata dividend upon a debt actually due from decedent should be allowed upon the final settlement of the accounts, although such creditor neglects to come in and prove his debt and claim a dividend thereon.[52]

Agreement as to payment. Where the executor of a shipowner authorized the master of the ship to pay to himself a debt due him from decedent out of the first earnings of the ship, being then unaware of the insolvency of the estate, the master was not entitled, after the estate proved insolvent, to retain the amount of such debt as against the executor.[53]

33. Clindenin v. Allen, 4 N. H. 385; Patterson v. Smith, 66 Vt. 633, 30 A 2; Georgia Probate Ct. v. Vanduzer, 13 Vt. 135. Contra Ashley v. Harrington, 1 D. Chipm. (Vt.) 348.

[a] **Plaintiff must discontinue if he wishes to prove claim before commissioners.**—Continental L. Ins. Co. v. Smith, 11 R. I. 433.

[b] **Early Alabama cases** (1) were in accord with the rule stated in the test. Lee v. Leachman, 22 Ala. 452; Weaver v. Weaver, 20 Ala. 557; Coster v. Brack, 19 Ala. 210; Middleton v. Maull, 16 Ala. 479; Powe v. Sterrett, 16 Ala. 339; Hearrin v. Savage, 16 Ala. 286; Edwards v. Gibbs, 11 Ala. 292; Hale v. Cummings, 3 Ala. 398; Woods v. McCann, 3 Ala. 61; Melone v. Gaines, Minor 317; Colbert v. Chandler, Minor 254. (2) But the present rule in Alabama is otherwise. See infra note 34.

34. Julian v. Woolbert, (Ala.) 81 S 32; Randle v. Carter, 62 Ala. 95; Hatchett v. Curbow, 59 Ala. 516; Waller v. Nelson, 48 Ala. 531; Ray v. Thompson, 43 Ala. 434, 94 AmD 696; McEachin v. Reid, 40 Ala. 410; Greenleaf v. Allen, 127 Mass. 248; Greenwood v. McGilvray, 120 Mass. 516; Trezevant v. McQueen, 20 Miss. 575; Campbell v. Hancock, 7 Humphr. (Tenn.) 75; Sellars v. Brown, (Tenn. Ch. A.) 46 SW 335. But compare Harmon v. Sweet, 221 Mass. 587, 109 NE 942 (contrary dictum); Continental L. Ins. Co. v. Smith, 11 R. I. 433 (query).

[a] **The creditor is bound nevertheless to take due heed** of the commissioners' proceedings so as not to come in too late for their report. Trezevant v. McQueen, 20 Miss. 575.

[b] **A suit begun before the appointment of commissioners** may be prosecuted to judgment. Strong v. Luther, 20 R. I. 317, 38 A 1054 (where the administrator does not procure the appointment of commissioners within the prescribed time, their subsequent appointment by the court does not bar plaintiff's suit already begun); Gardner v. Gardner, 17 R. I. 751, 24 A 785.

[c] **A judgment against a garnishee** after the estate has been declared insolvent is invalid. Seals v. Holloway, 77 Ala. 344.

35. Moore v. Eames, 15 Mass. 312; Hunt v. Whitney, 4 Mass. 620; Smith v. Smith, 18 R. I. 722, 29 A 584, 30 A 602.

36. Sturgis v. Reed, 2 Me. 109; Hunt v. Whitney, 4 Mass. 620.

37. Hunt v. Whitney, 4 Mass. 620.

38. Bacon v. Bacon, 51 Conn. 19; Cunningham v. Munroe, 15 Gray (Mass.) 471; Smith v. Smith, 18 R. I. 722, 29 A 584, 30 A 602.

[a] **A bill for winding up a partnership** of which the deceased was a member, if not an immediate suit for prosecuting a claim against the estate, is not discontinued by a declaration of insolvency. Goldthwait v. Day, 149 Mass. 185, 21 NE 359; Smith v. Smith, 18 R. I. 722, 29 A 584, 30 A 602.

39. New Milford Security Co. v. Windham County Nat. Bank, 90 Conn. 323, 97 A 428 (the general statute providing that insolvency proceedings shall dissolve all attachments made within sixty days next preceding applies to the settlement of the estate of a deceased debtor as insolvent).

40. Fulton v. Eggler, (Ala.) 76 S 35; Ouchita Nat. Bank v. Fulton, 195 Ala. 34, 70 S 722.

41. Dye v. Bartlett, 8 Miss. 224.

42. Ala.—Julian v. Woolbert, 81 S 32; Fulton v. Eggler, 76 S 35; Gamble v. Dunklin, 48 Ala. 425; Burk v. Jones, 13 Ala. 167.

Ind.—Joyce v. Hufford, 7 Blackf. 382.

Me.—Walker v. Newton, 85 Me. 458, 27 A 347; Duly v. Hogan, 60 Me. 351; Ring v. Burton, 5 Me. 45.

Mass.—Greenwood v. McGilvray, 120 Mass. 516; Hunt v. Whitney, 4 Mass. 620.

N. H.—Blaisdell v. Peaey, 108 A 134.

N. J.—Union Nat. Bank v. Poulson, 40 N. J. L. 284; Taylor v. Volk, 38 N. J. L. 204; Howell v. Potts, 20 N. J. L. 1.

N. Y.—Willis v. Sharp, 124 N. Y. 406, 26 NE 974 [aff 12 NYS 120].

[a] **If an administrator suffers judgment to be rendered against him** before he represents the estate insolvent, he must pay the full amount of such judgment without regard to the assets of the deceased. Newcome v. Goss, 1 Metc. (Mass.) 333.

43. Fulton v. Eggler, (Ala.) 76 S 35; Seals v. Holloway, 77 Ala. 344; Shiver v. Rousseau, 68 Ala. 564; Sharp v. Herrin, 32 Ala. 502; Willis v. Sharp, 124 N. Y. 406, 26 NE 974 [aff 12 NYS 120]; Barber v. Collins, 18 R. I. 760, 30 A 796.

44. Ala.—Powe v. Sterrett, 16 Ala. 339.

Ind.—Joyce v. Hufford, 7 Blackf. 382.

Mich.—Quackenbush v. Campbell, Walk. 525.

Miss.—Parker v. Whiting, 7 Miss. 352.

N. J.—Ryan v. Van Arx, 46 N. J. L. 531 [rev 45 N. J. L. 87].

45. Bass v. Heard, 33 Miss. 131.

46. Overpayment of claims after representation of insolvency see § 1797.

47. Woodward v. Fisher, 19 Miss. 303; Cairn's Est., 13 Phila. (Pa.) 350.

[a] **Insolvency caused by depreciation.**—It is not a sufficient defense that the estate has become insolvent since the payment by depreciation in the value. Woodward v. Fisher, 19 Miss. 303.

48. Pierce v. Allen, 12 R. I. 510.

49. Parker v. Daughtry, 111 Ala. 529, 20 S 362; Shelton v. Carpenter, 60 Ala. 201; Brooking v. Farmers' Bank, 7 KyL 492.

50. Brooking v. Farmers' Bank, 7 KyL 492; Bowking v. Farmers' Bank, 5 KyL 933; Flint v. Valpey, 130 Mass. 385; Richards v. Nightingale, 9 Allen (Mass.) 149; Heard v. Drake, 4 Gray (Mass.) 514; Colegrove v. Robinson, 11 Metc. (Mass.) 238; Bascom v. Butterfield, 1 Metc. (Mass.) 536; Bliss v. Lee, 17 Pick. (Mass.) 83; Austin v. Henshaw, 7 Pick. (Mass.) 46; Walker v. Bradley, 3 Pick. (Mass.) 261; Walker v. Hill, 17 Mass. 380.

[a] **Interest** on the amount overpaid can be recovered only after demand. Walker v. Bradley, 3 Pick. (Mass.) 261.

51. Hatcher v. Royster, 14 Lea (Tenn.) 222.

52. Johnson v. Corbett, 11 Paige (N. Y.) 265.

53. Shaw v. Gookin, 7 N. H. 16.

[§ 1759] **F. Commissioners or Auditors—1. Appointment.** The statutes usually provide, in the case of an insolvent decedent's estate, that upon the petition of the personal representative[54] or creditors,[55] the probate court may appoint suitable and disinterested commissioners or auditors who shall audit and examine the claims of all creditors submitted within a certain period and report for allowance accordingly.[56] Persons having an interest in the proceedings, either direct or indirect, are disqualified thereby and should not be appointed as commissioners.[57] Commissioners are, however, sometimes dispensed with by statute, with procedure being before the probate court.[58]

[§ 1760] **2. Powers.** After appointment and assignment of the estate to the commissioners all claims and causes of action should be presented for allowance to them,[59] and where the commissioners become vested with the legal interest in decedent's choses in action all suits thereon should be brought by them.[60]

[§ 1761] **G. Collection and Management of Estate—1. In General.** Creditors are sometimes given, by statute, the right to nominate and elect an administrator of the unadministered assets of an estate which has been decreed to be insolvent.[61] In the collection and management of an insolvent estate the usual rule as to the diligence and good faith required of executors and administrators applies, and their liability is governed accordingly;[62] and where the collection and management of the estate is committed to commissioners or syndics they are governed by the same rule.[63] An administrator is liable for rents and profits collected after the estate has been decreed insolvent, although it subsequently appears that the estate when closed will be found solvent.[64]

The debt of a surety to the estate of his deceased principal will not be enforced where the estate is insolvent and the surety is liable as such for a sum largely in excess of the estate's claim against him.[65]

[§ 1762] **2. Redemption of Property.** An executor or administrator is not justified in paying out of an insolvent estate, for the redemption of property, an amount in excess of its value, and the creditors may repudiate such a transaction;[66] but they cannot claim the benefit of the transaction and insist that the representative shall account for the property recovered for the estate solely by virtue of the contract which they repudiated.[67] Representatives of an insolvent estate cannot redeem property for the benefit of the widow.[68]

[§ 1763] **3. Rights of Heirs.** An heir of an insolvent intestate cannot maintain assumpsit for money had and received against the administrator for his share of the proceeds of land sold by the administrator,[69] nor is the administrator of an insolvent estate liable to an heir of the estate of the intestate for rents received for land rented by him at public auction and held as assets.[70] Negligence in the management of an insolvent estate cannot be charged against the administrator at the instance of the heirs, where such negligence does not affect their interest.[71]

[§ 1764] **4. Avoiding Preferences.** The executor or administrator cannot avoid a preference given by decedent during his lifetime to one of his creditors,[72] unless by virtue of statutory authority.[73]

[§ 1765] **H. Actions**[74]**—1. In General.** As the representative of the estate and of creditors generally the executor or administrator may main-

54. Hall v. Merrill, 67 Me. 112.

[a] **A claimant may acknowledge notice** of the petition for the appointment of commissioners, and of the time and place of hearing before the commissioners. Hall v. Merrill, 67 Me. 112.

55. McMillan's Est., 21 Pa. Co. 17 (holding, however, that the act of April 13, 1840, providing for the appointment of an auditor to settle with the creditors, does not authorize his appointment over the protest of the executor where the estate is largely solvent and the claim of the creditor asking such appointment is disputed).

56. Conn.—Sturges v. Peck, 12 Conn. 139.

Me.—Ludwig v. Blackinton, 24 Me. 25.

Mass.—Putney v. Fletcher, 140 Mass. 596, 5 NE 640.

Pa.—McMillin's Est., 21 Pa. Co. 17.

R. I.—McGowan v. Peabody, 20 R. I. 582, 40 A 578; Strong v. Luther, 20 R. I. 317, 38 A 1054.

[a] **When appointment unnecessary.**—The appointment of commissioners is not necessary where the funds in the hands of an administrator are not "sufficient to extend beyond the payment of the expenses of the funeral and administrators and the allowance to the widow and children." Ludwig v. Blackinton, 24 Me. 25.

[b] **Appeal will lie from appointment.**—Sturges v. Peck, 12 Conn. 139; Pierce v. Allen, 12 R. I. 510. Contra Putney v. Fletcher, 140 Mass. 596, 5 NE 640.

[c] **Nomination by creditors.**—Under a statute providing that the court may appoint as commissioner the person nominated "by majority of the creditors whose claims have been reported and filed" a nomination by the majority of such creditors present and voting is not sufficient to authorize the appointment unless they are also a majority of all the creditors whose claims are filed. Com. v. Anthony, 4 Watts & S. (Pa.) 511.

57. English v. Smith, 13 Conn. 221; Sturges v. Peck, 12 Conn. 139; Stoddard v. Moulthrop, 9 Conn. 502; Fairbank's App., 2 Root (Conn.) 386; Lyon v. Lyon, 2 Root (Conn.) 203; Barker v. Wales, 1 Root (Conn.) 265.

58. McNeil v. Macon, 20 Ala. 772.

59. Sugar River Bank v. Fairbank, 49 N. H. 131 (suits in equity are within the spirit of a statute so providing).

60. Johns v. Johns, 6 Oh. 271.

61. Julian v. Woolbert, (Ala.) 81 S 32.

62. U. S.—Peyatte v. English, 25 F. Cas. No. 15,054a, Hempst. 24.

Ala.—Clark v. Eubank, 80 Ala. 584, 3 S 49; Eubank v. Clark, 78 Ala. 73.

La.—Triche's Succ., 39 La. Ann. 289, 2 S 52; Connolly's Succ., 6 La. Ann. 795.

N. H.—Ayers v. Laighton, 73 N. H. 487, 63 A 43; Lane v. Thompson, 43 N. H. 320; Moulton v. Wendell, 37 N. H. 406.

Ont.—Higgins v. Ontario Trusts Corp., 27 Ont. A. 432 [aff. 30 Ont. 684].

Fundamental rule as to custody and management of estate generally see supra § 463.

Loss or depreciation of assets see supra §§ 576–591.

63. Desorme's Succ., 10 Rob. (La.) 474; Meilleur v. His Creditors, 3 La. 532.

[a] **The syndic of an insolvent succession is authorized to issue execution** on a twelve-months' bond, in order to preserve the assets under his charge from loss by prescription. Cloutier v. Lemée, 33 La. Ann. 305.

64. Ayers v. Laighton, 73 N. H. 487, 63 A 43.

65. Barnes v. Barnes, 106 Va. 319, 56 SE 172.

66. In re Gill, 199 N. Y. 155, 92 NE 390 [rev 137 App. Div. 901, 122 NYS 1129].

67. In re Gill, 199 N. Y. 155, 92 NE 390 [rev 137 App. Div. 901, 122 NYS 1129].

68. Whitehead v. Cummins, 2 Ind. 58; Gibson v. Crehore, 5 Pick. (Mass.) 146; Rossiter v. Cossit, 15 N. H. 38.

69. Henry v. Arms, Smith (N. H.) 39.

70. Boynton v. McEwen, 36 Ala. 348.

71. In re Armstrong, 125 Cal. 603, 68 P 183.

72. Stockwell v. Shalit, 204 Mass. 270, 90 NE 570 ("A preference founded upon a valuable consideration, although made with intent to defeat other creditors, is valid at common law. Stevens v. Bell, 6 Mass. 339; Everett v. Walcott, 15 Pick. (Mass.) 94. If proceedings in bankruptcy or insolvency have not been instituted before the debtor's death, the right of his administrator to set aside a preference depends solely on our statutes relating to the distribution among creditors of the estate. But no provisions similar to those found in Rev. Laws, c. 163, § 110, governing preferences made by insolvent debtors, having been enacted as to the settlement of insolvent estates of deceased persons, the common law control").

73. Stockwell v. Shalit, 204 Mass. 270, 90 NE 570.

74. Actions by creditors see infra §§ 1783–1790.

tain various actions for the protection of the insolvent estate,[75] or, where necessary, may bring a bill in equity,[76] in which he may set up fraud and avoid acts of decedent.[77] He may also interpose or defend in actions by others concerning the estate.[78] A bill in equity may be maintained against an executor or administrator of an insolvent estate for property held in trust by his intestate, which has come into his hands, if the trust property can be identified.[79] In contesting claims the representative should specially plead the insolvency in the manner required by statute.[80] Judgment creditors and those whose claims are undisputed should not be made parties to a bill by the administrator to avoid a multiplicity of suits by compelling the creditors to prove their claims.[81]

[§ 1766] **2. Respecting Realty.** In some jurisdictions it is held that a decree or declaration of insolvency entitles the personal representative to possession and control of the realty, and that he may thereafter maintain actions respecting the same;[82] but there is also authority for the view that, notwithstanding the declaration of insolvency, the right to maintain such actions is in the heir, until he is actually divested.[83]

[§ 1767] **I. Sales and Conveyances under Order of Court.**[84] Where an estate is insolvent, the creditors are entitled to have both the real and personal property within the jurisdiction appropriated in satisfaction of their demands;[85] and sales under order or sanction of the court may be procured accordingly.[86] It is usually the duty of the representative to proceed within a reasonable time to procure such sale,[87] but a creditor may also file a bill on behalf of himself and all other creditors for the purpose of having the land sold to pay their claims,[88] provided he does so within the time prescribed by statute in such cases.[89] A meeting of the creditors has been held not a necessary prerequisite to a sale.[90] Jurisdiction to order such sales is sometimes a matter of statutory regulation,[91] but it has been held that where an insolvent estate has been removed from the probate court to a court of chancery, the original general jurisdiction of the

75. Judson v. Connolly, 4 La. Ann. 169; McLean v. Weeks, 61 Me. 277; Hoyt v. Wilkinson, 10 Pick. (Mass.) 31; McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 S 260.

76. Sims v. Shelton, 21 S. C. Eq. 221.

77. U. S.—Beswick v. Dorris, 174 Fed. 502.

Conn.—Bassett v. McKenna, 52 Conn. 437.

La.—Sullice v. Gradenigo, 15 La. Ann. 582.

Mass.—Holland v. Cruft, 20 Pick. 321.

N. H.—Matthews v. Hutchins, 68 N. H. 412, 40 A 1063.

Pa.—Bouslough v. Bouslough, 68 Pa. 495.

[a] **Evidence.**—(1) In an action by an administrator to set aside a fraudulent conveyance made by his intestate, the commissioners' report allowing claims is admissible in evidence for the purpose of showing that the property so conveyed is needed to pay debts. Bassett v. McKenna, 52 Conn. 437; Matthews v. Hutchins, 68 N. H. 412, 40 A 1063. (2) The commissioners may testify as to the items allowed by them where the record of allowance fails to show such items. Matthews v. Hutchins, 68 N. H. 412, 40 A 1063.

Suit to set aside fraudulent conveyance of decedent see supra § 367; infra § 1766.

78. Lembeck, etc., Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 A 794.

79. Goodell v. Buck, 67 Me. 514; McLarren v. Brewer, 51 Me. 402; Thompson v. White, 45 Me. 445; Taylor v. Plumer, 3 M. & S. 562, 105 Reprint 721.

[a] **The burden is on plaintiff to identify** the property claimed as held by decedent in trust for him. Goodell v. Buck, 67 Me. 514.

80. Cameron v. Clarke, 11 Ala. 259; Humphreys v. Morrow, 9 Port. (Ala.) 283.

81. Green v. Allen, 45 Ga. 205.

82. Parkman v. Aicardi, 34 Ala. 393, 73 AmD 457; Norcum v. Lum, 33 Miss. 299; Moulton v. Wendell, 37 N. H. 406; Wessell v. Gross, (Tenn. Ch. A.) 57 SW 372; Trafford v. Austin, 3 Tenn. Ch. 496.

[a] **Acts done before the estate was decreed insolvent,** although after the decedent's death, do not give the personal representative a right to maintain trespass quare clausum fregit. Lane v. Thompson, 43 N. H. 326.

[b] **Aliter in Alabama prior to statute of 1857.**—Patton v. Crow, 26 Ala. 426; Long v. McDougald, 23 Ala. 413.

83. Boynton v. Peterborough, etc., R. Co., 4 Cush. (Mass.) 467; Nason v. Willard, 2 Mass. 478.

[a] **License to sell necessary.**—Where an administrator has represented an estate to be insolvent, and commissioners have been appointed by the probate court to receive and examine claims of creditors, the administrator is the creditors' representative to recover, for the payment of debts, property conveyed by intestate in fraud of his creditors; but he cannot maintain a writ of entry or a bill in equity to recover possession of land fraudulently conveyed, unless he first obtains a license to sell. Stockwell v. Shalit, 204 Mass. 270, 90 NE 570.

84. Sales under order of court generally see supra §§ 1438–1741.

85. Goodall v. Marshall, 11 N. H. 88, 35 AmD 472; Trafford v. Austin, 3 Tenn. Ch. 496.

86. Ala.—Friedman v. Shamblin, 117 Ala. 454, 23 S 821.

Conn.—Goodwin v. Sheldon, 1 Day 312.

Ga.—Streetman v. Streetman, 133 Ga. 760, 66 SE 883.

La.—Benedict v. Bonnot, 39 La. Ann. 972, 3 S 223.

Md.—Kent v. Waters, 18 Md. 53.

Mo.—White v. Drew, 42 Mo. 561.

Tenn.—Ingram v. Ingram, 5 Heisk. 541.

[a] **Illustration.**—The administrator of an insolvent, whose entire estate consists of land held under bond for title and worth more than the debt due the obligee, may have the land sold and receive the proceeds remaining after the extinguishment of the obligor's debt and the costs of the proceeding. Streetman v. Streetman, 133 Ga. 760, 66 SE 883 (holding also that in an action by an administrator of the obligee of a bond for title to land, against the obligor in possession, for an accounting of the rents and the sale to pay the obligor, and recover the excess, where the pleadings admitted that the obligor was in possession, and it appeared that the administrator could not redeem because of the insolvency of the estate, and that the land was worth more than the sum claimed by the obligor, the granting of a nonsuit was erroneous).

[b] **A reversion of land assigned as the widow's dower** cannot be sold under a general license to sell real estate under St. (1784) c 2, although it seems to be otherwise since the Revised Statutes. Bancroft v. Andrews, 6 Cush. (Mass.) 493.

[c] **Proof of insolvency.**—(1) In case of an application for the sale of real estate to pay debts of a deceased insolvent, primary proof of the insolvency stands in place of full proof until full proof is demanded, but such demand dispenses with the primary proof prescribed by the testamentary system. Kent v. Waters, 18 Md. 53. (2) The decree of insolvency is substituted for proof of the existence of debts and the insufficiency of the personal assets. Meadows v. Meadows, 78 Ala. 240.

[d] **An heir has no standing to object** to a probate sale for payment of debts where the estate is insolvent. Benedict v. Bonnot, 39 La. Ann. 972, 3 S 223.

87. West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

88. Meadows v. Meadows, 78 Ala. 240; Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 573; Jordan v. Moses, 10 S. C. 431.

[a] **What may be sold.**—Under such a bill the court may direct a sale of land lying in another county. Jordan v. Moses, 10 S. C. 431.

[b] **On a bill by a ward** to enforce her claim against the estate of a deceased surety of her guardian, who died insolvent without making a settlement, she is not entitled to a sale of lands until her debt has been established by a decree concluding the heirs, nor is she entitled to exclusive payment out of the assets over preferred claims or equal creditors. Sharp v. Sharp, 76 Ala. 312.

[c] **A former petition** for an order to sell lands, filed before the estate was declared insolvent and still pending, cannot be pleaded in abatement of a subsequent application under a statute authorizing a sale without taking testimony when an estate has been declared insolvent. Meadows v. Meadows, 78 Ala. 240.

89. Apperson v. Harris, 7 Lea (Tenn.) 323.

90. Lacroix's Succ., 30 La. Ann. 924. But compare Tucker v. Beatty, 12 Rob. (La.) 545 (meeting of creditors should be called to deliberate on most advantageous method of selling).

91. Harness v. Hughett, 117 Tenn. 489, 97 SW 68 (where the administrator of an estate worth less than one thousand dollars, filed a petition in the county court, alleging the insolvency of the estate and praying for a sale of lands, and he appealed from a decree dismissing the petition, the circuit court on appeal has no jurisdiction to enter a decree for a sale of the real estate, but it was the duty of the circuit court to remand the cause to the county court for further proceedings); Fleming v. Talliafer, 4 Heisk (Tenn.) 352 (when it becomes necessary in the settlement of an insolvent estate to sell real or personal property, the county court has jurisdiction to make such sale whenever the amount of the assets

latter court extends to authorizing a sale of land by way of compromise.[92] A decree for sale of an insolvent estate under proceedings allowed only in the case of solvent estates is erroneous;[93] but if jurisdiction has attached, errors or irregularities in the proceedings will not invalidate the sale.[94] As in other cases of needful sales of real estate, the heirs or devisees should be made parties before an order or license can properly issue,[95] and creditors by filing their claims, become quasi parties, and are bound by the proceedings.[96] An averment in a petition for the sale of realty that some years before the estate had regularly been declared insolvent, although perhaps insufficient on demurrer, is, in the absence of a direct attack, sufficient to call into existence the jurisdiction of the probate court to sell the land.[97] To establish the insolvency of the estate under proceedings for a sale of the land there need not be a judgment of insolvency in the probate court,[98] but it must appear that the estate was duly represented insolvent, that commissioners were duly appointed, and that their report showing the estate to be insolvent was duly made and accepted.[99] Where a decree confirming a judicial sale recited that all the conditions imposed by the decree ordering the sale had been complied with, and the deed to the purchaser recited that the consideration amounted to a specified sum of money, and in the accounting of the administrators making the sale, the estate being insolvent, that amount was charged against them as being received from the purchaser, payment was sufficiently shown as against a collateral attack on the sale on the ground that the consideration was never paid.[1] Where a decree authorizing a judicial sale of an insolvent estate authorized an administrator to name a place for the sale, and the sale was, in fact, made at a place other than the county seat, it was held that the decree authorizing the administrator to name the place of sale was the act of the court, and the sale was valid.[2] The syndic's consent to the sale of mortgaged property on credit and without appraisement is binding on the heirs unless they show that they were injured by it.[3]

[§ 1768] **J. Presentation and Allowance of Claims**[4]**—1. Presentation—a. Necessity of Presentation.** It is usually required that claims against the insolvent estate must, in order that they may be lawfully allowed or paid, be presented, duly verified, to the commissioners or the probate court within a specific time limited by statute, failing in which the creditor loses his right,[5] although under some statutes a lien creditor may have a lien declared in his favor without first proving his debt,

received by the personal representative, exclusive of real estate, does not exceed three thousand dollars. Up to that point the county and chancery courts have concurrent jurisdiction; but above that amount of assets, exclusive of real estate, the jurisdiction of the chancery court is exclusive).

92. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.

93. Maynard v. Cocke, (Miss.) 18 S 374.

94. King v. Gilreath, 154 Ala. 129, 132, 45 S 89 ("The attack upon the appellee's title, and the probate court proceeding affording it, being purely collateral, it has been long and well decided that, if jurisdiction attached, errors intervening therein will not avail to defeat rights acquired thereunder. The judicial declaration of insolvency of an estate, of course, concludes, as far as that proceeding may under our statutes, the insufficiency of both the real and personal property to pay the debts of the estate. Regardless of its effect upon the rights of the heir, he not being a party to the proceeding looking to the declaration of insolvency by the court, section 326 of the Code of 1896 clothes the judicial ascertainment of this financial status with an evidential power to make out a prima facie case for a decree of sale when the sale of the real estate of the estate is sought by the executor or administrator").

[a] **Lack of notice.**—A decree for the sale of land of an insolvent estate is not void for failure to give the heir notice of the application for sale made after the insolvency. King v. Gilreath, 162 Ala. 113, 49 S 860.

95. Lamar v. Gunter, 39 Ala. 324; French v. Hoyt, 6 N. H. 370, 25 AmD 464; Parchman v. Charlton, 1 Coldw. (Tenn.) 381; Frazier v. Pankey, 1 Swan (Tenn.) 75; Reid v. Huff, 9 Humphr. (Tenn.) 345.

[a] **If there are no heirs or devisees** the state should be made a party. Trafford v. Young, 3 Tenn. Ch. 496.

96. Ewing v. Maury, 3 Lea (Tenn.) 381.

97. King v. Gilreath, 154 Ala. 129, 45 S 89.

98. Friedman v. Shamblin, 117 Ala. 454, 23 S 821; Hudson v. Stewart, 48 Ala. 204; In re Godfrey, 72 N. J. Eq. 351, 65 A 202.

99. Griffin v. Pratt, 3 Conn. 513; Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581.

1. Ladd v. Craig, 94 Miss. 659, 47 S 777.

2. Ladd v. Craig, 94 Miss. 659, 47 S 777.

3. Poultney v. Cecil, 8 La. 321.

4. Presentation and allowance of claims generally see supra §§ 937–1090.

5. Ala.—Christopher v. Stewart, 133 Ala. 348, 32 S 11; Parker v. Daughtry, 111 Ala. 529, 20 S 362; Hatchett v. Curlow, 59 Ala. 516; Watson v. Rose, 51 Ala. 292; Gamble v. Dunklin, 48 Ala. 425; Erwin v. McGuire, 44 Ala. 499; Ray v. Thompson, 43 Ala. 434, 94 AmD 696; Sharp v. Sharp, 35 Ala. 574; Bell v. Andrews, 34 Ala. 538; Murdock v. Rousseau, 32 Ala. 611; Sharp v. Herrin, 32 Ala. 502; Carhart v. Clark, 31 Ala. 396; Steele v. Weaver, 20 Ala. 540; Shortridge v. Easley, 10 Ala. 520; Hollinger v. Holly, 8 Ala. 454.

Cal.—Pisalia Sav. Bank v. Curtis, 135 Cal. 350, 67 P 329.

Conn.—Nelson v. Hubbel, 2 Root 421.

Ill.—Tipton v. Carrigan, 10 Ill. A. 318.

Me.—Todd v. Darling, 11 Me. 34.

Mass.—Freeman v. Ward, 16 Pick. 201.

Miss.—Merchants', etc., Bank v. Kelleher, 119 Miss. 232, 80 S 697; Greener v. Neal, 61 Miss. 204; Herring v. Wellons, 13 Miss. 354.

N. H.—Stevens v. King, 74 N. H. 144, 65 A 944.

N. J.—In re Fogg, 37 N. J. Eq. 238; Stelle v. Conover, 30 N. J. Eq. 640; Gould v. Tingley, 16 N. J. Eq. 501.

Tenn.—Hearn v. Roberts, 9 Lea 365; Lunsford v. Jarrett, 2 Lea 579; Martin v. Blakemore, 5 Heisk. 50; Stone v. Sanders, 1 Head 248; Marley v. Cummings, 5 Sneed 479; Smith v. Sprout, (Ch. A.) 58 SW 376; Grimmett v. Midgett, (Ch. A.) 57 SW 399; Hurley v. Murrell, 2 Tenn. Ch. 620.

Vt.—Freeman v. Holt, 51 Vt. 538; McCollum v. Hinckley, 9 Vt. 143.

Ont.—Higgins v. Ontario Trusts Corp., 27 Ont. A. 432, 20 CanLTOcc Notes 347 [dism app 30 Ont. 684].

[a] **An agreement by the representative,** allowing a claim against the estate which had not been presented to and allowed by the commissioners, is unwarranted and void. Freeman v. Holt, 51 Vt. 538.

[b] **A claim on which an action is pending** when insolvency is declared need not be presented. Waller v. Nelson, 48 Ala. 531; Erwin v. McGuire, 44 Ala. 499; McDougald v. Dawson, 30 Ala. 553; Trezevant v. McQueen, 21 Miss. 311.

[c] **Judgments.** — The requirements, etc., that all claims against the estate must be filed within six months from the declaration of the insolvency apply to judgments rendered against intestate prior to decree of insolvency, and not to a judgment rendered against the administrator of such estate. Woodall v. Wright, 142 Ala. 205, 37 S 846.

[d] **One against whom the representative has brought suit** may file in offset a claim larger than that on which he is sued, although the debt to him is not yet due, and in such case the creditor is entitled to judgment for the balance and need not present his claim to the commissioners of insolvency, but the judgment, when rendered, is to be presented to the judge of probate and by him added to the claims allowed by the commissioners. Bigelow v. Folger, 2 Metc. (Mass.) 255.

[e] **A representative's statement of claims** which have come to his knowledge, filed with a report of insolvency pursuant to statute, does not indicate that there has been a presentment of claims included therein or avoid the bar of the statute of nonclaim as to a claim included in such statement but not properly presented. McDowell v. Jones, 58 Ala. 25.

[f] **A payment on a claim** is a fact tending to show its due presentation. Pharis v. Leachman, 20 Ala. 662.

[g] **When new presentation and allowance dispensed with.**—In the practice of some states, where a claim against an estate has been allowed by the executor or administrator in the usual way, and the account is left with him, and the estate is afterward declared probably insolvent, but no commissioners of insolvency are appointed, the claim should be reported to the court as a valid one, without a new presentation and allowance thereof, unless the holder

and certain preferred claims need not be presented.[6] A creditor whose claim has not been filed before the commissioners cannot sue the executor or administrator, although the estate finally proves to be actually solvent,[7] unless the claim is one which is privileged or preferred by statute and need not be proved or presented to the commissioners.[8] But where the claim is one which could not be presented to the commissioners, it may be enforced against any estate remaining after the payment of claims allowed by the commissioners,[9] and a creditor, whose claim was not presented in time, may sometimes enforce the same against assets subsequently discovered;[10] but a contrary view has been expressed.[11] It has been held that failure to present the claim does not prevent its being offset against a claim afterward made upon the creditor by the executor or administrator.[12] Where property remains unaccounted for by the administrator a provision of the statute in relation to insolvent estates that if a claim is not presented to the commissioners within a year it shall be forever barred does not apply.[13]

[§ 1769] **b. Right to Present.** Any one having a valid claim against the estate may present and prove it,[14] and the creditors may pursue their claims and have them allowed, in every jurisdiction where administration is taken, until they have obtained full payment,[15] although in such case what the creditor has received in one jurisdiction must be taken into account in another jurisdiction.[16]

A creditor whose claim is barred by the general statute of nonclaim is not entitled to share in the distribution of the estate when it has been declared insolvent.[17]

[§ 1770] **c. Claims Presentable.** As a general rule such claims, and only such claims, may be presented to the commissioners for allowance as are present and positive debts or fixed liabilities susceptible of a present valuation,[18] and not claims which depend on such contingencies that they may never become due.[19] A claim which is not provable before the commissioners cannot be ascertained in

is notified by the executor or administrator that he has rejected the claim. Haley v. Krug, 1 Oh. Cir. Ct. 44, 1 Oh. Cir. Dec. 27.

[h] **Proof of presentation** by one witness is sufficient where the statute of nonclaim is set up but presentation is not positively denied. Pharis v. Leachman, 20 Ala. 662.

[i] **Ignorance of the pendency of the insolvency proceedings** does not relieve a creditor from the effect of nonpresentation. Stevens v. King, 74 N. H. 144, 65 A 944.

[j] **Opening commission.**—Under a statute allowing a commission of insolvency to be opened by the probate court, the claim of the creditor in whose favor the commission is opened is not barred by any of the statutes of limitation in consequence of a lapse of time subsequent to the close of the first commission. Ostrom v. Curtis, 1 Cush. (Mass.) 461.

[k] **The claim of an executor** (1) having the right to retain assets sufficient to pay a debt due him need not be presented. Brown v. Greene, 181 Mass. 109, 63 NE 2, 92 AmSR 404. (2) "The private claim of an administrator is not within the bar of the statute against other creditors." In re Donnell, 114 Me. 324, 327, 96 A 230.

6. Bulfinch v. Benner, 64 Me. 404; Massachusetts Iron Co. v. Hooper, 7 Cush. (Mass.) 183; Greenough's App., 9 Pa. 18.

[a] **A vendor's lien** is not lost by nonpresentation of the claim. Hood v. Hammond, 128 Ala. 569, 30 S 540, 86 AmSR 159.

[b] **A claim of the state,** although entitled to preference over other claims, is not entitled to be paid unless presented. In re Mitchell, 2 Watts (Pa.) 87.

7. Conn.—Williams v. Lathrop, 2 Root 364.

Me.—Dillingham v. Weston, 21 Me. 263.

Mass.—Freeman v. Ward, 16 Pick. 201; Johnson v. Ames, 6 Pick. 330; Paine v. Nichols, 15 Mass. 264.

Tenn.—Martin v. Blakemore, 5 Heisk. 50.

Vt.—Burgess v. Gates, 20 Vt. 326.

8. Dillingham v. Weston, 21 Me. 263; Greenough's App., 9 Pa. 18.

[a] **A claim for taxes** may be enforced, although not presented. Bulfinch v. Benner, 64 Me. 404.

9. Bacon v. Thorp, 27 Conn. 251; Hawley v. Botsford, 27 Conn. 80; Ticknor v. Harris, 14 N. H. 272, 40 AmD 186; Lowry v. Stevens, 6 Vt. 113; In re McMurdo, [1902] 2 Ch. 684.

10. Sacket v. Mead, 1 Conn. 13.

11. Bell v. Andrews, 34 Ala. 538.

12. Berrigan v. Pearsall, 46 Conn. 274.

13. Allen v. Keith, 26 Miss. 232.

14. Ala.—Henry v. Black, 24 Ala. 417.

Mass.—Whitman v. Winchester, 15 Gray 453.

N. H.—Rollins v. Robinson, 35 N. H. 381.

N. J.—Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445.

R. I.—Fenner v. Manchester, 6 R. I. 140.

[a] **A claim may be presented by:** (1) An indorser. Henry v. Black, 24 Ala. 417. (2) A surety. Powe v. Tyson, 15 Ala. 221. (3) The representative. Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445; Fenner v. Manchester, 6 R. I. 140.

[b] **A secured creditor** may prove his debt before the commissioners of insolvency without first surrendering a mortgage on the separate estate of the debtor's wife which he holds as security. Whitman v. Winchester, 15 Gray (Mass.) 453.

[c] **A debt created by a declaration in the will** to the prejudice of other creditors cannot be presented, as where the testator recites that he had repeatedly promised to pay to the legatee the amount of his legacy as compensation for services rendered, the services having been rendered under a contract fixing as compensation therefor a smaller sum which has been paid. Klein's Est., 6 Pa. Dist. 370.

[d] **One having merely an equitable title to a demand** against an insolvent estate may file it as a claim against the estate. Hogan v. Calvert, 21 Ala. 194. To same effect Blankenship v. Nimmo, 50 Ala. 506.

[e] **Necessity for order for notice to file.**—An order by the clerk of the county court on the administrator to give notice to file claims is necessary to authorize the filing of claims. Grimmett v. Midgett, (Tenn. Ch. A.) 57 SW 399.

15. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Loomis v. Farnum, 14 N. H. 119; Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

16. Ramsey v. Ramsey, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270].

17. Gordon v. Ballentine, 50 Ala. 99.

18. Ala.—Prince v. Prince, 47 Ala. 283.

Conn.—Bacon v. Thorp, 27 Conn. 251.

Md.—Nelson v. Hagerstown Bank, 27 Md. 51.

Mass.—Haverhill Loan, etc., Assoc. v. Cronin, 4 Allen 141.

Miss.—Green v. Creighton, 15 Miss. 197.

N. H.—Simpson v. Gafney, 66 N. H. 261, 20 A 931.

N. Y.—Matter of Rooney, 3 Redf. Surr. 15.

R. I.—Moies v. Sprague, 9 R. I. 541.

Eng.—In re McMahon, [1900] 1 Ch. 173.

[a] **Unmatured claims** payable absolutely may be proved. Haverhill Loan, etc., Assoc. v. Cronin, 4 Allen (Mass.) 141; Alexander v. Follet, 5 N. H. 499 (under statute).

[b] **A debt evidenced by a mortgage,** unacknowledged and unrecorded, and without the affidavit required by statute, although insufficient to create a lien on the mortgaged premises, may be proved against the estate of the deceased insolvent mortgagor. Nelson v. Hagerstown Bank, 27 Md. 51.

[c] **A note given as collateral security** for an indorsement on another note may be proved against the insolvent estate of the deceased maker, although the indorsed note was proved by the holder in full against such estate. Emerson v. Paine, 176 Mass. 391, 57 NE 667.

[d] **A fiduciary bond** is not a valid claim against an insolvent decedent's estate without proof of actual damages. Green v. Creighton, 15 Miss. 197.

[e] **A claim for family expenses** incurred under a will between the death and the distribution is not such a "debt against the estate" as should be filed or allowed in insolvency. Prince v. Prince, 47 Ala. 283.

[f] **Rent.**—(1) A lessor is entitled to prove against the insolvent estate of his lessee for rent payable under the terms of the lease, before or after the lessee's death, up to the time that the claim is presented to the commissioner, but no claim for rent payable beyond that time is thus presentable. Deane v. Caldwell, 127 Mass. 242. (2) Where a lessor purchases the crop, agreeing to pay cash, he cannot, as against an insolvent succession, plead in compensation a debt, not yet due, for the rent. Romero's Succ., 137 La. 236, 68 S 433.

[g] **A claim which cannot be prosecuted at common law** cannot be proved, under some statutes, as a "claim" or "debt," where the estate is insolvent. Moies v. Sprague, 9 R. I. 541.

19. Bacon v. Thorp, 27 Conn. 251; Harding v. Smith, 11 Pick. (Mass.) 478; Ticknor v. Harris, 14 N. H. 272, 40 AmD 186; Fields v. Wheatley, 1 Sneed (Tenn.) 351.

[a] **A claim which may be proved at any time** is not "contingent" within the meaning of the statute, although the holder of it erroneously believes that he has a valid lien as security therefor, which must first be relinquished. Sears v. Wills, 7 Allen (Mass.) 430.

equity and added by decree to their report.[20] A secured creditor who has applied the value of the securities in his hands on the debt can prove only the balance against an insolvent estate.[21]

[§ 1771] **d. Time for Presentation.** The time for presentation is either fixed by statutes varying somewhat in the different jurisdictions, or left to be fixed by the probate court within certain limits;[22] and as a rule the time begins to run from the declaration of insolvency.[23] Presentation must of course be made within the time so allowed.[24] An extension of the time for presentation, at the court's discretion, for a limited period, is allowed under the statutes of some jurisdictions, when a proper case arises.[25] But where a notice stating the time for presentation has been published, the court cannot, after the estate has been declared insolvent, order a notice shortening the time originally fixed.[26]

[§ 1772] **e. Statement and Verification.** In the absence of a specific statutory requirement any statement of a claim against an insolvent estate is sufficient which, when taken in connection with the affidavit accompanying it, if any, fairly discloses an existing liability, and enables the commissioners or court to understand it and to act intelligently.[27] Under some statutes the claim must be verified by the affidavit of the claimant[28] or his agent,[29] or attorney,[30] made before the proper officer.[31] Unless the statute provides otherwise this affidavit may be made at any time before, or at the time of, the final settlement of the estate.[32]

Valuing security. A secured claimant is sometimes required in asserting his claim to put a specified value on his security,[33] but where a partner has individually joined as a maker in a promissory note of his firm, he is directly and primarily liable, and the creditor is not compelled to value security held by him on the estate of a third person.[34]

[§ 1773] **f. Sufficiency of Presentation or Filing.** Claims must be presented and filed in the place and manner prescribed by statute therefor.[35] Where properly presented the claim does not lose its status as to presentation, because the judge has allowed it to be taken from the office for a special purpose and it has become mislaid or not returned through inadvertence,[36] or because he fails to docket it,[37] or the clerk fails to file it.[38] Claims presented to the administrator within the required time, but not filed with the clerk as required by statute within the time prescribed, are nevertheless entitled to be paid if the estate ultimately proves solvent.[39]

Where a claim is withdrawn upon the administrator's false representation of solvency, this is not an abandonment of the claim, and the claim should be allowed if refiled before the assets are distributed.[40]

[§ 1774] **2. Proof of Claims.** Where the claim is properly filed and its validity is not disputed by

20. Moies v. Sprague, 9 R. I. 541.

21. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

22. Ala.—Woodall v. Wright, 142 Ala. 205, 37 S 846; Watson v. Rose, 51 Ala. 292; Waller v. Nelson, 48 Ala. 531; Phelan v. Phelan, 13 Ala. 679; Lattimore v. Williams, 8 Ala. 428.

Conn.—Berrigan v. Pearsall, 46 Conn. 274.

Ky.—Barnes v. Green, 3 KyL 253, 11 Ky. Op. 235.

Me.—Jellison v. Swan, 105 Me. 356, 71 A 920; Todd v. Darling, 11 Me. 34.

Miss.—Geisenberger v. Progress Knitting Mills, 113 Miss. 495, 74 S 331; Greener v. Neal, 61 Miss. 204.

N. J.—In re Togg, 37 N. J. Eq. 238.

Tenn.—Hurley v. Murrell, 2 Tenn. Ch. 620.

Wis.—Cole v. Lightfoot, 4 Wis. 295.

[a] **A creditor is entitled to the full statutory time** for presenting his claim, and this right cannot be defeated by an earlier report or other hindrance on the part of the commissioners. Cole v. Lightfoot, 4 Wis. 295.

[b] **A creditor who has recovered judgment** against an administrator on a liability of the intestate, before the administrator has suggested the insolvency of the estate, may file his claim in an insolvent suit at any time before the funds of the estate are paid out. Hurley v. Murrell, 2 Tenn. Ch. 620.

23. Shelton v. Poulson, 60 Ala. 578; Shortridge v. Easley, 10 Ala. 520; Lattimore v. Williams, 8 Ala. 428; Coppuck v. Wilson, 15 N. J. L. 75.

24. See cases supra § 1768.

[a] **A preferred claim** not filed in time can be paid only out of surplus assets if there be any. Merchants', etc., Bank v. Kelleher, 119 Miss. 232, 80 S 697.

25. Ala.—Lapsley v. Goldsby, 14 Ala. 73.

Conn.—Deming's App., 34 Conn. 201; Lockwood v. Reynolds, 16 Conn. 303; Webb v. Fitch, 1 Root 177.

Me.—Griffin v. Parcher, 48 Me. 406; Todd v. Darling, 11 Me. 34.

Mass.—Ryan v. Lyon, 212 Mass. 416, 99 NE 169; Walker v. Lyman, 6 Pick. 458.

N. H.—In re Peabody, 40 N. H. 342; Bufford v. Johnson, 34 N. H. 489.

[a] **Notice to the administrator is not necessary** to render valid an order by the probate court extending the time for exhibiting claims. Parker v. Gregg, 23 N. H. 416.

26. Geisenberger v. Progress Knitting Mills, 113 Miss. 495, 74 S 331.

27. Woodruff v. Winston, 68 Ala. 412; Thornton v. Moore, 61 Ala. 347; Hogan v. Calvert, 21 Ala. 194; American Bd. Foreign Missions Comrs.' App., 27 Conn. 344; Barnes v. Green, 3 KyL 253, 11 Ky. Op. 235.

[a] **Copy of evidence of debt or substantial statement will suffice.**—Erwin v. McGuire, 44 Ala. 499; Rutherford v. Mobile Branch Bank, 14 Ala. 92; Rowdon v. Young, 12 Ala. 234.

[b] **Delivering the evidence of indebtedness** to the commissioners with a verbal claim for its allowance may suffice. Mills v. Wildman, 18 Conn. 124.

[c] **A creditor coming in under a decree** to prove a claim not mentioned in the pleadings must present the particulars of his claim to the master, accompanied by his affidavit that the sum claimed is justly due, and that neither he, nor any person by his order or on his account, has received satisfaction or security for any part of the claim. Morris v. Mowatt, 4 Paige (N. Y.) 142.

28. Thornton v. Moore, 61 Ala. 347; Erwin v. McGuire, 44 Ala. 499; Fox v. Lawson, 44 Ala. 319; Trowbridge v. Pinckard, 31 Ala. 424; Lay v. Clark, 31 Ala. 409; Cook v. Davis, 12 Ala. 551; Campbell v. Campbell, 11 Ala. 730; Huffman v. Moore, 101 Ky. 288, 41 SW 292, 19 KyL 461; Gay v. Louisville, 93 Ky. 349, 20 SW 266, 14 KyL 327; Morgan v. McCausland, 96 Me. 449, 52 A 931; Smith v. Abbott, 17 N. J. L. 358.

[a] **A promise of the representative to pay** claims does not obviate the necessity for verification. Barnes v. Green, 3 KyL 253, 11 Ky. Op. 235.

[b] **A promissory note, upon which a suit is pending,** is not such a claim as is required to be verified by affidavit. Waller v. Nelson, 48 Ala. 531.

29. Planters', etc., Bank v. Smith, 14 Ala. 416.

30. Erwin v. McGuire, 44 Ala. 499.

31. Carhart v. Clark, 31 Ala. 396; Smith v. Abbott, 17 N. J. L. 358.

[a] **Where an affidavit is taken in another state** (1) the commissioners' certificate is presumptive evidence that the oath was taken before a lawful officer. Carhart v. Clark, 31 Ala. 396. (2) The affidavit is a sufficient basis to support an amended affidavit in support of the claim upon settlement of the insolvent estate in the domestic court. Fox v. Lawson, 44 Ala. 319.

32. Gaffney v. Williamson, 21 Ala. 112; Bloodgood v. Smith, 14 Ala. 423; Rutherford v. Mobile Branch Bank, 14 Ala. 92; Gilbert v. Brashear, 12 Ala. 191; Brown v. Easly, 10 Ala. 564; Shortridge v. Easley, 10 Ala. 520.

[a] **Before declaration of insolvency.**—An affidavit made after the intestate's death is sufficient to verify the claim, although it was made before the estate was declared to be insolvent. Norville v. Williams, 35 Ala. 551.

33. See the statutes.

34. Bell v. Ottawa Trust, etc., Co., 28 Ont. 519 (under 59 Vict. c 22 § 1 subs 1).

35. Woods v. Woods, 99 Tenn. 50, 41 SW 345; Prewett v. Goodlett, 98 Tenn. 82, 38 SW 434.

[a] **Filing before the declaration of insolvency** is sufficient, although the claim was not again filed after such declaration. Henderson v. Henderson, 67 Ala. 519 (in such case the creditor must show verification and docketing, so as to afford opportunity to file objections); Levert v. Read, 54 Ala. 529.

36. Ross v. Ross, 20 Ala. 105.

37. Henderson v. Henderson, 67 Ala. 519.

38. Rutherford v. Mobile Branch Bank, 14 Ala. 92; Gaffney v. Williamson, 12 Ala. 628.

39. Middleton v. Maull, 16 Ala. 479.

40. Stamps v. Bell, 2 Baxt. (Tenn.) 170.

the executor or administrator, the affidavit of the claimant, if regular, is sufficient to establish it and no other proof should be called for;[41] but if the claim or affidavit is duly objected to, the creditor must prove his claim by competent evidence.[42]

Notes and obligations of the deceased insolvent are not conclusive proof of the debts of which they are evidence, but such additional proof by affidavit or otherwise should be furnished as will satisfy the commissioners or other tribunal of the fairness and validity of the claim.[43] It is not always deemed necessary to produce the original note or instrument on which the debt is founded, and if a claim is disallowed and then sued at common law plaintiff is not confined to the proof he produced before the commissioners.[44]

Judgment. Where a defendant dies pending a suit, and the administrator comes in to defend, the judgment rendered against decedent's estate is to be laid before the commissioners of insolvency and by them received as conclusive evidence of the debt and reported by them accordingly.[45]

A presumption that the necessary proof of the ownership of the claim was made will arise where the record does not show that plaintiff, to whom a claim against the insolvent estate was decreed, was not the proprietor.[46]

[§ 1775] **3. Objections and Proceedings Thereon.** In proceedings before the court or commissioners with reference to a claim filed against the insolvent estate, so far as the statutes sanction, objections to the claim may be filed by the executor or administrator,[47] or by the distributees,[48] or other creditors.[49] Such objections must, however, be made and filed within the time prescribed by statute therefor,[50] or, in the absence of a statutory provision limiting the time, within a reasonable time;[51] but it has been held that an objection that the claim was not filed [52] or verified [53] within the time prescribed by statute may be made at any time before the hearing or at the hearing, and that matters occurring after the declaration in insolvency, which are a valid bar to the demand, or which deprive the creditor of all right in equity and good conscience to share in the distribution, may be shown at any time before a final decree declaring the amount of the claim and the ratable proportion of the assets to which the claimant is entitled.[54] The defense that a claim was not filed within the statutory period may be raised by exceptions to the report of the master, or by a motion to dismiss the claimant's petition.[55] Unless objections are filed the allowance of a claim duly filed is usually a matter of right and no objection thereto can be heard in the proceedings before the court or commissioners,[56] except where defenses have arisen after the time for filing objections has expired.[57] If there is a conflict of evidence upon the facts of the claim, an issue may be submitted to the jury for determination;[58] but if a jury is not demanded, it is the duty of the judge to decide the issue under the rules prevailing in courts of law.[59] Where a claim has been transferred before objection is filed to its allowance, the transferee may intervene and become the actor, where issues are formed against its allowance.[60]

[§ 1776] **4. Allowance or Rejection.** Claims against an insolvent estate, arising in decedent's lifetime, are to be decided upon as they existed on the date of his death.[61] In some jurisdictions the power of allowing or disallowing claims belongs to the commissioners, and their action in this respect is binding upon the estate and its creditors unless seasonable objection is made thereto,[62] or there is fraud in the proceedings before the commissioners.[63] The commissioners in such proceedings must give due notice of their meetings to all creditors,[64] and they combine so far the powers of law and equity that they ought to allow a claim which a court of equity would enforce.[65] In other jurisdictions

41. McNeil v. Macon, 20 Ala. 772.

42. Woodruff v. Winston, 68 Ala. 412; Brasher v. Lyle, 13 Ala. 524; Askew v. Weissinger, 6 Ala. 907.

[a] **Evidence properly excluded.—** Where it is shown and not denied that part of plaintiff's bill "as per contract with deceased" was copied from certain other bills, the exclusion of such other bills as further evidence of the fact was not error, since it could not have injured defendants. Huntington's App., 73 Conn. 582, 48 A 766.

[b] **An admission by decedent** is not conclusive in favor of the claimant. Klein's Est., 19 Pa. Co. 545.

43. Warren's Succ., 4 La. Ann. 451.

44. Cole v. Lightfoot, 4 Wis. 295.

45. Bullard v. Dame, 7 Pick. (Mass.) 239.

46. Boggs v. Mobile Branch Bank, 12 Ala. 494.

47. Christopher v. Stewart, 133 Ala. 348, 32 S 11; Gaffney v. Williamson, 21 Ala. 112; Trezevant v. McQueen, 21 Miss. 311; Allen v. Rice, 22 Vt. 333.

48. Christopher v. Stewart, 133 Ala. 248, 32 S 11; Eubank v. Clark, 78 Ala. 73.

49. Christopher v. Stewart, 133 Ala. 348, 32 S 11; Orr v. Thomas, 3 La. Ann. 682; Smith v. Sprout, (Tenn. Ch. A.) 58 SW 376.

50. Christopher v. Stewart, 133 Ala. 348, 32 S 11; Eubank v. Clark, 78 Ala. 73; Cunningham v. Lindsay, 77 Ala. 510; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Thames v. Herbert, 61 Ala. 340.

[a] **This requirement applies to:** (1) An objection denying the justice, correctness, and validity of the claim. Handy v. Meachem, 33 Ala. 457; Hogan v. Calvert, 21 Ala. 194; Bartol v. Calvert, 21 Ala. 42. (2) An objection going to the form or sufficiency of the verification or affidavit. Hogan v. Calvert, 21 Ala. 194; Gaffney v. Williamson, 21 Ala. 112; Bartol v. Calvert, 21 Ala. 42.

[b] **The time prescribed by statute cannot be enlarged by agreement** between the probate judge and the administrator of the estate. Hardy v. Meachem, 33 Ala. 457.

51. Steele v. Weaver, 20 Ala. 540.

52. Hogan v. Calvert, 21 Ala. 194; Bartol v. Calvert, 21 Ala. 42.

53. Carhart v. Clark, 31 Ala. 396.

54. Thornton v. Moore, 61 Ala. 347; Thames v. Herbert, 61 Ala. 340.

55. Smith v. Sprout, (Tenn. Ch. A.) 58 SW 376.

56. Christopher v. Stewart, 133 Ala. 348, 32 S 11; Chandler v. Wynne, 85 Ala. 301, 4 S 653; Cunningham v. Lindsay, 77 Ala. 510; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Guard v. Hale, 64 Ala. 479; Thames v. Herbert, 61 Ala. 340; Gaffney v. Williamson, 21 Ala. 112; Crater v. Smith, 42 N. J. Eq. 348, 7 A 575 [aff 43 N. J. Eq. 636, 12 A 530].

57. Christopher v. Stewart, 133 Ala. 348, 32 S 11.

58. Reed v. Wiley, 13 Miss. 394.

[a] **The Alabama act of 1843** did not impose upon the judge of the county court the duty of causing an issue to be made, on his own volition, between the creditor and the administrator of an insolvent estate. Cook v. Davis, 12 Ala. 551.

59. Nooe v. Garner, 70 Ala. 443.

60. Thornton v. Moore, 61 Ala. 347.

61. Blackmer v. Blackmer, 5 Vt. 355.

62. Bartram v. Hopkins, 71 Conn. 505, 42 A 645; Shelton v. Hadlock, 62 Conn. 143, 25 A 483; Hotchkiss v. Beach, 10 Conn. 232; Findlay v. Hosmer, 2 Conn. 350; Williams v. Perkins, 2 Root (Conn.) 470; Parsons v. Mills, 2 Mass. 80; Gold v. McMechan, 1 Mass. 23; Tuttle v. Robinson, 33 N. H. 104; Allen v. Fletcher, 14 Vt. 274.

[a] **Where decedent was a married woman,** the allowance by commissioners is conclusive that the claims bound her estate. Shelton v. Hadlock, 62 Conn. 143, 25 A 483.

[b] **Where commissioners of insolvency allow part of a claim and reject part,** and the executor or administrator brings a suit against the creditor on a demand in favor of the estate which was not laid before the commissioners, the creditor may file in set-off that part of his claim which the commissioners rejected. Wright v. Dunham, 9 Pick. (Mass.) 37.

[c] **An executor or administrator who has a disputed claim of his own** must present it to the probate court to determine its validity, and not to the commissioners in insolvency. Green v. Russell, 132 Mass. 536.

63. Hall v. Merrill, 67 Me. 112.

64. Davis' App., 39 Conn. 395; Saunders v. Planters' Bank, 10 Miss. 287.

65. Shelton v. Hadlock, 62 Conn. 143, 25 A 483; Collins v. Tillou, 26 Conn. 368, 68 AmD 398; Brown v. Slater, 16 Conn. 192, 41 AmD 136.

the probate court is invested with power in such matters.[66] In general the commissioners should reckon the total allowance of claims upon fair principles which do justice to all the creditors alike,[67] and should offset mutual debts or claims between each creditor and decedent, and report only the balance which they find due.[68] A judgment and costs of suit against decedent's estate may be added to the list of claims against the estate,[69] or a judgment against the claimant in favor of the estate may be deducted from his claim.[70] Interest on the claim may be allowed in a proper case,[71] but the disallowance of interest on a mortgage note on the ground of usury is not conclusive on the mortgagee on the question of usury in a subsequent action to foreclose the mortgage.[72] The allowance should be positive and intelligible in expression as to the amount allowed.[73] The allowance is not a judgment which becomes dormant by lapse of time as against newly discovered assets of such estate.[74] The allowance may be impeached for fraud by one sought to be affected by such allowance, who was not a party or privy to the proceeding,[75] and a claim allowed in favor of an administrator may be disproved in an action on his bond.[76] As a personal representative who has presented his own claim against the estate cannot elect to proceed at law or in equity against himself, the jurisdiction of the orphans' court cannot be taken away;[77] but, if the claim is not fraudulent, the orphans' court cannot disallow it simply on the ground that limitations have run against it.[78] The rejection of a claim secured by a pledge, mortgage, or other lien, only bars the right of such claim to any portion of the general fund in the hands of the administrator for payment, and does not discharge the lien.[79]

[§ 1777] 5. **Report of Commissioners.** After receiving and adjudicating claims against the insolvent estate, the commissioners should make their report to the court of probate, within the prescribed time;[80] but it has been held that the report of a commission to examine claims is not void because not made within the time limited in the order of appointment.[81] The report should not embrace preferred claims,[82] and it is sufficient if it states simply that a claimant was allowed a sum named, even though he made several distinct claims.[83] It need not appear of record that the report of the commissioners was made under oath,[84] or that the advertisement of their meeting was made according to the directions of the court.[85] The report is in the nature of a judgment and is conclusive upon all interested therein who fail properly to object thereto,[86]

66. Heydenfeldt v. Towns, 27 Ala. 423; Payne v. Matthews, 6 Paige (N. Y.) 19, 29 AmD 738; Steger v. Frizzell, 2 Tenn. Ch. 369.

[a] **Effect of action upon claims.**—(1) The action of the probate court in ascertaining the amount of decedent's indebtedness binds the real estate equally with personalty, and if not conclusive is at least prima facie evidence against all parties interested in the estate and against a fraudulent grantee of decedent. Heydenfeldt v. Towns, 27 Ala. 423. (2) The ascertainment of the validity and amount of the demand of a creditor in the probate court has the force and effect of a judgment in personam against the representative and may be assailed by the legatee for fraud, or when the administrator claims credit for it the legatee may show that defenses existed, and that by proper diligence he could have prevented it from being obtained. Randle v. Carter, 62 Ala. 95. (3) When a claim against an insolvent estate has been rejected by the probate judge, the claim cannot be investigated by the succeeding judge of probate, if any of the creditors object. Saltmarsh v. Bird, 19 Ala. 665.

[b] **Surrogate may classify claims and allow equitable as well as legal demands.**—Payne v. Matthews, 6 Paige (N. Y.) 19, 29 AmD 738.

[c] **The county court has power to determine the validity of claims** filed against an insolvent estate, the claimant becoming a party to the proceedings by filing his claim; and a claim so allowed cannot be afterward adjudicated by the clerk on objection by the administrator. Barksdale v. Ward, (Tenn. Ch. A.) 46 SW 771.

67. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Loomis v. Farnum, 14 N. H. 119.

[a] **Part payment by ancillary administrator.**—Where resident creditors who have received part payment of their claims in ancillary administration proceedings in another state ask to participate in the assets in the hands of the principal administrator, they should be required to account for what they have received under the ancillary administration. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270].

68. Gregory v. Benedict, 39 Conn. 22; Staniford v. Hide, 1 Root (Conn.) 397; Williams v. Darling, 1 Root (Conn.) 356; Hosmer v. Brattle, 1 Root (Conn.) 347; Helms v. Harclerode, 65 Kan. 736, 70 P 866; Medomak Bank v. Curtis, 24 Me. 36.

[a] **What a creditor has received as administrator** cannot be offset against his claim upon the estate. Staniford v. Hide, 1 Root (Conn.) 397.

[b] **Counterclaim need not be considered if interested parties consent to such course.**—Bailey v. Bussing, 41 Conn. 73.

[c] **An administrator is not bound to set off a judgment in favor of his decedent** against a claim upon his estate, but having done so he cannot complain that it makes an unequal distribution. Denny v. Moore, 13 Ind. 418.

[d] **Claims for which the intestate was the surety of a third person** are not to be considered in determining the amount of the claim by such third person against the estate under the commission. White Mountains R. Co. v. Eastman, 34 N. H. 124.

69. Healy v. Root, 11 Pick. (Mass.) 389.

70. Ellis v. Smith, 38 Me. 114.

71. Cal.—Visalia Sav. Bank v. Curtis, 135 Cal. 350, 67 P 329 [dist Ellis v. Polhemus, 27 Cal. 350].

Ky.—Hamilton v. Tarlton, 3 KyL 471, 11 Ky. Op. 371.

La.—Hagan v. Sompeyrac, 3 La. 154.

Mass.—Bowers v. Hammond, 139 Mass. 360, 31 NE 729; Dodge v. Breed, 13 Mass. 537.

R. I.—Mowry v. Peck, 2 R. I 60.

[a] **Interest on mortgage debt.**—A mortgagee proceeding under a statute permitting foreclosure, provided all recourse against other property of the estate is expressly waived, is entitled to interest at the rate expressed in the mortgage notes, and not merely that allowed on judgments in the supreme court. Visalia Sav. Bank v. Curtis, 135 Cal. 350, 67 P 329 [dist Ellis v. Polhemus, 27 Cal. 350]. But see Keebler's Est., 4 Pa. Dist. 346 (interest should not be allowed after decedent's death on a balance due on a mortgage).

[b] **Interest on amount allowed.**—(1) As a report of commissioners upon the estate of a deceased insolvent is in the nature of a judgment ascertaining the sums due from the deceased at his death, interest will be allowed upon said sums as upon a judgment. Mowry v. Peck, 2 R. I. 60. (2) The allowance of a claim against an estate represented to be insolvent by the commissioners is not a judgment which merges the debt and starts the running of a new rate of interest, but the claim thus allowed continues to bear interest at the rate specified in the original contract. Bowers v. Hammond, 139 Mass. 360, 31 NE 729.

72. Loomis v. Eaton, 32 Conn. 550.

73. Lowry v. Stevens, 6 Vt. 113.

74. Sharp v. Citizens' Bank, 70 Nebr. 758, 98 NW 50.

75. Matthews v. Hutchins, 68 N. H. 412, 40 A 1063.

76. Sherman v. Talman, 2 Root (Conn.) 140.

77. Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445.

78. Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445.

79. Tuttle v. Robinson, 33 N. H. 104.

80. Nelson v. Woodbury, 1 Me. 251; Saunders v. Planters' Bank, 10 Miss. 287; Jones v. Martin, 67 N. H. 334, 39 A 971.

[a] **Effect of delay.**—The fact that the report of commissioners is not returned until long after the time limited in the commission does not change the method of settling the estate. Jones v. Martin, 67 N. H. 334, 39 A 971.

81. Providence Steam Carpet Beating Co. v. Hazard, 20 R. I. 131, 37 A 635.

82. Flitner v. Hanley, 19 Me. 261.

83. Littlefield v. Clark, 3 R. I. 265.

84. Herring v. Wellons, 13 Miss. 354.

85. Herring v. Wellons, 13 Miss. 354.

86. Findlay v. Hosmer, 2 Conn. 350; Bordman v. Smith, 4 Pick. (Mass.) 212; Gold v. McMechan, 1 Mass. 23; Mowry v. Steere, 2 R. I. 420; Mowry v. Peck, 2 R. I. 60.

[a] **The report constitutes a lien upon the real estate** in favor of the creditors proving their claims, which will be paramount to the title acquired by the purchaser under an execution in favor of a creditor. Mowry v. Steere, 2 R. I. 420.

[b] **A creditor who failed to pre-**

especially where it has been accepted and approved by the probate court,[87] and the court should not thereafter reopen the report unless the former orders were null and void,[88] or except to correct a mistake[89] or supply an omission.[90] The report is not conclusive, however, upon one who was not a party to the proceedings, and had no right to appeal therefrom,[91] and where a claim was filed merely by way of notice and was considered as withdrawn at the time of the report, it was held that such claim had not been adjudicated on.[92] Objection to the report must be taken by way of exceptions thereto.[93] It is the duty of the representative to give notice of a pending suit against the estate to the commissioners and to insist that a reservation be made to meet the judgment in such suit, and if he does not, and the report of the commissioners is accepted, it seems he will be liable to the creditor for his pro rata share of the assets.[94]

[§ 1778] **6. Reference of Disputed Claims.** A submission of disputed claims to referees is sometimes permitted where the claims submitted to the commissioners have been rejected by them in whole or in part.[95] The referees' report in such cases should include the evidence upon which they based their report;[96] and, if erroneous, may be set aside by the probate court upon exceptions taken,[97] or may be recommitted to the referees if it appears to the court that the ends of justice will thus be best subserved.[98]

[§ 1779] **7. Review—a. In General.** Any person interested or aggrieved,[99] as, for example, the personal representative,[1] a creditor,[2] or even, it has been held, an heir or distributee,[3] has ordinarily the right to appeal from the report of the commissioners allowing or rejecting claims,[4] or from the action of the probate court in accepting or rejecting such report,[5] or allowing or disallowing

sent his claim within the statutory period is bound by the report of the commissioners. Canon v. Abbot, 1 Root (Conn.) 251.

87. Bates v. Ward, 49 Me. 87; Hemphill v. Fortner, 19 Miss. 344.

[a] **A report that no claims were presented** is within the rule. Hemphill v. Fortner, 19 Miss. 344.

88. Parsons v. Mills, 2 Mass. 80; Hemphill v. Fortner, 19 Miss. 344; Dahlgren v. Duncan, 15 Miss. 280; Herring v. Wellons, 13 Miss. 354; Powell v. Carbry, 12 Miss. 86; Addison v. Eldridge, 9 Miss. 510; Smith v. Berry, 9 Miss. 321.

[a] **A suggestion that the representative corruptly neglected to oppose illegal claims** against the estate will not cause the probate court to reject the report of commissioners, the remedy being against the personal representative by an action on his administration bond or a special action on the case for waste. Parsons v. Mills, 2 Mass. 80.

89. Towle v. Bannister, 16 Pick. (Mass.) 255.

90. Hemphill v. Fortner, 19 Miss. 344.

91. Matthews v. Hutchins, 68 N. H. 412, 40 A 1063.

92. Ostrom v. Curtis, 1 Cush. (Mass.) 461.

93. Crutcher v. Cavanaugh, 12 KyL 292; Hemphill v. Fortner, 19 Miss. 344.

94. Trezevant v. McQueen, 20 Miss. 575.

95. Green v. Creighton, 15 Miss. 197; Robins v. Norcum, 12 Miss. 332; Smith v. Berry, 9 Miss. 321; Bond v. Dunbar, 2 N. H. 216; Woman's College v. Horne, (Tenn. Ch. A.) 60 SW 609.

96. Green v. Creighton, 15 Miss. 197.

97. Green v. Creighton, 15 Miss. 197.

[a] **A variance** between the petition for an appointment of referees to hear and report a petition "according to law" and the writ directing the referees to decide as should seem "just and equitable" is not a ground for setting aside the report if the referees have decided according to law and have not followed the words of the writ. Sweet v. Mathewson, 1 R. I. 420.

[b] **Failure to agree on new referees** is no ground for setting aside the report of the old referees, where, after referees had been appointed, it was agreed between parties that two new referees should be agreed upon, but they are unable to agree upon them. Sweet v. Mathewson, 1 R. I. 420.

98. Reed v. Wiley, 13 Miss. 394.

99. Findlay v. Hosmer, 2 Conn. 350; Sawyer v. Copp, 6 N. H. 42; Yeaw v. Searle, 2 R. I. 168.

1. Gillette's App., 82 Conn. 500, 74 A 762; In re McCune, 76 Mo. 200; Clough v. Clark, 63 N. H. 403, 1 A 201.

2. Ala.—Clark v. Guard, 73 Ala. 456.

Conn.—Saunders v. Denison, 20 Conn. 521; Edwards v. Botsford, 1 Root 244.

N. H.—Foster v. Clark, 61 N. H. 29; Chapman v. Haley, 43 N. H. 300.

Oh.—Cromwell v. Herron, 11 Oh. Cir. Ct. 448, 5 Oh. Cir. Dec. 196.

Pa.—Meyer's Est., 25 Pa. Co. 399.

Vt.—Hobart v. Herrick, 28 Vt. 627.

[a] **A creditor's refusal to testify** in support of his claim does not affect his right of appeal. Foster v. Clark, 61 N. H. 29.

[b] **Supersedeas as to claims of other creditors.**—A creditor of an insolvent estate whose claim has been disallowed cannot, on appeal, have a supersedeas of decrees in favor of other creditors, but the administrator should be allowed to reserve a ratable proportion of the moneys in his hands for the payment of such claim. Clark v. Guard, 73 Ala. 456.

[c] **Claimant may object that his claim is allowed for too large an amount,** where he desires to establish a trust as to part of the claim. Meyer's Est., 25 Pa. Co. 399.

3. Harris v. Angell, 16 R. I. 347, 16 A 142, 17 A 909.

[a] **Heirs not entitled to appeal from decree accepting report.**—Burrows v. Bourne, 67 Me. 225.

[b] **Where the estate is insufficient to pay other debts in full,** even though the claim objected to be disallowed, an heir cannot appeal. Shuman's Est., 45 Pa. Super. 587, 589 ("It is difficult for us to see how the appellant is legally aggrieved. If he honestly believes that the appellee's claim is unjust he may be aggrieved in his feelings but that is not within the meaning of the act of assembly. The estate of the decedent being all converted into money and distributed and only paying 33.2 per cent of the creditor's claims, what harm did it do appellant when the auditor and the court below found that the appellee had a legal claim against the estate of $338.59, and allowed him a dividend thereon of $112.41? If we should sustain this appeal and send the case back to have the distribution corrected, the only possible result would be a small increase in the dividend of the other creditors. It is beyond all question of doubt that the appellant could not receive one cent out of the estate of his father, as an heir").

4. Conn.—Bennett's App., 33 Conn. 214.

Me.—Morgan v. McCausland, 96 Me. 449, 52 A 931.

N. H.—Clough v. Clark, 63 N. H. 403, 1 A 201; Foster v. Clark, 61 N. H. 29; Chapman v. Haley, 43 N. H. 300.

R. I.—Harris v. Angell, 16 R. I. 347, 16 A 142, 17 A 909; Barnes v. Mowry, 11 R. I. 420.

Vt.—Hobart v. Herrick, 28 Vt. 627.

[a] **The commissioners' report of a contingent claim cannot be appealed from,** but only their allowance of a claim. Hobart v. Herrick, 28 Vt. 627.

[b] **Appeal from allowance of part and disallowance of part.**—The superior court was not deprived of jurisdiction of an appeal from the commissioners of the insolvent estate in allowing a certain claim and disallowing another, by the mere fact that appellant, in order that final justice might be done between all the parties interested in the allowance or disallowance of an item, and which formed a part of the claim which was disallowed, combined in a single paper an appeal from the allowance of the one with an appeal from the disallowance of the other. In re Bennett, 79 Conn. 578, 65 A 946 (appeal by a single party presenting a single claim against the insolvent estate, from the commissioners of such estate to the superior court, which sought to bring up for review their action in disallowing such claim, and in allowing a claim in favor of another party for money for which decedent was accountable either to the party whose claim was allowed or to the one whose claim was disallowed, and an accounting for which to either would inure to the benefit of the party appealing, in behalf of whom decedent had assumed to receive it, was not an appeal from the acts of the commissioners in dealing with the independent claims of two or more creditors in severalty, and hence was not void, where both claims were based on the same identical payments and the same facts would be decisive as to the party to whom decedent was accountable for the money).

[c] **The commissioners' decision can be considered only on appeal directly therefrom,** not on appeal from the probate court. Bennett's App., 33 Conn. 214; Barnes v. Mowry, 11 R. I. 420.

[d] **Excess of jurisdiction.**—Commissioners of insolvency having no jurisdiction to determine that a preferred claim is a nonpreferred one, an appeal by a creditor from such a judgment by them cannot be sustained. State v. Hichborn, 67 Me. 504.

[e] **Where a party has neglected to prosecute his appeal** from the judgment of commissioners, a trial may be granted by the supreme court. Harris v. Earle, (R. I.) 39 A 192; Baker v. Hoxie, 20 R. I. 331, 38 A 1000.

[f] **No appeal from report of commissioners.** — Hooe v. American Fur Co., 1 Wis. 334.

5. Bennett's App., 33 Conn. 214;

claims.[6]

Venue. It has been held that an appeal from a decision of commissioners may be brought in the county where the administrator resides, although administration was granted in another county.[7]

[§ 1780] **b. Proceedings for Appeal.** An appeal must be taken in the manner prescribed by statute.[8] Appellant should aver in the reasons assigned for appeal the extent of his interest,[9] and how it is affected by the decision appealed from,[10] and the grounds of objection must be stated with reasonable certainty,[11] although minuteness and exact precision are not essential.[12] The appeal should be taken by appellant within the time prescribed by statute,[13] and due notice given to parties adversely interested,[14] who should, if claimants, bring their claims before the appellate court in the prescribed time and manner.[15] Even if appellee is entitled to require a bond he may waive such privilege.[16]

[§ 1781] **c. Hearing and Determination.** On appeal such questions or matters only will be heard and determined as were considered below and are properly brought before the appellate court.[17] Where the single issue is whether the claim itself ought to be allowed against the estate, formal pleadings are not necessary.[18] Under some statutes claimant may on appeal from the commissioners amend any defect, mistake, or informality in the statement of his claim which does not change the ground of the action.[19] The statutes sometimes permit the court to require the creditor to submit to examination under oath,[20] but such a statute does not authorize claimant to testify on his own motion.[21] Affidavits in explanation or contradiction of the testimony on which the petition is founded, as set forth in the petition itself, must be taken with notice, or filed a sufficient length of time to enable the party to examine them.[22] A statute requiring on an appeal from a commissioner a production of "attested copies of the petition, declaration, and order of notice" does not make his report competent evidence on the trial in the appellate court.[23] In the hearing and determination of a claim upon appeal, issues for a jury trial are sometimes framed.[24]

Stay of proceedings. Proceedings on appeal by a creditor of an insolvent estate from the allowance of the claim of another creditor whose demand is much larger than appellant's will be stayed to await the determination of an appeal taken by the administrator from the allowance of the claim of the appealing creditor.[25]

[§ 1782] **K. Rights and Remedies of Creditors —1. In General.** Under some statutes the creditors of an insolvent estate have the right to nominate a person as administrator of the property,

Saunders v. Denison, 20 Conn. 521; Peck v. Sturges, 11 Conn. 420; Edwards v. Botsford, 1 Root (Conn.) 244; Ostrom v. Curtis, 1 Cush. (Mass.) 461; Reed v. Wiley, 13 Miss. 394; In re McCune, 76 Mo. 200.

[a] **A confirmation of the report of referees is final** as to the action of the probate court but is subject to reëxamination in the supreme court upon the law and facts. Reed v. Wiley, 13 Miss. 394.

[b] **Conclusiveness of decision not appealed from.**—The decision of the probate judge upon the question whether further assets have come to the hands of an executor or administrator, so as to entitle a creditor to have the commission of insolvency opened for the purpose of letting in his claim, is conclusive upon the parties unless appealed from, and is not open to inquiry upon an appeal from the decision of the commissioners allowing or disallowing the claim. Ostrom v. Curtis, 1 Cush. (Mass.) 461.

[c] **A review is not allowed in a county court** in a case appealed from a decision of the probate court in accepting a report of commissioners upon an insolvent estate. Foster v. Caldwell, 18 Vt. 176.

6. Schulhoefer v. Fulton, (Ala.) 82 S 446; McNeil v. Macon, 20 Ala. 772; In re Donnell, 114 Me. 324, 96 A 230; Sawyer v. Coop, 6 N. H. 42; Barksdale v. Ward, (Tenn. Ch. A.) 46 SW 771.

[a] **Appeal from probate clerk to circuit court.**—An appeal from an adjudication of claims by the probate clerk lies directly to the circuit court, and the probate judge has no jurisdiction to review the acts of such clerk. England v. Pearson, 16 Lea (Tenn.) 443, 1 SW 42.

[b] **The allowance or disallowance of a claim of the representative** is a matter of law and not a matter of discretion, and hence an appeal lies from the action of the court with respect to such claim. In re Donnell, 114 Me. 324, 96 A 230.

[c] **An order striking out objections to claims** on the ground that the objections had not been filed within the prescribed time, is not within a statute providing for an appeal "upon any issue as to the allowance of any claim against insolvent estates." Christopher v. Stewart, 133 Ala. 348, 32 S 11.

7. Gould v. Carlton, 55 Me. 511.

8. Morgan v. McCausland, 96 Me. 449, 52 A 931; Bates v. Ward, 49 Me. 87.

[a] **Petition where appeal prevented by mistake, etc.**—The law allowing a petition for appeal from the decree of a judge of probate, where such appeal has been prevented by mistake, accident, or misfortune, does not extend to the decision of commissioners upon insolvent estates; neither can the supreme court grant or refuse new trials on such decisions. Jones v. Martin, 67 N. H. 334, 39 A 971; Hilton v. Wiggin, 46 N. H. 120 [both foll Swain v. Kemp, 71 N. H. 620, 51 A 905].

[b] **Ineffectual appeal.**—An appeal from a decree of a judge of probate and not from the decision of the commissioners is ineffectual to confer jurisdiction, where it appears that there is no decree of the judge of probate to appeal from, and no appeal is taken from the decision of the commissioners. Morgan v. McCausland, 96 Me. 449, 52 A 931.

9. Saunders v. Denison, 20 Conn. 521.

10. Saunders v. Denison, 20 Conn. 521.

11. Barnard v. Barnard, 16 Vt. 223.

12. Barnard v. Barnard, 16 Vt. 223.

13. Conn.—Bailey v. Whitman, 49 Conn. 79.

Me.—Robbins Cordage Co. v. Brewer, 48 Me. 481.

Mass.—Merriam v. Leonard, 6 Cush. 151.

N. J.—Young v. Young, 32 N. J. Eq. 275.

R. I.—Barnes v. Mowry, 11 R. I. 420; Burlingame v. Saunders, 4 R. I. 41.

[a] **Leave to appeal after the expiration of the time limited** for appeal will be granted only when it appears that the petitioner has not unreasonably neglected to appeal, and that injustice has been done by the decision of the judge, and the petitioner will be required to furnish some evidence that the appeal is taken in good faith and that he actually intends to try the issues presented thereby. In re Moulton, 50 N. H. 532.

14. Donovan's App., 40 Conn. 154; Pattee v. Lowe, 35 Me. 121; Jacobs v. Jacobs, 110 Mass. 229; Shaw v. Newell, 9 R. I. 111; Sheldon v. Johnston Prob. Ct., 5 R. I. 436.

[a] **The fact that giving notice of appeal will be inconvenient** cannot dispense with the positive requirement of the statute with regard thereto. Sheldon v. Johnston Prob. Ct., 5 R. I. 436.

15. Sumner v. Fisk, 45 N. H. 588.

16. Rich v. Eldredge, 42 N. H. 246.

17. Hart's App., 32 Conn. 520; Morgan v. McCausland, 96 Me. 449, 52 A 931; Rich v. Eldredge, 42 N. H. 246; Barksdale v. Ward, (Tenn. Ch. A.) 46 SW 771.

[a] **An appeal from the disallowance of one of two distinct claims** does not carry up for appeal the allowance of the other. Scutt's App., 46 Conn. 38.

[b] **Account different from that used below.**—Where upon the trial of an appeal plaintiff relied upon and used before the jury, against defendant's objection, an account against the deceased, which varied in amount and items charged, and was different in other respects from the original account filed in the probate court and used before the commissioners and auditor, the proceeding was irregular and the verdict should be set aside. Rich v. Eldredge, 42 N. H. 246.

18. Tolles' App., 54 Conn. 521, 9 A 402.

19. Huntington's App., 73 Conn. 582, 48 A 766; Donahue's App., 62 Conn. 370, 26 A 399; Bluehill Academy v. Ellis, 32 Me. 260; Abbott v. Keith, 11 Vt. 525.

[a] **The rule applies** to a statement of the claim in alternative form. Starkey's App., 61 Conn. 199, 23 A 1081.

20. Dyer v. Stanwood, 7 N. H. 261.

21. Morse v. Page, 25 Me. 496.

22. Wing v. Bates, 16 Vt. 148.

23. Cook v. Bennett, 51 N. H. 85.

24. Tolles' App., 54 Conn. 521, 9 A 402.

25. Farr v. Williams, 47 N. H. 560.

rights, and credits of such estate unadministered.[26] Each creditor is entitled to a ratable proportion of his claim, with other creditors, and no more,[27] taking into consideration the amount, if any, which he has received from the assets in another state.[28] Every creditor has the right to contest the claims of other creditors or claimants [29] provided his claims or objections are presented in the prescribed time and manner.[30]

[§ 1783] **2. Actions**[31]**—a. In General.** As a general rule after the representation or declaration of insolvency a creditor cannot bring an action on his full claim against the executor or administrator,[32] but exceptions to this rule have been recognized where the claim sued on is a preferred one, not affected by the insolvency,[33] where the estate proves solvent,[34] and where the estate has been wasted and not accounted for by the representative,[35] and under some statutes a suit may be prosecuted for the purpose of establishing the claim, the judgment thereon to be enforced and collected in the manner provided for the collection of other claims against the estate.[36] The creditor may also sue the representative where his claim is rejected [37] and the representative gives him notice to sue.[38] After the proceedings in insolvency a creditor's right is generally to maintain an action against the representative only for the balance allowed him by the commissioners,[39] or for his pro rata share of the dividend decreed by the probate court;[40] his usual remedy in such cases being either by a suit on the representative's administration bond [41] or

26. Weaver v. Weaver, 23 Ala. 789.

[a] **It is the duty of the court to appoint** an administrator so nominated by the creditors. Long v. Easly, 13 Ala. 239.

[b] **If the creditors fail to nominate** (1) an administrator the court may appoint such person as it may deem fit. Long v. Easly, 13 Ala. 239. (2) Where a meeting of creditors fails to appoint a syndic to an insolvent succession for whose administration neither the beneficiary, heir, or any other person has applied, the court may appoint the sheriff. Morris v. Williams, 6 La. Ann. 391.

27. Pike v. State, 14 Ark. 403; Merchants', etc., Nat. Bank v. Kern, 8 Pa. Dist. 75; Happoldt v. Jones, 16 S. C. L. 109; Hays v. Cecil, 16 Lea (Tenn.) 160.

[a] **Time for examination of claims.**—The rights of claimants as to demands which form items of an account which the syndic of an insolvent succession is ordered to render cannot be examined until such account is rendered. Percy v. Percy, 7 Mart. N. S. (La.) 348.

28. Hays v. Cecil, 16 Lea (Tenn.) 160 (a creditor who has received from the assets in another state a larger percentage on his claim than the creditors in the state where administration is had is entitled to nothing under the administration in the latter state).

29. La.—Stewart v. Newton, 12 La. Ann. 622.

Mass.—Farnum v. Boutelle, 13 Metc. 159.

Mont.—In re Mouillerat, 14 Mont. 245, 36 P 185 [dist Ryan v. Kinney, 2 Mont. 454].

N. J.—Currie v. Knight, 34 N. J. Eq. 485.

N. C.—Wordsworth v. Davis, 75 N. C. 159.

Pa.—In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680.

"The right of each to be heard in support of his claim, and in opposition to every claimant who interferes with it, is necessarily involved in the right to demand payment out of the fund." Kittera's Est., 17 Pa. 416, 423.

[a] **General creditors may:** (1) Require that their debts shall take precedent of voluntary and incomplete transfers of the decedent's property. Stewart v. Newton, 12 La. Ann. 622. (2) Dispute liens claimed upon assets and contest the validity of chattel mortgages or pledges claimed as security. Farnum v. Boutelle, 13 Metc. (Mass.) 159; Currie v. Knight, 34 N. J. Eq. 485.

[b] **A creditor may plead the statute of limitations** (1) in bar of another creditor's debt. Wordsworth v. Davis, 75 N. C. 159; In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680 [dist McWilliam's App., 117 Pa. 111, 11 A 383]. But compare matter of Smith, 1 Ashm. (Pa.) 352 (administrator not bound to plead statute of limitations against claim of one creditor on requisition of other creditors). (2) He has this right even though the representatives have waived or are estopped to plead the statute. In re Claghorn, 181 Pa. 600, 37 A 918, 59 AmSR 680 [dist McWilliam's App., 117 Pa. 111, 11 A 383].

[c] **Upon proceedings for distribution before an auditor** creditors may question each other's claims and the auditor may reject such as do not appear to be fair and just. Hahnlin's App., 45 Pa. 343; Kittera's Est., 17 Pa. 416.

[d] **Effect of opposition.**—An opposition by a creditor to an administrator's tableau of distribution puts in issue the validity as well as the rank of debts. Kerley's Succ., 18 La. Ann. 583.

30. Dahlgren v. Duncan, 15 Miss. 280; Koons v. Koons, 148 Pa. 585, 24 A 95.

31. Effect of representation of insolvency on pending actions see supra § 1756.

32. Ind.—Hardesty v. Kinworthy, 8 Blackf. 304; Remy v. Butler, 7 Blackf. 5.

Ky.—Trumbo v. Murphy, 7 KyL 41, 13 Ky. Op. 528.

Me.—Pattee v. Lowe, 36 Me. 138.

Mass.—Boston Fourth Nat. Bank v. Mead, 214 Mass. 549, 102 NE 69; Johnson v. Ames, 6 Pick. 330; Paine v. Nichols, 15 Mass. 264; Wildridge v. Patterson, 15 Mass. 148.

N. J.—Reeves v. Townsend, 22 N. J. L. 396.

Pa.—Shallcross v. Eastburn, 24 Pa. Dist. 558.

Tenn.—Spencer v. Goodlett, 104 Tenn. 648, 58 SW 322; Sellars v. Brown, (Ch. A.) 46 SW 335.

Tex.—Farmers', etc., Nat. Bank v. Bell, 31 Tex. Civ. A. 124, 71 SW 570.

B. C.—Wilson v. Marvin, 3 B. C. 327.

[a] **Action in federal courts.**—A decree of insolvency by a state court is no bar to the rendition of a judgment in an action at law in the federal courts, but when the estate is actually insolvent such judgment will be enjoined in equity and the creditor compelled to come in and take his place with other creditors of the estate. Byrne v. McDow, 23 Ala. 404.

[b] **Appeal lies from decree granting leave to institute suit.**—Leighton v. Chapman, 30 Me. 538.

[c] **Action on bond of deceased officer.**—Where a constable's estate had been represented insolvent, and commissioners appointed, his executrix was not subject to suit by creditors in order to fix the liability of his sureties, the claimant's remedy being by filing the claim with the commissioners and obtaining an extension of time if necessary. Ryan v. Lyon, 212 Mass. 416, 99 NE 169.

[d] **Rule in absence of statute.**—Acts [1821] c 30 p 72, and Acts [1822] p 55 § 1, prohibiting actions against executors and administrators of insolvent estates after declaration of insolvency, not being included in the code of 1857, and there being no law prohibiting such suits from the date of the enactment of such code until 1880, creditors of an estate declared insolvent in 1867 were entitled to sue on their claims prior to 1880, and not having done so such claims were barred, and not entitled to participate in the distribution of assets paid to the administrator by the United States government in 1902. Nutt v. Brandon, 85 Miss. 702, 38 S 104.

[e] **Action before appointment of commissioners.**—Creditors of an estate represented insolvent have the right to sue the executor or administrator before the appointment of commissioners. Blodget v. Brinsmaid, 7 Vt. 9.

33. Pattee v. Lowe, 36 Me. 138.

34. Bacon v. Thorp, 27 Conn. 251; Pattee v. Lowe, 36 Me. 138.

[a] **No action at law can be maintained** (1) against the representative of an estate which has been represented insolvent and for which commissioners have been appointed, even though the estate finally proves to be solvent. Paine v. Nichols, 15 Mass. 264 [foll Johnson v. Ames, 6 Pick. (Mass.) 330]. (2) It seems, however, that under such circumstances a creditor would have a remedy in equity. Johnson v. Ames, 6 Pick. (Mass.) 330.

35. McNeill v. Elkins, 10 La. 587; State v. Bowen, 45 Miss. 347; Burruss v. Fisher, 23 Miss. 228.

[a] **Contrary view.**—Pattee v. Lowe, 36 Me. 138; Longfellow v. Patrick, 25 Me. 18.

36. Wilson v. Broward, 15 Fla. 587; Crisp v. Dunn, 56 N. J. L. 355, 29 A 166.

37. Eaton v. Whitaker, 6 Pick. (Mass.) 465; Smith v. Crater, 43 N. J. Eq. 636, 12 A 530; James v. James, 14 R. I. 564.

[a] **Such suit may be brought without notice.**—James v. James, 14 R. I. 564.

[b] **Premature suit.**—A suit at law on a claim against an insolvent estate which is commenced after the claim has been rejected by the insolvency commissioners, but before they have made their report and procured its acceptance by the judge of probate, is premature. Goff v. Kellogg, 18 Pick. (Mass.) 256.

38. Smith v. Crater, 43 N. J. Eq. 636, 12 A 530.

39. Doolittle v. Hunsden, Brayt. (Vt.) 41.

40. Melone v. Gaines, Minor (Ala.) 317; Nelson v. Woodbury, 1 Me. 251; Mansfield v. Patterson, 15 Mass. 491; State v. Bowen, 45 Miss. 347; Burruss v. Fisher, 23 Miss. 228.

41. Tyler v. Cook, Kirby (Conn.) 391; Wass v. Bucknam, 40 Me. 289; Dickinson v. Bean, 11 Me. 50; Nelson v. Woodbury, 1 Me. 251; Mansfield v. Patterson, 15 Mass. 491; State v. Bowen, 45 Miss. 347.

[a] **Necessity for decree and demand.**—Before a creditor may maintain an action on the administration bond there must be a decree of distribution by the probate judge and a demand made upon the administrator for the amount decreed the creditor. Nelson v. Woodbury, 1 Me. 251.

by debt on the decree of distribution.[42] If the creditor is paid his pro rata share he cannot sue for the balance of his claim,[43] unless it is a preferred one, which has been paid only a pro rata share with general creditors.[44]

[§ 1784] **b. Suits in Equity.** Unless barred by lapse of time or laches,[45] a creditor of an insolvent estate may maintain a bill in equity to wind up such estate and to subject it to the payment of debts generally,[46] or he may maintain a bill to subject certain assets to the payment of his judgment,[47] to set aside a fraudulent conveyance or sale by the decedent,[48] to annul a fraudulent judgment against decedent,[49] or to restrain proceedings under a judgment at law obtained by another creditor after the estate was declared insolvent.[50] But he cannot by any such suits acquire a preference over other creditors.[51]

[§ 1785] **c. Time to Sue and Limitations.** Creditors are usually forbidden to bring suit within a prescribed period after the granting of administration, except as to preferred claims not affected by decedent's insolvency.[52] It is also generally provided that suits by creditors to enforce their claims are barred unless brought within a certain time prescribed by statute,[53] unless new assets come into the representative's hands;[54] but it has been held that the balance of a claim against the estate on which a dividend has been paid is not within the statute of limitations.[55]

[§ 1786] **d. Defenses.** The personal representative of an insolvent estate can defend a suit brought against him for a debt due from his decedent only by showing an account of administration properly settled in the probate court, or by regular proceedings in insolvency under statute,[56] and it has been held that when a claimant elects to proceed against the personal representative, the latter is not bound to interpose the bar of limitations.[57] An administrator who distributes the entire fund in his hands pending an appeal by a creditor whose claim is disallowed cannot set up such payment in bar of an action by the creditor against him on a settlement made after a reversal of the disallowance;[58] nor can the representative set up the allowance of a claim by the commissioners to the wrong person as a defense to an action by the proper person on the same claim.[59]

[§ 1787] **e. Parties.** The executor or administrator is generally a necessary party to proceedings against an insolvent estate in equity,[60] as are also the heirs where the bill has for its object the sale of land to pay debts.[61]

[§ 1788] **f. Pleading.** A declaration by a creditor's bill may be maintained after the death of a judgment debtor to reach equitable assets where the prayer is in the alternative that plaintiff is given a prior lien on the fund, or, if this cannot be granted, that there is a settlement and distribution of the debtor's assets. Riddle v. Motley, 1 Lea (Tenn.) 468.

[b] **Where new assets are discovered** pending proceedings of an insolvent estate, a creditor who has his claims allowed by the commissioners cannot sustain a suit for the recovery of such new assets, but should sue upon the administration bond for the benefit of all creditors in case the administrator refuse to inventory it. Tyler v. Cook, Kirby (Conn.) 391. To same effect Mansfield v. Patterson, 15 Mass. 491.

Actions on administration bonds generally see infra §§ 2600–2669.

42. Wass v. Bucknam, 40 Me. 289.

43. Siebert v. Zinkland, 26 Pittsb LegJ (Pa.) 137.

44. Filtner v. Hanley, 19 Me. 261.

45. Brown v. Morgan, 84 Ill. A. 233; Stone v. Sanders, 1 Head (Tenn.) 248; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

46. Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445; Lunsford v. Jarrett, 2 Lea (Tenn.) 579; Treece v. Carr, (Tenn. Ch. A.) 58 SW 1078; Timmons v. Rainey, (Tenn. Ch. A.) 55 SW 21.

47. Bay v. Cook, 31 Ill. 336; Trumbo v. Murphy, 7 KyL 41, 13 Ky. Op. 528; Simpson v. Simpson, 7 Humphr. (Tenn.) 275.

[a] **Bill in alternative.**—A creditor's bill may be maintained after the death of a judgment debtor to reach equitable assets where the prayer is in the alternative that plaintiff is given a prior lien on the fund, or, if this cannot be granted, that there is a settlement and distribution of the debtor's assets. Riddle v. Motley, 1 Lea (Tenn.) 468.

48. Lilienthal v. Drucklieb, 92 Fed. 753, 34 CCA 657; State v. Parsons, 147 Ind. 579, 47 NE 17, 62 AmSR 430; Morris v. Williams, 6 La. Ann. 391; Calkins v. Stedman, 146 App. Div. 202, 130 NYS 932; Spicer v. Ayres, 2 Thomps. & C. (N. Y.) 626.

[a] **A demand that the executor bring the action** (1) to set aside a fraudulent conveyance by decedent is not a condition precedent to an action by a creditor. Calkins v. Stedman, 146 App. Div. 202, 130 NYS 932. (2) Under the California statute a creditor must apply to the court for an order directing the representative to sue to recover property fraudulently conveyed by decedent before he himself may bring the suit to recover such property. Beswick v. Dorris, 174 Fed. 502.

[b] **Representative as fraudulent grantee.**—Where a defendant is both the administrator of the decedent and the party holding the fraudulent title, the estate being insolvent, a creditor at large may maintain his action in equity for relief. Spicer v. Ayers, 2 Thomps. & C. (N. Y.) 626.

[c] **Proof of claim.**—Plaintiff in such an action must prove his claim in the same manner that it would have to be proved in an action at law. Mertens v. Mertens, 48 Misc. 235, 96 NYS 785 [aff 113 App. Div. 905 mem, 99 NYS 1142 mem].

[d] **If the administratrix and an heir have conveyed the lands of the estate** in fraud of decedent's creditors, the latter are entitled to relief in a suit to settle the estate, as well as by an independent suit. Elliott v. Scoville, 144 Ky. 584, 139 SW 806.

[e] **This rule does not prevail in Massachusetts** where under Rev. L. c 142 § 30, and c 146 § 17, an executrix of an insolvent estate is alone entitled to sue to set aside preferences and to recover lands fraudulently conveyed, the remedy of the creditors, if she is the beneficiary of the fraudulent conveyances, being to apply for her removal. Boston Fourth Nat. Bank. v. Mead, 214 Mass. 549, 102 NE 69.

49. Morris v. Williams, 6 La. Ann. 391 (to enable creditors to annul a judgment obtained by a wife against her husband, they must allege and prove they were creditors at the time the judgment was rendered, and that it was obtained by collusion in order to defraud them of their recourse upon the husband's property).

50. Byrne v. McDow, 23 Ala. 404; Scarlett v. Hicks, 13 Fla. 314.

51. Bouchaud v. Dias, 1 N. Y. 201 [rev 10 Paige 445]; People's Nat. Bank v. Kern, 8 Pa. Dist. 72; Gleaves v. Wilson, 4 Baxt. (Tenn.) 54; Harper v. Harper, 2 B. C. 15.

52. Smith v. Rhodes, 29 Me. 360; Severance v. Hammatt, 28 Me. 511.

53. Ala.—Lea v. Leachman, 22 Ala. 452.

Me.—Leighton v. Chapman, 30 Me. 538.

N. H.—Parsons v. Parsons, 67 N. H. 419, 29 A 999.

R. I.—Burlingame v. Brown, 5 R. I. 410.

Tenn.—Gleaves v. Wilson, 4 Baxt. 54.

[a] **Where a claim has been rejected** by the commissioners for want of proof, and such rejection is confirmed by the probate court's allowance of the report of the commissioners, the claimant is concluded thereby, unless his suit is brought with all the diligence required by the statute. Burlingame v. Brown, 5 R. I. 410.

[b] **The time elapsing while proceedings are pending in the probate court** between the creditor's filing of his claim and the bringing of a suit thereon cannot be deducted to prevent the bar of the statute of limitations. Lea v. Leachman, 22 Ala. 452.

[c] **Relief from failure to sue within time limited.**—A statute providing that one who has a claim against the estate which has not been prosecuted in time may apply to the supreme court by petition stating the facts, and, if the court deem that justice and equity require it and that claimant has not been culpably negligent, they may give him judgment for the amount due him, does not apply to insolvent estates. Parsons v. Parsons, 67 N. H. 419, 29 A 999.

54. Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284.

55. Bancroft v. Andrews, 6 Cush. (Mass.) 493.

56. Cushing v. Field, 9 Metc. (Mass.) 180; Re Ryerson, 29 N. S. 81.

57. Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445.

Powers of representative to waive bar of limitations generally see supra §§ 907–911.

58. Clark v. Guard, 73 Ala. 456.

59. Salem First Nat. Bank v. Grant, 71 Me. 374, 36 AmR 334.

60. McDowell v. Cochran, 11 Ill. 31; White v. Follin, 10 S. C. Eq. 187.

[a] **A creditor's bill to recover assets fraudulently conveyed** by decedent does not depend on the existence of a legal representative of decedent or on his refusal to act and may be brought independent of such representative. Lilienthal v. Drucklieb, 92 Fed. 753, 24 CCA 657. To same effect Johnston v. Gundberg, 113 App. Div. 228, 98 NYS 1015.

61. Timmons v. Rainey, (Tenn. Ch. A.) 55 SW 21.

Parties to proceedings for sale of land generally see supra § 1493.

itor on a claim which has been rejected by the commissioners should set forth the demand truly and state that it was laid before the commissioners and was rejected.[62] It is no objection to a declaration by a creditor that he declares against himself as administrator.[63] In an action by a creditor, suing in behalf of all, against an administratrix and the county judge for an accounting, a petition which alleges collusion between defendants and a fraudulent payment and retention of illegal fees to the prejudice of the creditors is sufficient as against demurrer.[64]

[§ 1789] **g. Evidence.** The insolvency of the estate may be shown in a collateral proceeding by a creditor to enforce his claim,[65] although the proof required to establish insolvency in such proceeding need not be as positive as when the insolvency is directly in issue.[66] The opinion of the commissioners as to the facts in reference to a claim, as they appeared before them, is inadmissible to establish such claim in an action against the representative thereon.[67] In an action against a deceased attorney's estate, founded upon the attorney's negligence in collecting a note, proof of the attorney's admission that he had collected the money on the note and of his promise to pay it is not competent evidence for the creditor.[68]

[§ 1790] **h. Judgment and Relief.** Where a creditor's claim has been allowed by the commissioners, judgment may be rendered in an action by the creditor for the amount of the dividend awarded him by the court;[69] but if notice of dissatisfaction with the commissioners' report is given by the representative as required by statute, and the creditor in consequence brings an action at law, he may have judgment for a larger or smaller sum than that allowed by the commissioners[70] together with his costs in the action.[71] But the writ, in an action of this kind, should contain no order to attach the goods of the intestate, and if it does it may be abated by plea or motion, although unless so avoided the objection is waived.[72] A general decree may be rendered for the benefit of all creditors, although the bill is on behalf of one of them only, if it appears by the answer that the estate is insolvent, and that there are other creditors to be paid ratably with plaintiff.[73] A surety who brings an action on a note of the deceased insolvent, which he did not pay until after administration had ended, and to which the representative pleads plene administravit, may be entitled to a judgment quando acciderint.[74]

[§ 1791] **L. Payment of Claims and Distribution—1. In General.** As a general rule all the property of a deceased insolvent debtor not set apart for the widow and minor children[75] is applicable to the payment, pro rata, of all his debts, in the order of their classification, no matter where the assets may be found or the creditors reside.[76] As a general rule claims of a higher class are to be paid before distribution to those of a lower class, taking the whole fund if necessary.[77] No priority or preference of payment can be acquired by one creditor over other creditors of the same class.[78]

Redemption of trust property wrongfully pledged. Where decedent holding stock in trust pledged part of it to a bank as security for a loan, the real owner of the stock was not entitled to have the administrator of decedent's insolvent estate use the general assets of the estate to exonerate the stock in the possession of the bank from its liability for the indebtedness as the only property pledged being trust property, there was no opportunity to marshal assets in the payment of the debts from the proceeds of the pledged property.[79]

Delayed creditor. A creditor whose debt was not

62. Eaton v. Whitaker, 6 Pick. (Mass.) 465.

63. Ross v. Ross, 20 Ala. 105 (in a contest between creditors, it is the proper practice, where written objections are filed to a creditor's claim, for him to declare upon it as in a suit at common law, against the representative, and that such declaration is not demurrable because the creditor as plaintiff declares against himself as administrator de bonis non as defendant).

64. McGlave v. Fitzgerald, 67 Nebr. 417, 93 NW 692, 2 AnnCas 867 (it was not necessary in order to entitle the creditor to bring an action that he should show a technical refusal by the administratrix to sue).

65. Byrd v. Jones, 84 Ala. 336, 4 S 375.

66. Byrd v. Jones, 84 Ala. 336, 4 S 375.

67. Fitch v. Hyde, Kirby (Conn.) 258.

68. Stubbs v. Beene, 37 Ala. 627.

69. Peirce v. Whittemore, 8 Mass. 282.

70. Blake v. Dennie, 15 Pick. (Mass.) 385; Pierce v. Saxton, 14 Pick. (Mass.) 274; Burns v. Fay, 14 Pick. (Mass.) 8.

71. Blake v. Dennis, 15 Pick. (Mass.) 385; Pierce v. Saxton, 14 Pick. (Mass.) 274; Mathewson v. Sheldon, 6 R. I. 223.

72. Thayer v. Comstock, 39 Me. 140.

73. Dias v. Bouchaud, 10 Paige (N. Y.) 445 [rev on other grounds 1 N. Y. 201].

74. Rosborough v. Mills, 35 S. C. 578, 15 SE 281.

75. Allowances to widow and children see supra §§ 758–874.

76. U. S.—Tennessee Union Bank v. Vaiden, 18 How. 503, 15 L. ed. 472; Williams v. Benedict, 8 How. 107, 12 L. ed. 1003.

Ark.—Jamison v. Adler-Goldman Commission Co., 59 Ark. 548, 28 SW 35.

Ill.—Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270].

Mass.—Jennison v. Hapgood, 14 Pick. 345.

Miss.—Dahlgren v. Duncan, 15 Miss. 280.

N. Y.—Hoppenstedt v. Amy, 174 NYS 742.

Pa.—Smith's Est., 17 LancLRev 380; In re Helbling, 33 PittsbLegJNS 53.

Tex.—Tyler v. Thompson, 44 Tex. 497, 23 AmR 600.

Eng.—In re Bentinck, [1897] 1 Ch. 673; In re Jones, 31 Ch. D. 440; Wilson v. Coxwell, 23 Ch. D. 764.

Ont.—Re Williamson, 39 Ont. L. 413, 12 OntWN 154, 36 DomLR 783.

[a] **A nonresident creditor** is entitled to participate with resident creditors in the assets according to the rank and classification of his claim, where it does not appear that he has received payment on such claim in any other state. Tyler v. Thompson, 44 Tex. 497, 23 AmR 600.

[b] **The rule of distribution in a trust deed** for the benefit of creditors will be the rule of distribution of the estate, if not repugnant to the laws of the state where it is to be applied. Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 573.

[c] **Judgment given for support of wife.**—A judgment given by a deceased husband to a trustee to secure his wife's support must be postponed to claims of creditors in the distribution. Jaeger's Est., 1 Del. Co. (Pa.) 525.

[d] **Notes executed to a married woman by her husband** in consideration of her conveyance of land and slaves cannot be allowed out of his insolvent estate in preference to other creditors. Maraman v. Maraman, 4 Metc. (Ky.) 84.

[e] **Double payment not permitted.**—Where decedent had indorsed and discounted with a bank the notes of a corporation, and at his death was indebted both to the bank and to the corporation, the estate being insolvent, the executrix was not required to pay dividends on full amounts due both the bank and the corporation unless the corporation paid the notes to the bank, in which case the corporation would be subrogated to bank's rights. Feick v. Hill Bread Co., (N. J. Ch.) 99 A 851.

77. Gish's App., 31 Pa. 277.

Preferred claims see infra § 1793.

78. Williams v. Benedict, 8 How. (U. S.) 107, 12 L. ed. 1007; Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; U. S. Fidelity, etc., Co. v. Carnegie Trust Co., 161 App. Div. 429, 146 NYS 804; Leiper v. Levis, 15 Serg. & R. (Pa.) 108; Fulton's Est., 25 Pa. Dist. 723.

[a] **Judgment creditors** (1) share ratably in the assets of an insolvent estate notwithstanding the dates of the judgments. Williams v. Benedict, 8 How. (U. S.) 107, 12 L. ed. 1007; Newark Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618; Leiper v. Levis, 15 Serg. & R. (Pa.) 108. (2) If the personal estate is insufficient the judgments should be paid from the realty in the order of their priority. Bassett v. Elliott, 78 Mo. 525.

79. Lowe v. Jones, 192 Mass. 94, 78 NE 402, 116 AmSR 225, 6 LRANS 487.

due when the first account of the executor was audited, and who did not participate in the distribution then made, is entitled, on a further distribution, to receive an amount sufficient to give him a share of the entire estate proportionate to that received by other creditors of the same class.[80]

Where the creditor has two or more claims, a pro rata amount of the dividend allowed him should be credited on each claim.[81]

A claim of the personal representative against the insolvent estate can only be paid pro rata with other creditors of the same class,[82] but where he has paid preferred claims out of his own funds, he may become entitled to a preference by subrogation.[83]

Application of payments. Payments made by the representative from time to time go in reduction of the principal and interest then due, and where such payments exceed the interest due at the date of payment, the excess must be applied on the principal.[84]

[§ 1792] **2. New or Increased Assets.** Newly discovered assets also become a trust fund for ratable distribution among creditors,[85] and the fact that certain creditors have, by their special discovery and exertion, made such assets available to the estate for distribution, gives them no preference in the distribution,[86] although it would seem that their special and reasonable outlay in procuring such assets should be deducted with other costs from the fund thus made available.[87]

A creditor whose claim has become barred by the statute of limitations has been held not entitled to participate in new assets.[88]

[§ 1793] **3. Preferred Claims.**[89] The statutes usually provide what claims shall be entitled to a preference in the distribution of the assets of an insolvent estate[90] and for the classification of such claims.[91] Expenses of last illness and funeral,[92] necessary expenses of administration,[93] and debts due the government,[94] are generally recognized as privileged claims. Judgments also are sometimes accorded a preference,[95] although some of the statutes rank judgment creditors and creditors by specialty or simple contract on an equal footing of pro rata distribution.[96]

A claim for a trust fund cannot be treated as a preferred claim[97] unless the fund can be specifically identified,[98] in which case it can be recovered.[99] It has been held that the cestui que trust may par-

80. Cairn's Est., 13 Phila. (Pa.) 350.

81. Stamps v. Brown, 1 Miss. 526 (creditor holding judgment and note).

82. Ala.—Baker v. Wood, 51 Ala. 345; Shortridge v. Easley, 10 Ala. 520.
Fla.—Sealey v. Thomas, 6 Fla. 25.
Miss.—Tell City Furniture Co. v. Stiles, 60 Miss. 849.
N. J.—Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445.
Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.

83. Trumbo v. Tiernan, 7 KyL 41; Chamberlin v. McDowell, 42 N. J. Eq. 628, 9 A 577; In re Torr, 2 Rawle (Pa.) 250.

84. Lowentraut v. Jackson, 82 N. J. L. 402, 81 A 743.

85. Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284; Sharp v. Citizens' Bank, 70 Nebr. 758, 762, 98 NW 50; Gunter v. Gunter, 2 S. C. 11.
"The mere allowance of a claim against an insolvent estate does not operate as a judgment, which will become dormant in five years as contemplated by section 482 of the code. In Dexter v. Arnold, 7 F. Cas. No. 3,855, 3 Mason 284, it is said: 'Where an estate is insolvent, and distribution of assets is decreed . . . and afterwards new assets come into the hands of the administrator, more than sufficient to pay all the debts, a suit will lie against the administrator for payment, in behalf of creditors, notwithstanding the statute of limitations precludes an original suit against the administrator; for the new assets are a trust fund for the creditors, and the heirs can claim distribution only after all the debts are paid.'" Sharp v. Stanton Citizens' Bank, supra.

86. Colton v. Field, 131 Ill. 398, 22 NE 545; Jenkins v. Edens, 12 B. Mon. (Ky.) 239; Rains v. Rainey, 11 Humphr. (Tenn.) 261.

87. In re Weed, 163 Pa. 595, 30 A 272.

88. Nutt v. Brandon, 85 Miss. 702, 38 S 104. But compare Sharp v. Stanton Citizens' Bank, 70 Nebr. 758, 98 NW 50 (quoted supra note 85).

89. Classification and priorities of debts generally see supra §§ 1152–1192.

90. Ala.—Smith v. Mallory, 24 Ala. 628.
Ind.—Evans v. Pence, 78 Ind. 439.
Ky.—Crutcher v. Cavanaugh, 12 KyL 292.
Pa.—Michaelsen's Est., 26 Pa. Dist. 503.
Tenn.—Edmonson v. Walker, 137 Tenn. 569, 195 SW 168; Field v. Wheatley, 1 Sneed 351; Hartley v. Gains, 4 Hayw. 159.
[a] **Mortgages.**—(1) A mortgage on realty of a deceased insolvent is a preferred debt as to the personalty. Evans v. Pence, 78 Ind. 439. (2) A mortgagee cannot demand that the administrator be required to pay a balance due on the price of the chattels mortgaged as this would give a preference to the mortgagee over the other creditors. Wentworth v. S. A. Woods Mach. Co., 163 Mass. 28, 39 NE 414.
[b] **There is no preference as to a claim for:** (1) Services rendered to decedent as a bookkeeper for four months immediately preceding his death. Lehman v. Powe, 95 Miss. 446, 49 S 622. (2) Labor performed for decedent within ninety days of the appointment of an administrator. Morse v. Williams, (Iowa) 133 NW 120.

91. Smith v. Mallory, 24 Ala. 628.

92. Flitner v. Hanly, 18 Me. 270; Huse v. Brown, 8 Me. 167.

93. Friend v. Graham, 10 La. 438; Morel v. Misotiere, 3 Mart. (La.) 363; Fuller v. Connelly, 142 Mass. 227, 7 NE 853; Matter of Friedlander, 160 App. Div. 475, 145 NYS 679.
[a] **Unauthorized compromise.** — Where the administrator compromises a claim against a debtor without an order of court, costs paid by him in such case are not a preferred claim against the estate. Patapsco Guano Co. v. Ballard, 107 Ala. 710, 19 S 777, 54 AmSR 131.

94. Huse v. Brown, 8 Me. 167; Lockwood v. Lockwood, 68 S. C. 328, 47 SE 441; Fields v. Wheatley, 1 Sneed (Tenn.) 351.
[a] **Where a county treasurer deposited county funds in an unincorporated bank,** the debts are, upon the death of the banker and the insolvency of his estate, debts due the public, and payable in full before other debts. Lockwood v. Lockwood, 68 S. C. 328, 47 SE 441.
[b] **A debt due a state bank** is not a debt due the government within the meaning of this rule, for the statute refers only to debts and arrearages due the government or state in its sovereign character, as revenues, fines, forfeitures, penalties, etc. Fields v. Wheatley, 1 Sneed (Tenn.) 351.

95. See cases infra this note.
[a] **Judgment for costs as expense of administration.**—A judgment for defendants for costs in a suit by executors is entitled to priority of payment as an expense of administration, although the estate is insolvent. Matter of Friedlander, 160 App. Div. 475, 145 NYS 679.
[b] **Unregistered judgment.** — A simple contract creditor of a deceased insolvent who obtains but does not register a judgment for his debt against a legal personal representative is entitled to priority over the intestate's specialty and simple contract creditors. In re Williams, L. R. 15 Eq. 270.
[c] **Interest on judgment.**—Where, in an insolvent succession, the executor's account shows a specific sum for distribution, the amounts to be allowed to the distributees must be fixed; and where, in the case of a judgment creditor, he is allowed an amount, including interest up to the date of the filing of the account and costs, he cannot complain. Henderson's Succ., 113 La. 101, 36 S 904.
[d] **A decree in equity ranks with a judgment at law** in the distribution of the assets of an insolvent estate. Second Nat. Bank v. Blauvelt, 44 N. J. Eq. 173, 14 A 618.
[e] **A foreign judgment** against decedent is not entitled to preference. Dean's Est., 11 Pa. Dist. 84, 26 Pa. Co. 367.

96. Smith v. Mallory, 24 Ala. 628; Paschall v. Hailman, 9 Ill. 285.

97. Ky.—Stephens v. Stephens, 89 Ky. 185, 12 SW 192, 11 KyL 496; Crutcher v. Cavanaugh, 12 KyL 292.
N. J.—Cooley v. Vansyckle, 14 N. J. Eq. 496.
N. C.—Benbury v. Benbury, 22 N. C. 235.
Pa.—Schneider's Est., 11 Phila. 71.
W. Va.—Johnson v. Johnson, 98 SE 812.

98. MacReynolds's Est., 6 Pa. Co. 424; Schneider's Est., 11 Phila. (Pa.) 71.

99. Stokes v. Burlington County Trust Co., (N. J. Ch.) 108 A 863; Vandever v. Freeman, 20 Tex. 333, 70 AmD 391.
[a] **Proceeds of trust property sold after death of trustee.**—Where a trust is established against an insolvent estate, in property which has been sold as the property of such

ticipate as a general creditor, to the whole amount of the trust debt, without abandoning the right to pursue the particular fund subject to the trust so far as this may be possible, provided that the trust fund recovered and the pro rata distribution do not, together, result in overpayment of his claim.[1]

A creditor entitled to a preference as to legal assets, who has been partially paid out of such assets, cannot receive any share of the equitable assets until the payments to all creditors are equalized, when he will be paid ratably out of the residue.[2]

A stipulation of the administrator that, if it is decided that one has the right of specific performance of decedent's agreement to convey land, there shall be a money judgment for the right, which shall be a preferred claim, is valid against other creditors of the estate only to the extent of the money that the estate has received in settlement of its claim against another for the land.[3]

The rules of priority are sometimes done away with by statute in case the estate of a decedent is insolvent and all creditors placed upon a basis of absolute equality.[4]

[§ 1794] **4. Secured Claims—a. Preference Out of Security.** A lien or secured creditor is entitled to a preference of payment out of the specific property on which his lien exists[5] to the extent of such lien;[6] but he cannot apply the excess of the security over the amount of the secured claim to an unsecured claim which he holds and thereby obtain a preference over other creditors.[7] While money received from the sale of mortgaged land belonging to an insolvent estate cannot be taken to pay the cost of a settlement suit in which a mortgage lien is enforced, so as to leave an amount insufficient to satisfy the mortgage, if personal property is used in paying insurance, taxes, repairs, and interest on the mortgaged property to an extent exceeding what is taken to pay costs of settlement, including attorney's fee, commissioner's fee, and advertising, the mortgagee cannot complain, especially where he would have been required to pay a large part of such expenses out of the proceeds in case of foreclosure.[8]

The expenses incurred in the management of the estate must, as between secured and unsecured creditors, be paid out of the unencumbered assets, although the estate is insolvent.[9]

[§ 1795] **b. Rights as to General Assets.** While some statutes permit a secured creditor to prove only for the difference between the amount of his claim and the value of his security, unless he surrenders the security to go into the common fund,[10] or unless the security was furnished by a third person not primarily responsible for the debt,[11] the usual rule is that a secured creditor may prove and collect dividends on his entire claim allowed by the commissioners, without giving up or affecting his security.[12] If he thus obtains payment in full

estate since the death of the trustee, the cestui que trust will not be remitted to his pro rata with the general creditors, but is entitled to recover the proceeds of the trust property. Vandever v. Freeman, 20 Tex. 333, 70 AmD 391.

[b] **Agreement not creating trust entitling claimant to preference.**—In re Ruetschlin, 245 Pa. 473, 91 A 857.

1. Johnson v. Johnson, (W. Va.) 98 SE 812.

2. Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 AmD 781 (it makes no difference whether he has received payment of one of several distinct claims or a part of one entire claim).

3. Harriman v. Tyndale, 184 Mass. 524, 69 NE 353.

4. Richardson v. Vick, 125 Tenn. 532, 145 SW 174 ("The intention of the General Assembly was to abolish all rules of priority or preference in the payment of the debts of insolvent deceased debtors arising from the nature, degree, or dignity of the debt, and in case of deficiency of assets, to place all creditors upon the same footing—that of absolute equality, by compelling a pro rata distribution of the assets").

5. Conn.—Wagner v. New York Mut. L. Ins. Co., 88 Conn. 536, 91 A 1012.

Ind.—Jewett v. Hurrle, 121 Ind. 404, 23 NE 262.

La.—Durand v. Delahoussaye, 28 La. Ann. 622.

Mass.—Church v. Savage, 7 Cush. 440.

Oh.—Brown v. Trottner, 11 Oh. Cir. Ct. 498, 1 Oh. Cir. Dec. 222.

Newfoundl.—In re Boone, 7 Newfoundl. 196.

[a] **Proof of claim without notice of security.**—Presentation of a claim against insolvent estate, without notice to the commissioners of the security held by the creditor and the allowance of the claim, does not deprive the creditor of his right to the security and to a dividend from the estate upon the excess of the debt. Wagner v. New York Mut. L. Ins. Co., 88 Conn. 536, 91 A 1012.

[b] **Lien must have been perfected.**—Weed v. Standley, 12 Fla. 166; Rhoton's Succ., 34 La. Ann. 893; Raht v. Warren, 5 Tenn. Civ. A. 115. But compare In re Boone, 7 Newfoundl. 196 (equitable mortgage held good, although not registered in time under the insolvent law).

[c] **Equitable relief.**—Where one had arranged with his debtor, before the latter died, to take certain security on property, and the writing given is inadequate for that purpose, equity will relieve such creditor where the estate is insolvent, and enforce against decedent's personal representative the original undertaking. Hunt v. Ennis, 12 F. Cas. No. 6,889, 2 Mason 244.

[d] **A lien for labor** which expires by statutory limitation during the time for which the representative is not liable to be sued on debts of decedent is not entitled to preference. Severance v. Hammatt, 28 Me. 511.

6. Smith v. Bryant, 60 Ala. 235.

[a] **Where lien has expired.**—Heirs paying off judgments against their ancestor, the lien of which had expired, are not entitled thereby to any priority over general creditors of the estate. Belcher v. Wickersham, 9 Baxt. (Tenn.) 111.

7. Smith v. Bryant, 60 Ala. 235; Masonic Sav. Bank v. Bangs, 84 Ky. 135, 4 AmSR 197; Spratt v. Richmond First Nat. Bank, 84 Ky. 85, 7 KyL 791; Peters v. Nashville Sav. Bank, 86 Tenn. 224, 6 SW 133.

8. Sumrall v. Vanardsall, 111 SW 310, 33 KyL 768.

9. Rodgers v. Sturgis Nat. Bank, (Tex. Civ. A.) 152 SW 1176.

10. Bristol County Sav. Bank v. Woodward, 137 Mass. 412; Haverhill Loan, etc., Assoc. v. Cronin, 4 Allen (Mass.) 141; Savage v. Winchester, 15 Gray (Mass.) 453; Farnum v. Boutelle, 13 Metc. (Mass.) 159; Middlesex Bank v. Minot, 4 Metc. (Mass.) 325; Hooker v. Olmstead, 6 Pick. (Mass.) 481; Gibson v. Crehore, 5 Pick. (Mass.) 146; Amory v. Francis, 16 Mass. 308; Johnson v. Corbett, 11 Paige (N. Y.) 265; Virginia-Carolina Chemical Co. v. Edwards, 136 N. C. 73, 48 SE 568; Moore v. Dunn, 92 N. C. 63; Creecy v. Pearce, 69 N. C. 67.

11. Bristol County Sav. Bank v. Woodward, 137 Mass. 412; Savage v. Winchester, 15 Gray (Mass.) 453.

12. U. S.—Schuelenburg v. Martin, 2 Fed. 747, 1 McCrary 348.

Colo.—Erle v. Lane, 22 Colo. 273, 24 P 591.

Conn.—Findlay v. Hosmer, 2 Conn. 350.

Ill.—Peoria First Nat. Bank v. Commercial Nat. Bank, 151 Ill. 308, 37 NE 1019; Furness v. Union Nat. Bank, 147 Ill. 570, 35 NE 624; Matter of Bates, 118 Ill. 524, 9 NE 257, 59 AmR 383.

Ind.—Hight v. Taylor, 97 Ind. 392; Clarke v. Henshaw, 30 Ind. 144.

La.—Day's Succ., 2 La. Ann. 895.

Md.—Watkins v. Worthington, 2 Bland 509.

Mo.—Day v. Graham, 97 Mo. 398, 11 SW 55; In re McCune, 76 Mo. 200; Welton v. Hull, 50 Mo. 296.

N. H.—Moses v. Ranlet, 2 N. H. 488.

N. Y.—Hoppenstedt v. Amy, 174 NYS 742.

Oh.—Cromwell v. Herron, 11 Oh. Cir. Ct. 448, 5 Oh. Cir. Dec. 196.

Pa.—Mason's App., 89 Pa 402; In re Kittera, 17 Pa. 416; Daus' Est., 8 Pa. Dist. 326; Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536; Carr's Est., 15 Pa. Co. 354; Hager's Est., 32 PittsbLegJNS 310.

Tex.—Sutherland v. Elmendorf, 24 Tex. Civ. A. 137, 57 SW 890.

Vt.—Walker v. Baxter, 26 Vt. 710; West v. Rutland Bank, 19 Vt. 403.

Eng.—Mason v. Bogg, 2 Myl. & C. 443, 14 EngCh 443, 40 Reprint 709 [questioning Greenwood v. Taylor, 1 Russ. & M. 185, 5 EngCh 185, 39 Reprint 72].

[a] **A mortgage creditor** is entitled to payment out of the general assets, although a court of equity may compel him to first resort to the land. Tubb's Est., 161 Pa. 252, 28 A 1109; Fish's Est., 16 Phila. (Pa.) 373.

[b] **The purchase of the equity of redemption** by a mortgagee does not extinguish his debt so as to preclude him from an average. Findlay v. Hosmer, 2 Conn. 350.

[c] **Application of dividend.** — Where the claim allowed consisted wholly of principal the dividend should be applied solely to the principal leaving the interest unpaid. Loomis v. Eaton, 32 Conn. 550.

[d] **Secured creditor must account**

the security inures to the benefit of the unsecured creditors,[13] while if the dividend, although insufficient to pay his claim in full, reduces it to less than the value of the security, the representative must redeem for the benefit of the estate.[14] Where, however, the creditor enforces the security, the sum realized is generally held to operate as a partial payment to reduce his claim pro tanto, so that thereafter he is entitled to dividends only on the balance,[15] unless he has been compelled to pay the amount realized into the general fund of the estate.[16] Where a decedent died owning a plantation on which there were outstanding vendor's lien notes, covering also crops for specified years, and practically the entire assets of the estate, which was insolvent, consisted of the crops for one of these years, and subsequently the plantation was sold to satisfy a judgment lien, and bought in by the widow, who conveyed a half interest in the plantation to the administrator, as an individual, by a conveyance which was not to take effect until the vendor's lien notes were satisfied, which notes the widow agreed with the administrator as an individual to pay, it was error to authorize the administrator to apply the money in his hands arising from the sale of the crop to the satisfaction of the vendor's lien notes.[17]

[§ 1796] **5. Rights of Heirs or Distributees.** Any surplus remaining after paying verified claims goes, in the absence of statute, to the distributees in preference to creditors whose claims were rejected because not properly filed and verified,[18] but the settlement of the account of an administrator with reference to rents collected by him while the estate was being administered as insolvent, in which settlement the administrator was charged on behalf of the administrator de bonis non with rents embezzled by his coadministrator, does not constitute a conclusive adjudication that the heirs were absolutely entitled to the funds so accounted for which might finally remain in the hands of the administrator be bonis non for distribution as against the accountant and his sureties.[19]

[§ 1797] **6. Improper Payments.** If the representative makes overpayments, or pays some creditors in full while others are left unpaid, he will be personally liable to the latter to make up their respective proportions,[20] and where a claim is paid by the representative to the wrong person under a mistake, he may be compelled as administrator to pay it again to the right person.[21] Where an administrator of an insolvent estate paid a decedent's note with his own money, and redeemed stock pledged as collateral, knowing the same to be worthless, and thereafter repaid himself from the funds of the estate, he was properly surcharged with the wrongful payment of the note.[22] As a general rule a creditor who has received more than his pro rata proportion of his debt because of the representative's mistaken belief that the estate was insolvent may be compelled to refund the excess.[23]

[§ 1798] **7. Proceedings and Decree for Distribution—a. In General.** On proceedings for distribution after the lapse of the prescribed time from the grant of administration,[24] and on due notice to the parties interested or entitled to participate,[25] a decree for the distribution of the assets to the creditors in the mode prescribed by statute should be rendered,[26] the effect of which is to render the executor or administrator personally liable to and

for amount received in excess of debt and interest.—Daus' Est., 8 Pa. Dist. 326.

13. Erle v. Lane, 22 Colo. 273, 44 P 591.

14. Erle v. Lane, 22 Colo. 273, 44 P 591; Matter of Bates, 118 Ill. 524, 9 NE 257, 59 AmR 383.

15. Ark.—Jamison v. Adler-Goldman Commn. Co., 59 Ark. 548, 28 SW 35.

Colo.—Erle v. Lane, 22 Colo. 273, 44 P 591; Sullivan v. Erle, 8 Colo. A. 1, 44 P 948.

Hawaii.—Matter of Kapu, 18 Hawaii 369.

Ill.—Peoria First Nat. Bank v. Commercial Nat. Bank, 151 Ill. 308, 37 NE 1019; Furness v. Union Nat. Bank, 147 Ill. 570, 35 NE 624.

Ind.—La Plante v. Convery, 98 Ind. 499.

Mo.—In re McCune, 76 Mo. 200.

S. C.—Wheat v. Dingle, 32 S. C. 473, 11 SE 394, 8 LRA 375.

Tenn.—Winton v. Eldridge, 3 Head 361; Fields v. Wheatley, 1 Sneed 351.

Vt.—West v. Rutland Bank, 19 Vt. 403.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[a] **In Pennsylvania** the rule is that a creditor is entitled to have his dividend computed upon his total claim at the death of decedent, irrespective of the amount realized from sale of collateral security, although he cannot thus receive more than the sum actually due. In re Miller, 82 Pa. 113, 22 AmR 754; Fulton's Est., 25 Pa. Dist. 723; Carr's Est., 3 Pa. Dist. 740, 15 Pa. Co. 354; Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536.

16. In re Blackman, 143 Iowa 553, 120 NW 664 (where a creditor of a decedent filed its claim with decedent's administratrix showing the full amount of the indebtedness to be approximately a sum given, but stating that such creditor had foreclosed a chattel mortgage given by decedent and applied the proceeds on the indebtedness, leaving an unpaid balance of a sum given, and subsequently the administratrix, at the solicitation of other creditors, brought an action attacking the validity of the chattel mortgage and to recover as for conversion the value of the goods sold thereunder, and had judgment therein, and such mortgagee creditor was required to return the money he had so received to the estate, and it was held that, administratrix and such other creditors having repudiated the mortgage and insisted upon the return to the estate of the sum realized under the foreclosure sale, the mortgagee creditor was entitled to participate in the estate in proportion to the full amount of its indebtedness, and not merely to the difference between the full amount thereof and the sum received under the foreclosure sale).

17. O'Brien v. Wilson, 86 Miss. 540, 38 S 509.

18. Puryear v. Puryear, 34 Ala. 555; Murdock v. Rousseau, 32 Ala. 611. Contra Bartol v. Calvert, 21 Ala. 42.

19. Ayers v. Laighton, 73 N. H. 487, 63 A 43.

20. Ala.—Clark v. Guard, 73 Ala. 456.

Miss.—Harris v. Fisher, 13 Miss. 74.

Pa.—Taylor's Est., 4 Pa. Dist. 691, 17 Pa. Co. 166.

Tenn.—Rice v. Hunt, 7 Lea 33; Johnson v. Molsbee, 5 Lea 444.

Tex.—Redding v. Boyd, 64 Tex. 498.

N. S.—Re Ryerson, 29 N. S. 81.

[a] **Payment pending appeal.**—(1) If the representative pays out the entire funds in his hands pending an appeal by a creditor from a disallowance of his claim, he will be personally liable to such creditor upon a reversal of the disallowance, and cannot require him to proceed against a creditor who has been paid. Clark v. Guard, 73 Ala. 456. (2) In such case the representative is liable to claimant for his ratable proportion of his claim with interest, although the decree ordering distribution is not superseded. Schulhoefer v. Fulton, (Ala.) 82 S 446.

21. Bird v. Bohannon, 25 Ala. 279.

22. In re Locher, 219 Pa. 46, 67 A 954.

23. See supra § 1258.

24. Williamson v. Mason, 18 Ala. 87; Browne v. Doolittle, 151 Mass. 595, 25 NE 23.

25. Chaffe v. Farmer, 36 La. Ann. 813; Eakin v. Brick, 16 N. J. L. 98; In re Kittera, 17 Pa. 416; In re Barr, 4 Newfoundl. 715.

26. Mass.—Stanwood v. Owen, 5 Allen 439; Jewett v. Phillips, 5 Allen 150.

Miss.—State v. Bowen, 45 Miss. 347.

N. H.—Probate Judge v. Tillotson, 6 N. H. 292.

Oh.—Cromwell v. Herron, 11 Oh. Cir. Ct. 448, 5 Oh. Cir. Dec. 196.

Ont.—Re Williamson, 39 Ont. L. 413, 12OntWN 154, 36 DomLR 783.

[a] **That the judge of probate is himself a creditor** is no valid objection to his decree ordering claims of creditors of an estate which has been administered in insolvent course to be paid in full. Probate Judge v. Tillotson, 6 N. H. 292.

[b] **Form of decree.**—(1) Sometimes the decree is made in the form of a certain per cent upon the whole claim of a creditor, and sometimes so as to ascertain the aliquot part of a claim and direct its payment (State v. Bowen, 45 Miss. 347), or (2) in the form of a percentage on the balance

subject to execution in favor of each creditor,[27] and to release him from liability in his fiduciary capacity,[28] unless other assets are discovered.[29] A decree of distribution when properly rendered is generally conclusive upon all the persons interested,[30] except those who were not made parties to the proceedings,[31] unless it has been appealed from[32] or opened,[33] and, like other judgments or decrees properly rendered, cannot be impeached collaterally.[34]

[§ 1799] **b. Computation of Dividends.** The indebtedness on which the apportionment of assets is reckoned has been held to be the debt at the time of the insolvent's death,[35] although in other jurisdictions it is held to be only the balance due at the time of apportionment.[36] Where a creditor has realized a part of his claim, this should be considered in determining his pro rata dividend.[37] To ascertain the amount due the creditors, interest is sometimes reckoned on their allowances,[38] but such an allowance has also been held improper.[39] After a dividend is decreed no future interest will accrue on such dividend relative to the estate,[40] and if the representative so uses the proceeds of the estate as to render himself personally liable for interest, an action to charge him therewith must be brought against him in his personal capacity.[41] Under some statutes the judge of probate may correct the list of claims allowed by commissioners conformably to special facts arising after their report, such as a change in the condition of claimants or the assets, and compute dividends on the corrected list.[42]

[§ 1800] **8. Accounting and Settlement**[43]**—a. In General.** It is the duty of the personal representative of an insolvent estate to settle his accounts of administration after the commissioners' report[44] within the time prescribed by statute.[45] in the prescribed manner,[46] and on a proper citation and notice.[47] He should also settle with a successor in the trust, if one is appointed.[48] On final settlement it is the province of the probate judge to determine the proper charges against,[49] and credits in favor of,[50] the representative, and to pass

due on the claim (Cromwell v. Herron, 11 Oh. Cir. Ct. 448, 5 Oh. Cir. Dec. 196).

[c] **Reservation of assets. —** A statutory provision that a probate judge in ordering a dividend among creditors shall leave in the hands of the administrator a sum sufficient to pay a creditor who has a contingent claim, which could not be proved as a debt in the commission, in proportion to what has been paid to the other creditors, does not apply to a surety on a promissory note which has been proved by the holder and been allowed to him by the commissioners. Cummings v. Thompson, 7 Metc. (Mass.) 132.

27. Lehman v. Robertson, 84 Ala. 489, 4 S 728; Boggs v. Mobile Branch Bank, 12 Ala. 494; State v. Bowen, 45 Miss. 347; Powell v. Cooper, 42 Miss. 221; Anderson v. Tindall, 26 Miss. 332; Adams v. Barrett, 2 N. H. 374.

[a] **An administrator is chargeable as trustee** of a creditor under a decree of the probate court ordering him to pay a certain sum to the creditor where the estate is insolvent. Adams v. Barrett, 2 N. H. 374.

[b] **When formal insolvency proceedings are waived,** and by agreement of all parties a decree is entered directing the administrator to make distribution among creditors, he becomes personally liable for the amounts decreed to them respectively. Allen v. Smith, 72 Miss. 689, 18 S 579.

28. Anderson v. Tindall, 26 Miss. 332.

29. Anderson v. Tindall, 26 Miss. 332.

30. Coffin v. McCullough, 30 Ala. 107; State v. Bowen, 45 Miss. 347; Georgia Probate Ct. v. Vanduzer, 13 Vt. 135.

31. Rice v. Cannon, 8 S. C. Eq. 172.

32. Lehman v. Robertson, 84 Ala. 489, 4 S 728.

[a] **The absence of creditors is not ground for reversing** a decree confirming the auditor's report, for they might have verified their claims when sent to the administrator, but it would have been ground for adjourning a meeting of creditors before the auditor. Hahnlin's App., 45 Pa. 343.

33. In re Cowan, 184 Pa. 339, 39 A 59 [aff 28 PittsbLegJ 119].

34. Georgia Probate Ct. v. Vanduzer, 13 Vt. 135.

35. Carr's Est., 3 Pa. Dist. 740, 15 Pa. Co. 354; Morgan's Est., 1 Pa. Dist. 402, 11 Pa. Co. 536; Ihmsen's Est., 29 PittsbLegJ (Pa.) 218; Morton v. Caldwell, 22 S. C. Eq. 161.

[a] **Payments which have been subsequently made by a third person** upon any of the demands thus taken into consideration do not release the portion of decedent's assets originally liable to the creditor, if there still remains due on the demand a balance requiring that proportion to satisfy it. Morton v. Caldwell, 22 S. C. Eq. 161.

36. Peck v. Harrison, 23 Conn. 118; In re McCune, 76 Mo. 200; Lowell v. French, 54 Vt. 193.

37. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Virginia-Carolina Chemical Co. v. Edwards, 136 N. C. 73, 48 SE 568.

[a] **Illustration. —** Decedent became indebted for the price of goods sold under a contract between him and the seller providing that the goods and all the proceeds from resale of the goods should belong to the seller until his debt was paid, decedent guarantying payment of all accounts on resales by him. Decedent died insolvent, owing a balance on the debt, and thereafter decedent's administrator collected on notes and accounts for resales by decedent which he had in his possession at the time of his death, receiving credit on decedent's indebtedness for the amount from the seller. It was held that decedent's debt to the seller was thereby reduced pro tanto, and the seller was not, therefore, entitled, as against general creditors, to receive from assets of the decedent's estate a dividend on the amount of the debt unreduced as at the time of decedent's death. Virginia-Carolina Chemical Co. v. Edwards, 136 N. C. 73, 48 SE 568.

[b] **Payment in another state.—** Nonresident creditors who have received part of their claims from the assets under ancillary administration in another state must deduct such amount before sharing in the assets under the domiciliary administration. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270].

38. Williams v. American Bank, 4 Metc. (Mass.) 317; In re McCune, 76 Mo. 200; Lamb's Est., 11 Pa. Dist. 243; Daus' Est., 8 Pa. Dist. 326; Keebler's Est., 4 Pa. Dist. 346, 16 Pa. Co. 372.

[a] **Interest allowed only to decedent's death.—**Keebler's Est., 4 Pa. Dist. 346, 16 Pa. Co. 372.

39. Camp v. Grant, 21 Conn. 41, 54 AmD 321; U. S. Fidelity, etc., Co. v. Carnegie Trust Co., 161 App. Div. 429, 146 NYS 804.

"The rule is in the administration of an insolvent estate that as between the creditors themselves no interest should be allowed during the process of administration." U. S. Fidelity, etc., Co. v. Carnegie Trust Co., supra [foll Peo. v. American L. & T. Co., 172 N. Y. 371, 65 NE 200].

40. Camp v. Grant, 21 Conn. 41, 54 AmD 321; Fitch v. Huntington, Kirby (Conn.) 38.

41. Fitch v. Huntington, Kirby (Conn.) 38.

42. Williams v. American Bank, 4 Metc. (Mass.) 317; Ames v. Slater, 27 Minn. 70, 6 NW 418.

43. Accounting and settlement generally see infra §§ 2300–2532.

44. Shackleford v. King, 24 Ala. 158; Butler v. Ricker, 6 Me. 268.

[a] **An account of personal estate only required.—**Butler v. Ricker, 6 Me. 268.

[b] **The court has refused to require** the representative to file an account where the estate was insolvent, no funds remained in the representative's hands, and a settlement had been made with all creditors, including the petitioner for the accounting. Frier's Est., 24 Pa. Dist. 1080.

45. Eaton v. Brown, 8 Me. 22 (under a statute penalizing an administrator of an insolvent estate for failure to settle his account of administration within six months after the commissioners have reported a list of claims, the administrator is only bound to exhibit his account within that time and present himself to verify or support it; and the penalty does not attach where the administrator files a supplemental account consisting of items coming to his knowledge after the allowance of his former account, or arising from a realization of assets previously deemed worthless).

46. McKeown v. Fagan, 4 Redf. Surr. (N. Y.) 320.

[a] **A partial settlement** is permitted under some statutes. See Boggs v. Mobile Branch Bank, 12 Ala. 494.

47. Tuttle v. Robinson, 33 N. H. 104 (the private claim of an administrator cannot be allowed on a settlement of the account of administration unless the citation for such settlement contains a notice of the nature and amount of such private claim).

48. Cobb v. Muzzey, 13 Gray (Mass.) 57 (an administrator of insolvent estate must account to administrator de bonis non for money prematurely paid to creditors in belief that estate was solvent).

49. Whitlock v. Whitlock, 25 Ala. 543; Clarke v. West, 5 Ala. 117; Wheedon v. Nichols, 72 N. J. Eq. 366, 65 A 445; In re Helbling, 15 PittsbLegJNS (Pa.) 378.

50. Ala. — Lehman v. Robertson,

upon objections properly raised to his administration of the estate.[51] If, after final settlement of the estate as insolvent, there appears a balance, the persons entitled thereto may compel a settlement and distribution in their favor upon due notice to the representative.[52]

[§ 1801] **b. Proceedings—(1) Time for Institution.** A bill for the final settlement of an insolvent estate must be brought within the time prescribed by statute,[53] unless a delay beyond that period is justified by peculiar circumstances.[54]

[§ 1802] **(2) Parties.** The only necessary parties to proceedings for the settlement of an insolvent estate are usually the personal representative, on the one side, and the creditors whose claims have been allowed, or their assignees, on the other;[55] but legatees, distributees, or other persons interested may also appear or be joined as defendants,[56] and fraudulent grantees or donees of a deceased debtor may be joined as defendants, although they claim different parts of the property under separate gifts or conveyances.[57]

[§ 1803] **(3) Pleading and Proof.** The persons made parties to a bill for a settlement or coming in by petition must describe and set forth with certainty the origin and amounts of their claims,[58] and prove the same, unless they are admitted by the representative to be just and due.[59]

[§ 1804] **(4) Judgment.** The judgment of the probate court on such settlement is final and conclusive,[60] unless appealed from[61] or opened,[62] and cannot be attacked collaterally.[63]

[§ 1805] **(5) Appeal.** An appeal from a final judgment or decree rendered in a final settlement of an insolvent estate may be taken[64] by the personal representative,[65] a distributee,[66] or a creditor,[67] but upon appeal the appellate court may not hear such objections as have been waived below.[68] The appellate court may on reversal remand the cause for further proceedings.[69] The costs may be taxed against one of the parties[70] or apportioned among both.[71]

XIV. ACTIONS[72]

[§ 1806] **A. Capacity of Personal Representatives to Sue[73] and Be Sued Generally.** The executor or administrator of a deceased person may sue[74]

84 Ala. 489, 4 S 728; Clarke v. West, 5 Ala. 117.
Ky.—Clark v. Newman, 1 SW 880, 8 KyL 515.
Me.—Burrows v. Bourne, 67 Me. 225.
Mass.—Hunt v. Whitney, 4 Mass. 620.
N. H.—Rossiter v. Cossit, 15 N. H. 38.
Pa.—Schroeder's Est., 2 Woodw. 290.
R. I.—Rafferty v. Potter, 21 R. I. 517, 45 A 152.
Vt.—Reynolds v. McGregor, 16 Vt. 191.

[a] **A claim allowed by commissioners** and not appealed from must be allowed in the administrator's accounts, even though fictitious. Reynolds v. McGregor, 16 Vt. 101.

[b] **Payment of debts other than preferred debts** cannot be allowed as a credit in an administration account of an insolvent estate. Shedden v. Sterling, 23 Ala. 518; Overfield's Est., 37 LegInt (Pa.) 62.

[c] **Reasonable attorney's fees** are proper allowances in the administrator's favor, and being part of the expenses incident to the administration cannot be abated, although the estate be declared insolvent. Hearrin v. Savage, 16 Ala. 286.

[d] **Costs** in an action against an estate cannot be allowed an administrator if, pending such action, the estate becomes absolutely insolvent and the whole estate legally appropriated furnishes no dividend to the creditors. Hunt v. Whitney, 4 Mass. 620.

51. Edwards v. Gibbs, 11 Ala. 292.

52. McMillan v. Rushing, 80 Ala. 402; Purdom v. McBroom, 19 Ala. 110.

53. Cash v. Dickens, 2 Lea (Tenn.) 254.

54. Cash v. Dickens, 2 Lea (Tenn.) 254.

55. Eubanks v. Clark, 78 Ala. 73; Baker v. Wood, 51 Ala. 345.

[a] **Personal representative of fraudulent grantor a proper party.**—Handley v. Heflin, 84 Ala. 600, 4 S 725.

56. Meadows v. Edwards, 46 Ala. 354.

[a] **Distributees, although not necessary parties** to subsequent proceedings in insolvency, may appear on final settlement for the purpose of establishing a surplus, and are not precluded by any former proceedings to which they were not parties from surcharging the administrator's accounts. Eubanks v. Clark, 78 Ala. 73.

[b] **A legatee who has prematurely received his legacy** and participated with the executor in concealing assets is a proper party defendant in a bill by creditors for settlement of the estate. Handley v. Heflin, 84 Ala. 600, 4 S 725.

57. Handley v. Heflin, 84 Ala. 600, 4 S 725.

58. Reid v. Huff, 9 Humphr. (Tenn.) 345.

59. Reid v. Huff, 9 Humphr. (Tenn.) 345.

60. McDonald v. McDonald, 50 Ala. 26.

61. Heydenfeldt v. Towns, 27 Ala. 423.

62. Gist v. Cattell, 8 S. C. Eq. 343 (where a debt which increases the shares of certain distributees who assume it is subsequently released as being invalid, a court of equity will open the settlement, notwithstanding the creditors had received their shares and executed mutual releases).

63. Clarke v. Eureka County Bank, 116 Fed. 534; Heydenfeldt v. Towns, 27 Ala. 423.

64. Lehman v. Robertson, 84 Ala. 489, 4 S 728; Watt v. Watt, 37 Ala. 543; Heydenfeldt v. Towns, 27 Ala. 423; Coughlin's Succ., 35 La. Ann. 343.

65. In re McCune, 76 Mo. 200.

66. In re Swan, 54 Mo. A. 17.

67. Nicholls v. Hodge, 18 F. Cas. No. 10,231, 2 Cranch C. C. 582.

[a] **A creditor whose claim is rejected** at the final settlement of an insolvent estate of a deceased person cannot sue out a writ of error. Stout v. Ward, 10 Ala. 628.

68. Crothers v. Ross, 17 Ala. 816.

69. Weaver v. Weaver, 23 Ala. 789.

70. Timmons v. Rainey, (Tenn. Ch. A.) 55 SW 21.

71. Colton v. Field, 131 Ill. 398, 22 NE 545 [rev 28 Ill. A. 354].

72. Revival and continuance of actions commenced by or against decedent see Abatement and Revival §§ 434–563.

73. Proceedings for recovery of assets generally see supra §§ 425–427.
Right of representative to attack fraudulent conveyance by decedent see supra § 368.

74. U. S.—Humphreys v. Walsh, 248 Fed. 414, 160 CCA 424.
Ala.—Schuessler v. Goodhue, 146 Ala. 637, 41 S 958.
Cal.—Cortelyou v. Baker, 187 P 417; Pearl v. Pearl, 177 P 845.
Colo.—Grover v. Clover, 169 P 578.
Ga.—Thrift v. Baker, 144 Ga. 508, 87 SE 676.
Ill.—Knight v. Seney, 290 Ill. 11, 124 NE 813; Farrell v. Bruce, 200 Ill. A. 588; Webb v. Hunt, 190 Ill. A. 597.
Ky.—Buckner v. Louisville, etc., R. Co., 120 Ky. 600, 87 SW 777, 27 KyL 1009.
La.—Labit v. Perry, 28 La. Ann. 591.
Mass.—Norton v. Lilley, 210 Mass. 214, 96 NE 351.
Mich.—Brobst v. Brobst, 190 Mich. 63, 155 NW 734.
Miss.—McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 S 260.
N. Y.—Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1118 mem]; Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 NYS 181; Van Pelt v. New York, 91 Misc. 550, 155 NYS 9.
Oh.—Wentzel v. Chesley, 28 Oh. Cir. Ct. 192.
Pa.—Weil v. Marquis, 256 Pa. 608, 101 A 70.
Utah.—Coray v. Perry Irr. Co., 50 Utah 70, 166 P 672.
Wash.—Stein v. Waddell, 37 Wash. 634, 80 P 184.
W. Va.—Austin v. Calloway, 73 W. Va. 231, 80 SE 361, AnnCas1916E 112.

[a] **The administrator, and not a distributee, is the proper party to sue** for misfeasance or neglect of duty by an attorney employed by the administrator to settle the estate, the distributee's remedy being removal of the administrator and appointment of his successor, if he is a party to the wrong. Norton v. Lilley, 210 Mass. 214, 96 NE 351.

[b] **An administrator is the proper person to bring suit to impress a trust** on real estate purchased with money fraudulently obtained from his intestate, and invested in such real estate after the latter's death, since the action is for personal property, which would be in the administrator's custody until after distribution, and the fact that the money was invested in real estate was immaterial. Morris v. Vyse, 154 Mich. 253, 117 NW 639, 129 AmSR 472.

[c] **An action for the recovery of personal property of a decedent,** or

or be sued[75] upon causes of action connected with the estate committed to his care; and the personal representative of one estate may maintain an action against the personal representative of another estate.[76] A general creditor of a decedent cannot maintain a bill against the personal representative for the recovery of money due his estate, must be brought by the personal representative, except, where he refuses to sue, the action may be brought by a creditor or heir at law, making the personal representative a party defendant. Bennett v. Bennett, 134 Ky. 444, 120 SW 372.

[d] **Partition suit.**—(1) Code [1896] § 3187, which provides that the chancery court shall have jurisdiction to divide or partition, or to sell for division or partition any property, real or personal, held by joint owners or tenants in common, etc., and § 3185, which declares that should any of the parties interested in property held by joint owners or tenants in common die, the provisions of the article shall fully apply to his executor or administrator, confer power on an executor to file a bill for partition in his own name in the chancery court. Schuessler v. Goodhue, 146 Ala. 637, 41 S 958. (2) An administrator required to sell real estate to pay debts is not justified in joining with the heirs in partition against another heir, with a view to compel him to account for the rental value of the property while in possession, and thus wipe out his claim allowed against the estate. Owings v. Owings, 150 Mich. 609, 114 NW 393.

[e] **Setting aside conveyance.**—An executor and testamentary trustee may sue in his representative capacity to set aside a conveyance made by him and his coexecutors and cotrustees as procured by fraud, although he was a party to the fraudulent transaction. Smith v. David Stevenson Brewing Co., 50 Misc. 395, 100 NYS 521 [aff 117 App. Div. 690, 102 NYS 672].

[f] **Recovery of assets conveyed away by mistake.**—If there are no intervening equities, an executor can maintain an equitable action to have restored to the trust estate a portion of its assets, which he has, by mistake as to his authority under the will, conveyed away without consideration. Wentzel v. Chesley, 28 Oh. Cir. Ct. 192.

[g] **Action for services of decedent.**—Although the personal estate of an intestate, living in France at the time of his death, under the laws of France devolved on his heirs at law, to the exclusion of all others, an administrator de bonis non appointed by the surrogate's court of the county of New York may sue in New York for services performed by the intestate in Paris under a contract with defendant, a domestic corporation. Homans v. New York L. Ins. Co., 55 Misc. 574, 106 NYS 929.

[h] **Where a contract for the purchase of land is made with executors,** they have prima facie the right to forfeit or enforce the contract by suit or otherwise. Stein v. Waddell, 37 Wash. 634, 80 P 184.

[i] **An action to recover for royalty due on a sale of coal** in place is a personal action, and must be brought in the name of the personal representative, and not in the name of the heirs at law, although the estate is otherwise fully settled up. Hutson Coal Co. v. Hughes, 29 Oh. Cir. Ct. 139.

[j] **Effect of personal liability.**—The fact that under the statute an administrator is personally liable for cotton taken from the land of his intestate and sold by him, does not preclude him from suing the purchaser for the value thereof. McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 S 260.

[k] **An administrator's participation in a conversion** of estate funds does not preclude him from suing to recover them. Scully v. McGrath, 207 N. Y. 61, 94 NE 195 [rev 136 App. Div. 905, 120 NYS 1145].

[l] **Action on notes not appraised.**—A statute providing that no action shall be brought on notes and bonds owned by a decedent, unless appraised, does not apply to notes not taxable in the state, and sent by decedent's personal representative to an attorney for suit. Austin v. Calloway, 73 W. Va. 231, 80 SE 361, AnnCas1916E 112.

[m] **Suit by executors before appointment.**—A suit by persons named as executors, although not yet appointed, to restrain testator's widow from unlawfully endeavoring to hinder them in the performance of their duty in violation of her antenuptial agreement with testator, is within the jurisdiction of a court in equity. Eaton v. Eaton, (Mass.) 124 NE 37.

[n] **Representative cannot sue for use of stranger.**—Thrift v. Baker, 144 Ga. 508, 87 SE 676.

[o] **Intent to defraud beneficiaries.**—Although the right to sue to protect an equitable interest in a decedent's estate because of payments under a bond for title is in the administrator, the rule does not apply where the administrator and the obligor enter into a conspiracy to defraud those interested in the estate for the personal benefit of the administrator. Kinard v. George, 142 Ga. 111, 82 SE 560.

[p] **Breach of contract; representative not interested.**—Where testator gave his residuary estate to his wife for life with remainder over, and provided that the executor should for the performance of the will sell his real estate, and the wife, as executrix, conveyed real estate in consideration of a specified sum and an agreement by the purchaser with her individually to support her for life, a breach of the purchaser's agreement to support the wife gave her a right of action personally which on her death survived to her representatives, but the representatives of the testator after her death could not sue therefor. Fifield v. White, 139 App. Div. 390, 123 NYS 1094 [aff 207 N. Y. 701 mem, 101 NE 1102 mem].

75. Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Cal.—Le Mesnager v. Variel, 144 Cal. 463, 77 P 988, 103 AmSR 91.

Ill.—Anderson v. Patty, 168 Ill. A. 151.

Ky.—Forsee v. Forsee, 144 Ky. 169, 137 SW 836.

La.—Maxwell-Yerger Co. v. Rogan, 125 La. 1, 51 S 48.

Mass.—Meagher v. Kimball, 220 Mass. 32, 107 NE 431.

N. Y.—Beakes Dairy Co. v. Berns, 139 App. Div. 733, 124 NYS 365.

[a] **Suit upon rejected claim.**—Where an executor, or the judge of the superior court sitting in probate, rejects the claim of a creditor against the estate, the creditor may sue the executor thereon in the proper court. Garver v. Thoman, 15 Ariz. 38, 135 P 724.

[b] **Theory of action by creditor.**—Where a creditor sues the administratrix to recover a fund given by decedent to one to hold in trust for another during the donor's life, and at his death to become the cestui's absolutely, the creditor must, in order to maintain his action, rely either on the administratrix's right to the fund for the payment, or on some special property or lien thereon. Beakes Dairy Co. v. Berns, 139 App. Div. 733, 124 NYS 365.

[c] **Persons entitled to distributive shares** of an estate in the hands of an executor may maintain an action against such executor therefor. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; Le Mesnager v. Variel, 144 Cal. 463, 7 P 988, 103 AmSR 91.

[d] **Recovery of legacy.**—Assumpsit lies against an executor to recover a legacy, where the debts of the estate have been settled, the final account approved, and the legacy ordered paid, there being sufficient funds in the hands of the executor to pay it. Anderson v. Patty, 168 Ill. A. 151.

[e] **The remedy of a person entitled to rents wrongfully collected** by an administrator is by an action at law, the surrogate having no jurisdiction to determine controversies arising from such matters. Matter of Van de Walker, 79 Misc. 661, 141 NYS 325.

[f] **Pending administration,** a suit cannot be maintained by devisees against the executor or administrator to establish a liability arising out of the management and disposition of the estate. Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181 (in view of Rev. St. [1895] art 2011 requiring an executor indebted to his testator to account for the debt from the time it is due, the same as if it were money in his hands, an obligation due the estate from an executor, pending administration, stands on the same basis as one accruing before he was appointed, and hence devisees cannot recover it pending the administration).

[g] **When entire estate assigned to widow.**—Where the estate is of less value than fifteen hundred dollars, and has been assigned to his widow, an action cannot be maintained against the administratrix on a note of the decedent. Wills v. Booth, 6 Cal. A. 197, 91 P 759.

[h] **Where performance of a contract of decedent becomes impossible** by reason of his death, an action will not lie against his personal representative on such contract, although it stipulates that it shall bind the heirs, executors, and administrators of the parties. Browne v. Fairhall, 210 Mass. 290, 100 NE 556, 45 LRANS 349 (an agreement to buy corporate stock, part payment to be made in cash and property, and promissory notes to be executed by the purchaser to the amount of two hundred thousand dollars, in such amounts and running for such terms up to three years as the purchaser should see fit, all of which was to be delivered in escrow within ninety days, became impossible for performance by the death of the purchaser within the ninety days by reason of the personal character of the stipulation as to the notes).

[i] **Action for stock assessment.**—An insolvent bank cannot maintain an action against the executors of a deceased stockholder for an assessment on the stock necessary for liquidation levied after a final decree for the distribution of his estate, appealed from only so far as it determines the distributees. Union Sav. Bank v. De Laveaga, 150 Cal. 395, 89 P 84.

[j] **Action to set aside deed.**—No action can be maintained by a creditor to set aside an executor's deed as in fraud of creditors. Magoun v. Quigley, 115 App. Div. 226, 100 NYS 1037.

[k] **Responsibility for acts of administration.**—"In so far as plaintiffs sought to hold the administrator personally responsible for acts of administration, and to contest the existence and amount of the expenses incurred in the administration, and the distribution among the heirs of any balance then in the hands of the administrator, they should not have had recourse to a direct, separate action against the administrator, but set forward their objection by way of opposition to the account filed." Trahan's Succ., 118 La. 762, 763, 43 S 400.

76. Carlisle v. Farrow, 74 S. C. 527, 54 SE 766.

to charge the personal estate only, without showing some ground of equity jurisdiction, such as inadequacy of the legal remedies, inability to obtain satisfaction by judgment and execution, or necessity for discovery.[77]

Suit by representative against himself. It has been held that an executor or an administrator cannot maintain a suit against himself to recover a debt due to him from decedent,[78] but it has also been held that the probate court can order an administrator as such to bring an action against himself individually on his personal note owing decedent's estate.[79]

Special or temporary administrator. The right to sue and be sued extends under some statutes to special as well as general administrators,[80] but in the absence of an allegation of debts a special administrator has no capacity to sue to set aside deeds to realty alleged to have been executed by decedent through fraud, undue influence, and mental incapacity.[81] A statute defining the powers of a temporary administrator to be to take into his possession personal property, to preserve it, and to collect choses in action, does not authorize a temporary administrator to sue in equity to have it adjudged that the estate is the owner of a share of corporate stock, the certificate for which is already in the temporary administrator's possession, and to require a transfer of the share on the corporate books to the estate.[82]

A right to sue an administrator is not waived by bringing an action against the heirs before appointment of the administrator.[83]

[§ 1807] **B. Capacity in Which Representative Sues or Is Sued—1. Actions by Representatives—a. General Rules—(1) Causes of Action Accruing in Decedent's Lifetime.** The general rule is that on all causes of action accruing during the lifetime of decedent, the executor or administrator must sue in his representative capacity and not otherwise.[84]

[§ 1808] **(2) Causes of Action Accruing after Decedent's Death.** With respect to causes of action arising subsequent to the death of decedent, it is well settled that the executor or administrator may sue in his individual capacity.[85] Some decisions go so far as to hold that the representative can sue on such causes of action only in his personal capacity,[86] but the overwhelming weight of authority supports the view that if the fruits of the recovery will be assets the representative may

[a] **Illustration.**—An administrator of a devisee may sue the administrator of the executrix for the amount due the heirs of the devisee. Carlisle v. Farrow, 74 S. C. 527, 54 SE 766.

77. Price v. Laing, 67 W. Va. 373, 68 SE 24 [foll Hutchinson-Stephenson Hat Co. v. Bailey, 73 W. Va. 672, 80 SE 1056].

78. Perkins v. Se Ipsam, 11 R. I. 270.

79. Powell v. Jackson, 60 Ind. A. 597, 111 NE 208 (the administrator as such and as an individual are two distinct persons).

80. See cases infra this note.

[a] **Action by special administrator.**—Code Civ. Proc. § 1415, authorizes a special administrator to bring any suit or legal proceeding which might be brought by a general administrator or executor when authorized by the court appointing him. Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 P 330.

[b] **Action against special administrator to quiet title.**—Code Civ. Proc. § 1582, permitting actions to quiet title against administrators, includes special as well as general administrators. McNeil v. Morgan, 157 Cal. 373, 108 P 69.

81. Pratt v. Millard, 154 Mich. 112, 117 NW 552.

82. Hastings v. Tousey, 123 App. Div. 480, 108 NYS 526.

83. Churchill v. Woodworth, 148 Cal. 669, 84 P 155, 113 AmSR 324.

84. U. S.—Kane v. Paul, 14 Pet. 33, 10 L. ed. 341; Fugate v. Bronaugh, 9 F. Cas. No. 5,146, 3 Cranch C. C. 65.

Ark.—Yarborough v. Ward, 34 Ark. 204; Mohr v. Sherman, 25 Ark. 7; Hemphill v. Hamilton, 11 Ark. 425; Watkins v. McDonald, 3 Ark. 266.

Kan.—Hanlen v. Baden, 6 Kan. A. 635, 49 P 615.

Md.—Lake Roland El. R. Co. v. Frick, 86 Md. 259, 37 A 650.

Mass.—Kent v. Bothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258.

Mich.—Peirson v. McNeal, 137 Mich. 158, 100 NW 458.

Miss.—Bowen v. Bonner, 45 Miss. 10.

N. J.—Willett v. Clark, 61 N. J. L. 696, 44 A 515; Stewart v. Richey, 17 N. J. L. 164; Norcross v. Boulton, 16 N. J. L. 310.

N. Y.—Evans v. Supreme Council R. A., 223 N. Y. 497, 120 NE 93, 1 ALR 163; Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965 [rev 148 App. Div. 78, 132 NYS 1033]; Bingham v. Marine Nat. Bank, 2 Silv. A. 137, 19 NE 416 [aff 41 Hun 377, 2 NYSt 638, 17 AbbNCas 431 (rearg den 18 AbbNCas 135, 4 NYSt 528)]; Hone v. De Peyster, 106 N. Y. 645, 13 NE 778, 27 NYWklyDig 133 [rev 44 Hun 487, 9 NYSt 224, and foll Jack v. Robie, 48 Hun 181, 15 NYSt 605]; Buckland v. Gallup, 105 N. Y. 453, 11 NE 843, 26 NYWklyDig 447 [aff 40 Hun 61]; Ehrman v. Bassett, 159 App. Div. 752, 144 NYS 976; Weeks v. Garvey, 56 N. Y. Super. 562, 4 NYS 891; Sheldon v. Hoy, 11 HowPr 11; Patchen v. Wilson, 4 Hill 57; Packer v. Willson, 15 Wend. 343; Ketchum v. Ketchum, 4 Cow. 87; Tilton v. Williams, 11 Johns. 403.

N. C.—Beaty v. Gingles, 53 N. C. 302; Cotten v. Davis, 48 N. C. 355.

Pa.—Kline v. Guthart, 2 Penr. & W. 490.

Philippine.—Ibanez de Aldecoa v. Fortis, 17 Philippine 82.

S. C.—Cauthen v. Green, 80 S. C. 432, 61 SE 957; Jamison v. Lindsay, 17 S. C. L. 79; Forrest v. Trommell, 17 S. C. L. 77.

Vt.—Haskell v. Bowen, 44 Vt. 579.

Va.—Lawson v. Lawson, 16 Gratt. (57 Va.) 230, 80 AmD 702.

W. Va.—Elliott v. Blue, 74 W. Va. 209, 81 SE 982.

Wis.—Woodard v. Citizens' Sav., etc., Co., 167 Wis. 435, 167 NW 1054; Lawrence v. Vilas, 20 Wis. 401.

Eng.—Gallant v. Bouteflower, 3 Dougl. 34, 26 ECL 34, 99 Reprint 525; Jemott v. Cowley, 1 Saund. 112, 85 Reprint 112, 3 Williams Ex. p 1779.

[a] **The same rule differently expressed** is that, where it becomes necessary for plaintiff to make profert of his letters testamentary or of administration, he should sue in his representative character. Kansas City, etc., R. Co. v. Menager, 59 Kan. 687, 54 P 1043; Cauthen v. Green, 80 S. C. 432, 61 SE 957; Adams v. Campbell, 4 Vt. 447.

85. Ark.—Hemphill v. Hamilton, 11 Ark. 425.

D. C.—Campbell v. Wilson, 13 D. C. 497.

Ga.—Wylly v. King, Ga. Dec. Pt. II. 7.

Ky.—Pringle v. Samuels, 1 Bibb 167.

Me.—Carlisle v. Burley, 3 Me. 250.

N. Y.—Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965 [rev 148 App. Div. 78, 132 NYS 1033]; Bingham v. Marine Nat. Bank, 2 Silv. A. 137, 19 NE 416 [aff 41 Hun 377, 2 NYSt 638, 17 AbbNCas 431 (rearg den 18 AbbNCas 135, 4 NYSt 528)]; Buckland v. Gallup, 105 N. Y. 453, 11 NE 843, 8 NYSt 56, 26 NYWklyDig 447; Murray v. Church, 1 Hun 49 [aff 58 N. Y. 621]; Holdridge v. Scott, 1 Lans. 303; Cheney v. Beale, 47 Barb. 523; Brown v. Motteler, 2 NYCityCt 439.

Or.—Sears v. Dailey, 43 Or. 346, 73 P 5; Burrell v. Kern, 34 Or. 501, 56 P 809.

R. I.—Musk v. Hall, 34 R. I. 126, 82 A 593.

Tex.—Pryor v. Krause, (Civ. A.) 168 SW 498.

Vt.—Bates v. Sabin, 64 Vt. 511, 24 A 1013.

Va.—Lawson v. Lawson, 16 Gratt. (57 Va.) 230, 80 AmD 702.

W. Va.—Elliott v. Blue, 74 W. Va. 209, 81 SE 982.

Wis.—Lawrence v. Vilas, 20 Wis. 380.

Eng.—Gallant v. Bouteflower, 3 Dougl. 34, 26 ECL 34, 99 Reprint 525; Jenkins v. Plombe, 6 Mod. 181, 87 Reprint 936.

[a] **The rule is not changed by a statute** providing that an action by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought in his representative capacity. Buckland v. Gallup, 105 N. Y. 453, 11 NE 843; Bingham v. Marine Nat. Bank, 41 Hun 377 [aff 112 N. Y. 66 mem, 19 NE 416, 2 Silv. A. 137]; Brown v. Motteler, 2 NYCityCt 439.

[b] **A husband loaning personalty of his deceased wife** is entitled to sue for it in assumpsit in his individual capacity. Musk v. Hall, 34 R. I. 126, 82 A 593.

[c] **Where money recovered not assets.**—Where an executrix elected to take certain negroes as legatee under the will, and thereafter the negroes were hired out, plaintiff could not maintain an action for such hire as executrix, the hire belonging to her in her own right, since her recovery as executrix would prejudice the rights of her creditors. David v. Bell, Peck (Tenn.) 135.

86. Ind.—Helm v. Van Fleet, 1 Blackf. 342, 12 AmD 248.

N. J.—Stewart v. Richey, 17 N. J. L. 164 [overr Myers v. Weger, 62 N. J. L. 432, 42 A 280].

N. Y.—Burhans v. Blanchard, 1 Den. 626.

Pa.—Kline v. Guthart, 2 Penr. & W. 490 [crit Peries v. Avcinena, 3 Watts & S. 64].

declare in either his representative or his individual capacity,[87] although when suit has been brought in either capacity he is bound by his election in this respect.[88] This rule applies equally whether the action is in tort [89] or on contract,[90] and whether the consideration flows from decedent or the represen-

Eng.—Hosier v. Arundel, 3 B. & P. 7, 127 Reprint 5; Nicholas v. Killigrew, 1 Ld. Raym. 436, 91 Reprint 1189; Betts v. Mitchell, 10 Mod. 315, 88 Reprint 744.

87. U. S.—Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; Kane v. Paul, 14 Pet. 33, 10 L. ed. 341; Mason v. Lawrason, 16 F. Cas. No. 9,242, 1 Cranch 190; Giddings v. Green, 48 Fed. 489, 4 Hughes 446.

Ala.—Riddle v. Hill, 51 Ala. 224; Waldrop v. Pearson, 42 Ala. 636; Goodman v. Walker, 30 Ala. 482, 68 AmD 131; Tomkies v. Reynolds, 17 Ala. 109; Harbin v. Levi, 6 Ala. 399; Cummings v. Tindall, 4 Stew. & P. 357.

Ark.—Yarborough v. Ward, 34 Ark. 204; Mohr v. Sherman, 25 Ark. 7; McDonald v. Williams, 16 Ark. 36; Anderson v. Wilson, 13 Ark. 409; Hemphill v. Hamilton, 11 Ark. 425.

Cal.—Jahns v. Nolting, 29 Cal. 507; Munch v. Williamson, 24 Cal. 167.

Fla.—Branch v. Branch, 6 Fla. 314.

Ga.—Wheelus v. Long, 73 Ga. 110; Kenan v. Du Bignon, 46 Ga. 258; Macon, etc., R. Co. v. Davis, 18 Ga. 679; Daniel v. Hollingshead, 16 Ga. 190; Wylly v. King, Ga. Dec. Pt. II, 7.

Ill.—Miller v. Kingsbury, 128 Ill. 45, 21 NE 209; Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565; Laycock v. Oleson, 60 Ill. 30; Newhall v. Turney, 14 Ill. 338.

Ind.—Campbell v. Baldwin, 6 Blackf. 364.

Iowa.—Grimmell v. Warner, 21 Iowa 11.

Kan.—Stewart v. Rogers, 71 Kan. 53, 80 P 58; Getty v. Larkin, 59 Kan. 548, 53 P 755.

Ky.—Layne v. Power, 92 SW 945, 29 KyL 494; Brent v. Tivebaugh, 12 B. Mon. 87; Wilson v. Hunt, 6 B. Mon. 379; Gordon v. Woods, 4 Bibb 476.

Me.—Gage v. Johnson, 20 Me. 437.

Md.—Chapman v. Davis, 4 Gill 166.

Mass.—Mowry v. Adams, 14 Mass. 327.

Minn.—Bond v. Corbett, 2 Minn. 248.

Miss.—Klein v. French, 57 Miss. 662; Grinstead v. Fonte, 32 Miss. 120; Falls v. Wilson, 24 Miss. 168.

Mo.—Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410; Mosman v. Bender, 80 Mo. 579; Rittenhouse v. Ammerman, 64 Mo. 197, 27 AmR 215; Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025; Knoche v. Perry, 90 Mo. A. 483; Wolf v. Sun Ins. Co., 75 Mo. A. 306; State v. Kaime, 4 Mo. A. 479.

N. H.—Moulton v. Wendell, 37 N. H. 406; Keniston v. Little, 30 N. H. 318, 64 AmD 297; Pillsbury v. Hubbard, 10 N. H. 224.

N. J.—Myers v. Weger, 62 N. J. L. 432, 42 A 280; Norcross v. Boulton, 16 N. J. L. 310.

N. Y.—Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965 [rev 148 App. Div. 78, 132 NYS 1033]; Van Ness v. Kenyon, 208 N. Y. 228, 101 NE 881, AnnCas1914D 221; Moss v. Cohen, 158 N. Y. 240, 53 NE 8; Bingham v. Marine Nat. Bank, 112 N. Y. 661, 19 NE 416; Buckland v. Gallup, 105 N. Y. 453, 11 NE 843; Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Taggart v. Draz, 166 App. Div. 381, 150 NYS 41; Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820; Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1118 mem]; Van Buren v. Cooperstown First Nat. Bank, 53 App. Div. 80, 65 NYS 703 [aff 169 N. Y. 610 mem, 62 NE 1101 mem]; Spies v. Michelsen, 2 App. Div. 226, 37 NYS 720; Knox v. Metropolitan El. R. Co., 58 Hun 517, 12 NYS 848 [aff 128 N. Y. 625 mem, 28 NE 485 mem]; Bingham v. Marine Nat. Bank, 41 Hun 377 [aff 112 N. Y. 661 mem, 19 NE 416]; Barlow v. Myers, 24 Hun 286; Bostwick v. Brown, 15 Hun 308; Murray v. Church, 1 Hun 49 [aff 58 N. Y. 621 mem]; Cheney v. Beals, 47 Barb. 523; Eagle v. Fox, 28 Barb. 473, 8 AbbPr 40; Rockwell v. Saunders, 19 Barb. 473; Bright v. Currie, 7 N. Y. Super. 433, 10 NYLegObs 104; Kingsland v. Ryckman, 5 Daly 13; Gross v. Gross, 26 Misc. 385, 56 NYS 219; Woodruff v. Cook, 14 HowPr 481; Sheldon v. Hoy, 11 HowPr 11; Welles v. Webster, 9 HowPr 251; Burckle v. Luce, 2 HowPr 133; Patchen v. Wilson, 4 Hill 57; Mercein v. Smith, 2 Hill 210; Van Orden v. Reynolds, 18 Wend. 635; Packer v. Willson, 15 Wend. 343; Holbrook v. White, 13 Wend. 591; Valentine v. Jackson, 9 Wend. 302; Tilton v. Williams, 11 Johns. 403. And see Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [aff 201 N. Y. 518 mem, 94 NE 1099 mem].

N. C.—Cotten v. Davis, 48 N. C. 355; Anonymous, 3 N. C. 18.

Oh.—Howard v. Powers, 6 Oh. 92.

Or.—Sears v. Daly, 43 Or. 346, 73 P 5; Burrell v. Kern, 34 Or. 501, 56 P 809.

Pa.—Stephens v. Cotterell, 99 Pa. 188; Lea v. Hopkins, 7 Pa. 492; State Bank v. Haldeman, 1 Penr. & W. 161; Boggs v. Bard, 2 Rawle 102; O'Brian v. Coskrey, 4 Yeates 105.

R. I.—McGuinness v. Whalen, 17 R. I. 619, 24 A 44.

S. C.—Dial v. Tappan, 20 S. C. 167; Carroll v. Still, 13 S. C. 430; Carter v. Estes, 45 S. C. L. 363.

Tenn.—Wood v. Tomlin, 92 Tenn. 514, 22 SW 206; Walt v. Walsh, 10 Heisk. 314; Lashlee v. Wily, 8 Humphr. 659.

Tex.—Moss v. Witcher, 35 Tex. 388; Rider v. Duval, 28 Tex. 622; Claiborne v. Yoeman, 15 Tex. 44; Cheatham v. Riddle, 12 Tex. 112; Groce v. Herndon, 2 Tex. 410; Thompson v. Duncan, 1 Tex. 485; Gayle v. Ennis, 1 Tex. 184; Smart v. Panther, 42 Tex. Civ. A. 262, 95 SW 679; Brainard v. Bute, (Civ. A.) 44 SW 575.

Vt.—Hutchinson v. Ford, 62 Vt. 97, 18 A 1044; Haskell v. Bowen, 44 Vt. 579; Aiken v. Bridgman, 37 Vt. 249; Perrin v. Granger, 33 Vt. 101; Manwell v. Briggs, 17 Vt. 176; Baxter v. Buck, 10 Vt. 548; Adams v. Campbell, 4 Vt. 447; Trask v. Donoghue, 1 Aik. 370.

Va.—Lawson v. Lawson, 16 Gratt. (57 Va.) 230, 80 AmD 702.

W. Va.—Thurmond v. Guyan Valley Coal Co., 102 SE 221; Elliott v. Blue, 74 W. Va. 209, 81 SE 982.

Wis.—Lawrence v. Vilas, 20 Wis. 381; Roys v. Vilas, 18 Wis. 169; Knox v. Bigelow, 15 Wis. 415.

Eng.—Gallant v. Bouteflower, 3 Dougl. 34, 26 ECL 34, 99 Reprint 525; Cowell v. Watts, 6 East 405, 102 Reprint 1342.

"When the cause of action, whether in contract or in tort, accrues after the death of the testator or intestate, and the money if recovered will be assets, the plaintiff may declare in his representative character or in his own name, at his option. This rule prevails under the codes, as well as at common law, except that it is materially qualified where the code provides that actions must be brought by the real party in interest, and that actions by an executor or administrator, upon a cause of action belonging to him, in his representative capacity, must be brought by him in that capacity." Cauthen v. Green, 80 S. C. 432, 434, 61 SE 957.

"When a contract is made with an executor or administrator personally, after the death of the testator or intestate, or where money is received by the person sued after the death, in such cases the executor or administrator may sue either in his own name, or as executor or administrator." Mowry v. Adams, 14 Mass. 327, 329 [quot Cauthen v. Green, 80 S. C. 432, 434, 61 SE 957].

[a] **The reason for the rule** is "that no matter in which capacity a recovery is had the recovery becomes assets of the estate for which he is accountable, and it does not concern the defendant, whose liability is individual in any event, so that the form of judgment is necessarily the same, and the same defenses and remedies are available to the defendant whose liability will be discharged by the satisfaction of the recovery no matter in which form it may be had." Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965 [rev 148 App. Div. 78, 132 NYS 1033] (quot dis. op. Laughlin, J., in the court below).

[b] **Naming official character.**—"Where the action accrues to the Executor or Administrator upon a contract made by or with him, as such, since the death of the Testator or Intestate; or for an injury done to, or a conversion of, the property of the Testator or Intestate, in the hands or possession of the Executor or Administrator, after the death of the Testator or Intestate, there the action may and ought to be brought in the proper name of the Executor or Administrator, describing himself to be such; but not as Executor or Administrator." Stewart v. Richey, 17 N. J. L. 164, 165. But compare Haskell v. Bowen, 44 Vt. 579, 584 ("executors and administrators who contract for the sale of their testator's or intestate's effects, or make other agreements in their representative character, . . . may sue in their individual right without naming their representative character").

[c] **Transfer of interest by surviving partner to executrix.**—Where the survivor of two partners, as a part division of the assets of the firm, transferred his interest in an account of the firm to the executrix of the deceased partner, a suit upon the account was properly brought by her as such executrix. Lawrence v. Vilas, 20 Wis. 381; Roys v. Vilas, 18 Wis. 169.

88. Chapman v. Davis, 4 Gill (Md.) 166.

[a] **Rule not applied.**—Where the widow of a member of a fraternal accident association, named as beneficiary in the application, which was in custody of the association, in ignorance of the provision in her favor, sued in her representative capacity as administratrix of his estate, and after learning of the provisions of the application continued to prosecute such action, the suit should be sustained as against an objection that she was not, in such representative capacity, the real party in interest, as the judgment would be a bar to her subsequent individual claim as beneficiary. Thompson v. Iowa State Traveling Men's Assoc., 88 Nebr. 399, 129 NW 529.

89. Mass.—Kent v. Bothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258.

Or.—Burrell v. Kern, 34 Or. 501, 56 P 809.

Tenn.—Lashlee v. Wily, 8 Humphr. 659.

Vt.—Manwell v. Briggs, 17 Vt. 176.

Wis.—Knox v. Bigelow, 15 Wis. 415.

90. Ala.—James v. Johnson, 44 Ala. 629; Harbin v. Levi, 6 Ala. 399.

Ark.—Hemphill v. Hamilton, 11 Ark. 425.

Ga.—Daniel v. Hollingshead, 16 Ga. 190.

Ind.—Sheets v. Pabody, 6 Blackf. 120, 38 AmD 132.

Mo.—Holman v. Nance, 84 Mo. 674; Mosman v. Bender, 80 Mo. 579.

Pa.—Boggs v. Bard, 2 Rawle 102.

tative.[91] It has been held, however, under a code provision requiring suit to be brought in the name of the real party in interest that the personal representative must declare in his representative capacity, although the cause of action arose subsequent to decedent's death.[92]

[§ 1809] **b. Particular Actions—(1) On Notes.** Where a note is given to an executor or administrator in his representative capacity, he may sue on it in that capacity;[93] or, at his option, in his individual capacity without naming himself as executor or administrator.[94] For purposes of suits of representatives in their individual character, when a note is made payable to one as executor or administrator, the words "executor" or "administrator" may be regarded as merely descriptive of the person and may be rejected as surplusage.[95] Where notes or bills are indorsed or assigned to executors or administrators as such, they may sue either in their representative[96] or indi-

Eng.—Bull v. Palmer, 2 Lev. 165, 83 Reprint 501; Partridge v. Court, 5 Price 412, 146 Reprint 649; Powley v. Newton, 6 Taunt. 453, 1 ECL 701, 128 Reprint 1111; Thompson v. Stent, 1 Taunt. 322, 127 Reprint 857; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

91. Williams Ex. p 763.

92. Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Rogers v. Gooch, 87 N. C. 442; Cauthen v. Green, 80 S. C. 432, 61 SE 957.

[a] **The rule has been applied to:** (1) An action on a judgment recovered by the representative. Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118. (2) An action on a bond given to the representative. Rogers v. Gooch, 87 N. C. 442.

93. Ala.—Erwin v. Hill, 51 Ala. 580; Riddle v. Hill, 51 Ala. 224; James v. Johnson, 44 Ala. 629; Waldrop v. Pearson, 42 Ala. 636; Goodman v. Walker, 30 Ala. 482, 68 AmD 134.

Ark.—Mohr v. Sherman, 25 Ark. 7; Laster v. Toliver, 11 Ark. 450; Hemphill v. Hamilton, 11 Ark. 425.

Ga.—Oglesby v. Gilmore, 5 Ga. 56.

Ill.—Miller v. Kingsbury, 128 Ill. 45, 21 NE 209; Newhall v. Turney, 14 Ill. 338.

Ind.—Ratcliff v. Everman, 87 Ind. 446; Sheets v. Pabody, 6 Blackf. 120, 38 AmD 132.

Iowa.—Carleton v. Byington, 17 Iowa 579.

La.—Clampitt v. Newport, 8 La. Ann. 124.

Md.—Sasscer v. Walker, 5 Gill & J. 102, 25 AmD 272.

Miss.—Rucks v. Taylor, 49 Miss. 552; Eckford v. Hogan, 44 Miss. 398; Falls v. Wilson, 24 Miss. 168; Trotter v. White, 18 Miss. 607.

Mo.—Smith v. Gregory, 75 Mo. 121; Smith v. Monks, 55 Mo. 106; Rector v. Langham, 1 Mo. 568.

N. Y.—Litchfield v. Flint, 104 N. Y. 543, 11 NE 58; Merritt v. Seaman, 6 N. Y. 168; Eagle v. Fox, 28 Barb. 473, 8 AbbPr 40.

N. C.—Alston v. Jackson, 26 N. C. 49.

Or.—Sears v. Daly, 43 Or. 346, 73 P 5; Burrell v. Kern, 34 Or. 501, 56 P 809.

S. C.—Carroll v. Still, 13 S. C. 430.

Tenn.—Wood v. Tomlin, 92 Tenn. 514, 22 SW 206.

Tex.—Moss v. Witcher, 35 Tex. 388; Claiborne v. Yoeman, 15 Tex. 44; Groce v. Herndon, 2 Tex. 410; Gayle v. Ennis, 1 Tex. 184.

Eng.—Betts v. Mitchell, 10 Mod. 315, 88 Reprint 744; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

[a] **Note given by coexecutor.**—Where one of two executors gives his note or bond to the other as executor expressly for money borrowed from the estate of the testator, the executor of the payee so named may bring suit against the maker even before settlement made by him with the original testator's estate. Alston v. Jackson, 26 N. C. 49.

94. Ala.—Erwin v. Hill, 51 Ala. 580; Riddle v. Hill, 51 Ala. 224; McGehee v. Slater, 50 Ala. 431; James v. Johnson, 44 Ala. 629; Waldrop v. Pearson, 42 Ala. 636; Goodman v. Walker, 30 Ala. 482, 68 AmD 134.

Ark.—Mohr v. Sherman, 25 Ark. 7; Laster v. Toliver, 11 Ark. 450; Hemphill v. Hamilton, 11 Ark. 425.

Ga.—Collier v. Barnes, 64 Ga. 484; Oglesby v. Gilmore, 5 Ga. 56; Kennedy v. Gelders, 7 Ga. A. 241, 66 SE 620.

Ill.—Miller v. Kingsbury, 128 Ill. 45, 21 NE 209; Newhall v. Turney, 14 Ill. 338.

Ind.—Ratcliff v. Everman, 87 Ind. 446; Sheets v. Pabody, 6 Blackf. 120, 38 AmD 132; Barnes v. Modisett, 3 Blackf. 253; Savage v. Merian, 1 Blackf. 176.

Iowa.—Carleton v. Byington, 17 Iowa 579.

Ky.—Layne v. Power, 92 SW 945, 29 KyL 494.

La.—Clampitt v. Newport, 8 La. Ann. 124.

Miss.—Rucks v. Taylor, 49 Miss. 552; Eckford v. Hogan, 44 Miss. 398; Falls v. Wilson, 24 Miss. 168; Trotter v. White, 18 Miss. 607; Laughman v. Thompson, 14 Miss. 259; Carter v. Saunders, 3 Miss. 851.

Mo.—Smith v. Gregory, 75 Mo. 121; Smith v. Monks, 55 Mo. 106; Thomas v. Relfe, 9 Mo. 377; Lacompte v. Seargent, 7 Mo. 351; Rector v. Langham, 1 Mo. 568.

N. Y.—Litchfield v. Flint, 104 N. Y. 543, 11 NE 58; Merritt v. Seaman, 6 N. Y. 168; Buckingham v. Andrews, 34 Barb. 434, 12 AbbPr 322; Reznor v. Webb, 36 HowPr 353.

Or.—Sears v. Daly, 43 Or. 346, 73 P 5; Burrell v. Kern, 34 Or. 501, 56 P 809.

S. C.—Carroll v. Still, 13 S. C. 430.

Tenn.—Wood v. Tomlin, 92 Tenn. 514, 22 SW 206.

Tex.—Moss v. Whitaker, 35 Tex. 388; Claiborne v. Yoeman, 15 Tex. 44; Butler v. Robertson, 11 Tex. 142; Groce v. Herndon, 2 Tex. 410; Gayle v. Ernis, 1 Tex. 184.

W. Va.—Austin v. Calloway, 73 W. Va. 231, 80 SE 361, AnnCas1916E 112.

Eng.—Betts v. Mitchell, 10 Mod. 315, 88 Reprint 744; King v. Thom, 1 T. R. 487, 99 Reprint 1212.

[a] **Rule applies to note for purchase money of property sold by representative.**—Dunlap v. Newman, 47 Ala. 429; Evans v. Gordon, 8 Port. 346.

[b] **Where an instrument made payable to the estate** and not to any person or persons by name is regarded as a promise to pay the executors, there is no necessity for their suing in a representative capacity. Lyon v. Marshall, 11 Barb. (N. Y.) 241.

[c] **Unauthorized acceptance of note.**—Where an administrator obtained a note of third persons before its maturity, in payment of a note secured by a vendor's lien on land, payable to his intestate, which he surrendered, although he may not have been authorized to accept the note in payment, he paid a consideration for it, and it was immaterial whether he sued such third persons on the note in his character as administrator or otherwise. Brainerd v. Butte, (Tex. Civ. A.) 44 SW 575.

[d] **Where the note has been indorsed by the payee or by his executor** in his official capacity, the latter cannot recover it in his own name. Woodbury v. Woodbury, 47 N. H. 11, 90 AmD 555.

[e] **A distinction as to the form of note.**—If the note or bond is executed to him as administrator or by the use of any other terms, clearly indicating the debt to be due the estate of the testator, then the administrator should sue on it in his representative capacity and the money when collected will be assets; but if the note is executed to him "administrator" or "being administrator" then the law will hold it to be a note executed to him in his private right, such words operating as mere matter of description; and consequently suit can only be maintained on it in his own name. Perkins v. Crabtree, 5 Ark. 475.

[f] **After resignation or removal.**—Where an executor takes a nonnegotiable instrument from one to whom he loans money of the estate without authority, he may sue on such contract in his own name, notwithstanding he has resigned or been removed from the administration, unless it is shown that he has been in some way discharged from the liability incurred. Tomkies v. Reynolds, 17 Ala. 109.

[g] **Revocation of letters testamentary.**—In an action by an executor of an estate on a note payable to him as executor, etc., an answer alleging that the note belonged to the estate and that his letters testamentary had been revoked, is good. Leach v. Lewis, 38 Ind. 160.

95. Ala.—McGehee v. Slater, 50 Ala. 431; James v. Johnson, 44 Ala. 629; Waldrop v. Pearson, 42 Ala. 636; Goodman v. Walker, 30 Ala. 482, 68 AmD 134; Evans v. Gordon, 8 Port. 142.

Ga.—Collier v. Barnes, 64 Ga. 484.

Ill.—Laycock v. Oleson, 60 Ill. 30.

Ind.—Ratcliff v. Everman, 87 Ind. 446; Turner v. Burgess, 26 Ind. 195; Sheets v. Pabody, 6 Blackf. 120, 38 AmD 132; Barnes v. Modisett, 3 Blackf. 253.

Kan.—Shattuck v. Wolf, 72 Kan. 366, 83 P 1093.

Ky.—Layne v. Power, 92 SW 945, 29 KyL 494.

La.—Gilman v. Horseley, 5 Mart. N. S. 661.

Me.—Barrett v. Barrett, 8 Me. 353.

Mass.—Wheeler v. Johnson, 97 Mass. 39.

Miss.—Eckford v. Hogan, 44 Miss. 398; Falls v. Wilson, 24 Miss. 168.

Mo.—Smith v. Monks, 55 Mo. 106; Lyons v. Doherty, 50 Mo. 38; Thomas v. Relfe, 9 Mo. 377.

N. Y.—Litchfield v. Flint, 104 N. Y. 543, 11 NE 58.

N. C.—Blankenship v. Hunt, 76 N. C. 377.

Tenn.—Wood v. Tomlin, 92 Tenn. 514, 22 SW 206.

Tex.—Moss v. Witcher, 35 Tex. 388; Rider v. Duval, 28 Tex. 622; Claiborne v. Yoeman, 15 Tex. 44; Peters v. Caton, 6 Tex. 554; Groce v. Herndon, 2 Tex. 410; Gayle v. Ennis, 1 Tex. 184.

Vt.—Taylor v. Phillips, 30 Vt. 238.

Rejection as surplusage of words in pleading descriptive of capacity see infra § 2066.

96. King v. Thom, 1 T. R. 487, 99 Reprint 1212.

[a] **Administrator de bonis non.**—If a bill is indorsed to A as administrator of B for a debt to B, an action may be brought upon it by an administrator de bonis non of B afterward appointed. Catherwood v. Chabaud, 1 B. & C. 150, 8 ECL 65, 107 Reprint 56. See also Moore v. Ran-

vidual[97] capacity. An executor or administrator may also sue in his own name upon a note payable to decedent or bearer,[98] or a note payable to bearer and held originally by or transferred to decedent,[99] and it is immaterial that the time for payment had not arrived at the time of decedent's death.[1] It is also immaterial whether the administrator is domestic or foreign.[2] He may also sue in his representative capacity on such note.[3] It has been held that an executor or administrator may sue in his own right upon a negotiable note payable to decedent and indorsed by him in blank as if it were indorsed to him individually,[4] but other cases hold that an executor can sue only as such on a note payable to the order of his testator and indorsed by him.[5] If, however, the note has not been indorsed by decedent or by the personal representative in his official capacity he cannot recover upon it in his own name. He can sue on it only in his representative capacity.[6]

Death of executor or administrator. It has been held that, where a negotiable instrument is made payable to an executor or administrator, and such executor or administrator dies, an action on the instrument may be brought by his personal representative,[7] but other cases hold that in such case the administrator de bonis non of the first decedent may sue on such instrument.[8]

Action for another's benefit. It seems that a personal representative may maintain an action on negotiable instruments payable to his testator or intestate, although the beneficial ownership of such instruments is in another person, and they do not belong to the estate.[9]

[§ 1810] **(2) On Bonds.** An executor or administrator may sue individually, or in his representative character, on a bond made payable to him individually,[10] and when a bond is executed to him in his representative capacity he may sue on it in such capacity,[11] or individually[12] except where the statute requires suit to be brought by the real party in interest.[13] On a bond assigned to him in his representative capacity he may sue either in his individual[14] or representative[15] capacity, and he may sue in his representative capacity upon a bond running to decedent.[16]

[§ 1811] **(3) On Judgments.** Administrators in their representative capacity may have an action on a judgment recovered by the intestate in his lifetime.[17] Where a judgment is recovered by an executor or administrator it is a debt due to him in his personal character and he may sue on it in his own name,[18] even though the judgment was recovered in a foreign state.[19] The representative may also, however, sue in his representative capacity on such a judgment,[20] and it has been held that, where a statute requires all actions to be prosecuted in the name of the real party in interest, an action

dolph, 70 Ala. 575 (where a similar view was intimated).

97. Evans v. Gordon, 8 Port. (Ala.) 142; Rucks v. Taylor, 49 Miss. 552.

[a] **Suit prior to appointment of administrator.**—Although the action is brought prior to the appointment of an administrator the taking upon himself of that trust by the person bringing the suit legalizes all his acts relative to the goods and credits committed to him from the decease of the intestate and he may proceed with the suit. Gage v. Johnson, 20 Me. 437.

98. Robinson v. Crandall, 9 Wend. (N. Y.) 425, 426 ("The notes being payable to bearer, and the payee having died in Pennsylvania, admitting the plaintiffs to have been his administrators there, and in the manner to have obtained the possession of the notes, I see no legal objection to their maintaining an action upon them in their own names as bearers").

99. Gage v. Johnson, 20 Me. 437; Bright v. Currie, 7 N. Y. Super. 433, 10 NYLegObs 104; Patchen v. Wilson, 4 Hill (N. Y.) 57; Packer v. Wilson, 15 Wend. (N. Y.) 343; Floyd v. Brooks, 13 S. C. L. 264; Sanford v. McCreedy, 28 Wis. 103.

[a] **Reason for rule.**—The property in as well as all the rights incident to a note, payable to bearer, is transferable by delivery, and amongst these, the right to sue is the most indisputable; and whether the natural import of the term itself or its legal consequence is considered the same result follows. It is in direct terms a promise to pay to the bearer and when once it passes out of the hands of the original payee it enters into the circulating medium of the country, becomes identified with it as a representative of coin, and like it is the property of him who has the legal possession and as an incident the right to sue is indispensable. Floyd v. Brooks, 13 S. C. L. 364.

1. Patchen v. Wilson, 4 Hill (N. Y.) 57.

2. Giddings v. Green, 48 Fed. 489, 4 Hughes 446; Knapp v. Lee, 42 Mich. 41, 3 NW 244; Bright v. Currie, 7 N. Y. Super. 433; Sanford v. McCreedy, 28 Wis. 103.

Action by foreign representative generally see infra § 2702.

3. Floyd v. Brooks, 13 S. C. L. 364; Baxter v. Buck, 10 Vt. 548.

[a] **Note not delivered until after intestate's death.**—An administrator in his representative capacity may, it seems, maintain an action as bearer on a note payable to the intestate or bearer, although such note was not delivered until after the death of the intestate. Baxter v. Buck, 10 Vt. 548.

4. Barrett v. Barrett, 8 Me. 353; Barlow v. Myers, 24 Hun (N. Y.) 286; Cooper v. Kerr, 3 Johns. Cas. (N. Y.) 606.

[a] **If defendant has any matter of set-off** against the estate of decedent he may avail himself of it in defense of the action. Barrett v. Barrett, 8 Me. 353.

5. Leamon v. McCubbin, 82 Ill. 263; Van Sickle v. Staub, 155 Iowa 472, 136 NW 546; Woodbury v. Woodbury, 47 N. H. 11, 90 AmD 555.

6. Morse v. Clayton, 21 Miss. 373; Woodbury v. Woodbury, 47 N. H. 11, 90 AmD 555; Nash v. Hogan, 45 N. J. Eq. 108, 16 A 433.

7. Arrington v. Hair, 19 Ala. 243; Cook v. Holmes, 29 Mo. 61, 77 AmD 548.

[a] **Death pending suit.**—An action brought by an executor or administrator on a note payable to himself in that capacity may on his death, pending the suit, be revived in the name of his personal representative. Arrington v. Hair, 19 Ala. 243.

8. Sheets v. Pabody, 6 Blackf. (Ind.) 120, 38 AmD 132; Batchelor v. Douglas, 31 Tex. 182.

9. Orr v. Thompson, 9 Ill. 451; Bates v. Kempton, 7 Gray (Mass.) 382; Sigourney v. Severy, 4 Cush. (Mass.) 176; Cooper v. Hayward, 71 Minn. 374, 74 NW 152, 70 AmSR 330.

10. Oliver v. Townsend, 16 Iowa 430.

11. Sasscer v. Walker, 5 Gill & J. (Md.) 102, 25 AmD 272 (appeal bond). Contra Stewart v. Richey, 17 N. J. L. 164.

12. Ark.—Hemphill v. Hamilton, 11 Ark. 425.

Md.—Ayres v. Toland, 7 Harr. & J. 3.

N. J.—Stewart v. Richey, 17 N. J. L. 164.

N. Y.—Morris v. Hunken, 40 App. Div. 129, 57 NYS 712.

N. C.—Waddell v. Moore, 24 N. C. 261.

[a] **Suit on an appeal bond** may be brought by executors in their individual capacity, although it was given upon a judgment recovered by them as executors. Morris v. Hunken, 40 App. Div. 129, 57 NYS 712 (the undertaking is a contract).

13. Rogers v. Gooch, 87 N. C. 442.

14. Rucks v. Taylor, 49 Miss. 552.

15. McDonald v. Williams, 16 Ark. 36.

16. In re Ruetchlin, 245 Pa. 473, 91 A 857; Webster v. Tibbits, 19 Wis. 438.

17. Wooster v. Bishop, 2 Root (Conn.) 230. See also Ireland v. Litchfield, 21 N. Y. Super. 634, 22 HowPr 178 (on the death of a plaintiff after final judgment in his favor his personal representatives may bring an action on the judgment to obtain the same relief as was obtainable by a writ of scire facias prior to the code).

18. U. S.—Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315; Moore v. Kraft, 179 Fed. 685, 687, 103 CCA 231 [cit Cyc].

Ga.—Collier v. Barnes, 64 Ga. 484; Oglesby v. Gilmore, 5 Ga. 56.

Ind.—Campbell v. Baldwin, 6 Blatchf. 364.

Me.—Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314.

Mass.—Talmadge v. Chapel, 16 Mass. 71.

Tex.—Davis v. Phillips, 32 Tex. 564.

Vt.—Adams v. Campbell, 4 Vt. 447.

Eng.—Crawford v. Whittal, Dougl. (3d ed.) 4 note; Large v. Attwood, 1 D. & R. 551, 16 ECL 55; Bonafous v. Walker, 2 T. R. 126, 100 Reprint 69.

19. Moore v. Kraft, 179 Fed. 685, 103 CCA 231; Tittman v. Thornton, 167 Mo. 500, 17 SW 979, 16 LRA 410; Hall v. Harrison, 21 Mo. 277, 64 AmD 225; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; Nichols v. Smith, 7 Hun (N. Y.) 580; Bright v. Currie, 7 N. Y. Super. 433, 10 NYLegObs 104; Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71.

20. Willets v. Haines, 96 App. Div. 5, 88 NYS 1018 [aff 182 N. Y. 543 mem, 75 NE 1135 mem] (where the

by an administrator upon a judgment rendered in his favor as such must be brought by him in his representative capacity.[21] Where an administrator employed the funds of the estate in purchasing a judgment, he should be deemed to have done so in his individual capacity, and must sue for the debt in his own name.[22]

[§ 1812] **(4) On Contracts Made by Representative—(a) In General.** Where a contract is made by an executor or administrator a right of action arising therefrom is in his individual rather than his representative capacity.[23] He may therefore sue in his individual capacity to recover the purchase money of property of the estate sold by him,[24] or on a contract made by him with respect to the real estate of decedent.[25] Thus, where a person holding lands as administrator has leased them, he can recover the rents in his own name.[26] It has been held however that an administrator who lends money belonging to the estate may sue for it either in his representative or in his individual capacity.[27]

[§ 1813] **(b) Contracts Involving Unauthorized Use of Assets.** Where a personal representative by contract makes an unauthorized use of the money or choses in action of the estate this amounts to a conversion for which he is personally liable, and he may sue on the contract in his own name;[28] and it has been held that the action can only be brought in his individual capacity,[29] although there is also authority for the contrary view.[30] Where an executor was also charged with the duties of a trustee, in that he was to pay over the income of the estate to sole legatees, and before he had made an accounting and before the time for presentation of claims had expired, and less than two months after the grant of letters of administration, he gave a portion of the estate to a stockbroker to deal in stocks, this constituting an unlawful investment, the cause of action to recover the amount deposited with the broker was in the executor and those deriving their authority from that relation, and not in the executor as a trustee under the will.[31] If the administrator has settled the estate and has been discharged without having been charged with the proceeds of such a contract then he can maintain no action on such contracts or claims, and the right to sue passes to the succeeding administrator.[32]

[§ 1814] **(5) To Recover Money Paid.** Where a personal representative has paid out money of the estate by mistake he may recover it back in a suit brought in his individual capacity;[33] and it has also been held that such action may be properly brought in a representative capacity.[34]

Where a legacy has been paid, and thereafter the legatee forfeits his right thereto by contesting the will, an action to recover back the amount of the legacy may be brought by the executor in his representative capacity.[35]

[§ 1815] **(6) On Right of Surety to Indemnity.** Where a personal representative pays a debt for which decedent was surety, he may recover from the principal debtor in an action in his own name[36] or in his representative capacity.[37]

[§ 1816] **(7) To Recover Land or for Injuries Thereto.** Whenever an executor or administrator is entitled to possession of land, he may maintain an action in his individual capacity for a trespass

complaint described plaintiffs as surviving executors under a will, and the owners and holders of the judgment sued on, which they had formerly recovered in their capacity as executors, plaintiffs were entitled to recover in their representative capacity, although in the title of the action the word "as," between the names of plaintiffs and the words descriptive of their representative capacity was omitted).

21. Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118.

22. Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314.

23. Myers v. Weger, 62 N. J. L. 432, 42 A 280; Stewart v. Richey, 17 N. J. L. 164; O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238; Parker v. Day, 155 N. Y. 383, 49 NE 1046; Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950; Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Austin v. Monroe, 47 N. Y. 360; Ferrin v. Myrick, 41 N. Y. 315; Ehrman v. Bassett, 153 App. Div. 752, 144 NYS 976; Kline v. Guthart, 2 Penr. & W. (Pa.) 490.

24. Laycock v. Oleson, 60 Ill. 30; Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273, 8 NYCivProc 183 [aff 16 NYWklyDig 283]; Ehrman v. Bassett, 159 App. Div. 752, 144 NYS 976; Gross v. Gross, 26 Misc. 385, 56 NYS 219 [aff 25 Misc. 297, 54 NYS 572]; Aiken v. Bridgeman, 37 Vt. 249; Brassington v. Ault, 2 Bing, 177, 9 ECL 534, 130 Reprint 274, 1 C. & P. 302, 12 ECL 181; Heath v. Chilton, 12 M. & W. 632, 152 Reprint.

25. Pendergrass v. Allen, 101 Ark. 365, 141 SW 507; Fifield v. White, 139 App. Div. 390, 123 NYS 1094 [aff 207 N. Y. 701 mem, 101 NE 1102 mem]; Loew v. Christ, 13 App. Div. 624, 42 NYS 963.

26. Yarborough v. Ward, 34 Ark. 204; Dean v. Donalson, 2 Ga. A. 462, 58 SE 679; Kingsland v. Ryckman, 5 Daly (N. Y.) 13.

[a] **Construction of complaint.**—Where executors in their representative capacity brought assumpsit for the use and occupation of a farm described as "land and appurtenances of the plaintiffs, held by the defendant at the special instance and request, and by the sufferance and permission, of the plaintiffs" and no count in the declaration disclosed any contract made with the testator in his lifetime, and there was no allegation that the rent was not paid to him in his lifetime, the action must be deemed to be brought by the executors in their individual capacity. Fesmire v. Brock, 25 Ark. 20.

[b] **Distress warrant.**—An executor or administrator can sue out a distress warrant in his individual capacity, and terms indicating a representative capacity, if used, may be treated as surplusage. Dean v. Donalson, 2 Ga. A. 462, 58 SE 679.

27. Bond v. Corbett, 2 Minn. 248.

28. Dickson v. McLarney, 97 Ala. 383, 12 S 398; Collins v. Greene, 67 Ala. 211; Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314; Bates v. Sabin, 64 Vt. 511, 24 A 1013.

[a] **Effect of resignation or removal.**—A personal representative who has loaned money or choses in action of the estate without authority to do so may sue on the contract in his own name, notwithstanding he has resigned or been removed from the administration, unless it is shown that he has in some way been discharged from the liability thus incurred. Tomkies v. Reynolds, 17 Ala. 109.

29. Thornton v. Smiley, 1 Ill. 34; Ketchum v. Morrell, 2 NYLegObs 58.

[a] **Rule applies in case of unauthorized loan.**—Thornton v. Smiley, 1 Ill. 34; Ketchum v. Morrell, 2 NY LegObs 58.

30. McGraw v. Robinson Mercantile Co., 95 Miss. 828, 49 S 260. See also Parks v. Mockenhaupt, 133 Cal. 424, 65 P 875 (where the court was apparently of the view that, where an administrator borrowed money in his individual capacity pledging certificates of stock belonging to the estate, he may maintain replevin therefor in his official capacity, although the money was used in part to pay debts of the estate).

31. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [aff 201 N. Y. 518 mem, 94 NE 1099 mem].

32. Collins v. Greene, 67 Ala. 211; Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [aff 201 N. Y. 518 mem, 94 NE 1099 mem].

33. Sprinkle v. Forrester, 162 Ill. A. 45; Van Pelt v. New York, 91 Misc. 550, 155 NYS 9; Rogers v. Weaver, Wright (Oh.) 174.

[a] **Reason for rule.**—He is personally responsible for the money and has a corresponding personal right to recover it back. Rogers v. Weaver, Wright (Oh.) 174.

[b] **Excessive payments to counsel.**—If an executor retains the services of counsel with respect to the estate in his charge, and paid him fees only a portion of which are allowed by the court to be charged against the estate, any right to recover the excess amount is by himself in his individual rather than in his representative capacity. Sprinkle v. Forrester, 162 Ill. A. 45.

34. Phillips v. McConica, 59 Oh. St. 1, 51 NE 445, 69 AmSR 753 (an executor is always a proper party to maintain an action to recover money belonging to the estate).

35. Kelley v. Winslow, 73 Misc. 642, 131 NYS 65.

36. Mowry v. Adams, 14 Mass. 327; Williams v. Moore, 9 Pick. (Mass.) 432; O'Brian v. Coskrey, 4 Yeates (Pa.) 105.

37. Coffinberry v. McClellan, 164 Ind. 131, 73 NE 97; Williams v. Moore, 9 Pick. (Mass.) 432; Mowry v. Adams, 14 Mass. 327; Elliott v. Blue, 74 W. Va. 209, 81 SE 982, 983 [cit Cyc].

committed thereon since decedent's death;[38] but for a trespass committed during decedent's lifetime he must sue in his representative capacity.[39] If the complaint shows that he is by inheritance the sole owner of the land, the action must be brought in his individual and not in his representative capacity.[40] To recover possession of the land he may bring an action of unlawful detainer either in his representative or individual capacity,[41] ejectment in his individual[42] or representative[43] capacity, trespass to try title in his individual[44] or representative[45] capacity, or a writ of entry in his representative capacity.[46] For an interference with an incorporeal hereditament he may declare in his representative capacity,[47] or it seems in his own name, without setting up his representative character.[48]

[§ 1817] **(8) For Injury to or Conversion of Personalty.** Where personal property of the testator or intestate is injured or converted after his death, the executor or administrator may sue on the cause of action arising therefrom in his individual capacity.[49] It has accordingly been held that he may maintain, in his individual capacity, trover,[50] replevin,[51] detinue,[52] and trespass.[53] He is not, however, bound to sue in his individual capacity, but may sue in his representative capacity if he sees fit.[54]

[§ 1818] **c. Where Representative Has Been Charged with or Has Accounted for Proceeds of Contract.** Where an administrator has been charged with or has accounted for the proceeds of contracts made with decedent,[55] or with him in his representative character,[56] he may sue individually thereon.

[§ 1819] **d. Where Representative Is Sole Beneficiary.** Where there are no outstanding debts against the estate and the executor or administrator is the sole devisee and legatee, or sole heir and distributee, he may consider himself as holding the property in his own right and may sue for it on that theory.[57]

[§ 1820] **2. Actions against Representatives—a. General Rules.** The general rule is that no action will lie against an executor or administrator in his representative character except upon some claim or demand which existed against decedent in his lifetime, and that if a claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character,[58] the test being whether or not a judgment

38. Smith v. Smith, 11 N. H. 459.
39. Kennerly v. Wilson, 1 Md. 102.
40. Taylor v. Fickas, 64 Ind. 167, 31 AmR 114.
41. Spear v. Lomax, 42 Ala. 576; Diehr v. Dean, (Mo. A.) 187 SW 602.
42. Rucker v. Tennessee Coal, etc., Co., 176 Ala. 456, 58 S 465.
43. Moragne v. Doe, 143 Ala. 459, 39 S 161, 111 AmSR 52, 5 AnnCas 331; Chauncy v. Brown, 99 Ga. 766, 26 SE 763; Javier v. Javier, 6 Philippine 493; Gibson v. Slater, 42 Wash. 347, 84 P 648. See also Mayer v. Kornegay, 163 Ala. 371, 50 S 880, 136 AmSR 79 (if necessary for purpose of administration).
44. Pryor v. Krause, (Tex. Civ. A.) 168 SW 498.
45. Thompson v. Duncan, 1 Tex. 485.
46. Pierce v. Strickland, 26 Me. 277.
47. Perrin v. Granger, 33 Vt. 101 (right to use a pew).
48. Perrin v. Granger, 33 Vt. 101.
49. U. S.—White v. Pulley, 27 Fed. 436.
Ark.—Anderson v. Wilson, 13 Ark. 409.
Ga.—Strickland v. Thornton, 2 Ga. A. 377, 58 SE 540.
Me.—Wright v. Holmes, 100 Me. 508, 62 A 507, 3 LRANS 769, 4 Ann Cas 583.
Mo.—Griesel v. Jones, 123 Mo. A. 45, 99 SW 769.
N. J.—Stewart v. Richey, 17 N. J. L. 164.
N. Y.—Buckland v. Gallup, 105 N. Y. 453, 11 NE 843; Reichard v. Hutton, 148 App. Div. 813, 133 NYS 44; Patchen v. Wilson, 4 Hill 57; Valentine v. Jackson, 9 Wend. 302.
S. C.—Carter v. Estes, 45 S. C. L. 363; Guphill v. Isbell, 42 S. C. L. 463; Kerby v. Quinn, 24 S. C. L. 264.
Tenn.—Lashlee v. Wily, 8 Humphr. 659.
Vt.—Manwell v. Briggs, 17 Vt. 176; Trask v. Donoghue, 1 Aik. 370.
Wis.—Knox v. Bigelow, 15 Wis. 415.
Eng.—Fraser v. Swansea Canal Nav. Co., 1 A. & E. 354, 28 ECL 177, 110 Reprint 1241.
"This is an inevitable deduction from the fact of the existence of the right of property and possession consequent upon the executorship. It is the individual possession, actual or constructive, of the executor that is violated by the injury to the property, and the redress may be in the same capacity." Valentine v. Jackson, 9 Wend. (N. Y.) 302, 303.
50. Cal.—Ham v. Henderson, 50 Cal. 367.
Me.—Carlisle v. Burley, 3 Me. 250.
Mass.—Foster v. Gorton, 5 Pick. 185; Towle v. Lovet, 6 Mass. 394.
N. Y.—Valentine v. Jackson, 9 Wend. 302; Barker v. Baker, 5 Cow. 267.
N. C.—Satterwhite v. Carson, 25 N. C. 549.
S. C.—Carter v. Estes, 45 S. C. L. 363; Guphill v. Isbell, 42 S. C. L. 463; Kerby v. Quinn, 24 S. C. L. 264.
Tenn.—Lashlee v. Wily, 8 Humphr. 659.
Vt.—Manwell v. Briggs, 17 Vt. 176.
Eng.—Fraser v. Swansea Canal Nav. Co., 1 A. & E. 354, 28 ECL 177, 110 Reprint 1241; Hollis v. Smith, 10 East 293, 103 Reprint 786.
51. Branch v. Branch, 6 Fla. 314; Kent v. Bothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258; Peo. v. Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486.
52. Sims v. Boynton, 32 Ala. 353, 70 AmD 540.
53. Knox v. Bigelow, 15 Wis. 415; Granger v. O'Neill, 31 N. S. 462.
54. Ark.—Anderson v. Wilson, 13 Ark. 409.
Fla.—Branch v. Branch, 6 Fla. 314.
Mass.—Kent v. Rothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258.
Mich.—Gilkey v. Hamilton, 22 Mich. 283.
N. Y.—Bingham v. Marine Nat. Bank, 112 N. Y. 661, 19 NE 416; Wetmore v. Porter, 92 N. Y. 76; Reichard v. Hutton, 148 App. Div. 813, 133 NYS 44; Singleton v. Smith, 2 NYSt 173.
N. C.—Berry v. Pulliam, 2 N. C. 16.
Tenn.—Lashlee v. Wily, 8 Humphr. 659.
Vt.—Manwell v. Briggs, 17 Vt. 176.
Wis.—Knox v. Bigelow, 15 Wis. 415.
Eng.—Adams v. Cheverel, Cro. Jac. 113, 79 Reprint 97.
"Where property belonging to an estate has been interfered with by a third person, or where the representative of the estate has permitted such interference, and thus made himself liable on an accounting, an action for the wrong may be brought by the representative individually, or in his representative capacity. It is no defense to such an action that it is brought in a representative capacity, instead of the representative as an individual." Reichard v. Hutton, 148 App. Div. 813, 133 NYS 44.
55. Lyons v. Doherty, 50 Mo. 38.
56. Dickson v. McLarney, 97 Ala. 383, 12 S 398.
57. Ga.—Jackson v. Green, 123 Ga. 254, 51 SE 284.
Mich.—Ewers v. White, 114 Mich. 266, 72 NW 184
Nebr.—Tomson v. Iowa State Traveling Men's Assoc., 88 Nebr. 399, 129 NW 529.
R. I.—Musk v. Hall, 34 R. I. 126, 82 A 593.
W. Va.—Elliott v. Blue, 74 W. Va. 209, 81 SE 982, 983 [cit Cyc].
58. U. S.—Eggers v. Krueger, 236 Fed. 852, 150 CCA 114; Baring v. Putnam, 2 F. Cas. No. 984, 1 Holmes 261.
Ala.—McLeod v. McLeod, 169 Ala. 654, 53 S 834; McEldery v. McKenzie, 2 Port. 33, 27 AmD 645.
Ark.—Boshears v. Anderson, 215 SW 702.
Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; Sterrett v. Barker, 119 Cal. 492, 51 P 695; Malone v. Davis, 67 Cal. 279, 7 P 703.
Del.—Wilson v. Harvey, 3 Del. 500.
D. C.—Ryan v. McAdoo, 46 App. 117.
Fla.—L'Engle v. L'Engle, 19 Fla. 714.
Ga.—Humphrey v. Johnson, 143 Ga. 703, 85 SE 830.
Ill.—Claffy v. Farrell, 196 Ill. A. 65, 239; Jahp v. Bradley, 185 Ill. A. 215.
Me.—Davis v. French, 20 Me. 21, 37 AmD 36.
Md.—Curtis v. Somerset Bank, 7 Harr. & J. 25.
Nev.—Kingsbury v. Copren, 187 P 728.
N. J.—Veader v. Veader, 89 N. J. L. 727, 99 A 309.
N. Y.—Legget v. Pelletreau, 213 N. Y. 237, 107 NE 509 [aff 156 App. Div. 919, 141 NYS 1128]; O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238; Austin v. Monroe, 47 N. Y. 360; Ferrin v. Myrick, 41 N. Y. 315; Horowitz v. Cohen, 172 App. Div. 700, 159 NYS 325; Metropolitan Trust Co. v. Stallo, 166 App. Div. 649, 152 NYS 173 [aff 215 N. Y. 710 mem, 109 NE 1084 mem]; Williamson v. Stevens, 84 App. Div. 518, 82 NYS 1047; Moran v. Morrill, 78 App. Div. 440, 80 NYS 120 [aff 177 N. Y. 563 mem, 69

on the cause of action asserted would be a direct charge upon the estate.[59] Nevertheless it has been frequently held that, whatever property or money is lawfully recovered or received by an executor or administrator after the death of decedent in virtue of his representative character, he holds as assets of the estate, and that he is liable therefor in such representative character to the party who has a good title thereto,[60] or may be charged de bonis propriis with the money or property so received.[61] The fact that an action is brought against administrators as individuals does not prevent them from

NE 1127 mem]; Donohue v. Kendall, 50 N. Y. Super. 386 [aff 98 N. Y. 635 mem]; Bannon v. McGrane, 45 N. Y. Super. 517; Ross v. Harden, 44 N. Y. Super. 26; Cary v. Gregory, 38 N. Y. Super. 127; Rosenberg v. Jefferson, 98 Misc. 616, 163 NYS 157; Milner v. Hoag, 169 NYS 755; Sullivan v. Rosson, 148 NYS 611; Myer v. Cole, 12 Johns. 349.

N. C.—Whisnant v. Price, 175 N. C. 611, 96 SE 27; Beaty v. Gingles, 53 N. C. 302; Hailey v. Wheeler, 49 N. C. 159.

Oh.—Deschler v. Franklin, 20 Oh. Cir. Ct. 56, 11 Oh. Cir. Dec. 188; Connell v. Brumback, 18 Oh. Cir. Ct. 502, 10 Oh. Cir. Dec. 149; Hurd v. Wheeling, etc., R. Co., 6 OhS&CP 545, 4 OhNP 404.

Pa.—Com. v. Gregory, 261 Pa. 106, 104 A 562; Masterson v. Masterson, 5 Rawle 137; Grier v. Huston, 8 Serg. & R. 402, 11 AmD 627.

Tenn.—Wiles v. Wynne, 139 Tenn. 397, 201 SW 515.

Utah.—Dunn v. Wallingford, 47 Utah 491, 155 P 347.

[a] **An action to recover plaintiff's distributive share** of an estate is against the executor or administrator individually and not against the estate. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864 (the words "as executrix" in the title of the cause following defendant's name should be held to be merely descriptive).

[b] **Action for proceeds of insurance policy.**—Where a son gave his mother an insurance policy which ran to his executors or administrators, and the policy was collected by the son's wife as his administratrix, the mother might maintain an action against the wife in her individual capacity, for the wife, in collecting the policy, was only the mother's agent. Gledhill v. McCoombs, 110 Me. 341, 86 A 247, 45 LRANS 26, Ann Cas1914D 294.

[c] **Where a suit is brought by an executor against his coexecutor and another,** alleged to be interested in defeating a valid demand of the estate, the executor alleged to have personal interests inimical to those of the estate should be named defendant in his individual capacity. Quillan v. Johnson, 122 Ga. 49, 49 SE 801.

[d] **Where the heir sues the administrator for moneys had and received,** but there has been no adjudication of the estate, and there is nothing to show any promise by the administrator to pay any sum to plaintiff in lieu of her distributive share, the action will be dismissed. Wentz v. Blair, 232 Pa. 135, 81 A 144.

[e] **Presumption as to capacity in which representative acts.**—Where a levy of a fieri facias for municipal improvements, in which the lot is described as the property of S, executor, is met by an affidavit of illegality interposed by such person as owner, he is to be presumed to act in his individual, and not in his representative, capacity, although he is referred to in the affidavit as S, executor, where in the body of the affidavit he alleges that the property levied on never was held by him as executor. Stephens v. Atlanta, 119 Ga. 666, 46 SE 872 (where a fieri facias to enforce a tax for a municipal improvement described the property as that of S, executor, and an affidavit of illegality alleged that the property belonged to S individually, the court erred in dismissing it on the ground that no one but the executor had a right to object).

[f] **The nature of the action will be ascertained from the pleadings,** and if it appears that defendant, described as an executor, was sued as such, and not in his individual capacity, the court will so determine. Ryan v. McAdoo, 46 App. (D. C.) 117.

59. U. S.—De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457; Baring v. Putnam, 2 F. Cas. No. 984, 1 Holmes 261.

Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742; Churchill v. Woodworth, 148 Cal. 669, 84 P 155, 113 AmSR 324; Sterrett v. Barker, 119 Cal. 492, 51 P 695; Melone v. Davis, 67 Cal. 279, 7 P 703.

Conn.—State v. Culhane, 78 Conn. 622, 63 A 636.

Ga.—Allen v. Hurst, 120 Ga. 763, 48 SE 341.

N. J.—Cawley v. Reeve, 17 N. J. L. 415; Sibbit v. Lloyd, 11 N. J. L. 163.

N. Y.—Wall v. Kellogg, 16 N. Y. 385; Scheibeler v. Albee, 114 App. Div. 146, 99 NYS 706; Dunham v. Fitch, 48 App. Div. 321, 62 NYS 905; Patterson v. Buchanan, 40 App. Div. 493, 58 NYS 179; Riley v. Waller, 22 Misc. 63, 48 NYS 535.

Oh.—Howard v. Powers, 6 Oh. 92; Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Seip v. Drach, 14 Pa. 352.

Tex.—Schmitt v. Jacques, 26 Tex. Civ. A. 125, 62 SW 956.

"Nothing is better settled than that an executor or administrator, is answerable in his official character, for no cause of action that was not created by the act of the decedent himself. In actions against the personal representative on his own contract and engagements, though made for the benefit of the estate, the judgment is de bonis propriis; and he is, by every principal of legal analogy, to answer it with his personal property." Seip v. Drach, 14 Pa. 352, 356.

[a] **Recovery of funds received in representative capacity.**—Executors may be sued in their representative capacity for money received by them in that capacity under a contract for the sale of premises coming to them under the will, and to which they are unable to give good title. Scheibeler v. Albee, 114 App. Div. 146, 147, 99 NYS 706 ("The $1,000 was lawfully received by the defendants in their representative capacity in dealing concerning the property of their testator. The averments of the complaint show that they have no right in that capacity now to retain such money, because they were unable to give good title to the premises which they contracted to convey. The obligation to repay this money does not arise out of a pledge of the credit of the estate of the testator. Such pledging of credit would be without authority and would bind the person making it individually instead of as a representative. The defendants having received the money in their representative capacity, an action can be maintained against them in the same capacity for its recovery").

[b] **Action for rent.**—The surviving executrix and trustee under a will which entitled her to the income for life and on her death directed sale of the property and distribution to testator's children, leased the premises for a term of years, the lease providing that it should bind the heirs, executors, and legal representatives of the parties. After the death of the lessee, who continued his occupancy after the death of the executor and trustee, the executors of the lessee took and retained possession, and in partition suit brought by a child of the testator admitted, by failure to answer, that as executors of the lessee they had an estate for years in the premises. It was held that they were liable for the rent in their representative capacity. Steuber v. Huber, 107 App. Div. 599, 95 NYS 348.

[c] **Taxes due from deceased.**—An action cannot be maintained against an executrix in her personal capacity for taxes due from the deceased during his lifetime, and, if the executrix is liable in any event, it is only in her representative capacity. Eno v. Cornish, Kirby (Conn.) 296.

[d] **Circumstances not warranting personal action.**—Where a will directed that testator's executor might act as attorney for the estate and make charge therefor, and the executor furnished services, assigned his claim, and the assignor brought suit against the executor and his coexecutor on the claim, the case not being one where action must first be brought against the executors and they in turn reimburse themselves out of the estate, and not imposing a personal liability on the coexecutor, the action would not lie, but the proper practice would be to present the claim for allowance against the estate. Jacobsen v. Levine, 59 Misc. 449, 110 NYS 1002.

60. U. S.—De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457; Duffy v. Neale, 7 F. Cas. No. 4,119, Taney 271.

Ky.—Forsee v. Forsee, 144 Ky. 169, 137 SW 836.

Me.—Thurston v. Doane, 47 Me. 79.

N. Y.—Horowitz v. Cohen, 172 App. Div. 700, 159 NYS 325; Matter of Boericke, 93 Misc. 410, 158 NYS 138.

Oh.—Conger v. Atwood, 28 Oh. St. 134, 22 AmR 462.

61. De Valengin v. Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457; Duffy v. Neale, 7 F. Cas. No. 4,119, Taney 271; Call v. Houdlette, 70 Me. 308; Matter of Boericke, 93 Misc. 410, 158 NYS 138; In re Galloway, 21 Wend. (N. Y.) 32, 34 AmD 209.

[a] **Where a factor sells goods of his principal** in his own name upon a credit and dies before the money is received, if it is afterward paid to the administrator in his representative character, the creditor is entitled to consider it as assets in his hands and to charge him in the same character in which he received it. De Valengin v. Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457.

[b] **An executor or administrator who enters upon leasehold property** held by the testator or intestate in his lifetime, or who receives the rents and profits thereof, is chargeable in the debet and detinet directly on the covenant of the lessee as an assignee, and need not be named executor, etc. In re Galloway, 21 Wend. (N. Y.) 32, 34 AmD 209.

[c] **Effect of laches enforcing claim.**—An administrator who collects money upon a judgment founded on a suit in the name of his intestate is not individually liable to another for a share thereof belonging to such other person, unless before he appropriates the same to the use of the estate he has notice not to pay it over or unless in paying it

claiming to have acted in their representative character.[62]

Rejection of descriptive words as surplusage. The rule that in an action against an executor or administrator on a claim for which he may be liable individually the words "executor" or "administrator" will be rejected as surplusage does not apply where the action was brought against him in his representative capacity alone.[63]

Recovery on cause of action not stated. Where defendant is sued as administrator of his wife's estate, on a note executed by both himself and wife, he cannot be held as an individual as on a cause of action in equity arising out of an estoppel or trust.[64]

[§ 1821] **b. Actions on Contracts—(1) Of Decedent.** In an action against an executor or administrator founded on a contract made by decedent, defendant must be sued in his representative character, and the judgment will not be against him personally but de bonis testatoris or intestati.[65]

[§ 1822] **(2) Of Representative—(a) Consideration Arising during Decedent's Lifetime.** Where the consideration for the promise of the personal representative arose during the lifetime of decedent, he may be sued thereon in his representative capacity.[66]

[§ 1823] **(b) New and Independent Consideration.** A contract of an executor or administrator, although made in the interest and for the benefit of the estate, if made upon a new and independent consideration moving between his promisee and himself, is his personal contract, which does not bind the estate, and he must be sued on such contract in his individual, and not in his representative, capacity.[67] The fact that he is described in the con-

over he has acted in bad faith. Call v. Houdlette, 70 Me. 308.

62. Burton v. Williams, 63 Nebr. 431, 88 NW 765; Bryant v. Bryant, 25 N. Y. Super. 612.

63. Edwards v. Puterbaugh, 86 Kan. 758, 760, 121 P 1116 ("The appellant's contention is that he was entitled to a judgment against Walter Puterbaugh personally, notwithstanding the failure of proof to warrant a judgment against him as executor. In the brief it is said that 'there is but one question, practically, involved in this case: The liability of the appellee, Walter Puterbaugh, individually, for the services rendered by appellant . . . and the right of appellant to recover a personal judgment against said appellee under the allegations of his petition.' Authorities are cited to the effect that the words 'executor of the estate of Frank Frorer, deceased,' in the caption and body of the petition, should be construed as mere words of description and should be rejected as surplusage. And authorities are cited which hold that where the action is against the executor or administrator it is necessary to describe him 'as' executor or 'as' administrator. The recent case of Brown v. Quinton, 80 Kan. 44, 102 P 242, 25 LRANS 71, 18 AnnCas 290, is relied upon. That was an action against an administrator brought by attorneys employed to prosecute a suit for the estate. It was held that the claim set up in the petition was a personal one, and that the word 'administrator,' referring to defendant's official character, should be regarded as descriptive and rejected as surplusage. This is the general rule, but, like most general rules, there are cases where it cannot be applied, and this is obviously one where the exception obtains. The words 'executor of the estate of Frank Frorer, deceased,' can not in the present case be regarded as mere surplusage. Other circumstances of far more importance conclusively establish the fact that the appellee was sued in his representative capacity alone. This must be true, irrespective of the importance attached to the use of the words themselves in the caption and body of the petition. The right of the appellant to obtain service upon the appellee by publication depended in this case upon whether this was an action 'brought against a nonresident of the state . . . having in this state property . . . sought to be taken by' the provisional remedy of attachment. (Civ. Code § 78.) The appellee owned no real estate or other property in this state, and the court acquired jurisdiction of the proceeding in rem or quasi in rem solely because the action was brought for the purpose of appropriating some part of whatever interest he held therein as executor. The rule recognized in the Quinton case can not avail the appellant. If it were held that the words 'executor,' etc., were mere words of description, to be rejected as surplusage, then the court had no jurisdiction to proceed against Walter Puterbaugh as an individual. The moment the appellant abandoned the purpose to hold him liable as executor and elected to proceed against him individually, that moment the court lost jurisdiction to render any judgment against him").

64. Tyler v. Stitt, 127 Wis. 379, 381, 106 NW 114 ("This is a simple claim against an estate for a debt supposed to be due from the estate. The defendant is defending that claim in his representative character as administrator only. The estate is the real defendant; if there is no debt owing from the estate there can be no recovery. If there be any estoppel or trust which can be invoked against Mr. Stitt, it affects him only as an individual and not as administrator. Being sued as administrator in a pure action at law, he cannot be held as an individual upon an entirely different cause of action in equity. The two causes of action could not be joined. . . . A fortiori one cannot be turned into the other").

65. Cal.—Melone v. Davis, 67 Cal. 279, 7 P 703; Wood v. Long, (A.) 186 P 415.

N. Y.—Ferrin v. Myrick, 41 N. Y. 315; Williams v. Fischlein, 144 App. Div. 244, 129 NYS 129; Compton v. Whitehouse, 48 N. Y. Super. 208.

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Sedam v. Shaffer, 5 Watts & S. 529; Masterson v. Masterson, 5 Rawle 137.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc].

Tex.—Lewis v. Nichols, 38 Tex. 54.

W. Va.—Citizens' Trust, etc., Co. v. Young, 75 W. Va. 241, 83 SE 1007.

Wis.—Tyler v. Stitt, 127 Wis. 379, 106 NW 114.

[a] **In order to bind the estate of a deceased person** by judgment, the representative thereof must be sued in his representative capacity. Lewis v. Nichols, 38 Tex. 54.

[b] **The personal representative of a joint obligor** may be proceeded against under the contract as if those bound with decedent had been bound severally as well as jointly. Citizens' Trust, etc., Co. v. Young, 75 W. Va. 241, 83 SE 1007.

66. Wilkings v. Murphey, 29 F. Cas. No. 17,663, 3 N. C. 282; Vaughn v. Gardner, 7 B. Mon. (Ky.) 326; Gillet v. Hutchinson, 24 Wend. (N. Y.) 184; Howard v. Powers, 6 Oh. 92.

67. U. S.—C. E. Tayntoo Granite Co. v. Goetchius, 171 Fed. 108 [aff 183 Fed. 130, 105 CCA 420].

Ala.—Spotswood v. Bently, 132 Ala. 266, 31 S 445; Daily v. Daily, 66 Ala. 266; Humes v. Farris, 48 Ala. 615; Godbold v. Roberts, 20 Ala. 354; McEldery v. McKenzie, 2 Port. 33, 27 AmD 643; Greening v. Sheffield, Minor 276.

Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Ark.—Tucker v. Grace, 61 Ark. 410, 33 SW 530.

Cal.—Schlicker v. Hemenway, 110 Cal. 579, 42 P 1063, 52 AmSR 116; Melone v. Davis, 67 Cal. 279, 7 P 703; In re Page, 57 Cal. 238; Gurnee v. Maloney, 38 Cal. 85, 99 AmD 352; Dwinelle v. Henriquez, 1 Cal. 387; Renwick v. Garland, 1 Cal. A. 237, 82 P 89.

Ga.—Clarke v. Alexander, 71 Ga. 500.

Ill.—Jahp v. Bradley, 185 Ill. A. 215; Portis v. Sangerman, 159 Ill. A. 508.

Kan.—Milbourne v. Kelley, 93 Kan. 753, 145 P 816, AnnCas1916D 389; Getty v. Larkin, 59 Kan. 548, 53 P 755.

Ky.—Daviess County Bank, etc., Co. v. Wright, 129 Ky. 21, 33, 110 SW 361, 33 KyL 457, 17 LRANS 1122 [quot Cyc]; Moody v. Ewing, 8 B. Mon. 521; Heasley v. Dunn, 5 B. Mon. 145.

Me.—Walker v. Patterson, 36 Me. 273; Davis v. French, 20 Me. 21, 37 AmD 36.

Mass.—Sumner v. Williams, 8 Mass. 162, 5 AmD 83.

N. J.—Sibbit v. Lloyd, 11 N. J. L. 163.

N. Y.—O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238; Parker v. Day, 155 N. Y. 383, 49 NE 1046; Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950; Austin v. Munroe, 47 N. Y. 360 [aff 4 Lans. 67]; Ferrin v. Myrick, 41 N. Y. 315; Bossert v. Striker, 142 App. Div. 5, 126 NYS 726; Brackett v. Osstrander, 126 App. Div. 529, 110 NYS 779; Saperstein v. Ullman, 49 App. Div. 446, 63 NYS 626 [aff 168 N. Y. 636, 61 NE 553]; Ross v. Harden, 44 N. Y. Super. 26; Ross v. Harden, 42 N. Y. Super. 427; Cary v. Gregory, 38 N. Y. Super. 127; Limback v. Wallach, 70 Misc. 237, 126 NYS 666; Elisberg v. Simpson, 173 NYS 128; Decillis v. Mascelli, 152 App. Div. 304, 136 NYS 573; Chambers v. Greenwald, 94 NYS 504; Reynolds v. Reynolds, 3 Wend. 244; Demott v. Field, 7 Cow. 58; Myer v. Cole, 12 Johns. 349.

N. C.—Beaty v. Gingles, 53 N. C. 302.

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156; Connell v. Brumback, 18 Oh. Cir. Ct. 502, 10 Oh. Cir. Dec. 149.

Pa.—Seip v. Drach, 14 Pa. 352; Beeson v. McNabb, 2 Pa. 422; Fritz v. Thomas, 1 Whart. 66, 29 AmD 39; Masterson v. Masterson, 5 Rawle 137; Grier v. Huston, 8 Serg. & R. 402, 11 AmD 627; Geyer v. Smith, 1 Dall. 347, 1 L. ed. 169.

tract as executor or administrator does not affect the rule,[68] and although he is named in the declaration or complaint as personal representative, this will be considered merely descriptio personæ, which will be treated as surplusage or as intended to show the nature and origin of his liability. It cannot affect the form of the judgment.[69] Accordingly a personal representative must be sued in his individual capacity on notes [70] or bonds [71] executed by him, on bills of exchange drawn [72] or drafts accepted [73] by him, or on contracts made by him for payment for services of an attorney.[74] He must be sued in his individual capacity for work and labor performed at his request in his representative capacity,[75] and he is liable individually for goods furnished at his request.[76] A personal representative cannot be sued as such, either for money had and received by him,[77] money lent to him,[78] or on an account stated of money due from him as executor or administrator.[79]

Exceptions to the rule have been recognized in case of insolvency of the representative [80] or his removal beyond the jurisdiction of the state.[81]

Funeral and burial expenses. According to some

S. C.—Pearce v. Smith, 5 S. C. L. 360, 4 AmD 588.

Tenn.—Bedford v. Ingram, 5 Hayw. 155.

Eng.—Brigden v. Parkes, 2 B. & P. 424, 126 Reprint 1363; Wheeler v. Collier, Cro. Eliz. 406, 78 Reprint 650; Rose v. Bowler, 1 H. Bl. 108, 126 Reprint 89; Jennings v. Newman, 4 T. R. 347, 100 Reprint 1056; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324.

"Persons who have contracted with the executor are not authorized to pursue the course to enforce their contracts that is given by statute to parties who contract with the decedent. If the executor refuses to acknowledge and discharge his obligation, he may be sued personally on his contract, and, if compelled to disgorge, he may include the amount in his account current." Garver v. Thoman, 15 Ariz. 38, 44, 135 P 724.

"The contract sued upon was a personal contract on the part of the defendant, and an action will not lie against her as executrix." Chambers v. Greenwald, 94 NYS 504.

[a] **Reason for rule.**—He has the title to the personal estate. He has no principal behind him for whom he can contract as agent. This is the policy of the law. The estate in the personalty is given, by the law, directly to the administrator. For the purpose of use and sale the title vests in him and he is held responsible as owner. As owner, he must account to the persons ultimately entitled to distribution and as owner he sells, disposes, and contracts as his judgment dictates. These considerations fix the liability for the debt in question upon the administrators personally, and not upon the estate. Ferrin v. Myrick, 41 N. Y. 315.

68. Ala.—Christian v. Morris, 50 Ala. 585.

Cal.—Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127.

Ill.—Jahp v. Bradley, 185 Ill. A. 215.

Ky.—Woodsmall v. Keas, 7 Ky. Op. 275.

La.—Winthrop v. Jarvis, 8 La. Ann. 434.

Me.—Walker v. Patterson, 36 Me. 273.

N. Y.—Elisberg v. Simpson, 173 NYS 128.

Tenn.—Patterson v. Craig, 1 Baxt. 291.

[a] **Illustration.**—An action on an order for the delivery of materials for buildings belonging to an estate, signed by the executor, with the name of the estate, followed by his own name and the word "executor," was properly brought against the executor personally. Bossert v. Striker, 142 App. Div. 5, 126 NYS 726.

69. Cal.—Melone v. Davis, 67 Cal. 279, 7 P 703.

Ill.—Portis v. Sangerman, 159 Ill. A. 508.

N. Y.—Limback v. Wallach, 70 Misc. 237, 126 NYS 666.

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Smith v. Teacle, 8 Pa. Co. 150.

70. Ala.—Christian v. Morris, 50 Ala. 585.

N. Y.—Elisberg v. Simpson, 173 NYS 128, 897.

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Orne v. Ritchie, 12 Phila. 231.

Eng.—Childs v. Monins, 2 B. & B. 460, 6 ECL 228, 129 Reprint 1044.

71. Patterson v. Craig, 1 Baxt. (Tenn.) 291; Barry v. Rush, 1 T. R. 691, 99 Reprint 1324, 9 ERC 328.

72. Kirkman v. Benham, 28 Ala. 501.

73. Wisdom v. Becker, 52 Ill. 342.

74. Ark.—Parker v. Mayo, 72 Ark. 513, 83 SW 324; Pike v. Thomas, 62 Ark. 223, 35 SW 212, 54 AmSR 292; Tucker v. Grace, 61 Ark. 410, 33 SW 530.

Cal.—Sullivan v. Lusk, 7 Cal. A. 186, 94 P 91, 92.

N. Y.—Austin v. Munro, 47 N. Y. 360; Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779; Genet v. De Graaf, 27 App. Div. 238, 50 NYS 442.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953.

Oh.—Hurd v. Wheeling, etc., R. Co., 6 OhS&CP 545, 4 OhNP 404.

Philippine. — Escueta v. Sy-Juilliong, 5 Philippine 405.

[a] **Release of personal claim against representative.** — Where an attorney for executors, after executing a release to them reciting that he would make no further personal claim against them for his services, but that any further claim should be made against the estate, brought an ordinary common-law action against the executors to recover a money judgment for his services, such action was unsustainable on the theory that its object was merely to liquidate plaintiff's claim in order finally to reach the estate, such not being the purport of the complaint, and for the further reason that any judgment in favor of plaintiff rendered therein would not furnish a criterion as to the executors' right to reimbursement from the estate or through the extent of such right. Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779.

[b] **When representative refuses payment.**—Code (1906) § 2131, providing that in annual and final settlements the administrator shall be entitled to credit for reasonable sums paid for services of an attorney in the management of the estate, gives a method by which an administrator may, with the approval of the chancery court, employ and pay an attorney for service rendered without a suit to establish the claim; but it has no reference to a claim which an attorney seeks to enforce over the administrator's protest, and to enforce such a claim resort must be had to an action at law or in equity. Murphy v. Harris, 93 Miss. 286, 48 S 232.

[c] **A contrary view.**—Williams v. Walker, 31 Ga. 195 (where one of two executors named in a will qualified and employed the services of an attorney in behalf of the estate, and he died, and the other executor subsequently qualified, the attorney should recover his fees in an action at law against the second executor in his representative capacity); Jackson v. Leech, 113 Mich. 391, 71 NW 846 (under a statute providing that an executor shall be allowed all the necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides together with all extra expenses, an executor may bind the estate for the payment of a reasonable compensation for the services of an attorney).

Personal liability of representative for counsel fees generally see supra § 531.

75. Renwick v. Garland, 1 Cal. A. 237, 82 P 89; Austin v. Munroe, 47 N. Y. 360 [aff 4 Lans. 67]; Myer v. Cole, 12 Johns. (N. Y.) 349.

76. Daily v. Daily, 66 Ala. 266; Jahp v. Bradley, 185 Ill. A. 215.

77. Del. — Wilson v. Harvey, 3 Del. 500.

Ky.—Moody v. Ewing, 8 B. Mon. 521; Montgomery v. Armstrong, 5 J. J. Marsh. 175.

Mass.—Cronan v. Cotting, 99 Mass. 334; Farrelly v. Ladd, 10 Allen 127.

N. Y.—Scholey v. Halsey, 72 N. Y. 578. But compare Scheibeler v. Albee, 114 App. Div. 146, 99 NYS 706 (set forth and quoted supra § 1820 note 59 [a]).

N. C.—Hailey v. Wheeler, 49 N. C. 159.

Pa.—Grier v. Huston, 8 Serg. & R. 402, 11 AmD 627.

Eng.—Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789; Rose v. Bowler, 1 H. Bl. 108, 126 Reprint 65.

[a] **A person who has paid money on an erroneous judgment** may, after it is reversed, bring an action to recover it back against the parties who received it, personally, although they received the money as executors. Scholey v. Halsey, 72 N. Y. 578.

[b] **Where money is paid an administrator by mistake,** and he gives a receipt in his representative character, the action to recover it back must be brought against him personally. Grier v. Huston, 8 Serg. & R. (Pa.) 402, 11 AmD 627.

[c] **Where an administrator knowingly receives and enacts usury** (1) on debts due his intestate, he is personally liable to refund in an action of assumpsit, although he may have settled his accounts and accounted for it to those entitled to the estate. Heasley v. Dunn, 5 B. Mon. (Ky.) 145. (2) But in order to charge him personally it must be shown that he accepted the money with knowledge of the usury. Ossiper v. Gafney, 56 N. H. 352.

78. Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789; Rose v. Bowler, 1 H. Bl. 108, 126 Reprint 65.

79. Rose v. Bowler, 1 H. Bl. 108, 126 Reprint 65.

80. Miller v. Herzog, 148 NYS 945; In re Murray, 56 Or. 132, 107 P 19.

81. In re Murray, 56 Or. 132, 107 P 19.

decisions, notwithstanding it is his duty to pay such expenses from the estate, an administrator or executor should be sued in his individual capacity on contracts made by him for funeral or burial expenses of decedent,[82] although there are decisions which seem to maintain the contrary view.[83]

Where it does not appear when the cause of action arose, whether before or after decedent's death, an action thereon may be brought against the executors both individually and as executors.[84]

[§ 1824] **(c) Promise in Consideration of Assets.** Where a personal representative promises that in consideration of having assets he will pay a claim against decedent, he may be sued in his individual capacity and a judgment rendered de boni propriis,[85] or he may be sued in his representative capacity and a judgment rendered de bonis testatoris.[86] Nevertheless, although he is sued in his personal capacity, he is not bound to pay the debts of decedent beyond the assets which he received, nor will his written promise to do so make him liable unless founded on other sufficient consideration.[87]

[§ 1825] **(d) Testamentary Authority to Make Contracts.** Where an executor is empowered by will to make contracts in respect to the management and control of the estate, he may be sued in his representative capacity thereon;[88] and it has been held that, where a will authorizes a sale of the real estate of the testator, the executor may be sued in his representative capacity for specific performance of a contract of such sale.[89]

[§ 1826] **c. Actions Based on Tort—(1) In General.** For torts committed by a personal representative while acting in his representative capacity he must in general be sued in his individual, and not in his representative, capacity.[90] Indeed it has been laid down generally that no action can be

82. Ferrin v. Myrick, 41 N. Y. 315 [rev 53 Barb. 76]; Murphy v. Naughton, 68 Hun 424, 23 NYS 52; Demott v. Field, 7 Cow. (N. Y.) 58; Myer v. Cole, 12 Johns. (N. Y.) 349; Smith v. Teacle, 8 Pa. Co. 150.

83. Cal.—Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742.

Mass.—Hapgood v. Houghton, 10 Pick. 154.

N. J.—Campfield v. Ely, 13 N. J. L. 150.

N. Y.—Patterson v. Buchanan, 40 App. Div. 493, 58 NYS 179, 29 NYCiv Proc 238; Riley v. Waller, 22 Misc. 63, 48 NYS 535.

Or.—In re Murray, 56 Or. 132, 107 P 19.

Tenn.—Wiles v. Wynne, 139 Tenn. 397, 201 SW 515.

Eng.—Lucy v. Walrond, 3 Bing. N. Cas. 841, 32 ECL 386, 132 Reprint 634; Rogers v. Price, 3 Y. & J. 28, 148 Reprint 1080.

"The appellant argues that claims for funeral expenses stand upon the same ground as claims for attorney's fees, brokers' commissions, or other demands arising under contracts made by the executor or administrator, and that, accordingly, a demand for such funeral expenses cannot form the basis of any action except one against the executor or administrator personally. We think this position cannot be upheld. Claims for funeral expenses are not necessarily founded upon contracts made by the personal representative. It is seemly and proper, indeed necessary, that decent burial should be given to the body of a deceased person within a very short period after death. Ordinarily, arrangements for such burial must be made, and expense incurred, before the appointment of an executor or administrator. An undertaker is justified in furnishing the necessary service upon the request of any one so related to the decedent as to exclude the idea of officious interference. The one ordering the burial may or may not be the same person who subsequently becomes executor or administrator. If, as in this case, the person alleged to have ordered the funeral does become executor or administrator, the liability, if any, of the estate is not affected one way or the other by such circumstance. The person contracting for the service may be individually liable therefor, but this liability depends upon his individual agreement, and not upon his subsequent representative character. The claim for funeral services is not, to be sure, a claim on a contract or debt of the decedent, existing before his death. Neither, as we have pointed out, is it a claim on a contract made after death by the personal representative as such. It is a demand of a peculiar nature, arising immediately upon death, but prior to the commencement of administration. It is properly chargeable, in some form of procedure, against the assets of the estate." Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 98, 141 P 922, 52 LRANS 1152, AnnCas1915D 742.

[a] **Under special statutory provisions.**—Under a statute placing funeral expenses among debts to be first paid out of the estate and providing that an action for them may be brought against an executor, even within the six months which is generally allowed him to examine into the condition of the estate, an action will lie for such expenses against the executor in his representative capacity. Campfield v. Ely, 13 N. J. L. 150.

84. Noble v. Haff, 155 NYS 560.

85. Ind.—Carter v. Thomas, 3 Ind. 213.

N. Y.—Sullivan v. Rosson, 148 NYS 611.

N. C.—Sleighter v. Harrington, 4 N. C. 679, 7 AmD 715.

Pa.—Malin v. Bull, 13 Serg. & R. 441.

Va.—Kayser v. Disher, 9 Leigh (36 Va.) 357.

Eng.—Hawkes v. Saunders, Cowp. 289, 98 Reprint 1091; Atkins v. Hill, Cowp. 284, 98 Reprint 1088; Trewinian v. Howell, Cro. Eliz. 91, 78 Reprint 349.

[a] **Promise to pay legacy.**—An action may be brought against a personal representative individually on his promise and consideration of assets to pay a legacy. Clark v. Herring, 5 Binn. (Pa.) 33; Kayser v. Disher, 9 Leigh (36 Va.) 357; Hawkes v. Saunders, 1 Cowp. 289.

86. Dixon v. Ramsay, 7 F. Cas. No. 3,932, 1 Cranch C. C. 472; Faxon v. Dyson, 8 F. Cas. No. 4,705, 1 Cranch C. C. 441; Pole v. Simmons, 49 Md. 14; Forbes v. Perrie, 1 Harr. & J. (Md.) 109; Foulk v. Brown, 2 Watts (Pa.) 209; Hawkes v. Saunders, Cowp. 289, 98 Reprint 1091.

[a] **An action on a promise to pay a legacy** in consideration of assets may be brought against the executor in his representative capacity. Foulk v. Brown, 2 Watts (Pa.) 209; Hawkes v. Saunders, Cowp. 289, 98 Reprint 1091. Contra Kayser v. Disher, 9 Leigh (36 Va.) 357.

[b] **Where a promise is merely implied,** the action must be brought against the personal representative in his capacity as such. Courtney v. Hunter, 6 F. Cas. No. 3,285, 1 Cranch C. C. 265.

87. Byrd v. Holloway, 14 Miss. 199.

88. Wade v. Pope, 44 Ala. 690; Ingham v. Ryan, 18 Colo. A. 347, 71 P 899; Lund v. Riggs, 174 Iowa 79, 156 NW 161 [cit Cyc].

[a] **This rule has been applied:** (1) Where the will gave a trustee and executor authority to contract debts for expenses incidental to the management of the estate. Wade v. Pope, 44 Ala. 690. (2) Where a will gave an executor power to sell land and he entered into a contract authorizing an agent to sell a portion thereof, promising him a commission therefor. Ingham v. Ryan, 18 Colo. A. 347, 71 P 899.

[b] **Estate liable in equity but not at law.**—Elisberg v. Simpson, 173 NYS 128. See also O'Brien v. Jackson, 167 N. Y. 31, 60 NE 238 [rev 42 App. Div. 171, 58 NYS 1044] (notwithstanding such testamentary powers, an action would not lie against the executor in his representative capacity, although if the complaint stated a good cause of action in equity, the judgment might be suffered to stand for whatever it was worth in any subsequent proceeding taken to reach the trust estate).

89. Bostwick v. Beach, 103 N. Y. 414, 9 NE 41.

90. U. S.—Boston Beef Packing Co. v. Stevens, 12 Fed. 279, 20 Blatchf. 443.

Ala.—Burdine v. Roper, 7 Ala. 466.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117.

Conn.—Andrews v. Platt, 77 Conn. 63, 58 A 458.

Ill.—Monblatt v. Young, 199 Ill. A. 312.

Mich.—Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371.

N. Y.—Warren v. Banning, 21 NYS 883 [aff as to this point but mod on other grounds 140 N. Y. 227, 35 NE 428].

Oh.—Deschler v. Franklin, 20 Oh. Cir. Ct. 56, 11 Oh. Cir. Dec. 188.

Pa.—Wengert v. Beashore, 1 Penr. & W. 232; Gordon v. Robinson, 1 Browne 325.

Tex.—Hawkins v. Forrest, 1 Tex. Unrep. Cas. 167.

Wis.—Williams v. Davis, 18 Wis. 115.

[a] **The rule has been applied** to actions for: (1) Trespass on land. Gordon v. Robinson, 1 Browne (Pa.) 325. (2) Malicious prosecution. Wengert v. Beashore, 1 Penr. & W. (Pa.) 232. (3) Personal injuries to a servant. Decillis v. Mascelli, 152 App. Div. 304, 136 NYS 573. (4) Injuries caused by neglect to repair a street. Eustace v. Jahns, 38 Cal. 3. (5) Failure to keep in repair a building leased by defendant, as executor. Boston Beef Packing Co. v. Stevens, 12 Fed. 279, 20 Blatchf. 443. (6) Neglect in the management of a building. Deschler v. Franklin, 20 Oh. Cir. Ct. 56, 11 Oh. Cir. Dec. 188. (7) Injuries resulting to a purchaser of land of the estate from concealment and misrepresentations. Warren v. Banning, 21 NYS 883 [aff

maintained against a personal representative as such for malfeasance or misfeasance or for a tort;[91] but where a libel contained in a will was published by the probate thereof, it was held that the estate of the testator, and not the executor individually, was liable.[92]

[§ 1827] **(2) Conversion or Detention of Property.** If a personal representative takes property not belonging to the estate, he has no right to it in his representative capacity. Consequently, as a general rule, his refusal to restore it to the rightful owner renders him individually liable, and he cannot be sued in his representative capacity for his individual tort.[93] There is, however, authority for the view that a representative who, acting on behalf of the estate and claiming in his representative capacity, secured possession of and refuses to surrender property which in reality does not belong to the estate, may be held liable for the wrong in his representative, as well as in his individual, capacity.[94] It has also been held that, where one to whom property was given by a decedent surrendered it to the personal representative on demand, without disclaiming or making a gift or sale to the personal representative, the donee might waive the tort and bring suit in assumpsit for the value of the property against the representative in his individual or representative capacity.[95] Where the property of a third person has passed from the possession of decedent into the possession of his personal representative, the latter is liable in his individual capacity for the detention thereof,[96] but it is generally considered that under such circumstances he may also be held liable in his representative capacity,[97] although this has been de-

as to this point but mod on other grounds 140 N. Y. 227, 35 NE 428]. (8) Neglect or refusal to pay over as ordered by a decree of distribution a distributive share of the estate. Melone v. Davis, 67 Cal. 279, 7 P 703; Morrow v. Brenizer, 2 Rawle (Pa.) 185; Williams v. Davis, 18 Wis. 115.

[b] **Infringement of patent.** — A suit cannot be maintained against the executors for infringement of a patent in the construction of a mausoleum in which the body of their decedent was placed, where it was contracted and paid for by them and others individually, and not as executors. C. E. Tayntor Granite Co. v. Goetchius, 171 Fed. 108, 111 [aff 183 Fed. 120, 105 CCA 420] ("I am of opinion that the proofs show that the executors of Goetchius did not build this mausoleum. They do not own it, nor does the estate of Mr. Goetchius own it. Neither the defendants, nor any of them, made any contract or did any act in respect of the mausoleum in question in his capacity as executor. This would be true, even if the edifice had been reared on private land; but it is alleged and proven to have been erected in a cemetery in the state of New York, and by the laws of this state a lot in such cemetery, when once used for purposes of interment, ceases to be property in the ordinary sense of the word. It can only be used for the further interment of persons of the kin of the original purchaser, in accordance with the rules of the cemetery and the provision of the deed of conveyance. Without the consent of the cemetery authorities, nothing can be erected thereon or removed therefrom. Since, therefore, the defendants did not put up this building, do not own it, cannot remove it, and have very obviously made no profit therefrom, and never will make any profit therefrom, I do not think that a bill in equity will lie").

[c] **Extent of liability.**—An executrix in a suit to recover a legacy is only liable to the extent of the property which came into her hands and which had been appropriated wrongfully to her own use. Hawkins v. Forrest, 1 Tex. Unrep. Cas. 167.

91. Eggers v. Krueger, 236 Fed. 852, 150 CCA 114; Eustace v. Jahns, 38 Cal. 3; Decillis v. Mascelli, 152 App. Div. 304, 136 NYS 573.

92. Harris v. Nashville Trust Co., 128 Tenn. 573, 578, 585, 162 SW 584, 49 LRANS 897, AnnCas1914C 885 ("It is well settled that a principal is responsible where authority is given to an agent to publish libelous words and a publication is made by the agent in substantial accord with his authority. . . . The publication of this libel was made by the agent the executor, in literal pursuance of the authority given; that is to say, it was made by the probate of testator's will. It was of course the duty of the executor to probate this will, and for a suppression thereof criminal accountability would have followed. Smith v. Harrison, 2 Heisk (Tenn.) 230; Douglass v. Baber, 15 Lea 651. It is not a case, therefore, in which the agent, the executor, should be held to any liability, but if liability exists, the principal should be responsible. . . . By the grace of the law a man is allowed to control the disposition of property after his death and to do many other things by will. He is thus allowed to project his individuality, his grasp, and his desires, beyond the grave, and make them effective. If by will he breaches his contract, this executor and his estate are made to respond. If by will he commits a tort there seems to be no good reason why his executor and his estate should not likewise be held accountable. With the maxim, 'Actio personalis moritur cum persona,' out of the way, there is no good reason, and we have seen that this maxim does not touch this case").

93. U. S.—Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478 [aff 7 N. M. 666, 41 P 529]; De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457.

Ala.—Hunnicutt v. Higginbotham, 138 Ala. 472, 35 S 469, 100 AmSR 45; Daily v. Daily, 66 Ala. 266; Prater v. Stinson, 26 Ala. 456; Sims v. Canfield, 2 Ala. 555.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117.

Ill.—Havill v. Newton, 202 Ill. A. 15, 16 [quot Cyc]; Whitaker v. Shuman, 161 Ill. A. 568.

Ind.—Davis v. Schmidt, (A.) 31 NE 840.

Md.—Smith v. Wood, 31 Md. 293.

N. Y.—Van Slooten v. Dodge, 145 N. Y. 327, 39 NE 950 [rev 76 Hun 55, 27 NYS 666]; Hildreth v. Raffin, 141 App. Div. 77, 125 NYS 695; Anderson v. Thomson, 38 Hun 394; Matter of Van de Walker, 79 Misc. 661, 141 NYS 325.

Tenn.—Cocke v. Trotter, 10 Yerg. 213.

Va.—Royall v. Eppes, 2 Munf. (16 Va.) 479.

94. Grimes v. Barndollar, 58 Colo. 421, 148 P 256; Silsby v. Wickersham, 171 Mo. A. 128, 155 SW 1094; Hill v. Escort, 38 Tex. Civ. A. 487, 490, 86 SW 367.

"Where an administrator obtains and converts property belonging to another under the belief that it belongs to the estate of his intestate he is liable in his representative as well as in his individual capacity to the owner for the value of the property." Hill v. Escort, supra (where the administrator had obtained and converted bank deposit given by his intestate to plaintiff).

95. Michener v. Dale, 23 Pa. 59.

96. Ala. — Brewer v. Strong, 10 Ala. 961, 44 AmD 514.

Del.—Walter v. Miller, 1 Del. 7.

Ga.—Yeldell v. Shinholster, 15 Ga. 189.

Ill.—Havill v. Newton, 202 Ill. A. 15, 16 [quot Cyc].

La.—Warren v. Saltenberer, 6 La. Ann. 351. But compare Scott v. Key, 9 La. Ann. 213 (an action to recover property from an administrator on the ground that his intestate never had title thereto should be against the administrator in his official capacity and against the heirs of the intestate).

N. J.—Veader v. Veader, 89 N. J. L. 727, 99 A 309.

Pa.—Pryor v. Morgan, 170 Pa. 568, 33 A 98.

S. C.—Elmore v. Elmore, 58 S. C. 289, 36 SE 656, 51 LRA 261.

Tenn.—Norment v. Smith, 1 Humphr. 46.

Tex.—Clapp v. Walters, 2 Tex. 130.

Va.—Catlett v. Russell, 6 Leigh (33 Va.) 344; Newsum v. Newsum, 1 Leigh (28 Va.) 86, 19 AmD 739.

[a] **Distinction based on the good or bad faith of the representative.**—An executor or administrator is personally responsible for property he detains from a claimant as an asset of the estate, with knowledge that it did not belong to decedent, but to claimant; but where an executor or administrator inventoried in good faith as assets of the estate personal property in possession by decedent at the time of his death, and then refused to turn it over to a claimant, believing in good faith that the property was an asset of decedent's estate, replevin would lie against him in his representative capacity, and not against him in his individual capacity. White v. McFarland, 148 Mo. A. 338, 128 SW 23.

97. U. S.—De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457; Newcomb v. Burbank, 146 Fed. 400.

Ala.—Brewer v. Strong, 10 Ala. 961, 44 AmD 514.

Colo.—Grimes v. Barndollar, 58 Colo. 421, 148 P 256.

Ky.—Gentry v. McKehen, 5 Dana 34.

Mo.—Silsby v. Wickersham, 171 Mo. A. 128, 155 SW 1094.

N. J.—Boyle v. Knauss, 81 N. J. L. 330, 79 A 1025.

N. Y.—Moran v. Morrill, 78 App. Div. 440, 80 NYS 120 [aff 177 N. Y. 563, 69 NE 1127].

Pa.—Schott v. Sage, 4 Phila. 87.

Tex.—Clapp v. Walters, 2 Tex. 130; Schmitt v. Jacques, 26 Tex. Civ. A. 125, 62 SW 956.

Va.—Catlett v. Russell, 6 Leigh (33 Va.) 344.

Wash.—Collins v. Denny Clay Co., 41 Wash. 136, 145, 82 P 1012.

"When goods are unlawfully detained by an administrator, who has

nied.[98] Where a widow took charge of all her deceased husband's property, and continued to use and dispose of it as she pleased during her lifetime, her administrator could not be sued by her husband's administrator as for a conversion of such property in the absence of an identification of any of such property as coming into the hands of her administrator, but the remedy of the husband's administrator was by a proceeding in the probate court for the allowance of a demand against the widow's estate.[99] Under a statute providing that trespass or case may be maintained against a personal representative for the carrying away of goods by decedent, trover may be sustained against the personal representative as such, although the good never came into his hands.[1]

[§ 1828] **d. Action for Accounting of Income from Property Held in Trust by Decedent.** Where real estate came into the hands of an executor which was not properly assets, but which was held by his testatrix as a constructive trustee for the executor as an individual and others, and the executor received all the rents and profits after the death of his testatrix, he is liable to a personal judgment in a suit for accounting for the rents and profits.[2]

[§ 1829] **e. Ejectment.** Where an executor takes possession of real property held by his testator, which he is authorized by statute to do, ejectment may be brought against him in his representative capacity.[3] Where an administrator who is also the sole heir is in possession of lands of the decedent, ejectment is properly brought against him individually rather than as administrator.[4]

[§ 1830] **C. Form of Action.** Where a personal representative brings suit or is sued, the form of action is ordinarily the same as that by or against a person suing or sued in his own right. For injury to or conversion of property after decedent's death, the personal representative may maintain trover, replevin, detinue, or trespass;[5] and, when entitled to the possession of real property belonging to the estate, he may maintain such actions as unlawful retainer, ejectment, trespass to try title, or writ of entry.[6] In actions against personal representatives on simple contracts entered into by decedent debt will lie,[7] and this action also lies on an obligation of decedent that his executor shall pay after his death.[8] It cannot, however, be maintained by an administrator de bonis non, upon an unsatisfied judgment recovered by the original administrator as the remedy is by scire facias.[9] If rents are by statute made liable for claims against the estate, assumpsit and not an action on the administration bond is the proper remedy of a creditor.[10] A statutory action to recover a claim against the estate, if it is a demand for money, is an action at law, and the rejection of the claim does not change its character.[11] Where an action may be maintained in a court of law for a legacy, assumpsit,[12] debt,[13] or case [14] will lie. Assumpsit also lies against an executor by one entitled under the will to the rents and profits, where they are withheld by the executor.[15] For torts committed by decedent, any form of action which might have been maintained against him will be proper in actions against his representative based thereon, provided the action is one which survives.[16] Case is the proper remedy by decedent's widow for the refusal of the administrator to set apart for her the property to which she is entitled,[17] although if he has converted the property into money she may sue in assumpsit for money had and received.[18] Where the bailee of a special deposit of money dies without returning it, and the money cannot be identified, an action in the nature of conversion is the only

come into possession of them from his intestate, in due course of administration, and claims title to them in the right of his intestate, a person seeking by replevin to recover them has his choice of action against the detainer personally, or of suing him in his representative capacity." Boyle v. Knauss, 81 N. J. L. 330, 335, 79 A 1025.

"This stock stood in the name of the decedent at the time of his death, and came into the hands of his executor as a part of his estate. Under such circumstances the more equitable rule is that if the executor or administrator applies to the use of the estate money or the proceeds of property belonging to a third person, he is liable in both his individual and representative capacity, and the injured party may elect whether he will hold him in the one capacity or the other. Respondents elected to pursue the executor in his representative capacity, as they had a right to do; but having followed that course, they can only take such judgment as the law authorizes in such cases." Collins v. Denny Clay Co., supra.

[a] **Under a statute declaring that the action of trover shall survive** for or against an executor or administrator, the representatives are subjected to that form of action in their representative capacity where a conversion had taken place in the lifetime of decedent. Nations v. Hawkins, 11 Ala. 859.

[b] **Suit for possession or value of goods.**—Where a testator has attempted to dispose of by will property which he held only as bailee, and his executor, as such, has taken possession of the property, and refused, on proper demand, to deliver it to the owner, the owner may maintain an action against the executor in his representative capacity for the possession of the goods or their value. Moran v. Morrill, 78 App. Div. 440, 80 NYS 120 [aff 177 N. Y. 563 mem, 69 NE 1127 mem].

[c] **Where the representative has sold,** as property of the estate, property belonging to a third person, an action for the value of such property is properly brought against him in his representative capacity. Schmitt v. Jacques, 26 Tex. Civ. A. 125, 62 SW 956.

98. Havill v. Newton, 202 Ill. A. 15; Elmore v. Elmore, 58 S. C. 289, 36 SE 656, 51 LRA 261; Jones v. Littlefield, 3 Yerg. (Tenn.) 133; Norment v. Smith, 1 Humphr. (Tenn.) 46.

[a] **Property not becoming assets.**—Where the remainder of the estate of a widow's husband at her death vested absolutely in trustees of his estate, it did not become assets in the hands of her executors, and an action was properly brought against them individually and not in their representative capacity to recover the same. Luscomb v. Fintzelberg, 162 Cal. 433, 123 P 247.

[b] **Property loaned to decedent.**—The act of a surviving husband in assuming dominion over articles loaned to his deceased wife and in refusing to restore them to the lender creates a cause of action against him individually, and not in his capacity as administrator of the deceased wife. Hildreth v. Raffin, 141 App. Div. 77, 125 NYS 695.

99. White v. Blankenbeckler, 115 Mo. A. 722, 92 SW 503.

1. Ferrill v. Brewis, 25 Gratt. (66 Va.) 765.

2. Anderson v. Northrop, 44 Fla. 472, 33 S 419.

3. Pabst Brewing Co. v. Small, 83 Minn. 445, 86 NW 450.

4. Eggers v. Krueger, 236 Fed. 852, 150 CCA 114.

5. See supra § 1817.

6. See supra § 1816.

7. Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Tupper v. Tupper, 3 Oh. 387; McEwen v. Joy, 41 S. C. L. 33; Thompson v. French, 10 Yerg. (Tenn.) 452.

8. Harrison v. Vreeland, 38 N. J. L. 366.

9. Paine v. McIntyre, 32 Me. 131.

10. Davis v. Rawlins, 3 Del. 346.

11. Idaho Trust Co. v. Miller, 16 Ida. 308, 102 P 360.

12. Conn.—Colt v. Colt, 32 Conn. 422; Knapp v. Hanford, 6 Conn. 170.

Mass.—Miles v. Boyden, 3 Pick. 213.

N. H.—Tappan v. Tappan, 30 N. H. 50.

Pa.—Clark v. Herring, 5 Binn. 33.

Newfoundl.—Pike v. Renouf, 6 Newfoundl. 369.

13. Peddigrew v. Peddigrew, 1 Stew. (Ala.) 580; Knapp v. Hanford, 6 Conn. 170; Dubois v. Dubois, 6 Cow. (N. Y.) 494.

14. Farwell v. Jacobs, 4 Mass. 634.

15. Guthrie v. Wheeler, 51 Conn. 207.

16. Brummett v. Golden, 9 Gill (Md.) 95.

17. Neely v. McCormick, 25 Pa. 255 (she has neither such a general nor such a special property in the articles as will enable her to maintain trespass against the administrator).

18. Neely v. McCormick, 25 Pa. 255.

remedy available against the executrix on her refusal to recognize the claim.[19] Statutes providing that, for the purposes of suit, joint contracts shall be deemed joint and several, and that the executors of a joint obligor shall be bound to the same extent as if the obligation were joint and several, do not take from the executors of a joint obligor a defense which existed at common law, but merely enable them to be sued at law, where otherwise they could be proceeded against only in equity, and are therefore applicable to an action brought against such executors, although enacted subsequent to the obligation sued upon.[20]

[§ 1831] **D. Conditions Precedent—1. Actions by Representative—a. In General.** An executor or administrator should obtain the authority of the court of probate to institute and conduct litigation in order to protect himself and preclude the questioning of his expenditures.[21] But the facts that an action by an administrator to foreclose a mortgage was begun without an order from the probate court, that the money due was not necessary for the payment of debts, and that one heir desired the mortgage to be set off to him, do not in any way affect the capacity of plaintiff to sue.[22] Where a sheriff was by statute made ex officio administrator, the fact that he did not personally authorize a suit brought in his name did not render the decree therein void for want of jurisdiction.[23]

[§ 1832] **b. On Securities Deposited with Depositary.** Where the statute provides that the surrogate may direct securities for the payment of money belonging to an estate to be deposited with a trust company, after which the administrator's bond may be fixed without regard to such securities, and that a security thus deposited shall not be withdrawn from the custody of the trust company, and no person other than the proper officer of the trust company shall receive or collect any of the principal or interest secured thereby, without an order of the surrogate, an action by the administrator on a note thus deposited with a trust company, and issuance of execution by him on the judgment therein recovered, all without order of the surrogate, are without right, and do not furnish a valid judgment and return of execution unsatisfied, necessary for a judgment creditors' action by the administrator.[24]

[§ 1833] **c. To Set Aside Fraudulent Conveyance.**[25] It is sometimes required by statute that the personal representative shall obtain leave of the court before suing to set aside an alleged fraudulent conveyance made by decedent in his lifetime.[26] Under a statute authorizing an executor or administrator to sue to recover property fraudulently conveyed by the decedent where there is a deficiency of assets, such a deficiency arising through the allowance of claims which will become a charge on the estate, authorizes the representative to institute proceedings to set aside such a conveyance without an order of the probate court or an application by creditors.[27] Where a statute, providing for the recovery by the personal representative of property fraudulently disposed of by a testator, requires that claims of creditors must be evidenced by a judgment, or must have been allowed by the representative, an approval of the claim by the judge will take the place of an allowance by the representative.[28]

[§ 1834] **d. For Injury to or Conversion of Personalty.** To entitle a personal representative to maintain an action for injury to or conversion of personal property whether in his individual or representative capacity, it is not necessary that he should have had actual possession thereof at the time the cause of action arose,[29] but such action may be maintained, although the injury or conversion occurred between the time of decedent's death and the granting of letters of administration.[30] The action is based on the representative's right of property, which draws after it the right to possession,[31] and the legal effect of granting letters is to vest in the representative the legal title to the personal property, which relates back to the time of the death of decedent.[32] An administrator may sue in his own right for the conversion of goods acquired after the death of the intestate.[33]

[§ 1835] **2. Actions against Representative—a. For Debts of Decedent—(1) Leave of Court to Sue.** Where the statute makes leave of the probate court to sue the personal representative a condition precedent, an action against him cannot be maintained without procuring such permission.[34] It is not essential to the validity of the order granting permission that it should be made on petition and notice to the personal representative.[35] The application is addressed to the sound discretion of the court and will not be granted when it would be inequitable to do so.[36]

[§ 1836] **(2) Presentation of Claim**[37]**—(a) Necessity for Presentation—aa. In General.** Apart from any statutory requirements on the subject the presentation of a claim to the personal representative or the probate court is not a condition pre-

19. Stevens v. Stevens, 132 Mo. A. 624, 112 SW 35.

20. White v. Connecticut Gen. L. Ins. Co., 34 App. (D. C.) 460.

21. Crowe v. Morrison, 147 Ill. A. 107.

22. Ekblad v. Hanson, 85 Kan. 541, 117 P 1028.

23. Seffey v. Davis Colliery Co., 219 Fed. 465, 135 CCA 177 [aff 204 Fed. 337].

24. Ditmas v. McKane, 92 App. Div. 344, 86 NYS 1083.

25. Right of representative to sue see supra § 368.

26. Butts v. Purdy, 63 Or. 150, 125 P 313, 127 P 25.

27. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879.

28. Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

29. Kent v. Bothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258; Adams v. Cheverel, Cro. Jac. 113, 79 Reprint 97; Hollis v. Smith, 10 East 293, 103 Reprint 786; Grimstead v. Shirley, 2 Taunt, 116, 127 Reprint 1021; Williams Ex. & Adm. 762. But compare Cockerill v. Kynaston, 4 T. R. 277, 100 Reprint 1017 (if the goods which were the subject of the action were never in the actual possession of the executor or administrator it is absolutely necessary for him to declare in that character).

30. Cal.—Ham v. Henderson, 50 Cal. 367; Jahns v. Nolting, 29 Cal. 507.

N. Y.—Valentine v. Jackson, 9 Wend. 302.

N. C.—Satterwhite v. Carson, 25 N. C. 549.

Okl.—Litz v. Alva Exch. Bank, 15 Okl. 564, 83 P 790.

S. C.—Kerby v. Quinn, 24 S. C. L. 264.

Vt.—Manwell v. Briggs, 17 Vt. 176.

Wis.—Knox v. Bigelow, 15 Wis. 415.

31. Kent v. Botwell, 152 Mass. 341, 25 NE 721, 9 LRA 258; Hollis v. Smith, 10 East 293, 103 Reprint 786; Bollard v. Spencer, 7 T. R. 358, 101 Reprint 1018.

32. Valentine v. Jackson, 9 Wend. (N. Y.) 302; Satterwhite v. Carson, 25 N. C. 549; Kerby v. Quinn, 24 S. C. L. 264; Day v. Horton, 23 Man. 623, 14 DomLR 763, 26 WestLR 72, 5 WestWkly 751.

Relation back of letters testamentary or of administration see supra § 400.

33. White v. Pulley, 27 Fed. 436.

34. Crane v. Malony, 39 Iowa 39; Brackett v. Chamberlain, 115 Me. 335, 98 A 933; Ditmas v. McKane, 92 App. Div. 344, 86 NYS 1083; Butts v. Purdy, 63 Or. 150, 125 P 313, 127 P 25.

35. Sterritt v. Robinson, 17 Iowa 61.

36. In re Collins, 17 Hun (N. Y.) 289; Matter of Fleming, 5 Dem. Surr. (N. Y.) 336.

37. Presentation and allowance of claims generally see supra §§ 937–1078.

cedent to the commencement of an action against the personal representative upon such claim;[38] but in a number of jurisdictions statutes have been enacted establishing such a requirement and precluding any action against representatives on a claim which has not been presented for allowance.[39] The personal representative is not presumed to know what the claims against the estate are, and in a great majority of cases he cannot know until they are presented to him by the creditors,[40] and the object of statutes requiring presentation is to bring the claims to the knowledge of the representative in order that he may be able to judge in what manner the estate should be settled,[41] and for the purpose of affording him additional means of protecting the estate against spurious claims[42] and an opportunity to allow all valid claims against the estate and thereby avoid the cost of unnecessary litigation.[43]

Rule applies in chancery. The rule requiring

Presentation of claim as condition precedent to right to set off claim see infra § 1881.

38. Cal.—Sprague v. Walton, 145 Cal. 228, 78 P 645.

Ark.—Saunders v. Rudd, 21 Ark. 519; Maddin v. State Bank, 13 Ark. 276.

Colo.—Jones v. Perot, 19 Colo. 141, 34 P 728; Vance v. Maroney, 3 Colo. 293.

Ill.—Rosenthal v. Magee, 41 Ill. 370; Stitzel v. Miller, 157 Ill. A. 390.

Miss.—Rawlins v. Poindexter, 26 Miss. 654, 27 Miss. 61; Smith v. Smith, 4 Miss. 216.

N. D.—Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219.

N. S.—Re Chisholm, 50 N. S. 341.

[a] **Statute not requiring filing as condition precedent to action.**—Under statutes providing that a claim allowed by the personal representative and approved by the judge must be filed in the county court within a certain time, and that when a claim is rejected suit must be brought within a designated time after rejection, it is not essential to an action on a rejected claim that it should be filed in the county court. Saxton v. Musselman, 17 S. D. 35, 95 NW 291.

[b] **Failure to make demand** may prevent recovery of costs but not of the debt itself. Fisk v. Friend, 3 Rob. (La.) 264; St. Helena Police Jury v. Fluker, 1 Rob. (La.) 389.

[c] **Commencement of action as presentation.**—In the absence of a statutory requirement that a claim shall be presented as a condition precedent to any action thereon, the commencement of an action upon a claim is a sufficient presentation and demand of payment. Gould v. Whitmore, 79 Me. 383, 10 A 60. See generally supra § 939.

39. U. S.—Schurmeier v. Connecticut Mut. L. Ins. Co., 137 Fed. 42, 69 CCA 22.

Ark.—Furst v. Sanders, 134 Ark. 407, 204 SW 426; Ryan v. Lemon, 7 Ark. 78.

Cal.—Doolittle v. McConnell, 178 Cal. 697, 174 P 305; Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985; Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; Matter of Hincheon, 159 Cal. 755, 116 P 47, 36 LRANS 303; Morse v. Steele, 149 Cal. 303, 86 P 693; Barthe v. Rogers, 127 Cal. 52, 59 P 310; Morrow v. Barker, 119 Cal. 65, 51 P 12; Lichtenberg v. McGlynn, 105 Cal. 45, 38 P 541; Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Gillespie v. Winn, 65 Cal. 429, 4 P 411; McDonald v. McElroy, 60 Cal. 484; Eustace v. Jahns, 38 Cal. 3; Giles v. Reed, (A.) 186 P 614; Wills v. Booth, 6 Cal. A. 197, 91 P 759.

Conn.—Grant v. Grant, 63 Conn. 530 (where estate solvent); Pike v. Thorp, 44 Conn. 450.

Ind.—Stanford v. Stanford, 42 Ind. 485.

Ky.—Perry v. Seitz, 2 Duv. 122; Rogers v. Mitchell, 1 Metc. 22; Smith v. Clark, 7 KyL 746; Beazley v. Mershon, 3 Ky. Op. 21.

La.—Vavasseur v. Mouton, 34 La. Ann. 1044; Yarborough's Succ., 16 La. Ann. 258; Lobit v. Castille, 14 La. Ann. 779.

Me.—Holbrook v. Libby, 113 Me. 389, 94 A 482, LRA1916A 1167; Boothbay Harbor v. Marson, 112 Me. 505, 92 A 623; Maine Cent. Inst. v. Haskell, 71 Me. 487; Eaton v. Buswell, 69 Me. 552.

Miss.—Johnson v. Success Brick Mach. Co., 93 Miss. 169, 46 S 957.

Mo.—Evans v. King, 16 Mo. 525.

Mont.—Harwood v. Scott, 186 P 693; Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772; Brown v. Daly, 33 Mont. 523, 84 P 883; Dodson v. Nevitt, 5 Mont. 518, 6 P 358.

N. H.—Cummings v. Farnham, 75 N. H. 135, 71 A 632; Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25; Quigg v. Kittredge, 18 N. H. 137.

N. J.—Jaburg v. Kirschenbaum, (Ch.) 107 A 60.

N. M.—Buss v. Dye, 21 N. M. 146, 153 P 74.

N. C.—Ward v. Jones, 44 N. C. 127.

Oh.—Pepper v. Sidwell, 36 Oh. St. 454; Yager v. Greiss, 1 Oh. Cir. Ct. 531, 1 Oh. Cir. Dec. 296.

Okl.—Asher v. Stull, 161 P 808.

Or.—Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173; Zachary v. Chambers, 1 Or. 321.

R. I.—Andrews v. O'Reilly, 34 R. I. 256, 83 A 119; Anderson v. Williams, 26 R. I. 64, 58 A 251.

S. D.—Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934; Murray v. Johnson, 28 S. D. 571, 134 NW 206.

Tex.—Thompson v. Branch, 35 Tex. 21; Walters v. Prestidge, 30 Tex. 65; Wiley v. Pinson, 23 Tex. 486; Millican v. Millican, 15 Tex. 460; Dansey v. Swinney, 7 Tex. 617; Hall v. McCormick, 7 Tex. 269; Cummings v. Jones, Dall. 531; Ralston v. Stainbrook, (Civ. A.) 187 SW 413; Whitmire v. Powell, (Civ. A.) 117 SW 433; National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231; Roddy v. Harrell, (Civ. A.) 40 SW 1064.

Wash.—First Security, etc., Co. v. Englehart, 181 P 13; In re Parkes, 178 P 830; Empson v. Fortune, 102 Wash. 16, 172 P 873; Gray v. Hickey, 94 Wash. 370, 162 P 564; Harvey v. Pocock, 92 Wash. 625, 159 P 771; Foley v. McDonnell, 48 Wash. 272, 93 P 321; McFarland v. Fairlamb, 18 Wash. 601, 52 P 239.

[a] **The presentation is the beginning** of a legal prosecution to judgment. Hume v. Perry, (Tex. Civ. A.) 136 SW 594.

[b] **In order to confer jurisdiction** over the subject of the action a claim against the estate must be filed, placed upon the appearance docket, and, if not allowed, must be transferred to the issue docket; and, upon demurrer for want of jurisdiction, the record must show that such steps have been taken. Stanford v. Stanford, 42 Ind. 485. See also Ward v. Magaha, 71 Wash. 679, 129 P 395 (failure to present a claim against an estate to the executor or administrator, as required by Remington & B. Code § 1479, is not a mere matter of abatement, but the presentation is a fact essential to the cause of action). But compare Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926 (presentation of a claim to the executors is not jurisdictional to an action thereon).

[c] **Filing as a demand.**—The filing of a claim against the estate constitutes a sufficient demand against the administrator to authorize suit on it. Armacost v. Lindley, 116 Ind. 295, 19 NE 138; Walker v. Heller, 104 Ind. 327, 3 NE 114; Wright v. Jordon, 71 Ind. 1; Woods v. Matlock, 19 Ind. A. 364, 48 NE 384.

[d] **A claimant's ignorance of his rights** does not excuse his right to make timely presentation of his claim. Harvey v. Pocock, 92 Wash. 625, 159 P 771.

[e] **A mere failure to apply for administration** is not a "suspension" within Pub. St. (1901) c 191 §§ 2, 4, prohibiting suits against an administrator unless the demand is exhibited to, and suit is brought against, him within a specified time after grant of administration, excluding the time administration may have been suspended, the suspension contemplated being one caused by the death, resignation, removal, etc., of an original administrator upon a deceased debtor's estate within the period prescribed for presentation of claims or suing, and having no reference to a suspension of administration upon a deceased creditor's estate. Cummings v. Farnham, 75 N. H. 135, 71 A 632.

[f] **Contingent claim.**—Where, under the statute, the probate court may by order fix the time within which claims may be presented, and may allow such claims to be presented after such time and within eighteen months after notice of its order, actions on claims, which are so contingent that they are not susceptible of proof within the time limited, but which became absolute a sufficient length of time before the expiration of the eighteen months to give the creditors an opportunity to present their claims within eighteen months, are barred, unless the claims are presented, and the cause shown within that time. Schurmeier v. Connecticut Mut. L. Ins. Co., 137 Fed. 42, 69 CCA 22.

[g] **After exhibition of the claim** (1) an action may be maintained for the recovery of the amount of the demand as a common-law action in any court having jurisdiction of the amount involved. Furst v. Sanders, 134 Ark. 407, 204 SW 426 [foll Meredith v. Scallion, 51 Ark. 361, 11 SW 516, 3 LRA 812; Ryan v. Lemon, 7 Ark. 78]. (2) A creditor who has presented his claim has his debt fastened on the debtor's property so that he may maintain a bill against the buyer and the estate of the deceased seller to set aside a sale alleged to have been in violation of the Bulk Sales Act. Jaburg v. Kirschenbaum, (N. J.) 107 A 60.

[h] **Where administration is under a nonintervention will,** presentation is not necessary. Schulbach v. Redelsheimer, 92 Wash. 124, 158 P 739.

40. Grant v. Grant, 63 Conn. 530, 29 A 15, 38 AmSR 379; Pike v. Thorp, 44 Conn. 450.

41. Probate Judge v. Lane, 51 N. H. 342.

42. Marshall v. Perkins, 72 Me. 343, 345 [quot Hurley v. Farnsworth, 107 Me. 306, 308, 78 A 291] ("The evident design was to prevent actions involving needless cost and expense to the estate in collecting honest claims against it, by compelling a claimant to hand to the administrator the nature and extent of his claim and allow the reasonable prescribed period for investigating the justice of it").

43. Ryan v. Lemon, 7 Ark. 78; Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 436, 122 SW 225; Quigg v. Kittredge, 18 N. H. 137; Pepper v.

presentation has been held the same in chancery as at law.[44]

[§ 1837] **bb. Applications of Rule.** The statutory requirement of presentation[45] has been held to apply to claims evidenced by judgment as well as other demands,[46] and to joint actions against personal representatives and devisees on claims due from the estate.[47] Among claims which it has been held necessary to present as a condition precedent to any action thereon may be mentioned claims on contract generally,[48] a claim for services rendered to decedent,[49] a claim for fraud of decedent,[50] and a claim for damages for the obstruction of a right of way.[51] It sometimes happens, however, that the statute is applicable only to claims for money,[52] and has no application where the demand is for uncertain or unliquidated damages or for land.[53]

The requirement has been held not to apply to demands against a personal representative arising after the grant of administration,[54] to proceedings by a judgment creditor to subject to the payment of his judgment property fraudulently conveyed by decedent,[55] to actions brought against the debtor in his lifetime and revived against the representative,[56] to an action to have plaintiff adjudged the owner of land under an agreement by decedent giving plaintiff the property owned by decedent at death for caring for him,[57] to actions brought to correct errors made in a settlement with decedent,[58] to actions of replevin,[59] to claims in which the amount of the liability could not have been determined by the representative,[60] to claims based on tort,[61] to a claim for funeral expenses,[62] to an action by the assignee of a life policy, the administratrix of the insured's estate having been made a party,[63] or in other cases where it appears that no reason or necessity exists for the presentation of the claim,[64] as where the executor sells property in suit which by the terms of the will is reserved to the widow and children and by statute expressly de-

Sidwell, 36 Oh. St. 454; Wanz v. Park Hotel Co., 1 Oh. Cir. Ct. 105, 1 Oh. Cir. Dec. 63.

"The reason for requiring the claimant, before bringing an action on his claim, to make demand of payment, is to afford the personal representative an opportunity to pay it without cost of suit, and at the same time have a legal voucher of such payment." Crane, etc., Mfg. Co. v. Stagg, supra.

44. Owens v. Corbitt, 57 Ala. 92; Jones v. Lightfoot, 10 Ala. 17.

45. See supra § 1836.

46. Ready v. Thompson, 4 Stew. & P. (Ala.) 52; Curry v. Bryant, 7 Bush (Ky.) 301; Lobit v. Castille, 14 La. Ann. 779. Compare Stephenson v. Lichtenstein, 24 Wyo. 417, 160 P 1170 (not necessary to present such claim before bringing action to enforce judgment lien against land conveyed by deceased after lien had attached).

[a] **The reason is that** as such a claim like any other demand may be unjust or have been paid or be subject to set-offs or discounts, there is no reason for exempting it from the operation of the statute. Curry v. Bryant, 7 Bush (Ky.) 301.

[b] **After a revival of a judgment by scire facias** no presentation to the administrator is necessary, for the service of the scire facias is a presentation and the judgment of revival an allowance against the estate. Eddins v. Graddy, 28 Ark. 500.

47. Ryan v. Jones, 15 Ill. 1 (but devisees can insist only upon the general statutes of limitations).

48. American Trust Co. v. Chitty, (Okl.) 129 P 51.

49. Brown v. Truax, 58 Or. 572, 115 P 597 (a claim for services rendered decedent by hauling wood under an oral agreement giving claimant a lien on the wood for his services should have been presented to the administrator before attempting to foreclose the lien, the claim not being of record).

[a] **A claim for an unliquidated amount** for services to decedent need not be presented. Wells v. Hobbs, 57 Tex. Civ. A. 375, 122 SW 451.

50. Grubb v. Chase, 158 Cal. 352, 111 P 90. Contra Jones v. Woodward, 50 Okl. 704, 151 P 586.

51. Randall v. Brayton, 26 R. I. 233, 58 A 734.

52. Thompson v. Branch, 35 Tex. 21; Walters v. Prestidge, 30 Tex. 65; Wiley v. Pinson, 23 Tex. 486; Fulton v. Black, 21 Tex. 424; Millican v. Millican, 15 Tex. 460; Danzey v. Swinney, 7 Tex. 617; Hall v. McCormick, 7 Tex. 269; Cummings v. Jones, Dall. (Tex.) 531; National Guarantee L. & T. Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231; Roddy v. Harell, (Tex. Civ. A.) 40 SW 1064.

53. Bullion v. Campbell, 27 Tex. 653; Evans v. Hardeman, 15 Tex. 480; Robinson v. McDonald, 11 Tex. 385, 62 AmD 480; Merle v. Andrews, 4 Tex. 200; Curran v. Texas Land, etc., Co., 24 Tex. Civ. A. 499, 60 SW 466.

[a] **A claim requiring the intervention of a jury to ascertain the damages** is not such a "claim for money" as must be presented for allowance before commencing action thereon. Sutton v. Page, 4 Tex. 142.

54. Ill.—Duggan v. Oglesby, 99 Ill. 405.

Mo.—In re Lutz, 175 Mo. A. 427, 162 SW 679.

Mont.—Ryan v. Spieth, 18 Mont. 45, 44 P 403.

N. H.—Probate Judge v. Lane, 51 N. H. 342.

Tenn.—Brown v. Porter, 7 Humphr. 373.

Utah.—Martin v. Saxton, 48 Utah 488, 160 P 441.

[a] **A suit by a sheriff for money advanced to pay taxes for an estate** is not within the requirements of the statute. Brown v. Porter, 7 Humphr. (Tenn.) 373.

[b] **Actions for attorney's fee.**—The attorney of an administrator can institute an independent suit in the circuit court for his fee without seeking an allowance by the probate judge. In re Lutz, 175 Mo. A. 427, 162 SW 679.

55. O'Doherty v. Toole, 2 Ariz. 288, 15 P 28.

56. Colo.—Selkregg v. Thomas, 27 Colo. A. 259, 149 P 273.

Fla.—Ellison v. Allen, 8 Fla. 206.

Ind.—Clodfelter v. Hulett, 92 Ind. 426.

Ky.—Tipton v. Richardson, 54 SW 738, 21 KyL 1194; Cochran v. Whittaker, 10 KyL 495.

Oh.—Musser v. Chase, 29 Oh. St. 577.

Wash.—Strong v. Eldridge, 8 Wash. 595, 36 P 696.

57. Fred v. Asbury, 105 Ark. 494, 152 SW 155.

58. Linn County v. Day, 16 Iowa 158. See also Fox v. Apperson, 6 Bush (Ky.) 653 (affidavit as to claim and demand not necessary before filing petition in equity against executor of agent of plaintiff for discovery and settlement of his account as such).

59. Barlow v. Anglin, (Tex. Civ. A.) 45 SW 857 (replevin against an administrator the assertion of a money demand for failure to deliver the property is secondary and does not constitute a claim for money within the meaning of the statutes).

60. Wanz v. Park Hotel Co., 1 Oh. Cir. Ct. 105, 1 Oh. Cir. Dec. 63 (suit to enforce statutory liability of deceased stockholder in insolvent corporation).

[a] **Where foreign executors are sued, not for any liability by testator** or his estate, but on their own liability, for the misapplication of the trust funds which have come to their hands no previous proceedings before the surrogate are necessary. Montalvan v. Clover, 32 Barb. (N. Y.) 190.

61. Leverone v. Weakley, 155 Cal. 395, 101 P 304 (obstruction of highway); American Trust Co. v. Chitty, (Okl.) 129 P 51. But compare Randall v. Brayton, 26 R. I. 233, 58 A 734 (obstruction of right of way).

62. Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742.

63. Haynes v. Lawton City Nat. Bank, 30 Okl. 614, 121 P 182.

64. Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225.

[a] **Illustrations.**—(1) Where defendant's testator executed two notes to plaintiff, with a contract annexed which recited the issuance of certain stock to him (plaintiff), and provided that plaintiff would accept a certain sum, if tendered to him by testator within six months, and assign the stock to testator, or return the notes to him to be canceled, but providing that plaintiff should not demand payment of the notes when due unless he transferred the stock to testator or his representative, and testator had the stock in his possession at his death for the purpose of selling it, it was held, in an action against his administratrix on the notes, that she could not object that plaintiff did not present his claim and offer to transfer the stock to the estate in accordance with the contract, she being in possession of it, and refusing to produce it at trial for formal transfer to herself. Dickson v. Eames, 134 Mo. A. 373, 114 SW 574. (2) Where the seller of land scrip gave a note, secured by a deed of trust on lands, to the buyer to secure him in case the scrip proved invalid, as it afterward did, and the buyer pledged some of the scrip to a bank to secure his own note, it was held that the bank, without presenting the note as a claim against the maker's estate, and after the running of the two year statute of limitations, could sue to recover its share of the proceeds of the foreclosure of the deed of trust by the executor. Holland Banking Co. v. See, (Mo. A.) 130 SW 354. (3) Where, in an action by a stockholder's executor to recover dividends, the stockholder's widow was substituted as defendant and set up a claim to the dividends under a pledge of the stock to her to secure the payment of notes, the widow's rights were exactly the same as though she was suing the corporation, and nonpresentation of the notes

cleared not to be assets in the personal representative's hands.[65] An action to quiet title against certain fraudulent conveyances may be brought against the executors of the perpetrators of the fraud, without the claim being presented to them within one year after their appointment, where the fraud was not discovered until after the expiration of that time.[66]

Lien claims. It is very generally held that these statutes have no application where the claim is in relation to real estate and no presentation or demand is necessary in actions to foreclose mortgages, and the only effect of failure to present the claim for allowance would be to prevent a recovery of any deficiency that might remain after exhaustion of the mortgaged property, out of the testator's other estate.[67] The same rule applies to vendors' liens,[68] and a chattel mortgage may be foreclosed, although the claim secured thereby was not presented.[69]

Claims arising out of trust relations. Presentation of the claim is not a condition precedent to an action to declare a trust,[70] or to recover money or property identified as that held by decedent in trust,[71] but an action to recover trust money converted by the trustee to his own use, the identity of which cannot be traced, is an action on a claim against the estate, and is not maintainable unless a claim therefor has been presented to the administrator for approval.[72]

If there are no assets in the hands of the representative, a creditor is not, it has been held, obliged to present his claim before bringing suit to subject real estate of decedent to the payment of debts.[73]

Interest. Failure to make demand does not deprive claimant of the right to interest where there was no administrator of whom demand could be made.[74]

Independent executors. Where the estate is being administered by an independent executor free from the control of the court, presentation of a claim is not a condition precedent to an action thereon against him.[75]

[§ 1838] **(b) Effect of Knowledge of Representative.** It has been held that the representative's knowledge of the existence of a claim, no matter how full, does not dispense with the necessity of complying with the statutory requirement of presentation as a condition precedent to any action thereon.[76]

[§ 1839] **(c) By Whom Claim Presented.** It has been held that the claim may be presented either by plaintiff or by his agent or attorney,[77] but there is also authority for the view that the claim must be presented by the claimant himself.[78]

[§ 1840] **(d) Sufficiency of Presentation.** Claims must be presented as required by statute,[79] and they should be presented to the executor or administrator personally.[80] The claim presented need not be signed by the party making it and the demand of payment need not be in writing, although the claim must be.[81] Any presentment which gives

as a claim against the estate did not prejudice her rights. Savings Union Bank v. Crowley, 176 Cal. 543, 169 P 67. (4) Where land conveyed by decedent was condemned by a municipality, and the condemnation money placed in the hands of a stakeholder pending a determination of the rights of the parties, presentation of a claim to the executor was not a condition prerequisite to the commencement of suit to recover such money. Watts v. Lawrence, (Wyo.) 185 P 719. (5) Laborers employed by a contractor, who completed the contract after decedent's death and presented his claim to the executor may have the amount of their claims included in a personal judgment rendered in the contractor's favor, although they did not present their claims, where the contractor admits that he should pay them out of the amount claimed by him. Gray v. Hickey, 94 Wash. 370, 162 P 564.

65. Graves v. Graves, 10 B. Mon. (Ky.) 31.

66. Mullen v. Callanan, 167 Iowa 367, 149 NW 516.

67. Cal.—Weber v. McCleverty, 149 Cal. 316, 86 P 706; Dreyfus v. Giles, 79 Cal. 409, 2 P 840; Security Sav. Bank v. Connell, 65 Cal. 574, 4 P 580; Heeser v. Taylor, 1 Cal. A. 619, 82 P 977.

Iowa.—Allen v. Moer, 16 Iowa 307.

Kan.—In re Baker, 187 P 870.

Mont.—Lamme v. Dodson, 4 Mont. 560, 2 P 298.

Nebr.—National L. Ins. Co. v. Fitzgerald, 61 Nebr. 692, 85 NW 948.

Okl.—Fawcett v. McGaham-McKee Lumber Co., 39 Okl. 68, 134 P 388.

Or.—Teel v. Winston, 22 Or. 489, 29 P 142; Verdier v. Bigne, 16 Or. 208, 19 P 64.

Tex.—Miles v. Coleman Nat. Bank, 37 Tex. Civ. A. 73, 84 SW 284.

Wash.—Scammon v. Ward, 1 Wash. 179, 23 P 439.

See also supra § 955.

[a] **A surety who obtains an indemnity mortgage from his principal** may foreclose the mortgage after the death of the principal, although he does not file a claim with the administrator. MacDonald v. O'Shea, 58 Wash. 169, 108 P 436, AnnCas1912A 417.

[b] **On the other hand** in a case where, after the death of the grantor in a deed of trust, the county court, in administration proceedings, set apart the land described therein to defendants, who were the grantor's minor children, as their homestead, and the holder of the debt secured did not file his claim therefor as a claim against the estate, and did not appear in any manner in the administration proceedings, it was held that he could not thereafter enforce his lien against the land. Tiboldi v. Palms, 34 Tex. Civ. A. 318, 78 SW 726 [aff 97 Tex. 414, 79 SW 23].

68. Allen v. Smith, 29 Ark. 74; Stewart v. Webb, (Tex. Civ. A.) 156 SW 537.

69. Massey v. Fralish, 37 S. D. 91, 156 NW 791.

70. Title Ins., etc., Co. v. Ingersoll, 158 Cal. 474, 111 P 360.

71. Sprague v. Walton, 145 Cal. 228, 78 P 645.

72. Title Ins., etc., Co. v. Ingersoll, 158 Cal. 474, 111 P 360.

73. Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 436, 122 SW 225 ("If, however, there are no assets in the hands of the personal representative with which to pay the decedent's debts, or such as he may have be insufficient for that purpose, but the decedent left real estate liable for such debts, there can be no reason or necessity for a creditor's presenting his claim, accompanied by the statutory affidavit, to the personal representative, in order to entitle him (the creditor) to bring suit for the purpose of subjecting such real estate to the payment of the decedent's debts, including his own. As well said in Huffman v. Moore, 101 Ky. 288, 41 SW 292, 19 KyL 461 'Indeed, the right to bring an action such as this is expressly given to a creditor by section 428, Civil Code Prac. And that right is not thereby made conditional upon compliance by the creditor with the terms prescribed by the statute in order to maintain an action ordinary to recover personal judgment against the administrator or executor. Of course, an action such as this involves a reference to the master commissioner of court to pass upon and report, subject to approval of court, in regard to every claim or demand that may be presented, each of which must be verified, and approved as required by statute before being allowed' ").

74. Tatum v. Gibbs, 41 SW 565, 19 KyL 695.

75. Smyth v. Caswell, 65 Tex. 379; Pleasants v. Davidson, 34 Tex. 459; Shaw v. Ellison, 24 Tex. 197; Hogue v. Sims, 9 Tex. 546; Taylor v. Davidson, (Tex. Civ. A.) 120 SW 1018.

76. Owens v. Corbitt, 57 Ala. 92.

77. Marshall v. Perkins, 72 Me. 343.

78. Zachary v. Chambers, 1 Or. 321, 322 ("There are many transactions of life, from want of a wise precaution, or arising from that confidence which, too often perhaps, men repose in each other, of which there are no witnesses but the parties to the transactions; or if there is any evidence of it aliunde, it is known only to them. The decease of one party leaves all such knowledge in the breast of a single individual, and that one the claimant. The law can provide but one avenue to that knowledge,—an appeal to the conscience of the creditor under the solemn injunction of an oath").

79. Marshall v. Perkins, 72 Me. 343; Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934; Harvey v. Pocock, 92 Wash. 625, 159 P 771.

80. Rawson v. Knight, 71 Me. 99; Bruce v. Cromar, 22 U. C. Q. B. 321.

[a] **Presentation to agent.**—The reception of the notice and demand required by an agent or attorney of an administrator is not incident to a general appointment or employment to assist in settling an estate; nor will such an appointment relieve claimants from any duty incumbent upon them by force of the statute. Rawson v. Knight, 71 Me. 99.

81. Millett v. Millett, 72 Me. 117.

the personal representative to understand the nature and amount of the claim will be sufficient,[82] and it is not necessary to present the agreement on which the claim is founded.[83] It has been held that the demand must be such that the personal representative, if he wishes to pay, may do so at once and a demand for payment by letter is insufficient;[84] but it has also been held a sufficient exhibition of a claim founded on a note to deliver to the representative a verbatim copy of the note to which is attached the statutory affidavit of the justness of the claim.[85] The claimant can recover only on the claim which was presented to the personal representative,[86] and not on a cause of action not included in the claim,[87] but the fact that the proof does not establish the claim upon the precise theory stated in the claim filed will not prevent a recovery thereon.[88] So also the claimant may sue for an amount less than his rejected claim, if it is shown to be part of the claim presented,[89] and it has also been held that the presentation of a claim for a designated amount will not necessarily prevent a recovery for a greater amount.[90] An erasure of the names of indorsers on a note after presentment does not make an action thereon one for a different claim than the one presented,[91] and where claimant has presented a note, which proves invalid because of decedent's insanity, claimant may recover on a valid claim which was the basis of the note.[92]

[§ 1841] **(e) Cure or Waiver of Nonpresentation.** Presentment and allowance of a demand after suit brought does not cure the failure to present before bringing suit.[93] It is usually considered that presentment may be waived,[94] and is waived where the administrator joins issue and goes to trial on the validity of the claim without objection,[95] or files a demurrer.[96] So also the exhibition and demand of payment, required by statute, before action against an administrator, is sufficiently made,

82. Ark.—Little v. Arkansas Trust, etc., Co. 124 Ark. 466, 187 SW 629.

Conn.—Pratt v. Stoner, 78 Conn. 310, 61 A 1009.

Ky.—Fox v. Hudson, 140 Ky. 454, 131 SW 178.

Me.—Marshall v. Perkins, 72 Me. 343.

N. H.—Ross v. Knox, 71 N. H. 249, 51 A 910; Little v. Little, 36 N. H. 224; Tebbetts v. Tilton, 31 N. H. 273.

Wash.—Brownfield v. Holland, 63 Wash. 86, 114 P 890.

[a] **Exhibition held sufficient.**—Pending suit for contribution by one of two indorsers of accommodation notes, defendant died. Plaintiff's attorney orally called the attention of defendant's administrator to the fact that plaintiff had a claim against the estate, showed him the notes, and told him of the suits. The administrator was served with a writ of scire facias, and in response thereto entered his appearance. It was held that there was a sufficient exhibition of the claim to the administrator. Pratt v. Stoner, 78 Conn. 310, 61 A 1009.

[b] **Title of claim.**—Where the title to a claim against a deceased lessee was: "To the estate of [name of decedent] and [name of surviving lessee] . . . debtor to" lessor, and the verification of the claim conformed to the statute, but the executor rejected the claim, such claim was sufficiently presented to the executors to support an action thereon. Brownfield v. Holland, 63 Wash. 86, 114 P 890.

[c] **Presenting a copy of a note or other written instrument** will be sufficient unless the representative requires the original to be produced. Marshall v. Perkins, 72 Me. 343; Tebbetts v. Tilton, 31 N. H. 273; Mathes v. Jackson, 7 N. H. 259.

[d] **The presentment of an account,** including articles furnished for decedent's burial and articles sold and delivered to him in his lifetime, without showing the amount due for the funeral, is not sufficient as a demand for payment of the funeral expenses. Ward v. Jones, 44 N. C. 127.

[e] **Failure to state nature of claim.**—A written claim for "balance due Jan. 1, 1904 $2265.50," does not exhibit the nature of the claim as required by the statute. Hurley v. Farnsworth, 107 Me. 306, 78 A 291.

83. Altgelt v. Elmendorf, (Tex. Civ. A.) 86 SW 41.

84. Probate Judge v. Runnells, 66 N. H. 271, 21 A 1020.

85. Davenport v. Davenport, 110 Ark. 222, 161 SW 189.

86. Cal.—Pearson v. Parsons, 173 Cal. 336, 159 P 1173; Stockton Sav. Bank v. McCown, 170 Cal. 600, 150 P 985; Bechtel v. Chase, 156 Cal. 707, 106 P 81; Brocks v. Lawson, 136 Cal. 10, 68 P 97; Lichtenberg v. McGlynn, 105 Cal. 45, 38 P 541; Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

Or.—Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173.

R. I.—Anderson v. Williams, 26 R. I. 64, 58 A 251.

Wash.—Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

[a] **Action held to be on claim presented.**—Where a claim was rejected when acted upon by the administrator because it appeared from its face that it was then barred by limitations, the notice of claim not stating intestate's absence from the state for six months, which would take it out of the statute, a subsequent action on the rejected claim was on the claim presented, although the complaint alleged intestate's absence in order to take the claim out of the statute. Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

87. Barthe v. Rogers, 127 Cal. 52, 59 P 310; Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772; Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

[a] **Illustration.**—Presentation of a claim upon an open account for money loaned would not sustain an action upon a note, there being such variance as to amount to failure of proof. Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772.

88. Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035.

[a] **Illustration.**—A claim filed against an estate stated that claimant and her child were entitled to a certain legacy, and that she intrusted decedent, her nephew and a banker, in whose honesty and business ability she had great confidence, with the collection of such legacy, and that he collected it for claimant's use and benefit and with the exception of a part thereof never paid it to her, but retained it in his possession until his death; that on account of the confidential relationship between claimant and decedent, and of his superior knowledge in business affairs, and ability to loan and manage the fund, claimant permitted him to retain it, under an agreement that he would keep it loaned out, and that decedent, in retaining and accepting said fund, accepted such trust and agreed to account to claimant therefor, and that claimant at various times demanded a settlement of him, but he always deferred a settlement through a plausible excuse until he died. It was held that the claim was sufficient to authorize proof to support it in an action thereon, within Burns Annot. (1908) § 2828, requiring the holder of a claim against an estate to file a succinct and definite statement thereof. Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035.

89. Cochran v. Germania Nat. Bank, 8 KyL 790; Carter v. Beckwith, 104 N. Y. 236, 10 NE 350; Wilcox v. Alexander, (Tex. Civ. A.) 32 SW 561.

90. Morgan v. Bartlette, 3 Oh. Cir. Ct. 431, 2 Oh. Cir. Dec. 244; Russell v. Pratt, 7 Pa. Co. 662; McCormick v. Blum, 4 Tex. Civ. A. 9, 22 SW 1054, 1120. Contra Campbell v. Campbell, 35 R. I. 211, 85 A 930.

91. Morris v. Cude, 57 Tex. 337.

92. Campbell v. Campbell, 35 R. I. 211, 85 A 930.

93. Rogers v. Mitchell, 1 Metc. (Ky.) 22; Thompson v. Branch, 35 Tex. 21; Millican v. Millican, 15 Tex. 460; Danzey v. Swinney, 7 Tex. 617; Harvey v. Pocock, 92 Wash. 625, 159 P 771.

94. See cases infra this note and notes 96–98.

[a] **Decree barring claims.**—In an action at law on a claim, to which has been pleaded a decree of the surrogate barring all the claims not duly verified and presented within the time specified by notice for presenting claims, plaintiff cannot show facts constituting an estoppel of the executrix to interpose such decree as a defense, or that the presentation of plaintiff's claim under oath was waived But plaintiff may maintain a suit in equity to restrain such defense by showing waiver of verification of the claim which was presented before such decree. Seymour v. Goodwin, 68 N. J. Eq. 189, 59 A 93 [aff 69 N. J. Eq. 833, 66 A 1134].

[b] **Waiver by attorney.**—"The retainer of an attorney in a law suit brought against an administratrix does not give him any implied authority to waive the proper prosecution of the claim, according to law. The statute contains no provision which authorizes the administratrix to waive the filing of the claim as provided by the statute above cited." Andrews v. O'Reilly, 34 R. I. 256, 259, 83 A 119.

95. Selkregg v. Thomas, 27 Colo. A. 259, 149 P 273; Moore v. Pierce, 160 Ky. 107, 169 SW 620; Lyon v. Logan County Bank, 78 SW 454, 25 KyL 1668; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Rigney v. Pelley, 13 KyL 93; Robinson v. Hicks, 1 Ky. Op. 152; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Pepper v. Sidwell, 36 Oh. St. 454; Daykin v. Emery, 10 Oh. Cir. Ct. 652, 5 Oh. Cir. Dec. 121; Devereaux v. Hutchinson, 16 Oh. Cir. Ct. N. S. 447 [aff 78 Oh. St. 415 mem, 85 NE 1124 mem].

96. Lyttle v. Davidson, 67 SW 34, 23 KyL 2262.

or waived, where the administrator calls on the claimant's attorney and, after the claim is fully explained, states he will not pay, and that it would do no good to make a written statement.[97] There is, however, authority for the view that the statutory requirement of presentation as a condition precedent to action on a claim cannot be waived by the representative.[98] Where an executor or administrator has received a written claim that does not exhibit the nature of the claim, he need not call attention to the defect, and his omission to do so is not a waiver of his right to be informed of the nature of the claim, nor is his statement that he will not pay a wrong bill evidence of waiver.[99] An admission of the representative that the claim sued on was exhibited is equivalent to proof of exhibition.[1]

Equitable relief to a creditor who has, without culpable negligence, failed to present his claim in time is sometimes authorized by statute.[2]

[§ 1842] **(3) Verification of Claims—(a) Necessity.** The statutes in some jurisdictions make it a condition precedent to a suit against an executor or administrator on a claim against the estate that the claim be authenticated by affidavit,[3] or that an affidavit of the justice of the demand be made.[4] Such a requirement has been held to apply to a complainant who has commenced his action but has not recovered judgment before the death of his debtor,[5] and to a claim against an estate pleaded as a set-off or counterclaim,[6] but not to claims against the representative,[7] or in an action against an executor on a compromise made with plaintiff.[8] It has been held that a statute requiring authentication of claims is designed merely for the protection of the personal representative and lack of verification does not affect the creditor's right to sue.[9]

[§ 1843] **(b) Time for Verification.** Where the verification of the claim is a prerequisite to the right to bring an action thereon, an affidavit made after the commencement of the action is insufficient.[10]

[§ 1844] **(c) Sufficiency.** It is not necessary that the affidavit shall literally follow the language of the statute which provides what it shall contain.[11] So an affidavit in an action on a count for services rendered which follows substantially the language of the statute, states sufficient facts to constitute a cause of action, shows an employment, rendition of services, their value, and decedent's agreement to pay, is a sufficient verification of the demand.[12] But an affidavit wholly failing to state, as required by statute, that there are no offsets against the claim, is fatally defective.[13] Where the statute does not require the verification to state either the date or amount of the note or other demand, the fact that the affidavit states a wrong date is not a fatal variance.[14]

An affidavit of a third person to prove an account against the estate of a decedent which states that the account "is just and true as he verily believes" is insufficient.[15]

An affidavit made before an officer not having authority to take affidavits will be inoperative.[16]

[§ 1845] **(d) Waiver of Verification or Defects in Verification.** It has been held that the statutory requirement of verification cannot be waived, and if the affidavit made is defective, advantage may be taken of it at any time before final judgment,[17] but it has also been asserted that defendant does not waive his right to object to the sufficiency of the affidavit by answering without objection.[18] While it has been held that want of verification can be taken advantage of only before or at the time of filing the answer,[19] and that a failure to verify the demand is waived by appearance and answer to the merits,[20] it has also been laid down that, where the authentication of a claim is a prerequisite to the right of action against the administrator or executor, the failure to authenticate may be taken advantage of at any time before trial and final judgment.[21] Where, in an action brought in the lifetime of decedent and after his death revived against his administrator, plaintiff,

97. Dewey v. Noyes, 76 N. H. 493, 84 A 935.

98. Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934.

99. Hurley v. Farnsworth, 107 Me. 306, 78 A 291.

1. Ferguson v. Rochford, 84 Conn. 202, 79 A 177, AnnCas1912B 1212.

2. Beale v. Swasey, 106 Me. 35, 75 A 134, 20 AnnCas 396.

3. Ross v. Hyne, 48 Ark. 304, 3 SW 190; Saunders v. Rudd, 21 Ark. 519; Harding v. Bullard, 172 Ky. 417, 189 SW 242; Whitmire v. Powell, 103 Tex. 232, 125 SW 889; Whitmire v. Powell, (Tex. Civ. A.) 117 SW 433; First Security, etc., Co. v. Englehart, (Wash.) 181 P 13.

4. Swift Iron, etc., Works v. Schulte, 8 KyL 787; Smith v. Clark, 7 KyL 747.

5. Matthews v. Jones, 2 Metc. (Ky.) 254.

6. Warfield v. Gardner, 3 KyL 423.

7. Crenshaw v. Duff, 69 SW 962, 24 KyL 718 (where the only payment of usury sought to be recovered consisted of payments to defendant as administrator, it was no defense that no affidavit had been made before suit brought).

8. Newton v. Cecil, 43 SW 734, 19 KyL 1430.

9. Campbell v. Young, 4 Miss. 301.

10. Ross v. Hine, 48 Ark. 304; Alter v. Kinsworthy, 30 Ark. 756; Green v. Brooks, 25 Ark. 318.

11. Easley v. Rowe, (Ark.) 210 SW 145; Hayden v. Hayden, 105 Ark. 95, 150 SW 415.

[a] **Affidavit held sufficient.**—The complaint in an action against an administrator on a note of intestate, alleging that a certain sum was the only payment which had been made on the note, and that a certain sum was due on it, after allowing all just credits, and the affidavit of a plaintiff attached to the complaint stating that "the facts set forth in the foregoing complaint are true," there is a substantial compliance with Kirby's Dig. § 114, providing that the claimant against a decedent's estate shall append to his demand an affidavit, stating that nothing has been paid on it except what is credited thereon, and that the sum demanded, which shall be named, is justly due, so that there can be no nonsuit under § 119, providing that, if the affidavit required for authenticating claims against a decedent is not produced in an action against an administrator for a debt against deceased, nonsuit shall be entered. Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039.

12. Peak v. Grover, 12 KyL 189.

13. Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934.

14. Cochran v. Germania Nat. Bank, 8 KyL 790.

15. Trabue v. Harris, 1 Metc. (Ky.) 597.

16. Winder v. Hendricks, 56 Cal. 464. See also Alter v. Kinsworthy, 30 Ark. 756 (making affidavit before a justice of the peace of another state is not a sufficient compliance with the statutory requirement).

17. Alter v. Kinsworthy, 30 Ark. 756; Ryan v. Lemon, 7 Ark. 78.

18. Hansford v. Parrish, 7 KyL 94.

19. Gough v. Alvey, 10 KyL 590.

20. Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Lyons v. Logan County Bank, 78 SW 454, 25 KyL 1668; Tipton v. Richardson, 54 SW 738, 21 KyL 1195; Rigney v. Pelley, 13 KyL 93; Usher v. Flood, 17 SW 132, 12 KyL 721.

[a] **Reason for rule.**—"A personal representative, after negligently failing to avail himself of the protection designed by the statute in requiring demand of payment and verification of the claim, and suffering defeat in a trial on the merits in the court below, should, on appeal, in all fairness, be estopped by such negligence from making complaint of the want of such demand and proof." Harding v. Bullard, 172 Ky. 417, 423, 189 SW 242.

[b] **The proper practice** is for the personal representative to file an affidavit showing that no demand has been made on him before suit brought accompanied by an affidavit required by the statute and thereupon a rule should be awarded against plaintiff to show cause why his petition should not be dismissed. Tichenor v. Wood, 70 SW 637, 24 KyL 1109.

21. Ross v. Hine, 48 Ark. 304, 3 SW 190; Purcelly v. Carter, 45 Ark. 299; Alter v. Kinsworthy, 30 Ark. 756; Walker v. Byers, 14 Ark. 246; Beirne v. Imboden, 14 Ark. 237; Ryan

without having verified his demand, recovers a verdict and the court renders a judgment thereon against the administrator, such judgment will be reversed with directions to the court below to set it aside, but to render it again upon the necessary affidavit being made subject to any credits, offsets, or discounts disclosed in the affidavit;[22] and if no such affidavit shall be filed within a reasonable time then to set aside the verdict and dismiss the action.[23]

[§ 1846] **(4) Action on Claim by Probate Court.** It is not ordinarily a condition precedent to an action on a claim against the estate that it should have been passed on by the probate court,[24] but it has been held that there can be no recovery for legal services rendered to an executor until there has been an allowance therefor against the estate.[25]

[§ 1847] **(5) Rejection or Disallowance of Claim.** Under some statutes it is essential to the right to bring suit on a claim against the estate that it should have been rejected or disallowed when presented.[26] It is, however, sufficient that the claim has been unequivocally rejected, and a formal indorsement of rejection on the claim is not essential.[27] It has been held that, where the estate has been reported insolvent, an action cannot be brought on a rejected claim until the commissioners have reported.[28]

[§ 1848] **(6) Inability to Recover against Co-obligor.** The rule, that in an action against the personal representative of a deceased joint debtor it must be alleged and proved that the debt cannot be collected against the surviving joint debtors, has no application to an action on an undertaking, the obligation of which is joint and several.[29]

[§ 1849] **b. To Recover Legacies.** No action at law can be maintained for the recovery of a legacy unless the will has been regularly admitted to probate,[30] and in some jurisdictions it is essential that the legatee should, before bringing action, give a refunding bond.[31] It is also a condition to the right of recovery at law that sufficient assets have come into defendant's hands,[32] and that there are no debts for which the legacy could be made liable.[33] The general rule is that to authorize a recovery of a legacy in an action at law a demand therefor must be made[34] by someone having authority to receive and to discharge the legacy,[35] unless such demand is waived, as may be done.[36] No decree of the probate court in favor of the legatee is necessary to enable him to maintain an action for his legacy,[37] nor is it necessary that there should be an order that the legacy be paid to plaintiff or into court.[38] To authorize a bill in equity to recover a legacy it is not necessary that there should have been a settlement of the estate,[39] that the claim should have been first established against the executor, at law,[40] or that there should have been an order in the probate court for its payment;[41] and if the purpose of the bill is merely to establish the validity of the bequest and not to obtain possession of a particular thing bequeathed, a demand for the particular legacy is not a condition precedent to the bringing of a suit.[42]

[§ 1850] **c. To Recover Distributive Shares.** Neither an action at law[43] nor a bill in equity[44]

v. Lemon, 7 Ark. 78; Macoleta v. Packard, 14 Cal. 178.

22. Worthley v. Hammond, 13 Bush (Ky.) 510.

23. Worthley v. Hammond, 13 Bush (Ky.) 510.

24. Schnepfe v. Schnepfe, 124 Md. 330, 92 A 891, AnnCas1916D 988; Connecticut Mut. L. Ins. Co. v. Schurmeier, 117 Minn. 473, 136 NW 1, AnnCas1913D 462.

[a] **Where the decree of a federal court establishes a claim** against the executors of a decedent, and directs its payment by such executors, who are defendants in the suit, a formal adjudication of such claims by the probate court is not essential to the maintenance of an action to enforce payment of such claim. Connecticut Mut. L. Ins. Co. v. Schurmeier, 117 Minn. 473, 136 NW 1, AnnCas1913D 462.

25. Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089 (such services are expenses of administration).

26. Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Cal.—Lichtenberg v. McGlynn, 105 Cal. 45, 38 P 541; Eustace v. Jahns, 38 Cal. 3; Wills v. Booth, 6 Cal. A. 197, 91 P 759.

La.—Yarborough's Succ., 16 La. Ann. 258.

Mont.—Brown v. Daly, 33 Mont. 523, 84 P 883.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390; In re Smith, 13 N. D. 513, 101 NW 890.

Oh.—Erie County v. Walker, 10 Oh. Dec. (Reprint) 558, 22 CincLBul 106.

S. D.—Murray v. Johnson, 28 S. D. 571, 134 NW 206.

Tex.—Cummings v. Butler, Dall. 531; Butler v. Fechner, (Civ. A.) 200 SW 1126; Ralston v. Stainbrook, (Civ. A.) 187 SW 413; Whitmire v. Powell, (Civ. A.) 117 SW 433.

27. Erie County v. Walker, 10 Oh. Dec. (Reprint) 558, 22 CincLBul 106.

[a] **The neglect of defendant to make answer to a demand upon her** as administratrix to pay a sum due to certain persons as their share of the income of an estate owned jointly by them and decedent is such a demand and refusal to account as to warrant the bringing of an action on the claim. Cutler v. Currier, 54 Me. 81.

28. Ellsworth v. Thayer, 4 Pick. (Mass.) 122 (holding that the commissioners' report is the proper evidence of the rejection of the claim).

29. Erie County v. Baltz, 125 App. Div. 144, 109 NYS 304.

30. Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. ed. 589; Sheperd v. Nabors, 6 Ala. 631; Rex v. Netherseal, 4 T. R. 258, 100 Reprint 1006.

31. Nelson v. Cornwell, 11 Gratt. (52 Va.) 724.

32. Farwell v. Jacobs, 4 Mass. 634; York v. McCall, 160 N. C. 276, 76 SE 84.

33. Magee v. Gregg, 19 Miss. 70.

34. Miles v. Boyden, 3 Pick. (Mass.) 213; Prescott v. Parker, 14 Mass. 429; Tappan v. Tappan, 30 N. H. 50; Payne v. Smith, 12 N. H. 34; Pickering v. Pickering, 6 N. H. 120.

[a] **The reason** is that it is not the executor's duty to seek the legatee but it is sufficient if he pays when the legatee comes and demands payment. Miles v. Boyden, 3 Pick. (Mass.) 213; Tappan v. Tappan, 30 N. H. 50.

[b] **The fact that the legacies are made payable at a fixed time** does not obviate the necessity of making a demand. Miles v. Boyden, 3 Pick. (Mass.) 213.

[c] **Where a demand is made by an attorney,** the representative has the right at the time to require reasonable evidence of the authority of the individual to make it; but if no exception is taken at the time then a subsequent commencement of a suit by the party in whose behalf the demand was made claiming under such demand is a ratification of the demand and is prima facie evidence that it was made by his authority. Payne v. Smith, 12 N. H. 34.

[d] **Limitation of rule.**—If an express promise is made on a sufficient consideration to pay a legacy, it is not necessary to give a right of action that a demand should have been subsequently made for payment. Gause v. Hughes, 9 Port. (Ala.) 552.

[e] **Under special statutory provisions.**—Under a statute which provides that an executor shall after the expiration of a year from the grant of letters testamentary pay general legacies, no demand is necessary to make complete the right in the legatee to proceed by petition in the surrogate's court to compel payment of the legacy. Matter of Underhill, 9 NYS 455, 1 Conn. Surr. 541; House v. Agate, 3 Redf. Surr. (N. Y.) 307.

35. Miles v. Boyden, 3 Pick. (Mass.) 213; Butler v. Fechner, (Tex. Civ. A.) 200 SW 1126.

36. Miles v. Boyden, 3 Pick. (Mass.) 213.

[a] **What amounts to waiver.**—While a father as natural guardian is not entitled to demand or receive payment of a legacy to his child, yet if a demand by him is resisted solely on the ground that the child had no claim to the legacy, the executor thereby waives the necessity of the demand, and the action by the legatee by his father as prochein ami will be sustained. Miles v. Boyden, 3 Pick. (Mass.) 213.

37. Magee v. Gregg, 19 Miss. 70.

38. Wall v. Bulger, 46 Hun (N. Y.) 346.

39. Frey v. Demarest, 16 N. J. Eq. 236.

40. Taliaferro v. Thornton, 6 Call (10 Va.) 21.

41. Mahar v. O'Hara, 9 Ill. 424.

42. Haines v. Carpenter, 10 F. Cas. No. 5,905, 1 Woods 262 [aff 91 U. S. 254, 23 L. ed. 345].

43. Cathaway v. Bowles, 136 Mass. 54.

44. Cummings v. Cummings, 143 Mass. 340, 9 NE 730.

can under any circumstances be maintained for the recovery of a distributive share of decedent's estate, except after a decree of distribution has been rendered.[45] That a demand and a refusal to pay is a condition precedent to the right of a distributee to maintain an action at law for his distributive share as settled by the decree of distribution has been both asserted[46] and denied.[47]

[§ 1851] **d. To Have Deed Declared a Mortgage and Redeem.** A bill against one as administratrix to have a deed absolute in form declared a mortgage, and to redeem therefrom, may be maintained, without a prior trial in the probate court of the issue whether the deed belonged to defendant individually as claimed by her, or as administratrix, as asserted by plaintiff, such issue being triable in such suit, the bill being amended to make the administratrix a defendant in her individual capacity, although plaintiff and defendant are the only persons, except creditors, interested in the estate, and one of the things conveyed was personal property coming to plaintiff as one of the two persons interested in the estate.[48]

[§ 1852] **e. To Recover Money Paid on Unfulfilled Contract of Sale.** Where a purchaser has demanded and his vendor has refused to convey land according to contract, and the vendor subsequently died, it is not necessary for the purchaser to demand a conveyance from the vendor's executor before suing the executor for money paid on the contract.[49]

[§ 1853] **f. To Recover from Estate of Husband for Debts of Wife.** A suit at law cannot be maintained against the executor of a deceased husband to enforce payment of his wife's just debts, by virtue of a provision of the husband's will creating an estate in remainder in his daughter after the satisfaction of the just debts of his wife; but such executor may require the just debts of the wife to be first established by a suit against her executor.[50]

[§ 1854] **g. To Recover Trust Funds Converted by Decedent.** Where a guardian converted his wards' funds and did not account therefor during his lifetime, he having lived for a long period after his wards reached majority, the wards were not required to sue his executors for an accounting before suing them to recover the funds converted.[51]

[§ 1855] **E. Defenses—1. Actions by Personal Representatives—a. In General.** In an action by an administrator to recover a debt due the estate, it is no defense that the coadministrator directed defendant not to pay it to plaintiff,[52] nor is it any defense that the debtor has made payment to a foreign administrator.[53] A recovery by heirs is a good defense to a suit by an administrator for their benefit where there are no debts due or owing by decedent.[54] In an action to set aside decedent's conveyances in fraud of creditors, it is no defense that the creditors' claims have been assigned to the administrator who brings the action,[55] nor, where an administrator de bonis non sues to set aside a fraudulent conveyance by decedent in order to make good a deficiency of assets, is it any defense that there would have been no deficiency if the executor had accounted for personalty coming into his possession, or if his bondsman had been sued for his failure to do so.[56] In an action for the recovery of property belonging to the estate, defendant cannot set up as a defense that the estate owes him money.[57] In an action on a note due decedent, it is not a defense that the note was deposited with a trust company by order of court and was produced therefrom only for the purpose of the action.[58] The fact that an administrator as an attorney at law has received from defendant a note for collection, the proceeds of which are to be applied to the payment of a debt due the intestate's estate, is no defense to a bill filed by the administrator to enforce a vendor's lien reserved as security for such debt.[59] When sued on a note payable to decedent, the surety of the maker, who was insolvent, may insist on the application of a distributive share of the payee's estate, coming to the maker in discharge of the note.[60] An administrator is not estopped from bringing suit for an accounting because of delay occasioned by misapprehension of the validity of the contract between decedent and defendant, where such delay was not prejudicial to defendant.[61] Where an administrator of a tenant sues for an irregularity committed by the landlord in carrying out a lawful distress levied after the tenant's death, the mere insolvency of the tenant's estate is immaterial where there has been no decree of insolvency.[62] Where, after the insured in a life policy had been induced to assign it to a woman through her fraud, participated in by her husband, she died, and insured sued to set aside the transfer, but he died, the husband being his executor and sole legatee, it was held, in the action continued by the executor, that plaintiff was not precluded from maintaining the action because of his participation in the fraud, in the absence of a showing by defendant that there were no debts, so as to render plaintiff the only one benefiting by a recovery by him.[63] Where a corporation's charter provided that stock held by a member who died

45. Northwestern Inv. Co. v. Palmer, 113 Me. 395, 94 A 481; Cathaway v. Bowles, 136 Mass. 54; Elam v. Bond, 169 Mo. A. 584, 154 SW 880; Bishop v. Locke, 92 Wash. 90, 158 P 997.

[a] **The obligation to a distributee assumed by the administrator** is to pay to such persons as the court may direct any balance remaining in his hands upon the settlement of his accounts. This contemplates that an administrator is entitled to be protected by a decree of distribution, passed by the probate court, before he can be called upon to divide the balance remaining in his hands among those claiming it as distributees under the statutes. Cathaway v. Bowles, 136 Mass. 54.

46. State v. Culhane, 78 Conn. 622, 63 A 636; Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769 (under statute).

47. Melone v. Davis, 67 Cal. 279, 7 P 703; Henry v. State, 9 Mo. 778.

[a] **Commencement of action a sufficient demand.**—Melone v. Davis, 67 Cal. 279, 7 P 703.

48. Clark v. Seagraves, 186 Mass. 430, 71 NE 813.

49. Kean v. Landrum, 72 S. C. 556, 52 SE 421.

50. Deaton v. Dorsey, 78 N. J. L. 229, 73 A 239.

51. Miller v. Ash, 156 Cal. 544, 105 P 600.

52. Strever v. Feltman, 1 Thomps. & C. (N. Y.) 277 (because the coadministrator was acting in violation of his duty).

53. Crohn v. Clay County State Bank, 137 Mo. A. 712, 118 SW 498.

54. Hardaway v. Drummond, 27 Ga. 221, 73 AmD 730.

55. Howd v. Brackenridge, 97 Mich. 65, 56 NW 221 (while it is ordinarily true that a distinct right of action for fraud is not assignable, yet if the right to enforce a claim which is itself assignable depends on showing fraud incidentally the rule has no application).

56. Lynch v. Murray, 86 Vt. 1, 83 A 746.

57. Roumfort v. McAlarney, 82 Pa. 193.

58. Cornwall v. McElrath, 4 Cal. Unrep. Cas. 979, 39 P 617.

59. Mulloy v. Putnam, 1 Tenn. Ch. 473.

60. Wright v. Austin, 56 Barb. (N. Y.) 13.

61. Stennett v. Red Oak Inv. Co., 112 Iowa 273, 83 NW 1069.

62. Brown v. Howell, 68 N. J. L. 292, 53 A 459 (if insolvency without proceedings for a decree thereof would not be sufficient to prevent the collection of a debt it would a fortiori be insufficient to require the return of a debt that had been collected).

63. Huyler v. Dolson, 101 App. Div. 83, 91 NYS 794.

should vest in the corporation at a valuation fixed by its by-laws, it was no defense, in an action by his personal representative for this value, that the deceased member had rendered himself liable to a forfeiture of certain dividends.[64] The existence of a will which has not been offered for probate is no defense to an action by an administrator for an accounting as to property in the hands of defendant, who stood in a fiduciary relation to decedent.[65] Even if the administrator is entitled to sue for property delivered by decedent in his lifetime to a person in trust to pay to certain designated beneficiaries, it is a sufficient defense, where no rights of creditors or third persons are involved, that defendant had made payment and accounted to the persons who would ultimately be entitled to receive fund or the property.[66] If one who assigns property to another for sale subsequently sues for the proceeds as administrator of one deceased, defendant cannot set up that he may be required to pay again to plaintiff personally, since plaintiff is bound by his judicial admissions as to the ownership of the proceeds.[67] Defendant in an action by an administrator de bonis non may take advantage of fraud in the contract made by the original administrator,[68] and an equity growing out of a debt sought to be enforced by a special administrator may be set up against him.[69] The failure of the surety on an administrator's bond to enforce an agreement of indemnity given by him does not estop a second administrator from proceeding against a bank which participated by negligence in the first administrator's embezzlement of funds of the estate.[70]

[§ 1856] **b. Want of Representative Capacity.**[71] It may be pleaded as a defense in an action by an executor that his letters testamentary have been revoked,[72] but where letters of administration granted in another state where decedent was domiciled are revoked, such revocation does not affect ancillary letters which have been in the meantime taken out in the jurisdiction where the action is brought, nor is an action previously brought by such administrator on behalf of the estate abated by such revocation.[73] A stranger to the estate who is sued by an administrator cannot object to plaintiff's capacity to sue on the ground of failure of the court to give preference in appointment as administrator to the wife or next of kin of the decedent, as required by statute.[74] Where a suit to foreclose a mortgage was commenced by persons claiming to be administrators, the objection that they are not such cannot be sustained if they have obtained a grant of administration before the objection is passed on;[75] but it has been held a good defense to a bill in equity by an administrator that he had not taken out letters of administration in the state before filing the bill.[76] Want of administrative capacity cannot be pleaded in an action on a contract made with plaintiff as administrator since he may sue thereon in his individual capacity,[77] and one who had received the benefit of a contract made by him with an executor or administrator cannot set up that the contract is of such a character that the representative had no authority to make it.[78] The objection that a plaintiff has no right to sue in a representative capacity may be waived by defendant's admissions.[79] Lack of jurisdiction of the probate court to make an appointment as administrator may be set up as a defense in an action by such administrator.[80]

[§ 1857] **2. Actions against Personal Representative—a. Duty to Interpose.**[81] It is the duty of a personal representative to defend a suit against the estate, even though it is brought by a distributee,[82] and it has been said that, where one attempts to establish a claim as a creditor, the representative must interpose every available defense.[83]

[§ 1858] **b. Want of Representative Capacity.** One who is not a personal representatitve may set up this fact as a defense to an action against him as such,[84] unless he has done some act which will estop him to deny his representative capacity.[85] He may also plead, in bar of the further maintenance of an action against him in his representative capacity, a revocation of his letters[86] or that he has been removed from office.[87] It is not, however, a good plea in bar that the representative has resigned his trust, unless it is further alleged either that he has administered the assets that came into his hands, or that he delivered them to his successor;[88] and even a discharge on final set-

64. Pensacola Pilots Assoc. v. Stearns, 67 Fla. 279, 64 S 942.

65. Whitley v. Speed, 171 App. Div. 102, 156 NYS 973.

66. Baadte v. Walgenbach, (Iowa) 171 NW 146.

67. Whetstone v. Rawlins, 26 La. Ann. 474.

68. Rice v. Richardson, 3 Ala 428.

69. Nashville, etc., Turnpike Co. v. Harris, 8 Humphr. (Tenn.) 158 (a special administrator for the collection of a debt does not represent the intestate so as to be liable for an action for nonperformance of the intestate's contracts).

70. Allen v. Puritan Trust Co., 211 Mass. 409, 97 NE 916, LRA1915C 518.

71. Appointment, qualification, and tenure generally see supra §§ 55–316.

72. Leach v. Lewis, 38 Ind. 160.

73. Huntington v. Moore, 1 N. M. 489.

74. Chesapeake, etc., R. Co. v. Banks, 142 Ky. 746, 135 SW 285.

75. Martin v. Fowler, 51 S. C. 164, 38 SE 312 (a grant of letters relates back to decedent's death and legalizes previous acts of an administrator).

76. Carter v. Treadwell, 5 F. Cas. No. 2,480, 3 Story 25.

77. Claiborne v. Yoeman, 15 Tex. 44.

78. Shawhan v. Long, 26 Iowa 488, 96 AmD 164; Scott v. Meadow, 16 Lea (Tenn.) 290; Brossard v. Williams, 114 Wis. 89, 89 NW 832.

[a] **Unauthorized purchase of claim.**—Where a defendant in an action by an administrator on a claim sold and assigned to the latter for a valuable consideration has no interest in the estate, he cannot set up as a defense that the administrator had no right to purchase the claim. The general rule that the administrator will not be permitted to speculate with the funds of the estate has no application. Brossard v. Williams, 114 Wis. 89, 89 NW 832.

79. Martin v. Fowler, 51 S. C. 164, 28 SE 312; Reynolds v. Torrance, 4 S. C. L. 59; Barton v. Davidson, (Tex. Civ. A.) 45 SW 400.

80. Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 NYS 962; Baldwin v. Rice, 44 Misc. 64, 89 NYS 738.

81. Defense of limitations: General statutes see supra §§ 907–911. Special statutes see infra §§ 1968, 1969.

82. Lake v. Pattie, 116 Va. 130, 81 SE 78.

83. In re Van Voorhees, 55 Misc. 185, 106 NYS 354, 6 Mills Surr. 193.

84. Wise v. Brocker, 1 Colo. 550; Borden v. Thorpe, 35 N. C. 298.

85. Du Val v. Marshall, 30 Ark. 230 (as for instance executing an instrument as administrator).

86. Morrison v. Cones, 7 Blackf. (Ind.) 593.

87. Jewett v. Jewett, 5 Mass. 275 (it is not necessary for him to plead that he has fully administered since he cannot retain any assets for payment of the judgment). See also Parkhill v. Union Bank, 1 Fla. 110 (where an administratrix was removed pending a suit against her in that capacity, on being reappointed with others as administrators de bonis non a plea to the action that since the last continuance she had been removed by public authority, and that the assets had been taken out of her hands as administratrix, being in the nature of a plea of ne unques administratrix was properly pleaded in bar, although it might have been pleaded in abatement).

88. Gayle v. Elliott, 10 Ala. 264 (it is not sufficient to show that the property remained during the interval between his resignation and the appointment of his successor where the testator required that it should or that it has been clandestinely removed by some other person unless

tlement cannot be pleaded in bar to an action for a debt not barred by the statute of limitations at the time of final settlement.[89]

[§ 1859] **c. Disability of Decedent.** The existence of a disability, such as the infancy[90] or coverture[91] of decedent is a good defense by the personal representative in an action against him on contracts made by his testator or intestate. This is true, although the representative may have sold, as part of the estate, the property so acquired by decedent,[92] and the rule applies where plaintiff elects to waive a conversion by decedent and sue in contract.[93]

[§ 1860] **d. Fraud Participated in by Decedent.** A personal representative cannot set up as a defense to a claim against the estate that the claim arises out of a gift[94] or conveyance[95] by decedent which is in fraud of creditors, for, although such gift or conveyance may be void as to creditors, it is nevertheless good as between the parties, and the personal representative cannot set up a defense which would not have been available to decedent;[96] and one cannot complain of a wrong done by himself, or of another's wrong in which he participated.[97] So also an administrator sued on a judgment against decedent cannot set up as a defense that the judgment was obtained by collusion between plaintiff and decedent.[98]

[§ 1861] **e. Insolvency of Estate.** While it is a good plea puis darrein continuance that an estate has been represented insolvent pending an action against it,[99] a plea that the estate is insolvent is not good in bar, since the estate may be able to pay a portion of the debts.[1]

[§ 1862] **f. Plene Administravit.**[2] Plene administravit and want of assets is a good defense in an action on a claim brought several years after settlement of the administration account after having had previous notice of the claim.[3] The administratrix of a deceased guardian has been held not liable for the guardian's alleged default, where suit to enforce such liability was not commenced until five years after she had administered the guardian's estate according to the local law, had accounted for all property which she had received, and had been discharged from her trust, the correctness of her accounts not being assailed.[4] A plea by an administrator that he had fully administered, except as to goods and chattels to a certain amount not sufficient to satisfy a judgment recovered against him as such, does not bar a recovery.[5] That the estate has been fully settled and the lands apportioned is no defense to an action against the administrator by decedent's covenantee for a breach of a covenant of warranty against encumbrances.[6]

[§ 1863] **g. Defenses in Individual and Representative Capacity.** An administrator cannot set up an estoppel in his favor in his individual capacity against a claim against the estate,[7] nor is it a defense to a suit against him in his representative capacity that there is an action pending on the same claim against him in his individual capacity.[8] Where, however, one is sued both individually and as executor, he may set up a defense in either capacity.[9]

[§ 1864] **h. Actions for Legacies or Distributive Shares.** Where the assets are sufficient, it is no defense to a suit for a legacy that the estate has been partitioned among the heirs or other legatees,[10] or that debts have not been paid;[11] but lack of sufficient assets may be a defense pro tanto to an action for a legacy.[12] Plene administravit is not a good defense if several judgments are pleaded by the administrator and plaintiff falsifies any of them,[13] or where a legislative enactment was necessary to enable the legatee to receive a bequest and the legislature was not in session between the time of decedent's death and the time of final settlement.[14] It is not a defense that creditors enjoined an agent to receive legacies from a foreign executor under an appointment by the legatees from paying so much of the money as would be sufficient to satisfy their claims.[15] It is no defense to an action for a distributive share, that subsequent to a settlement of his account in the probate court charging himself with assets, a portion of the assets were subsequently recovered from the administrator in an adverse suit of which the distributees had notice.[16] The personal representative cannot, after final accounting, set up as a defense to an action for a distributive share that a mistake had occurred in the course of the settlement,[17] nor is a judgment for

he shows that he took such care of it as a man of prudence would have taken of his own estate, or that his successor went into possession of the testator's lands under the provisions of the will, and that they were of value sufficient to pay plaintiff's demand).

89. Pollock v. Buie, 43 Miss. 140.

90. Hussey v. Jewett, 9 Mass. 100; Counts v. Bates, 16 S. C. L. 464; Baker v. Huddleston, 3 Baxt. (Tenn.) 1.

91. Baker v. Garris, 108 N. C. 218, 13 SE 2.

92. Counts v. Bates, 16 S. C. L. 464.

93. Baker v. Huddleston, 3 Baxt. (Tenn.) 1.

94. Chappell v. Brown, 17 S. C. L. 528.

95. Roden v. Murphy, 10 Ala. 804; Drinkwater v. Drinkwater, 4 Mass. 354; Williams v. Williams, 34 Pa. 312; Tomlinson v. Tomlinson, 44 S. C. L. 404.

96. See cases supra notes 95, 96.

[a] **All the powers of executors and administrators are derivative,** and if the donor could not dispute his own voluntarily gift, on the ground that it operated a fraud on his creditors, his executor or administrator could not. Chappel v. Brown, 17 S. C. L. 528.

97. Dow v. Blake, 148 Ill. 76, 35 NE 761, 39 AmSR 156.

98. Dow v. Blake, 148 Ill. 76, 35 NE 761, 39 AmSR 156.

99. Fennell v. Patrick, 3 Stew. & P. (Ala.) 244; Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

Effect of declaration of insolvency on pending actions see supra § 1756.

1. Peyatte v. English, 2 F. Cas. No. 11,054a, Hempst. 24; Lavergne v. Evans Bros. Constr. Co., 166 Ala. 289, 52 S 318.

2. In action for legacy or distributive share see infra § 1864.

3. U. S. v. Primrose, 27 F. Cas. No. 16,091, Gilp. 58; Soules v. Soules, 35 U. C. Q. B. 334.

4. Newbery v. Wilkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111].

5. Parker v. Gainer, 17 Wend. (N. Y.) 559.

6. Taylor v. Priest, 21 Mo. A. 685.

7. McCoul v. Lekamp, 2 Wheat. (U. S.) 111, 4 L. ed. 197; Lee v. Carter, 52 Ind. 342; Newell v. Marcy, 17 Mass. 341; Com. v. Phillipsburg, 10 Mass. 78; Henderson v. McClure, 7 S. C. Eq. 466.

8. Hall v. Richardson, 22 Hun 444 [aff 89 N. Y. 636 mem].

9. Newcomb v. Burbank, 146 Fed. 400.

10. Stephenson v. McFaddin, 42 Tex. 322.

11. Kent v. Dunham, 106 Mass. 586; O'Donnell v. McCann, 77 N. J. Eq. 188, 75 A 999; Del Rosario v. Del Rosario, 2 Philippine 321.

12. J. Elwood Lee Co. v. Grace Hospital, 206 Fed. 994.

13. Bell v. Davidson, 13 N. C. 397.

14. England v. Prince George's Parish, 53 Md. 466.

15. Scotts v. Lindsay, 2 Dana (Ky.) 241.

16. Clark v. Callaghan, 2 Watts (Pa.) 259 (the administrator's remedy is by petition to the probate court for a review). See also Thompson v. McGaw, 2 Watts (Pa.) 161 (in an action against an executor for a legacy defendant cannot show that the balance of an administration account in his hands, settled by the orphans' court, was composed of bonds not due at the time of the settlement, and which afterward could not be collected because of the insolvency of the obligors).

17. Singleton v. Garrett, 23 Miss. 195 (if this could be done there would be no use in a final decree). But compare Cherry v. Belcher, 5 Stew. & P. (Ala.) 133 (where administrators are sued in chancery by a distributee to compel the payment of a distributive share, they are not precluded by the fact that the orphans' court had previously by

a distributive share, void for want of jurisdiction, a defense to such action.[18] In an action for a distributive share it may be set up as a defense that part of the funds had been lost without the administrator's negligence;[19] that a part of the estate is claimed by one of defendants as individual property, and that another part is subject to a trust,[20] or that the claimant's share has been paid to his regularly appointed guardian.[21] Where an assignment of one's interest in the estate is executed for a valid consideration, before the estate is settled, it constitutes a defense to an action by the assignor to recover for his own use the share adjudged by the court to be due him as distributee.[22]

[§ 1865] **i. Miscellaneous.** An administrator may maintain a plea in abatement seasonably pleaded as well as a plea in bar.[23] To an action on a note made by decedent defendant may plead a usurious consideration,[24] or non est factum.[25] A plea which sets up ownership in the administrator as such is a good defense to an action against him for conversion of property.[26] A void judgment in favor of a creditor against a personal representative is no defense to a subsequent suit by the creditor to recover the amount of his claim against the estate.[27] If a reason for rejecting the claim is indorsed thereon, the representative cannot plead in abatement of a suit thereon any other reason which goes merely to the sufficiency of the presentation for allowance.[28] The personal representative cannot allege his own illegal acts in bar of the action of creditors against him.[29] A receipt given decedent may be set up in defense of an award on the claim for which the receipt was given.[30] Where decedent representing himself as agent of another sold his property and converted the proceeds, the personal representative is estopped to set up title in a third person.[31] The settlement of an executor's account in the probate court is no bar, it seems, to a suit for malfeasance and waste.[32] Where a mortgagor defrauded of the surplus on foreclosure agreed to pay her attorney a sum not to exceed a specified per cent of any amount that he could recover, and on her death he continued the action for recovery as her representative, such agreement could not affect the equity of his cause, as the orphans' court had power to limit his compensation if injustice should appear.[33] In an action by a son of decedent against his executor for breach of a contract of the father to convey land to him, the executor may plead the son's election to take under the will instead of under the contract.[34] If an administrator is sued by a stranger for the recovery of land, proof of title in decedent is a good defense, although the administration is void.[35] In an action against an administrator de bonis non on a debt properly incurred by the former administrator in management of the estate, it is not material that the former administrator failed to include such claim in the final account rendered to his successor.[36] In an action against an administrator, it appeared that defendant's intestate and plaintiff agreed that the profits and accounts then outstanding and to accrue until a certain date on the business of an incorporated company, the capital stock of which was principally owned by them, should belong to them in equal parts; that the profits consisted largely of accounts due from various parties; that after defendant's appointment as administrator some of the accounts were paid to him, and plaintiff collected of such accounts a certain specified sum, and laid claim to a certain sum, which according to the terms of the contract and the respective sums collected, it appeared defendant was owing plaintiff; it was held that whether the accounts collected were partnership accounts would be immaterial; for, if the accounts collected were partnership funds, defendant had no right to them either in his representative or individual capacity, and, if there was no partnership, by collecting in either capacity more than the share belonging to intestate under the contract, defendant received money which should have been paid to plaintiff.[37]

[§ 1866] **F. Set-Off or Counterclaim—1. Actions by Personal Representatives—a. In General.** As a general rule, a person who is sued by an executor or administrator may assert a set-off or counterclaim,[38] and where an action by an executor

settlement ascertained the amount to which such distributee was entitled from showing mistakes, payments by them subsequent to the settlement, or any other matter which in equity may be relied on).

18. Basom v. Taylor, 39 Mich. 682.

19. Westervelt v. Ackerson, 35 N. J. Eq. 43.

20. Westervelt v. Ackerson, 35 N. J. Eq. 43.

21. Young v. Suggs, Sm. & M. Ch. (Miss.) 393.

22. Drew v. Provost, 100 Me. 128, 60 A 794.

23. Guild v. Richardson, 6 Pick. (Mass.) 364 (such a plea may be decisive of the action, but if it is not it may involve a question of costs on which the administrator may be appointed to relieve the estate).

24. Fox v. Whitney, 16 Mass. 118.

25. Stanton v. Burge, 34 Ga. 435.

26. Smith v. James, 163 Ill. A. 501.

27. Gorman v. Swaggerty, 4 Sneed (Tenn.) 560.

28. Hansell v. Gregg, 7 Tex. 223.

29. Collins v. Hollier, 13 La. Ann. 585; North v. Priest, 81 Mo. 561.

[a] **Thus,** in an action by a creditor to compel the administrator to pay his claim which had been duly presented and allowed, the administrator's answer that he had paid over the funds to the distributees and for that reason had no funds in hand with which to pay the claim presents no defense. North v. Priest, 81 Mo. 561.

30. Parsons v. Hall, 3 Me. 60.

31. McNair v. McKay, 33 N. C. 602.

32. Young v. Chaney, 3 La. 462.

33. Johnston v. Reilly, 68 N. J. Eq. 130, 59 A 1044.

34. Noyes v. Noyes, (Mass.) 123 NE 395.

35. Victory v. Stroud, 15 Tex. 373.

36. Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 P 593, LRA 1917E 966.

37. Bales v. Cannon, 42 Colo. 275, 94 P 21.

38. Del.—Jester v. Knotts, 57 A 1094.

Ill.—Claussen v. Claussen, 279 Ill. 99, 116 NE 693; Pollock v. Warner, 180 Ill. A. 718.

Me.—Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304.

N. Y.—Carpenter v. Newland, 92 Misc. 596, 156 NYS 438.

Wash.—Mendelhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas179.

Wis.—In re Gillen, 169 Wis. 58, 171 NW 758.

Eng.—Blakesley v. Smallwood, 8 Q. B. 538, 55 ECL 538, 115 Reprint 978.

[a] **Illustrations.**—(1) Where defendant was indebted to decedent on a note secured by a mortgage, and during decedent's lifetime defendant, while acting as her agent, performed services and advanced money for her benefit, for which he was entitled to reimbursement, and there was evidence that both parties contemplated that defendant's claim for services and advances should be credited on his indebtedness, defendant was entitled to set off such claim against the mortgage debt in a suit by decedent's administratrix to foreclose the mortgage. Printy v. Cahill, 235 Ill. 534, 85 NE 753 [rev 138 Ill. A. 600]. (2) Where, as partial consideration for a note, the payee agreed to perform personal services and died before the services had been rendered, in an action by his estate on the note, the maker might counterclaim for the difference between the consideration for the services and what it would cost to procure the services of another equally competent. Mendelhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179. (3) Where an executor as such by agreement with a stockbroker turned over to the latter funds of the estate for the purpose of dealing in stocks, which, on equitable principles, is an unlawful investment, the parties are not joint tort-feasors, in the sense that they have violated the law, there being no question of bad faith involved and

on a note is dismissed as to one of the defendants, credits claimed by the other defendant for labor and expenses are the proper subject of set-off.[39] But where, in an action against a surviving husband by the administrator of the wife to recover on a note executed by the husband to the wife, the court could not ascertain the amount of the surplus personal estate left by the wife, it could not allow the husband a credit in the judgment in favor of the administrator of one half of the amount of the note, or allow a set-off for the value of personal property belonging to the estate, and wrongfully converted by the brothers and sisters of the deceased wife.[40]

[§ 1867] **b. Mutuality of Demands.** In order to warrant a set-off or counterclaim in an action by an executor or administrator, the debts must be mutual, and the principle of mutuality requires not only that the debts should be due to and from the same person, but also to and from the same person in the same capacity.[41] It has been considered, however, that the rule of mutuality is not always controlling, but may be departed from where it appears that permitting the set-off cannot embarrass the administration or prejudice the rights of other persons interested in the assets.[42] Where an administrator suing as such is insolvent, and a portion of the recovery will belong to him in his individual capacity, defendant may claim as in the nature of a set-off a demand in his favor against plaintiff in his individual capacity.[43]

[§ 1868] **c. Particular Demands—(1) Debts Due in Decedent's Lifetime against Causes of Action Accruing after His Death.** In an action on a cause of action accruing after decedent's death defendant cannot set off a debt due from the intestate in his lifetime.[44] The rule is the same whether the action is brought by the personal representative

no positive law violated, and a cash payment made by the stockbroker to the executor by reason of the transaction should be allowed to the stockbroker as a credit in a suit to recover back the funds so invested. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [aff 201 N. Y. 518 mem, 94 NE 1099 mem]. (4) In an action by an executor on a note, a proposition of law asking the court to hold that defendant is entitled to credit for improvements made upon the farm as tenant of testator and for services performed by defendant at the request of testator is improperly refused. Pollock v. Warner, 180 Ill. A. 718.

39. Pollock v. Warner, 180 Ill. A. 718.

40. Bennett v. Bennett, 134 Ky. 444, 120 SW 372.

41. U. S.—McKown v. Manhattan L. Ins. Co., 91 Fed. 352.

Ala.—Mauldin v. Armistead, 14 Ala. 702; Rapier v. Holland, Minor 176.

Ark.—Bizzell v. Stone, 12 Ark. 378.

Conn.—Harris v. Taylor, 53 Conn. 500, 2 A 749; Nichols v. Dayton, 34 Conn. 65.

Ind.—Dayhuff v. Dayhuff, 27 Ind. 158.

Ky.—Williams v. Harth, 156 Ky. 702, 161 SW 1102; Cummins v. Williams, 5 J. J. Marsh. 384; Bibb v. Saunders, 2 Bibb 87; Hancock v. Hancock, 69 SW 757, 24 KyL 664; Lee v. Russell, 38 SW 874, 18 KyL 951.

La.—Guibert v. Herpin, 3 Mart. N. S. 395.

Me.—Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304; Adams v. Ware, 33 Me. 228.

N. H.—Woodman v. Barker, 2 N. H. 479.

N. Y.—Matter of Hill, 17 AbbNCas 273; Dale v. Cooke, 4 Johns. Ch. 11; Dudley v. Griswold, 2 Bradf. Surr. 24.

Pa.—Tenant v. Tenant, 110 Pa. 478, 1 A 532; Stuart v. Com., 8 Watts 74.

S. C.—Porter v. Cheesborough, 18 S. C. Eq. 275.

Tex.—Gresham v. Harcourt, 93 Tex. 149, 53 SW 1010.

Va.—James v. Johnston, 22 Gratt. (63 Va.) 461.

Ont.—Moffatt v. Foley, 26 U. C. Q. B. 509.

Newfoundl.—Newman v. Simms, 4 Newfoundl. 422.

42. Peo. v. California Safe Deposit, etc., Co., 168 Cal. 241, 247, 141 P 1181, 1184, LRA1915A 299 ("We are cited by respondent to a number of cases in support of their position that mutuality must exist between the demands in order to warrant a setoff between them, and particularly to cases where in actions by administrators or executors to recover money belonging to the estate on a liability created after the death of the testator or intestate it is held that claims against the estate, accruing prior to the death of the decedent, could not be asserted therein as setoffs. There can be no question but that the general rule as to the necessity of mutuality is as asserted by respondent, and it may be conceded that in a strict sense there is no mutuality between the claims here under consideration; they are not due to and from the same parties and in the same capacity. The general rule, too, is well settled, as claimed, that in actions by executors or administrators upon a cause of action arising to them after the death of the testator or intestate, a defendant cannot setoff a demand against the decedent existing at the time of his death. But this general rule is subject to exceptions which are applied in suits brought by executors or administrators such as above referred to, as well as in other actions, though we are now only concerned with ascertaining whether as to the claims here sought to be set off against each other an exception should apply. It will be found that when cases of the character cited are examined, but where in such actions by executors or administrators the right of setoff has been denied to the defendants, such denial is not so much based on a want of mutuality (and that ground in many of them is not assigned as the reason), but is put upon the ground that the allowance of such a setoff might disturb the just and equal distribution of the assets of the estate among its creditors in any case where it was uncertain from the unsettled condition of the estate whether the assets were sufficient to pay all the debts of the decedent, or in the case of an estate which was actually insolvent the allowance of such setoff would not only prevent a pro rata distribution among its creditors, but, on the contrary, would give the creditor claiming the benefit of a setoff an undue preference over other creditors of the estate to the extent of full payment of his claim. . . . When, however, by reason of the special character of an asserted setoff, it appears that in no particular can the rights of any party interested in the assets of the estate be affected by its allowance, or when the estate is solvent and able to pay all claims against it, including the allowed claim of a defendant asserting it as a setoff, the courts in the first instance do not, and in the latter should not, apply the strict rule of mutuality to prevent the allowance of the setoff. It has been held that persons paying funeral expenses of a decedent may set off the amount thereof in an action by the executor or administrator upon a claim owed by them to the decedent in his lifetime. . . . It is also held that, upon proof that all debts of the testator had been paid, an executor who was sole legatee could avail himself of a chose in action belonging to the estate as a counterclaim in an action against him. Blood v. Kane, 130 N. Y. 514, 29 NE 994, 15 LRA 490. Want of mutuality was not permitted in these cases cited to defeat the right of set-off; it being allowed in the first for the reason that other creditors of the estate could not be prejudiced, as the set-off was allowed in the last for the estate, and such set-off was allowed in the last for like reason. We refer to these cases as showing that the rule of mutuality is not always controlling in actions by or against personal representatives of an estate which involves its assets, but that it will be departed from in cases where it appears that permitting the set-off to be interposed cannot in any respect embarrass the administration of the estate or prejudice the rights or interests of any other party interested in its assets").

43. Carr v. Askew, 94 N. C. 194.

44. Ala.—Rapier v. Holland, Minor 176; Tate v. Chandler, 4 Stew. & P. 417.

Ark.—Bishop v. Dillard, 49 Ark. 285, 5 SW 341; Bizzell v. Stone, 12 Ark. 378.

Cal.—Peo. v. California Safe Deposit, etc., Co., 168 Cal. 241, 141 P 1181, LRA1915A 299.

Ga.—Mills v. Lumpkin, 1 Ga. 511, 44 AmD 677.

Ill.—Printy v. Cahill, 235 Ill. 534, 85 NE 753; Harding v. Shepard, 107 Ill. 264; Newhall v. Turney, 14 Ill. 338.

Ind.—Dayhuff v. Dayhuff, 27 Ind. 158.

Iowa.—Toerring v. Lamp, 77 Iowa 488, 42 NW 378.

Ky.—Cummins v. Williams, 5 J. J. Marsh. 384; Crews v. Williams, 2 Bibb 262, 4 AmD 701; Burton v. Chinn, Hard. 252; Hancock v. Hancock, 69 SW 757, 24 KyL 664; Lee v. Russell, 38 SW 874, 18 KyL 951; Dunn v. Carpenter, 10 KyL 494.

La.—Mercer v. Lobit, 10 La. Ann. 47.

Me.—Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304.

Mo.—Woodward v. McGaugh, 8 Mo. 161.

N. H.—Shaw v. Gookin, 7 N. H. 16, Woodman v. Barker, 2 N. H. 479; Colby v. Colby, 2 N. H. 419.

N. Y.—Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Carter v. Holahan, 92 N. Y. 498 [aff 11 Daly 104]; Jordan v. National Shoe, etc., Bank, 74 N. Y. 467, 30 AmR 319; Merritt v. Seaman, 6 N. Y. 168; Foley v. Scharmann, 58 App. Div. 250, 68 NYS 771; Wakeman v. Everett, 41 Hun 278 [aff 110 N. Y. 675 mem, 18 NE 481 mem]; Patterson v. Patter-

in his individual or in his representative character,[45] and it applies with equal force whether the contract sued on was made with the personal representative,[46] or with decedent, if no cause of action arose thereon until after his death.[47]

The reason for the rule is that the allowance of the set-off or counterclaim would necessarily destroy the equal and just distribution of the assets belonging to the estate among creditors in every case where the assets were insufficient to pay all the debts.[48] Again, to allow the administrator to bind the estate by the appropriation of the debts due to the estate, not due from defendant to the intestate in his lifetime, to be applied to the satisfaction of a debt due defendant upon a contract made with the intestate would open the door for avoiding statutes which require that all such claims against the estate must be presented to and allowed by commissioners appointed by the proper court, and for the allowance of claims against the estate which had been barred by the statutes of nonclaim because not presented and allowed as required by law.[49]

[§ 1869] **(2) Claim Accruing after Decedent's Death against Causes of Action Arising in His Lifetime—(a) General Rule.** It is usually considered that demands on which causes of action arise subsequent to decedent's death are not proper subjects of set-off against demands on causes of action arising in decedent's lifetime, because there is no mutuality of indebtedness between the parties,[50] although the contrary view has been asserted.[51]

[§ 1870] **(b) Limitations of and Exceptions to Rule.** Where by statute attorney's fees are part

son, 1 Hun 323 [aff 59 N. Y. 574, 17 AmR 384]; Fry v. Evans, 8 Wend. 530; Root v. Taylor, 20 Johns. 137; Irving v. De Kay, 10 Paige 319; Dale v. Cooke, 4 Johns. Ch. 11.

N. C.—Mauney v. Ingram, 78 N. C. 96.

Oh.—McDonald v. Black, 20 Oh. 185, 55 AmD 448; Downer v. State Sav., etc., Co., 16 Oh. Cir. Ct. N. S. 378.

Tex.—Robb v. Smith, 40 Tex. 89; Atchison v. Smith, 25 Tex. 228.

Wis.—McLaughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273; Armstrong v. Pratt, 2 Wis. 299.

Eng.—Schofield v. Corbett, 11 Q. B. 779, 63 ECL 779, 116 Reprint 666; Mardall v. Thellusson, 6 E. & B. 976, 88 ECL 976, 119 Reprint 1127 [rev 21 L. J. Q. B. 410]; Rees v. Watts, 11 Exch. 410, 156 Reprint 891; Tegetmeyer v. Lumley, Willes 264 note, 125 Reprint 1164; Shipman v. Thompson, Willes 103, 125 Reprint 1078.

"A debtor cannot set off a claim due him from the deceased against the debt which he is liable for to the administrator, growing out of a business transaction with the administrator." Printy v. Cahill, 235 Ill. 534, 536, 85 NE 753 [rev 138 Ill. A. 600].

[a] **Effect of special agreement by representative.**—It is not within the power of an administrator to bind the assets in his hands by an agreement that a debt contracted by his intestate may be set off against one contracted to himself in favor of the estate and an answer setting up such agreement presents no defense available either at law or in equity. Bishop v. Dillard, 49 Ark. 285, 5 SW 341.

[b] **Action for corporate dividends.**—In an action by executors of a solvent testator to recover dividends which became due after testator's death, defendant may set off a debt due to it by the testator when the suit was brought. Steinmeyer v. Ewalt St. Bridge Co., 189 Pa. 145, 42 A 132.

45. Aiken v. Bridgman, 37 Vt. 249.

46. U. S.—McKown v. Manhattan L. Ins. Co., 91 Fed. 352.

Ala.—Rapier v. Holland, Minor 176.

Ind.—Welborn v. Coon, 57 Ind. 270.

Ky.—Burton v. Chinn, Hard. 252; Hancock v. Hancock, 69 SW 757, 24 KyL 664; Dunn v. Carpenter, 10 KyL 494.

N. Y.—Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Dale v. Cooke, 4 Johns. Ch. 11.

Pa.—Stephens v. Cotterell, 99 Pa. 188.

Tex.—Atchison v. Smith, 25 Tex. 228.

Vt.—Aiken v. Bridgman, 37 Vt. 249.

Va.—Brown v. Garland, 1 Wash. 221.

Eng.—Lambarde v. Older, 17 Beav. 542, 51 Reprint 1144.

[a] **In an action for the price of goods belonging to the estate and sold by the administrator** defendant cannot set off a debt due him from decedent in his lifetime. Thompson v. Whitmarsh, 100 N. Y. 35, 2 NE 273; Stephens v. Cottrell, 99 Pa. 188; Steel v. Steel, 12 Pa. 64; Wolfersberger v. Bucher, 10 Serg. & R. (Pa.) 10; Aiken v. Bridgman, 37 Vt. 249; Lambarde v. Older, 17 Beav. 542, 51 Reprint 1144.

[b] **An obligor on a note executed to a married woman during her coverture** cannot in an action by her on the note set off against the same an indebtedness against the estate of her deceased husband of which estate she was administratrix. Hurst v. Hamilton, 44 SW 432, 19 KyL 1753.

47. Nichols v. Dayton, 34 Conn. 65; Patterson v. Patterson, 1 Hun 323 [aff 59 N. Y. 574, 17 AmR 384]; Ketchum v. Miln, Seld. Notes (N. Y.) 152; Hallett v. Hallett, 13 Ch. D. 232.

[a] **In an action by an executrix to foreclose a mortgage** for money which became due after testator's death, defendant cannot offset any debt due from the testator to him, although the offset existed at the time of his death. Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384 [aff 1 Hun 323].

[b] **In an action by an executrix on a life insurance policy,** defendant cannot offset a claim for money due from decedent to him in his lifetime. Hallet v. Hallet, 13 Ch. D. 232.

48. Cal.—Peo. v. California Safe Deposit, etc., Co., 168 Cal. 241, 141 P 1181, LRA1915A 299.

Ill.—Newhall v. Turney, 14 Ill. 338.

Mass.—Aldrich v. Campbell, 4 Gray 284.

Mo.—Woodward v. McGaugh, 8 Mo. 161.

N. Y.—Patterson v. Patterson, 59 N. Y. 574, 17 AmR 384; Fry v. Evans, 8 Wend. 530; Root v. Taylor, 20 Johns. 137.

Pa.—Steel v. Steel, 12 Pa. 64; Smith v. Boyer, 2 Watts 173.

Vt.—Aiken v. Bridgman, 37 Vt. 249.

Wis.—Lawrence v. Vilas, 20 Wis. 381.

Eng.—Wrout v. Dawes, 25 Beav. 369, 53 Reprint 678; Lambarde v. Older, 17 Beav. 542, 51 Reprint 1144; Shipman v. Thompson, Willes 103, 125 Reprint 1078.

49. McLaughlin v. Winner, 63 Wis. 120, 23 NW 402, 53 AmR 273.

50. Ark.—Lawson v. Fischer, 5 Ark. 52.

Del.—Robinson v. Robinson, 4 Harr. 418.

Ga.—Carter v. Tippins, 113 Ga. 636, 38 SE 946.

Ill.—Wisdom v. Becker, 52 Ill. 342; Webb v. Hunt, 190 Ill. A. 597.

Ky.—Lee v. Russell, 38 SW 874, 18 KyL 951.

Me.—Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304 [quot Cyc].

Mo.—White v. Henly, 54 Mo. 592.

Mont.—Dodson v. Nevitt, 5 Mont. 518, 6 P 358.

N. Y.—Jordan v. National Shoe, etc., Bank, 74 N. Y. 467, 30 AmR 319 [aff 12 Hun 512]; Fletcher v. MacGinniss, 168 App. Div. 225, 153 NYS 581.

Oh.—Granger v. Granger, 6 Oh. 35.

Pa.—Poorman v. Goswiler, 2 Watts 69.

Tex.—Guthrie v. Guthrie, 17 Tex. 541; Houston v. Evans, 17 SW 925.

Va.—Ashworth v. Tramwell, 102 Va. 852, 47 SE 1011.

Eng.—Newell v. National Provincial Bank of England, 1 C. P. D. 496.

[a] **Illustrations.** — (1) A note given defendant by decedent which matured after decedent's death cannot be set off in an action for a deposit made by decedent with defendant (Jaeger v. Bowery Bank, 8 Misc. 150, 29 NYS 303), (2) or in an action to recover a balance due from defendant to plaintiff's intestate at the time of his death (Jordan v. National Shoe, etc., Bank, 12 Hun (N. Y.) 512 [aff 74 N. Y. 467, 39 AmR 319]). (3) Services rendered to an executor after testator's death cannot be set off in an action by the executor for money due the estate. Dodson v. Nevitt, 5 Mont. 518, 6 P 358. (4) A defendant cannot counterclaim a demand arising out of a tort committed by the executor in a suit on a cause of action belonging to decedent. Wakeman v. Everett, 41 Hun 278 [aff 110 N. Y. 675, 18 NE 481]. (5) A purchaser of judgments against a person who died subsequent to the date of their rendition is not entitled to have them allowed against a demand due from the purchaser to the decedent arising out of a purchase of property, and secured by a lien thereon. Ashworth v. Tramwell, 102 Va. 852, 47 SE 1011. (6) The institution or unwarranted litigation or other wrongful conduct of the representative constitutes no ground of set-off or recoupment against a demand due to the decedent. Cumberland Island Co. v. Bunkley, 108 Ga. 756, 33 SE 183.

[b] **Money paid as surety for decedent since his death** (1) cannot be set off against a debt due to decedent in his lifetime. White v. Henly, 54 Mo. 592; Mercein v. Smith, 2 Hill (N. Y.) 210; Granger v. Granger, 6 Oh. 35 [overr by implication Bentley v. Hollingsback, Wright (Oh.) 168]; Minor v. Minor, 8 Gratt. (49 Va.) 1. See also Dorsheimer v. Bucher, 7 S. & R. (Pa.) 8, 9 ("This payment is not properly matter of set-off, but affords ground for an equitable defence"). (2) Such is the rule where the estate is insolvent. Poorman v. Goswiler, 2 Watts (Pa.) 69.

51. Ferris v. Mullan, 56 Ind. 164; Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 AnnCas 848.

of the expenses of administration entitled to priority of payment over all charges except funeral expenses, and the party rendering them has his option to hold the administrator or the estate liable therefor, an attorney who is sued to compel payment of money collected for the estate may set off a claim for services rendered in the settlement of the estate.[52] In some jurisdictions claims for funeral expenses may be set off in a suit brought by the personal representative to collect a debt due decedent.[53] It has also been held that the rule that a demand against decedent which accrued after his death cannot be set off in an action by the personal representative does not apply where the action is for the proceeds of decedent's note discounted by defendant, and defendant was induced to discount the note by decedent's fraudulent representations as to his solvency since the fraud relates back and vitiates the entire transaction, although the note matured and the fraud was discovered after decedent's death;[54] and that debts of decedent not due at the time of his death may be set off in an action on a claim due before decedent's death under a statute providing that, in an action by a personal representative, a demand against decedent which at the time of the death belonged to defendant may be set off in the same manner as if the action had been brought by decedent,[55] or under a statute providing that when cross demands have existed between persons under such circumstances that one could be pleaded as a counterclaim or set-off to an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other and that the demands must be deemed compensated so far as they equal each other.[56] So also where the intestate held the note of defendant and agreed that it should be paid by boarding, etc., his children, and afterward the administrator sanctioned the agreement, defendant was allowed to set it up in a suit on the note by the administrator de bonis non as to board both before and after the death of the intestate.[57]

A distinction based on solvency of the estate has been recognized, it being held that, where an administrator sues on a cause of action arising before decedent's death, defendant, if the estate is solvent, may set off a debt due by decedent when the suit was brought but becoming due after his death,[58] although such a set-off cannot be permitted where the estate is insolvent.[59]

[§ 1871] **(3) Debts Due in Decedent's Lifetime against Causes of Action Accruing in His Lifetime.** Where suit is brought on a cause of action accruing before decedent's death, defendant is entitled to set off a debt due him from decedent before his death.[60]

[§ 1872] **(4) Claims Accruing after Decedent's Death against Causes of Action Accruing after His Death.** As a general rule a demand against the personal representative may be set off against a demand of the personal representative arising after testator's death,[61] but where a creditor is sued on his agreement to refund to the estate, on its final settlement, the amount of his debt advanced him by the administrator, he cannot set off his debt against the estate,[62] and in a suit by administrators in their representative capacity to recover assets of the estate loaned by them, defendant cannot set off the value of his services rendered the estate at the request of the administrators, since the administrators can make no new contract binding the estate, unless specially authorized by law, and defendant's remedy is personal against them.[63]

[§ 1873] **(5) Claims in Favor of One Party against Another Party and Others Jointly.** Debts and demands between parties to a suit are not mutual when that in favor of one party is against

52. Gammage v. Rather, 46 Tex. 105.

53. Farrell v. Bruce, 190 Ill. A. 309; Adams v. Butts, 16 Pick. (Mass.) 343; Matter of May, 92 Misc. 649, 157 NYS 490; Barbee v. Greene, 86 N. C. 158.

[a] **It is necessary, however, that such claim should be pleaded** as a set-off. Defendant cannot avail himself thereof as a payment of his debt. Adams v. Butts, 16 Pick. (Mass.) 343. See generally infra § 1883.

54. Peyman v. Bowery Bank, 14 App. Div. 432, 43 NYS 826.

55. Boyden v. Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 NE 669.

56. Ainsworth v. State Bank, 119 Cal. 470, 51 P 952, 63 AmSR 135, 39 LRA 686; Convery v. Langdon, 66 Ind. 311.

57. Sorin v. Olinger, 12 Ind. 29.

58. Hicks v. Northern Liberties Nat. Bank, 168 Pa. 638, 32 A 63; Bosler v. Exchange Bank, 4 Pa. 32, 45 AmD 665.

59. Farmers, etc., Bank's App., 48 Pa. 57; Poorman v. Goswiler, 2 Watts (Pa.) 69.

60. Ala.—Smith v. Huie, 14 Ala. 201.

Conn.—Dickerson v. Whittlesey, 2 Root 121.

Del.—State v. Connoway, 7 Del. 206.

Ill.—Peacock v. Haven, 22 Ill. 23; Camp v. Elliott, 38 Ill. A. 337.

Ind.—Schoonover v. Quick, 17 Ind. 196.

Kan.—Helms v. Harclerode, 65 Kan. 736, 70 P 866.

Ky.—Barnes v. Greene, 12 SW 277, 11 KyL 422.

N. Y.—Patterson v. Patterson, 1 Hun 323 [aff 59 N. Y. 574, 17 AmR 384]; Conway v. Conway, 5 N. Y. Super. 650; Matter of May, 92 Misc. 649, 157 NYS 490; Furman v. Hinz, 4 NYSt 674.

N. C.—Austin v. Holmes, 23 N. C. 399.

Oh.—Granger v. Granger, 6 Oh. 35.

S. C.—Mayhew v. Flake, 11 S. C. L. 398.

Tenn.—Louisville, etc., R. Co. v. Kennedy, 90 Tenn. 185, 16 SW 113; Richardson v. Parker, 2 Swan 529; Gregory v. Hasbrook, 1 Tenn. Ch. 218.

Tex.—Traders' Nat. Bank v. Cresson, 75 Tex. 298, 12 SW 819.

Vt.—Rix v. Nevins, 26 Vt. 384.

Wash.—Mendelhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179; Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 AnnCas 848.

[a] **Illustrations.**—(1) A bank when sued by the administrator for the amount of decedent's deposit may set off the amount of the note of the intestate held by it which was due at the time of his death. Traders Nat. Bank v. Cresson, 75 Tex. 298, 12 SW 819. (2) In an action by an administrator a demand for the value of the goods delivered to testator may be pleaded as a set-off where the price thereon had not been agreed on. Smith v. Huie, 14 Ala. 201. (3) In an action on a note given to plaintiff's testator defendant may set off a claim for legal services rendered the testator in the settlement of an estate of which he was administrator, as the attorney has under the statute an option to demand his compensation either of the administrator individually or of the estate. Andrus v. Pettus, 36 Tex. 108.

[b] **A note due from the day of its date** is an existing demand in favor of the payee at the time of the maker's death, so as to be a proper counterclaim to a subsequent action by the administrator of the maker to foreclose a mortgage owned by intestate. Thornton v. Moore, 26 Misc. 120, 56 NYS 1100 [aff 41 App. Div. 617 mem, 58 NYS 1150 mem].

[c] **Extent of set-off.**—In an action by the administrator against a creditor the latter cannot set off the full amount of a note, made by the intestate and transferred to the creditor after the intestate's death, but is entitled only to a reduction ratably with other creditors. Happoldt v. Jones, 16 S. C. L. 109.

61. Tate v. Chandler, 4 Stew. & P. (Ala.) 417; Turner v. Tapscott, 30 Ark. 312; Lacompte v. Seargent, 7 Mo. 351; Griggs v. Renault Selling Branch, Inc., 167 NYS 355; Brooks v. Canon, 9 NYSt 506.

[a] **Illustrations.**—(1) In an action by an administrator on a note made to him as such against the maker an order drawn by a stranger upon the administrator and accepted by him as such in favor of the maker may be filed and set off by defendant. Tate v. Chandler, 4 Stew. & P. (Ala.) 417. (2) In an action by an administrator de bonis non against an attorney for money of the estate, collected during a prior administration, defendant may set off a judgment of allowance in the probate court against the former administrator for professional services rendered the estate. Turner v. Tapscott, 30 Ark. 312.

62. Golding v. McCall, 5 Ga. A. 545, 63 SE 706.

63. L'Engle v. L'Engle, 19 Fla. 714.

the other party jointly with others as parties.[64] Consequently in an action by a personal representative on a demand due by defendant alone defendant cannot set off a demand against decedent due to himself and another jointly,[65] nor can he set off a demand due him from decedent and others jointly.[66]

[§ 1874] **(6) Claims Growing Out of Partnership Dealings between Defendant and Decedent.** In an action by a personal representative to recover on a claim due decedent, claims growing out of partnership dealings between decedent and defendant are not a proper subject of set-off or counterclaim where there has been no accounting or final settlement of the partnership affairs.[67]

[§ 1875] **(7) Legacies or Distributive Shares.** Where suit is brought by a personal representative against a legatee the latter cannot in general plead as a set-off the amount of his legacy, at least where it is not shown that the estate is solvent and is in a condition to be distributed,[68] and some decisions seem to deny the right of set-off altogether on the ground that it would interfere with the regular course of distribution,[69] and enable defendant to obtain his share of the estate before the others would obtain theirs.[70] It is generally held that defendant in an action by the personal representative cannot set off the amount of a distributive share,[71] although such set-offs have been allowed in actions by the personal representative on notes given to them as such by distributees[72] or to recover the purchase price of property of the estate purchased by distributees.[73]

Rule in equity. It has been asserted that a legatee or the purchaser of a distributive share in an estate may in equity set off the same against a judgment in favor of the executor against such legatee or owner of such share, where no special reason exists for the collection of the judgment by the executor.[74]

[§ 1876] **(8) Claims against Estate Purchased after Decedent's Death.** The general rule is that claims against an estate purchased after decedent's death cannot be set off in an action against the purchaser thereof for a debt due decedent,[75] or even in an action for a debt created after the death of decedent.[76] The reason of this rule is that it is considered contrary to public policy to allow a person indebted to an insolvent estate to purchase a claim against such estate after the death of the intestate and make it available as a set-off in order to escape payment of his own debt.[77] Nevertheless it has been held that the one who is sued by a personal representative may by way of set-off avail himself of notes executed by decedent, although they were assigned to defendant by the payee after death of decedent, if the notes are such as would be proper matters of set-off in an action brought by decedent, if he were living, and there is no suggestion of

64. Adams v. Ware, 33 Me. 228.

65. Lee v. Russell, 38 SW 874, 18 KyL 951.

[a] **Waiver of objection.**—If the objection that a debt due to defendant and another jointly cannot be set off against a demand due by defendant alone is not availed of by demurrer, it is waived where a statute so provides. Lee v. Russell, 38 SW 874, 18 KyL 951.

66. Adams v. Ware, 33 Me. 228.

67. Ind.—Morrison v. Kramer, 58 Ind. 38; Skillen v. Jones, 44 Ind. 136.

Kan.—Anthony v. Stinson, 4 Kan. 211.

La.—Lewis v. Moore, 9 Rob. 196.

Miss.—Eyrich v. Capital State Bank, 67 Miss. 60, 6 S 615.

Wis.—Tomlinson v. Nelson, 49 Wis. 679, 6 NW 366.

[a] **Reason for rule.**—One partner has no claim against his copartner individually on account of partnership transactions, although a final settlement of the affairs would show a balance in favor of the former. Until such final settlement the general rule is that the firm and not the individual partner is the debtor and in such case it cannot be said correctly that there is a debt due from one partner to the other. Tomlinson v. Nelson, 49 Wis. 679, 6 NW 366 [appr Linderman v. Disbrow, 31 Wis. 465].

68. Dobbs v. Prothro, 55 Ga. 73; Brewer v. Brewer, 7 Ga. 584; Mast v. Mast, 176 Mo. A. 1, 5, 162 SW 328 [quot Cyc]; Woessner v. Wells, (Tex. Civ. A.) 28 SW 247. But compare Whedbee v. Reddick, 79 N. C. 521 (in an action by executors on a note for money of the testator loaned by them to a legatee, defendant may counterclaim the amount due him from the estate, and obtain an account to ascertain the same).

[a] **Illustration.**—Where an executor sought to enforce against the residuary legatee a vendor's lien in favor of the testator, and the legatee by way of defense pleaded that all bequests and charges payable out of the estate, other than the residuary bequest to himself, had been satisfied, but it also appeared that the time allowed by the statute for the presentation of claims against the estate had not elapsed, it was held that a demurrer to such defense was properly sustained, notwithstanding the action was in equity, since the allegation that there were no provable demands against the estate was not susceptible of absolute proof, and no refunding bond was tendered. Powell v. Palmer, 45 Mo. A. 236.

69. Shane v. Dickson, 111 Ark. 353, 357, 163 SW 1140 [quot Cyc]; Robinson v. Robinson, 4 Del. 418; Dunn v. Carpenter, 10 KyL 494.

70. Shane v. Dickson, 111 Ark. 353, 357, 163 SW 1140 [quot Cyc]; Dunn v. Carpenter, 10 KyL 494; Morel v. Surgi, 21 La. Ann. 184.

[a] **One who wrongfully obtains possession of the funds of an estate** cannot defend an action brought by the executor to recover them by claiming them in payment of a legacy due to himself. Morel v. Surgi, 21 La. Ann. 184.

71. Ky.—Bennett v. Bennett, 134 Ky. 444, 120 SW 372; Brents v. Vittatoe, 8 KyL 427.

La.—Landry v. Le Blanc, 4 Rob. 37.

N. J.—Vreeland v. Westervelt, 45 N. J. Eq. 572, 17 A 695.

Pa.—Morgan v. Morgan, 16 A 489.

Tex.—Guthrie v. Guthrie, 17 Tex. 541.

[a] **Under special statutory provisions.**—A statute which provides that a coheir on purchasing property from the succession can retain the price until his share is definitely fixed does not authorize the maker of a note in the hands of the administrator of a succession to resist payment on the ground that his wife was an heir when sued by the administrator. Landry v. Le Blanc, 4 Rob. (La.) 37.

72. Whaley v. Cape, 4 Mo. 233; Whedbee v. Reddick, 79 N. C. 521.

73. Parker v. Britt, 4 Heisk. (Tenn.) 243.

74. Dorsey v. Simmons, 49 Ga. 245.

75. Ark.—Watkins v. Parker, 97 Ark. 492, 134 SW 1187.

Ill.—Mack v. Woodruff, 87 Ill. 570.

Ind.—Haugh v. Seabold, 15 Ind. 343.

Iowa.—Woodward v. Laverty, 14 Iowa 381; Cook v. Lovell, 11 Iowa 81.

Kan.—Van Dusen v. Topeka Woolen Mill Co., 74 Kan. 437, 87 P 74.

Ky.—Thompson v. Thompson, 78 SW 418, 25 KyL 1626.

La.—Naquin v. Durac, 22 La. Ann. 249.

Me.—Rich v. Hayes, 101 Me. 324, 330, 64 A 656, 115 AmSR 321, 8 Ann Cas 304 [quot Cyc].

N. Y.—Root v. Taylor, 20 Johns. 137.

R. I.—Irons v. Irons, 5 R. I. 264.

S. C.—Schmidt v. Crafts, 4 S. C. L. 266.

Tex.—Mitchell v. Rucker, 22 Tex. 66.

Wis.—Union Nat. Bank v. Hicks, 67 Wis. 189, 30 NW 234.

"The debtor of an estate cannot buy up claims against the deceased, and, when sued upon his indebtedness to the estate, interpose such claims as a setoff." Printy v. Cahill, 235 Ill. 534, 536, 85 NE 753 [rev 138 Ill. A. 600].

[a] **The rule applies to a note of decedent,** purchased by defendant after his death. Watkins v. Parker, 97 Ark. 492, 134 SW 1187.

[b] **An administrator cannot authorize a person to purchase claims against** the estate to be used as a set-off against debts due the estate. Johnson v. Brown, 25 Tex. Suppl. 120.

[c] **Debt of insolvent estate purchased at discount.**—In a suit by an administrator to collect a debt due to an insolvent estate, a claim which accrued in the lifetime of decedent, and which defendant has purchased at a discount since his death, cannot be used as a set-off. Van Dusen v. Topeka Woolen Mill Co., 74 Kan. 437, 87 P 74.

76. Biscoe v. Moore, 12 Ark. 77; Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304 [quot Cyc]; Whitehead v. Cade, 2 Miss. 95.

77. Union Nat. Bank v. Hicks, 67 Wis. 189, 30 NW 234. See also Irons v. Irons, 5 R. I. 264 (it would enable them to take out of such an estate by way of set-off the full amount of the claims thus purchased, in general, too, at a large discount, to the lessening of the dividends of the other creditors of the estate while the other debtors of the estate not able or not fortunate enough thus to

insolvency of the estate.[78]

[§ 1877] **d. Actions by Representative for Commissions.** In an action by a personal representative for his commissions, the heirs, on showing that the personal representative could have recovered assets belonging to the estate amounting to more than the commissions claimed, but which have been lost to the estate by lapse of time, may plead these facts as a set-off to his claim for commissions.[79]

[§ 1878] **e. Actions between Representatives of Different Estates.** In an action by one personal representative against another for a debt due from defendant's decedent to plaintiff's decedent during the lifetime of both, defendant may set off a debt due to his decedent from plaintiff's decedent.[80]

[§ 1879] **f. Actions Brought by Representative While Exempt from Suit.** The fact that an action by an executor or administrator is commenced during the time for which he is exempt from being sued[81] does not preclude defendant from asserting a set-off to which he is entitled.[82]

[§ 1880] **g. Effect of Insolvency of Estate.**[83] In the absence of some special statutory provision to the contrary,[84] insolvency of an estate is not a ground for denying a set-off in an action brought by the personal representative,[85] for it would be inequitable that the administrator should recover the whole sum against the creditor and the creditor take only the average upon his debt.[86] Where an estate is insolvent the right of set-off is not limited to cases provided for by statutes of set-off,[87] but is based on the equitable principles which govern the settlement and distribution of the insolvent and bankrupt estates of living persons.[88] All mutual demands of every nature and kind are to be set off.[89] Claims which were not due and payable when the action was brought may be set off, providing they became due pending the action,[90] and claims not liquidated, as well as those the amounts of which are ascertained, may be set off.[91] The claimant is not estopped from a plea of set-off because he has exhibited his demand before commissioners in insolvency, whether it has been allowed[92] or disallowed.[93]

Where estate insufficient to make up statutory exemption. Where the only assets left by a decedent, exclusive of a judgment in his favor, are insufficient to make up the statutory exemption in the personalty allowed to the widow and children, and the balance necessary to make up the deficiency, together with the expenses of the last sickness and of administration, will exhaust such judg-

purchase in claims against the estate to set off against their debts would be obliged to pay them in full).

78. McGinnis v. Allen, 2 Swan (Tenn.) 645, 646 ("If in an action by Allen, in his lifetime, the notes would have been proper matters of set-off, they are equally so in an action by his personal representatives. We are aware of no principle upon which the distinction taken by the circuit judge can be maintained. The time of the assignment, whether prior or subsequent to the intestate's death, is immaterial, provided it were before the institution of the suit. It is well settled by the course of decision under the act of 1756, ch. 4, sec. 7, that if the defendant, in an action in which a plea of set-off is an admissible defense, were, at the time of the commencement of such action, the holder and proper owner of a note or bill single executed by the plaintiff, either by endorsement or delivery, he may avail himself of such note or bill single as a set-off to the plaintiff's demand. 8 Humphr. 46; 1 Swan 258; id. 92. Such debts are regarded as 'mutual' within the meaning of the act. The set-off is given as a more summary and convenient remedy than a cross-action. The policy of the statute is to suppress useless litigation, and its provisions are therefore entitled to receive a favorable and liberal construction. The argument against the admissibility of the set-off relied upon in this case, deduced from the policy of the statutes regulating the administration of insolvent estates, however well founded as applicable to cases conducted under the provisions of those statutes, has no application to the present case. So far as appears from this record, no suggestion of the insolvency of the intestate's estate has been or could be made. If the estate be in fact insolvent, it is the business of the administrators to resort to the proper proceedings under the statutes").

79. Burbank v. Duncan, 53 SW 19, 21 KyL 826.

80. Barnard v. Jordan, 25 N. C. 268.

81. See infra §§ 1907–1913.

82. Cunningham v. Baker, 11 S. C. L. 399.

83. Necessity of demand in case of insolvent estates see infra § 1882.

84. Whitehead v. Cade, 2 Miss. 95 (where a statute forbids any action against an estate after it has been reported insolvent the debtor of an insolvent estate will not be allowed a set-off).

85. Ala.—Godbold v. Roberts, 7 Ala. 662.

Ark.—Higgs v. Warner, 14 Ark. 192.

Conn.—Hosmer v. Merriam, 1 Root 427.

Ga.—Ray v. Dennis, 5 Ga. 357.

Ind.—Carley v. Lewis, 24 Ind. 23.

Mass.—Bigelow v. Folger, 2 Metc. 255.

Oh.—Creager v. Minard, Wright 519.

Pa.—Light v. Leininger, 8 Pa. 403; Mohn v. Myers, 16 LancLRev 213, 13 YorkLegRec 7.

Tenn.—Richardson v. Parker, 2 Swan 529.

Vt.—Olcott v. Morey, 1 Tyler 198.

Va.—Barnes v. Barnes, 106 Va. 319, 56 SE 172.

"The objection taken to it [the set-off] is that the debt against the defendant was a part of the assets to be distributed pro rata among all the creditors, and that the defendant's account must be filed, and be subject to a ratable deduction if the estate turned out to be insufficient to pay all the debts; that if he is allowed to plead his account as a set-off, he will in that way get the whole of it, to the prejudice of other creditors. Though this reasoning is plausible, it is not sound. The notes and accounts of the deceased are not assets, if they have been discharged by payment, the creation of adverse accounts, or otherwise. It is only what remains, after all just settlements with the debtors of the estate, which goes into the fund for distribution." Richardson v. Parker, supra.

[a] **A debt of a surety to the estate of his deceased principal** will not be enforced where the estate is insolvent and the surety is liable as such for a sum largely in excess of his debt to the estate. Barnes v. Barnes, 106 Va. 319, 56 SE 172.

[b] **Bank deposits.**—Where a bank holds a note against a depositor, the deposit exceeding the amount of the note, and the depositor dies insolvent, the bank has, in equity, a right to retain the amount of the note out of the deposit. Ford v. Thornton, 3 Leigh (30 Va.) 695.

[c] **Extinguishment of claim of estate.**—If the intestate was indebted to defendant in his lifetime in an equal or greater amount than the debt due from defendant to the intestate, then the intestate's demand as against defendant was paid and extinguished by such indebtedness and the note of defendant in the hands of the intestate's administrator cannot be considered as assets, for the reason it has been paid off and extinguished by the intestate's mutual indebtedness to defendant at the time of his death. Ray v. Dennis, 5 Ga. 357.

86. Hosmer v. Merriam, 1 Root (Conn.) 427.

87. Phelps v. Rice, 10 Metc. (Mass.) 128; Troup v. Mechanics' Nat. Bank, 24 R. I. 377, 53 A 122.

88. Troup v. Mechanics' Nat. Bank, 24 R. I. 377, 53 A 122.

[a] **Statutes relative to the settlement of insolvent estates** contemplate a fair adjustment of all demands subsisting between the deceased and his creditors at the time of his death, so that the balance justly due to the estate may be collected and then fairly distributed among the creditors. Lyman v. Estes, 1 Me. 182.

[b] **Estate actually insolvent but not declared so.**—In an action on certain notes for the benefit of a decedent's estate, the executrix not having chosen to have the estate declared insolvent in the probate court, the fact of actual insolvency could not be shown by the defendant for the purpose of sustaining an equitable set-off, under a statute providing that defendant may allege in defense any facts which would entitle him in equity to absolute and unconditional relief against plaintiff's claim or against any judgment recovered by plaintiff in the action. Jump v. Leon, 192 Mass. 511, 78 NE 532, 116 AmSR 265.

89. Bigelow v. Folger, 2 Metc. (Mass.) 255; Knapp v. Lee, 3 Pick. (Mass.) 452; McDonald v. Webster, 2 Mass. 498.

90. Boyden v. Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 NE 669; Bigelow v. Folger, 2 Metc. (Mass.) 255; Conquest v. Broadway Nat. Bank, 134 Tenn. 17, 183 SW 160.

91. Phelps v. Rice, 10 Metc. (Mass.) 128.

92. Olcott v. Morey, 1 Tyler (Vt.) 198.

93. Phelps v. Rice, 10 Metc. (Mass.) 128; Olcott v. Morey, 1 Tyler (Vt.) 198.

ment, the judgment debtor cannot offset a judgment against decedent, purchased by him, although it was bought prior to the filing of the appraise bill of decedent's effects in which the widow's allowance was made out of the decedent's judgment.[94]

[§ 1881] **h. Necessity for Presentment or Demand—(1) In General.** In some jurisdictions it is considered that in the absence of any special statutory provision on the subject presentation of a claim is not a condition precedent to its availability as a set-off against a claim of the estate,[95] so that if the creditor does not care to make any affirmative claim against the estate, but desires to use his claim only as a protection against any claim which the estate may set up against him, he may safely wait until he is sued by the representative and then set up his claim by way of set-off.[96] Accordingly, in construing a statute providing that no "action" shall be brought against a personal representative until after demand is made of him for payment, accompanied by affidavit and proof, it has been held that demand is unnecessary to authorize a set-off in a suit by the administrator against the holder thereof,[97] but that the claim must be verified and proceed in the manner required by law in the case of claims sued upon in a direct action.[98] It has also been held that notwithstanding a statute providing that no claimant shall maintain any action on his claim unless it is first presented to the personal representative, such presentation is not essential to the right of set-off where another statute provides that if two parties have cross demands which one may plead as a set-off in an action by the other, neither can be deprived of the benefit thereof by the death of the other and that the two demands must be deemed compensated so far as they equal each other,[99] and that under a statute providing that, if an administrator commences an action to recover in the interest of the estate, defendant may set off any claim he has against the deceased instead of presenting it to the probate court, such offset is permissible even though the time for filing claims has expired.[1] Again it has been held that failure to present a claim to the commissioners and procure its allowance will not bar the right of set-off in an action by the personal representative where his own fraudulent acts prevented its presentation.[2] On the other hand some statutes expressly provide that a claim shall not be available as a set-off unless it is duly filed,[3] and there is also considerable authority for the view that, where the

94. Thompson v. Thompson, 117 Ky. 526, 78 SW 418, 25 KyL 1626.

95. Jester v. Knotts, (Del.) 57 A 1094; Mitchell v. Rucker, 22 Tex. 66; Smalley v. Trammel, 11 Tex. 10; Mortin v. Gordon, Dall. (Tex.) 396; Mendelhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179; Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 AnnCas 848.

96. Conn.—Berrigan v. Pearsall, 46 Conn. 274.

Iowa.—Ware v. Howley, 68 Iowa 633, 27 NW 789.

Me.—Rogers v. Rogers, 67 Me. 456.

Minn.—Martin County Nat. Bank v. Bird, 92 Minn. 110, 99 NW 780.

Mo.—Lay v. Mechanics' Bank, 61 Mo. 72; Stiles v. Smith, 55 Mo. 363.

Okl.—Murphy v. Colton, 4 Okl. 181, 44 P 208.

Wash.—Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 Ann Cas 848.

"The statute applies to and contemplates cases where the creditor is the actor, and himself moves in the matter of getting the allowance. There he must proceed within a certain time or be forever barred. But a person may well have a demand against an estate, and knowing that he is also indebted to the estate, neglect to prove up the same, supposing that the amounts are about equal, and that when he is proceeded against, he can plead his demand as a set-off and thus determine the whole matter in one suit. If in such a case the administrator should wait till after two years had expired before instituting such an action, it was certainly never designed or intended that the creditor should be deprived of a just or lawful claim." Stiles v. Smith, 55 Mo. 363, 367.

[a] **Set-off of judgment.**—In an action by the owner of a judgment to have it set off against a judgment for administrator, it is not necessary that the judgment to be set off in such case be first proved and allowed in the probate court having jurisdiction of the estate. Martin County Nat. Bank v. Bird, 92 Minn. 110, 99 NW 780.

[b] **No affirmative recovery warranted.**—Where a defendant sued by an administrator filed by way of set-off a claim against the intestate, which claim had not been presented to the administrator within the statutory period, the claim was limited to the extinguishment of the demand sued on, and a judgment over against the estate for any excess could not be rendered. Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 AnnCas 848.

97. Harding v. Bullard, 172 Ky. 417, 189 SW 242; Millett v. Watkins, 4 Bush (Ky.) 642; Ward v. Rhorer, 54 SW 6, 21 KyL 1086; Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; Mendelhall v. Davis, 52 Wash. 169, 100 P 336, 21 LRANS 914, 17 AnnCas 179.

"The reason for requiring a claimant, before bringing an original action against a personal representative, to make demand of him for payment, is, that if the claim is just and properly proved, it may be paid without subjecting the estate to the costs of litigation. But the reason for requiring the demand to be made ceases when the personal representative begins litigation himself." Warfield v. Gardner, 79 Ky. 583, 587, 3 KyL 423.

[a] **No judgment can be rendered** for defendant for any excess over the claim sued on. Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P 38, 7 AnnCas 848. To same effect Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181.

98. Harding v. Bullard, 172 Ky. 417, 189 SW 242; Warfield v. Gardner, 79 Ky. 583, 3 KyL 423.

99. Murphy v. Colton, 4 Okl. 181, 44 P 208 (it is immaterial that the set-off exceeds the claim of the estate but it will be allowed only to an extent not to exceed the claim of the estate).

1. Talty v. Torling, 79 Minn. 386, 82 NW 632; Gerdtzen v. Cockrell, 52 Minn. 501, 55 NW 58.

2. Rose v. Clark, 1 Root (Conn.) 229.

3. Mass.—Lovell v. Nelson, 11 Allen 101, 87 AmD 706.

Mich.—Quinn v. McGovern, 97 Mich. 114, 56 NW 226.

Nebr.—Parker v. Wells, 94 NW 717.

Vt.—Soule v. Benton, 44 Vt. 309; Ewing v. Griswold, 43 Vt. 400.

Wis.—Portz v. Schantz, 70 Wis. 497, 36 NW 249; Carpenter v. Murphey, 57 Wis. 541, 15 NW 798.

[a] **Construction of statutes.**—Under Howell St. Annot. § 5901, which provides that any person failing to present his claim in the time limited shall be barred from recovering on it, or setting it off in any action, § 5894, which provides that at any time before the estate is closed, further time may be allowed for presenting a claim, § 5904, which provides that nothing in the chapter including those sections shall prevent an executor or administrator from commencing an action against another person, or prosecuting an action commenced by deceased, and § 5905, which provides in such case that defendant may set off any claim against deceased without presenting it to the commissioners, where after the expiration of the time for presenting claims to the commissioners an administrator begins an action, defendant cannot set off a claim which he had not presented to them. Quinn v. McGovern, 97 Mich. 114, 56 NW 226.

[b] **Effect of failure to appoint commissioners.**—The rule stated in the text does not apply where no commissioners to whom the claim might be presented were ever appointed. Boltwood v. Miller, 112 Mich. 657, 71 NW 506.

[c] **Misleading statement of court.**—The fact that the probate judge told a claimant that it was not necessary to file his claim and that it could be used as a set-off against a note given by the claimant to decedent does not alter the rule that a claim must be presented to authorize its allowance by way of set-off. Benjamin v. Early, 123 Mich. 93, 81 NW 973.

[d] **Rule under Vermont statutes.**—Under Gen. St. p 401 § 14 which provides that if a claimant does not exhibit his claim to the commissioners within the time limited by the court for that purpose he shall be forever barred from pleading it as a set-off in any action whatever, and § 17 which chapter provides that, in an action by the personal representative on a claim due the estate, defendant may plead in offset any claim he has against deceased instead of presenting it to the commissioners, the right of set-off exists only in cases where the administrator brings his suit before the commissioners have acted, where the institution of the suit prevents the offset before the commissioners. Probate Ct. v. Gale, 47 Vt. 473; Soule v. Benton, 44 Vt. 309; Ewing v. Griswold, 43 Vt. 400.

statute provides that claims not filed within the time allowed shall be forever barred, claims not so filed are not available as set-offs,[4] the view being taken that enforcing the claim by means of set-off is substantially equivalent to enforcing it by an action.[5] It has also been held that the bar created by a decree made upon proceedings to limit creditors of deceased persons applies to debts and demands alleged by way of set-off.[6] So also presentation has been held necessary under a statute to the effect that no demand shall be pleaded by way of set-off which was not justly due and accruing to the party pleading it at the time of the commencement of the suit.[7]

Estoppel in equity. Where a creditor of an insolvent estate, relying on an agreement with the administrator to allow the creditor's claim in offset to demands against him in favor of the estate, has neglected to present his claim to the commissioners, he is entitled to have it set off in equity against the claim of the estate.[8]

[§ 1882] **(2) Where Estate Insolvent.** It is usually considered that, where an estate is insolvent, no presentation of a demand is necessary to authorize its use as a set-off in a suit brought by the personal representative, the statutes of non-claim being very generally held not to apply under these circumstances.[9] Under such circumstances, however, a set-off can be used as matter of defense only, and not as the foundation of a recovery of any balance,[10] and if the amount claimed by way of set-off is greater than the amount due the estate, claimant cannot recover the balance without due presentation of the demand.[11]

Equitable principles applicable. In the case of mutual claims between an insolvent estate and a creditor or a debtor, set-off takes place by operation of law upon principles of equity and independently of the statutes relating to set-off.[12]

[§ 1883] **i. Necessity of Pleading Set-Offs.** In a suit by a personal representative defendant is not bound to plead a set-off,[13] unless he wishes to recover thereon;[14] but a set-off or counterclaim cannot be asserted unless properly pleaded.[15]

[§ 1884] **2. Actions against Personal Representatives.** In actions against personal representatives on claims against decedent they are entitled to set off claims in decedent's favor against plaintiff.[16]

4. Ala.—Parker v. Daughtry, 111 Ala. 529, 20 S 362; Patrick v. Petty, 83 Ala. 420, 3 S 779; Shelton v. St. Clair, 64 Ala. 565; Walker v. Tyson, 52 Ala. 593; Bell v. Andrews, 34 Ala. 538; Murdock v. Rousseau, 32 Ala. 611.

Ark.—Watkins v. Parker, 97 Ark. 492, 134 SW 1187; Walker v. Byers, 19 Ark. 323.

Cal.—Reed v. Johnson, 127 Cal. 538, 59 P 986; Lyon v. Petty, 65 Cal. 322, 4 P 103.

Ill.—Damiani v. Proulx, 195 Ill. A. 154.

Miss.—Cohn v. Carter, 92 Miss. 627, 46 S 60.

Nebr.—Schaberg v. McDonald, 60 Nebr. 493, 83 NW 737.

N. H.—Jones v. Jones, 21 N. H. 219.

N. J.—Emson v. Allen, 62 N. J. L. 491, 41 A 703.

N. Y.—Van Ness v. Kenyon, 208 N. Y. 228, 101 NE 881, AnnCas1914D 221 [mod 151 App. Div. 948, 136 NYS 1149].

Wis.—In re Gillen, 169 Wis. 58, 171 NW 758; White v. Fitzgerald, 19 Wis. 480.

[a] **Set-off by surviving partner.**—Under the statute relating to the powers and duties of the surviving partner a surviving partner is entitled to an allowance for sums drawn by the deceased from the partnership during his lifetime in an action against him by the administratrix notwithstanding the claim had not been presented to her for allowance. Manuel v. Escolle, 65 Cal. 110, 3 P 411.

[b] **Defendant, in an action on a life policy,** is entitled, under the plea of set-off, to a credit of the amount of the unpaid premium note, as provided in the policy, the claim therefor not being required to be presented to insured's administrator to save it from the bar of the statute of nonclaims as a credit on the policy. Union Cent. L. Ins. Co. v. Washburn, 158 Ala. 169, 48 S 475.

5. Hall v. Greene, 24 R. I. 286, 52 A 1087.

[a] **Waiver of nonpresentation.**—By joining issue upon the plea in set-off plaintiff waives his right to object that it was not presented for allowance. Hall v. Greene, 24 R. I. 286, 52 A 1087.

6. Emson v. Allen, 62 N. J. L. 491, 41 A 703.

7. Jones v. Jones, 21 N. H. 219.

8. Nims v. Rood, 11 Vt. 96, 34 AmD 669.

9. Me.—Morrison v. Jewell, 34 Me. 146; Lyman v. Estes, 1 Me. 182.

Mass.—McDonald v. Webster, 2 Mass. 498.

N. H.—Mathewson v. Strafford Bank, 45 N. H. 104.

R. I.—Hall v. Greene, 24 R. I. 286, 52 A 1087.

Vt.—Olcott v. Morey, 1 Tyler 198.

Wis.—Franklin v. Killilea, 126 Wis. 88, 104 NW 993.

[a] **Bar only pleaded in actions by creditor.**—The general bar in cases where the creditor fails to exhibit his claim to the commissioners in insolvency can be pleaded only in an action instituted by the creditor and cannot be taken advantage of by the administrator under the general issue in offset in exclusion of defendant's defense. Olcott v. Morey, 1 Tyler (Vt.) 198.

[b] **Contrary view.**—Under a statute which provides that every person having any claim on an estate declared insolvent must file it in the office of the judge of probate within nine months after declaration of insolvency or it is forever barred, a claim against an insolvent estate not filed within the time required is not available as a set-off. Shelton v. St. Clair, 64 Ala. 565; Bell v. Andrews, 34 Ala. 538; Murdock v. Rousseau, 32 Ala. 611.

10. Mathewson v. Strafford Bank, 45 N. H. 104; Troup v. Mechanics' Nat. Bank, 24 R. I. 377, 53 A 122.

11. McDonald v. Webster, 2 Mass. 498 (if the balance is against the estate it must be laid before the commissioners and be by them reported to the judge that the creditor may receive his dividend).

12. Hall v. Greene, 24 R. I. 286, 52 A 1087.

13. Gregory v. Hasbrook, 1 Tenn. Ch. 218 (he may decline to do so and afterward sue on his demand at law or set it off in equity against the judgment recovered against him, provided that he can make out a sufficient case to give the latter court jurisdiction).

14. Patterson v. Steele, 36 Ill. 272.

15. Adams v. Butts, 16 Pick. (Mass.) 343.

16. Ala.—Hale v. Brown, 11 Ala. 87.

Ark.—Burke v. Stillwell, 23 Ark. 294.

Ind.—Kennedy v. Swisher, 34 Ind. A. 676, 73 NE 724.

Ky.—Headley v. Jenkins, 13 KyL 463.

Me.—Cooley v. Patterson, 49 Me. 570.

Md.—Percy v. Clary, 32 Md. 245.

Mass.—Gannon v. Ruffin, 151 Mass. 204, 24 NE 37.

Miss.—Eyrich v. Capital State Bank, 67 Miss. 60, 6 S 615.

Mo.—Bealey v. Smith, 158 Mo. 515, 59 SW 984, 81 AmSR 317.

N. Y.—Shimer v. Kinder, 12 NYSt 728; Johnson v. Corbett, 11 Paige 265.

N. C.—Barnard v. Jordan, 25 N. C. 268.

Pa.—Warm Castle v. Castner, 34 Pa. Super. 464; Cotton's Est., 6 Pa. Dist. 205, 19 Pa. Co. 313.

S. C.—Nehbe v. Price, 11 S. C. L. 328. But compare Blakely v. Frazier, 11 S. C. 122, 139 (in an action against executors on a claim accruing against decedent in his lifetime, the unpaid costs of a suit on the same cause of action against testator brought and discontinued during his lifetime will not be set off. "The defendants, as defendants, have no right to demand such costs, but merely as the personal representatives of the deceased former defendant").

Va.—Stuart v. Peyton, 97 Va. 796, 34 SE 696.

Eng.—Blakesley v. Smallwood, 8 Q. B. 538, 55 ECL 538, 115 Reprint 978.

Ont.—Moffat v. Foley, 26 U. C. Q. B. 509.

[a] **Illustrations.**—(1) In an action on a claim against an estate for services rendered to decedent there may be set off sums of money and the value of articles furnished to the claimant by decedent during his lifetime. Shimer v. Kinder, 12 NYSt 728. (2) In an action on a claim due from decedent the personal representative may set off the claim of decedent against plaintiff on an instrument acknowledging the receipt of a sum of money in trust to be accounted for to decedent which is liquidated and payable on demand and that too whether it is considered as in trust or a mere debt. Gannon v. Ruffin, 151 Mass. 204, 24 NE 37. (3) In an action against an executor in his representative capacity on accounts stated by him as executor, a set-off of debts due from plaintiff to the testator is permissible, because an account stated by an executor as such shows a debt due from testator to plaintiff. Blakesley v. Smallwood, 8 Q. B. 538, 55 ECL 538, 115 Reprint 978.

[b] **Where a suit is brought by the administrator of one intestate against the administrator of another intestate** for a debt due from the intestate of one to the intestate of the other in their lifetime, defendant may set off a debt that was due from plaintiff's intestate to his intestate. Barnard v. Jordan, 25 N. C. 268.

The general rule is that a personal representative, when sued in his official capacity, may set off only those claims which decedent himself might have pleaded and which are due to his estate,[17] and cannot set off a claim due him in his individual capacity.[18] So, in an action for a debt due from decedent, defendant cannot set off a sum due on a note given by plaintiff to him as administrator for goods of his intestate which he had sold as administrator.[19] Neither can the representative set off a demand purchased by him after the death of decedent against a debt due by the estate to the person against whom such demand exists.[20] In an action against a personal representative in his individual capacity it is not permissible to set off claims due the estate as the claims are not between the same parties nor in the same right,[21] but the representative may set off a claim due to himself individually,[22] or due to himself and another individually, provided the other consents, but not otherwise.[23] Where an executor voluntarily pays a legacy without a refunding bond and afterward the estate is found to be insolvent, the executor may, in an action by the legatee against him for a debt due from testator, set off what he has paid upon the legacy beyond the proportion which he should have paid.[24] After the administration is wound up the commissions are due the administrator and ascertainable and may be counterclaimed in any action by the heirs without being reduced to judgment.[25]

Necessity of pleading set-off. An administrator is not bound to set off any debt or demand which the estate may have against a suing creditor, and his failure to do so will not bar such debt or demand.[26] On the other hand it has been held that in an action against a personal representative for a debt of the decedent, payments, credits, or off-sets are in issue, although not pleaded by defendant.[27]

[§ 1885] **G. Jurisdiction—1. Action on Claims in Favor of or against Estate—a. In General.** Actions on claims in favor of an estate should be brought in courts of ordinary jurisdiction and not in the probate court.[28] The same is usually true

[c] **Claims due decedent and executor jointly.**—In an action against the personal representative on a claim due from decedent defendant may set off a claim due to himself and deceased as partners. Burke v. Stillwell, 23 Ark. 294.

[d] **In an action against the administrator and the former partner** of decedent, a demand in favor of decedent alone may be set off by the administrator. Eyrich v. Capital State Bank, 67 Miss. 60, 6 S 615.

[e] **Where estate insolvent.**—In a suit on a note given by decedent if the estate is declared insolvent, claims between plaintiff and the estate are subject to be set off, and the balance on it should be allowed to be recovered, although there could have been no set-off if both parties had lived. Medomak Bank v. Curtis, 24 Me. 36.

[f] **Support of child.**—In an action by a child against his mother's administrator for money received by her as his guardian, the administrator cannot set up a claim for the support and education of her child by the intestate unless it appears that she intended to charge him therefor. Guion v. Guion, 16 Mo. 48, 57 AmD 223.

[g] **Time of filing set-off.**—Under a statute providing that an executor or administrator shall not be obliged to make a defense for one year after his appointment, he may file an account in set-off on the first day of the term next after the close of the year from the date of his appointment, although the action may have been begun at a previous term. Cooley v. Patterson, 49 Me. 570.

17. Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304; Cotton's Est., 6 Pa. Dist. 205, 19 Pa. Co. 313.

[a] **Debts due in different rights.**—Where one of the parties must sue or be sued in his representative character, and the other may sue or be sued without naming him executor, then, the debts being due in different rights, cannot be set off against each other. Barnard v. Jordan, 25 N. C. 268.

18. Ala.—Phillips v. Thompson, 9 Port. 664.

Me.—Rich v. Hayes, 101 Me. 324, 64 A 656, 115 AmSR 321, 8 AnnCas 304.

Mass.—Stickney v. Clement, 7 Gray 170.

N. H.—Lamberton v. Freeman, 16 N. H. 547.

N. Y.—Mead v. Merritt, 2 Paige 402.

N. C.—Barnard v. Jordan, 25 N. C. 268.

Pa.—Bradshaw's App., 3 Grant 109; Cotton's Est., 6 Pa. Dist. 205; Dale v. Medway, Wilcox 155.

Tex.—House v. Collins, 42 Tex. 486.

[a] **Contrary view.**—Mardall v. Thelluson, 21 L. J. Q. B. 410 [practically overr Rees v. Watts, 11 Exch. 410, 156 Reprint 891].

19. Smith v. Edwards, 6 Del. 427; Barnard v. Jordan, 25 N. C. 268. But compare Eldredge v. Bell, 64 Iowa 125, 19 NW 879 (the purchase money from the sale of the personal property of an estate belongs to the executors, regardless of any claim which the purchaser may have against the estate; but if, in an action by the purchaser against the estate to enforce his claim the executors set up the purchase money due as a counter claim against the purchaser, a court is justified in treating the purchase-money claim precisely as the executors pleaded it).

20. Lamberton v. Freeman, 16 N. H. 547; Weeks v. O'Brien, 25 App. Div. 206, 49 NYS 344, 27 NYCivProc 86 [rev 20 Misc. 48, 45 NYS 740]; Mead v. Merritt, 2 Paige (N. Y.) 402; McClenahan v. Cotten, 83 N. C. 332.

[a] **In equity.**—Where there is no set-off at law, there must be special circumstances of equity to authorize a set-off in chancery, and it is against the principles of sound policy to permit executors to purchase claims against the creditors of the estate in order to obtain a set-off in equity. Mead v. Peck, 2 Paige (N. Y.) 402.

21. Collins v. Greene, 67 Ala. 211; Prouty v. Hudson, 5 PaLJ 311; Lanier v. Brunson, 21 S. C. 41.

[a] **In an action for payment of a personal debt,** defendant cannot plead by way of set-off or counterclaim, a debt due to him as executor of decedent's estate. He cannot discharge his own liability by setting off the debt due the estate. Gourley v. Walker, 69 Iowa 80, 28 NW 444.

[b] **An executrix and sole devisee and legatee** who has paid all the debts of testator may in an action against her individually for services rendered her personally set off a debt due by plaintiff to the estate, although there was never any publication of notice to creditors to present their claims. Blood v. Kane, 130 N. Y. 514, 29 NE 994, 15 LRA 490 [rev 52 Hun 225, 6 NYS 353].

22. Mitchell v. Burt, 9 Ala. 226; Barlow v. Myers, 24 Hun (N. Y.) 286.

[a] **A note to the testator indorsed in blank** and held by the representative may be set up as a set-off. Barlow v. Myers, 24 Hun (N. Y.) 286.

[b] **Claim due to decedent and administrator jointly.**—When one joint maker of a note is the administrator of his comaker, he is entitled when sued to set off against the payee any debt which the latter owes the estate. Mitchell v. Burt, 9 Ala. 226.

23. Solliday v. Bissey, 12 Pa. 347.

24. Harris v. White, 5 N. J. L. 422 (the money refunded would belong to the executors in their representative capacity. The whole doctrine of refunding goes upon the principle that the money refunded is assets in the hands of the executors for the payment of debts). See also Smith v. Smith, 79 N. C. 455 (in an action against executors on a note of testator they may insist on a refund of a legacy paid plaintiff in order to pay the note out of the legacy).

25. Barlow v. Norfleet, 72 N. C. 535.

26. Ward v. Peo., 77 Ill. A. 522.

27. Granberry v. Granberry, 40 Tex. Civ. A. 420, 422, 90 SW 711, ("The defendant failed to plead any payments, credits or offsets; and on account of such failure, it is contended in behalf of appellant that the question of payments, credits and offsets was not involved in the case, and should not have been recognized by the court and embodied in the charge of the jury. As a general proposition, the contention urged by appellant's counsel may be conceded as correct, but it is believed that cases of this kind should be excepted from the rule of law referred to. It is provided by the probate law of this state (Rev. Stats., art. 2072) that 'no executor or administrator shall allow any claim for money against his testator or intestate, nor shall any county judge approve the same, unless such claim is accompanied by an affidavit in writing that the claim is just, and that all legal offsets, payments and credits known to affiant have been allowed.' In enacting this statute, we think it was the intention of the Legislature to cast upon those asserting claims against the estates of deceased persons, the burden of showing that all legal offsets, payments and credits known to the creditor have been allowed and that if the claim be rejected by the administrator, and the creditor seeks to enforce it in court, the burden referred to continues and has application in the trial of the case").

28. Ill.—Hays v. State Bank, 202 Ill. A. 535.

La.—Bernard v. Thayer, 19 La. Ann. 257; Barrett v. Halpin, 19 La. Ann. 160.

with respect to actions on claims against estates,[29] although the statutes sometimes permit actions of this character to be brought in the probate court.[30] It has been held, however, that a statute authorizing a summary trial in the court of probate jurisdiction does not provide the exclusive mode of trial or preclude an action in a court of ordinary jurisdiction.[31]

[§ 1886] **b. Courts of Equity.** Where a creditor has exhausted legal remedies without avail, he may sue in equity to subject to his claim an interest in the estate,[32] but one demanding, in his capacity as administrator, money of his intestate alleged to have been lent to and invested by a decedent, and retained by him until the time of his death, and praying that defendant, as administrator of decedent, be required to pay over the money with interest, has an adequate remedy at law, and cannot invoke the aid of equity,[33] especially where the testimony in support of the claim consists of evidence under the control of the claimant.[34] Where the limited powers of the probate court do not permit of adequate relief, a resort to equity is warranted.[35] So a court of equity has jurisdiction of a bill by a creditor to enforce his demand against the executors and legatees, to whom assets have been delivered upon the undertaking to pay all demands,[36] and it has been held that inasmuch as a personal representative is a trustee for creditors and others interested, a court of equity has jurisdiction of an action against the administrator for a debt due from decedent.[37] The jurisdiction of equity cannot be invoked, however, to enforce such a claim, where by statute the relief sought may be obtained in an ordinary legal proceeding in the probate court, and where no special circumstances requiring the aid of a court of equity are disclosed.[38] Under a statute authorizing the probate

Mont.—State v. Jefferson County Fifth Judicial Dist. Ct., 162 P 1053.
N. C.—Oldham v. Rieger, 145 N. C. 254, 58 SE 1091.
Pa.—McGrann's Est., 14 Pa. Dist. 52, 31 Pa. Co. 472.

29. Ark.—Easley v. Rowe, 210 SW 145.
Ida.—Idaho Trust Co. v. Miller, 16 Ida. 308, 102 P 360.
Miss.—Sanders v. Douglas, 11 Miss. 454.
Mo.—Linn County Bank v. Clifton, 263 Mo. 200, 172 SW 388.
Nebr.—Wunder v. Crane, 100 Nebr. 446, 160 NW 892.
N. Y.—Pache v. Oppenheim, 93 App. Div. 221, 87 NYS 704 [rev 84 NYS 926].
N. C.—Vaughn v. Stephenson, 69 N. C. 212.
S. C.—Hand v. Kelly, 102 S. C. 151, 86 SE 382.

[a] **Judgment creditor's action.**—Under a statute, authorizing original actions to be brought in the superior court against executors and administrators, and empowering the court to order an account to be taken and to adjudge the application or distribution of funds or grant other relief as the case may require, the superior court may entertain an action by a judgment creditor of decedent's estate to subject decedent's real property to a payment of his judgment. Shober v. Wheeler, 144 N. C. 403, 57 SE 152.

[b] **The municipal court of the city of New York** has jurisdiction of an action by a husband against the executor of his deceased wife's estate to recover for the reasonable expenses incurred and paid by him in connection with her burial. Pache v. Oppenheim, 93 App. Div. 221, 87 NYS 704 [rev 84 NYS 926].

30. Cole County v. Dallmey, 101 Mo. 57, 13 SW 687; Crawford v. Parker, 26 Pa. Co. 414; Jones' App., 11 WklyNC (Pa.) 554.

31. In re McCormick, 72 Or. 608, 143 P 915, 144 P 425.

32. Bennick v. Bennick, 62 N. C. 45.

33. McKee v. Allen, 204 Mo. 655, 103 SW 76.

34. McKee v. Allen, 204 Mo. 655, 103 SW 76.

35. Bankers' Surety Co. v. Mayer, 205 N. Y. 219, 98 NE 399, AnnCas 1913D 1218 [aff 46 App. Div. 867, 131 NYS 857]; Hard v. Ashley, 117 N. Y. 606, 23 NE 177; Haddow v. Lundy, 59 N. Y. 320; Post v. Ingraham, 122 App. Div. 738, 107 NYS 737; Matter of Smith, 120 App. Div. 199, 105 NYS 223.

[a] **A holder of a disputed unmatured claim,** who cannot avail himself of remedies given by Code Civ. Proc. § 1822 et seq, except the remedy of commencing an action against the administrator for the recovery of the claim, which is inadequate, because no part of the claim would be due for three years, and who cannot compel the filing of an inventory and an accounting in the surrogate's court, may proceed in equity against the administrator; and a complaint which alleges that decedent was indebted on unmatured notes, and that the administrator had rejected the claim thereon when duly presented, and that the notes will not mature until several years after decedent's death, states a cause of action in equity in the supreme court, entitling claimant to have the notes declared valid, although he is not entitled to have funds set apart by the administrator with which to meet the notes when they become due. Bankers' Surety Co. v. Meyer, 205 N. Y. 219, 98 NE 399, AnnCas1913D 1218 [aff 46 App. Div. 867, 131 NYS 857].

36. Moore v. Coldwell, 29 S. C. Eq. 22 (the remedy at law is neither so plain nor adequate as to exclude the creditor from a court of equity).

37. Pulver v. Leonard, 176 Fed. 586; Judal v. Brandon, 5 Blackf. (Ind.) 506.

"A suit against an administrator or executor in reference to the proper execution of his duty is equitable in its nature, for such persons are considered as trustees." Pulver v. Leonard, 176 Fed. 586, 589 [cit Kendall v. Creighton, 23 How. (U. S.) 90, 16 L. ed. 419].

38. D. C.—Parish v. McGowan, 39 App. 184.
Kan.—Kothman v. Markson, 34 Kan. 542, 9 P 218.
Me.—Holway v. Ames, 100 Me. 208, 60 A 897.
N. J.—Jordan v. Logue, 76 N. J. Eq. 471, 79 A 426.
W. Va.—Crawford v. Turner, 58 W. Va. 600, 52 SE 716, 112 AmSR 1014.

"What right has plaintiff, simply a general creditor of a deceased individual, to resort to a court of equity for the collection of his claim? The bill, when the surplusage relating to a partnership and its assets is omitted, does no more than to call upon the personal representatives of the deceased debtor for a settlement of their accounts and a payment of the debts of the decedent. This alone is not ground of equity cognizance. The bill goes no further than to seek to charge in the hands of the personal representatives the decedent's personal estate only, without some showing grounds necessary to equity jurisdiction in that behalf. 'A general creditor of a deceased person cannot maintain a bill in equity against the personal representative, to charge in his hands, the personal estate only, without showing some ground of equity jurisdiction, such as inadequacy of the legal remedies, inability to obtain satisfaction of his debt by pursuit thereof to judgment and execution, or necessity for discovery.' Price v. Laing, 67 W. Va. 373, 68 SE 24." Hutchinson-Stephenson Hat Co. v. Bailey, 73 W. Va. 672, 673, 80 SE 1056.

[a] **Illustration.**—The facts that an executrix is insolvent, and intends to remove from the jurisdiction of the court a fund available for the payment of a claim against her testator by attorneys who have no lien, but who had a contract with the testator to pay them a percentage of the amount that might be recovered on a claim against the government, will not give equity jurisdiction to entertain a suit by the attorneys to enforce their demand, as they have an adequate remedy in the probate court, by motion, to require the executrix to give an adequate bond, as such, in default of which her letters will be revoked. Parish v. McGowan, 39 App. (D. C.) 184.

[b] **A general creditor cannot sustain a bill in equity on a purely legal demand,** unless he shows that he has exhausted his legal remedy or that that remedy for some good cause would be inadequate or unavailable. Hale v. White, 47 W. Va. 700, 35 SE 884 (where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative to the injury of plaintiff).

[c] **Action by creditor who failed to present claim in time.**—Orphans' Court Act (P. L. [1898] p 740 et seq § 70 et seq) provides that, if there is a surplus after settlement of an estate, a creditor who has failed to file his claim with the administrator prior to entry of a rule of the orphans' court barring creditors may present his claim to the administrator and be paid to the extent that the surplus be found sufficient for such purpose, and, if the claim so presented is disputed, distribution will be suspended until suit is brought to determine the validity of the claim, and such creditor is also entitled to be paid ratably with other like creditors from such assets as he may find have not been accounted for at final settlement, and that when an administrator without reasonable cause fails to make final settlement of his accounts within a year, or apply for a decree of distribution within three months after final settlement, the orphans' court may extend to such creditor the same relief that he would be entitled to if the final account had been passed and refunding bonds taken for legacies and distributive shares. The act also affords protection to barred creditors by requiring refunding bonds for their benefit when distribution is made by an administrator. 2 Gen. St. p 1679 renders heirs and devisees liable to creditors of decedent to the extent of

court to allow an executor a reasonable charge for legal advice and services, and five per cent on money arising from the sale of real estate, it has been held that, where a will authorized an executor to sell land and he employed plaintiffs to give him legal advice concerning the management of the estate, and employed them to find a purchaser for the land, and they did so, whereby a sale was consummated, they were entitled to maintain a suit in equity against the administrator de bonis non with the will annexed to recover for such services, it appearing that their remedies at law in the probate court would have obtained allowance of their demands as of the fifth class, and the nature of the demands being such that they should be paid in priority to creditors.[39] Where suit is brought on a claim secured by a mortgage or trust deed, the court may determine the validity of the trust deed,[40] and the mortgage being an incident of the debt, the court has jurisdiction to settle and determine conflicting claims and interests thereunder.[41] Where a claim against a decedent's estate is transferred from the orphans' court to the chancery court, the latter will take it in the plight and condition it is then in, and proceed with it like other chancery causes, applying the law regulating such estates in the orphans' court.[42] A statute providing that actions, commenced against executors after decedent's death, shall be considered demands legally exhibited against the estate from the time of serving the original process on the executor has reference to the time when claims shall be considered exhibited, and is not authority for the maintenance of a bill in equity to obtain an allowance for a money judgment.[43] A federal court of equity is without jurisdiction of a suit against an executrix to recover for a tort alleged to have been committed by her testator, where she is not charged as trustee, but solely as the personal representative of the tort-feasor.[44]

[§ 1887] **2. Actions on Joint or Joint and Several Obligations.** A court of probate has jurisdiction of a claim on which a decedent is jointly and severally liable and may adjudicate upon it as an equitable money claim.[45] It is otherwise, however, as to a claim on which decedent is jointly liable with another which must be enforced in a court of ordinary jurisdiction,[46] as the living joint obligor is not amenable to the jurisdiction of a probate court,[47] unless jurisdiction over such claims is conferred on the probate court by statute.[48]

[§ 1888] **3. Actions for Legacies or Distributive Shares—a. Legacies.** In a few English cases it was held that an action might be maintained at law against an executor upon his promise to pay a general legacy in consideration of assets;[49] but these cases were subsequently overruled and the doctrine established that an action at law did not lie for the recovery of a legacy,[50] except in case of specific legacies assented to by the executor, where the action was allowed on the ground that the interest in any specific thing bequeathed vests at law in the legatee upon the assent of the executor.[51] In the United States the right to bring actions at law to recover legacies is sometimes given by statute,[52] and in a number of cases the right to bring such an action has been upheld independently of any statutory provision,[53] whether the promise to pay is express or merely implied,[54] the reason assigned being that the basis for the rule in England does not exist here, as the rights of all legatees, whether married women or infants, are as fully protected by legislation as they could be by any administration of the trust in equity.[55] Other decisions have recognized the English rule as to specific legacies and allow actions at law to recover such

assets by them severally received. Under these statutes, a barred creditor has an adequate remedy at law, and he cannot maintain a bill in the court of chancery to draw the administrator into that court where the bill fails to present special reasons calling for such action. Jordan v. Logue, 76 N. J. Eq. 471, 79 A 426.

39. Matson v. Pearson, 121 Mo. A. 120, 97 SW 983.

40. Albright v. Allday, (Tex. Civ. A.) 37 SW 646.

41. Dyer v. George, 32 Tex. Civ. A. 504, 75 SW 48.

42. Taliaferro v. Brown, 11 Ala. 702.

43. McKee v. Allen, 204 Mo. 655, 103 SW 76.

44. U. S. v. Bitter Root Dev. Co., 133 Fed. 274, 66 CCA 652 [aff 200 U. S. 451, 26 SCt 318, 50 L. ed. 550].

45. Moore v. Rogers, 19 Ill. 347.

46. Noble v. McGinnis, 55 Ind. 528; Gallier v. Walsh, 1 Rob. (La.) 226; Stewart v. Webb, (Tex. Civ. A.) 156 SW 537.

[a] **Illustration.**—An action on a vendor's lien notes and to foreclose the lien is properly brought in the district court, instead of in the probate court, where it involves the rights of plaintiff as against defendants other than administrators and the rights of defendants among themselves. Stewart v. Webb, (Tex. Civ. A.) 156 SW 537.

47. Gallier v. Walsh, 1 Rob. (La.) 226.

48. See cases infra this note.

[a] **Statutes conferring jurisdiction.**—Under a statute giving the probate court exclusive jurisdiction over "all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate," the probate court has exclusive jurisdiction of demands arising out of joint obligations of deceased as well as those arising out of his sole obligations. Wernse v. McPike, 76 Mo. 249; Julian v. Wood, 69 Mo. 153.

49. Hawkes v. Saunder, 1 Cowp. 289; Atkins v. Hill, 1 Cowp. 284.

50. Deeks v. Strutt, 5 T. R. 690, 101 Reprint 384.

[a] **The reason assigned** is that if an action will lie for a legacy no terms can be imposed on the party who is entitled to recover; and therefore when the legacy is given to a wife, the husband would recover at law and no provision could be made for the wife or family; whereas a court of equity will take care to make some provision for the wife in such a case. Deeks v. Strutt, 5 T. R. 690, 101 Reprint 384.

51. Williams v. Lee, 3 Atk. 223, 26 Reprint 930; Doe v. Guy, 3 East 120, 102 Reprint 543; Young v. Holmes, Str. 70, 93 Reprint 390; 3 Williams Ex. p 518.

52. Ala.—Gause v. Hughes, 9 Port. 556; Pettigrew v. Pettigrew, 1 Stew. 580.

Me.—Holt v. Libby, 80 Me. 329, 14 A 201.

Mass.—Gale v. Nickerson, 151 Mass. 428, 24 NE 400, 9 LRA 200; Colwell v. Alger, 5 Gray 67; Miles v. Boyden, 3 Pick. 213.

Miss.—Packwood v. Elliott, 43 Miss. 504; Magee v. Gregg, 19 Miss. 70; Worten v. Howard, 10 Miss. 527, 41 AmD 607.

N. J.—Woodruff v. Woodruff, 3 N. J. L. 552.

N. Y.—Ducasse v. Caze, Anth. N. P. 190.

Pa.—Solliday v. Bissey, 12 Pa. 347; Clark v. Herring, 5 Binn. 33; Hollobach v. Van Buskirk, 4 Dall. 147, 1 L. ed. 777.

[a] **The orphans' court has jurisdiction** of an action by legatees against the executor to recover legacies. Wyckoff v. O'Neil, 71 N. J. Eq. 681, 63 A 982.

[b] **The probate court has exclusive original jurisdiction of special proceedings** for legacies and distributive shares; in such cases, if the construction of a will comes in question or, should exceptions be filed to the account as stated by the probate judge, such questions and exceptions and all other questions of law will be sent up to the judge from whose decision an appeal may be taken. Heilig v. Foard, 64 N. C. 710.

[c] **Discharge of one joint executor.**—If one of several joint executors who have rendered an account showing a balance is discharged and ordered to pay over any funds in his hands to the other executors and he does so the legatee cannot sustain an action against him for a legacy as it would be in direct conflict with the decree. McNeal v. Holbrook, 25 Pa. 189.

53. Colt v. Colt, 32 Conn. 422; Knapp v. Hanford, 6 Conn. 170; Goodwin v. Chaffee, 4 Conn. 163; Spalding v. Spalding, 2 Root (Conn.) 271; Warren v. Rogers, 2 Root (Conn.) 159; Lamb v. Smith, 1 Root (Conn.) 419; Tappen v. Tappen, 30 N. H. 50; Webster v. American Bible Soc., 50 Oh. St. 1, 33 NE 297; Weeks v. Sowles, 58 Vt. 696, 6 A 603.

54. See Connecticut cases supra note 54.

55. Knapp v. Hanford, 6 Conn. 170.

legacies when they are assented to by the executor,[56] and some decisions hold that an action at law will lie on an express promise to pay a general legacy either in consideration of assets or of forbearance,[57] but that an express promise of the executor is necessary to authorize the action.[58] It is also held that assumpsit will lie to recover a legacy where the final report of the executor has been approved, all other debts and legacies have been paid, and the legacy in question has been ordered paid.[59] Legacies are recoverable on a bill in equity,[60] and assent by the executor is unnecessary, as a court of equity, which regards the executor as a trustee, will compel him to assent and pay the legacy.[61] It has been held that this jurisdiction of equity is not taken away by the fact that an action at law may be maintained for the recovery of a legacy,[62] although there is authority for the contrary view.[63]

[§ 1889] **b. Distributive Shares.** An action at law does not lie to recover a distributive share of an intestate's property,[64] even though the personal representative may have expressly promised to pay,[65] unless such an action is authorized by statute.[66] A bill in equity is the appropriate remedy for the recovery of a distributive share,[67] an administrator being considered a trustee for the benefit of those entitled to distributive shares in an estate.[68] Even though a statutory remedy by action at law is given for the recovery of a distributive share of an estate, this remedy is merely cumulative and does not qualify or limit the jurisdiction of equity over the subject.[69]

[§ 1890] **4. Suits to Determine Rights of Devisees.** A suit to determine the rights of devisees is properly cognizable in equity.[70]

[§ 1891] **5. Actions Based on Malfeasance or Misfeasance of Personal Representative.** The jurisdiction of the probate court is usually adequate to afford a complete remedy against an administrator for failure to return an inventory or conversion of assets of the estate to his own use,[71] and where this is the case neither a court of ordinary common-law jurisdiction,[72] nor the chancery court[73] will assume jurisdiction. Where, however, the estate has been finally settled and the representative discharged the jurisdiction of the probate court is exhausted, and actions based on improper administration cannot be brought therein, but must be brought in another tribunal.[74] The administrator of an executor cannot be sued at law for a devastavit of the latter;[75] resort must be had to a court of equity, where the liabilities of the succeeding representatives and their sureties can be adjusted;[76] and a court of equity is the proper tribunal to investigate and grant relief against the fraudulent combination by the personal representative and others confederating to injure those interested in the faithful administration of the estate;[77] in no other court can ap-

56. Lark v. Linstead, 2 Md. Ch. 162; Hodge v. Hodgem, 72 N. C. 616; Miller v. Burnest, 65 N. C. 67. See also Nelson v. Cornwell, 11 Gratt. (52 Va.) 724 (where an executor has assented to a specific legacy the legatee may sue for his legacy at law, provided the executor has waived a refunding bond, but the intention to waive the refunding bond must be very clear and will not be presumed from mere assent to the legatee).

[a] **A legacy uncertain in amount** is not recoverable by action at law, even where the executor has assented to it, or has made a part payment; but it is enforceable in the court of probate. Hendrick v. Mayfield, 74 N. C. 626.

57. McNeil v. Quince, 3 N. C. 153.

58. Coates v. Mackie, 43 Md. 127; Kent v. Sommervell, 7 Gill & J. (Md.) 265; Lark v. Linstead, 2 Md. Ch. 162; Vanlaar v. Haslet. Wright (Oh.) 458.

59. Anderson v. Patty, 168 Ill. A. 151.

60. Conn.—Colt v. Colt, 32 Conn. 422.

Del.—Walker v. Caldwell, 8 Del. Ch. 91, 67 A 1085.

Md.—Lark v. Linstead, 2 Md. Ch. 162.

N. J.—Frey v. Demarest, 16 N. J. Eq. 236.

N. C.—McNeil v. Quince, 3 N. C. 153.

Vt.—Bellows v. Sowles, 57 Vt. 411; Sparhawk v. Buell, 9 Vt. 41.

Va.—Taliaferro v. Thornton, 6 Call (10 Va.) 21.

[a] **Where the executor refuses to pay a legacy claimed by him to be void** under the state law, a bill to recover it lies, as the remedy at law is inadequate. Domestic, etc., Missionary Soc. Protestant Episcopal Church v. Gaither, 62 Fed. 422.

61. Lark v. Linstead, 2 Md. Ch. 162.

62. Ala.—Pettigrew v. Pettigrew, 1 Stew. 580.

Del.—Walker v. Caldwell, 8 Del. Ch. 91, 67 A 1085.

N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 681, 63 A 982.

Oh.—Webster v. American Bible Soc., 50 Oh. St. 1, 33 NE 297.

Va.—Nelson v. Cornwell, 11 Gratt. (52 Va.) 724.

63. Gale v. Nickerson, 151 Mass. 428, 24 NE 400, 9 LRA 200 (the action must be brought at law where a statute authorizes this mode of procedure because there is an adequate remedy at law, and a statute providing that a bill in equity may be maintained to reach and apply in payment of a debt any property of the debtor or which cannot be come at by attachment or execution is not applicable to a suit by heirs of a legatee to recover his share of an estate).

64. Jones v. Tanner, 7 B. & C. 542, 14 ECL 245, 108 Reprint 825.

65. Amos v. Campbell, 9 Fla. 187; Fischer v. Fischer, 50 N. Y. Super. 74; Howard v. Brown, 11 Vt. 361; Jones v. Tanner, 7 B. & C. 542, 14 ECL 245, 108 Reprint 825; Johnson v. Johnson, 3 B. & P. 162, 127 Reprint 89; Holland v. Clark, 1 Y. & Coll. 151, 20 EngCh 151, 62 Reprint 831.

[a] **A distributive share due a feme covert** cannot be recovered in an action at law except on the administrator's bond, the only remedy in chancery where the court will see that a suitable provision is made. At law a husband might obtain possession of a wife's property without being compellable to make a suitable settlement upon her. Howard v. Brown, 11 Vt. 361.

66. Wheeler v. Bolton, 54 Cal. 302; Schmidt v. Stark, 61 Minn. 91, 63 NW 255; Dorsheimer v. Rorback, 23 N. J. Eq. 46 [aff 25 N. J. Eq. 516]; Frey v. Demarest, 16 N. J. Eq. 236; Holmes v. Howell, 14 N. C. 98.

67. Cherry v. Belcher, 5 Stew. & P. (Ala.) 133; Garrison v. Hill, 81 Md. 206, 31 A 794; Parsons v. Parsons, 9 N. H. 309, 32 AmD 362; Pinkerton v. Walker, 3 Hayw. (Tenn.) 221.

[a] **Where an executor refuses to pay over the money in his hands to a person claiming the same as distributee** until the right of such person to receive it is established, equity has jurisdiction to grant relief upon a bill by the distributee against the executor. Garrison v. Hill, 81 Md. 206, 31 A 794.

68. Parsons v. Parsons, 9 N. H. 309, 32 AmD 362; Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800; Pinkerton v. Walker, 3 Hayw. (Tenn.) 321.

69. Dorsheimer v. Rorback, 23 N. J. Eq. 46 [aff 25 N. J. Eq. 516]; Frey v. Demarest, 16 N. J. Eq. 236.

70. Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800 (where a will devised to testator's niece certain premises for life, with fee to her issue, with limitation over in case of her death without issue, and further authorized the executors to take charge of the real estate not directly devised with right of immediate possession, and the executors took charge of the property devised to the niece, her suit for determination of her rights was cognizable in equity, for if the executors were testamentary trustees, as they claimed, plaintiff had no adequate remedy at law, and, if they were usurping the duties of such trustees, that fact depended solely on the construction of the will, which was a pure question of law, and could be determined by the court either in its equitable capacity or as a trial court).

71. Slad v. Hajicek, 203 Ill. A. 396; Bowers v. Cook, 132 Md. 432, 104 A 420; Edmundson v. Roberts, 3 Miss. 822; Vazis v. Zimmer, (Mo.) 209 SW 909.

[a] **Extent of power.**—The probate court can make necessary orders for settlement of estates of deceased persons, but cannot render judgments against administrators for receiving money of estates and failing to account therefor. Deer Lodge County v. Kohrs, 2 Mont. 66.

[b] **In Louisiana** opposition to a claim by an executor under a conveyance from the testator must be made by direct independent action. Kranz's Succ., 117 La. 647, 42 S 197.

72. Graffam v. Ray, 91 Me. 234, 39 A 569; Wentz v. Blair, 232 Pa. 135, 81 A 144.

73. Edmundson v. Roberts, 3 Miss. 822. But compare Dobbs v. Cockerham, 2 Port. (Ala.) 328, 338 ("The most ordinary course appears to be, to proceed by suit on the administration bond, or by bill in chancery").

74. Davis v. Harwood, 70 Tex. 71, 8 SW 58; Long v. Wooters, 18 Tex. Civ. A. 35, 45 SW 165.

75. Taliferro v. Bassett, 3 Ala. 670.

76. Taliferro v. Bassett, 3 Ala. 670.

77. Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 119; Crain v.

propriate relief be afforded.[78]

[§ 1892] **6. Suits for Specific Performance.** Specific performance is strictly a subject of equity jurisdiction;[79] and suits to enforce specific performance of a contract entered into by a person since deceased must be brought in a court of chancery in the absence of special statutes conferring jurisdiction on some other court.[80] To authorize any other court to exercise jurisdiction, it must be clearly conferred and cannot be given by implication merely.[81] In some states the statues have conferred on probate courts jurisdiction to entertain suits of the character under consideration,[82] and such jurisdiction has been held to be exclusive[83] although it is more commonly regarded as concurrent with the jurisdiction of courts of equity,[84] where there is nothing in the act conferring jurisdiction which indicates an intention to restrict the bringing of such suits to the probate court.[85]

[§ 1893] **7. Suits to Enforce Liens.** The enforcement of vendor's liens belongs to the jurisdiction of chancery courts,[86] and a probate court has no authority to enforce such lien unless this is conferred by statute.[87] The statutory jurisdiction of the probate court in such matters is sometimes made exclusive,[88] but unless a legislative intent to confer exclusive jurisdiction is clearly apparent, the jurisdiction of equity is not ousted.[89] Jurisdiction with respect to the foreclosure of mortgages given by decedent is sometimes conferred by statute on the probate courts,[90] but the mere grant of such jurisdiction, without indication of legislative intent to make it exclusive, leaves concurrent jurisdiction in the courts of equity.[91] A court of chancery and not a court of probate has jurisdiction to enforce a lien of an heir against land purchased by an administrator out of funds of the estate.[92]

[§ 1894] **8. Actions or Suits to Set Aside Fraudulent Conveyances.** Where a personal representative in behalf of creditors of the estate seeks to set aside a conveyance of realty by decedent made in fraud of creditors, suit must be brought in a court of equity.[93] It has been considered, however, that if the property sought to be reached is personalty, an action for its recovery may be brought in a court of law,[94] and even that such action must be brought in a court of law and a bill in equity cannot be maintained.[95] But there is also authority for the view that the only remedy of an administrator who seeks to recover goods transferred by his decedent in fraud of creditors is in equity, and he cannot maintain an action at law for the purpose.[96]

[§ 1895] **9. Actions on Contracts of Personal Representatives.** Common-law tribunals and not probate courts have jurisdiction of actions against personal representatives on contracts made by them, which bind them and not the estate, in the absence of some statute conferring jurisdiction on probate courts.[97] If by statute the contract binds the estate

Crain, 17 Tex. 80; Dobbin v. Bryan, 5 Tex. 276.

[a] **Illustration.**—Where a four thousand dollar interest in real estate owned by intestate at the time of his death was diverted from the estate by the administratrix and heirs, equity will entertain action by creditors to compel the heirs and the administratrix individually to pay such amount to the administratrix in her official capacity, creditors having no adequate remedy in probate court. Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 119.

78. Crain v. Crain, 17 Tex. 80.

79. See Specific Performance [36 Cyc 552 et seq].

80. Coil v. Pitman, 46 Mo. 51.

81. Coil v. Pitman, 46 Mo. 51.

82. U. S.—Aspley v. Murphy, 52 Fed. 570, 3 CCA 205.

Cal.—Corwin's Est., 61 Cal. 160.

Ind.—Boyle v. Moss, 4 Blackf. 535.

Me.—May v. Boyd, 97 Me. 398, 54 A 938, 94 AmSR 509.

Mass.—Lyons v. Hayden, 119 Mass. 482.

Miss.—White v. Gilbert, 39 Miss. 802; Servix v. Beatty, 32 Miss. 52.

Pa.—Fitzimmons v. Lindsay, 205 Pa. 79, 54 A 488; Myers v. Black, 17 Pa. 193; McFardon's App., 11 Pa. 503; Chess' App., 4 Pa. 52, 45 AmD 668; Logan's Est., 21 Pa. Co. 455.

Tex.—Walker v. Myers, 36 Tex. 203; Todd v. Caldwell, 10 Tex. 236; Buchanan v. Park, (Civ. A.) 36 SW 807.

Wash.—Christ Church v. Beach, 7 Wash. 65, 39 P 1053.

[a] **Suits to which statutes not applicable.**—(1) Statutes vesting in the orphans' court exclusive jurisdiction specifically to enforce a contract where a purchaser, under articles of agreement for the sale of land, leaves and the vendor retakes possession and then dies, does not apply when the vendor conveys the legal title to a third person, who subsequently dies, devising it to another. Merrell v. Merrell, 5 Pa. Co. 531. (2) The statutory jurisdiction of a probate court to enforce the specific performance by an administrator of a contract of the deceased to convey real estate can be exercised only when there is a bond or written agreement in writing to make title. Peters v. Phillips, 19 Tex. 70, 70 AmD 319.

83. Fitzsimmons v. Lindsay, 205 Pa. 79, 54 A 488; Wiley's App., 84 Pa. 270; Cobbs v. Burns, 61 Pa. 278; Porter v. Dougherty, 25 Pa. 405; Weller v. Weyand, 2 Grant (Pa.) 103; Woopel v. Calder, 8 LancBar (Pa.) 205.

84. Lyons v. Hayden, 119 Mass. 482; Mousseau v. Mousseau, 40 Minn. 236, 41 NW 977; Christ Church v. Beach, 7 Wash. 65, 39 P 1053.

85. Christ Church v. Beach, 7 Wash. 65, 39 P 1053.

86. Burger v. Potter, 32 Ill. 66; Edmonson v. Phillips, 73 Mo. 57; Shober v. Wheeler, 144 N. C. 403, 57 SE 152.

87. Ross v. Julian, 70 Mo. 209.

[a] **Such jurisdiction is not conferred by a statute** giving the probate court jurisdiction in "proceedings instituted against executors and administrators upon any demand against the estate of a decedent." Ross v. Julian, 70 Mo. 209.

88. Cunningham v. Taylor, 20 Tex. 126; Moore v. Glass, 6 Tex. Civ. A. 368, 25 SW 128.

89. Edmonson v. Phillips, 73 Mo. 57.

90. Western Mortg., etc., Co. v. Jackman, 77 Tex. 622, 14 SW 305.

91. Shoemaker v. Brown, 10 Kan. 383; Corbett v. Rice, 2 Nev. 330; Denton v. Maple, 92 Wash. 290, 158 P 1001.

92. Culver v. Pierson, (N. J. Ch.) 15 A 269.

93. Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

[a] **Surrogate's court without jurisdiction.**—L (1897) p 509 c 417 § 7, providing that a creditor of a deceased insolvent debtor may maintain an action to set aside a fraudulent conveyance by deceased, does not confer on the surrogate's court authority to determine whether a transfer by a testator was void as fraudulent, since such transfer may be attacked only in a court of equity. In re Bunting, 98 App. Div. 122, 126, 90 NYS 786 ("Assuming, however, that the Legislature intended to confer such power and authority upon the Surrogate's Court as is claimed for it by the petitioner, the statute would be clearly condemned by the provisions of section 15 of article 6 of the Constitution. So far as applicable this section reads: 'Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature.' We have already seen by the authorities cited that Surrogates' Courts neither before nor since the adoption of this provision of the Constitution possessed general equitable powers, and there exists no authority in the Legislature to confer it upon them. They have such jurisdiction and such only as they possessed at the time of the adoption of the constitution, and may exercise such jurisdiction until otherwise provided by the Legislature. The language excludes authority to add to the jurisdiction possessed by such courts. The only power reserved in the Legislature is to regulate, take away, cut down or limit the jurisdiction thus conferred; but no authority exists to add to it. If it did the Constitution would not have imposed any limitation or be a bar to the conferring of the most ample jurisdiction, both legal and equitable, which could be provided by law. Manifestly such is not its construction. It may withhold power, but it cannot grant it beyond the limitation of its exercise existing at the time when the Constitution was adopted").

Equitable remedies in case of fraudulent conveyance generally see Fraudulent Conveyances [20 Cyc 672].

94. Doe v. Clark, 42 Iowa 123; Cooley v. Brown, 30 Iowa 490, 35 Iowa 475; Bresnaham v. Nugent, 106 Mich. 459, 64 NW 458.

95. Bresnaham v. Nugent, 106 Mich. 429, 64 NW 458.

96. Benjamin v. Le Baron, 15 Oh. 517.

97. Flower v. Swift, 5 Mart. N. S. (La.) 529; Holmes v. Foster, 78 N. C. 35.

[a] **Circuit court.**—Under the statute providing that any person

and not the representative personally the probate court has exclusive original jurisdiction to enforce it,[98] and, under a statute giving probate courts jurisdiction in all suits against administrators arising from any duty omitted in the discharge of their trusts, an action may be brought in the probate court to compel specific performance of a contract of sale of land against an administrator who had individually executed a bond to convey to his intestate prior to his death and who in selling his intestate's interest in the land executed a bond to convey in his individual capacity instead of signing as administrator the bond that had been executed in favor of his intestate.[99]

[§ 1896] **10. Actions on Claims of Personal Representative against Estate.** Where an administrator has a claim to any portion of the property alleged by the creditors to belong to the estate and his claim is adverse to that of the creditors, they may resort to a court of equity to have the controversy settled.[1] A statute providing that any person having a demand against an estate may establish the same by the judgment of some court of record in the ordinary course of proceedings confers on circuit courts jurisdiction to establish demands against estates of deceased persons, but does not give them jurisdiction to adjust the claims of a personal representative for his services and expenses against the estate in his hands.[2]

[§ 1897] **11. Actions to Charge Personal Representative Individually.** Actions of this character are usually brought in courts of ordinary jurisdiction;[3] but under some statutes the probate court has jurisdiction of proceedings to charge a personal representative individually for a debt of decedent.[4]

[§ 1898] **12. Suits between Personal Representatives.** Subject to some few exceptions, courts of law have no jurisdiction of suits by one personal representative against another, suits of this character being of equitable cognizance.[5] Where a bill filed by an executor against his coexecutor sought to enjoin the latter from consummating and carrying out a wrongful scheme to despoil the estate and to get control of its interests represented by an outside corporation, the probate court had no jurisdiction in equity to enjoin defendant from consummating such act, and hence the fact that the probate court intervened by displacing defendant executor with an administrator with the will annexed did not require a dismissal of the bill.[6]

[§ 1899] **13. Interpleader.** Where, on a bill in equity by an administrator against a claimant to determine whether a note payable to the deceased in defendant's possession was received by him from the deceased as a gift causa mortis, both parties consented to the filing of a bill of interpleader by the representative of the deceased maker of the note and the payment into court by him of the amount due thereon, the court's jurisdiction to try the question of ownership of the note became unquestionable.[7]

[§ 1900] **14. Set-Off or Counterclaim.** The set-off of one judgment against another is a matter of equitable cognizance and the probate court has no power to try the validity of the judgments of other tribunals or the right of personal representatives to set off one judgment against another.[8] A court of equity has not jurisdiction to set off a claim against the estate not reduced to judgment against a judgment in favor of the estate.[9] Courts in which suit is brought by a personal representative to enforce a demand in favor of the estate are very generally held to have jurisdiction to entertain a claim against the estate and allow it by way of set-off and counterclaim, provided it is of such a character that it will admit of being set off or counterclaimed.[10] Statutes vesting the probate court with exclusive jurisdiction of suits or proceedings on demands against an estate only contemplate a voluntary proceeding against an estate and do not deny the right to make any defense on being involuntarily brought into another court.[11] Nevertheless the court in which the set-off is pleaded has jurisdiction only so far as the claims extinguish each other;[12] no judgment can be rendered for a balance in favor of defendant;[13] and the jurisdiction is further restricted by the character of the claims which are sought to be set off against each other.[14] The superior court sitting in probate has jurisdiction to enforce a set-off by an administrator in a proceeding to enforce payment of an allowed claim, although it is not authorized to award judgment in favor of the administrator for any excess.[15]

[§ 1901] **15. Miscellaneous.** If property of a person is inventoried by an administrator as belonging to an estate, the owner may sue at law for its recovery and a bill in equity will not lie, where the remedy at law is adequate.[16] To recover money paid to the distributee in case new debts appear against the intestate, the remedy of the administrator is in equity.[17] The representative may file a bill in chancery against one who intermeddles and embezzles goods of the estate, instead of proceeding at law, where statutes expressly authorize a suit in equity under these circumstances.[18] Statutes giving a court jurisdiction over all suits of executors and administrators on any "demand" against the estate confer on such court jurisdiction of an action of trespass for acts committed by decedent.[19] While a court of probate jurisdiction may entertain proceedings in the nature of a discovery against persons charged with secreting or refusing to account for property belonging to an estate, yet its power

having a claim against an estate may establish it by judgment or decree of some court of record, the circuit court has jurisdiction of an action by an attorney to establish a claim for services rendered a decedent's estate. Nichols v. Reyburn, 55 Mo. A. 1.

98. Gurnee v. Maloney, 38 Cal. 85, 99 AmD 352.

99. Boyle v. Moss, 4 Blackf. (Ind.) 535.

1. McFarlan v. McFarlan, 155 Mich. 652, 119 NW 1108 [quot Cyc]; Morse v. Slason, 13 Vt. 296.

2. Stephens v. Cassity, 104 Mo. A. 210, 77 SW 1089.

3. Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221; Prater v. Stinson, 26 Ala. 456; Burnett v. Strong, 26 Miss. 116; Dorscheimer's Est., 9 Pa. Dist. 46; Cox's Est., 2 Pa. Dist. 26.

4. Jones' App., 11 WklyNC (Pa.) 554.

5. See infra § 2298.

6. Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527.

7. Varrick v. Hitt, (N. J.) 55 A 139 [aff 66 N. J. Eq. 442, 57 A 406].

8. Stilwell v. Carpenter, 2 AbbN Cas (N. Y.) 238.

9. Reno v. Robertson, 41 Ind. 567 (it is only after the claims have passed into judgment that one can be used on motion to compel satisfaction of the other).

10. Thompson v. Mylne, 11 Rob. (La.) 349; Stiles v. Smith, 55 Mo. 363.

Set-off or counterclaim in actions by personal representatives see supra §§ 1866–1883.

11. Stiles v. Smith, 55 Mo. 363.

12. Thomson v. Mylne, 11 Rob. (La.) 349.

13. Thomson v. Mylne, 11 Rob. (La.) 349.

14. See supra §§ 1866–1883.

15. In re Bell, 168 Cal. 253, 141 P 1179.

16. Beekman v. Cottrell, 51 N. J. Eq. 337, 31 A 29.

17. Turner v. Egerton, 1 Gill & J. (Md.) 430, 19 AmD 235.

18. Thorn v. Tyler, 3 Blackf. (Ind.) 504.

19. Mayberry v. McClurg, 51 Mo. 256.

ends with the discovery, so that the right or title of decedent to property claimed by or from his administrator must if an adjudication becomes necessary be litigated in courts of ordinary jurisdiction.[20] Under a statute providing that actions may be prosecuted against executors in the circuit court when the county court cannot afford a remedy as adequate or efficient, the circuit court has jurisdiction of a suit by executors of a deceased director of a corporation to wind up the corporation, in which a cross bill is filed against the executors to recover, as a corporate asset, a sum alleged to be due the corporation from the estate of the director because of his wrongful conversion of the goodwill of the corporation.[21] A suit for an injunction against an administrator, charging a conspiracy between him and another, a resident of the county, to defraud the estate, and the distributee and creditors, and praying substantial relief against the other defendant is within the jurisdiction of the superior court of the county.[22]

[§ 1902] **16. Estoppel to Object to Jurisdiction.** Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed in the United States courts against the executor, alleging plaintiff to be a citizen of Tennessee and defendant of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court by the executor on the ground of residence of the parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in the state court against a purchaser at the sale.[23]

[§ 1903] **H. Venue—1. Actions against Personal Representative.** As a general rule, an executor or administrator cannot sue or be sued in any jurisdiction other than the one in which he was appointed.[24] A personal representative may be sued in the county in which he resides,[25] or where he is found,[26] unless the estate is being administered in another county.[27] It is sometimes required by statute that an action against an executor or administrator should be brought in the county where the estate is being administered,[28] and such a provision has been held to apply to an action against an executor or administrator who is sued together with other defendants who are not representatives of the estate,[29] although it has also been asserted that, when an administrator is a necessary party to an action, he may be sued in any county where any of his codefendants reside.[30] Such a requirement has, however, been held not to apply to an action for the construction of a will,[31] to an action against an independent executor for property belonging to minor children which is alleged to have been wasted,[32] to a suit for a community debt against the administratrix of community property,[33] to a suit by distributees against the administrator and the sureties on his bond,[34] or to a suit to recover a legacy payable at a specific time,[35] or to actions in which the personal representative is not sued in his character as such.[36] A statute providing that all actions on official bonds "or against" personal representatives in their official capacity shall be instituted in the county where the bond shall have been given, if the principal or any of the sureties is in the county, applies to all actions against personal representatives in their capacity as such, whether sued on the bond or merely as executor or administrator.[37] An action to settle a deceased guardian's estate and recover funds misappropriated has been held to be maintainable in the county in which the administrator and the deceased guardian qualified, although a party participating in the misappropriation was domiciled in another county.[38] Statutes sometimes permit actions against personal

20. Gardner v. Gillihan, 20 Or. 598, 27 P 220; McGrann's Est., 14 Pa. Dist. 52, 31 Pa. Co. 472; Scull's Est., 38 Pa. Co. 366; Re Fenwick, 35 Ont. L. 29, 9 OntWN 227, 25 DomLR 850.

21. Lindemann v. Rusk, 125 Wis. 210, 104 NW 119.

22. Kelly v. Jeffries, 147 Ga. 741, 95 SE 287.

23. Erwin v. Lowry, 7 How. (U. S.) 172, 12 L. ed. 655.

24. Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. ed. 639; Bryan v. Curtis, 30 App. (D. C.) 234; Johns v. Herbert, 2 App. (D. C.) 485; Plumb v. Bateman, 2 App. (D. C.) 156; Taylor v. Harris, 164 Ky. 654, 176 SW 168; Poole v. Allinsworth, 13 Ky. Op. 279.

25. Ga.—Long v. Stanford, 135 Ga. 823, 70 SE 645.

Ill.—People's Bank v. Wood, 193 Ill. A. 442.

Ky.—Forsee v. Forsee, 144 Ky. 169, 137 SW 836; Ecton v. Smith, 12 Ky. Op. 725.

N. Y.—Rathbun v. Brownell, 43 Misc. 307, 88 NYS 853.

N. C.—Bidwell v. King, 71 N. C. 287.

[a] **Coexecutors residing in different counties.**—Where the grantor is dead when a suit is brought to cancel an alleged void deed, and there are two qualified executors of his will residing in different counties, suit may be brought against the executors in either county. Brown v. Wilcox, 147 Ga. 546, 94 SE 993.

26. People's Bank v. Wood, 193 Ill. A. 442.

27. Rogers v. Harrison, 1 Tex. A. Civ. Cas. § 494 (holding, however, that a petition in a suit against an executor, instituted in one county, which alleges that defendant resided in another county, and which fails to allege that the estate was being administered in the former county, is insufficient to support a judgment by default against the executor).

28. Thomas v. Ellington, 162 N. C. 131, 78 SE 12; Joy v. Citizens' L. Ins. Co., (Tex. Civ. A.) 178 SW 590; Dickson v. Scharff, (Tex. Civ. A.) 142 SW 980.

[a] **An action for a legacy** must be brought in the probate court of the county in which the will was proved. Bidwell v. King, 71 N. C. 287.

[b] **Action involving account and settlement.**—Where the only jurisdictional fact alleged or appearing is that the action is brought to recover from defendant administratrix the amount due from the estate to the other defendants as heirs of the decedent, such amount having been pledged by them to plaintiff to secure a debt, the action involves an account and settlement of the estate and hence is within a statute declaring the venue of actions against administrators in their official capacity to be in the county where their bonds were given. Thomas v. Ellington, 162 N. C. 131, 78 SE 12.

[c] **Independent executors** as well as other executors are within a statute requiring suits for money demands against estates to be brought in the county where the estate is being administered. Bondies v. Buford, 58 Tex. 266; Morton v. Morris, (Tex. Civ. A.) 56 SW 559.

[d] **A claim against the proceeds of insurance** on the life of decedent is not a "money demand against the estate," within a statute acquiring an action on such a demand to be brought in the county where the estate is being administered. Joy v. Citizens' L. Ins. Co., (Tex. Civ. A.) 178 SW 590.

29. T. L. Horn Trust Co. v. Delano, 162 Mo. A. 402, 142 SW 770; Wilson v. Kyle, 35 Tex. 559; Dickson v. Scharff, (Tex. Civ. A.) 142 SW 980.

30. Owen v. State, 25 Ind. 107.

31. Crosson v. Dwyer, 9 Tex. Civ. A. 482, 30 SW 929 (suit may be brought in any county where the executors reside).

32. Morton v. Morris, (Tex. Civ. A.) 56 SW 559.

33. Jones v. McRae, 16 Tex. Civ. A. 308, 41 SW 403 (decided under Rev. St. art 2227, providing that an administratrix of community property may be sued in respect to such property the same as the deceased might have been in his lifetime. It was further held in this case that, where such administratrix qualified in one county and moved to another, suit must be brought against her in the county of her residence).

34. Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821.

35. Worthington v. Ware, 68 SW 627, 24 KyL 429 (such a suit does not involve a settlement of testator's estate).

36. Craven v. Munger, 170 N. C. 424, 87 SE 216; Roberts v. Connor, 125 N. C. 45, 34 SE 107.

37. Farmers' State Alliance v. Murrell, 119 N. C. 124, 25 SE 785; Wood v. Morgan, 118 N. C. 749, 24 SE 522; Bidwell v. King, 71 N. C. 287; Foy v. Morehead, 69 N. C. 512; Stanley v. Mason, 69 N. C. 1.

38. Taylor v. Harris, 164 Ky. 654, 176 SW 168.

representatives to be brought either in the county where they reside or were appointed or where they can be served personally.[39] Where a statute requires suits against an executor for distribution to be brought in the county where he qualifies, a plea of set-off equivalent to such suit to an action which the executors bring in a different county cannot be sustained.[40] Executors are not public officers within the meaning of statutes relating to place of trial of actions against public officers.[41] Where an administrator wrongfully inventories property of another's estate, the administrator of the latter estate may sue for its recovery in the county where he took out administration, although the court of another county has jurisdiction of the estate of defendant's intestate.[42] Where a devisee of land conveyed it to a minor, taking the minor's note therefor, and died before the minor reached his majority, an action against the devisee's administratrix by the minor on reaching his majority to set aside the note and cancel the deed is not a suit for the settlement of the devisee's estate, and may be brought in the county where the administratrix resides where she had removed from the county in which decedent had his domicile and in which she received her appointment.[43] A nominal party cannot be constituted an administrator and thus by uniting him with the real party in interest withdraw the jurisdiction from the county of the residence of the latter.[44] An action by an executor against a bank to compel it to transfer the stock to a certain devisee of the testator is a transitory action.[45]

[§ 1904] **2. Actions by Personal Representative.** Actions which are transitory and not local in their nature need not be brought by a personal representative in the county where the estate is being administered,[46] and he may bring suit on a note executed to decedent by a nonresident and payable at the maker's residence in the state in which his letters issued.[47] Where the assets prove insufficient to pay debts, an action by the representative to set aside his decedent's conveyance of realty is properly brought in the county where the land is situated.[48] A suit by an executor of an insolvent estate, to marshal the assets and enjoin pending actions of creditors, may be brought in the county of the residence of any creditor of the estate.[49]

[§ 1905] **3. Change of Venue.** Claims filed against a decedent's estate are civil suits within statutes relating to change of venue,[50] and a statute authorizing change of venue on application of any freeholder sued in any action not local out of the county of his residence applies to actions against personal representatives.[51] Change of venue to a county in which the personal representative is by statute required to be sued is proper when the action is brought in another county.[52] Where a defendant dies pending an action, his personal representative is not entitled to have the action removed to the county where the estate is being administered.[53]

[§ 1906] **I. Time to Sue—1. Premature Commencement of Action—a. In Absence of Statute.** There can of course be no action against personal representatives as such, until the will, if any, has been probated and the personal representatives have qualified and received letters testamentary or of administration;[54] and if the right to maintain an action depends on plaintiff's appointment the action must fail if the appointment was not made until after the action was commenced.[55] As soon as letters are issued the representatives become liable to be sued by persons holding claims against the estate,[56] in the absence of any statute protecting them from suit for a designated period,[57] although it is proper that such an action should be stayed for a reasonable time to enable the representative to ascertain the actual condition of the estate.[58]

An action to settle an estate may be brought as soon as the representative qualifies,[59] and hence, where part of the relief demanded, in an action against an administrator, is a settlement of the estate, a dismissal of the entire petition is improper.[60]

A suit by a mortgagee to fix his rights against a decedent's estate is premature when brought before default.[61]

An action on a contingent claim which has been rejected cannot be brought until the happening of the contingency which renders the claim an absolute one.[62]

A legatee or distributee cannot ordinarily maintain an action against an executor or administrator for his share of the estate until there has been a decree for distribution,[63] although the rule may be otherwise in case of a suit for an accounting and settlement,[64] or a suit by the widow to enforce an

39. Osborn v. Lidy, 51 Oh. St. 90, 37 NE 434.

40. Bennett v. McCrocklin, 3 Metc. (Ky.) 322.

41. Thompson v. Wood, 115 Cal. 301, 47 P 50.

42. Abbott v. Peo., 10 Ill. A. 62 [aff 105 Ill. 588].

43. Forsee v. Forsee, 144 Ky. 169, 137 SW 836.

44. Lawson v. Cunningham, 34 Ga. 523 (such a proceeding would be a fraud upon the provision of the constitution which guarantees to a defendant the right to be sued in the county of his residence).

45. Citizens' Nat. Bank v. Boswell, 93 Ky. 92, 19 SW 174, 14 KyL 17.

46. Ragan v. Smith, 142 Ga. 398, 83 SE 119; Trimble v. Lebus, 94 Ky. 304, 22 SW 329, 15 KyL 85; Dugan v. Harris, 13 Ky. Op. 297; Hannon v. Southern Power Co., 173 N. C. 520, 92 SE 353; Whitford v. North State L. Ins. Co., 156 N. C. 42, 44, 72 SE 85 [quot Cyc].

[a] **The representative may sue in the county where he resides,** although his letters were taken out in another county. Hannon v. Southern Power Co., 173 N. C. 520, 92 SE 353.

47. Perkins v. Stone, 18 Conn. 270; Wilmington Trust Co. v. De Paris, 28 Del. 565, 96 A 30; Amsden v. Danielson, 18 R. I. 787, 31 A 4.

48. Buck v. Lockwood, 193 Mich. 242, 159 NW 509.

49. Ragan v. Smith, 142 Ga. 398, 83 SE 119.

50. Lester v. Lester, 70 Ind. 201.

51. McLeod v. Shelton, 42 Miss. 517.

52. Wood v. Morgan, 118 N. C. 749, 24 SE 522.

53. Latham v. Latham, (N. C.) 100 SE 131 (the statute applies only to actions "instituted" against the personal representative).

54. Stratton v. Dines, 126 Fed. 968 [aff 135 Fed. 449, 68 CCA 161].

55. Gatfield v. Hanson, 57 HowPr (N. Y.) 331.

56. Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 NYS 852 [aff 201 N. Y. 546 mem, 95 NE 1129 mem]; Matson v. Abbey, 70 Hun 475, 24 NYS 284 [aff 141 N. Y. 179, 36 NE 11].

57. See infra §§ 1907–1913.

58. Montreal Bank v. Killoran, 3 Que. Pr. 204.

59. McCandless v. McCandless, 111 SW 302, 33 KyL 790.

60. McCandless v. McCandless, 111 SW 302, 33 KyL 790.

61. Union Cent. L. Ins. Co. v. Kimble, 140 Ky. 117, 130 SW 999.

62. Miller v. Miller, 171 Cal. 269, 152 P 728.

63. Tallon v. Tallon, 156 Mass. 313, 31 NE 287; Browne v. Doolittle, 151 Mass. 595, 25 NE 23; Cummings v. Cummings, 143 Mass. 340, 9 NE 730; Cathaway v. Bowles, 136 Mass. 54; Glanding's Est., 15 Pa. Dist. 985.

[a] **Suit to avoid transfer.**—Since a decedent's estate must be settled under the direction of the probate court by an executor or administrator, decedent's widow was not entitled to maintain a bill against the executors and the transferee of certain of decedent's personal property, alleged to have been transferred in fraud of her marital rights, to set aside such transfer prior to the final settlement of the estate in the probate court. Flynn v. Flynn, 183 Mass. 365, 67 NE 314.

64. Wheeler v. Horne, 136 Ga. 486, 71 SE 901.

antenuptial agreement.[65]

[§ 1907] **b. Under Statutes—(1) In General.** In many jurisdictions there have been enacted statutes which protect personal representatives from suit for a designated period after letters testamentary or of administration are granted,[66] and where an action is brought before the expiration of the statutory period, the court is without jurisdiction and may dismiss on its own motion or on the application of a party.[67] A statute protecting personal representatives from compulsory payment for a certain time after taking out letters does not, it is held, prohibit action against the representative within such time.[68] Provision is, however, sometimes made for the granting by the court of leave to sue before the expiration of the period of delay where it appears that unless the creditor is thus permitted to sue he will be deprived of his remedy by virtue of another statute.[69]

[§ 1908] **(2) Persons Protected by Statute.** Statutes protecting the representative from suit for a certain time apply to an executor who is also residuary legatee and who has given bond to pay debts and legacies,[70] and to an ordinary, on whom the duties and rights of an executor are cast by statute.[71] Where a plaintiff has died pending action, and his administrator has been substituted as plaintiff, a statute prohibiting actions against representatives within a certain period after their appointment, and judgments against them within a certain longer period, does not protect defendant from being forced to trial before the time when judgment might be rendered against the representative.[72]

[§ 1909] **(3) Actions to Which Statutes Applicable.** Some statutes protecting personal representatives from actions have been held to apply to suits in equity as well as actions at law;[73] but other statutes for this purpose have been held to apply only to actions at law.[74] While the statutes are applicable where the personal representative as such is a necessary defendant,[75] the suit must be against the personal representative as such. If brought against him in his personal capacity the exemption does not apply.[76]

Such statutes have been held to apply to a bill to enforce a vendor's lien for purchase money,[77] an action to recover counsel fees,[78] a bill by a creditor of the administrator to be subrogated to the administrator's rights as creditor of the estate, the latter having paid a debt of the estate with his own money, in fraud of complainant's rights,[79] and a bill against one both personally and as administrator charging him with a fraudulent transfer to decedent.[80]

Such statutes have been held not to apply to an action of detinue,[81] an action arising out of a breach of duty on the representative's part,[82] a suit against an executor to enforce a testamentary trust,[83] a suit by a legatee to whom the will gave "a comfortable support" during her lifetime to compel the executors to set aside a suitable allowance for her support,[84] a suit for an accounting of decedent's

65. Peck v. Vandemark, 99 N. Y. 29, 1 NE 41 (a suit by a widow against the executor of her deceased husband's estate to enforce an antenuptial agreement for a settlement upon her of one half of his property absolutely and the other half for life cannot be held as prematurely brought, although the estate is not yet settled up, if the debts of the estate and the expenses of administration can be approximately estimated by the court).

66. U. S.—Stratton v. Dines, 126 Fed. 968 [aff 135 Fed. 449, 68 CCA 161].
Ala.—Espy v. Comer, 76 Ala. 501.
Ark.—Easley v. Rowe, 210 SW 145.
Ga.—Irvine v. Irvine, 145 Ga. 660, 89 SE 746; Waters v. Hurst, 12 Ga. A. 248, 77 SE 102.
Ind.—White v. Suggs, 56 Ind. A. 572, 104 NE 55.
Mass.—Richardson v. Lane, 226 Mass. 224, 115 NE 305; Jump v. Leon, 192 Mass. 511, 78 NE 532, 116 AmSR 265.
Miss.—Reedy v. Armistead, 31 Miss. 353.
N. J.—United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985.
N. Y.—Clark v. Ford, 1 Abb. Dec. 359, 3 Keyes 370, 1 Transcr. A. 22, 3 AbbPrNS 245, 34 HowPr 478; In re Brooklyn Trust Co., 179 App. Div. 262, 166 NYS 513.
N. C.—Sandridge v. Spurgen, 37 N. C. 269.
S. C.—Beach v. Addison, 98 S. C. 215, 82 SE 428.
Tenn.—Jones v. Whitworth, 94 Tenn. 602, 30 SW 736.
W. Va.—Rowan v. Tracy, 74 W. Va. 649, 82 SE 478.

[a] **The purpose** of such statutes "is to protect the estate and to prevent claims being established against it by judicial proceedings until the personal representative has had ample opportunity to ascertain the condition of the estate and the true status of the claims against it." Consolidated Mercantile Co. v. Warren, 15 Ala. A. 623, 74 S 738 [certiorari den 75 S 1003 mem]. To same effect Hill v. Julian, 119 Ga. 607, 46 SE 834; United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985; Sandridge v. Spurgen, 37 N. C. 269.

[b] **Cross complaint in premature suit.**—In a premature suit to foreclose a mortgage, a cross complaint by a judgment creditor does not lie to compel the mortgagee to first exhaust the widow's separate estate, to enable the judgment creditor to enforce his lien upon the residue of the mortgaged property. Home Nat. Bank v. People's State Bank, 49 Ind. A. 13, 96 NE 710.

67. Home Nat. Bank v. People's State Bank, 49 Ind. A. 13, 96 NE 710.

68. Matter of Phyfe, 5 NYLegObs 331; Parsons v. Keystone Nat. Bank, 34 LegInt (Pa.) 297.

[a] **Effect of garnishment.**—Under a statute which provides that an administrator may be garnished, but shall not be compelled to answer until the estate in his hands is sufficiently administered to enable him safely to answer the writ, the only effect of the garnishment is to keep in his hands, by way of injunction, the property finally to be ascertained and disposed of by the court on a view of all the priorities and equities of existing creditors, and hence is not in violation of a statute which prohibits a suit to recover a debt owed by a decedent till twelve months from the qualification of the administrator, Sapp v. McArdle, 41 Ga. 628.

69. Jaburg v. Kirschenbaum, (N. J. Ch.) 107 A 60 (Bulk Sales Act).

70. Troy Nat. Bank v. Stanton, 116 Mass. 435.

71. O'Daniel v. Lehre, 21 S. C. Eq. 83.

72. Consolidated Mercantile Co. v. Warren, 15 Ala. A. 623, 74 S 738 [certiorari den 75 S 1003 mem].

73. Alabama State Bank v. Glass, 82 Ala. 278, 2 S 641; Rosenthal v. Enevoldsen, 61 Miss. 532; Anderson v. Newman, 60 Miss. 532; Reedy v. Armistead, 31 Miss. 353; Cleveland v. Mills, 9 S. C. 430.

74. Redford v. Lloyd, 147 Ga. 145, 93 SE 296; Crawford v. Wilson, 139 Ga. 654, 78 SE 30, 44 LRANS 773; Sandridge v. Spurgen, 37 N. C. 269; Stone v. Corcoran, 17 R. I. 759, 24 A 781.

75. Anderson v. Newman, 60 Miss. 532; Reedy v. Armistead, 31 Miss. 353.

76. Baker v. Mitchell, 109 Ala. 490, 20 S 40; Torrey v. Bishop, 104 Ala. 548, 16 S 422; Alabama State Bank v. Glass, 82 Ala. 278, 2 S 641; Sims v. Canfield, 2 Ala. 555; Stubbs v. Macon Fourth Nat. Bank, 12 Ga. A. 539, 77 SE 893.

[a] **An action on a note** signed by the representative "as administrator" of decedent's estate is not within the statute. Stubbs v. Macon Fourth Nat. Bank, 12 Ga. A. 539, 77 SE 893 (the note is the individual obligation of the representative).

77. Reedy v. Armistead, 31 Miss. 253.

78. Fry v. Lofton, 45 Ga. 171.

79. Anderson v. Newman, 60 Miss. 532.

80. Rosenthal v. Enevoldsen, 61 Miss. 532.

81. Sims v. Canfield, 2 Ala. 555 (such action cannot be instituted against the personal representative in his representative capacity).

82. Probate Judge v. Lane, 51 N. H. 342.

83. Smith v. Cain, 187 Ala. 174, 65 S 367.

84. Owens v. Waddell, 87 Miss. 310, 316, 39 S 459 ("The reason on which each of these statutes is based does not exist in this case. The estate is admittedly solvent, and no rights of creditors are involved or can be prejudiced. This is not a suit, within the meaning of the statute, such as may be instituted against the executors of a last will and testament within the prescribed period; nor is it a proceeding instituted by a legatee or annuitant to compel distribution. Appellee does not stand in the attitude of either. She was granted by the terms of the will a 'comfortable support' during her life; and in view of her advanced

acts as guardian of a minor,[85] a suit in equity to enforce a contract for adoption by securing a decree giving the child part of the deceased obligor's estate,[86] an action to set aside a fraudulent conveyance by decedent,[87] an action to recover lands from a personal representative by one claiming them adversely,[88] an action to cancel a deed to decedent,[89] a bill to remove the administration into equity,[90] a bill to enjoin an administrator from interference with a legacy to which decedent had no title,[91] a suit for specific performance of decedent's contract to convey land,[92] a bill to foreclose a mortgage,[93] a suit to foreclose on land which the deceased maker of the trust deed had conveyed,[94] an action to recover funeral expenses where expressly excepted from the operation of the statute,[95] or a proceeding by the sheriff in the county court to require the personal representatives of a deceased taxpayer to list property omitted from assessment.[96]

[§ 1910] **(4) Removal, Resignation, or Death of Original Representative.** Where an administrator resigns or is removed, his successor is not entitled to the full period of exemption from suit; but the time from which the exemption commences is the date of the qualification of the original administrator,[97] and the same principle is applicable where letters of administration are revoked on presentation and proof of a will naming as executor the person appointed as administrator,[98] although it has been held otherwise where letters were revoked because of failure of the representative to give sufficient bond.[99] That the successor of an administrator who has died is entitled to the full statutory period of exemption from the time of his own appointment has been both asserted [1] and denied.[2]

[§ 1911] **(5) Revival of Action against Decedent.** A proceeding to revive an action brought against decedent and pending at his death is not an action within the meaning of the statutes under consideration.[3]

[§ 1912] **(6) Mode of Objection.** The objection that an action against an executor or administrator is prematurely brought must be taken by plea in abatement.[4]

[§ 1913] **(7) Waiver of Objection.** It is perfectly competent for a personal representative to waive the objection that the suit is prematurely brought,[5] and such objection is waived by answering to the merits and consenting to have the case placed on the trial calendar [6] or going to trial on an answer denying the validity of the claim sued on.[7] A judgment rendered in such suit will protect the representative when pleaded in suits brought after that time,[8] and its validity cannot be questioned by a claimant of property against which it is sought to be enforced.[9] The exemption is not waived by a mere acknowledgment of service on the part of the representative, where there is no express waiver of the exemption and the representative does not file any defense.[10]

Presumption as to waiver. Where an executor permits a proceeding prematurely brought to proceed to a final decree, it will be presumed, on his application to set aside the decree on the ground that it was prematurely brought, that he intended to waive the defense unless there is proof of accident or inadvertence.[11]

age, her helpfulness, and her impoverished circumstances, it was manifestly the intention of the testator that this support should begin immediately upon his decease and continue so long as she should live. In view of the age and physical condition of appellee, as portrayed by this record, how idle and perfectly futile would have been this provision for her support, if the contention of the executors be true—that she must wait until the expiration of the statutory period mentioned in the sections cited, and then only recover at the end of a litigation with the executors! Such a course would inevitably tend to, and might absolutely, defeat the purpose of the testator—a purpose so worthy and so commendable that, in our opinion, under the peculiar circumstances of this case, the executors themselves, if in doubt as to their power, should have invoked the aid of the court to enable them to carry into effect the generous impulse of the testator, the common benefactor of them all; for, in all human probability, before the tedious delays thus entailed upon appellee would have ended, she would have been removed far beyond the need of human help and beyond the fear of human niggardliness").

85. Beech v. Addison, 98 S. C. 215, 82 SE 428 (not a suit to recover a "debt").

86. Crawford v. Wilson, 139 Ga. 654, 78 SE 30, 44 LRANS 773.

87. Freeman v. Pullen, 119 Ala. 235, 24 S 57; Alabama State Bank v. Glass, 82 Ala. 278, 2 S 641; Manning v. Drake, 1 Mich. 34.

88. Torrey v. Bishop, 104 Ala. 548, 16 S 422.

89. Lanfair v. Thompson, 112 Ga. 487, 37 SE 717 (under a statute in which the exemption only applies to a suit to recover a debt due by decedent).

90. Baker v. Mitchell, 109 Ala. 490, 20 S 40.

91. Womack v. Greenwood, 6 Ga. 299.

92. Redford v. Lloyd, 147 Ga. 145, 93 SE 296.

93. Ga.—Baggett v. Edwards, 126 Ga. 463, 55 SE 250.

Ill.—Menard v. Marks, 2 Ill. 25.

N. J.—United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985.

Oh.—Hathaway v. Lewis, 2 Disn. 260, 13 Oh. Dec. (Reprint) 160.

Or.—Teel v. Winston, 29 Or. 489, 29 P 142.

Vt.—Austin v. Jackson, 10 Vt. 267; Bradley v. Norris, 3 Vt. 369.

[a] **The reason for this view** (1) is that the statute merely suspends the remedy for the debt and does not suspend the remedy on any security which may have been given. Hathaway v. Lewis, 2 Disn. 260, 13 Oh. Dec. (Reprint) 160. (2) Scire facias to foreclose a mortgage is a proceeding in rem and not an action within the provision exempting a personal representative from suit within a year after letters of administration are taken out. Menard v. Marks, 2 Ill. 25.

[b] **A foreclosure suit in which no relief is sought against the administrator of the estate** which he represents is not within the meaning of the statutes. United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 27 A 985.

[c] **Contrary rule.** — White v. Suggs, 56 Ind. A. 572, 104 NE 55; Home Nat. Bank v. People's State Bank, 49 Ind. A. 13, 96 NE 710; Wood v. Priddy, (Tex. Civ. A.) 164 SW 1099.

94. Wood v. Priddy, (Tex. Civ. A.) 164 SW 1099.

95. Studley v. Willis, 134 Mass. 155.

96. Com. v. Ryan, 126 Ky. 649, 104 SW 727, 31 KyL 1069.

97. Troy Nat. Bank v. Stanton, 116 Mass. 435; Todd v. Wright, 12 Heisk. (Tenn.) 442; Coleman v. Raynor, 3 Coldw. (Tenn.) 25.

[a] **The reason** is that resigning administrator is required to settle and pay over to the new administrator the balance of money, property, and effects in his hands and is therefore furnished with information with regard to the situation of the estate, merely on taking upon himself the administration thereof, and that in consequence the reason for the rule exempting personal representatives from suit for a designated period does not apply. Todd v. Wright, 12 Heisk. (Tenn.) 442; Coleman v. Raynor, 3 Coldw. (Tenn.) 25.

98. Kittredge v. Folsom, 8 N. H. 98 (such administration is an original administration within the terms of the statute exempting personal representatives from suit commenced within a year after the original grant of administration).

99. Callahan v. Smith, T. U. P. Charlt. (Ga.) 149 (there was no administration under such letters).

1. Minor v. Webb, 1 Heisk. (Tenn.) 395.

2. Cooley v. Patterson, 49 Me. 570.

3. Breckenridge v. Mellon, 2 Miss. 273; Parker v. Willard, Smith (N. H.) 212; Quick v. Campbell, 44 S. C. 386, 22 SE 479.

4. Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25; Kittredge v. Folsom, 8 N. H. 98; Clements v. Swain, 2 N. H. 475.

5. Hill v. Julian, 119 Ga. 607, 46 SE 834; Kittredge v. Folsom, 8 N. H. 98; Boynton v. Sandford, 28 N. J. Eq. 184 [aff 28 N. J. Eq. 592]; Clements v. Rogers, 91 N. C. 63.

6. Clements v. Rogers, 91 N. C. 63.

7. Devereaux v. Hutchinson, 16 Oh. Cir. Ct. N. S. 447 [aff 78 Oh. St. 415 mem, 85 NE 1124 mem].

8. Terry v. Vest, 33 N. C. 65; Bryan v. Miller, 32 N. C. 129.

9. Hill v. Julian, 119 Ga. 607, 46 SE 834.

10. Waters v. Hurst, 12 Ga. A. 248, 77 SE 102.

11. Boynton v. Sandford, 28 N. J. Eq. 184 [aff 28 N. J. Eq. 592].

[§ 1914] **2. Statutes of Limitations—a. Actions by Personal Representatives—(1) General Statutes—(a) Actions Generally—aa. Causes of Action Arising in Decedent's Lifetime.** Where a cause of action accruing to testator or intestate is barred by the general statute of limitations in his lifetime, his personal representative cannot recover thereon, although decedent died on the last day of the statutory period and the representative sued shortly after his death.[12] As respects causes of action arising in decedent's lifetime, but not barred by the general statute of limitations during his lifetime, his death does not interrupt the running of the statute in the absence of some statutory provision to the contrary;[13] and it has been held that the fact that the administrator is ignorant of the existence of the cause of action does not affect the rule.[14]

[§ 1915] **bb. Causes of Action Arising after Decedent's Death.** The generally accepted rule is that a cause of action which accrues after decedent's death is not complete and does not arise and exist so that the statute of limitations can begin to run upon it until an administrator is appointed who can bring suit.[15] The reason assigned is that no cause of action can arise and exist in favor of an administrator until he comes into existence as such.[16] It has been held, however, that the statute commences to run on the appointment and qualification of the administrator, although the decree appointing him is reversed on appeal.[17] According to the weight of authority the statute of limitations does not commence to run against the right of an executor to bring suit on a cause of action arising after testator's death until probate of the will and his qualification as executor.[18] Undue delay by reasonable diligence in procuring the appointment of an administrator may, however, bar the right of action.[19]

12. Hatch v. Hatch, 46 Utah 116, 124, 148 P 1096, 1101 [quot Cyc]; Penny v. Brice, 18 C. B. N. S. 393, 114 ECL 393, 144 Reprint 497.

13. Ala.—McNeill v. McNeill, 35 Ala. 30; Johnson v. Wren, 3 Stew. 172.

Ark.—Brown v. Merrick, 16 Ark. 612.

D. C.—Campbell v. Wilson, 13 D. C. 497.

Iowa.—Mereness v. Charles City First Nat. Bank, 112 Iowa 11, 83 NW 711, 84 AmSR 318, 51 LRA 410; Ackerman v. Hilpert, 108 Iowa 247, 79 NW 90; Sherman v. Western Stage Co., 24 Iowa 515.

Kan.—Green v. Goble, 7 Kan. 297.

Ky.—Boughner v. Sharp, 144 Ky. 320, 138 SW 375; Hull v. Deatly, 7 Bush 687; Baker v. Baker, 13 B. Mon. 406; Beauchamp v. Mudd. 2 Bibb. 537.

Md.—Ruff v. Bull, 7 Harr. & J. 14, 16 AmD 290.

Miss.—Metcalf v. Grover, 55 Miss. 145; Byrd v. Byrd, 28 Miss. 144.

Mo.—McKee v. Downing, 224 Mo. 115, 124 SW 7.

N. C.—Hall v. Gibbs, 87 N. C. 4.

Oh.—Granger v. Granger, 6 Oh. 35; Tobias v. Richardson, 26 Oh. Cir. Ct. 81; Irwin v. Garretson, 1 Cinc. Super. 533.

Pa.—Light's Est., 136 Pa. 211, 20 A 536, 537; Amole's App., 115 Pa. 356, 8 A 614.

S. C.—Boyd v. Monro, 32 S. C. 249, 10 SE 963; Bolt v. Dawkins, 16 S. C. 198; Lott v. De Graffenreid, 31 S. C. Eq. 346.

Tenn.—Fowlkes v. Nashville, etc., R. Co., 9 Heisk. 829.

Utah.—Hatch v. Hatch, 46 Utah 116, 124, 148 P 1096, 1101 [quot Cyc].

Vt.—Conant v. Hitt, 12 Vt. 285.

Wash.—McAuliff v. Parker, 10 Wash. 141, 83 P 744.

W. Va.—Rowan v. Chenoweth, 49 W. Va. 287, 38 SE 544, 87 AmSR 796.

Eng.—Hickman v. Walker, Willes 27, 125 Reprint 1037; 2 Wood Lim. § 194.

Man.—Day v. Horton, 23 Man. 623, 14 DomLR 763, 26 WestLR 72, 5 WestWkly 751.

Statutes specially applicable to personal representatives see infra § 1921.

14. Boyd v. Monro, 33 S. C. 249, 10 SE 963.

15. U. S.—Fullenwider's Case, 9 Ct. Cl. 403.

Ala.—Johnson v. Wren, 3 Stew. 172.

Ark.—Word v. West, 38 Ark. 243; McCustian v. Ramey, 33 Ark. 141.

Cal.—Tynan v. Walker, 35 Cal. 634, 95 AmD 152.

Conn.—Root v. Lathrop, 81 Conn. 169, 70 A 614; Andrews v. Hartford, etc., R. Co., 34 Conn. 57; Hobart v. Connecticut Turnp. Co., 15 Conn. 145.

Del.—Carey v. Morris, 5 Del. 299.

D. C.—Tucker v. Nebeker, 2 App. 326.

Ga.—Doe v. Kennon, 1 Ga. 379; Spann v. Fox. Ga. Dec. 1.

Iowa.—Sherman v. Western Stage Co., 24 Iowa 515.

Kan.—Mills v. Mills, 43 Kan. 699, 23 P 944; Carney v. Havens, 23 Kan. 82.

Ky.—Walker v. Turley, 90 SW 576, 28 KyL 809; Hull v. Deatly, 7 Bush 687; Pendleton v. Pendleton, 6 Bush 469; Baker v. Baker, 13 B. Mon. 406; Beauchamp v. Mudd, 2 Bibb 537.

Md.—Rockwell v. Young, 60 Md. 563; Smith v. Doe, 33 Md. 442; Haslett v. Glenn, 7 Harr. & J. 17; Ruff v. Bull, 7 Harr. & J. 14, 16 AmD 290; Fishwick v. Sewell, 4 Harr. & J. 393.

Mass.—Boston, etc., Mill Corp. v. Tyndale, 218 Mass. 425, 105 NE 982.

Mich.—Parks v. Norris, 101 Mich. 71, 59 NW 428.

Miss.—Wood v. Ford, 29 Miss. 57.

Mo.—Polk v. Allen, 19 Mo. 467; McDonald v. Walton, 2 Mo. 48; Meyer v. Nischwitz, (A.) 199 SW 744.

N. H.—Clark v. Amoskeag Mfg. Co., 62 N. H. 612; Brewster v. Brewster, 52 N. H. 52.

N. Y.—Conway v. N. Y., 139 App. Div. 446, 124 NYS 661 [aff 208 N. Y. 567 mem, 101 NE 1099 mem]; Bucklin v. Ford, 5 Barb. 393; Wenman v. Mohawk Ins. Co., 13 Wend. 267, 28 AmD 464.

N. C.—Lynn v. Lowe, 88 N. C. 478.

Pa.—Riner v. Riner, 166 Pa. 617, 31 A 347, 45 AmSR 693; Amole's App., 115 Pa. 356, 8 A 614; Marsteller v. Marsteller, 93 Pa. 350.

S. C.—Witt v. Elmore, 18 S. C. L. 595; Geiger v. Brown, 15 S. C. L. 418.

Tex.—Lemp Brewing Co. v. La Rose, 20 Tex. Civ. A. 575, 50 SW 460.

Utah.—Hatch v. Hatch, 46 Utah 116, 124, 148 P 1096, 1101 [quot Cyc].

Va.—Hansford v. Elliott, 9 Leigh (36 Va.) 79; Clark v. Hardeman, 2 Leigh (29 Va.) 347.

Wis.—Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

Eng.—Burdick v. Garrick, L. R. 5 Ch. 233; Murray v. East India Co., 5 B. & Ald. 204, 7 ECL 118, 106 Reprint 1167; Pratt v. Swaine, 8 B. & C. 285, 15 ECL 146, 108 Reprint 1049; Fergusson v. Fyffe, 8 Cl. & F. 121, 8 Reprint 49; Curry v. Stephenson, 4 Mod. 372, 87 Reprint 450, 2 Salk. 421, 91 Reprint 366.

[a] **Conversion of property.** — In case of a wrongful conversion after decedent's death the statute does not begin to run until after the appointment of the administrator. The statute begins to operate only from the time the right to demand the property vests in some one. Johnson v. Wren, 3 Stew. (Ala.) 172; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Fishwick v. Sewall, 4 Harr. & J. (Md.) 393; Parks v. Norris, 101 Mich. 71, 59 NW 428; Witt v. Elmore, 18 S. C. L. 595; Pratt v. Swaine, 8 B. & C. 285, 15 ECL 146, 108 Reprint 1049.

[b] **In a cause of action for wrongful death,** accruing not to decedent but to his administrator, the statute does not commence to run until the appointment of an administrator. See Death § 84.

[c] **In a suit to vacate a judgment taken against decedent after his death** the statute of limitations begins to run against the administrator from the time of his appointment. Lynn v. Lowe, 88 N. C. 478.

[d] **Where a will is revoked,** the statute of limitations against the executor of such will does not commence to run in favor of the executor properly appointed until letters of administration were granted to him. Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.

[e] **Where an infant dies leaving a cause of action** which passes to his personal representatives, the statute which had not begun to run in his lifetime does not begin to run after his death until the qualification of the personal representative. Sorrels v. Trantham, 48 Ark. 386, 4 SW 281.

[f] **Limitation of rule.** — Where there is no administrator and no debts are shown to be due, the distributees have the right to sue for and recover the property belonging to their ancestors, and in such a case, where a suit by them would be barred by the statute of limitations a recovery by the administrator will also be barred, although there was no administrator when the cause of action accrued and none was appointed until within the period prescribed by the statute of limitations. Manly v. Kidd, 33 Miss. 141.

[g] **Contrary view.**—"The clause 'after the cause of action shall have accrued' does not, in our judgment, imply, in addition, the existence of a person legally competent to enforce it by suit. . . . It [the statute] must run in all cases not expressly excepted from its operation." Tynan v. Walker, 35 Cal. 634, 643, 644, 95 AmD 152.

16. Johnson v. Wren, 3 Stew. (Ala.) 172; Andrews v. Hartford, etc., R. Co., 34 Conn. 57; Meyer v. Nischwitz, (Mo. A.) 199 SW 744; Bucklin v. Ford, 5 Barb. (N. Y.) 393.

17. Mowry v. Harris, 18 R. I. 519, 28 A 657 (under a statute which declares that in case of an appeal from a decree of any court of probate its operation shall be suspended until it is affirmed by the supreme court, provided that, if the decree grants letters of administration, the administrator on giving bond may collect credits of intestate as though no appeal had been taken).

18. Hobart v. Connecticut Turnp. Co., 15 Conn. 115; Garland v. Milling, 6 Ga. 310; Donaldson v. Reboug, 26 Md. 312. But compare Arnold v. Arnold, 35 N. C. 174, 55 AmD 434 (which seems to maintain a contrary doctrine).

son of the doctrine stated is sometimes prevented by statutes providing that the absence of anyone authorized to bring an action at the time when the cause of action accrues shall not extend the time for suing beyond a certain period,[19] or that limitations shall start to run at a certain time after decedent's death if no representative is appointed within such time.[20]

[§ 1916] **(b) Actions by Administrator De Bonis Non.** Where a statute has commenced to run against an administrator it continues to run against the administrator de bonis non,[21] and is not suspended for the period during which there is a vacancy in the administration.[22] It has accordingly been held that, where a transfer of property of an estate by an administrator has become effectual under the statutes of limitation an administrator de bonis non cannot recover such property as a part of the estate.[23] Until a disputed will is finally adjudged to be invalid no cause of action accrues to an administrator de bonis non to recover goods remaining unadministered by the executor, and the statute of limitation does not begin to run against him until that time.[24]

[§ 1917] **(c) Actions to Recover Overpayments to Creditors or Legatees.** Where a personal representative makes overpayments to a creditor through mistake superinduced by the fraud of the latter, the statute does not commence to run against a right to recover the overpayment until the date when the payment was made.[25] If a creditor has been paid his claim in full, under an honest belief that the estate is solvent and the estate is subsequently declared insolvent and dividends ordered to be paid from all the assets then available, the statute of limitations commences to run in an action to recover the excess from the date when the dividend was ordered.[26] The statute runs against a cause of action for money paid a legatee in excess of his legacy by mistake from the date of payment and not from the date of settling the executor's final account.[27] Where a legatee dies before the executor's claim for overpayments is barred and the executor becomes the administrator of the legatee, the statute does not run against him while he remains administrator, because he cannot sue himself and because he is not obliged to exercise the right of retainer on pain of forfeiting it within any specific time after taking out administration.[28]

[§ 1918] **(d) Claims of Personal Representatives.** It is usually considered that, during the period of administration, limitations does not run with respect to a claim of the representative against his decedent, for the reason that the representative cannot sue himself,[29] although there is authority for the contrary view.[30] Where one of two residuary legatees and executors left the collection of the outstanding assets entirely to the other residuary legatee and executor, under an agreement between them by which the latter was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained, or could have been ascertained, within a year from the testator's death, it was held that the nonacting party's claim to what was so collected more than ten years before action brought was barred by the statute of limitations.[31]

[§ 1919] **(e) Effect of Failure to Prosecute Suit.** The failure of an administrator to prosecute with reasonable diligence a suit pending at decedent's death may be treated as an abandonment thereof so as to exclude him from bringing an action on the same cause of action barred by the statute of limitations subsequent to decedent's death,[32] and where, as authorized by statute, a person sues on a claim due the estate as administrator without appointment, and subsequently thereto an administrator who has been appointed refuses to prosecute, the suit will abate.[33]

[§ 1920] **(f) Circumstances Suspending Running of Statute.** In computing the time within which a personal representative must bring action the time during which the courts are by statute closed should be excluded,[34] and where an executor who has been ousted by means of a fraudulent will is subsequently reinstated, the time during which his functions were suspended must be excluded in estimating the period within which an action against those who perpetrated the fraud to recover property of the estate must be brought.[35] Where persons who have fraudulently secreted property of an estate for a number of years on discovery admit possession and promise to account therefor they cannot set up that the executor's claim to the property has be-

[a] **Effect of issue to try validity of will.**—Where a chattel is placed by a father in his daughter's possession and remains in her possession until his death, after which an issue is made up to try the validity of the will which pended for eight years, when the will was established, a demand made by an administrator pendente lite and a refusal did not make the daughter's possession adverse to the rights of the executor so as to set the statutes of limitations to running against him. Wooten v. Jarman, 51 N. C. 111.

19. State v. Wanshara County Cir. Ct., 165 Wis. 387, 162 NW 436 (twice the limitation period).

20. Crawford v. Turner, 67 W. Va. 564, 68 SE 179 (five years).

21. Campbell v. Wilson, 13 D. C. 497 (when the statute begins to run no subsequent transfer of title arrests its operation).

22. Underhill v. Mobile Fire Dept. Ins. Co., 67 Ala. 45; Bugg v. Summer, 26 S. C. L. 333.

23. Cajuigan v. Natividad, 14 Philippine 734; Collins v. Bankhead, 32 S. C. L. 25. But compare Lawson v. Lay, 24 Ala. 184 (if an administrator makes a gratuitous bailment of property belonging to the estate both he and his bailee are guilty of a conversion. The administrator himself cannot avoid the bailment nor sue for the recovery of the property, and the statute of limitations commences to run in favor of the bailee from the time of the appointment of an administrator de bonis non).

24. Finn v. Hempstead, 24 Ark. 111.

25. Gamble v. Hicks, 27 Miss. 781.

26. Richards v. Nightingale, 9 Allen (Mass.) 149; Walker v. Bradley, 3 Pick. (Mass.) 261.

27. Shelburne v. Robinson, 8 Ill. 597; Turner v. Debell, 2 A. K. Marsh. (Ky.) 383; Ely v. Norton, 6 N. J. L. 187; Reading v. Den, 6 N. J. L. 186; Montgomery's App., 92 Pa. 202, 37 AmR 670.

28. Dillard v. Ellington, 57 Ga. 567.

29. U. S.—Wilson v. Rose, 30 F. Cas. No. 17,831, 3 Cranch C. C. 371.

Fla.—Osborne v. Van Horn, 2 Fla. 360.

La.—Farmer's Succ., 32 La. Ann. 1037.

Md.—Semmes v. Magruder, 10 Md. 242; Spencer v. Spencer, 4 Md. Ch. 456; Brown v. Stewart, 4 Md. Ch. 368; State v. Reigart, 1 Gill 1, 39 AmD 628.

Tex.—Moore v. Bryant, 10 Tex. Civ. A. 131, 31 SW 223.

[a] **Where an independent executor claims the property** in his hands for the satisfaction of a debt due him from the estate, limitations cannot be invoked against such claim in an action by the heirs to recover the property so held. Moore v. Bryant, 10 Tex. Civ. A. 131, 31 SW 222.

30. In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44. See also Wharton v. Marberry, 3 Sneed (Tenn.) 603 (the statute runs from the accruing of the debt to the time when the claim and the intention to assert it are made known).

31. Re Kirkpatrick, 3 Ont. 361.

32. Richards v. Maryland Ins. Co., 8 Cranch (U. S.) 84, 3 L. ed. 496.

[a] **Where an administrator qualifies immediately after decedent's death but declines to prosecute,** the limitation legally attaches and a statute providing that for purposes of limitations letters are deemed to have been issued within six years after the death of the testator has no application to such a case and does not revive the lost cause of action or transfer it to the next of kin or the legatees. Hunt v. Peake, 2 NY CityCt 26.

33. Merrill v. Woodbury, 61 N. H. 504.

34. Quierry v. Faussier, 4 Mart. (La.) 609.

35. Marsden's App., 102 Pa. 199.

come stale and barred by lapse of time.[36] An action by a personal representative instituted after the statutory period has elapsed has been sustained, where no plea to the jurisdiction was filed and no showing was made that the estate had been closed or that the personal representative had been discharged.[37] The statute does not commence to run against a bill by the personal representative to recover property fraudulently conveyed by decedent until a reasonable time has elapsed after evidence of the fraud is discovered,[38] and it has been considered that the time for bringing such an action runs from the time when creditors recover judgments against the estate, for payment of which the property conveyed is necessary.[39] If a right of action exists in favor of the personal representative the statute of limitations is not prevented from running against a claim in favor of the estate by the disabilities of the heirs.[40]

[§ 1921] **(2) Statutes Specially Applicable to Personal Representatives.** Where a claim of a decedent is not actually barred by limitations at the time of his death, the statutes usually permit the representative to sue thereon within a certain time, even though the general statute of limitations would bar the claim earlier,[41] and where the time limited by the general statutes expires before the time limited by the special statute, the action must be brought within the time limited by the latter statute.[42] But a statute which provides that if any right of action existed in favor of a decedent at the time of his death and survives, action may be brought thereon within a designated period after the grant of administration, extends the time within which suits may be brought which would be otherwise barred by the general statute of limitations and does not limit the time of bringing actions against which the statute had not run;[43] and the same is the rule under a statute providing that if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within a designated period from his death.[44] Under statutes of this character suit need not be brought within the designated period after grant of administration, provided it is brought within the period fixed by the general statute of limitations,[45] the rule being that, if, at the time the special statute commences to run, there remains an unexpired portion of the general statute of greater length than the period fixed by the special statute, the general statute controls.[46] If it is provided by statute that the time which elapses between the death of a person and the grant of letters testamentary, or of administration on his estate, is not to be taken as any part of the time limited for the commencement of actions by executors or administrators, this period must be excluded in computing the time within which suit must be brought, although the statute commenced to run in the decedent's lifetime.[47] Statutes of this character contemplate the grant of permanent letters of administration. The suspension provided for does not cease upon the grant of temporary letters of administration.[48] It has been held that an action by one executor against another, brought more than the statutory period after defendant's appointment, although within the statutory period after plaintiff's appointment, cannot be maintained;[49] but it has also been considered that under a statute limiting the time within which actions against an administrator must be brought, an action by one administrator against another must be brought within the statutory period after plaintiff is entitled, under his appointment, to maintain the action.[50] Statutes requiring an administrator to sue within a designated time contemplate administration in the state of their enactment, and therefore one who qualifies as administrator and sues in that state within the

36. Croom v. Cone, 13 Ga. 21.

[a] **Notice of fraud relied on to take a case out of the statute of limitation,** to the heirs, is not necessarily notice to the administrator, as there may be debts due from the estate, the holders of which should not suffer from the negligence of the heirs may be disabled to sue and therefore not within the statute. Barfield v. King, 29 Ga. 288.

37. Card v. Fowler, 120 Mich. 646, 79 NW 925. See also Swift v. Williams, 1 La. 165 (an executor whose functions have been continued after the year may sue during such continuance).

38. Preston v. Cutter, 64 N. H. 461, 13 A 874.

39. Forde v. Exempt Fire Co., 50 Cal. 299.

40. Darnall v. Adams, 13 B. Mon. (Ky.) 273; Rosson v. Anderson, 9 B. Mon. (Ky.) 423; Rindge v. Oliphint, 62 Tex. 682. But compare Fleming v. Collins, 27 Ga. 494 (a court of equity will not enjoin an administrator in suing to recover a tract of land for the benefit of the heirs notwithstanding the seven years' bar has attached, where both the heirs were before and at the time of intestate's death and have been ever since non compos mentis).

41. Boston, etc., Mill Corp. v. Tyndale, 218 Mass. 425, 105 NE 982; Sullivan v. Sullivan, 188 Mass. 380, 74 NE 608; Smith v. Settle, 128 Mo. A. 379, 107 SW 430; Cummings v. Farnham, 75 N. H. 135, 71 A 632.

42. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 P 741.

43. Leahy v. Cheney, 19 Conn. 611, 98 A 132, LRA1917D 809; Moore v. Pierce, 160 Ky. 107, 169 SW 620; Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197; Morse v. Whitcher, 64 N. H. 591, 15 A 207; Winslow v. Benton, 130 N. C. 58, 40 SE 840.

44. Pinkney v. Pinkney, 61 Ill. A. 525; Harris v. Rice, 66 Ind. 267; McNear v. Robeson, 12 Ind. A. 87, 39 NE 896.

45. Converse v. Johnson, 146 Mass. 20, 14 NE 925.

46. Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526.

Ill.—Pinkney v. Pinkney, 61 Ill. A. 525.

Minn.—Wood v. Bragg, 75 Minn. 527, 78 NW 93.

N. H.—Frye v. Hubbell, 74 N. H. 358, 68 A 325, 17 LRANS 1197.

N. Y.—Tompkins v. Austin, 10 NYSt 339.

N. C.—Hughes v. Boone, 114 N. C. 54, 19 SE 63.

Wis.—Palmer v. O'Rourke, 130 Wis. 507, 511, 110 NW 389.

"The death of the person to whom the right of action accrues does not extend such time unless such death occurs during the last of the six years. In such circumstances sec. 4234, Stats. 1898, provides that 'if a person entitled to bring an action die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced by his representatives after the expiration of that time and within one year from his death.' Curran v. Witter, 68 Wis. 16, 31 NW 705, 60 AmR 827, limited such section to cases where the death of a person occurs during the last year of his right to commence the action." Palmer v. O'Rourke, supra.

47. Manly v. Turnipseed, 37 Ala. 522; McNeill v. McNeill, 35 Ala. 30; Hutchinson v. Tolls, 2 Port. (Ala.) 44; Grice v. Jones, 1 Stew. (Ala.) 254; Harvin v. Riggs, 9 S. C. Eq. 287.

[a] **In New York** it has been held that the provision of the Revised Statutes that "the time which shall have elapsed between the death of any person and the granting of letters testamentary on his estate, not exceeding," etc., "shall not be deemed any part of the time limited by law for the commencement of actions by executors" is superseded by the provisions of the code of civil procedure, and that the rule of limitation in that regard is furnished by Code § 402 which provides that "if a person entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death." Greene v. New York Cent., etc., R. Co., 48 N. Y. Super. 333.

48. Kirby v. Lake Shore, etc., R. Co., 120 U. S. 130, 7 SCt 430, 30 L. ed. 569; Scott v. Atwell, 63 Ga. 764.

49. Hill v. Mixter, 5 Allen (Mass.) 27.

50. Lawrence v. Norfleet, 90 N. C. 533.

statutory period is not barred, although he qualified as administrator in another state more than the statutory period before suit brought.[51] A statute extending the time for bringing actions in favor of administrators upon the happening of certain contingencies does not apply to an action brought by a party in his lifetime which was not abated or discontinued by his death or any other reason enumerated in the statute.[52]

Failure to appoint representatives. Where the statute permits actions to be brought within a certain period after the death of the person having the cause of action, the time runs regardless of the appointment of an administrator and lapse of the full period without the appointment of an administrator will bar the action,[53] and it has been held that, where the time runs from the appointment of an administrator, but the period allowed by the general statute for bringing the action expires before any administrator is appointed, the action is barred.[54]

[§ 1922] **(3) Miscellaneous.** Where leave to sue is necessary and is asked within the period fixed by statute for bringing suit, the motion cannot be denied on the ground of laches, for this would in effect establish a time for bringing suit different from that fixed by the statute.[55] If a surviving executor files a bill against the administratrix of his coexecutor to recover certain property inventoried as part of the coexecutor's estate, delay in filing the bill is no defense thereto if the delay was due to the action of both parties.[56] A widow who has wrongfully taken possession of a note payable to decedent and procured the debtor to give a note payable to herself in its place acquires no right to the debt evidenced by the original note and no lapse of time bars the right of the representative to sue for the amount due thereon;[57] and as to money actually collected by her on the note the statute runs from the time of its collection and she may invoke the bar of six years, no facts being shown to make her a trustee ex maleficio.[58] Where an administrator appointed seventeen years after decedent's death takes possession of land as belonging to intestate and is evicted therefrom by an intruder without title whose possession commences shortly after the grant of letters, he should not be permitted to allege that the claim of plaintiff was stale as to him.[59] The granting of an order allowing the administrator a certain time within which to move for a new trial, in a case in which a claim against a decedent is allowed, does not suspend the right of the administrator during such time to annul a conveyance by his decedent as in fraud of the creditor in whose favor the claim is allowed.[60]

[§ 1923] **b. Actions against Personal Representatives—(1) Actions on Claims against Estate—(a) General Statutes—aa. In General.** The general statutes of limitations apply with the same effect to causes of action against the estates of deceased persons as to causes of action against living persons,[61] and this is true whether the debt matured before or after decedent's death.[62] As between the executors and creditors of an estate no trust exists of that peculiar kind which is within the exclusive control of a court of equity, and to which the statute of limitations cannot be pleaded; the relation between them is simply that of debtor and creditor and the statute of limitations may be set up in any forum that has jurisdiction of the case, whether legal or equitable.[63]

[§ 1924] **bb. Accrual of Cause of Action.** A cause of action for services rendered decedent in his lifetime, compensation therefor to be made out of his estate, does not accrue until his death.[64] Where a liability accrued against a decedent's estate as surety on a bond on Jan. 15, 1894, and on Dec. 10, 1895, the obligee in the bond obtained a decree against the principal and sureties, and on July 15, 1899, the obligee intervened in a suit to settle the estate of decedent to enforce her decree, the obligee's demand was not barred by a statute providing that a right of action against the estate of a decedent which accrues after decedent's death shall not continue longer than five years after its accrual.[65]

[§ 1925] **(b) Special Statutes—aa. In General.** In a number of states special statutes of limitation have been enacted with respect to actions against executors and administrators on claims against decedent,[66] and as such statutes usually provide that the claim shall be forever barred unless action is

51. Holmes v. Brooks, 68 Me. 416.

52. Barlow v. Hitzler, 40 Colo. 109, 90 P 90.

53. Hughston v. Nail, 73 Miss. 284, 18 S 920 [dist Cook v. Reynolds, 58 Miss. 243; Boyce v. Francis, 56 Miss. 573; Clayton v. Merrett, 52 Miss. 353, decided under a statute since repealed]; Coppersmith v. Wilson, 107 N. C. 31, 12 SE 77.

54. Louisville, etc., R. Co. v. Brantley, 106 Ky. 849, 51 SW 585, 21 KyL 473.

55. Matter of Howe, 61 Hun 608, 16 NYS 465.

56. Vreeland v. Westervelt, 45 N. J. Eq. 572, 17 A 695.

57. Buie v. Buie, 67 Miss. 456, 7 S 344.

58. Buie v. Buie, 67 Miss. 456, 7 S 344.

59. Healy v. Buchanan, 34 Cal. 567.

60. Walker v. Cady, 106 Mich. 21, 63 NW 1005.

61. Colo.—In re Hobson, 40 Colo. 332, 91 P 929.

Miss.—Branch Bank v. Windham, 31 Miss. 317.

N. Y.—Constantine v. Constantine, 91 App. Div. 607, 87 NYS 139; Cotter v. Quinlan, 2 Den Surr. 29.

N. C.—Edwards v. Lemmond, 136 N. C. 329, 48 SE 737.

Pa.—Campbell v. Fleming, 63 Pa. 242; In re McCandless, 61 Pa. 9; Mitcheltree v. Veach, 31 Pa. 455; Man v. Warner, 4 Whart. 455.

Tex.—Henderson v. Davis, (Civ. A.) 191 SW 358; Robb v. Henry, (Civ. A.) 40 SW 1047.

Wash.—Gleason v. Hawkins, 32 Wash. 464, 73 P 533.

[a] **Illustration.**—Where a note was not exhibited as a claim against the estate, and more than six years had elapsed since it became due, the claim was barred by limitations. In re Hobson, 40 Colo. 332, 91 P 929.

[b] **Effect of presentation of claim.**—Where claimant presented a note against the estate to the administratrix before it was barred by limitations, the omission of the administratrix to reject it did not stay the running of limitations, and, where seven years and six months from the time the note became due expired without any action thereon, the holder cannot compel the representatives of decedent to render an account or obtain a decree for payment of the claim. In re Van Voorhees, 55 Misc. 185, 106 NYS 354, 6 Mills Surr. 193.

[c] **Taking up notes of decedent.**—Where a party, by virtue of a promise by a testator in his lifetime to reimburse him out of the estate, takes up notes of the testator during his lifetime, the party has no more rights than an assignee of the notes, and, if the statute of limitations is a defense against the assignor, it is a defense against the assignee. Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

62. McIntire v. Conrad, 93 Mich. 526, 53 NW 829; Man v. Warner, 4 Whart. (Pa.) 455; Sullivan v. Latimer, 38 S. C. 158, 17 SE 701; Davis v. Davis, 104 Va. 65, 51 SE 216.

[a] **If a cause of action against decedent is barred before his death,** the statute may be pleaded in an action against his personal representative. Sullivan v. Latimer, 38 S. C. 158, 17 SE 701.

63. Ill.—White v. Horn, 224 Ill. 238, 79 NE 629, 115 AmSR 155.

Pa.—In re Loughran, 257 Pa. 534, 101 A 817; York's App., 110 Pa. 69, 1 A 162, 2 A 65 [overr McCandless' Est., 61 Pa. 9; McClintock's App., 29 Pa. 360].

Wash.—Farmers', etc., Bank v. Lilly, 66 Wash. 309, 119 P 749.

Can.—Union Bank v. Clark, 43 Can. S. C. 299.

N. S.—In re Runciman, 38 N. S. 89.

64. Drury v. Gorrell, 44 App. (D. C.) 518; Walker v. Ganote, (Ky.) 116 SW 689; Raycraft v. Johnston, 41 Tex. Civ. A. 466, 93 SW 237.

65. Turk v. Ritchie, 104 Va. 587, 52 SE 339.

66. Ark.—Easley v. Rowe, 210 SW 145; Davis v. Cramer, 133 Ark. 224, 202 SW 239.

brought thereon within the required time,[67] and as such it is held that they operate as an absolute bar against the recovery of the claim either from the estate or from the heirs, distributees, devisees, or legatees.[68] Such statutes are held to control the general statutes of limitation,[69] but as they are of a penal character rather than statutes of repose, they must be strictly construed, and in order to entitle the representative to the benefit thereof the statutes must be complied with in all essential respects.[70] A statute fixing a limitation period for suits against executors and administrators is not applicable to a suit against a widow in her individual capacity to recover an overpayment alleged to have been made to her by mistake as the interest of her deceased husband in the assets of a firm,[71] or to the claim of a judgment creditor of a corporation against the estate of a deceased stockholder,[72] and a limitation as to claims against a decedent's estate does not bar the wife's administrator from recovering against her deceased husband's estate an amount paid by her out of her separate estate to liquidate his indebtedness for which she was entitled to be subrogated.[73] A third person's claim against an administrator and the heirs of the estate for money paid to the administrator under a mutual mistake is not a "claim against the deceased" within the meaning of a statute prescribing the time within which a suit must be begun against an executor upon any cause of action against the deceased.[74] Where a trustee executed the bond sued on, conditioned on behalf of himself, his heirs, executors, etc., to pay over the trust fund to his successor on the termination of the trust by his death or otherwise, the special statute of limitations did not begin to run against an action on the bond against the trustee's executors until demand made for the payment of the fund.[75] Such a statute applies to claims against estates after representation of insolvency as well as before, and is an absolute bar unless suit is brought within the period limited;[76] and under a statute limiting actions against an executor for conversion by himself or his testator to three years, a suit against an executor for converting bonds, which, believing they were his testator's, he sold and applied the proceeds as part of his testator's estate, was barred after three years, although the executor was sued individually.[77]

Claims in favor of the state have been regarded as within the purview of such statute,[78] unless expressly excepted,[79] but it has also been considered that such statutes do not apply to the state unless it appears, by express language or necessary implication, that such was the legislative intent.[80]

[§ 1926] **bb. Statutes Requiring Suit within Prescribed Time—(aa) In General.** The statutes of the various states fixing special periods of limitation for suits against executors or administrators vary considerably in detail both in respect to the time when the statutory period shall commence to run and the duration thereof. These statutes respectively fix the period at which the statute commences to run upon the death of the testator or intestate, the granting of letters testamentary or of administration, qualification, qualification and notice of appointment, etc.[81]

[§ 1927] **(bb) After Death of Decedent.** Statutes requiring creditors to sue within a designated time after decedent's death apply to actions against personal representatives as well as against heirs.[82] All persons who have demands originating from contracts or agreements are considered creditors within the meaning of such a statute,[83] and a claim based on an order in the nature of a judgment of the court of another county which was never a lien upon after-acquired real estate in the county where decedent died domiciled has only the lien of a general debt on the lands of decedent in the latter county, and is subject to the limitation of a statute, requiring an action for the recovery thereof to be commenced within two years after decedent's death.[84] Statutes of this character have been held to apply to a debt, although part of it did not become due until more than the statutory period after decedent's death, if no notice of the debt was given to the personal representative within the statutory period.[85] They do not, however, apply to actions not based on an indebtedness of decedent, such as an action by a surviving partner for an accounting of debts paid by him which should have been paid by decedent,[86] to the foreclosure of a trust deed given by him,[87] or to causes of action

Mass.—Knight v. Grant, 219 Mass. 199, 106 NE 853; Lovejoy v. Bailey, 214 Mass. 134, 101 NE 63.

Miss.—Rogers v. Rosenstock, 117 Miss. 144, 77 S 958.

N. Y.—In re Martin, 211 N. Y. 328, 105 NE 546 [rev 159 App. Div. 926, 144 NYS 306].

Oh.—Grant v. Baldwin, 89 Oh. St. 156, 105 NE 1045; Roth v. Hummel, 17 Oh. Cir. Ct. N. S. 252, 1 Oh. A. 361.

Pa.—Hollidaysburg v. Snyder, 258 Pa. 490, 102 A 168.

Tex.—Henderson v. Davis, (Civ. A.) 191 SW 358.

See also cases infra §§ 1926–1953.

[a] **A statute providing that real estate of a decedent shall not be liable** for his debts unless letters testamentary or of administration are granted within six years from the date of death is a statute of limitation. In re Mason, 95 Wash. 564, 164 P 205.

[b] **Administrators de bonis non.**—Waterman v. Soliday, 231 Mass. 422, 121 NE 155.

67. McDaniel v. Putnam, 100 Kan. 550, 556, 164 P 1167 LRA1917E 1100 [cit Cyc]; Thomson v. Hoxsie, 25 R. I. 377, 55 A 930; Whitmire v. Powell, (Tex. Civ. A.) 117 SW 433, 439 [cit Cyc]; Clark v. Bellamy, 27 Ont. A. 435.

68. Coburn v. Harris, 53 Md. 367; Zollickoffer v. Seth, 44 Md. 359; Selover v. Coe, 63 N. Y. 438; Grange Union v. Burkhart, 8 Or. 51.

69. Robbins v. Coffing, 52 Conn. 118.

70. Hoyt v. Bonnett, 50 N. Y. 538; Broderick v. Smith, 3 Lans. (N. Y.) 26; Calanan v. McClurt, 47 Barb. (N. Y.) 206; Van Saun v. Farley, 4 Daly (N. Y.) 165; Elliott v. Cronk, 13 Wend. (N. Y.) 35; Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 422; Morissey v. Hill, 142 N. C. 355, 55 SE 193.

71. Bowker v. Torrey, 215 Mass. 547, 102 NE 903.

72. Douglass v. Loftus, 85 Kan. 720, 119 P 74, AnnCas1913A 378, LRA 1915B 797.

73. Glenn v. Eicher, 30 Oh. Cir. Ct. 821.

74. Redington Hub Co. v. Putman, 76 N. H. 336, 82 A 715.

75. Downer v. Squire, 186 Mass. 189, 71 NE 534.

76. Jellison v. Swan, 105 Me. 356, 74 A 920.

77. Morales v. Klopsch, 158 App. Div. 824, 143 NYS 922.

78. Koering's Est., 34 Pa. Super. 425; State v. Crutcher, 2 Swan (Tenn.) 504.

79. O'Neal v. State, 10 Lea (Tenn.) 727.

80. Com. v. Ryan, 126 Ky. 649, 104 SW 727, 31 KyL 1069.

81. See the statutes.

82. Pickett v. Hobdy, 63 Ala. 609; Dry v. Roper, 1 N. C. 484; Lewis v. Hickman, 2 Overt. (Tenn.) 317.

83. Robson v. Evans, 20 Oh. Cir. Ct. N. S. 122, 35 Oh. Cir. Ct. 510, 3 Oh. A. 248; Williams v. Conrad, 11 Humphr. (Tenn.) 412.

[a] **Until payment by a surety on a judgment rendered against him** he is not a creditor within the meaning of the statutes. Marshall v. Hudson, 9 Yerg. (Tenn.) 57.

[b] **Purchase from decedent of property not owned by him.**—Where one in possession of slaves sold them and died, and the slaves were recovered from the purchaser on the vendor's title being adjudged invalid, the purchaser was not a creditor of the estate within the meaning of the statute. Caplinger v. Vaden, 5 Humphr. (Tenn.) 629.

84. Henry's Est., 34 Pa. Super. 597.

85. Neil v. Hosmer, 5 N. C. 202; McLellan v. Hill, 1 N. C. 532.

86. Clanton v. Price, 90 N. C. 96.

87. Smith v. Goodlet, 92 Tenn. 230, 21 SW 106 (the foreclosure does not take away any right which decedent

accruing after his death.[88] It has been held that these statutes will not operate as a bar to creditors not suing within the period thereby fixed where there is no executor or administrator during that time;[89] but there is also authority for the view that, where a creditor has a right to take out letters of administration or procure the appointment of an administrator, after the lapse of a certain time from the death of the decedent, the special statute of limitation begins to run from the expiration of such time.[90]

Where the cause of action does not accrue until more than the statutory period after the death of the debtor and the grant of letters and the settlement of his estate, the limitation as to claims against estates will not apply to an action brought by the creditor against the administrator and heirs of the deceased debtor.[91]

A petition by a ward for the appointment of an auditor to state an account against a deceased guardian is not an "action" within the meaning of a statute providing that no debts of a decedent, except those secured by mortgage or judgment, shall remain a lien on the realty longer than five years after his decease, unless an action thereon is commenced and duly prosecuted against his personal representatives within five years after his decease;[92] and hence, where the proceeding on such petition results in an adjudication against the guardian's estate and a sale of realty by order of the orphans' court, entered more than five years after decedent's death, to pay the indebtedness, no title passes under such sale.[93]

[§ 1928] **(cc) After Grant of Letters.** A statute requiring suit against executors or administrators to be brought within a designated time after grant of letters testamentary or of administration applies to actions against executors who are residuary legatees and give bonds for the payment of debts and of legacies,[94] and bars an action by a bank to recover the amount of an overdraft by decedent, although, owing to a mistake in bookkeeping, the fact of such overdraft was not known to the bank until after the statutory period had expired.[95] Such a statute does not begin to run until letters of administration are actually granted, although the claimant himself is entitled to such letters,[96] but where letters are granted, the statute begins to run immediately as against a claimant having actual knowledge thereof, although the statutory notice of issuance of the letters is not given.[97] Such statutes do not apply to claims maturing after decedent's death, their operation being confined to causes of action matured and existing against decedent at the time of his death.[98]

[§ 1929] **(dd) After Qualification of Representative.** Under some statutes suit must be brought against a personal representative within a designated period after he has qualified,[99] and if not brought within that period they are barred.[1] These statutes run without regard to the publication of notice for creditors to file their claims.[2] Ordinarily such statutes commence to run on the qualification of the administrator and are not stopped by his subsequent resignation;[3] but where one statute exempts a representative from suit for a specified period after his qualification, and another statute provides that no suit shall be brought against him unless within a certain period after his qualification, the period prescribed by the latter statute does not commence to run until the expiration of the period of exemption.[4] Where a claim is presented to an administrator and allowed by him, but is subsequently rejected by the administrator's successor, the statute limiting actions against the administrator to a certain time after his qualification does not begin to run until the rejection of the claim,[5] but where the only action ever taken on a claim is a rejection thereof, the statutory period runs from the date of qualification of the representative and not from the date of rejection.[6] Such statutes apply to suits on judgments obtained against decedent during his lifetime,[7] but have no application to claims accruing after his death,[8] or to notes given by him which are referred to in the schedule of debts attached

had from the representative, but leaves him to redeem the same as decedent might have done).

88. Fidelity Ins., etc., Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 38 CCA 193, 56 LRA 228; Armistead v. Bozman, 36 N. C. 117.

89. Jennings v. Love, 24 Miss. 249; Austin v. Shipman, 160 Mo. A. 206, 141 SW 425; Little v. Reid, 75 Mo. A. 266; McKinder v. Littiejohn, 23 N. C. 66; New Boston First Nat. Bank v. Daniel, (Tex. Civ. A.) 172 SW 747.

90. Hildebrand v. Kinney, (Ind. A.) 83 NE 379.

91. Dugger v. Oglesby, 99 Ill. 405.

92. Smith v. Ribblett, 233 Pa. 300, 82 A 245.

93. Smith v. Ribblett, 233 Pa. 300, 82 A 245.

94. Holden v. Fletcher, 6 Cush. (Mass.) 235; Walker v. Cheever, 29 N. H. 420; Fisher v. Ballard, 164 N. C. 326, 80 SE 239.

95. Lawrence County Bank v. Arendt, 80 Ark. 523, 98 SW 356.

96. Johnston v. Thompson, 145 Mo. A. 463, 122 SW 761.

97. Bray v. Darby, 30 Oh. Cir. Ct. 683.

98. Wilkinson v. Winne, 15 Minn. 159.

99. Ark.—Padgett v. State, 15 Ark. 495.

Fla.—Union Bank v. Powell, 3 Fla. 175, 52 AmD 367.

Mass.—Lovejoy v. Bailey, 214 Mass. 134, 101 NE 63; McMahon v. Miller, 192 Mass. 241, 78 NE 457.

Miss.—Hardenstein v. Brien, 96 Miss. 493, 50 S 979; Champion v. Cayce, 54 Miss. 695.

Tenn.—Rogers v. Etter, 8 Baxt. 13.

Va.—Spencer v. Flanary, 104 Va. 395, 51 SE 849.

1. Kesterson v. Hill, 101 Va. 739, 45 SE 288.

2. Sivley v. Summers, 57 Miss. 712; Bray v. Darby, 30 Oh. Cir. Ct. 683; Todd v. Wright, 12 Heisk. (Tenn.) 442; Atkinson v. Settle, 5 Yerg. (Tenn.) 299; Crabaugh v. Hart, 3 Yerg. (Tenn.) 431; Hooper v. Bryant, 3 Yerg. (Tenn.) 1.

3. Champion v. Cayce, 54 Miss. 695; Horgan v. Dodge, 44 N. H. 255, 82 AmD 213.

4. Hardenstein v. Brien, 96 Miss. 493, 50 S 979.

5. Bray v. Darby, 82 Oh. St. 47, 91 NE 861, 862 [quot Taylor v. Thorn, 29 Oh. St. 569] ("The right to maintain an action on claims against an estate presented to and allowed by the administrator is prohibited by the statute. The creditor is authorized to sue where his claim, on being presented for allowance, is rejected or disallowed by the administrator, but where its validity is acknowledged, and its allowance by the administrator as a just claim against the estate is secured, no action will lie upon it. There is nothing, in such case, for the statute to operate upon. . . . Statutes of limitation affect the remedy only. They do not extinguish the debt nor affect its validity. They merely withhold from the owner thereof the right to employ remedial process for its collection; and where there is no right to such process for the statute to operate upon, where the right to resort to the courts for the collection of the debt, is taken away, the statute ought not, and was not, intended to apply").

6. Harris v. O'Connell, 85 Oh. St. 136, 97 NE 49 [dist Speidel v. Phillips, 78 Oh. St. 194, 85 NE 53].

7. State Bank v. Vance, 9 Yerg. (Tenn.) 471; Spencer v. Flanary, 104 Va. 395, 51 SE 849; Peyton v. Carr, 1 Rand. (22 Va.) 436.

8. Cummins v. Kennedy, 3 Litt. (Ky.) 118, 14 AmD 45; Sivley v. Summers, 57 Miss. 712; Buckingham v. Walker, 48 Miss. 609; McLean v. Ragsdale, 31 Miss. 701; Sipe v. Taylor, 106 Va. 231, 55 SE 542.

[a] **Contracts made by a personal representative,** although in fulfillment of an executory contract made by decedent, are not within the meaning of the statute. Cummins v. Kennedy, 3 Litt. (Ky.) 118, 14 AmD 45.

[b] **Judgments against executor.**— A statute providing that no action shall be brought against an executor or administrator upon a judgment obtained against the testator or intestate, and that scire facias shall be issued to revive the same after the expiration of six years from the qualification of the executor or administrator, applies only to judgments against the testator or intestate and not to judgments against

to a petition to sell real estate filed before the bar of the statute has operated.[9]

Effect of removal of creditor to or from state. Under a statute which gives residents of the state two years and nonresidents three years within which to commence suits against personal representatives, the residence of a creditor at the time of administration granted determines the bar and his subsequent removal to or from the state will not change the bar.[10]

Tax proceedings. A proceeding by the sheriff in the county court to require the personal representative of a deceased taxpayer to list property omitted from assessment is not an action within the meaning of such a statute.[11]

[§ 1930] **(ee) After Qualification or Giving Bond and Notice of Appointment.** Where the statute provides that a personal representative, after giving notice of his appointment, is not liable to suit by a creditor unless it is commenced within a designated period after his giving bond, the statute does not commence to run from the date on which an insufficient bond is given.[12] While it has been held that the limitation provided for by such a statute commences to run from the date of giving bond, and not from notice,[13] notice is necessary to render the statute operative,[14] and it must be in strict compliance with the terms of the statute.[15] Failure to give the notice required by such a statute does not, however, affect the running of the general statutes of limitations.[16] It is sometimes required that, where the administrator had assets and sets up the statute, he must show that he has properly administered the same,[17] but if it is ascertained that he has no assets the statute is a complete bar.[18] The allowance of further time to settle the estate does not take the case out of the operation of such a statute.[19] Where no bond is required or given, the right of the creditor to bring an action is barred on the expiration of the statutory period after time of appointment, notice having been duly given.[20] Where the right of action accrues subsequent to qualification, the statute commences to run from the date of its accrual,[21] and the same principle applies where a contingent liability becomes fixed after the qualification.[22]

Such a statute applies to suits in equity as well as to suits at law,[23] to claims on judgments against decedent,[24] to a claim by a widow for a year's support allowed her by statute,[25] to a claim under a bond to which decedent was a party arising during his lifetime,[26] to actions by a collector of taxes against the administrator,[27] and to claims in favor of the administrator himself.[28]

Such a statute has no application to claims for specific property held in trust by decedent,[29] to actions on demands against the executor individually,[30] or to a bill against an administrator who has converted complainant's property to the use of decedent's estate;[31] nor does it apply to actions which do not accrue within the period fixed thereby.[32] Where the parties were descendants of a common ancestor and plaintiff brought an action for the sale of certain family portraits, claiming an interest under a will, which defendant claimed that they passed to him with the mansion house and also by adverse possession, the suit being to determine the rights of the parties to property, the special statute limiting time of action for "claims against the estate" did not apply.[33]

In computing the time within which action may be brought the day on which the bond was given must be excluded.[34]

Shortening period of limitation. If the period prescribed by the statute is shortened by an amended statute, the original, and not the amended, statute applies to actions against representatives who gave bond before the amended statute took effect.[35] A subsequent statute excepting from the operation of the amended statute any right which had ac-

executors and administrators. Bingaman v. Robertson, 25 Miss. 501 [foll Pope v. Bowman, 27 Miss. 194].

9. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

10. Humbard v. Smith, 10 Yerg. (Tenn.) 249.

11. Com. v. Ryan, 126 Ky. 649, 104 SW 727, 31 KyL 1069.

12. Abercrombie v. Sheldon, 8 Allen (Mass.) 532.

13. Knight v. Grant, 219 Mass. 199, 106 NE 853; Sewall v. Valentine, 6 Pick. (Mass.) 276 [expl dictum in In re Allen, 15 Mass. 58; Lawrence v. Norfleet, 90 N. C. 533]; Ardrey v. Shell, 77 Oh. St. 218, 82 NE 1075.

"The filing in the probate court of proof of publication of notice of appointment by an executor or administrator, required by section 6089, Revised Statute, is a mode of perpetuating the evidence of such notice, and is for the convenience and protection of the executor or administrator. It forms no part of the notice to creditors required to be given within three months after the giving of bond, and is not for the benefit of creditors. Hence, where such notice is duly given by publication within three months after the giving of bond, although proof of such publication is not filed in the probate court until after the expiration of a year from the giving of the bond, the two years' limitation within which actions may be brought provided by section 6113, Revised Statutes, will begin to run from the date of the giving of the bond." Ardrey v. Shell, supra.

14. Corliss Steam Engine Co. v. Schumacher, 109 Mass. 416; Love v. Ingram, 104 N. C. 600, 10 SE 77; Lawrence v. Norfleet, 90 N. C. 533; Gilbert v. Little, 2 Oh. St. 156; Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.

15. Bond v. Allen, 3 F. Cas. No. 1,619, Brunn. Coll. Cas. 3, 1 N. C. 83; Slattery v. Doyle, 180 Mass. 27, 61 NE 264; Cooper v. Cherry, 53 N. C. 323; Salter v. Blount, 22 N. C. 218.

[a] **Insufficient notices.** — (1) Where defendant, in accordance with the statute, was ordered to give notice by publication in a certain newspaper once a week for three weeks, but published the notice three times in one week and once in the week following, the notice was insufficient. Slattery v. Doyle, 180 Mass. 27, 61 NE 264 (2) Publication of notice of an administrator's qualification in a newspaper printed in the county is not a sufficient compliance with the statutory requirement that qualification be advertised at the courthouse door, and does not entitle the administrator to the benefit of the statute. McLin v. McNamara, 22 N. C. 82.

16. Toby v. Allen, 3 Kan. 399; Corliss Steam Engine Co. v. Schumacher, 109 Mass. 416.

17. Little v. Duncan, 89 N. C. 416; McKeithan v. McGill, 83 N. C. 517; Cooper v. Cherry, 53 N. C. 323; Reeves v. Bell, 47 N. C. 254; Godley v. Taylor, 14 N. C. 178.

18. Little v. Duncan, 89 N. C. 416.

19. Gilbert v. Little, 2 Oh. St. 156.

20. Delaplane v. Smith, 38 Oh. St. 413.

[a] **Where the will dispenses with a bond,** the statute commences to run from the time of this qualification. Jones v. Jones, 41 Oh. St. 417.

21. Miller v. Shoaf, 110 N. C. 319, 14 SE 800; Godley v. Taylor, 14 N. C. 178; Trott v. West, 9 Yerg. (Tenn.) 433; Bradford v. McLemore, 3 Yerg. (Tenn.) 318.

22. Binz v. Hyatt, 200 Mo. 299, 98 SW 637.

23. Burditt v. Grew, 8 Pick. (Mass.) 108.

24. Scroggs v. Tutt, 23 Kan. 181; McLellan v. Lunt, 11 Me. 150.

25. In re Glenn, 23 Oh. Cir. Ct. 397.

26. Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.

27. Rich v. Tuckerman, 121 Mass. 222, 223 ("The collector has the rights of a creditor, and may pursue the same remedy, and it follows that, in so doing, he must be subject to the provisions of law that apply to other creditors").

28. In re Ward, 21 Or. Cir. Ct. 753, 12 Oh. Cir. Dec. 44.

29. Johnson v. Ames, 11 Pick. (Mass.) 173.

30. Dallinger v. Davis, 149 Mass. 62, 20 NE 696.

31. Nashua Sav. Bank v. Abbott, 181 Mass. 531, 63 NE 1058, 92 AmSR 430.

32. McClaskey v. Barr, 79 Fed. 408.

33. Haven v. Haven, 181 Mass. 573, 64 NE 410.

34. Paul v. Stone, 112 Mass. 27.

35. Hildreth v. Marshall, 7 Gray (Mass.) 167; King v. Tirrell, 2 Gray (Mass.) 331.

crued or existed against a decedent or his representative prior to its passage excepts from the shortened period of limitations all causes of action which accrued to the creditor prior to the passage of the act shortening the period, and which were not barred at the time of the passage of the statute creating the exception,[36] but does not revive a right of action which was barred by the amended statute prior to the enactment of the statute creating the exception.[37]

[§ 1931] **(ff) After Probate or Grant of Administration and Notice of Appointment.** Where a statute provides that no action shall be brought against any executor or administrator in his representative capacity after a certain time from probate of the will or grant of administration, provided notice of his appointment is given, the statutory period to be reckoned from the time of giving notice, it is of course obvious that the time commences to run from the day of notice of appointment.[38] Notice is necessary to put such a statute in operation,[39] and the notice must be published in accordance with the provisions of the statute.[40] Such a statute applies to suits in equity as well as to actions at law,[41] and to contributions decreeed to be due from the stockholders of a bank under a section of their charter making them personally liable for "all losses, deficiencies, or failure of the capital stock of said bank."[42] It does not, however, apply to a bill against an administrator not in his capacity as such but as trustee.[43] Where an indorser of a note agreed in writing to save the other indorsers harmless from all loss, costs, and expenses on account of their indorsements, and such indorser died, and, on the maturity of the note, less than three months after his death, it was renewed by all the indorsers, except decedent, the liability of decedent's estate to the other indorsers arose immediately upon the execution of the renewal note, and hence where action was not brought on such liability within the statutory period of twenty months after the filing in the probate office of notice of the appointment of an administrator, the claims were barred and were not saved by a further provision of the statute extending the time for suing upon the cause of action which did not accrue within eighteen months after the affidavit of notice was filed.[44]

Change of period. An amendatory statute shortening the period within which actions must be brought does not govern an action against an estate, the settlement of which was pending at the time of its passage.[45]

[§ 1932] **(gg) After Rejection of Claim—aaa. In General.** In a number of states the statutes require that, where a claim which has been presented against the estate is rejected, action thereon must be commenced within a designated time after such rejection, failing in which the claim is barred,[46] and when the bar of such a statute has once attached, no act or omission of the personal representative can revive the right of action on the claim.[47] The object of such statutes is to effect the speedy settlement of estates.[48] They are independent of, and collateral to, the general statutes of limitation,[49] and their practical effect is to bar some claims in a much less time than the general statute does, while in other cases the time may be somewhat

36. Thompson v. Burnham, 13 Gray (Mass.) 211.

37. Page v. Melvin, 10 Gray (Mass.) 208.

38. Miner v. Aylesworth, 18 Fed. 199; Lynch v. Farnell, 24 R. I. 496, 53 A 869; Thompson v. Hoxsie, 24 R. I. 493, 53 A 873; Bosworth v. Smith, 9 R. I. 67.

[a] **The first publication** of notice starts the period running. Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061.

39. Knowles v. Whaley, 15 R. I. 97, 23 A 144.

[a] **Notice by an administrator de bonis non.**—Where an executor publishes no notice of his appointment and an administrator de bonis non with the will annexed is subsequently appointed and publishes notice, the statute commences to run only from the date of the publication. Lynch v. Farnell, 24 R. I. 496, 53 A 869.

[b] **Where an administrator dies after qualifying and without fully administering the estate** and an administrator de bonis non is appointed, the statutory period commences to run from the qualification of the original administrator and notice of appointment as by express provision of the statute, and the new administration is under these circumstances considered a continuance of the original administration. Thompson v. Hoxsie, 25 R. I. 377, 55 A 930.

40. Lynch v. Farnell, 24 R. I. 496, 53 A 869 (the fact that the executor made a payment on account of the creditor's claim, and that the creditor had actual knowledge that he was acting as executor of the estate, did not satisfy the terms of the statute, for without the notice no time is fixed for the statute to run at all).

41. Warren v. Providence Tool Co., 19 R. I. 656, 35 A 1041.

[a] **Illustration.**—A suit in equity cannot be maintained against the executor of a deceased stockholder of a corporation, the members of which are liable for the corporate debts or the payment of the debt out of the personal assets of the testator, after the lapse of three years from publication of notice. New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154, 75 AmD 688.

42. Atwood v. Rhode Island Agricultural Bank, 2 R. I. 191 (even though the three years have elapsed before the deficiency in the capital stock is discovered, and although the administrator may have received dividends on the shares on which contributions are decreed more than three years after administration is granted).

43. Randall v. Peckham, 10 R. I. 545 (bill to obtain surrender of mortgage notes given intestate and cancellation of the mortgage and to enjoin a sale thereunder on the ground of a release by intestate).

44. Blunt v. McCoombs, 110 Me. 211, 85 A 748.

45. Gunn v. Kelliher, 20 R. I. 180, 38 A 8.

46. Ariz.—Underwood v. Brown, 60 P 700.

Cal.—Jones v. Walden, 145 Cal. 523, 78 P 1046; Benedict v. Hoggin, 2 Cal. 385; Colburn v. Parrett, 27 Cal. A. 541, 150 P 786.

Ida.—Powell-Sanders Co. v. Carssow, 28 Ida. 201, 152 P 1067; Idaho Trust Co. v. Miller, 16 Ida. 308, 102 P 360.

Nev.—Wick v. O'Neale, 2 Nev. 303.

N. J.—Simons v. Forster, 73 N. J. L. 338, 63 A 858; Mathis v. Stevenson, 75 N. J. Eq. 68, 71 A 267.

N. Y.—In re Martin, 211 N. Y. 328, 105 NE 546; Hummel v. Hurd, 112 App. Div. 547, 98 NYS 801; Diehl v. Becker, 174 NYS 100 [aff 227 N. Y. 318, 125 NE 533]; In re Mudge, 118 NYS 568; Cramer v. Bedell, 10 NYSt 817.

N. D.—Mann v. Redmon, 27 N. D. 346, 145 NW 1031; Mann v. Redmon, 23 N. D. 508, 137 NW 478; Singer v. Austin, 19 N. D. 546, 125 NW 560.

Oh.—Speidel v. Philip, 78 Oh. St. 194, 85 NE 53; Crouse v. Frybarger, 22 Oh. Cir. Ct. 315, 12 Oh. Cir. Dec. 254; Pollock v. Pollock, 2 Oh. Cir. Ct. 140, 1 Oh. Cir. Dec. 408; McKent v. Kent, 2 Oh. Dec. (Reprint) 370, 2 WestLMonth 540.

R. I.—Carney v. Hawkins, 34 R. I. 297, 83 A 327.

Tex.—Butler v. Fechner, (Civ. A.) 200 SW 1126; Whitmire v. Powell, (Civ. A.) 117 SW 433.

Man.—Doidge v. Mimms, 13 Man. 48.

Ont.—Gooderham v. Moore, 31 Ont. 86.

[a] **A statute requiring action to be brought as speedily as the same can be done** after disallowance of a claim against an estate represented as insolvent does not require such action to be commenced at the next succeeding term of court in all cases. The intent of the legislature is that this should be done as speedily as possible having regard to the place of residence and of the circumstances of the parties. Guild v. Hale, 15 Mass. 455.

47. Selover v. Coe, 63 N. Y. 438; Flynn v. Diefendorf, 51 Hun 194, 4 NYS 934; Pollock v. Pollock, 2 Oh. Cir. Ct. 140, 1 Oh. Cir. Dec. 408; Williams v. Jackson, (Okl.) 179 P 603; Willis v. Talbert, (Tex.) 11 SW 535; Butler v. Fechner, (Tex. Civ. A.) 200 SW 1126.

"After a claim is once barred by the statute the administrator has no power or authority to voluntarily renew it or reinstate it to the prejudice of the parties in interest." Gardner v. Pitcher, 109 App. Div. 106, 109, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem].

Waiver of bar created by special statutes of limitations generally see infra § 1968.

48. Mathis v. Stevenson, 75 N. J. Eq. 68, 71 A 267.

49. Barclay v. Blackington, 127 Cal. 189, 59 P 834; Morissey v. Hill, 142 N. C. 355, 55 SE 193.

extended.[50] It has been held that they are not statutes of limitation in the sense that the operation thereof will be suspended by constitutional provisions suspending all statutes of limitation in civil suits.[51] They are considered highly penal in their nature, must be construed with great strictness, and in order to bring a case within their provisions and to make them available to the personal representative, all the requisites of the statute must have been strictly complied with and their terms implicitly obeyed.[52]

[§ 1933] **bbb. Claims to Which Statutes Applicable—(aaa) In General.** Statutes of this character apply to claims arising after decedent's death as well as to claims arising in his lifetime,[53] and a claim which becomes due on presentation is a claim "then due" within the meaning of such a statute.[54] These statutes have, however, no application to claims which need not be presented for allowance,[55] or to claims arising on dealings with the personal representative.[56] Neither do they authorize suits on claims not due[57] or contingent claims.[58] A contingent claim is, however, within the meaning of a statute requiring rejected claims which are not due to be sued on within a designated time after they become due.[59]

[§ 1934] **(bbb) Secured Claims.** Where a claim which is secured by mortgage is rejected, the filing of a bill to foreclose the mortgage within the statutory period after rejection does not suspend the operation of the statute as to the claim itself,[60] but the short statute of limitations does not operate against an action to foreclose a mortgage or other lien on property of decedent, where no deficiency judgment is sought or granted.[61]

[§ 1935] **(ccc) Claim of Guarantor for Contribution from Estate of Coguarantor.** Where one of several joint and several guarantors has paid the full amount due under the guaranty, he may enforce contribution against the estate of a deceased coguarantor for a proportionate amount of what was paid, although the claim of the original creditor against decedent would be barred by the short statute of limitations.[62]

[§ 1936] **ccc. Steps Necessary to Make Statute Available—(aaa) Presentation and Rejection of Claim—aaaa. In General.** In order that the rejection of a claim may set the statute in motion there must have been a valid presentation[63] by the claimant or by someone duly authorized by him to make presentation,[64] and the claim so presented must have been properly authenticated.[65] The claim must be presented to, and rejected by, the personal representative,[66] or by someone whom he

50. Continental L. Ins. Co. v. Barber, 50 Conn. 567; Speidel v. Phillips, 78 Oh. St. 194, 85 NE 53; Kyle v. House, 38 Tex. 155. But compare Barclay v. Blackington, 127 Cal. 189, 59 P 834 (while these statutes may shorten, they cannot lengthen the operation of the general statute).

[a] **Extension of period.**—Where decedent's note had been presented to the executors within the six months limited by the probate court therefor, and within the period fixed by the general statute (six years), an action brought within the four months prescribed by statute from rejection of the claim was not barred, although more than six years had elapsed since the right of action first accrued. Continental L. Ins. Co. v. Barber, 50 Conn. 567. To same effect Speidel v. Phillips, 78 Oh. St. 194, 85 NE 53; Kyle v. House, 38 Tex. 155.

51. Stanfield v. Neill, 36 Tex. 688; Walker v. Taul, 1 Tex. A. Civ. Cas. § 28.

52. Robeson v. Niles, 18 D. C. 182; Coburn v. Harris, 53 Md. 367; Peterson v. Ellicott, 9 Md. 52; Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041; Potts v. Baldwin, 67 App. Div. 434, 74 NYS 655 [aff 173 N. Y. 335, 66 NE 4]; Matter of Gall, 42 App. Div. 255, 59 NYS 254; Broderick v. Smith, 3 Lans. (N. Y.) 26; Calanan v. McClure, 47 Barb. (N. Y.) 206; Geer v. Archer, 2 Barb. (N. Y.) 420; Van Saun v. Farley, 4 Daly (N. Y.) 165; Adler v. Davis, 31 Misc. 47, 63 NYS 241; Reynolds v. Collins, 3 Hill (N. Y.) 36; Elliott v. Cronk, 13 Wend. (N. Y.) 35. But compare Miller v. Ewing, 68 Oh. St. 176, 67 NE 292 (statute should receive a liberal construction).

53. Withers v. Withers, 100 SW 253, 30 KyL 1099; Corners v. Wilkin, 14 Hun (N. Y.) 428 [aff 79 N. Y. 129].

[a] **A claim for funeral expenses is within such a statute.**—Withers v. Withers, 100 SW 253, 30 KyL 1099; Koons v. Wilkin, 2 App. Div. 13, 37 NYS 640; In re Mudge, 118 NYS 568.

54. Maurer v. King, 127 Cal. 114, 59 P 290.

55. National Guarantee Loan, etc., Co. v. Fly, 29 Tex. Civ. A. 533, 69 SW 231.

56. Coburn v. Harris, 58 Md. 87 (the reason for requiring presentation of claims is that the administrator is supposed to be ignorant of the character of such claims and in direct dealings with the administrator himself the reason of the rule ceases).

57. Irvine v. Baker, 225 Fed. 834; Brooks v. Lawson, 136 Cal. 10, 68 P 97; Radue v. Pauwelyn, 27 Mont. 68, 69 P 557.

58. Miller v. Miller, 171 Cal. 269, 152 P 728; Orendorff v. Utz, 48 Md. 298.

59. Morse v. Steele, 132 Cal. 456, 64 P 690.

60. Ware v. Weatherby, (N. J. Sup.) 45 A 914.

61. Fox v. Bernard, 29 Nev. 127, 85 P 351.

62. Hard v. Mingle, 141 App. Div. 170, 126 NYS 51 [aff 206 N. Y. 179, 99 NE 542, 42 LRANS 1131].

63. Coburn v. Harris, 53 Md. 367; Brown v. Daly, 33 Mont. 523, 84 P 883; Gaston v. McKnight, 43 Tex. 619.

[a] **Sufficiency of presentation of judgment.**—The presentation of an abstract of a judgment which showed its date, amount, rate of interest, and the names of the parties, and was duly authenticated, was a sufficient presentation to put in operation the limitation of actions as to rejected claims. Gaston v. McKnight, 43 Tex. 619.

[b] **A presentation stating an impossible date** is nugatory, and rejection thereof does not preclude claimant from presenting his claim in proper form, and its rejection thereafter starts the running of the period for bringing suit against the administrator. Lindsay v. Hogan, (Mont.) 185 P 1118.

64. Coburn v. Harris, 53 Md. 367; Peterson v. Ellicott, 9 Md. 52; Cobb v. Norwood, 11 Tex. 556.

[a] **Presentation by a foreign representative** of a creditor who has not taken out ancillary letters in the jurisdiction in which the estate against which the claim is presented is being administered is insufficient. Henry v. Roe, 83 Tex. 446, 18 SW 806; Cobb v. Norwood, 11 Tex. 556.

65. Gillespie v. Wright, 93 Cal. 169, 28 P 862; Washington Loan, etc., Co. v. Darling, 21 App. (D. C.) 132; Coburn v. Harris, 53 Md. 367; Crosby v. McWillie, 11 Tex. 94.

[a] **When claim sufficiently authenticated.**—After a claim against an estate had been presented and rejected by the executrix, plaintiff's attorney, deeming the claim not sufficiently formal, again presented it to the executrix's attorney, who simply took the claim and said it would be again rejected and it was so rejected by the executrix. There was nothing said at the second presentation by defendant's attorney as to the informality of the first presentation or that it would be considered as not having been before rejected. It was held that the statute limiting the time of action on rejected claims began to run from the first rejection. Gillespie v. Wright, 93 Cal. 169, 28 P 862.

66. Colburn v. Parrett, 27 Cal. A. 541, 150 P 786; Coburn v. Harris, 53 Md. 367; Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 NE 483 [aff 15 App. Div. 181, 44 NYS 493]; Hardy v. Ames, 47 Barb. (N. Y.) 413; Whitmore v. Foose, 1 Den. (N. Y.) 159; Morgan v. Bartlette, 3 Oh. Cir. Ct. 431, 2 Oh. Cir. Dec. 244.

[a] **A rejection by one of several coadministrators** is sufficient. Coburn v. Harris, 53 Md. 367.

[b] **Limitation of rule.**—When a claim has been passed by the orphans' court and payment of the same demanded by the creditor and refused by the administrator, or one of two administrators, then an action to recover it must be begun within nine months thereafter. In such case it is not necessary that there should be a physical exhibition of the claim to the administrator in order that the statutory limitation should begin to run. But when the claim has not been passed by the orphans' court there must be a physical presentation of it properly authenticated to the administrator in order that his refusal to pay may be such as to require suit to be brought by the claimant within nine months. Bradford v. Street, 84 Md. 273, 35 A 886.

[c] **Rejection by court after rejection by representative.**—Where a claim is presented to the representative and rejected, and subsequently presented to the county court and rejected, the statutory period runs from the date of rejection by the representative and not from the date of rejection by the county court, the statute providing that when a claim

has directed to reject the claim.[67] The rejection contemplated is one made at a time when suit could have been instituted by the claimant immediately thereafter;[68] and such a statute is not set running by a rejection by a foreign administrator,[69] or a temporary administrator who can be sued only by permission of the surrogate.[70] The rejection must be express, unequivocal, and final,[71] unless failure of the representative to act can, under the statute, be deemed a rejection.[72] It is not, however, essential that the rejection shall be in writing, but a verbal rejection is sufficient.[73] Whatever may be the language or declaration of the representative to the claimant if in the same notice or declaration or at the same time he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject the claim is not final, but that it will be further examined or considered either upon the vouchers already exhibited or such as may be thereafter presented, the claim is not rejected so as to set the statute in motion.[74] The claim rejected must be the same as that sued on or the statute will not apply[75] but this does not mean that a party whose claim is rejected can evade the statute by successive presentation of claims founded on the same transaction but varying in form or detail.[76]

[§ 1937] **bbbb. Failure of Representative to Act.** In the absence of a statute making provision as to the effect of nonaction upon a claim, the mere failure of the representative to act upon a claim is not sufficient to set the statute running;[77] but where the statute provides that failure of the representative to act on a claim within a specified time after presentation shall be deemed a rejection, the statutory period runs from the expiration of such time where there is no affirmative rejection.[78] Where the statute provides that, if a claim is not

is rejected either by the executor or administrator of a county judge suit must be brought within three months from same rejection, not contemplating the presentation of the rejected claims to the county court. Farwell v. Richardson, 10 N. D. 34, 84 NW 558.

[d] **The attorney for the estate** has not power to allow or reject claims, as the allowance or rejection of claims is an official act which must be performed by the executor or administrator. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439.

67. See cases infra this note.

[a] **Rejection by an attorney** directed so to do is sufficient, because when the representative gives to the attorney instructions how to act, it is not a delegation of the trust but a performance of it by the representative acting through another. Dorais v. Doll, 33 Mont. 314, 83 P 884; Selover v. Coe, 63 N. Y. 438; Wintermeyer v. Sherwood, 77 Hun 193, 28 NYS 449; Miller v. Ewing, 68 Oh. St. 176, 67 NE 292.

68. Irvine v. Baker, 225 Fed. 834.

69. Doidge v. Mimms, 13 Man. 48 (the statute did not apply to a rejection by an administrator appointed by a foreign court, although the letters of administration were afterwards resealed in Manitoba pursuant to the statute).

70. Matter of De Ridder, 183 App. Div. 657, 170 NYS 765.

71. Cal.—Ukiah Bank v. Shoemake, 67 Cal. 147, 4 P 420.

Conn.—Caulfield v. Green, 73 Conn. 321, 47 A 334.

Ida.—Powell-Sanders Co. v. Carssow, 28 Ida. 201, 152 P 1067.

N. Y.—Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 NE 483 [aff 15 App. Div. 181, 44 NYS 493]; Matter of Scheetz, 62 Misc. 166, 116 NYS 428, 7 Mills Surr. 88; Adler v. Davis, 31 Misc. 47, 63 NYS 241; Barsalou's Case, 4 AbbPr 135, 4 Bradf. Surr. 164.

N. C.—Woodlief v. Bragg, 108 N. C. 571, 13 SE 211.

Oh.—Miller v. Ewing, 68 Oh. St. 176, 67 NE 292.

[a] **Rejections held sufficient to set statutes in motion.**—(1) A statement by the administrator within a reasonable time after exhibition of the claim that the claim is rejected and that all claimant will get on it will be at the end of a lawsuit. Miller v. Ewing, 68 Oh. St. 176, 67 NE 292. (2) A distinct refusal to allow the claim and a statement to the creditor that he must consider it as rejected. Harter v. Taggart, 14 Oh. St. 122. (3) A notice by an executor to a claimant as follows: "You will please take notice that I doubt the justice and validity of your claim of $748.00 against the above named estate, and I hereby dispute the same and offer to refer it," etc. Van Ness v. Kenyon, 208 N. Y. 228, 101 NE 881, AnnCas1914D 221 [mod 151 App. Div. 948, 136 NYS 1149] (where an executor in his notice of rejection of a claim offered to refer it and three months prior to the expiration of the short statute of limitations a verbal agreement to refer was made, it being understood that the papers necessary to carry out the stipulation should be prepared by defendant's attorney, he having failed to do so until after the time limited had expired, the executor was not estopped to plead the statute of limitations as a bar to the claim by reason of the offer to refer). To same effect Dawbarn v. Fleischmann, 146 App. Div. 57, 130 NYS 397; Matter of Mudge, 118 NYS 568 [dist Matter of Eichman, 33 Misc. 322, 68 NYS 636]. (4) A statement that the claim is disputed and rejected. Peters v Stewart, 2 Misc. 357, 21 NYS 993. (5) A written notice as follows: "Please take notice that the claim filed by you . . . is hereby rejected, for the reason that the surrogate . . . has expressed doubts as to the validity of the same, and has refused to approve a proposed compromise thereof." Diehl v. Becker, 174 NYS 100, 101 [aff 227 N. Y. 318, 125 NE 533].

72. See infra § 1937.

73. Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem]; Peters v. Stewart, 2 Misc. 357, 21 NYS 993.

74. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Bradley v. Vail, 48 Conn. 375; Hoyt v. Bonnett, 50 N. Y. 538; Dawbarn v. Fleischmann, 146 App. Div. 57, 130 NYS 397; Calanan v. McClure, 47 Barb. (N. Y.) 206; Reynolds v. Collins, 3 Hill (N. Y.) 36; Elliot v. Cronk, 13 Wend. (N. Y.) 35; Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 414; Matter of Miller, 9 NYS 60, 2 Conn. Surr. 134; Barsalou v. Wright, 4 Bradf. Surr. (N. Y.) 164.

[a] **Rejections held insufficient to set statute in motion.**—(1) A mere statement by an executor that he doubted the justice of plaintiff's claim and an offer to refer it to disinterested persons. Matter of Scheetz, 62 Misc. 166, 116 NYS 428, 7 Mills Surr. 88; Matter of Eichman, 33 Misc. 322, 68 NYS 636, 9 NYAnnCas 250, 2 Mills Surr. 79. (2) A statement of the executor that he knew nothing about the justice of the demand, and that he had not looked into the affairs of the estate. Elliot v. Cronk, 13 Wend. (N. Y.) 35. (3) A written notice served upon the claimant stating that as at present advised the executors declined to pay the claim, but further stating that as the executors had no other means of information they would be greatly obliged if the claimant would furnish them with a bill of particulars. Hoyt v. Bonnett, 50 N. Y. 538 [rev 58 Barb. 529]. (4) A letter by the executor in which he stated that he would not be ready to settle the estate and that the claim presented would not be considered until he had seen claimant. Caulfield v. Green, 73 Conn. 321, 47 A 334. (5) A rejection upon any other ground than that the debt claimed or some part thereof is not legally or equitably due. Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 414. (6) A statement by the representative that he felt obliged to reject the claim followed by conduct which would create an impression that the claim had not been finally rejected. Calanan v. McClure, 47 Barb. (N. Y.) 206.

75. Robeson v. Niles, 18 D. C. 182 (where the claim was originally presented and rejected and was for services rendered as attorney and trustee, while that sued on was for services as attorney only). But compare Willis v. Talbert (Tex.) 11 SW 535 (under a statute providing that, where a claim for money has been rejected in whole or in part, the owner must sue within ninety days thereafter, the statute is set in motion on rejection of the claim because proper credits had not been entered thereon, and cannot be revived by a second presentation ninety days thereafter and indorsement thereon by the administrator of a portion of the claim).

76. Lindsay v. Hogan, (Mont.) 185 P 1118; Titus v. Poole, 145 N. Y. 414, 40 NE 228 [aff 73 Hun 383, 26 NYS 451].

77. Cal.—Steward v. Hinkel, 72 Cal. 187, 13 P 494; Ukiah Bank v. Shoemake, 67 Cal. 147, 7 P 420.

Conn.—Bradley v. Vail, 48 Conn. 375.

Ida.—Powell-Sanders Co. v. Carssow, 28 Ida. 201, 152 P 1067.

N. Y.—Kidd v. Chapman, 2 Barb. Ch. 414.

Tex.—Butler v. Fechner, (Civ. A.) 200 SW 1126.

78. Underwood v. Brown, (Ariz.) 60 P 700; Powell-Sanders Co. v. Carssow, 28 Ida. 201, 152 P 1067; Singer v. Austin, 19 N. D. 546, 125 NW 560; In re Smith, 13 N. D. 513, 101 NW 890; Farwell v. Richardson, 10 N. D. 34, 84 NW 558; Boyd v. Von Neida, 9 N. D. 337, 83 NW 329; Willams v. Jackson, (Okl.) 179 P 603.

[a] **Delay in investigating claim.**—Where a claim was made out and sent to the attorney of the administrator, and the administrator suggested that certain payments had not been credited, and had his attorney investigate the matter, and asked that for a full and complete statement of the account, which was made out and sent to him or his attorney, the ten days allowed by statute for action on the claim should be computed from the presentation

acted on within a certain time after presentation, the claimant may at his option deem such neglect equivalent to a rejection, the claimant is not bound to consider failure to act as a rejection, unless he chooses,[79] but may treat the proceedings as nugatory and file a new claim, thus avoiding the running of the statute.[80]

[§ 1938] **cccc. Partial Rejection.** Where a claim consists of independent items and the executor admits some and rejects others, the statute commences to run against the rejected items from the date of the rejection.[81] The allowance of only a portion of the claim is a sufficient rejection of the balance.[82]

[§ 1939] **dddd. Rejection after Allowance.** It has been held that, where a claim has been allowed by the executor or administrator, he cannot afterward reject the claim so as to set in motion the statute of limitations as to action rejected claims;[83] but it has also been considered that, where, after the allowance of a claim by an administrator, it is disallowed and rejected by his successor, the statute runs from such rejection.[84]

[§ 1940] **eeee. Ground of Rejection.** It has been held that in order to set the statute running, the rejection of a claim must be upon the ground that the debt, or some part of it, is not legally or equitably due.[85]

[§ 1941] **(bbb) Notice of Rejection—aaaa. Necessity.** The general rule is that knowledge of the rejection of a claim must be brought home to the claimant,[86] and the rejection is operative only from the time of actual notice to him,[87] although it has been held that in the absence of any statutory requirement to that effect notice of rejection is not necessary to start the statute running.[88] Where a claim against a decedent's estate was presented for allowance by agents of the claimant, who were notified of the rejection thereof, such rejection is binding on the claimant, although he was not informed thereof, or even though he was informed by his agents that the claim was not rejected.[89]

[§ 1942] **bbbb. Sufficiency.** The mere ministerial act of giving notice of rejection of a claim may be performed by the attorney for the estate.[90] The filing of a notice on rejection in a proceeding in a surrogate's court to which the claimant was an involuntary party does not obviate the necessity of bringing knowledge of the rejection home to her,[91] but it has been held that a written notice by an administrator rejecting a claim left at claimant's house with a person of suitable age to inform the bearer that claimant was not at home is equivalent to personal notice and sufficient to set the statute in motion.[92] Notice to the attorney of the creditor has been held sufficient,[93] but the mere fact that an attorney who had a claim against a decedent's estate for collection appeared in the proceedings in the surrogate's court in which such claim was rejected has been held insufficient to charge the claimant with notice of such rejection.[94] Where the attorney of an executor serves on the attorney of the claimant a notice of rejection of the claim and immediately mails a similar notice to the claimant, the claimant can treat the mailed notice as the notice prescribed by the statute, and an action begun within the statutory time after service of such notice is begun in time.[95]

[§ 1943] **cccc. Service by Mail.** In New York where notice of rejection is served by mail the time for commencement of the action is doubled,[96] and proof of actual receipt by the claimant of a notice of rejection mailed to him has been held necessary to render the bar of the statute available.[97]

[§ 1944] **(ccc) Notice to Present Claims.** Where a claim has been actually presented and rejected, the running of the statute is not prevented by the fact that no notice to present claims was published,[98] and a fortiori where such notice is published after rejection of the claim, the statute

of the latter account. Powell-Sanders Co. v. Carssow, 28 Ida. 201, 152 P 1067.

79. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Stewart v. Hinkel, 72 Cal. 187, 13 P 494; Ukiah Bank v. Shoemake, 67 Cal. 147, 7 P 420.

80. Steward v. Hinkel, 72 Cal. 187, 13 P 494.

81. Wintermeyer v. Sherwood, 77 Hun 193, 28 NYS 449, 23 NYCivProc 422.

82. Jones v. Walden, 145 Cal. 523, 78 P 1046.

[a] **Disallowance of interest.**—Where a claim for a certain sum with "accrued interest" was filed and an allowance for only the principal sum made, this was tantamount to a rejection of the sale for interest, so as to start the statute running. San Diego Cons. Nat. Bank v. Hayes, 112 Cal. 75, 44 P 469.

83. Thomas v. Chamberlain, 39 Oh. St. 112.

84. Stewart v. McLaughlin, 47 Oh. St. 555, 28 NE 175.

85. Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 414; Willis v. Talbert, (Tex.) 11 SW 535.

[a] **A rejection on the ground that proper credits** had not been indorsed on the claim is sufficient to start the statute running. Willis v. Talbert, (Tex.) 11 SW 535.

86. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Steward v. Hinkel, 72 Cal. 187, 13 P 494; Bradley v. Vail, 48 Conn. 375; Potts v. Baldwin, 67 App. Div. 434, 74 NYS 655 [aff 173 N. Y. 335, 66 NE 4]; Van Saun v. Farley, 4 Daly (N. Y.) 165, 167.

"The statute does not mean, by rejection, merely a mental emotion, but the action of the mind must be followed by some outward act by which the owner of the claim may be apprised of the result arrived at." Van Saun v. Farley, supra.

87. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Steward v. Hinkel, 72 Cal. 187, 13 P 494; Robbins v. Coffing, 52 Conn. 118; Diehl v. Becker, 227 N. Y. 318, 125 NE 533.

[a] **Where the actual date of rejection is concealed from the claimant,** the statute only commences to run from the date on which the claimant was actually notified of the rejection of his claim. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439.

[b] **Evidence showing notice to claimant of rejection.**—Hummel v. Hurd, 112 App. Div. 547, 98 NYS 801.

88. Lindsay v. Hogan, (Mont.) 185 P 1118.

89. Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem].

90. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P 439; Selover v. Coe, 63 N. Y. 438; Wintermeyer v. Sherwood, 77 Hun 193, 28 NYS 449, 23 NYCivProc 422; Miller v. Ewing, 68 Oh. St. 176, 67 NE 292.

91. Potts v. Baldwin, 67 App. Div. 434, 74 NYS 655 [aff 173 N. Y. 335, 66 NE 4].

92. Peters v. Stewart, 2 Misc. 357, 21 NYS 993 [rev 1 Misc. 8, 20 NYS 661].

93. Lockwood v. Dillenbeck, 104 App. Div. 71, 93 NYS 321 [disappr Van Saun v. Farley, 4 Daly (N. Y.) 165].

[a] **Illustration.**—Where an attorney was employed to present a claim against the estate of a decedent, and he sent it by mail to the executors, who sent him by mail a notice of the rejection, such notice was notice to the claimant, and started the running of the short statute of limitations. Heinrich v. Heidt, 106 App. Div. 179, 94 NYS 423.

94. Potts v. Baldwin, 67 App. Div. 434, 74 NYS 655 [aff 173 N. Y. 335, 66 NE 4].

95. Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041.

96. Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041.

97. Diehl v. Becker, 227 N. Y. 318, 125 NE 533.

98. Field v. Field, 77 N. Y. 294; Dawbarn v. Fleischmann, 146 App. Div. 57, 130 NYS 397; Wintermeyer v. Sherwood, 77 Hun 193, 28 NYS 449; Snell v. Dale, 17 NYS 575; Morissey v. Hill, 142 N. C. 355, 55 SE 193. See also Singer v. Austin, 19 N. D. 546, 125 NW 560 (where the claim deemed rejected because not acted on).

[a] **Claims presented and rejected before the enactment of the statute** establishing the rule stated in the text are not within its provisions. In re Haxtun, 102 N. Y. 157, 6 NE 111 [rev 33 Hun 364].

[b] **Aliter** under earlier New York statute. Tucker v. Tucker, 4 Abb. Dec. (N. Y.) 428, 4 Keyes 136; Hardy v. Ames, 47 Barb. (N. Y.) 413; Dolbeer v. Casey, 19 Barb. (N. Y.)

runs from the date of rejection and not from the date of such publication.[99]

[§ 1945] **(ddd) Rule to Limit Creditors.** Where a creditor was notified that his claim was disputed, but failed to bring action thereon within the statutory period, his claim was barred, although no rule to limit creditors was made until after an action on the claim was begun.[1]

[§ 1946] **ddd. Computation of Time.** Where the statute requires the action to be brought within a specified time "after" rejection, the day of the rejection is excluded in computing the time.[2]

[§ 1947] **eee. Mode of Asserting Claim.** After the lapse of the statutory period from rejection, the claimant is not only precluded from bringing direct proceedings to enforce the claim, but he cannot assert his claim as a counterclaim in an action brought by the representative.[3] The words "other remedy" in a statute providing that, unless a claimant commences an action for the recovery of his claim within six months after notice of dispute, he and all persons claiming under him are forever barred from maintaining any action on the claim, and from every other remedy to enforce payment thereof out of decedent's property, include statutory summary proceedings by an undertaker, and such proceedings cannot be maintained after the expiration of six months from notice of rejection of the claim.[4]

[§ 1948] **fff. What Constitutes Commencement of Action.** It has been held that an action is not commenced so as to toll the limitation prescribed by a statute requiring suit within three months after rejection of a claim, until the complaint is filed.[5]

[§ 1949] **ggg. Consent to Determination by Surrogate.** A statutory provision that an action on a claim rejected by an executor must be commenced within six months after rejection, unless a written consent is filed by the respective parties that the claim may be heard and determined by the surrogate on the judicial settlement of the executor's accounts, allows the claim to be litigated after the six months period only in proceedings before the surrogate, and such consent does not aid a claimant who brings an action in a court other than the surrogate's court after the statutory period has expired.[6] Under such a statute the consent may be joint as well as separate but it must be filed within six months after rejection of the claim to give jurisdiction.[7]

[§ 1950] **hhh. Negotiations after Notice of Rejection.** It has been held that, where an executor's notice of dispute and rejection of a claim is sufficient to start the six-months period of limitation, the fact that negotiations were carried on between the parties after rejection looking to a settlement of the claim is not sufficient to stay the running of the statute in the absence of any showing that the rejection of the claim was ever withdrawn or waived, or that claimant ever so believed, or of the period of time over which the negotiations extended, or that the claimant was either misled or prejudiced thereby.[8] But where an administrator after disallowing a claim and giving notice requested the creditor not to sue, expressing his belief that the claim would be compromised, and the creditor at the special instance and request of the administrator delayed the commencement of his suit accordingly, it was held that his conduct of the administrator was equivalent to an express declaration that he would not insist upon the disallowance and notice and justified the jury in finding a waiver.[9]

[§ 1951] **iii. Absence of Representative from State.** The statutes do not run in favor of a representative who as the time the action accrues and continuously thereafter resides out of the state,[10] but absence of the personal representative from the state for several months will not suspend the running of the short statute of limitations where it is not shown that he was without the state when the cause of action against him accrued.[11]

[§ 1952] **(hh) After Final Settlement.** Where executors had not made a final settlement and had not been discharged, and administrators with the will annexed were appointed on their death, an action against the administrators on a note executed by decedent was not barred by a statute limiting actions against personal representatives to seven years from the date of the final settlement.[12] Where executors applied to have their accounts judicially settled, a decree entered, settling their accounts, except that they were ordered to retain a certain sum with which to pay any judgment that plaintiff, claiming a legacy, might get against them, was a "judicial settlement," which started limitations running.[13]

[§ 1953] **cc. Extension Statutes.** In many jurisdictions there are statutes providing that if a person liable to action dies before the expiration of the time limited for action and the cause of action survives, an action thereon may be commenced against his personal representative within a specified period after the death of decedent or the grant of administration of his estate.[14] The object of such statutes is to extend, and in no case to limit, the time within which an action may be commenced;[15] so that, although an action may be

149; Whitmore v. Foose, 1 Den. (N. Y.) 159; Clark v. Sexton, 23 Wend. (N. Y.) 477; Salomon v. Heickel, 4 Dem. Surr. (N. Y.) 176; Flagg v. Ruden, 1 Bradf. Surr. (N. Y.) 193.

99. Singer v. Austin, 19 N. D. 546, 125 NW 560.

1. Simons v. Forster, 73 N. J. L. 338, 63 A 858.

2. Hunter v. Lanius, 82 Tex. 677, 18 SW 201.

3. Morissey v. Hill, 142 N. C. 355, 55 SE 193.

4. In re Mudge, 118 NYS 568.

5. Farmers', etc., Bank v. Lilly, 66 Wash. 309, 119 P 749.

6. Clark v. Scovill, 191 N. Y. 8, 83 NE 659 [aff 111 App. Div. 35, 97 NYS 1117].

7. In re Martin, 211 N. Y. 328, 105 NE 546.

8. Dawbarn v. Fleischmann, 146 App. Div. 57, 130 NYS 397.

9. Husted v. Hoyt, 12 Conn. 160.

10. Hayden v. Pierce, 71 Hun (N. Y.) 593, 25 NYS 55 [aff 144 N. Y. 512, 39 NE 638, 1 NYAnnCas 205].

11. Dawbarn v. Fleischmann, 146 App. Div. 57, 130 NYS 397.

12. Radford v. Harris, 144 Ky. 809, 139 SW 963.

13. Pattee v. Harper, 183 App. Div. 88, 170 NYS 562 [aff 224 N. Y. 706 mem, 121 NE 882 mem].

14. See the statutes.

[a] **Reason for enactment.**—"To avoid the harshness and injustice of this rule, which often barred a cause of action without any fault or laches on the part of the creditor, the statute in question was enacted, which preserves to the creditor the right to bring an action within six months after the appointment of an executor or administrator, when the time limited would otherwise expire subsequent to the death of the debtor, and before the appointment of his personal representative." Blaskower v. Steel, 23 Or. 106, 108, 31 P 253.

15. Ark.—Worthington v. De Bardiekin, 33 Ark. 651.

Cal.—McMillan v. Hayward, 94 Cal. 357, 29 P 774; Lowell v. Kier, 50 Cal. 646; Smith v. Hall, 19 Cal. 85.

Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526.

Ga.—Tarver v. Cowart, 5 Ga. 66.

Ida.—Miller v. Lewiston Nat. Bank, 18 Ida. 124, 142, 108 P 901.

Nev.—Rickards v. Hutchinson, 18 Nev. 215, 2 P 52, 4 P 702; Wick v. O'Neale, 2 Nev. 303.

N. Y.—Scovil v. Scovil, 45 Barb. 517.

N. C.—Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

Or.—Blaskower v. Steel, 23 Or. 106, 31 P 253.

brought within the period allowed by the special statute notwithstanding the expiration of the period allowed by the general statute of limitations,[16] an action brought within the period allowed by the general statute is in time, although the period allowed by the special statute has expired.[17] But if at the time the special statute commences to run, a portion of the time fixed by the general statute longer than that fixed by the special statute remains unexpired, the period fixed by the general statute controls and the special statute cannot operate to extend the time for bringing suit.[18] Of course an action brought after the expiration both of the general statutes of limitations and of the period fixed by statutes of the character under consideration is barred.[19] It has been held that a suit brought within the period fixed by the special statute is in time no matter how long the appointment had been delayed,[20] and certainly where the creditor is not entitled to apply for the appointment of an administrator for a certain time, and no administrator is appointed, the time within which the creditor could not secure an appointment should not be counted as part of the statutory period within which he may sue.[21] But where a creditor is entitled to apply for the appointment of an administrator, it has been considered that he cannot prolong the statutory period within which he may sue by failure to act, but must move with reasonable promptness to secure the appointment of an administrator, failing in which the statute will run against him notwithstanding there is no representative of the estate.[22] These statutes are applicable whether the administrator has given notice of his appointment or not,[23] and apply to suits to foreclose mortgages given to secure notes not barred by limitation when the maker died, although the personal representative is not a party thereto.[24] These special statutes do not have the effect of reviving a cause of action barred at the time of decedent's death,[25] and they apply only to cases where the general statute of limitations has commenced to run.[26]

A presentation for allowance of notes which were not barred prior to the death of the testator, within the statutory period after the issuance of letters of administration, is the commencement of an action within the meaning of the statute.[27]

[§ 1954] **(c) Suspension of Operation of Statutes of Limitations—aa. Death of Decedent.** Where a cause of action accrues after the death of the person against whom it lies, limitation does not begin to run until there is a grant of administration on his estate;[28] but the general rule is that the death of one against whom a cause of action has already accrued does not suspend the running of limitations until administration on his estate is taken out,[29]

S. D.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

"It is apparent that the provisions of this section were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom, and thus to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period, and in such a case it has no effect whatever." Miller v. Lewiston Nat. Bank, supra.

16. Cal.—Hibernia Sav., etc., Soc. v. Hebert, 53 Cal. 375.

Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526.

Ill.—Roberts v. Tunnell, 165 Ill. 631, 46 NE 713 [aff 65 Ill. A. 191]; Higgins v. Spring, 36 Ill. A. 310.

Ind.—Roeder v. Keller, 135 Ind. 692, 35 NE 1014; Epperson v. Hostetter, 95 Ind. 583; Knippenberg v Morris, 80 Ind. 540; Harris v. Rice, 66 Ind. 267; Lewis v. Hershey, 45 Ind. A. 104. 90 NE 332.

Mich.—Sword v. Keith, 31 Mich. 247.

Miss.—Klaus v. Moore, 77 Miss. 701, 27 S 612; Weir v. Monahan, 67 Miss. 434, 7 S 291; Sledge v. Jacobs, 58 Miss. 194; Adams v. Williams, 57 Miss. 38; Bissinger v. Lawson, 57 Miss. 36; Clayton v. Merrett, 52 Miss. 353.

Nev.—Wick v. O'Neale, 2 Nev. 303.

N. H.—Cummings v. Farnham, 75 N. H. 135, 71 A 632; Brown v. Leavitt, 26 N. H. 493.

N. Y.—Sanford v. Sanford, 62 N. Y. 553; Scovil v. Scovil, 45 Barb. 517.

N. C.—Winslow v. Benton, 130 N. C. 58, 40 SE 840; Benson v. Bennett, 112 N. C. 505, 17 SE 432.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393.

Vt.—Briggs v. Thomas, 32 Vt. 176; Hapgood v. Southgate, 21 Vt. 384.

Wis.—Boyce v. Foote, 19 Wis. 199.

17. Lowell v. Kier, 50 Cal. 646; Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497; Hall v. Brennan, 140 N. Y. 409, 35 NE 663.

18. Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526.

Ky.—Johnson v. U. S. Equitable L. Assur. Soc., 137 Ky. 437, 125 SW 1074; Jones v. Mitchell, 9 KyL 858.

Mich.—Morse v. Hayes, 150 Mich. 597, 114 NW 397, 121 AmSR 643, 13 LRANS 1200.

Miss.—Hambrick v. Jones, 64 Miss. 240, 8 S 176.

Or.—Blaskower v. Steel, 23 Or. 106, 31 P 253.

Vt.—Briggs v. Thomas, 32 Vt. 176.

19. Wright v. Zitrouer, 55 Ga. 85; Schwartz v. Stock, 26 Nev. 155, 65 P 357; McNeill v. Gallagher, 24 R. I. 490, 53 A 630.

20. Danglada v. De la Guerra, 10 Cal. 386.

21. Robertson v. Tarry, 83 Kan. 716, 112 P 603.

22. Robertson v. Tarry, 83 Kan. 716, 112 P 603.

23. Lancey v. White, 68 Me. 28.

24. Roberts v. Tunnell, 165 Ill. 631, 46 NE 713 [aff 65 Ill. A. 191].

25. Hibernia Sav., etc., Assoc. v. Herbert, 53 Cal. 375.

26. Smith v. Hall, 19 Cal. 85.

27. Frew v. Clark, 34 Wash. 561, 76 P 85.

28. Cal.—Hibernia Sav., etc., Soc. v. Farnham, 153 Cal. 578, 96 P 9, 126 AmSR 129; In re Bullard, 116 Cal. 355, 48 P 219 [dist Hibernia Sav., etc., Soc. v. Conlin, 67 Cal. 178, 7 P 477]; Smith v. Hall, 19 Cal. 85.

D. C.—Drury v. Gorrell, 44 App. 518.

Ga.—Johnson v. Johnson, 80 Ga. 260, 5 SE 629.

Ind.—Hildebrand v. Kinney, 172 Ind. 447, 87 NE 832, 19 AnnCas 788.

Iowa.—In re Oldfield, 158 Iowa 98, 138 NW 846.

Kan.—Nelson v. Herkel, 30 Kan. 456, 2 P 110; Toby v. Allen, 3 Kan. 399.

Miss.—Abbott v. McElroy, 18 Miss. 100.

Mo.—Austin v. Shipman, 160 Mo. A. 206, 141 SW 425; Stanton v. Gibbins, 103 Mo. A. 264, 77 SW 95.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

Eng.—Jolliffe v. Pitt, 2 Vern. Ch. 694, 23 Reprint 1050.

Ont.—Grant v. McDonald, 8 Grant Ch. (U. C.) 468.

[a] **Where one agrees to compensate by his will** for services and no compensation is made, the claim for services will not be barred by limitations until after the lapse of the statutory period after administration granted. Tuohy v. Trail, 19 App. (D. C.) 79.

29. U. S.—Hayman v. Keally, 11 F. Cas. No. 6,265, 3 Cranch C. C. 325.

Ala.—Johnson v. Wren, 3 Stew. 172.

Ark.—Whipple v. Johnson, 66 Ark. 204, 49 SW 827; Biscoe v. Madden, 17 Ark. 533; Brown v. Merrick, 16 Ark. 612; Etter v. Finn, 12 Ark. 632.

Cal.—Quivey v. Hall, 19 Cal. 97.

D. C.—Gibson v. Ruff, 8 App. 262.

Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526.

Ill.—Bonney v. Stoughton, 122 Ill. 536, 13 NE 833; Baker v. Brown, 18 Ill. 91.

Ind.—Hildebrand v. Kinney, 172 Ind. 447, 87 NE 832, 19 AnnCas 788.

Ky.—Johnson v. U. S. Equitable L. Assur. Soc., 137 Ky. 437, 125 SW 1074.

La.—Linderman's Succ., 3 La. Ann. 714; Dubreuil's Succ., 12 Rob. 507.

Miss.—Abbott v. McElroy, 18 Miss. 100.

N. J.—Dekay v. Darrah, 14 N. J. L. 288. But see infra note 30.

N. Y.—Sanford v. Sanford, 62 N. Y. 553; Church v. Alendorf, 49 Hun 439, 3 NYS 557; Matter of Howard, 11 Misc. 224, 32 NYS 1098 [aff 36 NYS 1126].

N. C.—Copeland v. Collins, 122 N. C. 619, 30 SE 315 [dist Long v. Clegg, 94 N. C. 763]; Daniel v. Laughlin, 87 N. C. 433; Armistead v. Bozman, 36 N. C. 117; Godley v. Taylor, 14 N. C. 178; Jones v. Brodie, 7 N. C. 594. But see infra note 30.

Pa.—Mitcheltree v. Veach, 31 Pa. 455; Caldwell's Est., 10 Pa. Dist. 679, 26 Pa. Co. 420; Otterson's Est., 7 Pa. Dist. 379.

Philippine.—Medel v. Avecilla, 15 Philippine 465.

S. C.—Callum v. Rice, 35 S. C. 551, 15 SE 268; Bolt v. Dawkins, 16 S. C. 198; Bugg v. Summer, 26 S. C. L. 333; Nicks v. Martindale, 16 S. C. L. 135, 18 AmD 647; McCollough v. Speed, 14 S. C. L. 455.

although there is some authority for the contrary view,[30] and in some jurisdictions such a situation is provided for by statutes suspending the running of limitations during the period between the death of a debtor and the appointment of a representative of his estate,[31] with a further provision, in some cases, that limitations shall again begin to run at the expiration of a designated time from decedent's death without administration being taken out.[32]

[§ 1955] **bb. Presentation of Claim.**[33] Under some statutes it is held that the mere filing or exhibition of a claim against an estate does not interrupt the running of limitations against such claim,[34] but under other statutes it is held that limitation does not run against a claim during the period between its presentation and action thereon by the representative.[35] But presentation of a claim within the required time will not validate the claim if before presentation it was barred by the general statute of limitations.[36]

An order for an accounting of the indebtedness of an estate will suspend the running of limitations as to all creditors whose claims are asserted therein.[37]

[§ 1956] **cc. Allowance of Claim.** The general rule is that, where a claim against the estate has been allowed, it cannot be affected by the statute of limitations while the proceedings for settlement of the estate are pending.[38] Where a statute requires suit to be brought within a year after allowing recognition as such and demanding that the executor give security for his claim. Berens v. Boutte, 31 La. Ann. 112. (5) Notice of exhibition of demand properly made, and cause docketed in the probate court and continued. Nicholls-Shephard Co. v. Donavon, 67 Mo. A. 286. (6) Presentation while estate in hands of statutory collector acting as administrator pendente lite. Berry, etc., Co. v. Dante, 43 App. (D. C.) 110. (7) Citation on petition of creditor. Heller's Est., 5 Pa. Dist. 205, 17 Pa. Co. 603.

Tenn.—Anderson v. Bedford, 4 Coldw. 464.

Va.—Harshberger v. Alger, 31 Gratt. (72 Va.) 52.

W. Va.—Handy v. Smith, 30 W. Va. 195, 3 SE 604.

Eng.—Rhodes v. Smethurst, 4 M. & W. 42, 150 Reprint 1335; Freake v. Cranefeldt, 3 Myl. & C. 499, 14 EngCh 499, 40 Reprint 1019. But see infra note 30.

Man.—McKinnon v. Shanks, 26 Man. 427, 28 DomLR 77, 34 WestLR 761, 10 WestWkly 895.

Ont.—Grant v. McDonald, 8 Grant Ch. (U. C.) 468.

[a] **This is true even though** the appointment of a representative was delayed until after the expiration of the statutory period by litigation over the right to probate. Rhodes v. Smethurst, 4 M. & W. 42, 150 Reprint 1335.

30. Nelson v. Herkel, 30 Kan. 456, 2 P 110; Toby v. Allen, 3 Kan. 399; Burnet v. Bryan, 6 N. J. L. 377; Baird v. Reynolds, 99 N. C. 469, 6 SE 377; Lee v. Gause, 24 N. C. 440; Jolliffe v. Pitt, 2 Vern. Ch. 694, 23 Reprint 1050.

[a] **Failure of creditor to take out administration.**—As a creditor is authorized by statute to take out letters of administration in case of delay by persons entitled to do so the statute of limitations will run against his claim after a reasonable time has elapsed subsequent to the death of decedent, although no personal representative had been appointed. Black v. Elliott, 63 Kan. 211, 65 P 215, 88 AmSR 239; Bauserman v. Charlott, 46 Kan. 480, 26 P 1051 [aff 147 U. S. 647, 13 SCt 466, 37 L. ed. 316, and foll Kulp v. Kulp, 51 Kan. 341, 32 P 1118, 21 LRA 550].

31. U. S.—Platt v. Hungerford, 116 Fed. 771.

Ark.—Bowdre v. Pitts, 94 Ark. 613, 128 SW 57.

Ga.—Langmade v. Tuggle, 78 Ga. 777, 3 SE 666.

Miss.—Ferguson v. Crowson, 25 Miss. 430.

N. Y.—De Crano v. Moore, 50 App. Div. 361, 63 NYS 585, 64 NYS 3.

N. C.—Winslow v. Benton, 130 N. C. 58, 40 SE 840.

32. Langmade v. Tuggle, 78 Ga. 777, 3 SE 666; Crow v. Hartzler, 103 Kan. 800, 176 P 651; Matthews v. Peterson, 150 N. C. 132, 63 SE 722.

33. As commencement of action see infra § 1957.

34. Colo.—Alvater v. Central City First Nat. Bank, 45 Colo. 528, 103 P 378.

Ill.—Viskniskki v. Bleakley, 88 Ill. A. 613.

Kan.—Hanson v. Towle, 19 Kan. 273.

N. Y.—Matter of Neher, 57 Misc. 527, 109 NYS 1090, 6 Mills Surr. 322 [aff 128 App. Div. 882, 112 NYS 1138 (aff 196 N. Y. 565 mem, 90 NE 1162 mem)].

Pa.—Reber's App., 125 Pa. 20, 17 A 189; Keyser's App., 124 Pa. 80, 16 A 577, 2 LRA 159 [expl York's App., 110 Pa. 69, 1 A 162, 2 A 65]; Irwin's Est., 6 Pa. Co. 582; Shand's Est., 1 Pa. Co. 600.

R. I.—Thompson v. Hoxsie, 25 R. I. 377, 55 A 930.

Tenn.—Woods v. Woods, 99 Tenn. 50, 41 SW 345; Prewett v. Goodlett, 98 Tenn. 82, 38 SW 434.

Tex.—Riggs v. Hanrick, 59 Tex. 570.

[a] **Claim not acted upon.**—The fact that an executor has received a claim against the estate, which is never affirmatively accepted or rejected by him, does not stop the running of limitations. Matter of Neher, 57 Misc. 527, 109 NYS 1090, 6 Mills Surr. 322 [aff 128 App. Div. 882, 112 NYS 1138 (aff 196 N. Y. 565 mem, 90 NE 1162 mem)].

[b] **Filing and withdrawal of a claim** does not constitute the commencement of an action to prevent the statute of limitations from running. Morse v. Clark, 10 Colo. 216, 14 P 327.

35. Ark.—Salinger v. Black, 68 Ark. 449, 60 SW 229.

Cal.—Nally v. McDonald, 66 Cal. 530, 6 P 390.

Colo.—Milner Bank, etc., Co. v. Whipple, 61 Colo. 252, 156 P 1098.

D. C.—Berry, etc., Co. v. Dante, 43 App. 110.

Fla.—Barnes v. Scott, 29 Fla. 285, 11 S 48; Deans v. Wilcoxson, 25 Fla. 980, 7 S 163; Bush v. Adams, 22 Fla. 177.

Ill.—Mason v. Tiffany, 45 Ill. 392.

Iowa.—Fritz v. Fritz, 93 Iowa 27, 61 NW 169.

Kan.—Clifton v. Meuser, 79 Kan. 655, 100 P 645.

La.—Berens v. Boutte, 31 La. Ann. 112.

Mo.—Nicholls-Shepard Co. v. Donavon, 67 Mo. A. 286.

N. M.—Browning v. Browning, 3 N. M. 371, 9 P 677.

N. J.—Smith v. Crater, 43 N. J. Eq. 636, 12 A 530.

N. Y.—Matter of Nelson, 63 Misc. 627, 118 NYS 673, 7 Mills Surr. 216.

N. C.—Warden v. McKinnon, 94 N. C. 378.

Or.—In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029.

Pa.—Agnew's Est., 17 Pa. Super. 201; Geist's Est., 16 Pa. Dist. 331; Hilborn's Est., 5 Pa. Dist. 265.

S. C.—Johnson v. Ballard, 45 S. C. L. 178.

[a] **The term "filing"** signifies that the claim is to be exhibited to the personal representative for inspection in order that he may reject or allow it. It is not required of the creditor that he should part with the possession of the evidence of his claim. Hinton v. Pritchard, 126 N. C. 8, 35 SE 127.

[b] **Sufficient filing.**—(1) Presentation of execution by sheriff to debtor's administrator who recognized it as a valid debt against the debtor's estate. Stonestreet v. Frost, 123 N. C. 640, 31 SE 836. (2) Action brought against administrator. McLeod v. Graham, 132 N. C. 473, 43 SE 935. (3) Administrator's action for sale of realty for the payment of debts. Harris v. Davenport, 132 N. C. 697, 44 SE 406. (4) Formal petition by a mortgage creditor asking

36. McKinzie v. Hill, 51 Mo. 303, 11 AmR 450; Jones v. Keep, 23 Wis. 45.

37. Robinett v. Mitchell, 101 Va. 762, 45 SE 287, 99 AmSR 928; Gunnell v. Dixon, 101 Va. 174, 43 SE 340; Repass v. Moore, 96 Va. 147, 30 SE 458.

38. Ark.—Fort v. Blagg, 38 Ark. 471.

Cal.—Wise v. Williams, 72 Cal. 544, 14 P 204; German Sav., etc., Soc. v. Hutchinson, 68 Cal. 52, 8 P 627; Dohs v. Dohs, 60 Cal. 255; Schroeder's Est., 46 Cal. 304; Beckett v. Selover, 7 Cal. 215, 68 AmD 237; Schroeder's Est., Myr. Prob. 7; Shively v. Harris, 5 Cal. A. 513, 90 P 971.

Ill.—De Clerque v. Campbell, 231 Ill. 442, 83 NE 224, 125 Ill. A. 357.

La.—Willis' Succ., 109 La. 281, 33 S 314.

Miss.—Allen v. Hillman, 69 Miss. 225, 13 S 871.

N. Y.—Matter of Hannon, 46 Misc. 229, 93 NYS 207, 4 Mills Surr. 480 (claim presented and not disputed).

N. C.—Harris v. Davenport, 132 N. C. 697, 44 SE 406; Turner v. Shuffler, 108 N. C. 642, 13 SE 243; Woodlief v. Bragg, 108 N. C. 571, 13 SE 211.

Oh.—Taylor v. Thorn, 29 Oh. St. 569.

Pa.—Reber's App., 125 Pa. 20, 17 A 189.

Tex.—Wygal v. Myers, 76 Tex. 598, 13 SW 567; Howard v. Battle, 18 Tex. 673; Herbert v. Harbert, (Civ. A.) 59 SW 594.

But compare Fox v. Lipe, 14 Colo. A. 258, 59 P 850 (the fact that a judgment against a decedent was allowed as a claim against his estate, and the allowance filed in the clerk's office, making it a lien on decedent's real estate, within three years next before the bringing of an action to subject land held by decedent's wife to the payment thereof, on the ground that it was paid for with the husband's funds, does not stop the running of the statute of limitations, requiring bills for relief on the ground of fraud to be brought within three years after the discovery of the fraud).

[a] **Illustration.** — The statute does not run against a claim founded on a note and mortgage after allowance by the counsel of a deceased mortgagor. German Sav., etc., Soc. v. Hutchinson, 68 Cal. 52, 8 P 627.

[b] **An allowed claim has the force of a judgment.**—It stands pending the final close of the ad-

ance, and an appeal is taken from the allowance of a claim, the statute commences to run from the time of the entry of the certification of the allowance by the court to which the appeal is taken, in the court where the claim was originally presented.[39]

[§ 1957] **dd. Commencement of Action.** The commencement of an action within the period fixed by statute therefor stops the running of a statute of limitations,[40] and it is immaterial that a judgment thereon is not rendered within the statutory period.[41] The filing of claims with the proper officer and his indorsement thereof has been held to be the commencement of an action within statutes of limitations specially applicable to administrators or executors.[42] The commencement of proceedings by an executor for leave to sell testator's land for the payment of debts has, as regards the statute of limitations, been regarded as the commencement of an action against the testator's estate by the creditors, especially as to a claim which the executor acknowledges, and asks leave to pay;[43] but it has been held otherwise as to the pleading of a lien on land by a judgment creditor in an action by the executor to sell the land for the payment of debts.[44] Where a reference by statute stands in the place of an action, the entry of an order to refer is the commencement of an action sufficient to stop the running of the general statutes of limitations.[45] Where an action is commenced within the statutory period, amendments to cure defects of form made after the expiration of that period do not set up a new cause of action or entitle defendant to avail himself of the statute,[46] but amendments setting up a new cause of action after the expiration of the statutory period will not be permitted to save the action.[47] If through mistake of plaintiff's attorney an action is not entered, another action for the same cause commenced after the expiration of the special statutes of limitations will be barred,[48] and if plaintiff suffers a nonsuit in an action commenced within the statutory period, a subsequent action brought by him after the expiration of the statutory period will be barred.[49] So if an action against one administrator is discontinued because there are several who should be sued, a second action against all the administrators commenced after the expiration of the statute will be barred;[50] and if a suit is dismissed for champerty a new suit for the same cause of action brought after the expiration of the statutory period is barred.[51] Where a demurrer is sustained, because the remedy is in equity,[52] or a suit is dismissed for want of jurisdiction because defendant, an administrator appointed in one state, was sued by plaintiff for the same cause in the federal court of another state,[53] the action is one defeated by defect in form within a statute permitting a new suit within a year thereafter, in case a suit is defeated on this ground. Where a party de-

ministration waiting payment in due course under orders of the court. Fort v. Blagg, 38 Ark. 471.

[c] **What is not a sufficient allowance.**—Under a statute requiring the clerk upon the receipt of the prescribed affidavit and the claim and its approval by him to indorse thereon the words, "Probated, allowed for $—— and registered and to sign his name officially thereto, an indorsement that the claim is 'allowed and registered,'" is insufficient to stop the running of the statute. Cheairs v. Cheairs, 81 Miss. 662, 33 S 414, 60 LRA 549.

[d] **Approval by the probate judge** before expiration of the period of limitations is necessary to prevent the running of limitations against the claim. Mere allowance by the administrator does not have this effect. Danzey v. Swinney, 7 Tex. 617.

39. Horst v. McCormick Harvester Mach. Co., 30 Nebr. 558, 46 NW 717.

40. Lockhart v. Horn, 15 F. Cas. No. 8,446, 3 Woods 542; Knisely v. Leathe, 256 Mo. 341, 166 SW 257; Heller's Est., 5 Pa. Dist. 205, 17 Pa. Co. 603.

[a] **Where suit by legatee inures to benefit of other legatees.**—Where on a bill by legatees against an executor and other legatees for settlement and distribution a decree is made ordering payment to complainants of the amounts due them and allowing legatees who were defendants to propound their claims by petition, which they do, the running of the statute as to them is suspended by the filing of the original bill. Lockhart v. Horn, 15 F. Cas. No. 8,446, 3 Woods 542.

41. Lee v. McKoy, 118 N. C. 518, 24 SE 210; Phillips v. Allegheny Valley R. Co., 107 Pa. 472.

42. Ill.—Reitzell v. Miller, 25 Ill. 67.

Iowa.—Fritz v. Fritz, 93 Iowa 27, 61 NW 169.

Mass.—Robinson v. Robinson, 173 Mass. 233, 53 NE 854.

Pa.—Agnew's Est., 17 Pa. Super. 201 [appr on this point but rev on other grounds 24 Pa. Co. 327, 334, 7 LackLegN 33].

Tenn.—Treece v. Carr, (Ch. A.) 58 SW 1078.

"The demand of one's legal rights in the orphans' court, according to the form of procedure in that court, is the equivalent of the issuing of a summons in the common pleas. It is not essential in either court that the claim be reduced to final judgment within six years." Agnew's Est., supra.

[a] **Filing of a claim with the commissioners of a insolvent estate** is equivalent to the commencement of an action wherein the meaning of the statute limiting actions in certain cases to two years after letters testamentary or of administration are granted. Guild v. Hale, 15 Mass. 455.

[b] **Time of filing and action upon claim.**—"The filing of a claim in the probate court, if it may be regarded as the commencement of a suit, so as to prevent the running of the statute of limitations, must be at the time fixed by the administrators for filing claims for adjustment. And it must also be followed by an adjudication at that term, or be regularly continued from term to term until it is passed upon by the court. If it is not so acted upon or continued, a discontinuance takes place, and the cause is no longer in that court. Propst v. Meadows, 13 Ill. 157. After it is thus discontinued, to again become a pending suit, the administrator must be brought into court by the notice prescribed by the statute." Reitzell v. Miller, 25 Ill. 67.

43. Wyrick v. Wyrick, 106 N. C. 84, 87, 10 SE 916 ("If, then, the claim was not barred when the proceeding was instituted it is not barred at all, as the very purpose of the proceeding is to subject the lands of the testator to the payment of this and all other indebtedness of the estate").

44. Ambrose v. Byrne, 61 Oh. St. 146, 55 NE 408.

45. Bucklin v. Chapin, 1 Lans. (N. Y.) 443; Sipe v. Taylor, 106 Va. 231, 55 SE 542.

46. Hutchinson v. Tucker, 124 Mass. 240; Coles v. Portis, 18 Tex. 155.

[a] **This rule has been applied** where the petition in an action against an administrator on a note of his intestate did not allege that the note was for a valuable consideration nor state the precise date of the transfer to plaintiff. Tolbert v. McBride, 75 Tex. 95, 12 SW 752.

[b] **An amendment of a writ so as to charge defendant as administrator** is not objectionable, although made more than two years after due notice of his appointment and after final accounting. Hutchinson v. Tucker, 123 Mass. 240.

47. Spalding v. Butts, 6 Conn. 28; Carney v. Hawkins, 34 R. I. 297, 83 A 327; Miller v. Taylor, 6 Heisk. (Tenn.) 465.

[a] **Illustration.**—An action of account against the administrator of a guardian to recover a balance found to be due on adjustment of his account, made on application of his administrator, is not a continuation of an action of debt on a record of the county court showing such adjustment and finding such balance to be due, and the second action if brought after the expiration of the statutory period is not saved from the bar of such statute by the fact that the first action was brought within the statutory period. Spalding v. Butts, 6 Conn. 28.

48. Packard v. Swallow, 29 Me. 458.

49. Peyton v. Carr, 1 Rand. (22 Va.) 436.

50. Hopkins v. McPherson, 2 S. C. L. 194. See also Gray v. Trapnall, 23 Ark. 510 (where a suit for land is brought against the administrator only within the period of limitation and dismissed, a new suit for the same land against the administrator and an heir after the period of limitation is barred by the statute. The second suit is not such a continuance as to avoid the bar of the statute).

51. Anderson v. Bedford, 4 Coldw. (Tenn.) 464.

52. Taft v. Stow, 174 Mass. 171, 54 NE 506.

53. Caldwell v. Harding, 4 F. Cas. No. 2,302, 1 Lowell 326.

fendant dies during the pendency of an action, no change in the form of the proceedings will cause plaintiff to lose the benefit of his lis pendens and authorize defendant's representatives to set up the bar of the statute where decedent could not have done so.[54]

[§ 1958] **ee. Statutes Exempting Representatives from Suit.** Where a statute exempts personal representatives from suit for a designated time;[55] such period must be excluded in estimating the time within which an action against the personal representatives must be commenced.[56] Such suspension applies only where the action is against the representative as such,[57] and seeks to fasten or establish a liability on or against property of decedent.[58] But the suspension has been held to apply to claims which had been duly presented and were existing at the time of the adoption of the statutes,[59] and to actions for the recovery of land.[60]

[§ 1959] **ff. Statutes Fixing Time for Presentation of Claims.** A statute fixing the time within which claims against the estate of a decedent must be filed does not suspend the general statute of limitations for the full period allowed for the filing of claims, at least where another statute extends, for a shorter period, the time for bringing actions in case of the death of the party to be charged.[61]

[§ 1960] **gg. Acknowledgment, Promise, or Part Payment.** The acknowledgment by an executor or administrator of a debt or promise to pay the same within the statutory period of limitations is usually held to operate to suspend the running of the statute, which begins to run anew from the date of such acknowledgment or promise,[62] although

54. Glenn v. Smith, 17 Md. 260; Bredin v. Agnew, 8 Pa. 233.

[a] **The substitution of the administrator** of a defendant in an action pending at his decease is a sufficient commencement of an action to continue the lien on the real estate of defendant; and such an action in the county where administration was granted duly prosecuted to judgment more than five years after the death of the intestate continues the lien of the debts on his real estate, throughout the commonwealth. Bredin v. Agnew, 8 Pa. 233.

55. See supra §§ 1907–1913.

56. U. S.—Marsh v. Burroughs, 16 F. Cas. No. 9,111.

Ala.—Hood v. League, 102 Ala. 228, 14 S 572; Allen v. Elliott, 67 Ala. 432; Posey v. Decatur Bank, 12 Ala. 802; Houpt v. Shields, 3 Port. 247; Hutchinson v. Tolls, 2 Port. 44.

Ark.—McGill v. Hughes, 84 Ark. 238, 105 SW 255.

Cal.—Quivey v. Hall, 19 Cal. 97.

Ga.—Coney v. Horne, 93 Ga. 723, 20 SE 213; Pendleton v. Andrews, 70 Ga. 306; Tarver v. Cowart, 5 Ga. 66; Jordan v. Jordan, Dudl. 182.

Ill.—Tilton v. Yount, 28 Ill. A. 580.

Ky.—Caldwell v. Irvine, 4 J. J. Marsh. 107; Field v. Wallace, 6 T. B. Mon. 333.

Mich.—Field v. Loveridge, 114 Mich. 220, 72 NW 160; Sword v. Keith, 31 Mich. 247.

Miss.—Allen v. Hillman, 69 Miss. 225, 13 S 871; Adams v. Williams, 57 Miss. 38; Wilkinson v. Moore, 27 Miss. 365; Jennings v. Love, 24 Miss. 249; West Feliciana R. Co. v. Stockett, 21 Miss. 395; Henderson v. Ilsley, 19 Miss. 9, 49 AmD 41; Abbott v. McElroy, 18 Miss. 100; Dowell v. Webber, 10 Miss. 452.

N. Y.—Klotz v. Angle, 220 N. Y. 347, 116 NE 24; Riley v. Riley, 141 N. Y. 409, 36 NE 398; Hall v. Brennan, 140 N. Y. 409, 35 NE 663 [aff 64 Hun 394, 19 NYS 623]; Sanford v. Sanford, 62 N. Y. 553; Scovil v. Scovil, 45 Barb. 517, 30 HowPr 246; Coddington v. Carnley, 2 Hilt. 528; O'Flyn v. Powers, 21 NYS 905 [aff 136 N. Y. 412, 32 NE 1085]; Wenman v. Mohawk Ins. Co., 13 Wend. 267, 28 AmD 464.

Or.—Blaskower v. Steel, 23 Or. 106, 31 P 253.

S. C.—Gaston v. Gaston, 80 S. C. 157, 61 SE 393; Moore v. Smith, 29 S. C. 254, 7 SE 485; Lawton v. Bowman, 33 S. C. L. 190; Moses v. Jones, 11 S. C. L. 259; Wightman v. Chouler, 4 S. C. L. 251.

Tenn.—Woods v. Woods, 99 Tenn. 50, 41 SW 345; Jones v. Whitworth, 94 Tenn. 602, 30 SW 736; Bright v. Moore, 87 Tenn. 186, 10 SW 356; Todd v. Wright, 12 Heisk. 442; Maynard v. May, 2 Coldw. 44.

Va.—Templeman v. Pugh, 102 Va. 441, 46 SE 474.

Wis.—Boyce v. Foote, 19 Wis. 199; Lightfoot v. Cole, 1 Wis. 26.

Eng.—Douglas v. Forrest, 4 Bing. 686, 13 ECL 693, 130 Reprint 933. But compare Dekay v. Darrah, 14 N. J. L. 288 (which seems to lay down a contrary rule).

57. Alabama State Bank v. Glass, 82 Ala. 278, 6 S 641; McGovney v. Gwillim, 16 Colo. A. 284, 65 P 346; Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Lester v. Stephens, 113 Ga. 495, 39 SE 109; Ayres v. Shepherd, 64 N. J. Eq. 166, 53 A 690.

[a] **Illustrations.**—(1) The time allowed by statute in which executors and administrators are exempt from suit does not apply to suits by legatees and devisees to restrain the executor and others coöperating with him from wasting the estate. Lester v. Stephens, 113 Ga. 495, 39 SE 109. (2) Where an executor is by will vested with a trust entirely disconnected from executorial duties, such for instance as the power to sell and take charge of the real estate until such sale, a suit against the executor to foreclose a mortgage thereon is not within the statutes. Ayres v. Shepherd, 64 N. J. Eq. 166, 53 A 690.

58. Alabama State Bank v. Glass, 82 Ala. 278, 6 S 641; Pickron v. Pickron, 147 Ga. 657, 95 SE 238; Manning v. Drake, 1 Mich. 34.

[a] **There is no suspension as to** a bill by a creditor against the administrator of the deceased debtor and others to set aside a fraudulent conveyance by decedent, the land not being assets in the hands of the administrator. Manning v. Drake, 1 Mich. 34.

59. Rayburn v. Rayburn, 130 Ala. 217, 30 S 365.

60. Wynee v. Parke, (Tex. Civ. A.) 32 SW 726.

61. Malone v. Averill, 166 Iowa 78, 147 NW 135 (where a cause of action against a decedent was not barred by limitations at the time of his death, but the period of limitation had fully passed before the claim was filed against the estate more than six months after the death, it was barred by limitations, the statute not being tolled to the extent of one year in which claims may be filed, in view of Code Suppl. [1907] § 3447a, providing that, where, by the death of the party to be charged, the bringing of an action against his estate shall have been delayed beyond the period provided for by statute, the time within which the action may be brought is extended for six months from the date of the death).

62. U. S.—Thompson v. Peter, 12 Wheat. 565, 6 L. ed. 730.

Ala.—Townes v. Ferguson, 20 Ala. 147.

Cal.—Rodgers v. Byers, 127 Cal. 528, 60 P 42.

Conn.—Peck v. Botsford, 7 Conn. 172, 18 AmD 92.

Fla.—Patterson v. Cobb, 4 Fla. 481.

Ga. — Griffin v. Justices Baker County Infer. Ct., 17 Ga. 96.

Ill.—Holmes v. Bartlett, 160 Ill. A. 443.

Kan. — Cleveland Paper Co. v. Mauk, 8 Kan. A. 562, 54 P 1035.

Ky.—Hamilton v. Wright, 87 SW 1093, 27 KyL 1144; Head v. Manners, 5 J. J. Marsh. 255.

La.—Willis' Succ., 109 La. 281, 33 S 314; Sevier v. Gordon, 21 La. Ann. 373.

Mass.—Chase v. Redding, 13 Gray 418.

Miss.—Waul v. Kirkman, 25 Miss. 606.

N. Y.—Carroll v. Carroll, 11 Barb. 293; Matter of Fingar, 101 Misc. 516, 168 NYS 361; Matter of Prince, 56 Misc. 222, 107 NYS 296, 6 Mills Surr. 255; Elliot v. Cronk, 13 Wend. 35.

Pa.—Jessop's Est., 11 Kulp 39.

S. C.—Divine v. Miller, 70 S. C. 225, 49 SE 479, 106 AmSR 743; Walter v. Radcliffe, 2 S. C. Eq. 577.

Tenn.—McWhirter v. Jackson, 10 Humphr. 209.

Tex.—Daniel v. Harvin, 10 Tex. Civ. A. 439, 31 SW 421; Suhre v. Benton, (Civ. A.) 25 SW 822; Park v. Pendergast, 4 Tex. Civ. A. 566, 23 SW 535.

Va.—Brooke v. Shelly, 4 Hen. & M. (14 Va.) 266.

Eng.—Briggs v. Wilson, 5 De G. M. & G. 12, 54 EngCh 10, 43 Reprint 772; McCulloch v. Dawes, 9 D. & R. 40, 22 ECL 587; Tullock v. Dunn, R. & M. 416, 21 ECL 784.

[a] **Promise must be supported by consideration.**—Forney v. Benedict, 5 Pa. 225.

[b] **Promise to pay when assets realized.**—Under St. (1903) § 2552, providing that the limitation period prescribed with respect to sureties shall not apply to a period during which the surety obstructs or hinders suit, an executor of a surety who induces the creditor to stay suit and not to file a claim against the estate in reliance on the surety's promises that the amount due him will be paid in full on the realization of sufficient assets cannot rely on limitations prescribed for sureties in order to defeat such creditor's claims. Hamilton v. Wright, 87 SW 1093, 27 KyL 1144.

[c] **Right of administrator to sue on acknowledged claims.**—An administrator who has admitted claims made against the estate of his intestate before they were barred by the special statute of limitations and has agreed with such creditors to bring a suit for their benefit to recover back a gift causa mortis of the intestate may bring such suit after the expiration of such period of limitation. Chase v. Redding, 13 Gray (Mass.) 418.

[d] **Right to waive bar of statute and right to acknowledge subsisting debt distinguished.**—There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate, which had been extinguished by law, and his right to acknowledge, and to keep in force, a subsisting obliga-

a contrary rule prevails in a few jurisdictions.[63] A part payment by the representative, before the claim has become barred, fixes a new date from which the entire statutory period must run before the claim will become barred,[64] although no promise to pay the balance is made.[65]

Requisites and sufficiency. In order to be effective, the acknowledgment, promise of payment, or part payment must be made by the personal representative himself,[66] at a time when he was such representative,[67] and to the creditor or someone lawfully acting in his behalf.[68] It is also necessary that the acknowledgment or promise should be clear and unequivocal,[69] although it is not essential that it should be in writing.[70]

By one of several representatives. It has been held that a promise to pay or part payment by one of two or more personal representatives will arrest the running of the statute,[71] but there is also authority for the view that it will not have this effect,[72] except where the one promising afterward becomes sole representative of the estate.[73]

[§ 1961] **hh. Absence of Representative from State.** Where special provision is made for bringing actions against personal representatives absent from the state, their absence does not interrupt the running of the statute of limitations;[74] and, independently of any statutory provision on the subject, it has been held that absence of the executor from the state after rejection of a claim does not excuse the creditor's failure to sue him within the time limited by law.[75] A statute excluding a period of nonresidence and absence of defendant from the state from the time within which actions must be commenced has been held to apply to actions against administrators on rejected claims;[76] and a statute providing that, after any cause of action shall accrue, if the person against whom it has accrued

tion, by making payments from time to time upon the principal of the debt, or by way of keeping down the interest. In one case he in effect creates an indebtedness, while in the other he is performing a moral obligation and is executing a duty recognized by law. Holly v. Gibbons, 176 N. Y. 520, 68 NE 889, 98 AmSR 694, 177 N. Y. 401, 69 NE 731 [rev 67 App. Div. 628, 74 NYS 1132].

[e] **Promise binding only as to personal estate.**—"The fact that the executor made payment on the claim would stop the running of the statute as to him, but a promise by him to pay the debt would only bind the personal estate in his hands. It would not affect the devisees; for the executor was without power to bind them, the title to the land passing under the will directly to the devisees." Withers v. Withers, 100 SW 253, 254, 30 KyL 1099.

[f] **Time running from happening of contingency.**—Where creditors of an estate were told by the executor that their claims would be paid when the real estate was sold, the statute of limitations did not run against such debts until the time of the sale of the real estate. Matter of Prince, 56 Misc. 222, 107 NYS 296, 6 Mills Surr. 255 (where all the real and personal estate was given to the executors in trust for the payment of debts, etc., with a direction to sell at such time as would in their judgment be to the best interest of the estate).

[g] **Where the claim has not been presented,** the promise of the representative will not stop the running of the statute. Butler v. Fechner, (Tex. Civ. A.) 200 SW 1126.

63. Dern v. Olson, 18 Ida. 358, 110 P 164, AnnCas1912A 1, LRA1915B 1016; Whitehurst v. Dey, 90 N. C. 542; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

[a] **Illustration.**—An executor's simple admission of the correctness of a claim against the estate and a verbal promise to pay it from the assets will not arrest the running of the statute of limitations, there being no proof that the creditor refrained from suing at the executor's request, or that there was any agreement for indulgence. Whitehurst v. Dey, 90 N. C. 542.

64. Ill.—Holmes v. Bartlett, 160 Ill. A. 443.

Ky.—Withers v. Withers, 100 SW 253, 30 KyL 1099.

Mass.—Slattery v. Doyle, 180 Mass. 27, 61 NE 264; Foster v. Starkey, 12 Cush. 324.

N. Y.—Denise v. Denise, 110 N. Y. 562, 18 NE 368 [aff 41 Hun 91; McLaren v. McMartin, 36 N. Y. 88, 1 Transcr. A. 226, 3 AbbPrNS 345, 33 HowPr 449; Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Heath v. Grenell, 61 Barb. 190; Matter of Bradley, 25 Misc. 261, 54 NYS 555 [aff 42 App. Div. 301, 59 NYS 105]; Matter of Robbins, 7 Misc. 264, 27 NYS 1009, 1 Gibb. Surr. 32.

Oh.—Niemcewicz v. Bartlett, 13 Oh. 271.

[a] **Presumption as to presentation arising from part payment.**—Part payment on a claim after the period fixed by the statute of nonclaims has elapsed raises the presumption that the claim was presented before the statutory period had elapsed. Pharis v. Leachman, 20 Ala. 662.

65. Foster v. Starkey, 12 Cush. (Mass.) 324.

66. See cases infra this note.

[a] **Illustrations.**—(1) The fact that an assignee for the benefit of creditors of a surviving partner made a payment on a firm note after the death of one partner will not prevent the running of limitations in favor of the estate of decedent. Matter of Neher, 57 Misc. 527, 109 NYS 1090, 6 Mills Surr. 322 [aff 128 App. Div. 882, 112 NYS 1138 (aff 196 N. Y. 565 mem, 90 NE 1162 mem)]. (2) An acknowledgment and part payment by an heir at law will not overthrow presumption of payment in a suit against the executor. Blake v. Quash, 14 S. C. L. 340.

67. Larason v. Lambert, 12 N. J. L. 247; Haselden v. Whitesides, 33 S. C. L. 353.

[a] **The promise of an executor de son tort** to pay decedent's debt will not prevent the bar of the statute of limitations to a suit for the debt, brought against him afterward when he is rightful administrator. Haselden v. Whitesides, 33 S. C. L. 353.

68. Kisler v. Sanders, 40 Ind. 78; Clawson v. McCune, 20 Kan. 337.

69. Ala.—Newhouse v. Redwood, 7 Ala. 598.

Kan.—Hanson v. Towle, 19 Kan. 273.

La.—Sevier v. Gordon, 21 La. Ann. 373.

Me.—Oakes v. Mitchell, 15 Me. 360, 362.

Md.—Goldsmith v. Kilbourn, 46 Md. 289.

N. Y.—Clark v. Van Amburgh, 14 Hun 557.

Tenn.—McWhirter v. Jackson, 10 Humphr. 209.

Va.—Kesterson v. Hill, 101 Va. 539, 45 SE 288.

"In determining what language will be sufficient to raise a new promise, there is a distinction between those who are acting for themselves, and those who are acting in trust for others, which must be regarded. Declarations or acknowledgments from which a new promise might be inferred if made by the debtor himself, when made by an executor or administrator, will not be sufficient to charge the estate. There must be a clear agreement or promise to pay." Oakes v. Mitchell, supra.

[a] **The acknowledgment must be an unqualified admission** of a subsisting debt, which the party is liable for and willing to pay. Kesterson v. Hill, 101 Va. 539, 45 SE 288.

[b] **Sufficient acknowledgments or promises.**—(1) An indorsement on a note that it has been presented and allowed will be paid on settlement of the estate. Sevier v. Gordon, 21 La. Ann. 373. (2) An indorsement of an account: "The within account is accepted and will be paid when means sufficient come to my hands." McWhirter v. Jackson, 10 Humphr. (Tenn.) 209. (3) "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes." Townes v. Ferguson, 20 Ala. 147, 150. (4) Inserting a note in the inventory which is signed and verified by the executor. Clark v. Van Amburgh, 14 Hun (N. Y.) 557; Morrow v. Morrow, 12 Hun (N. Y.) 386.

[c] **Insufficient acknowledgments or promises:** (1) Filing by administrator as exhibit in suit in chancery of account against his intestate. Forbes v. Perrie, 1 Harr. & J. (Md.) 109. (2) A mere general request for delay, or the simple assurance that the debt is good. Langham v. Baker, 5 Baxt. (Tenn.) 701. (3) A statement in the account of an administrator that a certain claim had been presented and that he had disputed it and that it remained unpaid. Matter of Kendrick, 6 NYSt 521. (4) Mere silence. Matter of Fingar, 101 Misc. 516, 168 NYS 361.

70. Matter of Fingar, 101 Misc. 516, 168 NYS 361.

71. Hamlin v. Smith, 72 App. Div. 601, 76 NYS 258; Heath v. Grenell, 61 Barb. (N. Y.) 190.

72. Caruthers v. Mardis, 3 Ala. 599 (one administrator has no power to bind those connected in the administration so as to make them responsible for a devastavit).

73. Hall v. Darrington, 9 Ala. 502.

74. French v. Davis, 38 Miss. 218.

75. Wilkinson v. Winne, 15 Minn. 159; McFarland v. Bowling, 139 Tenn. 691, 203 SW 254; Cotten v. Jones, 37 Tex. 34. Contra Jennings v. Browder, 24 Tex. 192.

[a] **If the claim had not been presented** to the administrator the rule would be otherwise. Cotten v. Jones, 37 Tex. 34.

76. Schwartz v. Loftus, 216 Fed. 320, 324, 132 CCA 464 [cit Cyc]; Hayden v. Pierce, 144 N. Y. 512, 39 NE 638 [aff 71 Hun 593, 25 NYS 55].

shall be absent from and reside out of the state, the period of his absence or residence out of the state shall be excluded in computing the statutory period of limitations has been held to apply to an action against an administrator who removes from the state before expiration of the limited time, although the action accrued against decedent in his lifetime.[77] But it has been held that absence of the representative from the state will not affect the running of the statute if the suit could be prosecuted against the heirs within the state and the representative made a party by publication.[78]

[§ 1962] **ii. Absence of Decedent from State at Time of Death.** Although at the time of a decedent's death limitation was not running in his favor, because of his absence from the state,[79] his decease sets the statute in motion,[80] unless he was absent when the cause of action accrued, so that limitations never began to run, in which case the period commences when administration is granted.[81]

[§ 1963] **jj. Absence of Claimant from State.** If a statute contains a saving clause in favor of persons living out of the state, the disability is removed by coming into the state even for temporary purposes, provided the debtor at that time is within the state.[82] Failure of a nonresident of the state to sue on a claim within the statutory period cannot operate as a bar, where he received no notice of intestate's death or appointment of an administrator until immediately before bringing suit, and it appears that the administrator had not settled the estate and had assets to pay all claims against it;[83] these facts constitute "peculiar circumstances entitling the claimant to equitable relief" within a statutory exception.[84]

[§ 1964] **kk. Disability of Claimant.** If the statutes of limitations for bringing actions against personal representatives contain no exception in favor of persons under disability, a claim of a person under disability not sued on within the statutory period will be barred.[85]

[§ 1965] **ll. Vacancy in Office of Representative.** The general rule is that, where administration has once been granted, a subsequent vacancy in the office of the executor or administrator does not affect the running of limitations,[86] unless the first grant of letters was void.[87] But provision is sometimes made by statute for an extension of time for bringing suit, where a vacancy in the administration occurs,[88] and it has been held that, where the appointment of an administrator is revoked by the probate court, but on appeal the administrator is restored to his office and duties, the period during which he was suspended from his office is to be deducted in computing the time allowed for the bringing of an action against him as such administrator.[89]

[§ 1966] **mm. Miscellaneous.** The running of the statutes has been held to be suspended by an appeal from the decree appointing the personal representative,[90] by an order of injunction issued in a suit by the administrator for a settlement of the estate preventing creditors from suing,[91] or where plaintiff puts in his claim immediately and keeps it up by a regular correspondence and demand of payment, although the statutory period elapses before suit is brought.[92] But it has been held that no suspension of the running of the statute results from the institution of insolvency proceedings,[93] the pendency of an action to settle the estate if creditors are not restrained from suit by injunction,[94] an unreasonable delay on the part of the personal representative to make objection to the claim presented to him,[95] the fact that the administrator made dis-

77. Smith v. Arnold, 1 Lea (Tenn.) 378.

78. Taylor v. McGill, 6 Lea. (Tenn.) 294 (party by publication).

79. See Limitations of Actions [25 Cyc 1232–1253].

80. U. S.—Grubb v. Clayton, 11 F. Cas. No. 5,849a, Brunn. Coll. Cas. 30, 3 N. C. 378.

Ill.—Hibernian Banking Assoc. v. Commercial Nat. Bank, 157 Ill. 524, 31 NE 919.

Iowa.—Savage v. Scott, 45 Iowa 130.

N. Y.—Christophers v. Garr, 6 N. Y. 61.

Oh.—Whitney v. Webb, 10 Oh. 513.

Or.—In re Webster, 74 Or. 489, 145 P 1063.

Tex.—Teal v. Ayres, 9 Tex. 588.

[a] **The decedent's estate stands precisely on the same footing as it would have stood had he died within the limits of the state,** and the fact of his dying abroad does not impede the grant of administration or the facility of subjecting the property to the payment of claims. Whether the debtor is a resident or nonresident, the vigilant creditor can with like facility force administration, and if he does not and his claim as against one is barred, there is no sound reason why it should not be precluded as against the other. Teal v. Ayres, 9 Tex. 588.

81. Davis v. Garr, 6 N. Y. 124, 55 AmD 387; Benjamin v. De Groot, 1 Den. (N. Y.) 151. See generally supra § 1954.

82. Faw v. Roberdeau, 3 Cranch (U. S.) 174, 2 L. ed. 402.

83. McCormack v. Cook, 11 Iowa 267.

84. McCormack v. Cook, 11 Iowa 267.

85. In re Ward, 21 Oh. Cir. Ct. 753, 12 Oh. Cir. Dec. 44; Williams v. Conrad, 11 Humphr. (Tenn.) 412.

86. Ala.—Reed v. Minell, 30 Ala. 61; Pipkin v. Hewlett, 17 Ala. 291; Lowe v. Jones, 15 Ala. 545; Richardson v. Williams, 5 Port. 515.

Cal.—McMillan v. Hayward, 94 Cal. 357, 29 P 774.

Ga.—Pendleton v. Andrews, 70 Ga. 306.

Me.—Heard v. Meader, 1 Me. 156.

Miss.—Boyd v. Lowry, 53 Miss. 352.

N. Y.—Conway v. New York, 139 App. Div. 446, 124 NYS 660 [aff 208 N. Y. 567 mem, 101 NE 1099 mem].

R. I.—Thompson v. Hoxsie, 24 R. I. 493, 53 A 873; Mowry v. Harris, 18 R. I. 519, 28 A 657.

[a] **The rule applies** to vacancies caused by: (1) Death. Lowe v. Jones, 15 Ala. 545; Thompson v. Hoxsie, 24 R. I. 493, 53 A 873. (2) Removal. Mowry v. Harris, 18 R. I. 519, 28 A 657.

[b] **Appointment of an administrator de bonis non** is not a grant of letters de novo. Thompson v. Hoxsie, 24 R. I. 493, 53 A 673.

[c] **The marriage of an executrix** does not ipso facto terminate her authority or interrupt the running of the statute of limitations, and an action brought against an administrator subsequently appointed after the statutory bar had attached cannot be sustained. McMillan v. Hayward, 94 Cal. 357, 29 P 774.

87. Brown v. Hill, 27 Miss. 44.

88. U. S.—Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95.

Mass.—Eddy v. Adams, 145 Mass. 489, 14 NE 509; Fisher v. Metcalf, 7 Allen 209; Hemenway v. Gates, 5 Pick. 321.

N. H.—Cummings v. Farnham, 75 N. H. 135, 71 A 632.

N. C.—Brittain v. Dickson, 104 N. C. 547, 10 SE 701; Smith v. Brown, 101 N. C. 347, 7 SE 890.

Tenn.—Atkinson v. Brooks, 10 Yerg. 484.

[a] **Illustration.**—A statute providing that if a person against whom an action may be brought dies before the expiration of the limitation, if the action survives it may be commenced in one year after the qualification of the personal representative extends to a case where an executor is removed and an administrator de bonis non appointed. Smith v. Brown, 99 N. C. 377, 6 SE 667.

[b] **Where an administrator dies after judgment quando acciderint** recovered against him, the time between his death and the appointment of an administrator de bonis non must be excluded in determining whether action on the judgment is barred. Dickson v. Crowley, 112 N. C. 629, 17 SE 158.

89. Badger v. Orr, 34 Oh. Cir. Ct. 328, 1 Oh. A. 293.

90. McPhetres v. Halley, 32 Me. 72.

91. Smith v. Morgan, 4 KyL 829. But compare Barnes v. Green, 3 KyL 253 (an order of court enjoining creditors from proceeding at law to compel the payment of their claims, made in a proceeding by an administrator for the settlement of an estate as an insolvent estate, does not prevent limitations from running against claims filed in the action and not properly verified).

92. Littlejohn v. Gilchrist, 3 N. C. 393 (this decision does not seem to be based on any valid reason).

93. Reed v. Minell, 30 Ala. 61; Aiken v. Morse, 104 Mass. 277.

94. Dugan v. Mitchell, 5 KyL 150.

95. Bucklin v. Chapin, 1 Lans. (N. Y.) 443; Matter of Van Voorhees, 55 Misc. 185, 106 NYS 354, 6 Mills Surr. 193.

tribution after he had notice of plaintiff's claim,[96] or failure of the creditors to institute proceedings to compel sale of real estate until after the administrator had rendered an account.[97] A clause in a will directing all of testator's debts to be paid and appropriating therefor the rents of his real estate does not take the case at law out of the statutes of limitations where plaintiff does not seek his remedy under the will.[98] Ignorance of the fact that a conveyance made by decedent was in fraud of creditors does not avoid the bar of the statute.[99] The fact that a creditor lives outside of the county in which the will is proved and notice of appointment of executors published does not excuse failure to sue the executors within the statutory period.[1] Where a member of a firm dies, and the surviving partner becomes insolvent and makes an assignment for the benefit of creditors, the holder of a firm note may proceed against the estate of decedent without first bringing an action against the survivor; and so in such case the running of limitations in favor of decedent's estate is not stayed.[2]

[§ 1967] **(d) Waiver of Bar of Limitations—aa. General Statutes.** The question whether an executor or administrator has power to waive the general statute of limitations has already been discussed in this treatise.[3]

[§ 1968] **bb. Special Statutes—(aa) General Rule.** As the usual effect of a failure to observe the requirements of statutes limiting the time for presenting claims against the estate of a decedent,[4] or for bringing action against executors or administrators,[5] is to bar the right as well as the remedy, the bar created by these statutes cannot be waived by the personal representatives.[6] The creditor is bound to obey the plain requirements of the statutes,[7] and the fact that he fails to present a claim in reliance on an agreement which the administrator had not the power to make is a mistake of law on his part for which the courts furnish no relief.[8] If the executor or administrator neglects to plead the statute and thereby judgment is recovered in an action brought after the debt is legally barred, or if he voluntarily pays the debt, it is held to be in his own wrong and he cannot claim to be reimbursed from the estate.[9]

[§ 1969] **(bb) Statutory Exceptions to Rule.** In some jurisdictions the statutes fixing the period within which suit must be brought on claims against the estate contain provisos excepting the claimant from the operation of the statute where he delays commencement of his action at the special request of the personal representative.[10] In order that the claimant may have the benefit of this exception the request must be made by the personal representative himself,[11] within the statutory period,[12] and it must stipulate for a definite time of indulgence, or until the happening of a designated event which may occur and thereby render the period certain.[13] If on request suit is delayed for a speci-

96. Woodward v. Perry, 85 Me. 440, 27 A 345.

97. Butler v. Johnson, 111 N. Y. 204, 18 NE 643 [aff 41 Hun 206].

98. Wilson v. Turberville, 30 F. Cas. No. 17,843, 1 Cranch C. C. 512.

99. Reed v. Minell, 30 Ala. 61.

1. Richards v. Child, 98 Mass. 284.

2. Matter of Neher, 57 Misc. 527, 109 NYS 1090, 6 Mills Surr. 322 [aff 128 App. Div. 882, 112 NYS 1138 (aff 196 N. Y. 565, 90 NE 1162 mem)].

3. See supra §§ 907–911.

4. See supra § 1020.

5. See supra § 1925.

6. U. S.—Miner v. Aylesworth, 18 Fed. 199.

Ark.—Rhodes v. Cannon, 112 Ark. 6, 164 SW 752; Hill v. State, 23 Ark. 604.

Cal.—Barclay v. Blackinton, 127 Cal. 189, 59 P 834.

Conn.—Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 A 1019; Winchell v. Sanger, 73 Conn. 399, 47 A 706, 66 LRA 935.

Ill.—Stillman v. Young, 16 Ill. 318.

Kan.—McDaniel v. Putnam, 100 Kan. 550, 164 P 1167, LRA1917E 1100; Collamore v. Wilder, 19 Kan. 67.

Me.—Littlefield v. Eaton, 74 Me. 516.

Mass.—In re Hubbard, 185 Mass. 22, 69 NE 349; Stebbins v. Scott, 172 Mass. 356, 52 NE 535; Ames v. Jackson, 115 Mass. 508; Waltham Bank v. Wright, 8 Allen 121; Heath v. Wells, 5 Pick. 140, 16 AmD 383; Emerson v. Thompson, 16 Mass. 429; Thompson v. Brown, 16 Mass. 172; In re Allen, 15 Mass. 58; Dawes v. Sheadd, 15 Mass. 6, 8 AmD 80; Brown v. Anderson, 13 Mass. 201; Scott v. Hancock, 13 Mass. 162.

Mich.—Draper v. Brown, 153 Mich. 120, 117 NW 213.

Minn.—Gilman v. Maxwell, 79 Minn. 377, 82 NW 669.

Miss.—Cockrell v. Seasongood, 33 S 77; Nagle v. Ball, 71 Miss. 330, 13 S 929; Woods v. Elliott, 49 Miss. 168.

Mo.—Stiles v. Smith, 55 Mo. 363; Wiggins v. Lovering, 9 Mo. 262.

Nebr.—Fitzgerald v. Chariton First Nat. Bank, 64 Nebr. 260, 89 NW 813.

N. H.—Preston v. Cutter, 64 N. H. 461, 13 A 874; Probate Judge v. Ellis, 63 N. H. 366; Hall v. Woodman, 49 N. H. 295; Sugar River Bank v. Fairbank, 49 N. H. 131; Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25; Hodgdon v. White, 11 N. H. 208.

N. Y.—Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041; In re Mudge, 118 NYS 568.

N. D.—Mann v. Redmon, 23 N. D. 508, 137 NW 478; Farwell v. Richardson, 10 N. D. 34, 84 NW 558.

Oh.—Miller v. Ewing, 68 Oh. St. 176, 67 NE 292; Crouse v. Frybarger, 22 Oh. Cir. Ct. 315, 12 Oh. Cir. Dec. 254; Pollock v. Pollock, 2 Oh. Cir. Ct. 140, 1 Oh. Cir. Dec. 408. Contra Joyce v. Hart, 11 Oh. Dec. (Reprint) 487, 27 CincLBul 144.

R. I.—Carney v. Hawkins, 34 R. I. 297, 83 A 327; Kenyon v. East Greenwich Prob. Ct., 27 R. I. 566, 65 A 267; Thompson v. Hoxsie, 25 R. I. 377, 55 A 930; Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Alvis v. Oglesby, 87 Tenn. 172, 10 SW 313; Langham v. Baker, 5 Baxt. 701; Brown v. Porter, 7 Humphr. 373; Puckett v. James, 2 Humphr. 565.

Tex.—Whitmire v. Powell, (Civ. A.) 117 SW 433, 439 [rev on other grounds 103 Tex. 232, 125 SW 889, and cit Cyc].

Utah.—Fullerton v. Bailey, 17 Utah 85, 53 P 1020.

Wis.—Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

Wyo.—O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

"The general statute of limitations applies to the remedy only, and the debt, after it is barred, may be revived by a new promise, part payment, etc., but the statute of nonclaim applies to the right, and, when the claim is barred by it, it is forever barred. No promise of the executor or administrator, made in any form, can revive the claim. It is not within their power to allow a demand after the expiration of the two years. The policy of the statute forbids it. The statute need not be pleaded, but the executor or administrator may insist on the bar, at any time before final judgment." Hill v. State, 23 Ark. 604, 612 [quot Rhodes v. Cannon, 112 Ark. 6, 15, 164 SW 752, 754–755].

[a] **An agreement between the creditor and executrix to refer** the claim does not waive the bar of the statute. Flynn v. Diefendorf, 51 Hun 194, 4 NYS 934.

[b] **It is the duty of the representative to interpose** the statute as a defense. Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041; Mann v. Redmon, 23 N. D. 508, 137 NW 478.

7. Nagle v. Ball, 71 Miss. 330, 13 S 929.

8. Collamore v. Wilder, 19 Kan. 67.

9. Stillman v. Young, 16 Ill. 318; Nowell v. Nowell, 8 Me. 220; Ames v. Jackson, 115 Mass. 508.

[a] **Rights of heirs.**—The failure of an executor or administrator to plead the special statute will not bar or preclude the heirs from pleading it on the settlement with the executor or administrator. Stillman v. Young, 16 Ill. 318; Nowell v. Nowell, 8 Me. 220.

10. See statutory provisions.

11. Hubbard v. Marsh, 29 N. C. 204 (a request by a coöbligor of decedent is insufficient).

[a] **Forbearance to file lien.**—Where creditors were persuaded to postpone selling real estate for more than five years after decedent's death but nothing was said to them to induce them to forbear filing a lien, or any promise made that the lien of debts should remain, it was held that the lien should not be extended beyond the statutory period. Welsh's App., 5 Pa. Cas. 494, 10 A 34.

12. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

13. Prewett v. Goodlett, 98 Tenn. 82, 88 SW 434; State v. Murray, 9 Baxt. (Tenn.) 209; Langham v. Baker, 5 Baxt. (Tenn.) 701; Cook v. Cook, 10 Heisk. (Tenn.) 464; Birdsong v. Birdsong, 2 Head (Tenn.) 289; Farmers, etc., Bank v. Leach, 11 Humphr. (Tenn.) 515; Puckett v. James, 2 Humphr. (Tenn.) 565; Trott v. West, 9 Yerg. (Tenn.) 433.

[a] **Delay until certain event.**—The definite time may as well be the time which might elapse until the

fied time the creditor must sue within the statutory period after the expiration of that time.[14] So the request only stops the running of the special statute of limitations and has no effect on the general statute.[15] An offer by the personal representative to refer a disputed claim to arbitration which is accepted within the period limited for bringing suit thereon and followed by a submission may operate as a waiver of the statute,[16] but it is otherwise as to a mere offer by an executor to refer a claim after an unqualified refusal to pay it.[17] Where the parties agree that the claim shall be submitted to the surrogate for hearing and determination upon the judicial settlement of the accounts of the representative, the short statute of limitations becomes inapplicable to a determination in this particular manner.[18]

[§ 1970] **(e) Statutes Saving Claims Barred by Limitations—aa. In General.** The statutes of some states provide in effect that judgment may be rendered against a personal representative notwithstanding the statutory limitation, if the court thinks justice and equity require it and that the creditor is not chargeable with culpable neglect in not prosecuting his claim within the time limited therefor.[19] The operation of these statutes is not limited to cases where the failure to sue seasonably was due to such fraud, accident, or mistake as would be ground for equitable relief if there was no such statute,[20] and a creditor whose delay is caused by his ignorance of a fact which he did not know existed and which he had reasonable ground to believe did not exist is not chargeable with culpable neglect within the meaning of the statute.[21] Such also is the rule with respect to delay agreed to by all parties interested in the estate, including heirs and creditors.[22] But a creditor is not entitled to relief where he has refrained from bringing suit within the time limited at the suggestion of the administrator and in reliance on statements made in good faith by him,[23] or where his delay in bringing suit is merely the result of his ignorance of the limitation of actions against personal representatives,[24] or is not caused by accident or mistake or by the practice of fraud or imposition.[25] These statutes have been held to apply not only to claims which might have been sued on within the time limited by statute, but also to contingent claims which could not have been sued on but which might have been presented and to claims which come into existence after the expiration of the statutory period,[26] but they do not apply to claims barred by the statute of limitations at the time of their passage,[27] or which would not have been enforceable against the representative if action had been brought thereon within the statutory period.[28] The question of culpable neglect is one of fact to be determined by the trial court[29] whose decision thereon is not subject to review.[30]

[§ 1971] **bb. Receipt of New Assets by Personal Representative.** In some jurisdictions statutes which provide the period of limitations for suit against personal representatives make an exception in the case of discovery and receipt of new assets by the representative after the expiration of the statutory period.[31] In such event the bar of the statute is removed and the estate reopened so that any creditor,[32] even though he has not proved his claim within the statutory period,[33] may come in and assert his claim as against such new assets.[34] The limitation commences to run from the time of the receipt of the new assets,[35] and if the suit is not brought within the time limited thereafter the claim is conclusively barred.[36] Property recovered by an administrator after the expiration of the statutory period by setting aside a fraudulent conveyance of

personal representative could accomplish a certain event as for a particular length of time named. Puckett v. James, 2 Humphr. (Tenn.) 565.

[b] **There is a sufficient request** where representative asks for delay until: (1) The representative collects the debts of the estate. McKizzack v. Smith, 1 Sneed (Tenn.) 470. (2) The representative has settled with another creditor. State v. Murray, 9 Baxt. (Tenn.) 209. (3) Land bought by decedent has been paid for. Puckett v. James, 2 Humphr. (Tenn.) 565.

[c] **Insufficient requests.**—(1) A general request to creditors of the estate for delay from time to time. Langham v. Baker, 5 Baxt. (Tenn.) 701. (2) A statement on presentation of the claim "hold on, your claim is good." Chestnutt v. McBride, 1 Heisk. (Tenn.) 389. (3) A payment of part of the debt and a promise "to pay the balance soon." Trott v. West, Meigs (Tenn.) 163, 9 Yerg. (Tenn.) 433. (4) Where a claimant against an estate had a settlement with the administrator who agreed on the correctness of the claim and he subsequently moved out of the county and was notified by the administrator that he had lost the claim and that it would have to be proved and filed with the clerk and the claimant then wrote the administrator to send him a memorandum, these circumstances were not sufficient to excuse the failure to file the claim within two years and six months after the appointment of the administrator as required by statute. Smith v. Sprout, (Tenn. Ch. A.) 58 SW 376.

14. Cook v. Cook, 10 Heisk. (Tenn.) 464.

[a] **Illustration.**—Where an executor's request for an extension of time in which to pay a debt due the estate was for indulgence until certain land should be paid for, the statute of limitations will commence running from the time the land is paid for. Puckett v. James, 2 Humphr. (Tenn.) 565.

15. Bates v. Elrod, 13 Lea (Tenn.) 156; Loyd v. Loyd, 9 Baxt. (Tenn.) 406.

16. Cornes v. Wilkin, 79 N. Y. 129; Fishkill Nat. Bank v. Speight, 47 N. Y. 668.

17. Cornes v. Wilkins, 79 N. Y. 129; Fishkill Nat. Bank v. Speight 47 N. Y. 668; Snell v. Dale, 17 NYS 575.

18. See supra § 1949.

19. Brackett v. Chamberlain, 115 Me. 335, 98 A 933; Farrington v. Miller, 225 Mass. 535, 114 NE 737; Ryan v. Lyon, 212 Mass. 416, 99 NE 169.

20. Holway v. Ames, 100 Me. 208, 60 A 897; Farrington v. Miller, 225 Mass. 535, 114 NE 737; Ewing v. King, 169 Mass. 97, 47 NE 597.

[a] **Case proper for relief.**—Where complainant who had been compelled to take up notes indorsed by him for the decedent was informed by the executors that the personal property was insufficient to pay the debts, and was requested by them not to bring suit in order that the real estate might be sold at private sale to increase the assets, from which the executors promised to pay complainant's claim, and thereafter, and before the expiration of the two year limit for actions against personal representatives, the executors sold the real estate under a license from the probate court, of which complainant was not informed until after the two years had expired, and on a bill subsequently filed the court found that the complainant had not been guilty of culpable negligence in not previously instituting suit, complainant was entitled to relief. McMahon v. Miller, 192 Mass. 241, 78 NE 457.

21. Ewing v. King, 169 Mass. 97, 47 NE 597.

22. Knight v. Cunningham, 160 Mass. 580, 36 NE 466.

23. Powow River Nat. Bank v. Abbott, 179 Mass. 336, 60 NE 973; Wells v. Child, 12 Allen (Mass.) 333.

24. Jenney v. Wilcox, 9 Allen (Mass.) 245.

25. Beale v. Swasey, 106 Me. 35, 75 A 134, 20 AnnCas 396; Waltham Bank v. Wright, 8 Allen (Mass.) 121.

[a] **Negligence of an attorney** is not an excuse within the statute. Beale v. Swasey, 106 Me. 35, 75 A 134, 20 AnnCas 396.

26. Libby v. Hutchinson, 72 N. H. 190, 55 A 547.

27. Garfield v. Bemis, 2 Allen (Mass.) 445.

28. Ryan v. Lyon, 212 Mass. 416, 99 NE 169.

29. Powers v. Holt, 62 N. H. 625.

[a] **Facts showing culpable neglect.**—Farrington v. Miller, 225 Mass. 535, 114 NE 737.

30. Libby v. Hutchinson, 72 N. H. 190, 55 A 547.

31. See statutory provisions.

32. Thurston v. Lowder, 47 Me. 72.

33. Holland v. Cruft, 20 Pick. (Mass.) 321.

[a] **In Manitoba** claims barred by limitations have been held unenforceable even against newly discovered assets. In re Bedson, 19 Man. 664.

34. Morse v. Pacific R. Co., 93 Ill. A. 31 [aff 191 Ill. 356, 61 NE 104] (such claim can be enforced only against newly inventoried assets).

35. Thurston v. Lowder, 47 Me. 72.

36. Thurston v. Lowder, 47 Me. 72.

decedent is new assets within the rule,[37] as is also land redeemed by an executrix from a deed absolute in form but held by the court to be a mortgage.[38] On the other hand the following have been held not new assets: Property received by an administrator de bonis non in settlement of a suit against the surety on the bond of his predecessor for failure to account for inventoried property;[39] money arising from the sale of land possessed by the decedent at the time of his death and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the intestate under an arrangement made to save their lands from sale;[40] proceeds of a mortgage given by the heirs at law without leave of court on lands of which their intestate ancestor died seized;[41] and money accruing from inventoried patent rights, either as royalties or as proceeds of sales of such rights.[42] The fact that a note fraudulently given in settlement of certain other notes is set out in the inventory while the other notes are omitted does not make the proceeds of such notes afterward coming into the executor's hands new assets.[43] The collection, by an administrator de bonis non with the will annexed, of a fund over which a general power of appointment was given testator by his mother, and conversion of such fund into cash, was not collection of "new assets" within such a statute.[44]

[§ 1972] **(2) Actions for Legacies or Distributive Shares.**[45] While it is held in some jurisdictions that the statute of limitations may avail to bar an action or suit by a legatee or distributee, against the personal representative for his share of the estate,[46] the preponderance of authority supports the view that a statute of limitations, whether general or special, does not run in favor of an executor or administrator with respect to claims for legacies or distributive shares,[47] for the reason that the relation of the personal representative and the legatee or distributee is that of trustee and cestui que trust, in a direct and continuing trust and therefore the personal representative's possession cannot be adverse so long as this relation exists;[48] but the rule ceases when the reason therefor ceases to exist, and consequently the statute is available to an executor or administrator against the claim of a legatee or distributee, when he does some act purporting to be an execution of the trust, for he thereby divests himself of his character as trustee and thenceforth stands in an adverse relation to the cestui que trust.[49] To put the statute in operation, there must be a final settlement or at least a disavowal of the

37. Holland v. Cruft, 20 Pick. (Mass.) 321.

38. Horton v. Robinson, 212 Mass. 248, 98 NE 681.

39. Veazie v. Marrett, 6 Allen (Mass.) 372.

40. Favorite v. Booher, 17 Oh. St. 548.

41. Shute v. Wilkins, 163 Mass. 491, 40 NE 848.

42. Robinson v. Hodge, 117 Mass. 222.

43. Gould v. Camp, 157 Mass. 358, 32 NE 225.

44. Shattuck v. Burrage, 229 Mass. 448, 118 NE 889.

45. **Presumption of payment arising from lapse of time** see infra § 1978.

46. U. S.—Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95.

Ga.—Thornton v. Jackson, 129 Ga. 700, 59 SE 905.

La.—Nolasco v. Lurty, 13 La. Ann. 100.

N. Y.—Roup v. Bradner, 19 Hun 513; American Bible Soc. v. Hebard, 51 Barb. 552 [aff 41 N. Y. 619 mem]; Smith v. Remington, 42 Barb. 75; Souzer v. De Meyer, 2 Paige 574; Kane v. Bloodgood, 7 Johns. Ch. 90, 11 AmD 417 [overr Decouche v. Savetier, 3 Johns. Ch. 190, 8 AmD 478]; House v. Agate, 3 Redf. Surr. 307. Contra Arden v. Arden, 1 Johns. Ch. 313.

Oh.—Webster v. Bible Soc., 50 Oh. St. 1, 33 NE 297.

N. S.—In re Runciman, 38 N. S. 89.

Ont.—Stewart v. Snyder, 30 Ont. 110 [app dism 27 Ont. A. 423]; Clark v. Bellamy, 27 Ont. A. 435 [rev. 30 Ont. 532].

[a] **Present English rule.**—(1) By 3 & 4 Wm. IV c 27 § 40 legacies are barred after twenty years (Piggott v. Jeffreson, 12 Sim. 26, 35 EngCh 26, 59 Reprint 1040), (2) unless there has been some payment or signed acknowledgment (Proud v. Proud, 32 Beav. 234, 55 Reprint 92). (3) Formerly it was held that the statute did not run against claims for legacies. Parker v. Ash, 1 Vern. Ch. 256, 23 Reprint 452; Higgins v. Crawfurd, 2 Ves. Jr. 571, 30 Reprint 781.

[b] **Coverture.**—Where a legacy to a daughter was payable on her marriage or when she became of age, and she married before becoming of age, the disability of coverture prevented the bar of the statute against an action by her and her husband for the legacy. Wood v. Riker, 1 Paige Ch. (N. Y.) 616.

47. Ala.—Bonner v. Young, 68 Ala. 35; Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; High v. Worley, 32 Ala. 709; Colbert v. Daniel, 32 Ala. 314.

Ark.—Harriet v. Swan, 18 Ark. 495.

Conn.—Wilmerding v. Russ, 33 Conn. 67.

Fla.—Amos v. Campbell, 9 Fla. 187.

Ill.—Randolph v. Peo., 40 Ill. A. 174 [rev on other grounds 130 Ill. 533, 22 NE 615].

Ind.—Smith v. Calloway, 7 Blackf. 86.

Ky.—Mason v. Mason, 3 KyL 397, 11 Ky. Op. 345.

Md.—Ogle v. Tayloe, 49 Md. 158; Smith v. Smith, 7 Md. 55; Ward v. Reeder, 2 Harr. & M. 145.

Mass.—Kent v. Dunham, 106 Mass. 586.

Mich.—Moores' App., 84 Mich. 474, 48 NW 39.

Miss.—Peebles v. Acker, 70 Miss. 356, 12 S 248; Cooper v. Cooper, 61 Miss. 676; Roberts v. Roberts, 34 Miss. 322; Wren v. Gayden, 1 How. 365.

Mo.—Picot v. Bates, 39 Mo. 292.

N. J.—Hedges v. Norris, 32 N. J. Eq. 192; King v. Berry, 3 N. J. Eq. 44.

N. C.—Bushee v. Surles, 77 N. C. 62; Davis v. Cotten, 55 N. C. 430; McCraw v. Fleming, 40 N. C. 348; Salter v. Blount, 22 N. C. 218; Bailey v. Shannonhouse, 16 N. C. 416.

Pa.—Logan v. Richardson, 1 Pa. 372; Thompson v. McGaw, 2 Watts 161; Durdon v. Gaskill, 2 Yeates 268; Pennepacker v. Pennepacker, 2 Pa LJR 114, 3 PaLJ 357; Pierce's Est., 11 Montg. Co. 110; Brown's Est., 8 Phila. 197.

S. C.—Jones v. Swearingen, 42 S. C. 58, 19 SE 947; Edwards v. Williams, 39 S. C. 86, 17 SE 457; Montgomery v. McCloud, 27 S. C. 188, 3 SE 196; Beard v. Stanton, 15 S. C. 164; Presley v. Davis, 28 S. C. Eq. 105, 62 AmD 396; Sims v. Sims, 11 S. C. Eq. 61.

Tenn.—Carr v. Lowe, 7 Heisk. 84; Lafferty v. Turley, 3 Sneed 157; Haynie v. Hall, 5 Humphr. 290, 42 AmD 427; Guthrie v. Owen, 10 Yerg. 339; Smart v. Waterhouse, 10 Yerg. 94; McDonald v. McDonald, 8 Yerg. 145; Pinkerton v. Walker, 3 Hayw. 221.

Vt.—Davis v. Eastman, 68 Vt. 225, 35 A 73; Sparhawk v. Buell, 9 Vt. 41.

Va.—Jones v. Jones, 92 Va. 590, 24 SE 255; Leake v. Leake, 75 Va. 792; Nelson v. Cornwell, 11 Gratt. (52 Va.) 724.

[a] **Where the characters of administrator and distributee unite in the same person,** who holds possession of personal property in the former character for more than five years, his rights as distributee will not be barred by the statute of limitations. Vaiden v. Bell, 3 Rand. (24 Va.) 448.

[b] **Taking possession of estate without qualifying.**—Where a devisee, who was appointed executor, has refused to qualify and has taken the estate into his own hands without administration, he cannot set up the statute of limitations to defeat the claim of a legatee. Mason v. Mason, 3 KyL 397, 11 Ky. Op. 345.

48. Ark.—Harriet v. Swan, 18 Ark. 495.

Cal.—Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474.

Mass.—Kent v. Dunham, 106 Mass. 586.

Miss.—Cooper v. Cooper, 61 Miss. 676; Jordan v. McKenzie, 30 Miss. 32.

Mo.—Picot v. Bates, 39 Mo. 292.

S. C.—Montgomery v. Cloud, 27 S. C. 188, 3 SE 196; Beard v. Stanton, 15 S. C. 164.

Tenn.—Carr v. Lowe, 7 Heisk. 84.

Va.—Jones v. Jones, 92 Va. 590, 24 SE 255; Leake v. Leake, 75 Va. 792.

"Until the trust is ended and the executor discharged from any further accounting, the beneficiaries have the right to consider the trust an active one, and mere delay on the part of the trustee in settling with the court, and through it with the beneficiaries, and obtaining his discharge, cannot be considered such a breach of the trust as to set the statute in motion in his favor. To so hold would be to offer a reward to executors and administrators to be dilatory instead of diligent in the performance of their duties. Nevertheless, we are not to be understood as saying that there may not be cases in which, after an actual suspension of the trust, there has been such long acquiescence or delay on the part of the cestui que trust as to require the court to deny him relief upon the ground of laches." Cooper v. Cooper, 61 Miss. 676, 694.

49. McChord v. Caldwell, 96 Ky. 617, 29 SW 440, 16 KyL 733; Cooper-

trust.[50] It is usually held that, on final settlement by an executor or administrator, the statute of limitations commences to run in his favor against claims of legatees and distributees,[51] although this has been denied;[52] and it has been held that the statute does not begin to run in favor of a personal representative against the distributees until an order of a court having jurisdiction directing a delivery of the estate to the distributees.[53] It may also happen that, without any final settlement or any act purporting to be in execution of the trust, the representative may set up a claim adverse to that of the legatee or distributee, in which case the statute is operative from the time the adverse claim is made known to the latter,[54] but notice to him is necessary;[55] and this notice must be actual or the acts or declarations of the personal representative must be so notorious and unequivocal as to raise a presumption of notice.[56] So where an administrator who acknowledges a balance due is removed, and an administrator de bonis non appointed, the statute commences to run against the claims of heirs against the administrator from the time of the removal, in the absence of any concealment or disability on their part.[57]

[§ 1973] **(3) Actions Based on Misconduct of Representative.** An action on a claim against an executor or administrator arising out of his misfeasance or neglect in connection with the administration of the estate must be brought within the period allowed by the statute of limitations.[58] If the claim is based on negligence in respect to collecting a debt, the statute runs from the time of the loss.[59] The statutory period runs in favor of the representative from the date of his discharge where he has, without concealment of the circumstances of the sale, purchased land of decedent at a judicial sale thereof,[60] or where, having purchased land for the estate, taking title as administrator, he continues in possession, under a claim of title in himself, after discharge on final settlement.[61] But limitations do not run as against an action by those entitled to the estate to recover the property thereof from the representative until he had done some open and unequivocal act showing an intention to assert in himself a title adverse to that of the persons beneficially interested.[62] Where an administrator rents land improperly allotted to intestate's widow and occupies it while administrator, he cannot, in a suit against him by a succeeding representative to recover possession, set up adverse possession during the time he was administrator.[63] If he assumes as

smith v. Wilson, 104 N. C. 28, 10 SE 134; Montgomery v. Cloud, 27 S. C. 188, 3 SE 196; Beard v. Stanton, 15 S. C. 164; Glover v. Lott, 20 S. C. Eq. 79; Moore v. Porcher, 8 S. C. Eq. 195; Myers v. Skrine, 5 S. C. Eq. 179.

[a] **Illustrations.**—(1) Where defendant as executor in discharge of his trust paid over to an unmarried infant, seventeen years of age, who was a residuary legatee of his testator, her distributive share of the estate and took the joint receipt of herself and her father for the same, he was entitled to the protection of the statute of limitations against a suit for the amount brought by the legatee and her husband. Glover v. Lott, 20 S. C. Eq. 79. (2) Where distributees of an estate give to the administrator receipts in full for the amount due them on payment of a less amount, the statute begins to run against their right of action for the balance from the giving of such receipts. Coppersmith v. Wilson, 104 N. C. 28, 10 SE 134.

[b] **Duty to assert right.**—If the legatee or distributee supposes that the trust has not been faithfully and fully performed, it is his duty to assert his right. Beard v. Stanton, 15 S. C. 164; Moore v. Porcher, 8 S. C. Eq. 195.

50. Mass.—Flynn v. Flynn, 183 Mass. 365, 67 NE 314.
Mich.—Matter of Moore, 84 Mich. 474, 48 NW 39.
Miss.—Peebles v. Acker, 70 Miss. 356, 12 S 248; Roberts v. Roberts, 34 Miss. 322.
N. J.—Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085.
N. Y.—Wood v. Riker, 1 Paige 616.
N. C.—Burgwyn v. Daniel, 115 N. C. 115, 20 SE 462.
S. C.—Edwards v. Williams, 39 S. C. 86, 17 SE 457; Barnwell v. Barnwell, 11 S. C. Eq. 228.

51. Conn.—Gray v. Goddard, 90 Conn. 561, 98 A 126; Wilmerding v. Russ, 33 Conn. 67.
Del.—Buckmaster v. Reed, 12 Del. 207, 30 A 971.
Ga.—Jacobs v. Pou, 18 Ga. 346; Walker v. Wootten, 18 Ga. 119.
Ky.—Clift v. Newell, 102 SW 832, 31 KyL 486.
Miss.—Young v. Cook, 30 Miss. 320.
Mo.—State v. Blackwell, 20 Mo. 97; State v. Shires, 39 Mo. A. 560.
N. Y.—Matter of Cooper, 51 Misc. 381, 101 NYS 283, 37 NYCivProc 309, 5 Mills Surr. 495.
N. C.—Nunnery v. Averitt, 111 N. C. 394, 16 SE 683; Wilkerson v. Dunn, 52 N. C. 125.
Oh.—Lease v. Downy, 5 Oh. Cir. Ct. 480, 3 Oh. Cir. Dec. 235.
S. C.—Buchanan v. Buchanan, 35 S. C. L. 63.
Tex.—Tinnen v. Mebane, 10 Tex. 246, 60 AmD 205.

[a] **Effect of making return subsequent to settlement.**—Where the statute is set in motion by final settlement, the fact that the administrator makes a return subsequent to the settlement in which he states matters occurring before the settlement, the payments made at that settlement, but nothing which happened afterward does not amount to an admission sufficient to take an action against him, by the heirs out of the statute of limitation. Walker v. Wootten, 18 Ga. 119.

[b] **Interruption by admissions.**—Notwithstanding a final settlement sets the statute of limitations in motion, the running thereof may be interrupted by admissions of the executor made subsequent to the settlement. Buchanan v. Buchanan, 35 S. C. L. 63.

52. Amos v. Campbell, 9 Fla. 187.

53. Smith v. Moore, 102 Va. 260, 46 SE 326.

54. Patton v. Overton, 8 Humphr. (Tenn.) 192.

55. Borner v. Young, 68 Ala. 35; Lewis v. Welch, 47 Minn. 193, 48 NW 608, 49 NW 665.

56. See Trusts [39 Cyc 604].

[a] **Married distributee becoming discovert.**—Where an administrator held property to which one of the distributees was entitled, but which had been assigned to the administrator by the distributee's husband, it was held proper to charge that if made with her consent, and the administrator claimed and held the property afterward as his own, with the knowledge of the distributee who had meanwhile become discovert, the statute commenced to run against her from the time she became a feme sole. Smith v. Atwood, 14 Ga. 402.

57. Mott v. Ruenbuhl, 1 Tex. A. Civ. Cas. § 599.

58. U. S.—Taylor v. Benham, 5 How. 233, 12 L. ed. 130.
Ark.—Bland v. Fleeman, 58 Ark. 84, 23 SW 4.
Conn.—Wilmerding v. Russ, 33 Conn. 67.
Fla.—Gadsden v. Jones, 1 Fla. 332.
Ga.—Boswell v. Underwood, 84 Ga. 79, 10 SE 595.
Mo.—Keeton v. Keeton, 20 Mo. 530.
N. Y.—Morales v. Klopsch, 158 App. Div. 824, 143 NYS 922.
S. C.—Swindersine v. Miscally, 8 S. C. Eq. 304.
Ont.—Clarkson v. McLean, 42 Ont. L. 1; Gardner v. Perry, 6 Ont. L. 269, 2 OntWR 681.

[a] **Purchase of property of estate.**—If the administrator buys in personal property of the estate at a sale thereof, and thenceforth openly and notoriously asserts title in himself, the statute of limitations will bar a bill brought by the heirs for relief after the action was barred at law. Wilmerding v. Russ, 33 Conn. 67; Keeton v. Keeton, 20 Mo. 530.

[b] **Limitation fixed by special statute.**—(1) An action against an administrator for personal liability incurred by mismanagement of the estates must be brought within five years from the time of his discharge. Gadsden v. Jones, 1 Fla. 332. (2) The limitation of a statute providing that an action against an administrator for malfeasance must be brought within a year from the time of final settlement does not apply to an action by an administrator de bonis non against an original administrator to recover an amount alleged to have been charged to defendant in his final account, since the final accounting intended by the statute is not the last accounting of successive representatives before the final settlement of the estate. Bartels v. Gove, 4 Wash. 632, 30 P 675.

[c] **Actions by judgment creditors.**—An action by a judgment creditor of decedent to reach assets misapplied by the administrator in order that they may be applied in due course of administration must be brought during the time limited by statute for bringing actions on judgments. Malloy v. Vanderbilt, 4 Abb NCas (N. Y.) 127.

59. Harrington v. Keteltas, 92 N. Y. 40; Johnston v. McCain, 188 Pa. 513, 41 A 592.

60. McGaughey v. Brown, 46 Ark. 25.

61. Harney v. Donohoe, 97 Mo. 141, 10 SW 191.

62. Butler v. Lawson, 72 Mo. 227; Norris' App., 71 Pa. 106, 124. See also supra § 1972.

63. Baker v. Barclift, 76 Ala. 414 (he cannot as an individual hold adversely to himself as the legal representative of the estate).

agent for the heirs to collect rents and apply them in payment of decedent's debts in exoneration of the land and fails so to apply the rents, he cannot set up the statute of limitations unless there is a demand and refusal, and then only from the time thereof.[64] A plea of a statute providing that actions of assumpsit or debt grounded upon any lending or contract without specialty shall be commenced within five years is not good in bar of an action against the personal representative of a personal representative for a devastavit committed by the latter.[65] When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification and the limitation in force at the time governs;[66] but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors, and is governed by the limitation then in force.[67] Where a judgment is rendered for plaintiff in an action against a representative for a devastavit, a further action by plaintiff to subject real estate to the payment of the judgment cannot be treated as an equitable continuation, or writ of execution on the judgment, so as to avoid the bar of the statute of limitations.[68]

[§ 1974] **(4) Actions to Set Aside Settlement for Mistake or Fraud.** Under a statute authorizing any person interested in the estate to have a settlement thereof set aside for mistake or fraud within three years after settlement, if a settlement should be made without in some manner finally disposing of debts against the estate within the knowledge of the administrator the creditors will be barred from any further action against the administrator after three years.[69] But persons under disabilities are not barred by their failure to except to an administrator's settlement, but may be heard on a question of fraud after the removal of their disabilities.[70]

[§ 1975] **(5) Actions against Representative and Coöbligor of Decedent.** Where suit is brought against an obligor and the representative of a deceased coöbligor, the fact that the suit is barred as to the latter by some statute specially applicable to suits against executors and administrators does not prevent the recovery of a judgment against the former.[71] Where an administrator is sued on a joint and several obligation with the surviving obligor, they are in respect of the application of the statute of limitations to be regarded as if they had been sued separately, and the time during which suits cannot be brought against an administrator must be added to the period fixed by the general statute before the statute can be made a bar as to his liability.[72]

[§ 1976] **(6) Assertion of Claim in Suit in Which Estate Is Being Administered.** In courts of equity, a creditor has the right to assert his claim against a decedent in a suit in which the estate of such decedent is being administered at any time before the assets of the estate have been disbursed.[73]

[§ 1977] **3. Laches—a. Claims of Creditors.** No delay short of the time fixed by some special statute of limitations will bar a creditor seeking the enforcement of a claim against the estate which is not barred by a general statute of limitations; so long as he pursues the remedies pointed out by law within the time it prescribes he is entitled to the aid of the courts in the enforcement of his demand.[74] It has also been held that a proceeding instituted in the probate court to subject the real estate to the payment of debts, brought within nine months from the time of the expiration of the time for the filing of claims, is diligently brought, and the defense of laches will not lie.[75] On the other hand there are cases in which a claimant has delayed seeking to enforce his claim for a long time, usually considerably exceeding the statutory period of limitation, in which the court had denied relief upon the ground that the claimant's rights had been lost by laches.[76]

64. Shuffler v. Turner, 111 N. C. 297, 16 SE 417.

65. Brockenbrough v. Campbell, 5 Fla. 83; Darling v. Brown, 2 Can. S. C. 26. See also Williams v. Freeman, 7 Watts & S. (Pa.) 359 (a statute providing that "all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit-rents, shall be commenced and sued within six years next after the cause of such actions or suits, and not after," has no application to an action against an administrator founded upon a devastavit).

66. Syme v. Badger, 96 N. C. 197, 2 SE 61.

67. Syme v. Badger, 96 N. C. 197, 2 SE 61.

68. Syme v. Badger, 96 N. C. 197, 2 SE 61.

69. Beard v. Peru First Presb. Church, 15 Ind. 490.

70. Riley v. Norman, 39 Ark. 158.

71. Buie v. Buie, 24 N. C. 87; Nashville Bank v. Campbell, 7 Yerg. (Tenn.) 353.

72. Parker v. Jackson, 16 Barb. (N. Y.) 33.

73. Com. v. McCue, 109 Va. 302, 63 SE 1066; Wooding v. Bradley, 76 Va. 614.

74. U. S.—Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466; Gaines v. Hammond, 6 Fed. 449, 2 McCrary 432.

Cal.—Casey v. Gibbons, 136 Cal. 368, 68 P 1032.

Ky.—Radford v. Harris, 144 Ky. 809, 139 SW 963.

Mass.—Burgess v. Keyes, 108 Mass. 43.

Miss.—Westbrook v. Munger, 61 Miss. 329.

N. C.—Person v. Montgomery, 120 N. C. 111, 26 SE 645.

Oh.—Miller v. McLean, 31 Oh. Cir. Ct. 64.

Va.—Turk v. Ritchie, 104 Va. 587, 52 SE 339.

[a] **Illustration.**—As the statute of limitations does not begin running during coverture, the doctrine of stale equity or laches cannot be invoked against a wife's administrator in an action against her husband's estate to recover her separate property which passed into his possession during coverture. Miller v. McLean, 31 Oh. Cir. Ct. 64.

75. Wachsmuth v. Penn Mut. L. Ins. Co., 147 Ill. A. 510 [aff 241 Ill. 409, 89 NE 787, 132 AmSR 226, 26 LRANS 411].

76. See cases infra this note.

[a] **Illustrations.**—(1) Twenty years' delay will bar a creditor. Goodrum v. Mitchell, 143 Ill. A. 134 [aff 236 Ill. 183, 86 NE 217]. (2) Failure of a mortgagee having ample security at the death of the mortgagor and at the time of filing the account of his administrator showing distribution to the creditors then existing to make any effort to enforce payment on his claim until nearly eight years thereafter, when the mortgaged tract had decreased in value, and the remaining unencumbered tracts had been sold by the heirs to bona fide purchasers, constitutes laches which will estop the mortgagee and his assignee from asserting any claim against the holders of the unencumbered lands. Kemper v. Appollo Bldg., etc., Co., 30 Oh. Cir. Ct. 700.

[b] **Circumstances not showing laches.**—Plaintiff and her husband agreed to separate and to return all community property held by them to two men appointed to divide the same between them. The husband did not return a sum of money belonging to the community deposited in a bank, and subsequently transferred all his property to defendant's intestate, who was appointed the husband's executor and was subsequently discharged because he found no property belonging to the estate. Plaintiff did not discover the fraud of her husband in concealing the bank deposit for thirteen years after the settlement, and made no effort during that time to ascertain the facts. She discovered the fraud shortly before the death of defendant's intestate, but delayed the presentation of her claim against the estate of her husband until after the death of defendant's intestate. The deed by which her husband conveyed the property to defendant's intestate was in consideration of love and affection only. It was not shown that defendant's intestate knew anything about the facts existing at the

Action for devastavit. Mere delay of a creditor in presenting his demand for payment does not preclude him from suing the representative for a devastavit, and the fact that the personal representative has distributed the estate does not relieve him of liability to a creditor who sues within the period fixed by statute.[77]

[§ 1978] **b. Claims of Legatees or Distributees.** While statutes of limitations are ordinarily inoperative to bar a claim for a legacy or distributive share,[78] a legatee or distributee may lose his right to enforce payment against the personal representative by his laches in failing to assert his rights for such period of time as raises a presumption of satisfaction or payment.[79] Stale demands are unwillingly countenanced in courts.[80] Interference in behalf of those who sleep on their rights, or who procrastinate them until evidence has passed away is reluctantly awarded, even where there is no statutory bar.[81] A lapse of twenty years or over from the time the legacy or distributive share becomes payable raises a presumption of payment or satisfaction and unless rebutted bars the claim.[82] Nevertheless the presumption may be rebutted and the liability to account will then remain in full force.[83] If the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected,[84] and where there is any evidence to rebut the presumption of payment the sufficiency of the evidence is a question of fact to be determined by the jury.[85] On the other hand if no evidence is given to repel the presumption the court should instruct the jury that they are bound by it.[86]

[§ 1979] **J. Parties—1. In General.** As a general rule, so far as personalty is concerned, the executor or administrator represents the estate and those who are beneficially interested therein, and hence he may sue in his own name, without joining legatees or distributees, to protect the interests of the estate,[87] and conversely, an action to enforce any liability of decedent is properly brought against his personal representatives without joining those who are beneficially interested.[88] Nevertheless those who are beneficially interested may appear to protect their own rights where such rights are jeopardized by reason of collusion with the personal representative.[89]

The public administrator commencing an action under a premature reference to him of an estate cannot amend the petition to show a later reference to him.[90]

[§ 1980] **2. Actions Relating to Personalty.** The personal representative is the proper party to sue in relation to the personal estate, both at law and in equity,[91] and it is in general improper to

time of the separation. Plaintiff, after defendant's intestate had been discharged as executor, was appointed administratrix cum testamento annexo, and had her claim for a portion of the bank deposit allowed, and within three years after discovering the fraud of her husband in concealing the bank deposit sued to set aside the conveyance by her husband of real estate to defendant's intestate. It was held that her action was not barred by laches, there being nothing tending to show that the heirs of defendant's intestate, nor any creditors interested in the estate, had suffered prejudice by delay in presenting the claim. Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

77. Harpending v. Daniels, 11 KyL 858.

78. See supra § 1972.

79. D. C.—U. S. Trust Co. v. National Sav., etc., Co., 37 App. 296.

Ind.—Smith v. Calloway, 7 Blackf. 86.

Ky.—Clift v. Newell, 102 SW 832, 31 KyL 486.

N. Y.—Arden v. Arden, 1 Johns. Ch. 313.

N. C.—Bird v. Graham, 36 N. C. 196.

Pa.—Summerville v. Holliday, 1 Watts 507; Durdon v. Gaskill, 2 Yeates 268; Ingraham v. Cox, 1 Pars. Eq. Cas. 70.

S. C.—Sims v. Aughtery, 23 S. C. Eq. 103; Barnwell v. Barnwell, 11 S. C. Eq. 228.

Va.—Leake v. Leake, 75 Va. 792; Anderson v. Burwell, 6 Gratt. (47 Va.) 405.

Eng.—Sturt v. Mellish, 2 Atk. 610, 26 Reprint 765; Parker v. Ash, 1 Vern. Ch. 256, 23 Reprint 452; Higgins v. Crawfurd, 2 Ves. Jr. 571, 30 Reprint 781.

[a] **Illustration.**—Where a beneficiary in a will reached her majority in 1882 and eleven years thereafter brought a suit against her brother, as administrator de bonis non of decedent's estate, twelve years after he had made his final settlement, and the husband of the beneficiary had been appointed to succeed him, the right of action was barred by laches. Clift v. Newell, 102 SW 832, 31 KyL 486.

[b] **An action in which it is sought to charge an executor personally** for the amount of a legacy paid by him under order of court, not commenced until nine years after the payment, and after it is too late to recover it from the legatee, is barred by laches. Home for Poor Catholic Men v. Coleman, 122 Ky. 544, 92 SW 342, 29 KyL 75.

[c] **Circumstances not showing laches.**—Where one of the legatees to whom testator's interest in a firm was bequeathed was appointed administrator with the will annexed a few months after obtaining his majority, and immediately sued the surviving partner for an accounting, he was not chargeable with laches. Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074.

[d] **Fifteen years' delay of an absentee** in suing for a legacy which had been paid to an administrator for him was not such laches as to bar his right of action, where the executor, whose duty it was to pay the legacy, was still living, and no evidence had been lost by death, no records had been destroyed, and there was no uncertainty in the amount due, not any presumption of payment. Selden v. Kennedy, 104 Va. 826, 52 SE 635, 113 AmSR 1076, 4 LRA 944, 7 AnnCas 879.

80. See Equity § 211 et seq.

81. Glen v. Kimbrough, 58 N. C. 173.

82. Ala.—Bonner v. Young, 68 Ala. 35.

Mass.—Andrews v. Sparhawk, 13 Pick. 393.

N. C.—Hamlin v. Mebane, 54 N. C. 18; Shearin v. Eaton, 37 N. C. 282; Ivy v. Rogers, 16 N. C. 58.

Pa.—Norris' App., 71 Pa. 106; Okeson's App., 2 Grant 303; Foulk v. Brown, 2 Watts 209; Brown's Est., 8 Phila. 197.

S. C.—Ex p. Epting, 22 S. C. 399.

See also In re Runciman, 38 N. S. 89 (doctrine of laches held applicable after lapse of thirty years).

[a] **Nothing short of twenty years** raises a presumption of payment unless corroborated by proof of other circumstances. Sparhawk v. Buell, 9 Vt. 41. See also Richardson v. Richardson, 9 Pa. 428 (no bar after delay of thirteen years).

[b] **Within the twenty year period the burden of proof** lies on defendant; after that time it lies on plaintiff to show the contrary. Norris' App., 71 Pa. 106.

83. Arden v. Arden, 1 Johns. Ch. (N. Y.) 313; Glen v. Kimbrough, 58 N. C. 173; Shearin v. Eaton, 37 N. C. 282; Bird v. Graham, 36 N. C. 196; Falls v. Torrance, 11 N. C. 412; Norris' App., 71 Pa. 106; Foulk v. Brown, 2 Watts (Pa.) 209; Durdon v. Gaskill, 2 Yeates (Pa.) 268; Selden v. Kennedy, 104 Va. 826, 52 SE 635, 113 AmSR 1076, 4 LRANS 944, 7 AnnCas 879.

[a] **Facts held sufficient to rebut presumption.**—Declarations by an administrator inducing a belief that he would not contest a claim for a legacy or distributive share was sufficient to repel the presumption of satisfaction or abandonment. Falls v. Torrance, 11 N. C. 412.

84. McHardy v. McHardy, 7 Fla. 301; Falls v. Torrance, 11 N. C. 412; Burwell v. Anderson, 3 Leigh (30 Va.) 348.

85. Kingman v. Kingman, 121 Mass. 249; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Summerville v. Holliday, 1 Watts (Pa.) 507.

86. Summerville v. Holliday, 1 Watts (Pa.) 507.

87. Ryan v. Hutchinson, 161 Iowa 575, 143 NW 433; Rhodes v. Stout, 26 Iowa 313; Rine v. Rine, 91 Nebr. 248, 135 NW 1051; Morris v. Morris, 172 App. Div. 719, 158 NYS 361; Anderson v. Anderson, (N. C.) 99 SE 106.

88. Ryan v. Hutchinson, (Iowa) 143 NW 433; Powell v. Spaulding, 3 Greene (Iowa) 443; Rine v. Rine, 91 Nebr. 248, 135 NW 1051.

89. Rine v. Rine, 91 Nebr. 248, 135 NW 1051.

90. Fentzka v. Warwick Constr. Co., 162 Ky. 580, 172 SW 1060.

91. U. S.—Puder v. Agler, 242 Fed. 95, 98 [quot Cyc]; Barrielle v. Bettman, 199 Fed. 838.

Ariz.—In re Tamer, 179 P 643.

Ark.—Whelan v. Edwards, 31 Ark. 723.

Ga.—Lamar College v. Wells, 144 Ga. 114, 86 SE 223; Jones v. McCleod, 61 Ga. 602.

Ill.—Roos v. Muth, 175 Ill. A. 517.

Ind.—Craig v. Norwood, 61 Ind. A. 104, 108 NE 395.

Ky.—Bennett v. Bennett, 134 Ky. 444, 120 SW 372; Boyd v. Jones, 2 SW 552, 8 KyL 602.

Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

Mass.—Norton v. Lilley, 210 Mass. 214, 96 NE 351.

Nebr.—Cox v. Yeazel, 49 Nebr. 343, 68 NW 483.

join as parties other persons having ultimate rights in the estate.[92] Thus the personal representative is the proper party to bring a suit for the collection of debts due the estate, and it is improper to join heirs, devisees, or legatees as parties to the suit;[93] and where a son, by means of fraud, induced his father to transfer personalty to him, and after the father's death retained possession and proceeded to administer the property for his own benefit, the administrator of the father, and not the heirs, was entitled to sue the son for conversion of the property, although the heirs were adults and there were no debts.[94] The executor or administrator is the proper party to bring an action for injuries to personal property of the estate,[95] or to protect it from sale on execution issued on a judgment against himself personally,[96] or to recover property exempt from execution belonging to intestate and wrongfully withheld.[97] Where land has been sold, the personal representative of the vendor may collect the purchase money by an action, without joining the heirs at law.[98] In a suit by an administrator de bonis non against the former administrator to recover personal property of the estate, the heirs or distributees need not be made parties,[99] and where an administrator with the will annexed sues to compel the executor of the deceased husband of the testatrix acting as executor of testatrix to account for property coming into his hands from the estate of testatrix and left unadministered, he need not make the legatees parties.[1] Where testator bequeathed his interest in a firm to his wife, remainder to his children, she was not a necessary party to a suit by testator's administrator with the will annexed for an accounting of his interest in the firm.[2] The executor eo nomine is a necessary party defendant to a bill praying a decree that will deprive him of title to the personal estate,[3] and also to a bill to establish an equitable lien on funds of the estate.[4] The heirs are not necessary parties to a foreclosure of a mortgage of personal property belonging to the estate.[5]

Exceptions and limitations of rule. The general rule, as stated, is subject to some exceptions. Thus a creditor of deceased may under peculiar circumstances, such as fraud or collusion on the part of the personal representative, bring suit against a debtor to the estate,[6] and where an administrator makes a settlement of a matter in litigation which is prejudicial to the substantial rights of the heir at law and not such as properly protects his interest or which is entered into collusively and in fraud of his rights and without his consent, the court may properly permit the heir at law to be substituted to prosecute the action in his own name.[7] If an administrator sues to recover on a note given to a former administrator of the same estate, the court can order the latter to be made a party if necessary to a proper determination of the case.[8] Where a decree of distribution of the estate of a decedent was reversed, a company which had transferred shares of stock belonging to the estate to a distributee is a proper party defendant to an action by the executors to recover such shares and to cancel the transfer thereof.[9] Where the estate has been fully partitioned and the executor discharged, he is not a proper party to an action on an account brought by one to whom it had been allotted on the partition.[10] Where prior to the attempted foreclosure of a trust deed in the nature of a chattel mortgage, the beneficiary died and no administrator or executor was appointed for her estate, her heirs were the only necessary and proper parties to a suit to restrain such foreclosure.[11] When provided by

N. Y.—McQuaide v. Perot, 223 N. Y. 75, 119 NE 230; Morris v. Morris, 172 App. Div. 719, 158 NYS 361.

S. C.—Gregory v. Forrester, 6 S. C. Eq. 318; Galphin v. McKinney, 6 S. C. Eq. 280.

Vt.—Robinson v. Swift, 3 Vt. 377.

W. Va.—Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 SE 90.

Eng.—Smith v. Bolden, 33 Beav. 262, 55 Reprint 368; Jones v. Goodchild, 2 Eq. Cas. Abr. 168, 22 Reprint 144, 3 P. Wms. 33, 24 Reprint 958; 1 Daniel Ch. Pr. 220; Pomeroy Rem. & Rem. Rights § 261.

But compare Phillips v. Threadgill, 37 Ala. 93 (the administrator is a necessary party to a bill filed by distributees against a person in adverse possession of personal property alleged to belong to the estate. There is nothing in this case to show why the court thought the distributees entitled to sue at all).

[a] **Illustration.**—An original bill to recover and restore to an estate the certificate of shares of stock issued by a decree of court to defendant bank is properly brought in the name of an administrator de bonis non. Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

[b] **The right of action to recover a legacy or other chose in action** due an intestate is in his administrator and cannot be maintained by the distributees of the estate or their assignee. Whelan v. Edwards, 31 Ark. 723.

[c] **Where both a foreign and a resident administrator** assert by petition in the same action the same demand, the latter is the proper party to represent the estate. Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 SE 90.

92. Morris v. Morris, 172 App. Div. 719, 158 NYS 361; Joseph v. Herzig, 72 Misc. 475, 131 NYS 321. See also cases supra note 91; infra note 93.

[a] **This rule is relaxed** in case of a surviving partner in order that he may have a final account. Burn v. Burn, 8 Ont. 237.

[b] **In Louisiana,** where an executor sues for personal property of the estate, the heirs, if interested and present, or their representatives, if absent, should be made parties. Hart v. Boni, 6 La. 97.

93. Burge v. Burge, 76 SW 873, 25 KyL 979; Conley v. Walton, 49 Misc. 1, 96 NYS 400; Anderson v. Anderson, (N. C.) 99 SE 106; Graveley v. Graveley, 84 Va. 145, 4 SE 218.

[a] **An action for rents** accruing in decedent's lifetime is within the rule. O'Bannon v. Roberts, 2 Dana (Ky.) 54.

94. Griesel v. Jones, 123 Mo. A. 45, 99 SW 769.

95. Coleman v. Bailey, 4 Bibb (Ky.) 297 (the heirs should not be joined).

96. Labitut v. Prewett, 14 F. Cas. No. 7,962, 1 Woods 144.

97. Staggs v. Ferguson, 4 Heisk. (Tenn.) 690.

98. Brackett v. Boreing, 89 SW 496, 28 KyL 386. See generally supra §§ 671, 1617.

99. Long v. Easly, 13 Ala. 239.

1. Phillips v. Wisner, 75 Misc. 278, 132 NYS 1006 (if the administrator may sue, he represents the legatees, and, if he cannot maintain the suit, the executor of the deceased husband is the custodian of the property out of which the legacies must be paid and he represents the legatees).

2. Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074.

3. Kempton v. Bartine, 60 N. J. Eq. 411, 45 A 966 [aff 59 N. J. Eq. 149, 44 A 461]; Waterman v. Albany City Sav. Inst., 86 Misc. 274, 149 NYS 174.

4. Guyer v. Wilson, 139 Ill. 392, 28 NE 738 [rev 36 Ill. A. 539].

5. Scott v. Jenkins, (Fla.) 35 S 101.

6. N. Y.—Fisher v. Hubbell, 7 Lans. 481, 65 Barb. 74.

N. C.—Nance v. Powell, 39 N. C. 297.

S. C.—Gregory v. Forrester, 6 S. C. Eq. 318.

W. Va.—Broderick v. Broderick, 28 W. Va. 378.

Eng.—Atty.-Gen. v. Wynne, Mosely 126, 25 Reprint 309; Wilson v. Moore, 1 Myl. & K. 126, 7 EngCh 126, 39 Reprint 629; Alsager v. Rowley, 6 Ves. Jr. 748, 31 Reprint 1289; 1 Daniel Ch. Pr. 200.

[a] **Where an administrator fails to sue** (1) creditor of the deceased creditors can only file a bill against the debtor on charging collusion between him and the administrator. Nance v. Powell, 39 N. C. 297. (2) If an executor has failed to institute suit to ascertain outstanding claims any creditor may prosecute that action after the expiration of six months from the executor's qualification, whether he has obtained judgment on his claim or not. Broderick v. Broderick, 28 W. Va. 378.

7. Tecumseh Nat. Bank v. McGee, 61 Nebr. 709, 85 NW 949.

8. Dancy v. Smith, 68 N. C. 179.

9. Ashton v. Heggerty, 130 Cal. 516, 62 P 934.

10. Hill v. Herndon, (Tex. Civ. A.) 89 SW 813.

11. Peeples v. Yates, 88 Miss. 289, 40 S 996.

statute that one claiming an adverse interest, or who is a necessary party to a complete determination, may be made a defendant, and that the court may determine any controversy where it can be done without prejudice to the rights of others, in a suit by an administratrix against a bank to recover intestate's deposit, a claimant in possession of the pass book is a proper party defendant.[12]

Refusal of representative to sue.[13] A creditor may maintain a bill when the personal representative refuses to sue,[14] and where, in an action to recover for bank stock of a decedent's estate, alleged to have been converted, a brother of decedent, who was an heir at law and remainderman, was not joined, the petition was held subject to special demurrer on the ground of a defect of parties.[15] Where an administrator makes a fraudulent transfer of property belonging to the estate and refuses to bring suit for its recovery, it has been held that the heirs may do so.[16]

[§ 1981] **3. Joining Representative as Party Defendant on Refusal to Sue.** An exception to the rule that an action to recover assets can be brought only by the personal representative arises where such representative is derelict in the performance of his duty, in which case the next of kin may maintain the action, joining the administrator as a party defendant.[17] In a case where a residuary legatee sued the executrix of the testator and others, alleging that the executrix had intrusted moneys of the estate to one since deceased, who invested it in her own name and attempted to dispose of it by will, and that the executrix refused to sue to recover the same for the estate, it was held that in such an action the executrix was a necessary and proper party.[18]

[§ 1982] **4. Actions by Creditors of Estate—a. Plaintiffs.** A husband and wife who rendered services to the wife's parent under an implied agreement for compensation may join in an action against his estate to enforce such contract.[19] A suit in equity for an accounting for property wrongfully withheld from an estate cannot be maintained by a creditor alone, but the legal representative of the decedent is an indispensable party.[20] Where heirs and devisees are seeking to hold the executor liable for mismanagement of the estate, they may be joined as plaintiffs in a creditor's bill.[21]

[§ 1983] **b. Defendants—(1) In General.** In actions or suits by creditors to enforce claims against the estate, the general rule is that the personal representative is the only necessary or even proper party defendant.[22] Accordingly plaintiff should not join as defendants the widow[23] or heirs[24] or legatees,[25] unless their legacies have been paid and there is a deficiency of assets,[26] or residuary legatees, unless the interests of the executor are adverse to them and their rights may be prejudiced,[27] or distributees,[28] or devisees,[29] or persons to whom decedent conveyed property in trust to convert into money and pay his creditors and to account for any surplus to decedent or his legal representatives,[30] or debtors to the estate.[31] A debtor to the estate may, however, be joined as a defendant in case of collusion between the personal representative and the debtor, or insolvency of the personal representative, or unwillingness to proceed to collect the assets,[32] although in no event can a

12. Stevens v. People's Sav. Bank, (Iowa) 171 NW 130.

13. See also infra § 1981.

14. Ravenscraft v. Pratt, 22 Kan. 20; Bennett v. Bennett, 134 Ky. 444, 120 SW 372; Beakes Dairy Co. v. Berns, 139 App. Div. 733, 124 NYS 365; Burroughs v. Elton, 11 Ves. Jr. 29, 32 Reprint 998.

[a] **A right in the representative to the fund** which is sought to be recovered must be shown. Beakes Dairy Co. v. Berns, 139 App. Div. 733, 124 NYS 365.

15. Yager v. Commonwealth Bank, 125 Ky. 177, 100 SW 848, 30 KyL 1287.

16. Kimard v. George, 142 Ga. 111, 82 SE 560; Randel v. Dyett, 38 Hun (N. Y.) 347.

17. Buchanan v. Buchanan, 75 N. J. Eq. 274, 71 A 745, 138 AmSR 563, 22 LRANS 454, 20 AnnCas 91 [rev 73 N. J. Eq. 544, 68 A 780].

18. Rathbun v. Brownell, 43 Misc. 307, 88 NYS 833.

19. Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838.

20. Ryan v. Kelsey, 259 Fed. 945.

21. Spencer v. Goodlett, 104 Tenn. 648, 58 SW 322.

22. U. S.—Schwartz v. Loftus, 216 Fed. 320, 132 CCA 464.

Cal.—Miller v. Katz, 10 Cal. A. 576, 102 P 946.

Ga.—McKinney v. Powell, 146 Ga. 569, 91 SE 690; Harvey v. Beasley, 144 Ga. 517, 87 SE 655; Johnson v. Fulton County Home Builders, 142 Ga. 702, 83 SE 656.

La.—Monget v. Penny, 7 La. Ann. 134.

Mich.—Dodge v. Mills, 150 Mich. 394, 113 NW 1123.

Minn. — Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 NW 472.

Mo.—Buck v. Meyer, 195 Mo. A. 287, 190 SW 997.

Nebr.—Rine v. Rine, 91 Nebr. 248, 135 NW 1051.

N. J.—Melick v. Melick, 17 N. J. Eq. 156.

N. Y.—Waterman v. Albany City Sav. Inst., 86 Misc. 274, 149 NYS 174.

S. C.—Frazer v. Charleston, 19 S. C. 384; Pripp v. Talbird, 10 S. C. Eq. 142.

W. Va.—McConaughey v. Bennett, 50 W. Va. 172, 40 SE 540.

Wis.—King v. Lawrence, 14 Wis. 238.

Eng.—Newland v. Champion, 1 Ves. 105, 27 Reprint 920.

But compare Villarruz v. Azarraga, 15 Philippine 108 (guardian of infant children of deceased debtor who took and converted all of the estate consisting of a bank account liable in action by only creditor).

[a] **Where suit is brought for a breach of covenant of warranty** after the covenantor's death and the only relief sought is establishment of the claim, the devisees and heirs should not be joined as parties defendant. McConaughey v. Bennett, 50 W. Va. 172, 40 SE 540.

[b] **In a suit against executors to recover funds bequeathed by decedent,** but claimed to be in fact the property of plaintiff, the legatees thereof are not necessary parties defendant. King v. Lawrence, 14 Wis. 238.

[c] **In an action by a wife against the estate of her deceased husband** to recover a money judgment against it, the administrator is a necessary party, since a judgment without the administrator, with whom creditors of the estate could file claims, would not bind the creditors, and the administrator's presence would be necessary, even though the claims sued on were equitable liens on the husband's land. Sawyer v. Platt, (N. J.) 77 A 1043.

[d] **A father acting in the capacity of tutor** to his minor children is the representative of the succession of the mother and as such the proper party to be sued for a debt of his deceased wife. Monget v. Penny, 7 La. Ann. 135.

23. Miner v. Aylesworth, 18 Fed. 199; Nelson v. Hart, 8 Ind. 293.

24. Miner v. Aylesworth, 18 Fed. 199; Miller v. Katz, 10 Cal. A. 576, 102 P 946; Nelson v. Hart, 8 Ind. 293.

25. Glover v. Patten, 165 U. S. 394, 17 SCt 411, 41 L. ed. 760; Flatauer v. Loser, 156 App. Div. 591, 141 NYS 951 [rev on other grounds 211 N. Y. 15, 104 NE 1123]; Still v. Wood, 85 S. C. 562, 67 SE 910; Frazer v. Charleston, 19 S. C. 384; Douglas v. Fraser, 7 S. C. Eq. 105.

[a] **In a suit to modify a decree of distribution** legatees are necessary parties. In re Gall, 182 N. Y. 270, 74 NE 875.

26. Douglas v. Fraser, 7 S. C. Eq. 105.

27. Melick v. Melick, 17 N. J. Eq. 156.

28. Fripp v. Talbird, 10 S. C. Eq. 142.

29. Greene v. Martine, 27 Hun (N. Y.) 246.

[a] **A sole devisee and legatee** under the will of a respondent in a suit for an accounting is a proper, but not a necessary, party to an amended bill against respondent's administrator de bonis non. Julian v. Woolbert, (Ala) 81 S 32.

30. Miner v. Aylesworth, 18 Fed. 199.

31. Gilbert v. Thomas, 3 Ga. 575; Lancaster v. Evors, 4 Beav. 158, 49 Reprint 299; Alsager v. Rowley, 6 Ves. Jr. 748, 31 Reprint 1239; Utterson v. Mair, 2 Ves. Jr. 95, 30 Reprint 540.

32. Gilbert v. Thomas, 3 Ga. 575; Lancaster v. Evors, 4 Beav. 158, 49 Reprint 299; Gedge v. Traill, 1 Russ. &. M. 281 note, 5 EngCh 281, 39 Reprint 109; Newland v. Champion, 1 Ves. 105, 27 Reprint 920; Burroughs v. Elton, 11 Ves. Jr. 29, 32 Reprint 998; Doran v. Simpson, 4 Ves. Jr. 651, 31 Reprint 336; Story Eq. Pl. §§ 178–227; Burn v. Burn, 8 Ont. 237.

[a] **Illustration.**—A creditor may join as defendant a person claiming a fund in court on which the estate has an equitable demand for the pur-

creditor sue a debtor of the estate without making the personal representative a party.[33] Where a debt for the benefit of the estate is contracted by an executor who is insolvent, the debtor bringing action against the trust estate should make the executor, as well as the cestui que trust, parties.[34] The heirs may be permitted to come in and defend if the personal representative refuses or neglects to do so.[35] Where a bond has been given by an heir under a statute authorizing the administrator on written requisition by an heir to disallow a claim on the giving of a bond approved by the court for the payment of all expenses in the collection of such claim, the party giving the bond must be made a party to the suit on a rejected claim and permitted to defend if he desires or he cannot be held liable for the cost and expenses of the suit.[36] Where the petition in an action against an administrator on a note contains no allegation of a partnership between defendant's intestate and other persons named, or of any facts necessarily constituting a partnership as between the intestate and the other persons, it is proper to overrule a plea in abatement that the persons named should have been joined as defendants.[37] The assignor of a senior judgment is a proper party to an action by the holder of a junior judgment against the assignee and the personal representatives of the judgment debtor to enjoin the payment of the senior judgment on the ground that it had been paid before the assignment and to compel the payment of plaintiff's judgment.[38]

[§ 1984] **(2) Creditor's Bills.** Legatees are ordinarily not necessary parties to a creditor's bill against the estate, because their interests are sufficiently protected by the personal representative;[39] but where the executor is removed, the reason for the rule ceases, and they are necessary parties to such bill in accordance with the general doctrine that all persons having an interest in the object of the suit should be made parties.[40] In a creditor's bill against the administrator and heir of a decedent to enforce the collection of the joint obligation of decedent and another obligor such obligor is a necessary party, although a nonresident in order that he may be made primarily liable for whatever portion of the debt may in equity be due from him.[41] In a creditor's suit to subject the proceeds of money fraudulently donated to defendants by his debtor, the personal representative of the deceased debtor is a proper, but not a necessary, party.[42]

[§ 1985] **(3) Suits to Establish Rejected Claims.** On rejection of a claim it is to be established, if at all, by an ordinary civil action, brought and prosecuted by the claimant against the administrator the same as against any other defendant,[43] and he can be joined as a defendant with a surety of deceased in a suit by a city on the bond of a deceased municipal contractor.[44] In a suit to establish a rejected claim against a decedent's estate, and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party.[45]

[§ 1986] **(4) Proceedings to Subject Property in Hands of Distributees.** In a proceeding against distributees to subject property in their hands to the payment of an obligation of the decedent to account for personalty held in trust by him, the executor or administrator must be made a party in order that the validity of the claim against the estate may be determined.[46]

[§ 1987] **5. Actions Relating to Land—a. In General.** As a general rule the executor or administrator is not a necessary party to an action by heirs or devisees to recover realty which was part of decedent's estate,[47] nor is he even a proper party,[48] except where he is entitled to possession of the property;[49] and, conversely, the executor is not a necessary party to an action against devisees to recover land claimed by them under the will.[50] Where the executor has been authorized by the probate court to take possession of and rent the land, he is a proper party plaintiff in an action by a devisee to determine the title thereto.[51] In suit by a wife's administrator to set aside deeds, a deed given by herself and husband and a deed given by the grantee to a third person, the proper position of the husband as a party was as a plaintiff, and not as a defendant.[52]

Representative and heirs or devisees. Even though the personal representative has the right to possession of land as assets for the purpose of administration the heirs are indispensable parties in ejectment or any similar action where the title is in question;[53] and a statute providing that, when a mortgagee dies before payment of the debt, all his

pose of obtaining payment out of it where the executor refuses to take steps to establish the demand. Lancaster v. Evors, 4 Beav. 158, 49 Reprint 299.

33. Voorhies v. Eubank, 6 Iowa 274; Isaacs v. Clark, 13 Vt. 657.

[a] **"Estate" as party.**—In a suit against an executor, the executor and not the "estate" should be made the party defendant. Voorhies v. Eubank, 6 Iowa 274.

34. Miller v. Herzog, 148 NYS 945.

35. Gibson v. Higdon, 15 B. Mon. (Ky.) 205; Baxter v. Knox, 31 SW 284, 17 KyL 489; Rine v. Rine, 9 Nebr. 248, 135 NW 1051; McMullin v. Day, 1 Miles (Pa.) 136.

36. Fullerton v. Davis, 1 Oh. Cir. Ct. 572, 1 Oh. Cir. Dec. 320.

37. Altgelt v. Alamo Nat. Bank, (Tex. Civ. A.) 79 SW 582 [rev on other grounds 98 Tex. 252, 83 SW 6].

38. Cullen v. Walsh, 179 App. Div. 9, 166 NYS 233.

39. Hobbs v. Cashwell, 152 N. C. 183, 67 SE 495; Frazer v. Charleston, 13 S. C. 533; Jones v. Lackland, 2 Gratt. (43 Va.) 81. But compare Shurtleff v. Right, 66 W. Va. 582, 66 SE 719, 135 AmSR 1041 (a creditor may maintain a bill against an administrator and the widow and heirs of a decedent for discovery of assets, settlement of the administration accounts, and in default of personal assets to subject to the payment of his debt land conveyed by decedent in his lifetime to children, in consideration of love and affection, maintenance and support, and at the death of the surviving grantor to pay stipulated sums to other heirs).

40. Praser v. Charleston, 13 S. C. 533.

[a] **Assignees** of the legatees have the right to be made parties to the bill. Frazer v. Charleston, 13 S. C. 533.

41. White v. Kennedy, 23 W. Va. 221.

42. Shelton v. Timmons, 189 Ala. 289, 66 S 9.

43. Spokane v. Costello, 57 Wash. 183, 106 P 764.

44. Spokane v. Costello, 57 Wash. 183, 106 P 764.

45. Ryon v. George, 32 Tex. Civ. A. 504, 75 SW 48.

46. Mathewson v. Wakelee, 83 Conn. 75, 75 A 93.

47. Scroggins v. Oliver, 7 Ind. T. 740, 104 SW 1161.

48. Doris v. Story, 122 Ga. 611, 50 SE 348.

49. Wilson v. Kirkland, 170 Ala. 72, 55 S 174; Moragne v. Doe, 143 Ala. 459, 39 S 161, 111 AmSR 52, 5 AnnCas 55; McKay v. Broad, 70 Ala. 377; Scroggins v. Oliver, 7 Ind. T. 740, 104 SW 1161.

50. Stiles v. Hawkins, (Tex.) 207 SW 89 (there being no debts).

51. Spicer v. Spicer, 249 Mo. 582, 155 SW 832, AnnCas1914D 238.

52. Grisby v. Miller, 231 Fed. 521.

53. Ala.—Randolph v. Hubbert, 190 Ala. 610, 67 S 416. But compare Wilson v. Kirkland, 172 Ala. 72, 74, 55 S 174 ("Ejectment cannot be maintained by heir and personal representative jointly as original parties, because they have no interests in common").

Ark.—Cook v. Franklin, 73 Ark. 23, 83 SW 325; Chowning v. Stanfield, 49 Ark. 87, 4 SW 476; Sisk v. Almon, 34 Ark. 391.

La.—Benton v. Benton, 106 La. 99, 30 S 137; Ledoux v. Burton, 30 La. Ann. 576.

N. C.—Barbee v. Penny, 172 N. C. 653, 90 SE 805.

Oh.—Clark v. McClain Fire Brick Co., 125 NE 877.

rights and powers pass to the personal representative does not empower the personal representative to maintain ejectment with making the mortgagee's heirs at law parties.[54] An administrator, in the absence of statute,[55] cannot maintain a bill in equity to which the heirs are not parties to recover land of his intestate on the ground that the assets of the estate are insufficient to pay its debts,[56] in the absence of a showing that it has been declared insolvent.[57] Where suit is brought by an executor of one succession to recover property seized by the executor of another succession, he must join as defendants the heirs of the seizing creditor.[58] Under a statute providing that in suits against decedent's estates, involving title to land, the executor or administrator, if any, and the heirs, shall be made parties defendant in a suit to recover land, the heirs are necessary parties.[59] Where executors who have, under the will, a naked power of sale seek to cancel their contract for the sale of the land on the ground of want of authority to make the contract, the heirs or devisees are necessary parties.[60]

Representative without heirs or devisees. Where an administrator purchases land at a sale under execution in his favor as such, it may be treated as personalty until his duty in respect to it is performed and he may proceed for its recovery without joining the heirs.[61] Where the purchaser at a sheriff's sale on execution dies, and a conveyance is made to his personal representative, the latter may bring an action to recover possession, without joining any of the heirs.[62] Under a statute providing that ejectment may be maintained in all cases where plaintiff is legally entitled to the possession of the premises, the administrator of an estate, the personal assets of which have been exhausted, leaving debts unpaid, is entitled to bring ejectment for lands of decedent without decedent's heirs being joined,[63] when defendant does not seek affirmative relief against the heirs.[64] Under statutes authorizing an executor to sue without joining the person for whose benefit the action is prosecuted, requiring the executor to take into his possession all the estate of the decedent, and providing that for the purpose of bringing suits to quiet title his possession is the possession of the devisees, and that actions for the recovery of any real property may be maintained by the executor, etc., an action for the cancellation of a deed may be continued on plaintiff's death by his executor without joining the devisees as parties, and their rights are fully protected by an order allowing them to intervene at any time prior to final judgment.[65] If the sole and exclusive right to prosecute and defend all suits concerning decedent's land is given by will to the executor and the legal title vested in him, the devisees are not necessary parties to a suit concerning the land;[66] and where title in fee vests in the executors by the terms of the will, they may maintain an action against one wrongfully in possession of the land for its recovery without joining the heirs as parties.[67]

[§ 1988] **b. Foreclosure of Mortgages—(1) After Death of Mortgagee.** Where a mortgagee dies, his personal representative is the proper party to maintain a bill to foreclose the mortgage,[68] for the reason that the money secured belongs to the personal estate and draws after it the mortgaged estate as an incident.[69] It has been considered that the heir of the mortgagee is a necessary party,[70] as being a trustee of the legal estate for the executor,[71] and because if the mortgage should be redeemed there would be no one before the court by whom an effectual conveyance of the legal estate could be made.[72] It has also been considered that, where the heir of the mortgagee is in possession, he should be made a party.[73] But the heir is not a necessary party where the statute provides that payment of the mortgage debt to the mortgagee or his representative revests the title in the mortgagor without reconveyance,[74] or that a mortgage may be released by the personal representative of a de-

Tex.—Wiseman v. Cottingham, (Civ. A.) 141 SW 817.

[a] **Under statutes authorizing heirs or devisees to join with the personal representative** in suits to recover real property belonging to the estate, the heirs cannot compel the bringing of such action by an executor. Crosby v. Dowd, 61 Cal. 557.

[b] **Trespass to try title.**—(1) The statute authorizes the personal representative to maintain an action of trespass to try title without joining the heirs. Bogess v. Brownson, 59 Tex. 417; Zacharie v. Waldrom, 56 Tex. 116; Gunter v. Fox, 51 Tex. 383 [overr Barrett v. Barrett, 31 Tex. 344]; Guilford v. Love, 49 Tex. 715. (2) Where a defendant in such a suit asks affirmative relief in his answer, he becomes a plaintiff to the extent of such relief, and if he fails to make the heirs a judgment in his favor will not divest their title. East v. Dugan, 79 Tex. 329, 15 SW 273.

54. Hughes v. Gay, 132 N. C. 50, 43 SE 539.

55. See infra text and notes 63, 64.

56. Campbell v. Doyle, 57 Miss. 292.

57. Campbell v. Doyle, 57 Miss. 292.

58. Bird v. Générès, 34 La. Ann. 321.

59. Wiseman v. Cottingham, (Tex. Civ. A.) 141 SW 817 (personal service on the administrator does not make the heirs parties).

60. Barbee v. Penny, 172 N. C. 653, 90 SE 805.

61. Jackson v. Roberts, 95 Ky. 410, 25 SW 879, 15 KyL 831 (nevertheless it is not improper to substitute the heirs as plaintiffs in his stead).

62. Reynolds v. Darling, 42 Barb. (N. Y.) 418.

63. Cook v. Franklin, 73 Ark. 23, 83 SW 325.

64. Cook v. Franklin, 73 Ark. 23, 83 SW 325.

65. Subera v. Jones, 20 S. D. 628, 108 NW 26.

66. Lee v. Colston, 5 T. B. Mon. (Ky.) 238; Paterno v. Solis, 15 Philippine 153.

67. Winn v. Walker, 147 Ga. 427, 94 SE 468; Martin v. Spurrier, 23 Oh. Cir. Ct. 110.

63. Ark.—Swinton v. Cuffman, 213 SW 409.

Cal.—Grattan v. Wiggins, 23 Cal. 16.

Conn.—Roath v. Smith, 5 Conn. 133.

Ill.—Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 NE 492.

Me.—Plummer v. Doughty, 78 Me. 341, 5 A 526; Webster v. Calden, 56 Me. 204; Felch v. Hooper, 20 Me. 159.

Mass.—Marsh v. Austin, 1 Allen 235; Fay v. Cheney, 14 Pick. 399.

Miss.—Griffin v. Lovell, 42 Miss. 402.

Oh.—Miller v. Donaldson, 17 Oh. 264.

Eng.—Freake v. Horseley, 2 Freem. Ch. 180, 22 Reprint 1145, Nels. 93, 21 Reprint 798; Story Eq. Pl. § 200.

[a] **An administrator de bonis non with the will annexed** may bring suit to foreclose a mortgage making other mortgagees as well as the mortgagor parties. Miller v. Donaldson, 17 Oh. 264.

[b] **The personal representative of a trust creditor** is a necessary party to a bill by the trustees to remove a cloud on the title to the property, fix the amount of the trust debt, and obtain a decree of sale. Bryan v. McCann, 55 W. Va. 372, 47 SE 143.

[c] **Limitation of rule.**—Where the widow had made an amicable settlement with other heirs, and was the sole owner of the mortgage which had been assigned to her, and the administrator of the estate had fully settled it and been discharged, and the settlement had been approved by the court, the administrator was neither a necessary nor a proper party to an action for foreclosure brought by the widow. Westerfield v. Spencer, 61 Ind. 339.

69. Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 NE 492; Griffin v. Lovell, 42 Miss. 402; Story Eq. Pl. § 200.

Mortgage and mortgage interests as assets see supra § 342.

70. Worthington v. Lee, 2 Bland (Md.) 678; Hughes v. Gay, 132 N. C. 50, 43 SE 539; Hughes v. Hodges, 94 N. C. 56; McIver v. Cherry, 8 Humphr. (Tenn.) 713; Scott v. Nicoll, 3 Russ. 476, 3 EngCh 476, 38 Reprint 654; Powell Mortg. p 970; Story Eq. Pl. § 200.

71. Scott v. Nicoll, 3 Russ. 476, 3 EngCh 476, 38 Reprint 654.

72. Worthington v. Lee, 2 Bland (Md.) 678; Powell Mortg. 970; Story Eq. Pl. § 200.

73. Huggins v. Hall, 10 Ala. 283; Osborne v. Tunis, 25 N. J. L. 633.

74. Griffin v. Lovell, 42 Miss. 402.

ceased mortgage,[75] or gives the administrator the sole right to maintain actions for debts due deceased;[76] and under statutes of this character it has been held that the heir is not even a proper party.[77] Where an executor accepts payment of a bond secured by mortgage in Confederate currency and delivers up the bond and enters the mortgage satisfied and cancels it, he is a necessary party to a suit by the legatees against the obligor in the bond to compel him to deliver it up and to obtain control of the property mortgaged for distribution.[78]

On the death of one of two comortgagees, the survivor is the only person who can sue to foreclose, but he must make the representatives of the deceased comortgagee parties.[79]

[§ 1989] **(2) After Death of Mortgagor—(a) Personal Representative—aa. As Necessary Party.** It is sometimes expressly required by statute that the personal representative of a deceased mortgagor shall be made a party to a suit to foreclose the mortgage,[80] and such joinder has been held to be necessary under statutes giving the personal representative possession of the real as well as the personal property for purposes of administration;[81] but in the absence of any such controlling statute the weight of authority supports the view that the personal representative of the mortgagor is not a necessary party to a foreclosure suit,[82] although there are decisions asserting the contrary view.[83] If the heir desires the benefit of having the personal estate applied in exoneration of the real, he must enforce the right by filing a bill against the representative for such relief.[84] If, however, the bill, in addition to seeking to foreclose, seeks to charge the personal estate with any deficiency in case an amount sufficient to pay the mortgage debt is not realized, the personal representative of the mortgagor is a necessary party;[85] and it has also been held that in the case of a mortgage of a term of years only, the equity belongs to the personal representative and he is a necessary party.[86] If the mortgage comprises both freehold and leasehold estates the heir and the personal representative are both necessary parties.[87]

[§ 1990] **bb. As Proper Party.** The personal representative of a deceased mortgagor is a proper party to a bill to foreclose the mortgage,[88] and if not made a defendant, he may upon his own motion

75. Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 NE 492; Dayton v. Dayton, 7 Ill. A. 136.

76. Grattan v. Wiggins, 23 Cal. 16.

77. Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 NE 492.

78. Howland v. Kelly, 12 F. Cas. No. 6,796, Chase 427.

79. Mutual L. Ins. Co. v. Sturges, 32 N. J. Eq. 678 [rev on other grounds 33 N. J. Eq. 328].

80. Hall v. Klepzig, 99 Mo. 83, 12 SW 372; Tierney v. Spiva, 97 Mo. 98, 10 SW 433; Miles v. Smith, 22 Mo. 502; Riley v. McCord, 21 Mo. 285; Hardy v. Atkinson, 136 Mo. A. 595, 118 SW 516.

81. Boyle v. Williams, 72 Ala. 351; Wilkins v. Wilkins, 4 Port. (Ala.) 245; Harwood v. Marye, 8 Cal. 580; Kelsey v. Welch, 8 S. D. 255, 66 NW 390.

[a] **The appointment of an administrator ad litem** is insufficient to cure the defect arising from not making the heirs and legal representatives of the mortgagor parties. Bell v. Hall, 76 Ala. 546.

[b] **Such joinder is not necessary where:** (1) The mortgagor has conveyed the mortgaged property to another. Gutzeit v. Pennie, 98 Cal. 327, 33 P 199; Hibernia Sav., etc., Soc. v. Herbert, 53 Cal. 375. (2) The mortgaged premises have been set apart to the widow. Schadt v. Heppe, 45 Cal. 433. (3) It is shown that the assets in the representative's hands to be administered are discharged from all liability for the mortgage debt. Boyle v. Williams, 72 Ala. 351; Dooley v. Villalonga, 61 Ala. 129 [disappr Inge v. Boardman, 2 Ala. 331].

82. Ill.—Bissell v. Chicago Mar. Co., 55 Ill. 165; Roberts v. Flatt, 42 Ill. A. 608.

Ind.—Lovering v. King, 97 Ind. 130; Cole v. McMickle, 30 Ind. 94; Slaughter v. Foust, 4 Blackf. 379.

Iowa.—Darlington v. Effey, 13 Iowa 177.

Md.—David v. Grahame, 2 Harr. & G. 94; Worthington v. Lee, 2 Bland 678.

Mich.—Abbott v. Godfrey, 1 Mich. 178.

Minn.—Hill v. Townley, 45 Minn. 167, 47 NW 653.

Nev.—Ricketts v. Hutchinson, 18 Nev. 215, 2 P 52, 4 P 702.

N. J.—Harlem Co-operative Bldg., etc., Assoc. v. Freeburn, 54 N. J. Eq. 37, 33 A 514; United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985.

N. Y.—Heidgerd v. Reis, 135 App. Div. 414, 119 NYS 921.

N. C.—Fraser v. Bean, 96 N. C. 327, 2 SE 159; Averett v. Ward, 45 N. C. 192. See also McGowan v. Davenport, 134 N. C. 526, 47 SE 27 (authority of cases cited above recognized).

Oh.—Sherman v. Millard, 27 Oh. Cir. Ct. 175. Contra Hall v. Musler, 1 Disn. 36, 12 Oh. Dec. (Reprint) 471 [foll Bateman v. Morris, 7 OhS&CP 287, 4 OhNW 397].

Pa.—Herron v. Stevenson, 259 Pa. 354, 357, 102 A 1049 [quot Cyc].

S. C.—Butler v. Williams, 27 S. C. 221, 3 SE 211; Trapier v. Waldo, 16 S. C. 276; Bryce v. Bowers, 32 S. C. Eq. 41.

Va.—Graham v. Carter, 2 Hen. & M. (12 Va.) 6.

Wis.—Walker v. Jarvis, 16 Wis. 28.

Eng.—Duncombe v. Hansley, 3 P. Wms. 333 note, 24 Reprint 1089.

"An administrator as such has no interest in the land of his intestate, nor does he represent the general creditors of his intestate in any such sense as makes him a necessary party to a foreclosure action even where there is a deficiency of personalty to pay debts. An administrator is the person through whom any deficiency on the bond and mortgage debt may be collected and he may be made a party defendant and adjudged to pay through his administration of the estate any deficiency which may arise if the plaintiff sees fit to so demand. . . . But it is not incumbent upon the holder of the mortgage to make this demand, for the only necessary parties defendant to a foreclosure action are the persons having title to the premises covered by the mortgage and those who have acquired liens subsequent to the mortgage." Heidgerd v. Reis, 135 App. Div. 414, 416, 119 NYS 921.

[a] **Where the mortgagor has conveyed mortgaged premises,** his personal representative is not a necessary party to a bill for foreclosure. Wright v. Eaves, 31 S. C. Eq. 582.

83. Dixon v. Cuyler, 27 Ga. 248; Barton v. Burbank, 138 La. 997, 71 S 134; Sargent v. Baldwin, 60 Vt. 17, 13 A 854.

84. Harlem Co-operative Bldg., etc., Assoc. v. Freeburn, 54 N. J. Eq. 37, 33 A 514; Herron v. Stevenson, 259 Pa. 354, 357, 102 A 1049 [quot Cyc]; Duncombe v. Hansley, 3 P. Wms. 333 note, 24 Reprint 1089.

[a] **The mortgagee need not intermeddle with the personal estate** or run into an account thereof, and if the heir would have the benefit of any payment made by the mortgagor of his executor he must prove it. Duncombe v. Hansley, 3 P. Wms. 333 note, 24 Reprint 1089.

85. Ill.—Roberts v. Flatt, 42 Ill. A. 608 [aff 142 Ill. 485, 32 NE 484].

Ind.—Lovering v. King, 97 Ind. 130; Slaughter v. Foust, 4 Blackf. 379.

Iowa.—Darlington v. Effey, 13 Iowa 177.

Mich.—Abbott v. Godfroy, 1 Mich. 178.

N. Y.—Leonard v. Morris, 9 Paige 90.

S. C.—Drayton v. Marshall, 22 S. C. Eq. 373, 33 AmD 84. Contra Butler v. Williams, 27 S. C. 221, 3 SE 211 (the prayer for relief is no part of the complaint).

86. Bradshaw v. Outram, 13 Ves. Jr. 234, 33 Reprint 282.

87. Story Eq. Pl. 196.

88. Ill.—Black v. Thomson, 120 Ill. A. 424.

Iowa.—Hodgdon v. Heidman, 66 Iowa 645, 24 NW 257; Huston v. Stringham, 21 Iowa 36; Darlington v. Effey, 13 Iowa 177.

Minn.—Hill v. Townley, 45 Minn. 167, 47 NW 653.

N. J.—United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985.

N. Y.—Heidgerd v. Reis, 135 App. Div. 414, 119 NYS 921.

N. C.—Averett v. Ward, 45 N. C. 192.

[a] **Reasons for rule.**—(1) The estate is liable for any deficit after exhausting the mortgage, although no judgment can be rendered against the personal representative for the deficiency. Hodgdon v. Heidman, 66 Iowa 645, 24 NW 257; Hill v. Townley, 45 Minn. 167, 47 NW 653. (2) The interest which the personal representative has in being present when an account is taken of the amount remaining due in order that he may see that all proper credits are given and that the sum remaining due it fairly and correctly ascertained is sufficient to make him a proper party. The complainant also has this advantage in making him a party that, while no direct or active relief can be awarded against him, he will nevertheless be concluded by the decree as to the amount due, and if a suit at law or other proceeding should afterward be necessary to recover the whole amount due on the bond, the amount so recovered will be considered, after the proceeds of sale of

be joined as such.[89]

[§ 1991] **(b) Heirs.** As a general rule the heirs of a deceased mortgagor are necessary parties for a suit to foreclose the mortgage,[90] but it has been held otherwise,[91] and a foreclosure suit against the personal representative without joining the heirs is sometimes authorized by statute.[92]

[§ 1992] **c. Redemption from Mortgage.** The personal representative of a mortgagor is sometimes given by statute the right to sue to redeem mortgage premises,[93] and the same right has been held to arise from a statute giving the representative the right to possession of decedent's land.[94] But in the absence of statute a suit for redemption is properly brought by the heirs or devisees,[95] and it is not necessary to make the personal representative a party where all payments on the debt were made by the heir and no effort is made to charge the personal assets of the estate.[96] Where, however, the bill alleges that part of the mortgage was paid by the mortgagor in his lifetime, his personal representative as well as his heir or devisee is a necessary party to take an account of what is due on the mortgage;[97] and it has been said that as the personal assets are usually first to be applied in exoneration of the real estate mortgaged it would seem that on a bill to redeem by the heir or devisee the personal representative of the mortgagor might properly be made a party defendant in order to have the assets so applied.[98] Where a bill by heirs of a deceased grantor to declare his deed a mortgage alleges that his estate owed no debts and that there was no necessity for an administration, the personal representative is not a necessary party and the bill is properly filed by the heirs alone.[99] In case of the death of a mortgagee, his personal representative, being entitled to receive payment of the mortgage debt, is a necessary party to an action to a suit by the mortgagor to redeem,[1] and, under the modern view that a mortgage is merely security for a debt,[2] the heirs of the mortgagee are not necessary parties.[3]

[§ 1993] **d. Enforcement of Vendor's Lien.** The personal representative of a deceased vendor is the proper party to file a bill to enforce a lien for unpaid purchase money.[4] If the legal title has been retained by the vendor[5] his heirs or devisees are necessary parties,[6] and it has been held that their presence cannot be dispensed with by tendering either in the pleadings or at the trial a deed from the heirs to the purchasers unless the latter accepts the deed.[7] One who has purchased at an administrator's sale part of the land previously sold by decedent, and on which the administrator is seeking to foreclose a vendor's lien, has such an interest as warrants the court to permit him to become a party defendant.[8] Where the purchaser of land dies, his heirs or devisees are ordinarily necessary parties defendant to a bill to enforce a vendor's lien on the land;[9] but the personal representative is also a proper,[10] and ordinarily a necessary,[11] party, because the personal estate is primarily liable for

the mortgaged premises have been credited, as having been unalterably determined by the decree in the foreclosure suit. United Security L. Ins., etc., Co. v. Vandegrift, 51 N. J. Eq. 400, 26 A 985.

89. Huston v. Stringham, 21 Iowa 36; Darlington v. Effey, 13 Iowa 177.

90. Scott v. Jenkins, (Fla.) 35 S 101; Barton v. Burbank, 114 La. 224, 38 S 150.

[a] **When the administrator delivers possession** of the property of the succession to the widow and heirs with the consent of a particular creditor, and such creditor after eight years seeks to foreclose a mortgage given by decedent on the property so delivered, the heirs and the widow are necessary parties to the proceedings, and notice to the former administrator alone is not sufficient. Barton v. Burbank, 114 La. 224, 38 S 150.

[b] **Circumstances under which widow and heirs permitted to join.—** An administrator filed a petition against the widow and heirs seeking to sell certain land to pay off a mortgage given by decedent to secure a note. The widow and heirs answered that the note had been fully paid by the deceased in his lifetime. The mortgagee was made a party plaintiff to the proceeding. The administrator and mortgagee submitted to a voluntary nonsuit. Thereafter the widow and heirs sued the mortgagee, alleging that the mortgage indebtedness had been fully paid by the deceased in his lifetime, and praying that the note and mortgage are canceled, and the cloud upon their title be thus removed. The mortgagee denied payment, and a trial was had, resulting in the judgment that the note and mortgage are surrendered by defendant and canceled. Subsequently the mortgagee sued the administrator to foreclose the mortgage, and the administrator refused to answer. It was held in such subsequent suit, that the court properly permitted the widow and heirs to become defendants and answer the complaint, by setting up the judgment canceling the note and mortgage, it being manifestly just, under the circumstances, that they are given the opportunity to resist the foreclosure of the mortgage and prevent the land from being applied to the payment of a debt which does not exist. McArthur v. Griffith, 147 N. C. 545, 61 SE 519.

91. Dixon v. Cuyler, 27 Ga. 248.

92. McCaughey v. Lyall, 152 Cal. 615, 93 P 681 [aff 224 U. S. 558, 32 SCt 602, 56 L. ed. 883].

93. Long v. Richards, 170 Mass. 120, 48 NE 1083, 64 AmSR 281; Aiken v. Morse, 104 Mass. 277.

94. Enos v. Sutherland, 11 Mich. 538 (heirs need not be joined).

95. Sutherland v. Rose, 47 Barb. (N. Y.) 144 (an administrator has no interest in the controversy and can bring no action).

96. Jones v. Richardson, 85 Ala. 463, 5 S 194.

97. Cholmondeley v. Clinton, 2 Jac. & W. 1, 37 Reprint 527, 2 Meriv. 171, 35 Reprint 905 [aff 4 Bligh 1, 4 Reprint 721]; Story Eq. Pl. § 182.

98. Story Eq. Pl. § 182.

99. Nelson v. Wadsworth, (Ala.) 55 S 120.

1. Ark.—Wood v. Holland, 57 Ark. 198, 21 SW 223.
Me.—Hilton v. Lothrop, 46 Me. 297.
Mass.—Haskins v. Hawkes, 108 Mass. 379.
N. C.—Guthrie v. Sorrell, 41 N. C. 13.
Eng.—Anonymous, 2 Freem. Ch. 52, 22 Reprint 1053; Hobart v. Abbot, 2 P. Wms. 643, 24 Reprint 897.

[a] **This doctrine is based upon** the principle that the money should return to the fund from which it came. Anonymous, 2 Freem. Ch. 52, 22 Reprint 1053.

2. See Mortgages [27 Cyc 961].

3. Dexter v. Arnold, 7 F. Cas. No. 3,857, 1 Sumn. 109; Copeland v. Yoakum, 38 Mo. 349.

4. Adams v. Green, 34 Barb. (N. Y.) 176; McCoy v. Broderick, 3 Sneed (Tenn.) 203.

5. See Vendor and Purchaser [29 Cyc 1794].

6. Ark.—Anderson v. Levy, 33 Ark. 665.
Ky.—Phillips v. Breck, 79 Ky. 465; Smith v. West, 5 Litt. 48; Brackett v. Boreing, 89 SW 496, 28 KyL 386.
Miss.—Kimbrough v. Curtis, 50 Miss. 117.
Mo.—Leeper v. Lyon, 68 Mo. 216.
Tenn.—McCoy v. Broderick, 3 Sneed 203.
Tex.—Loller v. Frost, 38 Tex. 208.
Va.—Mott v. Carter, 26 Gratt. (67 Va.) 127.

[a] **Reason for rule.—**The personal representative has no right to the purchase money until he can show that he is in a condition to make a good title to the purchaser and this can only be done by bringing the heirs who are vested with the legal title before the court. McCoy v. Broderick, 3 Sneed (Tenn.) 203.

[b] **Amendment adding parties.—** Where, notwithstanding an objection that the heirs of the vendors should be made parties, the trial court, without requiring this to be done, makes a decree for the sale of the land, the appellate court may amend the decree by directing that the heirs be made parties before the land is sold and affirmed as amended. Mott v. Carter, 26 Gratt. (67 Va.) 127.

7. Leeper v. Lyon, 68 Mo. 216. But compare Wollenberg v. Rose, 41 Or. 314, 68 P 804 (the fact that a bill by an administrator to foreclose defendant's equitable interest in lands sold him by plaintiff's intestate does not make the heirs of the intestate parties is not an objection after answer, the administrator alleging his readiness to furnish a good and sufficient deed).

8. Chapman v. Callahan, 66 Mo. 299.

9. See generally Vendor and Purchaser.

10. Lord v. Wilcox, 99 Ind. 491.

11. Lewis v. Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113; Moore v. Alexander, 81 Ala. 509, 8 S 199; Overly v. Tipton, 68 Ind. 410; Teetor v. Abden, 2 Ind. 183; Bryer v. Chase, 8 Blackf. (Ind.) 508; Sommerville v. Sommerville, 26 W. Va. 484; Morris v. Payton, 10 W. Va. 1.

[a] **Personal representative of**

the debt and the heir or devisee is entitled to have the personal estate first applied to the payment thereof.[12] But it has been held that, where a debt has long been barred so that a deficiency judgment cannot be had, the personal representatives of a deceased purchaser need not be made parties to a proceeding against his heirs to enforce a vendor's lien.[13]

[§ 1994] **e. Release of Vendor's Lien.** Where a vendor's lien has been reserved by a person who has since died, his personal representative is a necessary party to a bill seeking the release of the lien.[14]

[§ 1995] **f. Enforcement of Mechanic's Lien.** In a proceeding to enforce a mechanic's lien against decedent's land, his administrator is properly cited to defend, where the land is needed to pay debts.[15]

[§ 1996] **g. Specific Performance of Contract of Sale—(1) After Death of Vendor.** As a general rule the heirs or devisees of the deceased vendor in an executory contract of sale are necessary parties to a suit by his personal representative against the purchaser to enforce specific performance,[16] although it has been held otherwise under a statute giving the personal representative of a deceased vendor power to convey the property.[17] Where an action for specific performance is brought by the purchaser, the heirs or devisees of the vendor are necessary parties,[18] unless the statute authorizes the bringing of such an action against the personal representative alone;[19] but the representative is also a proper party, as the representative of creditors, to pay whom the property may be needed,[20] although he is not a necessary party.[21] One who claims property as a remainderman under a marriage agreement between his parents and brings a bill for specific performance of such agreement should not make the legatees in his father's will parties defendant,[22] as the executor represents the adverse interest under the will.[23]

[§ 1997] **(2) After Death of Purchaser.** The representative of the purchaser may properly join as a complainant in a bill for specific performance when the purchase money is unpaid or the fact of payment is controverted,[24] but it is otherwise where the purchase money has been paid in full,[25] and the bill affirmatively shows that there can be no necessity for the exercise by the administrator of his statutory powers over the real estate.[26] The widow of the purchaser is a necessary party complainant because she was entitled to dower in her husband's equitable estate in the land at the time of his

subpurchaser.—Where a purchaser of land resells it and the person purchasing from him dies, the personal representative of the latter is a necessary party to a bill to enforce a vendor's lien on the land. Mullins v. Sparks, 43 Miss. 129.

[b] **Administrator ad litem.**—When the bill alleges that the estate is largely insolvent and has been declared insolvent and that all the assets have been administered and distributed, the estate should be represented by an administrator with full powers, and an administrator ad litem is not sufficient. Moore v. Alexander, 81 Ala. 509, 8 S 199.

[c] **Limitations of rule.**—(1) The personal representative of the deceased purchaser is not a necessary party defendant if decedent left no personal estate to be administered and this is alleged in the bill. Overly v. Tipton, 68 Ind. 410. (2) Where the purchaser was a nonresident and died without personal estate or a personal representative in the state, a bill might be brought against the heirs alone. Reed v. Gregory, 46 Miss. 740. (3) When complainant sues as assignee of a promissory note given for the purchase money of land claiming as residuary legatee under the will of the deceased vendor, and it is shown that the executors have made a final settlement of the estate and delivered the note to complainant, they are neither necessary nor proper parties to the suit. Bogan v. Hamilton, 90 Ala. 454, 8 S 186.

12. Reed v. Gregory, 46 Miss. 740; Sommerville v. Sommerville, 26 W. Va. 484.

13. Cook v. Atkins, 173 Ala. 363, 56 S 224.

14. Thompson v. Hern, 62 W. Va. 497, 59 SE 504.

15. Russell v. Howell, 74 N. H. 551, 69 A 886.

16. U. S.—Morgan v. Morgan, 2 Wheat. 290, 4 L. ed. 242.

Ill.—Butman v. Butman, 213 Ill. 104, 72 NE 821; Burger v. Potter, 32 Ill. 66.

Ky.—Phillips v. Breck, 79 Ky. 465, 3 KyL 271.

Mo.—Perry v. Roberts, 23 Mo. 221.

Eng.—Roberts v. Marchant, 1 Hare 547, 23 EngCh 547, 66 Reprint 1148, 1 Phil. Ch. 370, 19 EngCh 370, 41 Reprint 672; Calvert Parties p 293; Story Eq. Pl. § 160.

[a] **Reason for rule.**—"Boreing did not accept the deed to the out lands which was tendered to him by Brackett. The legal title to these lands therefore remained in Brackett, and when he died descended to his heirs at law. They look the legal title subject to his heirs at law. They took the legal title subject to the right of Boreing to accept the deed which their father tendered, or subject to the power of the chancellor to compel the aceptance of the deed by Boreing. But they are necessary parties to the action, for no valid title will be made to Boreing for the land unless they are before the court and bound by the orders of the court." Brackett v. Boreing, 89 SW 496, 500, 28 KyL 386.

[b] **Effect of conveyance by heirs to personal representative.**—Where the heirs consent to have a contract of sale executed and voluntarily convey the title to the administratrix to enable her to transfer it to the purchaser, it is not necessary to make them parties in a suit for specific performance of the contract brought by the administratrix. Schroeppel v. Hopper, 40 Barb. (N. Y.) 425.

17. Griffith v. Stewart, 31 App. (D. C.) 29 [aff 217 U. S. 323, 30 SCt 528, 54 L. ed. 783, 9 AnnCas 639] (Maryland statute).

18. Duncan v. Wickliffe, 5 Ill. 452; Carr v. Callaghan, 3 Litt. (Ky.) 365.

[a] **Reason of rule.**—This is necessary in order to afford the heirs an opportunity of contesting the fact whether their ancestor had done an act by which their interest in the property alleged to be conveyed should be divested. Carr v. Callaghan, 3 Litt. (Ky.) 365.

19. Judd v. Mosely, 30 Iowa 423; Shannon v. Taylor, 16 Tex. 413; Ottenhouse v. Burleson, 11 Tex. 87; Kegans v. Allcorn, 9 Tex. 25; Holt v. Clemmons, 3 Tex. 423; Thompson v. Duncan, 1 Tex. 485.

[a] **Such a statute is permissive** and does not preclude suit against the heirs. Judd v. Mosely, 30 Iowa 423.

[b] **It is proper to join** the heirs or devisees as parties, although such joinder is not necessary. Ottenhouse v. Burleson, 11 Tex. 87.

20. In re Healy, 6 Cal. Unrep. Cas. 780, 66 P 175; Judd v. Mosely, 30 Iowa 423; Allen v. Troutman, 1 Ky. Op. 66; Colfax v. Colfax, 32 N. J. Eq. 206.

[a] **Where representative not a party and no title shown.**—Where the administrator of a decedent, who contracted to convey land, is not made a party to a bill for specific performance, and complainant admits that decedent had no title, it is error to decree specific performance. Southworth v. Brownlow, 84 Miss. 405, 36 S 522.

21. Judd v. Mosely, 30 Iowa 423; Freeman v. Swiger, (W. Va.) 98 SE 440.

[a] **An executor who is also a devisee** and is made a party in that character is not a necessary party in his character of executor. Watson v. Mahan, 20 Ind. 223.

[b] **Contract to devise homestead.**—The executor of the obligor is not a necessary party to a suit for specific performance of a contract to devise a homestead where he is not charged with any duty involving the land in question. Eastman v. Eastman, 117 Me. 276, 104 A 1.

22. Harrington v. McLean, 62 N. C. 258.

23. Harrington v. McLean, 62 N. C. 258.

24. McKay v. Broad, 70 Ala. 377.

[a] **Necessary party.**—Where the purchaser dies, and his heirs seek to enforce specific performance against the vendor, the representative of the purchaser is a necessary party defendant, as the heirs to whom the contract descends in equity are entitled to have the contract primarily paid out of the personal assets. Champion v. Brown, 6 Johns. Ch. (N. Y.) 398, 10 AmD 343; Story Eq. Pl. § 177. See also Downing v. Risley, 15 N. J. Eq. 93 (where the estate has not been settled or decedent's debts paid, the administrator should be a party because he has an interest in disputing the contract, and is the party liable to pay the purchase money).

25. McKay v. Broad, 70 Ala. 377; Hill v. Smith, 32 N. J. Eq. 473.

26. McKay v. Broad, 70 Ala. 377.

[a] **Amendment striking out name of administrator.**—When a bill is improperly filed in the name of an administrator as sole plaintiff, and the heirs are brought in by amendment, the name of the administrator cannot be struck out by a second amendment, since this would work an entire change of parties. McKay v. Broad, 70 Ala. 377.

death.[27] The heirs or devisees, as well as the personal representative, of the purchaser are necessary parties to a suit by the vendor for specific performance.[28]

[§ 1998] **h. Rescission of Decedent's Contract.** The personal representative of a vendor against whom a rescission of contract for the sale of land is asked is a necessary party to the suit,[29] and if he is empowered to sell lands and make and acknowledge titles, he represents all the beneficiaries and they are not necessary parties.[30] So where an obligee of a bond for the conveyance of land dies before the time fixed for the conveyance, his executors must be made parties to a bill to rescind the contract on the ground of fraud on the part of the obligor.[31] If a covenant to convey is not broken in the purchaser's lifetime, his heirs, being entitled to all the advantages resulting from the covenant, are necessary parties to an action to cancel the contract.[32] An administrator's bill to cancel decedent's deed, being for the benefit of all persons interested in the estate, a decree setting it aside cannot be disturbed, on appeal of defendants, as affecting the interest of a person not a party.[33]

[§ 1999] **i. Recovery of Purchase Price of Property Sold.**[34] The personal representative of a deceased vendor of land should be a party to a suit for the recovery of the purchase money;[35] but the heirs are not necessary parties,[36] nor is it proper to join the widow, or, after her death, her next of kin.[37] When an executor acting in good faith and in the exercise of sound discretion has purchased lands at a judicial sale in order to save a debt due to the estate, the lands are regarded simply as personalty in his hands, and the devisees or heirs are not necessary parties to a bill filed by him against a subsequent purchaser to subject the lands to payment of the purchase money.[38]

[§ 2000] **j. Suits to Set Aside Fraudulent Conveyances of Decedent.** The question whether or not a personal representative is a proper party to bring suit to set aside a fraudulent conveyance executed by his decedent has already been discussed in this treatise.[39] The necessity or propriety of joining the personal representative of the grantor in an action by creditors to set aside such a conveyance is discussed in another article.[40]

[§ 2001] **k. Suits to Set Aside Conveyances for Fraud.** Where an executor and testamentary trustee sues to set aside a conveyance made by him as induced by fraud, he may also join himself as plaintiff in his individual capacity.[41]

[§ 2002] **l. Suits to Quiet Title.** The heirs or devisees are the proper parties to sue to quiet title to land of which decedent died possessed,[42] unless a different rule is established by statute.[43] A statute requiring the heirs or devisees to be made parties defendant to every action against the estate involving the title to real estate applies to a suit to quiet title.[44]

[§ 2003] **m. Suits to Subject Land to Payment of Debts.** The administrator is a proper party to an action to subject lands conveyed by a decedent to the lien of a creditor,[45] although not a necessary party to a suit to subject the lands to a judgment lien, decedent admittedly having died without personal assets, and no relief against the administrator being sought.[46] An estate by the entireties devolves on the wife's death on the husband, so that her personal representatives are not necessary parties to a proceeding to collect a judgment against the husband and wife from property so held.[47] Questions relating to the proper parties where the lands sought to be subjected are in the possession of heirs or devisees are considered elsewhere in this work.[48]

[§ 2004] **n. Vacation of Condemnation Proceedings.** An administrator has been held to be a necessary party to a proceeding to vacate condemnation proceedings.[49]

[§ 2005] **o. Establishment of Right of Way.** In an action to establish a right of way across the land of a decedent, the heirs or devisees are necessary parties defendant.[50]

[§ 2006] **p. Enforcement of Trust.** The heirs are necessary parties defendant in a suit against an administrator to obtain a conveyance of real estate alleged to have been held in trust for complainant by defendant's intestate.[51]

[§ 2007] **q. Reformation of Instrument.** The heir of a deceased mortgagee is not a necessary party to a proceeding to correct a misdescription in the mortgage.[52] A suit to correct a mistake in a sale of a land certificate by an executor is not a suit to contest the title of the estate to land, within a statute requiring the executor and heirs and devisees to be made parties to suits contesting

27. Hill v. Smith, 32 N. J. Eq. 473.

28. Townsend v. Champernowne, 9 Price 130, 147 Reprint 44 (while the personal property is primarily chargeable the land purchased belongs in equity to the heirs or devisees and is chargeable with any deficit).

29. Cravens v. Dyer, 1 Litt. (Ky.) 153.

30. Alger v. Anderson, 78 Fed. 729; Forsee v. Forsee, 144 Ky. 169, 137 SW 836.

31. Gatewood v. Rucker, 1 T. B. Mon. (Ky.) 21.

[a] **Reason for rule.**—The right of decedent to be restored the purchase money paid by him has none of the attributes of land but partakes of the nature of a chattel and goes to his personal representative. Rice v. Spotswood, 6 T. B. Mon. (Ky.) 40, 17 AmD 115.

32. Cox v. Grant, 6 J. J. Marsh. (Ky.) 201.

33. Travis v. Parks, 130 Mich. 15, 89 NW 569; Corcoran v. Kennedy, 163 NYS 703.

34. Recovery of price of:
Personalty sold by representative see supra § 745.
Property sold under order of court see supra § 1617.
Realty sold by representative under testamentary authority see supra § 671.

35. Barbour v. Craig, Litt. Sel. Cas. (Ky.) 213.

36. Brackett v. Boreing, 89 SW 496, 500, 28 KyL 386 ("Where land has been sold and conveyed, the personal representative may collect the purchase money by an action, without joining with him the heirs at law").

37. Hubbard v. Clark, (N. J. Ch.) 7 A 26.

38. Hughes v. Hatchett, 55 Ala. 539.

39. See supra § 368.

40. See Fraudulent Conveyances [20 Cyc 714].

41. Smith v. David Stevenson Brewing Co., 50 Misc. 395, 100 NYS 521 [aff 117 App. Div. 690, 102 NYS 672].

42. Marsh v. Waupaca County, 38 Wis. 250.

[a] **Effect of improper joinder.**—Where the administrators have improperly joined with the heirs in bringing an action to quiet title, the misjoinder cannot be reached by demurrer, but the averments of the complaint concerning the administration of the estate would probably be stricken out as irrelevant and redundant. Marsh v. Waupaca County, 38 Wis. 250.

43. Jameson v. Goodwin, 43 Okl. 154, 141 P 767 (under [1909] §§ 5347, 5348, Comp L. [(1910) §§ 6301, 6302 Rev. L.], suits for the recovery of real property and to remove a cloud and to quiet title thereto may be maintained by and against administrators and executors, and the heirs of decedent are not necessary parties).

44. Lufkin v. Galveston, 73 Tex. 340, 11 SW 340; Russell v. Texas, etc., R. Co., 68 Tex. 646, 5 SW 686.

45. Simpson v. Rockius, 77 N. J. Eq. 339, 78 A 758.

46. Johnston v. Pearson, 121 Va. 453, 93 SE 640.

47. Frey v. McGaw, 127 Md. 23, 95 A 960.

48. See Descent and Distribution §§ 313–317; Wills [40 Cyc 2079].

49. Hare v. Ft. Smith, etc., R. Co., 104 Ark. 187, 148 SW 1038.

50. Dwyer v. Olivari, (Tex.) 16 SW 800.

51. Wiley v. Davis, (Me.) 10 A 493.

52. Dayton v. Dayton, 7 Ill. A. 136.

the estate's title to land.[53] Where an executrix, on the sale of her testator's real estate, took a purchase-money mortgage in her own name, a suit for the reformation of the mortgage, so as to make the mortgage payable to her as executrix, cannot be maintained without making the purchaser and the representative of the deceased executrix parties.[54]

[§ 2008] **r. Enjoining Sale by Representative.** All the devisees must be made parties to a bill to enjoin executors from selling land belonging to testator's estate.[55]

[§ 2009] **s. Action for Cutting and Carrying Away Timber.** Where plaintiff's intestate owned an undivided half of the timber on certain land which had been cut and converted by defendants, the intestate's cotenants were not necessary parties to an action by his administrator against the parties who cut and converted the timber for such conversion.[56]

[§ 2010] **t. Actions on Covenants.** It is improper to join the heir and residuary legatee with the administrator of a grantor in an action on the grantor's covenant.[57]

[§ 2011] **u. Action to Restrain Paving Contract by City.** Until the heirs have come forward and accepted the succession and taken charge of it they cannot undertake to represent it and have not alone the quality to stand in judgment in a suit as an abutting owner and taxpayer to restrain the city from entering into a paving contract, but the testamentary executor is the proper person to represent the succession.[58]

[§ 2012] **6. Suit for Specific Performance of Contract of Adoption.** Where a decedent made a contract to adopt a child and to give it a child's rights in his estate, but died without formally adopting the child, and an action was brought to enforce specific performance of the contract so far as the property was concerned, the administrator was properly made a party in order that he might be restrained from delivering the property to the next of kin,[59] although he would not have been a proper party if no affirmative relief had been sought against him.[60]

[§ 2013] **7. Actions or Suits for Legacies or Distributive Shares—a. Actions at Law.** Where the interests of legatees or distributees have been ascertained and fixed by decree and the share of each determined, each may maintain a separate suit for his share without joining the others;[61] and the same is true where the whole estate has been converted into money as directed by a nonintervention will, and the determination of the amount to which each legatee is entitled is a mere matter of calculation.[62] The assignee of a residuary legatee is entitled to maintain an action against the executors and one to whom a part of the estate has been conveyed in payment of an individual indebtedness of one of the executors.[63] Judgment cannot be rendered against executors, on proceedings instituted in the name of the husband alone, for his wife's distributive share in an estate.[64]

[§ 2014] **b. Suits in Equity—(1) By General or Specific Legatee.** Where a legatee brings suit to recover a legacy, the executor is a necessary party defendant,[65] but it is not necessary that other legatees or the residuary legatee are made parties,[66] especially where sufficient assets are admitted by the executor.[67] So far as the residuary legatees are concerned, the executor is their legal representative and it is his duty to see that they are properly defended.[68] Where, however, the suit involves the construction and effect of the residuary clause in the will, the residuary legatees are necessary parties;[69] and to a bill brought by a legatee where legacy is charged on real estate, all other legatees whose legacies are charged on real estate are necessary parties,[70] and the devisee of the land is also a

53. Wood v. Mistretta, 20 Tex. Civ. A. 236, 49 SW 236, 50 SW 135.

54. Cumberland Trust Co. v. Padgett, 70 N. J. Eq. 349, 61 A 837.

55. Lee v. Marshall, 2 T. B. Mon. (Ky.) 30.

56. Ayer, etc., Tie Co. v. Witherspoon, 100 SW 259, 30 KyL 1067.

57. McKillop v. Burton, 82 Vt. 403, 74 A 78.

58. Gurley v. New Orleans, 124 La. 390, 50 S 411.

59. Furman v. Craine, 18 Cal. A. 41, 121 P 1007.

60. Furman v. Craine, 18 Cal. A. 41, 121 P 1007.

61. Van Dyke v. Van Dyke, 72 N. J. Eq. 300, 65 A 215; Beers v. Strong, 128 App. Div. 20, 112 NYS 382; Hauenstein v. Kull, 59 HowPr (N. Y.) 24; Wells v. Margraves, (Tex. Civ. A.) 164 SW 881.

62. Wells v. Margraves, (Tex. Civ. A.) 164 SW 881.

63. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435 [rev 122 App. Div. 890, 106 NYS 1146].

64. Blackwell v. Meneese, 5 Stew. & P. (Ala.) 397.

65. Walker v. Caldwell, 8 Del. Ch. 91, 67 A 1085; McKinney v. Powell, 146 Ga. 569, 91 SE 690; Deptford Tp. M. E. Church v. Hammell, 73 N. J. Eq. 293, 67 A 941; Cooper Eq. Pl. p. 34; Story Eq. Pl. § 171.

[a] **On a bill to charge a legacy upon devised lands,** the executor is a necessary party. Deptford Tp. M. E. Church v. Hammell, 73 N. J. Eq. 293, 67 A 941 (holding, however, that where no objection that the executor was not made a party was made until all the testimony was taken on final hearing, complainant would be allowed to amend the bill by adding the executor as a party defendant, it appearing that the amendment was necessary to the ends of justice, and would in no way embarrass defendant's right of defense).

[b] **Limitation of rule.**—Where, by misrepresentation of the residuary legatee, the legatee receives only a party of his legacy, and the executor has paid over all the remaining assets to the residuary legatee, the legatee may bring a bill against the residuary legatee and the representative of the executor for what remains due him without making the representative of the testator a party. Beasley v. Kenyon, 3 Beav. 544, 43 EngCh 544, 49 Reprint 214.

66. U. S.—Schnepfe v. Schnepfe, 230 Fed. 781, 145 CCA 91 [cit Cyc]; J. Elwood Lee Co. v. Grace Hospital, 206 Fed. 994; West v. Randall, 29 F. Cas. No. 17,424, 2 Mason 181; Dandridge v. Washington, 2 Pet. 370, 7 L. ed. 454.

Ga.—Beall v. Blake, 16 Ga. 119.

Ky.—Todd v. Sterrett, 6 J. J. Marsh. 425.

Mich.—In re Sloman, 186 Mich. 434, 152 NW 957.

N. J.—Davison v. Rake, 45 N. J. Eq. 767, 18 A 752; Read v. Patterson, 44 N. J. Eq. 211, 14 A 490, 6 AmSR 877; Melick v. Melick, 17 N. J. Eq. 156; Vanderpool v. Davenport, 3 N. J. Eq. 120.

N. Y.—Cromer v. Pinckney, 3 Barb. Ch. 466; Pritchard v. Hicks, 1 Paige 270; Davoue v. Fanning, 4 Johns. Ch. 199; Brown v. Ricketts, 3 Johns. Ch. 553; Wiser v. Blachly, 1 Johns. Ch. 437.

Va.—Sharpe v. Rockwood, 78 Va. 24.

Eng.—Lawson v. Barker, 1 Bro. Ch. 303, 28 Reprint 1147; Atty.-Gen. v. Ryder, 2 Ch. Cas. 178, 22 Reprint 901; Haycock v. Haycock, 2 Ch. Cas. 124, 22 Reprint 877; Brown v. Dowthwaite, 1 Madd. 446, 56 Reprint 164; Dunstall v. Rabett, Rep. t. Finch 243, 23 Reprint 133; Atwood v. Hawkins, Rep. t. Finch, 113, 23 Reprint 62; Wainwright v. Waterman, 1 Ves. Jr. 311, 30 Reprint 360.

Ont.—Hughes v. Hughes, 6 Ont. A. 373.

[a] **In a suit by the assignee of a legatee** under a will against the administrators with the will annexed to set aside a receipt given by such legatee for his share and to establish his right to an interest in the estate, the other legatees are not necessary parties. Adams v. Cowan, 174 U. S. 800, 19 SCt 873, 43 L. ed. 1188 [aff 38 Fed. 536, 24 CCA 198].

[b] **Where the interests of the executor are adverse to the residuary legatee** and the rights and interests of the residuary legatee may be prejudiced, it seems that he should be made a party. Melick v. Melick, 17 N. J. Eq. 156.

67. Marsh v. Hague, 1 Edw. (N. Y.) 174.

68. Dandridge v. Washington, 2 Pet. (U. S.) 370, 7 L. ed. 454; Davison v. Rake, 45 N. J. Eq. 767, 18 A 752; Pritchard v. Hicks, 1 Paige (N. Y.) 270; Wiser v. Blachly, 1 Johns. Ch. (N. Y.) 437; Marsh v. Hague, 1 Edw. (N. Y.) 174.

69. Read v. Patterson, 44 N. J. Eq. 211, 14 A 490, 6 AmSR 877.

70. Ky.—Todd v. Sterrett, 6 J. J. Marsh. 425.

necessary party.[71] Where several general legatees bring separate suits against the executors to recover the amount of their legacies and the estate is insufficient to pay them all, the court will direct an account of the estate to be taken in one cause only and in the meantime direct the proceedings in all the other suits to be stayed.[72] A stranger to whom it is alleged that the legacy has been paid for the benefit of the legatees is not a necessary party defendant in a suit against the executor for the recovery of the legacy;[73] and it has been held that an administrator de bonis non with the will annexed is not a necessary party to a bill for a legacy filed by a legatee against the personal representative of the deceased executor of the testator, the executor having received assets to pay the legacy.[74] Debtors to the estate should not be joined,[75] unless special cause for such joinder is made to appear[76] as where there is collusion between the executor and the debtor or where the executor is insolvent.[77] One who is indebted to the executor is not a proper party to a suit against the executor for a legacy.[78] In a suit by a legatee to recover part of property conveyed to a widow under a decree based on her interest in the estate of her deceased husband, the personal representative of widow's estate is a necessary party.[79]

[§ 2015] **(2) By Residuary Legatee or Distributee.** The executor or administrator is a necessary party to a bill by a residuary legatee or a distributee seeking to recover his share of the estate.[80] Where there has been collusion between the personal representative and a debtor of the estate to avoid payment of the debt, the debtor may be joined as a party.[81] The administrator is not a necessary party to a suit by the heirs to enjoin a bank from paying funds belonging to decedent to an adverse claimant thereof.[82]

Other residuary legatees or distributees. In such an action by a residuary legatee or distributee the other residuary legatees or distributees, if there are any, should also be made parties in order that the rights and claims of all may be established at the same and in the same suit,[83] and where one of such residuary legatees or distributees dies before distribution his personal representative is a necessary party to the suit.[84] The joinder of other residuary legatees or distributees may, however, be

N. Y.—Hallett v. Hallett, 2 Paige 15; Fish v. Howland, 1 Paige 20.

N. C.—Parker v. Cobb, 131 N. C. 25, 42 SE 531.

Va.—Findlay v. Sheffey, 1 Rand. (22 Va.) 73.

W. Va.—Snider v. Brown, 3 W. Va. 143.

Eng.—Mose v. Sadler, 1 Cox. Ch. 352, 29 Reprint 1199.

71. Jones v. McGinty, 3 Dana (Ky.) 425 (the personal representatives of a deceased devisee are necessary parties to a bill by the widow of the testator against his executors and devisees for an annuity given to her and charged on the real estate).

72. Ross v. Crary, 1 Paige (N. Y.) 416.

73. Gleason v. Thayer, 24 Barb. (N. Y.) 82.

74. Kirkwood v. Mitchell, 1 Del. Ch. 130.

75. Evans v. Evans, 23 N. J. Eq. 71; Dorsheimer v. Rorback, 23 N. J. Eq. 46; Beaty v. Downing, 96 Va. 451, 31 SE 612.

76. Harrison v. Righter, 11 N. J. Eq. 389.

77. Dorsheimer v. Rorback, 23 N. J. Eq. 46.

78. Hunt v. Mayberry, 29 N. J. L. 403 (the only proper defendants are those against whom the decree of distribution was made).

79. McKinney v. Powell, 146 Ga. 569, 91 SE 690.

80. Ala.—Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Gardner v. Gantt, 19 Ala. 666.

Md.—Alexander v. Stewart, 8 Gill. & J. 226.

N. Y.—Rathbun v. Brownell, 43 Misc. 307, 88 NYS 833.

S. C.—Farley v. Farley, 6 S. C. Eq. 506.

Tenn.—Willard v. Goddard, (Ch. A.) 48 SW 397.

Va.—Robertson v. Gillenwaters, 85 Va. 116, 7 SE 371; Hansford v. Elliott, 9 Leigh (36 Va.) 79; Samuel v. Marshall, 3 Leigh (30 Va.) 567.

W. Va.—Nease v. Capehart, 8 W. Va. 95.

Eng.—Logan v. Fairlie, 2 Sim. & St. 284, 1 EngCh 284, 57 Reprint 355.

[a] **The reason** is that the law casts title to all the personal estate upon the personal representative. Gardner v. Gantt, 19 Ala. 666.

[b] **Making one who has not taken out letters of administration a party** is not sufficient, even though he is entitled to administration. Farley v. Farley, 6 S. C. Eq. 506.

[c] **A bill cannot be maintained by distributees against an executor of his own wrong,** who has sold decedent property, to have an account and obtain a decree against the former for the proceeds of the sale, unless the rightful personal representative is a party plaintiff or defendant. Nease v. Capehart, 8 W. Va. 95.

[d] **Where the bill does not allege that the estate does not owe any debts,** the administrator is a necessary party to a bill to enforce a distributee's claim to decedent's estate. Willard v. Goddard, (Tenn. Ch. A.) 48 SW 397.

[e] **When rule not applicable.**—Where an infant died when only eleven years old a bill to distribute her estate brought twenty years afterward may proceed without making the administrator of the infant a party. Markly v. Singletary, 32 S. C. Eq. 393.

81. Haywood v. Currie, 9 Baxt. (Tenn.) 357.

82. Mewes v. Mewes, 116 Ark. 155, 172 SW 853.

83. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Dandridge v. Washington, 2 Pet. 370, 7 L. ed. 454; West v. Randall, 29 F. Cas. No. 17,424, 2 Mason 181. Contra Alston v. Cohen, 1 F. Cas. No. 265, 1 Woods 487.

Ala.—High v. Worley, 32 Ala. 709; Boyett v. Kerr, 7 Ala. 9. Contra Cherry v. Belcher, 5 Stew. & P. 133, (dictum).

Ark.—Morris v. Virden, 57 Ark. 232, 21 SW 223; Neal v. Robertson, 55 Ark. 73, 17 SW 587.

Ky.—Cargile v. Harrison, 9 B. Mon. 518; Hawkins v. Craig, 1 B. Mon. 27; Kavanaugh v. Thacker, 2 Dana 137; Noland v. Turner, 5 J. J. Marsh. 179; Turley v. Young, 5 J. J. Marsh. 133; Kellar v. Beelor, 5 T. B. Mon. 573; Slaughter v. Froman, 5 T. B. Mon. 19, 17 AmD 33; Chinn v. Caldwell, 4 Bibb 543; Prewett v. Prewett, 4 Bibb 266.

N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 681, 63 A 982; Deegan v. Capner, 44 N. J. Eq. 339, 15 A 819; Dehart v. Dehart, 3 N. J. Eq. 471.

N. Y.—Davoue v. Fanning, 4 Johns. Ch. 199; Brown v. Ricketts, 3 Johns. Ch. 553.

N. C.—Huson v. McKenzie, 16 N. C. 463.

Tex.—Newland v. Holland, 45 Tex. 588.

Va.—Sillings v. Bumgardener, 9 Gratt. (50 Va.) 273; Purcell v. Maddox, 3 Munf. (17 Va.) 79; Sheppard v. Starke, 3 Munf. (17 Va.) 29.

Eng.—Parsons v. Neville, 3 Bro. Ch. 365, 29 Reprint 586; Sherrit v. Birch, 3 Bro. Ch. 229, 29 Reprint 505; Haycock v. Haycock, 2 Ch. Cas. 124, 22 Reprint 877; Morse v. Sadler, 1 Cox Ch. 352, 29 Reprint 1199; Hawkins v. Hawkins, 1 Hare 543, 546, 23 EngCh 543, 66 Reprint 1147; Dunstall v. Rabett, Rep. t. Finch. 243, 23 Reprint 133; Atwood v. Hawkins, Rep. t. Finch. 113, 23 Reprint 62; Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Reprint 1005; Story Eq. Pl. § 89.

"The general rule of this Court is that all persons interested in the subject of a suit must be parties, except where their numbers are so great as to render the application of the rule highly inconvenient or impracticable. And therefore, where the interests of a class, as of the children or next of kin of a particular person, is concerned, the whole of those who constitute the class must be parties, and the Court must be satisfied, by evidence of some kind, that they are so." Hawkins v. Hawkins, supra.

[a] **Nonjoinder fatal on demurrer.**—Lavoue v. Fanning, 4 Johns. Ch. (N. Y.) 199.

[b] **Distributees not named as complainants.**—In a suit by a part of the distributees against the administrator, the court has power, after determining the fund due from the administrator, to decree the separate sums due from such fund to the several distributees of the estate, although many of such distributees are not named as complainants in the bill. Thornton v. Tison, 95 Ala. 589, 10 S 639.

[c] **The distributees cannot join** in an action against the administrators for their distributive shares, as each distributee has a separate, distinct, and independent claim to his distributive share. Waldsmith v. Waldsmith, 2 Oh. 156.

84. Ala.—McMullen v. Brazelton, 81 Ala. 442, 1 S 778; Hall v. Andrews, 17 Ala. 40; Boyett v. Kerr, 7 Ala. 9.

Ark.—Morris v. Virden, 57 Ark. 232, 21 SW 223.

Ky.—Wilkinson v. Perry, 7 T. B. Mon. 214.

N. J.—Dehart v. Dehart, 3 N. J. Eq. 471.

N. Y.—Stone v. Demarest, 67 App. Div. 549, 73 NYS 903.

Va.—Purcell v. Maddox, 3 Munf. (17 Va.) 79; Sheppard v. Starke, 3 Munf. (17 Va.) 29.

[a] **The personal representative and not the heirs** of the deceased distributee should be joined. Wilkinson v. Perrin, 7 T. B. Mon. (Ky.) 214.

[b] **Executor appointed in another state.**—Where a residuary legatee sues the executor and other residuary

dispensed with where it would be impracticable or very inconvenient to enforce the rule requiring such joinder,[85] and the court can do substantial justice to the parties before it without injury to absent parties equally interested.[86] So where the persons interested are very numerous and some of them are out of the jurisdiction, the court on being satisfied that it has before it a sufficient number to ensure a fair trial of the question at issue, may hear the cause and distribute the shares of the parties before it.[87] The decree in such case should, however, be without prejudice to the rights of those who are not made parties and who do not come in before the decree,[88] and it is not conclusive upon persons not made parties.[89] So one of several distributees may sue for his distributive share without making the other distributees parties, if the latter are unknown and cannot be found and this fact is stated in the bill.[90] It has also been said that the necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction and deprive parties entitled to the interposition of a court of equity of any remedy whatever.[91] A distributee who has sold out his interest need not be made a party of the bill for distribution.[92]

Creditors, specific legatees, and prior encumbrancers. It has been held that creditors, specific legatees, or prior encumbrancers need not be made parties to a bill of the character under consideration,[93] although some of the legacies to be paid before the residuum are not to be paid immediately and may depend on such residuum to make up any deficiency;[94] but it has also been considered that specific legatees should be made parties unless it satisfactorily appears that their legacies have been satisfied, in which case it is not necessary to join them.[95] If the administrator has wrongfully paid over money belonging to a distributee to a third person the latter may be properly joined as a defendant in a suit against the administrator for its recovery.[96] Where a specific legatee was dead at the time of the execution of the will and the next of kin sues the executor to recover the amount of the legacy as undisposed of property, the trustee of the residuary legatee is not a necessary party, although the sum sued for may have been paid to him by the executor.[97] Where a testator devised his residuary estate to his daughter subject to a legacy contingent on her weath without issue and the amount of such legacy was held by the testator's executor and passed to his executors on his death, such executors are properly joined as defendants with the administrator of the daughter after her death without issue in an action to recover the legacy.[98]

[§ 2016] **(3) By Representative of Legatee or Distributee.** A bill for a legacy or distributive share belonging to one deceased cannot be maintained by the next of kin but must be brought by his personal representative.[99]

[§ 2017] **(4) By Purchaser from or Assignee of Legatee or Distributee.** One who purchases a distributee's interest may maintain a bill in his own name to compel distribution where the vendor and the other distributees are before the court;[1] and it has been held that a legatee who has assigned all his interest is neither a necessary nor a proper party to a bill by his assignee for the recovery of the legacy.[2] Where a widow assigned notes and claims of her husband, to which she was entitled, to a married woman, and on the death of the latter her husband and children reconveyed the notes and claims to the widow, who then brought suit against the administrator of her deceased husband to compel a settlement of the estate, the widow was not entitled to have a distribution of the assets in the administrator's hands without bringing into court as a party the personal representative of the deceased assignee of the notes and claims.[3]

[§ 2018] **(5) By Attaching Creditor of Legatee.** In a suit by one who has succeeded by operation of law by virtue of attachment proceedings to the rights of a legatee against the executor of the estate to compel payment to him of the legacy, the legatee is a necessary party and the bill will be demurrable for failure to join him as such.[4]

[§ 2019] **(6) By Person Claiming as Devisee or Legatee and Next of Kin of Decedent.** Where there has been no accounting between the executors of a testator and the executors of a legatee under his will, nor between the executors of the legatee and one claiming an interest in the legacy and original estate as next of kin and also as devisee of the legatee, the amount due such claimant cannot be de-

legatees for a distribution of the estate, the executor of a deceased nonresident legatee may be made a defendant, although appointed as executor in another state. Stone v. Demarest, 67 App. Div. 549, 73 NYS 903.

[c] **The rule applies although** the deceased distributee died insolvent and no administrator of his estate had previously been appointed. Dehart v. Dehart, 3 N. J. Eq. 471.

85. Dehart v. Dehart, 3 N. J. Eq. 471; Wiser v. Blachly, 1 Johns. Ch. (N. Y.) 437; Hawkins v. Hawkins, 1 Hare 543, 23 EngCh 543, 66 Reprint 1147; Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Reprint 1005.

86. Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260.

87. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Bradwin v. Harpur, Ambl. 374, 27 Reprint 249; Harvey v. Harvey, 4 Beav. 215, 49 Reprint 321.

88. McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015; Hallett v. Hallett, 2 Paige (N. Y.) 15; Harvey v. Harvey, 5 Beav. 134, 49 Reprint 528.

89. Harrison v. Harrison, 9 Ala. 470; Dehart v. Dehart, 3 N. J. Eq. 471; Story Eq. Pl. § 89.

90. Cooper Eq. Pl. 39, 40; Story Eq. Pl. § 90.

91. Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260.

92. Kellar v. Beelor, 5 T. B. Mon. (Ky.) 573.

93. Vanderpool v. Davenport, 3 N. J. Eq. 120 (they are not interested in the account to be taken. There can be no residuum until they are satisfied).

94. Vanderpool v. Davenport, 3 N. J. Eq. 120.

95. Nelson v. Page, 7 Gratt. (48 Va.) 160.

96. Watkins v. Sansom, 22 Tex. Civ. A. 178, 54 SW 1096.

97. Mabry v. Stafford, 88 N. C. 602 (if it is to be considered as intestate property and goes to the next of kin, the unauthorized payment by the executor to the trustee will be no defense to him against the rightful demand of plaintiffs).

98. Auburn Theological Seminary v. Cole, 18 Barb. (N. Y.) 360.

99. Ala.—Sullivan v. Lawler, 72 Ala. 68; Plunkett v. Kelly, 22 Ala. 655.

Ky.—Kellar v. Beelor, 5 T. B. Mon. 573.

N. Y.—Palmer v. Green, 63 Hun 6, 17 NYS 441; Jenkins v. Freyer, 4 Paige 47.

N. C.—Haglar v. McCombs, 66 N. C. 345.

S. C.—Carlisle v. Farrow, 74 S. C. 527, 54 SE 766; Strickland v. Bridges, 21 S. C. 21.

Tenn. — Puckett v. James, 2 Humphr. 565; Trafford v. Wilkinson, 3 Tenn. Ch. 449.

Va.—Hays v. Hays, 5 Munf. 418.

[a] **"The reason** is, that the distributee has no title to such property, but only to the surplus after payment of debts, to be acquired through a personal representative." Trafford v. Wilkinson, 3 Tenn. Ch. 449, 451.

1. Kavanaugh v. Thacker, 2 Dana (Ky.) 137.

2. King v. Berry, 3 N. J. Eq. 44.

3. Cornell v. Hartley, 41 W. Va. 493, 23 SE 789.

4. Drake v. Delliker, 24 Fed. 527.

termined in an action to which the only parties are the claimant and the executors of the original testator.[5]

[§ 2020] **8. Action by Widow to Enforce Statutory Rights in Estate.** In a widow's action against the executrix of her deceased husband, the widow claiming to be entitled to certain personal property by operation of law and not under the will, the legatees who are interested only in so much of the estate as passed by the will and who are represented by the executrix are not necessary parties.[6]

[§ 2021] **9. Suits for Marshaling Assets.** Where a suit is instituted for marshaling assets, the executor or administrator must be made a party,[7] and it has been considered that legatees[8] and heirs or distributees[9] are also necessary parties to such a suit. Where an executor sues to marshal assets and enjoin pending actions of creditors who are not expressly named as parties defendant, an interlocutory injunction will not be reversed for want of jurisdiction, where on the hearing one of the creditors is made a party.[10]

[§ 2022] **10. Actions for Settlement of Partnership Affairs.** The beneficiaries under a decedent's will are not necessary parties to an action by the executor against decedent's surviving partner for an accounting of the good will of the firm business.[11]

[§ 2023] **11. Proceedings for Revival of Judgment.** The personal representative of a judgment debtor is not a necessary party to proceedings to revive a judgment which is merely for the sale of land and does not grant any personal relief.[12]

[§ 2024] **12. Actions for Insurance Premiums Paid by Decedent in Fraud of Creditors.** Where insured's estate is insolvent, his administrator is the proper party to sue to recover premiums paid by insured in fraud of creditors, out of the proceeds of the policies.[13]

[§ 2025] **13. Suits to Enforce Contribution for Overpayment on Distribution.** Distributees of an estate who have voluntarily contribtued the respective sums with which they are chargeable by reason of overadvances made by the administrator in a partial distribution of the estate are not necessary parties to a bill filed by him to recover contribution from another distributee who refuses to reimburse him.[14]

[§ 2026] **14. Actions on Joint Rights of Action in Favor of Decedent and Others.** Where one of two or more persons having a joint right of action dies, the right of action vests in the survivor or survivors.[15] In consequence, the action must be brought in the name of the survivor or survivors alone, and it is error to join as plaintiff the personal representative of decedent.[16] Nor can the personal representative sue separately, for the entire legal interest survives; he must resort to a court of equity to obtain from the survivor decedent's share of the amount recovered.[17]

[§ 2027] **15. Actions or Suits on Joint or Joint and Several Obligations of Decedent and Others.** If a contract is joint and several, the personal representative of one obligor may be sued at law in a separate action,[18] and it is sometimes permitted by statute that the personal representative of a joint obligor may be sued alone on the obligation and judgment entered against him.[19] Where the practice remains unaffected by statute, if a contract is joint or joint and several, the personal representative of a deceased obligor cannot be joined with the survivor as a defendant in an action at law on the contract.[20] The reason given, as respects both

5. Duchesse d'Auxy v. Soutter, 35 Fed. 809.

6. Flatauer v. Loser, 156 App. Div. 591, 141 NYS 951 [rev on other grounds 211 N. Y. 15, 104 NE 1123].

7. American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920; Cooper Eq. Pl. 34; Story Eq. Pl. § 171.

8. Fraser v. Charleston, 19 S. C. 384.

9. Still v. Wood, 85 S. C. 562, 67 SE 910.

10. Rayan v. Smith, 142 Ga. 398, 83 SE 119.

11. Joseph v. Herzig, 72 Misc. 475, 131 NYS 321 [aff 146 App. Div. 952, 131 NYS 1122].

12. Galloway v. Craig, 122 Ky. 447, 92 SW 320, 29 KyL 1.

13. York v. Flaherty, 210 Mass. 35, 96 NE 53.

14. Alexander v. Fisher, 18 Ala. 374.

15. Birdsall v. Delaware, etc., Co., 216 Fed. 717; Waters v. Creagh, Minor (Ala.) 128; Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 NYS 181; Jones v. Yates, 9 B. & C. 532, 17 ECL 241, 109 Reprint 198.

16. U. S.—Crocker v. Beal, 6 F. Cas. No. 3,396, 1 Lowell 416.

Ala.—Waters v. Creagh, Minor 128.

Ky.—Clark v. Parish, 1 Bibb 547; Morrison v. Winn, Hard. 480.

Mass.—Smith v. Franklin, 1 Mass. 480; Walker v. Maxwell, 1 Mass. 104.

N. J.—Freeman v. Scofield, 16 N. J. Eq. 28.

N. Y.—Semon v. Daggett, 62 Misc. 55, 114 NYS 763, 1 NYCivProcNS 23.

Eng.—Anderson v. Martindale, 1 East 497, 102 Reprint 334; Rolls v. Yate, Yelv. 177, 80 Reprint 117, 1 Chitty Pl. (16th Am. ed) p 31.

But compare Hardwood Log Co. v. Coffin, 130 N. C. 432, 41 SE 931 (which seems to maintain a contrary doctrine).

[a] **Surviving judgment creditors** are the only proper parties plaintiff in an action on a judgment, and the representative of the deceased judgment creditor should not be joined. Semon v. Daggett, 62 Misc. 55, 114 NYS 763, 1 NYCivProcNS 23.

[b] **Insurance policy issued to firm after death of partner.**—The joinder of the administrator of a deceased partner with the surviving partners, in an action on a policy issued in the name of the firm after the death of the administrator's intestate, is proper although the legal title to the property is in the individual members. Scott v. Dixie Ins. Co., 70 W. Va. 533, 74 SE 659, 40 LRANS 152.

17. Waters v. Creagh, Minor (Ala.) 128; Freeman v. Scofield, 16 N. J. Eq. 28.

18. Eggleston v. Buck, 31 Ill. 254; Moore v. Rogers, 19 Ill. 347; New Haven, etc., Co. v. Hayden, 119 Mass. 361; Citizens' Trust, etc., Co. v. Young, 75 W. Va. 241, 83 SE 1007.

[a] **Statute forbidding action against representative of deceased obligor.**—State v. Cunningham, 101 Ind. 461.

19. Fleming v. Reed, 77 N. J. L. 563, 72 A 299 [appr Thompson v. Johnson, 40 N. J. L. 220]; Alcorn v. Cook, 101 Pa. 209.

20. U. S.—Thomas v. Green County, 159 Fed. 339, 89 CCA 405; U. S. v. Bullard, 103 Fed. 256.

Ala.—Rupert v. Elston, 35 Ala. 79; Murphy v. Mobile Branch Bank, 5 Ala. 421; Gayle v. Agee, 4 Port. 507.

Cal.—May v. Hanson, 6 Cal. 642; Humphreys v. Crane, 5 Cal. 173.

Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770.

Ill.—Eggleston v. Buck, 31 Ill. 254; Moore v. Rogers, 19 Ill. 347; Witteman Co. v. Goeke, 200 Ill. A. 108.

Ky.—Head v. Oliver, 1 A. K. Marsh. 254.

Mass.—Cochrane v. Cushing, 124 Mass. 219; New Haven, etc., Co. v. Hayden, 119 Mass. 361; Foster v. Hooper, 2 Mass. 572.

Miss.—Poole v. McLeod, 9 Miss. 391.

N. J.—Sindle v. Kiersted, 3 N. J. L. 926.

N. Y.—Jenkins v. De Groot, 1 Cai. Cas. 122.

Oh.—Burgoyne v. Ohio L. Ins., etc., Co., 5 Oh. St. 586.

Pa.—Githers v. Clarke, 158 Pa. 616, 28 A 232; Ensminger v. Finkey, 5 Pa. Dist. 358. But compare Philadelphia Loan Co. v. Elliott, 15 Pa. 224 (joinder a mere irregularity).

S. C.—Ayer v. Wilson, 9 S. C. L. 319, 12 AmD 677.

Va.—Grymes v. Pendleton, 4 Call (8 Va.) 130.

W. Va.—Freeman v. Swiger, 98 SE 440.

Eng.—Kemp v. Andrews, Carth. 170, 90 Reprint 704; Hall v. Huffam, 2 Lev. 228, 83 Reprint 531.

[a] **Such joinder is permitted** (1) in Texas. Henderson v. Kissam, 8 Tex. 46. See also Bennett v. Spillars, 9 Tex. 519 (where one of several defendants sued jointly on a promissory note dies pending the action, his personal representatives are properly on suggestion of his death made parties to the action). (2) But the claim against decedent's estate must first have been presented and rejected. Wiley v. Pinson, 23 Tex. 486; Martin v. Harrison, 2 Tex. 456.

[b] **Death of all coöbligors.**—(1) Whether the contract or obligation is joint or joint and several, their representatives cannot be joined in one action. Head v. Oliver, 1 A. K. Marsh. (Ky.) 254; Grymes v. Pendleton, 4 Call (8 Va.) 130; Watkins v. Tate, 3 Call (7 Va.) 521. (2) The

classes of contracts, is that the same judgment cannot be rendered against the survivor and personal representative because one is to be charged be bonis testatoris and the other de bonis propriis,[21] and as respects contracts which are joint only, and not joint and several, a still stronger reason is that the death of one joint obligor extinguishes all remedy at law against his estate and casts the legal liability under the contract on the surviving obligor.[22] However, it has been held that a bill in chancery on a joint obligation must join as a defendant the personal representative of a deceased obligor.[23] In some jurisdictions it has been held that the common-law rule is not affected by the adoption of the code system of pleading.[24] But in others the rule is considered to have been abolished by the codes, through necessary implication, and it is held that in actions on joint or joint and several obligations the personal representative of a deceased obligor may be joined as defendants with the surviving obligors.[25] There are sometimes found express statutory provisions or rules of court authorizing the joinder of a surviving obligor and the personal representatives of the deceased obligor,[26] or the substitution, as a codefendant, of the personal representatives of an obligor who died after the suit was instituted.[27]

[§ 2028] **16. Actions for Torts Committed by Decedent and Others.** In an action for trespass committed by several where one of defendants dies, pending suit, his personal representatives cannot be brought by scire facias on the record, as the same judgment cannot be rendered and the same execution asserted against the surviving defendants and the personal representative of the dead one.[28]

[§ 2029] **17. Actions Based on Wrongful Acts of Personal Representative.** Where an executor has been guilty of fraudulent conduct in dealing with the assets of the estate, his coexecutors may bring suit against him for an accounting without joining creditors, next of kin, or legatees.[29] Creditors, legatees, and distributees may maintain an action against the personal representative of an administrator or executor for waste or conversion of the assets of the estate,[30] and it is not necessary to join the administrator de bonis non of the original

action survives against the surviving obligor and his representative. Head v. Oliver, 1 A. K. Marsh. (Ky.) 254.

[c] **Objection for suing wrong party.**—No advantage can be taken by the executor of one obligor of being sued alone on a joint obligation, without pleading in abatement, unless it appears on the record that the other obligor is alive or survived the testator. Geddis v. Hawk, 10 Serg. & R. (Pa.) 33.

[d] **Where one of several obligors sued jointly dies** pending the action, it should be revived against his personal representatives, and a judgment against the other defendants alone is erroneous. Tipton v. Harris, Peck (Tenn.) 414.

21. U. S.—U. S. v. Bullard, 103 Fed. 256.

Cal.—Lawrence v. Doolan, 68 Cal. 309, 5 P 484, 9 P 159; Stockton Bank v. Howland, 42 Cal. 129; May v. Hanson, 6 Cal. 642; Humphreys v. Crane, 5 Cal. 173.

Colo.—Miller v. Blake, 6 Colo. 118; Mattison v. Childs, 5 Colo. 78.

Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770.

Ill.—Eggleston v. Buck, 31 Ill. 254; Witteman Co. v. Goeke, 200 Ill. A. 108.

Ind.—Norwood v. Harness, 98 Ind. 134, 49 AmR 739.

Ky.—Clark v. Parish, 1 Bibb 547.

Md.—Biggs v. Langhammer, 103 Md. 94, 106, 63 A 198 [cit Cyc].

Mass.—Cochrane v. Cushing, 124 Mass. 219; New Haven, etc., Co. v. Hayden, 119 Mass. 361.

N. Y.—Barnes v. Brown, 130 N. Y. 372, 29 NE 760; Hauck v. Craighead, 67 N. Y. 432; Voorhis v. Baxter, 18 Barb. 592, 1 AbbPr 43 [aff 17 N. Y. 354]; Jersey City First Nat. Bank v. Lenk, 18 NYCivProc 209, 10 NYS 261 [aff 123 N. Y. 638 mem, 25 NE 953 mem]; Divine v. Duncan, 2 AbbNCas 328, 52 HowPr 446; Hulbert v. Ferguson, 40 HowPr 474.

Oh.—Burgoyne v. Ohio L. Ins., etc., Co., 5 Oh. St. 586; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750.

Pa.—Githers v. Clarke, 158 Pa. 616, 28 A 232.

22. Moore v. Rogers, 19 Ill. 347; New Haven, etc., Co. v. Hayden, 119 Mass. 361; Barnes v. Seligman, 55 Hun 339, 8 NYS 834 [aff 130 N. Y. 372, 29 NE 760]; Jenkins v. De Groot, 1 Cai. Cas. (N. Y.) 122; Burgoyne v. Ohio L. Ins., etc., Co., 5 Oh. St. 586.

23. White v. Johnson, 4 Dana (Ky.) 595; Quince v. Quince, 5 N. C. 160.

24. Miller v. Blake, 6 Colo. 118; Mattison v. Childs, 5 Colo. 78; Barlow v. Scott, 12 Iowa 63; Marsh v. Goodrell, 11 Iowa 474; Childs v. Hyde, 10 Iowa 294, 77 AmD 113; Wapello County v. Bigham, 10 Iowa 39, 74 AmD 370; Pope v. Cole, 55 N. Y. 124, 14 AmR 198; Barnes v. Seligman, 55 Hun 339, 8 NYS 834 [aff 130 N. Y. 372, 29 NE 760]; Morehouse v. Ballou, 16 Barb. (N. Y.) 289; Hulbert v. Ferguson, 40 HowPr 474. Contra Erie County v. Blatz, 125 App. Div. 144, 109 NYS 304; Churchill v. Trapp, 3 AbbPr (N. Y.) 306.

[a] **The personal representatives of a deceased partner** cannot be joined with the surviving partner in an action at law to collect a debt against the partnership. Pope v. Cole, 55 N. Y. 124, 14 AmR 198; Richter v. Popenhausen, 42 N. Y. 373; Voorhis v. Childs, 17 N. Y. 354.

[b] **Where one of the makers of a joint and several note dies pending suit thereon,** his administrator cannot be substituted and joined with the surviving maker as a defendant. Marsh v. Goodrell, 11 Iowa 474; Pecker v. Cannon, 11 Iowa 20.

[c] **How objection taken advantage of.**—The objection that a surviving obligor and the administrator of the deceased joint obligor are improperly joined should be taken by demurrer. Where the objection is raised by motion and arrest of judgment, plaintiff should be allowed to dismiss as to survivor. Miller v. Blake, 6 Colo. 118. To same effect Mattison v. Childs, 5 Colo. 78.

25. U. S.—Brew v. Cochran, 141 Fed. 459.

Cal.—Lawrence v. Doolan, 68 Cal. 309, 5 P 484, 9 P 159; Bostwick v. McEvoy, 62 Cal. 496.

D. C.—White v. Connecticut Gen. L. Ins. Co., 34 App. 460.

Ind.—Corbaley v. State, 81 Ind. 62; Milam v. Milam, 60 Ind. 58; Hays v. Crutcher, 54 Ind. 260; Owen v. State, 25 Ind. 107; Braxton v. State, 25 Ind. 82; Mewkirk v. Johnson, 5 Blackf. 362.

Mich.—Carpenter v. St. Clair Cir. Judge, 122 Mich. 323, 81 NW 95.

Nev.—Maples v. Geller, 1 Nev. 233.

N. C.—Brown v. Clary, 2 N. C. 107.

Oh.—Burgoyne v. Ohio L. Ins., etc., Co., 5 Oh. St. 586; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750; Batavia Bank v. Sewell, 8 Oh. Dec. (Reprint) 210, 6 CincLBul 288.

Pa.—Alcorn v. Cook, 101 Pa. 209.

S. C.—Wiesenfeld v. Byrd, 17 S. C. 106; Trimmier v. Thomson, 10 S. C. 164.

Tex.—Planters', etc., Nat. Bank v. Robertson, (Civ. A.) 86 SW 643.

Wash.—Brownfield v. Holland, 63 Wash. 86, 114 P 890.

W. Va.—Scott v. Dixie Ins. Co., 70 W. Va. 533, 74 SE 659, 40 LRANS 152.

[a] **Settlement of partnership affairs.**—(1) To a suit in equity by the personal representative of a deceased partner against a sole surviving partner, to whom also all the assets of the partnership have been transferred as trustee under an agreement between all parties in interest, to obtain a final settlement of the partnership affairs, the personal representatives of other deceased partners are indispensable parties. Brew v. Cochran, 141 Fed. 459. (2) Where a firm is composed of an individual and the members of another firm, an administrator of one of the latter is a necessary party to a bill for an accounting. Carpenter v. St. Clair Cir. Judge, 122 Mich. 323, 81 NW 95.

[b] **Heirs not proper parties.**—In an action on a guaranty of payment of a note executed by a husband and his wife, the wife and the administrator of the deceased husband, but not the husband's heirs, are proper parties defendant. Batavia Bank v. Sewell, 8 Oh. Dec. (Reprint) 210, 6 CincLBul 288.

26. Davis v. Wilkinson, 2 N. C. 334; Brown v. Clary, 2 N. C. 107.

27. Githers v. Clark, 158 Pa. 616, 28 A 232; Ash v. Guie, 97 Pa. 493, 39 AmR 818; Dingman v. Amsink, 77 Pa. 114.

[a] **Plaintiff cannot be compelled** to substitute decedent's representatives nor can they be substituted without plaintiff's consent. Ash v. Guie, 97 Pa. 493, 39 AmR 818.

28. Mechanics', etc., Ins. Co. v. Spang, 5 Pa. 113. See also Abatement and Revival §§ 271, 356.

29. Wood v. Brown, 34 N. Y. 337. To same effect Price v. Brown, 10 AbbNCas (N. Y.) 67, 60 HowPr 511.

30. Ga.—Thomas v. Hardwick, 1 Ga. 78.

Ky. — Yager v. Commonwealth Bank, 125 Ky. 177, 100 SW 848, 30 KyL 1287.

Md.—Sibley v. Williams, 3 Gill & J. 52.

N. Y.—Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.

S. C.—Smith v. Carrere, 18 S. C. Eq. 123.

Va.—Coleman v. McMurdo, 5 Rand. (26 Va.) 51.

decedent,[31] as the latter cannot sue the representative of a former executor or administrator either at common law or in equity for assets wasted and converted by the first executor or administrator.[32] When a suit is instituted or a bill filed to recover property sold illegally by the administrator out of the hands of those who had purchased or possess it, the sureties on his bond are neither proper nor necessary parties.[33] Where an administrator commits a fraud upon the estate, or colludes with others to do so, the heirs may bring an equitable action against such administrator and the person charged to be in collusion with him for the purpose of protecting the estate.[34] Where the wrongful acts complained of consist of the sale of personal property of the estate, all purchasers and the personal representative sought to be made liable should be united in the same suit.[35] If heirs bring a suit against the administrator charging a fraudulent conversion of the assets all the heirs are necessary parties.[36] Where, in an action by a judgment creditor of an administrator in the nature of a creditor's bill, plaintiff seeks to subject to the payment of his judgment land the legal title to which was in a third person at the time of intestate's death and which the administrator fraudulently caused to be conveyed to defendant, such third person and the administrator are necessary parties.[37]

[§ 2030] **18. Suits for General Administration of Estate.** Where suit is brought for a general administration of an estate, a properly constituted personal representative of the estate is always a necessary party;[38] consequently if a personal representative is out of the jurisdiction the suit cannot proceed,[39] and the court will not decree a general account and administration in a suit in which decedent is represented by an administrator ad litem merely.[40] Where a bill is brought for an administration of the estate, and the executor dies, the suit cannot be revived against his personal representative, but there must be a representative of the testator before the court,[41] and where children of a deceased administrator of an estate, in which they have no interest, bring an action against the administrator de bonis non for a settlement, the original administrator's estate should be administered, and his administrator made a party to the action.[42] Where an administrator with the will annexed, who is also testamentary trustee, sues for an accounting and confirmation of various settlements, and releases, and one of the legatees is dead, a legatee of the deceased legatee is not a necessary party;[43] but where the deceased legatee resided in another state, and his will was there proved, the legatee under it may be properly joined as a party, he having an interest in the controversy adverse to plaintiff.[44] Where a surviving husband agreed with the heirs of the wife, in the event of the will of the wife being set aside, to accept a certain sum of money in full, and from it to pay specified sums to certain persons, none of whom, after the will was annulled, had any interest in the estate or were parties in fact to the settlement, it was not necessary that they should be parties to a bill filed by the heirs, which related to the final disposition of the estate in the hands of the administrator de bonis non of the wife.[45] A distributee may join in one suit the administrator and a debtor of the estate, where both are necessary parties for a settlement of the estate, and the administrator and debtor were on intimate terms with decedent, who intrusted them with the management of her business, and each of them was indebted to the estate, and the administrator had not charged his own indebtedness nor attempted to collect that of the debtor.[46]

[§ 2031] **19. Suit to Remove Administration into Chancery Court.** Sureties on an administrator's bond are not proper parties to a bill against the administrator to remove the administration of the estate from the probate into the chancery court.[47]

[§ 2032] **20. Joinder of Coexecutors or Coadministrators—a. Actions at Law—(1) By Executors—(a) Common-Law Rule.** The common-law doctrine is that in actions at law all the executors named in the will, who are living, must join, although some have refused or omitted to prove the will or to administer the estate[48] and even though one or more of the executors are infants.[49] If the renouncing executor will not join in the suit, the practice is to issue the writ in his name and then

31. Smith v. Carrere, 18 S. C. Eq. 123.

32. Thomas v. Hardwick, 1 Ga. 78; Coleman v. McMurdo, 5 Rand. (26 Va.) 51. But compare Gibbs v. Hodge, 65 Ala. 366 (where creditors of a deceased debtor not having reduced their claims to judgment as against the estate seek by a bill in equity to reach property alleged to have been fraudulently conveyed by the executor, who was also the sole devisee, and who has been removed from office, a personal representative of the estate must be made a party).

33. Nutting v. Boardman, 43 Ga. 598.

34. Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

35. Jones v. Clark, 25 Gratt. (66 Va.) 642.

36. Bland v. Fleeman, 29 Fed. 669.

37. Huneke v. Dold, 7 N. M. 5, 32 P 45.

38. Hansford v. Elliott, 9 Leigh (36 Va.) 79; Rowsell v. Morris, L. R. 17 Eq. 20; Cary v. Hills, L. R. 15 Eq. 79; Donald v. Bather, 16 Beav. 26, 51 Reprint 685; Penny v. Watts, 2 Phil. 149, 22 EngCh 149, 41 Reprint 898; 1 Daniel Ch. Pr. p 196.

39. Donald v. Bather, 16 Beav. 26, 51 Reprint 685.

40. Dowdeswell v. Dowdeswell, 9 Ch. D. 294; Croft v. Waterton, 13 Sim. 653, 36 EngCh 653, 60 Reprint 254.

41. Barber v. Walker, 15 Wkly. Rep. 728.

42. Rawlings v. Rawlings, (Ky.) 112 SW 862.

43. Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079.

44. Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079.

45. Crockett v. Sibley, 73 N. H. 322, 61 A 469.

46. Reager v. Chappelear, 104 Va. 14, 51 SE 170.

47. Martin v. Martin, 173 Ala. 106, 55 S 632.

48. Ala.—Martin v. Nall, 22 Ala. 610; Williams v. Sims, 8 Port. 579.

Kan.—Insley v. Shire, 54 Kan. 793, 39 P 713, 45 AmSR 308.

Ky.—Mitchell v. Rice, 6 J. J. Marsh. 623.

N. J.—Cole v. Smalley, 25 N. J. L. 374; Hunt v. Kearney, 3 N. J. L. 721.

N. Y.—Mallory v. Virginia Hot Springs Co., 157 App. Div. 253, 141 NYS 961; Bodle v. Hulse, 5 Wend. 313.

Eng.—Webster v. Spencer, 3 B. & Ald. 360, 5 ECL 211, 106 Reprint 694; Hensloe's Case, 9 Coke 36b, 77 Reprint 784; Swallow v. Emberson, 1 Lev. 161, 83 Reprint 348; Walters v. Pfeil, M. & M. 362, 22 ECL 544; Scott v. Briant, 6 N. & M. 381, 36 ECL 644; Brookes v. Stroud, 1 Salk. 3, 91 Reprint 3; Kilby v. Stanton, 2 Y. & J. 75, 148 Reprint 838.

[a] **Reason for rule.**—The reasons assigned for the rule at law are that the executors constitute but one person; that each executor derives his interest from the will itself; that the probate is merely operative as the authenticated evidence, and not as the foundation of the executor's title; and that the renunciation is a renunciation of probate merely and not a renunciation or waiver of title. Mitchell v. Rice, 6 J. J. Marsh. (Ky.) 623; Cole v. Smalley, 25 N. J. L. 374; Rinehart v. Rinehart, 15 N. J. Eq. 44; Webster v. Spencer, 3 B. & Ald. 360, 5 ECL 211, 106 Reprint 694.

[b] **Waiver of objection.**—Where the action is brought by one executor alone the others are made defendants, and no question is raised on account of the misjoinder before judgment is rendered, the failure to name them as plaintiffs is not a fatal objection. Insley v. Shire, 54 Kan. 793, 39 P 713, 45 AmSR 308.

49. Foxwist v. Tremaine, 1 Lev. 299, 83 Reprint 416, 2 Saund. 212, 85 Reprint 1009, 1 Sid. 449, 82 Reprint 1211, T. Raym. 198, 83 Reprint 104; Smith v. Smith, Yelv. 130, 80 Reprint 88. But compare Colborne v. Wright, 2 Lev. 239, 83 Reprint 537 (where one executor is under age the other may bring an action alone).

to summon or rule him to proceed, and if he will not, the court will give judgment of severance.[50] The rule does not apply to actions which an executor can maintain in his individual capacity; it has accordingly been held that an executor may, without joining him with his corepresentatives, maintain an action to recover a loan,[51] or to recover money had and received to his use,[52] or on a sealed note given to himself,[53] and that no more should be joined than those who made the contract sought to be enforced.[54] Where a will appointing several executors makes provision for one acting alone and only one proves the will, he alone can maintain an action in behalf of the estate.[55]

[§ 2033] **(b) Rule under Statute.** The common-law rule discussed above[56] has been very generally superseded by statutes under which the executors who have qualified may maintain an action without joining other persons nominated in the will as executors but who have not qualified.[57] It is usually necessary that all the executors who have qualified shall join.[58]

[§ 2034] **(c) Objection for Nonjoinder.** Where all the executors are not joined, the defect may be availed of by plea in abatement setting up that there are other executors living not named,[59] and it has been held that the defect can only be taken advantage of in this manner, unless the practice is changed by statute.[60] Under code practice the objection is properly taken by demurrer, if the defect appears on the face of the complaint,[61] and otherwise by answer.[62] At common law, on a plea in abatement, it is sufficient to allege that the person who was not joined was constituted executor and is still living, and it is unnecessary to allege that he has administered upon the estate,[63] but where the statute permits those executors who have qualified to sue without joining others, it is necessary to allege that the executor not joined was qualified.[64]

[§ 2035] **(d) Joining Coexecutors as Defendants.** Where an executor refuses to join or cannot properly join in a complaint by a coexecutor for the benefit of the estate, the refusing executor may be made a party defendant,[65] and it has been held that in an action by an executor to recover money lent by testator, the coexecutors were properly made defendants, without a request that they join as plaintiffs, where they were subservient to the principal defendant and hostile to plaintiff executor.[66]

[§ 2036] **(2) By Administrators—(a) General Rule.** Where there are several administrators their power is joint only and the general rule is that they must sue jointly.[67] Nevertheless an administrator may, without joining his coadministrators, maintain an action for the price of property belonging to the estate sold by him;[68] and where an administrator makes an unauthorized loan an action to recover it back should be brought in his name alone.[69] On a note payable to intestate or bearer, an administrator need not sue in his representative character or join his coadministrator as plaintiff;[70] and where subsequent to a decree in favor of several administrators some of them are removed action may be brought on the decree in the name of the remaining administrator.[71] An administrator suing to recover damages for breach of covenant, broken after intestate's death, cannot unite with him one who was a joint administrator with him in another state, since the authority of a foreign administrator to sue is not recognized.[72]

[§ 2037] **(b) Where One Refuses to Prosecute.** The practice at law is to bring the suit in the first place in the name of all the administrators, and if either of them is unwilling to have the suit prosecuted in his name afterward, the one who has instituted the suit may then upon a summons have a judgment of severance and continue the suit in his own name only.[73] But under a statute providing that if the consent of one who should be joined as plaintiff cannot be obtained, he may be made a defendant, on the reason therefor being stated in the petition, if one of two administrators refuses to join in an action on a cause of action belonging to the estate the other may bring the action, joining the refusing administrator as defendant and stating in the petition the reason therefor.[74]

[§ 2038] **(3) Against Executors or Administrators.** All the executors who have qualified[75] or all the administrators[76] must be made parties defendant to an action by which it is sought to charge

50. Cole v. Smalley, 25 N. J. L. 374; Bodle v. Hulse, 5 Wend. (N. Y.) 313; Tooker v. Oakley, 10 Paige (N. Y.) 288.

51. Brassington v. Ault, 2 Bing. 177, 9 ECL 534, 130 Reprint 274, 1 C. & P. 302, 12 ECL 181.

52. Heath v. Chilton, 12 M. & W. 632, 152 Reprint 1352.

53. Foote v. Noland, 9 F. Cas. No. 4,915, 5 Cranch C. C. 399.

54. Brassington v. Ault, 2 Bing. 177, 9 ECL 534, 130 Reprint 274, 1 C. & P. 302, 12 ECL 181; Heath v. Chilton, 12 M. & W. 632, 152 Reprint. 1352.

55. Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

56. See supra § 2032.

57. Ala. — Williams v. Sims, 8 Port. 579; Cleveland v. Chandler, 3 Stew. 489.

Ky.—Mitchell v. Rice, 6 J. J. Marsh. 623.

Me.—Gilman v. Gilman, 54 Me. 453.

N. Y.—Moore v. Willett, 2 Hilt. 522.

N. C.—Alston v. Alston, 25 N. C. 447; Burrow v. Sellers, 2 N. C. 501.

58. Gilman v. Gilman, 54 Me. 453; Matter of Slingerland, 36 Hun (N. Y.) 575 [rev 3 Dem. Surr. 1]; Scranton v. Farmers', etc., Bank, 33 Barb. 527 [aff 24 N. Y. 424]; In re Ringler, 70 Misc. 576, 127 NYS 934; Burrow v. Sellers, 2 N. C. 501.

[a] **Power of attorney to one executor.**—Where three executors are empowered by the will to act as such jointly and severally, two may give a power of attorney to the third to sue alone, and in such case they need not be joined as parties plaintiff. Paterno v. Solis, 15 Philippine 153.

59. Foxwist v. Tremaine, 1 Lev. 299, 83 Reprint 416, 2 Saund. 212, 85 Reprint 1009, 1 Sid. 449, 82 Reprint 1211, T. Raym. 198, 83 Reprint 104; Walters v. Pfeil, M. & M. 362, 22 ECL 544; Smith v. Smith, Yelv. 130, 80 Reprint 88.

60. Macon, etc., R. Co. v. Davis, 27 Ga. 113; Packer v. Willson, 15 Wend. (N. Y.) 343; Gordon v. Goodwin, 11 S. C. L. 70, 10 AmD 573.

[a] **A motion for nonsuit** or nonjoinder of an executor as plaintiff does not lie. Gordon v. Goodwin, 11 S. C. L. 70, 10 AmD 573.

61. Scrantom v. Farmers', etc., Bank, 33 Barb. 527 [aff 24 N. Y. 424].

62. Scrantom v. Farmers', etc., Bank, 33 Barb. 527 [aff 24 N. Y. 424].

63. Cole v. Smalley, 25 N. J. L. 374; Webster v. Spencer, 3 B. & Ald. 360, 5 ECL 211, 106 Reprint 694; Hensloe's Case, 9 Coke 36b, 77 Reprint 784; Brookes v. Stroud, 1 Salk. 3, 91 Reprint 3.

64. Gilman v. Gilman, 54 Me. 453; Burrow v. Sellers, 2 N. C. 501.

65. Monmouth Inv. Co. v. Meams, 151 Fed. 159, 80 CCA 527.

66. Wallach v. Dryfoos, 140 App. Div. 438, 125 NYS 305.

67. Smith v. Smith, 11 N. H. 459; Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396; Matter of Slingerland, 36 Hun (N. Y.) 575 [rev 3 Dem. Surr. 1].

68. Aiken v. Bridgman, 37 Vt. 249.

69. Thornton v. Smiley, 1 Ill. 34.

70. Packer v. Willson, 15 Wend. (N. Y.) 343.

71. Green v. Foley, 2 Stew. & P. (Ala.) 441.

72. Lee v. Gause, 24 N. C. 440.

73. Tooker v Oakley, 10 Paige (N. Y.) 288.

74. Rizer v. Gillpatrick, 16 Kan. 564.

75. In re Ringler, 70 Misc. 576, 127 NYS 934.

[a] **Where all the executors contract for the services of an accountant in settling the estate,** an action against one executor will not lie, another being living. Douglas v. Leonard, 14 NYS 274.

76. Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396; Ryerson v. Ryerson, 4 N. J. L. 363.

the estate of a decedent. At common law all persons named as executors in the will may be joined as parties defendant, although they have not proved the will,[77] but it is necessary to join as defendants only those who have administered,[78] for a stranger is bound to take notice of those only as executors who have acted as such.[79] Where a coexecutor has administered he should be joined as defendant, although he refused to prove the will.[80] It has been held, however, that nonresidence of a coexecutor is sufficient to relieve plaintiff from the necessity of joining him in an action against his coexecutor,[81] and that if one of two executors has in his hands the balance remaining for distribution an action may be maintained against him without joining his coexecutor.[82] The objection for nonjoinder may be taken advantage of by a motion for nonsuit.[83]

[§ 2039] **b. Suits in Equity—(1) By Executors or Administrators.** In equity all the executors who prove the will must be joined as complainants, but those who have not proved the will need not be joined.[84] If, however, an executor or administrator who should join as a coplaintiff refuses to join in the suit, he should be joined as a defendant and the suit cannot be carried on in his name as plaintiff without his consent.[85] If one executor renounces, the others may file a bill in their name and may make him a party defendant if necessary to bring him before the court, stating in the bill the fact of his refusal to join as complainant.[86] Where a suit is brought by one of two coexecutors against the other for a debt due from the latter to the estate, the latter should not be made a complainant, but should be made a defendant in the character in which he owes the debt.[87] Where nothing is involved but the appropriation of money a single executor may ask aid of the court for that purpose,[88] especially where the other executor is personally interested in the fund and is brought into court so that he can answer and protect the fund in which he is interested in its entirety.[89]

[§ 2040] **(2) Against Executors or Administrators.** Where there are several executors or administrators it is not ordinarily permissible to sue any number less than all,[90] unless perhaps, where from special reasons shown, the character of the relief sought makes it unnecessary to join them.[91]

Waiver of objection for nonjoinder. Where one of two executors also made trustees in their individual capacity fails to qualify, the failure to join him as defendant in a suit to foreclose a mortgage given by testator does not invalidate a sale in such proceedings where neither the heirs, legatees, cestuis que trust, nor the widow as individually vested with the remainder or as sole executrix, and trustee, made any objection to the foreclosure proceedings to which they were necessary parties.[92]

[§ 2041] **21. Joinder of Representatives of Different Estates.** Where a person is administrator of the estates of husband and wife and it is doubtful whether the right to a fund is in the estate of husband or wife, he may sue for it in equity in both characters.[93] A count for money had and received or for money paid to the use of one per-

[a] **If one only is summoned and the other returned non est inventus,** he that is summoned may and must plead for both, but the plea must be joint and the judgment for or against them in their joint capacity. Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396.

77. Williams v. Sims, 8 Port. (Ala.) 579.

78. Mitchell v. Rice, 6 J. J. Marsh. (Ky.) 623; Cole v. Smalley, 25 N. J. L. 374; Swallow v. Emberson, 1 Lev. 161, 83 Reprint 348; Rawlinson v. Shaw, 3 T. R. 557, 100 Reprint 731; Alexander v. Mawman, Willes 40, 125 Reprint 1045.

79. Mitchell v. Rice, 6 J. J. Marsh. (Ky.) 623. See also Cole v. Smalley, 25 N. J. L. 374 (the executor who has in fact received the assets should be responsible to the creditor, whether he has proved the will or not, without regard to others who have not interfered with the estate, although entitled by the will to do so).

80. Hensloe's Case, 9 Coke 36b, 77 Reprint 785.

81. Williams v. Sims, 8 Port. (Ala.) 579; Bledsoe v. Huddleston, 5 Yerg. (Tenn.) 295. See also Wheeler v. Bolton, 54 Cal. 302 (where only one of two executors has acted and the decree of distribution refers to him alone, the other absent from the state is not a necessary party to an action against the former by a distributee to recover his share in the estate).

[a] **Removal of executor from state.** — Under a statute providing that in case one of the executors has removed the one remaining in the jurisdiction may be sued, removal means a change of residence and not temporary absence on a journey. Bledsoe v. Huddleston, 5 Yerg. (Tenn.) 295.

82. Negley v. Gard, 20 Oh. 310.

83. Ryerson v. Ryerson, 4 N. J. L. 363.

84. Rinehart v. Rinehart, 15 N. J. Eq. 44 [cit 1 Daniel Ch. Pr. p 273; 2 Williams Ex. p 1626]; Marsh v. Oliver, 14 N. J. Eq. 259; In re Coursen, 4 N. J. Eq. 408; Thompson v. Graham, 1 Paige (N. Y.) 384; Davies v. Williams, 13 East 232, 104 Reprint 358; Cramer v. Morton, 2 Molloy 108; Kilby v. Stanton, 2 Y. & J. 75, 148 Reprint 838.

[a] **Where land devised to be sold has been sold by one of several executors, all the executors** ought to be parties in a suit to foreclose the mortgage existing on such lands. Mayo v. Tomkies, 6 Munf. (20 Va.) 520.

85. Mulford v. Allen, 2 N. J. Eq. 288; Wallach v. Dryfoos, 140 App. Div. 438, 125 NYS 305; Tooker v. Oakley, 10 Paige (N. Y.) 288; Blount v. Burrow, 3 Bro. Ch. 90, 29 Reprint 424; Finch v. Winchelsea, 1 Eq. Cas. Abr. 2, 21 Reprint 828.

86. Tooker v. Oakley, 10 Paige (N. Y.) 283; Thompson v. Graham, 1 Paige (N. Y.) 384; Finch v. Winchelsea, 1 Eq. Cas. Abr. 2, 21 Reprint 828.

87. Ransom v. Geer, 30 N. J. Eq. 249.

88. Personette v. Johnson, 40 N. J. Eq. 173.

[a] **One of two executors may apply for money in the hands of the court** to pay undisputed claims when any reason appears for not joining the other executor. Hattersley v. Bissett, 52 N. J. Eq. 693, 30 A 86.

89. Personette v. Johnson, 40 N. J. Eq. 173.

90. Ala.—Clements v. Kellogg, 1 Ala. 330.

D. C.—Willard v. Wood, 1 App. 44 [aff 164 U. S. 502, 17 SCt 176, 41 L. ed. 531].

Md.—Spencer v. Ragan, 9 Gill 480.

N. J.—In re Coursen, 4 N. J. Eq. 408.

N. Y.—Matter of Ringler, 70 Misc. 576, 127 NYS 934; Miller v. Herzog, 148 NYS 945.

Va.—Eustace v. Gaskins, 1 Wash. (1 Va.) 188.

[a] **Where executors have all taken out letters** they must be sued jointly in the same manner as if they had all proved the will at the same time and before the same officer. In re Coursen, 4 N. J. Eq. 408.

[b] **After bill filed against one executor, if the other executor qualifies,** he ought to be made a party to the suit as soon as it is known that he has so qualified. Eustace v. Gaskins, 1 Wash. (1 Va.) 188.

91. Fraser v. Cole, 214 Fed. 556, 131 CCA 556; Clements v. Kellogg, 1 Ala. 330; Footman v. Pray, R. M. Charlt. (Ga.) 291.

[a] **Illustration.** — Where a bill seeks discovery and relief against the acts of one only of the executors of an estate, the other need not be made a party in the first instance but may be made a party during the progress of the suit if it proves necessary. Footman v. Pray, R. M. Charlt. (Ga.) 291.

[b] **Where an executor has been ordered by the probate court to pay** specified sums to enumerated legatees, and one of them brings a suit against executor to reach real estate fraudulently conveyed by the executor, a coexecutor is not an indispensable party. Fraser v. Cole, 214 Fed. 556, 131 CCA 556.

[c] **Suit against personal representatives of one executor or administrator.**—(1) Where two executors of a will are dead and the third and only surviving one resides out of the jurisdiction, and the estate has gone into the hands of the personal representatives of one of the deceased executors, the testator having left no debts, persons entitled to legacies under the will may maintain a bill in equity for such legacies against the personal representatives of the deceased executor. Rushin v. Young, 27 Ga. 325. (2) Where one administrator has settled his final account on which a decree of distribution has been made, a distributee may sue the personal representative of such administrator for his distributive share, although a coadministrator still survives. Baughman v. Kunkle, 8 Watts (Pa.) 483.

92. Steinhardt v. Cunningham, 55 Hun 375, 8 NYS 627 [aff 130 N. Y. 292, 29 NE 100].

93. Brent v. Washington, 18 Gratt. (59 Va.) 526.

son as administrator of a certain decedent and to another person as administrator of another decedent is bad, and judgment cannot be rendered thereon against defendants either jointly or severally.[94]

[§ 2042] **22. Personal Representative as Party in Both Individual and Representative Capacity.** A personal representative who is also beneficially interested in the estate may sue both in his representative and in his individual capacity, such action involving no misjoinder,[95] and in a proper case an action may be brought against a personal representative in both his individual and his representative capacity.[96]

[§ 2043] **23. Personal Representative as Plaintiff and Defendant in Same Action.** The courts do not permit a party to be both plaintiff and defendant in the same action and therefore it is not competent for a personal representative acting in his representative capacity to sue himself in his individual capacity.[97] The rule is not altered by the fact that his corepresentative is joined with him as coplaintiff, but the pleading may be amended by striking out his name as coplaintiff.[98] On the other hand a personal representative cannot maintain a suit in his individual capacity against himself in his representative capacity.[99] Neither can an individual, as representative of one estate, maintain an action against himself as representative of another estate.[1] It has been held, however, that the court will take jurisdiction of an action on a claim against a decedent's estate, although the guardian of the insane claimant and the administrator of decedent are the same person, where the action is brought and defended in good faith.[2]

[§ 2044] **24. Intervention.** The personal representative may insist on being made a party to a bill against the heir for the discovery of assets and their application to the payment of debts,[3] and one who is an acknowledged representative of a decedent should be allowed on application to intervene in a special proceeding in the surrogate's court to which decedent was a party.[4] Where one of several makers of a note dies, his representative may appear as a party defendant to contest the validity of the note.[5] In a vendor's suit against the purchaser's assignee, praying for a sale of the land by a receiver and the application of the proceeds to the price, the purchaser's administrator may be made a party on his application.[6] In a suit by a client against her attorneys to set aside an assignment of her interest in the estate of her father on a contest of the will, the executors, being accountable to any one entitled to receive decedent's property, were entitled to intervene.[7] Where a mortgage and the debt secured thereby pass from the intestate as a gift causa mortis, the administrator can intervene in the suit on the mortgage only at the request of the donees and for their benefit;[8] and where one heir sues the others on an alleged contract with the ancestor whereby after administration plaintiff would be entitled to a distribution of all the property remaining in the hands of the administrator, the latter has no interest in the controversy and violates no obligation of his trust by not intervening.[9] Where a suit is brought for partition between heirs of decedent, the administrator cannot intervene asking for a sale of the land to make assets nor interfere in the proceeding in any manner.[10] Where a personal representative asking permission to intervene alleges his representative capacity, it is not proper to admit him as a party without first compelling him to prove his legal appointment, although his representative capacity is not denied nor any proof given that he had not been appointed.[11]

By special or temporary administrator. A special administrator is properly allowed to become a party to a bill by an heir of decedent against one charged to have fraudulently procured a conveyance from decedent and to have converted personal property.[12] Where complaint for land was brought by one who claimed title to the property sued for

94. Sibbit v. Lloyd, 11 N. J. L. 163.

95. Haydon v. Haydon, 98 Ark. 480, 136 SW 671; Rogers v. Schlotterback, 167 Cal. 35, 138 P 728.

[a] **Illustration.**—Where decedent at the time of his death owned a crop growing on certain land which he held under lease, and his widow continued to cultivate the crops to maturity after his decease, when they were converted by defendant, the widow had an interest in the crops in her own right, and therefore was entitled to sue both as an individual and as administratrix of decedent's estate under a statute providing that all persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, except where otherwise provided. Haydon v. Haydon, 98 Ark. 480, 136 SW 671.

[b] **Where an action was revived** by an administrator, who was also an heir of the decedent, there was no misjoinder in allowing the administrator to be a party plaintiff in both his representative and individual capacity. Rogers v. Schlotterback, 167 Cal. 35, 138 P 728.

96. Dodge v. Mills, 150 Mich. 394, 113 NW 1123.

[a] **Illustration.** — Where executors, in their representative capacity and individually, manipulated the finances of a railway company, they being required to account for such assets as they received in their capacity as executors to the beneficiaries of the estate, they were proper parties to a bill for an accounting by a stockholder of the railway company in order to recover his proportionate share of the profits arising from such financial transactions, both as executors and in their individual capacity. Dodge v. Mills, 150 Mich. 394, 113 NW 1123.

97. Thomas v. Thomas, 3 Litt. (Ky.) 8; Harris v. Pickett, 37 La. Ann. 741; McKnight v. Calhoun, 36 La. Ann. 408; Johnson v. Dubel, (N. J. Ch.) 3 A 705.

98. Williams v. McHugh, 17 Ga. A. 59, 61, 86 SE 272 [quot Cyc]; Johnson v. Dubel, (N. J. Ch.) 3 A 705.

99. Cal.—Byrne v. Byrne, 94 Cal. 576, 29 P 1115, 30 P 196.

La.—Harris v. Pickett, 37 La. Ann. 741; Farmer's Succ., 32 La. Ann. 1037.

Mont. — Phillips v. Phillips, 18 Mont. 305, 45 P 221.

N. J.—Black v. Shreeve, 7 N. J. Eq. 440.

Pa.—De Witt v. De Witt, 38 Pa. Co. 689.

R. I.—Perkins v. Se Ipsam, 11 R. I. 270.

[a] **Notwithstanding a statute** providing that a personal representative if a creditor of decedent may bring action on a claim against the estate when it has been rejected, a personal representative cannot in his individual capacity bring suit against himself in his representative capacity on a claim paid by him personally after decedent's death. The statute only includes claims existing at the time of decedent's death. Phillips v. Phillips, 18 Mont. 305, 45 P 221.

1. Medlin v. Simpson, 144 N. C. 397, 57 SE 24; Phillips v. Phillips, 19 Pa. Dist. 795.

[a] **Illustration.**—Where a person was administrator of the estate of a wife and also one of the executors of her husband's will, it was irregular for him to be one of the defendants in an action brought by himself and his coexecutor, affecting the rights of the widow's estate, but he should have been placed on the same side in both capacities. Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

2. Haberly v. Haberly, 27 Cal. A. 139, 149 P 53.

3. Cosby v. Wickliffe, 7 B. Mon. (Ky.) 120.

4. Van Alen v. Hewins, 5 Hun (N. Y.) 44; Merritt v. Jackson, 2 Dem. Surr. (N. Y.) 214; Lafferty v. Lafferty, 5 Redf. Surr. (N. Y.) 326; Jefferson County Bank v. Robbins, 67 Wis. 68, 29 NW 209, 893.

5. Womack v. Shelton, 31 Tex. 592.

6. Couch v. Crane, 142 Ga. 22, 82 SE 459.

7. Moran v. Simpson, (N. D.) 173 NW 769.

8. Borneman v. Sidlinger, 18 Me. 225.

9. In re Healy, 137 Cal. 474, 70 P 455.

10. Clayton v. Bough, 93 Ind. 85; George v. Brown, (W. Va.) 99 SE 509.

11. Hamilton v. Lamphear, 54 Conn. 237, 7 A 19.

12. Slafter v. Savage, 89 Vt. 352, 95 A 790.

under a deed from his mother, it was alleged that the mother had died since the execution of the deed, leaving no property and no administrator, and that defendants named in the petition, together with plaintiff, were all of the heirs at law of decedent, one showing that he was the duly appointed and qualified temporary administrator of decedent, and that he was in possession of the property sued for, was, upon his intervention duly filed praying that he be made a party defendant, properly allowed to become a party defendant to such suit.[13]

By succeeding representative. Where, upon the filing of a bill by one coexecutor against another, complainant filed a petition to remove his coexecutor, which was met by an answer and a cross petition for the same relief with reference to complainant, whereupon the probate court removed both and appointed an administrator with the will annexed, the latter was entitled to intervene and maintain the bill alone for the benefit of the estate.[14]

By creditor. In a suit by a creditor against a personal representative to recover a claim against the estate, other creditors have no right to intervene and become codefendants.[15] In a suit by an administrator to recover a fund belonging to the estate, it is proper to allow a creditor seeking to charge the fund with the payment of a debt to intervene.[16]

By legatee. Where a disputed claim against an estate has been referred under the statute and the proceeding has assumed the status of an action in the supreme court, a legatee cannot intervene on the ground of collusion between the administrator and the claimant and consequent danger to his legacy.[17]

Miscellaneous. One who acquired from decedent's heirs decedent's interest in real estate may intervene and defend a claim against the estate.[18] Where a bill was filed to marshal the assets of an insolvent estate and among the debts due by decedent was one due as guardian of his two daughters both of whom were married at the death of the father, and the husband of one of the daughters was a party to the original bill, and was charged with wasting the assets to a large amount, and pending these proceedings the two daughters by their next friend came in and were made parties by petition setting up the debt due them by their father and praying that it should be settled to their sole use, and before any final decree one of the daughters died leaving minor children it was held that the right to a settlement was sufficiently asserted by the mother during her lifetime to authorize the children to come in by petition and assert the right for their own benefit as survivors.[19] In a proceeding by the administrator of an intestate estate for interpleader against several defendants claiming to be heirs, and in this respect contesting with each other, the superior court has no jurisdiction to determine whether the estate has escheated, and therefore one who claims an interest in the estate only in the event that there are no heirs has no right to be made a party defendant by intervention for the purpose of showing that none of the defendants are heirs, and that the estate has escheated.[20] Where an equity suit in the nature of a creditor's bill was brought against a decedent and others, and an award of a distributive share of decedent's estate had been made by the orphans' court to one of defendants in the equity suit, but such defendant had received and misappropriated certain stocks which belonged to decedent and the master in the equity suit had recommended a decree against her, and by reason of these facts complainant in the equity suit asked a special lien on the award to the distributee and asked to intervene in a petition filed by the executor in the orphans' court, which latter petition set forth the above facts and further set forth that defendant distributee would be unable to reimburse the estate in case a final decree was rendered against her in the equity proceeding and the estate had to pay the amount thereof, it was held that the complainant in the equity suit should be permitted to intervene in the proceeding in the orphans' court.[21]

[§ 2045] **25. Joinder of Personal Representatives in Actions by Legatees or Distributees.** Where the legatee of an undivided half interest in a firm and the executors contracted in writing under seal with decedent's partner for a final accounting of the firm's business, the agreement providing that upon violation of its provisions by either party the other should be entitled to recover liquidated damages, although the legatee was the legal owner of the bequest by reason of the executor's assignmnt thereof to him, the executors had an interest in the liquidated damage clause and in the other undivided half of the firm's assets in an adjustment of the accounts, and the legatee could not assign the cause of action belonging to himself and the executors jointly, or sue alone, and hence the legatee's assignee could not sue without joining the executors.[22]

[§ 2046] **26. Effect of Death of Personal Representative[23]—a. Actions by Personal Representative.** At common law all personal actions abated by the death of either party before judgment,[24] but by virtue of statutory provisions the rule is almost universal that, where suit is brought by a personal representative, and he dies pending suit, it does not abate on his death.[25] Where the personal representative sues in his individual capacity, the suit, on his death, must be continued in the name of his personal representative and not in the name of his successor,[26] but where the cause of action is

13. Hayes v. Hayes, 137 Ga. 362, 73 SE 659.

14. Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527.

15. Hassinger v. Hassinger, 20 Pa. Co. 485.

16. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

17. Honigbaum v. Jackson, 97 App. Div. 527, 90 NYS 182.

18. Gordon-Tiger Min., etc., Co. v. Loomer, 50 Colo. 409, 115 P 717.

19. Polhill v. Neal, 50 Ga. 146.

20. Duggan v. Lamar, 110 Ga. 470, 35 SE 670 (where a county school commissioner was denied permission to be made a party and to answer and plead).

21. Kern's Est., 5 Pa. Dist. 117, 17 Pa. Co. 437.

22. Porter v. Baldwin, 139 App. Div. 278, 123 NYS 1043.

23. See also Abatement and Revival § 247 et seq.

24. Portevant v. Pendleton, 23 Miss. 25. See Abatement and Revival § 247 et seq.

25. Ex p. Jones, 54 Ala. 108; Wood v. Flynn, 30 Hun 444; Bain v. Pine, 1 Hill 615; Owen v. Curzon, 2 Vern. Ch. 237, 23 Reprint 753. See Abatement and Revival § 257.

[a] **A claim filed by an administratrix under order of court** against the estate of another decedent and pending in that court for allowance or rejection is a suit or action within the rule. Reynolds v. Crook, 95 Ala. 570, 11 S 412.

[b] **Rule applies to suits in equity.**—Fletcher v. Sanders, 7 Dana (Ky.) 345, 32 AmD 96; Owen v. Curzon, 2 Vern. Ch. 237, 23 Reprint 753; Mitford Pl. p 64.

26. Tate v. Shackelford, 24 Ala. 510, 60 AmD 488; Arrington v. Hair, 19 Ala. 243; Horskins v. Williamson, T. U. P. Charlt. (Ga.) 145, 4 AmD 703.

[a] **Illustration.**—Where an administrator sues in his individual capacity and recovers judgment and after issuance of execution thereon an affidavit of illegality is filed and

such that the representative can only sue on it in his representative capacity, it must be continued, after his death, by his successor in office.[27] Where the personal representative sues in his representative capacity on a cause of action which he could sue on either individually or as representative and the amount recovered would be assets of the estate, it has been held that on his death suit should be continued by his successor;[28] but it has also been held that under such circumstances the suit may be revived either in the name of the administrator de bonis non or of the administrator of the deceased representative.[29]

Where the representative dies after recovering judgment for a debt due to the estate, the administrator de bonis non is properly substituted as plaintiff for the purpose of enforcing the judgment;[30] but it has been held that, where at the time of the death of the representative, pending scire facias on a judgment obtained by him, the estate had been fully settled and the debts paid, the proceeding may be revived in the name of the distributees.[31]

[§ 2047] **b. Actions against Personal Representative.** Actions against personal representatives cannot be revived on death of the representatives unless there is statutory authority therefor;[32] but by virtue of statutory provisions such actions do not ordinarily abate on the death of the personal representative pending suit.[33] A suit may be [34] and ordinarily should be [35] continued against the administrator de bonis non and not against the administrator of the personal representative.[36] If, however, the object of the suit is to fasten a liability on a personal representative for a devastavit, the suit should be revived against his administrator;[37] and it has been held that, where an administrator who died pending an action against him by a creditor for a settlement of the estate had in his hands the money to pay plaintiff's claim, it was proper to render judgment against his administrator therefor.[38] So in a proceeding against an administrator to hold him accountable for maladministration his administrator and not the administrator de bonis non of his intestate is the proper party against whom to revive a suit.[39] A statute which authorizes the making of the successor of an executor a party by scire facias to a suit against him prevents abatement of such suit even when pending in a different county from that where an administration de bonis non is granted.[40] Where an administrator who is sued dies before levy of execution, his administrator does not become a party to the record and is not in privity to the subject matter of the execution and can take no legal steps to defeat the execution.[41] An action commenced by a widow against the administrator of her husband for the year's support and the exempt property cannot be revived against the representatives of the administrator, but only against the administrator de bonis non of the husband.[42] Where a suit was pending by the next of kin against an administrator for the distribution of his estate and defendant dies, the action could not be continued by the next of kin, as no one but an administrator de bonis non could call the representative of the deceased administrator to account for the assets.[43]

[§ 2048] **c. Death of One of Several Personal Representatives.** Where suit is brought by or against two or more personal representatives and one of them dies, the whole action or grounds of relief survive in favor of or against the survivor or survivors.[44] In consequence on the death of one of several personal representatives, the suit is prop-

he dies, an administrator de bonis non cannot be made a party to the proceeding. Saffold v. Bank, 69 Ga. 289.

27. Ala.—Morrow v. Taggart, 45 Ala. 293.
Ill.—Thomas v. Adams, 10 Ill. 319.
Ky.—Robertson v. Robertson, 174 Ky. 836, 192 SW 878.
Okl.—Moss v. Ramsey, 49 Okl. 499, 153 P 843.
Tenn.—Brasfield v. Cardwell, 7 Lea 252.

[a] **Where an administrator continues an action commenced by decedent** and dies, the administrator de bonis non is the only proper party to continue the action. Stephenson v. Peebles, 77 N. C. 364.

[b] **Creditors** cannot continue a suit originally brought by the administrator against the heirs to have land sold to make assets. On the death of the administrator, suit can only be continued by the administrator de bonis non. Brittain v. Dickson, 111 N. C. 529, 16 SE 326.

[c] **Where an administrator de bonis non declines to prosecute an action** in which the administrator was plaintiff, one who makes affidavit that the suit was originally brought for his use is not entitled to be made plaintiff, but on giving indemnity to secure costs he is entitled to have the administrator de bonis non made plaintiff, and the action prosecuted in his name. Stephenson v. Peebles, 77 N. C. 364.

[d] **Prerequisites to continuance of suit.**—Under a statute requiring a public administrator to give bond and take out letters of administration in each particular case before he is invested with any control over the estate, a public administrator has no authority to prosecute a suit commenced by an administrator who has died until he has given bond and taken out letters of administration in the case of that particular estate. Thomas v. Adams, 10 Ill. 319.

28. Hemphill v. Hamilton, 11 Ark. 425.

29. Wood v. Tomlin, 92 Tenn. 514, 22 SW 206.

30. Lea v. Hopkins, 7 Pa. 385 (under a statute giving an administrator de bonis non the right to sue out writs of execution or scire facias on judgments obtained by or in the name of the executor or administrator into whose place he may have come).

31. Crane v. Crane, 51 Ark. 287, 11 SW 1.

32. Portevant v. Pendleton, 23 Miss. 25.

33. Portevant v. Pendleton, 23 Miss. 25; Parks v. Lubbock, (Tex. Civ. A.) 50 SW 466. See Abatement and Revival § 258.

34. U. S.—Owen v. Blanchard, 18 F. Cas. No. 10,628, 2 Cranch C. C. 418.
Ga.—Roe v. Doe, 30 Ga. 775.
Md.—Mitchell v. Williamson, 9 Gill 71.
Va.—Dabney v. Smith, 5 Leigh (32 Va.) 13.
W. Va.—Jones v. Reid, 12 W. Va. 350, 29 AmR 455.

35. Jones v. Jones, 8 Humphr. (Tenn.) 705.

36. Sprengel v. Schroeder, 203 Ill. A. 213; Jones v. Jones, 8 Humphr. (Tenn.) 705.

37. Clopton v. Haughton, 57 Miss. 787; Carlisle v. Farrow, 74 S. C. 527, 54 SE 766. See also Rodgers v. Rushin, 30 Ga. 934 (where an executor dies pending a suit to fix a personal liability on him for a devastavit, his representative should be made a party to the proceedings).

38. Caldwell v. Hampton, 53 SW 14, 21 KyL 793.

39. Leonard v. Cameron, 39 Miss. 419.

40. Walton v. Gill, 46 Ga. 600.

41. Henderson v. Winchester, 31 Miss. 290.

42. Holliday v. Holland, 41 Miss. 528.

43. Merrill v Merrill, 92 N. C. 657.

44. Goble v. Andruss, 2 N. J. Eq. 66; Shook v. Shook, 19 Barb. (N. Y.) 653; Lachaise v. Libby, 21 HowPr (N. Y.) 362; Richardson v. Richardson, 9 Pa. 428.

[a] **Suits to recover legacies.** — (1) If one of two coexecutors has died, his personal representatives are not necessary parties to a bill to recover a legacy (Dehart v. Dehart, 3 N. J. Eq. 471; Richardson v. Richardson, 9 Pa. 428); (2) especially where it charges that all the assets of the testator are in the hands of the surviving executor (Goble v. Andruss, 2 N. J. Eq. 66). (3) But such representatives are proper parties whenever the deceased executor is charged with having assets or where fraud and collusion are charged between the executors or in a case of insolvency. Goble v. Andruss, 2 N. J. Eq. 66.

[b] **Effect of want of service on survivor.** — Where an action is brought against two executors and service is had on one for whom there is a special appearance, a trial and judgment after the death of the executor on whom the writ was served is erroneous, the other executor never having been in court as a party, it would be unjust to permit plaintiff to hold him as such.

erly continued by or against the survivor or survivors,[45] and it is error to revive the suit against the representatives of the deceased representative.[46] The widow of an intestate cannot come into court on an open unliquidated claim against the representative of one administrator while there is another living, nor can she do so even upon a joint judgment or decree previously obtained against both.[47]

[§ 2049] **27. Effect of Resignation, Removal, or Discharge of Personal Representative.** The resignation, removal, or discharge of a personal representative pending a suit brought by him does not operate to abate the action,[48] although after his removal he cannot himself continue the suit.[49] The suit should be continued in the name of his successor in office,[50] and the cause cannot be proceeded with further until the latter is made a party.[51] The same rules apply where a personal representative dies pending a suit against him.[52] Where letters are revoked because the alleged decedent is not dead, he is entitled to be substituted as a party without terms.[53]

[§ 2050] **28. Effect of Marriage of Executrix or Administratrix.** It is a well settled common-law rule that if a feme sole who has been appointed a personal representative subsequently marries, her husband becomes coexecutor or coadministrator with her,[54] or as it is sometimes expressed he becomes executor in her right;[55] and in actions or suits subsequently brought by or against either in a representative capacity, the other is a necessary party.[56] It has been held, however, that in cases where an administrator may be charged in his own right the action lies against the husband alone;[57] and that if a bond is given to a husband and wife, who is administratrix, the husband may declare on it alone as a bond made to himself.[58] Where there are several personal representatives, one of whom is a married woman, she should be joined with the other representatives whether she was constituted one before or after marriage,[59] and her husband should

Greiner v. Hummel, 2 Watts (Pa.) 345.

45. Ala.—Wright v. Land, 66 Ala. 389; Elliott v. Eslava, 3 Ala. 568.
Ga.—Castor v. Pace, 24 Ga. 137.
Miss.—Hicks v. Harris, 26 Miss. 420.
N. Y.—Patterson v. Copeland, 52 HowPr 460.
S. C.—Gadsden v. Whaley, 14 S. C. 210.

46. Hicks v. Harris, 26 Miss. 420.

47. Wade v. Potter, 14 N. J. L. 278.

48. Ala.—Russell v. Erwin, 41 Ala. 292; Elliott v. Eslava, 3 Ala. 568.
Ark.—Carley v. Barnes, 11 Ark. 291.
Ill.—Larimer v. Snell, 181 Ill. A. 50.
Md.—Cole v. Hebb, 7 Gill & J. 20.
Nebr.—Burlington, etc., R. Co. v. Crockett, 17 Nebr. 570, 24 NW 219.
[a] **Contrary view.** — Gormly v. Skinner, Wright (Oh.) 680.

49. Peo. v. Harrigan, 291 Ill. 206, 125 NE 903; Knight v. Hamaker, 33 Or. 154, 54 P 277, 659.

50. U. S.—Person v. Fidelity, etc., Co., 92 Fed. 965, 35 CCA 117 [rev 84 Fed. 759].
Ala.—Lunsford v. Lunsford, 122 Ala. 242, 25 S 171; Ex p. Jones, 54 Ala. 108; Russell v. Erwin, 41 Ala. 292; Townsend v. Jeffries, 24 Ala. 329; Elliott v. Eslava, 3 Ala. 568.
Ark.—Carley v. Barnes, 11 Ark. 291.
Colo.—Jones v. Pearl Min. Co., 20 Colo. 417, 38 P 700.
Ill.—Larimer v. Snell, 181 Ill. A. 50.
Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.
Md.—Cole v. Hebb, 7 Gill & J. 20.
Miss.—Cox v. Martin, 75 Miss. 229, 21 S 611, 65 AmSR 604, 36 LRA 800.
Nebr.—Burlington, etc., R. Co. v. Crockett, 17 Nebr. 570, 24 NW 219.
Oh.—Bishop v. Stoddard, 4 Oh. Dec. (Reprint) 276, 1 ClevLRep 201.
[a] **Where a public administrator** resigns or his office is otherwise terminated pending an action brought by him, it may be revived in the name of his successor. Russell v. Erwin, 41 Ala. 292; Carley v. Barnes, 11 Ark. 291; Cox v. Martin, 75 Miss. 229, 21 S 611, 65 AmSR 604, 36 LRA 800.
[b] **Revival by administrator as his own successor.**—Where pending an action by administrator his letters are revoked, the action may be revived by him on his reinstatement. Hill v. Bryant, 61 Ark. 203, 32 SW 506.
[c] **Presumption as to propriety of substitution.**—Where plaintiff is an administrator substituted by order of court for another who was also an administrator, it will be presumed in the absence of evidence to the contrary that the substitution was properly made. Jones v. Pearl Min. Co., 20 Colo. 417, 38 P 700.
[d] **Notice of revivor in the name of the successor** must be given to the adverse party. Bishop v. Stoddard, 4 Oh. Dec. (Reprint) 276, 1 ClevLRep 201.
[e] **Where one who has never qualified as administrator resigns after bringing suit,** an administrator who is thereafter appointed and who qualifies may procure himself to be substituted as plaintiff under a statute providing that no civil suit should be dismissed for want of necessary parties before the court shall have power to strike out or insert in the writ and pleadings the names of either plaintiffs or defendants so as to have the proper parties before it. Person v. Fidelity, etc., Co., 92 Fed. 965, 35 CCA 117 [rev 84 Fed. 759].

51. Taylor v. Savage, 2 How. (U. S.) 395, 11 L. ed. 313 [aff 1 How. 282, 11 L. ed. 132]; Trimmer v. Todd, 52 N. J. Eq. 426, 28 A 583.

52. Ala.—Skinner v. Frierson, 8 Ala. 915.
Cal.—Kerns v. Dean, 77 Cal. 555, 19 P 817.
Ill.—Larimer v. Snell, 181 Ill. A. 50.
Mass.—Troy Nat. Bank v. Stanton, 116 Mass. 435.
N. Y.—Hamilton v. Crawford, 73 Misc. 23, 132 NYS 277; Burras v. Looker, 2 Edw. 499.
Oh.—Matter of Dunham, 8 Oh. Cir. Ct. 160, 4 Oh. Cir. Dec. 325.
[a] **Removal pending appeal.** — Where an administrator defendant pending his appeal is removed, his successor has the right to prosecute the appeal and defend the action. Kerns v. Dean, 77 Cal. 555, 19 P 817.
[b] **Discharge pending appeal.** — A judgment for defendant, in an action against an executor of a deceased stockholder of a bank, for an assessment on stock necessary for liquidation will be affirmed on appeal, on it appearing that the executor has been discharged on the entry of a final order of distribution not appealed from. Union Sav. Bank v. De Laveaga, 150 Cal. 395, 89 P 84.
[c] **No judgment can be rendered against a representative who has been removed.**—(1) Troy Nat. Bank v. Stanton, 116 Mass. 435; Matter of Dunham, 8 Oh. Cir. Ct. 160, 4 Oh. Cir. Dec. 325. (2) Such a judgment is invalid, although rendered pending an appeal from the order of removal. More v. More, 127 Cal. 460, 59 P 823 [aff 6 Cal. Unrep. Cas. 78, 53 P 1077].
[d] **Failure to substitute successor.**—If an administrator resigns after rendition of a decree against him and an administrator de bonis non is appointed but is not made a party to the pending suit, either by bill of revivor or amendment, the court is without jurisdiction to proceed against him on complainant's motion for a summary judgment because of his failure to follow the direction of the decree rendered against the administrator as to the disposition of assets of the estate. Passmore v. Ellington, 122 Ala. 559, 26 S 144.
[e] **Effect of failure to suggest dismissal.**—Where an executor is discharged pending suit against him and an administrator de bonis non appointed, but there is no suggestion or plea by the executor setting up the discharge and plaintiff obtains a verdict against him, the administrator de bonis non cannot by means of a rule to show cause be made a party to the suit as of a date prior to the verdict and judgment is thus entered against him. Weddington v. Huey, 80 Ga. 651, 6 SE 281.
[f] **Where the birth of a posthumous child is the ground for revocation of letters testamentary,** the newly appointed administrator cannot be made a party defendant to a suit pending against the removed executor. He is not an administrator de bonis non, but to all intents and purposes an original administrator on an intestate estate. Martin v. Brooch, 6 Ga. 21, 50 AmD 306.
[g] **A suit for an injunction** to restrain an executor from removing property of the estate from the jurisdiction with a view to defeating the rights of creditors abates on the resignation of the executor. Vaugh v. Cox, 27 Miss. 701.

53. Ferree v. Balph, 35 Pa. Co. 574.

54. Dowty v. Hall, 83 Ala. 165, 3 S 315; Williamson v. Hill, 6 Port. (Ala.) 184; Buck v. Fischer, 2 Colo. 709; Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716; Wood v. Chetwood, 27 N. J. Eq. 311.

55. Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716.

56. Ala.—Williamson v. Hill, 6 Port. 184.
Colo.—Buck v. Fischer, 2 Colo. 709.
Md.—Linthicum v. Polk, 93 Md. 84, 48 A 842.
Mass.—Barber v. Bush, 7 Mass. 510.
N. J.—Oliva v. Bunaforza, 31 N. J. Eq. 395; Wood v. Chetwood, 27 N. J. Eq. 311.
N. C.—Moore v. Suttril, 2 N. C. 16.

57. Williamson v. Hill, 6 Port. (Ala.) 184.

58. Ankerstein v. Clarke, 4 T. R. 616, 100 Reprint 1207.

59. Gratz v. Phillips, 1 Penr. & W. (Pa.) 333.

be joined in an action against them.[60] Where a feme sole personal representative marries pending an action commenced by her, the action cannot be allowed to proceed unless the husband is joined as plaintiff,[61] but in the absence of statute providing otherwise the action may proceed if the husband is joined.[62] Where an action is brought against a feme sole representative and she marries, the action may be further prosecuted on making the husband a party,[63] or even, it has been held, without making the husband a party.[64] In a number of jurisdictions, by virtue of statutory enactment, marriage of a feme sole personal representative operates as an extinguishment of her authority,[65] and she cannot further prosecute a suit brought by her,[66] even though her husband join,[67] and if she is one of two joint representatives and the other sues alone it is not necessary to amend by adding her as a party.[68]

[§ 2051] **K. Process**[69]**—1. In General.** To give a court jurisdiction to render judgment against a personal representative, service of process on him is necessary;[70] and a recital, in an order making the administrator a party on the death of decedent, that he had been served, does not prevent his showing that he neither was served nor appeared.[71]

Nonresident representatives. Where persons not residents of a state are appointed personal representatives on their petition by a court of that state the court may require them to submit to service of summons in an action to determine the liability of the estate on a claim not provable in course of administration,[72] and nonresident executors are sometimes required by statute, before entering on the duties of their trust, to appoint resident agents on whom process may be served.[73] Service on the sureties on the bond of a nonresident representative is sometimes authorized by statute and given the same effect as though service were made on the representative,[74] and statutory authority is also found by which, when suit is brought upon the bond given by an administrator on a sale of realty and the summons is issued in the county which has control of the account of such administrator, service may be made on his personal representative at the latter's residence outside of the county.[75]

Time of service. Statutory provisions as to the time of serving process must be strictly complied with.[76] Under statutes requiring the service of summons within a year after the commencement of the action, and providing that an action may be commenced against a personal representative within a year after the issuing of letters testamentary or of administration, and the bringing of new parties to an action and the service of summons on them, where an action was properly commenced against the heirs of a decedent to foreclose a mortgage, and an administrator was afterward appointed, the court might order him to be brought in as a party and summons to be served on him over a year after the commencement of the action but within a year of his appointment.[77]

Attachment in suit against heir to charge land. Under a statute imposing a lien in favor of the administrator of a solvent estate upon the share of an heir indebted to the intestate at his death, and making it enforceable by suit and attachment by the administrator within two years after administration granted, the lien to have priority to any other attachment of the share, it has been held that in enforcing the lien by suit and attachment it is not necessary that the writ or the officer's return should contain a description of any particular land

60. Ludlow v. Marsh, 3 N. J. L. 983.

61. Memphis, etc., R. Co. v. Womack, 84 Ala. 149, 4 S 618; Townshend v. Townshend, 10 Gill. & J. (Md.) 373; Swan v. Wilkinson, 14 Mass. 295.

62. Memphis, etc., R. Co. v. Womack, 84 Ala. 149, 4 S 618.

[a] **Prosecution by administrator de bonis non.**—A statute providing that, where an administrator is removed from office pending a suit in which he is a party it may be prosecuted by the administrator de bonis non applies where the authority of a sole administratrix to sue is extinguished by her marriage pending suit. Brown v. Pendergast, 7 Allen (Mass.) 427.

63. Henderson v. McClure, 7 S. C. Eq. 466.

64. Bobe v. Frowner, 18 Ala. 89.

65. Whittaker v. Wright, 35 Ark. 511; Young v. Duhme, 4 Metc. (Ky.) 239; Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716; Vielhaber v. Eyermann, 1 Mo. A. 115.

66. Whittaker v. Wright, 35 Ark. 511.

67. Vielhaber v. Eyermann, 1 Mo. A. 115 (when an executrix marries or becomes nonresident, her suit cannot be further prosecuted until an administrator with the will annexed is appointed).

68. Teschemacher v. Thompson, 18 Cal. 11, 79 AmD 151; Mason, etc., R. Co. v. Davis, 27 Ga. 113.

69. Process generally see Process [34 Cyc 212].

70. Ala.—Paulling v. Creagh, 63 Ala. 398.

Cal.—Morrissey v. Gray, 160 Cal. 390, 117 P 438.

Fla.—Manley v. Union Bank, 1 Fla. 160.

Ga.—Dozier v. Richardson, 25 Ga. 90.

Ill.—Slatts v. Bernstein, 209 Ill. A. 545.

Ind.—Crabb v. Atwood, 10 Ind. 322.

Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

Tex.—Owsley v. Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

Que.—Pattle v. Horsfall, 27 Que. Super. 427.

[a] **As party to cross bill.**—Where an administrator became a party complainant to a bill by his intestate to enjoin a sale of mortgaged property and defendants filed a cross bill and bill of revivor against the administrator and intestate's heirs and devisees to obtain a sale of the property, the administrator must be served with process to make him a party to the cross bill. Paulling v. Creagh, 63 Ala. 398.

[b] **An administrator de bonis non appointed after suit brought** cannot be made a party to it by mere suggestion, although the record of such suggestion and of his having been made a party is served upon him. Manley v. Union Bank, 1 Fla. 160.

[c] **Where defendant is sued both as executor and in his individual capacity,** he need not be served with more than one copy of the citation. Owsley v. Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

[d] **Service on person not representative.**—In a bill by a bank to compel an insurance company to issue to it a share of its stock pledged by the first administrator of an estate, service of the bill and decree pro confesso against one who is not in fact the administrator de bonis non is without effect on the estate. Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328. See also Howard v. Daniel, 6 J. J. Marsh. (Ky.) 125 (service ineffectual unless it appears that person served was representative).

[e] **Return showing service as individual only.**—A return of service personally by delivery to a certain person of a copy of the summons attached to a copy of the complaint did not show service on her as administratrix of her deceased husband's estate, but only as an individual. Morrissey v. Gray, 160 Cal. 390, 117 P 438. To similar effect Slatts v. Bernstein, 209 Ill. A. 545.

[f] **Mode of service.**—In Quebec service of process upon testamentary executors domiciled in Quebec, made at an office which they have opened by leaving a copy of the writ and declaration with their secretary, is irregular and void. Pattle v. Horsfall, 27 Que. Super. 427.

71. Dozier v. Richardson, 25 Ga. 90.

72. State v. Rock County Prob. Ct., 66 Minn. 246, 68 NW 1063. See also Linn v. Hagan, 87 SW 763, 27 KyL 996 (St. [1903] § 3846, requiring the removal of nonresident personal representatives of decedents, contemplates that a personal representative shall reside in the state, and hence an administratrix appointed under the laws of Kentucky cannot, while exercising the office, be allowed, in her representative capacity, to set up her nonresidence to avoid service of process in the courts of the state).

73. Gorman v. Stillman, 25 R. I. 55, 54 A 934.

74. McCahan v. Reeder, 10 Pa. Dist. 298, 25 Pa. Co. 148.

75. Byers v. Hay, 9 Pa. Dist. 502.

76. Carter v. Spencer, 4 Ind. 78; Jones v. Roland, 8 Blackf. (Ind.) 272.

77. Churchill v. Woodworth, 148 Cal. 669, 84 P 155, 113 AmSR 324.

to be attached, as the lien is upon the entire share, but it is sufficient if the writ and return show that the attachment is made to enforce the lien, nor is it necessary that the certificate of the attaching officer returned to the register of deeds should contain a statement that plaintiff sues as administrator.[78]

[§ 2052] **2. Coexecutors or Coadministrators.** Where suit is brought against two or more personal representatives they must all be served with process in order to make them parties.[79] Service of process on one will not authorize a judgment against all,[80] and according to some decisions service must be made upon all to authorize a judgment against any one of them,[81] although there is also authority for the view that the case may proceed the judgment as to those who were served.[82] The rule requiring service as to all is subject to some limitations. Thus it has been held that if process is served on one and returned "not found" as to the others plaintiff may take judgment against all,[83] and where one is a nonresident process may be served on those who are residents and plaintiff may proceed to judgment against them.[84]

A judgment in a suit against independent executors to recover taxes due on city lots is not rendered void, but at most voidable, if erroneous at all, by failure to serve one of the executors.[85]

[§ 2053] **3. Defects, Objections, and Amendments.** A citation may issue against "the estate of [naming decedent]."[86] Process defective for failure to allege defendant's representative capacity may be amended,[87] and process against defendant personally may be amended so as to charge him in a representative capacity.[88] Irregularities in process against a personal representative cannot be taken advantage of by a stranger to the suit.[89] Where a petition alleges that it is brought against a defendant as administratrix of a certain deceased person, and alleges the death of her intestate, her qualification as such administratrix, and her consent to be sued within twelve months from her qualification, and prays the cancellation of certain mortgages executed by her intestate, and other relief against her as administratrix, and where service of a copy of the petition is acknowledged, and process, copy process, and service thereof, and twelve months' exemption from suit are waived in an entry indorsed upon the petition and signed by one as attorney at law for such defendant as administratrix of such deceased person, such defendant as administratrix of her intestate is a party to the suit, notwithstanding the fact that in the prayer for process her representative character is not stated.[90]

[§ 2054] **L. Appearance.**[91] An appearance by attorney is a sufficient appearance by an administrator in an action on a claim against an estate where a judgment is rendered by agreement against the estate.[92] An administrator by moving to dismiss for want of demand thereby enters his appearance to the action.[93] Process is not necessary to make a personal representative a party to the suit when he comes voluntarily into court and asks to be made such;[94] and by voluntarily appearing and answering an administrator against whom a suit in which his intestate was defendant is sought to be revived waives want of proper service on decedent,[95] or, it has been held, failure to file claims in accordance with statutory requirements.[96] Where defendant's administrators filed a paper reciting that defendant had died and that they were the administrators and praying that they be permitted to defend the action, this was in substance a general appearance by them.[97] Where two persons were sued as partners and one of them died, and his executor was substituted as a party of record, and at the trial the attorney who had entered an appearance for the two partners appeared for the surviving partner and the estate of the deceased partner, the case could proceed to judgment against the executor.[98] Where the personal representative appears in an action and demurs and answers therein, this sufficiently shows jurisdiction of the court over his person,[99] and such appearance waives any defect in the service upon him.[1] When an administrator appears in a proceeding for the allowance of a claim against the estate he represents, and asks to have the order of allowance vacated, and for leave to defend, this amounts to a general appearance in the case, and the court thereby obtains jurisdiction over the entire proceedings.[2] Appearance and answer waive the defense that suit against an executor is prematurely brought,[3] and appearance affects the personal representative with notice

78. C. A. Weston Co. v. Colby, 107 Me. 104, 77 A 637.

79. Owen v. Brown, 2 Ala. 126; Jones v. Wilkinson, 3 Stew. (Ala.) 44; U. S. Rolling Stock Co. v. Potter, 48 Iowa 56.

[a] **Service on resigned executor.** —Where one of four executors resigned, the service of notice on him eight months after his resignation, in an action against the executors as such, conferred no jurisdiction to enter judgment by default. U. S. Rolling Stock Co. v. Potter, 48 Iowa 56.

80. Terry v. Lindsay, 3 Stew. & P. (Ala.) 317; Breckenridge v. Mellon, 2 Miss. 273; Lobb v. Lobb, 26 Pa. 327; Myrick v. Adams, 4 Munf. (18 Va.) 366.

81. Owen v. Brown, 2 Ala. 126; Barnes v. Jarnagin, 20 Miss. 108.

82. Lobb v. Lobb, 26 Pa. 327 (if judgment is rendered against both it will be reversed as to the one not summoned and affirmed as to the other). See also Hunt v. Anderson, 33 Miss. 559 (which sustains the view stated in the text and makes no mention of Barnes v. Jarnagin, 20 Miss. 108).

[a] **Service on one executor and the return of not found as to the other** is good, as they are "joint contractors as to their testator's contracts" and plaintiff may proceed to judgment against those served. Wynn v. Booker, 26 Ga. 553.

83. Moore v. Paul, 2 Bibb. (Ky.) 330; Rous v. Etherington, 2 Ld. Raym. 870, 92 Reprint 81, 1 Salk. 312, 91 Reprint 275.

84. Hansom v. Jacks, 22 Ala. 549; Owen v. Brown, 2 Ala. 126; Tappan v. Bruen, 5 Mass. 193.

[a] **On discontinuance of the writ as to a nonresident administrator,** in the declaration, on the ground of nonresidence, it is the same as if the writ had been sued out originally against the resident administrator alone which would have been the correct mode of procedure. English v. Brown, 9 Ala. 504.

85. Ross v. Drouilhet, 34 Tex. Civ. A. 327, 80 SW 241.

86. New Orleans v. Stewart, 28 La. Ann. 180 (the constitution and statutes contemplate that a succession may be a plaintiff or defendant, and "estate" is synonymous with "succession").

87. Richardson v. Hickman, 32 Ark. 406.

88. Lester v. Lester, 8 Gray (Mass.) 437.

89. Helfrich v. Stem, 17 Pa. 143.

90. Emmett v. Dekle, 132 Ga. 593, 64 SE 682.

91. **Appearance generally** see Appearances 4 C. J. p 1312.

92. Collins v. Rose, 59 Ind. 33.

93. Tipton v. Richardson, 54 SW 738, 21 KyL 1195.

94. Garber v. Hirsh, 225 Mass. 422, 114 NE 670; Bowen v. Bonner, 45 Miss. 10.

95. Clark v. Stoddard, 3 Ala. 366; Campbell v. Collins, 152 Iowa 608, 132 NW 381; Daykin v. Emery, 10 Oh. Cir. Ct. 652, 5 Oh. Cir. Dec. 121.

96. Morrison v. Kreamer, 58 Ind. 38 [overr Stanford v. Stanford, 42 Ind. 485].

[a] **The ten days' notice** required by the statute to be given to the personal representative of the prosecution of a claim to the probate court is in the nature of process to bring the representative into court, and is waived by his voluntary appearance. McCoy v. Lemons, 1 F. Cas. No. 8,730a, Hempst. 216.

97. Garber v. Hirsh, 225 Mass. 422, 114 NE 670.

98. Taylor v. Siers, 63 Pa. Super. 564.

99. Le Mesnager v. Variel, 144 Cal. 463, 77 P 988, 103 AmSR 91.

1. Madison County Bank v. Suman, 79 Mo. 527.

2. Dredla v. Baache, 60 Nebr. 655, 83 NW 916.

3. Hill v. Fly, (Tenn. Ch. A.) 52

of all the subsequent proceedings.[4] An appearance by the executor individually, as attorney for the widow, cannot bind the estate;[5] and an appearance by one executor does not bind a coexecutor.[6] Where an executor is sued in both his individual and his representative capacity he is entitled to appear in each capacity by a different attorney.[7] Where an action is brought against a nonresident executor of a foreign estate and lands in which defendant has no interest other than as executor are attached in the action and service obtained upon the foreign executor by publication, and he files an answer defending for the estate, the court acquires no jurisdiction to render a judgment against him individually, notwithstanding the allegations of the petition or the fact that he may have incurred a personal liability to plaintiff on the claim sued on.[8]

[§ 2055] **M. Joinder of Causes of Action—1. Actions by Personal Representatives—a. Causes of Action in Individual and in Representative Capacity—(1) In General.** An executor or administrator cannot join a cause of action in his individual right with a cause of action in his representative capacity,[9] for the courts will not take cognizance of distinct and separate claims or liabilities of different persons in the same action.[10] The rule applies to suits in equity as well as actions at law.[11] It has been held, however, that a complaint showing a good cause of action in plaintiff in his individual capacity and for the estate which he represents, each arising under the same contract, and demanding specific performance and damages, is not demurrable;[12] and where a statute authorizes the uniting in the same complaint of several causes of action when they all arise out of the same transaction or transactions connected with the same subject of action, provided they affect all the parties to the action, plaintiff may unite a cause of action as executrix with one as devisee where both accrue under a contract made by the testator with defendant growing out of the same matter.[13]

[§ 2056] **(2) How Misjoinder Availed of.** The objection that a personal representative has joined a cause of action in his individual capacity with one in his representative capacity, although it is pleadable in abatement,[14] is fatal also in every stage of the suit.[15] The declaration is bad on demurrer, motion in arrest, and on error.[16]

[§ 2057] **b. Causes of Action Accruing to Decedent and to Representative in Representative Capacity.** While it was formerly held that an executor or administrator could not join a cause of action accruing to decedent with one accruing to himself in his representative capacity,[17] the present rule is that such counts may be joined whenever the money recovered will be assets.[18] But in order to authorize a joinder it must be alleged that the cause of action arising after decedent's death accrued to plaintiff

SW 731; Altgelt v. Sullivan, (Tex. Civ. A.) 79 SW 333 [rev on other grounds 98 Tex. 252, 83 SW 6].

4. Duffee v. Buchanan, 8 Ala. 27.

5. Mathushek, etc., Piano Co. v. Weid, 94 Misc. 282, 158 NYS 169.

6. Terry v. Lindsay, 3 Stew. & P. (Ala.) 317.

7. Roche v. O'Connor, 95 App. Div. 496, 88 NYS 968.

[a] **Circumstances not showing default.**—An executor was sued as an individual and as executor, and appeared in each capacity by a different attorney. Thereafter defendant served a notice of appearance as executor, demanding a copy of the complaint, which notice was signed by A, attorney for defendant, as executor. Plaintiff's attorney, not noticing that defendant had appeared as executor by one attorney and individually by another, served a copy of complaint on the attorney for the executor, but none on the attorney for defendant individually. Within twenty days defendant, as executor, served an answer on plaintiff's attorney, who returned it on the ground that defendant, as executor, was in default. It was held that the executor was not in default as claimed. Roche v. O'Connor, 95 App. Div. 496, 88 NYS 968.

8. Edwards v. Puterbaugh, 86 Kan. 758, 121 P 1116.

9. U. S.—Iowa State Traveling Men's Assoc. v. Moore, 73 Fed. 750, 19 CCA 662; Picquet v. Swan, 19 F. Cas. No. 11,132, 3 Mason 469.

Ark.—Governor v. Evans, 1 Ark. 349.

Cal.—Dias v. Phillips, 59 Cal. 293.

Conn.—Bulkley v. Andrews, 39 Conn. 523.

Iowa.—Frink v. Taylor, 4 Greene, 196.

Mass.—Brown v. Webber, 6 Cush. 560.

Mich.—Barnum v. Stone, 27 Mich. 332.

Miss.—Hoover v. Wells, 35 Miss. 159.

Mo.—Mertens v. Loewenberg, 69 Mo. 208; Yates v. Kimmel, 5 Mo. 87.

N. J.—Mason v. Norcross, 1 N. J. L. 280.

N. Y.—Taggart v. Draz, 166 App. Div. 381, 150 NYS 41; Groh v. Flammer, 89 App. Div. 28, 85 NYS 305; Lucas v. New York Cent. R. Co., 21 Barb. 245; Hall v. Fisher, 20 Barb. 441; Moss v. Cohen, 15 Misc. 108, 36 NYS 265 [rev on other grounds 158 N. Y. 240, 53 NE 8]; McMahon v. Allen, 1 Hilt. 103, 3 AbbPr 89 [aff 12 HowPr 39]; Landau v. Levy, 1 AbbPr 376; Wiltsie v. Beardsley, Lalor 386; Christopher v. Stockholm, 5 Wend. 36. But compare Hood v. Hood, 6 NYSt 684 (action by executrix who was also a legatee).

N. C.—May v. Smith, 45 N. C. 196, 59 AmD 594.

Pa.—Peries v. Aycinena, 3 Watts & S. 64; Stevens v. Gregg, 10 Serg. & R. 234; Weil v. Townsend, 25 Pa. Super. 638.

Tenn.—Lashlee v. Wily, 8 Humphr. 659.

Va.—Epes v. Dudley, 5 Rand. (26 Va.) 437.

Wis.—Robbins v. Gillett, 2 Pinn. 439, 2 Chandl. 96.

Eng.—Petrie v. Hannay, 3 T. R. 659, 100 Reprint 789.

[a] **Illustrations.**—(1) A count upon an account stated with plaintiffs, "executrix and executors," not saying "as" executrix and executors, cannot be joined with counts on promises to the testator; for there is no allegation that the promises were made to plaintiffs in their representative capacity; and under such a count proof might be given of an account stated with them in their individual characters. Henshall v. Roberts, 5 East 150, 102 Reprint 1026. (2) Where an action is brought by one individually, and as executrix, for the rescission of transfers to defendant of stock in a corporation by herself and her testator, both procured by fraudulent representations to her, the complaint not alleging that the testator knew of or acted on them, there is a misjoinder of parties plaintiff. Groh v. Flammer, 89 App. Div. 28, 85 NYS 305.

10. Yates v. Kimmel, 5 Mo. 87, 1 Chitty Pl. pp 8, 31.

11. May v. Smith, 45 N. C. 196, 59 AmD 594; Adams Eq. (2d ed.) p 567.

[a] **The reason assigned** is that different decrees and proceedings might be required; for convenience therefore the joinder will not be permitted. May v. Smith, 45 N. C. 196, 59 AmD 594.

12. Greene v. New York, etc., R. Co., 46 Misc. 478, 480, 93 NYS 18 ("The defect in the complaint, if any, cannot be remedied by demurrer").

13. Armstrong v. Hall, 17 HowPr (N. Y.) 76 (plaintiff had a common interest as executrix and devisee).

14. Picquet v. Swan, 19 F. Cas. No. 11,132, 3 Mason 469.

15. Picquet v. Swan, 19 F. Cas. No. 11,132, 3 Mason 469.

16. Bulkley v. Andrews, 39 Conn. 523; Brown v. Webber, 6 Cush. (Mass.) 560; Peries v. Aycinena, 3 Watts & S. (Pa.) 64. But compare Greene v. New York, etc., R. Co., 46 Misc. 478, 93 NYS 18 (quot supra § 2055 note 12).

17. Myer v. Cole, 12 Johns. (N. Y.) 349; Hosier v. Arundell, 3 B. & P. 7, 127 Reprint 5; Herrenden v. Palmer, Hob. 89, 80 Reprint 238; Nicolas v. Killigrew, 1 Ld. Raym. 436, 91 Reprint 1189; Betts v. Mitchell, 10 Mod. 316, 88 Reprint 744; Rogers v. Cook, 1 Salk. 10, 91 Reprint 9.

18. Ark.—Lyon v. Evans, 1 Ark. 349.

Cal.—Rogers v. Schlotterback, 167 Cal. 35, 138 P 728.

Conn.—Bulkley v. Andrews, 39 Conn. 523.

Ind.—Lowe v. Bowman, 5 Blackf. 410.

Ky.—Wilson v. Hunt, 6 B. Mon. 379.

Mass.—Brown v. Webber, 6 Cush. 560; Clark v. Lamb, 6 Pick. 512.

N. H.—French v. Merrill, 6 N. H. 465.

N. Y.—Welles v. Webster, 9 HowPr 251; Fry v. Evans, 8 Wend. 530; Valleau v. Cahill, 1 NYCityCt 47.

Pa.—Lea v. Hopkins, 7 Pa. 492; Peries v. Aycinena, 3 Watts & S. 64; State Bank v. Haldeman, 1 Penr. & W. 161; Stevens v. Gregg, 10 Serg. & R. 234.

S. C.—Sebring v. Keith, 18 S. C. L. 192.

R. I.—Brown v. Lewis, 9 R. I. 497.

Tenn.—Lashlee v. Wily, 8 Humphr. 659.

Vt.—Preston v. St. Johnsbury, etc., R. Co., 64 Vt. 280, 25 A 486; Ranney

in his representative capacity.[19]

[§ 2058] **c. Counts for Goods of Representative and for Goods of Decedent.** As a personal representative may sue in his own right on contracts made with him in his representative capacity, he may join counts for goods sold of which he was owner with counts for goods sold which he held as executor.[20]

[§ 2059] **d. Miscellaneous.** A personal representative of two decedents cannot join in one action causes of action belonging to the two estates.[21] Where the decree of a surrogate's court was against plaintiff as administrator and the docketing and levying reached his individual property, it was proper for plaintiff to sue both in his representative and in his individual capacity in an action to declare the decree satisfied.[22] A bill is not multifarious which is filed by a single complainant as administrator cum testamento annexo of two estates which are so blended and so nearly the same that it is necessary to proceed under both wills at the same time, and which asks the direction of the court, for the complainant's protection, in the construction of the wills, the distribution and administration of the estates, the establishment of certain charitable bequests contained in one of the wills, the marshaling of the assets, and, contingently, contribution from the legatees for the payment of debts.[23]

[§ 2060] **2. Actions against Personal Representatives—a. Causes of Action in Individual and in Representative Capacity—(1) In General.** The general rule is that a cause of action against a personal representative in his representative capacity cannot be joined with a cause of action against him in his individual capacity,[24] particularly where

v. St. Johnsbury, etc., R. Co., 64 Vt. 277, 24 A 1053; Haskell v. Bowen, 44 Vt. 579; Pope v. Stacy, 28 Vt. 96; Flowers v. Kent, Brayt. 134.

Va.—Boyle v. Townes, 9 Leigh (36 Va.) 158; Epes v. Dudley, 5 Rand. (26 Va.) 437.

Wis.—Robbins v. Gillett, 2 Pinn. 439.

Eng.—Thompson v. Stent, 1 Taunt. 322, 127 Reprint 857.

"Wherever the funds to which the money and the costs are to be applied, or out of which the costs are to be paid, are the same, and the money, when recovered, would be assets, then the counts may be joined." Stevens v. Gregg, 10 Serg. & R. (Pa.) 234.

"The criterion whether the counts are misjoined is, whether the money, if recovered, will be assets in the hands of the executor." Thompson v. Stent, 1 Taunt. 322, 127 Reprint 857.

[a] **Applications of rule.**—(1) An administrator or executor may join in the same declaration counts on promises to himself as executor or administrator and counts on promises to the intestate or testator (Sullivan v. Holker, 15 Mass. 374; Wiltsie v. Bearsly, Lalor (N. Y.) 386; Stevens v. Gray, 10 Serg. & R. (Pa.) 243; Brown v. Lewis, 9 R. I. 497; Partridge v. Court, 5 Price 412), (2) if the money recovered on the counts on the premises to himself will be assets (Fry v. Evans, 8 Wend. (N. Y.) 530; Sebring v. Keith, 18 S. C. L. 192; Powley v. Newton, 6 Taunt. 452, 1 ECL 452, 128 Reprint 1111). (3) A count for money had and received to the use of testator and a count for money had and received to plaintiff's use as executor may be joined. Flowers v. Kent, Brayt. (Vt.) 134; Petrie v. Hannay, 3 T. R. 659, 100 Reprint 789. (4) Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator as such. Court v. Partridge, 7 Price 591, 146 Reprint 1071. (5) "A count on an insimul computasset with the plaintiff as executor may be joined with a count for goods sold by the testator." Thompson v. Stent, 1 Taunt 322, 127 Reprint 857. (6) Where an executor in his capacity as such, sued on the common counts in general assumpsit, there was no misjoinder of causes because some of the counts, as for work and labor, were in their nature such that the right of action accrued to him in his own right and not in the right of the testator. Bulkley v. Andrews, 39 Conn. 523.

19. Ark.—Lyon v. Evans, 1 Ark. 349.

Mich.—Barnum v. Stone, 27 Mich. 332.

Pa.—Peries v. Aycinena, 3 Watts & S. 64.

S. C.—Sebring v. Keith, 18 S. C. L. 192.

Eng.—Henshall v. Roberts, 5 East 150, 102 Reprint 1026.

[a] **Sufficiency of averment.**—"It is not enough to say that it accrued to him, executor or being executor, it must be averred that it accrued to him as executor or as administrator." Governor v. Evans, 1 Ark. 349, 364.

20. Haskell v. Bowen, 44 Vt. 579.

21. Danaher v. Brooklyn, 4 NY CivProc 286.

22. Laney v. Laney, 58 Hun 601, 11 NYS 319.

23. Carter v. Balfour, 19 Ala. 814.

24. Ala.—Christian v. Morris, 50 Ala. 585; Godbold v. Roberts, 20 Ala. 354; Kennedy v. Stallworth, 18 Ala. 263; Jefford v. Ringgold, 6 Ala. 544.

Ark.—McDaniel v. Parks, 19 Ark. 671.

Cal.—Sterrett v. Barker, 119 Cal. 492, 51 P 695; Schlicker v. Hemenway, 110 Cal. 579, 42 P 1063, 52 AmSR 116; Mesmer v. Jenkins, 61 Cal. 151.

Del.—Farmers' Bank v. Cullen, 4 Del. 289.

Ky.—Moody v. Ewing, 8 B. Mon. 521; Vaughn v. Gardner, 7 B. Mon. 326; Maddox v. Williams, 5 KyL 695.

La.—Hemken v. Ludwig, 12 Rob. 188.

Md.—Grahame v. Harris, 5 Gill & J. 489.

Mass.—Hapgood v. Houghton, 10 Pick. 154, 19 AmD 238.

Mo.—Lilly v. Menke, 126 Mo. 190, 28 SW 643, 994.

N. J.—Pfeifer v. Badenhop, 86 N. J. L. 492, 92 A 273; Mailly v. Elliott, 80 N. J. L. 70, 75 A 472; Terhune v. Bray, 16 N. J. L. 53; Mason v. Norcross, 1 N. J. L. 242.

N. Y.—Sortore v. Scott, 6 Lans. 271; Pugsley v. Aikin, 14 Barb. 114 [rev on other grounds 11 N. Y. 494]; Benjamin v. Taylor, 12 Barb. 328; Ross v. Harden, 44 N. Y. Super. 26; Hayward v. McDonald, 7 NYCivProc 100, 1 HowPrNS 229; In re Randell, 8 NYS 652, 2 Conn. Surr. 29; Clark v. Coles, 50 HowPr 178; McMahon v. Allen, 12 HowPr 39 [aff 1 Hilt. 103, 3 AbbPr 89]; Wiltsie v. Beardsley, Lalor 386; Gillet v. Hutchinson, 24 Wend. 184; Demott v. Field, 7 Cow. 58; Myer v. Cole, 12 Johns. 349.

N. C.—Mobley v. Runnels, 14 N. C. 303.

Pa.—Bogle v. Kreitzer, 46 Pa. 465; Seip v. Drach, 14 Pa. 352; Strohecker v. Grant, 16 Serg. & R. 237; Schott v. Sage, 4 Phila. 87.

Vt.—Smith v. Purmort, 63 Vt. 378, 20 A 928.

Va.—Kayser v. Disher, 9 Leigh (36 Va.) 357; Bishop v. Harrison, 2 Leigh (29 Va.) 532; Epe v. Dudley, 5 Rand. (26 Va.) 437.

W. Va.—Knotts v. McGregor, 47 W. Va. 566, 35 SE 899.

Wis.—Tyler v. Stitt, 127 Wis. 379, 106 NW 114; Crowley v. Hicks, 98 Wis. 566, 74 NW 348.

Eng.—Brigden v. Parkes, 2 B. & P. 424, 126 Reprint 1363; Wheeler v. Collier, Cro. Eliz. 406, 78 Reprint 650; Bignell v. Harpur, 4 Exch. 773, 154 Reprint 1428; Herrenden v. Palmer, Hob. 88, 80 Reprint 238; Hall v. Huffam, 2 Lev. 228, 83 Reprint 531; Corner v. Shew, 3 M. & W. 350, 150 Reprint 1179; Coryton v. Lithebye, 2 Saund. 115, 85 Reprint 823.

[a] **The rule precludes joinder of:** (1) A count on a claim against decedent and a count on a promise by a personal representative in his capacity as such for money had and received by him as such. Farmers' Bank v. Cullen, 4 Del. 289; Wilson v. Harvey, 3 Del. 500; Moody v. Ewing, 8 B. Mon. (Ky.) 521; Seip v. Drach, 14 Pa. 352; Ashby v. Ashby, 7 B. & C. 444, 14 ECL 202, 108 Reprint 789. (2) A cause of action on a claim against decedent and a cause of action on a promise by the personal representative as such on an action for moneys due from himself. Gillet v. Hutchinson, 24 Wend. (N. Y.) 184; Reynolds v. Reynolds, 3 Wend. (N. Y.) 244. (3) A cause of action on a claim against decedent and a cause of action on a promise made by an executor to pay for services performed for him as such. Vaughn v. Gardner, 7 B. Mon. (Ky.) 326. (4) A cause of action against executors on their covenants in a deed executed under a power in the will to perform an agreement made by the testator and a count against him on a covenant of the testator. Strohecker v. Grant, 16 Serg. & R. (Pa.) 237. (5) A count for a conversion by decedent and a count for a conversion by his personal representatives. Terhune v. Bray, 16 N. J. L. 53. (6) A demand for damages arising from the individual acts of defendant with a demand for damages arising from their misconduct as executors. Newcombe v. Chicago, etc., R. Co., 8 NYS 366. (7) A demand of an executrix for an account and tableau of distribution with one to render her individually liable for maladministration. Hemken v. Ludewig, 12 Rob. (La.) 188. (8) A count on a promise made by the testator and a count on a promise by the personal representative for services performed at his request for work and labor about decedent's funeral. Myer v. Cole, 12 Johns. (N. Y.) 349; Demott v. Field, 7 Cow. (N. Y.) 58. Contra Hapgood v. Houghton, 10 Pick. (Mass.) 154. (9) An action for waste against one in possession of land as executor under the will of the former owner is improperly joined with one for the partition of the property to which he has been made a party in his individual capacity. Lily v. Menke, 126 Mo. 190, 28 SW 643, 994.

[b] **Surplusage.**—Where in an action against administrators it is apparent from the whole declaration that defendants are charged in their representative character, it is good on general demurrer, although it also alleges a promise by the administrators. Curtis v. Bowrie, 6 F. Cas. No. 3,498, 2 McLean 374.

one cause of action is legal and the other equitable.[25] This rule is operative in suits in equity as well as in actions at law.[26]

The reason for the rule is that different judgments would be required; the first de bonis testatoris and the other de bonis propriis.[27] There would of necessity be two judgments entirely dissimilar; in the one the assets of decedent's estate would be charged while in the other the estate both real and personal of defendant would be subjected to its payment;[28] and it is only where the counts are of the same nature and the same judgment is to be given on them all that they may be joined.[29]

Statutory modification of rule. It is sometimes permitted by statute that causes of action against a representative personally and in his representative capacity be joined where the cause of action stated is against him in both capacities, where the facts render it uncertain in which capacity the cause of action exists, or where the causes of action grew out of the same transaction or transactions connected with the same subject matter, do not require different places or modes of trial, and are not inconsistent.[30]

[§ 2061] **(2) How Misjoinder Availed of.** The objection for such misjoinder may be taken advantage of by general demurrer to the whole declaration,[31] or on error.[32] It has also been held that defendant may move to instruct the jury that plaintiff cannot recover because of a misjoinder.[33]

[§ 2062] **(3) Effect of Misjoinder.** It has been held that a complaint which states a good cause of action against executors in their representative capacity for a sum which is specific and separable from another amount demanded, for which they are not liable in such capacity, is not subject to dismissal because of misjoinder;[34] and, under statute, that in case of misjoinder of causes of action, the judge should order the action divided and not dismissed.[35]

[§ 2063] **b. Counts on Promise of Decedent and Promise of Representative on Consideration Connected with Estate.** Where the consideration of the promise or undertaking by the personal representative in his capacity as such arose in the lifetime of decedent, or, in other words, springs from or is connected with the estate itself, a cause of action thereon may be joined with one on a promise or undertaking of decedent,[36] and some decisions go further and hold without any qualification as to the consideration arising in decedent's lifetime that a count on a promise by a personal representative in his capacity as such may be joined with a count on a promise by decedent.[37]

[§ 2064] **c. Miscellaneous.** The personal representative cannot bind the estate by an arrangement with one having a demand against it, and also one against a third person to submit the question

25. Tyler v. Stitt, 127 Wis. 379, 106 NW 114.

26. Wren v. Gayden, 2 Miss. 365; Day v. Stone, 5 Daly (N. Y.) 353, 15 AbbPrNS 137; Latting v. Latting, 4 Sandf. Ch. (N. Y.) 31.

"It is a well understood general rule, that courts of equity, as well as courts of law, will not take cognizance of distinct and separate claims or liabilities of different persons in one suit; and this, though they stand in the same relative situation." Wren v. Gayden, 2 Miss. 365, 367.

[a] **Illustration.**—Where a bill joined a demand by plaintiff as executor with the demand by plaintiff in his private capacity against defendant in his individual character, it is demurrable for multifariousness. Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199.

27. Terhune v. Bray, 16 N. J. L. 53; Clark v. Coles, 50 HowPr (N. Y.) 178; Demott v. Field, 7 Cow. (N. Y.) 58; Boyle v. Kreitzer, 46 Pa. 465; Seip v. Drach, 14 Pa. 352; Epe v. Dudley, 5 Rand. (26 Va.) 437.

28. Jefford v. Ringgold, 6 Ala. 544; Sibbit v. Lloyd, 11 N. J. L. 163.

29. Vaughn v. Gardner, 7 B. Mon. (Ky.) 326.

30. Leggett v. Pelletreau, 213 N. Y. 237, 107 NE 509; Roche v. O'Connor, 95 App. Div. 496, 88 NYS 968; Rogers v. Wheeler, 89 App. Div. 435, 85 NYS 981; Magoun v. Magoun, 84 App. Div. 232, 82 NYS 820; Metropolitan Trust Co. v. McDonald, 52 App. Div. 424, 65 NYS 260; De Crano v. Moore, 50 App. Div. 361, 63 NYS 585, 64 NYS 3 [mod 30 Misc. 303, 63 NYS 585]; Simpson v. Simpson, 44 App. Div. 492, 60 NYS 879; Gibson v. Blakley, 85 Hun 305, 32 NYS 1005; Perkins v. Slocum, 82 Hun 366, 31 NYS 474; Murphy v. Naughton, 68 Hun 424, 23 NYS 52; Blum v. Dabritz, 39 Misc. 800, 81 NYS 315, 33 NY CivProc 290; Budd v. Hardenbergh, 36 Misc. 90, 72 NYS 537; McCue v. Finck, 20 Misc. 506, 46 NYS 242; Noble v. Haff, 155 NYS 560; Newcombe v. Lottimer, 12 NYS 381.

[a] **Such a statute does not authorize** a suit against an executor personally and as executrix for damages on a covenant for quiet enjoyment in a lease to plaintiff from the testator broken by proceedings for dispossession by the executrix. Blum v. Dabritz, 78 NYS 207 [aff 39 Misc. 800, 81 NYS 315].

31. Godbold v. Roberts, 7 Ala. 662; Jefford v. Ringgold, 6 Ala. 544; Kayser v. Disher, 9 Leigh. (36 Va.) 357; Epe v. Dudley, 5 Rand. (26 Va.) 437.

32. McDaniel v. Parks, 19 Ark. 671; Mailly v. Elliott, 80 N. J. L. 70, 75 A 472.

33. Grahame v. Harris, 5 Gill & J. (Md.) 489.

34. Scheibeler v. Albee, 114 App. Div. 146, 99 NYS 706.

35. Martin v. Goode, 111 N. C. 288, 16 SE 232, 32 AmSR 799.

36. U. S.—Wilkings v. Murphey, 29 F. Cas. No. 17,663, 3 N. C. 282; Curtis v. Bowrie, 6 F. Cas. No. 3,498, 2 McLean 374.

Ky.—Hamlet v. Bates, 10 B. Mon. 437; Moody v. Ewing, 8 B. Mon. 521; Vaughn v. Gardner, 7 B. Mon. 326; McKinley v. Call, 1 T. B. Mon. 54.

Md.—Bonaparte v. State, 63 Md. 465.

Mass.—Hapgood v. Houghton, 10 Pick. 154; Eaton v. Whitaker, 6 Pick. 465.

Mo.—State v. Petticrew, 19 Mo. 373.

N. J.—Cawley v. Reeve, 17 N. J. L. 415.

N. Y.—Pugsley v. Aiken, 11 N. Y. 494; Tradesmen's Nat. Bank v. McFeely, 61 Barb. 522; Benjamin v. Taylor, 12 Barb. 328; Ross v. Harden, 44 N. Y. Super. 26; Smith v. Proctor, 3 N. Y. Super. 72; Gillet v. Hutchinson, 24 Wend. 184; Reynolds v. Reynolds, 3 Wend. 244; Carter v. Phelps, 8 Johns. 440; Whitaker v. Whitaker, 6 Johns. 112.

N. C.—Gregory v. Hooker, 8 N. C. 394, 9 AmD 646; Wilkings v. Murphey, 29 F. Cas. No. 17,663, 3 N. C. 282.

Oh.—Howard v. Powers, 6 Oh. 92.

Pa.—Malin v. Bull, 13 Serg. & R. 441.

Va.—Bishop v. Harrison, 2 Leigh (29 Va.) 532; Epe v. Dudley, 5 Rand. (26 Va.) 437.

Eng.—Secar v. Atkinson, 1 H. Bl. 102, 126 Reprint 62; Coryton v. Lithebye, 2 Saund. 115, 85 Reprint 823; Powell v. Graham, 7 Taunt. 580, 2 ECL 580, 129 Reprint 232.

"In suits against executors or administrators, as such, a count upon an indebtedness or promise arising in their representative capacity, may be joined with one upon the indebtedness or promise of the decedent, provided the consideration of the demand spring from, or is connected with, the estate itself." Bonaparte v. State, 63 Md. 465, 475.

[a] **Damages for breach of a covenant for quiet enjoyment** accruing both before and after the death of the covenantor may be recovered in one and the same action against his administrator. Hovey v. Newton, 11 Pick. (Mass.) 421.

[b] **Demands for rent accruing before and after decedent's death.**—Where the demised premises for which a tenant from year to year paid an annual rental pass to his executors, and they become liable for rent by continued possession, a demand against them for rent may be joined with a demand for rent which accrued during the life of the tenant. Pugsley v. Aikin, 11 N. Y. 494 [rev 14 Barb. 114].

[c] **Demands for taxes due before and after decedent's death.**—In assumpsit against an executor to recover taxes due on the estate of his testatrix, it is not a misjoinder to unite a count for taxes due by the testatrix in her lifetime with a count for taxes due from the executor on the same property while in his hands as executor. Bonaparte v. State, 63 Md. 465.

37. Dixon v. Ramsay, 7 F. Cas. No. 3,932, 1 Cranch C. C. 472; Hapgood v. Houghton, 10 Pick. (Mass.) 154. But compare Moody v. Ewing, 8 B. Mon. (Ky.) 521, 522 ("A declaration containing a count on a promise by the testator and a count on a promise by the defendant as executor, for money paid him or received by him as such, is bad on general demurrer").

"It is true, the precedents furnish only cases where the testator gave birth to the obligation, or received the consideration of the promise, but the reason of the thing applies to all obligations thrown upon the executor by virtue of his office." Gregory v. Hooker, 8 N. C. 394, 407, 9 AmD 646.

of liability and amount thereof on both demands directly in a single suit.[38] A count on promises by decedent and another on promises by decedent alone may be joined, although the surviving promisor is living, where such procedure is authorized by statute.[39] Administrators and executors of different estates and their sureties cannot be made defendants to the same bill, founded on a claim against one estate.[40] Where an administrator, on the death of a distributee, was appointed administrator of the distributee's estate, persons entitled as distributees to a portion of both estates may unite both claims in one bill against the administrator.[41] Where a surviving partner qualifies as administrator of the deceased partner, he may be sued both in his individual and in his representative capacity on an obligation on which he was jointly liable with decedent.[42] If heirs bring suit to annul an administrator's sale of land and at the same time ask that he be ordered to file his account, that he be removed from office, and that they be put in possession of the property of the estate, the demands are not inconsistent with one another.[43] Where an executor is directed by will to sell all real and personal property, the surviving husband's cause of action for an allotment to him of one third of the land for life was properly joined with his cause of action against the executor for one half the surplus personalty.[44] Where plaintiff brought an action to recover a portion of real estate from defendant as executrix of the estate of her husband, allegations that the testator was in possession, holding the same under a lease from plaintiff and that he wrongfully encroached on an additional portion of the premises and occupied the same at the time of his death, which possession had been retained by the executrix ever since, did not show an improper joinder of a cause of action against the executrix in her representative capacity with one against her in her individual capacity.[45] In an action by a widow for the rent of her dower interest after its assignment, the fact that a claim for rent derived from a lease made by her husband during his lifetime was joined with a claim for rent against the administrators personally did not render the bill objectionable as multifarious.[46]

[§ 2065] **N. Pleading**[47]**—1. Rules Applicable to Actions Generally—a. Declaration, Petition, Complaint, or Bill—(1) Allegations of Representative Capacity and Authority to Sue or Be Sued—(a) Actions at Law—aa. Allegations of Representative Capacity**[48]**—(aa) Actions by Personal Representatives—aaa. Necessity and Sufficiency of Allegations.** If an executor or administrator sues in a representative capacity, it must appear from the declaration, petition, or complaint that the suit is brought by him in such capacity.[49] There is considerable confusion and uncertainty in the decisions as to what is necessary to distinguish when an action is brought in a representative capacity from one brought as an individual.[50] Some decisions hold, seemingly without any qualification, that the mere use of the word "executor" or "administrator" of a designated person following plaintiff's name in the caption or commencement of the pleading sufficiently shows that the suit is brought in a representative capacity;[51] but other cases hold that, where a suit is one which plaintiff may bring either in his individual or representative capacity and the caption of the pleading describes plaintiff, "executor" instead of "as executor," and the body of the pleading contains no averment showing representative capacity, the suit will be considered as brought in plaintiff's individual capacity.[52] There are also decisions which go further and hold that whether the suit is one which plaintiff can bring only in his representative capacity, or is one which may be brought either individually or in his representative capacity his description of himself, "executor" or "administrator," instead of "as executor" or "as administrator," in the caption of the complaint, does not show that suit was brought in a representative capacity, but the contrary.[53] But while it has been said that it is better pleading to describe

38. Daniel v. Morrison, 6 Dana (Ky.) 182; Barry v. Davis, 33 Mich. 515; Hoffman v. Wheelock, 62 Wis. 434, 22 NW 713, 716.

39. Foster v. Hopkins, 197 Ill. A. 374; Hamlet v. Bates, 10 B. Mon. (Ky.) 437.

40. McNiell v. Burton, 2 Miss. 510.

41. Breckinridge v. Floyd, 7 Dana (Ky.) 456.

42. Little Grocer Co. v. Johnson, 50 Ark. 62, 6 SW 231.

43. Thompson v. Barrow, 33 La. Ann. 1225.

44. Brand v. Brand, 109 Ky. 721, 60 SW 704, 22 KyL 1366.

45. Pabst Brewing Co. v. Small, 83 Minn. 445, 86 NW 450.

46. Boyd v. Hunter, 44 Ala. 705.

47. Pleading generally see Pleading [31 Cyc 1].

48. [a] **Forms** of declaration or complaint are held sufficient to show that suit is brought in a representative capacity. Rhodes v. Walker, 44 Ala. 213; Williams v. Eikenbary, 36 Nebr. 478, 54 NW 852; Pope v. Stacy, 28 Vt. 96.

Profert and oyer of letters testamentary or of administration see infra §§ 2079–2083.

49. Ala.—Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89.

Ark.—Mohr v. Sherman, 25 Ark. 7; Sabin v. Hamilton, 2 Ark. 485.

Fla.—Bowden v. Jacksonville Electric Co., 51 Fla. 152, 41 S 400, 7 AnnCas 859.

La.—Hatcher's Succ., 23 La. Ann. 136.

Minn.—Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97.

Mo.—State v. Matson, 38 Mo. 489; Smith v. Zimmerman, 29 Mo. A. 249.

N. Y.—Worden v. Worthington, 2 Barb. 368; Cordier v. Thompson, 8 Daly 172.

Tex.—Wilson v. Hall, 13 Tex. Civ. A. 489, 36 SW 327.

Wash.—Harvey v. Pocock, 92 Wash. 625, 159 P 771.

W. Va.—Thurmond v. Guyan Valley Coal Co., 102 SE 221; Brogan v. Union Tract. Co., 76 W. Va. 698, 86 SE 753; Perry v. New River, etc., Cons. Coal Co., 74 W. Va. 122, 81 SE 844; Austin v. Calloway, 73 W. Va. 231, 80 SE 361, AnnCas1916E 112.

Eng.—1 Saunders Pl. & Ev. p 498.

50. Lucas v. Pittman, 94 Ala. 616, 10 S 603.

51. Jordan v. Hamlink, 21 D. C. 189; Bowler v. Lane, 3 Metc. (Ky.) 311; McKee v. Ellis, (Tex. Civ. A.) 83 SW 880; Lawson v. Lawson, 16 Gratt. (57 Va.) 230, 80 AmD 702.

52. Ark.—Mohr v. Sherman, 25 Ark. 7; Hemphill v. Hamilton, 11 Ark. 425.

Ga.—Daniel v. Hollingshead, 16 Ga. 190; Gilbert v. Hardwick, 11 Ga. 599; Leathers v. Raburn, 13 Ga. A. 744, 79 SE 946.

Me.—Bragdon v. Harman, 69 Me. 29.

N. Y.—Smiley v. Finucane, 134 NYS 59; Sheldon v. Hoy, 11 HowPr 11.

Tex.—Guesh v. Phillips, 34 Tex. 176.

Eng.—Henshall v. Roberts, 5 East 150, 102 Reprint 1026.

[a] **Reason for rule.**—If plaintiff describes himself as "executor" this only shows that the debt sued on was contracted with him in that character, but does not show that he elected in his suit to treat it as a debt of the estate. On a contract of this character he may sue either in his personal or representative capacity; hence the necessity of showing definitely the character in which he intends to sue. Daniel v. Hollingshead, 16 Ga. 190.

53. Ala.—Lucas v. Pittman, 94 Ala. 616, 10 S 603; Freeman v. McCann, 37 Ala. 714; George v. English, 30 Ala. 582.

Fla.—Branch v. Branch, 6 Fla. 314 (where it appeared that the cause of action was one which plaintiff might sue on either in his individual or representative capacity, but the language of the opinion was broad enough to support the rule stated in the text).

Ind.—Hamilton v. Ewing, 6 Blackf. 88.

N. Y.—Stilwell v. Carpenter, 62 N. Y. 639 mem, 2 AbbNCas 238.

Tex.—Roundtree v. Stone, 81 Tex. 299, 16 SW 1035.

[a] **Use of words "as administrators," etc., without naming decedent.**—The words "as administrators," following the names of plaintiffs in the marginal statement of the parties and in the commencement of the complaint without an averment of the intestate's name, are mere surplusage, and do not indicate the character in which plaintiffs sue. Ikelheimer v. Chapman, 32 Ala. 676.

plaintiff "as executor" or "as administrator" in the caption or commencement of the pleading,[54] it is very generally held that it will be sufficient if the allegations in the body of the pleading show that plaintiff sues in a representative capacity.[55] In other words, if the title of the action does not declare the character in which plaintiff sues, it may be supplied from the body of the declaration.[56] It follows therefore that, although the caption or commencement describes plaintiff "executor" instead of "as executor," the action will nevertheless be considered as brought in a representative capacity if the allegations of the pleading are sufficient to show such fact,[57] and the same is the case, although the caption contains no descriptive words of any character.[58] Some decisions hold that the words "as executor" or "as administrator" in the caption sufficiently show that suit is brought in a representative capacity and that these words need not be repeated in the body of the pleading;[59] but others hold that no issue can be taken to the description of the parties in the title and that there must be a direct allegation in the body of the pleading that suit is brought in a representative capacity.[60] Where a bill recites that complainant is the administrator of a certain estate, but does not indicate that it is filed by him solely as administrator, the suit will be deemed to be brought by him individually and as administrator.[61] If there are several counts in a declaration and the first describes the cause of action as accruing to plaintiff as executor the other counts need not describe him as executor or allege that the right of action accrued to him as such.[62] Where the declaration shows that the action is brought by plaintiff as executor, it is not material that it concludes to the damage of the plaintiff individually.[63]

An affidavit of demand by a plaintiff, suing in the capacity of an administratrix, need not aver that affiant is the administratrix.[64]

[§ 2066] **bbb. Rejection of Descriptive Words as Surplusage.** If a personal representative brings suit on a cause of action which he must or may bring in his individual capacity and the pleading states a good cause of action in that capacity, the use of the words "executor or administrator" will be considered merely descriptive of the person and, not being essential in the pleading to his right of recovery, may be rejected as surplusage;[65] but it has been held to be otherwise where the word "as"

54. Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89; Beers v. Shannon, 12 Hun (N. Y.) 161 [cit 1 Chitty Pl. p 315]; Cordier v. Thompson, 8 Daly (N. Y.) 172; 1 Saunders Pl. & Ev. p 498.

55. Ala.—Englehart v. Richter, 136 Ala. 562, 33 S 939; Lucas v. Pittman, 94 Ala. 616, 10 S 603; Rhodes v. Walker, 44 Ala. 213; Dubberly v. Black, 38 Ala. 193; Watson v. Collins, 37 Ala. 587.

Ark.—Sabin v. Hamilton, 2 Ark. 485.

Ga.—Laughter v. Butt, 25 Ga. 177; Peavy v. Sangster, 13 Ga. A. 418, 79 SE 215.

Ind.—Durham v. Hudson, 4 Ind. 501.

Ky.—Quinn v. Newport News, etc., Co., 22 SW 223, 15 KyL 74.

Mo.—State v. Bartlett, 68 Mo. 581; Bird v. Cotten, 57 Mo. 568.

Nebr.—Williams v. Eikenbary, 36 Nebr. 478, 54 NW 852.

N. Y.—Beers v. Shannon, 73 N. Y. 292 [aff 12 Hun 161]; Willets v. Haines, 96 App. Div. 5, 88 NYS 1018 [aff 182 N. Y. 543 mem, 75 NE 1135 mem]; Scanton v. Farmers', etc., Bank, 83 Barb. 527 [aff 24 N. Y. 424]; Cordier v. Thompson, 8 Daly 172; Levy v. New York Commercial Trust Co., 148 NYS 173; Stilwell v. Carpenter, 62 N. Y. 639 mem, 2 AbbNCas 238.

Vt.—Trask v. Karrick, 87 Vt. 451, 89 A 472; Pope v. Stacy, 28 Vt. 96.

Wis.—Mohr v. Dodson, 14 Wis. 279.

[a] **Allegations sufficient to show suit brought in representative capacity:** (1) Allegations of the death of B, the execution and probate of his will, plaintiffs' appointment as executors, issuance of letters testamentary to them and their qualification and acceptance. Marshall v. Bresler, 1 HowPrNS (N. Y.) 217; Moir v. Dodson, 14 Wis. 279. (2) Allegations of the death of B, intestate, plaintiff's appointment as administrator and qualification as such by reason of which defendant became liable to pay him the sum of $——. Quinn v. Newport News, etc., Co., 22 SW 223, 15 KyL 74. (3) An allegation in the breach that defendant "has not paid to the intestate in his lifetime nor to plaintiff as administrator aforesaid." Sabin v. Hamilton, 2 Ark. 485. (4) An allegation that a tax certificate counted upon is "now lawfully possessed and owned by said administrator and plaintiff." Hyde v. Keonshe County, 43 Wis. 129. (5) An allegation that plaintiff's husband died after bringing suit, that she was shortly thereafter appointed executrix of his estate, and that at the time of his death he was plaintiff. Williams v. Eikenbary, 36 Nebr. 478, 54 NW 852. (6) An allegation that the money sued for will when collected be assets of decedent's estate. Watson v. Collins, 37 Ala. 587.

56. Stilwell v. Carpenter, 2 AbbN Cas (N. Y.) 238.

57. Lucas v. Pittman, 94 Ala. 616, 10 S 603; Graham v. Gunn, 45 Ala. 577; Hemphill v. Hamilton, 11 Ark. 425 [overr Watkins v. McDonald, 3 Ark. 266]; Carr v. Carr, 15 Cal. A. 480, 115 P 261; Beers v. Shannon, 73 N. Y. 292 [aff 12 Hun 161]; Willets v. Haines, 96 App. Div. 5, 88 NYS 1018 [aff 182 N. Y. 543 mem, 75 NE 1135 mem]; Cordier v. Thompson, 8 Daly (N. Y.) 172.

[a] **Illustration.**—Where the complaint, in an action brought by an administrator to recover money deposited in the defendant bank, set out the death of intestate, that plaintiff was duly appointed and qualified administrator of deceased, that the deposit is the property of the estate, and that plaintiff, "as such administrator," had demanded of defendants a delivery to him, "as such administrator," of the money so on deposit, but in the title to the action the word "as" was not inserted after the name of plaintiff, the averments clearly disclosed that plaintiff had brought the action as administrator, and not in his own right. Carr v. Carr, 15 Cal. A. 480, 115 P 261.

58. Williams v. Eikenbary, 36 Nebr. 478, 54 NW 852.

59. Lucas v. Pittman, 94 Ala. 616, 10 S 603; Crimm v. Crawford, 29 Ala. 623; Ketchum v. Morrell, 2 NYLegObs 58.

60. Dodson v. Scroggs, 47 Mo. 185; Smith v. Zimmerman, 29 Mo. A. 249; Forrest v. New York, 13 AbbPr (N. Y.) 350; Shelton v. Hoy, 11 HowPr (N. Y.) 11; Neil v. Cherry, 2 Oh. Dec. (Reprint) 28, 1 WestLMonth 143; Guest v. Phillips, 34 Tex. 176.

61. Lake v. Weaver, 80 N. J. Eq. 395, 86 A 817 [aff 80 N. J. Eq. 554, 86 A 821].

62. Bulkley v. Andrews, 39 Conn. 523. To same effect Ketchum v. Morrell, 2 NYLegObs 58.

63. Trask v. Karrick, 87 Vt. 451, 89 A 472.

64. Newlin v. Adair, 26 Del. 441, 84 A 1028.

65. U. S.—Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315; Moore v. Petty, 135 Fed. 668, 68 CCA 306; Newberry v. Robinson, 36 Fed. 841; White v. Pulley, 27 Fed. 436.

Ala.—Lucas v. Pittman, 94 Ala. 616, 10 S 603; Riddle v. Hill, 51 Ala. 224; James v. Johnson, 44 Ala. 629; Freeman v. McCann, 37 Ala. 714; Watson v. Collins, 37 Ala. 587; Ikelheimer v. Chapman, 32 Ala. 676; Williams v. Moore, 32 Ala. 506; Farrow v. Bragg, 30 Ala. 261; Wyatt v. Rambo, 29 Ala. 510, 68 AmD 89; Agee v. Williams, 27 Ala. 644; Tate v. Shackelford, 24 Ala. 510, 60 AmD 488; Arrington v. Hair, 19 Ala. 243; Warren v. Rist, 16 Ala. 686; Harbin v. Levi, 6 Ala. 399; King v. Griffin, 6 Ala. 387; Curry v. Paine, 3 Ala. 154.

Ark.—Pine Bluff Aerie No. 209 F. O. E. v. Dreyfus, 92 Ark. 284, 287, 122 SW 655 [cit Cyc]; Mohr v. Sherman, 25 Ark. 7; Bailey v. Gatton, 14 Ark. 180; Anderson v. Wilson, 13 Ark. 409; Brown v. Hicks, 1 Ark. 232.

Cal.—Burling v. Thompkins, 77 Cal. 257, 19 P 429; Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423; Munch v. Williamson, 24 Cal. 167.

D. C.—Campbell v. Wilson, 13 D. C. 497.

Fla.—Branch v. Branch, 6 Fla. 314.

Ga.—Wheelus v. Long, 73 Ga. 110; Kenan v. Du Bignon, 46 Ga. 258; Macon, etc., R. Co. v. Davis, 18 Ga. 679.

Ill.—Wolf v. Beaird, 123 Ill. 585, 15 NE 161, 5 AmSR 565; Laycock v. Oleson, 60 Ill. 30; Higgins v. Halligan, 46 Ill. 173; McKinley v. Braden, 2 Ill. 64.

Ind.—Daniels v. Ritchie, 7 Blackf. 391; Campbell v. Baldwin, 6 Blackf. 364; Capp v. Gilman, 2 Blackf. 45; Helm v. Van Vleet, 1 Blackf. 342, 12 AmD 248.

Kan.—Shattuck v. Wolf, 72 Kan. 366, 83 P 1093.

Ky.—Reid v. Watts, 4 J. J. Marsh. 440; Baker v. Baker, 4 Bibb 346; Spurgen v. Robinet, 4 Bibb 75.

Me.—Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314; Bragdon v. Harmon, 69 Me. 29.

Md.—Barton v. Higgins, 41 Md. 539; Sasscer v. Walker, 5 Gill & J. 102, 25 AmD 272.

Mass.—Talmage v. Cappel, 16 Mass. 71; Clark v. Lowe, 15 Mass. 476.

Miss.—Falls v. Wilson, 24 Miss. 168.

Mo.—Rittenhouse v. Ammerman,

precedes the words designating the representative capacity, as the descriptive part is then of substance and cannot be regarded as immaterial.[66] Where an administrator sues properly in his capacity as such, his allegation of another capacity, as for instance that he is attorney in fact for the heirs, may be treated as surplusage.[67] It has been held that, where a declaration alleges in the commencement that plaintiff was decedent's executor and in a subsequent part that he took out letters of administration, the declaration is insufficient, since it fails to show whether plaintiff is executor or administrator,[68] but it has also been considered that a description of plaintiff as administrator in the caption may be disregarded where in the body of the complaint it appears that plaintiff is executor.[69] It has been held that, where the declaration is in a representative capacity, but concludes the ad damnum to the representative personally, it is bad, since it cannot be determined whether the recovery was sought by plaintiff as administrator or in his own right,[70] although there is authority for the contrary view.[71]

[§ 2067] **ccc. Amendments.** It is generally held that, where a pleading is filed in the name of one suing in his individual capacity, it may be amended so as to make the suit stand in his representative capacity, and vice versa,[72] although there is authority for the contrary view.[73] The logical distinction would seem to be that, where the cause of action

64 Mo. 197, 27 AmR 215; Fuggle v. Hobbs, 42 Mo. 537; State v. Matson, 38 Mo. 489; Knoche v. Perry, 90 Mo. A. 483; State v. Kaime, 4 Mo. A. 479.

N. H.—Keniston v. Little, 30 N. H. 318, 64 AmD 297.

N. Y.—Litchfield v. Flint, 104 N. Y. 543, 11 NE 58; Merritt v. Seaman, 6 N. Y. 168 [rev 6 Barb. 330]; Steele v. R. M. Gilmour Mfg. Co., 77 App. Div. 199, 78 NYS 1078; Collins v. Steuart, 2 App. Div. 271, 37 NYS 891; Bingham v. Marine Nat. Bank, 41 Hun 377, 17 AbbNCas 431 [aff 112 N. Y. 661 mem, 19 NE 416]; Murray v. Church, 1 Hun 49 [aff 58 N. Y. 621 mem]; Bright v. Carrie, 7 N. Y. Super. 433; Gross v. Gross, 26 Misc. 385, 56 NYS 219; Scott v. Parker, 5 NYS 753; Wick v. Wick, 9 NYSt 477.

N. C.—Beaty v. Gingles, 53 N. C. 302; Cotten v. Davis, 48 N. C. 355; Cotten v. Davis, 46 N. C. 355.

Or.—Sears v. Daly, 43 Or. 346, 73 P 5; Burrell v. Kern, 34 Or. 501, 56 P 809.

Pa.—Stephens v. Cotterell, 99 Pa. 188; Kline v. Guthart, 2 Penr. & W. 490.

S. C.—Jerkowski v. Marco, 56 S. C. 241, 34 SE 386; Willis v. Tozer, 44 S. C. 1, 21 SE 617.

Tenn.—McCallum v. Woolsey, 6 Baxt. 308; Walt v. Walsh, 10 Heisk. 314; Page v. Cravens, 3 Head 383.

Tex.—Roundtree v. Stone, 81 Tex. 229; Rider v. Duval, 28 Tex. 622; Claiborne v. Yoeman, 15 Tex. 44; Gayle v. Ennis, 1 Tex. 184; Nelson v. Bagby, 25 Tex. Suppl. 305; Hayden v. Kirby, 31 Tex. Civ. A. 441, 72 SW 198; Wilson v. Hall, 13 Tex. Civ. A. 489, 36 SW 327.

Wis.—Robbins v. Gillett, 2 Pinn. 439, 2 Chandl. 96.

Eng.—Hornsey v. Dimocke, Vent. 119, 86 Reprint 82.

[a] **Applications of rule.** — (1) Where an administrator sues on a contract made with himself, the word "administrator" appearing in the pleading may be rejected as mere description and does not vitiate the declaration. Falls v. Wilson, 24 Miss. 168; Walt v. Walsh, 10 Heisk. (Tenn.) 314. (2) Where an executor sues as executor when in fact the action is brought upon his own possession, the words "as executor" do not prevent him from recovering in his own right. Munch v. Williamson, 24 Cal. 167; Cotten v. Davis, 48 N. C. 355; Hornsey v. Dimocke, 1 Vent. 119, 86 Reprint 82. And see Comyns Dig. Pl. p 2, d. (3) Where plaintiff sues in his individual capacity, and title in the damaged property is alleged to be in him, an amendment merely adding the words "as administrator of" A will not entitle him to recover as administrator, where neither the petition nor the amendment alleges that the title was in the decedent named, and that such person is dead, and plaintiff his administrator. Leathers v. Raburn, 13 Ga. A. 744, 79 SE 946. (4) In trespass quare clausum by an administrator the declaration charged that defendants broke and entered the close of plaintiff "administrator as aforesaid" and throughout alleged the injury to have been done to plaintiff's close. It was held that the quoted words were mere description of the person and that the declaration was in his individual and not his representative capacity. Robbins v. Gillett, 2 Pinn. (Wis.) 439, 2 Chandl. 96.

[b] **No amendment is necessary,** as the court will consider that the words are not in the declaration. Cotten v. Davis, 48 N. C. 355.

[c] **Limitations of rule.**—(1) In a complaint to the judge of probate for embezzlement of the estate of a person deceased the complainant having described himself as "administrator and creditor," and it appearing that he was not entitled to act as administrator, it was held that the words "administrator and" were material and could not be rejected as surplusage. "It may have been upon this ground alone that the judge took jurisdiction." Arnold v. Sabin, 4 Cush. (Mass.) 46, 48. (2) Where the words "as administrator of the estate," etc., appeared in the title of action, and the averments in the complaint confirmed the fact that the action was brought by plaintiff in his official capacity, it was held that the words of description could not be rejected as surplusage, and a demurrer was sustained because plaintiff, being a foreign administrator, was not qualified to sue as such. Farrington v. American L. & T. Co., 9 NYS 433, 18 NYCivProc 135.

66. Gilbert v. Hardwick, 11 Ga. 599; Farrington v. American L. & T. Co., 9 NYS 433, 18 NYCivProc 135. "The rule as to descriptio personae, in these cases, is this: if the plaintiff describes himself executor, &c, &c., it is an action in his personal character the descriptive part being regarded as immaterial. But if the plaintiff describes himself, as he has done in this case, as executor &c., then it is an action in his representative character, and the descriptive part is of substance, and cannot be regarded as immaterial. Whether this distinction be with or without reason, it is the rule of the Common Law, and was the rule of the Common Law when we adopted it, and is therefore, obligatory upon this Court." Gilbert v. Hardwick, 11 Ga. 599, 602.

67. McNeil's Succ., 9 La. Ann. 113.

68. Rowan v. Lee, 3 J. J. Marsh. (Ky.) 97.

69. Fuggle v. Hobbs, 42 Mo. 537.

70. Trott v. Birmingham R., etc., Co., 144 Ala. 383, 39 S 716; Duncan v. Whedbee, 4 Colo. 143.

71. Trask v. Karrick, 87 Vt. 451, 89 A 472.

72. Ala.—Lucas v. Pittman, 94 Ala. 616, 10 S 603; Crimm v. Crawford, 29 Ala. 623.

Conn.—Stanley v. Stanley, 42 Conn. 539.

Ga.—Hines v. Rutherford, 67 Ga. 606; Atlanta, etc., R. Co. v. Smith, 1 Ga. A. 162, 58 SE 106.

Ill.—National Ben. Assoc. v. Jackson, 114 Ill. 533, 2 NE 414; U. S. Insurance Co. v. Ludwig, 108 Ill. 514; Elliott v. Knight, 64 Ill. A. 87.

La.—Womack v. Womack, 2 La. Ann. 339; McRae v. McRae, 11 La. 571.

Me.—Bragdon v. Harmon, 69 Me. 29. But see infra note 73.

Mich.—Wolscheid v. Thome, 76 Mich. 265, 43 NW 12.

Nebr.—Burlington Voluntary Relief Dept. v. Moore, 52 Nebr. 719, 73 NW 15.

N. H.—Stearns v. Wright, 50 N. H. 293.

N. Y.—Tighe v. Pope, 16 Hun 180; Haddow v. Haddow, 3 Thomps. & C. 777. But see infra note 73.

N. C.—Mann v. Baker, 142 N. C. 235, 55 SE 102.

Oh.—Sherman v. Tucker, 16 Oh. Cir. Ct. N. S. 190.

Pa.—Snavely v. Prudential Ins. Co., 22 Pa. Dist. 557; Wolfenden v. Pennsylvania Schuykill Valley R. Co., 2 Pa. Co. 243. But see infra note 73.

S. C.—Glenn v. Gerald, 64 S. C. 236, 42 SE 155; Willis v. Tozer, 44 S. C. 1, 21 SE 617.

S. D.—Hardy v. Woods, 33 S. D. 416, 418, 146 NW 568, AnnCas1916C 398 [cit Cyc].

Tenn.—Winningham v. Crouch, 2 Swan 170. But see infra note 73.

Tex.—Smith v. Anderson, 39 Tex. 496; Whitehead v. Herron, 15 Tex. 127, 65 AmD 145.

Ont.—Chamberlain v. Smith, 21 U. C. Q. B. 103.

[a] **Necessary showing.**—In order to obtain permission to amend, plaintiff must show that the situation arose because of a mistake, and that an amendment is necessary for a trial on the merits. Reynolds v. Industrial Ins. Co., 19 Pa. Co. 295.

[b] **Amending complaint to conform to summons.**—Where plaintiff is described in the summons as suing in his representative capacity as administrator and in the complaint as suing individually, the complaint may be so amended as to make it conform to the summons. Ikelheimer v. Chapman, 32 Ala. 676.

[c] **Amendment as to statement of cause of action.**—Where the complaint shows suit in a representative capacity, both in its body and in the marginal statement of the parties, it may be so amended as to describe the cause of action with more particularity, and thus authorize a recovery by plaintiff in his representative capacity. Farrow v. Bragg, 30 Ala. 261.

73. Me.—Fleming v. Courtenay, 98 Me. 401, 57 A 592, 99 AmSR 414.

N. J.—Lower v. Segal, 60 N. J. L. 99, 36 A 777.

N. Y.—Phillips v. Melville, 10 Hun 211.

Pa.—Wildermuth v. Long, 196 Pa. 541, 46 A 927; McPartland v. Pennsylvania R. Co., 2 Pa. Co. 244, 18 WklyNC 79.

Tenn.—Hagerty v. Hughes, 4 Baxt. 222.

[a] **Reason for rule.**—"There is no more identity between a person suing as executor, upon a cause of action accruing to his estate, and

is one which might be sued on by the representative in either his individual or his representative capacity, such an amendment is properly allowed,[74] but it should not be allowed where the cause of action is in one capacity only.[75]

[§ 2068] **ddd. Effect of Allegations.** Where plaintiff sues as an administrator, and his pleadings are not amended to show that he prosecuted the suit in any other capacity, he must be treated as having sued in such capacity alone, and not as trustee of an express trust.[76] An allegation that plaintiff duly qualified as intestate's administrator raises a presumption that plaintiff took the necessary oath.[77] A petition, the caption of which describes plaintiff as independent executor of a decedent, is not a petition of plaintiff in his individual right, where it again mentions plaintiff as a distinct party suing in his own right and thus makes evident an intention to proceed in both capacities.[78]

[§ 2069] **(bb) Actions against Personal Representative—aaa. Necessity and Sufficiency of Allegations.** In an action against an executor or administrator it is necessary to state that he is sued as executor or administrator if it is sought to hold him liable as such.[79] The word "as" prefixed to the title of defendant indicates that he is sued in his representative capacity.[80] If, however, he is described "executor" without the word "as" prefixed, the word "executor" will be considered merely description of the person and the action will be considered as brought against him in his individual capacity,[81] unless the pleading contains other averments showing that he is sued in his representative capacity, which will be sufficient as no particular form of words is required.[82] With regard to the representative character of defendant plaintiff is not supposed to know the particulars, and it is sufficient to aver in general terms that he is executor or administrator of the particular estate.[83] So where the complaint sufficiently shows that defendant is the administrator of the debtor, it is not necessary to allege whether defendant is a domestic or a foreign administrator,[84] or that he was still acting as administrator when the action was com-

the same person suing in his individual capacity, upon a cause of action accruing to himself, than there is between two entirely different persons." Fleming v. Courtenay, 98 Me. 401, 414, 57 A 592, 99 AmSR 414.

74. Fleming v. Courtenay, 98 Me. 401, 57 A 592, 99 AmSR 414.

75. Fleming v. Courtenay, 98 Me. 401, 414, 57 A 592, 99 AmSR 414 ("It is true, that in Bragdon v. Harmon, 69 Me. 29, where a plaintiff was described in the writ as executor, the court held that an amendment could be allowed by striking out the words 'executor, etc.'; but the reason of this, as expressly stated in the opinion, was because the cause of action was described as one accruing to the plaintiff in his own right, and consequently the words allowed to be stricken out were simply descriptio personae. That case is no authority for the power of the court to allow an amendment whereby a new plaintiff would be substituted, or even the same person as plaintiff but in an entirely different capacity").

76. Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025.

77. Louisville, etc., R. Co. v. Herndon, 126 Ky. 589, 104 SW 732, 31 KyL 1059.

78. McKee v. Ellis, (Tex. Civ. A.) 83 SW 880.

79. U. S.—United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 146 CCA 532; Curtis v. Bowrie, 6 F. Cas. No. 3,498, 2 McLean 374.

Ala.—McNeill v. Cook, 33 Ala. 278.

Ark.—Brown v. Hicks, 1 Ark. 232.

N. Y.—Kley v. Higgins, 59 App. Div. 581, 69 NYS 826 [rev 33 Misc. 367, 68 NYS 453]; Worden v. Worthington, 2 Barb. 368; Kingsland v. Stokes, 25 Hun 107, 61 HowPr 494.

R. I.—Gilbane v. Hawkins, 29 R. I. 502, 72 A 723.

Tex.—Hawkins v. Forrest, 1 Tex. Unrep. Cas. 167.

Va.—Bishop v. Harrison, 2 Leigh (29 Va.) 532.

W. Va.—Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930; Hanson v. Blake, 63 W. Va. 560, 60 SE 589.

[a] **Reason for rule.**—If the rule was different, defendant could not plead ne unques executor or if he was not an administrator or anything else that would abate the suit or writ. Brown v. Hicks, 1 Ark. 232.

[b] **Death of one of several defendants.**—Where the fact stated and the prayer for relief fully characterize the actions against defendants as one against them in their representative capacity, this is enough to sustain a judgment against the survivors notwithstanding the death of one. Patterson v. Copeland, 52 HowPr (N. Y.) 460.

[c] **In a suit to charge an executrix as trustee of specific property,** it must be alleged that she had come into possesion of property and that it was charged with trust in favor of plaintiff. Reed v. Reed, (Cal.) 172 P 600.

80. Austin v. Munroe, 47 N. Y. 360; Yates v. Hoffman, 5 Hun (N. Y.) 113.

81. Ark.—Brown v. Hicks, 1 Ark. 232.

Ga.—Glisson v. Weil, 117 Ga. 842, 45 SE 221.

Ky.—Hood v. Link, 2 B. Mon. 37.

N. Y.—Bannon v. McGrane, 45 N. Y. Super. 517; Gatti-McQuade Co. v. Flynn, 79 Misc. 430, 140 NYS 135; Limbach v. Wallach, 70 Misc. 237, 126 NYS 666.

R. I.—Gilbane v. Hawkins, 29 R. I. 502, 72 A 723.

Vt.—Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

[a] **Illustration.**—A complaint in an action for the negligence of a driver employed by an administratrix carrying on decedent's business, which demands only a money judgment against defendant named followed by the words, "administratrix of the estate of . . . deceased," sets forth a cause of action against defendant in her individual capacity. Gatti-McQuade Co. v. Flynn, 79 Misc. 430, 140 NYS 135.

82. Ga.—Wallace v. Wallace, 142 Ga. 408, 83 SE 113; Jennings v. Wright, 54 Ga. 537 [foll Empire State Chemical Co. v. Shubreck, (Ga.) 97 SE 541].

Md.—Stoner v. Devilbliss, 70 Md. 144, 16 A 440; Giles v. Perryman, 1 Harr. & G. 164.

Miss.—Smith v. Bobb, 20 Miss. 322.

Mo.—White v. McFarland, 148 Mo. A. 338, 128 SW 23.

N. Y.—Yates v. Hoffman, 5 Hun 113.

Tex.—Lang v. Light, 54 Tex. Civ. A. 497, 117 SW 1038.

"The rule is, that if the averments in the complaint show that the cause of action devolves upon, or exists against, a party in his representative capacity, the action will have a representative character, despite the fact that the party sues, or is sued, individually." Collins v. Steuart, 2 App. Div. 271, 278, 37 NYS 891.

[a] **Insufficient averment.** — A complaint which alleges merely that plaintiff filed her duly verified claim with defendants as executors, and that it was rejected, does not show that the action is brought against them in their representative capacity. Kley v. Higgins, 59 App. Div. 581, 69 NYS 826 [rev 33 Misc. 367, 68 NYS 453].

83. U. S.—Winters v. Drake, 102 Fed. 545.

Cal.—Wise v. Williams, 72 Cal. 544, 14 P 204.

Del.—Harris v. Harris, 2 Del. 354.

Iowa.—Hanen v. Lenander, 178 Iowa 569, 160 NW 18.

Mo.—Dodson v. Scroggs, 47 Mo. 285.

Tex.—Lang v. Light, 54 Tex. Civ. A. 497, 117 SW 1038.

W. Va.—Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930.

[a] **Illustrations.**—(1) In an action against decedent's estate, where the bill names one of defendants as executrix, and alleges that she was nominated as executrix by the will and in pursuance of such nomination had been acting as such, the bill is not subject to demurrer on the ground that the qualified personal representative is not before the court, although it does not state that she qualified by giving a bond and taking the oath prescribed by law. Gooch v. Gooch, 70 W. Va. 38, 73 SE 56, 37 LRANS 930. (2) A pleading based on breach of L's covenant against encumbrances, alleging P qualified as executrix of L, and property of L's estate came into her hands and still remains there subject to payment of the encumbrance, and not alleging she was a devisee, states a cause against her merely as executrix. Lang v. Light, 54 Tex. Civ. A. 497, 117 SW 1038.

[b] **Failure to name the county where administration is pending is not a fatal defect.**—Hanen v. Lenander, 178 Iowa 569, 160 NW 18.

[c] **Effect of affidavit of demand.**—An action on a note was brought by one who was not the payee against a trust company "administrator of Samuel D. Forbes, deceased." The note was signed, "S. D. Forbes." Plaintiff in his affidavit of demand stated that he was plaintiff in the action, that the note constituted his cause of action, and that there was due from defendant a specified sum with interest from a given date. It was held that it appeared prima facie from the affidavit that defendant was the administrator of the maker of the note. Miller v. Wilmington Trust Co., 24 Del. 251, 75 A 789.

84. Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039.

menced.[85] Defendant need not be described in his representative capacity in the beginning of the declaration if in a subsequent part thereof he is declared against as such.[86] Where the complaint in an action against an executor contains several causes of action separately stated, an allegation showing defendant's representative character need not be contained in each count; one allegation at the conclusion of the complaint is sufficient.[87] An allegation that defendant is the "duly qualified and acting executrix" of the estate of a named decedent "by the due consideration and order of the Surrogate's Court" inferentially sets forth that decedent left a will, that it was duly probated, that defendant was named as executrix, and that she was duly appointed and qualified as such.[88]

Omission to state representative capacity in prayer for process. Where a petition alleges that it is against defendant as administratrix, the death of defendant's intestate, her qualification as administratrix, and her consent to be sued within twelve months from her qualification, and prays the cancellation of mortgages executed by intestate and other relief against defendant as administratrix, and where service of the petition is acknowledged, and process and service thereof, and the twelve months' exemption from suit is waived in an entry indorsed on the petition and signed by one as attorney for defendant, as administratrix, such defendant, as administratrix, is the party to the suit, notwithstanding in the prayer for process her representative character is not stated.[89]

A complaint in intervention in an action of ejectment brought by an executor need not allege plaintiff's status as executor, where such status is fully alleged in plaintiff's complaint.[90]

[§ 2070] **bbb. Rejection of Descriptive Words as Surplusage.** Where suit is brought against a personal representative on a cause of action for which he can be held liable only in his individual capacity, the pleading is not vitiated by describing him therein as executor or administrator, but such description may be rejected as surplusage,[91] because the naming of defendant as executor or administrator neither adds to nor diminishes his individual responsibility and is matter of form and not of substance.[92] So where an action is brought, the object of which is to charge defendant individually and a legal ground for the individual liability of the representative is set forth in the pleading, the fact that he was named therein as executor does not vitiate the pleading and this allegation may be treated as surplusage,[93] and it has been said that under these circumstances it is not improper to name defendant as administrator by way of description or for the purpose of showing the circumstances of the transaction and the origin of the liability.[94] It has been held, however, that, where the descriptive words are preceded by the word "as," the action cannot be regarded as against the representative individually.[95]

[§ 2071] **ccc. Amendments.** If a defendant is sued in a representative character the pleading may be amended so as to permit a recovery against him personally,[96] and if he is sued personally the pleading may be amended so as to charge him in his

85. Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039; Seaman v. Jamison, 146 App. Div. 428, 131 NYS 155.

[a] **Reason for rule.**—The fact that defendant was a foreign administrator or had ceased to be administrator was a matter of defense. Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039.

86. Bristol v. Guyse, 1 Saund. 111, 85 Reprint 119.

87. Mosely v. Heney, 66 Cal. 478, 6 P 134. See also Epe v. Dudley, 5 Rand. (26 Va.) 437 (if all the counts are laid against defendant as administrator, they will be held applicable to him in that capacity, although some of them omit to aver that the claim is for money due from the intestate).

88. Pache v. Oppenheim, 84 NYS 926 [rev on other grounds 93 App. Div. 221, 87 NYS 704].

89. Emmett v. Dekle, 132 Ga. 593, 64 SE 682.

90. Cameron v. Ah Quong, 175 Cal. 377, 165 P 961.

91. Ala.—Johnson v. Gaines, 8 Ala. 791; Oliver v. Hearne, 4 Ala. 271; Peters v. Heydenfeldt, 3 Ala. 205.

Cal.—St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864; Heydenfeldt v. Jacobs, 107 Cal. 373, 40 P 492; Melone v. Davis, 67 Cal. 279, 7 P 703; Peo. v. Houghtaling, 7 Cal. 348.

Iowa.—Laverty v. Woodward, 16 Iowa 1.

Kan.—Edwards v. Puterbaugh, 86 Kan. 758, 121 P 1116; Brown v. Quinton, 80 Kan. 44, 47, 102 P 242, 25 LRANS 71, 18 AnnCas 290 [cit Cyc].

Ky.—King v. Beeler, 4 Bibb 83.

Me.—Baker v. Fuller, 69 Me. 152.

Md.—Curtis v. Somerset Bank, 7 Harr. & J. 25.

Mo.—Blair v. Hall, (A.) 201 SW 945, 946 [quot Cyc].

N. Y.—Bennett v. Whitney, 94 N. Y. 302; Donohue v. Kendall, 50 N. Y. Super. 386 [aff 98 N. Y. 635 mem].

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Miltenberger v. Schlegel, 7 Pa. 241; Geddis v. Irvine, 5 Pa. 508; Smith v. Teacle, 8 Pa. Co. 150.

R. I.—Gilbane v. Hawkins, 29 R. I. 502, 72 A 723.

Tenn.—Braden v. Hollingsworth, 8 Humphr. 19.

Vt.—Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

Va.—Belvin v. French, 84 Va. 81, 3 SE 891; Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653.

[a] **Illustrations.**—(1) In a suit for a devastavit, declaring against defendant as administrator, is but description of the person and does not vitiate the pleading. King v. Beeler, 4 Bibb (Ky.) 83. (2) Where executors are sued personally for wrongfully collecting the proceeds of an insurance policy payable to the heirs, the statement in the complaint that, when they collected such proceeds, defendants were acting as executors is immaterial. Heydenfeldt v. Jacobs, 107 Cal. 373, 40 P 492. (3) Where in an action for services of attorneys, employed by an administratrix in behalf of the estate, defendant was referred to as administratrix in the caption and in the body of the petition, as a claim was a personal, and not an official, liability, the reference to her official character was a description of the person, and surplusage, and the petition stated a cause of action against defendant as an individual. Brown v. Quinton, 80 Kan. 44, 102 P 242, 25 LRANS 71, 18 AnnCas 290.

[b] **When the question is raised by demurrer** before trial, the description as representative cannot be treated as mere surplusage. Skivington v. Richards, 208 Pa. 385, 57 A 768.

[c] **On appeal.**—When it appears from the record that the description was not treated as surplusage by the parties or either of them in the trial court, it will not be so considered on the hearing of the cause on appeal. Laverty v. Woodward, 16 Iowa 1.

92. Johnson v. Gaines, 8 Ala. 791; Blair v. Hall, (Mo. A.) 201 SW 945, 946 [quot Cyc].

93. Cal.—Melone v. Davis, 67 Cal. 279, 7 P 703; Peo. v. Houghtaling, 7 Cal. 348.

Mo.—Blair v. Hall, (A.) 201 SW 945, 946 [quot Cyc].

N. Y.—Williamson v. Stevens, 84 App. Div. 518, 82 NYS 1047; Gatti-McQuade Co. v. Flynn, 79 Misc. 430, 140 NYS 135.

Oh.—Fleischman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

Pa.—Miltenberger v. Schlegel, 7 Pa. 241.

But compare Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653 (if the demand may possibly be maintained against the personal representative as such, the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative capacity it must fail).

94. Waldsmith v. Waldsmith, 2 Oh. 156.

95. Beaty v. Gingles, 53 N. C. 302; Hailey v. Wheeler, 49 N. C. 159.

96. Ala.—Lucas v. Pittman, 94 Ala. 616, 10 S 603 [overr Christian v. Morris, 50 Ala. 585; Taylor v. Taylor, 43 Ala. 649].

Conn.—McDonald v. Ward, 57 Conn. 304, 18 A 51.

Ga.—Worrill v. Taylor, 27 Ga. 398. But compare Smith v. Ardis, 49 Ga. 602 (on a bill asking a decree against defendant as administrator a demurrer to an amendment charging him individually should have been sustained).

Mass.—Leighton v. Leighton, 1 Mass. 433.

Mo.—Blair v. Hall, (A.) 201 SW 945, 946 [quot Cyc].

N. Y.—Austin v. Munroe, 47 N. Y. 360; Tighe v. Pope, 16 Hun 180; Obnot v. Ridder, 100 Misc. 142, 166 NYS 171.

Pa.—Geddis v. Irvine, 5 Pa. 508.

[a] **Discretion in allowing amendment.**—On failure to recover against executors as such the court is not bound to allow plaintiff to amend his petition so as to make a case against them as individuals, it not being shown to be in furtherance of justice, and such amendment sub-

capacity as executor or administrator.[97] In an action against an executor as such on a note executed by him as executor the complaint may be amended on demurrer filed for failure to show a cause of action against him as executor by adding counts stating an indebtedness by testator in his lifetime and striking out the count on the note described in the original complaint.[98] If defendant is improperly described as a personal representative of the estate of a person designated when he is in fact the administrator of the estate of another person, this is a mere misdescription of the representative capacity and may be amended.[99]

[§ 2072] **ddd. Effect of Allegations.** In an action against an administrator for injuries to plaintiff by reason of an unsafe building, an allegation that defendant is administrator and as such in possession of the property does not necessarily negative his personal liability.[1]

[§ 2073] **(cc) Mode of Objection.** If plaintiff's incapacity to sue in a representative capacity does not clearly appear from the statement of the declaration or complaint, the objection cannot be taken by demurrer but only by plea or answer,[2] or motion to make the allegation more certain and specific.[3] But if the declaration or complaint shows on its face that plaintiff has not capacity to sue as a personal representative, objection must be taken by demurrer or it will be considered waived.[4] The objection cannot be raised by general demurrer,[5] but only by special demurrer.[6]

[§ 2074] **bb. Allegations Showing Authority to Sue as Personal Representative—(aa) Necessity.** Many decisions clearly hold that in actions by personal representatives as such all that is necessary to be shown is that they are suing in a representative capacity and that nothing need be alleged to show their right or authority to sue in that capacity.[7] This also seems to be the rule deducible from other decisions, although not so stated in so many words.[8] But on the other hand there are many decisions which hold that plaintiff must state in a direct and issuable form the facts showing his right or authority to sue in a representative capacity.[9]

stantially changing the nature of plaintiff's claim. Fleischman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

[b] **On demurrer** (1) an action against defendants "as executors," demanding a judgment against them "as executors," cannot be converted into an action against defendants individually. Austin v. Munroe, 47 N. Y. 360. (2) This case was referred to in Sterrett v. Barker, 119 Cal. 492, 51 P. 695, as holding "that the complaint cannot be amended so as to constitute an action against the executor individually." (3) But in making this statement the California court overlooked the fact that the judgment of the New York court was that the demurrer to the complaint against defendants "as executors" should be sustained "with leave to the plaintiffs to amend on payment of costs." Austin v. Munroe, supra.

[c] **After the trial** (1) a summons and complaint entitled against defendants "as" executor cannot be amended and judgment entered against defendant individually, as such amendment would substitute a new and different cause of action against which defendant, as an individual, had been furnished no opportunity to defend. Van Cott v. Prentice, 104 N. Y. 45, 10 NE 257 [aff 35 Hun 317]. (2) Where the declaration alleges promises by the intestate, plaintiff cannot recover for services after his death, but after a full trial and a referee's report in plaintiff's favor under such counts, plaintiff may be permitted to amend by adding the proper counts on paying costs of the motion to set aside the report. Smith v. Proctor, 3 N. Y. Super. 72.

97. Poole v. Hines, 52 Ga. 500; Hutchinson v. Tucker, 124 Mass. 240; Blair v. Hall, (Mo. A.) 201 SW 945, 946 [quot Cyc].

98. Taylor v. Perry, 48 Ala. 240.

99. U. S.—Randolph v. Barrett, 16 Pet. 138, 10 L. ed. 914.

Fla.—Barnes v. Scott, 29 Fla. 285, 11 S 48.

N. H.—Ballou v. Tilton, 52 N. H. 605.

N. Y.—McElwain v. Corning, 12 AbbPr 16.

Tex.—Kendall v. Riley, 45 Tex. 20.

1. Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371.

2. Locke v. Klunker, 123 Cal. 231, 55 P 993; Louisville Trust Co. v. Louisville, etc., R. Co., (Ky.) 43 SW 698; Paterson v. Pagan, 18 S. C. 584.

3. Ohio, etc., R. Co. v. McClure, 47 Ind. 317.

4. U. S.—Fugate v. Bronaugh, 9 F. Cas. No. 5,146, 3 Cranch C. C. 65.

Ill.—Foster v. Adler, 84 Ill. A. 654.

Ky.—Warfield v. Gardner, 3 KyL 423.

Mo.—Fuggle v. Hobbs, 42 Mo. 537.

N. J.—Stover v. Reading, 29 N. J. Eq. 152.

N. Y.—Nanz v. Oakley, 122 N. Y. 631, 25 NE 263; Varnum v. Taylor, 59 Hun 554, 14 NYS 242; Robbins v. Wells, 24 N. Y. Super. 666; Boyle v. Southern R. Co., 36 Misc. 289, 73 NYS 465, 32 NYCivProc 218; Forrest v. New York, 13 AbbPr 350; Sheldon v. Hoy, 11 HowPr 11; Christopher v. Stockholm, 5 Wend. 36.

S. C.—Mickle v. Congaree Constr. Co., 41 S. C. 394, 18 SE 725.

Tex.—Wilson v. Hall, 13 Tex. Civ. A. 489, 36 SW 327.

Wis.—Moir v. Dodson, 14 Wis. 279.

[a] **Want of jurisdiction of court to appoint.**—Where the petition in an action by an administrator affirmatively shows that the court appointing the administrator had no jurisdiction to grant administration, objection may be made by special demurrer. Louisville Trust Co. v. Louisville, etc., R. Co., (Ky.) 43 SW 698.

[b] **Where the complaint shows that plaintiff is a foreign administrator or executor,** the objection will be considered waived unless taken by demurrer. Robbins v. Wells, 24 N. Y. Super. 666; Moir v. Dodson, 14 Wis. 279.

[c] **Different rule under statute.**—Under the statutes objections based on failure of the complaint to show capacity to sue cannot be raised by demurrer, and plaintiff's right to sue in a representative capacity can be questioned only by plea verified by affidavit. Hansford v. Van Auken, 79 Ind. 157.

5. Gibson v. Ponder, 40 Ark. 195; Secor v. Pendleton, 47 Hun (N. Y.) 281.

[a] **A demurrer alleging that the complaint fails to show a cause of action** does not raise the question that the complaint does not sufficiently show legal capacity to sue. Secor v. Pendleton, 47 Hun (N. Y.) 281. Contra Toner v. Wagner, 158 Ind. 447, 63 NE 859.

6. De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663; Warfield v. Gardner, 3 KyL 423; Boyle v. Southern R. Co., 36 Misc. 289, 73 NYS 465, 32 NYCivProc 218; Cochran v. Thompson, 18 Tex. 652.

[a] **Objection that plaintiff's appointment is void** if apparent on the face of the complaint must be taken by special demurrer. Cochran v. Thompson, 18 Tex. 652.

7. U. S.—Champlin v. Tilley, 5 F. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

D. C.—Jordan v. Hamlink, 21 D. C. 189.

Ga.—Beale v. Hall, 22 Ga. 431.

Ind.—Toner v. Wagner, 158 Ind. 447, 63 NE 859; Kelley v. Love, 35 Ind. 106; McDowell v. North, 24 Ind. A. 435, 55 NE 789; Chicago, etc., R. Co. v. Cummings, 24 Ind. A. 192, 53 NE 1026.

Ky.—Walton v. Kindred, 5 T. B. Mon. 388.

Me.—Brown v. Nourse, 55 Me. 230, 92 AmD 583.

Mass.—Langdon v. Potter, 11 Mass. 313.

Mo.—Duncan v. Duncan, 19 Mo. 368.

R. I.—Ellis v. Appleby, 4 R. I. 462.

Va.—Lawson v. Lawson, 16 Gratt. (57 Va.) 230, 80 AmD 702.

[a] **The title of an administrator to letters of administration** need not appear in pleadings to entitle them to be read in evidence. Beale v. Hall, 22 Ga. 431.

8. U. S.—Cawood v. Nichols, 5 F. Cas. No. 2,531, 1 Cranch C. C. 180.

Ala.—Lucas v. Pittman, 94 Ala. 616, 10 S 603; Watson v. Collins, 37 Ala. 587; Crimm v. Crawford, 29 Ala. 623.

Ark.—Hemphill v. Hamilton, 11 Ark. 425; Sabin v. Hamilton, 2 Ark. 485.

Pa.—Oram v. Rothermel, 98 Pa. 300.

Vt.—Pope v. Stacy, 28 Vt. 96.

9. U. S.—Campbell v. U. S., 13 Ct. Cl. 108.

Cal.—Barfield v. Price, 40 Cal. 535.

Ill.—Collins v. Ayers, 13 Ill. 358; Foster v. Adler, 84 Ill. A. 654.

Minn.—Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97.

Miss.—Cushing v. Gibson, 1 Miss. 87.

Mo.—Headlee v. Cloud, 51 Mo. 301; Dodson v. Scroggs, 47 Mo. 285; State v. Matson, 38 Mo. 489.

N. Y.—Secor v. Pendleton, 47 Hun 281; Kingsland v. Stokes, 25 Hun 107; Forrest v. New York, 13 AbbPr 350; Sheldon v. Hoy, 11 HowPr 11; Beach v. King, 17 Wend. 197.

Oh.—Neil v. Cherry, 2 Oh. Dec. (Reprint) 28, 1 WestLMonth 155.

S. C.—Heyward v. Williams, 57 S. C. 235, 35 SE 503.

Tex.—Beal v. Batte, 31 Tex. 371; Boyle v. Forbes, 9 Tex. 35; Wilson v.

[§ 2075] **(bb) Sufficiency.**[10] No particular form of words is absolutely essential to show plaintiff's authority to sue in a representative character, but the fact must appear substantially so that issue may be made upon the allegation if proper to do so.[11] The pleading must allege the appointment of plaintiff as executor or administrator,[12] or facts from which appointment will be necessarily inferred.[13] It has been held that a mere statement that plaintiff was duly appointed executor or administrator is sufficient,[14] but this is denied in other cases.[15] A proper and sufficient way to show authority is to allege that plaintiff is executor or administrator by virtue of letters issued by a probate court of some county, giving the name of the court and the time at which the letters were issued.[16] It is not necessary to set forth the facts showing that the probate court had jurisdiction.[17] While it would be better to allege directly that letters testamentary or of administration have been issued,[18] such allegation is unnecessary if this fact appears from other facts stated.[19] It has been held that acceptance of the trust and qualification need not be alleged, as both are implied in the grant and issuance of letters testamentary,[20] but there is also authority for the view that such an allegation is necessary.[21] In a suit to enjoin a sale under a trust deed brought by an executor, a petition which alleges that plaintiff is the qualified independent executor of the will of decedent, that the will has been duly probated in the probate court of a designated county, and that independent administration by the executor has been continuously and is still open and pending, and that there has been no distribution of the estate, sufficiently shows the executor's authority to prosecute the suit, without alleging the condition of the estate, the time of his qualification, the terms of the will, what act he is performing, and sufficiently shows why the heirs do not prosecute.[22] A plea in an action on notes executed by an independent executor for money borrowed to carry on decedent's business, alleging that at the time of the death of decedent the name averred to be signed to the notes was a partnership composed of decedent and other persons, that the partnership was dissolved by the death of decedent, and no authority existed in any of the surviving partners to execute notes binding decedent's estate, relates merely to the authority of a surviving partner to execute such notes, and not to the authority of one of the alleged partners as executor of decedent.[23]

In an action by an administrator de bonis non, the complaint must state the name of the former representative and allege nonpayment to him;[24] and it should also allege his death or resignation, the revocation of his letters, or his discharge by the court.[25]

Hall, 13 Tex. Civ. A. 489, 30 SW 327.

[a] **Showing proof of will.**—A complaint by an executor for injuries to land is bad on demurrer unless it shows that the will has been proved. Pott v. Pennington, 16 Minn. 509.

[b] **A complaint on a note by an assignee of a nonresident executor** is demurrable as failing to state sufficient facts to constitute a cause of action, where it fails to allege that the will has been probated in the state where the action is brought. Heyward v. Williams, 57 S. C. 235, 35 SE 503.

10. [a] **Forms** held sufficient to show authority to sue in representative capacity. Central Branch Union Pac. R. Co. v. Andrews, 37 Kan. 162, 14 P 509; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97; Knight v. Le Beau, 19 Mont. 223, 47 P 952; Brenner v. McMahon, 20 App. Div. 3, 46 NYS 643; Nohrden v. Northwestern R. Co., 54 S. C. 492, 32 SE 524.

11. Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97; Taylor v. Williams, (Tex. Civ. A.) 105 SW 837 [rev on other grounds 101 Tex. 388, 108 SW 815].

12. Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97; Kingsland v. Stokes, 25 Hun (N. Y.) 107; Sheldon v. Hoy, 11 HowPr (N. Y.) 11; Neil v. Cherry, 2 Oh. Dec. (Reprint) 28, 1 WestLMonth 155; Brogan v. Union Tract. Co., 76 W. Va. 698, 86 SE 753; Byer v. Paint Creek Collieries Co., 76 W. Va. 641, 86 SE 476.

[a] **Renewal of appointment.**—Where by statute an administrator's powers continue but one year unless renewed and an administrator sues thirteen years after appointment, he must allege and prove a renewal of his appointment. Boyle v. Forbes, 9 Tex. 35.

13. Bird v. Cotton, 57 Mo. 568.

14. San Francisco, etc., Land Co. v. Hartung, 138 Cal. 223, 71 P 337; Collins v. O'Laverty, 136 Cal. 31, 68 P 327; Bowden v. Jacksonville Electric Co., 51 Fla. 152, 41 S 400, 7 AnnCas 859. Contra Judah v. Fredericks, 57 Cal. 389 (under earlier statute).

15. Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Secor v. Pendleton, 47 Hun (N. Y.) 281; Boyle v. Southern R. Co., 36 Misc. 289, 73 NYS 465, 32 NYCivProc 218; Sheldon v. Hoy, 11 HowPr (N. Y.) 11; Beach v. King, 17 Wend. (N. Y.) 197; Bliss Code Pl. § 264.

16. U. S.—Stanley v. Sierra Nevada Silver Min. Co., 118 Fed. 931.

Minn.—Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97.

Mo.—Dodson v. Scroggs, 47 Mo. 285.

N. Y.—Cohu v. Husson, 113 N. Y. 662, 21 NE 703 [aff 14 Daly 200, 6 NYSt 292].

N. C.—Hurst v. Addington, 84 N. C. 143.

Oh.—Neil v. Cherry, 2 Oh. Dec. (Reprint) 28, 1 WestLMonth 155.

S. C.—Dial v. Tappan, 20 S. C. 167.

[a] **Such allegations include** an averment of all that is necessary to warrant the court in making the appointment and include an averment that the will has been admitted to probate. Dial v. Tappan, 20 S. C. 167.

[b] **Sufficient showing as to county of appointment.**—Where it appears from the caption of a complaint that the action was in a certain county and it alleges the appointment of plaintiff as administrator in such county, it is sufficient as against an objection that it fails to set forth the county in which the appointment was made which is made for the first time on appeal. Hughes v. Meehan, 84 Minn. 226, 87 NW 768.

[c] **Failure to show probate and qualification.**—Where a complaint contains the allegations indicated in the text, a demurrer on the ground that it does not show the probate of the will and qualification of the executor before suit brought is frivolous. Hurst v. Addington, 84 N. C. 143.

[d] **Failure to allege date of death.**—In an action by an administratrix, an allegation that her decedent died intestate, and that on a certain date plaintiff was appointed administratrix of decedent's estate was not objectionable for failure to allege the date of decedent's death and by reason thereof failing to show that deceased did not die until after plaintiff was appointed administratrix of his estate since such a contingency would not be presumed. Stanley v. Sierra Nevada Silver Min. Co., 118 Fed. 931.

[e] **Omission of word "county."**—An allegation that plaintiffs have "qualified as executors in Probate Court of Darlington, S. C." should be construed to mean the probate court of the county of Darlington. Jerkowski v. Marco, 56 S. C. 241, 34 SE 386.

[f] **In an action by the trustees under a nonintervention will,** an averment that they have duly qualified and accepted the trust and are the acting executors sufficiently shows that they are executors, although it is not alleged that letters testamentary have been granted to them. Boyer v. Robinson, 26 Wash. 117, 66 P 119.

17. Cohu v. Husson, 113 N. Y. 662, 21 NE 703 [aff 14 Daly 200, 6 NYSt 292].

18. Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97; Dodson v. Scroggs, 47 Mo. 285.

19. Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97.

20. Mattison v. Childs, 5 Colo. 78.

21. Wilson v. Hall, 13 Tex. Civ. A. 489, 36 SW 327.

22. Taylor v. Williams, (Civ. A.) 105 SW 837 [rev on other grounds 101 Tex. 388, 108 SW 815].

23. Altgelt v. Alamo Nat. Bank, (Civ. A.) 79 SW 582 [rev on other grounds 98 Tex. 252, 83 SW 6].

24. Griffith v. Fischli, 4 Blackf. (Ind.) 427; Vanblaricum v. Yeo, 2 Blackf. (Ind.) 322.

25. Cummings v. Edmundson, 5 Port. (Ala.) 145; Lucas v. Todd, 28 Cal. 182; Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; State v. Green, 65 Mo. 528.

[a] **Where an estate has been under the charge of two administrators,** the petition in a suit by an administrator de bonis non should show that the administration of both has been brought to a close. State v. Green, 65 Mo. 528.

[b] **Allegations held sufficient.**—A complaint alleging testator's death, the probate of his will, the issuance of letters to his executors, their resignation, and the acceptance thereof by the court, that plaintiff was appointed administrator by the probate court of a designated county, that he qualified and that letters

Continuance of authority. Where a complaint in an action by an administrator shows that plaintiff was appointed as administrator only six days before the action was brought, and it is not shown that he has since been discharged, it need not be alleged that he is still qualified to act as administrator.[26] If the suit is brought by an administrator durante absentia, it must be alleged that the executor continued absent at the time of bringing the action.[27]

[§ 2076] **cc. Allegations Showing Defendant's Authority to Act as Personal Representative.**[28] According to some decisions, where a person is sued as executor or administrator, the pleading must allege his appointment as such and that he was acting in that capacity,[29] but the more generally accepted view is that it is sufficient to allege that the suit is brought against defendant in his representative capacity without setting forth facts to show that he has authority to act in that capacity.[30] It is not necessary to negative every ground of disqualification of defendant.[31] An allegation in an action against an executor that letters testamentary were duly issued to him, who then duly qualified and acted as such, is not objectionable as a mere conclusion of law in the absence of special demurrer, especially where admitted in the answer.[32]

[§ 2077] **(b) Suits in Equity—aa. By Personal Representative.** One who files a bill in equity as personal representative must show on the face of the bill his authority to sue as such.[33] Mere description of himself as executor or administrator in the commencement of the bill is not sufficient,[34] nor is it sufficient to allege that he was duly appointed administrator.[35] If the bill is filed by one as executor the will must be pleaded or exhibited,[36] and it must be alleged that the will has been proved.[37] The bill is demurrable if it shows that the will was proved in a court other than the proper one.[38] The bill must show that letters testamentary or of administration have been granted to complainant,[39] and allege that he has qualified as such.[40] It is not usual or necessary, however, to state when the testator or intestate died.[41] If the bill contains proper allegations to show that complainant is entitled to relief as executor or administrator he need not be so styled in the process,[42] or in the bill itself.[43] It is not proper for an executor who sues to describe himself merely as "personal representative" of the decedent; he should describe himself as "executor."[44]

[§ 2078] **bb. Against Personal Representative.** It is not necessary that a defendant to a bill in equity sought to be charged as a personal representative be described as executor or administrator in the process,[45] or in the commencement or conclusion of the bill,[46] where the bill sets forth facts sufficient to show that he is liable in that capacity. A bill alleging the death of a designated person and that defendant was thereafter appointed and acted as his administratrix sufficiently charges defendant's representative capacity.[47] A further allegation that he accepted the trust is not necessary.[48] Title to revive the suit against defendant is not shown by the mere statement that such defendant is the representative of a party who had answered the original bill.[49]

[§ 2079] **(2) Profert and Oyer—(a) Profert—aa. Necessity.** If an executor or administrator sues

were issued to him, and that he was still administrator sufficiently shows his authority to sue. Lucas v. Todd, 28 Cal. 182.

26. Nohrden v. Northeastern R. Co., 54 S. C. 492, 32 SE 524.

27. Lewis v. Ewing, 3 Serg. & R. (Pa.) 44.

28. [a] **Form** of complaint held sufficient to show defendant's authority to act as executor. Kirsch v. Derby, 96 Cal. 602, 31 P 567.

29. Crimm v. Townsend, 9 Ala. 403; Barfield v. Price, 40 Cal. 535 [foll Flinn v. Gouley, 139 Cal. 623, 73 P 542]. Contra Wise v. Williams, 72 Cal. 544, 14 P 204.

30. Ark.—Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039.

Miss.—Quinn v. Moss, 20 Miss. 365.

Mo.—Dodson v. Scroggs, 47 Mo. 285.

N. J.—Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

N. Y.—Kingsland v. Stokes, 25 Hun 107.

Eng.—Holliday v. Fletcher, 2 Ld. Raym. 1510, 92 Reprint 480.

[a] **Reasons for rule.**—(1) Plaintiff is not supposed to know the particulars. Dodson v. Scroggs, 47 Mo. 285. (2) Suing one as administrator necessarily implies that administration was granted to him. Holliday v. Fletcher, 2 Ld. Raym. 1510, 92 Reprint 480.

[b] **In an action to foreclose a mortgage purporting to be executed by an executor** (1) and trustee in his representative capacity the complaint need not allege that the mortgagor was in fact such executor and trustee and the facts relating to his appointment. Kingsland v. Stokes, 25 Hun (N. Y.) 107; Skelton v. Scott, 18 Hun (N. Y.) 375. (2) The mortgagor is estopped to deny his appointment. Skelton v. Scott, 18 Hun (N. Y.) 375.

31. Seaman v. Jamison, 146 App. Div. 428, 131 NYS 155.

32. Vragnizan v. Savings Union Bank, etc., Co., 31 Cal. A. 709, 161 P 507.

33. Colo.—Buck v. Fischer, 2 Colo. 182.

Mich.—Middlesworth v. Nixon, 2 Mich. 425, 57 AmD 136.

N. J.—Stover v. Reading, 29 N. J. Eq. 152; Pelletreau v. Rathbone, 1 N. J. Eq. 331.

N. C.—Belloat v. Morse, 3 N. C. 157.

Eng.—Humphreys v. Ingledon, 1 P. Wms. 752, 24 Reprint 599.

[a] **Showing in an exhibit** to the bill that the complainants have authority to sue as personal representatives is not sufficient. This fact must be shown by the bill itself. Buck v. Fischer, 2 Colo. 182.

34. Middlesworth v. Nixon, 2 Mich. 425, 57 AmD 136.

35. Otto v. Regina Music-Box Co., 87 Fed. 510.

36. Trapnall v. Burton, 24 Ark. 371.

37. U. S.—Armstrong v. Lear, 12 Wheat. 169, 6 L. ed. 589; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16.

Mich.—Middlesworth v. Nixon, 2 Mich. 425, 57 AmD 136.

N. J.—Pelletreau v. Rathbone, 1 N. J. Eq. 331.

N. C.—Belloat v. Morse, 3 N. C. 157.

Eng.—Humphrey v. Ingledon, 1 P. Wms. 752, 24 Reprint 599; Mitford Eq. Pl. by Jeremy pp 155, 156; Story Eq. Pl. § 260.

38. Pelletreau v. Rathbone, 1 N. J. Eq. 331; Mitford Eq. Pl. by Jeremy 155, 156; Story Eq. Pl. § 260.

39. Giddings v. Green, 48 Fed. 489; Trapnall v. Burton, 24 Ark. 371; Stover v. Reading, 29 N. J. Eq. 152.

[a] **Amendment.**—An administrator appointed in one state who has brought suit in the courts of another before he has obtained letters therefrom and has afterward obtained letters there may allege the fact by way of amendment. Giddings v. Green, 48 Fed. 489; Black v. Henry G. Allen Co., 42 Fed. 618, 9 LRA 433; Swatzel v. Arnold, 23 F. Cas. No. 13,682, Woodw. 383.

40. Belloat v. Morse, 3 N. C. 157.

41. Bosbel v. Thigpen, 75 Miss. 308, 92 S 823.

42. Matthews v. Hoagland, 48 N. J. Eq. 455, 21 A 1054; Plaut v. Plaut, 44 N. J. Eq. 18, 13 A 849; Evans v. Evans, 23 N. J. Eq. 71.

43. Buck v. Fischer, 2 Colo. 182; Walker v. Cady, 106 Mich. 21, 63 NW 1005; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 A 1054; Plaut v. Plaut, 44 N. J. Eq. 18, 13 A 849; Evans v. Evans, 23 N. J. Eq. 71.

[a] **Sufficient and insufficient bills illustrated.**—(1) The complainants in a bill described themselves as "administrators of the goods and chattels, rights, credits, moneys and effects which were of Henry Ossum, late of Huntington county, deceased, who died intestate." The bill further stated that "on or about the 1st day of October, 1848, said Henry Ossum died intestate, and that your orators were duly appointed," etc. It was held that the bill sufficiently showed that the complainants were administrators of Henry Ossum, deceased. English v. Roche, 6 Ind. 62. (2) The allegation that the complainant "hath taken upon himself the burthen of executing the trusts and duties required of him by the will, and become duly qualified as executor" is not sufficient to show his authority to sue. Pelletreau v. Rathbone, 1 N. J. Eq. 331.

44. Capehart v. Hale, 6 W. Va. 547.

45. Matthews v. Hoagland, 48 N. J. Eq. 455, 25 A 1054; Evans v. Evans, 23 N. J. Eq. 71.

46. Matthews v. Hoagland, 48 N. J. Eq. 455, 21 A 1054; White v. Davis, 48 N. J. Eq. 22, 21 A 187; Plaut v. Plaut, 44 N. J. Eq. 18, 13 A 849.

47. Manning v. Drake, 1 Mich. 34; Winsor v. Pettis, 11 R. I. 506.

48. Manning v. Drake, 1 Mich. 34.

49. Griffith v. Ricketts, 3 Hare

in his individual capacity it is unnecessary for him to make profert of his letters testamentary or of administration.[50] Many decisions lay down the rule without qualification that, where an executor or administrator sues as such, he must make profert of his letters testamentary or of administration.[51] Others hold that, where the suit is one which must be brought in a representative capacity, plaintiff must make profert of his letters.[52] There are, however, decisions holding that profert is only necessary where suit must be brought in a representative capacity.[53] In some jurisdictions independently of any statutory provisions profert has never been necessary;[54] in others it has been dispensed with by express statutory provisions,[55] and in some of the code states, where the question has arisen, it has been declared that, whatever the common-law rule might have been, it is no longer necessary to make profert.[56] Where a declaration by an administrator contains an averment of grant to him of letters of administration, with mention of their date and the officer by whom granted, the want of profert of the letters of administration is not a defect of sufficient importance to authorize striking out the declaration.[57]

[§ 2080] **bb. Object and Effect.** The object of profert is to notify defendant not only of the character plaintiff asserts but of the source of his authority,[58] and to afford him an opportunity of taking advantage of any impropriety in the granting of the letters or of any defect to which they may be liable.[59] The effect of profert is to bring the letters testamentary or of administration into court and it operates the same as if they had been set out in the declaration.[60] The profert of the letters of administration in construction of law places them in the hands of the court of whom oyer is craved and not of the party, and the court is sufficiently informed of the right to sue and that the letters were granted by the proper jurisdiction by the inspection of them.[61]

[§ 2081] **cc. Form[62] and Requisites.** A formal statement in the declaration or complaint that plaintiff brings into court letters showing his qualification as executor or administrator is sufficient,[63] without alleging that the will had been proved or showing by what authority it had been admitted to probate,[64] and if defendant desires to question the validity of the probate or the regularity of the grant of letters he should crave oyer and make them part of the record.[65] Where letters of administration had been granted to the predecessor of one suing as administrator, the profert should set forth such facts and that the letters had been revoked.[66] Where the original declaration makes profert, it is not essential that the amended declaration repeat such a profert.[67]

Variance. Where plaintiff makes profert of letters of administration as having been granted to him by the probate court of a particular county, and those given on oyer were granted to him by the clerk of such court in vacation, the variance is immaterial.[68]

[§ 2082] **dd. Effect of Failure to Make Profert Reaching or Curing Defect.** Failure to make profert renders the pleading fatally defective on special demurrer,[69] but it has been held that this defect cannot be reached otherwise than by special demurrer.[70] It has also been held that failure to make profert is not a ground for demurrer, but the defect should be reached by a rule to produce the letters or a copy thereof.[71] Objection for want of profert is waived by pleading to the merits.[72] A want of profert is cured by verdict,[73] and an arrest of judg-

476, 25 EngCh 475, 67 Reprint 469.

50. Brent v. Shook, 36 Ill. 125.

51. Fla.—Sullivan v. Honacker, 6 Fla. 372.

Ill.—Collins v. Ayers, 13 Ill. 358; Foster v. Adler, 84 Ill. A. 654.

Miss.—Ligon v. Bishop, 43 Miss. 527.

N. C.—Hyman v. Gray, 49 N. C. 155; —— v. Oldham, 2 N. C. 165.

Pa.—McDonald v. Browning, 4 Phila. 21. Contra Axers v. Musselman, 2 Browne 115 (in a suit by an executor for a cause of action arising in the testator's lifetime plaintiff need not make profert of the letters testamentary).

S. C.—Trapier v. Mitchell, 11 S. C. L. 64.

52. Worthington v. McRoberts, 7 Ala. 814; Trapnall v. Craig, 19 Ark. 243; Hynds v. Imboden, 5 Ark. 385; Campbell v. Baldwin, 6 Blackf. (Ind.) 364; Beaty v. Gingles, 53 N. C. 302.

53. U. S.—Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315.

Ala.—Hill v. Huckabee, 52 Ala. 155; Riddle v. Hill, 51 Ala. 224; Caller v. Dade, Minor 20.

Ark.—Anderson v. Wilson, 13 Ark. 409.

Ind.—Campbell v. Baldwin, 6 Blackf. 364; Savage v. Merian, 1 Blackf. 176.

S. C.—Thames v. Richardson, 34 S. C. L. 484.

Tenn.—Walt v. Walsh, 10 Heisk. 314.

[a] **Where a contract is made with an administrator as such** if he sues on it, no profert is necessary because the making of a contract with a personal representative in his representative capacity admits such capacity. Hill v. Huckabee, 52 Ala. 155; Riddle v. Hill, 51 Ala. 224; Harbin v. Levi, 6 Ala. 399; Caller v. Dade, Minor (Ala.) 20; Knott v. Clements, 13 Ark. 335; Walt v. Walsh, 10 Heisk. (Tenn.) 314.

[b] **In a suit on a judgment recovered by an administrator in his own name** no profert of letters is necessary, although he describes himself as administrator. Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315; Capp v. Gilman, 2 Blackf. (Ind.) 45.

54. Champlin v. Tilley, 5 F. Cas. No. 2,586, Brunn. Coll. Cas. 71, 3 Day (Conn.) 303; Langdon v. Porter, 11 Mass. 313; Ellis v. Appleby, 4 R. I. 462.

55. Rawlings v. Paty, 23 Ark. 204; Hansford v. Van Auken, 79 Ind. 157; Cromwell v. Barnes, 58 Ind. 20; Wyant v. Wyant, 38 Ind. 48; Walton v. Kindred, 5 T. B. Mon. (Ky.) 388.

[a] **Under the Arkansas statutes** which prescribe the form of a petition in debt it has been held unnecessary for an administrator to make profert of his letters. Rawlings v. Paty, 23 Ark. 204.

56. Judah v. Fredericks, 57 Cal. 389; Hamilton v. McIndoo, 81 Minn. 324, 84 NW 118; Chamberlain v. Tiner, 31 Minn. 371, 18 NW 97; Bright v. Currie, 7 N. Y. Super. 433.

57. Sautter v. Metropolitan L. Ins. Co., 73 N. J. L. 455, 63 A 994.

58. Vickery v. Bier, 16 Mich. 50; Reynolds v. Torrance, 4 S. C. L. 59.

59. Reynolds v. Torrance, 4 S. C. L. 59.

60. Carr v. Wyley, 23 Ala. 821; Morgan v. Ownbey, 29 Del. 379, 100 A 411, 426 [cit Cyc].

61. Brown v. Jones, 10 Gill & J. (Md.) 334.

62. [a] **Forms** of profert held sufficient. Linder v. Monroe, 33 Ill. 388; Brown v. Jones, 10 Gill & J. (Md.) 334; McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479; Thompson v. Reynolds, 3 C. & P. 123, 14 ECL 484.

63. Cocke v. Walters, 6 Ark. 404; Linder v. Monroe, 33 Ill. 388; Brown v. Jones, 10 Gill & J. (Md.) 334; McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479. But compare Hynds v. Imboden, 5 Ark. 385 (dictum).

64. Cocke v. Walters, 6 Ark. 404.

65. Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Cocke v. Walters, 6 Ark. 404.

66. Ketchum v. Morrell, 2 NYLeg Obs 58.

67. McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479.

68. Knott v. Clements, 13 Ark. 335.

69. Fla.—Sullivan v. Honacker, 6 Fla. 372.

Ind.—Campbell v. Baldwin, 6 Blackf. 364.

Miss.—Ligon v. Bishop, 43 Miss. 527.

Pa.—McDonald v. Browning, 4 Phila. 21.

S. C.—Trapier v. Mitchell, 11 S. C. L. 64.

70. U. S.—Kane v. Paul, 14 Pet. 33, 10 L. ed. 341.

Del.—Mitchel v. Woodward, 16 Del. 311, 43 A 165.

Fla.—Sullivan v. Honacker, 6 Fla. 372.

N. Y.—Welles v. Webster, 9 HowPr 251.

R. I.—Ellis v. Appleby, 4 R. I. 462.

Tenn.—McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479.

71. Surginer v. Paddock, 31 Ark. 528.

72. Mitchel v. Woodward, 16 Del. 311, 43 A 165; Vickery v. Bier, 16 Mich. 50; McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479.

73. U. S.—Matheson v. Grant, 2 How. 263, 11 L. ed. 261; Kane v. Paul, 14 Pet. 33, 10 L. ed. 341; Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315; Gardner v. Lindo, 9 F. Cas. No. 5,231, 1 Cranch C. C. 78.

Ala.—Worthington v. McRoberts, 7

ment will not be granted because of such defect.[74] Neither will an objection for lack of profert be entertained when presented for the first time in an appellate court.[75] The fact that the administrator was made a party after abatement of the suit by the death of plaintiff does not alter the rule.[76] Although objection for failure to make profert is properly raised, it may be cured by amendment.[77]

[§ 2083] **(b) Oyer.** Although plaintiffs name themselves administrators yet if they have not made profert of their letters of administration they are not bound to give oyer of them.[78] If profert is unnecessarily made, it may be treated as surplusage and plaintiff is not bound to produce them on prayer of oyer,[79] even though he sues in his representative character.[80] Nevertheless if he grants oyer of them, they become part of the record and defendant may avail himself of any defense in reference to them that he could have done had oyer been necessarily granted of them in the first instance.[81] Where plaintiff sues in a representative character and necessarily makes profert of his letters, defendant is entitled as a matter of right to a grant of oyer of them,[82] provided the demand therefor is seasonably made. Demand is in time if made before the expiration of the time to plead had expired,[83] but it cannot be made after issue joined.[84] Where demand is seasonably made, the declaration is not complete until oyer has been furnished,[85] and failure to produce the letters on demand puts an end to the suit.[86] Upon filing the prayer of oyer of the letters of administration it is the duty of plaintiff to respond thereto as to any other pleading;[87] but the court upon application and a proper showing has the discretionary power to grant plaintiff a reasonable time to respond to the prayer of oyer.[88] On grant of oyer the letters testamentary or a certified copy of them without the proof establishing the will is sufficient prima facie evidence of the authority of the representative to sue.[89] Certificates attached to the letters need not be shown as they form no part of the letters and are merely evidence.[90] On production of the letters defendant may take any exceptions to them by pleading or otherwise which he may think proper.[91] By demurring to the declaration defendant may reach any substantial defect apparent on the face of the letters,[92] and may thus take advantage of any material variance between the letters produced on oyer and the statement of them in the declaration.[93] Defendant may avail himself of plaintiff's want of title by plea where the defects are not such as can be reached by demurrer,[94] and if oyer has been seasonably demanded, a plea to plaintiff's capacity to sue as soon as the letters have been filed is in time.[95]

[§ 2084] **(3) Allegations Negativing Premature Commencement of Suit.**[96] It has been held that the declaration or complaint in an action against a personal representative must show that the suit is brought after expiration of the period during which the personal representative is protected from suit, or that it is within the exceptions provided by the statute granting exemption;[97] but there is also authority for the contrary view.[98]

[§ 2085] **(4) Variance between Process and**

Ala. 814; Copewood v. Taylor, 7 Port. 33.
Fla.—Sullivan v. Honacker, 6 Fla. 372.
Ky.—Walton v. Kindred, 5 T. B. Mon. 388.
Md.—Vandersmith v. Washmein, 1 Harr. & G. 3.

74. Gardner v. Lindo, 9 F. Cas. No. 5,231, 1 Cranch C. C. 78 [rev on another point in 1 Cranch 343, 2 L. ed. 130].

75. McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479; Walt v. Walsh, 10 Heisk. (Tenn.) 314; Holdeman v. Knight, Dall. (Tex.) 566.

76. Copewood v. Taylor, 7 Port. (Ala.) 33.

77. Ligon v. Bishop, 43 Miss. 527.

78. Mason v. Lawrason, 16 F. Cas. No. 9,242, 1 Cranch C. C. 190 [aff 3 Cranch 492, 2 L. ed. 509].

79. Anderson v. Wilson, 13 Ark. 409; Knott v. Clements, 13 Ark. 335; Collins v. Ayers, 13 Ill. 358.

80. Anderson v. Wilson, 13 Ark. 409.

81. Knott v. Clements, 13 Ark. 335.

82. U. S.—North v. Clark, 18 F. Cas. No. 10,308, 3 Cranch C. C. 93.
Ark.—Trapnall v. Craig, 19 Ark. 243.
Del.—Prettyman v. Ratcliffe, 4 Del. 29.
Ill.—Collins v. Ayers, 13 Ill. 358.
Miss.—Caradine v. Balfour, 1 Miss. 532.
N. Y.—Varick v. Bodine, 3 Hill 444.
N. C.—Hyman v. Gray, 49 N. C. 155.
S. C.—Trapier v. Mitchell, 11 S. C. L. 64.
Eng.—Soresby v. Sparrow, Str. 1186, 93 Reprint 1117.

[a] **Tender of an order of appointment by the probate court** is not a sufficient compliance with a demand of oyer. The letters must be produced. Caradine v. Balfour, 1 Miss. 532.

83. North v. Clark, 18 F. Cas. No. 10,308, 3 Cranch C. C. 93 [crit dictum in Roberts v. Arthur, 2 Salk. 497, 91 Reprint 426]; Varick v. Bodine, 3 Hill (N. Y.) 444.

84. —— v. Oldham, 2 N. C. 165; Berry v. Pulliam, 2 N. C. 16; Fisher v. Condy, 15 S. C. L. 344; Trapier v. Mitchell, 11 S. C. L. 64.

85. Varick v. Bodine, 3 Hill (N. Y.) 444 (if plaintiff, without complying with the demand, enters defendant's default for want of plea, the proceedings will be set aside as irregular).

86. Trapnall v. Craig, 19 Ark. 243; Prettyman v. Waples, 4 Del. 299; Sullivan v. Honacker, 6 Fla. 372; Soresby v. Sparrow, Str. 1186, 93 Reprint 1117.

[a] **Presumptions on appeal.**—Where the court discontinues the action for the failure of plaintiff to respond to the prayer of oyer of letters of administration the appellate court will presume in favor of the correctness of the judgment, unless plaintiff puts such facts upon the record as makes it appear that the court erred. Trapnall v. Craig, 19 Ark. 243.

87. Trapnall v. Craig, 19 Ark. 243.

88. Trapnall v. Craig, 19 Ark. 243.

89. Diamond v. Shell, 15 Ark. 26; Collins v. Ayers, 13 Ill. 358. To same effect Bales v. Binford, 6 Blackf. (Ind.) 415; Beach v. Pears, 1 N. J. L. 133.

[a] **On exhibition of letters duly authenticated** plaintiff's right to sue cannot be impeached without showing a revocation of the letters or matter avoiding them. Carter v. Menifee, 4 Ark. 152.

90. Collins v. Ayers, 13 Ill. 358.

91. Trapier v. Mitchell, 11 S. C. L. 64.

92. Trapnall v. Craig, 19 Ark. 243; Collins v. Ayers, 13 Ill. 358; Foster v. Adler, 84 Ill. A. 654; Philbrick v. Hazen, 3 N. H. 120; —— v. Oldham, 2 N. C. 165.

[a] **Want of jurisdiction.**—If a declaration does not set forth proper jurisdiction for granting the letters and they appear to be granted by an improper jurisdiction defendant may demur. —— v. Oldham, 2. N. C. 165.

[b] **A demurrer based on the ground that letters produced were not stamped** cannot be sustained, because it is sufficient to stamp either the letters or administration bonds which need not be produced and the objection if good should be made by plea. Miller v. Henderson, 24 Ark. 344.

93. Collins v. Ayers, 13 Ill. 358; Foster v. Adler, 84 Ill. A. 654.

94. Sullivan v. Honacker, 6 Fla. 372; —— v. Oldham, 2 N. C. 165.

[a] **If the letters are properly authenticated,** but defendant has been advised that they had been unduly obtained or that for any other cause they had no right to institute suit, he may avail himself of their want of title by putting in the proper plea. Sullivan v. Honacker, 6 Fla. 372.

95. Lovering v. McKinney, 7 Tex. 521.

96. Statutory prohibition of suit against representative within designated period see supra §§ 1907–1913.

97. Rhodes v. Doggett, 2 Oh. Dec. (Reprint) 451, 3 WestLMonth 134; Green v. Ulwatt, 2 Oh. Dec. (Reprint) 427, 3 WestLMonth 44; Wells v. Applegate, 10 Or. 519. See also Levi v. Buchanan, 2 Cinc. Super. 144 (where, in a suit against an administrator on a claim against the estate, the petition shows on its face that suit is brought before the expiration of the time during which he is by statute ordinarily exempt from suit, and does not show that the suit is within any of the exceptions to the statute, a demurrer will lie).

98. Granjang v. Markle, 22 Ill. 250. See also Lemmal v. Puska, 54 Tex. 505 (although an executor is not obliged to plead to a suit within twelve months from the date of probate, yet if he does plead, he waives his privilege and a judgment rendered against him is valid).

Declaration.[99] If plaintiff sues in his individual capacity and the process is to answer to him "as administrator" there is such a variance as will justify a plea in abatement.[1] But it is not a material variance that the writ describes a party as administrator and the declaration describes him as administrator with the will annexed.[2] A variance between the relief asked and that specified in the citation is amendable.[3]

[§ 2086] **b. Plea or Answer—(1) Denial of Representative Capacity—(a) Plea of Ne Unques Executor or Ne Unques Administrator—aa. Propriety or Necessity of Plea.** At common law, where plaintiff sues as executor or administrator for any cause of action accruing in the lifetime of his testator or intestate, and makes profert of his letters testamentary or of administration, if defendant would controvert his representative character by reason of any extrinsic matter, he must put it in issue by a plea of ne unques executor or ne unques administrator,[4] which is, in effect, an assertion by defendant that he can be held answerable, if at all, only to one having lawful authority to sue, which plaintiff has not.[5] The language of many decisions is broad enough to indicate that a special plea is necessary whether the cause of action arose in decedent's lifetime or after his death,[6] although others recognize a limitation of the rule in certain causes of action arising after decedent's death.[7] Such a plea is not good where plaintiff sues in his individual capacity,[8] nor may it be interposed where he sues on a contract made with himself in his representative capacity, irrespective of whether he sues individually or in his representative capacity.[9]

Where one is sued as the personal representative of another, he may plead ne unques executor or ne unques administrator;[10] but it has been held that, where upon the death of a defendant a person comes in and acknowledges service of a bill of revivor as administrator, it is too late for him at a subsequent term to plead that he never was administrator.[11]

[§ 2087] **bb. Nature of Plea.** While the plea of ne unques executor or ne unques administrator has been regarded as a plea in abatement,[12] the more generally accepted view is that it is a plea in bar,[13] for the reason that the plea cannot give plaintiff a better writ but defeats the action abso-

99. Variance between pleading and proof see infra § 2169.

1. Mohr v. Sherman, 25 Ark. 7. See also Blanchard v. Strait, 8 How Pr (N. Y.) 83 (it is a fatal variance).

2. Brockman v. McDonald, 16 Ill. 112.

3. Spencer v. Popham, 5 Redf. Surr. (N. Y.) 425.

4. U. S.—Cunningham v. Rodger, 171 Fed. 835, 96 CCA 507.

Ala.—Milbra v. Sloss-Sheffield Steel, etc., Co., 182 Ala. 622, 62 S 176, 46 LRANS 274; Worthington v. McRoberts, 7 Ala. 814.

Cal.—Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

Ga.—Mettitt v. Cotton States L. Ins. Co., 55 Ga. 103; Hazelhurst v. Morrison, 48 Ga. 397; Kenan v. Du Bignon, 46 Ga. 258; Macon, etc., R. Co. v. Davis, 18 Ga. 679; Peavy v. Sangster, 13 Ga. A. 418, 79 SE 215.

Ill.—H. G. Goelitz Co. v. State Industrial Bd., 278 Ill. 164, 115 NE 855; Ballance v. Frisby, 3 Ill. 63; Foster v. Adler, 84 Ill. A. 654.

Ind.—Weathers v. Newman, 1 Blackf. 232; Craig v. Norwood, 61 Ind. A. 104, 108 NE 395.

Ky.—Louisville v. Hart, 143 Ky. 171, 136 SW 212, 35 LRANS 207; Willis v. Willis, 6 Dana 48; Henderson v. Clark, 4 Bibb 391.

N. Y.—Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 NYS 962; Goodrich v. Pendleton, 4 Johns. Ch. 549.

S. C.—Mickle v. Congaree Constr. Co., 41 S. C. 394, 19 SE 725; Reynold v. Torrance, 4 S. C. L. 59.

Tenn.—McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479; Cheek v. Wheatly, 11 Humphr. 556.

Tex.—Dignowitty v. Coleman, 77 Tex. 98, 13 SW 857; Cheatham v. Riddle, 12 Tex. 112; Purington v. Broughton, (Civ. A.) 158 SW 227; Fischer v. Giddings, 43 Tex. Civ. A. 393, 95 SW 33; Young v. Meredith, 38 Tex. Civ. A. 59, 85 SW 32.

Vt.—Perrin v. Granger, 33 Vt. 101.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SE 1033.

Eng.—Thynne v. Protheroe, 2 M. & S. 553, 105 Reprint 488; Fry v. Richardson, 10 Sim. 475, 16 EngCh 475, 59 Reprint 699; Simons v. Milman, 2 Sim. 241, 2 EngCh 241, 57 Reprint 779; Winn v. Fletcher, 1 Vern. Ch. 473, 23 Reprint 598.

Newfoundl.—Sommerville v. Brien, 7 Newfoundl. 41; Prowse v. Wingfield, 4 Newfoundl. 51.

[a] **A plea that the original plaintiff is not dead** is a good plea in scire facias to revive a suit in the name of plaintiff as administrator. French v. Frazier, 7 J. J. Marsh. (Ky.) 425.

[b] **Amendment.**—Defendant should be permitted to amend his plea filed by adding to the plea of the general issue the plea of ne unques executor. Vermilyea v. Beatty, 2 HowPr (N. Y.) 57.

[c] **Where plaintiff alleges that he is administrator de bonis non** and the note in suit is payable to another person as administrator of the same estate, plaintiff need not prove that he was administrator de bonis non in the absence of a plea denying his allegation to that effect. Tobler v. Stubblefield, 32 Tex. 188.

[d] **Motion to dismiss not the proper procedure.**—Invalidity of the appointment of an administrator suing for negligent death should be raised by a pleading specifying the objections to the appointment, and his right to prosecute an action cannot be raised by motion to dismiss. Louisville v. Hart, 143 Ky. 171, 136 SW 212, 35 LRANS 207.

[e] **A sworn answer** is, under the statute, the only method of raising the question of plaintiff's capacity to sue. Hansford v. Vanauken, 79 Ind. 302; Kelley v. Love, 35 Ind. 106.

[f] **A general denial** is sufficient to put in issue an allegation in the petition that plaintiff is administrator. Gilmore v. Morris, 13 Mo. A. 114.

[g] **Action by special administrator.**—A statute under which the right of an executor or administrator to sue as such cannot be questioned, unless the opposite party files a plea, denying such right, with his affidavit as to the truth thereof, does not apply where the answer questions the court's power to appoint plaintiff as special administrator while the regular administrator was in office and acting. Powell v. Jackson, 68 Ind. A. 597, 111 NE 208.

5. Milbra v. Sloss-Sheffield Steel, etc., Co., 182 Ala. 622, 62 S 176, 46 LRANS 274.

6. Ala.—Johnson v. Kyser, 127 Ala. 309, 27 S 784; Louisville, etc., R. Co. v. Trammell, 93 Ala. 350, 9 S 870.

Cal.—Liening v. Gould, 13 Cal. 598.

Ill.—Chicago Legal News Co. v. Browne, 103 Ill. 317; Steele v. Thatcher, 79 Ill. 400; Collins v. Ayers, 13 Ill. 358; Ballance v. Flisby, 3 Ill. 63; Damiani v. Prouix, 195 Ill. A. 154; Dye v. Gritton, 29 Ill. A. 54.

Iowa.—Mayes v. Turley, 60 Iowa 407, 14 NW 731.

Me.—Brown v. Nourse, 55 Me. 230, 92 AmD 583.

Mass.—Langdon v. Potter, 11 Mass. 313.

N. Y.—Stone v. Groton Bridge, etc., Co., 77 Hun 99, 28 NYS 446.

Tex.—Callahan v. Hendrix, 79 Tex. 494, 15 SW 593; Dignowitty v. Coleman, 77 Tex. 98, 13 SW 857; Cochran v. Thompson, 18 Tex. 652.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SE 1033.

Wis.—Ewen v. Chicago, etc., R. Co., 38 Wis. 613.

7. See infra § 2093.

8. Governor v. Evans, 1 Ark. 349; Spurgen v. Robinet, 4 Bibb (Ky.) 75.

9. Riddle v. Hill, 51 Ala. 224 (because the making of a contract is an admission that he is a representative).

10. Witcher v. Wilson, 47 Miss. 663.

[a] **Notice to produce letters.**—Where the plea ne unques executor is interposed, plaintiff should serve defendants with notice to produce their letters testamentary in order to lay the foundation for the introduction of secondary evidence. Witcher v. Wilson, 47 Miss. 663.

11. Newland v. Tate, 38 N. C. 226.

12. U. S.—Kane v. Paul, 14 Pet. 33, 10 L. ed. 341; Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705; Cunningham v. Rodgers, 171 Fed. 835, 96 CCA 507.

Ind.—Craig v. Norwood, 61 Ind. A. 104, 108 NE 395.

Me.—Brown v. Nourse, 55 Me. 230, 92 AmD 583; Clark v. Pishon, 31 Me. 503.

Pa.—Hummel v. Brown, 24 Pa. 310.

Tenn.—Glass v. Stovall, 10 Humphr. 453.

Tex.—Spann v. Glass, 35 Tex. 761; Fischer v. Giddings, 43 Tex. Civ. A. 393, 95 SW 33; Barton v. Davidson, (Civ. A.) 45 SW 400.

Vt.—Clapp v. Beardsley, 1 Vt. 168.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SE 1033.

[a] **In an action by two as executors** it is a good plea in abatement that one of plaintiffs was not executor, the other only having proved the will and taken out letters testamentary. Call v. Ewing, 1 Blackf. (Ind.) 301.

[b] **Substituted executor.** — The objection that one substituted as executor or one who had died pending suit had not been appointed executrix is waived if not taken by plea in abatement. Murray v. Murray, 6 Or. 26.

13. U. S.—Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 368; North v. Clark, 18 F. Cas. No. 10,308, 3 Cranch C. C. 93.

lutely by establishing the fact that he is not the representative of decedent.[14] Nevertheless it has been held that if the plea begins and concludes in abatement, it will be considered a plea in abatement.[15] The view has also been advanced that the plea may be considered one which may be set up either in bar or in abatement.[16]

[§ 2088] **cc. Requisites and Sufficiency of Plea.** A plea not denying the averment that letters of administration were issued but stating facts to show that they should not have been granted is bad on demurrer.[17] A plea alleging only that defendant was not executor at the time suit was brought is insufficient, as it should be alleged that defendant never was executor and that he never administered on any of the goods and chattels belonging to deceased at the time of his death.[18] An answer denying that plaintiff had capacity to sue does not put in issue plaintiff's appointment as administrator as alleged in the petition.[19] A plea alleging that plaintiff's intestate was a nonresident at the time of his death and had no effects in the state at that time does not show that the letters are void for want of jurisdiction in the court granting them.[20] It has been held, however, that the allegation that plaintiff has been duly appointed administrator, etc., is put in issue by an answer denying the complaint and "each and every part and portion thereof."[21] A denial of an allegation that letters of administration were duly issued has been held to raise an issue as to the jurisdiction of the surrogate's court.[22]

Verification. That a plea denying plaintiff's capacity to sue as the personal representative of a decedent must be verified has been both asserted[23] and denied.[24] It has been held that one who is sued as administrator need not deny his representative capacity under oath.[25]

[§ 2089] **dd. Time of Interposing Plea.** It is too late to plead plaintiff's want of representative capacity after pleading to the merits,[26] or after judgment by default.[27]

[§ 2090] **(b) Plea That Defendant Is Administrator and Not Executor.**[28] It has been held that the fact that defendant is administrator and not executor can be pleaded only in abatement.[29]

[§ 2091] **(c) Plea of Termination of Authority Pending Suit.**[30] Where the authority of one suing

Ala. — Milbra v. Sloss-Sheffield Steel, etc., Co., 182 Ala. 622, 62 S 176, 46 LRANS 274; Logan v. Central Iron, etc., Co., 139 Ala. 548, 36 S 729; U. S. Rolling Stock Co. v. Weir, 96 Ala. 396, 11 S 436; Cotton v. Ward, 45 Ala. 359; Watson v. Collins, 37 Ala. 587; Miller v. Jones, 26 Ala. 247; Sorrell v. Craig, 15 Ala. 789; Worthington v. McRoberts, 7 Ala. 814; Stallings v. Williams, 6 Ala. 509.

Ark.—Governor v. Evans, 1 Ark. 349.

D. C.—Ferguson v. Washington, etc., R. Co., 6 App. 525.

Fla.—Epping v. Robinson, 21 Fla. 36.

Ind.—Codding v. Whitaker, 5 Blackf. 470.

Ky.—French v. Frazier, 7 J. J. Marsh. 425.

Mass.—Langdon v. Potter, 11 Mass. 313.

Mich.—Vickery v. Bier, 16 Mich. 50.

N. Y.—Flinn v. Chase, 4 Den. 85; Varick v. Bodine, 3 Hill 444; Thomas v. Cameron, 16 Wend. 579.

N. C.—Shown v. Barr, 33 N. C. 296.

[a] **In scire facias to revive in the name of plaintiff as administrator** a plea that he is not administrator is a good bar. French v. Frazier, 7 J. J. Marsh. (Ky.) 425.

[b] **After issues have been joined in an action by administrators,** and the case been opened to the jury, defendant cannot plead in abatement that no letters of administration have been granted to plaintiffs but the matter must then be pleaded in bar. Langdon v. Potter, 11 Mass. 313.

[c] **Where letters are void.**—A plea alleging facts which show plaintiff's letters of administration are void for want of jurisdiction in the court by which they were issued is a good plea in bar. Watson v. Collins, 37 Ala. 587; Epping v. Robinson, 21 Fla. 36.

[d] **If a plea setting up a revocation of letters is filed before a continuance,** it may be drawn as a plea in bar. Morrison v. Cones, 7 Blackf. (Ind.) 593; Jewett v. Jewett, 5 Mass. 275.

14. Sorrell v. Craig, 15 Ala. 789; Stallings v. Williams, 6 Ala. 509; Governor v. Evans, 1 Ark. 349; Codding v. Whitaker, 5 Blackf. (Ind.) 470; Thomas v. Cameron, 16 Wend. (N. Y.) 579.

"The question is, can ne unques executor be pleaded in bar of an action brought by an executor for a cause of action accruing in the lifetime of the testator? We are not aware that this question has ever been directly answered in the negative by any decided case, in which it formed the subject-matter of adjudication. It is true, the old books contain forms and instances of such a plea in abatement; and dicta have found their way into the books, that it can be pleaded only in that form. There are instances, too, and of a later date, in which it has been pleaded in bar, and issue taken upon it, without question of its validity. Stokes v. Bate, 5 B. & C. 491, 11 ECL 554, 108 Reprint 183; Thompson v. Reynolds, 3 C. & P. 123, 14 ECL 484. Upon the authority of the former of these cases, Chitty has given the form of this plea in bar, 3 Chitty Pldg. 941, and it is not among his precedents in abatement. Sergeant Williams, in commenting upon a case in Yeomans v. Bradshaw, Carth. 373, 90 Reprint 817, in which the plea denying the character of the plaintiff as administrator was in abatement, condemns that form of pleading, and insists that it should have been in bar. The reason assigned by him is that every plea in abatement must give a better writ, whereas a plea denying the character of the plaintiff as administrator shows that he has no right to sue at all in that capacity. Rex v. Sutton, 1 Saund. 274, n. 3. Without deciding that the plea in question would not be good in abatement, we conceive that on principle and authority it is good in bar; and this view of the matter is in accordance with the case of Weathers v. Newman, 1 Blackf. (Ind.) 232." Codding v. Whitaker, supra.

15. U. S. Rolling Stock Co. v. Weir, 96 Ala. 396, 11 S 436; Governor v. Evans, 1 Ark. 349.

16. Langdon v. Potter, 11 Mass. 313, 316 ("cases and opinions may be reconciled by considering the plea that the plaintiff is not administrator as one of those which may be pleaded either in bar or in abatement").

17. Rogers v. Duval, 23 Ark. 77.

18. Lively v. Ballard, 2 W. Va. 496, 500 ("A good plea of ne unques executor must aver that the defendant never was executor of the last will and testament of the deceased, and that he never administered any of the goods and chattels which were of the deceased at the time of his death, as executor of the last will and testament of the deceased").

19. Smith v. Bowersock, 95 Kan. 96, 147 P 118.

20. Miller v. Jones, 26 Ala. 247 (the court of probate has jurisdiction to grant letters if property belonging to the estate is brought in the county after intestate's death, although he was not a resident of the state and had no property in the state at the time of his death).

21. Fogle v. Schaeffer, 23 Minn. 304 (in which it was said that such denial was not confined to the denial of the principal fact on which the complaint is founded, but is equivalent to a denial of each allegation thereof just as though the pleading had traversed the several allegations in detail).

Effect of general denial see infra § 2093.

22. Webster v. M. W. Kellogg Co., 168 App. Div. 443, 153 NYS 800.

23. Young v. Meredith, 38 Tex. Civ. A. 59, 85 SW 32.

24. Logan v. Central Iron, etc., Co., 139 Ala. 548, 36 S 729.

25. American Loan, etc., Co. v. Bangle, (Tex. Civ. A.) 153 SW 662.

26. U. S.—Barras v. Bidwell, 2 F. Cas. No. 1,039, 3 Woods 5.

Ind.—Scanland v. Ruble, 4 Blackf. 481.

Ky.—Cox v. Robertson, 1 Bibb 604.

La.—Dirmeyer v. O'Hern, 39 La. Ann. 961, 3 S 132.

N. C.—Spencer v. Cahoon, 14 N. C. 80.

[a] **After plea of condition performed,** replication, rejoinder, and special demurrer in an action of debt on a bond, defendant is not entitled to plead that plaintiff is not executor. Grahame v. Cooke, 10 F. Cas. No. 5,678, 1 Cranch C. C. 116.

[b] **After issue joined on nul tiel record** and after the cause is called for trial on that issue defendant will not be permitted to plead that plaintiff was never administrator. Duvall v. Wright, 8 F. Cas. No. 4,212, 4 Cranch C. C. 169.

Effect of plea to the merits generally see infra § 2093.

27. Barras v. Bidwell, 2 F. Cas. No. 1,039, 3 Woods 5; Cheevers v. Burke, 19 La. 429.

28. **In action against executor de son tort** see infra § 2938.

29. Granwell v. Sibly, 2 Lev. 190, 83 Reprint 512; Harding v. Salkill, 1 Salk. 296, 91 Reprint 263.

30. [a] **Form of plea setting up revocation of defendant's letters held sufficient.**—Morrison v. Cones, 7 Blackf. (Ind.) 593.

as executor or administrator determines pending suit by reason of his resignation, removal, or discharge, this fact must be brought to the knowledge of the court by a plea in abatement puis darrein continuance or a judgment rendered against defendant will bind him.[31] Suit cannot be dismissed on the mere suggestion that plaintiff has been removed as administrator.[32] On the other hand if one is sued as executor he may plead puis darrein continuance that he has been removed or discharged.[33] It has been held that this abates the suit,[34] but it has also been considered that such a plea is a good plea in bar.[35] It has also been said that such a plea is not a plea in bar of the suit but in bar of its further maintenance.[36] To take advantage of such facts, it is necessary that they should be pleaded puis darrein continuance,[37] in default of which a judgment should be entered on a verdict against defendant.[38]

[§ 2092] **(d) Demurrer, Answer, or Supplemental Pleading.** In code practice the issue of plaintiff's representative capacity cannot be raised by a general denial of all the allegations of the complaint,[39] but must be raised either by demurrer, where the necessary facts appear on the face of the complaint,[40] or by a special denial in the answer, where the facts do not appear.[41] If plaintiff had official authority at the commencement of the suit, but has since been deprived thereof, the fact should be introduced by supplemental pleading.[42]

[§ 2093] **(e) Effect of Pleading to Merits.** The general rule is that, where a personal representative sues on a cause of action which he must sue on in his representative capacity, that is, a cause of action accruing to decedent in his lifetime, a plea of the general issue or other plea to the merits operates as an admission of his representative capacity and he need not prove it,[43] for the reason that such plea does not question plaintiff's character, but only his right to recover on the merits.[44] Many decisions lay down the rule broadly that, in an ac-

31. Yeaton v. Lynn, 5 Pet. (U. S.) 224, 8 L. ed. 105; Ex p. Jones, 54 Ala. 108; Wilson v. Bothwell, 50 Ala. 378; Witherington v. Brantley, 18 Ala. 197; Hall v. Pearman, 20 Tex. 168; El Paso, etc., Co. v. La Londe, (Tex. Civ. A.) 173 SW 890.

"If the fact occurred before issue joined, or plea pleaded, then it should have been pleaded to the further maintenance of the suit; if after issue joined or plea pleaded, then it should have been pleaded puis darrein continuance." Wilson v. Bothwell, 50 Ala. 378, 379 (the objection cannot be raised under a plea of ne unques administrator).

[a] **Requisites and sufficiency of plea.**—An executor or administrator of a solvent estate cannot allege that he has resigned or been removed, or that his letters have been revoked, or his authority has ceased from any cause, in defense to any action or proceeding, without an averment that he has settled his accounts, and delivered over the assets of the estate as required by law; but a plea that, before the commencement of the suit, his authority had ceased, the estate had been declared insolvent, and there was an administrator de bonis non, would bar the action, because the appointment of the latter would revoke any former grant of letters, and vest in him the property of the estate. Cogburn v. McQueen, 46 Ala. 551.

32. Winslett v. McLemore, 6 Ala. 416.

33. Fla.—Parkhill v. Union Bank, 1 Fla. 110.

Ga.—Broach v. Walker, 2 Ga. 428.

Ind.—Morrison v. Cones, 7 Blackf. 593.

Mass.—Jewett v. Jewett, 5 Mass. 275.

N. J.—McDonald v. O'Connell, 39 N. J. L. 317.

Oh.—Gormly v. Skinner, Wright 681.

S. C.—Jones v. Hammett, 5 S. C. 41.

34. Gormly v. Skinner, Wright (Oh.) 681.

35. Parkhill v. Union Bank, 1 Fla. 110; Jewett v. Jewett, 5 Mass. 275.

36. Odom v. Moore, 147 Ala. 567, 41 S 162.

37. Weddington v. Huey, 80 Ga. 651, 6 SE 287; Jones v. Hammett, 5 S. C. 41.

38. Weddington v. Huey, 80 Ga. 651, 6 SE 281.

39. Mickle v. Congaree Constr. Co., 41 S. C. 394, 19 SE 725; Sanford v. McCreedy, 28 Wis. 103.

Effect of general denial see infra § 2440.

40. Gibson v. Ponder, 40 Ark. 195; Warfield v. Hume, 91 Mo. A. 541; Goodrich v. Pendleton, 4 Johns. Ch. (N. Y.) 549; Mickle v. Congaree Constr. Co., 41 S. C. 394, 19 SE 725.

[a] **A general demurrer** does not raise the question of want of title to the character in which plaintiff sues, but only of defendant's liability to the estate. Gibson v. Ponder, 40 Ark. 195.

41. Zitmer v. Crucible Steel Co., 99 App. Div. 169, 90 NYS 962; Goodrich v. Pendleton, 4 Johns. Ch. (N. Y.) 549; Mickle v. Congaree Constr. Co., 41 S. C. 394, 19 SE 725; Patterson v. Pagan, 18 S. C. 584; Young v. Meredith, 38 Tex. Civ. A. 59, 85 SW 32; Sanford v. McCreedy, 28 Wis. 103.

[a] **An oral demurrer at the trial** is not sufficient. Mickle v. Congaree Constr. Co., 41 S. C. 394, 19 SE 725.

[b] **Denial must be under oath.**—Young v. Meredith, 38 Tex. Civ. A. 59, 85 SW 32.

42. Williams v. Eikenbary, 36 Nebr. 478, 54 NW 852.

43. U. S.—Yeaton v. Lynn, 5 Pet. 224, 8 L. ed. 105; McAleer v. Clay County, 38 Fed. 707; Champlin v. Tilley, 5 F. Cas. No. 2,586, Brunn. Coll. Cas. 71, 3 Day (Conn.) 303; Wise v. Getty, 30 F. Cas. No. 17,909, 3 Cranch C. C. 292.

Ala.—Espalla v. Richard, 94 Ala. 159, 10 S 137; Worsham v. Goar, 4 Port. 441.

Ark.—Kowanachi v. Askew, 17 Ark. 595.

Colo.—Denver, etc., R. Co. v. Woodward, 4 Colo. 1.

Del.—Mitchel v. Woodward, 16 Del. 311, 43 A 165; Harris v. Harris, 2 Del. 354.

Ga.—Hazelhurst v. Morrison, 48 Ga. 397.

Fla.—Sullivan v. Honacker, 6 Fla. 372.

Ill.—Collins v. Ayers, 13 Ill. 358; McKinley v. Braden, 2 Ill. 64; John Hancock Mut. L. Ins. Co. v. Powell, 116 Ill. A. 151; Harte v. Fraser, 104 Ill. A. 201; Foster v. Adler, 84 Ill. A. 654; Dye v. Gritton, 29 Ill. A. 54.

Ind.—Lowe v. Bowman, 5 Blackf. 410; Scanland v. Ruble, 4 Blackf. 481; Pollard v. Buttery, 3 Blackf. 239; Weathers v. Newman, 1 Blackf. 232 note.

Ky.—Willis v. Willis, 6 Dana 48; Thomas v. Tanner, 6 T. B. Mon. 52; Kerley v. West, 3 Litt. 362; Henderson v. Clark, 4 Bibb 391; Floyd v. Breckenridge, 4 Bibb 14.

La.—Wingate v. Wheat, 6 La. Ann. 238.

Me.—Brown v. Nourse, 55 Me. 230, 92 AmD 583; Clark v. Pishon, 31 Me. 503.

Mich.—Vickery v. Beir, 16 Mich. 50.

Miss.—Stewart v. Richardson, 32 Miss. 313.

Mo.—Gross v. Watts, 206 Mo. 373, 104 SW 30, 121 AmSR 662. Contra Gilmore v. Morris, 13 Mo. A. 114.

N. Y.—Smith v. Ludlow, Anth. N. P. 174.

N. C.—Hyman v. Gray, 49 N. C. 155; Spencer v. Cahoon, 14 N. C. 80.

Pa.—Lewis v. Ewing, 3 Serg. & R. 44; McKimm v. Riddle, 2 Dall. 100, 1 L. ed. 306; Axers v. Musselman, 2 Browne 115; Finney v. Huston, 7 WklyNC 44.

S. C.—Greenville, etc., R. Co. v. Joyce, 42 S. C. L. 117; Lomax v. Spierin, 23 S. C. L. 365; Hutchinson v. Bobo, 17 S. C. L. 546; Brockington v. Vereen, 17 S. C. L. 447; Reynolds v. Torrance, 4 S. C. L. 59; Kelly v. Thomson, 4 S. C. L. 58.

Tenn.—McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479; Cheek v. Wheatly, 11 Humphr. 556; Glass v. Stovall, 10 Humphr. 453.

Tex.—Callahan v. Hendrix, 79 Tex. 494, 15 SW 593; Dignowitty v. Coleman, 77 Tex. 98, 13 SW 857; Tolbert v. McBride, 75 Tex. 95, 12 SW 752; Spann v. Glass, 35 Tex. 761; Tobler v. Stubblefield, 32 Tex. 188; Rider v. Duval, 28 Tex. 622; Cheatham v. Riddle, 12 Tex. 112; Coles v. Perry, 7 Tex. 109.

Vt.—Walker v. Wooster, 61 Vt. 403, 17 A 792; Perrin v. Granger, 33 Vt. 101; Clapp v. Beardsley, 1 Vt. 151.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SE 1033.

Eng.—Marsfield v. Marsh, 2 Ld. Raym. 824, 92 Reprint 50; Thynne v. Protheroe, 2 M. & S. 553, 105 Reprint 488; Gidley v. Williams, 1 Salk. 37, 91 Reprint 39.

Alta.—Toll v. Canadian Pac. R. Co., 1 Alta. L. 244, 8 CanRCas 291, 8 WestLR 795.

"Under a general denial it was not necessary for plaintiff to prove his appointment as administrator. A general denial puts in issue only the merits of the case. If defendants desire to question the appointment of plaintiff, they should have done so by a special plea in the nature of a plea in abatement." Gross v. Watts, 206 Mo. 373, 392, 104 SW 30, 121 AmSR 662 [foll Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 SW 856].

[a] **Representative capacity is admitted** by a plea of: (1) Non assumpsit. Mitchell v. Woodward, 16 Del. 311, 43 A 165; Cheek v. Wheatly, 11 Humphr. (Tenn.) 556. (2) Non est factum. Kerley v. West, 3 Litt. (Ky.) 362. (3) Non detinet. Willis v. Willis, 6 Dana (Ky.) 48; Floyd v. Breckenridge, 4 Bibb (Ky.) 14. (4) Covenant performed. Helm v. Jones, 9 Dana (Ky.) 26.

[b] **A plea in bar,** except ne unques executor or administrator, admits representative capacity. Pollard v. Buttery, 3 Blackf. (Ind.) 239; Clark v. Pishon, 31 Me. 503.

44. Denver, etc., R. Co. v. Woodward, 4 Colo. 1.

tion by a personal representative in his capacity as such, a plea to the merits admits his representative capacity and obviates the necessity of proving it and the weight of authority sustains this view.[45] While it is true that most of these decisions were in cases where the cause of action arose prior to decedent's death, the language of the decisions was broad enough to include all causes of action sued on by the representative in his capacity as such, and some cases have expressly declared that the rule is applicable, although the cause of action arose after death.[46] There are, however, decisions which recognize a limitation of the rule in certain classes of actions arising subsequent to decedent's death; thus it has been held that if the representative brings an action of trover or detinue counting on his own possession instead of that of decedent he must, whether he sues in his individual or representative capacity, show title in himself to the property sued for, although defendant has pleaded to the merits, and that this can only be done by producing competent evidence of his appointment as executor or administrator,[47] and it has also been held that, where an administrator declares in ejectment upon his own seizin, it is essential for him to prove his appointment as such as part of his title in order to make out his case.[48] Where one who is sued as executor or administrator pleads to the merits, plaintiff need not prove defendant's representative capacity.[49]

[§ 2094] **(2) Plene Administravit—(a) Propriety and Necessity of Plea—aa. General Plea—(aa) At Common Law.** Plene administravit is a good defense, when a personal representative is sued in his representative capacity,[50] provided he has done all that the law requires as a protection to him in the payment of debts and legacies.[51] Conversely, his failure to make this plea operates as a conclusive admission of assets sufficient to satisfy the claim and he will not afterward be permitted to deny that he has such assets;[52] but he will be ultimately liable

45. U. S.—Yeaton v. Lynn, 5 Pet 224, 8 L. ed. 105; Hodges v. Kimball, 91 Fed. 845, 34 CCA 103.

Ala.—Louisville, etc., R. Co. v. Trammell, 93 Ala. 350, 9 S 870; Clarke v. Clarke, 51 Ala. 498; Worsham v. Goar, 4 Port. 441.

Ark.—Kowanachi v. Askew, 17 Ark. 595.

Fla.—Sullivan v. Honacker, 6 Fla. 372; Raney v. Baron, 1 Fla. 327.

Ga.—Kenan v. Du Bignon, 46 Ga. 258.

Ill.—Chicago, etc., R. Co. v. Smith, 180 Ill. 453, 54 NE 325 [aff 77 Ill. 492]; Union R., etc., Co. v. Shacklet, 119 Ill. 232, 10 NE 896; Chicago Legal News Co. v. Browne, 103 Ill. 317; Collins v. Ayers, 13 Ill. 358; McKinley v. Braden, 2 Ill. 64; Barrett v. Marschak, 210 Ill. A. 171; Harte v. Fraser, 104 Ill. A. 201; Dye v. Gritton, 29 Ill. A. 54.

Iowa.—Mayes v. Turley, 60 Iowa 407, 14 NW 731.

Kan.—Atchison, etc., R. Co. v. McFarland, 2 Kan. A. 662, 43 P 788.

La.—Dirmeyer v. O'Hern, 39 La. Ann. 961, 3 S 132.

Me.—Stewart v. Smith, 98 Me. 104, 56 A 401; Brown v. Nourse, 55 Me. 230, 92 AmD 583; Clark v. Pishon, 31 Me. 503.

Mass.—Langdon v. Potter, 11 Mass. 313.

Mich.—Vickery v. Beir, 16 Mich. 50.

N. Y.—Smith v. Ludlow, Anth. N. P. 174.

Pa.—McKimm v. Riddle, 2 Dall. 100, 1 L. ed. 306.

S. C.—Hutchinson v. Bobo, 17 S. C. L. 546; Brockington v. Vereen, 17 S. C. L. 447; Trapier v. Mitchell, 11 S. C. L. 64.

Tenn.—McMillan Marble Co. v. Black, 89 Tenn. 118, 14 SW 479; Glass v. Stovall, 10 Humphr. 453.

Tex.—Callahan v. Hendrix, 79 Tex. 494, 15 SW 593; Dignowitty v. Coleman, 77 Tex. 98, 13 SW 857; Cheatham v. Riddle, 12 Tex. 112.

Vt.—Clapp v. Beardsley, 1 Vt. 168.

W. Va.—Hanley v. West Virginia, etc., R. Co., 59 W. Va. 419, 422, 53 SE 625 [cit Cyc]; McDonald v. Cole, 46 W. Va. 186, 32 SE 1033.

Wis.—Ewen v. Chicago, etc., R. Co., 38 Wis. 613.

Eng.—Gidley v. Williams, 1 Salk. 37, 91 Reprint 39.

Alta.—Toll v. Canadian Pac. R. Co., 1 Alta. L. 244, 8 CanRCas 291, 8 WestLR 795.

[a] **Reason for rule.**—Preliminary objections like the denial of plaintiff's right to be heard in court or the want of capacity in either of the parties should be interposed and determined in limine. The rules of pleading demand that such defenses should be heard before the merits are reached so as to prevent unnecessary costs and delay. Stewart v. Smith, 98 Me. 104, 56 A 401; Clark v. Pishon, 31 Me. 503.

[b] **The rule applies** whether the action be ex contractu or ex delicto. Hutchinson v. Bobo, 17 S. C. L. 546.

[c] **Limitations of rule.** — Although a plea of the general issue in a suit by an administrator is an admission of plaintiff's right to sue, the same rule does not apply where the cause is revived in the name of an administrator after the plea has been filed. In such a case the representative character of plaintiff is in issue in the trial and defendant may disprove it. Vickery v. Beir, 16 Mich. 50.

[d] **The general issue may be rejected** in an action by one suing in a representative capacity if it purports to reserve to defendant the right of denying that plaintiff is administrator. Clarke v. Pishon, 31 Me. 503.

[e] **Admissibility of facts not inconsistent with admission.**—Although defendant, by pleading over to the action, admits generally the right of plaintiff to sue as administrator, yet he is not thereby precluded from giving in evidence a fact not inconsistent with that admission, namely, that the administrator has no right to recover because there is an executor. Chew v. Travers, 4 S. C. L. 146.

46. Lowe v. Bowman, 5 Blackf. (Ind.) 410; Cheek v. Wheatly, 11 Humphr. (Tenn.) 556; Cheatham v. Riddle, 12 Tex. 112; Watson v. King, 4 Campb. 272.

[a] **On principle the rule of practice should be uniform** and apply in the same manner to cases where the cause of action originated after the death of the testator or intestate. Cheek v. Wheatly, 11 Humphr. (Tenn.) 556.

47. Colo.—Denver, etc., R. Co. v. Woodward, 4 Colo. 1.

Ga.—Macon, etc., R. Co. v. Davis, 18 Ga. 679.

Ky.—Thomas v. Tanner, 6 T. B. Mon. 52; Floyd v. Breckenridge, 4 Bibb 14.

N. C.—Davis v. Taylor, 49 N. C. 499.

S. C.—Reynolds v. Torrance, 4 S. C. L. 59.

Eng.—Marsfield v. Marsh, 2 Ld. Raym. 824, 92 Reprint 50; Hunt v. Stevens, 3 Taunt. 113, 128 Reprint 46.

48. Austin v. Downer, 25 Vt. 558; Aldis v. Burdick, 8 Vt. 21.

49. Ala.—Espalla v. Richard, 94 Ala. 159, 10 S 137.

Del.—Harris v. Harris, 2 Del. 354.

Ga.—Bray v. Parker, 82 Ga. 234, 7 SE 922.

La.—Hays v. Compton, 19 La. Ann. 434; Cheevers v. Burke, 19 La. 429.

Pa.—Hantz v. Sealy, 6 Binn. 405.

R. I.—Roberts v. White, 32 R. I. 185, 78 A 497, AnnCas1912D 793.

S. C.—Greenville, etc., R. Co. v. Joyce, 42 S. C. L. 117; Lomax v. Spierin, 23 S. C. L. 365.

Tex.—Tolbert v. McBride, 75 Tex. 95, 12 SW 752; Hagelstein v. Blaschke, (Civ. A.) 149 SW 718.

50. Conn. — Contra Olcott v. Graham, Kirby 246.

Del.—Hall v. Hering, 21 Del. 111, 63 A 576.

D. C.—Glenn v. Sothoron, 4 App. 125.

Ky.—Com. v. Richardson, 8 B. Mon. 81; Griffith v. Com., 1 Dana 270; Clarkson v. Com., 2 J. J. Marsh. 19.

Mich.—Peckham v. Hoag, 57 Mich. 289, 23 NW 818.

N. J.—Southard v. Potts, 22 N. J. L. 278; Haines v. Price, 20 N. J. L. 480; Speer v. Van Houten, 19 N. J. L. 46; Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396; Bellerjeau v. Kotts, 4 N. J. L. 415.

[a] **The fact that lands are made liable to the payment of debts** of decedent does not affect the validity of the plea where the lands are not by force of the statute made assets in the hands of the administrators. Haines v. Price, 20 N. J. L. 480.

51. Stuart v. Carr, 6 Gill (Md.) 430.

[a] **Plea is available** where the whole of an insolvent estate has been absorbed in the payment of debts due the estate and the expenses of the last sickness and the funeral, which are preferable debts. Davis v. Weed, 9 F. Cas. No. 3,658, 44 Conn. 569.

[b] **Compliance with statute requiring notice.**—The plea of plene administravit will not protect an administrator, unless he has given the six months' notice to creditors required by statute. Glenn v. Smith, 17 Md. 260; Stuart v. Carr, 6 Gill (Md.) 430.

52. Ala.—Odom v. Moore, 147 Ala. 567, 41 S 162.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Ind.—Goodwin v. Wilson, 1 Blackf. 344.

Md.—Evans v. Iglehart, 6 Gill & J. 171; Contee v. Dawson, 2 Bland 264.

Miss.—Howard v. Cousins, 8 Miss. 114; Vick v. House, 3 Miss. 617.

N. J.—Howell v. Potts, 20 N. J. L. 569; Haines v. Price, 20 N. J. L. 480; Howell v. Potts, 20 N. J. L. 1.

N. Y.—Butler v. Hempstead, 18 Wend. 666.

N. C.—Parker v. Stephens, 2 N. C. 218, 1 AmD 557.

S. C.—Parker v. Latimer, 59 S. C.

to discharge the judgment recovered,[53] his liability being fixed by the presumption that if there had not been assets sufficient he would have pleaded it in the first instance.[54] The rule is, however, subject to the limitation that, when from the nature of the proceedings the personal representative has not had the opportunity of making the defense previous to the rendition of a decree against him, he has the right to plead fully administered to a scire facias sued out to charge him de bonis propriis,[55] and in some decisions it has been held that the rule in equity differs from the rule at law and that in a court of equity assets in the representative's hands must be alleged and if denied or not admitted must be proved.[56] Where there is a suggestion of insolvency, it seems that a failure to plead plene administravit does not admit assets,[57] and it has been held that unless the declaration alleges that assets came into defendant's hands a plea of plene administravit is not necessary.[58]

If a personal representative is sued in his individual capacity he cannot plead plene administravit.[59]

Where a defendant dies when the cause is at issue and his personal representative is brought in to defend, plene administravit is not a proper plea.[60]

[§ 2095] **(bb) Effect of Statutes.** Statutes in some jurisdictions have modified or abrogated the common-law rule; thus, under statutes providing that neither mispleading nor lack of pleading shall render an executor or administrator personally liable, failure to plead plene administravit does not constitute an admission of assets;[61] and in an action on a judgment suggesting a devastavit, defendant may show that he has fully administered, although he failed to plead plene administravit.[62] Where by statute the effect of a judgment against a personal representative merely establishes the debt against the estate to be paid in due course of administration and the creditor is not entitled to execution against the representative or the property of decedent, the plea of plene administravit is in effect abolished and is neither necessary nor effectual.[63] Where the statute makes it the duty of the administrator to inventory and sell real estate when necessary to pay debts no such plea as plene administravit, without showing a dividend, is good except in one particular case—where the privileged debts have absorbed the whole estate.[64]

[§ 2096] **bb. Special Plea.** Where defendant admits a balance in his hands of a certain sum he must plead specially, plene administravit præter, that except such sum he has fully administered,[65] and the same is the case where he sets up the right of retainer of the sum admitted for the payment of other debts to which they are legally appropriated or has paid debts of an inferior nature without notice of plaintiff's claim.[66] It has been said that these are the only cases in which a special plea of plene administravit is necessary,[67] but it has also been said that pleas of this character are appropriate and necessary wherever a general plea of plene administravit would be appropriate and necessary, and when they are made it is erroneous to disregard them.[68]

[§ 2097] **(b) Requisites and Sufficiency of Plea.**[69] The plea should allege that defendant had not, at the time of interposing the plea or at the time of the commencement of the action or at any time thereafter, in his hands as executor or administrator any goods of decedent to be administered;[70]

330, 37 SE 918; Huger v. Drawson, 3 S. C. 328; Thomas v. Dyott, 12 S. C. L. 76.

Tenn.—Ford v. Woltering, 10 Heisk. 203.

Vt.—Sharon First Cong. Soc. v. Lovell, Brayt. 113.

Eng.—In re Marvin, [1905] 2 Ch. 490; Ramsden v. Jackson, 1 Atk. 292, 26 Reprint 187; Rock v. Leighton, 1 Salk. 310, 91 Reprint 273; Erving v. Peters, 3 T. R. 685, 100 Reprint 803; Skelton v. Hawling, 1 Wils. C. P. 258, 95 Reprint 605.

[a] **If an administrator suffers judgment by default**; he cannot afterward, in an action against him suggesting a devastavit, plead plene administravit as the default is a confession of assets. Moore v. Martindale, 2 Blackf. (Ind.) 353; Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Baracliff v. Griscom, 1 N. J. L. 195.

[b] **Where set-off pleaded.**—In an action by an administrator for a debt due the estate if a set-off pleaded by defendant exceeds the debt, the administrator should reply plene administravit to the surplus. Mayhew v. Flake, 11 S. C. L. 398.

[c] **Effect of repeal of statute conferring authority.**—Where pending suit against an ordinary who had taken charge of a derelict estate, the statute by virtue of which he acquired authority was repealed, a plea setting up such repeal in abatement was insufficient without a further plea of plene administravit or plene administravit præter. Strobhart v. Norrall, 41 S. C. L. 140.

53. Howell v. Potts, 20 N. J. L. 569; Haines v. Price, 20 N. J. L. 480.

54. Vick v. House, 3 Miss. 617.

55. Dance v. McGregor, 5 Humphr. (Tenn.) 428; Wray v. Williams, 2 Yerg. (Tenn.) 302.

56. Stevens v. Gordy, 9 Gill (Md.) 405; Dugan v. Gittings, 3 Gill (Md.) 138, 43 AmD 306; Evans v. Iglehart, 6 Gill & J. (Md.) 171; Contee v. Dawson, 2 Bland (Md.) 264.

57. Ford v. Woltering, 10 Heisk. (Tenn.) 203.

58. Sergeant v. Ewing, 30 Pa. 75; O'Connor v. Weeks, 9 WklyNC (Pa.) 461.

59. Glisson v. Weil, 117 Ga. 842, 45 SE 221; Slaughter v. McClain, 1 A. K. Marsh. (Ky.) 485.

60. Janney v. Mandeville, 13 F. Cas. No. 7,213, 2 Cranch C. C. 31; Borden v. Thorpe, 35 N. C. 298.

[a] **If a defendant dies after office judgment and writ of inquiry awarded,** his administrator cannot plead plene administravit because "after an office judgment in the lifetime of intestate, the defendant cannot plead any plea which the intestate could not have pleaded." Janney v. Mandeville, 13 F. Cas. No. 7,213, 2 Cranch C. C. 31.

61. Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Miller v. Ewing, 163 Ky. 401, 174 SW 22; Howard v. Cousins, 8 Miss. 114; Vick v. House, 3 Miss. 617; Conner v. Burd, 1 LegChron (Pa.) 17.

[a] **These statutes apply to executors de son tort** as well as to regularly appointed representatives. Hill v. Henderson, 21 Miss. 688.

[b] **Judgments rendered previous to enactment of statutes.**—A statute enacting that no mispleading or lack of pleading shall thereafter render any executor or administrator personally liable does not apply to judgments rendered previously to its enactment. Martindale v. Moore, 3 Blackf. (Ind.) 275.

62. Goodwin v. Wilson, 1 Blackf. (Ind.) 344.

63. U. S.—Covington v. Burnes, 6 F. Cas. No. 3,291, 1 Dill. 16.

Conn.—Phelps v. Swan, Kirby 428; Olcott v. Graham, Kirby 246.

Del.—Hall v. Hering, 21 Del. 111, 63 A 576.

Fla.—Sammis v. Wightman, 31 Fla. 10, 12 S 526; Barnes v. Scott, 29 Fla. 285, 11 S 48.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Ky.—Miller v. Ewing, 163 Ky. 401, 174 SW 22.

N. Y.—Pache v. Oppenheim, 84 NYS 926 [rev on other grounds 93 App. Div. 221, 87 NYS 704]; Allen v. Bishop, 25 Wend. 414; Butler v. Hempstead, 18 Wend. 666; Parker v. Gainer, 17 Wend. 559, 561.

Vt.—Bates v. Kimball, 1 Aik. 95.

"The old system of preferential administration being almost entirely subverted, all the pleadings and other parts of the ancient superstructure, in so far as it was raised for the protection of that system, have gone with it." Parker v. Gainer, supra.

64. Bates v. Kimball, 1 Aik. (Vt.) 95. See also Davis v. Weed, 44 Conn. 569; supra § 2094 note 51 [a].

65. U. S. v. Hoar, 26 F. Cas. No. 15,373, 2 Mason 311; Bassett v. Granger, 136 Mass. 174.

66. U. S. v. Hoar, 26 F. Cas. No. 15,373, 2 Mason 311.

67. U. S. v. Hoar, 26 F. Cas. No. 15,373, 2 Mason 311.

68. Clark v. Crout, 34 S. C. 417, 13 SE 602.

69. [a] **Forms of plea of plene administravit** held sufficient. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 SE 782; McKinley v. Call, 1 T. B. Mon. (Ky.) 54; Seighman v. Marshall, 17 Md. 550; Lee v. Beaman, 73 N. C. 410; Fowler v. Sharp, 15 Johns. (N. Y.) 323; Potter v. Dolan, 19 R. I. 514, 34 A 1116; Noell v. Nelson, 2 Saund. 214, 85 Reprint 1011; Martin Civ. Proc. p 389; 3 Chitty Pl. (ed. 1872) p 945.

70. Ala.—Reid v. Nash, 23 Ala. 733.

Md.—Iglehart v. State, 2 Gill & J. 235.

Miss.—Cogan v. Duncan, 23 Miss. 274.

and it has been held that this will be sufficient without a further formal allegation that defendant has fully administered the goods of decedent,[71] although this averment is found in the form of plea given by Chitty in his work on pleading.[72] The plea should also allege that at the time when the assets were administered defendant did not know of the existence of the claim of plaintiff as a creditor.[73] The plea need not allege that there was no real estate of decedent at the time of his death to be administered,[74] unless the statute makes real estate assets in the hands of the representative, in which case a plea that defendant has fully administered the personal estate is insufficient.[75] If required by statute or rule of court, the plea should be accompanied by a full and particular account of his administration with a certified copy of the inventory and appraisement.[76] If defendant pleads plene administravit præter, it is usual to state some certain sum as the value of the goods, but this allegation is not material and traversable.[77] It has been held that a plea of plene administravit should not conclude to the country but with a verification,[78] but it has also been held that such a plea need not be verified.[79] If pleaded singly it need not be signed by counsel;[80] but if pleaded with the general issue it must be so signed.[81] If a plea amounts to no more than a plea of plene administravit allegations not essential to its validity will be disregarded as surplusage.[82]

[§ 2098] **(c) Time of Pleading.** Defendant may in the discretion of the court be permitted to plead plene administravit after plea of the general issue,[83] or issue joined on some other plea,[84] or, it has been held, at any time before judgment,[85] provided plaintiff suffers no disadvantage by reason of defendant's failure to plead it earlier.[86] He may plead plene administravit, although several terms have elapsed, if he alleges that he can show that he had no assets at the time suit was commenced or at any time since.[87] Where the declaration in an action on a judgment recovered against the administrator suggests a devastavit which accrued after rendition of the judgment, the executor may plead a special plene administravit.[88] Where a reference is had on a plea of plene administravit and a report made charging him with assets, he cannot at a subsequent term be allowed to strike out the plea and plead plene administravit anew;[89] nor can he plead fully administered since the last continuance.[90]

[§ 2099] **(d) Time to Which Plea Relates.** Every plea of plene administravit must have reference to the commencement of the action or at least to the time of service of the process,[91] in the absence of statutory provisions changing the rule.[92] Defendant cannot avail himself of voluntary payment of a debt after notice of a writ sued out.[93]

[§ 2100] **(e) Joinder of Several Defendants in Plea.** Two administrators may join in a plea of plene administraverunt, although their defenses under that plea are different.[94]

[§ 2101] **(f) Amendments.** A defective plea of

N. C.—Gregory v. Hooker, 4 N. C. 215.

Eng.—Gewen v. Roll, Cro. Jac. 131, 79 Reprint 114; Hewlet v. Framingham, 3 Lev. 28, 83 Reprint 560.

[a] **A plea of plene administravit of assets which had come to defendant's hand "in this state"** is demurrable because he is chargeable with assets received by him in any part of the world. Conover v. Chapman, 18 S. C. L. 436.

[b] **Where a scire facias charges that a certain sum came into defendant's hands** as assets, a plea denying that such sum came into his hands but not denying that a less sum, sufficient to pay plaintiff's judgment, came into his hands is bad. Rumbarger v. Stiver, 6 Oh. 99.

[c] **A plea that defendants have fully administered** all the goods and chattels, rights and credits of decedent which have come to their hands to be administered, "shall be intended to speak as to the time when the plea is filed," and although informal is good especially after verdict. Nixon v. Bullock, 9 Yerg. (Tenn.) 414, 416.

[d] **A plea that the administrator had no assets to pay a judgment against him at the time of its rendition** is insufficient in an action against him as administrator for failure to pay such judgment. The plea should either deny that there were assets at any time belonging to the estate or show that they had been applied to claims having a prior right to satisfaction. Cogan v. Duncan, 23 Miss. 274.

[e] **Allegations of amount disputed or admitted.**—Notwithstanding a statute which requires a defendant to make affidavit that his pleas are true and to state the amount of defendant's demand, if anything, admitted to be due or owing, and the amount disputed, the pleas of plene administravit, and that the claim has been paid supported by affidavit are sufficient. The statement of the amount due if anything and the amount disputed would add nothing to the meaning of an affidavit explicitly alleging the complete satisfaction of plaintiff's claim. Furthermore it is doubtful whether the statute has any application to executors who seldom have and are not supposed to have personal knowledge of testator's indebtedness. May v. Wolvington, 69 Md. 117, 14 A 706.

71. Fowler v. Sharp, 15 Johns. (N. Y.) 323, 2 Saund. 221 note 3.

72. See Fowler v. Sharp, 15 Johns. (N. Y.) 323 (the form of the replication as given by Chitty takes issue on defendant having assets in his hands to be administered on the day of exhibiting the bill; and this shows that the material and essential part of the plea is the possession of unadministered assets).

73. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 SE 782.

74. Potter v. Dolan, 19 R. I. 514, 34 A 1116.

75. Brattle v. Willard, 4 F. Cas. No. 1,815, Smith (N. H.) 374.

76. Willis v. Tozer, 44 S. C. 1, 21 SE 617; Ford v. Rouse, 24 S. C. L. 219.

77. Burr v. Baldwin, 2 Wend. (N. Y.) 580 (if plaintiff should prove the value of the goods to be more than it is alleged to be he will thereby gain nothing. To entitle him to recover he must prove their value to be more than the sum defendant can retain to satisfy the judgment previously obtained against him).

78. Eppes v. Smith, 4 Munf. (18 Va.) 466 (a defect in this respect is cured by verdict).

79. Wheatman v. Andrews, 85 N. J. L. 107, 89 A 285.

80. Satterlee v. Satterlee, 8 Johns. (N. Y.) 327.

81. Satterlee v. Satterlee, 8 Johns. (N. Y.) 327.

82. Potter v. Dolan, 19 R. I. 514, 34 A 1116.

83. Sawyer v. Sexton, 3 N. C. 67.

84. Woolford v. Simpson, 3 N. C. 132; Reid v. Hester, 1 N. C. 488; Haig v. Smith, 3 S. C. L. 529.

85. Sawyer v. Sexton, 3 N. C. 67; Ford v. Woltering, 10 Heisk. (Tenn.) 203.

[a] **After jury sworn.**—Where, after a cause of action taken by appeal to a surrogate court, defendant dies and the cause is revived against his executrix she should be permitted to plead plene administravit after the jury is sworn. Ford v. Woltering, 10 Heisk. (Tenn.) 203.

[b] **After verdict** against an administrator who went to trial on a plea of payment, although in good faith and not knowing the effect of a finding against him on that plea, he will not be relieved by being let in to plead plene administravit. Martin v. Sarles, 4 Cow. (N. Y.) 24.

86. Sawyer v. Sexton, 3 N. C. 67.

87. Sawyer v. Sexton, 3 N. C. 67.

88. Ruffin v. Pendleton, 2 Wash. (2 Va.) 184.

89. Wright v. Flanner, 64 N. C. 510 (this would give him the benefit of any payments of debts of equal dignity with plaintiff's made by him since his first plea).

90. Hall v. Gully, 26 N. C. 345; Collins v. Underhill, 4 N. C. 381; Smoot v. Wright, 1 N. C. 374.

91. Reid v. Nash, 23 Ala. 733; Hall v. Gully, 26 N. C. 345; White v. Arrington, 25 N. C. 166; Gregory v. Hooker, 4 N. C. 215; Wilcox v. ——, 2 N. C. 484; Smoot v. Wright, 1 N. C. 374.

92. Bryan v. Miller, 32 N. C. 129 (under a statute providing that the executor may have nine months to plead and that then he may plead relative to the assets anything which could be pleaded had the suit been instituted at that time the plea does not relate to the commencement of the suit or any other point of time prior to that at which the executor is bound to plead after the expiration of the nine months).

93. White v. Arrington, 25 N. C. 166.

94. More v. Tandy, 3 Bibb (Ky.) 97 (the general rule, that if two defendants join in a plea sufficient for one and not for the other, the plea is bad as to both, does not apply in a case of a joint plea of plene administravit by executors. In such plea each is only liable to pay the assets found by the jury to be in his own hands).

plene administravit præter may be amended.[95] Defendant should be permitted to amend his plea by setting up plene administravit at any time before trial, if it appears that the plea is not made for delay.[96] In scire facias against administrators on a judgment against the intestate they should, after an agreement that the merits of the original judgment be tried without regard to the pleading, be allowed to amend by pleading plene administravit and no assets.[97]

[§ 2102] **(g) Withdrawal of Plea.** A plea of plene administravit cannot be withdrawn at the trial for the purpose of pleading ne unques executor.[98]

[§ 2103] **(3) Statutes of Limitations—(a) Necessity of Pleading.** The general rule, that one who desires to avail himself of the defense of the general statutes of limitation must plead them and show affirmatively that he comes within their provisions,[99] applies to executors and administrators,[1] unless, as is sometimes the case, the statute permits a personal representative to avail himself of the defense of limitations under a plea of the general issue.[2] Even under such statutes defendant may plead limitations specially if he elects to do so.[3] Unless it clearly appears from the complaint that the cause of action is barred by a special statute of limitations in favor of personal representatives,[4] such statutes must be specially pleaded to be availed of, in the absence of some statute dispensing with the necessity therefor,[5] and even where by virtue of statute a special plea is not necessary, if the representative prefers to present his defense by special plea instead of giving evidence under the general issue he will be held to the strictness of pleading.[6]

[§ 2104] **(b) Requisites and Sufficiency of Plea.** A plea of the general statute of limitations by a personal representative need not allege that decedent was a resident of the state for the statutory period prior to his death.[7] To make a special statute of limitations available as a defense the representative in his plea must set forth facts showing that he has complied with the provisions of the statute.[8] Thus, if the defense is that suit was not brought within the period required by statute, after grant of administration, the plea must show that notice of the grant of administration was given,[9] and in the manner required by statute,[10] unless the requirement in this regard is construed to be merely directory.[11] In alleging the giving of bond it will be sufficient for the plea to state that defendant gave bond to the judge of probate for the faithful administration of the estate according to law without setting out the bond.[12] It is not necessary for the plea to allege that defendant delivered the assets to the distributees or has taken refunding bonds.[13] In an action against a personal representative a plea of the statute of limitations should not notice the period which is in effect added to the period of limitation for bringing suits against personal representatives, the provision for such additional period not being intended to alter the form of pleading.[14] A plea "that the alleged cause of action did not accrue within three years of defendant's death" sufficiently shows that it must have accrued more than three years before the suit was brought.[15]

[§ 2105] **(c) Effect of Plea.** Where a bill is filed to charge both realty and personalty with de-

95. Parker v. Salmons, 113 Ga. 1167, 39 SE 475.

96. Chisholm v. Anthony, 1 Hen. & M. (11 Va.) 27.

97. Robeson v. Whitesides, 16 Serg. & R. (Pa.) 320.

98. State v. Boone, 1 Harr. & J. (Md.) 134.

99. See Limitations of Actions [25 Cyc 1401].

1. Ala.—Harrison v. Harrison, 39 Ala. 489.

Conn.—White v. Judson, 2 Root 301.

Ind.—Cundy v. Coppock, 85 Ind. 594.

N. Y.—Miller v. Longshore, 147 App. Div. 214, 131 NYS 1041; Minzesheimer v. Bruns, 1 App. Div. 324, 37 NYS 261.

Pa.—O'Neill's Est., 14 Pa. Dist. 151.

2. Holmes v. Burwell, 30 Ill. A. 445; Perrill v. Nichols, 89 Ind. 444; Zeller v. Griffith, 89 Ind. 80; Purviance v. Purviance, 14 Ind. A. 269, 42 NE 364; McBride v. Ulmer, 30 Ind. A. 154, 65 NE 610; Sanders v. Robertson, 23 Miss. 389; Wren v. Span, 2 Miss. 115; Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895.

[a] **Statutes dispensing with the necessity of special pleading.**—The necessity of specially pleading the general statute of limitations is dispensed with by a statute: (1) Providing that all matters of valid defense except set-off may be given in evidence without any special pleading. Zeller v. Griffith, 89 Ind. 80. (2) Forbidding the allowance of a claim shown to be barred by the statute of limitations. Martin v. Martin, 108 Wis. 284, 84 NW 439, 81 AmSR 895.

[b] **Written plea of limitations not necessary.**—Hinshaw v. Warren, 167 Mo. A. 365, 151 SW 497.

3. Niblack v. Goodman, 67 Ind. 174 (plea not demurrable).

4. Wise v. Hogan, 77 Cal. 184, 19 P 278; Wise v. Williams, 72 Cal. 544, 14 P 204; Coney v. Horne, 93 Ga. 723, 20 SE 213; Page v. Findley, 5 Tex. 391.

[a] **A general demurrer will lie** where it appears from the petition in a suit on a claim against an estate that the suit was not brought within the statutory period after its rejection. Page v. Findley, 5 Tex. 391.

5. Ala.—Mardis v. Smith, 2 Ala. 382.

Iowa.—Easton v. Somerville, 111 Iowa 164, 82 NW 475, 82 AmSR 502.

Miss.—Sanders v. Robertson, 23 Miss. 389.

Mo.—Munday v. Leeper, 120 Mo. 417, 25 SW 381; Stiles v. Smith, 55 Mo. 363; Wiggins v. Lovering, 9 Mo. 262.

N. Y.—Matter of Hoes, 183 App. Div. 38, 170 NYS 543.

[a] **Set-off in suit by administrator.**—Where an executor or administrator sues in debt or assumpsit, it is incumbent on him to plead non-presentation of the claim within the statutory time, where the estate he represents is sought to be charged under the plea of set-off. Smith v. Huie, 14 Ala. 201.

[b] **The rule is different in a court of equity;** the defense may then be made by plea, answer, or demurrer, and when it is interposed in the one mode or the other, if there are any special circumstances or any reason for excepting the case out of the statute it must be introduced by an amendment to the bill. McDowell v. Brantley, 80 Ala. 173; Owens v. Corbitt, 57 Ala. 92; Fretwell v. McLemore, 52 Ala. 124.

[c] **Statutes dispensing with necessity of pleading.**—(1) The necessity of specially pleading statutes of limitations governing suits against personal representatives is dispensed with by statute allowing personal representatives to give in evidence under the general issue any special matter of defense. Sanders v. Robertson, 23 Miss. 389; Wren v. Span, 2 Miss. 115. (2) A statute of this character does not obviate the necessity of a special plea. The object of the statute is to give greater facilities to those sued in another's right and whom the law presumes not to be so conversant with the facts as the original actor in the transaction, and this reason can have no application in cases where the facts are peculiarly within the knowledge of the personal representative as must be the case when the defense is a failure of presentation of the claim to him within the required time. Mardis v. Smith, 2 Ala. 382.

6. Wren v. Span, 2 Miss. 115.

7. Saxton v. Musselman, 17 S. D. 35, 95 NW 291.

8. See infra notes 9-14.

9. Wren v. Span, 2 Miss. 115; Munday v. Leeper, 120 Mo. 417, 25 SW 381; Stiles v. Smith, 55 Mo. 363; Wiggins v. Lovering, 9 Mo. 262; Ryan v. Flanagan, 38 N. J. L. 161; Turner v. Shuffer, 108 N. C. 642, 13 SE 243.

10. Wren v. Span, 2 Miss. 115.

[a] **Plea of notice held sufficient.**—It is sufficient for an administrator pleading limitations to allege that he posted up notifications of his appointment in public places in a designated town or city without specifying the places. Burditt v. Grew, 8 Pick. (Mass.) 108; Sewall v. Valentine, 6 Pick. (Mass.) 276.

11. Burditt v. Grew, 8 Pick. (Mass.) 108; Crabaugh v. Hart, 3 Yerg. (Tenn.) 431.

12. Sewall v. Valentine, 6 Pick. (Mass.) 276.

13. Goodman v. Smith, 15 N. C. 450.

14. Codman v. Rogers, 10 Pick. (Mass.) 112; Benjamin v. De Groot, 1 Den. (N. Y.) 151.

15. Wallace v. Schaub, 81 Md. 594, 32 A 324.

cedent's debts, a plea of the statute of limitations by the personal representative goes to the defense of both the personal and the real estate.[16]

[§ 2106] **(4) Premature Commencement of Action.** It is a good plea to an action against an executor that the action was commenced within the period during which he is by statute exempt from suit.[17] Such a plea has been held a plea in bar,[18] but it has also been regarded as a dilatory plea.[19] After a plea of the statute of limitations by an administrator, in an action against him for a debt of the estate it is too late to urge that the suit was prematurely brought, he never having refused to acknowledge the debts.[20]

[§ 2107] **(5) Filing and Withdrawal of Pleas.** Statutes allowing personal representatives a designated time in which to plead have no application to suits in equity.[21] An administrator should not be permitted to file additional pleas without showing that the justice of the case requires it, and if no circumstances are shown to prove that he was not culpably negligent his application to file additional pleas should be denied.[22] As a plea of discharge in bankruptcy is a personal defense to be set up by the debtor or his administrator, the latter when sued on a claim against his intestate may withdraw a plea of intestate's discharge in bankruptcy.[23] A plea of ne unques executor is a plea to the merits within a statute authorizing a defendant on his demurrer being overruled to withdraw the same and plead to the merits.[24]

[§ 2108] **c. Replication—(1) To Plea of Limitations.** An unanswered plea of the statute of limitations is a prima facie bar to a recovery.[25] If a personal representative sues or is sued in his individual capacity, a replication to a plea of the statute of limitations framed on the theory that he sues or is sued in his representative capacity is a departure and is fatally defective on demurrer,[26] and the same is true where the personal representative sues or is sued in his representative capacity, and the replication is framed on the theory that he sues or is sued in his individual capacity.[27] If plaintiff wishes to avoid the effect of a plea of the state of limitations by an executor or administrator by showing facts which take the case out of the operation of the statute, such, for instance, as nonadministration,[28] or delay at the request of the executor,[29] a special replication setting up such facts is necessary, and the same has been held to be necessary where plaintiff relies on the fact that by reason of the statutory exemption of the representative from suit for a designated period after death of decedent or qualification of the administrator the period fixed by the statute of limitations had not expired,[30] although this has been denied.[31] If to a declaration for money paid to defendant's use as executor he pleads statutory proceedings to bar creditors, a reply that the money was paid after the time limited for presentation for payment had expired is good without also alleging that assets remained in the executor's hands;[32] it devolves on him to allege want of assets.[33] Where a replication in an action against an administrator avers the pendency of a previous action against defendant's intestate at the time of the latter's death, that such action was brought before the statute of limitations had run, the appointment of commissioners after decedent's death and the presentation of the claim within one year after the death, it sufficiently denies the running of the statute of limitations.[34] To a plea of limitations by an executor of an estate represented insolvent it is not a sufficient answer to say that the estate is solvent and that after the lapse of the statutory period for bringing suit a further time was allowed by the judge of probate for creditors to exhibit and prove their claims, under which the demand in suit was duly proved.[35] A replication to a plea of the statute of nonclaim which shows that the demand was not presented within the statutory period is bad on demurrer.[36] Where a statute makes legacies or distributive shares not attached or paid to the person entitled thereto assets for the payment of a ratable proportion of the debts of a creditor who has not presented his claim within the time limited, a replication to a plea setting up his

16. Findley v. Cunningham, 53 W. Va. 1, 44 SE 472 (if a debt does not bind personalty, neither does it bind the realty of a decedent; its defeat as to one is defeat as to the other).

17. Ferrand v. Walker, 5 Blackf. (Ind.) 424; Carson v. Bryant, 4 S. C. L. 159.

[a] **In the District of Columbia and in Maryland** in an action against an executor, he may be ruled to plead before the expiration of the year after letters granted. Buckley v. Beatty, 4 F. Cas. No. 2,091, 1 Cranch C. C. 245; Frazier v. Brackenridge, 9 F. Cas. No. 5,071, 1 Cranch C. C. 203.

18. Ferrand v. Walker, 5 Blackf. (Ind.) 424.

19. O'Daniel v. Lehre, 21 S. C. Eq. 83 (the long established practice in courts of equity is not to dismiss the bill but to order plaintiff to pay costs and let the bill stand over).

20. Bird v. Pate, 4 La. Ann. 225.

21. Marsh v. Grist, 62 N. C. 349 (courts of equity have peculiar jurisdiction and a course of proceeding subject to be modified by the chancellor to suit the justice of each case).

22. Hulett v. Hall, Litt. Sel. Cas. (Ky.) 83.

23. Lee v. Eure, 93 N. C. 5.

24. Stallings v. Williams, 6 Ala. 509.

25. Vandiver v. Hodge, 4 Bush (Ky.) 538.

26. Williams v. Moore, 32 Ala. 506; Worden v. Worthington, 2 Barb. (N. Y.) 368.

[a] **Rule applied.**—Where administrators declare in their individual capacity and defendants plead the six years' statute of limitations, to which plaintiff replies that intestate died and letters of administration were issued within six years and so the promises were made within six years is bad on demurrer. Worden v. Worthington, 2 Barb. (N. Y.) 368.

27. Worden v. Worthington, 2 Barb. (N. Y.) 368; Benjamin v. De Groot, 1 Den. (N. Y.) 151; Bedford v. Ingram, 5 Hayw. (Tenn.) 155; Hickman v. Walker, Willes 27, 125 Reprint 1037.

[a] **Rule applied.**—(1) Where the statute of limitations is pleaded to a count on promises to the testator, a replication of a promise to the executor within the statutory period is a departure. Hickman v. Walker, Willes 27, 125 Reprint 1037. (2) Where the declaration counts upon a promise by the testator, plaintiff cannot reply to a plea of limitations a new promise made by defendant. Benjamin v. De Groot, 1 Den. (N. Y.) 151.

[b] **Joinder of counts.**—Where in an action against an administrator there is a plea of limitations, the replication is not defective where it joins a count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate. Wilkins v. Murphey, 29 F. Cas. No. 17,663, Brunn. Coll. Cas. 21, 3 N. C. 282.

28. Hutchison v. Tolls, 2 Port. (Ala.) 44; Langford v. Gentry, 4 Bibb (Ky.) 468; Webster v. Newbold, 41 Pa. 482, 82 AmD 487.

29. Hubbard v. Marsh, 29 N. C. 204; Parsons v. Crabb, 31 U. C. Q. B. 434.

30. Langford v. Gentry, 4 Bibb (Ky.) 468. To same effect Hiatt v. Hough, 11 Ind. 161.

31. Nelson v. Lounsbury, 3 Barb. (N. Y.) 125; Howell v. Babcock, 24 Wend. (N. Y.) 488.

[a] **Proper pleading for plaintiff.**—"If the plaintiff mean to contest the time, he should reply that the cause of action did accrue within the six years. The statute then comes in and directs the mode of computation. It declares that the eighteen months shall not be deemed a part of the six years pleaded; in other words, the six years are not complete, in the special case, unless the whole time be seven years and a half. The statute is one of evidence or computation." Howell v. Babcock, 24 Wend. (N. Y.) 488, 489.

32. Wakeman v. Paulmier, 39 N. J. L. 340.

33. Wakeman v. Paulmier, 39 N. J. L. 340.

34. Walker v. Wooster, 61 Vt. 403, 17 A 792.

35. Parkman v. Osgood, 3 Me. 17.

36. Clark v. Washington, 44 Ala. 291.

presentation of the claim in suit must allege that there has been a final settlement of the executors' accounts, for until that is done it cannot be determined whether there will be any surplus with which to pay legacies or distributive shares.[37] Variance in immaterial dates as stated in the declaration and in the replication is not such a departure as will sustain a general demurrer.[38]

[§ 2109] **(2) To Plea of Plene Administravit.**[39] It is a good replication to a plea of plene administravit that defendant has not fully administered the assets which came into his hands,[40] and it is not necessary that the replication should specify the assets unadministered.[41] It is not a good replication that decedent at the time of his death was seized of real estate which defendant if necessary could have reduced to assets for the payment of debts.[42] A replication to a plea of plene administravit which tenders an issue on publication is bad where the statute of nonclaim creates a complete bar on omission to exhibit a demand within the specified time whether the administrator dies or does not make publication as required by statute.[43] Where an administratrix sued as such alleges in a plea puis darrein continuance that she has fully administered, a replication which seeks a recovery on the faith of the assets received by her as "an administratrix de bonis non" after a new grant of administration without joining the coadministrator or coadministratrix de bonis non is bad as amounting to a departure.[44] If an administrator pleads fully administered except a certain sum and as to that sets forth judgments confessed by him giving the particulars of each, plaintiff cannot impeach them for fraud except on a special replication.[45] It has been held, however, that it is sufficient to allege fraud and covin generally without showing such fraud specifically.[46] Where, in an action against an executrix for attorney's fees for services rendered decedent, defendant pleaded a subsequent discharge as executrix and a settlement of the estate, and the replication alleged that the claim was duly filed in the probate court and presented to the executrix and subsequently sued on, at which time the executrix had sufficient assets to pay the indebtedness of the estate, including the claim sued on, and that the executrix, without declaring the estate insolvent and without paying the claim, procured an order finally discharging her as executrix, it was held that, as the replication was designed to defeat the pleas and to justify the further maintenance of the suit, it was permissible, and sufficient against a demurrer.[47]

[§ 2110] **(3) To Plea Denying Representative Capacity.** Where by the practice an executor or administrator need not set forth in his declaration specially his title to the office in which he sues or make profert of his letters testamentary or of administration, an executor or administrator suing in that character may properly reply to a plea of ne unques executor or administrator his special title to that character and make profert of his letters in his replication concluding the same on account of the new matter with a verification.[48] When one was sued as executor of a designated person and he pleaded in abatement that such person died intestate and that letters of administration were afterward granted to defendant, a replication alleging that before letters of administration were granted defendant made himself executor de son tort was held bad on demurrer.[49] Where to a plea by one sued as administrator, denying representative capacity, plaintiff replies that defendant was appointed and qualified as administrator, but refused to pay the claim in suit, although he had sufficient assets and admitted its validity, and there is no rejoinder, the only issue presented by the pleading is whether or not defendant was administrator when sued.[50]

[§ 2111] **(4) To Other Pleas.** Upon a scire facias issued to show cause why plaintiff should not have judgment to be levied de bonis propriis if an administrator pleads judgment and no assets ultra, replication thereto may be either nul tiel record, or assets ultra, or per fraudem, or any other fact properly triable by jury.[51] Where on a petition for a legacy against an administrator, he pleads that the will had been set aside by the probate court and distribution ordered among his heirs, a reply that the revocation by the court was void as being decreed without an issue to try the validity of the will and without notice and proof is good on demurrer.[52] Where in assumpsit against an executor defendant pleads that the testator devised land to plaintiff in satisfaction of his demand and that plaintiff accepted the devise, and plaintiff, protesting that testator did not make the devise in satisfaction of the demand and that the will was not proved, replies that he did not accept the land devised, the replication is good.[53] Where to an action against an estate defendant pleads a return of insolvency of the estate pending the action, which by statute is a good defense to all suits against the estate except for designated debts, a replication failing to show how much of the demand sued for is within the excepted class of debts is bad.[54]

[§ 2112] **d. Rejoinder.** If the replication in a suit against a personal representative is a departure from the declaration, plaintiff cannot object

37. Cunningham v. Stanford, 68 N. J. L. 7, 52 A. 374.

38. Wakeman v. Paulmier, 39 N. J. L. 340.

39. [a] **Form** of replication to plea of plene administravit. Sanford v. Wicks, 3 Ala. 369.

40. Sanford v. Wicks, 3 Ala. 369; Bishop v. Hamilton, 4 J. J. Marsh. (Ky.) 548; Johnson v. Johnson, 17 S. C. L. 601.

41. Johnson v. Johnson, 17 S. C. L. 601.

42. Joiner v. Sanders, 5 Blackf. (Ind.) 378 (defendant had no such power).

43. Thrash v. Sumwalt, 5 Ala. 13.

44. Parkhill v. Union Bank, 1 Fla. 110.

45. Bell v. Davidson, 13 N. C. 397 (holding further, however, that in an action against an administrator where defendant pleads fully administered except a certain sum and as to that sum pleads that he has confessed sundry judgments at a certain term of the court, without giving any particulars of them, plaintiff may under a general replication impeach any judgment offered by defendant in support of his plea).

46. Sherwood v. Johnson, 1 Wend. (N. Y.) 443.

47. Odom v. Moore, 147 Ala. 567, 41 S. 162.

48. Ellis v. Appleby, 4 R. I. 462.

[a] **Conclusion of replication.** — Where the plea in a suit by an administrator truly sets forth plaintiff's title as such and impeaches it by alleging that his intestate was not at the time of his death a resident of the town whose court of probate granted to plaintiff his letters, but was at that time a resident of another town in the state named in the plea, and plaintiff in his replication affirms that his intestate resided at the time of his death in the town whose court of probate granted to him his letters and denies that he resided in the town named in the plea, he should conclude his replication to the country, notwithstanding he unnecessarily makes profert therein of his letters of administration and states all the particular circumstances attending the grant of them. Ellis v. Appleby, 4 R. I. 462.

49. Rattoon v. Overacker, 8 Johns. (N. Y.) 126.

50. Barr v. Sullivan, 75 Miss. 536, 23 S. 536.

51. Teasdale v. Branton, 23 F. Cas. No. 13,813, Brunn. Coll. Cas. 28, 3 N. C. 377.

52. Quinn v. Moss, 20 Miss. 365.

53. Hapgood v. Houghton, 8 Pick. (Mass.) 451.

54. Fennell v. Patrick, 3 Stew. & P. (Ala.) 244.

that a rejoinder answering it is a departure from the plea because if the rejoinder does depart from the plea the fault lies with plaintiff.[55] Where an executor pleads in bar a devise in satisfaction of plaintiff's claims and a refusal by him to elect whether to take or refuse it and plaintiff replies a refusal to accept and traverses the refusal to elect, a rejoinder that the devise has not been waived is bad for departure.[56] A rejoinder alleging that defendant has assets but not more than sufficient to pay a judgment of a designated amount is not a departure in pleading from a plea of plene administravit præter alleging the unadministered assets to be of considerably less value than the sum designated in the rejoinder;[57] an averment of value is a mere matter of form and not traversable.[58] Where the replication to a plea of set-off sets up failure to file claims against the estate within the statutory time, a rejoinder that at the time the money which is sought to be recovered back was paid defendant's claims were not barred is insufficient, because failing to show that defendant was entitled to demand payment.[59]

[§ 2113] **e. Demurrer.** Where one sues as administrator, a demurrer to the complaint for want of sufficient facts raises the question of whether a cause of action exists in plaintiff as administrator.[60]

[§ 2114] **f. Amendment.** In actions by or against executors or administrators amendments to pleadings may be allowed in a proper case and upon the usual terms.[61] But as a temporary administrator has no authority to sue for recovery of land held adversely to the estate, his petition in such an action cannot be amended by substituting the name of one who sues as permanent administrator, and who was appointed as such after the commencement of the action, although the temporary administrator is the same person who was afterward made permanent administrator.[62]

[§ 2115] **2. Pleadings in Particular Classes of Actions—a. On Claims in Favor of Estate—(1) Declaration or Complaint.** Where one sues in a representative capacity on a writing purporting to be executed to his decedent, the declaration or complaint must show decedent's death.[63] A count on an indebtedness to decedent with a promise to the representative is good without showing any promise to decedent,[64] and in assumpsit by an administrator de bonis non, the promise may be laid to have been made to the former administrator.[65] A defective allegation of a promise to the administrator, although a good ground for demurrer, cannot be taken advantage of after verdict.[66]

Action for deposit in bank. In an action by an executor for an amount deposited in bank by testator, an allegation that payment of the amount was demanded by means of an order requiring payment thereof, signed by the executor, which was "duly presented" to defendant for payment and payment refused, is sufficient to admit proof of a proper demand by plaintiff.[67]

Action for money had and received. A declaration alleging that money was received by defendant to the use of decedent in his lifetime and alleging a promise to decedent may be amended so as to allege that the money was received for the use of the administrator and the promise made to her.[68]

Action for rent. Where an administrator sues for rent under a statute, vesting him with authority to receive rents in the absence of heirs, a complaint for rent by the administrator alleging that he had authority to and did rent the property is a sufficient allegation of authority under the statute.[69]

Action for value of goods sold. A bill by an administrator to recover the value of certain personalty of decedent's estate sold by plaintiff to defendant was demurrable where it alleged that sale of the property was made at such price as could be agreed upon by arbitrators selected, but that before the arbitrators had acted the purchaser declared that he would not abide by their decision, and did not show that any price was agreed upon or that any inventory or appraisement of the property or any order of court for private sale thereof was made or that either party to the contract was uninformed as to the facts.[70]

Action for work done. If the cause of action is

55. Parkhill v. Union Bank, 1 Fla. 110.

56. Hapgood v. Houghton, 8 Pick. (Mass.) 451.

57. Burr v. Baldwin, 2 Wend. (N. Y.) 580.

58. Burr v. Baldwin, 2 Wend. (N. Y.) 580.

59. Traweek v. Hagler, (Ala.) 75 S 152.

60. Euler v. Euler, 55 Ind. A. 547, 102 NE 856.

61. U. S.—Chicago Great Western R. Co. v. McCormick, 200 Fed. 375, 118 CCA 527.

Cal.—White v. Deering, (A.) 179 P 401.

Colo.—Berkey v. Pueblo County, 48 Colo. 104, 110 P 197, 20 AnnCas 1109.

Ind. T.—Scroggins v. Oliver, 7 Ind. T. 740, 104 SW 1161.

Miss.—Barnes v. Barnes, 109 Miss. 273, 68 S 248.

R. I.—Lewis Historical Pub. Co. v. Greene, 40 R. I. 309, 100 A 1017; Roberts v. White, 32 R. I. 185, 78 A 497, AnnCas1912D 793.

[a] **Illustrations.**—(1) A defect in a plea to debt on a bond to which defendants' testator was a party, setting up failure to present the claim or to file the same in the office of the probate clerk within six months from the date of the first advertisement of the notice of the qualification of defendants as executors, and also that the action was not commenced within two years from the date of such notice, in failing to aver that the notice was published, is curable by amendment. Municipal Ct. v. Whaley, 26 R. I. 25, 57 A 1061. (2) In an action by an administrator de bonis non, where duly authenticated copies of his official bond and letters testamentary were filed with the clerk of the court, the proper practice being to incorporate copies of those documents in the petition itself, which was not done, he should be allowed to amend in this particular. Berkey v. Pueblo County, 48 Colo. 104, 110 P 197, 20 AnnCas 1109. (3) Where a demurrer is interposed to a declaration, in an action against an administrator, which alleges the presentation of the claim of the administrator for failing to allege that the claim was filed in the office of the clerk of the probate court as required by statute, the court may in its discretion permit an amendment to remedy the defect. Roberts v. White, 32 R. I. 185, 78 A 497, AnnCas1912D 793.

[b] **Amendment not materially changing parties or cause of action.**—There is not a material change of party or cause of action by the allegation of the original complaint that plaintiff was administrator by appointment of the United States court, being changed by the amended complaint to one that he was administrator by appointment of the tribal probate court. Scroggins v. Oliver, 7 Ind. T. 740, 104 SW 1161.

[c] **Absence of discretion in refusing to allow amendment.**—It is an abuse of discretion for the court, in an action to foreclose a mortgage, to refuse to permit an amendment of the complaint to be made at the trial by inserting a waiver of all recourse against the estate of the deceased mortgagor other than that described in the complaint. Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P 1080.

[d] **After impaneling of jury.**—It was not error to permit plaintiff administratrix, after the jury had been impaneled, to amend by averring that her appointment was by a local court of a different county from that first alleged. Chicago Great Western R. Co. v. McCormick, 200 Fed. 375, 118 CCA 527.

62. Ward v. McDonald, 135 Ga. 515, 69 SE 817.

63. Phelps v. Risk, 4 KyL 893.

64. Black v. Reybold, 3 Del. 528.

65. Sullivan v. Holker, 15 Mass. 374.

66. Vandersmith v. Washmein, 1 Harr. & G. (Md.) 4.

67. Levy v. Commercial Trust Co., 86 Misc. 10, 148 NYS 173.

68. Stanley v. Stanley, 42 Conn. 539.

69. Guynn v. Jones, 12 Ind. 486.

70. Ramey v. McCain, 51 Ind. 496.

work done by testator the executor in assumpsit therefor need not set out the contract specially.[71]

Action on bill or note. A declaration by an administrator, in an action on a note payable to his decedent, and past due at his death, need not aver a promise to the administrator.[72] In a suit on a note or other obligation in decedent's favor the declaration should show nonpayment both to decedent and his personal representative or representatives;[73] but it has been held that a general allegation that the note or obligation is due and unpaid is sufficient.[74] If an administrator acquires a note by assignment in the settlement of the estate and sues on it as administrator it is not necessary to allege that the note is an asset of the estate.[75] As an administrator may sue in his own name on a note payable to bearer, although transferred to his intestate during the lifetime of the latter, the complaint need not state the source of his title and if stated it need not be proved.[76] A complaint alleging that plaintiff as administrator had indorsed a note and was the legal holder of it and giving a description of the note states facts sufficient to constitute a cause of action.[77]

Action over against surety. Where an administratrix paid part of a debt for which intestate was liable as surety and after her marriage she and her husband pay the balance, she may as administratrix recover the whole of the debt from the principal in assumpsit for money paid by husband and wife as administrators without counting separately for the money paid by the administratrix before marriage.[78]

[§ 2116] **(2) Plea or Answer.** A plea in a suit by executors on a note given to them that the consideration was the sale of testator's title to land to which plaintiffs represented that testator had a right when in fact he had no title thereto is sufficient without an allegation that plaintiffs warranted title and that they knew that the title was not good.[79] In an action of debt by two executors on a note given to them a plea that defendant was appointed executor and qualified will not abate the suit.[80] A statute requiring verification of a plea denying execution of an instrument applies where the declaration alleges that plaintiffs were administrators of a designated person deceased at the time the promises were made and that the promises were made to them personally by that description.[81] Where an administrator sues as such on a note payable to him as administrator, it is a sufficient answer that the note is not the property of the estate but the individual property of the administrator.[82] To an action by an administrator for money in defendant's hands belonging to the estate, a plea that defendant's wards were entitled as distributees to a portion of the estate, without alleging that there were no debts, or what that interest amounted to, presents no defense.[83] In an action against a surviving husband by the administrator of his wife on a note executed by the husband, an allegation in the answer that at the wife's death the husband became entitled, as the surviving husband to her personal estate, is not a denial of the petition alleging the heirship of the wife,[84] and an allegation that neither decedent nor her estate was indebted to any person in any sum at the time of plaintiff's appointment and qualification as administrator, and that there was no occasion for his appointment and qualification, is not tantamount to a specific denial of a statement in the petition that plaintiff and his wife are creditors of the estate.[85]

Payment. To a suit by an executor on a claim due deceased, an answer that defendant had paid deceased the amount due and that it was paid in goods in satisfaction of the claim and so received by deceased is good as a plea either of payment or of accord and satisfaction.[86] To a suit by an administrator de bonis non a plea alleging, first, payment to the administrator who had afterward deposited it with defendant in his own name, and second, that such sum had been paid out on the orders of the administrator, is bad as setting up inconsistent defenses.[87]

Set-off. In an action by executors for an accounting on a contract, defendant, in pleading a set-off, is not required to allege affirmatively the facts showing that the demand is not affected fatally by any statute of limitations, or that the claim is valid or enforceable in the county court.[88] To entitle defendant to avail himself of an approved claim due him from the estate as an offset against the price of property sold him by the administrator, the answer must show that he is the only creditor entitled to the fund in which he seeks to apply the offset, or if other creditors are interested in the fund, it must state the extent and character of such other claims so that the court may determine whether such relief can be allowed.[89]

[§ 2117] **(3) Affidavit of Defense.** In an action by an executor for money loaned by testator to defendant, an affidavit of defense is sufficient which denies that the money was loaned at the special instance and request of defendant, and avers that testator proffered it to defendant knowing him to be in need of money, that the kindness was accepted, that defendant gave to testator valuable rings as security, and that the money was thereafter fully repaid and the rings restored to defendant.[90]

[§ 2118] **(4) Reply.** Where defendant sets up that the claim on which the action is based was

71. Peries v. Aycinena, 3 Watts & S. (Pa.) 64.

72. Austin v. Calloway, 73 W. Va. 231, 80 SE 361, AnnCas1916E 112.

73. Stallings v. Williams, 6 Ala. 509; Griffith v. Fischli, 4 Blackf. (Ind.) 427; Buckner v. Blair, 2 Munf. (16 Va.) 336.

[a] **In suit by an administrator de bonis non** against a debtor of the original intestate, the declaration must state the name of the previous administrator and aver that the money had not been paid to him or to the original intestate or to plaintiff. Griffith v. Fischli, 4 Blackf. (Ind.) 427; Vanblaricum v. Yeo, 2 Blackf. (Ind.) 322.

[b] **In an action by a surviving executor** for a debt due the testator in his lifetime, the declaration must aver not only that the debt was not paid to plaintiff, but also that it was not paid to the testator nor to either of the coexecutors. Buckner v. Blair, 2 Munf. (16 Va.) 336.

74. Cromwell v. Barnes, 58 Ind. 20 (it need not be specifically alleged that the note was not paid to decedent).

75. Dowing v. Carr, 38 SW 1044, 18 KyL 979 (this fact is obvious).

76. Sanford v. McCreedy, 28 Wis. 103.

77. Elliott v. Pollitzer, 24 S. C. 81.

78. Williams v. Moore, 9 Pick. (Mass.) 432.

79. Baker v. Baker, 4 Bibb (Ky.) 346.

80. Baker v. Baker, 4 Bibb (Ky.) 346 (as the note was given to the executors they could only sue thereon in their own right and consequently a plea that there was another executor could not abate the suit).

81. Adams v. King, 16 Ill. 169, 61 AmD 64.

82. Harte v. Houchin, 50 Ind. 327.

83. Holliday v. Strickland, 60 Ga. 150.

84. Bennett v. Bennett, 134 Ky. 444, 120 SW 372.

85. Bennett v. Bennett, 134 Ky. 444, 120 SW 372.

86. Hart v. Crawford, 41 Ind. 197.

87. Smith v. Culligan, 74 Mo. 387.

88. Rust v. Fitzhugh, 132 Wis. 549, 112 NW 508 (evidence of defendant's counterclaim was improperly excluded).

89. Alford v. Smith, 40 Tex. 77.

90. Fronefield v. Fry, 51 Pa. Super. 403.

settled with a special administrator, a reply denying that a special administrator was appointed is sufficient to put in issue the validity of the alleged order appointing the special administrator.[91]

[§ 2119] **(5) Demurrer.** In a suit on a note by an administratrix, an objection that the declaration does not allege to whom the note was made payable or that defendant owes plaintiff as administratrix is not available unless taken by demurrer.[91½]

[§ 2120] **b. On Claims against Estate—(1) Declaration or Complaint—(a) In General.** The declaration or complaint in an action on a claim against an estate need only state facts showing a prima facie claim,[92] but it must specify the particular claims or damages sought to be charged, and must convey definite information to the personal representative, and its allegations must be as certain and specific as the claim or statement thereof should be.[93] If, however, the complaint contains a definite statement of the claim and the amount thereof and enough to bar another action therefor, it is sufficient.[94] In an action on a money claim "due from deceased in his lifetime" a declaration which fails to allege that the money was due plaintiff is defective.[95] Under a statute providing for the payment by an administrator of claims which have either been admitted by the judge or allowed by the executor plaintiff, in an action on a claim founded on a judgment, in alleging that the probate court had ordered payment of his demand, alleged a sufficient establishment of his claim and it was immaterial that he did not sufficiently allege a judgment.[96] While debt cannot be brought against executors on a simple contract they cannot make the objection after verdict if they plead to the issue.[97]

Averment of nonpayment. Where the action is on a written instrument for the payment of money, the declaration must allege nonpayment by decedent and also by personal representative.[98] If the complaint alleges presentation to, and rejection of, a claim by an administrator the specific allegation of nonpayment is unnecessary as this fact will be presumed from a rejection of the claim.[99]

Averment that representative "detains" or "owes." Although in charging an administrator as to a debt of his intestate it is usual to allege that he detains, or owes and detains, the money, the omission of the word "detains," and the use of the word "owes" only, does not vitiate a declaration charging defendant as administrator, and setting forth facts imposing liability in a representative capacity only.[1]

On promise of one of several executors. A count against an executor on the death of testator alleging a promise by one of the executors who was then the only executor who had qualified and that afterward letters were granted to the other executors whereby an action had accrued against both as executors is good.[2]

Averment of assets. In suits on claims against an estate it is not necessary to allege that there are assets in the hands of the representative;[3] but where the action is against the widow and the executor on a contract by which the widow promised to pay a certain amount and authorized the executor to pay such amount to plaintiff out of her share of the husband's estate, the complaint was demurrable, as to the executor, where it failed to allege that he had in his hands, when the agreement was made or at any time thereafter, money or property belonging to the widow.[4] A bill in equity to enforce a debt against a decedent's real estate, which discloses that he left personal assets, is insufficient, where by statute the personal assets are made primarily liable for debts.[5]

Variance between complaint and claim presented. In an action for services, a variance between the complaint and the claim presented to the representative with respect to the exact nature of the services may be disregarded where not prejudicial to defendant.[6] Where a claim presented to an administrator sought payment on one half the principal and interest due on certain notes, of which the claimant and deceased were joint makers, and a complaint, filed after the rejection of the claim counted on the same notes, made the same demand for payment, and further stated that plaintiff became the owner of the notes by virtue of a decree of distribution of the estate of the payee, the complaint sufficiently appeared to be based on the same

91. Bombolis v. Minneapolis, etc., R. Co., 128 Minn. 112, 150 NW 385 [aff 241 U. S. 211, 36 SCt 595, 60 L. ed. 961, LRA1917A 86].

91½. Osborn v. Osborn, 114 Mass. 515.

92. Wiggs v. Hendricks, 147 Ga. 444, 94 SE 556; Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035.

93. Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 S 228 (a general averment which may include one or several claims, or many or all claims, and which describes one claim no more than another is not sufficient).

94. Gillespie v. Campbell, 149 Ala. 193, 43 S 28; Pittsburgh, etc., R. Co. v. Remington, 45 Ind. A. 561, 89 NE 614, 91 NE 249; Moore v. Gholson, 34 Miss. 372.

[a] **Illustration.**—A complaint in an action against an administrator, which alleges that there is due a specified sum on account made by decedent on a specified date, and that there is a specified sum due on an account stated between plaintiff and decedent on the same day, and which demands judgment for labor done for decedent and his wife during his lifetime at his request between designated dates, and which avers that the claim was verified and duly filed in the probate court, is sufficient as against the objection that the claim for money due by account fails to state for what the indebtedness was incurred, that it is indefinite as to whether the work was done for the administrator or decedent, and that it fails to show that the claim filed in the probate court was filed within twelve months after the granting of letters of administration. Gillespie v. Campbell, 149 Ala. 193, 43 S 28.

[b] **Where the particulars of a claim lie rather within defendant's knowledge** than plaintiff's, as where he has acknowledged in writing the receipt from decedent of "various claims" amounting to, etc., to be collected, in a suit on a receipt by the administrator, it is enough to set out the claims generally. Moore v. Gholson, 34 Miss. 372.

95. Merryman v. Ryder, 34 Md. 98.

96. State v. Bowden, 3 Ind. 504.

97. Carson v. Hood, 4 Dall. (Pa.) 108, 1 L. ed. 762 (it will be presumed that everything was done at the trial necessary to support the action, unless the contrary appears of record).

98. Junkins v. Sullivan, 110 Md. 539, 73 A 264.

99. Wise v. Hogan, 77 Cal. 184, 19 P 278.

1. Cameron v. Hicks, 65 W. Va. 484, 64 SE 832, 17 AnnCas 926.

2. Benjamin v. Taylor, 12 Barb. (N. Y.) 328 (on qualification of the second executor he acquired all the rights and subjected himself to all the liabilities of an executor).

3. Giles v. Perryman, 1 Harr. & G. (Md.) 164; Malin v. Bull, 13 Serg. & R. (Pa.) 441; Smyth v. Caswell, 65 Tex. 379.

[a] **In suing an executor administrating independently in the county court** on a claim against the testator it is unnecessary to allege the existence of assets. Smith v. Caswell, 65 Tex. 379.

4. Van Schoick v. Van Schoick, 76 N. J. L. 242, 69 A 1080 (the widow may have received her share of her husband's estate, or may not have been entitled to any part of such estate).

5. Dahlgren v. National Sav., etc., Co., 41 App. (D. C.) 201.

6. Wood v. James, 15 Cal. A. 253, 114 P 587 (claim for services as nurse and complaint for services as nurse "including the cooking, housekeeping, laundering and caring for" decedent, it being admitted by defendant that the services as nurse were of a value equal to the amount claimed for all services).

demand as the claim to satisfy the requirements of the statute that a claim should be presented before being sued on.[7]

Miscellaneous averments. Where a statute provides that an executor or administrator, if the estate is insolvent, may institute suit before a probate court, and by giving notice compel the creditors to exhibit their claims, to be adjudged and paid pro rata, and that no suit shall afterward be brought against the executor or administrator, unless plaintiff alleges that such executor or administrator has been guilty of fraud, negligence, or waste, such allegation, in a subsequent suit, must be contained in plaintiff's declaration.[8] A count stating that decedent in his lifetime was indebted to plaintiff in a certain sum and made a writing ordering his executors to pay such sum to plaintiff one year after decedent's death does not state a cause of action against the executors, where it contains neither a statement of a promise to pay nor a statement of a delivery of the paper, which was testamentary.[9] The fact that a complaint on a rejected claim presented to an administrator segregates and lumps certain classes of items in the claim is no ground of objection where the complaint does not increase or diminish the amount of any item, or allege any different contract as to liability on any of the items than appeared on the face of the claim.[10]

[§ 2121] **(b) Allegations as to Presentation, Verification, and Rejection of Claims—aa. Necessity.** According to the weight of authority, where the statutes require presentation of a claim against an estate to the personal representative, the declaration or complaint in an action on such claim must allege presentation,[11] and it has been held that this rule applies as well in suits in equity as in actions at law.[12] In some jurisdictions, however, it is held that no allegation of the presentation of claims is necessary,[13] the view being taken that nonpresentation is a matter of defense.[14] If the statute requires rejection of the claim before suit brought it is necessary in an action on a claim to allege that it has been rejected.[15]

Authentication. It has been considered that one suing on a claim against an estate must allege not only the presentation and rejection of his claim, but also the proper authentication of the claim when presented.[16] But the more general view is that, although the statute requires verification or an affidavit of the justice of a claim as a condition to bringing suit thereon, it is not necessary that the petition in an action on the claim allege that a proper affidavit had been presented to the personal representative.[17]

[§ 2122] **bb. Sufficiency.** In alleging presentment an averment that notice of the claim was given in writing is not equivalent to an averment that the claim was presented in writing and is in-

7. Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075.

8. Walker v. Johnson, 29 F. Cas. No. 17,074, 2 McLean 92.

9. Haines v. Rogers, 73 N. J. L. 51, 62 A 272.

10. Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075; Osborn v. Osborn, 114 Mass. 515.

11. Cal.—Reed v. Reed, 172 P 600; Morrison v. Land, 169 Cal. 580, 147 P 259; Burke v. Maguire, 154 Cal. 456, 98 P 21; Morse v. Steele, 149 Cal. 303, 86 P 693; Hearn v. Kennedy, 85 Cal. 55, 24 P 606; Hentsch v. Porter, 10 Cal. 555; Wills v. Booth, 6 Cal. A. 197, 91 P 759.

Conn.—Grant v. Grant, 63 Conn. 530, 29 A 15, 38 AmSR 379.

Ga.—Cook v. Cook, 18 Ga. A. 730, 90 SE 488.

Me.—Holbrook v. Libby, 113 Me. 389, 94 A 482, LRA1916A 1167; Stevens v. Haskell, 72 Me. 244; Maine Cent. Inst. v. Haskell, 71 Me. 487; Eaton v. Buswell, 69 Me. 552.

Mont.—Vanderpool v. Vanderpool, 48 Mont. 448, 138 P 772; Brown v. Daly, 33 Mont. 523, 84 P 883.

N. Y.—Equitable L. Assur. Soc. v. Wilds, 171 NYS 505 [aff 175 NYS 901 mem]; Noble v. Haff, 155 NYS 560.

N. D.—Mann v. Redmon, 27 N. D. 346, 145 NW 1031.

R. I.—Lewis Historical Pub. Co. v. Greene, 40 R. I. 309, 100 A 1017.

Tex.—Walters v. Prestidge, 30 Tex. 65; Fulton v. Black, 21 Tex. 424; Leverett v. Wherry, (A.) 15 SW 121.

[a] **Claims secured on homestead.**—Under a statute requiring all claims secured by liens or encumbrances on the homestead of a person deceased to be presented and allowed as other claims against the estate a complaint in an action on a note given by defendant and her deceased husband and secured on their homestead which asks for a personal judgment and a sale of the mortgaged property is bad on general demurrer, where it fails to allege that the claim had been presented for allowance. Hearn v. Kennedy, 85 Cal. 55, 24 P 606.

[b] **Excuse for nonpresentation.**—A petition in a suit against an executor on a claim which had not been presented for acceptance which fails to allege why it had not been so presented is insufficient to sustain a judgment against the executor. Rogers v. Harrison, 1 Tex. A. Civ. Cas. § 494.

[c] **Amendment.**—Where in an action against executors on a claim plaintiffs fail to allege that the claim was presented in writing to defendants as required by statute, the declaration may be amended. Maine Cent. Inst. v. Haskell, 71 Me. 487; Lewis Historical Pub. Co. v. Greene, 40 R. I. 309, 100 A 1017.

12. Grimball v. Mastin, 77 Ala. 553; Morgan v. Morgan, 68 Ala. 80; Foster v. Holland, 56 Ala. 474; Fretwell v. McLemore, 52 Ala. 124; Holbrook v. Libby, 113 Me. 389, 94 A 482 LRA1916A 1167.

[a] **In cases of purely equitable cognizance or in which purely equitable relief is sought** the cause of action is not a claim which is required by statute to be presented to the administrator before suit brought and therefore it is not necessary to allege presentation of such claim. Toulouse v. Bukett, 2 Ida. (Hasb.) 184, 10 P 26.

13. Rogers v. Mitchell, 1 Metc. (Ky.) 22; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Kittridge v. Folsom, 8 N. H. 98; Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

[a] **Bill for relief against fraudulent conveyance by decedent.**—An allegation of presentation of the claim to the executor is not necessary in order to establish the right to relief on a bill against the executors and the alleged fraudulent grantee of decedent's lands, where the allegations in the bill admitted by the demurrer show complainant to be a creditor of decedent. Rutherford v. Alyea, 53 N. J. Eq. 580, 32 A 70. See also Merchants', etc., Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 A 272 (to recover insurance premiums paid by decedent in fraud of creditors).

14. Holland v. Lowe, 101 Ky. 98, 39 SW 834, 41 SW 9, 19 KyL 97; Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

15. Cal.—Hentsch v. Porter, 10 Cal. 555.

N. Y.—Equitable L. Assur. Soc. v. Wilds, 171 NYS 505 [aff 175 NYS 901 mem].

N. D.—Mann v. Redmon, 27 N. D. 346, 145 NW 1031.

R. I.—Slocum v. Wilbour, 23 R. I. 97, 49 A 489.

Tex.—Walters v. Prestidge, 30 Tex. 65; Fulton v. Black, 21 Tex. 424.

W. Va.—Cameron v. Hicks, 65 W. Va. 484, 64 SE 832, 17 AnnCas 926.

[a] **An allegation of the executor's failure to take action on a claim presented** is proper to take the cause out of the statute requiring suit within a designated time after rejection of a claim. Slocum v. Wilbour, 23 R. I. 97, 49 A 489.

16. Whitmire v. Powell, (Tex. Civ. A.) 117 SW 433, 439 [rev on other grounds 103 Tex. 232, 125 SW 889] ("In the instant case plaintiff in error neither alleged, nor did he prove, that the claim sought to be established by him against the estate of Mrs. Pippin was properly authenticated. It was merely alleged that said claim had been presented and rejected, and neither by any statement made in defendants in error's brief or pleading, nor in any other way, does it appear that the claim was accompanied by the affidavit prescribed by the statute. The notes were introduced in evidence, and while the record shows that certain indorsements were made upon them, yet it does not appear that either of said notes was accompanied by the affidavit prescribed in article 2070 of the statute, nor does it appear that either had indorsed thereon or annexed thereto a memorandum in writing signed by the administrator of Mrs. Pippin's estate showing its rejection by said administrator. It follows that, in the absence of allegations and proof that plaintiff in error's claim, based on the notes set out in his answer, was duly authenticated as prescribed by the statute, he failed to make out such a case as authorized a judgment in his favor. Judgment having been rendered against plaintiff in error as to the establishment of his claim, no presumption can be indulged that said claim, when presented to the administrator and by him rejected, if it was so presented and rejected, was properly verified").

17. Rogers v. Mitchell, 1 Metc. (Ky.) 22; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Walker v. Nelson, 87 Miss. 268, 39 S 809; Jones v. Rich, 20 Mont. 289, 50 P 936; Dean v. Duffield, 8 Tex. 235, 58 AmD 108.

sufficient,[18] and a declaration which alleges presentation, but not presentation in writing, is demurrable.[19] The complaint should state the facts constituting the presentation.[20] Where the complaint alleged that plaintiff duly presented her claim to defendant as administratrix, which claim contained a copy of such promissory note, and was duly verified by the oath of plaintiff in the form prescribed by law, it was held that if this averment was not sufficiently definite and certain the defect would not be fatal to a judgment for plaintiff, in the absence of demurrer or any averment in the answer that the claim was not supported by proper evidence.[21] If the statute requiring presentation is also a statute of nonclaim and bars the right of action if the claim is not presented within the prescribed time, the declaration, complaint, or bill should show that it was filed in the prescribed time,[22] or state grounds taking the claim out of the operation of the statute;[23] but it has been held that if the declaration or complaint alleges that the claim was properly presented failure to allege that it was filed in the prescribed time,[24] or a defective allegation in this regard[25] will not render the complaint bad on general demurrer. A declaration which alleges the presentation of the claim to the administrator but fails to allege that the claim was filed in the office of the clerk of the probate court as required by statute is demurrable.[26] If sufficient compliance with the statute as to the affidavit filed with the claim is shown by the complaint, it is immaterial that the affidavit attached to the complaint does not comply therewith.[27] Where plaintiff sues individually and as executor of another estate, an allegation that he presented to defendant, as administrator, a claim duly verified according to law amounts to an allegation that plaintiff presented such claim both individually and as executor.[28] As regards demand, it is enough for the petition to allege the claim had been proved and payment demanded,[29] and it has been held that demand and default need not be alleged, the presentation of the claim and its rejection being sufficient.[30]

[§ 2123] **(c) Showing Set-Offs, Payments, and Credits.** A petition alleging that no part of the notes sued on had been paid except the payments which appeared as credits on the notes, the date and amount of which had been previously set out, and that the notes remained due and unpaid, was not objectionable for failure sufficiently to allege that all legal offsets, payments, and credits had been allowed.[31] Where plaintiff's rejected claim against decedent's estate admitted a set-off in favor of decedent for several loans made on the security of real estate and contracts to purchase real estate, the complaint in an action on such claim was insufficient for uncertainty where it failed specifically to set out the loans made, and the property transferred and contracts assigned as security, with sufficient fullness to acquaint defendant administrator and the court therewith.[32]

[§ 2124] **(d) Attaching Affidavit in Support of Claim.** It is sometimes required that one suing a decedent's estate for personal services rendered decedent in his lifetime shall produce an affidavit that the claim is just and nothing has been paid thereon.[33] Where the complaint, in an action against an administrator on a note of intestate, alleges that a certain sum is the only payment which has been made on the note, and that a certain sum is due on it, after allowing all just credits, and the affidavit of plaintiff attached to the complaint states that "the facts set forth in the foregoing complaint are true," there is a substantial compliance with a statute providing that the claimant against a decedent's estate shall append to his demand an affidavit stating that nothing has been paid on it, except what is credited thereon, and that the sum demanded, which shall be named, is justly due.[34] In action against an administratrix to recover money collected by her and her deceased husband on plaintiff's notes, an affidavit authenticating the claim, setting out its amount, that nothing has been paid in satisfaction, and that a stated amount was justly due, was sufficient.[35]

[§ 2125] **(e) Allegations of Breach of Contract.** It is not necessary to allege a breach of a contract which only matures on the death of one of the parties, where the action is to recover from decedent's representative nothing more than what is expressly stipulated in the contract.[36]

[§ 2126] **(f) Allegations of Solvency of Estate.** A petition against an independent executor need not allege the solvency of the estate.[37]

[§ 2127] **(g) Particular Actions or Claims—aa. Actions to Establish Unmatured Claims.** A complaint, alleging that decedent was indebted to plaintiff for unmatured notes, that the administra-

18. Maine Cent. Inst. v. Haskell, 71 Me. 487.

19. Gray v. Chase, 115 Me. 350, 98 A 940.

20. Janin v. Browne, 59 Cal. 37 (a complaint alleging that the claim sued on was presented to the administrator within the time limited and that a copy of the claim was given to him with the verification annexed, together with the indorsement thereon which was also attached to the complaint, sufficiently alleges presentation of the claim).

21. Chase v. Evoy, 58 Cal. 348.

22. Page v. Bartlett, 101 Ala. 193, 13 S 768; Owens v. Corbitt, 57 Ala. 92; Dexter Sav. Bank. v. Copeland, 72 Me. 220.

[a] **Declarations held sufficient.**—(1) The allegation that plaintiff first presented to the executor his claim in writing and demanded payment thereof more than thirty days before the commencement of the action and within two years after notice given by the executor of his appointment is good. Dexter Sav. Bank v. Copeland, 72 Me. 220. (2) A complaint in an action against an administrator, which alleges that there is due a specified sum on an account made by decedent on a specified date, and that there is a specified sum due on an account stated between plaintiff and decedent on the same day, and which demands judgment for labor done for decedent and his wife during his lifetime at his request between designated dates, and which avers that the claim was verified and duly filed in the probate court, is sufficient as against the objection that the claim for money due by account fails to state for what the indebtedness was incurred, that it is indefinite as to whether the work was done for the administrator or decedent, and that it fails to show that the claim filed in the probate court was filed within twelve months after the granting of letters of administration. Gillespie v. Campbell, 149 Ala. 193, 43 S 28.

23. Owens v. Corbitt, 57 Ala. 92; Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206.

24. McCann v. Pennie, 100 Cal. 547, 25 P 158.

25. Wise v. Hogan, 77 Cal. 184, 19 P 278.

26. Roberts v. White, 32 R. I. 185, 78 A 497, AnnCas1912B 793 (but the court may permit amendment to remedy defect).

27. Lasker-Morris Bank, etc., Co. v. Gans, 132 Ark. 402, 200 SW 1029.

28. Harvey v. Pocock, 92 Wash. 625, 159 P 771.

29. Moore v. Pierce, 160 Ky. 107, 169 SW 620.

30. Clark v. Boltz, 29 Oh. Cir. Ct. 665.

31. Dashiell v. Moody, 44 Tex. Civ. A. 87, 97 SW 843.

32. Hibbard v. Clark, 39 Nev. 230, 156 P 447.

33. Langrell v. Wright, 25 Del. 311, 80 A 235.

34. Wilkerson v. Eads, 97 Ark. 296, 133 SW 1039.

35. Easley v. Rowe, (Ark.) 210 SW 145.

36. Bunting v. Hutchinson, 5 Ga. A. 194, 63 SE 49.

37. Hartz v. Hausser, (Tex. Civ. A.) 90 SW 63 (solvency is presumed).

tor has rejected the claim, and that the notes will not mature for several years, states a cause of action in equity, entitling claimant to have the notes declared valid.[38]

[§ 2128] **bb. Actions Based on Fraud.** Where the gist of an action against an administrator is a fraud perpetrated by his intestate, the fraud must be alleged and proved.[39]

[§ 2129] **cc. Claims for Money Lent.** In an action by one who had loaned money to executors to pay a note renewing one executed by decedent, praying that the land be sold to pay the judgment, and alleging that the money was loaned at request of legatees, where there was no allegation that the debts had been paid or the estate was insolvent, or setting forth how such agreement could bind any creditors, the petition did not state a cause of action.[40]

[§ 2130] **dd. Claims for Money Paid.** In assumpsit against an executor for money paid by a cosurety of the testator after his death the declaration should set forth the facts specially.[41] A count for money paid out and expended for the use of a person designated as administrator of another, deceased, is bad because the administrator is personally liable and the declaration should be so drawn.[42]

[§ 2131] **ee. Claims for Money Received.** A count for money had and received by a person designated as administrator of another, deceased, is bad because the representative is personally liable.[43]

[§ 2132] **ff. Claims for Services.** In a petition to establish a rejected claim for services rendered an estate under contract the claimant must allege the contract, rendition of the services, and that they were for the benefit of the estate, and that the price charged was reasonable.[44] Where the action is by one who stood in a family relation to decedent so as to raise a presumption that the services were gratuitous,[45] the complaint must allege a promise on the part of decedent to pay therefor or facts from which such a promise would be implied.[46] In an action against executors to recover commissions on the sale of lands under a contract made with them an allegation that defendants are executors, independent of the control of the county court, and that there is no restriction in the contract as to the sale of the lands "save that it was requested by defendants that they should be sold as soon as practicable for cash, as provided by the will of defendants' testator, at a fair price," is sufficient on general demurrer as to the power of the executors to make the contract.[47] The complaint in an action against an executor for services rendered decedent and his wife states a cause of action where it alleges that the services were rendered under an agreement with decedent, plaintiff's father, that after she became twenty-one years of age she should keep house and care for her parents, and, in consideration thereof, her father would devise the homestead in fee to her; that he executed such a will, which plaintiff saw, and which induced her to remain at home and care for her parents for more than twelve years, but that shortly before his death her father, decedent, destroyed such will and executed another, which did not devise the property to plaintiff, leaving his estate indebted to her in the sum named.[48] In an action against an executor for personal services rendered to decedent, allegations as to the amount of decedent's estate are immaterial, and should be stricken out on motion.[49] Where the petition in an action against an administrator seeking a personal judgment on account of care and support furnished to decedent for a number of years set forth an agreement under which such care and support were to be furnished during the remainder of her life in consideration of a house and lot being conveyed to plaintiffs, and that decedent died the owner of such house and lot and intestate, the action was for a quantum meruit and the references in the petition to the agreement or the contract were surplusage.[50]

Amendment. One suing on a claim against an estate for services rendered may amend his complaint so as to increase the amount sought to be recovered to an amount greater than the claim presented without changing the claim from that originally presented.[51]

[§ 2133] **gg. Claims on Joint Obligations of Decedent and Others.** Since the surviving obligor of a joint obligation is primarily liable, a complaint against the executors of his coöbligor must allege the insolvency of the surviving obligor;[52] but an averment that he is entirely insolvent is sufficient without alleging the issue and return unsatisfied of an execution against him.[53]

[§ 2134] **hh. Claims on Joint and Several Obligations of Decedent and Others.** A declaration against a personal representative on a joint and several demand against a decedent and another may set forth the demand as if it had been a cause of action against decedent alone.[54]

[§ 2135] **ii. Claims for Funeral Expenses.** A complaint in an action for funeral expenses of the decedent must allege that the amount sought to be recovered is a reasonable amount in view of all the circumstances.[55]

[§ 2136] **jj. Claims Barred by Limitations.**

38. Bankers' Surety Co. v. Meyer, 205 N. Y. 219, 98 NE 399, AnnCas 1913D 1218 [aff 146 App. Div. 867, 131 NYS 857].

39. Grubb v. Chase, 158 Cal. 352, 111 P 90.

40. O'Kelly v. McGinnis, 141 Ga. 379, 81 SE 197.

41. Bachelder v. Fiske, 17 Mass. 464.

42. Sterrett v. Barker, 119 Cal. 492, 51 P 695; Sibbit v. Lloyd, 11 N. J. L. 163.

43. Sibbit v. Lloyd, 11 N. J. L. 163.

44. Doolittle v. McConnell, (Cal.) 174 P 305; Anderson v. Aikins, 99 Nebr. 630, 157 NW 334; Adriance v. Crews, 45 Tex. 181.

45. See supra § 881.

46. Jeffries v. Ferree, 175 Ky. 18, 193 SW 646.

47. O'Brien v. Gilleland, 79 Tex. 602, 15 SW 681.

48. Eppert v. Gardner, 48 Ind. A. 188, 93 NE 550.

49. McGrews v. O'Donnell, 92 SW 301, 28 KyL 1366.

50. Clark v. Boltz, 29 Oh. Cir. Ct. 665.

51. Field v. Field, 77 N. Y. 294.

52. Barnes v. Brown, 130 N. Y. 372, 29 NE 760; Barnes v. Seligman, 55 Hun 339, 8 NYS 834.

53. Stahl v. Stahl, 2 Lans. (N. Y.) 60.

54. Citizens' Trust, etc., Co. v. Young, 75 W. Va. 241, 83 SE 1007.

55. Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P 922, 52 LRANS 1152, AnnCas1915D 742.

"In order to state a cause of action in such a case, the complaint must contain proper allegations designed to show that the amount sought to be recovered is a reasonable and proper charge against the estate in view of all the circumstances, so far as they could with reasonable diligence be ascertained at the time of the burial. (Woerner on Administration, 2d ed. sec 359.) The complaint before us contains no such allegations. All that is alleged is that the plaintiff rendered services and supplied materials for the funeral and burial of the body and 'that the reasonable value of such services and merchandise was and is the sum of $1110.' This means no more than it says,—namely, that the services and merchandise furnished were worth the amount named. It may well be that they were fairly worth $1110, but that at the same time a charge of $1110 would be greatly excessive for the estate upon which the burden of this payment is sought to be imposed. The plaintiff is not seeking to recover upon a contract made by the decedent, but is endeavoring to charge against the estate the

Plaintiff may, for the purpose of avoiding the statute of limitations, plead a promise of the representative to pay, in consideration of the existence of the indebtedness, and it is not necessary to allege that such promise was made in consideration of assets.[56]

[§ 2137] **(2) Plea or Answer—(a) In General.** Non est factum is a good plea in an action against an executor or administrator on an obligation of deceased.[57] In an action on a promise of decedent a plea of not guilty by his representative is insufficient;[58] and a plea of outstanding judgments recovered against decedent jointly with other persons must allege that decedent was the survivor.[59] Where a claim is not presented to the commissioners of an insolvent estate in accordance with a statute prohibiting suit thereon, unless the claim has been so presented, objection for nonpresentation may be taken by plea in bar, or by a brief statement, and need not be taken by a plea in abatement.[60] In an action against an administrator on a nonnegotiable written instrument under seal, payment of which was to be made by the administrator after the maker's death, a plea alleging that the instrument was executed by the maker for fraudulent purposes, and the payee and administrator knew of the fraudulent intention when the writing was executed, is good.[61] It has been held that in an action against an executor a plea based upon the want of an affidavit verifying the existence of the debt claimed is not good.[62] If the laws of a state give a preference to its citizens in the payment of the debts of the deceased, the representative if sued by a foreign creditor should plead such preference,[63] and if he wishes to avail himself of a statutory provision that suit to establish a money demand against the estate must be brought in the county where the estate is being administered he must in order to assert his privilege state in what county the estate is being administered.[64] The statutes sometimes make it unnecessary for defendant to plead any matter by way of answer, except a set-off or counterclaim.[65] Where in an action against an administrator on a former judgment against decedent the complaint did not allege and it did not appear that intestate had any real estate, a demurrer to the answer on the ground that it did not state what disposition if any had been made of the real estate is insufficient,[66] and where in such action the answer states the date and terms of the sale of decedent's property by the administrator and alleges that the purchase money was paid when due, it is not demurrable for failure to state at what time the money was received.[67]

[§ 2138] **(b) Allegations as to Failure to Give Notice of or Present Claim.** The objection that plaintiff has failed to comply with the statutory requirement as to notice or presentment of his claim to the personal representative as a prerequisite to bringing suit thereon cannot be taken by plea in abatement but only by plea in bar, as a compliance with the statute is essential to the right of recovery.[68] Under statute, it has been held that evidence of noncompliance with the statutory requirement may be given either under a special plea or a brief statement under the general issue;[69] and, independent of any statutory provisions to that effect, it has been held that, where the general issue is pleaded, plaintiff must in order to entitle himself to a verdict prove that he has exhibited his demand to the personal representative before bringing suit.[70]

[§ 2139] **(c) Payment or Settlement.** In an action against an administrator for board and cash furnished decedent, a plea of payment is insufficient where it avers that defendant cannot allege when and to whom payment was made for want of sufficient information, except that decedent habitually paid his board monthly and was prompt to pay what he owed at maturity.[71] A plea alleging that the administrator settled the claim sued on is not bad for failing to allege that he received a reasonable amount in satisfaction of the claim and that the settlement was authorized by the court.[72]

[§ 2140] **(d) Set-Off.** If, in defense to an action ex contractu, brought against an administrator, he desires to plead by way of set-off that rent on land belonging to the estate he represented was illegally collected by plaintiff, he must allege facts from which the law will imply an obligation on

amount of an expenditure incurred on behalf of the estate. The complaint shows that some expenditure was necessary and proper. It does not show what amount was necessary or proper and for that reason justly chargeable against the estate. For these reasons we think the demurrer should have been sustained, with leave to plaintiff to amend its complaint." Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 101, 141 P 922, 52 LRANS 1152, AnnCas1915D 742.

56. Whitaker v. Whitaker, 6 Johns. (N. Y.) 112.

57. Langford v. Frey, 8 Humphr. (Tenn.) 443.

[a] **Verification.** — (1) Where the complaint is founded on an instrument alleged to have been executed by decedent, the administrator need not deny decedent's signature on oath. Heath v. Lent, 1 Cal. 410; Knight v. Knight, 9 Fla. 283; Hicks v. Northwestern Mut. L. Ins. Co., 166 Iowa 532, 147 NW 883, LRA1915A 872. Contra Vincent v. Pitman, 1 Mo. 712. (2) But where a statute provides that one sued as maker of a note signed in his name by agent cannot deny the agency, except by plea verified by oath, an administrator denying that an agent had authority to sign his intestate's name to a note must do so on oath. Ellis v. Planters' Bank, 8 Miss. 235.

[b] **A rule of court that the execution of the note may be taken as admitted** at the trial unless defendant or someone in his behalf shall deny its execution on oath does not apply to executors and administrators, because in no ordinary case would it be possible for a personal representative to set out on oath in specific detail the nature and incidents of a transaction to which his decedent had been a party and to which he was a stranger. Perkins v. Humes, 200 Pa. 235, 49 A 934.

58. Morrison v. Kelly, 6 Blackf. (Ind.) 224.

59. Douglass v. Satterlee, 11 Johns. (N. Y.) 16.

60. Dillingham v. Weston, 21 Me. 263.

61. Junkins v. Sullivan, 110 Md. 539, 73 A 264.

62. Straton v. Hudson, 28 N. B. 81.

63. De Sorby v. De Laistre, 2 Harr. & J. (Md.) 191, 3 AmD 555.

64. McKie v. Echols, 1 Tex. A. Civ. Cas. § 1282.

65. Kennedy v. Swisher, 34 Ind. A. 676, 73 NE 724.

66. Lee v. Beaman, 73 N. C. 410.

67. Lee v. Beaman, 73 N. C. 410.

68. Rawson v. Knight, 71 Me. 99; Eaton v. Buswell, 69 Me. 552.

[a] **Sufficient pleas illustrated.** — (1) Where, in a suit against executors upon a claim against decedent, plaintiff alleges in his complaint that on Dec. 9, 1881, his claim duly verified was duly presented to defendants as executors, for allowance, and defendants "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of plaintiff for the sum of thirty six thousand dollars . . . or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance," the denial, although open to criticism, is sufficient to raise an issue. Rowland v. Madden, 72 Cal. 17, 20, 12 P 226, 870. (2) Where the complaint alleges that the claim duly verified had been presented, presentation is sufficiently denied by an affirmative allegation in the answer that the claim was not presented or verified as required by answer. Derby v. Jackman, 89 Cal. 1, 26 P 610.

69. Rawson v. Knight, 71 Me. 99.

70. Kittredge v. Folsom, 8 N. H. 98; Mathes v. Jackson, 6 N. H. 105; Dakota Nat. Bank. v. Kleinschmidt, 33 S. D. 132, 144 NW 934.

71. Ginn v. Carithers, 14 Ga. A. 298, 80 SE 698.

72. Loveman v. Birmingham, R., etc., Co., 149 Ala. 515, 43 S 411.

the part of plaintiff to account for the money so collected as money had and received by him to defendant's use.[73]

[§ 2141] **(e) Right to Delay Answer.** A statutory right of an executor or administrator to delay answer "until the estate in his hands is sufficiently administered to enable him to answer the same" must be asserted by proper plea or motion, and it is not incumbent on plaintiff to show the condition of the estate in his hands.[74]

[§ 2142] **(3) Affidavit of Defense.** In an action on a contract made by decedent, his personal representative is not required to file an affidavit of defense as to matters arising before decedent's death.[75] An executor will not be required to file an additional affidavit of defense, where plaintiff is permitted to amend his statement in an action on several notes by alleging that all the notes were received before maturity instead of alleging that all the notes except one were received before maturity.[76]

[§ 2143] **(4) Demurrer.** The absence of an averment, required by statute, that the claim has been duly presented, may be taken advantage of by general demurrer.[77]

[§ 2144] **c. To Set Aside Fraudulent Conveyances.** In a suit by a personal representative to set aside a fraudulent conveyance of decedent the bill must state a case clearly within the statute under which he claims his authority to sue.[78] It must show that suit is brought within the period fixed by statute for instituting suits of this character,[79] and that the suit is brought on behalf of creditors;[80] and if the statute requires a request from creditors to bring the suit, the bill must also allege such request.[81] The petition must state substantially the same facts as the decedent's creditors would have been required to allege if they had sued to set aside the conveyance,[82] and must of course show that the conveyance was in fraud of creditors.[83] It should also show that there is a deficiency of assets to pay claims against the estate [84] or that the estate is insolvent;[85] and if the statute requires a suggestion of insolvency this also must be alleged.[86] The names of the creditors defrauded by the conveyance need not be alleged.[87]

Pleas and answers. It is not a sufficient answer to a suit of this character that other property conveyed by decedent is equally liable with that conveyed to defendant.[88]

[§ 2145] **d. To Set Aside Gifts.** Where an administrator sues in behalf of creditors to recover a gift made by his intestate in contemplation of death, it sufficiently appears that there are creditors interested in having the property recovered where it is alleged that there are outstanding and unpaid claims, which have been duly presented, allowed by the administrator, and approved by the county judge, and that there is no property other than that in possession of defendants out of which they can be satisfied.[89]

[§ 2146] **e. To Avoid Sales or Transfers for Fraud on Decedent.** In an action by an administrator to avoid a sale for fraud practiced by the buyer on the intestate, an allegation that the intestate was induced to make the sale in fraud of his creditors does not make the action one by the administrator as trustee for the creditors.[90] A complaint by a special administrator, alleging that defendants by fraud and undue influence secured the execution of a contract by the parents of one of them, whereby they transferred to them all their property, on the pretended consideration of defendants' promise to support them, and praying cancellation thereof and an accounting, does not state a cause of action under a statute affording creditors of a decedent the means of following property fraudulently transferred by decedent, and hence the requirements of such statute are inapplicable.[91]

[§ 2147] **f. To Recover Real Estate.** In ejectment by an executor the declaration or complaint must show his title to the premises.[92] Where an administrator sues to recover lands from a purchaser holding under the heir at law and seeks to avoid that sale on account of the necessity of paying debts, the debts and the creditors must be set forth

73. De Laperriere v. Bowles, 127 Ga. 18, 55 SE 1030.

74. Morrison v. Hilburn, 126 Ga. 114, 54 SE 938.

75. Brookville Title, etc., Co. v. Beaver Trust Co., 258 Pa. 139, 101 A 944.

76. Ludwig v. Dearborn, 8 Pa. Dist. 683.

77. Maine Cent. Inst. v. Haskell, 71 Me. 487.

78. Lant v. Manley, 71 Fed. 7; Crittenden v. Basom, 46 Mich. 33, 8 NW 573; Boxly v. McKay, 4 Sneed (Tenn.) 286; Borchert v. Borchert, 132 Wis. 593, 113 NW 35.

79. Cox v. Hunter, 79 Ind. 590.

80. Boxly v. McKay, 4 Sneed (Tenn.) 286.

81. Lant v. Manley, 71 Fed. 7 [mod on other grounds 75 Fed. 627, 21 CCA 457].

82. Cox v. Hunter, 79 Ind. 590.

83. Threlkel v. Scott, 89 Cal. 351, 26 P 879; Cox v. Hunter, 79 Ind. 590; Crittenden v. Basom, 46 Mich. 33, 8 NW 573; Walker v. Pease, 17 Misc. 415, 41 NYS 219.

[a] **Fraudulent intent will not be inferred** (1) from facts set out in the complaint that the conveyance was voluntary and that intestate was insolvent. Threlkel v. Scott, 89 Cal. 351, 26 P 879. (2) A general allegation that decedent delivered the deed in escrow for the purpose of distributing the property among his heirs without will or administration and reserving the power to destroy the instruments is not sufficient to show fraud. Crittenden v. Basom, 46 Mich. 33, 8 NW 573.

[b] **Amendments.**—Where an administrator sues to set aside certain conveyances by his intestate on the ground that they were procured by fraud, he may at the trial be allowed to amend his bill and claim relief on the ground of the insolvency of the estate and that consequently the conveyances were fraudulent as to creditors. Clark v. Clough, 65 N. H. 43, 23 A 526.

84. Ackerman v. Merle, 137 Cal. 157, 69 P 982; Radabaugh v. Silvers, 135 Ind. 605, 35 NE 694; Kellogg v. Beeson, 58 Mich. 340, 25 NW 300.

[a] **Allegation sufficient to show deficiency.**—(1) A complaint is sufficient where it alleges that claims allowed against the estate amount to five hundred dollars and claims pending for two hundred and fifty dollars more and that the personal estate is only fourteen dollars without further alleging that the claims are valid. Radabaugh v. Silvers, 135 Ind. 605, 35 NE 694. (2) A complaint alleging a deficiency of assets to meet the payment of claims is sufficient, at least in the absence of a special demurrer, without alleging that all the property so fraudulently conveyed was needed to pay the debts and that between the time of the conveyance and the institution of the suit the debtor remained without sufficient property to satisfy the creditors. Ackerman v. Merle, 137 Cal. 157, 69 P 982.

[b] **Failure to show formal presentation or allowance of claims.**—Where the grantor's administrator set out, in an action to reform a deed, that claims were asserted against the estate, and that its assets were insufficient to meet them, the petition was not demurrable because it showed that the demands had not been allowed or formally exhibited. McGuire v. Davis, 95 Kan. 486, 148 P 755.

85. Boxly v. McKay, 4 Sneed (Tenn.) 286.

86. Boxly v. McKay, 4 Sneed. (Tenn.) 286.

87. Peterson v. Tull, 85 Wash. 546, 148 P 598.

88. Kaufman v. Elderd, 154 Ind. 157, 56 NE 215.

89. Bright v. Ecker, 9 S. D. 192, 68 NW 326.

90. Curry v. Brockway, 12 Daly (N. Y.) 17.

91. Borchert v. Borchert, 132 Wis. 593, 113 NW 35.

92. Sturgeon v. Underwood, 2 SW 655, 8 KyL 606; Martin v. Spurrier, 23 Oh. Cir. Ct. 110.

[a] **Complaint held sufficient.**—In an action for possession of real estate brought by the executors of a will it is sufficient to allege that they have a legal estate in the premises, and are entitled to the immediate possession thereof, and that defendant unlawfully keeps them out of possession. Martin v. Spurrier, 23 Oh. Cir. Ct. 110.

in his bill in order that defendant may be put on notice as to the facts on which his property is sought to be condemned.[93]

[§ 2148] **g. To Quiet Title.** Under the statute passing to the personal representative of a decedent the right of possession of his real estate for the purpose of administration, an allegation in an action by an administrator to quiet title that defendants claim adversely to the heirs of his intestate is equivalent to an allegation of a claim adverse to the administrator and is a sufficient pleading of such adverse claim, although there is no direct allegation of a claim adverse to plaintiff as administrator.[94]

[§ 2149] **h. To Foreclose Mortgages.** On a bill by an executor to foreclose a mortgage, it must be alleged that the mortgage is part of the estate of decedent.[95] It is not necessary to allege that plaintiff is the owner and holder of the mortgage, but it is sufficient that it is in his possession as executor and is on its face made to decedent.[96] If it is sought to foreclose a mortgage given by an executor on testator's property, an allegation that "the will authorized and directed said executor to administer upon said estate without the intervention, order, or advice of any court and to fully execute all its terms and provisions" sufficiently shows that its terms dispense with letters of administration;[97] and his power to make the mortgage is shown where it appears from the complaint that it was decedent's intent that the estate should be administered without the aid of any court, that the executor had performed all the terms and conditions of the will, had executed the note and mortgage, and that his action therein had been fully confirmed by the court.[98] If one suing as executrix to recover the surplus proceeds of a foreclosure sale of property of the estate is without power to maintain such suit, this fact is apparent on the face of the complaint and must be taken advantage of by demurrer or the objection is waived.[99]

Pleas and answers. In proceedings to foreclose a mortgage, or in any action asserting a charge on the land, commenced in the courts of the Indian Territory before statehood, the plea of the statute of nonclaim was not available, nor was any affidavit of nonpayment or justness necessary.[1]

[§ 2150] **i. To Foreclose Mechanics' Liens.** Where the complaint in mechanic's lien proceedings against the administrator of the owner of the premises seeks to recover on a contract with the owner in his lifetime for the performance of work and labor upon, and the furnishing of material for, a building, and to enforce a mechanic's lien, a plea, averring a decree of the probate court declaring the estate to be insolvent after suit was brought, although not an answer to the part of the complaint seeking a lien and not a bar to the part seeking a judgment against the personal property of decedent which might come into the hands of the administrator, is something more than mere suggestion, and should be permitted to remain on the files as a plea to protect the administrator.[2]

[§ 2151] **j. For Injuries to Land.** Where an executor or administrator sues for injuries to decedent's land after his death, the facts on which the representative's right to sue depends must be alleged.[3] Where the action is brought under a statute vesting the representative with control of the land during the settlement of the estate, an allegation that plaintiff was administrator, etc., and in lawful possession of the land sufficiently alleges that the injury occurred during the settlement of the estate and that the land belongs to the estate of which he was administrator.[4] Where, in trespass, plaintiff charges negligence on the part of the defendants as executors and as individuals and jointly as executors and individuals, but does not set forth facts in a statement of claim informing defendants in which character they are charged, a demurrer to the statement will be sustained.[5]

[§ 2152] **k. For Specific Performance.** On a bill against an executor and devisees to compel the conveyance of property which testator contracted to convey upon the execution of certain notes, performance of conditions precedent on the part of complainants is sufficiently shown by alleging generally that they are ready to execute the notes upon receiving the conveyance.[6] A bill against an executor for specific performance defective for failure to allege petitioner's performance of the agreement on his part or his readiness and willingness to perform may be amended.[7] In an action by an executor to recover on notes given decedent as payments for land purchased the complaint must show the right of plaintiff to make a deed.[8]

[§ 2153] **l. Based on Misfeasance or Malfeasance of Representative.** A declaration in debt for a devastavit should allege that goods and chattels sufficient to pay the debt came to the hands of the representative to be administered,[9] and the charges of waste, etc., must be specific;[10] general charges are insufficient.[11] In a complaint against an executor for neglecting to inventory and sell certain prop-

93. Seabrook v. Brady, 47 Ga. 650.

94. Berry v. Howard, 26 S. D. 29, 127 NW 526, AnnCas1913A 994.

95. Peck v. Mallams, 10 N. Y. 509.

96. Locke v. Klunker, 123 Cal. 231, 55 P 993.

97. Miller v. Borst, 11 Wash. 260, 39 P 662.

98. Miller v. Borst, 11 Wash. 260, 39 P 662.

99. Warfield v. Hume, 91 Mo. A. 541.

1. International Bank, etc., Co. v. Tolbert, 28 Okl. 595, 115 P 601.

2. Lavergne v. Evans Bros. Constr. Co., 166 Ala. 289, 52 S 318 (this should be done so that, if judgment should be rendered on other issues against the administrator, execution could not issue, and the judgment would have to be certified for allowance to the probate court).

3. See cases infra this note.

[a] **Illustrations.**—(1) The pleading should show that the will purports to devise the land in question since otherwise it would descend to the heirs at law. Pott v. Pennington, 16 Minn. 509. (2) If the administrator's right to sue depends on the insolvency of the estate this fact must be alleged. Forist v. Androscoggin River Impr. Co., 52 N. H. 477.

4. Smith v. Moodus Water Power Co., 33 Conn. 460.

5. Skivington v. Richards, 208 Pa. 385, 57 A 768.

6. Deglow v. Meyer, 15 SW 875, 12 KyL 974 (it was not necessary to allege an offer to perform by a tender of the notes to executor as he had no power to convey).

7. Chess' App., 4 Pa. 52, 45 AmD 668.

8. Acton v. Walker, 74 SW 231, 24 KyL 2377.

9. Griffith v. Com., 1 Dana (Ky.) 270 (an allegation that the estate of intestate to a large amount came into the possession or knowledge of the administrator sufficient to pay, etc., is insufficient because he may have knowledge of goods of decedent sufficient to pay the debt and yet be unable to reduce them to possession).

10. Davis v. Yerby, Sm. & M. Ch. (Miss.) 508.

[a] **Allegation sufficient to show devastavit.**—A bill against an administrator averring that he received money arising from a sale of decedent's property, which he did not appropriate to any legal purpose, and that the complainants, who were judgment creditors, made frequent demands on him to pay their claims which he refused after the return nulla bona of executions issued on their judgments sufficiently alleges a devastavit without further averring that the assets of the estate were misapplied and wasted by the administrator. Whitfield v. Evans, 56 Miss. 488.

11. Davis v. Yerby, Sm. & M. Ch. (Miss.) 508.

erty, it must be expressly averred that the property has come to his knowledge.[12] If a distributee seeks to charge an administrator after final settlement for waste, the petition must allege that there are no creditors and that the property alleged to have been wasted was not applicable to the payment of debts.[13] A complaint, in an action by heirs against the administrator for loss of lands through defendant's failure to pay taxes, or redeem, is demurrable where there is no allegation of negligence and an unassailed discharge of the administrator.[14] Where the complaint charges that a coexecutor who had been removed purchased stock sued for in his own name with the funds of the estate which he pledged for his own debt, and alleges that such executor and his wife transferred their interest in the stock of plaintiff, the complaint should also allege the date of such transfer.[15] The complaint of the administrator of a life tenant under a will to recover rents and profits belonging to her, but converted to his own use by one named in the will as executor but who did not qualify as such, need not allege that the estate of testator had been settled and his debts paid.[16] Where an administrator sells land of the estate subject to a mortgage, but fails to take a bond from the purchaser to pay the mortgage as he is required by statute to do, a complaint by the widow against him for damages for neglect to take a bond does not state a cause of action if it fails to allege that the whole property was worth more than the amount of the mortgage.[17] In an action to subject an executor to a penalty for failure to file the will within the time prescribed by statute the declaration need not allege that the omission was intentional,[18] but it must be alleged in the language of the statute that the neglect was without "just excuse made and accepted by the judge of probate for such delay."[19] In an action by an administrator de bonis non to recover property alleged to have been illegally sold by his predecessor or, if the sale is valid, to foreclose the statutory mortgage for the price, the bill must allege the amount of money to be recovered or an excuse must be given for not doing so.[20] A bill against an administrator for not collecting accounts alleged to have been solvent at the time he received them cannot be so amended as to include a claim for the balance of the year's support, which had been set aside for testator's children, especially as it had been allowed and approved by the ordinary of the county for that amount.[21]

Pleas and answers. In an action against an executor suggesting a devastavit the plea of nil debet is good as well as that of not guilty.[22] In trespass quare clausum by the widow against the administrator a plea of justification "that he entered to remove the goods of the intestate" must allege that the goods of intestate were on the premises.[23] In an action to recover property bequeathed to plaintiff and alleged to be unlawfully detained by the executor the answer may properly set up facts showing an excuse for the detention of the property.[24] In an action by heirs to recover land illegally purchased by the representative at a sale thereof to pay debts, he cannot without pleading it avail himself of the defense that the heirs were estopped by their conduct from attacking the validity of the purchase.[25]

[§ 2154] **m. Based on Conversion of or Injuries to Personal Property.**[26] If a personal representative brings an action based on the conversion of personal property belonging to the estate the declaration or complaint must describe the property.[27] An allegation that defendant "took and carried away certain chattels of the plaintiff's intestate" sufficiently alleges property in the intestate,[28] and an allegation that the estate owned and possessed the property is equivalent to an allegation that the administrator owned and possessed it.[29] The alternative averment that the property was received "by the decedent or by the defendants for his use" is good.[30] A complaint in an action by an administrator against decedent's sole heir, charging defendant with the sale of real estate belonging to decedent, and that a certain sum is due from defendant to complainant on account of moneys "and other personal property" wrongfully converted by defendant, does not by the use of the words quoted sufficiently allege that decedent owned any personal property at the time of his death.[31] A complaint alleging that decedent held in trust for plaintiff certain securities which he bequeathed by his will and that his executors had converted them and although requested have refused to account to plaintiff for them, states a good cause of action against the executors.[32] A bill for the recovery of bonds deposited to secure the performance by the pledgor of a contract with the pledgee cannot be maintained against the administrator of the pledgee, where it is not alleged that the bonds had ever come into the administrator's possession.[33] A petition in replevin, which describes defendant as executrix, which alleges the death of decedent, the granting of letters testamentary to defendant, and her qualifying as executrix and acting as such, and which alleges plaintiff's ownership of the property in controversy, and defendant's refusal to surrender it on demand, when considered in connection with a summons directed against defendant as executrix, states a cause of action against defendant as executrix, and not individually.[34] A complaint in action in claim and delivery, or replevin, against an administrator both personally and in his representative capacity, which charged that defendant, having obtained the property from plaintiff by false represen-

[a] **Where the civil law obtains,** an action by a creditor of a testator against his executor charging him with a devastavit without alleging proceedings to compel defendant to exhibit a tableau of distribution cannot be maintained. McGill v. Armour, 11 How. (U. S.) 142, 13 L. ed. 638.

12. State v. Scott, 12 Ind. 529.

13. Foster v. Kenrick, 71 Mo. 422.

14. Winters v. Ellefson, 128 Minn. 3, 150 NW 171.

15. Ruggles v. O'Brien, 79 App. Div. 641, 79 NYS 940.

16. Niehaus v. Cooper, 22 Ind. A. 610, 52 NE 761.

17. Sparrow v. Kelso, 92 Ind. 514.

18. Smith v. Moore, 6 Me. 274.

19. Smith v. Moore, 6 Me. 274 (failure to make this allegation not cured by verdict).

20. Prestidge v. Pendleton, 24 Miss. 80.

21. Adkins v. Hutchings, 79 Ga. 260, 4 SE 887.

22. Archer v. Duval, 1 Fla. 255.

23. Finley v. Broadwell, 4 J. J. Marsh. (Ky.) 257.

24. Roberts v. Stuart, 80 Tex. 379, 15 SW 1108.

25. Wood v. Nicholls, 33 La. Ann. 744.

26. [a] **Form of statement of demand in trover** held sufficient. Davis v. Davis, 6 Blackf. (Ind.) 394.

27. David v. David, 66 Ala. 139; Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

[a] **Insufficient description.** — In an action by an administrator to recover goods belonging to the estate the allegation of the complaint, "bonds to the amount of $2,100, issued by the county of Wilson, State of Tennessee, and known as Wilson county bonds," is not a sufficient description of the bonds. David v. David, 66 Ala. 139.

28. Stanley v. Gaylord, 10 Metc. (Mass.) 82.

29. Ham v. Henderson, 50 Cal. 367.

30. Gerard v. Jones, 78 Ind. 378.

31. Tippecanoe L. & T. Co. v. Carr, 40 Ind. A. 125, 78 NE 1043.

32. King v. Lawrence, 14 Wis. 238.

33. Angus v. Robinson, 62 Vt. 60, 19 A 993.

34. White v. McFarland, 148 Mo. A. 338, 128 SW 23.

tations, thereafter caused it to be inventoried and appraised as the property of the estate, etc., did not state a cause of action against defendant as an individual.[35] One suing executors individually and in their representative capacity for conversion and alleging demand on both deceased and his executors must allege the date of each demand.[36] In trespass for an injury to personal property, the declaration should allege that the property belonged to plaintiff as administrator.[37]

Seeking double damages. An administrator, proceeding under a statute providing that a person converting to his own use property of a decedent shall be liable to the administrator in double the amount of damages, should allege that he seeks to recover double damages, or the action will be treated as one for the actual damages sustained under a statute making a person converting to his own use property of a decedent liable to the administrator for the value thereof and injury caused thereby.[38]

Pleas and answers. An answer in an action by the representative to recover certain property, denying decedent's title to it and asserting a lien should specifically state the nature of the lien,[39] and in an action by an administrator for the conversion of a certain sum of money left by decedent an answer that defendant loaned decedent the identical money described, that decedent's widow took possession of it on his death and told defendant that she would take out letters of administration and requested him to take back the money and deliver to her a note decedent had given therefor, which he did, is insufficient.[40] Where the complaint for a conversion by executors of property received by them from the estate of their testator, but owned by a third person, seeks to charge them both as individuals and as executors, they may set up in their answer any matter which would constitute a defense in either aspect of the case.[41]

[§ 2155] **n. On Covenants.** The declaration in an action by an executor for breach of a covenant real must show a breach in the lifetime of the testator, since otherwise the right of action belongs to the heir.[42] Where there are two covenantees, the administrator of one of them cannot sue for breach of the covenant without showing in his declaration that the other covenantee is dead.[43] Where one covenants with executors as such they need not in a suit thereon allege their interest in its enforcement as their interest will be assumed.[44] A declaration in covenant against an administrator which merely avers a nonperformance by the intestate is insufficient, as he may have died before the time for performance.[45]

Pleas and answers. An executor sued in covenant may under a general plea to the merits, such as covenant performed, give any special matter in evidence, where a statute provides that executors may give any special matter in evidence under the general issue.[46]

[§ 2156] **o. For Legacies or Distributive Shares.** The complaint in an action for a legacy must show that plaintiff is entitled thereto under the terms of the will.[47] One who sues for a legacy or distributive share need not negative the existence of matters of defense;[48] nor is it necessary to allege that plaintiff had demanded his legacy where it is alleged that the executors have refused to pay it.[49] It has also been held unnecessary to allege that a refunding bond was executed and tendered before suit.[50] The declaration or bill should, however, allege that a surplus sufficient to satisfy the legacy or distributitve share remains or will remain after payment of debts of the estate,[51] or that the unpaid claims are barred,[52] especially where the estate has been declared insolvent.[53] If under the will title to a legacy does not pass to the legatee until the executor has assented thereto his assent or refusal must be alleged, although the estate owes no debts.[54] If suit is brought on a decree of the probate court to recover a legacy, it is not necessary to allege that the executor has it in his possession.[55] If suit is brought by an heir to recover a legacy to the ancestor death of the ancestor must be alleged,[56] and a bill against the administrator of complainant's father to recover the distributive shares of their brothers, alleged to have died during minority, is demurrable where no reason is shown why there was no administration on their estates.[57] The complaint in an action by the legatee against the administrator and a creditor of the estate in which

35. Kingsbury v. Copren, (Nev.) 187 P 728.

36. Noble v. Huff, 155 NYS 560.

37. Hutchins v. Adams, 3 Me. 174 (holding, however, that a complaint which merely alleges that the property belonged to decedent will be good after verdict).

38. Springer v. Jenkins, 47 Or. 502, 84 P 479.

39. Matter of Motz, 5 NYSt 343.

40. Robinson v. Isenhower, 47 Ind. 199.

41. Newcomb v. Burbank, 146 Fed. 400.

42. Ashby v. Moore, 7 J. J. Marsh. (Ky.) 166; Abney v. Brownlee, 2 Bibb (Ky.) 170.

43. Waln v. Cuthbert, 54 N. J. L. 1, 22 A 1007.

44. Farnham v. Mallory, 2 Abb. Dec. (N. Y.) 100, 3 Keyes 527, 3 Transcr. A. 171, 5 AbbPrNS 380.

45. Warner v. Bledsoe, 4 Dana (Ky.) 73.

46. Martin v. White, 1 Stew. (Ala.) 473.

47. Jones v. Folsom, 143 Ga. 23, 84 SE 68, LRA1915D 1122 (where testator bequeathed a certain sum to each of his employees "who have been in my employ or service for ten years up to and next preceding my death," a complaint alleging merely that plaintiff had been in testator's service "for ten years previous to his death" is demurrable as it fails to show any right of recovery).

48. Sherwood v. Thomasson, 124 Ind. 541, 24 NE 334; Del Rosario v. Del Rosario, 2 Philippine 321.

[a] **Illustration.**—In an action by a widow against the administrator of her husband's estate to recover her distributive share, it is not necessary that she should aver that she did not desert her husband and was not living in adultery at the time of his death. Sherwood v. Thomasson, 124 Ind. 541, 24 NE 334.

49. Dilley v. Henry, 25 N. J. L. 302.

50. Dilley v. Henry, 25 N. J. L. 302; Foulks v. Foulks, 2 Silv. Sup. 516, 6 NYS 112; Soules v. Soules, 35 U. C. Q. B. 334.

[a] **A refunding bond may be waived** by defendant, and if one is not given he should plead it in abatement if he wishes to object to the action on that ground. Dilley v. Henry, 25 N. J. L. 302.

51. Norwood v. Holliman, 27 Ark. 445; Coulter v. Bradley, 30 Ind. A. 421, 66 NE 184; Dewitt v. Schoonmaker, 2 Johns. (N. Y.) 243.

[a] **Limitation of rule.**—Where a suit to recover a legacy is based on a decree of the probate court, it is not necessary to allege that the debts of the estate have been paid. This question is res judicata. Weeks v. Sowles, 58 Vt. 696, 6 A 603.

[b] **Complaint not insufficient for failure to allege existence of assets.**—The complaint in an action for a legacy brought by the legatee against the executor which alleges that the executor refused to allow or disallow the legacy as a claim, and that within the time allowed by law, the clerk of the court entered the claim on the court docket for trial, is not insufficient for failing to allege the existence of assets to pay the legacy. Lupton v. Coffel, 47 Ind. A. 446, 94 NE 799.

52. Wright v. Dunklin, 83 Ala. 317, 3 S 597.

53. Wright v. Dunklin, 83 Ala. 317, 3 S 597; McMillan v. Rushing, 80 Ala. 402.

54. Lester v. Stephens, 113 Ga. 495, 39 SE 109.

55. Weeks v. Sowles, 58 Vt. 696, 6 A 603 (this fact is res judicata).

56. King v. King, 42 Ga. 512.

57. Tuggle v. Tuggle, 52 Ga. 475.

a fraudulent payment of the creditor's claim is alleged need not set forth the will under which the legacy is claimed.[58] In an action by a guardian to recover a legacy bequeathed to his ward, the complaint need not allege that the legacy had been paid into the surrogate's court.[59]

Pleas and answers. Where the action is to recover a balance alleged to be due on a legacy, an answer setting up that such balance has been paid as a collateral inheritance tax by order of court is not objectionable for failure to state the order to have been duly made.[60] In such action an answer denying that any demand has been made for such balance raises an issue which must be tried under a statutory requirement that if after a certain time a personal representative refuses on demand to pay over a legacy an action may be maintained therefor.[61] Where, in a suit against an executrix for plaintiff's distributive share, the complaint charged that the decree distributed to plaintiff a certain amount in discharge of a legacy bequeathed to plaintiff to endow a bed in plaintiff's hospital to the memory of testatrix's husband, an allegation in the answer that the decree directed that the legacy is used for the endowment of a bed for the poor, in memory of testatrix's husband, and that plaintiff should take the legacy subject to that condition, raised no material issue.[62] In a proceeding to recover a legacy an answer by the executor stating that no assets have come to hand, that none could be acquired by defendant, and that all the general personalty left by testator was consumed by his family for their support before defendant qualified, is insufficient as a plea in bar of an accounting.[63]

[§ 2157] **p. To Charge Representative Individually.**[64] While a promise in writing is necessary in order to charge an executor individually, such written promise need not be alleged in declaring against him.[65] If it is sought to charge an administrator personally on a promise to pay a debt of decedent, in consideration of forbearance by the creditor to sue the estate, an allegation that defendant is administrator of the decedent debtor is surplusage and does not make it necessary to allege that he has assets.[66]

[§ 2158] **q. Between Personal Representatives.** In a suit by one administrator against his coadministrator for the recovery of money alleged to be due complainant from intestate for services rendered and merchandise supplied, the bill should give defendant full information so as to apprise him of the time when and the nature of the labor performed, and the kind and extent of the merchandise delivered and when delivered, such matters being peculiarly within complainant's knowledge and of which defendant is presumptively ignorant.[67]

[§ 2159] **r. By Administrator De Bonis Non against Predecessor.** A petition by an administrator de bonis non in an action against his predecessor for property not accounted for which alleges the value of the estate which came into defendant's hands as shown by the inventory is sufficient without setting up the entire inventory of the estate, where the amount paid over to creditors by defendant and the value of the assets turned over to plaintiff are both alleged and from these a balance appears not to have been accounted for.[68] If the basis of the suit is a devastavit in failing to redeem stock belonging to the estate which had been sold under a decree subject to redemption within a designated time, it must be alleged that there were assets in defendant's hands available and applicable for the purpose of redemption and that the proper court order the redemption to be made.[69] If an administrator is appointed to administer on assets left unadministered on the death of the executor and brings suit against an executor of the former executor, the complaint need not allege that assets ever came into defendant's hands.[70] In an action by an administrator de bonis non against his predecessor for an alleged conversion of money belonging to the estate defendant cannot show under the general issue payment and expenditures for the estate, as such matter is in confession an avoidance.[71]

[§ 2160] **s. Miscellaneous.** Where a petition by heirs seeks to revise proceedings in the administration of the estate, it is subject to demurrer, unless a copy of the proceedings complained of is attached thereto.[72] Where an administrator seeks to enjoin a surrogate from disregarding, in a decree on final settlement, certain sealed instruments, executed by the next of kin, releasing him from liability for their distributive shares, the complaint must contain averments as to the validity of the releases.[73] Where a complaint alleged a recovery of judgment against one defendant individually, and as an administrator, that he was insolvent, that he had loaned to the other defendants a sum of money belonging to plaintiffs, and to which they were entitled as their distributive share of the estate of which the first named defendant was administrator, that in fact the mortgage was executed to secure the payment of any judgment which plaintiffs might obtain against the administrator, that the administrator refused to bring suit to foreclose such mortgage and prayed that the mortgage might be foreclosed to satisfy a judgment which plaintiffs had obtained against the administrator, this sufficiently showed that plaintiffs were the owners of the fund loaned to the mortgagee by the administrator.[74] Conceding that an administrator who advances his own funds to pay demands against the estate acquires a right of action against the heirs of the intestate, the purpose of the advance should be affirmatively alleged, that the court may determine from the complaint whether it constitutes a sufficient cause of action.[75] Where there was no suggestion, in the complaint by the administrator of a deceased partner for an accounting, that the parties interested in decedent's estate, some of whom

58. Bell v. Ayres, 24 Ind. 92.
59. Wall v. Bulger, 46 Hun (N. Y.) 346 (if a proceeding had been instituted before that court for an accounting and to compel defendants to pay this legacy to plaintiff, then payment into that court would doubtless have been a bar to this action, but it would constitute an affirmative defense and would have to be pleaded as such).
60. Kennagh v. McColgan, 4 NYS 230.
61. Kennagh v. McColgan, 4 NYS 230.
62. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.
63. York v. McCall, 160 N. C. 276, 76 SE 84.
64. See also supra § 2154.
65. Pettigrew v. Pettigrew, 1 Stew. (Ala.) 580.
66. Pratt v. Humphrey, 22 Conn. 317.
67. Muller v. Muller, 76 N. J. Eq. 158, 79 A 429.
68. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.
69. Steel v. Holladay, 20 Or. 70, 25 P 69, 10 LRA 670.
70. Walton v. Walton, 4 Abb. Dec. (N. Y.) 512, 1 Keyes 15, 2 AbbPrNS 428.
71. Grothaus v. Witte, 72 Tex. 124, 11 SW 1032.
72. Ward v. Ward, 1 Tex. Unrep. Cas. 123.
73. Wright v. Fleming, 76 N. Y. 517 [aff 12 Hun 469].
74. Chaves v. Myer, 13 N. M. 368, 85 P 233, 6 LRANS 793.
75. McClure v. McClure, 19 Ind. 185.

had at all times been minors, without guardians, prior to the bringing of the suit, had settled their ancestor's interest in the partnership without administration, the complaint was not demurrable on the ground that they might have done so.[76] The complaint, in an action to foreclose a lien on certificates of stock, alleging that plaintiff is the holder of one certificate under a pledge from the deceased owner to secure a debt and the holder of the other certificate, together with the indebtedness it secured by assignment from a third person to whom it had been assigned by decedent to secure the indebtedness, that after the owner pledged the first certificate to plaintiff he assigned his interest to defendant subject to the indebtedness secured, and that the title to the second certificate assigned to the third person, subject to the indebtedness, was owned by decedent at his death, states a cause of action against the administratrix of the deceased owner as against a demurrer.[77] Where a statute imposes a lien in favor of the administrator of a solvent estate upon the share of an heir indebted to the intestate at his death, and makes it enforceable by suit and attachment by the administrator within two years after administration granted, the lien to have priority to any other attachment of the share, it is not necessary in enforcing the lien by suit and attachment to allege in the declaration that the estate is solvent if the right of action is not based on the statute, but is independent of it.[78]

[§ 2161] **t. Answers in Actions against Several Personal Representatives.**[79] Joint executors must agree as to the mode of conducting suits and cannot file separate pleas which place them in a hostile attitude to each other.[80] Sometimes under statutes, where an action is brought against several personal representatives, such of them as are first served with process, or first appear, are entitled to answer for the estate, and it is irregular for their coexecutors to put in an answer afterward.[81] It has been held, however, that an executor not served, but who has appeared by counsel and participated in a trial of the issues raised by his coexecutors and answers, may be allowed upon terms and without prejudice to the proceedings already had to serve a separate answer raising new issues.[82]

[§ 2162] **O. Issues, Proof, and Variance**[83]**—1. Issues.** In an action on a note claimed to have been executed by decedent, a general denial puts such execution in issue,[84] unless a special plea is required by statute,[85] and such general denial also raises an issue as to presentation to the representative before the commencement of the action.[86] But where in an action on a note the administrator files pleas not required by the statute, he limits his defense to those pleaded.[87] In an action by an administrator an answer denying that plaintiff was duly appointed administrator raises the issue of jurisdiction involving the right of the surrogate to issue the letters.[88] In an action by an administratrix with the will annexed against the administrator of another estate to recover property in the hands of decedent belonging to the estate of plaintiff's decedent, where the appointment of plaintiff is alleged in the complaint and is not denied in the answer, a question as to the jurisdiction of the court to appoint plaintiff cannot be raised.[89] In an action against an administrator, payments, credits, or offsets are in issue, although not pleaded by defendant.[90] Where, in a suit by an executor to set aside an alleged fraudulent conveyance of testator's property on the ground that there was a deficiency of assets, defendant's answer admitted that the commissioners on claims gave notice of their meetings "according to the statute in such case made and provided" defendants were not entitled to avail themselves of the fact that notice of such meetings was not given to the executor.[91] Where a petition against an administrator and a debtor of the estate alleged that a third person had borrowed money from decedent and repaid it to the administrator, and the administrator in his answer denied the receipt of the money, and the debtor alleged that the third party handed the money in question over to her, and that she gave it to decedent, and the third party testified that he paid the money to the debtor, and that the allegation of the bill was an error, there could be no recovery of the sum of money in question in the absence of an amendment of the bill.[92] Where the action is against defendant in his representative capacity, his personal liability on the contract sued on is not in issue and cannot be inquired into.[93] Where an executrix brings suit in her representative capacity to set aside assignments of certain mortgages executed by her testator, she cannot in such action litigate her right as an individual to a lien on real estate purchased by her husband for defendant.[94] Where a suit to recover back funds of an estate unlawfully deposited with a stockbroker by a deceased executor was brought against the broker, and no claim was made against the estate of the deceased executor, but the personal representatives of such executor were brought in as parties, it was held that the court would not adjudicate the question of the right to contribution or to a recovery over, as between them and plaintiff.[95]

76. Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074.

77. Beyer v. Bullock, 56 Wash. 110, 105 P 155.

78. C. A. Weston Co. v. Colby, 107 Me. 104, 77 A 637.

79. Coexecutors and coadministrators generally see infra §§ 2814–2867.

80. Hilligsberg's Succ., 5 La. Ann. 118.

81. Salters v. Pruyn, 15 AbbPr (N. Y.) 224 (collusion between plaintiff and the executor who first answers does not give his coexecutor the right to answer, at least not without leave of court on a direct application for that purpose).

82. Guernsey v. Cheyne, 18 AbbN Cas (N. Y.) 361.

83. Issues, proof, and variance generally see Pleading [31 Cyc 670].

84. Digan v. Mandel, 167 Ind. 586, 79 NE 899, 119 AmSR 515; Ruddell v. Tyner, 87 Ind. 529; Wells v. Wells, 71 Ind. 509; Cawood v. Lee, 32 Ind. 44.

[a] **Waiver of proof of execution.** —Where the execution of a note is put in issue by the general denial, proof thereof is not waived by the fact that the administrator allowed it to be read in evidence without objection. Cawood v. Lee, 32 Ind. 44.

85. Thornton v. Alliston, 20 Miss. 124 (where this is the case a special plea is necessary, notwithstanding a statute which permits executors to give any special matter in evidence under general issue).

86. Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934.

87. Abelman v. Haehnel, 57 Ind. A. 15, 103 NE 869.

88. Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 NYS 962 [foll Webster v. M. W. Kellogg Co., 168 App. Div. 443, 153 NYS 800].

89. Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

90. Granberry v. Granberry, 40 Tex. Civ. A. 420, 90 SW 711.

91. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879.

92. Reager v. Chappelear, 104 Va. 14, 51 SE 170.

93. Yarrington v. Robinson, 141 Mass. 450, 6 NE 382.

94. Peirson v. McNeal, 137 Mich. 158, 100 NW 458.

95. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518, 94 NE 1099].

[§ 2163] **2. What Must Be Proved.** An executor or administrator suing in his representative capacity need not prove his appointment where this is admitted by the answer,[96] or even, it has been held, where there is no plea challenging his right to sue.[97] Where an administrator files a plea of the statute of nonclaim, and plaintiff takes issue thereon, plaintiff in order to recover must prove the time of the granting of letters of administration and that the claim was filed within the statutory time thereafter.[98] Where the answer of an administrator admits the presentation and rejection of plaintiff's claim, evidence thereof is not required,[99] it being sufficient for plaintiff to show that the action is founded on the claim which was presented for allowance.[1] Neither is it necessary for plaintiff to prove nonpayment of his claim, where the representative had appeared and contested to claim but did not set up the payment in his answer.[2] Under a statute providing that, when any claim is transferred for trial, it shall not be necessary for the executor or administrator to plead any matter by way of answer except a set-off or counterclaim, to which plaintiff shall reply, etc., a verified plea of non est factum in an action on a note against an administrator of one of the parties was not necessary to impose on plaintiff the burden of proving the execution of the instrument sued on and the assignment thereof.[3] In an action by an administrator for the conversion of property belonging to his decedent, failure to prove an allegation that decedent left a will is not fatal, since plaintiff does not derive his title from the will.[4] Where a rule of court provides that the execution of a note shall be taken as admitted, unless defendant or some one in his behalf shall by affidavit of defense deny its execution, and another rule requires executors and administrators to file affidavits of defense, proof of the execution of a note in an action against an executor will not be required, if no affidavit of defense has been filed denying the execution of the note.[5]

[§ 2164] **3. Evidence Admissible under Pleadings—a. In General.** In an action by a son against the executor of his deceased father for breach of a contract to convey land, evidence that the father, who before his death conveyed the land to another person, was incompetent because of indulgence in liquor, is immaterial where the son did not assail the validity of the conveyance.[6] It has been held that in assumpsit by an administrator, where to a plea of limitations plaintiff replies a promise to decedent within the statutory period, evidence of a promise to plaintiff is admissible to maintain the replication.[7]

[§ 2165] **b. Denial of Representative Capacity.** A plea of ne unques administrator is a denial only that plaintiff was administrator at the commencement of the suit, and defendant cannot under this plea show the termination of plaintiff's authority as administrator pending the suit.[8] Under this plea questions whether the court granted the letters to the right or the wrong person or acted irregularly in revoking letters issued to defendant and granting letters to plaintiff cannot be considered.[9]

[§ 2166] **c. Plea of Plene Administravit.** Under a plea of plene administravit defendant may show payment of preferred debts, funeral expenses, and expenses of administration,[10] and may give in evidence the record of a judgment confessed by him.[11] He may also give in evidence a debt due himself,[12] or show that the estate has been settled and distributed in accordance with proceedings under a commission in insolvency.[13] Returns of administrators of legatees who were deceased at the time of the trial charging themselves with sums received from the executors are admissible.[14] Defendant cannot show under such plea a receipt for payment of money, which payment had been disallowed by the probate court.[15] He cannot give in evidence outstanding judgments,[16] or the existence of debts of a superior dignity[17] or a deed of trust to prove that certain property is not to be considered as assets;[18] and in an action by a legatee against an executor the executor cannot give in evidence proof that he had equally or proportionately distributed the residue of the personal estate after payment of debts among his several legatees.[19] Under this plea plaintiff may show assets not included in the inventory or, where there is no inventory returned, may show assets in the hands of the administrator.[20] In a suit against the sureties on the bond of an administrator, where defendant is a legal representative of one of the sureties on the bond, a plea of plene administravit may be met by the introduction of evidence disclosing that defendant's testator left property which was subject to plaintiff's demand, and which ought to be in defendant's hands for administration.[21] Under a replication to a plea of plene administravit that assets have and ought to have come to the administrator's hands plaintiff is entitled to prove a devastavit.[22]

[§ 2167] **d. Actions on Claims in Favor of Estate.** In a suit by a personal representative as such he must allege a promise made to decedent in his lifetime to admit proof of that fact,[23] and in an action by an executor to recover money alleged to

96. Peavy v. Sangster, 13 Ga. A. 418, 79 SE 215.

97. Layne v. Johnson, 19 Cal. A. 95, 124 P 860; Spikes v. Howard, 51 Tex. Civ. A. 389, 111 SW 792.

[a] **Illustration.**—In an administrator's action to quiet title, where his appointment and qualification have not been denied, a copy of the order of appointment is irrelevant. Layne v. Johnson, 19 Cal. A. 95, 124 P 860.

98. Stewart v. Lasseter, 4 Ala. A. 665, 59 S 233.

99. Martin v. Brosnan, 18 Cal. A. 477, 123 P 550.

1. Martin v. Brosnan, 18 Cal. A. 477, 123 P 550.

2. Thomas v. Fursman, (Cal. A.) 178 P 870.

3. Digan v. Mandel, 167 Ind. 586, 79 NE 899, 119 AmSR 515.

4. Grant v. Hathaway, 118 Mo. A. 604, 96 SW 417.

5. Lowenstein v. Michael, 55 Pa. Super. 628.

6. In re Bremer, 151 Iowa 449, 131 NW 667.

7. Buswell v. Roby, 3 N. H. 467.

8. Wilson v. Bothwell, 50 Ala. 378.

9. Sadler v. Sadler, 16 Ark. 628.

10. Seighman v. Marshall, 17 Md. 550; Haines v. Price, 20 N. J. L. 480; Hickey v. Hayter, 6 T. R. 384, 101 Reprint 608.

[a] **The record of the debts allowed,** required to be kept by statute, is competent to support a plea of no assets by the administrator. Seighman v. Marshall, 17 Md. 550.

11. Reynolds v. Puney, 8 N. C. 318.

12. Sebring v. Keith, 20 S. C. L. 340.

13. Potter v. Dolan, 19 R. I. 514, 34 A 1116.

14. Willingham v. Chick, 14 S. C. 93.

15. Union Bank v. Parkhill, 2 Fla. 660.

16. Hines v. Craig, 12 F. Cas. No. 6,518, 1 Cranch C. C. 340.

17. Kerley v. West, 3 Litt. (Ky.) 362 (it is a general rule that an executor is bound to plead specially every debt or demand of greater dignity belonging to others to protect the assets in his hands).

18. Taylor v. Richards, 3 Munf. (17 Va.) 8.

19. Morgan v. Slade, 2 Harr. & J. (Md.) 38.

20. Worthy v. Battle, 125 Ga. 415, 54 SE 667; Seighman v. Marshall, 17 Md. 550; Marr v. Rucker, 1 Humphr. (Tenn.) 348.

21. Worthy v. Battle, 125 Ga. 415, 54 SE 667.

22. Seighman v. Marshall, 17 Md. 550; Shannon v. Denkins, 33 S. C. L. 196.

23. Merritt v. Keeler, 75 Mich. 314, 42 NW 941; Barnum v. Stone, 27 Mich. 332.

have been paid by testatrix in her lifetime evidence of payment made by himself after her death is inadmissible.[24] In the absence of a statute providing otherwise, an administrator relying on a new promise to avoid the plea of limitations must insert in the declaration a count on the promise made to himself or to his intestate as the case may be.[25] If an administrator is substituted as plaintiff in an action commenced by his intestate and defendant pleads a set-off of moneys due from plaintiff, evidence of an indebtedness of intestate to defendant is admissible.[26]

Under general issue. A release given by a former administrator of plaintiff's intestate, who was authorized to make it may properly be introduced under the general issue, in an action by an administrator to recover for causing the death of his intestate.[27]

Under plea of payment. A plea of payment to the representative will not warrant the introduction of evidence of payment to decedent,[28] and in debt on a judgment by executors defendants cannot prove under the plea of payment that testator had renounced his interest in certain of defendants' lands and that his devisee had since sold a part thereof.[29] An agreement by an administratrix to credit on a note held by her the value of certain work done by the maker should be pleaded as a counterclaim and cannot be interposed as a defense by payment.[30]

[§ 2168] **e. Actions on Claims against Estate.** In an action on a claim against a decedent's estate no claim other than the one directly covered by the pleadings can be proved.[31] In an action against the executor of one of several makers of a promissory note defendant may give in evidence the survivorship of the other makers without pleading it.[32] If the action is based on the promise of decedent a promise by the representative cannot be given in evidence to establish the demand.[33] In an action on a promise of decedent in which the statute of limitations is pleaded, evidence of a promise made by defendant to pay the claim in suit is not admissible to take the case out of the statute of limitations where the declaration does not allege that the promise was made by him as administrator.[34] Proof that a note presented as a claim against a decedent's estate was executed by mistake can be introduced only when the mistake is properly alleged by equitable counterclaim.[35] In an action on a claim against a decedent's estate, plaintiff is entitled to prove the terms of the will under an allegation that it did not specifically direct how the executor should dispose of the property.[36] In an action to recover disbursements for the benefit of an estate, an item for a certain amount for taxes paid can be supported by evidence of different payments of different amount all tending to make up the sum stated.[37]

Under general issue or denial. Under a statute permitting a personal representative to give any special matter in evidence under the general issue, an administrator sued on a note executed by decedent need not plead payment specially, but may prove it under the general issue,[38] and a set-off may also be shown under the general issue.[39] If, however, a statute requires notice at the time of pleading the general issue that a set-off will be insisted on in evidence, a set-off cannot be given in evidence under the general issue unless such notice is given.[40] Failure to present the claim is provable under the general issue,[41] although the answer does not plead payment, it may be shown that claimant received money from other sources reducing or extinguishing the claim.[42] In an action against an executor or administrator on a claim for money received by decedent, defendant may show, under a general denial, that plaintiff appropriated to his own use articles belonging to decedent,[43] and enjoyed the rents and profits of decedent's land, to the use of which decedent was entitled.[44]

Under plea of payment. In an action against an executor on a note, where the only defense set up is payment, and no special notice of any other defense was given as required by rule of court, evidence will not be admitted at the trial tending to show that the note was given in settlement of a partnership, and represented the amount due to the payee on the adjustment and final settlement of the partnership business, and that the amount represented by the note was not in fact due to the payee on the accounting of the partnership business.[45]

[§ 2169] **4. Variance.**[46] In actions by or against executors or administrators, the pleadings and proof must correspond, and there can be no recovery if there is a substantial variance,[47] although an immaterial variance will not prevent a recovery.[48] Where suit is brought by a personal representative

24. Turner v. Maddock, 3 Gill. (Md.) 190.

25. Felty v. Young, 18 Md. 163 (under Acts (1856) c 112, a declaration containing counts for money payable as administrator for money loaned and found due on account stated is sufficient to admit proof of a new promise to the administrator).

26. Lawson v. Fischer, 5 Ark. 52.

27. Chicago, etc., R. Co. v. Wolfrum, 136 Ill. A. 161.

28. Dose v. Hirsch, 67 Misc. 229, 124 NYS 595.

29. Matlack v. Read, 2 Yeates (Pa.) 71.

30. Cook v. Cook, 24 S. C. 204.

31. Hurley v. Hewett, 87 Me. 200, 32 A 875.

32. Osgood v. Spencer, 2 Harr. & G. (Md.) 133.

33. Quarles v. Littlepage, 2 Hen. & M. (12 Va.) 401, 3 AmD 637.

34. Chapman v. Dixon, 4 Harr. & J. (Md.) 527.

35. Schmidt v. Schmidt, 123 Wis. 295, 101 NW 678.

36. Algeld v. Elmendorf, (Tex. Civ. A.) 86 SW 41.

37. Littlefield v. Cook, 112 Me. 551, 92 A 787.

38. Gray v. Thomas, 20 Miss. 111; Livingston v. Holt, 38 N. D. 556, 165 NW 975.

39. Herrington v. Herrington, 1 Miss. 305.

40. Boyd v. Thompson, 2 Yeates (Pa.) 217.

41. Holbrook v. Libby, 113 Me. 389, 94 A 482, LRA1916A 1167.

42. Livingston v. Holt, 38 N. D. 556, 165 NW 975.

43. Dunton v. Dawley, 122 Iowa 512, 98 NW 307.

44. Dunton v. Dawley, 122 Iowa 512, 98 NW 307.

45. Lowenstein v. Michael, 55 Pa. Super. 628.

46. Between process and declaration see supra § 2085.

47. Cal.—Roberts v. Levy, 31 P 570; Eidinger v. Sigwart, 13 Cal. A. 667, 110 P 521; Enscoe v. Fletcher, 1 Cal. A. 659, 82 P 1075.

Ind.—Saylor v. Obendorf, 45 Ind. A. 436, 89 NE 600.

Ky.—Bishop v. Newman, 168 Ky. 238, 182 SW 165.

N. Y.—Smith v. Proctor, 3 N. Y. Super. 72.

Pa.—Richards v. Richards, 46 Pa. 78.

Tex.—Stacey v. McClave, (Civ. A.) 175 SW 807.

W. Va.—Hanson v. Blake, 63 W. Va. 560, 60 SE 589.

48. Ala.—Moseley v. Mastin, 37 Ala. 216.

Cal.—Pollitz v. Wickersham, 150 Cal. 238, 88 P 911.

Ind.—Abelman v. Haehnel, 57 Ind. A. 15, 103 NE 869.

Ky.—Gilliam v. Gilliam, 146 Ky. 15, 141 SW 370.

Nebr.—Anderson v. Akins, 99 Nebr. 630, 157 NW 334.

N. Y.—Linden v. Thieriot, 96 App. Div. 256, 89 NYS 273.

Okl.—Hamilton v. Blakeney, 165 P 141.

S. C.—Hursey v. Surles, 91 S. C. 284, 74 SE 618.

Vt.—McDonald v. Webster, 71 Vt. 392, 45 A 895.

W. Va.—Citizens' Trust, etc., Co. v. Young, 75 W. Va. 241, 83 SE 1007.

[a] **On appeal** a variance not the

in his individual capacity he cannot recover by showing a cause of action accruing to him in his representative capacity,[49] and if he sues in his representative capacity he cannot recover on a cause of action accruing to him in his individual capacity.[50] One who sues on a note as administrator of a decedent's estate can only recover on proof that the note was made to decedent during his lifetime.[51] If a personal representative is sued as such, proof of a claim against him individually will not sustain the declaration,[52] and a suit against him in his individual capacity cannot be maintained by showing a cause of action against decedent.[53] Where plaintiff has a suit pending against defendant as executor all proceedings in other courts intended to create evidence to be used in such suit should be against him in the same character and not in the character of administrator, since an executor represents primarily the devisees and legatees and the administrator represents the heirs at law.[54] If plaintiff describes himself as administrator de bonis non, proof of issuance of general letters of administration to him is not a fatal variance where it is shown that there had been a previous administration,[55] and, where issue is joined on a plea denying that plaintiff is administrator, proof that he is administrator with the will annexed supports the issue.[56] So also if plaintiff declares as administrator, proof that he was administrator de bonis non is an immaterial variance.[57] There is no material variance between a complaint to recover money alleged to have been loaned by plaintiffs individually and evidence that the money was loaned by them as executors,[58] or between the allegations that plaintiff who sues only in his individual capacity recovered a judgment and proof which shows that the judgment was recovered by him in a representative capacity as administrator.[59] Proof that limited letters of administration were granted to plaintiff does not sustain an allegation that unrestricted letters were granted to him, so as to authorize him to maintain an action not designated by the letters.[60] To authorize a joint judgment against two who are sued jointly as executors, the proof must show a joint liability as such;[61] but where several defendants are sued as personal representatives, on a contract made with their decedent, plaintiff may recover a judgment against such of defendants as are shown to be executors or administrators.[62] Where a bill against an administrator avers exhaustion of personal assets and the proof shows a misapplication of those assets, although a liability exists, a decree cannot be granted for the misapplication unless the allegations and prayer shall be amended.[63]

A variance may be cured by the granting of a motion, made at the close of plaintiff's case, without objection by defendants, to conform the pleadings to the proof.[64]

[§ 2170] **P. Evidence**[65]**—1. Presumptions**[66]**—a. In General.** In the absence of allegations or proof to the contrary, it will be presumed that one shown to be at one time an executor or administrator continued in that capacity until the estate was administered by the collection of assets and payment of debts;[67] that he properly performed his duty;[68] that the possession of property of the estate by the representative is legal;[69] that one shown to have had possession of a decedent's property subsequent to his death still has possession;[70] that a demand for payment of a claim has been made, where a special request for delay in payment is made by the representative;[71] and that a delay in payment in such case was in consequence of such

subject of exception in the trial court is not available. Roberts v. White, 32 R. I. 185, 78 A 497, AnnCas1912D 793.

49. Freeman v. McCann, 37 Ala. 714; Ikelheimer v. Chapman, 32 Ala. 676; Barnum v. Stone, 27 Mich. 332; Glenn v. McCullough, 13 S. C. L. 212.

50. Conn.—Stanley v. Stanley, 42 Conn. 539.

Ind.—Saylor v. Obendorf, 45 Ind. A. 436, 89 NE 600.

Iowa.—Van Sickle v. Staub, 155 Iowa 472, 136 NW 546.

Miss.—Hoover v. Wells, 35 Miss. 159.

Eng.—Sarell v. Wine, 3 East 409, 102 Reprint 654; Dean v. Crane, 6 Mod. 309, 87 Reprint 1049, 1 Salk. 28, 91 Reprint 27.

51. Van Sickle v. Staub, 155 Iowa 472, 136 NW 546.

52. Ala.—Anderson v. Rice, 20 Ala. 239.

Md.—Beard v. Cowman, 3 Harr. & M. 152.

N. Y.—Bartlett v. Hatch, 17 AbbPr 461.

Oh.—Fleischman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

Tenn.—Bedford v. Ingram, 5 Hayw. 155.

53. Shangle v. Runk, 17 N. J. L. 372; Ross v. Harden, 44 N. Y. Super. 26; Hanson v. Blake, 63 W. Va. 560, 60 SE 589.

[a] **In artificiality of complaint.**—Proof of services rendered decedent sustains a declaration alleging that decedent was indebted to plaintiff for services rendered "defendant." The pleading, although inartificial, shows that the estate and not the administrator in his individual capacity is declared against for an indebtedness of decedent. McDonald v. Webster, 71 Vt. 392, 45 A 895.

54. Fulghum v. Carruthers, 87 Ga. 484, 13 SE 597.

55. Moseley v. Mastin, 37 Ala. 216; State v. Price, 21 Mo. 434; Steen v. Bennett, 24 Vt. 303.

56. Owings v. Beall, 1 Litt. (Ky.) 257.

57. Barkman v. Duncan, 10 Ark. 465.

58. Myers v. Weger, 62 N. J. L. 432, 42 A 280 (since he can sue either in his individual or representative capacity on such a cause of action).

59. Allen v. Lyman, 27 Vt. 20.

60. Kirwin v. Malone, 45 App. Div. 93, 61 NYS 844.

61. Moody v. Ewing, 8 B. Mon. (Ky.) 521.

62. Gray v. White, 5 Ala. 490.

63. Rowan v. Bowles, 21 Ill. 17.

64. Noble v. Haff, 165 NYS 287.

65. **Evidence generally** see Evidence 22 C. J. p 1.

66. **Presumptions generally** see Evidence §§ 25–88.

As to regularity of appointment of personal representative see supra § 243.

67. Barr v. Sullivan, 75 Miss. 536, 23 S 772; Purington v. Broughton, (Tex. Civ. A.) 158 SW 227.

68. Sherman v. American Cong. Assoc., 113 Fed. 609, 51 CCA 329 [aff 98 Fed. 495]; Jones v. Linton, 34 Ga. 429; McCreery v. Bluefield First Nat. Bank, 55 W. Va. 663, 47 SE 890.

[a] **Illustration.**—Where the bill in a suit by an heir to recover a sum given as a legacy and alleged to have been wrongfully paid to defendant as legatee fails to allege that the payment was not made at the time required by the will, or that an annuity on which such legacy was conditioned was not duly paid, there is a presumption that such payment was properly made. Sherman v. American Cong. Assoc., 113 Fed. 609, 51 CCA 329 [aff 98 Fed. 495].

69. Tuskaloosa Cotton-Seed Oil Co. v. Perry, 85 Ala. 158, 4 S 635; Butt v. Clark, 23 Ind. 548; Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371.

[a] **Illustration.**—Where the complaint in an action against an administrator avers that he has taken possession of real estate of the decedent it will be presumed that it was a legal possession. Butt v. Clark, 23 Ind. 548.

70. Howell v. Howell, 37 Mo. 124; Matter of Nickerson, 5 NYS 841, 2 Conn. Surr. 6.

[a] **In a proceeding to recover personal property belonging to the estate** of a decedent, of which defendant had taken possession and which he had delivered to others, claiming to have done so in accordance with decedent's wishes, the burden is on defendant to show that the property is not under his control; and where he gives no evidence that he sought to regain the property after he became aware that his action was illegal, and a finding that the property would have been restored to him on request is warranted by the evidence, the property will be considered under his control. Matter of Nickerson, 5 NYS 841, 2 Conn. Surr. 6.

[b] **Possession prior to decedent's death.**—The fact that the legatee had his legacy in his possession prior to decedent's death affords no conclusive evidence that he had it in his possession at the time of decedent's death, and in an action therefor the burden is upon the personal representative to show that the legatee had possession at the latter time. Enders v. Enders, 2 Barb. (N. Y.) 362.

71. Farmers', etc., Bank v. Leath, 11 Humphr. (Tenn.) 515.

request;[72] that property delivered in payment of debts of the estate, and described as property of the estate, belonged to the estate;[73] and that returns and accounts to the court were made by the representative in his representative capacity, where he has no power to make them in any other.[74] But it will not be presumed that the representative performed a wrongful act in dereliction of his official duty,[75] that he failed to give notice of his appointment where he seeks to use such failure in his own favor;[76] or that there are creditors, in a suit by the representative to assert a right which is good in favor of creditors, but not in favor of heirs.[77] There is no presumption that a foreign legatee, suing for his legacy, has creditors within the state.[78]

As to value of land. Where an administrator who entered on leasehold property of the intestate and received the rents and profits is sued as an assignee of the lease, although it is a good defense that he has no assets, or that the land is not worth the sum due, the presumption is that the land is worth more than the sum demanded.[79]

Heirs are presumed to continue in life until facts are proved from which a different presumption arises, and it is therefore not necessary for an administrator to show affirmatively that his intestate's heirs are living, in order to sustain an action for land conveyed by the intestate conditionally, after the condition is broken.[80]

The fact that previously rendered accounts had been paid by the testator raises no presumption against the allowance of a subsequent account consisting of previous charges, and which is set up as a defense in a suit by an executor against defendant, where is appears that the former accounts were for disbursements only and the latter for services.[81]

In an action for the amount of a book account for goods furnished to an administrator who represents two undivided estates, plaintiff is not bound to prove that the goods were properly applied, or in what proportion they were divided between the two estates, as it is to be presumed that the representative applied them to the purposes for which they were purchased.[82]

Where one renders services to a stranger, who receives the services, the law presumes that he shall be compensated therefor,[83] but it is otherwise where the parties stand in a family relation.[84]

Funeral expenses may under statute be presumed to have been incurred on the credit of the estate.[85]

Publication of notice to creditors. In an action brought by a creditor against an estate more than five years after testator's death, where the complaint shows no cause for the delay, and does not allege that notice to creditors to present their claims was not published, it will be presumed that the executrix performed her duty by seasonably publishing the notice, thereby barring the action one year thereafter.[86]

Collection of assets. Where a husband acted as the wife's agent, and it appears that several of the notes included in a debt, and referred to in the will as being in the wife's possession, were collected by the husband, and that none of them are in existence, it will be presumed, after a lapse of nine years, that he collected all of them, and the estate should be charged with the amount thereof, with interest from the date of the will, especially where testator indorsed them, guaranteeing their payment.[87]

Receipt of proceeds of sale. Where a wife's stock in a turnpike road was sold, and payment made by checks payable to her, which were indorsed by her, she presumably received the proceeds, and they should not be charged as part of the estate's indebtedness to her.[88]

Continuance of title. Where a certificate of stock given by its owner to his wife was discovered after his death with a bank, which claimed it as collateral for a debt of the husband, and the assignment had been changed by erasing the wife's name as assignee and writing in pencil, in place thereof, the bank's name and date, and no evidence was offered showing by whose authority the alterations were made, and the stock was subsequently sold by the bank, and the proceeds applied to the husband's debt, it was held that, the wife having acquired title to the certificate, the presumption was that such title continued until other facts appeared overcoming it, and the reasonable inference was that the wife, to render financial assistance to her husband, permitted a deposit of the certificate as collateral, and that she was entitled to be reimbursed from her husband's estate.[89]

A bank deposit standing in the name of the decedent will be presumed to be his, and the burden of proof is upon the person claiming a title thereto adverse to the representative.[90]

Presumption from failure to produce evidence. Presumptions in favor of testimony arising from the failure of the opposite party to rebut it, where it is obvious that the means to do so are readily accessible to him, do not hold so strongly against the representative as they might against the decedent, if living, in a matter in which the administrator might be at fault for want of knowledge of facts necessary to enable him to make a full defense.[91]

[§ 2171] **b. As to Settlement of Estate and Payment of Claims.**[92] After the lapse of a considerable length of time, usually twenty years, from the grant of letters, combined with other circumstances, it

72. Farmers', etc., Bank v. Leath, 11 Humphr. (Tenn.) 515.

73. Williams v. Troop, 17 Wis. 463.

74. Stewart v. Richardson, 32 Miss. 313.

75. Tucker v. Murphy, 71 Ind. 576 (no presumption that representative appropriated as assets emblements to which widow and children were entitled).

76. Aiken v. Morse, 104 Mass. 277.

77. Bradshaw v. Mayfield, 18 Tex. 21.

78. Sultan v. Tiryakian, 213 N. Y. 429, 108 NE 72.

79. In re Galloway, 21 Wend. (N. Y.) 32, 34 AmD 209.

80. Austin v. Downer, 27 Vt. 636.

81. Merritt v. Seaman, 6 Barb. 330 [rev on other grounds 6 N. Y. 168].

82. Jones v. Linton, 34 Ga. 429.

83. Marx v. Marx, 127 Md. 373, 96 A 544; Giering v. Sauer, 120 Md. 295, 87 A 774; Parmalee v. Wigent, 189 Mich. 507, 155 NW 577; Hartley v. Hartley, (Mo. A.) 155 SW 1099.

[a] **As to services during the last illness** of a decedent for board, room rent, and the board and rent of nurses, presumptions both of law and fact arise that payment is to be made therefor. Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

84. See supra § 881.

85. Hayes v. Gill, 226 Mass. 388, 115 NE 492.

86. Foley v. McDonnell, 48 Wash. 272, 93 P 321.

87. Harding v. Harding, 132 Ky. 133, 116 SW 305.

88. Harding v. Harding, 132 Ky. 133, 116 SW 305.

89. Matter of Darrow, 64 Misc. 224, 118 NYS 1082, 7 Mills Surr. 240.

90. Staib's Est., 11 Pa. Super. 447.

91. Chandler v. Meckling, 22 Tex. 36.

92. Presumption of payment of claims and of settlement of accounts as affecting time for distribution see supra § 1281.

will be presumed, in the absence of evidence to the contrary, that all legacies and claims against the estate have been paid,[93] and that the estate has been fully settled and distributed by the executor or administrator.[94]

Payment of a debt by decedent may be presumed where it appears that he was amply able to pay his debts.[95]

Wages for domestic services and board bills are presumed to be paid at stated periods.[96] A presumption of payment for services rendered a brother by a sister keeping house and caring for him in his last illness is raised by evidence that he regularly paid her a stated sum per week until his death.[97]

[§ 2172] **2. Burden of Proof**[98]**—a. In General.** The general rule that the burden of proof is on whoever has the affirmative of an issue as determined by the pleadings, or by the nature of the investigation,[99] applies to actions by or against a personal representative.[1] Thus in an action against

93. Ala.—Jones v. Brevard, 59 Ala. 499.
Ga.—Hodges v. Stuart Lumber Co., 128 Ga. 733, 58 SE 354.
Ill.—Langworthy v. Baker, 23 Ill. 484.
N. J.—Paterson Gen. Hospital Assoc. v. Blauvelt, 72 N. J. Eq. 725, 66 A 1055.
N. Y.—Austin v. Tompkins, 5 N. Y. Super. 22.
N. C.—Shearin v. Eaton, 37 N. C. 282.
Pa.—In re Yocum, 242 Pa. 82, 88 A 919; Peters' App., 106 Pa. 340; Parker's Est., 2 Pa. Dist. 101, 12 Pa. Co. 436.
S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032.
[a] **Illustration.**—After a lapse of twenty-seven years a claim against an estate will be presumed to have been satisfied unless the laches is explained, even though the administrator does not plead the statute. Langworthy v. Baker, 23 Ill. 484.
[b] **Until twenty years has elapsed** payment of a legacy will not be presumed. Paterson Gen. Hospital Assoc. v. Blauvelt, 72 N. J. Eq. 725, 66 A 1055.
[c] **The presumption of payment of a judgment quando acciderint from lapse of time** is rebutted by a statement that no assets have ever come to the representative's hands. Austin v. Tompkins, 3 Sandf. (N. Y.) 22.
[d] **A citation on executors to settle their accounts** issued at the instance of a legatee within twenty years from the time his legacy became payable is a claim of such legatee and hence will constitute a bar to the presumption of payment in an action to recover the legacy. Foulk v. Brown, 2 Watts (Pa.) 209.
[e] **Circumstances rebutting presumption.**—Barr's Est., 33 Pa. Co. 647.
Presumption of payment resulting from lapse of time generally see Payment [30 Cyc 1273].

94. Randolph v. Hubbert, 190 Ala. 610, 67 S 416; Bass v. Bass, 88 Ala. 408, 7 S 243; Austin v. Jordan, 35 Ala. 642; Hodges v. Stuart Lumber Co., 128 Ga. 733, 58 SE 354; Hooper v. Howell, 52 Ga. 315; In re De Haven, 215 Pa. 549, 64 A 779. See also infra § 2337.
[a] **A distributive share** (1) will be presumed to have been paid after the lapse of twenty years from the time it was demandable. Com. v. Snyder, 62 Pa. 153. (2) This presumption is not rebutted by the settlement of an administration account showing a balance, that being no admission that the amount is in the hands of the accountants and that it has not been paid over. Com. v. Snyder, 62 Pa. 153.
[b] **The fact of administration** (1) is sometimes presumed from lapse of time in order to protect bona fide holders of the decedent's property. Woolfolk v. Beatly, 18 Ga. 520. (2) But not where the records furnish no evidence that administration had been granted. Guardner v. Cumming, Ga. Dec. 1.

95. Schultz v. Carrard, 103 App. Div. 609, 94 NYS 740.

96. Winfield v. Beaver Trust Co., 229 Pa. 530, 79 A 138; In re Cummisky, 224 Pa. 509, 73 A 916, 132 AmSR 787.

97. Matter of Draper, 74 Misc. 335, 134 NYS 236, 8 Mills Surr. 479.

98. **Burden of proof generally** see Evidence §§ 13–24.

99. See Evidence § 14.

1. U. S.—Kuykendall v. Union Pac. R. Co., 163 Fed. 819, 90 CCA 125.
Cal.—Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.
Ill.—Wight v. Worden, 162 Ill. A. 182; Telford v. Howell, 119 Ill. A. 83 [aff 220 Ill. 52, 77 NE 82].
Ind.—Deeter v. Burk, 59 Ind. A. 449, 107 NE 304.
Iowa.—Kauffman v. Logan, 174 NW 366; Gladstone v. Sanborn, 167 NW 189; Meginnes v. McChesney, 179 Iowa 563, 160 NW 50, LRA1917E 1060.
Ky.—Bishop v. Newman, 168 Ky. 238, 182 SW 165; Elliott v. Scoville, 144 Ky. 584, 139 SW 806.
Me.—Fairbanks v. Barker, 115 Me. 11, 97 A 3.
Mass.—Lovell v. Nelson, 11 Allen 101, 87 AmD 706.
Mich.—Chamberlain v. O'Leary, 161 Mich. 670, 126 NW 831.
Mo.—Denny v. Brown, 193 SW 552; Gunby v. Cooper, 177 Mo. A. 354, 164 SW 152.
N. H.—Harriman v. Bunker, 106 A 499.
N. Y.—Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.
Pa.—Smith v. Loafman, 145 Pa. 628, 23 A 395.
S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032.
Tex.—Smith v. Smith, (Civ. A.) 200 SW 540.
Vt.—Vitty v. Peaslee, 76 Vt. 402, 57 A 967.
Wash.—Kennedy v. Burr, 101 Wash. 61, 171 P 1022.
Wis.—Sawyer v. Metters, 133 Wis. 350, 113 NW 682.
[a] **Illustrations.**—(1) In an action by an administrator to recover certain property alleged to belong to the estate where defendant alleges a purchase from decedent a short time before his death, the burden is on him to establish title. Buford v. Shinkle, 12 KyL 686. (2) A decedent's estate is not chargeable under an agreement not signed by him, reciting assignment of patent rights to him, in consideration of a certain payment to be made, in the absence of a showing of his acceptance of the agreement. Thurber v. Aldrich, 167 Mich. 656, 133 NW 620. (3) Where a stockbroker takes the funds of an estate on an agreement with the executor for the purpose of dealing in stocks, which constitutes an unlawful investment, and an action is thereafter brought to recover back the funds placed in the hands of the broker, the burden is on him to show that money paid by reason of the transaction was paid to the estate, or that the estate had the benefit of it, before he can be allowed a credit therefor. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518, 94 NE 1099]. (4) Under a statute fixing a limitation of six months for bringing an action for land of an estate conveyed by heirs or devisees in the hands of bona fide purchasers, a creditor, bringing such suit after expiration of the time limited, has the burden of showing that the purchase was not in good faith. Elliott v. Scoville, 144 Ky. 584, 139 SW 806. (5) In a suit by an administrator to recover money transferred by his intestate to defendant in her lifetime, the transaction having been fully consummated, defendant is under no obligation to show a consideration for the transfer, but the burden is on plaintiff to prove that it was invalid for some reason. Murphy v. Fay, 147 App. Div. 574, 132 NYS 574. (6) Where in an action on a claim against the estate of a decedent, the estate claimed, by way of set-off, that claimant had obtained moneys belonging to decedent at a time when he sold a farm for her, and there was evidence that claimant had paid some of the money to a third person at the decedent's request, it was proper to charge that the burden was on him to account for it, as having been paid to the decedent, or disposed of in accordance with her directions. Vitty v. Peaslee, 76 Vt. 402, 57 A 967.
[b] **In a suit on a note payable to plaintiff as administrator** where plaintiff was so described in the writ, the burden of showing that the note was a debt due to the estate of plaintiff's intestate is on defendant, if he wishes to enforce a set-off in the same right. Lovell v. Nelson, 11 Allen (Mass.) 101, 87 AmD 706.
[c] **Where in ejectment against devisees the latter claim title** on the ground that they are also heirs, that fact must be affirmatively proved and will not be inferred from the fact that they are near relatives of decedent, unless it is shown that no nearer relatives survive him. Hunt v. Payne, 29 Vt. 172, 70 AmD 402.
[d] **Application of proceeds of insurance.**—A life policy, payable in part to insured's wife and in part to his mother, is not to be applied to a subsequent debt due to the mother and presented by her against debtor's estate, in the absence of any proof that it was so intended by insured. Pherigo v. Gutman, 150 Ky. 779, 150 SW 1022.
[e] **An administrator suing to set aside a conveyance** by his intestate to his wife as fraudulent against creditors has the burden of proving fraud, where at the time of the conveyance the intestate was free from debts, except to his wife, and there was a valuable consideration moving from the wife. Sawyer v. Metters, 133 Wis. 350, 113 NW 682.
[f] **In an action by an administrator to recover possession of notes,** etc., as the property of the estate, the burden is upon him to establish the allegations of his declaration. Wight v. Worden, 162 Ill. A. 182.
[g] **Receipt of interest.**—The burden is on the claimant, in a suit to charge a personal representative with interest during the first two years, to show negligence in not receiving it, but after that time the burden is on him to show why he did not receive it. Howe v. Winn, 150 Ky. 667, 150 SW 842.
[h] **In an action for a legatee's interest under a will,** which gave the proceeds of the estate to certain persons and their children, and, if any of them died without issue, gave their interest to the living legatees, the burden is on plaintiff to prove that a deceased legatee died without children. Wells v. Margraves, (Tex. Civ. A.) 164 SW 881.

the personal representative the burden is on plaintiff to establish all facts necessary to prove his claim,[2] but he is not required to make proof with respect to matters which, if they exist, would properly be matters of defense,[3] the burden being upon the representative to prove all matters upon which he relies by way of defense.[4] In an action for a legacy is it incumbent on plaintiff to show that the legacy was due and payable at the time of the commencement of the action,[5] and where such an action is brought by heirs of the legatee it is incumbent upon them to show that the legatee survived the testator, where the legacy would otherwise lapse.[6] Where an administrator deals with the property in his care to his own advantage the burden is upon him, when the transaction is attacked for fraud, to prove that he acted in good faith.[7] If the action is against the representative for a neglect or breach of trust or duty, the burden is generally on plaintiff to prove such neglect or breach;[8] but where the action is for

2. Ala.—Bush v. Cunningham, 39 Ala. 68.

Cal.—Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 148 P 206; Grubb v. Chase, 158 Cal. 352, 111 P 90; Barthe v. Rogers, 127 Cal. 52, 59 P 310; Lichtenberg v. McGlynn, 105 Cal. 45, 38 P 541.

Colo.—Gilmour v. Hawley Merchandise Co., 21 Colo. A. 307, 121 P 765.

Conn.—Leahy v. Cheney, 90 Conn. 611, 98 A 132, LRA1917D 809; Shannon v. Mereness, 90 Conn. 28, 96 A 173.

Ga.—Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 AnnCas 392.

Ill.—Edwards v. Harness, 87 Ill. A. 471.

Ind.—Schele v. Wagner, 163 Ind. 20, 71 NE 127; Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441.

Iowa.—Gladstone v. Sanborn, 167 NW 189.

Ky.—Cottrell v. Barnes, 90 SW 1048, 28 KyL 1014; Mimms v. Lawrence, 91 SW 715, 28 KyL 1317.

Me.—Gordon v. Keene, 107 A 849; Haslam v. Perry, 115 Me. 295, 98 A 812; Goodell v. Buck, 67 Me. 514.

Md.—Kent v. Wilkinson, 5 Gill & J. 497.

Mass.—Lyons v. Jackson, 122 NE 304.

Mich.—In re McLaughlin, 139 NW 50.

Mo.—State v. Collier, 15 Mo. 293; McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728.

N. J.—Frean v. Hudson, 87 N. J. L. 244, 93 A 582.

N. Y.—Leask v. Hoagland, 205 N. Y. 594, 98 NE 1106 [den reh 205 N. Y. 171, 98 NE 395, AnnCas1913D 1199 (rev 144 App. Div. 138, 128 NYS 1017)]; In re Bayles, 177 NYS 697.

N. D.—Mann v. Redmon, 27 N. D. 346, 145 NW 1031.

Or.—Goltra v. Penland, 45 Or. 254, 77 P 129.

Pa.—Wentz v. Blair, 232 Pa. 135, 81 A 144; Foulk v. Brown, 2 Watts 209; Shipley's Est., 38 Pa. Co. 593.

S. D.—Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 NW 934.

Tex.—Wells v. Margraves, (Civ. A.) 164 SW 881.

Va.—Tazewell v. Whittle, 13 Gratt. (54 Va.) 329.

Wash.—In re Masterson, 183 P 93.

"It is incumbent upon the plaintiff to prove by proper evidence the validity of his claim made against the estate of a deceased person." Gilmour v. Hawley Merchandise Co., 21 Colo. A. 307, 312, 121 P 765.

[a] **Illustrations.**—(1) In order to maintain a bill against an administrator of an insolvent estate for property received by him, on the ground that it was held by his intestate in trust for plaintiff, the burden is on plaintiff to identify the property claimed as held by the intestate in trust for him. Goodell v. Buck, 67 Me. 514. (2) In an action against an administrator de bonis non, the onus is upon plaintiff to show the amount of assets that went into his hands and his failure to account for them. State v. Collier, 15 Mo. 293.

[b] **If plaintiff's evidence fails,** defendant is entitled to submit the case on claimant's testimony, rather than move for a nonsuit. Bartne v. Rogers, 127 Cal. 52, 59 P 310.

[c] **Action on promise of representative.**—Where in assumpsit under plea of limitations, plaintiff proved that defendant administrator, in answer to demand for payment, said he thought the debt had been paid, but if it was correct, it should be paid, he must also prove the debt before he could avail himself of the promise. Kent v. Wilkinson, 5 Gill & J. (Md.) 497.

[d] **In a suit for payment for services to decedent** the burden is on plaintiff to show that they were furnished as a consideration for a legal obligation. Hedrick v. Hedrick, 48 Ind. A. 658, 94 NE 728; Hunt v. Osborn, 40 Ind. A. 646, 82 NE 933; Broughton v. Nicholson, 150 Iowa 119, 129 NW 814; Trautman v. Traub, 150 Iowa 23, 129 NW 322 (extra compensation); Conway v. Conway, 130 Ky. 218, 113 SW 94; Lowe v. Lowe, 111 Md. 113, 73 A 878; Johnson v. Kimball, 172 Mass. 398, 52 NE 386; Williams v. Williams, 132 Mass. 304; In re Helpbringer, 175 Mo. A. 325, 162 SW 288; Crowley v. Dagley, 174 Mo. A. 561, 161 SW 366; Hartley v. Hartley, 173 Mo. A. 18, 155 SW 1099; Baxter v. Troll, 152 Mo. A. 557, 133 SW 1188 (extra services to boarder); Cole v. Fitzgerald, 132 Mo. A. 17, 111 SW 628; McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728 (where the family relation existed, but not otherwise); Rose v. Leask, 124 App. Div. 799, 109 NYS 484 (extra compensation); Wise v. Martin, 42 Pa. Super. 443 (nursing); Riemensberger's Est., 29 Pa. Super. 596. But compare Matter of Oatman, 5 NYLegObs 378 (the promise to pay, implied from valuable services rendered to a decedent, must be answered by satisfactory affirmative evidence that they were gratuitously rendered before the right of the claim can be defeated).

[e] **In an action for the payment of a legacy** (1) plaintiff must show either by proof or admissions of executors that there are sufficient assets to pay the legacy after payment of debts, funeral charges, etc. Bush v. Cunningham, 37 Ala. 68; Stevens v. Gordy, 9 Gill (Md.) 405. (2) Where by the terms of the bequest a debt due to the legatee from the testator is to be deducted therefrom, he must also show the amount of the indebtedness to him. Bush v. Cunningham, 39 Ala. 68.

3. Blakeley v. Cochran, 117 Mich. 394, 75 NW 940; Smith v. Smith, (Tex. Civ. A.) 200 SW 540.

[a] **Illustration.**—A claimant against an estate upon a note need not show affirmatively, where he was agent for decedent for several years before her death, that he had properly accounted to her as to all matters between them, as the failure so to account is matter of defense. Blakely v. Cochran, 117 Mich. 394, 75 NW 940.

4. Cal.—Sowash v. Emerson, 32 Cal. A. 13, 161 P 1018.

Ill.—Gross v. Thornson, 286 Ill. 185, 121 NE 600; Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327.

Iowa.—Herrick v. Hayes, 173 NW 110; Craig v. Craig, 167 Iowa 340, 149 NW 454.

Ky.—Bishop v. Newman, 168 Ky. 238, 182 SW 165; Radford v. Harris, 144 Ky. 809, 139 SW 963.

La.—Edwards v. Daley, 14 La. Ann. 384.

Mich.—Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

Mo.—Hoss v. Crawford, 145 Mo. A. 360, 129 SW 1053.

Mont.—Wight v. Dolenty, 53 Mont. 168, 162 P 387.

N. Y.—Troy Bank v. Topping, 13 Wend. 557.

Or.—Godfrey v. Howes, 91 Or. 98, 178 P 388.

S. C.—Parker v. Latimer, 59 S. C. 330, 37 SE 918.

"It is true they were not required to make good every ground of defense relied on; but to defeat a recovery it was incumbent upon them to establish one of them. As to the plea of non est factum, the burden of proof was on the appellee; but in respect to the other grounds of defense pleaded in the answer, viz.: No consideration, limitation, and the equitable estoppel growing out of the alleged staleness of appellee's claim, the burden of proof was on the appellants." Radford v. Harris, 144 Ky. 809, 811, 139 SW 963.

[a] **Lack of consideration.**—(1) Where an administrator of one upon whom an order for funds in his hands was given contests the consideration of such an order, the burden is on him to establish want of consideration. Edwards v. Daley, 14 La. Ann. 384. (2) In a proceeding against an administrator on a note, the burden of introducing testimony to show want of consideration after introduction of the note is on defendant, but he does not have the burden of proving by a preponderance of the evidence that there was no consideration. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

[b] **A want of assets** to pay a claim when relied upon as a defense by the representative must be proved by him. Troy Bank v. Topping, 13 Wend. (N. Y.) 557 (a note given by the representative prima facie imports a sufficiency of assets and the burden is upon him to show that there was in fact a deficiency); McSorley v. Leary, 1 NYLegObs 410.

[c] **On the issue of devastavit** and where the representative fails to plead plene administravit the burden is on him to show that assets formerly in his hands were taken away from him without his fault or that without fault he failed to realize on them. Parker v. Latimer, 59 S. C. 330, 37 SE 918.

5. Pierce v. Loomis, 224 Mass. 226, 112 NE 1027.

6. Correa v. Correa, 18 Porto Rico 115.

7. Taylor v. Taylor, 259 Ill. 524, 102 NE 1086.

8. Gadsden v. Jones, 1 Fla. 332; Ladd v. Stephens, 147 Mo. 319, 48 SW 915; Matter of Cozine, 104 App. Div. 182, 93 NYS 557; Johnson's Est., 11 Phila. (Pa.) 83.

[a] **The burden of proving maladministration** by administrators is on the one who charges it, except that when the administrators admit, or it is shown that they have received, assets, they must account for or produce them. Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

failure to collect debts due the estate it is incumbent upon the representative to prove that he used reasonable diligence and prudence in attempting to make the collection.[9] In an action by heirs for a devastavit the burden is on plaintiffs to show a resulting injury to themselves as heirs.[10] In a suit by an administrator to recover money borrowed from deceased, after showing the original loan, plaintiff is not bound to show that the debt has not been discharged.[11] Where the administrator holds a note of decedent, the fact that it was overdue at the time of decedent's death does not compel the administrator to prove negatively that he did not hold the note in his individual right in the absence of fraud.[12] Where an administrator brings an equitable action to have restored to the estate a portion of its assets, which he has, by mistake as to his authority under the will, conveyed away without consideration, the burden of showing that he is estopped, by reason of his consent to such transfer, from maintaining the action, is on defendant.[13]

[§ 2173] **b. As to Presentation and Rejection of Claim.** Where the statute makes presentation of a claim against an estate a condition precedent to an action thereon,[14] the burden is on one suing the representative to show that his claim was presented,[15] even though presentation is not alleged in the complaint.[16] Where the representative sets up a defense that the claim sued on is barred because of nonrepresentation,[17] the burden is on him to show that he took the steps necessary to set the statutory period running, at such a time that the claim was barred when the action thereon was commenced;[18] and it has been held that it is also incumbent on him to establish nonrepresentation,[19] although other authorities hold that, where issue is joined on the fact of presentation the burden of proof is on plaintiff.[20] Where the statute requires action to be instituted within a specified time after rejection of the claim,[21] the burden is upon plaintiff to show that the action was brought within the statutory period after rejection.[22]

[§ 2174] **c. As to Value of Services.** Where action is brought on a claim for services rendered to decedent, it is incumbent upon claimant to prove the value of such services.[23]

[§ 2175] **d. As to Payment.** Where in an action upon a claim against a decedent's estate plaintiff has proved the existence of his debt within the period of statutory limitation, he need not prove nonpayment,[24] although he alleges it;[25] but the burden of proof is upon defendant representative to prove payment of the claim, where such defense is relied upon.[26] Conversely where the personal representative seeks to enforce payment of an alleged debt due to the estate, the burden of proving payment is upon defendant.[27] Where defendant, in an action by executor, produces a receipt signed by decedent and produces two witnesses to the genuineness of the signature, the burden is on plaintiff to show the invalidity of the receipt.[28]

[§ 2176] **e. In Actions on Written Instruments.** While it has been held that the general rule that in an action on a note or other written instrument plaintiff is not bound to prove its execution, unless this is denied by proper plea,[29] applies to actions against a personal representative on notes or instruments executed by decedent;[30] the more generally accepted view is that one suing the representative on a note or other written instrument purporting to be executed by decedent must prove such execution even though this is not denied by the answer.[31]

9. Peytavin's Succ., 7 Rob. (La.) 477; Longbottom v. Babcock, 9 La. 44; Collins v. Andrews, 6 Mart. N. S. (La.) 190.

10. Harbert v. Harbert, (Tex. Civ. A.) 59 SW 594.

11. Hoss v. Crawford, 145 Mo. A. 360, 129 SW 1053.

12. In re McPherran, 212 Pa. 425, 61 A 954.

13. Wentzel v. Chesley, 28 Oh. Cir. Ct. 192.

14. See supra § 1836.

15. Holbrook v. Libby, 113 Me. 389, 94 A 482, LRA1916A 1167.

16. Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25; Kittredge v. Folsom, 8 N. H. 98; Mathes v. Jackson, 6 N. H. 105.

17. See supra § 1020.

18. Ala.—Evans v. Norris, 1 Ala. 511.

Mo.—Weber v. Jantzen, (A.) 180 SW 432.

N. Y.—Clark v. Sexton, 23 Wend. 477.

N. C.—Cox v. Cox, 84 N. C. 138; Gilliam v. Willey, 54 N. C. 128.

Pa.—Loder's Est., 5 Pa. Co. 276.

[a] **Publication of notice.**— In order to subject a creditor to the short limitation of six months created by the statute concerning executors and administrators, it is incumbent upon the latter to show the publication of notice to creditors to come in. Clark v. Sexton, 23 Wend. (N. Y.) 477.

19. McConaughy v. Wilsey, 115 Iowa 589, 88 NW 1101.

20. Brannan v. Sherry, 195 Ala. 272, 71 S 106; Weller v. Rensford, 185 Ala. 333, 64 S 366; McKenzie v. Matthews, 156 Ala. 437, 44 S 958; Kornegay v. Mayer, 135 Ala. 141, 33 S 36; Mitchell v. Lea, 57 Ala. 46; Evans v. Norris, 1 Ala. 511; Stewart v. Lasseter, 4 Ala. A. 665, 59 S 233; Rowland v. Madden, 72 Cal. 17, 12 P 226, 870.

21. See supra § 1932.

22. Mann v. Redmon, 27 N. D. 346, 145 NW 1031 (even though statute not pleaded by defendant).

23. Broughton v. Nicholson, 150 Iowa 119, 129 NW 814; Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

24. Hurley v. Ryan, 137 Cal. 461, 70 P 292; Thomas v. Fursman, (Cal. A.) 178 P 870; Matter of Rowell, 45 App. Div. 323, 61 NYS 382; Kartoghian v. Harboth, (Tex. Civ. A.) 56 SW 79.

[a] **In an action for compensation for services rendered** to decedent where plaintiff has proved the rendition of such services and their value, he is not required to prove nonpayment. Ralley v. O'Connor, 71 App. Div. 328, 75 NYS 925 [aff 173 N. Y. 621, 66 NE 1115]; Hicks-Alixanain v. Walton, 14 App. Div. 199 43 NYS 541.

25. Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127.

26. Cal.—Hurley v. Ryan, 137 Cal. 461, 7 P 292; Melone v. Ruffino, 129 Cal. 514, 62 P 93, 79 AmSR 127; Griffith v. Lewin, 125 Cal. 618, 58 P 205.

Ill.—Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327.

Iowa.—Sheldon v. Thornburg, 153 Iowa 622, 133 NW 1076.

Ky.—Best v. Best, 74 SW 738, 25 KyL 93.

N. Y.—Lerche v. Brasher, 104 N. Y. 157, 10 NE 58; Matter of Rowell, 45 App. Div. 323, 61 NYS 382.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Or.—Godfrey v. Howes, 91 Or. 98, 178 P 388.

Pa.—In re Brown, 210 Pa. 499, 60 A 149.

[a] **Illustration.**—In an action by an administrator to have a claim for board and nursing furnished a decedent ascertained, the administrator has the burden of proving payment of the board when it is shown that the claimant furnished it to decedent. Best v. Best, 74 SW 738, 25 KyL 93.

27. Williams v. Williams, 109 Me. 537, 85 A 43; Chamberlain v. O'Leary, 161 Mich. 670, 126 NW 831; Marshall v. De Cordova, 26 App. Div. 615, 50 NYS 294.

[a] **Where an agent admits the collection of money** for his principal, he has the burden of proving payment of such money to the principal in an action by the principal's executrix to recover it. Williams v. Williams, 109 Me. 537, 85 A 43.

[b] **Where an administrator sues to foreclose a mortgage,** which, with the note secured, was found in intestate's papers, the same indicating a considerable part of the debt to be unpaid, defendant has the burden of proving payment. Chamberlain v. O'Leary, 161 Mich. 670, 126 NW 831.

28. Paige v. Paige, 53 Pa. Super. 311 (plaintiff cannot impeach the receipt by offering the deposit book of decedent which contained no account of the deposit of the sum apparently covered by the receipt, or by showing that decedent had a small personal estate, and was careful and methodical, and that defendant has made the other payments on the same indebtedness by check, but that no check was produced corresponding with the receipt).

29. See Bills and Notes § 1302.

30. Knight v. Knight, 9 Fla. 283; Foster v. Nowlin, 4 Mo. 18.

31. Ruddell v. Tyner, 87 Ind. 529; Wells v. Wells, 71 Ind. 509; Cawoods v. Lee, 32 Ind. 44; Barnett v. Cabinet Makers' Union, 28 Ind. 254; Mahon v. Sawyer, 18 Ind. 73; Riser v. Snoddy, 7 Ind. 442, 65 AmD 740; Deeter v. Burk, 59 Ind. A. 449, 107 NE 304; Indiana Trust Co. v. Byram, 36 Ind. A. 6, 72 NE 670, 73 NE 1094; Bowen v. O'Hair, 29 Ind. A. 466, 64 NE 672;

Where, however, rules of court provide that the execution of a promissory note shall be taken as admitted at the trial unless such execution is denied by affidavit of defense, and require executor and administrators to file affidavits of defense, proof of the execution of the note sued on will not be required where the representative has not filed an affidavit of defense denying such execution.[32] Where the execution of a note by decedent is proved the burden of proving want of consideration is on defendant representative.[33] In an action against an estate for the amount of a note given by defendant as representative, the burden is upon plaintiff to show that the cause of action arose upon a contract made by decedent in his lifetime, that the original claim or debt was not extinguished by the acceptance of the note, and that there was an assignment to him of the original claim to the extent of the note.[34] In an action on an official bond signed by decedent the acknowledgment of the bond as provided for by statute is prima facie evidence of the signature and execution of the bond and plaintiff need not introduce extrinsic proof of decedent's signature, unless defendant introduces evidence to overcome the prima facie proof of execution made by the acknowledgment.[35]

[§ 2177] **f. On Plea on Plene Administravit.** Where in an action against a personal representative the latter pleads plene administravit and an issue is joined thereon, the burden is on plaintiff to show assets unadministered in defendant's hands at the time the action was commenced, applicable to the payment of his claim;[36] to produce a copy of the inventory of the estate from the public records, if he wishes thereby to charge the administrator with assets;[37] and to show notice of his claim by the representative before distribution.[38]

[§ 2178] **g. As to Representative Capacity.** Except so far as the pleadings or special circumstances may have shown a waiver of such proof,[39] a personal representative who brings an action should prove his appointment as part of his title, and to substantiate his right of action,[40] unless the cause of action is one which arose after decedent's death;[41] and the same is true in actions against him, in which he relies upon a matter of defense dependent upon

Kennedy v. Graham, 9 Ind. A. 624, 35 NE 925, 37 NE 25; Smith v. King, 88 Iowa 105, 55 NW 88; Perkins v. Humes, 200 Pa. 235, 49 A 934; Campion v. Schinnick, 93 Wis. 111, 67 NW 11.

32. Lowenstein v. Michael, 55 Pa. Super. 628 [expl Perkins v. Humes, 200 Pa. 235, 49 A 934].

33. Thompson v. Thompson, 140 Cal. 545, 74 P 21.

34. Cary v. Gregory, 38 N. Y. Super. 127.

35. Ramsey v. Peo., 197 Ill. 572, 64 NE 549, 90 AmSR 177 [aff 97 Ill. A. 283].

36. Ky.—Wallace v. Barlow, 3 Bibb 168.

Md.—Morgan v. Slade, 2 Harr. & J. 38.

N. Y.—Seaward v. Davis, 198 N Y. 415, 91 NE 1107; Vultee v. Rayner, 2 N. Y. Super. 407; Bentley v. Bentley, 7 Cow. 701. But compare Platt v. Robins, 1 Johns. Cas. 276, 1 AmD 110 (a plea of plene administravit is an affirmative plea and therefore it is incumbent on defendants to show that they had fully administered according to the inventory which they were bound to make when they assumed the administration).

N. C.—Ray v. Patton, 86 N. C. 386; McKethan v. McGill, 83 N. C. 517.

S. C.—Shannon v. Dinkins, 33 S. C. L. 196.

Tenn.—Gilpin v. Noe, 9 Heisk. 192; May v. Wright, 1 Overt. 385.

[a] **Order of proof.**—Upon such issue the representative begins by showing that he has administered something and then the burden of proof is upon plaintiff to show by inventory or otherwise assets to a greater amount than is prudent to be administered. Anonymous, 3 N. C. 14.

37. Vultee v. Rayner, 2 Hall (N. Y.) 407 (where plaintiff objected to the administrator's introducing evidence before he had produced such an inventory).

38. Willingham v. Chick, 14 S. C. 93, 95 ("If a plaintiff comes into court and establishes his claim, and the executor pleads plene administravit, and that all funds have been paid out, and his accounts balanced, if he satisfies the jury that he has fully administered, unless notice of the claim be brought home to him, he is entitled to a verdict. If, however, such notice be brought home to him, the plea of plene administravit is no answer; but it is incumbent upon the plaintiff to show that he had such notice").

39. Spikes v. Howard, 51 Tex. Civ. A. 389, 111 SW 792.

Pleading to merits as admission of representative capacity see supra § 2093.

40. U. S.—Campbell v. U. S., 13 Ct. Cl. 108.

Ala.—Randolph v. Hubbert, 190 Ala. 610, 67 S 416; Enzor v. Rushton, 13 Ala. A. 550, 69 S 909.

Ga.—Horn v. Johnson, 87 Ga. 448, 13 SE 633.

Ill.—Collins v. Ayers, 13 Ill. 358.

La.—De Brucys v. Freret, 18 La. Ann. 80.

N. Y.—Webster v. M. W. Kellogg Co., 168 App. Div. 443, 153 NYS 800; Ketchum v. Morrell, 2 NYLegObs 58.

N. C.—Kesler v. Roseman, 44 N. C. 389.

Oh.—Matter of Dunham, 8 Oh. Cir. Ct. 160, 4 Oh. Cir. Dec. 325; Humphries v. Loomis, 18 Oh. Cir. Ct. N. S. 529.

Philippine.—Malahacan v. Ignacio, 14 Philippine 771; Craig v. Leuterio, 11 Philippine 44.

S. C.—Kerby v. Quinn, 24 S. C. L. 264; Browning v. Huff, 18 S. C. L. 174.

Tenn.—Partee v. Caughran, 9 Yerg. 460.

Tex.—Werbiskie v. McManus, 31 Tex. 116; Rogers v. Tompkins, (Civ. A.) 87 SW 379.

Vt.—Austin v. Downer, 25 Vt. 558; Aldis v. Burdick, 8 Vt. 21.

Wis.—Wittmann v. Watry, 37 Wis. 238.

[a] **To sustain an order of seizure and sale** at the suit of the administrator of a succession, authentic evidence of plaintiff's appointment as administrator is necessary. De Brueys v. Freret, 18 La. Ann. 80; Landry v. Landry, 12 La. Ann. 167.

[b] **In ejectment** (1) by a representative his appointment becomes part of his title to recover and must be shown by him. Horn v. Johnson, 87 Ga. 448, 13 SE 633; May v. Killen, 56 Ga. 527; Sorrell v. Ham, 9 Ga. 55; Austin v. Downer, 25 Vt. 558; Aldis v. Burdick, 8 Vt. 21. (2) If he fails to do so by competent evidence, it is proper to grant a nonsuit. Lay v. Sheppard, 112 Ga. 111, 37 SE 132.

[c] **In an action by a public administrator,** he must, to substantiate his right of action, adduce evidence of his special character. Ketchum v. Morrell, 2 NYLegObs 58. But compare Wetzell v. Waters, 18 Mo. 396 (a public administrator is regarded like any other administrator in bringing suits, and defendant cannot require him to show that the facts exist which authorize him to administer).

[d] **Necessary evidence.**—(1) If on the trial of an action the authority of an executor or administrator is denied he must produce his letters of administration, duly signed and sealed, or if lost then the certificate of the clerk that such letters have issued. Werbiskie v. McManus, 31 Tex. 116. (2) When the representative character of an administrator is put in issue, he will be required to exhibit a copy of the letters of administration authenticated as the act of congress directs, together with the certificate of the proper officer that they were granted in pursuance of, and conformable to, the laws of the state in which they were granted. Collins v. Ayers, 13 Ill. 358.

[e] **Where special provisions of the will constitute the basis of his authority** in bringing the suit, the will or a duly attested copy thereof should be produced in evidence. Horn v. Johnson, 87 Ga. 448, 13 SE 633; Mays v. Killen, 56 Ga. 527; Sorrell v. Ham, 9 Ga. 55; Partee v. Caughran, 9 Yerg. (Tenn.) 460; Aldis v. Burdick, 8 Vt. 21.

[f] **Appearance by representative upon revivor of action.**—After the appearance of an administrator of executor has been entered, his right to appear must be proved, in the same manner as though the suit had been commenced in his name, but his right cannot be questioned before he has become a party. Moore v. Rand, 1 Wis. 245.

[g] **Where the granting of letters of administration to plaintiff is admitted,** the onus is on one disputing his title to show that the court making the appointment had no jurisdiction. Welch v. New York Cent. R. Co., 53 N. Y. 610.

41. Sears v. Daly, 43 Or. 346, 73 P 5 (in an action by an executor on a note alleged to have been given after the death of his testator, his failure to prove his representative capacity, or that the note was the property of the estate of which he was executor, was immaterial, as the averment as to plaintiff's representative character may be regarded as surplusage, and the complaint still state a good cause of action in his favor as an individual).

Right of representative to sue in individual capacity on cause of action arising after decedent's death see supra § 1807.

his representative character.[42] Where the suit is against the representative as such, the burden is on plaintiff to prove not only the representative's appointment, but also that he had taken upon himself the trust,[43] unless the suit is upon a decree of the probate court against the representative, in which case such decree is of itself evidence of the appointment, and plaintiff need not prove it.[44]

[§ 2179] **3. Admissibility**[45]**—a. In General.** The admissibility of evidence in actions by or against a personal representative depends upon the nature of the fact sought to be proved;[46] and the general rules of evidence[47] must be applied, so as to receive any evidence which is a proper character and legitimately tends to support or refute the contentions of the parties,[48] and to exclude evidence which is irrelevant, incompetent, immaterial, or of such a character that it is not proper to presentation and consideration.[49] For example evidence is admissible in an action for a legacy which

42. Partee v. Caughran, 9 Yerg. (Tenn.) 460 (where one sued as executor relies upon a retainer he must produce the letters testamentary and show that he is the rightful executor).

43. Witcher v. Wilson, 47 Miss. 663; American Loan, etc., Co. v. Bangle, (Tex. Civ. A.) 153 SW 662; Picard v. Brown, 6 T. R. 550, 101 Reprint 697.

[a] **Made of proof.**—In an action against executors this may be shown by proving that they had proved the will, or given bond and taken the oath, or in case they are charged as executors de son tort, by proving acts of intermeddling with the estate. Witcher v. Wilson, 47 Miss. 663.

44. Dubois v. Dubois, 6 Cow. (N. Y.) 494 (a surrogate's decree against an executor to pay a pecuniary legacy makes the claim a personal claim against the executor; and it is of itself evidence that there was a will and that defendant was executor, so that plaintiff need not prove such facts on the trial).

45. Admissions of:

Decedent as evidence against personal representative see Evidence §§ 418–430.

Representative as evidence against estate or successor see Evidence § 486.

46. Ala.—Sanford v. Howard, 29 Ala. 68, 68 AmD 101; Nance v. Countess, (A.) 78 S 464.

Conn.—Fenton v. Mansfield, 82 Conn. 343, 73 A 770.

Ga.—Graham v. Peacock, 131 Ga. 785, 63 SE 348; White v. Edmondson, 15 Ga. 301; Askew v. Singletary, 11 Ga. A. 727, 76 SE 98.

Ill.—Union Trust Co. v. Shoemaker, 172 Ill. A. 365.

Ind.—Slade v. Leonard, 75 Ind. 171; Baker v. Baker, 43 Ind. A. 26, 86 NE 864.

Iowa.—In re Bremer, 151 Iowa 449, 131 NW 667; Dunton v. Dawley, 122 Iowa 512, 98 NW 307.

Ky.—Proctor v. Proctor, 118 Ky. 474, 81 SW 272, 26 KyL 348.

Md.—Giering v. Sauer, 120 Md. 295, 87 A 774.

Mass.—Whitcomb v. Whitcomb, 217 Mass. 558, 105 NE 613; Tripp v. Macomber, 187 Mass. 109, 72 NE 361.

Mich.—Oliver v. Jessup, 137 Mich. 642, 100 NW 900.

Minn.—Bond v. Corbett, 2 Minn. 248.

Nebr.—Gandy v. Bissell, 5 Nebr. (Unoff.) 184, 97 NW 632.

N. Y.—Place v. Place, 122 App. Div. 363, 106 NYS 781; Roberge v. Bonner, 94 App. Div. 342, 88 NYS 91 [aff 185 N. Y. 265, 77 NE 1023]; Farrer v. Farmers' L. & T. Co., 85 App. Div. 478, 83 NYS 218; Dwane v. Miller, 89 Misc. 297, 152 NYS 1060; Beddoe v. Wadsworth, 21 Wend. 120.

Tex.—Tomlinson v. Drought, (Civ. A.) 127 SW 262.

Vt.—Comstock v. Jacobs, 86 Vt. 182, 84 A 568.

47. See Evidence 22 C. J. p 1.

48. Cal.—Colburn v. Parrett, 27 Cal. A. 541, 150 P 786; Martin v. Brosnan, 18 Cal. A. 477, 123 P 550.

Conn.—Fenton v. Mansfield, 82 Conn. 343, 73 A 770.

D. C.—Drury v. Gorrell, 44 App. 518.

Ga.—Newman v. Thompson, 134 Ga. 137, 67 SE 662; Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 459; Parker v. Salmons, 113 Ga. 1167, 39 SE 475; Bass v. Gobert, 113 Ga. 262, 38 SE 834; Jones v. Linton, 34 Ga. 429.

Ill.—Cunningham v. Daugherty, 220 Ill. 45, 77 NE 95; Smythe v. Evans, 209 Ill. 376, 70 NE 906 [rev 108 Ill. A. 145]; Greenfield v. Maclin, 183 Ill. A. 596.

Ind.—Zimmerman v. Beatson, 39 Ind. A. 664, 79 NE 518, 80 NE 165.

Iowa.—Hoyt v. Hoyt, 137 Iowa 563, 115 NW 222; Blake v. Robinson, 129 Iowa 196, 105 NW 401; Simmons v. Rust, 39 Iowa 241.

Kan.—Story v. McCormick, 70 Kan. 323, 78 P 819.

Ky.—Benge v. Creech, 175 Ky. 6, 192 SW 817; Morawick v. Martineck, 128 Ky. 155, 107 SW 759, 32 KyL 971; Fuqua v. Hagan, 107 SW 735, 32 KyL 1040.

Me.—Drew v. Provost, 100 Me. 128, 60 A 794.

Md.—Herman v. Oehrl, 116 Md. 512, 82 A 161; Huff v. Simmers, 114 Md. 548, 79 A 1003.

Mass.—Butler v. Butler, 225 Mass. 22, 113 NE 577; Chandler v. Baker, 191 Mass. 579, 78 NE 387; Tripp v. Macomber, 187 Mass. 109, 72 NE 361; Green v. Gill, 8 Mass. 111.

Mich.—Fishell v. Fishell, 172 NW 432; In re Davis, 200 Mich. 500, 166 NW 899; Bolthouse v. De Spelder, 181 Mich. 153, 147 NW 589; Abel v. Roosenraad, 173 Mich. 93, 138 NW 325; Forsythe v. Thompson, 157 Mich. 669, 122 NW 219; Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

Mo.—Hammer v. Crawford, (A.) 93 SW 348.

N. H.—Page v. Hazelton, 74 N. H. 252, 66 A 1049.

N. Y.—Cunningham v. Hewitt, 177 N. Y. 541, 69 NE 1122 [aff 84 App. Div. 114, 81 NYS 1102]; Salisbury v. Henion, 138 App. Div. 389, 122 NYS 748; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [writ of error dism 197 N. Y. 521 mem, 90 NE 1156 mem]; Place v. Place, 122 App. Div. 363, 106 NYS 781; Leask v. Dew, 102 App. Div. 529, 92 NYS 891 [aff 184 N. Y. 599 mem, 77 NE 1190]; Dwane v. Miller, 89 Misc. 297, 152 NYS 1060; Beekman v. Beekman, Anth. N. P. 169.

N. D.—Boelter v. Crist, 33 N. D. 331, 157 NW 115.

Pa.—Power v. Grogan, 232 Pa. 387, 81 A 416.

Tex.—Dunn v. Epperson, (Civ. A.) 175 SW 837; Altgelt v. Elmendorf, (Civ. A.) 86 SW 41.

Vt.—Mayhew v. Felton, 90 Vt. 370, 98 A 900; Gilfillan v. Gilfillan, 90 Vt. 94, 96 A 704; Comstock v. Jacobs, 86 Vt. 182, 84 A 568; Vitty v. Peaslee, 76 Vt. 402, 57 A 967.

Wash.—Peterson v. Tull, 85 Wash. 546, 148 P 598; Robertson v. O'Neill, 67 Wash. 121, 120 P 884; Poncin v. Furth, 15 Wash. 201, 46 P 241.

W. Va.—Barrett v. Andrew, 81 W. Va. 283, 94 SE 144.

[a] **Evidence held admissible.**—(1) In action on note. Green v. Smith, 180 Ill. A. 572 (decedent's financial condition). (2) In action to recover value of land sold. Stripling v. Stripling, 49 Ga. 95. (3) In action by representative to set aside fraudulent conveyance. Andruss v. Doolittle, 11 Conn. 283 (insolvency of estate); Lynch v. Murray, 86 Va. 1, 83 A 746. (4) In ejectment by representative. Graham v. Peacock, 131 Ga. 785, 63 SE 348; Power v. Grogan, 232 Pa. 387, 81 A 416. (5) In action for conversion. Howard v. Patrick, 43 Mich. 121, 5 NW 84. (6) In an action against administrator for fraud in sale of land certificate by intestate to plaintiff. Goss v. Dysant, 31 Tex. 186. (7) On issue of negligence. Greenwell v. Crow, 73 Mo. 638. (8) On issue of indebtedness. Garretson v. Kinkead, 118 Iowa 383, 92 NW 55. (9) On issue as to loan of money by attorney to client. Matter of Mulligan, 82 Misc. 336, 143 NYS 686 [aff 165 App. Div. 912 mem, 150 NYS 1098 mem]. (10) On issue as to gift. Pryor v. Morgan, 170 Pa. 568, 33 A 98. (11) Knowledge of claim. California Electric Light Co. v. California Safe Deposit, etc., Co., 145 Cal. 124, 78 P 372. (12) Small loans on issue of whether large payments made. Williams v. Williams, 109 Me. 537, 85 A 43. (13) Recognition of liability by decedent. Bull v. Payne, 47 Or. 580, 84 P 697. (14) Rental value. Oliver v. Hammond, 85 Ga. 323, 11 SE 655 (action by owner of land to recover rents and profits from representative). Wright v. Davis, 72 N. H. 448, 57 A 335 (where set-off for rent claimed). (15) Insolvency of estate where defendant sued by representative pleads set-off. Ray v. Dennis, 5 Ga. 357. (16) To discredit claim. Sanguinetti v. Pelligrini, 2 Cal. A. 294, 83 P 293.

49. Ala.—Nance v. Countess, (A.) 78 S 464.

Cal.—Colburn v. Parrett, 27 Cal. A. 541, 150 P 786.

Colo.—Gilmour v. Central City First Nat. Bank, 21 Colo. A. 301, 121 P 767.

Conn.—Andruss v. Doolittle, 11 Conn. 283.

Del.—McGovern v. O'Donnell, 102 A 183.

Ga.—Parker v. Salmons, 113 Ga. 1167, 39 SE 475; Wardlaw v. Frederick, 13 Ga. A. 594, 79 SE 523.

Ill.—Moss v. Redmon, 184 Ill. A. 290; Einwechter v. Murray, 168 Ill. A. 317; Telford v. Howell, 119 Ill. A. 83 [aff 220 Ill. 52, 77 NE 82].

Ind.—Henderson v. Henderson, 165 Ind. 666, 75 NE 269; Baker v. Baker, 43 Ind. A. 26, 86 NE 864.

Iowa.—Dunton v. Dawley, 122 Iowa 512, 98 NW 307.

Kan.—In re Burkhart, 103 Kan. 97, 172 P 1024.

Ky.—Benge v. Creech, 175 Ky. 6, 192 SW 817; McGrew v. Congleton, 102 SW 1185, 31 KyL 609.

Md.—Giering v. Sauer, 120 Md. 295, 87 A 774.

Mass.—Loweth v. Bradford, 227 Mass. 584, 116 NE 892; Whitcomb v. Whitcomb, 217 Mass. 558, 105 NE 613; Edwards v. Davis, 198 Mass. 441, 84 NE 855; Parker v. Coburn, 10 Allen 82.

Mich.—Parmalee v. Wigent, 189 Mich. 507, 155 NW 577; Stockwell v. Sedina, 170 Mich. 476, 136 NW 476; In re Johnson, 160 Mich. 585, 125 NW 702; McGregor v. McGregor, 156 Mich. 487, 120 NW 1071.

Minn.—Meehan v. Meehan, 119 Minn. 35, 137 NW 163.

Miss.—Wells v. McCollough, 113 Miss. 401, 74 S 289.

Mo.—McCartney v. Finnell, 106 Mo. 445, 17 SW 446; Nelson v. Poorman, (A.) 215 SW 753.

tends to show that property existed, subject to such legacy, during the lifetime of the testator,[50] or that assets came into the hands of the executor,[51] or by the exercise of due diligence on his part, might have come into his hands.[52] Plaintiff in an action against the representative may introduce evidence as to the validity of his claim at the time the indebtedness was incurred, and if he sees proper may show the subsequent conduct of decedent or his representative;[53] and to reduce his personal liability, the representative may prove payments which the probate court through mistake has disallowed,[54] but he cannot give in evidence his own acts or declarations or those of his decedent subsequent to contracting the debt for the purpose of discharging the estate from liability.[55] A claim filed against an administrator is admissible in an action against him for a certain sum, although the claim filed exceeds the sum by the amount of interest due.[56]

In an action for services rendered or board and lodging furnished to decedent, any competent evidence which legitimately bears on the issues should be received.[57] Evidence is admissible to show the financial condition of decedent,[58] the character and extent[59] and value[60] of the services rendered, that a bequest or devise was made in favor of plaintiff,[61] or that the employment was by another than decedent;[62] or if such services were rendered by a member of decedent's family, or a near relative, to show either an express agreement, or facts from which an implied agreement to pay therefor may be inferred.[63] But evidence which does not throw light on the issues or is of a character which is not proper for acceptance or consideration should be rejected.[64]

N. J.—Armitt v. English, 79 N. J. L. 8, 74 A 130;
N. Y.—Sipple v. Fickett, 158 App. Div. 306, 143 NYS 124; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [writ of error dism 197 N. Y. 521 mem, 90 NE 1156 mem]; Roberge v. Bonner, 94 App. Div. 342, 88 NYS 91 [aff 185 N. Y. 265, 77 NE 1023]; In re Kissick, 170 NYS 636; Kraushaar v. Kraushaar, 168 NYS 619.
Or.—Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173.
Pa.—Ebbs v. Com., 11 Pa. 374.
Wis.—McNaughton v. McClure, 169 Wis. 288, 171 NW 936; Thoni v. McDonnell, 166 Wis. 319, 165 NW 290.

[a] **Evidence held not admissible.**—(1) In action on notes executed by decedent. Daggett v. Simonds, 173 Mass. 340, 53 NE 907, 46 LRA 332. (2) In issue of insolvency. Andruss v. Doolittle, 11 Conn. 283. (3) On issue of limitations. Nissley v. Brubaker, 192 Pa. 388, 43 A 967. (4) As to payment. Smythe v. Evans, 209 Ill. 376, 70 NE 906 [rev 108 Ill. A. 145]. (5) Decedent's reputation for prompt payment of debts. Hammer v. Crawford, (Mo. A.) 93 SW 348. (6) Payment of claims other than that asserted by plaintiff. Tyndall v. Van Auken, 106 App. Div. 238, 94 NYS 269. (7) Conversations preceding suit. Giering v. Sauer, 120 Md. 295, 87 A 774. (8) Explanation of failure to present claim during decedent's lifetime. Meehan v. Meehan, 119 Minn. 35, 137 NW 163. (9) Testimony of representative as to when he first learned of claim. Patterson v. State Bank, 55 Ind. A. 331, 102 NE 880. (10) Pleadings in suit to set aside first allowance of claim by probate court. Renfrow v. Goodfellow, 162 Mo. A. 333, 141 SW 1153. (11) Insolvency of estate in action against widow for conversion of personalty, where no creditor interested. Fellows v. Smith, 130 Mass. 378. (12) Financial condition of the parties at the time of the execution of notes, where no fraud in procuring the notes is alleged or proved. Perkins v. Humes, 200 Pa. 235, 49 A 934 [foll Hartman v. Shaffer, 71 Pa. 312]. (13) Evidence that heirs not opposed to claim. In re Helpbringer, 175 Mo. A. 325, 162 SW 288.

50. Knapp v. Hanford, 7 Conn. 132.
51. Knapp v. Hanford, 7 Conn. 132; Snelling v. Darrell, 17 Ga. 141.
52. Smith v. Griffin, 32 Ga. 81.
53. Johnston v. Hawkins, 31 Oh. St. 137.
54. Hendricks v. Mitchell, 37 Ga. 230.
55. Johnston v. Hawkins, 31 Oh. St. 137.
56. Parker v. Eufaula Nat. Bank, 121 Ala. 516, 25 S 1001.
57. Ga.—Belcher v. Craine, 135 Ga. 73, 68 SE 839.
Iowa.—Yoder v. Englebert, 155 Iowa 515, 136 NW 522; Kinney v. McFaul, 122 Iowa 452, 98 NW 276.
Md.—Giering v. Sauer, 120 Md. 295, 87 A 774.
Mo.—McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728.
N. C.—Rooker v. Rodwell, 165 N. C. 80, 80 SE 971.
R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595.

58. Leonard v. Gillette, 79 Conn. 664, 66 A 502; Snow v. Moore, 107 Mass. 512; Gall v. Gall, 27 App. Div. 173, 50 NYS 563 [app dism 160 N. Y. 696 mem, 55 NE 1095]; Horne v. McRae, 53 S. C. 51, 30 SE 701. But compare Benge v. Creech, 175 Ky. 6, 10, 192 SW 817 ("The amount which appellee was entitled to recover did not rest upon the value of the estate, but the value of her services, at the time and place of their rendition, was the criterion by which the jury should have been guided").

59. Sarchfield v. Hayes, (Iowa) 112 NW 1100; Elwell v. Roper, 72 N. H. 585, 58 A 507.

[a] **The apparent condition of decedent** is relevant on an issue as to the amount of care required. Sarchfield v. Hayes, (Iowa) 112 NW 1100.

60. Ky.—Benge v. Creech, 175 Ky. 6, 192 SW 817.
Md.—Marx v. Marx, 127 Md. 385, 96 A 548; Gill v. Donovan, 96 Md. 518, 54 A 117.
Mich.—Maynard v. Schrumpf, 192 Mich. 494, 158 NW 845.
Pa.—Jack v. McKee, 9 Pa. 235.
Vt.—Raymond v. Sheldon, 104 A 106.
N. S.—In re Condon, 28 N. S. 208.

[a] **Illustration.**—Where plaintiff declared upon a contract by decedent, in consideration of plaintiff continuing to live with him and taking care of his house until he died, he would give her certain land, it was competent to prove that a note was given plaintiff by decedent payable after his death, without producing or accounting for the note for the purpose of showing the value the testator placed on plaintiff's services. Jack v. McKee, 9 Pa. 235.

[b] **Statements of decedent to a third person** as to his intention to make a bequest to claimant in the amount of the claim for services is inadmissible to show value. Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

61. Cunningham v. Hewitt, 84 App. Div. 114, 81 NYS 1102 [aff 177 N. Y. 541 mem, 69 NE 1122 mem].

62. Gerlach v. Terry, 75 Cal. 290, 17 P 207; Elwell v. Roper, 72 N. H. 254, 56 A 342.

[a] **Illustration.**—In an action for medical services rendered decedent, evidence that plaintiff was employed by one living with the deceased as her husband, and that plaintiff looked to him for payment is admissible. Gerlach v. Terry, 75 Cal. 290, 17 P 207.

63. Ala.—Nance v. Countess, (A.) 78 S 464.
Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.
Ga.—Howard v. Randolph, 134 Ga. 691, 68 SE 586, 29 LRANS 294, 20 AnnCas 392; Jackson v. Buice, 132 Ga. 51, 63 SE 823.
Iowa.—Yoder v. Englebert, 155 Iowa 515, 136 NW 522.
Md.—Marx v. Marx, 127 Md. 373, 96 A 544; Gill v. Donovan, 96 Md. 518, 54 A 117.
Mich.—Maynard v. Schrumpf, 192 Mich. 494, 158 NW 845.
Minn.—Meehan v. Meehan, 119 Minn. 35, 137 NW 163.
Mo.—Lillard v. Wilson, 178 Mo. 145, 77 SW 74; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; Fry v. Fry, 119 Mo. A. 476, 94 SW 990; Allen v. Allen, 101 Mo. A. 676, 74 SW 396.
N. J.—Gay v. Mooney, 67 N. J. L. 27, 50 A 596 [aff 67 N. J. L. 687, 52 A 1131]; Disbrow v. Durand, 54 N. J. L. 343, 24 A 545, 33 AmSR 678.
N. C.—Rooker v. Rodwell, 165 N. C. 80, 80 SE 971.
Pa.—Gloss' Est., 36 Pa. Co. 457.
R. I.—White v. Almy, 34 R. I. 29, 82 A 397.
S. C.—Dash v. Inabinet, 53 S. C. 382, 31 SE 297; Ex p. Aycock, 34 S. C. 255, 13 SE 450.

[a] **Conversations between decedent and plaintiff** are admissible. Wessinger v. Roberts, 67 S. C. 240, 45 SE 169.

[b] **Declarations of decedent** are admissible to show that he intentionally made his home with plaintiff. Yoder v. Englebert, 155 Iowa 515, 136 NW 522.

[c] **In case of a confidential relation,** whether witness ever heard deceased mention an intention to pay for the services involved is admissible. Nance v. Countess, (Ala. A.) 78 S 464.

[d] **Actual relationship.**—Where, in an action against an estate for services rendered by a young girl, defendant's proof proceeded on the theory that plaintiff was with decedent as a member of the family, and not as a domestic, and testimony has been offered that she was a niece of decedent, there was no error in admitting evidence that the relationship was of the half blood. Gill v. Donovan, 96 Md. 518, 54 A 117.

[e] **The expression of an intention by decedent to pay** both plaintiff (a daughter-in-law) and her husband is admissible in order to prove a promise to pay plaintiff for her services. Allen v. Allen, 101 Mo. A. 676, 74 SW 396.

64. Ala.—Gillespie v. Campbell, 149 Ala. 193, 43 S 28.
Cal.—Outwaters v. Brownlee, 22 Cal. A. 535, 135 P 300.
Conn.—Hoskins v. Saunders, 80 Conn. 19, 66 A 785.

The court is sometimes authorized by statute to require a plaintiff, suing for services rendered to a decedent, to testify.[65]

In an action to recover funeral expenses, evidence as to the value of the casket should be confined to the retail, and not the wholesale, value.[66]

Hearsay evidence as to whether the person on whose estate administration was granted was actually alive cannot be set up collaterally, to defeat the administrator's right of action.[67]

[§ 2180] **b. Writings Generally.** Subject to the general rules of documentary evidence,[68] and of best and secondary evidence,[69] receipts and vouchers given or taken by a representative or his decedent are admissible in actions by or against the representative[70] to show payments made by him or his decedent,[71] provided such receipts are connected with the matter in issue by other evidence.[72] Affidavits,[73] judgments or orders,[74] wills,[75] and other documents or writings[76] taken or given by decedent or his

Del.—White v. Dougherty, 24 Del. 355, 76 A 609.

Ga.—Belcher v. Craine, 135 Ga. 73, 68 SE 839.

Iowa.—Sheldon v. Thornburg, 153 Iowa 622, 133 NW 1076.

Ky.—McGrew v. O'Donnell, 92 SW 301, 28 KyL 1366.

Mich.—Hialey v. Hialey, 157 Mich. 45, 121 NW 465; Luizzi v. Brady, 140 Mich. 73, 103 NW 574; Oliver v. Jessup, 137 Mich. 642, 100 NW 900.

Mo.—McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728; Birch v. Birch, 112 Mo. A. 157, 86 SW 1106.

N. H.—Elwell v. Roper, 72 N. H. 585, 58 A 507.

N. J.—Heinz v. Jacobi, 76 N. J. L. 189, 68 A 1069.

N. Y.—Scheu v. Blum, 119 App. Div. 825, 104 NYS 887.

N. C.—Stocks v. Cannon, 139 N. C. 60, 51 SE 802.

Oh.—Fell v. Carter, 16 Oh. Cir. Ct. N. S. 241.

[a] **It is proper to exclude evidence of:** (1) Payments made to others by representative. Gillespie v. Campbell, 149 Ala. 193, 43 S 28. (2) A demand for payment. Sheldon v. Thornburg, 153 Iowa 622, 133 NW 1076. (3) An attempt of decedent before employing plaintiff to render services sued for, to make plaintiff a beneficiary in an insurance policy and statements of decedent that he would provide for plaintiff in his will. Scheu v. Blum, 119 App. Div. 825, 104 NYS 887. (4) Entries in a diary. Elwell v. Roper, 72 N. H. 585, 58 A 507.

[b] **Decedent's will,** making a bequest to plaintiff, is not admissible as evidence to show that the bequest was in payment for the services unless the will so states. Fell v. Carter, 16 Oh. Cir. Ct. N. S. 241.

65. Yost v. Dunk, 57 Ind. A. 151, 106 NE 644 (the circumstances under which the discretion of the trial court was exercised, on which depends the question whether such discretion was abused, must be examined on appeal).

66. Waters v. Register, 76 S. C. 132, 56 SE 849.

67. Hummel v. Brown, 24 Pa. 310.

68. See Evidence §§ 900–1218.

69. See Evidence §§ 1219–1379.

70. Kimball v. Kimball, 16 Mich. 211; Altgelt v. Elmendorf, (Tex. Civ. A.) 86 SW 41.

[a] **As foundation of other evidence.**—In an action to recover a claim founded on certain receipts which had been signed by an intestate jointly with others, they are admissible as a foundation or other evidence of the several liability, but not to fix the liability of the intestate's estate, it being a joint undertaking. Kimball v. Kimball, 16 Mich. 211.

71. Smith v. Kimball, 105 Mass. 499; Melvin v. Stephens, 82 N. C. 283.

[a] **Illustration.** — Receipts for payments are admissible in an action against a representative for nonpayment of a decree, whether they purport to be prior or subsequent to the date of the decree. Melvin v. Stephens, 82 N. C. 283.

72. Field v. Bevil, 12 Ala. 608 (receipts and vouchers found among decedent's papers are inadmissible as proof of payment, without connection with other facts and circumstances pertinent to the issue).

73. Schupp v. Schupp, 1 Pa. Cas. 283, 2 A 870 (under the rule of the courts of common pleas of Allegheny county, admitting as evidence such portions of the affidavit of claim as are not denied by the affidavit of defense, the affidavit of claim of an administrator suing in his representative capacity is admissible). But compare Adkins v. Hutchings, 79 Ga. 260, 4 SE 887 (affidavits of accounts found among a deceased administrator's papers connected with the intestate's estate are ex parte and merely hearsay, and are inadmissible in an action against an administrator, appointed in his place, for not collecting certain debts).

74. Ga.—Floyd v. Wallace, 31 Ga. 688.

Mass.—Day v. Floyd, 130 Mass. 488.

Mich.—Cook v. Stevenson, 30 Mich. 242.

N. C.—Davis v. Duval, 111 N. C. 422, 16 SE 471, 112 N. C. 833, 17 SE 528.

Pa.—Reber v. Gilson, 1 Pa. 54.

S. D.—Bright v. Ecker, 9 S. D. 192, 68 NW 326.

Tex.—Smyth v. Caswell, 67 Tex. 567, 4 SW 848.

[a] **The record of a former judgment against lessees** for nonperformance of covenants is admissible in an action by them against administrators on a bond given by the intestate for performance of covenants in the lease. Reber v. Gilson, 1 Pa. 54.

[b] **A citation and order** of court directing parties to deliver assets to administrator is competent evidence to charge defendants in a subsequent action by the administrator for the value of the assets. Bright v. Ecker, 9 S. D. 192, 68 NW 326.

[c] **In an action against an executor upon a note** it is competent for defendant who denies the execution of the note under oath to introduce the record of a former judgment in his favor against the executor, in a proceeding in which the debt sued on could have been pleaded as an offset, and was not. Smyth v. Caswell, 67 Tex. 567, 4 SW 848.

[d] **Decree granting letters of administration.**—In an action against an administrator on a debt due from the intestate, a decree granting letters of administration is admissible as evidence that defendant is administrator and bound to pay the debt. Day v. Floyd, 130 Mass. 488.

[e] **On an issue whether decedent was indebted to plaintiff on a note destroyed by fire,** the auditor's report and decree of the orphans' court granting leave to mortgage real estate are inadmissible to show that decedent did not have personal property sufficient to pay his debts, and that consequently the claim must be a just one. Simpson v. Irvin, 5 Pa. Super. 471.

[f] **A decree setting aside a deed which had been given to plaintiff as compensation for services** rendered decedent is admissible in an action for such services to show that they had not been paid or provided for. Davis v. Duval, 111 N. C. 422, 16 SE 471, 112 N. C. 833, 17 SE 528.

75. Allen v. Field, 124 Mich. 466, 83 NW 151; Cowell v. Roberts, 79 Mo. 218; Hughes v. Keichline, 168 Pa. 115, 31 A 887.

[a] **Thus** a will is admissible in an action for services rendered or board furnished decedent, to show whether or not plaintiff took a bequest thereunder, and as bearing upon the supposed undertaking to pay wages. Allen v. Field, 124 Mich. 466, 83 NW 151; Cowell v. Roberts, 79 Mo. 218; Allen v. Allen, 101 Mo. A. 676, 74 SW 396; Hughes v. Keichline, 168 Pa. 115, 31 A 887.

[b] **When immaterial.**—The will is properly excluded in an action against an executor to recover rent of land, where there is no question of the fact that plaintiff was the owner of the land. Parker v. Salmons, 113 Ga. 1167, 39 SE 475.

[c] **Where the construction of an executor's contract is altogether foreign from his authority under the will,** the will is inadmissible. Sanford v. Howard, 29 Ala. 684, 68 AmD 101.

76. Cal.—California Electric Light Co. v. California Safe Deposit, etc., Co., 145 Cal. 124, 78 P 372.

Colo.—Lane v. Lane, 57 Colo. 419, 140 P 804.

Ga.—Hilton, etc., Lumber Co. v. Alwood, 141 Ga. 653, 81 SE 1119; Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359.

Ill.—De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

Ky.—Fuqua v. Hagan, 107 SW 735, 32 KyL 1040.

Me.—Northwestern Inv. Co. v. Palmer, 113 Me. 395, 94 A 481.

Md.—Dukehart v. State, 4 Harr. & J. 506.

Mass.—Whitcomb v. Whitcomb, 217 Mass. 558, 105 NE 613.

Mich.—Bolthouse v. De Spelder, 181 Mich. 153, 147 NW 589.

N. Y.—Jones v. Jones, 41 Hun 163.

N. C.—Rooker v. Rodwell, 165 N. C. 80, 80 SE 971.

Wash.—Poncin v. Furth, 15 Wash. 201, 46 P 241.

W. Va.—Painter v. Long, 69 W. Va. 765, 72 SE 1092.

[a] **Illustration.**—In an action on an account for the support of plaintiff's mother-in-law, defendant's intestate, a paper writing to the effect that intestate was to give plaintiff her land in consideration of care for the rest of her life, offered by plaintiff only to rebut any presumption or contention that his services were gratuitous, is admissible. Rooker v. Rodwell, 165 N. C. 80, 80 SE 971.

[b] **Notes.**—(1) Where an executor sues to recover money claimed by defendant as a gift from the testator, he may, to show fraud, put in evidence a note given by the testator to himself before the time of the gift. Jones v. Jones, 41 Hun (N. Y.) 163. (2) The notes, on the guaranty of which by deceased the claim is based, are admissible in evidence without proof of their execution, in the absence of an affidavit denying the execution. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224. (3) The admission of a note, executed by the father for services and delivered to a third person in support of the child's claim, is not objectionable on the theory that the note was void as a gift for want of delivery. Abel v. Roosenraad, 172 Mich. 93, 138 NW 325. (4) Athough a note belonging to a decedent's estate is sued on before appraisement and without in-

representative are also admissible in such actions for what they purport to express. But a written agreement between an executrix and a claimant against the estate, which recited that the claimant claimed a certain sum without interest, which claim was not prejudiced by the agreement, is not admissible as an agreement not to claim interest or as an estoppel from claiming interest.[77]

[§ 2181] **c. Letters Testamentary or of Administration.** In actions by or against a personal representative his letters testamentary or of administration,[78] properly authenticated by the official seal of the probate court,[79] or certified copies thereof,[80] are admissible as evidence in any court in the state in which they were granted[81] for the purpose of showing the representative's authority, even though the letters were granted on a defectively verified petition.[82] In ejectment against an executor or administrator, his letters are admissible, although they do not mention realty,[83] for they prove his appointment, and the law clothes him with authority.[84]

[§ 2182] **d. Inventory and Appraisal.** An inventory and appraisal of a decedent's estate duly made and returned by a representative[85] or a certi-

dorsement of appraisal, it is admissible as evidence, if appraised and indorsed at any time before trial. Painter v. Long, 69 W. Va. 765, 72 SE 1092. (5) A note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against a co-administrator unless accompanied by proof of an original indebtedness upon which such note was founded. Weston v. Murnan, 4 Ind. 271.

[c] **Letters.**—Whitcomb v. Whitcomb, 217 Mass. 558, 105 NE 613; In re Davis, 200 Mich. 500, 166 NW 899.

[d] **Claim and letter.**—In an action on a note against the administrator of a deceased maker, it was competent for plaintiffs to introduce the claim that had been rejected by the administrator, and the letter accompanying the rejection, to show that no voucher had been required from plaintiffs. Poncin v. Furth, 15 Wash. 201, 46 P 241.

[e] **Deed.**—Marchant v. Young, 147 Ga. 37, 92 SE 863.

[f] **Bank book.**—Direct proof should be alleged to support a claim for trust moneys against decedent, and the decedent's own deposit book, without other earmark or evidence, is inadmissible to sustain such a claim. Bagnall v. Roach, 76 Cal. 106, 18 P 137.

[g] **An arbitration bond** given by administrators individually is inadmissible in an action against them as administrators. Mahaffey v. Mahaffey, 13 Serg. & R. (Pa.) 163.

[h] **Plaintiff's unsworn statement of a debt,** which consisted of copies of the notes, and the statement that decedent promised to pay, but did not do so, is inadmissible in an action against an executor on notes alleged to have been executed by the testator. Perkins v. Humes, 200 Pa. 235, 49 A 934.

[i] **On plene administravit.**—(1) A settlement by executors with the county court is admissible in a contest between a creditor and the personal representatives, whether made before or after suit brought, as prima facie evidence on the issue of plene administravit; but such settlement will prove nothing, unless it shows the dates of the payments, and whether made on judgments, specialties, or simple contracts. Cochran v. Davis, 5 Litt. (Ky.) 118. To like effect Mountjoy v. Lowry, 4 Hen. & M. (14 Va.) 428; Atwell v. Milton, 4 Hen. & M. (14 Va.) 253. (2) To disprove such a plea a lease duly executed to the testator, at annual rent, may be read in evidence, although it had not been returned in the inventory to the orphans' court, and although no notice had been given to defendant that it was intended to be offered in evidence, to show fraud or want of truth in the inventory. Dukehart v. State, 4 Harr, & J. (Md.) 506.

[j] **Plat and survey.**—In a suit for specific performance, a plat and survey ordered by the administrator are not rendered inadmissible by proof that a successor has been appointed. Mills v. McLanahan, 70 W. Va. 288, 73 SE 927.

[k] **Where an administrator assumes the defense of an action brought against his intestate,** it becomes an action against him, within a statute providing that, where an action by an administrator is supported by oral testimony of a promise or statement made by his intestate, evidence of the latter's written or oral statement, memoranda, and entries written by him, and of his act and habits of dealings, shall be admissible to disprove such statement or promise. Brooks v. Holden, 175 Mass. 137, 55 NE 802.

[l] **Where the insolvency of the estate is a prerequisite to the representative's right to maintain an action** for waste or trespass on the lands of decedent, the only proper evidence of the insolvency is documentary evidence from the probate office. Bates v. Avery, 59 Me. 354 (such evidence is sufficient).

77. Wardlaw v. Frederick, 13 Ga. A. 594, 79 SE 523.

78. Conn.—Sanford v. Hayes, 19 Conn. 591.

Mich.—Warn v. Flint, 140 Mich. 573, 104 NW 37; Farrand v. Caton, 69 Mich. 235, 37 NW 199; John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41; Cook v. Stevenson, 30 Mich. 242.

Minn.—Pick v. Strong, 26 Minn. 303, 3 NW 697.

Tex.—Rogers v. Tompkins, (Civ. A.) 87 SW 379; Metropolitan L. Ins. Co. v. Gibbs, 34 Tex. Civ. A. 131, 78 SW 398.

Va.—Dickinson v. McCraw, 4 Rand. (25 Va.) 158.

79. Tuck v. Boone, 8 Gill (Md.) 187; Maloney v. Woodin, 11 Hun (N. Y.) 202.

[a] **Supplying seal.**—Where such letters are excluded for want of a seal, the seal may thereafter be affixed so as to render them admissible. Maloney v. Woodin, 11 Hun (N. Y.) 202.

[b] **Unauthenticated letters not admissible.**—Letters of administration de bonis non with the will annexed are inoperative unless authenticated by the official seal of the orphans' court by which they were granted; and hence, unless so authenticated, are not admissible in an action by the administrator to prove his authority to sue. Tuck v. Boone, 8 Gill (Md.) 187.

80. Farrand v. Caton, 69 Mich. 235, 37 NW 199.

[a] **Certificate of appointment.**—In an action by a foreign administrator, a certificate of the clerk of the surrogate's court of the foreign state that letters were granted to plaintiff is inadmissible. Cromley v. Dean, 177 Ill. A. 67.

81. Dickinson v. McCraw, 4 Rand. (25 Va.) 158.

[a] **As proof of death.**—In an action by an executor, the order of the court probating the will and appointing the executor is admissible and prima facie proof of testator's death and of the existence of facts authorizing such order. Fischer v. Giddings, 43 Tex. Civ. A. 393, 95 SW 33. To same effect Wagner v. Alderson, 91 Wash. 157, 157 P 476 (decree granting letters of administration).

[b] **When irrelevant.**—Where, in an action to quiet title by a decedent's administrator and his heirs at law, defendant's answer did not deny plaintiff's appointment and qualification as administrator, a probate order of appointment, showing the date of decedent's death, was irrelevant, the date of such death not being essential to confer jurisdiction on the probate court, nor necessary for decision on the application for administration. Layne v. Johnson, 19 Cal. A. 95, 124 P 860.

82. Shaw v. New York Cent., etc., R. Co., 101 App. Div. 246, 91 NYS 746.

83. Lamar v. Sheffield, 66 Ga. 710.

84. Lamar v. Sheffield, 66 Ga. 710.

85. Thompson v. Thompson, 77 Ga. 692, 3 SE 261; Middleton v. Carrol, 4 J. J. Marsh. (Ky.) 143; Chalfant v. Hart, 1 A. K. Marsh. (Ky.) 572; Green v. Johnson, 3 Gill & J. (Md.) 389; Emory v. Thompson, 2 Harr. & J. (Md.) 244; Bogie v. Nolan, 96 Mo. 85, 9 SW 14.

[a] **Reason for rule.**—The inventory required by law to be made and returned by an administrator is partly for information of creditors of the estate; and where the administrator of one of the creditors is sued for failing to collect from the administrator of the debtor, the inventory made and returned by the latter is admissible in evidence to show means of information of which the former might have availed himself touching the debtor's estate and the particular property of which it apparently consisted. Thompson v. Thompson, 77 Ga. 692, 3 SE 261.

[b] **Illustration.**—In an action against an administrator on notes alleged to have been executed by his intestate, where the defense is wanting of consideration, in order to prove that after the death of the intestate no trace of such a sum as that alleged to have been borrowed could be found among the assets, the administrator may testify as to an inventory made by him of all the personal estate, and the reading of the names and amounts from such paper as part of his testimony is not reversible error. Bogie v. Nolan, 96 Mo. 85, 9 SW 14.

[c] **An inventory made and returned by an administrator, after he has commenced an action** for the recovery of the property included therein, is not competent evidence for him at the trial of the cause, he being personally liable to costs. Allender v. Riston, 2 Gill & J. (Md.) 86.

[d] **An appraisement made by commissioners** appointed for that purpose may not be admissible as evidence against the representative, unless he connects himself with it in some way; yet, if he makes it the basis of a petition for the sale of property, this is a sufficient adoption of it as his inventory, no other inventory being shown. Glover v. Hill, 85 Ala. 41, 4 S 613.

fied copy thereof from the record [86] is admissible for or against the representative, either for the purpose of releasing him from liability for certain assets, or of charging him therewith. But the parties in adverse interest seeking to charge the representative or his estate may prove the facts purporting to be shown by such inventory without reference to it.[87]

[§ 2183] **4. Weight and Sufficiency—a. In General.** The weight and sufficiency of evidence in actions by or against a personal representative are governed by the general rules of evidence, which have been fully discussed elsewhere.[88] Subject to such rules the sufficiency of evidence in these actions depends entirely upon the nature of the issue or matter to be proved,[89] and reference is made in the note to a number of illustrative cases in which the sufficiency of the evidence adduced has been considered and passed upon.[90] A transcript of record from the probate court of all the proceedings, showing that a settlement was ordered, but not showing that it was ever made, or that the administrators had ever resigned, died, or been removed, is affirmative evidence of no vacancy of the administrator's

86. Glover v. Hill, 85 Ala. 41, 4 S 613; Chalfant v. Hart, 1 A. K. Marsh. (Ky.) 572; Emory v. Thompson, 2 Harr. & J. (Md.) 244.

87. McDonald v. Jacobs, 77 Ala. 524; Park v. Mullins, 124 Ga. 1072, 53 SE 568.

88. See Evidence §§ 1730–1806.

89. Ill.—Austin v. Kuehn, 211 Ill. 113, 71 NE 841 [aff 111 Ill. A. 506]; Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327.

Ind.—Patton v. Cooper, (A.) 119 NE 31; Deeter v. Burk, 59 Ind. A. 449, 107 NE 304.

Iowa.—Shore v. Carpenter, 173 NW 389; Stevens v. People's Sav. Bank, 171 NW 130; Geddes v. McElroy, 171 Iowa 133, 154 NW 320.

Ky.—Proctor v. Proctor, 118 Ky. 474, 81 SW 272, 26 KyL 348.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487.

Miss.—Loviza v. Lynch, 115 Miss. 694, 76 S 629.

Mo.—Denny v. Brown, 193 SW 552; Troll v. Spencer, 238 Mo. 81, 141 SW 855, AnnCas1913A 276; Hinshaw v. Raines, (A.) 185 SW 1192; Campbell v. Hayden, 181 Mo. A. 681, 168 SW 363.

N. J.—Taylor v. Coriell, 66 N. J. Eq. 262, 57 A 810.

N. M.—National Rubber Supply Co. v. Oleson, 20 N. M. 624, 151 P 694.

Tenn.—Hill v. Fly, (Ch. A.) 52 SW 731.

Wash.—Wagner v. Alderson, 91 Wash. 157, 157 P 476.

Wis.—Meyer v. Arends, 126 Wis. 603, 106 NW 675.

[a] **In an action against an executor for money of the testator,** collected by defendant before testator's death, the testimony of defendant's wife that she saw defendant pay the money to testator is sufficient to exonerate defendant, in absence of evidence to the contrary. Hill v. Fly, (Tenn. Ch. A.) 52 SW 731.

[b] **Avoidance of statute of nonclaim.**—Where plaintiff avers in a writ begun against the administrator more than two years after notice of his appointment that the cause of action had been fraudulently concealed from plaintiff by defendant, plaintiff's testimony that defendant promised before he was appointed administrator that he would see to plaintiff's account against the estate and that defendant had neglected to do so is not sufficient evidence from which a jury could find such fraudulent concealment. Given v. Whitmore, 73 Me. 374.

90. Ark.—Huffman v. Sudbury, 117 Ark. 628, 174 SW 1149.

Cal.—Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P 67; Shiels v. Nathan, 12 Cal. A. 604, 108 P 34; Sanguinetti v. Pelligrini, 2 Cal. A. 294, 83 P 293.

Colo.—Brown v. Stair, 25 Colo. A. 140, 136 P 1003.

Conn.—McDonald v. Hartford Trust Co., 90 Conn. 231, 96 A 939.

Del.—Denash v. Security Trust, etc., Co., 89 A 597.

Ga.—Daniel v. West Point Bank, 147 Ga. 695, 95 SE 255; Newman v. Thompson, 134 Ga. 127, 67 SE 662; Ireland v. Dyer, 133 Ga. 851, 67 SE 195, 26 LRANS 1050, 18 AnnCas 544.

Ida.—Tritthart v. Tritthart, 24 Ida. 186, 133 P 121.

Ill.—Jaegle v. Jaegle, 204 Ill. A. 154; Burns v. Clark, 200 Ill. A. 277; Hauk v. Louden, 199 Ill. A. 112; In re Gorlewicz, 197 Ill. A. 337; Moss v. Redmon, 184 Ill. A. 290; Frorer v. Nicholson, 181 Ill. A. 38; Pollock v. Warner, 180 Ill. A. 718.

Ind.—Ellis v. Ford, 5 Blackf. 554.

Iowa.—Kauffman v. Logan, 174 NW 366; In re Oldfield, 158 Iowa 98, 138 NW 846; Graham v. McKinney, 147 Iowa 164, 125 NW 840; Goodrich v. Conrad, 24 Iowa 254.

Ky.—Wilson v. McCullough, 216 SW 74; Gragg v. Barton, 161 Ky. 210, 170 SW 621; Harding v. Harding, 132 Ky. 133, 116 SW 305.

La.—McCloskey's Succ., 144 La. 438, 80 S 650.

Md.—Fletcher v. Elosser, 126 Md. 244, 94 A 776.

Mass.—Cleaveland v. Draper, 194 Mass. 118, 80 NE 227.

Mich.—Greenman v. Gillerman, 188 Mich. 74, 154 NW 82; Graham v. Graham, 184 Mich. 638, 151 NW 596; Tolsma v. Tolsma, 183 Mich. 314, 149 NW 1050; Lewis v. Roulo, 93 Mich. 475, 53 NW 622.

Miss.—Wells v. McCullough, 113 Miss. 401, 74 S 289; Carr v. McNally, 69 S 220.

Mo.—Nelson v. Poorman, (A.) 215 SW 753; Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 1119; St. Louis Union Trust Co. v. Manhattan L. Ins. Co., (A.) 198 SW 491; Kleinberg v. Kinealy, (A.) 193 SW 981; Weber v. Jantzen, (A.) 180 SW 432; Campbell v. Hayden, 181 Mo. A. 681, 168 SW 363; Campbell v. Hayden, 164 Mo. A. 252, 145 SW 103.

Mont.—Bennighoff v. Robbins, 54 Mont. 66, 166 P 687.

Nebr.—Tillson v. Holloway, 98 Nebr. 509, 153 NW 545; Loeb v. Huston, 98 Nebr. 314, 152 NW 553; Gandy v. Bissell, 5 Nebr. (Unoff.) 184, 97 NW 632.

N. J.—Sternberg v. Wolff, (Ch.) 92 A 585; In re Riker, (Prerog.) 94 A 622.

N. Y.—Diehl v. Becker, 227 N. Y. 318, 125 NE 533; Matter of Carrington, 163 App. Div. 544, 148 NYS 952; Merino v. Munoz, 99 App. Div. 201, 90 NYS 985; Motz v. Motz, 85 App. Div. 4, 82 NYS 926; Wells v. McCullough, 113 Miss. 401, 74 S 289; Matter of Lothrop, 94 Misc. 52, 158 NYS 999; Gould v. Fleitmann, 176 NYS 631; In re Babcock, 169 NYS 800 [aff 171 NYS 1078 mem]; McKible v. Shepherd, 164 NYS 830; Rhule v. Davenport, 5 LackLegN 69.

Or.—Godfrey v. Howes, 91 Or. 98, 178 P 288.

Pa.—In re Bean, 107 A 671; Kotz v. Smith, 253 Pa. 346, 98 A 608; In re Bergner, 244 Pa. 526, 90 A 1068; Hawk v. Maxler, 233 Pa. 337, 82 A 465; Raspa v. Mark, 57 Pa. Super. 272; Paige v. Paige, 56 Pa. Super. 261.

S. C.—DuBose v. Gladden, 75 S. C. 78, 55 SE 152.

Tenn.—Jones v. Walker, (Ch. A.) 57 SW 384.

Tex.—Morrison v. Brooks, (Civ. A.) 189 SW 1094.

Utah.—Robison v. Gull, 173 P 905; Woolley v. Taylor, 45 Utah 227, 144 P 1094.

Va.—Schmelz v. McMenamin, 119 Va. 227, 89 SE 126; Teawalt v. Ramey, 103 Va. 42, 48 SE 505.

Wash.—Kennedy v. Burr, 101 Wash. 61, 171 P 1022.

Wis.—McNaughton v. McClure, 169 Wis. 288, 171 NW 936; Rockwell v. Robinson, 158 Wis. 319, 148 NW 868; McNelly v. Marshall, 153 Wis. 333, 141 NW 281.

Ont.—In re Staebler, 21 Ont. A. 266.

[a] **Evidence held sufficient:** To establish: (1) A debt due by a creditor to the estate, as a cross account in a suit to enjoin the sale of decedent's real estate to pay such creditor. Jones v. Walker, (Tenn. Ch. A.) 57 SW 384. (2) A prima facie case for the return of money paid so as to render dismissal improper. Friedlander v. Fleischauer, 132 NYS 508. (3) As against an executor, the ownership of a house and lot claimed as part of decedent's estate. Liter v. Johnson, 78 SW 905, 25 KyL 1783. (4) To justify a finding that deeds were executed in fraud of legatees. Barnard v. Keathley, 230 Mo. 209, 130 SW 306. (5) To prevent nonsuit in action for widow's allowance. Wood v. Brown, 121 Ga. 471, 49 SE 295. (6) To rebut the presumption that money found in the decedent's house at the time of his death belonged to him. Weiss' App., 133 Pa. 84, 19 A 311. (7) To refute claim for part of profits of partnership. Justis v. Justis, 99 Md. 69, 57 A 23. To show: (8) Acquiescence in modification of contract. Gauss v. Trump, 48 Mont. 92, 135 P 910. (9) Agreement by administrator to pay heir a certain sum of money on sale of a mortgage. Hannan v. Dreckman, 182 Ill. A. 146. (10) Claimant's interest in stock held by decedent. In re Brown, 210 Pa. 493, 60 A 147. (11) Consideration for note. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400; In re Bradbury, 105 App. Div. 250, 93 NYS 418. (12) Contract for support as against motion for nonsuit. Mitchell v. Brown, 18 Cal. A. 117, 122 P 426. (13) Fraud. Hipkins v. Estes, 51 Wash. 1, 97 P 1089. (14) Ownership of money, Stuyvaert v. Arnold, 122 Mo. A. 421, 99 SW 529. (15) Payment. Zonig v. Boehme, 60 Wash. 500, 111 P 566. (16) Settlement of ownership of personalty. Diem v. Drogmiller, 158 Mich. 380, 122 NW 637. (17) That check should not be applied toward payment of judgment. Panezzi's Est., 40 Pa. Super. 282. (18) That compensation for services was fixed by contract. Matter of Mosher, 103 App. Div. 459, 93 NYS 123 [aff 185 N. Y. 556, 77 NE 1191]. (19) That decedent was the owner of a note found among his effects. Hair v. Edwards, 104 Mo. A. 213, 77 SW 1089. (20) That note given by decedent to defendant did not represent a valid indebtedness. Varick v. Hitt, (Ch.) 55 A 139 [aff 66 N. J. Eq. 442, 57 A 406]. (21) That tenant in common had not paid to his cotenant the latter's share of the proceeds of the common prop-

office.[91] Declarations against interest may be sufficient,[92] as also may circumstantial evidence,[93] to make out at least a prima facie case for the one offering it.[94] The acknowledgment by an administrator that an account is just is not sufficient evidence to warrant a judgment de bonis testatoris.[95] An inventory of the estate is prima facie evidence of the solvency of those stated therein to owe the estate,[96] and of the fact that such persons are indebted to the estate.[97]

To charge a representative with a devastavit the failure of an executor to pay a debt when the estate is solvent, and his allowing judgment to be taken and stay to be entered, is prima facie evidence of waste, if the estate subsequently became insolvent,[98] but where it is attempted to charge him for the payment of a debt barred by limitations, and it is acknowledged that the debt was just, the executor will not be put to so strict proof that the delay was at his request, as where a creditor of the estate is attempting to enforce a claim against the executor.[99]

In an action to recover land under a statute authorizing the representative to recover possession of any part of an estate from the heirs or their purchasers, when necessary for the purpose of paying debts or making distribution, an order of sale granted by the court of ordinary is at least prima facie evidence that such sale was necessary to pay debts, and is sufficient to sustain a verdict for so much of the land sued for as is embraced in such order,[1] but is not sufficient to sustain a verdict for the parcels to which the order does not relate.[2]

To sustain a plea of property in a defendant as administrator the evidence should be such that the jury should believe from it not only that defendant was defending as administrator in good faith, but also that the property in controversy belonged to the estate of his intestate, and not plaintiff.[3]

Proof of set-off. Proof of the existence merely of a debt which might have been applied as a set-off to a demand against the estate does not raise a presumption that the debt was so applied, when neither the minutes of the probate court nor the account presented and allowed against the estate shows anything in relation to the set-off, although claimant on presenting his claim filed the affidavit prescribed by statute that he had allowed all just credits against the claim.[4]

Proof of administration bond.—Evidence of the clerk of probate that he had been unable to find in his office any bond relating to the administration of an estate fifteen years before, and that he did not know whether any such bond had been filed, as at that early day no papers were recorded, and attorneys frequently took out and kept such papers for months, does not show conclusively that no bond was given.[5]

In trespass, replevin, or trover by a representative for the recovery of a chattel or its value, his possession of the chattel at the time it was taken or converted is prima facie proof of his title.[6]

[§ 2184] **b. As to Existence of Indebtedness.** Public policy requires that claims against the estate should be carefully scrutinized and admitted only upon very satisfactory proof,[7] and it is therefore

erty so as to defeat the action of the cotenant's executrix to recover it. Williams v. Williams, 109 Me. 537, 85 A 43. (22) That widow and children, as well as widow's brother, upon whose advice she relied, advised the continuance of decedent's business by administrator as being for the best interests of estate. Swaine v. Hemphill, 165 Mich. 561, 131 NW 68, 40 LRANS 201. (23) Want of consideration for note. Kolb v. Stephens, 176 Ill. A. 391. To support: (24) Findings that decedent pledged stock to secure notes and that notes were not paid. Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P 67. (25) Judgment for defendant upon issue that an allowance to him for services was wrongfully made. Taylor v. Harrison, 35 SW 908, 18 KyL 164. To sustain finding: (26) As to an agreement for an interest in a note. Ryan v. Ford, 151 Mo. A. 689, 132 SW 610. (27) That claim arose from debt of firm in which deceased was partner. In re Morgan, 46 Or. 233, 77 P 608, 78 P 1029. (28) That sale was made under direction of distributee. State v. Dickson, 213 Mo. 66, 111 SW 817. (29) That testator's business was carried on by his son on his own account, and not as agent of the executrix. American Tube Works v. Tucker, 185 Mass. 236, 70 NE 59. (30) That trust deed was executed primarily for grantor's personal indebtedness, as distinguished from his liability as indorser on certain notes. In re Thomson, 165 Cal. 290, 131 P 1045. (31) To warrant finding that executrix had in her possession funds belonging to the estate sufficient to pay judgment and that such judgment was the only claim. In re Macdonald, 29 Wash. 422, 69 P 1111.

[b] **Evidence held insufficient:** To establish: (1) Contract to assure to plaintiff a large amount on decedent's death. Roberge v. Bonner, 94 App. Div. 342, 88 NYS 91 [aff 185 N. Y. 265, 77 NE 1023]. (2) Value of the services at amount awarded plaintiff in the trial court. Weiss v. Bader, 124 App. Div. 495, 108 NYS 920. (3) To impeach certificate of acknowledgment. Lennartz v. Popp, 175 Ill. A. 539. To show: (4) Collusion as to claim. Ketchum v. Ketchum, 177 Mich. 100, 143 NW 25. (5) Contract to look to estate for compensation as referee. Dwane v. Miller, 89 Misc. 297, 152 NYS 1060. (6) Conversion of assets. Roberts v. Stuart, 80 Tex. 379, 15 SW 1108. (7) Fraud. Sharpe v. Hodges, 121 Ga. 798, 49 SE 775. (8) Fraudulent concealment of decedent's interest in speculative deals. Troll v. Spencer, 238 Mo. 81, 141 SW 855, AnnCas1913 A 276. (9) Ownership of bonds by decedent. Kuykendall v. Union Pac. R. Co., 163 Fed. 819, 90 CCA 125. (10) Payment. Williams v. Young, 71 Ark. 164, 71 SW 669; Chamberlain v. O'Leary, 161 Mich. 670, 126 NW 831. (11) Presentation of claim to administrator within time required by statute. Smith v. Wilson, 79 N. J. Eq. 310, 81 A 851. (12) That claimant was entitled to money represented by certain certificates of deposit, retained and used by decedent as his own property. (13) That decedent's interest in land was of any value. Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 1119. (14) That defendants had fraudulently withheld money from decedent. Graham v. Graham, 184 Mich. 638, 151 NW 596. (15) That money used by executors to pay individual claims was returned to estate. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435 [rev 122 App. Div. 890, 106 NYS 1146]. (16) Valuation placed by decedent on claimant's services. Luizzi v. Brady, 140 Mich. 73, 103 NW 574. (17) Want of consideration for a note. Thompson v. Thompson, 140 Cal. 545, 74 P 21; Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327. (18) To support recovery for hire of team. Carwille v. Franklin, 164 Ala. 543, 51 S 396.

91. Bean v. Chapman, 73 Ala. 140.

92. Sowash v. Emerson, 32 Cal. A. 13, 161 P 1018; Roy v. King, (Mont.) 179 P 821.

[a] **Illustration.**—A statement in an executor's petition for the probate of the will that a part of the estate consisted of a sum of money in his hands is sufficient, where he died without rendering an account, to sustain a finding that such sum came into his hands while acting as executor. Raskin v. Robarts, (Cal.) 35 P 763.

93. Sovern v. Yoran, 15 Or. 644, 15 P 395 (circumstantial evidence of conversion held sufficient to go to jury).

94. Grimes v. Booth, 19 Ark. 224.

95. Ciples v. Alexander, 5 S. C. L. 558.

96. Grant v. Reese, 94 N. C. 720.

97. Rittenhouse v. Levering, 6 Watts & S. (Pa.) 190. See also supra § 383.

98. Smith v. Slaughter, 3 Heisk. (Tenn.) 565.

99. Puckett v. James, 2 Humphr. (Tenn.) 565.

1. Dixon v. Rogers, 110 Ga. 590, 35 SE 781.

2. Dixon v. Rogers, 110 Ga. 590, 35 SE 781.

3. Prewitt v. Lambert, 19 Colo. 7, 34 P 684.

4. Sweet v. Maupin, 47 Mo. 323.

5. Harris v. Chipman, 9 Utah 101, 33 P 242.

6. Cheek v. Wheatly, 11 Humphr. (Tenn.) 556. See also supra § 714.

7. Iowa.—Graham v. McKinney, 147 Iowa 164, 125 NW 840.

Me.—Weed v. Clark, 109 A 8.

Mich.—Vandecar v. Nowland, 188 Mich. 429, 154 NW 137.

Mont.—Gauss v. Trump, 48 Mont. 92, 135 P 910.

N. Y.—Van Slooten v. Wheeler, 140 N. Y. 624, 35 NE 583 [rev 21 NYS 329]; Kearney v. McKeon, 85 N. Y. 136; Scheu v. Blum, 119 App. Div.

generally held that evidence to establish such an indebtedness should be clear, certain, and satisfactory,[8] and it has been said that an action of this kind must be maintained by evidence which is more cogent than such as would suffice to sustain an action against a living person.[9] Whether or not the evidence is sufficient depends upon the circumstances of the particular case,[10] and while no general rule can be laid down, reference is made in the notes to a number of illustrative cases in which the evidence adduced has been held sufficient[11] or

825, 104 NYS 887; Walbaum v. Heaney, 104 App. Div. 412, 93 NYS 640; Roberge v. Bonner, 94 App. Div. 342, 88 NYS 91 [aff 185 N. Y. 265, 77 NE 1023]; Matter of Fordham, 100 Misc. 737, 165 NYS 1038; Matter of Schwartz, 87 Misc. 559, 151 NYS 374; Matter of Duke, 57 Misc. 541, 109 NYS 1087, 6 Mills Surr. 337.

Or.—Scott v. Merrill, 74 Or. 568, 146 P 99.

Pa.—In re Mathiot, 243 Pa. 375, 90 A 139.

B. C.—McMeekin v. Furry, 13 B. C. 20.

"When claims are presented against the estates of decedents the courts will scrutinize sharply testimony as to long-past transactions, and will require a high degree of probability to establish obligations made out chiefly, as in this case, by statements in the form of admissions which are easily capable of being misunderstood." Ryan v. Halligan, 136 App. Div. 65, 68, 120 NYS 646.

[a] **To recover on an implied contract** with a person since deceased the facts justifying the implication must be well established without leaving anything to conjecture. Graham v. McKinney, 147 Iowa 164, 125 NW 840; Bartholomew v. Adams, 143 Iowa 354, 121 NW 1026.

[b] **Claim of stenographer.**—Although a claimant against a decedent's estate was his stenographer, and was intrusted with confidential matters, where there was no evidence that they were in any way connected with her claim against the estate or her personal interests, or were other than appurtenant to her duties as stenographer, she did not occupy such a confidential relation as to render it necessary that she should establish her claim by a higher measure of proof than in ordinary cases. In re Brown, 210 Pa. 493, 60 A 147.

8. Cal.—Thompson v. Thompson, 140 Cal. 545, 74 P 21; Brooks v. Lawson, 136 Cal. 10, 68 P 97.

Colo.—Carl v. Northcutt, 48 Colo. 47, 108 P 994; De Monco v. Means, 47 Colo. 457, 107 P 1107.

Conn.—Fenton v. Mansfield, 83 Conn. 343, 73 A 770.

Del.—Denash v. Security Trust, etc., Co., 89 A 597.

Ill.—Wilson v. Phares, 184 Ill. A. 128.

Ind.—Leimgruber v. Leimgruber, 172 Ind. 370, 86 NE 73, 88 NE 593.

Iowa.—Graham v. McKinney, 147 Iowa 164, 125 NW 840; Wickham v. Wickham, 90 NW 527.

La.—Turgeau's Succ., 130 La. 650, 58 S 497; Barrow v. Grant, 116 La. 952, 41 S 220.

Me.—Liberty v. Haines, 103 Me. 182, 68 A 738.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

N. Y.—In re Marcellus, 165 N. Y. 70, 58 NE 796; Van Slooten v. Wheeler, 140 N. Y. 624, 35 NE 583 [rev 21 NYS 329]; Kearney v. McKeon, 85 N. Y. 136; Matter of Carpenter, 178 App. Div. 165, 165 NYS 10; Matter of Dole, 168 App. Div. 253, 153 NYS 895; Apthrop v. Thurston, 153 App. Div. 572, 138 NYS 41; Ryan v. Halligan, 136 App. Div. 65, 120 NYS 646; Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080; Dueser v. Meyer, 129 App. Div. 598, 114 NYS 64; Butcher v. Geissenhainer, 125 App. Div. 272, 109 NYS 159; Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Weiss v. Bader, 124 App. Div. 495, 108 NYS 920; Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Conway v. Cooney, 111 App. Div. 864, 98 NYS 171; Lucas v. Boss, 110 App. Div. 220, 97 NYS 112; Lindon v. Thieriot, 105 App. Div. 405, 94 NYS 246; Walbaum v. Heaney, 104 App. Div. 412, 93 NYS 640; Merino v. Munoz, 99 App. Div. 201, 90 NYS 985; Roberge v. Bonner, 94 App. Div. 342, 88 NYS 91 [aff 185 N. Y. 265, 77 NE 1023]; Dougall v. Dougall, 61 App. Div. 282, 70 NYS 336; Rowland v. Howard, 75 Hun 1, 26 NYS 1018; Davis v. Seaman, 64 Hun 572, 19 NYS 260; Matter of People's Trust Co., 79 Misc. 595, 141 NYS 201; Matter of Schmidt, 68 Misc. 13, 124 NYS 856, 7 Mills Surr. 523; Matter of Duke, 57 Misc. 541, 109 NYS 1087, 6 Mills Surr. 337; Larkins v. McGinley, 88 NYS 153.

Pa.—In re Bradshaw, 243 Pa. 114, 89 A 831; Lewis's Est., 50 Pa. Super. 417; Panick's Est., 12 Pa. Dist. 71, 28 Pa. Co. 71; McGarry's Est., 9 Pa. Dist. 172.

Tex.—Bright v. Briscoe, (Civ. A.) 193 SW 156; George v. Ryon, (Civ. A.) 61 SW 138.

Utah.—Kislingbury v. Evans, 40 Utah 356, 121 P 571.

Wash.—Anderson v. Osborn, 62 Wash. 400, 114 P 160.

Can.—Thompson v. Coulter, 34 Can. S. C. 261, 3 OntWR 82.

Man.—Doidge v. Mimms, 13 Man. 48; Rankin v. McKenzie, 3 Man. 323.

Ont.—Halliday v. Rutherford, 1 OntWR 816; Wilson v. Howe, 1 Ont WR 272.

"The court is of opinion that the evidence required to establish an ante mortem contract that results in a post mortem disposition of an estate must come within the rule governing the quality of proof required to establish the reformation of an instrument, to prove the contents of a lost will, or a deed, or an agreement to bequeath by will. We can conceive of no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contract calculated to subvert the muniments of title and divert descent of intestate property from its legal channel. No class is more susceptible to the temptation of fraud and none in which it can be more easily practiced." Liberty v. Haines, 103 Me. 182, 193, 68 A 738.

[a] **"Public policy requires** that claims against the estates of the dead should be established by very satisfactory evidence, and the courts should see to it that such estates are fairly protected against unfounded and rapacious raids." Van Slooten v. Wheeler, 140 N. Y. 624, 633, 35 NE 583 [quot Stafford v. Brown, 120 App. Div. 156, 157, 104 NYS 801].

[b] **Oral evidence relied on to prove a decedent's acknowledgment** of a debt must be clear and convincing, showing something in the nature of a specific acknowledgment of a specific debt, and the more improbable the debt the more convincing should be the evidence. McLain's Succ., 141 La. 376, 75 S 85.

[c] **Evidence of loose declarations,** made to outside parties, as to testamentary intentions which are not carried out, is insufficient to establish an express contract to pay for extra services at the death of the promisor or to provide for such compensation by legacy. Grossman v. Thunder, 212 Pa. 274, 61 A 904.

9. Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080.

10. Cal.—In re Thomson, 165 Cal. 290, 131 P 1045.

Del.—McGovern v. O'Donnell, 102 A 183.

Iowa.—In re Oldfield, 175 Iowa 118, 156 NW 977, LRA1916D 1260, AnnCas1917D 1067.

Ky.—Gilliam v. Gilliam, 146 Ky. 15, 141 SW 370.

Mich.—Tolsma v. Tolsma, 183 Mich. 314, 149 NW 1050.

Mo.—McCartney v. Finnell, 106 Mo. 445, 17 SW 446; Hoss v. Crawford, 145 Mo. A. 360, 129 SW 1053; Stuyvaert v. Arnold, 122 Mo. A. 421, 99 SW 529.

N. J.—Wilson v. Clear, 85 N. J. L. 474, 89 A 1031.

N. Y.—Valentine v. Valentine, 4 Redf. Surr. 265.

Pa.—Engle v. Betz, 214 Pa. 185, 63 A 457.

R. I.—Lewis Historical Pub. Co. v. Greene, 40 R. I. 309, 100 A 1017; Hayes v. Welling, 38 R. I. 553, 96 A 843; Sheldon v. Wilbur, 32 R. I. 192, 78 A 631.

Tenn.—Jordan v. Maney, 10 Lea. 135.

Tex.—George v. Ryon, (Civ. A.) 61 SW 138.

Wis.—Rockwell v. Robinson, 158 Wis. 319, 148 NW 868.

Ont.—Collins v. Collins, 6 OntWR 71.

[a] **The testimony of an executrix given twenty-six months after the probate of the will that no debts are outstanding** against the estate, in which no commissioners on claims have been appointed, is prima facie evidence that there are no such debts. Ewers v. White, 114 Mich. 266, 72 NW 184.

[b] **In a suit to establish a note given by decedent in payment of a judgment against him, as a claim against his estate,** it is not necessary for the holders to show that the judgment had not been paid where there is no evidence that the payees of the note had any connection therewith or that the judgment was kept on foot as security for the note. George v. Ryon, (Tex. Civ. A.) 61 SW 138.

[c] **Judgment as evidence.**—(1) A judgment against the personal representative is conclusive evidence of indebtedness as to the personal estate but only prima facie evidence as to the land descended or devised. Steele v. Lineberger, 59 Pa. 308; Sergeant v. Ewing, 36 Pa. 156. (2) "Heirs and devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item concluded in or constituting the judgment against the administrator, if they can; so that in fact, the only importance of the judgment against the administrator, so far as an interest in the realty is concerned, is, that it is prima facie evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it." Steele v. Lineberger, 59 Pa. 308, 313.

[d] **The claim of a surety of decedent,** although primarily based upon a summary judgment, will be sustained by proof of the claim itself, if the bill is filed in time. Jordan v. Maney, 10 Lea (Tenn.) 135.

[e] **The verified account of an administrator,** and the duly vouched claim of a claimant, prima facie establish the genuineness and validity of the claim, and throw the burden of proof on those contesting it, although the claimant is a relative of decedent, and of the administrator. Valentine v. Valentine, 4 Redf. Surr. (N. Y.) 265.

11. Ark.—Free v. Maxwell, 212 SW 325.

insufficient[12] to establish an indebtedness of decedent or his estate to the claimant.

Cal.—California Electric Light Co. v. California Safe Deposit, etc., Co., 145 Cal. 124, 78 P 372; Tiefel v. Chant, (A.) 186 P 382; White v. Deering, (A.) 179 P 401; Sowash v. Emerson, 32 Cal. A. 13, 161 P 1018.

Colo.—Brown v. Douglas County First Nat. Bank, 49 Colo. 393, 113 P 483.

Conn.—Fenton v. Mansfield, 82 Conn. 343, 73 A 770.

D. C.—American Security, etc., Co. v. Kaveney, 39 App. 223.

Ill.—Somers v. Petteys, 175 Ill. A. 168.

Ind.—Taber v. Zehner, 47 Ind. A. 165, 93 NE 1035; Willette v. Miller, 46 Ind. A. 133, 92 NE 6.

Iowa.—Shore v. Carpenter, 173 NW 889; In re Rule, 178 Iowa 184, 159 NW 699; In re Pauly, 174 Iowa 122, 156 NW 355; Craig v. Craig, 167 Iowa 340, 149 NW 454; In re Oldfield, 158 Iowa 93, 138 NW 846; Levi v. Levi, 156 Iowa 297, 136 NW 696; Graham v. McKinney, 147 Iowa 164, 125 NW 840; McElroy v. Allfree, 108 Iowa 518, 108 NW 119.

Kan.—In re Jewell, 103 Kan. 381, 173 P 923.

Ky.—Miller v. Ewing, 163 Ky. 401, 174 SW 22; Jones v. Richardson, 150 Ky. 123, 150 SW 13; Bolling v. Bolling, 146 Ky. 313, 142 SW 387, Ann Cas1913C 306; McCoy v. McCoy, 125 SW 177; Walker v. Ganote, 116 SW 689; Weisinger v. Harding, 115 SW 800.

La.—Billiero's Succ., 82 S 705.

Me.—Fairbanks v. Barker, 115 Me. 11, 97 A 3; Hatch v. Dutch, 113 Me. 405, 94 A 487.

Md.—Huff v. Simmers, 114 Md. 548, 79 A 1003; Eirley v. Eirley, 102 Md. 452, 62 A 962.

Mich.—McNall v. Mitchell, 178 Mich. 493, 144 NW 850; McGregor v. McGregor, 156 Mich. 487, 120 NW 1071; Shane v. Shearsmith, 137 Mich. 32, 100 NW 123.

Minn.—In re Davis, 142 Minn. 187, 171 NW 778; In re Kosanke, 137 Minn. 115. 162 NW 1060.

Miss.—Wells v. McCollough, 113 Miss. 401, 74 S 289; Hardenstein v. Brien, 96 Miss. 493, 50 S 979.

Mo.—Denny v. Brown, 193 SW 552; Hinshaw v. Raines, (A.) 185 SW 1192; Coates v. Dunnivant, (A.) 182 SW 821; Biggerstaff v. Riley, 192 Mo. A. 92, 179 SW 744; Hoss v. Crawford, 145 Mo. A. 360, 129 SW 1053; Pittman v. Schaithman, 127 Mo. A. 29, 106 SW 103; Graham v. Rapp, 105 Mo. A. 590, 80 SW 42.

Mont.—Roy v. King, 179 P 821.

Nebr.—Keeler v. Hiles, 172 NW 363; Yearsley v. Blake, 85 Nebr. 736, 124 NW 161; In re Van Auken, 78 Nebr. 744, 111 NW 782.

N. J.—Wilson v. Clear, 85 N. J. L. 474, 89 A 1031.

N. Y.—Matter of Cushman, 177 App. Div. 127, 163 NYS 712; Mead v. Cavanagh, 161 App. Div. 177, 146 NYS 353; Sipple v. Fickett, 158 App. Div. 306, 143 NYS 124; Corless v. Carlisle, 137 App. Div. 611, 122 NYS 407; Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227 [aff 197 N. Y. 595 mem, 91 NE 1116 mem]; Hummel v. Hurd, 112 App. Div. 547, 98 NYS 801; Matter of Brown, 77 Misc. 507, 137 NYS 978, 9 Mills Surr. 434; In re Mara, 137 NYS 151; Frankel v. Owens, 117 NYS 909; Larkins v. McGinley, 88 NYS 153.

N. C.—Debruhl v. New Bern Banking, etc., Co., 172 N. C. 839, 90 SE 9.

Or.—Godfrey v. Howes, 91 Or. 98, 178 P 388; Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173; Bull v. Payne, 47 Or. 580, 84 P 697.

Pa.—Raub's Est., 67 Pa. Super. 33; Klees' Est., 63 Pa. Super. 202; Martin's Est., 54 Pa. Super. 168; McTammany's Est., 44 Pa. Super. 484.

R. I.—Brooks v. Aldrich, 107 A 100; Lewis Historical Pub. Co. v. Greene, 40 R. I. 309, 100 A 1017.

S. D.—Higgs v. Bigelow, 39 S. D. 359, 164 NW 89; Gaffney v. Mentele, 23 S. D. 38, 119 NW 1030.

Tex.—Buckler v. Kneezell, (Civ. A.) 91 SW 367.

Wash.—Olsen v. Hagan, 102 Wash. 321, 172 P 1173; Thompson v. Jackson, 85 Wash. 330, 148 P 5.

W. Va.—Clark v. Gruber, 74 W. Va. 583, 82 SE 338.

Wis.—McHatton v. McDonnell, 166 Wis. 323, 165 NW 468.

Ont.—Green v. McLeod, 23 Ont. A. 676.

12. Ark.—Jefferson v. Edrington, 53 Ark. 545, 14 SW 99, 903.

Cal.—Roddan v. Doane, 92 Cal. 555, 28 P 604; Bagnall v. Roach, 76 Cal. 106, 18 P 137.

Colo.—Lockard v. Ware, 61 Colo. 354, 157 P 1165.

Conn.—Leahy v. Cheney, 90 Conn. 611, 98 A 132, LRA1917D 809; Shannon v. Mereness, 90 Conn. 28, 96 A 173.

Del.—Green v. Wilmington Trust Co., 27 Del. 232, 87 A 885.

Ill.—Austin v. Kuehn, 211 Ill. 113, 71 NE 841 [aff 111 Ill. A. 506]; Jaegle v. Jaegle, 204 Ill. A. 154.

Ind.—Patton v. Cooper, (A.) 119 NE 31; Featherngill v. Dougherty, 44 Ind. A. 452, 89 NE 521.

Iowa.—Lamb v. Whitaker, 170 NW 737; Campbell v. Collins, 152 Iowa 608, 132 NW 381; In re Bremer, 151 Iowa 449, 131 NW 667; Trautman v. Traub, 150 Iowa 23, 129 NW 322; Bartholomew v. Adams, 143 Iowa 354, 121 NW 1026; Stickley v. Hanson, 102 NW 514.

Kan.—West v. West, 186 P 1004.

Ky.—Armstrong v. Shannon, 177 Ky. 547, 197 SW 950; Fish v. Welch, 157 Ky. 19, 162 SW 553; Lancaster v. O'Brien, 136 Ky. 589, 124 SW 854; Wheeler v. Bettis, 116 SW 252; Weisinger v. Harding, 115 SW 800.

La.—Billiero's Succ., 82 S 705; Larmeau's Succ., 142 La. 1050, 78 S 113; Williams v. Douglas, 139 La. 922, 72 S 455; Richards v. McLain, 118 La. 424, 43 S 38.

Me.—Gordon v. Keene, 107 A 849; Haswell v. Wilker, 117 Me. 427, 104 A 810; Coombs v. Hogan, 116 Me. 437, 102 A 237; Liberty v. Haines, 103 Me. 182, 68 A 738.

Mich.—Vandecar v. Nowland, 188 Mich. 429, 154 NW 137; Quillan v. Van Dyke, 171 Mich. 195, 137 NW 79; Davidson's App., 163 Mich. 502, 128 NW 733; Lapham v. Lacy, 161 Mich. 176, 125 NW 738.

Minn.—Meehan v. Meehan, 119 Minn. 35, 137 NW 163.

Miss.—Carr v. McNally, 69 S 220; Bell v. Oates, 97 Miss. 790, 53 S 491; Bouie v. Wood, 43 S 480.

Mo.—Korte v. Boynton, (A.) 196 SW 89; Kleinberg v. Kinealy, (A.) 193 SW 981; Pierce Loan Co. v. Killian, 153 Mo. A. 106, 132 SW 280.

Nebr.—Carr v. Carr, 102 Nebr. 158, 166 NW 254; In re Hinrich, 93 Nebr. 551, 141 NW 152.

N. H.—Hubbard v. Leighton, 106 A 485.

N. J.—Conrad v. Conrad, 81 N. J. Eq. 24, 88 A 381 [aff 81 N. J. Eq. 217, 88 A 382]; In re Flaack, 72 N. J. Eq. 944, 73 A 1117 [aff (Prerog.) 64 A 1020]; Ten Broeck v. Jackson, 71 N. J. Eq. 582, 69 A 488 [aff 73 N. J. Eq. 734, 69 A 490]; Varick v. Hitt, (Ch.) 55 A 139; Harrison v. Patterson, (Ch.) 50 A 113.

N. Y.—Leask v. Hoagland, 205 N. Y. 594, 98 NE 1106 [den reh 205 N. Y. 171, 98 NE 395, AnnCas1913D 1199 (rev 144 App. Div. 138, 128 NYS 1017)]; Rousseau v. Rouss, 180 N. Y. 116, 72 NE 916 [rev 91 App. Div. 230, 86 NYS 497]; McDermott v. Conlon, 153 App. Div. 69, 137 NYS 1105; Reilly v. Burkelman, 149 App. Div. 548, 134 NYS 13; Halladay v. Haas, 147 App. Div. 180, 132 NYS 25; Lyon v. Smith, 142 App. Div. 186, 126 NYS 994; Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [dism writ of error 197 N. Y. 521 mem, 90 NE 1156 mem]; Clem v. Fairchild, 127 App. Div. 261, 111 NYS 262; Kilmer v. Quackenbush, 125 App. Div. 352, 109 NYS 444; Rose v. Leask, 124 App. Div. 799, 109 NYS 484; Stafford v. Brown, 120 App. Div. 156, 104 NYS 801; Scheu v. Blum, 119 App. Div. 825, 104 NYS 887; Volhard v. Volhard, 119 App. Div. 266, 104 NYS 578; Kane v. Smith, 109 App. Div. 163, 95 NYS 818; Linden v. Thieriot, 105 App. Div. 405, 94 NYS 246; Maisenhelder v. Crispell, 105 App. Div. 219, 94 NYS 707; Mulhern v. Carrad, 103 App. Div. 609, 94 NYS 741; Matter of Steenwerth, 97 App. Div. 116, 89 NYS 654; Matter of Baker, 42 App. Div. 370, 59 NYS 121; Matter of Fordham, 100 Misc. 737, 165 NYS 1038; Janz v. Schwender, 95 Misc. 143, 159 NYS 200; Matter of Lothrop, 94 Misc. 54, 158 NYS 998; Matter of Stacey, 89 Misc. 88, 152 NYS 717; Matter of People's Trust Co., 79 Misc. 595, 141 NYS 201; Matter of Brown, 77 Misc. 507, 137 NYS 978, 9 Mills Surr. 434; Luria v. DeWitt, 179 NYS 695; In re Kissick, 170 NYS 636.

Oh.—Wright v. Hull, 83 Oh. St. 385, 94 NE 813 (ancient document).

Or.—Consor v. Andrew, 61 Or. 483, 123 P 46.

Pa.—In re Bean, 107 A 671; Furlow v. Roland, 259 Pa. 70, 102 A 417; In re Ellis, 254 Pa. 402, 98 A 1083; Shenk's Est., 59 Pa. Super. 467; Anspach v. Christman, 44 Pa. Super. 99; Riemensberger's Est., 29 Pa. Super. 596.

R. I.—Arnold v. Draper, 106 A 581.

S. C.—Jenkins v. Jenkins, 83 S. C. 537, 65 SE 736.

Tex.—Dodge v. Lacey, (Civ. A.) 216 SW 400; Lans v. Bristow, (Civ. A.) 188 SW 970.

Utah.—Kislingbury v. Evans, 40 Utah 356, 121 P 571.

Va.—Jones v. Coleman, 121 Va. 86, 92 SE 910.

Wis.—Heber v. Heber, 139 Wis. 472, 121 NW 328.

13. La.—Parkerson's Succ., 141 La. 511, 75 S 225; Turgeau's Succ., 130 La. 650, 58 S 497.

N. M.—Union Land, etc., Co. v. Arce, 21 N. M. 115, 152 P 1143.

N. J.—Berg v. Baldwin, 84 N. J. Eq. 90, 92 A 90.

N. Y.—Mulhern v. Carrad, 103 App. Div. 609, 94 NYS 741; Matter of Mulligan, 82 Misc. 336, 143 NYS 686 [aff 165 App. Div. 912 mem, 150 NYS 1098 mem]; In re Bayles, 177 NYS 697.

Or.—Quinn v. Gross, 24 Or. 147, 33 P 535.

B. C.—Blacquiere v. Corr, 10 B. C. 448.

Man.—Re Montgomery, 20 Man. 444, 17 WestLR 77; Simpkin v. Paton, 18 Man. 132.

N. S.—Re Kaulbach, 45 N. S. 62, 9 EastLR 226.

Terr. L.—Re Blank, 5 Terr. L. 230.

[a] **Limitation of rule.**—A statute providing that no claim which shall have been rejected by the executor or administrator shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant, applies only on the trial on the merits of a rejected claim, and not to the preliminary question as to whether there was due presentation and disallowance within a reasonable time. Goltra v. Penland, 45 Or. 254, 77 P 129.

[b] **The probate judge is not bound by the rule** requiring corroborative proof. Re Blank, 5 Terr. L. 230.

Corroboration of the claimant is sometimes required in order to establish the claim,[13] but the

corroborative evidence may, it has been held, be furnished by one who is interested,[14] or by books of account,[15] or inference arising from facts proved may afford sufficient corroboration.[16] The rule does not require that the claim be proved entirely by evidence independent of the testimony of the claimant,[17] and it has been held that the general rule requiring corroboration does not preclude giving effect to a claim where the uncorroborated testimony of the claimant is completely convincing.[18]

Where a person who stood in a family relation to decedent seeks to recover for services rendered to decedent, the claim will be carefully scrutinized, and a recovery permitted only when the rendition of the services and the contract to pay therefor or the mutual understanding that they should be paid for are established by clear and convincing evidence.[19] It is not necessary, however, that a contract or understanding that the claimant should be paid for the services rendered should be established beyond a reasonable doubt, but a clear preponderance of evidence is sufficient.[20] In the absence of any statute to the contrary, such a claim may be established by parol evidence,[21] or on the theory of an implied promise made by the decedent to pay for services rendered by a relative;[22] but where a parol agreement is relied on to establish the right to payment, the evidence establishing such agreement must be given, or at least corroborated in all substantial particulars, by disinterested witnesses.[23]

A written acknowledgment of a debt by decedent is in general sufficient to show an indebtedness due by the estate in the hands of the personal representative,[24] in the absence of proof of payment,[25] even though the debt is denied by the representative on information and belief.[26] But such acknowledgment may be overcome by proof of subsequent statements made by plaintiff that decedent "did not owe him

14. Batzold v. Upper, 4 Ont. L. 116, 1 OntWR 381; In re Curry, 32 Ont. 150.

[a] **One instrusted as cestui que trust** may furnish the necessary corroboration. Batzold v. Upper, 4 Ont. L. 116, 1 OntWR 381.

15. Ratcliffe v. Chaves, 15 N. M. 258, 110 P 699.

16. Union Land, etc., Co. v. Arce, 21 N. M. 115, 152 P 1143; Green v. McLeod, 23 Ont. A. 676; In re Curry, 32 Ont. 150.

17. Radford v. Macdonald, 18 Ont. A. 167.

18. McKinnon v. Shanks, 26 Man. 427, 28 DomLR 77, 34 WestLR 761, 10 WestWkly 895; Bakewell v. Mackenzie, (N. W. Terr.) 1 WestLR 68.

19. Iowa.—Smay v. Roberts, 164 NW 236.

Ky.—Jeffries v. Ferree, 175 Ky. 18, 193 SW 646.

Me.—Coombs v. Hogan, 116 Me. 437, 102 A 237.

Mass.—Sherry v. Littlefield, 122 NE 300.

Miss.—Hoyle v. Smith, 113 Miss. 729, 74 S 611.

Mo.—Clow v. Wormington, (A.) 206 SW 415; Morrison v. Morrison, 197 Mo. A. 527, 196 SW 1082.

N. Y.—Cannon v. Sares, 177 App. Div. 588, 164 NYS 294; Matter of Doubleday, 173 App. Div. 739, 159 NYS 947 [rev sub nom. In re Clyde, 155 NYS 621]; More v. Shepard, 133 App. Div. 471, 117 NYS 1095; Conway v. Cooney, 111 App. Div. 864, 98 NYS 171; Matter of Goss, 98 App. Div. 489, 90 NYS 769; Platt v. Hollands, 85 App. Div. 231, 83 NYS 556; Matter of Gilman, 92 Misc. 140, 156 NYS 169 [aff 175 App. Div. 185, 161 NYS 645].

Oh.—Merrick v. Ditzler, 91 Oh. St. 256, 110 NE 494.

Pa.—In re Bean, 107 A 671; In re Schoyer, 252 Pa. 96, 97 A 104; Raub's Est., 67 Pa. Super. 33.

Tex.—Lans v. Bristow, (Civ. A.) 188 SW 970.

[a] **Evidence sufficient to support recovery.**—In re Rohrer, 160 Cal. 574, 117 P 672, AnnCas1913A 479; Wood v. James, 15 Cal. A. 253, 114 P 587; Phinazee v. Bunn, 123 Ga. 230, 51 SE 300; Eppert v. Gardner, 48 Ind. A. 188, 93 NE 550; Miller v. Miller, 47 Ind. A. 239, 94 NE 243; Hill v. Hill, 45 Ind. A. 99, 90 NE 331; Sarchfield v. Hayes, (Iowa) 112 NW 1100; Humble v. Humble, 152 Ky. 160, 153 SW 249; Leahy v. Lillard, 80 SW 1112, 26 KyL 119; Leighton v. Nash, 111 Me. 525, 90 A 385; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Hartley v. Hartley, 173 Mo. A. 18, 155 SW 1099; Taylor v. Hudson, 145 Mo. A. 377, 129 SW 261; Stone v. Troll, 134 Mo. A. 308, 114 SW 82; McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728; Birch v. Birch, 112 Mo. A. 157, 86 SW 1106; Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Greenwood v. Judson, 109 App. Div. 398, 96 NYS 147; Matter of Parker, 69 Misc. 136, 126 NYS 165, 7 Mills Surr. 582; Matter of Dailey, 43 Misc. 552, 89 NYS 538, 4 Mills Surr. 305; Freeman v. Brown, 151 N. C. 111, 65 SE 743; White v. Almy, 34 R. I. 29, 82 A 397; Hobin v. Hobin, 33 R. I. 249, 80 A 595; Mathias v. Tingey, 39 Utah 561, 118 P 781, 38 LRANS 749; Pool v. Pool, 21 Wyo. 435, 133 P 372.

[b] **Evidence not sufficient to support recovery.**—Patterson v. Carter, 147 Ala. 522, 41 S 133; Crane v. Derrick, 157 Cal. 667, 109 P 31; Dallman v. Frank, 1 Cal. A. 541, 82 P 564; Gillette's App., 82 Conn. 500, 74 A 762; Phillips v. Owens, 135 Ga. 500, 69 SE 705; Roberts v. Roberts, 175 Ill. A. 109; Brooks v. Ostrander, 158 Ill. A. 78; Bolling v. Bolling, 146 Ky. 313, 142 SW 387, AnnCas 1913C 306; Sutherland v. Sutherland, 142 Ky. 688, 134 SW 1152; Conway v. Conway, 130 Ky. 218, 113 SW 94; Foley v. Dillon, 105 SW 461, 32 KyL 222; Lowe v. Lowe, 111 Md. 113, 73 A 878; In re De Haan, 169 Mich. 146, 134 NW 983; In re Myron, 165 Mich. 63, 130 NW 338; Beneke v. Beneke, 119 Minn, 441, 138 NW 689, AnnCas 1914B 381; Crowley v. Dagley, 174 Mo. A. 561, 161 SW 366; Burt v. Gabbert, 174 Mo. A. 521, 160 SW 838; McGrath v. O'Hare, 175 Mo. A. 9, 156 SW 826; Brand v. Ray, 156 Mo. A. 622, 137 SW 623; Rose v. Mays, 139 Mo. A. 246, 122 SW 769; Riley v. Wortendyke, 80 N. J. L. 663, 77 A 1035; Seaman v. Jamison, 158 App. 832, 144 NYS 209; Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899; More v. Shepard, 133 App. Div. 471, 117 NYS 1095; Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Conway v. Cooney, 111 App. Div. 864, 98 NYS 171; Matter of Draper, 74 Misc. 335, 134 NYS 236, 8 Mills Surr. 479; Matter of Nelson, 63 Misc. 627, 118 NYS 673, 7 Mills Surr. 216; Danyew v. Powers, 84 Vt. 255, 78 A 785; Hodge v. Hodge, 47 Wash. 196, 91 P 764, 11 LRANS 873.

[c] **Evidence insufficient to show amily relation between plaintiff and decedent.**—McMorrow v. Dowell, 116 Mo. A. 289, 90 SW 728; Birch v. Birch, 112 Mo. A. 157, 86 SW 1106.

20. Ark.—Miller v. Summers, 187 SW 664.

Cal.—Doolittle v. McConnell, 174 P 305.

Iowa.—In re Newton, 171 NW 708.

Me.—Fairbanks v. Barker, 115 Me. 11, 97 A 3.

Mass.—Butler v. Butler, 225 Mass. 22, 113 NE 577.

Mich.—Maynard v. Schrumpf, 192 Mich. 494, 158 NW 845.

Minn.—Wagner v. Seaberg, 138 Minn. 37, 163 NW 975.

Mo.—Hinshaw v. Raines, (A.) 185 SW 1192.

R. I.—Hobin v. Hobin, 33 R. I. 249, 80 A 595.

Tex.—Henderson v. Davis, (Civ. A.) 191 SW 358.

Wash.—In re Masterson, 183 P 93.

Wis.—Nelson v. Christensen, 169 Wis. 373, 172 NW 741.

21. Bowman v. Shelton, 175 Mo. A. 696, 158 SW 404.

22. Iowa.—Wright v. Reed, 118 Iowa 333, 92 NW 61.

Mich.—In re Scully, 199 Mich. 181, 165 NW 688.

Minn.—Lovell v. Beedle, 138 Minn. 12, 163 NW 778.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

Or.—Tharp v. Jackson, 85 Or. 78, 165 P 585, 1173.

23. Daste's Succ., 125 La. 657, 51 S 677, 29 LRANS 297; Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899; Butcher v. Geissenhainer, 125 App. Div. 272, 109 NYS 159.

24. Cal.—Reiter v. Rothschild, 4 Cal. Unrep. Cas. 103, 33 P 849.

Ill.—In re Moore, 167 Ill. A. 625.

Mo.—Weber v. Jantzen, (A.) 180 SW 432.

N. Y.—Moore v. Moore, 32 Misc. 68, 66 NYS 167.

Pa.—McCullough v. Barr, 145 Pa. 459, 22 A 962.

S. C.—Hursey v. Surles, 91 S. C. 284, 74 SE 618.

Va.—Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

[a] **Illustration.**—A document prepared under the direction of and signed by decedent during his last illness, in which he acknowledged an indebtedness "estimated at approximately $21,000" to a person named, although not a will, was an admission of liability sufficiently certain to justify the allowance of the claim filed against his estate. In re Moore, 167 Ill. A. 625.

[b] **Acknowledgment in will.**—A distinct and unequivocal acknowledgment of an indebtedness contained in the debtor's will suffices to establish the debt against his estate, unless there is opposing evidence. Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

[c] **A sworn statement of decedent** is sufficient to show an indebtedness, although as a matter of fact it was not true. Reiter v. Rothschild, (Cal.) 33 P 849.

[d] **A note found among decedent's papers and never delivered,** while slight evidence of admission, is insufficient to establish a contract to pay. Robinson v. Cushman, 2 Den. (N. Y.) 149.

[e] **Evidence not invalidating acknowledgment on ground of mental infirmity.**—McGregor v. McGregor, 156 Mich. 487, 120 NW 1071.

25. Moore v. Moore, 32 Misc. 68, 66 NYS 167.

26. McCullough v. Barr, 145 Pa. 459, 22 A 962.

anything.'' [27]

A will directing payment of a debt alleged to be due to the testator, within a certain time, is not in itself such evidence of the indebtedness as will support an action of assumpsit thereon by the executor.[28]

Admissions of the representative are prima facie evidence of the liability of his decedent's estate for a claim made upon it,[29] as is also his inventory of the debts stated therein.[30]

Allowance of a claim by the commissioners on claims is sufficient prima facie to establish the claim.[31]

A verified proof of claim filed in the county court has been held sufficient to warrant the district court on appeal from the county court, in rendering judgment in favor of the claimant.[32]

[§ 2185] **c. As to Representative Capacity.** In accordance with the rule that letters testamentary and of administration are prima facie evidence of all they purport to show, and in the absence of evidence to the contrary, are conclusive of the appointment and qualification of the legal representative,[33] such letters properly authenticated, or duly certified copies thereof,[34] are sufficient proof of the representative's right to enforce or protect rights of the estate he assumes to represent,[35] unless it appears that such letters have been revoked [36] or that the representative's authority has otherwise been terminated. It has been held that such letters are the only proper proof of authority,[37] unless it is shown that they are lost or destroyed;[38] but it is also held that the record showing the representative's appointment and qualification, and his acts of administration thereunder, may constitute sufficient evidence of his authority.[39] It has also been

27. Robinson v. Dugan, 4 Cal. Unrep. Cas. 472, 35 P 902.

28. Zimmerman v. Zimmerman, 47 Pa. 378.

29. Matoon v. Clapp, 8 Oh. 248.

30. Huntington v. Spears, 25 N. C. 450 (as to debts therein recited there is presumed to be an indebtedness, and even where a debt is returned as "desperate," it is sufficient for a creditor to prove that the debtor was solvent, in order to throw upon the executor or administrator the burden of showing that the debt could not be collected from any cause). See generally supra § 383.

31. Warren v. Sheehan, 156 Mich. 432, 120 NW 810.

32. Tucker v. Tucker, 21 Colo. A. 94, 98, 121 P 125 ("If it was necessary upon the trial in the district court to comply with the provisions of section 7217 Revised Statutes of 1908, which requires the county court before giving judgment against an executor, administrator or conservator to require the claimant to make oath that such claim is just and unpaid, that requirement was satisfied by the claimant's oath on file in the court as hereinbefore set forth").

33. See supra § 243.

34. Farrand v. Caton, 69 Mich. 235, 37 NW 199; Wittmann v. Watry, 45 Wis. 491.

[a] **Certified copies of plaintiff's letters testamentary and his bond** duly approved and filed, are sufficient prima facie evidence of his qualification as executor, without evidence of the will and the probate thereof. Wittmann v. Watry, 45 Wis. 491.

[b] **A clerk's certificate,** which has his signature and official seal, is complete evidence of the appointment of an administrator of a succession, as the clerk has authority to grant letters except where there is opposition to the appointment, when the action of the judge is required. Davie v. Stevens, 10 La. Ann. 496.

35. U. S.—Hurlburt v. Van Wormer, 14 Fed. 709.

Ala.—Sands v. Hickey, 135 Ala. 322, 33 S 827; Wolfe v. Underwood, 97 Ala. 375, 12 S 234; Tarver v. Boykin, 6 Ala. 353.

Cal.—Garthwaite v. Tulare Bank, 134 Cal. 237, 66 P 326; Ralphs v. Hensler, 97 Cal. 296, 32 P 243.

Colo.—Salazar v. Taylor, 18 Colo. 538, 33 P 369.

Fla.—Davis v. Shuler, 14 Fla. 438.

La.—Dean v. Wade, 8 La. Ann. 85.

Md.—Wilson v. Ireland, 4 Md. 444.

Mass.—Newman v. Jenkins, 10 Pick. 515.

Mich.—James v. Emmett Min. Co., 55 Mich. 335, 21 NW 361; Albright v. Cobb, 30 Mich. 355.

Minn.—Pick v. Strong, 26 Minn. 303, 3 NW 697; Moreland v. Lawrence, 23 Minn. 84.

Mo.—Hensley v. Dodge, 7 Mo. 479.

N. H.—Jeffers v. Radcliff, 10 N. H. 242.

N. Y.—Carroll v. Carroll, 60 N. Y. 121, 19 AmR 144 [rev 2 Hun 609]; Farley v. McConnell, 52 N. Y. 630; Belden v. Meeker, 47 N. Y. 307 [aff 2 Lans 470]; More v. Finch, 65 Hun 404, 20 NYS 164; Parhan v. Moran, 4 Hun 717 [aff 71 N. Y. 596].

Philippine.—Serra v. Go-Huna, 6 Philippine 479.

Tenn.—Eller v. Richardson, 89 Tenn. 575, 15 SW 650; Wright v. Mongle, 10 Lea 38; Smith v. Mabry, 7 Yerg. 26.

Vt.—Seymour v. Beach, 4 Vt. 493.

W. Va.—Rush v. Brannon, 82 W. Va. 58, 95 SE 521.

[a] **The original letters of administration and the bond** duly filed and recorded are sufficient evidence of the right of the administrator to sue in behalf of the estate. Wilson v. Ireland, 4 Md. 444.

[b] **The possession of letters** of administration by the person to whom they purport to be granted is prima facie evidence of delivery; and no proof being offered to rebut that presumption it must be held conclusive. Hensley v. Dodge, 7 Mo. 470; McNiar v. Dodge, 7 Mo. 404.

[c] **Letters of administration granted on an unverified petition** are prima facie proof that they were properly issued, and it is incumbent on a person claiming that they were improperly issued to establish that fact by affirmative proof. Shaw v. New York Cent., etc., R. Co., 101 App. Div. 246, 91 NYS 746.

[d] **Reading to jury.**—It is not necessary that the letters of administration be formally read to the jury. Salazar v. Taylor, 18 Colo. 538, 33 P 369.

[e] **Where defendant sued as executors plead ne unques executors,** proof by plaintiff that defendants had received letters testamentary under a grant thereof by the county court will throw upon defendants the burden of sustaining their plea. Tarver v. Boykin, 6 Ala. 353.

[f] **Letters of administration granted upon the mere presumption of the death** of another by seven years' absence, where the basis of the presumption does not clearly appear, will not, without more positive proof of death, entitle the administrator to recover money owing the absent person. McElroy v. Philadelphia Sav. Fund Soc., 2 Pa. Co. 643, 19 WklyNC 289.

[g] **Where two sets of letters of administration are offered** in a case, one to the court only, to lay the foundation for the second set by showing the expiration of the first, and the second to the jury, to show a substitution of plaintiff as administrator, and as conclusive proof of his right to sue, it is not error in the court to charge that the second set is conclusive of plaintiff's right to sue. Beale v. Hall, 22 Ga. 431.

36. Hurlburt v. Van Wormer, 14 Fed. 709; Dean v. Wade, 8 La. Ann. 85.

37. —— v. Oldham, 2 N. C. 165.

[a] **Probate of the will** is the only evidence of the executor's title in some jurisdictions. Simpson v. Stewart, 10 Man. 176.

38. —— v. Oldham, 2 N. C. 165.

39. Ala.—Wolfe v. Underwood, 97 Ala. 375, 12 S 234.

Conn.—Billings v. McKenzie, 87 Conn. 617, 89 A 344.

Fla.—Davis v. Shuler, 14 Fla. 438.

La.—Morse v. Griffith, 25 La. Ann. 213.

Md.—Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 AmR 560.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Okl.—Daugherty v. Feland, 157 P 1144.

Tenn.—Wright v. Mongle, 10 Lea 38.

Tex.—Halbert v. Carroll, (Civ. A.) 25 SW 1102.

[a] **Illustration.**—Where the record shows the appointment and qualification of an administrator, his annual reports, recognition of him by the court, his final settlements, discharge, and also a contest and compromise with him by the heirs in regard to the final report, his final status must be recorded as settled. Halbert v. Carroll, (Tex. Civ. A.) 25 SW 1102.

[b] **Under a statute authorizing the sheriff to act as administrator** in certain cases, when ordered by the probate court, a certified copy of the order directing him to act as such is proper evidence of his authority. Davis v. Shuler, 14 Fla. 438.

[c] **Public administrator.** — The exhibition of a decree of the court in which the succession was opened, authorizing plaintiff to administer the same according to law in his capacity of public administrator, and, as such, an officer of the parish as well as of the court, is at least a prima facie showing of capacity and authority to sue and stand in judgment in another parish. Morse v. Griffith, 25 La. Ann. 213.

[d] **The appointment of executors** (1) is sufficiently shown by a certified copy of the will, and of the proceedings of the court probating the will and appointing the executors, and their qualification thereunder (Wolfe v. Underwood, 97 Ala. 375, 12 S 234; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 AmR 560; Wright v. Mongle, 10 Lea. (Tenn.) 38), and (2) by the exhibition and passage by the court of their accounts as executors showing among other matters the specific allowance

held that one's representative capacity may be shown by his own testimony, not objected to,[40] by a deed from him, describing himself as representative,[41] or by his appearance in an action against him as administrator.[42] An admission by a representative, in an action against him, is not sufficient proof of his representative capacity;[43] nor is his refusal to accept or protest an order presented to him for payment of a debt of the estate, or his appearnance and resistance to a suit on it, sufficient proof of such capacity.[44] It has also been held that testimony by a wife that she is administratrix of her husband is not proof that she was duly qualified and acting as such at the filing of the petition in an action for his death by wrongful act.[45]

[§ 2186] **d. As to Assets.** Where in an action against a personal representative, the existence of assets is in issue, a prima facie case is made out as to their existence by showing that the representative had filed an inventory showing more assets in his hands than the amount sued for;[46] by showing that he had received property of the estate and had omitted to file or exhibit any inventory;[47] by showing that a judgment had been rendered in his favor;[48] or where an executor, who is sole residuary legatee, gives bond to pay all debts and legacies, by showing his appointment and the giving of such bond.[49] The mere signing of a note by executors is prima facie evidence of assets in their hands sufficient to pay it, and they are personally liable unless they show that such assets are insufficient.[50] A plea of plene administravit is sustained by proof that the legal assets had been fully administered,[51] and this can be shown only by regular probate proceedings.[52]

[§ 2187] **e. As to Allowance or Rejection of Claim.** Under a statute allowing suit only on a rejected claim, it has been held that the fact of rejection, when in issue, must be shown to have been decided, unequivocal, and absolute.[53]

[§ 2188] **f. Effect of Admissions.**[54] The general rule is that admissions made by a personal representative prior to his assumption of official duties are not evidence against him in his representative capacity;[55] but an admission made by him while engaged in the discharge of his duties as such binds the estate to that extent.[56] He cannot, however, render the estate liable for a claim otherwise invalid, by his admissions.[57]

[§ 2189] **Q. Trial**[58]**—1. Course and Conduct Generally.** While an executor or administrator may not admit a liability against the estate, he must in the trial of a case be bound by the rules of law which regulate the practice in court.[59] In an action by or against a representative the issues framed are sometimes tried by the jury as in other suits, although questions of fact as well as of law are frequently determined by the court alone.[60] Under some statutes such actions are entitled to a preference on the court calendar.[61] A plea of the statute of nonclaim in a proceeding in chancery against several defendants may be allowed at the time of the argument, or the court may let it stand over

of a fee paid by them to the register for issuing the letters (Blaen Avon Coal Co. v. McCulloh, supra). (3) But proof of the execution of the will alone, without showing that probate was granted to the one claiming to be the executor, is insufficient. Newton v. Cocke, 10 Ark. 169; —— v. Oldham, 2 N. C. 165.

[e] **An order appointing an administrator, and directing that letters issue to him accordingly, on his giving bond,** is not sufficient evidence of his appointment without proof that the required bond had been given. O'Neal v. Tisdale, 12 Tex. 40.

40. Alabama Great Southern R. Co. v. Blevins, 92 Ga. 522, 17 SE 836.

41. Bratt v. Bratt, 21 Md. 578 (a deed from an administratrix, describing her as such, to defendant, in a proceeding in equity to enforce her lien on the property for the purchase money, is sufficient evidence of the capacity in which she sues).

42. Squires v. Martin, 24 Oh. Cir. Ct. 232 (where in an action against an administrator before a justice of the peace, defendant as such administrator appears and contests plaintiff's claim, such appearance is sufficient evidence of his capacity as administrator, and a claim on appeal that there was no evidence on the trial that he was the administrator cannot be considered).

43. Howard v. Daniel, 6 J. J. Marsh. (Ky.) 125 (even though such an admission was good as against the one making it, it would not be sufficient evidence of the representative capacity of his alleged corepresentatives).

44. Howard v. Daniel, 6 J. J. Marsh. (Ky.) 125.

45. Pittsburgh, etc., R. Co. v. Francis, 32 Oh. Cir. Ct. 189 [aff 83 Oh. St. 520 mem, 94 NE 1113 mem] (holding, however, that if there was no evidence of her legal capacity to sue, defendant knowing or having good reason to believe that she had that capacity, judgment will not be reversed on that ground only).

46. Fitch v. Randall, 163 Mass. 381, 4 NE 182.

47. Knapp v. Hanford, 7 Conn. 132; Stephens v. Barnett, 7 Dana (Ky.) 257.

Effect of failure to make inventory generally see supra § 385.

48. Blodgett v. Brinsmaid, 7 Vt. 9 (a judgment in ejectment, recovered by an administrator, is prima facie evidence of assets in an action against him for breach of covenant of his intestate; and the introduction in evidence of a quit-claim deed of the same premises from the intestate to defendant will not rebut this presumption of assets, since the natural presumption would be that the judgment in ejectment was on a title of intestate accruing subsequent to the deed to defendant).

49. Jones v. Richardson, 5 Metc. (Mass.) 247 (no other proof beyond the appointment and giving of such bond is needed by a creditor or legatee to the point of establishing assets of the estate, in such a case).

50. Sullivan v. Rosson, 148 NYS 611.

51. Cloudas v. Adams, 4 Dana (Ky.) 603.

52. Woodbridge v. Tilton, 84 Me. 92, 24 A 582.

53. Hoyt v. Bonnett, 50 N. Y. 538; Kidd v. Chapman, 2 Barb. Ch. (N. Y.) 414; Matter of Miller, 9 NYS 60, 2 Conn. Surr. 134; Barsalou v. Wright, 4 Bradf. Surr. (N. Y.) 164, 4 AbbPr 135; Tolbert v. McBride, 75 Tex. 95, 12 SW 752.

[a] **Indorsement on claim.**—In the absence of a plea of non est factum an indorsement upon a claim rejecting it, and signed by a name identical with defendant who is sued as administrator upon such rejected claim, is sufficient evidence of such rejection. Tolbert v. McBride, 75 Tex. 95, 12 SW 752.

[b] **Identity of claim** sued on with that presented to and disallowed by the county commissioners held sufficiently established by the evidence. McDonald v. Webster, 71 Vt. 392, 45 A 895.

54. Admissions of indebtedness see supra § 2184.

55. Thomasson v. Driskell, 13 Ga. 253; Gilkey v. Hamilton, 22 Mich. 283; Gaines v. Alexander, 7 Gratt. (48 Va.) 257; Fenwick v. Thornton, M. & M. 51, 22 ECL 470. Contra Smith v. Morgan, 2 M. & Rob. 257.

56. Ida.—Meinert v. Snow, 3 Ida. 851, 27 P 677.

La.—Wilson v. Early, 18 La. Ann. 219; Reynaud v. Peytavin, 13 La. 121.

Me.—Piper v. Goodwin, 23 Me. 251.

Mass.—Faunce v. Gray, 21 Pick. 243; Hill v. Buckminster, 5 Pick. 391.

N. Y.—Whiton v. Snyder, 88 N. Y. 299; Church v. Howard, 79 N. Y. 415.

57. Rhodes v. Seymour, 36 Conn. 1; Jenkins v. Brittin, 185 Ill. A. 67.

58. Trial generally see Trial [38 Cyc 1238].

59. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

60. Gilbert v. Morrison, 53 Hun 442, 6 NYS 491; Lynch v. Johnson, 33 N. C. 224; Anderson v. Clark, 2 Swan (Tenn.) 156.

[a] **No jury trial as of right.**—In an action against a representative by a legatee for the amount due, and for an order directing the conversion of the estate into money, and payment of the legacy out of the proceeds, it has been held that defendant's representative is not entitled to a trial by jury as a matter of right and that such a trial may be refused, especially where the evidence is not sufficient to be submitted to the jury. Gilbert v. Morrison, 53 Hun 442, 6 NYS 491.

[b] **If a personal representative pleads "fully administered"** in an action against him, the plea will be tried by the jury if the action is tried in the county court, but by the justice alone if the cause is tried in the justice's court where the plea is properly pleaded. Anderson v. Clark, 2 Swan (Tenn.) 156.

61. Haux v. Dry Dock Sav. Inst., 150 N. Y. 581, 44 NE 1099 (the statute which entitles a cause in which an executor or administrator is sole plaintiff or sole defendant to the preference on the court calendar does not apply to an action brought by an executor suing in both his representative and individual capacities).

until the final hearing of the cause.[62] Where several bills are pending against the representative over essentially the same cause of litigation, they should all be brought to a hearing at the same time if possible, in order that a final disposition may at the same time be made of all the questions arising on all of them.[63] In an administrator's suit to set aside a fraudulent conveyance by decedent, it is not necessary for the master to audit the various bills upon which he reported on the question of deficiency of assets, where he has reported bills for administration expenses to double the amount of assets.[64]

Accounting. In the course of the proceedings the complainant may be entitled to an accounting;[65] and if an examination of accounts and calculations is necessary to ascertain plaintiff's demand, the usual practice is to make a reference to a master or an auditor, so as to reduce the points to be disputed to as few a number as possible.[66]

A stay or continuance of the proceedings may be had under some statutes for the purpose of allowing the representative's account to be settled,[67] of permitting proper persons to be made parties to the proceedings,[68] of permitting an answer to be filed upon prescribed terms and conditions,[69] or for the appointment of an administrator de bonis non and his substitution as plaintiff, where the original administrator has become disqualified.[70] Where a plea of plene administravit is found for a representative and scire facias issued to the heirs, the representative is continued in court until the heirs come in to make up an issue;[71] and the representative is not compelled to try the issue at the same term at which it is made up.[72]

Affidavit of assets. Where in an action against an administrator there have been ascertained the debts of the creditors and the account of assets in defendant's hands, reserving for further consideration a certain amount with which it was supposed defendant was wrongfully charged, and the complainant asks leave to file a supplemental bill, the court may require him to show by affidavit that the assets which he proposes to charge were not charged in the former bill and that assets are in defendant's hands.[73]

[§ 2190] **2. Reception of Evidence.** While the representative may waive formal mode of proof in a suit to which he is a party,[74] it is generally his duty to object to a witness or to proof where a proper case for such objection arises,[75] and if he fails to do so, whether through ignorance, inadvertence, collusion, or fraud, any other person interested in the suit may make such objection.[76]

Time for production. Probate of notes admitted in evidence without objection under a plea of set-off in an action by an administrator are produced in time when produced at the conclusion of the testimony on both sides, and after a motion has been made for the exclusion of the notes for want of probates.[77]

Order of proof. In an action for services it is not error, requiring a new trial, to permit proof of the value of the services before proof of prima facie liability.[78]

[§ 2191] **3. Questions of Law and Fact.** In an action by or against an executor or administrator it is for the jury to determine questions of fact,[79] such as the ownership of an unindorsed note made to the order of decedent,[80] the validity of a claim asserted against the estate,[81] the existence of assets

62. State v. Shall, 23 Ark. 601.

63. Armstrong v. Lear, 8 Pet. (U. S.) 52, 8 L. ed. 863.

64. Lynch v. Murray, 86 Vt. 1, 83 A 746.

65. Coates v. Muse, 5 F. Cas. No. 2,916, 1 Brock. 529; Schrum v. Simpson, 155 Ind. 160, 57 NE 708, 59 LRA 792.

[a] **Waiver of accounting.** — Where, on an accounting with an administratrix as to money held by her decedent, it is admitted that decedent in his life made a formal statement of his account with complainant, and that such account was unpaid, complainant may waive his right to an accounting, and stand on the balance shown by such statement, where his remedy is sufficient without it. Moore v. Moore, 32 Misc. 68, 66 NYS 167.

66. Apperson v. Hazelrigg, 2 KyL 64; Putnam v. Burrill, 62 Me. 44; Bellerjeau v. Knotts, 4 N. J. L. 359; Gill v. Drummond, 4 N. J. L. 295; Grant v. Hughes, 94 N. C. 231.

[a] **Construction of statute.** — Rev. St. c 31 § 119, authorizing references to be made in courts of law to state the accounts of administrators, executors, etc., applies only to suits brought upon their bonds respectively, and not to suits brought on bonds given by a testator or intestate, in which fully administered is pleaded. Anderson v. Jernigan, 33 N. C. 414; Lynch v. Johnson, 33 N. C. 224.

[b] **Limits of account.**—Where a creditor brings a bill to enforce a testamentary charge to pay debts, the court of chancery will not take an account of the personal estate but will leave the orphans' court in which the account has been filed to complete it, where circumstances do not require the court of chancery to act. Suydam v. Voorhees, 58 N. J. Eq. 157, 43 A 4.

67. Ross v. Crary, 1 Paige (N. Y.) 416; Hall v. Hurford, 2 PaLJR 291, 4 PaLJ 44.

[a] **Where several suits are brought by different legatees** against the executor for legacies, and the estate is insufficient to pay them all, the court will allow the suit in which the account can be taken most advantageously to those interested to proceed for the benefit of all the legatees, and the other suits will be stayed. Ross v. Crary, 1 Paige (N. Y.) 416.

68. Jones v. Britton, 16 La. Ann. 320.

69. Ducker v. Rapp, 67 N. Y. 464 [rev 41 N. Y. Super. 235].

70. Moore v. Estes, 23 Ark. 152 (by marriage).

71. Alston v. Sumner, 2 N. C. 359.

72. Alston v. Sumner, 2 N. C. 359.

73. Campbell v. Harlston, 3 N. C. 157.

74. Tipton v. Richardson, 54 SW 738, 21 KyL 1195; Anderson v. Washabaugh, 43 Pa. 115.

[a] **Where no demand is necessary** in an action against a representative on a claim, objection to the formal proof of the claim comes too late after the trial on the merits. Tipton v. Richardson, 54 SW 738, 21 KyL 1195.

75. Thurber v. Miller, 14 S. D. 352, 85 NW 600; Tate v. Tate, 75 Va. 522.

76. Tate v. Tate, 75 Va. 522.

77. Jester v. Knotts, (Del.) 57 A 1094.

78. Jackson v. Buice, 132 Ga. 51, 63 SE 823.

79. Ala.—Carpenter v. Naftel, 83 S 471; Nance v. Countess, (A.) 78 S 464.

Ga.—Ireland v. Dyer, 133 Ga. 851, 67 SE 195, 26 LRANS 1050, 18 Ann Cas 544; Curry v. Thompson, 18 Ga. A. 507, 89 SE 603; Sheffield v. Cook, 17 Ga. A. 385, 87 SE 150.

Ill.—Roberts v. Roberts, 186 Ill. A. 314.

Iowa.—Mehlisch v. Mabie, 180 Iowa 450, 160 NW 368; Meginnes v. McChesney, 179 Iowa 563, 160 NW 50, LRA1917E 1060.

Ky.—Leach v. Owensboro City R. Co., 137 Ky. 292, 125 SW 708.

Me.—Fairbanks v. Barker, 115 Me. 11, 97 A 3.

Mass.—American Tube Works v. Tucker, 185 Mass. 236, 70 NE 59.

Mich.—In re Teller, 200 Mich. 181, 166 NW 865.

N. H.—Hubbard v. Leighton, 106 A 485.

N. J.—Righter v. Haines, 73 N. J. L. 512, 64 A 148.

N. Y.—Gardner v. Pitcher, 185 N. Y. 534, 77 NE 1187 [aff 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259]; North v. People's Bank, 147 App. Div. 203, 131 NYS 911; Salisbury v. Henion, 138 App. Div. 389, 122 NYS 748; Dueser v. Meyer, 129 App. Div. 598, 114 NYS 64; Linden v. Thieriot, 96 App. Div. 256, 89 NYS 273; Noble v. Haff, 165 NYS 287.

N. C.—Eekhout v. Cole, 135 N. C. 583, 47 SE 655.

Pa.—John McGlinn Distilling Co. v. Dervin, 260 Pa. 414, 103 A 872; Bleadingheiser v. Crumrine, 34 Pa. Super. 241; Frick v. Shimer, 26 Pa. Super. 563.

S. D.—Norman v. Miller, 40 S. D. 399, 167 NW 391.

Tex.—Altgelt v. Elmendorf, (Civ. A.) 84 SW 412.

80. Thompson v. Onley, 96 N. C. 9, 1 SE 620 (as against an administrator suing to get possession of an unindorsed note to the order of his intestate for the balance of the purchase money on land sold by him, an indorsement or assignment is not necessary to give title, and the question of ownership is one of fact for the jury).

81. Colo.—Briggs v. Chamberlain,

applicable to the payment of the claim sued on, when plene administravit is pleaded,[82] the making of a gift by decedent,[83] the genuineness of the signature to a receipt purporting to be signed by decedent,[84] whether a loan was made to decedent as claimed by plaintiff,[85] whether a contract was made as claimed by plaintiff,[86] whether there was sufficient property to pay the year's support assigned to the widow,[87] whether a certain claim was allowed by the commissioners whose report has been destroyed,[88] whether one who rendered services to decedent was a member of his family,[89] whether services rendered to decedent by relatives or one living as a member of his family were intended to be gratuitous or were rendered under an implied contract to pay therefor,[90] whether there was an express contract to pay for services rendered decedent,[91] the value of services rendered to decedent[92] or the estate,[93] whether decedent, shown to have been aged, decrepit, and with impaired faculties at the time of the execution of the note sued on, was then competent to transact business,[94] whether a claim upon which the representative is sued has been paid,[95] whether funds of the estate were transferred by the representative in settlement of a bona fide claim,[96] whether the representative invested certain trust funds of the estate prudently and in good faith,[97] whether the representative acted with prudence and skill in selling personal assets of the estate at private sale,[98] or whether the representative has made a new contract with an agent who collected a claim for the estate rendering him individually liable.[99] It is not, however, proper to submit to the jury a contention which is supported by no evidence, although the question presented thereby may be one of fact.[1] It is for the court to determine questions of law,[2] such as the sufficiency of the notice required by statute to be given by the representative to creditors,[3] the construction of letters or orders of appointment,[4] the construction of the powers of an executor or administrator,[5] the reasonableness of fees charged by the representative's attorneys,[6] or whether the representative's delay in

47 Colo. 382, 107 P 1082, 135 AmSR 223; Titus v. Bernard, 20 Colo. A. 104, 77 P 256.

Iowa.—Graham v. McKinney, 147 Iowa 164, 125 NW 840.

Ky.—Smith v. Park, 84 SW 304, 27 KyL 12, 84 SW 1167, 27 KyL 351.

Mich.—In re Davis, 200 Mich. 500, 166 NW 899; In re Johnson, 160 Mich. 585, 125 NW 702.

Mo.—Linderman v. Carmin, 255 Mo. 62, 164 SW 614; Baxter v. Troll, 152 Mo. A. 557, 133 SW 1188; Linderman v. Carmin, 142 Mo. A. 519, 127 SW 124.

N. H.—Hubbard v. Leighton, 106 A 485.

N. Y.—Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899 [writ of error dism 197 N. Y. 521 mem, 90 NE 1156 mem].

N. C.—Ray v. Patton, 86 N. C. 386.

Pa.—McCarthy v. Murray, 41 Pa. Super. 482.

Vt.—Gilfillan v. Gilfillan, 90 Vt. 94, 96 A 704.

82. Gill v. Staylor, 93 Md. 453, 49 A 650; Ray v. Patton, 86 N. C. 386.

[a] **Reference or issue to jury.—** Where an administrator denies an alleged debt, pleads plene administravit, and no assets applicable to the same, the issue as to the contestant's indebtedness must be determined by the jury; and this being settled an inquiry as to the assets and the disposition thereof must be had by reference or upon issue to a jury. Ray v. Patton, 86 N. C. 386.

[b] **Contrary view. —** Under the act of Febr. 24, 1834 § 54, where pleas of want of assets and others are filed, the jury can only pass upon plaintiff's right to the claim and its amount, and leave it to the orphans' court to determine the question of assets. Breden v. Gilliland, 67 Pa. 34.

83. Hawk v. Maxler, 233 Pa. 337, 82 A 465.

84. Paige v. Paige, 53 Pa. Super. 311.

85. Walbaum v. Heaney, 104 App. Div. 412, 93 NYS 640.

86. Herman v. Oehrl, 116 Md. 512, 82 A 161.

87. Wood v. Brown, 121 Ga. 471, 49 SE 295.

88. Hardwick v. Richardson, 28 Mich. 508.

89. Morrow v. Duggan, 176 Ill. A. 415; Birch v. Birch, 112 Mo. A. 157, 86 SW 1106.

90. Colo.—Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223.

Ga.—Sheffield v. Cook, 17 Ga. A. 385, 87 SE 150.

Ind.—Weesner v. Weesner, (A.) 124 NE 710.

Iowa.—Feltes v. Tobin, 171 NW 739; Parnham v. Weeks, 180 Iowa 649, 163 NW 454; Mehlisch v. Mabie, 180 Iowa 450, 160 NW 368; Wright v. Reed, 118 Iowa 333, 92 NW 61.

Kan.—Story v. McCormick, 70 Kan. 323, 78 P 819.

Ky.—Smith v. Park, 84 SW 304, 1167, 27 KyL 12, 351.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487.

Md.—Marx v. Marx, 127 Md. 373, 96 A 544.

Mich.—Weessies v. Van Dyke, 159 Mich. 180, 123 NW 608; Luizzi v. Brady, 140 Mich. 73, 103 NW 574.

Mo.—Lillard v. Wilson, 178 Mo. 145, 77 SW 74; Whaley v. Peak, 49 Mo. 80; Hart v. Hess, 41 Mo. 441; Smith v. Myers, 19 Mo. 433; Nelson v. Poorman, (A.) 215 SW 753; Le Count v. Fountain, (A.) 182 SW 102; Parker v. O'Bryen, 181 Mo. A. 487, 164 SW 648; Kingston v. Roberts, 175 Mo. A. 69, 157 SW 1042; Cupp v. McCallister, 144 Mo. A. 111, 129 SW 435; Shannon v. Carter, 99 Mo. A. 134, 72 SW 495.

N. H.—Elwell v. Roper, 72 N. H. 254, 56 A 342.

N. J.—Anderson v. Searles, 107 A 429.

N. Y.—Cannon v. Sares, 177 App. Div. 588, 164 NYS 294.

N. C.—Lowrie v. Oxendine, 153 N. C. 267, 69 SE 131; Eekhout v. Cole, 135 N. C. 583, 47 SE 655.

Pa.—Frick v. Shimer, 26 Pa. Super. 563; Winings v. Hearst, 17 Pa. Super. 314.

S. D.—Norman v. Miller, 40 S. D. 399, 167 NW 391.

Utah.—Wilkin v. O'Brien, 176 P 853.

Vt.—Cowles v. Cowles, 81 Vt. 498, 71 A 191.

Claim for services by person in family relation to decedent generally see supra §§ 881, 882.

91. Ky.—Benge v. Fouts, 174 Ky. 654, 192 SW 703; Northrup v. Williams, 100 SW 1192, 30 KyL 1279.

Me.—Hatch v. Dutch, 113 Me. 405, 94 A 487.

Mich.—Foote v. Hoffman, 200 Mich. 464, 166 NW 924; In re McConaughy, 181 Mich. 381, 148 NW 161.

Mo.—Nelson v. Poorman, (A.) 215 SW 753; Shock v. Price, (A.) 207 SW 834; Le Count v. Fountain, (A.) 182 SW 102.

N. J.—Frean v. Hudson, 87 N. J. L. 244, 93 A 582.

92. Moore v. Pierce, 160 Ky. 107, 169 SW 620; Parmalee v. Wigent, 189 Mich. 507, 155 NW 577; Raymond v. Sheldon, (Vt.) 104 A 106.

93. Parmalee v. Wigent, 189 Mich. 507, 155 NW 577.

94. Rietz v. Crutcher, 103 Wash 702, 175 P 293.

95. Tennison v. Platt, 50 Kan. 631, 32 P 369; Beers v. Strong, 128 App. Div. 20, 112 NYS 382; McKible v. Shepherd, 164 NYS 830.

96. Scully v. McGrath, 201 N. Y. 61, 94 NE 195 [rev 136 App. Div. 905, 120 NYS 1145].

97. Smith v. Byers, 41 Ga. 439.

98. State v. Dickson, 213 Mo. 66, 111 SW 817.

99. Stiles v. Causten, 2 Gill & J. (Md.) 49.

1. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400; Wise v. Martin, 42 Pa. Super. 443.

[a] **Thus** (1) although a claim by a child against his parent's estate for money loaned the parent is generally regarded with suspicion, unless clearly established, when such a claim is supported by testimony fair on its face, a mere suspicion of fraud will not make its existence a jury question. McGregor v. McGregor, 156 Mich. 487, 120 NW 1071. (2) In an action against a decedent's estate to recover twenty-five dollars per week for nursing decedent during the last months of his life, where it appears that plaintiff was employed during the same period as a domestic with wages at two dollars per week, the question as to whether such a contract was made cannot be submitted to the jury where there is no evidence except loose declarations made by decedent to outside parties, indefinite understandings, suggested gratuities, anticipated benefactions, and testamentary intentions not carried out. Wise v. Martin, 42 Pa. Super. 443.

2. See cases infra notes 3–7.

3. Rawlings v. Adams, 7 Md. 26.

[a] **Where the court has any doubt** as to the sufficiency of the notice, it may submit the matter to the jury. Rawlings v. Adams, 7 Md. 26; Curry v. Thompson, 18 Ga. A. 507, 89 SE 603; Cannon v. Sares, 177 App. Div. 588, 164 NYS 294.

4. Sims v. Boynton, 32 Ala. 353, 70 AmD 540; Sadler v. Sadler, 16 Ark. 628; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 AmD 603.

[a] **Whether plaintiff or defendant is or is not the true and bona fide representative** of the estate can only arise in a proceeding to review the action of the probate court, and is not a question for the jury. Sadler v. Sadler, 16 Ark. 628.

5. Altgelt v. Oliver, (Tex. Civ. A.) 86 SW 28.

6. In re McNamara, 154 Mich. 671, 118 NW 598 (where certain heirs had stipulated that the expenses of an executor in attempting to probate de-

acting on a claim presented was unreasonable.[7]

[§ 2192] **4. Instructions.** Instructions in actions by or against a personal representative are regulated entirely by the general rules of instructions in civil actions,[8] and by the facts and issues of the particular case.[9] The court should in case of dispute instruct the jury as to whether or not the alleged appointment of the personal representative was valid.[10] It should also charge the jury as to the legal effect of the evidence,[11] as that the jury should not consider an admission of indebtedness of the estate, by one only of two or more corepresentatives.[12] But it should not give instructions which are inapplicable to the issues and misleading[13] or unwarranted by the evidence,[14] or which relate to immaterial matters[15] or matters not in issue[16] or are likely to exclude from the consideration of the jury important matters.[17] Nor need the court give further instructions on matters that are already covered by other instruction.[18] Plaintiff in an action against an administrator is not entitled to an instruction balancing his inability to testify against defendant's difficulty of not having decedent's testimony.[19] Reference is made in the note to a number of illustrative cases in which the courts have passed on the propriety of particular instructions in actions on claims against the estate,[20] actions for services performed for decedent[21] by a relative or member of his family,[22] an action involving a charge of devastavit,[23] an action

cedent's will should be allowed out of the estate).

7. Goltra v. Penland, 45 Or. 254, 77 P 129 (the length of time during which action was withheld being undisputed, and no excuse being offered for the delay).

8. See Trial [38 Cyc 1594].

9. Conn.—Fenton v. Mansfield, 82 Conn. 343, 73 A 770.

D. C.—Drury v. Gorrell, 44 App. 518.

Ga.—McAfee v. Flanders, 138 Ga. 403, 75 SE 319.

Iowa.—In re Oldfield, 175 Iowa 118, 156 NW 977, LRA1916D 1260, Ann Cas1917D 1067.

Kan.—Story v. McCormick, 70 Kan. 323, 78 P 819.

Ky.—Benge v. Fouts, 163 Ky. 796, 174 SW 510.

Mass.—Murphy v. O'Connell, 218 Mass. 105, 105 NE 629.

Mo.—Kleinberg v. Kinealy, (A.) 207 SW 237; Le Count v. Fountain, (A.) 182 SW 102.

Okl.—Spaulding v. Thompson, 159 P 509.

Or.—Goltra v. Penland, 45 Or. 254, 77 P 129.

[a] **Erroneous charge as to duty to distribute.**—In an action against executors, a charge that if, when the will was about to be probated in solemn form, there was an agreement among all the heirs that the estate should be collected and turned over to the widow, and the widow had distributed under that agreement, defendants would not be liable, was erroneous in requiring distribution by the widow pursuant to the agreement to release defendants from liability. McAfee v. Flanders, 138 Ga. 403, 75 SE 319.

10. Sims v. Boynton, 32 Ala. 353, 70 AmD 540; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 AmD 603.

11. Cole v. Waters, 164 Mo. A. 567, 147 SW 552; Tiffany v. Morgan, (R. I.) 73 A 465.

[a] **Thus** (1) the court may tell the jury that it is immaterial when plaintiff first informed defendant of his claim under the agreement in suit, provided they believed that the agreement was made, and the demand was presented to the administrator in time. Clark v. Cordry, 69 Mo. A. 6. (2) Where an administrator of an assignor is made a party to answer as to the assignment of the note sued on, an instruction that if the jury returned a general verdict for plaintiff on the note sued on, the effect would be a finding that the estate had no interest in such note is not erroneous. Johnson v. Johnson, 156 Ind. 592, 60 NE 451.

12. Forsyth v. Ganson, 5 Wend. (N. Y.) 558, 21 AmD 241.

13. Kitchens v. Pool, (Ga.) 91 SE 81; In re Busch, 174 Ill. A. 331; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Douglass v. Leonard, 17 NYS 591 [rev 14 NYS 274].

[a] **In an action against a personal representative on a personal contract for services** made by him with plaintiff, an instruction that the personal representative cannot bind the estate by the employment of a third person, but that when he represented his accounts to the surrogate he had a right to offer the expense of such employment as a proper disbursement and that it was for the surrogate to allow or disallow it, although correct as a proposition of law, is inapplicable to the case. Douglass v. Leonard, 17 NYS 591 [rev 14 NYS 274].

14. Ala.—Nance v. Countess, (A.) 78 S 464.

Ga.—Dillard v. Ellington, 57 Ga. 567.

Md.—Herman v. Oehrl, 116 Md. 512, 82 A 161; Huff v. Simmers, 114 Md. 548, 79 A 1003; Pearre v. Smith, 110 Md. 531, 73 A 141.

Mo.—Vazis v. Zimmer, 209 SW 909.

Pa.—Fullam v. Rose, 181 Pa. 138, 37 A 197.

[a] **Thus,** (1) in an action by an executor on a sealed instrument merely produced by plaintiff, a statement in the instructions that such paper "was found among the belongings of" the testator was unwarranted by the evidence and erroneous. Fullam v. Rose, 181 Pa. 138, 37 A 197. (2) Where the evidence shows that bonds received by a legatee from the executor were received as bonds, a charge directing the jury to determine whether they were accepted as "good money" is error. Dillard v. Ellington, 57 Ga. 567.

15. Langsdale v. Woollen, 99 Ind. 575 (the existence or nonexistence of demands against the estate is immaterial in an administrator's action to recover trust moneys, and special interrogatories should not be addressed to the jury in that regard).

16. Murphy v. O'Connell, 218 Mass. 105, 105 NE 629 (where plaintiff, in an action for the value of services rendered to defendant's intestate, testified that deceased promised to pay him for his services in part by free rent and in part by leaving him a legacy, his evidence that no price for the services was agreed on and that while he was performing the work for her she had said he "won't lose anything by it" does not raise the issue, so as to call for an instruction thereon, of what she said as to a legacy being that she would leave him one by way of a gratuity, and not as part of the contract for services).

17. O'Connor v. O'Connor, 52 Ill. 316 (an instruction implying that the fact of an unexplained three-years' delay in presenting a claim against an estate need not be considered by the jury is erroneous and ground for reversal of a judgment allowing the claim). See also McNeill v. McNeill, 35 Ala. 30 (erroneous instruction under a statute declaring that a certain length of time after decedent's death is not to be taken as any part of the time limiting the commencement of actions by or against his representative).

18. Fuller v. Mowry, 18 R. I. 424, 28 A 606 (where the court charged that a promise by an administrator that plaintiff should be paid could not create a claim against the estate, but that if in writing it might bind the administrator, it need not charge that the admissions or promises of the administrator were not to be considered).

19. Parsons v. Trowbridge, 226 Fed. 15, 140 CCA 310, AnnCas1917C 750.

Exclusion of testimony as to communications or transactions with decedent see Witnesses [40 Cyc 2313].

20. Ga.—Belcher v. Craine, 135 Ga. 73, 68 SE 839.

Ill.—Greenfield v. Maclin, 183 Ill. A. 596.

Ind.—Stanley v. Pence, 160 Ind. 636, 66 NE 51, 67 NE 441; Ray v. Moore, 24 Ind. A. 480, 56 NE 937.

Md.—Huff v. Simmers, 114 Md. 548, 79 A 1003.

Mich.—Beecham v. Wetherbee, 160 Mich. 585, 125 NW 702.

Mo.—Hammer v. Crawford, (A.) 93 SW 348.

Or.—Bull v. Payne, 47 Or. 580, 84 P 697.

Tex.—Granberry v. Granberry, 40 Tex. Civ. A. 420, 90 SW 711.

Va.—Hoskins v. Wright, 1 Hen. & M. (11 Va.) 377.

Wis.—Fitzpatrick v. Phelan, 58 Wis. 250, 16 NW 606.

21. Ala.—Nance v. Countess, (A.) 78 S 464.

Conn.—Fenton v. Mansfield, 82 Conn. 343, 73 A 770.

Ga.—Kitchens v. Pool, 91 SE 81; Belcher v. Craine, 135 Ga. 73, 68 SE 839.

Ill.—In re Busch, 174 Ill. A. 331.

Ky.—Armstrong v. Shannon, 177 Ky. 547, 197 SW 950; Benge v. Fouts, 163 Ky. 796, 174 SW 510.

Md.—Giering v. Sauer, 120 Md. 295, 87 A 774.

Mich.—In re Johnson, 160 Mich. 585, 125 NW 702; Lewis v. Roulo, 93 Mich. 475, 53 NW 622.

Mo.—Shock v. Price, (A.) 207 SW 834.

R. I.—Tiffany v. Morgan, 73 A 465.

22. Ark.—Williams v. Walden, 82 Ark. 136, 100 SW 898.

Ga.—Jackson v. Buice, 132 Ga. 51, 63 SE 823.

Ind.—Eppert v. Gardner, 48 Ind. A. 188, 93 NE 550.

Ky.—Humble v. Humble, 152 Ky. 160, 153 SW 249.

Mass. — Chandler v. Baker, 191 Mass. 579, 78 NE 387.

Mich.—Van Slambrook v. Little, 127 Mich. 61, 86 NW 402.

Mo.—Sprague v. Sea, 152 Mo. 327, 53 SW 1074; Hyde v. Honiter, 175 Mo. A. 583, 158 SW 83; Kingston v. Roberts, 175 Mo. A. 69, 157 SW 1042; Moore v. Renick, 95 Mo. A. 202, 68 SW 936.

R. I.—White v. Almy, 34 R. I. 29, 82 A 397.

23. Parker v. Latimer, 59 S. C. 330, 37 SE 918 (on the issue of de-

involving a claim of payment,[24] and an action by the personal representative for services rendered by decedent.[25] The representative cannot complain of error in an instruction given pursuant to his request.[26]

[§ 2193] **5. Verdict or Findings—a. In General.** The verdict or findings should correspond to the issues involved or submitted,[27] although a general verdict is not defective for failing to dispose of issues submitted, which by reason of rulings of the court were practically excluded;[28] and such a verdict on several counts may be amended within a reasonable time so as to apply to the count under which evidence is given.[29] Where the facts show presentation of a claim, a recovery in an action thereon is not precluded by findings that the claim was never presented to the administrator or allowed by him or filed in the probate court.[30] Findings that services performed for decedent were to be paid for "after she was through with her property" and that such payment was not to be made by request in her will are neither literally nor positively inconsistent.[31] In an action on a note signed by defendant's intestate and an open account for goods sold to intestate a verdict against defendant is against him in his representative capacity, although it does not contain descriptive words showing this fact.[32]

[§ 2194] **b. On Issue of Plene Administravit or No Assets.** Upon the issue of plene administravit or no assets, a verdict for plaintiff should find not only the amount of plaintiff's claim, but also the amount of assets in the hands of the representative, otherwise the court cannot render a judgment upon the verdict.[33] Where, however, the unadministered assets exceed the amount of plaintiff's claim, it is usual to find not the whole amount of such assets but only a sum sufficient to cover what is due to plaintiff.[34] It has been said that on a plea of no assets the practice is for the jury to find for defendant and where the representative does not plead plene administravit it is error to instruct that, as the pleading showed that the representative had property of decedent in his hands at the time a judgment on which he is sued was recovered, he could only relieve himself by showing that he had expended it on prior liens, funeral expenses, and judgments, and to fail to charge that he would not be liable if he had judgments in favor of the estate, but was unable to collect the same).

24. Morrow v. Duggan, 176 Ill. A. 415 (on a claim for material and labor used in constructing buildings on a farm, where there is a set-off for rent, an instruction to the effect that proof that plaintiff used and occupied the farm cast upon him the burden of showing payment for such use and occupation, and that the law does not require him to show payment by direct evidence, but that it is sufficient if the jury believe from the evidence, facts, and circumstances that such payment was made, is not erroneous where there is testimony that rent was paid).

25. McCain v. Smith, 172 Mich. 1, 137 NW 616.

26. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

27. See Curran v. Kennedy, 89 Cal. 98, 26 P 641 (finding held sufficient in an action against the representative for failing to account for money received on decedent's life insurance policy). And see cases infra this note.

[a] **Illustrations.**—(1) Where, in an action against an estate to recover one thousand five hundred dollars for services to decedent, the answer averred that the allowance of the claim by the executors and the judge of the superior court to whom it was presented for only five hundred dollars was a bar to the recovery of more than that sum, but further denied the debt in excess of five hundred dollars, the court's failure to find as to the amount actually due was error, requiring a new trial if the allowance by the executors and court was not a bar to the action, the issue as to the amount being material requiring a finding thereon. Haub v. Leggett, 160 Cal. 491, 117 P 556. (2) A finding that decedent did not promise to pay for services performed is not outside the issues, where the complaint alleges that decedent promised to pay for such services, and the answer denies the promise. Watson v. Miller, (Cal.) 58 P 135. (3) A finding that on a certain day letters of administration of intestate's estate were issued by a certain court to "plaintiff herein, that said letters have not since been revoked," is sufficient on the issue that an order of such court was duly given, made, and entered, appointing plaintiff administrator of such estate. Curran v. Kennedy, 89 Cal. 98, 26 P 641. (4) A finding, in an action by an administrator to recover money deposited by decedent in defendant bank, that the decedent opened an account in his own name in the bank and thereafter made deposits on and drew from such account, and while such account remained with defendant bank deceased, in the presence of this son, caused the bank to change the deposit to the names of himself and his son, as "joint owners, payable to either or survivor," and that decedent thereby agreed with the bank that the account could be paid by the bank either to himself or his son during his lifetime and after his death could be paid to the son does not support a conclusion that the deposit was the property of decedent, and continued to be his property after such agreement, and at all times until his death. Carr v. Carr, 15 Cal. A. 480, 115 P 261. (5) The omission to find the amount of assets in the representative's hands is no objection to a verdict for defendant in a suit against him by decedent and revived by his representatives, in which defendant had filed a set-off for more than the decedent's demand. Adams v. Evans, 4 Blackf. (Ind.) 247. (6) A verdict need not find the value of the estate devised, where, in an action against the executor and heir and devisees, the issue and verdict taken together constitute a finding of estate devised more than sufficient to pay the debt sued for. Jameson v. Martin, 3 J. J. Marsh. (Ky.) 330. (7) A finding of fact in an action by an administrator with the will annexed that testator's executor paid to defendant's intestate one thousand dollars for alleged professional services, where it does not appear that there was any fraud or bad faith in procuring such payment, or that the estate was not liable for professional services in a greater amount, is not sufficient to sustain a judgment for one thousand dollars, where the defense was that the money in question was paid to defendant's intestate for professional services and the return of such money was never demanded by plaintiff. Davis v. Olmsted, 800 N. Y. 557, 93 NE 473 [mod 128 App. Div. 915, 112 NYS 1126]. (8) Where, under an issue as to assets, plaintiff, suing an administrator, offered evidence of a devastavit, causing a failure of assets, the jury must find assets to the amount of the failure, and not find a devastavit. Shannon v. Dinkins, 33 S. C. L. 196. (9) A finding that defendant is indebted to plaintiff instead of that the "defendant detains from the plaintiff as administrator," etc., is sufficient. Glass v. Stovall, 10 Humphr. (Tenn.) 453.

[b] **Where the question of presentation within the time prescribed by statute is in issue,** the finding must show when the claim became due. Elliott v. Peck, 53 Cal. 84.

[c] **A verdict for money only** can be rendered in an action to recover a legacy of personal property which had already been distributed. Snelling v. Darrell, 17 Ga. 141.

28. Hunicke v. Thomas, 102 Mo. A. 129, 76 SW 659.

29. Murphy v. Stewart, 2 How. (U. S.) 263, 11 L. ed. 260 (where a general verdict is rendered upon two counts, in one of which the representative sues in his representative capacity, and in the other in his individual capacity, and evidence is introduced on the former count only, the verdict may be amended within a reasonable time by an entry nunc pro tunc to correspond to that count).

30. Little v. Arkansas Trust, etc., Co., 124 Ark. 466, 187 SW 629.

31. Dubbs v. Haworth, 102 Kan. 603, 171 P 624.

32. Empire State Chemical Co. v. Shubrick, (Ga.) 97 SE 541. To similar effect Gray v. Graziani, 165 Ky. 771, 178 SW 1070.

33. U. S.—Fairfax v. Fairfax, 5 Cranch. 19, 3 L. ed. 24 [rev 8 F. Cas. No. 4,612, 1 Cranch. C. C. 292].

Ark.—Jarrett v. Wilson, 1 Ark. 137.

Ind.—Gaston v. Hiatt, 5 Blackf. 44; Johnson v. Hawkins, 2 Blackf. 459; King v. Anthony, 2 Blackf. 131.

Ky.—Ely v. Com., 3 Dana 137; Bishop v. Hamilton, 4 J. J. Marsh. 548; Buckner v. Morris, 2 J. J. Marsh. 121; McKinley v. Call, 1 T. B. Mon. 54; Young v. Whitaker, 1 A. K. Marsh. 398; Porter v. Glenn, 3 Bibb 86; Forbes v. Scoby, 1 Bibb 281.

Pa.—Strohecker v. Drinkle, 16 Serg. & R. 38.

Va.—Gardner v. Vidal, 6 Rand. (27 Va.) 106.

[a] **Time of possession of assets.**—A verdict upon the plea of fully administered ought to ascertain the amount of assets in the hands of defendant at the commencement of the suit and at the time of the plea pleaded; and a verdict which merely finds that assets sufficient to pay plaintiff's demand "have come" to defendant's hands, without saying when, is erroneous. Gardner v. Vidal, 6 Rand. (27 Va.) 106.

34. Strohecker v. Drinkle, 16 Serg. & R. (Pa.) 38. See also Marr v. Rucker, 1 Humphr. (Tenn.) 348 (a verdict on the issue of fully administered should find the assets to be coextensive with the entire verdict, and a finding that defendant had received assets which he had not paid out to an amount much larger than plaintiff's debt as found and assessed by the jury was too vague).

fendant, and for plaintiff to pray judgment de terris, etc., and of assets quando acciderint.[35]

[§ 2195] **R. Dismissal and Nonsuit.**[36] A nonsuit or dismissal of an action by or against an executor or administrator may be granted under proper circumstances,[37] as for want of the proof required by statute,[38] or where plaintiff suing the representative has admitted that he had funds belonging to decedent in his possession but refuses to disclose the amount thereof;[39] or where the action was improperly instituted,[40] or there is a misjoinder of parties;[41] or where the record does not show that defendant was liable to be sued.[42] A dismissal may be without prejudice to the right to bring another action[43] or on the merits,[44] as the circumstances of the case require. Where the statute provides that plaintiff, suing an executor or administrator, shall, on motion, be nonsuited if he fails to produce an affidavit that the sum demanded is justly and truly due and that there are no credits save as mentioned, the necessary affidavit may be produced on defendant's motion for a nonsuit after plaintiff has closed his case.[45] A legatee who has filed a bill against the executor and other legatees for his share cannot, after an interlocutory decree establishing his right, voluntarily dismiss his bill to the prejudice of the legatees who are benefited by the decree.[46] If one item of an account against a decedent's estate is properly proved in an action thereon, it is error to dismiss the entire claim.[47]

A voluntary dismissal as to one of two corepresentatives who is the active representative of the estate is a dismissal as to both.[48]

[§ 2196] **S. New Trial.**[49] On suitable grounds a new trial is sometimes granted in actions by or against an executor or administrator,[50] but in an action against executors for the funeral expenses of the testator, it is not ground for a new trial that the amount of the verdict embraced an item not included in plaintiff's statement, the item being connected with the transaction, and needed to make up the aggregate claim.[51]

35. Wilson v. Hurst, 30 F. Cas. No. 17,809, Pet. C. C. 441.

36. Dismissal and nonsuit generally see Dismissal and Nonsuit 18 C. J. p 1142.

37. Ga.—Allen v. Allen, 144 Ga. 687, 87 SE 891; Walker v. Shannon, 21 Ga. A. 39, 93 SE 498.

La.—Jones v. Britton, 16 La. Ann. 320.

Pa.—Dunn v. Tisch, 262 Pa. 215, 105 A 75; Furlow v. Roland, 259 Pa. 70, 102 A 417.

S. D.—Hartshorn v. Smith, 19 S. D. 653, 104 NW 467.

Wis.—Weir v. Mosher, 19 Wis. 311.

[a] **Illustrations.**—(1) In an action by an executor to foreclose a mortgage to his testator, which the evidence shows to have been improperly released by a former coexecutor, the court should either dismiss the action without prejudice to plaintiff's right to bring a new one, or, upon proper application and upon terms, should direct an amendment to the complaint, so that the release may be vacated in such action. Weir v. Mosher, 19 Wis. 311. (2) A petition to the county court to have the executor of one bound by contract to convey real estate, but dying before making the conveyance, decreed to make the conveyance, is properly dismissed without prejudice to petitioner's right to proceed in the circuit court, under Rev. Prob. Code § 259, providing therefor where on the hearing the right of petitioner to have specific performance is found to be doubtful, it appearing that the contract price was only a third of the value of the property at the time of the hearing, that only a third of the contract price was paid when the contract was made, and that, although the contract, which was not recorded until nine years after its exeution, provided that on payment of the balance of the purchase money, evidenced by the purchaser's note payable five years after date, and payment of taxes, or on execution and tender of a mortgage securing the balance of the purchase money, the vendor would give a deed, no payment of the note or taxes or tender of the same or of a mortgage was made during the life of the vendor, who died four years after the note was due, and no reasons excusing such failure to make payment or tender being disclosed. Hartshorn v. Smith, 19 S. D. 653, 104 NW 467.

[b] **A refusal to dismiss an action brought by two executors is proper,** where one of the executors petitions for its dismissal and the other executor insists that it shall proceed, and questions are involved in the application which ought not to be decided on motion or petition. Ewing v. Handley, 4 Litt. (Ky.) 346, 14 AmD 140.

[c] **Where the representative obtains a formal discharge, after an action against and an answer by him** and no mention thereof is made in any pleading of the case, it is error, on proof of the discharge, to nonsuit plaintiff. Jones v. Hammett, 5 S. C. 41.

[d] **The failure to have the letters of administration read** is not ground for nonsuit in an action by an administrator who had stated that his evidence was all in, but he may be allowed to read them after defendant moves for nonsuit on that ground. Huston v. Becknell, 4 Mo. 39.

38. Hayden v. Kale, 7 KyL 375.

39. Hebert v. Lacour, 5 La. Ann. 599 (where a party being present at the taking of an inventory admitted that he had funds of decedent in his possession but refused to state the amount, afterward brings suit for a debt alleged to be due to him from the estate, he will be nonsuited unless he shows the amount of such funds in his possession, and in such case the representative is not bound to propound interrogatories to compel a disclosure concerning such funds).

40. Hyatt v. Mavity, 34 Ind. 415; Mann v. Redmon, 27 N. D. 346, 145 NW 1031.

[a] **Illustration.**—Where a complaint shows on its face that the action is to recover a claim against the estate, and the proceeding has been commenced by complaint and summons as an ordinary action, and not by filing a claim, the suit should be dismissed on motion. Hyatt v. Mavity, 34 Ind. 415.

41. Beaty v. Downing, 96 Va. 451, 31 SE 612.

42. Wilson v. Shelton, 9 Leigh (36 Va.) 342 (under 1 Rev. Code [1819] p 380 c 104 §§ 24, 42, a suit against a curator would be dismissed where it was not shown by the record that he was liable to be sued).

43. Hayden v. Kale, 7 KyL 375; Beaty v. Downing, 96 Va. 451, 31 SE 612.

[a] **The dismissal of a suit by a legatee** of a decedent against his personal representative and debtor of the estate for the purpose of holding the debtor to account, while a separate suit was pending against the personal representative for the settlement of his account, should be without prejudice to the right of the legatee to have the personal representative charged in the other suit for any sum which it was his duty to collect. Beaty v. Downing, 96 Va. 451, 31 SE 612.

44. Bartle v. Tubbs, 178 Iowa 503, 159 NW 969.

45. Johnson v. Higgins, (Del.) 108 A 647.

46. Collins v. Taylor, 4 N. J. Eq. 163.

47. Collingsworth v. Davidson, 10 KyL 312.

48. Willard v. Wood, 164 U. S. 502, 17 SCt 176, 41 L. ed. 531.

49. New trial generally see New Trial [29 Cyc 707].

50. Ill.—Lockwood v. Onion, 48 Ill. 325.

Mo.—Campbell v. Hayden, 164 Mo. A. 252, 145 SW 103.

Oh.—Reed v. Reed, 25 Oh. St. 422.

S. D.—Thurber v. Miller, 14 S. D. 352, 85 NW 600.

N. B.—Powell v. Ward, 20 N. B. 15.

[a] **Failure of the trial court to rule on an objection** to evidence as to the presentation of the claims in issue may be ground for the granting of the new trial by an appellate court. Thurber v. Miller, 14 S. D. 352, 85 NW 600.

[b] **An excessive verdict** for board and services rendered decedent may be grounds for a new trial. Lockwood v. Onion, 48 Ill. 325.

[c] **Defect in pleadings.**—(1) Where the writ describes defendant as administrator, but declares against him personally, and the verdict is that defendant's intestate promised to pay as alleged, a new trial will not be granted if the evidence sustains the verdict and plaintiff amends his declaration so as to sustain the verdict. Perkins v. Hix, (Me.) 13 A 131. (2) Where an executor is sued in his individual capacity for money received by him as administrator, by a creditor of the estate, and he answers that he holds the money as administrator and not as an individual, and a trial is had upon the merits, such defendant will not be granted a new trial because of defect of parties defendant, and be allowed to file an answer as administrator. Ten Eick v. Dye, 9 Oh. Dec. (Reprint) 511, 14 CincLBul 214. See also Fritz v. McGill, 31 Minn. 536, 18 NW 753 (where the court in deciding a motion for judgment on the pleadings had construed the action as being against defendant as administrator).

51. Smith v. Teacle, 8 Pa. Co. 150.

[§ 2197] **T. Judgment**[52]**—1. Rendition, Form,**[53] **and Requisites—a. In General.** A decree in form against the estate of a decedent, instead of against his personal representative as such, although irregular, is not erroneous.[54] Erroneous directions in a judgment for a pro rata payment of the claim sued on do not necessarily vitiate the judgment, but may be rejected as surplusage.[55] On a bill by a distributee against an administrator for his distributive share a decree which directs complainant's share to be paid to him without taking notice of the shares of other distributees is erroneous.[56] In some states certain demands against an estate cannot be prosecuted to judgment before the expiration of a certain time from the granting of letters testamentary or letters of administration,[57] and under some conditions no money judgment can be rendered against a personal representative.[58] Where part of the claim sued on has been allowed, but the verdict is for defendant, judgment should be entered in favor of plaintiff for the amount allowed, but plaintiff should be taxed with costs.[59] In an action against an executor to recover money that testator had received as guardian of plaintiff, a judgment ordering a sale of land to pay the claim is erroneous.[60] In a suit against an administrator to enforce a debt, however, a decree declaring certain property to be assets of the estate should also direct a sale thereof to discharge the debt.[61] The rendition of judgment against the representative, although the demand in suit is not due at the time of trial, is sometimes authorized by statute.[62] Where, in an action for rent against the executor of a deceased lessee and the surviving lessee, the latter was not served with process and did not appear, and there was no evidence that the executors and the surviving lessee had any joint property in the estate, and the executor did not serve a cross complaint on the surviving lessee for the adjustment of their rights, and there was nothing to indicate whether the surviving lessee was within the jurisdiction of the court, a judgment against the executor only is not objectionable, although the statute authorizes a judgment against all defendants jointly indebted, so far only as it may be enforced against the joint property of all and the separate property of defendants served.[63] A loan by a father to a son subsequent to the execution by the father of his will, which is evidenced by a receipt reciting that repayment is to be made out of the estate, is to be charged in equity upon the real estate devised to such son by the will, and an executor is not entitled to a personal judgment against such son in an action to recover such loan.[64] In an action on a note signed by defendant personally and by decedent, whose administrator defendant is, a judgment against him personally providing for satisfaction out of property jointly owned by defendant personally and as administrator was not void, the provision giving it no added force.[65]

The amount of the judgment depends of course on the peculiar circumstances of the particular case.[66] Under proper circumstances interest may be

52. Judgment or decree generally see Equity §§ 820–968; Judgments [23 Cyc 623].

53. Form of judgment of revival see infra § 2232.

54. Banks Grocery Co. v. Wheatley, 5 Tenn. Civ. A. 250, 259 ("The effect of the decree is, that estate of W. H. Reynolds, Sr., is liable for the debts sued on, and that an execution issue against the administrator of his estate with the will annexed").

55. Hart v. Jewett, 11 Iowa 276 (although in a suit on a claim against an administrator the court has simply to allow or disallow the claim, without fixing the per cent to be paid thereon, except in cases where the assets are determined and the several claims ascertained as contemplated in the code, yet the judgment for pro rata payment is not void).

56. Buckley v. Buckley, 9 Gill (Md.) 497.

57. Smith v. Rhodes, 29 Me. 360; Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629.

[a] **A premature judgment will be reversed** on error. Smith v. Rhodes, 29 Me. 360.

[b] **A premature judgment is merely voidable** and not void. Woolley v. Sullivan, 92 Tex. 28, 45 SW 377, 46 SW 629; Ross v. Drouilhet, 34 Tex. Civ. A. 327, 80 SW 241.

[c] **Judgment inoperative until expiration of statutory period.**—A statute declaring that a judgment against an executor or administrator by confession or default within six months after his qualification shall be "void" is intended only to prevent favoritism on the part of the personal representative by which a preference might be given some creditors over others, and the word "void" is not used absolutely but means merely that the judgment shall be inoperative for the time limited, so that no such advantage shall be taken. Roche v. Washington, 7 Humphr. (Tenn.) 142. But compare Gorman v. Swaggerty, 4 Sneed (Tenn.) 560, 562 ("The judgments against the administrator on the garnishment process were altogether null and void").

58. See cases infra this note.

[a] **Foreclosure suit.**—Where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against the administrator for the balance of the debt not satisfied by the sale of the premises. Newkirk v. Burson, 21 Ind. 129.

[b] **Successful plea of set-off.**—Where both parties are executors or administrators, suing and sued in their representative capacity, and defendant pleads payment with notice of a set-off exceeding in amount plaintiff's claim, judgment cannot be entered up against plaintiff for the balance, but it nevertheless becomes a debt of record, to be enforced by an action of debt or a scire facias. Paterson v. Shinn, 17 N. J. L. 322.

[c] **Cancellation of receipts.**—Where the petition against an administratrix for the cancellation of receipts alleged to have been fraudulently obtained and for the payment of plaintiff's claim fails to allege any settlement of the estate by the administratrix and the balance found due plaintiff, no money judgment can be rendered. Duhme v. Mehner, 18 Oh. Cir. Ct. 706, 6 Oh. Cir. Dec. 78.

[d] **Stipulation.**—Where an administrator de bonis non entered into an agreement with his predecessor that the issue as to whether there were any assets in his hands should be tried in an amicable action, the fact found, and a certificate transmitted to the orphans' court, it was error to enter judgment against the former administrator on a verdict finding that there was a certain sum due. Finney v. Moore, 8 Serg. & R. (Pa.) 345.

59. Selzer v. Selzer, 45 Okl. 372, 145 P 318.

60. Murray v. Barden, 132 N. C. 136, 43 SE 600.

61. Ewing v. Handley, 4 Litt. (Ky.) 346, 14 AmD 140; Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

62. Traylor v. Cabanne, 8 Mo. A. 131 (a judgment for rent against an executor for land leased to testator may be rendered prospectively for the part not due at the time of trial, the judgment distinguishing between the amounts presently and prospectively payable).

63. Brownfield v. Holland, 63 Wash. 86, 114 P 890.

64. Goodson v. Goodson, 31 Oh. Cir. Ct. 627.

65. Bingham v. Domer, 94 Wash. 253, 162 P 355.

66. Ga.—Crawford v. Wilson, 142 Ga. 734, 83 SE 667.

Mich.—Maney v. Casserly, 134 Mich. 252, 96 NW 478.

Miss.—Tatum v. McLellan, 56 Miss. 352.

N. J.—Wier v. Lum, 5 N. J. L. 967.

N. Y.—Hayward v. Place, 4 Silv. Sup. 390, 7 NYS 523.

Tex.—Manchester v. Bursey, 48 Tex. Civ. A. 633, 107 SW 557.

W. Va.—Martin v. Fielder, 82 Va. 455, 4 SE 602.

[a] **Illustrations.**—(1) Where an administrator and an intestate's widow fraudulently concealed from the probate court that complainants were heirs of intestate and as such entitled to a one-half interest in certain real estate, complainants were entitled to one half of the rental value of such real estate from the time their bill was filed to the date of the decree, with interest allowed for the average time at six per cent, less the value of necessary repairs. Maney v. Casserly, 134 Mich. 252, 96 NW 478. (2) A decree should not be rendered against an administrator for the whole of the trust fund in his hands at the suit of a single legatee, but only for a sufficient amount to pay complainant. Tatum v. McLellan, 56 Miss. 352. (3) In an action by a distributee to recover his distributive share of his administrators, judgment cannot be rendered also to include plaintiff's distributive share in the distributive share of the widow of intestate, who has since deceased, although the same dis-

allowed as part of the damages.[67]

Classifying claim. It has been held that the court in which an action against an executor or administrator is brought has power to classify the claim in suit, and order it to be paid as a claim of the class to which it belongs,[68] but this has also been denied.[69]

In an action for damages to property, a judgment against a tort-feasor's executor should be several and not jointly with his codefendant.[70]

[§ 2198] **b. Judgment by Confession or Consent.** The personal representative of a decedent may confess judgment both at law and in equity,[71] but it has been considered that the statement of indebtedness relied on as a basis of a confession of judgment must be clear and unequivocal.[72] Where, on a bill by decedent's widow and two infant children against the administrator, a decree is entered by consent that the administrator is indebted to the estate in a certain sum, and that of this sum one third belongs to the widow and two thirds to the infant children, the decree is not erroneous in failing to require refunding bonds to be given by plaintiffs, since this would be incompatible with the evident intent and legal effect of the decree.[73]

[§ 2199] **c. Judgment by Default.** A judgment by default may be taken against an administrator the same as against any other party,[74] unless there is some statutory provision to the contrary.[75]

[§ 2200] **d. Judgment for Payment in Due Course of Administration.** Where a judgment establishes a claim against the estate, the creditor should be remitted to the probate court for satisfaction,[76] and hence the general rule is that such a judgment should not be in the form of a general money judgment against the representative, but should direct that payment be made in due course of administration,[77] although entry of judgment in

tributees are entitled to such share of the widow in the same proportion. Wier v. Lum, 5 N. J. L. 823. (4) An executor and a legatee who have misappropriated the estate are liable for no more than is proved to have remained in the hands of the executor and to have been received by the legatee beyond what he was entitled to; and that a judgment against them transcending this liability, without showing in what manner or upon what evidence it is done, so that its modification is impracticable, will be reversed. Hayward v. Place, 4 Silv. Sup. 390, 7 NYS 523. (5) Where in a suit by an administrator to recover money, in which defendants pleaded offsets for boarding, etc., and for advancements to heirs, it was undisputed that defendants received six hundred and fifty dollars belonging to decedent, and only fifty dollars was shown to have been paid on decedent's behalf, a judgment for plaintiff for fourteen dollars was inadequate. Manchester v. Bursey, 48 Tex. Civ. A. 633, 107 SW 557. (6) Where a guardian de facto is dead, in a proceeding by the wards against his administrator, it is not error to decree the whole amount due them for rents and profits against the administrator, although the deceased guardian's land, including the land of such wards, had been partitioned among his heirs, and one of them in particular held the wards' shares since his coheirs would have to contribute to his compensation, and such a decree avoids circuity of action. Martin v. Fielder, 82 Va. 455, 4 SE 603.

[b] **Attorney's fees.**—Where certain notes, filed as a claim against intestate's estate, provided for ten per cent of principal and interest unpaid as an attorney's fee, if the notes were placed in the hands of an attorney for collection, and the notes, with the deed of trust securing them, having been twice presented to the maker's administrator, were rejected in toto, the holders, having previously placed them in the hands of an attorney for collection, were entitled to recover ten per cent for attorney's fees, without proving affirmatively that they had agreed to pay such amount for attorney's fees, or that such sum was reasonable. Dashiell v. Moody, 44 Tex. Civ. A. 87, 97 SW 843.

67. Maney v. Casserly, 134 Mich. 252, 96 NW 478. See also Rogers v. Holley, 19 Wend. (N. Y.) 624 (in a suit against an executor, where a report of referees is made in favor of plaintiff, although the court may not see fit to award costs to plaintiff, he may take judgment for the interest of the sum reported due in the same manner as if costs had been awarded, if he has been delayed by defendant in entering judgment by a motion to set aside the report).

68. Bradwell v. Wilson, 158 Ill. 346, 42 NE 145; De Wolf v. Springer, 190 Ill. A. 116.

69. Hotchkiss v. Denver First Nat. Bank, 37 Colo. 228, 85 P 1007.

70. Nelson Theatre Co. v. Nelson, 216 Mass. 30, 102 NE 926.

71. Lawrence v. Bush, 3 Wend. (N. Y.) 305; Ruggles v. Sherman, 14 Johns. (N. Y.) 446; Mactier v. Lawrence, 7 Johns. Ch. (N. Y.) 206; Anonymous, 2 N. C. 295; Strause v. Braunreuter, 21 Pa. Co. 228; Hussey v. White, 10 Serg. & R. (Pa.) 346; Smith v. Eyles, 2 Atk. 385, 26 Reprint 633; Waring v. Danvers, 1 P. Wms. 295, 24 Reprint 396.

[a] **Reasons for rule.**—(1) "If the creditor has a right to sue at law, the administrator must equally have a right to waive the expense and folly of a litigation, and confess the debt." Mactier v. Lawrence, 7 Johns. Ch. (N. Y.) 206, 208. (2) "The suit ties up the hands of the administrator or executor, who cannot accelerate the proceedings in it, nor can the creditors of the intestate generally, who are interested in the administration going forward, do anything to advance it. Courts therefore allow of the confession of a judgment to relieve the executor or administrator from a situation embarrassing to him and injurious to the creditors." Lawrence v. Bush, 3 Wend. (N. Y.) 305, 306.

[b] **One representative cannot confess judgment as against a corepresentative.**—Heisler v. Knipe, 1 Browne (Pa.) 319.

72. See Marrin v. Marrin, 27 Hun 601 [rev without opinion 92 N. Y. 644 mem] (a statement by defendant that "on accounting . . . as said executor, and on examination of my accounts as said trustee, it appears that there is now due and owing said plaintiffs the sum of two thousand five hundred dollars, and that the same is justly due," is not sufficient whereon to found a confession of judgment, it not showing that the sum was due, but that, upon examination, it would "appear").

73. Harman v. Davis, 30 Gratt. (71 Va.) 461.

74. Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075; Chase v. Swain, 9 Cal. 130; Piper v. Goodwin, 23 Me. 251.

[a] **In equity.**—The complainant in a bill against an executor or administrator may in a proper case take a decree pro confesso. Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075.

75. Distilling Co. v. Dervin, 25 Pa. Dist. 341; National Bank v. Detwiller, 22 Pa. Co. 150; Honeywell v. McGuire, 8 Pa. Co. 396; Hendrix v. Hendrix, 46 Tex. 6; O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

[a] **Illustrations.**—(1) Where, in an action against the executor of an insolvent estate, an exception was sustained to the answer, it was error to assume the facts alleged in the petition to be true for want of an answer, and to render judgment thereon without the introduction of evidence. Hendrix v. Hendrix, 46 Tex. 6. (2) Where an administrator appears in a suit against him for foreclosure of a mortgage, the petition in which does not aver presentation of the claim in suit, nor waive recourse against the estate, judgment by default against him for a deficiency and for attorney's fees is erroneous. O'Keefe v. Foster, 5 Wyo. 343, 40 P 525.

[b] **Judgment for want of affidavit of defense.**—(1) A judgment entered against administrators, in a suit upon a contract of their decedent, for want of an affidavit of defense, is void, and will be stricken off on motion. Parker v. Farr, 2 Browne (Pa.) 39; Lawall v. Love, 1 LegRec (Pa.) 257; Wright v. Cheyney, 10 Phila. (Pa.) 469. (2) A judgment for want of a sufficient affidavit of defense cannot be taken against an administrator de bonis non, where the matters out of which the action grew happened in the lifetime of his intestate. Johnston v. Shurtleff, 1 LackLegN (Pa.) 255.

76. Colo.—Jones v. Perot, 19 Colo. 141, 34 P 728.

Ill.—Stitzel v. Miller, 157 Ill. A. 390.

N. Y. Matter of Watson, 163 App. Div. 41, 148 NYS 525.

N. D.—Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

Tex.—Lauraine v. Ashe, 191 SW 563; Watson v. Blymer Mfg. Co., 66 Tex. 558, 2 SW 353; Fortson v. Caldwell, 17 Tex. 627.

[a] **Decree for sale of mortgaged property improper.**—A decree of the district court ordering the sheriff to make sale of mortgaged property of an estate in process of settlement is irregular, since after the court has established the mortgage, the creditor should be remitted to the county court for satisfaction of his claim in due course of administration. McCormick v. McNeel, 53 Tex. 15.

Filing transcript in probate court see infra § 2214.

77. U. S.—Covington v. Burnes, 6 F. Cas. No. 3,291, 1 Dill. 16.

Ark.—Yonley v. Lavender, 27 Ark. 252 [aff 21 Wall. 276, 22 L. ed. 536].

Cal.—Reed v. Reed, 172 P 600; Nathan v. Dierssen, 164 Cal. 607, 130 P 12; Moore v. Russell, 133 Cal. 297, 65 P 624, 85 AmSR 166; Vance v. Smith, 124 Cal. 219, 56 P 1031; Preston v. Knapp, 85 Cal. 559, 24 P 811;

the usual form is not ground for reversal.[78] Where the claim sued on is against the representative in his individual capacity, a judgment to be paid in due course of administration is improper.[79]

[§ 2201] **e. Judgment De Bonis Testatoris or Intestati.** In an action brought against an executor or administrator in his representative capacity on an obligation of his decedent, the judgment should ordinarily be de bonis testatoris or intestati,[80] and as a general rule a judgment against the rep-

Laurence v. Doolan, 68 Cal. 309, 5 P 484, 9 P 159; Drake v. Foster, 52 Cal. 225; Kelly v. Bandini, 50 Cal. 530; Atherton v. Fowler, 46 Cal. 323; Stockton Bank v. Howland, 42 Cal. 129; Rice v. Innskeep, 34 Cal. 224; De Racouillat v. Sansevain, 32 Cal. 376; Wells v. Robinson, 13 Cal. 133; Chase v. Swain, 9 Cal. 130; Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. A. 643, 166 P 371.

Colo.—Jones v. Perot, 19 Colo. 141, 34 P 728; Kilpatrick v. Haley, 14 Colo. A. 399, 60 P 361; Mattison v. Childs, 5 Colo. 78.

Del.—Hall v. Hering, 21 Del. 111, 63 A 576.

Ida.—McElroy v. Whitney, 24 Ida. 210, 133 P 118.

Ill.—Darling v. McDonald, 101 Ill. 370; Albee v. Wachter, 74 Ill. 173; Le Moyne v. Quimby, 70 Ill. 399; Peo. v. Cloud, 50 Ill. 439; Wells v. Miller, 45 Ill. 33; Bull v. Harris, 31 Ill. 487; Eggleston v. Buck, 31 Ill. 254; Granjang v. Merkle, 22 Ill. 249; Peacock v. Haven, 22 Ill. 23; Stillman v. Young, 16 Ill. 318; Turney v. Gates, 12 Ill. 141; Armstrong v. Cooper, 11 Ill. 560; Judy v. Kelly, 11 Ill. 211, 50 AmD 455; McDowell v. Cochran, 11 Ill. 31; Peck v. Stevens, 10 Ill. 127; Welch v. Wallace, 8 Ill. 490; Powell v. Kettelle, 6 Ill. 491; Weber v. Ridgway, 212 Ill. A. 159; Barnard v. Springfield, etc., Tract. Co., 194 Ill. A. 218 [aff 274 Ill. 148, 113 NE 89, LRA1916F 451]; In re Reed, 192 Ill. A. 453; Jones v. Illinois Cent. R. Co., 106 Ill. A. 597.

La.—Anderson v. Birdsall, 19 La. 441; Wooter v. Turner, 6 Mart. N. S. 442; Baillio v. Wilson, 5 Mart. N. S. 214; Herman v. Flood, 2 Mart. N. S. 659.

Mo.—Wernecke v. Wood, 58 Mo. 352.

N. J.—Paterson v. Shinn, 17 N. J. L. 322; Montgomery v. Reynolds, 14 N. J. L. 283; Woodruff v. Woodruff, 4 N. J. L. 436; Sindle v. Kiersted, 3 N. J. L. 484; Murphy v. Davis, 3 N. J. L. 412.

N. Y.—Brown v. King, 63 Hun 158, 17 NYS 678; Hopper v. Hopper, 53 Hun 394, 6 NYS 271 [aff 125 N. Y. 400, 26 NE 457, 12 LRA 237].

N. C.—Grant v. Bell, 91 N. C. 495; Holmes v. Foster, 78 N. C. 35; Wall v. Fairley, 73 N. C. 464; Dunn v. Barnes, 73 N. C. 273; Vaughn v. Stephenson, 69 N. C. 212.

Tex.—Keowne v. Love, 65 Tex. 152; Goff v. Hauser, 33 Tex. 430; Wilcox v. State, 24 Tex. 544; Cook v. Jordan, 21 Tex. 221; Fortson v. Caldwell, 17 Tex. 627; Thorn v. State, 10 Tex. 295; Bennett v. Spillars, 9 Tex. 519, 7 Tex. 600; Bason v. Hughart, 2 Tex. 476; Mott v. Ruenbuhl, 1 Tex. A. Civ. Cas. 599.

Utah.—Anderson v. Hanson, 34 Utah 183, 96 P 1092; Smith v. Hanson, 34 Utah 171, 96 P 1087, 18 LRANS 520; Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Wash.—Spokane v. Costello, 57 Wash. 183, 106 P 764; Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

W. Va.—Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

Wyo.—Fisher v. Hopkins, 4 Wyo. 379, 34 P 899, 62 AmSR 38.

Alta.—J. I. Case Threshing Mach. Co. v. Bolton, 2 Alta. L. 174.

"Under our system a judgment against an executor practically only establishes a claim." Hopper v. Hopper, 53 Hun 394, 397, 6 NYS 271 [aff 125 N. Y. 400, 26 NE 457, 12 LRA 237].

78. Smythe v. U. S., 188 U. S. 156, 23 SCt 279, 47 L. ed. 425 [aff 107 Fed. 376, 46 CCA 354]; Chase v. Swain, 9 Cal. 130; Spears v. Spears, 27 La. Ann. 537; Spokane v. Costello, 57 Wash. 183, 191, 106 P 764.

"It is further contended that the judgment is erroneous as to form, in view of § 1483 of Remington Ballinger's A. Code, which provides: 'The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due, but no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment.' It is true this section seems to contemplate that the judgment should contain the direction as to the manner of its payment by the administrator. In this case the judgment was in usual form, but without any such direction. It is clear from the provisions of this section what the effect of such a judgment is and how it shall be paid by the administrator, and since in this case it is against the administrator as such, its force and effect is easily understood, though it may not contain words directing its manner of payment as provided by this section. We think, however, it is a better practice to use the words of the statute in a judgment against an administrator, and therefore direct that the judgment against the administrator be amended by inserting the words of the statute directing the manner of its payment." Spokane v. Costello, supra.

[a] **Illustration.** — An absolute judgment against the administrator of a surety on the official bond of a federal official, rendered by a federal court sitting in Louisiana, is not objectionable on the theory that it should have been against the administrator, payable only in due course of administration, since if by the law of that state the judgment is so payable, it will be thus interpreted and enforced. Smythe v. U. S., 188 U. S. 156, 23 SCt 279, 47 L. ed. 425 [aff 107 Fed. 376, 46 CCA 354].

79. Jahp v. Bradley, 185 Ill. A. 215.

80. U. S.—Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Washington Bank v. Peltz, 2 F. Cas. No. 952, 2 Cranch C. C. 241.

Ala.—Bowie v. Foster, Minor 264; Armstrong v. Johnson, Minor 169.

Ark.—Stone v. Kaufman, 25 Ark. 186; Barasien v. Odum, 17 Ark. 122.

Cal.—Reed v. Reed, 172 P 600; Stockton Bank v. Howland, 42 Cal. 129.

Colo.—Grimes v. Barndollar, 58 Colo. 421, 148 P 256.

D. C.—Cake v. Woodbury, 3 App. 60 [aff 164 U. S. 311, 17 SCt 100, 41 L. ed. 447].

Fla.—Phillips v. Sanchez, 35 Fla. 187, 17 S 363; Cooper v. Livingston, 19 Fla. 684.

Ga.—Empire State Chemical Co. v. Shubrick, 97 SE 541; Humphrey v. Johnson, 143 Ga. 703, 85 SE 830; Jennings v. Wright, 54 Ga. 537; Justices Inferior Ct. v. Sloan, 7 Ga. 31; Janes v. Robinson, Dudl. 1.

Ind.—Steinmetz v. State, 47 Ind. 465; Horrall v. Mattingly, 27 Ind. 500; Horrall v. Scudder, 27 Ind. 499; Flagg v. Winans, 2 Ind. 123; Phipps v. Addison, 7 Blackf. 375; Priest v. Martin, 4 Blackf. 311; Raymond v. Simonson, 4 Blackf. 77.

Iowa.—Hodgdon v. Heidman, 66 Iowa 645, 24 NW 257; Tyler v. Langworthy, 37 Iowa 555; Wile v. Wright, 32 Iowa 451; Lawton v. Buckingham, 15 Iowa 22; Voorhies v. Eubank, 6 Iowa 274.

Kan.—Insley v. Shire, 54 Kan. 793, 39 P 713, 45 AmSR 308.

Ky.—Rust v. Carpenter, 159 Ky. 623, 167 SW 873, 158 Ky. 672, 166 SW 180; Lusk v. Anderson, 1 Metc. 426; Vaughn v. Gardner, 7 B. Mon. 326; Botts v. Fitzpatrick, 5 B. Mon. 397; Leathers v. Meglasson, 2 T. B. Mon. 63; Speed v. Hann, 1 T. B. Mon. 16, 15 AmD 78; Rece v. May, 2 A. K. Marsh. 23; Morton v. Fox, 4 Bibb 392; Fisher v. Kay, 2 Bibb 434; Clark v. Parish, 1 Bibb 547; Sudduth v. Gore, 1 Bibb 505; Howard v. Cooper, 5 Ky. Op. 552; Dickens v. Yelton, 1 Ky. Op. 377.

Me.—Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793; Davis v. French, 20 Me. 21, 37 AmD 36.

Mich.—Peckham v. Hoag, 57 Mich. 289, 23 NW 818.

Miss.—Pilcher v. Drennan, 51 Miss. 873; Guice v. Selleres, 43 Miss. 52, 5 AmR 476; Barrow v. Wade, 15 Miss. 49; Neeley v. Planters' Bank, 12 Miss. 113; Hill v. Robeson, 10 Miss. 541.

Mo.—Blondeau v. Sheridan, 81 Mo. 545; Banney v. Thomas, 45 Mo. 111; Finney v. State, 9 Mo. 227; Laughlin v. McDonald, 1 Mo. 684; Powers v. Conran, (A.) 182 SW 1012.

N. H.—Quigg v. Kittredge, 18 N. H. 137.

N. J.—Monfort v. Vanarsdalen, 5 N. J. L. 686; Imlay v. Hamilton, 3 N. J. L. 997; Murphy v. Davis, 3 N. J. L. 843; Nelson v. Golden, 3 N. J. L. 625; Quicksall v. Quicksall, 3 N. J. L. 50, 457.

N. M.—Senescal v. Bolton, 7 N. M. 351, 34 P 446.

N. Y.—Cooperstown Bank v. Corlies, 1 AbbPrNS 412; Peo. v. Erie County, 4 Cow. 445.

N. C.—Usry v. Suit, 91 N. C. 406; Hogg v. White, 2 N. C. 298; Parker v. Stevens, 2 N. C. 218, 1 AmD 557.

Oh.—Gormly v. Skinner, Wright 680.

Okl.—Collier v. Gannon, 40 Okl. 275, 137 P 1179.

Pa.—Dickey v. Trainer, 43 Pa. 509; Mead v. Kilday, 2 Watts 110.

Tenn.—Massingale v. Jones, 3 Hayw. 36.

Tex.—Thorn v. State, 10 Tex. 295.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Va.—Hite v. Paul, 2 Munf. (16 Va.) 154; Spotswood v. Price, 3 Hen. & M. (13 Va.) 123.

W. Va.—Davidson v. Kunst, 72 W. Va. 116, 77 SE 548; Jones v. Reid, 12 W. Va. 350, 29 AmR 455.

Wis.—Bogue v. Laughlin, 149 Wis. 271, 286, 136 NW 606, 40 LRANS 927, AnnCas1913C 1367 [cit Cyc]; Borchert v. Borchert, 141 Wis. 142, 123 NW 628; Ladd v. Anderson, 58 Wis. 591, 17 NW 320; Hei v. Heller, 53 Wis. 415, 10 NW 620; Woodward v. Howard, 13 Wis. 557; Lightfoot v. Coles, 1 Wis. 26.

Eng.—Mounson v. Bourn, Cro. Car. 518, 79 Reprint 1049.

"A judgment de bonis testatoris is a proper judgment in all cases where the executor is a party and the estate of decedent is liable for the debt." Bogue v. Laughlin, 149 Wis. 271, 286, 136 NW 606, 40 LRANS 927, AnnCas1913C 1367 [cit Cyc].

[a] **"The meaning of a judgment de bonis testatoris** is, that the plaintiff recover his debt or damages, to be levied of the goods and chattels of the testator in the hands of the executor; and it is so expressed, where the record is made up at length." Moore v. Kerr, 10 Serg. & R. (Pa.) 348, 349.

[b] **Form of judgment.**—At common law the judgment de bonis testatoris is rendered "that the said

resentative de bonis propriis in such an action is improper.[81] The same rule obtains where the action is brought by the executor or administrator but results in a judgment in favor of defendant.[82]

Construction of judgment. It has been held that if a suit is instituted and progresses against defendant as executor or administrator and the judgment is against "said defendant," it is a judgment de bonis testatoris or intestati;[83] but other authorities hold that such a judgment binds the representative individually.[84] It has been held that a judgment against a person designated administrator of the estate of a named decedent,[85] or against a person "as administrator"[86] is not a personal judgment, but a judgment against him in his representative capacity only, to be paid out of the assets of the estate; but, on the other hand, a judgment against an executor or administrator has been held to bind him personally, although he was therein designated executor or administrator,[87] although it followed a writ and declaration against him "as administrator,"[88] or even though it was rendered against him "in his capacity of administrator."[89] In order to ascertain whether a judgment against an administrator was intended to bind him de bonis propriis, or only de bonis testatoris, reference may be had to the pleadings in the case.[90]

[§ 2202] **f. Judgment Quando Acciderint.** A judgment against an executor or administrator should provide for its satisfaction out of the estate to the extent that assets may be found in defendant's hands, and as to the balance out of assets which may subsequently come into his hands.[91] If a plea of plene administravit is confessed by plaintiff or found in defendant's favor, plaintiff, on establishing his claim, is entitled to a judgment quando acciderint for the full amount thereof.[92] So also on a plea of no assets plaintiff may pray

John recover against the said Jane, executrix, as aforesaid, —— pounds, etc., to be levied of the goods and chattels which were of the said J. D., deceased, at the time of his death, in the hands of said Jane, to be administered." Keniston v. Little, 30 N. H. 318, 64 AmD 297.

[c] **In an action against an administrator on an order directing payment of a claim** judgment should be rendered for only so much as the assets will warrant, since the order should direct payment only to the extent of the assets. Peckham v. Hoag, 57 Mich. 289, 23 NW 818.

[d] **Judgment in foreign attachment.**—As a general rule a judgment against an administrator on a debt due from the intestate's estate should be against the estate, and the same rule prevails in a process of foreign attachment against an administrator. Quigg v. Kittredge, 18 N. H. 137.

[e] **Judgment by default.**—Judgment in favor of a creditor of the intestate against an administrator who enters no appearance and makes no plea should be de bonis testatoris. Jennings v. Wright, 54 Ga. 537.

[f] **Judgment by confession.**—Where executors are sued as "J's executors," without naming them, and they confess judgment generally, the judgment binds the estate only, and not themselves personally. Jones v. Gardner, 4 Watts (Pa.) 416.

[g] **Judgment for funeral expenses.**—Under a statute placing funeral expenses among debts to be first paid out of the estate, and providing that an action for them may be brought against an executor, even within the six months which is generally allowed him to examine into the condition of the estate, judgment may be entered de bonis testatoris. Campfield v. Ely, 13 N. J. L. 150.

[h] **Judgment in action revived against administrator.**—Where a defendant dies, and the suit is revived against his administrator, the decree against him should be de bonis intestati only. Myers v. Mott, 29 Cal. 359, 89 AmD 49; Hunt v. Martin, 8 Gratt. (49 Va.) 578; Cocke v. Gilpin, 1 Rob. (40 Va.) 20. But compare Greenlee v. Bailey, 9 Leigh (36 Va.) 526 [foll Catlett v. Russell, 6 Leigh (33 Va.) 344] (personal judgment proper in detinue action).

[i] **Individual appearance.**—Where decedent received property under a will providing that at his death it should go to other heirs of testatrix in an action against his executrix to recover the property, she could only be compelled to account as executrix, plaintiff being not entitled to a personal judgment against her, although she appeared individually and the court acquired jurisdiction over her. Volhard v. Volhard, 119 App. Div. 266, 104 NYS 578.

[j] **Judgment on plea of plene administravit.**—(1) On a verdict against an executor on a plea of plene administravit the judgment should be de bonis testatoris. Sigiar v. Haywood, 8 Wheat. (U. S.) 675, 5 L. ed. 713; Jameson v. Martin, 3 J. J. Marsh. (Ky.) 330. (2) Where the estate is solvent, including real estate, and the administrators neglect to apply for a sale of the real estate, and pay out all the personal estate to one creditor to the exclusion of the rest, it is a devastavit, and the judgment must be de bonis testatoris, notwithstanding the plea of plene administravit, which is an immaterial plea. Abbott v. Cole, 5 Oh. 86.

[k] **Necessity of fixing executor with assets.**—(1) A decree cannot properly be made against an executor for a debt of his testator until he has, by confession or the report of a master, been fixed with assets. Moody v. Sitton, 37 N. C. 382. (2) If, however, an administrator does not plead want of assets, the judgment of de bonis testatoris is awarded. Hogg v. White, 2 N. C. 298; Parker v. Stephens, 2 N. C. 218, 1 AmD 557. (3) So in suits against executors it is not regular to enter a decree to be levied on the goods of the testator, without an account. McRae v. Bates, 4 Hen. & M. (14 Va.) 490. (4) If, however, plaintiff's claim is proved or admitted, and the executor confesses assets, plaintiff may, at the hearing, have a decree for payment without taking a decree for an account. Duerson v. Alsop, 27 Gratt. (68 Va.) 229.

[l] **Necessity of direction as to payment out of assets.**—(1) A judgment against an administrator as such is sufficient, if the recitals therein show that it was rendered against him in his representative capacity, although there is no express direction that the money is to be levied of the goods and chattels of his intestate in his hands to be administered. Cake v. Woodbury, 3 App. (D. C.) 60; Guice v. Sellers, 43 Miss. 52, 5 AmR 476. Contra Thorn v. State, 10 Tex. 295; Hite v. Paul, 2 Munf. (16 Va.) 154. (2) A judgment against an executor or administrator, where there is no plea that the sum recovered "be levied of the goods and chattels, lands and tenements, of the testator or intestate," is sufficient, on an affidavit of illegality interposed to the execution, without adding the words, "in the hands of," etc., "to be administered." Woolfolk v. Kyle, 48 Ga. 419.

[m] **Limitation as to judgment binding assets.**—In no case can a judgment be rendered against an administrator, to be levied on the assets of the estate, except where it directs a sale of specified articles thereof. Johnson v. Meier, 62 Ind. 98.

81. See infra § 2203.

82. Pillsbury v. Hubbard, 10 N. H. 224.

83. Ark.—Stone v. Kaufman, 25 Ark. 186.

Del.—Crossan v. Glass, 4 Del. 342; Moore v. Lunney, 3 Del. 28.

Pa.—Jones v. Gardner, 4 Watts 416; Burd v. McGregor, 2 Grant 353.

Tex.—Clapp v. Walters, 2 Tex. 130.

Va.—Snead v. Coleman, 7 Gratt. (48 Va.) 300, 56 AmD 112.

84. Ala.—McCalley v. Wilburn, 77 Ala. 549.

Md.—Curtis v. Somerset Bank, 7 Harr. & J. 25.

Miss.—Simmons v. Ingram, 60 Miss. 886.

N. Y.—Pinney v. Johnson, 8 Wend. 500; Smith v. Lockwood, 10 Johns. 366.

Wyo.—Peabody v. Hutton, 5 Wyo. 102, 37 P 694, 39 P 980.

85. Collier v. Gannon, 40 Okl. 275, 137 P 1179.

86. Sharpe v. Morgan, 44 Ill. A. 346 [aff 144 Ill. 382, 33 NE 22]; Egbert v. State, 4 Ind. 399; Howcott v. Collins, 23 Miss. 398; Neeley v. Planters' Bank, 12 Miss. 113.

87. Hall v. McGregor, 65 W. Va. 74, 64 SE 736 [foll Hanson v. Blake, 63 W. Va. 560, 60 SE 589; Thompson v. Mann, 53 W. Va. 432, 44 SE 246]; Re Joyce, 6 Man. 281.

88. Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

89. Hardy v. Call, 16 Mass. 530 (the words quoted, being ambiguous, should be so construed as to comport with a legal judgment de bonis propriis).

90. Tyler v. Langworthy, 37 Iowa 555.

91. Ky.—Girty v. Girty, 175 Ky. 166, 193 SW 1024; Botts v. Fitzpatrick, 5 B. Mon. 397.

Me.—Brown v. Whitmore, 71 Me. 65.

Md.—Scott v. Dorsey, 1 Harr. & J. 227.

N. Y.—Peo. v. Erie County, 4 Cow. 445; Douglass v. Satterlee, 11 Johns. 16.

N. C.—Grant v. Bell, 91 N. C. 495; Gregory v. Haughton, 12 N. C. 442.

Va.—Nimmo v. Com., 1 Hen. & M. (11 Va.) 470.

Eng.—Bridgman v. Lightfoot, Cro. Jac. 671, 79 Reprint 581; Bull v. Wheeler, Cro. Jac. 647, 79 Reprint 559.

92. Ala.—Skinner v. Frierson, 8 Ala. 915.

D. C.—National Sav. Bank v. Welcker, 21 D. C. 324.

Ill.—Morse v. Pacific R. Co., 191 Ill. 356, 61 NE 104.

Ind.—Wilt v. Bird, 7 Blackf. 258.

Ky.—Miller v. Towles, 4 J. J. Marsh. 255; Bowman v. Green, 6 T.

judgment of assets when they shall come into the hands of the administrator.[93] If a judgment against a personal representative is presented for payment within the time prescribed by statute, it is to be satisfied out of the estate then inventoried;[94] otherwise it is to be satisfied out of subsequently inventoried assets.[95] A judgment quando acciderint is sometimes authorized on a claim which is barred, as against general assets, because of nonpresentation.[96]

Effect as admission of no assets. It has been held that a judgment quando acciderint amounts to an admission by plaintiff that defendant had no assets at its date,[97] but plaintiff may require an accounting of prior assets where they were fraudulently misappropriated and the fraud was not discovered until after the entry of the judgment quando acciderint.[98]

Effect on priorities. A judgment quando acciderint does not alter the common-law priority between debts, so as to give one of inferior dignity, on which such a judgment has been taken, a preference before a debt of higher dignity not sued on.[99]

[§ 2203] **g. Judgment De Bonis Propriis.** As a general rule where an executor or administrator is sued for a debt of decedent, a judgment cannot be rendered against him de bonis propriis,[1] but it

B. Mon. 339; Burns v. Burton, 1 A. K. Marsh. 349.

Me.—Brown v. Whitmore, 71 Me. 65.

N. Y.—Ford v. Crane, 6 Cow. 71; Osterhout v. Hardenbergh, 19 Johns. 266.

N. C.—Gregory v. Haughton, 12 N. C. 442.

S. C.—Rosborough v. Mills, 35 S. C. 578, 15 SE 281.

Va.—Timberlake v. Benson, 2 Va. Cas. (4 Va.) 348.

93. U. S.—Wilson v. Hurst, 30 F. Cas. No. 17,809, Pet. C. C. 441.

Ky.—South v. Carr, 7 T. B. Mon. 419; Ewing v. Handley, 4 Litt. 346, 14 AmD 140.

Me.—Brown v. Whitmore, 71 Me. 65.

N. C.—McRae v. Moore, 2 N. C. 182.

Va.—Nimmo v. Com., 1 Hen. & M. (11 Va.) 470.

94. Peacock v. Haven, 22 Ill. 23; Bradford v. Jones, 17 Ill. 93.

95. Peacock v. Haven, 22 Ill. 23.

96. Darling v. McDonald, 101 Ill. 370; Shepard v. Lawrence County Nat. Bank, 67 Ill. 292; Peacock v. Haven, 22 Ill. 23; Bradford v. Jones, 17 Ill. 93.

[a] **Where the claim did not accrue until after the statutory period had elapsed,** plaintiff should not be confined, in the satisfaction of his judgment, to assets which may be discovered after its rendition; he is entitled to participate in assets discovered after the lapse of the statutory period from the granting of the letters. Stone v. Clarke, 40 Ill. 411.

Rights of creditor who failed to present claim as to subsequently discovered assets generally see supra § 1033.

97. Greer v. Willis, 67 Ga. 43; Orcutt v. Orms, 3 Paige (N. Y.) 459; Whitley v. Alexander, 73 N. C. 444; Rosborough v. Mills, 35 S. C. 578, 15 SE 281; McDowall v. Branham, 11 S. C. L. 572.

98. Spoon v. Smith, 36 S. C. 588, 15 SE 800.

99. Henderson v. Burton, 38 N. C. 259.

1. U. S.—Smith v. Chapman, 93 U. S. 541, 23 L. ed. 795; Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

Ala.—Greening v. Brown, Minor 353; Bowie v. Foster, Minor 264; Armstrong v. Johnson, Minor 169; Pope v. Robinson, 1 Stew. 415.

Ark.—Vance v. State, 35 Ark. 176.

Cal.—Reed v. Reed, 172 P 600; Atherton v. Fowler, 46 Cal. 323; Rice v. Inskeep, 34 Cal. 224.

Colo.—Grimes v. Barndollar, 58 Colo. 421, 148 P 256; Jones v. Perot, 19 Colo. 141, 34 P 728.

Conn.—Andrews v. Platt, 77 Conn. 63, 58 A 458; McDonald v. Ward, 57 Conn. 304, 307, 18 A 51; Middlebrook v. Pendleton, 47 Conn. 9.

Del.—Cloud v. Whiteman, 2 Del. 401.

Fla.—Phillips v. Sanchez, 35 Fla. 187, 17 S 363.

Ga.—Humphrey v. Johnson, 143 Ga. 703, 85 SE 830.

Ind.—Horrall v. Mattingley, 27 Ind. 500; Horrall v. Scudder, 27 Ind. 499.

Iowa.—Hodgdon v. Heidman, 66 Iowa 645, 24 NW 257; Lawton v. Buckingham, 15 Iowa 22.

Kan.—Insley v. Shire, 54 Kan. 793, 39 P 713, 45 AmSR 308.

Ky.—Lusk v. Anderson, 1 Metc. 426; Botts v. Fitzpatrick, 5 B. Mon. 397; Dawson v. Clay, 1 J. J. Marsh. 165; Rece v. May, 2 A. K. Marsh. 23; Howard v. Cooper, 5 Ky. Op. 552; Dickens v. Yelton, 1 Ky. Op. 377.

Miss.—Barrow v. Wade, 15 Miss. 49; Hill v. Robeson, 10 Miss. 541.

Mo.—Finney v. State, 9 Mo. 227; Laughlin v. McDonald, 1 Mo. 684; Powers v. Conran, (A.) 182 SW 1012; White v. McFarland, 148 Mo. A. 338, 128 SW 23.

N. H.—Pillsbury v. Hubbard, 10 N. H. 224.

N. J.—Montfort v. Vanarsdalen, 5 N. J. L. 686; Sindle v. Kiersted, 3 N. J. L. 926.

N. M.—Senescal v. Bolton, 7 N. M. 351, 34 P 446.

N. Y.—Rhodes v. Evans, Clarke 168.

N. C.—Usry v. Suit, 91 N. C. 406; Moody v. Sitton, 37 N. C. 382.

Pa.—Maurer v. Kerper, 102 Pa. 444; Lorenz v. King, 38 Pa. 93.

Tenn.—Dance v. McGregor, 5 Humphr. 428.

Tex.—Keowne v. Love, 65 Tex. 152; Thorn v. State, 10 Tex. 295.

Utah.—Anderson v. Hanson, 34 Utah 183, 96 P 1092; Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926; Smith v. Hanson, 34 Utah 171, 96 P 1087, 18 LRANS 520; Bacon v. Thornton, 16 Utah 138, 51 P 153.

Va.—Staples v. Staples, 85 Va. 76, 7 SE 199; Wills v. Dunn, 5 Gratt. (46 Va.) 384; Pugh v. Jones, 6 Leigh (33 Va.) 299; Hite v. Paul, 2 Munf. (16 Va.) 154.

W. Va.—Davidson v. Kunst, 72 W. Va. 116, 77 SE 548; Jones v. Reid, 12 W. Va. 350, 29 AmR 455.

Wis.—Viles v. Green, 91 Wis. 217, 64 NW 856; Woodward v. Howard, 13 Wis. 557.

"It is further claimed that the court erred in entering a personal judgment against the appellant. Under the statute (section 3862, Rev. St. 1898, a judgment against an executor or administrator upon any claim for money against the estate of a deceased person only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due and that no execution must issue upon such judgment nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment. The judgment as entered was not in compliance with the statute, and for that reason was erroneous." Smith v. Hanson, 34 Utah 171, 180, 96 P 1087, 18 LRANS 520; Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

[a] **Where administrators are garnishees,** it is error to enter judgment against them de bonis propriis. Lorenz v. King, 38 Pa. 93.

[b] **While a legacy or distributive share may be reached** in the executor's hands by attachment execution, only the orphans' court can determine the amount due on the settlement of the estate, and hence judgment should not be rendered in the common pleas for a sum certain against the executor de bonis propriis. Maurer v. Kerper, 102 Pa. 444.

[c] **Possession by executrix of administrator.**—The fact that an administrator died testate, and that his executrix took possession of the estate in process of administration, does not authorize a judgment de bonis propriis, against the executrix. Keowne v. Love, 65 Tex. 152.

[d] **Foreclosure of heir.**—Although the statute provides that an administrator may be sued to foreclose a lien, it is error to enter a personal judgment against an administrator in an action to foreclose a lien. Viles v. Green, 91 Wis. 217, 64 NW 856.

[e] **Judgment by default.**—(1) Judgment de bonis propriis by default is erroneous, under a statute providing that administrators shall not, as at common law, be liable personally on failure to plead. Phillips v. Munsell, 5 J. J. Marsh. (Ky.) 253; Rece v. May, 2 A. K. Marsh. (Ky.) 23; Senescal v. Bolton, 7 N. M. 351, 34 P 446. (2) Where an action of replevin is against an executrix in her representative capacity, a default judgment for the value of the property, rendered against her personally, is irregular, if not void, and may be set aside on application therefor within the statutory period. White v. McFarland, 148 Mo. A. 338, 128 SW 23.

[f] **On plea of plene administravit.**—In an action against an executor upon a contract of his testator, where devastavit is not alleged and proved, a judgment de bonis propriis is erroneous. "Unless an administrator or executor in such a case pleads a false plea, he is not liable to a judgment beyond the assets in his hands to be administered; and it is well settled that a plea of plene administravit is not necessarily a false plea, and that the judgment in such a case, even if the plea is not sustained, should be a judgment de bonis testatoris." Smith v. Chapman, 93 U. S. 41, 23 L. ed. 795 [foll Siglar v. Haywood, 8 Wheat. (U. S.) 675, 5 L. ed. 713].

[g] **Partial invalidity.** — A joint judgment on a note against the administrator of a deceased maker and the surviving makers is erroneous as to the administrator, if it is not made payable de bonis testatoris; but this error does not invalidate it as to the other defendants. Stockton Bank v. Howard, 42 Cal. 129.

[h] **Action against nonresident executor sued by publication.** — Where a nonresident executor of a foreign estate was sued for commissions for the sale of lands in Kansas belonging to the estate, which lands were attached and service had on the executor by publication, who answered defending for the estate, the court had no jurisdiction to render judgment against the executor individually, although he may have in-

should be rendered against him de bonis testatoris [2] to be paid in due course of administration.[3] In a creditors' suit to enforce claims against an estate, where an accepted order by an executor is rejected as against the estate, the creditor is not entitled to a decree against the executor personally.[4]

A judgment de bonis propriis is proper where the representative is personally liable on the claim in suit,[5] as where the action is upon a promise made or obligation incurred by the representative after the death of decedent.[6] It has also been considered that a personal judgment de bonis propriis may be rendered against an executor or administrator where he has been guilty of a violation of duty in the administration of the estate committed to his charge,[7] as by committing a devastavit;[8] where the action is for a legacy in the hands of the executor;[9] where there has been a decree of the probate court requiring the representative to make payment, and nothing remains to be done but to pay the money;[10] or where the representative has made a false plea in the action.[11] Where an executor or administrator sues on a cause of action alleged to have accrued after the death of a decedent, and upon which the representative might, therefore, have sued in his own right, judgment de bonis propriis may be entered against him in case defendant succeeds.[12] In equity a decree against an administrator having assets, or acknowledging assets, should be de bonis propriis.[13] A personal decree against executors de son tort is proper where they jointly converted certain notes which were not returned as assets of the estate, and they cannot contend that these notes are assets to be collected only by an administrator to be appointed.[14] Where an administrator of a defendant in detinue, who dies pendente lite, consents that the case shall stand revived against him, and goes to trial on the plea put in by his intestate, the judgment against him should be personal for the property or its alternative value, while the costs and damages should be levied de bonis testatoris.[15]

Construction of judgment. Where objections to the return of appraisers setting aside a year's support on a widow's application therefor were filed, and the case was appealed to the superior court, where a verdict was returned in favor of the applicant, and a judgment was rendered: "The jury having returned a verdict in the above-stated case for $101.38, it is thereupon considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant, James Beall, Admr., etc., the sum of $101.38, principal, and $9.65, costs of suit," the judgment was in terms a judgment against defendant individually, and not binding on the assets of the administrator's decedent.[16]

curred a personal liability on the claim. Edwards v. Puterbaugh, 86 Kan. 758, 121 P 1116.

2. See supra § 2201.

3. See supra § 2200.

4. Staples v. Staples, 85 Va. 76, 7 SE 199.

5. Offut v. Bradford, 4 Bush (Ky.) 413; Taylor v. Tatum, 30 Miss. 701; Bacon v. Thornton, 16 Utah 138, 51 P 153; Martin v. Stover, 2 Call (6 Va.) 514.

[a] **This rule has been applied:** (1) In assumpsit against executors for money had and received by them to plaintiff's use. Martin v. Stover, 2 Call (6 Va.) 514. (2) On dissolution of an injunction sued out by an executrix for her own benefit as devisee. Offut v. Bradford, 4 Bush (Ky.) 413. (3) In an action of detinue. Taylor v. Tatum, 30 Miss. 701.

6. Ala.—Johnson v. Gaines, 8 Ala. 791.

Cal.—Melone v. Davis, 67 Cal. 279, 7 P 703.

Fla.—L'Engle v. L'Engle, 19 Fla. 714.

Ind.—Carter v. Thomas, 3 Ind. 213.

Ky.—Ellis v. Merriman, 5 B. Mon. 296; Daviess v. Mead, 2 Bibb 397.

N. J.—Doolittle v. Willet, 57 N. J. L. 398, 31 A 385.

Oh.—Waldsmith v. Waldsmith, 2 Oh. 156.

Pa.—Collins v. Weiser, 12 Serg. & R. 97.

Va.—Belvin v. French, 84 Va. 81, 3 SE 891; Fitzhugh v. Fitzhugh, 11 Gratt. (52 Va.) 300, 62 AmD 653.

[a] **Illustrations.**—A judgment de bonis propriis is proper in an action on: (1) A due bill signed by the administrator as such. Ellis v. Merriman, 5 B. Mon. (Ky.) 296. (2) A contract made by an executor for the benefit of the estate. Doolittle v. Willet, 57 N. J. L. 398, 31 A 385.

7. Dawson v. Clay, 1 J. J. Marsh. (Ky.) 165; Woodward v. Howard, 13 Wis. 557; Purchase v. Pitman, 8 Newfoundl. 469.

[a] **Illustration.** — Where an executor has never been charged in a settlement of his transactions with the purchase price of land which, without authority, he sold with warranty of title as executor, he cannot be prejudiced by a judgment in favor of the purchaser against him individually, and not as executor. Collins v. Sanders, 5 KyL 860.

8. Smith v. Chapman, 93 U. S. 41, 23 L. ed. 795; Shorter v. Hargroves, 11 Ga. 658; Saunders v. Smith, 3 Ga. 121; Dawson v. Clay, 1 J. J. Marsh. (Ky.) 165; Dance v. McGregor, 5 Humphr. (Tenn.) 428.

[a] **Who may take advantage of devastavit.**—Where the assets are insufficient to pay all claims against the estate, plaintiff is not entitled to a judgment de propriis against the administrator on proof that the latter has paid demands inferior in dignity to that of plaintiff, if there exists outstanding and unpaid a claim of higher dignity than his, sufficient in amount to absorb the entire assets; for, although such payments constitute a devastavit for which the administrator is personally liable, such liability exists only in favor of a creditor injured by the making of such payments. Gwinn v. Trotter, 112 Ga. 703, 38 SE 49.

[b] **Necessity for previous judgment de bonis testatoris.**—"As to the $75 and the costs, the judgment is in effect to be levied de bonis propriis, and to that extent convicts the executor of a devastavit. To entitle the plaintiff to such a judgment, he must have obtained a previous judgment against the executor to be levied de bonis testatoris, and upon which execution had been returned nulla bona, as settled in Carroll v. Connet, 2 J. J. Marsh. 195, 208, and other cases. Without such judgment and return, no suit for a devastavit could be brought, unless authorized by the act of 1839, regulating the administration and settlement of estates; and neither the letter nor spirit of that act seems to contemplate any proceeding under it except in a Court of Equity. It gives no new remedy, nor does it change the mode of proceeding at law." Markham v. Allen, 8 B. Mon. (Ky.) 417, 418.

9. Pettigrew v. Pettigrew, 1 Stew. (Ala.) 580.

10. Peckham v. Berrien Cir. Judge, 74 Mich. 287, 41 NW 926; Quigg v. Kittredge, 18 N. H. 137; Wachter's Case, 1 Walk. (Pa.) 267.

11. U. S.—Smith v. Chapman, 93 U. S. 41, 23 L. ed. 795; Peters v. Breckenridge, 17 F. Cas. No. 11,030, 2 Cranch C. C. 518.

Ga.—Justices Inferior Ct. v. Sloan, 7 Ga. 31.

Ind.—King v. Anthony, 2 Blackf. 131.

N. Y.—Peo. v. Judges Ct. of C. Pl., 4 Cow. 445, 447; Lansing v. Lansing, 18 Johns. 502.

S. C.—Harrison v. Taylor, 3 S. C. L. 233.

"If he plead ne unques executor, or a release to himself, and the issue be found against him, the judgment is, that execution issue in the first instance, de bonis testatoris si, et si non, de bonis propriis, for both debt and costs; and the reason is that he pleaded a plea which he knew to be false; and thus, unnecessarily delayed the plaintiff. The rule laid down in Lansing v. Lansing, 18 Johns. (N. Y.) 502, is right as to that case; but it is too broad, and should be accompanied with this qualification, that if the executor suffer judgment by default, or give a cognovit actionem, or plead any other plea but the two above named, and the issue be found against him, the judgment is de bonis testatoris si, for the whole debt or damages and costs, et si non, then de bonis propriis for the costs." Peo. v. Judges Ct. of C. Pl., supra.

[a] **Illustration.**—In a creditors' suit against the debtor's executor for an accounting of the personal property and a discovery of the real property, where the executor pleads in bar that he has assets sufficient to pay all claims, and the allegations of the plea prove untrue, the admission of assets renders him personally liable, and a decree against him is proper without a discovery. Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075.

12. Moulton v. Wendell, 37 N. H. 406; Pillsbury v. Hubbard, 10 N. H. 224.

13. Templeton v. Fauntleroy, 3 Rand (24 Va.) 434.

14. Weaver v. Williams, 75 Miss. 945, 23 S 649.

15. Greenlee v. Bailey, 9 Leigh (36 Va.) 526.

16. Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125.

[§ 2204] **h. Alternative Judgment.** If an executor or administrator has become personally liable, a judgment may be rendered against him in the alternative, to be satisfied out of the goods of the testator or intestate if sufficient, and if not, then out of the goods of the personal representative himself,[17] and if those are insufficient, then out of his real estate.[18] A court of equity may render judgment in the alternative that the executor shall execute the trust imposed on him by the will, or, in case of default, be personally liable.[19]

[§ 2205] **i. Judgment against Personal Representative and Heirs Jointly.** A judgment against a personal representative and heirs jointly is to be satisfied first out of the assets in the hands of the executors if sufficient, and if not, then out of the assets descended to the heirs.[20]

[§ 2206] **j. Action to Set Aside Fraudulent Conveyance.** It has been held that in a suit by an executor to set aside an alleged fraudulent conveyance of testator's property because of the deficiency of assets to pay claims allowed against the estate, a decree requiring a reconveyance of such property to the executor and a sale thereof in the ordinary manner to pay debts is erroneous and should be modified, so as to require the grantee to pay claims allowed against the estate and costs of the proceedings in the probate and circuit courts within a reasonable time from the entry of the decree, and that the lands be sold only on his failure to do so.[21] A decree in equity, holding property fraudulently conveyed by decedent to be subject to payment of debts to be established by county court administration, should designate claimant and adjudge that his claim has been approved by the county court for a stated amount, that plaintiff suing has been appointed the personal representative and maintains the action for the benefit of said claimant, the facts concerning the transfer and the insolvency thereafter of the grantor and his estate, that the transfer was in fraud of creditors, the identity of the property conveyed, and the order in which it may be resorted to and applied, and that it is subject to the payment of the approved claim exhibited in the creditor's bill, with administration costs of its collection, and by interlocutory decree require and direct the property be held in status quo subject to the final determination of the debt in the course of administration, whenever it shall appear that the grantee in good faith desires to litigate in probate court the validity of the debt on which the claim is asserted.[22] Where the statutes authorize an administrator to recover for the benefit of creditors all real estate fraudulently conveyed by decedent, and provide that all real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, and the proceeds appropriated in payment of the debts in the same manner as other property in the hands of the administrator, and the remainder paid to the person from whom such property was recovered, a judgment in an action by an administrator to recover property fraudulently conveyed by decedent vests the title in him for the benefit of creditors, and a further provision that the property is free and clear of all claims of the grantee, or any other person claiming through or under him, should be stricken out.[23] Where one of the defendants was appointed administrator of complainant's deceased wife, and as such was in possession of her personal estate at the time when complainant sued to set aside a deed to certain lands made by him after his wife's death to defendants, who were his brothers-in-law, and to recover such personal property, it was error for the court on setting aside the conveyance also to require the administrator to surrender the personal property to complainant.[24] In a suit in equity by an administrator to recover assets transferred by decedent to defendant, the court on sustaining the assignment has jurisdiction to decree the title in defendant and direct a delivery of the property to him under the transfer, instead of directing a transfer to the administrator for administration, there being no debts.[25]

[§ 2207] **k. Action for Rescission of Contract.** An action against an executrix to rescind a sale by decedent of live stock and for return of the purchase-money notes is an equity action, and the court has jurisdiction to determine all questions connected with the subject matter of the action, and the power, on decreeing rescission, to allow plaintiff's compensation for the keeping of the animals without a presentation of a claim therefor to the executrix.[26]

[§ 2208] **l. Action Revived by Representative.** Where an action is revived by the administrator who is also one of decedent's heirs, the money judgment should run in favor of the substituted plaintiff in his representative capacity.[27]

[§ 2209] **m. Parties.**[28] The judgment must specify with certainty the parties in whose favor it is rendered,[29] and where the complaint states a cause of action against defendant both individually and as administrator of a decedent, a judgment against defendant must designate the capacity in which he is bound.[30] The power of coadministrators is joint, and not joint and several, and there cannot be several judgments against them,[31] but it has been held that where after ascertaining the amount of assets in the hands of executors subject to distribution, the court rendered judgment against one of the executors in favor of some of the legatees and

17. Boyce v. Grundy, 9 Pet. (U. S.) 275, 9 L. ed. 127; Stroud v. Barnett, 3 Dana (Ky.) 391; Peo. v. Erie County, 4 Cow. (N. Y.) 445; Lansing v. Lansing, 18 Johns. (N. Y.) 502.

18. Lansing v. Lansing, 18 Johns. (N. Y.) 502.

19. Guiou v. Guiou, 5 Oh. Dec. (Reprint) 205, 3 AmLRec 476.

20. Stroud v. Barnett, 3 Dana (Ky.) 391; Chalfant v. Monroe, 3 Dana (Ky.) 35; Leather v. McGlasson, 3 T. B. Mon. (Ky.) 223.

[a] **Recital not necessary.**—A judgment against executors, heirs, and devisees need not recite that execution is to be levied first of the assets, next of the estate descended, and lastly of the estate devised; but the sheriff is to take notice of the law to that effect. Morgan v. Morgan, 2 Bibb. (Ky.) 388.

21. Chapoton v. Prentis, 144 Mich. 283, 107 NW 879. To same effect Brown v. Keiser, 182 Mich. 432, 148 NW 731.

22. Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

23. Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

24. Irwin v. Sample, 213 Ill. 160, 72 NE 687 (the administrator was required to account for such personal property only in the course of administration).

25. Campbell v. Alsop, 116 Va. 39, 81 SE 31.

26. Kline v. Gingery, 25 S. D. 16, 124 NW 958.

27. Rogers v. Schlotterback, 167 Cal. 35, 138 P 728.

28. Parties to action generally see supra §§ 1979–2050.

Right to judgment where less than all of several defendants are served see supra § 2051.

29. See cases infra this note.

[a] **Judgments or decrees void for uncertainty.**—(1) A judgment against an administrator in favor of "the estate or the legal representatives thereof." Betts v. Blackwell, 2 Stew. & P. (Ala.) 373. (2) A decree against an administrator in favor of "the legal representative" of a distributee. Kyle v. Mays, 22 Ala. 673.

30. Legget v. Pelletreau, 213 N. Y. 237, 107 NE 509 [aff 156 App. Div. 919, 141 NYS 1128].

31. Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396.

against the other in favor of the remaining legatees, such judgment, although irregular and voidable, was not void.[32] At common law judgment cannot be rendered on a joint obligation against surviving obligors and the representative of a deceased obligor.[33] Where the executor of a deceased tort-feasor is sued promptly in equity with the other tort-feasor, the decree should charge the executor severally, and not jointly with his codefendant, for the payment of damages.[34] Where heirs have the same interest in the personalty, which has not been distributed, as they have in the realty, which has been partitioned, a decree in a suit against the administrator and heirs on a debt of the ancestor may be rendered against the administrator alone, since payment of the debt out of the personalty will avoid litigation between the heirs for contribution.[35] No decree can be made against an administrator ad litem, where he is not obligated by bond or affidavit and has no power to bind anyone in interest.[36] The fact that one to whom letters of administration have issued has not duly qualified as administrator does not invalidate a judgment against him as such.[37] A plaintiff cannot object to a decree because it was rendered against him in the name and capacity in which he sued.[38] If a person sues and recovers as administrator, the judgment cannot be sustained as individual judgment.[39] Prima facie a judgment in favor of a person as executor or administrator is his individual property,[40] at least where it does not appear that he could not have recovered in his own right,[41] but the presumption may be overcome by evidence that he holds the judgment in trust.[42] Where the statute limits the liability of heirs to the extent of assets received, and in an action to establish a claim against decedent the creditor neither alleges nor proves that the heirs have received any part of his estate, the court is authorized only to render a judgment against the representative to be levied on the assets in his hands as such.[43]

[§ 2210] **n. Conformity to Pleadings, Proof, Verdict, Findings, and Report—(1) In General.** The judgment in an action or proceeding by or against the personal representative of a deceased person must be such as will conform to the pleadings,[44]

32. Elliott v. Mayfield, 3 Ala. 223.

33. Stockton Bank v. Howland, 42 Cal. 129; Brown v. King, 1 Bibb. (Ky.) 462. But compare Myers v. State, 47 Ind. 293, 297 ("In such cases, the judgment may be against all the parties for the full amount, and not against the administrator for a proportionate amount").

[a] **Where one of two joint defendants died pending suit,** and the executors of deceased defendant were made parties, it was proper for the court to render judgment against defendants jointly, with an order that execution should issue against the surviving defendant, and that the executors should pay the judgment in due course of administration. Bennett v. Spillars, 7 Tex. 600.

34. Nelson Theatre Co. v. Nelson, 216 Mass. 30, 102 NE 926.

35. Martin v. Felder, 82 Va. 455, 4 SE 602.

36. Russell v. Umphlet, 27 Ark. 339.

37. Ryan v. American Freehold Land Mortg. Co., 96 Ga. 322, 23 SE 411.

38. Sowles v. Sartwell, 76 Vt. 70, 56 A 282.

39. Garman v. Glass, 197 Pa. 101, 46 A 923. See also infra § 2211.

40. Dozier v. McWhorter, 117 Ga. 786, 45 SE 61; Marshall v. Charland, 109 Ga. 306, 34 SE 671; Wynn v. Irvine's Georgia Music House, 109 Ga. 287, 34 SE 582; Kenan v. Du Bignon, 46 Ga. 258.

41. Hall v. Pearman, 20 Tex. 168.

42. Dozier v. McWhorter, 117 Ga. 786, 45 SE 61.

43. Cline v. Waters, 90 SW 231, 28 KyL 679.

44. Ala.—Boykin v. Cook, 61 Ala. 472; Oliver v. Hearne, 4 Ala. 271.

Cal.—Myers v. Mott, 29 Cal. 359, 89 AmD 49.

Colo.—Perrin v. Smith, 39 Colo. 404, 89 P 648.

Conn.—Middlebrook v. Pendleton, 47 Conn. 9; Eno v. Cornish, Kirby 296.

Fla.—Cooper v. Livingston, 19 Fla. 684.

Ill.—McDowell v. Wight, 5 Ill. 403.

Ind.—Steinmetz v. State, 47 Ind. 465.

Ky.—Blackerby v. Holton, 5 Dana 520.

Md.—Neale v. Hermanns, 65 Md. 474, 5 A 424.

N. J.—Sibbit v. Lloyd, 11 N. J. L. 163; Montfort v. Vanarsdalen, 5 N. J. L. 803.

N. Y.—Corcoran v. Kennedy, 177 App. Div. 63, 163 NYS 703.

Pa.—Collins v. Weiser, 12 Serg. & R. 97.

S. C.—Quick v. Campbell, 44 S. C. 386, 22 SE 479.

Tex.—Lott v. Cloud, 23 Tex. 254.

Va.—Turk v. Ritchie, 104 Va. 587, 52 SE 339.

W. Va.—Shields v. Simonton, 65 W. Va. 179, 63 SE 972; Hanson v. Blake, 63 W. Va. 560, 60 SE 589.

[a] **Illustrations.**—(1) Where a statute directing the court, in suits against administrators, "to enter judgment against the defendant for the penalty of the bond or damages laid in the plaintiff's declaration, . . . to be released upon payment of the sum ascertained to be paid by the verdict," the court should not enter the judgment for the penalty of the bond, when the bond is not in suit. Neale v. Hermanns, 65 Md. 474, 5 A 424. (2) The court cannot decree partition of land not designated in a bill against an administrator for distribution. Blackerby v. Holton, 5 Dana (Ky.) 520. (3) Judgment cannot be rendered against the land of a decedent in a proceeding in personam against the personal representative. McDowell v. Wright, 5 Ill. 403. (4) Where an action as for money had and received against an executor by a legatee, who received notes of the executor in payment of the legacy, is tried on the theory that defendant, while being an executor, became personally liable for the payment of the legacy, the judgment for plaintiff cannot be sustained on the theory that the action was on the notes, although the notes were offered in evidence, there being no count upon them. Camp v. Smith, 117 N. Y. 354, 22 NE 1044 [aff 49 Hun 100, 1 NYS 372]. (5) In an action against an administrator a decree for plaintiff cannot be made subject to the plea of plene administravit, when such plea has not been interposed. Quick v. Campbell, 44 S. C. 386, 22 SE 479. (6) Where, in an action to restrain the shutting off of water furnished to plaintiffs for irrigation through certain pipes, the answer alleged that the pipes belonged to an estate, of which P acted only as administratrix in furnishing water through them to plaintiffs, no judgment could be properly rendered against P personally, nor would the estate be bound by a judgment so erroneously rendered. Perrin v. Smith, 39 Colo. 404, 89 P 648. (7) Where a claim against an estate is already allowed, and entitled to be paid in due course of administration, a judgment for defendant for his claim in a suit brought in the district court for setting aside and annulling the allowance of the claim is unnecessary, and will be set aside on appeal, if defendant is not entitled to it on his pleadings. Lott v. Cloud, 23 Tex. 254. (8) Where a suit to recover funds of an estate unlawfully deposited with a stockbroker by a deceased executor was brought against the broker, and no claim is made against the estate of the deceased executor, but the personal representatives of such executor were brought in as parties, it was held that the court would not adjudicate the question of the right of contribution or to a recovery over as between such representative and plaintiff. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518, 94 NE 1099]. (9) A bill alleging the execution of a bond by a principal and sureties, the death of the principal and the sureties, and that the orator and oratrix are entitled to have the sum due collected and paid over, making the personal representatives, heirs, and distributees of the principal and of the sureties, parties defendant, specially praying that the personal estate of the principal and certain land covered by a deed of trust securing the debt be applied to the payment of the debt, and concluding with a prayer for general relief, confers upon the court jurisdiction to render a decree against the personal representatives of the sureties under the prayer for general relief. Turk v. Ritchie, 104 Va. 587, 52 SE 339.

[b] **A judgment de bonis testatoris is supported by:** (1) A declaration for money paid for the use of defendant as executor and at his request. Wakeman v. Paulmier, 39 N. J. L. 340. (2) A count for money paid by plaintiff after testator's death on a bond in which plaintiff was surety of testator. Cawley v. Reeve, 17 N. J. L. 415. (3) A count alleging an implied promise by an administratrix to refund the moneys expended for her use as such by paying a debt of intestate for which he and plaintiff were jointly liable. Collins v. Weiser, 12 Serg. & R. (Pa.) 97. (4) Where in an action against an executor plaintiff states testator's indebtedness, and that the executor, after the death of testator, in consideration, etc., promised to pay, the judgment will be de bonis testatoris and not de bonis propriis, the mode of declaring being merely to save

proof,[45] verdict,[46] findings,[47] and report.[48]

[§ 2211] **(2) Capacity in Which Representative Allowed to Recover or Held Bound.** It has been held that if an executor or administrator sues as such, he cannot recover in his individual right;[49] but there are also cases in which an individual recovery by one who sued as executor or administrator has been regarded as permissible.[50] If a person sues individually, he cannot recover as executor or administrator.[51] If an action is brought against a person individually, judgment cannot be rendered against him as the personal representative of another.[52] As a general rule where one is sued as executor or administrator, no personal judgment can be rendered against him,[53] although there are cases in which it has been regarded as permissible

limitations and not to prevent defendant from making any defense which he might have made had the declaration stated the promise of testator and his liability only. Whitaker v. Whitaker, 6 Johns. (N. Y.) 112.

[c] **A judgment de bonis propriis** (1) is authorized by a count alleging that goods were in possession of testator, and in effect averring that they came to the possession of defendants as executors and were converted by them. Schott v. Sage, 4 Phila. (Pa.) 87. (2) Where a declaration sets out as the cause of action a promise made by defendant as administrator, etc., the judgment must be de bonis propriis, and if rendered de bonis testatoris it will be reversed on error and the correct judgment rendered. Oliver v. Hearne, 4 Ala. 271; Vaughn v. Gardner, 7 B. Mon. (Ky.) 326. (3) A count in assumpsit by a legatee against an executor for a legacy which alleges a promise by defendant as executor to pay the legacy is a count against the executor in his representative capacity, upon which the judgment can only be de bonis testatoris. Kayser v. Disher, 9 Leigh (36 Va.) 357. (4) Where an executor obtained a judgment for a debt due his testator against the administrator of the debtor to be levied on the goods and chattels of the intestate, and afterward brought an action of debt against the administrator suggesting a devastavit, and declared in detinue only, he could not have a judgment de bonis propriis but only de bonis testatoris. Spotswood v. Price, 3 Hen. & M. (13 Va.) 123. (5) If the declaration contains a count founded on the promise of a testator, and also a count founded on an assumpsit by the executrix, it is error, under a general verdict, to render judgment against the executrix individually. Luke v. Marshall, 6 J. J. Marsh. (Ky.) 458. (6) The petition of the principal plaintiffs in an action in the district court alleged that their father, wrongfully assuming to act as independent executor of their mother, conveyed, without an order of court, a part of her separate estate, which in her lifetime she had mortgaged to secure a community indebtedness to defendant D for the purpose of defrauding plaintiffs; that D reconveyed to the executor, reserving the timber; that the conveyance to D was void because the executor was not an independent executor; that as a part of the consideration of the reconveyance the executor executed two vendor's lien notes which were a cloud on the title; that D, who was the owner and holder of the note secured by the mortgage given by testatrix, sold the timber on the land to others for a fair price, which was more than sufficient to discharge the mortgage. The evidence, however, showed a balance due on such mortgage. The prayer of the complaint was for an injunction restraining defendants from transferring any of the notes, claims, and judgment, to recover the land and timber, and cancel the deed to the land as a cloud upon plaintiff's title, and for a personal judgment against the executor. It was held that the prayer for a personal judgment against the executor on the ground that the amount received for the land and timber was applied to his personal debt in paying the mortgage on the land was not so incidental to the cancellation of the deed and removal of cloud from their title as to authorize the district court to enter a personal judgment against the executor. Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181.

[d] **Where incongruous counts requiring different judgments are joined** in the same declaration, as when two counts in the narr. against them on their personal promise are joined with one on the promise of the testator, and there is a special finding on the last count, or no evidence on the first two, a judgment specially entered on the last is good. Bogle v. Kreitzer, 46 Pa. 465.

[e] **On the other hand** it has been held that where an administrator brings an action under Prob. Act. § 116 against one who has embezzled or alienated the personal property of the intestate between the death of the latter and the grant of letters of administration, but fails to bring the case within said section by his proof, so as to recover the enhanced damages therein given, he is still entitled to recover for a wrongful conversion as in the action of trover at common law. Jahns v. Nolting, 29 Cal. 507.

45. Corcoran v. Kennedy, 177 App. Div. 63, 163 NYS 703; Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

46. Conformity of judgment to verdict generally see Judgments [23 Cyc 820].

47. Carr v. Carr, 15 Cal. A. 480, 115 P 261 (a finding, in an action by an administrator to recover money deposited by deceased in defendant bank, that deceased opened an account in his own name in the bank and thereafter made deposits on and drew from such account, and while such account remained with defendant bank, deceased, in the presence of this son, caused the bank to change the deposit to the names of himself and his son, as "joint owners, payable to either or survivor," and that deceased thereby agreed with the bank that the account could be paid by the bank either to himself or his son during his lifetime and after his death could be paid to the son, does not support a conclusion that the deposit was the property of the deceased, and continued to be his property after such agreement, and at all times until his death).

48. Eaton v. Cole, 10 Me. 137; White v. White, 69 Vt. 360, 37 A 1114; Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

[a] **Illustration.**—On appeal from the probate court to the county court, where the cause has been tried by a referee, judgment must be rendered according to the facts reported, although plaintiff recovered interest on the common money counts in assumpsit, as the county court could have allowed such amendments to the declaration as the nature of the demand required. White v. White, 69 Vt. 360, 37 A 1114.

[b] **Foreclosure of mortgage.**—On a bill against a living mortgagor and the administrator and heirs of a deceased mortgagor to foreclose a mortgage, no decree need be pronounced against the administrator if the pleadings, proofs, and report of the commissioner do not disclose any personal estate in the administrator's hands unadministered. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

[c] **Report authorizing judgment de bonis testatoris.**—Where an action was brought by an administrator, an account filed in set-off by defendant, and both submitted to a referee, who reported that defendant recover a certain sum as debt or damage, and costs, against plaintiff, instead of against the goods and estate of the intestate, and judgment was rendered by the court of common pleas on such report against the goods, etc., of the intestate, it was no error. Eaton v. Cole, 10 Me. 137.

49. Rogers v. Schlotterback, 167 Cal. 35, 138 P 728; Ranney v. Thomas, 45 Mo. 111; Burdyne v. Mackey, 7 Mo. 374; Garman v. Glass, 197 Pa. 101, 46 A 923.

[a] **Where a suit is revived** by the administrator of the plaintiff, who is also one of the plaintiff's heirs, a money judgment should run in favor of the substituted plaintiff in his representative capacity. Rogers v. Schlotterbach, 167 Cal. 35, 138 P 728.

[b] **Descriptio personæ.**—Where a person sued on a note payable to D or bearer, setting forth that he was the holder, but describing himself as "administrator of the estate of L, deceased," the quoted words were held to be descriptio personæ only, and in no way militating against his right to a judgment in his own name. Rider v. Duval, 28 Tex. 622.

50. Childress v. Davis, 15 La. 492; Bingham v. Marine Nat. Bank, 18 Abb NCas (N. Y.) 135.

51. Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314; Mason v. Lord, 20 Pick. (Mass.) 447; Rosenberg v. Jefferson, 163 NYS 157.

[a] **Illustrations.**—(1) Where plaintiff, one of four sureties on a note, paid half the amount due on it with funds of the principal and the other half as administrator of the estate of a cosurety, and this last sum was allowed him in the settlement of his administration accounts, and it was held that, in an action against the other cosureties for contribution, brought in his own name, he could not recover in his capacity as administrator of his cosurety, although he filed an instrument claiming to recover in trust for the heirs and binding himself to pay them the sum recovered, provided he was not entitled to retain it to his own use. Mason v. Lord, 20 Pick. (Mass.) 447. (2) Where plaintiff brings an action on a judgment, alleging that the judgment creditor had assigned it to plaintiff, "then the administrator de bonis non" of D's estate, the consideration being a note payable to plaintiff, surrendered by him to defendant, plaintiff is not entitled to judgment in his capacity as administrator, but may take judgment in his individual capacity. Hayes v. Rich, 101 Me. 314, 64 A 659, 115 AmSR 314.

52. Ala.—Singleton v. Gayle, 8 Port. 270.

Conn.—Middlebrook v. Pendleton, 47 Conn. 9.

Ky.—Davis v. Davis, 13 KyL 46.

La.—Shiff v. Wilson, 3 Mart. N. S. 91.

N. Y.—Merritt v. Seamon, 6 N. Y. 168.

Tex.—Lewis v. Nichols, 38 Tex. 54.

[a] **Executor de son tort.**—A party to a bill cannot be decreed against as executor de son tort, where the bill does not make him a party in that capacity. Singleton v. Gayle, 8 Port. (Ala.) 270.

53. Ala.—Singleton v. Gayle, 8 Port. 270.

Conn.—Andrews v. Platt, 77 Conn. 63, 58 A 458.

to render a personal judgment against one so sued [54] at least where the suit is brought in equity.[55]

Where one is sued both personally and as administrator, a judgment properly rendered against him individually will not be reversed because of failure of the court to render judgment against him as administrator, especially when no motion for such latter judgment has been made, nor any objection offered to entering the personal judgment against him.[56]

[§ 2212] **o. Award of Execution.**[57] As an execution may issue on a judgment without any award of execution, such an award adds nothing to the judgment.[58]

[§ 2213] **p. Withholding Judgment for Lack of Parties.** In a New York case it appeared that testator died in 1877, giving his daughter the income of two hundred thousand dollars during life, with remainder to her legal issue in equal proportion after they reached the age of twenty-one years. In an action to construe the will, in which all of the children of the daughter were parties, a judgment was rendered in 1880 determining that the term "legal issue," in the remainder clause of the will, meant such children of the daughter as should survive her. In an action against the daughter and a son, as administrators of the deceased father, for an accounting as to the fund and to have a trustee appointed, it appeared that two sons of the daughter had died intestate, without issue, leaving their father surviving them, and that one of the sons was also survived by his wife. It was held that the fact that the father and the surviving wife of the son, individually and as administratrix of the son, were not parties to the action, was no ground for withholding final judgment, they not being issue of testator's daughter.[59]

[§ 2214] **2. Entry and Transcript.** The judgment entry must conform to the judgment as rendered.[60] The construction of an entry of judgment is a question for the court.[61] It is sometimes required that when a judgment is recovered against a personal representative as such, a transcript thereof shall be filed in the probate court.[62]

[§ 2215] **3. Amendment and Correction.** Clerical errors in a judgment against the personal representative of a decedent may be corrected by amendment.[63] If through clerical error a judgment is entered against a person in another capacity than that in which he is sued, the defect may

Del.—Cloud v. Whiteman, 2 Del. 401.

Fla.—Phillips v. Sanchez, 35 Fla. 187, 17 S 363.

Iowa.—Tyler v. Langworthy, 37 Iowa 555; Lawton v. Buckingham, 15 Iowa 22.

Ky.—Lusk v. Anderson, 1 Metc. 426; Moody v. Ewing, 8 B. Mon. 521; Monroe v. Wilson, 6 T. B. Mon. 122.

Miss.—Barrow v. Wade, 15 Miss. 49; Hill v. Robeson, 10 Miss. 541.

Mo.—Ranney v. Thomas, 45 Mo. 111; Powers v. Conran, (A.) 182 SW 1012.

Nebr.—Burton v. Williams, 63 Nebr. 431, 88 NW 765.

N. J.—Little v. Brannin, 4 N. J. L. 330; Imlay v. Hamilton, 3 N. J. L. 550; Murphy v. Davis, 3 N. J. L. 412; Nelson v. Golden, 3 N. J. L. 207.

N. Y.—Austin v. Munroe, 47 N. Y. 360; In re Bender, 111 App. Div. 23, 97 NYS 171; Corcoran v. Kennedy, 163 NYS 703.

N. C.—Allison v. Davidson, 21 N. C. 46; Shearin v. Neville, 18 N. C. 3.

Oh.—Flieschman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

Tex.—Clapp v. Walters, 2 Tex. 130; Ross v. Drouilhet, 34 Tex. Civ. A. 327, 80 SW 241.

Utah.—Anderson v. Hanson, 34 Utah 183, 96 P 1092; Smith v. Hanson, 34 Utah 171, 96 P 1087, 18 LRA NS 520; Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Wis.—Woodward v. Howard, 13 Wis. 557.

[a] **Illustrations.**—(1) Where, in a bill to foreclose a mortgage on a slave, defendant is charged as administrator of the estate of the mortgagor, a decree cannot be entered against him as a purchaser of the property belonging to the estate. Singleton v. Gayle, 8 Port. (Ala.) 270. (2) Where an executor is brought into court by scire facias as executor merely, he cannot in the same suit, without a supplemental bill, be charged on his own acts. Allison v. Davidson, 21 N. C. 46.

[b] **An executor cannot be charged as devisee** (1) in an action brought against him as executor. Monroe v. Wilson, 6 T. B. Mon. (Ky.) 122. (2) Accordingly on a bill to recover a legacy against the executor as such, the court cannot decree against him as devisee, on the ground that the legacy was charged on land devised to him. Cloud v. Whiteman, 2 Del. 401.

[c] **Amendment of summons and complaint.** — Where the complaint charges defendant in his representative capacity, an amendment of the complaint and summons after trial, and a direction to enter judgment against defendant individually, is erroneous. It introduces a new cause of action which defendant as an individual has had no opportunity to defend. Van Cott v. Prentice, 104 N. Y. 45, 10 NE 257.

[d] **A foreign judgment against an administrator individually** is not binding in another jurisdiction when it appears that the question of his personal liability was not raised in the action. Burton v. Williams, 63 Nebr. 431, 88 NW 765.

54. La.—Russell v. Cash, 2 La. 185.

Md.—Baugher v. Wilkins, 16 Md. 35, 77 AmD 279.

N. Y.—Donohue v. Kendall, 50 N. Y. Super. 386.

Pa.—Patterson v. McCarty, 1 Pa. 491.

Tenn.—Braden v. Hollingsworth, 8 Humphr. 19.

Va.—Belvin v. French, 84 Va. 81, 3 SE 891.

[a] **Descriptio personæ.**—Where, in a suit before a justice of the peace, the warrant directed the officer to summon "George Braden, administrator of John Braden," and proceeded to state a personal liability of A, the words "administrator of John Braden" might be rejected as personal description, and judgment rendered George Braden in his individual right. Braden v. Hollingsworth, 8 Humphr. (Tenn.) 19.

55. Irving v. Melton, 27 Ga. 330.

56. Carter v. Zenblin, 68 Ind. 436.

57. Execution and enforcement of judgment generally see infra §§ 2240–2257.

58. Hartz v. Hausser, (Tex. Civ. A.) 90 SW 63 (holding, however, that it was proper for a judgment against an independent executrix to contain an award of execution against the estate).

59. Jewett v. Schmidt, 45 Misc. 34, 90 NYS 848.

60. Woodruff v. Woodruff, 4 N. J. L. 375 (a judgment rendered against executors as such, if entered against them generally, will be reversed on certiorari).

61. McVay v. Krebs, 7 Ala. 456 (a judgment entry as to a plea of insolvency reciting that "the same is overruled" means that the court declared the plea bad as a defense).

62. Kennedy's Est., 93 Cal. 16, 28 P 839; Green v. Taney, 16 Colo. 398, 27 P 249; Allen v. Reilly, 62 Tex. Civ. A. 624, 131 SW 1152.

[a] **The filing of a "transcript of the judgment docket"** is a sufficient compliance with a statute requiring a "transcript of the record of the judgment entry" to be filed. Green v. Taney, 16 Colo. 398, 27 P 249.

[b] **On affirmance of judgment.**—Where a transcript is filed as required by statute, it is not necessary, on the subsequent affirmance of the judgment on appeal, that a transcript of the judgment subsequent to the coming down of the remittitur should be filed. Kennedy's Est., 93 Cal. 16, 28 P 839.

Necessity of certifying judgment to probate court for payment in due course of administration see supra § 2200.

63. Lunsford v. Baskins, 6 Ala. 512; Anderson v. Daniel, 19 Ga. A. 526, 91 SE 940; McElroy v. Whitney, 24 Ida. 210, 133 P 118; In re Loevinger, 40 S. D. 450, 167 NW 726.

[a] **Illustration.**—Where defendant, an administratrix, pleaded that the estate was adjudged insolvent, and the jury found the plea to be true, assessed plaintiff's damages, and judgment was rendered that the suit abate and be referred to the orphans' court, and it was held that, although the statute required that judgment in such case should be that plaintiff is entitled to the sum found due him, but that no execution shall issue, and the judgment shall be certified to the proper orphans' court, yet the defect was a mere clerical misprision, amendable at plaintiff's costs. Lunsford v. Baskins, 6 Ala. 512.

[b] **Judgment against one who has died pendente lite.**—(1) Where an action was prosecuted on the death of defendant against his administrator, and in entering up judgment the substitution of the administrator was overlooked, the court has no power eighteen months thereafter to enter an order correcting the judgment without notice to the administrator. Rauh v. Ritchie, 1 Ill. A. 188. (2) Where, however, on motion for a rehearing, it appeared that the suit was originally brought by an administrator, who died before judgment in the court below, and an administrator de bonis non was made plaintiff, but that the final judgment was erroneously rendered in favor of the de-

ordinarily be cured by amendment.[64] Thus a judgment entered against a person as executor or administrator in a suit against him individually may be amended to conform to the summons and complaint;[65] and a corresponding amendment may be made where a person is sued as personal representative on a cause of action against decedent and judgment is entered against him individually.[66] A judgment against an executor or administrator de bonis propriis may be amended, in a proper case, so as to make it de bonis testatoris or intestati,[67] and vice versa,[68] even after the lapse of the term,[69] or in an appellate court.[70] A judgment against an executor or administrator may be amended so as to make it payable in due course of administration,[71] and a general judgment de bonis testatoris may be amended so as to make it quando acciderint.[72] A judgment against an executor who has made himself liable de bonis propriis by pleading a false plea may be amended at a subsequent term by adding the words, "to be levied de bonis testatoris si," etc., "et si non, de bonis propriis;"[73] and in case the execution cannot be made from the personal chattels of the executor, the judgment may be amended so as to provide for its satisfaction from his real estate.[74] A judgment against a personal representative may be amended so as to subject decedent's real estate to levy and sale in satisfaction,[75] when that course is allowed by statute.[76] Where the holder of a mortgage sued to foreclose without presenting it to the administrator of the mortgagor, and without waiving recourse against other property, a decree of foreclosure providing for an attorney's fee, although there was no deficiency judgment, cannot be modified by striking out the provision for an attorney's fee, so as to allow the judgment to stand as if the suit had been brought under a statute which authorizes the holder of a mortgage against a decedent's property to enforce it against the particular property subject thereto, when all recourse against other property is waived in the complaint, but which provides that no counsel fee shall be recovered, unless the claim is presented to the administrator.[77]

[§ 2216] 4. **Opening or Vacating.** A judgment against a personal representative, whether taken by default[78] or otherwise,[79] may be opened or vacated

ceased administrator, instead of the administrator de bonis non, the judgment was reformed and rendered in favor of the administrator de bonis non. Dawson v. Hardy, 33 Tex. 198.

64. Terry v. Lindsay, 3 Stew. & P. (Ala.) 317; Empire State Chemical Co. v. Shubrick, (Ga.) 97 SE 541; Humphrey v. Johnson, 143 Ga. 703, 85 SE 830.

[a] **Illustration.** — Where persons are sued as executors and they answer as such, a judgment against them as administrators will be deemed a clerical error and amendable. Terry v. Lindsay, 3 Stew. & P. (Ala.) 317.

65. Pool v. Minge, 50 Ala. 100; Irby v. Brown, 59 Ga. 596.

66. Ware v. St. Louis Bagging, etc., Co., 47 Ala. 667; Adams v. Re Qua, 22 Fla. 250, 1 AmSR 191; Humphrey v. Johnson, 143 Ga. 703, 85 SE 830; Hoggatt v. Montgomery, 7 Miss. 93.

[a] **Amendment after execution sale.**—Where a judgment revived after the debtor's death directs execution against his executors, instead of against his estate in their hands, and executions issue accordingly and sales thereunder are made, it is too late to amend the judgment and executions. McKay v. Paris Exch. Bank, 75 Tex. 181, 12 SW 529, 16 AmSR 884.

[b] **After expiration of time for appeal.**—Where a decree was rendered and execution issued against an administratrix personally for money in the hands of deceased as executor, the error in charging the administratrix personally, instead of in her representative capacity, was not a mistake or clerical error but affected a material matter, and after the time to appeal had expired the court had no power to amend the decree so as to charge the administratrix only to the extent of deceased's property in her hands. Matter of Seaman, 63 App. Div. 49, 71 NYS 376.

67. Ala.—Boykin v. Cook, 61 Ala. 472; Ware v. St. Louis Bagging, etc., Co., 47 Ala. 667; Yarborough v. Scott, 5 Ala. 221.

Ga.—Empire State Chemical Co. v. Shubrick, 97 SE 541; Carter v. Penn, 79 Ga. 747; Redd v. Davis, 59 Ga. 823; Pryor v. Leonard, 57 Ga. 136; Jennings v. Wright, 54 Ga. 537; Clements v. Maloney, 17 Ga. 289; Anderson v. Daniel, 19 Ga. A. 526, 91 SE 940.

Ind.—King v. Anthony, 2 Blackf. 131.

Ky.—Hood v. Link, 2 B. Mon. 37; Leathers v. Meglasson, 2 T. B. Mon. 63; Speed v. Hann, 1 T. B. Mon. 16, 15 AmD 78.

Me.—Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793.

N. Y.—Peo. v. McDonald, 1 Cow. 189.

Va.—Snead v. Coleman, 7 Gratt. (48 Va.) 300, 56 AmD 112.

[a] **Even after the judgment has been partially satisfied,** such an amendment may be made. Pryor v. Leonard, 57 Ga. 136.

[b] **Operation of amendment.** — Where a judgment was entered against an executor so as to bind him personally, and afterward it was ordered to be amended so as to make it a lien on the estate of testator, the judgment as amended did not relate back to the date of the first judgment, so as to encumber property of testator which had been purchased of his executor between the dates of the original and amended judgments, in good faith, for a valuable consideration, and without notice. Logon v. Rogers, 12 Ga. 281.

68. Hicks v. Barrett, 40 Ala. 291; Hood v. Link, 2 B. Mon. (Ky.) 37.

69. Boykin v. Cook, 61 Ala. 472; Adams v. Re Qua, 22 Fla. 250, 1 AmSR 191; Hood v. Link, 2 B. Mon. (Ky.) 37; Harrison v. Taylor, 3 S. C. L. 233.

[a] **Such an amendment nunc pro tunc takes effect** as of the date when the original judgment was rendered. Boykin v. Cook, 61 Ala. 472.

70. Ala.—Oliver v. Hearne, 4 Ala. 271.

Cal.—Drake v. Foster, 52 Cal. 225; In re Schroeder, 46 Cal. 304; Racouillat v. Sansevain, 32 Cal. 376.

Ga.—Mitchell v. Long, 74 Ga. 94.

Ill.—Peck v. Stevens, 10 Ill. 127.

Ind.—Lewis v. Reed, 11 Ind. 239.

Ky.—Bowman v. Green, 6 T. B. Mon. 339.

Me.—Piper v. Goodwin, 23 Me. 251.

N. C.—Gregory v. Haughton, 12 N. C. 442.

Tenn.—Hassingale v. Jones, 3 Hayw. 36.

Tex.—Thorn v. State, 10 Tex. 295.

Wis.—Woodward v. Howard, 13 Wis. 557.

[a] **Even though the error was not pointed out** in the assignment of errors, it may be corrected in the appellate court. Massingale v. Jones, 3 Hayw. (Tenn.) 36.

[b] **Contrary view.** — Neeley v. Planters Bank, 12 Miss. 113 (where the court said: "We have not gone so far upon the subject of amendment," conceding, however, that the courts had regarded such errors as merely clerical).

71. In re Schroeder, 46 Cal. 304; De Wolf v. Springer, 190 Ill. A. 116.

[a] **Amendment on appeal.** — An absolute judgment against an executor may be modified on appeal so as to be made payable in due course of administration in conformity with the statute. Preston v. Knapp, 85 Cal. 559, 24 P 811.

72. Skinner v. Frierson, 8 Ala. 915; Bowman v. Green, 6 T. B. Mon. (Ky.) 339.

73. Harrison v. Taylor, 3 S. C. L. 233.

74. Lansing v. Lansing, 18 Johns. (N. Y.) 502.

75. Smith v. Vining, 3 S. C. L. 376.

76. Hoxie v. Kennedy, 2 NYS 643, 15 NYCivProc 185.

77. Sonoma County Bank v. Charles, 86 Cal. 322, 24 P 1019.

78. See cases infra this note.

[a] **Illustrations.**—(1) Where a judgment by default is regularly obtained against an administratrix, she may be allowed to come in and plead, but the judgment ought to stand as security for the assets in her hands beyond the amount of other judgments. Nitchie v. Smith, 2 Johns. Cas. (N. Y.) 286. (2) A regular judgment against an administrator by default will be set aside on payment of costs to let the administrator plead so as to prevent his being made liable de bonis propriis through the ignorance or negligence of his attorney, although more than a term has elapsed since defendant first knew of the default. Philips v. Hawley, 6 Johns. (N. Y.) 129. (3) An office judgment may be set aside after the first term on the plea of "never executrix." Alexander v. West, 1 F. Cas. No. 177, 1 Cranch C. C. 88.

79. See cases infra this note.

[a] **Illustrations.** — (1) Where, after a decree entered on summary process on demurrer, the district court on the same day rescinded the decree and gave defendant leave to withdraw his plea on payment of costs and to plead de novo upon cause shown, he being an administrator, and sued as such, and it appearing that he had not pleaded amiss for delay, and that he had a just defense. Hays v. Spann, 4 S. C. L. 494. (2) Under a statute giving the probate court power to decree performance of the land contracts of decedents, but providing that such decree may be set aside in the district court on petition of any person having an interest therein within two years for good cause shown, that

when proper grounds for relief exist.[80] Thus a judgment procured through the fraud or collusion of an executor or administrator will not be allowed to stand against the objection of a party in interest.[81]

[§ 2217] **5. Equitable Relief.** In cases where no remedy at law exists,[82] a court of equity may, upon sufficient reasons for such action being shown, grant relief against the enforcement of a judgment at law in favor of [83] or against [84] an executor or administrator, where such relief is sought by a party in interest [85] within a reasonable time.[86] It is sufficient ground for the intervention of a court of equity that the judgment defendant, although having a good equitable defense to the claim, had no legal defense to the action at law,[87] or that, having a legal defense, he was unable for sufficient reason to present it,[88] as where he was afforded no opportunity to prove it.[89] In a proper case an executor or administrator may be relieved in equity from personal liability under a judgment at law, as where there are no assets or there is a deficiency of assets,[90] although in a number of instances equitable relief upon this ground has been denied.[91] Equity will not as a rule lend its aid to

such a decree obtained with the consent of the administrator will be set aside by the district court upon a showing by decedent's widow that her husband had repudiated the contract upon the drafts given for the price being protested for nonpayment, and that the purchaser was insolvent, and that the land has since materially advanced in value. Todd v. Caldwell, 10 Tex. 236.

80. Fischer v. Woodruff, 254 Pa. 140, 98 A 878.

[a] **Circumstances under which relief refused.**—(1) Where an administrator by his plea admits assets, on which there is a regular judgment entered, it will not be set aside on pleading a judgment confessed in favor of another plaintiff in another court after plea in the case at bar. Tremper v. Wright, 2 Cai. (N. Y.) 101. (2) Where defendant in the previous recovery had neglected to plead plene administravit, and a motion to open the judgment and for leave to file the plea on an affidavit of instructions to the attorney in the former suit was refused in the trial of the action of devastavit on that judgment. Caldwell v. Micheau, 28 S. C. L. 276. (3) Where one ineligible to be appointed administratrix has received letters and entered on her duties, a judgment rendered against her as administratrix will not be vacated on her motion because she had not given the bond required by law. Mitchell v. Albright, 10 Oh. Dec. (Reprint) 301, 20 CincLBul 101. (4) An executor is not bound to plead the statute of limitations to a debt which he considers justly due, and the court will not set aside the judgment in such case to allow devisees to insist upon the statute. Walter v. Radcliffe, 2 S. C. Eq. 577.

81. Patterson v. Carter, 147 Ala. 522, 41 S 133; Hoboken First Baptist Church v. Syms, 52 N. J. Eq. 545, 31 A 717 [rev 51 N. J. Eq. 363, 28 A 461]; Nagle v. Groff, 1 PaLJR 366, 2 PaLJ 363.

[a] **Illustration.** — A judgment against an executor on a sealed note of testator more than twenty years old will be opened, on the application of creditors of testator, on a petition alleging fraud and collusion between the judgment creditor and the executor, without requiring the parties to stipulate not to take advantage of the lapse of time, although an executor is not bound to plead limitations on the request of creditors. Nagle v. Groff, 1 PaLJR 366, 2 PaLJ 363.

[b] **Circumstances not raising presumption of fraud.**—While an administrator in defending an action of foreclosure should demand the fullest proof, his failure to do so will not raise a presumption of fraud. Cadwallader v. Cadwallader, 26 Mo. 76.

82. Roche v. Washington, 7 Humphr. (Tenn.) 142 (if a judgment against an executor or administrator is absolutely void, ample relief may be obtained in a court of law, and therefore equity will not interpose to grant relief against it).

83. Link v. Link, 48 Mo. A. 345 (a petition against an administrator to set aside a judgment obtained by him against the estate alleging that plaintiffs were coheirs with defendant and that he procured the judgment upon a false and fraudulent account, concealing from plaintiffs all knowledge thereof until two and one-half years after the rendition of the judgment, sufficiently alleges the facts constituting the fraud).

[a] **When equitable relief denied.**—(1) The fact that an administrator to whom a note was due knew or connived at the purpose of the principal not to defend the suit, with the view that the surety, who depended on the principal to make defense, would thereby be misled and fail to appear, is not such an excuse for the failure to defend at law as will enable the surety to come into equity to enjoin the judgment. Walker v. Tyson, 52 Ala. 593. (2) Where one against whom a decree has been rendered in favor of an administrator for money due intestate is notified by the proper representatives that the administrator has ceased to be such and has no right to collect the money, his proper course, if he has good ground to believe that it would be unsafe to pay it over to the judgment plaintiff, is to file a bill in the nature of a bill of interpleader and bring the money into court, and he is not entitled to enjoin the judgment. Fowler v. Williams, 20 Ark. 641.

84. Hamilton v. Newman, 10 Humphr. (Tenn.) 557.

85. Gold v. Bailey, 44 Ill. 491, 92 AmD 190.

[a] **A bill will lie by a surety of an administrator** to declare void a judgment illegally rendered against the latter and to enjoin further proceedings thereon. However, equity will not restrain collection of a judgment against an administrator at the suit of an heir because a release of the claim on which the judgment was recovered had been executed to the intestate in his lifetime, no excuse being shown why it was not interposed as a defense at law, and no fraud or collusion on the part of the administrator being alleged. Washington v. Barnes, 41 Ga. 307.

86. Callaway v. Alexander, 8 Leigh (35 Va.) 114, 31 AmD 640 (where complainant was held guilty of laches).

87. Lyon v. Howard, 16 Ga. 481 (one holding funds belonging to an estate, but having an equitable claim against it of which he cannot avail himself as a defense in an action at law by the administrator to recover the funds, may, on a recovery against him, where the legatees are residents of different states, maintain a bill in equity, joining the administrator and legatees, to restrain the enforcement of the judgment until an accounting is had between himself and the legatees).

88. Wilson v. Bastable, 30 F. Cas. No. 17,788, 1 Cranch C. C. 304; Pickett v. Stewart, 1 Rand. (22 Va.) 478; Pendleton v. Stuart, 6 Munf. (20 Va.) 377.

89. Smith v. Nelson, 6 Ala. 320; Pickett v. Stewart, 1 Rand. (22 Va.) 478.

[a] **Illustration.**—Where an administrator employed counsel who appeared in the suit at law, and subsequently the case was taken up out of its order without notice and judgment rendered, equity might enjoin the judgment. Smith v. Nelson, 6 Ala. 320.

90. Gause v. Walker, 55 Ga. 129; Mosier v. Zimmerman, 5 Humphr. (Tenn.) 62; Pendleton v. Stuart, 6 Munf. (20 Va.) 377.

[a] **Illustrations.**—(1) Where an executor, while suits were pending against the estate, neglected to file any of the usual pleas for avoiding personal liability, because the estate was then solvent, but the property was afterward made valueless while in his hands through the effects of the war without negligence on his part, he is entitled to relief in equity from personal liability. Hendricks v. Mitchell, 37 Ga. 230. (2) Administrators will be relieved in equity against a judgment at law recovered on a debt, and a subsequent judgment against them personally in an action suggesting a devastavit, where the bill alleges that complainants never had any assets out of which they could properly pay the debt, and that the existence of several chancery suits prevented their pleading fully administered. Pendleton v. Stuart, 6 Munf. (20 Va.) 377. (3) Equity will afford relief against a personal judgment against an administrator on a charge of a devastavit, where it was rendered in the absence of his counsel, and the condition of the estate was so complicated as to make it nearly impracticable for the administrator to plead at law in relation to the assets. Pickett v. Stewart, 1 Rand. (22 Va.) 478. (4) An executor will be relieved in equity against judgments at law on the ground that assets which came to his hands sufficient to pay all the debts of the estate have since been recovered of him by a paramount title. Royall v. Johnson, 1 Rand. (22 Va.) 421.

[b] **Perpetual injunction improper.**—A decree enjoining a judgment at law against an administrator because of a deficiency of assets should not be made perpetual, but only until assets shall come into his hands, reserving to the creditors to show the assets by scire facias at law. Haydon v. Goode, 4 Hen. & M. (14 Va.) 460.

[c] **Burden of proof on motion to dissolve injunction.**—Where an administrator enjoins a judgment against him as such, on the ground that he is a creditor of the estate, he must, on motion to dissolve the injunction, be prepared to show from his accounts that he is a creditor. Deloney v. Hutcheson, 2 Rand. (23 Va.) 183.

91. U. S.—Wilson v. Bastable, 30 F. Cas. No. 17,788, 1 Cranch C. C. 304.
Ga.—Page v. Haines, 56 Ga. 263.
Or.—Brenner v. Alexander, 16 Or. 349, 19 P 9, 8 AmSR 301.
Tenn.—Hamilton v. Newman, 10 Humphr. 557.
Eng.—Vincent v. Godson, 3 De G. & Sm. 717, 64 Reprint 675.
Ont.—Doner v. Ross, 19 Grant Ch. (U. C.) 229.

secure the benefit of a defense available at law which the administrator neglected to interpose;[92] and a defendant is not justified in failing to present his defense at law simply because plaintiff verbally assures him that he will not be held responsible according to the terms of the judgment prayed for.[93] In a proper case a bill will lie to review a decree in equity against a personal representative.[94]

[§ 2218] **6. Operation and Effect—a. In General.** A judgment rendered against an executor or administrator in his representative capacity does not bind him personally,[95] but only the estate of decedent is bound thereby.[96] Conversely where the representative is sued in his individual capacity, a judgment against him does not bind the estate.[97] Where, in an action to foreclose a mechanic's lien for materials supplied a contractor since deceased, the contractor's personal representative is made a defendant, the determination of the amount due the lien claimant is conclusive on the estate of the contractor.[98] A judgment confessed by one of two joint administrators is not binding on the other.[99] A judgment against an executor or administrator as such binds the personal property of the estate,[1] but not the realty.[2]

[§ 2219] **b. Estoppel by Judgment—(1) Mer-**

[a] **Illustrations.**—(1) Equity will not relieve against a judgment at law upon plene administravit on the ground that defendant at law could not produce vouchers to support his plea, unless the bill alleges fraud, mistake, surprise, or accident; and a general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling an administration account, without stating from what circumstances that difficulty and delay arose, is not sufficient ground to enjoin the judgment. Wilson v. Bastable, 30 F. Cas. No. 17,788, 1 Cranch C. C. 304. (2) An administrator is not entitled to relief in equity against a judgment at law because he did not know that the assets were insufficient or that a judgment was evidence of assets. Page v. Haines, 56 Ga. 263. (3) After a judgment de bonis testatoris has been recovered at law against an administrator by default, and, on the return of nulla bona on an execution issued thereon, judgment is rendered against him by default de bonis propriis, equity will not relieve him. Bostwick v. Perkins, 1 Ga. 136. (4) Where an executor, on a miscalculation of assets in his hands, confesses judgment against himself for a debt of testator, in a suit in which it is alleged that he has assets sufficient to pay the claims, he will not be relieved in equity against the judgment, upon a showing that the assets are insufficient to satisfy it. Brenner v. Alexander, 16 Or. 349, 19 P 9, 8 AmSR 301. (5) An administrator cannot, six years after administration granted, protect himself against judgments issued against him as administrator by a suggestion of the insolvency of the estate and praying an injunction on the ground of having exhausted the assets. Hamilton v. Newman, 10 Humphr. (Tenn.) 557.

92. Walker v. Tyson, 52 Ala. 593; Gold v. Bailey, 44 Ill. 491, 92 AmD 190.

93. Weakley v. Gurley, 60 Ala. 399; Wilson v. Randall, 37 Ala. 74, 76 AmD 347.

94. Head v. Perry, 1 T. B. Mon. (Ky.) 253; Taylor v. Sewall, 69 Me. 148.

[a] **Distributees cannot have a revision** of a decree against an administrator, where there is no circumstance showing that he was guilty of fraud or gross negligence in defending the suit, and where they cannot show that the defense which he failed to make was good. Head v. Perry, 1 T. B. Mon. (Ky.) 253.

[b] **Administrator de bonis non.**—A statute providing that scire facias, debt, and writ of error will lie either by or against an administrator de bonis non on a judgment for or against his predecessor, does not bring such administrator into privity with his predecessor, and therefore he cannot maintain a bill to review a judgment against his predecessor. Taylor v. Sewall, 69 Me. 148.

95. Del.—Crossan v. Glass, 4 Del. 342.

Ga.—Lane v. Cohen, 141 Ga. 501, 81 SE 128.

Ill.—Pierce v. Coryn, 139 Ill. A. 445.

Ind.—Egbert v. State, 4 Ind. 399.

Kan.—Mendenhall v. Robinson, 56 Kan. 633, 44 P 610.

N. Y.—Volhard v. Volhard, 119 App. Div. 266, 104 NYS 578.

Okl.—Collier v. Gannon, 40 Okl. 275, 137 P 1179.

Pa.—Burd v. McGregor, 2 Grant 353.

Tex.—Ross v. Drouilhet, 34 Tex. Civ. A. 327, 80 SW 241.

Wash.—Smith v. Fisher, 99 Wash. 102, 168 P 975.

[a] **A judgment against the estate** of a decedent does not bind the executor or administrator personally, although he may have omitted to plead. Conner v. Burd, 1 LegChron (Pa.) 17.

[b] **Judgment held to be against estate and not against representative personally.**—A suit for taxes resulting in a judgment for the city, was styled "City of G. against the Estate of B." B's executors were subsequently made parties. The judgment named the executors as executors, and they were so named in the order of sale. No personal judgment was rendered against them, but the lien was foreclosed on the property on which the taxes accrued, and the sheriff was directed to proceed against that property and no other, no judgment over against the executors being awarded in case the proceeds of sale should be insufficient. In a subsequent suit to set aside the judgment, the petition showed that the tax suit was brought against plaintiffs, defendants in the former suit, in their capacity as executors, and that the taxes were claimed against the estate. The order of sale of the property was also alleged to have been issued against them as executors, and the levy made on the property of the estate. It was held that a contention on appeal, in the suit to set aside the judgment, that the judgment and order of sale were against the executors personally, was without merit. Ross v. Drouilhet, 34 Tex. Civ. A. 327, 80 SW 241.

[c] **Interest of representative in estate.**—(1) If a bill for foreclosure makes a certain person defendant as executor and as guardian, and the return of process shows that he was served as executor and guardian, and the bill states that he has an individual interest in the mortgaged land, a decree of foreclosure binds him as well in his individual as in his representative capacity. Cornell v. Green, 43 Fed. 105 [app dism 163 U. S. 75, 16 SCt 969, 41 L. ed. 76]. (2) Where a widow possessed of a life estate in a moiety of the real property of her deceased husband, under authority from the orphans' court to mortgage the real estate of her intestate to raise funds for the payment of debts, procured the loan by executing to the lender a bond and warrant of attorney, upon which judgment was regularly entered, the judgment was held to bind the interest of the widow, although invalid against the rest of the estate. Barger v. Cassidy, 4 Phila. (Pa.) 324.

[d] **Assets in possession at commencement of action.**—Where judgments are obtained against an executor after service of a writ in another case and before plea, they make him responsible for the assets he had when served with the writ, although such judgments are entered up quando, the executor having sold the property of testator under the statute between the time of the service of the writ and the judgments quando. Littlejohn v. Underhill, 4 N. C. 377.

96. Owsley v. Central Trust Co., 196 Fed. 412; Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 NW 472; Matter of Watson, 163 App. Div. 41, 148 NYS 525; Jordan v. Polk, 1 Sneed (Tenn.) 430.

[a] **A judgment against a special administrator** appointed solely to enable the court to proceed in the cause binds the estate. Jordan v. Polk, 1 Sneed (Tenn.) 430.

[b] **Both estate and representative individually bound.**—Where a judgment is rendered for the payment of money against an individual in a case wherein he has answered, alleging that he holds the funds as administrator, the estate is bound by the judgment equally with defendant in his individual capacity. Ten Eick v. Dye, 9 Oh. Dec. (Reprint) 511, 14 CincLBul 214.

[c] **A judgment recovered against administrators after they have resigned** their trust is a nullity, not binding upon the estate or the administrator de bonis non. Buckingham v. Owen, 14 Miss. 502.

[d] **A judgment against one who is not executor** does not bind the estate, although it is rendered against him as executor. Griffith v. Frazier, 8 Cranch (U. S.) 9, 3 L. ed. 471.

97. Bostwick v. Brush, 4 NYSt 100.

[a] **Judgment held to be against representative individually.**—A judgment against one styled as executrix, without recovery to be had from goods and chattels in her hands to be administered, is not a judgment against the estate, but an individual judgment against the person so styled. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

[b] **A judgment against administrators on a bond and warrant of attorney** executed by them does not bind the estate so that it can be taken upon an execution issued thereon. Pinney v. Johnson, 8 Wend. (N. Y.) 500.

98. Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 NW 472.

99. Heisler v. Knipe, 1 Browne (Pa.) 319.

1. Greenwood v. Spiller, 3 Ill. 502; Packwood v. Elliott, 43 Miss. 504; Langston v. Abney, 43 Miss. 161. See also McDonough v. Cross, 40 Tex. 251 (a sale under a judgment against the administrator of land which has been partitioned among the heirs prior to the suit in which the judgment is rendered is void and passes no title).

2. Ill.—Greenwood v. Spiller, 3 Ill. 502.

Miss.—Packwood v. Elliott, 43 Miss. 504; Langston v. Abney, 43 Miss. 161.

ger and Bar of Causes of Action and Defenses. If judgment is rendered for or against an executor or administrator, the cause of action is merged, and no suit can subsequently be brought thereon,[3] and a judgment establishing a right of action precludes defendant therein from subsequently disputing it on any ground of defense that was or might properly have been urged in the action in which it was rendered.[4] A judgment negativing a right of action precludes the unsuccessful party from asserting it in a subsequent proceeding between the same parties,[5] but rights subsequently accruing are not barred.[6]

[§ 2220] **(2) Judgment as Establishing Particular Facts—(a) General Rule.** A judgment in an action by or against an executor or administrator is conclusive, as between the parties, of every matter that was determined in the action in which it was rendered.[7] But an adjudication by a surrogate that an administrator was decedent's next

N. C.—Baker v. Webb, 2 N. C. 43.
Tenn.—Peck v. Wheaton, Mart. & Y. 353.
Tex.—Thompson v. Cragg, 24 Tex. 582.
See also Ianson v. Clyde, 31 Ont. 579, 20 CanLTOccNotes 116 (judgment against executors is only prima facie evidence of its being for a debt due by the testator, and parties interested in real estate are at liberty to disprove it).

3. Brown v. Equitable L. Assur. Soc., 112 Fed. 845.

[a] **A proceeding in the probate court of another state** against an administratrix to obtain necessary orders for settling the estate, and the issuance of such orders in administration proceedings, under which execution or fieri facias would issue against her in case of her failure to comply, does not merge a prior cause of action in favor of her resident creditor for damages. Drane v. Gunymere, 2 Tex. Unrep. Cas. 496.

4. Ala.—Ouichita Nat. Bank v. Fulton, 195 Ala. 34, 70 S 722; Wright v. Phillips, 56 Ala. 69; Dent v. Smith, 15 Ala. 286.
Ark.—Fowler v. Williams, 20 Ark. 641.
Fla.—Gilchrist v. Meacham, 3 Fla. 219.
Mo.—Greenabaum v. Elliott, 60 Mo. 25.
Pa.—McClain's Est., 5 Pa. Dist. 155.
S. C.—Trimmier v. Thomson, 19 S. C. 247.
Va. — Scott v. Tankersley, 10 Leigh (37 Va.) 581.

[a] **Illustrations.**—(1) A decree in chancery against an administrator in favor of one of the distributees for his share of a specific fund is conclusive as to any set-off on account of such distributee's appropriation of assets which might have been available to the administrator in defense of that suit, and which was in fact then adjudicated. Wright v. Phillips, 56 Ala. 69. (2) Where an execution was levied on slaves under a judgment against decedent's executor, one who interposed a claim by virtue of a trust executed by decedent during his life could not attack the validity of the judgment, but could only show that the property claimed was not subject to execution. Dent v. Smith, 15 Ala. 286. (3) Where an administrator has recovered and collected a judgment on a note given to the intestate, the maker of the note cannot subsequently sue to recover back the money on the ground that the debt had already been paid to the intestate, his failure to set up such defense in the action by the administrator being a conclusive bar to the subsequent action. Greenabaum v. Elliott, 60 Mo. 25. (4) Where, on a motion against a sheriff's administrator for the default of the sheriff's deputy, the executor of the deputy was notified to defend the motion, and promised to attend to it, but failed to do so, and judgment by default was rendered, the executor could not, in an action against him by the sheriff's administrator to recover the amount of the judgment, raise the objection that the statute of limitations would have been a defense to the motion. Scott v. Tankersley, 10 Leigh (37 Va.) 581.

[b] **Contradiction of record.**—Executors who plead plene administravit in a suit for their testator's debt cannot, when afterward sued individually on the judgment, show that no evidence was taken under the plea, and that the only question controverted at the trial was as to the validity of plaintiff's claim against testator. Trimmier v. Thomson, 19 S. C. 247.

5. Conn.—Sheldon v. Bradley, 37 Conn. 324.
Ky.—Buford v. Pawling, 5 Dana 283.
N. Y.—Crabb v. Young, 92 N. Y. 56.
S. C.—Kerr v. Webb, 30 S. C. Eq. 369.
Vt.—Probate Ct. v. Rogers, 7 Vt. 198.
Can.—Clark v. Phinney, 25 Can. S. C. 633.

[a] **Illustrations.**—(1) Where an action was brought against an executor by beneficiaries under a will to recover damages for delay in the execution of a trust imposed by the will, judgment merely ordering a sale within a certain time, and suspending one of the executors, but not allowing damages, conclusively established that plaintiff was not entitled to damages, or to the removal of the trustee on the facts existing prior to its rendition. Crabb v. Young, 92 N. Y. 56. (2) Where the supreme court, on petition of the heirs of an estate, on the ground of fraud, accident, or mistake, orders an appeal from the decision of commissioners allowing a claim to be entered in the county court, which is accordingly done by the clerk, whereupon claimant files his declaration and proceeds to prosecute his suit from term to term, and finally suffers a nonsuit, he cannot afterward sustain an action against the administrator for the original allowance of the commissioners, although no record of an appeal appears in the probate court. Probate Ct. v. Rogers, 7 Vt. 198.

[b] **Rule applies to compromise judgment.**—Kerr v. Webb, 30 S. C. Eq. 369.

[c] **The two causes of action must be the same** else the judgment is not a bar. Sheldon v. Bradley, 37 Conn. 324 (where a conveyance by deed absolute in form was intended in part to secure a debt and in part to defraud creditors, the property exceeding in value the amount of the debt, and on a bill by the grantor's administrator against the grantee to set aside the conveyance a decree was entered declaring the deed to be valid and vesting the title absolutely in the grantee, it was conclusive as against the grantor's administrator as to the fraudulent character of the instrument, but did not estop him from claiming, in a suit subsequently brought to compel the grantee to account for moneys received from a sale of the premises, that the conveyance was intended as a mortgage); Buford v. Pawling, 5 Dana (Ky.) 283 (where a suit was brought against A as executor and revived against his executors, and judgment was rendered with an entry of an agreement that neither the executors of A nor his estate should in any event be liable on the judgment, it was a bar to a proceeding for a devastavit but not to a bill for a discovery of assets).

[d] **Pleading.**—In an action by an executor against an attorney to recover money belonging to the estate, which was received by the attorney and which he claims the right to appropriate in payment for services rendered by him for plaintiff's coexecutor, an answer alleging that theretofore, in proceedings before the surrogate to secure an order directing the payment of a sum of money to another attorney, it was represented to the surrogate that defendant attorney had collected and retained the sum sued for, but which does not allege that the surrogate approved the retention or acted on it in any way, is demurrable. Arkenburgh v. Little, 176 N. Y. 551, 68 NE 1114 [aff 49 App. Div. 636, 64 NYS 742].

6. See cases infra this note.

[a] **Illustrations.**—(1) Where it appears in an action against an administrator that his account has been settled and that there are no assets in his hands, and a judgment is consequently rendered for him, although plaintiff has a valid claim, it does not bar another action if new assets come into his hands. Keith v. Molineux, 160 Mass. 499, 36 NE 476. (2) A decree by an ordinary against an administrator is no bar to a bill founded on the after misconduct of the administrator. Taylor v. Taylor, 19 S. C. Eq. 123.

7. U. S.—Owsley v. Central Trust Co., 196 Fed. 412.
Cal.—Curtis v. Herrick, 14 Cal. 117, 73 AmD 632.
Ga.—Bynum v. Bell, 18 Ga. A. 384, 89 SE 431.
Ind.—Eggleston v. Barnes, 12 Ind. 604.
Ky.—Norton v. Marksberry, 5 SW 482.
Miss.—Parker v. Whiting, 7 Miss. 352.
S. C.—Summers v. Tidmore, 12 S. C. L. 270.
Va.—Montague v. Turpin, 8 Gratt. (49 Va.) 453.
Can.—Clark v. Phinney, 25 Can. S. C. 633.

[a] **Necessity of actual determination.**—Important matters which a decree does not profess on its face to dispose of, and upon which it fails to show any affirmative action by the court, it being apparent from the record that the court was not in condition to be heard as to those matters, will be presumed not to have been considered or embraced in the decree, and it is therefore not final and conclusive as to these matters. Shegogg v. Perkins, 34 Ark. 117.

[b] **Judgment quando acciderint.**—In an action against an administrator, a judgment quando acciderint is prima facie an adjudication that there are no debts known to the administrator which would take precedence of plaintiff's claim, and that assets subsequently coming into possession of the estate will be prima facie applicable to plaintiff's judgment. Willis v. Tozer, 44 S. C. 1, 21 SE 617.

[c] **Title.**—(1) A default confesses plaintiff's title as administra-

of kin, in a contest between him and another as to the grant of letters of administration, is not conclusive on the question of distribution.[8]

[§ 2221] **(b) Representative Capacity.** A judgment for or against an executor or administrator in his representative capacity establishes his character as such.[9]

[§ 2222] **(c) Existence of Assets.** At common law a judgment against an executor or administrator on a debt due from his decedent is a conclusive admission that he has assets on hand sufficient to pay it; and he cannot dispute this fact in a subsequent proceeding between him and the creditor.[10] The rule, however, is subject to some qualifications,[11] and in some states changed by statute.[12]

A judgment by confession is conclusive proof that the representative has assets sufficient to satisfy it,[13] but raises no estoppel in favor of a claimant other than the plaintiff in whose favor such judgment was confessed.[14]

A judgment by default is an admission of assets to the extent charged in the complaint,[15] but such admission does not operate in favor of a claimant other than plaintiff in such action.[16]

Where the representative fails to plead a want of assets or plene administravit or plene administravit præter, a judgment against him is conclusive as to the existence of assets.[17]

tor, if well alleged. Curtis v. Herrick, 14 Cal. 117, 73 AmD 632. (2) Where, however, suit was brought by an administrator to recover moneys deposited in a savings bank in the name of defendant as trustee for plaintiff's intestate, and the surrogate passed an order deciding that the administrator by virtue of his office as such was entitled to the custody of the bank-book, this was not an adjudication of his title to the funds. Westervelt v. Westervelt, 46 N. Y. Super. 298. (3) A decree against an executor in a suit by heirs to compel him to inventory land to which he claimed title is not a conclusive adjudication of the title thereto in a subsequent suit by the heirs against the executor's heirs, after his death, to recover the property. White v. Shepperd, 16 Tex. 163.

8. Caujolle v. Ferrie, 5 F. Cas. No. 2,525, 5 Blatchf. 225, 2 AbbPrNS (N. Y.) 3 [aff 13 Wall. 465, 20 L. ed. 507].

9. U. S.—Borer v. Chapman, 119 U. S. 587, 7 SCt 342, 30 L. ed. 532.

Ark.—Fowler v. Williams, 20 Ark. 641.

Ky.—Davis v. Connelly, 4 B. Mon. 136.

Minn.—Whitney v. Pinney, 51 Minn. 146, 53 NW 198.

N. Y.—Rogers v. Rogers, 3 Paige 379.

N. C.—McNair v. Ragland, 16 N. C. 533.

Tex.—Dunn v. Epperson, (Civ. A.) 175 SW 837.

[a] **A sister state judgment** has the same effect. Davis v. Connelly, 4 B. Mon. (Ky.) 136. Contra Pierce v. Strickland, 26 Me. 277 (holding that a sister state judgment is prima facie evidence that the person suing as administrator had regularly taken out letters of administration in the state in which the judgment was recovered, but is subject to be rebutted by proof).

[b] **Order for revival of suit.**—An administrator is not obliged to be always ready with proof of his authority, and an order of court permitting him to revive a suit is conclusive proof of his authority. McNair v. Ragland, 16 N. C. 533.

[c] **Qualification of administrator.**—Clark v. Tabor, 22 Vt. 595.

10. Ala.—Banks v. Speers, 97 Ala. 560, 11 S 841.

Ga.—Whiddon v. Williams, 98 Ga. 310, 24 SE 437; Phipps v. Alford, 95 Ga. 215, 22 SE 152; Gibson v. Robinson, 90 Ga. 756, 16 SE 969, 35 AmSR 250; Woolfolk v. Kyle, 48 Ga. 419; Walker v. Shannon, 21 Ga. A. 39, 93 SE 498; Bynum v. Bell, 18 Ga. A. 384, 89 SE 431.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Md.—McLaughlin v. McGee, 131 Md. 156, 101 A 682; Gaither v. Welch, 3 Gill & J. 259; Post v. Mackall, 3 Bland 486; Ellicott v. Welch, 2 Bland 242; Dorsey v. Hammond, 1 Bland 463.

N. J.—Southard v. Potts, 22 N. J. L. 278; Howell v. Potts, 20 N. J. L. 569.

N. Y.—Matter of Waring, 1 App. Div. 29, 36 NYS 529.

N. C.———v. Person, 3 N. C. 301.

S. C.—Caldwell v. Micheau, 28 S. C. L. 276; Young v. Kennedy, 27 S. C. L. 80.

Tenn.—Simmons v. Page, 96 Tenn. 718, 36 SW 843.

Va.—Eppes v. Smith, 4 Munf. (18 Va.) 466.

[a] **Judgment on demurrer conclusive as to assets.**—Williams v. Hinkle, 15 Ala. 713.

[b] **Sister state judgment.**—In an action against executors on a judgment against an administrator de bonis non of another state, the former judgment is sufficient proof of assets authorizing the entry of a judgment de bonis propriis. —— v. Person, 3 N. C. 301. To same effect White v. Archbill, 2 Sneed (Tenn.) 588.

11. See cases infra this note.

[a] **Illustrations.**—(1) A decree of a court of equity that complainant recover a sum certain of an administrator and have execution of the goods and of the estate of the intestate in his hands to be administered, etc., is not alone sufficient evidence to establish a devastavit. Vick v. House, 3 Miss. 617. (2) A judgment against an executor or administrator by default on demurrer, or on any plea except one denying assets, does not preclude the executor or administrator from traversing an allegation, in an action on the judgment, that he has eloigned and wasted the assets of decedent. Howell v. Potts, 20 N. J. L. 569. (3) If judgment is entered against an executor de bonis non, execution to be levied on the lands of testator for a certain sum, it is to be considered as a judgment de terris, and is not evidence of devastavit against the executor, on a return of nulla bona and devastavit, where a levy has been made on lands and part payment received. Moore v. Kerr, 10 Serg. & R. (Pa.) 348. (4) A matter arising subsequent to the former discovery, showing a destruction of the assets or a removal of them from the hands of the executor or administrator without his fault, may be set up. Caldwell v. Micheau, 28 S. C. L. 276. (5) It seems that judgment against an administrator is conclusive evidence of assets only when rendered upon a simple contract debt, where there are also specialty debts. Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

[b] **Declaration not alleging assets.**—Where an administrator suffers judgment to be rendered against him in an action wherein the declaration does not charge him with having received estate sufficient to pay the debt sued for, he does not thereby make such an admission of assets as will charge him personally. Senescal v. Bolton, 7 N. M. 351, 34 P 446; Sinclair v. Wilson, 3 Penr. & W. (Pa.) 167.

[c] **If an administrator sues as such on his own possession,** the judgment affords evidence against him of assets. Berry v. Prilliam, 2 N. C. 16.

[d] **A scire facias against an executor** of a defendant before final judgment is merely to make the executor a party to the record; and, although the judgment is against the executor, it is not a judgment fixing him with assets, but a second scire facias is necessary for that purpose, to which the executor may plead a want of assets or make any other defense which he might have made if sued on a judgment against his testator. Borden v. Thorpe, 35 N. C. 298.

12. See infra this section.

13. Peo. v. Judges Ct. of C. Pl., 4 Cow. (N. Y.) 445; Ruggles v. Sherman, 14 Johns. (N. Y.) 446; Griffith v. Chew, 8 Serg. & R. (Pa.) 17, 11 AmD 556; Braxton v. Wood, 4 Gratt. (45 Va.) 25. See also Lockyer v. De Hart, 6 N. J. L. 450 (a cognovit actionem by an executor is an admission of assets). But compare Hussey v. White, 10 Serg. & R. (Pa.) 346, 349 ("Where the personal assets are exhausted, the plaintiff, if there be no defense, on the merits, may take judgment for the debt or damages, to be levied of the decedent's land; and such judgment is, therefore, no admission of personal assets").

14. Ruggles v. Sherman, 14 Johns. (N. Y.) 446.

15. U. S.—Dickson v. Wilkinson, 3 How. 57, 11 L. ed. 491; Covington v. Burnes, 6 F. Cas. No. 3,291, 1 Dill 16.

Ala.—Garrow v. Emanuel, 3 Stew. 285.

Ind.—Moore v. Martindale, 2 Blackf. 353.

Ky.—Walker v. Kendall, Hard. 404. See also Nicholas v. Jones, 3 A. K. Marsh. 385 (the failure of an executor to answer a bill for the discovery of assets is an implied admission of assets).

N. J.—Howell v. Potts, 20 N. J. L. 569; Baracliff v. Griscom, 1 N. J. L. 191.

N. Y.—Ruggles v. Sherman, 14 Johns. 446; Platt v. Swartout, 1 Johns. Cas. 276, 1 AmD 110.

N. C.—Brown v. McKee, 108 N. C. 387, 13 SE 8.

Tenn.—Mosier v. Zimmerman, 5 Humphr. 62.

Va.—Braxton v. Wood, 4 Gratt. (45 Va.) 25.

[a] **Prima facie admission of assets.**—Mason v. Peter, 1 Munf. (15 Va.) 437.

16. Ruggles v. Sherman, 14 Johns. (N. Y.) 446.

17. U. S.—Covington v. Burnes, 6 F. Cas. No. 3,291, 1 Dill. 16; Davis v. Weed, 6 F. Cas. No. 3,658, 44 Conn. 569.

Ga.—Phipps v. Alford, 95 Ga. 215, 22 SE 152; Justices Inferior Ct. v. Sloan, 7 Ga. 31.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Ind.—Martindale v. Moore, 3 Blackf. 275; Goodwin v. Wilson, 1 Blackf. 344.

Miss.—Howard v. Cousins, 8 Miss. 114; Vick v. House, 3 Miss. 617.

N. J.—Howell v. Potts, 20 N. J. L. 569; Haines v. Price, 20 N. J. L. 480.

Judgment in favor of legatees or heirs. A judgment against an executor or administrator in favor of legatees or heirs may also be conclusive of the existence of assets in his hands.[18]

Statutory modification of rule. In a number of states the common-law rule by which a judgment against an executor or administrator is conclusive as to the existence of assets has been modified or abrogated by statutes, under which the judgment merely establishes the debt, leaving the question as to existence of assets undetermined,[19] unless the existence of assets was alleged in the complaint and the issue was thus determined.[20]

A creditor of an estate may be estopped by a judgment to assert the existence of assets.[21]

[§ 2223] **(d) Indebtedness of Estate.** A judgment against an executor or administrator as such establishes the amount and validity of the demand in suit, and it cannot be collaterally attacked on any ground that might have been urged in the suit in which it was rendered.[22]

[§ 2224] **(3) Requisites of Judgment.** In order to work an estoppel in favor of or against an executor or administrator, the judgment must be final[23] and the decision must, as a rule, have been made on the merits.[24] It is also necessary that the judgment should be valid,[25] and hence the rule does not apply where the judgment was secured by

N. Y.—Butler v. Hempstead, 18 Wend. 666.

N. C.—McDowell v. Clark, 68 N. C. 117; —— v. Person, 3 N. C. 301; Parker v. Stephens, 2 N. C. 218, 1 AmD 557.

S. C.—Parker v. Latimer, 59 S. C. 330, 37 SE 918.

Tenn.—White v. Archbill, 2 Sneed 588.

Va.—Eppes v. Smith, 4 Munf. (18 Va.) 466.

"This doctrine, as is well known, is held in this state to the present day, except in relation to judgments obtained after the estate may have been declared insolvent, and it is of frequent occurrence, that executors or administrators are held liable, under such circumstances and on such evidence, in a second suit upon suggestion of a devastavit." Haines v. Price, 20 N. J. L. 480, 482.

"He was forever afterwards estopped, by this implied admission of assets, from pleading that he had fully administered." Martindale v. Moore, 3 Blackf. (Ind.) 275, 276.

[a] **"The only exception to this rule** is in cases where the administrator had no opportunity to plead, such as a judgment by motion, etc. Wray v. Williams, 2 Yerg. (Tenn.) 302; Dance v. McGregor, 5 Humphr. (Tenn.) 428; Williams v. Greer, 4 Hayw. (Tenn.) 235. In these cases he is allowed his plea of fully administered or no assets, to a sci. fa., or action of debt upon the judgment." White v. Archbill, 2 Sneed (Tenn.) 588, 595.

[b] **Only prima facie evidence as against surety.**—Where an administrator is sued on a debt of his intestate, and fails to plead a want of assets, a judgment against him in such suit is, as to a surety on his bond, merely prima facie evidence of a sufficiency of assets. Gibson v. Robinson, 90 Ga. 756, 16 SE 969, 35 AmSR 250.

18. Schnader v. Bitzer, 9 LancBar (Pa.) 37; Harmon v. Bynum, 40 Tex. 324.

19. U. S.—Covington v. Burnes, 6 F. Cas. No. 3,291, 1 Dill 16; Davis v. Weed, 6 F. Cas. No. 3,658, 44 Conn. 569.

Ala.—Quigley v. Campbell, 5 Ala. 76, 12 Ala. 58.

Ark.—Outlaw v. Yell, 5 Ark. 468.

Del.—Hall v. Hering, 21 Del. 111, 63 A 576.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Ind.—Martindale v. Moore, 3 Blackf. 275; Goodwin v. Wilson, 1 Blackf. 344.

Ky.—Loftus v. Locker, 1 J. J. Marsh. 297.

Md.—McLaughlin v. McGee, 131 Md. 156, 101 A 682.

Miss.—Dobbins v. Halfacre, 52 Miss. 561; Howard v. Cousins, 8 Miss. 114; Vick v. House, 3 Miss. 617.

N. M.—Senescal v. Bolton, 7 N. M. 351, 34 P 446.

N. Y.—Butler v. Hempstead, 18 Wend. 666.

N. C.—Brown v. McKee, 108 N. C. 387, 13 SE 8; Grant v. Bell, 91 N. C. 495; Holmes v. Foster, 78 N. C. 35; Wall v. Fairley, 73 N. C. 464; Dunn v. Barnes, 73 N. C. 273.

Oh.—Abbott v. Cole, 5 Oh. 86.

Pa.—Burd v. McGregor, 2 Grant 353; Hussey v. White, 10 Serg. & R. 346.

Tenn.—Mosier v. Zimmerman, 5 Humphr. 62.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Va.—Braxton v. Wood, 4 Gratt. (45 Va.) 25.

Wash.—Collins v. Denny Clay Co., 41 Wash. 136, 82 P 1012.

Wis.—Chouteau v. Hooe, 1 Pinn. 663.

[a] **Rule applies to judgment by default.**—Loftus v. Locker, 1 J. J. Marsh. (Ky.) 297; Butler v. Hempstead, 18 Wend. (N. Y.) 666; Brown v. McKee, 108 N. C. 387, 13 S 8; Chouteau v. Hooe, 1 Pinn. (Wis.) 663.

20. Collins v. Denny Clay Co., 41 Wash. 136, 82 P 1012.

21. Wilson v. Leigh, 39 N. C. 97; Dupuy v. Southgates, 11 Leigh. (38 Va.) 92. But compare Lash v. Hauser, 37 N. C. 489 (not estopped as to negroes, or right of redemption, not constituting assets at law).

[a] **Illustration.**—A creditor, by accepting a confession of judgment quando from the administrator, is estopped from afterward alleging that the administrator, at the time of confessing judgment, had assets applicable to the demand. Dupuy v. Southgates, 11 Leigh (38 Va.) 92.

22. U. S.—Owsley v. Central Trust Co., 196 Fed. 412.

Cal.—Chase v. Swain, 9 Cal. 130.

Colo.—Green v. Taney, 16 Colo. 398, 27 P 249.

Ill.—Darling v. McDonald, 101 Ill. 370; Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Ind.—Chicago, etc., R. Co. v. Harshman, 21 Ind. A. 23, 51 NE 343.

La.—D'Aunoy's Succ., 3 La. Ann. 36.

Me.—Nowell v. Bragdon, 14 Me. 320.

Mass.—Thayer v. Hollis, 3 Metc. 369.

Mo.—Pierce v. Pierce, 139 Mo. A. 416, 122 SW 1147.

N. Y.—Schmitz v. Langhaar, 88 N. Y. 503; In re Thompson, 41 Barb. 237; Matter of Miner, 39 Misc. 605, 80 NYS 643, 3 Mills Surr. 377; Allen v. Bishop, 25 Wend. 414; Leroy v. Bayard, 3 Bradf. Surr. 228; In re St. John, Tuck. Surr. 126.

N. C.—Grant v. Bell, 91 N. C. 495; Wall v. Fairley, 73 N. C. 464; Dunn v. Barnes, 73 N. C. 273.

Pa.—Steele v. Lineberger, 59 Pa. 308; Walthaur v. Gossar, 32 Pa. 259.

S. C.—Fraser v. Charleston, 23 S. C. 373.

Ont.—Ianson v. Clyde, 31 Ont. 579, 20 CanLTOccNotes 116; Re Hague, 13 Ont. 727.

[a] **Rule applies to default judgment.**—Chase v. Swain, 9 Cal. 130.

[b] **Judgment for payment in course of administration.**—A judgment of a circuit court against executors, requiring the claim to be paid in due course of administration, is binding on the county court to which it is certified by order of the circuit court, and the judgment of the latter court may also direct the classification of the claim. Darling v. McDonald, 101 Ill. 370.

[c] **A judgment against the goods and estate** of a deceased intestate in the hands of his administrator is conclusive evidence that he was indebted. Nowell v. Bragdon, 14 Me. 320.

[d] **Defense of limitations.**—A judgment against an executor or administrator on a debt of decedent cannot, in a proceeding to collect it, be attacked because the debt was barred by limitations, since that defense might have been interposed in the former action. West v. Smith, 8 How. (U. S.) 402, 12 L. ed. 1130; Thayer v. Hollis, 3 Metc. (Mass.) 369; Posthlewaite v. Ghiselin, 97 Mo. 420, 10 SW 482; Leroy v. Bayard, 3 Bradf. Surr. (N. Y.) 228.

[e] **Report of auditor approved by court.**—In an action against an administrator for money received by his intestate, the report of an auditor is prima facie evidence of the amount due on the principles and evidence stated in the report; and if approved by the court so much of the report may be read to the jury as shows a balance so stated, although before the jury are sworn defendant excepts to the evidence admitted by the auditor. U. S. Bank v. Williams, 2 F. Cas. No. 942, 3 Cranch C. C. 240.

23. Chaplin v. Jenkins, 21 S. C. Eq. 96 (where the litigation was for the adjustment of the claims of different legatees, and there was no default on the part of the executors, a decree adjusting those claims, but making no order as to costs, is not such a final decree fixing the executors with costs as may be opened only by petition for rehearing or by bill of review, but the costs may afterward be adjusted under an order of court on a rule taken for that purpose).

24. Robbins v. Wells, 1 Rob. (N. Y.) 666 (a judgment dismissing a supplemental complaint filed by the representative of a plaintiff who has died since the filing of the original complaint, given solely upon the ground that such representative has no legal capacity to sue, is not a bar to further proceedings by the proper representatives). See also Emmett v. Stedman, 3 N. C. 15 (where a judgment is erroneously entered against executors in an action wherein they pleaded non assumpsit and plene administravit, and the jury returned a verdict for plaintiff on the first plea but did not make any finding under the second, the executors may, on the issuance of a scire facias, again enter the plea of plene administravit; but to sustain such plea they must show a full administration and no assets at the time of the commencement of the original action).

25. Pickens v. Yarborough, 30 Ala. 408; Coffin v. Cottle, 9 Pick. (Mass.) 287.

[a] **Insufficiency of proof.**—The court having jurisdiction, a judgment

fraud,[26] collusion,[27] or accident.[28] But an administrator is not relieved from personal liability on a judgment de bonis testatoris, rendered against him for his failure to plead a want of assets, by the fact that he did not know the real condition of the estate, when by the exercise of due diligence he might have known it.[29] A judgment which has been reversed works no estoppel.[30]

[§ 2225] **(4) Persons Estopped and Entitled to Urge Estoppel—(a) In General.** A judgment concerning a decedent's estate works an estoppel between the parties to the suit and their privies,[31] but strangers to the litigation who are not in privity with a party thereto are not concluded by the judgment.[32] The estoppel may be urged by the parties to the judgment and their privies,[33] but strangers not in privity may not take advantage of it.[34] A judgment against a party in one right or capacity does not estop him when suing in another right or capacity.[35]

[§ 2226] **(b) Executors and Administrators.** A judgment for or against an executor is not conclusive in favor of or against a subsequent administrator de bonis non,[36] nor is a judgment against an administrator de bonis non conclusive on the personal representative of the original executor or administrator.[37] A judgment against an administrator is not conclusive on a preceding administrator.[38] A judgment against collectors of an estate appointed pending proceedings to set aside a will is not conclusive on the executors.[39] A judgment against heirs[40] or distributees[41] is not binding on the executor or administrator. A recovery in trover against an administrator in favor of one claiming under a deed of a distributee is binding on the distributee's executor.[42] A judgment against a foreign executor or administrator is not binding on the domiciliary representative.[43]

[§ 2227] **(c) Heirs, Devisees, Distributees, and Legatees.**[44] Ordinarily a judgment against an executor or administrator is not conclusive on heirs,[45]

rendered against a succession is not an absolute nullity, whether sufficient proof was adduced or not. Vaughn's Succ., 26 La. Ann. 149.

[b] **Nonapproval of decree annulling sale.**—In a suit by an administrator to enforce a vendor's lien brought in a district court, a decree rendered by consent annulling the sale is not void by reason of not having been approved by the probate court having jurisdiction of the estate. Titus v. Johnson, 50 Tex. 224.

[c] **Right to question validity.**—Although a decree pro confesso against an administrator is not an admission by him of the averments of the bill, yet he cannot complain that no proof was taken to establish complainant's case, where he is merely a nominal party to the action, and no relief is asked or granted against him, and decrees pro confesso are regularly entered against all the other defendants. Thornton v. Neal, 49 Ala. 590.

26. U. S.—West v. Smith, 8 How. 402, 12 L. ed. 1130.

Me.—Nowell v. Bragdon, 14 Me. 320.

N. C.—Thompson v. Badham, 70 N. C. 141; Wilson v. Leigh, 39 N. C. 97.

S. C.—Spoon v. Smith, 36 S. C. 588, 15 SE 800.

Tenn.—Simons v. Page, 96 Tenn. 718, 36 SW 843.

Tex.—Parker v. Cater, 8 Tex. 318.

[a] **The acceptance of a judgment quando acciderint** against an administrator will not estop plaintiff from afterward suing the administrator for the amount of such judgment on the ground that the administrator applied all the assets of his intestate's estate to the payment of a judgment fraudulently confessed by intestate in his favor, where plaintiff did not know of the fraud when he accepted his judgment. Spoon v. Smith, 36 S. C. 588, 15 SE 800.

27. Smith v. Downey, 38 N. C. 268 (where an administrator suffered judgment to be recovered against him as administrator without opposition, upon a claim of which he was himself the beneficial owner, the judgment was no proof of the debt).

28. Simons v. Page, 96 Tenn. 718, 36 SW 843.

29. Whiddon v. Williams, 98 Ga. 310, 24 SE 437.

30. Green v. Stone, 1 Harr. & J. (Md.) 405.

31. Ga.—Latine v. Clements, 3 Ga. 426.

Me.—Thompson v. Dyer, 55 Me. 99.

S. C.—Fraser v. Charleston, 19 S. C. 384.

Tenn.—Cope v. McFarland, 2 Head. 543.

Vt.—Randall v. Kelsey, 46 Vt. 158.

Can.—Clark v. Phinney, 25 Can. S. C. 633.

[a] **Persons liable over.**—Plaintiff as administrator delivered the assets of the estate to defendant in consideration of a promise to pay all claims arising against plaintiff as administrator. Afterward, on a claim being made against plaintiff, defendant was notified and promised to take care of it if sued, and, suit being brought against plaintiff, defendant neglected to attend to it, and a judgment was obtained against plaintiff, which he was compelled to pay. The claim was one which the estate was bound to pay and defendant had recognized it by promising to pay it. It was held that in a suit by plaintiff to recover the amount paid on the judgment, defendant was precluded from objecting that the claim on which the judgment was obtained was not against plaintiff as administrator. Randall v. Kelsey, 46 Vt. 158.

[b] **Receiptor.**—Where the administrator of a decedent who died during the pendency of the suit, after representing the estate as insolvent, has appeared in the suit as representative of the deceased party and submitted to a general default without suggesting the insolvency or praying for the stay of execution, the judgment awarded against the estate of the intestate in the hands of the administrator cannot be impeached in an action against a receiptor upon a receipt for goods of the original defendant attached on mesne process. Thompson v. Dyer, 55 Me. 99.

32. Ill.—Scheel v. Eidman, 68 Ill. 193.

Ky.—Richards v. Porter, 6 T. B. Mon. 1.

Mass.—Tarbell v. Jewett, 129 Mass. 457.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

Pa.—Soles v. Hickman, 29 Pa. 342, 72 AmD 635.

Eng.—Talbot v. Shrewsbury, L. R. 14 Eq. 503.

[a] **A tenant of property in suit** is not bound by the judgment. Tarbell v. Jewett, 129 Mass. 457.

[b] **Donees of decedent.**—A judgment against an executor or administrator is not conclusive against the donees of decedent. Richards v. Porter, 6 T. B. Mon. (Ky.) 1; Dozier v. Dozier, 21 N. C. 96.

33. Hunt v. Payne, 29 Vt. 172, 70 AmD 402 (a judgment in favor of an executor in ejectment against devisees is conclusive evidence in favor of an administrator de bonis non appointed to succeed the executor, in an action to recover the same premises).

34. See cases infra this note.

[a] **Illustrations.**—(1) An unsuccessful effort by a creditor to obtain satisfaction out of personal estate in an action at law against an executor alone is no bar to a proceeding in equity against land in the hands of the heirs of a devisee. Buford v. McKee, 3 B. Mon. (Ky.) 224. (2) Where the probate court appoints a person to collect and preserve an estate until administration is granted, who as such personally cannot properly be sued on a bond of decedent, a judgment against him in such a suit is no bar to a new action against the administrator on such bond. Wynn v. Wynn, 8 Leigh (35 Va.) 264.

35. Hoopes' Est., 2 Chest. Co. (Pa.) 67; Talbot v. Shrewsbury, L. R. 14 Eq. 503.

[a] **Illustration.**—The fact that a husband, in an action against him by his wife's executor for moneys received by him for her, in which judgment was recovered for plaintiff, did not set off his wife's funeral expenses, which had been paid by him pursuant to a direction in her will, does not prevent his recovering the expenses from her estate, as the claim in that action and the husband's claim to be recouped such expenses were not due in the same right. Hoopes' Est., 2 Chest. Co. (Pa.) 67.

36. Graves v. Flowers, 51 Ala. 402, 23 AmR 555; Hummel v. Central City First Nat. Bank, 2 Colo. A. 571, 32 P 72; Alsop v. Mather, 8 Conn. 584, 21 AmD 703; Grout v. Chamberlin, 4 Mass. 611, 613.

[a] **Contrary rule under statute.**—Thompson v. Badham, 70 N. C. 141.

37. Thomas v. Sterns, 33 Ala. 137; Anderson v. Irvine, 5 B. Mon. (Ky.) 488.

38. McLaughlin v. Nelms, 9 Ala. 925.

39. Brick v. Brick, 9 D. C. 256.

40. Warren v. Hall, 10 La. 377.

41. Johnson v. Longmire, 39 Ala. 143.

42. Kerr v. Webb, 30 S. C. Eq. 369.

43. Reed v. Bloodworth, (Ala.) 76 S 376. But compare McLean v. Meek, 18 How. (U. S.) 16, 15 L. ed. 277 (a recovery against an administrator in one state is no evidence against another administrator of the same decedent in another state).

44. See also supra § 2225.

45. U. S.—Deneale v. Archer, 8 Pet. 528, 8 L. ed. 1033.

Ala.—Steele v. Steele, 64 Ala. 438, 38 AmR 15; Scott v. Ware, 64 Ala. 174.

Cal.—Luco v. Commercial Bank, 70 Cal. 339, 11 P 650.

D. C.—Groot v. Hitz, 14 D. C. 247.

Ky.—Quinn v. Stockton, 2 Litt. 343.

N. Y.—Riley v. Ryan, 103 App. Div. 176, 93 NYS 386; Matter of Neufeld, 50 Misc. 215, 100 NYS 444, 5 Mills Surr. 352.

devisees,[46] or legatees[47] who were not made parties to the suit. Nor is a judgment in favor of an administrator conclusive on the distributees.[48]

[§ 2228] **(d) Creditors.** Creditors, being represented by the executor or administrator,[49] are concluded by judgments against him establishing claims against the estate.[50]

[§ 2229] **c. Persons Entitled to Share in Recovery.** An administratrix who fraudulently settled a suit to defraud a distributee is not entitled to share in a recovery brought about by the distributee who was permitted to prosecute the action.[51]

[§ 2230] **d. Lien.**[52] In the absence of a statute providing otherwise,[53] a judgment against an executor or administrator is not a lien either on the lands of the estate[54] or on those belonging to the representative individually.[55] In some states

N. C.—Carrier v. Hampton, 33 N. C. 307.

Pa.—Colwell v. Rockwell, 100 Pa. 133; Steele v. Lineberger, 59 Pa. 308; Walthaur v. Gossar, 32 Pa. 259; Benner v. Phillips, 9 Watts & S. 13; Murphy's App., 8 Watts & S. 165.

S. C.—Gillilant v. Caldwell, 1 S. C. 194.

Ont.—Ianson v. Clyde, 31 Ont. 579, 20 CanLTOccNotes 116; Re Hague, 13 Ont. 727.

[a] **Defense of limitations.** — Where judgment is rendered against an administrator after the expiration of the statutory period of limitation, and the creditor does not show that the action was commenced before the limitation expired, no presumption will be indulged as to that time to prevent the bar, in an action against the heir. Scott v. Ware, 64 Ala. 174.

[b] **Judgment against estate.**—If there is a vacancy in the office of executor of a deceased person at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound thereby. Luco v. Commercial Bank, 70 Cal. 339, 11 P 650.

[c] **In scire facias against heirs and devisees** to continue the lien of a judgment entered against an executor within five years of decedent's death, defendants may contest the debt but not the lien. Colwell v. Rockwell, 100 Pa. 133.

[d] **A judgment obtained by one administrator against the other,** touching the estate of the intestate, does not bind the heirs, although the administrator who was plaintiff never acted as administrator. Quinn v. Stockton, 2 Litt. (Ky.) 343.

[e] **On the other hand** it has been held: (1) That an administrator who is a party to an action involving the title of his intestate represents the title which the deceased had at his death, and judgment against him binds the heirs. Cunningham v. Ashley, 45 Cal. 485. (2) That the claim of a creditor of the succession, after having been established by judgment obtained against the executor, cannot thereafter be collaterally attacked in a suit by heirs, but must be classified as a liquidated debt of the succession. D'Aunoy's Succ., 3 La. Ann. 36. (3) That under the law authorizing proceedings by scire facias on a mortgage to enforce payment of the mortgage debt against the lands of a deceased mortgagor, a judgment against the personal representative is binding on the heirs. Biggerstaff v. Loveland, 8 Oh. 44. (4) That a decree for specific performance against one sued as the administrator and guardian of the sole heir, ordering a conveyance "as guardian," binds the heir, the fact that he was administrator being admitted, but the guardianship being neither proved, admitted, nor denied. Owen v. Shaw, 20 Tex. 81.

46. Ky.—Saunders v. Saunders, 2 Litt. 314.

N. Y.—Gouraud v. Gouraud, 3 Redf. Surr. 262.

Pa.—Colwell v. Rockwell, 100 Pa. 133; Steele v. Lineberger, 59 Pa. 308; Walthaur v. Gossar, 32 Pa. 259; Benner v. Phillips, 9 Watts & S. 13; Murphy's App., 8 Watts & S. 165.

S. C.—Screven v. Joyner, 10 S. C. Eq. 252, 26 AmD 199.

Eng.—Harvey v. Wilde, L. R. 14 Eq. 438; Willson v. Leonard, 3 Beav. 373, 43 EngCh 373, 49 Reprint 146; Marten v. Whichelo, Cr. & Ph. 257, 18 EngCh 257, 41 Reprint 488.

[a] **A purchaser from a devisee** is not bound by a judgment against the executor. Soles v. Hickman, 29 Pa. 342, 72 AmD 635.

[b] **On the other hand** it has been held: (1) That where a purchaser of land from an executor sued him to quiet the title, and the executor admitted a valid sale by him, and a decree was entered accordingly, the decree was binding upon the devisees in remainder, being the executor's children and testator's grandchildren. Wilkinson v. Tuggle, 61 Ga. 381. (2) That where an executor one year before the limitation expired, indorsed, as payable in due course of administration, a mortgage note executed by his testator, and two years thereafter the creditor foreclosed the mortgage, the judgment of foreclosure is not impeachable, in an action for the mortgaged premises by a devisee, on the ground that the suit was brought after the note was outlawed. Howard v. Johnson, 69 Tex. 655, 7 SW 522.

47. Mathews v. Springer, 16 F. Cas. No. 9,277, 2 Abb. 283; In re Hellier, 169 Cal. 77, 143 P 1008; Lamb v. Gatlin, 22 N. C. 37; Redmond v. Coffin, 17 N. C. 437.

[a] **A decree by consent** against an executor is not conclusive in his favor as against a residuary legatee on a settlement of the estate. Lamb v. Gatlin, 22 N. C. 37.

[b] **Upon the delivery of a legacy** to the legatee the privity between the executor and legatee ceases; and judgment in a suit subsequently commenced against the executor does not bind the legatee. Redmond v. Coffin, 17 N. C. 437.

[c] **On the other hand** it has been held: (1) That judgments obtained by innocent creditors against an executor on notes purporting to bear testator's signature but which had been forged by the executor in testator's lifetime are conclusive on the executor and on the legatees as his privies. Fraser v. Charleston, 19 S. C. 384. (2) That a decree against the executor of an executor is prima facie evidence to charge the legatee of the first testator. McMullin v. Brown, 11 S. C. Eq. 457. (3) That executors who are also made by the will trustees for infant legatees of their legacies, so long as they hold the personal property as part of the estate of testator for the payment of debts or legacies or as a residuum to be distributed, hold it by virtue of their office and are accountable for it as executors; and where they, being made defendants as executors to a suit to determine the interests of distributees in the residuum in their hands, appear as such, and the infants are also represented by a guardian, the judgment therein is conclusive on the beneficial interest of the infants, as against the objection that the executors were not before the court in their capacity as trustees. Colt v. Colt, 111 U. S. 566, 4 SCt 553, 28 L. ed. 520.

48. Gwynn v. Hamilton, 29 Ala. 233.

49. See supra § 387.

50. Pickens v. Yarborough, 30 Ala. 408; Blankenbaker v. Bank of Commerce, 85 Ind. 459; Parker v. Cater, 8 Tex. 318.

51. New Bell Jellico Coal Co. v. Stewart, 155 Ky. 415, 159 SW 962.

52. Amendment of judgment as to lien see supra § 2215.

53. See Payne v. Craft, 7 Watts. & S. (Pa.) 458 (statutes limiting and regulating the liens of judgments in general are not applicable to such as are obtained against the representatives of deceased debtors).

[a] **Nature of judgment.** — Under the statute the real estate of a decedent is not bound by a judgment against his personal representative, unless such judgment was rendered upon a verdict or inquisition or upon the report of referee or a rule of reference. Tappan v. Bacon, 25 Del. 113, 78 A 294.

54. Conn.—Flynn v. Morgan, 55 Conn. 130, 10 A 466.

Iowa.—Applegate v. Applegate, 107 Iowa 312, 78 NW 34.

Miss.—Treadwell v. Herndon, 41 Miss. 38; Lowry v. Houston, 4 Miss. 394.

Mo.—Scott v. Whitehill, 1 Mo. 764.

N. J.—Mott v. Newark German Hospital, 55 N. J. Eq. 722, 37 A 757.

N. Y.—Platt v. Platt, 105 N. Y. 488, 12 NE 22 [rev 42 Hun 592]; Cook v. Ryan, 29 Hun 249; Di Lorenzo v. Dragone, 25 Misc. 26, 54 NYS 420, 28 NYCivProc 102; Wambaugh v. Gates, 11 Paige 505.

Oh.—Wright v. Franklin Bank, 59 Oh. St. 80, 51 NE 876.

W. Va.—Maudru v. Humphreys, 98 SE 259; Custer v. Custer, 17 W. Va. 113; Woodyard v. Polsley, 14 W. Va. 211; Laidley v. Kline, 8 W. Va. 218.

[a] **Judgment de bonis testatoris.** —A judgment against an administrator is no lien on the lands of the intestate, although the judgment is de bonis testatoris. Scott v. Whitehill, 1 Mo. 764.

[b] **Land conveyed to representatives.**—A judgment recovered against executors as such is not a lien on land conveyed to them as executors. Cook v. Ryan, 29 Hun (N. Y.) 249.

55. Lane v. Cohen, 141 Ga. 501, 81 SE 128; Williams v. Green, 80 N. C. 76; McCulloch v. Sample, 1 Penr. & W. (Pa.) 422; Gay v. Skeen, 36 W. Va. 582, 15 SE 264.

[a] **Illustration.** — Where executors sold the real estate of their testator by virtue of authority in the will for the payment of certain legacies, and on settlement of their account in the orphans' court it appeared there were assets to pay the legacies, a judgment obtained by the legatees against the executors did not constitute a lien on the real estate of the executors, and judgments obtained by legatees who have filed refunding bonds against executors who have accounted and been discharged by the orphans' court are not liens on the real estate of such executors. McCulloch v. Sample, 1 Penr. & W. (Pa.) 422.

[b] **A conditional decree directing an executor to pay** certain debts due by his testator's estate or due from him in his fiduciary capacity, when he shall have collected certain other specified claims or debts coming to his testator's estate, constitutes no lien upon the real estate of such executor. Gay v. Skeen, 36 W. Va. 582, 15 SE 64.

the judgment is a lien on the assets in the hands of the personal representative,[56] but the contrary rule is sometimes established by statute.[57] In cases where a lien is allowed, proceedings to establish or enforce it must be reasonably commenced.[58]

Judgment in favor of estate. Where an administrator having a judgment as such records a certificate of lien, the fact that the certificate is signed not only by him but also by those beneficially interested in the judgment does not invalidate it.[59]

[§ 2231] **7. Satisfaction and Set-Off.** An individual indebtedness of an administrator to one against whom he has recovered judgment in his representative capacity cannot be credited on the judgment.[60] Satisfaction of a judgment in favor of a distributee against one to whom the administrator has wrongfully paid the distributee's share has the effect of extinguishing the administrator's liability to the distributee.[61] Judgments in favor of and against an executor or administrator may be set off against each other[62] where the debts are mutual and due to and from the same persons in the same capacity.[63] A proceeding by a debtor of decedent to set off a judgment obtained by him against decedent against a judgment obtained by the administrator on the debt due the estate is not affected by the insolvency of the estate.[64]

[§ 2232] **8. Revival of Judgment—a. Against Decedent.**[65] A judgment against one who dies subsequent to its rendition may be revived against his personal representative by scire facias,[66] and in some states this is the only mode in which the judgment may be enforced against the estate.[67] The scire facias must contain a suggestion of the death of the judgment debtor and show the appointment of defendant in the writ as executor or administrator.[68] Nothing can be pleaded in defense of the proceeding that might have been pleaded in the original action,[69] but it is a good plea that defendant is not the personal representative of the judg-

56. Treadwell v. Herndon, 41 Miss. 38; Lowry v. Houston, 4 Miss. 394; Dancy v. Pope, 68 N. C. 147.

[a] **An absolute judgment against a decedent's estate** is a lien, not only upon the assets in hand, but upon such as may come into the hands of the administrator after its rendition. Dancy v. Pope, 68 N. C. 147.

57. Collins v. Denny Clay Co., 41 Wash. 136, 82 P 1012; Prefontaine v. McMicken, 16 Wash. 16, 47 P 231.

58. Johnson v. Peck, 58 Ark. 580, 25 SW 865; Bowman v. Knorr, 206 Pa. 272, 55 A 976; Buehler v. Buffington, 43 Pa. 278.

[a] **Illustrations of loss of lien.**—(1) One obtaining a judgment against the estate cannot, after delaying to enforce his lien on decedent's land for thirteen years, enforce it as against one who purchases the land at the end of that time. Johnson v. Peck, 58 Ark. 580, 25 SW 865. (2) Where a judgment was recovered against executors prior to the act of 1834, and revived by scire facias against the executors only after that act and within five years, without making the owners of the land parties, the lands of devisees were discharged from the lien. Keenan v. Gibson, 9 Pa. 249.

[b] **Married woman as judgment creditor.**—Under the act of 1797, requiring debts of decedent to be sued upon within seven years to become liens upon his land, but allowing a feme covert four years after discoverture to bring such action, a judgment confessed by executors, more than seven years after the death of testator, to a married woman and her husband for her sole and separate use, for money loaned by her during her marriage, is within the exception of the statute and constitutes a lien on the land. Keil v. Wolf, 7 Pa. 424.

[c] **Revival of judgment.** — A judgment obtained against the administrators of an intestate within seven years after his death, and revived by a note made on the record of the original judgment of the agreement of the parties for that purpose, made within every five years, is such a due prosecution of the claim as will preserve the lien of the debt on the lands of the intestate according to the provisions of the act of 1797. Payne v. Craft, 7 Watts & S. (Pa.) 458.

59. Ives v. Beecher, 75 Conn. 153, 52 A 746.

60. Weaver v. Tuten, 144 Ga. 8, 85 SE 1048 (although the administrator agreed that such indebtedness should be received in payment).

61. Prater v. Stinson, 26 Ala. 456.

62. Wikel v. Garrison, 82 Iowa 453, 48 NW 803; Barrett v. Barrett, 8 Pick. (Mass.) 342; Dudley v. Griswold, 2 Bradf. Surr. (N. Y.) 24; Abercrombie v. Abercrombie, 25 S. C. 45.

[a] **Illustrations.** — (1) A judgment against an administrator on a debt contracted by the intestate and enforceable against him in his lifetime may in equity be set off against a judgment rendered in favor of the administrator against the judgment creditor, although there are no assets other than the judgment, and the estate is indebted to the administrator for costs to an equal amount. Wikel v. Garrison, 82 Iowa 453, 48 NW 803. (2) A judgment in favor of a judge of probate in a suit on a probate bond brought in his name for the benefit of a legatee against an executor and his sureties may be set off against a judgment recovered by the executor in his individual capacity against the legatee. Barrett v. Barrett, 8 Pick. (Mass.) 342. (3) Distributees who have not received the shares due them under the decree of distribution are entitled, as against a creditor of the estate who did not present his claim or reduce it to judgment until years after the decree of distribution was passed, to have the amounts due them set off against judgments in favor of the administrator on notes given by the husbands of the distributees for the price of property sold by him. Abercrombie v. Abercrombie, 25 S. C. 45.

[b] **Purchase of judgments.**—(1) An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a debt owing by the intestate cannot set off such judgment. Hills v. Tallman, 21 Wend. (N. Y.) 674. (2) Judgments against an administrator on debts contracted by the intestate cannot be purchased by a debtor of the estate, and alleged as counterclaims to judgments or demands due from him to the estate. Wikel v. Garrison, 82 Iowa 453, 48 NW 803.

[c] **Assignment of judgment.** — Where the assignee of a judgment against decedent brought an action of debt thereon and recovered judgment, it was too late for the executor to claim a set-off against plaintiff in the original judgment. Reigne v. Hunt, 1 Speers (S. C.) 281.

63. Dudley v. Griswold, 2 Bradf. Surr. (N. Y.) 24.

64. Quick v. Durham, 115 Ind. 302, 304, 16 NE 601 ("It has been said, and we have no doubt rightly said, in some of our decided cases, that the question as to whether a judgment in favor of an estate ought to be set off and cancelled by one against it, is not affected by the solvency of the estate on the one hand, or its insolvency on the other. Convery v. Langdon, 66 Ind. 311; Carter v. Compton, 79 Ind. 37. If at the time of the death of the decedent the equities existing between him and one of his seeming debtors are such that the judgments which may be rendered on their respective claims ought to be set off one against the other, and that is accordingly done, then the judgment against the supposed debtor does not really constitute assets in the hands of the administrator, and the creditors have no lawful cause of complaint. This is upon the familiar principle that where items in an account against one apparently indebted to an estate are absorbed and cancelled in the settlement of mutual accounts between him and the decedent, such items do not become assets of the estate, and the creditors have no claim upon them as such, either legal or equitable. If, in such a case, nothing is left for the creditors, they are in no worse condition than are other unfortunate creditors who have no means of enforcing payment from those indebted to them").

65. Revival against heirs or devisees see Judgments [23 Cyc 1441].

Revival of action on death of party see Abatement and Revival §§ 434–563.

66. Brearly v. Peay, 23 Ark. 172; Fulcher v. Mandell, 83 Ga. 715, 10 SE 582; Diese v. Fackler, 58 Pa. 109.

[a] **A plea to a scire facias to revive** a judgment against the administrator of a deceased judgment debtor, setting forth a presentation but not an allowance thereof in the probate court, is bad, for a party may pursue concurrent remedies, although he can have but one satisfaction. Brearly v. Peay, 23 Ark. 172.

[b] **Revival nunc pro tunc.**—The court may, with the consent of the personal representative, permit an amicable action of scire facias to be filed nunc pro tunc to cure a sale of land made under a judgment obtained against decedent in his lifetime and not revived against the representative. Diese v. Fackler, 58 Pa. 109.

67. Handley v. Fitzhugh, 3 A. K. Marsh. (Ky.) 561; Brown v. Webb, 1 Watts (Pa.) 411; Righter v. Rittenhouse, 3 Rawle (Pa.) 273; Eby v. Patton, 18 Pa. Dist. 52; Gwin v. Latimer, 4 Yerg. (Tenn.) 22.

[a] **A revivor in an appellate court** against the representative does not revive the judgment in the court below so as to permit execution there against the representative. Handley v. Fitzhugh, 3 A. K. Marsh. (Ky.) 561.

[b] **An executor or administrator cannot waive** the necessity of a scire facias or revive a judgment, so as to authorize the issuing of an execution against the estate. Gwin v. Latimer, 4 Yerg. (Tenn.) 22.

68. Walker v. Hood, 5 Blackf. (Ind.) 266.

69. Lynch v. Inglis, 1 S. C. L. 449 (an executor can plead nothing but

ment debtor,[70] or that there are no assets of the estate.[71] It is no defense, however, that the personal representative has not accounted to the surrogate,[72] nor will an application of an executor to the orphans' court, representing that the real and personal property of decedent are insufficient to pay his debts, bar a scire facias issued to revive a judgment entered before the application was made.[73] Where the estate had not the means of paying a judgment against it, and one of two executors bought the judgment with his own money and had it assigned to a third person who issued scire facias thereon, naming both executors and also heirs as defendants, a plea of payment by the executors did not estop the executor who had bought the judgment from showing that it was in fact paid but that it was intended to be kept alive for his use.[74] A judgment of revival may be entered on default.[75] The judgment of revival should require the money to be made first out of the assets in the hands of the executor or administrator, and, failing in this, then out of the lands descended to the heirs.[76] Where a judgment against decedent has ceased to be a lien on his land by reason of lapse of time, it cannot be renewed against the administrator by acquiescence of the latter.[77]

[§ 2233] **b. In Favor of or against Representative.** In some states a judgment in favor of or against an executor or administrator may be revived by or against his successor in office;[78] but there is also authority for the contrary view.[79] A plea of plene administravit, when supported by the facts, may be sufficient in a proceeding to revive a judgment against a personal representative,[80] but such a plea is bad on demurrer where it appears that there is real estate which might be sold to pay debts, since the administrator is bound to sell such real estate for that purpose.[81] A plea that executors have not accounted to the surrogate has been considered good as against a scire facias issued on a judgment against the executors.[82] A judgment against an executor or administrator cannot be revived after his death against his own personal representative,[83] unless such judgment was binding on him in his individual capacity.[84]

[§ 2234] **9. Actions on Judgments—a. Right of Action.** An executor or administrator may sue on a judgment obtained by himself,[85] by his pre-

a release or something arisen since the entering up of the judgment).

70. White v. Brown, 1 Dana (Ky.) 104.

71. National Sav. Bank v. Welcker, 21 D. C. 324; Fulcher v. Mandell, 83 Ga. 715, 10 SE 582; Tanner v. Freeland, 1 Harr. & M. (Md.) 34.

[a] **Illustration.**—An administrator may show that he has no assets, that he has fully administered them, or that the assets in his hands were taken possession of by intestate as sole heir of his deceased wife, and that there are outstanding debts against the wife sufficient to exhaust such assets. Fulcher v. Mandell, 83 Ga. 715, 10 SE 582.

[b] **Plene administravit** (1) is a good plea. National Sav. Bank v. Welcker, 21 D. C. 324; Tanner v. Freeland, 1 Harr. & M. (Md.) 34. (2) But plaintiff is entitled to judgment quando acciderint. National Sav. Bank v. Welcker, 21 D. C. 324.

72. Clark v. Sexton, 23 Wend. (N. Y.) 477.

73. Howell v. Potts, 20 N. J. L. 1.

74. McKerrahan v. Crawford, 59 Pa. 390.

75. Middleton v. Middleton, 106 Pa. 252.

76. Graves v. Skeels, 6 Ind. 107; Wilmer v. Trumbo, 121 Md. 445, 88 A 259. See also Mills v. Thursby, 2 AbbPr (N. Y.) 432, 12 HowPr 385 (a proceeding under Code § 376, providing that in case of the death of a judgment debtor after judgment his executors may be summoned to show cause why the judgment should not be enforced against the estate in their hands, is limited merely to the enforcement of the original judgment against the estate in the executors' hands, and a judgment therein against the executors as broad as if founded on a summons in an ordinary action in which they could be made personally liable for the whole amount of the judgment is unauthorized).

77. Brantley v. Brittle, 72 S. C. 179, 51 SE 561.

78. Ark.—Alexander v. Raney, 8 Ark. 324.

Miss.—Brown v. Bonner, 45 Miss. 10.

Oh.—Weaver v. Reese, 6 Oh. 418.

Pa.—Borland v. Dexter, 13 Wkly NC 44.

S. C.—Brantley v. Bittle, 72 S. C. 179, 51 SE 561.

Tex.—Austin v. Townes, 10 Tex. 24.

Va.—Wynn v. Wynn, 8 Leigh (35 Va.) 264.

[a] **Purpose of statute.** — The statute providing for the revival of judgments for or against the successors of executors or administrators by or against whom they were originally recovered is intended to do away with the common-law doctrine that a judgment vested individual rights in executors and administrators. Bowen v. Bonner, 45 Miss. 10.

[b] **Privity of estate exists** between an executor whose letters have been revoked and one to whom letters are granted under another will, and hence a judgment against the former may be revived against the latter. Borland v. Dexter, 13 Wkly NC (Pa.) 44.

[c] **Procedure.**—(1) An administrator de bonis non has a right to appear in court, suggest the death of his predecessor, and ask that a judgment recovered by such predecessor be revived in his name as successor in the administration; he need not resort to the writ of scire facias for that purpose. Bowen v. Bonner, 45 Miss. 10; Dibble v. Norton, 44 Miss. 158. (2) Prior to the act of 1846 (Hartley Dig. art 784), an action of debt on the judgment in the name of the administrator de bonis non was the proper remedy to revive a judgment recovered by a deceased administrator. Austin v. Townes, 10 Tex. 24.

[d] **Name in which judgment should be revived.**—(1) A judgment rendered in favor of A for the use of B, administrator of C, cannot be revived, on the death of B, in the name of D as administrator de bonis non of C, the original judgment not having been recovered by B in his representative character, nor constituting any part of the estate of C. Alexander v. Raney, 8 Ark. 324. (2) Where letters of administration have been revoked and an administrator de bonis non appointed, a scire facias cannot be sued out in the name of the former administrator to revive a judgment rendered in his favor while in office. Weaver v. Reese, 6 Oh. 418.

[e] **Time of revival.**—A judgment against an administrator can be revived by scire facias against the administrator de bonis non, his successor, more than seven years after its rendition, but less than seven years from the issuing of the last preceding execution thereon. Stith v. Parham, 57 Miss. 289.

[f] **Judgment against person appointed to collect and preserve estate.**—Where a court of probate appoints a person to collect and preserve the estate until administration is granted, such appointee cannot properly be sued on a bond of decedent, and if he is so sued and a judgment is rendered against him, a scire facias upon the judgment will not lie, after administration is granted, against the administrator. Wynn v. Wynn, 8 Leigh (35 Va.) 264.

79. Bobo v. Gunnels, 92 Ala. 601, 8 S 797 (a judgment against an administrator under which an execution against the estate has been returned unsatisfied cannot be revived against the administrator de bonis non, since there is no privity between the two).

80. Cox v. Cox, 2 Yerg. (Tenn.) 305.

81. Bates v. Kimball, 1 Aik. (Vt.) 95.

82. Clark v. Sexto, 23 Wend. (N. Y.) 477.

83. Mendenhall v. Robinson, 56 Kan. 633, 44 P 610.

84. Coates v. Muse, 5 F. Cas. No. 2,916, 1 Brock 529.

[a] **Judgment against coexecutors and devisees.**—Where, in a bill against two persons as joint executors who are also devisees and legatees of the testator, defendants permit a joint decree to be entered against them, the presumption is that they are liable in equal proportions, and, on entering a decree on a revival of the suit against their executors, it should be for a moiety of the joint decree against the representative of each in the first instance. Coates v. Muse, 5 F. Cas. No. 2,916, 1 Brock. 529. See also Coates v. Muse, 5 F. Cas. No. 2,917, 1 Brock. 539 (a decree against two executors jointly prima facie charges each executor equally, whether it is so expressed or not, but where on an application to carry the decree into execution it is shown that they were unequally indebted the decree may be revived against each according to his liability; but the fact that they were debtors to the estate in unequal sums for purchases made at the sale of the estate is no proof of their unequal liability).

85. Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315; Oglesby v. Gilmore, 5 Ga. 56.

[a] **Action in personal capacity.**—After judgment recovered in a suit by an administrator, the debt is due to plaintiff in his personal capacity, and he may declare on it as such. Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315.

[b] **Suit in sister state.**—An ad-

decessor in office,[86] or by his decedent.[87] An action will not lie against an administrator in one state on a judgment obtained against a different administrator of the same estate appointed in another state.[88]

[§ 2235] **b. Time to Sue and Limitations.** An action upon a judgment against a personal representative must be brought within the time limited by statute.[89] Where the statute declares that a judgment against an administrator on a claim for money against the estate only establishes the claim in the same manner as if it had been allowed by the administrator and the judge, that the judgment must be that the administrator pay in due course of administration, and that no execution shall issue, nor shall the judgment create any lien on the property of the estate nor give the judgment creditor priority of payment, limitations do not run pending administration of the estate, against a judgment against the personal representative.[90]

[§ 2236] **c. Defenses.** In an action on a judgment quando acciderint against an administrator, defendant may plead plene administravit.[91] Where a suit is brought against an executor in his representative capacity upon a judgment alleged to have been duly rendered against him in that capacity, and the defendant by plea admits the rendition of the judgment and pleads payment, and also at the trial as a witness admits the rendition of the judgment as alleged, it is wholly immaterial that the fieri facias issued upon the judgment did not properly describe defendant in his representative capacity and did not properly describe the judgment.[92] Defendant may be estopped to assert the invalidity of the judgment sued on.[93]

[§ 2237] **d. Parties.** An administrator is a necessary party to an action on a judgment in his favor,[94] and an administrator de bonis non is a necessary party to a suit on a judgment in favor of his predecessor in office.[95] Persons beneficially interested in a judgment in favor of an administrator may properly be joined as plaintiffs in a suit thereon,[96] but heirs cannot be joined as defendants in an action on a judgment against an administrator.[97] A nonjoinder of a necessary party defendant should be objected to by plea in abatement.[98]

[§ 2238] **e. Pleading.** In an action on a judgment quando against an administrator, a declaration alleging that assets have come into defendant's hands since the judgment was rendered is sufficient without alleging that plaintiff is entitled to the assets.[99] The failure to demand a proper judgment in a complaint on a judgment against an intestate does not necessarily defeat the action.[1]

[§ 2239] **f. Evidence.** In an action on a judgment quando acciderint against an administrator, plaintiff need not prove in the first instance that he is entitled to assets which he alleges have subsequently come into defendant's hands.[2] An allegation in the answer that no assets have come into defendant's hands since the judgment was rendered refutes the presumption of payment arising from lapse of time.[3] If, in an action by an administrator de bonis non on a judgment obtained by the executor, plaintiff alleges that the judgment was obtained by the executor, it will be presumed that the judgment was for a debt due testator.[4]

[§ 2240] **U. Execution and Enforcement of Judgment—1. Enforcement against Representative as Such—a. In General.**[5] Under the provisions of a number of statutes a judgment rendered against a personal representative on a claim against his decedent's estate can be enforced only by a proper proceeding in the probate court, in due course of administration,[6] and execution thereon, except from

ministratrix who recovers judgment makes the debt hers individually, and she may sue thereon out of the state where she was appointed, allegations showing representative capacity being treated as surplusage. Newberry v. Robinson, 36 Fed. 841.

[c] **Circumstances under which action unauthorized.** — Where the statute provides that the surrogate may direct securities for the payment of money belonging to an estate to be deposited with a trust company, and that a security thus deposited shall not be withdrawn from the custody of the trust company and no person other than the proper officer of the trust company shall receive or collect any of the principal or interest secured thereby, without an order of the surrogate, an action by an administrator on a note thus deposited with a trust company, and the issuance of execution by him on the judgment recovered in such action, all without the order of the surrogate, are without right, and do not furnish a valid judgment and return of execution unsatisfied, such as is necessary to support a judgment creditor's action by the administrator. Ditmas v. McKane, 92 App. Div. 344, 86 NYS 1083 (such judgment is not validated, so as to support a judgment creditor's action by the administrator, by the fact that, after the rendition of the judgment and a return of the execution, he individually acquired title to the note).

86. Austin v. Townes, 10 Tex. 24 (so holding prior to the act of 1846 [Hartley Dig. art 784]).

87. Freeman v. Dutcher, 15 AbbN Cas (N. Y.) 431 (the right given to an executor by statute to take out execution on a judgment in favor of his intestate does not preclude him from bringing suit on the judgment without leave of court).

88. Stacey v. Thrasher, 6 How. (U. S.) 44, 12 L. ed. 337 (there is no privity between them).

89. Jenkins v. Wood, 134 Mass. 115 (a creditor who recovers a judgment against an executor in an action upon a debt due from testator, brought within the two years limited by statute, is not entitled, the execution on the judgment not being satisfied, to bring an action on the judgment after the expiration of the two years, although the bond given by the executor who is also residuary legatee is one conditioned to pay debts and legacies).

90. Shively v. Harris, 5 Cal. A. 513, 90 P 971.

91. Southard v. Potts, 22 N. J. L. 278.

92. Solomon v. Chapman, 9 Ga. 189, 70 SE 964 ("The suit being based upon a judgment, and not upon the fi. fa. issued thereon, and the judgment being still in life, irrespective of any entry made upon the fi. fa., errors in the issuance of the fi. fa. were immaterial").

93. Copeland v. Todd, 30 S. C. 419, 9 SE 341 (whether the probate court had jurisdiction to render judgment in favor of a creditor for his pro rata part of a claim filed against the estate, which is allowed, is immaterial to the sufficiency of a complaint based upon such a judgment, when it is alleged that the amount of the judgment was ascertained to be in the executor's hands in a settlement of his accounts made before such court, and that he has recognized by subsequent payments thereon the validity of the judgment, as by the admission of assets in his settlement he became liable personally to the creditor, and by the payments and his acquiescence in the judgment his personal representative is estopped to deny his liability as against the creditor's executor).

94. Ives v. Beecher, 75 Conn. 153, 52 A 746 (although other persons are the only ones beneficially interested, and whether they purchased the judgment or acquired it under the will).

95. Ives v. Beecher, 75 Conn. 153, 52 A 746.

96. Ives v. Beecher, 75 Conn. 153, 52 A 746 (although they own the judgment in several and unequal shares).

97. Nourse v. Ramsey, 2 Bibb. (Ky.) 547; Moore v. Nowell, 94 N. C. 265. But compare In re Schwartz, 14 Pa. 42 (where the heirs are made parties, the action may be regarded as an original action).

98. In re Schwartz, 14 Pa. 42 (where a judgment is taken against a personal representative alone, and a subsequent action of debt is brought thereon against the representative and heirs, the nonjoinder of an heir can be objected to only by plea in abatement).

99. Southard v. Potts, 22 N. J. L. 278.

1. Moore v. Nowell, 94 N. C. 265.

2. Southard v. Potts, 22 N. J. L. 278.

3. Austin v. Tompkins, 5 N. Y. Super. 22.

4. Dykes v. Woodhouse, 3 Rand. (24 Va.) 287.

5. Supplementary proceedings in aid of execution see Executions §§ 927–1029.

6. In re Reed, 192 Ill. A. 453.

Judgment for payment in due course of administration see supra § 2200.

the probate court, cannot be issued against the representative.[7] But at common law and also under some statutes a judgment obtained against the representative may be enforced by execution against the property of decedent in his hands to be administered, as in other cases in law or equity,[8] although it is sometimes required that leave of court to issue the execution shall first be obtained.[9]

[§ 2241] **b. Practice in New York.** Under the statutes of this state,[10] in order that an execution may issue against a personal representative upon a judgment for money rendered against him in his representative capacity, an order permitting its issuance must be made by the surrogate from whose court the representative's letters were issued, upon proper application therefor by the judgment creditor,[11] and after citation or notice to the parties

7. Ark.—Meredith v. Scallion, 51 Ark. 361, 11 SW 516, 3 LRA 812; Yonley v. Lavender, 27 Ark. 252 [aff 21 Wall. (U. S.) 276, 22 L. ed. 536]; Hornor v. Hanks, 22 Ark. 572 [disappr U. S. v. Drennen, 25 F. Cas. No. 14,992, Hempst. 320]; Adamson v. Cummins, 10 Ark. 541.

Cal.—Rice v. Inskeep, 34 Cal. 224.

Colo.—Jones v. Perot, 19 Colo. 141, 34 P 728; Lamping v. Keenan, 9 Colo. 390, 12 P 434; Mattison v. Childs, 5 Colo. 78; Kilpatrick v. Haley, 14 Colo. A. 399, 60 P 361.

Ill.—Rodisch v. Moore, 266 Ill. 106, 107 NE 108; Darling v. McDonald, 101 Ill. 370; Albee v. Wachter, 74 Ill. 173; Bull v. Harris, 31 Ill. 487; Stillman v. Young, 16 Ill. 318; Turney v. Gates, 12 Ill. 141; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Peck v. Stevens, 10 Ill. 127; Welch v. Wallace, 8 Ill. 490; Greenwood v. Spiller, 3 Ill. 502; Gustin v. Bryden, 205 Ill. A. 204.

La.—Anderson v. Birdsall, 19 La. 441; Baillio v. Wilson, 5 Mart. N. S. 214.

Mich.—Peckham v. Judge Berrien County Ct., 74 Mich. 287, 41 NW 926.

Mo.—Wernecke v. Wood, 58 Mo. 352; Powers v. Conran, (A.) 182 SW 1012; In re Simpson, 81 Mo. A. 582.

N. H.—Blaisdell v. Peavey, 108 A 134.

N. C.—Atkinson v. Ricks, 140 N. C. 418, 53 SE 230; Vaughn v. Stephenson, 69 N. C. 212.

Tex.—Meyers v. Evans, 68 Tex. 466, 5 SW 66; Paxton v. Meyer, 67 Tex. 96, 2 SW 817; Hart v. McDade, 61 Tex. 208; McDonough v. Cross, 40 Tex. 251; Lewis v. Nichols, 38 Tex. 54; Wilcox v. State, 24 Tex. 544; Carroll v. Carroll, 20 Tex. 731; Boggess v. Lilly, 18 Tex. 200; Forston v. Caldwell, 17 Tex. 627; Ansley v. Baker, 14 Tex. 607, 65 AmD 136; Bennett v. Spillards, 7 Tex. 600, 9 Tex. 519; Bason v. Hughart, 2 Tex. 476; Stewart v. Webb, (Civ. A.) 156 SW 537; Flack v. Bremen, 45 Tex. Civ. A. 473, 101 SW 537; Mott v. Ruenbuhl, 1 Tex. A. Civ. Cas. § 599.

Wyo.—Peabody v. Hutton, 5 Wyo. 102, 37 P 694, 39 P 980.

[a] **Where estate insolvent.**—Under the statutes of New Jersey execution on a judgment against the representative cannot issue, where the estate is represented insolvent within the time limited to creditors to bring in their claims. Taylor v. Volk, 38 N. J. L. 204.

[b] **A testamentary provision** exempting the executor from giving bond does not authorize the issuance of execution against the estate. Lewis v. Nichols, 38 Tex. 54.

[c] **A decree of foreclosure** against mortgaged property of the decedent is within the application of this rule, since any process under which property may be sold is an execution within the meaning of the statute. Smithwick v. Kelly, 79 Tex. 564, 15 SW 486; Flack v. Braman, (Tex. Civ. A.) 101 SW 537. But compare Danzey v. Swinney, 7 Tex. 617 (where the claim is one secured by mortgage and has been rejected by the probate court, it may be carried to judgment in the district court and the property subject to the lien may be seized and sold by the sheriff and the proceeds of such sale be applied to the satisfaction of the judgment).

[d] **Enforcement of vendor's lien.**—In an action in the district court against administrators and others to foreclose a vendor's lien, a judgment against administrators for a deficiency should be enforced by the county court under the probate statutes, and not by an execution issued by the district court. Stewart v. Webb, (Tex. Civ. A.) 156 SW 537.

[e] **Where a judgment is revived against the representative,** the judgment of revivor may authorize the issuance of execution. Hart v. McDade, 61 Tex. 208.

[f] **A judgment against an independent executor may be enforced by execution.**—Roberts v. Connellee, 71 Tex. 11, 8 SW 626; Hart v. McDade, 61 Tex. 208; Lewis v. Nichols, 38 Tex. 54; Hartz v. Hausser, (Tex. Civ. A.) 90 SW 63; Ellis v. Mabry, 25 Tex. Civ. A. 164, 60 SW 571; Croom v. Winston, 18 Tex. Civ. A. 1, 43 SW 1072; McKie v. Simpkins, 1 Tex. A. Civ. Cas. § 278.

8. U. S.—U. S. v. Drennen, 25 F. Cas. No. 14,992, Hempst. 320.

Alaska.—In re Gladough, 1 Alaska 649.

Ga.—Braswell v. Brown, 112 Ga. 740, 38 SE 51.

Ill.—Darling v. McDonald, 101 Ill. 370.

Kan.—Halsey v. Van Vliet, 27 Kan. 474.

Ky.—Sherwood v. Campbell, 1 B. Mon. 54.

Me.—Nowell v. Bragdon, 14 Me. 320.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942; Nelson Theatre Co. v. Nelson, 216 Mass. 30, 102 NE 926; Tracy v. Strassel, 191 Mass. 187, 77 NE 700; Steel v. Steel, 4 Allen 417.

Mo.—Carson v. Walker, 16 Mo. 68. See also Sweringen v. Eberins, 7 Mo. 421, 38 AmD 463; Scott v. Whitehill, 1 Mo. 691.

N. C.—Pennington v. Hayes, 3 N. C. 502; Alston v. Harris, 3 N. C. 125; Burnside v. Green, 3 N. C. 112; Borden v. Nash, 3 N. C. 42.

Va.—Nimmo v. Com., 1 Hen. & M. (11 Va.) 470.

[a] **A judgment quando acciderint** (1) cannot be enforced by execution. Braxton v. Wood, 4 Gratt. (45 Va.) 25. (2) But plaintiff may proceed immediately by debt or scire facias to ascertain whether there is not a surplus of assets after paying the debts which have priority over his payment; and he thereby converts his judgment into a judgment de bonis testatoris and obtains a priority over other creditors in equal degree who have not recovered judgment. Braxton v. Wood, 4 Gratt. (45 Va.) 25.

[b] **A decree directing several coexecutors to pay a certain sum to one of their number** cannot be enforced by execution. Eisner v. Avery, 2 Dem. Surr. (N. Y.) 466.

[c] **Order for payment into court.**—Where judgment has been obtained against an estate, the administrator admitting that he has money on hand to pay it may be ordered to pay such money into the court. In re Gladough, 1 Alaska 649 (where the court, although admitting that execution against the administrator might be allowed in a proper case, was not disposed to order it under the circumstances).

Executions generally see Executions 23 C. J. p 281.

9. See Wallace v. Holmes, 40 Pa. 427 (an order to show cause why execution should not issue upon a judgment against the decedent and revived against the representative, or upon a judgment against the representative, is required).

10. [a] **The new Surrogates' Court Act of 1914** (L. 1914 c 443) does not change the practice with respect to the matters discussed in this section.

11. Chicago Mar. Bank v. Van Brunt, 49 N. Y. 160 [aff 61 Barb. 361]; Matter of Bernardston Cong. Unitarian Soc., 34 App. Div. 387, 54 NYS 269; Matson v. Abbey, 70 Hun 475, 24 NYS 284 [mod on other grounds 141 N. Y. 179, 36 NE 11]; Sartorelli v. Ezangni, 64 Misc. 115, 118 NYS 46; In re Loughlin, 177 NYS 96 [rev on other grounds 189 App. Div. 657, 179 NYS 48]; Mills v. Thursby, 2 AbbPr (N. Y.) 432, 12 HowPr 385; Butler v. Hempstead, 18 Wend. (N. Y.) 666; Winne v. Van Schaick, 9 Wend, (N. Y.) 448; Melcher v. Fisk, 4 Redf. Surr. (N. Y.) 22 (construing 3 Rev. Ct. [6th ed] p 96 § 42).

[a] **This rule does not take away from the supreme court** the power of controlling execution of its judgments. Marine Bank v. Van Brunt, 49 N. Y. 160 [aff 61 Barb. 361].

[b] **An order in the alternative** granting leave to issue execution, unless the representative applies for license to sell realty, is not authorized under such statutes. St. Johns v. Voorhies, 19 AbbPr (N. Y.) 53.

[c] **A judgment within the meaning of these statutes** (1) is one against a personal representative in his representative capacity after a trial upon the merits of the case (Schmitz v. Langhaar, 88 N. Y. 503; Peo. v. Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486), (2) whether it was recovered for a debt of the decedent or for one contracted by the representative for necessary and reasonable expenses of the administration (In re Thompson, 41 Barb. (N. Y.) 237 [aff 1 Redf. Surr. 490]), (3) not including, however, a judgment against him, after he has been discharged on a final accounting, on an indebtedness created by the decedent in his lifetime (In re Hathaway, 24 NYS 468, Pow. Surr. 447), (4) or a judgment in an action to recover damages for decedent's death (Matter of Jansen, 9 NYS 451, 1 Conn. Surr. 362), (5) or a judgment against a firm composed of a surviving partner and the executor of a deceased partner who was empowered by the will to carry on the testator's business (Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 NE 239 [aff 61 Hun 557, 16 NYS 337]), (6) or a judgment in an action originally commenced against decedent and revived against his personal representatives (Thacker v. Bancroft, 15 AbbPr (N. Y.) 243).

[d] **The pendency of an appeal from the judgment** is no bar to a motion for leave to issue execution unless the proceedings have been stayed. Matter of Morey, 10 NYSt 693, 6 Dem. Surr. (N. Y.) 287; Keyser v. Kelly, 4 Redf. Surr. (N. Y.) 157; Smith v. Howell, 2 Redf. Surr. (N. Y.) 225.

[e] **Nature of proceeding.**—Where judgment is recovered against executors in the supreme court, a proceeding before the surrogate for leave to issue execution against them

interested.[12] But before leave to issue such execution will be granted, it must be clearly made to appear by the application or by an accounting ordered by the surrogate that the representative has assets of the estate in his hands which are applicable to the payment of the judgment,[13] or that funds of the estate which ought to have been devoted to the payment of the judgment have been misapplied.[14] The burden rests upon the petitioner to satisfy the surrogate that the proper conditions exist to warrant the granting of the order authorizing the execution to issue,[15] but in a case where, on an application for an order directing an administrator to pay a judgment creditor, the administrator admitted that the assignment of the beneficial interest, on which judgment was based, was made prior to the decree for final accounting, thereby in effect admitting that applicant was a proper party thereto, it was held that the burden was on the administrator to show that the applicant was bound by the decree for final accounting by having notice thereof.[16] The execution, if issued, must substantially require the sheriff to satisfy the judgment out of the personal estate in the hands of the executor belonging to the estate of his testator.[17] But the surrogate should permit execution to issue only for a proportionate amount of the judgment,[18] unless it appears that other creditors of the estate will not be prejudiced by execution for the full amount of the judgment.[19]

One who has recovered a judgment against an administrator for funeral expenses should have leave to issue execution to the amount of a fund in the administrator's hands arising from an action for damages for the wrongful death of decedent.[20]

Order as to proceeds of partition sale. Where a judgment on a claim against a decedent's estate was obtained in an action against his administrator commenced more than three years after letters of administration were granted him, the proceeds of a sale in an action to partition decedent's real estate may not be ordered to be paid to the surrogate court, there to be accounted for, and eventually subjected to payment of the judgment.[21]

[§ 2242] **c. Against Administrator De Bonis Non.** It has been held that a judgment recovered against an administrator in chief cannot be enforced against an administrator de bonis non,[22] unless the judgment is revived against the latter administrator;[23] but there is also authority for the contrary view.[24]

[§ 2243] **d. Enforcement in Equity.** A judgment creditor, unless he has estopped himself by electing to rely on other remedies,[25] may in some cases resort to a court of equity for the purpose of enforcing his judgment,[26] even though execution cannot be issued against the representative.[27] Such a bill may be maintained for the purpose of reaching assets which have already been distributed or disposed of by the representative,[28] or for the dis-

is a special proceeding de novo, to be begun by the filing of a verified petition and the issue of a citation or order to show cause, served on each of the executors. McGinn v. Lighthouse, 137 NYS 110.

12. Marine Bank v. Brunt, 49 N. Y. 160 [aff 61 Barb. 361]; McGinn v. Lighthouse, 137 NYS 110; St. John v. Voorhies, 19 AbbPr (N. Y.) 53.

[a] **Where a judgment is recovered against several executors,** each is entitled to service of an application for leave to issue execution thereon. McGinn v. Lighthouse, 137 NYS 110.

[b] **Where an account by the executor shows the assets applicable to the judgment,** leave to issue execution may be granted the judgment creditor, without citing the executor to account. Smith v. Howell, 2 Redf. Surr. (N. Y.) 325.

[c] **Objection to failure to issue a citation** is waived by the representative appearing and accounting and taking an appeal without objection to the irregularity. St. John v. Voorhies, 19 AbbPr (N. Y.) 53.

13. Matter of Gall, 40 App. Div. 114, 57 NYS 835; Matter of Bernardston Cong. Unitarian Soc., 34 App. Div. 387, 54 NYS 269; In re Thurber, 37 Misc. 155, 74 NYS 949, 2 Mills Surr. 479; Matter of Lazelle, 16 Misc. 515, 40 NYS 343, 2 Gibb. Surr. 47; Matter of Boyle, 9 NYS 473, 2 Conn. Surr. 57; Matter of Dougherty, 15 NYSt 743; St. John v. Voorhies, 19 AbbPr (N. Y.) 53; Mitchell v. Mount, 19 AbbPr (N. Y.) 1; Winne v. Van Schaick, 9 Wend. (N. Y.) 448; Peters v. Carr, 2 Dem. Surr. (N. Y.) 22; Hauselt v. Gano, 1 Dem. Surr. (N. Y.) 36; Melcher v. Fisk, 4 Redf. Surr. (N. Y.) 22.

[a] **This is true, although** the representative gave an undertaking in the action, on which defendant cannot sue until he has had execution upon his judgment returned unsatisfied. Matter of Lazelle, 16 Misc. 515, 40 NYS 343, 2 Gibb. Surr. 47.

[b] **An order or decree of a surrogate directing payment by a personal representative** (1) is "conclusive evidence that there are sufficient assets in his hands to satisfy the sum" directed to be paid by the decree. Matter of Seaman, 63 App. Div. 49, 71 NYS 376; Matter of Weil, 110 App. Div. 67, 96 NYS 1017. (2) But this does not apply to a decree ordering payment by an administrator of a deceased executor, and execution in that case cannot issue without leave of the surrogate. Matter of Seaman, 63 App. Div. 49, 71 NYS 376.

[c] **When accounting should be directed.**—(1) Where, on application for leave to issue execution on a judgment against an administrator, it appears that the fund held by the administrator consists of a part of the proceeds of a judgment against the government in favor of decedent, based on a French spoliation claim, and the affidavit of the administrator expressly avers that there is not property in his hands applicable to the judgment, the court should direct an accounting. In re Warren, 105 App. Div. 582, 94 NYS 286. (2) Where there is no proof to overcome the administrator's affidavit that he had no assets in his possession when the judgment was rendered, and that he owned part of the property listed as assets of the estate, the proper practice is to require him to file an intermediate accounting, on which the question of existence of assets can be judicially determined. In re Lansing, 179 NYS 48.

14. Matter of Gall, 40 App. Div. 114, 57 NYS 835.

15. Matter of Lazelle, 16 Misc. 515, 40 NYS 343, 2 Gibb. Surr. 47.

[a] **Where the petition alleges that the representative has in his possession assets sufficient** to satisfy the judgment, the burden of showing that they are insufficient to pay all debts, legacies, or other claims of the class to which plaintiff's claim belongs is upon the representative, and if he presents no papers in opposition the surrogate may grant the petition. Matter of Steinau, 23 App. Div. 550, 48 NYS 886.

16. Matter of Weil, 110 App. Div. 67, 96 NYS 1017.

17. Matter of Lazelle, 16 Misc. 515, 40 NYS 343, 2 Gibb. Surr. 47.

[a] **No execution against real estate.**—The surrogate has no power to permit execution against real estate under such statute. Lichtenberg v. Herdtfelder, 103 N. Y. 302, 8 NE 526; Matter of Jansen, 9 NYS 451, 1 Conn. Surr. 362.

[b] **Execution must not issue against executor individually.**—In re Bender, 111 App. Div. 23, 97 NYS 171.

18. Schmitz v. Langhaar, 88 N. Y. 503; Matter of Thurber, 37 Misc. 155, 74 NYS 949, 2 Mills Surr. 479; Mitchell v. Mount, 17 AbbPr 265 [rev on other grounds 31 N. Y. 356, 19 AbbPr 1]; Olmsted v. Vredenbergh, 10 HowPr (N. Y.) 215.

19. Sippel v. Macklin, 2 Dem. Surr. (N. Y.) 219.

20. Matter of McDermott, 49 Misc. 402, 99 NYS 829, 5 Mills Surr. 286.

21. Early v. Korn, 89 NYS 392.

22. Brothers v. Gunnels, 110 Ala. 436, 18 S 3; Martin v. Ellerbee, 70 Ala. 326; Graves v. Flowers, 51 Ala. 402, 23 AmR 555; Wilson v. Auld, 8 Ala. 842.

23. Meredith v. Scallion, 51 Ark. 361, 11 SW 516, 3 LRA 812; Cocke v. Foote, 49 Miss. 181.

24. Jones v. Jones, 8 Humphr. (Tenn.) 705; Garland v. Garland, 84 Va. 181, 4 SE 334.

[a] **A decree against a domiciliary executor** may be enforced against an administrator de bonis non with the will annexed of the same decedent in any jurisdiction. Garland v. Garland, 84 Va. 181, 4 SE 334.

25. Martin v. Harding, 38 N. C. 603.

26. Martin v. Harding, 38 N. C. 603.

[a] **A personal judgment at law against a representative for services rendered the estate** at the request of the representative cannot be enforced by a suit in equity against the representative as such. Wade v. Pope, 44 Ala. 690.

27. Steere v. Bigelow, 39 Ill. 264; Bay v. Cook, 31 Ill. 336; McDowell v. Cochran, 11 Ill. 31.

Statutes precluding execution against representative see supra § 2240.

28. Redd v. Davis, 59 Ga. 823; Sherwood v. Campbell, 1 B. Mon. (Ky.) 54.

[a] **A creditor having an unproductive judgment against the admin-**

covery and production of assets.[29] A judgment against the representative not expressed to be de bonis testatoris cannot be enforced in equity unless it is amended in that respect,[30] or unless the conditions of the case are such that it cannot be enforced against the representative, as where he is a nonresident and insolvent and all the assets of the estate have been distributed.[31]

[§ 2244] **2. Enforcement by or against Representative after Removal or Resignation.** After a personal representative has been removed from office he cannot regularly sue out execution on a judgment recovered by him as representative;[32] nor can execution be lawfully issued against him, and an execution issued while there exists a vacancy in the office is void and no right of property passes by a sale thereunder.[33] However, an administrator has been held entitled to maintain a creditor's bill after his discharge.[34]

[§ 2245] **3. Enforcement against Representative Individually—a. In General.** Where the personal representative has been guilty of waste, and there is a return of nulla bona or nulla bona and devastavit on the original execution against him as representative, it is generally recognized that the judgment may be enforced against him personally; but the means of enforcing such a judgment are not uniform. At common law a judgment against a personal representative, as such, could be enforced against him individually by capias ad satisfaciendum or by fieri facias de bonis propriis, where the return on the original execution on the judgment was not only nulla bona, but also devastavit;[35] but where the return was merely nulla bona the earlier practice was to issue a special inquiry to determine whether the representative had wasted decedent's property, and if a devastavit was found, a scire facias was issued;[36] later, however, these proceedings were joined into what was called a scire fieri inquiry.[37] The waiver by the personal representative of a judgment debtor of the scire facias to revive might authorize an execution against the personal representative,[38] but not against the deceased debtor.[39] Under some statutes upon leave of the court after proper motion and notice[40] an execution de bonis propriis may issue against the representative personally, to be levied upon his individual property, where a return of nulla bona,[41] or nulla bona and devastavit,[42] is made on the execution de bonis testatoris, or where a judgment fixing him with assets is rendered against him.[43] A statutory execution is sometimes permitted to issue as of right against the representative and his sureties upon a return of "no property found."[44] In Louisiana execution can issue against a personal representative who fails to pay a judgment creditor of the succession only when he has funds on hand wherewith to discharge the debt and does not do so after due demand,[45] and where a personal rule or judgment is obtained against him after due notice of the judgment liquidating the debt;[46] or execution may be issued against an administrator personally where he makes a vague and insufficient answer to a rule taken by creditors whose claims have been fixed by a final judgment upon the administrator's account.[47] In Maryland it has been held that an absolute judgment against a personal representative is conclusive of the existence of the debt and of the sufficiency of assets to pay it, and that a fieri facias may be issued thereon and levied upon the lands of the representative as well as upon his goods and chattels.[48]

Judgment for disposing of widow's exemption. An executor's liability for disposing of articles required by statute to be set apart to the widow is a personal liability, and the judgment against him thereon is therefore properly enforced by rule.[49]

Action on bond to pay debts and legacies. A statute exempting the person and estate of an executor from execution for the debts and legacies of his testator has no application to an action on a bond given by the executor as residuary legatee conditioned to pay the debts and legacies of the testator.[50]

[§ 2246] **b. By Scire Facias.** At common law and under the statutes in a number of jurisdictions a judgment obtained against a personal representative may be enforced against his individual property, where he has been guilty of waste or there is a return of nulla bona on the judgment, by means of a scire facias suggesting a devastavit;[51]

istrator de bonis non of his debtor cannot in equity reach assets of the debtor in the hands of the personal representative of the original administrator, against whom a decree settling the estate has been rendered and performed. Thomas v. Sterns, 33 Ala. 137.

29. Pilkington v. Gaunt, 5 Dana (Ky.) 410; Ruth v. Owens, 2 Rand. (23 Va.) 507.

[a] **Where an administrator pleads no assets, and judgment is rendered quando,** the creditor is entitled to a bill in chancery for the discovery and production of assets. Ewing v. Handley, 4 Litt. (Ky.) 346, 14 AmD 140.

30. Redd v. Davis, 59 Ga. 823.

31. Redd v. Davis, 59 Ga. 823.

32. Salter v. Cain, 7 Ala. 478.

33. Taylor v. Savage, 2 How. (U. S.) 395, 11 L. ed. 313 [aff 1 How. 282, 11 L. ed. 132]; Wilson v. Auld, 8 Ala. 842; Meredith v. Scallion, 51 Ark. 361, 11 SW 516, 3 LRA 812; Thompson v. Knight, 23 Ga. 399.

34. Walker v. Montgomery, 143 Ill. A. 216, 221 ("Where the judgment at law was rendered against Michael Montgomery it was rendered in favor of appellant as administrator. The judgment itself fixed the status of the parties to it and determined the capacity in which appellant's recovery was had. Under it he, as administrator, had a right to enforce collection and to issue execution in the name in which recovery had been allowed").

35. Peo. v. Judges Ct. of C. Pl., 4 Cow. (N. Y.) 445; Platt v. Robins, 1 Johns. Cas. (N. Y.) 276, 1 AmD 110; Wheatley v. Lane, 1 Saund. 216, 219 note 8, 85 Reprint 233.

36. State Bank v. Hooks, 2 Port. (Ala.) 271; Sims v. Nash, 2 Miss. 271; McDowell v. Asbury, 66 N. C. 444; Palmer v. Waller, 1 M. & W. 689, 150 Reprint 611; Blackmor v. Mercer, 2 Saund. 402a, 85 Reprint 1214; Merchant v. Driver, 1 Saund. 303, 85 Reprint 420; Wheatley v. Lane, 1 Saund. 216, 219 note 8, 85 Reprint 233.

37. See cases supra note 36.

38. Gwin v. Latimer, 4 Yerg. (Tenn.) 22.

39. Gwin v. Latimer, 4 Yerg. (Tenn.) 22.

40. McDowell v. Asbury, 66 N. C. 444.

41. Whetstone v. McQueen, 137 Ala. 301, 34 S 229; Allen v. Allen, 80 Ala. 154.

[a] **Second execution.**—Where such execution is issued against the representative in the county where the judgment was rendered, it is not necessary that another execution to be levied de bonis testatoris should be sent to the county in which the representative was appointed. Allen v. Allen, 80 Ala. 154.

42. Schnader v. Bitzer, 9 LancBar (Pa.) 37.

43. McDowell v. Asbury, 66 N. C. 444; Gowan v. Gentry, 32 S. C. 369, 11 SE 82.

44. Hudson v. Modawell, 64 Ala. 481; Jewett v. Hoogland, 30 Ala. 716.

Summary proceedings on administration bond see infra § 2599.

45. Comstock's Succ., 44 La. Ann. 427, 10 S 850; Payne v. Dejean, 32 La. Ann. 888; Querry v. Faussier, 6 Mart. (La.) 645.

46. Comstock's Succ., 44 La. Ann. 427, 10 S 850; Castille v. Chacere, 13 La. Ann. 561; Carriere v. Meyer, 16 La. 126.

47. Philbrick's Succ., 18 La. Ann. 220; Stevens v. Stevens, 13 La. Ann. 416.

48. Beall v. Osbourn, 30 Md. 8.

49. Franzell v. Franzell, 153 Ky. 171, 154 SW 912.

50. Central Falls Prob. Ct. v. Adams, 27 R. I. 97, 60 A 769, 8 AnnCas 1028.

51. U. S.—Teasdale v. Branton, 23 F. Cas. No. 13,813, Brunn. Col. Cas. 28, 3 N. C. 377.

and upon the proof of a devastavit,[52] or upon the representative's failure to appear or to show cause why execution should not be awarded against him,[53] execution de bonis propriis may be awarded against him.[54] The writ must allege or suggest a devastavit by the representative,[55] and also the fact that a judgment was obtained against him in that character,[56] and must notify him to appear and show cause why execution should not issue against his own property,[57] although as to a defect of this character the writ may be amended.[58] It should also be against him in his representative capacity,[59] although, in the absence of pleading or proof to the contrary, it is not necessary to allege or show that defendant is the personal representative.[60] This proceeding is in the nature of an original action against the representative[61] in which he may set up any legal defense which he had no opportunity of pleading in the original suit,[62] but not matters which might have been pleaded therein.[63] Where the judgment rendered in the original action is considered an admission of assets to the amount of the claim in suit, the representative cannot set up fully administered or want of assets as a defense,[64] unless the nature of the original suit was such that the representative had no opportunity to set up such defense.[65] If the judgment is not an admission of assets, plene administravit may be pleaded.[66] If after verdict and before judgment defendant dies, and his administrator becomes a party to the suit, and judgment passes against him, and execution issues thereon, and is returned unsatisfied, on scire facias against the administrator he may plead no assets or insolvency, for he had no time to plead such plea in the original suit.[67]

[§ 2247] **c. By Action of Debt Suggesting Devastavit.** The more usual practice, both at common law and under the statutes, is for the judgment creditor to bring an action of debt against the representative on the judgment, suggesting a devastavit.[68] This action is sometimes a substitute for the

Me.—Sturgis v. Reed, 2 Me. 109.
Md.—State v. Goldsmith, 1 Harr. & J. 101.
Miss.—Black v. Barton, 14 Miss. 239.
N. H.—Folsom v. Blaisdell, 38 N. H. 100; Pillsbury v. Hubbard, 10 N. H. 224.
N. Y.—Peo. v. Judges Ct. of C. Pl., 4 Cow. 445; Platt v. Robins, 1 Johns. Cas. 276, 1 AmD 110.
N. C.—Dozier v. Simmons, 11 N. C. 26; Hunter v. Hunter, 4 N. C. 558.
Pa.—Schnader v. Bitzer, 9 LancBar 37.
R. I.—Carver v. Wells, 17 R. I. 688, 24 A 466.
Tenn.—Hillman v. Hickerson, 3 Head 575; Cox v. Cox, 2 Yerg. 305.

[a] **The pendency of a commission of insolvency is no bar to a scire facias** against an administrator upon a judgment had against him. Hatch v. Eustis, 11 F. Cas. No. 6,207, 1 Gall. 160. See also Howell v. Potts, 20 N. J. L. 1 (application representing that estate is insolvent precludes issuing of execution only as to cases pending when, or commenced after, the application is made).

52. Ring v. Burton, 5 Me. 45; Sims v. Nash, 2 Miss. 271; Graham v. Ruble, 1 Coldw. (Tenn.) 170.

[a] **The representative's appraisement and account** showing that sufficient assets have come into his hands to pay a debt sought to be enforced is sufficient to support a devastavit in a scire facias against him, where there is no evidence of the disposition of the assets. Stewart v. Richardson, 32 Miss. 313.

[b] **Allegations of a devastavit without proof thereof** will not justify a final judgment by default awarding execution de bonis propriis. Sims v. Nash, 2 Miss. 271.

[c] **A return of nulla bona** upon the execution against the estate is not by itself sufficient to support a suggestion of waste. Ring v. Burton, 5 Me. 45; Graham v. Ruble, 1 Coldw. (Tenn.) 170; Hillman v. Hickerson, 3 Head (Tenn.) 575. Contra Platt v. Robins, 1 Johns. Cas. (N. Y.) 276, 1 AmD 110.

53. Folsom v. Blaisdell, 38 N. H. 100; Pillsbury v. Hubbard, 10 N. H. 224.

54. Sims v. Nash, 2 Miss. 271; Folsom v. Blaisdell, 38 N. H. 100; Carver v. Wells, 17 R. I. 688, 24 A 466.

55. Cooper v. Hanna, 2 Ind. 97; Black v. Barton, 14 Miss. 239; Graham v. Ruble, 1 Coldw. (Tenn.) 170; Hillman v. Hickerson, 3 Head (Tenn.) 575; Cope v. McFarland, 2 Head (Tenn.) 543; Cox v. Cox, 2 Yerg. (Tenn.) 305; Wray v. Williams, 2 Yerg. (Tenn.) 302.

[a] **A scire facias alleging waste should aver** (1) that there are not goods of the estate in the representative's hands sufficient to pay the judgment. Cooper v. Hanna, 2 Ind. 97. (2) It should state the amount of assets which came into his hands as representative. Black v. Barton, 14 Miss. 239.

[b] **Contrary rule under statute.**—It is sufficient to allege that the sheriff has made a return of nulla bona upon an execution against the goods and estate of the deceased. It is not necessary in addition to allege or suggest any waste or misapplication of the funds. Peaslee v. Kelley, 38 N. H. 372.

56. Cope v. McFarland, 2 Head (Tenn.) 543; Cox v. Cox, 2 Yerg. (Tenn.) 305.

57. Cox v. Cox, 2 Yerg. (Tenn.) 305; Wray v. Williams, 2 Yerg. (Tenn.) 302.

58. Cox v. Cox, 2 Yerg. (Tenn.) 305.

59. Hillman v. Hickerson, 3 Head (Tenn.) 575; Cope v. McFarland, 2 Head (Tenn.) 543.

60. Stewart v. Richardson, 32 Miss. 313; Dimond v. Allen, 1 Tyler (Vt.) 10.

[a] **The reason** is that if defendant is not the personal representative, he should have shown it in his defense to the original suit. Dimond v. Allen, 1 Tyler (Vt.) 10.

61. Sims v. Nash, 14 Miss. 271.

62. Coleman v. Hall, 12 Mass. 570; Sims v. Nash, 14 Miss. 271; Dox v. Backentose, 12 Wend. (N. Y.) 542; Whiteford v. McLeod, 28 U. C. Q. B. 349.

[a] **No rendition of account.**—Under a statute providing that no execution should issue upon a judgment against an executor or administrator until an account of his administration had been rendered and settled, or unless on an order of the surrogate who appointed him, it was held a good plea to a declaration on a scire facias that the representative had not rendered an account of his administration to the surrogate. Dox v. Backenstose, 12 Wend. (N. Y.) 542.

[b] **The insolvency of the estate established since the recovery of the judgment** is a good plea to a scire facias against an administrator to have execution by a former judgment recovered against him in that capacity. Coleman v. Hall, 12 Mass. 570.

[c] **That there are effects of decedent in the jurisdiction subject to the execution** is no answer to a writ of scire facias with the suggestion of devastavit, for if there were such effects it became the duty of the representative to apply them accordingly. Stewart v. Richardson, 32 Miss. 313.

63. Dickson v. Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491; Hatch v. Eustis, 11 F. Cas. No. 6,207, 1 Gall. 160; Hunter v. Hunter, 4 N. C. 558; Cude v. Spence, 7 Humphr. (Tenn.) 278.

64. Coleman v. Hall, 12 Mass. 570; Platt v. Robins, 1 Johns. Cas. (N. Y.) 276, 1 AmD 110; Carver v. Wells, 17 R. I. 688, 24 A 466; Graham v. Ruble, 1 Coldw. (Tenn.) 170; Cope v. McFarland, 2 Head (Tenn.) 543; White v. Archbill, 2 Sneed (Tenn.) 588; Blount v. Hopson, 1 Yerg. (Tenn.) 399.

[a] **This rule has been applied** to a scire facias upon a foreign judgment against the representative. White v. Archbill, 2 Sneed (Tenn.) 588.

65. Cox v. Cox, 2 Yerg. (Tenn.) 305; Wray v. Williams, 2 Yerg. (Tenn.) 302.

66. Black v. Barton, 14 Miss. 239; Dimond v. Allen, 1 Tyler (Vt.) 10.

67. Hatch v. Eustis, 11 F. Cas. No. 6,207, 1 Call. 160.

68. Ala.—State Bank v. Hooks, 2 Port. 271.
Ga.—Porter v. Rountree, 111 Ga. 369, 36 SE 761.
Ky.—Jeeter v. Durham, 6 J. J. Marsh. 228; Harpending v. Daniels, 11 KyL 858.
Minn.—Whitney v. Pinney, 51 Minn. 146, 53 SW 198.
N. J.—Howell v. Potts, 20 N. J. L. 569; Van Horn v. Teasdale, 9 N. J. L. 379.
N. Y.—Peo. v. Judges Ct. of C. Pl., 4 Cow. 445.
N. C.—Hunter v. Hunter, 4 N. C. 558.
Pa.—Mead v. Kilday, 2 Watts 110.
S. C.—Willis v. Tozer, 44 S. C. 1, 21 SE 617.
Tenn.—Hillman v. Hickerson, 3 Head 575; Cope v. McFarland, 2 Head 543.
Va.—Nuttall v. McDouall, 6 Call (10 Va.) 53.
Wis.—Rusk v. Sackett, 28 Wis. 400.
Eng.—Wheatley v. Lane, 1 Saund. 216, 219 note 8, 85 Reprint 233.

[a] **It is essential to this action** that the judgment should have been rendered against the representative in that capacity. Van Horn v. Teasdale, 9 N. J. L. 379; Brown v. Hillegas, 20 S. C. L. 447.

[b] **Election of creditor.**—Where execution against the goods of decedent proves ineffectual, a creditor may elect to proceed at law against a representative for a devastavit, or by bill against him and the legatees or distributees for an account of assets and a proportional contribution to pay the debt. Sampson v. Payne, 5 Munf. (19 Va.) 176.

[c] **Where a judgment quando ac-**

writ of scire facias,[69] and sometimes a remedy concurrent with that writ.[70] The usual practice is not to bring such an action until after an execution has been issued and returned nulla bona,[71] although the action may be brought before this is done.[72] The foundation of this action is a devastavit committed by the personal representative, and without a suggestion or allegation and proof of a devastavit it cannot be maintained.[73] The representative may defend himself in such action by proving that there were goods of the intestate which might have been taken in execution of the judgment;[74] but he will not be allowed to plead any plea which assumes to place his defense merely on the want of assets;[75] or any other matter which he might or ought to have pleaded to the former action.[76] The amount of recovery in such action should in general be for the sum of the principal debt on which the judgment was rendered, together with interest and costs;[77] but if the representative pleads plene administravit and shows the real amount of assets in his hands unadministered at the date of the first judgment, the amount of recovery should be limited to that amount.[78] If a devastavit is established, an execution de bonis propriis may issue.[79]

[§ 2248] **4. Judgment for Representative's Personal Debts.** The general rule is that a judgment against the representative for his individual debt cannot be enforced by execution against decedent's estate in his hands until there has been a final accounting and settlement of the estate.[80] It has been held, however, that as between the representative and his individual creditor assets of decedent may be seized and sold on execution wherever the representative has so dealt with the assets as to be responsible for a devastavit,[81] or has used them in a manner inconsistent with his trust.[82]

[§ 2249] **5. Property Subject to Execution—a. In General.** A judgment de bonis testatoris rendered against a personal representative as such can be executed only against the goods and chattels of decedent in the representative's hands to be administered.[83] It cannot be levied upon the individual

ciderint is rendered against an administrator who has pleaded plene administravit an action of debt suggesting a devastavit may be maintained on such judgment against the representative personally for assets subsequently coming into his hands. Willis v. Tozer, 44 S. C. 1, 31 SE 617.

[d] **One executor may bring debt against another** suggesting a devastavit in the life of his testator on a judgment recovered by the testator against defendant. Berwick v. Andrews, 2 Ld. Raym. 971, 92 Reprint 147.

[e] **Such action will not lie against the executor of an executor** because founded on a tort which dies with the person. Griffith v. Beasly, 10 Yerg. (Tenn.) 434.

[f] **A decree rendered in another state to be levied on decedent's property,** and if there is no such property then on the representative's property, will support an action suggesting a devastavit against the representative. Pennington v. Hayes, 3 N. C. 330.

[g] **That plaintiff creditor did not present his claim to defendants under oath and affirmation** is no defense to such an action. Howell v. Potts, 20 N. J. L. 569.

[h] **Allegation of time and place.**—A plea by a defendant that he did not waste, etc., any of the chattels which at any time came into his hands to be administered, etc., is not bad for failure to allege time and place, since it is merely a negative averment. Howell v. Potts, 20 N. J. L. 569.

[i] **Insufficient pleas.** — (1) In debt on a judgment against two administrators with a suggestion of a devastavit, a plea that they or either of them did not waste the goods, etc., which came into the hands of one of them is not sufficient, since it does not apply to what came into the hands of the other. Howell v. Potts, 20 N. J. L. 569. (2) A plea setting up an application to settle the estate as insolvent, as a bar to such an action, is insufficient under a statute providing that such application shall not bar an action against the administrator, except when the application is made before action is brought or pending the action, where it fails to allege that the application was made before the judgment was obtained against the administrator. Howell v. Potts, 20 N. J. L. 569.

69. See cases supra note 68.

70. Hillman v. Hickerson, 3 Head (Tenn.) 575.

71. State Bank v. Hooks, 2 Port. (Ala.) 271; Peo. v. Judges Ct. of C. Pl., 4 Cow. (N. Y.) 445; Wheatley v. Lane, 1 Saund. 216, 219 note 8, 85 Reprint 233.

72. Burke v. Adkins, 2 Port. (Ala.) 236; Jeeter v. Durham, 6 J. J. Marsh. (Ky.) 228; Howell v. Potts, 20 N. J. L. 569.

73. Porter v. Rountree, 111 Ga. 369, 36 SE 761; Howell v. Potts, 20 N. J. L. 569; Brown v. Hillegas, 20 S. C. L. 447; Hillman v. Hickerson, 3 Head (Tenn.) 575; Griffith v. Beasly, 10 Yerg. (Tenn.) 434; Glenn v. Maguire, 3 Tenn. Ch. 695.

[a] **Return as evidence of devastavit.**—(1) The return of a devastavit by the sheriff is not conclusive evidence of that fact in such an action. Howell v. Potts, 20 N. J. L. 569. (2) A return of "No property to be found," on an execution against a certain person individually, issued on a judgment recovered against him as administrator, is no evidence of a devastavit as to him in that capacity. Forrester v. Tift, 84 Ga. 595, 10 SE 1015.

74. Griffith v. Beasly, 10 Yerg. (Tenn.) 434.

75. Moore v. Martindale, 2 Blackf. (Ind.) 353; Cope v. McFarland, 2 Head (Tenn.) 543; Hope v. Bague, 3 East 2, 102 Reprint 496; Erving v. Peters, 3 T. R. 685, 100 Reprint 803, 9 ERC 330.

76. Bastable v. Wilson, 2 F. Cas. No. 1,097, 1 Cranch C. C. 124; Porter v. Rountree, 111 Ga. 369, 36 SE 761; Walker v. Kendall, Hard. (Ky.) 404; Reigne v. Hunt, 28 S. C. L. 281.

[a] **Collateral attack on judgment.**—Where a judgment de bonis testatoris is obtained against an executor, execution issued thereon, a return of nulla bona made by the sheriff, and a suit brought on the judgment against the executor personally, suggesting a devastavit, the executor cannot in his defense to the suit make a collateral attack upon the judgment by showing fraud or mistake in its rendition; and this is true although the judgment was rendered by the same court in which the suit thereon is pending. Porter v. Rountree, 111 Ga. 369, 36 SE 761.

77. Greenup v. Woodworth, 1 Ill. 232; Young v. Lancaster, 5 T. B. Mon. (Ky.) 381; Walker v. Kendall, Hard. (Ky.) 404.

[a] **A judgment by default** in such action admits the truth of the allegation and declaration, and a jury of inquiry is not necessary to ascertain the damages. Greenup v. Woodworth, 1 Ill. 232.

[b] **Future interest.**—It is erroneous to give judgment in such case for running interest upon the debt until paid. Young v. Lancaster, 5 T. B. Mon. (Ky.) 381.

78. Com. v. Richardson, 8 B. Mon. (Ky.) 81.

79. Brown v. Hillegas, 20 S. C. L. 447.

80. Burton v. Robinson, 8 Del. 154; Worrall v. Driggs, 1 Redf. Surr. (N. Y.) 449; Ray v. Ray, Coop. 264, 10 EngCh 264, 35 Reprint 553; Whale v. Booth, 4 T. R. 625 note, 100 Reprint 1211; Farr v. Newman, 4 T. R. 621, 100 Reprint 1209, 2 ERC 214; McLeod v. Drummond, 17 Ves. Jr. 152, 34 Reprint 59.

[a] **Reason of rule.**—The interest of an executor in the assets of the estate is not vested until an accounting is had so as to be subject to the lien of an execution against him for his personal debts. Worrall v. Driggs, 1 Redf. Surr. (N. Y.) 449.

81. Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617.

82. Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617.

83. U. S.—Ford v. Douglas, 5 How. 143, 12 L. ed. 89.

Ala.—Wier v. Davis, 4 Ala. 442.

Ga.—Rogers v. Bullen, R. M. Charlt. 196.

Ky.—Myers v. Daviess, 10 B. Mon. 394.

Mass.—Nelson Theatre Co. v. Nelson, 216 Mass. 30, 102 NE 926.

Miss.—Packwood v. Elliott, 43 Miss. 504.

Pa.—Miller v. Ege, 8 Pa. 352; Mead v. Kilday, 2 Watts 110; Reakirt v. Flanagan, 6 Pa. Dist. 402, 40 WklyNC 375.

Tex.—Roberts v. Connellee, 71 Tex. 11, 8 SW 626.

Va.—Tucker v. Sweney, Jeff. 5.

[a] **Property devised to an executor in trust** is subject to execution against the trustee in his capacity as executor until it is assigned in accordance with the trust. Myers v. Daviess, 10 B. Mon. (Ky.) 394.

[b] **Money in the hands of a debtor of decedent** is not the subject of execution at the suit of a creditor on a judgment rendered against the administrator of such decedent. Hartshorne v. Henderson, 3 PaLJR 511, 6 PaLJ 192.

[c] **Independent executor.**—(1) This rule applies to an execution against an independent executor (Roberts v. Connellee, 71 Tex. 11, 8 SW 626; Hartz v. Hausser, (Tex. Civ. A.) 90 SW 63; Texas Sav. Loan Assoc. v. Banker, 26 Tex. Civ. A. 107, 61 SW 724) (2) where the estate is insolvent, as well as where it is solvent (Hartz v. Hausser, supra).

[d] **As to property transferred from the estate,** execution cannot be

property of the representative,[84] or upon personalty of the estate in the hands of a legatee or distributee with the representative's assent,[85] the creditor's remedy in such case being to pursue the representative at law or to follow the property in equity.[86] It has been held, however, that a creditor who has obtained judgment against an executrix may, within the limitation period, have execution levied upon land which the executrix in her individual right has redeemed from a mortgage executed by testatrix, although the executrix has conveyed the land to a third person.[87] A judgment de bonis propriis can only be executed upon the individual property of the representative, and not upon the property of the estate or of any other person.[88] Where a defaulting executor or administrator has no property in the county where the probate court having jurisdiction of his accounts sits, the issuance of execution to take his property in any other county is sometimes authorized by statute.[89]

[§ 2250] **b. Lands of Decedent.** As a general rule, an execution upon a judgment against a personal representative for a debt of decedent cannot be levied upon land which belonged to decedent.[90] Nevertheless, in some jurisdictions a resort to the land is permitted in case of necessity[91] as where there is a deficiency of personalty,[92] even though they have been partitioned and are in the hands of

levied by the creditor with a judgment against the representative; and if such judgment creditor contends that the transfer was fraudulent or void he should first bring a bill to set the transfer aside. Ford v. Douglas, 5 How. (U. S.) 143, 12 L. ed. 89. To same effect Wier v. Davis, 4 Ala. 442.

84. Jones v. Miles, 2 Miss. 50.

85. Castellaw v. Guilmartin, 58 Ga. 305; Anderson v. Irvine, 6 B. Mon. (Ky.) 231; Alston v. Foster, 16 N. C. 337; Randolph v. Randolph, 6 Rand. (27 Va.) 194; Burnley v. Lambert, 1 Wash. (1 Va.) 308.

[a] **After distribution.**—The personal property of a deceased debtor in the hands of a distributee, after distribution made, is liable to the satisfaction of a judgment obtained against an administrator. Brooks v. Lewis, 2 Miss. 207.

86. Burnley v. Lambert, 1 Wash. (1 Va.) 308.

87. Horton v. Robinson, 212 Mass. 248, 98 NE 681.

88. Lemon v. Thaxton, 59 Ga. 706; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; Small v. Small, 16 S. C. 64; Moore v. Ferguson, 2 Munf. (16 Va.) 421; Barr v. Barr, 2 Hen. & M. (12 Va.) 26.

[a] **A scire facias against an executor which directs the seizure of his property** and not the property of the testator cannot be levied upon the effects of the estate, the presumption being that the execution followed the judgment, and consequently that the judgment was against the executor personally. Lemon v. Thaxton, 59 Ga. 706.

89. Helfrich v. Stem, 17 Pa. 143 (decided under the act of March 29, 1832).

90. U. S.—Schley v. Collis, 47 Fed. 250, 13 LRA 567; O'Brien v. Woody, 18 F. Cas. No. 10,398, 4 McLean 75.

Ala.—Taylor v. Taylor, 162 Ala. 162, 50 S 375; Spigener v. Farquhar, 82 Ala. 569, 3 S 47.

Conn.—Flynn v. Morgan, 55 Conn. 130, 10 A 466; Welles v. Faning, 1 Root. 95.

Ga.—Jones v. Parker, 55 Ga. 11.

Ill.—Reichert v. Carr, 183 Ill. A. 99.

Ky.—Helm v. Darby, 3 Dana 185.

Mass.—Thayer v. Hollis, 3 Metc. 369; Clarke v. Tufts, 5 Pick. 337; Ex p. Allen, 15 Mass. 58; Borden v. Borden, 5 Mass. 67, 4 AmD 32.

Miss.—Packwood v. Elliott, 43 Miss. 504; Buckingham v. Nelson, 42 Miss. 417; Foster v. Sumner, 11 Misc. 606; Lowry v. Houston, 4 Miss. 394.

N. Y.—Matter of Lazelle, 16 Misc. 515, 40 NYS 343; Matter of Hesdra, 23 NYS 842, Pow. Surr. 359; Matter of Jansen, 9 NYS 451, 1 Conn. Surr. 362.

N. C.—Cardwell v. Brodic, 5 N. C. 97.

Oh.—Gray v. Askew, 3 Oh. 466.

Pa.—Crawford v. Parker, 26 Pa. Co. 414.

Ont.—Freed v. Orr, 6 Ont. A. 690.

[a] **Reason for rule.**—"The lands of an intestate, at common law and under our statutes, descend immediately to his heirs. The administrator takes no estate or interest in them; hence a judgment against him in any capacity cannot bind the lands. It has always been the policy of the law to prevent lands of a decedent from being subject to legal process issuing against personal representatives. Lands of an intestate are liable to process issuing against the heirs, because they are the owners, but not to that issuing against the personal representative, because he is not the owner, and has no interest therein, except that which the statute gives him of intercepting the possession and retaining it, if necessary, to collect rents, or to sell to pay debts in such cases, and in such mode and proceedings, and such only, as the statute authorizes and directs, and the statute has never authorized him or the creditors to sell it under an execution against the personal representative. If there be no necessity for renting, or for the sale of the lands for the purpose authorized by the statutes, the personal representative, of course, cannot intercept the possession for the purposes of thus administering the land. The administrator has no authority to charge the lands for any purpose, except as given him by statute; for at common law lands could not be sold for the debts of the decedent, and under our law they can be sold for such purposes only under the conditions and in the modes prescribed by the statute." Taylor v. Taylor, 162 Ala. 162, 166, 50 S 375.

[b] **No revival against devisees.**—On the return of nulla bona to an execution against an executor a scire facias will not lie to revive the judgment against the devisees to subject the real estate. Foster v. Sumner, 11 Miss. 606.

[c] **Effect of testamentary direction for sale.**—The real estate is not subject to execution, although decedent's will directed the sale of such real estate for the purpose of administration and distribution, since in such case the doctrine of equitable conversion does not apply. Matter of Hesdra, 23 NYS 842, Pow. Surr. 359.

[d] **Lands devised to an executor for the payment of the testator's debts** are equitable assets which a creditor can reach only through the aid of a court of equity, and are not subject to execution on a judgment against the executor. Helm v. Darby, 3 Dana (Ky.) 185; Smith v. Caswell, 3 N. C. 285. See also Matter of Hesdra, 23 NYS 842, Pow. Surr. 359 (land directed by will to be sold for purposes of administration).

[e] **Land turned over to heir on final settlement.**—Where land of an intestate is turned over in good faith by the administrator to the sole heir on final settlement, judgment thereafter against the administrator cannot be enforced against it by levy and sale without further proceedings. Jones v. Parker, 55 Ga. 11. To like effect Daniel v. Hollingshead, 16 Ga. 190.

[f] **Realty purchased by an executor on a sale under a foreclosure** of a mortgage held by him as executor is not subject to execution. Matter of Lazelle, 16 Misc. 515, 40 NYS 343.

91. Del.—Holschumaker v. Etchells, 9 Del. Ch. 33, 74 A 644.

Ky.—Litsey v. Smith, 10 B. Mon. 74.

Me.—Frost v. Ilsley, 54 Me. 345; Nowell v. Bragdon, 14 Me. 320; Sturgis v. Reed, 2 Me. 109.

Mass.—Tracy v. Strassel, 191 Mass. 187, 77 NE 700; Dunbar v. Kelly, 189 Mass. 390, 75 NE 740; Bigelow v. Jones, 4 Mass. 512; Wyman v. Brigden, 4 Mass. 150.

S. C.—Smith v. Byers, 102 S. C. 215, 86 SE 481; Brock v. Kirkpatrick, 60 S. C. 322, 38 SE 779, 85 AmSR 847; Hendrix v. Holden, 58 S. C. 495, 36 SE 1010; Jones v. Wightman, 20 S. C. L. 579; Martin v. Latta, 15 S. C. L. 128; D'Urphey v. Nelson, 3 S. C. L. 289; Smith v. Smith, 6 S. C. Eq. 134.

[a] **Where both heir or devisee and representative are sued,** and nulla bona is returned as to the latter, the creditor may have satisfaction out of the real estate. Litsey v. Smith, 10 B. Mon. (Ky.) 74.

[b] **Land fraudulently conveyed.**—(1) A creditor may, on recovering judgment against his debtor's administrator, cause execution to be levied on land fraudulently conveyed by his debtor. Dunbar v. Kelly, 189 Mass. 390, 75 NE 740. (2) An execution issued upon a judgment recovered against an administrator of an estate represented as insolvent may, under Rev. St. c 76 §§ 13, 43, be legally levied on the real estate of the intestate fraudulently conveyed by him, if the administrator assumed the defense of the action pending against his intestate, and neglected to suggest the insolvency upon the record. Wyman v. Fox, 55 Me. 523, 59 Me. 100.

[c] **Release of attachment.**—A creditor of a deceased person obtaining judgment against the administrator is not estopped from levying his execution on the real estate of deceased by his release of the attachment on mesne process prior to the intestate's death. Tracy v. Strassel, 191 Mass. 187, 77 NE 700.

[d] **An execution creditor will not be enjoined** from selling real estate of a decedent on a judgment recovered against his administrator because of a defense to the judgment available in the action at law, even though the devisees and heirs at law are complainants in the bill for injunction; nor will such sale be enjoined on the ground that after the issuing of execution the administrator applied to the orphans' court for leave to sell land to pay debts which the personal estate was insufficient to pay, or on the ground that the administrator showed in his first account a balance due the estate. Holschumaker v. Etchells, 9 Del. Ch. 33, 74 A 644.

92. Gaither v. Welch, 3 Gill & J. (Md.) 259; In re Fritz, (N. J. Prerog.) 91 A 1017; Cardwell v. Brodic, 5 N. C. 97; Henry v. Mills, 1 Lea (Tenn.) 144; Woolridge v. Page, 1 Lea (Tenn.) 135; Saunders v. Wilder, 2 Head (Tenn.) 577; Gilman v. Tisdale, 1 Yerg. (Tenn.) 285; Peck v. Wheaton, Mart. & Y. (Tenn.) 353.

[a] **Full administration and deficiency.**—A judgment of execution

the heirs or devisees,[93] or of purchasers from the heirs or devisees.[94] Special statutory proceedings are sometimes required in order to subject the land.[95]

[§ 2251] **c. Under Judgment Quando Acciderint.** A judgment quando acciderint applies to assets and property which may come into the representative's hands after the judgment is rendered, and it therefore can be levied on all of decedent's estate except such as was in the hands of the representative at the time of the judgment or such as had been previously administered by him.[96] Conversely, it has been held that scire facias to reach assets which have come into the representative's hands since the judgment was rendered can issue only on a judgment quando acciderint.[97]

[§ 2252] **6. Issuance, Form, and Requisites of Execution—a. In General.** If the judgment fixes the liability upon decedent's estate, the execution should issue against the representative as such, and should direct the levy to be made upon the property of the estate in his hands to be administered.[98] If the judgment fixes the liability upon the representative individually, the execution should issue against him individually and should direct the levy to be made upon his individual property.[99] Under some statutes where the judgment is for debt or damages and costs, one execution may issue for the debt or damages against the estate of decedent and another for costs against the representative's individual property.[1]

The mere addition of the word "executor" or "administrator" to defendant's name in a decree or in the execution thereon, without anything further to indicate that it is against him in his representative capacity, does not prevent the decree from binding his personal goods and chattels and the execution from being levied thereon,[2] nor does it authorize a levy on property of decedent.[3]

[§ 2253] **b. Time for Issuance.** Execution upon a judgment rendered against a personal representative must be issued within the time limited by law, if any, after the rendition of the judgment,[4] unless a sufficient cause for delay is shown;[5] but under some statutes it cannot be issued until the expiration of a certain period of time.[6]

[§ 2254] **7. Lien, Levy, or Extent and Custody of Property.** In accordance with the general rules

against the real estate of a deceased debtor in the hands of his representatives cannot issue unless it appears that the executor has fully administered, and had not sufficient assets to satisfy the creditor's demand. Carwell v. Brodie, 5 N. C. 97.

[b] **Proof of claim.**—Judgments obtained against an executor of an administrator by a creditor of decedent are not alone such evidences of debt against the heir at law as to entitle the creditor to payment from the proceeds of the real estate; but when such proceeds are in the court, and a creditor wishes to subject them to his claim on the ground of a deficiency of personal assets, he need not exhibit full proof of his claim in the first instance. That may be done under an order nisi upon the heirs at law. Gaither v. Welch, 3 Gill & J. (Md.) 259.

93. Nowell v. Bragdon, 14 Me. 320.

[a] **Extent.**—An execution issued on a judgment against the goods and estate of a decedent in the hands of his executor or administrator may be legally extended on any lands of which decedent died seized, although a partition of them among the heirs or devisees may already have been made by order of the probate court. Nowell v. Bragdon, 14 Me. 320.

[b] **Judgment after devisee in possession.**—A devisee's possession of the devise, with the bona fide assent of the executor, ousts the right of creditors to sell the devise under a judgment obtained against the executor alone after such assent and possession. Rowell v. Hyatt, 108 S. C. 300, 94 SE 113.

94. Tracy v. Strassel, 191 Mass. 187, 77 NE 700.

95. Pauley v. Langdon, 83 Ind. 353; Allen v. Vestal, 60 Ind. 245; Berry v. Bullard, 8 Blackf. (Ind.) 399; Brownfield v. Vail, 7 Blackf. (Ind.) 203; Williams v. Morehouse, 6 Blackf. (Ind.) 215; Brown v. Rose, 6 Blackf. (Ind.) 69; Leiper v. Thomson, 60 Pa. 177; Kessler's App., 32 Pa. 390; Sample v. Barr, 25 Pa. 457; McCracken v. Roberts, 19 Pa. 390; Benner v. Phillips, 9 Watts & S. (Pa.) 13; Murphy's App., 8 Watts & S. (Pa.) 165; Payne v. Craft, 7 Watts & S. (Pa.) 458.

[a] **The petition** should also set out and describe the real estate of a debtor against which the creditor seeks execution. Armstrong v. Milligan, 6 Blackf. (Ind.) 463.

[b] **A judgment by default** against some of defendants to such petition is erroneous, where no process appears to have been issued or publication made or where the record does not show the petition to have been proved. Berry v. Bullard, 8 Blackf. (Ind.) 399.

[c] **Prior to the Pennsylvania Act of 1834** a judgment against a representative, whether adverse or by confession, bound the lands of decedent without notice to the heirs or devisees. Payne v. Craft, 7 Watts & S. 458; Pennsylvania Agricultural, etc., Bank v. Stambaugh, 13 Serg. & R. 299; Morris v. McConaughey, 1 Yeates 9.

96. Hollis v. Sales, 103 Ga. 75, 29 SE 482; Smith v. Smith, 59 Ga. 550; Allen v. Matthews, 7 Ga. 149; McDowall v. Branham, 11 S. C. L. 572.

97. Miller v. Spencer, 6 N. C. 281.

98. Boykin v. Cook, 61 Ala. 472; Wright v. Scott, 145 Ga. 514, 89 SE 426; Wall v. Jones, 62 Ga. 725; Jones v. Parker, 60 Ga. 500; Horn v. Bird, 45 Ga. 610; Horne v. Spivey, 44 Ga. 616; Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc]; Beazley v. Dunn, 42 S. C. L. 345; Lowndes v. Pinckney, 21 S. C. Eq. 44.

[a] **An erroneous judgment against a representative without designating him as such** does not warrant an execution against the estate. McCullough v. Tidwell, 3 S. C. L. 479.

[b] **Failure to describe defendant in representative capacity.**—In a suit against an executor as such on a judgment against him in that capacity, where defendant admits the judgment and pleads payment, and at the trial, as a witness, admits the rendition of the judgment, it is immaterial that the fi. fa. on the judgment did not describe defendant in his representative capacity. Solomon v. Chapman, 9 Ga. A. 189, 70 SE 964.

[c] **Execution against representative and surety.**—Where a judgment de bonis intestati is rendered against an appellant who is administrator, and at a subsequent term judgment is rendered against his surety for the appeal, the entries only authorized one execution; de bonis intestati as to the principal, and de bonis propriis as to the surety. Bancroft v. Stanton, 7 Ala. 351.

[d] **A variance** (1) between the execution and the judgment is ground for quashing the execution. Moughon v. Brown, 68 Ga. 207. (2) But it does not render the execution void. Beale v. Botetourt Justices, 10 Gratt. (51 Va.) 278. (3) The execution may be amended on motion to correspond with the judgment. Empire State Chemical Co. v. Shubrick, 148 Ga. 551, 97 SE 541; Hollis v. Sales, 103 Ga. 75, 29 SE 482; Dewey v. Peeler, 161 Mass. 135, 36 NE 800, 42 AmSR 399; McCormack v. Meason, 1 Serg. & R. (Pa.) 92.

[e] **An execution against a representative jointly with other defendants** on a judgment recovered against decedent with the other defendants is irregular and void. Blanks v. Rector, 24 Ark. 496, 88 AmD 780.

99. Lemon v. Thaxton, 59 Ga. 706; Keniston v. Little, 30 N. H. 318, 64 AmD 297; Power v. Speckman, 126 N. Y. 354, 27 NE 474; Rowell v. Hyatt, 108 S. C. 300, 94 SE 113, 115 [cit Cyc].

[a] **An execution against a representative personally is presumed to follow** the judgment and cannot be levied on the estate until amended. Lemon v. Thaxton, 59 Ga. 706; Freeman v. Binswanger, 57 Ga. 159.

[b] **Execution upon a decree directing payment of money** (1) by a representative as such must run against the representative's property. Power v. Speckman, 126 N. Y. 354, 27 NE 474; Bennett v. Crain, 41 Hun (N. Y.) 183 [dist Peo. v. McAdam, 84 N. Y. 287]; Matter of Quackenbos, 38 Misc. 66, 76 NYS 964; Matter of Waring, 7 Misc. 502, 28 NYS 393; Davies v. Skidmore, 5 Hill (N. Y.) 501; Peyser v. Wendt, 2 Dem. Surr. (N. Y.) 221. (2) Form of execution on a surrogate's order or decree for the payment of money by a representative in the supreme court. Davies v. Skidmore, 5 Hill (N. Y.) 501.

1. Ludwig v. Blackinton, 24 Me. 25; Look v. Luce, 136 Mass. 249; Beasley v. Mott, 46 S. C. L. 354.

2. Ga.—Bagley v. Roberson, 57 Ga. 148; Fry v. Shehee, 55 Ga. 208; Tinsley v. Lee, 51 Ga. 482.

Iowa.—Lepage v. McNamara, 5 Iowa 124.

N. Y.—Olmsted v. Vredenburgh, 10 HowPr 215.

S. C.—Gowan v. Gentry, 32 S. C. 369, 11 SE 82.

Vt.—Rich v. Sowles, 64 Vt. 408, 23 A 723, 15 LRA 850.

3. Wright v. Scott, 145 Ga. 514, 89 SE 426.

4. Taylor v. Daniel, 9 B. Mon. (Ky.) 53.

5. Taylor v. Daniel, 9 B. Mon. (Ky.) 53 (the absence of the clerk was sufficient to excuse a delay of ten days in suing out execution after the time limited).

6. Taylor v. Volk, 38 N. J. L. 204 (no execution can issue on a judg-

regulating the levy of executions upon judgments[7] the personal representative is entitled to notice to choose the appraiser or appraisers, where appraisement is a requisite to a valid sale of the property,[8] or he may waive an inquisition and condemnation.[9] A suggestion of insolvency of the estate by the representative prevents an execution thereafter levied on the estate from creating a lien thereon, although the teste of the writ was dated prior to such suggestion.[10] A levy collusively made by the representative is void as against another creditor of the estate who makes a regular levy on the same estate.[11] Equity will relieve an executor from liability for forthcoming bonds given after confession of judgment, where he executed them believing the assets of the estate were ample to meet them but they proved not to be so by reason of an unexpected depreciation.[12]

[§ 2255] **8. Stay, Quashing, Vacating, and Relief against Execution.**[13] An execution against a personal representative should be suspended where it does not show on its face whether it is to be satisfied out of the individual property of defendant representative or out of the property of his decedent;[14] or until it is determined what amount of assets is applicable thereto;[15] or, it has been held, where it appears that the personal assets are insufficient to pay all debts, until an application for the sale of real estate is made.[16] An execution upon a judgment rendered for or against a personal representative may also be stayed, under some statutes, by defendant giving a proper bond;[17] or where equitable circumstances exist, as where the estate has been represented insolvent,[18] a court of equity may restrain the execution by an injunction.[19] So also where a creditor, who recovered judgment against a debtor in his lifetime, did not sue out execution, on reviving such judgment by scire facias against the administrators of the debtor after his death, he will be enjoined from enforcing his judgment beyond the pro rata share to which he may be entitled.[20] An execution issued by a representative who had power only to prosecute the action will be vacated;[21] and the fact that he afterward obtains authority to issue such execution will not cure the illegal issuance.[22] Sureties who have been released or discharged from liability on the administration bond may obtain relief from a statutory execution

ment in an action commenced against a representative after the making of an order, authorized under the supplement of March 17, 1855, to the Orphans' Court Act, §§ 22, 24, limiting creditors to nine months within which to bring in their claims, until ten months after the making of such order).

7. See Executions §§ 206–333.

8. Daniels v. Ellison, 3 N. H. 279.

9. Bennett v. Fulmer, 49 Pa. 155; Hunt v. Devling, 8 Watts (Pa.) 403. But compare Sample v. Barr, 25 Pa. 457 (where this was doubted).

10. Gunn v. Boone, 7 Heisk. (Tenn.) 8.

11. Goddard v. Divoll, 1 Metc. (Mass.) 413 (where a personal representative fraudulently represents both the nominal plaintiff and also the estate in an action against himself as administrator, and in levying execution on the judgment thus obtained he obtains no title thereunder, and a nonsuit is properly entered against him in an action for the recovery of land claimed under such levy).

12. Miller v. Rice, 1 Rand. (22 Va.) 438.

13. Supersedeas or stay pending appeal generally see Appeal and Error §§ 1391–1460.

14. Higgins v. Driggs, 21 Fla. 103.

15. Rountree v. Britt, 94 N. C. 104 (where an administrator recovers judgment on his cause of action, and defendant on his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on defendant's judgment will be stayed until it is determined what amount of assets is applicable thereto).

16. Dundas v. Leiper, 1 Phila. (Pa.) 569 (holding, however, that a levari facias on a mortgage is not an execution, within the act of Febr. 24, 1834 § 35, directing that in case of an execution against executors if the personal assets are insufficient to pay all debts the court shall stay proceedings until application is made to the orphans' court for the sale of the real estate, and hence the proceedings will not be stayed to enable executors to apply to the orphans' court for a sale of the premises as provided by the act). But compare Gray v. Coulter, 4 Pa. 188 (decided under law prior to act of 1834).

17. Elliott v. Moore, 5 Blackf. (Ind.) 270; Glassford v. Hacket, 3 Call (7 Va.) 193.

[a] **Stay by donee of property.**— In an action by the administrator of an insolvent estate, acting as representative of the creditors to recover property donated by the intestate, it was proper to stay execution against the donee upon payment by him of the costs and the filing of a bond to pay such sum as should be necessary to discharge the debts and the expenses of administration. Abbott v. Tenney, 18 N. H. 109.

[b] **Judgment against representative as such not repleviable.**—A judgment against an administrator in his representative capacity is not a repleviable judgment within the meaning of the statute authorizing a stay of execution upon the giving of repleviable bail, and therefore the representative is not liable on such bail given to secure a stay of such a judgment. Egbert v. State, 4 Ind. 399.

18. Lambert v. Mallet, 50 Ala. 73; Neibert v. Withers, Sm. & M. Ch. (Miss.) 599; Johnson v. Rutherford, 28 N. D. 87, 147 NW 390.

[a] **Allegation of fraud.**—It is no answer to the bill that the representation of insolvency was procured by fraud. Neibert v. Withers, Sm. & M. Ch. (Miss.) 599.

19. Ala.—Lambert v. Mallett, 50 Ala. 73.

Ark.—Brice v. Taylor, 51 Ark. 75, 9 SW 854; Fowler v. Williams, 20 Ark. 641.

Del.—Holschumaker v. Etchells, 9 Del. Ch. 33, 74 A 644.

Ga.—Dobbs v. Prothro, 57 Ga. 14.

Ill.—Cohen v. Menard, 136 Ill. 130, 24 NE 604.

Md.—Kearney v. Sascer, 37 Md. 264.

N. C.—Curtis v. Hartsfield, 4 N. C. 114.

Pa.—Randalls v. Davidson, 1 Pa. C. Pl. 13.

Tex.—Coombs v. Lane, 17 Tex. 280.

Va.—Hickerson v. Helm, 2 Rob. (41 Va.) 628.

[a] **Damages on dissolution.**— Where defendant produces no evidence to sustain his allegation, he will, on dissolution of the injunction, be liable under the statute to damages. Fowler v. Williams, 20 Ark. 641.

[b] **Failure to plead limitations no ground for injunction.**—Where an executor is under no legal or moral duty to plead limitations to an action against him, his failure to do so affords no ground for an injunction against the enforcement of the decree. Lee v. Colston, 5 T. B. Mon. (Ky.) 238.

[c] **Right of creditor.**—Although the heirs renounce, a creditor cannot, without letters of curatorship, enjoin an execution sale of the property under a judgment against decedent. A curator must be appointed, and the injunction prosecuted by him. Vienne v. Boissier, 10 Mart. (La.) 359.

[d] **Fault of representative.**— Where the representative who seeks relief shows that the erroneous execution was attributable to his own culpable negligence or misconduct, and comes into court without having done equity, he will not be relieved by equity. Kearney v. Sascer, 37 Md. 264.

[e] **Levy under execution against representative individually.**— Where property in the hands of the representative is levied on under an execution against him individually, the probate court will enjoin the sale of the property until the representative accounts and the property belonging to him individually is thereby ascertained. Turner's Est., 7 Kulp (Pa.) 481; Klein's Est., 11 WklyNC (Pa.) 354.

[f] **Levy on property specifically bequeathed.**—Where execution against the goods of a testator is levied on property specifically bequeathed by him, and allotted to the legatee by the executor, an injunction ought to be granted to restrain proceedings until an account of the assets remaining unadministered should be taken. Sampson v. Bryce, 5 Munf. (19 Va.) 175; Scott v. Holliday, 5 Munf. (19 Va.) 103.

[g] **Where judgment has been recovered against the executor of the debtor's surety,** the creditor may enforce his claim by execution against the property of the executor, although an injunction is pending restraining the creditors generally of the principal debtor from proceeding against him at law. Beall v. Osbourn, 30 Md. 8.

[h] **Proceedings under a special execution,** allowed by statute against the estate of a decedent whose lands have been sold under a prior execution, upon condition that the land is first redeemed from the prior execution sale, will be enjoined where the first execution has been set aside in equity. Cohen v. Menard, 136 Ill. 130, 24 NE 604.

20. Crenshaw v. Delgado, 1 N. M. 376.

21. Lambert v. Metropolitan St. R. Co., 33 Misc. 579, 68 NYS 877.

22. Lambert v. Metropolitan St. R. Co., 33 Misc. 579, 68 NYS 877 [aff 56 App. Div. 624 mem, 67 NYS 1137 mem].

issued against them and the representative by a supersedeas,[23] or by motion to the court, if in session, to quash the execution,[24] or if there are equitable circumstances by a bill in equity.[25] A variance between the execution and the judgment may constitute a valid ground for quashing the execution.[26]

[§ 2256] **9. Sale—a. In General.** A sale of a decedent's property under execution upon a judgment rendered against his personal representative passes a good title to the purchaser only where all the statutory requirements have been complied with,[27] and the sale conforms to the judgment and execution,[28] and is of property subject to such execution.[29] But where the purchaser has acted in good faith and the heirs or devisees have received a benefit from the proceeds of the sale, as by such proceeds being applied to the payment of debts to which the property was subject, equity will not permit the property to be recovered from the purchaser except upon his being reimbursed.[30] Where, after a writ of venditioni exponas has been issued and stayed, an administrator de bonis non with the will annexed is substituted as defendant, and he permits a pluries writ to be issued and the property to be sold by the sheriff and a sheriff's deed to be executed and acknowledged, he waives such irregularities affecting innocent purchasers at the sale as that the executor of defendant was the substituted defendant at the time the fieri facias was issued, although he had previously renounced as executor.[31]

On foreclosure of vendor's lien. It has been held that in an action against administrators and others to enforce a vendor's lien, the district court has jurisdiction to enforce its judgment by a sale of the property instead of leaving its enforcement to the county court under the probate statutes.[32]

Where execution is not permitted to issue against a decedent's estate, a sale of decedent's property under such execution is void,[33] although the representative made no objection to the proceedings and received the surplus of the proceeds after payment of the amount of the judgment upon which the execution issued.[34]

[§ 2257] **b. Disposition of Proceeds.** The disposition of the proceeds of an execution sale of a decedent's property is regulated entirely by statute,[35] under which it is variously provided that the proceeds shall be applied to all liens of record,[36] or to the satisfaction of the executions under which the property is sold,[37] unless proceedings were taken to declare the estate insolvent before execution issued, in which case the proceeds should be distributed pro rata among decedent's creditors;[38] and that the surplus, if any, shall be paid to the personal representative for distribution according to law.[39]

23. Hudson v. Modawell, 64 Ala. 481.

24. Hudson v. Modawell, 64 Ala. 481.

25. Hudson v. Modawell, 64 Ala. 481.

26. See supra § 2252 note 98 [d].

27. Fla.—Ponder v. Moseley, 2 Fla. 207, 48 AmD 194.

Ga.—Worthy v. Hames, 8 Ga. 234.

Iowa.—Lepage v. McNamara, 5 Iowa 124.

Pa.—McCormick v. Skelly, 201 Pa. 184, 50 A 765; Murphy's App., 8 Watts & S. 165.

S. C.—Rowell v. Hyatt, 108 S. C. 300, 94 SE 113.

S. D.—McCarthy v. Speed, 16 S. D. 584, 94 NW 411.

Tex.—Carroll v. Carroll, 20 Tex. 731.

[a] **Where the heirs or devisees are not made parties to a judgment obtained against a representative,** in compliance with statute, a sale of decedent's real estate under such judgment does not divest the title of the heirs. Lepage v. McNamara, 5 Iowa 124; McCracken v. Roberts, 19 Pa. 390; Mangan's App., 20 WklyNC (Pa.) 257.

28. Boykin v. Cook, 61 Ala. 472; Rowell v. Hyatt, 108 S. C. 300, 94 SE 113; Anderson v. Lyons, 2 Tenn. Ch. 61.

[a] **Illustration.**—Where a judgment against a personal representative is satisfied by levy of an execution on the right, title, and interest of the personal representative in certain "land" belonging to the estate and sale thereof to judgment plaintiff, the purchaser gets nothing, and equity has jurisdiction to set aside the satisfaction. Anderson v. Lyons, 2 Tenn. Ch. 61.

[b] **Where the judgment and execution run against the personal representative de bonis propriis,** (1) only his individual interest, if any, can be sold and not the interest of other devisees or heirs. Small v. Small, 16 S. C. 64. (2) A sale of a decedent's land under an execution upon a representative personally, issued on a judgment against him in his representative capacity, is void. Boykin v. Cook, 61 Ala. 472.

29. See cases infra this note.

[a] **Land devised in trust to pay debts.**—A sale under execution of land devised to an executor in trust to pay debts may be quashed on motion of such executor. Helm v. Darby, 3 Dana (Ky.) 185.

[b] **Where an executor has assented to a specific legacy,** and afterward an execution issues against the goods of the testator in his hands, the purchaser of such specific legacy at the sheriff's sale under the execution acquires no title. Alston v. Foster, 16 N. C. 337; Burnley v. Lambert, 1 Wash. (1 Va.) 308.

[c] **A sale of the representative's individual property** under a judgment against him as representative may be set aside on motion of the representative in his individual capacity. McCarthy v. Speed, 16 S. D. 584, 94 NW 411.

30. Smith v. Knoebel, 82 Ill. 392; McGee v. Wallis, 57 Miss. 638, 34 AmR 484; Alston v. Foster, 16 N. C. 337; Evans v. Meylert, 19 Pa. 402.

[a] **Void execution.**—Although a judgment against an administrator can be enforced only by being brought under administration of the probate court, and execution otherwise issued is void, it will not be declared void after sale thereunder, except that the amount due on the judgment is paid, or so much of the lands as may be necessary to pay the judgment is sold. Hornor v. Hanks, 22 Ark. 572.

[b] **Redemption.**—Smith v. Knoebel, 82 Ill. 392.

[c] **Where the purchaser under the execution is afterward ousted by the heirs,** he is entitled to a decree against the administrator and heirs for the amount of the purchase money credited upon the execution, with interest. White v. Park, 5 J. J. Marsh. (Ky.) 603. Contra Sanders v. Sanders, 13 N. C. 193.

31. Riffert v. Lehigh Valley Coal Co., 232 Pa. 629, 81 A 810.

32. Stewart v. Webb, (Tex. Civ. A.) 156 SW 537.

33. O'Brien v. Woody, 18 F. Cas. No. 10,398, 4 McLean 75; Meredith v. Scallion, 51 Ark. 361, 11 SW 516, 3 LRA 812; Hornor v. Hanks, 22 Ark. 572; Bertin v. Phillips, 1 La. Ann. 173; McGee v. Wallis, 57 Miss. 638, 34 AmR 484.

34. Bertin v. Phillips, 1 La. Ann. 173; Emmons v. Williams, 28 Tex. 776.

35. See the statutes, and cases infra this section.

36. Morrison's Case, 9 Watts & S. (Pa.) 116; Willing v. Yohe, 1 Phila. (Pa.) 223.

[a] **No liens except those actually existing of record** at the time of decedent's death are liens of record within the meaning of the statute, and the filing of a copy of a contract does not make the debt of a decedent a lien of record. Willing v. Yohe, 1 Phila. (Pa.) 223.

[b] **Issue to determine amount due on judgment.**—Where the proceeds of realty sold at an orphans' court or execution sale are before an auditor for distribution, an application to the court for an issue to determine how much is due on a judgment against an administrator is proper. Bacon's Est., 2 Phila. (Pa.) 376.

37. Dibble v. Woodhull, 24 N. J. L. 618; Huger v. Dawson, 37 S. C. L. 328.

[a] **Where an executor does not plead plene administravit,** and several judgments, of different dates, are thereupon recovered against him under which the sheriff sells real estate, he is bound to apply the proceeds to the executions in the order of their dates, without regard to the grade of the claims on which the judgments are founded. The rule, it seems, is the same when personal estate is levied on. Huger v. Dawson, 37 S. C. L. 328.

[b] **Distinction between realty and personalty.**—Where personalty is sold, the whole proceeds, if these are needed, go to payment of the execution debt; but where land is sold the proceeds must be applied to all debts in their order of priority. Pennsylvania Agricultural, etc., Bank v. Stambaugh, 13 Serg. & R. (Pa.) 299.

38. Matthews v. Williams, 13 Fla. 615; Wemple v. Van Arx, 46 N. J. Eq. 53 [rev 45 N. J. L. 89]; Dibble v. Woodhull, 24 N. J. L. 618 [rev on other grounds 46 N. J. L. 531].

39. Vincent v. Platt, 5 Del. 164; Robinson v. Robinson, 3 Del. 391; Morrison's Case, 9 Watts & S. (Pa.) 116; Com. v. Rahm, 2 Serg. & R. (Pa.) 375; Willing v. Yohe, 1 Phila. (Pa.) 223.

[a] **Proceeds of real estate.**—

[§ 2258] **V. Review**[40]**—1. In General.** Appeals from judgment or orders in probate matters or on claims against a decedent's estate are governed and controlled by the statutes regulating the settlement of decedents' estates;[41] and judgments or orders against a decedent's estate not provided for by these statutes are not appealable unless they come within the statutes relating to appeals in civil cases generally.[42]

[§ 2259] **2. Right and Duty to Appeal.** An appeal from a judgment or order rendered against or affecting a decedent's estate may be taken by his personal representative,[43] unless he has resigned or been removed, in which case his successor may prosecute the appeal, upon his being made a party to the suit.[44] It has been held that heirs of a decedent may also appeal from a judgment against the estate by which they are aggrieved,[45] but it has also been held that the heirs have no standing to appeal in an action involving personal property and assets,[46] and that a residuary legatee cannot obtain a review by writ of error of a judgment on a claim against the estate.[47] Under some statutes, if a personal representative declines to appeal, any party interested may do so.[48] Executors have no personal interest in a decree awarding certain increase of the estate to the life tenants, as against the residuary legatees, and are not entitled to appeal therefrom;[49] nor is an executor aggrieved by a decree directing him to pay to the widow insurance upon his decedent's life where he is protected from claims of creditors by such decree.[50] Neither has an executor, in his individual capacity, any standing to appeal from an order enjoining him from disposing of the estate during the pendency of an action to determine the validity of the will.[51] As an administrator cannot maintain a bill to remove a cloud from the title to land owned in fee by his decedent,[52] he is not an interested party entitled to appeal from a decree in such a case.[53]

[§ 2260] **3. Time for Appeal.** The time for taking an appeal from a judgment or order for or against a decedent's estate is regulated by the statutes relating to appeals in matters connected with decedents' estates,[54] or by the statutes relating to

Where there is a balance remaining after sale of part of intestate's real estate in satisfaction of executions, the administrator is not entitled to the surplus either in law or equity as assets for payment of debts, although the creditors themselves might have claimed it at law. Garlick v. Patterson, 15 S. C. Eq. 27. See also Clifton v. Haig, 4 S. C. Eq. 330 (payment to commissioner of court).

40. Review generally see Appeal and Error 3 C. J. p 256; Equity §§ 871–936.

41. Ohm's Est., 82 Cal. 160, 22 P 927; Zimmerman v. Love, 97 Ind. 602; McCurdy v. Love, 97 Ind. 62; Taylor v. Burk, 91 Ind. 252; Bell v. Mousset, 71 Ind. 347; Seward v. Clark, 67 Ind. 289 [overr Hamlyn v. Nesbit, 37 Ind. 284]; Louisville, etc., R. Co. v. Etzler, 4 Ind. A. 31, 34 NE 669. See also Appeal and Error §§ 496–411.

[a] **An order compelling a personal representative to allow his name to be used as plaintiff** in an action to recover property alleged to have been fraudulently conveyed by the decedent is not appealable. Ohm's Est., 82 Cal. 160, 22 P 927.

[b] **A judgment in an action of replevin by an administrator** growing out of a matter not connected with the estate is not within a statute governing appeals from orders relating to the settlement of a decedent's estate. Sloan v. Lowder, 23 Ind. A. 118, 54 NE 135.

[c] **An action begun by a decedent and prosecuted to judgment by his executrix** is not within Rev. St. (1881) § 2155, providing for appeals for matters connected with a decedent's estate. Louisville, etc., R. Co., 4 Ind. A. 31, 34 NE 669.

[d] **Action on life insurance policy.**—An action by an administrator to recover on a policy of insurance on the life of his decedent does not involve the exercise of probate jurisdiction, and an appeal from a judgment therein is therefore governed by the Civil Code. Holderman v. Wood, 34 Ind. A. 519, 73 NE 199.

42. Ohm's Est., 82 Cal. 160, 22 P 927; May v. Darden, 83 N. C. 237.

43. U. S.—Briggs v. Walker, 171 U. S. 466, 19 SCt 1, 43 L. ed. 243 [aff 102 Ky. 359, 43 SW 479, 19 KyL 1490].

Ariz.—In re Tamer, 20 Ariz. 228, 179 P 643.

Colo.—Clayton v. Cheeley, 5 Colo. 337.

Ind.—Palmer v. Fuller, 22 Ind. 115.

La.—Graf's Succ., 125 La. 197, 51 S 115; Allen's Succ., 48 La. Ann. 1036, 20 S 193, 55 AmSR 295; Baumgarden's Succ., 35 La. Ann. 675; Charmbury's Succ., 34 La. Ann. 21; Taylor v. Jeffries, 10 La. 435.

Md.—Moore v. White, 4 Harr. & J. 548.

N. Y.—Wood v. Phillips, 11 AbbPr NS 1.

Tex.—Taylor v. Barron, 2 Tex. Unrep. Cas. 689; Altgelt v. Elmendorf, (Civ. A.) 84 SW 412.

[a] **An administrator sued before a justice of the peace** on a claim against him in his fiduciary capacity has a right to appeal from the judgment rendered, although the justice had no jurisdiction of the cause. Palmer v. Fuller, 22 Ind. 115.

[b] **In federal courts.**—An executor may maintain a writ of error to the supreme court of the United States to review the decision of the supreme court of a state so construing a statute of the United States as to sustain a claim of creditors against the estate which he represents. Briggs v. Walker, 171 U. S. 466, 19 SCt 1, 43 L. ed. 243 [aff 102 Ky. 359, 43 SW 479, 19 KyL 419].

[c] **Appeal not taken in individual behalf.**—Where an action was brought against an administrator in his official capacity to recover a money judgment against the estate, so that it was impossible under the pleadings for a judgment to have been rendered against him individually, or for him to have had a personal interest in the subject matter of the proceedings, a designation of himself in the pleadings, in the assignments of error and in the record generally as "defendant, G. C. A., administrator," etc., could not be deemed as a designation of himself in his personal right; nor would an appeal by him be dismissed as an appeal taken on his own behalf. Altgelt v. Elmendorf, (Tex. Civ. A.) 84 SW 412.

[d] **Where an administrator is made a party to a suit involving more than one estate,** and verdict and judgment are certain as to the estate which he represents, he is not in position to allege error on the ground that they are uncertain as to the other estate, in which he has no interest. Taylor v. Barron, 2 Tex. Unrep. Cas. 689.

44. U. S.—Taylor v. Savage, 1 How. 282, 11 L. ed. 132; Slater v. Thompson, 255 Fed. 768.

Cal.—Kerns v. Dean, 77 Cal. 555, 19 P 817.

Iowa.—Iowa L. & T. Co. v. Holderbaum, 86 Iowa 1, 52 NW 550.

N. Y.—Place v. Hayward, 56 N. Y. Super. 609, 5 NYS 959.

W. Va.—Miller v. Neff, 33 W. Va. 197, 10 SE 378, 6 LRA 515.

[a] **An administrator de bonis non need not make himself a formal party** to the record by an order of the circuit court before petitioning for an appeal from a decree in that court against the administrator in chief, for money to be paid out of the assets in his hands to be administered, where the administrator in chief dies after the decree has been rendered. Miller v. Neff, 33 W. Va. 197, 10 SE 378, 6 LRA 515.

[b] **Where an administrator appeals from an order removing him,** it is regular for him to proceed with the suits he has brought until the decision of the appeal; and any default taken while the appeal is pending will be regular, although the order removing him is subsequently affirmed. Thayer v. Mead, 2 CodeRep (N. Y.) 18.

[c] **Refusal of new appointee to act.**—Where an administrator who is appointed pending an appeal from a judgment against an executor who has been removed refuses to prosecute the appeal, a legatee cannot claim to be substituted as plaintiff to prosecute the appeal, as the removal of the executor did not in itself affect the litigation, and until the administrator is substituted the original plaintiff will continue to be such in his capacity as executor, and he can allow the legatee as party in interest to prosecute the appeal. Place v. Hayward, 65 N. Y. Super. 208, 13 NYSt 288 [rev on other grounds 117 N. Y. 487, 23 NE 25].

45. Brater v. Hopper, 77 Hun 244, 28 NYS 472.

46. In re Tamer, 20 Ariz. 228, 179 P 643; In re Tamer, 20 Ariz. 232, 179 P 644.

47. Carney v. Providence, etc., Counties Super. Ct., 30 R. I. 276, 74 A 1018.

48. Rutherford v. Allen, 62 Vt. 260, 19 A 714.

49. Tuckerman v. Currier, 54 Colo. 25, 129 P 210, AnnCas1914C 599.

50. Schlegel v. Sisson, 8 S. D. 476, 66 NW 1087.

51. Heist v. Heist, 139 App. Div. 712, 124 NYS 462.

52. Strong v. Peters, 212 Ill. 282, 72 NE 369.

53. Strong v. Peters, 212 Ill. 282, 72 NE 369.

54. Ida.—McElroy v. Whitney, 24 Ida. 210, 133 P 118.

Ind.—Mason v. Roll, 130 Ind. 260, 29 NE 1135; Koons v. Mellett, 121 Ind. 585, 23 NE 95, 7 LRA 231; May v. Hoover, 112 Ind. 455, 14 NE 472; Wilt v. Martinsville First Nat. Bank, (A.) 114 NE 91; In re Whisler, 56 Ind. A. 269, 105 NE 158; Moore v.

appeals in civil cases generally,[55] according to whether the judgment or order appealed from is within one or the other of such statutes.

[§ 2261] **4. Bond.** In most jurisdictions an appeal bond need not be given by a personal representative, unless the appeal is from a judgment affecting him personally,[56] and the same is true in some jurisdictions in reference to a supersedeas bond,[57] although it is sometimes left to the discretion of the court whether or not such bonds shall be given by the representative.[58]

Liability of sureties.[59] The manner in which a judgment against the representative is to be paid does not affect the primary liability of sureties on their bond, although the compliance with the judgment in manner and form expressed may discharge them from all obligation.[60]

Rights of surety on supersedeas bond on payment of judgment. A representative's execution of a supersedeas bond creates no privity between the sureties and the estate, and the sureties' payment of the judgment on affirmance gives them no right of action against the estate.[61] They can only recover against property devised or bequeathed by being subrogated to the rights of the representative, who can only recover as for an original deficiency of assets, and not for a deficiency caused by his own want of diligent and prudent administration.[62]

Equitable relief from bond. Where an executor enters into a certiorari bond, on which a judgment has been had, he cannot be relieved in equity if the estate is solvent, although the assets are real and not yet converted into money.[63]

[§ 2262] **5. Notice of Appeal.** All persons interested in the judgment or order appealed from should be served with notice of the appeal.[64] A personal representative must give the requisite notice of appeal, although he has under the statute the privilege of appealing without giving bond.[65]

[§ 2263] **6. Transcript and Filing Thereof.** The transcript on appeal must be filed within the time allowed therefor by statute,[66] or the appellate court will not acquire jurisdiction.[67]

[§ 2264] **7. Parties.** All persons interested in the judgment or order appealed from should be made parties to the appeal,[68] but the heirs are not necessary parties, as the representative has full power to represent the whole estate for the purposes of the appeal.[69] One of two or more representatives cannot appeal from a judgment or decree rendered against the estate, without joining the other representative,[70] unless a severance in pleading appears on the record.[71] Although a suit may have been brought by one of two executors against his coexecutor and another, alleged to be interested in defeating a valid demand of the estate, yet, if the facts at the trial show that the executor named as a defendant has no personal interest in the outcome of the litigation, he may, on the death of plaintiff, after writ of error sued out, be substituted as party entitled to represent interests of testator's estate.[72] Where a minor distributee of an estate, by her guardian, filed in the district court a motion to reinstate on the docket an appeal in an action against the administrator of the ancestor's estate, brought by persons representing all the distributees, and asked for her proportionate share of the judgment recovered by them in the county court against the appealing administrator, she thereby became a party to such action, and was charged with notice of an instrument filed by the persons representing the distributees, acknowledging settlement with the administrator, since his appeal, in reliance on which the court dismissed the appeal.[73]

[§ 2265] **8. Presentation and Reservation of Grounds of Review.** Questions or objections not

Bankers' Surety Co., 34 Ind. A. 633, 73 NE 607; Holderman v. Wood, 34 Ind. A. 519, 73 NE 199; Swindle v. State, 15 Ind. A. 415, 44 NE 60.

N. C.—Love v. Love, 139 N. C. 363, 51 SE 1024.

Oh.—Fergus v. McClure, 31 Oh. Cir. Ct. 207.

S. C.—Ex p. Thompson, 18 S. C. L. 116.

Tex.—Bloom v. Oliver, 56 Tex. Civ. A. 391, 120 SW 1101.

[a] **Where a decision grows out of any matter connected with a decedent's estate,** it is necessary to comply with Burns St. Annot. (1908) § 2978, fixing the time for the filing of an appeal bond and the transcript on appeal from decisions growing out of any matter connected with a decedent's estate, the remedy provided by the statute being exclusive. Vail v. Page, 175 Ind. 126, 93 NE 705.

55. Koons v. Mellett, 121 Ind. 585, 23 NE 95, 7 LRA 231; Swindle v. State, 15 Ind. A. 415, 44 NE 60; Reid v. Windsor, 111 Va. 825, 69 SE 1101.

[a] **Cases in which general statutes govern.**—The statutes relating to appeals in civil actions, and not those relating to appeals in matters connected with decedent's estate, regulate the time for appeal: (1) In an action by a personal representative for the collection of assets of the estate. Walker v. Steele, 121 Ind. 436, 22 NE 142, 23 NE 271; Rusk v. Gray, 74 Ind. 231; Merritt v. Straw, 6 Ind. A. 360, 33 NE 657. (2) From a decree in a suit by an executor to quiet his title to land under his testator's will. Mason v. Roll, 130 Ind. 260, 29 NE 1135. (3) In an action brought against a person who dies before it is finally determined, and in which his representative is substituted as defendant. May v. Hoover, 112 Ind. 455, 14 NE 472; Wright v. Manns, 111 Ind. 422, 12 NE 160; Heller v. Clark, 103 Ind. 591, 3 NE 844.

56. See Appeal and Error § 1157.

[a] **An appeal from an award of arbitration** may be taken by a personal representative without payment of costs or entering into a recognizance, although he took out the rule for reference. Murray v. Sharp, 72 Pa. 360; Zerbe v. Miller, 1 Pearson (Pa.) 290.

57. See Appeal and Error § 1424.

58. See Appeal and Error § 1424.

59. See generally Appeal and Error §§ 3315–3444.

60. Mills v. Forbes, 12 HowPr (N. Y.) 466.

61. Maybury v. Grady, 67 Ala. 147.

62. Maybury v. Grady, 67 Ala. 147.

63. Leslie v. Wille, Wright (Oh.) 145.

64. Cotes v. Smith, 31 HowPr (N. Y.) 146.

[a] **An administrator may waive the necessity of citation** and make himself party defendant in error. Morrison v. Lewis, 13 Tex. 64.

65. Lockhart v. Lockhart, 1 Tex. 199.

66. Chipman v. Wells, 34 Ind. A. 1, 72 NE 172 (under a statute providing that an appeal bond shall be filed within ten days after the decision complained of, and that the transcript shall be filed within ninety days after the filing of the bond, a personal representative who takes an appeal in his representative capacity, although not required to file an appeal bond, is required to file the transcript within one hundred days after the decision).

[a] **Treating appeal as vacation appeal where record not filed in time.**—Under Burns St. Annot. [1901] § 657, providing that administrators may have an appeal and stay of proceedings in the court below without giving an appeal bond, the appeal of an administrator who fails to procure a stay of proceedings in the lower court, and who fails to file the record in the appellate court within the time allowed by law for term time appeals, must be treated as a vacation appeal. Holderman v. Wood, 34 Ind. A. 519, 73 NE 199.

67. Vail v. Page, 175 Ind. 126, 93 NE 705 (failure to file the transcript within the time fixed by statute prevents the court from acquiring jurisdiction of the appeal, and it must, on its own motion, order a dismissal).

68. Clarke v. West, 5 Ala. 117 (where judgment is rendered against an administrator upon a final settlement of an isolvent estate in favor of several creditors, all of them must be made parties to a writ of error sued out by the administrator).

69. McCalop v. Fluker, 12 La. Ann. 345.

70. Portis v. Creagh, 4 Port. (Ala.) 332; Harrington v. Roberts, 7 Ga. 510; Lyon v. Allison, 1 Watts (Pa.) 161.

71. French v. Peters, 177 Mass. 568, 59 NE 449.

72. Quillian v. Johnson, 122 Ga. 49, 49 SE 801.

73. Bridgens v. West, 35 Tex. Civ. A. 277, 80 SW 417.

properly raised in the lower court and preserved in the record cannot be considered on appeal from a judgment for or against the personal representative.[74] Thus it cannot be contended for the first time on appeal from such judgment that a claim against the estate had not been authenticated and presented to the representative for allowance or rejection,[75] that the person suing or defending as personal representative has no right to sue or defend in that capacity,[76] that there was a defect in the pleading,[77] that persons who were proper parties to the suit were not brought in,[78] that the claim sued on was not verified as required by statute,[79] or that the judgment against the representative was not in the proper form.[80] But it has been held that, under a general exception to the decision, a personal representative, appealing from a judgment against him, may raise for the first time in the appellate court the point that plaintiff failed to prove that the action was brought within the statutory time after a rejection of the claim.[81]

[§ 2266] **9. Dismissal[82] or Withdrawal.** The appellate court may dismiss the appeal where the appeal is not brought within the prescribed time,[83] or where an improper party is made appellee,[84] or where the statutory prerequisites of such appeal

74. U. S.—Walker v. Beal, 9 Wall. 743, 19 L. ed. 814.

Conn.—Ferguson v. Rochford, 84 Conn. 202, 79 A 177, AnnCas1912B 1212.

Ind.—Devol v. Halstead, 16 Ind. 287.

Ky.—Lyon v. Logan County Bank, 78 SW 454, 25 KyL 1668.

N. Y.—Stilwell v. Carpenter, 2 AbbNCas 238.

N. C.—Scroggs v. Alexander, 103 N. C. 162, 9 SE 401.

S. C.—Brown v. Brown, 75 S. C. 25, 54 SE 838.

Tenn.—Cooper v. Lyons, 9 Lea 596.

Tex.—Kearney v. Nicholson, (Civ. A.) 67 SW 361.

Wash.—Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

[a] **Illustrations.**—(1) An heir cannot charge executors with items not referred to in the briefs and first urged on motion for rehearing. Kearney v. Nicholson, (Tex. Civ. A.) 67 SW 361. (2) A claim against an estate on two notes alleged to have been executed by decedent, not setting out a copy of the notes, nor accompanied with a copy thereof as an exhibit, and not showing affirmatively that such notes were signed by decedent in his lifetime, will be held sufficient when attacked for the first time in the appellate court, where it appears in the record that two notes signed by decedent and corresponding in dates and amounts to those described in the claim were put in evidence at the trial without objection and the signatures of decedent admitted, although the claim might have been subject to demurrer in the lower court. Hinshaw v. Security Trust Co., 48 Ind. 351, 93 NE 567. (3) Although the statute prohibits the recovery of any interest accruing after the death of a debtor unless the claim is verified and demanded of his personal representative within a year after his appointment, in a suit begun on a note several years after the maker's death this question cannot be raised for the first time on appeal, where the record simply fails to show affirmatively, without plea calling it out, that a demand was made within the year. Lyon v. Logan County Bank, 78 SW 454, 25 KyL 1668.

[b] **The failure of a nonresident administrator to give bond** in the prosecution of an action in this state is a matter in abatement of the action, and cannot be taken advantage of for the first time on appeal. Northwestern Mut. L. Ins. Co. v. Lowry, 13 KyL 205.

[c] **That plaintiff cannot sue both as executor and devisee** cannot be first urged on appeal. Stilwell v. Carpenter, 2 AbbNCas (N. Y.) 238.

[d] **An appeal by one of several creditors** in a bill against an administrator for recovery of their debts and an account of the personal assets does not bring up the case of another creditor, whose claim was allowed, so as to allow its validity to be questioned in the higher court. Cooper v. Lyons, 9 Lea. (Tenn.) 596.

[e] **An objection to the time of the commencement of an action** against an executor not raised in a state court cannot be considered where the case has been removed to the United States supreme court. Walker v. Beal, 9 Wall. (U. S.) 743, 19 L. ed. 814.

[f] **Sufficient objection.**—The objection that the claim sued on is different from that presented is sufficiently raised by an objection to the sufficiency of evidence to support an amended complaint where the original complaint set out the claim presented but was amended at the trial to conform to the proof. Zuhn v. Horst, 100 Wash. 359, 170 P 1033.

75. Ark.—Black v. Black, 60 Ark. 390, 30 SW 755.

Cal.—Drake v. Foster, 52 Cal. 225; Stockton Bank v. Howland, 42 Cal. 129; Peterson v. Hornblower, 33 Cal. 266; Coleman v. Woodworth, 28 Cal. 567; In re Cook, 14 Cal. 129; Hentsch v. Porter, 10 Cal. 555.

Ind.—Hardin v. Crist, 7 Ind. 167.

Ky.—Lyon v. Logan County Bank, 78 SW 454, 25 KyL 1668.

Wash.—Neis v. Farquharson, 9 Wash. 508, 37 P 697.

See also supra §§ 1035, 1881.

[a] **Heirs** are estopped on appeal to object to the claim as unverified where they failed to demand verification. Maynard v. Maynard, 178 Ky. 332, 198 SW 910.

76. Ala.—Ligon v. Ligon, 84 Ala. 555, 4 S 405.

Ark.—Texarkana Gas, etc., Co. v. Orr, 59 Ark. 215, 27 SW 66, 43 AmSR 30.

Colo.—Scala v. Miners, etc., Bank, 171 P 752.

Ill.—Breckenridge v. Ostrom, 79 Ill. 71.

Ind.—Rundles v. Jones, 3 Ind. 35.

Iowa.—Laverty v. Woodward, 16 Iowa. 1.

Ky.—Illinois Cent. R. Co. v. McDonald. 13 KyL 781.

La.—Garcia v. Kitchings, 11 La. Ann. 642; Allen v. May, 11 La. Ann. 627.

Mass.—Stone v. Simonds, 131 Mass. 457.

N. J.—Oliva v. Bunaforza, 31 N. J. Eq. 395.

Tex.—Homuth v. Zapp, 33 Tex. 130; Bull v. Jones, (Civ. A.) 47 SW 474.

[a] **Illustration.**—Complaint cannot for the first time be made on appeal that plaintiff should have sued as administrator, instead of simply denominating himself "administrator," or that he should have shown his official character by profert of letters of administration. Texarkana Gas. etc., Co. v. Orr, 59 Ark. 215, 27 SW 66, 43 AmSR 30.

[b] **It will be presumed on appeal** that one once shown to be the legal representative of the estate is still such, although there has been a final settlement of the estate, where it does not appear that he has been discharged or that a decree of distribution has been made. Ligon v. Ligon, 84 Ala. 555, 4 S 405.

[c] **The right to defend a revived action as executrix** cannot be questioned in the first instance on a second appeal. Moss v. Rowland, 3 Bush (Ky.) 505.

77. Chambers v. Wright, 52 Ala. 444; Jones v. Beverly, 45 Ala. 161; Preston v. Knapp, 85 Cal. 557, 24 P 811.

[a] **Illustration.**—A bill by the heir at law to recover his share of a particular fund in the hands of the administrator of a solvent estate, although defective, if it seeks relief as to that fund only, and not a final settlement and distribution also, is not without equity; and, if not assailed for its defects in the court below, the objection cannot be raised in the appellate court. Chambers v. Wright, 52 Ala. 444.

[b] **Objection that the presentation and rejection of the claim were not alleged in the complaint** cannot be raised for the first time on appeal by a representative who has proceeded to the trial of the claim without objecting to the complaint, and who has expressly admitted that the claim was presented in due time, and that she refused to act upon it. Preston v. Knapp, 85 Cal. 557, 24 P 811.

78. Alexander v. Steele, 84 Ala. 332, 4 S 281 (failure to bring in all proper parties to the suit is not ground for reversal on appeal where not objected to in the lower court).

79. Phillips v. Rudy, 146 Ky. 780, 143 SW 397.

80. Cal.—Hellman v. Merz, 112 Cal. 661, 44 P 1079.

Ind.—Simons v. Busby, 119 Ind. 13, 21 NE 451.

Iowa.—Wile v. Wright, 32 Iowa 451.

N. Y.—De Lavallette v. Wendt, 75 N. Y. 579, 31 AmR 494.

Tex.—Harmon v. Bynum, 40 Tex. 324.

[a] **Illustration.** — An objection that a judgment against an executor, as such, is not in form de bonis testatoris cannot be raised for the first time on appeal. De Lavallette v. Wendt, 75 N. Y. 579, 31 AmR 494.

[b] **The rendition of a personal judgment against the administrator** in the enforcement of a claim against the estate is erroneous; but he cannot avail himself of the error on appeal to the supreme court, unless a motion was made to correct it in the court below, and there overruled. Wile v. Wright, 32 Iowa 451.

[c] **That a judgment against an administrator is also rendered against his securities,** who were not parties to the suit, is not ground for reversal on proceedings in behalf of the administrator, the defect not being objected to by him in the trial court, when assigned as error. Harmon v. Bynum, 40 Tex. 324.

81. Kennedy v. Sniffen, 23 Hawaii 115, 120 ("The rule as to the necessity of raising a question in the trial court cannot well be applied where the point is one which the party may not waive").

82. For failure to file transcript in time see supra § 2263.

83. Wilt v. Martinsville First Nat. Bank, (Ind. A.) 114 NE 91; McMillan v. Kelch, 16 Tex. 150.

84. Davis v. Chapier, 4 La. 133 (where after judgment in an action by an executor against the curator, the curator has been discharged without opposition, an appeal making him appellee will be discharged, he having no further right to represent the heirs).

have not been complied with.[85] A motion by an administrator de bonis non to dismiss an appeal on behalf of the estate will prevail as against a protest filed by an attorney for some of the heirs which is not supported by a showing justifying a denial of the right of the administrator to control the litigation.[86] Where upon an appeal the case is to be tried de novo, a personal representative who was defendant in the court below and has taken an appeal cannot dismiss the appeal of his own volition.[87] The legal representatives of a deceased executor cannot consent to the dismissal of an appeal taken by the executor officially.[88]

[§ 2267] **10. Determination and Disposition of Cause.** The appellate court will presume on an appeal from a judgment for or against a personal representative that all the statutory prerequisites have been complied with;[89] and as a general rule will not review the lower court's findings of fact.[90] If the record shows that material errors occurred in the proceedings in the lower court the judgment may be reversed,[91] or may be remanded for further proceedings if the justice of the case seems to require such proceedings,[92] as where the lower court erred in sustaining exceptions to a plea.[93] But if no error is found,[94] or the error is a harmless one,[95] or was caused or invited by the appealing party,[96] the judgment will be affirmed.[97] Mere clerical errors,[98] as where the clerk of the lower court enters judgment against the representative instead of against the decedent's estate or vice versa,[99] or makes a mistake in the name of the representative,[1] may be amended or corrected by the appellate court. Where an administrator appeared to an action, and demurred solely as administrator, and the judgment entered after sustaining his demurrer ran in his favor solely as administrator, and he, as an individual, was not brought within the jurisdiction of the court, and plaintiff's counsel in their brief treated the action as one against the administrator as such, it was held that the action would be deemed on appeal to have been one against the estate, and the judgment would be sustained if no cause of action was alleged against it.[2]

[§ 2268] **W. Costs**[3]**—1. Personal Liability of Representative—a. Actions at Law—(1) By Personal Representative—(a) In Absence of Special Statute—aa. Actions Necessarily Brought in Representative Capacity—(aa) General Rule.** It is very generally held that a personal representative who sues on a cause of action, which he can sue on only in his representative capacity, ordinarily but not necessarily a cause of action accruing in decedent's lifetime, is not personally liable for costs if he fails in his action.[4] The reason of the rule is that, not being privy to the original transaction, the personal

85. McConnel v. Morton, 11 Pa. 398 (the appeal of an administrator from an award of arbitrators will be dismissed for want of an affidavit that "it is not for the purpose of delay that the appeal is entered, etc").

86. McArthur v. Brigham, 22 Colo. A. 505, 125 P 576.

87. Bingham v. Waterhouse, 32 Tex. 468, 472 ("If he meant by dismissing the appeal that he had no defense, the court should have affirmed the judgment of the probate court").

88. Gallia's Succ., 130 La. 867, 875, 58 S 691 ("We find that the appellees have assumed in argument that the consent of the legal representatives of the deceased executor was conclusive, and that, therefore, the other grounds assigned in the motion to dismiss need not be considered. We are not of that opinion. The legal representatives of the deceased executor can represent him only personally. 'The powers of the testamentary executor do not go to his heirs.' C. C. art. 1680. Therefore these legal representatives of the deceased executor are without authority to consent to the dismissal of an appeal taken by the executor officially").

89. See Weeks v. Coe, 76 App. Div. 310, 78 NYS 477 (where a referee has given judgment for a claim against an executor, with costs, it will be presumed, on appeal from an order of the special term granting an extra allowance, that he gave the certificate of unreasonable resistance or neglect of the executor required by statute as a condition to granting costs against an executor).

90. Ga.—Malloy v. McNeel Marble Co., 22 Ga. A. 148, 95 SE 719; McAfee v. Flanders, 140 Ga. 386, 78 SE 744.

Ind.—Dearing v. Coulson, 48 Ind. A. 414, 96 NE 9.

Mich.—McNail v. Mitchell, 178 Mich. 493, 144 NW 850.

Mo.—Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025.

Mont.—Gauss v. Trump, 48 Mont. 92, 135 P 910.

N. Y.—Niblo v. Binsse, 47 Barb. 435, 31 HowPr 476, 32 HowPr 92.

[a] **Where the preponderance of evidence sustains** the court's finding as to the residence of decedents in a suit by an administrator, it will not be disturbed. Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025.

91. Cowdery v. McChesney, 124 Cal. 363, 57 P 221; Meehan v. Meehan, 119 Minn. 35, 137 NW 163; Hartig v. Hartig, 147 App. Div. 6, 131 NYS 587.

[a] **Erroneous rulings on evidence** may be ground for reversal. Coddery v. McChesney, 124 Cal. 363, 57 P 221, (erroneous exclusion); Hartig v. Hartig, 147 App. Div. 6, 131 NYS 587 (erroneous admission).

92. Haub v. Leggett, 160 Cal. 491, 117 P 556; Hazelbaker v. Clipper Coal Co., 158 Pa. 393, 27 A 1051.

[a] **Failure to annex testimony to record.**—In a proceeding in the probate court the judge is required to take the testimony of the witnesses and annex it to the record, together with a list of the documents produced by the parties, that they may be read on appeal, and in case he fails or neglects to do so the cause will be remanded for a new trial at the cost of appellee. Pargoud v. Breard, 4 La. Ann. 517; Polk v. Childers, 4 La. Ann. 500; Reeve's Succ., 3 La. Ann. 554; Desormes v. Desormes, 17 La. 111; Graham v. Graham, 16 La. 201; Tompkins v. Benjamin, 16 La. 197.

93. Alford v. Cochrane, 7 Tex. 485.

94. Borden v. Thorpe, 35 N. C. 298; Sixta v. Heiser, 14 S. D. 346, 85 NW 598.

95. Ga.—Parker v. Salmons, 113 Ga. 1167, 39 SE 475; Searcy v. Ocmulgee Bank, 23 Ga. 504.

Ill.—Todtleben v. Rudowsky, 181 Ill. A. 318.

Ind.—Hedrick v. Hedrick, 48 Ind. A. 658, 94 NE 728.

Ky.—Clark v. Young, 74 SW 245, 24 KyL 2395.

Md.—Harper v. Davis, 115 Md. 349, 80 A 1012, 35 LRANS 1026, AnnCas 1913A 861.

Mich.—Low v. Hill, 67 Mich. 343, 34 NW 588.

Mo.—Stewart v. Glenn, 58 Mo. 481.

Tex.—Jenkins v. Cain, 12 SW 1114.

[a] **The joinder of the heirs with the administrator as defendants,** in an action to establish a claim against a decedent's estate, is harmless error, where the judgment is against the estate alone. Jenkins v. Cain, (Tex. Suppl.) 12 SW 1114.

96. Farnsworth v. Fraser, 137 Mich. 296, 100 NW 400.

[a] **Illustration.**—Although there is some uncertainty as to the correctness of the amount of a judgment rendered by the probate court against an executor, yet, if this uncertainty arises from the executor's own remissness in his rendition of accounts, the appellate court will confirm the judgment. Johnston v. Cox, 13 La. 536.

97. Johnston v. Cox, 13 La. 536; Borden v. Thorpe, 35 N. C. 298.

[a] **Form of judgment for damages and costs on affirmance** of judgment of lower court on appeal by personal representative. Borden v. Thorpe, 35 N. C. 298; Hawkins v. Berkley, 1 Wash. (1 Va.) 204.

98. English v. Brown, 9 Ala. 504; Gauss v. Trump, 48 Mont. 92, 155 P 910.

99. Piper v. Goodwin, 23 Me. 251; Kent v. Lyles, 7 Gill & J. (Md.) 73.

1. Piper v. Goodwin, 23 Me. 251.

2. Nichals v. Stanley, 146 Cal. 724, 81 P 117.

3. Costs generally see Costs, 15 C. J. p 1.

4. Ala.—Stewart v. Hood, 10 Ala. 600.

Ark.—Warren, etc., R. Co. v. Waldrop, 93 Ark. 127, 123 SW 792.

Ga.—Justices Clark County Inferior Ct. v. Haygood, 20 Ga. 847; Janes v. Robinson, Dudl. 1.

Ill.—Hunter v. Bilyeu, 39 Ill. 367; Selby v. Hutchinson, 9 Ill. 319; Burnap v. Dennis, 4 Ill. 478; Greenup v. Porter, 4 Ill. 64; Gibbons v. Johnson, 4 Ill. 61; Greenwood v. Spiller, 3 Ill. 502; Bailey v. Campbell, 2 Ill. 110; Church v. Jewett, 2 Ill. 55; Martin v. St. Luke's Hospital, 195 Ill. A. 388; Barnard v. Springfield, etc., Tract. Co., 194 Ill. A. 218; Ingham v. Mitchell, 176 Ill. A. 469; Jones v. Illinois Cent. R. Co., 106 Ill. A. 597; Masters v. Masters, 13 Ill. A. 611.

Ind.—Cavanaugh v. Toledo, etc., R. Co., 49 Ind. 149; Evans v. Newland, 34 Ind. 112; Cooper v. Thatcher, 3 Blackf. 59; Harrison v. Warner, 1 Blackf. 385; Smith v. Cleveland, etc., R. Co., (A.) 117 NE 534.

Iowa.—Secor v. Siver, 161 NW 769.

Ky.—Arnold v. Crooks, 8 Dana 37;

representative cannot be presumed to know exactly what the case may turn out to be upon investigation and consequently should not be required to pay the costs himself;[5] and it has been observed that "few administrators would take the risks of suit, if they were required to pay the costs if unsuccessful and estates would thus often suffer by reason of their rights not being properly enforced."[6] It is very generally held, however, that the exemption of a personal representative from liability for defendant's costs is not an exemption from the obligation of his own contracts, or a privilege to procure gratuitous services; in other words, he must pay his own costs.[7] If the personal representative is successful in his action, he is not personally liable for costs where defendant proves insolvent.[8]

[§ 2269] **(bb) Extent and Limits of Rule.** Ordinarily the general rule that a personal representative necessarily suing in his fiduciary capacity is not liable for costs on failure of his suit applies, although the suit is terminated by nonsuit,[9] and if he has acted in good faith in bringing the suit he will be permitted to discontinue without paying costs upon discovering that he has no cause of action.[10] The rule applies also to suits commenced by decedent and revived by the representative,[11] to suits by an administrator de bonis non on a note given to the administrator in chief in that capacity, for goods of the estate,[12] to suits in which the administrator has been removed before judgment,[13] to proceedings in error in an action brought by the personal representative to recover a debt due his intestate,[14] and to an appeal taken by decedent and prosecuted by his executor.[15] On the other hand, notwithstanding the fact that suit is necessarily brought by the personal representative in his capacity as such, he will, if unsuccessful, be personally liable for costs where the suit is vexatious or wanton[16] or known by him to be groundless,[17] where his prosecution of the suit is without the care and inquiry which ordinary prudence would have suggested,[18] or where he sues in a representative capacity without legal authority to do so[19] or unnecessarily takes an appeal.[20] The costs of an attempt by an executrix to compel her coexecutrix to join in a conveyance of real estate improperly sold by the former to her husband must be borne by her and not by the estate.[21] Where judgment, as in

Turnham v. Shouse, 8 Dana 3, 33 AmD 473; Peyton v. McDowell, 3 Dana 314; Hughes v. Sandeford, 3 Dana 285; Hutchcraft v. Gentry, 2 J. J. Marsh. 499; Brown v. McKee, 1 J. J. Marsh. 471; Caperton v. Callison, 1 J. J. Marsh. 396; Scroggin v. Scroggin, 1 J. J. Marsh. 362; Holley v. Christopher, 3 T. B. Mon. 14; Jameson v. Young, 2 Litt. 387; Carrico v. Lilly, 3 A. K. Marsh. 398; Reed v. Beaty, 3 Bibb. 208.

Mo.—Ross v. Alleman, 60 Mo. 269; State v. Maulsby, 53 Mo. 500; Renney v. Thomas, 45 Mo. 111; Wooldridge v. Draper, 15 Mo. 470.

N. H.—Folsom v. Blaisdell, 38 N. H. 100; Moulton v. Wendell, 37 N. H. 406; Pillsbury v. Hubbard, 10 N. H. 224.

N. J.—Bell v. Samuels, 60 N. J. L. 370, 37 A 613; Kinney v. Central R. Co., 34 N. J. L. 273; Norcross v. Boulton, 16 N. J. L. 310; Ellis v. Pennsylvania R. Co., 90 N. J. L. 349, 101 A 415; Wilbur v. Jones, 80 N. J. Eq. 520, 86 A 769.

N. Y.—Spencer v. Strait, 40 Hun 463; Dean v. Roseboom, 37 Hun 310; Fox v. Fox, 5 Hun 53; Holdridge v. Scott, 1 Lans. 303; McGovern v. McGovern, 50 N. Y. Super. 390; Lindslay v. Deafendorf, 43 HowPr 90; Van Orden v. Reynolds, 18 Wend. 635; Peo. v. Judges Albany Mayor's Ct., 9 Wend. 486; Barker v. Baker, 5 Cow. 267; Ketchum v. Ketchum, 4 Cow. 87; Salisbury v. Philips, 12 Johns. 289; Tilton v. Williams, 11 Johns. 403; Carlile v. Bates, 8 Johns. 379; Mahany v. Fuller, 2 Johns. Cas. 209; Fleming v. Tyler, 1 Johns. Cas. 102.

N. C.—Collins v. Roberts, 28 N. C. 201; Arrington v. Coleman, 5 N. C. 102.

Oh.—Farrier v. Cairns, 5 Oh. 45.

Okl.—Scott v. Pittman, 37 Okl. 470, 132 P 491.

Or.—De Bow v. Wollenberg, 52 Or. 404, 429, 96 P 536, 97 P 717 [cit Cyc].

Pa.—Ammon's App., 31 Pa. 311; Callender v. Keystone Mut. L. Ins. Co., 23 Pa. 471 [overr Ewing v. Furness, 13 Pa. 531]; Musser v. Good, 11 Serg. & R. 247; Smith's Est., 11 Pa. Co. 448; Myers v. Barton, 3 Pa LJR 257, 5 PaLJ 142; Ketler's Est., 16 Phila. 294.

R. I.—Lynch v. Webster, 17 R. I. 513, 23 A 27, 14 LRA 696.

S. C.—Buckels v. Carter, 40 S. C. 106; Mealer v. Meyers, 18 S. C. L. 53; Bordeaux v. Cave, 18 S. C. L. 6; Jamison v. Lindsay, 17 S. C. L. 79; Murrell v. Duncan, 3 S. C. L. 384; Vanderhorst v. Whitner, 3 S. C. L. 174, 2 S. C. L. 399; Frink v. Luyten, 2 S. C. L. 166, 1 AmD 638.

Va.—Thornton v. Jett, 1 Wash. (1 Va.) 138.

Wis.—Knox v. Bigelow, 15 Wis. 415.

Eng.—Nicolas v. Killigrew, 1 Ld. Raym. 437, 91 Reprint 1189; Bigland v. Robinson, 3 Salk. 105, 91 Reprint 719; Eaves v. Mocato, 1 Salk. 314, 91 Reprint 277; Goldthwayte v. Petrie, 5 T. R. 234, 101 Reprint 132.

[a] **Action brought as nonresident.**—An administratrix in the state having given a bond as such is not personally liable for costs in an action in her fiduciary character, although brought as a nonresident. Warren, etc., R. Co. v. Waldrop, 93 Ark. 127, 123 SW 792.

5. Holdridge v. Scott, 1 Lans. (N. Y.) 303; Lynch v. Webster, 17 R. I. 513, 23 A 27, 14 LRA 696. See also Bordeaux v. Cave, 18 S. C. L. 6 (a testator may leave behind him the most satisfactory evidence of an existing cause of action, when in truth no cause of action exists; or it may be in the power of the opposite party to show that there has been satisfaction made and accorded. In that case there is no alternative left to the executor, but to sue and procure the adjudication of a competent tribunal, or to assume the responsibility of showing it himself upon a final account of his administration).

6. Smith's Est., 11 Pa. Co. 448 [quot De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717].

7. Campbell v. Doyle, 57 Miss. 292; Matlock v. Gray, 11 N. C. 1; Musser v. Good, 11 Serg. & R. (Pa.) 247; Buckels v. Carter, 40 S. C. L. 106.

[a] **Illustration.**—A personal representative is liable for his process and witness' fees and the price of a transcript made out for his appeal without regard to probable cause for bringing or defending the suit or his success therein. Campbell v. Doyle, 57 Miss. 292.

8. Janes v. Robinson, Dudl. (Ga.) 1.

9. Ky.—Frogg v. Long, 3 Dana 157, 28 AmD 69.

N. J.—Ellis v. Pennsylvania R. Co., 90 N. J. L. 349, 101 A 415.

N. Y.—Slocum v. Staples, 2 NYLeg Obs 259; Purdy v. Purdy, 5 Cow. 14; Morse v. McCoy, 4 Cow. 551; Ketchum v. Ketchum, 4 Cow. 871; Phœnix v. Hill, 3 Johns. 249; Fleming v. Tyler, 1 Johns. Cas. 102. Contra Hogeboom v. Clark, 17 Johns. 268 (nonsuit on scire facias to revive judgment, payment being pleaded).

Pa.—Musser v. Good, 11 Serg. & R. 247; Myers v. Barton, 3 PaLJR 257, 5 PaLJ 142.

S. C.—Mealer v. Myers, 18 S. C. L. 53; Bordeaux v. Cave, 18 S. C. L. 6; Vanderhorst v. Whitner, 3 S. C. L. 174.

Wis.—Ladd v. Anderson, 58 Wis. 591, 17 NW 320.

Eng.—Eaves v. Mocato, 1 Salk. 314, 91 Reprint 277.

10. Fowler v. Starr, 3 Den. (N. Y.) 164; Purdy v. Purdy, 5 Cow. (N. Y.) 14; Morse v. McCoy, 4 Cow. (N. Y.) 551; Phœnix v. Hill, 3 Johns. (N. Y.) 249; Bordeaux v. Cave, 18 S. C. L. 6; Vanderhorst v. Whitner, 2 S. C. L. 399; Bennet v. Coker, 4 Burr. 1927, 98 Reprint 3.

11. Brooks v. Stevens, 2 Pick. (Mass.) 68; Arrington v. Coleman, 5 N. C. 102.

[a] **Contrary view.**—Clark v. Higgins, 2 Root (Conn.) 398.

12. Stewart v. Hood, 10 Ala. 600.

13. Baxter v. Davis, 3 AbbPrNS (N. Y.) 249.

14. Gleason v. Clark, 1 Wend. (N. Y.) 303.

15. Hudson v. Ross, 1 Wash. (1 Va.) 74.

16. Ala.—Reynolds v. Carter, 32 Ala. 444.

Ky.—Hutchcraft v. Gentry, 2 J. J. Marsh. 499; Trible v. Ellison, 1 Ky. Op. 59.

N. Y.—Peo. v. Judges Albany Mayor's Ct., 9 Wend. 486.

Or.—De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717.

Pa.—Show v. Conway, 7 Pa. 136; Reeser's Est., 4 Pa. Co. 417.

17. Ind.—Raugh v. Weis, 138 Ind. 42, 37 NE 331; Harrison v. Warner, 1 Blackf. 385.

La.—Porche v. Banks, 8 La. Ann. 65.

Mich.—Hill v. Mitchell, 40 Mich. 389; Taylor v. Whitmore, 35 Mich. 97.

Or.—De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717.

Pa.—Pennypacker's App., 57 Pa. 114.

S. C.—Bordeaux v. Cave, 18 S. C. L. 6.

Tenn.—Wells v. Jenkins, 7 Tenn. Civ. A. 566.

Eng.—Comber v. Hardcastle, 3 B. & P. 115, 127 Reprint 62.

18. Pennypacker's App., 57 Pa. 114.

19. Lewis v. McCabe, 16 Mo. A. 398; Baldwin v. Rice, 44 Misc. 74, 89 NYS 743.

20. Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452.

21. Schafer's Est., 10 Pa. Co. 100.

case of nonsuit or by default, is rendered for not proceeding to trial and no excuse is shown, costs may be awarded against the personal representative individually.[22] These cases are in principle like interlocutory orders for the payment of costs upon some default or motion.[23] Where the representative seeks the allowance of a fraudulent demand in his own behalf upon final settlement and the heirs prevail in resisting the demand, costs should be taxed against him personally and not against the estate;[24] and where a default judgment in favor of the representative is set aside by motion for irregularity, he will be ordered to pay the costs of the motion.[25]

[§ 2270] **bb. Actions Which May Be Brought in Individual Capacity.** Where a personal representative brings suit on a cause of action accruing after decedent's death, that is, on a contract made with himself or for a wrong done to the estate in his possession, he is personally liable for costs if he fails in his action.[26] The reason is said to be that, inasmuch as the personal representative is a party to the transaction, he is presumed to know all about it, and to act upon his own responsibility, and therefore should not be permitted to burden the estate with costs in case of failure,[27] and even though he sues in his representative capacity on a cause of action of this character he cannot thereby evade liability for costs,[28] the true rule being that if it is not necessary for plaintiff to name himself as executor or administrator he shall pay costs.[29] The doctrine of some of the early decisions to the effect that plaintiff's liability to costs depended on the question whether the money recovered would be assets or not [30] has long since been exploded and was contrary to older authorities than those by which it was set up.[31] It has also been held that, although the representative is successful in his action, he and not the estate is liable for costs on failure to collect them from defendant.[32]

[§ 2271] **(b) Under Special Statutes.** The rule exempting the personal representative from personal liability for costs in actions which he was obliged to bring, if at all, in his representative capacity [33]

22. Harrison v. Warner, 1 Blackf. (Ind.) 385; How v. Taylor, 1 Wend. (N. Y.) 34; Morse v. McCoy, 4 Cow. (N. Y.) 551; Brown v. Lambert, 16 Johns. (N. Y.) 148; Rudd v. Long, 4 Johns. (N. Y.) 190; Vanderhorst v. Whitner, 2 S. C. L. 399; Eaves v. Mocato, 1 Salk. 314, 91 Reprint 277.

23. Pillsbury v. Hibbard, 10 N. H. 224.

24. Garr v. Harding, 45 Mo. A. 618.

25. Varick v. Bodine, 3 Hill (N. Y.) 444.

26. Ark.—Watkins v. McDonald, 3 Ark. 266.

Ind.—Pollard v. Buttery, 3 Blackf. 239; Harrison v. Warner, 1 Blackf. 385.

Ky.—Turnham v. Shouse, 8 Dana 3, 33 AmD 473; Scroggin v. Scroggin, 1 J. J. Marsh. 362; Holley v. Christopher, 3 T. B. Mon. 14; Garner v. Strode, 5 Litt. 314.

Md.—Ferguson v. Cappeau, 6 Harr. & J. 394.

Mo.—Ross v. Allelman, 60 Mo. 269; Wooldridge v. Draper, 15 Mo. 470; Lewis v. McCabe, 16 Mo. A. 398.

N. H.—Moulton v. Wendell, 37 N. H. 406; Keniston v. Little, 30 N. H. 318, 64 AmD 297; Pillsbury v. Hubbard, 10 N. H. 224.

N. J.—Kinney v. Central R. Co., 34 N. J. L. 273; Norcross v. Boulton, 16 N. J. L. 310; Ivins v. Jacob, 67 N. J. Eq. 387, 58 A 941.

N. Y.—Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965 [rev 148 App. Div. 78, 132 NYS 1033]; Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820; Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179; Mullen v. Guinn, 88 Hun 128, 34 NYS 625; Bostwick v. Brown, 15 Hun 308; Fox v. Fox, 5 Hun 53; Van Pelt v. New York, 91 Misc. 550, 155 NYS 9; Ackley v. Ackley, 66 Hun 636, 21 NYS 877; Burhans v. Blanchard, 1 Den. 626; Reynolds v. Collin, 3 Hill 441; Peo. v. Judges Albany Mayor's Ct., 9 Wend. 486; Barker v. Baker, 5 Cow. 267; Ketchum v. Ketchum, 4 Cow. 87.

N. C.—Arrington v. Coleman, 5 N. C. 102.

R. I.—Lynch v. Webster, 17 R. I. 513, 23 A 27, 14 LRA 696.

S. C.—Carter v. Estes, 45 S. C. L. 363; Farley v. Farley, 18 S. C. L. 319; Bordeaux v. Cave, 18 S. C. L. 6; Ford v. Travis, 4 S. C. L. 299; Frink v. Luyten, 2 S. C. L. 166, 1 AmD 638.

Va.—Carr v. Anderson, 2 Hen. & M. (12 Va.) 361; Thornton v. Jett, 1 Wash. (1 Va.) 138.

Eng.—Slater v. Lawson, 1 B. & Ad. 893, 20 ECL 734, 109 Reprint 1018; Jobson v. Forster, 1 B. & Ad. 6, 20 ECL 375, 109 Reprint 690; Dowbiggin v. Harrison, 9 B. & C. 666, 17 ECL 299, 109 Reprint 247; Tattersall v. Groote, 2 B. & P. 253, 126 Reprint 1266; Cowell v. Watts, 6 East 405, 102 Reprint 1342; Cooke v. Lucas, 2 East 395, 102 Reprint 420; Nicolas v. Killigrew, 1 Ld. Raym. 436, 91 Reprint 1189; Jenkins v. Plombe, 6 Mod. 91, 87 Reprint 849, 1 Salk. 207, 91 Reprint 184; Eaves v. Mocato, 1 Salk. 314, 91 Reprint 277; Marsh v. Yellowly, Str. 1106, 93 Reprint 1062; Baynham v. Matthews, Str. 871, 93 Reprint 905; Bollard v. Spencer, 7 T. R. 358, 101 Reprint 108; Goldthwayte v. Petrie, 5 T. R. 234, 101 Reprint 132.

N. S.—Granger v. O'Neill, 31 N. S. 462.

"Where a cause of action accrues to the personal representatives of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he is unsuccessful, the costs may be taxed against him individually without an application to the court." Leavett v. Jas. F. Scholes Co., 210 N. Y. 107, 112, 102 NE 965 [rev 148 App. Div. 78, 132 NYS 1033].

"The matter now under consideration for which the complainant seeks redress is thus shown to be an alleged injury to the complainant in the conduct of the business incident to the settlement of his intestate's estate and not an injury done to the intestate himself in his lifetime. Under such a showing the defendant is, I think, entitled to costs when he successfully resists the complainant's attack." Ivins v. Jacob, 67 N. J. Eq. 387, 390, 58 A 941.

[a] **An action by an executor for a conversion occurring immediately after testator's death,** whether prosecuted in his name individually or in his representative capacity, is, for purposes of taxation of costs, an action by him individually, and costs may be taxed against him individually on judgment being rendered for defendant, without the direction of the court. Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179 [aff 194 N. Y. 587 mem, 88 NE 1118 mem].

[b] **On declaration demurrable for failure to show capacity.**—In an action by an administrator upon a debt due him in his representative capacity, on demurrer sustained to the declaration because it does not show that plaintiff sues in his representative character, judgment against plaintiff de bonis propriis for costs is correct. Watkins v. McDonald, 3 Ark. 266.

[c] **Limitations of rule.**—A cause of action on a note made payable to decedent or bearer forms an exception to the general rule that the representative must sue in his capacity as such on a cause of action accruing in the lifetime of decedent, but notwithstanding this fact an administrator suing in his representative capacity on a note of this character is not personally liable for costs if his suit fails. Jamison v. Lindsay, 17 S. C. L. 79.

27. Lynch v. Webster, 17 R. I. 513, 23 A 27, 14 LRA 696.

28. Ky.—Turnham v. Shouse, 8 Dana 3, 33 AmD 473.

N. Y.—Leavitt v. Jas. F. Scholes Co., 210 N. Y. 107, 103 NE 965; Buckland v. Gallup, 105 N. Y. 453, 11 NE 843 [aff 40 Hun 61]; Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179; Bostwick v. Brown, 15 Hun 308; Holdridge v. Scott, 1 Lans. 303; Lyon v. Marshall, 11 Barb. 241; Ackley v. Ackley, 21 NYS 877; Feig v. Wray, 3 NYCivProc 159, 64 HowPr 391; Smith v. Patten, 9 AbbPrNS 205; Matter of Justices New York Super. Ct., 1 HowPr 200; Van Orden v. Reynolds, 18 Wend. 635; Peo. v. Judge Albany Mayor's Ct., 9 Wend. 486; Ketchum v. Ketchum, 4 Cow. 87; Tilton v. Williams, 11 Johns. 403.

Pa.—Muntorf v. Muntorf, 2 Rawle 180.

S. C.—Frink v. Luyten, 2 S. C. L. 166, 1 AmD 638.

Eng.—Grimstead v. Shirley, 2 Taunt. 116, 127 Reprint 1021; Goldthwayte v. Petrie, 5 T. R. 234, 101 Reprint 132; Hooker v. Quilter, 1 Wils. C. P. 171, 95 Reprint 556.

[a] **Illustration.**—Where a plaintiff sues as executor, when the action should or might have been brought in his own right, and is successful, judgment will be given against him for defendant's costs, to be levied of the assets, if any; if none, of his own estate. Turnham v. Shouse, 8 Dana. (Ky.) 3, 33 AmD 743.

29. Norcross v. Bolton, 16 N. J. L. 310.

30. Hutchinson v. Gamble, 12 Ala. 36; Bull v. Palmer, 2 Lev. 165, 83 Reprint 501; Cockerill v. Kynaston, 4 T. R. 277, 100 Reprint 1017.

31. Norcross v. Bolton, 16 N. J. L. 310.

32. Daniel v. Hollingshead, 16 Ga. 190.

33. See supra § 2268.

has, in a number of jurisdictions, been modified by statutes abolishing the distinction in this respect between such actions and those which may be brought in an individual capacity,[34] imposing individual liability for costs in all cases where a personal representative is unsuccessful in an action prosecuted by him,[35] or permitting the court to direct that the representative be personally held for the costs when it deems such action proper because of his conduct in relation to the action.[36] Under some of these statutes a personal representative, after payment, may charge the amount in his account of administration to be allowed or not as it may appear to the judge of probate that the suit was discreet or otherwise.[37] Under others the personal representative is entitled to an allowance for the costs if the court awarding them certify that there were probable grounds for instituting the action in which the costs were awarded, but not otherwise.[38] It is sometimes provided that on return unsatisfied of an execution sued on a judgment for costs upon nonsuit in an action by an administrator, execution may be awarded against the administrator for the seizure of his property if he fails to show cause why it should not be awarded against him.[39] A special administrator in whose name a suit is brought is sometimes specially exempted from liability for costs.[40]

[§ 2272] **(2) Actions against Personal Representative—(a) In Absence of Special Statute.** The general rule is that the personal representative who makes an unsuccessful defense is not personally liable for costs, which are payable out of the assets in his hands in the same manner as the debt for which judgment was recovered.[41] The representative may, however, be liable personally for costs where he has pleaded a false plea,[42] that is to say, sets up new matter in avoidance of the action and fails in supporting it.[43] He may also render himself liable in case he is guilty of a devastavit,[44] or of mismanagement, misconduct, or fraud.[45] It is also held, in some cases, that if the assets of the estate are insufficient to satisfy the costs of an action successfully prosecuted to judgment against a personal representative, they are to be levied out of his individual estate.[46] In a case where, in a suit to set aside deeds and a bill of sale brought against a defendant in his representative capacity as administrator, it appeared that defendant took the instruments with actual knowledge of the purpose for which they were given, knowing that they were intended to convey in trust only, and that he repudiated the trust, it was held that the court properly taxed costs against him individually on decreeing a cancellation of the instruments.[47]

[§ 2273] **(b) Under Special Statutes—aa. In General.** In several states there are statutory provisions pursuant to which, under certain circumstances, costs may be taxed individually as against a personal representative who is sued in his representative capacity.[48] In actions to which such statutes are applicable, personal representatives are entitled to one lawful trial and to exemption from costs, saving the excepted cases, which trial must

34. Reay v. Butler, 99 Cal. 477, 33 P 1134; O'Hear v. Skeeles, 22 Vt. 152; Knox v. Bigelow, 15 Wis. 415.

35. Md.—Ticonic Nat. Bank v. Turner, 96 Md. 380, 52 A 793.

Mass.—Hardy v. Call, 16 Mass. 530.

Miss.—Campbell v. Doyle, 57 Miss. 292; Taylor v. Webb, 56 Miss. 631; Williamson v. Childress, 26 Miss. 328.

R. I.—Lynch v. Webster, 17 R. I. 513, 23 A 27, 14 LRA 696.

Vt.—O'Hear v. Skeeles, 22 Vt. 152.

36. Cal.—Stevens v. San Francisco, etc., R. Co., 103 Cal. 252, 27 P 146.

N. Y.—Dunphy v. Callahan, 126 App. Div. 11, 110 NYS 179.

S. C.—Clark v. Wright, 26 S. C. 196, 1 SE 814.

S. D.—McCarthy v. Speed, 16 S. D. 584, 94 NW 411.

Wis.—Wiesmann v. Brighton, 83 Wis. 550, 53 NW 911; Ladd v. Anderson, 58 Wis. 591, 17 NW 320; Hei v. Heller, 53 Wis. 415, 10 NW 620; Knox v. Bigelow, 15 Wis. 415; Lightfoot v. Cole, 1 Wis. 36.

[a] **Failure to appear.**—The mere failure of one who sues in a representative capacity to appear when the cause is called for trial is not sufficient to warrant the inference of mismanagement or bad faith. Ladd v. Anderson, 58 Wis. 591, 17 NW 320.

37. Meyer v. O'Rourke, 150 Cal. 177, 88 P 706; Stevens v. San Francisco, etc., R. Co., 103 Cal. 252, 27 P 146; Hardy v. Call, 16 Mass. 530; McCarthy v. Speed, 16 S. D. 584, 94 NW 411; O'Hear v. Skeeles, 22 Vt. 152.

38. Beachley v. Bollinger, 119 Md. 151, 86 A 135; Taylor v. Webb, 56 Miss. 631; Williamson v. Childress, 26 Miss. 328.

39. Folsom v. Blaisdell, 38 N. H. 100.

[a] **It is good cause why such execution should not be awarded** against the administrator personally that he commenced the suit in good faith upon a supposed valid claim, although at the time of suit brought he had administered all the estate and settled his account and had no balance in his hands to be distributed. Folsom v. Blaisdell, 38 N. H. 100.

40. Driver v. Hayes, 51 Ark. 82, 9 SW 853.

41. See supra § 2201.

[a] **The fact that one of two executors insists on making defense,** against the protest of the other, does not render him personally liable. Dale v. Dale, 42 Pa. Co. 255.

42. Scroggin v. Scroggin, 1 J. J. Marsh. (Ky.) 362; Pierson v. Evans, 1 Wend. (N. Y.) 30; Smith v. Goggans, 16 S. C. L. 52.

[a] **What is not a false plea.**—The pleas of non assumpsit or of non assumpsit infra, etc., are not technically such false pleas as subject the representative personally to costs where the jury find against him. Pierson v. Evans, 1 Wend. (N. Y.) 30; Ford v. Crane, 6 Cow. (N. Y.) 71; Osterhout v. Hardenberg, 19 Johns. (N. Y.) 266; Moore v. Hunt, 17 S. C. L. 370.

43. Pierson v. Evans, 1 Wend. (N. Y.) 30.

44. Scroggin v. Scroggin, 1 J. J. Marsh. (Ky.) 362.

45. Cal.—St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

Ill.—In re Corrington, 124 Ill. 363, 16 NE 252.

Ky.—Ball v. Townsend, Litt. Sel. Cas. 325.

Mass.—Burns v. Fay, 14 Pick. 8.

N. J.—Meeker v. Arrowsmith, 16 N. J. L. 227.

N. Y.—Ackerman v. Emott, 4 Barb. 626; Savage v. Gould, 60 HowPr 217.

N. C.—Parker v. Stephens, 2 N. C. 218, 1 AmD 557.

Or.—De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717.

S. C.—Giles v. Pratt, 19 S. C. L. 239, 26 AmD 170.

Ont.—Willison v. Gourlay, 10 Ont WR 853.

[a] **Where litigation is rendered necessary** by mismanagement or misconduct of the personal representative, he is personally liable for costs on making an unsuccessful defense. In re Corrington, 124 Ill. 363, 16 NE 252.

[b] **Judgment by default.**—An executor or administrator who suffers judgment by default is personally liable for costs. Giles v. Pratt, 19 S. C. L. 239, 26 AmD 170.

[c] **Where an executor improperly takes second mortgages** and on foreclosure by a senior mortgagee is compelled to buy in the property, he will be held personally liable for costs. Savage v. Gould, 60 HowPr (N. Y.) 217.

[d] **Insolvent estate.**—Where the administrator of an insolvent estate gives notice of his dissatisfaction with the sum awarded to a creditor by the commissioners, and the creditor recovers a larger sum than was allowed by the commissioners, he is entitled to an execution for the costs of the action against an administrator de bonis propriis, but if the administrator had sufficient reasons for his appeal, the probate judge may allow the costs to be charged in the administration account. Burns v. Fay, 14 Pick. (Mass.) 8.

[e] **Where defendant fails to plead no assets,** a judgment against him may, under certain circumstances, be levied de bonis propriis. Parker v. Stephens, 2 N. C. 218, 1 AmD 557.

[f] **A representative who has wrongfully withheld a distributive share** of the estate from the persons entitled thereto is personally liable for costs in a suit to recover such share. St. Mary's Hospital v. Perry, 152 Cal. 338, 92 P 864.

46. Phipps v. Addison, 7 Blackf. (Ind.) 375; Priest v. Martin, 4 Blackf. (Ind.) 311; Sindle v. Kiersted, 3 N. J. L. 926; Quicksall v. Quicksall, 3 N. J. L. 457; Senescal v. Bolton, 7 N. M. 351, 34 P 446; Peo. v. Judges Erie County C. Pl., 4 Cow. (N. Y.) 445.

47. De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717.

48. See the statutes; and Pauley v. Millspaugh, 95 App. Div. 208, 88 NYS 565; Lightfoot v. Davis, 112 NYS 289; In re Knowles, 148 N. C. 461, 62 SE 549; Whitaker v. Whitaker, 138 N. C. 205, 50 SE 630.

be a binding one determining their liability and sufficient to stand the test of an appeal if one is taken.[49]

[§ 2274] **bb. Actions or Proceedings to Which Statutes Applicable.** Such statutes have been held not to apply to an action against a personal representative on a contract made by himself,[50] to an action brought against deceased in his lifetime and revived after his death,[51] to a proceeding to subject a personal representative to liability for misapplication of assets,[52] or to an action by a sheriff against an executor in aid of an attachment against the distributive share of a legatee, such action being independent of any matters concerning the administration.[53]

[§ 2275] **cc. Grounds of Allowance—(aa) In General.** The grounds for taxing costs against the representative personally are unreasonable resistance to or neglect to pay the claim, refusal to refer the matter in controversy, or failure to file a written consent that a rejected claim is heard and determined by the surrogate on settlement of the representative's accounts.[54] If either ground is established, a case is made for the award of costs,[55] provided the steps made necessary by statute as a prerequisite to the allowance have been complied with,[56] but unless one of these grounds is fairly established costs cannot be awarded against the representative personally.[57] Where executors who had no duties to perform in connection with certain property insisted on a right to act therein to the disadvantage of the devisee, and in violation of her legal rights, in refusing to give possession, they were acting personally, and were individually chargeable with the costs of an action by her to enforce her rights.[58]

[§ 2276] **(bb) Unreasonable Resistance of Claim.** A personal representative cannot be said to have unreasonably resisted a claim within the meaning of the statutes merely because his defense failed,[59] or because plaintiff recovers the full amount of his demand,[60] and a fortiori he is not chargeable with an unreasonable resistance where he succeeds in obtaining a material reduction of the claim.[61] There is no unreasonable resistance such as will subject the personal liability for costs where his refusal to pay the claim is based on the ground that he has no assets,[62] where it appears that his defense would probably have been successful, if at the trial he could have procured his witness,[63] where suit on a claim is commenced before the representative has a reasonable time to examine it,[64] where resistance is made under advice of counsel,[65] or where the credit was originally given and the amount charged to a third person, but it appeared on the hearing to be for the benefit of decedent.[66] Where before the expiration of the period allowed for the payment of debts suit is brought on a claim which he has promised to pay, the conclusion of unreasonable resistance is not warranted, merely because when sued after promise to pay he disputes his liability to the action in his representative capacity.[67] Where interest in excess of the legal rate has been paid voluntarily, without any agreement, on certain notes, so that a question arose whether the notes were usurious, or whether the excess pay-

49. Benjamin v. Ver Nooy, 168 N. Y. 578, 61 NE 971 [rev order in 36 App. Div. 581, 55 NYS 796].

50. O'Brien v. Jackson, 42 App. Div. 171, 58 NYS 1044 [rev on other grounds 167 N. Y. 31, 60 NE 238]; Smith v. Patten, 9 AbbPrNS (N. Y.) 205.

51. Benedict v. Caffe, 10 N. Y. Super. 669; Mitchel v. Mount, 17 Abb Pr (N. Y.) 213; Tindal v. Jones, 11 AbbPr (N. Y.) 258, 19 HowPr (N. Y.) 469; Lemen v. Wood, 16 HowPr (N. Y.) 285.

[a] **Failure to present claim.**—If plaintiff in such an action continues the prosecution thereof without any presentment of his claim or offer to refer it he cannot recover costs. McCann v. Bradley, 15 HowPr (N. Y.) 79.

52. Valentine v. Britton, 127 N. C. 57, 37 SE 74.

53. Dunn v. Arkenburgh, 165 N. Y. 669, 59 NE 1122 [aff 48 App. Div. 518, 62 NYS 861].

54. See the statutes.

55. Field v. Field, 77 N. Y. 294; Pauley v. Millspaugh, 95 App. Div. 208, 88 NYS 565; Davis v. Gallagher, 37 App. Div. 626, 55 NYS 1060; Brinker v. Loomis, 43 Hun (N. Y.) 247; Snyder v. Snyder, 26 Hun (N. Y.) 324; Nellis v. Duesler, 18 NYS 315; Gansevoort v. Nelson, 6 Hill (N. Y.) 389.

56. See infra §§ 2277–2279.

57. Mallard v. Curran, 123 Ga. 872, 51 SE 712; Corcoran v. Kennedy, 177 App. Div. 63, 163 NYS 703; Domeyer v. Hoes, 99 App. Div. 294, 90 NYS 1074; Horton v. Brown, 29 Hun (N. Y.) 654; Belden v. Knowlton, 5 N. Y. Super. 758, CodeRepNS 127; Lightfoot v. Davis, 112 NYS 289 [rev on other grounds 132 App. Div. 452, 116 NYS 904 (rev 198 N. Y. 261, 91 NE 582, 139 AmSR 817, 29 LRANS 119, 19 AnnCas 747)]; Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Snyder v. Young, 4 HowPr (N. Y.) 217; Bullock v. Bogardus, 1 Den. (N. Y.) 276; Winne v. Van Schaick, 9 Wend. (N. Y.) 448; Nicholson v. Showerman, 6 Wend. (N. Y.) 554; Morris v. Morris, 94 N. C. 613; May v. Darden, 83 N. C. 237.

58. Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800.

59. Bosworth v. Kinghorn, 94 App. Div. 187, 87 NYS 983 [aff 179 N. Y. 590 mem, 72 NE 1139 mem]; Oliver v. Sahler, 172 NYS 637; Sabsevitz v. Gabrilowitz, 148 NYS 615; Nicholson v. Showerman, 6 Wend. (N. Y.) 554; Raser v. McQuade, 11 B. C. 161.

[a] **The justice of plaintiff's cause of action** alone, unless the claim as presented gave a proper credit, would not make resistance to the payment of a balance demanded unreasonable. Overheiser v. Morehouse, 8 NYCivProc 11, 16 AbbNCas 208, 2 HowPrNS 257.

60. Ehrenreich v. Lichtenberg, 29 Misc. 305, 60 NYS 513 (a recovery of the full amount is not inconsistent with a reasonable and justified opposition).

61. Johnson v. Myers, 103 N. Y. 666, 9 NE 55; Ryan v. McElroy, 15 App. Div. 216, 44 NYS 196; Anderson v. McCann, 14 App. Div. 365, 43 NYS 956; Davis v. Myers, 86 Hun 236, 33 NYS 352; Pursell v. Fry, 19 Hun (N. Y.) 595; Russell v. Lane, 1 Barb. (N. Y.) 519; Holcombe v. Nettleton, 41 Misc. 504, 85 NYS 12; Healy v. Murphy, 16 NYS 541, 21 NYCivProc 13; Bailey v. Schmidt, 5 NYS 405; Overheiser v. Morehouse, 8 NYCiv Proc 11, 16 AbbNCas 208, 2 How PrNS 257; Daggett v. Mead, 11 Abb NCas (N. Y.) 116; Comstock v. Olmstead, 6 HowPr (N. Y.) 77; Robert v. Ditmas, 7 Wend. (N. Y.) 522; Whitaker v. Whitaker, 138 N. C. 205, 50 SE 630.

[a] **What amounts to a material reduction.**—It is a material reduction: (1) Where a claim is reduced to one fifth of the amount demanded. Russell v. Lane, 1 Barb. (N. Y.) 519. (2) Where a claim is reduced by one half. Anderson v. McCann, 14 App. Div. 365, 43 NYS 956. (3) Where a claim amounting to sixteen hundred and twenty dollars is reduced by five hundred and twenty-five dollars. Ryan v. McElroy, 15 App. Div. 216, 44 NYS 196. (4) The reduction of a claim for one hundred and ninety-six dollars to one hundred and seventy-eight dollars is not a material reduction. Dukelow v. Searles, 20 NYS 348.

[b] **Where a claimant consents to a material reduction at the trial** it is error to tax costs against defendant. Healy v. Malcolm, 75 App. Div. 422, 78 NYS 315.

[c] **Difference of opinion as to quantum meruit.**—There is an unreasonable resistance where the claim is reduced, not by failure of plaintiff to prove the whole amount charged, nor by the establishment of an offset, but by a difference of opinion as to the value of the services resting upon a quantum meruit. Fort v. Gooding, 9 Barb. (N. Y.) 388.

[d] **Defeat of counterclaim.**—Notwithstanding defendant obtains a material reduction, he will be chargeable with costs when he interposes a claim which is wholly defeated. Sutton v. Newton, 7 NYCivProc 333, 15 AbbNCas 452, 2 HowPrNS 56.

62. Bullock v. Bogardus, 1 Den. (N. Y.) 276.

63. Stephenson v. Clark, 12 How Pr (N. Y.) 282.

64. Macy v. Williams, 55 Hun 489, 8 NYS 658 [aff 125 N. Y. 767, 27 NE 409]; Buckhout v. Hunt, 16 HowPr (N. Y.) 407; Knapp v. Curtiss, 6 Hill (N. Y.) 386; May v. Darden, 83 N. C. 237.

65. Proude v. Whiton, 15 HowPr (N. Y.) 304. But compare Curtis v. Poppino, 2 HowPr (N. Y.) 182 (where a contrary rule is stated without discussion).

66. Comstock v. Olmstead, 6 How Pr (N. Y.) 77.

67. Patterson v. Buchanan, 40 App. Div. 493, 58 NYS 179, 29 NY CivProc 238.

ments of interest should not be credited on the principal, the administrators of the maker of the notes are justified in resisting payment, so as to procure the determination of the question by the court, and costs should not be awarded to the holder of the notes on procuring judgment against the administrators for the amount thereof.[68]

The representative is guilty of an unreasonable resistance where the defense is instituted merely for the purpose of delaying payment rather than in the expectation of defeating a recovery,[69] where the question of law involved was simple and had been held against him by an appellate court and the expenses of further litigation were likely to amount to considerably more than the claim itself,[70] or where there was no defense on the merits against the claim and the only issue presented was whether the claim was barred by the short statutes of limitation, which was determined against the representative.[71] Where, in an action against executors on a note indorsed by testator, the only question litigated was whether testator had waived protest, and such fact was established by a son of testator who was also the father of the executor and brother of the executrix, whose testimony was not disputed, and whose whereabouts were at all times known to defendants, a finding that payment was "unreasonably resisted" was warranted.[72]

[§ 2277] **dd. Prerequisites to Allowance—(aa) Presentation of Claim—aaa. In General.** Under the statutes under consideration costs cannot be recovered in a suit against the personal representative, unless the claim in suit was presented within the time prescribed by statute,[73] and it has been held that it must be presented in writing.[74] The fact that the payment of the claim had been unreasonably resisted does not alter the rule, as presentation within the time limited and unreasonable resistance of the claim must concur to authorize an allowance of costs.[75] To entitle a plaintiff to costs it must appear that the demand which had been presented for payment, or which plaintiff had offered to refer, were substantially the same as that upon which the recovery was had,[76] and if plaintiff should serve a bill of particulars claiming other demands it seems that he would lose his costs.[77] Where the claim presented is based upon a special contract for work and labor and a recovery had for a considerably less sum on a quantum meruit plaintiff is not entitled to costs.[78] On the other hand the fact that the amount claimed in the account as presented was larger than the amount named in the complaint and much larger than that recovered will not prevent a recovery of costs where it is for the same services and disbursements and the representative is in no way misled or prejudiced by the amount.[79] A creditor does not lose his right to costs by including in the declaration other claims than the one offered to be referred where no attempt was made to give evidence in regard to such other claims.[80] If the claimant has precluded himself from recovering costs against the administrator in an action on a claim he cannot recover costs against a defendant other than the personal representative who was surety for decedent on the claim sued on.[81]

[§ 2278] **bbb. Effect of Failure to Advertise for Claims.** The fact that executors or administrators have never advertised for the presentment of claims does not entitle a creditor to recover costs in a suit brought against them.[82] Conversely the fact that there has been no advertisement to present claims does not prevent an allowance of costs, if the claim has been duly presented and one of the grounds for allowance of costs provided by statute is shown.[83] Nor is it requisite that the claim be presented during the publication of the notice to creditors, because claims may be presented at any time after personal representatives qualify and enter upon their duties.[84]

[§ 2279] **(bb) Certificate of Judge or Referee.** Under statutes providing that, where an action on a claim against a decedent's estate is brought in the supreme court, it is necessary to entitle claimant to costs, for the judge or referee to certify that payment of the claim was unreasonably resisted or neglected, the allowance of costs to plaintiff without such certificate having been made is erroneous,[85] unless it is waived by stipula-

68. Bosworth v. Kinghorn, 94 App. Div. 187, 87 NYS 983 [aff 179 N. Y. 590 mem, 72 NE 1139 mem].

69. Boyd v. Wilkin, 23 HowPr (N. Y.) 137.

70. Gross v. Moore, 14 App. Div. 353, 43 NYS 945; Willison v. Gourlay, 10 OntWR 853.

71. Gardner v. Pitcher, 109 App. Div. 106, 95 NYS 678, 17 NYAnnCas 259 [aff 185 N. Y. 534 mem, 77 NE 1187 mem].

72. Pauley v. Millspaugh, 95 App. Div. 208, 88 NYS 565.

73. Cornwell v. Sheldon, 134 App. Div. 58, 118 NYS 707; Nichols v. Moloughney, 85 App. Div. 1, 82 NYS 949; Horton v. Brown, 29 Hun 654; Keyser v. Kelly, 43 N. Y. Super. 22; Belden v. Knowlton, 5 N. Y. Super. 758, CodeRepNS 127; Cornwell v. Sheldon, 134 App. Div. 58, 118 NYS 707; King v. Todd, 15 NYS 156; Clarkson v. Root, 18 AbbNCas (N. Y.) 462; Chesebro v. Hicks, 66 HowPr (N. Y.) 194; McCann v. Bradley, 15 HowPr (N. Y.) 79; Snyder v. Young, 4 How Pr (N. Y.) 217; Beecher v. Duel, 14 NYWklyDig 109; Bullock v. Bogardus, 1 Den. (N. Y.) 276; Potter v. Etz. 5 Wend. (N. Y.) 74; Greene v. Day, 1 Dem. Surr. (N. Y.) 45; Roe v. Hunter, 8 OhS&CP 423, 8 OhNP 21.

[a] **Presentation of the claim to the decedent** during his lifetime is insufficient. Clapp v. Schaus, 156 App. Div. 681, 141 NYS 451.

74. Wells v. Disbrow, 20 NYS 518; King v. Todd, 15 NYS 156.

75. Domeyer v. Hoes, 99 App. Div. 294, 90 NYS 1074; Clarkson v. Root, 18 AbbNCas (N. Y.) 462.

76. Genet v. Binsse, 3 Daly (N. Y.) 239; Hartshorne v. King, 1 Den. (N. Y.) 674; Wallace v. Markham, 1 Den. (N. Y.) 671.

77. Hartshorne v. King, 1 Den. (N. Y.) 674.

78. Wallace v. Markham, 1 Den. (N. Y.) 671.

79. Carter v. Beckwith, 104 N. Y. 236, 10 NE 350; Field v. Field, 77 N. Y. 294; Genet v. Binsse, 3 Daly (N. Y.) 239.

80. Hartshorne v. King, 1 Den. (N. Y.) 674.

81. Rhodes v. Doggett, 2 Oh. Dec. (Reprint) 451, 3 WestLJ 134.

82. Snyder v. Young, 4 HowPr (N. Y.) 217; Bullock v. Bogardus, 1 Den. (N. Y.) 276 [overr Harvey v. Skillman, 22 Wend. 571; Knapp v. Curtiss, 6 Hill 386].

[a] **Reason for rule.**—An executor is not bound to give this notice in any case, and does not violate his duty by its total omission. He may give notice for his own protection, or for the benefit of the estate he represents, but there is nothing in the statute which makes it compulsory on him to do so nor which subjects him to costs for failure to give the notice. Bullock v. Bogardus, 1 Den. (N. Y.) 270.

83. Clark v. Post, 45 Hun (N. Y.) 265 [rev on other grounds 113 N. Y. 17, 20 NE 573]; Brinker v. Loomis, 43 Hun 247, 5 NYSt 430.

84. Field v. Field, 77 N. Y. 294.

85. Matson v. Abbey, 141 N. Y. 179, 36 NE 11; Cornwell v. Sheldon, 134 App. Div. 58, 118 NYS 707; Scheu v. Blum, 119 App. Div. 825, 104 NYS 887; Darde v. Conklin, 73 App. Div. 590, 77 NYS 39; German-American Provision Co. v. Garrone, 73 App. Div. 409, 77 NYS 134; O'Connor v. Healey, 96 Misc. 278, 161 NYS 582; Oliver v. Sahler, 172 NYS 637; Wray v. Halliday, 3 NYMonthLBul 98.

"Inasmuch as there must be a new trial, it may not be out of place to call attention to the fact that the plaintiff was not entitled to costs. Such costs were awarded without any certificate or finding of the trial judge showing the facts upon which the award was founded. The Code of Civil Procedure (§ 1835) forbids the allowance of costs in an action brought against an executor or administrator in his representative capacity, except as prescribed in section 1836, which permits such an award where it appears that the claim was duly presented; that its payment was unreasonably resisted or rejected; or that there was a refusal to refer. Since these facts de-

tion.[86] The certificate, however, is required only for the recovery of costs and not of disbursements.[87]

Plaintiff is entitled to a certificate such as the statute prescribes where the facts warranting it exist.[88]

Form and sufficiency. A certificate by a referee that plaintiff is entitled to recover a sum "with the usual costs and disbursements" is not sufficient.[89] A certificate is not defective because it states that payment of the claim was unreasonably resisted and neglected "and" defendant did not file the consent to have it determined upon the settlement of his accounts instead of stating the two grounds in the disjunctive.[90]

Effect of certificate. The certificate of the referee before whom the trial took place that before the action was commenced the executor refused to refer the claim is prima facie conclusive on the court.[91]

[§ 2280] **(cc) Time of Commencing Suit.** If claimant commences his action before the expiration of the time allowed the representative by statute for filing his consent to refer the claim to the surrogate, he waives his right to costs.[92] After the action has been commenced the filing of the consent specified by the statute would be a useless formality.[93] On the other hand, if claimant brings his action after the expiration of the statutory period for filing the consent, and he recovers judgment, he will be entitled to costs, although the action was commenced before the expiration of the statutory period within which he must have brought his action.[94]

[§ 2281] **(3) Where Representative Personally Interested in Litigation.** The mere fact that a representative is personally interested in a suit brought by him in his representative capacity will not render him personally liable for costs in case the suit is unsuccessful if the suit was one which it was his duty to bring in a representative capacity and he was not guilty of mismanagement or bad faith.[95] It has been held, however, that representatives contesting for their own interests the claims of heirs are bound in case of failure to pay the costs of the suit;[96] and where an executrix who is also a legatee appeals from a judgment in her individual capacity as legatee she cannot claim the benefit of a statute providing that costs shall only be taxed against an executor personally in case of mismanagement or bad faith.[97] The personal representative does not represent the estate where he resists an attack on his settlement, and hence costs are properly taxed against him personally,[98] and the same is true of a representative who resists a suit by a beneficiary for the termination of his trust.[99] In a probate proceeding to set aside an order for the sale of real estate and for the removal of the administrator, the parties unsuccessfully opposing the granting of such relief were properly charged with a portion of the costs.[1]

[§ 2282] **b. Suits in Equity.** In suits brought by or against personal representatives in a court of equity costs are always in the discretion of the court.[2] Ordinarily, however, if the representative is unsuccessful in a suit brought by him in good faith he is not personally liable for costs,[3] although the bill is dismissed upon the merits.[4] On the other hand he will be personally liable in case he brings a vexatious and groundless suit,[5] or where he sues wantonly or is guilty of some willful default.[6] So where an executor institutes proceedings to be relieved from the amount charged against him in his final accounting on his being refused relief, he is liable to pay costs, although he also asks incidentally for a construction of the will;[7] and where the bill is brought merely in defense of a suit at law, a representative will not, in case of failure, be excused from costs in the court of equity in a case where costs would be given against him in the action at law.[8] He should not be allowed costs in a cause instituted by him for the purpose of having the instructions of the court upon questions which with reasonable certainty may be solved by counsel, or where they are incurred by making unnecessary

pend in whole or in part, at least, upon circumstances outside of the litigation, and not within its issues, the latter section provides that the facts must be certified by the judge or referee before whom the trial was had. The award of costs, therefore, must depend upon the certificate." Scheu v. Blum, 119 App. Div. 825, 829, 104 NYS 887 [foll Matson v. Abbey, supra].

86. Nellis v. Duesler, 18 NYS 315.

87. Lounsbury v. Sherwood, 53 App. Div. 318, 65 NYS 676.

88. Demarest v. Smith, 143 App. Div. 104, 127 NYS 659.

89. Lounsbury v. Sherwood, 53 App. Div. 318, 65 NYS 676.

90. Pauley v. Millspaugh, 95 App. Div. 208, 210, 88 NYS 565 (the statute "is alternative, and the conjunctive form of the certificate is but the natural method of statement of two alleged separate derelictions of the defendants. If the learned court had used 'or' instead of 'and,' there would thereupon arise a doubt as to which dereliction he intended to certify, and there would not be certainty as to either one of them").

91. Ely v. Taylor, 42 Hun (N. Y.) 205.

92. Pauley v. Millspaugh, 95 App. Div. 208, 88 NYS 565; Hart v. Hart, 45 App. Div. 280, 61 NYS 131; Hoye v. Flynn, 30 Misc. 636, 64 NYS 252.

93. Hart v. Hart, 45 App. Div. 280, 61 NYS 131.

94. De Kalb Ave. M. E. Church v. Kelk, 30 Misc. 367, 62 NYS 393.

95. Hone v. De Peyster, 106 N. Y. 645, 13 NE 778 [rev 44 Hun 487]; Finley v. Jones, 6 Barb. (N. Y.) 229.

96. Phillips v. Duckett, 112 Ill. A. 587; Rooney v. Bodkin, 93 App. Div. 431, 87 NYS 800; Hurtzell v. Brown, 5 Binn. (Pa.) 138.

97. Gardner v. Gardner, 6 Paige (N. Y.) 455; Roberts v. Lamberton, 117 Wis. 634, 94 NW 650.

98. Stricklin v. Galloway, 102 Ark. 142, 143 SW 1083.

99. Lanius v. Fletcher, (Civ. A.) 99 SW 169 [rev on other grounds 100 Tex. 550, 101 SW 1076].

1. Brunk v. Brunk, 157 Iowa 51, 137 NW 1065.

2. Daniels v. Eisenlord, 10 Mich. 454; Walton v. Taylor, 78 N. J. Eq. 266, 79 A 437; Shepard v. McClain, 18 N. J. Eq. 128; Corcoran v. Kennedy, 163 NYS 703; McBride v. Chamberlain, 26 NYS 94; Garr v. Bright, 1 Barb. Ch. (N. Y.) 157; Roosevelt v. Ellithorp, 10 Paige (N. Y.) 415; Getman v. Beardsley, 2 Johns. Ch. (N. Y.) 274; Brickle v. Leach, 55 S. C. 510, 33 SE 720.

3. Peyton v. McDonell, 3 Dana (Ky.) 314; Gifford v. Thorn, 9 N. J. Eq. 702; Corcoran v. Kennedy, 163 NYS 703; McCamman v. Worrall, 11 Paige (N. Y.) 99; Manny v. Phillips, 1 Paige (N. Y.) 472; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 520; Getman v. Beardsley, 2 Johns. Ch. (N. Y.) 274; Williams v. Mattocks, 3 Vt. 189.

[a] **Illustration.** — A court of equity may refuse to allow costs against an executor who has prosecuted a claim resting upon securities found among the papers of his testator and apparently in full force, although the court decreed against him. Williams v. Mattock, 3 Vt. 189.

[b] **Where an executor has commenced a wrong suit by mistake,** or ascertained that it would be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without costs. Arnoux v. Steinbrenner, 1 Paige (N. Y.) 82.

[c] **On revival of bill.**—Where an administrator revives a bill brought by his testator, costs should not be decreed against him individually if it is dismissed. Garner v. Strobe, 5 Litt. (Ky.) 314.

4. Roosevelt v. Ellithorp, 10 Paige (N. Y.) 415.

5. Shepherd v. McClain, 18 N. J. Eq. 128; Garr v. Bright, 1 Barb. Ch. (N. Y.) 157; Roosevelt v. Ellithorn, 10 Paige (N. Y.) 415; Getman v. Beardsley, 2 Johns. Ch. (N. Y.) 273; Isenhart v. Brown, 2 Edw. (N. Y.) 341; Wade v. Fisher, 10 Heisk. (Tenn.) 490.

6. Peyton v. McDowell, 3 Dana (Ky.) 314.

7. Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452 [rev on other grounds 41 N. J. Eq. 563].

8. Manny v. Phillips, 1 Paige (N. Y.) 472.

parties.[9] In suits brought against a personal representative in his capacity as such he is not personally liable for costs on failure of his defense, provided it was interposed in good faith,[10] but he will be personally liable where he has interposed a vexatious or groundless defense,[11] or through his neglect the estate has lost debts;[12] and an executor who makes costs by relying upon an unreasonable objection is personally chargeable therewith.[13] Where demands against the representative individually and against him in his representative capacity have, with his consent, been contested in a single suit, in which he has been unsuccessful, the court will not discriminate as to costs, but will charge the entire amount against him personally.[14] On settlement of an estate, executors should be charged individually with the costs of suit where they have permitted a great and unwarrantable delay in the final settlement of their accounts.[15]

[§ 2283] **2. Liability of Estate—a. Actions at Law—(1) By Personal Representatives.** Where an action is brought by a personal representative necessarily in his representative capacity and is unsuccessful, judgment for costs must be rendered against him in his representative capacity to be satisfied out of the assets of the estate,[16] except where he has by his own acts made himself personally liable,[17] or the action might have been brought in his individual capacity.[18] However, the rule that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action does not justify his resorting for this purpose to real estate which has been specifically devised.[19] Where an administrator fails in a suit brought by him at the procurement of a nominal defendant for such defendant's benefit and not for the benefit of the estate, the costs should be taxed against such defendant.[20]

Where the administrators of two estates join in an appeal, it is error to charge all the expenses necessarily incurred thereby to one estate.[21]

[§ 2284] **(2) Actions against Personal Representatives—(a) General Rule.** The general rule is that where a personal representative is sued as such and makes an unsuccessful defense, the judgment for costs should be de bonis testatoris.[22] He is liable for costs to the same extent that he is liable for the debt of the decedent, to be levied out of the assets in his hands.[23] In any event the assets

9. Colson v. Martin, 62 N. C. 125.

10. Ball v. Townsend, Litt. Sel. Cas. (Ky.) 325; Von Schuckmann v. Heinrich, 182 N. Y. 538, 75 NE 1135; Corcoran v. Kennedy, 163 NYS 703; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 472; Andrews v. Tower, 3 Phila. (Pa.) 111; Davis v. Davis, 20 S. C. L. 377.

[a] **On a bill for specific performance** of a land contract by a decedent, his executors cannot be charged personally with the costs of such proceeding where they were not contumacious in hesitating to form the contract. Andrews v. Tower, 3 Phila. (Pa.) 111.

[b] **Descriptio personæ.**—Where a note was executed to A, as administrator of R and judgment was rendered on the note which was enjoined at the cost of A in his individual capacity, such provision as to costs was not erroneous, since the words, "as administrator of R," were mere descriptio personæ. Reid v. Watts, 4 J. J. Marsh. (Ky.) 440.

11. Lee v. Pindle, 12 Gill & J. (Md.) 288; Campau v. Campau, 25 Mich. 127.

12. Sorrel v. Procter, 4 Hen. & M. (14 Va.) 431.

13. Lair v. Keys, 1 Ky. Op. 599; Benick v. Bowman, 56 N. C. 314.

14. Hunn v. Norton, Hopk. (N. Y.) 344.

15. Egerton v. Egerton, 17 N. J. Eq. 419.

[a] **Where exceptions are sustained to the charges of executors administering a trust fund,** they may be held personally liable for the costs of litigating such exceptions. Brokaw v. Brokaw, 41 N. J. Eq. 304, 7 A 414.

16. Ga.—Clements v. Maloney, 17 Ga. 289.

Ill.—Gibbons v. Johnson, 4 Ill. 61; Masters v. Masters, 13 Ill. A. 611.

Ind.—Brooks v. Muncie, etc., Tract. Co., 176 Ind. 298, 95 NE 1006; Cooper v. Thatcher, 3 Blackf. 59; Smith v. Cleveland, etc., R. Co., (A.) 115 NE 603.

Iowa.—Cuppy v. Coffman, 82 Iowa 214, 47 NW 1005.

Ky.—Corrico v. Lilly, 3 A. K. Marsh. 398; Beauchamp v. Davis, 3 Bibb 111.

Mass.—Brooks v. Stevens, 2 Pick. 68.

Mo.—Ross v. Alleman, 60 Mo. 269; State v. Maulsby, 53 Mo. 500; Ranney v. Thomas, 45 Mo. 111; Wooldridge v. Draper, 15 Mo. 470.

N. H.—Pillsbury v. Hubbard, 10 N. H. 224.

N. Y.—Dodge v. Crandall, 30 N. Y. 294; Van Pelt v. New York, 91 Misc. 550, 155 NYS 9; Collins v. Hoxie, 9 Paige 81.

Pa.—Callander v. Keystone Mut. L. Ins. Co., 23 Pa. 471; Muntorf v. Muntorf, 2 Rawle 180; Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; Jenkins v. Cutchens, 2 Miles 65; Myers v. Barton, 3 PaLJR 257, 5 PaLJ 142.

Wis.—Christensen v. Christopher, 157 Wis. 525, 147 NW 830.

[a] **Where an administrator is removed for failure to file bond** pending an action by him, all costs accruing in the action before such removal must be taxed to the estate. Cuppy v. Coffman, 82 Iowa 214, 47 NW 1005.

[b] **If an administrator prosecutes a suit commenced by decedent** and fails to support it, defendant will have costs against the estate. Brooks v. Stevens, 2 Pick. (Mass.) 68.

[c] **Defense of suit by heirs.**—Where a judgment is rendered against an administrator in an action which was defended by the heirs upon his refusal to do so, and they were defeated, the costs should be taxed against the heirs and not against the estate. Drummond v. Irish, 52 Iowa 41, 2 NW 622.

[d] **Action for benefit of next of kin.**—A statutory action by an administrator to recover damages for an assault on his intestate, being not for the benefit of the estate but of the next of kin, a judgment for costs in favor of defendant cannot be levied on the estate, but the administrator is personally liable. Hicks v. Barrett, 40 Ala. 291.

17. See supra § 2269.

18. See supra § 2270.

19. St. Jean v. Simard, 7 Ont. L. 537, 3 OntWR 515, 24 CanLTOccNotes 234.

20. Scott v. Pittman, 37 Okl. 470, 132 P 491.

21. In re Davis, 35 Mont. 273, 88 P 957.

22. See supra § 2201.

23. Ill.—Rodisch v. Moore, 266 Ill. 106, 107 NE 108; McKay v. Riley, 135 Ill. 586, 26 NE 525; Burnap v. Dennis, 4 Ill. 478; Ingham v. Mitchell, 176 Ill. A. 469.

Ind.—Mackey v. Ballou, 112 Ind. 198, 13 NE 715; Smith v. Cleveland, etc., R. Co., (A.) 117 NE 534 [superseding former op. on reh 115 NE 603].

Ky.—Hughes v. Standeford, 3 Dana 285; Scroggin v. Scroggin, 1 J. J. Marsh. 362; Lot v. Parish, 1 Litt. 393; Thomas v. Smith, 6 KyL 737, 13 Ky. Op. 392.

Mass.—Healy v. Root, 11 Pick. 389.

N. Y.—Corcoran v. Kennedy, 177 App. Div. 63, 163 NYS 703; Sabsevitz v. Gabrilowitz, 148 NYS 615; Lightfoot v. Davis, 112 NYS 289.

N. C.—Thompson v. Smith, 159 N. C. 439, 74 SE 635.

Oh.—Farrier v. Cairns, 5 Oh. 45.

Or.—De Bow v. Wollenberg, 52 Or. 404, 96 P 536, 97 P 717.

Pa.—Dale v. Dale, 42 Pa. Co. 255.

S. C.—Frink v. Luyten, 2 S. C. L. 166, 1 AmD 638.

Utah.—Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

Va.—Greenlee v. Bailey, 9 Leigh (36 Va.) 526.

Wis.—Christensen v. Christopher, 157 Wis. 525, 147 NW 830.

Ont.—Hill v. Hill, 6 Ont. 244.

But compare Meyer v. O'Rourke, 150 Cal. 177, 88 P 706 (in the absence of a specific statute authorizing the imposition of costs against executors, costs will be imposed upon an executor individually, leaving him the right to seek reimbursement from the estate should he be fairly entitled to it).

[a] **Where a suit commenced against decedent is continued by the court against his personal representatives,** plaintiff is entitled to costs against the estate if the verdict is such that he would have recovered costs if defendant had not died. Benedict v. Caffe, 10 N. Y. Super. 669.

[b] **Where while living, the original defendant suffers default** and interlocutory judgment, the estate should be charged with costs, on letting the administrators in to plead after his death. Lefevere v. Van Vechten, 3 HowPr (N. Y.) 201.

[c] **Presumption as to liability.**—Costs awarded to a plaintiff in an action against an executor will be presumed to be payable out of the estate and not by the executor personally in the absence of proof. Berwick v. Halsey, 4 Redf. Surr. (N. Y.) 18.

[d] **Suit to recover legacy.**—Where a suit to recover a legacy is rendered necessary by the ambiguity of the will, the costs should be a general charge upon the whole estate and not upon the legacy. Sawyer v. Baldwin, 20 Pick. (Mass.) 378.

[e] **Costs of appeals.**—"We are satisfied that the respective appeals by the executor were prosecuted in good faith, and it was therefore not improper to order the costs occasioned thereby to be paid by the executor in due course of administration." Leischner v. Kaiser, 156 Ill. A. 123, 129.

[f] **Insolvent estate.**—Where the administrator of an insolvent estate

in his hands are primarily liable for costs.[24] Where a suit is begun against executors without a presentation of the claim, and the executors find the claim to be just, and confess the demand within the time to appear and plead to the merits, there should be no judgment for costs.[25]

[§ 2285] **(b) Special Statutory Provisions—aa. As to Time of Commencing Action.** Under some statutes, a claimant who brings action within the time allowed for adjustment and settlement of claims is not entitled to costs, although successful in the action.[26]

[§ 2286] **bb. As to Amount of Recovery.** Under some statutes the right to costs is affected by the amount of recovery.[27] Thus where suit is brought against a personal representative on an allowed claim which has been allowed in part, plaintiff is sometimes denied costs unless he recovers more than the administrator was willing to allow,[28] and similar provision has been made with respect to the holder of a disputed claim against an estate which has been rejected and referred pursuant to statute.[29] Provision is also found that where personal representatives sue in the supreme court and recover less than an amount designated, they are not entitled to costs.[30] A statute which provides that plaintiff who recovers less than a designated amount in the circuit court shall be liable for costs does not apply to suits by an administrator who is by statute expressly empowered to sue for any sum in the circuit court.[31]

[§ 2287] **cc. As to Presentation of Claim.** Some statutes provide that one who successfully prosecutes a claim against an estate shall not recover costs unless he has presented his claim for allowance in accordance with the statutory provisions,[32] and other statutes make plaintiff liable for costs in case of nonpresentation.[33] These statutes have been held not to apply to actions against the personal representative when sued jointly with coöbligors of the deceased upon joint and several contracts;[34] or to cases in which the statute of nonclaim is immaterial and in which due presentment could not have avoided litigation.[35] If defendant intends to raise the question of presentation he must present it on the record by plea or suggestion so that plaintiff may have an opportunity of proving the presentation and the issue must be tried by the jury;[36] if no such plea or suggestion is made and plaintiff has a general verdict on the issue joined, he is entitled to full costs.[37] In order to recover costs it is not necessary for the declaration to allege a compliance with the statutory requirement as to presentation of the claims.[38]

[§ 2288] **b. Suits in Equity.** On a bill by an administrator de bonis non of a husband against the executor of the wife to set aside conveyances made by the husband to the wife in fraud of his creditors on a decree in favor of plaintiff he is entitled to recover costs against the estate of the wife.[39] Where an executor in good faith files a bill to foreclose a mortgage on land, securing a note absolute in terms, given to the testator, and the mortgagor successfully defends upon the ground that the mortgage was given as additional security for the payment of a chattel mortgage which has been paid, a decree for defendant canceling the mortgage will not be allowed to carry costs.[40] Where the answer to a bill of discovery filed by an executor shows that there was no fact within defendant's knowledge which could in any way aid the executor in his defense, costs are payable by the executor out of decedent's estate which has come into his hands.[41] In an action against heirs and administrators to compel specific execution of a contract of a decedent, where the heirs declare their readiness to lay title and the administrators admit assets on decree for plaintiff, the costs should be ordered paid by the administrators out of the assets.[42] Under a statute subjecting costs in chancery cases to the discretion of the court, except in a few cases it was proper in a suit brought in good faith to establish an equitable title in lands belonging to the estate to charge the estate with the taxable costs as part of the necessary expenses in the administration of the estate, although the relief prayed by the bill was denied.[43] Costs will not be awarded on a bill against executors of one who had purchased a bond and mortgage given for the purchase money of a trust estate sold by the trustee pending a suit against him for breach of trust, it not appearing that testator had actual notice of the suit against the trustee.[44]

On a bill by a legatee, where defendant submitted

gives notice of his dissatisfaction with the amount awarded to a creditor by the commissioners, and the creditor recovers a larger sum than was awarded by the commissioners, he is entitled to judgment for costs against the administrator de bonis propriis. Burns v. Fay, 14 Pick. (Mass.) 8.

[g] **Exceptions to the rule** stated in the text see supra § 2272.

24. Phipps v. Addison, 7 Blackf. (Ind.) 375; Priest v. Martin, 4 Blackf. (Ind.) 311; Sindle v. Kiersted, 3 N. J. L. 926; Quicksall v. Quicksall, 3 N. J. L. 457; Senescal v. Bolton, 7 N. M. 351, 34 P 446; Peo. v. Judges Erie County C. Pl., 4 Cow. (N. Y.) 445.

25. Clayton v. Dinwoodey, 33 Utah 251, 93 P 723, 14 AnnCas 926.

26. Pate v. Gray, 18 F. Cas. No. 10,794a, Hempst. 155; Cooper v. Livingston, 19 Fla. 684; Butts v. Genung, 5 Paige (N. Y.) 254; Freer v. Love, Wright (Oh.) 414; Kinney v. Lockwood, Wright, (Oh.) 340.

[a] **A plea of set-off is not an action** within such a statute. Pate v. Gray, 18 F. Cas. No. 10,794a, Hempst. 155.

27. See the statutes.

28. Corbett v. Rice, 2 Nev. 330.

29. Lamphere v. Lamphere, 54 App. Div. 17, 66 NYS 270; Cuylers v. Kniffin, 2 Wend. (N. Y.) 243.

30. Mahany v. Fuller, 2 Johns. Cas. (N. Y.) 209.

31. Hillenberg v. Bennett, 88 Ind. 540; Wheeler v. Calvert, 25 Ind. 365.

32. Milner Bank, etc., Co. v. Whipple, 61 Colo. 442, 158 P 811; Rosenthal v. Magee, 41 Ill. 371; Granjang v. Markle, 22 Ill. 250; Lamson v. Vevay First Nat. Bank, 82 Ind. 21.

33. Mitchell v. Lea, 57 Ala. 46.

[a] **Purpose of statutes.**—The obvious design of the statutes is to prevent estates from being charged with costs on account of demands which would have been paid or arranged without such costs had they been presented to the personal representative of the decedents. Mitchell v. Lea, 57 Ala. 46.

34. Lamson v. Vevay First Nat. Bank, 82 Ind. 21.

35. Mitchell v. Lea, 57 Ala. 46.

36. Wallace v. Nelson, 28 Ala. 282.

37. Wallace v. Nelson, 28 Ala. 282.

38. Granjang v. Markle, 22 Ill. 249.

39. Preston v. Cutter, 65 N. H. 85, 18 A 92.

40. Wilbur v. Jones, 80 N. J. Eq. 520, 525, 86 A 769 ("There will be a decree for the defendant denying the relief sought by the complainant, and ordering the $600 mortgage to be surrendered and delivered up for cancellation, but without costs as against the complainant. The reason for this is that the defendant was indifferent enough to make a mortgage absolute on its face, when intended only for collateral security and he could have protected himself by insisting upon a proper recital in it. Not having done so, and the mortgage coming to the executrix of the mortgagee after his death, who, the executrix, knowing nothing about the original transaction, was justified in filing a bill to foreclose the mortgage, and should not be subjected to the payment of costs as the mortgagor succeeds only upon an affirmative defence").

41. Williams v. Harden, 1 Barb. Ch. (N. Y.) 298; Boughton v. Philips, 6 Paige (N. Y.) 334.

42. Tindall v. Mounger, 5 N. C. 290.

43. Van Wert v. Chidester, 31 Mich. 207.

44. Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441.

to and asked the direction of the court in a matter proper for such direction, his costs were ordered to be paid out of the fund.[45]

[§ 2289] **3. When Personal Representative Entitled to Costs.** Where the issue on the single plea of plene administravit is found for defendant, he is entitled to judgment for general costs in the case, notwithstanding judgment may be rendered in plaintiff's favor for his debt and costs to be levied on the goods of the estate quando acciderint.[46] It has been held that where the personal representative pleads the general issue and plene administravit and issues are joined on both pleas and judgment quando acciderint rendered, he is entitled to the general costs of the suit,[47] although there is also authority for the view that plaintiff is entitled to costs under such circumstances.[48] It has been held that where the representative pleads the general issue and plene administravit he will be entitled to costs on a judgment quando notwithstanding the plea of plene administravit is admitted,[49] but this has been denied in one case which holds that plaintiff is entitled to judgment for costs de bonis propriis,[50] and in another in which it is merely held that no costs should be adjudged to defendant.[51] A statute giving plaintiff costs if he recovers judgment has no application to a special statutory proceeding by an executor to recover property alleged to belong to his estate.[52] Executors who have no interest in the subject matter of the litigation, when made defendants, are entitled to costs,[53] and where an executor is sued as trustee and defends on the ground that he was liable only as executor, and that the probate court alone had jurisdiction and the court sustains the defense as to the greater part of the estate, it was held that he might be allowed a proportionate share of the expenses.[54] It has been held that where an executor demands securities of decedent from a trustee and exhibits a certificate of the surrogate showing that he is executor and the trustee refuses to deliver them until an accounting in court, the executor on obtaining judgment against the trustee for the delivery of the securities is entitled to judgment for costs.[55] Under statutes declaring that, if an executor refuses to pay a legacy, the person entitled thereto may maintain such action as the case requires, and providing that defendant is entitled to costs of course on final judgment in an action in which the complaint demands judgment for money only, an executor is entitled to costs on final judgment in his favor in an action brought against him, in which judgment is demanded for a certain sum, and the principal issue is whether or not the legacies claimed were revoked by a codicil.[56] In an action by remaindermen of personal property, charging misconduct, against the life tenant and another, executors, the remaindermen are properly charged with costs on failing to sustain the charges.[57] Where an administrator executed a mortgage on decedent's real estate under order of court to raise money to pay debts, and in a suit to foreclose such mortgage he successfully defended plaintiff's claim that he was personally liable thereon, the court properly awarded costs in his favor.[58]

Division of costs. Where an executor permitted an action to proceed as a suit to recover property after it was disclosed that defendant claimed title under an alleged gift, and plaintiff recovered only one item of the property, the court properly divided the costs.[59]

Withdrawal of replication to plea of plene administravit. Defendant may object to plaintiff's withdrawal by consent of court of the replication to the plea of plene administravit, unless on terms of plaintiff's payment of the costs occasioned by such replication, but if he neglects so to do at the time of withdrawal it admits that he is not entitled to recover such costs and there can be no judgment at any future term for his separate costs on account thereof if the issue of non assumpsit is found against him.[60]

[§ 2290] **4. Extra Allowance.** Where costs have been properly awarded against an executor personally, an extra allowance against him will be allowed under proper circumstances,[61] as in extraordinary or difficult cases.[62] A motion for extra allowance when made before the right to recover the ordinary costs in the action has been determined is premature;[63] and where an action against an administrator in which plaintiff recovered judgment for a sum of money only was tried before a referee, there can be no extra allowance of costs until the cost allowed by the referee have been regularly taxed.[64]

[§ 2291] **5. Security for Costs.** A foreign administrator may be required to give security for costs,[65] as may also a nonresident administrator,[66] although he brings suit as an administrator appointed within the jurisdiction.[67] The statutes sometimes leave it discretionary with the court in actions by or against personal representatives to require security for costs from plaintiff.[68] It is sufficient to authorize an order requiring security for costs

45. Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153.

46. Timberlake v. Benson, 2 Va. Cas. 348.

47. Ky.—Burns v. Burton, 1 A. K. Marsh. 349.
N. Y.—Osterhout v. Hardenbergh, 19 Johns. 266.
N. C.—Battle v. Rorke, 12 N. C. 228; Welborn v. Gordon, 5 N. C. 502.
Va.—Timberlake v. Benson, 2 Va. Cas. 348.
Eng.—Cockson v. Drinkwater, 3 Dougl. 239, 26 ECL 163, 99 Reprint 633; Hogg v. Graham, 4 Taunt. 135, 128 Reprint 280.

48. Hindsley v. Russell, 12 East 232, 104 Reprint 90; Speer v. Van Houten, 19 N. J. L. 46.

49. Lewis v. Johnston, 69 N. C. 392.

50. Marshall v. Willder, 9 B. & C. 655, 17 ECL 294, 109 Reprint 243.

51. Timberlake v. Benson, 2 Va. Cas. 348.

52. Fancher v. Kenner, 110 Ark. 117, 161 SW 166.

53. Delafield v. Colden, 1 Paige (N. Y.) 139.

54. Clement's App., 49 Conn. 519.

55. Farrington v. Farmers' L. & T. Co., 21 NYS 194.

56. Ladies' Union Benev. Soc. v. Van Natta, 96 App. Div. 99, 88 NYS 1083.

57. In re Knowles, 148 N. C. 461, 62 SE 549.

58. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 NW 341, 105 AmSR 1032.

59. Fancher v. Kenner, 110 Ark. 117, 161 SW 166.

60. Timberlake v. Benson, 2 Va. Cas. (4 Va.) 348.

61. Niblo v. Binsse, 31 HowPr (N. Y.) 476.

62. Weeks v. Coe, 76 App. Div. 310, 78 NYS 477.

63. Mersereau v. Ryerss, 12 How Pr (N. Y.) 300.

64. Lightfoot v. Davis, 112 NYS 289.

65. Tucker v. West, 31 Ark. 643; Podmore v. Seaman's Bank, 28 Misc. 488, 59 NYS 629.

66. Davis v. You, 43 Ala. 691; Chevalier v. Finnis, 1 B. & B. 277, 5 ECL 633, 129 Reprint 729.

67. Davis v. You, 43 Ala. 691; Schmalz v. William L. Crow. Constr. Co., 146 App. Div. 623, 131 NYS 398.

68. Tolman v. Syracuse, etc., R. Co., 92 N. Y. 353; Schmalz v. William L. Crow Constr. Co., 146 App. Div. 623, 131 NYS 398; Caccavo v. Rome, etc., R. Co., 59 N. Y. Super. 129, 13 NYS 884.

[a] **Appointment procured in bad faith.**—Security may be required where at the time of the appointment the fact that another administrator had been previously appointed was concealed from the court and the estate was insolvent and success of the suit doubtful. Pfeifer v. Supreme Lodge Bohemian-Slavonian Benev. Soc., 54 App. Div. 200, 66 NYS 604.

[b] **Such discretion is reviewable** on appeal. Schmalz v. William L. Crow Constr. Co., 146 App. Div. 623, 131 NYS 398.

to be given that the court considers it proper to require security,[69] and it is not necessary that there should be evidence of bad faith.[70] Security may be required at any time during the pendency of the suit either before trial or judgment or pending an appeal;[71] and the court may require security for costs already accrued or entered on the judgment appealed from as well as for those that shall thereafter accrue or limit the requisition to the costs which shall accrue in the future.[72] Statutes requiring security from a foreign administrator bringing suit have no application to one who is sued and chooses to defend.[73] The statutes do not apply to actions originally brought by decedent and revived in favor of his personal representative.[74]

[§ 2292] **6. Suits in Forma Pauperis.** The privilege conferred by statutes allowing suits to be brought in forma pauperis is a personal one and an administrator cannot so sue on account of the insolvency of the estate;[75] much less can he do so where he would be the sole beneficiary of any recovery.[76]

[§ 2293] **7. Award of Costs.** Sometimes, under statute, a defendant in a suit brought by an executor or administrator is entitled to costs without a motion where a successful defense is interposed;[77] but, where actions are brought against an executor or administrator and a judgment obtained, no costs can be recovered unless the court in the exercise of its powers upon motion adjudges that it is a case in which costs should be paid by the estate or its representatives.[78] So in actions prosecuted or defended by an executor or administrator a referee to whom the whole issue or cause is referred has not the right to decide the question of costs or the power to award costs against the executor or administrator personally or against the estate he represents;[79] such costs can only be allowed by the court upon application therefor [80] after trial.[81] The personal liability of an executor for the costs of an appeal in an action originally begun by the testator is not a matter for adjustment on the judicial accounting before the surrogate but must be determined by the court having original jurisdiction of the cause.[82] Under a statute providing for the appointment of an attorney to defend an action on a claim presented against an estate by the personal representative and that if plaintiff recovers no judgment he shall pay all costs including reasonable attorney's fees to be fixed by the court, a charge for services rendered by an attorney so appointed for services in the successful defense of such an action is not a part of the bill of costs and the fee therefor is to be fixed by the court.[83] The allowance of the fee can only be made after termination of the action.[84]

[§ 2294] **8. Judgment.** Where the verdict is against a defendant as administrator judgment for costs must be entered against him in the same character,[85] but notwithstanding the fact that a judgment is erroneously rendered against an administrator for costs individually it is nevertheless effective until corrected on motion, on review, or on appeal.[86] Under various statutes it has been held that in order to charge the estate with costs the judgment must contain an express direction that the costs shall be payable out of the estate;[87] that where the court orders a judgment to be entered against an executor or administrator for costs without any special instructions, it means that the judgment shall be only de bonis testatoris, and there must be an express direction in the judgment to charge the personal representative individually for costs;[88] that the judgment, in order to charge the estate with costs, must contain a formal direction for the payment of costs out of the estate;[89] and that if it is sought to charge the administrator personally the judgment must expressly direct the costs to be paid by him personally for mismanagement or bad faith in the action.[90] Where by statute the personal representative is always individually liable for costs, a judgment against a designated person "as administrator," etc., is against him personally for costs.[91] A judgment for costs against the es-

69. Pfeifer v. Supreme Lodge Bohemian-Slavonian Benev. Soc., 54 App. Div. 200, 66 NYS 604.

[a] **Insolvency.** — An administrator prosecuting an action in good faith and with reasonable prospect of success will not be required to give security on the ground that the estate is without assets. Podmore v. South Brooklyn Sav. Inst., 27 Misc. 120, 57 NYS 406.

70. Collins v. Sanders, 5 KyL 860, 12 Ky. Op. 579; Tolman v. Syracuse, etc., R. Co., 92 N. Y. 353; Pfeifer v. Supreme Lodge Bohemian-Slavonian Benev. Soc., 54 App. Div. 200, 66 NYS 604.

71. Gedney v. Purdy, 47 N. Y. 676; Knoch v. Funke, 19 NYS 242, 22 NY CivProc 161.

72. Gedney v. Purdy, 47 N. Y. 676.

73. Moss v. Rowland, 3 Bush (Ky.) 505.

74. Sullivan v. Remington Sewing Mach. Co., 27 Hun (N. Y.) 270.

75. McCoy v. Broderick, 3 Sneed (Tenn.) 203.

76. Barbee v. Frazier, 9 Lea (Tenn.) 348.

77. Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820; Howe v. Lloyd, 2 Lans. (N. Y.) 335; Woodbury v. Cook, 14 HowPr (N. Y.) 481.

78. Ely v. Taylor, 42 Hun (N. Y.) 205; Howe v. Lloyd, 2 Lans. (N. Y.) 335; Fox v. Fox, 22 HowPr (N. Y.) 453; Weeks v. Wanamaker, 2 HowPr (N. Y.) 15; Knapp v. Curtiss, 6 Hill (N. Y.) 386.

79. Bailey v. Bergen, 5 Hun 555 [aff 67 N. Y. 346]; Smith v. Randall, 67 Barb. (N. Y.) 377; O'Connor v. Healey, 96 Misc. 278, 161 NYS 582 [aff 161 NYS 1137]; Morgan v. Skidmore, 3 AbbNCas (N. Y.) 92; Mesereau v. Ryerss, 12 HowPr (N. Y.) 300.

80. See cases supra note 79.

81. Bailey v. Bergen, 5 Hun (N. Y.) 555 [aff 67 N. Y. 346].

[a] **Allowance nunc pro tunc.** — Although it is irregular to enter judgment for costs against executors upon the report of a referee, without obtaining special leave of court, the judge before whom a motion to strike the costs from the judgment and a cross motion for an extra allowance of costs are made has power to have his order giving costs and the allowance entered nunc pro tunc. Niblo v. Binsse, 47 Barb. (N. Y.) 435.

82. Harrington v. Strong, 49 App. Div. 39, 63 NYS 257.

83. Painter v. Painter, 78 Cal. 625, 21 P 433.

84. Painter v. Painter, 78 Cal. 625, 21 P 433.

85. Clements v. Maloney, 17 Ga. 289; Ingham v. Mitchell, 176 Ill. A. 469.

[a] **Judgment for payment in due course of administration.**—(1) It is error to render judgment against plaintiff administrator for costs, and to award execution thereon, since the judgment should provide that costs are to be paid in due course of administration. Ingham v. Mitchell, 176 Ill. A. 469. (2) Such error is not, however, a sufficient cause for reversal, as it is purely technical and harmless in its effect, and even if considered otherwise could readily be cured by a proper form of judgment entered in the appellate court. Roy v. East St. Louis, etc., R. Co., 119 Ill. A. 313.

86. State v. Ritter, 20 Ind. 406.

[a] **Correction by reviewing court.**—Where a judgment is erroneous in form as being against the administrator personally instead of in his representative capacity, it may be corrected in the reviewing court and the proper judgment rendered there. Masters v. Masters, 13 Ill. A. 611.

87. Stevens v. San Francisco, etc., R. Co., 103 Cal. 252, 37 P 146; Boyer v. Northwestern El. R. Co., 174 Ill. A. 161; McCarthy v. Speed, 16 S. D. 584, 94 NW 411.

88. Scroggin v. Scroggin, 1 J. J. Marsh. (Ky.) 362; Hone v. De Peyster, 106 N. Y. 645, 13 NE 778 [rev 44 Hun 487]; Dodge v. Crandall, 30 N. Y. 294; Callender v. Keystone Mut. L. Ins. Co., 23 Pa. 471.

89. Wiesmann v. Brighton, 83 Wis. 550, 53 NW 911; Ladd v. Anderson, 58 Wis. 591, 17 NW 320; Hei v. Heller, 53 Wis. 415, 10 NW 620.

90. Wiesmann v. Brighton, 83 Wis. 550, 53 NW 911; Ladd v. Anderson, 58 Wis. 591, 17 NW 320.

91. Lough v. Flaherty, 29 Minn. 295, 13 NW 131.

tate should not contain a direction that execution issue for the same, as execution can only issue when allowed by the probate court.[92]

[§ 2295] **9. Execution.** Ordinarily where a judgment is rendered against a personal representative in his capacity as such for costs, execution cannot issue thereon but the costs should be certified to the probate court for allowance and payment in due course of administration.[93] If a judgment is against the personal representative for costs in his individual capacity, it is a money judgment and therefore enforceable only by execution,[94] which is therefore properly issued.[95] On a judgment of this character the property of an heir received from the estate is not liable to execution.[96] By the express provisions of the statutes in some jurisdictions where judgment is rendered against an executor for debt, or damages and costs, two separate executions issue, one for the debt or damages against the goods and estate of deceased and the other for the costs against the goods, estate, and body of the executor.[97] These statutes do not give the creditor a cumulative remedy in respect of costs but deprive him of his right to have an execution for costs against the goods and estate of deceased.[98] It has been held that an execution for costs issued against a personal representative warrants his arrest without affidavit or special instruction to the officer.[99]

[§ 2296] **X. Attorneys' Fees and Other Expenses of Litigation.** The allowance of attorneys' fees,[1] fees of witnesses,[2] stenographers' fees,[3] and disbursements,[4] in civil actions generally, have been treated elsewhere in this work.

Allowance to representative. Ordinarily in litigation by or against executors or administrators, where they employ counsel or stenographers, they are personally liable, although the litigation is for the benefit of the estate and is prosecuted or defended in their representative capacity, since they cannot bind the estate by any affirmative contract they may make respecting it.[5] Nevertheless one may agree not to hold the executor or administrator personally, and look to the estate only or to such allowances as may be made in the action or proceeding for his compensation,[6] and where a referee and an unofficial stenographer in a proceeding against administrators acquiesced in a stipulation between the parties that the referee's and stenographer's fees should be paid out of the estate, the administrators cannot be held personally liable therefor.[7] Where an administrator has control of the estate's funds and the right to reimbursement for all proper expenses and counsel fees in an action against him, the court in which an action against such administrator is brought cannot properly consider and determine the amount to be allowed for such expenses and counsel fees, and award such amount, to be taxed as a part of the costs, and to be allowed upon settlement of the administrator's account.[8] Allowances to an administrator for attorney's fees and court costs can be made only out of property belonging to the estate, and hence such fees and costs incurred in contesting a daughter's claim to the proceeds of an insurance policy, which are her own property, are not allowable.[9] Where an action is brought by an administrator, on a deficiency of assets, to set aside a fraudulent conveyance by decedent, the expenses of litigation, including attorney's fees, may be set aside out of the property fraudulently conveyed.[10]

Allowance to legatee claimant. In a suit by a legatee to enforce his claim against an executor and to reach real estate fraudulently conveyed, the court may not include in the claim of the legatee solicitor's fees,[11] although the legatee, as the original complainant, may be given such an allowance out of the recovery as against colegatees who intervened.[12]

Allowance to intervener. Where, in a suit by the executrixes of an estate, who claimed adversely thereto, being personally interested in the property involved, the interests of the estate were protected by the intervention of legatees thereof and the property claimed by the executrixes individually was added to the estate fund, the legatees were entitled to reasonable compensation for counsl fees and expenses out of the trust fund.[13]

Allowance to other claimants. It has been held that, where a disputed claim is referred and a report in claimant's favor confirmed, he is not entitled as matter of right to disbursements necessarily made by him, such as fees of referees, witnesses, etc.,[14] but they, as well as the costs, are to be awarded or withheld by the court in its discretion,[15] but

92. Syms v. New York, 105 N. Y. 153, 11 NE 369 [aff 50 N. Y. Super. 289].

93. Clemens v. Kaiser, 211 Ill. 460, 71 NE 1055; Dye v. Noel, 85 Ill. 290; Peck v. Stevens, 10 Ill. 127; Welch v. Welch, 8 Ill. 490; Burnep v. Dennis, 4 Ill. 478; Martin v. St. Luke's Hospital, 195 Ill. A. 388; Syms v. New York, 105 N. Y. 153, 11 NE 369 [aff 50 N. Y. Super. 289]; Matter of Boyle, 9 NYS 473, 2 Conn. Surr. 57; Crawford v. Parker, 26 Pa. Co. 414; Davis v. Thomas, 5 Tex. 389; Schmidt v. Huff, 7 Tex. Civ. A. 593, 28 SW 1053.

94. Matter of Feehan, 36 Misc. 614, 73 NYS 1126, 2 Mills Surr. 416.

95. More v. Luther, 153 Mich. 215, 117 NW 932.

96. Daniels v. Hollingshead, 16 Ga. 190.

97. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793; Greenwood v. McGilvray, 120 Mass. 516.

[a] **Effect of insolvency of estate.** —The right to an execution against an executor for costs under the statutes mentioned is not affected by a statute providing that when judgment has been rendered against the estate of a deceased person which has been represented as insolvent no execution shall be issued thereon. Perkins v. Fellows, 136 Mass. 294.

98. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793.

[a] **Where an execution issued for both debt and costs against the goods, and estate of decedent** is satisfied by levying it on the lands of the testator, such levy is bad, as the costs are collectable only against the executor. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A 793.

99. Gibbs v. Taylor, 143 Mass. 187, 9 NE 576.

1. See Costs §§ 248, 249.

2. See Costs §§ 275–303.

3. See Costs §§ 319–322.

4. See Costs §§ 328–338.

5. Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 54 Misc. 258, 104 NYS 429, and aff 194 N. Y. 575 mem, 88 NE 1115 mem].

[a] **The expenses of a referee's hearing** in a proceeding against administrators were subject to approval and allowance by the surrogate, and, in the absence of an express agreement to pay, did not become a fixed charge against the estate or the administrators until passed upon and allowed by him. Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 54 Misc. 258, 104 NYS 429, and aff 194 N. Y. 575 mem, 88 NE 1115 mem].

6. Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 54 Misc. 258, 104 NYS 429, and aff 194 N. Y. 575 mem, 88 NE 1115 mem]. To same effect Brackett v. Ostrander, 126 App. Div. 529, 110 NYS 779.

7. Bottome v. Neeley, 124 App. Div. 600, 109 NYS 120 [aff 54 Misc. 258, 104 NYS 429, and aff 194 N. Y. 575 mem, 88 NE 1115 mem].

8. Bowlin v. Rhode Island Hospital Trust Co., 76 A 770, 31 R. I. 289, 76 A 348, 140 AmSR 758.

9. Young v. Roach, 105 Miss. 6, 61 S 984.

10. Lynch v. Murray, 86 Vt. 1, 83 A 746.

11. Fraser v. Cole, 214 Fed. 556, 131 CCA 556.

12. Fraser v. Cole, 214 Fed. 556, 131 CCA 556.

13. Bean v. Bean, 74 N. H. 404, 68 A 409, 124 AmSR 978 (holding also that the fact that they did not succeed in a second suit did not conclusively show that they were not entitled to remuneration from the estate for the expenses incurred therein, it being merely a circumstance bearing on the reasonableness of the services and good faith in rendering them for the estate).

14. See cases infra note 15.

15. Miller v. Miller, 32 Hun (N. Y.) 481; Bertholf v. Carr, 3 Silv. Sup.

other authorities hold that he is entitled to his disbursements as a matter of right.[16] If a claim based on a note containing a promise to pay attorney's fees is put in suit against an estate,[17] the claimant, if successful, is entitled to an allowance of the attorney's fees provided for therein.[18] Expenses and counsel fees reasonably incurred in litigation against the administrator which resulted in the recovery of a portion of the estate are a proper charge against it;[19] and attorney's fees are properly allowed to a widow in enforcing her claim against executors for an allowance under a will directing them to pay her an allowance to be determined by the court, in case of failure to agree on the amount.[20] In a suit to restrain an executor from paying illegal claims against the estate of his testator, complainant's attorneys may be paid out of the estate, where it is shown that the services rendered by them were in the interest of all the heirs alike, were beneficial to the estate, and were reasonably worth the sum allowed.[21] Where a bill for an accounting as to a bequest to trustees involved the issue whether complainants were testator's grandchildren, born of his son in lawful wedlock, which question had been determined against them in a prior suit in which they were unsuccessful, they would not be entitled to an allowance for counsel fees on the theory that the suit involved the inquiry whether complainants were entitled to a share in testator's estate under the trust provisions of his will, and accordingly involved the proper administration of the estate.[22]

[§ 2297] **Y. Liabilities in Respect to Conduct of Action or Defense.** The heirs and creditors of an estate are generally bound, in the absence of collusion or fraud, as far as third persons are concerned, by the acts of the personal representative in prosecuting or defending a suit concerning the estate,[23] although the representative may also be personally liable for damages caused by his wrongful acts, in the course of the proceedings,[24] unless it appears that he was disinterested and acted in good faith for the interests of the estate.[25] As between such heirs and creditors and the representative the latter is bound to act with diligence, prudence, and good faith, and unless he does so he may render himself personally liable for any loss occasioned by his negligence or bad faith in prosecuting[26] or defending[27] proceedings by or against him in his representative capacity, or in intervening in suits instituted between other persons.[28] The representative may be personally liable for a loss

281, 6 NYS 254, 17 NYCivProc 213; Daggett v. Mead, 11 AbbNCas (N. Y.) 116.

16. Krill v. Brownell, 10 NYCiv Proc 8; Overheiser v. Morehouse, 8 NYCivProc 11; Sutton v. Newton, 7 NYCivProc 533; Hall v. Edmunds, 67 HowPr (N. Y.) 202.

17. Validity of provision in bill or note for payment of attorney's fees and costs of collection see Bills and Notes § 256.

18. Jewett v. Hurrie, 121 Ind. 404, 23 NE 262; Price v. Jones, 105 Ind. 543, 5 NE 683, 55 AmR 230; Hanna v. Fisher, 95 Ind. 383; Bond v. Osndorf, 77 Ind. 583.

19. In re Simons, 55 Conn. 239, 11 A 36; Hannen v. Harrod, 99 SW 976, 30 KyL 976.

20. McLean v. Thomas, 159 Ill. 227, 42 NE 798 [aff 52 Ill. A. 161].

21. Hannen v. Harrod, 99 SW 976, 30 KyL 976.

22. Sparks v. Ross, 82 N. J. Eq. 121, 88 A 214.

23. Parnham v. Weeks, 180 Iowa 649, 163 NW 454; Pauline v. Hubert, 14 La. Ann. 161; Matthews v. Joyce, 85 N. C. 258.

[a] **A party cannot be deprived of the fruits of an adjudication** because of the failure of an administrator to set up an available defense, unless such failure was the result of collusion with such party. Matthews v. Joyce, 85 N. C. 258.

24. Schneider v. Hesse, 9 KyL 242 (an administrator plaintiff in an execution is personally liable for procuring the sale of the property of another than the execution defendant).

25. Berens v. Boutte, 31 La. Ann. 112.

[a] **Wrongful injunction.**—A succession should not be condemned in damages for an abuse by the administrator of the process of injunction; and the administrator, personally liable for his wrongful act cannot be condemned personally in a proceeding in which he is a party only in his representative capacity. Lamorere v. Cox, 32 La. Ann. 246; Berens v. Boutte, 31 La. Ann. 112.

26. U. S.—Pickett v. Foster, 36 Fed. 514 [aff 149 U. S. 505, 13 SCt 998, 37 L. ed. 829].

Iowa.—Meyeringh v. Wendt, 86 Iowa 465, 53 NW 414.

Ky.—Russell v. Russell, 4 Dana 40.

Oh.—Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

S. C.—Hudgens v. Sullivan, 34 S. C. 99, 12 SE 934.

[a] **Bail bond.**—An administrator is not responsible for the sufficiency of a bail bond taken by a sheriff in a case where he is plaintiff, even though he expressly accepted such bond. Charleton v. Sloan, 64 N. C. 702.

[b] **A suit instituted by a public administrator without authority** does not charge his successor in office with any official duties in relation to it, and the latter's having the suit called out and dismissed, or his failure to prosecute it, does not make him liable to the heirs. Pickett v. Foster, 36 Fed. 514 [aff 149 U. S. 505, 13 SCt 998, 37 L. ed. 829].

27. Ala. — Teague v. Corbitt, 57 Ala. 529; Pearson v. Darrington, 32 Ala. 227.

Ga.—Skrine v. Simmons, 11 Ga. 401; Bomgaux v. Bevan, Dudl. 110.

Ky.—Macey v. Fenwick, 4 B. Mon. 306; Hutchcraft v. Tilford, 5 Dana 353.

Md.—State v. Greenwell, 4 Gill & J. 407.

Mass.—Brazier v. Clark, 5 Pick. 96.

S. C.—Warley v. Warley, 8 S. C. Eq. 397.

Tenn. — Gorman v. Swaggerty, 4 Sneed 560.

Va.—Boyd v. Boyd, 3 Gratt. (44 Va.) 113.

Ont.—Hutchinson v. Edmison, 11 Grant Ch. (U. C.) 477.

[a] **It is the representative's duty, when sued by a creditor,** so to plead as to protect the rights of all the creditors of the estate, according to their priorities, of whose demands he has notice, and if he fails to do so he becomes personally chargeable. Davis v. Smith, 5 Ga. 274, 47 AmD 279.

[b] **Defense by direction of persons beneficially interested.**—Where an action by a legatee is defended by the executor by direction of the heirs and other legatees, such executor cannot be held liable for waste by reason of the defense thereby incurred, although plaintiff was successful. Brazier v. Clark, 5 Pick. (Mass.) 96.

[c] **If counterclaims were set up** in an action by an administrator against the lessors for the amount due from them for the purchase of the unexpired term, and were resisted by the administrator in good faith, and a judgment was rendered against the administrator allowing such claims, he will be exonerated; and it is not necessary, to entitle him to such exoneration, that he shall have taken an appeal. Pate v. Oliver, 104 N. C. 458, 10 SE 709.

[d] **After judgment against an administrator** for payment out of specified assets, any other application of them will render him liable for waste. Davies v. Flewellen, 29 Ga. 49.

[e] **Failure to plead an outstanding covenant of warranty** made by his decedent does not render him personally liable, if at the time of the rendition of the judgment there was no breach of the covenant. Davis v. Smith, 5 Ga. 274, 47 AmD 279.

[f] **Statute of frauds.**—Where the creditors have, by promise of the administrator, been induced to defer bringing actions against the estate, and have finally brought personal actions against the administrator on such promises, he cannot be required to set up thereon the defense of the statute of frauds for the benefit of the next of kin of the intestate. Ames v. Jackson, 115 Mass. 508.

[g] **Burden of proof.**—Where an executor seeks credit for payment of a judgment against the estate, the burden of proof is upon the objector to show that the judgment was the result of the fiduciary's breach of duty. Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878.

28. Bettis v. Taylor, 8 Port. (Ala.) 564; Borders v. Peo., 31 Ill. A. 483.

[a] **Illustration.**—An administrator who as such interposes a claim to property levied on by execution will be liable individually for the forthcoming of the property, even if destroyed after the claim is interposed and the property goes into his possession. Bettis v. Taylor, 8 Port. (Ala.) 564.

[b] **Failure to intervene.**—An administrator who is aware, or, by the exercise of prudence, should be aware, of the pendency of proceedings for the sale of lands in which his intestate had an interest, is liable on his bond for his failure to intervene therein, so that the proceeds of such interest may come to his hands for the payment of the debts of the estate. Borders v. Peo., 31 Ill. A. 483.

occasioned by his failure to record a judgment recovered by him[29] or to issue execution thereon.[30] But if he acts honestly and diligently he is not liable for failure to maintain an unjust[31] or useless[32] suit; or for a failure to insist on mere technicalities,[33] as for failing to plead in abatement,[34] or for omitting to appeal.[35]

[§ 2298] **Z. Actions or Suits between Personal Representatives.**[36] It is well settled as a general rule that one personal representative cannot maintain an action at law against another personal representative of the same decedent.[37] There are, however, some exceptions and limitations to this rule. Thus it has been held that an executor may maintain an action at law against his joint executor on an express promise,[38] and that an action may be maintained by an executor against one who has renounced,[39] or who does not accept the trust,[40] or who has been removed as executor.[41] One executor may sue another where questions arise between the estate and the derelict executor jeopardizing the rights of persons interested in the estate,[42] and where an executor or administrator refuses to or cannot properly join in a complaint, he may be made a codefendant.[43] After the settlement of the accounts, an executor, as heir at law or next of kin, may maintain an action against the coexecutor for the property belonging to the testator which has not been taken into the account before the surrogate.[44] In jurisdictions which have no courts of chancery, it seems that an administrator who has made a final settlement of the estate and paid the balance due from him to the persons entitled to receive it may bring an action against the estate of his coadministratrix who was also an heir for the amount received by her beyond her share;[45] he cannot, however, maintain such action before a final settlement of the administration account and while a portion of the estate remains in his hands.[46]

In equity the same considerations as govern in courts of law do not apply. Consequently one personal representative may maintain a bill in equity to compel payment of a debt due from defendant to the estate.[47] So it has been held that equity has jurisdiction of a suit by an executor against his co-

29. Glover's Succ., 2 La. Ann. 4.

30. Glover's Succ., 2 La. Ann. 4.

31. McGuire v. Rogers, 74 Md. 192, 21 A 723.

32. Banta v. Marcellus, 2 Barb. (N. Y.) 373.

33. McGuire v. Rogers, 74 Md. 192, 21 A 723.

34. McDowall v. McDowall, 8 S. C. Eq. 324.

35. McDowall v. McDowall, 8 S. C. Eq. 324.

36. Jurisdiction of suits between personal representatives see supra § 1898.

37. U. S.—Ransom v. Geer, 12 Fed. 607, 20 Blatchf. 535.

Kan.—Taylor v. Minton, 45 Kan. 17, 25 P 222.

Mo.—Martin v. Martin, 13 Mo. 36.

N. J.—Cole v. Wooden, 18 N. J. L. 15; Ransom v. Geer, 30 N. J. Eq. 249; Ely v. Ely, (Ch.) 50 A 657.

N. Y.—McGregor v. McGregor, 35 N. Y. 218; Rogers v. Rogers, 75 Hun 133, 27 NYS 276; Dean v. Roseboom, 37 Hun 310; Whitney v. Coapman, 39 Barb. 482; Peters v. Smith, 60 Misc. 203, 111 NYS 842; Smith v. Lawrence, 11 Paige 206.

Pa.—Simon v. Albright, 12 Serg. & R. 429. But compare Pringle v. Pringle, 130 Pa. 565, 18 A 1024 (under the system which obtains in Pennsylvania of administering equitable principles in common-law forms of procedure, an executor who has received no part of the assets may sustain as an individual action at law in the court of common pleas against a coexecutor who has received all the assets, to charge the estate with a debt due to plaintiff from the testator).

Va.—Rodes v. Rodes, 24 Gratt. (65 Va.) 256.

[a] **Reason for rule.** — "In the common law courts one executor, or administrator, cannot bring a suit against his co-executor, or co-administrator, to recover a debt which was due from the latter to the testator, or intestate. For each has the same right to the possession of the fund which belongs to both, as the representatives of the estate of which they are joint trustees. And the effect of a common law judgment, in favor of one against the other, would be to give the former the right to issue an execution and transfer the whole fund to his own exclusive possession. A court of equity, however, from its peculiar mode of administering justice, can settle the question as to the fact of indebtedness, and as to the amount due from one of the executors to the estate of which both are trustees, whenever the decision of this question becomes necessary, without changing the possession of the fund." Smith v. Lawrence, 11 Paige (N. Y.) 206, 208 [quot Peters v. Smith, 60 Misc. 203, 205, 111 NYS 842]. To similar effect Taylor v. Minton, 45 Kan. 17, 25 P 222; Rogers v. Rogers, 75 Hun 133, 27 NYS 276.

38. Phillips v. Phillips, 1 Stew. (Ala.) 71; Cocker v. Cocker, 2 Mo. A. 451.

[a] **Where administrator charged with amount of note sued on.**—Where one of two administrators who have given a joint bond takes on himself the sole administration of the estate and on final settlement is charged in cash with the amount of a note taken from his coadministrator and others payable to both as administrators and of the decrees rendered on such settlement, some remained unpaid, the sole equitable title to the note vests in the administrator to which it has been charged and he can maintain an action thereon. Waldrop v. Pearson, 42 Ala. 636.

39. Rawlinson v. Shaw, 3 T. R. 557, 100 Reprint 731.

40. Hunter v. Hunter, 19 Barb. (N. Y.) 631.

41. Hendricks v. Thornton, 45 Ala. 299 (the reason for the rule ceases on removal of the executor).

42. Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 A 1054; Petty v. Young, 43 N. J. Eq. 654, 12 A 392; McGregor v. McGregor, 35 N. Y. 218.

43. Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527.

44. Guibert v. Saunders, 10 NYSt 43.

45. Steinman v. Saunderson, 14 Serg. & R. (Pa.) 357.

46. Steinman v. Saunderson, 14 Serg. & R. (Pa.) 357.

47. Conn.—Rogers v. Moor, 1 Root 472.

N. J.—Petty v. Young, 43 N. J. Eq. 654, 9 A 377, 12 A 392; Ransom v. Geer, 30 N. J. Eq. 249; Marsh v. Oliver, 14 N. J. Eq. 259.

N. Y.—McGregor v. McGregor, 35 N. Y. 218; Wallach v. Dryfoos, 140 App. Div. 438, 125 NYS 305; Rogers v. Rogers, 75 Hun 133, 27 NYS 276; Wurts v. Jenkins, 11 Barb. 546; Decker v. Miller, 2 Paige 149.

Va.—Rodes v. Rodes, 24 Gratt. (65 Va.) 256.

Eng.—Peake v. Ledger, 4 De G. & Sm. 137, 64 Reprint 769, 8 Hare 313, 32 EngCh 313, 68 Reprint 380.

But compare Beall v. Hilliary, 1 Md. 186, 54 AmD 649 (which seems to be in direct conflict with the rule stated in the text).

"The action is brought in equity, and the plaintiff seeks a judgment establishing the indebtedness of the respondent to the estate. That such an action may be maintained by one executor against a coexecutor is well settled. McGregor v. McGregor, 35 N. Y. 218; Rogers v. Rogers, 75 Hun 134, 27 NYS 276. In such an action the court, if it finds that the debt exists, can make proper provision by the decree for its payment and disposition. The Code does not require that a party who should be a plaintiff must be asked to become such before being joined as defendant. Its requirement is that: 'If the consent of one who should be joined as a plaintiff cannot be obtained he may be made a defendant the reason therefor being stated in the complaint.' Section 448, Code Civ. Proc. Undoubtedly the simplest way to determine whether a person will become a party plaintiff is to ask him; but it is not necessary to do so, when it appears that such a request would necessarily be futile." Wallach v. Dryfoos, 140 App. Div. 438, 125 NYS 305, 308.

[a] **Reason for rule.**—A court of equity, from its peculiar mode of administering justice, can settle the questions as to the fact of indebtedness and as to the amount due from one of the executors to the estate of which both are trustees whenever the decision of those questions becomes necessary without changing the possession of the fund. And when the amount of such indebtedness is ascertained the court may make such disposition of the fund as justice and equity shall then require. Smith v. Lawrence, 11 Paige (N. Y.) 206.

[b] **Illustration.**—A suit by one administrator against the coadministrator for recovery of money alleged to be due complainant from intestate for services rendered and merchandise supplied and of money paid by complainant for funeral expenses, being primarily to establish a debt from intestate to complainant as administrator which is disputed by his coadministrator, is properly brought in the court of chancery. Muller v. Muller, 76 N. J. Eq. 158, 79 A 429.

[c] **An action to foreclose a mortgage** against one who on the death of plaintiff pending the action qualifies as his executor may be revived and continued by the coexecutor. McGregor v. McGregor, 35 N. Y. 218.

[d] **Where executors are directed to pay money into the estate** and to pay a legacy to a coexecutor, but they failed to pay such money, such

executor on a bill for services rendered the testator,[48] or of a suit by administrators against their coadministrators to ascertain and settle the amount due on a claim made by the coadministrator against the estate.[49] If one of several executors has been guilty of fraudulent misconduct in his dealings with the estate, his coexecutors may maintain a suit against him for an accounting.[50] A bill in equity may also be maintained for an account between the executors or administrators of different estates.[51] Where the managing executor and trustee of an estate obtained a portion of the property for his own use by committing a breach of trust and procuring the property to be conveyed to a corporation, in which he received a majority of the stock without consideration, and caused some shares of the stock to be transferred to plaintiff, his coexecutor, without consideration, none of the shares having been transferred to bona fide holders, plaintiff was entitled to disaffirm the transfer of the shares to himself and sue to have all the stock in the corporation declared the property of the executors and trustees.[52] Where a surviving partner and another are appointed administrators of the deceased partner's estate, a bill does not lie by the surviving partner against his coadministrator for a settlement of the affairs of the firm, as this amounts to taking a position on both sides of the case.[53] But where a special administratrix brought suit to set aside a deed executed by decedent to defendant, and to have the property decreed a part of decedent's estate, and subsquently a will of decedent naming plaintiff and defendant as executrix and executor was probated, and they qualified as such, and afterward the court substituted plaintiff in her capacity as executrix in place of herself as special administratrix, it was held that the action was maintainable, and defendant could not defeat it on the ground that he could not be sued because he was an executor.[54]

XV. ACCOUNTING AND SETTLEMENT

[§ 2299] **A. Definitions.** An account of a personal representative is a brief statement of the conduct of the administration in the form of a debit and credit, with receipts and disbursements itemized.[55] The term "settlement," strictly speaking, means the adjustment of the claims and demands in favor of and against the estate and does not include the distribution of the estate.[56]

[§ 2300] **B. Duty to Account—1. In General.** An executor or administrator is bound to keep clear, distinct, and accurate accounts of his management of the estate, like any trustee, which accounts ought to be open in some way to the inspection of persons interested in the estate.[57] Upon the analogies of trusteeship, English courts of equity long exercised a jurisdiction in such matters; and hence, both in England and some of the older American states, creditors' bills have been entertained by way of bills of discovery against the personal representative, forcing him to set forth an account of the assets and the manner in which he has applied them.[58] But under modern statutes jurisdiction of such accounts is usually vested in courts of probate, and such probate jurisdiction includes, under appropriate legislation, the compulsion of a regular accounting by the executor or administrator of an

coexecutor may sue in a court of equity in his individual right against the executors individually. Evans v. Evans, 23 N. J. Eq. 71.

[e] **Necessity must appear.** — A court of chancery will not interpose between executors unless it appears to be absolutely necessary for the purpose of justice. Rogers v. Moor, 1 Root (Conn.) 472.

[f] **Adequate remedy at law.**—On a bill filed by an executor against a coexecutor to recover a pro rata share of compensation and commissions allowed by the order of the probate court and paid to and retained by the coexecutor who refuses to pay over the share claimed by complainant, the remedy at law is plain and adequate, that no discovery is necessary and chancery has no jurisdiction. Bellamy v. Hawkins, 16 Fla. 733.

48. Muller v. Muller, 76 N. J. Eq. 158, 79 A 429; Ely v. Ely, 64 N. J. Eq. 790, 53 A 1125, (Ch.) 50 A 657.

49. Petty v. Young, 43 N. J. Eq. 654, 12 A 392.

50. Wood v. Brown, 34 N. Y. 337; Price v. Brown, 60 HowPr (N. Y.) 511.

51. Stiver v. Stiver, 8 Oh. 217.

52. Smith v. David Stevenson Brewing Co., 117 App. Div. 690, 102 NYS 672 [aff 50 Misc. 395, 100 NYS 521] (the representative was entitled to disaffirm and the complaint stated a cause of action in equity to set aside the transaction).

53. Smith v. Bryson, 62 N. C. 267, 93 AmD 610.

54. Stohr v. Stohr, 148 Cal. 180, 82 P 777.

55. See infra § 2445.

[a] **Distinction between final and partial accounts.**—Burgwyn v. Daniel, 115 N. C. 115, 20 SE 462; Hubley's App., 19 Pa. 138; Chambers' App., 11 Pa. 436.

56. Allen v. Dean, 148 Mass. 594, 20 NE 314; In re Batchelor, 119 Mich. 239, 77 NW 941; Calkins v. Smith, 41 Mich. 409, 1 NW 1048; In re Creighton, 12 Nebr. 280, 11 NW 313.

[a] **A final settlement** is a proceeding in which the amount of the residue subject to distribution is judicially determined and established by an order or decree of the court, but not the rights or shares of those who are entitled to it. Granger v. Bassett, 98 Mass. 462. Compare Ashley v. Ashley, 15 Ala. 15, 17 ("The material requisites therefore, of a final settlement are, first, that there be parties to it, whose rights are bound thereby; secondly, that those rights should be judicially ascertained, and established by the judgment of the court").

57. Ky.—Furey v. Gallagher, 180 Ky. 231, 202 SW 641.

La.—Willis v. Berry, 104 La. 114, 28 S 888.

Mich.—Damouth v. Klock, 29 Mich. 163.

Mont.—In re Higgins, 15 Mont. 474, 39 P 550, 28 LRA 116.

N. Y.—Matter of Stanton, 41 Misc. 278, 84 NYS 46.

Or.—In re Osborn, 36 Or. 8, 58 P 521.

Pa.—Houser's Est., 177 Pa. 441, 35 A 671; Harrison's Est., 2 Pa. Dist. 108; Rivers' Est., 30 Pa. Co. 461.

Porto Rico.—Cintron v. Banco, 15 Porto Rico 495.

S. C.—Patterson v. Jones, 99 S. C. 128, 82 SE 1008.

Tenn.—Hux v. Russell, 138 Tenn. 272, 197 SW 865.

Eng.—Freeman v. Fairlie, 3 Meriv. 24, 36 Reprint 10.

Que.—Quinn v. Fraser, 10 Que. 320.

[a] **This duty grows out of** the relations of the parties, and is not contractual, even as to property purchased by the representative. Berry v. Hart, 1 S. C. 125.

[b] **Even though a decedent's estate is not in a position to be finally settled,** the creditors and other interested persons have a right to know the situation of the property, and to be informed thereof by accounts to be filed by the administrator. Witman's Est., 2 Woodw. (Pa.) 350. To same effect Rhett v. Mason, 18 Gratt. (59 Va.) 541 (where a widow and executrix having absolute estate for life or widowhood with power of appointment was required to account).

[c] **A testamentary executor is not obliged to account to the heirs or legatees until** the end of his administration; but nevertheless when all the assets have come into his hands he should furnish statements of account on demand. Quinn v. Fraser, 10 Que. 320.

[d] **The province of the account** is simply to show what the representative had received from the estate (and everything received is to be accounted for), and how much he has paid out on expenses and the debts of decedent. The balance remains for distribution. White's Est., 23 Pa. Super. 552.

[e] **Estoppel to deny liability to account.**—(1) Where an administrator files a final account showing that he has administered the estate, he is estopped to deny his representative character or liability to account. In re Osborn, 36 Or. 8, 58 P 521. (2) Persons who have assumed to act as administrators under an appointment made by the probate court, and claim to have administered fully, are estopped to deny their liability to account accordingly. Damouth v. Klock, 29 Mich. 163.

58. Schouler Ex. §§ 518–520. See infra § 2364.

[a] **Existence of debt necessary.**—Brooks v. Headen, 88 N. C. 449.

estate.[59] Where no assets or personal property come into the hands of the executor or administrator he is not bound to render an account;[60] and it has been held that an administrator should not be required to file an account where it appeared that all the money which he had received since his former account was audited had been absorbed by the repayment of a sum which was found due to him at the audit of the first account and by counsel fees.[61] It has also been held that, where there are no creditors and the sole legatee is also executor an appropriation by him of the personal estate is an accounting which relieves the sureties from responsibility.[62] An order discharging an administrator who in his petition alleged that he had received no assets will be rescinded when it subsequently appears that assets have been received by him, and he will be required to account as to such assets as come into his hands.[63]

Upon the setting aside of a will, it is error for the court to order the executor to turn over to an administrator appointed all of the property in his possession belonging to the estate, without first affording to the executor an opportunity to state his account,[64] and under such circumstances an order requiring the executor to account is proper.[65]

Second account. When an account has been regularly filed in the proper place, a personal representative will not be compelled to file a second account[66] unless it is shown that the first is lost;[67] and it will be presumed that it is in the proper place until the contrary is shown.[68]

[§ 2301] **2. Periodical Accounting.** Periodical returns are part of the American probate system, a first account being ordered within a stated time, and other accounts, from time to time, as the statute and the representative's bond may designate, until the estate is fully settled.[69] But partial accounts of representatives exhibited and allowed by the court will not prevent a person interested in the estate from bringing the representatives into court for a final settlement.[70]

[§ 2302] **3. Supplemental Accounting.** It has been held that an executor or administrator who receives assets of the estate after he has filed an account should file a supplementary account thereof and may be compelled to do so,[71] but that it is only with respect to matters occurring after the settlement of their final account that representatives will be compelled to file supplementary accounts.[72] Under a statute providing that a statement of any receipts and disbursements of the executor or administrator since a rendition of his final account must be reported and filed at the time of making distribution, these statements may be settled at the time the decree of distribution is made, without notice,[73] or the court may order notice to be given and refer them for settlement.[74] Where the petition in an action to compel an executor to account after he has accounted and has been discharged fails to allege that any further sums came into the hands of the executor, and the executor specifically denies the receipt of any further sums, the accounting should be denied.[75]

Shrinkage of assets. Where there has been an unexplained shrinkage of assets between any two accounts, the representative will be ordered to file a further account explaining the apparent disappearance of assets.[76]

[§ 2303] **4. Time for Accounting.** At common law an executor or administrator was not required to account at stated times, but only when cited for that purpose by the probate court at the instance of a person interested in the estate,[77] but at the present time it is usually provided by statute that a first account shall be filed within a certain time from the date of appointment, that other accounts shall follow at prescribed intervals, and that a final account shall be filed and settlement made at the expiration of a prescribed period.[78] Such statutes

59. See infra § 2329.

60. Dak.—Territory v. Bramble, 2 Dak. 189, 5 NW 945.
Ill.—Turner v. Fell, 142 Ill. A. 458.
La.—Watterston's Succ., 19 La. Ann. 104.
Me.—Thurlough v. Kendall, 62 Me. 166.
Mass.—Walker v. Hall, 1 Pick. 20.
Mo.—State v. Stuart, 111 Mo. A. 478, 86 SW 471.
N. Y.—In re O'Brien, 45 Hun 284.
Pa.—Stoker's Est., 10 Pa. Dist. 375; Lockard's Est., 10 Pa. Dist. 192; Power's Est., 10 Pa. Dist. 165; Singerly's Est., 9 Pa. Dist. 261, 23 Pa. Co. 575; Trout's Est., 5 Pa. Dist. 761, 18 Pa. Co. 608; Guinane's Est., 17 Pa. Co. 438; Bestford's Est., 10 Kulp 223.
Va.—Perdue v. Dillon, 89 Va. 182, 15 SE 385.
"An accounting will be refused where there are no funds to be accounted for, and by a parity of reasoning it need not be ordered where no fund is presently available for distribution, nor where the question of whether there is a fund at all is dependent upon the determination of issues which are in course of adjustment before competent tribunals." Singerly's Est., supra.
[a] **Personal estate invested in partnership.**—"All the personal estate of testator consisted of his interest in a firm of which he in his lifetime was a copartner, and which he authorized his executors by his will to allow to remain in a new limited copartnership between them and his son as copartners. It appears the limited copartnership has been formed, and the interest of testator in the old firm been contributed by the executors towards the capital thereof. There is nothing therefore to be gained by requiring the executors now to file an account." Maule's Est., 13 Pa. Dist. 142.
[b] **An administrator de bonis non.**—"It is urged that the administrator de bonis non did not file a just and true account. Having shown that the personal estate was exhausted, this was excused." Turner v. Fell, 142 Ill. A. 458, 459.
[c] **The fact that an intestate owed her administrator** a sum larger than the value of the estate left by her did not excuse the administrator for a failure to inventory and account for all the money collected by him as administrator, but his remedy to collect his debt was to present his claim to the probate court for allowance, and to have a special administrator appointed. State v. Stuart, 111 Mo. A. 478, 86 SW 471.

61. Lee's Est., 14 Phila. (Pa.) 304.

62. McKim v. Harwood, 129 Mass. 75.

63. Cummings v. Robinson, 95 Md. 83, 51 A 1105.

64. Snell v. Weldon, 162 Ill. A. 11.

65. Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982.

66. Ingraham v. Cox, 1 Pars. Eq. Cas. (Pa.) 70.

67. Ingraham v. Cox, 1 Pars. Eq. Cas. (Pa.) 70.

68. Ingraham v. Cox, 1 Pars. Eq. Cas. (Pa.) 70.

69. In re Sweetser, 109 Mich. 198, 67 NW 130; Merselis v. Mead, 7 N. J. Eq. 557; Matter of Arkenburgh, 11 App. Div. 193, 42 NYS 965; Glaskin v. Sheehy, 2 Dem. Surr. (N. Y.) 289; Ingber's Est., 19 Pa. Dist. 223; Jenning's Est., 10 Pa. Dist. 90.
[a] **Where a legatee has become of age since the last accounting,** he may demand a further accounting, as such coming of age is a "new fact" on which such a demand may be predicated. Hood v. Hood, 1 Dem. Surr. (N. Y.) 392.

70. Merselis v. Mead, 7 N. J. Eq. 557.

71. Shaffer's App., 46 Pa. 131; Witman's App., 28 Pa. 376; Urian's Est., 11 Pa. Co. 495.
[a] **The court in its discretion may permit a postponement** until the time of formal accounting. Wetmore v. Wetmore, 3 Dem. Surr. (N. Y.) 414.

72. In re Irvine, 209 Pa. 325, 58 A 618.

73. In re Sheid, 129 Cal. 172, 61 P 920; Firebaugh v. Burbank, 121 Cal. 186, 53 P 560.

74. In re Sheid, 129 Cal. 172, 61 P 920.

75. Matter of Jenkins, 132 App. Div. 339, 117 NYS 74.

76. Jennings' Est., 10 Pa. Dist. 90.

77. Greerside v. Benson, 3 Ark. 248, 26 Reprint 944; Cunnington v. Cunnington, 2 Ont. L. 511.

78. Ala.—Chamblee v. Proctor, 82 S 21; Jackson v. Rowell, 87 Ala. 685, 6 S 95, 4 LRA 637; Hooper v. Smith, 57 Ala. 557; Austin v. Jordan, 35 Ala. 642; Semoice v. Semoice, 35 Ala. 295.
Cal.—In re Adams, 121 Cal. 415, 63 P 838; Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264.
Colo.—Erie v. Lane, 22 Colo. 273, 44 P 591.
Ga.—Irvine v. Irvine, 145 Ga. 660, 89 SE 746; Field v. Brantley, 144 Ga. 55, 86 SE 245; Williams v. Lancaster,

do not, however, prescribe a limit as to the obligation of the representative to account, but the probate court may require an accounting at any time,[79] and the statutes sometimes permit an action to settle an estate to be commenced at any time after the qualification of the executor or administrator.[80] The representative should account and settle up the estate as soon as this is reasonably possible,[81] but he should not make his final settlement before the expiration of the statutory period for filing claims,[82] and if he does so he and his sureties become liable to the creditors of the estate.[83] Neither can a final account be settled and approved so long as there are outstanding claims against the estate and property in the hands of the representative available for the payment thereof either in whole or in part.[84] Notwithstanding a statutory requirement for a final accounting and settlement after a certain length of time, such final accounting may be postponed as justice requires where delay occurs necessarily and without fault of the representative,[85] and it has been held that an executor or administrator ought not to be compelled to make a final settlement before the estate has been fully administered, with col-

113 Ga. 1020, 39 SE 471; Adams v. Adams, 113 Ga. 824, 39 SE 291; Wellborn v. Rogers, 24 Ga. 558.

Ill.—Reynolds v. Peo., 55 Ill. 328.

Ind.—Shirley v. Thompson, 123 Ind. 454, 24 NE 253; Tilson v. Hoosier Tropical Fruit Co., 43 Ind. A. 684, 88 NE 524.

Kan.—Hudson v. Barratt, 62 Kan. 137, 61 P 737; Musick v. Beebe, 17 Kan. 47.

La.—Weeks' Succ., 104 La. 573, 29 S 219; Reed v. Crocker, 12 La. Ann. 445; Lafon v. Gravier, 1 Mart. N. S. 243.

Me.—Ring v. Burton, 5 Me. 45.

Md.—Jones v. Harbaugh, 93 Md. 269, 48 A 827.

Mich.—Hall v. Grovier, 25 Mich. 428.

Nebr.—In re Fletcher, 83 Nebr. 156, 119 NW 232.

Nev.—In re Delaney, 41 Nev. 384, 171 P 383, LRA1918D 1022.

N. J.—Duncan v. Barnes, 20 N. J. L. 75; Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498; Pomeroy v. Mills, 37 N. J. Eq. 578.

N. Y.—Matter of Congregation Unitarian Soc., 34 App. Div. 387, 54 NYS 269; Matter of Hale, 6 App. Div. 411, 39 NYS 577; Matter of Miner, 39 Misc. 605, 80 NYS 643; In re Lansing, 37 Misc. 177, 74 NYS 945; Matter of Lawson, 36 Misc. 96, 72 NYS 645; Matter of Crowley, 33 Misc. 624, 68 NYS 939; Matter of Bronner, 30 Misc. 31, 62 NYS 1003; Matter of Miller, 15 Misc. 556, 37 NYS 1129; Matter of Reeves, 14 NYS 454; Menck's Est., 5 NYSt 341; Matter of Clayton, 5 NYS 266, 14 NYCivProc 68, 1 Conn. Surr. 444; In re Harris, 1 NYCivProc 162; Woodruff v. Woodruff, 17 AbbPr 165; Matter of Jones, 5 NYLegObs 124, 1 Redf. Surr. 263.

N. C.—Ingram v. Ingram, 49 N. C. 188; Hobbs v. Craig, 23 N. C. 332.

Oh.—In re Morrison, 68 Oh. St. 252, 67 NE 567; State v. Moore, 3 Oh. Dec. (Reprint) 68, 2 WklyLGaz 405 [rev 3 Oh. Dec. (Reprint) 62, 2 WklyLGaz 389].

Or.—In re Roach, 50 Or. 179, 92 P 118; Rutenic v. Hamakar, 40 Or. 444, 67 P 196; In re Chambers, 38 Or. 131, 82 P 1013.

Pa.—Irwin's App., 6 Pa. Cas. 316, 9 A 298, 3 Montg. Co. 88; Rastaetter's Est., 15 Pa. Super. 549; Clemens' Est., 21 Pa. Dist. 175; Miller's Est., 14 Pa. Dist. 163; Rivers' Est., 13 Pa. Dist. 762; Schlemmer's Est., 12 Pa. Dist. 137, 28 Pa. Co. 247; Lockard's Est., 10 Pa. Dist. 192; Clinton's Est., 8 Pa. Dist. 661, 23 Pa. Co. 209; Miller's Est., 31 Pa. Co. 577; Clinton's Est., 23 Pa. Co. 209; Brader's Est., 6 LuzLReg 243; Disston's Est., 14 Phila. 310; Dickson's Est., 11 Phila. 86, 1 WklyNC 534; Matter of Harley, 1 Phila. 511; Toner's Est., 5 WklyNC 386; Wistar's Est., 5 WklyNC 128.

Tex.—Cobb v. Speers, (Civ. A.) 49 SW 666.

N. S.—McDonald's Est., 2 N. S. 342.

[a] **An administrator with the will annexed** may proceed to a final accounting at the same time that his predecessor could have done so. He need not wait for the lapse of a year after letters were issued to him. Matter of Burling, 5 Dem. Surr. (N. Y.) 47.

[b] **Administrator of deceased guardian.**—Application for an accounting against the administrator of a deceased guardian may be made immediately on his appointment. In re Wiley, 119 N. Y. 642, 23 NE 1054.

[c] **Public administrators** are required to make semiannual returns. In re Hedrick, 127 Cal. 184, 59 P 590.

[d] **When an administrator has resigned or been removed** (1) it is his duty to settle his accounts within one month after his authority has ceased and on his failure to do so the court proceeds ex mero motu to compel a settlement. Glenn v. Billingslea, 64 Ala. 345. (2) A statute which allows a year to elapse from the death of an intestate before the rendering of an account by an administrator does not apply where he has been dismissed within the year. Lockard's Est., 10 Pa. Dist. 192.

[e] **The account of an administrator who is a creditor** of the estate must be filed at least a month before the distribution of the estate. McDonald's Est., 2 N. S. 342.

[f] **Rents.**—An executor must have a reasonable time to collect and pay over rents before the court will compel an accounting. Cox's Est., 8 Montg. Co. (Pa.) 161.

[g] **Partnership settlement involved.**—Under a statute providing that the surviving partner may retain firm assets until the business is settled, while paying balances to the executor of the deceased partner from time to time, it is not error to settle an annual account of the executor without an account between him and the surviving partner. In re Lux, 100 Cal. 606, 35 P 345, 347.

[h] **Where the funds of the estate are involved in litigation,** as yet undetermined, the representative is relieved from a present accounting. Smythe's Est., 11 Pa. Dist. 441, 27 Pa. Co. 170.

79. Ala.—Burch v. Gaston, 182 Ala. 467, 62 S 508.

Ill.—Reynolds v. Peo., 55 Ill. 328.

Mich.—Hall v. Grovier, 25 Mich. 428.

N. Y.—Matter of Withers, 23 App. Div. 404, 48 NYS 169.

Oh.—In re Morrison, 68 Oh. St. 252, 67 NE 567.

Pa.—Smith's Est., 7 Pa. Dist. 754, 43 WklyNC 248.

Wis.—In re Campbell, 12 Wis. 369.

[a] **Court may act on its own motion.**—In re Morrison, 68 Oh. St. 252, 67 NE 567.

[b] **Discretion of court.**—The statute "clearly contemplates that the surrogate is to exercise a discretion as to when a final accounting should be ordered." Matter of Withers, 23 App. Div. 404, 406, 48 NYS 169.

[c] **A second account will not be ordered until** exceptions to the first account have been disposed of. Matter of Harley, 1 Phila. (Pa.) 511.

[d] **Account ordered for specific purpose.**—A decree for an account for a specific purpose, as to satisfy the widow that her annuity under the will is secure, cannot be turned into a general overhauling of the estate. In re Young, 202 Pa. 431, 51 A 1036.

[e] **Short intervals.**—Testamentary executors are not bound to render accounts at short intervals, and an action for an accounting within four months after a preceding accounting will be dismissed. Lapierre v. St. Jean, 11 Que. Pr. 225.

80. Holland v. Lowe, 101 Ky. 98, 39 SW 834, 41 SW 9, 19 KyL 97; Craddock v. Payton, 114 Ky. 298, 70 SW 684; Brand v. Brand, 109 Ky. 721, 60 SW 704; Faulkner v. Tucker, 83 SW 579, 26 KyL 1130; Linthecum v. Vowel, 118 Ky. 338, 80 SW 1090, 26 KyL 221.

81. Wylie v. Bushnell, 277 Ill. 484, 115 NE 618.

82. Tilson v. Hoosier Tropical Fruit Co., 43 Ind. A. 684, 88 NE 524; Culbertson's Est., 20 Pa. Dist. 1081; Wright's Est., 2 Pa. Dist. 195, 12 Pa. Co. 589; Tobin's Est., 41 Pa. Co. 433; Gallen's Est., 26 WklyNC (Pa.) 398.

83. Yakel v. Yakel, 96 Md. 240, 53 A 914.

84. In re Williams, 47 Mont. 325, 132 P 421.

85. Ga.—Beers v. Strohecker, 21 Ga. 442.

Iowa.—In re Smith, 133 Iowa 142, 109 NW 196.

Me.—Ring v. Burton, 5 Me. 45.

Md.—Rieman v. Peters, 2 Md. 104.

Mich.—Hoffman v. Beard, 32 Mich. 218 [dist Larzelere v. Starkweather, 38 Mich. 96].

N. Y.—Matter of Sherwood, 105 Misc. 183, 173 NYS 639; Matter of Whitney, 15 NYS 468.

Pa.—Martin's Est., 18 Pa. Dist. 952; Singerly's Est., 23 Pa. Co. 575.

Tex.—Flores v. Howth, 5 Tex. 329.

[a] **This rule has been applied in case of:** (1) Delay caused by litigation. Beers v. Strohecker, 21 Ga. 442. (2) Delay over a disputed claim. Matter of Whitney, 15 NYS 468.

[b] **Final accounting postponed by will.**—Where a will made a bequest of an annuity for life to the testator's widow, the executor was not bound to render a final account until after her death. Rieman v. Peters, 2 Md. 104. See also Owens v. Pierce, 5 Lea (Tenn.) 462 (under the will an older child was not entitled, without alleging fraud, to an account with the executor, or to a distribution of the estate in whole or in part, until the youngest child became of age).

[c] **After the lapse of seven years** from the grant of administration, a final settlement should not be deferred at the instance of an administrator, because of outstanding debts or unsettled accounts. Ditmar v. Bogle, 53 Ala. 169.

[d] **Limit of extension.**—The time within which an administrator is required to close up an estate under the statutes of that state cannot be extended beyond the period of four and one-half years, during which period the creditors have a lien upon the realty belonging to the estate. Hoffman v. Beard, 32 Mich. 218 [dist Larzelere v. Starkweather, 38 Mich. 96].

[e] **Account of distribution.**—A judge of probate has no jurisdiction to allow an account of distribution to heirs and legatees, unless presented within one year after decree of distribution. In re Mudgett, 105 Me. 387, 74 A 916.

lections made and the debts and legacies paid.[86] But a settlement should not be postponed until the determination of an action to recover funeral expenses where the probate court has jurisdiction to determine the question of the reasonableness of such expenses.[87] A testamentary provision allowing more time than is specified by the statute for the settlement of the accounts of an executor has also been held binding on the legatees and devisees.[88] But the necessity for retaining funds to pay legacies becoming due at the death of testator's widow furnishes an executor no excuse for delaying settlement when he has in his hands a sum of money in excess of the legacies payable at such time.[89]

A temporary administrator is required to account only when his office terminates by the qualification of the executor or the appointment of an administrator.[90] He has no right to make an intermediate accounting before such time,[91] nor should he be required to account pending an appeal in the proceedings which rendered his appointment necessary.[92]

[§ 2304] **5. Who Entitled to Require Accounting—a. In General.** An accounting may be ordered on the application of any person having an interest in the estate and in the proper administration thereof,[93] and, conversely, it is necessary that it should appear that the applicant has such interest and is not a mere intermeddler.[94] It has been held, however, that, where an executor was

86. Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.
Miss.—Allison v. Abrams, 40 Miss. 747.
Mo.—State v. Holtcamp, 266 Mo. 347, 181 SW 1007.
Mont.—In re Williams, 47 Mont. 325, 132 P 421.
Pa.—Maule's Est., 13 Pa. Dist. 142.

87. Matter of McDonald, 51 Misc. 318, 101 NYS 275.

88. Linthecum v. Vowel, 118 Ky. 338, 80 SW 1090, 26 KyL 221; In re Fletcher, 83 Nebr. 156, 119 NW 232.

[a] **Where a will contemplates that the estate shall be held intact until** the death of testator's wife, the statute limiting the time within which the estate shall be settled does not control. In re Fletcher, 83 Nebr. 156, 119 NW 232.

89. Brown v. Ferren, 73 N. H. 6, 58 A 870.

90. In re Hoystradt, 176 NYS 780.

[a] **Where a will is admitted to probate,** the account of the temporary administrator should not be judicially settled until letters testamentary have been issued and the executors brought in as parties. Voorhis' Est., 1 NYSt 306, 4 Dem. Surr. 450.

91. In re Hoystradt, 176 NYS 780.

92. Fow's Est., 9 Pa. Co. 558.

93. Ala.—Salmon v. Wynn, 153 Ala. 538, 45 S 133, 15 AnnCas 478; Vincent v. Daniel, 59 Ala. 602.
Ill.—Maurer v. Bowman, 169 Ill. 586, 48 NE 823 [aff 65 Ill. A. 261].
La.—Rabasse's Succ., 50 La. Ann. 746, 23 S 910; Giddens' Succ., 48 La. Ann. 356, 19 S 125; Scott's Succ., 9 La. Ann. 336.
Miss.—Robinson v. Gholson, 16 Miss. 392.
Mo.—Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.
N. H.—Attwill v. Dole, 74 N. H. 300, 67 A 403.
N. J.—In re Bastedenbeck, (Prerog.) 67 A 179.
N. Y.—Riggs v. Cragg, 89 N. Y. 479, 11 AbbNCas 401; Matter of Emerson, 59 Hun 244, 12 NYS 788; Matter of Rabell, 175 App. Div. 345, 162 NYS 218; Wood v. Cregan, 170 App. Div. 533, 156 NYS 810; Matter of Steiner, 134 App. Div. 162, 118 NYS 833; Close v. Farmers' L. & T. Co., 121 App. Div. 528, 106 NYS 329; Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem]; Citizens' Cent. Nat. Bank v. Toplitz, 113 App. Div. 73, 98 NYS 826 [aff 188 N. Y. 634 mem, 81 NE 1162 mem]; Matter of Meyer, 98 App. Div. 7, 90 NYS 185 [aff 181 N. Y. 562 mem, 74 NE 1120 mem]; In re Egan, 89 App. Div. 565, 85 NYS 663; Matter of Sayles, 57 Misc. 524, 109 NYS 972; Matter of Kinsella, 50 Misc. 235, 100 NYS 485; Matter of Thompson, 41 Misc. 223, 83 NYS 983; Coman's Est., 15 NYSt 442; Woodruff v. Woodruff, 17 AbbPr 165; Matter of Duffy, 3 HowPrNS 240, 4 Dem. Surr. 366; Becker v. Hager, 8 HowPr 68; Gratacap v. Phyfe, 1 Barb. Ch. 485; Guild v. Peck, 11 Paige 475; Smith v. Lawrence, 11 Paige 206; Schlegel v. Winckel, 2 Dem. Surr. 232; Edwards v. Edwards, 1 Dem. Surr. 132.
Oh.—Ferguson v. Stuart, 14 Oh. 140.
Or.—In re Chambers, 38 Or. 131, 62 P 1013.
Pa.—Lightner's Est., 144 Pa. 273, 22 A 808; Beeber's App., 8 A 191; Okeson's App., 2 Grant 303; Del Valle's App., 2 Pa. Cas. 270, 5 A 441; Lee's Est., 23 Pa. Dist. 689; McManemin's Est., 11 Pa. Dist. 338; Price's Est., 9 Pa. Dist. 511; 24 Pa. Co. 224; Smith's Est., 7 Pa. Dist. 754, 43 WklyNC 248; McArdle's Est., 28 Pa. Co. 561; Kromer's Est., 22 Pa. Co. 327; Stewart's Est., 7 Pa. Co. 603; Koerner's Est., 4 Pa. Co. 478; McNeal's Est., 6 Kulp 271; Blackman's Est., 2 Kulp 162; Flaherty's Est., 4 LackJur 354; Koerner's Est., 45 LegInt 5; In re Heenan, 15 Phila. 588; Disston's Est., 14 Phila. 310; Mazurie's Est., 11 Phila. 143; Fryer's Est., 12 WklyNC 408; Pratt's Est., 2 WklyNC 704; In re Painter, 1 Wkly NC 190; Emig's Est., 17 YorkLegRec 99.
R. I.—Burch v. Champlin, 52 A 988.
Tex.—Gallaspie v. Hardy, (Civ. A.) 196 SW 592.
Vt.—Davis v. Eastman, 68 Vt. 225, 35 A 73.
W. Va.—Cornell v. Hartley, 41 W. Va. 493, 28 SE 789.
Can.—Contant v. Mercier, 20 RevLeg 379.
Ont.—Simpson v. Corbett, 5 Ont. 377 [app dism 10 Ont. A. 32].
N. S.—Re McRae, 28 N. S. 20.
"To any one having an interest is given the right to rule an administrator to an account." Voinche v. Brouillette, 50 La. Ann. 370, 371, 23 S 318.

[a] **A prima facie showing of interest is sufficient.**—Wever v. Marvin, 14 Barb. (N. Y.) 376, 7 HowPr 182; Sayre v. Sayre, 3 Dem. Surr. (N. Y.) 264; Thomson v. Thomson, 1 Bradf. Surr. (N. Y.) 24; Lightner's Est., 144 Pa. 273, 22 A 808; Schlemmer's Est., 12 Pa. Dist. 137, 28 Pa. Co. 247; McNeal's Est., 6 Kulp (Pa.) 271; Kern's Est., 11 LancLRev (Pa.) 15; Bushong's Est., 14 Phila. (Pa.) 322; Disston's Est., 14 Phila. (Pa.) 310; McKeown's Est., 8 WklyNC (Pa.) 343; Toner's Est., 5 WklyNC (Pa.) 386; Wistar's Est., 5 WklyNC (Pa.) 128.

[b] **An accounting may be demanded by:** (1) One who has acquired an interest since the last accounting. Edwards v. Edwards, 1 Dem. Surr. (N. Y.) 132. (2) An indorsee of a note drawn by decedent to the order of his wife and indorsed by her. Fryer's Est., 12 WklyNC (Pa.) 408.

[c] **The widow of** the decedent may demand an accounting. Stille's Succ., 52 La. Ann. 1538, 27 S 954; Matter of Tisdale, 110 App. Div. 857, 97 NYS 494 (widow having life estate in lieu of dower); Haddow v. Haddow, 3 Thomps. & C. (N. Y.) 777; Ferguson v. Stuart, 14 Oh. 140; Melizet's App., 17 Pa. 449, 55 AmD 573; White's Est., 23 Pa. Super. 552; Lacey's Est., 12 Phila. (Pa.) 126; Cornell v. Hartley, 41 W. Va. 493, 23 SE 789.

[d] **One claiming to be interested** in his grandfather's estate, but who was not cited and did not appear in proceedings for the settlement of the administrator's account, was entitled to a citation requiring the administrator to show cause why he should not account, which citation should bring in all parties cited to the original account or who appeared thereon. Matter of Hasselbrook, 128 App. Div. 874, 113 NYS 97.

[e] **A surviving trustee** may compel the executor of a deceased cotrustee to account, as he is a "person interested in the estate." Matter of Kreischer, 30 App. Div. 313, 51 NYS 802.

94. See cases supra note 93 and infra this note.

[a] **An accounting cannot be demanded by:** (1) A debtor of the estate. Matter of Kenney, 92 Misc. 330, 156 NYS 827. (2) An attorney employed by the representative. Matter of Rabell, 175 App. Div. 345, 162 NYS 218. (3) Municipal authorities. Matter of Wood, 15 NYSt 722. (4) The widow of decedent's son. Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem]. (5) A wife suing for alimony, with respect to the estate of her husband's father, although the executors have been summoned as garnishees. Nisbet v. Nisbet, 178 Ky. 456, 198 SW 1154. (6) The cestui que trust under a testamentary provision void under the statute against perpetuities. Matter of Wood, 15 NYSt 722. (7) One whose interest under the will is a bare possibility, depending on the death of the first taker without issue. Keene's App., 60 Pa. 504. (8) The beneficiary of a trust fund, entitled in remainder after the death of the life beneficiary, who survived the trustee, with respect to the estate of the trustee. Matter of Meehan, 104 Misc. 219, 171 NYS 766.

[b] **Where testamentary trustees have assumed the execution of a trust,** the executor of the will occupies no fiduciary relation to the cestui que trust, and neither the cestui que trust nor her administrator can call on the executor to execute the trust or compel him to account as trustee, but the trustees alone can compel an accounting. Attwill v. Dole, 74 N. H. 300, 67 A 403.

[c] **A receiver of an executor appointed in supplementary proceedings** has not such an interest in the estate of the testator as entitles him to require the executor to account in order that the commissions due the executor may be ascertained and applied to the judgment. "The commissions due the executor from the estate not having been ascertained, on a proper accounting, it cannot be said that there is anything due him from the estate." Worrall v. Driggs, 1 Redf. Surr. (N. Y.) 449, 451. But see Matter of Rainey, 5 Misc. 367, 26 NYS 892 (set out infra § 2308 text and note 26).

[d] **Estoppel.**—(1) One who de-

also guardian of a minor child of decedent, although the child was old enough to exercise the right of choosing her own guardian, the court had discretion to entertain a proceeding instituted by a mere volunteer to compel the executor to make a final report and to make charges against himself as guardian.[95]

[§ 2305] **b. Creditors.** The right of a decedent's creditors to have the assets of his estate applied to payment of their debts constitutes such an interest as entitles them to call on the representative for an accounting.[96] It has been held that the right of creditors in this respect is not defeated by the fact that their claims were not presented within the time prescribed by the statute relating to the payment of claims, if the failure to present does not operate to bar entirely their right to payment,[97] or by the fact that their claims are barred by the general statute of limitations, where the personal representative has power to waive such bar.[98]

The creditors of a partnership in which the estate has an interest cannot require the personal representative to account, they not being creditors of decedent.[99]

A creditor of the personal representative, even though his claim arises out of expenses incurred by or services rendered to the latter in connection with the administration of the estate, is not entitled to demand an accounting.[1]

nies that he is interested in an estate may thereby estop himself from subsequently compelling the administrator to account. In re Rusko, 34 Hun (N. Y.) 334. (2) Where there were no debts, and decedent's son as administrator, by agreement with the widow and heirs, paid money into a partnership formerly owned by decedent and the son, and made no report for thirty years, there was an abandonment of administration, and the widow's administrator was estopped to call on the son as administrator to account except so as to show that all money received was paid to partnership. In re Dovey, 102 Nebr. 147, 166 NW 353.

[e] **When question of interest determined.**—Whether a person claiming to have an interest in an estate is entitled to any standing is a matter which should be determined on the hearing for distribution rather than upon the settlement of an account. In re Willey, 140 Cal. 238, 73 P 998.

95. Wheeler v. Long, 128 Iowa 643, 105 NW 161.

96. U. S.—Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

Ala.—Whaley v. Rothschild, 176 Ala. 69, 57 S 707; Rensford v. Magnus, 150 Ala. 288, 43 S 853.

Ky.—Beddow v. Wilson, 90 SW 228, 28 KyL 661.

La.—Voinche v. Brouillette, 50 La. Ann. 370, 23 S 318; Maraist v. Guilbeau, 31 La. Ann. 713; State v. Judge Second Dist. Ct., 20 La. Ann. 580; Williams' Succ., 7 Rob. 46; Carriere v. Meyer, 16 La. 126.

Miss.—Freeman v. Rhodes, 11 Miss. 329.

N. Y.—Clark v. Scovill, 191 N. Y. 8, 83 NE 659 [aff 116 App. Div. 923, 101 NYS 1116]; Matter of Gill, 183 N. Y. 347, 76 NE 274; Wood v. Cregan, 170 App. Div. 533, 156 NYS 810; Matter of Whitehead, 38 App. Div. 319, 56 NYS 989; Rositzke v. Meyer, 95 Misc. 356, 159 NYS 464; McKeown v. Fagan, 4 Redf. Surr. 320; Keyser v. Kelly, 4 Redf. Surr. 157.

N. C.—Isler v. Murphy, 76 N. C. 52.

Pa.—Wolff's Est., 21 Pa. Dist. 783; Ingber's Est., 19 Pa. Dist. 223; Raeder's Est., 10 Pa. Dist. 282; Hart's Est., 9 Pa. Dist. 347; Agnew's Est., 8 Pa. Dist. 699; Clinton's Est., 8 Pa. Dist. 661, 23 Pa. Co. 209; Ingber's Est., 37 Pa. Co. 225; Bortin's Est., 28 Pa. Co. 496; Schlemmer's Est., 28 Pa. Co. 247; Wright v. Taylor, 26 Pa. Co. 369; In re Mahon, 8 LackLegN 258; Wistar's Est., 12 Phila. 48; Peters' Est., 1 Phila. 581; In re Helbling, 33 PittsbLegJNS 53; Fryer's Est., 12 WklyNC 408; Love's Est., 11 WklyNC 324; Callender's Est., 1 WklyNC 518; Witman's Est., 2 Woodw. 350.

Wis.—Stehn v. Hayssen, 124 Wis. 583, 102 NW 1074.

[a] **The indorsee of a note drawn by decedent** may require his executor to file an account. Fryer's Est., 12 WklyNC (Pa.) 408.

[b] **The guardian of an infant creditor** may require an accounting. Beddow v. Wilson, 90 SW 228, 28 KyL 661.

[c] **The receiver of an insolvent creditor** may demand an accounting. Matter of Gill, 183 N. Y. 347, 76 NE 274.

[d] **The fact that a creditor was a partner of decedent** does not affect his right to an accounting. Wolff's Est., 21 Pa. Dist. 783.

[e] **Consent to determination of claim by surrogate.**—Where claimant against an estate and the executors have consented that the surrogate determine the claim upon the judicial settlement of the executors' accounts, the claimant is a creditor of the estate as entitled to petition to compel the executors to account in the surrogate's court. Clark v. Scovill, 191 N. Y. 8, 83 NE 659 [aff 116 App. Div. 923, 101 NYS 1116].

[f] **An injunction restraining alleged creditors** from requiring executors to account before the surrogate will not be granted, where the complaint does not show any action of the surrogate detrimental to the executors, or that he has unjustly refused to hear objections to the claims presented. Hotchkiss v. Hotchkiss, 2 NYS 825, 16 NYCivProc 129.

[g] **Attorneys recovering judgment against estate.**—Where attorneys who had recovered, on behalf of their clients, a judgment against the estate for damages and costs, alleged that the costs belonged to them, it was held that, although they were not creditors of the decedent, they had such an interest as entitled them to institute a proceeding for an accounting. Close v. Shute, 4 Dem. Surr. (N. Y.) 546.

[h] **Nature of proceeding.**—A special proceeding by a creditor against a personal representative of a debtor for an accounting must be by summons and complaint in the first instance, and other creditors coming in need not file complaints unless their claims are denied, in which case they must do so. Isler v. Murphy, 76 N. C. 52.

[i] **Further account at demand of creditor.**—Where an executor or administrator has filed an account within the proper time, further accounts will not be ordered, "whenever the convenience or caprice of the creditor may demand. Such subsequent accounts, the Act of Assembly says, are to be filed 'when legally required,' and they will not therefore be ordered when, under all the circumstances of the case, it would be unjust or inequitable to do so." Seeger's Est., 6 WklyNC (Pa.) 369.

[j] **Delays in settling an estate** to which a creditor contributed give him no ground of complaint. Fatjo's Succ., 52 La. Ann. 1561, 28 S 135.

[k] **A stockholder of a corporation** has no standing to apply for an accounting on a claim alleged to exist in favor of the corporation, although it has failed after demand to apply in its own behalf. Matter of Huntington, 39 Misc. 477, 80 NYS 220.

[l] **Where estate has been exhausted** by the widow's exemption and preferred debts, the rule is otherwise. Stuart's Est., 24 Pa. Co. 448.

97. U. S. Equitable Life Assur. Soc. v. Chesley, 64 N. J. Eq. 348, 51 A 725 [rev on other grounds 63 N. J. Eq. 219, 49 A 718]; In re Gill, 183 N. Y. 347, 76 NE 274 [rev 101 App. Div. 607, 91 NYS 1095 (aff 42 Misc. 457, 87 NYS 252)]; O'Connor v. Gifford, 3 NYS 207, 6 Dem. Surr. 71 [rev on other grounds 117 N. Y. 275, 22 NE 1036].

[a] **Entire estate paid out.** — Where an executrix causes to be published the regular notice for claimants to present their claims against the estate of her decedent, and after the expiration of the time for presentation, pays out to various creditors the entire estate, leaving nothing in her hands for further distribution, but has never proceeded to wind up the estate by accounting and decree, it is the absolute right of an unpaid creditor who failed to present his claim until some time thereafter, to institute a proceeding for an accounting. The contention that an estate can be paid out and wound up out of court and the creditors afforded no opportunity to scrutinize the proceedings on a final accounting has no foundation in law or equity. Matter of Gill, 183 N. Y. 347, 76 NE 274 [rev 101 App. Div. 607, 91 NYS 1095 (aff 42 Misc. 457, 87 NYS 252)].

Effect of failure to present claims see supra §§ 1020–1034.

98. Wainford v. Barker, 1 Ld. Raym. 232, 91 Reprint 1051; Philipson v. Harvey, 2 Lee Eccl. 344, 161 Reprint 364.

Right of representative to waive bar of statute of limitations see supra §§ 1967–1969.

99. Frothingham v. Hodenpyl, 61 Hun 627, 16 NYS 341 [aff 135 N. Y. 630 mem, 32 NE 240 mem].

1. Matter of Sayles, 57 Misc. 524, 109 NYS 972; Matter of Flint, 15 Misc. 598, 38 NYS 188; Ashoff's Est., 14 Pa. Dist. 333; Lewis' Est., 23 Wkly NC 492, 6 Pa. Co. 457.

[a] **The assignee of a judgment recovered against an administrator for legal services** rendered in the management of the estate cannot maintain an application for an accounting. Matter of Sayles, 57 Misc. 524, 527, 109 NYS 972 ("The petitioner has a personal judgment against one of the administrators of the Joseph I. Sayles estate, which is uncollectible, and its payment out of said estate is opposed. Such a judgment or claim does not bind the estate. Parker v. Day, 155 N. Y. 383, 49 NE 1046. Nor does it make the owner, in law, a person interested in the estate; or one entitled to maintain this proceeding under subdivision 3 of section 2514 of the Code of Civil Procedure, on the theory that such a claim is one 'for expense of administration'.").

Creditors of legatees or distributees are not, merely as such, entitled to demand an accounting,[2] even though their debts have been reduced to judgment.[3] But they may demand an accounting where they have seized or levied upon the interest of the legatee or distributee,[4] as where they have attached such interest.[5]

Cannot maintain bill in equity. An unsecured creditor having a mere legal demand which has not been reduced to judgment is not a cestui que trust in such a sense as to be entitled, in the absence of fraud, gross wrong, or unreasonable delay on the part of decedent's executor, to maintain a bill in equity in the federal court against such executor to compel an accounting.[6]

A personal representative who has been removed cannot be compelled to account on the petition of creditors,[7] unless the administrator de bonis non is insolvent or colludes with the debtors.[8]

[§ 2306] **c. Heirs and Distributees.** Heirs or distributees are persons interested who may require the executor or administrator to render an account of his administration,[9] and the exercise of this right is not dependent upon any charge of devastavit against the personal representative.[10] But in a case where the heirs and widow by agreement distributed all the estate, except certain stock, before the appointment of the administratrix, and the heirs had received their full share under the agreement, any remaining balance being more than offset by the expense of the administration, it was held that they could not require a further accounting.[11]

Where the entire estate is disposed of by will, an heir at law or distributee to whom nothing is given by the will is not entitled to require an accounting.[12]

One who has assigned or released his interest in the estate has been held to have the right to demand an accounting where he denies the validity of the assignment or release, because the probate court cannot try that question.[13] But there is also authority for the view that the probate court may determine the validity of the assignment, and if it is held valid will deny relief to the assignor;[14] and it has been held that where an heir brings suit against the personal representative for an accounting and to set aside releases of his interest in the estate to such representative, an accounting, which would involve an extensive and expensive investigation, should not be granted until the validity of the releases has been fully determined.[15]

[§ 2307] **d. Legatees and Devisees.**[16] A legatee, being a party in interest, has the right to demand an accounting,[17] although he is not at the time en-

2. Matter of Collmar, 79 Misc. 592, 141 NYS 179; In re Witt, 141 NYS 179; Raeder's Est., 10 Pa. Dist. 282; Gallagher's Est., 8 Pa. Dist. 699; Hart's Est., 24 Pa. Co. 515; Greiner's Est., 2 WklyNC (Pa.) 292.

3. Gallagher's Est., 8 Pa. Dist. 699; Greiner's Est., 2 WklyNC (Pa.) 292.

4. Voinche v. Brouillette, 50 La. Ann. 370, 23 S 318; Raeder's Est., 10 Pa. Dist. 282.

5. Voinche v. Brouillette, 50 La. Ann. 370, 23 S 318; Raeder's Est., 10 Pa. Dist. 282; Hart's Est., 9 Pa. Dist. 347, 24 Pa. Co. 347; Agnew's Est., 8 Pa. Dist. 699; Gallagher's Est., 8 Pa. Dist. 699; Manigle's Est., 11 Phila. (Pa.) 39.

[a] **Reason for rule.**—"As the attaching creditor succeeds to the rights of the legatee or distributee, subject to all the equities previously existing, we think he acquires by operation of law, such an interest in the estate of the decedent, as will entitle him to require the administrator to account." Manigle's Est., 11 Phila. (Pa.) 39.

[b] **Share held in discretionary trust.**—An attaching creditor of a legatee whose share in the estate is held by the executors in trust, payable at their discretion, has no such interest as will entitle him to compel an account. Locher's Est., 18 LancLRev (Pa.) 6.

[c] **Where the estate is insolvent** an attaching creditor of a remainderman has no right to an accounting. Reyburn's Est., 24 Pa. Dist. 696.

6. Thiel Detective Service Co. v. McClure, 130 Fed. 55 [aff 142 Fed. 952, 74 CCA 122, 4 LRANS 843]; In re Foley, 76 Fed. 390; Walker v. Brown, 63 Fed. 212, 11 CCA 135 [aff 58 Fed. 23].

7. Hardwick v. Thomas, 10 Ga. 266; Matter of Duffy, 3 Dem. Surr. (N. Y.) 251.

8. Hardwick v. Thomas, 10 Ga. 266.

9. Ala.—Alexander v. Steele, 84 Ala. 332, 4 S 281; Alexander v. Alexander, 70 Ala. 212; Gould v. Hayes, 19 Ala. 438.

Cal.—Pratt v. Pratt, (A.) 184 P 956.

Ga.—Adams v. Adams, 113 Ga. 824, 39 SE 291; Shorter v. Hargroves, 11 Ga. 658.

Ky.—Auxier v. Auxier, 182 Ky. 588, 206 SW 789; Furey v. Gallagher, 180 Ky. 231, 202 SW 641.

La.—Wiemann's Succ., 106 La. 387, 30 S 893; Touzanne's Succ., 36 La. Ann. 420; Stein v. Bowman, 9 La. 281.

Me.—Rogers v. Marston, 80 Me. 404, 15 A 22.

N. H.—Flanders v. Lane, 54 N. H. 390.

N. J.—Vaiden v. Edson, 85 N. J. Eq. 65, 98 A 635 [aff 85 N. J. Eq. 184, 95 A 980].

N. Y.—Matter of Meyer, 98 App. Div. 7, 90 NYS 185; Matter of Wood, 5 Dem. Surr. 345.

Pa.—Bushong's Est., 11 WklyNC 107.

R. I.—Burch v. Champlin, 52 A 988.

Va.—Graff v. Castleman, 5 Rand. (26 Va.) 195, 16 AmD 741.

[a] **The heirs must be recognized as such** in order to have the right. Stein v. Bowman, 9 La. 281; In re Lewis, 32 N. J. Eq. 690 (dispute as to legitimacy).

[b] **Heirs of heirs.**—Sisters of a decedent who claim through their deceased father are not persons interested. Brooke's Est., 14 Phila. (Pa.) 325.

[c] **If the administrator dies** an administrator de bonis non is necessary to an accounting sought by a distributee. Ward v. Huggins, 37 N. C. 135. Contra Graff v. Castleman, 5 Rand (26 Va.) 195, 16 AmD 741 (heirs may demand accounting from representative of deceased personal representative).

[d] **Insolvent estate.** — Distributees have no such interest in an insolvent estate as will authorize them to proceed against an administrator for a final account. Bird v. Furniss, 33 Miss. 44. But compare Bushong's Est., 11 WklyNC (Pa.) 107, 108 ("Even conceding that his estate is wholly insolvent, which is averred in the answer only as a matter of belief, it does not follow that the son has no interest in the payment of the father's debts. It is true that the 'executor represents the person of his testator' [Co. Litt. 209, a. b.], but he may, nevertheless, be called to account for his administration by the next of kin. If their interest will enable them to do this, it should also entitle them, where the executor is silent, to be heard in the distribution of an estate in which their decedent had a vested right").

10. Alexander v. Steele, 84 Ala. 332, 4 S 281.

11. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

12. Matter of Steiner, 134 App. Div. 162, 118 NYS 833 (daughter of testator).

13. Matter of Duffy, 3 HowPrNS (N. Y.) 240, 4 Dem. Surr. 366; Bonfanti v. Deguerre, 3 Bradf. Surr. (N. Y.) 429; Kenny v. Jackson, 1 Hagg. Eccl. 105, 162 Reprint 523.

14. In re Trainor, 171 NYS 955 (application by administratrix of deceased heir at law and next of kin who had assigned his interest).

15. Balfe v. Tilton, 198 Fed. 704.

16. **Effect of assignment or release** see supra § 2306.

17. U. S. — Silsby v. Young, 3 Cranch 249, 2 L. ed. 429; Pulliam v. Pulliam, 10 Fed. 23.

D. C.—U. S. Trust Co. v. National Sav., etc., Trust Co., 37 App. 296.

Ga.—Hanvy v. Moore, 140 Ga. 691, 79 SE 772; Harrell v. Warren, 105 Ga. 476, 30 SE 426.

Mich.—Fingleton v. Kent Cir. Judge, 116 Mich. 211, 74 NW 473.

N. J.—In re Bastedenbeck, (Prerog.) 67 A 179; McCarthy v. Cutter, 76 N. J. Eq. 616, 75 A 897; In re Hastendenbeck, 73 N. J. Eq. 337, 75 A 823; Bird v. Hawkins, 58 N. J. Eq. 229, 42 A 588.

N. Y.—Clark v. Ford, 1 Abb. Dec. 359, 3 Keyes 370, 1 Transcr. A. 22, 3 AbbPrNS 245, 34 HowPr 478; Matter of Steiner, 134 App. Div. 162, 118 NYS 833; Matter of Watts, 68 App. Div. 357, 74 NYS 75; McKenzie v. L'Amoureux, 11 Barb. 516; In re Rainforth, 37 Misc. 660, 76 NYS 314; Matter of Jones, 30 Misc. 354, 63 NYS 726 [aff 51 App. Div. 420, 64 NYS 667]; Woodruff v. Woodruff, 17 Abb Pr 165; Carroll v. Carroll, 2 Edm. Sel. Cas. 158; Crawford v. Crawford, 5 Dem. Surr. 37; Bonfanti v. Deguerre, 3 Bradf. Surr. 429; Colon's Est., Tuck. Surr. 429.

N. C.—Brotten v. Bateman, 17 N. C. 115, 22 AmD 732.

Pa.—Brown's Est., 6 Pa. Dist. 163, 19 Pa. Co. 229; Meyer's Est., 30 Pa. Co. 84; Wright v. Taylor, 26 Pa. Co. 369; Heath's Est., 25 Pa. Co. 258;

titled to a decree for distribution;[18] but when he has received the full amount of his legacy he has no further interest and cannot thereafter demand an accounting.[19] A devisee, although not directly interested in the personalty, may, in cases where it is doubtful whether the personalty will be sufficient to satisfy the debts, have such an interest as will entitle him to demand an accounting,[20] especially if he is residuary devisee.[21]

A contingent interest in the estate is usually regarded as sufficient to support a demand for an accounting,[22] although it has been held that an interest so entirely contingent and uncertain that it may never have an actual existence does not give the right to require the executor to account.[23]

[§ 2308] **e. Assignees or Representatives of Legatees or Distributees.** The assignees[24] or personal representatives[25] of a legatee or distributee have the same right as the legatee or distributee had to demand an accounting. Where administrators are also the intestate's next of kin, a receiver appointed in supplementary proceedings against one of the administrators may compel an accounting and object to improper disbursements.[26] If the legatee or distributee died intestate, no one except his administrator has a right to demand an accounting from the personal representative administering the estate in which he was interested.[27] But it has been held that if such legatee or distributee has disposed of his legacy or distributive share by will, his legatee has an interest in the principal estate by virtue of which he may require the representative thereof to account.[28]

[§ 2309] **f. Remaindermen.** A remainderman whose rights in an estate are vested is so interested therein as to be entitled to apply to compel an executor to account, even though the owner of the life estate is also living and entitled to make similar application;[29] and this right has been held to exist, although the life tenant has the right to use both principal and income for specified purposes.[30]

An heir of a remainderman has been held to have

Alter's Est., 3 WklyNC 356; Mackaw's Est., 1 WklyNC 203.

[a] **An infant legatee who came of age** (1) since the last accounting may demand a further account. Hood v. Hood, 1 Dem. Surr. (N. Y.) 392. (2) A legatee ward who has reached majority, and not his guardian, has the right to require an accounting. Colon's Est., Tuck. Surr. (N. Y.) 244.

[b] **Such right exists unless** it is shown that the fiduciary has no assets in his hands which ought to be applied to the purposes prayed for by the bill. Silsby v. Young, 3 Cranch (U. S.) 249, 2 L. ed. 429.

[c] **Person occupying dual capacity.**—An executrix of an executor, although also a legatee of such executor's testator, cannot as legatee cite herself as such executrix to account, because she cannot sue herself. Popham v. Spencer, 4 Redf. Surr. (N. Y.) 399.

[d] **The assignee of an executor, or of the administrator of an executor,** cannot be called to account by legatees, where there is no fraud or collusion, even though the assets could be traced or identified. Rayner v. Pearsall, 3 Johns. Ch. (N. Y.) 578.

18. Harris v. Ely, 25 N. Y. 138; In re Rainforth, 37 Misc. 660, 76 NYS 314.

[a] **Payment postponed by will.**—A legatee is a "person interested" and qualified to compel an accounting, although the time when the legacy is to be paid is postponed by the will. Matter of Jones, 30 Misc. 354, 63 NYS 726 [aff 51 App. Div. 420, 64 NYS 667].

19. In re Kilbourne, 173 Mich. 258, 139 NW 16; Phillip's App., 10 Pa. Cas. 249, 13 A 906.

[a] **Where there is a settlement between the executor and a residuary legatee,** and the latter receives what was agreed on and gives a receipt in full for his interest in the estate, the residuary legatee cannot thereafter demand an accounting. In re Kilbourne, 173 Mich. 258, 139 NW 16.

[b] **Presumption of payment of legacy.**—A legacy will be presumed to have been paid after the lapse of thirty-three years, and the legatee cannot thereafter require the executors to file an account. Phillip's App., 10 Pa. Cas. 249, 13 A 906.

20. Cook v. Farmers Bank Trust Co., 16 KyL 286; Carroll v. Carroll, 11 Barb. (N. Y.) 293; Palethorp's Est., 14 Pa. Co. 288; Clifton v. Haig, 4 S. C. Eq. 330.

[a] **Extent of right.** — A devisee cannot call the executor to account for the whole estate, but only as to the fund in which he has an interest. Clifton v. Haig, 4 S. C. Eq. 330.

21. See cases supra note 20.

22. Tunnicliffe v. Fox, 68 Nebr. 811, 94 NW 1032; In re Killan, 172 N. Y. 547, 65 NE 561, 63 LRA 95 [rev 66 App. Div. 312, 72 NYS 714]; Bearse v. Brown, 167 App. Div. 415, 153 NYS 514; Matter of St. John, 164 App. Div. 460, 93 NYS 836; Matter of Hunt, 84 App. Div. 159, 82 NYS 538 [aff 38 Misc. 30, 76 NYS 968 (aff 179 N. Y. 570, 72 NE 1143)]; Dority v. Dority, 40 App. Div. 236, 57 NYS 1073; Gratacap v. Phyfe, 1 Barb. Ch. (N. Y.) 485; Edwards v. Edwards, 1 Dem. Surr. (N. Y.) 132; Hartman's App., 90 Pa. 203; Raeder's Est., 10 Pa. Dist. 282; Stewart's Est., 7 Pa. Co. 603; Bushong's Est., 11 WklyNC (Pa.) 107.

23. Keene's App., 60 Pa. 504.

24. Minn.—Starkey v. Sweeney, 71 Minn. 241, 73 NW 859.

N. Y.—Citizens' Cent. Nat. Bank v. Toplitz, 188 N. Y. 634, 81 NE 1162 [aff 113 App. Div. 73, 98 NYS 826]; Matter of Egan, 89 App. Div. 565, 85 NYS 663; Matter of Fortune, 14 Abb NCas 415.

N. C.—Wright v. Lowe, 6 N. C. 354.

Pa.—Meyer's Est., 13 Pa. Dist. 191; Smith's Est., 7 Pa. Dist. 754, 43 Wkly NC 248.

Tex.—Branch v. Hanrick, 70 Tex. 731, 8 SW 539.

[a] **An accounting may be demanded by:** (1) The purchaser of an heir's interest in the estate. Branch v. Hanrick, 70 Tex. 731, 8 SW 539. (2) One having a valid assignment of a portion of a legacy or distributive share. Citizens' Cent. Nat. Bank v. Toplitz, 113 App. Div. 73, 98 NYS 826 [aff 188 N. Y. 634 mem, 81 NE 1162 mem].

[b] **The assignee of a legatee of a specific chattel** has no right to compel the executrix, who is the legatee of the rest of the personal property, to account, there being no debts due from decedent. Matter of Egan, 89 App. Div. 565, 85 NYS 663.

25. Ala.—High v. Worley, 32 Ala. 709.

N. J.—In re Bastedenbeck, (Prerog.) 67 A 179; Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498.

N. Y.—Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem]; Citizens' Cent. Nat. Bank v. Toplitz, 113 App. Div. 73, 98 NYS 826 [aff 188 N. Y. 634 mem, 81 NE 1162 mem]; Ward v. Ward, 57 Misc. 428, 109 NYS 711; Jenkins v. Freyer, 4 Paige 47; Edwards v. Edwards, 1 Dem. Surr. 132.

N. C.—Wright v. Lowe, 6 N. C. 354.

Pa.—Palethorp's Est., 3 Pa. Dist. 144, 14 Pa. Co. 288; Emerick's Est., 6 Pa. Co. 641; Lacey's Est., 12 Phila. 126; Brooke's Est., 11 WklyNC 124. See also Palethorp's Est., 14 Pa. Co. 288 (executrix of devisee).

S. C.—Dawson v. Dawson, 19 S. C. Eq. 34.

[a] **The guardian of an infant legatee** is entitled to demand an accounting. Buffalo Loan, etc., Co. v. Leonard, 154 N. Y. 141, 47 NE 966 [aff 9 App. Div. 384, 41 NYS 294].

[b] **Estoppel to require accounting.**—The administrators of a deceased administrator who was also the next of kin of the first decedent, and to whom his coadministrator had turned over assets of the estate, cannot require such coadministrator to account for the assets so turned over. Matter of Van Wert, 3 Misc. 563, 24 NYS 719.

26. Matter of Rainey, 5 Misc. 367, 26 NYS 892 [foll Matter of Beyea, 10 Misc. 198, 31 NYS 200].

27. Lacey's Est., 12 Phila. (Pa.) 126; Dawson v. Dawson, 19 S. C. Eq. 34.

[a] **The husband of a deceased legatee** is not entitled to an account for the legacy except as her administrator. Dawson v. Dawson, 19 S. C. Eq. 34.

[b] **The widow of a legatee** has no interest in the testator's estate which will entitle her to require the executor to account. Lacey's Est., 12 Phila. (Pa.) 126.

28. Matter of Prout, 52 Hun 109, 4 NYS 841 (residuary legatee of deceased distributee).

29. In re Hunt, 179 N. Y. 570, 72 NE 1143 [aff 84 App. Div. 159, 82 NYS 538]; Matter of Hunt, 84 App. Div. 159, 82 NYS 538 [aff 38 Misc. 30, 76 NYS 968]; Earle v. Earle, 73 App. Div. 300, 76 NYS 851 [aff 173 N. Y. 480, 66 NE 398]; In re Lawrence, 1 NYS 213; Matter of Wood, 5 Dem. Surr. (N. Y.) 345; Campbell v. Purdy, 5 Redf. Surr. (N. Y.) 434; Godwin v. Watford, 107 N. C. 168, 11 SE 1051; Mason's Est., 12 Pa. Dist. 324; In re Heath, 10 Pa. Dist. 281, 25 Pa. Co. 258; Smith's Est., 7 Pa. Dist. 754, 43 WklyNC 248; Bushong's Est., 14 Phila. (Pa.) 322; Albertson's Est., 1 WklyNC (Pa.) 188. But compare Abell v. Abell, 11 Ky. Op. 128, 129 ("Ordinarily an action for a settlement could not be maintained by those in remainder; but under the facts of this case there was much reason why a court of equity should take cognizance of the case in order that those in remainder might know the extent of their interest, and this is all the relief they are entitled to").

30. Matter of Hunt, 84 App. Div. 159, 82 NYS 538 [aff 179 N. Y. 570 mem, 72 NE 1143 mem].

the same right.[31]

[§ 2310] **g. Coexecutors and Coadministrators.** The right of a personal representative to compel his corepresentative to account is discussed elsewhere in this treatise.[32]

[§ 2311] **h. Successors and Representatives.** At common law, when an executor or administrator is removed, and an administrator de bonis non is appointed, the latter can only administer upon the estate which remains unadministered, and cannot call upon the removed executor or administrator to account;[33] but this rule has been very generally abrogated by statutory provisions under which an administrator de bonis non appointed upon the resignation or removal of an executor or administrator has the right to compel an accounting by his predecessor.[34] So also, in the absence of statute, it is usually considered that where an executor or administrator dies, his personal representatives cannot be compelled to account by the administrator de bonis non of the principal estate,[35] the right to demand such accounting being in the legatees and distributees only,[36] although in some states the rule, under statute, is that under such circumstances the administrator de bonis non is the proper person to compel an accounting.[37] It has been decided in New York that no statutory provision in that state authorizes the representatives of a deceased executor to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was executor.[38]

[§ 2312] **i. Sureties of Personal Representative.** It has been held that sureties on the bond of an executor or administrator cannot compel an accounting by their principal;[39] but a surviving administrator may be compelled to account by a surety on the bond of his deceased coadministrator;[40] and it has been held that suit was properly brought by sureties of administrators against them and their successor to compel an accounting between the parties, to ascertain the amount of the estate, to ascertain the distributive shares of defendants as next of kin and apply the same to pay the damages caused by their default, to ascertain the amount thereof, and have a judgment entered against them in the first instance and plaintiffs decreed secondarily liable, and to enjoin their successor from prosecuting the bond.[41]

[§ 2313] **j. Probate Court.** The probate court, having jurisdiction of the estate, may on its own motion, and without application of any interested party, make an order citing the executor or administrator to render an account, after the lapse of the time fixed by statute or the bond of the representative.[42] Whether an order to account shall be made is a matter resting in the sound discretion of the court

31. In re Lawrence, 1 NYS 213.

32. See infra § 2859.

33. Moore v. Armstrong, 9 Port. (Ala.) 697; Hardwick v. Thomas, 10 Ga. 266; Oglesby v. Gilmore, 5 Ga. 56; Brown v. Wilson, 174 N. C. 668, 94 SE 419.

34. Ala.—Waring v. Lewis, 53 Ala. 615; Simmons v. Price, 18 Ala. 405; King v. Smith, 15 Ala. 264.

Cal.—Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

Ga.—Giles v. Brown, 60 Ga. 658; Knight v. Lasseter, 16 Ga. 151; Hardwick v. Thomas, 10 Ga. 266; Oglesby v. Gilmore, 5 Ga. 56.

Ill.—Duffin v. Abbott, 48 Ill. 17 [overr Stose v. Peo., 25 Ill. 600 (foll Rowan v. Kirkpatrick, 14 Ill. 1), and appr Marsh v. Peo., 15 Ill. 284].

Ind.—Kelly v. Weddell, Smith 362.

La.—Collins v. Hollier, 13 La. Ann. 585.

Mass.—Fay v. Muzzey, 13 Gray 53, 74 AmD 619.

N. J.—Middleton v. Carter, 73 N. J. Eq. 624, 68 A 763 [aff 74 N. J. Eq. 853, 71 A 1134]; Boulton v. Scott, 3 N. J. Eq. 231.

N. Y.—Harrison v. Clark, 87 N. Y. 572; In re O'Brien, 45 Hun 284.

N. C.—State Univ. v. Hughes, 90 N. C. 537; Lansdell v. Winstead, 76 N. C. 366; Cannon v. Jenkins, 16 N. C. 422.

Oh.—Hocking Valley R. Co. v. White, 87 Oh. St. 413, 101 NE 354, AnnCas1914A 190.

Pa.—Matter of Bradley, 9 Phila. 327.

S. C.—Villard v. Robert, 20 S. C. Eq. 393.

Tenn.—Whitaker v. Whitaker, 12 Lea 393.

[a] **An accounting for assets wasted or converted** may be compelled by the administrator de bonis non. Waring v. Lewis, 53 Ala. 615.

[b] **Preliminary showing.**—An administrator de bonis non will be required to prove not only that debts existed, but that the administrator had notice of them within the year before he can require an account on the ground that judgments remained unsatisfied. Thompson v. Buckner, 11 S. C. Eq. 499.

[c] **Accounting of profits.**—A suit in chancery by the administrator de bonis non against the sureties of the executor, for an account of profits may be sustained. Waddy v. Hawkins, 4 Leigh (31 Va.) 458.

[d] **Assets already administered.**—An administrator de bonis non has no authority to call upon the first administrator for an account of assets already administered upon. Rowan v. Kirkpatrick, 14 Ill. 1.

[e] **Where there is no personal estate,** an administrator de bonis non has, as such, no right to maintain an action for a settlement of the estate. Withers v. Withers, 100 SW 253, 30 KyL 1099.

35. Bliss v. Seaman, 165 Ill. 422, 46 NE 279 [aff 59 Ill. A. 236]; Duffin v. Abbott, 48 Ill. 17; Marsh v. Peo., 15 Ill. 284; Bradshaw v. Com., 3 J. J. Marsh. (Ky.) 632; Douglas v. Day, 28 Oh. St. 175; Mehrer's Est., 20 Pa. Dist. 653.

36. Duffin v. Abbott, 48 Ill. 17, 19. "The distinction is observed between an administrator de bonis non appointed on the death of an administrator, and one appointed on the revocation of the letters. In the former case, the representatives of the deceased administrator cannot be called to account by the subsequent administrator, but only by the heirs and distributees. In the latter case, the section of the statute we have cited, expressly authorizes proceedings by the subsequent administrator against the prior administrator." Duffin v. Abbott, supra.

37. Oglesby v. Gilmore, 5 Ga. 56; Jones v. Wooten, 137 N. C. 421, 49 SE 915; Hocking Valley R. Co. v. White, 87 Oh. St. 413, 424, 101 NE 354, AnnCas1914A 190.

"The first duty of this administrator de bonis non with the will annexed of Hiram Maxon, deceased, is to compel an accounting by the executor of Nancy Maxon Gilman of the administration of her trust as executrix of the will of Hiram Maxon, deceased." Hocking Valley R. Co. v. White, supra.

38. Bunnell v. Ranney, 66 HowPr (N. Y.) 291, 2 Dem. Surr. 327; Spencer v. Popham, 5 Redf. Surr. (N. Y.) 425; Popham v. Spencer, 4 Redf. Surr. (N. Y.) 399.

39. McElroy v. Hatheway, 44 Mich. 399, 6 NW 867; Moore's Est., 19 Pa. Dist. 109; Dunnell v. Providence Municipal Ct., 9 R. I. 189.

[a] **Contrary view.**—Fisher's Est., 20 Pa. Dist. 362, 363 ("The surety has unquestionably the right under proper circumstances to ask the court to compel his principal to file an account. He is liable for the default of his principal, and it would be hard, indeed, if he could not ask the court's aid in seeking to have the affairs of the estate for which he is liable properly administered. This is especially so in the case of an administrator, whose bond calls for him to account at the end of the year, and who allows years to pass before so accounting").

40. Matter of Provost, 87 App. Div. 86, 84 NYS 29.

41. Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

42. Ala.—Burch v. Gaston, 182 Ala. 467, 62 S 508; Vincent v. Daniel, 59 Ala. 602.

Miss.—Robinson v. Gholson, 8 Sm. & M. 392.

N. Y.—Matter of Kennedy, 143 App. Div. 839, 128 NYS 626; Anonymous, 14 NYSt 490; Woodruff v. Woodruff, 17 AbbPr. 165; Matter of Uglow, 51 HowPr 342; Tucker v. McDermott, 2 Redf. Surr. 312.

Oh.—In re Morrison, 68 Oh. St. 252, 67 NE 567.

Philippine.—Pascual v. Baldovi, 11 Philippine 79.

Tex.—Thompson v. Buckley, 1 Tex. 33.

Wis.—In re Campbell, 12 Wis. 369.

[a] **A surrogate who is asked to remove executors** for wasting the estate may order an accounting on his own motion. Matter of Kennedy, 128 NYS 626.

[b] **Exhibition of accounts.**—The act of Jan. 16, 1843 does not prohibit judges of probate from calling upon administrators to exhibit their accounts and show their actings and doings in the administration, even without the application of an interested party, but except upon such application, an administrator cannot be called upon to render and settle his accounts. Thompson v. Buckley, 1 Tex. 33.

[c] **Rents and profits.**—Where, by consent of heirs or devisees, the executor or administrator enters into possession of real estate and takes rents and profits, he is liable to them only, if the estate is solvent, and the judge of probate cannot call him to account for such rents and profits. Goodrich v. Thompson, 4 Day (Conn.) 215.

of probate jurisdiction, the exercise of which will not be interfered with by an appellate court except in cases of abuse.[43]

[§ 2314] **6. Who May Be Required to Account —a. In General.** Generally speaking any executor or administrator may be called on to render an account;[44] and where a man, by marrying an executrix or administratrix, becomes executor or administrator,[45] and renders himself a trustee with her of the assets of the estate, he may be compelled to account,[46] even after the death of the wife.[47]

A temporary or special administrator may be required to account.[48]

Termination of office. Where an executor or administrator resigns or is removed or his letters are revoked, he may be required to render a final account and turn over the balance due,[49] unless it appears that he never took charge or possession of any part of the estate.[50]

The insanity of an executor does not affect the power of the probate court to require a settlement of his account.[51]

Persons who without authority assume to administer an estate and receive property of the estate may be compelled to account therefor,[52] although there are authorities which deny the power of the

43. Matter of Merritt, 35 App. Div. 337, 54 NYS 955; Matter of Adler, 60 Hun 481, 15 NYS 227.

44. Ala.—McLaughlin v. Nelms, 9 Ala. 925.

Cal.—French v. San Diego County Super. Ct., 3 Cal. A. 304, 85 P 133.

Ky.—Somerset Presb. Church v. Mize, 181 Ky. 567, 205 SW 674, 2 ALR 1237.

La.—McGehee v. McGehee, 41 La. Ann. 657, 6 S 253.

N. J.—Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498.

N. Y.—Matter of Dwyer, 112 App. Div. 195, 98 NYS 329, 37 NYCivProc 74.

Pa.—Com. v. Gregory, 261 Pa. 106, 104 A 562.

Can.—Taché v. Taché, 14 RevLeg 257.

Ont.—Simpson v. Corbett, 5 Ont. 377 [app dism 10 Ont. A. 32].

[a] **A sheriff appointed ex officio an administrator** may be cited in to account like any other administrator. McLaughlin v. Nelms, 9 Ala. 925.

[b] **The fact that an executrix is also life tenant** (1) does not excuse her failure to file an account. Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498. (2) But an administratrix with the will annexed, who is legatee of a life estate under the will and who has been in possession of the property for many years, there being no outstanding debts due from decedent, will be regarded as holding as life tenant and not as administratrix and cannot be called to account therefor in the latter capacity. Rowland v. Rowland, 29 S. C. 54, 6 SE 902.

[c] **Changing domicile.**—A person who undertakes the administration of an estate situated in one state cannot exonerate himself from suit by the heirs for the rendition of an account of his administration by removing his domicile and citizenship to another state. McGehee v. McGehee, 41 La. Ann. 657, 6 S 253.

[d] **A judgment closing the succession and sending the heirs into possession** (1) does not release the personal representative from his liability to account to the heirs; nor does partition of the property among the coheirs, which is in no wise inconsistent with its continued possession by him. Weimann's Succ., 106 La. 387, 30 S 893. (2) It is otherwise as to creditors, their remedy after the rendition of such a judgment being against the persons in possession. Duffy's Succ., 50 La. Ann. 795, 24 S 277.

[e] **A representative improperly appointed** is a de facto representative and may be required to account. Com. v. Gregory, 261 Pa. 106, 104 A 562.

45. See supra § 263.

46. Draughon v. French, 4 Port. (Ala.) 352; Smith v. Chapman, 5 Conn. 14; Wood v. Chetwood, 27 N. J. Eq. 311; Lindsay v. Lindsay, 1 S. C. Eq. 150.

47. Draughon v. French, 4 Port. (Ala.) 352; Gavin v. Carling, 55 Md. 530.

48. French v. San Diego County Super. Ct., 3 Cal. A. 304, 85 P 133; Ro Bards v. Lamb, 89 Mo. 303, 1 SW 222; Lawrence's Est., Tuck. Surr. (N. Y.) 68; Coyle's Est., 43 Pa. Co. 290; Webb's Est., 20 WklyNC (Pa.) 295.

[a] **A special administrator whose authority has been superseded** by a grant of general letters may be cited to account; but the surrogate has no further control over him. Lawrence's Est., Tuck. Surr. (N. Y.) 68.

[b] **An administrator pendente lite** may be required to file an account, and on the termination of the litigation which was the occasion of his appointment it is his duty to settle his accounts and turn over the estate to his successor. Ro Bards v. Lamb, 89 Mo. 303, 1 SW 222; Webb's Est., 20 WklyNC (Pa.) 275.

49. Ala.—Sloan v. McKinney, 19 Ala. 115.

Cal.—Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

Ga.—Giles v. Brown, 60 Ga. 658; Hardwick v. Thomas, 10 Ga. 266.

Ill.—Snell v. Weldon, 162 Ill. A. 11.

Kan.—Hudson v. Barratt, 62 Kan. 137, 61 P 737.

La.—Chaffe v. Farmer, 36 La. Ann. 813; Frazier's Succ., 35 La. Ann. 381; Rentz v. Cole, 26 La. Ann. 623.

Md.—Cummings v. Robinson, 95 Md. 83, 51 A 1105.

Miss.—Noland v. Calvit, 20 Miss. 273.

Mo.—Francisco v. Wingfield, 161 Mo. 542, 61 SW 842.

N. J.—Schenck v. Schenck, 3 N. J. L. 149; Middleton v. Carter, 73 N. J. Eq. 624, 68 A 763 [aff 74 N. J. Eq. 853, 71 A 1134]; Aldridge v. McClelland, 34 N. J. Eq. 237.

N. Y.—Dunford v. Weaver, 84 N. Y. 445 [aff 21 Hun 349]; Geroud v. Wilson, 81 N. Y. 573 [aff 16 Hun 530]; Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982; Foster v. Wilber, 1 Paige 537; Rayner v. Pearsall, 3 Johns. Ch. 578.

N. C.—Pace v. Pace, 73 N. C. 119; Thompson v. McDonald, 22 N. C. 463; Ralston v. Telfair, 22 N. C. 414.

Oh.—Hocking Valley R. Co. v. White, 87 Oh. St. 413, 101 NE 354, AnnCas1914A 190; In re Morrison, 68 Oh. St. 252, 67 NE 567; James v. West, 67 Oh. St. 28, 65 NE 156.

Or.—Rutenic v. Hamaker, 40 Or. 444, 67 P 196.

Pa.—Com. v. Gregory, 261 Pa. 106, 104 A 562; Peeble's App., 15 Serg. & R. 39; Lockard's Est., 10 Pa. Dist. 192.

S. C.—Villard v. Robert, 18 S. C. Eq. 393.

Tenn.—Whitaker v. Whitaker, 12 Lea 393.

Tex.—Ingram v. Maynard, 6 Tex. 130.

Can.—Mack v. Mack, 23 Can. S. C. 146.

[a] **A discharge of administrators on account of insolvency** of themselves and their sureties does not relieve them of the duty to account Union Nat. Bank v. Poulson, 31 N. J. Eq. 239.

[b] **The next of kin may require** an accounting by an executor or administrator who has been removed, although his successor has not been appointed. Geroud v. Wilson, 81 N. Y. 573.

[c] **Settlement before successor appointed.**—A settlement made by an executor or administrator on his resignation is not conclusive as to his successor, if made before such successor was appointed and qualified. Emmons v. Gordon, 125 Mo. 636, 28 SW 863, 24 SW 146.

[d] **Alleged disbursement.**—An administratrix who has been dismissed cannot evade the duty of accounting by alleging, in her answer to a petition for account, that she has paid out all the money of the estate which has come into her hands. Lockard's Est., 10 Pa. Dist. 192.

[e] **The burden is upon a removed administrator** to show that he has made a full accounting of the assets of the estate. In re Glover, 127 Mo. 153, 29 SW 982.

[f] **A bill for an accounting does not abate** by the revocation of the administrator's letters and the appointment of his successor after a decree had been entered and a reference of accounts ordered, but the new administrator may be joined as a party to avoid multiplicity of suits. Henderson v. McClure, 7 S. C. Eq. 466.

[g] **The probate court** has no jurisdiction to compel an accounting in such a case, unless the account was in process of settlement when the representative was removed. In re Miller, 11 OhS&CP 624, 8 OhNP 385.

[h] **County court.**—After an executor has resigned or been discharged the county court has no authority to settle his accounts. Ingram v. Maynard, 6 Tex. 130; Long v. Mooters, 18 Tex. Civ. A. 35, 45 SW 165; McClellan v. Mangum, 33 Tex. Civ. A. 193, 75 SW 840.

50. Hanley v. Holton, 120 Mo. A. 393, 96 SW 691.

[a] **Where the letters of an executrix were revoked on the same day they were granted,** and she never took charge of any part of the estate or attempted to inventory or charge herself therewith, she could not be compelled by an administrator pendente lite subsequently appointed to account for any portion of decedent's property. Hanley v. Holton, 120 Mo. A. 393, 96 SW 691.

Lack of assets relieving from liability to account generally see infra § 2322.

51. Michigan Trust Co. v. Ferry, 228 U. S. 346, 33 SCt 550, 57 L. ed. 867 [rev 175 Fed. 667, 99 CCA 221, 175 Fed. 681, 99 CCA 235].

52. Ky.—Marshall v. Strange, 9 SW 250, 10 KyL 410.

Mich.—Damouth v. Klock, 29 Mich. 289.

N. Y.—Farrell's Est., Tuck. Surr. 110.

N. C.—Pace v. Pace, 73 N. C. 119.

N. D.—Dobler v. Strobel, 9 N. D. 104, 81 NW 37, 81 AmSR 530.

[a] **Nullity of appointment.**—One who has been appointed as administrator of an estate and received letters of administration therein and

probate court to require an accounting under such circumstances.[53]

If an infant is appointed executor or administrator, and he receives and disposes of assets of the estate, he cannot be required to account in respect to receipts during infancy.[54]

If the person named in the will as executor does not qualify, he cannot be required to render an account.[55]

An executor or administrator who has been discharged cannot subsequently be called upon to account,[56] unless and until the discharge has been set aside.[57]

One who is both life tenant and executor under the will, and who has discharged his functions as executor and remains in possession simply as life tenant, cannot be required to account as executor.[58]

Sureties on an administration bond cannot be required to account for the acts of their principal, and a decree against them for an accounting is extrajudicial and inoperative.[59]

Attorney of representative. Where an administrator's attorney made a profit on his purchase of land of the estate, it was held that the estate could not be settled until an accounting by him.[60]

[§ 2315] **b. Coexecutors and Coadministrators.** Where there are two or more executors or administrators of an estate, each has a several right to the assets of the estate, and is responsible and need account only for the assets he receives.[61] Each of several coexecutors or coadministrators has a right to settle a separate account of his administration;[62] but it is improper to file several sets of accounts covering the same transactions and assets.[63] The liability of corepresentatives who jointly settle their final accounts is fully discussed elsewhere.[64] A petition by an executor to compel his coexecutor to join in stating an account should be dismissed, where it appears that such coexecutor has repeatedly declared his willingness to unite with the petitioner in the statement of an account disposing of the assets in accordance with the proper practice and in such manner as to allow the petitioner full opportunity to establish certain disputed claims held by him against the estate, but that the petitioner has persistently failed to coöperate with him.[65]

[§ 2316] **c. Representative of Deceased Executor or Administrator.** The general rule is that, where an executor or administrator dies without having settled his administration account, it is for his own representative and not the administrator de bonis non of the first decedent to present and settle the account of the deceased representative; and an accounting may accordingly be compelled.[66]

has seized, misappropriated, and dissipated the property of the estate, cannot evade an accounting upon the ground of the nullity of his appointment. Dobler v. Strobel, 9 N. D. 104, 81 NW 37, 81 AmSR 530.

[b] **Grant of letters to executor de son tort.**—If a person who has made himself an executor de son tort subsequently takes out letters, the letters relate back and he becomes liable to account in the probate court. Farrell's Est., Tuck. Surr. 110.

53. Rentz v. Cole, 26 La. Ann. 623; Davis v. Davis, 72 N. H. 326, 56 A 747; Peebles' App., 15 Serg. & R. (Pa.) 39; Power's Est., 14 Phila. (Pa.) 289, 10 WklyNC 208.

[a] **The reason** given for this is that an executor de son tort has acted only under usurped authority. Peebles' App., 15 Serg. & R. (Pa.) 39.

[b] **Failure to give bond.**—Under Pub. St. (1901) c 188 § 12, providing that no person shall be considered as having the trust of a decedent's estate until he has given bond, where letters of administration have been issued by the probate court to an executor, but no administration bond has been given, the probate court has no jurisdiction to require him to account for property of the decedent lost through his negligence. Davis v. Davis, 72 N. H. 326, 56 A 747.

[c] **Estate of married woman.**—There is no authority for calling on a negotiorum gestor, by an ex parte order obtained by the heirs of his deceased wife, to render an account to the court in a fiduciary capacity, as an administrator of a succession and that a surviving husband holding under the law as usufructuary is not to be called on thus for an account of administration. Rentz v. Cole, 26 La. Ann. 623.

54. Stott v. Meanock, 31 L. J. Ch. 746; Hindmarsh v. Southgate, 3 Russ. 324, 3 EngCh 324, 38 Reprint 597.

55. Wever v. Marvin, 14 Barb. (N. Y.) 376, 7 HowPr 182.

56. Cook v. Weaver, 77 Ga. 9; Baron v. Baum, 44 La. Ann. 295, 10 S 766.

[a] **Persons claiming to be sole heirs of the decedent** cannot demand an account of the administration of the succession after the administrator has been discharged, although they attack a judgment homologating an account, where the order discharging the administrator is not assailed and the person to whom the residue of the estate was paid, and who had been recognized as the sole heir, is not made a party defendant. Baron v. Baum, 44 La. Ann. 295, 10 S 766.

[b] **A right conferred upon minors by statute** to bring suit against an executor or administrator within five years after arriving at majority, which right the statute provides shall not be barred by the discharge of the representative, does not apply to a citation by the ordinary issued to a discharged executor requiring him to account. Cook v. Weaver, 77 Ga. 9.

57. Cook v. Weaver, 77 Ga. 9.

[a] **The fact that the discharge might be set aside** for fraud does not confer jurisdiction upon the ordinary to issue a citation for a settlement until the discharge has been actually set aside. Cook v. Weaver, 77 Ga. 9.

58. Matter of Comer, 72 Misc. 321, 131 NYS 187.

59. Ross v. Chambers, 17 S. C. L. 548; Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643.

60. Vaiden v. Edson, 85 N. J. Eq. 65, 98 A 635 [aff 85 N. J. Eq. 184, 95 A 980].

61. Gaultney v. Nolan, 33 Miss. 569; Matter of Van Wert, 3 Misc. 563, 24 NYS 719; In re Rust, 3 NYS 308 mem; Davis' App., 23 Pa. 206; Lafferty's Est., 5 Pa. Dist. 75, 17 Pa. Co. 401.

[a] **No assets received.**—An accounting and settlement cannot be required from a coexecutor or coadministrator who received none of the assets, but in the exercise of prudence and good faith permitted his associate to control them exclusively. In re Rust, 3 NYS 308, 23 Abb NCas 78. Compare Matter of Campbell, 21 Misc. (N. Y.) 133, 47 NYS 29 (an executor cannot evade an accounting on the ground that he did not make or join in the making of any inventory of the estate and that no part thereof came into his hands and that he took no part in its management, although it does not follow that he will be liable to make good any waste which may have been committed by his coexecutor).

[b] **Paying over assets to corepresentative.**—(1) Where an administrator turns over the property of the estate to his coadministrator, who is also next of kin of intestate, he cannot be required to account therefor by the administrators of his coadministrator. Matter of Van Wert, 3 Misc. 563, 24 NYS 719, Pow. Surr. 473. (2) One who collects and receives assets is not relieved from an accounting by paying them over to his coexecutor when the habits, health, and pecuniary circumstances of such coexecutor should have awakened inquiry on his part. Knight v. Haynie, 74 Ala. 542.

62. Mercer v. Glass, 25 SW 114, 15 KyL 710; In re Patterson, 1 Watts & S. (Pa.) 291.

[a] **Joint liability on the official bond** for acts of the coadministrator is not affected thereby. In re Patterson, 1 Watts & S. (Pa.) 291.

[b] **Rights of representative of corepresentative.**—Where one of two corepresentatives who have faithfully administered different parts of their decedent's estate dies his own executor or administrator may settle a separate account of his administration. Barclay v. Morrison, 16 Serg. & R. (Pa.) 129. See also infra § 2316.

63. In re Fleming, 32 PittsbLeg JNS (Pa.) 439.

64. See infra § 2860.

65. Strasbaugh v. Dallam, 93 Md. 712, 50 A 417.

66. Ala.—Salmon v. Wynn, 153 Ala. 538, 45 S 133, 15 AnnCas 478; Howard v. Howard, 26 Ala. 682.

Ark.—Wilson v. Hinton, 63 Ark. 145, 38 SW 338.

Cal.—Wetzler v. Fitch, 52 Cal. 638; Bush v. Lindsey, 44 Cal. 121.

Conn.—State v. Osborne, 69 Conn. 257, 37 A 491; Smith v. Chapman, 5 Conn. 14.

Ind.—Ray v. Doughty, 4 Blackf. 115.

Ky.—Clark v. Farmers' Nat. Bank, 124 Ky. 563, 99 SW 674.

La.—Landers' Succ., 126 La. 371, 52 S 545.

Me.—Libby v. Jerrard, 117 Me. 303, 104 A 351; Cook v. Titcomb, 115 Me. 38, 97 A 133; Nowell v. Nowell, 2 Me. 75.

Md.—Muncaster v. Muncaster, 23 Md. 286; Smithers v. Hooper, 23 Md. 273. See also Donaldson v. Raborg, 26 Md. 312, 327, 28 Md. 34 (a final account "was necessary in order to exonerate the administrator or his personal representatives").

Mass.—Storer v. Storer, 6 Mass. 390.

But in a few states this rule is not acceded to.[67] The representative of a representative is not required to account as the representative of the original decedent[68] when there is no proof that any of the effects of such decedent came to his hands in his representative character.[69]

A testamentary direction relieving an executor from liability to account precludes the compelling of an account by the personal representatives of such executor.[70]

Executors of life tenant. Where by the will of a married woman her husband is made a life tenant of her entire estate, the surrogate's court, on the death of the husband, is without jurisdiction to direct his executors to account as to such estate, on the petition of the wife's administrators with the will annexed,[71] the husband having discharged her debts and paid her funeral expenses.[72]

[§ 2317] **7. Person Acting in Different Capacities—a. As Representative of Different Estates.** Where the same person is administrator de bonis non with the will annexed of the original decedent and administrator of the original executor, he may file his account in the former capacity, although technically he should file the account of his intestate.[73]

[§ 2318] **b. As Representative and Guardian.** When a person acts both as executor or administrator and guardian of the children of the deceased, he should render separate accounts as personal representative and as guardian,[74] and he should first file his account in the former capacity in order

Mich.—Perrin v. Lepper, 72 Mich. 454, 40 NW 859.

Miss.—Jarnagin v. Frank, 59 Miss. 393; Prestige v. Pendleton, 28 Miss. 379; Steen v. Steen, 25 Miss. 513; Byrd v. Holloway, 14 Miss. 323; Probate Judge v. Phipps, 6 Miss. 59.

N. J.—Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.

N. Y.—In re Hayden, 204 N. Y. 330, 97 NE 718 [rev 130 NYS 1114, and rearg den 204 N. Y. 688, 98 NE 1104]; Merritt v. Merritt, 161 N. Y. 634, 57 NE 1117 [aff 32 App. Div. 442, 53 NYS 127]; In re Moehring, 154 N. Y. 423, 48 NE 818; In re Rogers, 153 N. Y. 316, 47 NE 589 [aff 36 NYS 1132 mem]; In re Wiley, 119 N. Y. 642, 23 NE 1054; In re Clark, 119 N. Y. 427, 23 NE 1052; Matter of Collyer, 124 App. Div. 16, 108 NYS 600; Volhard v. Volhard, 119 App. Div. 266, 104 NYS 578; Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem]; Matter of Walton, 112 App. Div. 176, 98 NYS 42; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Matter of Armstrong, 72 App. Div. 286, 76 NYS 37; Matter of Irvin, 68 App. Div. 158, 74 NYS 443; Matter of Fithian, 44 Hun 457, 3 NYS 193, 1 Conn. Surr. 187; In re Latz, 33 Hun 618 [app dism 110 N. Y. 661 mem, 18 NE 260, 2 Silv. A. 109]; Matter of Fry, 79 Misc. 180, 140 NYS 592; Matter of Scudder, 21 Misc. 179, 47 NYS 101, 2 Gibb. Surr. 233 [cit In re Wiley, 119 N. Y. 642 mem, 25 NE 1054 mem, 2 Silv. A. 548]; Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58; Coman's Est., 15 NYSt 442; Matter of Trask, 49 NYS 825, 27 NYCivProc 7; In re Smith, 1 HowPrNS 64; Matter of Ranney, 66 HowPr 291, 2 Dem. Surr. 327; In re Bacon, 24 NYWklyDig 194; Matter of Fithian, 5 Dem. Surr. 305; Crawford v. Crawford, 5 Dem. Surr. 37; Herbert v. Stevenson, 3 Dem. Surr. 236; Le Count v. Le Count, 1 Dem. Surr. 29; Spencer v. Popham, 5 Redf. Surr. 425; Wood v. Crooke, 5 Redf. Surr. 381.

N. C.—Jones v. Wooten, 137 N. C. 421, 49 SE 915.

Oh.—Hocking Valley R. Co. v. White, 87 Oh. St. 413, 101 NE 354, AnnCas1914A 190; Jones v. Willis, 72 Oh. St. 189, 74 NE 166; Jones v. Willis, 72 Oh. St. 189, 74 NE 166.

Pa.—In re Huber, 249 Pa. 90, 94 A 556; In re Wagner, 227 Pa. 460, 76 A 215; Bowman's App., 62 Pa. 166; Millers' Est., 18 Pa. Dist. 1029; Graham's Est., 14 Pa. Dist. 5, 18 YorkLegRec 147; Bickley's Est., 13 Pa. Dist. 461; Houseman's Est., 11 Pa. Dist. 87, 26 Pa. Co. 477; Grayham's Est., 31 Pa. Co. 217; Bickley's Est., 30 Pa. Co. 382; Gressle's Est., 29 Pa. Co. 97; Montgomery's Est., 3 Brewst. 306; In re Van Dyke, 31 LegInt 69; Shoch's Est., 11 WklyNC 288.

Vt.—Nason v. Smith, 13 Vt. 170.

Va.—Graff v. Castleman, 5 Rand. (26 Va.) 195, 16 AmD 741.

Can.—Mack v. Mack, 23 Can. S. C. 146.

Ont.—Cunnington v. Cunnington, 2 Ont. L. 511.

[a] **The accounting is limited** to acts done by the deceased representative in his lifetime. Libby v. Jerrard, 117 Me. 303, 104 A 351.

[b] **A surviving executor** who has an individual interest in the estate may cite the executor of his deceased coexecutor to account. Matter of Hodgman, 10 NYS 491.

[c] **Access to books and papers of deceased representative.**—For the purpose of settling the account the legal representative of the deceased executor or administrator is entitled to free access to the books and papers relating to the executorship in the hands of the representative succeeding to the administration of the first estate, but is not entitled to their exclusive possession. Eckart's Est., 14 Pa. Dist. 423. To similar effect Thomas's Est., 8 Pa. Dist. 400, 22 Pa. Co. 518.

[d] **Where an executor dies pending proceeding for his removal,** his executrix cannot be required to file an account in that proceeding. In re McCalmont, 242 Pa. 578, 89 A 687.

[e] **Where an administrator dies pending an appeal from the allowance of his account,** his administrator cannot be cited to appear before the court where the appeal was pending to settle such account. Wentworth v. Wentworth, 12 Vt. 244.

67. McClellan v. Manguin, 33 Tex. Civ. A. 193, 75 SW 840; Reed v. Wilson, 73 Wis. 497, 41 NW 716.

68. Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121.

N. J.—Schenck v. Schenck, 3 N. J. L. 562; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

N. Y.—Matter of Schlesinger, 36 App. Div. 77, 55 NYS 514 [rev on other grounds 24 Misc. 456, 53 NYS 710]; Matter of Trask, 49 NYS 825, 27 NYCivProc 7; Dakin v. Demming, 6 Paige 95.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Vt.—Wentworth v. Wentworth, 12 Vt. 244.

See also Pickett v. Pickett, 41 La. Ann. 882, 885, 6 S 655 ("It is evident that the administrator of W. M. Pickett can not administer as such administrator the succession of Nathan Pickett. Only an administrator appointed for that purpose can administer that succession").

"It is well settled that if an executor dies without having made a full distribution and delivery of the assets of the estate, it is necessary to have an administrator de bonis non appointed. The executor's executor is not competent as a general rule, to interfere with such assets or to render an account for the deceased executor." Lawson v. Burgee, 121 Md. 203, 207, 88 A 121.

[a] **A proceeding for the settlement of the accounts of an executor or administrator** abates on his death and cannot be revived against his personal representatives, but they must account de novo. Matter of Steencken, 51 App. Div. 417, 64 NYS 660; Matter of Schlesinger, 36 App. Div. 77, 55 NYS 514 [rev on other grounds 24 Misc. 456, 53 NYS 710]; Herbert v. Stevenson, 3 Dem. Surr. (N. Y.) 236; Wentworth v. Wentworth, 12 Vt. 244.

69. Ky.—Barbour v. Robertson, 1 Litt. 93.

Miss.—Davis v. Yerby, Sm. & M. Ch. 508.

N. Y.—In re O'Brien, 45 Hun 284; Dakin v. Demming, 6 Paige 95.

Or.—Cross v. Baskett, 17 Or. 84, 21 P 47.

Pa.—Zachman's Est., 26 Pa. Dist. 693; Thomas's Est., 9 Pa. Dist. 87.

[a] **When the deceased executor received no property** of his decedent's estate, his representative need not file an account. Thomas' Est., 9 Pa. Dist. 87.

70. In re Keller, 224 Pa. 523, 73 A 926.

[a] **Illustration.** — Under a will appointing testator's widow and son executors, with a direction that they should not be required to file an account, the executor of the widow, in the absence of fraud, cannot require the executors of the son to account on the ground that he had received and converted all the assets of the estate, and not paid the income to the widow for life as provided by the will, but the remedy is by an action of debt at law. In re Keller, 224 Pa. 523, 73 A 926.

71. Matter of Comer, 72 Misc. 321, 131 NYS 187.

72. Matter of Comer, 72 Misc. 321, 131 NYS 187.

73. Matter of Brewster, 92 Misc. 339, 156 NYS 588; Hughes' Est., 1 Pa. Co. 179, 17 WklyNC (Pa.) 160.

[a] **Joint administration de bonis non.**—Where the administrator of a deceased executor takes out jointly with another letters of administration de bonis non on the estate of the testator, he does not exclusively represent both estates, and consequently there can be no transfer by operation of law of the property in his hands as administrator to him as administrator de bonis non, and an account should be stated between him as administrator and the estate of the testator. Thomas v. Wood, 1 Md. Ch. 296.

74. Foteaux v. Lepage, 6 Iowa 123; Dinger's Est., 23 Pa. Dist. 756; Thomas' Est., 2 Kulp (Pa.) 160; Hannah v. Boyd, 25 Gratt. (66 Va.) 692.

[a] **Mode of accounting.**—Where one is both executor and guardian, it is error for him to account as executor for rents and repairs of real estate belonging to the ward, as the same belong exclusively to the ward's estate, and should be accounted for by him as guardian in a separate account. Thomas' Est., 2 Kulp (Pa.) 160.

that it may be definitely ascertained what amount he should charge himself with in the latter.[75] An executor cannot be required to settle his accounts as such in a proceeding against him as guardian of an heir of the estate.[76]

[§ 2319] **c. As Representative and Trustee.** One who is testamentary trustee as well as executor holds the fund as executor until his final account as such is settled,[77] and he cannot properly assume the rights and duties of trustee until the court has approved his accounts as executor and ordered a distribution of the estate.[78] It has been considered that executors who are charged with trust duties should, when finally accounting as executors, include all their proceedings in the administration of the estate in whatever capacity they have assumed to act;[79] but it has also been said that blending accounts as personal representative and trustee is not permissible.[80] Where, in proceedings for the judicial settlement of his accounts as guardian, administrator with the will annexed, and testamentary trustee, it appeared that at all times since accountant had been concerned with the assets for which he sought to account he was only entitled to custody and administration of such assets as testamentary trustee, an account as administrator with the will annexed did not require adjustment.[81] An administrator who collects a trust fund belonging to the estate of his intestate and is subsequently appointed trustee of such fund is liable to account for the same as administrator when it does not appear that he has ever made any transfer of such fund to himself as trustee.[82] An executor who was also an agent or trustee of the testator in his lifetime cannot, after the final settlement of his accounts as executor, be called on to account in equity as such trustee;[83] there can be no separate accounting in the two different capacities.[84] A statement in an executor's inventory that the estate had a residuary interest in certain land whose legal title was in him cannot affect such executor's right to apply for an accounting to the circuit court of the trust, which existed independent of his position as executor.[85]

[§ 2320] **8. Scope of Liability and Property to Be Included.** An executor or administrator must render his account for all the personal property of decedent which has come into his hands, wherever found or by whatever means collected.[86] The inventory of the estate which it is the duty of the repre-

75. Davis v. Davis, 10 Ala. 299; Wells v. Cuny, 4 La. 489; Fish's App., 3 Pa. Cas. 239, 7 A 222. But compare In re Scott, 36 Vt. 297 (where an administrator is also guardian, he may charge himself with funds as guardian without an order of the probate court, and this will be a sufficient accounting for the same as administrator).

76. Dale v. Dale, 134 Ark. 61, 203 SW 258.

77. Wallber v. Wilmanns, 116 Wis. 246, 93 NW 47. See generally supra § 470.

78. Ida.—Jones v. Broadbent, 21 Ida. 555, 123 P 476.

Mass.—Donnelly v. Levers, etc., Co., 115 NE 252; Herbert v. Squire, 186 Mass. 189, 71 NE 534; Hall v. Cushing, 9 Pick. 395, 409.

Mont.—In re Higgins, 15 Mont. 474, 39 P 506, 28 LRA 116.

N. Y.—Cluff v. Day, 124 N. Y. 195, 26 NE 306 [rev 55 N. Y. Super. 460, 14 NYSt 729].

Or.—In re Roach, 50 Or. 179, 191, 92 P 118 [cit Cyc].

"Before there could be any transmutation of property, as contended for by the defendants' counsel, the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee for the minor children. And such an allowance would not, it is to be presumed, be made by the judge of probate, without first requiring him to give bond for the faithful performance of his duties as trustee." Hall v. Cushing, supra.

[a] **An executor having a discretionary power** which will affect a residuary trust fund must elect as to its use or nonuse before closing his account as executor. Matter of Bischoff, 73 Misc. 191, 132 NYS 494.

[b] **Liability as executor.**—An executor who is also a trustee under the same will is liable as executor for assets in his hands until his account as executor has been filed and allowed in the probate court. Herbert v. Squire, 186 Mass. 189, 71 NE 534.

79. Whitney v. Phœnix, 4 Redf. Surr. (N. Y.) 180.

80. Dinger's Est., 23 Pa. Dist. 756.

81. Matter of Brewster, 92 Misc. 339, 156 NYS 588.

82. In re Hodson, 131 N. Y. 575, 30 NE 63 [aff 61 Hun 504, 16 NYS 371].

83. Vanmeter v. Jones, 3 N. J. Eq. 520.

84. Vanmeter v. Jones, 3 N. J. Eq. 520.

85. Johnston v. Grice, 272 Mo. 423, 199 SW 409.

86. Cal.—In re Hall, 154 Cal. 527, 98 P 269; Radovich's Est., 74 Cal. 536, 16 P 321, 5 AmSR 466.

Hawaii.—Matter of Enos, 18 Hawaii 542.

Ill.—Matter of Brown, 207 Ill. A. 536; Wilbanks v. Crosno, 112 Ill. A. 503.

Ind.—Keister v. Howe, 3 Ind. 268.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Kan.—Gille v. Emmons, 91 Kan. 462, 138 P 608, 91 Kan. 920, 139 P 379.

Ky.—Smith v. Morgan, 4 KyL 829.

La.—Francez's Succ., 49 La. Ann. 1732, 23 S 254; Von Hoven's Succ., 46 La. Ann. 911, 15 S 391; Plantevignes' Succ., 28 La. Ann. 562.

Md. — Bauernschmidt v. Bauernschmidt, 101 Md. 148, 60 A 437.

Mass.—Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847; Clark v. Seagraves, 186 Mass. 430, 71 NE 813; Fay v. Taylor, 2 Gray 154; Jennison v. Hapgood, 10 Pick. 77; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72.

Minn.—Fischer v. Hintz, 176 NW 177; Bealeui v. Ain-E-Waush, 126 Minn. 321, 148 NW 282.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524.

N. H.—Ella's App., 68 N. H. 35, 38 A 501.

N. Y.—In re Hunt, 179 N. Y. 570, 72 NE 1143 [aff 84 App. Div. 159, 82 NYS 538]; Matter of Hiscox, 135 App. Div. 848, 120 NYS 308; Matter of Brown, 86 Misc. 187, 149 NYS 138; Matter of Brown, 86 Misc. 187, 149 NYS 138; Matter of Watson, 86 Misc. 588, 148 NYS 902; Matter of McDermott, 151 App. Div. 914, 135 NYS 870; In re Clark, 11 NYS 911.

Pa.—In re Bell, 226 Pa. 531, 75 A 726; Wilson's Est., 59 Pa. Super. 358; Stouffer's Est., 14 Pa. Dist. 108; Osterhout's Est., 8 LancLRev 18; Tracy's Est., 15 Montg. Co. 30; In re Marshall, 32 PittsbLegJNS 247; In re Ruppel, 32 PittsbLegJNS 233.

S. C.—McIntyre v. McClenaghan, 12 S. C. 185.

Tex.—Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441.

"The final account should be a full, complete and final exhibit of all the affairs of the deceased, leaving nothing for inference, however fair and honest the administration may have been, and there should be nothing omitted, which might possibly provoke future litigation, as the bounty item would do, if collected by the heirs after the close of the administration." Gardere's Succ., 48 La. Ann. 289, 291, 19 S 134.

[a] **Where a surviving partner of the testator is his executor,** his testamentary account must include a statement of partnership affairs. Marre v. Ginochio, 2 Bradf. Surr. (N. Y.) 165.

[b] **Where an administrator was charged with the duty of preserving** the funds from which annuities were to be paid, as well as other funds of the estate, he was liable to account as administrator for such funds. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

[c] **Money paid to the representative by the heirs or devisees** of the real estate to avoid a sale thereof for the payment of debts and legacies must be accounted for by the representative. Fay v. Taylor, 2 Gray (Mass.) 154.

[d] **Fund belonging to widow.**—An administrator must account for a fund arising out of his intestate's estate, although it rightfully belongs to the widow, when she has directed him to receive it and apply it on the debts of the estate. Wilkinson v. Ward, 42 Ill. A. 541.

[e] **Receipts and disbursements after filing account.**—An administrator's final account may be brought down to include receipts and expenditures subsequent to its filing, on a verified affidavit of such items. Hone v. Lockman, 4 Redf. Surr. (N. Y.) 61.

[f] **Goodwill.**—Executors will not be relieved from charging themselves in their account with the goodwill of testator's business because they do not know what it is worth, as it is their duty to make an honest effort to find out. Matter of Hiscox, 135 App. Div. 848, 120 NYS 308.

[g] **Trade-marks.**—Executors will not be excused from charging themselves in their account with the value of trade-marks of proprietary articles, on the ground that the trade-marks were of little value without the formulæ in accordance with which the articles protected by the trade-marks are manufactured, where they, who had been employees in testator's business, knew the formulæ, since it was their duty to disclose them for the benefit of the estate, and they could not use them for their

sentative to make [87] constitutes the basis or starting point for such accounting,[88] but it is not conclusive as to the assets for which an executor or administrator is accountable [89] or as to their value [90] and he may be required to account for assets not inventoried or credited by him.[91] Ordinarily, the personal representative is required to account for the personal property only,[92] and not for the realty;[93] but he may be required to account for the proceeds of realty, where these have come into his possession.[94] It is only as to money or property which an executor or administrator is entitled to receive in his representative capacity that an account should be taken in settling his administration;[95] if he receives money or property to which he is not entitled in his representative capacity he cannot be required to account therefor.[96]

Where an appointment as representative is a

own benefit. Matter of Hiscox, 135 App. Div. 848, 120 NYS 308.

[h] **Debts** are not properly chargeable to the administrator as assets of the estate, and he is only answerable for such as actually come into his possession. In re Bell, 226 Pa. 531, 75 A 726.

[i] **A liquor license** must be accounted for. Immendorf's Est., 7 Pa. Dist. 449, 21 Pa. Co. 268 [aff 190 Pa. 590, 42 A 959].

[j] **Receipt of money by deceased.**—Evidence that a testator one year before his death received certain money is not sufficient, without proof connecting his executor with the money, to make him accountable therefor. Matter of Haney, 74 Hun 205, 26 NYS 815.

[k] **The administratrix of a surviving partner** cannot be required to account in the state courts for partnership assets which are outside the state until such time as the proceeds thereof actually come into her hands within the state. Scudder v. Ames, 142 Mo. 187, 43 SW 659.

[l] **Life insurance policies.**—(1) An executor is not chargeable in his account with the amount of insurance policies in his hands on the lives of debtors of his intestate before he has realized on such policies. Richardson's Est., 2 Misc. 288, 23 NYS 978. (2) An executor is not chargeable with the sum paid on a life insurance policy of his testator, when it appears that the policy was made payable to the testator's wife to whom it was paid and that she delivered the proceeds to the executor who deposited them in bank as her agent. In re Gordon, 15 NYS 502 [aff 131 N. Y. 658 mem, 30 NE 867 mem]. (3) Under a statute which provides that a married woman may cause the life of her husband to be insured and be entitled to receive the insurance money as her separate property, free from any claim of creditors of her husband, except that, where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance which is purchased by the excess of the premium over five hundred dollars is primarily liable for the husband's debts, a surrogate has no jurisdiction of a proceeding by a creditor of a deceased husband to compel his wife, as executrix, to account for the excess of life insurance purchased by the portion of annual premiums in excess of five hundred dollars. In re Thompson, 184 N. Y. 36, 76 NE 870 [rev 102 App. Div. 617, 92 NYS 1147, and reh den 185 N. Y. 574, 78 NE 74].

[m] **Property specifically bequeathed** (1) to the executor must be accounted for. Von Hoven's Succ., 46 La. Ann. 911, 15 S 391. (2) Where testatrix bequeathed specific property to a legatee, and the property was not necessary for any purpose of administration, and the executor assented to the title of the legatee, but a third person who was in possession of the property claimed title thereto, the legatee was entitled to bring an action to recover the property, and hence the executor's accounts could not be surcharged with the value of the property. Matter of Warren, 148 App. Div. 525, 133 NYS 145.

[n] **A widow who is executrix** need not charge herself with the allowance prescribed by statute. Bell v. Altheimer, 99 Ark. 529, 138 SW 993; In re Hamilton, 148 Iowa 127, 126 NW 776.

[o] **Provisions in the house,** which the family consumed immediately after the decedent's death and before the taking of the inventory, are not to be accounted for. Williamson v. Williamson, 6 Paige (N. Y.) 298.

[p] **Food for an exempt animal** need not be accounted for. In re Irwin, 152 Iowa 323, 131 NW 57.

[q] **Where the will does not give the seizin** of the property to the executor, and he is not shown to have had possession of that which is sued for, he will not be responsible, unless he has neglected to take possession of the estate when entitled to do so; and, in the last case, the heirs have only the right of demanding an account of his executorship, and delivery of any property in his possession, or any balance due. Grubb v. Henderson, 1 Rob. (La.) 4.

[r] **Amount actually received.**—Testatrix gave all her property to her two infant daughters. One of the daughters died, and the survivor, believing that she was entitled to the whole estate, settled with the guardian, and accepted as cash claims against third persons, and executed a release in full, and later she was appointed administratrix of the deceased daughter. For nine years an adult heir of testatrix acquiesced in the construction of the will; but the court finally determined that the title of the deceased daughter was absolute at her death, and that her share in the property did not pass exclusively to the surviving daughter. It was held that the surviving daughter, in settling her account as administratrix, was liable only for the amount actually received from the guardian, and she was not concluded by the release. Matter of Lehrbach, 148 App. Div. 74, 132 NYS 44.

[s] **Presumption as to continuance of ownership.**—Where the evidence shows that stock stood in decedent's name at the time a dividend was declared, it will be presumed to have continued the property of the estate until payment of such dividend, and the administrator should be made to account therefor. Matter of McKinnon, 182 App. Div. 277, 169 NYS 416.

[t] **Where the ownership of a fund alleged to belong to deceased is disputed,** and no part of it is in the possession of the executrix of a deceased coexecutor, such executrix cannot be compelled to account therefor to the surviving executor. In re Denham, 174 NYS 883.

87. **Inventory and appraisal** see supra §§ 373–385.

88. In re Hermann, 226 Pa. 543, 75 A 731. See also cases supra note 86.

89. See supra § 383.

90. Davis v. Blumenberg, 107 Miss. 432, 65 S 503 (actual and not appraised value is what must be accounted for).

91. In re Hall, 154 Cal. 527, 98 P 269; Field v. Hitchcock, 14 Pick. (Mass.) 405; Boston v. Boylston, 4 Mass. 318; Schick v. Grote, 42 N. J. Eq. 352, 7 A 852; Perea v. Barela, 5 N. M. 458, 23 P 766.

[a] **Determination of amount.**—The superior court had jurisdiction, in settling the accounts of an administrator, to determine the amount of money or property of the estate which had come into his hands and to charge him therewith. In re Hall, 154 Cal. 527, 98 P 269.

92. Shuttleworth v. Winter, 55 N. Y. 624; Gardner v. Dering, 2 Edw. (N. Y.) 131.

93. Matter of Gill, 42 Misc. 457, 87 NYS 252 [aff 101 App. Div. 607, 91 NYS 1095]; In re Bell, 226 Pa. 531, 75 A 726; Crook's Est., 11 Pa. Dist. 387; Conway's Est., 11 Pa. Dist. 163; Grover's Est., 12 LuzLegReg (Pa.) 224; Reeves' Est., 12 LuzLegReg (Pa.) 137.

94. Choate v. Arrington, 116 Mass. 552; Jennison v. Hapgood, 10 Pick. (Mass.) 77; Harris v. Ingalls, 74 N. H. 35, 64 A 727; Candelaria v. Miera, 18 N. M. 107, 134 P 829; Baldwin v. Smith, 3 App. Div. 350, 38 NYS 299; Matter of Irwin, 100 Misc. 348, 165 NYS 697; In re Beecher, 19 NYS 971.

[a] **This is true, even though the realty** is held under a trust which remains unexecuted. In re Beecher, 19 NYS 971.

[b] **Where the will directs a conversion** of real into personal estate, the money arising from the sale becomes assets in the hands of the executor for which he is bound to account. Stagg v. Jackson, 1 N. Y. 206, How. A. Cas. 561, 4 HowPr 294; Bloodgood v. Bruen, 2 Bradf. Surr. (N. Y.) 8.

[c] **The proceeds of land sold under a power in the will** must be accounted for in the surrogate's court. Baldwin v. Smith, 3 App. Div. 350, 38 NYS 299.

[d] **The proceeds of an invalid sale** of possessory rights in real estate must be accounted for. Candelaria v. Miera, 18 N. M. 107, 134 P 829.

[e] **Sale of land to which decedent's title defective.**—If an executor receives money for land sold by him, to which the testator's title proves defective, he must nevertheless be charged with the money, unless he can show himself to be under a legal obligation to refund it. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

[f] **Income from realty.**—Where executors took possession of testator's real estate during the settlement of the estate as insolvent, they were bound to account for the income received therefrom after the decree of insolvency. Harris v. Ingalls, 74 N. H. 35, 64 A 727.

[g] **Rent of land in another state.**—A Missouri administrator is not chargeable as administrator for rents collected by him from land of the intestate in Illinois, where such rents accrued after the testator's death, in the absence of any proof that the laws of Illinois gave him as administrator any power to collect such rents. McPike v. McPike, 111 Mo. 216, 20 SW 12.

[h] **Pending proceedings for the probate of a will,** where the administrator has no power to collect the rents, the temporary administrator is not obliged to account to him for the same. Matter of Goetz, 120 App. Div. 10, 104 NYS 832.

95. See cases infra note 96.

96. Ala.—Key v. Jones, 52 Ala. 238; Pettit v. Pettit, 32 Ala. 288;

nullity by reason of incapacity of the person appointed to execute the office, the appointee cannot be required to account for anything more than the property which actually came into his possession.[97]

An infant administrator is responsible for all acts done after he becomes of age and before revocation of his appointment.[98] A court of equity regards him as a trustee and compels him so far to account, but not with respect to assets which came into his hands during infancy.[99]

In an accounting between an executor or administrator and his successor he must account for chattels included in his inventory [1] and all funds and property which he has received for and on account of such estate;[2] but cannot be required to account for property which he did not receive.[3]

[§ 2321] **9. Relief from Duty** [4]**—a. In General.** To relieve a personal representative from the duty to account or from the consequences of a failure to account his excuse must be legal and reasonable, and whether it is so is a matter largely for the discretion and judgment of the court in each particular case.[5] Persons interested in the estate,[6] whether as legatees [7] or distributees,[8] or as creditors,[9] may waive their right to an accounting by agreement or by acquiescing in a settlement.[10] Although the personal representative may be entirely relieved from

Ashurst v. Ashurst, 13 Ala. 781; Smith v. Smith, 13 Ala. 329.

Conn.—Guinan's App., 70 Conn. 342, 39 A 482.

Iowa.—Berryhill's Est., 61 Iowa 345, 16 NW 198.

Mo.—Schoeneich v. Reed, 8 Mo. A. 356.

N. J.—Matter of Grattan, 78 N. J. Eq. 225, 78 A 813; Geyer v. Geyer, (Ch.) 78 A 449.

N. Y.—In re Soutter, 105 N. Y. 514, 12 NE 34; Matter of Dunn, 63 Misc. 179, 118 NYS 560; Johnson v. Corbett, 11 Paige 265.

Or.—Highland v. Tollisen, 75 Or. 578, 147 P 558.

Pa.—In re McCauley, 258 Pa. 502, 102 A 136; Rine v. Hall, 187 Pa. 264, 40 A 1088; Watson's App., 6 Pa. 505; Merrick's Est., 8 Watts & S. 402; Kober's Est., 18 Pa. Dist. 213; Crook's Est., 11 Pa. Dist. 387; Walker's Est., 4 Pa. Dist. 124, 16 Pa. Co. 160; Carr's Est., 3 Pa. Dist. 740, 15 Pa. Co. 354; Osterhout's Est., 8 LancLRev 18; Tracy's Est., 15 Montg. Co. 30.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

Va.—Cary v. Macon, 4 Call (8 Va.) 605.

[a] **Item included by mistake.**—Where executors, in settling their joint account, include in it, by mistake, acting in good faith, and on advice, an item which does not belong there, and the money represented by it was never received by them, but remained in the hands of one of them as trustee for his children, and was lost by him after settlement of the account, the others should not be held liable therefor. Cassel's Est., 180 Pa. 252, 36 A 744.

[b] **An administrator who is also guardian** of infant heirs of decedent is not required to account, as administrator, for property received by him, as guardian, from sources other than decedent or his estate. In re McCauley, 258 Pa. 502, 102 A 136 (where decedent left no estate).

[c] **Estoppel.**—Where the administrator and the heirs agreed that the rents of real estate should be collected by the administrator and regarded as part of the estate, the administrator is estopped to deny the jurisdiction of the orphans' court to compel him to account for the rents. Huffman's Est., 19 Pa. Co. 558.

97. Cason v. Cabrara, 4 La. Ann. 538 (where a woman, incapable under the law of exercising the office, was appointed administratrix).

98. Carow v. Mowatt, 2 Edw. (N. Y.) 57. See also supra § 293.

99. Carow v. Mowatt, 3 Edw. (N. Y.) 57.

1. Fay v. Muzzey, 13 Gray (Mass.) 53, 74 AmD 619.

2. Chaffe v. Farmer, 36 La. Ann. 813; Matter of Dwyer, 112 App. Div. 195, 98 NYS 329.

[a] **A determination as to ownership** must be left to the final accounting. Matter of Dwyer, 112 App. Div. 195, 98 NYS 329.

[b] **An executor pro forma is accountable to the testamentary executor only for** the surplus remaining after payment of debts. De Sobry v. De Laistre, 2 Harr. & J. (Md.) 191, 3 AmD 555.

3. Milam v. Ragland, 25 Ala. 243.

[a] **Illustration.**—An administrator in chief on the settlement of his accounts with the succeeding administrator de bonis non cannot be charged with a sum of money which is shown to have been deposited by the intestate a short time before his death in the hands of a bailee for safe-keeping and to have been paid over by the bailee to the administrator de bonis non himself. Milam v. Ragland, 25 Ala. 243.

4. By private accounting and settlement see infra § 2527.

Limitations and laches see infra §§ 2336–2338.

5. Ark.—Ex p. Pearce, 44 Ark. 509.

N. Y.—Matter of Titus, 86 Misc. 375, 148 NYS 359.

Pa.—Singerly's Est., 23 Pa. Co. 575; Morrow's Est., 3 Pa. C. Pl. 37; Dundas' Est., 2 WklyNC 128.

S. C.—Johnson v. Henagan, 11 S. C. 93.

Va.—Trevelyan v. Lofft, 83 Va. 141, 1 SE 901.

"It was the administration of a small estate which was devised in 1765, and yet no account is settled by the executors till after all their deaths in 1786, when a partial one is made up by the executors of the survivor. This had a bad aspect respecting the executors; but since no fraud or misconduct is imputed to them in the management of the estate, nor any apparent advantage, which they could or did derive to themselves from the omission, but on the contrary a probable disadvantage, in having articles disallowed for defect in the proof, which they might have justified at an earlier period, we inclined to attribute it to inattention in them, and confidence on the part of the legatees in their integrity, rather than to any impure motives, and, therefore, think it would be too severe to deny them justice on account of that omission of a duty; for, such perhaps it is, although the law only directs them to render accounts when desired." Jones v. Williams, 2 Call (6 Va.) 102, 104.

[a] **Illustrations.**—(1) It is no defense to a citation to an administrator to file an account of a deceased executor that moneys received by such executor were rents of real estate of his testator, or moneys which vested in him of his own right as devisee. Handbest's Est., 4 Wkly NC (Pa.) 402. (2) Want of settlement by an administrator of an intestate's estate, caused by his own neglect, is not a valid objection to his accounting for another estate incidentally connected therewith, of which he is also administrator. Johnson v. Henagan, 11 S. C. 93.

6. Cal.—Middlecoff v. San Joaquin County Super. Ct., 149 Cal. 94, 84 P 764.

La.—In re Dimmick, 111 La. 655, 35 S 801; Francez's Succ., 49 La. Ann. 1732, 23 S 254.

Mass.—Forbes v. Keyes, 193 Mass. 38, 78 NE 733.

Mo.—State v. Stuart, 74 Mo. A. 182.

N. Y.—Matter of Douglas, 60 App. Div. 64, 69 NYS 687.

Pa.—Wilt's Est., 13 Pa. Dist. 483; Meyer's Est., 13 Pa. Dist. 131, 30 Pa. Co. 84; Reinert's Est., 9 Pa. Dist. 405; Hart's Est., 9 Pa. Dist. 274, 23 Pa. Co. 641; Henry's Est., 8 Pa. Dist. 649, 23 Pa. Co. 290 [aff 198 Pa. 382, 48 A 274]; Root's Est., 8 Pa. Dist. 223; Donnelly's Est., 8 Pa. Dist. 182; Hoff's Est., 7 Pa. Dist. 93; Armstrong's Est., 16 Montg. Co. 9.

R. I.—Tillinghast v. Brown Univ., 25 R. I. 284, 55 A 758.

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

7. In re Bastedenbeck, (N. J. Prerog.) 67 A 179.

[a] **Right of set-off not relieving from duty.**—Where an executrix who was entitled to all the personal estate after payment of debts and legacies filed no release or receipt from a legatee, it was no defense to an application to account at the instance of the legatee's administrator that the executrix was entitled to set off advancements made for nursing, attendance, medical bills, etc., furnished to the legatee during her life, and tendered the balance of the legacy after deducting such claim. In re Bastedenbeck, (N. J. Prerog.) 67 A 179.

8. Ala.—Powell v. Powell, 10 Ala. 900.

Mass.—Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

Nebr.—In re Dovey, 102 Nebr. 147, 166 NW 353.

Oh.—Piatt v. Longworth, 27 Oh. St. 159.

Or.—Highland v. Tollisen, 75 Or. 578, 147 P 558.

Pa.—Justice's Est., 15 Pa. Dist. 343; Higgin's Est., 41 Pa. Co. 8; Marvill's Est., 33 Pa. Co. 465; Harlan's Est., 16 Pa. Co. 51.

9. Love's Est., 11 WklyNC (Pa.) 324.

10. See cases supra notes 6–9.

[a] **Accounting dispensed with by agreement of parties.**—The filing of an account by an executor or administrator is a matter with which the public has no concern, and with which the parties for whose benefit it is required by law may dispense, whether they are creditors or mere legatees or distributees. This may be done by express agreement, or by implication from long continued acquiescence after the right to demand the account has fully accrued, where the parties entitled to it are of full age and under no legal disability, especially if in the meantime the one who subsequently asks for it has acted in a way calculated to mislead the person sought to be charged. Harlan's Est., 3 Pa. Dist. 809, 16 Pa. Co. 51, 1 LackLegN 122.

[b] **Agreement as to part of assets.**—The fact that testator's widow and children agreed to a distribution among them of mining stocks belonging to the estate, if it was in effect an agreement to set aside the terms of the will, should not be extended beyond the property immediately affected thereby, and would have no

his obligation to account by the terms of the will,[11] he is not so relieved merely because the will gives him absolute discretion as to the management of the estate,[12] or allows him a specified time in which to settle the same;[13] nor does a gift to the personal representative of the entire estate for life, or in the case of a widow who is made executrix for life or during widowhood, relieve from the duty to account,[14] unless the will itself evidences a testamentary intent that an accounting shall not be required,[15] and the same has been held true of a gift to the executor of the whole estate with absolute power to manage or sell it.[16] Permission from the court to an administrator to retain in his possession the money of minors does not relieve him from the obligation to make annual and final settlements,[17] nor is the representative relieved from the duty to account by the mere fact that proceedings in bankruptcy had been instituted against decedent, and an assignee chosen, where it appears that the assignee did not accept the trust, that no assignment in bankruptcy was ever made, and that the proceedings had been practically abandoned.[18] Where, after a will has been duly probated, the executrix, both by assignment and under the will, acquired the right to have the entire residence distributed to her absolutely, and after the time for filing claims had expired she filed a petition for distribution containing a detailed description of all the property of the estate, and alleging that she had filed no accounts, as executrix, because she was entitled to have the whole of the residue distributed to her, such statement constituted a waiver of an account, and it was therefore proper for the court, after due notice, to direct distribution without requiring the executrix to file an account.[19]

[§ 2322] **b. Lack of Assets.** Where no assets have come into the possession of an executor or administrator, no accounting should be required of him,[20] but where the personal representative has received assets he cannot escape liability to account by showing that all of such assets have been paid out.[21]

[§ 2323] **c. Bond to Pay Debts and Legacies.** Where an executor who is also the residuary legatee has given bond to pay the testator's debts and legacies, as he may do in some jurisdictions,[22] a bill in equity cannot be maintained against him for an accounting,[23] nor can a probate accounting be com-

bearing upon a daughter's right to demand an accounting of the profits of the business, or as to other assets of the estate. Matter of Hiscox, 135 App. Div. 848, 120 NYS 308.

[c] **Acquiescence in acts of executor or administrator.**—If the beneficiaries of the estate concur in the misapplication of the assets by the executor or administrator, or if they acquiesce therein without original concurrence, they cannot afterward compel him to account for such assets. Butterfield v. Cowing, 112 N. Y. 486, 20 NE 369; Sherman v. Parish, 53 N. Y. 483; In re Washbon, 14 NYS 672.

11. Sellers v. Sellers, 35 Ala. 235; Maurer v. Bowman, 169 Ill. 586, 48 NE 823; In re Keller, 224 Pa. 523, 73 A 926; Brown's Est., 6 Pa. Dist. 163, 19 Pa. Co. 229.

[a] **Will relieving from liability to account in orphans' court.**—"The will directs, that the residue of the testator's property should be kept together, under the control and management of Mrs. Sellers, 'to be managed entirely at her discretion,' for the use and benefit of the testator's family, for the support of his wife, and for the support and education of his children. The will also expresses the testator's desire, that Mrs. S. should not be held to account, or to settle with the orphans' court, for the management and possession of his estate. So far as the conduct of Mrs. S. had reference to the support of the family, and the support and education of the children, she acted under a discretionary power, and would not be responsible, unless her conduct was fraudulent, which is negatived by the allegations of the bill. We think, too, that so far as the mere 'management and possession of the estate' were concerned, the will exempts her from accounting, and also from the duty of settling in the court designated. Viewing the sentence as to the liability to account in connection with the discretionary power bestowed upon her, and looking to the grammatical construction of the sentence, we understand it to relieve her altogether from liability to account for the 'management and possession of the estate.' The word estate is used in various senses. It is often used to designate the property composing the assets of a decedent; or the property, real and personal, belonging to an existing individual. In that sense, we think the word is used in the will. In the same connection, there is an exemption from liability to account for the possession of the estate. The thing intended to be designated, was something tangible—susceptible of possession, as well as management. The clause must, therefore, be understood to relieve her from liability to account for the management and possession of the property belonging to the estate, and coming under the operation of the will. She is also relieved from settling in the orphans' court; but the words relieving her from that duty, do not have a sufficiently extensive import to justify us in holding her exempted from responsibility in any forum." Sellers v. Sellers, 35 Ala. 235, 240 (executrix might be compelled to make a settlement in chancery).

12. Reed v. Reed, 80 Conn. 411, 68 A 852; Harrison's Est., 2 Pa. Dist. 108, 12 Pa. Co. 388.

13. Young's Est., 1 Pa. Co. 513.

14. Ill.—Ridgley v. Peo., 163 Ill. 112, 45 NE 116.

Ky.—Somerset Presb. Church v. Mize, 181 Ky. 567, 205 SW 674, 2 ALR 1237.

N. J.—Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498.

N. Y.—Matter of Hunt, 84 App. Div. 159, 82 NYS 538 [aff 179 N. Y. 579 mem, 72 NE 1143 mem].

Pa.—Heath's Est., 10 Pa. Dist. 281, 25 Pa. Co. 258; Kromer's Est., 22 Pa. Co. 327.

[a] **Illustration.**—An executrix is not relieved from liability to account by the fact that she is a residuary legatee for life under the will, which provides that she shall not be required to account to any one for the use of the property. In such case she occupies a dual relation to the administration, and her accounts as executrix are under the control of the court until the estate is administered and the residue turned over to her as legatee. Ridgley v. Peo., 163 Ill. 112, 45 NE 116.

15. Brown's Est., 6 Pa. Dist. 163, 19 Pa. Co. 229.

[a] **Where the widow is made executrix and given sole use and control** of both the real and personal property during her life or widowhood, a son of the testator cannot compel her to account for the income, although he is given what is left upon the death or remarriage of the widow. In re Runner, 3 Del. Co. (Pa.) 395.

16. Solomon v. Tarver, 79 Ga. 601, 4 SE 317.

17. Devore v. Pitman, 3 Mo. 179.

18. Newell v. West, 149 Mass. 520, 21 NE 954.

19. Middlecoff v. San Joaquin County Super. Ct., 149 Cal. 94, 84 P 764.

20. Ky.—Redmond v. Redmond, 112 Ky. 760, 66 SW 745.

Me.—Thurlough v. Kendall, 62 Me. 166.

Md.—Sydnor v. Graves, 119 Md. 321, 86 A 341.

Mass.—Walker v. Hall, 1 Pick. 20.

Mo.—Hanley v. Holton, 120 Mo. A. 393, 96 SW 691.

Pa.—Conway's Est., 11 Pa. Dist. 163; Stoker's Est., 10 Pa. Dist. 375; Stuart's Est., 10 Pa. Dist. 130, 24 Pa. Co. 448; Baxter's Est., 10 Pa. Dist. 97; Thomas' Est., 9 Pa. Dist. 87; Gallagher's Est., 8 Pa. Dist. 699; Graham's Est., 8 Pa. Dist. 479, 22 Pa. Co. 540; Thomas' Est., 8 Pa. Dist. 385; Singerly's Est., 23 Pa. Co. 575; Bestford's Est., 10 Kulp 223; Hutchinson's Est., 9 LancLRev 24.

Va.—Perdue v. Dillon, 89 Va. 182, 15 SE 385.

[a] **Property not constituting assets.**—Where an executor never received any personal property for which to account, and all the moneys ever received by him were collected from the rents of real estate, not in his representative capacity, but as agent for the owners of the land, he cannot be required to file an account in the orphans' court. Crook's Est., 11 Pa. Dist. 387.

21. In re Hastendenbeck, 73 N. J. Eq. 337, 75 A 823; Lockard's Est., 10 Pa. Dist. 192.

22. See supra § 191.

23. Clarke v. Tufts, 5 Pick. (Mass.) 337; Durfee v. Abbott, 50 Mich. 278, 15 NW 454; McElroy v. Hatheway, 44 Mich. 399, 6 NW 857; Tilton v. Tilton, 70 N. H. 325, 47 A 256; Copp v. Hersey, 31 N. H. 317; Batchelder v. Russell, 10 N. H. 39; Leonard v. Clark, 24 R. I. 470, 53 A 636.

[a] **An executor acquires absolute title** by giving bond under such circumstances. Clarke v. Tufts, 5 Pick. (Mass.) 337.

[b] **A surety on the bond** to pay debts and legacies given by an executor who is residuary legatee cannot maintain a bill in equity against the executor and the other sureties on the bond for an accounting, the ap-

pelled.[24]

[§ 2324] **d. Pendency of Other Proceedings.** The pendency of other proceedings affecting the estate or its settlement does not ordinarily relieve a personal representative from the necessity of accounting as required by law,[25] and a fortiori a proceeding for an accounting in the court of probate jurisdiction cannot be defeated by the subsequent commencement of an action for an accounting in another court.[26] However, a suit in chancery for a settlement has been held to be a bar to a suit for a final accounting in the court of probate jurisdiction,[27] and a court has refused to compel an account during the pendency of a suit between coexecutors to determine the ownership of bank deposits claimed by one of them individually.[28]

[§ 2325] **10. Consequences of Failure to Account.**[29] Failure of an executor or administrator to account is an omission of duty and a breach of trust.[30] Under various statutes a representative who fails to account as required may become personally liable for the debts of the estate[31] may have an execution awarded against him for the full value of whatever personal property decedent has come to his hands,[32] may incur a penalty,[33] or may subject himself to liability to imprisonment[34] or to indictment.[35] Failure to account may also raise a presumption of misappropriation of assets that have come to the hands of the representative,[36] or require that all doubts be resolved against him,[37] and a representative who fails to keep and render accounts will be held to strict proof that he has done his duty.[38] It has been held, however, that in a suit by the distributees against an executrix to restrain the enforcement of a deed executed by plaintiff's father to the executrix to secure an overpayment of the father's distributive share, an allegation that the executrix had properly expended the entire personal estate warranted the court in adopting defendant's statement of the account, although she had failed to present a complete account of her administration.[39]

Statement of account by interested persons. It has been held that, where an executor or administrator refuses to file an account, it is proper for those interested to state an account for him.[40]

[§ 2326] **C. Proceedings for Accounting—1. In General.** A personal representative's account can be settled only in some proceeding appropriate for that purpose, in a court having the requisite jurisdiction.[41] Proceedings by attachment are inapplicable for the purpose of compelling the settlement of an estate,[42] nor can a proceeding provided in case of failure to file an inventory be invoked to compel an account by a personal representative.[43] Where plaintiff sued to establish a lost deed, and to enforce an alleged resulting trust of realty, she could not in that action compel an accounting of personal property belonging to an estate in which she claimed an interest, it not appearing that the administrator was a party to the action in his representative capacity.[44] But where, in a suit by a life tenant to recover his life estate, it appeared that defendant, as executor of the ancestor, had refrained from filing an inventory of the estate under the will, or to render any accounts, it was held he might properly be required in such proceedings to account for any personal property that passed under the will in order that the life tenant's rights in the personal property might be ascertained.[45]

The fact that an executor could be held by the court as in contempt for failure to turn over assets to a receiver will not prevent the court from ordering him to account for the assets of the estate in his possession.[46]

[§ 2327] **2. Nature of Proceeding.** It has been held that a proceeding in a court of probate jurisdiction to compel an accounting by an executor or administrator is a proceeding in rem,[47] but, on the other hand, it has been said that a proceeding by an administrator for final settlement of his accounts is in personam.[48] A petition in a suit in equity by distributees against the administrator for an accounting and settlement, alleging fraudulent con-

pointment of a receiver, and an administration of the estate by the court of chancery. McElroy v. Hatheway, 44 Mich. 399, 6 NW 8567.

24. See cases supra note —.

25. Ala.—Chighizola v. Le Baron, 21 Ala. 406.

Ill.—Rucker v. Redmon, 67 Ill. 187.

Ind.—Norwood v. Harness, 98 Ind. 134, 49 AmR 739.

Md.—Jones v. Jones, 41 Md. 354.

N. Y.—Matter of Reeves, 14 NYS 454.

Pa.—Keily's Est., 9 Pa. Co. 175; Nicholson's Est., 16 Phila. 267. But compare Singerly's Est., 23 Pa. Co. 575, 576 ("An accounting will be refused where there are no funds to be accounted for, and by a parity of reasoning it need not be ordered where no fund is presently available for distribution, nor where the question of whether there is a fund at all is dependent upon the determination of issues which are in course of adjustment before competent tribunals").

[a] **The representative is not relieved by** the pendency of: (1) Proceedings in equity to have the estate distributed under a decree of the court of equity. Jones v. Jones, 41 Md. 354. (2) A suit in chancery in another county to settle the right of the representative to participate in the distribution. Rucker v. Redmon, 67 Ill. 187. (3) A suit on a joint and several bond executed by decedent. Norwood v. Harness, 98 Ind. 134, 49 AmR 739. (4) An unsettled appeal from a decree entered in the last accounting. Matter of Reeves, 14 NYS 454.

26. Matter of Hazard, 51 Hun 201, 4 NYS 701.

27. Barroll v. Peters, 20 Md. 172.

28. Keily's Est., 9 Pa. Co. 175.

29. Failure to account as: Breach of bond see infra § 2587. Ground for removal see supra § 297.

30. Dubberly v. Varnedoe, 22 Ga. A. 738, 97 SE 261.

31. Kenner v. Duncan, 3 Mart. N. S. (La.) 563; Butler v. Ricker, 6 Me. 268.

[a] **Neglect to comply with clerk's order.**—There is no law which renders an administrator personally liable for a debt of his intestate on his mere neglect to comply with an ex parte order of the clerk to file his account. Lockhart v. Wall, 14 La. Ann. 273.

32. Williams v. Esty, 36 Me. 243.

33. Lippert v. Lippert, 110 Iowa 550, 81 NW 777; St. Mary's Cong. v. Farrelly, 34 La. Ann. 533; Toy's Succ., 14 La. Ann. 536; Dejol v. Johnson, 12 La. Ann. 853; West v. Municipal Ct., 25 R. I. 84, 54 A 926.

[a] **Persons who have induced the violation** of a statute prescribing a penalty for failure to account cannot claim the penalty. Plunkett's Succ., 12 La. Ann. 558.

[b] **Interest on balance.**—An executor or administrator who is removed for failure to settle his accounts is to be charged with interest on all sums for which he is responsible from the time when his account should have been settled. In re Dimmick, 111 La. 655, 35 S 801; Conery's Succ., 111 La. 113, 35 S 479; Bass v. Chambliss, 9 La. Ann. 376.

34. Ex p. Wright, 65 Ind. 504; Lobit v. Castille, 14 La. Ann. 779.

[a] **Pending proceedings for an accounting** an attachment for failure to account will not be issued. Moore's Est., 19 Pa. Dist. 109.

35. State v. Parrish, 4 Humphr. (Tenn.) 285.

36. Fassbender v. American Surety Co., 66 Misc. 6, 122 NYS 442.

37. Lawson v. Burges, 131 Md. 436, 103 A 516.

38. Cosby v. Weaver, 107 Ga. 761, 33 SE 656; Wellborn v. Rogers, 24 Ga. 558; Kee v. Kee, 2 Gratt. (43 Va.) 116.

39. Lake v. Weaver, (N. J.) 70 A 81.

40. Stevens v. Ottawa Prob. Judge, 156 Mich. 526, 121 NW 477.

41. See infra §§ 2328–2335, 2353–2391.

42. Metcalf v. Clark, 41 Barb. (N. Y.) 45.

43. Peo. v. Corlies, 3 N. Y. Super. 228.

44. Ricks v. Wilson, 154 N. C. 282, 70 SE 476.

45. Geyer v. Geyer, 75 N. J. Eq. 124, 78 A 449.

46. Ex p. Hurt, 157 Ala. 368, 47 S 264.

47. King v. Chase, 159 Cal. 420, 115 P 207. See generally supra § 27.

48. Evans v. Evans, 200 Ala. 329, 330, 76 S 95 ("The final settlement of any trust is essentially a proceeding in personam as to the conclusion of the property rights of the cestui que trust or the distributee").

cealment of assets, refusal to account, and appropriation of moneys to personal use, is not demurrable on the ground that petitioner has an adequate remedy at law.[49]

[§ 2328] **3. Jurisdiction—a. In General.** An executor or administrator cannot be compelled to account by an action in a court of common law,[50] but only by a proceeding in a court of probate,[51] or of equity.[52]

A common-law action of account will not, it is usually held, lie against an executor or administrator,[53] although the contrary view has been asserted,[54] and provision is sometimes made by statute for such an action between coexecutors and coadministrators.[55]

Insolvency courts have no jurisdiction to compel the executors or administrators of deceased trustees to account in these courts for the trust estate.[56]

[§ 2329] **b. Probate Courts—(1) In General.** Jurisdiction as to accounting and settlement by personal representatives is usually given to probate courts, or to general courts upon which probate power is expressly conferred,[57] although courts of equity in many instances also have jurisdiction as to these matters.[58] The extent of the jurisdiction of probate courts as to such matters depends upon the constitutional and statutory provisions conferring it, and it must be exercised in accordance with such provisions.[59]

The court which granted letters testamentary or

49. Strickland v. Strickland, 147 Ga. 494, 94 SE 766.

50. Hawaii.—Castle Est., Ltd. v. Haneberg, 20 Hawaii 123.

La.—Flint v. Wells, 4 La. 537.

Me.—Graffam v. Ray, 91 Me. 234, 39 A 569.

Md.—Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308.

Mass.—Tyler v. Wheeler, 160 Mass. 206, 35 NE 666.

Mich.—Elwell v. Pierce, 200 Mich. 479, 166 NW 874; Pitcher v. Douglas, 37 Mich. 339.

N. Y.—Furguson v. Glover, 103 Misc. 341, 170 NYS 141.

S. C.—Ordinary v. Robinson, 17 S. C. L. 25; Harrington v. Cole, 14 S. C. L. 509; Ordinary v. Williams, 10 S. C. L. 587.

Tex.—Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181.

Vt.—Merriam v. Hemmenway, 26 Vt. 565; Wentworth v. Wentworth, 12 Vt. 244.

[a] **Appeals from a probate court** on matters involving the settlement of accounts will not be heard in a court of law. Wallis v. Gill, 14 S. C. L. 475.

51. See infra §§ 2329–2334.

52. Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308.

Equitable jurisdiction in administration of estates see Equity §§ 97–104.

53. Fischer v. Hintz, (Minn.) 176 NW 177; Anonymous, 2 N. C. 226; Merriam v. Hemmenway, 26 Vt. 565; Curtis v. Curtis, 13 Vt. 517.

54. Smith v. Chapman, 5 Conn. 14.

55. Curtis v. Curtis, 13 Vt. 517.

56. Purviance v. Glenn, 8 Md. 202.

57. U. S.—Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221.

Ala.—Hatchett v. Billingslea, 65 Ala. 16; Malone v. Marriott, 64 Ala. 486; Vincent v. Daniel, 59 Ala. 602; Savage v. Benham, 11 Ala. 49.

Ark.—Ex p. Pearce, 44 Ark. 509.

Cal.—In re De Bernal, 165 Cal. 223, 131 P 375, AnnCas1914D 26; King v. Chase, 159 Cal. 420, 115 P 207.

Conn.—Brush v. Button, 36 Conn. 292; Beach v. Norton, 9 Conn. 182.

D. C.—Keyser v. Breitbarth, 14 D. C. 19.

Ill.—Griswold v. Smith, 221 Ill. 341, 77 NE 551; Boyd v. Swallows, 59 Ill. A. 635.

Ky.—Holland v. Lowe, 101 Ky. 98, 41 SW 9, 39 SW 854, 19 KyL 97; McAfee v. Balden, 6 Bush 537.

La.—Baumgarden's Succ., 36 La. Ann. 46; Spivey's Succ., 15 La. Ann. 248; Boyce v. Davis, 13 La. Ann. 554; Grubb v. Henderson, 1 Rob. 4; Humphreys v. King, 2 La. 49; Taylor v. Hollander, 4 Mart. N. S. 535; Casanovichi v. Debon, 10 Mart. 11.

Me.—Graffam v. Ray, 91 Me. 234, 39 A 569; Androscoggin County Prob. Judge v. Quimby, 89 Me. 574, 36 A 1049; Decker v. Decker, 74 Me. 465; Gilbert v. Duncan, 65 Me. 469; Simpson v. Norton, 45 Me. 281; Pierce v. Irish, 31 Me. 254; Potter v. Cummings, 18 Me. 55.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302; Allen v. Hunt, 213 Mass. 276, 100 NE 552; Sargent v. Sargent, 168 Mass. 420, 47 NE 121.

Mich.—Elwell v. Pierce, 200 Mich. 479, 166 NW 874; Wessborg v. Merrill, 195 Mich. 556, 162 NW 102, LRA 1918E 1074; Brooks v. Hargrave, 179 Mich. 136, 146 NW 325; Davis v. McCamman, 165 Mich. 287, 130 NW 691; Fingleton v. Kent Cir. Judge, 116 Mich. 211, 74 NW 473.

Minn.—Fischer v. Hintz, 176 NW 177; Pierce v. Maetzold, 126 Minn. 445, 148 NW 302; Betcher v. Betcher, 83 Minn. 215, 86 NW 1; Starkey v. Sweeney, 71 Minn. 241, 73 NW 859; Luse v. Reed, 63 Minn. 5, 65 NW 91; Boltz v. Schutz, 61 Minn. 444, 64 NW 48; Culver v. Hardenbergh, 37 Minn. 225, 33 NW 792; State v. Ueland, 30 Minn. 277, 15 NW 245; Jacobs v. Fouse, 23 Minn. 51.

Miss.—Foute v. McDonald, 27 Miss. 610; Steen v. Steen, 25 Miss. 513.

Mo.—Thompson v. Thompson, (A.) 217 SW 863.

Mont.—In re Higgin, 15 Mont. 474, 39 P 506, 28 LRA 116; Deer Lodge County v. Kohrs, 2 Mont. 66.

N. H.—Tappan v. Tappan, 24 N. H. 400.

N. J.—Duncan v. Barnes, 20 N. J. L. 75; Filley v. Van Dyke, 75 N. J. Eq. 571, 72 A 943.

N. Y.—Sexton v. Sexton, 174 N. Y. 510, 66 NE 1116 [aff 64 App. Div. 385, 72 NYS 213]; Borrowe v. Corbin, 165 N. Y. 634, 59 NE 1119 [aff 31 App. Div. 172, 52 NYS 741]; In re Callahan, 152 N. Y. 320, 46 NE 486; Harris v. Ely, 25 N. Y. 138; Matter of Cavanagh, 121 App. Div. 200, 105 NYS 850; Matter of Smith, 120 App. 199, 105 NYS 223; Matter of Arkenburgh, 11 Ap. Div. 193, 42 NYS 965; Utica Trust, etc., Co. v. Thomson, 87 Misc. 31, 149 NYS 392; Matter of Hall, 75 Misc. 71, 134 NYS 866; Leask v. McCarty, 59 Misc. 565, 112 NYS 405; Matter of Robinson, 42 Misc. 169, 85 NYS 1087; Matter of Plummer, 38 Misc. 536, 77 NYS 1115; Matter of Wade, 38 Misc. 154, 77 NYS 163; In re Yuill, 178 NYS 871; Matter of Coombs, 185 App. Div. 312, 173 NYS 58; Furguson v. Glover, 103 Misc. 341, 170 NYS 141; Matter of Uglow, 51 HowPr 342; Clark v. Clark, 8 Paige 152, 35 AmD 676; Foster v. Wilber, 1 Paige 537.

N. C.—Gay v. Grant, 101 N. C. 206, 8 SE 99, 106; Ex p. Spencer, 95 N. C. 271; Stancill v. Gay, 92 N. C. 455; Hendrick v. Mayfield, 74 N. C. 626; Ballard v. Kilpatrick, 71 N. C. 281; Herring v. Outlaw, 70 N. C. 334; Hutchinson v. Roberts, 67 N. C. 223; Heilig v. Foard, 64 N. C. 710; Hunt v. Sneed, 64 N. C. 176.

Oh.—Trumpler v. Royer, 95 Oh. 194, 115 NE 1018; Voss v. Loomis, 1 Oh. Cir. Ct. 20, 1 Oh. Cir. Dec. 12.

Or.—In re Roach, 50 Or. 179, 92 P 118; Rutenic v. Hamakar, 40 Or. 444, 67 P 196; Gatch v. Simpson, 40 Or. 90, 66 P 688.

Pa.—Walls v. Walls, 170 Pa. 48, 32 A 649; Reese's App., 116 Pa. 272, 9 A 315; Wimmer's App., 1 Whart. 96; Com. v. Brady, 3 Serg. & R. 309; Com. v. Wood, 14 Pa. Dist. 509; Rivers' Est., 13 Pa. Dist. 762; Yerke's Est., 10 Pa. Dist. 204; Berry's Est., 8 Pa. Dist. 50; Com. v. Smith, 6 Pa. Dist. 416; Marschall's Est., 6 Pa. Dist. 386; Bickley's Est., 30 Pa. Co. 382; Eisenmann's Est., 28 Pa. Co. 543; Huffman's Est., 19 Pa. Co. 558; Darrach's Est., 2 PaLJR 454, 4 PaLJ 245; Parker's Est., 8 Phila. 217; Apple's Est., 2 Phila. 171.

S. C.—Koon v. Munro, 11 S. C. 139.

Tex.—Shiner v. Shiner, 90 Tex. 414, 38 SW 1126; Gallaspie v. Hardy, (Civ. A.) 196 SW 592.

Wash.—In re Alfstad, 27 Wash. 175, 67 P 593.

Ont.—In re Russell, 8 Ont. L. 481; Cunnington v. Cunnington, 2 Ont. L. 511.

Newfoundl.—Horwood v. Milligan, 7 Newfoundl. 439.

[a] **Both solvent and insolvent estates** may be brought into the orphans' court for settlement. Peters' Est., 1 Phila. (Pa.) 581.

[b] **The personal representative of a deceased executor or administrator** (1) may be compelled to account in a court of probate jurisdiction. King v. Chase, 159 Cal. 420, 115 P 207. (2) But the probate court has no jurisdiction to receive or act upon an account presented by an executor of an executor against the estate of the testator of the deceased executor. Wetzler v. Fitch, 52 Cal. 638; Bush v. Lindsey, 44 Cal. 121.

[c] **Leave granted to bring suit upon an administrator's bond** for his neglect, upon being cited, to settle his accounts, does not divest the court of probate of its jurisdiction for the settlement of the accounts, if no suit has been commenced. Sturtevant v. Tallman, 27 Me. 78.

[d] **The power given by statute to clerks** of courts to homologate accounts and tableaux of distribution after thirty days' notice does not deprive the courts of the power, as previously exercised, to homologate such accounts and tableaux after ten days' notice. Spivey's Succ., 15 La. Ann. 248.

[e] **When probate court without jurisdiction.**—Where an heir appropriated an estate without administration and intermingled it with her own for five years, and after her it was handled by her executor for six years, the probate court did not have jurisdiction of an action by an administrator for an accounting. Meyer v. Nischwitz, 198 Mo. A. 101, 199 SW 744.

58. See Equity §§ 97–104.

59. U. S.—Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221.

Ala.—Gayle v. Johnson, 80 Ala. 388; Vincent v. Martin, 79 Ala. 540; Whorton v. Moragne, 62 Ala. 201; Carter v. Carter, 39 Ala. 579; Reaves v. Garrett, 34 Ala. 558; Gerald v. Bunkley, 17 Ala. 170; Brazier v. King, 16 Ala. 730.

Ark.—Hughes v. Pike, 27 Ark. 298.

Cal.—King v. Chase, 159 Cal. 420, 115 P 207.

of administration is generally the proper court to exercise jurisdiction in the settling of the account of the executor or administrator,[60] but it has been held that, where the personal representative has died without having rendered an account, the account can be rendered only in the probate court where his own estate is administered,[61] although the statutes sometimes give to the probate court which issued letters jurisdiction to entertain a petition by a surviving executor against the executor of his deceased coexecutor to compel the filing of an inventory and the rendition of an account.[62]

Effect of agreement of parties interested. Under a statute providing that a division of the estate of an intestate by agreement of the parties interested, executed and filed in the probate court, shall operate as a valid distribution of such estate, the execution and filing of an agreement by all the heirs, wherein they agreed what each of them should have and take as his or her share of the estate, does not deprive the probate court of jurisdiction over the administrator's accounts, where at the time of the filing of the agreement there had been no settlement thereof, and there remained in the representative's hands a considerable part of the estate.[63]

Waiver of jurisdictional question. When a coexecutor filed in the orphans' court a petition to compel the representatives of his deceased coexecutor to file an inventory and render an accounting, and to pay over to petitioner any sum remaining in the hands of the deceased coexecutor, any question of jurisdiction was waived by act of the representatives of the deceased executor in filing the inventory,[64] and it was too late to make the question after petitioner had excepted to the inventory as filed.[65]

[§ 2330] **(2) Matters Incidental to Accounting and Settlement.** As a general rule probate courts have jurisdiction to do everything necessary to the full and final administrations of estates,[66] and should so exercise their powers as to settle all questions in controversy if this is practicable.[67] Accordingly under the statutes of the several states such courts have jurisdiction as to various matters incidental to accounting and settlement.[68]

Jurisdiction to construe a will attaches as incident

D. C.—U. S. v. Ames, MacArthur & M. 278.

Ga.—Echols v. Almon, 77 Ga. 330, 1 SE 269.

Ill.—Teel v. Mills, 117 Ill. A. 97.

La.—Wise's Succ., 32 La. Ann. 1229; Lawrence v. Guice, 9 Rob. 219.

Me.—In re Mudgett, 105 Me. 387, 74 A 916.

Md.—Linthicum v. Polk, 93 Md. 84, 48 A 842.

Mass.—Boston v. Boylston, 4 Mass. 318.

Mich.—Byrne v. Hume, 73 Mich. 392, 41 NW 331.

Miss.—West v. Gibbs, 42 Miss. 168; Thornton v. Glover, 25 Miss. 132; Harris v. Fisher, 13 Miss. 74; Scott v. Searles, 13 Miss. 25.

Mo.—Johnson v. Johnson, 72 Mo. A. 386.

Mont.—State v. Eighth Judicial Dist. Ct., 26 Mont. 369, 68 P 856; In re Barker, 26 Mont. 279, 67 P 941.

N. J.—Martin v. Martin, 19 N. J. L. 44; Kinnan v. Wight, 39 N. J. Eq. 501; Fennimore v. Fennimore, 3 N. J. Eq. 292; In re Struble, (Prerog.) 101 A 177.

N. Y.—Sanders v. Soutter, 126 N. Y. 193, 27 NE 263; In re Wagner, 119 N. Y. 28, 23 NE 200; Alexander v. Durkee, 112 N. Y. 655, 19 NE 514 [aff 46 Hun 665]; Stilwell v. Carpenter, 59 N. Y. 414; Minion v. Warner, 185 App. Div. 246, 173 NYS 69; Matter of Robinson, 156 App. Div. 363, 141 NYS 470; Matter of Taber, 132 App. Div. 495, 116 NYS 960; Matter of McGoughran, 124 App. Div. 312, 108 NYS 934; Matter of Hull, 97 App. Div. 258, 89 NYS 939; Matter of Miles, 61 App. Div. 562, 71 NYS 71 [rev 33 Misc. 147, 68 NYS 368]; Matter of Mitchell, 61 Hun 372, 16 NYS 180; Matter of Hazard, 51 Hun 201, 4 NYS 701; Richardson v. Root, 19 Hun 473; Farnsworth v. Oliphant, 19 Barb. 30; Matter of Kenny, 92 Misc. 330, 156 NYS 827; Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff sub nom. In re Hoffman, 150 NYS 776]; Matter of Hall, 75 Misc. 71, 134 NYS 866; Matter of McInerney, 62 Misc. 441, 116 NYS 1039; Matter of Cooper, 6 Misc. 501, 27 NYS 425; Matter of Watson, 86 Misc. 588, 148 NYS 902; In re Hearns, 147 NYS 447; In re Schmidt, 58 NYS 595; Matter of Blow, 11 NYS 193, 2 Conn. Surr. 360; Matter of Cooley, 19 NYSt 241, 6 Dem. Surr. 77; Banks v. Taylor, 10 AbbPr 199; Thompson v. Mott, 5 Redf. Surr. 574; Gottsberger v. Smith, 2 Bradf. Surr. 86.

Oh.—In re Raab, 16 Oh. St. 273.

Or.—Dray v. Bloch, 29 Or. 347, 45 P 772.

Pa.—In re Goetz, 236 Pa. 630, 85 A 65; In re Jacoby, 201 Pa. 442, 50 A 935; Lafferty v. Corcoran, 180 Pa. 309, 36 A 860; Walker's App., 116 Pa. 419, 9 A 654; Hamburg Bank's App., 3 Pa. Cas. 332, 6 A 255; Titlow's Est., 3 Pa. Co. 370, 20 WklyNC 15; Matter of Mitchel, 1 Pearson 428; Gillespie's Est., 13 Phila. 239; Gordon's Est., 9 Phila. 350; In re Marshall, 32 PittsbLegJNS 247; In re Schulte, 28 PittsbLegJ 95.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

S. C.—Walker v. Pinson, 33 S. C. Eq. 445.

Tex.—Cobb v. Speers, (Civ. A.) 49 SW 666.

Wash.—In re Alfstad, 27 Wash. 175, 67 P 593.

Ont.—In re MacIntyre, 11 Ont. L. 136, 7 OntWR 122; Cunnington v. Cunnington, 2 Ont. L. 511.

[a] **Personal dealings of executor.**—A probate court has no jurisdiction to compel an executor to account for his personal dealings. Byrne v. Hume, 73 Mich. 392, 41 NW 331.

[b] **Jurisdiction with respect to particular matters.**—(1) To inquire into the validity of representative's claim satisfied by retainer. Kinnan v. Wight, 39 N. J. Eq. 501. (2) To determine all property rights between a personal representative and the estate which are necessary to a full adjustment of all matters connected with the trust. Matter of Cooper, 6 Misc. 501, 27 NYS 425. (3) To determine the amount due on a judgment in another court. Gordon's Est., 9 Phila. (Pa.) 350. (4) Account of payments made under decree of distribution. In re Mudgett, 105 Me. 387, 74 A 916. (5) Accounting for real estate sold under a power in a will. Stagg v. Jackson, 1 N. Y. 206, How. A. Cas. 561, 4 How Pr 294; Baldwin v. Smith, 3 App. Div. 350, 38 NYS 299. (6) Determination as to whether legacies charged on land. Matter of Taber, 132 App. Div. 495, 116 NYS 960. (7) No jurisdiction to annul or set aside instruments executed by parties who are before it, questioning their validity. In re Schmidt, 58 NYS 595. (8) No chancery jurisdiction and no power upon accounting to set aside collateral agreement between legatees and devisees. Teel v. Mills, 117 Ill. A. 97.

[c] **Refunding excess paid legatee.**—Upon an accounting by the representative, the probate court has no jurisdiction to require the legatee or distributee overpaid to refund the excess as the claim to such excess so far as a recovery thereof is concerned is a matter between the representative and such overpaid party. Hatchett v. Billingslea, 65 Ala. 16; Echols v. Almon, 77 Ga. 330, 1 SE 269.

[d] **The indebtedness of the personal representative to the estate** is a matter within the jurisdiction of the probate court. Wood v. Tallman, 1 N. J. L. 153; Everts v. Everts, 62 Barb. (N. Y.) 577; Matter of Strickland, 5 NYS 851, 1 Conn. Surr. 435; Matter of Eisner, 5 NYS 30, 1 Conn. Surr. 358; Gardner v. Gardner, 7 Paige (N. Y.) 112; In re Raab, 16 Oh. St. 273. Contra Wilson v. Ruthrauff, 82 Mo. A. 435.

[e] **Legacies.**—The statutes do not include legacies within an administration account and such inclusion is not within the jurisdiction of probate courts. Williams v. Herrick, 18 R. I. 120, 25 A 1099; Arnold v. Smith, 14 R. I. 217.

60. Ala.—Taliferro v. Bassett, 3 Ala. 670.

La.—Boyce v. Davis, 13 La. Ann. 554.

N. Y.—Peo. v. Pelham, 14 Wend. 48; Dakin v. Hudson, 6 Cow. 221; Foster v. Wilber, 1 Paige 537; Seymour v. Seymour, 4 Johns. Ch. 409.

N. C.—Smith v. Sheppard, 3 N. C. 163.

Tenn.—George v. Lee, 6 Humphr. 61.

61. Thomas v. Bourgeat, 6 Rob. (La.) 435.

62. Crothers v. Crothers, 121 Md. 114, 88 A 114.

63. Mathews' App., 72 Conn. 555, 45 A 170.

64. Crothers v. Crothers, 121 Md. 114, 88 A 114.

65. Crothers v. Crothers, 121 Md. 114, 88 A 114.

66. Johnson v. Johnson, 72 Mo. A. 386.

67. West v. Gibbs, 42 Miss. 168.

68. Ala.—Cary v. Simmons, 87 Ala. 524, 6 S 416.

Ark.—Brogan v. Brogan, 63 Ark. 405, 39 SW 58, 58 AmSR 124.

Cal.—In re Kruger, 143 Cal. 141, 76 P 891; In re Sanderson, 2 Cal. Unrep. Cas. 750, 13 P 497.

Ill.—Duval v. Duval, 153 Ill. 49, 38 NE 944; Platt v. Williams, 175 Ill. A. 1; Matter of German, 144 Ill. A. 109.

Iowa.—In re Heath, 58 Iowa 36, 11 NW 723.

La.—In re Altemus, 32 La. Ann. 364; Prudhomme's Succ., 23 La. Ann. 228.

Mich.—Stevens v. Ottawa Prob. Judge, 156 Mich. 526, 121 NW 477.

Miss.—Crowder v. Shackelford, 35 Miss. 321.

N. H.—Weston v. Nashua Second Orthodox Congr. Soc., 77 N. H. 576.

to the proceeding for an accounting where a construction becomes necessary to the determination of questions arising on the accounting,[69] but the will cannot be construed in a proceeding to compel an accounting by an executor of an executor, where it appears that no accounting should be had.[70] Upon an accounting by the executor of the original testator, the validity of trusts created by the devisee's exercise of a power of appointment which are to commence in futuro, should not be determined.[71]

Title to property. Ordinarily a probate court has no jurisdiction to decide a dispute as to the ownership of personal property,[72] or to try the title to real estate,[73] but this question should if necessary be determined by some other tribunal before an accounting is ordered.[74] In some jurisdictions, however, where a question of title arises between the personal representative and the estate such question may be determined by the court of probate jurisdiction upon the accounting,[75] although this even has been denied.[76] The question whether decedent held property in trust, and the administrator, therefore, took a transfer thereof subject to the same trust,

95 A 146; Willard v. Kingsbury, Smith 223.

N. J.—Dunham v. Marsh, 52 N. J. Eq. 256, 30 A 473 [aff 52 N. J. Eq. 831, 31 A 619].

N. Y.—In re Schaefer, 171 N. Y. 686, 64 NE 1125 [aff 65 App. Div. 378, 73 NYS 57 (mod 34 Misc. 34, 69 NYS 489)]; Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 NYS 48; In re Perkins, 131 App. Div. 658, 116 NYS 147; In re Meyer, 95 App. Div. 443, 88 NYS 798; Matter of Kenny, 92 Misc. 330, 156 NYS 827; Matter of Archer, 51 Misc. 260, 100 NYS 1095; In re Bruchaeser, 49 Misc. 194, 98 NYS 937; Matter of Sistare, 15 NYS 709, 2 Conn. Surr. 544; Dakin v. Demming, 6 Paige 95; Gladding v. Follett, 2 Dem. Surr. 58; Matter of Adams, 2 Redf. Surr. 66.

Or.—Phillips v. State, 5 Oh. St. 122, 64 AmD 635.

Pa.—In re Cooper, 106 A 98; In re Crosetti, 211 Pa. 490, 60 A 1081; In re Bitler, 1 LegRec 210.

S. C.—Charleston v. Mortimer, 41 S. C. L. 176.

Wash.—In re Tachi, 90 Wash. 621, 156 P 833.

[a] **Such jurisdiction may extend to:** (1) Allowing sums advanced and paid to an infant distributee. Hyland v. Baxter, 98 N. Y. 610. (2) Making an allowance for money paid on account of the education and support of minor heirs. Cary v. Simmons, 87 Ala. 524, 6 S 416. (3) A determination as to who the parties in interest are and the solution of any question necessary to reach that end. Dunham v. Marsh, 52 N. J. Eq. 256, 30 A 473 [aff 52 N. J. Eq. 831, 31 A 619]. (4) Determining whether a judgment has been discharged. In re Williams, 118 NYS 562. (5) Determining the validity of assignment of a legacy. Matter of Dollard, 74 Misc. 312, 133 NYS 1107. (6) Determination as between the executor and the residuary legatee and the devisees of a specific part of mortgaged realty, of the rights and liabilities of the parties as to the payment of debts and expenses, the payment of interest, and the application of the rents and profits of the realty specifically devised. In re De Bernal, 165 Cal. 223, 131 P 375, AnnCas1914D 26. (7) Passing on questions growing out of the wrongful inclusion of certain funds in the account. In re Crosetti, 211 Pa. 490, 60 A 1081. (8) The disposition of an opposition by creditors. Prudhomme's Succ., 23 La. Ann. 228. (9) An inquiry and decision as to whether creditors have lost the right to subject real estate to the payment of their debts. Brogan v. Brogan, 63 Ark. 405, 39 SW 58, 58 AmSR 124. (10) An incidental inquiry into a partnership settlement. In re Altemus, 32 La. Ann. 364. (11) Settlement of the account of a testamentary trustee. Gladding v. Follett, 2 Dem. Surr. (N. Y.) 58. (12) Amendment of the decree as to the allowance of interest. Charleston v. Mortimer, 41 S. C. L. 176.

[b] **The surrogate's court has no jurisdiction,** (1) upon the settlement of the accounts of an executor, to determine a claim for injury alleged to have been inflicted upon the estate by his joining in the purchase of a portion of the real estate of testator for his own profit; but the question is of equitable cognizance. Matter of McInerney, 62 Misc. 441, 116 NYS 1039. (2) Neither can such court pass upon a claim that the executrix should be surcharged with the value of certain bonds and mortgages, the assignment of which was alleged to have been procured by fraud. In re Dittrich, 53 Misc. 511, 105 NYS 301. (3) Where the testator's will gave the income of his estate to his wife for life, and on accounting by the executor, who was also executor of the will of the testator's father, under which the testator was a beneficiary, the executor claimed that he had paid the widow, as income of the estate of the father, moneys which were principal of the testator's estate, and also sought a determination as to his right to pay himself a salary for the management of the estate of the testator's father, the questions could not be determined in the accounting proceeding. Matter of Chapman, 32 Misc. 187, 66 NYS 235. (4) In a proceeding for the judicial settlement of executor's accounts, a reference by them in their account to unliquidate assets of a partnership, including a stock exchange seat, did not submit the firm liquidation to the surrogate. Matter of Hearns, 163 App. Div. 897, 147 NYS 447.

[c] **Annulling sequestration.** — A proceeding to have judicial sequestration of property of a succession annulled was properly brought under Const. art 134, in the succession in the district court. Drysdale's Succ., 128 La. 151, 54 S 701.

69. Burgess v. Marriott, 3 Curt. Eccl. 424; Small v. Thompson, 92 Me. 539, 43 A 509; Garlock v. Vandevort, 128 N. Y. 374, 28 NE 599; Riggs v. Cragg, 89 N. Y. 479, 11 AbbNCas 401 [rev 26 Hun 89]; Matter of French, 52 Hun 303, 5 NYS 249; Matter of Irwin, 100 Misc. 348, 165 NYS 697; Matter of Comer, 72 Misc. 321, 131 NYS 187; Matter of Scoville, 72 Misc. 310, 131 NYS 205; Matter of McCahill, 29 Misc. 450, 61 NYS 1071; In re Gaffney, 179 NYS 760; Matter of Goldmark, 186 App. Div. 447, 174 NYS 595; Stevens v. Stevens, 2 Redf. Surr. (N. Y.) 265.

[a] **The existence of a testamentary intent equitably to convert realty** into personalty may be determined on the judicial settlement of the account of the executors. Matter of Faile, 51 Misc. 166, 100 NYS 856.

[b] **Only the will of which the account is executor** can be construed; the power of the surrogate's court does not extend to the construction of another will through which the testator acquired title. Matter of Irwin, 100 Misc. 348, 165 NYS 697.

70. Matter of Comer, 72 Misc. 321, 131 NYS 187.

71. Matter of Banker's Trust Co., 82 Misc. 375, 143 NYS 843.

72. Gille v. Emmons, 91 Kan. 462, 138 P 608; State v. Eighth Judicial Dist. Ct., 26 Mont. 369, 68 P 856; Matter of McGoughran, 124 App. Div. 312, 108 NYS 934.

[a] **Money claim by third person.**—Gille v. Emmons, 91 Kan. 462, 138 P 608.

73. Matter of Fogarty, 117 App. Div. 922, 102 NYS 1136; Matter of Irwin, 100 Misc. 348, 165 NYS 697.

[a] **Surrogate's court cannot impress trust on real property.**—In re Brommer, 105 Misc. 336, 173 NYS 200.

74. Matter of Fogarty, 117 App. Div. 583, 102 NYS 776.

75. Matter of Niles, 142 App. Div. 198, 126 NYS 1066; Matter of Cavanagh, 121 App. Div. 200, 105 NYS 850; Matter of Archer, 51 Misc. 260, 100 NYS 1095; In re Cooper, (Pa.) 106 A 98; In re Hermann, 226 Pa. 543, 75 A 731; Justice's Est. (No. 1), 33 Pa. Co. 61.

[a] **Claim by creditor that property belongs to estate.**—Code Civ. Proc. § 2731, providing that, where a contest arises between an administrator or executor, on the settlement of his account, and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, the contest must, except where the claim is made in representative capacity, be tried in the same manner as any other issue arising in the surrogate's court, does not give the surrogate authority to surcharge the account of an administratrix with a sum received on the sale of personal property after the death of intestate, which had been transferred to her by the intestate during his lifetime, on the ground that such transfer was fraudulent as to creditors of the intestate, the mere claim of a creditor that the property belonged to the estate being insufficient to give the surrogate any power to pass upon the question. In re Schnabel, 202 N. Y. 134, 95 NE 698 [aff 136 App. Div. 522, 121 NYS 54].

[b] **Scope of determination.**—Code Civ. Proc. § 2731, providing that, where a contest arises between an accounting administrator and any other party respecting property alleged to belong to the estate, but to which the accounting party lays claim, the contest may be tried and determined in the same manner as any other issue arising in the surrogate's court, contemplates that an honest claim of an administratrix to individual ownership of property, claimed by others to belong to the estate, shall be disposed of by the surrogate without determining that she, if unsuccessful, is a tort-feasor, and holding her liable, as for a conversion. Matter of Niles, 142 App. Div. 198, 126 NYS 1066.

76. State v. Eighth Judicial Dist. Ct., 26 Mont. 369, 68 P 856 (on settlement of the account of an administrator the court had jurisdiction to require him to turn over to the special administrator certain property which had come into his possession in his representative capacity, although he also claimed it in his private capacity as agent for a third person).

cannot be determined on exceptions to the administrator's final account,[77] but only in a personal action against him to enforce the trust.[78]

[§ 2331] **(3) Where Trust Created by Will.**[79] In Alabama it has been decided that when a trust is created by will the probate courts have no jurisdiction to enforce or settle such trust;[80] but this principle does not oust the jurisdiction of the probate court in all cases where a testator by his will devolves testamentary trusts upon the person appointed executor, and in such cases the probate court may properly undertake to settle up such matters as pertain to the executorial duties or office, and decline to take cognizance of the extraordinary trusts which fall outside of the scope or sphere of the ordinary duties of executors and administrators.[81] In New Jersey it has been said that it would seem difficult to create a pure trust by will which could not be administered in the orphans' court.[82] In Pennsylvania, where the trust is not annexed to the office of executor by the terms of the will, the court of common pleas and the orphans' court have concurrent jurisdiction.[83]

[§ 2332] **(4) Accounting after Removal, Resignation, or Death.** It seems that probate courts generally have jurisdiction to compel personal representatives to account even after they have been removed[84] or have resigned.[85] In Texas it has been held not to be within the jurisdiction of a county court, sitting in probate, to determine the amount due from a deceased personal representative,[86] but in New York the surrogate's court has power, in a proceeding to settle an executor's accounts, to determine a claim against the estate of another which was administered by the executor's testatrix.[87]

[§ 2333] **(5) Accounting after Final Settlement.** After the final account of a personal representative has been rendered and allowed, the jurisdiction of the probate court to compel an accounting terminates.[88] But where an heir asked for an accounting by the administrator of his father's estate during the first year after attaining his majority, and within eight years after the administrator claimed to have made distribution of the estate, it was held that the estate had not been closed in a legal manner, and the probate court had jurisdiction of the proceeding for such accounting.[89] Where an administrator, who was also general guardian for the infants next of kin, was a codefendant with his wards in an action in the supreme court for the partition of real estate, and in that action a decree was rendered directing payment to him of large sums out of his wards' shares of the proceeds of sale, this was not such a settlement of his accounts as precluded the surrogate from investigating and accepting them.[90]

[§ 2334] **(6) Enforcement of Orders or Judgments.** After the death of an executor or administrator the probate court has no jurisdiction to enforce against his personal representative a decree rendered in final settlement against the representative.[91] It has been held that the jurisdiction of the ordinary extends no further than to take and adjust accounts, and he has no authority to enforce the performance of his order or decree.[92]

[§ 2335] **c. Territorial Jurisdiction.** A personal representative should as a general rule be compelled to account in the tribunals of the county in which administration was granted.[93] In a bill by heirs for an injunction against the sale of lands and for an accounting, a prayer that the administrator be compelled to deliver the lands to the heirs does not render the suit one respecting title to the lands so as to require a decree from the court in whose jurisdiction the lands lie.[94] The jurisdiction of a surrogate is not limited to the bounds of his county, but he may send a citation to any part of the state to compel a personal representative to account and settle.[95] Where a will has been proved in a foreign state, the executors can be called to account there for their dealings with the estate,[96] but it is otherwise where the will has not been probated in the foreign state.[97] A personal representative who changes his domicile is still bound to account to the court of his former domicile where the administration was granted,[98] and where letters testamentary upon the estate of a resident of one state are granted in that state to a resident of another state, the estate must be settled in the former state and the courts of the latter state have no jurisdiction over the accounts of the personal representative.[99] After submitting his account to the examination of an auditor appointed by a probate court to audit his administration account, and after a

77. In re Vance, 141 Cal. 624, 75 P 323.

78. In re Vance, 141 Cal. 624, 75 P 323.

79. See generally Trusts [39 Cyc 1].

80. Johnson v. Longmire, 39 Ala. 143; Harrison v. Harrison, 9 Ala. 470.

81. Hinson v. Williamson, 74 Ala. 180; Foxworth v. White, 72 Cal. 224; Pinney v. Werborn, 72 Ala. 58, 74 Ala. 591; Ex p. Dickson, 64 Ala. 188.

82. Phillips v. Phillips, (N. J. Ch.) 18 A 579.

83. Apple's Est., 2 Phila. (Pa.) 171.

84. Ind.—Kelly v. Weddle, 1 Ind. 550.

Miss.—Denson v. Denson, 33 Miss. 560; Davis v. Cheves, 32 Miss. 317. Contra Washburn v. Dorsey, 16 Miss. 214.

Mo.—Francisco v. Wingfield, 161 Mo. 542, 61 SW 842.

N. Y.—Prentiss v. Weatherly, 68 Hun 114, 22 NYS 680 [aff 144 N. Y. 707 mem, 39 NE 858 mem]; Gerould v. Wilson, 16 Hun 530 [aff 81 N. Y. 573]; Lawrence's Est., Tuck. Surr. 68.

Pa.—In re Redclay, 6 LancBar 57. Contra Johnson v. Brown, 3 Mart. N. S. (La.) 601.

85. Slagle v. Entrekin, 44 Oh. St. 637, 10 NE 675; Ingram v. Maynard, 6 Tex. 130.

86. McClellan v. Magnum, (Tex. Civ. A.) 75 SW 840.

87. Matter of Hull, 97 App. Div. 258, 89 NYS 939.

88. Ark.—Beckett v. Whittington, 92 Ark. 230, 235, 122 SW 633 [cit Cyc].

Minn.—State v. Ramsey County Prob. Ct., 84 Minn. 289, 87 NW 783.

Mo.—State v. Stephenson, 12 Mo. 178.

N. Y.—Rosen v. Ward, 96 App. Div. 262, 89 NYS 148; Minion v. Warner, 185 App. Div. 246, 173 NYS 69.

Pa.—In re Irvine, 209 Pa. 325, 58 A 618. But compare Stouffer's Est., 14 Pa. Dist. 108 (supplemental account of omitted assets may be had).

Tex.—Portis v. Cummings, 14 Tex. 139; Francis v. Northcote, 6 Tex. 185.

89. Loomis v. Armstrong, 63 Mich. 355, 29 NW 867.

90. In re Moreau, Tuck. Surr. (N. Y.) 470.

91. Dilworth v. Carter, 32 Miss. 206.

92. Ordinary v. McClure, 17 S. C. L. 7, 19 AmD 648. To same effect Walker v. Pinson, 33 S. C. Eq. 445.

93. Ill.—Dickinson v. Belden, 268 Ill. 105, 108 NE 1011.

Ky.—McNew v. Martin, 60 SW 412, 22 KyL 1275.

N. C.—Perry v. Perry, 172 N. C. 62, 89 SE 999.

Pa.—Nesper's Est., 23 Pa. Dist. 688; Bickley's Est., 13 Pa. Dist. 461.

S. C.—French v. Way, 93 S. C. 522, 76 SE 617.

Tenn.—George v. Lee, 6 Humphr. 61.

[a] **Personal representative of a deceased executor or administrator** must file an account of the estate of which their decedent was the representative in the county in which letters were issued to their decedent. Bickley's Est., 13 Pa. Dist. 461; French v. Way, 93 S. C. 522, 76 SE 617.

94. Williams v. Lancaster, 113 Ga. 1020, 39 SE 471.

95. Peo. v. Pelham, 14 Wend. (N. Y.) 48.

96. Pratt v. Douglass, 38 N. J. Eq. 516.

97. Cocks v. Varney, 42 N. J. Eq. 514, 8 A 722.

98. Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221; McGehee v. McGehee, 41 La. Ann. 657, 6 S 253; Farmer's Succ., 32 La. Ann. 1037.

99. Musselman's App., 101 Pa. 165.

decision by the auditor, it is too late for an executor to object that money accounted for was received for land in another state, and was therefore not within the jurisdiction of the court to which he has submitted his account.[1] A bill in chancery seeking to revive a proceeding against an estate long after its final settlement is properly dismissed where it appears that the parties thereto are nonresidents and no property of the estate remains in the state;[2] in this condition of things the courts of their own state should be resorted to for relief.[3]

Transfer of proceedings. Ordinarily proceedings to settle estates cannot be transferred from one county to another,[4] but when the county in which decedent resided and in which administration on his estate was granted is divided and a new county formed, in which his estate is situated, jurisdiction of the settlement of such estate may be transferred to the new county.[5]

[§ 2336] **4. Limitations and Laches—a. Statutes of Limitations.** The general rule is that the relation of a personal representative and persons entitled to the estate is that of trustee and cestuis que trust, and so long as this relation is acknowledged to exist between the parties and the trust is continued, the general statute of limitations does not constitute a bar to a proceeding to compel an accounting and settlement.[6] But when this relation ceases to exist or where the personal representative does some act by which he renounces his trust character and such cestuis que trust have full notice so as to put them on their remedies, and there is no disability or other impediment in the way of their enforcing their rights, the statute of limitations is set in operation.[7] Mere neglect to render accounts at the time required by law will not, however, start the running of the statute of limitations,[8] nor is a settlement of an estate or what purports to be a final account necessarily a termination of the trust which will set the statute in operation.[9]

A statute limiting the time within which creditors must make their claims does not bar the right of a legatee to have an accounting after the time therein limited.[10]

In New York the rule as stated by most of the decisions is that proceedings in a surrogate's court to compel an accounting and settlement by a personal representative are barred by the statute of limitations applicable to special proceedings if not commenced within the statutory period from the time when the right to compel such accounting or settlement accrued.[11] There are, however, cases in

1. Jennison v. Hapgood, 10 Pick. (Mass.) 77.

2. Slaughter v. Garland, (Miss.) 6 S 648.

3. Slaughter v. Garland, (Miss.) 6 S 648.

4. In re King, 105 Iowa 320, 75 NW 187.

[a] **Order of transfer not void.**—Where the court of one county has jurisdiction its order changing the venue to another county is not void, however erroneous it may be. McNew v. Martin, 60 SW 412, 22 KyL 1275.

5. Flournoy v. Flournoy, 1 Bush (Ky.) 515.

6. U. S.—Pulliam v. Pulliam, 10 Fed. 23.

Ala.—Salmon v. Wynn, 153 Ala. 538, 45 S 133, 15 AnnCas 478; Greenlees v. Greenlees, 62 Ala. 330; Harrison v. Harrison, 39 Ala. 489; Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Rhodes v. Turner, 21 Ala. 210.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12; Brinkley v. Willis, 22 Ark. 1.

Cal.—Elizalde v. Murphy, 163 Cal. 681, 126 P 978; Sanderson's Est., 74 Cal. 199, 15 P 753.

Ill.—Boyd v. Swallows, 59 Ill. A. 635.

Kan.—Allen v. Bartlett, 52 Kan. 387, 34 P 1042.

Ky.—McRoberts v. Carneal, 44 SW 442; McLaughlin v. Daniel, 8 Dana 182.

La.—McGehee v. McGehee, 41 La. Ann. 657, 6 SE 253; Courtade v. Chamberlain, 4 La. Ann. 368. But see Deranco v. Montgomery, 13 La. Ann. 513 (construing statute of 1808).

Me.—In re Mudgett, 105 Me. 387, 74 A 916.

Md.—Constable v. Camp, 87 Md. 173, 39 A 807; Fishwick v. Sewell, 4 Harr. & J. 393.

Mass.—Fuller v. Cushman, 170 Mass. 286, 49 NE 631; White v. Swain, 3 Pick. 365.

Miss.—Cooper v. Cooper, 61 Miss. 676; Wren v. Gayden, 2 Miss. 365.

Mo.—Picot v. Bates, 39 Mo. 292.

N. J.—Hill v. Hill, 70 N. J. Eq. 107, 62 A 385.

N. C.—Davis v. Cotten, 55 N. C. 430; McCraw v. Fleming, 40 N. C. 348; Bird v. Graham, 36 N. C. 196; Salter v. Blount, 22 N. C. 218; Ives v. Sumner, 16 N. C. 338.

Oh.—Gilbert v. Marsh, 7 OhS&CP 230, 4 OhNP 338.

Pa.—In re Stewart, 212 Pa. 327, 61 A 941; In re Fischer, 189 Pa. 179, 42 A 8; Logan v. Richardson, 1 Pa. 372; Campbell's Est., 54 Pa. Super. 356; Matter of Hoffman, 2 Pearson 491; Landis' Est., 13 Phila. 305; Creidland's Est., 2 Phila. 379.

S. C.—Cauthen v. Cauthen, 70 S. C. 167, 49 SE 321; Montgomery v. Cloud, 27 S. C. 188, 3 SE 196; Colburn v. Holland, 25 S. C. Eq. 176.

Tenn.—Carr v. Lowe, 7 Heisk. 84; Lafferty v. Turley, 3 Sneed 157.

Tex.—McKinney v. Nunn, 82 Tex. 44, 17 SW 516; Main v. Brown, 72 Tex. 505, 10 SW 571, 13 AmSR 823; McLain v. Pate, 58 Tex. Civ. A. 500, 124 SW 718; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Vt.—Davis v. Eastman, 68 Vt. 225, 35 A 73.

Va.—Smith v. Moore, 102 Va. 260, 46 SE 326; Leake v. Leake, 75 Va. 792; Marsteller v. Weaver, 1 Gratt. (42 Va.) 391.

Wash.—Reformed Presb. Church of North America v. McMillan, 31 Wash. 643, 72 P 502.

Wis.—In re McClear, 147 Wis. 60, 132 NW 539.

Ont.—Re Gabourie, 13 Ont. 635.

[a] **Correction of settlement.**—Under the statute when any error of law or fact has occurred in the settlement of an estate, to the injury of any party, without any fault or neglect on his part, such party may correct such error by a bill in chancery within two years after the final settlement thereof. Baldwin v. Deming, 51 Ala. 553; Millsap v. Stanley, 50 Ala. 319 (when statute not applicable); Ansley v. King, 35 Ala. 278.

7. U. S.—Prince v. Towns, 33 Fed. 161.

Md.—Whiting v. Leakin, 66 Md. 255, 7 A 688.

Oh.—Gilbert v. Marsh, 7 OhS&CP 230, 4 OhNP 338.

S. C.—Colburn v. Holland, 35 S. C. Eq. 176.

Vt.—Davis v. Eastman, 66 Vt. 651, 30 A 1, 68 Vt. 225, 35 A 73.

Ont.—Lees v. Morgan, 40 Ont. L. 233, 12 OntWN 353 [allowing app 11 OntWN 222].

[a] **This rule has been applied.**—(1) Where the personal representative was removed. Whiting v. Leakin, 66 Md. 255, 7 A 688. (2) Where an account has been heard and passed upon and the trust renounced. Gilbert v. Marsh, 7 OhS&CP 230, 4 OhNP 338. (3) Where an order of a probate judge has been made on the ex parte application of a personal representative granting him a final discharge. Fricks v. Lewis, 26 S. C. 237, 1 SE 884 [dist Dickerson v. Smith, 17 S. C. 289; Riddle v. Riddle, 26 S. C. Eq. 31].

[b] **When there has been no actual settlement,** but "some positive act manifesting a clear intention to terminate his trust" has been done by the trustee, the statute begins to run from this act. Such an act amounts to a claim that the trustee has fully accounted, and the acquiescence in the claim for the statutory period is a bar to any reopening of what has been so long acquiesced in. It must, however, be an act manifesting the intention to throw off the trust, not merely to strangers, but to the beneficiary or cestui que trust. Roberts v. Johns, 24 S. C. 580, 16 S. C. 171.

8. Allen v. Bartlett, 52 Kan. 387, 34 P 1042; Young v. Schelly, (N. J. Ch.) 21 A 1049.

[a] **A delay of sixteen years** by legatees, without bringing suit against an executor who has failed to account in all that time, will not bar their right to an accounting. Young v. Schelly, (N. J. Ch.) 21 A 1049.

9. Renwick v. Smith, 11 S. C. 294; Davis v. Eastman, 66 Vt. 651, 30 A 1, 68 Vt. 225, 35 A 73. To same effect Wilson v. McCarty, 55 Md. 277.

[a] **Illustration.**—Where an administrator filed a sworn return, intended to be a full and final account, but produced no vouchers, and no notice of such filing was given to the distributees and no decree was passed by the ordinary, there was not such an abandonment of the trust as to start the statute of limitations running. Renwick v. Smith, 11 S. C. 294.

10. McCraw v. Fleming, 40 N. C. 348.

11. In re Rogers, 153 N. Y. 316, 47 NE 589; Butler v. Johnson, 111 N. Y. 204, 18 NE 643; Loder v. Hatfield, 71 N. Y. 92; In re Lesser, 119 App. Div. 507, 104 NYS 213; Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem]; Monroe v. Turner, 114 App. Div. 634, 100 NYS 27

which a contrary view has been asserted,[12] and it has been held that the statute does not apply so as to bar an accounting as to the proceeds of real estate.[13] A statute with respect to actions by legatees or distributees has been held not applicable to a proceeding for an accounting.[14] The statute does not begin to run until the right to an accounting has accrued.[15] The act of a personal representative in

[aff 189 N. Y. 563 mem, 82 NE 1129 mem]; In re Smith, 66 App. Div. 340, 72 NYS 1062 [aff 179 N. Y. 563 mem, 71 NE 1140 mem]; Matter of Longbotham, 38 App. Div. 607, 57 NYS 118 [overr Matter of Taylor, 30 App. Div. 213, 51 NYS 609, and crit on other grounds Matter of Cruikshank, 40 Misc. 325, 81 NYS 1029]; Matter of Schlesinger, 36 App. Div. 77, 55 NYS 514 [rev on other grounds 24 Misc. 456, 53 NYS 710]; Matter of Hale, 6 App. Div. 411, 39 NYS 577; In re Van Dyke, 44 Hun 394 [rev 7 NYSt 710]; In re Latz, 33 Hun 618 [app dism 110 N. Y. 661 mem, 18 NE 260, 2 Silv. A. 109]; Drake v. Wilkie, 30 Hun (N. Y.) 537; Cole v. Terpenning, 25 Hun (N. Y.) 482; Clarke v. Chadeagne, 10 Hun (N. Y.) 97; American Bible Soc. v. Hebard, 51 Barb. 552 [aff 41 N. Y. 619 mem]; Smith v. Remington, 42 Barb. (N. Y.) 75; Gravey v. New York L. Ins., etc., Co., 4 Silv. Sup. 348, 7 NYS 818; Matter of Toms, 84 Misc. 312, 147 NYS 550; Matter of Rothschild, 42 Misc. 161, 85 NYS 1084; Matter of Boylan, 25 Misc. 281, 55 NYS 426; Matter of Barnes, 25 Misc. 279, 55 NYS 430; Matter of Bradley, 25 Misc. 261, 54 NYS 555; Matter of Campbell, 21 Misc. 133, 47 NYS 29; Matter of Miller, 15 Misc. 556, 37 NYS 1129; Matter of Kirkpatrick, 9 Misc. 228, 30 NYS 283; Matter of Van Wert, 3 Misc. 563, 24 NYS 719; Matter of Perry, 15 NYS 535, 2 Conn. Surr. 536; Pitkin v. Wilcox, 12 NYS 322; Matter of May, 9 NYS 785; Matter of Underhill, 9 NYS 455, 1 Conn. Surr. 541; Matter of Nicholls, 8 NYS 7, 23 AbbNCas 479, 2 Conn. Surr. 156; Matter of Dunham, 6 NYS 563, 22 AbbNCas 479, 1 Conn. Surr. 323; Matter of Clayton, 5 NYS 266, 17 NYCivProc 68, 1 Conn. Surr. 444; Matter of Gregory, 4 NYS 235; Stagg's Est., 6 NYCivProc 88; Clark v. Ford, 1 Abb. Dec. (N. Y.) 359, 3 Keyes 370, 1 Transcr. A. 22, 3 Abb PrNS 245, 34 HowPr 478; Matter of Van Epps, 64 HowPr (N. Y.) 464; McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455; House v. Agate, 3 Redf. Surr. (N. Y.) 307; Paff v. Kinney, 1 Bradf. Surr. (N. Y.) 1.

"While the duties pertaining to the office of a guardian of property and that of an executor or administrator may not be materially different respecting matters of accounting and liability to account, and it may, with much plausibility of argument, be contended that the rule of limitation applicable to one is alike applicable to the other, and that such rule should be the one applied in equity to trustees, seemingly laid down in In re Camp, 126 N. Y. 377, 27 NE 799, yet we are of the opinion that the court in that case did not intend to alter, modify or change the rule of limitation made applicable to proceedings to compel payment of a distributive share or an accounting by an executor or administrator, established by the long and almost uniform line of decisions which we have cited. There is nothing in the language of the opinion which imports any such purpose, and no such intention should be presumed. This view of the case is strengthened by the fact that in the case of Butler v. Johnson, 111 N. Y. 204, 18 NE 643, the Court of Appeals (in an opinion also written by Peckham, J.) recognized and reiterated the rule that the six years' Statute of Limitations would bar a proceeding in Surrogate's Court against an executrix to compel the payment of a legacy; and it seems to us that we would not be warranted in presuming that the court intended to overrule the doctrine there recognized, without even referring to it . . . It has several times been urged in our appellate courts that the provisions incorporated into the statute by the adoption of section 1819 of the Code of Civil Procedure, which provides that 'for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled and not before,' has changed the rule of limitation governing special proceedings in Surrogate's Court of this nature. The opinions expressed by our judges upon the question have not been entirely harmonious. The section referred to relates exclusively to actions, and makes no reference to special proceedings instituted for the purposes mentioned. It will be observed, also, that this section does not change or alter the period of limitation, but only prescribes the time from whence it is to be computed. The weight of authority seems to be to the effect that the rule of limitation applied by that section to an action does not affect the rule of limitation applied to a special proceeding in Surrogate's Court, and that the six years' statute is still a bar to such proceedings." Matter of Miller, 15 Misc. 556, 561, 37 NYS 1129, 26 NYCivProc 13.

[a] **The reason for rule** is that the legislature never could have intended to give to a party the right to institute such a suit before a surrogate, after his remedy was barred by the statute of limitations in all other courts. McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455.

[b] **Infant legatees and heirs at law.**—As to persons under age when the cause of action accrues, the time of such disability is not a part of the time limited. Matter of Fond, 40 Misc. 66, 81 NYS 249; Collins' Est., 6 NYCivProc 85, 3 Dem. Surr. 30.

[c] **A proceeding by an administrator de bonis non** to compel the representative of his deceased predecessor to account is controlled by the ten years' statute applicable to suits in equity. In re Rogers, 153 N. Y. 316, 47 NE 589 [rev 36 NYS 1132]; Matter of Smith, 66 App. Div. 340, 72 NYS 1062; Matter of Longbotham, 38 App. Div. 607, 57 NYS 118 [overr Matter of Taylor, 30 App. Div. 213, 51 NYS 609]; In re Latz, 33 Hun (N. Y.) 618; Pitkin v. Wilcox, 12 NYS 322, 20 NYCivProc 27.

[d] **Liability of personal representative of deceased executor.**—Where an executor dies before the statute has run against his liability to account, it will not run against the liability of his personal representative to settle the account, until the expiration of the statutory period after the latter's appointment. Matter of Irvin, 68 App. Div. 158, 74 NYS 443.

[e] **When statute not a defense.**—(1) The six-year statute of limitations forms no defense to an action for an accounting of the administration of testatrix's estate by the life beneficiary, to whom letters cum testamento annexo were issued and the estate surrendered five years before the proceedings were instituted, although eleven years have elapsed since the issuance of letters to the executors. In re Post, 9 NYS 449, 2 Conn. Surr. 243 [dist In re Van Dyke, 44 Hun (N. Y.) 394]. (2) Where an executor pays over assets to legatees in advance of the final settlement of the estate, and thereafter a judgment for costs is recovered against the estate in an action brought by him, the statute of limitations is no defense to proceedings to compel an accounting by him, brought by the judgment creditor. In In Darling, 13 NYS 783.

12. Matter of Watson, 163 App. Div. 41, 148 NYS 525; Matter of Anderson, 122 App. Div. 453, 106 NYS 818; Matter of Meyer, 98 App. Div. 7, 90 NYS 185 [aff 181 N. Y. 553 mem, 74 NE 1120 mem, and dist Matter of Rogers, 153 N. Y. 316, 47 NE 589]; Matter of Irvin, 68 App. Div. 158, 74 NYS 443; Matter of Jones, 51 App. Div. 420, 64 NYS 667 [aff 30 Misc. 354, 63 NYS 726]; Matter of McNally, 68 Misc. 8, 124 NYS 864; Matter of Lyth, 32 Misc. 608, 67 NYS 579; Foster v. Town, 2 Dem. Surr. (N. Y.) 333.

"It stands undisputed that the respondent Meyer qualified and entered upon the duties of his office as executor and received and took possession of the property of the testator. By virtue of the relation thus created the executor became trustee of those persons entitled to take pursuant to the provisions of the will. Occupying such relation, the Statute of Limitations would not begin to run until by some act sufficient for the purpose he repudiated his liability as trustee." Matter of Meyer, 98 App. Div. 7, 8, 90 NYS 185.

"In In re Camp, 126 N. Y. 377, 27 NE 799, the Court of Appeals decided that a general guardian could be compelled to render an account sixteen years after his ward became of age, because the fund received by him as guardian was the property of another confided to his care, and in that sense he occupied the position of a trustee so as to prevent the running of the Statute of Limitations, even if it was not a trust in the usual legal sense of the term. There are some distinctions between the nature and duties of the office of an executor and an administrator and those of a general guardian, but I doubt if they be of such a character as to place them outside of the application of the decision in In re Camp, 126 N. Y. 377, 27 NE 799, when so broad a character, as to their duties to account, is given such officers. Executors and administrators are appointed to take the custody and care of the property of others impressed with certain duties and trusts which they must discharge in order to be relieved either by their actual performance, or by the presumption of their having been performed; and it would seem that this presumption will not arise until such duties have been openly repudiated for the statutory period, and does not by the expiration of the statutory period after the time fixed for them to account." Matter of Beyea, 10 Misc. 198, 199, 31 NYS 200.

13. Matter of Sargent, 42 App. Div. 301, 59 NYS 105 [aff 25 Misc. 261].

14. In re Van Dyke, 44 Hun 394 [rev 7 NYSt 710]; Matter of Miller, 15 Misc. 556, 37 NYS 1129, 26 NYCiv Proc 13; Matter of Perry, 15 NYS 535, 2 Conn. Surr. 536; Matter of Nicholls, 8 NYS 7, 23 AbbNCas 479, 2 Conn. Surr. 156; Matter of Dunham, 6 NYS 563, 22 AbbNCas 479, 1 Conn. Surr. 323. But compare Collins' Est., 6 NYCiv Proc 85, 3 Dem. Surr. 30 (where the court appears to have been of a different opinion).

15. Collins' Est., 6 NYCivProc 85, 3 Dem. Surr. 30.

[a], **Accordingly** (1) where the estate cannot be settled until the happening of certain contingencies the statute does not begin to run before that time has arrived. In re Hodgman, 10 NYS 491. (2) So also where a legatee is entitled to a life interest in the estate the statute does not begin to run during the life of the beneficiary. Matter of Jones, 51 App. Div. 420, 64 NYS 667; Matter

enforcing an obligation or liability to the estate[16] or paying a person having a claim against the estate[17] will not prevent the running of the statute, where it does not appear that the person seeking an account has been under any disability or that he has acted in ignorance of or been misled with respect to his rights in the premises, or that he has remained in repose or been inactive by reason of any promise, statement, or representation made by the personal representative.[18] Where, however, the representative has by his acts held out to those beneficially interested in the estate that he was engaged in winding up the estate and discharging the claims prior to theirs, the statute does not run as against such persons,[19] and part payment of a legacy will interrupt the running of the statute of limitations as against the right of the legatee to require an accounting.[20] It has been held that a personal representative may interpose the defense of the statute of limitations at any time before the close of the evidence, and need not interpose it in a formal manner,[21] but a motion to dismiss the citation to account has been held not the proper mode of raising the objection that the right to demand an account is barred by the statute.[22] It has been held that the question whether the statute is a bar should be decided before the accounting is had,[23] but the contrary rule has also been asserted.[24] A personal representative who sets up a defense of the statute of limitations in his answer to a proceeding does not waive this defense by voluntarily filing an account.[25] Where, however, executors or administrators, many years after their appointment, petition for a voluntary account, and those interested are cited to appear, such executors cannot set up the statute of limitations.[26]

Statutes expressly made applicable to proceedings for accounting are found in some jurisdictions.[27]

[§ 2337] **b. Presumption from Lapse of Time.** It is a well settled general rule that a presumption that a personal representative has duly accounted and settled may arise from lapse of time,[28] although a contrary rule is sometimes established by express statutory provision.[29] Such presumption is not a flat bar to a proceeding for an accounting, but it can be overcome either by the acts or admissions of the personal representative or by other competent evidence, its practical effect being merely to shift the burden of proof,[30] unless, according to the view obtaining in some states, twenty years have elapsed, in which event no accounting can be compelled unless there have been admissions of the personal representative or recognition by him of the trust as continuing and unsettled,[31] or unless there has been some disability of the persons entitled to an account.[32]

[§ 2338] **c. Laches.** Ordinarily, an accounting will be denied where the party seeking it has been guilty of laches, or has allowed his claim to come within the equitable rule against stale claims.[33] The

of McCormick, 27 Misc. 416, 59 NYS 374; Matter of Campbell, 21 Misc. 133, 47 NYS 29. (3) The same rule applies where the personal representative is entitled to a life interest in the estate. Peltz v. Schultes, 64 Hun 369, 19 NYS 637.

[b] **The right of a legatee who has obtained a judgment for his legacy** to commence a proceeding for leave to issue execution against a personal representative does not accrue until after the entry of the judgment; and hence the issuing of an order by a surrogate requiring the personal representative to render an immediate account showing the assets in his hands is not prevented by the mere fact that the statute has run against any application for an accounting for the purpose of compelling the personal representative to pay the legacy. Matter of Bernardston Cong. Unitarian Soc., 34 App. Div. 387, 54 NYS 269.

16. Matter of Miller, 15 Misc. 556, 37 NYS 1129.

17. Matter of Bradley, 25 Misc. 261, 54 NYS 555.

18. See cases supra notes 16, 17.

19. Carroll v. Carroll, 2 Edm. Sel. Cas. (N. Y.) 158.

20. Matter of Irvin, 68 App. Div. 158, 74 NYS 443; Matter of Campbell, 21 Misc. 133, 47 NYS 29.

21. Matter of Rothschild, 42 Misc. 161, 85 NYS 1084.

22. Matter of Jordan, 50 App. Div. 244, 63 NYS 911.

23. Matter of Ashheim, 111 App. Div. 176, 97 NYS 607.

24. Matter of Anderson, 122 App. Div. 453, 106 NYS 818.

25. Matter of Perry, 15 NYS 535, 2 Conn. Surr. 536; Matter of Clayton, 5 NYS 266, 17 NYCivProc 68, 1 Conn. Surr. 444.

26. Matter of Lyth, 32 Misc. 608, 67 NYS 579; Wyckoff v. Van Siclen, 3 Dem. Surr. (N. Y.) 75.

27. Nunnery v. Averitt, 111 N. C. 394, 16 SE 683; Wyrick v. Wyrick, 106 N. C. 84, 10 SE 916; Woody v. Brooks, 102 N. C. 334, 9 SE 294 [dist Grant v. Hughes, 94 N. C. 231]; Chandler v. Lamborne, 2 PaLJR 124, 3 PaLJ 367; Clark v. Bellamy, 27 Ont. A. 435 [allowing app 30 Ont. 532]; Stewart v. Snyder, 27 Ont. A. 423 [dism app 30 Ont. 110]; Uffner v. Lewis, 27 Ont. A. 242.

28. Ala.—Greenless v. Greenless, 62 Ala. 330; Scruggs v. Orme, 46 Ala. 533; Harrison v. Harrison, 39 Ala. 489; Rhodes v. Turner, 21 Ala. 210; Gregg v. Bethea, 6 Port. 9.

Ark.—State Bank v. Williams, 6 Ark. 156.

La.—McGehee v. McGehee, 41 La. Ann. 657, 6 S 253.

Md.—Donaldson v. Raborg, 28 Md. 34; Gardner v. Simmes, 1 Gill 425.

N. C.—Petty v. Harman, 16 N. C. 191 [dist Falls v. Torrance, 9 N. C. 490].

Oh.—Pennock v. Miller, 1 Oh. Dec. (Reprint) 456, 10 WestLJ 85.

Pa.—Norris' App., 71 Pa. 106; Com. v. Snyder, 62 Pa. 153; Hubley's App., 19 Pa. 138; Foulk v. Brown, 2 Watts 209; McLean v. Findley, 2 Penr. & W. 97; Phillip's App., 10 Pa. Cas. 249, 13 A 906; Higgins' Est., 22 Pa. Dist. 179, 41 Pa. Co. 8; Hocker's Est., 18 Pa. Dist. 516; Hedderly's Est., 12 Pa. Dist. 72, 28 Pa. Co. 64, 19 Montg. Co. 132; Higgins' Est., 41 Pa. Co. 8; Grayham's Est., 31 Pa. Co. 217; Hedderly's Est., 28 Pa. Co. 64; Ingraham v. Cox, 1 Pars. Eq. Cas. 70; Karns' Est., 1 AmLReg 121; Blackman's Est., 2 Kulp 162; Leibert v. McKnight, 32 LegInt 291; Hodgdon's Est., 16 WklyNC 164; Finley's Est., 7 York LegRec 201.

S. C.—Roberts v. Johns, 16 S. C. 171, 24 S. C. 580.

"Where, as in this case, a petition to compel the filing of an account by an administrator is not presented until nineteen years after the death of the decedent, and there is no explanation of the delay, it will be presumed that the parties in interest knew that the estate had been exhausted in payment of debts, or that there has been a family settlement dispensing with an account." Hedderly's Est., 12 Pa. Dist. 72, 28 Pa. Co. 64, 19 Montg. Co. 132.

29. Blackwell v. Blackwell, 86 Tex. 207, 24 SW 389; Main v. Brown, 72 Tex. 505, 10 SW 571, 13 AmSR 823; Branch v. Hanrich, 70 Tex. 731, 8 SW 539; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

30. Fuller v. Cushman, 170 Mass. 286, 49 NE 631; Matter of Watson, 163 App. Div. 41, 148 NYS 525; Glen v. Kimbrough, 58 N. C. 173; Norris' App., 71 Pa. 106; Hocker's Est., 18 Pa. Dist. 516; Blackman's Est., 2 Kulp (Pa.) 162; Nixon's Est., 14 Phila. (Pa.) 297; Bentley's Est., 9 Phila. (Pa.) 344; Brown's Est., 8 Phila. (Pa.) 197.

31. Werborn v. Austin, 82 Ala. 498, 8 S 280; Holt v. Wilson, 75 Ala. 58; Garrett v. Garrett, 69 Ala. 429; Greenlees v. Greenlees, 62 Ala. 330; Harrison v. Heflin, 54 Ala. 552; Ragland v. Morton, 41 Ala. 344, 91 AmD 516; Blackwell v. Blackwell, 33 Ala. 57, 70 AmD 556; Weatherford v. Tate, 21 S. C. Eq. 27.

32. Weatherford v. Tate, 21 S. C. Eq. 27.

33. Ala.—Salmon v. Wynn, 153 Ala. 538, 45 S 133, 15 AnnCas 478; Ragland v. Morton, 41 Ala. 344, 91 AmD 516.

Ark.—Martin v. Campbell, 35 Ark. 137.

Cal.—Pratt v. Pratt, (A.) 184 P 955.

Del.—Hall v. Walker, 1 Del. Ch. 241.

Fla.—Anderson v. Northrup, 30 Fla. 612, 12 S 318.

Ga.—Akins v. Hill, 7 Ga. 573.

Ky.—Bailey v. Duncan, 2 T. B. Mon. 20.

La.—McGehee v. McGehee, 41 La. Ann. 657, 6 S 253.

Md.—Constable v. Camp, 87 Md. 173, 39 A 807; Donaldson v. Raborg, 28 Md. 34.

Miss.—Norris v. Burnett, 108 Miss. 407, 66 S 332; Davis v. Yerby, Sm. & M. Ch. 508.

N. J.—Bennett v. Piatt, 85 N. J. Eq. 436, 96 A 482 [aff 85 N. J. Eq. 602 mem, 96 A 895]; Hill v. Hill, 70 N. J. Eq. 107, 62 A 385; Holzer v. Thomas, 69 N. J. Eq. 515, 61 A 154; Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428; Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; Osborne v. O'Reilly, 43 N. J. Eq. 647, 12 A 377; Hance v. Conover, 31 N. J. Eq. 505.

effect of the lapse of time in this respect, however, may be obviated either by the facts of the case or by evidence showing a subsisting right in the petitioner and a corresponding obligation on the part of the executor or administrator.[34] Thus, it has been held that lapse of time does not bar an accounting if it appears that there are assets in the hands of the executor or administrator,[35] or if no account has ever been filed;[36] nor is the doctrine of laches applicable to a person under disability.[37] Neither is the doctrine of laches applicable where the representative has acquiesced in the delay by refusing to render his accounts and by resisting a suit brought against him for an accounting,[38] or where he has kept the estate in his hands for many years under the pretense of outstanding debts.[39]

Laches of representative. In a case where an executor failed to account for over twenty years, and the estate had been so managed that it would be impossible to arrive at the correct balance between the executor and the beneficiaries, the court refused to decree an account on the application of the executor, who claimed disbursements largely in excess of receipts.[40]

[§ 2339] **5. Audit or Approval before Settlement.** Approval by the probate court is a needful preliminary to a final settlement and allowance of the administration account; and in some states an audit of the account under direction of the court is considered necessary.[41]

[§ 2340] **6. Stay of Proceedings.** A surrogate has power to stay accounting proceedings in a proper case.[42]

[§ 2341] **7. Voluntary Accounting—a. In General.** In American probate practice the executor or administrator usually voluntarily presents his ac-

N. Y.—Matter of Schlesinger, 36 App. Div. 77, 55 NYS 514; Leroy v. Bayard, 3 Bradf. Surr. 228.

N. C.—Glen v. Kimbrough, 58 N. C. 173.

Pa.—In re Bordley, 39 Pa. 218; Hubley's App., 19 Pa. 138; Stache's Est., 25 Pa. Dist. 1038; Higgins' Est., 22 Pa. Dist. 179, 41 Pa. Co. 8; Rhode's Est., 19 Pa. Dist. 296; Rhode's Est., 18 Pa. Dist. 1073; Hocker's Est., 18 Pa. Dist. 516; Lowry's Est., 16 Pa. Dist. 6; Wilt's Est., 13 Pa. Dist. 483; Meyer's Est., 13 Pa. Dist. 191, 30 Pa. Co. 84; Boyd's Est., 12 Pa. Dist. 280, 28 Pa. Co. 426; Hedderly's Est., 12 Pa. Dist. 72, 28 Pa. Co. 64, 19 Montg. Co. 132; Baxter's Est., 10 Pa. Dist. 97; Hart's Est., 9 Pa. Dist. 274, 23 Pa. Co. 641; Henry's Est., 8 Pa. Dist. 649, 23 Pa. Co. 290 [aff 198 Pa. 382, 48 A 274]; Trout's Est., 5 Pa. Dist. 761; Henry's Est., 23 Pa. Co. 290; Washburn's Est., 9 Kulp 60; In re Silkman, 5 LackJur 299; Armstrong's Est., 16 Montg. Co. 9; McCluen's Est., 35 PittsLegJNS 297.

Va.—Tate v. Jones, 98 Va. 544, 36 SE 984; Covington v. Griffin, 98 Va. 124, 34 SE 974; Saum v. Coffelt, 79 Va. 510; Castleman v. Dorsey, 78 Va. 342; Stamper v. Garnett, 31 Gratt. (72 Va.) 550; Hayes v. Goode, 7 Leigh (34 Va.) 452; Carr v. Chapman, 5 Leigh (32 Va.) 164; Parks v. Rucker, 5 Leigh (32 Va.) 149; Todd v. Moore, 1 Leigh (28 Va.) 457.

Eng.—Deloraine v. Browne, 3 Bro. Ch. 633, 29 Reprint 739; Scurrah v. Scurrah, 2 Curt. Eccl. 919; Heroy v. Dinwoody, 2 Ves. Jr. 87, 30 Reprint 536.

"The Court cannot interfere in this matter. The testator died in 1815, and now, after an interval of seventeen years, an inventory and account have been called for, and I am of opinion the demand has been sufficiently complied with, for although this lapse of time is not an absolute bar to a disclosure of the deceased's assets, yet after a delay of so many years a full and particular inventory and account cannot be expected or required, and therefore a declaration has been substituted and produced." Higgins v. Higgins, 4 Hagg. Eccl. 242, 162 Reprint 1435.

"If the party in interest has been contented to let the estate rest for more than a quarter of a century, it is not very unreasonable to suppose that she has been satisfied with what she supposed to be the course of administration. The whole policy of the law is against the enforcement of stale demands, when, from the mere fact of acquiescence, the party responsible for the discharge of a trust may have been led into a less careful preservation of vouchers and accounts, than would otherwise have been the case, had the duty of accounting been insisted upon at an earlier period." Thomson v. Thomson, 1 Bradf. Surr. (N. Y.) 24, 30.

[a] **Exceptions to an account** are subject to the same rule, and a delay of twelve years in filing such exceptions will preclude their consideration. Lupton v. Janney, 13 Pet. (U. S.) 381, 10 L. ed. 210.

[b] **Delay held not sufficient to excuse accounting.** — Young v. Schelly, (N. J. Ch.) 21 A 1049 (sixteen years); Stephen's Est., 18 Wkly NC (Pa.) 286 (eighteen years).

[c] **Conditions imposed on dilatory applicant.**—A deposit of costs of filing an account and adjudication thereon or entering security therefor has been imposed as a condition of granting an application for accounting made nearly six years after removal of the administrator. Trout's Est., 18 Pa. Co. 608.

34. U. S.—Huntington Nat. Bank v. Huntington Distilling Co., 152 Fed. 240.

Ala.—Werborn v. Austin, 82 Ala. 498, 8 S 280.

N. J.—Holzer v. Thomas, 69 N. J. Eq. 515, 61 A 154.

N. Y.—In re Ries, 187 App. Div. 82, 175 NYS 58.

Pa.—In re Stewart, 212 Pa. 327, 61 A 941; McCluen's Est., 36 PittsbLeg JNS 73.

W. Va.—Tiernan v. Minghini, 28 W. Va. 314.

[a] **Family relationship.**—Where the distributees were of the administrator's own family, a delay of twenty years in asserting their right to an accounting was not unreasonable. Matter of McNally, 68 Misc. 8, 124 NYS 864.

[b] **Proof of existing claim.** — A creditor may have a citation for an accounting, although more than twenty-one years have elapsed since letters were granted, if he establishes his claim by affirmative proof. Blackman's Est., 2 Kulp (Pa.) 162.

[c] **Acknowledgment within prescriptive period.**—The lapse of twenty years does not release an executor or administrator from liability to account if there has been a recognition by him within that time of his obligation. Werborn v. Austin, 82 Ala. 498, 8 S 280.

[d] **Accounting prevented by executor or administrator.**—The doctrine of laches and staleness does not apply so as to exempt an administrator or his representative from settling his administration accounts where he aided in producing the delay. Tiernan v. Minghini, 28 W. Va. 314.

[e] **When representative charged with fraud.**—In the application of the doctrine of laches, when the rights of persons who sustain to the personal representative the relation of cestuis que trust are involved, and the representative is charged with fraud, the latitude in favor of such persons is very much more liberal than in other cases where the same defense is relied upon. Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085.

35. Leroy v. Bayard, 3 Bradf. Surr. (N. Y.) 228.

36. Fuller v. Cushman, 170 Mass. 286, 49 NE 631; Graham's Est., 14 Pa. Dist. 5, 18 YorkLegRec 146; Matter of Hoffman, 2 Pearson (Pa.) 491; Nixon's Est., 14 Phila. (Pa.) 297.

37. Werborn v. Austin, 82 Ala. 498, 8 S 280; Wilson v. McCarty, 55 Md. 277; Graham's Est., 14 Pa. Dist. 5, 18 YorkLegRec 146; Boyd's Est., 12 Pa. Dist. 280, 28 Pa. Co. 426.

[a] **Laches of guardian not imputable to ward.**—Grayham's Est., 31 Pa. Co. 217.

38. Tiernan v. Minghini, 28 W. Va. 314.

39. Clifton v. Haig, 4 S. C. Eq. 330.

40. Morgan v. Morgan, 50 N. J. Eq. 473, 26 A 331 [aff on this point but rev on other grounds 48 N. J. Eq. 399, 22 A 545].

41. Ala.—Miles v. Meade, 191 Ala. 80, 67 S 1012; Rhodes v. Turner, 21 Ala. 210; Blackwell v. Vastbinder, 6 Ala. 218; Robinson v. Steele, 5 Ala. 473; Taylor v. Reese, 4 Ala. 121.

Colo.—Hallett v. Lathrop, 20 Colo. A. 212, 77 P 1096.

Hawaii. — Matter of Enos, 18 Hawaii 542.

Ky.—Steele v. Morrison, 4 Dana 617.

Mass.—Brigham v. Morgan, 185 Mass. 22, 69 NE 418.

Miss.—Cameron v. Gibson, 1 Miss. 500.

Pa.—Edenborn's Est., 10 Pa. Dist. 184; Page's Est., 3 Pa. Dist. 212; McMahon's Est., 18 Phila. 188.

[a] **Form and contents of report of auditor.**—Graham's Est., 15 Pa. Dist. 258.

42. Matter of Farrell, 125 App. Div. 702, 110 NYS 41.

"A stay in an action or proceeding is based upon the regulatory power possessed by the court over the parties and their attorneys, it is an administrative function and largely rests in the sound discretion of the court." Matter of Sherwood, 105 Misc. 183, 173 NYS 639.

[a] **Pending an appeal** (1) from a decision declaring a will invalid the judicial settlement of the accounts of the executors, as to their claim for reimbursement of the expenses of probating and defending the will, will be stayed. Matter of Sherwood, 105 Misc. 183, 173 NYS 639. (2) The pendency of an appeal from a judgment in favor of the administrator in an action against him as such does not preclude approval of his final account and final closing of the estate, the claim against the estate having been disposed of in the trial court, and claimant, in case of his success on the appeal, having a remedy under the statute providing for reopening estates after final settlement in a proper case. In re Smith, (Wash.) 185 P 618.

count to the register or clerk, who duly issues a citation directing next of kin, creditors, legatees, and all other persons interested in the estate to appear before the probate court at a day stated and show cause, if any they have, against its allowance, and such proceedings are frequently regulated by express statute.[43] A personal representative will not, however, be permitted to settle an account in the probate court merely for his own benefit or convenience.[44] It has been held that after the representative has cited persons interested and they have appeared and filed objections they cannot cite the representative to appear for settlement in compulsory proceedings;[45] but it has also been considered that a voluntary proceeding and an involuntary proceeding for an accounting of the same estate may be consolidated when such consolidation is shown to be equitable.[46]

Nature of proceeding. A voluntary accounting by an executor or administrator is in the nature of a proceeding in rem.[47]

By temporary administrator. Where a temporary administrator was appointed pending a contest of the will and the will was admitted to probate and letters testamentary issued to the executor named therein, and subsequently an appeal was taken from the decree of probate, and the temporary administrator, after the appeal was taken, filed an account and prayed for a settlement thereof, it was held that the accounting should be deferred until an order of court authorizing the executor to exercise full powers was obtained or until the appeal was determined.[48]

[§ 2342] **b. Parties.** On a voluntary accounting and settlement by an executor or administrator it is necessary to join as parties all persons interested,[49] including legatees,[50] distributees,[51] heirs,[52] and creditors, where they have an interest in the accounting,[53] as for instance where the estate is insolvent so that their claims are not paid in full.[54] It is also proper to join sureties on the administration bond,[55] and one who has a vested remainder interest in the estate,[56] as well as persons interested in the estate of a deceased coexecutor of the accountant;[57] and it has been held that the probate court has jurisdiction to bring in a trust company, named as depositary of the funds in the hands of a temporary administrator, as a party to a judicial accounting of such administrator.[58] Where the settlement is not a final one, but the representative has resigned, the administrator de bonis non is a proper party.[59] It has been held that a mere debtor of the estate or the trustee of a voidable trust attempted to be created by the decedent is not a necessary or proper party,[60] but it has also been held that in an action by the administrator of a decedent and the present guardian of an infant of whom decedent was guardian at the time of his death, brought against his heirs at law, creditors, and the surety on his bond as guardian, for a settlement of the estate and his accounts as such guardian and to recover for the present guardian the amount due the ward, certain claimants and holders of parts of the trust fund belonging to the estate of such ward, which they had wrongfully received from the decedent as guardian and aided him in misappropriating, were necessary parties to the action and were properly made so by an amended petition, and the cross petition of the surety in the bond which had been given by the decedent as guardian.[61] Persons interested in the estate are sometimes given by statute the right to appear on the hearing, although

43. Matter of Lawson, 36 Misc. 96, 72 NYS 645; Matter of Crowley, 33 Misc. 624, 68 NYS 939; Gaines v. Eason, 130 Tenn. 86, 169 SW 309.

[a] **Right to have final accounting.**—Where administrators who retained an attorney are directed by the surrogate, on the attorney's motion to pay him for his services, they are privileged to have a final accounting to protect themselves or for other reasons. Matter of Rabell, 175 App. Div. 345, 162 NYS 218.

44. See cases infra this note.

[a] **Purposes for which not allowed.**—An executor will not be permitted to settle an account in the probate court for the mere purpose of: (1) Charging the estate with a debt due to himself by the testator in his lifetime. In re Shenck, 5 Watts (Pa.) 84. (2) Having costs, incurred in determining the validity of the will, allowed. Royer's App., 13 Pa. 569.

[b] **In the case of a small estate** the petition of the executor for a citation and answer will not be granted where he claims only one fourth of the estate, and no rights of creditors intervene, and all other persons interested in the estate desire an amicable division or sale. Reinert's Est., 9 Pa. Dist. 405.

45. Reeves v. Harrell, (Ga. A.) 101 SE 193.

46. In re Rainforth, 37 Misc. 660, 76 NYS 314; Matter of Mulvy, 31 Misc. 78, 64 NYS 576.

[a] **When proceedings not consolidated.**—Baylis v. Swartwout, 4 Redf. Surr. (N. Y.) 395.

47. Miles v. Meade, 191 Ala. 80, 85, 67 S 1012 ("So it is immaterial that the motion to charge the administrator with funds wrongfully paid to the distributees was made by one of the distributees who had wrongfully received such funds").

48. Matter of Dayton, 100 Misc. 632, 166 NYS 951 [aff 168 NYS 1106].

49. Waller v. Ray, 48 Ala. 468; Sparrow's Succ., 42 La. Ann. 500, 7 S 611; Harrell's Succ., 12 La. Ann. 337; Symmes v. Libbey, Smith (N. H.) 137; Cookman v. Stoddard, 132 App. Div. 485, 116 NYS 901; McMahon v. Smith, 24 App. Div. 25, 49 NYS 93 [rev 20 Misc. 305, 45 NYS 663]; Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079; Matter of Sill, 41 Misc. 270, 84 NYS 213; Matter of Walton, 38 Misc. 723, 78 NYS 296; In re Quinn, 9 NYS 550; Tilden's Est., 5 NYCivProc 449.

[a] **An assignee of a devisee** should be joined. Tilden's Est., 5 NY CivProc 449.

50. Waller v. Ray, 48 Ala. 468; Hull v. Hull, 225 N. Y. 342, 122 NE 252.

[a] **Where property is bequeathed to one in trust for others,** the trustee is regarded at law as the legatee, and his cestuis que trust are not necessary parties to a settlement of the administration. Gaunt v. Tucker, 18 Ala. 27.

[b] **A holder of a third mortgage given by a residuary legatee,** secured on the property conveyed by the will, has no standing in proceedings for an accounting by the executor. Matter of Collmar, 79 Misc. 592, 141 NYS 179.

51. Waller v. Ray, 48 Ala. 468; Boyett v. Kerr, 7 Ala. 9; Merrill v. Jones, 2 Ala. 192.

[a] **Where a distributee dies before the settlement,** his personal representative is a necessary party. McMullan v. Brazelton, 81 Ala. 442, 1 S 778; Thomas v. Dumas, 30 Ala. 83; Hall v. Andrews, 17 Ala. 40; Reynolds v. Reynolds, 11 Ala. 1023; Boyett v. Kerr, 7 Ala. 9.

[b] **The husband of a distributee** is a necessary party. Smith v. Hooper, 20 Ala. 245.

[c] **Creditors of a distributee** are not proper parties. Duncan v. Guest, 5 Redf. Surr. (N. Y.) 440.

52. Waller v. Ray, 48 Ala. 468; Harrell's Succ., 12 La. Ann. 337.

[a] **An executor who has a claim against the estate cannot represent** a minor heir on an application for the homologation of accounts. Baldwin v. Carleton, 11 Rob. (La.) 109.

[b] **The wives of heirs** should be made parties, but failure to do so was not fatal, where, after judgment, they came into the case and ratified what had been done. Barry v. Fain, 172 Ky. 309, 189 SW 220.

53. Waller v. Ray, 48 Ala. 468; Sparrow's Succ., 42 La. Ann. 500, 7 S 611; Coiron v. Millaudon, 3 La. Ann. 664; Browne v. Doolittle, 151 Mass. 595, 25 NE 23; Matter of Hiscox, 135 App. Div. 848, 120 NYS 308.

[a] **Assignment of claim.**—Where creditors did not present their claims, but assigned them to another person before the account of the administratrix was filed, they need not be cited to attend the judicial settlement. Matter of Freije, 90 Misc. 246, 152 NYS 726.

54. Waller v. Ray, 48 Ala. 468.

55. McMahon v. Smith, 24 App. Div. 25, 49 NYS 93 [rev 20 Misc. 305, 45 NYS 663]; Matter of Sill, 41 Misc. 270, 84 NYS 213.

56. Symmes v. Libbey, Smith (N. H.) 137.

57. In re Quinn, 9 NYS 550.

58. Matter of Rothschild, 109 App. Div. 546, 96 NYS 372.

59. Waller v. Ray, 48 Ala. 468.

60. Matter of Kenny, 92 Misc. 330, 156 NYS 827.

61. Taylor v. Harris, 164 Ky. 654, 176 SW 168.

they have not been cited,[62] and this right extends to next of kin whose interest is contingent.[63] It is not necessary to cite or join as parties illegitimate relatives of decedent,[64] or persons holding disputed assignments of interests in the estate,[65] nor need the attorney-general be included in the citation in proceedings for the settlement of the account of a public administrator with respect to an estate in his charge.[66] Where an intestate made an assignment to his wife in writing of all interests in the estate of a brother, a receiver of property of such assignor on behalf of his creditors had no standing, in a proceeding in the surrogate's court on accounting by the administrator of the estate of the assignor's brother, to object to such assignment, the court being without jurisdiction in the matter.[67] On an accounting by an administrator appointed pending probate of the will the executor represents beneficiaries, and, in the absence of fraud or collusion, is the only person whom it is necessary to cite.[68]

[§ 2343] **c. Citation or Notice—(1) In General.** Generally, before rendering his account and making a settlement of the estate, a personal representative must cause a citation to issue or give due notice to all persons interested, stating the time and place of such accounting and settlement and such other matters as are required by statute.[69] Sometimes, under statute, notice of an intended settlement of a representative's account must be given whether the settlement is annual or partial or final,[70] but it has been held that a notice of final settlement need not be given where an executor or administrator intends to resign or has resigned.[71]

The settlement must be pursuant to the notice given,[72] and hence notice of an annual or partial settlement will not support a decree of final settlement.[73]

Revival of accounting. Where an executor died during the pendency of an accounting and the proceedings were dropped, and other proceedings were instituted by the administrator with the will annexed to compel an accounting by the personal representatives of the deceased executor, but during the pendency of these proceedings the personal representatives of the deceased executor obtained an ex parte order reviving the old accounting by the executor and requiring the issuance of a citation to all interested to attend such settlement, it was held that such order was not authorized except on notice to all interested of the application therefor and

62. Matter of Thompson, 41 Misc. 223, 83 NYS 983.

[a] **The people** may appear and claim payment of the collateral inheritance tax. Matter of Arnett, 49 Hun 599, 2 NYS 428.

63. Matter of St. John, 104 App. Div. 622, 93 NYS 840; Matter of St. John, 104 App. Div. 460, 93 NYS 836.

64. In re Losee, 46 Misc. 363, 94 NYS 1082.

65. In re Losee, 46 Misc. 363, 94 NYS 1082.

66. Matter of Davenport, 142 App. Div. 41, 126 NYS 693.

67. In re Stephens, 64 NYS 990.

68. Matter of Haag, 100 Misc. 249, 166 NYS 621.

69. Ala.—Robinson v. Steele, 5 Ala. 473; Douthitt v. Douthitt, 1 Ala. 594.

Ark.—Greely Burham Grocery Co. v. Graves, 43 Ark. 171. But compare Jones v. Graham, 36 Ark. 383 (all persons interested in the action of an administrator are required to follow the regular statutory proceedings of the probate court and take notice of what may affect them, and hence those who are to be affected by his settlement are charged with due notice of its filing).

Ga.—Head v. Bridges, 67 Ga. 227.

Ill.—Reizer v. Mertz, 223 Ill. 555, 79 NE 283 [rev 125 Ill. A. 425]; French v. Chicago Univ., 187 Ill. A. 109.

Ind.—Roberts v. Spencer, 112 Ind. 81, 13 NE 127.

Iowa.—Jordan v. Woodin, 93 Iowa 453, 61 NW 948. Compare In re Feldner, 167 Iowa 150, 152, 149 NW 38 ("No notice of the filing of either of these [final or interlocutory] reports is necessary to meet any constitutional requirement, as the parties in interest are presumptively present or properly represented, either by the court or the administratrix, and the notice required by section 3422 of the Code is a matter of favor only. Of course, if not given as required, it is error to approve the final report; but this fact does not in any manner affect the rule just announced").

Ky.—Scott v. Kennedy, 12 B. Mon. 510.

La.—Winn's Succ., 30 La. Ann. 702; Capdevielle v. Erwin, 13 La. Ann. 236; Hart's Succ., 8 Rob. 121; Bry v. Dowell, 1 Rob. 111; Millaudon v. Cajus, 6 La. 222.

Md.—Yakel v. Yakel, 96 Md. 240, 53 A 914.

Mich.—Cole v. Shaw, 134 Mich. 499, 96 NW 573.

Miss.—Treadwell v. Herndon, 41 Miss. 38.

Mo.—State v. Donegan, 83 Mo. 374 [aff 12 Mo. A. 190]; Brashears v. Hicklin, 54 Mo. 102.

N. J.—Gray v. Myrick, 38 N. J. Eq. 210; Githens v. Goodwin, 32 N. J. Eq. 286.

N. Y.—Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Cookman v. Stoddard, 132 App. Div. 485, 116 NYS 901; Matter of De Forest, 86 Hun 300, 33 NYS 216, 24 NYCiv Proc 363, 1 NYAnnCas 234; Remington v. Walker, 21 Hun 322; Matter of Joslin, 74 Misc. 332, 134 NYS 229; Blake v. National Surety Co., 184 App. Div. 57, 171 NYS 614; In re Powers, 166 NYS 1008; Keegan v. Smith, 39 NYS 826; Brick's Est., 15 AbbPr 12; Hallett v. Hare, 5 Paige 315.

Okl.—Caulk v. Lowe, 178 P 101.

Or.—In re Osburn, 36 Or. 8, 58 P 521.

Va.—Campbell v. Winston, 2 Hen. & M. (12 Va.) 10.

Wis.—Shæffner's App., 41 Wis. 260.

[a] **Notice should be given to:** (1) Heirs. Remington v. Walker, 21 Hun (N. Y.) 322. (2) Legatees. Remington v. Walker, 21 Hun (N. Y.) 322. (3) Creditors. Matter of De Forest, 86 Hun 300, 33 NYS 216, 24 NYCivProc 363, 1 NYAnnCas 234; Remington v. Walker, 21 Hun (N. Y.) 322. (4) Sureties of the representative. Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Keegan v. Smith, 39 NYS 826. (5) A corepresentative of the accountant. Yakel v. Yakel, 96 Md. 240, 53 A 914.

[b] **Citation against unknown persons.**—A personal representative may sue out a citation running against persons unknown, and a judicial settlement of the accounts of a personal representative is void as against persons interested in the estate, whether known or unknown, who were not duly cited to appear or did not voluntarily appear at such judicial settlement. In re Killan, 172 N. Y. 547, 65 NE 561, 63 LRA 95 [rev 66 App. Div. 312, 72 NYS 714].

[c] **Adverse claimant.**—One claiming title to property under an execution sale and by adverse possession, who is not a party to a suit by the administrator of the record owner of the land against heirs and creditors for a settlement of the estate, is not entitled to notice of any proceedings therein. Wallace v. Lackey, 173 Ky. 140, 190 SW 709.

[d] **Supplemental citation to executor on accounting by temporary administrator.**—Where a temporary administrator is appointed pending a contest of the will, and the will is admitted to probate and an appeal taken from such probate, and the temporary administrator subsequently proceeds to settle his account, citing the executor, and subsequently an order is made authorizing the executor to exercise full powers pending the appeal, a supplemental citation must be issued to the executor before a decree can be made. Matter of Dayton, 100 Misc. 632, 166 NYS 951 [aff 168 NYS 1106].

[e] **No order of court is necessary** for the issuance of a citation on a petition for the judicial settlement of accounts, as a citation is issued by the clerk where the jurisdictional facts are set forth in the petition, although in certain cases, after issuance, an order is required for the manner of its service, such as substituted service, etc. Mount's Est., 180 NYS 266.

[f] **Notice prescribed by judge.**—Schæffner's App., 41 Wis. 260.

[g] **Time for procuring.**—Executors should obtain the necessary citations at the time of filing their accounts. In re Powers, 166 NYS 1008.

[h] **An administrator of a partnership estate** must give notice of a final settlement as in the case of other administrators. State v. Donegan, 83 Mo. 374 [aff 12 Mo. A. 190].

[i] **A supplemental account** cannot be settled without a new citation or waiver thereof by all concerned. Matter of Ripley, 101 Misc. 465, 167 NYS 162.

70. Sims v. Waters, 65 Ala. 442.

71. Emmons v. Gordon, 125 Mo. 636, 28 SW 863.

72. Brashears v. Hicklin, 54 Mo. 102.

[a] **Illustration.**—Where an administrator gave statutory notice of a final settlement at the next term of the probate court, and at that time he filed the settlement, but on his motion it was continued until the next term, and no further action was taken until ten years later, when the administrator without further notification withdrew his final settlement and made a different and corrected one, it was held that the later settlement had no binding force on the persons interested in the estate. Brashears v. Hicklin, 54 Mo. 102.

73. Sims v. Waters, 65 Ala. 442; King v. Collins, 21 Ala. 363.

that an appearance of all those interested, in response to the citation, was not sufficient to authorize another order reviving the old accounting, since they were entitled to notice of such an order before its issuance.[74]

A special administrator, appointed pending the contested probate of a will, may settle and be discharged without giving previous notice of the contemplated settlement.[75]

The personal representative cannot object to the notice for want of regularity, as such notice is intended for the benefit of creditors and distributees and not for his advantage.[76]

[§ 2344] **(2) Mode of Giving Notice.** Publication or posting is the more usual mode of giving notice of the accounting of an executor or administrator,[77] although personal service is sometimes required.[78] In Louisiana it is held that notification of the filing of a tableau operates as a citation to all persons concerned therein, creditors as well as legatees, and the homologation of an account and tableau bars all further inquiries as to all matters included in the account.[79]

[§ 2345] **(3) Proof of Service or Publication.** It is usually considered that service or publication of notice of the hearing with respect to the final account of an executor or administrator must be shown affirmatively,[80] and a recital in a decree that proof of service of citation was produced is not conclusive.[81] But there is also authority for the view that it will be presumed, until the contrary is shown, that notice has been given according to the statute,[82] and it is sometimes provided by statute that the finding in the order shall be conclusive evidence of the fact whether or not proof of notice was made.[83] An indorsement by a clerk of a probate court on the petition of an administrator that notice was published on a certain day is not sufficient proof of the publication of the notice required by law.[84]

[§ 2346] **(4) Effect of Lack of Notice.** It is generally held that where proper notice of an account has not been given the accounting is void,[85] unless there have been actual appearances [86] or notice has been otherwise waived.[87] But it has also been held that the requirement of notice is directory only,[88] and that it is merely an irregularity for the probate court to confirm an account before notice of the filing thereof has been given.[89] It has also been held to be immaterial whether minor heirs were properly served with notice of an executor's final report and his discharge, where the order was favorable to the minors, in that a release of a portion of the widow's award was thereby approved.[90]

[§ 2347] **(5) Waiver of Notice.** The parties interested in an estate are sometimes permitted by statute to dispense with notices by assenting in writing to the omission thereof,[91] or notice may be waived.[92]

[§ 2348] **d. Appearance.** The voluntary appearance of persons interested in the estate in accounting proceedings amounts to a waiver of any defects with respect to notice.[93] The effect of a failure of persons properly cited to appear is to enable the representative to proceed ex parte as to

74. Matter of Tredwell, 77 App. Div. 155, 79 NYS 83.

75. Robards v. Lamb, 127 U. S. 58, 8 SCt 1031, 32 L. ed. 60 [aff 89 Mo. 303, 1 SW 222].

76. Williamson v. Hill, 6 Port. (Ala.) 184.

77. U. S.—Goodrich v. Ferris, 214 U. S. 71, 29 SCt 580, 53 L. ed. 914 (rule in California).

Ala.—Trawick v. Trawick, 67 Ala. 271; Parks v. Stonum, 8 Ala. 752.

Fla.—Anderson v. Northrop, 30 Fla. 612, 12 S 318.

Ill.—Reizer v. Mertz, 223 Ill. 555, 79 NE 283 [rev 125 Ill. A. 425].

Iowa.—In re Feldner, 167 Iowa 150, 149 NW 38.

La.—Arrieux v. Dugas, 5 Rob. 453.

Miss.—Cason v. Cason, 31 Miss. 578; Steen v. Steen, 25 Miss. 513.

Mo.—Ratliff v. Magee, 165 Mo. 461, 65 SW 713.

Or.—In re Conant, 43 Or. 530, 73 P 1018.

Pa.—Madden's Est., 26 Pa. Dist. 470; Small's Est., 23 Pa. Dist. 793; Miller's Est., 7 Pa. Dist. 762; Kulp v. McGreevy, 5 Kulp 134.

[a] **Language of publication.**—(1) A notice of final settlement of an estate, published in English in a German newspaper, is not a legal notice. Heitkamp v. Biedenstein, 3 Mo. A. 450 [foll Graham v. King, 50 Mo. 22, 11 AmR 401]. (2) But a notice of final settlement is sufficiently published in a German-English newspaper on the English side thereof. McLean v. Bergner, 80 Mo. 414.

[b] **Mode to be fixed by court.**—Under a statute providing that no final settlement of an administrator shall be approved unless the heirs have been notified in such manner as the court shall direct, the fixing by the court of the manner in which such notice shall be given, where it is constructive, is jurisdictional, and no constructive notice can be given to a nonresident heir which will bind him unless the court has fixed the manner of giving notice prior to the time it is given. Reizer v. Mertz, 223 Ill. 555, 79 NE 283 [rev 125 Ill. A. 425].

78. Hatchett v. Billingslea, 65 Ala. 16; Dandry v. Landry, 105 La. 362, 29 S 900; Mullen v. King, 10 La. Ann. 674; Roberts v. Roberts, 34 Miss. 322; Brick's Est., 15 AbbPr (N. Y.) 12.

[a] **Distributees residing within the county** are entitled to personal notice. Roberts v. Roberts, 34 Miss. 322.

[b] **Manner of serving citation of ward.**—Brick's Est., 15 AbbPr (N. Y.) 12.

[c] **Personal notice to administrator de bonis non necessary.**—Hatchett v. Billingslea, 65 Ala. 16.

79. Bougere's Succ., 29 La. Ann. 378; De Egana's Succ., 18 La. Ann. 263; Penniston's Succ., 18 La. Ann. 281; Peytavin's Succ., 10 Rob. (La.) 118.

80. Ala.—Jenkins v. Jenkins, 16 Ala. 693.

Ill.—French v. Chicago Univ., 187 Ill. A. 109.

Miss.—Fort v. Battle, 13 Sm. & M. 133.

Mont.—In re Davis, 35 Mont. 273, 88 P 957.

Or.—In re Conant, 43 Or. 530, 73 P 1018.

[a] **Statutory notice not presumed.**—Where the court orders the publication of notice for three consecutive times, and the decree recites that it was so made, it cannot be presumed that publication was made for three consecutive weeks as required by the statute. Jenkins v. Jenkins, 16 Ala. 693.

[b] **Proof held sufficient.**—In re Conant, 43 Or. 530, 73 P 1018.

81. Dogan v. Brown, 44 Miss. 235; Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300].

82. Scott v. Kennedy, 12 B. Mon. (Ky.) 510.

83. In re Davis, 35 Mont. 273, 88 P 957.

84. Taylor v. Jeffries, 1 Rob. (La.) 1.

85. Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221; Dogan v. Brown, 44 Miss. 235; Neylans v. Burge, 22 Miss. 201; Fort v. Battle, 21 Miss. 133; Neal v. Wellons, 20 Miss. 649; Washburn v. Phillips, 5 Miss. 600; In re Sullivan, 36 Wash. 217, 78 P 945.

86. See infra § 2348.

87. See infra § 2347.

88. Scott v. Kennedy, 12 B. Mon. (Ky.) 510.

89. Greely v. Burnham Grocery Co. v. Graves, 43 Ark. 171.

90. Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221.

91. Browne v. Doolittle, 151 Mass. 595, 25 NE 23.

92. Browne v. Doolittle, 151 Mass. 595, 25 NE 23; Donald v. McWhorter, 40 Miss. 231; Matter of Ripley, 101 Misc. 465, 167 NYS 162.

[a] **Where an infant is interested,** there can be no waiver of new citation on settlement of an executor's supplemental account. Matter of Ripley, 101 Misc. 465, 167 NYS 162.

[b] **Foreign consul cannot waive.**—In proceedings for the judicial settlement of the account of an executor, the Austria-Hungarian consul, representing foreign alien infant heirs, could not waive the issuance and service of citation on such heirs. In re Nyahay, 66 Misc. 418, 121 NYS 207.

93. Barnett v. Tarrence, 23 Ala. 463; Perret's Succ., 20 La. Ann. 86; In re Davis, 35 Mont. 273, 88 P 957; Emelle v. Spinner, 20 Wyo. 507, 126 P 397.

[a] **An opposition to the account,** objecting to items therein, is in the nature of an answer, and cures irregularities with respect to notice. Fly v. Noble, 37 La. Ann. 667. To same effect Perret's Succ., 20 La. Ann. 86.

them.[94]

[§ 2349] **e. Pleadings.** The pleadings in a voluntary settlement by the representative are the account filed by him and the objections, if any, thereto.[95]

[§ 2350] **f. Evidence.** Where testator bequeathed all of his personal property to his widow for life or widowhood, one of the executors on voluntary proceedings for a final accounting was entitled to testify that the perishable property was sold as the property of the widow, and that the proceeds belonged to her.[96]

[§ 2351] **g. Judgment and Relief Awarded.** When an executor or administrator files an account and asks for its approval the judgment so secured is binding upon him,[97] and he cannot object to it upon the ground that it was rendered ex parte.[98] In an action by an executor to settle his accounts the executrix of the estate of testator's son cannot compel the adjustment of the son's interest in an estate of which the father was executor at the time of his death.[99]

[§ 2352] **h. Proceedings in Equity.** It has been held that when an executor or administrator finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of a court of equity, he may institute a suit in equity against creditors for the purpose of having all their claims adjusted and a final decree ordering the payment of the assets.[1]

[§ 2353] **8. Compulsory Accounting — a. By Probate Proceedings—(1) In General.** A personal representative who does not render his account will ordinarily be compelled to do so by a citation from the probate court,[2] which may exercise its power to require an accounting ex mero motu whenever the exigencies of the case seem to require it.[3] A second proceeding for an accounting cannot be instituted while the first is pending.[4]

Consolidation of proceedings. Where three separate petitions were filed, requiring different surviving executors and executors of deceased executors to file accounts, and that all persons interested should be cited to attend a final settlement of the estate, an order requiring an executor to account will not be reversed because the surrogate heard all the proceedings together, when no evil result is shown, and where the rights of all persons were protected.[5]

[§ 2354] **(2) Parties.** Who are entitled to an administration account, and from whom such an account may be required, are questions which have already been discussed,[6] and this discussion necessarily enumerates most of the persons who may become parties to a probate proceeding for an account. The only general rule that can be stated is that those persons who have an interest in the accounting in a particular case are the proper parties thereto.[7] Where the next of kin, entitled to a share of the estate, calls the administrator to an account, and claims to be entitled to the share of either of the other next of kin, such persons should be made parties to the proceedings.[8] A depositary designated by the court is a proper party,[9] and a receiver in supplementary proceedings is a proper party to the accounting of the debtor as administrator of his deceased wife.[10] Where infants without a general guardian are interested, a guardian ad litem should be appointed for them and made a party.[11]

Intervention may be allowed for the protection of an ultimate interest, although the applicant is not a necessary party;[12] but where proceedings have been instituted by one having no right to institute them, and an answer denying the right of the petitioner to require an accounting has been filed, a party in interest should not be allowed to inter-

94. Kellett v. Rathbun, 4 Paige (N. Y.) 102.

95. See infra § 2448.

96. Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

97. Capdevielle v. Erwin, 13 La. Ann. 286.

98. Capdevielle v. Erwin, 13 La. Ann. 286.

99. Bushe v. Wright, 118 App. Div. 320, 103 NYS 410 [aff 195 N. Y. 509 mem, 88 NE 1116 mem].

1. Hanna v. Galford, 55 W. Va. 160, 47 SE 359.

2. D. C.—Humphrey v. Conger, 7 App. 23.

La.—Touzanne's Succ., 36 La. Ann. 420; Feltmeyer's Succ., 18 La. Ann. 153.

N. Y.—Matter of Gill, 183 N. Y. 347, 76 NE 274; Matter of Arkenburgh, 11 App. Div. 193, 42 NYS 965; Matter of Broderick, 163 App. Div. 91, 148 NYS 541.

Pa.—In re Parmer, 237 Pa. 229, 85 A 148; Shaffer's App., 46 Pa. 131; Holland's Est., 39 Pa. Co. 201; Davis' Est., 12 Phila. 82.

Wis.—Perkins v. Shadbolt, 44 Wis. 574.

N. W. Terr.—Allan v. Kennedy, 2 Terr. L. 285.

[a] **Right to proceeding.** — (1) A citation to personal representatives is a matter of right, and the court cannot dismiss a petition for an accounting because it is known that the matter has already been determined unless it so appears on the record. Smith v. Black, 9 Pa. 308. (2) The surrogate may in certain cases decline to entertain a petition for an accounting in his discretion, and his discretion is not exhausted by the issuance of a citation, but he may thereafter dismiss the proceeding. Matter of Stevenson, 77 Hun 203, 28 NYS 362.

[b] **A postponement of the accounting** may be granted until a contemplated sale is made, in order to avoid expense. Marvill's Est., 15 Pa. Dist. 874.

3. Ala.—Burch v. Gaston, 182 Ala. 467, 62 S 508; Vincent v. Daniel, 59 Ala. 602.

Ill.—Reynolds v. Peo., 55 Ill. 328.

Mich.—Hall v. Grovier, 25 Mich. 428.

N. Y.—Harris v. Ely, 25 N. Y. 138.

Pa.—Witman's App., 28 Pa. 376.

Wis.—In re Campbell, 12 Wis. 369.

4. Davis' Est., 12 Phila. (Pa.) 82.

[a] **Illustration.**—Where a petition praying for an account was filed and the answer set up a release, which was subsequently declared void by the supreme court, a second petition for a citation is demurrable, and a demurrer thereto will be sustained with leave to file a replication to the original answer. Davis' Est., 12 Phila (Pa.) 82.

5. Matter of Hodgman, 10 NYS 491.

6. See supra §§ 2304–2316.

7. Ga.—Hanvy v. Moore, 140 Ga. 691, 79 SE 772.

Ky.—Linthecum v. Vowel, 118 Ky. 338, 80 SW 1090, 26 KyL 221; Crooks v. Turpen, 1 B. Mon. 183.

La.—Thomas' Succ., 12 Rob. 215.

Miss.—Smith v. Hurd, 8 Miss. 188.

N. Y.—In re O'Brien, 45 Hun 284; Clock v. Chadeagne, 10 Hun 97; Matter of Joslin, 74 Misc. 332, 134 NYS 229; Jewett v. Schmidt, 45 Misc. 34, 90 NYS 848; Matter of Gilligan, 3 NYS 17, 1 Conn. Surr. 137; Welte v. Bosch, 6 Dem. Surr. 364.

N. C.—Southal v. Shields, 81 N. C. 28.

S. C.—Easterling v. Thompson, 24 S. C. L. 346.

Can.—Cream v. Davidson, 27 Can. S. C. 362 [aff 6 Que. Q. B. 34].

[a] **The widow and the heir** may be parties in a joint proceeding for the settlement and distribution of the personalty of an estate. Smith v. Hurd, 8 Miss. 188.

[b] **Coheirs not necessary parties.** —Any one heir may compel the administrator to render his account without the concurrence of his coheirs, and without making his coheirs parties to the suit. Hickman v. Flenniken, 12 La. Ann. 268 [dist Douglass v. Edwards, 9 La. 234].

[c] **Creditors whose claims cannot be thereby prejudiced** cannot intervene in proceedings by heirs to compel an administrator to account. Thomas' Succ., 12 Rob. (La.) 215.

[d] **A surety on the administration bond** (1) is not entitled to require an accounting by his principal. Moore's Est., 19 Pa. Dist. 109. (2) Such surety need not be summoned before the ordinary when the administrator is called on to account. Lyles v. Caldwell, 14 S. C. L. 225.

8. Clock v. Chadeagne, 10 Hun (N. Y.) 97.

9. Matter of Rothschild, 109 App. Div. 546, 96 NYS 372.

10. Matter of Gilligan, 3 NYS 17, 1 Conn. Surr. 137.

11. Petty v. Britt, 46 Ala. 491; Willis v. Willis, 16 Ala. 652; Matter of Wood, 5 Dem. Surr. (N. Y.) 345; Gunning v. Lockman, 3 Redf. Surr. (N. Y.) 273.

12. Schlesinger v. Bear, 128 App. Div. 494, 112 NYS 826.

vene.[13]

[§ 2355] **(3) Petition.** One who seeks to compel an accounting and settlement by an executor or administrator should ordinarily present a petition showing his right to such relief,[14] although sometimes, under statute, a citation is all the pleading that is necessary.[15] The petition need not conform strictly to the rules of pleading,[16] but the relief sought should be stated,[17] and the facts relied on for relief should be distinctly averred so that the court may be informed and the personal representative receive notice of all he is required to answer.[18] The petitioner should sufficiently show or aver his interest or right to an accounting,[19] and if the allegation of the interest is positive, that is, if facts sufficient in the first instance, if uncontroverted to show a legal interest are stated on oath, an account will be ordered,[20] notwithstanding the fact that the interest of the party applying is denied.[21] A petition to compel the filing of a final account must aver that decedent's estate is ready for the final settlement.[22] Where a petition for a decree for a distribution of income received and to be received by executors prays for general relief, the probate court can order an accounting, although the answer of the executors shows that the petition could not be sustained as a petition for distribution.[23] Matters in avoidance of the statute of limitations need not be stated.[24]

Verification. It has been held that the petition should be verified,[25] but there is also authority for the view that verification is not essential,[26] and verification by the attorney of the applicant has been held sufficient, although made on information and belief without giving any reason why the petition was not verified by the applicant.[27]

[§ 2356] **(4) Citation or Notice.** The citation or notice to a personal representative, which is generally made necessary in compulsory proceedings for an accounting, should conform to statutory require-

13. Moore's Est., 19 Pa. Dist. 109, 111 ("To permit such intervention at such time is to complicate the record and deprive the administrator of the legal and required notice to which he is entitled before being required to account").

14. Feltmeyer's Succ., 18 La. Ann. 153; Matter of Joslin, 74 Misc. 332, 134 NYS 229.

15. Lyons v. Armstrong, 142 Ga. 257, 82 SE 651; Brantley v. Greer, 71 Ga. 11.

16. Crowder v. Shakelford, 35 Miss. 321.

[a] **Where prescribed form not applicable to case presented.**—"It is contended that the petition is contrary to law in form and substance, because it is provided by section 43 of chapter 65, R. S., that no other blanks shall be used in probate procedure than those approved by the Supreme Judicial Court, and that the defendant's petition is not in conformity with any blank so prescribed. It is insisted that the defendant should have used form No. 121 of the probate blanks. But this is the general form of the citation to settle an account in the probate court and not applicable to the special and extraordinary conditions alleged to exist in this case. The statute establishing uniformity in the use of blanks in the probate court is not to be so construed as to deprive the petitioner of his remedy if there is no prescribed form adapted to the existing situation. He is not prohibited from presenting a petition containing allegations appropriate to the facts of his case." McKenzie v. Webber Hospital Assoc., 106 Me. 385, 388, 76 A 704 [aff 104 Me. 320, 71 A 1032].

17. Westervelt v. Gregg, 1 Barb. Ch. (N. Y.) 469.

[a] **Only relief asked to be granted.**—Where a petition by a legatee asked for no relief except that an account be rendered, a new application must be made before a payment of his legacy could be ordered. Westervelt v. Gregg, 1 Barb. Ch. (N. Y.) 469.

18. Ga.—Tate v. Gairdner, 119 Ga. 133, 46 SE 73.

Ky.—Rawlings v. Rawlings, 112 SW 862.

Miss.—Treadwell v. Sorrell, 23 Miss. 563.

N. J.—Ludlow v. Ludlow, 4 N. J. L. 189.

Pa.—Thompson's Est., 23 Pa. Dist. 290; Loughran's Est., 21 Pa. Dist. 672; Mead's Est., 4 Pa. Dist. 750; Davis' Est., 12 Phila. 128.

[a] **Setting forth grounds of liability.**—Where it is desired to charge a personal representative on an account, the petition must set forth the grounds of liability with the same certainty as if application had been made a court of equity to compel the representative to come to a settlement. Tate v. Gairdner, 119 Ga. 133, 46 SE 73.

[b] **Sufficient petition.**—A petition which avers that the debts have been paid, and that there is an estate to be distributed, presents at least a prima facie showing that a final settlement ought to be made. Treadwell v. Sorrell, 23 Miss. 563.

[c] **Insufficient petition.**—In an action by children of a deceased son, who died without having settled his account as administrator of his father's estate, to require the administrator de bonis non to settle the estate, a petition which does not aver that any estate came into the hands of the administrator de bonis non, or that at the time the petition was filed there was any estate left by the grandfather undistributed, is insufficient. Rawlings v. Rawlings, (Ky.) 112 SW 862.

[d] **Waiver of objection.**—Where a decree appealed from, requiring an administrator to file a final account, was based on a petition which failed to state evidence sufficient to entitle petitioners to the relief prayed, such defect was not waived by the administrator answering over after the overruling of his demurrer to the petition. In re Morrison, 48 Or. 612, 87 P 1043.

19. Ala.—Davis v. Davis, 6 Ala. 611.

Mich.—In re Robinson, 6 Mich. 137.

Miss.—Robinson v. Gholson, 16 Miss. 392.

N. Y.—In re Hurlburt, 43 Hun 311; Wever v. Martin, 14 Barb. 376, 7 HowPr 182.

N. C.—Henry v. Henry, 31 N. C. 278.

Pa.—Okeson's App., 2 Grant 303; Stuart's Est., 10 Pa. Dist. 130; Engles' Est., 7 Pa. Dist. 434, 15 Pa. Co. 26; Guinane's Est., 5 Pa. Dist. 118, 17 Pa. Co. 438; Bortin's Est., 28 Pa. Co. 155; Davis' Est., 6 WklyNC 15.

[a] **The word "distributees"** may properly be used to denote those who are entitled to succeed to an intestate's estate under the statute of distribution. Henry v. Henry, 31 N. C. 278.

[b] **If the petitioner claims as an heir or legatee** he should state specifically the nature of his interest under the will or intestate law. Davis' Est., 12 Phila. (Pa.) 128.

[c] **If the petitioner is a creditor** (1) he should disclose in what manner he became a creditor of the decedent and the nature of the indebtedness. Davis' Est., 12 Phila. (Pa.) 128. (2) "The petition should disclose the nature and character of the debt claimed to be due from decedent to the petitioner, the amount thereof and when same became due and payable." Matter of Zeuschner, 15 NYSt 744, 745. (3) A creditor cannot call a personal representative to account without averring that his claim is legally authenticated against the estate, and that there is an insufficiency of assets, or that the estate is insolvent. Freeman v. Rhodes, 11 Miss. 329.

[d] **A petition presented by the president of an association** to require an executrix to settle her final account need not show his authority to present it for the association. McKenzie v. Webber Hospital Assoc., 106 Me. 385, 76 A 704, 104 Me 320, 71 A 1032.

[e] **Oath as to interest.**—An application for an accounting will not be entertained merely on the oath of the petitioner that he has an interest in the estate, where the application shows that he has no interest. Matter of De Pierris, 79 Hun 279, 29 NYS 360.

[f] **Defect cured by evidence and facts found.**—Wilson's App., 3 Walk. (Pa.) 216.

20. Dority v. Dority, 40 App. Div. 236, 57 NYS 1073; Forsyth v. Burr, 37 Barb. (N. Y.) 540; Matter of Kipp, 17 Misc. 491, 41 NYS 259; Gratacap v. Phyfe, 1 Barb. Ch. (N. Y.) 485; Burwell v. Shaw, 2 Bradf. Surr. (N. Y.) 322; Peters' Est., 1 Phila. (Pa.) 581.

21. Matter of Fortune, 14 AbbN Cas (N. Y.) 415; Matter of Cowdrey, 5 Dem. Surr. (N. Y.) 453; Bonfanti v. Deguerre, 3 Bradf. Surr. (N. Y.) 429; Thomson v. Thomson, 1 Bradf. Surr. (N. Y.) 24; Clinton's Est., 8 Pa. Dist. 661, 23 Pa. Co. 209; In re Fry, 3 Del. Co. (Pa.) 405; Stevens' Est., 6 LancBar (Pa.) 58; Kern's Est., 11 LancLRev (Pa.) 15; Disston's Est., 14 Phila. (Pa.) 310; Peters' Est., 1 Phila. (Pa.) 581; McKeown's Est., 8 WklyNC (Pa.) 343; Evans' Est., 3 WklyNC (Pa.) 519; Callender's Est., 1 WklyNC (Pa.) 518; Monigle's Est., 1 WklyNC (Pa.) 234; Devine's Est., 1 WklyNC (Pa.) 222.

22. In re Morrison, 48 Or. 612, 87 P 1043.

23. Matter of Robinson, 156 App. Div. 363, 141 NYS 470 (construing Code Civ. Proc. § 2803).

24. Matter of Underhill, 9 NYS 455, 1 Conn. Surr. (N. Y.) 541.

25. Okeson's App., 2 Grant (Pa.) 303; Darrach's Est., 2 PaLJR 454, 4 PaLJ 245.

26. In re Robinson, 6 Mich. 137.

27. In re Robinson, 6 Mich. 137.

ments and should be served in accordance therewith;[28] and it should appear from the record that proper notice was given.[29] An error or irregularity in the notice or citation or in the service thereof may be waived by the representative's general appearance,[30] or by his rendering his account,[31] or submitting to a settlement.[32] Notice to an executor of a petition to a probate court for an accounting is notice that the accounting will cover all his accounts as executor, where the jurisdiction of the probate court extends to requiring him to account for and distribute all that comes into his hands.[33]

An order requiring an executor to file a supplemental account may be made without the institution of a new proceeding by citation when it is made in a pending proceeding for an accounting.[34]

[§ 2357] **(5) Answer or Defense.** The personal representative may set up as a defense that the petitioner has no interest in the estate,[35] or no valid claim against it,[36] or that there has been a former accounting and settlement.[37] But in order for the plea or answer to be sufficient it should clearly and fully set out the facts relied upon and distinctly aver all matters necessary to negative the duty to account.[38] The representative cannot question the validity of subsequent letters of administration;[39] and in a proceeding to compel an administrator to account for rents to the administrator de bonis non, it is no defense that the heirs were guilty of fraud on such administrator and his sureties in procuring the appointment of a coadministrator, by whom certain of the rents so collected were embezzled.[40] Neither can an executor, who is cited to account on the application of the administrator of a legatee, evade the duty of accounting by setting up payments to himself for bills for medical attendance upon the legatee, and for the legatee's funeral and burial expenses paid by the executor and for board and lodging furnished by the executor.[41] Error cannot be predicated on a refusal to allow the administrator to amend his answer, where all the proof which would have been admissible under an issue made by the proposed amendment could have been received under the case as it already stood.[42]

[§ 2358] **(6) Replication.** It has been held that, where the answer challenges the position of the petitioner as a party in interest or as a creditor, the petitioner should file a replication and make prima facie proof of the matters contained in the petition.[43]

[§ 2359] **(7) Issues.** In a proceeding by an heir against his father's administrator for an accounting, an inquiry into the widow's pecuniary condition at the time of trial is irrelevant and improper, especially if it tends to injure the heir by raising the inference that he has been benefited out of property to which the widow was entitled.[44] Where a distributee cites an administrator to a settlement of his accounts before the ordinary, a stranger to the proceeding cannot set up an adverse title to the property sold by the administrator and claim the proceeds from its sale,[45]

[§ 2360] **(8) Evidence.** Where the duty to file an annual or partial account is imposed by statute, it is not necessary that the interest of one seeking such an account should be proved to the entire satisfaction of the court.[46] An administrator, failing to make returns, has the burden of proving to satisfaction of court and jury that he faithfully discharged his trust.[47]

[§ 2361] **(9) Hearing and Determination.** All the issues should be heard and determined at the same time.[48] Where the interest of the petitioner

28. Ala.—McRee v. McRee, 34 Ala. 165; Kavanaugh v. Thompson, 16 Ala. 817.

La.—State v. Judge Ouachita Parish Ct., 31 La. Ann. 116; Caldwell v. Glenn, 6 Rob. 9.

Miss.—Winborn v. King, 35 Miss. 157.

N. J.—Duncan v. Barnes, 20 N. J. L. 75.

N. Y.—Gratacap v. Phyfe, 1 Barb. Ch. 485; Mead v. Miller, 3 Dem. Surr. 577; Boerum v. Betts, 1 Dem. Surr. 471.

N. C.—Staley v. Sellars, 65 N. C. 467.

[a] **Citation should follow prayer of petitioner.**—Schlegel v. Winckel, 2 Dem. Surr. (N. Y.) 232.

[b] **Service of the order of court** is sufficient notice. State v. Judge Ouachita Parish Ct., 31 La. Ann. 116.

[c] **Manner of serving administratrix who has married.**—Kavanaugh v. Thompson, 16 Ala. 817.

[d] **Service on absent representative.**—Mead v. Miller, 3 Dem. Surr. (N. Y.) 577.

[e] **Notice to representative who resigns or is removed not necessary.**—Glenn v. Billingslea, 64 Ala. 345.

[f] **Service by publication.**—Lyon v. Odom, 31 Ala. 234; Ashurst v. Fountain, 67 Cal. 18, 6 P 849.

[g] **Citing representatives of deceased surety.**—Under the act of 1839, when an administrator had died without having accounted, leaving no executor or administrator, it was sufficient to cite the representatives of a deceased surety for an accounting. Thompson v. Bailey, 39 S. C. L. 68.

[h] **Insufficient citation.**—A citation which mentions neither the title of the cause, the residence of defendant, nor place at which the office where defendant is cited to appear and answer is held, is insufficient. Caldwell v. Glenn, 6 Rob. (La.) 9.

29. Winborn v. King, 35 Miss. 157.

30. Davis v. Davis, 6 Ala. 611; Sankey v. Sankey, 6 Ala. 607; In re Hurlburt, 43 Hun (N. Y.) 311; In re Macaulay, 27 Hun (N. Y.) 577 [aff 94 N. Y. 574].

31. Hearne v. Harbison, 9 Ala. 731; Reynolds v. Reynolds, 12 La. 617.

32. Petty v. Wafford, 11 Ala. 143.

33. Michigan Trust Co. v. Ferry, 228 U. S. 346, 33 SCt 550, 57 L. ed. 867 [rev 175 Fed. 667, 99 CCA 221, 175 Fed. 681, 99 CCA 235].

34. Matter of Arkenburgh, 11 App. Div. 193, 42 NYS 965.

35. Becker v. Hager, 8 HowPr (N. Y.) 68; Sayre v. Sayre, 3 Dem. Surr. (N. Y.) 264; Roak's Est., 22 Pa. Dist. 540; Bortin's Est., 11 Pa. Dist. 760; Williams's Est., 1 LackLegN (Pa.) 340; Koerner's Est., 19 Phila. (Pa.) 10, 4 Pa. Co. 478; Emig's Est., 17 YorkLegRec (Pa.) 99.

[a] **Such a plea is no ground for relief by injunction.**—Becker v. Hager, 8 HowPr (N. Y.) 68.

36. In re Callahan, 139 N. Y. 51, 34 NE 756 [aff 66 Hun 118, 20 NYS 824]; Lightner's Est., 144 Pa. 273, 22 A 808.

"The proper practice is, when a person who is not a creditor obtains a citation, to answer it, denying that the petitioner is a creditor. This at once challenges his position as such, and, unless he can make out a prima-facie claim, it is the duty of the court to dismiss his petition." Lightner's Est., 144 Pa. 273, 22 A 808.

37. In re Hood, 90 N. Y. 512 [rev 27 Hun 579]; Brundage v. Rust, 3 NYS 308, 23 AbbNCas 78.

38. Harrison v. Harrison, 39 Ala. 489; Stagg's Est., 6 NYCivProc 88; Marzius' Est., 15 Pa. Dist. 36; Tasker's Est., 13 Pa. Dist. 402.

[a] **Insufficient pleas.**—(1) In a proceeding against a personal representative of a deceased administrator, a plea that the latter had in his lifetime duly distributed, according to law and by order of the probate court, all of the property and assets of his intestate which ever came to his hands as administrator is bad, since it does not show that he reduced to possession all of the assets with which he might have been chargeable or that he ever made a final settlement of his account. Harrison v. Harrison, 39 Ala. 489. (2) An answer is insufficient when it merely alleges the payment of legacies and the distribution of the estate, but contains no definite statement as to what legacies have been paid, or as to how the estate has been distributed. Stagg's Est., 6 NY CivProc 88.

39. Simpson v. Corbett, 5 Ont. 377 [app dism 10 Ont. A. 32].

40. Ayers v. Laighton, 73 N. H. 487, 63 A 43.

41. In re Hastendenbeck, 73 N. J. Eq. 337, 75 A 823.

42. Lyons v. Armstrong, 142 Ga. 257, 82 SE 651.

43. Lightner's Est., 144 Pa. 273, 22 A 808; In re Williams, 1 Lack LegN (Pa.) 340.

44. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

45. Lyons v. Armstrong, 142 Ga. 257, 82 SE 651.

46. Dickson's Est., 11 Phila. (Pa.) 86.

47. Dubberly v. Varnedoe, 22 Ga. A. 738, 97 SE 261.

48. In re Loeb, 109 Misc. 167, 168, 178 NYS 364 (denying application that the court, before directing an accounting, construe an agreement

is denied, it is proper for the probate court to take evidence to satisfy itself that the petitioner is prima facie a person interested in the estate.[49] Where an application for an accounting makes out a plain case of previously undisclosed and undiscovered assets, the surrogate should direct an accounting as to such assets, in the absence of a showing of good cause to the contrary.[50]

[§ 2362] **(10) Judgment.** In determining upon a petition for an accounting the probate court should not adjudicate as to the interest of the petitioner in the estate, beyond determining that he has prima facie such an interest as to entitle him to an accounting,[51] nor should the court, in making absolute a rule to show cause why a citation to executors to file an account should not issue, direct in the same decree that the executors shall charge themselves with certain amounts.[52] The judgment in a proceeding to compel the administrator of a deceased executor to account for a sum voluntarily concealed by such executor should not determine to whom the fund is payable, but simply that there is a fund and its amount, to be paid over under the decree of the probate court to the proper parties.[53] A legatee is not entitled, in a proceeding against the representative of a deceased executor, to a decree ordering the property of the estate to be delivered to him;[54] the object of the proceeding is only to enable anyone interested to compel the placing of the fund in official custody.[55] In Georgia it is held that in a citation proceeding in the court of ordinary by a distributee against an administrator a personal judgment is intended,[56] but that a judgment de bonis propriis should not be rendered in the absence of any plea by the representative of ne unques executor, a release to himself, plene administravit, or plene administravit præter.[57] A surrogate's finding, on petition to compel an executor to account, that testator's wife survived him, such survival being a matter affecting distribution of the estate, does not bind parties neither cited nor heard.[58] Where an application by creditors to compel an accounting makes out a plain case of previously undisclosed and undiscovered assets, the surrogate should direct an accounting.[59]

[§ 2363] **(11) Appeal.**[60] Whether an appeal lies from an order of a probate court directing or refusing to direct an executor or administrator to render his account depends upon the nature of the judgment, order, or decree within the statutory provisions of the particular jurisdiction,[61] and is considered elsewhere in this work.[62]

[§ 2364] **b. By Action—(1) In General.** Persons who are entitled to an accounting by an executor or administrator are not confined to probate proceedings,[63] but may bring an action against the executor and administrator for an accounting in which the claims of all parties may be settled.[64] It has been said, however, that although a court of general jurisdiction possesses concurrent jurisdiction with the surrogate's court to take and state accounts of executors and administrators, it will ordinarily refuse to exercise such jurisdiction and will do so only where special circumstances exist which prevent the surrogate's court from granting full relief, or where, because of such circumstances, justice requires that the accounting be had in the court of general jurisdiction.[65]

[§ 2365] **(2) Mode and Form of Procedure.** An accounting and settlement may ordinarily be sought by a bill in equity,[66] in which case the bill should be for a general account and settlement of the estate;[67] or a creditor's bill may be brought to reach the assets of a decedent,[68] even though the creditor has not exhausted his remedy at law by judgment and execution,[69] such a case forming an exception to the general rule requiring remedies at law to be exhausted before commencing a creditor's suit.[70] Such a bill may ask that an administrator be compelled to sell decedent's lands and ap-

of guaranty entered into by the testator, the executor, and a third person, and determine the extent of the separate liability of the estate and its interest in certain securities. "To determine certain issues of law and fact in advance would in my mind be open to criticism").

49. Matter of Laffargue, 142 App. Div. 426, 126 NYS 965 [aff 202 N. Y. 614 mem, 96 NE 1118 mem].

50. In re Ries, 187 App. Div. 82, 175 NYS 58.

51. Matter of Laffargue, 142 App. Div. 426, 126 NYS 965 [aff 202 N. Y. 614 mem, 96 NE 1118 mem].

[a] **Illustration.** — On application by testator's wife's heir and executrix to compel the executor to account, it was unnecessary for the surrogate formally to determine whether the wife survived testator, they having died from injuries received in the same accident, and a finding on that question should be stricken. Matter of Laffargue, 142 App. Div. 426, 126 NYS 965 [aff 202 N. Y. 614 mem, 96 NE 1118 mem].

52. In re Parmer, 237 Pa. 229, 85 A 148.

53. Davis v. Eastman, 68 Vt. 225, 35 A 73.

54. Spencer v. Popham, 5 Redf. Surr. (N. Y.) 425.

55. Spencer v. Popham, 5 Redf. Surr. (N. Y.) 425.

56. Webb v. Webb, (Ga. A.) 101 SE 200; Thompson v. Stephens, 138 Ga. 205, 75 SE 136; Everett v. Sparks, 107 Ga. 48, 32 SE 878, 73 AmSR 107.

57. Merritt v. Merritt, 66 Ga. 324.

58. Matter of Laffargue, 142 App. Div. 426, 126 NYS 965 [aff 202 N. Y. 614 mem, 96 NE 1118 mem].

59. In re Ries, 187 App. Div. 82, 175 NYS 58.

60. **Review of proceedings on settlement of accounts generally** see infra §§ 2508–2526.

61. See statutory provisions.

62. See Appeal and Error §§ 406–411.

63. **Probate proceedings** see supra §§ 2353–2363.

64. Roberts v. Roberts, 137 Ga. 510, 73 SE 736; Taylor v. Harris, 164 Ky. 654, 176 SW 168; Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308; Matter of Farrell, 125 App. Div. 702, 110 NYS 41; Ward v. Ward, 57 Misc. 428, 109 NYS 711.

65. Utica Trust, etc., Co. v. Thomson, 87 Misc. 31, 149 NYS 392 (where the circumstances were held to warrant the supreme court to take jurisdiction).

66. **Equitable jurisdiction in administration of estates generally** see Equity §§ 97–104.

[a] **In Quebec** an account can be demanded from a testamentary executor only by action at law, instituted by means of a writ of summons, and not by petition. O'Borne v. Lemay, 7 Que. Pr. 333.

67. Hester v. Lawrence, 102 N. C. 319, 8 SE 915; King v. Galloway, 58 N. C. 122; Dorion v. Dorion, 20 Can. S. C. 430.

[a] **A bill as to only one article of property** cannot be sustained. King v. Galloway, 58 N. C. 122.

68. U. S.—McRea v. Mobile Branch Bank, 19 How. 376, 15 L. ed. 688.

D. C.—Yates v. Seitz, 7 D. C. 11.

Iowa.—Postlewait v. Howes, 3 Iowa 365.

Md.—Simmons v. Tongue, 3 Bland 341.

N. Y.—Thompson v. Brown, 4 Johns. Ch. 619.

N. C.—Warden v. McKinnon, 94 N. C. 378; Renan v. Banks, 83 N. C. 483; Herring v. Outlaw, 70 N. C. 334.

S. C.—Reeder v. Speake, 4 S. C. 293.

Va.—Wilson v. Wilson, 93 Va. 546, 25 SE 596.

[a] **A judgment creditor** may have the proceeds of the property thus obtained applied to the payment of the debts of the intestate in the order prescribed by law, although no execution has been issued upon his judgment and returned unsatisfied. Everingham v. Vanderbilt, 12 Hun (N. Y.) 75.

69. Postlewait v. Howes, 3 Iowa 365; Everingham v. Vanderbilt, 12 Hun (N. Y.) 75; Malloy v. Vanderbilt, 4 AbbNCas (N. Y.) 127; Smith v. Sheppard, 3 N. C. 163; Reeder v. Speake, 4 S. C. 293.

[a] **Where the will charges the land with the payment of debts,** the land is converted into equitable assets which can be reached only by a bill in chancery and the door of equity is opened to creditors of every description to come in and call for an execution of the trust. A suit at law to establish the debt is never a necessary prerequisite to such a bill. Poindexter v. Green, 6 Leigh (33 Va.) 504.

70. See Creditors' Suits § 13.

ply the proceeds to the payment of debts.[71] Where, in an administration suit, an original bill was filed to procure the distribution of the estate and speedy settlement, a supplemental bill is the appropriate procedure to compel settlement, it having been delayed beyond the time fixed, and to give relief against administrator's attorney, who purchased land belonging to estate.[72]

Allegations of fraud or malversation on the part of an administrator in a suit against his personal representative for an accounting do not change the bill into an action for tort.[73]

[§ 2366] **(3) Time for Bringing Action.**[74] It has been held that an action for the settlement of an estate may be brought at any time after the granting of letters testamentary or of administration,[75] or as soon as the executor or administrator has qualified.[76] But an executor or administrator is sometimes given, by statute, a certain period of exemption from suit by legatees for a settlement of his accounts, and an action for settlement within that time is premature.[77]

[§ 2367] **(4) Parties—(a) In General.** The general rule is that all persons entitled to an interest in the estate must be made parties to a suit for a settlement thereof,[78] and conversely an action for an accounting may be brought by any person having such an interest.[79] Where the statute provides that the representatives, and all persons having an interest in the property, and all creditors, must be made parties to an action for the settlement of the estate, a petition which omits any of such persons is defective as to parties.[80] Where a husband and wife by a deed conveyed in trust for their infant daughter certain leasehold personal property, the trustee, not being charged with any active duty relative to the trust, was not a necessary party to a suit for an accounting brought by the daughter at her majority against the executors of the grantors.[81]

A bank in which a decedent held stock is not a necessary party to an action for the settlement of decedent's estate, the bank having no lien upon the interest in the stock.[82]

[§ 2368] **(b) Personal Representatives.** The executor or administrator is a necessary party to an action for an accounting and settlement,[83] and where there are several personal representatives, all should usually be made parties,[84] although it has been held that an executor or administrator who has never actively administered on the estate is not a necessary party to a bill against his coexecutor or coadministrator for an accounting.[85] In an action against the first administrator or his representative for an accounting, an administrator de bonis non, if such there is, is a necessary party.[86]

[§ 2369] **(c) Sureties.**[87] The sureties of the representative may, according to some authorities, be made parties to a bill against him for an accounting,[88] and in order that there may be a decree against the sureties as such it is necessary that they should be made parties as sureties, although they are already parties in another capacity.[89] But there is also authority for the view that the sureties on an administration bond cannot properly be joined in proceedings against the administrator for an account and final settlement of the estate,[90] as they are responsible only on the bond and must be sued at law after proper steps have been taken to fix the liability of the administrator.[91]

[§ 2370] **(d) Heirs and Devisees.** Ordinarily in an action by a creditor for an accounting the heirs

71. Wadsworth v. Davis, 63 N. C. 251.

72. Vaiden v. Edson, 85 N. J. Eq. 65, 98 A 635 [aff 85 N. J. Eq. 184, 95 A 980].

73. Elizalde v. Murphy, 163 Cal. 681, 126 P 978 (holding that such allegations are unessential).

74. Limitations and laches generally see supra §§ 2336–2338.

75. St. John v. St. John, 150 Ala. 237, 43 S 580; Baker v. Mitchell, 109 Ala. 490, 20 S 40.

[a] **Before the probate court has entered on the final settlement** of the estate a beneficiary under the will may invoke the concurrent jurisdiction of the chancery court, without assigning any special reason therefor, on making all persons interested in the estate parties. St. John v. St. John, 150 Ala. 237, 43 S 580.

76. Harris v. Harris, 147 Ky. 712, 145 SW 369; Brand v. Brand, 109 Ky. 721, 60 SW 704, 22 KyL 1366; Holland v. Lowe, 101 Ky. 98, 39 SW 834, 41 SW 9, 19 KyL 97.

[a] **Action held not one to "settle" estate.**—Harris v. Harris, 147 Ky. 712, 145 SW 369.

77. Field v. Brantley, 144 Ga. 55, 86 SE 245.

78. Cooper v. Whitehurst, 7 KyL 374; York v. McCall, 160 N. C. 276, 76 SE 84.

[a] **Persons whose interests under the will will be affected** by the order or judgment are necessary parties. York v. McCall, 160 N. C. 276, 76 SE 84.

79. Metropolitan Trust Co. v. Stallo, 166 App. Div. 639, 152 NYS 183; Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

80. Linthicum v. Vowel, 118 Ky. 338, 80 SW 1090, 26 KyL 221.

81. Owens v. Crow, 62 Md. 491.

82. Citizens' Nat. Bank v. Boswell, 12 KyL 468.

83. Cal.—Reither v. Murdock, 135 Cal. 197, 67 P 784.

Ga.—Strickland v. Strickland, 147 Ga. 494, 94 SE 766.

Ky.—Linthicum v. Vowel, 118 Ky. 338, 80 SW 1090, 26 KyL 221.

La.—Rabasse's Succ., 49 La. Ann. 1405, 22 S 767.

N. Y.—Matter of Rabell, 175 App. Div. 345, 162 NYS 218.

N. C.—Ricks v. Wilson, 154 N. C. 282, 70 SE 476; Goode v. Goode, 6 N. C. 335.

Va.—Hansford v. Elliott, 9 Leigh (36 Va.) 79; Moring v. Lucas, 4 Call (8 Va.) 577.

W. Va.—Donahoe v. Fackler, 8 W. Va. 249.

[a] **Joinder in representative capacity necessary.**—Where a legatee, after bringing an action against the executor for an accounting, is appointed administratrix, she becomes a necessary party to the action in her representative, in addition to her individual capacity. Landon v. Townsend, 112 N. Y. 93, 19 NE 424, 8 AmSR 712 [foll in Hayward v. Place, 7 NYS 523, 4 Silv. Sup. 390].

[b] **A resident of another county who claims to be executor under void probate proceedings** is a proper party defendant, he having a lien on the estate for sums advanced to pay debts and being in possession of the assets of the estate which he holds in trust for the estate. Ashford v. Tipton, 53 SW 268, 21 KyL 866.

84. Conolly v. Wells, 33 Fed. 205; Owens v. Owens, 84 Miss. 673, 37 S 149; Bregaw v. Claw, 4 Johns. Ch. (N. Y.) 452; Brotten v. Bateman, 17 N. C. 115, 22 AmD 732.

[a] **A nonresident coexecutor** is a necessary party. Conolly v. Wells, 33 Fed. 205.

[b] **In a suit against a surviving executor** for an accounting, it was proper to make the executrix of a deceased executor a party on petition of the surviving one. Owens v. Owens, 84 Miss. 673, 37 S 149.

85. Shorter v. Hargroves, 11 Ga. 658; Clifton v. Haig, 4 S. C. Eq. 330; Wills v. Dunn, 5 Gratt. (46 Va.) 384.

86. Gould v. Hayes, 19 Ala. 438; Hardy v. Miles, 91 N. C. 131; Raby v. Ellison, 40 N. C. 265; Cannon v. Jenkins, 16 N. C. 422; Strickland v. Bridges, 21 S. C. 21; Henderson v. McClure, 7 S. C. Eq. 466; Easterling v. Thompson, 24 S. C. L. 346.

87. Intervention by see infra § 2376.

88. Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Donohue v. Roberts, 1 Fed. 449, 1 McCrary 112; State v. Canterbury, 124 Mo. A. 241, 101 SW 678; Dorsheimer v. Rorback, 23 N. J. Eq. 46 [aff 25 N. J. Eq. 516]; Taylor v. Taylor, 19 S. C. Eq. 123.

[a] **If the only acting administrator is without the jurisdiction,** the sureties may be joined, although there are coadministrators within the jurisdiction. McBee v. Crocker, 16 S. C. Eq. 485 (holding, however, that as a general rule the sureties on an administrator's bond could not be joined with him in a bill for an account of his administration).

[b] **Proper but not necessary parties.**—Dorsheimer v. Rorback, 23 N. J. Eq. 46 [aff 25 N. J. Eq. 516].

89. Lyles v. Lyles, 10 S. C. Eq. 76.

90. Judge Limestone County Ct. v. Coalter, 3 Stew. & P. (Ala.) 348; Judge Limestone County Ct. v. French, 3 Stew. & P. (Ala.) 263; Grady v. Hughes, 80 Mich. 184, 44 NW 1050; Smith v. Everett, 50 Miss. 575.

91. Grady v. Hughes, 80 Mich. 184, 186, 44 NW 1050; Smith v. Everett, 50 Miss. 575; Green v. Tunstall, 6 Miss. 638.

"Their liability to pay for the default of their principal arises only after his default is fixed, and then only under the terms of the obligation entered into by them." Grady v. Hughes, supra.

are not necessary parties,[92] but inasmuch as they may be liable in the event of the insufficiency of the personal assets, they have been held proper parties,[93] and to a creditor's bill asking that the administrator be compelled to sell lands and apply the proceeds to the debts and that the rents and profits received from the lands by the heirs or devisees be applied in the same manner, all the heirs or devisees must be made parties.[94] To a bill by a residuary devisee for an account, an objection that the heir should have been made a party cannot be sustained where it does not appear that the testator left any heir capable of inheriting and where no one had ever claimed the inheritance.[95] The rule that an action cannot be maintained against the heirs and the personal representative jointly does not apply where a creditor has established his demand before the surrogate and the personal estate has been concealed or wasted.[96]

[§ 2371] **(e) Legatees and Distributees.** To a suit brought by a distributee for a settlement of the estate and recovery of his distributive share, all the other distributees of the estate are generally held necessary parties;[97] and it has been held that, where several legacies are to be increased or diminished as the estate may increase or diminish, one legatee may file a bill on behalf of himself and the others who may choose to come in against the executor for an account and payment, making all other legatees parties,[98] although there is also authority for the view that one legatee cannot bring suit for himself and the other legatees to compel an executor or administrator charged with an express trust to account.[99] Distributees are necessary parties to an action brought by an administrator de bonis non for the settlement of an estate,[1] but are not proper parties to a bill in equity by an administrator to compel his coadministrator to pay over money alleged to be due to the estate.[2] Inasmuch as the executor is the trustee and proper representative of all persons interested in the personal estate and has the duty cast upon him by law of protecting it against improper demands,[3] it is held that legatees are not necessary parties to a bill by creditors for an accounting,[4] although if distributees have received personal property of the estate, the court may make them parties and compel them to account for what they have received.[5] On a bill by a creditor against the executor for an account of assets and the legatees for contribution, if there is a dispute between the executor and legatees as to whether he ought not to pay the debt without contribution from them, and all the legatees are not made parties, the bill may well be dismissed as to the legatees.[6] In a legatee's proceeding for an accounting, the other legatees, although not necessary parties, may be permitted to intervene to contest the moving legatee's claim against the estate dependent upon the construction of the will.[7] If one of several executors has been guilty of fraudulent misconduct in his dealings with the estate, his coexecutors may maintain an action for an accounting against him without joining the creditors, legatees, or next of kin.[8] The necessity or propriety of making legatees or next of kin parties sometimes depends upon statutory provisions.[9]

[§ 2372] **(f) Debtors.** Debtors of an estate are not generally proper parties to a suit to settle the estate;[10] but it has been held that a distributee may join in one suit the administrator and a debtor of the estate, where both are necessary parties for a settlement of the estate, and the administrator and debtor were on intimate terms with the decedent, who intrusted them with the management of her business, and each of them was indebted to the estate, and the administrator had not charged his own indebtedness nor attempted to collect that of the debtor.[11]

[§ 2373] **(g) Creditors.** Creditors are not indispensable parties either in proceedings by the heirs to compel an administrator to render his account[12] or on a bill by an executor against a devisee of land charged with the payment of debts,[13] although it has been held that, where the claims of creditors are made by the will a charge on the land, the creditors or some of them are necessary parties.[14] Creditors may bring action for an accounting and settlement of the estate,[15] and in a suit by a

92. Diversey v. Johnson, 93 Ill. 547; Smith v. Rotan, 44 Ill. 506; Green v. Martine, 1 NYCivProc 129; Byrd v. Byrd, 117 N. C. 523, 23 SE 324; Still v. Wood, 85 S. C. 562, 67 SE 910.

[a] **Suit held to be to establish debt.**—A suit by a child against the executor of her father's estate, who was also her guardian, for an accounting for the amount due her by her father and her testamentary guardian arising out of her interest in her grandfather's estate, is a suit to establish a debt against her father's estate, which, when established, will have precedence over any disposition of his estate by will or otherwise, and his heirs at law under the will who have never been in possession of his real estate are not proper parties. Still v. Wood, 85 S. C. 562, 67 SE 910.

93. Diversey v. Johnson, 93 Ill. 547.

94. Wadsworth v. Davis, 63 N. C. 251.

95. Rogers v. Ross, 4 Johns. Ch. (N. Y.) 388, 8 AmD 575.

96. Littell v. Sayre, 7 Hun (N. Y.) 485.

97. Ala.—Baines v. Barnes, 64 Ala. 375.

Mo.—Picot v. Bates, 39 Mo. 292.

N. J.—Nelson v. Errickson, 81 N. J. Eq. 226, 87 A 116; Van Mater v. Sickler, 9 N. J. Eq. 483.

Va.—Campbell v. Winston, 2 Hen. & M. (12 Va.) 10.

W. Va.—Woodyard v. Buffington, 23 W. Va. 195.

Ont.—Uffner v. Lewis, 27 Ont. A. 242.

[a] **Notice to legatees and distributees should be given** of the hearing before a commissioner appointed by the court of chancery to settle the administration, or his settlement will be set aside. Campbell v. Winston, 2 Hen. & M. (12 Va.) 10.

[b] **Residuary legatees.** — The other residuary legatees should be made parties to a bill in equity by one of them against the executor for an accounting and discovery. Nelson v. Errickson, 81 N. J. Eq. 226, 87 A 116.

[c] **The surviving husband of a distributee who died without issue** is a proper party in a suit by distributees to settle the estate of the deceased wife's father. Baines v. Barnes, 64 Ala. 375.

98. Brown v. Ricketts, 3 Johns. Ch. (N. Y.) 553.

99. Brinkley v. Willis, 22 Ark. 1.

1. Karn v. Seaton, 62 SW 737, 23 KyL 101.

2. Whiting v. Whiting, 64 Md. 157, 20 A 1030.

3. Terry v. Cape Fear Bank, 20 Fed. 773; Phillips v. Wisner, 75 Misc. 278, 132 NYS 1006.

4. Gordon v. Small, 53 Md. 550; Lucas v. McBlair, 12 Gill & J. (Md.) 490; Brown v. Dowthwaite, 1 Madd. 446, 56 Reprint 164.

5. Quinn v. Stockton, 2 Litt. (Ky.) 343; Warden v. McKinnon, 94 N. C. 378.

6. Sampson v. Payne, 5 Munf. (19 Va.) 176.

7. Hanvy v. Moore, 140 Ga. 691, 79 SE 772.

8. Wood v. Brown, 34 N. Y. 337.

9. Word v. Word, 90 Ala. 81, 7 S 412; Harrell v. Warren, 105 Ga. 476, 30 SE 426.

10. Citizens' Nat. Bank v. Boswell, 93 Ky. 92, 19 SW 174, 14 KyL 17; Matter of Kenny, 92 Misc. 330, 156 NYS 827; Adams v. Corbin, 3 Vt. 372; Wilson v. Wilson, 93 Va. 546, 25 SE 596.

11. Reager v. Chappelear, 104 Va. 14, 51 SE 170.

12. Moreau v. Moreau, 25 La. Ann. 214.

13. Potter v. Gardner, 12 Wheat. (U. S.) 498, 6 L. ed. 706.

14. Payne v. Johnson, 95 Ky. 175, 24 SW 238, 609, 15 KyL 522.

15. Rensford v. Magnus, 150 Ala. 288, 43 S 853; Beddow v. Wilson, 90 SW 228, 28 KyL 661; Matter of Sayles, 57 Misc. 524, 109 NYS 972; Shurtleff v. Right, 66 W. Va. 582, 66 SE 719, 135 AmSR 1041.

[a] **When an administrator sues to settle** the estate, all creditors may treat it as their action, and, if they

creditor all other creditors are proper parties,[16] and are entitled to notice to come in and prove claims.[17] Creditors who sue for an accounting need not sue separately, but any one may sue for himself and others.[18] If several suits are pending in favor of different creditors, the court will order proceedings in all the suits but one to be stayed,[19] and will require the several parties to come in under the decree of such suit so that only one account of the estate may be necessary.[20]

[§ 2374] **(h) Persons with Contingent Interests.** One who in a certain event may be interested in the disposition of the estate is not a necessary party to a bill brought by a beneficiary under the will against the executor praying for an account and construction of the will.[21]

[§ 2375] **(i) Personal Representatives and Assignees of Necessary Parties.** If the original executor or administrator is dead, his personal representative is a necessary party,[22] and in case a legatee, distributee, or other person who would have been a necessary party to the suit is dead his personal representative becomes a necessary party.[23] It has also been held that the personal representative of a deceased attorney of the administrator, for whose professional services a large amount is claimed, is a necessary party to a bill for an accounting.[24] The assignee of a legatee and next of kin is a necessary party to an action for an accounting brought by such legatee,[25] and in an action brought by executors and trustees under a will for a final settlement of their accounts and to obtain a construction of the will the assignees of a legatee are properly made parties.[26] It has been held, however, that, where there are no debts outstanding, the personal representative of a deceased distributee is not a necessary party to a bill filed by the living distributees for a settlement of the estate.[27] To a bill in equity by a devisee and legatee for the settlement of an administration and for a distribution, mortgagees of the undivided interests of other devisees are necessary parties.[28]

Death pending suit. Where an action was brought by legatees against an executor for an accounting and other legatees were made parties defendant and one of them died during the action, his personal representative was held not a necessary party to further proceedings.[29] On a bill against an administrator for settlement of the estate, an order of reference and the report thereon were not void because one of the complainants was then dead and her estate was not represented, where, when the final decree was rendered, her personal representative had been made a party and was represented.[30]

[§ 2376] **(j) Intervention.** Intervention in an action to sell decedent's real estate and settle his estate should be permitted where the allegations of the petition for intervention are sufficient to support a constructive trust in petitioner's favor in land to which decedent held title.[31] Sureties on the administration bond, who have been subjected to liability, may be allowed to intervene so as to receive credit for the amount paid by them.[32]

[§ 2377] **(5) Bill, Petition, or Complaint.** Under a statute requiring that proceedings shall be by summons and complaint neither memoranda of the evidences of debt filed in a special proceeding by a creditor against the executor for an account nor a replication can take the place of a complaint.[33] The bill or petition should show facts sufficient to authorize the interposition of equity,[34] and that there

file a properly verified claim in the action, it should be treated, so far as applying limitation to it, as if filed when the action by the administrator was begun. Bryson v. Biggs, 104 SW 982, 32 KyL 159.

[b] **The guardian of an infant judgment creditor** of the deceased may bring a settlement action under a statute authorizing a representative, legatee, distributee, or creditor of decedent to bring such action. Beddow v. Wilson, 90 SW 228, 28 KyL 661.

[c] **Claim not constituting one a creditor.**—The assignee of a judgment recovered against an administrator with the will annexed of decedent for legal services rendered in the managment of the estate has no judgment which binds the estate, nor does it make the owner in law a person interested in the estate, or one entitled to maintain an application for an accounting on the theory that the claim is one for expense of administration. Matter of Sayles, 57 Misc. 524, 109 NYS 972.

16. Gould v. Hays, 19 Ala. 438; Carter v. Bishop, 19 S. C. L. 403.

[a] **Right to come in under decree.**—On a bill by one or more creditors against an administrator for an accounting, all the creditors may, if they will come in under the decree made against him, and regard is as a judgment in their favor, and if they have notice to come in and prove their demands, be restrained from proceeding at law. Carter v. Bishop, 19 S. C. L. 403.

[b] **Where a bill to marshal the assets of an intestate is filed,** any creditor who comes in and proves his debt, under the master's notice, becomes a party to the decree, an actor in the proceedings, and is entitled to any order to speed the cause or carry the decree into successful execution. Boyce v. Boyce, 26 S. C. Eq. 263.

[c] **In North Carolina** (1) a special proceeding under the statute differs from a creditor's bill in that in the latter all the creditors may make themselves parties, while in the former they are required to do so. Patterson v. Miller, 72 N. C. 516. (2) In a proceeding brought under the statute, by creditors on behalf of themselves and all other creditors to compel a personal representative to account for his administration, each complaint of the several creditors constitutes a distinct proceeding, to be proceeded in separately. Graham v. Tate, 77 N. C. 120.

17. Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Hester v. Lawrence, 102 N. C. 319, 8 SE 915.

[a] **Creditor not bound in absence of notice.**—A creditor is not bound by a special proceeding against a personal representative in the nature of a creditor's bill unless he is personally served with notice or a general notice is published as prescribed by statute. Hester v. Lawrence, 102 N. C. 319, 8 SE 915.

18. Garver v. Thoman, 15 Ariz. 38, 135 P 724; Piatt v. St. Clair, Wright (Oh.) 526; Dana v. Western, 2 Edm. Sel. Cas. (N. Y.) 391.

[a] **When the estate is solvent** a creditor may proceed to make his own debt and leave other creditors to pursue theirs. Piatt v. St. Clair, Wright (Oh.) 526.

[b] **Where the fact that there will be a deficiency in the fund** appears upon the face of a bill brought by creditors, and there are other creditors or legatees who are entitled to a ratable distribution with complainants, such creditors or legatees should be made parties to the bill, or the suit should be brought by complainants in behalf of themselves and all others standing in a similar situation. Egberts v. Wood, 3 Paige (N. Y.) 517, 24 AmD 236.

19. Hallett v. Hallett, 2 Paige (N. Y.) 15; Ross v. Crary, 1 Paige (N. Y.) 416; Bloodgood v. Bruen, 2 Bradf. Surr. (N. Y.) 8; Kent v. Cloyd, 30 Gratt. (71 Va.) 555.

20. Stephenson v. Taverners, 9 Gratt. (50 Va.) 398.

21. U. S. v. Gillespie, 8 Fed. 140; Bearse v. Brown, 167 App. Div. 415, 153 NYS 514.

22. U. S.—Howth v. Owens, 29 Fed. 722.

Ala.—Kennedy v. Kennedy, 2 Ala. 571;

Ky.—Rawlings v. Rawlings, 112 SW 862.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

N. Y.—Silsbee v. Smith, 60 Barb. 372, 41 HowPr 418.

Pa.—Graham's Est., 14 Pa. Dist. 5.

[a] **If there is more than one** executor or administrator of the deceased personal representative all are necessary parties. Howth v. Owens, 29 Fed. 722.

23. McKenzie v. Matthews, 153 Ala. 437, 44 S 958; Oliver v. Wiley, 75 N. C. 320; Haglar v. McCombs, 66 N. C. 345; Strickland v. Bridges, 21 S. C. 21; Robertson v. Gillenwaters, 85 Va. 116, 7 SE 371.

24. Jewell v. Jewell, 32 S. C. Eq. 296.

25. Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300].

26. Barnes v. Blake, 58 Hun 525, 12 NYS 354.

27. Baines v. Barnes, 64 Ala. 375.

28. Bragg v. Beers, 71 Ala. 151.

29. Johnson v. Henagan, 11 S. C. 93.

30. McKenzie v. Matthews, 153 Ala. 437, 44 S 958.

31. Middleton v. Beasley, (Ky.) 216 SW 591.

32. Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 NYS 48; Moore v. Smith, 116 N. C. 667, 21 SE 506.

33. Isler v. Murphy, 76 N. C. 52.

34. Clay v. Coggins, 148 Ga. 543, 97 SE 623; Hanna v. Galford, 55 W. Va. 160, 47 SE 359.

is a necessity for an accounting.[35] It has been said that a petition averring that the party presenting it is the creditor of the estate, and that the full time has elapsed without an account having been filed, duly verified, is all that can be required as the basis of an order requiring an executor or administrator to file his account in the proper office.[36] In a bill by an heir, devisee, legatee, or distributee, complainant should state the right, title, or claim and all other necessary matters upon which he relies for relief with accuracy and clearness for the information both of defendant and the court.[37] Where the will bequeathed to testator's widow the use of the residue of the testator's estate, subject to certain charges, and in lieu of dower, and after testator's lands had been sold by the executor under a power of sale and the widow had received considerable sums of money from the executor under the will, she petitioned for an order requiring the executor to render an intermediate account, it was held that the failure of the widow to allege and prove performance of conditions mentioned in the will and an election by her to take under the will in lieu of dower would not defeat an accounting on her petition.[38] Where the same person is administrator of the estates of a father and son, a petition by the son's distributees asking for an accounting as to certain sums alleged to be due from the father to the son states no cause of action.[39] If a bill seeks to compel a final settlement it must aver that the estate is ready for a final settlement.[40] Specifications in a bill for the settlement of an estate brought by one executor against his coexecutors in whose control the estate was must be particular in order to obtain relief.[41] A bill which attacks a prior partial accounting should specify the items complained of.[42]

Statutory requirements as to the allegations in the bill, petition, or complaint must be fully complied with,[43] but facts other than those prescribed by statute need not be set out.[44] It is sometimes required by statute that a petition for settlement of an estate should allege the amount of decedent's debts and the nature and value of the property.[45]

Allegations of breach of duty or fraud. Allegations of fraud or mismanagement on the part of the personal representative are not necessary to the maintenance of an action for the settlement of the estate,[46] although a bill alleging fraudulent mismanagement of an estate by a personal representative shows sufficient equity to require an answer.[47] Where the action is by heirs or distributees, it is sufficient to aver a breach of duty on the part of the executor or administrator in failing to file his final account and fully to settle the estate,[48] but it has been held that a bill by a legatee or distributee must show that the statutory period allowed to the administrator to make distribution or pay legacies has run.[49]

Allegation of existence of assets. To entitle a petitioner to an accounting from the executor of a deceased executor, the petition must aver that there are assets of the estate in the hands of the second executor,[50] and a similar rule has been announced where the proceeding was against an administrator de bonis non.[51] Where a bill filed by a general creditor against the administrator and heirs does not seek to charge the real estate and subject it to

[a] **Insufficient bill.**—Where executors filed a bill, alleging that their testator had made specific bequests to his wife and children and a residuary legacy to his granddaughter, that testator was one of the sureties on the official bond of the sheriff, that a judgment had been rendered against the sheriff and his sureties on the bond, that one of the sureties had paid judgment and claimed contribution from testator's estate, that the legatees were asking for their legacies, and that the estate was not liable for any part of the claim of the cosurety, and praying that the validity of such claim is fixed and their accounts settled, this was held insufficient to authorize interposition of equity. Hanna v. Galford, 55 W. Va. 160, 47 SE 359.

[b] **Bill sufficient as against demurrer.**—Complainant, an illiterate, alleged that her former husband died leaving her land worth one hundred thousand dollars, and a policy for ten thousand dollars; that she permitted defendant, her brother-in-law, to manage the estate; that defendant had fraudulently evaded reporting the crops from 1900 to 1904, and, after obtaining administration, procured from complainant a pretended deed of an undivided half interest in the estate, and a petition to release him from liability to account until ordered by the court, and to discharge him, and that to defraud complainant, he procured a signature, purporting to be hers, to a lease by which he fraudulently designed to purchase her half interest in the personal property, and to rent her half interest in the estate for ten years, with the option of buying for the inadequate sum of twenty thousand dollars, and proposed to purchase her remaining half interest for forty-five thousand dollars; that he fraudulently procured a signature, purporting to be hers and her second husband's, to a pretended deed purporting to convey to defendant all of her interest in the estate, which deed complainant never signed, etc.; that she had lost the net proceeds of the crops, the lands, worth one hundred thousand dollars, and the insurance policy, and prayed an accounting by defendant as administrator, together with the vacation of all transactions except the final sale of the land to defendant. It was held that the bill was not demurrable for want of equity. Swinney v. Cockrell, 86 Miss. 318, 38 S 353. See also Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308 (bill sufficiently definite and certain).

35. Citizens' Cent. Nat. Bank v. Toplitz, 113 App. Div. 73, 98 NYS 826 [aff 188 N. Y. 634 mem, 81 NE 1162 mem].

36. Peters' Est., 1 Phila. (Pa.) 581.

37. U. S.—Hubbard v. Urton, 67 Fed. 419.

Ala.—Whitworth v. Oliver, 39 Ala. 286.

Fla.—West v. Reynolds, 35 Fla. 317, 17 S 740.

Md.—Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308.

N. Y.—Muir v. Leake, etc., Orphan House, 3 Barb. Ch. 477.

"Every fact essential to a plaintiff's title to maintain his bill and obtain the relief asked, must be stated in the bill, otherwise the defect will be fatal." Anderson v. Northrop, 30 Fla. 612, 615, 12 S 318.

[a] **Thus** (1) the relationship of the complainant to decedent should be set out in full. Hubbard v. Urton, 67 Fed. 419. (2) The provisions of the will should be stated. Muir v. Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477. (3) It should be shown that the will was probated. Wood v. Mathews, 53 Ala. 1.

[b] **Reference as to relationship.**—Upon a bill by the next of kin, if his character does not conclusively appear, a reference as to that fact will be directed. Redmond v. Coffin, 17 N. C. 437.

38. Matter of Tisdale, 110 App. Div. 857, 97 NYS 494.

39. Davis v. Davis, 7 KyL 42.

40. Baker v. Mitchell, 109 Ala. 490, 20 S 40; Acklen v. Goodman, 77 Ala. 521; In re Morrison, 48 Or. 612, 87 P 1043.

41. Beach v. Norton, 9 Conn. 182.

42. Lovewell v. Schoolfield, 217 Fed. 698, 133 CCA 449.

43. Lyons v. Armstrong, 142 Ga. 257, 82 SE 651; Harris v. Harris, 147 Ky. 712, 145 SW 369; Meyer v. Zotel, 96 Ky. 362, 29 SW 28, 16 KyL 506; Hignutt v. Cranor, 62 Md. 216.

44. Holland v. Lowe, 101 Ky. 98, 39 SW 834, 19 KyL 97, 41 SW 9.

45. See the statutes.

[a] **Petition held sufficient.**—A petition alleging that the personal property amounted to "$——," and was more than sufficient to pay all the indebtedness, and that certain individuals claimed to be creditors, but plaintiffs did not know who were creditors, was sufficient, since the failure to name the value of the personal estate by filling in the blank was an oversight which defendants could have cured by motion, and the statutory requirement as to a statement of the debts, being for the benefit of creditors, was satisfied by the allegation that the personal estate was more than sufficient to pay all indebtedness. Staton v. Byron, 105 SW 928, 32 KyL 246.

46. Faulkner v. Tucker, 83 SW 579, 26 KyL 1130.

47. Grady v. Hughes, 80 Mich. 184, 44 NW 1050.

48. Mann v. Baker, 142 N. C. 235, 55 SE 102.

49. Harris v. Orr, 42 W. Va. 745, 26 SE 455.

50. Maze v. Brown, 2 Dem. Surr. (N. Y.) 217.

51. Rawlings v. Rawlings, (Ky.) 112 SW 862.

decedent's debts, it is bad on demurrer if it fails to show that there are assets to be administered.[52] In an action to compel an administrator to account to his successor for sums received from the sale of lands, a complaint alleging the receipt of money from the sale of real estate of the intestate and that defendant has refused to account, although often requested, and that he still has the money in his hands is sufficient.[53] Where, in an action to compel an executrix to account after she had accounted and been discharged, the petition failed to allege that any further sums came into the hands of the executrix and she specifically denied that she had received any further sums, it was held that a further accounting was properly denied.[54] Where the complaint, in an action by the heirs and distributees against an administrator for a settlement, alleged a balance due on account collected by the administrator, as shown by his annual account, and that a further sum was due from the administrator, of which plaintiffs averred that they had but recently received information, it was held that the complaint was for an accounting of any sums which the administrator should have collected.[54½]

Verification of the petition is sometimes required,[55] although lack of verification, when not detrimental to anyone interested in the estate, is not ground for reversal of a decree for settlement.[56]

The court has power to permit an amendment to a bill by the representative of a deceased executor against a coexecutor and legatees under the will for an accounting of decedent's transactions as executor, by way of a supplemental bill setting up certain facts showing complainants' right to contribution which were omitted from the original bill.[57]

[§ 2378] **(6) Plea or Answer, and Defenses.** A personal representative who consents to answer a bill in equity, or, having pleaded, is ordered to answer, must answer fully;[58] and he is properly compelled to account where the answer does not raise an issue in bar of an accounting.[59] When an administrator is called on to account in a court of equity he may exhibit with his answer a copy of the final account;[60] but it has been held that he cannot be compelled to exhibit his account,[61] although there is authority to the contrary.[62] If a personal representative charges himself in a schedule to his answer he cannot discharge himself by another schedule to the same answer stating his disbursements.[63] The administrator may defend by pleading and showing that he has fully administered,[64] that he has properly paid over or expended a certain sum in question,[65] or that he has delivered the assets to his successor.[66] That plaintiff has parted with all his interest in the estate is a perfect defense to his petition for an accounting,[67] but the fact that pending proceedings defendant's letters were revoked is no defense to his liability to account.[68] The pendency of another suit concerning property in which the estate is largely interested and the fact that a sale of the property would result in a sacrifice are not valid objections to the maintenance of a bill by devisees to remove the administration into a court of equity and compel a settlement.[69]

Account stated. If the representative pleads to an action by a legatee an account stated between himself and the legatee, the plea must show that the legatee was present when the account was made up and that he examined and approved it.[70] Where an administrator de bonis non with the will annexed was sued by alleged legatees of the testator, who averred that the testator's original executor had died without having fully administered the testator's estate, that plaintiffs had requested defendant to require the administrator of the deceased executor to account, and that he had refused, a plea by defendant that a full and complete accounting and settlement to and with each other for, and on account of, any money, goods, and chattels belonging to the estate of the testator which went into or should have gone into the hands of his original executor had been had between himself and

52. Crawford v. Turner, 58 W. Va. 600, 52 SE 716, 112 AmSR 1014.

53. Lindley v. State, 115 Ind. 502, 17 NE 611.

54. Matter of Jenkins, 132 App. Div. 339, 117 NYS 74.

54½. Mann v. Baker, 142 N. C. 235, 55 SE 102.

55. Thompson v. Thompson, 105 SW 1185, 32 KyL 319; Peters' Est., 1 Phila. (Pa.) 581.

56. Thompson v. Thompson, 105 SW 1185, 32 KyL 319.

57. Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

[a] **Consistent averments.**—Where an original bill by representatives of a deceased executor for an accounting against a coexecutor and legatees under the will averred that defendant coexecutor intrusted practically the entire management of the affairs of the estate and trust to decedent, such averment was not inconsistent with an averment in a supplemental or amended bill that defendant coexecutor joined with decedent in the first instance in appointing a joint agent for managing the affairs of the estate in a certain county. Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

58. Beall v. Blake, 10 Ga. 449; Mitchell v. Mitchell, 3 Md. Ch. 71; Tasker's Est., 30 Pa. Co. 298; Clement v. Riley, 29 S. C. 286, 6 SE 932.

59. York v. McCall, 160 N. C. 276, 76 SE 84.

60. Mitchell v. Mitchell, 3 Md. Ch. 71; Grant v. Bell, 87 N. C. 34; Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

[a] **A copy of the account is properly annexed** to the answer where this is practicable. Grant v. Bell, 87 N. C. 34.

[b] **The representative may exhibit and explain the vouchers** for the credits allowed him in the account. Mitchell v. Mitchell, 3 Md. Ch. 71.

61. Mitchell v. Mitchell, 3 Md. Ch. 71; Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

62. Tison v. Tison, 14 Ga. 167.

[a] **An answer to a petition which waives discovery** and prays for an accounting and settlement cannot be objected to because there is not attached thereto a schedule of the returns of the administrator. Adams v. Adams, 113 Ga. 824, 39 SE 291.

63. Dodson v. Dodson, 6 Heisk. (Tenn.) 110.

64. Ky.—Bedell v. Keethley, 5 T. B. Mon. 598.

N. Y.—Rayner v. Pearsal, 3 Johns. Ch. 578.

N. C.—Grant v. Bell, 87 N. C. 34.

S. C.—Thompson v. Buckner, 11 S. C. Eq. 499.

Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

[a] **Averment as to account.**—If defendant pleads that he has fully accounted, he must aver that there has been an "account stated" and that the same is just and true. Grant v. Bell, 87 N. C. 34.

[b] **Sufficient plea.**—A plea that he has fully administered is not objectionable because the answer shows that an agent of decedent collected more money than he turned over to representative, it not being shown that the representative actually received the amount of money collected. Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

65. Siedler v. Bell, 20 NYS 451; Bacon v. Berry, 85 N. C. 124; Hanlon v. Wheeler, (Tex. Civ. A.) 45 SW 821.

[a] **In a suit for an account of rents** it is a sufficient answer that they were consumed in maintaining the realty and in repaying defendant a balance due on the surrogate's decree. Wilcox v. Quinby, 20 NYS 5.

[b] **Payment of a dormant justice's judgment** is a good defense to an action for an account. Bacon v. Berry, 85 N. C. 124.

[c] **Effect of allegation.**—Where a daughter presents a petition to the surrogate to compel an accounting by her mother's administrator, an allegation of payment in the answer is not fatal to the application. Matter of Williams, 57 Misc. 537, 109 NYS 974, 6 Mills Surr. 333.

[d] **Payment of medical bills and funeral expenses of legatee not a defense.**—In re Hastendenbeck, 73 N. J. Eq. 337, 75 A 823 [rev (Prerog.) 67 A 179].

66. Bogle v. Bogle, 23 Ala. 544; Gayle v. Elliott, 10 Ala. 264; Skinner v. Frierson, 8 Ala. 915.

67. Price's Est., 9 Pa. Dist. 511, 24 Pa. Co. 224.

68. Henderson v. McClure, 7 S. C. Eq. 466.

69. Stein v. Gordon, (Ala.) 10 S 631.

70. Meeker v. Marsh, 1 N. J. Eq. 198.

the administrator of the deceased executor, and that in such settlement the correct balance was ascertained and payment made, constituted a good plea in bar of the action, and hence it was error to order a reference before disposition was made of the plea.[71]

A claim for certain credits which the probate court has authorized the administratrix to take at some future settlement to be filed by her cannot be made in an action by creditors to have certain lands, which have been redeemed by the general assets, subjected to the payment of their debts, when she has not asked for a credit in any settlement and her administration is still open.[72]

Settlement of foreign administrator. Where a foreign administrator, pending the litigation against him for an accounting, settles his accounts in the forum of his appointment, such settlement will be conclusive on the rights of the parties.[73]

Pleading limitations. In order to defeat a proceeding to compel him to account on the ground of limitations, the executor or administrator must allege in his answer not only the requisite lapse of time but also that such lapse occurred after the repudiation by him of the trust relation.[74]

When allegations of answer taken as true. Where a bill against executors for a second accounting after one final settlement does not specify errors, and the executors answer, giving a full account of their administration, and there is a decree for an account, the allegations of their answer, although affirmative, must be taken as true, unless disproved, so far as they relate directly to the accounts which they are thus required to give, and if in such a case plaintiff does not amend his bill and specify errors in the accounts, allegations in the answer, although not explanatory of the account, and therefore perhaps not within the scope of the discovery sought by the bill, but having a relation to the subject matter of the account, and important to a correct understanding of the motives of the executors and of the circumstances under which they acted, unless disproved, are to be taken as true.[75]

Mode of objection for insufficiency. Insufficiency of the answer cannot be set up in exceptions but must be taken advantage of by demurrer or replication.[76]

[§ 2379] **(7) Issues, Proof, and Variance.** In order to entitle a party seeking an accounting to relief, the allegations and proof must correspond.[77] The rule that the evidence must be confined to the issues raised by the pleading[78] is applicable to an action for an accounting and settlement of an estate;[79] but where a bill for a general account of the administration is filed by a specific legatee, he is not confined to evidence as to the specified allegations in the bill as he would be in a bill to surcharge and falsify an account or to reopen a settlement.[80] An immaterial variance between pleading and proof may be disregarded.[81]

[§ 2380] **(8) Evidence—(a) Presumptions.** As a general rule the answer of the personal representative, when responsive in its averments, should be assumed to be true,[82] but an allegation by way of defense which is not responsive to the bill is not to be regarded as proved until rebutted by two witnesses or equivalent evidence, as is the rule in equity.[83] Where no distinct and clear accounts have been kept by an executor, doubts which arise must be taken most strongly against him, and against his personal representatives.[84]

[§ 2381] **(b) Burden of Proof.** Ordinarily where the existence of assets is put in issue, the burden of proof rests upon the party seeking an accounting,[85] although under a vague and unsatisfactory answer it may not be incumbent on complainant to show that debts due the estate had been collected or were collectable.[86] If it is shown that the representative has assets in his hands the burden is on him to account for the funds,[87] and where plaintiffs show an indebtedness due the estate, the administrator has the burden of proving that he used due diligence to collect it and was unable to do so,[88] or, having collected it, has accounted for it.[89] An administrator who paid for a street improvement for which his intestate was not legally liable has the burden of proving, when sued by the heirs, that the fund appropriated to its payment had been set apart by intestate for that purpose.[90] Distributees to whom an executor submitted his accounts to further an amicable settlement and who retained them for nearly a year without question will have the burden cast on them to surcharge and falsify the accounts,[91] but distributees who had no connection with the examination of the accounts will not be affected.[92] The books of a firm are prima facie evidence against a surviving partner who is executor of the deceased member of the firm, and it is incumbent upon the executor to show what corrections, if any, should be made.[93]

Fraud. Where fraud is alleged by plaintiff, the burden rests on him to establish the charge,[94] but

71. Jones v. Wooten, 137 N. C. 421, 49 SE 915.

72. Salinger v. Black, 68 Ark. 449, 60 SW 229.

73. Whittaker v. Whittaker, 10 Lea (Tenn.) 93.

74. Matter of Meyer, 98 App. Div. 7, 90 NYS 185 [aff 181 N. Y. 553 mem, 74 NE 1120 mem]; Matter of Williams, 57 Misc. 537, 109 NYS 974, 6 Mills Surr. 333.

75. Corbin v. Mills, 19 Gratt. (60 Va.) 438.

76. Reichner's Est., 32 Pa. Co. 498.

77. Julian v. Reynolds, 11 Ala. 960; Butterfield v. Munch, 183 Ill. A. 31.

78. See Pleading [31 Cyc 670].

79. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Ga.—Wright v. Clark, 145 Ga. 534, 89 SE 618.

Ky.—Willis v. Willis, 168 Ky. 250, 181 SW 1105.

Miss.—Perkins v. Sturdivant, 4 S 555.

N. Y.—Stiles v. Burch, 5 Paige 132.

N. C.—Daniel v. Bellamy, 91 N. C. 78.

80. Pulliam v. Pulliam, 10 Fed. 53.

81. Montgomery v. Givhan, 24 Ala. 568.

82. Barroll v. Peters, 20 Md. 172; Price's Est., 9 Pa. Dist. 511, 24 Pa. Co. 224; Mead's Est., 4 Pa. Dist. 750.

83. Duncan v. Dent, 26 S. C. Eq. 7.

84. Lawson v. Burgee, 131 Md. 436, 103 A 516.

85. Hough's Succ., 119 La. 435, 44 S 190; Seaward v. Davis, 198 N. Y. 415, 91 NE 1107 [mod 133 App. Div. 191, 117 NYS 468]; Seaward v. Davis, 198 N. Y. 415, 91 NE 1107 [mod 133 App. Div. 191, 117 NYS 468].

[a] **Rule applied.**—In a suit by the administrator with the will annexed of testator against the executor of the widow for an accounting as to the property which the widow had received from the estate of her deceased husband, the burden was on plaintiff to show that some part of the husband's estate passed to defendant, or was in his possession, where the executor filed an account in which he stated that he was unable to find any of the personal property of the husband. Seaward v. Davis, 198 N. Y. 415, 91 NE 1107 [mod 133 App. Div. 191, 117 NYS 468].

86. Smith v. Griffin, 32 Ga. 81.

87. Adams v. Adams, 113 Ga. 824, 39 SE 291.

88. Mann v. Baker, 142 N. C. 235, 55 SE 102.

89. Mann v. Baker, 142 N. C. 235, 55 SE 102.

90. May v. Smith, 177 Ky. 707, 198 SW 2.

91. Powell v. Powell, 10 Ala. 900.

92. Powell v. Powell, 10 Ala. 900.

93. Matter of Saltus, 3 Abb. Dec. (N. Y.) 243, 3 Keyes 500.

94. Veysey v. Veysey, 86 Wash. 553, 151 P 39.

where fraud has been shown, the burden rests on the representative to show that he has reaped no benefit therefrom.[95]

Birth of posthumous child. Where a widow, who acted as administratrix of her deceased husband, who died leaving as his only relatives the widow, his father and mother, and sisters and a brother, sought to defeat the petition of the father for a compulsory accounting by showing birth of a posthumous child, she had the burden of proving that she gave birth to a child born alive.[96]

[§ 2382] **(c) Admissibility.** In a suit in equity brought by a legatee against an executor for account and distribution, if the answer of the executor is vague and unsatisfactory, many years having elapsed since the transaction took place, great latitude should be allowed in offering evidence to charge the executor, and all evidence, not positively illegal, tending even remotely to elucidate the case should be admitted.[97] It is competent for heirs and distributees, suing the administrator for a settlement, to show any indebtedness due the estate,[98] and the admission of an administrator made in writing but not under oath, that he has collected assets, is evidence against him in an action to which he is a party.[99] In a suit by legatees against an executor for an accounting and payment of their legacies, evidence that some of the heirs at law did not know of or authorize a settlement pleaded by the executor in bar of the suit is admissible on the issue made in regard to the bona fides of the settlement.[1] The testimony of an executor that the life tenant of the estate objected to his suing upon a note due the estate is competent as bearing upon his bona fides as to its collection.[2] In a proceeding by an administrator de bonis non against the representative of the former administrator to compel final settlement of the first administration, the records of the court, containing a partial settlement, are admissible.[3] Where certain creditors of an estate by note received payments thereon and agreed to release the administrator from personal liability on account of a previous improper payment of a note barred by the statute of limitations, such notes were not admissible, in a subsequent suit by a creditor by account against the administrator, to show outstanding debts of higher dignity than plaintiff's.[4] In an action by the heirs and distributees of a decedent against his administrator for a settlement, plaintiffs were entitled to show that a former administrator had received a specified sum as proceeds on a sale of decedent's real estate, pursuant to the order of court, and, on the evidence, being admitted, defendant was obliged to show that he had used diligence to collect it, and, having done so, had accounted for it.[5] In suit by distributees against the administrator for an accounting and settlement, alleging that he had dominated intestate and by fraud and undue influence had obtained money from her, evidence that he influenced intestate's general conduct by threats and acts of violence, etc., was admissible.[6] In an action by the permanent administratrix against a temporary administrator for an accounting as to personalty of intestate, an agreement between the widow and the temporary administrator conferring authority on the latter as to the disposal of property of intestate is irrelevant.[7] Vouchers or official copies of them may be controverted by parol evidence.[8]

Value of bonds. The parties seeking an account are not compelled to take the price realized at a sale of certain bonds and stocks by the administrator, as conclusive evidence of value, but may prove the market quotations of value at different times.[9]

Financial condition of representative. Where the representative was charged with antecedent obligations to decedent, a statement made by him in his application to a surety company to become surety on his bond, showing his solvency, was admissible in evidence against him on the question of his solvency at the time of his appointment,[10] and the number of docketed judgments in his favor was also competent along with evidence of the extent and value of his estate.[11]

[§ 2383] **(d) Weight and Sufficiency.** In a creditor's bill against an administrator, when it is found upon a reference to ascertain the debts that the fund is sufficient to pay such debts, a judgment against the administrator, or the admission of the debt, is taken as full proof, for the reason that the other creditors are not interested in the matter.[12] Where evidence is conflicting as to whether an administrator paid a claim out of the estate funds or with his own money, a finding that estate funds were used for that purpose will not be disturbed.[13] Where, in an action by an administrator for a settlement of his intestate's estate and seeking to recover of defendant certain property which he alleged belonged to the estate, defendant admitted that the property once belonged to decedent, but alleged that he purchased it from him for a valuable consideration a short time before his death, evidence tending to show a gift of the property by decedent to defendant's wife failed altogether to sustain the allegations of the answer.[14] Reference is made in the note to decisions in which the courts have passed upon the sufficiency of evidence with respect to such matters as failure to account,[15] settlement with decedent of a claim,[16] failure of an administrator to make a final settlement during his life,[17] fraud in procuring a decree of distribution which discharged the representative,[18] the character of a pretended absolute purchase of property as a conveyance to

95. Balfe v. Tilton, 235 Fed. 448.
96. Matter of Smith, 136 App. Div. 10, 120 NYS 124 [app dism 198 N. Y. 616 mem, 92 NE 1102 mem].
97. Smith v. Griffin, 32 Ga. 81.
98. Mann v. Baker, 142 N. C. 235, 55 SE 102.
99. Biss' Est., 4 Pa. Dist. 251; Montgomery v. Caldwell, 14 Lea (Tenn.) 29.
1. Kidd v. Huff, 105 Ga. 209, 31 SE 430.
2. Orr v. Orr, 34 S. C. 275, 13 SE 467.
3. McDonald v. Jacobs, 85 Ala. 64, 4 S 605; Powell v. Powell, 10 Ala. 900; McCall v. Peachy, 3 Munf. (17 Va.) 288.
4. McBride v. Hunter, 64 Ga. 655.
5. Mann v. Baker, 142 N. C. 235, 55 SE 102.
6. Strickland v. Strickland, 147 Ga. 494, 94 SE 766.
7. Wright v. Clark, 145 Ga. 534, 89 SE 618.
8. McCall v. Peachy, 3 Munf. (17 Va.) 288.
Parol evidence to contradict receipts generally see Evidence § 1520.
9. Moseley v. Johnson, 144 N. C. 257, 274, 56 SE 922.
10. Moseley v. Johnson, 144 N. C. 257, 274, 56 SE 922.
11. Moseley v. Johnson, 144 N. C. 257, 274, 56 SE 922.
12. Overman v. Grier, 70 N. C. 693.
13. Sanguinetti v. Gianelli, 6 Cal. Unrep. Cas. 489, 61 P 1106.
14. Buford v. Shinkle, 12 KyL 686.
15. Dugan v. Harris, 13 Ky. Op. 297 (insufficient).
16. McClure v. Anchor Roller Mills, 99 SW 221, 30 KyL 509 (not shown).
17. French v. Way, 93 S. C. 522, 76 SE 617 (sufficient).
18. Veysey v. Veysey, 86 Wash. 553, 151 P 39 (insufficient).

the administrator as security for money advanced by him,[19] a transfer of trust funds by executors to themselves as trustees,[20] the assumption by decedent, through an agent, of the sole management and control of certain properties,[21] and acquirement by the representative of possession of certain gold coin buried by decedent.[22]

[§ 2384] **(9) Trial, Hearing, and Determination.** Where a petition by legatees and the answer involved questions of the removal of the executor, his liability to account, and an accounting, it was proper for the court to take testimony on all these questions and decide them by one decree.[23] In an action against an administrator and another, beneficiaries under the will, for the administrator's failure to account for notes executed by him to the testator, the only issue being as to whether testator had given the notes to the administrator's codefendant, the question of value was immaterial, and it was not error for the court in its instructions to assume that they were worth their face value.[24] The court has a reasonable discretion as to whether it will order an accounting.[25]

Direction of verdict. Where an administrator's return was never approved by the ordinary, and his answer in a proceeding by heirs to compel a settlement admitted that he had received a certain amount in cash, a directed verdict against him for such amount, less an item admitted to be correct, was proper.[26]

Reference. Where a good plea in bar of an accounting has been interposed, it is improper to order a reference until such plea has been disposed of.[27] The report of a master to whom the cause was referred was not subject to objection because it did not contain a complete statement of the executors' account in debtor or creditor form, where it contained itemized exhibits and schedules which, in connection with the inventory and settlements made by the executors, afforded more complete information than such a statement would have done.[28]

[§ 2385] **(10) Dismissal.** Where no question as to the sufficiency of the petition was ever submitted to the court, or even raised upon the record, it was error to dismiss the petition pending a motion for a reference to a master commissioner.[29] Where, in a suit by testator's grandchildren against the executrix of the estate of testator's widow for settlement of his estate and a division of his personal property between the grandchildren, on the theory that his will passed only a life estate to his widow, it appeared on demurrer that testator had no personal property at the time of his death, and that there was therefore no estate to settle, the suit was properly dismissed.[30] Where accounts involved in the settlement of an estate are in confusion, and the evidence as to them conflicting, the court may refuse to adjust the accounts and leave the parties where by their manner of dealing they have placed themselves.[31]

[§ 2386] **(11) Judgment or Decree.** Where a bill for removal of the administration of an estate from the probate to the chancery court presents several contested points, affecting the administration, for determination, complainants are entitled to a decree on such of the contested points presented as are sustained by the proofs.[32] Where the petition contains a demand for an accounting and the removal of the administrator, the judgment may validly decree his removal, and that he shall pay a certain sum of money for which he is liable to the estate.[33] Where testator gave a certain sum to his niece to be put out at interest, the interest to be paid to her annually during the lifetime of her husband and at his death, should she outlive him, the principal to be paid to her, and the executor of the testator paid the interest to the niece until his death, and the administrator of the executor paid to the administrator de bonis non of the testator the sum given to the niece in Confederate money, and thereafter the niece died leaving her husband surviving, it was held, in a suit by the husband and others for a settlement in which the administrator de bonis non of the testator was not a party, that it was error to direct an inquiry as to what he had done with the Confederate money paid to him by the administrator of the executor, but the decree against the administrator of the executor should be without prejudice to his right to proceed against the administrator de bonis non for an accounting.[34]

Directing payment of debts. So long as decrees of reference entered in a suit to settle the estate of a decedent are not fully executed, and the data are not arrived at whereby an accurate account can be made for the final distribution of the assets of the estate, it is proper for the commissioner to whom the cause has been referred to include in his report any outstanding valid debt against the estate and for the court to decree payment of such debt.[35] Where on a bill by a creditor against an executor and the legatees there is a dispute between the executor and the legatees as to whether he should pay the creditor without contribution from them, he will be decreed to pay the debt from his own goods and left to his remedy at law against the legatees, where it appears that he has paid them enough to satisfy the debt.[36]

Setting aside conveyance and directing sale. Where plaintiff furnished part of the money to purchase land and make improvements thereon, the title being taken by plaintiff's sister, who thereafter conveyed to decedent, her mother, and plaintiff claimed that a note given her for the money was executed by decedent, while defendants claimed that the sister executed it, and the land was all the sister had that was subject to her debts, and under the express provisions of the statute, the conveyance was void as to her creditors, although valid as between the parties thereto, it was held in an action by plaintiff as creditor to settle decedent's

19. Hauser v. Lash, 22 N. C. 212 (sufficient).
20. Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev 178 App. Div. 243, 164 NYS 1024].
21. Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296 (sufficient).
22. Bauernschmidt v. Bauernschmidt, 101 Md. 148, 60 A 437 (sufficient).
23. Stevens v. Ottawa Prob. Judge, 156 Mich. 526, 121 NW 477.
24. Crawford v. Hord, 40 Tex. Civ. A. 352, 89 SW 1097.
25. Lightner's Est., 144 Pa. 273, 22 A 808; Greenwald's Est., 25 Pa. Dist. 684.
26. Dubberly v. Varnedoe, 22 Ga. A. 738, 97 SE 261.
27. Jones v. Wooten, 137 N. C. 421, 49 SE 915.
28. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.
29. Courts v. Courts, 6 KyL 523.
30. Voss v. Cook, 149 Ky. 18, 147 SW 757.
31. Taylor v. Roulstone, 60 SW 867, 61 SW 354, 22 KyL 1515; Lightner v. Speck, (Va.) 28 SE 326.
32. Bromberg v. Bates, 112 Ala. 363, 20 S 786.
33. Gray v. Waddell, 33 La. Ann. 1021.
34. Stark v. Lipscomb, 29 Gratt. (70 Va.) 322.
35. Turk v. Ritchie, 104 Va. 587, 52 SE 329.
36. Sampson v. Payne, 5 Munf. (19 Va.) 176.

estate, making the latter's executor and her devisees, including the sister parties defendant, that the court should have adjudged the conveyance void, in so far as it affected plaintiff's right to subject the land to her debt, and to that end should have decreed a sale of the property, it being indivisible.[37]

In whose favor decree may run. A decree against an administrator who has resigned, rendered in favor of "the present administrator de bonis non," is void when there is no such administrator in existence.[38] A final decree should not be rendered in favor of one of complainants as guardian ad litem of a certain person where such person is not a party and is not shown to have any interest in the estate.[39] But in a suit by a part of the distributees and heirs at law of an intestate against his administrator, the court has power, after determining the fund due from the administrator, to decree the separate sums due from such fund to the several distributees of the estate, although many of such distributees were not named as complainants in the bill.[40]

Against whom decree may run. Where the sureties of an administrator are made parties and duly notified, the judgment should be rendered against the administrator and the sureties.[41]

Character of decree as final. A decree in a suit to settle a decedent's estate, adopting certain specific portions of the commissioner's report, directing the payment of certain specified debts and a partial distribution of the assets of the estate among the legatees, requiring such legatees to give refunding bonds, and recommitting the cause to a master to take a further account and not confirming the report, is not a final decree, such as to preclude a creditor from thereafter coming into the cause and asserting a demand against the estate.[42]

Effect of decree. A decree against an executor and his sureties and their personal representatives in favor of the testator's legatees and creditors, in a suit for the settlement and distribution of the estate, is conclusive on the question whether or not a claim asserted in such suit was barred by the statute of limitations.[43] On a bill by an executor to administer the assets for the payment of decedent's debts, which states that a person named claims a debt against the estate, and makes such person a formal party, if he does not appear, and a decree is made not allowing his debts, and subjecting the land of the estate to the payment of other debts, such person is concluded by the decree.[44]

[§ 2387] **(12) Appeal.** Ordinarily, under the statutes, an appeal lies in an action for the settlement of a decedent's estate.[45] But where, in such an action, the administrator set up no individual claim to certain real estate alleged to belong to deceased, either by pleading or otherwise, in the trial court, he is not entitled to claim such property on an appeal in his individual capacity.[46] Where the creditors of an estate in progress of settlement in chancery are required by an order of court to come in and prove their debts, they become quasi parties to the cause, and may appeal and assign error on account of the rejection of their claims.[47]

[§ 2388] **(13) Stay of Other Actions or Proceedings pending Accounting.** After equity has taken jurisdiction of the settlement of an estate and of the accounting of the executor or administrator, proceedings by him to settle an account in the probate court are of no effect;[48] and after a bill has been filed against an executor or administrator he cannot at the same time be proceeded against at law[49] or in the surrogate's court[50] for the same purpose.[51] It has been held, however, that an action to determine a matter connected with an accounting, which action is pending in another court, need not suspend proceedings in the surrogate's court.[52] A decree for an account in one creditor's suit operates as a suspension of all other pending suits, for the other creditors may come in under the decree[53] inasmuch as the account is for the benefit of all.[54] From the date of the decree an injunction will be granted as a matter of course on motion of either party[55] and on due disclosure of assets[56] to stay all proceedings of any creditor at law.[57] But an injunction will not issue until an account has been decreed.[58]

[§ 2389] **(14) Execution.** A decree against the executor or administrator for the payment of money is enforceable by execution against his goods,[59] not against the goods and chattels of decedent.[60] When

37. Heckling v. Gehring, 100 SW 824, 30 KyL 1198.

38. Julian v. Woolbert, (Ala.) 81 S 32; Martin v. Atkinson, 108 Ala. 314, 18 S 888.

39. McKenzie v. Matthews, 153 Ala. 437, 44 S 958.

40. Thornton v. Tison, 95 Ala. 589, 10 S 639.

41. State v. Canterbury, 124 Mo. A. 241, 101 SW 678.

42. Turk v. Ritchie, 104 Va. 587, 52 SE 339.

43. Smith v. Moore, 102 Va. 260, 46 SE 326.

44. Trail v. Trail, 56 W. Va. 594, 49 SE 431.

45. See Appeal and Error §§ 406–411; and Trail v. Trail, 56 W. Va. 594, 49 SE 431.

[a] **Illustration.**—A decree in a suit by an executor against devisees to convene the creditors and administer the assets for their payment, on a report of debts by a commissioner, which decrees debts against the estate and subjects its lands to their payment, is appealable within two years. Trail v. Trail, 56 W. Va. 594, 49 SE 431.

46. Hiles v. Hiles, 82 SW 580, 26 KyL 824 [reh den 83 SW 615, 26 KyL 1264].

47. Pearson v. Darrington, 32 Ala. 227.

48. Pearson v. Darrington, 21 Ala. 169; Wood v. Lee, 5 T. B. Mon. (Ky.) 50; Saunders v. Saunders, 2 Litt. (Ky.) 314.

49. Valentine v. Farrington, 2 Edw. (N. Y.) 53.

50. Matter of De Pierris, 79 Hun 279, 29 NYS 360.

51. See supra notes 49, 50.

52. Peo. v. Rollins, 33 Hun (N. Y.) 47.

53. Brooks v. Gibbons, 4 Paige (N. Y.) 374; Paxton v. Rich, 85 Va. 378, 7 SE 531, 1 LRA 639; Duerson v. Alsop, 27 Gratt. (68 Va.) 229; Stephenson v. Taverners, 9 Gratt. (50 Va.) 398.

54. Boyd v. Harris, 1 Md. Ch. 466; Hazen v. Durling, 2 N. J. Eq. 133; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619.

55. Boyd v. Harris, 1 Md. Ch. 466; Rogers v. King, 8 Paige (N. Y.) 210.

56. Boyd v. Harris, 1 Md. Ch. 466; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619.

57. Boyd v. Harris, 1 Md. Ch. 466; Rogers v. King, 8 Paige (N. Y.) 210; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Duerson v. Alsop, 27 Gratt. (68 Va.) 229.

58. Mactier v. Lawrence, 7 Johns. Ch. (N. Y.) 206.

[a] **An administrator cannot be enjoined from paying a particular debt before** the decree to account is rendered. Wadsworth v. Davis, 63 N. C. 251; Allison v. Davidson, 21 N. C. 46.

59. U. S.—Catlett v. Fairfax, 5 F. Cas. No. 2,516, 2 Cranch C. C. 99.

La.—Philbrick's Succ., 18 La. Ann. 220.

Mass.—Taft v. Stow, 174 Mass. 171, 54 NE 506 [foll Tyler v. Brigham, 143 Mass. 410, 9 NE 750].

N. Y.—Power v. Speckman, 126 N. Y. 354, 27 NE 474; Matter of Waring, 7 Misc. 502, 28 NYS 393, 1 Gibb. Surr. 49; Peyser v. Wendt, 2 Dem. Surr. 221.

Va.—Moore v. Ferguson, 2 Munf. (16 Va.) 421; Barr v. Barr, 2 Hen. & M. (12 Va.) 26.

[a] **On a bill by a beneficiary against the executor of a trustee** for an accounting, the beneficiary is entitled to an execution as at common law against the estate of the trustee in the hands of the executor for the principal sum found due, and another execution for costs against the executor personally. Taft v. Stow, 174 Mass. 171, 54 NE 506 [foll Tyler v. Brigham, 143 Mass. 410, 9 NE 750].

60. Matter of Waring, 7 Misc. 502,

judgment is obtained against the personal property of decedent, the execution should not run against his personal representatives.[61] No execution can be issued on a void decree.[62] Execution may be ordered against an administrator personally if he makes a vague and insufficient answer to a rule taken by creditors whose claims have been fixed by a final judgment upon the administrator's account.[63]

[§ 2390] **(15) Costs.** Since it is the right of the persons who are beneficiaries of the estate to have an account and settlement from the administrator they cannot be compelled to pay the costs incurred in settling the estate,[64] but costs are sometimes allowed against an executor or administrator who has neglected his duty.[65] It has also been held proper to allow costs to neither party as against the other,[66] and in a proper case costs may be paid out of the estate.[67] Where a court's order assessing all costs previously incurred in an action by heirs against an administrator against such heirs, as a condition to setting aside a dismissal of the action for the heirs' failure to prosecute, was not set aside or appealed from, the court had no power after the term to adjudge such costs against the administrator.[68]

The executor of a deceased executor cannot be personally charged with the costs of a proceeding to compel him to account as to the estate of which his testator was executor, where he had received no property as executor and has been guilty of no misappropriation of funds or wrongdoing.[69]

[§ 2391] **(16) Counsel Fees.** A representative is entitled on the settlement of his accounts in equity to an allowance for reasonable counsel fees for services rendered in a suit instituted by him for a settlement and distribution when the condition of the estate and the conflicting trusts united in his person rendered it necessary to resort to a court of equity,[70] but the fees of attorneys employed by the representatives to resist a settlement should not be paid out of the estate.[71] Fees of counsel for services rendered solely for the benefit of a legatee[72] or one claiming to be such,[73] or a creditor who brings an action for a settlement,[74] will not be paid out of the estate, although it has been held that counsel fees will be allowed where the action results in benefit to all the legatees,[75] or to the estate,[76] or was prosecuted by one of the heirs for the benefit of all.[77] It has been held that the court has jurisdiction to rule the administrator to pay to the attorney for devisees a proper compensation for his services rendered to them and at their instance in an action brought by the administrator against them for a settlement.[78]

[§ 2392] **D. Charges.** In his account the representative should be charged with moneys and other assets of the estate which he has received,[79] al-

28 NYS 593, 1 Gibb. Surr. 49; Moore v. Ferguson, 2 Munf. (16 Va.) 421; Barr v. Barr, 2 Hen. & M. (12 Va.) 26.

61. Olmsted v. Vredenburgh, 10 HowPr (N. Y.) 215.

62. Martin v. Atkinson, 108 Ala. 314, 18 S 888.

63. Stevens v. Stevens, 13 La. Ann. 416.

64. Ransdell v. Threlkeld, 4 Bush (Ky.) 347; Craig v. Manning, 8 N. J. Eq. 806; Lee's Est., 6 Pa. Dist. 466; Re Winters, 7 Terr. L. 250.

65. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

66. Torbet v. McReynolds, 4 Humphr. (Tenn.) 215.

67. Anderson v. Piercy, 20 W. Va. 282 (where an executor brought a suit to settle his accounts and made a distribution of the estate under the order of the court, there being a necessity for such a suit because of the difficulty of making distribution, and after a settlement in such suit of the executor's accounts by a commissioner, the necessity for the interposition of the court having ceased, the suit was not prosecuted by the executor, and the legatees after the lapse of much time instituted an independent suit for a settlement of the executor's accounts, and both causes were heard together, and a balance was found due from the executor, and the appellate court reversed the decision and found a larger balance due from the executor, the costs of the court below and in the appellate court should be paid out of the estate, and not by the executor personally).

68. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

69. Matter of Walton, 112 App. Div. 176, 98 NYS 42.

70. Clark v. Knox, 70 Ala. 607, 45 AmR 93; McCain v. McCain, 167 Ky. 115, 180 SW 56; Snook v. Kennedy, 103 Wash. 390, 174 P 643.

71. Griggs v. Love, 13 KyL 175.

72. Hood v. Maxwell, 66 SW 276, 23 KyL 1791.

73. Sparks v. Ross, 82 N. J. Eq. 121, 88 A 214.

74. Miller v. Swan, 91 Ky. 36, 14 SW 964, 12 KyL 629; Patterson v. Miller, 72 N. C. 516.

75. Wooten's Est., 21 Pa. Dist. 1035.

76. McCain v. McCain, 167 Ky. 115, 180 SW 56.

77. Griggs v. Love, 13 KyL 175.

78. Adams v. Landrum, 9 KyL 287.

79. Ala.—Munden v. Bailey, 70 Ala. 63.

Cal.—In re Gianelli, 146 Cal. 139, 79 P 841; In re Kennedy, 120 Cal. 458, 52 P 820.

Ill.—Matter of Brown, 207 Ill. A. 536; Platt v. Williams, 175 Ill. A. 1.

Iowa.—In re Irwin, 152 Iowa 323, 131 NW 57.

Md.—Bauernschmidt v. Bauernschmidt, 101 Md. 148, 60 A 437.

Mass.—Allen v. Hunt, 213 Mass. 276, 100 NE 552.

Mich.—Gee v. Hasbrouck, 128 Mich. 509, 86 NW 621.

Minn.—Bealieu v. Ain-E-Waush, 126 Minn. 321, 148 NW 282.

Mo.—Scudder v. Ames, 89 Mo. 496, 14 SW 525.

Mont.—In re Williams, 55 Mont. 63, 173 P 790.

N. J.—In re Slater, 88 N. J. Eq. 296, 102 A 384.

N. Y.—Matter of Edelmeyer, 157 App. Div. 773, 142 NYS 726 [aff 210 N. Y. 552 mem, 104 NE 1129 mem]; Matter of Hamlin, 141 App. Div. 318, 126 NYS 396; Matter of McMonagle, 139 App. Div. 398, 124 NYS 258; Matter of Ablowich, 118 App. Div. 626, 103 NYS 699; Matter of McDowell, 97 Misc. 306, 163 NYS 164 [rev on other grounds 178 App. Div. 243, 164 NYS 1024]; Matter of Pollock, 91 Misc. 471, 155 NYS 270; Matter of Collmar, 79 Misc. 592, 141 NYS 179; Matter of Davies, 50 Misc. 94, 100 NYS 349, 5 Mills Surr. 328; Matter of Kemp, 49 Misc. 396, 100 NYS 221, 5 Mills Surr. 280.

Or.—In re Conser, 40 Or. 138, 66 P 607.

Pa.—In re Kramer, 255 Pa. 595, 100 A 447; In re Bell, 230 Pa. 359, 79 A 644; Frederick's Est., 54 Pa. Super. 535; White's Est., 23 Pa. Super. 552; Nuss' Est., 20 Pa. Dist. 159; Mansfield's Est., 13 Pa. Dist. 15, 29 Pa. Co. 464; In re Eisenmann, 12 Pa. Dist. 322, 28 Pa. Co. 543, 19 Montg. Co. 215; Furlong's Est., 10 Pa. Dist. 527; Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; Bickley's Est., 31 Pa. Co. 465; Collins' Est., 31 Pa. Co. 31; Kite's Est., 28 Pa. Co. 560; Eisenmann's Est., 28 Pa. Co. 543; McLean's Est., 5 Kulp 207; Osterhout's Est., 8 LancLRev 18.

S. C.—Ex p. Coleman, 98 S. C. 420, 82 SE 674.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288.

[a] **Proceeds of insurance.**—Linzy v. Whitney, 110 App. Div. 462, 96 NYS 1075.

[b] **Legacy not paid over.**—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720.

[c] **Gold coin buried by decedent.**—Bauernschmidt v. Bauernschmidt, 101 Md. 148, 60 A 437.

[d] **Goodwill.**—Matter of Hiscox, 135 App. Div. 848, 120 NYS 308 [app dism 200 N. Y. 584 mem, 94 NE 1094]; Matter of Moor, 69 Misc. 535, 127 NYS 884, 8 Mills Surr. 16 [aff 145 App. Div. 938 mem, 130 NYS 1122 mem].

[e] **Price or value of tobacco.**—McCall v. Peachy, 3 Munf. (17 Va.) 288.

[f] **Trade-marks.**—Matter of Hiscox, 135 App. Div. 848, 120 NYS 308 [app dism 200 N. Y. 584 mem, 94 NE 1094 mem].

[g] **Amount recovered by executrix under invalid will.**—Read v. Franklin, (Tenn. Ch. A.) 60 SW 215.

[h] **Liable for money collected in a foreign state or country.**—McPike v. McPike, 111 Mo. 216, 20 SW 12; Swearinger v. Pendleton, 4 Serg. & R. (Pa.) 389; Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

[i] **Life estate of widow.**—Where testator by will gave his widow all his personal estate during her widowhood and to others all the property that might revert to his estate, the widow was entitled to the possession of all such property and the administrators were chargeable with only so much as was received back by them. Gee v. Hasbrouck, 128 Mich. 509, 86 NW 621.

[j] **The proceeds of a sale by an**

though they are not included in the inventory,[80] as where they have been received since the filing of the inventory.[81] But he cannot be charged in his account with money or property received or held by him otherwise than in his fiduciary capacity as the representative of decedent,[82] or which, although received by him in his fiduciary capacity, does not belong to the estate by reason of the failure of the condition on which it was received,[83] or with money or property which, although in decedent's possession at the time of his death, really belonged to the representative.[84] Neither can he be charged with property which has never been in his possession or control or admitted by him to be available assets.[85] The representative should in the first instance be charged with assets at their inventoried or appraised value;[86] but such charge is not conclusive of his liability for that amount,[87] and if such assets have actually realized more[88] or, without fault or negligence on the part of the representative, less,[89] the representative is accountable for the amount so realized. Executors filing a joint account are properly surcharged with notes due the estate by one of them.[90] The representative should not be charged more than once with the same item,[91] nor can he be surcharged with certain items without being given an opportunity to be heard and produce evidence as to the propriety of such surcharge;[92] but he may be required to charge himself with amounts for which he has improperly taken credit;[93] and items for which credit is unjustly claimed on an intermediate accounting may be surcharged, with-

executor under a direction in the will to sell real estate, proceeds to become part of the residuary estate of testatrix, are not assets for which the executor can be called upon to account in the surrogate's court. Matter of Green, 63 Misc. 638, 118 NYS 747, 7 Mills Surr. 228.

What constitutes assets see supra §§ 317–372.

80. Md.—Hoffman v. Armstrong, 90 Md. 123, 44 A 1012.

Mass.—Hooker v. Bancroft, 4 Pick. 50; Boston v. Boylston, 4 Mass. 318.

Mich.—Porter v. Long, 124 Mich. 584, 83 NW 601.

N. J.—Schick v. Grote, 42 N. J. Eq. 352, 7 A 852.

N. Y.—In re Rogers, 153 N. Y. 316, 47 NE 589 [aff 92 Hun 609 mem, 36 NYS 1132 mem]; Matter of Mullon, 145 N. Y. 98, 39 NE 821; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Matter of Goundry, 57 App. Div. 232, 68 NYS 155; Matter of Baker, 42 App. Div. 370, 59 NYS 121; Matter of Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 57 NE 1117 mem]; Bainbridge v. McCullough, 1 Hun 488; Matter of Van Sise, 38 Misc. 155, 77 NYS 266, 3 Mills Surr. 112; Halsted v. Hyman, 3 Bradf. Surr. 426.

Oh.—In re Glenn, 23 Oh. Cir. Ct. 397.

Pa.—Hubley's App., 19 Pa. 138; Reed's Est., 22 Pa. Super. 635; Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; Immendorf's Est., 7 Pa. Dist. 449, 21 Pa. Co. 268, 4 LackLegN 266 [aff 109 Pa. 590, 42 A 959].

S. C.—Bramlett v. Mathis, 71 S. C. 123, 50 SE 644.

Wis.—Robinson v. Hodgkin, 99 Wis. 327, 74 NW 791.

[a] **Debt of executor or administrator.**—The rule applies to debts owing by the administrator or executor and omitted from the inventory, as well as to debts owing by third persons. Jones v. Willis, 72 Oh. St. 189, 74 NE 166 [cit In re Raab, 16 Oh. St. 273].

81. Hooker v. Bancroft, 4 Pick. (Mass.) 50; Schick v. Grote, 42 N. J. Eq. 352, 7 A 852; Matter of Mullon, 74 Hun 358, 26 NYS 683 [aff 145 N. Y. 98, 39 NE 821]; Hubley's App., 19 Pa. 138; Fitzpatrick's Est., 29 Pa. Co. 222; Squire's Est., 11 Phila. (Pa.) 110.

[a] **"Increase" of the inventory.**—In rendering an account the executor must first charge himself with the amount of the inventory, then with "the increase" of the inventory for any cause. If there is no increase, that fact must be stated. In re Jones, 1 Redf. Surr. (N. Y.) 263.

Additional or supplementary inventory see supra § 379.

82. Ala.—Miles v. Meade, 191 Ala. 80, 67 S 1012.

Ky.—Offutt v. Divine, 53 SW 816, 49 SW 1065, 20 KyL 1732.

Mich.—Reed v. Whipple, 140 Mich. 7, 103 NW 548.

N. Y.—Matter of Rossell, 121 App. Div. 381, 105 NYS 1098; Woodruff v. Young, 31 Hun 420; Matter of Harris, 61 Misc. 563, 116 NYS 270, 7 Mills Surr. 49.

Pa.—In re McCauley, 258 Pa. 502, 102 A 136; Monaghan's Est., 26 Pa. Dist. 754; Belcher's Est., 13 Pa. Dist. 327; Rementer's Est., 13 Pa. Dist. 313; Walker's Est., 4 Pa. Dist. 124, 16 Pa. Co. 160.

R. I.—Jones v. East Greenwich Prob. Ct. 25 R. I. 361, 55 A 881.

[a] **Illustration.**—One who is administrator of his father's estate, and also executor of his mother's will, cannot be charged, on his settlement as administrator, with funds held by him as executor, where there has been no settlement or disposition of the funds as executor. Miles v. Meade, 191 Ala. 80, 67 S 1012.

[b] **The representative is not concluded by** receipting for funds or signing a certificate of deposit as administrator. Reed v. Whipple, 140 Mich. 7, 103 NW 548.

83. Crawford's Est., 10 Pa. Super. 587.

84. Matter of Fry, 79 Misc. 180, 140 NYS 592; Bracken's Est., 32 Pa. Co. 215; Jones v. East Greenwich Prob. Ct., 25 R. I. 361, 55 A 881.

85. Mass.—Nickerson v. Chase, 122 Mass. 296.

Mich.—Gee v. Hasbrouck, 128 Mich. 509, 87 NW 621.

Mo.—Weber v. Oviatt (A.) 194 SW 80.

N. Y.—Matter of Lehrbach, 148 App. Div. 74, 132 NYS 44; Matter of Hamlin, 141 App. Div. 318, 126 NYS 396; Matter of Walton, 112 App. Div. 176, 98 NYS 42; Matter of Myers, 36 App. Div. 625, 55 NYS 168; Matter of Pollock, 91 Misc. 471, 155 NYS 270; Matter of Sergant, 62 Misc. 173, 116 NYS 273, 7 Mills Surr. 95.

W. Va.—McSwegin v. Howard, 63 W. Va. 92, 59 SE 894.

[a] **Specific legacies** released to the legatees and never in the possession of the executor should not be made the subject of a surcharge. Matter of Warren, 148 App. Div. 525, 133 NYS 145.

[b] **Pledged property.**—An executor should not be charged with the value of stock pledged by the testator as additional security for a mortgage debt. Matter of Van Houten, 18 Misc. 524, 42 NYS 1115, 2 Gibb. Surr. 168 [rev on other grounds 18 App. Div. 301, 46 NYS 190].

86. Me.—Weed v. Lermond, 33 Me. 492.

N. J.—Crane v. Van Duyne, 9 N. J. Eq. 259.

N. Y.—Wright v. Fleming, 71 N. Y. 612.

Pa.—Powell's Est., 23 Pa. Dist. 286; Squire's Est., 11 Phila. 110.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

[a] **Sale in violation of order of court.**—An administrator sued for an accounting is properly charged with the appraised value of property sold in violation of an order of sale fixing that amount as the upset price, when the appraisement given in evidence against him is the only evidence of value introduced. Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

[b] **Difference in appraisements.**—Where there was no evidence that certain goods accounted for by an administratrix were not all the goods which had been received by her intestate, a difference in the estimated value thereof, as appraised by two distinct sets of appraisers, was insufficient to justify a surcharge of the amount of such difference. Delp v. Edlis, 190 Pa. 25, 42 A 462.

87. Weed v. Lermond, 33 Me. 492; Gaskill v. Weeks, 154 Mich. 223, 117 NW 647; Davis v. Blumenberg, 107 Miss. 432, 65 S 503; Meagher's Est., 22 Pa. Dist. 823.

Operation and effect of inventory and appraisal generally see supra § 383.

88. Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428; Matter of Mitchell, 41 Misc. 603, 85 NYS 288, 4 Mills Surr. 99; Squire's Est., 11 Phila. (Pa.) 110.

[a] **Goodwill of business whose value increased by representative.**—An administratrix, who on the death of intestate, who had a liquor business, had the license transferred to her, had the stock replenished at her own expense, and after increasing the value of the goodwill, sold the business, is not to be charged with the full amount received by her for transfer of the license, stock, and fixtures. In re Immendorf, 190 Pa. 590, 42 A 959.

89. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847; Gaskill v. Weeks, 154 Mich. 223, 117 NW 647; Horton v. Howell, (N. J. Ch.) 56 A 702; In re Thompson, 41 Misc. 420, 84 NYS 1111 [aff 87 App. Div. 609 mem, 83 NYS 1117 mem (aff 178 N. Y. 554 mem, 71 NE 1140 mem)].

90. In re Bierly, 81 Pa. 419.

91. Corbett v. Johnson, 6 KyL 596, 13 Ky. Op. 246; Evans v. Iglehart, 6 Gill & J. (Md.) 171; In re Pope, (Minn.) 97 NW 1046; Hughes' Est., 19 Pa. Super. 534; Bracken's Est., 15 Pa. Dist. 71, 32 Pa. Co. 215; Dorscheimer's Est., 9 Pa. Dist. 46.

92. Tucker v. Tucker, 28 N. J. Eq. 223; In re Stitzel, 221 Pa. 227, 70 A 749, 18 LRANS 284.

93. Roberts v. Weimer, 227 Ill. 138, 81 NE 40 [aff 130 Ill. A. 297]; Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff on op below 181 N. Y. 562 mem, 74 NE 1120 mem]; In re Hill, 242 Pa. 80, 88 A 878; Carey's Est., 15 Pa. Dist. 527.

[a] **Illustration.**—An administrator sold decedent's business to the widow for five thousand five hundred dollars, and was ordered to distribute four thousand five hundred dollars to the heirs. About the same time, he organized a corporation with fifteen thousand dollars capital stock, and the widow conveyed the business to it. He delivered four thousand five hundred dollars in stock at par value to the heirs, and credited himself with that amount. It was held that the heirs, on discovering the stock to be substantially worthless, could return it to him and require him to ac-

out awaiting a final accounting.[94] Where a testator directs his executor to sell certain property or rights, the executor cannot be surcharged with an additional amount which he could have obtained by exceeding his powers under the will.[95] An administrator who pays out money under an order of the county court cannot be personally charged with reimbursement of it, in absence of evidence that the order was obtained by fraud, and that he had guilty knowledge thereof.[96]

Debts of representative to decedent are chargeable in his account as cash,[97] although he may of course contest the indebtedness.[98]

Property not delivered. An administrator is chargeable in his annual account with property which he, as lessee under a lease with his intestate, agreed to deliver to him at a certain time, where he failed to make such delivery to himself as administrator.[99]

Losses. Where culpable loss occurs, the representative should be required to debit himself with the amount;[1] and a payment or expenditure made by the representative improperly or without authority is a loss within this rule;[2] but where the loss was excusable, he may leave the amount out of his account altogether, or, if it is charged to him, have a corresponding credit allowed.[3]

count for the money he was ordered to pay to them, and charge himself with the amount for which he had taken credit. Roberts v. Weimer, 227 Ill. 138, 81 NE 40 [aff 130 Ill. A. 297].

94. Calhoun's Est., 34 Pa. Co. 555; Pelham's Est., 9 Kulp (Pa.) 347.

95. Allshouse's Est., 23 Pa. Super. 146.

96. Weeke v. Wortmann, 84 Nebr. 217, 120 NW 933.

97. U. S.—U. S. v. Eggleston, 25 F. Cas. No. 15,027, 4 Sawy. 199.

Ala.—Miles v. Meade, 191 Ala. 80, 67 S 1012; Wright v. Lang, 66 Ala. 389; Miller v. Irby, 63 Ala. 477; Seawell v. Buckley, 54 Ala. 592; Breitling v. Clarke, 49 Ala. 450; Jay v. Martin, 49 Ala. 192; Whitlock v. Whitlock, 25 Ala. 543; King v. Shackleford, 13 Ala. 435; Purdom v. Tipton, 9 Ala. 914; Duffee v. Buchanan, 8 Ala. 27; Hampton v. Shehan, 7 Ala. 295; Childress v. Childress, 3 Ala. 752.

Cal.—In re Thomas, 140 Cal. 397, 73 P 1059; Sanchez v. Forster, 133 Cal. 614, 65 P 1077; Walker's Est., 125 Cal. 242, 57 P 991, 73 AmSR 40; In re Miner, 46 Cal. 564.

Conn.—Davenport v. Richards, 16 Conn. 310.

Ill.—Peo. v. Rardin, 171 Ill. A. 226.

Ind.—Condit v. Winslow, 106 Ind. 142, 5 NE 751.

Ky.—Swart v. Reveal, 29 SW 24, 16 KyL 503; Webster v. Webster, 7 KyL 302.

La.—Bayly's Succ., 30 La. Ann. 75.

Mass.—Com. v. Gould, 118 Mass. 300; Hazelton v. Valentine, 113 Mass. 472; Chapin v. Waters, 110 Mass. 195; Leland v. Felton, 1 Allen 531; Mattoon v. Cowing, 13 Gray 387; Benchley v. Chapin, 10 Cush. 173; Sigourney v. Wetherell, 6 Metc. 553; Ipswich Mfg. Co. v. Story, 5 Metc. 310; Kinney v. Ensign, 18 Pick. 232; Winship v. Bass, 12 Mass. 199; Stevens v. Gaylord, 11 Mass. 256.

Mo.—Wilson v. Ruthrauff, 82 Mo. A. 435.

Nebr.—Howell v. Anderson, 66 Nebr. 575, 92 NW 760, 61 LRA 313.

N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 347; Jones v. Chase, 55 N. H. 234; Norris v. Towle, 54 N. H. 290.

N. J.—Harker v. Irick, 10 N. J. Eq. 269.

N. Y.—In re Consalus, 95 N. Y. 340; Baucus v. Stover, 89 N. Y. 1; Adair v. Brimmer, 74 N. Y. 539; Soverhill v. Suydam, 59 N. Y. 140; Keegan v. Smith, 60 App. Div. 168, 70 NYS 260 [rev on other grounds 33 Misc. 74, 67 NYS 281 (rev 31 Misc. 651 mem, 64 NYS 1117 mem), and aff 172 N. Y. 624 mem, 65 NE 1118 mem]; Matter of Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 5 NE 1117 mem]; Baucus v. Barr, 45 Hun 582 [aff 107 N. Y. 624 mem, 13 NE 939 mem]; Soverhill v. Suydam, 2 Thomps. & C. 464 [aff 59 N. Y. 140]; Burkhalter v. Norton, 3 Dem. Surr. 610; Warner v. Knower, 3 Dem. Surr. 208.

Oh.—Jones v. Willis, 72 Oh. St. 189, 74 NE 166; McGaughey v. Jacoby, 54 Oh. St. 487, 44 NE 231; Hall v. Pratt, 5 Oh. 72; Perkins v. Scott, 9 Oh. Cir. Ct. 207, 6 Oh. Cir. Dec. 226.

Or.—United Brethren v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353; Mason's Est., 42 Or. 177, 70 P 507, 95 AmSR 734.

Pa.—Bull's App., 24 Pa. 286; In re Piper, 15 Pa. 533; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81; Kingan's Est., 7 PittsbLegJNS 41; Neustadt's Est., 12 Phila. 8, 4 WklyNC 16.

S. C.—Charles v. Jacobs, 9 S. C. 295; Jacobs v. Woodside, 6 S. C. 490; Griffin v. Bonham, 30 S. C. Eq. 71; Field v. Pelot, 16 S. C. Eq. 369; Schnell v. Schroder, 8 S. C. Eq. 334; Hall v. Hall, 7 S. C. Eq. 269; Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643.

Tenn.—Rader v. Yeargin, 85 Tenn. 486, 3 SW 178.

Wis.—Robinson v. Hodgkin, 99 Wis. 327, 74 NW 791; Finch v. Houghton, 19 Wis. 149.

[a] **A special administrator** must charge himself in his account with the amount of his individual indebtedness to decedent. In re Armstrong, 69 Cal. 239, 10 P 335.

[b] **Where decedent was surety on notes of the administrator,** and the latter, being unable to pay the notes, has paid them, as administrator, out of the estate, he should be charged with the amount so paid. Peo. v. Rardin, 171 Ill. A. 226.

[c] **The debts of a firm of which the representative is a member** is the debt of the executor or administrator within the rule. Bassett v. Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552; In re Consalus, 95 N. Y. 340. Contra James v. West, 67 Oh. St. 28, 65 NE 156.

Debts due from representative as assets see supra § 324.

98. Ala.—Arnold v. Arnold, 124 Ala. 550, 27 S 465, 82 AmSR 199; Dickie v. Dickie, 80 Ala. 57.

N. J.—Wood v. Tallman, 1 N. J. L. 177.

N. Y.—Everts v. Everts, 62 Barb. 577.

S. C.—Black v. White, 13 S. C. 37.

Wis.—Lynch v. Divan, 66 Wis. 490, 29 NW 213.

99. In re More, 121 Cal. 609, 54 P 97.

1. Ill.—Roberts v. Weimer, 227 Ill. 138, 81 NE 40.

Mass.—Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

Mich.—Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

N. J.—In re Williams, 55 Mont. 63, 173 P 790; In re Slater, (Prerog.) 102 A 384.

N. Y.—Matter of Titus, 86 Misc. 375, 148 NYS 359; Matter of Greifenstein, 86 Misc. 173, 149 NYS 136; In re Beer, 124 NYS 423; In re McGovern, 118 NYS 378.

Pa.—In re Locher. 219 Pa. 46, 67 A 954; Finney's App., 37 Pa. 323; Powell's Est., 23 Pa. Dist. 286; Carey's Est., 15 Pa. Dist. 527; In re Carey, 34 PittsbLegJNS 58.

S. C.—Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

Can.—Daly v. Brown, 39 Can. S. C. 122.

Ont.—Shaw v. Tackaberry, 2 Ont WN 255.

[a] **Sale of property for much less than its value** renders the representative liable. Daly v. Brown, 39 Can. S. C. 122.

[b] **Failure to plead the statute of frauds** may render the representative liable as for a devastavit. Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

[c] **Payment of an improper tax** under such circumstances that it may be recovered back does not require a charge against the representative. Matter of Marx, 117 App. Div. 890, 103 NYS 446.

[d] **Delay in paying inheritance tax.**—Where the executor had ample funds to pay an inheritance tax promptly and secure a discount, but failed to do so, he should be charged with the amount of the discount so lost. In re Slater, (N. J. Prerog.) 102 A 384.

Liability for loss or depreciation of assets generally see supra §§ 576–591.

2. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; In re Irwin, 152 Iowa 323, 131 NW 57; Matter of Watson, 115 App. Div. 310, 100 NYS 993 [aff 187 N. Y. 541 mem, 80 NE 1122 mem]; Kline's Est., 49 Pa. Super. 122.

[a] **Credit improperly allowed on amount due to estate.**—On sale of the interest of an estate in a firm to the surviving partners, on an understanding that the disbursements made by the surviving partners for the estate which had not been adjusted were to be deducted from the price, the surviving partners were allowed a claim for taxes and other disbursements they claimed to have made, and, on this allowance being challenged, the executors made no showing that the disbursements were actually made. It was held the executors should be charged with the amount so allowed. Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff on op below 181 N. Y. 562 mem, 74 NE 1120 mem].

[b] **Voluntary payments by widow who is sole beneficiary.**—Where a testator appointed his widow and his brother executors of his estate which he gave entirely to his widow, and the widow voluntarily paid out two hundred dollars from estate funds as rent for a nickelodeon, which the executrix and executor used for some time after decedent's death, the brother should not be surcharged when he files his account as acting executor with such sum so paid out by the widow. Buck's Est., 47 Pa. Super. 518.

[c] **Where amount recoverable.**—An executrix who has paid an inheritance tax to the federal government should not be surcharged to the amount thereof on it subsequently appearing that the tax was not a proper one, it being conceded that the sum paid may be recovered. Matter of Marx, 117 App. Div. 890, 103 NYS 446 [rev 49 Misc. 280, 99 NYS 334].

3. Pitts v. Singleton, 44 Ala. 363; Hosher v. Fitzpatrick, 146 Ga. 525, 91

Personal profits. As any personal profit which the representative has made out of his dealings with the property of the estate belongs to the estate,[4] he is chargeable with such profits in his accounts.[5]

Realty; rents and profits. The representative is not as a rule properly chargeable in his account with the rent of his decedent's realty, for if he takes charge of the realty without some testamentary or statutory authority and collects the rents he acts merely as agent of the heirs and does not bind himself in his fiduciary capacity, or if he is a mere wrongdoer as against the heirs he is not amenable to the probate court;[6] but where any rents or profits are received by him in his fiduciary capacity he is of course chargeable therewith.[7] Where an administrator, who was also an heir, agreed with the other heirs that he should rent the lands and credit the proceeds on his account, he should charge himself with his share of the rent as well as of the other heirs.[8] An executor who under a power in the will has sold mortgaged land of the estate to pay the debts, and in order to give a clear title has paid off the encumbrance with the proceeds of the sale, should in his account simply charge himself with the balance.[9] Under an agreement between the administrator and the heir of deceased that the administrator shall collect the rents of the real estate and pay debts of the estate with the proceeds, also the costs of repairing and keeping the real estate in condition, he is to apply on the debts of the estate, and therefore to account for only the net income of the property as a whole, that within and without the state.[10] An administrator being entitled to the possession of his decedent's land only as assets for the payment of debts is not accountable for waste in his settlement, however he may be otherwise.[11]

Property received from decedent during his lifetime. The representative may sometimes be charged with money or property received from decedent during his lifetime, where no transfer of title was intended;[12] but it is otherwise where such money or property was received in payment of an indebtedness or it otherwise appears that it was intended to pass the title.[13]

Mere choses in action. The representative should not be charged with debts, choses in action, proceeds of sale, or the like, until he has received the money,[14] unless the amount has been lost through his negli-

SE 780; In re Hermann, 226 Pa. 543, 75 A 731.

4. See supra § 559.

5. Hawaii.—Matter of Turner, 1 Hawaii 476.

Ill.—Roberts v. Weimer, 227 Ill. 138, 81 NE 40 [aff 130 Ill. A. 297]; Wilbanks v. Crosno, 112 Ill. A. 503.

N. Y.—Matter of Clark, 69 Misc. 527, 127 NYS 888.

Pa.—Heimgartner's Est., 38 Pa. Co. 676; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Eng.—Sugden v. Crosland, 3 Sm. & G. 192, 65 Reprint 620.

Ont.—Re Wilson, 15 Ont. L. 596, 11 OntWR 214.

6. Me.—Brown v. Fessenden, 81 Me. 522, 17 A 709.

Miss.—Trotter v. Trotter, 40 Miss. 704.

N. Y.—Matter of Dunn, 63 Misc. 179, 118 NYS 560, 7 Mills Surr. 174.

Oh.—In re Gallagher, 7 OhS&CP 548, 5 OhNP 518.

Pa.—In re Moran, 261 Pa. 269, 104 A 585; In re Hoffman, 185 Pa. 315, 39 A 954; Walker's App., 116 Pa. 419, 9 A 654; Fross' App., 105 Pa. 258; Rementer's Est., 13 Pa. Dist. 313; Paxson's Est., 13 Pa. Dist. 78, 29 Pa. Co. 427; Hallowell's Est., 9 Pa. Dist. 90; Miller's Est., 4 Pa. Dist. 408, 16 Pa. Co. 528; Auer's Est., 31 Pa. Co. 77; Anck's Est., 11 Phila. 118; Montier's Est., 7 Phila. 491; In re Littell, 33 PittsbLegJNS 168; In re Rosenstell, 33 PittsbLegJNS 72.

[a] **Rents which should be distributed** to heirs and devisees need not be accounted for to the court. In re Gallagher, 7 OhS&CP 548, 5 OhNP 518.

Rents and profits of realty as assets generally see supra § 530.

7. Ill.—Goeppner v. Leitzelmann, 98 Ill. 409; Wilbanks v. Crosno, 112 Ill. A. 503.

Mass.—Coffey v. Coffey, 193 Mass. 398, 79 NE 742, 118 AmSR 535.

Minn.—Nordlund v. Dahlgren, 130 Minn. 462, 153 NW 876, AnnCas1917B 941.

Mo.—Williams v. Williams, 145 Mo. A. 382, 129 SW 454.

N. H.—Harris v. Ingalls, 74 N. H. 35, 64 A 727.

N. Y.—Matter of Edelmeyer, 157 App. Div. 773, 142 NYS 726 [aff 210 N. Y. 552 mem, 104 NE 1129 mem]; Matter of Woods, 55 Misc. 181, 106 NYS 471, 6 Mills Surr. 188.

Oh.—Campbell v. McCormick, 1 Oh. Cir. Ct. 504, 1 Oh. Cir. Dec. 281.

Pa.—King's Est., 18 Pa. Dist. 1027; Appleton's Est., 10 Pa. Dist. 441; Gressle's Est., 29 Pa. Co. 97; Kite's Est., 28 Pa. Co. 560.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Va.—Robertson v. Breckinridge, 98 Va. 569, 37 SE 8.

Ont.—Shaw v. Tackaberry, 5 Ont WN 255.

[a] **This rule applies where** the representative is given credit for all payments of debts made by him for the estate. Robertson v. Breckinridge, 98 Va. 569, 37 SE 8.

[b] **If an executor is chargeable with rent** of the lands of the estate, he is liable therefor in his settlement with the probate court. Williams v. Williams, 145 Mo. A. 382, 129 SW 454.

[c] **Charging with rents of land improperly sold.**—Where a decree of sale did not in express terms authorize sales of land in another state, and the will was not probated nor the executors qualified there, sales of land there made are invalid, and on an accounting the executors will not be credited with notes taken in payment on such sales, and will be charged with rents as if no sale had been made. Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

8. Cauthen v. Cauthen, 70 S. C. 167, 49 SE 321.

9. Millard v. Harris, 119 Ill. 185, 10 NE 387 [aff 17 Ill. A. 512].

10. Mansfield v. Holton, 74 N. H. 417, 68 A 541.

11. Reynolds v. New Orleans Canal, etc., Co., 30 Ark. 520.

12. Matter of Pollock, 91 Misc. 471, 155 NYS 270; Matter of Brintnall, 40 Misc. 67, 81 NYS 250, 3 Mills Surr. 449; Moseley v. Johnson, 144 N. C. 257, 274, 56 SE 922; Lovell's Est., 21 Pa. Super. 378; Titlow's Est., 11 Pa. Co. 625.

13. Hughes' Est., 19 Pa. Super. 534; Calhoun's Est., 16 Pa. Dist. 586.

[a] **Illustration.**—Where an administrator in the lifetime of decedent operated a mill for the latter as her agent, and advanced money borrowed from his wife to operate the mill, and prior to the death of decedent goods were furnished to the administrator on account of the moneys which had been advanced by him, the administrator cannot be surcharged in his account as administrator with the value of the goods thus furnished. Hughes' Est., 19 Pa. Super. 534.

14. Ala.—Wilkinson v. Hunter, 37 Ala. 268; Douthitt v. Douthitt, 1 Ala. 594.

Conn.—Bridgeport Trust Co.'s App., 77 Conn. 657, 60 A 662.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ga.—Arendale v. Smith, 107 Ga. 494, 33 SE 669.

Kan.—In re Beam, 8 Kan. A. 835, 57 P 854.

Md.—Skinner v. Gaither, 87 Md. 330, 39 A 876.

Mich.—Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Miss.—Banks v. Machen, 40 Miss. 256; Smith v. Hurd, 16 Miss. 682.

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622.

N. J.—Mulford v. Mulford, (Ch.) 53 A 79.

N. Y.—Matter of Walton, 112 App. Div. 176, 98 NYS 42; Matter of Hosford, 62 App. Div. 626, 71 NYS 163; Matter of Pollock, 91 Misc. 471, 155 NYS 270; Matter of Woodbury, 40 Misc. 143, 81 NYS 503, 3 Mills Surr. 452; Matter of Guldenkirch, 35 Misc. 123, 71 NYS 310; Richardson's Est., 2 Misc. 288, 23 NYS 978, Pow. Surr. 384.

N. C.—Worthy v. Brower, 93 N. C. 344; Hobbs v. Craige, 23 N. C. 332.

Or.—In re Marks, 81 Or. 632, 160 P 540.

Pa.—In re Bell, 226 Pa. 531, 75 A 726; In re Allam, 199 Pa. 573, 49 A 252; In re Smith, 194 Pa. 259, 45 A 82; Barclay v. Morrison, 16 Serg. & R. 129; Marley's Est., 18 Pa. Super. 303; Roop's Est., 22 Pa. Dist. 484; McDonald's Est., 13 Pa. Dist. 483; Edenborn's Est., 10 Pa. Dist. 184; Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; McMahon's Est., 18 Phila. 188.

S. C.—Tompkins v. Tompkins, 18 S. C. 1; Pettus v. Clawson, 25 S. C. Eq. 92.

Tenn.—Bowman v. Carr, 5 Lea 571.

Tex.—Kearney v. Nicholson, (Civ. A.) 67 SW 361.

Va.—Reager v. Chappelear, 104 Va. 14, 51 SE 170; Fauber v. Gentry, 89 Va. 312, 15 SE 899; Burnley v. Duke, 1 Rand. (22 Va.) 108; Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

W. Va.—Harris v. Orr, 46 W. Va. 261, 33 SE 257, 76 AmSR 815; Hooper v. Hooper, 32 W. Va. 526, 9 SE 937; Evans v. Shroyer, 22 W. Va. 581; Reitz v. Bennett, 6 W. Va. 417.

Eng.—Giles v. Dyson, 1 Stark. 32, 2 ECL 22.

gence or lack of good faith in failing to collect.[15]

Interest. Where the circumstances are such as to warrant holding the representative liable for interest on funds of the estate,[16] such interest is properly made a charge against him in his account. In a proper case the representative may be charged with interest on funds of the estate.[17]

Effect of charges in settlement; mistake. An executor who in his settlement charges himself with assets is responsible therefor at the demand of heirs or creditors of the estate;[18] but a mistake in the account, in charging himself with items which he did not owe, or amounts which he did not receive, should be corrected on the settlement of the account,[19] and an administrator who has improperly charged himself with the value of stock not constituting assets of the estate is entitled to withdraw the charge from his account.[20]

Trust property. Where the will created a trust and the executor set aside the amount stipulated, lending it upon alleged insufficient security, without asking credit therefor in his account, the heirs were not entitled to complain that the security was inadequate and have the executor charged therewith, since a final decree allowing the account would have charged him as trustee, and not as executor, so that the cestui, if the security was inadequate, could recover from him and not from the estate, and the heirs were therefore not interested.[21]

[§ 2393] **E. Credits.** The representative should receive credit for all proper disbursements, as in the payment of claims or authorized expenditures;[22]

Can.—Darling v. Brown, 2 Can. S. C. 26.

[a] **The representative should not be charged with:** (1) Foreign debts which he could not collect. Bridgeport Trust Co.'s App., 77 Conn. 657, 60 A 662; Governor v. Williams, 25 N. C. 152, 38 AmD 712; Bowman v. Carr, 5 Lea (Tenn.) 571. (2) The amount rebated from a claim on a proper compromise thereof. In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622. (3) The amount of a judgment debt, the collection of which has been enjoined. Fauber v. Gentry, 89 Va. 312, 15 SE 899. (4) Dividends which were allowed to be retained in satisfaction of a debt. Broome v. Van Hook, 1 Redf. Surr. (N. Y.) 444. (5) Notes inventoried but subsequently missing. Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428.

[b] **Where the dates of payments made to an executor are not furnished** by him in his account, he is chargeable as of the date of the expiration of the year when distribution should have been made. Zweidinger's Est., 29 PittsbLegJ (Pa.) 63.

[c] **Debts inventoried as doubtful** are not even prima facie chargeable in the account. Gay v. Grant, 101 N. C. 206, 8 SE 99, 106.

[d] **Indirect purchase by representative.** — An administrator who procured a bidder to buy his intestate's land at a sale made by himself as administrator, and after making a deed to the bidder took a reconveyance to himself individually and reported to the court that the land brought a certain sum is chargeable with such sum and interest from the date of the sale, although no money passed in either transaction and he disclaimed purchasing the land on his own account and immediately after the conveyance to himself contracted to sell to others at a less price. McNeill v. Fuller, 121 N. C. 209, 28 SE 299.

15. D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ky.—Burbank v. Duncan, 53 SW 19, 21 KyL 826.

Mo.—Hallway v. Eckler, 105 Mo. A. 585, 80 SW 46.

N. Y.—O'Connor v. Gifford, 117 N. Y. 275, 22 NE 1036; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; In re McGovern, 118 NYS 378.

Pa.—Kauffeld's Est., 28 Pa. Super. 162; Crouse's Est., 16 Pa. Super. 212; Bard's Est., 13 Pa. Dist. 552, 21 Lanc LRev 81; Schilskey's Est., 12 Pa. Dist. 181, 28 Pa. Co. 241; Heimgartner's Est., 38 Pa. Co. 676; Harris's Est., 12 LuzLegReg 58; Campbell's Est., 32 PittsbLegJNS 409.

S. C.—Edmonds v. Crenshaw, 5 S. C. Eq. 224.

Tenn.—Davis v. Jackson, (Ch. A.) 39 SW 1067.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Va.—Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

W. Va.—Hooper v. Hooper, 32 W. Va. 526, 9 SE 937.

Eng.—Stiles v. Guy, 16 Sim. 230, 60 Reprint 861 [aff 1 Macn. & G. 422, 47 EngCh 339, 41 Reprint 1328].

Ont.—McCarter v. McCarter, 7 Ont. 243.

[a] **Presumption that money was collected.**—Burbank v. Duncan, 53 SW 19, 21 KyL 826.

[b] **Evidence of collectability is necessary** to charge the representative. Barclay v. Morrison, 16 Serg. & R. (Pa.) 129; Kauffeld's Est., 28 Pa. Super. 162; Bramlett v. Mathis, 71 S. C. 123, 50 SE 644; Hooper v. Hooper, 32 W. Va. 526, 9 SE 937.

Liability for failure to collect assets generally see supra §§ 461, 462.

16. See supra §§ 495–510.

17. Cal.—In re Piercy, 168 Cal. 755, 145 P 91.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ga.—Tippin v. Perry, 122 Ga. 120, 50 SE 35.

Ill.—Matter of Stanowick, 147 Ill. A. 28; White v. Lewis, 201 Ill. A. 105; Fraser v. Fraser, 149 Ill. A. 186; McDonald v. Peo., 123 Ill. A. 346 [222 Ill. 325, 78 NE 609].

Ky.—Steele v. Lewis, 105 SW 1191, 32 KyL 439.

Mich.—In re Zimmer, 158 Mich. 170, 122 NW 563.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

N. J.—Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

N. Y.—Matter of McMonagle, 139 App. Div. 398, 124 NYS 258; Matter of Adams, 51 App. Div. 619, 64 NYS 591 [mod 30 Misc. 184, 61 NYS 751, and aff 166 N. Y. 623 mem, 59 NE 1118 mem].

N. C.—Overman v. Lanier, 159 N. C. 437, 74 SE 630.

Pa.—In re Forry, 246 Pa. 448, 92 A 697; In re Hill, 242 Pa. 80, 88 A 878; In re Groff, 215 Pa. 586, 64 A 783; Everett's App., 19 Pa. Dist. 477, 37 Pa. Co. 434; Bracken's Est., 15 Pa. Dist. 71, 32 Pa. Co. 215; Bollinger's Est., 10 Pa. Dist. 223; Collier's Est., 30 Pa. Co. 607; Hensler's Est., 18 LancLRev 317; Hoffman's Est., 15 YorkLegRec 114.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217; Anderson v. Silcox, 82 S. C. 109, 63 SE 128; Jones v. West, 20 S. C. L. 561 note.

S. D.—In re Hawgood, 37 S. D. 565, 159 NW 117.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

Wash.—In re Hagerty, 97 Wash. 491, 166 P 1139.

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414; Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[a] **An administrator who appropriates** funds of the estate to his own use is properly charged with interest thereon on his final settlement. Matter of Adams, 51 App. Div. 619, 64 NYS 591 [mod 30 Misc. 184, 61 NYS 751, and aff 166 N. Y. 623 mem, 59 NE 1118 mem].

[b] **Premature withdrawal of commissions.**—An executor is not entitled to commissions until his accounts have been settled and allowed, and if he withdraws from the estate prior to such settlement any money on account of such commissions, he will be chargeable with interest thereon. Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

[c] **Effect of charge of interest.**—An administrator, having charged himself with interest on the price of stocks and bonds taken by him from the time of the taking to the time of rendering his account, is entitled to the dividends paid since that time. Dudley v. Sanborn, 159 Mass. 185, 34 NE 181.

18. Matter of Greifenstein, 86 Misc. 173, 149 NYS 136; Dorscheimer's Est., 9 Pa. Dist. 46; Read v. Franklin, (Ch. A.) 60 SW 215; Davis v. Jackson, (Tenn. Ch. A.) 39 SW 1067.

[a] **Agreement that note be given certain persons.**—An executor is not chargeable with a note, at the demand of one who agreed that it might be given to certain persons, and acquiesced in their recovery thereof from the executor. Davis v. Jackson, (Tenn. Ch. A.) 39 SW 1067.

19. Coey's Est., Tuck. Surr. (N. Y.) 125; McLure v. Steele, 35 S. C. Eq. 105; James v. Craighead, (Tex. Civ. A.) 69 SW 241. See also infra § 2393.

[a] **Correction on objection by sureties.**—Coey's Est., Tuck. Surr. (N. Y.) 125.

20. In re McCauley, 258 Pa. 502, 102 A 136.

21. In re Slater, 88 N. J. Eq. 296, 102 A 384.

22. Ala.—Howard v. Rutherford, 149 Ala. 661, 43 S 30; Benagh v. Turrentine, 60 Ala. 557; Bates v. Vary, 40 Ala. 421; Pearson v. Darrington, 32 Ala. 227.

Ark.—Massey v. Doke, 123 Ark. 211, 185 SW 271.

Cal.—In re Shively, 145 Cal. 400, 78 P 869.

Colo.—Haines v. Christie, 28 Colo. 502, 66 P 883.

Ill.—Bachman v. Wilkins, 194 Ill. A. 232; Platt v. Williams, 175 Ill. A. 1.

Iowa.—In re Irwin, 152 Iowa 323, 131 NW 57.

Kan.—Commercial State Bank v. Ross, 90 Kan. 423, 133 P 538.

Ky.—Wood v. Nelson, 10 B. Mon. 229; Rogers v. Burbridge, 7 KyL 42, 48, 13 Ky. Op. 517.

La.—Hansell v. Hickox, 121 La. 721, 46 S 784.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Edelen v. Edelen, 11 Md. 415.

Mass.—Allen v. Hunt, 213 Mass. 276, 100 NE 552; Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318; Shouldice v. McLeod, 145 Mich. 708, 108 NW 1083.

and if the payment or disbursement was a proper | one he is entitled to credit therefor, although it was

Minn.—Nordlund v. Dahlgren, 130 Minn. 462, 153 NW 876, AnnCas1917B 941.

Miss.—Davis v. Blumenberg, 107 Miss. 432, 65 S 503.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1063; Matson v. Pearson, 121 Mo. A. 120, 97 SW 983.

Nebr.—In re Vasek, 97 Nebr. 617, 150 NW 1004; In re Bush, 89 Nebr. 334, 131 NW 602; Patrick v. Patrick, 72 Nebr. 454, 100 NW 939.

N. H.—Barrett v. Cady, 78 N. H. 60, 96 A 325.

N. J.—Matter of New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

N. Y.—Matter of Edelmeyer, 157 App. Div. 773, 142 NYS 726 [aff 210 N. Y. 552 mem, 104 NE 1129 mem]; Matter of McMonagle, 139 App. Div. 398, 124 NYS 258; Matter of McDonough, 132 App. Div. 614, 117 NYS 258; Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem]; Matter of Dutcher, 102 App. Div. 410, 92 NYS 418; Matter of Hull, 97 App. Div. 258, 89 NYS 939; Matter of Rogers, 10 App. Div. 593, 42 NYS 133; Matter of Day, 86 Misc. 131, 149 NYS 221; Matter of Freel, 49 Misc. 380, 99 NYS 505, 5 Mills Surr. 262; In re Lyon, 137 NYS 171; In re Williams, 118 NYS 562; Matter of Benedict, 13 AbbNCas 67, 1 Dem. Surr. 547; In re Jones, 5 NYLebObs 124, 1 Redf. Surr. 263; Glover v. Holley, 2 Bradf. Surr. 291.

N. C.—In re Winston, 172 N. C. 270, 90 SE 201; Kelly v. Odum, 139 N. C. 278, 51 SE 953; Whitted v. Webb, 22 N. C. 442; Clarke v. Cotton, 17 N. C. 51.

Pa.—In re Moran, 261 Pa. 269, 104 A 585; In re Wilson, 2 Pa. 325; Melville's Est., 25 Pa. Dist. 5; Elder's Est., 23 Pa. Dist. 369; Tasker's Est., 14 Pa. Dist. 435; Greiner's Est., 14 Pa. Dist. 348; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81; McCann's Est., 11 Pa. Dist. 244; Douglass' Est., 10 Pa. Dist. 479, 25 Pa. Co. 566; Witzels' Est., 10 Pa. Dist. 462; Sunderland's Est., 10 Pa. Dist. 358, 25 Pa. Co. 538; Hall's Est., 10 Pa. Dist. 215; Salin's Est., 10 Pa. Dist. 97; Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; Burton's Est., 4 Pa. Dist. 107; Fitzpatrick's Est., 29 Pa. Co. 222; Grover's Est., 12 LuzLegReg 224; Reeve's Est., 12 LuzLegReg 137; Squires' Est., 11 Phila. 110; In re Ruppel, 32 PittsbLegJNS 233.

Philippine.—White v. Enriquez, 15 Philippine 113.

Porto Rico.—Vazquez v. Sosa, 16 Porto Rico 465.

S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032; Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878; Trimmier v. Darden, 61 S. C. 220, 39 SE 373.

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899; Hall v. Hall, (Ch. A.) 59 SW 203.

Tex.—Mattingly v. Kelly, (Civ. A.) 124 SW 483.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Va.—Kincheloe v. Gibson, 115 Va. 119, 78 SE 603; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

Wash.—Plath v. Mullins, 94 Wash. 154, 161 P 1187; In re Witt, 74 Wash. 172, 132 P 1012.

Wis.—In re Morgan, 152 Wis. 138, 139 NW 745.

Eng.—In re Lucas, [1900] 1 Ir. 292; Bacon v. Bacon, 5 Ves. Jr. 331, 31 Reprint 614.

N. S.—Cullen v. McNeil, 42 N. S. 346.

Ont.—Re Dingman, 35 Ont. L. 51, 9 OntWN 272; Simpson v. Corbett, 10 Ont. A. 32 [dism app 5 Ont. 377].

[a] **Disbursements for which credit will be allowed** are "unavoidable payments of money without which the estate of the testator cannot be collected and disposed of for the benefit of his creditors. Funeral charges, charges for the probate of the will or granting letters of administration, recording of inventories, accounts of sales, orders of sales, and the charges of suits legally brought for the benefit of the estate, or of defending suits brought against them, and the like charges and disbursements, are allowable; but expenses in travelling and remaining at court, and others of a similar nature, are not allowable." Stephenson v. Stephenson, 3 Hayw. (Tenn.) 123, 124.

[b] **Credit should be allowed for:** (1) Payments beneficial to the estate. Albert v. Sanford, 201 Mo. 117, 99 SW 1068. (2) Payment of arrears of interest on mortgage. Darrah's Est., 6 Pa. Dist. 178, 19 Pa. Co. 287. (3) Medical charges paid in good faith. Matter of Title Guarantee, etc., Co., 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542 mem, 80 NE 1121 mem].

[c] **Judgment against representative as such.**—(1) An executor or administrator is entitled to credit for an amount paid in settlement of a judgment rendered against him in his representative capacity. Parks v. McDaniel, 75 S. C. 7, 9, 54 SE 801, 117 AmSR 878 ("When a payment is made pursuant to the judgment of a court of competent jurisdiction against the fiduciary, it is not the voluntary act of the fiduciary, but a compliance with the mandate of the court under compulsion. When such a payment is assailed the question is not merely whether the fiduciary was negligent in the conduct of the suit leading to the judgment, but whether he acted in such bad faith towards his trust or in such utter disregard of his duty as would warrant a court in setting aside the judgment or in depriving him of any equitable right to be subrogated to the position of judgment creditor, or in treating the judgment as of no avail as a protection for its payment. In such case the burden of proof is upon the party assailing the payment of the judgment, at least to show the invalidity of the claim, and that the judgment was the result of the fiduciary's breach of duty"). (2) Where a judgment was obtained against an executor by default, it will be allowed as a credit in his settlement where he moved for leave to answer after time, and, at the ensuing term, moved to open judgment because of his excusable neglect, and both motions were refused. Parks v. McDaniel, supra.

[d] **Where creditors purchase at an executor's sale** and credit the purchase price on their claims the executor is entitled to a corresponding credit on his account. Boyd v. Boyd, 9 SW 842, 10 KyL 85.

[e] **Where it is shown that a debt of decedent was paid after his death,** the representative is entitled to credit therefor, even though there is nothing to indicate by whom the payment was made. Williamson's Est., 6 WklyNC (Pa.) 452, 471.

[f] **Actual payment necessary.**—(1) In re Blair, 49 App. Div. 417, 63 NYS 678; Matter of Brintnall, 40 Misc. 67, 81 NYS 250, 3 Mills Surr. 449; Matter of Van Nostrand, 3 Misc. 396, 24 NYS 850, Pow. Surr. 495; Matter of White, 15 NYSt 729, 6 Dem. Surr. (N. Y.) 375; Williamson's Est., 6 WklyNC (Pa.) 452, 471. Contra Couts' Est., 87 Cal. 480, 25 P 685; Vreeland v. Schoonmaker, 16 N. J. Eq. 512. (2) No allowance can be made for obligations incurred by the representative in the management of the estate but which have not been actually paid at the time when the account is presented and before his letters are revoked. In re Blair, 49 App. Div. 417, 63 NYS 678 [mod and aff 28 Misc. 611, 59 NYS 1090].

[g] **Payment must have been on behalf of estate.**—An executor is not entitled to a credit for a balance due upon a mortgage given by testator in the absence of evidence that he has paid the sum due as an obligation of the estate. Matter of Tisdale, 110 App. Div. 857, 97 NYS 494.

[h] **Payments without order of court,** if proper, may be allowed as credits. In re Bottoms, 156 Cal. 129, 103 P 849; Mayer v. Schneider, 122 Ill. A. 48; Hansell v. Hickox, 121 La. 721, 46 S 784.

[i] **Payment by setting off against debt due estate.**—(1) Where executors seek to credit themselves with the payment of a debt owed by the estate by offsetting such debt against one due the estate, they must show that such offset has actually been allowed and credit given the estate. In re Archer, 23 NYS 1041, Pow. Surr. 292. (2) But where the persons interested in a decedent's estate knew that the special administrator allowed a set-off against an account due intestate, and approved of the adjustment when such administrator's account was settled, they cannot after his death deny his power to allow the set-off and charge it to his estate. Foster v. Stone, 67 Vt. 336, 31 A 841.

[j] **Crediting amounts** due the executor from the estate on a note from the executor to the testator is a sufficient payment to entitle the executor to credit for the amounts. In re Morgan, 152 Wis. 138, 139 NW 745.

[k] **Purchase of interest of tenant.**—Where an executor was authorized to conduct certain farming operations on testator's land pending settlement of the estate, and by reason of a failure of crops for a particular year the tenants threatened to abandon it, and the executor found it necessary to take charge of them, and for this purpose bought the tenants' interest therein, he was properly credited with the amounts paid out for the purchase of such interest. Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

[l] **Where a guardian was also executor** of a will in which his ward was residuary legatee, and he paid out for the support of his ward as appeared by his guardianship account, as allowed, more than he received as guardian, the excess should be credited to him in his executor's account as paid over to himself as guardian and charged to him in his guardianship account, and if this was not done in form, the excess should be deducted from the liability of the executor and his sureties on his bond. Mattoon v. Cowing, 13 Gray (Mass.) 387.

[m] **Necessary showing as to credit claimed.**—A credit claimed by an administratrix for the keeping of a colt belonging to the estate, without the showing of the expense of keeping it, is properly rejected. In re Irwin, 152 Iowa 323, 131 NW 57.

[n] **Failure to require the statutory affidavit of correctness** of a claim paid does not deprive the representative of the right to credit for the payment thereof, if the claim was in fact a just one. Commercial State Bank v. Ross, 90 Kan. 423, 133 P 538.

[o] **The representative may waive his right to credit** for reimbursement for payment of debts of the estate with his own funds in favor of the distributees of the estate. Bates v. Vary, 40 Ala. 421.

[p] **Assignment of mortgage securing debt.**—Where a testator, by his will, directs that certain debts, for which the testator is secondarily responsible, and which are secured by mortgage upon lands of the original debtor, shall be paid, and that the

not made out of funds of the estate but he used his own funds for the purpose.[23] Where the payment itself was a proper one the representative is not to be denied credit because the payment was made at an improper time,[24] or involved an excess of authority.[25] The representative can receive no credit for disbursements which he made improperly, such as the payment of claims not existing or not properly established or allowed, or unauthorized expenditures.[26] But where the representative has settled a claim against the estate in good faith and from a reasonable fear that litigation for its enforcement might go against the estate, he should be credited with the sum paid, although the claim is afterward shown to have had no foundation.[27] On filing a second account the representative is entitled to credit for any balance due him on the first.[28] Where the representative turns over money of the

mortgages shall be charged to a specific share in the distribution of his estate, the executors will not be allowed credit for the payment of those debts until they secure assignments of the mortgages, and are in position to charge themselves with those mortgages for the purposes of distribution. Hurlbut v. Hutton, 44 N. J. Eq. 302, 15 A 417.

[q] **Disbursements before letters were granted** will not be allowed unless they were necessary and from the nature of the circumstances could not properly have been postponed. Samuel v. Thomas, 51 Wis. 549, 8 NW 361.

[r] **Debts paid after a decree to account** should not be allowed to the administrator, but he is entitled to stand in the place of the creditors paid. Jones v. Jukes, 2 Ves. Jr. 517, 30 Reprint 753.

Liabilities of estate see supra §§ 875–936.

Necessity for vouchers see infra § 2475.

What expenditures are authorized see supra §§ 513–558.

23. Garver v. Thoman, 15 Ariz. 38, 135 P 724; Amos v. Heatherby, 7 Dana (Ky.) 45; Albert v. Sanford, 201 Mo. 117, 99 SW 1068; In re Lyon, 137 NYS 171.

[a] **An executor who has been sued personally** on his contract for expenditures for the estate and compelled to pay may include the amount in his current account. Garver v. Thoman, 15 Ariz. 38, 135 P 724.

[b] **Where the will requires the executor to maintain testator's family,** a son who acts as executor and supports testator's widow for a certain period from his own means is entitled, on an accounting, to a credit for a reasonable estimate of the cost of such maintenance. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

[c] **An administratrix, entitled to reimbursement for the care of a minor child** pending administration, is entitled to a reasonable allowance therefor in her account, and is not bound to pay over the child's share to a general guardian, and obtain such allowance through proceedings against him. In re Lyons, 137 NYS 171.

[d] **Payment by note.**—Where administrators pay a claim against the estate with their note they are entitled to a corresponding credit against the estate. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

[e] **Payment with individual property at excessive valuation.**—If an administrator pays debts of the estate with his own property at an excessive valuation, he will be credited only with the actual value of such property. Amos v. Heatherby, 7 Dana (Ky.) 45.

24. Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

[a] **Where the executor has paid the collateral inheritance taxes on legacies,** although, under the statute, it is his duty to deduct such tax at settlement with a legatee, he may properly be allowed credit for such payments in his final account. Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

25. Steelman v. Wheatman, 72 N. J. Eq. 626, 66 A 195 [aff 73 N. J. Eq. 743, 70 A 1102].

[a] **Where an administrator pendente lite pays a legacy** to a person entitled to it, which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, if the estate was able and liable to pay after all prior charges were provided for. Steelman v. Wheaton, 72 N. J. Eq. 626, 66 A 195 [aff 73 N. J. Eq. 743, 70 A 1102].

26. Ala.—McKenzie v. Matthews, 153 Ala. 437, 44 S 958; Denman v. Payne, 152 Ala. 342, 44 S 635.

Cal.—In re Hite, 155 Cal. 448, 101 P 448; In re Loheide, 17 Cal. A. 475, 120 P 56; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

Conn.—Reed v. Reed, 80 Conn. 401, 68 A 849; Robbins v. Wolcott, 27 Conn. 234.

Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613]; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228]; Teel v. Mills, 117 Ill. A. 97.

Ind.—McClelland v. Bristow, 9 Ind. A. 543, 35 NE 197.

Iowa.—In re Irwin, 152 Iowa 323, 131 NW 57.

Kan.—Sarbach v. Fidelity, etc., Co., 99 Kan. 29, 160 P 990, LRA1917B 1043.

La.—Bertrand's Succ., 127 La. 857, 54 S 127.

Md.—In re Hagerstown Trust Co., 119 Md. 224, 86 A 982; Bantz v. Bantz, 52 Md. 686.

Mass.—Washburn v. Hale, 10 Pick. 429; Jennison v. Hapgood, 10 Pick. 77.

Mo.—In re Whitlow, 184 Mo. A. 229, 167 SW 463.

Nev.—In re Millenovich, 5 Nev. 161.

N. H.—Brackett v. Tillotson, 4 N. H. 208.

N. Y.—Matter of Rowland, 153 App. Div. 327, 137 NYS 1010; Matter of Merrill, 151 App. Div. 785, 136 NYS 884, 152 App. Div. 917, 137 NYS 1129; Matter of Watson, 115 App. Div. 310, 100 NYS 993 [aff 187 N. Y. 541 mem, 80 NE 1122 mem]; Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem]; Matter of Hull, 97 App. Div. 258, 89 NYS 939; Matter of Titus, 86 Misc. 375, 148 NYS 359; Matter of Robert, 72 Misc. 625, 132 NYS 396; Matter of Harris, 61 Misc. 563, 116 NYS 270, 7 Mills Surr. 49; Matter of Archer, 51 Misc. 260, 100 NYS 1095, 5 Mills Surr. 460; Matter of Johnson, 50 Misc. 99, 100 NYS 373, 5 Mills Surr. 333; Matter of Very, 24 Misc. 139, 53 NYS 389, 28 NYCivProc 163, 2 Gibb. Surr. 506; Matter of Smith, 1 Misc. 269, 22 NYS 1067, Pow. Surr. 271.

N. C.—Phillips v. Hensley, 175 N. C. 23, 94 SE 673; In re Winston, 172 N. C. 270, 90 SE 201.

Pa.—In re Moran, 261 Pa. 269, 104 A 585; In re Shoenberger, 221 Pa. 112, 70 A 579, 12 AmSR 737, 19 LRANS 290; Geiger's App., 1 Mon. 547, 16 A 851; Schafer's Est., 39 Pa. Super. 384; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Wallace's Est., 13 Pa. Dist. 155; Hibberd v. Hubbard, 13 Pa. Dist. 12, 29 Pa. Co. 422 [rev on other grounds 211 Pa. 331, 60 A 911]; Monroe's Est., 9 Kulp 334; Reeve's Est., 12 LuzLegReg 137.

R. I.—Kenyon v. East Greenwich Prob. Ct., 27 R. I. 566, 65 A 267.

S. C.—Ex p. Coleman, 98 S. C. 420, 82 SE 674; Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878; Johnson v. Henagan, 11 S. C. 93; Kerr v. Butler, 2 S. C. Eq. 279.

Tenn.—Sutton v. Sutton, (Ch. A.) 58 SW 891.

Tex.—James v. Craighead, (Civ. A.) 69 SW 241.

W. Va.—Dawson v. Hemelrick, 33 W. Va. 675, 11 SE 31.

Wis.—In re Hemphill, 157 Wis. 331, 147 NW 1089.

Eng.—Pannel v. Fenn, Cro. Eliz. 348, 78 Reprint 595.

N. S.—Re McRae, 28 N. S. 20.

Ont.—Re McIntyre, 11 Ont. L. 136, 7 OntWR 122; Re Williams, 27 Ont. 405.

[a] **Where the same person is both administrator and tutor** his claim for the support of minor heirs should not be ingrafted on his account as administrator. Bertrand's Succ., 127 La. 857, 54 S 127.

[b] **Payment on decedent's contract of purchase.**—Where an administrator pays money due from the intestate at his death on a contract to purchase land, the payment can neither be allowed nor disallowed in his account, but must be stricken therefrom. Matter of Roberts, 72 Misc. 625, 132 NYS 396.

[c] **Claim of representative not filed.**—(1) In Alabama under Code (1896) § 129, requiring personal representatives holding claims against the estate to file them in the office of the judge of probate, and prohibiting payment on claims not so filed, on settlement of an administrator's accounts, credit for money paid on such a claim is properly refused, where the administrator does not show compliance with the statute. McKenzie v. Matthews, 153 Ala. 437, 44 S 958. (2) But in Wisconsin L. (1907) c 660, authorizing allowance by the court of payments by an executor of debts or claims, which were not duly filed, approved, or allowed, is held to apply to a debt or claim due the executor. In re Morgan, 152 Wis. 138, 139 NW 745.

[d] **Advances made by an administrator to an heir** on account of his distributive share cannot be allowed on the administrator's accounting, but are to be allowed only as a credit against the heir's distributive share upon final distribution. In re Ross, (Cal.) 182 P 303; In re Loheide, 17 Cal. A. 475, 120 P 56. To same effect Elizalde v. Murphy, 163 Cal. 681, 126 P 978 (advances to widow).

27. Cal.—In re Ross, 182 P 303.

Kan.—In re Kappelman, 101 Kan. 654, 168 P 876.

N. Y.—Matter of Baruth, 62 Misc. 596, 116 NYS 1125, 7 Mills Surr. 129; In re Kissick, 170 NYS 636.

N. C.—Phillips v. Hensley, 175 N. C. 23, 94 SE 673.

Pa.—In re Donnelly, 246 Pa. 308, 92 A 306; Bard's Est., 13 Pa. Dist. 552, 2 LancLRev 81; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Bickley's Est., 13 Pa. Dist. 323; Mooney's Est., 34 Pa. Co. 612; Lakey's Est., 30 Pa. Co. 287; Witzel's Est., 26 Pa. Co. 58.

Can.—Re Rundle, 52 Can. S. C. 114 [dism app 32 Ont. L. 312, 7 OntWN 350].

N. S.—Cookson v. Driscoll, 50 N. S. 1.

Ont.—Re Rundle, 7 OntWN 350.

Right of representative to compromise claim against estate see supra § 1227.

28. Schlecht's Est., 2 Brewst. (Pa.) 397.

estate to his successor he is entitled to credit therefor in his accounts,[29] and the same is true where he himself takes charge of funds as representative of another estate and duly charges himself with and accounts for the same as representative of the latter estate.[30] Where a fine is imposed on the representative for the benefit of creditors, he is entitled to credit for the amount of it when paid;[31] but where the amount of a decree against an administrator is collected from one of his sureties and distributed and the decree is subsequently reversed, the administrator is not entitled to credit for the amount collected, pending an action by the surety against the administrator de bonis non to recover such amount.[32]

Losses and depreciation. The representative may, to offset charges against him as for assets received, receive credit for articles lost, for depreciation, and for debts due the estate which have not been collected, if the loss or depreciation is not due to his negligence or bad faith;[33] and where property in the possession of the representative as assets has been delivered by him to persons who have been judicially declared to be the owners thereof, the representative is properly credited therewith.[34] The representative is not entitled to credit for money paid out on a judgment obtained on a doubtful claim where there is no evidence of diligent resistance or genuine good faith in the effort to defeat the claim.[35]

29. Allen v. Shriver, 81 Va. 174.

30. Alexander v. Steele, 84 Ala. 332, 4 S 281 (even though the settlement of the first estate has been held void).

31. Matter of Pye, 18 App. Div. 306, 46 NYS 350 [aff 154 N. Y. 773 mem, 49 NE 1103 mem].

32. Price v. Simmons, 21 Ala. 337.

33. U. S.—Littell v. Hackley, 126 Fed. 309, 61 CCA 295.

Ala.—Clary v. Sanders, 43 Ala. 287.

Ark.—Dyer v. Jacoway, 50 Ark. 217, 6 SW 902.

Cal.—In re Gianelli, 146 Cal. 139, 79 P 841; In re Armstrong, 125 Cal. 603, 58 P 183; In re Loheide, 17 Cal. A. 475, 120 P 56.

Md.—Edelen v. Edelen, 11 Md. 415.

Mass.—Poole v. Munday, 103 Mass. 174.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759.

Minn.—Harding v. Canfield, 73 Minn. 244, 75 NW 1112.

Mo.—Ladd v. Stephens, 147 Mo. 319, 48 SW 915; Williams v. Petticrew, 62 Mo. 460; Foster v. Davis, 46 Mo. 268; State v. Meagher, 44 Mo. 356, 100 AmD 298.

N. J.—Horton v. Howell, (Ch.) 56 A 702; In re Sharp, 61 N. J. Eq. 601, 48 A 327; Hunt v. Smith, 58 N. J. Eq. 25, 43 A 428; Woodruff v. Lounsberry, 40 N. J. Eq. 545, 5 A 99 [aff 42 N. J. Eq. 699 mem, 11 A 113 mem].

N. Y.—Matter of Hosford, 62 App. Div. 626, 71 NYS 163; Matter of Ball, 55 App. Div. 284, 66 NYS 874; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; Matter of Joost, 50 Misc. 78, 100 NYS 378, 5 Mills Surr. 310; Matter of Thorp, 31 Misc. 581, 65 NYS 575, 1 Mills Surr. 553; Furman v. Coe, 1 Cai. Cas. 96; In re Jones, 1 Redf. Surr. 263.

N. C.—Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

Or.—In re Conser, 40 Or. 138, 66 P 607.

Pa.—In re Connolly, 198 Pa. 137, 47 A 1125; Delp v. Edlis, 190 Pa. 25, 42 A 462; In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; Leslie's App., 63 Pa. 355; Tasker's Est., 14 Pa. Dist. 435; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81; Bickley's Est., 13 Pa. Dist. 323; Schilskey's Est., 12 Pa. Dist. 181, 28 Pa. Co. 241; Lehigh's Est., 11 Pa. Dist. 176; Thomas' Est., 8 Pa. Dist. 385; Hall's Est., 8 Pa. Dist. 8; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287]; Squire's Est., 11 Phila. 110; Schwoyer's Est., 2 Woodw. 456.

Tenn.—Pearson v. Gillenwaters, 99 Tenn. 446, 42 SW 9, 63 AmSR 844.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589; Hoke v. Hoke, 12 W. Va. 427.

"The first credit is for articles perished or lost." In re Jones, 5 NYLegObs 124, 126, 1 Redf. Surr. 263.

[a] **Uncollected debts.**—(1) If debts which have been charged to the executor or administrator prove uncollectable and their loss is not attributable in any way to his fault or neglect, he is entitled to credit for the amount. Stong v. Wilkson, 14 Mo. 116; In re Jones, 5 NYLegObs 124, 1 Redf. Surr. 263; Cline's App., 106 Pa. 617. (2) But credit for uncollected debts will not be allowed where the loss was the result of negligence, as in case of failure to sue the debtors within a reasonable time, although there was no bad faith. Harris v. Parker, 41 Ala. 604; Foster v. Foster, 71 SW 524, 24 KyL 1396; Frazier v. Cavanaugh, 4 KyL 711; Hallway v. Eckler, 105 Mo. A. 585, 80 SW 46; McDowell v. Sutton First Nat. Bank, 73 Nebr. 307, 102 NW 615; Kauffeld's Est., 28 Pa. Super. 162 [rev 35 PittsbLegJNS 174]; Harris' Est., 12 LuzLegReg 58; Campbell's Est., 32 PittsbLegJNS (Pa.) 409. (3) No credit will be allowed where the claim which was lost had not been charged to the executor or administrator as part of the assets of the estate. Mahon v. Bower, 2 Miss. 275. (4) Nor will credit be allowed on account of the insolvency of the obligor in a note where the administrators did not produce the note and had made two settlements without claiming credit for it. Amos v. Heatherby, 7 Dana (Ky.) 45.

[b] **Losses on sales.**—(1) In case loss results on a sale of property of the estate, the executor or administrator is entitled to credit for the amount thereof, if it was not caused by his neglect or misconduct. Ex p. Jones, 13 F. Cas. No. 7,443, 4 Cranch C. C. 185; Matter of Wagner, 40 Misc. 490, 82 NYS 797, 3 Mills Surr. 506; In re Moore, 198 Pa. 611, 48 A 884. (2) But he must show that the loss was without his fault, in order to entitle him to such credit. Underhill v. Newburger, 4 Redf. Surr. (N. Y.) 499. (3) The difference between the par value of securities and a less amount for which they were sold is properly allowed a representative in the absence of evidence that they were sold for less than their market value. Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

[c] **Depreciation of values.**—If the market value of a commodity belonging to the estate falls while in the hands of the executor or administrator, he is not liable for the former value if his failure to obtain it was not caused by his negligence or misconduct. Clary v. Sanders, 43 Ala. 287; Matter of Thompson, 41 Misc. 420, 84 NYS 1111, 4 Mills Surr. 69 [aff 87 App. Div. 609 mem, 83 NYS 1117 mem (aff 178 N. Y. 554 mem, 71 NE 1140 mem)]; Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

[d] **If property has perished** since the administration was granted the appraised value thereof will be credited to the administrator. Edelen v. Edelen, 11 Md. 415.

[e] **Loss by ordinary wear and tear** of chattels bequeathed for life, while in the hands of the life legatee, entitles the executor or administrator to credit therefor. In re Goetschius, 2 Misc. 278, 23 NYS 970, Pow. Surr. 371.

[f] **Losses resulting from continuing decedent's business** (1) will in a proper case be allowed as a credit in the account, as where the executor or administrator carried on the business in good faith, at the request of all the persons interested in the estate. Poole v. Munday, 103 Mass. 174; Smith's Est., 30 PittsbLeg JNS (Pa.) 188. (2) Where decedent's interest in a partnership could not have been converted into money without considerable loss, the administratrix, decedent's widow, was not chargeable with losses resulting from allowing the surviving partner to continue the business on paying interest on the value of decedent's share. Browne v. Bedford, 4 Dem. Surr. (N. Y.) 304. (3) But where the business was highly speculative in character and the administrator continued it without consultation with the creditors and without an order of court, but merely on the advice of the next of kin, and heavy losses resulted, he was not allowed credit. Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656.

[g] **Satisfaction of lien on personalty of estate.**—Where the representative satisfies a lien on personalty of the estate, and on a sale of it receives less than the amount so paid out, he is not chargeable for the loss, if he acted in good faith. In re Armstrong, 125 Cal. 603, 58 P 183.

[h] **Losses caused by neglect.**—An executor or administrator who has once actually received funds of a decedent cannot discharge himself from accounting for them by showing that they were lost by his own neglect. Lindsley v. Dodd, 53 N. J. Eq. 69, 73, 30 A 896 [rev on other grounds 53 N. J. Eq. 652, 33 A 963] ("This proposition seems so self-evident as to require no authority to support it").

[i] **The cause of the loss must be stated** in the account, because the surrogate is to pass on the sufficiency of the excuse offered, that is, whether the loss was without the fault of the executor or administrator. In re Jones, 5 NYLegObs 124, 1 Redf. Surr. 263.

[j] **The oath of the representative is prima facie proof** of worthlessness or loss of assets. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

34. In re Williams, 118 NYS 562.

[a] **Property claimed and recovered by third persons.**—Where property with which an administrator has charged himself is afterward recovered by third persons, the administrator is entitled to credit for it. Dyer v. Jacoway, 50 Ark. 217, 6 SW 902.

[b] **Assets taken from representative by receiver.**—Where partnership assets inventoried by the representative have been taken into the possession of a receiver, he is entitled to credit therefor in his account. Kalbfell's Est., 30 PittsbLeg JNS 273 [aff 17 Pa. Super. 255].

35. Matter of Watson, 115 App. Div. 310, 100 NYS 993 [aff 187 N. Y. 541 mem, 80 NE 1122 mem]; Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615, 57 NE 1129].

Expenses, compensation, commissions, etc. The expenses of administration may be allowed to the representative in his account,[36] and he should also be allowed credit for the compensation to which he is entitled,[37] although where the taking of commissions by an executor was premature the sum taken should, for purposes of accounting, be regarded as still in his hands.[38] Where an administrator has collected rents and has made disbursements for repairs, insurance, and taxes on real estate, he should not be allowed for such disbursements without accounting for the rents.[39] Where an executor expends estate funds in the preservation of property of the estate, he should be given credit for the money realized out of such property by reason of such preservation,[40] although the court reserves until final accounting the question whether such expenditures were necessary.[41]

Reimbursements to third persons. Where on the accounting it appears that items of expenditure for which credit is claimed were actually paid by a third person, the representative may show that he repaid such person out of the funds of the estate, and upon such showing the credit claimed will be allowed.[42]

Widow's allowance or dower. A widow, accounting as administratrix, should be credited with the amount set apart to her by appraisers as her allowance or exemption, where there is no evidence that she did not receive it.[43] Where an executor sells real estate to the widow, who has a right of dower therein, he will not be entitled to a credit on his account equal to the value of her dower, as it will be presumed that the sale was made subject to dower.[44]

Combination of credits and charges. Where a claim not properly proved is paid by an administrator, but the amount is afterward repaid and accounted for by him, the item should not appear in his settlement as either a debit or a credit.[45] In a case where adult heirs and the widow and a third person to be appointed as guardian for a minor heir entered into an agreement under which they released their interest in certain property in favor of the widow and the minor heirs, and the widow was appointed administratrix, it was held that as against the adults the widow in her account should credit herself with the property delivered to the adults and should show that the property released by them was turned over to herself as widow and the minor heir, leaving the remaining property to be accounted for and distributed in accordance with the statute of distribution.[46]

Items charged by mistake. Where a representative through mistake has charged himself with money, claims, or property not constituting assets of the estate, he is entitled to a corresponding credit in his accounts;[47] and where he has been charged for an unauthorized expenditure, but the estate has received a benefit therefrom, he is entitled to a corresponding credit.[48]

Credits exceeding assets. The jurisdiction to settle an account of personal assets of an estate does not extend to the allowance to the administratrix of charges in her favor beyond the amount of such assets.[49]

Credit illegal in part. Where a credit taken by an administrator in his general account is legal

36. Ala.—Pearson v. Darrington, 32 Ala. 227.
Cal.—In re Willard, 139 Cal. 501, 73 P 240, 64 LRA 554; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.
Conn.—Fairman's App., 30 Conn. 205.
Ill.—In re Thurber, 209 Ill. A. 533.
Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.
Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.
Ky.—Floyd v. Floyd, 7 B. Mon. 290.
Md.—Edelen v. Edelen, 11 Md. 415.
Mass.—Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847; Edwards v. Ela, 5 Allen 87.
N. Y.—Matter of King, 122 App. Div. 354, 106 NYS 1073; Matter of Smith, 111 App. Div. 23, 97 NYS 171; Williamson v. Williamson, 6 Paige 298; Glover v. Holley, 2 Bradf. Surr. 291.
N. C.—Whitted v. Webb, 22 N. C. 442; Clarke v. Cotton, 17 N. C. 51.
Or.—Muldrick v. Galbraith, 31 Or. 86, 49 P 886.
Pa.—Kost's App., 107 Pa. 143; In re Wilson, 2 Pa. 325; Yerkes' Est., 8 Pa. Dist. 36; Mutchmore's Est., 31 Pa. Co. 353.
S. C.—Manigault v. Holmes, 8 S. C. Eq. 283; Wright v. Wright, 7 S. C. Eq. 185.
Vt.—Sowles v. Hall, 73 Vt. 55, 50 A 550.
Va.—Dromgoole v. Smith, 78 Va. 665; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.
Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.
Eng.—In re Jones, [1897] 2 Ch. 190; Hide v. Haywood, 2 Atk. 126, 26 Reprint 479; Potts v. Leighton, 15 Ves. Jr. 277, 33 Reprint 758.
[a] **Allowance on settlement of distribution account.**—In re Wilson, 2 Pa. 325.
[b] **Expenses of litigation.**—Matter of Title Guarantee, etc., Co., 114 App. Div. 778, 100 NYS 243 [aff 188 N. Y. 542 mem, 80 NE 1121 mem].
[c] **Costs.**—A representative will be allowed a credit on settling his accounts for the costs of a suit paid under a judgment recovered against him by a creditor of the estate when it does not appear that in failing to pay the debt without suit he was guilty of any negligence, bad faith, or other improper conduct. Pearson v. Darrington, 32 Ala. 227.
[d] **Counsel fees.**—(1) Mayer v. Schneider, 122 Ill. A. 48; Muldrick v. Galbraith, 31 Or. 86, 49 P 886. (2) Where a sum of six hundred and fifty dollars has been allowed to an executor for counsel fees paid to a firm of attorneys, it was error to allow the executor a further sum of five hundred dollars for attorney's fees paid to another firm, where the only proof of service rendered by such firm was the executor's general statement that it was for advice given. In re Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem].
[e] **Allowance of gross sum.**—(1) It is improper to allow a gross sum for "expenses of settling the estate" without any items either in the account or in the schedule annexed to it. Fairman's App., 30 Conn. 205. (2) When one attorney either performs or directs all the legal work in settling an estate, the compensation therefor may be entered in the administrator's account and allowed as one gross sum. Muldrick v. Galbraith, 31 Or. 86, 49 P 886.
[f] **That an administrator made no claim in prior accounts** for an allowance of attorney's fees, expenses, and for extraordinary services, did not constitute an absolute waiver thereof. Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.
Liability of estate for expenses of administration see supra § 933.
37. Allen v. Hunt, 213 Mass. 276, 100 NE 552.
[a] **Allowances to an administrator for extraordinary services** in the settlement of the estate are part of the statement of his account, and are to be so considered by the court. McMahon v. Ambach, 79 Oh. St. 103, 86 NE 512.
Right to compensation see infra §§ 2394–2444.
38. Matter of McDowell, 102 Misc. 275, 169 NYS 853 [mod on other grounds 184 App. Div. 646, 172 NYS 658].
39. Matter of Bussman, 182 App. Div. 335, 170 NYS 420.
40. In re Smith, 118 Cal. 462, 50 P 701; Matter of McMonagle, 139 App. Div. 398, 124 NYS 258; In re Donnelly, 246 Pa. 308, 92 A 306.
41. In re Smith, 118 Cal. 462, 50 P 701.
42. In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686]; Wooten v. House, (Tenn. Ch. A.) 36 SW 932.
43. In re Kennedy, 186 App. Div. 188, 173 NYS 607.
44. Matter of Smith, 1 Misc. 269, 22 NYS 1067, Pow. Surr. 271.
45. Hatfield v. Steele, 61 SW 999, 22 KyL 1893.
46. Fletcher v. Fletcher, 191 Mass. 211, 77 NE 758.
47. Tartt v. Wahl, 77 Ill. A. 578; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Hallowell's Est., 9 Pa. Dist. 90; Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; In re Compton, 8 Lack LegN (Pa.) 320; Re Winters, 7 Terr. L. 250.
48. In re Witt, 74 Wash. 172, 132 P 1012.
[a] **Illustration.**—Where an executor was charged with the cost of an automobile alleged to have been unlawfully charged against the estate, he was entitled to credit for its selling price, which he turned into the estate. In re Witt, 74 Wash. 172, 132 P 1012.
49. Buxton v. Barrett, 14 R. I. 40.

in part and in part illegal, and there is no mode of discriminating as to what is legal, the entire credit should be rejected.[50]

Debts barred by limitations. Where the executor or administrator has power to waive the bar of the statute of limitations,[51] he is entitled to credit in his accounts for payment of a debt which was so barred,[52] but he can have no credit for such payment where he had not power to waive the bar.[53] It has been held, however, that, where the representative has paid a debt barred by the statute before decedent's death, the court will presume, after a lapse of more than twenty years, that the executor had evidence of a new promise by the debtor in his lifetime, and that credit should be allowed for the payment;[54] and in a case where it appeared in the settlement of an executor's account that a note executed by him and testator was barred by the statute of limitations, except for partial payments made thereon; that such payments were made by the executor with money furnished by testator for that purpose; that the note was given to aid the executor, who was testator's son, in purchasing a team; and that testator had designed paying the note himself, the executor was held entitled to credit for the amount paid to cancel the note.[55]

Interest. The representative may, according to some authorities, be credited with interest on proper disbursements where he has been charged with interest on money declared to be assets,[56] but the allowance of interest is not a necessary consequence of the entry of a credit at a particular date,[57] and interest should not be allowed on advances made to pay debts when there were sufficient assets to pay them.[58]

[§ 2394] **F. Compensation—1. Right to Compensation—a. In General.** At common law the office of personal representative was regarded as honorary, to be performed without remuneration.[59] In the United States and Canada, however, the common-law doctrine does not obtain, but executors and administrators are allowed a reasonable compensation for their services,[60] even though they are entitled to share in the estate or to receive some

50. Pearson v. Darrington, 32 Ala. 227; Clark's Est., 20 Pa. Co. 439.

51. See supra § 907.

52. Pursel v. Pursel, 14 N. J. Eq. 514; Halliburton v. Carson, 100 N. C. 99, 5 SE 912, 6 AmSR 565; Anderson's App., 3 Walk. (Pa.) 497; Hunter v. Baxter, 3 Giffard 214, 66 Reprint 388.

53. Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Woods v. Elliott, 49 Miss. 168; Matter of Oosterhoudt, 15 Misc. 556, 38 NYS 179, 1 Gibb. Surr. 516; Matter of Hill, 7 NYS 328, 2 Conn. Surr. 25; Willson v. Willson, 2 Dem. Surr. (N. Y.) 462; Burnett v. Noble, 5 Redf. Surr. (N. Y.) 69; Freeman v. Freeman, 2 Redf. Surr. (N. Y.) 137; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

[a] **How allowance contested.**—Where the representative claims credit for the payment of barred debts, the allowance must be contested in the manner prescribed by law, but this must be done in the lower court and cannot be done for the first time on appeal. Blakey's Succ., 12 Rob. (La.) 155.

54. Broome v. Van Hook, 1 Redf. Surr. (N. Y.) 444.

55. Matter of Beach, 1 Misc. 27, 22 NYS 1079.

56. State v. Layton, 3 Del. 469; Scott v. Crews, 72 Mo. 261; Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32; Royston v. McCulley, (Tenn. Ch. A.) 59 SW 725, 52 LRA 899.

[a] **Such interest may be at the same rate as is charged** against the representative. Scott v. Crews, 72 Mo. 261.

[b] **Interest saved by paying inheritance taxes before required time** may be credited. Wyckoff v. O'Neil, 72 N. J. Eq. 880, 67 A 32.

[c] **Contrary view.**—"It seems from the account presented that the administrator charged himself with interest on all sums received, and gave himself credit for all claims paid, with interest thereon, both debts and credits, to the date of settlement, in 1866. This mode of calculation the court properly rejected." Trotter v. Trotter, 40 Miss. 704, 705.

57. Durnford's Succ., 1 La. Ann. 92; Bryan's Est., (Mo.) 190 SW 581, 585 [cit Cyc].

58. Matter of Hawley, 108 App. Div. 185, 96 NYS 61 [aff 185 N. Y. 566 mem, 77 NE 1188 mem].

59. Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699.

Ark.—Gordon v. Greening, 121 Ark. 617, 182 SW 272.

Ga.—Walton v. Gairdner, 111 Ga. 343, 36 SE 666.

Ky.—Avey v. Stearman, 145 Ky. 574, 578, 140 SW 1055 [cit Cyc].

Md.—Gaines v. Reutch, 64 Md. 517, 2 A 913.

N. J.—Warbass v. Armstrong, 10 N. J. Eq. 263; In re Christie, 89 N. J. Eq. 303, 101 A 64.

N. Y.—Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Manning v. Manning, 1 Johns. Ch. 527.

N. C.—Boyd v. Hawkins, 17 N. C. 329.

Oh.—Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Charleston College v. Willingham, 34 S. C. Eq. 195; Logan v. Logan, 6 S. C. Eq. 1.

Tenn.—Bryant v. Puckett, 3 Hayw. 252; Hoffman v. Jones, 7 Tenn. Civ. A. 392.

Eng.—Kirkman v. Booth, 11 Beav. 273, 50 Reprint 821, 12 ERC 29; Brocksopp v. Barnes, 5 Madd. 90, 56 Reprint 829; Scattergood v. Harrison, Mosely 128, 25 Reprint 310; Robinson v. Pett, 3 P. Wms. 249, 251, 24 Reprint 1049; Sheriff v. Axe, 4 Russ. 33, 4 EngCh 33, 38 Reprint 717; Hovey v. Blakeman, 4 Ves. Jr. 596, 31 Reprint 306.

Newfoundl.—In re Southcott, 8 Newfoundl. 645.

"It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble, the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust, or not." Robinson v. Pett, supra.

[a] **Where a commission agent becomes the executor of his deceased principal** he is entitled to commissions on all moneys received and paid by him prior to the death of the testator; as to all moneys received or paid by him after the death of the testator he is entitled to be paid for any trouble taken by him in regard thereto before the testator's death and at the same rate that any other agent would be entitled for the same services according to the usual course of mercantile employment. Sheriff v. Axe, 4 Russ. 33, 4 EngCh 33, 38 Reprint 717.

[b] **In India** commissions are allowed to an executor in respect only to the assets collected by him while in India. Denton v. Davy, 1 Moore P. C. 15, 12 Reprint 716; Cockrell v. Barber, 2 Russ. 585, 3 EngCh 585, 38 Reprint 455, 1 Sim. 23, 2 EngCh 23, 57 Reprint 487; Campbell v. Campbell, 13 Sim. 168, 36 EngCh 168, 60 Reprint 65.

60. U. S.—Nicholls v. Hodges, 1 Pet. 562, 7 L. ed. 263; Atkinson v. Robbins, 2 F. Cas. No. 617, 5 Cranch C. C. 312.

Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Ivey v. Coleman, 42 Ala. 409; Carroll v. Moore, 7 Ala. 615; Phillips v. Thompson, 9 Port. 664.

Ark.—Gordon v. Greening, 121 Ark. 617, 182 SW 272; Ex p. Bell, 14 Ark. 76.

Cal.—In re Dudley, 123 Cal. 256, 55 P 897; In re Goodrich, 6 Cal. A. 730, 93 P 121.

Conn.—Main's App., 73 Conn. 638, 48 A 965.

Del.—Bush v. McComb, 7 Del. 546.

Fla.—Shepard v. Shepard, 19 Fla. 300.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498; Walton v. Gairdner, 111 Ga. 343, 36 SE 666; Burney v. Spear, 17 Ga. 223; Williamson v. Wilkins, 14 Ga. 416.

Ill.—In re Wincox, 85 Ill. A. 613 [aff 186 Ill. 445, 57 NE 1073].

Ind.—Ray v. Doughty, 4 Blackf. 115.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.

Ky.—Avey v. Stearman, 144 Ky. 574, 140 SW 1055 [cit Cyc]; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Caldwell v. Hampton, 53 SW 14, 21 KyL 793; Terrell v. Rowland, 86 Ky. 67, 4 SW 825, 9 KyL 258; Jennings v. Davis, 5 Dana 127; Carroll v. Connet, 2 J. J. Marsh. 195; Webb v. Webb, 6 T. B. Mon. 163; Fauntleroy v. Lyle, 5 T. B. Mon. 266; Logan v. Troutman, 3 A. K. Marsh. 66; Rogers v. Burbridge, 7 KyL 42, 48, 13 Ky. Op. 517.

La.—Wells v. Alexander, 27 La. Ann. 624; Pomponeau's Succ., 10 La. Ann. 79; Fowler's Succ., 7 La. Ann. 207; Heath v. Lambeth, 3 La. Ann. 361; Ball v. Hodge, 11 Rob. 390; Pinnell v. Scriber, 12 La. 608.

Md.—Hall v. Griffith, 2 Harr. & J. 483.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

Mich.—Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617; In re Power, 92 Mich. 106, 52 NW 298.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 NW 74.

Miss.—Merrill v. Moore, 8 Miss. 271, 40 AmD 60.

Mo.—Elstroth v. Young, 94 Mo. A. 351, 68 SW 100.

Mont.—In re Dewar, 10 Mont. 426, 25 P 1026.

Nev.—In re Nicholson, 1 Nev. 518.

benefit therefrom by virtue of the statute of distribution or the provisions of the will.[61]

The reason for allowing compensation to executors and administrators is to reward them not only for their time, labor, and trouble in administering the estates, but also for the responsibility incurred and for the fidelity with which they discharge the duties of their trusts.[62]

Death or revocation of authority. An executor or administrator who dies or whose authority is revoked is nevertheless entitled to compensation for the services actually performed by him.[63]

Trust company as administrator. Where a trust company, appointed as an administrator of an estate, has rendered the services, and the estate has received the benefit, it cannot be denied a reasonable compensation, the measure of which is that allowed by the statute to legally appointed executors and administrators.[64]

Public administrator. A public administrator is sometimes allowed, by statute, the same compensation as other administrators,[65] or double the commission to which an ordinary administrator would be entitled,[66] but such a provision is superseded, as to the county in question, by a statute fixing a salary for the public administrator, and providing that the same shall be in full compensation for all services performed by him.[67] A public administrator who, during the period between the election of his successor and the expiration of his own term of office, fails to procure a revocation of his letters, and fails to state his accounts to the close of his term, and to petition for relief from the further performance of his trust, but continues to administer upon the estates in his hands after the expiration of his term of office, cannot complain because his services are regarded as voluntary, and he is denied special compensation therefor.[68]

[§ 2395] **b. What Law Governs.** It is usually held that the compensation of a personal representative is governed by the law operative at the time of the rendition of his services and not by the law in force at the time of his appointment or the settlement of his accounts,[69] but there is also authority for the views that compensation is to be computed under the law in force at the time of the settlement of the representative's accounts[70] or the award of compensation;[71] that a statute allowing to exec-

N. H.—Stewart v. Harriman, 56 N. H. 25, 22 AmR 408; Lucy v. Lucy, 55 N. H. 9; Marston v. Marston, 21 N. H. 491; Wendell v. French, 19 N. H. 205; Gordon v. West, 8 N. H. 444.

N. J.—Weeks v. Selby, 61 N. J. Eq. 668, 46 A 948; Dickerson v. Canfield, 11 N. J. Eq. 259; Warbass v. Armstrong, 10 N. J. Eq. 263; State Bank v. Marsh, 1 N. J. Eq. 288.

N. Y.—Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Prentice, 25 App. Div. 209, 49 NYS 353 [aff 160 N. Y. 568, 55 NE 275]; Matter of Meuschke, 61 Misc. 9, 114 NYS 722, 7 Mills Surr. 10; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Matter of Foulds, 35 Misc. 171, 71 NYS 473, 2 Mills Surr. 252; Matter of Guldenkirch, 35 Misc. 123, 71 NYS 310; Halsey v. Van Amringe, 6 Paige 12; McWhorter v. Benson, Hopk. 28.

N. C.—Peyton v. Smith, 22 N. C. 325; Boyd v. Hawkins, 17 N. C. 329.

Oh.—Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

Pa.—In re Reid, 250 Pa. 103, 95 A 392; In re Moore, 211 Pa. 338, 60 A 987; In re Sunderland, 203 Pa. 155, 52 A 167; Culbertson's App., 84 Pa. 303; Wootten's Est., 21 Pa. Dist. 1035; In re Thomas, 1 Dauph. Co. 381; Schwoyer's Est., 2 Woodw. 456.

R. I.—Williams v. Herrick, 18 R. I. 120, 25 A 1099.

S. C.—Tompkins v. Tompkins, 18 S. C. 1.

Tenn.—Leach v. Cowan, 125 Tenn. 182, 140 SW 1070, AnnCas1913C 188; Ex p. Parker, 19 SW 571; German v. German, 7 Coldw. 180; Bryant v. Puckett, 3 Hayw. 252; Read v. Franklin, (Ch. A.) 60 SW 215.

Tex.—Kearney v. Nicholson, (Civ. A.) 67 SW 361.

Vt.—In re Hall, 70 Vt. 458, 41 A 508.

Va.—Dromgoole v. Smith, 78 Va. 665; Fitzgerald v. Jones, 1 Munf. (15 Va.) 150; Miller v. Beverleys, 4 Hen. & M. (14 Va.) 415.

Wash.—In re Sour, 17 Wash. 675, 50 P 587; Granberry v. Granberry, 1 Wash. 246, 1 AmD 455.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589; Hoke v. Hoke, 12 W. Va. 427.

Wis.—Cameron v. Cameron, 15 Wis. 1, 82 AmD 652.

Ont.—Re McIntyre, 7 Ont. L. 548, 1 OntWR 56, 3 OntWR 258, 24 Can LTOccNotes 268; Hoover v. Wilson, 24 Ont. A. 424; Archer v. Severn, 13 Ont. 316; In re Honsberger, 10 Ont. 521; Sievewright v. Leys, 1 Ont. 375; Thompson v. Fairbairn, 11 Ont. Pr. 333; McMillan v. McMillan, 21 Grant Ch. (U. C.) 369; Thompson v. Freeman, 15 Grant Ch. (U. C.) 384; Biggar v. Dickson, 15 Grant Ch. (U. C.) 233; Wilson v. Proudfoot, 15 Grant Ch. (U. C.) 103; Torrance v. Chewett, 12 Grant Ch. (U. C.) 407; Gould v. Burritt, 11 Grant Ch. (U. C.) 523; Chisholm v. Barnard, 10 Grant Ch. (U. C.) 479.

[a] **Partner of decedent.**—An administrator is not deprived of his right to commissions because he was the intestate's partner, the assets administered not being partnership property. Bewley's Est., 12 Phila. (Pa.) 56.

[b] **An employee** who becomes administrator of his deceased employer is entitled to receive the usual commissions. Bewley's Est., 12 Phila. (Pa.) 56.

[c] **Compensation for keeping together and managing estate.**—Pearson v. Darrington, 32 Ala. 227; Gould v. Hayes, 19 Ala. 438; Chancellor v. Ashby, 2 Patt. & H. (Va.) 26.

[d] **Sheriff acting as administrator** entitled to compensation. Scarce v. Page, 12 B. Mon. (Ky.) 311.

[e] **One who acts as agent** of an estate at the request of the duly qualified personal representative, through motives of humanity and benevolence, is not entitled to compensation. Mason v. Roosevelt, 5 Johns. Ch. (N. Y.) 534.

61. Ark.—Sharp v. Himes, 129 Ark. 327, 196 SW 131.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ky.—Thome v. Allen, 49 SW 1068.

La.—McGee's Succ., 132 La. 335, 61 S 394; Filhiol's Succ., 123 La. 497, 49 S 138.

N. Y.—In re Mason, 98 N. Y. 527; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Campbell v. Mackie, 1 Dem. Surr. 185.

N. C.—Blount v. Hawkins, 57 N. C. 161; Oden v. Windley, 55 N. C. 440.

Pa.—Pelham's Est., 9 Kulp 347.

R. I.—Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728.

Va.—Granberry v. Granberry, 1 Wash. (1 Va.) 246, 1 AmD 455.

Ont.—McClenaghan v. Perkins, 5 Ont. L. 129, 1 OntWR 752.

[a] **Husband or wife of decedent.**—(1) A husband (Moulton v. Smith, 16 R. I. 126, 12 A 891, 27 AmSR 728) or (2) wife (Sharp v. Himes, 129 Ark. 327, 196 SW 131; Pelham's Est., 9 Kulp (Pa.) 347) who serves as personal representative of his or her deceased spouse is entitled to compensation. (3) The right of a surviving husband to the commission of an administrator is not defeated by his enjoyment of the usufruct in the community property. McGee's Succ., 132 La. 335, 61 S 394. (4) The fact that a husband who is appointed administrator of his wife's estate is insolvent is not sufficient to deprive him of this right. Reed's Est., 4 Phila. (Pa.) 375.

[b] **A testamentary executor who is also universal legatee** is not entitled to commissions. McNeely v. McNeely, 50 La. Ann. 823, 24 S 338.

62. Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Powell v. Burrus, 35 Miss. 605; Merrill v. Moore, 8 Miss. 271, 40 AmD 60; Hipkins v. Bernard, 2 Hen. & M. (12 Va.) 21.

63. See infra §§ 2428, 2435.

64. Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

65. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

66. Matter of Hammer, 94 Misc. 36, 158 NYS 981.

67. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

68. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

[a] **The public administrator cannot retain the fees** allowed him for services rendered after the expiration of his term of office. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

69. Ala.—Key v. Jones, 52 Ala. 238; Pearson v. Darrington, 32 Ala. 227; Gould v. Hayes, 19 Ala. 438.

Md.—Gaines v. Reutch, 64 Md. 517, 2 A 913.

Mo.—In re Tutt, 41 Mo. A. 662.

Mont.—In re Dewar, 10 Mont. 426, 25 P 1026.

Va.—Turner v. Turner, 1 Gratt. (42 Va.) 11.

[a] **Legal services.**—A statute requiring the surrogate to allow an executor who is an attorney and who has rendered legal services in connection with his executorial duties compensation therefor, is not retroactive, and an executor is not entitled to compensation for legal services rendered before such statute took effect. Matter of Daly, 180 App. Div. 307, 167 NYS 229 [rev 99 Misc. 203, 165 NYS 792].

70. In re Naylor, 164 NYS 462.

71. In re Barker, 186 App. Div. 317, 174 NYS 230.

utors and administrators a compensation for their services applies to all settlements made after its passage, although the services were performed before that time;[72] and that the power to grant an allowance for the expenses of administration is governed by the law in force when the application therefor is made.[73] If an administrator goes into a foreign state and there collects assets and voluntarily brings them into the state of his appointment and subjects them to the order of court in such state, his compensation must be regulated by the laws of such state.[74]

[§ 2396] **c. Void or Irregular Appointment.** It has been held that the validity of an administrator's appointment cannot be questioned on the accounting, and where he has rendered services as such he is entitled to his expense and commissions.[75] Accordingly compensation has been allowed to executors or administrators who acted under letters which were irregular or improperly issued, although not void,[76] and even to an executor who has acted under void letters testamentary.[77] But it has also been held that one is not entitled to compensation where he acts under void letters,[78] procures his appointment as public administrator knowing that he is not by law entitled to it,[79] or is displaced because allowed to qualify without giving the requisite security.[80] One who takes possession of the estate of a relative in time of war when there is no authority competent to grant letters of administration will not be considered as a trespasser but as a trustee acting for the best,[81] and will be allowed commissions on his accounts.[82] One who is entitled to administer, but never actually does so, may be entitled to commissions as against one who does administer, if such result is brought about by the improper conduct of the latter in obtaining a wrongful appointment and in failing to deliver the estate to the rightful administrator.[83] It is usually held that the fact that a will under which one is appointed and acts is afterward found invalid will not deprive him of compensation for services rendered in good faith,[84] and the same rule applies to an administrator whose letters are revoked by the admission of a will to probate.[85]

Where appointment as administrator is fraudulently obtained by means of false representations of relationship to decedent and consequent right to administer, compensation will be denied, even though the estate has not been injured.[86]

[§ 2397] **d. Necessity for Judicial Allowance.** Personal representatives have no right to appropriate assets of the estate for the payment of their commissions until an allowance thereof by the court;[87] but they are entitled to retain in their hands a sufficient fund to cover their lawful commissions to be awarded on the settlement of their accounts,[88] although a failure to retain funds for this purpose does not deprive the representative of the right to compensation.[89]

[§ 2398] **e. Effect of Testamentary Provisions.**[90] It has been held that a testator may deprive his executor of all compensation if he so expressly provides in his will,[91] and where the testator makes to his executor a bequest or devise in lieu of compensation for his services, no compensation other

72. Dakin v. Demming, 6 Paige (N. Y.) 95.

73. Matter of Bell, 94 Misc. 552, 158 NYS 142.

74. Satterwhite v. Littlefield, 21 Miss. 302.

75. Carroll v. Hughes, 5 Redf. Surr. (N. Y.) 337; Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

76. Matter of Hurst, 111 App. Div. 460, 97 NYS 697; In re Owen, 32 Utah 469, 91 P 283; Rice v. Tilton, 14 Wyo. 101, 82 P 577.

77. Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

78. In re Frey, 52 Cal. 658; In re Myler, (Minn.) 158 NW 395; Slate v. Henkle, 45 Or. 430, 78 P 325.

79. Miller's Succ., 27 La. Ann. 574.

80. McDonogh's Succ., 7 La. Ann. 472.

81. Lloyd v. Cannon, 2 S. C. Eq. 232.

82. Lloyd v. Cannon, 2 S. C. Eq. 232.

83. Preval v. Debuys, 5 Mart. (La.) 428.

84. U. S.—Bradford v. Boudinot, 3 F. Cas. No. 1,765, 3 Wash. 122.

Conn.—Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 AmD 100.

Ky.—Wood v. Nelson, 10 B. Mon. 229.

Md.—Glass v. Ramsey, 9 Gill 456.

N. C.—Ralston v. Telfair, 22 N. C. 414.

Tenn.—Read v. Franklin, (Ch. A.) 60 SW 215.

Wis.—Brown v. McGee, 117 Wis. 389, 94 NW 363.

[a] **Services in unsuccessful effort to probate will.**—The law does not cast upon the person nominated executor in a will the legal duty of procuring its probate, and such person, although acting in good faith, is not entitled to payment out of the fund for his services and expenses in an ultimately unsuccessful effort to probate the will against a contest by the heir upon the ground of want of testamentary capacity, although he was successful in the first instance, securing its allowance in the probate court. In re Myler, (Minn.) 158 NW 395.

[b] **Nuncupative will.**—Where one prepares a nuncupative will, which is probated mainly on his evidence, and takes out letters with the will annexed, but the will is afterward set aside, he is not entitled to compensation for services as such administrator, although he acted with the honest idea that the will was valid. Royston v. McCulley, (Tenn. Ch. A.) 59 SW 725, 52 LRA 899.

85. Matter of Hurst, 111 App. Div. 460, 97 NYS 697.

[a] **However,** the fact that a decree permitted an administrator to turn over to the executor, his successor, certain securities in specie, did not entitle the administrator to commissions on the securities. Matter of Hurst, 111 App. Div. 460, 97 NYS 697.

86. Hall v. Santangelo, 178 Ala. 447, 60 S 168. To same effect Morere's Succ., 3 La. A. (Orleans) 155.

87. Ga.—McBride v. Hunter, 64 Ga. 655.

Ind.—Collins v. Tilton, 58 Ind. 374.

N. J.—Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388.

N. Y.—Beard v. Beard, 140 N. Y. 260, 35 NE 488; Matter of Furniss, 86 App. Div. 96, 83 NYS 530; Wheelwright v. Rhoades, 28 Hun 57, 11 Abb NCas 382; Matter of Gerow, 23 NYS 847, Pow. Surr. 364; Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58; Matter of Harris, 4 Dem. Surr. 463; Meeker v. Crawford, 5 Redf. Surr. 450; Carroll v. Hughes, 5 Redf. Surr. 337; Lacey v. Davis, 4 Redf. Surr. 402; Whitney v. Phœnix, 4 Redf. Surr. 180; Wheelwright v. Wheelwright, 2 Redf. Surr. 501 [rev on other grounds 28 Hun 57, 11 AbbN Cas 382].

N. C.—Hodges v. Armstrong, 14 N. C. 253.

[a] **Interest is chargeable** (1) to a personal representative on sums appropriated by him in payment of his commissions in advance of their judicial allowance, from the date of appropriation to the date of allowance. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388 [app on this point but rev on other grounds 72 N. J. Eq. 880, 67 A 32]; Wheelwright v. Rhoades, 28 Hun (N. Y.) 57, 11 Abb NCas 382; In re Herrick, 12 NYS 105; In re Butler, 9 NYS 641, 1 Conn. Surr. (N. Y.) 58; Meyer's Est., 67 HowPr (N. Y.) 170; Matter of Peyser, 5 Dem. Surr. (N. Y.) 244; U. S. Trust Co. v. Bixby, 2 Dem. Surr. (N. Y.) 494; Lacey v. Davis, 4 Redf. Surr. (N. Y.) 402; Freeman v. Freeman, 4 Redf. Surr. (N. Y.) 211; Whitney v. Phœnix, 4 Redf. Surr. (N. Y.) 180; In re Hagerty, 97 Wash. 491, 166 P 1139. But compare Beard v. Beard, 140 N. Y. 260, 35 NE 488 (testamentary trustee who withdrew commissions before allowance not charged with interest where he acted in good faith, the commissions had been actually earned when taken, and no injury to the estate resulted). (2) Adult parties may, for the purpose of permitting a prompt distribution of the assets, where debts and other legacies are paid, compute the amount of commissions properly allowable, and interest will not be charged as a penalty, if commissions finally approved are then paid by the executors to themselves. Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58.

Time for allowance see infra § 2438.

88. Wheelwright v. Wheelwright, 2 Redf. Surr. (N. Y.) 501.

89. Matter of Prentice, 25 App. Div. 209, 49 NYS 353 [aff 160 N. Y. 568, 55 NE 275].

90. Testamentary provisions as to amount of compensation see infra § 2424.

91. Matter of Gerard, 1 Dem. Surr. (N. Y.) 244; Secor v. Sentis, 5 Redf. Surr. (N. Y.) 570. See also Frazer v. Frazer, 76 SW 13, 25 KyL 473 (where, however, compensation was allowed because of the loss of an advantage given by the will).

[a] **In Maryland** a testator cannot, by any testamentary provision, affect the commissions which the

than such bequest can be allowed.[92] But testamentary provisions will not be construed as depriving the executor of the right to compensation if they may be construed otherwise with equal reason,[93] and the general rule is that before a bequest or devise can be held to be made in compensation for services to be rendered by executors, there must be language in the will from which such an intention can be inferred.[94]

[§ 2399] **f. Priority of Claim.** It has been held that the compensation of the executor or administrator should be allowed to him in preference to debts,[95] and legacies,[96] and even that such compensation is entitled to priority in payment over funeral expenses.[97] But the court is sometimes authorized by statute to direct payment of the expenses of the funeral and last illness of the decedent in priority to the compensation of the representative.[98]

[§ 2400] **2. For What Services Allowed.**[99] Unless statutory fees are provided to compensate personal representatives for all services rendered, and other compensation forbidden except in cases especially provided,[1] the general rule is that personal representatives are entitled to reasonable compensation for all services which are necessary to a proper administration and settlement of the estate, or which benefit the estate,[2] but are not entitled to compensation for services which are not properly connected

law allows his executor. Handy v. Collins, 60 Md. 229, 45 AmD 725; State v. Baker, 8 Md. 44; McKim v. Duncan, 4 Gill 72.

92. Me.—Connolly v. Leonard, 114 Me. 29, 95 A 269.

Md.—Renshaw v. Williams, 75 Md. 498, 23 A 905.

N. Y.—Fletcher v. Hurd, 14 NYS 388; Secor v. Sentis, 5 Redf. Surr. 570.

Oh.—Rote v. Warner, 17 Oh. Cir. Ct. 342, 9 Oh. Cir. Dec. 536.

Va.—Jones v. Williams, 2 Call (6 Va.) 102.

Eng.—Freeman v. Fairlie, 3 Meriv. 24, 36 Reprint 10.

[a] **Abatement of legacy as compensation.**—A legacy to executors, expressly as a compensation for their trouble, does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. Anderson v. Dougall, 15 Grant Ch. (U. C.) 405.

[b] **In Maryland** when a testator makes a bequest to his executor by way of compensation in lieu of commissions, and the sum bequeathed is less than that which an allowance of the highest rate of commissions fixed by statute would produce, the orphans' court may in its discretion allow the executor such a percentage as reckoning the legacy therein will not exceed the maximum, and not be less than the minimum rate established by law. Renshaw v. Williams, 75 Md. 498, 23 A 905; Handy v. Collins, 60 Md. 229, 45 AmR 725.

93. Thome v. Allen, 49 SW 1068, 20 KyL 1728; Fidelity Trust, etc., Co. v. Watkins, 42 SW 753, 19 KyL 957; In re Marshall, 67 HowPr (N. Y.) 519, 3 Dem. Surr. 173; Fox's Est., 20 Pa. Dist. 749; Hamilton Boys' Home v. Lewis, 4 Ont. 18.

94. D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ky.—Thome v. Allen, 49 SW 1068, 20 KyL 1728.

N. J.—In re Haines, 8 N. J. Eq. 506.

N. Y.—In re Kernochan, 104 N. Y. 618, 11 NE 149; In re Mason, 98 N. Y. 527; Campbell v. Mackie, 1 Dem. Surr. 185.

N. C.—Oden v. Windley, 55 N. C. 440.

Pa.—In re Fox, 235 Pa. 105, 107, 83 A 613, AnnCas1914B 744.

Va.—Granberry v. Granberry, 1 Wash. 246, 1 AmD 455.

Ont.—McClenaghan v. Perkins, 5 Ont. L. 129, 1 OntWR 752.

"A bequest in a will made to one who is appointed executor is presumed to be a bounty and not compensation for services to be rendered in settling the estate, unless it appears expressly or by clear implication that the testator intended that the legacy should be received by the executor in lieu of his commissions." In re Fox, supra.

[a] **An executor who is also tenant for life** of the estate of the testator is entitled to commissions. Blount v. Hawkins, 57 N. C. 161.

[b] **Bequest of part of residue.**—Where there is a bequest of a share of the residue of the estate to executors, it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum. Hamilton Boys' Home v. Lewis, 4 Ont. 18.

[c] **In Louisiana** (1) the rule is that, where an executor is a gratuitous legatee he will not be entitled to commissions unless the testator has formally declared his intention that he should have the legacy over and above his commission. Filhiol's Succ., 123 La. 497, 49 S 138; Abrams' Succ., 82 S 727; Cardere's Succ., 48 La. Ann. 280, 19 S 134; Fink's Succ., 13 La. Ann. 103; Ross' Succ., 1 La. Ann. 129; Cucullu's Succ., 4 Rob. 397. (2) The formal expression of testator's intention that the executor shall be entitled to a commission in addition to his legacy must be found in the testament, or at least must be made in testamentary form. Abrams' Succ., supra. (3) Where a legacy purports to be remunerative, but the services were rendered by a minor to his father without expectation of reward, the legatee cannot take both the legacy and his commission as executor in the absence of express language in the will showing such intention. Waechter's Succ., 131 La. 505, 59 S 918. (4) The executor is entitled to commissions where he is given no more by the will than he would have been entitled to as an heir at law. Gilmore's Succ., 8 La. A. (Orleans) 295. (5) A bequest of articles of sentimental value only does not deprive the executor of the right to a commission. Gilmore's Succ., supra.

95. Williamson v. Wilkins, 14 Ga. 416; Fauntleroy v. Lyle, 5 T. B. Mon. (Ky.) 266; Logan v. Troutman, 3 A. K. Marsh. (Ky.) 66; Semple's Est., 10 Pa. Dist. 605, 31 PittsbLegJNS 428, 15 YorkLegRec 18.

96. Williamson v. Wilkins, 14 Ga. 416; Logan v. Troutman, 3 A. K. Marsh. (Ky.) 66; In re Nicholson, 1 Nev. 518; Halsey v. Van Amringe, 6 Paige (N. Y.) 12; Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 198.

97. In re Nicholson, 1 Nev. 518.

98. In re Magorty, 169 Cal. 163, 146 P 430.

99. Services as attorney see supra § 547.

1. See infra §§ 2422–2425.

2. Ala.—Gerald v. Bunkley, 17 Ala. 170; Craig v. McGehee, 16 Ala. 41.

Ark.—Armstrong v. Cashion, 16 SW 666.

Cal.—Wells v. Robinson, 13 Cal. 133.

D. C.—Howard v. Howard, 38 App. 575.

Fla.—Sherrell v. Shepard, 19 Fla. 30.

Ga.—Hosher v. Fitzpatrick, 146 Ga. 525, 91 SE 780.

Ky.—Kelley v. Kelley, 141 Ky. 414, 132 SW 1031; Scarborough v. Watkins, 9 B. Mon. 540, 50 AmD 528.

Md.—Lee v. Lee, 6 Gill & J. 316.

Mich.—Zimmer v. Saier, 155 Mich. 388, 119 NW 433, 130 AmSR 575; Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617.

Mo.—Hawkins v. Cunningham, 67 Mo. 415.

Nebr.—In re Wilson, 83 Nebr. 252, 119 NW 522.

N. H.—Bartlett v. Fitz, 59 N. H. 502; Gordon v. West, 8 N. H. 444.

N. J.—Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994.

N. Y.—Matter of Lown, 165 App. Div. 552, 151 NYS 171 [aff 216 N. Y. 725 mem, 111 NE 1090 mem]; Matter of Martin, 124 App. Div. 793, 109 NYS 217.

Pa.—In re Neafie, 245 Pa. 576, 91 A 958; Winsel's Est., 19 Pa. Dist. 659; Donat's Est., 3 Pa. Dist. 749, 15 Pa. Co. 379; Oliver's Est., 4 Pa. Co. 209; Squibb's Est., 1 Del. Co. 529; Fendrick's Est., 20 LancLRev 69.

Tenn.—Killebrew v. Murphy, 3 Heisk. 546.

Vt.—Hapgod v. Jennison, 2 Vt. 294.

Wash.—In re Lichtenberg, 58 Wash. 585, 109 P 48.

Wis.—In re Hemphill, 157 Wis. 331, 147 NW 1089.

Ont.—Re Batt, 9 Ont. Pr. 447.

[a] **Caring for property of estate.**—A personal representative is entitled to an allowance against the estate for his time and services in taking care of the property of the estate, so long as it remains under his management, and he is accountable for it in that capacity, although the use of the property was bequeathed to another, who during all the time had the income of it. Richardson v. True, 28 Vt. 676.

[b] **Collection and investment of a fund pending litigation.**—Where pending a suit against an administrator to recover specific funds, by consent of all parties the administrator collected and invested them, he was allowed his commission, it being held to be his duty to take care of the funds until the ownership was determined. Wells v. Robinson, 13 Cal. 133.

[c] **Services by agent.**—In no case will an executor be entitled to an allowance for services performed by an agent gratuitously. Chisholm v. Barnard, 10 Grant Ch. (U. C.) 479.

[d] **Services performed by attorneys.**—Where executors employ attorneys to make collections which they might conveniently make themselves, they ought not to be allowed commissions thereon in addition to those of the attorneys. Carter v. Cutting, 5 Munf. (19 Va.) 223.

[e] **Services resulting in loss.**—Although ordinarily the only services for which an administrator or executor will be allowed are such as are beneficial to the estate, an allowance may be made for services undertaken in good faith, although they are not of pecuniary or other benefit, but rather result in loss. In re Lichtenberg, 58 Wash. 585, 109 P 48.

with such settlement or for acts done for their own benefit.[3]

[§ 2401] **3. From What Fund Payable.** The compensation of personal representatives is usually to be paid out of the general personal estate[4] of his decedent.[5] The residuary estate is the primary fund to be looked to for payment of the compensation of the representative,[6] and such compensation is not chargeable on legacies,[7] except by way of abatement when the general estate is insufficient to pay both the legacies and the representative's compensation.[8] Such compensation is not generally a charge on real estate,[9] but where the personal estate is exhausted or there was none in the first instance compensation for services rendered in selling land for the payment of debts and paying out the proceeds is a charge on such proceeds,[10] and it has also been held that compensation for managing and selling real estate devised to be sold for the benefit of testator's children must be paid out of the proceeds of the land[11] so as to leave the personalty for the payment of debts.[12] Where a representative, under the provisions of a will, acts in relation to a certain fund as a trustee rather than as a representative, his compensation for executing the trust is to be paid out of the income of such fund rather than out of the general estate,[13] and so where the income of a certain fund is given by will to a person for life or for a shorter period, commissions for collecting and paying the income must be paid out of the income and not out of the general estate or out of the principal of the fund.[14] Where, on the death of an administratrix, her accounts were settled by her executor, any commissions to which she was entitled should have been allowed to the accountant, and not as a claim against the administrator de bonis non.[15]

[§ 2402] **4. Commissions—a. In General.** In a number of jurisdictions the statutes provide for compensation to executors and administrators in the form of commissions on the value of the assets received or administered by them.[16]

[§ 2403] **b. On What Allowed—(1) In General.** The commissions of an executor or administrator are regarded as his entire compensation, not only for collecting the assets of the estate, but also for the labor, risk, and trouble attending the entire administration and settlement, and it is therefore generally held that commissions should be allowed upon any and all property of the estate which comes into the possession of the representative and for which he accounts.[17] Commissions may be al-

3. Ga.—Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

Ill.—In re Teeple, 196 Ill. A. 378; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108].

Ky.—Slusher v. Weller, 151 Ky. 203, 151 SW 684.

La.—Scott's Succ., 9 La. Ann. 336.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

Mass.—Miller v. Congdon, 14 Gray 114.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318; Wisner v. Mabley, 74 Mich. 143, 41 NW 835.

Minn.—Minnesota Loan, etc., Co. v. Pettit, 175 NW 540.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

N. H.—Supreme Commandery, U. O. G. C. v. Donaghey, 75 N. H. 197, 72 A 419.

N. Y.—Cook v. Stockwell, 206 N. Y. 481, 100 NE 131, AnnCas1914B 491; Matter of Woods, 55 Misc. 181, 106 NYS 471, 6 Mills Surr. 188; In re Boyle, 151 App. Div. 568, 136 NYS 96 [aff 208 N. Y. 545, 101 NE 1095].

Pa.—In re Morrison, 196 Pa. 80, 46 A 257; Wissel's App., 4 Pennyp. 236; Hulseman's Est., 18 Pa. Dist. 441; Price's Est., 11 Pa. Dist. 229; Franket's Est., 2 LehighValLR 406.

S. C.—Griffin v. Bonham, 30 S. C. Eq. 71; Esswein v. Seigling, 12 S. C. Eq. 200.

[a] **Where an executor is instructed in the will to rent a farm** belonging to the estate, he is not entitled to compensation for services performed in managing the farm himself. Bartolet's App., 1 Walk. (Pa.) 77.

[b] **Conducting farm.**—Where decedent owned much farm land at the time of his death and his executors continued farming operations for three years thereafter, employing agents to attend to the business and paying them out of the funds of the estate, the executors were not entitled to commissions on receipts and disbursements in connection with the farming operation after the first year. Ex p. Coleman, 98 S. C. 420, 82 SE 674.

[c] **Work on farm.**—Where a son, who is executor under a will, together with the widow and a daughter of testator, resides on a farm belonging to the estate, and during that time they are supported on the products, and the son is manager and chief laborer on the farm, he is not entitled, on an accounting, to a credit for the value of his personal services. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

[d] **Repairing and painting real estate.**—An estate is not liable to an executor for his personal services in repairing and painting the real estate. Matter of Woods, 55 Misc. 181, 106 NYS 471, 6 Mills Surr. 188.

4. Ga.—Williamson v. Wilkins, 14 Ga. 416.

Ky.—Logan v. Troutman, 3 A. K. Marsh. 66.

Miss.—Brandon v. Hoggatt, 32 Miss. 335.

N. J.—McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498].

N. Y.—Van Sise v. Van Sise, 113 App. Div. 691, 100 NYS 53; Matter of Fisher, 93 App. Div. 186, 87 NYS 567; Westerfield v. Westerfield, 1 Bradf. Surr. 198.

Tenn.—Hoffman v. Jones, 7 Tenn. Civ. A. 392.

[a] **The indebtedness of an insolvent representative** to the estate constitutes assets and will be applied in the discharge of any commissions allowed him. Freeman v. Freeman, 4 Redf. Surr. (N. Y.) 211.

5. See State v. Ramsey County Prob. Ct., 76 Minn. 132, 135, 78 NW 1039 ("An executor or administrator takes his office with its burdens as well as its benefits, and the fact that the estate he represents is insolvent is no reason why he should receive compensation from the opposite party in any litigation which may arise").

6. Lutjen v. Lutjen, 63 N. J. Eq. 391, 51 A 790 [rev on other grounds 64 N. J. Eq. 773, 53 A 625]; McKnight v. Walsh, 23 N. J. Eq. 136 [aff 24 N. J. Eq. 498]; Milly v. Harrison, 7 Coldw. (Tenn.) 191.

7. Lutjen v. Lutjen, 63 N. J. Eq. 391, 51 A 790 [rev on other grounds 64 N. J. Eq. 773, 53 A 625]; McKnight v. Walsh, 23 N. J. Eq. 136; Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 198; Milly v. Harrison, 7 Coldw. (Tenn.) 191.

8. Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 198.

9. Newsom v. Newsom, 38 N. C. 411. See also infra § 2413.

[a] **Land devised for particular purposes.**—The expenses and compensation of an executor for managing and selling real estate devised to be sold for the education and advancement of children ought to be paid out of the proceeds of the lands. Mason County Justices v. Lee, 1 T. B. Mon. (Ky.) 247.

10. Belcher's Est., 13 Pa. Dist. 327; Loftis v. Loftis, 94 Tenn. 232, 28 SW 1091; Re Patterson, 24 Man. 217. See also infra § 2414.

11. Mason County v. Lee, 1 T. B. Mon. (Ky.) 247.

12. Mason County v. Lee, 1 T. B. Mon. (Ky.) 247.

13. Johnson v. Holifield, 82 Ala. 123, 2 S 753; Grinnell v. Baker, 17 R. I. 41, 20 A 8, 23 A 911; In re Hemphill, 157 Wis. 331, 147 NW 1089; Re Church, 12 Ont. L. 18, 8 OntWR 983.

14. N. J.—Woodruff v. Loundsberry, 40 N. J. Eq. 545, 5 A 99 [aff 42 N. J. Eq. 699 mem, 11 A 113 mem]; Danly v. Cummins, 31 N. J. Eq. 208.

N. Y.—Matter of Fuehrer, 75 Misc. 596, 136 NYS 173; Cammann v. Cammann, 2 Dem. Surr. 211 [disappr Matter of Mount, 2 Redf. Surr. 405]; Booth v. Ammerman, 4 Bradf. Surr. 129; Pinckney v. Pinckney, 1 Bradf. Surr. 269. But see Drake v. Price, 5 N. Y. 430 (where a contrary view was intimated).

Pa.—In re Spangler, 21 Pa. 335; Hoxie's Est., 3 Pa. Dist. 296.

Wis.—In re Hemphill, 157 Wis. 331, 147 NW 1089.

Ont.—Re Church, 12 Ont. L. 18, 8 OntWR 983.

15. Matter of Hallenbeck, 119 App. Div. 757, 104 NYS 568 [mod on other grounds 195 N. Y. 143, 88 NE 16, 133 AmSR 782].

16. O'Brien's Est., 23 Pa. Dist. 198; Hulseman's Est., 18 Pa. Dist. 441; Moore's Est., 13 Pa. Dist. 137, 30 Pa. Co. 80; Mariani v. Mariani, 25 Porto Rico 424. And see the statutes.

17. U. S.—Harrison v. Perea, 168 U. S. 311, 18 SCt 129, 42 L. ed. 478 [rev 7 N. M. 666, 41 P 529].

Ark.—Ex p. Bell, 14 Ark. 76.

Cal.—In re Straus, 144 Cal. 553, 77 P 1122; In re Fernandez, 119 Cal. 579, 51 P 851; Ricaud's Est., 70 Cal. 69, 11 P 471; In re Simmons, 43 Cal. 543; In re Isaacs, 30 Cal. 105; Ord v. Little, 3 Cal. 287.

D. C.—Howard v. Howard, 38 App. 575.

Hawaii.—Matter of Enos, 18 Hawaii 542; Matter of Lunalilo, 13 Hawaii 317.

Ill.—Mayer v. McCracken, 245 Ill. 551, 92 NE 355.

Ky.—Floyd v. Floyd, 7 B. Mon. 290; Quaintance v. Darnell, 14 KyL 238, 332.

La.—Barbin v. Couvillon, 122 La.

lowed on the proceeds of a sale of assets.[18] However, the allowance is sometimes limited by statute, so that commissions are to be computed only on amounts collected and paid out,[19] or are reduced where the estate is distributed in kind.[20] Commissions cannot be allowed on money borrowed by the representative for the estate, which did not increase the corpus thereof,[21] or upon moneys voluntarily advanced to the estate by the representative.[22] Where the representative renders more than one account, commissions cannot be allowed, on a second or subsequent account, on assets included in a prior account and on which commissions have already been allowed.[23]

A recovery for the death of decedent not being assets of the estate,[24] the administrator is not entitled to a commission thereon.[25]

[§ 2404] **(2) Inventoried Property.** Commissions are sometimes based on the property inventoried as composing the estate,[26] less deductions for worthless and uncollected assets.[27] But it is also held that commissions should be allowed on property coming to hand after the inventory is taken.[28] Where the appraised value of the estate is greater

407, 47 S 698; Pierce's Succ., 119 La. 727, 44 S 446; Day's Succ., 22 La. Ann. 366; Powell's Succ., 14 La. Ann. 425; McDonogh's Succ., 7 La. Ann. 472; Labatut v. Rogers, 6 Mart. 272; Pinnell v. Scriber, 12 La. 608; Robouam v. Robouam, 12 La. 73.

Md.—McKim v. Duncan, 4 Gill 72; McPherson v. Israel, 5 Gill & J. 60.

Mich.—Webb v. Peck, 131 Mich. 579, 92 NW 104.

Miss.—Shurtliff v. Witherspoon, 9 Miss. 613; Merrill v. Moore, 8 Miss. 271, 40 AmD 60.

Mo.—Browning v. Richardson, 186 Mo. 361, 85 SW 518; Stong v. Wilkson, 14 Mo. 116; In re Purl, 147 Mo. A. 105, 125 SW 849.

N. J.—In re Walsh, 74 A 563; Pomeroy v. Mills, 37 N. J. Eq. 578.

N. Y.—Matter of Lester, 172 App. Div. 509, 158 NYS 763; In re Hoagland, 145 NYS 1110; Matter of King, 122 App. Div. 354, 106 NYS 1073; Matter of Murphy, 121 App. Div. 426, 106 NYS 183; Matter of Hunt, 121 App. Div. 96, 105 NYS 696; Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Green v. Sanders, 18 Hun 308; Matter of Bolles, 67 Misc. 40, 124 NYS 620, 7 Mills Surr. 467; Matter of Kings County Trust Co., 69 Misc. 531, 127 NYS 879, 8 Mills Surr. 12; Martin v. Andrews, 59 Misc. 298, 111 NYS 40; Matter of Fleming, 51 Misc. 662, 102 NYS 204; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Hoagland, 159 App. Div. 886, 145 NYS 1110; Betts v. Betts, 4 AbbNCas 317, 57 HowPr 355 note; Matter of Goodrich, 2 HowPrNS 291.

N. C.—Drake v. Drake, 82 N. C. 443.

Oh.—Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

Or.—Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—In re Allam, 199 Pa. 573, 49 A 252; Magaldo's Est., 13 Pa. Dist. 149; Lafferty's Est., 5 Pa. Dist. 75, 17 Pa. Co. 401; Miller's Est., 2 Pa. Dist. 410; Siep's Est., 35 Pa. Co. 254; McCallum's Est., 29 Pa. Co. 501; Wilson's Est., 29 Pa. Co. 497; Walker's Est., 6 Pa. Co. 515.

S. C.—Ketchin v. Rion, 72 S. C. 153, 51 SE 557.

Tex.—Wolf v. Wolf, 36 Tex. Civ. A. 168, 81 SW 90.

Va.—Hipkins v. Bernard, 4 Munf. (18 Va.) 83.

Wash.—Noble v. Whitten, 38 Wash. 262, 80 P 451.

Ont.—Archer v. Severn, 13 Ont. 316.

[a] **Commissions on interest.**—(1) An administrator who does not deduct his commissions until a final settlement is entitled to his per cent on the aggregate of his receipts and disbursements, including interest thereon. Drake v. Drake, 82 N. C. 443. (2) But where an administrator is liable for interest for delaying payment on the principal of the estate, pending suit to determine the title thereto, he is not entitled to commissions on the interest with which he was charged. Thomas v. Frederick County School, 9 Gill & J. (Md.) 115.

[b] **Commission on notes taken in payment.**—An administrator is entitled to his commission on the amount of notes taken by him for property sold at the probate sale of the succession. The commission is allowed not only for the actual trouble he may have had, but for the responsibility incurred. Smith v. Cheney, 1 Rob. (La.) 98.

[c] **Taxes collected.**—The allowance of commissions on state and county taxes collected by the administratrix of a deceased insolvent sheriff is within the discretion of the court. Clark v. Newman, 1 SW 880, 8 KyL 515.

[d] **Commissions allowed on wife's interest in community.**—Bertrand's Succ., 123 La. 784, 49 S 524.

[e] **An executor collecting from the maker of notes on which he was surety** and properly accounting for the proceeds is entitled to commissions on the amount collected. Kelley v. Kelley, 141 Ky. 414, 132 SW 1031.

[f] **Where residuary legatees elect to take securities left them by a decedent, instead of the proceeds** received from their sale by the executors, and file notice of such election in the surrogate's office, as required by law, delivering duplicates of the notice to the executors, the executors are entitled to their commissions on the securities the same as though they had sold them. Martin v. Andrews, 59 Misc. 298, 111 NYS 40.

[g] **Where a will gave property to one for life, with remainder over,** the executors were entitled to their commissions on the property, whether the same was reduced to cash or not. Matter of Fleming, 51 Misc. 662, 102 NYS 204.

18. Fla.—Shepard v. Sherrell, 19 Fla. 300.

Ky.—Ramsey v. Ramsey, 4 T. B. Mon. 151.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

Mo.—Roloson v. Riggs, 274 Mo. 522, 203 SW 973.

Pa.—De Wald's Est., 13 Phila. 251.

S. C.—Norton v. Gillison, 25 S. C. Eq. 213.

Va.—Triplett v. Jameson, 2 Munf. (16 Va.) 242.

19. Avey v. Stearman, 145 Ky. 574, 140 SW 1055; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Anderson v. Prewitt, (Ky.) 114 SW 275; In re Purl, 147 Mo. A. 105, 125 SW 849; Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406; Matter of Hurst, 111 App. Div. 460, 97 NYS 697.

[a] **Dividends on corporate stock.**—Executors were entitled to the statutory commissions on bank stock owned by decedent and constituting a portion of the assets of his estate, where the executors inventoried such stock, took possession of it, and collected dividends thereon for several years, and paid such dividends to the devisees of the stock. Judson v. Bennett, 233 Mo. 607, 136 SW 681.

[b] **An executor cannot require the distributees to pay him money** which he would be required to distribute immediately to such distributees merely to collect a commission for its distribution. Anderson v. Prewitt, (Ky.) 114 SW 275.

[c] **A delivery by an executor to his successor in a trust** is not a "paying out" of moneys on which a commission may be charged. Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 6 Mills Surr. 496.

20. In re Davis, 8 Cal. A. 355, 97 P 86.

[a] **What amounts to distribution in kind.**—Where property consisted of an undivided one half of the estate of her brother, then in course of administration in another county, consisting of real estate in the possession of the brother's administrator, who sold the land for partition and paid the proceeds of decedent's interest to her administrator, which was by him distributed, it was held that, although decedent's administrator had inventoried such interest as real estate, he nevertheless received and accounted therefor in money, and was therefore only entitled to one half commissions, nor was such right affected by the fact that he was made a party to the partition suit, it not appearing that he was put to any extra trouble, or expense thereby. In re Davis, 8 Cal. A. 355, 97 P 86.

21. Matter of Lester, 172 App. Div. 509, 158 NYS 763.

22. In re Rhodes, 109 Misc. 406, 178 NYS 782.

23. Tasker's Est., 14 Pa. Dist. 435.

24. See Death § 58.

25. Allen v. Napier, 144 Ga. 38, 85 SE 1013.

26. Manion's Succ., 143 La. 799, 79 S 409; Bertrand's Succ., 123 La. 784, 49 S 524; Barbin v. Couvillon, 122 La. 407, 47 S 698; McCan's Succ., 49 La. Ann. 968, 22 S 225; Boyer's Succ., 36 La. Ann. 506; Kock's Succ., 24 La. Ann. 243; Shaffer v. Cross, 13 La. Ann. 110; Handy v. Collins, 60 Md. 229, 45 AmR 725; In re Stratton, 46 Md. 551; McPherson v. Israel, 5 Gill & J. (Md.) 60.

[a] **The inventory and appraisement may be considered** for the purpose of ascertaining the amount of commissions to be allowed, but the valuation of the inventory is not conclusive. In re Coursen, (Cal.) 65 P 965; Carver's Est., 123 Cal. 102; In re Fernandez, 119 Cal. 579, 51 P 851; In re Hinckley, 58 Cal. 457; In re Simmons, 43 Cal. 543.

[b] **Excess over appraisement.**—Commissions should be allowed on the excess of sales over the appraised value of the assets. Evans v. Iglehart, 6 Gill & J. (Md.) 171.

[c] **When partnership interest a part of estate.**—An executor's commission on the value of the succession's interest in a partnership should not be determined by an inventory made before the partnership affairs have been liquidated, but by the amount of productive property accruing therefrom to the succession after liquidation. Milmo's Succ., 47 La. Ann. 126, 16 S 772.

27. See infra § 2418.

28. Pinnell v. Scribner, 12 La. 608.

[a] **Rents and revenues not included in inventory.**—Commissions should be allowed on rents and revenues which have come into the hands of the personal representative in the course of administration, if not cov-

than the value at the time of settlement, the latter value controls in fixing compensation,[29] but it has been held that in determining the value of property not sold to fix the administrator's commissions, the appraised value of land as contained in the original inventory and appraisement should be taken, and not the present value, where the administrator had received and accounted for the rents for twenty years.[30]

[§ 2405] **(3) Legacies and Distributive Shares —(a) In General.** As a general rule personal representatives are entitled to commissions for paying over legacies and distributive shares as well as for paying debts,[31] and commissions may properly be allowed on assets which the heirs desire to retain.[32] Where, however, parties entitled to the proceeds of an estate during a year are infants, and the personal representative has neither given them or their guardian a complete statement in writing, nor paid the money over to the guardian, but has only given information verbally and by informal memoranda as to the receipts for the year, he is not entitled to commissions on the shares of the infants.[33]

[§ 2406] **(b) Specific Legacies.** The personal representative is not entitled to a commission on a specific legacy,[34] even though such legacy consists of stocks, bonds, or other securities, which are usually regarded in the business world as practically the equivalent of money.[35]

[§ 2407] **(c) Property Delivered in Kind.** A commission may be allowed on the amount of a general legacy or distributive share, although it is paid by the delivery of property in kind instead of in money,[36] the commission being based on the market value of what was thus turned over.[37] This rule is ordinarily applied in the case of stocks, bonds, or other securities, the delivery of which is regarded as equivalent to a payment in money.[38]

[§ 2408] **(4) Investments and Income.** Com-

---

ered by the inventory. Robertson's Succ., 49 La. Ann. 80, 21 S 197.

29. In re Hagerty, 97 Wash. 491, 166 P 1139.

[a] **Real estate.** — Statutory administrator's fees should not have been based upon the appraised value of the estate, which is only prima facie evidence of the real value, but on such real value, where there was ample evidence thereof. In re Johnston, (Wash.) 181 P 209.

30. Priewe v. Priewe, (N. D.) 175 NW 732.

31. U. S.—West v. Smith, 8 How. 402, 12 L. ed. 1130.

Ga.—Walton v. Gairdner, 111 Ga. 343, 33 SE 666; Williamson v. Wilkins, 14 Ga. 416.

Ky.—Avey v. Stearman, 145 Ky. 574, 140 SW 1055.

N. Y.—Matter of Fisher, 93 App. Div. 186, 87 NYS 567; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Grosvenor, 105 Misc. 344, 173 NYS 203; In re Evans, 104 Misc. 641, 172 NYS 876.

N. C.—Scroggs v. Stevenson, 100 N. C. 354, 6 SE 111; Shepard v. Parker, 35 N. C. 103. Contra Clarke v. Cotton, 17 N. C. 51; Arnold v. Blackwell, 17 N. C. 1; Potter v. Stone, 9 N. C. 30.

Pa.—Eby's Est., 2 Pa. Dist. 326, 12 Pa. Co. 601.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

[a] **Representative entitled to commission on money received by himself as beneficiary.** — Avey v. Stearman, 144 Ky. 574, 140 SW 1055.

[b] **Where an executor is a legatee,** his coexecutor is entitled to commissions on the legacy paid to him. Heard v. Clements, 145 Ga. 146, 88 SE 566.

[c] **Refusal of distributee to accept** —An administrator was not entitled to a commission for distributing a share of an estate under order of the probate court, where the distributee refused to accept it, although such share was set aside under instructions of the probate court and deposited in a place of safe-keeping, and was, subsequent to the death of the administrator, accepted by the distributee. Peper v. Bell, (Mo. A.) 218 SW 438.

[d] **Legacy chargeable on real estate specifically devised.**—(1) An executor is not entitled to commissions on the share of a legatee that the will directs deducted from the valuation of a farm specifically devised to him, on his paying the executor the residue of the appraised value. Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77. (2) If the devisee of land charged with legacies and expenses of administration pay the legacies and tender to the executor the costs of administration, no commissions are allowable on the amount of the legacies. Williams v. Williams, 8 Oh. St. 300.

[e] **Légitime of forced heirs.**— "In no case can the commission allowed the testamentary executor affect the légitime reserved to the forced heirs of the testator." Manion's Succ., 143 La. 799, 79 S 409.

[f] **Aliter under statute.** — Spofford v. Minor, 13 Tex. Civ. A. 534, 36 SW 771.

32. Park's Est., 4 Pa. Co. 560, 21 WklyNC 227.

33. Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

34. Ala.—Jenkins v. Jenkins, 33 Ala. 731; Wilson v. Wilson, 30 Ala. 670.

Ga.—Walton v. Gairdner, 111 Ga. 343, 33 SE 666; Ex p. Burney, 29 Ga. 33.

Hawaii.—Matter of Kraft, 16 Hawaii 159; Molteno's Est., 3 Hawaii 288.

Ky.—Renick v. Renick, 92 Ky. 335, 17 SW 1018, 13 KyL 600; Garr v. Roy, 50 SW 25, 20 KyL 1697.

N. H.—Gordon v. West, 8 N. H. 444.

N. J.—McKnight v. Walsh, 23 N. J. Eq. 136.

N. Y.—Schenck v. Dart, 22 N. Y. 420; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Fisher, 93 App. Div. 186, 87 NYS 567; Matter of Whipple, 81 App. Div. 589, 81 NYS 393; Matter of Kings County Trust Co., 69 Misc. 531, 127 NYS 879; In re Robinson, 37 Misc. 336, 75 NYS 490, 2 Mills Surr. 516; In re Evans, 104 Misc. 641, 172 NYS 876; In re Brewis, 165 NYS 1066 [aff 170 NYS 1070 mem]; Farguharson v. Nugent, 6 Dem. Surr. 296; Hawley v. Singer, 5 Dem. Surr. 82; Hill v. Nelson, 1 Dem. Surr. 357; Hall v. Tryon, 1 Dem. Surr. 296.

N. C.—Scroggs v. Stevenson, 100 N. C. 354, 6 SE 111; Sellars v. Ashford, 37 N. C. 104; Walton v. Avery, 22 N. C. 405; Spruill v. Cannon, 22 N. C. 400; Peyton v. Smith, 22 N. C. 325; Clarke v. Cotton, 17 N. C. 51; Potter v. Stone, 9 N. C. 30.

Pa.—In re Ellis, 254 Pa. 402, 98 A 1083; Miller's Est., 13 Pa. Co. 137.

S. C.—Herndon v. Caine, 106 S. C. 230, 91 SE 1; Turnipseed v. Sirrine, 60 S. C. 272, 38 SE 423; Charleston College v. Willingham, 34 S. C. Eq. 195; Ruff v. Summers, 4 S. C. Eq. 529.

Va.—Claycomb v. Claycomb, 10 Gratt. 589; Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582; Hipkins v. Bernard, 4 Munf. (18 Va.) 83; Hipkins v. Bernard, 2 Hen. & M. (12 Va.) 21.

[a] **Reasonable compensation.** — Under the statute providing compensation for performing extraordinary services, he is entitled to a reasonable allowance for services in caring for and distributing property devised or bequeathed in kind. Glover v. Check, 71 SW 438, 24 KyL 1281; Reed v. Reed, 66 SW 819, 23 KyL 2186.

35. Matter of Whipple, 81 App. Div. 589, 81 NYS 393; In re Robinson, 37 Misc. 336, 75 NYS 490, 2 Mills Surr. 516; O'Brien's Est., 23 Pa. Dist. 198; Charleston College v. Willingham, 34 S. C. Eq. 195.

[a] **Unspecified stocks of specified amount.**—Where a testator bequeaths stock but leaves it to the judgment of his executors to select the particular stock, out of the mass of his estate by which to pay bequests, the legacies are not specific, and the executors are entitled to commissions. Thompson v. Pritchard, 12 NYWkly Dig 80.

36. U. S.—West v. Smith, 8 How. 402, 12 L. ed. 1130.

Cal.—In re Cudworth, 133 Cal. 462, 65 P 1041.

Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917.

La.—Smith v. Cheney, 1 Rob. 98.

Md.—Handy v. Collins, 60 Md. 229, 45 AmR 725.

N. Y.—In re Grosvenor, 105 Misc. 344, 173 NYS 203.

Pa.—Mayberry's App., 33 Pa. 258; Ziegler's App., 2 Pa. Cas. 351, 4 A 837; Thewlis' Est., 15 Pa. Dist. 361; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Holt's Est., 12 Pa. Dist. 205, 28 Pa. Co. 268; Heinitsh's Est., 21 LancLRev 394; McMenamin's Est., 15 Phila. 510.

Va.—Allen v. Virginia Trust Co., 116 Va. 319, 82 SE 104.

[a] **Reasonable compensation only.** —No commission may be paid to a personal representative for delivering over of any property in kind, but reasonable compensation may be allowed by the ordinary for such services. Turning over stocks or bonds in discharge of a general legacy is not such a delivering over of property in kind as to entitle a personal representative to compensation. Walton v. Gairdner, 111 Ga. 343, 36 SE 666.

37. Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

38. Mo.—Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

N. Y.—Matter of Johnson, 57 App. Div. 494, 67 NYS 1004 [mod on other grounds 170 N. Y. 139, 63 NE 63]; Matter of Curtiss, 9 App. Div. 285, 37 NYS 586, 41 NYS 1111 [dist McAlpin v. Potter, 126 N. Y. 285, 27 NE 475]; In re Naylor, 164 NYS 462; Cairns v. Chaubert, 9 Paige 160.

N. C.—Shepard v. Parker, 35 N. C. 103.

Oh.—In re Duddy, 5 OhS&CP 412, 7 OhNP 589.

Pa.—Coggin's App., 3 Walk. 426; Rockafield's Est., 4 LancLRev 113.

missions may be allowed an interest and income accruing to the estate.[39] Where a fund is given to a personal representative in trust and he is required to receive and disburse the income of the fund, he is usually held entitled to commissions upon such income,[40] although a contrary view has been expressed.[41] Executorial trustees, directed by the will to receive the rents and profits of real estate and apply them to the use and benefit of a person for life, who permit the beneficiary to occupy and use the devised premises, are entitled to commissions on the annual income thereof.[42] It has also been held that an administrator was properly allowed commissions on rents collected by him from land belonging to beneficiaries, and not acquired under the will involved, in carrying out testator's desire to provide for the education of the beneficiaries.[43] No commissions are to be allowed on income retained by the testamentary trustee as beneficiary.[44] An executor is not entitled to commissions on an enhanced value of stocks and other investments made with money on which commissions have been charged and allowed in a prior account.[45] An executor who is directed by his testator, while holding his estate in trust, to keep all moneys belonging thereto safely and profitably invested, is entitled to commissions on the real value of notes in which he finds the money already safely and profitably invested by the testator, and it is not necessary for him to convert such notes into money and reinvest them.[46]

[§ 2409] **(5) Receipts and Disbursements—(a) In General.** The commissions of executors and administrators are sometimes based on their receipts and disbursements;[47] and for this purpose receipts and disbursements are sometimes made separate items, a certain per cent being allowed for receiving and a certain per cent for disbursing assets.[48] The terms "receipts" and "disbursements," as here used, ordinarily refer to money actually received

S. C.—Gist v. Gist, 7 S. C. Eq. 473; Deas v. Spann, 5 S. C. Eq. 176.

Va.—Allen v. Virginia Trust Co., 116 Va. 319, 82 SE 104; Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582; Hipkins v. Bernard, 4 Munf. (18 Va.) 83 [overr Hipkins v. Bernard, 2 Hen. & M. 21].

[a] **Rule applies where note paid over as cash.**—Shepard v. Parker, 35 N. C. 103.

[b] **Where the beneficiaries elect to take securities instead of the proceeds** of a sale thereof, the representative is entitled to commissions. Martin v. Andrews, 59 Misc. 298, 111 NYS 40.

39. In re Selleck, 111 N. Y. 284, 19 NE 66; Drake v. Price, 5 N. Y. 430 [aff 7 Barb. 388]; Matter of McLaren, 6 Misc. 483, 27 NYS 289, Pow. Surr. 585; Slosson v. Naylor, 2 Dem. Surr. (N. Y.) 257; Meeker v. Crawford, 5 Redf. Surr. (N. Y.) 450; Washington v. Emery, 57 N. C. 32; Briggs v. Holcombe, 24 S. C. Eq. 15; Massey v. Massey, 11 S. C. Eq. 492.

40. Ga.—Williamson v. Wilkins, 14 Ga. 416.

Ky.—Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

N. Y.—Foote v. Bruggerhof, 66 Hun 406, 21 NYS 509; Matter of Kings County Trust Co., 69 Misc. 531, 127 NYS 879; Westerfield v. Westerfield, 1 Bradf. Surr. 198.

Man.—Re Patterson, 24 Man. 217.

[a] **Limitation of rule.**—An executor is not entitled to commissions for paying to a legatee, as directed by the will, the interest on a certain part of the estate, such commissions being allowed only when the executor receives interest annually and lets it out again as principal. Bobo v. Poole, 33 S. C. Eq. 224; Howard v. Schmidt, 9 S. C. Eq. 452; Wright v. Wright, 7 S. C. Eq. 185.

41. Solliday v. Bissey, 12 Pa. 347.

42. Matter of Vanneck, 175 App. Div. 363, 161 NYS 893; In re Washbon, 14 NYS 672; Moore's Est., 13 Pa. Dist. 137.

43. Muldrow v. Mixson, 89 S. C. 551, 72 SE 466.

44. Matter of McCoy, 51 Misc. 441, 101 NYS 539, 5 Mills Surr. 497.

45. In re Riter, 260 Pa. 168, 103 A 554; In re Davidson, 204 Pa. 381, 54 A 273; Holt's Est., 28 Pa. Co. 268.

46. Hardt v. Birely, 72 Md. 134, 19 A 606.

47. Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955; Wright v. Wilkerson, 41 Ala. 267; Newberry v. Newberry, 28 Ala. 691.

Ky.—Nickell v. Nickell, 118 SW 966; Glover v. Check, 71 SW 438, 24 KyL 1281, 72 SW 302, 24 KyL 1783; Beeler v. Hill, 5 Dana 37; Reed v. Reed, 66 SW 819, 23 KyL 2186.

La.—Fontelieu's Succ., 28 La. Ann. 638.

Miss.—Kelly v. Davis, 37 Miss. 76.

Mo.—Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406.

N. J.—Pomeroy v. Mills, 37 N. J. Eq. 578.

N. Y.—Matter of Blun, 176 App. Div. 189, 162 NYS 458; Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Matter of Whipple, 81 App. Div. 589, 81 NYS 393; Matter of Burden, 98 Misc. 542, 164 NYS 747; Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 6 Mills Surr. 496; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Troughton, 187 App. Div. 928, 174 NYS 517; In re Barker, 186 App. Div. 317, 174 NYS 230; Betts v. Betts, 4 AbbNCas 317, 57 HowPr 355 note; Hill v. Nelson, 1 Dem. Surr. 357.

N. C.—Bond v. Turner, 4 N. C. 690.

Pa.—Righter's Est., 14 Pa. Dist. 440.

Philippine.—De Viademonte v. Gavieres, 12 Philippine 155; Matter of Martinez, 11 Philippine 389.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Taveau v. Ball, 6 S. C. Eq. 456; Logan v. Logan, 6 S. C. Eq. 1; Ruff v. Summers, 4 S. C. Eq. 529.

Tex.—Spofford v. Minor, 13 Tex. Civ. A. 534, 36 SW 771; Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

Va.—Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582.

W. Va.—Estill v. McClintic, 11 W. Va. 399.

N. B.—Wright v. Berton, 32 N. B. 708.

[a] **Commissions on a sale of pledged securities** may be allowed. Matter of Bolles, 67 Misc. 40, 124 NYS 620, 7 Mills Surr. 467.

[b] **Money disbursed for use of family.**—An executor is entitled to commissions for disbursing money found in testator's house after his death for the use of the family or for investing the same. Hipkins v. Bernard, 4 Munf. (17 Va.) 83.

[c] **Amount collected and to be distributed.**—An administrator is only entitled to his commissions on the amount collected and to be distributed. Fontelieu's Succ., 28 La. Ann. 638.

[d] **Disbursements under invalid will.**—An executor is entitled to commissions on money paid out pursuant to the will, although such payments afterward appear to have been improper in view of the invalidity of the will. Kelly v. Davis, 37 Miss. 76.

[e] **Where stocks are purchased on margin** and sold to satisfy the broker's lien, no commission is allowable on the transaction. In re Mercantile Trust Co., 210 N. Y. 83, 103 NE 884.

[f] **Receiving and investing proceeds of real estate.**—The receipt of money from the sale of real estate, and its reinvestment to bear interest, is not "receiving and paying out," so as to entitle an executor to commissions. Betts v. Betts, 4 Abb NCas (N. Y.) 317.

[g] **Advancements** made by decedent cannot be considered as so received or paid out by the personal representative as to entitle him to commissions thereon. Metcalfe v. Colles, 43 N. J. Eq. 148, 10 A 804; Hill v. Nelson, 1 Dem. Surr. (N. Y.) 357; Barhite's App., 126 Pa. 404, 17 A 617; Ziegler's App., 2 Pa. Cas. 351, 4 A 837.

[h] **Receipts and disbursements in Confederate money.**—Under a statute allowing administrators a commission on receipts and disbursements, it was held that one receiving Confederate money during the Civil War should be allowed commissions in Confederate money and that on receipts and disbursements in United States currency since the war commissions should be allowed in that currency. Dockerey v. McDowell, 40 Ala. 476. To like effect Trammel v. Philleo, 33 Tex. 395. See also May v. Green, 75 Ala. 162 (full commissions in good money not allowed on receipts and disbursements in Confederate money).

[i] **In the event of the death of one of the executors** of a will prior to the final accounting, his personal representative is entitled to commissions only upon such sums as were received and paid out during his lifetime. Matter of Whipple, 81 App. Div. 589, 81 NYS 393; In re Ziegler, 218 N. Y. 544, 113 NE 553, 220 N. Y. 98, 115 NE 471, AnnCas 1917E 248 [aff 168 App. Div. 735, 154 NYS 652].

[j] **Receipts as basis for commissions.**—Gulick v. Conover, 15 N. J. L. 420; Pomeroy v. Mills, 37 N. J. Eq. 578; Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582; Estill v. McClintic, 11 W. Va. 399.

[k] **Disbursements as basis of commissions.**—Webb v. Webb, 6 T. B. Mon. (Ky.) 163; Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

48. Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Noble v. Jackson, 124 Ala. 311, 26 S 955; Wright v. Wilkerson, 41 Ala. 267; Newberry v. Newberry, 28 Ala. 691.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498; Walton v. Gairdner, 111 Ga. 343, 36 SE 666; Davidson v. Story, 106 Ga. 799, 32 SE 867.

N. Y.—In re Mason, 98 N. Y. 527.

S. C.—Logan v. Logan, 6 S. C. Eq. 1.

and paid out.[49] In some jurisdictions it seems commissions are allowable only on receipts and disbursements of money to the exclusion of other property;[50] but even where this is the rule commissions have been allowed upon bonds, notes, accounts, etc., which have been used in lieu of money, the principle being that that which was used as money should in equity and fairness be regarded and considered as money,[51] but the delivery of bonds by an executor under an order of court is not such a payment of money as to entitle him to commissions.[52] Where a creditor of the estate purchased property at a sale made by the executors and gave credit for the amount, it was held that the executors were entitled to commissions on the amount thus settled, although no money was paid.[53] In other jurisdictions commissions are not limited to money, but may be allowed upon any property having a money value.[54] Where disbursements are not allowed by the court, no commissions on such disbursements are allowed.[55]

[§ 2410] **(b) Resulting from Continuance of Decedent's Business.** Where a personal representative carries on the business of his decedent, he is not entitled to commissions on the gross receipts realized or the necessary disbursements made by him while conducting the business,[56] but the proper compensation is a reasonable allowance for the time and labor bestowed in carrying on the business.[57]

[§ 2411] **(6) Surcharges.** According to some of the authorities, no commissions should be allowed on sums with which a representative is charged on account of his neglect or other misconduct,[58] but there is also authority for the contrary view.[59] For simi-

Tex.—Kearney v. Nicholson, (Civ. A.) 67 SW 361; Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

See also cases supra note 47.

[a] **In New York** (1) the literal interpretation of the statute limiting commissions to cases where there has been both a receipt and disbursement of funds has not been adopted, but the courts have almost uniformly granted one half of such commission for receiving and the other half for disbursing assets. In re Mason, 98 N. Y. 527; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Naylor, 164 NYS 462; Howes v. Davis, 4 AbbPr (N. Y.) 71; Meacham v. Sternes, 9 Paige (N. Y.) 398; Matter of Kellogg, 7 Paige (N. Y.) 265; Matter of Roberts, 3 Johns. Ch. (N. Y.) 43; Rowland v. Morgan, 3 Dem. Surr. (N. Y.) 289; Matter of Roosevelt, 5 Redf. Surr. (N. Y.) 601; Ward v. Ford, 4 Redf. Surr. (N. Y.) 34. (2) Accordingly on moneys collected and paid over to a successor half commissions have been allowed. Matter of Hurst, 111 App. Div. 460, 97 NYS 697. (3) It has been held, however, that the representative is not entitled to commissions for receiving money unless he has paid it out. Matter of Bidgood, 36 Misc. 516, 73 NYS 1061, 2 Mills Surr. 407.

49. Ala.—Wright v. Wilkerson, 41 Ala. 267.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

N. Y.—Matter of McAlpine, 126 N. Y. 285, 27 NE 475.

N. C.—Walton v. Avery, 22 N. C. 405.

Pa.—Bedell's App., 85 Pa. 398.

S. C.—Vance v. Gary, 14 S. C. Eq. 2.

[a] **A set-off** in reduction of a debt due to the decedent does not fall within the description of "receipts" on which commissions are allowable. Walton v. Avery, 22 N. C. 405; Bedell's App., 85 Pa. 398; Immendorf's Est., 7 Pa. Dist. 449, 21 Pa. Co. 268, 4 LackLegN 266 [aff 109 Pa. 590, 42 A 959].

[b] **Securities** coming into the hands of an executor do not constitute "receipts" on which half commissions can be allowed, until he has converted them into money or they have been accepted by the legatees in payment of legacies. Matter of McAlpine, 126 N. Y. 285, 27 NE 475 [rev 12 NYS 662].

[c] **Taking possession of a savings bank book** is not the receipt of the money deposited, and therefore does not entitle the administrator to commissions on the amount of the deposit, where it has been lost by the subsequent failure of the bank. Sheerin v. Public Admr., 2 Redf. Surr. (N. Y.) 421.

[d] **Purchase by representative of property of estate.**—An administrator is not considered as receiving the price of property of the estate sold by him, in such a sense as to entitle him to commissions, where he was himself the purchaser. Vance v. Gary, 14 S. C. Eq. 2.

50. Wright v. Wilkerson, 41 Ala. 267; Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Tompkins v. Tompkins, 18 S. C. 1; Ball v. Brown, 8 S. C. Eq. 374; Ruff v. Summers, 4 S. C. Eq 529; Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

51. Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Ball v. Brown, 8 S. C. Eq. 374; Gist v. Gist, 7 S. C. Eq. 473; Deas v. Spann, 5 S. C. Eq. 176.

52. Rutledge v. Williamson, 1 S. C. Eq. 159.

53. Kiddle v. Hammond, 5 S. C. Eq. 223.

54. Pomeroy v. Mills, 37 N. J. Eq. 578; Ogden v. Murray, 39 N. Y. 202; Cairns v. Chabert, 3 Edw. (N. Y.) 312; Matter of De Peyster, 4 Sandf. Ch. (N. Y.) 511; Rowland v. Morgan, 3 Dem. Surr. (N. Y.) 289; Matter of Roosevelt, 5 Redf. Surr. (N. Y.) 601; Ward v. Ford, 4 Redf. Surr. (N. Y.) 34.

55. Pryor v. Davis, 109 Ala. 117, 19 S 440; Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

56. Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

Ill.—Field v. Colton, 7 Ill. A. 379.

N. J.—Gilligan v. Daly, 79 N. J. Eq. 36, 41, 80 A 994 [cit Cyc].

N. Y.—Beard v. Beard, 140 N. Y. 260, 35 NE 488.

S. C.—Ex p. Coleman, 98 S. C. 420, 82 SE 674; Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

N. B.—Matter of Manzer, 42 N. B. 251.

[a] **Commissions on net income.**—Commissions cannot be charged on money disbursed and received from the conduct of a business carried on to produce a net income, but only upon the net income which increases the corpus of the estate. Beard v. Beard, 140 N. Y. 260, 35 NE 488.

[b] **Replenishing stock of goods.**—Where an executor in order to make a better sale of a stock of goods left by his testator added to such stock from his own stock, commissions should be allowed only upon the amount of the personal estate of the testator exclusive of what was added to replenish the stock in trade. Field v. Colton, 7 Ill. A. 379.

[c] **Permanent improvements.**—An executor is entitled to commissions on expenditures for necessary permanent improvements on land on which he is conducting farming operations under the provisions of his testator's will. Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

[d] **Contrary view.** — Walker's Est., 6 Pa. Co. 515.

57. Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

Md.—Lee v. Lee, 6 Gill & J. 316.

Mich.—In re Brewster, 113 Mich. 561, 71 NW 1085.

Or.—In re Osburn, 36 Or. 8, 58 P 521; In re Partridge, 31 Or. 297, 51 P 82.

Pa.—Clayton's Est., 20 Pa. Dist. 407; Smith's Est., 30 PittsbLegJNS 188.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

Eng.—Forster v. Ridley, 4 De G. J. & S. 452, 69 EngCh 347, 46 Reprint 993.

N. B.—Matter of Manzer, 42 N. B. 251.

Ont.—Thompson v. Freeman, 15 Grant Ch. (U. C.) 384.

[a] **In New York** (1) the rule is that, when the business is carried on without any direction in the will, a reasonable compensation in addition to legal commissions will be allowed. Lent v. Howard, 89 N. Y. 169 [rev 25 Hun 60]; Matter of Moriarity, 27 Misc. 161, 58 NYS 380; Matter of Braunsdorf, 13 Misc. 666, 35 NYS 298, 1 Gibb. Surr. 326 [aff 2 App. Div. 73, 37 NYS 229]; Lawrence v. Garner, 1 NYS 534. (2) But where the will expressly authorizes a continuance of the business by executors, services so rendered are regarded as in the line of duty, and no compensation in addition to commissions will be allowed. Matter of Hayden, 54 Hun 197, 7 NYS 313 [aff 125 N. Y. 776, 27 NE 409]; Matter of Taft, 5 Silv. Sup. 370, 8 NYS 282. (3) A fortiori, where the will authorizes a continuance of the testator's business and provides for a percentage of profits as compensation, in addition to the commissions allowed by law, a still further compensation cannot be allowed. Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [aff 192 N. Y. 566 mem. 85 NE 1110 mem].

[b] **In England** (1) it seems that an executor will not be allowed any compensation for carrying on his testator's business (Stocken v. Dawson, 6 Beav. 371, 49 Reprint 869; Marshall v. Holloway, 2 Swanst. 432, 36 Reprint 681; Burden v. Burden, 1 Ves. & B. 170, 35 Reprint 67) (2) in the absence of some contract to that effect between him and the testator (Browne v. Collins, 21 Wkly. Rep. 222). (3) Nevertheless an allowance has been made for time and trouble in managing testator's leasehold property and carrying on his business. Forster v. Ridley, 4 De G. J. & S. 452, 69 EngCh 347, 46 Reprint 993.

58. Slocum's Est., 14 Pa. Dist. 39; Bickley's Est., 13 Pa. Dist. 323; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Gilson's Est., 18 WklyNC (Pa.) 570; Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414; Bald v. Thompson, 17 Grant Ch. (U. C.) 154.

59. Matter of Mount, 2 Redf. Surr. (N. Y.) 405 [cit Meacham v. Sternes, 9 Paige (N. Y.) 398]; Edmonds v. Grenshaw, 5 S. C. Eq. 224.

lar reasons it has been held that an administrator is not entitled to an allowance of commissions upon assets which he has charged to himself under protest.[60]

[§ 2412] **(7) Indebtedness between Representative and Estate.** While the general rule is that an executor or administrator is not entitled to a commission for the collection of a debt which he himself owes to the estate,[61] a contrary view has been asserted.[62] If, however, the representative has actually paid his debt to the estate, he may be allowed half commissions for handling and disbursing the amount.[63] It has been held that the representative is entitled to commissions on a debt due to himself from decedent, a claim for which is presented and allowed on his accounting,[64] but there is also authority for the contrary view.[65]

[§ 2413] **(8) Real Property and Its Usufruct—(a) In General.** Personal representatives are not generally allowed commissions upon real estate, or the proceeds thereof,[66] or upon rents or profits derived therefrom;[67] but in a few jurisdictions the rule is otherwise.[68] Where the will works an equitable conversation of realty into personalty, it is to be treated as personalty with respect to commissions,[69] and it has been held that, where real estate comes into the hands of executors as trustees, and is treated as personalty, and accepted by the persons entitled thereto as such, the executors are entitled to have it so considered in determining the amount of their commissions.[70]

[§ 2414] **(b) Proceeds of Authorized Sales.** A

60. Kempton v. Peo., 139 Ill. A. 563.

61. Ky.—Worsley v. Worsley, 16 B. Mon. 455; Com. v. Bracken, 32 SW 609, 17 KyL 785; Webster v. Webster, 7 KyL 302, 13 Ky Op. 545.

Md.—Handy v. Collins, 60 Md. 229, 45 AmR 725 [dist McKim v. Duncan, 4 Gill 72].

N. J.—McKnight v. Walsh, 23 N. J. Eq. 136, 24 N. J. Eq. 498.

N. Y.—Brenneman's Est., 14 York LegRec 14.

N. C.—Arnold v. Blackwell, 17 N. C. 1; Bond v. Turner, 4 N. C. 690.

Pa.—In re Hoffer, 156 Pa. 473, 27 A 11; Barhite's App., 126 Pa. 404, 17 A 617; Borell's Est., 25 Pa. Dist. 430; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; Muth's Est., 6 Pa. Co. 597; Waylan's Est., 1 Pa. Co. 366, 17 WklyNC 375; Spackman's Est., 2 Chest. Co. 153; Stewart's Est., 1 LackJur 225; Heinitsh's Est., 21 Lanc LRev 394; Haines' Est., 1 LegGaz 91.

Va.—Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582; Carter v. Cutting, 5 Munf. (19 Va.) 223.

[a] **Debt specifically bequeathed to representative.**—An executrix is not entitled to commissions on a debt due from her to testator, and specifically bequeathed to her. Handy v. Collins, 60 Md. 229, 45 AmR 725 [dist McKin v. Duncan, 4 Gill (Md.) 72].

[b] **Joint executors** are not entitled to commissions on their several debts owing to the estate. Tomlison's Est., 20 Pa. Dist. 856.

[c] **Legacy charged on land devised to representative.**—(1) Executors are not entitled to commissions on money paid by them as individuals in satisfaction of legacies charged on land devised to them. In re Glesenkamp, 34 PittsbLegJNS (Pa.) 155. (2) An executor to whom land is devised charged with a provision for the support of the testator's widow is not entitled to commissions on the amount of such provision, because accepting the devise makes the charge his individual debt. Muth's Est., 6 Pa. Co. 597.

62. Griffin v. Bonham, 30 S. C. Eq. 71.

63. In re Phillips, 6 N. J. L. J. 371; Heft's App., 5 Pa. Cas. 573, 9 A 87; Stewart's Est., 1 LackJur (Pa.) 225; Smith's Est., 20 PittsbLegJNS (Pa.) 33.

64. Matter of Mount, 2 Redf. Surr. (N. Y.) 405.

65. Brown v. Walker, 38 Tex. 109.

66. Ala.—Key v. Jones, 52 Ala. 238.

Ky.—Glover v. Check, 71 SW 438, 24 KyL 1281, 72 SW 302, 24 KyL 1783; Quaintance v. Darnell, 14 KyL 238.

Mo.—Garesche v. Levering Inv. Co., 146 Mo. 436, 48 SW 653, 46 LRA 232; Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457.

N. Y.—Matter of Brown, 5 Dem. Surr. 223.

N. C.—Graves v. Graves, 58 N. C. 280.

Oh.—Stone v. Strong, 42 Oh. St. 53.

Pa.—Robb's App., 41 Pa. 45; Scott's Est., 18 Pa. Super. 375; Sharp's Est., 9 Pa. Dist. 727, 24 Pa. Co. 417; Haley's Est., 9 Pa. Dist. 116; Pickering's Est., 4 Pa. Dist. 263, 16 Pa. Co. 359; Pritchett's Est., 2 Chest. Co. 158; Reid's Est., 2 Chest. Co. 157; Spear's Est., 2 Chest. Co. 156; John's Est., 2 Chest. Co. 77; Rockafield's Est., 4 LancLRev 113; Scheidt's Est., 1 LegChron 22; Clark's Est., 11 Phila. 53; Montier's Est., 7 Phila. 491; Skinner's Est., 4 Phila. 189.

Tenn.—Read v. Franklin, (Ch. A.) 60 SW 215.

[a] **Personal devise to executor.**—Where real estate is devised to the executor named in the will in trust for another person, with power of sale, and the devise runs to the executor personally, and not to him in his capacity as executor, he is not entitled to charge executorial commissions on a sale made in pursuance of such power. Matter of Brown, 5 Dem. Surr. (N. Y.) 223.

[b] **Where the intestate's lands are sold under written agreement of the heirs,** part of the price being paid in cash and the remainder in notes made payable to, and received by, the heirs in payment of their respective shares, the proceeds of such sales or notes are not proper matters of the administrator's accounts, and he is not entitled to commissions thereon. Key v. Jones, 52 Ala. 238.

[c] **Efforts to sell on behalf of persons entitled.**—Although the representative has an agreement with the persons beneficially interested to sell the real estate for them, under which he has sold part and made effort to sell all, he is not entitled to commissions on the value of that remaining unsold. Haley's Est., 9 Pa. Dist. 116 [aff 16 Pa. Super. 70].

67. Scudder v. Ames, 89 Mo. 496, 14 SW 525; Myers v. Bolton, 157 N. Y. 393, 52 NE 114 [aff as to this matter 89 Hun 342, 35 NYS 577]; Walker's App., 116 Pa. 419, 9 A 654; Franket's Est., 2 LehighValLR (Pa.) 406; Apple's Est., 2 Phila. (Pa.) 239; Dagg v. Dagg, 25 Grant Ch. (U. C.) 542; Doan v. Davis, 23 Grant Ch. (U. C.) 207.

68. In re Carver, 123 Cal. 102, 55 P 770; In re Fernandez, 119 Cal. 579, 51 P 851; Ord v. Little, 3 Cal. 287; In re Reck, Myr. Prob. (Cal.) 59; Calloway's Succ., 49 La. Ann. 968, 22 S 225; Morvant's Succ., 46 La. Ann. 301, 14 S 922; Girod's Succ., 4 La. Ann. 386; Smith v. Cheney, 1 Rob. (La.) 98; Noble v. Whitten, 38 Wash. 262, 80 P 451; In re Smith, 18 Wash. 129, 51 P 348; Wilbur v. Wilbur, 17 Wash. 683, 50 P 589; Horton v. Barto, 17 Wash. 675, 50 P 587.

[a] **In New York** (1) the representative was formerly not entitled to commissions on realty. Myers v. Bolton, 157 N. Y. 393, 52 NE 114 [reh den 158 N. Y. 665 mem, 52 NE 1125 mem, and mod on other grounds 89 Hun 342, 35 NYS 577]; Matter of Hull, 97 App. Div. 258, 89 NYS 939; Matter of Duncan, 81 Misc. 575, 143 NYS 492; Matter of Ogden, 41 Misc. 158, 83 NYS 977, 4 Mills Surr. 1; Matter of McGlynn, 41 Misc. 156, 83 NYS 975, 3 Mills Surr. 600; In re McKay, 37 Misc. 590, 75 NYS 1069, 3 Mills Surr. 12 [mod as to other matter 75 App. Div. 78, 77 NYS 845]; Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58. (2) But the present statute provides that "the value of any real or personal property distributed or delivered shall be considered as money in making computation of commissions." Code Civ. Pro. § 2753. (3) This statute is not retroactive. In re Bushe, 183 App. Div. 832, 171 NYS 404. (4) It gives no right to commissions on real estate not delivered, distributed, or converted into money. In re Rhodes, 109 Misc. 406, 178 NYS 782. (5) Where the personal property was given to one class of persons and the real property to another class, and one of the executors administered the personalty and the other executor administered the realty, and they rendered separate accounts, each executor should have commissions out of the fund represented by him. Matter of Mansfield, 10 Misc. 296, 31 NYS 684, 1 Gibb. Surr. 158.

[b] **Commissions on rents.**—Robertson's Succ., 49 La. Ann. 80, 21 S 197; Sparrow's Succ., 40 La. Ann. 484, 4 S 513 (administrator the lessee).

[c] **The appraised value is not conclusive** as to the commissions to be allowed thereon, but the real value may be shown. In re Smith, 18 Wash. 129, 51 P 348; In re Sour, 17 Wash. 675, 50 P 587.

[d] **If the realty is sold** either by the administrator or by the trustees in a deed of trust securing a debt, the commissions are estimated on the price for which the sale was made, and not on the appraised value. In re Fernandez, 119 Cal. 579, 51 P 851.

[e] **No commissions on waste or uncultivated land.** — McDonogh's Succ., 7 La. Ann. 475; Girod's Succ., 4 La. Ann. 386; Milne's Succ., 5 Rob. (La.) 48.

69. Gilbreath v. Cosgrove, 193 Mo. A. 419, 185 SW 1181; In re Barker, 186 App. Div. 317, 174 NYS 230.

[a] **Where the beneficiaries effect a reconversion** by electing to take the land instead of its proceeds, the executor who was directed to sell the property is entitled to his statutory commission. Gilbreath v. Cosgrove, 193 Mo. A. 419, 185 SW 1181.

Proceeds of authorized sales see infra § 2414.

70. Matter of Buchanan, 5 NYSt 351, 5 Dem. Surr. 169.

personal representative who receives and accounts for the proceeds of realty sold under the direction of the will, or by a decree of court, is entitled to commissions thereon,[71] even though payment is affected otherwise than in money,[72] as for instance where the land is purchased by a creditor of the estate, and the debt and the purchase price are set off against each other.[73] But when land is sold or the proceeds thereof disbursed without the agency of the representative, he is not entitled to commissions.[74]

An actual sale is necessary in order to entitle the representative to commissions; the mere fact that he is empowered by the will to sell realty is not sufficient,[75] unless the will gives him the right to commissions without regard to actual conversion of the realty into personalty.[76] Nor does the rendition of valuable services with respect to real estate which is not sold create a right to commissions.[77] It has been held, however, that, where an executor who was directed by the will to sell real estate made repeated efforts to sell the same but such efforts were unsuccessful, and he died without having effected a sale, his personal representative could collect a commission for the services rendered;[78] and that, when a conversion of realty authorized by will is prevented by the beneficiary, by means of a bill brought to restrain the executor from converting the real estate, on the ground that there is no necessity for it and to compel him to convey it to the complainant, commissions will be allowed.[79]

Where there is an actual partition of the real estate among the persons entitled thereto, the executor does not become entitled to commissions on the value of the property merely because he joins in the deeds, either as a party in interest or because of a power of sale given to him by the will.[80]

[§ 2415] **(c) Where Collection of Rents Authorized.** Even where the rule generally prevailing is that an executor or administrator is not entitled to commission on the rents and profits of real estate,[81] commission on rents may be allowed in exceptional cases where such rents were lawfully collected by the representative.[82]

[§ 2416] **(d) Realty Subject to Encumbrances.** The general rule is that, in allowing commissions

71. Cal.—In re Robl, 163 Cal. 801, 127 P 55, AnnCasl914A 319; In re Pease, 149 Cal. 167, 85 P 149; In re Fernandez, 119 Cal. 579, 51 P 851.

Fla.—Sherrell v. Shepard, 19 Fla. 300.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Waring v. Darnall, 10 Gill & J. 126; Scott v. Dorsey, 1 Harr. & J. 227.

Miss.—Shurtliff v. Witherspoon, 9 Miss. 613.

Mo.—Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457; Gilbreath v. Cosgrove, 193 Mo. A. 419, 185 SW 1181; In re O'Bannon, 142 Mo. A. 268, 126 SW 215; Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Elstroth v. Young, 94 Mo. A. 351, 68 SW 100; Garrison v. St. Louis Trust Co., 77 Mo. A. 333.

N. Y.—Phœnix v. Livingston, 101 N. Y. 451, 5 NE 70; Matter of Wanninger, 120 App. Div. 273, 105 NYS 4 [aff 190 N. Y. 527 mem, 83 NE 1133 mem]; Matter of Prentice, 25 App. Div. 209, 49 NYS 353 [aff 160 N. Y. 568, 55 NE 275]; Smith v. Buchanan, 5 NYS 351, 5 Dem. Surr. 169.

N. C.—Scroggs v. Stevenson, 100 N. C. 354, 6 SE 111.

Oh.—Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

Pa.—In re Neafie, 245 Pa. 576, 91 A 958; In re Moore, 211 Pa. 338, 60 A 987 [aff 13 Pa. Dist. 137]; Snyder's App., 54 Pa. 67; Nathans v. Morris, 4 Whart. 389; Tasker's Est., 14 Pa. Dist. 435; Slocum's Est., 14 Pa. Dist. 39; Moore's Est., 13 Pa. Dist. 137, 30 Pa. Co. 80; Singerly's Est., 10 Pa. Dist. 258, 25 Pa. Co. 268; Sharp's Est., 9 Pa. Dist. 727, 24 Pa. Co. 417; Kelly's Est., 9 Pa. Dist. 387; Hallowell's Est., 9 Pa. Dist. 90; Felton's Est., 7 Pa. Dist. 262; Pickering's Est., 4 Pa. Dist. 263, 16 Pa. Co. 359; Hoxie's Est., 3 Pa. Dist. 296; Markle's Est., 1 Pa. Dist. 54, 11 Pa. Co. 13, 29 WklyNC 479; Gelbach's Est., 30 Pa. Co. 609; Price's Est., 29 Pa. Co. 400; Singerly's Est., 25 Pa. Co. 268; Rowe's Est., 11 Kulp 36; Clark's Est., 11 Phila. 53.

Tenn.—Loague v. Brennan, 86 Tenn. 634, 9 SW 693.

Ont.—Bald v. Thompson, 17 Grant Ch. (U. C.) 154.

[a] **The condition of the title** to lands sold under an order of the court cannot affect the administrator's statutory right to commissions on the proceeds, where he has disbursed them in the payment of duly established claims against the estate. Crenshaw v. Bentley, 31 Mo. A. 75.

[b] **Land sold by predecessor.**—An administrator is not entitled to commissions on land sold by his predecessor in office under an order of court and brought into court for distribution without his agency. Moore v. Randolph, 70 Ala. 575.

[c] **An executor who by authority of court buys at his own sale** is entitled to commissions on the transaction. Markle's Est., 1 Pa. Dist. 54, 11 Pa. Co. 13, 29 WklyNC 479.

[d] **Unauthorized sales.** — (1) Where the sale was made without authority, the executor or administrator is not entitled to any commissions on the proceeds. Garesche v. Levering Inv. Co., 146 Mo. 436, 48 SW 653, 46 LRA 232. (2) If a sale was not necessary for the payment of debts, commissions will not be allowed on a sale made for that purpose. Matter of Turner, 1 Hawaii 476.

72. Kiddle v. Hammond, 5 S. C. Eq. 223; Wolf v. Wolf, 36 Tex. Civ. A. 168, 81 SW 90.

[a] **Commissions on bonds taken in payment and delivered to distributees.**—Gist v. Gist, 7 S. C. Eq. 473; Deas v. Spann, 5 S. C. Eq. 176.

73. In re Pease, 149 Cal. 167, 85 P 149; Kiddle v. Hammond, 5 S. C. Eq. 223.

74. Ala.—Moore v. Randolph, 70 Ala. 575.

Hawaii.—Matter of Turner, 1 Hawaii 476.

La.—Gollain's Succ., 31 La. Ann. 173.

Mo.—Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406.

Oh.—Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317.

Pa.—Sloan's Est., 7 Pa. Co. 377.

S. C.—Ball v. Brown, 8 S. C. Eq. 374.

Tenn.—Loague v. Brennan, 86 Tenn. 634, 9 SW 693.

[a] **Purchase by mortgagee at foreclosure sale.**—Where a testator's land was sold by a master on the foreclosure of a mortgage and purchased by the mortgagee for less than the mortgage debt, payment of the price being made by the allowance of a credit to the amount thereof on the debt, the executor was not entitled to commissions on the price, because it could not be considered under such circumstances as having passed through his hands. Ball v. Brown, 8 S. C. Eq. 374.

75. Matter of Kraft, 16 Hawaii 159; In re O'Bannon, 142 Mo. A. 268, 126 SW 215; Matter of Wanninger, 120 App. Div. 273, 105 NYS 4 [aff 190 N. Y. 527 mem, 83 NE 1133 mem]; Matter of Johnson, 57 App. Div. 494, 67 NYS 1004 [mod on other grounds 170 N. Y. 139, 63 NE 63]; Roosevelt v. Van Alen, 31 App. Div. 1, 52 NYS 304; Matter of Clinton, 12 App. Div. 132, 42 NYS 674 [aff 16 Misc. 199, 38 NYS 945]; Matter of Julliard, 103 Misc. 178, 169 NYS 1079; Matter of Duncan, 81 Misc. 575, 143 NYS 492; Matter of McGlynn, 41 Misc. 156, 83 NYS 975, 3 Mills Surr. 600; Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58; Matter of Tucker, 29 Misc. 728, 62 NYS 1021, 1 Mills Surr. 371; Matter of Hardenbrook, 23 Misc. 538, 52 NYS 845, 2 Gibb. Surr. 460; Matter of Clinton, 16 Misc. 199, 38 NYS 945, 1 Gibb. Surr. 557; Matter of McLaren, 6 Misc. 483, 27 NYS 289, Pow. Surr. 585; Smith v. Buchanan, 5 NYSt 351, 5 Dem. Surr. 169; Buxton v. Shaffer, 43 W. Va. 296, 37 SE 319.

[a] **A naked power** of sale gives no right to commissions. Buxton v. Shaffer, 43 W. Va. 296, 37 SE 319.

[b] **Where part of the land remains unsold,** no commissions are allowed on the value of the unsold part. In re O'Bannon, 142 Mo. A. 268, 126 SW 215; Phœnix v. Livingston, 101 N. Y. 451, 5 NE 70.

76. Stein v. Huesmann, 38 N. J. Eq. 405.

77. Bruce v. Lorillard, 62 Hun 416, 16 NYS 900.

78. Donat's Est., 3 Pa. Dist. 749, 15 Pa. Co. 379.

79. Stein v. Huesmann, 38 N. J. Eq. 405.

80. In re O'Bannon, 142 Mo. A. 268, 126 SW 215; Metcalfe v. Colles, 43 N. J. Eq. 148, 10 A 804; In re Tilden, 44 Hun (N. Y.) 441 [aff 5 Dem. Surr. 230]; Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58; Buxton v. Shaffer, 43 W. Va. 296, 27 SE 319.

81. See supra § 2413.

82. Mass.—Lufkin v. Jakeman, 188 Mass. 528, 74 NE 933.

Mo.—In re Soulard, 141 Mo. 642, 43 SW 617.

N. Y.—In re Washbon, 14 NYS 672.

Pa.—McCallum's Est., 13 Pa. Dist. 279.

Ont.—Doan v. Davis, 23 Grant Ch. (U. C.) 207.

[a] **Commissions may be allowed:** (1) Where the duty of collecting rents was imposed by the will. Fisher v. Fisher, 1 Bradf. Surr. (N. Y.) 335. (2) Where the will empowered the executors to lease real estate. McCallum's Est., 13 Pa. Dist. 279. (3) Where the representative, acting in the interest of the beneficiaries of the estate, has collected rents and accounted therefor.

on real estate or the proceeds thereof, the value of all lawful encumbrances must be deducted, and the surplus only taken as a basis of computation,[83] although it has been held otherwise where all the proceeds were received and disbursed by the representative.[84] It has also been held that the reasonable value of decedent's mortgaged realty, which was charged to the administratrix as assets, and was taken, under foreclosure, into immediate possession of the mortgagee on a compromise, in consideration of a waiver of a deficiency judgment against the estate, is properly included in the value of property administered as a basis of computing commissions;[85] and a personal representative has been held entitled to commissions on the whole amount bid at a mortgage foreclosure sale of land of the estate, to pay a debt of the estate, although the money was not actually handed over to him.[86] It has been held that, where mortgaged realty is purchased by the mortgagee from an administrator of the deceased mortgagor, the administrator is not entitled to any fixed commission,[87] but should receive only what his services are actually worth.[88]

[§ 2417] **(9) Property Not Assets of Estate.** As a general rule a personal representative is not entitled to commissions on property not belonging to the estate, even though taken possession of or inventoried by him;[89] and where an executor is allowed commissions on an accounting for a bond which was in the hands of the testator as trustee, such commissions belong to the estate of the testator and not to the executor personally.[90] But when the representative is compelled by law to hold, protect, and guard funds coming into his hands which he has reason to believe to be assets of the estate until the right to such funds can be determined he is entitled to his commissions thereon;[91] and it has been considered that the representative was entitled to "some commissions" on property which came to his hands as belonging to the estate of his decedent, whether or not it rightfully belonged to the estate.[92]

[§ 2418] **(10) Worthless or Uncollected Assets.** An executor or administrator has no right to charge commissions on worthless or uncollected debts or assets,[93] unless perhaps where he has attempted in good faith to realize upon them.[94] Even if he is entitled to anything for his services as to uncollectable debts specific compensation and not commissions should be allowed.[95]

On debts due by distributees commissions should be allowed, although such debts are not actually paid to the representative, when they are included in the administration account and set off against the distributive shares of the debtors.[96]

[§ 2419] **(11) Lost or Perished Assets.** An executor or administrator has been held not entitled to commissions on property which has been lost or which has perished.[97]

[§ 2420] **(12) Assets Not in Possession or Unadministered.** On assets never in possession of the personal representative nor chargeable to him, and in no sense administered by him, a commission is not allowable.[98] Accordingly it is held that, where

Haley's Est., 9 Pa. Dist. 116; Doan v. Davis, 23 Grant Ch. (U. C.) 207.

83. In re Marvin, Myr. Prob. (Cal.) 163; Baucus v. Stover, 24 Hun 109 [rev on other grounds 89 N. Y. 1, and disappr Cox v. Schermerhorn, 18 Hun (N. Y.) 16]; In re Lawrence, 37 Misc. 702, 76 NYS 653; In re Moore, 211 Pa. 343, 60 A 989; Brolasky's App., 3 Pennyp. (Pa.) 329; Pollard's Est., 18 Pa. Dist. 636; Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64. But compare Slocum's Est., 14 Pa. Dist. 39 (where the principal asset was a house and lot which were sold for one thousand two hundred dollars subject to a mortgage of one thousand dollars and three per cent on two thousand two hundred dollars was allowed).

[a] **A deduction should be made for:** (1) A charge. Pritchett's Est., 2 Chest. Co. (Pa.) 158. (2) A ground rent. In re Moore, 211 Pa. 343, 60 A 989; Brolasky's App., 3 Pennyp. (Pa.) 329. (3) A homestead portion. In re Reck, Myr. Prob. (Cal.) 59.

84. In re Pease, 149 Cal. 167, 85 P 149; Crenshaw v. Bentley, 31 Mo. A. 75; Price's Est., 13 Pa. Dist. 129.

85. In re Carver, 123 Cal. 102, 55 P 770.

86. Huddleston v. Kempner, 87 Tex. 372, 28 SW 936 [overr Watt v. Downs, 36 Tex. 116; James v. Corker, 30 Tex. 617].

87. Zeiger's Est., 11 Pa. Co. 517.

88. Zeiger's Est., 11 Pa. Co. 517.

89. Cal.—Blackenburg v. Jordan, 86 Cal. 171, 24 P 1061.

Ill.—Haines v. Hay, 67 Ill. A. 445 [aff 169 Ill. 93, 48 NE 218].

Ky.—Laughlin v. Boughner, 84 SW 300, 27 KyL 19.

La.—Millaudon v. Cajus, 9 La. 306.

N. Y.—Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410; Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 6 Mills Surr. 496.

Tenn.—Hancock v. Fidelity Mut. L. Ins. Co., (Ch. A.) 53 SW 181.

[a] **He is not entitled to commissions on:** (1) The value of land included in his inventory but subsequently adjudged not to belong to the estate of his decedent (In re Delaney, 110 Cal. 563, 42 P 981; Ricaud's Est., 70 Cal. 69, 11 P 471). (2) Property held by his decedent in trust. Haines v. Hay, 67 Ill. A. 445 [aff as to this point 169 Ill. 93, 48 NE 218]; Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410; Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 6 Mills Surr. 496. (3) Commissions and counsel fees for settling an estate cannot be charged to the portion in which the deceased had only a usufruct. Millaudon v. Cajus, 9 La. 306.

90. Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410.

91. Wells v. Robinson, 13 Cal. 133; Mayer v. McCracken, 245 Ill. 551, 92 NE 355; Girod's Succ., 4 La. Ann. 386; De Peyster v. Ferrers, 11 Paige (N. Y.) 13.

92. Bohrer v. Otterback, 21 D. C. 32.

93. Cal.—In re Coursen, 65 P 965; In re Simmons, 43 Cal. 543.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

Ky.—Bickel v. Bickel, 79 SW 215, 25 KyL 1945.

La.—Gollain's Succ., 31 La. Ann. 173; Foulkes' Succ., 12 La. Ann. 537; McDonogh's Succ., 7 La. Ann. 475; Macarty's Succ., 5 La. Ann. 434; Milne's Succ., 1 Rob. 400.

Md.—Handy v. Collins, 60 Md. 229, 45 AmR 725.

Mich.—Webb v. Peck, 131 Mich. 579, 92 NW 104.

Miss.—Moffatt v. Loughridge, 51 Miss. 211.

Mo.—Matson v. Pearson, 121 Mo. A. 120, 97 SW 983.

N. J.—McKnight v. Walsh, 23 N. J. Eq. 136.

N. Y.—Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Matter of Dill, 60 Misc. 294, 113 NYS 384, 6 Mills Surr. 539; In re Freeman, 105 Misc. 423, 174 NYS 416.

Or.—Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—Reeser's App., 100 Pa. 79; Mayberry's App., 33 Pa. 258; Vanderford's App., 12 A 491; Powell's Est., 16 Pa. Dist. 544; Righter's Est., 14 Pa. Dist. 440; Bowers' Est., 12 Pa. Dist. 59; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Edenborn's Est., 10 Pa. Dist. 184; Immendorf's Est., 7 Pa. Dist. 449, 21 Pa. Co. 268, 4 LackLegN 266 [aff 109 Pa. 590, 42 A 959]; Hinnescheidt's Est., 12 Luz LegReg 23; Smethurst's Est., 18 Phila. 66; Robinson's Est., 2 Phila. 340; Hofelt's Est., 28 PittsbLegJNS 402.

S. C.—De Loach v. Sarratt, 58 S. C. 117, 36 SE 532.

W. Va.—Kester v. Lyon, 40 W. Va. 161, 20 SE 933.

Ont.—Bald v. Thompson, 17 Grant Ch. (U. C.) 154.

[a] **This is true even though** the representative is charged with the amount on the ground that he had been guilty of a default. Gilson's Est., 18 WklyNC (Pa.) 570; Bald v. Thompson, 17 Grant Ch. (U. C.) 154.

94. Johnston's Succ., 1 La. Ann. 75; Blakey's Succ., 12 Rob. (La.) 155; John's Est., 1 Chest. Co. (Pa.) 281; Behee's Est., 8 Kulp (Pa.) 157.

95. John's Est., 2 Chest. Co. (Pa.) 281; Kester v. Lyon, 40 W. Va. 161, 20 SE 933.

[a] **Reimbursement for legitimate expenses incurred** is the proper allowance. Adamson v. Parker, 74 Ark. 168, 85 SW 239.

96. Elder v. Whittemore, 51 Ill. A. 662; Posey's Est., 1 Chest. Co. (Pa.) 351.

97. Eversfield v. Eversfield, 4 Harr. & J. (Md.) 12 (under statute); Matter of Lester, 172 App. Div. 509, 158 NYS 763; Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

98. Ala.—Moore v. Randolph, 70 Ala. 575.

Ark.—Reynolds v. New Orleans Canal, etc., Co., 30 Ark. 520.

Cal.—In re Simmons, 43 Cal. 543.

Ill.—Crowley v. McCambridge, 154 Ill. A. 135; Morrissey v. Rogers, 120 Ill. A. 37.

Ky.—Bickel v. Bickel, 79 SW 215, 25 KyL 1945.

an executor or administrator does not receive any funds or other assets of the estate, he is not entitled to any compensation even though he may have been subjected to trouble in preparing for administration.[99] But it has been held that the representative is entitled to commissions on property of the estate actually brought into his possession and administered by him, although the will did not give him seizin of such property.[1]

[§ 2421] **(13) Foreign Assets.** It has been held that commissions are not allowable on money collected by the administrator in a foreign jurisdiction and paid to a creditor residing therein,[2] no administration having been granted in that jurisdiction.[3]

[§ 2422] **5. Amount of Compensation—a. In General.** The amount of the compensation of executors and administrators is governed by statutes, some of which fix a definite amount, while others leave the matter to the discretion of the court, either entirely or within certain maximum and minimum limits.[4] Where the court has a discretion in the matter, it should award an amount which is reasonable under the circumstances of the case, in view of the time, trouble, risk, and responsibility demanded by the nature of the trust, the manner in which the estate is managed, and the faithfulness

La.—Delano's Succ., 125 La. 869, 51 S 1019; Day's Succ., 22 La. Ann. 366; Powell's Succ., 14 La. Ann. 425; Butterly's Succ., 10 La. Ann. 258; Macarty's Succ., 5 La. Ann. 434; Baillio v. Baillio, 5 Mart. N. S. 228; Nesbit's Succ., Mann. Unrep. Cas. 299; Gorham's Succ., Mann. Unrep. Cas. 253.

Mo.—Hitchcock v. Mosher, 106 Mo. 578, 17 SW 638; Garrison v. St. Louis Trust Co., 77 Mo. A. 333.

N. H.—Stevens v. Clough, 70 N. H. 165, 47 A 615.

N. J.—In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944, 73 A 1117].

N. Y.—In re Mercantile Trust Co., 210 N. Y. 83, 103 NE 884 [mod 156 App. Div. 224, 141 NYS 460]; Matter of Vanneck, 175 App. Div. 363, 161 NYS 893; Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Matter of Whipple, 81 App. Div. 589, 81 NYS 393; Matter of Dill, 60 Misc. 294, 113 NYS 384, 6 Mills Surr. 539; Matter of McCoy, 51 Misc. 441, 101 NYS 539, 5 Mills Surr. 497; In re Julliard, 103 Misc. 178, 169 NYS 1079.

Oh.—Williams v. Williams, 8 Oh. St. 300.

Or.—Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; Sloan's Est., 7 Pa. Co. 377; Sharp's Est., 11 Phila. 92.

S. C.—De Loach v. Sarratt, 58 S. C. 117, 36 SE 552; Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

Wash.—In re Johnston, 181 P 209.

Ont.—Bald v. Thompson, 17 Grant Ch. (U. C.) 154.

99. Adamson v. Parker, 74 Ark. 168, 85 SW 239; In re Towne, 143 Cal. 507, 77 P 446; Browning v. Richardson, 186 Mo. 361, 85 SW 518; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; Moore's Est., 13 Pa. Dist. 137; In re Chahoon, 12 Pa. Dist. 229, 28 Pa. Co. 421; Holt's Est., 12 Pa. Dist. 205, 28 Pa. Co. 268; Lankenau's Est., 12 Pa. Dist. 160, 28 Pa. Co. 301; Price's Est., 11 Pa. Dist. 229; Sunderland's Est., 10 Pa. Dist. 358, 25 Pa. Co. 538; Singerly's Est., 10 Pa. Dist. 258, 25 Pa. Co. 268; Rowe's Est., 11 Kulp (Pa.) 36; In re Young, 4 LackJur (Pa.) 99; Kercher's Est., 21 LancLRev (Pa.) 111; In re Glesenkamp, 34 PittsbLegJNS (Pa.) 155.

1. McDonogh's Succ., 7 La. Ann. 475; Anderson v. Anderson, 10 La. 29.

2. Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

3. Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

4. U. S.—Smith v. Worthington, 53 Fed. 977, 4 CCA 130.

Ala.—Collins v. Clements, 75 S 165; Kenan v. Graham, 135 Ala. 585, 33 S 699; Noble v. Jackson, 124 Ala. 311, 26 S 955; Newberry v. Newberry, 28 Ala. 691; Pinckard v. Pinckard, 24 Ala. 250.

Ark.—Adamson v. Parker, 74 Ark. 168, 85 SW 239; Ex p. Bell, 14 Ark. 76.

Cal.—In re Towne, 143 Cal. 507, 77 P 446; In re Davis, 8 Cal. A. 355, 97 P 86; In re Goodrich, 6 Cal. A. 730, 93 P 121.

Colo.—Doss v. Stevens, 13 Colo. A. 535, 59 P 67.

D. C.—Howard v. Howard, 38 App. 575; McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369]; Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Fla.—Sherrell v. Shepard, 19 Fla. 300; Moore v. Felkel, 7 Fla. 44.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498; Walton v. Gairdner, 111 Ga. 343, 36 SE 666; Davidson v. Story, 106 Ga. 799, 32 SE 867.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289; Griswold v. Smith, 214 Ill. 323, 73 NE 400; In re Colton, 187 Ill. A. 558.

Ind.—Cox v. Baker, 113 Ind. 62, 14 NE 740; Watkins v. Romine, 106 Ind. 378, 7 NE 193; Collins v. Tilton, 58 Ind. 374; Ex p. Hodge, 6 Ind. A. 487, 33 NE 980.

Iowa.—In re Sawyer, 124 Iowa 485, 100 NW 484; Foteaux v. Lepage, 6 Iowa 123.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Slusher v. Weller, 151 Ky. 203, 151 SW 684; May v. Walter, 149 Ky. 749, 149 SW 1014; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Nickell v. Nickell, 118 SW 966; Hays v. Johnson, 99 SW 332, 30 KyL 614; Glover v. Check, 71 SW 438, 24 KyL 1281, 72 SW 302, 24 KyL 1783; Reed v. Reed, 66 SW 819, 23 KyL 2186; Stanberry v. Robinson, 27 SW 973, 16 KyL 309; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Webb v. Webb, 6 T. B. Mon. 163; Wood v. Lee, 5 T. B. Mon. 50; Ramsey v. Ramsey, 4 T. B. Mon. 151.

La.—Pierce's Succ., 119 La. 727, 44 S 446; Kernan's Succ., 105 La. 592, 30 S 239; Haile's Succ., 52 La. Ann. 1529, 27 S 967; Calloway's Succ., 49 La. Ann. 968, 22 S 225; Robertson's Succ., 49 La. Ann. 80, 21 S 197; Bougere's Succ., 30 La. Ann. 422; Hart's Succ., 26 La. Ann. 662; Girod's Succ., 4 La. Ann. 386; Day's Succ., 3 La. Ann. 624; Milne's Succ., 1 Rob. 400; Young v. Chaney, 3 La. 462; Baillio v. Baillio, 5 Mart. N. S. 228.

Md.—In re Watts, 108 Md. 696, 71 A 316; Jones v. Harbaugh, 93 Md. 269, 48 A 827; Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Parker v. Gwynn, 4 Md. 423; Thomas v. Frederick County School, 9 Gill & J. 115; McPherson v. Israel, 5 Gill & J. 60; Gwynn v. Dorsey, 4 Gill & J. 453; Wilson v. Wilson, 3 Gill & J. 20.

Mass.—Bailey v. Crosby, 226 Mass. 492, 116 NE 238; Cabell v. Cabell, 1 Metc. 319.

Miss.—Powell v. Burrus, 35 Miss. 605; Spratt v. Baldwin, 33 Miss. 581; Cherry v. Jarratt, 25 Miss. 221; Satterwhite v. Littlefield, 21 Miss. 302; Merrill v. Moore, 8 Miss. 271, 40 AmD 60.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681; Browning v. Richardson, 186 Mo. 361, 85 SW 518; Matson v. Pearson, 121 Mo. A. 120, 97 SW 983; Elstroth v. Young, 94 Mo. A. 351, 68 SW 100; Garrison v. St. Louis Trust Co., 77 Mo. A. 333.

N. H.—Wendell v. French, 19 N. H. 205.

N. J.—In re Hibbler, 78 N. J. Eq. 217, 78 A 188 [aff 79 N. J. Eq. 230, 81 A 1133]; Mathis v. Mathis, 18 N. J. L. 59; Weeks v. Selby, 61 N. J. Eq. 668, 46 A 948; In re Wolfe, 34 N. J. Eq. 223; Dickerson v. Canfield, 11 N. J. Eq. 259.

N. Y.—In re Martin, 196 N. Y. 415, 90 NE 46 [mod 134 App. Div. 924 mem, 118 NYS 1123 mem]; Matter of King, 122 App. Div. 354, 106 NYS 1073; Matter of Hunt, 121 App. Div. 96, 105 NYS 696; Matter of Clinton, 12 App. Div. 132, 42 NYS 674; Lansing v. Lansing, 45 Barb. 182, 1 Abb PrNS 280, 31 HowPr 55; Matter of Hammer, 94 Misc. 36, 158 NYS 981; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Matter of Martin, 124 App. Div. 793, 109 NYS 217; Hosack v. Rogers, 9 Paige 461; McWhorter v. Benson, Hopk. 28.

N. C.—Overman v. Lanier, 157 N. C. 544, 73 SE 192; Graves v. Graves, 58 N. C. 280; Washington v. Emery, 57 N. C. 32; Walton v. Avery, 22 N. C. 405; Peyton v. Smith, 22 N. C. 325; Potter v. Stone, 9 N. C. 30; Bond v. Turner, 6 N. C. 331.

Oh.—Union Sav. Bank, etc., Co. v. Smith, 26 Oh. Cir. Ct. 317; Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

Pa.—In re Sinnott, 231 Pa. 299, 80 A 363; In re Moore, 211 Pa. 343, 60 A 989; In re Sunderland, 203 Pa. 155, 52 A 167; Gable's App., 36 Pa. 395; Miller's App., 7 A 190; Johnston's App., 8 Pa. Cas. 205, 11 A 78; Fisher's Est., 25 Pa. Dist. 362; Gelbach's Est., 24 Pa. Dist. 1020; Herter's Est., 18 Pa. Dist. 1026; Thewlis' Est., 15 Pa. Dist. 361; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Price's Est., 11 Pa. Dist. 229; Neafie's Est., 12 Pa. Dist. 749; Becker v. Espenshade, 8 Pa. Dist. 525, 16 LancLRev 195; Hall's Est., 8 Pa. Dist. 8; Holt's Est., 28 Pa. Co. 268; Michael's Est., 5 Pa. Co. 321; Matter of Miller, 1 Ashm. 323; Shirk's Est., 4 Del. Co. 214; Lancaster's Est., 14 Phila. 237; McCloskey's Est., 11 Phila. 95; Wharton's Est., 11 Phila. 39; King's Est., 11 Phila. 26; In re Walter, 7 PittsbLegJNS 49.

R. I.—Williams v. Herrick, 18 R. I. 120, 25 A 1099.

S. C.—Logan v. Logan, 6 S. C. Eq. 1.

Tenn.—Leach v. Cowan, 125 Tenn. 182, 140 SW 1070, AnnCas1913C 188.

Tex.—Kearney v. Nicholson, (Civ. A.) 67 SW 361; Claridge v. Lavenburg, 7 Tex. Civ. A. 155, 26 SW 324.

Va.—Boyd v. Oglesby, 23 Gratt. (64 Va.) 674; Strother v. Hull, 23 Gratt. (64 Va.) 652; Sheppard v. Starke, 3 Munf. (17 Va.) 29; Taliaferro v. Minor, 2 Call (6 Va.) 190.

Wash.—In re Mason, 26 Wash. 259, 66 P 435; In re Sour, 17 Wash. 675, 50 P 587.

W. Va.—Kester v. Lyon, 40 W. Va. 161, 20 SE 933.

Eng.—Cockerell v. Barber, 2 Russ. 585, 3 EngCh 585, 38 Reprint 455, 1 Sim. 23, 2 EngCh 23, 57 Reprint 487 (rate in India).

Ont.—McMillan v. McMillan, 21 Grant Ch. (U. C.) 369; Thompson v. Freeman, 15 Grant Ch. (U. C.) 384; Torrance v. Chewett, 12 Grant Ch. (U. C.) 407.

of the personal representative,[5] although it is very usual for courts to adopt a specified rate of commission as the measure of compensation in ordinary cases,[6] which will not be exceeded unless a proper case therefor is shown by clear and convincing evidence.[7] As a general rule the exercise by a probate court of its discretion in awarding compensation to an executor or administrator is not reviewable on appeal unless it is shown that the discretion was manifestly abused, or there was no evidence to support the award.[8] Compensation is often allowed according to the amount of the estate administered

5. U. S.—In re Wade, 3 MillRev 411.

Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Noble v. Jackson, 124 Ala. 311, 26 S 955; Pearson v. Darrington, 32 Ala. 227; Gould v. Hays, 25 Ala. 426; Bendall v. Bendall, 24 Ala. 295, 60 AmD 469; Pinckard v. Pinckard, 24 Ala. 250.

Ark.—Ex p. Bell, 14 Ark. 76.

Conn.—Main's App., 73 Conn. 638, 48 A 965.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Fla.—Sherrell v. Shepard, 19 Fla. 300; Moore v. Felkel, 7 Fla. 44.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289; Mumper v. Murphy, 212 Ill. A. 52; White v. Lewis, 201 Ill. A. 105; Bachman v. Wilkins, 194 Ill. A. 232; In re Colton, 187 Ill. A. 558; Giger v. Bishop, 135 Ill. A. 448.

Ind.—Pollard v. Barkley, 117 Ind. 40, 17 NE 294.

Kan.—Chapman v. Kennett, 94 Kan. 535, 146 P 1153.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917; Pennebaker v. Williams, 136 Ky. 120, 120 SW 321, 123 SW 672; Root v. Green, 81 SW 243, 26 KyL 315; Reed v. Reed, 66 SW 819, 23 KyL 2186; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Offutt v. Divine, 53 SW 816; Fidelity Trust, etc., Co. v. Watkins, 42 SW 753, 19 KyL 957; Stanberry v. Robinson, 27 SW 973, 16 KyL 309; Carrol v. Connet, 2 J. J. Marsh. 195; Bailey v. Penick, 10 KyL 239; Trible v. Ellison, 1 Ky. Op. 59.

Md.—Friedenwald v. Burke, 123 Md. 511, 91 A 461; In re Watts, 108 Md. 696, 71 A 316.

Miss.—Adams v. Westbrook, 41 Miss. 385.

Mo.—Hawkins v. Cunningham, 67 Mo. 415.

N. H.—Wendell v. French, 19 N. H. 205; Gordon v. West, 8 N. H. 444.

N. J.—In re Walsh, 74 A 563; Weeks v. Selby, 61 N. J. Eq. 668, 46 A 948; Rogers v. Hand, 39 N. J. Eq. 270; Pomeroy v. Mills, 37 N. J. Eq. 578; In re Wolfe, 34 N. J. Eq. 223; Runkle v. Smith, (Ch.) 106 A 474; In re Christie, 89 N. J. Eq. 303, 101 A 64; In re Steelman, 87 N. J. Eq. 270, 99 A 612.

N. Y.—Matter of Runk, 181 App. Div. 461, 168 NYS 970 [aff 224 N. Y. 570 mem, 120 NE 875 mem]; In re Troughton, 187 App. Div. 928, 174 NYS 517.

N. C.—Overman v. Lanier, 157 N. C. 544, 73 SE 192; Ex p. Haughton, 14 N. C. 441; Potter v. Stone, 9 N. C. 30.

Pa.—In re Ellis, 254 Pa. 402, 98 A 1083; In re Kelley, 250 Pa. 172, 95 A 400; In re Reid, 250 Pa. 103, 95 A 392; In re Sinnott, 231 Pa. 299, 80 A 363; In re Harrison, 217 Pa. 207, 66 A 354; In re Moore, 211 Pa. 343, 60 A 989 [rev 13 Pa. Dist. 137]; In re McCallum, 211 Pa. 205, 60 A 903; In re Young, 204 Pa. 32, 53 A 511; In re Betts, 198 Pa. 640, 48 A 873; In re Wistar, 192 Pa. 289, 43 A 1006; In re Semple, 189 Pa. 385, 42 A 28; Gilpin's Est., 138 Pa. 143, 20 A 713; Johnston's App., 8 Pa. Cas. 205, 11 A 78; Harbster's App., 125 Pa. 1, 17 A 204; Davis' App., 100 Pa. 201; Carrier's App., 79 Pa. 230; Robb's App., 41 Pa. 45; Barclay's App., 2 Walk. 17; Stevenson's Est., 4 Whart. 98; In re Walker, 9 Serg. & R. 223; Pusey v. Clemson, 9 Serg. & R. 204; Middleton's Est., 66 Pa. Super. 55; O'Brien's Est., 59 Pa. Super. 19; Kline's Est., 49 Pa. Super. 122; Eberle's Est., 25 Pa. Dist. 625; Arnold's Est., 22 Pa. Dist. 271; Wootten's Est., 21 Pa. Dist. 1035; Everett's Est., 19 Pa. Dist. 477, 37 Pa. Co. 434; Gertzen's Est., 18 Pa. Dist. 925; Taylor's Est., 17 Pa. Dist. 395; Hamilton's Est., 16 Pa. Dist. 75; Righter's Est., 14 Pa. Dist. 440; Gelbach's Est., 14 Pa. Dist. 51; Slocum's Est., 14 Pa. Dist. 39; Lakey's Est., 13 Pa. Dist. 533, 30 Pa. Co. 287; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Miles' Est., 13 Pa. Dist. 264, 30 Pa. Co. 80; Barry's Est., 12 Pa. Dist. 789; Chahoon's Est., 12 Pa. Dist. 229, 28 Pa. Co. 421; Holt's Est., 12 Pa. Dist. 205, 28 Pa. Co. 268; Lankenau's Est., 12 Pa. Dist. 160, 28 Pa. Co. 301; Price's Est., 11 Pa. Dist. 229; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Sunderland's Est., 10 Pa. Dist. 358, 25 Pa. Co. 538 [aff 203 Pa. 160, 52 A 1135]; Singerly's Est., 10 Pa. Dist. 258, 25 Pa. Co. 268; Edenborn's Est., 10 Pa. Dist. 184; Kelly's Est., 9 Pa. Dist. 387; Mutchmore's Est., 9 Pa. Dist. 293, 24 Pa. Co. 257; Donat's Est., 6 Pa. Dist. 78, 15 Pa. Co. 379; Siddall's Est., 5 Pa. Dist. 102, 17 Pa. Co. 424; Pickering's Est., 4 Pa. Dist. 263, 16 Pa. Co. 359; Eby's Est., 2 Pa. Dist. 326, 12 Pa. Co. 601; Thompson's Est., 36 Pa. Co. 289; Gelbach's Est., 30 Pa. Co. 609; Collier's Est., 30 Pa. Co. 607; Miles' Est., 30 Pa. Co. 80; Wilson's Est., 29 Pa. Co. 497; Barry's Est., 29 Pa. Co. 330; Chahoon's Est., 28 Pa. Co. 421; Donat's Est., 19 Pa. Co. 142; Zeiger's Est., 11 Pa. Co. 517; Matter of Miller, 1 Ashm. 323; John's Est., 2 Chest. Co. 281; Rowe's Est., 11 Kulp 36; Carey's Est., 10 Kulp 227; Pelham's Est., 9 Kulp 347; Laubach's Est., 9 Kulp 150; Woodward's Est., 6 Kulp 7, 27 WklyNC 407; Corby's Est., 5 Kulp 159; In re Young, 4 LackJur 99; Wade's Est., 22 LancL Rev 257; Kercher's Est., 21 LancL Rev 111; Yeiger's Est., 3 North. Co. 207; Schweitzer's Est., 3 North. Co. 40; McCloskey's Est., 11 Phila. 95; Pennock's Est., 2 Phila. 141; In re Walsh, 35 PittsbLegJNS 289; In re Shamberg, 33 PittsbLegJNS 262; Scully's Est., 31 PittsbLegJNS 307; Kauffman's App., 20 WklyNC 364; Sheetz's Est., 2 Woodw. 407; Wirt's Est., 11 YorkLegRec 145.

R. I.—Rogers v. Chester, 69 A 848.

Tenn.—Ex p. Parker, 19 SW 571.

Vt.—Powell v. Foster, 71 Vt. 160, 44 A 96; In re Hall, 70 Vt. 458, 41 A 508; Hapgood v. Jennison, 2 Vt. 294.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288; Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

W. Va.—Kester v. Lyon, 40 W. Va. 161, 20 SE 933; Hoke v. Hoke, 12 W. Va. 427.

Man.—Re Sanford, 18 Man. 413.

N. B.—Wright v. Berton, 32 N. B. 708.

Ont.—Archer v. Severn, 13 Ont. 316; Hoover v. Wilson, 24 Ont. A. 424; Re Smith, 11 OntWN 103; Re Fleming, 11 Ont. Pr. 426; McMillan v. McMillan, 21 Grant Ch. (U. C.) 369; Thompson v. Freeman, 15 Grant Ch. (U. C.) 384; Chisholm v. Barnard, 10 Grant Ch. (U. C.) 479; McLennan v. Heward, 9 Grant Ch. (U. C.) 178.

"The rule is fair compensation for the amount and character of labor performed and responsibility involved." In re Moore, 211 Pa. 343, 347, 60 A 989 [rev 13 Pa. Dist. 137].

"The circumstances of each case, as it arises, must afford the criterion of commissions; a positive standard would necessarily work injustice." Matter of Miller, 1 Ashm. (Pa.) 323, 335.

[a] **Reasonable compensation for the services of an administrator means** what will fairly compensate him when the character of and the effectiveness and ability entering into the service are considered. Powell v. Foster, 71 Vt. 160, 44 A 96.

[b] **Trouble and risk rather than the quantum of the estate** are to be considered. Weeks v. Selby, 61 N. J. Eq. 668, 46 A 948.

[c] **Facts held to justify allowance of highest rate.**—Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

[d] **Consideration of legal services.**—In fixing an executor's compensation, the probate court may consider the fact that he saved expense to the estate by performing services as a lawyer. Nelson v. Schoonover, 89 Kan. 779, 132 P 1183, AnnCas1915A 147 [den reh 89 Kan. 388, 131 P 147].

[e] **Excessive compensation on part of estate.**—Where executors receive an excessive compensation on the real estate account filed by them, such excessive allowance will be taken into consideration in fixing the compensation in the account of the personalty. In re Wirt, 11 YorkLeg Rec (Pa.) 145.

[f] **Evidence of amount allowed in similar case inadmissible.**—Hawkins v. Cunningham, 67 Mo. 415.

[g] **The requirement of a heavy bond** is a fact which should enter into the consideration. In re Wolfe, 34 N. J. Eq. 223.

6. Conn.—Main's App., 73 Conn. 638, 48 A 965.

Ky.—Offutt v. Divine, 53 SW 816; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Cabell v. Cabell, 1 Metc. 319.

Pa.—Gilpin's Est., 138 Pa. 143, 20 A 713 [rev 21 PittsbLegJNS 127]; Pusey v. Clemson, 9 Serg. & R. 204; McCallum's Est., 13 Pa. Dist. 279; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Barry's Est., 12 Pa. Dist. 789; Holt's Est., 12 Pa. Dist. 205, 28 Pa. Co. 268; Lankenau's Est., 12 Pa. Dist. 160, 28 Pa. Co. 301; Sharp's Est., 9 Pa. Dist. 727, 24 Pa. Co. 417; Collier's Est., 30 Pa. Co. 607; Gressle's Est., 29 Pa. Co. 97, 21 LancLRev 73; Rockafield's Est., 4 LancLRev 113.

Tenn.—Ex p. Parker, 19 SW 571; Hall v. Hall, (Ch. A.) 59 SW 203.

Va.—Triplett v. Jameson, 2 Munf. (16 Va.) 242.

W. Va.—Estill v. McClintic, 11 W. Va. 399.

Ont.—Chisholm v. Barnard, 10 Grant Ch. (U. C.) 481.

"The responsibility which is incurred by the receipt and disbursement of money, is a legitimate subject of compensation, and an unvarying rate per cent., without regard to the magnitude of the sum, will always be a just measure of it, because the responsibility increases in proportion to the amount." Stevenson's Est., 4 Whart. (Pa.) 98, 103.

7. Ashurst v. Ashurst, 13 Ala. 781.

8. U. S.—Nicholls v. Hodge, 18 F. Cas. No. 10,231, 2 Cranch C. C. 582.

Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Noble v. Jackson, 132 Ala. 230, 31 S 450.

Ark.—Reynolds v. New Orleans Canal, etc., Co., 30 Ark. 520.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—Griswold v. Smith, 214 Ill. 323, 73 NE 400.

Ky.—Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Clark v. Newman, 1 SW 880; McCracken v.

or the nature of the services rendered by the personal representative.[9] Although personal representatives are usually allowed commissions,[10] their compensation sometimes takes the form of an allowance of a gross sum for all services rendered,[11] or a per diem allowance for the time spent in performing the duties of administration.[12]

Where commissions are paid on part of an estate at an intermediate accounting, commissions can be allowed only on the amount which comes into the representative's hands afterward, and such commissions are calculated as if the subsequent receipts were part of the prior receipts.[13]

Annual rests. A personal representative cannot make annual rests in his account and be allowed full commissions thereon, unless he makes an annual accounting.[14]

Interest on commissions has been disallowed where the representative was in default,[15] and where the commission alone was ample compensation in consideration of the size of the estate.[16] It has also been held that an administrator is not entitled to recover interest on his claim for services during the pendency of an appeal in a suit to remove him and compel him to account.[17]

A court should not fix in advance the compensation of executors where it has the administration of the estate before it.[18]

A statute fixing the salary of the public administrator of a certain county controls as to his entire compensation and he is not entitled to compensation in accordance with the general statute fixing the compensation of executors and administrators.[19]

The executor of a deceased coexecutor, on the settlement of the accounts of a sole surviving executor, is not before the court in his official capacity; and any allowance to be made to him rests in the sound discretion of the surrogate, and is not measured by the statute relating to the compensation of executors.[20]

Where executors have received more than they were entitled to as commissions, interest on the excess to the date of the accounting should be deducted from the amount to which they are entitled.[21]

[§ 2423] **b. Extra Allowance.**[22] When the exact amount of compensation or the maximum amount allowable is fixed by statute, in the absence of a testamentary[23] or statutory provision for increased compensation for extraordinary services, personal representatives can be allowed only the fixed com-

McCracken, 6 T. B. Mon. 342; Ramsey v. Ramsey, 4 T. B. Mon. 151.

Md.—Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Thomas v. Frederick County School, 9 Gill & J. 115; McPherson v. Israel, 5 Gill & J. 60; Gwynn v. Dorsey, 4 Gill & J. 453; Wilson v. Wilson, 3 Gill & J. 20.

Mich.—Mower's App., 48 Mich. 441, 12 NW 646.

Miss.—Spratt v. Baldwin, 33 Miss. 581.

N. Y.—Matter of Gall, 107 App. Div. 310, 95 NYS 124.

N. C.—Green v. Barbee, 84 N. C. 69; Walton v. Avery, 22 N. C. 405.

Pa.—In re Donnelly, 246 Pa. 308, 92 A 306; In re Moore, 211 Pa. 343, 60 A 989; In re Moore, 211 Pa. 338, 60 A 987 [aff 13 Pa. Dist. 137]; Mutchmore's Est., 9 Pa. Dist. 702; Laubach's Est., 9 Kulp 150.

Ont.—Torrance v. Chewett, 12 Grant Ch. (U. C.) 407.

9. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Conn.—Main's App., 73 Conn. 638, 48 A 965.

Fla.—Sherrell v. Shepard, 19 Fla. 300.

Kan.—Chapman v. Kennett, 94 Kan. 535, 146 P 1153.

Ky.—Reed v. Reed, 66 SW 819, 23 KyL 2186; Fidelity Trust, etc., Co. v. Watkins, 42 SW 753, 19 KyL 957; Quaintance v. Darnell, 14 KyL 238.

Md.—In re Watts, 108 Md. 696, 71 A 316.

Miss.—Powell v. Burrus, 35 Miss. 605.

N. H.—Wendell v. French, 19 N. H. 205.

N. J.—Rogers v. Hand, 39 N. J. Eq. 270; Pomeroy v. Mills, 37 N. J. Eq. 578 [rev 35 N. J. Eq. 442]; In re Wolfe, 34 N. J. Eq. 223.

N. Y.—Leask v. Beach, 173 App. Div. 873, 160 NYS 147.

N. C.—Graves v. Graves, 58 N. C. 280.

Oh.—Mitchell v. Schultz, 8 Oh. Dec. (Reprint) 78, 5 CincLBul 503; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

Pa.—Barhite's App., 126 Pa. 404, 17 A 617; Harbster's App., 125 Pa. 1, 17 A 204; Wood's App., 86 Pa. 346; In re Lloyd, 82 Pa. 143; Eshleman's App., 74 Pa. 42; Stong's App., 3 Walk. 499; Stevenson's Est., 4 Whart. 98; In re Walker, 9 Serg. & R. 223; Pusey v. Clemson, 9 Serg. & R. 204; Ziegler's App., 2 Pa. Cas. 351, 4 A 837; O'Brien's Est., 59 Pa. Super. 19; Wootten's Est., 21 Pa. Dist. 1035; Houston's Est., 21 Pa. Dist. 395; Hulseman's Est., 18 Pa. Dist. 441; Taylor's Est., 17 Pa. Dist. 395; Powell's Est., 16 Pa. Dist. 544; Collis' Est., 16 Pa. Dist. 242; Wilson's Est., 13 Pa. Dist. 276, 29 Pa. Co. 497; Sunderland's Est., 10 Pa. Dist. 358, 25 Pa. Co. 538; Kelly's Est., 9 Pa. Dist. 387; Siddall's Est., 5 Pa. Dist. 102, 17 Pa. Co. 424; Eby's Est., 2 Pa. Dist. 326, 12 Pa. Co. 601; Sharp's Est., 24 Pa. Co. 417; Oliver's Est., 4 Pa. Co. 209; Bird's Est., 2 Pars. Eq. Cas. 168; Baily's Est., 2 Chest. Co. 568; Spackmous' Est., 2 Chest. Co. 153; Eachus' Est., 2 Chest. Co. 152; Corby's Est., 5 Kulp 159; Benedict's Est., 4 Lanc LRev 99; Wilson's Est., 18 Phila. 123; Wernle's Est., 13 Phila. 328; McCloskey's Est., 13 Phila. 254; In re Semple, 11 PittsbLegJNS 431; Rogers' Est., 17 WklyNC 29; Lang's Est., 13 WklyNC 14.

S. D.—In re Nelson, 26 S. D. 615, 129 NW 113.

Tenn.—Ex p. Parker, 19 SW 571.

Va.—Cavendish v. Fleming, 3 Munf. (17 Va.) 198.

Wash.—In re Johnston, 181 P 209; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

Man.—Re Patterson, 24 Man. 217.

Ont.—Denison v. Denison, 17 Grant Ch. (U. C.) 306; Thompson v. Freeman, 15 Grant Ch. (U. C.) 384.

Newfoundl.—In re Southcott, 8 Newfoundl. 645.

10. See supra § 2402.

11. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450, 124 Ala. 311, 26 S 955; Cummings v. Bradley, 57 Ala. 224.

Ind.—Watkins v. Romine, 106 Ind. 378, 7 NE 193; Ray v. Doughty, 4 Blackf. 115.

Iowa.—Foteaux v. Lepage, 6 Iowa 123.

Ky.—Root v. Green, 81 SW 243, 26 KyL 315; Bickel v. Bickel, 79 SW 215, 25 KyL 1945; Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079; Fidelity Trust, etc., Co. v. Watkins, 42 SW 753, 19 KyL 957; Chalfant v. Stearns, 4 Dana 602; Stanberry v. Robinson, 27 SW 973, 16 KyL 309.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

Mich.—In re Power, 92 Mich. 106, 52 NW 298; Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

N. J.—Andress v. Andress, 46 N. J. Eq. 528, 22 A 124; Metcalfe v. Colles, 43 N. J. Eq. 148, 10 A 804.

Pa.—In re Semple, 189 Pa. 385, 42 A 28 [rev 28 PittsbLegJNS 431]; McCain's App., 138 Pa. 143, 20 A 713; St. Clair's App., 15 A 914; Stewart's App., 110 Pa. 410, 6 A 321; Reeser's App., 100 Pa. 79; Montgomery's App., 86 Pa. 230; Kennedy's App., 4 Pa. 149; Kauffman's App., 7 Pa. Cas. 482, 12 A 31; Scott's Est., 18 Pa. Super. 375; Fiscus' Est., 13 Pa. Super. 615; Collier's Est., 30 Pa. Co. 607; In re Young, 4 LackJur 99; Shamberg's Est., 33 PittsbLegJNS 262; Smith's Est., 30 PittsbLegJNS 188.

R. I.—Williams v. Herrick, 18 R. I. 120, 25 A 1099 [foll Grinnell v. Baker, 17 R. I. 41, 20 A 8, 23 A 911.

Tenn.—German v. German, 7 Coldw. 180; Guild v. Young, (Ch. A.) 62 SW 404.

12. In re Nuckols, 103 Mich. 297, 61 NW 506; Wisner v. Mabley, 74 Mich. 143, 41 NW 835; Higbie v. Westlake, 14 N. Y. 281; Matter of Martin, 124 App. Div. 793, 109 NYS 217; Powell v. Foster, 71 Vt. 160, 44 A 96; In re Hall, 70 Vt. 458, 41 A 508; Cameron v. Cameron, 15 Wis. 1, 82 AmD 652.

[a] **Only time actually and necessarily occupied** in the affairs of the estate can be considered in making a per diem allowance. Higbie v. Westlake, 14 N. Y. 281.

[b] **Where a different mode of fixing compensation is provided by statute,** a per diem allowance cannot be made. Booker v. Armstrong, 93 Mo. 49, 4 SW 727.

13. Tucker v. Tucker, 33 N. J. Eq. 235 [aff 34 N. J. Eq. 292 mem].

14. Lansing v. Lansing, 45 Barb. (N. Y.) 182, 1 AbbPrNS 280, 31 How Pr 55; Betts v. Betts, 4 AbbNCas (N. Y.) 317, 57 HowPr 355 note; Hosack v. Rogers, 9 Paige (N. Y.) 461; Cram v. Cram, 2 Redf. Surr. (N. Y.) 244.

15. Williams v. Walter, 3 KyL 336.

16. In re Armstrong, 6 Watts (Pa.) 236.

17. McClelland v. Bristow, 9 Ind. A. 543, 35 NE 197.

18. Anderson v. Sabin, 132 Iowa 507, 109 NW 1080.

19. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

20. Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507.

21. Matter of McDowell, 102 Misc. 275, 169 NYS 853 [mod on other grounds 184 App. Div. 646, 172 NYS 658].

22. For carrying on business of decedent see supra § 2410.

For services as attorney see supra § 547.

23. Effect of testamentary provisions as to compensation see infra § 2424.

pensation, even though the administration of the estate has been especially difficult, or they have rendered unusual services which have benefited the estate.[24] However, the statutes sometimes permit an allowance of extra or special compensation in cases where the administration of the estate has imposed unusual burdens.[25] A claim for an extra allowance will be carefully scrutinized,[26] and the allowance can be made only when it appears that the services were necessary,[27] that they were of an extraordinary character,[28] that they were actually performed[29] by the representative[30] to promote some object beneficial to the estate,[31] and that the circumstances are such that justice to the representative requires that he shall be allowed something more than the ordinary compensation.[32] Such an allowance should not be made for performing any of the duties ordinarily incident to administra-

24. Ala.—Collins v. Clements, 75 S 165.

Ark.—Ex p. Bell, 14 Ark. 76.

Cal.—In re Hite, 155 Cal. 448, 101 P 448; Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; In re Goodrich, 6 Cal. A. 730, 93 P 121.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108; Askew v. Hudgens, 99 Ill. 468; Willard v. Bassett, 27 Ill. 37, 79 AmD 393; Bachman v. Wilkins, 194 Ill. A. 232; U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108]; Peo. v. Allen, 25 Ill. A. 657.

Ky.—Hays v. Johnson, 99 SW 332; Renick v. Renick, 92 Ky. 335, 17 SW 1018, 13 KyL 600; Quaintance v. Darnell, 14 KyL 238.

La.—Pierce's Succ., 119 La. 727, 44 S 446; Rabasse's Succ., 51 La. Ann. 590, 25 S 326; Calloway's Succ., 49 La. Ann. 968, 22 S 225; Turnell's Succ., 34 La. Ann. 888; Liles' Succ., 24 La. Ann. 490; Sprowl's Succ., 21 La. Ann. 544; New Orleans v. Baltimore, 15 La. Ann. 625; Key's Succ., 5 La. Ann. 567; Young v. Chaney, 3 La. 462.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318.

Miss.—Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Roloson v. Riggs, 274 Mo. 522, 203 SW 973; Judson v. Bennett, 233 Mo. 607, 653, 136 SW 681 [quot Cyc]; Albert v. Sanford, 201 Mo. 117, 99 SW 1068; Scudder v. Ames, 142 Mo. 187, 43 SW 659; Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457; Booker v. Armstrong, 93 Mo. 49, 4 SW 727; Scudder v. Ames, 89 Mo. 496, 14 SW 525; Gamble v. Gibson, 59 Mo. 585.

N. Y.—Collier v. Munn, 41 N. Y. 143, 7 AbbPrNS 193; Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [aff 192 N. Y. 566 mem, 85 NE 1110 mem]; Matter of King, 122 App. Div. 354, 106 NYS 1073; Matter of Popp, 123 App. Div. 2, 107 NYS 277; Matter of Hallenbeck, 119 App. Div. 757, 104 NYS 568 [mod on other grounds 195 N. Y. 143, 88 NE 16, 133 AmSR 782]; Matter of Archer, 77 Misc. 288, 137 NYS 770; Matter of Krisfeldt, 49 Misc. 26, 97 NYS 877, 5 Mills Surr. 162; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Wallace, 157 NYS 245; Matter of Butler, 9 NYS 641, 1 Conn. Surr. 58; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; Vanderheyden v. Vanderheyden, 2 Paige 287, 21 AmD 86; Fisher v. Fisher, 1 Bradf. Surr. 335.

N. C.—Parker v. Grant, 91 N. C. 338; Morris v. Morris, 54 N. C. 326; Schaw v. Schaw, 1 N. C. 168.

S. C.—Anderson v. Silcox, 82 S. C. 109, 63 SE 128; Jenkins v. Fickling, 4 S. C. Eq. 369; Snow v. Callum, 1 S. C. Eq. 542.

[a] **A contrary view** has some support in Missouri. Hawkins v. Cunningham, 67 Mo. 415; Lewis v. McCabe, 16 Mo. A. 398; In re Handfield, 16 Mo. A. 332. But see Missouri cases supra this note.

25. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450; Noble v. Jackson, 124 Ala. 311, 26 S 955; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Munden v. Bailey, 70 Ala. 63; Teague v. Corbitt, 57 Ala. 529; Raines v. Raines, 51 Ala. 237; Waller v. Ray, 48 Ala. 468; Ivey v. Coleman, 42 Ala. 409; Wright v. Wilkerson, 41 Ala. 267; Holman v. Sims, 39 Ala. 709; Reese v. Gresham, 29 Ala. 91; Newberry v. Newberry, 28 Ala. 691; Gould v. Hays, 25 Ala. 426; Craig v. McGhee, 16 Ala. 41.

Cal.—In re Broome, 162 Cal. 258, 122 P 470; In re Coursen, 65 P 965; Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; Moore's Est., 96 Cal. 522, 31 P 584; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

Ga.—Fields v. Case, 137 Ga. 147, 73 SE 899, AnnCas1913A 1266; Adair v. St. Amand, 136 Ga. 1, 70 SE 578; Lamar v. Lamar, 118 Ga. 684, 45 SE 498; Walton v. Gairdner, 111 Ga. 343, 36 SE 666; Bird v. Mitchell, 101 Ga. 46, 28 SE 674.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; Anderson v. Sabin, 132 Iowa 507, 109 NW 1080; In re Sawyer, 124 Iowa 485, 100 NW 484; Fitzgerald v. Paisley, 110 Iowa 98, 81 NW 181; In re Young, 97 Iowa 218, 66 NW 163; In re Gloyd, 93 Iowa 303, 61 NW 975; Patterson v. Bell, 25 Iowa 149.

Kan.—Nelson v. Schoonover, 89 Kan. 779, 132 P 1183, AnnCas1915A 147.

Ky.—Nickell v. Nickell, 118 SW 966; Harding v. Harding, 132 Ky. 133, 116 SW 305; Clark v. Young, 74 SW 245, 24 KyL 2395; Glover v. Check, 71 SW 438, 24 KyL 1281, 72 SW 302, 24 KyL 1783]; Reed v. Reed, 66 SW 819, 23 KyL 2186; McCracken v. McCracken, 6 T. B. Mon. 342.

Md.—Edelen v. Edelen, 11 Md. 415; Lee v. Lee, 6 Gill & J. 316.

Mass.—May v. Skinner, 149 Mass. 375, 21 NE 870; Urann v. Coates, 117 Mass. 41.

Mich.—In re King, 113 Mich. 606, 71 NW 1080, 110 Mich. 203, 68 NW 154; In re Brewster, 113 Mich. 561, 71 NW 1085; Wisner v. Mabley, 74 Mich. 143, 41 NW 835; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Loomis v. Armstrong, 63 Mich. 355, 29 NW 867; Mower's App., 48 Mich. 441, 12 NW 646.

Nebr.—In re Wilson, 83 Nebr. 252, 119 NW 522.

N. Y.—Russell v. Hilton, 37 Misc. 642, 76 NYS 233 [mod on other grounds 80 App. Div. 178, 80 NYS 563 (aff 175 N. Y. 525 mem, 67 NE 1089 mem)]; Matter of Moriarity, 27 Misc. 161, 58 NYS 380.

Oh.—McMahan v. Ambach, 79 Oh. St. 103, 86 NE 512; Madden v. McGillin, 24 Oh. Cir. Ct. N. S. 607; Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326; Matter of Wolfe, 7 OhS&CP 220, 4 OhNP 336; In re Johnson, 7 OhS&CP 1, 4 OhNP 156; In re Duddy, 5 OhS&CP 412, 7 OhNP 589, Oh. Prob. 130.

Or.—In re Osburn, 36 Or. 8, 58 P 521; In re Partridge, 31 Or. 297, 51 P 82; Muldrick v. Galbraith, 31 Or. 86, 49 P 886.

Pa.—Greiner's Est., 14 Pa. Dist. 348; Fendrick's Est., 20 LancLRev 69; In re Walsh, 35 PittsbLegJNS 289; Smith's Est., 30 PittsbLegJNS 188; Scott's Est., 14 YorkLegRec 77.

Philippine.—Chung Muy Co. v. Lim Quioc, 23 Philippine 518.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Esswein v. Seigling, 12 S. C. Eq. 200; Wallace v. Ellerbe, 9 S. C. Eq. 49; Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643; Rutledge v. Williamson, 1 S. C. Eq. 159.

Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75; Davenport v. Lawrence, 19 Tex. 317; James v. Craighead, (Civ. A.) 69 SW 241.

Vt.—Powell v. Foster, 71 Vt. 160, 44 A 96.

Wis.—Mackin v. Hobbs, 126 Wis. 216, 105 NW 305; Sloan v. Duffy, 117 Wis. 480, 94 NW 342; Zentner v. Schinz, 90 Wis. 236, 63 NW 162; Schinz v. Schinz, 90 Wis. 236, 63 NW 162; Ford v. Ford, 88 Wis. 122, 59 NW 464.

N. S.—In re Hamilton, 29 N. S. 249.

[a] **Presumption as to allowance.**—It will be presumed that compensation received by executors beyond that fixed by statute was for extraordinary services in the absence of a showing to the contrary. Anderson v. Sabin, 132 Iowa 507, 109 NW 1080.

26. In re Carmody, 163 Iowa 463, 145 NW 16.

27. In re Carmody, 163 Iowa 463, 145 NW 16; In re Gloyd, 93 Iowa 303, 61 NW 975; James v. Craighead, (Tex. Civ. A.) 69 SW 241.

28. In re Carmody, 163 Iowa 463, 145 NW 16; Miles' Est., 17 Pa. Dist. 824.

29. Ala.—May v. Green, 75 Ala. 162.

Cal.—Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; In re Delaney, 110 Cal. 563, 42 P 981; Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479; Moore's Est., 96 Cal. 522, 31 P 584.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; Fitzgerald v. Paisley, 110 Iowa 98, 81 NW 181.

Mich.—In re O'Leary, 193 Mich. 282, 159 NW 497; Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

Oh.—Piatt v. St. Clair, Wright 526.

Or.—In re Partridge, 31 Or. 297, 51 P 82.

Tex.—James v. Craighead, (Civ. A.) 69 SW 241.

30. In re Carmody, 163 Iowa 463, 145 NW 16.

[a] **Where another person was employed to perform the services,** there can be no allowance of extra compensation to the representative therefor. In re Carmody, 163 Iowa 463, 145 NW 16.

31. In re Carmody, 163 Iowa 463, 145 NW 16; Mackin v. Hobbs, 126 Wis. 216, 105 NW 305.

32. U. S.—Herron v. Comstock, 139 Fed. 370, 71 CCA 466.

Ala.—Dockery v. McDowell, 40 Ala. 476.

Ga.—Fields v. Case, 137 Ga. 147, 72 SE 899, AnnCas1913A 1266.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; In re Young, 97 Iowa 218, 66 NW 163; In re Gloyd, 93 Iowa 303, 61 NW 975.

Ky.—Miller v. Keown, 176 Ky. 117, 195 SW 430; Baldwin v. Barber, 148 Ky. 370, 146 SW 1124; Nickell v. Nickell, 118 SW 966.

Mich.—Gaskill v. Weeks, 154 Mich. 223, 117 NW 647; Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

Pa.—Kline's Est., 49 Pa. Super. 122.

S. D.—In re Nelson, 26 S. D. 615, 129 NW 113.

[a] **The fact that an administrator resides at a considerable distance from the county seat** does not entitle him to extraordinary compensation for his services. Watkins v. Romine, 106 Ind. 378, 7 NE 193.

tion,[33] which includes any duties imposed upon the executor by the terms of the will of the decedent;[34] and, conversely, it is proper to make an extra allowance for extraordinary services which are outside of the duties of the executor or administrator as such.[35] Further than this no general rule can be stated, the matter being largely within the discretion of the court.[36] The amount of the extra allowance is also largely within the discretion of the court,[37] although a limit beyond which such allowance cannot go is sometimes fixed by statute.[38] In fixing the allowance the governing consideration is what the services were reasonably worth rather than the customary charge for such services,[39] although the court may in its discretion fix the amount at less than any of the witnesses have testified that the services were worth.[40] Where executors agreed to a surcharge on account of their commissions because of a depreciation in the value of securities held by the estate, with the understanding that they should receive additional compensation if the securities recovered in value, and such recovery occurred, additional compensation was properly allowed.[41]

[§ 2424] **c. Effect of Testamentary Provisions.**[42] The right of a testator to fix by his will the compensation of his executor is generally recognized,[43] although where extraordinary services are per-

33. Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699; Noble v. Jackson, 132 Ala. 230, 31 S 450; Holman v. Sims, 39 Ala. 709.

Cal.—In re Coursen, 65 P 965.

Ill.—Giger v. Bishop, 231 Ill. 472, 83 NE 289.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; In re Sawyer, 124 Iowa 485, 100 NW 484.

Ky.—Morton v. Morton, 112 Ky. 706, 66 SW 641, 23 KyL 2079.

Mich.—Webb v. Peck, 131 Mich. 579, 92 NW 104.

N. J.—Wilkinson v. Abbott, (Ch.) 30 A 1098.

N. Y.—Lent v. Howard, 89 N. Y. 169; Smith v. Albany, 61 N. Y. 444; Collier v. Munn, 41 N. Y. 143, 7 Abb PrNS 193; Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [aff 192 N. Y. 566 mem, 85 NE 1110 mem]; Matter of Popp, 123 App. Div. 2, 107 NYS 277; Matter of Hosford, 27 App. Div. 427, 50 NYS 550; Matter of Seigler, 49 Misc. 189, 98 NYS 929, 5 Mills Surr. 189; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Harrison v. McAdam, 38 Misc. 18, 76 NYS 701; Matter of Moriarity, 27 Misc. 161, 58 NYS 380; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; Betts v. Betts, 4 AbbNCas 317, 57 HowPr 355 note; Margan v. Hannas, 13 AbbPrNS 361; Van Sickler v. Graham, 7 HowPr 208; Clinch v. Eckford, 8 Paige 412; Vanderheyder v. Vanderheyder, 2 Paige 287, 21 AmD 86; McWhorter v. Benson, Hopk. 38; Fisher v. Fisher, 1 Bradf. Surr. 335.

N. C.—Parker v. Grant, 91 N. C. 338.

Oh.—In re Johnston, 7 OhS&CP 1, 4 OhNP 156; In re Duddy, 5 OhS&CP 412, 7 OhNP 589, Oh. Prob. 130.

Pa.—Shirk's Est., 4 Del. Co. 214.

S. C.—Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643; Logan v. Logan, 6 S. C. Eq. 1.

[a] **Extra compensation has been denied for:** (1) Ordinary attendance to a suit brought by the representative. Holman v. Sims, 39 Ala. 709. (2) Making inquiries as to evidence in suits against the estate while the representative was on his own business in an adjoining county. Dockery v. McDowell, 40 Ala. 476. (3) Making inventories or keeping accounts. O'Neill v. Donnell, 9 Ala. 734. (4) The adjusting and collecting of numerous accounts belonging to the estate. In re Carmody, 163 Iowa 463, 145 NW 16. (5) Filing a petition to sell real estate for the payment of charges upon the estate. Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326. (6) The risk and care attendant on the custody of certificates of stock forming part of the assets of an estate. In re Duddy, 5 OhS&CP 412, 7 OhNP 589, Oh. Prob. 130.

[b] **Personal attention to the estate** gives rise to no right to extra compensation. Parker v. Grant, 91 N. C. 338.

34. Wilkinson v. Abbott, (N. J. Ch.) 30 A 1098; Matter of Popp, 123 App. Div. 2, 107 NYS 277; Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [aff 192 N. Y. 566 mem, 85 NE 1110 mem]; Matter of Archer, 77 Misc. 288, 137 NYS 770; In re Taft, 5 Silv. Sup. 370, 8 NYS 282. See also cases supra note 33.

[a] **Continuing the business of the testator,** (1) pursuant to the directions of the will, does not entitle the executor to extra compensation, where none is provided for by the will. Gilligan v. Daly, 79 N. J. Eq. 36, 80 A 994; Matter of Popp, 123 App. Div. 2, 107 NYS 277 [mod 53 Misc. 200, 104 NYS 585]; Matter of Froelich, 122 App. Div. 440, 107 NYS 173 [mod 100 NYS 436, and aff 192 N. Y. 566 mem, 85 NE 1110 mem]. Commissions where business of testator continued see supra § 2410. (2) A fortiori an executor who, without authority, continues the business of his testator does not render service entitling him to compensation independent of his statutory commissions. Matter of Archer, 77 Misc. 288, 137 NYS 770.

35. Matter of McCord, 2 App. Div. 324, 37 NYS 852, 3 NYAnnCas 64; Matter of Taft, 5 Silv. Sup. 370, 8 NYS 282; Russell v. Hilton, 37 Misc. 642, 76 NYS 233 [mod on other grounds 80 App. Div. 178, 80 NYS 563 (aff 175 N. Y. 525 mem, 67 NE 1089 mem)]; Matter of Braunsdorf, 13 Misc. 666, 35 NYS 298, 1 Gibb. Surr. 326 [mod on other grounds 2 App. Div. 73, 37 NYS 229]; In re Moore, 211 Pa. 343, 60 A 989 [aff 13 Pa. Dist. 137].

36. Ala.—Reese v. Gresham, 29 Ala. 91.

Cal.—In re Carr, 175 Cal. 387, 165 P 958; In re Hedrick, 127 Cal. 184, 59 P 590.

D. C.—Howard v. Howard, 38 App. 575.

Ga.—Fields v. Case, 137 Ga. 147, 72 SE 859, AnnCas1913A 1266; Adair v. St. Amand, 136 Ga. 1, 70 SE 578; Bird v. Mitchell, 101 Ga. 46, 28 SE 674.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; In re Sawyer, 124 Iowa 485, 100 NW 484.

Md.—Scott v. Dorsey, 1 Harr. & J. 227.

Mich.—In re O'Leary, 193 Mich. 282, 159 NW 497; In re Fischer, 158 Mich. 1, 122 NW 257; In re Brewster, 113 Mich. 561, 71 NW 1085; Doty v. King, 113 Mich. 606, 71 NW 1080; Wisner v. Mabley, 74 Mich. 143, 41 NW 835; Loomis v. Armstrong, 63 Mich. 355, 29 NW 867, 49 Mich. 521, 14 NW 505; Mower's App., 48 Mich. 441, 12 NW 646.

Nebr.—In re Wilson, 83 Nebr. 252, 119 NW 522; In re Van Auken, 78 Nebr. 744, 111 NW 782.

N. Y.—In re Hoagland, 145 NYS 1110.

Oh.—Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326; Matter of Wolfe, 7 OhS&CP 220, 4 OhNP 336.

Or.—In re Partridge, 31 Or. 297, 51 P 82; In re McCullough, 31 Or. 86, 49 P 886; Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—Gertzen's Est., 18 Pa. Dist. 925.

Wis.—Sloan v. Duffy, 117 Wis. 480, 94 NW 342.

Man.—Re Fortune, 25 Man. 239.

Ont.—Re Smith, 11 OntWN 103.

[a] **Extra compensation has been allowed for:** (1) Services requiring professional skill. In re Carmody, 163 Iowa 463, 145 NW 16; Sloan v. Duffy, 117 Wis. 480, 94 NW 342. (2) Conducting extensive and successful litigation for the benefit of the estate. In re Beideman, Myr. Prob. (Cal.) 66. (3) Drafting a bill to construe a provision in a will, going outside of the state to settle a partnership business, and selling property outside of the state. Wisner v. Mabley, 74 Mich. 143, 41 NW 835. (4) Keeping the estate together and loaning money of the estate. Reese v. Gresham, 29 Ala. 91. (5) The collection of rents, payment of taxes, insuring of the property and attending to repairs. In re Wilson, 83 Nebr. 252, 119 NW 522; Matter of Wolfe, 7 OhS&CP 220, 4 OhNP 336. (6) Surveying and subdividing large tracts of land into lots when ordered to sell real estate. Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326. (7) Investing funds of the estate and collecting and paying interest to the legatees. Fitzgerald v. Paisley, 110 Iowa 98, 81 NW 181. (8) Superintending farming operations. Ivey v. Coleman, 42 Ala. 409. (9) Managing a ranch. In re Broome, 162 Cal. 258, 122 P 470.

37. In re Carmody, 163 Iowa 463, 145 NW 16; In re Fischer, 158 Mich. 1, 122 NW 257; In re Riter, 260 Pa. 168, 103 A 554.

[a] **Extra compensation assessed by jury.**—Logan v. Logan, 6 S. C. Eq. 1.

38. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

39. Clark v. Knox, 70 Ala. 607, 45 AmR 93; Munden v. Bailey, 70 Ala. 63; Harris v. Martin, 9 Ala. 895; In re Carmody, 163 Iowa 463, 145 NW 16.

40. Ford v. Ford, 88 Wis. 122, 59 NW 464.

41. Barry's Est., 17 Pa. Dist. 339.

42. Testamentary provisions affecting right to commissions see supra § 2398.

43. Ala.—Kenan v. Graham, 135 Ala. 585, 33 S 699.

Cal.—In re Ringot, 124 Cal. 45, 56 P 781.

D. C.—Marfield v. McMurdy, 25 App. 342.

Iowa.—In re McIntosh, 159 NW 223, 224, 225 [cit Cyc].

Mass.—Fernald v. Gooch, 202 Mass. 408, 88 NE 763; Manning v. American Bd. Foreign Missions Comrs., 8 Metc. 566.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

N. Y.—Ireland v. Corse, 67 N. Y. 343; In re Tilden, 44 Hun 441 [aff 5 Dem. Surr. 230]; Clinch v. Eckford, 8 Paige 412; Secor v. Sentis, 5 Redf. Surr. 570; Greer v. reer, 5 Redf. Surr. 214.

Pa.—In re Hays, 183 Pa. 296, 38 A 622; In re Lilly, 181 Pa. 478, 37 A 557; Allen's Est., 125 Pa. 544, 17 A 453 [aff 45 LegInt 227]; O'Donnell v. Producers, etc., Oil Co., 68 Pa. Super. 478; Lennig's Est., 53 Pa. Super. 596; Allen's Est., 7 Pa. Co. 14.

Tenn.—Hoffman v. Jones, 7 Tenn. Civ. A. 392.

formed, increased compensation may be allowed according to some cases,[44] which are, however, opposed by other cases asserting a contrary view.[45] Where an executor accepts the office with knowledge of a provision in the will fixing his compensation, he is ordinarily entitled only to the amount fixed by the will.[46]

Executors' compensation provided by the will is not a legacy and does not abate with the legacies on insufficiency of the estate to satisfy the legacies, where it does not appear that the stipulated compensation is unreasonable or unearned, and the services were fully and faithfully performed.[47]

Where an executor dies pending the administration, he is not, it has been held, entitled to the compensation fixed by the will or a pro rata share there-

Tex.—Thomas v. Matthews, 51 Tex. Civ. A. 304, 112 SW 120.

Va.—Waddy v. Hawkins, 4 Leigh (31 Va.) 458.

Wash.—In re Smith, 18 Wash. 129, 51 P 348.

Eng.—Re Wertheimer, 106 L. T. Rep. N. S. 590.

[a] **Illustration.** — Where a will provided that the executor should receive in addition to compensation allowed by law a certain sum per annum out of the estate, he is entitled to both, notwithstanding Code Civ. Proc. § 2730, providing that, where a will gives specified compensation to an executor, he is not entitled to any allowance unless he renounces the specified compensation. Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466.

[b] **Construction of provisions.**— (1) A provision of a will that the executors should be paid for their services one half the fees allowed by law in such cases contemplated the fixed fees allowed by law to guardians of estates, and the compensation was to be determined by Sayles Civ. St. Annot. (1897) art 2780, fixing such fees at five per cent on all sums that the guardian actually received or paid away in cash. Thomas v. Matthews, 51 Tex. Civ. A. 304, 112 SW 120. (2) Where a will directed that executors should take charge of the residue of testator's estate, invest a portion of it in bank stock, and loan out the balance, collect all the accounts, and manage the estate, and during that time make certain payments to the widow and children, and also provided that the executors should file a complete inventory, and should make annual accounting to the probate court, it was held that testator did not intend that his executors should act in the double capacity of executors and trustees, and, where they acted as executors merely in carrying out the provisions of the will, they were not entitled to compensation for services as trustees in addition to their regular compensation as executors. Judson v. Bennett, 233 Mo. 607, 136 SW 681.

[c] **"Handsomely paid."**—Where a testator directs that his executor shall be "handsomely paid" for his services, only the ordinary commission will be allowed him unless there has been extraordinary trouble. Waddy v. Hawkins, 4 Leigh (31 Va.) 458. To similar effect Kenan v. Graham, 135 Ala. 585, 33 S 699 (testamentary provision that executor be paid "liberally").

[d] **"Usual commission."**—A provision in a will that an executor shall receive the "usual commission" has been held to mean that he shall receive (1) a five per cent commission on the personalty (In re Lilly, 181 Pa. 478, 37 A 557), and (2) a two and one-half per cent commission on sales of real estate (Wedekind's Est., 11 Phila. (Pa.) 68).

[e] **Allowance for professional services.**—By his will the testator declared that any executor or trustee for the time being of his will engaged in any profession or business should be entitled to charge and be paid all usual professional or other charges for any business done by him in the premises, whether in the ordinary course of his profession or business or not. The testator had a large and valuable collection of works of art, and in the sale of this collection defendant, who was one of the executors and was a well-known art expert and keeper of mediæval antiquities at the British Museum, priced the various articles and gave valuable advice as to their sale. It was held that defendant was carrying on a profession or business within the meaning of the clause of the will, and was entitled to be paid a commission of 10s per cent on the sale price. Re Wertheimer, 106 L. T. Rep. N. S. 590.

[f] **Periodical payments.** — The will may provide for payment of portions of the compensation at stated intervals. In re Ringot, 124 Cal. 45, 56 P 781.

[g] **Making up deficiency.**—Where a will provides that out of the income generally of the estate the executor shall receive compensation at the rate of so much a year in lieu of commissions, if the income is less in one year and greater in another, the deficiency of compensation in one year may be made up by the excess in other years, especially where there are no provisions of the will that will fail in the event that the executor receives all the compensation that was intended for him, although there may be less of income to be distributed. The rule might be different if the will limited the payment of the executor's annual compensation to the annual income of the estate. Marfield v. McMurdy, 25 App. (D. C.) 342.

[h] **Continuance of compensation beyond period of administration.**— Where a will provides that the executor shall receive in lieu of commissions a given sum annually during the time he acts as such, and it is evident from the whole scheme of the will that the testator contemplated that the executorship should last for several years, certainly until the death or remarriage of the testator's widow, the right of the executor to receive such annual compensation will continue beyond the period of administration. Marfield v. McMurdy, 25 App. (D. C.) 342.

[i] **In Maryland** (1) it was formerly held that a testator cannot, by anything put in his will, in any wise affect the commissions which the law allows to his executor. Handy v. Collins, 60 Md. 229, 45 AmR 725; State v. Baker, 8 Md. 44; McKim v. Duncan, 4 Gill 72. (2) But later, it was provided by statute that if anything be bequeathed to an executor by way of compensation, no allowance of commissions shall be made unless the said compensation shall appear to the court to be insufficient; and if so it shall be reckoned in the commission to be allowed by the court. Renshaw v. Williams, 75 Md. 498, 23 A 905.

44. Raines v. Raines, 51 Ala. 237; Young v. Smith, 9 Bush (Ky.) 421; Good's Est., 150 Pa. 301, 24 A 624; Bartolet's App., 1 Walk. (Pa.) 77; Nathan's Est., 6 Pa. Dist. 481; Matter of Guien, 1 Ashm. (Pa.) 317; Denison v. Denison, 17 Grant Ch. (U. C.) 306.

[a] **Extraordinary services** necessarily rendered by an executor whose compensation was fixed by the will justify a further allowance by the court. Bartolett's App., 1 Walk. (Pa.) 77; Re Hays, 27 PittsbLegJNS (Pa.) 263.

45. In re Runyon, 125 Cal. 195, 57 P 783; Williams v. Roy, 9 Ont. 534 [doubting Denison v. Denison, 17 Grant Ch. (U. C.) 306].

46. Ark.—Gordon v. Greening, 121 Ark. 617, 182 SW 272.

Cal.—In re Runyon, 125 Cal. 195, 57 P 783; In re Ringot, 124 Cal. 45, 56 P 781.

Hawaii.—In re King, 3 Hawaii 384.

Ky.—Brown v. Brown, 6 Bush 648.

La.—Fink's Succ., 13 La. Ann. 103.

Me.—Connolly v. Leonard, 114 Me. 29, 95 A 269.

Mass.—Bailey v. Crosby, 226 Mass. 492, 116 NE 238; Little v. Little, 161 Mass. 188, 36 NE 795; Manning v. American Bd. Foreign Missions Comrs., 8 Metc. 566.

N. Y.—Matter of Nester, 166 App. Div. 224, 151 NYS 194 [aff 216 N. Y. 716 mem, 111 NE 1092 mem]; Matter of Arkenburgh, 38 App. Div. 473, 56 NYS 523; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Matter of Rowe, 42 Misc. 172, 86 NYS 253, 4 Mills Surr. 131; In re Gerard, 1 Dem. Surr. 244; Secor v. Sentis, 5 Redf. Surr. 570; Greer v. Greer, 5 Redf. Surr. 214.

Or.—In re Sonser, 40 Or. 138, 66 P 607.

Pa.—In re Sweatman, 223 Pa. 552, 72 A 895; In re Betts, 198 Pa. 640, 48 A 873; In re Hays, 183 Pa. 296, 38 A 622; Allen's Est., 125 Pa. 544, 17 A 453; Shippen v. Burd, 42 Pa. 461; Bartolet's App., 1 Walk. 77; Lennig's Est., 53 Pa. Super. 596; Fox's Est., 20 Pa. Dist. 749; Hill's Est., 16 Pa. Dist. 984, 34 Pa. Co. 493; Re Hays, 27 PittsbLegJNS 263.

Tenn.—Hoffman v. Jones, 7 Tenn. Civ. A. 392.

Tex.—Kearney v. Nicholson (Civ. A.) 67 SW 361.

Va.—Jones v. Williams, 2 Call (6 Va.) 102.

Wash.—In re Smith, 18 Wash. 129, 51 P 348.

B. C.—Re Bossi, 5 B. C. 446.

Ont.—Re Aspel, 42 Ont. L. 191; Williams v. Roy, 9 Ont. 534.

"If the will discloses that it was the intention of the testator to reward the executor for his services by the legacy, it is conclusive on the executor, and if he accept the position and administer the estate by virtue of his appointment as executor he must accept the reward for his services named in the will." In re Fox, 235 Pa. 105, 107, 83 A 613, Ann Cas1914B 744.

[a] **Failure to object to claim of more compensation.**—Where an executor whose compensation is fixed by the will claims commissions in his account, and the trustees to whom the fund is distributable do not except to the item of commissions, the auditing judge does not exceed his powers in calling the attention of the trustees to the provision in the will, and, if they then except, in withholding confirmation of the adjudication, and surcharging the executor with the amount of the commissions claimed. Lennig's Est., 53 Pa. Super. 596.

[b] **Provision for award by heirs.** —Where the will provided that the executor's and trustee's compensation should be such as a majority of the heirs should award him, the executor was entitled only to the amount allowed by the heirs, and not to a reasonable compensation under the statute. Bailey v. Crosby, 226 Mass. 492, 116 NE 238.

47. Matter of Runk, 181 App. Div. 461, 168 NYS 970 [aff 224 N. Y. 570 mem, 120 NE 875 mem].

of, but his compensation should be measured by the rule of quantum meruit to be gauged by the compensation allowed by law.[48]

An administrator with the will annexed is entitled to reasonable compensation for his services, regardless of any declaration made by the testator in his will fixing compensation for administering the estate.[49]

Renunciation of testamentary provision. The statutes sometimes give an executor the right to renounce a testamentary provision as to compensation and to take the statutory compensation.[50]

[§ 2425] **d. Effect of Agreement.** The compensation of an executor or administrator may be fixed by an agreement between him and persons beneficially interested in the estate,[51] or even by an agreement made with the testator in his lifetime.[52] Pursuant to such agreement the representative may be bound to accept a compensation less than he would be entitled to under the statute,[53] or even to serve without any compensation whatever.[54] Some authorities hold that an agreement with the testator[55] or with those beneficially interested in the estate[56] may entitle the representative to greater compensation than is allowed by the statute; but other authorities hold that an agreement for more than the statutory rate of compensation for performing the ordinary duties of administration cannot be enforced,[57] although an agreement for additional compensation for services outside of his official duties is valid and enforceable.[58] The burden of establishing an agreement as to compensation is of course upon the party who asserts it.[59]

[§ 2426] **6. Temporary or Special Administrators.** Temporary or special administration is a recognized trust, and entitles the administrator to reasonable compensation,[60] the amount whereof is held

48. Ellington v. Durfey, 156 N. C. 253, 72 SE 194.

49. In re Fox, 235 Pa. 105, 83 A 613, AnnCas1914B 744.

50. In re Runyon, 125 Cal. 195, 57 P 783; Fink's Succ., 13 La. Ann. 103; Heath v. Maddock, 83 N. J. Eq. 681, 94 A 218; Matter of Nester, 166 App. Div. 224, 151 NYS 194 [transf 164 App. Div. 967, 149 NYS 1099]; Matter of Arkenburgh, 38 App. Div. 473, 56 NYS 523 [dist Matter of Hopkins, 32 Hun 618 (aff 98 N. Y. 636 mem; Secor v. Sentis, 5 Redf. Surr. 570)]; Matter of Sprague, 46 Misc. 216, 94 NYS 84, 4 Mills Surr. 466; Aspinwall v. Pirnie, 4 Edw. (N. Y.) 410.

[a] **Written renunciation required.**—Matter of Arkenburgh, 38 App. Div. 473, 56 NYS 523.

[b] **Right not lost by lapse of time.**—Matter of Weeks, 5 Dem. Surr. (N. Y.) 194 ("No time is fixed by law within which an executor must choose between his statutory commissions and his testamentary bequest, and I see no reason to doubt that so long as he has not indicated his election by taking to himself one or the other, or by some other mode, his right to file a renunciation and to avail himself of its benefits remains unimpaired"). But compare Arthur v. Nelson, 1 Dem. Surr. (N. Y.) 337, (an executor's election must be exercised promptly or it will be lost by laches). See Matter of Arkenburgh, 38 App. Div. 473, 477, 56 NYS 523 [rev 13 Misc. 744, 35 NYS 251] (where the court reviewed the two cases cited above and said that in the case at bar there was nothing "to demand or justify an application of the doctrine of laches").

[c] **Retracting renunciation.**—An executor cannot retract his renunciation without the consent of the parties in interest. Matter of Weeks, 5 Dem. Surr. (N. Y.) 194.

51. U. S.—Littell v. Hackley, 126 Fed. 309, 61 CCA 295.

Ga.—Jones v. Jones, 141 Ga. 727, 82 SE 451.

Iowa.—In re McIntosh, 159 NW 223, 224, 225 [quot Cyc]; In re Mansfield, 80 Iowa 681, 46 NW 65.

Ky.—Crutcher v. Methodist Episcopal Church Missions, 62 SW 895, 23 KyL 257.

Md.—Cummings v. Robinson, 95 Md. 759, 53 A 795; Jones v. Harbaugh, 93 Md. 269, 48 A 827.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

Miss.—Ratliff v. Davis, 38 Miss. 107.

Mo.—In re Bryan, 190 SW 581, 585 [cit Cyc]; In re Irwin, 123 Mo. A. 508, 100 SW 565.

N. Y.—In re Martin, 196 N. Y. 415, 90 NE 46; Matter of Scott, 70 Misc. 165, 128 NYS 255; Matter of Fargo, 68 Misc. 273, 125 NYS 156; In re Moncrief, 161 NYS 639; Matter of Turfler, 24 NYS 91, Pow. Surr. 421.

Pa.—In re Schoonover, 250 Pa. 353, 95 A 524; Koch's Est., 148 Pa. 159, 23 A 1057; Fiscus' Est., 13 Pa. Super. 615; Gross' Est., 14 Pa. Dist. 137; Rambo's Est., 15 Montg. Co. 25.

Vt.—Powell v. Foster, 71 Vt. 160, 44 A 96; Hubbell v. Olmstead, 36 Vt. 619.

Wash.—In re Field, 33 Wash. 63, 73 P 768.

N. S.—In re Hamilton, 29 N. S. 249.

"That an executor or personal representative may agree with the persons interested in the settlement of an estate, for compensation greater or less in amount than that allowed by the statute, can hardly be questioned." In re Schoonover, 250 Pa. 353, 356, 95 A 524, 525.

[a] **"Fair compensation."** — A promise by a distributee to pay a personal representative a "fair compensation" for his services is a mere promise to pay what may be allowed by the appropriate tribunal according to law. Ratliff v. Davis, 38 Miss. 107.

[b] **An agreement by some of the beneficiaries** that the executor shall have additional compensation does not entitle him to an allowance thereof. Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454.

52. In re McIntosh, (Iowa) 159 NW 223 [quot infra note 55]; In re Sinnott, 231 Pa. 299, 80 A 363.

53. Iowa.—In re McIntosh, 159 NW 223, 224, 225 [quot Cyc].

Mo.—In re Lutz, 181 Mo. A. 267, 276, 170 SW 334 [cit Cyc].

N. Y.—Matter of Hodgman, 69 Hun 484, 23 NYS 725 [aff 140 N. Y. 421, 35 NE 660]; Matter of Turfler, 24 NYS 91, Pow. Surr. 421.

Pa.—In re Schoonover, 250 Pa. 353, 95 A 524 [quot supra note 51].

N. S.—In re Hamilton, 29 N. S. 249.

54. See infra § 2430.

55. In re McIntosh, (Iowa) 159 NW 223, 224, 225 [cit and quot Cyc] ("The owner of property may give it away, and if the donor be competent and there be no fraud or coercion, the heirs may not complain. Much less have they the right to insist that the property must come to them free from contract obligations of the owner, and without check on the method and expense of administration. We hold that contract, as well as will, may, as to heirs, direct who shall be executor, what he shall be paid, and that the estate shall pay him").

56. In re McIntosh, (Iowa) 159 NW 223, 224, 225 [quot Cyc]; In re Schoonover, 250 Pa. 353, 95 A 524 [quot supra note 51]; Powell v. Foster, 71 Vt. 160, 44 A 96; Hubbell v. Olmstead, 36 Vt. 619. But compare Mallalieu's Est., 42 Pa. Super. 101, 105 ("His compensation is determined by established legal standards, and he cannot be permitted to contract for excessive compensation for himself or any other person").

57. Firebaugh v. Burbank, 121 Cal. 186, 53 P 560 (rule established by statute); Matter of McCord, 2 App. Div. 324, 37 NYS 852, 3 NYAnnCas 64; Matter of Ross, 33 Misc. 163, 68 NYS 373, 2 Mills Surr. 58; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; In re Young, 4 Wash. 534, 30 P 643.

58. Matter of McCord, 2 App. Div. 324, 37 NYS 852, 3 NYAnnCas 64.

[a] **Such a contract may be questioned for unfairness.** — Matter of Popp, 123 App. Div. 2, 107 NYS 277 [mod 53 Misc. 200, 104 NYS 585].

[b] **The consent of some legatees** to an allowance of extra compensation operates only as a consent that their shares be charged with a proportionate part thereof, and not that it shall be paid in full from their shares. Matter of Popp, 123 App. Div. 2, 107 NYS 277 [mod 53 Misc. 200, 104 NYS 585].

59. Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

[a] **Salary agreement.**—The burden of proving that an executor has waived his right to the statutory commission, and agreed to accept a flat salary in lieu thereof, is upon those asserting it. Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

60. Ala.—Clark v. Knox, 70 Ala. 607, 45 AmR 93; Wright v. Wilkerson, 41 Ala. 267.

Cal.—More's Est., 88 Cal. 1, 25 P 915.

Ga.—Fields v. Case, 137 Ga. 147, 72 SE 899, AnnCas1913A 1266.

Ill.—Stone v. Haskins, 97 Ill. A. 3.

Ky.—Scarce v. Page, 12 B. Mon. 311.

La.—Forstall's Succ., 39 La. Ann. 1052, 3 S 277; De Lerno's Succ., 34 La. Ann. 38.

Md.—Friedenwald v. Burke, 123 Md. 511, 91 A 461; Friedenwald v. Burke, 122 Md. 156, 89 A 424; Harrison v. Clark, 95 Md. 308, 52 A 514; Wilson v. Wilson, 3 Gill & J. 20.

Mass.—Lufkin v. Jakeman, 188 Mass. 528, 74 NE 933.

Mo.—Hawkins v. Cunningham, 67 Mo. 415; In re Handfield, 16 Mo. A. 332.

Mont.—In re Ford, 29 Mont. 283, 74 P 735.

N. Y.—Richardson v. Richardson, 145 App. Div. 540, 129 NYS 941; Matter of King, 122 App. Div. 354, 106 NYS 1073; Green v. Sanders, 18 Hun 308; Matter of Egan, 7 Misc. 262, 27 NYS 1009, 1 Gibb. Surr. 40; Matter of Duncan, 3 Redf. Surr. 153.

Tex.—Bell v. Goss, 33 Tex. Civ. A. 158, 76 SW 315; James v. Craighead, (Civ. A.) 69 SW 241.

Vt.—Powell v. Foster, 71 Vt. 160, 44 A 96.

[a] **A natural tutrix,** administering in that capacity the succession of her husband, is entitled to an administrator's commissions. Forstall's

to rest in the discretion of the court,[61] which may adopt, as a proper standard for fixing the allowance, the rate of compensation allowed by statute to a regular administrator.[62] It has been held that a special administrator should be allowed a commission only upon moneys actually paid out, and in addition to this a reasonable compensation for services rendered the estate, and he is not entitled to commissions on money and property delivered to his successor in office,[63] but other courts have declined to adopt this view,[64] considering that the commissions of a temporary administrator should be based upon the value of the whole estate received and passed over by him.[65] A temporary administrator is not entitled to commissions on such money and securities of the estate in his hands as had been in the possession of his predecessor, and as to which the estate of the predecessor had been awarded commissions.[66]

[§ 2427] 7. **Coexecutors and Coadministrators.** Where there are two or more executors or administrators of an estate, they are usually entitled only to the recompense or commissions payable to a single representative,[67] in which all share,[68] although a different rule is sometimes established by statute allowing full commissions to each representative, not exceeding a certain number, where the estate exceeds a certain amount.[69] The waiver of commissions by one personal representative does not prejudice the rights of his corepresentative,[70] and it has been held that, where one of two executors is not entitled to commissions, the other executor is entitled to only one half of the regular commissions.[71]

Division according to services rendered. As a general rule the compensation is divided in proportion to the services rendered,[72] and a personal representative who has rendered no services receives

Succ., 39 La. Ann. 1052, 3 S 277; De Lerno's Succ., 34 La. Ann. 38.

[b] **Extra compensation for extraordinary services** may be allowed to a temporary administrator. Fields v. Case, 137 Ga. 147, 72 SE 899, Ann Cas1913A 1266.

61. Ala.—Clark v. Knox, 70 Ala. 607, 45 AmR 93.

Cal.—Moore's Est., 88 Cal. 1, 25 P 915.

Md.—Friedenwald v. Burke, 123 Md. 511, 91 A 461.

Mich.—In re Klein, 172 NW 540.

Mo.—Lewis v. McCabe, 16 Mo. A. 398.

Mont.—In re Ford, 29 Mont. 283, 74 P 735.

Tex.—Bell v. Goss, 33 Tex. Civ. A. 158, 76 SW 315.

[a] **A statute fixing the compensation of "administrators"** does not apply to a special administrator. In re Klein, (Mich.) 172 NW 540.

[b] **The opinions of members of the bar** have weight as to what is proper compensation for a special administrator. Friedenwald v. Burke, 123 Md. 511, 91 A 461.

62. Moore's Est., 88 Cal. 1, 25 P 915; In re Handfield, 16 Mo. A. 332; Matter of Runk, 181 App. Div. 461, 168 NYS 970 [aff 224 N. Y. 570 mem, 120 NE 875 mem]; Matter of Egan, 7 Misc. 262, 27 NYS 1009, 1 Gibb. Surr. 40.

[a] **Property specifically bequeathed.**—Although the statutory commissions of executors and administrators furnish the standard by which the commissions of a temporary administrator are to be measured, "the fact that an executor is not entitled to commissions on property specifically bequeathed is no reason for depriving a temporary administrator of commissions thereon," because "the object of the law in providing for the appointment of a temporary administrator is to insure the safety and preservation of the property, and ordinarily its ultimate delivery in kind by the administrator upon the termination of his office, and the compensation which is awarded to him is given for these services." Matter of Egan, 7 Misc. 262, 27 NYS 1009, 1 Gibb. Surr. 40.

63. Hawkins v. Cunningham, 67 Mo. 415; In re Boothe, 38 Mo. A. 456.

64. Green v. Sanders, 18 Hun (N. Y.) 308; Matter of Duncan, 3 Redf. Surr. (N. Y.) 153.

65. Matter of King, 122 App. Div. 354, 106 NYS 1073.

66. In re Haskin, 112 NYS 1008.

67. Cal.—In re Ross, 182 P 303.

Ill.—Griswold v. Smith, 214 Ill. 323, 73 NE 400.

Ky.—Phillips v. Richardson, 4 J. J. Marsh. 212.

N. J.—In re Hibbler, 78 N. J. Eq. 217, 78 A 188 [aff 79 N. J. Eq. 230, 81 A 1133].

N. Y.—Matter of McAlpine, 126 N. Y. 285, 27 NE 475 [rev 112 NYS 662]; Matter of Arnton, 106 App. Div. 326, 94 NYS 471; Matter of Kenworthy, 63 Hun 165, 17 NYS 655; Matter of Franklin, 26 Misc. 107, 56 NYS 858, 1 Mills Surr. 7; Matter of Clinton, 16 Misc. 199, 38 NYS 945, 1 Gibb. Surr. 557; Matter of Newland, 7 Misc. 728, 28 NYS 496, 1 Gibb. Surr. 62; In re Freeman, 105 Misc. 423, 174 NYS 416; Matter of Blakeney, 7 NYS 55, 1 Conn. Surr. 128, 23 AbbNCas 32; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; Welling v. Welling, 3 Dem. Surr. 511.

Pa.—In re Aston, 5 Whart. 228; In re Walker, 9 Serg. & R. 223; Haines' Est., 1 LegGaz 91.

[a] **The commissions should be computed upon** the aggregate sums received and paid out by all collectably and not upon the amount received and disbursed by each individual. Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 430.

68. Cal.—In re Ross, 182 P 303.

Ga.—Heard v. Clements, 145 Ga. 146, 88 SE 566.

Ky.—Couchman v. Bush, 83 SW 1136, 27 KyL 108; Couchman v. Bush, 83 SW 1039, 26 KyL 1277.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

N. Y.—Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff 181 N. Y. 562 mem, 74 NE 1120 mem]; In re Freeman, 105 Misc. 423, 174 NYS 416.

[a] **On the death of one of two joint executors** after settlement of the estate except for final acounting, his estate is entitled to one half of the commissions allowed. Crothers v. Crothers, 123 Md. 603, 91 A 691.

69. In re Johnson, 170 N. Y. 139, 63 NE 63 [aff 57 App. Div. 494, 67 NYS 1004]; In re McAlpine, 126 N. Y. 285, 27 NE 475 [rev 12 NYS 662]; Matter of Martin, 124 App. Div. 793, 109 NYS 217; Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff on op. below 181 N. Y. 562 mem, 74 NE 1120 mem]; Matter of Kenworthy, 63 Hun 165, 17 NYS 655; Matter of Saunders, 77 Misc. 54, 137 NYS 438 [aff 156 App. Div. 891, 141 NYS 1145]; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Lawrence, 37 Misc. 702, 76 NYS 653; Matter of Franklin, 26 Misc. 107, 56 NYS 858, 1 Mills Surr. 7; Matter of Clinton, 16 Misc. 199, 38 NYS 945, 1 Gibb. Surr. 557; Matter of Newland, 7 Misc. 728, 28 NYS 496, 1 Gibb. Surr. 62; Matter of Blakeney, 7 NYS 55, 23 AbbNCas 32, 1 Conn. Surr. 128; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; Smith v. Buchanan, 5 NYSt 351, 5 Dem. Surr. 169; Welling v. Welling, 3 Dem. Surr. (N. Y.) 511; Waters v. Faber, 2 Dem. Surr. (N. Y.) 290; Matter of Leggatt, 4 Redf. Surr. (N. Y.) 148.

[a] **Death of one representative.**—Where three executors were named in a will, and only two qualified, and one died after serving for nine months, and before the settlement of the surviving executor's accounts, and no accounting was made by the executor of the deceased executor, and the estate exceeded one hundred thousand dollars, personal property over all debts, only one full commission can be allowed to the accounting executor for receiving the principal of the estate, and for turning it over to himself in the form of the investments in which he received it. Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507.

[b] **Equitable conversion.** — (1) When executors are vested with the power of sale which is mandatory, so as to impose a duty upon them to exercise it and thereafter to account for its proceeds as personalty, the land is treated as equitably converted into money and its value may be considered not for the purpose of awarding them commissions upon such value in advance of sale, but in order to determine whether the entire estate exceeds one hundred thousand dollars, so as to give to each executor a full commission. Matter of Clinton, 16 Misc. 199, 38 NYS 945, 1 Gibb. Surr. 557; Matter of McLaren, 6 Misc. 483, 27 NYS 289, Parr. Surr. 585; Smith v. Buchanan, 5 Dem. Surr. (N. Y.) 169. (2) This rule does not apply when there is a discretionary power of sale which does not work an equitable conversion. Matter of McGlynn, 41 Misc. 156, 83 NYS 975, 3 Mills Surr. 600; Matter of Hardenbrook, 23 Misc. 538, 52 NYS 845, 2 Gibb. Surr. 460.

[c] **The number of executors or administrators to whom commissions can be allowed** is measured by the number in office at the time of awarding such commissions, and not by the number who may have acted at some time, and for one reason or another have ceased to be executors or administrators at the time of the judicial settlement. Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507.

70. Schoeneich v. Reed, 8 Mo. A. 356; Porter's Est., 14 Phila. (Pa.) 290.

71. Edwards' Succ., 34 La. Ann. 216; Elkins v. Elkins, 11 La. 224; Mon v. Garnier, 6 La. 324; Lee v. Lee, 6 Gill & J. (Md.) 316.

72. Cal.—In re Carter, 132 Cal. 113, 64 P 123, 484; In re Dudley, 123 Cal. 256, 55 P 897; Hope v. Jones, 24 Cal. 89.

Fla.—Bellamy v. Hawkins, 17 Fla. 750.

Ky.—Couchman v. Bush, 83 SW 1136, 27 KyL 108; Glover v. Check,

no compensation.[73] However, where a gross sum is allowed by the court it must, unless the representatives agree otherwise, be equally divided, and one cannot retain the whole sum on the ground that the other rendered no services.[74] It has been held that, where both representatives had been equally willing and ready to do whatever was required in administering the estate, the commissions should be equally divided between them,[75] even though one has actually done all the work,[76] but other courts have declined to accede to this view.[77]

Effect of agreement between representatives. The portion which the several representatives are to receive may be and sometimes is settled by an agreement entered into by them,[78] but questions as to the existence of such a contract and the rights of the parties under it cannot be determined on final settlement of the accounts of the representatives.[79]

Where the compensation of executors is fixed by the will, and one of the executors dies after qualification, his estate is entitled to the compensation fixed.[80]

Effect of failure to qualify. Where only one of two executors named in a will qualifies, he is entitled to the entire commissions.[81]

[§ 2428] **8. Successive Administrations.** Where an estate is administered by successive personal representatives, the compensation allowed should be apportioned among them according to the services rendered,[82] and the compensation of one will not be increased because his predecessors received no compensation for their services.[83]

Where the compensation is measured by commissions [84] on the amount or value of the estate administered, the usual practice is to allow to each representative commissions on that part of the estate administered by him,[85] or on his receipts and disbursements.[86] A second administrator is not en-

72 SW 302, 24 KyL 1783; Shrader v. Phillips, 1 Ky. Op. 513.

Mich.—Speirs v. Wisner, 88 Mich. 614, 50 NW 654, 26 AmSR 306.

Minn.—Slingerland v. Norton, 136 Minn. 204, 161 NW 497.

N. J.—Andress v. Andress, 46 N. J. Eq. 528, 22 A 124; Mount v. Slack, 45 N. J. Eq. 129, 17 A 297 [aff 45 N. J. Eq. 889 mem, 19 A 622 mem].

N. Y.—Matter of Arnton, 106 App. Div. 326, 94 NYS 471; Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff on op. below 181 N. Y. 562 mem, 74 NE 1120 mem]; Matter of Kenworthy, 63 Hun 165, 17 NYS 655; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; Matter of Franklin, 26 Misc. 107, 56 NYS 858, 1 Mills Surr. 7; Matter of Mansfield, 10 Misc. 296, 31 NYS 684, 1 Gibb. Surr. 158; Matter of Newland, 7 Misc. 728, 28 NYS 496, 1 Gibb. Surr. 62; Valentine v. Valentine, 2 Barb. Ch. 430; Matter of Harris, 4 Dem. Surr. 463; Hill v. Nelson, 1 Dem. Surr. 357; Walke v. Hitchcock, 5 Redf. Surr. 217. But see White v. Bullock, 4 Abb. Dec. 578, 15 HowPr 102 [rev 20 Barb. 91]; In re Van Nest, Tuck. Surr. 130 (both decided before the enactment of the present statute).

N. C.—Waddill v. Martin, 38 N. C. 562; Sellars v. Ashford, 37 N. C. 104; Hodge v. Hawkins, 21 N. C. 564; Perry v. Maxwell, 17 N. C. 488; Grant v. Pride, 16 N. C. 269.

Oh.—Meyers v. Hopkins, 28 Oh. Cir. Ct. 208.

Pa.—In re McManus, 214 Pa. 634, 63 A 1074; In re Walker, 9 Serg. & R. 223; Stevenson's Est., 1 Pars. Eq. Cas. 18; In re Munhall, 33 PittsbLeg JNS 45.

S. C.—Ex p. Hilton, 64 S. C. 201, 41 SE 978, 92 AmSR 800.

Ont.—Re Fleming, 11 Ont. Pr. 426.

[a] **Compensation for extraordinary services** may be thus apportioned. Glover v. Check, 72 SW 302, 24 KyL 1783.

[b] **Such apportionment cannot be made by a court of law** in an action by one executor or administrator against another to recover a share of the commissions. White v. Bullock, 4 Abb. Dec. (N. Y.) 578, 15 HowPr 102; McManus's Est., 212 Pa. 267, 61 A 892 [dist Wickersham's App., 64 Pa. 67].

73. Cal.—Hope v. Jones, 24 Cal. 89.

N. Y.—Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454.

N. C.—McAuslan v. Green, 1 N. C. 172.

Pa.—Lafferty's Est., 5 Pa. Dist. 75, 17 Pa. Co. 401.

S. C.—Ex p. Hilton, 64 S. C. 201, 41 SE 978, 92 AmSR 800.

Va.—Claycomb v. Claycomb, 10 Gratt. (51 Va.) 589.

74. Ill.—Griswold v. Smith, 214 Ill. 323, 73 NE 400.

Md.—Richardson v. Stansbury, 4 Harr. & J. 275; Brown v. Stewart, 4 Md. Ch. 368.

Mo.—Smart v. Fisher, 7 Mo. 580.

N. J.—Pomeroy v. Mills, 40 N. J. Eq. 517, 4 A 768; Squier v. Squier, 30 N. J. Eq. 627.

Ont.—Re Fleming, 11 Ont. Pr. 426.

75. Pomeroy v. Mills, 40 N. J. Eq. 517, 4 A 768; Squier v. Squier, 30 N. J. Eq. 627.

76. Couchman v. Bush, 83 SW 1039, 26 KyL 1277; Garr v. Roy, 30 SW 25, 20 KyL 1697.

77. Bellamy v. Hawkins, 17 Fla. 750; Walke v. Hitchcock, 5 Redf. Surr. (N. Y.) 217.

78. Cal.—In re Carter, 132 Cal. 113, 64 P 123, 484.

Ga.—Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

Md.—Bassett v. Miller, 8 Md. 548; Brown v. Stewart, 4 Md. Ch. 368.

N. Y.—White v. Bullock, 4 Abb. Dec. 578, 15 HowPr 102.

Pa.—John v. John, 122 Pa. 107, 15 A 675; In re Aston, 5 Whart. 228.

[a] **Consideration.**—If there were letters testamentary taken out and responsibility incurred in pursuance of the agreement, there was a sufficient consideration to support it. John v. John, 122 Pa. 107, 15 A 675.

[b] **Agreement not illegal.**—An agreement between two executives that one should receive two fifths of a commission charged by the other, who settled a separate account, was not illegal if the executor receiving the two fifths transacted a part of the business of the estate. In re Aston, 5 Whart. (Pa.) 228.

[c] **Existence of agreement a question for jury.**—John v. John, 122 Pa. 107, 15 A 675.

[d] **Failure to perform agreement.**—Where executors agreed in writing that one of them should keep books of account, and by subsequent parol contract fixed the amount to be paid for keeping such books, and the books actually kept were not such as were agreed upon by the written contract, the executor keeping them was not entitled to compensation therefor. Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

79. In re Carter, 132 Cal. 113, 64 P 123, 484.

80. In re Sweatman, 223 Pa. 552, 72 A 895.

81. Bodenheimer's Succ., 35 La. Ann. 1034.

82. Cal.—In re Piercy, 168 Cal. 750, 145 P 88; In re Strong, 119 Cal. 663, 51 P 1078; Ord v. Little, 3 Cal. 287; In re Leavitt, 8 Cal. A. 756, 97 P 916.

Hawaii.—Treadway v. Phillips, 3 Hawaii 178.

La.—Kernan's Succ., 105 La. 592, 30 S 239; Linton's Succ., 31 La. Ann. 130; Brown's Succ., 27 La. Ann. 328; Poindexter's Succ., 19 La. Ann. 22; Rice's Succ., 14 La. Ann. 317; Girod's Succ., 4 La. Ann. 386.

Md.—In re Baxley, 47 Md. 555; McPherson v. Israel, 5 Gill & J. 60; Haslett v. Glenn, 7 Harr. & J. 17.

Miss.—Spratt v. Baldwin, 33 Miss. 581; Cherry v. Jarratt, 25 Miss. 221.

Mo.—In re Handfield, 16 Mo. A. 332.

N. Y.—Matter of Douglass, 60 App. Div. 64, 69 NYS 687; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; In re Naylor, 164 NYS 462; Matter of Depew, 19 NYSt 902, 6 Dem. Surr. 54; Lyendecker v. Eisemann, 3 Dem. Surr. 72.

N. C.—Scroggs v. Stevenson, 100 N. C. 354, 5 SE 111.

Oh.—Bates v. Creed, 15 Oh. Cir. Ct. N. S. 433, 2 Oh. A. 59 [aff 90 Oh. St. 288, 107 NE 770, AnnCas1916C 1198]; Thurston v. Ludwig, 25 Oh. Cir. Ct. N. S. 298, 4 Oh. A. 486; Bates v. Creed, 15 Oh. Cir. Ct. N. S. 433, 2 Oh. A. 59 [aff 90 Oh. St. 288, 107 NE 770, AnnCas1916C 1198].

Pa.—Elder's Est., 23 Pa. Dist. 369; Sweatman's Est., 17 Pa. Dist. 593, 35 Pa. Co. 248.

Utah.—In re Owen, 32 Utah 469, 91 P 283.

Wis.—Brown v. McGee, 117 Wis. 389, 94 NW 363.

[a] **Apportionment not governed by fixed rules.**—Where an administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has rendered, but in such a case it is the duty of the probate court to examine into the nature and value of the services rendered, and, comparing, as well as possible, that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment. Ord v. Little, 3 Cal. 287.

83. Linton's Succ., 31 La. Ann. 130.

84. See supra § 2402.

85. In re Barton, 55 Cal. 87 [crit Ord v. Little, 3 Cal. 287]; Kernan's Succ., 105 La. 592, 30 S 239; Girod's Succ., 4 La. Ann. 386; Day's Succ., 3 La. Ann. 624; Milne's Succ., 1 Rob. (La.) 400; Smith v. Cheney, 1 Rob. (La.) 98; Matter of Whipple, 81 App. Div. 589, 81 NYS 393; Cairns v. Chaubert, 9 Paige (N. Y.) 160.

86. Matter of Newland, 7 Misc. 728, 28 NYS 496, 1 Gibb. Surr. 62; Betts v. Betts, 4 AbbNCas (N. Y.) 317, 57 HowPr 355 note; Matter of Depew, 19 NYSt 902, 6 Dem. Surr. 54; Lyendecker v. Eisemann, 3 Dem. Surr. (N. Y.) 72; Griffin v. Bonham, 30 S. C. Eq. 71.

titled to commissions on assets on which a commission has been paid to a former administrator,[87] unless the statute contemplates the allowance of several commissions on the same assets,[88] and the fact that there are successive administrations should not increase the rate of commissions on any part of the assets;[89] but it has been held that the allowance for compensation made to a special administrator has no effect upon the commissions of the general executor or administrator of the same estate, these being distinct and independent allowances for different services.[90] The right of the last personal representative to his commissions, whether they are large or small, is a direct liability from the estate to himself, and he is entitled to payment from the estate, and cannot be remitted for payment to a settlement between himself and a prior representative who had appropriated to himself for commissions the whole amount allowed for the commissions of a full administration.[91] Where the probate of a will revoked an administrator's letters, there was not a mere succession of the administrator by an executor so as to deprive the administrator of commissions.[92]

Representatives of a deceased executor or administrator are not entitled, in their own right, to any compensation out of the estate of the original decedent for their services in settling accounts of their own decedent[93] or paying out assets received by their decedent.[94] Where an executor dies without having collected any assets, commissions cannot be recovered, on behalf of his estate, by his personal representative.[95] An executor of an executor is entitled to commissions on pecuniary legacies paid out under the will of the first testator, commissions to be retained out of the fund due to the legatees;[96] but he is not entitled to commissions from the estate of his immediate testator, on the hypothesis that the amount was due as a debt from his estate to the former estate, unless it appears that the last testator claimed the fund adversely to the legatees under the first will.[97]

[§ 2429] **9. Where Representative also Trustee or Guardian.** Where the will names the same person as executor and as testamentary trustee, and by the terms of the will the two functions, with their corresponding duties, coexist and run from the death of the testator to the final discharge, interwoven, inseparable, and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function ends and the other begins, double commissions or compensation in both capacities cannot be properly allowed.[98] But the same individual may be entitled to one commission as executor and another as trustee where, under the terms of the will, his duties as executor and as trustee are separable, and, his duties as executor having ended, he takes the property as trustee and afterward acts in that capacity.[99] Executors who are also trustees should not be allowed com-

87. In re Marvin, Myr. Prob. (Cal.) 163; McCan's Succ., 49 La. Ann. 968, 22 S 225; Bougere's Succ., 30 La. Ann. 422; In re Haskins, 112 NYS 1008; McConnigle's Est., 14 PittsbLegJNS (Pa.) 28.

[a] **Additional commissions on profits.**—Where compensation to executors and administrators was fixed at a certain sum, and that sum was allowed to the first executor and trustee, a subsequent executor and trustee was entitled to an allowance of at least five per cent on the profits realized upon a large and well managed trust fund. Young v. Smith, 9 Bush (Ky.) 421.

88. Lemmon v. Hall, 20 Md. 168; McPherson v. Israel, 5 Gill & J. (Md.) 60.

89. In re Waring, 5 OhS&CP 415, 7 OhNP 553, Oh. Prob. 146.

90. In re Miller, 15 Cal. A. 557, 115 P 329; Wilson v. Wilson, 3 Gill & J. (Md.) 20.

91. Kernan's Succ., 105 La. 592, 30 S 239.

92. Matter of Hurst, 111 App. Div. 460, 97 NYS 697.

93. Crothers v. Crothers, 123 Md. 603, 91 A 691.

94. In re Naylor, 164 NYS 462.

95. McKnight v. Walsh, 23 N. J. Eq. 136.

96. In re Jones, 25 Ga. 414.

97. In re Jones, 25 Ga. 414.

98. Ala.—Ramser v. Blair, 123 Ala. 139, 26 S 341.

Ga.—Lamar v. Harris, 121 Ga. 285; 48 SE 932.

Ill.—Dunne v. Cooke, 197 Ill. A. 422.

Ky.—Albro v. Robinson, 93 Ky. 195, 19 SW 587, 14 KyL 124.

La.—Milmo's Succ., 47 La. Ann. 126, 16 S 772.

Md.—Sanderson v. Pearson, 45 Md. 483.

Mo.—Johnston v. Grice, 272 Mo. 423, 199 SW 409; Judson v. Bennett, 233 Mo. 607, 136 SW 681 [quot Cyc].

N. J.—Bruere v. Gulick, 41 N. J. Eq. 289, 7 A 441; Baker v. Johnston, 39 N. J. Eq. 493. But compare Pitney v. Everson, 42 N. J. Eq. 361, 7 A 860 [rev 40 N. J. Eq. 539, 5 A 95] (if a person is appointed in a will an executor and trustee, such person is entitled to commissions, calculating on the corpus of the estate, in each capacity, at such rate as will yield a reasonable compensation for the services in each of such respective offices).

N. Y.—In re Ziegler, 218 N. Y. 544, 113 NE 553, 220 N. Y. 98, 115 NE 471, AnnCas1617E 248 [aff 168 App. Div. 735, 154 NYS 652]; In re Slocum, 169 N. Y. 153, 62 NE 130 [mod 60 App. Div. 438, 69 NYS 1036]; In re McAlpine, 126 N. Y. 285, 27 NE 475 [rev 12 NYS 662]; Johnson v. Lawrence, 95 N. Y. 154; Hurlburt v. Durant, 88 N. Y. 121; Hall v. Hall, 78 N. Y. 535 [aff 18 Hun 358]; Drake v. Price, 5 N. Y. 430 [aff 7 Barb. 388]; Matter of Vanneck, 175 App. Div. 363, 161 NYS 893; Leask v. Beach, 173 App. Div. 873, 160 NYS 147; Matter of Martin, 124 App. Div. 793, 109 NYS 217; Matter of Union Trust Co., 70 App. Div. 5, 75 NYS 68 [rev 35 Misc. 260, 71 NYS 844, and app dism 172 N. Y. 494, 65 NE 259]; Matter of Hogarty, 62 App. Div. 79, 70 NYS 839 [mod and aff 34 Misc. 610, 70 NYS 428]; Matter of Clinton, 12 App. Div. 132, 42 NYS 674; Matter of McDowell, 102 Misc. 275, 169 NYS 853 [mod on other grounds 184 App. Div. 646, 172 NYS 658]; Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410; Matter of Waterman, 60 Misc. 292, 113 NYS 280, 6 Mills Surr. 537; In re Lawrence, 37 Misc. 702, 76 NYS 653; In re Union Trust Co., 25 Misc. 584, 56 NYS 149; Matter of Martin, 124 App. Div. 793, 109 NYS 217; In re Thompson, 1 NYS 213; Matter of McAlpine, 15 NYSt 532; Valentine v. Valentine, 2 Barb. Ch. 430; Holley v. S. G., 4 Edw. 284; Matter of Townsend, 5 Dem. Surr. 147; Bacon v. Bacon, 4 Dem. Surr. 5; Matter of Leinkauf, 4 Dem. Surr. 1; Matter of Starr, 2 Dem. Surr. 141.

Pa.—In re Riter, 260 Pa. 168, 103 A 554; Middleton's Est., 66 Pa. Super. 55; Kennedy's Est., 26 Pa. Dist. 124; Middleton's Est., 25 Pa. Dist. 647; Kerrigan's Est., 17 Pa. Dist. 893; Horwitz's Est., 7 Pa. Dist. 179, 20 Pa. Co. 616; Scull's Est., 4 Pa. Dist. 699, 17 Pa. Co. 198; Porter's Est., 44 Pa. Co. 548; Milliken's Est., 36 Pa. Co. 187; Jennings' Est., 27 Pa. Co. 626; Keller's Est., 21 LancLRev 183; Evans' Est., 21 LancLRev 50; In re Old, 8 LancLRev 329 [aff 150 Pa. 529, 24 A 752]; Reed's Est., 8 Montg. Co. 98; Barclay's Est., 11 Phila. 123; In re Glesenkamp, 34 PittsbLegJNS 155.

[a] **Executor and guardian.**—A person holding at one and the same time the position of testamentary executor of an estate and tutor of the minor heirs thereto cannot receive and disburse a fund in the capacity of executor and charge commissions upon the fund as being in his hands as tutor. Milmo's Succ., 47 La. Ann. 126, 16 S 772.

[b] **This rule can have no application** in the case of one who was trustee in his individual capacity for several years before he became executor. Johnston v. Grice, 272 Mo. 423, 199 SW 409.

[c] **Extra compensation** may be allowed to an executor who has been under added responsibility and subjected to unusual work because of his functions as trustee. Oliver's Est., 4 Pa. Co. 209.

99. Ill.—Dunne v. Cooke, 197 Ill. A. 422.

Md.—Mitchell v. Holmes, 1 Md. Ch. 287.

N. J.—Lyon v. Bird, 79 N. J. Eq. 157, 80 A 456; In re Hibbler, 78 N. J. Eq. 217, 78 A 188 [aff 79 N. J. Eq. 230, 81 A 1133]; Baker v. Johnston, 39 N. J. Eq. 493; In re Christie, 89 N. J. Eq. 303, 101 A 64.

N. Y.—Matter of McAlpine, 126 N. Y. 285, 27 NE 475; In re Crawford, 113 N. Y. 560, 21 NE 692, 5 LRA 71; In re Willets, 112 N. Y. 289, 665, 19 NE 690 [aff 9 NYSt 321]; Phœnix v. Livingston, 101 N. Y. 451, 5 NE 70; In re Mason, 98 N. Y. 527; Laytin v. Davidson, 95 N. Y. 263 [aff 29 Hun 622]; Johnson v. Lawrence, 95 N. Y. 154; Matter of Blun, 176 App. Div. 189, 162 NYS 458 [mod 160 NYS 731]; Matter of Vanneck, 175 App. Div. 363, 161 NYS 893; Matter of Union Trust Co., 70 App. Div. 5, 75 NYS 68 [rev 35 Misc. 260, 71 NYS 844, and app dism 172 N. Y. 494, 65 NE 259]; Matter of Johnson, 57 App. Div. 494, 67 NYS 1004 [mod on other grounds 170 N. Y. 139, 63 NE 63];

pensation as executors for services which could be rendered by them only as trustees.[1]

Acting or holding in one capacity only. Where by will one is appointed both executor and trustee, but holds the estate as executor until it is finally settled, never having qualified as trustee, he is entitled to compensation for his services as executor.[2] Where a will contemplates that the income of the residuary estate shall be received by the trustees directly and never be held by them as executors, they are not entitled, when accounting as executors, to double commissions on unexpended income in their hands.[3] Where one who is named executor and trustee declined to act as executor, although he qualified as such, but did serve as trustee, he is entitled to commission as trustee, but not as executor.[4]

Self-imposed trusteeship. An executor who is not appointed trustee by the will cannot perform self-imposed duties as such and receive compensation therefor.[5]

Acting as executor and guardian. Where a person is trustee by reason of his being executor, and voluntarily assumes control of a fund willed to minor children, he not being their guardian, he is not entitled to commissions as guardian;[6] but where an administrator having the funds of an infant in his hands is appointed his guardian he has the right as administrator to charge commissions for transferring the funds to himself as guardian, and as guardian the right to charge for receiving it.[7]

Executor under one will and trustee under another. One acting as trustee under one will and executor under another, although dealing with the same funds, may receive commissions for services in each capacity.[8]

[§ 2430] **10. Waiver or Renunciation of Compensation.** An executor or administrator may waive or renounce his claim to compensation for performance of the duties of his trust,[9] and a promise or agreement made by him that he will not charge for his services may be regarded as equivalent to a renunciation of his claim.[10]

Implied waiver. The waiver or renunciation of any claim for compensation need not be expressed but may be implied from the acts and conduct of the personal representative,[11] provided of course

Matter of Clinton, 12 App. Div. 132, 42 NYS 674; Beard v. McCredie, 77 Hun 111, 28 NYS 305; Foote v. Bruggerhof, 66 Hun 406, 21 NYS 509; Matter of Babcock, 52 Hun 510, 5 NYS 634; Blake v. Blake, 30 Hun 469; Matter of Cadwalader, 96 Misc. 407, 160 NYS 523; Matter of Goodwin, 95 Misc. 461, 159 NYS 111; Matter of Howard, 94 Misc. 560, 157 NYS 1114; Matter of Kings County Trust Co., 69 Misc. 531, 127 NYS 879, 8 Mills Surr. 12; Matter of Waterman, 60 Misc. 292, 113 NYS 280, 6 Mills Surr. 537; Matter of Rafferty, 52 Misc. 69, 102 NYS 432, 5 Mills Surr. 534; Matter of Freel, 49 Misc. 386, 99 NYS 509, 5 Mills Surr. 269; In re Lawrence, 37 Misc. 702, 76 NYS 653; Matter of Tucker, 29 Misc. 728, 62 NYS 1021, 1 Mills Surr. 371; In re Union Trust Co., 25 Misc. 584, 56 NYS 149; Matter of Curtiss, 15 Misc. 545, 37 NYS 586, 1 Gibb. Surr. 530 [aff 9 App. Div. 285, 41 NYS 1111]; In re Moller, 110 Misc. 184, 179 NYS 768; In re Textor, 157 NYS 848; Matter of Selleck, 1 NYSt 575; Hall v. Campbell, 1 Dem. Surr. 415; Ward v. Ford, 4 Redf. Surr. 34; Matter of Carman, 3 Redf. Surr. 46; Cram v. Cram, 2 Redf. Surr. 244.

Pa.—Nathan's Est., 6 Pa. Dist. 481; Scull's Est., 4 Pa. Dist. 699, 17 Pa. Co. 198; Malin's Est., 27 Pa. Co. 538; Ex p. Witherspoon, 24 S. C. Eq. 13.

[a] **Test for determining right.**—Double commissions to the same persons, first in the character of executors and then in that of trustees, are to be awarded only when the will contemplates a several and separate action in each capacity, not at the same but different stages of the administration, and that they are not to be allowed where the will makes no such separation, but blends the two duties and commingles them without a severance. To the ordinary duties of an executor may be added the performance of a trust in such a manner that the two functions run on together. It is the duty of an executor, as such, to pay to a legatee the amount of the legacy in the manner and at the time provided by the testator, and it does not change that duty that the payment of the principal is postponed and the income made payable annually in the meantime. A trust duty may thus be imposed upon an executor which thereby becomes and is made a function of his office. A will must go further than that to admit of double commissions, and must clearly and definitely indicate an intention of the testator to end the executor's duty at some point of time, and require him thereupon to constitute and set up one or more several trusts, to be held and managed as such for the interest of the beneficiary. Matter of McAlpine, 126 N. Y. 285, 27 NE 475.

[b] **Illustration.**—On an accounting by executors who are also trustees, in addition to their compensation as executors, they are entitled to one-half commissions for receiving the trust fund and one half on such portions as they have paid out. Matter of Kenworthy, 63 Hun 165, 17 NYS 655.

[c] **The mere mental determination of an executor** to appropriate property in his hands as such to himself as trustee under the will is not such a setting apart as to entitle him to any separate compensation for his services as trustee. Miller v. Congdon, 14 Gray (Mass.) 114.

[d] **Correction of error.**—An error in allowing executors too large a commission may be corrected by cutting down their commissions as trustees. Griggs v. Shaw, 42 N. J. Eq. 631, 9 A 578.

1. In re Steelman, 87 N. J. Eq. 270, 99 A 612.

2. Schinz v. Schinz, 90 Wis. 236, 63 NW 162.

3. Matter of Tucker, 29 Misc. 728, 62 NYS 1021, 1 Mills Surr. 371.

4. Matter of Pike, 2 Redf. Surr. (N. Y.) 255.

5. Hepburn's Est., 11 Phila. (Pa.) 80. See also Haglar v. McCombs, 66 N. C. 345; Re Rundle, 52 Can. S. C. 114 [dism app 32 Ont. L. 312, 7 OntWN 350] (both recognizing the rule).

6. Haglar v. McCombs, 66 N. C. 345; Re Rundle, 52 Can. S. C. 114 [dism app 32 Ont. L. 312, 7 OntWN 350].

7. Ex p. Witherspoon, 24 S. C. L. 13.

8. Scull's Est., 4 Pa. Dist. 699; Clermontel's Est., 13 Phila. (Pa.) 235.

9. U. S.—McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 14 App. (D. C.) 337].

Cal.—Davis' Est., 65 Cal. 309, 4 P 22.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

Ind.—Polk v. Johnson, 35 Ind. A. 478, 65 NE 536.

La.—In re Dimmick, 111 La. 655, 35 S 801.

Md.—In re Watts, 108 Md. 696, 71 A 316; Mott v. Fowler, 85 Md. 676, 37 A 717.

Mich.—Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

N. Y.—In re Hopkins, 32 Hun 618 [aff 98 N. Y. 636]; In re Williams, 170 NYS 80; Secor v. Sentis, 5 Redf. Surr. 570.

Pa.—In re Fitzgerald, 252 Pa. 575, 97 A 937; In re Scull, 249 Pa. 57, 94 A 476; In re Taylor, 239 Pa. 153, 86 A 708; Horwitz's Est., 7 Pa. Dist. 179, 20 Pa. Co. 616.

S. C.—McCaw v. Blewit, 7 S. C. Eq. 90.

Wash.—Noble v. Whitten, 38 Wash. 262, 80 P 451 [cit Matter of Field, 33 Wash. 63, 73 P 768].

10. U. S.—McIntire v. McIntire, 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 [aff 20 App. (D. C.) 134] (order made by consent).

Cal.—Davis' Est., 65 Cal. 309, 4 P 22.

Colo.—Fogg v. Quackenbush, 27 Colo. A. 480, 150 P 726.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ind.—Drake v. Drake, (A.) 117 NE 871.

Ky.—Doty v. Cox, 22 SW 321, 15 KyL 68; Bate v. Bate, 11 Bush 639 (no charges beyond actual expenses).

La.—Regan's Succ., 43 La. Ann. 723, 9 S 753.

Mich.—Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Mo.—In re Lutz, 181 Mo. A. 267, 170 SW 334.

N. J.—Middleton v. Carter, 73 N. J. Eq. 624, 641, 68 A 763, 765 [aff 74 N. J. Eq. 853, 71 A 1134].

N. Y.—In re Hopkins, 32 Hun 618 [aff 98 N. Y. 636]; Matter of Eno, 92 Misc. 658, 157 NYS 491; In re Moncrief, 161 NYS 639; Matter of Turfler, 24 NYS 91, Pow. Surr. 421.

Pa.—In re Taylor, 239 Pa. 153, 86 A 708; Scull's Est., 23 Pa. Dist. 542; Horwitz's Est., 7 Pa. Dist. 179, 20 Pa. Co. 616; Frishmuth's Est., 2 Pa. Dist. 814, 14 Pa. Co. 49; Mulligan's Est., 1 Pa. Dist. 511, 12 Pa. Co. 166.

S. C.—McCaw v. Blewit, 7 S. C. Eq. 90.

[a] **A promise to some beneficiaries** is sufficient, although it was not made to all. Bate v. Bate, 11 Bush (Ky.) 639.

[b] **Representation amounting to promise.**—Where a stranger to an estate obtained the consent of the distributees to his appointment as administrator upon his professions of friendship for them, and his statement that "it would not be a nickel in his pocket," thereby giving them to understand that his services would be gratuitous, he should not be allowed any commissions, but only his expenses as administrator. Hilton v. Hilton, 109 SW 905, 33 KyL 276.

11. Matter of Tucker, 29 Misc.

the acts are such as to indicate clearly a purpose on the part of the representative not to claim compensation;[12] but a mere intention to waive such a claim at the time of performing services is not alone sufficient to deprive the representative of his right,[13] nor is a statement of the representative, made long after qualifying that he did not intend to claim any compensation, sufficient to defeat his rights, where there was no agreement at the outset that he would serve gratuitously.[14]

Consideration. A promise to forego commissions must be supported by a consideration in order to be binding,[15] although if it is carried into effect by actual payment to the promisees, without deduction, the transaction becomes a gift which, except as against creditors, needs no consideration.[16] It has been held that allowing one to be appointed administrator, or foregoing the right to oppose his appointment, is a sufficient consideration for his promise to serve without compensation,[17] but it has also been considered that an agreement to administer the estate for a certain amount, if no objection to the promisor's appointment as administrator was made, was void as against public policy, because involving trafficing in the office of administrator.[18]

Proof of waiver. It is, however, incumbent upon those who oppose an allowance of compensation to show that there was an actual waiver or renunciation.[19]

Effect of waiver. A waiver or renunciation precludes of course any subsequent assertion of a claim for compensation,[20] and is binding not only upon the representative himself but also upon his assignees and representatives.[21]

Coexecutor not bound. The refusal of an executor to charge any commissions cannot prejudice the rights of his coexecutor in that respect.[22]

Withdrawal of waiver. A waiver of commissions in a petition for letters of administration does not deprive the representative of the right to commissions where the waiver was without objection and by leave of court withdrawn before appointment.[23]

[§ 2431] **11. Forfeiture or Deprivation of Compensation—a. In General.** While there are a few cases holding that statutes providing for the allowance of commissions to personal representatives are imperative and that the courts are without discretion to withhold them,[24] the generally accepted view is that the allowance of compensation to an executor or administrator may be refused where a proper ground for such action exists.[25] As a general rule, however, compensation should be allowed unless

728, 62 NYS 1021, 1 Mills Surr. 371; In re McDermott, 13 OhS&CP 390; In re Fitzgerald, 252 Pa. 575, 97 A 937; In re Scull, 249 Pa. 57, 94 A 476; In re Taylor, 239 Pa. 153, 86 A 708; Wiener's Est., 4 Pa. Dist. 422; Frishmuth's Est., 2 Pa. Dist. 814, 14 Pa. Co. 49.

[a] **Failure to claim compensation in probate court.**—An administratrix, widow of her intestate, entitled to and receiving a considerable estate as distributee, waives her commissions by failing to claim them in the probate proceedings. In re McDermott, 13 OhS&CP 390.

[b] **Paying out the income** received from an estate without retaining or providing for commissions constitutes a waiver. Matter of Tucker, 29 Misc. 728, 62 NYS 1021, 1 Mills Surr. 371. Contra Matter of Mount, 2 Redf. Surr. (N. Y.) 405.

12. Mintzer's Est., 13 Pa. Dist. 258.

[a] **A failure to claim fees in the final account** is not a waiver. Smith v. Griswold, 161 Ill. A. 483.

[b] **Partial settlement without allowance.**—No presumption that the right of an executor or administrator to compensation has been waived arises from the fact that a partial settlement of his accounts is silent as to the question of compensation. Clay v. Hart, 7 Dana (Ky.) 1.

[c] **Failure to credit.**—The right to commissions is not waived by a representative's failure to credit his account with them or to appeal from a decree of the probate court in which none were allowed. Williams v. Cubage, 36 Ark. 307.

[d] **Depositing funds in safe custody.**—An executor does not waive his right to commissions by depositing the securities and funds of the estate in safe custody. Hughes' Est., 6 Phila. (Pa.) 350.

[e] **Promise to protect interests of heirs.**—Where an administrator, prior to appointment, stated to the intestate's husband that he would protect the interests of the heirs as he had theretofore protected the interests of intestate, as her agent and attorney, he did not thereby waive his right to an allowance of statutory fees for his services as administrator. Noble v. Whitten, 38 Wash. 262, 80 P 451.

13. Matter of Shanley, 95 Misc. 427, 160 NYS 733; King v. Whiton, 15 Wis. 684.

14. Albro v. Robinson, 93 Ky. 195, 19 SW 587, 14 KyL 124.

15. Jones v. Jones, 141 Ga. 727, 82 SE 451; Horwitz's Est., 7 Pa. Dist. 179, 20 Pa. Co. 616.

[a] **Benefit to the estate** is a sufficient consideration for a promise of an executor to reduce his commissions. Regan's Succ., 43 La. Ann. 723, 9 S 753.

16. Horwitz's Est., 7 Pa. Dist. 179, 20 Pa. Co. 616; Barton's Est., 1 Pars. Eq. Cas. (Pa.) 24; McCawley's Est., 14 WklyNC (Pa.) 260.

17. Davis' Est., 65 Cal. 309, 4 P 22; Fogg v. Quackenbush, 27 Colo. A. 480, 150 P 726; Drake v. Drake, (Ind. A.) 117 NE 871; Mott v. Fowler, 85 Md. 676, 37 A 717.

[a] **Where the promisor's right is superior to that of the promisee,** such a promise is without consideration. Coste's Succ., 43 La. Ann. 144, 9 S 62.

[b] **Administration pending contest of will.**—An administrator with the will annexed who in consideration of being permitted to remain such pending a contest over the validity of the will expressly agrees to relinquish all commissions cannot thereafter be heard to deny such relinquishment. McIntire v. McIntire, 14 App. (D. C.) 337, 20 App. 104 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369 (dist Richardson v. Stansbury, 4 Harr. & J. (Md.) 275; Eversfield v. Eversfield, 4 Harr. & J. (Md.) 125)].

18. In re Irwin, 123 Mo. A. 508, 100 SW 565. Contra Fogg v. Quackenbush, 27 Colo. A. 480, 150 P 726.

19. See cases infra this note.

[a] **Evidence insufficient to show waiver or renunciation.**—Griswold v. Smith, 116 Ill. A. 223; Caldwell v. Hampton, 53 SW 14, 21 KyL 793; Eversfield v. Eversfield, 4 Harr. & J. (Md.) 12; Matter of Shanley, 95 Misc. 427, 160 NYS 733.

20. Hilton v. Hilton, 109 SW 905, 33 KyL 276; Randall v. Gray, 80 N. J. Eq. 13, 83 A 482; Middleton v. Carter, 73 N. J. Eq. 624, 68 A 763 [aff 74 N. J. Eq. 853, 71 A 1134].

[a] **"It violates no rule of public policy** to hold one to his agreement who voluntarily seeks an appointment, in a case like this, under the promise to the court and parties interested that he will make no charge for his services. The desire to administer upon large estates for the purpose of obtaining compensation in the way of commissions would prompt many to tender a donation of their services, if they were assured by the chancellor that such promises would be disregarded and the full compensation allowed them as fixed by law." Bate v. Bate, 11 Bush (Ky.) 639.

[b] **Conduct of beneficiaries.**—An administrator is not relieved from his agreement to administer without compensation because the beneficiaries have refused to assist him, and have made unfair and unjust charges against him, and have instituted litigation against him. Randall v. Gray, 80 N. J. Eq. 13, 83 A 482.

21. Doty v. Cox, 22 SW 321, 15 KyL 68; In re Mulligan, 157 Pa. 98, 27 A 398 [aff 1 Pa. Dist. 511, 12 Pa. Co. 166]; Frishmuth's Est., 14 Pa. Co. 49, 34 WklyNC 427.

22. Schoeneich v. Reed, 8 Mo. A. 356.

23. In re Carver, 123 Cal. 102, 55 P 770.

24. In re Goodrich, 6 Cal. A. 730, 93 P 121; Handy v. Collins, 60 Md. 229, 45 AmR 725; State v. Baker, 8 Md. 44; In re Fitzgerald, 57 Wis. 508, 15 NW 794.

25. Ala.—Hall v. Santangelo, 178 Ala. 447, 60 S 168.

Del.—In re Pennewell, 105 A 377.

Hawaii.—In re Akana, 11 Hawaii 420, 13 Hawaii 388.

Ill.—Matter of Brown, 207 Ill. A. 536; Huddleston v. Henderson, 161 Ill. A. 176.

Mass.—Bailey v. Crosby, 226 Mass. 492, 116 NE 238.

Mo.—State v. Berning, 74 Mo. 87; State v. Taylor, 112 Mo. A. 585, 87 SW 7.

N. Y.—In re Rutledge, 162 N. Y. 31, 56 NE 511, 47 LRA 721; Cook v. Lowry, 95 N. Y. 103; Matter of Ellis, 176 App. Div. 425, 163 NYS 27; Matter of Gall, 107 App. Div. 310, 95 NYS 124; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507.

N. C.—Allen v. Royster, 107 N. C. 278, 12 SE 134.

Or.—In re Roach, 50 Or. 179, 92 P 118.

Pa.—In re Groff, 215 Pa. 586, 64 A 783; Marsden's Est., 17 Pa. Co. 476.

there has been some act or omission calling for punishment,[26] and a representative who has acted in good faith should not be deprived of compensation because of mistakes or irregularities in his proceedings,[27] although it has been held proper to refuse to allow any compensation where no services were performed,[28] unless the failure was due to the act of the beneficiaries in preventing the performance of his duties by the representatives.[29] Where the assets of an estate have been exhausted in payment the expenses of litigation instituted by those interested therein, an administrator cannot recover compensation for his services, although his efforts to perform his duty were honest and intelligent, and although he was subjected to much annoyance and trouble from such litigation.[30]

[§ 2432] **b. Mismanagement.** The general rule is that an executor or administrator who has been guilty of fraud, willful default, or other misconduct, or of gross negligence in the management of the estate, by reason of which the estate has suffered detriment, may be deprived of compensation,[31] although there is also authority for the view that the representative is not to be deprived of compensation by reason of any fault, mismanagement, or neglect, or any loss resulting therefrom, but that he

26. D. C.—Reid v. Dodge, 44 App. 558.

Ill.—Bachman v. Wilkins, 194 Ill. A. 232.

Iowa.—In re Ring, 132 Iowa 216, 109 NW 710.

La.—Baum's Succ., 9 La. Ann. 412.

Mo.—Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

N. Y.—Matter of Ordway, 131 App. Div. 339, 115 NYS 817 [mod on other grounds 196 N. Y. 95, 89 NE 474]; Matter of Dutcher, 102 App. Div. 410, 92 NYS 418; Matter of Ingersoll, 95 App. Div. 211, 88 NYS 698 [mod 41 Misc. 600, 85 NYS 293]; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272.

N. C.—Hannah v. Hyatt, 170 N. C. 634, 640, 87 517 [cit Cyc].

Pa.—Merkel's Est., 131 Pa. 584, 18 A 931; Old's Est., 57 Pa. Super. 509; Wears' Est., 25 Pa. Dist. 30; Houston's Est., 21 Pa. Dist. 395; Magaldo's Est., 13 Pa. Dist. 149, 30 Pa. Co. 97, 20 Montg. Co. 219; Conway's Est., 10 Pa. Dist. 509; Hall's Est., 8 Pa. Dist. 8; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287]; Magaldo's Est., 30 Pa. Co. 97; Walker's Est., 6 Pa. Co. 515; Williamson's Est., 2 Pa. Co. 221, 18 WklyNC 138; Benedict's Est., 4 LancLRev 99; Gauff's Est., 2 LehighValLR 245; Montier's Est., 7 Phila. 491.

Tenn.—Willeford v. Watson, 12 Heisk. 476.

Va.—Boyd v. Boyd, 3 Gratt. (44 Va.) 113.

Ont.—Sievewright v. Leys, 1 Ont. 375.

[a] **Inaccurate accounts.** — An executor who discharges his duty honestly but, owing to want of business training, keeps his accounts loosely and inaccurately, is entitled to compensation for his care, pains, and trouble, but the amount of compensation should not in such a case be relatively large. Hoover v. Wilson, 24 Ont. A. 424. Compare Kee v. Kee, 2 Gratt. (43 Va.) 116 (where the usual commission was allowed, although accounts had not been properly kept).

[b] **Failure to deposit or account for funds.**—Failure to comply with a statute providing a penalty for not depositing or accounting for funds will not deprive a personal representative of his commissions, as such a statute is highly penal, and the penalty provided therein cannot be increased. Baum's Succ., 9 La. Ann. 412; Cresswell's Succ., 8 La. Ann. 122.

[c] **An executor who is compelled to make good an amount embezzled by his coexecutor** is entitled to commissions. Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272.

[d] **Assuming attitude of creditor.** —The administrator is not deprived of his right to compensation by assuming the attitude of a creditor of the estate. Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

[e] **The representative is entitled to offset** commissions against the amount for which his default has rendered him liable, and hence a decree providing that commissions shall not be computed until the default is made good is improper. Matter of McDowell, 184 App. Div. 646, 172 NYS 658.

[f] **Partial commissions may be allowed** when the court deems it proper to show disapprobation of the executor's conduct by a deprivation of all commissions would impose too heavy a penalty. Jacobus v. Munn, 38 N. J. Eq. 622 [rev 37 N. J. Eq. 48].

27. Matter of Ingersoll, 95 App. Div. 211, 88 NYS 698 [mod 41 Misc. 600, 85 NYS 293]; Matter of Baker, 72 App. Div. 211, 76 NYS 61 [aff 172 N. Y. 617 mem, 64 NE 1118 mem]; In re Hoffer, 156 Pa. 473, 27 A 11; Merkel's Est., 131 Pa. 584, 18 A 931; In re Brennan, 65 Pa. 16; Hall's Est., 8 Pa. Dist. 8; Heft's App., 19 WklyNC (Pa.) 302; In re Johnston, (Wash.) 181 P 209.

[a] **This rule has been applied:** (1) Where the mistake arose out of placing a wrong interpretation on the will. Miller's App., 5 Pa. Cas. 492, 8 A 864. (2) Where the representative, through mistake, and without fraudulent intent, claimed a credit to which he was not entitled. In re Hoffer, 156 Pa. 473, 27 A 11.

[b] **The failure of an executor to procure a judicial construction of the will,** and his refusal to pay anything to the beneficiaries thereunder, based on a plausible, although erroneous, view of the will, do not warrant the withholding of commissions earned. Matter of Ingersoll, 95 App. Div. 211, 88 NYS 698 [mod 41 Misc. 600, 85 NYS 293].

[c] **Unsuccessful business policy.** —Commissions will not be denied because management of the estate by the administrators resulted in insolvency, where they acted on the recommendation of competent advisers and with the approval of the creditors of the estate. Merkel's Est., 131 Pa. 584, 18 A 931.

28. Foster v. Foster, 71 SW 524, 24 KyL 1396; Nicholson v. Ogden, 6 La. Ann. 486; In re Baker, 35 Hun (N. Y.) 272; In re Manice, 31 Hun (N. Y.) 119; In re Lyons, 186 App. Div. 161, 173 NYS 590; Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454; Morris v. Kent, 2 Edw. (N. Y.) 175; Matter of Pike, 2 Redf. Surr. (N. Y.) 255; Kernan's Est., 6 Kulp (Pa.) 73. But compare Matter of Allen, 96 N. Y. 327, 330 [aff 29 Hun 7] ("The law now permits compensation to persons placed in that situation [testatmentary trustees], and who serve to the end of the trust without regard to the actual trouble or labor to which they have been put").

29. Hopkins' Succ., 33 La. Ann. 1166; Hale v. Salter, 25 La. Ann. 320.

30. Dunlap v. Savage, 196 Ill. A. 378.

31. Ala.—Noble v. Jackson, 124 Ala. 311, 26 S 955; Ivey v. Coleman, 42 Ala. 409; Smith v. Kennard, 38 Ala. 695; Henderson v. Simmons, 33 Ala. 291, 70 AmD 590; Pearson v. Darrington, 32 Ala. 227; Stewart v. Stewart, 31 Ala. 207; Bendall v. Bendall, 24 Ala. 295, 60 AmD 469; Gould v. Hayes, 19 Ala. 438; Emanuel v. Draughn, 14 Ala. 303; Hall v. Wilson, 14 Ala. 295; Powell v. Powell, 10 Ala. 900.

Ark.—Ambleton v. Dyer, 53 Ark. 224, 13 SW 926.

Fla.—Eppinger v. Canepa, 20 Fla. 262.

Hawaii. — Matter of Kaiu, 17 Hawaii 514.

Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; Huddleston v. Henderson, 181 Ill. A. 176; Whittemore v. Coleman, 144 Ill. A. 109 [aff 239 Ill. 450, 88 NE 228].

Ky.—Foster v. Foster, 71 SW 524, 24 KyL 1396.

La.—Miller v. Gallia, 134 La. 769, 64 S 708; Trouzanne's Succ., 36 La. Ann. 420; Liles' Succ., 24 La. Ann. 490; Badillo v. Tio, 7 La. Ann. 487.

Minn.—St. Paul Trust Co. v. Kittson, 62 Minn. 408, 64 NW 74.

Mo.—Davidson v. I. M. Davidson Real Est., etc., Co., 249 Mo. 474, 155 SW 1; State v. Berning, 74 Mo. 87; State v. Taylor, 112 Mo. A. 585, 87 SW 7.

N. J.—In re Frey, 73 N. J. Eq. 346, 67 A 192; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; Brewster v. Demarest, 48 N. J. Eq. 559, 23 A 271; McKnight v. Walsh, 23 N. J. Eq. 136; Frey v. Demarest, 17 N. J. Eq. 71; Warbass v. Armstrong, 10 N. J. Eq. 263.

N. Y.—In re Rutledge, 162 N. Y. 31, 56 NE 511, 47 LRA 721; Stevens v. Melcher, 152 N. Y. 551, 46 NE 965 [mod 80 Hun 514, 30 NYS 625]; In re Wiley, 119 N. Y. 642, 23 NE 1054; Cook v. Lowry, 95 N. Y. 103; Matter of Gall, 107 App. Div. 310, 95 NYS 124; Matter of Wotton, 59 App. Div. 584, 69 NYS 753 [aff 167 N. Y. 629 mem, 60 NE 1123 mem]; Matter of Welling, 51 App. Div. 355, 64 NYS 1025; Matter of Yetter, 44 App. Div. 404, 61 NYS 175 [aff 162 N. Y. 615 mem, 57 NE 1129 mem]; Matter of Matthewson, 8 App. Div. 8, 40 NYS 140; McMahon v. Allen, 4 E. D. Smith 519; Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; Matter of Ingersoll, 41 Misc. 600, 85 NYS 293, 4 Mills Surr. 96 [mod on other grounds 95 App. Div. 211, 88 NYS 698]; Matter of Rainforth, 40 Misc. 609, 83 NYS 57, 3 Mills Surr. 559; Matter of Hayes, 40 Misc. 500, 82 NYS 792, 3 Mills Surr. 518; Matter of Scudder, 21 Misc. 179, 47 NYS 101, 2 Gibb. Surr. 233; In re Ellis, 176 App. Div. 425, 163 NYS 27; Matter of Conklin, 20 NYS 59, 2 Conn. Surr. 176; Matter of Harnett, 15 NYSt 725.

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953; Grant v. Reese, 94 N. C. 720.

Or.—In re Roach, 50 Or. 179, 92 P 118.

Pa.—In re Hermann, 226 Pa. 543, 75 A 731; In re Locher, 219 Pa. 46, 67 A 954; Geiger's App., 16 A 851, 1 Mon. 547, 24 WklyNC 264; In re Clauser, 84 Pa. 51; Norris' App., 71 Pa. 106; Smith's App., 47 Pa. 424; Berryhill's App., 35 Pa. 245; Witman's App., 28 Pa. 376; In re Swartswalter, 4 Watts 77; Reed's Est., 22 Pa. Super. 635; Evans' Est., 1 Pa. Super. 37; Auer's Est., 14 Pa. Dist. 273; Bickley's Est., 13 Pa. Dist. 323; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Lafferty's Est., 5 Pa. Dist. 75, 17 Pa. Co. 401; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Palmer's

should be charged with the losses and allowed his commissions.[32] Whether or not the misconduct is such as to warrant the refusal of compensation in any particular case is a matter resting within the discretion of the court,[33] and it has been considered that compensation should be withheld only where the misconduct was willful and exceptional,[34] or where there was gross negligence[35] or fraud.[36] In the case of active misconduct, the act alone has been regarded as sufficient to warrant a withholding of compensation, regardless of its effects,[37] but in the case of mere neglect or default, the generally accepted view is that this should result in a deprivation of compensation only where there has been a resulting loss to the estate,[38] although there are also to be found cases in which gross neglect has of itself been regarded as sufficient to warrant a withholding of compensation regardless of any resulting detriment to the estate.[39] In so far as the services of the executor or administrator have been beneficial to the estate, he may be allowed compensation therefor, although in other respects he has been unfaithful to his trust.[40]

Misconduct of coexecutor. A devastavit by one executor cannot deprive his coexecutor, who is not a party thereto, of the right to commission, although the latter is liable therefor.[41]

[§ 2433] **c. Conversion, Misappropriation, or Commingling of Funds.** As a rule, where the personal representative unlawfully converts or misappropriates the funds of the estate, or commingles them with his own to the detriment of the estate, he will be denied compensation;[42] but this rule is not arbitrarily applied, and, notwithstanding the

Est., 2 Del. Co. 180; Atherton's Est., 8 Kulp 150; Unruh's Est., 13 Phila. 337; Steger's Est., 11 Phila. 158; Bradley's Est., 11 Phila. 87; Sourin's Est., 11 Phila. 14; Robinson's Est., 5 Phila. 99; Smith's Est., 20 Pittsb LegJNS 33; Barrett's Est., 14 Pittsb LegJNS 53.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

Tenn.—Bland v. Gollaher, (Ch. A.) 48 SW 320.

Tex.—Chapman v. Brite, 4 Tex. Civ. A. 506, 23 SW 514.

W. Va.—Wolfe v. Morgan, 61 W. Va. 287, 56 SE 504.

Wis.—Macklin v. Hobbs, 126 Wis. 216, 105 NW 305.

Can.—Re Rundle, 52 Can. S. C. 114 [dism app 32 Ont. L. 312, 7 OntWN 350].

32. In re Carver, 123 Cal. 102, 55 P 770; Moore's Est., 96 Cal. 522, 31 P 584; Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264.

33. Matter of Morris, 65 N. J. Eq. 699, 56 A 161; Crosson's App., 125 Pa. 380, 17 A 423. See also cases infra this note.

[a] **The retention of irregular securities,** causing loss, is not such a dereliction of duty as to justify a refusal of commissions. Gillespie v. Brooks, 2 Redf. Surr. (N. Y.) 349.

[b] **Manner of account.**—Commissions will not be disallowed because the manner in which the account was made out might be construed as showing a purpose of getting commissions to which the representative was not entitled, there being no misconduct of improper management of the estate. Matter of Dutcher, 102 App. Div. 410, 92 NYS 418.

[c] **The fact that an accountant was unsuccessful in establishing a claim against the estate** is no reason why he should be deprived of his compensation, where he has faithfully performed his duties. Magaldo's Est., 13 Pa. Dist. 149, 30 Pa. Co. 97, 20 Montg. Co. 219.

[d] **Taking commission on settlement of claim.**—The conduct of an administrator settling a claim of an alleged illegitimate son of decedent at the instance of the heirs of full age to avoid scandal, who secretly took a twenty-five per cent commission on the amount paid from claimant, and charged the heirs for the full amount, while not commendable, was not such misconduct as to justify a refusal of any compensation for his services as administrator. In re Wilson, 86 Nebr. 175, 125 NW 158.

[e] **Investments.**—(1) An administrator is entitled to no commissions when he has neglected to invest funds remaining in his hands, or has converted them to his own use. In all cases such neglect to invest funds is treated as a breach of trust, and commisions are disallowed. McKnight v. Walsh, 24 N. J. Eq. 498 [aff 23 N. J. Eq. 136]; Frey v. Demarest, 17 N. J. Eq. 71. But see Edmonds v. Crenshaw, 5 S. C. Eq. 224 (executors allowed commissions notwithstanding gross failure to discharge duties imposed by will, where they were charged in their account with the amount to which the estate would have amounted if such duties had been properly performed). (2) But it is no ground for denying an administrator compensation for his general services that he has made investments which were not authorized by statute, where they have resulted in no loss to the estate. Sanderson v. Sanderson, 20 Fla. 292.

[f] **Commissions refused when property of estate purchased by representative.**—Darcus v. Crump, 6 B. Mon. (Ky.) 363; Drysdale's App., 14 Pa. 531 (fact that purchase made for himself concealed from heirs). Contra Vance v. Gary, 14 S. C. Eq. 2.

[g] **Facts not showing mismanagement or negligence warranting refusal of compensation.**—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

34. Bachman v. Wilkins, 194 Ill. A. 232; Sievewright v. Leys, 1 Ont. 375; Kennedy v. Pingle, 27 Grant Ch. (U. C.) 305.

35. Matter of Baker, 72 App. Div. 211, 76 NYS 61 [mod 27 Misc. 126, 57 NYS 398, aff 172 N. Y. 617 mem, 64 NE 1118 mem]; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287].

36. Merkel's Est., 131 Pa. 584, 18 A 931 [dist In re Clauser, 84 Pa. 51; Stehman's App., 5 Pa. 413]; Orne's Est., 7 Pa. Dist. 337 [aff 192 Pa. 626, 44 A 287]; Miller's Est., 16 WklyNC (Pa.) 115.

37. State v. Taylor, 112 Mo. A. 585, 87 SW 7; Arnold v. Blackwell, 17 N. C. 1; Davis v. Eastman, 68 Vt. 225, 35 A 73; McClenaghan v. Perkins, 5 Ont. L. 129, 1 OntWR 191, 752, 23 CanLTOccNotes 84.

38. U. S.—Walker v. Beal, 9 Wall. 743, 19 L. ed. 814.

Ala.—Alexander v. Bates, 127 Ala. 328, 28 S 415; Lyon v. Foscue, 60 Ala. 468; Smith v. Kennard, 38 Ala. 695; Pearson v. Darrington, 32 Ala. 227; Gould v. Hayes, 19 Ala. 438, 25 Ala. 426; Hall v. Wilson, 14 Ala. 295; Donelson v. Posey, 13 Ala. 752; Powell v. Powell, 10 Ala. 900.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

La.—Touzanne's Succ., 36 La. Ann. 420; Lee's Succ., 4 La. Ann. 578.

Mass.—Blake v. Pegram, 109 Mass. 541.

N. J.—Matter of Morris, 65 N. J. Eq. 699, 56 A 161; Brewster v. Demarest, 48 N. J. Eq. 559, 23 A 271; Frost v. Denman, 41 N. J. Eq. 47, 2 A 926; Moore v. Zabriskie, 18 N. J. 51.

N. Y.—Matter of Brintnall, 40 Misc. 67, 81 NYS 250, 3 Mills Surr. 449; Ward v. Ford, 4 Redf. Surr. 34.

N. C.—Grant v. Reese, 94 N. C. 720.

Pa.—Fross' App., 105 Pa. 258; In re Clauser, 84 Pa. 51; Norris' App., 71 Pa. 106; Hermstead's App., 60 Pa. 423; McManus' Est., 3 Pa. Dist. 183, 14 Pa. Co. 379, 34 WklyNC 222; Unruh's Est., 13 Phila. 337.

S. C.—Brown v. McCall, 21 S. C. L. 335.

Vt.—Hapgood v. Jennison, 2 Vt. 294.

Ont.—Gould v. Burritt, 11 Grant Ch. 523.

[a] **Unauthorized investments.**—Compensation for the general services of an administrator will not be denied on the ground that he failed to comply with the law in regard to investments, where he settled in accordance with the law relating to unauthorized investments, so that no loss fell on the estate. Sanderson v. Sanderson, 20 Fla. 292.

39. Matter of McCormick, 46 Misc. 386, 94 NYS 1071, 16 NYAnnCas 401, 4 Mills Surr. 507; Matter of Conklin, 20 NYS 59, 2 Conn. Surr. 176; Matter of Harnett, 15 NYSt 725; In re Locher, 219 Pa. 46, 67 A 954.

40. Hawaii.—Matter of Alina, 13 Hawaii 388.

La.—Miller v. Gallia, 134 La. 769, 64 S 708.

Mass.—Jennison v. Hapgood, 10 Pick. 77.

N. J.—Matter of Morris, 65 N. J. Eq. 699, 56 A 161.

Oh.—Campbell v. McCormick, 1 Oh. Cir. Ct. 504, 1 Oh. Cir. Dec. 281.

Pa.—Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656; Melville's Est., 25 Pa. Dist. 5.

S. C.—Epperson v. Jackson, 83 S. C. 157, 65 SE 217.

Tex.—Chapman v. Brite, 4 Tex. Civ. A. 506, 23 SW 514.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101; Foster v. Stone, 67 Vt. 336, 31 A 841; Hapgood v. Jennison, 2 Vt. 294.

Ont.—McClenaghan v. Perkins, 5 Ont. L. 129, 1 OntWR 191, 752, 23 CanLTOccNotes 84; Hoover v. Wilson, 24 Ont. A. 424; Archer v. Severn, 13 Ont. 316.

41. Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272.

42. Ill.—In re Wincox, 85 Ill. A. 613 [aff 186 Ill. 445, 57 NE 1073].

La.—Badillo v. Tio, 7 La. Ann. 487.

Mass.—McIntire v. Mower, 204 Mass. 233, 90 NE 567.

Mo.—Garesche v. Levering Inv. Co., 146 Mo. 436, 48 SW 653, 46 LRA 232.

N. J.—In re Walsh, 74 A 563; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643; Blauvelt v. Ackerman, 23 N. J. Eq. 495 [aff 25 N. J. Eq. 570]; Frey v. Demarest, 17 N. J. Eq. 71.

N. Y.—Matter of Wotton, 59 App. Div. 584, 69 NYS 753 [aff 167 N. Y. 629 mem, 60 NE 1123 mem]; Matter of Adams, 51 App. Div. 619, 64 NYS 591 [aff 166 N. Y. 623 mem, 59 NE 1118 mem]; Matter of Matthewson, 8 App. Div. 8, 40 NYS 140; Matter of Hobson, 61 Hun 504, 16 NYS 371 [aff 131 N. Y. 575 mem, 30 NE 63 mem]; Matter of Rainforth, 40 Misc. 609,

misapplication or commingling of funds of the estate, compensation has been allowed in cases when no fraud or bad faith on the part of the personal representative was shown,[43] or it appeared that on the whole the estate derived benefit from his services.[44] It has also been held proper to refuse commissions on funds which have been commingled but to allow compensation for services as to other property.[45]

[§ 2434] **d. Failure to File Inventory or Accounts.** Compensation is sometimes refused to personal representatives who fail to file their inventories or accounts as required by law,[46] but this is a matter resting largely in the discretion of the court,[47] and commissions are frequently allowed notwithstanding such a default where the representative has acted in good faith and no loss or injury to the estate has resulted.[48] A representative may be allowed a commission on money paid over under a decree in a suit against him for an accounting, although his failure to make a return deprived him of the right to commissions for managing the estate.[49]

[§ 2435] **e. Resignation or Removal.** While personal representatives who resign or are removed before the estate is fully administered are not entitled to full compensation,[50] they should be allowed a sum commensurate with the services which they

83 NYS 57, 3 Mills Surr. 559; Matter of Koch, 33 Misc. 153, 68 NYS 375, 2 Mills Surr. 46.

N. C.—Arnold v. Blackwell, 17 N. C. 1.

Pa.—In re Groff, 215 Pa. 586, 64 A 783; Milligan's App., 97 Pa. 525; In re Clauser, 84 Pa. 51; Geiger's App., 1 Mon. 547, 16 A 851; Boud's App., 2 Pennyp. 241; Schmeyer's App., 3 Walk. 310; Cope's Est., 27 Pa. Co. 366, 4 LackJur 45; Williamson's Est., 2 Pa. Co. 221, 18 WklyNC 138; Waylan's Est., 1 Pa. Co. 366, 17 WklyNC 375; Drake's Est., 2 Kulp 256; Ziegler's Est., 4 Montg. Co. 17.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Vt.—Davis v. Eastman, 68 Vt. 225, 35 A 73.

"There is nothing better settled, nor more universally held, than that a trustee who has used the fund for his own profit cannot have pay for caring for it." Walworth v. Bartholomew, 76 Vt. 1, 13, 56 A 101.

[a] **Fraudulent retention or concealment of assets a ground for refusing compensation.**—Badillo v. Tio, 7 La. Ann. 487; Arnold v. Blackwell, 17 N. C. 1; Davis v. Eastman, 68 Vt. 225, 37 A 73.

[b] **An executor who has lost trust funds in speculation** will be denied commissions although he had theretofore been faithful in the performance of his duties. Richardson's Est., 12 WklyNC (Pa.) 386.

[c] **Use of funds of estate to speculate in claims against estate.**—Matter of Rainforth, 40 Misc. 609, 83 NYS 57, 3 Mills Surr. 559.

43. Ark.—Tiner v. Christian, 27 Ark. 306.

Miss.—Troup v. Rice, 55 Miss. 278.

N. Y.—Matter of Schaefer, 34 Misc. 34, 69 NYS 489, 2 Mills Surr. 136 [mod on other grounds 65 App. Div. 378, 73 NYS 57 (aff 171 N. Y. 686 mem, 64 NE 1125 mem)].

Pa.—Heft's App., 5 Pa. Cas. 573, 9 A 87; Bracken's Est., 15 Pa. Dist. 71, 32 Pa. Co. 215; Everett's Est., 19 Pa. Dist. 477, 37 Pa. Co. 434; Bennet's Est., 21 LancLRev 134; Conway's Est., 18 LancLRev 129; Hoffman's Est., 15 YorkLegRec 114.

Wash.—In re Johnston, 181 P 209.

[a] **Compensation has been allowed:** (1) Where the commingling was caused merely by an error of bookkeeping. Williamson's Est., 12 Phila. (Pa.) 64, 7 WklyNC 82. (2) Where the representative was not guilty of gross neglect or fraud. Souerin's Est., 32 LegInt (Pa.) 40.

44. N. C.—Hannah v. Hyatt, 170 N. C. 634, 640, 87 SE 517 [cit Cyc].

Pa.—Shinn's Est., 166 Pa. 121, 30 A 1026, 1030, 45 AmSR 656; Williamson's Est., 2 Pa. Co. 221, 18 WklyNC 138.

Vt.—Foster v. Stone, 67 Vt. 336, 31 A 841.

Wash.—In re Johnston, 181 P 209.

Ont.—In re Honsberger, 10 Ont. 521.

[a] **Where funds were commingled for the benefit of the estate** compensation has been allowed. Williamson's Est., 2 Pa. Co. 221, 18 WklyNC 138.

45. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

46. U. S.—Prince v. Towns, 33 Fed. 161.

Ala.—May v. Carlisle, 68 Ala. 135.

Fla.—Sanderson v. Sanderson, 20 Fla. 292; Eppinger v. Canepa, 20 Fla. 262; Moore v. Felkel, 7 Fla. 44.

Ga.—Awtrey v. Campbell, 118 Ga. 464, 45 SE 301; Davidson v. Story, 106 Ga. 799, 32 SE 867; Doster v. Arnold, 60 Ga. 316; Kenan v. Hall, 8 Ga. 417; Fall v. Simmons, 6 Ga. 265.

Ky.—Foster v. Foster, 71 SW 524, 24 KyL 1396; Hamilton v. Hamilton, 6 KyL 95.

Mass.—Brooks v. Jackson, 125 Mass. 307.

N. Y.—Matter of Matthewson, 8 App. Div. 8, 40 NYS 140; Eager v. Roberts, 2 Redf. Surr. 247.

N. C.—Grant v. Reese, 94 N. C. 720; Finch v. Ragland, 17 N. C. 137.

Oh.—Putnam v. Loeb, 2 Oh. Cir. Ct. 110, 1 Oh. Cir. Dec. 391.

Or.—In re Roach, 50 Or. 179, 92 P 118.

Pa.—Potts' App., 3 Walk. 135; Auer's Est., 14 Pa. Dist. 273; Palmer's Est., 2 Del. Co. 180; Barrett's Est., 14 PittsbLegJNS 53.

R. I.—West v. Providence Municipal Ct., 25 R. I. 84, 54 A 926.

S. C.—Sherwood v. McLaurin, 103 S. C. 370, 88 SE 363; Epperson v. Jackson, 83 S. C. 157, 65 SE 217; Roberts v. Johns, 24 S. C. 580; Brooks v. Brooks, 12 S. C. 422; Brown v. McCall, 21 S. C. L. 335; Vance v. Gary, 14 S. C. Eq. 2; Frazier v. Vaux, 10 S. C. Eq. 203; Corbin v. Jones, 9 S. C. Eq. 52; Wallace v. Ellerbe, 9 S. C. Eq. 49; Gee v. Hicks, 9 S. C. Eq. 5; Corbin v. Howell, 8 S. C. Eq. 183; Wright v. Wright, 7 S. C. Eq. 185; Black v. Blakely, 7 S. C. Eq. 1; Edmonds v. Crenshaw, 5 S. C. Eq. 224; Benson v. Bruce, 4 S. C. Eq. 464; Jenkins v. Fickling, 4 S. C. Eq. 369; Ramsay v. Ellis, 3 S. C. Eq. 78.

Tenn.—Horton v. Cope, 6 Lea 155; Bland v. Gollaher, (Ch. A.) 48 SW 320.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Va.—Crismond v. Jones, 117 Va. 34, 83 SE 1045; Frazier v. Frazier, 77 Va. 775; Moses v. Hart, 25 Gratt. (66 Va.) 795; Nelson v. Page, 7 Gratt. (48 Va.) 160; Morris v. Morris, 4 Gratt. (4 Va.) 293; Boyd v. Boyd, 3 Gratt. (44 Va.) 113; Turner v. Turner, 1 Gratt. (42 Va.) 11; Wood v. Garnett, 6 Leigh (33 Va.) 271.

W. Va.—Fredlock v. Fredlock, 70 W. Va. 607, 74 SE 865; Wolfe v. Morgan, 61 W. Va. 287, 56 SE 504; Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589; Hays v. Freshwater, 47 W. Va. 217, 34 SE 831; Estill v. McClintic, 11 W. Va. 399.

[a] **Forfeiture for failure to file account when ordered by the court.**—May v. Carlisle, 68 Ala. 135; Putnam v. Loeb, 2 Oh. Cir. Ct. 110, 1 Oh. Cir. Dec. 391; Cairns v. Hedges, 2 Oh. Cir. Ct. 103, 1 Oh. Cir. Dec. 387; Loew's Est., 6 WklyNC (Pa.) 333; West v. Providence Municipal Ct., 25 R. I. 84, 54 A 926 (satisfactory reasons for delay not given).

[b] **Extra compensation denied.**—Where an executor did not apply to the county court for advice in the management of the estate, and for more than eight years made no report of his dealings, although required by statute to account semi-annually, the court properly denied him any extra compensation. In re Roach, 50 Or. 179, 92 P 118.

[c] **Failure to keep regular accounts.**—The rule that an administrator who omits to keep regular accounts shall not be allowed commissions is not universal, although very general. Finch v. Ragland, 17 N. C. 137.

47. Moorman v. Crockett, 90 Va. 185, 17 SE 875; Travelyan v. Lofft, 83 Va. 141, 1 SE 901; Brent v. Clevinger, 78 Va. 12.

48. Ala.—Gould v. Hayes, 19 Ala. 438; Craig v. McGehee, 16 Ala. 41.

Ga.—Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

Miss.—Spratt v. Baldwin, 33 Miss. 581.

N. J.—Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569; In re Barcalow, 29 N. J. Eq. 282 [rev on other grounds 36 N. J. Eq. 611].

N. C.—Perkins v. Caldwell, 79 N. C. 441.

Pa.—Williamson's Est., 2 Pa. Co. 221, 18 WklyNC 138; Fox's Est., 5 Kulp 218; Wert's Est., 7 LackLegN 222, 15 YorkLegRec 67; Nelson's Est., 12 WklyNC 440.

Tenn.—Guild v. Young, (Ch. A.) 62 SW 404.

Vt.—In re Lane, 79 Vt. 323, 65 A 102.

Va.—Crismond v. Jones, 117 Va. 34, 83 SE 1045.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Ont.—Hoover v. Wilson, 24 Ont. A. 424.

[a] **Where the filing of a bill in chancery prevented** an accounting the representative will not be deprived of compensation. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

[b] **Keeping the accounts loosely and inaccurately** will not justify withholding compensation entirely, where the executor, who was not a man of education or acquainted with accounts, acted honestly. Hoover v. Wilson, 24 Ont. A 424.

[c] **Circumstances warranting allowance must be shown.**—Although a court of equity may have discretion to allow a commission to an administrator in a settlement when he has failed to make it or to make a statement of the money in his hands or lay his accounts before a commissioner within the time prescribed by statute, it is error to allow commissions in the absence of any fact calling upon the court to exercise of such discretion. Taylor v. Taylor, 66 W. Va. 228, 68 SE 690, 19 AnnCas 414.

49. Epperson v. Jackson, 83 S. C. 157, 65 SE 217 [foll Blackmon v. Blackmon, (S. C.) 101 SE 827].

50. In re Piercy, 168 Cal. 750, 145 P 88; Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Thurston v. Ludwig, 25 Oh. Cir. Ct. N. S. 298, 4 Oh. A. 486.

have performed, if beneficial to the estate,[51] and full commissions have been allowed where the estate was fully administered before the revocation of letters.[52] Where, however, a representative was allowed to qualify without giving bond and was afterward removed for failure to give the bond, he was held entitled to no commissions.[53]

[§ 2436] **12. Jurisdiction, Proceedings, and Review—a. Jurisdiction—(1) In General.** As a general rule questions as to the allowance of compensation are within the jurisdiction of probate courts, or courts having probate functions.[54] It has been held, however, that an appellate court may allow compensation in a case where none was claimed or allowed below,[55] or fix the amount of compensation where the question of compensation was not before the court below for decision on the merits, and all the parties and evidence are before the appellate court.[56] It has also been held that where a court of equity is in possession of a suit for settling the administration of an estate, it may fix the compensation,[57] and one court has gone so far as to say that an allowance of commissions to an administrator may be made at any time by any court before which his accounts are drawn in question.[58]

Executing trusts as to realty. Allowing compensation to an executor for executing limited and contingent trusts as to realty is not a matter within the jurisdiction of the probate court.[59]

[§ 2437] **(2) Apportionment of Commissions.** It is usually considered that probate courts have jurisdiction to apportion compensation among corepresentatives,[60] although it has been held that the court has no power to determine the relative value of services as between the representatives and divide the commissions accordingly,[61] but should make a single allowance for the entire administration leaving the representatives to make a division among themselves.[62] Probate courts have no jurisdiction, after allowing compensation to corepresentatives in a gross sum, to compel one who has possessed himself of the whole amount to pay the others their shares.[63] According to some of the decisions, the remedy of one personal representative against another for his share of compensation is by action in the common-law courts;[64] but there also is authority to the effect that equity has jurisdiction in such a case.[65]

[§ 2438] **b. Time for Allowance.** Sometimes an allowance of compensation is not made until final settlement of the representative's accounts, at which time his total compensation is fixed;[66] but it is quite usual to make, at the time when intermediate accounts are settled, an allowance for such part of the compensation, or such commissions, as may then fairly be regarded as earned,[67] although full compensation for the entire administration cannot

51. Cal.—In re Strong, 119 Cal. 663, 51 P 1078; In re Barton, 55 Cal. 87; Ord v. Little, 3 Cal. 287.
Ky.—Wood v. Nelson, 10 B. Mon. 229; Frazier v. Cavanaugh, 4 KyL 711.
La.—Morere's Succ., 117 La. 543, 42 S 132; Brown's Succ., 27 La. Ann. 328 [dist Lee's Succ., 4 La. Ann. 578]; Vogel's Succ., 20 La. Ann. 81; Poindexter's Succ., 19 La. Ann. 22; Rice's Succ., 14 La. Ann. 317; Day's Succ., 3 La. Ann. 624.
Mass.—Brooks v. Jackson, 125 Mass. 307.
Miss.—Sprott v. Baldwin, 34 Miss. 327; Spratt v. Baldwin, 33 Miss. 581; Cherry v. Jarratt, 25 Miss. 221.
N. Y.—Matter of Hurst, 111 App. Div. 460, 97 NYS 697; Matter of Douglas, 60 App. Div. 64, 69 NYS 687.
Wis.—Brown v. McGee, 117 Wis. 389, 94 NW 363.
See also supra § 2428.
[a] **Discretion of court.**—On the resignation of an executor before the administration has been completed he will not be allowed full commissions. The amount to be awarded is within the discretion of the surrogate. Matter of Douglas, 60 App. Div. 64, 69 NYS 687.
[b] **No commission for turning over assets.** — An administrator whose letters have been revoked is entitled to half commissions only for receiving the fund. No allowance will be made for turning over the assets to his successor. Lyendecker v. Eisemann, 3 Dem. Surr. (N. Y.) 72.
[c] **When no compensation allowed.**—Where personal representatives resigned for their own convenience after having rendered very little service to the estate, they were not entitled to any compensation whatever. Matter of Hayden, 5 NYS 845, 1 Conn. Surr. 454.

52. Spratt v. Baldwin, 33 Miss. 581.

53. McDonogh's Succ., 7 La. Ann. 472.

54. U. S.—West v. Smith, 8 How. 402, 12 L. ed. 1130; Smith v. Worthington, 53 Fed. 977, 4 CCA 130; Nicholls v. Hodge, 18 F. Cas. No. 10,231, 2 Cranch C. C. 582; Atkinson v. Robbins, 2 F. Cas. No. 617, 5 Cranch C. C. 312.
Ark.—Ringgold v. Stone, 20 Ark. 526.
D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].
Ill.—In re Colton, 187 Ill. A. 558.
Ind.—Cox v. Baker, 113 Ind. 62, 14 NE 740.
Md.—In re Watts, 108 Md. 696, 71 A 316; Hardt v. Birely, 72 Md. 134, 19 A 606; Gwynn v. Dorsey, 4 Gill & J. 453; Scott v. Dorsey, 1 Harr. & J. 227.
Mich.—Nowland v. Rice, 138 Mich. 146, 101 NW 214.
Miss.—Cherry v. Jarratt, 25 Miss. 221.
[a] **It is the duty of the court** to fix the commissions, not only where the executor fails to claim them, but in all cases, except where compensation has been bequeathed to the executor. In re Watts, 108 Md. 696, 71 A 316.

55. Williams v. Cubage, 36 Ark. 307.

56. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

57. Hosher v. Fitzpatrick, 146 Ga. 525, 91 SE 780; Adair v. St. Amand, 136 Ga. 1, 70 SE 578; Walton v. Avery, 22 N. C. 405; Newby v. Skinner, 21 N. C. 488, 31 AmD 397; Cameron v. Bethune, 15 Grant Ch. (U. C.) 486; McLennan v. Heward, 9 Grant Ch. (U. C.) 279.

58. Ladd v. Stephens, 147 Mo. 319, 48 SW 915.

59. In re Rickenbaugh, 42 Mo. A. 328.

60. Cal.—Hope v. Jones, 24 Cal. 89.
Minn.—Slingerland v. Norton, 136 Minn. 204, 161 NW 497.
N. J.—Mount v. Slack, 39 N. J. Eq. 230.
N. Y.—Matter of Dunkel, 5 Dem. Surr. 188.
Oh.—Meyers v. Hopkins, 28 Oh. Cir. Ct. 208.
Pa.—Markle's Est., 1 Pa. Dist. 54, 11 Pa. Co. 13, 29 WklyNC 479; John's Est., 2 Chest. Co. 281; Davis' Est., 1 Phila. 360. But see infra note 62.
N. B.—Matter of Manzer, 42 N. B. 251.

61. In re Seitz, 6 Mo. A. 250. But compare Smart v. Fisher, 7 Mo. 580 (contrary view intimated).

62. Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400]; Aston's Est., 5 Whart. (Pa.) 228.

63. Mount v. Slack, 39 N. J. Eq. 230; Wickersham's App., 64 Pa. 67.

64. Bush v. McComb, 7 Del. 546; Slingerland v. Norton, 136 Minn. 204, 161 NW 497; Wickersham's App., 64 Pa. 67; John's Est., 2 Chest. Co. (Pa.) 281.
[a] **Order allowing each representative a specified sum.**—An order of the probate court, made on the application of two coexecutors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate, will not support an action at law in favor of one of them or his assignee against the other. Carver v. Hallett, 26 Ala. 722.

65. Speirs v. Wisner, 88 Mich. 614, 50 NW 654, 26 AmSR 306; Huff v. Thrash, 75 Va. 546.

66. Cal.—In re Hite, 155 Cal. 448, 101 P 448; In re Carter, 132 Cal. 113, 64 P 123, 484; Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479; Rose's Est., 80 Cal. 166, 22 P 86; Dunne's Est., 58 Cal. 543; In re Miner, 46 Cal. 564; Ord v. Little, 3 Cal. 287.
S. C.—Taveau v. Ball, 6 S. C. Eq. 456.
Utah.—In re Owen, 32 Utah 469, 91 P 283.
Wash.—In re Hagerty, 97 Wash. 491, 166 P 1139; In re Doane, 64 Wash. 303, 116 P 847.
Man.—Re Fortune, 25 Man. 239, 21 DomLR 646, 30 WestLR 735.
[a] **The compensation of successive administrators** cannot be apportioned until the closing of the estate. In re Owen, 32 Utah 469, 91 P 283.
[b] **Allowance before final settlement to removed executor.**—Under a statute providing that an executor may at any time after one year from the granting of administration apply for an allowance upon his commissions, such an allowance may be made before the final settlement of the estate to an executor who has been removed by the court. In re Jones, 166 Cal. 147, 135 P 293. To like effect In re Piercy, 168 Cal. 750, 145 P 88.

67. Ind.—Collins v. Tilton, 58 Ind. 374.

be awarded until final settlement.[68] Even on the final accounting the representative will not be allowed his commissions in full, if the final distribution of the estate is not to be made until a considerable time after such settlement; in that event the court will reserve, until the distribution is made, so much of the commissions as are allowable therefor.[69] The subject of commissions is closed by the settlement of the administration account, so that personal representatives cannot claim commissions on charges there made, or on interest charged at the settlement of the distribution account on the balance of the administration account.[70] A probate court cannot, several months after the final settlement of an estate, without opening such settlement after due notice to the parties interested, make an allowance in favor of the personal representative for his services in administering the estate.[71] The commissions are to be deducted as of the date of the settlement of an account and not as of the date of the filing thereof.[72]

[§ 2439] **c. Proceedings for Allowance.** No compensation will be awarded until an account is presented for settlement and an allowance asked,[73] and in order to warrant an extra allowance a claim therefor must be made.[74] According to some authorities, a personal representative should not claim a gross sum for his services, but should specify the items for which he claims compensation,[75] but it has also been held proper for the representative to claim a gross sum,[76] based upon a percentage of the assets,[77] or upon the time devoted to the business of administration.[78] It is for the personal representative to show compliance with a statutory provision upon which the allowance of compensation depends;[79] and when extra compensation is asked it is for him to show that he has rendered unusual services meriting such compensation.[80]

Notice to persons beneficially interested in the estate is sometimes regarded as a prerequisite to the allowance of compensation to the representative.[81]

In an action by legatees to recover their share of an indebtedness from the executor to the estate of the testator, the right of the executor to commissions on such indebtedness may, it has been held, be determined.[82]

[§ 2440] **d. Objections and Exceptions.** Per-

La.—Meyer's Succ., 44 La. Ann. 871, 11 S 532; Sparrow's Succ., 40 La. Ann. 484, 4 S 513, 42 La. Ann. 500, 7 S 611; Frantum's Succ., 3 Rob. 283.

Md.—In re Stratton, 46 Md. 551.

Mich.—Webb v. Peck, 131 Mich. 579, 92 NW 104.

Miss.—Powell v. Burrus, 35 Miss. 605; Crowder v. Shackelford, 35 Miss. 321. But see Rucker v. Lambdin, 20 Miss. 230; Merrill v. Moore, 8 Miss. 271, 40 AmD 60 (both decided prior to the statute now in force).

Mont.—In re Ricker, 14 Mont. 153, 35 P 960, 29 LRA 622 [dist In re Dewar, 10 Mont. 426, 25 P 1026].

N. J.—Conover v. Ellis, 49 N. J. Eq. 549, 25 A 701.

N. Y.—In re Selleck, 111 N. Y. 284, 19 NE 66; In re Mason, 98 N. Y. 527; Oakeshott v. Smith, 104 App. Div. 384, 93 NYS 659, 16 NYAnnCas 371 [aff 185 N. Y. 583 mem, 78 NE 1108 mem]; Vanderheyden v. Vanderheyden, 2 Paige 287, 21 AmD 86; Hawley v. Singer, 3 Dem. Surr. 589; Freeman v. Freeman, 4 Redf. Surr. 211.

Pa.—Stewart's App., 110 Pa. 410, 6 A 321; In re Parker, 64 Pa. 307; Callaghan v. Hall, 1 Serg. & R. 241; Gelbach's Est., 24 Pa. Dist. 1020; Clayton's Est., 20 Pa. Dist. 407; Tasker's Est., 14 Pa. Dist. 435.

W. Va.—Van Winkle v. Blackford, 54 W. Va. 621, 46 SE 589.

Ont.—Hoover v. Wilson, 24 Ont. A. 424.

[a] **Reason for allowance.**—"The hardship and injustice of postponing such credits until final settlement is too apparent to require an argument to show it." Van Winkle v. Blackford, 54 W. Va. 621, 652, 46 SE 589.

[b] **The court may in its discretion defer** an adjudication as to commissions until a future settlement. In re McGannon, (Okl.) 150 P 1109.

[c] **When the estate consists of income producing property,** and the circumstances are such that its settlement properly covers a number of years, it is within the discretion of the court, even in making a final settlement where no previous accounts have been rendered, to credit the services of the administrator for each year at the end of the year. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

[d] **When not made part of partial account.**—If an administrator does not make commissions and counsel fees a part of his partial account, he cannot, upon the audit of such account, claim the same. They must go over for the final settlement. Shipe's App., 114 Pa. 205, 6 A 103.

[e] **Revision of intermediate allowances.**—(1) The claims of an administrator for compensation for his own services and expenditures are, of all the credits demanded by him, peculiarly appropriate for consideration and review upon the final report. He is an officer of the court itself, and these matters should be and are at all times subject to the court's revision, until the final report is approved and the order of discharge entered. In re Sawyer, 124 Iowa 485, 100 NW 484. (2) Where excessive commissions have been allowed on one class of property, such fact is properly taken into consideration in fixing the rate to be allowed on another class. Wirt's Est., 11 YorkLegRec (Pa.) 145.

68. Meyer's Succ., 44 La. Ann. 871, 11 S 532; Sparrow's Succ., 40 La. Ann. 484, 4 S 513, 42 La. Ann. 500, 7 S 611; Conover v. Ellis, 49 N. J. Eq. 549, 25 A 701.

69. Conover v. Ellis, 49 N. J. Eq. 549, 25 A 701; Pomeroy v. Mills, 35 N. J. Eq. 442 [rev on other grounds 37 N. J. Eq. 578]; Matter of Johnson, 57 App. Div. 494, 67 NYS 1004 [aff 170 N. Y. 139, 63 NE 63]; Thomas' Est., 1 Dauph. Co. (Pa.) 381.

70. In re Brinton, 10 Pa. 408.

71. Snider v. Graham, 14 Oh. Cir. Ct. 386, 8 Oh. Cir. Dec. 3.

72. Haskin v. Teller, 3 Redf. Surr. (N. Y.) 316.

73. Cal.—Parsons' Est., 65 Cal. 240, 3 P 817.

Ga.—Hosher v. Fitzpatrick, 146 Ga. 525, 91 SE 780.

Ind.—Collins v. Tilton, 58 Ind. 374.

Miss.—Effinger v. Richards, 35 Miss. 540.

N. Y.—Oakeshott v. Smith, 185 N. Y. 583, 78 NE 1108 [aff 104 App. Div. 384, 93 NYS 659]; Oakeshott v. Smith, 104 App. Div. 384, 93 NYS 659, 16 NYAnnCas 371 [aff 185 N. Y. 583 mem, 78 NE 1108 mem]; Matter of Hammer, 94 Misc. 36, 158 NYS 981; Matter of Eno, 92 Misc. 658, 157 NYS 491; Matter of Barker, 186 App. Div. 317, 174 NYS 230.

[a] **A personal representative must present his claim** for his services, in the form prescribed by the statute, to the court having jurisdiction of his decedent's estate; and upon such claim, so presented, and upon satisfactory evidence, the court may allow him just compensation. Collins v. Tilton, 58 Ind. 374.

[b] **Rule applies to temporary administrator.**—Matter of Eno, 98 Misc. 658, 157 NYS 491.

74. May v. Green, 75 Ala. 162; Firebaugh v. Burbank, 121 Cal. 186, 53 P 560; In re Delaney, 110 Cal. 563, 42 P 981; Moore's Est., 96 Cal. 522, 31 P 584; Matter of Wolfe, 7 OhS&CP 220, 4 OhNP 336; In re Partridge, 31 Or. 297, 51 P 82; Steel v. Holladay, 20 Or. 462, 26 P 562.

75. Wright v. Wilkerson, 41 Ala. 267; Chung Muy Co. v. Lim Quioc, 23 Philippine 518.

[a] **A claim for extra services** must be itemized fully, so that the court may understand the exact nature of the claim and the services rendered. In re Carmody, 163 Iowa 463, 145 NW 16; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Matter of Wolfe, 7 OhS&CP 220, 4 OhNP 33[illegible]

76. Main's App., 73 Conn. 638, [illegible] A 965; Powell v. Foster, 71 Vt. 16[illegible] 44 A 96; Evarts v. Nason, 11 Vt. 122.

[a] **A claim for an extra allowance** (1) in the form of a gross sum is not fatally defective. Sloan v. Duffy, 117 Wis. 480, 94 NW 342; Ford v. Ford, 88 Wis. 122, 59 NW 464. (2) But it would be better practice to itemize such a claim. Ford v. Ford, 88 Wis. 122, 59 NW 464.

77. Main's App., 73 Conn. 638, 48 A 965.

78. Powell v. Foster, 71 Vt. 160, 44 A 96.

79. Knight v. Watts, 26 W. Va. 175.

80. Cal.—In re Davis, 8 Cal. A. 355, 97 P 86.

Iowa.—In re Carmody, 163 Iowa 463, 145 NW 16; Fitzgerald v. Paisley, 110 Iowa 98, 81 NW 181.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; McCracken v. McCracken, 6 T. B. Mon. 342.

La.—Young v. Chaney, 3 La. 462.

Oh.—Ballard v. Mack, 27 Oh. Cir. Ct. 839.

Or.—Steel v. Holladay, 20 Or. 462, 26 P 562.

Pa.—Shaw v. Betts, 2 Pa. Cas. 452, 4 A 731; Watson's Est., 6 LuzLeg Reg 13.

Philippine.—Chung Muy Co. v. Lim Quioc, 23 Philippine 518.

[a] **In order to warrant an extra allowance it must appear** (1) that the estate was large, that the settlement was very difficult, and that a high degree of capacity was required. Chung Muy Co. v. Lim Quioc, 23 Philippine 518. (2) The necessity for the services and the insufficiency of the statutory compensation must be shown. In re Gloyd, 93 Iowa 303, 61 NW 975.

81. Ballard v. Mack, 27 Oh. Cir. Ct. 839; In re Sullivan, 36 Wash. 217, 78 P 945.

82. Sloan v. Sloan, 117 Md. 141, 83 A 38.

sons interested in an award have a right within a reasonable time after the account of the personal representative has been passed to appear in the probate court and make their objections to the allowance of compensation,[83] and indeed it has been held that an auditing judge may properly call the attention of interested persons to unauthorized claims for compensation.[84] An allowance to an administrator on an annual settlement of credits for commissions is not a final adjudication as to the right to such credits, and such an allowance is carried over and can be excepted to on final settlement.[85] A person who has consented to the allowance made to a personal representative cannot thereafter object that the compensation was excessive.[86] An attaching creditor of a legatee cannot complain of the allowance of extra compensation, unless it appears that he is entitled to have the fund subjected to the payment of his claim.[87] Persons beneficially interested in the estate cannot object to an award to one of two executors of the entire compensation allowed.[88] Where an order of reference to take and state the account of an administrator does not embrace the question of the administrator's compensation, an exception to the allowance of compensation in the master's report is well taken.[89] Objections to the allowance of any compensation, based upon alleged mismanagement of the estate, should state specifically the acts of mismanagement which are relied on.[90] Under a prayer for general relief in an opposition to a personal representative's account and upon proof received without objection, the court may reject a claim for compensation, although the opposition itself does not present such an issue.[91]

[§ 2441] **e. Hearing and Determination.** Where persons beneficially interested in the estate oppose the representative's claim for compensation, it is the duty of the court to hear evidence on behalf of the opponents designed to defeat or reduce such allowance.[92] In passing upon the right of an administrator to extra compensation the court should possess itself of all the information available as to the manner of his administration.[93] The court may, notwithstanding the testimony of the representative, find that he has performed no services entitling him to more than statutory fees,[94] and it has been held that a representative should not be allowed a credit for extraordinary services where the only evidence to support such credit is his own testimony.[95] In determining the compensation of a special administrator, appointed to defend a will and protect contingent interests thereunder, the court should accord great weight to the opinions of eminent members of the bar.[96] Where executors claimed credit for commissions on their account, but withdrew their claim at the audit, reserving their rights for a future accounting, whereupon the auditing judge added the amounts of the commissions to the balance, there was no adjudication upon the question of commissions.[97]

Court or jury. Whether or not an executor or administrator is entitled to an extra allowance is a question for the court and not for the jury,[98] although it has been held that, where under the evidence it cannot be declared as matter of law that the executor was or was not entitled to extra compensation, it is proper to submit to the jury an exception of fact to the auditor's allowance of extra compensation, after such exception has been approved by the judge.[99] Even though the statute permits an action by administrators for extra compensation, and makes the verdict of the jury and the judgment therein conclusive, where the parties waive trial by jury and submit the question to the court it may pass upon the question of extra compensation.[1]

[§ 2442] **f. Order or Decree of Allowance.** It is proper to allow a lump sum as the compensation of an executor or administrator,[2] without particularly specifying the item for which the allowance is made.[3] Where a percentage allowance to an administrator is a reasonable compensation for the services performed and shown to the court, the form of the allowance does not render it improper, although there is no law authorizing an administrator to charge a percentage.[4] An order directing that there be paid to the executor for his services as such a certain sum which the court finds to be a reasonable and proper executor's fee for his services to the estate is not personal against the heirs of the deceased, but is in due form.[5] A decree allowing compensation in excess of that to which the representatives are entitled is binding on the beneficiaries who expressly consent to the account and acquiesce in the decree.[6]

Construction. Where one was named executor and trustee under a will and the estate of testator came to him under the will and his duties as executor were inconsiderable as compared with his duties as trustee, in determining the amount of his compensation, the principal fund should be deemed as having passed to him at once as trustee and an allowance on the corpus should be held to have been an allowance to him as trustee, although the

83. Hardt v. Birely, 72 Md. 134, 19 A 606; McMahon v. Ambach, 79 Oh. St. 103, 86 NE 512.

84. Lennig's Est., 53 Pa. Super. 596; Fisher's Est., 25 Pa. Dist. 362.

85. Peper v. Bell, (Mo. A.) 218 SW 438.

86. Rambo's Est., 15 Montg. Co. (Pa.) 25; Stump's Est., 2 Woodw. (Pa.) 162.

87. Morris' App., 42 LegInt (Pa.) 395.

88. Claycomb v. Claycomb, 10 Gratt. (51 Va.) 589.

89. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

90. Gallia's Succ., 130 La. 867, 58 S 691.

91. Hughes' Succ., 14 La. Ann. 863.

92. Collins v. Tilton, 58 Ind. 374; Friedenwald v. Burke, 122 Md. 156, 89 A 424.

[a] **An allowance by a former judge** of the court to an executor by the mere approval of a partial report wherein an allowance for services has been claimed as a credit is no reason why a subsequent judge of the court should refuse to hear evidence regarding the same. Collins v. Tilton, 58 Ind. 374.

93. In re Fischer, 158 Mich. 1, 122 NW 257.

94. In re O'Leary, 193 Mich. 282, 159 NW 497.

95. Evans v. McVey, 172 Ky. 1, 188 SW 1075.

96. Friedenwald v. Burke, 123 Md. 511, 91 A 461.

97. Bradley's Est., 5 Pa. Co. 572.

98. Baldwin v. Carleton, 15 La. 394; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

99. Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

1. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

2. Little v. Little, 161 Mass. 188, 36 NE 795; In re Nuckols, 103 Mich. 297, 61 NW 506.

3. In re Nuckols, 103 Mich. 297, 61 NW 506; Loomis v. Armstrong, 63 Mich. 355, 29 NW 867.

4. Main's App., 73 Conn. 638, 48 A 965.

5. Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400].

6. In re Martin, 196 N. Y. 415, 90 NE 46 [mod 118 NYS 1123].

[a] **This rule has been applied** to a decree granting to each of the executors and trustees full commission in each capacity, although the executors and trustees were entitled only to one full commission as executors on the corpus of the estate collected and paid. In re Martin, 196 N. Y. 415, 90 NE 46 [mod 118 NYS 1123].

accounts were filed as executor.[7]

Effect. The mere fact that one auditing judge may have mistakenly allowed an executor commissions in one account will not prevent another auditing judge, on the adjudication of a later account, involving a different fund, from refusing commissions to the executor.[8]

Conclusiveness. Where the statute provides that errors in settlements in the probate court may be corrected at any time by equitable proceedings, an order fixing compensation and attorney's fees obtained by an administrator on ex parte application only three days before filing his final account and after having given notice of his intention to do so is not conclusive on final accounting.[9] The ex parte allowance by the clerk of commissions to an administrator is not conclusive.[10]

[§ 2443] **g. Review.** While the right to appeal from orders or decrees of probate courts as to compensation depends largely upon constitutional or statutory provisions,[11] the action of the court in allowing or refusing compensation is usually subject to appeal,[12] and may of course be corrected if erroneous,[13] although where there is sufficient evidence to sustain the finding as to the compensation of executors, the action of the court below will not be reversed in the absence of manifest error.[14] But only persons having an interest, which is injuriously affected by the order allowing compensation, can appeal therefrom,[15] and an objection as to the allowance of compensation cannot ordinarily be taken for the first time in an appellate court.[16] An appeal will usually lie from an order fixing the amount of compensation,[17] but when the amount of compensation is left to the discretion of the court[18] its award will not be interfered with, unless it appears that there has been a manifest abuse of such discretion.[19] A finding of the lower court as to the value of assets for the purpose of estimating commissions will not be disturbed when there is evidence to support such valuation.[20] The action of the court in the allowance of compensation will not be reviewed, where the facts on which it acted do not appear in the record;[21] and where the evidence as to an alleged agreement by the administrator to serve without compensation was oral and conflicting, the trial court's decision on the issue was accepted as conclusive.[22] Reversible error cannot be predicated on an adjudication merely that the representative's claim for commissions was premature, leaving the question as to the right to compensation open until a future settlement.[23] The decree of the lower court may be affirmed notwithstanding error in respect to allowing[24] or refusing to allow[25] com-

7. Matter of Hibbler, 78 N. J. Eq. 217, 78 A 188 [aff 79 N. J. Eq. 230 mem, 81 A 1133].

8. Lennig's Est., 53 Pa. Super. 596.

9. In re Sawyer, 124 Iowa 485, 100 NW 484.

10. Overman v. Lanier, 157 N. C. 544, 73 SE 192.

11. See statutory provisions; and Walkerly's Est., 94 Cal. 352, 29 P 719; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Andress v. Andress, 46 N. J. Eq. 528, 22 A 124; Pomeroy v. Mills, 37 N. J. Eq. 578; Anderson v. Berry, 15 N. J. Eq. 232. See also Appeal and Error §§ 406–411.

[a] **Order not appealable.**—An order denying a motion to vacate an order, denying a petition of an executor for allowance of compensation for extraordinary services and to restore the petition to the calendar, is not an appealable order, as it is not mentioned in the statute regulating the right to appeal in probate proceedings. Walkerly's Est., 94 Cal. 352, 29 P 719.

12. Cal.—In re Broome, 162 Cal. 258, 122 P 470.

Ill.—Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400].

Ky.—Nickell v. Nickell, 118 SW 966; Stanberry v. Robinson, 27 SW 973, 16 KyL 309.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Nebr.—In re Wilson, 83 Nebr. 252, 119 NW 522.

N. J.—Anderson v. Berry, 15 N. J. Eq. 232.

N. Y.—Matter of Gall, 107 App. Div. 310, 95 NYS 124.

N. C.—Overman v. Lanier, 157 N. C. 544, 73 SE 192; Shepard v. Parker, 35 N. C. 103; Ex p. Haughton, 14 N. C. 441.

Pa.—Bickley's Est., 13 Pa. Dist. 323.

S. C.—Burns v. Ford, 17 S. C. L. 507.

Va.—Trevelyan v. Lofft, 83 Va. 141, 1 SE 901.

Wash.—In re Doane, 64 Wash. 303, 116 P 847.

Ont.—In re Alexander, 31 Ont. 167 (by statute).

[a] **Action on failure to settle accounts.**—The discretion of the court to allow or refuse commissions to a personal representative who has failed to settle his accounts is reviewable on appeal. Trevelyan v. Lofft, 83 Va. 141, 1 SE 901; Brent v. Clevinger, 78 Va. 12.

13. See cases supra note 12.

[a] **Amount allowed may be reduced.**—Mumper v. Murphy, 212 Ill. A. 52; Nickell v. Nickell, (Ky.) 118 SW 966.

14. In re Moore, 211 Pa. 338, 60 A 987.

15. Hoffar v. Stonestreet, 6 Md. 303; Andress v. Andress, 46 N. J. Eq. 528, 22 A 124.

16. La.—Perret's Succ., 20 La. Ann. 86.

N. H.—Supreme Commandery U. O. G. C. v. Donaghey, 75 N. H. 197, 72 A 419.

Pa.—Friend's Est., 15 Pa. Dist. 12.

W. Va.—Estill v. McClintic, 11 W. Va. 399.

Wis.—Zentner v. Schinz, 90 Wis. 236, 63 NW 162.

17. In re Swan, 115 Me. 501, 99 A 449; Hawkins v. Cunningham, 67 Mo. 415; Pomeroy v. Mills, 37 N. J. Eq. 578; Anderson v. Berry, 15 N. J. Eq. 232; Green v. Barbee, 84 N. C. 69; Shepard v. Parker, 35 N. C. 103.

[a] **Where the amount is not within the discretion** of the court, an appeal lies. Hawkins v. Cunningham, 67 Mo. 415.

[b] **Review not a matter of right.**—Wetherill's Est., 13 Phila. (Pa.) 273.

18. See supra § 2422.

19. Ala.—Noble v. Jackson, 132 Ala. 230, 31 S 450.

Cal.—In re Hedrick, 127 Cal. 184, 59 P 590.

D. C.—Sinnott v. Kenaday, 14 App. 1.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—Askew v. Hudgens, 99 Ill. 468.

Iowa.—Anderson v. Sabin, 132 Iowa 507, 109 NW 1080.

Ky.—Cabell v. Cabell, 1 Metc. 319; Wood v. Lee, 5 T. B. Mon. 50; Ramsay v. Ramsay, 4 T. B. Mon. 151; Quaintance v. Darnell, 14 KyL 238.

Md.—Beachley v. Bollinger, 119 Md. 151, 86 A 135; Dalrymple v. Gamble, 68 Md. 156, 11 A 718; Handy v. Collins, 60 Md. 229, 45 AmR 725; Wilson v. Wilson, 3 Gill & J. 20.

Mich.—In re McNamara, 166 Mich. 451, 122 NW 86; In re Fischer, 158 Mich. 1, 122 NW 257; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Mower's App., 48 Mich. 441, 12 NW 646.

Miss.—Powell v. Burrus, 85 Miss. 605; Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

Mont.—In re Ford, 29 Mont. 283, 74 P 735.

N. J.—Anderson v. Berry, 15 N. J. Eq. 232.

N. Y.—Riggs v. Cragg, 26 Hun 89 [rev on other grounds 89 N. Y. 479].

N. C.—Green v. Barbee, 84 N. C. 69; Whitted v. Webb, 22 N. C. 442; Walton v. Avery, 22 N. C. 405; Ex p. Haughton, 14 N. C. 441 [overr Potter v. Stone, 9 N. C. 30].

Oh.—Prentiss v. Woods, 20 Oh. Cir. Ct. N. S. 380.

Or.—In re McCullough, 31 Or. 86, 49 P 886.

Pa.—In re Brooks, 249 Pa. 66, 94 A 478; In re Donnelly, 246 Pa. 308, 92 A 306; Davis' App., 100 Pa. 201; Twaddell's App., 81 Pa. 221; Fisher's Est., 65 Pa. Super. 297; O'Brien's Est., 59 Pa. Super. 19; Middleton's Est., 25 Pa. Dist. 647; Laubach's Est., 9 Kulp 150; Scheidt's Est., 2 Woodw. 355.

N. B.—Matter of Manzer, 42 N. B. 251.

Ont.—Re Smith, 38 Ont. L. 67, 11 OntWN 103.

[a] **An allowance to a special administrator** will not be interfered with where no abusive discretion appears. In re Ford, 29 Mont. 283, 74 P 735.

[b] **Presumption that allowance properly made.**—(1) In the absence of anything to the contrary, it will be presumed that the compensation awarded was rightfully allowed. Anderson v. Sabin, 132 Iowa 507, 109 NW 1080; Patterson v. Bell, 25 Iowa 149; McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342. (2) But the allowance of a reasonable compensation and expenses to an administrator cannot be presumed in the absence of any showing in the record as to whether they were allowed or not. Dromgoole v. Smith, 78 Va. 665.

20. Glover v. Holliday, 109 Mo. 108, 18 SW 1133.

21. Ex p. Hodge, 6 Ind. A. 487, 33 NE 980; Friend's Est., 15 Pa. Dist. 12; Morris' App., 42 LegInt (Pa.) 395.

22. Drake v. Drake, (Ind. A.) 117 NE 871.

23. In re McGannon, (Okl.) 150 P 1109.

24. Webster v. Webster, 7 KyL 302.

25. Bates v. Vary, 40 Ala. 421.

pensation, where under the circumstances of the case the error is harmless. It has been held that on appeal in proceedings for final settlement of an administrator's accounts, where there were heirs of age and also minor heirs, an administrator could not be compelled to remit from his judgment for compensation a commission received from a claimant for effecting settlement of the claim, taken out of money furnished by the heirs of age, since, if a remittitur were ordered, the minor heirs who contributed nothing to the fund for satisfaction of the claim would receive money to which they were not entitled, at the expense of the adult heirs, and the remedy of the heirs contributing could be asserted only in an independent action.[26] Where, on appeal from an ex parte order of the orphans' court allowing compensation to a special administrator, and from its refusal to suspend the effect of such order, it was determined that parties objecting to the compensation as excessive were entitled to be heard thereon, the appeal from the refusal to suspend was dismissed, and the cause remanded, without affirming or reversing the order for compensation.[27]

[§ 2444] **h. Costs.**[28] The costs of a proceeding pertaining to the allowance of commissions and attorneys' fees to an administrator to collect may be ordered paid from the estate.[29]

[§ 2445] **G. Stating and Settling Accounts—1. Form and Requisites—a. In General.** No special form is generally required for the account of a personal representative,[30] but such an account should present briefly a clear and definite statement of the conduct of the administration,[31] and it has been held to be sufficient if the account, together with the inventory, shows the condition of the estate.[32] The account should ordinarily be stated in the form of debts and credits,[33] and the receipts and disbursements should be itemized,[34] although items of ex-

26. In re Wilson, 86 Nebr. 175, 125 NW 158.

27. Friedenwald v. Burke, 122 Md. 156, 89 A 424.

28. Costs and expenses of accounting and settlement generally see infra §§ 2528–2532.

29. Bachman v. Wilkins, 194 Ill. A. 232.

30. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Ind.—Sackett v. Wilson, 2 Blackf. 85.

Miss.—Weir v. Monahan, 67 Miss. 434, 7 S 291.

N. Y.—Solomons v. Kursheedt, 3 Dem. Surr. 307.

S. C.—Henshaw v. Robertson, 8 S. C. Eq. 311.

Que.—Beaudry v. Prevost, 22 Que. Super. 32.

[a] **Book containing other matters.**—Where a party is ordered to render "a full and fair account" it is no objection to the account presented that it is in a book which contains a variety of other matters. Henshaw v. Robertson, 8 S. C. Eq. 311.

31. Cal.—In re Bottoms, 156 Cal. 129, 103 P 849.

Ga.—Davis v. Brookins, 53 Ga. 282.

Iowa.—In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 213.

Ky.—McCracken v. McCracken, 6 T. B. Mon. 342.

La.—Lacroix's Succ., 29 La. Ann. 366; Hickman v. Flenniken, 12 La. Ann. 268; Kendrick's Succ., 7 Rob. 138.

N. J.—Morgan v. Morgan, 48 N. J. Eq. 399, 22 A 545 [rev on other grounds 50 N. J. Eq. 473, 26 A 331].

N. Y.—Sheldon v. Wright, 7 Barb. 39 [aff 5 N. Y. 497]; Matter of Phyfe, 5 NYLegObs 331; In re Jones, 5 NY LegObs 124, 1 Redf. Surr. 263; Solomons v. Kursheedt, 3 Dem. Surr. 307.

Oh.—In re Williamson, 7 OhS&CP 24, 4 OhNP 282.

Pa.—Hurst's Est., 21 LancLRev 334; Breiter's Est., 21 LancLRev 101; In re Marshall, 17 PittsbLegJNS 382.

S. C.—Patterson v. Jones, 99 S. C. 128, 82 SE 1008; Lewis v. Price, 24 S. C. Eq. 172.

Tenn.—Read v. Franklin, (Ch. A.) 60 SW 215.

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Va.—Cary v. Macon, 4 Call (8 Va.) 605.

[a] **"The correct form** is to charge the accountant with the amount of the inventory and appraisement of personal property, and all moneys received since filing the same, from debts due decedent, not inventoried, together with any excess over the appraised value realized by a sale of the personal property, or any portion thereof, and any proper surcharges either admitted or duly proved. Credit is then to be allowed for preferred debts, expenses of administration, allowance to the widow or children, if claimed, loss upon appraisement by sale, and debts of decedent if undisputed and estate solvent. The true balance for distribution will thus appear." Squire's Est., 11 Phila. (Pa.) 110, 111.

[b] **Where notes and accounts are contained in the inventory** of the estate, the settlement with the administrator should show distinctly which of them have been collected; and, as to those which have not been collected, the causes of the failure to collect them should be satisfactorily explained. Steele v. Morrison, 4 Dana (Ky.) 617.

[c] **Sales of realty.**—It seems that, where by will a personal representative is given full authority to dispose of the real estate without further proceedings in court relating thereto, either asking for sale or confirmation of the same, it is proper to require the personal representative in making his account to set out with reasonable fulness all such sales, giving the date of the sale, the location of the land, the amount sold, and the name of the purchaser. When, however, the personal representative must secure the order of the court for the sale of his decedent's estate and report and have confirmed the sale of the same, all matters being matters of record and accessible at all times, the account need not be so specific. In re Williamson, 7 OhS&CP 24, 4 OhNP 282.

[d] **A list of all the unpaid claims** against the estate and of the names and residences of persons interested in the estate may be required of a personal representative on filing his account, under the Pennsylvania act of 1832. Fettig's Est., 5 Kulp (Pa.) 152.

[e] **Description of claims and creditors.**—An account should declare the nature of the claims of the creditors, and their names and residences should be mentioned. Gautier's Succ., 8 La. Ann. 451.

[f] **Annual stops and rests.**—Where the court, in stating an administrator's account, made annual stops and rests, crediting the administrator with the current expenses of administration, and charging him with interest at eight per cent on the balance until settlement, and in the calculations deducted from the share of each distributee the allowances and advancements made by the administrator to each distributee during the particular year, charging the administrator with interest on the balance from the rests so made, the distributees were not prejudiced by such method of stating the account. Howard v. Rutherford, 149 Ala. 661, 43 S 30.

[g] **Full disclosure.**—A direction of the court that the representative make full disclosure of the condition of the estate, specifically with reference to securities mentioned in the inventory, was not complied with by an account which merely stated that debt to bank had been paid, and "said collaterals returned to the executrix." In re Dolenty, 53 Mont. 33, 161 P 524.

[h] **Where a trust was created** for the benefit of testator's son and the son's family, and the trust fund was charged with such advances by the testator to his son as the executors should in their discretion determine, and such debts of the son at the testator's death as the executors should elect to pay, the executors should exercise their discretion as to these matters before their final accounting as executors and before the trust fund was constituted, and should be required on their final accounting, where the existence of any debts of the son is denied, to state what debts existed as to which the executors claimed authority to exercise their discretion. Matter of Bischoff, 73 Misc. 191, 132 NYS 494.

32. Spicer's App., 80 Conn. 620, 69 A 936; Hayes v. Welling, 38 R. I. 553, 96 A 843 [rearg den 98 A 61].

33. Pulliam v. Pulliam, 10 Fed. 28; Maxwell v. McCreery, 57 N. J. Eq. 287, 41 A 498; Whitlock v. Whitlock, 34 S. C. Eq. 165; Duncan v. Tobin, 15 S. C. Eq. 143, 34 AmD 605; Anderson v. Piercy, 20 W. Va. 282.

[a] **Scaling.**—During the period of paper money, all sums of debt and credit in an administration account ought to be stated in due order of time, and to stand as nominally entered, without scaling, when the executor is debtor; but, when there is an excess, it should be scaled. Cary v. Macon, 4 Call. (8 Va.) 605.

34. Ark.—Thurmond v. Sanders, 21 Ark. 255.

Cal.—Magraw v. McGlynn, 26 Cal. 420 [aff 8 Wall. (U. S.) 639, 19 L. ed. 531].

Conn.—Hutchinson's App., 34 Conn. 300; Fairman's App., 30 Conn. 205; Atwater v. Barnes, 21 Conn. 237; Swan v. Wheeler, 4 Day 137.

Md.—In re Hagerstown Trust Co., 119 Md. 224, 86 A 982.

Mich.—Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Mont.—In re Davis, 31 Mont. 421, 78 P 704.

N. J.—In re Slater, (Prerog) 102 A 384.

N. Y.—Matter of Hunt, 84 App. Div. 159, 82 NYS 538 [aff 179 N. Y. 570 mem, 72 NE 1143 mem]; Matter of Hammer, 94 Misc. 36, 158 NYS 981.

Or.—Johnson v. Savage, 50 Or. 294, 91 P 1082; In re Osburn, 36 Or. 8, 58

penditure may be expressed in general terms.[35] Where a claim has been allowed by the representative, he should so report in his next periodical account or in his final account if no previous account has been made.[36] In stating an account the income or interest should be separated from the principal,[37] and items relating to real estate should be stated separately from those relating to personal property.[38]

Statutory requirements. Of course, however, if there are statutory requirements as to the account they must be complied with.[39] It is sometimes required by statute that allowance claimed for services, etc., shall be specifically stated.[40]

Concerning property in another state. The account of a domiciliary personal representative as to property in another state, where he has taken out ancillary letters of administration, should be rendered by obtaining a certified copy of the account rendered in the other state, with a certificate of the proper court that the same has been examined, allowed, and confirmed, and that the original account and necessary vouchers are on file.[41]

Same items in two accounts. An item may properly be charged to either of two accounts where the representative could lawfully determine in the first instance to make the expenditure out of either of the accounts.[42]

Expenses of administration and the representative's compensation need not be included in the account, as they are claims which are to be ascertained and adjusted by the court.[43]

Partnership affairs between an executor and another, both distributees of the estate, should be settled between them personally, and not through the executor's account.[44]

The balance for distribution should be shown, and not left to be ascertained by calculation.[45]

An intermediate account should state whether an inventory has been filed,[46] and if none has been filed the account should furnish the information usually supplied by the inventory.[47] Such account should also state the facts as to advertisement for, presentation, payment, or rejection of claims,[48] the names and ages of legatees or distributees,[49] and the names and residences of guardians if any,[50] and should be accompanied by vouchers.[51] As the purpose of such an account is to inform the court and persons interested as to the receipts, disbursements, and changes in property, if any, the administrator need not charge himself therein with the appraised value of the entire estate.[52] Where an administrator filed an account styled a "final account," showing a balance in his hands applicable to unpaid audited claims, but it did not state what the indebtedness of the estate amounted to, or the names of the creditors, their residence, etc., or ask that the administrator be discharged, and the court allowed the same in the form prescribed by statute for the allowance of an annual exhibit, and did not audit and settle the same as the statute requires in the case of a final account, such account should not be treated as a final account.[53]

Knowledge as to statements. A statement by an executor in his account as of his own knowledge, of a matter which he does not know to be true, is fraudulent in law.[54]

Amendments and corrections. When an account as presented is not sufficiently specific, or is otherwise defective, it may be amended by order of court[55] and mistakes in accounts may be corrected

P 521; In re Partridge, 31 Or. 297, 51 P 82.

Pa.—Fow's Est., 14 Pa. Co. 648.

Porto Rico.—Banco Territorial v. Gill, 17 Porto Rico 316.

[a] **Kind of money received.**—A representative may be required to specify in his account the kind of money received by him as the property of the estate. Magraw v. McGlynn, 26 Cal. 420.

[b] **The purpose of each item** or entry should be stated. Banco Territorial v. Gill, 17 Porto Rico 316.

[c] **Improper statement of item of disbursement.**—Where a will provided that the income from the estate should be paid to a trustee for the widow during her life, an item in the account of the executor claiming credit for a specified amount paid to the trustee for the wife, but which failed to show that the widow had died prior to the accounting, was not in proper form. In re Hagerstown Trust Co., 119 Md. 224, 86 A 982.

[d] **Details of continued business of decedent.**—Where an administrator, without authority, continues the business of his intestate, he need not state the details of the business in his account, since it becomes his individual business. Matter of Munzor, 4 Misc. 374, 25 NYS 818.

[e] **An amendment may be allowed** with respect to a claim for a credit for miscellaneous expenses incurred in the administration which is objectionable because of failure to set forth the items. Matter of Hammer, 94 Misc. 36, 158 NYS 981.

35. Wheaton v. Pope, 91 Minn. 299, 97 NW 1046; In re Davis, 31 Mont. 421, 78 P 704; Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; In re McCullough, 31 Or. 86, 49 P 886.

[a] **Illustration.**—An item was stated with sufficient definiteness where it appeared on the credit side of the account as follows: "By various expenses and disbursements, not itemized, including gifts to church and relatives, $1,008.05." Wheaton v. Pope, 91 Minn. 299, 97 NW 1046.

[b] **Attorneys' fees.**—Where attorneys were retained generally, and represented the estate in all litigation for several years, the administrator's account for the amount paid such attorneys is sufficiently itemized by giving the dates of the commencement and close of such services, with the gross amount. In re Davis, 31 Mont. 421, 78 P 704.

36. Irvine v. Beck, 62 Or. 593, 125 P 832.

37. Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Evans' Est., 11 Phila. (Pa.) 113, 2 WklyNC 337; Rankin's Est., 9 WklyNC 407.

[a] **Dividends on railroad and bank stock,** declared after a decedent's death, should be credited to the income of the estate, and not to the principal, in the account. Cassady's Est., 13 Phila. (Pa.) 365.

38. Price's Est., 11 Kulp (Pa.) 259.

39. Cal.—In re Adams, 131 Cal. 415, 63 P 838.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Mont.—In re Davis, 31 Mont. 421, 78 P 704.

Or.—In re Conser, 40 Or. 138, 66 P 607; In re Chambers, 38 Or. 131, 62 P 1013; In re Osburn, 36 Or. 8, 58 P 521; In re Partridge, 31 Or. 297, 51 P 82.

Tex.—McShan v. Lewis, 33 Tex. Civ. A. 253, 76 SW 616.

[a] **Particularity as to claim of representative.**—Where a claim due one of the executors was described as "amount due on note signed by the deceased in favor of Francis Palmer, $61.93," and the date of the note was not stated and it did not appear whether the amount stated was the face of the note, or the face and interest, or the balance due thereon, the statement was insufficient under the statute requiring particularity as to the claim of a representative, and could not be saved by proof. In re Palmer, 110 Me. 441, 86 A 919.

40. In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 213.

41. In re Phelps, 3 Oh. Dec. (Reprint) 13, 2 WklyLGaz 120.

42. In re Ward, 152 Mich. 218, 116 NW 23.

43. Lund v. Lund, 41 N. H. 355; Matter of Kane, 64 App. Div. 566, 72 NYS 333; In re Collyer, 9 NYS 297, 1 Conn. Surr. 546.

44. In re Wentz, 225 Pa. 566, 74 A 424.

45. McCullough's Est., 14 Pa. Dist. 7.

46. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

47. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

48. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

49. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

50. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

51. In re Dwight, 9 NYS 927, 2 Conn. Surr. 180.

Vouchers generally see infra § 2475.

52. In re Bottoms, 156 Cal. 129, 103 P 849; In re Davis, 31 Mont. 421, 78 P 704.

53. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

54. Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

55. Cal.—Hirschfeld v. Cross, 67 Cal. 661, 8 P 507.

Me.—Pettingill v. Pettingill, 60 Me. 411, 64 Me. 350.

Mich.—Jackson v. Leech, 113 Mich. 391, 71 NW 846; Loomis v. Armstrong, 63 Mich. 355, 29 NW 867.

N. J.—Maxwell v. McCreery, 57 N

on their settlement.[56] The court cannot command the conscience of the personal representative, so as to compel him to conform his returns under oath to the views of the court;[57] it is for the representative to make returns;[58] the court judges their effect.[59] The court has no authority to make alterations in the account of an administrator by striking out items on both sides of the account and interlining others, but still preserving in the aspect of the account such an appearance as would indicate that the administrator had sworn to the account as altered, when as a matter of fact he had not; but the court should proceed to state the account de novo.[60]

[§ 2446] **b. Blending or Separating Accounts.** The administration account and the distribution account should be kept separately and not blended or mingled,[61] and it has been held that the court should, of its own motion, refuse to confirm an administration account containing items of distribution;[62] but it has also been held that on an accounting by an executor who is also a legatee the court should state the entire account, both as executor and as legatee, charging against the legacy all money received, less disbursements and commissions.[63] Blending into one account the transactions of an accountant as administrator with the will annexed and as trustee under appointment by the court is irregular, tends to confusion, and will not be allowed;[64] but the circumstances may be such as to render it unnecessary that accountants should state their accounts as executors in advance of or as formally separate from their accounts as trustees under the will.[65] Neither should the account of an administrator de bonis non with the will annexed be blended with the account of the first executor.[66] Where a will creates several distinct trusts in the executors, a separate account should be rendered as to each of such trusts.[67] In a suit by wards and distributees against their father's executors and their guardian for an account, there should be a separate account taken with each distributee and ward.[68] Separate estates cannot be blended by the consent of persons interested therein and only one account rendered and one settlement effected.[69] An account cannot be rejected merely because it mingles statements as to the proceeds of real property with statements as to personal property;[70] but where sureties on an administration bond are not responsible for the proceeds of realty,[71] separate accounts of personalty and of the proceeds of realty should be rendered, when on a settlement the liability of such sureties is to be determined.[72]

[§ 2447] **c. Verification.** The accounts of an executor or administrator should be duly verified by his oath;[73] but it has been held that the omission of a formal affidavit is immaterial if the personal representative attends in person and is examined under oath as to his account.[74] Where there are several personal representatives, the affidavit of one of them to the truth of the account is sufficient.[75]

[§ 2448] **2. Objections and Exceptions—a. Necessity.** If a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must make proper objections and take proper exceptions;[76] and in ad-

J. Eq. 287, 41 A 498; In re Slater, (Prerog) 102 A 384.
N. Y.—Matter of Munzor, 4 Misc. 374, 25 NYS 818.
[a] **On appeal to the circuit court** an amendment may be effected. Jackson v. Leech, 113 Mich. 391, 71 NW 846.

56. Russell v. Wheeler, 129 Mich. 41, 88 NW 73; James v. Craighead, (Tex. Civ. A.) 69 SW 241.

57. Trotter v. Trotter, 40 Miss. 704.

58. Trotter v. Trotter, 40 Miss. 704.

59. Trotter v. Trotter, 40 Miss. 704.

60. Eakin v. Brick, 16 N. J. L. 98.

61. Howard v. Rutherford, 149 Ala. 661, 43 S 30; In re Willey, 140 Cal. 238, 73 P 998; Johnson v. Savage, 50 Or. 294, 91 P 1082; In re Kramer, 255 Pa. 595, 100 A 447; In re Thompson, 229 Pa. 542, 79 A 173; In re Wentz, 225 Pa. 566, 74 A 424; Jones App., 99 Pa. 124; Tasker's Est., 14 Pa. Dist. 435; Hart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401; Parker's Est., 2 Pa. Dist. 101, 12 Pa. Co. 436; Brinton's Est., 29 Pa. Co. 107, 21 LancLRev 76; Barker's Est., 13 Pa. Co. 419; In re Hill, 19 LancLRev (Pa.) 209; Price's Est., 11 Kulp (Pa.) 259; Hamilton's Est., 21 LancLRev (Pa.) 213; Grover's Est., 12 LuzLeg Reg (Pa.) 224; Jones' Est., 11 Pittsb LegJNS (Pa.) 375; Lewis' Est., 20 WklyNC (Pa.) 88; Jones' Est., 11 WklyNC (Pa.) 554.

62. In re Thompson, 229 Pa. 542, 79 A 173.

63. In re Knight, (Nebr.) 135 NW 379.

64. Simon's Est., 9 Pa. Dist. 59.

65. Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

66. Hamaker's Est., 5 Watts (Pa.) 204.

67. Roney v. McCall, 128 Ga. 249, 57 SE 503; Frame v. Willets, 4 Dem. Surr. (N. Y.) 368.

68. Duncan v. Petty, 3 Dana (Ky.) 223; Dinger's Est., 23 Pa. Dist. 756.

69. Richardson v. Richardson, 24 Ala. 395.

70. In re Place, 1 Redf. Surr. (N. Y.) 276.

71. See infra § 2550.

72. Baldwin's Est., 1 Chest. Co. (Pa.) 315; Strother v. Hull, 23 Gratt. (64 Va.) 652.

73. Ga.—Crawford v. Clark, 110 Ga. 729, 36 SE 404.
Ky.—Browning v. Earl, 54 SW 833, 21 KyL 1295.
La.—Rabasse's Succ., 50 La. Ann. 746, 23 S 910.
Mass.—Bailey v. Blanchard, 12 Pick. 166.
N. Y.—Matter of Kane, 64 App. Div. 566, 72 NYS 333; Terry v. Dayton, 31 Barb. 519; Westervelt v. Gregg, 1 Barb. Ch. 469; Gardner v. Gardner, 7 Paige 112 [rev on other grounds 22 Wend. 526, 34 AmD 340]; Williams v. Purdy, 6 Paige 166; Kellett v. Rathbun, 4 Paige 102.
Or.—In re Conser, 40 Or. 138, 66 P 607.
Pa.—Case's Est., 1 Kulp 307.
S. C.—Duncan v. Tobin, 15 S. C. Eq. 143, 34 AmD 605.
[a] **Verification by the attorney** of the representative is not sufficient. Case's Est., 1 Kulp (Pa.) 307.

74. Henshaw v. Robertson, 8 S. C. Eq. 311.

75. Kennedy v. Wachsmuth, 12 Serg. & R. (Pa.) 171, 14 AmD 676.

76. Cal.—In re Kruger, 143 Cal. 141, 76 P 891; In re More, 121 Cal. 635, 54 P 148.
Ida.—Chandler v. Kootenai County Prob. Ct., 26 Ida. 173, 141 P 635.
Ind. T.—In re Overton, 5 Ind. T. 334, 82 SW 766.
Iowa.—In re Brown, 113 Iowa 351, 85 NW 617.
La.—Trahan's Succ., 118 La. 762, 43 S 400.
N. Y.—Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261; Matter of Hart, 60 Hun 516, 15 NYS 239; Matter of Titus, 86 Misc. 375, 148 NYS 359; Matter of Fithian, 3 NYS 193, 1 Conn. Surr. 187 [aff 3 Silv. Sup. 282, 6 NYS 409].
Oh.—Tharp v. U. S. Fidelity, etc., Co., 21 Oh. Cir. Ct. N. S. 321, 35 Oh. Cir. Ct. 416, 2 Oh. A. 28.
Or.—In re Roach, 50 Or. 179, 92 P 118.
Pa.—In re Jacoby, 201 Pa. 442, 50 A 935; O'Brien's Est., 43 Pa. Super. 546; Clark's Est., 20 Pa. Co. 439; Wilbur's Est., 9 Kulp 327.
Tenn.—Gaines v. Eason, 130 Tenn. 86, 169 SW 309.
[a] **The office of exceptions** to administration accounts is not to demand affirmative relief, but to call the attention of the court to errors of omission or commission in the statements of account. The account and objections form the issue to be tried, and involve no more than the correctness of the accounts presented by the personal representative as such. His individual liability is not involved and claims against him individually must be determined in a jurisdiction other than the court of probate. In re Brown, 113 Iowa 351, 85 NW 617.
[b] **Confirmation when no opposition.**—When legal notices of the filing of the representative's account have been given and the legal delays for opposition have expired, any party in interest may obtain a judgment homologating the account. Rabasse's Succ., 50 La. Ann. 746, 23 S 910. To same effect Moise's Succ., 107 La. 717, 31 S 990.
[c] **Subsequently discovered errors.**—If the account of an executor or administrator, under a citation from a surrogate, is produced properly authenticated, the adverse party should be called upon by the surrogate to state his objections, if any; but such objections do not absolutely conclude the party from further objecting, if, in the course of the investigation, errors in the account are discovered, which the party objecting had no means of knowing at the time when he was called upon to object to the account. Gardner v.

judicating upon an account, the report of the representative and the exceptions thereto stand as the pleadings of the parties [77] and limit the issues to be tried.[78] It is usually held, however, that whether or not exceptions are filed, the court should carefully examine every account presented for settlement and be satisfied that it is in every respect practically correct before entering an order settling it,[79] although it has also been asserted that unchallenged items on the credit side of an executor's final account cannot be rejected;[80] that a surcharge of an executor for an overpayment of counsel fees cannot be made by the court without an exception to his account taken by a party in interest before the court;[81] and that under a statute authorizing the filing of objections to the final account of an executor, "specifying the particulars of such objections," etc., the court on hearing objections to the final account of an executor is limited to the particular specifications set forth in the objections.[82]

[§ 2449] **b. Persons Entitled to Object.** Any person interested in the disposition of the property of a decedent embraced in an administration account may object or file exceptions to its allowance.[83] An executor or administrator may contest the account of his corepresentative,[84] or of his predecessor;[85] and the guardian of a person interested in the estate may object on behalf of his ward.[86]

Legatees and distributees come within the scope of the rule;[87] and where persons averring that they are beneficially interested in the estate file objections to the account, such objections should be disposed of in a legal manner, and not summarily dismissed on the assumption without proof that the objectors are not heirs or distributees.[88] A person to whom the heirs have made conveyances purporting to transfer the legal title to all the property which decedent owned has a sufficient interest to question the accounts of the representative.[89]

A creditor may be a person interested, and so entitled to contest such an account,[90] and it has been held that the mere allegation that one is a

Gardner, 7 Paige (N. Y.) 112 [rev 22 Wend. 526].

[d] **Contest before referee.** — A person desiring to take any part in the contest of an account before a referee must file objections to such account. Matter of Gilman, 7 NYS 694, 2 Conn. Surr. 78.

77. Spray v. Bertram, 165 Ind. 13, 74 NE 502; Shuey v. Lambert, 53 Ind. A. 567, 102 NE 150; Pettingill v. Pettingill, 64 Me. 350; In re Hearns, 214 N. Y. 426, 108 NE 816 [rev 163 App. Div. 897, 147 NYS 447]; Matter of Sloane, 135 App. Div. 703, 119 NYS 667; Matter of Woodward, 69 App. Div. 286, 74 NYS 755; Matter of Heuser, 87 Hun 262, 33 NYS 831; Matter of Hart, 60 Hun 516, 15 NYS 239; Matter of Bielby, 91 Misc. 353, 155 NYS 133; James v. West, 67 Oh. St. 28, 65 NE 156.

[a] **Demurrer.**—Where the statute provides that exceptions may be filed to an administration account, but does not authorize an answer to such exceptions, no question can be raised by a demurrer to such pleading. Dohle v. Stults, 92 Ind. 540; Conger v. Babcock, 87 Ind. 497.

78. Matter of Bielby, 91 Misc. 353, 155 NYS 133.

79. Ala.—Waller v. Ray, 48 Ala. 468.

Ark.—Jones v. Graham, 36 Ark. 383.

Cal.—In re Willey, 140 Cal. 238, 73 P 998; In re Franklin, 133 Cal. 584, 65 P 1081; In re More, 121 Cal. 635, 54 P 148; In re Spanier, 120 Cal. 698, 53 P 357; Sanderson's Est., 74 Cal. 199, 15 P 753; In re Loheide, 17 Cal. A. 475, 120 P 56.

Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.

Ky.—Slaughter v. Slaughter, 8 B. Mon. 482.

N. J.—In re Slater, (Prerog.) 102 A 384.

N. Y.—Matter of Broderick, 163 App. Div. 91, 148 NYS 541; Matter of De Vany, 147 App. Div. 494, 132 NYS 582, 148 App. Div. 932 mem, 132 NYS 1126 mem [rev on other grounds 205 N. Y. 591, 98 NE 1101 mem].

Oh.—Jones v. Creamer, 32 Oh. Cir. Ct. 223; Jones v. Creamer, 13 Oh. Cir. Ct. N. S. 585.

Pa.—Bleakley's Est., 20 Pa. Dist. 1000; Bracken's Est., 32 Pa. Co. 215.

[a] **Where an executor or administrator has been guilty of a devastavit**, the court may refuse to allow his account. Harris v. Fisher, 13 Miss. 74.

80. In re Roach, 50 Or. 179, 92 P 118.

81. In re Stitzel, 221 Pa. 227, 70 A 749, 18 LRANS 284.

82. In re Roach, 50 Or. 179, 92 P 118.

83. Ala.—Spear v. Banks, 125 Ala. 227, 27 S 979.

Cal.—In re Ross, 182 P 303; In re Spanier, 120 Cal. 698, 53 P 357; Rose's Est., 66 Cal. 241, 5 P 220.

Ida.—Kent v. Dalrymple, 23 Ida. 694, 132 P 301.

Ill.—Sargent v. Mundy, 194 Ill. A. 111.

Ind.—Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

Iowa.—In re Miller, 169 Iowa 24, 149 NW 227, LRA1915C 736.

Md.—Helms v. Franciscus, 2 Bland 544, 20 AmD 402.

Mont.—In re Barker, 26 Mont. 279, 67 P 941.

N. J.—Dunham v. Marsh, 52 N. J. Eq. 831, 31 A 619; Poulson v. Frenchtown Nat. Bank, 33 N. J. Eq. 618.

N. Y.—Buchan v. Rintoul, 70 N. Y. 1.

Oh.—Jones v. Creamer, 32 Oh. Cir. Ct. 223.

Pa.—In re Rees, 246 Pa. 188, 92 A 126; Tracy's Est., 13 Montg. Co. 30.

Tex.—Houston v. Mayes, 66 Tex. 297, 17 SW 729.

Va.—Triplett v. Jameson, 2 Munf. (16 Va.) 242.

[a] **Rule applies to account of discharged or removed representative.**—Poulson v. Frenchtown Nat. Bank, 33 N. J. Eq. 618.

[b] **A remainderman** cannot except to an allowance which affects merely the beneficiaries for life. Byrd v. Wells, 40 Miss. 711.

84. Mead v. Willoughby, 4 Dem. Surr. (N. Y.) 364; Matter of Ritch, 2 Redf. Surr. (N. Y.) 330; In re Fleming, 32 PittsbLegJNS (Pa.) 439.

[a] **An executor who has performed no duties** in settling the estate has no standing in court to object to the correctness of the account of his coexecutor. Eager v. Roberts, 2 Redf. Surr. (N. Y.) 247.

85. In re Spanier, 120 Cal. 698, 53 P 357; Desjardins v. Masson, 3 Que. Pr. 538.

86. Rose's Est., 66 Cal. 241, 5 P 220.

87. Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Iowa.—In re Miller, 169 Iowa 24, 149 NW 227, LRA1915C 736.

La.—Ames' Succ., 33 La. Ann. 1317; Barbour's Succ., 17 La. Ann. 133.

N. Y.—Matter of St. John, 104 App. Div. 460, 93 NYS 836.

Pa.—Dampf's App., 97 Pa. 371.

[a] **Residuary legatees** (1) who have no vested rights in the annual profits of an estate have no right to question the account of an executor as to such profits. Martin's App., 23 Pa. 433. (2) A residuary legatee is not a claimant against an estate within the meaning of the statute, but if he were he would have to show some injury before he would be permitted to object to a final account, because some technical requirement has been imperfectly complied with. Conser's Est., 40 Or. 138, 66 P 607.

[b] **Where distributees had received all that they were entitled to** under a final distributive decree, they were not prejudiced by the fact that the statement of the administrator's account was irregular in embracing charges against the distributees on their distributive shares. Howard v. Rutherford, 149 Ala. 661, 43 S 30.

[c] **Objection not available to beneficiaries.**—Beneficiaries under a will have no standing to object to the executor's account on the ground that they received some part of the estate which should have gone to another beneficiary. In re Casner, 1 Cal. A. 145, 81 P 991.

88. Matter of St. John, 104 App. Div. 460, 93 NYS 836; In re Ollschlager, 50 Or. 55, 89 P 1049.

[a] **Right to share need not be determined.**—Under Code Civ. Proc. § 2728, providing, in regard to the judicial settlement of an executor's account, that a person interested in the estate is entitled to appear on the hearing, and section 2514, subd. 11, defining a "person interested" as including one entitled, absolutely or contingently, to share in the estate as next of kin, the application of one of the next of kin to appear should be granted, without deciding on the motion his right to share in the estate, which question should be reserved for the accounting, where it depends on the survivorship of testator and two other persons, who perished in a common disaster. Matter of St. John, 104 App. Div. 460, 93 NYS 836 [foll 104 App. Div. 622, 93 NYS 840, 104 App. Div. 623, 93 NYS 841].

89. In re Ross, (Cal.) 182 P 303.

90. Ala.—Byrd v. Jones, 84 Ala. 336, 4 S 375.

Ariz.—Garver v. Thoman, 15 Ariz. 38, 135 P 724.

Cal.—In re Fisher, 5 Cal. Unrep. Cas. 168, 42 P 237.

La.—Sterry's Succ., 38 La. Ann. 854; Glover's Succ., 2 La. Ann. 4.

Mo.—Taylor v. Bader, 117 Mo. A. 72, 98 SW 80; Wilson v. Ruthrauff, 82 Mo. A. 435.

N. J.—U. S. Equitable L. Assur. Soc. v. Chesley, 64 N. J. Eq. 348, 51 A 725 [rev on other grounds 63 N. J. Eq. 219, 49 A 718]; Poulson v. Frenchtown Nat. Bank, 33 N. J. Eq. 618.

N. Y.—Matter of Miles, 33 Misc. 147, 68 NYS 368 [rev on other grounds 61 App. Div. 562, 71 NYS 71]; Martine's Est., 11 AbbNCas 50.

Pa.—Reese's App., 116 Pa. 272, 9 A 315; Dorscheimer's Est., 9 Pa. Dist. 46.

Wis.—Robinson v. Hodgkin, 99 Wis. 327, 74 NW 791.

creditor entitles him to be heard,[91] although there is also authority for the view that some proof of the status of the objector as a creditor is necessary.[92]

A person who has no interest in the estate is not entitled to object or except to the account of the personal representative,[93] and the same is true of one who claims as his own, and adversely to the estate, property which is also claimed to belong to the estate.[94] A creditor of a distributee has not such an interest in the estate as authorizes him to contest the account of the representative.[95]

[§ 2450] **c. Time for Making and Filing.**[96] The law usually designates a period within which opposition must be made, particularly in excepting to an allowance, and one who objects or excepts should comply with such a requirement.[97] It has been held, however, that the fact that exceptions to an executor's report are filed one day too late does not prejudice any substantial right of the executor, and is not sufficient ground for the striking of such exceptions,[98] and that it is within the discretion of the court to permit the filing of exceptions to an executor's report raising a question passed upon in overruling former exceptions, where the exceptions last filed are filed before the final approval of the report, and bring to the attention of the court provisions of the will not previously noticed.[99]

Opening default. One cited as legatee to appear at the accounting of an executor, but who did not appear because she did not then know of her interest as heir, may have her default opened and be allowed to file objections on account of her rights as heir.[1]

Filing nunc pro tunc. Where an account of an administrator was absolutely confirmed under the rule, and before the end of the term parties in interest applied for leave to file exceptions nunc pro tunc, showing that they were nonresidents and without actual knowledge of the proceedings, and alleging that the administrator had appropriated all the personal estate and had secured a decree in his favor for an amount chargeable on the real estate in payment of an alleged claim which was unfounded, it was held that permission to file exceptions should be granted.[2]

Laches. Where exceptions to the final report of an administrator were filed and heard within a month after presentation of such report, the heirs were not chargeable with laches because they had, five years previously, served notice on the administrator not to make payments involved in the exception.[3]

[§ 2451] **d. Grounds.** An objection or exception may be directed to any matter as to which the account is incorrect or improper.[4] An objection may

[a] **Extent of right.**—A creditor has no right to oppose each and every item on a tableau of distribution in a thoroughly solvent succession, where, after an amount amply sufficient to meet his claim has been retained, the payment of such items cannot possibly affect or injure him. Gohs' Succ., 37 La. Ann. 428.

[b] **A creditor whose claim is barred** (1) by reason of his failure to file it within the time prescribed by statute has no interest in an estate which will entitle him to object to an administration account. Schrichte v. Stite, 127 Ind. 472, 26 NE 77, 1009. (2) Aliter where nonpresentation does not bar claim. Martine's Est., 11 AbbNCas (N. Y.) 50.

91. Matter of Miles, 33 Misc. 147, 68 NYS 368 [rev on other grounds 61 App. Div. 562, 71 NYS 71].

92. Cabouret's Succ., 9 La. Ann. 520.

93. Cal.—In re Kruger, 143 Cal. 141, 76 P 891; In re Conroy, 6 Cal. A. 741, 93 P 205; In re Casner, 1 Cal. A. 145, 81 P 991.

Ky.—Bailey v. Furnish, 3 Dana 455.

La.—Poret's Succ., 26 La. Ann. 157.

Miss.—Byrd v. Wells, 40 Miss. 711.

Nebr.—Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

N. J.—In re Slater, (Prerog.) 102 A 384.

N. Y.—Matter of Sudds, 75 App. Div. 612 mem, 77 NYS 413.

Oh.—Jones v. Creamer, 13 Oh. Cir. Ct. N. S. 585.

Pa.—Law's Est., 140 Pa. 444, 21 A 429 [aff 8 Pa. Co. 296]; Price's Est., 13 Pa. Dist. 129, 29 Pa. Co. 400; Adams' Est., 10 Pa. Dist. 296, 25 Pa. Co. 256; Herbein's Est., 2 Chest. Co. 449; Stevens' Est., 3 Lanc LRev 170; In re Davis, 32 Pittsb LegJNS 155.

[a] **An attorney employed by an executor or administrator** to assist him in the execution of his trust is not the attorney of the estate, but simply of the executor or administrator employing him, and he is not a person interested in the estate, within the statute permitting such persons to file exceptions to accounts of executors or administrators, although he has agreed with the executor or administrator that he will accept for his services such sum as the probate court may allow. In re Kruger, 143 Cal. 141, 76 P 891.

[b] **An executor may not complain** because one filing objections to his account is not a person interested, as the court has the right of its own motion to inquire into all of the items of the account, and to settle it properly. In re Pease, 149 Cal. 167, 85 P 149.

94. Cathey v. Kerr, 15 La. Ann. 228; In re Campfield, (N. J. Prerog.) 98 A 381.

95. Owens v. Thurmond, 40 Ala. 289; Junqua's Succ., 123 La. 714, 49 S 482.

[a] **Where an heir has not refused to accept** an inheritance, and is in the way of settling her rights and obtaining the portion due her, there is no law which would authorize her creditor, with a claim which has not been reduced to judgment, to obstruct the settlement of the succession, in which others are interested, by opposition to the executor's account. Junqua's Succ., 123 La. 714, 49 S 482.

96. After reversal of decree settling account see infra § 2526.

97. Ark.—Sharp v. Himes, 129 Ark. 327, 196 SW 131; Himes v. Sharp, 123 Ark. 61, 184 SW 431.

Del.—Larkin v. Simms, 18 Del. 543, 46 A 750; Allen v. Leach, 7 Del. Ch. 83, 29 A 1050.

Ida.—Kent v. Dalrymple, 23 Ida. 694, 132 P 301.

La.—Ball v. Ball, 42 La. Ann. 204, 7 S 567; Scott's Succ., 41 La. Ann. 668, 6 S 792; Bellande's Succ., 41 La. Ann. 491, 6 S 505; Ostrander's Succ., 26 La. Ann. 450; Hogan's Succ., 25 La. Ann. 331; Macarty's Succ., 3 La. Ann. 383; Chiasson v. Dupuy, 9 La. 57; Longbottom v. Babcock, 9 La. 44; Marchand v. Caurlier, 4 La. 299; McCombs v. Dunbar, 3 La. 517.

Miss.—Smith v. Hurd, 16 Miss. 682.

N. Y.—Matter of Von Glahn, 53 App. Div. 164, 65 NYS 865; Matter of Ferrigan, 42 App. Div. 1, 58 NYS 920 [aff 160 N. Y. 689 mem, 55 NE 1095 mem].

Pa.—Mayes' Est., 38 Pa. Co. 418.

Tex.—Houston v. Mayes, 66 Tex. 297, 17 SW 729; Walker v. Kerr, 7 Tex. Civ. A. 498, 27 SW 299.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

Va.—Morriss v. Garland, 78 Va. 215.

N. W. Terr.—Allan v. Kennedy, 2 Terr. L. 285.

[a] **Objections or exceptions may be filed at any time before:** (1) Homologation of the account. Price's Succ., 35 La. Ann. 905. (2) The hearing upon the settlement of the estate. Morriss v. Garland, 78 Va. 215. (3) An application or other proceeding is decided by the court. Houston v. Mayes, 66 Tex. 297, 18 SW 729.

[b] **Account stated by judge in vacation or commissioner.**—If a probate judge states an executor's account in vacation, when it comes forward for allowance and confirmation in term time, exceptions may be filed to it in court or, if the account is stated by a commissioner to whom it has been referred, it may in like manner be excepted to in court when it is presented for allowance and confirmation. Smith v. Hurd, 16 Miss. 682.

98. In re Overton, 5 Ind. T. 334, 82 SW 766.

99. In re Overton, 5 Ind. T. 334, 82 SW 766.

1. Matter of St. John, 104 App. Div. 622, 93 NYS 840.

2. In re Irwin, 225 Pa. 372, 74 A 212.

3. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228 [aff 144 Ill. A. 109].

4. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

[a] **Immaterial errors.** — On exceptions to the accounts of a public administrator in three different estates, where it appeared that the exceptors were the sole beneficiaries in the same proportion as to two of the estates, there was no prejudicial error in overruling the exceptions to the accounts merely because credits entered in favor of one of the estates in which the exceptors were interested would more properly have appeared in the settlement of the other estate, in which the exceptors were interestd, the result to the exceptors being the same whether the credits were taken in the settlement of one or the other of the estates. Browning v. Richardson, 186 Mo. 361, 85 SW 518; King v. Richardson, 186 Mo. 361, 85 SW 518.

be directed to credits claimed,[5] such as disbursements,[6] or may be urged against the representative's claim for compensation.[7] But persons excepting to a final account of executors cannot complain that vouchers showing payments to other persons interested were not filed.[8] Charges against the representative may also be the subject of objection[9] based upon a contention that certain charges not in the account should be added thereto,[10] or that charges in the account should be increased,[11] as when it is claimed that the assets of the estate are greater than the account shows.[12] Where a trustee dies, and there is found in the possession of his surety securities slightly exceeding the trust estate, and his administrator files an account charging himself with all such securities, exceptions filed by the substituted trustee to the account must be considered to determine whether or not the securities are proper investments to be taken over by the new trustee.[13] An objection on a subject not touched upon by the report may be disregarded where the estate remains open,[14] and it has been held that the court cannot entertain an objection to the final settlement on an administration which involves his acts as executor of another person, based on his failure to account for such acts.[15] Exceptions based on the representative's neglect to account for rents are properly stricken out where the court has no jurisdiction to compel him to account therefor.[16] An objection by a creditor that the amount paid him is less than his claim cannot be urged as an objection to the account.[17] It is immaterial that executors charged themselves with stock at less than its true value, where they were in a position to distribute the stock in kind and most of the legatees consented to such distribution.[18]

Technical objections to an account are not favored[19] and some injury resulting from the technical defect complained of must be shown before they will be permitted.[20]

An objection which presents a question of law which can be determined only when the issues of fact have been decided is improper as such a question should be presented to the court when a decree upon the account is submitted.[21]

An exception directed to a clerical error of the auditing judge, which may be readily corrected by him, is needless and will not be allowed.[22]

Exceptions to a supplemental account of an executor must be confined to matters contained in that account.[23]

[§ 2452] **e. Form and Sufficiency.** Exceptions must be taken in the manner provided by statute,[24] and it is sometimes required that the exceptions be filed in writing.[25] When a person interested in a decedent's estate is not satisfied with the account of the personal representative, he must point out to the court clearly and specifically the ground of his objections,[26] and state specifically the item or items to which he objects.[27] It has been said that opposi-

5. In re Roach, 50 Or. 179, 92 P 118.

Credits generally see supra § 2393.

6. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Expenditures generally see supra §§ 513–558.

7. In re Kruger, 143 Cal. 141, 76 P 891; Matter of Hammer, 94 Misc. 36, 158 NYS 981.

[a] **An objection to a schedule** in the account, stating the amount claimed as commission but not entered as a charge against the estate, must be overruled in so far as it is made against an alleged charge, although so far as it controverts the right of the representative to the amount claimed it should receive consideration. Matter of Hammer, 94 Misc. 36, 158 NYS 981.

Compensation of representative see supra §§ 2394–2444.

8. Meyer v. Meyer, 106 Miss. 638, 64 S 420.

9. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Charges generally see supra § 2392.

10. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

11. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

12. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505.

Collection of assets see supra §§ 423–462.

Discovery of assets see supra §§ 402–422.

13. In re Spatz, 240 Pa. 303, 87 A 572.

14. In re Smith, 133 Iowa 142, 109 NW 196.

15. Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051.

16. In re Struble, (N. J. Prerog.) 101 A 177.

17. In re Swan, 115 Me. 501, 99 A 449 (the creditor's remedy is by action).

18. Matter of Titus, 86 Misc. 375, 148 NYS 359.

19. In re Dalton, 183 Iowa 1013, 168 NW 332.

20. In re Conser, 40 Or. 138, 66 P 607.

21. Matter of Brommer, 105 Misc. 344, 173 NYS 200.

22. Mart's Est., 10 Pa. Dist. 421, 25 Pa. Co. 401.

23. In re Irvine, 209 Pa. 325, 58 A 618.

24. Blackwell v. Blackwell, 29 N. J. Eq. 576 [aff 31 N. J. Eq. 796].

25. Cummings v. Bradley, 57 Ala. 224; In re Marre, 127 Cal. 128, 59 P 385; More's Est., 121 Cal. 635, 54 P 148; Von Hoven's Succ., 46 La. Ann. 911, 15 S 391. Compare Kennedy's Est., 120 Cal. 458, 52 P 820 (it is not improper for the court to listen to objections to such an account in advance of the filing of written objections).

[a] **An opposition in the form of an answer** in writing is sometimes filed. In re Halleck, 49 Cal. 111 (one who files an opposition to the settlement of the final account of an executor and to a decree of distribution on the ground that he has a contingent claim against the estate must state in his opposition facts showing that such claim exists); Bothick's Succ., 47 La. Ann. 613, 17 S 198; Milmo's Succ., 47 La. Ann. 126, 16 S 772; Sparrow's Succ., 39 La. Ann. 696, 2 S 501; Commagere's Succ., 38 La. Ann. 830; Bofenschen's Succ., 29 La. Ann. 711 (if the opposition does not contain a general clause indicating opposition to the whole account, the opponent will be confined in his contestation to those items specifically mentioned); Barbour's Succ., 17 La. Ann. 133; Foster's Succ., 4 La. Ann. 479; Filhiol v. Hempkin, 16 La. 326.

[b] **An objection not contained in the written grounds** cannot be sustained. In re Sylvar, 1 Cal. A. 35, 81 P 663.

[c] **Written objections may be waived.**—In re Marre, 127 Cal. 128, 59 P 385.

26. Ala.—Robertson v. Black, 74 Ala. 322; Pearson v. Darrington, 32 Ala. 227.

Cal.—In re More, 121 Cal. 635, 54 P 148.

Ga.—Tate v. Gairdner, 119 Ga. 133, 46 SE 73.

Ill.—Elder v. Whittemore, 51 Ill. A. 662.

Ind.—Conger v. Babcock, 87 Ind. 497; Christie v. Wade, 87 Ind. 294.

La.—Gallia's Succ., 130 La. 867, 58 S 691.

N. J.—Holcomb v. Holcomb, 11 N. J. Eq. 281.

N. Y.—Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of Brommer, 105 Misc. 336, 173 NYS 200; Metzger v. Metzger, 1 Bradf. Surr. 265.

Or.—In re Roach, 50 Or. 179, 191, 92 P 118 [cit Cyc].

Pa.—Harned's Est., 10 Kulp 183.

Tenn.—Guild v. Young, (Ch. A.) 62 SW 404.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

[a] **Acts of mismanagement** must be specifically stated. Gallia's Succ., 130 La. 867, 58 S 691.

[b] **Surcharging or falsifying.**—(1) It is a well settled rule in equity that one who objects to a stated account must surcharge or falsify, that is, must allege an omission in the account or deny the correctness of some or of all the items rendered. An account rendered by a personal representative is a stated account within the meaning of this rule. Tate v. Gairdner, 119 Ga. 133, 46 SE 73. (2) "An exception to the account of executors must make objection to the justness of the account in charge or discharge, and not merely seek the recovery of a demand from the estate." Carey v. Monroe, 54 N. J. Eq. 632, 35 A 456.

[c] **Credit illegal in part.**—On the settlement of the accounts of an administrator, where a credit claimed is legal in part, and in part illegal, an exception to the allowance of such credit need not point out what part is illegal. Pearson v. Darrington, 32 Ala. 227.

[d] **Ground of objection may be stated on information and belief.**—Matter of Brommer, 115 Misc. 336, 173 NYS 200.

27. Elder v. Whittemore, 51 Ill. A. 662; Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569; Peck v. Sherwood, 56 N. Y. 615 (infra this note); Reeside v. Reeside, 6 Phila. (Pa.) 507.

[a] **A general objection "to any and all of the items"** may warrant an investigation and scrutiny of the account, although the better and more proper practice would be to object specifically to the items which it is intended to question. Peck v. Sherwood, 56 N. Y. 615.

tions to an executor's account are in the nature of answers, and matters alleged therein are open to every objection of law and fact as if such objections had been specially pleaded.[28] Whether or not exceptions filed are sufficiently specific must be determined from the circumstances of the case.[29]

[§ 2453] **f. Additional or Further Exceptions.** If the objections filed are insufficient the surrogate may allow further objections to be filed,[30] but this is not within the power of an auditor.[31] Legatees objecting to the final account of the executor are not limited to their original objections, but they may file additional objections to modify their demand to correspond with the testimony;[32] and an opponent to an account homologated so far as not opposed retains a right to amend his pleadings and claim a larger amount than first claimed, provided it does not change the nature of the demand.[33] Objections repeated after they have been overruled are properly stricken out.[34]

[§ 2454] **g. Effect of Filing Exceptions.** Exceptions which have been filed and are not withdrawn remain before the court for consideration until the account is finally passed on.[35]

[§ 2455] **h. Waiver and Estoppel.** One may, as a result of his acts, omissions, or agreements, waive the right or become estopped to make objections to or to contest the account of a personal representative;[36] and one who has been paid by a personal representative considerably more than he had any right to claim from him is not in a position to complain of his accounts.[37] A person appealing generally from the allowance of an administration account is bound to make all objections to

28. Pizzati's Succ., 141 La. 645, 75 S 498.

29. Matter of Hammer, 94 Misc. 36, 158 NYS 981; In re McEvoy, 3 NYS 207, 6 Dem. Surr. 71 [rev on other grounds 3 NYS 337 (aff 117 N. Y. 275, 22 NE 1036)]; Thompson v. Mott, 2 Dem. Surr. (N. Y.) 154.

[a] **Exceptions held sufficient.** — Shuey v. Lambert, 53 Ind. A. 567, 102 NE 150.

[b] **Insufficient exceptions.** — (1) An objection to an administrator's third account that he had not accounted for all the estate of the decedent which had come into his possession was insufficient to raise a contention that the administrator should be charged with interest. In re Sylvar, 1 Cal. A. 35, 81 P 663. (2) Where a contestant filed exceptions to the final account of an administratrix, claiming that she had received money belonging to the estate, with which she had not charged herself, but the exceptions did not contain a statement of facts showing that the money actually belonged to the estate, no inquiry as to a gift by the testator to the administratrix, in fraud of the former's creditors, on which the contestant's claim was based, could be made. In re Vance, 141 Cal. 624, 75 P 323.

30. Boughton v. Flint, 74 N. Y. 476; Fithian's Est., 14 NYCivProc 52.

31. Boughton v. Flint, 74 N. Y. 476. But compare Fithian's Est., 14 NYCivProc 52 (a referee might have power to entertain a motion to amend an objection or to allow further objections).

32. In re Roach, 50 Or. 179, 92 P 118.

33. Sangfried's Succ., 114 La. 878, 38 S 593.

34. In re Denneny, 182 Iowa 362, 165 NW 1007.

35. Himes v. Sharp, 123 Ark. 61, 184 SW 431 (under Kirby Dig. § 140, providing that an heir may file exceptions to an administrator's account at the term to which the account may be continued, and that, if exceptions are not filed within that time, the account shall be confirmed, and not afterward subject to investigation, etc., a party filing exceptions to an account does not have to repeat them at each term to which the case may be continued and until final confirmation, and, where exceptors could not appeal from an order dismissing such exception until final judgment was rendered confirming or rejecting the account, the court's order continuing the consideration of the account current for reinstatement necessarily carried over the consideration of the exceptions when such account came up for consideration at a subsequent term).

36. Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

D. C.—Sinnott v. Kenaday, 14 App. 1 [rev on other grounds 179 U. S. 606, 21 SCt 233, 45 L. ed. 339].

Ida.—Chandler v. Kootenai County Prob. Ct., 26 Ida. 173, 141 P 635.

Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228.

Ky.—Harber v. Green, 7 KyL 594.

La.—Brownlee's Succ., 44 La. Ann. 917, 11 S 590; Ross' Succ., 1 La. Ann. 129.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552.

Minn.—Wheaton v. Pope, 91 Minn. 299, 97 NW 1046.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420.

N. J.—Pursel v. Pursel, 14 N. J. Eq. 514.

N. Y.—Matter of Weatherbee, 101 Misc. 522, 167 NYS 701; In re Frost, 165 NYS 980; In re Harper, 159 NYS 532.

Pa.—Metzroth's Est., 19 Pa. Dist. 54; Dalton's Est., 14 Pa. Dist. 406; Dolph's Est., 3 LuzLegReg 146; Ginginger's Est., 2 Woodw. 206.

Va.—Radford v. Fowlkes, 85 Va. 820, 8 SE 817.

[a] **Circumstances amounting to estoppel.**—(1) Where a life tenant under a will, who is also the executrix therein, discharges a pecuniary obligation to mature after her death to a remainderman, the latter, accepting the payment, cannot insist that the executrix shall again account for the amount when making a final settlement. Wheaton v. Pope, 91 Minn. 299, 97 NW 1046. (2) Where testator, who had always credited his sons with a percentage of the profits of his business, died leaving a will making two of the sons, his executors, the widow of one of the sons who died prior to final settlement is estopped to except to the allowance of such profits to the executors, where she was given the share to which her husband would have been entitled, but her minor children who received nothing are not so estopped. Meyer v. Meyer, 106 Miss. 638, 64 S 420. (3) Where executors paid a corporation for collecting rents which they should have collected themselves under the will, and an officer of the corporation, who received the greater part of the payment, filed objections as heirs and asked that the executors are charged with such payment the court should refuse to surcharge the account unless sum received is paid back. Parker v. Leighton, 131 Md. 407, 102 A 552.

[b] **Withdrawal of objections.** — Where on the hearing on a reference in proceedings for the settlement of the account of a temporary administrator the objections were confined to a single point, and all the others were expressly withdrawn, on a second hearing before the same referee had pursuant to an order to take further evidence on the single point, the other objections to the account were withdrawn. Matter of Grant, 132 App. Div. 739, 116 NYS 767, 1152.

[c] **Circumstances not amounting to estoppel.**—(1) Where the administrator of an estate sells a crop of cotton belonging to the estate on credit, and takes from the purchaser, who afterward becomes insolvent, a note without sureties, and the husband of one of the distributees actually assists in making the sale, but it is not shown that he knew of or approved the taking of the notes, without sureties, she will not be estopped from objecting to the note as a credit to the administrator in final settlement. Walls v. Grigsby, 42 Ala. 473. (2) A legatee is not estopped to contest a charge which is made against him by advice of his attorney, who without his knowledge is also attorney for the personal representative. In re Cummings, 120 Iowa 421, 94 NW 1117. (3) The failure of a creditor of a decedent to object to certain acts of the administrator, it not appearing that he knew his rights, or that his failure to object influenced the administrator's conduct, creates no estoppel in the creditor to object to the accounts of the administrator. Crum v. Meeks, 128 Ind. 360, 27 NE 722. (4) The fact that testator's widow talked with the executor about the advisability of making certain repairs on property of the estate does not preclude her from questioning the validity of expenditures for such repairs, if they were in fact unlawful. Matter of Tisdale, 110 App. Div. 857, 97 NYS 494. (5) A legatee is not estopped from claiming interest by the fact that she had previously applied to court for an order compelling executor to pay an amount due, and her acceptance of the amount awarded, she not being compelled to combine two claims. In re Lackie, (Iowa) 171 NW 679.

[d] **A previous objection** made on accounting by executors that they could not account in the surrogate's court for the proceeds of realty does not estop the objecting parties to afterward claim that such proceeds were personalty, and to demand an accounting. Bolton v. Myers, 83 Hun 259, 31 NYS 588 [aff 146 N. Y. 257, 40 NE 737].

[e] **Failure to object to item when first reported.**—The fact that on the filing by an administrator of his first report no objection is made on a particular item, although other items are objected to, does not waive the right of the party who has so objected, subsequently to object to such item on the filing by the administrator of a supplemental report. Morrissey v. Rogers, 120 Ill. A. 37.

37. Williams v. Rhodes, 81 Ill. 571.

the account as it then stands and if he fails to object to an item he waives his objection to it.[38]

[§ 2456] **i. Exceptions to Partial Accounts.** It has been held that on the settlement of a final account the court cannot hear exceptions to an intermediate account previously filed, but such exceptions should be made the subject of a separate application to open the intermediate account or for a restatement thereof.[39] But it has also been considered that any account filed by a personal representative is open to be excepted to at the final settlement, and it is not necessary that exceptions should be taken previously, although it may sometimes be expedient to file exceptions to the different accounts as they are from time to time settled,[40] and exceptions, although not groundless, may be overruled where in the judgment of the court they would be more properly exhibited against the final than against a mere partial account.[41] When persons prefer exceptions to a partial account and withdraw them before its confirmation, they have no right to prefer the same exceptions to a subsequent account, but such withdrawal will not prevent other persons from making the same exception.[42]

[§ 2457] **3. Hearing and Reference—a. In General.** With respect to the settlement of the account of an executor or administrator there should be a hearing,[43] of which proper notice should be given to the persons interested.[44] The proceedings on the filing of exceptions to an administration account are in the nature of a suit[45] in equity.[46] Whenever applicable the rules of procedure in civil cases should be applied,[47] but in most matters arising in such a proceeding strict formality is not required.[48] The personal representative stands as plaintiff and the objector as defendant in such proceedings,[49] and the former has the right to open and conclude.[50] Evidence may be taken either orally[51] or by deposition,[52] although it has been considered that, where nice questions both of law and of fact are involved, the trial thereof on affidavits, instead of oral testimony, should be discouraged.[53] Where, on an executor's accounting involving its validity of an antenuptial agreement, the surrogate, after the evidence had been closed and briefs submitted, stated orally that he would find the agreement invalid for want of consideration, it was error for him to refuse to receive evidence of a pecuniary consideration therefor.[54] Such proceedings may be continued for proper cause[55] or stayed pending the determination of an independent suit over matters arising in connection therewith.[56] In proceedings on the settlement of estates such entries should be made as to show at whose instance settlements are ordered, what representatives appear before the court, and who claim under the estate and are actors in the cause.[57]

[§ 2458] **b. Submission of Issues to Jury.** It has been considered that issues of fact arising in an accounting proceeding in a probate court should be determined by the court and not submitted to a jury,[58] although there is also authority for the contrary view.[59] It is certainly true that there may be cases in which it is very desirable to submit an issue arising on a settlement of an account to a jury, and in such cases the court may doubtless frame an issue for the jury,[60] whose verdict is, how-

38. Clement's App., 49 Conn. 519; Snook v. Kennedy, 103 Wash. 390, 174 P 643.

39. In re Slater, (N. J. Prerog.) 102 A 384.

40. Steele v. Knox, 10 Ala. 608; Dement v. Heth, 45 Miss. 388; Picot v. O'Fallon, 35 Mo. 29, 86 AmD 134; In re Walker, 3 Rawle (Pa.) 243. But see Weaver's Est., 5 LancBar (Pa.) Jan. 24, 1874.

[a] **Omissions in a partial account** are not the subject of exceptions. Reese's Est., 10 Kulp (Pa.) 524.

41. Tracy v. Card, 2 Oh. St. 431.

42. Light's App., 22 Pa. 445.

43. Kent v. Dalrymple, 23 Ida. 694, 132 P 301; In re Stitzel, 221 Pa. 227, 70 A 749, 18 LRANS 284.

44. Kent v. Dalrymple, 23 Ida. 694, 132 P 301; In re Stitzel, 221 Pa. 227, 70 A 749, 18 LRANS 284.

[a] **A surcharge** by the orphans' court of an executor's account is an adjudication against him which cannot be made without notice to him and an opportunity to be heard. In re Stitzel, 221 Pa. 227, 70 A 749, 18 LRANS 284.

45. Gray v. Harris, 43 Miss. 421; In re Hearns, 214 N. Y. 426, 108 NE 816; Gaines v. Eason, 130 Tenn. 86, 169 SW 309.

[a] **A rule is not the proper mode to dispose of an opposition** of heirs to a tableau of distribution when excepted to. Barbour's Succ., 17 La. Ann. 133.

46. Loomis v. Armstrong, 49 Mich. 521, 14 NW 505; In re Danforth, 66 Mo. A. 586; In re Meeker, 45 Mo. A. 186.

[a] **The liability of an administrator** to the estate or to creditors is to be tested by equitable rules, regardless of mere technicalities, and this on appeal as well as in the probate court. Brown v. Forsche, 43 Mich. 492, 5 NW 1011.

47. Goodbub v. Hornung, 127 Ind. 181, 26 NE 770; Matter of Sloane, 135 App. Div. 703, 119 NYS 667.

48. Goodbub v. Hornung, 127 Ind. 181, 26 NE 770; Hancock v. Hancock, 63 Ind. A. 173, 111 NE 336; Anderson v. Gregg, 44 Miss. 170; Sterrett's App., 2 Penr. & W. (Pa.) 419. See Bleakley's Est., 20 Pa. Dist. 1000.

49. Brownlee v. Hare, 64 Ind. 311; Pizzati's Succ., 141 La. 645, 75 S 498.

[a] **The executor represents** whoever will be entitled to take the share of an alleged heir in case his claim of heirship is disallowed. Pizzati's Succ., 141 La. 645, 75 S 498.

50. Taylor v. Burk, 91 Ind. 252; Yingling v. Hesson, 16 Md. 112.

51. May v. Walter, 149 Ky. 749, 149 SW 1014.

52. May v. Walter, 149 Ky. 749, 149 SW 1014.

53. Matter of Sloane, 135 App. Div. 703, 119 NYS 667 [rev 63 Misc. 472, 118 NYS 555].

54. In re Scott, 156 NYS 960.

55. Baillio v. Wilson, 6 Mart. N. S. (La.) 334; Neill v. Hodge, 5 Tex. 487.

[a] **Continuance when account amended.**—Hasley's Succ., 27 La. Ann. 586.

[b] **When refusal proper.** — The refusal of a continuance of the hearing on an executor's report on the ground of garnishment proceedings brought against him with his collusion is a proper exercise of discretion. In re Millard, 161 Iowa 212, 141 NW 1050.

56. Troxler's Succ., 46 La. Ann. 738, 15 S 153; In re Brown, 3 NYCiv Proc 39, 2 McCarty Civ. Proc. 274, 1 Dem. Surr. 136; Price's Est., 12 Pa. Dist. 694; John's Est., 1 Chest. Co. (Pa.) 311.

[a] **Duty to stay proceedings.** — Under Code § 2743, providing that, where an account of an executor, etc., is judicially settled and any part of the estate remains for distribution, the decree must direct distribution, and, where the validity of a debt, claim, or distributive share is not disputed or has been established, the decree must determine to whom it is payable, etc., the surrogate, where an executor or administrator disputes the validity of a debt, claim, or distributive share, must suspend his jurisdiction until the debt, claim, or distributive share shall have been established by some competent tribunal other than the surrogate's court. In re Brown, 3 NYCivProc 39, 2 McCarty Civ. Proc. 274, 1 Dem. Surr. 136.

[b] **The pendency of an action to recover certain lands** alleged to belong to testator is not ground for staying proceedings on exceptions to the account of the executor. Matter of Benedict, 15 NYSt 746.

57. Portis v. Creagh, 4 Port. (Ala.) 332.

58. Ala.—Kirksey v. Kirksey, 41 Ala. 626. Contra Savage v. Dickson, 16 Ala. 256; Reynolds v. Reynolds, 11 Ala. 1023; Willis v. Willis, 9 Ala. 330.

Cal.—Sanderson's Est., 74 Cal. 199, 15 P 753.

Ill.—Butler v. Bocock, 160 Ill. A. 501; Clifford v. Gridley, 113 Ill. A. 164; Boyd v. Swallows, 59 Ill. A. 635.

Ind.—Taylor v. Wright, 93 Ind. 121. Contra Taylor v. Burk, 91 Ind. 252; Clouser v. Ruckman, 89 Ind. 65; Hamlyn v. Nesbit, 37 Ind. 284.

La.—Bozant's Succ., 5 La. Ann. 709.

Mich.—Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

Mo.—Schooler v. Stark, 73 Mo. A. 301; In re Meeker, 45 Mo. A. 186; McClelland v. McClelland, 42 Mo. A. 32.

59. In re Atwood, 2 App. (D. C.) 74 [cit Pegg v. Warford, 4 Md. 385]; Barton v. Barton, 142 Ky. 487, 134 SW 902; Barroll v. Reading, 5 Harr. & J. (Md.) 175.

60. Moore's Est., 72 Cal. 335, 13 P 880; In re Pfeffer, 117 Mich. 207, 75 NW 454; Morris v. Morris, 172 App. Div. 719, 158 NYS 361; Thompson's App., 103 Pa. 603; Rife v. Galbreath, 3 Penr. & W. (Pa.) 204; Mothland v. Wireman, 3 Penr. & W. (Pa.) 185, 33 AmD 71; Sterrett's App., 2 Penr. &

ever, only advisory to the court.[61] Conversely, where the allowance or disallowance of an item is a matter for the discretion of the court, the subject is not a proper one for submission to a jury.[62]

Issue of law. The question whether an amount paid by an administrator out of assets in his hands should be placed to his credit is one of law and not of fact, and should not be submitted to a jury.[63]

[§ 2459] **c. Matters to Be Determined.**[64] The matters proper for determination on an accounting by a personal representative are the correctness of his account,[65] and the jurisdiction extends to all questions necessarily involved.[66] It is proper to determine such matters as the amount of assets with which the representative should be charged,[67] the justness and legality of credits claimed against the estate arising from the payment of debts of the decedent, funeral expenses, statutory allowances, and the expenses of administration,[68] whether the personal representative has managed the affairs of the estate with good faith and ordinary prudence,[69] and whether certain expenditures should be charged to principal or income.[70] The court may also make an allowance of interest in favor of a legatee and against an executor.[71] In a proceeding for final settlement of an administrator's account, the surrogate cannot voice, alter, or change the plain terms of an order of the supreme court making advances to putative heirs of a lunatic, either directly or through the indirect process of interputation.[72]

To avoid multiplicity of suits. Where, on final accounting, the sole heir claimed to share in the administrator's commissions, it was held that the court might, to avoid multiplicity of suits, dispose of that contention without leaving the heir to action over against the administrator.[73]

Matters not to be determined. Irregularities which have not been prejudicial to the estate should not be inquired into,[74] nor should the validity of the appointment of the personal representative be determined.[75] Neither can the right of a public administrator to take charge of an estate be raised under exceptions which go only to the proper settlement of his administration.[76] In settling an administration account the payment of legacies or the distribution of the surplus should not be included.[77] Issues cannot be raised with parties as to matters not brought into court through the presentation of the account,[78] nor should questions as to matters which

W. (Pa.) 419; In re Rhoads, 3 Rawle (Pa.) 420.

[a] **Not a matter of right.**—(1) The demand of an issue is not, however, a matter of right upon every disputed claim, it must be shown by evidence that there exists in regard to such claim some disputed fact for the determination of which the intervention of a jury is necessary and of this necessity the court must determine from the evidence presented. Sharp's App., 3 Grant (Pa.) 260; Evans' Est., 11 Phila. (Pa.) 113, 2 WklyNC 337; Hansell's Est., 11 Phila. (Pa.) 47; Beehler's Est., 3 Phila. (Pa.) 254. (2) One cannot take his chance for a favorable finding of facts by an auditor, and when the report is adverse demand as matter of right an issue to try the same facts before a jury. Bradford's App., 29 Pa. 513; White's Est., 11 Phila. (Pa.) 100 [aff 4 WklyNC 208].

[b] **Discretion of court.**—Where, on an accounting by an administrator, who presents notes to his own order, made by the decedent, the validity of which is denied, an issue is demanded, the grant of an issue is within the discretion of the court. In re Ike, 236 Pa. 429, 84 A 786 [foll In re Ike, 200 Pa. 202, 49 A 791].

61. Moore's Est., 72 Cal. 335, 13 P 880; In re Pfeffer, 117 Mich. 207, 75 NW 454.

62. Maynardier v. Armstrong, 98 Md. 175, 56 A 357; Bitely v. Bitely, 85 Mich. 227, 48 NW 540; Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Mower's App., 48 Mich. 441, 12 NW 646; Showers v. Morrill, 41 Mich. 700, 3 NW 193.

63. Hapke v. People., 29 Ill. A. 546.

64. Jurisdiction to:
Construe will see supra § 2330.
Determine ownership of property see supra § 2330.

65. Elwell v. Pierce, 200 Mich. 479, 166 NW 874; Snyder's Est., 15 Pa. Co. 253; Cobb v. Speers, (Tex. Civ. A.) 49 SW 666.

66. In re Bruchaeser, 49 Misc. 194, 98 NYS 937, 5 Mills Surr. 211.

[a] **Whether judgment against decedent discharged by bankruptcy.**—The surrogate's court has jurisdiction, on the settlement of an executor's accounts, to determine whether a valid judgment recovered against testator has been discharged in bankruptcy, although it has no authority to pass on the validity of the judgment, etc. In re Williams, 118 NYS 562.

[b] **Fraud in assignment to executor.**—In proceedings to compel an accounting by an executor, surrogate has jurisdiction under Code Civ. Proc. § 2472a, to determine whether an assignment of all interest to executor by petitioner was obtained by fraud. Matter of Dollard, 74 Misc. 312, 133 NYS 1107 [aff 149 App. Div. 926 mem, 133 NYS 1118 mem].

[c] **Death of next of kin.**—The fact of the death of one of the next of kin should be determined by the surrogate's court on a judicial settlement of the account of an administrator, and not necessarily in a separate proceeding for that purpose. Matter of Benjamin, 155 App. Div. 233, 139 NYS 1091 [rev 77 Misc. 434, 137 NYS 758].

67. Vulte v. Martin, 44 HowPr (N. Y.) 18.

[a] **Failure to recover assets.**—Where an executor fails to bring action to recover assets of his testator, the estate may be protected upon the proceeding for accounting in the surrogate's court. Morris v. Morris, 172 App. Div. 719, 158 NYS 361.

68. Sharp v. Himes, 129 Ark. 327, 195 SW 131; In re Millenovich, 5 Nev. 161; Matter of Drummond, 100 Misc. 78, 165 NYS 78; Vulte v. Martin, 44 HowPr (N. Y.) 18; Arnold v. Smith, 14 R. I. 217.

[a] **The question as to whether or not a claim should be paid as preferred** may properly be raised at the time of the consideration of a final report, and it may be raised either by a petition or by exceptions to the report. Goodbub v. Hornung, 127 Ind. 181, 26 NE 770.

69. Iowa.—In re Miller, 169 Iowa 24, 149 NW 227, LRA1915C 736.

Mich.—Ward v. Tinkham, 65 Mich. 695, 32 NW 901.

Nev.—In re Millenovich, 5 Nev. 161.

N. H.—Weston v. Second Orthodox Cong. Soc., 77 N. H. 576, 95 A 146.

N. Y.—Morris v. Morris, 172 App. Div. 719, 158 NYS 361; Matter of Weed, 81 Misc. 386, 143 NYS 349; Thorne v. Underhill, 1 Dem. Surr. 306.

[a] **The question arising on the settlement of the final account** of an administrator involves his official acts in collecting, controlling, and managing the estate, the disposition of the proceeds, and the balance on hand belonging to the estate awaiting distribution, which cannot be one amount in favor of the distributees, and another in favor of the sureties in the administrator's bond. Ward v. Tinkham, 65 Mich. 695, 32 NW 901.

[b] **Sale of realty.**—The surrogate's court had power to determine on an accounting whether the executors had exercised proper care and diligence in selling real property pursuant to a power contained in the will. Matter of Weed, 81 Misc. 386, 143 NYS 349.

[c] **Management of real estate.**—On objections to the report of an administratrix it was proper to ignore objections having relation to her management of the real estate, the report not having touched on that subject, and the estate remaining open. Smith v. Smith, 133 Iowa 142, 109 NW 196.

70. In re Power, 166 NYS 1007 (alteration of building).

71. In re Lackie, (Iowa) 171 NW 679.

72. Matter of Farmers' L. & T. Co., 181 App. Div. 642, 168 NYS 952 [rev 99 Misc. 420, 163 NYS 961].

73. In re Tachi, 90 Wash. 621, 156 P 833.

74. In re Millenovich, 5 Nev. 161.

[a] **Whether the appraisers of an estate were disinterested** persons or not was a question not necessary to be determined in an accounting proceeding. In re Millenovich, 5 Nev. 161.

75. Epperson's Succ., 26 La. Ann. 595; Matter of Bankers' Trust Co., 82 Misc. 375, 143 NYS 843; Carroll v. Hughes, 5 Redf. Surr. (N. Y.) 337.

76. Browning v. Richardson, 186 Mo. 361, 85 SW 518.

77. South v. Hoy, 3 T. B. Mon. (Ky.) 88; Bradbury v. Jefferds, 15 Me. 212; Ake's App., 21 Pa. 320; Arnold v. Smith, 14 R. I. 217.

[a] **Where an administration account shows no balance for distribution,** the proper practice is to merely audit and settle the account and ascertain its correctness. It is error to hear and determine the claims of creditors, legatees, and distributees, until there is a fund for distribution. Snyder's Est., 15 Pa. Co. 253; Hamill's Est., 36 LegInt (Pa.) 137; Jones' Est., 19 Phila. (Pa.) 228.

78. Ala.—Jones v. Jemison, 4 Ala. 632.

Cal.—In re Vance, 141 Cal. 624, 75 P 323.

Ill.—Cagney v. O'Brien, 83 Ill. 72.

La.—Oteri's Succ., 108 La. 395, 32 S 423; Troxler's Succ., 46 La. Ann. 738, 15 S 153; Macarty's Succ., 5 La. Ann. 434.

are entirely collateral be determined.[79] One who claims property as belonging to himself and not to the estate administered will not be permitted to assert such claim by way of opposition to the account.[80] An objection to the account of an executor who is also trustee that the decree should provide for the quarterly payment to the objector of the interest payable to him under the will is more properly a matter for disposition upon the settlement of the decree.[81] When a claim has been adjudicated against an administrator it is so far binding upon the heirs that they cannot have the allowance set aside as against claimant by exceptions to the administrator's account.[82] Where the property of an estate was transferred to a corporation to continue the testator's business, it was held that the probate court had no jurisdiction in auditing the executor's accounts to distribute the corporation's profits, or to allow the executor compensation for services as manager of the corporation.[83]

Corporate stock partly owned by estate. On exceptions to the account of executors relating to the distribution of stock in a corporation, the probate court has jurisdiction only over the shares owned by the estate, and not over shares in the same corporation owned by decedent's children individually.[84]

Fraud in allowance of claim. It has been held that the allowance of a claim of a personal representative against the estate of his decedent, procured by fraud, cannot be set aside upon exception to his account,[85] but it has also been considered that an issue of fraud and collusion in the establishment of a claim of another person against the estate, by reason of which it is claimed that the representative is liable for the amount, may be determined on the accounting.[86]

Rents and profits. The right to land or to the rents or profits thereof must be settled by a direct action at law and not in a collateral manner by objecting to an administration account.[87] Where an accounting executor and trustee had no power under the will to collect the rents of testator's realty accruing after death of the cestui, his account in that respect could not be settled in probate proceeding.[88]

The rights of legatees or distributees should not be determined upon the accounting,[89] unless the statute authorizes such procedure.[90] A distributee cannot, by objecting to a final settlement, raise and litigate the question whether a personal representative is indebted to the estate, since the latter is entitled to a jury trial on that issue.[91]

Right to contest. It is usually considered that if the interest of a person contesting a settlement is disputed that question may be determined on the settlement,[92] although it has also been held that whether a person claiming to have an interest in the estate is entitled to a standing in court is a question which should be determined on the hearing for distribution rather than on the settlement of the executor's account.[93]

On annual, partial, or preliminary accounting. When proceedings are instituted and conducted for an annual or partial settlement, the court of probate cannot of its own motion convert it into a final settlement and render a final decree.[94] In a proceeding for the settlement of the preliminary accounts of an executor, questions as to the final distribution of the estate or of the method of procuring repayment of advances made by testator cannot be determined.[95]

In Louisiana an opposition and not a separate action is the proper proceeding by an heir making a claim against the succession,[96] or by a creditor who demands to be placed on the tableau,[97] or for ascertaining the extent of the personal liability of a representative for acts of maladministration.[98] The question of the widow's right to the marital fourth may be raised and passed on in her opposition to the account when there are no heirs in Louisiana or claiming an interest and when the universal legatee is present and the account exhibits the proposed settlement of the succession.[99] A direct action should be brought to determine whether a legacy is

N. Y.—Van Valkenburg v. Lasher, 53 Hun 594, 6 NYS 775; Matter of McInerney, 62 Misc. 441, 116 NYS 1039, 7 Mills Surr. 114; In re Finn, 44 Misc. 622, 90 NYS 159, 4 Mills Surr. 384.

Pa.—Stine's Est., 16 Pa. Super. 12; Fry's Est., 10 Pa. Dist. 493, 25 Pa. Co. 173.

Wash.—In re Campbell, 98 Wash. 295, 167 P 905.

79. Ala.—Byrd v. Jones, 84 Ala. 336, 4 S 375.

Cal.—In re Carter, 132 Cal. 113, 64 P 123, 484.

Me.—Treat v. Treat, 80 Me. 156, 13 A 684.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

N. Y.—Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff 181 N. Y. 562 mem, 74 NE 1120 mem].

Or.—Dray v. Bloch, 29 Or. 347, 45 P 772.

[a] **The court should not:** (1) Determine the liability as between the personal representatives and their sureties. Brigham v. Morgan, 185 Mass. 27, 69 NE 418. (2) Pass upon agreements between corepresentatives as to the division of commissions. In re Carter, 132 Cal. 113, 64 P 123, 484. (3) Take cognizance of matters between the personal representative and the individual heirs or distributees and not between him and the estate. Treat v. Treat, 80 Me. 156, 13 A 684.

[b] **Validity of trusts.**—Where trusts were in part valid and required payment by the executor to trustees, the court should not, on a judicial settlement of the executor's account, determine the validity of subsequent trusts. In re Zimmerman, 168 NYS 729 [aff 171 NYS 1103].

80. Cathey v. Kerr, 15 La. Ann. 228; In re Campfield, (N. J. Prerog.) 98 A 381; Fribourg v. Emigrants Industrial Sav. Bank, 168 App. Div. 816, 154 NYS 532.

81. Matter of Wolfe, 2 NYS 494, 1 Conn. Surr. 102 [rev on other grounds 52 Hun 510, 5 NYS 634].

82. McLeary v. Doran, 79 Iowa 210, 44 NW 360 [dist Dessaint v. Foster, 72 Iowa 639, 34 NW 454] (where the claim was allowed in the absence of the administrator).

83. In re Goetz, 236 Pa. 630, 85 A 65.

84. In re Myers, 238 Pa. 195, 86 A 89.

85. Ashton v. Miles, 49 Iowa 564.

86. In re Miller, 169 Iowa 24, 149 NW 227, LRA1915C 736.

87. West v. Smith, 8 How. (U. S.) 402, 12 L. ed. 1130; In re Whiton, 86 Nebr. 367, 125 NW 606; In re Finn, 44 Misc. 622, 90 NYS 159, 4 Mills Surr. 384; In re Blow, 11 NYS 193, 2 Conn. Surr. 360; Vulte v. Martin, 44 HowPr (N. Y.) 18; In re Duffy, 209 Pa. 390, 58 A 840.

88. Matter of Ring, 98 Misc. 119, 163 NYS 813.

89. In re Brown, 3 NYCivProc 39, 2 McCarty Civ. Proc. 274, 1 Dem. Surr. 136.

[a] **Whether legacies chargeable on real estate.**—On the settlement of an executor's account in the surrogate's court, that court has no jurisdiction to determine whether legacies are chargeable on the residuary real estate. Matter of Taber, 132 App. Div. 495, 116 NYS 960.

90. Gallagher v. Martin, 102 Md. 115, 62 A 247.

[a] **Ademption of legacy.**—Under Code Pub. Gen. L. art 93 § 234, providing that the probate court shall have full power to settle the accounts of executors and administrators, superintend the distribution of estates, and secure the rights of orphans and legatees, such court has power to hear and determine the question of the ademption of a legacy because of the alleged payment thereof by the testatrix in her lifetime. Gallagher v. Martin, 102 Md. 115, 62 A 247.

91. Wilson v. Ruthrauff, 82 Mo. A. 435.

92. Garwood v. Garwood, 29 Cal. 514; Poulson v. Frenchtown Nat. Bank, 33 N. J. Eq. 250 [aff 33 N. J. Eq. 618]; Herbein's Est., 2 Chest. Co. (Pa.) 449.

93. In re Willey, 140 Cal. 238, 73 P 998.

94. Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185; Whorton v. Moragne, 59 Ala. 641.

95. Hayes v. Welling, 98 A 61 [den rearg 38 R. I. 553, 96 A 843].

96. Bozant's Succ., 5 La. Ann. 709.

97. Pargoud v. Griffing, 10 La. 356.

98. Cooper v. Cotton, 15 La. Ann. 214.

99. Leppelman's Succ., 30 La. Ann. 468.

illegal;[1] or to enforce a claim against the administrator of a succession for property belonging to another succession of which he is alleged to be in possession,[2] or an unliquidated claim for property not included in the inventory against a succession under administration.[3] The liability of a widow, as an intermeddler, for her husband's debts cannot be enforced by opposition to her tableau of distribution as his administratrix.[4] Where a rule filed in a probate proceeding is dismissed, and no appeal taken by the mover, the issues raised by the rule cannot be considered and adjudicated on the trial of an opposition to the administrator's account filed before the order of dismissal, although such opposition recites the filing of the rule and the issues therein raised as a reason for the rejection of the account.[5]

[§ 2460] **d. Reference**[6]**—(1) In General.** In a proper case, upon the settlement of the account of a personal representative, a reference may be ordered by the probate court to a referee, auditor, commissioner, or master,[7] who may be directed to state an account.[8]

Amending order of reference. Where the court decided to refer all questions arising on an executor's account for hearing and determination, and all parties proceeded as if such reference had been made, although in fact the order as entered merely directs the referee to hear and report the evidence, the court may, on receiving the referee's report, amend the order of reference nunc pro tunc.[9]

A reference to arbitration of matters of controversy arising on the settlement of the estate of a decedent is sometimes provided for by statute.[10]

[§ 2461] **(2) Eligibility for Appointment as Referees, Auditors, or Commissioners.** Where the duty devolves on the county court to revise and approve or reject the report of commissioners of accounts, it is not strictly proper to appoint members of such court as commissioners,[11] although it cannot be said to be irregular and inadmissible to make such appointments, where the law imposes no restrictions in the matter of selection of commissioners and there is always a sufficient number of justices to form a court for a revision of the report without those who act as commissioners.[12] A referee will not be removed on motion of the personal representative in the absence of any showing of bias against him or his attorney.[13]

[§ 2462] **(3) Qualification of Referees, Auditors, or Commissioners.** It has been held not necessary that the auditor or referee should take any oath unless this is required by statute.[14]

[§ 2463] **(4) Powers of Referee, Auditor, or Commissioner.** A referee before whom a proceeding to settle an account is pending may allow an amended account to be filed at the hearing.[15] When this is deemed necessary for the promotion of justice the auditor has the right to retain all vouchers submitted to him until the filing of his report.[16]

[§ 2464] **(5) Scope of Inquiry.** The referee or auditor should determine all matters submitted by the order under which he acts and no others;[17] and it has been held that in referring an adminis-

1. Barker's Succ., 10 La. Ann. 28.
2. Blancand's Succ., 48 La. Ann. 578, 19 S 683.
3. Sanchez's Succ., 41 La. Ann. 504, 6 S 791.
4. Mouton's Succ., 3 La. Ann. 561.
5. Thomas' Succ., 114 La. 693, 38 S 519.
6. See generally References [34 Cyc 770].
7. U. S.—U. S. Bank v. Williams, 2 F. Cas. No. 942, 3 Cranch C. C. 240.
Ark.—Quinlan v. Fitzpatrick, 25 Ark. 471.
Conn.—Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.
D. C.—Matter of Ames, 10 D. C. 30.
Ga.—Gay v. Gay, 114 Ga. 361, 40 SE 265.
Ill.—In re Wincox, 186 Ill. 445, 57 NE 1073.
Ind.—Cunningham v. Cunningham, 94 Ind. 557.
Iowa.—In re Heath, 58 Iowa 36, 11 NW 723.
Ky.—Smith v. Cochran, 7 Bush 548.
Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.
Miss.—Anderson v. Gregg, 44 Miss. 170.
Mont.—In re Courtney, 31 Mont. 625, 79 P 317.
N. J.—Smith v. Smith, 80 N. J. Eq. 478, 85 A 226.
N. Y.—Matter of Schroeder, 113 App. Div. 204, 90 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem]; Matter of Woodward, 69 App. Div. 286, 74 NYS 755; Matter of Hoes, 54 App. Div. 281, 66 NYS 664; Matter of Fithian, 3 Silv. Sup. 282, 6 NYS 409; Matter of Meng, 96 Misc. 126, 159 NYS 535; Matter of Nestell, 72 Misc. 331, 131 NYS 193 [aff 146 App. Div. 940 mem, 131 NYS 1131 mem]; Matter of Smith, 40 Misc. 331, 81 NYS 1035, 3 Mills Surr. 485; Matter of Munzor, 4 Misc. 374, 25 NYS 818; Matter of Malcomson, 188 App. Div. 600, 177 NYS 238; In re Siesel, 2 NYS 704; Matter of Douglass, 3 Redf. Surr. 538; Matter of Foster, 3 Redf. Surr. 532.
N. C.—Evans v. Smith, 84 N. C. 146.
Oh.—James v. West, 67 Oh. St. 28, 65 NE 156.
Pa.—In re Meyers, 253 Pa. 537, 98 A 694; Spellisy's Est., 174 Pa. 628, 34 A 316; Parker's App., 61 Pa. 478; Maxwell v. McClintock, 10 Pa. 237; Marriot v. Davey, 1 Dall. 164, 1 L. ed. 83; Ames' App., 8 Pa. Cas. 332, 11 A 232; Hughes' Est., 19 Pa. Super. 534; Troelsch's Est., 19 Pa. Dist. 566, 38 Pa. Co. 40; Rankin's Est., 5 Pa. Co. 603; John's Est., 2 Chest. Co. 281; Hansell's Est., 11 Phila. 47; Gaul's Est., 11 Phila. 18; Benner's Est., 11 Phila. 6; Hutchinson's Est., 9 Phila. 322.
Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203.
Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.
Va.—Nelson v. Kownslar, 79 Va. 468; Chapman v. Shepherd, 24 Gratt. (65 Va.) 377.
[a] **Reference required by statute.**—Smith v. Cochran, 7 Bush (Ky.) 548.
[b] **Statute as to reference merely directory.**—Crowder v. Shackelford, 35 Miss. 321.
[c] **Only after accounts filed and exceptions made.**—(1) The orphans' court has no power, under Orphans' Court Act §§ 122, 126, to refer to a master in chancery the matter of stating the accounts of an executor until the latter has filed his account, and exceptions are made thereto by some interested party. Smith v. Smith, 80 N. J. Eq. 478, 85 A 226. To similar effect Quinlan v. Fitzpatrick, 25 Ark. 471. (2) The withdrawal of exceptions to the account ends the authority of the auditor. Brong's Est., 20 Pa. Dist. 1041.
[d] **Intermediate accounts.**—The surrogate cannot of his own motion direct the examination of an intermediate account by a referee, the only object of such an account being to ascertain the condition of the estate, and not to determine the propriety or validity of the transactions of the personal representative. Matter of De Russey, 60 Hun 577, 14 NYS 177, 20 NYCivProc 270 [dist Buchan v. Rintoul, 70 N. Y. 1 (aff 10 Hun 183)].
[e] **The fact that the court has already approved accounts** previously filed does not preclude the appointment of an auditor to make an examination as preliminary to the approval of the final account. Brigham v. Morgan, 185 Mass. 27, 69 NE 418.
[f] **Consent references.**—(1) Notwithstanding the repeal of the statute authorizing the reference of the final account of a personal representative to a commissioner, such reference may be made by consent of parties. Cunningham v. Cunningham, 94 Ind. 557. (2) Such accounts cannot be referred to auditors without the consent of the parties interested. Ludlow v. Ludlow, 4 N. J. L. 189.
8. Chamberlain v. Chamberlain, 16 SW 455, 13 KyL 192; Scott v. Dorsey, 1 Harr. & J. (Md.) 227; Witman's App., 28 Pa. 376; Montgomery's Est., 3 Brewst. (Pa.) 306.
[a] **Auditor not concluded by allowance by court.**—An auditor, in stating an account against executors, is not concluded by any allowance made to them by the orphans' court, but must determine from the vouchers whether the allowance was just. Scott v. Dorsey, 1 Harr. & J. (Md.) 227.
9. Matter of May, 53 Hun 127, 6 NYS 356.
10. Caldwell v. Caldwell, 121 Ala. 598, 25 S 825; Holdsombeck v. Fancher, 112 Ala. 469, 20 S 519.
11. Chalfant v. Sterns, 4 Dana (Ky.) 602.
12. Chalfant v. Sterns, 4 Dana (Ky.) 602.
13. In re Rainforth, 37 Misc. 660, 76 NYS 314, 3 Mills Surr. 26.
14. Smith v. Cochran, 7 Bush (Ky.) 548; Benoit v. Brill, 24 Miss. 83.
15. Matter of Munzor, 4 Misc. 374, 25 NYS 818.
16. Hutchinson's Est., 9 Phila. (Pa.) 322.
17. Matter of Mellen, 56 Hun 553, 9 NYS 929; Matter of Rothschild, 42

tration settlement for the correction of frauds the courts should find and designate the points in which the fraud may consist and confine the reference to those points.[18] Disputed questions of fact should not be referred to the auditor when this can be avoided, but he should be confined as nearly as possible to a mere statement of account.[19] A referee on an accounting by an administratrix has no power to pass on the question of allowances, costs, and taxable disbursements.[20]

[§ 2465] **(6) Report.** It is the duty of the referee or auditor to make a report to the court,[21] within the time fixed by statute or rule of court,[22] and he cannot withhold such report until his fees are paid.[23] It has been held to be the duty of commissioners to report the vouchers, the written evidence, and the substance of the parol proof on which they acted,[24] but it has also been held that when an order of reference does not require evidence to be reported, an exception on the ground of the failure of the referee to report evidence is not available.[25] Only questions within the jurisdiction of the court can be passed on by an auditor,[26] and the auditor cannot report on matters as to which no evidence has been submitted.[27] Where some of the items of an account are disputed or objected to as improper, and it is doubtful whether they should be allowed or not, it is not improper for the commissioner before whom the settlement is had to direct the attention of the court to them by alternate statements leading to different results, and thus leave the court to draw its own conclusions as to which statement should be confirmed.[28] A finding, by a committee to whom the accounts of an administrator were referred, that the charges made by the administrator for his services were reasonable, is sufficient, in the absence of a showing that it committed an error of law in so finding.[29] After a referee has filed his report he cannot make an additional finding.[30]

Where an account has been referred to the clerk of the probate court, it is no ground of exception that the court made a final decree without a report from the clerk.[31]

[§ 2466] **(7) Exceptions to Report.** The report of a referee may be excepted to by any party to the accounting proceedings;[32] and it has been held that an administrator, who has waived his exceptions to the commissioner's report under the erroneous impression that the report would be sustained, and the case then finally disposed of, may withdraw his waiver and renew his exceptions.[33] Exceptions ought to be at least specific enough to point out the error complained of.[34] An exception for lack of proper parties goes to the petition for an accounting and cannot be directed to the report of the commissioner.[35] Before passing upon the report in gross the court should consider in detail the exceptions taken thereto;[36] but exceptions should be dismissed, where the error complained of is not an error of the auditor but an error of the court, which can only be corrected on appeal.[37]

New or additional exceptions. It has been held that the court may allow the filing of further objections if the objections filed are insufficient,[38] but it has also been asserted that it is not error to refuse to allow a party to file new exceptions to the report, after the time for filing exceptions has expired, when no reason or excuse for not filing such exceptions within the time prescribed by law is offered.[39]

Effect of failure to except. Where an administrator takes no exception to a report finding a balance but declining to approve or disapprove the account, and acquiesces by moving for a judgment, the court will not be held to have lacked authority to render a judgment refusing to approve the accounts.[40]

[§ 2467] **(8) Action of Court on Report.** A referee or auditor does not decide as a court, but is employed simply to aid the court making the reference, and is subject to its directions; his determination is subject to approval or disapproval of the

Misc. 161, 85 NYS 1084, 4 Mills Surr. 119; Matter of Leslie, 3 Redf. Surr. (N. Y.) 280; Coggins' App., 3 Walk. (Pa.) 426; Wetherill's App., 3 Walk. (Pa.) 261; Hughes' Est., 19 Pa. Super. 534; Hamor's Est., 1 Chest. Co. (Pa.) 319; Speise's Est., 21 LancLRev (Pa.) 185; Taylor's Est., 5 Phila. (Pa.) 218.

[a] **Objections filed.**—When disputed accounts of an executor are referred to an auditor for examination, it is the duty of the auditor to pass upon the objections filed to the accounts and no others. Boughton v. Flint, 74 N. Y. 476 [rev 13 Hun 206]. Compare Scheidt's Est., 2 Woodw. (Pa.) 355 (objection that auditor inquired into matters not raised by exceptions, made after filing of report, is too late).

[b] **Items not objected to.**—Where an auditor is appointed to pass on specific exceptions to an administrator's account, he cannot surcharge the administrator as to an item not covered by any of the exceptions. In re Ford, 232 Pa. 179, 81 A 200.

[c] **Payments by way of distribution** are not part of an administration account; and auditors appointed to settle such an account have no authority to report distribution. Robins' Est., 180 Pa. 630, 37 A 121.

[d] **The private account of the personal representative with the estate** may be settled on a reference, although it may not have been specifically and particularly put in issue. Trevelyan v. Lofft, 83 Va. 141, 1 SE 901; Carter v. Cutting, 5 Munf. (19 Va.) 223.

18. Reinhardt v. Cartrell, 33 Ark. 727.

19. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

20. In re McGovern, 118 NYS 378.

21. Steel v. Morrison, 4 Dana (Ky.) 617; Matter of Foster, 3 Redf. Surr. (N. Y.) 532; James v. West, 67 Oh. St. 28, 65 NE 156; Hansell's Est., 11 Phila. (Pa.) 47.

22. James v. West, 67 Oh. St. 28, 65 NE 156; Hansell's Est., 11 Phila. (Pa.) 47.

23. Matter of Foster, 3 Redf. Surr. (N. Y.) 532.

24. Steele v. Morrison, 4 Dana (Ky.) 617.

25. Cunningham v. Cunningham, 94 Ind. 557.

26. Axford's Est., 11 Phila. (Pa.) 145.

27. Bradley's Est., 11 Phila. (Pa.) 87.

28. Campbell v. White, 14 W. Va. 122.

29. Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

30. Richardson's Est., 2 Misc. 288, 23 NYS 978, 1 Pow. Surr. 384.

31. Satterwhite v. Littlefield, 21 Miss. 302.

32. Ga.—Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

Miss.—Benoit v. Brill, 24 Miss. 83.

Pa.—Benedict's Est., 4 LancLRev 99.

S. C.—Tindal v. Tindal, 1 S. C. 111.

Tex.—Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

[a] **Exceptions may be made by:** (1) Creditors. Tindal v. Tindal, 1 S. C. 111. (2) Distributees. Benoit v. Brill, 24 Miss. 83. (3) Legatees. Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

[b] **Effect of appointment of receiver.**—Where a legatee proceeds in equity to have an accounting by an executor, and to obtain judgment against him for mismanagement and waste, the fact that a receiver is appointed for the estate will not operate to deprive the moving legatee of his right as a litigant, so that he may not contest the claim set up by the attacked executor against the estate, which would affect the interest of such legatee, and prevent such legatee from filing exceptions of law and fact to the report of an auditor to which the case had been referred. Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

33. Hannah v. Boyd, 25 Gratt. (66 Va.) 692.

34. Tippin v. Perry, 122 Ga. 120, 50 SE 35; Gay v. Gay, 114 Ga. 361, 40 SE 265; In re Moore, 103 Iowa 474, 72 NW 674; Hurlburt v. Hutten, 44 N. J. Eq. 302, 15 A 417; Newell v. Doty, 33 N. Y. 83; In re Levy, 1 AbbNCas (N. Y.) 177; Ingram v. Mackey, 5 Redf. Surr. (N. Y.) 357.

35. Hobbs v. Craige, 23 N. C. 332.

36. In re Bedford, 30 Hun (N. Y.) 551.

37. Taylor's Est., 12 Phila. (Pa.) 137.

38. Boughton v. Flint, 74 N. Y. 476.

39. Tippin v. Perry, 122 Ga. 120, 50 SE 35.

40. Torruellas v. Ferrer, 25 Porto Rico 821.

court and his report amounts to nothing until confirmed by it,[41] although it has been held that where an auditor appointed by the orphans' court to audit an executor's account, by agreement of the parties in interest, audited accounts of moneys received and paid out by the executor as agent for the collection of rents accruing after the testator's death, the orphans' court was without jurisdiction to revise the findings of the auditor as to moneys thus received as agent.[42] The court may adopt [43] or modify [44] the report, recommit it to the referee,[45] or set it aside.[46] In passing on exceptions to the report, the court exercises a jurisdiction in the nature of that possessed by a court of review or appeal, and is not called on to make any additional or independent findings on its disposition of the questions or issues referred or embraced in the report, whatever such disposition may be.[47] It may, however, if it so desires, take further testimony, and make findings of its own on which to base its orders.[48] It has been held that where no exceptions have been taken and filed the court has no alternative but to confirm the report,[49] and the report of a referee has the force and effect of the verdict of a jury, and must be allowed to stand, unless without support from the evidence,[50] or unless some plain and obvious error sufficient to warrant the setting aside of the report is made to appear by the party who objects thereto.[51]

An order that the report of a commissioner be recorded has been regarded as a confirmation thereof.[52]

Effect of confirmation. Where the court approves or confirms the report, it becomes conclusive as to all matters embraced therein,[53] and such approval and confirmation may cure whatever irregularity there may have been in the auditor's passing upon matters not within the submission to him.[54]

[§ 2468] **(9) Rehearing or Second Reference.** In a proper case the report may be recommitted to the referee, auditor, or commissioners for a further hearing or additional findings,[55] or for the purpose of having omissions in the original report supplied.[56] Such recommitment is, however, largely discretionary with the court,[57] and it has been considered proper to refuse to send the matter back for the purpose of allowing the representative to make further proof as to a point as to which he had ample opportunity to offer proof,[58] or where no error is apparent and no after-discovered evidence is

41. Ky.—Briscoe v. Brady, 6 T. B. Mon. 134.
Mont.—In re Courtney, 31 Mont. 625, 79 P 317.
N. Y.—Boughton v. Flint, 74 N. Y. 476 [rev 13 Hun 206]; Matter of Mellen, 56 Hun 553, 9 NYS 929.
Pa.—Welsh's Est., 24 Pa. Dist. 489.
Porto Rico.—Torruellas v. Ferrer, 25 Porto Rico 821.

42. Shisler's Est., 13 Phila. (Pa.) 333.

43. Willis v. Willis, 168 Ky. 250, 181 SW 1105; In re Courtney, 31 Mont. 625, 79 P 317.

44. In re Courtney, 31 Mont. 625, 79 P 317; Matter of Schaefer, 65 App. Div. 378, 73 NYS 57 [mod 34 Misc. 34, 69 NYS 489].

[a] **Opening account taken by master or auditor.**—In re Gorman, 49 App. Div. 637, 63 NYS 123; Evertson v. Tappen, 5 Johns. Ch. (N. Y.) 497; Scheetz's Est., 2 Woodw. (Pa.) 213.

45. See infra § 2468.

46. In re Courtney, 31 Mont. 625, 79 P 317; Sullivan v. Kraus, 170 App. Div. 769, 155 NYS 803; Hottenstein's App., 2 Grant (Pa.) 301; Hoare v. Muloy, 2 Yeates (Pa.) 161.

47. Matter of Nestell, 72 Misc. 331, 131 NYS 193 [aff 146 App. Div. 940 mem, 942 mem, 131 NYS 1131 mem].

48. In re Courtney, 31 Mont. 625, 79 P 317.

49. In re Leffingwell, 30 Hun (N. Y.) 528.

50. U. S.—Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740].
Iowa.—In re Heath, 58 Iowa 36, 11 NW 723.
Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.
N. Y.—Matter of Bradley, 2 NYS 751, 1 Conn. Surr. 106.
Pa.—In re Young, 204 Pa. 32, 53 A 511; Hottenstein's App., 2 Grant 301; Wendt's Est., 14 Pa. Super. 644; Wilhelm's Est., 23 Pa. Dist. 757; Wenderoth's Est., 23 Pa. Dist. 652; Roth's Est., 23 Pa. Dist. 428; Elder's Est., 23 Pa. Dist. 369; Milligan's Est., 16 Pa. Dist. 243; Hufl's App., 32 LegInt 284; In re Kern, 9 North. Co. 153; In re Pearson, 8 North. Co. 23; White's Est., 11 Phila. 100; Wedekind's Est., 11 Phila. 68; White's Est., 11 Phila. 100.

51. Nauman's App., 116 Pa. 505, 9 A 934; Thompson's App., 103 Pa. 603; Atkinson's App., 8 Pa. Cas. 292, 11 A 239; Wilhelm's Est., 23 Pa. Dist. 757; McBride's Est., 4 Pa. Co. 564; In re Greenwalt, 9 LancBar (Pa.) 50; Sweeten's Est., 4 LancLRev (Pa.) 54; Dolph's Est., 3 LuzLegReg (Pa.) 146; Vandermark's Est., 2 LuzLeg Reg (Pa.) 83; Frey's Est., 12 Phila. (Pa.) 15; Re Parker, 5 Newfoundl. 17.

52. McCracken v. McCracken, 6 T. B. Mon. (Ky.) 342.

53. Lee v. Patrick, 31 N. C. 135.
[a] **Illustration.**—Where, in an action against an administrator, a reference was made to a commissioner to take an account of the administration of the assets, and the commissioner made a report, which was confirmed, stating an outstanding judgment, the amount of which was more than sufficient to cover the balance of the assets in his hands, and plaintiff made use of the report to charge the administrator, it was held that the report was conclusive in favor of the administrator, and that he was not required to produce the record of the judgment. Lee v. Patrick, 31 N. C. 135.
[b] **Conclusiveness of findings of fact.**—Where the final accounting of an executor was referred, and the referee's findings of fact objected to were adopted by the court, such findings are conclusive on the supreme court on appeal. Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

54. Morris v. Morris, 172 App. Div. 719, 158 NYS 361; Matter of Mellen, 56 Hun 553, 9 NYS 929; Bloom's App., 106 Pa. 498.

55. Miss.—Crowder v. Shackelford, 35 Miss. 321.
N. Y.—Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem]; Matter of Bayer, 54 Hun 189, 7 NYS 566; Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff sub nom. In re Hoffman, 150 NYS 776]; Matter of Rothschild, 42 Misc. 161, 85 NYS 1084, 4 Mills Surr. 119; In re Watson, 148 NYS 902 [aff 165 App. Div. 252, 150 NYS 776]; Matter of Pollock, 3 Redf. Surr. 100.
N. C.—Barnawell v. Smith, 58 N. C. 168; Peyton v. Smith, 22 N. C. 325.
Pa.—In re Harlan, 1 PaLJR 451, 3 PaLJ 116; Bradley's Est., 11 Phila. 87; Donnelly's Est., 3 Phila. 18.
Vt.—In re Pierce, 68 Vt. 639, 35 A 546.
Va.—Thomas v. Dawson, 9 Gratt. (50 Va.) 531.
[a] **Where rehearing should be granted.**—(1) Where, on an accounting by an executor and executrix before a referee, the referee proceeded on the theory that a partnership relation had been established between testator and the executor, but on a hearing before the surrogate on the referee's report the surrogate held the proof insufficient to establish a partnership, and thereupon surcharged the executors' account, an application for a rehearing on the ground that the executors had other evidence of the existence of a partnership, which they were led to refrain from introducing on the reference because of the referee's ruling that evidence already adduced was sufficient to establish a partnership, should be granted. Matter of Muller, 96 App. Div. 619, 88 NYS 673. (2) A surety on the bond of a temporary administrator who replaced a former surety was entitled, in a proceeding to charge the administrator with a devastavit of the estate in regard to a stock exchange seat, to show that, if there was such a devastavit, it took place prior to the time he became a surety, and for that purpose have the account filed by the temporary administrator referred back to the referee to whom it was originally referred, to admit evidence in relation to the stock exchange seat controversy. Matter of Grant, 122 App. Div. 602, 107 NYS 375.

56. Steele v. Morrison, 4 Dana (Ky.) 617; Abercrombie v. Holder, 63 N. Y. 628 [aff 4 Hun 141]; Thompson v. McDonald, 22 N. C. 463.

57. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

58. Matter of O'Hara, 50 Misc. 495, 100 NYS 635, 5 Mills Surr. 425; Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.
[a] **Illustration.**—Where an administrator's account contained items for moneys paid for legal services, which were duly objected to, and no proof was offered on the subject, although the attorney who rendered the services was notified of the necessity of proof as to such services and their value, and the claim of the executor in this respect was disallowed, the matter will not be sent back to the referee to enable the representative to produce proof as to such services, especially where it appears that he has attempted to conceal assets and has made false and fraudulent charges against the estate with respect to other matters. Matter of O'Hara, 50 Misc. 495, 100 NYS 635, 5 Mills Surr. 425.

averred.[59] A rehearing before another referee may be ordered in a proper case.[60] On a rehearing of an executor's account by an auditing judge, it is irregular to introduce new matter not comprised within the purpose of the rehearing,[61] especially where such new matter is contrary to the findings of the court.[62]

[§ 2469] **4. Evidence—a. Presumptions.** In proceedings for stating and settling the accounts of personal representatives proper presumptions will be indulged.[63] Thus it will be presumed that some assets were received by the personal representative,[64] that amounts due to the estate could have been collected by the representative,[65] that notes taken by the representative on sales made by him were paid at maturity,[66] that a debt returned in the inventory without comment has been collected in full,[67] that a stock certificate standing in decedent's name and produced by his wife as his administratrix came into her hands after decedent's death,[68] that a debt of decedent was paid with money belonging to his estate,[69] that the personal representative of two estates, one of which was indebted to the other, paid the debt as soon as he had sufficient funds on hand,[70] that articles specifically bequeathed have been disposed of conformably to the will,[71] and that the receipt of a residuary legatee to the personal representative in full of the interest which he took under the will covered his share of uncollected assets.[72] Where the representative's general management of the estate evinces fidelity and prudence, a presumption arises in favor of the correctness of his account;[73] but where he has failed to keep accounts or take vouchers, or otherwise shows carelessness in his general management, obscurity and doubt as to whether a credit should be given in his favor will be resolved against him,[74] and where his accounts are not only untrustworthy, but of a most suspicious character, all presumptions are against him.[75] Where it is shown that the representative has converted a certain sum, there is no presumption that he has not converted other sums.[76]

[§ 2470] **b. Burden of Proof—(1) In General.** When a personal representative renders his account and it is contested, the burden is generally on him to sustain and establish its correctness,[77] and even though there is no formal opposition, the represen-

59. Douglass' Est., 10 Pa. Dist. 478, 25 Pa. Co. 568.

60. Matter of Watson, 101 App. Div. 550, 92 NYS 195, 34 NYCivProc 150.

[a] **Illustration.**—Where, on a reference by the surrogate, the widow's claim against her husband's estate for property advanced to him was allowed on her testimony, the question of her competency to testify as to transactions between herself and her deceased husband not being raised, and the testimony of one of the executors, who had been testator's private secretary and business manager, and who was familiar with the nature and merits of the claim, and it also appeared that if her claim had not been allowed the widow would have contested the validity of testator's will, and the judgment on the claim having been paid, the executors charged the same to the estate, and on their judicial settlement the amount so paid was surcharged to their account, the executor who formerly testified being excluded as a witness as a person interested, and the testimony of the widow being given little weight because she was incompetent when testifying in support of her claim before the referee, it was held that the acts of the executors should not be characterized as fraudulent, collusive, or negligent, in failing to resist the widow's claim more stubbornly, and that a new hearing of their account should be had before another referee. Matter of Watson, 101 App. Div. 550, 92 NYS 195, 34 NYCivProc 150.

61. Lafferty's Est., 5 Pa. Dist. 347, 18 Pa. Co. 296.

62. Lafferty's Est., 5 Pa. Dist. 347, 18 Pa. Co. 296.

63. Cal.—Sanderson's Est., 74 Cal. 199, 15 P 753.

La.—Bry v. Dowell, 1 Rob. 111.

Mass.—Dickinson v. Arms, 8 Pick. 394.

Miss.—Stone v. Morgan, 65 Miss. 247, 3 S 580.

Mo.—Myers v. Myers, 98 Mo. 262, 11 SW 617.

N. Y.—In re Clark, 119 N. Y. 427, 23 NE 1052; Mesick v. Mesick, 7 Barb. 120; Matter of Viles, 86 Misc. 170, 149 NYS 121.

N. C.—Nichols v. Dunn, 22 N. C. 287.

Pa.—Eavenson's App., 84 Pa. 172; Brown's Est., 8 Phila. 197.

Vt.—Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

Va.—Tate v. Jones, 98 Va. 544, 36 SE 984.

Wis.—In re Morgan, 152 Wis. 138, 139 NW 745.

Presumptions generally see Evidence §§ 25–88.

64. Wyatt v. Luton, 10 Heisk. (Tenn.) 458.

65. Sanderson's Est., 74 Cal. 199, 15 P 753; Stone v. Morgan, 65 Miss. 247, 3 S 580; Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

[a] **Promissory note presumed collectable.**—Sanderson's Est., 74 Cal. 199, 15 P 753; Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

66. Chesnut v. Strong, 11 S. C. Eq. 146.

67. Graham v. Davidson, 22 N. C. 155.

68. Matter of Brown, 86 Misc. 187, 149 NYS 138.

69. In re Orne, 192 Pa. 626, 44 A 287.

70. Dickinson v. Arms, 8 Pick. (Mass.) 394.

71. Matter of Pollock, 3 Redf. Surr. (N. Y.) 100.

72. Tate v. Jones, 98 Va. 544, 546, 36 SE 984 ("That presumption, however, is only prima facie, and in a case like this would be more easily rebutted than where the party taking the receipt did not occupy a fiduciary relation").

73. Ashbrook v. Ashbrook, 28 SW 660, 16 KyL 593; Bauman's Succ., 30 La. Ann. 1138; Wederstrandt's Succ., 19 La. Ann. 494; In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; Rich v. Morisey, 149 N. C. 37, 47, 62 SE 762.

[a] **Intermediate accounting presumed correct.**—In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811.

[b] **The final account** of an administrator duly verified and filed is prima facie correct. Rich v. Morisey, 149 N. C. 37, 47, 62 SE 762.

74. Huston v. Roe, 78 N. J. Eq. 215, 78 A 162 [rev on other grounds 79 N. J. Eq. 220, 81 A 843]; Hetfield v. Debaud, 54 N. J. Eq. 371, 34 A 882; Matter of Brown, 86 Misc. 187, 149 NYS 138.

75. Downie v. Knowles, 37 N. J. Eq. 513 [aff 39 N. J. Eq. 594].

76. In re McCauley, 49 Misc. 209, 99 NYS 238, 5 Mills Surr. 226.

[a] **Rule applied.**—Where an administrator collected and converted assets of the estate and died, leaving a will which was probated in a foreign state, and the foreign executor refused to come into this state or to take any steps toward, or consent to, the granting of ancillary letters, and an administrator de bonis non was appointed, who by action collected from the surety of the deceased administrator the amount of five thousand dollars, it was held that upon the accounting of the administrator de bonis non, there was no presumption that the deceased administrator had not received and converted other assets than those for which a recovery had been had against the surety. In re McCauley, 49 Misc. 209, 99 NYS 238, 5 Mills Surr. 226.

77. U. S.—Balfe v. Tilton, 235 Fed. 448.

Ill.—Wilbanks v. Crosno, 112 Ill. A. 503.

Ind.—Taylor v. Burk, 91 Ind. 252; Brownlee v. Hare, 64 Ind. 311; Hamlyn v. Nesbit, 37 Ind. 284.

Iowa.—In re Munger, 168 Iowa 372, 150 NW 447, AnnCas1917B 213.

Ky.—Kirby v. Moore, 99 SW 1156, 30 KyL 1020; Cox v. Doty, 45 SW 1044, 20 KyL 287.

La.—Dougart's Succ., 30 La. Ann. 268.

Mass.—Wood v. Farwell, 195 Mass. 559, 81 NE 294.

Mont.—In re Williams, 47 Mont. 325, 132 P 421.

Nebr.—In re Mall, 80 Nebr. 233, 114 NW 156.

N. J.—In re Atkinson, 98 A 269 [aff 85 N. J. Eq. 485, 96 A 89]; In re Frey, 73 N. J. Eq. 346, 67 A 192; In re Wiley, 65 A 212; In re Bayley, 67 N. J. Eq. 566, 59 A 215.

N. Y.—Matter of McKinnon, 182 App. Div. 277, 169 NYS 416; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Brown, 86 Misc. 187, 149 NYS 138; Matter of Joost, 50 Misc. 78, 100 NYS 378, 5 Mills Surr. 310; Underhill v. Newburger, 4 Redf. Surr. 499.

N. C.—Moseley v. Johnson, 144 N. C. 257, 56 SE 922.

Or.—In re Roach, 50 Or. 179, 191, 92 P 118 [cit Cyc].

Pa.—Lewis' Est., 50 Pa. Super. 417; Kulp's Est., 1 LegGaz 37.

[a] **The representative must show:** (1) The propriety of credits claimed. Shuey v. Lambert, 53 Ind. A. 567, 102 NE 150. (2) Actual payment of a claim alleged to have been paid. In re Frey, 73 N. J. Eq. 346, 67 A 192. (3) The validity of his individual claim against the estate. Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125. (4) The exact amount of taxes paid by him. Cox v. Doty, 45 SW 1044, 20 KyL 287. (5) The disposition of moneys shown to have come into his possession. Wilbanks v. Crosno, 112 Ill. A. 503. (6) Payment of his own admitted debt to the estate. In re Mall, 80 Nebr. 233, 114 NW 156. (7) The adequacy of the

tative must show that his account is correct,[78] although he is not in such case obliged to prove each separate item.[79] An executor relying on consent of the beneficiaries to the use of funds of the estate in his own business must show that he acted in good faith and obtained such consent on full and fair representations and disclosures.[80]

On contestant. Where exceptions to an account are of an affirmative nature, the burden of sustaining such exceptions rests upon the contestant;[81] and it is also incumbent upon the contestant to show that he has an interest in the estate entitling him to oppose the accounting.[82]

[§ 2471] **(2) As to Assets.** The burden of showing that there were more assets than are acknowledged by the inventory or account rests on the party objecting,[83] who must sustain his contention with reasonable certainty and not leave the matter to mere conjecture or suspicion;[84] and the same is true where the objection is based on a claim that property of the estate was of greater value than is shown by the inventory or appraisement.[85]

On representative. When, however, assets are shown or admitted, the burden is upon the personal representative to account for their proper disposition;[86] and where the representative has failed to collect a claim due to the estate, the burden rests upon him to show that it could not have been collected by the use of due diligence.[87] So also, where certain property has been included in the inventory, but the representative claims an allowance therefor on the ground that it should not have been included in the inventory, the burden rests upon him to show that such property was not, in fact, a part of the estate.[88]

[§ 2472] **(3) As to Disbursements.** When a credit is claimed by a personal representative and its validity is disputed, the law casts on him the burden of supporting it;[89] and in order to sustain such credit he must prove not only the payment but

security taken by him for money of the estate which he loaned. In re Roach, 50 Or. 179, 92 P 118.

[b] **Inability to pay debt to estate.**—An administrator is charged with his own personal obligations to the estate as a cash asset in hand, and he and his surety can be relieved only by showing that, at the time of his appointment, the administrator was hopelessly insolvent, and so remained up to and including the time of his final settlement. Moseley v. Johnson, 144 N. C. 257, 56 SE 922.

[c] **A general denial,** in the opposition of an account of an executor or administrator, puts in issue each and every item of the account, and puts upon the representative the onus of proving each item. Dougart's Succ., 30 La. Ann. 268.

[d] **An amended account,** correcting errors, omissions, etc., must be supported by proof, like the items of the original account. McCraw's Succ., Mann. Unrep. Cas. (La.) 277.

78. Lee's Succ., 4 La. Ann. 578.

"When the representative of a succession files an account he is plaintiff. The burden is on him to prove and establish the correctness of the account, and it cannot be homologated without such proof. If no opposition is made, the proof is introduced, and the whole proceeding is ex parte, just as in ordinary cases where judgment by default has been taken, and is to be confirmed." Planchet's Succ., 29 La. Ann. 520, 521.

79. Bougere's Succ., 29 La. Ann. 378; Wederstrandt's Succ., 19 La. Ann. 494.

80. In re Spann, (Okl.) 152 P 68.

81. Ala.—Eubank v. Clark, 78 Ala. 73; Kirksey v. Kirksey, 41 Ala. 626.

Cal.—In re Vance, 141 Cal. 624, 75 P 323.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Kelley v. Kelley, 141 Ky. 414, 132 SW 1031.

La.—Watt's Succ., 122 La. 952, 48 S 335; Conery's Succ., 106 La. 50, 30 S 294; Gayle's Succ., 27 La. Ann. 547.

Mo.—Young v. Ray, (A.) 193 SW 608.

Mont.—In re Williams, 53 Mont. 63, 173 P 790; In re Dolenty, 53 Mont. 33, 161 P 524.

Nebr.—In re Mall, 80 Nebr. 233, 114 NW 156.

N. Y.—Matter of Perry, 129 App. Div. 587, 114 NYS 246; Matter of Chauncey, 101 Misc. 275, 166 NYS 949; Matter of Brown, 86 Misc. 187, 149 NYS 138; In re Miller, 64 Misc. 232, 119 NYS 52, 7 Mills Surr. 254 [mod on other grounds 138 App. Div. 885 mem, 122 NYS 1135 mem]; Matter of Dittrich, 53 Misc. 511, 105 NYS 301, 6 Mills Surr. 112 [aff 128 App. Div. 893 mem, 112 NYS 1127 mem]; In re Watson, 148 NYS 902 [aff 165 App. Div. 252, 150 NYS 776].

N. C.—Overman v. Lanier, 157 N. C. 544, 73 SE 192.

Pa.—Wolf's Est., 22 Pa. Dist. 541; Bleakley's Est., 20 Pa. Dist. 1000; Borda's Est., 10 Pa. Dist. 117; In re Fitch, 8 LackLegN 150.

Porto Rico.—Vazquez v. Sosa, 16 Porto Rico 465.

[a] **The contestant must prove allegations of:** (1) Bad faith of the representative. Young v. Ray, (Mo. A.) 193 SW 608. (2) Negligence of the personal representative. Howe v. Winn, 150 Ky. 667, 150 SW 842; Matter of Wagner, 40 Misc. 490, 82 NYS 797; Johnson's Est., 11 Phila. (Pa.) 83. (3) Double compensation for the same services. Kelley v. Kelley, 141 Ky. 414, 132 SW 1031.

[b] **Where it is sought to charge the representative with profits** of a business in which he has used the money of the estate, the burden of proving such profits is on those who make the charge. In re Suess, 37 Misc. 459, 75 NYS 938, 2 Mills Surr. 543; Matter of Munzor, 4 Misc. 374, 25 NYS 818.

82. Emelle v. Spinner, 20 Wyo. 507, 126 P 397.

83. Conn.—Mulcahy v. Mulcahy, 84 Conn. 659, 81 A 242.

Ky.—South v. Carr, 7 T. B. Mon. 419

La.—Gagneux's Succ., 40 La. Ann. 701, 4 S 869.

Nebr.—In re Mall, 80 Nebr. 233, 114 NW 156.

N. J.—Kirby v. Coles, 15 N. J. L. 441.

N. Y.—In re Rogers, 153 N. Y. 316, 47 NE 589; In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683]; Forbes v. Halsey, 26 N. Y. 53; Matter of Ryalls, 74 Hun 205, 26 NYS 815, 80 Hun 459, 30 NYS 455; Bainbridge v. McCullough, 1 Hun 488, 3 Thomps. & C. 486; Matter of Perry, 129 App. Div. 587, 114 NYS 246; Matter of Baker, 42 App. Div. 370, 59 NYS 121; Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff sub nom. In re Hoffman, 150 NYS 776]; Matter of Koch, 33 Misc. 153, 68 NYS 375, 2 Mills Surr. 46; Matter of Taber, 30 Misc. 172, 63 NYS 728, 1 Mills Surr. 429 [aff 54 App. Div. 629, 66 NYS 1146]; In re Denham, 174 NYS 883; Matter of Fithian, 3 NYS 193, 1 Conn. Surr. 187 [aff 3 Silv. Sup. 282, 6 NYS 409]; Matter of Palmer, 3 Dem. Surr. 129; Marre v. Ginochio, 2 Bradf. Surr. 165.

Pa.—Hart's Est., 9 Pa. Dist. 347, 25 Pa. Co. Ct. 515; Ripple's Est., 9 Kulp 66; Thomas' Est., 4 Kulp 446.

[a] **The contestant must show:** (1) The existence of an alleged indebtedness of the representative to the estate. In re Mall, 80 Nebr. 233, 114 NW 156. (2) Ownership by decedent at the time of his death of certificates of corporate stock which are claimed not to have been accounted for. Matter of Perry, 129 App. Div. 587, 114 NYS 246.

[b] **Receipt of assets from the predecessor** of the accounting representative must be proved by the contestant. Gagneux's Succ., 40 La. Ann. 701, 4 S 869.

[c] **Where the representative denies** the existence or receipt of assets, the burden of proof is on the contestant. South v. Carr, 7 T. B. Mon. (Ky.) 419.

84. Hough's Succ., 119 La. 435, 44 S 190; Matter of Baker, 42 App. Div. 370, 59 NYS 121; Marre v. Ginochio, 2 Bradf. Surr. (N. Y.) 165.

85. In re Rogers, 153 N. Y. 316, 47 NE 589; In re Mullon, 145 N. Y. 98, 39 NE 821 [aff 74 Hun 358, 26 NYS 683]; Forbes v. Halsey, 26 N. Y. 53.

86. Ill.—Wilbanks v. Crosno, 112 Ill. A. 503.

Miss.—Bogan v. Walter, 20 Miss. 666.

Mont.—In re Williams, 47 Mont. 325, 132 P 421.

Nebr.—In re Mall, 80 Nebr. 233, 235, 114 NW 156 [quot Cyc].

N. Y.—Matter of Eisner, 5 NYS 30, 1 Conn. Surr. 358.

N. C.—Evans v. Smith, 84 N. C. 146.

Pa.—Halloway's Est., 13 Phila. 317, 8 WklyNC 148; Kalbfell's Est., 26 PittsbLegJNS 394.

[a] **Property in possession of representative before qualification.** — Where a person who had in his possession just prior to his qualification as administrator certain property of deceased desires to show that it did not come into his hands as administrator, he must clearly establish some disposition of the property before the date of his qualification as administrator. Kirby v. Moore, 99 SW 1156, 30 KyL 1020.

87. Stone v. Morgan, 65 Miss. 247, 3 S 580; Booker v. Armstrong, 93 Mo. 49, 4 SW 727; Hallway v. Eckler, 105 Mo. A. 585, 80 SW 46; Matter of Joost, 50 Misc. 78, 100 NYS 378, 5 Mills Surr. 310; Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

[a] **The actual worthlessness of a note** alleged to be worthless must be shown by the representative. Matter of Joost, 50 Misc. 78, 100 NYS 378, 5 Mills Surr. 310.

88. In re Bayley, 67 N. J. Eq. 566, 59 A 215.

89. Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440; Harwood v. Pearson, 60 Ala. 410; Morgan v. Morgan, 35 Ala. 303.

Cal.—Herteman's Est., 73 Cal. 545, 15 P 121.

Conn.—Robbins v. Wolcott, 27 Conn. 234.

also the correctness of the demand.[90] So with respect to the expenses of administration, the burden rests upon the representative to show that the expenses incurred were necessary and proper, and that the payments made were fair and reasonable.[91]

On contestant. But where a credit has been allowed on an annual or partial settlement, it is presumed to be correct, and the burden of overcoming this presumption rests upon the contestants;[92] and where a payment made by the representative is apparently a proper one and a contestant makes exceptions of an affirmative nature to such payments, the burden rests upon the contestant to show the impropriety thereof.[93]

[§ 2473] **c. Admissibility.** The general rules of evidence[94] are ordinarily applied in determining whether the evidence offered in accounting proceedings is admissible,[95] although there is also authority for the view that strict rules of evidence should not be allowed to govern in such proceedings.[96] Reference is made in the notes to numerous cases in which the courts have passed upon the admissibility of evidence adduced, and held, either that it was competent in its nature and possessed sufficient relevancy and materiality to warrant its reception,[97] or on the other hand that it fell short of these re-

Ga.—Rudolph v. Underwood, 88 Ga. 664, 16 SE 55.
Ill.—Emerick v. Hileman, 71 Ill. A. 512 [aff 177 Ill. 368, 52 NE 311].
Ky.—May v. Smith, 177 Ky. 707, 198 SW 2; Terrell v. Rowland, 86 Ky. 67, 4 SW 825, 9 KyL 258; Clark v. Newman, 8 KyL 515.
La.—Girardey's Succ., 44 La. Ann. 543, 10 S 851.
Miss.—Brandon v. Hoggatt, 32 Miss. 335.
Mo.—Williams v. Petticrew, 62 Mo. 460.
N. J.—In re Wiley, 65 A 212; Bechtold v. Read, 28 A 264; Kirby v. Coles, 15 N. J. L. 441; In re Frey, 73 N. J. Eq. 346, 67 A 192.
N. Y.—Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Cozine, 113 App. Div. 22, 98 NYS 1041; Matter of Meng, 188 App. Div. 69, 176 NYS 290 [rev on other grounds 227 N. Y. 264, 125 NE 508]; Metzger v. Metzger, 1 Bradf. Surr. 265.
Oh.—In re McAlpin, 8 OhS&CP 654.
Or.—In re Roach, 50 Or. 179, 92 P 118.
Pa.—In re Kalbfell, 184 Pa. 25, 38 A 1007; McGregor's Est., 131 Pa. 359, 18 A 902; Bleakley's Est., 20 Pa. Dist. 1000; Douglass' Est., 10 Pa. Dist. 479, 25 Pa. Co. 566.
S. C.—Sartor v. Newberry Land, etc., Co., 104 S. C. 184, 88 SE 467; Johnson v. Henagan, 11 S. C. 93.
Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203; Ridley v. Ridley, 1 Coldw. 323.
W. Va.—Fields v. Lawyer, 97 SE 597.

[a] **A credit claimed for taxes** paid must be supported by proof. Rudolph v. Underwood, 88 Ga. 664, 16 SE 55.

[b] **Expenses of carrying on farm.**—An executor cannot be allowed for expenses after decedent's death in stocking or carrying on a farm left by decedent, in the absence of evidence that the expenditures were beneficial. Larrour v. Larrour, 2 Redf. Surr. (N. Y.) 69.

[c] **Advances for infants.**—Before an administrator will be allowed for moneys advanced for the support of infants, all the facts must appear, such as his good faith, and the amounts, times, and purposes of the advances. Hyland v. Baxter, 31 Hun (N. Y.) 354 [aff 98 N. Y. 610].

[d] **Evidence to be taken in writing.**—It is required by statute that the evidence in support of claims for disbursements shall be taken in writing and annexed to the record. Girardey's Succ., 44 La. Ann. 543, 10 S 851; Dorville's Succ., 27 La. Ann. 131.

[e] **Degree of proof required.**—Matter of Koch, 33 Misc. 153, 68 NYS 375, 2 Mills Surr. 46.

90. Ala.—Jenks v. Terrell, 73 Ala. 238; Harwood v. Pearson, 60 Ala. 410; Pearson v. Darrington, 32 Ala. 227; Gaunt v. Tucker, 18 Ala. 27.
Ind.—Wysong v. Nealis, 13 Ind. A. 165, 41 NE 388.
Me.—In re Eacott, 95 Me. 522, 50 A 708.
Miss.—Tell City Furniture Co. v. Stiles, 60 Miss. 849; Haralson v. White, 38 Miss. 178.
N. J.—In re Atkinson, 86 N. J. Eq. 173, 98 A 269; Brewster v. Demarest, 48 N. J. Eq. 559, 23 A 271.
N. Y.—Matter of McKinnon, 182 App. Div. 277, 169 NYS 416; Matter of Lester, 172 App. Div. 509, 158 NYS 763; Matter of Bussman, 187 App. Div. 574, 176 NYS 505; Matter of Harnett, 15 NYSt 725.
N. C.—Barnawell v. Smith, 58 N. C. 168.
Pa.—Douglass' Est., 10 Pa. Dist. 479, 25 Pa. Co. 566.
S. C.—Sartor v. Newberry Land, etc., Co., 104 S. C. 184, 88 SE 467.
N. S.—Cookson v. Driscoll, 50 N. S. 1, 27 DomLR 488.

[a] **Proper vouchers** constitute such prima facie evidence as shifts the burden of proof to the contestants. See infra § 2476.

91. Ala.—Munden v. Bailey, 70 Ala. 63.
Iowa.—In re Dalton, 183 Iowa 1013, 168 NW 332.
Miss.—Brandon v. Hoggatt, 32 Miss. 335.
N. Y.—Matter of Peck, 79 App. Div. 296, 80 NYS 76 [aff 177 N. Y. 538 mem, 69 NE 1129 mem]; Matter of Swart, 2 Silv. Sup. 585, 6 NYS 608; Matter of Rainforth, 40 Misc. 609, 83 NYS 57, 3 Mills Surr. 559; Matter of Arkenburgh, 13 Misc. 744, 35 NYS 251, 1 Gibb. Surr. 380 [aff 148 N. Y. 756 mem, 43 NE 985 mem]; Matter of Meng, 188 App. Div. 69, 176 NYS 290 [rev on other grounds 227 N. Y. 264, 125 NE 508]; In re Archer, 23 NYS 1041, Pow. Surr. 292; Matter of Nockin, 15 NYSt 731; Matter of Harnett, 15 NYSt 725; Matter of Peyser, 5 Dem. Surr. 244; St. John v. McKee, 2 Dem. Surr. 236.
Oh.—In re McAlpin, 8 OhS&CP 654.
Pa.—McGregor's Est., 131 Pa. 359, 18 A 902.
S. C.—Johnson v. Henagan, 11 S. C. 93.
Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203.

92. Ala.—King v. Brown, 108 Ala. 68, 18 S 935; Dickie v. Dickie, 80 Ala. 57; Newberry v. Newberry, 28 Ala. 691; McCreeliss v. Hinkle, 17 Ala. 459; Willis v. Willis, 16 Ala. 652, 9 Ala. 330.
N. Y.—Matter of Knab, 38 Misc. 717, 78 NYS 292, 3 Mills Surr. 271.
Pa.—O'Donnell's Est., 9 Kulp 123.
S. C.—Cunningham v. Cauthen, 37 S. C. 123, 15 SE 917.
W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

93. Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Matter of Cozine, 104 App. Div. 182, 93 NYS 557, 113 App. Div. 22, 98 NYS 1041; Matter of Percival, 79 Misc. 567, 141 NYS 180 [mod on other grounds 162 App. Div. 923 mem, 146 NYS 1108 mem]; Matter of Dittrich, 53 Misc. 511, 105 NYS 301, 6 Mills Surr. 112 [aff 128 App. Div. 893 mem, 112 NYS 1127 mem]; Overman v. Lanier, 157 N. C. 544, 73 SE 192.

94. See Evidence 22 C. J. p 1.

95. Cal.—In re More, 121 Cal. 609, 54 P 97.
Iowa.—In re Newton, 171 NW 708.
Ky.—Morawick v. Mortineck, 128 Ky. 155, 107 SW 759, 32 KyL 971.
Nebr.—In re Whiton, 86 Nebr. 367, 125 NW 606.
N. Y.—Matter of Goss, 98 App. Div. 489, 90 NYS 769; Matter of Myers, 36 App. Div. 625, 55 NYS 168.
Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203.

[a] **Best evidence required.**—Where credit is claimed for a sum alleged to have been paid on a judgment, the transcript of the judgment should be produced, as it is the best evidence. Hall v. Hall, (Tenn. Ch. A.) 59 SW 203.

96. Matter of Woodward, 69 App. Div. 286, 74 NYS 755; Upson v. Badeau, 3 Bradf. Surr. (N. Y.) 13; Kennedy's App., 4 Pa. 149; Sterrett's App., 2 Penr. & W. (Pa.) 419.

97. Ala.—Hall v. Santangelo, 178 Ala. 447, 60 S 168.
Cal.—In re More, 121 Cal. 635, 54 P 148.
Conn.—Guinan's App., 70 Conn. 342, 39 A 482.
Ga.—Adkins v. Hutchings, 79 Ga. 260, 4 SE 887.
Ill.—Schneider v. Westerman, 25 Ill. 514.
Iowa.—In re Newton, 171 NW 708.
La.—Frank v. Frank, 108 La. 201, 32 S 414; Mandeville v. Arnoult, 9 Rob. 447.
Mich.—In re Buchan, 100 Mich. 219, 58 NW 1003.
Miss.—Donald v. McWhorter, 40 Miss. 231.
N. H.—Page v. Hazelton, 74 N. H. 252, 66 A 1049.
N. J.—Camman v. Doughty, 79 N. J. Eq. 650, 84 A 270.
N. Y.—Matter of Scott, 173 App. Div. 270, 156 NYS 960; Matter of Niles, 142 App. Div. 198, 126 NYS 1066; Matter of Mellen, 56 Hun 553, 9 NYS 929; Matter of D'Adamo, 94 Misc. 1, 157 NYS 374; Matter of Robbins, 89 Misc. 345, 152 NYS 1067; Matter of Rothschild, 42 Misc. 161, 85 NYS 1084, 4 Mills Surr. 119; In re Grant, 49 NYS 574, 27 NYCivProc 21; Cinochio v. Porcella, 3 Bradf. Surr. 277.
N. C.—Williams v. Maitland, 36 N. C. 92.
Pa.—In re Barnes, 221 Pa. 399, 70 A 790; In re Semple, 189 Pa. 385, 42 A 28; Yeager's Est., 31 Pa. Super. 202.
S. C.—French v. Way, 93 S. C. 522, 76 SE 617.
Vt.—In re Brown, 65 Vt. 331, 26 A 638.
Va.—Wills v. Dunn, 5 Gratt. (46 Va.) 384.

[a] **Admissibility of will.**—On an issue to try with what amount an executor was chargeable as such, the will was evidence to show his appointment as executor and his duties thereunder. Rife v. Galbreath, 3 Penr. & W. (Pa.) 204.

[b] **Tax books** are admissible to show that decedent returned for taxes in each of the last two years of his life a certain sum, where the contention is as to the solvency of certain of his open accounts. Adkins v. Hutchings, 79 Ga. 260, 4 SE 887.

[c] **Ex parte affidavit of payee admissible as a receipt.**—Williams v. Maitland, 36 N. C. 92.

quirements and should be rejected.[98]

[§ 2474] **d. Weight and Sufficiency.** The general rules on the subject of weight and sufficiency of evidence,[99] govern in determining the effect that should be accorded to the evidence submitted on the settlement of accounts.[1] Credits claimed by the representative must be supported by testimony substantially sufficient to establish the facts before a jury,[2] and it has been held that, when a credit claimed for the payment of a debt of a decedent is contested, the personal representative must prove it by the same degree of evidence which the creditor himself would have been required to produce, if he had been forced to an action for its recovery,[3] although there is also authority for the view that so high a degree of proof is not required.[4]

[§ 2475] **e. Vouchers and Proof of Payment—(1) In General.** It is the duty of the representative of an estate to support every charge against it by competent evidence,[5] and for this purpose he is generally required to produce proper vouchers.[6] But

98. Ala.—McDonald v. Carnes, 90 Ala. 147, 7 S 919; Byrd v. Jones, 84 Ala. 336, 1 S 375.

Cal.—In re More, 121 Cal. 609, 54 P 97.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Mich.—Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Minn.—Hanson v. Swenson, 78 Minn. 18, 80 NW 833.

Nebr.—In re Whiton, 86 Nebr. 367, 125 NW 606.

N. Y.—Matter of Goss, 98 App. Div. 489, 90 NYS 769; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Matter of Gabriel, 44 App. Div. 623 mem, 60 NYS 87 [aff 161 N. Y. 644 mem, 57 NE 1110 mem]; Matter of D'Adamo, 94 Misc. 1, 157 NYS 374; Matter of Rose, 35 Misc. 21, 71 NYS 172, 2 Mills Surr. 239 [aff 75 App. Div. 615, 77 NYS 1139 (aff 176 N. Y. 587 mem, 68 NE 1124 mem)]; In re Williams, 12 NYLegObs 179, 1 Redf. Surr. 208.

Pa.—Hengst's App., 24 Pa. 413; Semple's Est., 28 PittsbLegJNS 434.

R. I.—Jones v. East Greenwich Prob. Ct., 25 R. I. 361, 55 A 881.

S. C.—Reeves v. Tucker, 26 S. C. Eq. 150.

Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203.

Tex.—James v. Craighead, (Civ. A.) 69 SW 241.

[a] **Self-serving declarations** are not admissible. Byrd v. Jones, 84 Ala. 336, 4 S 375.

[b] **Opinion evidence as to compensation of representative inadmissible.**—Kenan v. Graham, 135 Ala. 585, 33 S 699.

99. See Evidence §§ 1730, 1806.

1. Ala.—Jay v. Mosely, 47 Ala. 227; Milam v. Ragland, 25 Ala. 243, 19 Ala. 85.

Ark.—Sharp v. Himes, 129 Ark. 327, 196 SW 131.

Cal.—In re Shively, 145 Cal. 400, 78 P 869; In re Thomas, 140 Cal. 397, 73 P 1059; In re Willard, 139 Cal. 501, 73 P 240, 64 LRA 554; In re Heeney, 3 Cal. A. 548, 86 P 842.

Ill.—Butterfield v. Munch, 183 Ill. A. 31; Platt v. Williams, 175 Ill. A. 1.

Iowa.—In re McIntosh, 159 NW 223; Townsley v. Townsley, 167 Iowa 226, 149 NW 262.

La.—Watt's Succ., 122 La. 952, 48 S 335; Le Sage's Succ., 112 La. 857, 36 S 757; Oubre's Succ., 109 La. 516, 33 S 583; Conery's Succ., 106 La. 50, 30 S 294.

Md.—Horwitz v. Forbes, 22 A 267.

Mass.—Bardwell v. Hatch, 219 Mass. 43, 106 NE 567; Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318; In re Norton, 169 Mich. 531, 135 NW 253; Knapp v. Jessup, 146 Mich. 348, 109 NW 666, 7 LRANS 617; Reed v. Whipple, 140 Mich. 7, 103 NW 548.

Minn.—Poupore v. Stone-Ordean-Wells Co., 133 Minn. 421, 158 NW 703; Christians v. Christians, 108 Minn. 157, 121 NW 633; Ryan v. Williams, 92 Minn. 506, 100 NW 380.

Mo.—Bryan's Est., 190 SW. 581; Young v. Ray, (A.) 193 SW 608; In re Branch, 123 Mo. A. 573, 100 SW 516.

Mont.—In re Dolenty, 53 Mont. 33, 161 P 524; In re Davis, 31 Mont. 421, 78 P 704.

Nebr.—Wunder v. Crane, 100 Nebr. 446, 160 NW 892; In re Nichols, 93 Nebr. 80, 139 NW 719; In re Mall, 80 Nebr. 233, 114 NW 156; In re Van Auken, 78 Nebr. 744, 111 NW 782.

N. J.—Mulford v. Mulford, 53 A 79; In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; Greene v. Butterworth, 45 N. J. Eq. 738, 17 A 949.

N. Y.—Matter of Frost, 179 App. Div. 431, 165 NYS 980; Sullivan v. Kraus, 170 App. Div. 769, 155 NYS 803; Matter of Hoffman, 136 App. Div. 516, 121 NYS 184 [rev 62 Misc. 600, 115 NYS 984]; Matter of Gerstenberg, 133 App. Div. 372, 117 NYS 190; Matter of Perry, 129 App. Div. 587, 114 NYS 246; Matter of Rossell, 121 App. Div. 381, 105 NYS 1098, 126 App. Div. 607, 110 NYS 706; Matter of Milligan, 112 App. Div. 373, 98 NYS 480; Matter of Myers, 36 App. Div. 625, 55 NYS 168; Matter of Bielby, 91 Misc. 353, 155 NYS 133; Matter of Sergant, 62 Misc. 173, 116 NYS 273, 7 Mills Surr. 95; Matter of Humphrey, 54 Misc. 198, 105 NYS 922, 6 Mills Surr. 145; Matter of Freel, 49 Misc. 380, 99 NYS 505, 5 Mills Surr. 262; Matter of Sewell, 32 Misc. 604, 67 NYS 456, 2 Mills Surr. 4; Matter of Bussman, 187 App. Div. 574, 176 NYS 505; Matter of Kennedy, 186 App. Div. 188, 173 NYS 607; In re Underhill, 11 NYS 113.

Or.—In re Roach, 50 Or. 179, 92 P 118.

Pa.—Camp v. John, 259 Pa. 38, 102 A 285; In re Richey, 251 Pa. 324, 96 A 748; In re Donnelly, 246 Pa. 308, 92 A 306; In re Hoffer, 156 Pa. 473, 27 A 11; Shadle's Est., 30 Pa. Super. 151; Witzel's Est., 10 Pa. Dist. 462; In re McGeary, 16 PittsbLegJNS 404.

R. I.—Hayes v. Welling, 38 R. I. 553, 96 A 843 [rearg den 98 A 61]; Carney v. Hawkins, 34 R. I. 297, 83 A 327.

S. C.—Smith v. Smith, 105 S. C. 393, 89 SE 1032; Bramlett v. Mathis, 71 S. C. 123, 50 SE 644.

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899; Bland v. Gollaher, (Ch. A.) 48 SW 320.

Va.—McIntyre v. Wright, 113 Va. 299, 74 SE 172; Dillard v. Dillard, 77 Va. 820.

Wash.—In re Tachi, 90 Wash. 621, 156 P 833; In re Mason, 26 Wash. 259, 66 P 435.

Wis.—In re Morgan, 152 Wis. 138, 139 NW 745.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **When the representative claims funds** as against the rights of his decedent, fullness of proof and freedom from suspicion should be required. Matter of Barefield, 82 App. Div. 463, 81 NYS 843 [rev 36 Misc. 745, 74 NYS 472].

[b] **Evidence of the contents of unproduced letters,** admitted without objection, acknowledging payment, when supplemented by the testimony of the personal representative that he actually made payment, is sufficient proof. In re Hilliard, 83 Cal. 423, 23 P 393.

[c] **Payment of a note secured by a mortgage on realty** will be allowed, when the evidence of the satisfaction of the mortgage necessary in the state where the realty is situated is produced. Hart's Est., Tuck. Surr. (N. Y.) 133.

2. Edelen v. Edelen, 11 Md. 415.

3. Jackson v. Wood, 108 Ala. 209, 19 S 312; McDonald v. Carnes, 90 Ala. 147, 7 S 919; Jenks v. Terrell, 73 Ala. 238; Teague v. Corbitt, 57 Ala. 529; Kirksey v. Kirksey, 41 Ala. 626; Pearson v. Darrington, 32 Ala. 227; Gaunt v. Tucker, 18 Ala. 27.

[a] **In Missouri** (1) this rule formerly obtained by express statute. Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457. (2) But the statute has been repealed. Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477.

4. Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477; Matter of Myers, 36 App. Div. 625, 55 NYS 168; Matter of Pollock, 3 Redf. Surr. (N. Y.) 100; Parks v. McDaniel, 75 S. C. 7, 54 SE 801, 117 AmSR 878.

5. Ky.—Browning v. Earl, 54 SW 833, 21 KyL 1295.

La.—Planchet's Succ., 29 La. Ann. 520.

Md.—Owens v. Collinson, 3 Gill & J. 25.

Mo.—Williams v. Petticrew, 62 Mo. 460.

S. C.—Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64; Lewis v. Price, 24 S. C. Eq. 172.

6. U. S.—Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock 159 [aff 12 Wheat. 594, 6 L. ed. 740]; Hanson v. Cox, 11 F. Cas. No. 6,040, 1 Hayw. & H. 167; Backhouse v. Jett, 2 F. Cas. No. 710, 1 Brock. 500.

Ala.—Quigley v. Campbell, 12 Ala. 58.

Cal.—In re Hedrick, 127 Cal. 184, 59 P 590; In re Rose, 63 Cal. 349.

Ga.—Crawford v. Clark, 110 Ga. 729, 36 SE 404.

Ky.—Browning v. Earl, 54 SW 833, 21 KyL 1295.

La.—Foulkes' Succ., 12 La. Ann. 537.

Me.—Pearce v. Savage, 51 Me. 410.

Md.—Parker v. Leighton, 131 Md. 407, 102 A 552; Maynadier v. Armstrong, 98 Md. 175, 56 A 357.

Mass.—Hall v. Hall, 1 Mass. 101.

Mont.—In re Ford, 29 Mont. 283, 74 P 735.

N. J.—Adams v. Adams, 14 A 575 [aff 17 A 775].

N. Y.—In re Selleck, 111 N. Y. 284, 19 NE 66; Jacques v. Elmore, 7 Hun 675; Matter of Wicke, 74 App. Div. 221, 77 NYS 558; Matter of Woodward, 69 App. Div. 286, 74 NYS 755; Matter of Blair, 67 App. Div. 116, 73 NYS 675 [aff 34 Misc. 444, 69 NYS 1013]; Matter of Davis, 43 App. Div. 331, 60 NYS 315; Matter of Meuschke, 61 Misc. 9, 114 NYS 722, 7 Mills Surr. 10; Matter of Baker, 27 Misc. 126, 57 NYS 398 [mod on other grounds 72 App. Div. 211, 76 NYS 61]; Broome v. Van Hook, 1 Redf. Surr. 444.

Or.—In re Roach, 50 Or. 179, 92 P 118; In re Conser, 40 Or. 138, 66 P 607; In re Osborn, 36 Or. 8, 58 P 521; In re Partridge, 31 Or. 297, 51 P 82.

Pa.—Romig's App., 84 Pa. 235; Fow's Est., 14 Pa. Co. 648.

Porto Rico.—Banco Territorial v. Gill, 17 Porto Rico 316.

S. C.—Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64; McGougan v. Hall, 21 S. C. 600; Johnson v. Henagan, 11 S. C. 93; Owens v. Walker, 21 S. C. Eq. 289; Duncan

such charges may be allowed without vouchers,[7] when the parties interested admit that they are correct,[8] or when a reasonable explanation of the failure to produce vouchers is offered,[9] as for example, that on account of the lapse of time or other special circumstances vouchers cannot be produced.[10] No voucher is necessary with respect to money paid to the representative to himself,[11] and the necessity for vouchers is sometimes dispensed with in respect to small items of payment or expenditure which are supported by the uncontradicted oath of the representative.[12]

Right to retain vouchers. Where an executor denied payments made by a deceased coexecutor, the representatives of the estate of the deceased coexecutor were entitled to retain the vouchers for the payments as a matter of protection to the estate.[13]

The requirement of vouchers may be waived by parties objecting to the account.[14]

[§ 2476] **(2) Weight as Evidence.** When proper vouchers are produced, they are of themselves prima facie evidence of disbursements without any further proof,[15] and the burden is cast upon a con-

v. Tobin, 15 S. C. Eq. 143, 34 AmD 605; Wright v. Wright, 7 S. C. Eq. 185; Black v. Blakely, 7 S. C. Eq. 1.

Tenn.—Stephenson v. Yandel, 5 Hayw. 261.

Tex.—McShan v. Lewis, 33 Tex. Civ. A. 253, 76 SW 616.

Va.—Street v. Street, 11 Leigh (38 Va.) 498.

Wash.—In re Campbell, 98 Wash. 295, 167 P 905.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **Each item of disbursement should be vouched** by the production of receipts or other competent evidence. Buerhaus v. De Saussure, 41 S. C. 457, 19 SE 926, 20 SE 64.

[b] **Where an administrator continues his intestate's business** without authority, he need not produce vouchers for the disbursements thereof on accounting, since the business becomes his individual business, for which he alone is liable. Matter of Munzor, 4 Misc. (N. Y.) 374, 25 NYS 818 [foll In re Suess, 37 Misc. 459, 57 NYS 938, 2 Mills Surr. 543].

[c] **Vouchers a part of report of settlement.**—A reference to the report of the settlement of an administrator's account necessarily implies a reference to the vouchers accompanying the report. Mattingly v. Corbit, 7 B. Mon. (Ky.) 376.

[d] **Vouchers should accompany account when filed.**—Bleakley's Est., 20 Pa. Dist. 1000.

[e] **Surrogate's fees allowed without voucher.**—Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569.

[f] **Sufficiency of vouchers.**—Where a widow, as administratrix, claimed the right to charge for the support and maintenance of a minor during administration, she was only required to file a voucher therefor, from herself individually to herself as administratrix. In re Lyons, 137 NYS 171.

[g] **Indorsement on note as voucher.**—An indorsement of an amount due the executor from the testatrix on a note from him to her was a sufficient voucher. In re Morgan, 152 Wis. 138, 139 NW 745.

[h] **Time for examination of vouchers.**—Where the executor of an estate and the tutor of a minor heir files one account as executor and tutor combined, and secures its approval by the minor emancipated on the day of its approbation, without affording legal time for an examination of the vouchers, the approbation will be annulled. Ferguson v. Chastant, 35 La. Ann. 485.

[i] **Vouchers as evidence in suit by or against personal representative.**—Quigley v. Campbell, 12 Ala. 58.

[j] **Document not amounting to voucher.**—A writing signed by a legatee authorizing the executor to retain out of his legacy a certain sum for legal services to be rendered by a solicitor is not a voucher. Cookson v. Driscoll, 50 N. S. 1, 27 DomLR 488.

[k] **Canceled checks.**—While canceled checks are not what the statute contemplates as vouchers, where evidence shows payments made and the purpose thereof, they are sufficient to support an account. In re Campbell, 98 Wash. 295, 167 P 905.

7. U. S.—Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740].

Cal.—In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965.

Miss.—Meyer v. Meyer, 106 Miss. 638, 64 S 420.

N. Y.—Matter of Langlois, 26 AbbNCas 226, 14 NYS 146, 2 Conn. Surr. 481.

Pa.—Romig's App., 84 Pa. 235.

S. C.—Wright v. Wright, 7 S. C. Eq. 185.

Va.—Fitzgerald v. Jones, 1 Munf. (15 Va.) 150.

W. Va.—Campbell v. White, 14 W. Va. 122.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

Ont.—Beatty v. Haldan, 10 Ont. 278.

[a] **Oath as substitute for vouchers.**—Cases may arise where the orphans' court in the exercise of a reasonable discretion may supply the want of a regular voucher by the oath of a personal representative, but evidence of this kind should be resorted to with great delicacy and even then should be sustained by some corroborating proof. Romig's App., 84 Pa. 235; In re Mylin, 7 Watts (Pa.) 64; Reeside v. Reeside, 6 Phila. (Pa.) 507.

8. In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965; Meyer v. Meyer, 106 Miss. 638, 64 S 420; In re Langlois, 14 NYS 146, 26 AbbNCas 226, 2 Conn. Surr. 481.

9. Powell v. Powell, 10 Ala. 900; Rice v. Tilton, 14 Wyo. 101, 82 P 577.

10. U. S.—Lidderdale v. Robinson, 15 F. Cas. No. 8,337, 2 Brock. 159 [aff 12 Wheat. 594, 6 L. ed. 740].

N. Y.—In re Gerow, 23 NYS 847, Pow. Surr. 364 [dist and crit In re Langlois, 14 NYS 146, 2 Conn. Surr. 481]; Matter of Rose, 19 NYSt 783, 6 Dem. Surr. 26; Matter of Rowland, 5 Dem. Surr. 216.

S. C.—Wright v. Wright, 7 S. C. Eq. 185.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288; Fitzgerald v. Jones, 1 Munf. (15 Va.) 150; Major v. Dudley, Jeff. 51.

W. Va.—Campbell v. White, 14 W. Va. 122.

Ont.—Beatty v. Haldan, 10 Ont. 278.

[a] **Loss of vouchers by an officer of court** affords a sufficient excuse for nonproduction. Beatty v. Haldan, 10 Ont. 278.

[b] **Presumption of existence.**—On a bill to surcharge and falsify an administrator's former settlement, vouchers which cannot be produced may be presumed to have existed, especially after long lapse of time. Campbell v. White, 14 W. Va. 122.

11. In re Ross, (Cal.) 182 P 303; Meyer v. Meyer, 106 Miss. 638, 64 S 420.

12. Cal.—In re Ross, 182 P 303; In re Hedrick, 127 Cal. 184, 59 P 590; Rose's Est., 80 Cal. 166, 22 P 86; In re Van Tassel, 2 Cal. Unrep. Cas. 435, 5 P 611.

Mass.—Bailey v. Blanchard, 12 Pick. 166.

N. Y.—Gardner v. Gardner, 7 Paige 112 [rev on other grounds 22 Wend. 526, 34 AmD 340]; Williams v. Purdy, 6 Paige 166; Kellett v. Rathbun, 4 Paige 102; Orser v. Orser, 5 Dem. Surr. 21; Tickel v. Quinn, 1 Dem. Surr. 425; Metzger v. Metzger, 1 Bradf. Surr. 265.

Pa.—Reeside v. Reeside, 6 Phila. 507.

Eng.—Robinson v. Cumming, 2 Atk. 409, 26 Reprint 646.

[a] **Sufficiency of oath.**—Where the amount of an item is less than twenty dollars and there is no doubt of its payment, it will be allowed upon the oath of the personal representative, although he cannot name the payee, or describe him sufficiently for identification. Matter of Nichols, 4 Redf. Surr. (N. Y.) 288.

[b] **Reasonableness and justness of expenditure must be shown.**—Matter of Rowland, 5 Dem. Surr. (N. Y.) 216.

[c] **If the representative actually holds vouchers** for items which might be allowed without vouchers, he should file them. Orser v. Orser, 5 Dem. Surr. (N. Y.) 21.

13. Crothers v. Crothers, 121 Md. 114, 88 A 114.

14. Matter of Rose, 19 NYSt 783, 6 Dem. Surr. 26.

[a] **There is a waiver** of the requirement of vouchers where the objecting party himself calls and examines the representative as to disputed payments. Matter of Rose, 19 NYSt 783, 6 Dem. Surr. 26.

15. Ala.—McCreeliss v. Hinkle, 17 Ala. 459.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075.

La.—Frantum's Succ., 3 Rob. 283; Casanovichi v. Debon, 2 Mart. N. S. 596.

Miss.—Gray v. Harris, 43 Miss. 421.

N. Y.—Bainbridge v. McCullough, 1 Hun 488, 3 Thomps. & C. 486; Matter of Viles, 86 Misc. 170, 149 NYS 121; In re Butler, 16 NYS 103, 2 Conn. Surr. 572; Metzger v. Metzger, 1 Bradf. Surr. 265; Thompson's Est., Tuck. Surr. 51.

Va.—Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488.

[a] **Where a disbursement is admitted to be correct** and the only question at issue is whether the representative has paid it, a receipt signed by the duly authorized agent of the person to whom the payment was made accompanied with proof of his signature and of the removal of both the principal and agent from the state is prima facie evidence of the payment. McCreeliss v. Hinkle, 17 Ala. 459.

[b] **Admission of genuineness of vouchers.**—An admission that vouchers filed by a curator are genuine dispenses with other proof of payments claimed by him; but, if made without order of court, he must show that the debts were due, or he cannot be allowed credit therefor. Miller v. Miller, 12 Rob. (La.) 88.

[c] **The mere production of an instrument purporting to be a receipt** without proof of the signature of the party signing it is neither proof of the payment nor of the validity of the debt against the estate. Jenks v. Terrell, 73 Ala. 238; Wright v. Wright, 64 Ala. 88; Gaunt v. Tucker, 18 Ala. 27; Savage v. Benham, 11 Ala. 49. See also Landreth v. Landreth, 9 Ala. 430 (failure to prove official character of person signing as guardian).

testant to show that the items paid by the personal representative and represented by the vouchers were not just debts or claims against the estate.[16] A voucher may, however, be impeached, by showing that it was obtained by fraud, that the signature thereto is forged, that the amount it represents was not due to him who executed it, that such amount has not in fact been paid, or that only a portion of it has been paid.[17]

[§ 2477] **f. Examination of Representative.** Statutes frequently provide for examining an executor or administrator upon oath as to any matter relating to his account.[18] Pursuant to such a provision the representative may be examined as to whether he is indebted to the estate,[19] or with respect to a liability of a corepresentative to decedent,[20] or the disposition of a balance shown by the account,[21] or the examination may be directed to a disclosure of assets of a partnership of which the representative and decedent were members,[22] or of property held by the representative during his administration in his own name, but in fact for the benefit of the estate.[23] An examination may be had, although formal objections have not been filed,[24] and notwithstanding the representative's verified denial that property has come into his hands.[25] But where the disputed charges are not properly matters of account between the representative and the estate, but are mere personal claims against the heirs in respect to which the relation of debtor and creditor exists between the heirs and the representative, a statute providing for the examination of the representative does not apply.[26] An executor or administrator is a competent witness in his own behalf on the settlement of his accounts,[27] and may be examined for any purpose,[28] although it has been held that he is not a competent witness as to facts occurring before the death of decedent.[29]

Entire statement to be considered. If a personal representative is examined under oath, for the purpose of charging him, a portion of his statements tending to charge him cannot be taken apart from an accompanying explanation operating in his favor.[30]

Admissibility of evidence to disprove answers. Where an administrator, in answer to interrogatories in the probate court touching his accounts, makes answers thereto, the party at whose instance the interrogatories have been proposed may offer evidence to disprove the answers.[31]

[§ 2478] **g. Production of Books.** An objecting creditor is entitled to full information as to collections made by the representative, who should be required, on proper notice being given him, to produce his books.[32]

[§ 2479] **h. Examination of Legatees.** Legatees are incompetent to testify in their own behalf as to matters occurring in the lifetime of decedent,[33] but are competent when called by a creditor in support of his claim against the estate.[34]

[§ 2480] **5. Findings and Conclusions.** It is sometimes required that there shall be findings of fact and conclusions of law on the trial of objections or exceptions to the account of an executor or administrator,[35] and the propriety of such findings and conclusions, although not expressly required, has been recognized.[36] But on the other hand it has also been held that findings and conclusions are not required,[37] and that a question as to whether certain additional attorney's fees should be allowed is not

16. In re Frazer, 92 N. Y. 239; Boughton v. Flint, 74 N. Y. 476; Matter of Sprague, 40 App. Div. 615 mem, 57 NYS 1128 mem [aff 162 N. Y. 646 mem, 57 NE 1125 mem]; Matter of Stevenson, 86 Hun 325, 33 NYS 493; Matter of Percival, 79 Misc. 567, 141 NYS 180 [mod on other grounds 162 App. Div. 923 mem, 146 NYS 1108 mem].

[a] **Where the gross injustice of a charge for legal services is apparent** upon the very face of the account, no legal technicalities as to presumption or burden of proof should compel the surrogate to adjudicate as "just and reasonable" what he knows to be unreasonable and unjust. St. John v. McKee, 2 Dem. Surr. (N. Y.) 236.

[b] **Contents of voucher.**—Where a personal representative who has paid out money on account of expenses of administration produces a voucher showing the nature of the disbursement and stating facts which if true show the same to have been reasonable and necessary for the good of the estate, a presumption is raised in favor of the correctness of the charge which must be opposed by affirmative evidence on the part of one contesting the demand for credit. Matter of White, 15 NYSt 729, 6 Dem. Surr. 375 [appr Valentine v. Valentine, 3 Dem. Surr. (N. Y.) 597].

17. Westover v. Carman, 49 Nebr. 397, 68 NW 501; In re Butler, 16 NYS 103, 2 Conn. Surr. 572; Metzger v. Metzger, 1 Bradf. Surr. (N. Y.) 265.

18. Ill.—Booth v. Tabbernor, 23 Ill. A. 173.

Md.—Hammond v. Hammond, 2 Bland 306.

Mass.—Sigourney v. Wetherell, 6 Metc. 553; Higbee v. Bacon, 7 Pick. 14, 8 Pick. 484; Saxton v. Chamberlain, 6 Pick. 422; Stearns v. Brown, 1 Pick. 530.

Mich.—In re Rathbone, 44 Mich. 57, 6 NW 115.

N. H.—Griswold v. Chandler, 5 N. H. 492.

N. J.—Davison v. Davison, 17 N. J. L. 169.

N. Y.—In re Chamberlain, 140 N. Y. 390, 35 NE 602, 37 AmSR 568; Matter of Freligh, 42 Misc. 11, 85 NYS 830, 4 Mills Surr. 107; Fithian's Est., 14 NYCivProc 52; Anonymous, 14 NY CivProc 38; Woodruff v. Woodruff, 17 AbbPr 165; Westervelt v. Gregg, 1 Barb. Ch. 469; Geer v. Ransom, 5 Redf. Surr. 578; Wood v. Crooke, 5 Redf. Surr. 381; Leroy v. Bayard, 3 Bradf. Surr. 228; Matter of Rich, 3 Redf. Surr. 177.

N. C.—Ward v. Simmons, 46 N. C. 404.

Pa.—Kline's Est., 8 LancLRev 356; Matter of Bowen, 2 PaLJR 147, 3 PaLJ 405.

Wis.—In re Fitzgerald, 57 Wis. 508, 15 NW 794.

[a] **Representative may be examined by counsel for parties interested in the estate.**—In re Rathbone, 44 Mich. 57, 6 NW 115; Matter of Rich, 3 Redf. Surr. (N. Y.) 177.

19. Sigourney v. Wetherell, 6 Metc. (Mass.) 553.

20. Davison v. Davison, 17 N. J. L. 169.

21. Saxton v. Chamberlain, 6 Pick. (Mass.) 422; Stearns v. Brown, 1 Pick. (Mass.) 530; Griswold v. Chandler, 5 N. H. 492; Kline's Est., 8 LancL Rev (Pa.) 356.

22. Woodruff v. Woodruff, 17 AbbPr (N. Y.) 165.

23. Vineland Historical, etc., Soc. v. Landis, (N. J.) 66 A 946.

[a] **In the absence of fraud or mistake** the court cannot compel the representative by answer in advance to reveal or discover matters of which complainant could compel a discovery in the orphans' court. Vineland Historical, etc., Soc. v. Landis, (N. J.) 66 A 946.

24. Sanderson's Est., 74 Cal. 199, 15 P 753; Geer v. Ransom, 5 Redf. Surr. (N. Y.) 578.

25. Wood v. Crooke, 5 Redf. Surr. (N. Y.) 381.

26. In re Fitzgerald, 57 Wis. 508, 15 NW 794.

27. Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185; Harding v. Canfield, 73 Minn. 244, 75 NW 1112; In re Frey, 73 N. J. Eq. 346, 67 A 192.

[a] **Payment of claim.**—An administratrix is a competent witness on the question whether a claim for which she claims allowance has been paid, and her testimony in the absence of contradiction may be relied upon by the court. In re Frey, 73 N. J. Eq. 346, 67 A 192.

[b] **Good faith.**—An executor or administrator may testify as to his own good faith in handling funds of the estate. Harding v. Canfield, 73 Minn. 44, 75 NW 1112.

28. Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185.

29. Booth v. Tabbernor, 23 Ill. A. 173.

30. Ogilvie v. Ogilvie, 1 Bradf. Surr. (N. Y.) 356.

31. Higbee v. Bacon, 8 Pick. (Mass.) 484.

32. Matter of McKinnon, 182 App. Div. 277, 169 NYS 416.

33. Taylor's Est., 12 Phila. (Pa.) 137.

Testimony as to transactions with decedent generally see Witnesses [40 Cyc 2260].

34. Taylor's Est., 12 Phila. (Pa.) 137.

35. Matter of Sloane, 135 App. Div. 703, 119 NYS 667 [rev 63 Misc. 472, 118 NYS 555].

36. Taylor v. Wright, 93 Ind. 121; Taylor v. McGrew, 29 Ind. A. 324, 64 NE 651; Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

37. In re McPhee, 156 Cal. 335, 104 P 455 [den motion to dism app 154 Cal. 385, 97 P 878].

one upon which propositions of law may properly be submitted.[38] It has been held that special findings made upon exceptions to an administrator's report need not set out all the various items of the report,[39] but only those items relating to the issues raised by the exceptions.[40] But it has also been asserted that the findings should state what items are allowed, and what rejected.[41] Specific findings of fact, approving separately a long list of items allowed on final settlement, are properly refused.[42] A claim of which the record contains no evidence should not be included in a finding in a decree sustaining objections to the report of the representative.[43] The rule that, where the court makes a special finding, failure to find a material fact is equivalent to a finding of such fact against the party having the burden of proof applies to the settlement of an executor's accounts.[44]

Exceptions to conclusions of law, made upon findings upon the hearing of exceptions to an administratrix's report, admit the correctness of the findings.[45]

[§ 2481] **6. Order or Decree.** On the settlement of the accounts of an executor or administrator there should be an order or decree,[46] which should be signed by the judge,[47] and should bear date and take effect as of the time when it is officially announced.[48] It should comply with the statutes and practice of the jurisdiction in which it is rendered,[49] and should conform to the exigencies of the particular case presented to the court.[50] A decree requiring an executor in the settlement of his final account to account for sums found to be due the estate must be based on the allegation composed of his final account, and the objections thereto and the proof.[51] A decree may be made without prejudice with any right of an alleged legatee.[52]

Balance on hand and distribution. A decree on the final settlement of a personal representative should ascertain the balance in his hands,[53] or the amount with which he is chargeable,[54] name specifically the persons in whose favor it is rendered,[55]

38. Jester v. Young, 180 Ill. A. 690.

39. Roberts v. Dimmett, 45 Ind. A. 566, 88 NE 870, 89 NE 496.

40. Roberts v. Dimmett, 45 Ind. A. 566, 88 NE 870, 89 NE 496.

[a] **Findings held sufficient.**—Where exceptions were taken to an administratrix's report because she paid herself as widow one third of the personalty without deducting the debts of the estate and her statutory allowance, that an aggregate allowance of one hundred and sixty-four dollars and forty cents for expenditures and services was excessive, and that certain amounts were improperly paid to heirs because they had received their full share of the estate during intestate's lifetime, conclusions of law that the administratrix is allowed only one hundred and twenty-five dollars for services and expenditures and one third of the surplus of the estate after payment of the debts and liabilities, and that the advancements shown by the findings be considered in distributing the estate, were sufficiently explicit for a judgment upon the issues. Roberts v. Dimmett, 45 Ind. A. 536, 88 NE 870, 89 NE 496.

41. Nowland v. Rice, 138 Mich. 146, 101 NW 214.

42. Chapman v. Kennett, 94 Kan. 535, 146 P 1153.

43. Matter of Brown, 207 Ill. A. 536.

44. Shuey v. Lambert, 53 Ind. A. 567, 102 NE 150.

45. Roberts v. Dimmett, 45 Ind. A. 566, 88 NE 870, 89 NE 496.

46. Picot v. Bates, 39 Mo. 292; In re Slater, (N. J. Prerog.) 102 A 384.

47. Ashbridge's Succ., 1 La. Ann. 206.

48. Lanier v. Richardson, 72 Ala. 134.

49. Portis v. Creagh, 4 Port. (Ala.) 332; In re McDougald, 143 Cal. 476, 77 P 443; Dean v. Santa Barbara County Super. Ct., 63 Cal. 473; In re Sylvar, 1 Cal. A. 35, 81 P 663; Wiemann's Succ., 112 La. 293, 36 S 354; Squire v. Ordemann, 194 N. Y. 394, 87 NE 435; Matter of Sloane, 135 App. Div. 703, 119 NYS 667; Matter of Ryer, 94 App. Div. 449, 88 NYS 52 [aff 180 N. Y. 532 mem, 72 NE 1150 mem]; Matter of Daymon, 47 App. Div. 315, 61 NYS 997.

[a] **Ordering payment of debts.**—Under Code Civ. Proc. § 1647, providing that on settlement of the accounts of an administrator or executor the court shall make an order for the payment of the debts as the circumstances of the estate require, where on the settlement of an administrator's third account a balance of cash was shown to be in the hands of the administrator, it was error for the court to refuse to grant an order for the payment of debts, and to make an order merely directing the administrator to close the estate and have the proceeds thereof distributed among the creditors at the earliest possible date. In re Sylvar, 1 Cal. A. 35, 81 P 663.

[b] **The California statute does not require** that the judgment or decree should contain copies of vouchers or recite the evidence which shall satisfy the court that the personal representative has delivered all the property of the estate. Dean v. Santa Barbara County Super. Ct., 63 Cal. 473.

50. Jones v. Creamer, 32 Oh. Cir. Ct. 223. See also cases infra this note.

[a] **Protecting contingent claim.**—Where the executrix and sole legatee in her report and objection to a contingent claim filed against the estate admitted the validity of the claim upon a personal guaranty made by decedent of the payment of corporate bonds, and only objected thereto on the ground that the estate's liability thereon was uncertain, and that she wanted to close the estate, and was willing to assume personal liability on the claim in order to do so, the court should have protected the contingent claimant by approving the final report, subject to a liability against the estate for any amount thereafter found to be due on decedent's guaranty, the pleadings having admitted the existence of a valid contingent claim. In re Mardis, 148 Iowa 740, 127 NW 1021.

[b] **Setting aside previous allowance of claim.**—Allowance of a claim by the court is not conclusive against an heir excepting to the administrator's final report, but the court, in adjusting the account, may exercise powers of equity and set aside its previous judgment allowing it and require the final report to be surcharged with all matters improperly allowed by its previous order. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228.

[c] **Provision with respect to security.**—Where as the accounts of the executors and trustees stood when passed by the prerogative court, the trustees were prima facie chargeable to the cestuis que trust for the full value of a bond and mortgage executed by one of the executors and trustees with her husband to secure a debt to the estate, they will not be required to proceed to realize a security by proceedings to foreclose and subsequent suit on the bond, it being a matter for the sound discretion of the other executors and of them alone. Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612.

[d] **Distribution of corporate stock.**—Where it appeared that the estate held a controlling interest in the stock of a corporation, and it was agreed by the parties that it was not advisable to sell the stock, it was proper to order a distribution thereof whereby the management of the corporation passed into the hands of the guardian and relatives of an infant daughter of the intestate, there being no showing that these persons were not capable of managing the corporation. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

[e] **Allowing interest.**—Where the objection to the allowance of a credit in an executor's final account did not require him to account for interest on the amount thereof, and there was no declaration in the exception of any sum due as compensation for the use of money on account of the item, interest could not be allowed on the amount of the credit on the same being disallowed. In re Roach, 50 Or. 179, 92 P 118.

[f] **Where an executor wrongfully collected bonds and mortgages** bequeathed to testamentary trustees, but in good faith reinvested the proceeds in other securities in the name of the testatrix, it was held that, on his being required to account to the trustees for the value of the original securities in cash, the decree should contain a provision requiring the trustees to vest title to the new securities in the executor. Matter of Ryer, 94 App. Div. 449, 88 NYS 52 [aff 180 N. Y. 532, 72 NE 1150].

51. In re Roach, 50 Or. 179, 92 P 118.

52. In re Harper, 159 NYS 532.

53. Ala.—Watt v. Watt, 37 Ala. 543; Rhodes v. Turner, 21 Ala. 210; Sankey v. Sankey, 18 Ala. 713; Elliott v. Mayfield, 3 Ala. 223.

Minn.—Balch v. Hooper, 32 Minn. 158, 20 NW 124.

Miss.—Coffee v. Ragsdale, 14 S 454.

N. J.—Sayre v. Sayre, 16 N. J. Eq. 505.

Pa.—Purviance v. Com., 17 Serg. & R. 31.

54. In re Raleigh, 48 Utah 128, 158 P 705.

55. Watt v. Watt, 37 Ala. 543; Lyon v. Odom, 31 Ala. 234; Willis v. Willis, 16 Ala. 652; Betts v. Blackwell, 2 Stew. & P. (Ala.) 373; Hines v. Noah, 52 Miss. 192.

[a] **A decree in favor of "heirs when known"** is insufficient. Lyon v. Odom, 31 Ala. 234.

[b] **Decree for one representative against another.**—The only case in which a decree is authorized in favor

and specify a person against whom it can be enforced by proper process of the court;[56] but it should not provide for relief not demanded.[57] The court should provide for the payment of commissions, expenses, and all necessary future disbursements, and so should not order a balance of cash to be distributed until the final winding up of the estate.[58]

Probate allowances in favor of creditors or third persons are directed, not against the executor or administrator personally or his property, but against the assets of the estate in his hands; the matter of inquiry lies between the creditor or third person and the estate and the executor or administrator has no personal interest or responsibility concerning it;[59] but when it comes to a final settlement the whole contest if any is between the estate and the executor or administrator, and the result of the contest, if adverse to him, charges him personally and the judgment therefore should run not against the estate but against him.[60]

Where a personal representative is also guardian of decedent's children, a separate decree must be rendered on his separate accounts as guardian of each ward and as personal representative.[61]

Informal and irregular decrees. The fact that a decree is irregular in form does not constitute reversible error when no injury appears to have resulted therefrom,[62] and an order made on the records of the probate court after the presentation of a final account, that "the final account be filed and recorded," has been held to be a sufficient judgment of ratification of the account, although no formal judgment of allowance was entered.[63] But it has been held that an entry made upon an account itself of "received and ordered for record" which is signed by the probate judge, but is not dated and not entered upon the minutes of the court, cannot be regarded as an order or judgment of the court and is no evidence of a settlement or allowance of the account by the court.[64] A judgment finally disposing of a suit of an executor for settlement of his accounts, although not in words confirming the settlement and discharging the executor, necessarily has such effect, where no exceptions to the settlement were filed.[65] Where certain exceptions to an executor's report were sustained, and an amended report ordered filed, which, when filed, was approved, it became the judgment of the court, so that the objector's exceptions were effective to test the correctness of the court's conclusions, unless the amendments cured the error.[66]

When not deemed consented to. A final order settling an estate is not deemed to have been by consent where it was entered in the usual way, notwithstanding it appears from the order that the parties in interest consented to the approval of the report of the executors and to their discharge.[67]

Amendment, correction, or modification. Where no material injury results, the order or decree may be amended, corrected, or modified by the court.[68]

Construction. In construing the decree, the in-

of one personal representative against another is where there has been a removal, resignation, or a revocation of the letters of an executor or administrator, or from some other cause his authority ceases. In such case the decree may be rendered in favor of the remaining or succeeding executor or administrator. Cook v. Cook, 69 Ala. 294.

[c] **In favor of guardian ad litem.**—On the settlement of an estate, a decree may be made in favor of an infant's guardian ad litem, and execution may issue thereon, although the proceeds should be paid into court, to be taken out only by a general guardian. Morgan v. Morgan, 35 Ala. 303.

[d] **No judgment in favor of heirs filing no opposition.**—Where one of several heirs opposes the account filed by an administrator, and such account in due time is homologated so far as not opposed, judgment should not be rendered against the administrator in favor of the heirs who have filed no oppositions. Wiemann's Succ., 112 La. 293, 36 S 354.

[e] **When balance in favor of representative.**—If the decree rendered on the final settlement of the account of a personal representative ascertains the amount of his indebtedness and the credits to which he is entitled, showing a balance in his favor, it is valid and binding until reversed, although it is rendered in favor of no one and no execution could have issued on it. Hutton v. Williams, 60 Ala. 107.

[f] **Waiver of irregularity.**—Although, in a suit by an administrator de bonis non against the representative of the first administrator for a settlement of the first administrator's accounts of his administration, it is irregular to decree payment to the administrator de bonis non, yet, where the distributees are parties to the suit, and do not complain, so that a payment to the administrator de bonis non would be a valid discharge to the representative of the first administrator, the decree will not be reversed for such irregularity. Morris v. Morris, 4 Gratt. (45 Va.) 293.

56. Billings v. Perry, 6 S. C. 106.

57. Finley v. Pearson, 76 SW 374, 25 KyL 766.

58. Matter of Schroeder, 113 App. Div. 204, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem].

59. McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346]; Haeussler v. Scheitlin, 9 Mo. A. 303; Wills v. Dunn, 5 Gratt. (46 Va.) 384.

[a] **Allowance to attorney.**—An order in proceedings for the allowance of an administrator's account, awarding the administrator's attorney the sum of three hundred and ten dollars, and directing the administrator to pay the same within five days out of the funds of the estate in his hands, did not increase the burden of the administrator or his bondsmen, the funds being otherwise payable to the distributees of the estate. McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346].

60. Ala.—Davis v. Davis, 6 Ala. 611.

La.—Heffner's Succ., 49 La. Ann. 407, 21 S 905.

Mo.—Haeussler v. Scheitlin, 9 Mo. A. 303.

Nebr.—Lydick v. Chaney, 64 Nebr. 288, 89 NW 801.

N. Y.—Matter of Monell, 28 Misc. 308, 59 NYS 981, 1 Mills Surr. 147; Sherwood v. Judd, 3 Bradf. Surr. 419.

Pa.—McCracken v. Graham, 14 Pa. 209.

S. C.—Verner v. Bookman, 53 S. C. 398, 31 SE 283, 69 AmSR 870.

Va.—Sheppard v. Starke, 3 Munf. (17 Va.) 29; Moore v. Ferguson, 2 Munf. (16 Va.) 421; Barr v. Barr, 2 Hen. & M. (12 Va.) 26.

[a] **Assets become property of personal representative.**—Under a decree ascertaining and declaring the amount of assets in the hands of a personal representative, the whole amount due, and the sum payable to each creditor out of the assets, and ordering that the assets be placed in the hands of the personal representative, and that he personally pay the sum payable to each creditor, the liability of the personal representative becomes personal and the assets his individual property, in the absence of a showing of some special equity to follow and reach such assets. Paff v. Kinney, 5 Sandf. Ch. (N. Y.) 380.

[b] **Lien on real estate.**—(1) The real estate of a personal representative becomes subject to a lien upon the filing of a transcript showing the amount appearing to be due and in his hands, on the settlement of his accounts in the orphans' court. McCracken v. Graham, 14 Pa. 209 (proper form of transcript); Hanson v. Penn Tp. Bank, 7 Pa. 261 (place of filing); Roshing v. Chandler, 3 Pa. 369; Rowland v. Harbaugh, 5 Watts (Pa.) 365; Ramsey's App., 4 Watts (Pa.) 71. (2) But the personal estate of the representative is also bound for the payment of a balance decreed to be in their hands by the orphan's court. Burd v. McGregor, 2 Grant (Pa.) 353.

[c] **Mortgage to secure payment.**—An executor, who, upon a balance being found due from him upon his accounting, gives a mortgage, in the nature of a declaration of trust, to hold the balance under the provisions of the will, and afterward pays a larger amount upon a valid outstanding claim against the estate, is entitled to have the mortgage discharged. Harris v. Young, 19 S. C. 34.

[d] **Supplementary proceedings** may be had upon such a judgment. Rhodes v. Casey, 20 S. C. 491.

61. Forteaux v. Lepage, 6 Iowa 123.

62. Siniard v. Green, 123 Ala. 527, 26 S 661.

63. Fort v. Battle, 21 Miss. 133.

64. Steen v. Steen, 25 Miss. 513.

65. U. S. Fidelity, etc., Co. v. Martin, 143 Ky. 241, 136 SW 200.

66. Shuey v. Lambert, 53 Ind. A. 567, 102 NE 150.

67. Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400].

68. See Equity § 871; Judgments [23 Cyc 859].

tention of the court must be ascertained, when possible, and the decree given effect in conformity thereto.[69] Where the order confirms the account of an executor who is required to pay a specified sum to a legatee, it makes the legatee a creditor of the executor.[70]

Where an administrator has delayed his final accounting for many years, and any errors in the accounting are due to the loose methods of the administrator, all doubts as to the validity of a judgment sustaining exceptions to such an accounting will be resolved against the administrator.[71]

An order for the payment of a dividend on an accounting by an administrator is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims reported therein, so that the parties to whom the dividends are payable do not thereby become parties to the accounting.[72]

Incidental or final determination. In the order or decree the determination may be as to incidental[73] or final[74] matters, depending upon the circumstances of the case. An order or decree of final settlement necessarily means a determination of all matters proper to be included therein, unless they are excepted therefrom in accordance with express statutory provisions;[75] but a provision which expressly continues the estate for further administration with respect to certain matters excludes the idea of final settlement.[76] Such a decree determines nothing beyond the amount received and paid out by the representative, and, unless the two amounts balance each other, the balance in his hands belonging to the estate, or due to him from it.[77]

Enforcement.[78] A decree directing the executor to pay a specified amount which the decree finds the executor owes the estate establishes the amount due from the executor, and to whom payable, and can be docketed and enforced as a judgment of the supreme court.[79]

[§ 2482] **H. Operation and Effect—1. Final Settlement**[80]**—a. In General.** The general rule is that a decree rendered on the final settlement of a personal representative has the force and effect of a judgment and is conclusive on the parties to the accounting and settlement as to the matters properly determined therein, until it is set aside for proper cause or reversed on appeal,[81] although there is some authority for the view that a final set-

[a] **Thus,** where a decree on an executor's final account provided that he should pay over to contestant all interest, income, or other accretion which came into his hands subsequent to the verification of his account, provided that the amount thereof should be determined and adjudged, together with the commissions and allowances for necessary expenses due the executor "on account thereof" by supplemental account to be made and filed, contestant was not prejudiced by a modification of the order on the theory that it limited the executor's allowance and expenses incurred on such supplemental account, so as to provide for a final accounting and the allowance of legitimate expenses incurred in the management of the estate subsequent to the prior accounting. Matter of Hull, 120 App. Div. 674, 105 NYS 961.

69. See Equity § 862; Judgments [23 Cyc 1101]

[a] **Rule applied.**—(1) Where the court stated in its order approving an executor's report that the executor made due proof of the publication of notice of the filing of his final report, such statement was not a finding that the executor made proof that a nonresident heir had been duly notified by publication, in accordance with the court's direction. Reizer v. Mertz, 223 Ill. 555, 79 NE 283 [rev 125 Ill. A. 425]. (2) Where an administrator in a suit to settle the estate made three settlements with the master commissioner in which he reported all cash collected on claims due the estate, and cash received from the purchaser of certain real estate at the time of each settlement, and the widow filed exceptions to the first two reports, including an exception to a report charging the administrator with cash received as purchase money on the real estate, and the court sustained the exceptions, it was an interlocutory order, and where it did not expressly adjudge that the administrator had no right to sell the real estate, and there was no order directing the commissioner to refund to him the amounts turned over as receipts of the sale, and the deed made the purchaser was not declared void, nor the purchaser directed to surrender possession, but the court afterward ordered the commissioner to pay out to the creditors, one of whom was the widow, all the money received from the sale of the real estate paid over to him by the administrator, the order sustaining the exceptions to the report did not decide that the executor had no authority to make the sale of real estate. Harding v. Weisiger, 109 SW 890, 33 KyL 170. (3) Where, in an accounting by executors, it appeared that they had unlawfully invested in securities, but that such securities had a value, and the decree of the probate court charged them with the difference between such value and the amount expended, and on appeal the charge was affirmed, but the decree provided that all the investments in question were disapproved, the decree should be construed as meaning that the executors were liable merely for the loss, and not that they should not be allowed the sum which was the actual value of the securities. Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

70. Fraser v. Cole, 214 Fed. 556, 131 CCA 102.

71. Huston v. Roe, 78 N. J. Eq. 215, 78 A 162 [rev on other grounds 79 N. J. Eq. 220, 81 A 848] (delay of twenty years).

72. In re McDougald, 143 Cal. 476, 77 P 443.

73. Matter of Amend, 100 Misc. 90, 165 NYS 76 (in accounting proceedings by executors and trustees, a determination by the surrogate that remaindermen are interested parties is merely incidental, and is not a final determination on which a decree can be entered).

74. Lile v. Kincaid, 160 Mo. A. 297, 142 SW 434 (a judgment of the probate court rendered on notice by the administrator of his intention to make a settlement of the estate, which recites that the accounts of the administrator are correct, and which approves the same, and which declares that the allowed claims have been paid in full, and that the balance on final settlement has been distributed in conformity to the order of the court, and that the administrator has accounted for the assets that have come into his hands, and that the estate has been administered, and which orders the discharge of the administrator, is a final judgment).

75. Green v. Brown, 8 Ind. A. 110, 33 NE 979; U. S. Fidelity, etc., Co. v. Martin, 143 Ky. 241, 136 SW 200; Matter of James, 172 App. Div. 800, 159 NYS 140 [rev on other grounds 221 N. Y. 242, 117 NE 1072]; In re Raleigh, 48 Utah 128, 158 P 705.

76. Green v. Brown, 8 Ind. A. 110, 33 NE 979.

77. Johnson v. Richards, 3 Hun (N. Y.) 454, 5 Thomps. & C. 654.

78. **Enforcement of decree or judgment generally** see Equity § 865; Executions 23 C. J. p 182.

79. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435 [rev 122 App. Div. 890, 106 NYS 1146].

80. **Final settlement does not operate as a discharge** see supra § 260.

81. U. S.—Newberry v. Wilkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111]; Clarke v. Eureka County Bank, 116 Fed. 534; Sherman v. American Cong. Assoc., 113 Fed. 609, 51 CCA 329 [aff 98 Fed. 495]; Hiller v. Ladd, 85 Fed. 703, 29 CCA 394; Newman v. Moody, 19 Fed. 858.

Ala.—Sampey v. Sowell, 93 Ala. 447, 9 S 600; Hatcher v. Dillard, 70 Ala. 343; Hutton v. Williams, 60 Ala. 107; Seawell v. Buckley, 54 Ala. 592; Tarver v. Tankersley, 51 Ala. 309; Griffin v. Ryland, 45 Ala. 688; Shackleford v. Cunningham, 41 Ala. 203; Modawell v. Holmes, 40 Ala. 391; Ashley v. Ashley, 15 Ala. 15.

Ark.—Remshard v. Renshaw, 102 Ark. 309, 143 SW 1092; Floyd v. Newton, 97 Ark. 459, 134 SW 934; Beckett v. Whittington, 92 Ark. 230, 235, 122 SW 633 [cit Cyc]; Washington v. Govan, 73 Ark. 612, 84 SW 792; Jones v. Graham, 36 Ark. 383; West v. Waddill, 33 Ark. 575; Ringgold v. Stone, 20 Ark. 526; Dooley v. Dooley, 14 Ark. 122.

Cal.—Bacon v. Bacon, 150 Cal. 477, 89 P 317; In re Pichoir, 146 Cal. 404, 80 P 512; In re Bell, 142 Cal. 97, 75 P 679; In re Grant, 131 Cal. 426, 63 P 731; Toland v. Earl, 129 Cal. 148, 61 P 914, 79 AmSR 100; McKeeby v. Los Angeles, 125 Cal. 639, 58 P 263; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624; Crew v. Pratt, 119 Cal. 139, 51 P 38; Burdick's Est., 112 Cal. 387, 44 P 734; Couts' Est., 87 Cal. 480, 100 Cal. 400; Tobelman v. Hildebrandt, 72 Cal. 313, 14 P 20; Reynolds v. Brumagim, 54 Cal. 254; In re Stott, 52 Cal. 403; Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291; L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Conn.—Bulkley v. Andrews, 39 Conn. 523.

Del.—State v. Barnett, 16 Del. 115, 42 A 420.

D. C.—Magruder v. Drury, 37 App. 519.

Ga.—Echols v. Almon, 77 Ga. 330, 1 SE 269; Jacobs v. Pou, 18 Ga. 346; Carter v. Anderson, 4 Ga. 516.

Ill.—Strawn v. Jacksonville Female Academy, 240 Ill. 111, 88 NE 460; McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346]; McDonald v. Holdom, 208 Ill. 128, 70 NE 21, 208 Ill. 146, 70 NE 1112 [aff 108 Ill. A. 449]; Peo. v. Kohlsaat, 168 Ill. 37, 48 NE 81 [aff 66 Ill. A. 505]; Peo. v. Medart, 166 Ill. 348, 46 NE 1095 [aff 63 Ill. A. 111]; Wheeler v. Dawson, 63 Ill. 54; Jester v. Young, 180 Ill. A. 690; Clifford v. Gridley, 113 Ill. A. 164; Peo. v. Lease, 71 Ill. A. 380.

Ind.—Manifold v. Jones, 117 Ind. 212, 20 NE 124; Carver v. Lewis, 104 Ind. 438, 2 NE 705; State v. Kelso, 94 Ind. 587; Cunningham v. Cunningham, 94 Ind. 557; Vestal v. Allen, 94 Ind. 268; Ferguson v. State, 90 Ind. 38; Pate v. Moore, 79 Ind. 20; Candy v. Hanmore, 76 Ind. 125; Peacocke v. Leffler, 74 Ind. 327; Sanders v. Loy, 61 Ind. 298; Holland v. State, 48 Ind. 391; Barnes v. Bartlett, 47 Ind. 98; Reed v. Reed, 44 Ind. 429; Camper v. Hayeth, 10 Ind. 528; Kuhn v. Boehne, 27 Ind. A. 340, 61 NE 199.

Iowa.—McEwen v. Fletcher, 164 Iowa 517, 146 NW 1, AnnCas1916D 637; Ryan v. Hutchinson, 161 Iowa 575, 143 NW 433; Tucker v. Stewart, 147 Iowa 294, 126 NW 183; Tucker v. Stewart, 121 Iowa 714, 97 NW 148; Kowa v. Mowery, 57 Iowa 20, 10 NW 283.

Kan.—Lewis v. Woodrum, 76 Kan. 384, 92 P 306; Scruggs v. Scruggs, 69 Kan. 487, 77 P 269; Crane v. Lowe, 59 Kan. 606, 54 P 666; Proctor v. Dicklow, 57 Kan. 119, 45 P 86; Musick v. Beebe, 17 Kan. 47; Shoemaker v. Brown, 10 Kan. 383.

Ky.—U. S. Fidelity, etc., Co. v. Martin, 143 Ky. 241, 136 SW 200; Larue v. White, 8 Dana 45.

La.—St. Dizier's Succ., 132 La. 657, 61 S 727; Wiemann's Succ., 112 La. 293, 36 S 354; Rabasse's Succ., 50 La. Ann. 746, 23 S 910; Allen's Succ., 49 La. Ann. 1096, 22 S 319; Ledoux v. Lavedan, 49 La. Ann. 913, 22 S 214; Simonin v. Czarnowski, 47 La. Ann. 1334, 17 S 847; Searcy v. Creditors, 46 La. Ann. 376, 14 S 910; Smith v. Lewis, 45 La. Ann. 1457, 14 S 221; Hoss' Succ., 42 La. Ann. 1022, 8 S 833; Duhe's Succ., 42 La. Ann. 252, 7 S 327; Triche's Succ., 39 La. Ann. 289, 2 S 52; Castillo v. Elliott, 13 La. Ann. 363; Bujac v. Loste, 12 La. Ann. 96; Anderson's Succ., 12 La. Ann. 95; Robin v. His Executors, 5 Mart. 515.

Me.—Graffam v. Ray, 91 Me. 234, 39 A 569; Harlow v. Harlow, 65 Me. 448; Arnold v. Mower, 49 Me. 561.

Md.—Roberts v. Roberts, 71 Md. 1, 17 A 568.

Mass.—Thompson v. De Visser, 219 Mass. 40, 106 NE 548; Cleaveland v. Draper, 194 Mass. 118, 80 NE 227; Barker v. Ensign, 77 NE 719; Parcher v. Bussell, 11 Cush. 107.

Mich.—Houghteling v. Stockbridge, 136 Mich. 544, 99 NW 759; Maney v. Casserly, 134 Mich. 252, 96 NW 478; Lawrence v. Hathaway, 128 Mich. 119, 87 NW 84; Holden v. Lathrop, 65 Mich. 652, 32 NW 879.

Minn.—Kittson v. St. Paul Trust Co., 78 Minn. 325, 81 NW 7; State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033.

Miss.—Crowder v. Shackelford, 35 Miss. 321; Winborn v. King, 35 Miss. 157; Singleton v. Garrett, 23 Miss. 195; Austin v. Lamar, 23 Miss. 189; Stubblefield v. McRaven, 13 Miss. 130, 43 AmD 502.

Mo.—Bishop v. Chase, 156 Mo. 158, 56 SW 1080, 79 AmSR 515; Smith v. Hauger, 150 Mo. 437, 51 SW 1052; Young v. Byrd, 124 Mo. 590, 28 SW 83, 46 AmSR 461; State v. Gray, 106 Mo. 526, 17 SW 500; RoBards v. Lamb, 89 Mo. 303, 1 SW 222; Van Bibber v. Julian, 81 Mo. 618; Woodworth v. Woodworth, 70 Mo. 601; Williams v. Petticrew, 62 Mo. 460; Townsend v. Townsend, 60 Mo. 246; Lewis v. Williams, 54 Mo. 200; Murray v. Roberts, 48 Mo. 307; Picot v. Bates, 47 Mo. 390; Barton v. Barton, 35 Mo. 158; Whittelsey v. Dorsett, 23 Mo. 236; State v. Roland, 23 Mo. 95; Jones v. Brinker, 20 Mo. 87; Caldwell v. Lockridge, 9 Mo. 362; Einstein v. Strother, (A.) 182 SW 122; Crump v. Hart, 189 Mo. A. 572, 176 SW 1089; Lile v. Kincaid, 160 Mo. A. 297, 142 SW 434; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Michie v. Grainger, 149 Mo. A. 301, 129 SW 983; Mueller v. Grunker, 145 Mo. A. 611, 123 SW 469; State v. Carroll, 101 Mo. A. 110, 74 SW 468; Tonnies v. McIntyre, 82 Mo. A. 268; Johnson v. Johnson, 72 Mo. A. 386; Cooper v. Duncan, 58 Mo. A. 5; Lycan v. Miller, 56 Mo. A. 79; Voshage v. Voshage, 45 Mo. A. 172; Weinerth v. Trendley, 39 Mo. A. 333; Standard v. Lacks, 25 Mo. A. 64; Haeussler v. Scheitlin, 9 Mo. A. 303.

Mont.—In re Williams, 47 Mont. 325, 132 P 421.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630.

N. H.—Jones v. Chase, 55 N. H. 234; Hurlburt v. Wheeler, 40 N. H. 73.

N. J.—Woolsey v. Woolsey, 72 N. J. Eq. 898, 67 A 1047; Wyckoff v. O'Niel, 71 N. J. Eq. 681, 63 A 982; Adams v. Adams, 14 A 575 [aff 17 A 775]; Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586; In re Heath, 52 N. J. Eq. 807, 33 A 46; Ordinary v. Kershaw, 14 N. J. Eq. 527.

N. Y.—Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 NE 480 [mod 94 App. Div. 612, 88 NYS 1094]; In re Killan, 172 N. Y. 547, 65 NE 561, 63 LRA 95 [rev on other grounds 66 App. Div. 312, 72 NYS 714]; Mahoney v. Bernhard, 169 N. Y. 589, 62 NE 1097 mem [aff 45 App. Div. 499, 63 NYS 642 (mod 27 Misc. 339, 58 NYS 748)]; In re Hodgman, 140 N. Y. 421, 35 NE 660; Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 NE 75; In re Soutter, 105 N. Y. 514, 12 NE 34; Denton v. Sanford, 103 N. Y. 607, 9 NE 490; In re Hood, 90 N. Y. 512 [rev 27 Hun 579]; Poughkeepsie Bank v. Hasbrouck, 6 N. Y. 216; De Nuber v. Millard, 152 App. Div. 774, 137 NYS 731; Matter of Warren, 148 App. Div. 525, 133 NYS 145; Weinstraub v. Siegel, 133 App. Div. 677, 118 NYS 261 [rev 57 Misc. 246, 109 NYS 215]; Matter of Guaranty Trust Co., 131 App. Div. 658, 116 NYS 147 [aff 195 N. Y. 611 mem, 89 NE 1101 mem]; Matter of Mahar, 131 App. Div. 420, 116 NYS 1068; Matter of Peck, 131 App. Div. 81, 115 NYS 239; Matter of Schmid, 116 App. Div. 706, 102 NYS 80; Matter of Irvin, 87 App. Div. 466, 84 NYS 707; Skillin v. Central Trust Co., 80 App. Div. 206, 80 NYS 188; Matter of Turner, 79 App. Div. 495, 80 NYS 573; Matter of Killan, 66 App. Div. 312, 72 NYS 714 [rev on other grounds 172 N. Y. 547, 65 NE 561, 33 NYCivProc 249, 63 LRA 95]; Matter of Union Trust Co., 65 App. Div. 449, 72 NYS 977 [aff 174 N. Y. 541 mem, 66 NE 1117 mem]; Matter of Douglas, 60 App. Div. 64, 69 NYS 687; Shimmel v. Morse, 57 App. Div. 434, 63 NYS 322, 68 NYS 1148 [aff 30 Misc. 257, 63 NYS 322]; Kager v. Brenneman, 47 App. Div. 63, 62 NYS 339, 30 NYCiv Proc 168; Reilly v. Porcher, 46 App. Div. 290, 61 NYS 662; Frethey v. Durant, 24 App. Div. 58, 48 NYS 839; Baldwin v. Smith, 91 Hun 230, 638, 36 NYS 159; Foulks v. Foulks, 57 Hun 591, 10 NYS 785; Ashley v. Lamb, 50 Hun 568, 3 NYS 715; Fulton v. Whitney, 5 Hun 16 [aff 66 N. Y. 548]; Rose v. Lewis, 3 Lans. 320; Brown v. Brown, 53 Barb. 217; Peo. v. Townsend, 37 Barb. 520; Wurts v. Jenkins, 11 Barb. 546; Matter of Ziegler, 82 Misc. 10, 143 NYS 682; Matter of Murphy, 59 Misc. 131, 112 NYS 220 [aff 127 App. Div. 929 mem, 111 NYS 1131 mem]; Matter of Burr, 48 Misc. 56, 96 NYS 225 [rev on other grounds 118 App. Div. 482, 104 NYS 29]; Matter of David, 44 Misc. 337, 89 NYS 927, 4 Mills Surr. 364; Matter of Stevens, 40 Misc. 377, 82 NYS 397, 3 Mills Surr. 500; Matter of Wait, 39 Misc. 74, 78 NYS 869, 12 NYAnnCas 141, 3 Mills Surr. 293; Matter of Foulds, 35 Misc. 171, 71 NYS 473, 2 Mills Surr. 252; Matter of Blair, 34 Misc. 444, 69 NYS 1013, 2 Mills Surr. 192 [aff 67 App. Div. 116, 73 NYS 675]; In re Clapp, 30 Misc. 395, 63 NYS 1096, 1 Mills Surr. 465; Shimmel v. Morse, 30 Misc. 257, 63 NYS 322 [aff 57 App. Div. 434, 63 NYS 322, 68 NYS 1148]; Matter of Whitbeck, 22 Misc. 494, 50 NYS 932, 2 Gibb. Surr. 381; In re Crise, 7 NYS 202, 2 Conn. Surr. 59; Brick's Est., 15 AbbPr 12; Ball v. Miller, 17 HowPr 300; Kellett v. Rathbun, 4 Paige 102; Bronson v. Ward, 3 Paige 189; Wright v. New York M. E. Church Corp., Hoffm. 202; Newcomb v. St. Peter's Church, 2 Sandf. Ch. 636.

N. C.—Marler-Dalton-Gilmer Co. v. Golden, 172 N. C. 823, 90 SE 909; Burgwyn v. Daniel, 115 N. C. 115, 20 SE 462; Collins v. Smith, 109 N. C. 468, 14 SE 88.

Oh.—Crawford v. Zeigler, 84 Oh. St. 224, 95 NE 743; Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769; Jones v. Willis, 72 Oh. St. 189, 74 NE 166; James v. West, 67 Oh. St. 28, 65 NE 156; Banning v. Gotshall, 62 Oh. St. 210, 56 NE 1030; McAfee v. Phillips, 25 Oh. St. 374; Swearingen v. Morris, 14 Oh. St. 424; In re Koehnken, 25 Oh. Cir. Ct. 245 [mod 11 OhS&CP 799, 8 OhNP 657]; Clark v. Clark, 16 Oh. Cir. Ct. 103, 8 Oh. Cir. Dec. 752; Kinsella v. De Camp, 15 Oh. Cir. Ct. 494, 8 Oh. Cir. Dec. 352; Snider v. Graham, 14 Oh. Cir. Ct. 386, 8 Oh. Cir. Dec. 3; Smith v. Hayward, 5 OhS&CP 462, 5 OhNP 501; In re Hess, 4 OhS&CP 413, 3 OhNP 62.

Okl.—Greer v. McNeal, 11 Okl. 519, 69 P 891.

Or.—In re Conant, 43 Or. 530, 73 P 1018; Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Pa.—In re Rahm, 233 Pa. 602, 82 A 941; Heffner v. Albright, 231 Pa. 396, 80 A 887; Connor v. Gibbons, 228 Pa. 617, 77 A 1009; Samuel Hano Co. v. Hano, 224 Pa. 212, 73 A 341; In re Irvine, 209 Pa. 325, 58 A 618; Yocum v. Commercial Nat. Bank, 195 Pa. 411, 46 A 94 [aff 8 Pa. Dist. 631]; Schaeffer's App., 119 Pa. 640, 13 A 507; Smith v. Seaton, 117 Pa. 382, 11 A 661, 2 AmSR 668; Hartzell v. Com., 42 Pa. 453; Burd v. McGregor, 2 Grant 353; Clark v. Callaghan, 2 Watts 259; Thompson v. McGaw, 2 Watts 161; Fox v. Winters, 4 Rawle 174; App v. Dreisbach, 2 Rawle 287, 21 AmD 447; McLenachan v. Com., 1 Rawle 357; McFadden v. Geddis, 17 Serg. & R. 336; McPherson v. Hamilton, 2 Yeates 40; Patton's Est., 19 Pa. Super. 545; Craig's Est., 24 Pa. Dist. 851; Mayes' Est., 20 Pa. Dist. 608; Alexander's Est., 14 Pa. Dist. 155; Volans' Est., 12 Pa. Dist. 716; Hart's Est., 12 Pa. Dist. 47; Hart's Est., 28 Pa. Co. 126; Harned's Est., 10 Kulp 183; Monroe's Est., 9 Kulp 334.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

R. I.—Doringh's Pet., 20 R. I. 459, 40 A 4.

S. C.—Simkins v. Cobb, 18 S. C. L. 60; Wright v. Wright, 7 S. C. Eq. 185.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715; Cooper v. Burton, 7 Baxt. 406.

Tex.—Sabrinos v. Chamberlain, 76 Tex. 624, 13 SW 634; Debrell v. Ponton, 27 Tex. 623; Townsend v. Munger, 9 Tex. 300; Watkins v. Sansom, 22 Tex. Civ. A. 178, 54 SW 1096; Ball v. Ball, (Civ. A.) 45 SW 605; Long v. Wooters, 18 Tex. Civ. A. 35, 45 SW 165.

tlement, approved by the court, is only prima facie evidence,[82] and the allowance of an item in an administrator's account without evidence on file in support thereof has been held to be not even prima facie correct as between the parties.[83] In order that the settlement shall have this conclusive effect, it is necessary that it should have been made in accordance with the statutory requirements relating to such settlements,[84] although presumptions of regularity are to be indulged with respect to such settlements.[85] A final settlement made without notice is not conclusive, although it should be treated as prima facie correct.[86] Where there is a total lack of appropriate parties to the proceedings, resulting in a defect of jurisdiction, the settlement is not conclusive,[87] although after a lapse of twenty years it will be presumed, in support of a final settlement, that proper notices were given and all necessary parties brought in, notwithstanding a failure of the record to show these matters.[88] It has also been held that a settlement made in vacation is invalid and of no effect,[89] as is also a judgment homologating the account of an administrator, made without any evidence as to the correctness of the account.[90]

What constitutes final settlement. In order that a settlement of the account of the executor or administrator shall be regarded as final and conclusive, it must mark the termination of the administration of the estate.[91] So an executor on whom the will imposes duties as trustee continues liable as executor until he is discharged as such and there is a severance of the fund, and the mere settlement of his executor's accounts does not discharge him in the absence of a provision to that effect in the decree.[92]

Closing of estate. Until the probate court has ordered the administrator of an estate discharged, the estate is not closed, and a final settlement therein is not a binding judgment, although approved by the court.[93]

Interest on awards. When an adjudication upon executors' accounts has been confirmed absolutely, the awards, whether to creditors or legatees, become final judgments, and, if not promptly paid, bear interest from that date.[94]

Form of settlement not affecting distributive shares. In a case where adult heirs, as parties of the first part, and the widow and a third person to be appointed as guardian for a minor heir, as parties of the second part, entered into a contract

Utah.—Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

Vt.—Harris v. Harris, 82 Vt. 199, 72 A 912; Sparhawk v. Buell, 9 Vt. 41; Probate Ct. v. Merriam, 8 Vt. 234.

Va.—Carter v. Skillman, 108 Va. 204, 60 SE 775.

Wash.—In re Goss, 73 Wash. 330, 132 P 409; In re Doane, 64 Wash. 303, 116 P 847.

Wis.—Perkins v. Owen, 123 Wis. 238, 101 NW 415; Vaughn v. Walsh, 122 Wis. 486, 100 NW 840; Schinz v. Schinz, 90 Wis. 236, 63 NW 162; Barker v. Barker, 14 Wis. 131.

Wyo.—Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

Ont.—Cunnington v. Cunnington, 2 Ont. L. 511; Gibson v. Gardner, 13 Ont. L. 521, 7 OntWR 474, 8 OntWR 526.

[a] **Proceeding characterized as in rem.**—Such proceedings have been said not to be, as a rule, in personam but in rem, and if regular, binding upon all persons equally, whether they appear personally to take part in the controversies or proceedings or hold themselves aloof. Matter of Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff 68 Oh. St. 58, 67 NE 156, 96 AmSR 648].

[b] **No further accounting as to trust.**—Where executors of a deceased trustee have had their discharge under the surrogate's decree, and accounted for and distributed all of the assets of the estate which came into their hands, they cannot be required to account further in an executorial capacity as to a trust declared by testator, in the absence of proof of any claim which would show either knowledge on their part of the existence of a trust fund, or that any such fund ever came into their hands, or that they had any assets out of which unliquidated claims against the fund could be paid. Rosen v. Ward, 96 App. Div. 262, 89 NYS 148.

[c] **Testimony that an administrator paid private debts** with checks as administrator did not show misappropriation of funds by an administrator, as against confirmed report of commissioner of accounts, showing all funds accounted for. McIntyre v. Wright, 113 Va. 299, 74 SE 172.

[d] **Where an adversary trial upon the issues was prevented by fraud,** the decree is not conclusive. Pickens v. Merriam, 242 Fed. 363, 155 CCA 139.

82. Scott v. Fox, 14 Md. 388; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Mitchell v. Mitchell, 3 Md. Ch. 71; Cross v. Baskett, 17 Or. 84, 21 P 47; Kohr v. Fedderhaff, 4 Serg. & R. (Pa.) 248 (in action for distributive share); Dasher v. Leinaweaver, 3 Serg. & R. (Pa.) 200; Blackwell v. Bragg, 78 Va. 529; Corbin v. Mills, 19 Gratt. (60 Va.) 438; Newton v. Poole, 12 Leigh (39 Va.) 112.

83. Herndon v. McDowell, 121 Ky. 554, 89 SW 539, 28 KyL 512.

84. Shirley v. Thompson, 123 Ind. 454, 24 NE 253; Herndon v. McDowell, 121 Ky. 554, 89 SW 539, 28 KyL 512; Van Liew v. Barrett, etc., Beverage Co., 144 Mo. 509, 46 SW 202.

[a] **Accordingly** a settlement is not conclusive : (1) If made before the expiration of the time allowed by law for the presentation of claims. Shirley v. Thompson, 123 Ind. 454, 24 NE 253. (2) If notice was not published as required by statute. Van Liew v. Barrett, etc., Beverage Co., 144 Mo. 509, 46 SW 202.

85. State v. Gray, 106 Mo. 526, 17 SW 500.

86. Crawford v. Redus, 54 Miss. 700; Winborn v. King, 35 Miss. 157; Sumrall v. Sumrall, 24 Miss. 258; Heitkamp v. Biedenstein, 3 Mo. A. 450.

87. American Mortgage Co., etc. v. Boyd, 92 Ala. 139, 9 S 166; Green v. Sargent, 23 Vt. 466, 56 AmD 88; Adams v. Adams, 22 Vt. 50.

88. Barnett v. Tarrence, 23 Ala. 463.

89. Stockton v. Ransom, 60 Mo. 535.

90. Cloney's Succ., 29 La. Ann. 327.

91. Ill.—Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

Ind.—Hartzell v. Hartzell, 37 Ind. A. 481, 76 NE 439.

Me.—McKenzie v. Muchmore, 104 Me. 320, 71 A 1032.

Md.—Foley v. Syer, 121 Md. 79, 88 A 38.

Nebr.—In re Wilson, 98 Nebr. 852, 154 NW 717, 97 Nebr. 780, 151 NW 316.

N. Y.—Willets v. Haines, 96 App. Div. 5, 88 NYS 1018 [aff 182 N. Y. 543 mem, 75 NE 1135 mem].

Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Va.—Owens v. Owens, 109 Va. 432, 63 SE 990.

[a] **Reports held final.**—(1) Where an administratrix filed her final report, and on the hearing additions to sums in her hands were made, which additions consisted of property not inventoried and a sum received for property in excess of the appraisement, the corrected report, whether corrected by the court or by the administratrix on the court's order, became the final report, which the court properly approved and then discharged her from further liabilities. Hartzell v. Hartzell, 37 Ind. A. 481, 76 NE 439. (2) Where, under a will giving a life estate in personalty to the testator's widow, she was entitled to the possession for life of the securities and cash left by him, an account passed by the orphans' court filed by the widow and another, as executors, charging themselves with receipts, allowing credits for payments and disbursements, and then reciting that the balance consisting of certain securities and twenty-three thousand dollars in cash was retained by the widow under the terms and conditions of the will to be held by her during her natural life, showed a full and complete administration of the estate, and the widow thereafter held it not as executrix but as life tenant, especially where of the twenty-three thousand dollars retained by her the bulk had previously been invested by her under orders of the court. Foley v. Syer, 121 Md. 79, 88 A 38.

[b] **Surcharge necessary to finality.**—Until an executor's account, after having been confirmed, is surcharged, it is mere evidence, and not a final settlement. Owens v. Owens, 109 Va. 432, 63 SE 990.

[c] **Action not final.**—The approval by the court of a report of an administrator of a sale of realty to pay debts of the estate, the payment of certain debts, and a dividend on others does not settle the estate. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

[d] **The fact that the representative regarded an account** as his final account does not make it such where it was not so accepted by the probate judge and no notice was given thereon as a final account. McKenzie v. Muchmore, 104 Me. 320, 71 A 1032.

Settlement on resignation, removal, or death see infra § 2490.

92. In re Hood, 98 N. Y. 363, 7 NY CivProc 257 [rev 33 Hun 338]; Pearse v. National Lead Co., 162 App. Div. 766, 147 NYS 989.

93. State v. Noll, (Mo. A.) 189 SW 582.

94. Wainwright's Est., 13 Phila. (Pa.) 371.

whereby the parties of the second part assumed the payment of two notes executed by one of the adults, and whereby certain property should be turned over to the adults and whereby they released their interest in certain property in favor of the widow and minor heir, and as administratrix filed an account stated on the theory of ascertaining what the shares of each in the personalty would have been if no agreement had been made and showing a performance of the agreement, and paid the notes, charging them on the credit and debit sides of her account, it was held that the form of accounting did not increase or diminish the shares of the adults for purposes of distribution of the remainder of the estate.[95]

[§ 2483] **b. Persons Concluded.** A decree finally settling accounts of an executor or administrator is conclusive on him,[96] and all other persons who are interested in the estate, of whom the court has acquired jurisdiction by due notice or service of citation, or who personally appear,[97] including legatees and distributees,[98] creditors,[99] and sureties of the representative,[1] but persons of whom jurisdiction was not acquired are not concluded thereby.[2]

95. Fletcher v. Fletcher, 191 Mass. 211, 77 NE 758.

96. U. S.—Butterfield v. Smith, 101 U. S. 570, 25 L. ed. 868.

Ala.—Lyon v. Hays, 30 Ala. 430.

La.—St. Dizier's Succ., 132 La. 657, 61 S 727; Serret v. Labauve, 15 La. Ann. 186; Capdevielle v. Erwin, 13 La. Ann. 286.

Me.—Treat v. Treat, 80 Me. 156, 13 A 684.

Md.—Scott v. Burch, 6 Harr. & J. 67.

Mass.—Davis v. Cowdin, 20 Pick. 510; White v. Starr, 13 Pick. 380.

Miss.—Singleton v. Garrett, 23 Miss. 195.

N. Y.—Hull v. Hull, 225 N. Y. 342, 122 NE 252; Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 NE 480; Marsh v. Avery, 81 N. Y. 29; Matter of Mahar, 131 App. Div. 420, 116 NYS 1068; Hendrickson v. Empire Trust Co., 95 Misc. 612, 159 NYS 794; In re Hills, 178 NYS 348; O'Brien v. Heeney, 2 Edw. 242; Garvey v. McCue, 3 Redf. Surr. 313 [rev on other grounds 14 Hun 562].

N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445.

Pa.—Patton's Est., 19 Pa. Super. 545.

S. C.—Wright v. Wright, 7 S. C. Eq. 185.

Ont.—Cunnington v. Cunnington, 2 Ont. L. 511.

[a] **An administrator cannot set up his own irregularity** in blending accounts. Gross' Est., 36 Pa. Super. 54.

[b] **One who has rendered services at the instance of the personal representative** is concluded, as he claims under the personal representative who is concluded. Lyon v. Hays, 30 Ala. 430.

97. U. S.—Beatty v. Maryland, 7 Cranch 281, 3 L. ed. 343; Lipse v. Spears, 88 Fed. 952.

Ala.—Sampey v. Sowell, 93 Ala. 447, 9 S 600; Werborn v. Austin, 82 Ala. 498, 8 S 280; Pinney v. Werborn, 72 Ala. 58; Carter v. Carter, 53 Ala. 365; Horn v. Grayson, 7 Port. 270.

Ark.—Crowley v. Mellon, 52 Ark. 1, 11 SW 876.

Cal.—Archer v. Harvey, 164 Cal. 274, 128 P 410; Couts' Est., 87 Cal. 480, 25 P 685, 100 Cal. 400, 34 P 865; Washington v. Black, 83 Cal. 290, 23 P 300; Tobelman v. Hildebrandt, 72 Cal. 313, 14 P 20; Townsend v. Gordon, 19 Cal. 188; Deck v. Gerke, 12 Cal. 433, 73 AmD 555; Williams v. Price, 11 Cal. 212; Belloc v. Rogers, 9 Cal. 123; Clarke v. Perry, 5 Cal. 58, 63 AmD 82; In re Keenan, Myr. Prob. 186; L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Ill.—Burnett v. Burnett, 38 Ill. A. 186.

Ind.—Shirley v. Thompson, 123 Ind. 454, 24 NE 253.

La.—Winn's Succ., 30 La. Ann. 702; Castillo v. Elliott, 13 La. Ann. 363; Whitten's Succ., 9 La. Ann. 417; Mann's Succ., 4 La. Ann. 28.

Mich.—Gee v. Hasbrouck, 128 Mich. 509, 87 NW 621.

Miss.—Lambeth v. Elder, 44 Miss. 80.

Mo.—Van Liew v. Barrett, etc., Beverage Co., 144 Mo. 509, 46 SW 202; Nelson v. Barnett, 123 Mo. 564, 27 SW 520; Patterson v. Booth, 103 Mo. 402, 15 SW 543; Van Bibber v. Julian, 81 Mo. 618; Ritchey v. Withers, 72 Mo. 556; Sheetz v. Kirtley, 62 Mo. 417; Einstein v. Strother, (A.) 182 SW 122; Crump v. Hart, 189 Mo. A. 572, 176 SW 1089; Johnson v. Johnson, 72 Mo. A. 386.

Mont.—In re Williams, 47 Mont. 325, 132 P 421.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369.

N. H.—Redington Hub Co. v. Putnam, 76 N. H 336, 82 A 715.

N. J.—Budd v. Hiler, 27 N. J. L. 43; Livingston v. Combs, 1 N. J. L. 50; Wyckoff v. O'Neil, 71 N. J. Eq. 681, 63 A 982; Bray v. Neill, 21 N. J. Eq. 343.

N. Y.—Denton v. Sanford, 103 N. Y. 607, 9 NE 490 [aff 39 Hun 487]; Davis v. Crandall, 101 N. Y. 311, 4 NE 721; Matter of Cummings, 142 App. Div. 377, 127 NYS 109; Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261; Matter of Hasselbrook, 128 App. Div. 874, 113 NYS 97; Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Matter of Turner, 79 App. Div. 495, 80 NYS 573; Matter of Gall, 42 App. Div. 255, 59 NYS 254; Peo. v. Townsend, 37 Barb. 520; Hendrickson v. Empire Trust Co., 95 Misc. 612, 159 NYS 794; Matter of O'Brien, 33 Misc. 17, 67 NYS 1116, 2 Mills Surr. 26; Shimmel v. Morse, 30 Misc. 257, 63 NYS 322 [aff 57 App. Div. 434, 63 NYS 322, 68 NYS 1148]; In re Hillis, 178 NYS 348; In re Crise, 7 NYS 202, 2 Conn. Surr. 59; McCunn's Est., 15 NYSt 712; Wells v. Wallace, 2 Redf. Surr. 58; Redmond v. Ely, 2 Bradf. Surr. 175.

Okl.—Caulk v. Lowe, 178 P 101.

Pa.—McCollough v. Montgomery, 7 Serg. & R. 17; Borden's Est., 26 Pa. Dist. 516; Umbstaetter's Est., 19 Pa. Dist. 1121; Garwin's App., 2 AmLJ 253.

S. C.—Holladay v. Holladay, 24 S. C. 521; Ward v. Parker, 19 S. C. 603; Roberts v. Johns, 16 S. C. 171; Miller v. Alexander, 10 S. C. Eq. 25.

Tex.—Vann v. Calcasieu Trust, etc., Bank, (Civ. A.) 204 SW 1062.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Wash.—In re Doane, 64 Wash. 303, 116 P 847.

Ont.—Gibson v. Gardner, 13 Ont. L. 521, 7 OntWR 474, 8 OntWR 526; Uffner v. Lewis, 27 Ont. A. 242.

[a] **Conclusiveness of finding of notice.**—A decree of the orphans' court on final settlement of the accounts of an administrator, adjudging that due notice of such settlement was given, is conclusive. Boulton v. Scott, 3 N. J. Eq. 231.

[b] **Effect of recitals as to notice.**—Upon an issue whether the heirs and legatees had notice of a final settlement, recitals of the decree are prima facie correct, but are not conclusive of the fact of notice. Crawford v. Redus, 54 Miss. 700. Compare Pollock v. Buie, 43 Miss. 140 (recitals sufficient evidence of notice).

98. U. S.—Butterfield v. Smith, 101 U. S. 570, 25 L. ed. 868; Lupton v. Janney, 15 F. Cas. No. 8,607, 5 Cranch C. C. 474 [aff 13 Pet. 381, 10 L. ed. 210].

Ill.—Mosier v. Osborn, 284 Ill. 141, 119 NE 924; Curts v. Brooks, 71 Ill. 125.

La.—Miguez v. Delcambre, 109 La. 1090, 34 S 99; Miller v. Rougieux, 20 La. Ann. 577; Bujac v. Loste, 12 La. Ann. 96; Bry v. Dowell, 1 Rob. 111.

Md.—Appler v. Merryman, 91 Md. 706, 47 A 1026.

Miss.—Crawford v. Redus, 54 Miss. 700.

Mo.—Bishop v. Chase, 156 Mo. 158, 56 SW 1080, 79 AmSR 515; Lycan v. Miller, 56 Mo. A. 79.

N. H.—Starkey v. Kingsley, 69 N. H. 293, 39 A 1017; Symmes v. Libbey, Smith 137.

N. Y.—Hull v. Hull, 225 N. Y. 342, 122 NE 252; Armstrong v. Stone, 64 Misc. 504, 118 NYS 998.

Oh.—Clark v. Clark, 16 Oh. Cir. Ct. 103, 8 Oh. Cir. Dec. 752.

Pa.—McCullough v. Montgomery, 7 Serg. & R. 17.

Can.—Dorion v. Dorion, 20 Can. S. C. 430.

[a] **Persons having a life interest** in an estate are bound by the accountings had in the surrogate's court, to which they were regularly cited, although those entitled to the property on the termination of the life estates were not cited. Elsworth v. Hinton, 47 Hun (N. Y.) 625.

[b] **Personal citation to the heirs** is necessary to render the judgment homologating an administrator's final account binding as between the heirs and the administrator; but as between the heirs and the creditors of the succession, it has been held that the homologation is binding without personal citation or notice, when the notice has been given as required by statute. Couder's Succ., 47 La. Ann. 810, 17 S 317; Von Hoven's Succ., 46 La. Ann. 911, 15 S 391; Conrad's Succ., 45 La. Ann. 89, 11 S 935; Yardborough's Succ., 16 La. Ann. 258; Carter v. McManus, 15 La. Ann. 676; Truxillo v. Truxillo, 11 La. Ann. 412.

99. Jefferson v. Edrington, 53 Ark. 545, 14 SW 99, 903; Hood v. Hood, 80 Ky. 39, 3 KyL 515; Bellocq's Succ., 28 La. Ann. 154; Carter v. McManus, 15 La. Ann. 676; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398; Bogart v. Van Velsor, 4 Edw. (N. Y.) 718.

[a] **A judgment creditor,** applying for an order for payment of the judgment is bound by the decree. Matter of Weil, 110 App. Div. 67, 96 NYS 1017.

1. State v. American Surety Co., 191 Mo. A. 191, 177 SW 1074; Slagle v. Entrekin, 44 Oh. St. 637, 10 NE 675; Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Liability on administration bonds see infra §§ 2533–2669.

2. U. S.—Butterfield v. Smith, 101 U. S. 570, 25 L. ed. 868; Canfield v. Canfield, 118 Fed. 1, 55 CCA 169; Scruggs v. Scruggs, 105 Fed. 28.

Cal.—In re Scott, 1 Cal. A. 740, 83 P 85.

Ga.—Wright v. Clark, 145 Ga. 534, 89 SE 618.

Ind.—Collins v. Tilton, 58 Ind. 374; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130; State v. Burkam, 23 Ind. A. 271, 55 NE 237.

A minor is concluded when the court has acquired jurisdiction of his regular guardian or when he is represented by a regularly appointed guardian ad litem, but not otherwise.[3]

A decree entered on consent is binding on all parties who consented thereto to the same extent as if made on due notice or citation.[4]

[§ 2484] **c. Matters Concluded.** A final settlement is conclusive as to all matters, the proper subject of account, included in such a settlement or necessarily involved therein;[5] but it is not conclusive as to matters not included or necessarily involved therein,[6] or as to matters not within the

La.—Miguez v. Delcambre, 109 La. 1090, 34 S 99; Landry v. Landry, 105 La. 362, 29 S 900; Couder's Succ., 47 La. Ann. 810, 17 S 317; Baldwin v. Carleton, 11 Rob. 109; Millaudon v. Cajus, 6 La. 222.

Mass.—Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 100 AmSR 552.

Miss.—Treadwell v. Herndon, 41 Miss. 38.

Mo.—Emmons v. Gordon, 24 SW 146.

N. H.—Redington Hub Co. v. Putnam, 76 N. H. 336, 82 A 715.

N. Y.—In re Gall, 182 N. Y. 270, 74 NE 875 [mod on other grounds 102 App. Div. 624, 92 NYS 1124]; In re Killan, 172 N. Y. 547, 65 NE 561, 63 LRA 95 [rev 66 App. Div. 312, 72 NYS 714]; Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Matter of Gall, 40 App. Div. 114, 57 NYS 835, 42 App. Div. 255, 59 NYS 254, 47 App. Div. 490, 62 NYS 420; Elwood v. Deifendorf, 5 Barb. 398; Matter of Schulz, 26 Misc. 688, 57 NYS 952, 1 Mills Surr. 50.

N. C.—Royster v. Wright, 118 N. C. 152, 24 SE 746.

Tenn.—Murray v. Luna, 86 Tenn. 326, 6 SW 603.

Va.—Hurt v. West, 87 Va. 78, 12 SE 141.

Wash.—In re Sullivan, 36 Wash. 217, 78 P 945.

[a] **Final settlement not conclusive on successor of accounting executor or administrator.**—Emmons v. Gordon, (Mo.) 24 SW 146; Wright v. Clark, 145 Ga. 534, 89 SE 618; Henderson v. Henderson, 21 Mo. 379.

[b] **Removed representative not bound when not a party.**—Reither v. Murdock, 135 Cal. 197, 67 P 784.

[c] **Settlement not binding on representative of representative who had no notice.**—Boyd v. Kaufman, 6 Munf. (20 Va.) 45.

[d] **The attorney of the personal representative** is not a person interested in the estate so as to be bound. Briggs v. Breen, 123 Cal. 657, 56 P 633, 886; In re Scott, 1 Cal. A. 740, 83 P 85.

[e] **Remainder interest.**—Where a trustee in bankruptcy is entitled only to an interest in a remainder and the life tenant is still living, the remainder is not distributable, and cannot be affected by an accounting of testator's executor before the death of the life tenant. Matter of Gill, 92 Misc. 661, 155 NYS 1019.

[f] **Remedy of person not concluded.**—If an order settling an administrator's account is not conclusive on a claimant by reason of his claim not having been included, his remedy is to petition for an order directing the administrator to pay and he may appeal from a refusal to grant such order. Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291.

3. Ala.—Watts v. Frazer, 80 Ala. 186; Hutton v. Williams, 60 Ala. 133; Jones v. Fellows, 58 Ala. 343; Stabler v. Cook, 57 Ala. 22; Waring v. Lewis, 53 Ala. 615; Collier v. Slaughter, 22 Ala. 671.

Ky.—Schlickman v. Dusing, 180 Ky. 506, 203 SW 295; Stull v. Davidson, 12 Bush 167.

Miss.—Dogan v. Brown, 44 Miss. 235; Cason v. Cason, 31 Miss. 578.

N. H.—Stevens v. Meserve, 73 N. H. 293, 61 A 420, 11 AmSR 612; Simmons v. Goodell, 63 N. H. 458, 2 A 897.

N. Y.—In re Ziegler, 218 N. Y. 544, 113 NE 553; Cagney v. Daly, 149 NYS 985.

Pa.—Tysseur's Est., 31 PittsbLegJ NS 86; Lang's Est., 13 PittsbLegJNS 97.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

[a] **Statute rendering settlement not conclusive against person under disability.**—Butts v. Larison, (Okl.) 170 P 500.

4. Thompson v. De Visser, 219 Mass. 40, 106 NE 548.

5. U. S.—Newbery v. Wilkinson, 190 Fed. 62 [aff 199 Fed. 673, 118 CCA 111].

Ala.—Carpenter v. Carpenter, 79 S 598; Waring v. Lewis, 53 Ala. 615.

Ark.—Remshard v. Renshaw, 102 Ark. 309, 143 SW 1092.

Cal.—In re Ross, 182 P 303; Childs v. De Laveaga, 150 Cal. 281, 89 P 82; In re Stott, 52 Cal. 403; L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Colo.—French v. Woodruff, 25 Colo. 339, 54 P 1015.

Conn.—Sellew's App., 36 Conn. 186.

Ga.—Wicker v. Howard, 126 Ga. 119, 54 SE 821.

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609.

Ind.—Hartzell v. Hartzell, 37 Ind. A. 481, 76 NE 439; Barnett v. Vanmeter, 7 Ind. A. 45, 33 NE 666.

Iowa.—Harris v. Graf, 111 NW 434.

Ky.—U. S.—Fidelity, etc., Co. v. Martin, 143 Ky. 241, 136 SW 200; Bush v. Hampton, 4 Dana 83.

La.—Conrad's Succ., 45 La. Ann. 89, 11 S 935; Hoss' Succ., 42 La. Ann. 1022, 8 S 833; De Egana's Succ., 18 La. Ann. 263; Peytavin's Succ., 10 Rob. 118.

Md.—Thomas v. Frederick County School, 9 Gill & J. 115.

Mass.—Rhines v. Wentworth, 209 Mass. 585, 95 NE 951.

Mich.—In re McNamara, 166 Mich. 451, 132 NW 86.

Minn.—Winters v. Ellefson, 128 Minn. 3, 150 NW 171.

Miss.—Cole v. Leak, 31 Miss. 131.

Mo.—Young v. Byrd, 124 Mo. 590, 28 SW 83, 46 AmSR 461; State v. Gray, 106 Mo. 526, 17 SW 500; Van Bibber v. Julian, 81 Mo. 618; Sheetz v. Kirtley, 62 Mo. 417; Crump v. Hart, 189 Mo. A. 572, 176 SW 1089; Johnson v. Johnson, 72 Mo. A. 386.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630.

N. J.—Shearman v. Cameron, 78 N. J. Eq. 532, 80 A 545 [rev 76 N. J. Eq. 426, 74 A 979]; Woolsey v. Woolsey, 72 N. J. Eq. 898, 67 A 1047; Mount v. Slack, 45 N. J. Eq. 129, 17 A 297 [aff 45 N. J. Eq. 889 mem, 19 A 622 mem].

N. Y.—Hull v. Hull, 225 N. Y. 342, 122 NE 252; In re Zeigler, 218 N. Y. 544, 113 NE 553, 220 N. Y. 98, 115 NE 471, AnnCas1917E 248 [aff 168 App. Div. 735, 154 NYS 652]; Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261 [rev 57 Misc. 246, 109 NYS 215]; Matter of Guaranty Trust Co., 131 App. Div. 658, 116 NYS 147 [aff 195 N. Y. 611 mem, 89 NE 1101 mem]; Matter of Mahar, 131 App. Div. 420, 116 NYS 1068; Matter of Heaney, 125 App. Div. 619, 110 NYS 80; Douglas v. Yost, 64 Hun 155, 18 NYS 830, 28 AbbNCas 370; Matter of Weatherbee, 101 Misc. 522, 167 NYS 701; Matter of Chase, 40 Misc. 616, 83 NYS 62, 3 Mills Surr. 567; In re Jarvis, 180 NYS 324; Matter of Varet, 105 Misc. 443, 173 NYS 559; In re Lese, 163 NYS 1014; Cagney v. Daly, 149 NYS 985; In re Boyle, 151 App. Div. 568, 136 NYS 96 [aff 208 N. Y. 545 mem, 101 NE 1095 mem]; Sheldon v. Sheldon, 11 NYS 477 [rev on other grounds 133 N. Y. 1, 30 NE 730].

N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445.

Oh.—McAfee v. Phillips, 25 Oh. St. 374; Sharp v. Pontius, 2 Oh. Cir. Ct. 7, 1 Oh. Cir. Dec. 331.

Pa.—In re Irvine, 209 Pa. 325, 58 A 618; Sager v. Lindsey, 118 Pa. 25, 13 A 211; McFadden v. Geddis, 17 Serg. & R. 336; Taylor's Est., 17 Pa. Dist. 880; Fry's Est., 10 Pa. Dist. 493, 25 Pa. Co. 173; People's Nat. Bank v. Kern, 8 Pa. Dist. 72.

Tex.—Herbert v. Herbert, (Civ. A.) 59 SW 594.

Vt.—Rix v. Smith, 8 Vt. 365.

Wash.—Veysey v. Veysey, 86 Wash. 553, 151 P 39; In re Doane, 64 Wash. 303, 313, 116 P 847 [cit Cyc].

Wis.—Baker v. Baker, 51 Wis. 538, 8 NW 289.

[a] **The decree is conclusive as to:** (1) The amount of property received by the representative and the amounts disbursed in paying debts and expenses of administration. Remshard v. Renshaw, 102 Ark. 309, 143 SW 1092. (2) The correctness of the items set out in the account and directly acted upon by the court. App v. Dreisbach, 2 Rawle (Pa.) 287, 21 AmD 447. (3) The assignment of a share of the estate. Armstrong v. Stone, 64 Misc. 504, 118 NYS 998.

[b] **Payment of debts.**—Where a probate court makes an order of final settlement of an estate and discharges the personal representative, such action involves a consideration and approval of payments made by the representative, and if the court has jurisdiction to declare the estate settled such payments are thereby ratified. Peo. v. Medart, 166 Ill. 348, 46 NE 1095 [aff 63 Ill. A. 111].

[c] **A decree allowing compensation** (1) to the personal representative and fixing the amount thereof is conclusive as to that matter. Barney v. Saunders, 16 How. (U. S.) 535, 14 L. ed. 1047; Campbell v. Strong, 4 F. Cas. No. 2,367a, Hempst. 265; Ringgold v. Stone, 20 Ark. 526; Simonds v. Creswell, 10 La. Ann. 318; Thomas v. Frederick County School, 9 Gill & J. (Md.) 115 (when not appealed from); Scott v. Dorsey, 1 Harr. & J. (Md.) 227; Eistein v. Strother, (Mo. A.) 182 SW 122; Mount v. Slack, 45 N. J. Eq. 129, 17 A 297 [aff 45 N. J. Eq. 889 mem, 19 A 622 mem]; Matter of Prentice, 25 App. Div. 209, 49 NYS 353. (2) An order of the probate court in the final settlement of the administration of an estate, by joint administrators, awarding a certain sum to one of the administrators for extra services is not, however, a conclusive adjudication against the other administrator as to the right of the one, to whom the allowance was made, to the entire sum so awarded. Oakley v. Oakley, 111 Ala. 506, 20 S 335. (3) Where the probate court ordered a payment to an attorney of the administrator on account of extraordinary services, the allowance of a further sum was not precluded for the words "on account" might well have been used to indicate that the allowance was not intended as compensation in full. In re Ross, (Cal.) 182 P 303.

[d] **The determination of the rights of a widow** by the probate court on final settlement of her husband's administrator with her consent had the effect of a final judgment. Wyatt v. Wilhite, 192 Mo. A. 551, 183 SW 1107.

6. U. S.—Canfield v. Canfield, 118 Fed. 1, 55 CCA 169.

Ala.—Daniel v. Baldwin, 148 Ala. 292, 40 S 421; Odom v. Moore, 147 Ala. 567, 41 S 162; Greenwood v. Warren, 120 Ala. 71, 23 S 686.

jurisdiction of the court.[7] The settlement is not conclusive as to assets not accounted for in such statement or received thereafter, but as to such assets the personal representative may be required to make a further settlement.[8]

[§ 2485] **d. Effect on Pending Actions.** A final settlement made pending litigation against the estate is unwarranted and will not defeat a recovery; but the pending suit may proceed and judgment be rendered against the personal representative notwithstanding such settlement.[9]

[§ 2486] **e. Effect on Jurisdiction of Probate**

Ark.—Crowley v. Mellon, 52 Ark. 1, 11 SW 876.
Cal.—In re Ross, 182 P 303; In re Adams, 131 Cal. 415, 63 P 838.
Colo.—French v. Woodruff, 25 Colo. 339, 54 P 1015; Hartsel v. Peo., 21 Colo. 296, 40 P 567.
Conn.—Sellew's App., 36 Conn. 186.
Ga.—Davis v. Harper, 54 Ga. 180.
Ida.—Miller v. Lewiston Nat. Bank, 18 Ida. 124, 108 P 901.
Ill.—Starr v. Willoughby, 218 Ill. 485, 75 NE 1029, 2 LRANS 623; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345]; Diversy v. Johnson, 93 Ill. 547; Peo. v. Rardin, 171 Ill. A. 226; Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400]; Bayless v. Peo., 56 Ill. A. 55.
Ind.—Foley v. O'Donaghue, 167 Ind. 134, 77 NE 352; Stuckwisch v. Kamman, 166 Ind. 672, 77 NE 349; Graham v. Russell, 152 Ind. 186, 52 NE 806.
Iowa.—Tucker v. Stewart, 121 Iowa 714, 97 NW 148; Crosley v. Calhoon, 45 Iowa 557.
Ky.—Louisville, etc., R. Co. v. Hoskin, 108 SW 305, 32 KyL 1263.
La.—Tucker v. Benedict, 114 La. 203, 38 S 142; Durham v. Williams, 32 La. Ann. 968; Cabrol's Succ., 26 La. Ann. 609; Schaffer's Succ., 13 La. Ann. 113.
Mass.—Case v. Clark, 220 Mass. 344, 107 NE 936; Security Bank v. Callahan, 220 Mass. 84, 107 NE 385.
Mich.—Powell v. Pennock, 181 Mich. 588, 148 NW 430; In re Doyle, 147 Mich. 544, 111 NW 165; Porter v. Long, 124 Mich. 584, 83 NW 601.
Mo.—Bramell v. Adams, 146 Mo. 70, 47 SW 931; State v. Jones, 131 Mo. 194, 33 SW 23; Nelson v. Barnett, 123 Mo. 564, 27 SW 520; Patterson v. Booth, 103 Mo. 402, 15 SW 543; Rugle v. Webster, 55 Mo. 246; State v. Stuart, 74 Mo. A. 182; Schooler v. Stark, 73 Mo. A. 301.
Nebr.—In re Wilson, 98 Nebr. 852, 154 NW 717.
N. H.—Ayers v. Laighton, 73 N. H. 487, 63 A 43.
N. J.—Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612; Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586; Vreeland v. Westervelt, 45 N. J. Eq. 572, 17 A 695.
N. Y.—Orthey v. Bogan, 226 N. Y. 234, 123 NE 487; In re Ziegler, 218 N. Y. 544, 113 NE 553, 220 N. Y. 98, 115 NE 471, AnnCas1917E 248 [aff 168 App. Div. 735, 154 NYS 652]; Joseph v. Herzig, 198 N. Y. 456, 92 NE 103 [mod 135 App. Div. 141, 120 NYS 34]; Corse v. Chapman, 153 N. Y. 466, 47 NE 812; Van Rensselær v. Van Rensselær, 113 N. Y. 207, 21 NE 75; Matter of Cummings, 142 App. Div. 377, 127 NYS 109 [rev 63 Misc. 621, 118 NYS 684]; Matter of Peck, 131 App. Div. 81, 115 NYS 239; Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522; Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154; Matter of Meyer, 95 App. Div. 443, 88 NYS 798 [aff 181 N. Y. 562 mem, 74 NE 1120 mem]; Matter of Arkenburgh, 38 App. Div. 473, 56 NYS 523 [rev on other grounds 13 Misc. 744, 35 NYS 251]; Frethey v. Durant, 24 App. Div. 58, 48 NYS 839; Barker v. Laney, 90 Hun 108, 35 NYS 626; Wurts v. Jenkins, 11 Barb. 546; Matter of Gill, 92 Misc. 661, 155 NYS 1019; Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410; Harrison v. McAdam, 38 Misc. 18, 76 NYS 201; Merritt v. Merritt, 33 Misc. 230, 67 NYS 188; Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 NYS 612 [aff 49 App. Div. 636, 64 NYS 742 (aff 176 N. Y. 551 mem, 68 NE 1114 mem)]; Matter of Whitbeck, 22 Misc. 494, 50 NYS 932, 2 Gibb. Surr. 381; Matter of Haslehurst, 4 Misc. 366, 25 NYS 827; Paff v. Kinney, 1 Bradf. Surr. 1.
Oh.—McAfee v. Phillips, 25 Oh. St. 374; Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400.
Pa.—In re McKinney, 260 Pa. 123, 103 A 590; Weiting v. Nissley, 13 Pa. 650; Hibshman v. Dulleban, 4 Watts 183; Thomas v. Riegel, 5 Rawle 266; Hartman's Est., 49 Pa. Super. 203; Kelly's Est., 37 Pa. Super. 320; Galloway's Est., 5 Pa. Super. 272; Roney's Est., 18 Pa. Dist. 475; McClelland's Est., 15 Pa. Co. 375; Spencer's Est., 11 Kulp 199; Schulte's Est., 28 PittsbLegJNS 95.
Tex.—Vann v. Calcasieu Trust, etc., Bank, (Civ. A.) 204 SW 1062; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.
Vt.—Boomhower v. Babbitt, 67 Vt. 327, 31 A 838; Davis v. Eastman, 66 Vt. 651, 30 A 1; Probate Ct. v. Merriam, 8 Vt. 234.
Va.—Tidball v. Shenandoah Nat. Bank, 98 Va. 768, 37 SE 318.
Wash.—In re Hagerty, 105 Wash. 547, 178 P 644; Showalter v. Spangle, 93 Wash. 326, 160 P 1042; Ball v. Clothier, 34 Wash. 299, 75 P 1099.

[a] **The decree is not conclusive as to:** (1) Validity of the will. Foley v. O'Donaghue, 167 Ind. 134, 77 NE 352; Stuckwisch v. Kamman, 166 Ind. 672, 77 NE 349. (2) The construction of the will. Macy v. Mercantile Trust Co., 68 N. J. Eq. 235, 59 A 586. (3) The rights of parties under the will. Burnell v. U. S., 44 Ct. Cl. (U. S.) 535. (4) The widow's right to dower. Crowley v. Mellon, 52 Ark. 1, 11 SW 876. (5) Liability for mismanagement. Bryant v. McIntosh, 3 Cal. A. 95, 84 P 440. (6) Transfer taxes. Matter of Cummings, 142 App. Div. 377, 127 NYS 109 [rev 63 Misc. 621, 118 NYS 684]. (7) Matters omitted from the account by fraud or accident. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129. (8) The rights of administrators as between themselves. Moore v. Woodson, 53 Tex. Civ. A. 588, 116 SW 608.

[b] **An order approving the joint final account of executors** is not conclusive of the joint responsibility for acts of one of them in drawing money from the bank thereafter on checks signed by himself alone. In re Hagerty, 105 Wash. 547, 178 P 644.

[c] **A decree on final settlement determines nothing beyond** the amount received and paid out by the representative and the balance, if any, in his hands belonging to the estate, or due to him from it. Matter of Doheny, 70 App. Div. 370, 75 NYS 24 [aff 171 N. Y. 691 mem, 64 NE 1120 mem].

[d] **Where an account is confirmed so far as not opposed:** (1) Questions presented by an opposition which has never been withdrawn but is still active remain open. Gaines v. New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950. (2) The heirs are not concluded as to items in the account to which opposition was filed by creditors. Schaffer's Succ., 13 La. Ann. 113.

7. Ala.—Gerald v. Bunkley, 17 Ala. 170.
Ark.—Clark v. Shelton, 16 Ark. 474.
Me.—Mattocks v. Moulton, 84 Me. 545, 24 A 1004.
Mo.—Patterson v. Booth, 103 Mo. 402, 15 SW 543.
N. J.—Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 A 612.
Pa.—Work v. Work, 14 Pa. 316; Hartman's Est., 49 Pa. Super. 203.
S. C.—Holladay v. Holladay, 24 S. C. 521.

8. U. S.—Pickens v. Merriam, 242 Fed. 363, 155 CCA 139.
Ill.—Peo. v. Rardin, 171 Ill. A. 226; Fraser v. Fraser, 149 Ill. A. 186.
La.—Johnston v. Cox, 13 La. 536.
Me.—Robinson v. Ring, 72 Me. 140, 39 AmR 308.
Md.—Wilson v. McCarty, 55 Md. 277.
Mass.—Saxton v. Chamberlain, 6 Pick. 422.
Mich.—Powell v. Pennock, 181 Mich. 588, 148 NW 430; Porter v. Long, 124 Mich. 584, 83 NW 601.
Miss.—Henderson v. Winchester, 31 Miss. 290; McCullom v. Box, 16 Miss. 619; Smith v. Hurd, 8 Miss. 188.
Mo.—State v. Stuart, 74 Mo. A. 182.
Nebr.—In re Wilson, 98 Nebr. 852, 154 NW 717.
N. H.—Clough v. Clark, 63 N. H. 403, 1 A 201.
N. Y.—Joseph v. Herzig, 198 N. Y. 456, 92 NE 103; Matter of Peck, 131 App. Div. 81, 115 NYS 239; Matter of Heaney, 125 App. Div. 619, 110 NYS 80; Rosen v. Ward, 96 App. Div. 262, 89 NYS 148; Brown v. Brown, 53 Barb. 217; Matter of Butler, 66 Misc. 409, 123 NYS 279, 7 Mills Surr. 410; Matter of Mitchell, 41 Misc. 603, 85 NYS 288, 4 Mills Surr. 99; Matter of Ries, 187 App. Div. 82, 175 NYS 58; Pearse v. National Lead Co., 147 NYS 989; Sheldon v. Sheldon, 11 NYS 477 [rev on other grounds 133 N. Y. 1, 30 NE 730]; Brick's Est., 15 AbbPr 12; Paff v. Kinney, 7 N. Y. Super. 380.
N. C.—McAdoo v. Thompson, 72 N. C. 408.
Oh.—McAfee v. Phillips, 25 Oh. St. 374.
Or.—Dray v. Bloch, 29 Or. 347, 45 P 772.
Pa.—Groff's App., 45 Pa. 379; Shuman's App., 27 Pa. 64, 1 Grant 272; Stouffer's Est., 14 Pa. Dist. 108, 30 Pa. Co. 204; Mutchmore's Est., 9 Pa. Dist. 293, 24 Pa. Co. 257; Spencer's Est., 11 Kulp 199; Reese's Est., 10 Kulp 524; Rogan's Est., 10 Kulp 138; Pelham's Est., 9 Kulp 347; Beyerbach's Est., 18 LancLRev 381; Carpenter's Est., 3 LancLRev 5; Davis' Est., 6 WklyNC 15.
Tex.—Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.
Vt.—Davis v. Eastman, 66 Vt. 651, 30 A 1; Probate Ct. v. Merriam, 8 Vt. 234.

[a] **Interest on money received.**—A settlement of an administrator's account, in which he does not charge himself with interest on money received, does not preclude a subsequent inquiry as to charging him with such interest; but, if there is an adjudication as to the matter of interest, the settlement is conclusive, unless the administrator was guilty of fraud. Saxton v. Chamberlain, 6 Pick. (Mass.) 422.

[b] **Evidence of funds unaccounted for.**—In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he has been discharged. Johnston v. Cox, 13 La. 536.

9. Ala.—Odom v. Moore, 147 Ala. 567, 41 S 162.

Court. After a personal representative has made a final settlement and has resigned or been discharged, and the administration has been closed, the jurisdiction of the probate court ceases.[10] But a final settlement without a discharge does not divest such jurisdiction.[11]

[§ 2487] **f. Collateral Attack.** An order or decree rendered on the final settlement of a personal representative is not subject to collateral attack,[12] except in cases where the court acted without jurisdiction[13] or the order or decree is of a character such as the court had no power to make under any circumstances.[14]

[§ 2488] **2. Ex Parte Settlements.** The general rule, which is established by express statute in some jurisdictions, is that ex parte settlements of accounts by executors or administrators are prima facie evidence of their correctness but are not conclusive.[15] Such settlement may have the

Ill.—Fraser v. Fraser, 149 Ill. A. 186.

Miss.—Ogden v. Waller, 24 Miss. 190.

Mo.—Smiley v. Cockrell, 92 Mo. 105, 4 SW 443.

Pa.—Miller v. Young, 2 Serg. & R. 518.

Tex.—Neill v. Hodge, 5 Tex. 487. See also Abatement and Revival §§ 50, 60, 61.

[a] **Rule applies to action pending on appeal.**—Fraser v. Fraser, 149 Ill. A. 186.

10. Ala.—Medley v. Shipes, 177 Ala. 94, 58 S 304; Horn v. Bryan, 44 Ala. 88; Bryant v. Horn, 42 Ala. 496; Modawell v. Holmes, 40 Ala. 391.

Ark.—Abramson v. Rogers, 97 Ark. 189, 133 SW 836; Beckett v. Whittington, 92 Ark. 230, 122 SW 633.

Iowa.—Jordan v. Hunnell, 96 Iowa 334, 65 NW 302.

La.—Caire v. Judge, 43 La. Ann. 1133, 10 S 178; Gillespie v. Twitchell, 34 La. Ann. 288; Augustin v. Avila, 29 La. Ann. 837; Taylor's Succ., 28 La. Ann. 367.

Md.—Binnerman v. Weaver, 8 Md. 517.

Tex.—Davis v. Harwood, 70 Tex. 71, 8 SW 58; Long v. Wooters, 18 Tex. Civ. A. 35, 45 SW 165.

[a] **Further letters of administration** should not be issued after final settlement except for good cause shown. O'Brien v. Nelson, 164 Cal. 573, 129 P 985.

11. Fletcher v. Nicholson, 45 Ind. A. 375, 90 NE 910.

Authority of representative not terminated by final settlement see supra § 260.

12. U. S.—Mcgruder v. Drury, 235 U. S. 106, 35 SCt 77, 59 L. ed. 151; Tate v. Norton, 94 U. S. 746, 24 L. ed. 222; Barney v. Saunders, 16 How. 535, 14 L. ed. 1047; Northrup v. Browne, 204 Fed. 224, 122 CCA 496; Campbell v. Strong, 4 F. Cas. No. 2,367a, Hempst. 265.

Ala.—Modawell v. Holmes, 40 Ala. 391.

Ark.—Washington v. Govan, 73 Ark. 612, 84 SW 792; Bonner v. Gorman, 71 Ark. 480, 77 SW 602; Dooley v. Dooley, 14 Ark. 122.

Cal.—Crew v. Pratt, 119 Cal. 131, 51 P 44; Tobelman v. Hildebrandt, 72 Cal. 313, 14 P 20; Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291; L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Del.—State v. Barnett, 16 Del. 115, 42 A 420.

Ga.—Groves v. Williams, 68 Ga. 598.

Ill.—Rahe v. Jobusch, 197 Ill. A. 200.

Ind.—Jones v. Jones, 115 Ind. 504, 18 NE 20; Carver v. Lewis, 105 Ind. 44, 2 NE 714; Carver v. Lewis, 104 Ind. 438, 2 NE 705; Peacocke v. Leffler, 74 Ind. 327; Sanders v. Loy, 61 Ind. 298; Barnum v. Rallihan, 63 Ind. A. 349, 112 NE 561; Kuhn v. Boehne, 27 Ind. A. 340, 61 NE 199; State v. Burkam, 23 Ind. A. 271, 55 NE 237.

Iowa.—Van Wechel v. Van Wechel, 178 Iowa 491, 159 NW 1039; Tucker v. Stewart, 147 Iowa 294, 302, 126 NW 183 [cit Cyc]; Harlin v. Stevenson, 30 Iowa 371.

La.—Rouse's Succ., 144 La. 143, 80 S 229; Malnoury v. Pugh, Mann. Unrep. Cas. 235.

Me.—Harlow v. Harlow, 65 Me. 448.

Md.—Roberts v. Roberts, 71 Md. 1, 17 A 568.

Mass.—Allen v. Puritan Trust Co., 211 Mass. 409, 97 NE 916, LRA1915C 518; Parcher v. Bussell, 11 Cush. 107.

Mich.—Holden v. Lathrop, 65 Mich. 652, 32 NW 879.

Minn.—State v. Ramsey County Prob. Ct., 40 Minn. 296, 41 NW 1033.

Miss.—Austin v. Lamar, 23 Miss. 189.

Mo.—Pearson v. Murray, 230 Mo. 162, 130 SW 21; Rogers v. Johnson, 125 Mo. 202, 28 SW 635; State v. Gray, 106 Mo. 526, 17 SW 500; Van Bibber v. Julian, 81 Mo. 618; Whittelsey v. Dorsett, 23 Mo. 236; State v. Roland, 23 Mo. 95; State v. Noll, (A.) 189 SW 582; Wyatt v. Wilhite, 192 Mo. A. 551, 183 SW 1107; Einstein v. Strother, (A.) 182 SW 122; Crump v. Hart, 189 Mo. A. 572, 176 SW 1089; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Mueller v. Grunker, 145 Mo. A. 611, 123 SW 469; Michie v. Grainger, 149 Mo. A. 301, 129 SW 983; State v. Carroll, 101 Mo. A. 110, 74 SW 468.

N. J.—Voorhees v. Voorhees, 18 N. J. Eq. 223; Ordinary v. Kershaw, 14 N. J. Eq. 527.

N. Y.—Wiederhold v. Koehler, 174 App. Div. 139, 160 NYS 927; Matter of Ziegler, 82 Misc. 10, 143 NYS 682; Matter of Stevens, 40 Misc. 377, 82 NYS 397, 3 Mills Surr. 500; Newcomb v. St. Peter's Church, 2 Sandf. Ch. 636.

Okl.—Shipman v. Brown, 36 Okl. 623, 130 P 603.

Pa.—Samuel Hano Co. v. Hano, 224 Pa. 212, 73 A 341; McNeal v. Holbrook, 25 Pa. 189; Lowrie's App., 1 Grant 373; Clark v. Callaghan, 2 Watts 259; Thompson v. McGaw, 2 Watts 161; Houseman's Est., 11 Pa. Dist. 87, 26 Pa. Co. 477.

Tenn.—Grimstead v. Huggins, 13 Lea 728.

Tex.—Debrell v. Ponton, 27 Tex. 623; Kearney v. Nicholson, (Civ. A.) 67 SW 361; Ball v. Ball, (Civ. A.) 45 SW 605.

Wis.—Carpenter v. U. S. Fidelity, etc., Co., 123 Wis. 209, 101 NW 404; Vaughn v. Walsh, 122 Wis. 486, 100 NW 840; Barker v. Barker, 14 Wis. 131.

[a] **Cannot be collaterally attacked for fraud.**—Smith v. Hauger, 150 Mo. 437, 51 SW 1052; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; State v. Carroll, 101 Mo. A. 110, 74 SW 468. Contra Knox v. Raynor, 146 Ga. 146, 90 SE 853.

[b] **However** (1) it has been held that in an action to establish a trust in plaintiff's favor against a person purchasing real estate at a foreclosure sale, wherein it was claimed that defendant purchased the property as administrator of the mortgagor, for the benefit of his intestate's estate, and in which defendant rendered an account charging the estate with certain liens on the property paid off by him, defendant's accounts as administrator were properly collaterally inquired into, and certain moneys received by him in that capacity, applicable to the discharge of those liens, charged against him as offsets. Abell v. Bradner, 15 NYS 64. (2) The possibility of collateral attack was also recognized in Lippincott v. Bechtold, 54 N. J. Eq. 407, 34 A 1079 (holding that a decree of the orphans' court allowing an executor's account, made after due publication, will, even though irregular, cast upon those who seek to impugn the account collaterally the burden of proving its incorrectness).

13. State v. Burkam, 23 Ind. A. 271, 55 NE 237; Nash v. Sawyer, 114 Iowa 742, 87 NW 707; State v. Holtcamp, 266 Mo. 347, 181 SW 1007; Trammel v. Philleo, 33 Tex. 395.

[a] **An adjudication made without notice may be collaterally attacked.**—State v. Burkam, 23 Ind. A. 271, 55 NE 237.

[b] **An irregularity** in the appointment of a guardian ad litem for an infant who was a necessary party to the settlement was a mere matter of error, not of jurisdiction, and did not detract from the conclusiveness of the decree pronounced by the court. Gamble v. Jordan, 54 Ala. 432.

[c] **The failure to present a claim** to an executor before the court settles the executor's account and directs the payment of the claim, and does not go to the court's jurisdiction, so as to make the decree subject to collateral attack. L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

14. Trammel v. Philleo, 33 Tex. 395 (such an order or decree is null, and its nullity may be asserted in any collaterial proceeding where it is relied on).

15. U. S.—Lupton v. Janney, 13 Pet. 381, 10 L. ed. 210.

Ga.—Shine v. Redwine, 30 Ga. 780; Cumming v. Fryer, Dudl. 182.

Iowa.—Clark v. Cress, 20 Iowa 50.

Ky.—Owensboro Deposit Bank v. Smith, 109 Ky. 311, 58 SW 792, 22 KyL 808; Turley v. Barnes, 103 Ky. 127, 44 SW 446, 19 KyL 1808; Thomason v. Thomason, 1 Metc. (Ky.) 51; Manion v. Titsworth, 18 B. Mon. 582; Scott v. Kennedy, 12 B. Mon. 510; Calvert v. Holland, 9 B. Mon. 458; Cundiff v. Zachary, 1 Dana 371; Smith v. Hoskins, 7 J. J. Marsh. 502; Briscoe v. Brady, 6 T. B. Mon. 134; Cochran v. Davis, 5 Litt. 118; Logan v. Troutman, 3 A. K. Marsh. 66; Burns v. Burton, 1 A. K. Marsh. 349; Thome v. Allen, 49 SW 1068, 20 KyL 1728; Raison v. Williams, 42 SW 1108, 19 KyL 1142; Stanberry v. Robinson, 27 SW 973, 16 KyL 309; Carrico v. Brummel, 5 KyL 776; Crow v. Crow, 4 KyL 909; Frazier v. Cavanaugh, 4 KyL 711.

La.—Verret v. Aubert, 6 La. 350; Marchand v. Gracie, 2 La. 147; Kendrick's Succ., 7 Rob. 138; Williams' Succ., 7 Rob. 46; Baillio v. Wilson, 8 Mart. N. S. 334.

Md.—Seighman v. Marshall, 17 Md. 550; Scott v. Fox, 14 Md. 388; Evans v. Iglehart, 6 Gill & J. 171; Gist v. Cockey, 7 Harr. & J. 134; Mitchell v. Mitchell, 3 Md. Ch. 71.

Miss.—Crawford v. Redus, 54 Miss. 700; Winborn v. King, 35 Miss. 157; Vertner v. McMurran, Freem. 136.

Mo.—State v. Holtcamp, 266 Mo. 347, 181 SW 1007; Heitkamp v. Biedenstein, 3 Mo. A. 450.

Nebr.—Boales v. Ferguson, 55 Nebr. 565, 76 NW 18.

N. Y.—Hetzel v. Easterly, 96 App. Div. 517, 89 NYS 154.

N. C.—Jones v. Sugg, 136 N. C. 143, 48 SE 575; Bean v. Bean, 135 N. C. 92, 47 SE 232 [foll Marler-Dalton-Gilmer Co. v. Golden, 172 N. C. 823, 90 SE 909]; Allen v. Royster, 107 N. C. 278, 12 SE 134; Turner v. Turner, 104 N. C. 566, 10 SE 606; Grant v. Hughes, 94 N. C. 231; State Univ. v. Hughes, 90 N. C. 537.

force and effect of a stated account.[16] The fact that it appears from an ex parte settlement of an executor's accounts that he paid certain debts out of their order of priority does not raise the presumption of payment of all other debts having priority over those paid.[17] A bill to surcharge and falsify such a settlement must specify wherein it is erroneous,[18] and the burden of proving error or impropriety rests upon the one who seeks to impeach the correctness of the settlement.[19] The right to attack such a settlement may be lost by a delay for such a length of time and under such circumstances as to constitute laches.[20]

[§ 2489] **3. Annual or Partial Settlements.** Annual or partial settlements of personal representatives, when made ex parte, as they usually are, have not, like final settlements, the force and effect of judgments and so are not conclusive, but are only prima facie evidence of the correctness of the account stated,[21] the burden of overcoming their

Oh.—Muskingum Bank v. Carpenter, 7 Oh. 21, 28 AmD 616.

S. C.—Miller v. Alexander, 10 S. C. Eq. 25; Neville v. Robinson, 17 S. C. L. 361.

Tenn.—Vaccaro v. Cicalla, 89 Tenn. 63, 14 SW 43; Alvis v. Oglesby, 87 Tenn. 172, 10 SW 313; Murray v. Luna, 86 Tenn. 326, 6 SW 603; Shield v. Alsup, 5 Lea 508; Snodgrass v. Snodgrass, 1 Baxt. 157; Milly v. Harrison, 7 Coldw. 191; Curd v. Bonner, 4 Coldw. 632; Elrod v. Lancaster, 2 Head 571, 75 AmD 749; Turney v. Williams, 7 Yerg. 172; Burton v. Dickinson, 3 Yerg. 112; Stephenson v. Yandel, 2 Hayw. 261; Stephenson v. Stephenson, 3 Hayw. 123; Bashaw v. Blakemore, 1 Overt. 348; Greenlee v. Hays, 1 Overt. 300.

Va.—Scott v. Porter, 99 Va. 553, 39 SE 220; Leavell v. Smith, 99 Va. 374, 38 SE 202; Robinett v. Robinett, 92 Va. 124, 22 SE 856; Hurt v. West, 87 Va. 78, 12 SE 141; Radford v. Fowlkes, 85 Va. 820, 8 SE 817; Carter v. Edmonds, 80 Va. 58; Wimbish v. Rawlins, 76 Va. 48; Leake v. Leake, 75 Va. 792; Robertson v. Wright, 17 Gratt. (58 Va.) 534; Shearman v. Christian, 9 Leigh (36 Va.) 571; Wyllie v. Venable, 4 Munf. (18 Va.) 369; McCall v. Peachy, 3 Munf. (17 Va.) 288; Cavendish v. Fleming, 3 Munf. (17 Va.) 198; Mountjoy v. Lowry, 4 Hen. & M. (14 Va.) 428; Atwell v. Milton, 4 Hen. & M. (14 Va.) 253; Nimmo v. Com., 4 Hen. & M. (14 Va.) 57, 4 AmD 488; Anderson v. Fox, 2 Hen. & M. (12 Va.) 245.

W. Va.—American Bank, etc., Co. v. Douglass, 75 W. Va. 207, 83 SE 920; Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26; Seabright v. Seabright, 28 W. Va. 412; Kyle v. Kyle, 25 W. Va. 376; Leach v. Buckner, 19 W. Va. 36; Bruce v. Bickerton, 18 W. Va. 342.

16. Turney v. Williams, 7 Yerg. (Tenn.) 172.

17. Smith v. Moore, 102 Va. 260, 46 SE 326.

18. Green v. Thompson, 84 Va. 376, 5 SE 507; Corbin v. Mills, 19 Gratt. (60 Va.) 438; Newton v. Poole, 12 Leigh (39 Va.) 112.

19. U. S.—Lupton v. Janney, 13 Pet. 381, 10 L. ed. 210.

Ga.—Wright v. Bessman, 55 Ga. 187; Brown v. Wright, 5 Ga. 29.

Ill.—Eckley v. Clark, 24 Ill. A. 495.

Md.—Owens v. Collinson, 3 Gill & J. 25.

Va.—Green v. Thompson, 84 Va. 376, 5 SE 507; Wimbish v. Rawlins, 76 Va. 48; Corbin v. Mills, 19 Gratt. (60 Va.) 438; Newton v. Poole, 12 Leigh (39 Va.) 112.

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478.

20. Bland v. Stewart, 35 W. Va. 518, 14 SE 215.

21. U. S.—Lupton v. Janney, 13 Pet. 381, 10 L. ed. 210; Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449.

Ala.—Tayloe v. Bush, 75 Ala. 432; Ditmar v. Bogle, 53 Ala. 169; Scruggs v. Orme, 46 Ala. 533; Jones v. Jones, 42 Ala. 218; Holman v. Sims, 39 Ala. 709; Newberry v. Newberry, 28 Ala. 691; Rhodes v. Turner, 21 Ala. 210; Smith v. Smith, 13 Ala. 329; King v. Cabiness, 12 Ala. 598; Savage v. Benham, 11 Ala. 49; Brazeale v. Brazeale, 9 Ala. 491; Willis v. Willis, 9 Ala. 330.

Ark.—Holland v. Doke, 135 Ark. 372, 205 SW 648.

Cal.—In re Pease, 149 Cal. 167, 85 P 149; Runyon's Est., 53 Cal. 196; In re Richmond, 9 Cal. A. 402, 99 P 554.

Conn.—Clement's App., 49 Conn. 519; Mix's App., 35 Conn. 121, 95 AmD 222.

Del.—Robinson v. Robinson, 4 Del. 433 [appr Peckard v. Price, 5 Del. Ch. 239].

Ga.—Tate v. Gairdner, 119 Ga. 133, 46 SE 73; Crawford v. Clark, 110 Ga. 729, 36 SE 404; Smith v. Griffin, 32 Ga. 81; Brown v. Wright, 5 Ga. 29.

Hawaii.—Matter of Davis, 22 Hawaii 436, 440 [cit Cyc].

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41]; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345]; Bliss v. Seaman, 165 Ill. 422, 46 NE 279; Long v. Thompson, 60 Ill. 27; Peo. v. Lott, 36 Ill. 447; Ford v. Stuart First Nat. Bank, 100 Ill. A. 70 [rev on other grounds 201 Ill. 120, 66 NE 316]; Emerick v. Hileman, 71 Ill. A. 512 [aff 172 Ill. 368, 52 NE 311]; Bliss v. Seaman, 59 Ill. A. 236 [aff 165 Ill. 422, 46 NE 279]; Clifford v. Davis, 22 Ill. A. 316.

Ind.—Fraim v. Millison, 59 Ind. 123; Collins v. Tilton, 58 Ind. 374; State v. Wilson, 51 Ind. 96; Goodwin v. Goodwin, 48 Ind. 584; State v. Brutch, 12 Ind. 381; Sherry v. Sansberry, 3 Ind. 320; Murdock v. Holland, 3 Blackf. 114; Brackenridge v. Holland, 2 Blackf. 377, 20 AmD 123; Allen v. Clark, 2 Blackf. 343.

Iowa.—Parnham v. Weeks, 170 NW 750; Ryan v. Hutchinson, 161 Iowa 575, 143 NW 433; Metcalf's Est., 143 Iowa 310, 120 NW 104; In re Sawyer, 124 Iowa 485, 100 NW 484; In re Heath, 58 Iowa 36, 11 NW 723.

Kan.—Calman v. Savidge, 68 Kan. 620, 75 P 1010; Young v. Scott, 59 Kan. 621, 54 P 670; Musick v. Beebe, 17 Kan. 47.

Ky.—Manion v. Titsworth, 18 B. Mon. 582; Amos v. Heatherby, 7 Dana 45; Burnes v. Burton, 1 A. K. Marsh. 349.

La.—Miguez v. Delcambre, 109 La. 1090, 34 S 99; Stille's Succ., 52 La. Ann. 1538, 27 S 954; In re Beecroft, 28 La. Ann. 824; Bellocq's Succ., 28 La. Ann. 154; Caballero v. Executor, 25 La. Ann. 646.

Me.—Arnold v. Mower, 49 Me. 561; Coburn v. Loomis, 49 Me. 406.

Md.—Hoffman v. Hoffman, 88 Md. 60, 40 A 712; Martin v. Jones, 87 Md. 43, 39 A 102; Sewell v. Slingluff, 62 Md. 592; Wilson v. McCarty, 55 Md. 277; Bantz v. Bantz, 52 Md. 686; In re Stratton, 46 Md. 551; Seighman v. Marshall, 17 Md. 550; Scott v. Fox, 14 Md. 388.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418; Denholm v. McKay, 148 Mass. 434, 19 NE 551, 12 AmSR 574; Granger v. Bassett, 98 Mass. 462; Wiggin v. Swett, 6 Metc. 194, 39 AmD 716; Field v. Hitchcock, 14 Pick. 405.

Mich.—Cheever v. Ellis, 134 Mich. 645, 96 NW 1067; Hilton v. Briggs, 54 Mich. 265, 20 NW 265.

Minn.—Kittson v. St. Paul Trust Co., 78 Minn. 325, 81 NW 7.

Miss.—Dement v. Heth, 45 Miss. 388; Sumrall v. Sumrall, 24 Miss. 258; Harper v. Archer, 17 Miss. 71.

Mo.—Ladd v. Stephens, 147 Mo. 319, 48 SW 915; Clarke v. Sinks, 144 Mo. 448, 46 SW 199; McPike v. McPike, 111 Mo. 216, 20 SW 12; Myers v. Myers, 98 Mo. 262, 11 SW 617; State v. Roeper, 82 Mo. 57; North v. Priest, 81 Mo. 561; West v. West, 75 Mo. 204; Ritchey v. Withers, 72 Mo. 556; Seymour v. Seymour, 67 Mo. 303; Folger v. Heidel, 60 Mo. 284; State v. Lankford, 55 Mo. 564; Baker v. Schoeneman, 41 Mo. 391; Picot v. O'Fallon, 35 Mo. 29, 86 AmD 134; Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477; Ansley v. Richardson, 95 Mo. A. 332, 68 SW 609; McClelland v. McClelland, 42 Mo. A. 32.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; Boales v. Ferguson, 55 Nebr. 565, 76 NW 18; Bachelor v. Schmela, 49 Nebr. 37, 68 NW 378.

N. H.—Allen v. Hubbard, 8 N. H. 487.

N. J.—In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; Livingston v. Combs, 1 N. J. L. 50; Jackson v. Reynolds, 39 N. J. Eq. 313.

N. Y.—In re Henderson, 157 N. Y. 423, 52 NE 183 [aff 33 App. Div. 545, 53 NYS 957]; Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [aff 201 N. Y. 518 mem, 94 NE 1099 mem]; Matter of Cohn, 187 App. Div. 392, 176 NYS 225; Valentine v. Valentine, 4 Redf. Surr. 265.

N. C.—Bean v. Bean, 135 N. C. 92, 47 SE 232; Grant v. Hughes, 94 N. C. 231; State Univ. v. Hughes, 90 N. C. 537.

Oh.—Muskingum Bank v. Carpenter, 7 Oh. 21, 28 AmD 616.

Okl.—In re McGannon, 150 P 1109.

Or.—In re Mills, 40 Or. 424, 67 P 107; In re Chambers, 38 Or. 131, 62 P 1013.

Pa.—In re Schoonover, 250 Pa. 353, 95 A 524; Leslie's App., 63 Pa. 355; Rhoad's App., 39 Pa. 186; In re Walker, 3 Rawle 243; Marriot v. Davey, 1 Dall. 164, 1 L. ed. 83; Lennig's Est., 53 Pa. Super. 596.

R. I.—Sherman v. Chace, 9 R. I. 166.

Tenn.—Hall v. Hall, (Ch. A.) 59 SW 203; Vaccaro v. Cicalla, 89 Tenn. 63, 14 SW 43; Shields v. Alsup, 5 Lea 508; Milly v. Harrison, 7 Coldw. 191; Curd v. Bonner, 4 Coldw. 632; Elrod v. Lancaster, 2 Head 571, 75 AmD 749; Turney v. Williams, 7 Yerg. 172; Stephenson v. Yandel, 5 Hayw. 261; Stephenson v. Stephenson, 3 Hayw. 123.

Tex.—Jones v. Gilliam, 212 SW 930; Richardson v. Kennedy, 74 Tex. 507, 12 SW 219; Ingraham v. Rogers, 2 Tex. 465; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129; McShan v. Lewis, 33 Tex. Civ. A. 253, 76 SW 616.

Va.—Owens v. Owens, 109 Va. 432, 63 SE 990; Leavell v. Smith, 99 Va. 374, 38 SE 202; Leake v. Leake, 75 Va. 792; Newton v. Poole, 12 Leigh (39 Va.) 112; Shearman v. Christian, 9 Leigh (36 Va.) 571; Burwell v. Anderson, 3 Leigh (30 Va.) 348; McCall v. Peachy, 3 Munf. (17 Va.) 288; Cavendish v. Fleming, 3 Munf. (17 Va.) 198; Mountjoy v. Lowry, 4 Hen. & M. (14 Va.) 428.

W. Va.—Dearing v. Selvey, 50 W. Va. 4, 40 SE 478; Kyle v. Kyle, 25 W. Va. 376.

"A partial or annual account of an executor or administrator is usually an ex parte proceeding, and is only a judgment de bene esse and only prima

presumption being, however, on the party impeaching such a settlement.[22] Indeed such settlements have been denied any recognition at all as evidence,[23] at least when not made in conformity with the statutes.[24] Such settlements have also been held open to collateral attack.[25] On the other hand statutes sometimes make such settlements conclusive if they are not objected to within a certain time.[26]

As to any matters contested and adjudicated on such settlements, the usual rule as to adjudications by the courts applies, and the parties contesting are concluded,[27] and the same rule applies when notice of the settlement is given and no objections are presented.[28]

As against the representative and in favor of the estate an ex parte partial settlement has been regarded as conclusive except in cases of errors arising from oversight, mistake, or miscalculation,[29] although there is also authority for the contrary view;[30] and it has been held that the statement of an account in the court of probate is not an ad-

facie correct, and, although not excepted to or appealed from, is open to subsequent correction or challenge." Bliss v. Seaman, 165 Ill. 422, 46 NE 279.

"There is a great difference between ordinary annual settlements, and what is technically known as a final settlement. The former is simply a statement of the administrator, that he has received such amounts, and paid out such; and the approval finds that statement to be true. It is therefore in the nature of an adjudication, a judicial determination. But it is, so to speak, only a present adjudication, and prima facie correct—one made for the purpose of enabling the court to keep watch of the estate, and to control the disposition of its assets, and the payment of its debts. Unquestioned, it is accepted as an adjudication, and made the basis and starting point of further administration. But it may be challenged without appeal, and in the same court, and without motion for rehearing, or any direct proceedings to set it aside; and any errors or mistakes in it may be corrected at any subsequent settlement. . . . These accounts are settled ex parte, and without even the pretense of notice by publication or otherwise to any parties interested. But the final settlement of an estate is a more stringent and less easily avoided adjudication. It is more emphatically a judgment. True, it may by the probate court be opened up, and the administration continued; but this requires a direct proceeding therefor. While generally ex parte, yet it can only be made upon notice." Musick v. Beebe, 17 Kan. 47, 53.

[a] **A construction given a will** on a partial distribution, by the judge of the orphans' court, to which no exceptions are filed and from which no appeal is taken, is not res adjudicata on the subsequent adjudication in the orphans' court of an account covering another portion of the estate. In re Kellerman, 242 Pa. 3, 88 A 865 [aff 52 Pa. Super. 412].

[b] **The amount paid to an heir or legatee** on the first annual settlement of an administrator is not evidence as to what such person's interest will amount to after final settlement and an order of distribution. Elam v. Bond, 169 Mo. A. 584, 154 SW 880.

[c] **May be investigated.**—An intermediate account of an executor may, even without express authority at law, be made the subject of investigation for the sake of testing its accuracy. Scofield's Est., 3 NYMonthL Bul 37 [foll Glaskin v. Sheehy, 2 Dem. Surr. 289 (holding that the same rule applies to a testamentary trustee)].

22. Ala.—Dickie v. Dickie, 80 Ala. 57; Tayloe v. Bush, 75 Ala. 432; Ditmar v. Bogle, 53 Ala. 169; Scruggs v. Orme, 46 Ala. 533.

Ill.—Emerick v. Hileman, 71 Ill. A. 512 [aff 177 Ill. 368, 52 NE 311].

Iowa.—In re Heath, 58 Iowa 36, 11 NW 723.

Kan.—Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

Ky.—Raison v. Williams, 42 SW 1108, 19 KyL 390.

La.—Caballero's Succ., 25 La. Ann. 646.

Md.—Martin v. Jones, 87 Md. 43, 39 A 102; Shafer v. Shafer, 85 Md. 554, 37 A 167.

Pa.—Ripple's Est., 9 Kulp 66, 112.

23. Pearson v. Darrington, 32 Ala. 227; Duke v. Duke, 26 Ala. 673; McCreeliss v. Hinkle, 17 Ala. 459; Willis v. Willis, 16 Ala. 652; In re Shively, 145 Cal. 400, 78 P 869.

24. Jones v. Jones, 42 Ala. 218.

25. West v. West, 75 Mo. 204.

26. Harlin v. Stevenson, 30 Iowa 371; In re Slater, (N. J. Prerog.) 102 A 384; Fross' App., 105 Pa. 258; Shindel's App., 57 Pa. 43; Carter v. Edmonds, 80 Va. 58.

27. Ala.—Alexander v. Bates, 127 Ala. 328, 28 S 415; Duke v. Duke, 26 Ala. 673.

Cal.—In re Bell, 142 Cal. 97, 75 P 679; In re Grant, 131 Cal. 426, 63 P 731; In re Fernandez, 119 Cal. 579, 51 P 851; In re Marshall, 118 Cal. 379, 50 P 540.

Del.—State v. Barnett, 16 Del. 115, 42 A 420.

D. C.—Mercer v. Hogan, 15 D. C. 520.

Ga.—Baber v. Woods, 39 Ga. 643.

Ill.—Allen v. Baker, 202 Ill. A. 463.

Kan.—In re Baker, 187 P 870; Young v. Scott, 59 Kan. 621, 54 P 670.

La.—Wæchter's Succ., 131 La. 505, 59 S 918; Triche's Succ., 39 La. Ann. 289, 2 S 52; State v. Ouachita Parish Judge, 30 La. Ann. 183.

Md.—Appler v. Merryman, 91 Md. 706, 47 A 1026.

Mich.—Cheever v. Ellis, 134 Mich. 645, 96 NW 1067; Porter v. Long, 124 Mich. 584, 83 NW 601; Morton v. Johnston, 124 Mich. 561, 83 NW 369.

Minn.—Kittson v. St. Paul Trust Co., 78 Minn. 325, 81 NW 7.

N. H.—Flanders v. Lane, 54 N. H. 390; Allen v. Hubbard, 8 N. H. 487.

N. J. — Voorhees v. Voorhees, 18 N. J. Eq. 223.

N. Y.—In re Prentice, 160 N. Y. 568, 55 NE 275 [aff 25 App. Div. 209, rearg den 161 N. Y. 630, 55 NE 1099]; Matter of Lese, 176 App. Div. 744, 163 NYS 1014; Matter of Union Trust Co., 65 App. Div. 449, 72 NYS 977 [aff 174 N. Y. 541 mem, 66 NE 1117 mem]; Matter of Douglas, 60 App. Div. 64, 69 NYS 687; Matter of Rainforth, 40 Misc. 609, 83 NYS 57, 3 Mills Surr. 559.

Oh.—Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Pa.—In re Bowers, 240 Pa. 388, 87 A 711; Brown's Est., 190 Pa. 464, 42 A 890; Crouse's Est., 16 Pa. Super. 212; Galloway's Est., 5 Pa. Super. 272; Borell's Est., 25 Pa. Dist. 430; Weyant's Est., 11 Pa. Dist. 177; Young's Est., 14 Pa. Co. 547; Reese's Est., 10 Kulp 524; Harned's Est., 10 Kulp 183.

R. I.—Sherman v. Chace, 9 R. I. 166.

Tenn.—Turney v. Williams, 7 Yerg. 172.

Tex.—Herbert v. Herbert, (Civ. A.) 59 SW 594.

28. Cal.—In re McDougald, 146 Cal. 191, 79 P 878; In re Bell, 142 Cal. 97, 75 P 679; In re Grant, 131 Cal. 426, 63 P 731; In re Fernandez, 119 Cal. 579, 51 P 851; In re Marshall, 118 Cal. 379, 50 P 540; Couts' Est., 87 Cal. 480, 25 P 685, 100 Cal. 400, 34 P 865; Kowalsky v. Santa Cruz County Super. Ct., 13 Cal. A. 218, 109 P 158; In re Richmond, 9 Cal. A. 413, 99 P 558.

Mich.—In re Ward, 152 Mich. 218, 116 NW 23; Nowland v. Rice, 138 Mich. 146, 101 NW 214; Porter v. Long, 124 Mich. 584, 83 NW 601; Morton v. Johnston, 124 Mich. 561, 83 NW 369.

N. Y.—Matter of Douglas, 60 App. Div. 64, 69 NYS 687.

Pa.—In re Bowers, 240 Pa. 388, 87 A 711; Rhoads' App., 39 Pa. 186 [overr Light's App., 22 Pa. 445; In re Walker, 3 Rawle 243; McGrew's App., 14 Serg. & R. 396; Crouse's Est., 16 Pa. Super. 212; Galloway's Est., 5 Pa. Super. 272]; Bower's App., 2 Pa. 432; Weaver's Est., 5 LancBar, Jan. 24, 1874; In re Sharp, 37 LegInt 133.

Wis.—Schinz v. Schinz, 90 Wis. 236, 63 NW 162.

[a] **Inquiry as to negligence.**—Annual accountings by a personal representative consisting of credits to him and charges against him will not preclude inquiry into losses of securities resulting from his negligence on the ground that they were adjudications approving what had been done and thereby binding the estate. Cheever v. Ellis, 134 Mich. 645, 96 NW 1067.

[b] **Semiannual returns** of a public administrator, showing the condition of estates in his hands as required by Code Civ. Proc. § 1736, are not accounts stated and hence are not conclusive on persons interested in such estates, although they made no objection to such returns at the time they were filed. In re Hedrick, 127 Cal. 184, 59 P 590.

29. Cal.—Carver's Est., 123 Cal. 102, 55 P 770.

Ga.—Tate v. Gairdner, 119 Ga. 133, 46 SE 73.

La.—Capdevielle v. Erwin, 13 La. Ann. 286.

Mich.—In re Ward, 152 Mich. 218, 116 NW 23; Nowland v. Rice, 138 Mich. 146, 101 NW 214.

Miss.—Stone v. Morgan, 65 Miss. 247, 3 S 580; Effinger v. Richards, 35 Miss. 540.

N. Y.—Matter of Fischer, 183 App. Div. 535, 171 NYS 17 [app dism 227 N. Y. 617 mem]; Matter of Douglas, 60 App. Div. 64, 69 NYS 687; Matter of Daly, 99 Misc. 203, 165 NYS 792 [mod on other grounds 180 App. Div. 307, 167 NYS 229].

Okl.—U. S. Fidelity, etc., Co. v. Clutter, 179 P 754.

Tenn.—Dodson v. Dodson, 6 Heisk. 110.

[a] **Errors arising from mistake, oversight, or miscalculation** may be corrected at the instance of the executor or administrator on the final accounting, if it is shown that the correction will not prejudice the adverse party. Stone v. Morgan, 65 Miss. 247, 3 S 580.

30. Ala.—Smith v. Smith, 13 Ala. 329.

Mo.—McPike v. McPike, 111 Mo. 216, 20 SW 12.

N. C.—Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

Oh.—Watts v. Watts, 38 Oh. St. 480.

W. Va.—Seabright v. Seabright, 28 W. Va. 412.

[a] **Returning items as assets** of the estate does not estop the representative from subsequently claiming a different ownership. Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

mission that the balance shown by it is actually in hand,[31] although it raises a presumption to that effect.[32]

An improper allowance of commissions by the auditing judge in one account, where no objection was made, will not prevent a disallowance of similar commissions on a subsequent accounting where exception thereto is taken.[33]

Effect as starting limitations. A decree settling the accounts of the executors except that they were ordered to retain a certain sum with which to pay any judgment which a person claiming a legacy might get against them was a "judicial settlement," the effect of which was to start limitations running against claimant of the legacy, who was a party to the accounting proceeding.[34]

As to items not included in an annual or partial settlement, it can have no effect whatever.[35]

[§ 2490] **4. Settlement on Resignation, Removal, or Death.** A settlement made by a personal representative who resigns his trust or is removed while the estate remains unsettled is not a final settlement of the estate,[36] but is to be regarded as the final settlement of the outgoing representative,[37] and binds all persons interested as to the matters embraced in such settlement until it is set aside in some direct proceeding.[38]

Legatees and distributees are bound by a settlement made in good faith and in the absence of fraud and collusion between the representative of a deceased representative and his corepresentative,[39] or successor,[40] or between an outgoing representative and his successor,[41] although as to the successor such a settlement is to be regarded as prima facie evidence only.[42]

Settlement before appointment of successor. Since a retiring representative must make his settlement with his successor, no final settlement can be made by him until his successor is appointed, and a purported final settlement made by him before such appointment will have the force of an annual settlement only.[43]

[§ 2491] **I. Opening, Vacating, or Setting Aside Settlements—1. Jurisdiction—a. Courts of Equity.** Final settlements of personal representatives may be opened or set aside by courts of equity when sufficient grounds appear,[44] and such jurisdiction is not taken away or abridged by a statute conferring a like jurisdiction upon probate courts,[45] or extinguished by anything short of a direct and positive prohibitory enactment.[46] The power of the chancery court is, however, limited to setting aside

31. Arendale v. Smith, 107 Ga. 494, 33 SE 669; In re McIntosh, 158 Pa. 525, 27 A 1042; Com. v. Snyder, 62 Pa. 153; Page's Est., 3 Pa. Dist. 213.

32. Schooler v. Stark, 73 Mo. A. 301.

33. Lennig's Est., 53 Pa. Super. 596 (where executor's compensation fixed by will and he claimed commissions).

34. Pattee v. Harper, 183 App. Div. 88, 170 NYS 562 [aff 224 N. Y. 706 mem, 121 NE 882 mem] (this is true, although the court did not pass on the alleged legatee's claim and provided that the decree was without prejudice to any right he might have to compel payment of the legacy claimed, and although final settlement of the account of the executors was not had until several years later).

35. In re Adams, 131 Cal. 415, 63 P 838; In re Hill, 62 Cal. 186; Walls v. Walker, 37 Cal. 424, 99 AmD 290; Matter of Cohn, 187 App. Div. 392, 176 NYS 225; Grim's App., 109 Pa. 391, 1 A 212; Fross' App., 105 Pa. 258; McLellan's App., 76 Pa. 231; Leslie's App., 63 Pa. 355; Shindel's App., 57 Pa. 43; Pepper's Est., 13 Pa. Co. 407.

36. Lang v. State, 67 Ind. 577; Musick v. Beebe, 17 Kan. 47; Emmons v. Gordon, 125 Mo. 636, 28 SW 863.

37. Waller v. Ray, 48 Ala. 468; State v. Moffitt, 33 Oh. Cir. Ct. 238.

38. Waller v. Ray, 48 Ala. 468; Lang v. State, 67 Ind. 577; Parsons v. Milford, 67 Ind. 489.

39. Douglass v. Murray, 63 Ga. 369.

40. Austin v. Raiford, 68 Ga. 201.

41. Waring v. Lewis, 53 Ala. 615.

42. Waring v. Lewis, 53 Ala. 615; Wright v. Clark, 145 Ga. 534, 89 SE 618.

43. Emmons v. Gordon, 125 Mo. 636, 28 SW 863.

44. U. S.—Griffith v. Godey, 113 U. S. 89, 5 SCt 383, 28 L. ed. 934; Ridenbaugh v. Burnes, 14 Fed. 93, 4 McCrary 522; Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95.

Ala.—Watts v. Frazer, 80 Ala. 186; Waldrom v. Waldrom, 76 Ala. 285; Waring v. Lewis, 53 Ala. 615; Morrow v. Allison, 39 Ala. 70; Watt v. Watt, 37 Ala. 543.

Ark.—Beckett v. Whittington, 92 Ark. 230, 122 SW 633; Hankins v. Layne, 48 Ark. 544, 3 SW 821; Jones v. Graham, 36 Ark. 383; Shegogg v. Perkins, 34 Ark. 117; Mock v. Pleasants, 34 Ark. 63; Osborne v. Graham, 30 Ark. 66; Clark v. Shelton, 16 Ark. 474; Dooley v. Dooley, 14 Ark. 122.

Cal.—Cahalan's Est., 70 Cal. 604, 12 P 427; Sanford v. Head, 5 Cal. 297; Barber v. San Diego County Super. Ct., (A.) 184 P 952.

Ga.—Pass v. Pass, 98 Ga. 791, 25 SE 752; Walker v. Wootten, 18 Ga. 119.

Ill.—Anderson v. Anderson, 178 Ill. 160, 52 NE 1038; Anderson v. Anderson, 77 Ill. A. 533 [aff 178 Ill. 160, 52 NE 1038].

Ind.—Miller v. Steele, 64 Ind. 79; Ray v. Doughty, 4 Blackf. 115; Murdock v. Holland, 3 Blackf. 114; Brackenridge v. Holland, 2 Blackf. 377, 20 AmD 123; Allen v. Clark, 2 Blackf. 343; Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130; Kingan v. Hawley, 29 Ind. A. 376, 64 NE 620.

Kan.—Ladd v. Nystol, 63 Kan. 23, 64 P 985; Gafford v. Dickinson, 37 Kan. 287, 15 P 175; Shoemaker v. Brown, 10 Kan. 383.

Ky.—Caplinger v. Pritchard, 136 Ky. 349, 124 SW 352; Roll v. Stum, 46 SW 223, 20 KyL 661; Speed v. Nelson, 8 B. Mon. 499.

Mich.—Maney v. Casserly, 134 Mich. 252, 96 NW 478.

Miss.—Foute v. McDonald, 27 Miss. 610; Neylans v. Burge, 22 Miss. 201; Searles v. Scott, 22 Miss. 94; Green v. Creighton, 18 Miss. 159, 48 AmD 742; Turnbull v. Endicott, 11 Miss. 302.

Mo.—Baldwin v. Dalton, 168 Mo. 20, 67 SW 599; Baldwin v. Davidson, 139 Mo. 118, 40 SW 765, 61 AmSR 460; Smiley v. Smiley, 80 Mo. 44; Byerly v. Donlin, 72 Mo. 270; Sheetz v. Kirtley, 62 Mo. 417; State v. Roberts, 60 Mo. 402; Stewart v. Caldwell, 54 Mo. 536; Lewis v. Williams, 54 Mo. 200; Clyce v. Anderson, 49 Mo. 37; Picot v. Bates, 47 Mo. 390; Sullivan County v. Burgess, 37 Mo. 300; Mitchell v. Williams, 27 Mo. 399; State v. Roland, 23 Mo. 95; Jones v. Brinker, 20 Mo. 87; Oldham v. Trimble, 15 Mo. 225; Strong v. Wilkson, 14 Mo. 116; State v. Stephenson, 12 Mo. 178; McNally v. Hawkins, 163 Mo. A. 692, 147 SW 503; Dingle v. Pollick, 49 Mo. A. 479.

N. J.—Bird v. Hawkins, 58 N. J. Eq. 229, 42 A 588; Black v. Whitall, 9 N. J. Eq. 572, 59 AmD 423; Vanmeter v. Jones, 3 N. J. Eq. 520; Boulton v. Scott, 3 N. J. Eq. 231.

N. M.—Candelaria v. Miera, 18 N. M. 107, 134 P 829.

N. C.—Murphy v. Harrison, 65 N. C. 246; James v. Matthews, 40 N. C. 28.

Okl.—Johnson v. Filtsch, 37 Okl. 510, 138 P 165, 42 Okl. 64, 138 P 806.

Or.—Froebrich v. Lane. 45 Or. 13, 76 P 351, 106 AmSR 634.

Pa.—Stuffer's Est., 14 Pa. Dist. 108, 30 Pa. Co. 204.

S. C.—Harris v. Stilwell, 4 S. C. 19; McCrae v. Hollis, 4 S. C. Eq. 122.

Tex.—Portis v. Cummings, 14 Tex. 139.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

Vt.—Green v. Sargeant, 23 Vt. 466, 56 AmD 88.

Va.—Wyllie v. Venable, 4 Munf. (18 Va.) 369.

Wis.—McLachlan v. Staples, 13 Wis. 448.

[a] **Suit in equity not a collateral attack.**—A suit to vacate an order approving an administrator's final settlement is a direct, and not a collateral, attack thereon, although plaintiff seeks other relief in the same suit. Johnson v. Filtsch, 37 Okl. 510, 138 P 165, 42 Okl. 64, 138 P 806.

[b] **Unconfirmed settlements.** — A suit in equity will not be entertained to correct frauds in unconfirmed settlements of an executor's accounts; and if an executor has settled his accounts several times, and another settlement is pending in the probate court, his failure to charge himself with certain assets in any of the settlements cannot be the subject of an equitable suit. Hankins v. Layne, 48 Ark. 544, 3 SW 821.

[c] **A discharge obtained by means of fraud** practised upon the legatees or the ordinary is void by express statute, and may be attacked as a nullity by an equitable petition in the superior court. Pass v. Pass, 98 Ga. 791, 25 SE 752. To same effect Jacobs v. Pou, 18 Ga. 346.

45. Black v. Whitall, 9 N. J. Eq. 572, 59 AmD 423; Vanmeter v. Jones, 3 N. J. Eq. 520; Boulton v. Scott, 3 N. J. Eq. 231.

46. Baldwin v. Dalton, 168 Mo. 20, 67 SW 599; Stewart v. Caldwell, 54 Mo. 536; Dingle v. Pollick, 49 Mo. A. 479.

the settlement and ordering a new settlement in the probate court; it cannot assume the jurisdiction of the probate court and have the settlement made in its own forum.[47]

[§ 2492] **b. Probate Courts.** It has been held that a probate court may open or vacate its own decree on the final settlement of an estate during the term at which such decree was rendered,[48] but it has also been asserted that, where courts of probate are open at all times and no terms thereof are provided by law they have not the power of vacating their judgments during the terms at which they are rendered, like courts having regular terms.[49] In a number of states the power of a probate court to disturb a judgment or decree of final settlement after the expiration of the term at which it was rendered has been denied,[50] although in other states, either by virtue or inherent equity jurisdiction or as a result of express statutory enactment, probate courts are held to have the same powers as courts of equity with respect to their vacation or setting aside a decree of final settlement.[51]

[§ 2493] **2. Grounds for Relief—a. In General.** The grounds, other than statutory ones,[52] on which a court of equity or a court of probate in the exercise of equity jurisdiction will relieve against a final settlement are fraud, accident, or mistake.[53]

Nature of the fraud, accident, or mistake. The

47. Foute v. McDonald, 27 Miss. 610; Neylans v. Burge, 22 Miss. 201; Searles v. Scott, 22 Miss. 94; Green v. Creighton, 18 Miss. 159, 48 AmD 742; Turnbull v. Endicott, 11 Miss. 302.

48. Ill.—Griswold v. Smith, 221 Ill. 341, 77 NE 551.

Kan.—Pickens v. Campbell, 98 Kan. 518, 159 P 21.

Mo.—Caldwell v. Lockridge, 9 Mo. 362; McNally v. Hawkins, 163 Mo. A. 692, 147 SW 503.

N. J.—Eakin v. Brick, 16 N. J. L. 98.

N. Y.—Matter of Klugh, 176 App. Div. 187, 162 NYS 543; Matter of Waters, 183 App. Div. 840, 171 NYS 897.

Okl.—Caulk v. Lowe, 178 P 101.

Pa.—Metz's App., 11 Serg. & R. 204; Macpherson's Est., 24 Pa. Dist. 740; Lynch's Est., 17 Pa. Dist. 374; Seager's Est., 6 Pa. Dist. 105; Wright's Est., 2 Pa. Dist. 195; Audenried's Est., 31 Pa. Co. 198.

[a] **Notice** is necessary. Caldwell v. Lockridge, 9 Mo. 362.

[b] **Where the estate is insolvent** the orphans' court has no authority at a subsequent day in the same term to reconsider and alter its final decree settling the claims on the estate, and the amount of assets in the administrators hands, without notice to or the appearance of the creditors who are interested in the estate and entitled to dividends thereof. Eakin v. Brick, 16 N. J. L. 98.

49. Johnson v. Johnson, 26 Oh. St. 357; In re Koehnken, 25 Oh. Cir. Ct. 245; Kinsella v. De Camp, 15 Oh. Cir. Ct. 494, 8 Oh. Cir. Dec. 352.

50. Ala.—Medley v. Shipes, 177 Ala. 94, 58 S 304; Trawick v. Trawick, 67 Ala. 271; Cunningham v. Thompson, 59 Ala. 158; Seawell v. Buckley, 54 Ala. 592; Alexander v. Nelson, 42 Ala. 462; Watt v. Watt, 37 Ala. 543.

La.—Hacker's Succ., 28 La. Ann. 446; Benoit v. Hebert, 1 La. 212.

Mich.—Grady v. Hughes, 64 Mich. 540, 31 NW 438.

Mo.—Smith v. Hauger, 150 Mo. 437, 51 SW 1052.

Nev.—Lucich v. Medin, 3 Nev. 93, 93 AmD 376.

N. C.—Murphy v. Harrison, 65 N. C. 246.

Or.—In re Conant, 43 Or. 530, 73 P 1018; Dray v. Bloch, 29 Or. 347, 45 P 772; Deering v. Quivey, 26 Or. 556, 38 P 710.

S. C.—Harris v. Stilwell, 4 S. C. 19.

Tex.—Townsend v. Munger, 9 Tex. 300.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

[a] **A decree which is void ab initio** (1) may be set aside by the probate court at a subsequent term. Trawick v. Trawick, 67 Ala. 271; Cunningham v. Thompson, 59 Ala. 158; Seawell v. Buckley, 54 Ala. 592; Barwick v. Hackley, 45 Ala. 215; Laird v. Reese, 43 Ala. 148; Alexander v. Nelson, 42 Ala. 462; Watt v. Watt, 37 Ala. 543; In re Conant, 43 Or. 530, 73 P 1018. (2) Such settlement is void when no guardian ad litem was appointed to represent the complainant who was then a minor. Eatman v. Eatman, 82 Ala. 223, 2 S 729; Barwick v. Rackley, 45 Ala. 215; Laird v. Reese, 43 Ala. 148. (3) The final settlement of a personal representative made during the Civil War and fully carried into effect is not void. Griffin v. Ryland, 45 Ala. 688 [foll Catterlin v. Morgan, 50 Ala. 501].

51. Cal.—Bacon v. Bacon, 150 Cal. 477, 89 P 317; Cahalan's Est., 70 Cal. 604, 12 P 427; Wiggin v. San Francisco Super. Ct., 68 Cal. 398, 9 P 646; Williams v. Price, 11 Cal. 212.

Colo.—Clemes v. Fox, 25 Colo. 39, 53 P 225.

Conn.—Sellew's App., 36 Conn. 186.

Ill.—Heppe v. Szczepanski, 209 Ill. 88, 70 NE 737, 101 AmSR 221.

Ind.—Graham v. Russell, 152 Ind. 186, 52 NE 806; Williams v. Williams, 125 Ind. 156, 25 NE 176; Dillman v. Barber, 114 Ind. 403, 16 NE 825; Reed v. Reed, 44 Ind. 429.

Me.—Smith v. Dutton, 16 Me. 308.

Md.—Malkus v. Richardson, 124 Md. 224, 92 A 474; Stonesifer v. Shriver, 100 Md. 24, 59 A 139.

Mass.—Thompson v. De Visser, 219 Mass. 40, 106 NE 548; Boynton v. Dyer, 18 Pick. 1; Hall v. Cushing, 9 Pick. 395; White v. Woodberry, 9 Pick. 136; Stetson v. Bass, 9 Pick. 27; Jenison v. Hapgood, 7 Pick. 1, 19 AmD 258; Sever v. Russell, 4 Cush. 513, 50 AmD 811.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 302.

Miss.—Mayo v. Clancy, 57 Miss. 674; Bowen v. Seale, 45 Miss. 30; Bowers v. Williams, 34 Miss. 324; Gadberry v. Perry, 27 Miss. 114; Pendleton v. Prestridge, 20 Miss. 302; Hooker v. Hooker, 18 Miss. 599; McCullom v. Box, 16 Miss. 619.

N. H.—Ayer v. Messer, 59 N. H. 279.

N. J.—Engle v. Crombie, 21 N. J. L. 614; Stevenson v. Phillips, 21 N. J. L. 70, 15 N. J. Eq. 236; Hyer v. Morehouse, 20 N. J. L. 125; Crombie v. Engle, 19 N. J. L. 82; Bennett v. Piatt, 85 N. J. Eq. 436, 96 A 482; Matter of Morris, 65 N. J. Eq. 699, 56 A 161; Jackson v. Reynolds, 39 N. J. Eq. 313; Trimmer v. Adams, 18 N. J. Eq. 505; Stevenson v. Phillips, 15 N. J. 236; Black v. Whitall, 9 N. J. Eq. 572, 59 AmD 423; Stevenson v. Hart, 7 N. J. Eq. 471; Vanmeter v. Jones, 3 N. J. Eq. 520; Boulton v. Scott, 3 N. J. Eq. 231; In re Van Wagoner, (Prerog.) 97 A 893.

N. Y.—In re Deyo, 102 N. Y. 724, 7 NE 819; In re Hawley, 100 N. Y. 206, 3 NE 68; In re Tilden, 93 N. Y. 434; Matter of Doig, 125 App. Div. 746, 110 NYS 93; Matter of Seaman, 63 App. Div. 49, 71 NYS 376; Matter of McGorray, 65 Hun 624, 20 NYS 366; In re Salisbury, 6 NYS 932; Brick's Est., 15 AbbPr 12; Pew v. Hastings, 1 Barb. Ch. 452; Strong v. Strong, 3 Redf. Surr. 477.

Pa.—In re Long, 254 Pa. 370, 98 A 1066; In re Finley, 196 Pa. 140, 46 A 443 [aff 8 Pa. Dist. 723]; Meckel's App., 112 Pa. 554, 4 A 447; Scott's App., 112 Pa. 427, 5 A 671; Cramp's App., 81 Pa. 90; Kinter's App., 62 Pa. 318; Parker's App., 61 Pa. 478; Bishop's App., 26 Pa. 470; Thompson's Est., 19 Pa. Dist. 407.

R. I.—Sherman v. Howes, 37 R. I. 260, 92 A 564; Sherman v. Chace, 9 R. I. 166.

Vt.—Adams v. Adams, 21 Vt. 162; Smith v. Rix, 9 Vt. 240.

[a] **Statute not retrospective.**—Hooker v. Hooker, 18 Miss. 599.

[b] **Statute constitutional.**—McCullom v. Box, 16 Miss. 619.

[c] **Prior to the statute** conferring such power probate courts had no jurisdiction to entertain such bills. Harper v. Archer, 17 Miss. 71; Jones v. Coon, 13 Miss. 751; Washburn v. Phillips, 13 Miss. 600; Hendricks v. Huddleston, 13 Miss. 422; Harris v. Fisher, 13 Miss. 74.

[d] **Not a summary proceeding.**—A proceeding in the orphans' court to rescind an order approving an administrator's account, and to require the administrator to restate his account, in pursuance of which the court ordered the administrator to show cause, as authorized by Code art 93 § 231, is not a summary proceeding. Stonesifer v. Shriver, 100 Md. 24, 59 A 139.

[e] **Where no application was made to open** a decree confirming the audit of administrators' accounts, the orphans' court was without jurisdiction to appoint an auditor to redistribute the estate, although two of decedent's heirs were joined in the answer of the accountants. In re Forry, 246 Pa. 448, 92 A 697.

52. See infra § 2494.

53. U. S.—Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95; Mallett v. Dexter, 16 F. Cas. No. 8,988, 1 Curt. 178.

Ala.—Morrow v. Allison, 39 Ala. 70; Mock v. Steele, 34 Ala. 198, 73 AmD 455; Hooper v. Hooper, 32 Ala. 669; Williamson v. Howell, 4 Ala. 693.

Ark.—Bell v. Altheimer, 99 Ark. 529, 138 SW 993; James v. Gibson, 73 Ark. 440, 84 SW 485; Ambleton v. Dyer, 53 Ark. 224, 13 SW 926; McLeod v. Griffis, 51 Ark. 1, 8 SW 837, 45 Ark. 505; Jones v. Graham, 36 Ark. 383; Shegogg v. Perkins, 34 Ark. 117; Osborne v. Graham, 30 Ark. 66.

Cal.—Barber v. San Diego County Super. Ct., (A.) 184 P 952; In re Richmond, 9 Cal. A. 402, 99 P 554.

Ga.—Seagraves v. W. E. Powell Co., 143 Ga. 572, 85 SE 760.

Ill.—Griswold v. Smith, 221 Ill. 341, 77 NE 551; Brandon v. Brown, 106 Ill. 519; Smith v. Griswold, 161 Ill. A. 483; Anderson v. Anderson, 77 Ill. A. 533 [aff 178 Ill. 160, 52 NE 1038]; Schlink v. Maxton, 48 Ill. A. 471 [aff 153 Ill. 447, 38 NE 1063]; Seymour v. Edwards, 31 Ill. A. 50.

Ind.—Miller v. Steele, 64 Ind. 79; Ray v. Doughty, 4 Blackf. 115; Brackenridge v. Holland, 2 Blackf. 377, 20 AmD 123; Allen v. Clark, 2 Blackf. 343; Mefford v. Lamkin, 38 Ind. A. 33, 76 NE 1024, 77 NE 960; Cullop v. Vincennes, 34 Ind. A. 667, 72 NE 166; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

fraud which will warrant setting aside a final settlement may be positive and actual, with wrongful intent,[54] but it need not be such,[55] for any improper act or concealment that operates as fraud and results in loss will be sufficient regardless of the motive.[56] The fraud must relate to the procurement of the judgment,[57] but the matter complained of must be something extrinsic or collateral to the matter tried upon the original hearing, and not a fraud or mistake in the very matter on which the judgment was entered or order made.[58] A willful omission from the account or concealment of assets constitutes a fraud for which a settlement may be set aside.[59] A final settlement will not be interfered with on account of mere errors or irregularities,[60] unless they are sufficiently gross to raise a

Iowa.—Bradbury v. Wells, 138 Iowa 673, 115 NW 880, 16 LRANS 240.

Kan.—Pickens v. Campbell, 98 Kan. 518, 159 P 21; Young v. Scott, 59 Kan. 621, 54 P 670; Gafford v. Dickinson, 37 Kan. 287, 15 P 175.

Ky.—Welch v. Lewis, 104 Ky. 531, 47 SW 454, 20 KyL 716; Speed v. Nelson, 8 B. Mon. 499; Hammon v. Pearl, 6 T. B. Mon. 410; Roll v. Stum, 46 SW 223, 20 KyL 661.

La.—Ames v. Hale, 27 La. Ann. 349.

Me.—McKenzie v. Webber Hospital Assoc., 106 Me. 385, 76 A 704, 104 Me. 320, 71 A 1032.

Md.—Gallagher v. Martin, 102 Md. 115, 62 A 247.

Mass.—Blake v. Ward, 137 Mass. 94; Bassett v. Granger, 103 Mass. 177; Davis v. Cowdin, 20 Pick. 510; Wiggin v. Swett, 6 Metc. 194, 39 AmD 716; Stetson v. Bass, 9 Pick. 27.

Miss.—Vaughn v. Hudson, 59 Miss. 421; Foute v. McDonald, 27 Miss. 610; Green v. Creighton, 18 Miss. 159, 48 AmD 742; Smith v. Hurd, 8 Miss. 188.

Mo.—Baldwin v. Davidson, 139 Mo. 118, 40 SW 765, 61 AmSR 460; Lenox v. Harrison, 88 Mo. 491; Houts v. Sheperd, 79 Mo. 141; Miller v. Major, 67 Mo. 247; Sheetz v. Kirtley, 62 Mo. 417; Stong v. Wilkson, 14 Mo. 116; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Michie v. Grainger, 149 Mo. A. 301, 129 SW 983; Dingle v. Pollick, 49 Mo. A. 479; Weinerth v. Trendley, 39 Mo. A. 333; James v. Withinton, 7 Mo. A. 575.

N. J.—Engle v. Crombie, 21 N. J. L. 614 [rev 19 N. J. L. 82]; Stevenson v. Phillips, 21 N. J. L. 70, 15 N. J. Eq. 236; Schweitzer v. Bonn, 55 N. J. Eq. 107, 31 A 24; Black v. Whitall, 9 N. J. Eq. 572, 59 AmD 423; Conover v. Conover, 1 N. J. Eq. 403; In re Slater, (Prerog.) 102 A 384.

N. M.—Candelaria v. Miera, 18 N. M. 107, 134 P 829.

N. Y.—Matter of Klugh, 176 App. Div. 187, 162 NYS 543; Matter of Malone, 150 App. Div. 31, 134 NYS 496; Spalholz v. Sheldon, 148 App. Div. 573, 132 NYS 560; Matter of Doig, 125 App. Div. 746, 110 NYS 93; Brick's Est., 15 AbbPr 12; Pew v. Hastings, 1 Barb. Ch. 452.

Oh.—Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769; Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400; Rote v. Stratton, 3 OhS&CP 156, 2 OhNP 27.

Okl.—Johnson v. Filtsch, 37 Okl. 510, 138 P 165, 42 Okl. 64, 138 P 806.

Or.—Johnson v. Savage, 50 Or. 294, 91 P 1082; Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634; In re Conant, 43 Or. 530, 73 P 1018.

Pa.—Reese's Est., 10 Kulp 524; Reeside v. Reeside, 6 Phila. 507.

R. I.—Pierce v. East Greenwich Prob. Ct., 19 R. I. 472, 34 A 992; Williams v. Herrick, 18 R. I. 120, 25 A 1099; Hall v. Anthony, 13 R. I. 221; Sherman v. Chace, 9 R. I. 166.

Ont.—In re Wilson, 15 Ont. L. 596, 11 OntWR 214; Gibson v. Gardner, 13 Ont. L. 521, 7 OntWR 474, 8 Ont WR 526.

[a] **Returning a false inventory** is a fraud for which a final settlement may be set aside. West v. Reavis, 13 Ind. 294.

[b] **False representation by administrator.**—A final settlement will be set aside in equity where the administrator, for the purpose of inducing the distributees not to object to the allowance of a certain credit, represented the credit to be correct and made statements as to the circumstances out of which the credit grew which, if true, plainly demonstrated its correctness, and the distributees, being ignorant of the circumstances, relied on such statements and representations. Mock v. Steele, 34 Ala. 198, 73 AmD 455.

[c] **Improper credits.**—(1) It is a fraud on the estate for which a final settlement will be set aside, where an executor or administrator takes a credit to which he is not entitled in any view of the case. Houts v. Shepherd, 79 Mo. 141. (2) An administrator was guilty of fraud where he obtained credit for money which he knew he had never paid out. Morrow v. Allison, 39 Ala. 70. (3) It was considered fraudulent for an executor to obtain credit for the full amount of a note which he settled at a considerable discount. Matter of Beach, 3 Misc. 393, 24 NYS 717, 1 Pow. Surr. 469. (4) Where an administrator has entered into an agreement limiting the amount to be allowed him for compensation and attorney's fees, he is guilty of fraud in taking credit for a larger sum. Froebrick v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634. (5) It is not fraudulent to obtain credit for disbursements actually made, although they were improper. Sorrels v. Trantham, 48 Ark. 386, 3 SW 198, 4 SW 281 (taxes paid without order of court). (6) An executor is not chargeable with actual fraud because he is credited with one or two items not in fact paid, where the account was made out by his attorney in his absence and without his knowledge. Williams v. Rhodes, 81 Ill. 571.

[d] **Concealment.**—Where an administrator concealed from the court on his final accounting that he did not have funds belonging to the estate, which his report represented had been paid over to the guardian of minor heirs, and the administrator obtained his discharge on the representation that such funds had been so paid over in cash, when in fact only notes had been given and accepted by the guardian therefor, such acts constituted a fraud on the court authorizing the vacation of the order discharging such administrator. Tucker v. Stewart, 121 Iowa 714, 97 NW 148.

[e] **Fraud in obtaining allowance of claim.**—It is fraud for an administrator to obtain an allowance to himself for the whole amount of a claim assigned to him by a former administrator of the deceased without deducting the amount in which his assignor is indebted to the estate. He should set off one debt against the other and take the allowance for the difference. Sorrels v. Trantham, 48 Ark. 386, 3 SW 198, 4 SW 281.

[f] **Mistake caused by complainant.**—Equity will not relieve against a mistake which the complainant was instrumental in causing, or which occurred by reason of his negligence. Griffith v. Vertner, 6 Miss. 736.

[g] **Mistake as to value of securities.**—Where executors filed a final account charging themselves with a certain amount, the fact that a part of that amount consisted of securities which they then supposed were good, but which they afterward failed to collect, is not a mistake for which they can obtain relief in equity six years thereafter. Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452 [rev on other grounds 41 N. J. Eq. 563, 7 A 338].

[h] **Whether fraud appears on the face of an administration account** is a question for the court and not for the jury. Burns v. Burton, 1 A. K. Marsh. (Ky.) 349.

[i] **Where a beneficiary acquiesces in the misapplication of a fund** directed to be paid to him by the order of distribtuion, he cannot have the account opened for fraud or manifest error. In re Koehnken, 27 Oh. Cir. Ct. 840.

54. Clyce v. Anderson, 49 Mo. 37.

55. Mueller v. Grunker, 145 Mo. A. 611, 123 SW 469.

56. Clyce v. Anderson, 49 Mo. 37; Mueller v. Grunker, 145 Mo. A. 611, 123 SW 469.

57. State v. Shaw, 163 Mo. 191, 63 SW 371; Bates v. Hamilton, 144 Mo. 1, 45 SW 641, 66 AmSR 407; Nelson v. Barnett, 123 Mo. 564, 27 SW 520; Lewis v. Williams, 54 Mo. 200; Einstein v. Strotker, (Mo. A.) 182 SW 122; Warden v. Busbee, 89 Mo. A. 113; Woodward v. Curtis, 19 Oh. Cir. Ct. 15, 10 Oh. Cir. Dec. 400.

58. Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291; Bradbury v. Wells, 138 Iowa 673, 115 NW 880, 16 LRANS 240.

59. U. S.—Griffith v. Godey, 113 U. S. 89, 5 SCt 383, 28 L. ed. 934.

Ark.—Jefferson v. Edrington, 53 Ark. 545, 14 SW 99, 903; Osborne v. Graham, 30 Ark. 66; Stone v. Stillwell, 23 Ark. 444; Ringgold v. Stone, 20 Ark. 526.

Ind.—Zeek v. Reed, 69 Ind. 319.

Mo.—Smiley v. Smiley, 80 Mo. 44; Houts v. Shepherd, 79 Mo. 141; Merritt v. Merritt, 62 Mo. 150; Clyce v. Anderson, 49 Mo. 37; Mueller v. Grunker, 145 Mo. A. 611, 123 SW 469.

N. Y.—Matter of Heaney, 125 App. Div. 619, 110 NYS 80.

Pa.—In re McNeel, 68 Pa. 412 [rev 1 PittsbLegJNS 154].

[a] **Failure to account for assets a fraud.**—Ridenbaugh v. Burnes, 14 Fed. 93, 94, 4 McCrary 522.

[b] **A fraudulent concealment or disposition of property** is a general and always existing ground for the interposition of equity. Griffith v. Godey, 113 U. S. 89, 5 SCt 383, 28 L. ed. 934.

[c] **However,** it has been held that there was no such fraud as would authorize a court of equity to review a final settlement of an estate where the executor failed to account for cattle which had been inventoried and appraised as assets of the estate, and gave such cattle to the widow as her separate property, and also charged commissions on an uncollected and worthless note. Dickson v. Hitt, 98 Ill. 300.

60. Ark.—Bell v. Altheimer, 99 Ark. 529, 138 SW 993; Greely Burnham Grocery Co. v. Graves, 43 Ark. 171; Jones v. Graham, 36 Ark. 383; Reinhardt v. Gartrell, 33 Ark. 727; Ringgold v. Stone, 20 Ark. 526; Ragsdale v. Stuart, 8 Ark. 268.

Cal. — Benning v. Sacramento County Super. Ct., 34 Cal. A. 296, 167 P 291.

Ill.—Williams v. Rhoades, 81 Ill. 571.

Kan.—Young v. Scott, 59 Kan. 621, 54 P 670.

presumption of fraud,[61] nor are mere illegal allowances, unless obtained by fraud, ground for impeaching or setting aside a final settlement.[62] Neither will a final settlement be disturbed because of a mistake of law.[63] Matters which have not resulted in prejudice to any substantial right of any party interested in the estate do not furnish ground for setting aside the settlement.[64] Where the allowance of commission to an administrator on approval of his final settlement was induced by the negligence of plaintiff, there was no mistake or fraud entitling him to equitable relief.[65]

[§ 2494] **b. Statutory Grounds.** In some states statutes have been enacted enumerating the grounds upon which and the circumstances under which the final settlement of a personal representative may be set aside, opened, or otherwise disturbed. These statutes have been construed in numerous cases, which are referred to in the note,[66] but which it is deemed unnecessary to discuss in detail, because of

Ky.—Herndon v. McDowell, 121 Ky. 554, 89 SW 539, 28 KyL 512.

La.—Fendler v. Daigre, 19 La. Ann. 190.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 202.

Miss.—Smith v. Hurd, 8 Miss. 188.

Mo.—Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Standard v. Lacks, 25 Mo. A. 64.

N. Y.—Matter of Bodine, 119 App. Div. 493, 104 NYS 138.

Or.—Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634.

Pa.—Troelsch's Est., 19 Pa. Dist. 566, 38 Pa. Co. 40; Clever's Est., 44 Pa. Co. 232; Walker's Est., 41 Pa. Co. 14.

[a] **Mere technical illegality** in the conduct of the administration is not sufficient grounds for impeaching the settlement. Young v. Scott, 59 Kan. 621, 54 P 670.

[b] **However,** it has been held sufficient ground for opening an account that it is apparent on the face thereof that the representative has mingled his personal matters with the affairs of the estate. Beyerbach's Est., 18 LancLRev (Pa.) 381.

61. Dyer v. Jacoway, 42 Ark. 186, 50 Ark. 217, 6 SW 902.

62. Ark.—Mock v. Pleasants, 34 Ark. 63.

Ill.—Dickson v. Hitt, 98 Ill. 300.

Iowa.—Patterson v. Bell, 25 Iowa 149.

Kan.—Ladd v. Nystol, 63 Kan. 23, 64 P 985.

Mo.—Baldwin v. Dalton, 168 Mo. 20, 67 SW 599; Byerly v. Donlin, 72 Mo. 270; Miller v. Major, 67 Mo. 247; Lewis v. Williams, 54 Mo. 200; Whittelsey v. Dorsett, 23 Mo. 236; Jones v. Brinker, 20 Mo. 87; Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Warden v. Busbee, 89 Mo. A. 113.

Nebr.—In re Greenwood, 83 Nebr. 429, 119 NW 671.

Wash.—In re Doane, 64 Wash. 303, 116 P 847.

63. Bacon v. Bacon, 150 Cal. 477, 89 P 317; Einstein v. Strother, (Mo. A.) 182 SW 122; Lile v. Kaincaid, 160 Mo. A. 297, 142 SW 434; Weinerth v. Trendley, 39 Mo. A. 333; Monroe's Est., 9 Kulp (Pa.) 334. But compare Dorris v. Miller, 105 Iowa 564, 573, 75 NW 482 ("This may have been a mistake of law, but equity will, in a proper case, grant relief from such a mistake").

64. Bradbury v. Wells, 138 Iowa 673, 115 NW 880, 16 LRANS 240; Griffith v. Vertner, 6 Miss. 736.

[a] **A mistake in favor of a distributee** does not give him the right to impeach a final settlement. Griffith v. Vertner, 6 Miss. 736.

65. Einstein v. Strother, (Mo. A.) 182 SW 122.

66. Ala.—Evans v. Evans, 76 S 95; Carpenter v. Carpenter, 75 S 472; Morgan v. Gaiter, 182 Ala. 322, 62 S 731; Martinez v. Meyers, 167 Ala. 456, 52 S 592; Knabe v. Rice, 106 Ala. 516, 17 S 666; Hall v. Pegram, 85 Ala. 522, 5 S 209, 6 S 612; Crumpler v. Deens, 85 Ala. 149, 4 S 826; Tutwiler v. Lane, 82 Ala. 456, 3 S 104; Watts v. Frazer, 80 Ala. 186; Vincent v. Martin, 79 Ala. 540; Waldrom v. Waldrom, 76 Ala. 285; Massey v. Modawell, 73 Ala. 421; Cawthorn v. Jones, 73 Ala. 82; Stoudenmire v. De Bardelaben, 72 Ala. 300; Foxworth v. White, 72 Ala. 224; Lyne v. Wann, 72 Ala. 43; Humphreys v. Burleson, 72 Ala. 1; Alexander v. Alexander, 70 Ala. 357; Hatcher v. Dillard, 70 Ala. 343; Lowe v. Guice, 69 Ala. 80; Bowden v. Perdue, 59 Ala. 409; Jones v. Fellows, 58 Ala. 343; Boswell v. Townsend, 57 Ala. 308; Stabler v. Cook, 57 Ala. 22; Gamble v. Jordan, 54 Ala. 432; Waring v. Lewis, 53 Ala. 615; Otis v. Dargan, 53 Ala. 178; Robertson v. Walker, 51 Ala. 484; Monnin v. Beroujon, 51 Ala. 196; Meadows v. Edwards, 46 Ala. 354; Morrow v. Allison, 39 Ala. 70; Wilson v. Randall, 37 Ala. 74, 76 AmD 347; Duckworth v. Duckworth, 35 Ala. 70; Mock v. Steele, 34 Ala. 198, 73 AmD 455; Arnett v. Arnett, 33 Ala. 273; Moore v. Lesueur, 33 Ala. 237; Cowan v. Jones, 27 Ala. 317.

Cal.—In re Miller, 15 Cal. A. 557, 115 P 329.

Ill.—Reizer v. Mertz, 223 Ill. 555, 79 NE 283 [rev 125 Ill. A. 425].

Ind.—Gramham v. Russell, 152 Ind. 186, 52 NE 806; Harter v. Songer, 138 Ind. 161, 37 NE 595; Crum v. Meeks, 128 Ind. 360, 27 NE 722; Williams v. Williams, 125 Ind. 156, 25 NE 176; Shirley v. Thompson, 123 Ind. 454, 24 NE 253; Pollard v. Barkley, 117 Ind. 40, 17 NE 294; Dillman v. Barber, 114 Ind. 403, 16 NE 825; Chase v. Beeson, 92 Ind. 61; Heaton v. Knowlton, 65 Ind. 255; Miller v. Steele, 64 Ind. 79; Reed v. Reed, 44 Ind. 429; Dufour v. Dufour, 28 Ind. 421; State v. Overturf, 16 Ind. 261; Beard v. Peru First Presb. Church, 15 Ind. 490; West v. Reavis, 13 Ind. 294; Camper v. Hayeth, 10 Ind. 528; Fox v. Rhodes, 43 Ind. A. 573, 88 NE 92; Cullop v. Vincennes, 34 Ind. A. 667, 72 NE 166; Kingan v. Hawley, 29 Ind. A. 376, 64 NE 620; Jaap v. Digman, 8 Ind. A. 509, 36 NE 50.

Iowa.—In re Lackie, 171 NW 679; Bradbury v. Wells, 138 Iowa 673, 115 NW 880, 16 LRANS 240; Tucker v. Stewart, 121 Iowa 714, 97 NW 148 [withdrawing op 86 NW 371]; Dorris v. Miller, 105 Iowa 564, 75 NW 482; Godes v. Hassen, 81 Iowa 197, 46 NW 980; Van Aken v. Welch, 80 Iowa 114, 45 NW 406; McLeary v. Doran, 79 Iowa 210, 44 NW 360; Arnold v. Spates, 65 Iowa 570, 22 NW 680; Daniels v. Smith, 58 Iowa 577, 12 NW 599; Kows v. Mowery, 57 Iowa 20, 10 NW 283; Cowins v. Tool, 36 Iowa 82; Patterson v. Bell, 25 Iowa 149.

Mass.—Thompson v. De Visser, 219 Mass. 40, 106 NE 548.

Mich.—In re Mills, 158 Mich. 504, 122 NW 1080.

N. J.—Stevenson v. Phillips, 21 N. J. L. 70, 15 N. J. Eq. 236; In re Morris, 86 N. J. Eq. 161, 97 A 284; Matter of Morris, 65 N. J. Eq. 699, 56 A 161; Black v. Whitall, 9 N. J. Eq. 572, 59 AmD 423; Vanmeter v. Jones, 3 N. J. Eq. 520; Boulton v. Scott, 3 N. J. Eq. 231; In re Slater, (Prerog.) 102 A 384; In re Van Wagoner, (Prerog.) 97 A 893.

N. Y.—In re Henderson, 157 N. Y. 423, 52 NE 183 [aff 33 App. Div. 545, 53 NYS 957]; In re Deyo, 102 N. Y. 724, 7 NE 819; In re Hawley, 100 N. Y. 206, 3 NE 68 [rev 36 Hun 258 (aff 3 Dem. Surr. 571)]; In re Tilden, 98 N. Y. 434 [aff 5 Dem. Surr. 230, and rev 67 HowPr 447]; Sipperly v. Baucus, 24 N. Y. 46; Matter of Bodine, 119 App. Div. 493, 104 NYS 138; Matter of Hoes, 119 App. Div. 288, 104 NYS 529; Matter of Wicke, 74 App. Div. 221, 77 NYS 558; Matter of McManus, 66 App. Div. 53, 73 NYS 88 [rev 35 Misc. 678, 72 NYS 409]; Matter of Seaman, 63 App. Div. 49, 71 NYS 49; Matter of Douglas, 52 App. Div. 303, 65 NYS 103; Matter of White, 52 App. Div. 225, 65 NYS 168 [app dism 170 N. Y. 575 mem, 62 NE 1101 mem]; Matter of Gall, 42 App. Div. 255, 59 NYS 254; Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 [aff 161 N. Y. 627 mem, 55 NE 1096 mem]; Matter of Humfreville, 8 App. Div. 312, 40 NYS 939; Matter of Patterson, 79 Hun 371, 29 NYS 451 [aff 146 N. Y. 327, 40 NE 990]; Matter of Soule, 72 Hun 594, 25 NYS 270; Matter of Engs, 57 Hun 591, 11 NYS 42; In re O'Neil, 46 Hun 500; In re Kranz, 41 Hun 463; In re Dey Ermand, 24 Hun 1; Yale v. Baker, 2 Hun 468, 5 Thomps. & C. 10; Campbell v. Thatcher, 54 Barb. 382; Matter of May, 2 Silv. Sup. 457, 6 NYS 357; Decker v. Elwood, 3 Thomps. & C. 48; Matter of Isaac, 103 Misc. 191, 169 NYS 1070; Matter of Henry, 78 Misc. 319, 139 NYS 690; Matter of Peterson, 68 Misc. 10, 124 NYS 907, 7 Mills Surr. 519; Matter of Campbell, 55 Misc. 469, 106 NYS 677, 6 Mills Surr. 203; In re Walrath, 37 Misc. 696, 76 NYS 448, 3 Mills Surr. 37; Matter of McCormick, 27 Misc. 416, 59 NYS 374; Matter of Mount, 27 Misc. 411, 59 NYS 176, 1 Mills Surr. 89; Matter of Monteith, 27 Misc. 163, 58 NYS 379; Matter of Gearns, 27 Misc. 76, 58 NYS 200, 1 Mills Surr. 55; Matter of Beach, 3 Misc. 393, 24 NYS 717, 1 Pow. Surr. 469; Matter of Malone, 150 App. Div. 31, 134 NYS 496; In re McGorray, 20 NYS 366; In re Carr, 19 NYS 647; In re Salisbury, 6 NYS 932; In re Mull, 5 NYS 202; Matter of Soutter, 6 NYSt 531 [aff 105 N. Y. 514, 12 NE 34]; In re Wright, 16 Abb PrNS 429; Farmers' L. & T. Co. v. Hill, 4 Dem. Surr. 41; Ricard v. Laytin, 2 Dem. Surr. 587; Strong v. Strong, 3 Redf. Surr. 477.

Oh.—Crawford v. Ziegler, 84 Oh. St. 224, 95 NE 743; Stayner's Case, 33 Oh. St. 481; In re Koehnken, 27 Oh. Cir. Ct. 840; Matter of Seeger, 1 OhS&CP 113, 7 OhNP 207.

Or.—Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634.

Pa.—In re Rees, 246 Pa. 188, 92 A 126; In re Nixon, 239 Pa. 270, 86 A 849; In re Dox, 227 Pa. 606, 76 A 318; Milliken's App., 227 Pa. 502, 76 A 248; In re Bailey, 208 Pa. 594, 57 A 1095; In re Sherwood, 206 Pa. 465, 56 A 20 [aff 26 Pa. Co. 589]; In re Finley, 196 Pa. 140, 46 A 443 [aff 8 Pa. Dist. 723]; In re Washburn, 187 Pa. 162, 40 A 979; In re Thomas, 184 Pa. 640, 39 A 567; Priestley's App., 127 Pa. 420, 17 A 1084, 4 LRA 503; Fletcher's App., 125 Pa. 352, 17 A 340; Johnson's App., 114 Pa. 132, 6 A 556; Meckel's App., 112 Pa. 554, 4 A 447; Scott's App., 112 Pa. 427, 5 A 671; Le Moyne's App., 104 Pa. 321; Milne's App., 99 Pa. 483; Lehr's App., 98 Pa. 25; Milligan's App., 82 Pa. 389; Cramp's App., 81 Pa. 90; Whelen's App., 70 Pa. 410; Kinter's App., 62 Pa. 318; Green's App., 59 Pa. 235; Hartman's App., 36 Pa. 70; Russell's App., 34 Pa. 258; Yeager's App., 34 Pa. 173; Stevenson's App., 32 Pa. 318; Bishop's App., 26 Pa. 470; In re Riddle, 19 Pa. 431; George's App., 12 Pa. 260; In re Bishop, 10 Pa. 469; Seager's Est., 6 Pa. Dist. 105; Schmitt's App., 2 Walk. 316; Wachter's Case, 1 Walk. 267; Hartz's App., 2 Grant 83; Stoever's App., 3 Watts & S. 154; In re

their purely local interest, the varying provision of the statutes, and the liability of the statutory provisions under which they were decided to modification and repeal.

[§ 2495] **3. Time for Application.** When the time within which relief against a settlement can be obtained is prescribed by statute, it must be sought before the expiration of that period.[67] The time from which the statutory period runs varies, being sometimes the time of final settlement[68] or confirmation of the final account,[69] and sometimes the time of the final discharge of the representative.[70] In the case of fraud, the statutory period has been held to run from the time of the discovery of the fraud by the party complaining thereof.[71] When there is no positive limitation of the period in which such relief may be sought, a decree of final settlement may be opened or vacated within any reasonable time after its rendition,[72] although such relief will be denied where there has been delay for so long a time or under such circumstances as to cause the application of the doctrine of laches.[73] It

Clauser, 1 Watts & S. 208; In re Mylin, 7 Watts 71; Deardorff's App., 6 Watts 159; In re Downing, 5 Watts 90; McLenachan v. Com., 1 Rawle 357; Dull's App., 10 Pa. Cas. 349, 13 A 961; Fish's App., 3 Pa. Cas. 239, 7 A 222; O'Reilly's App., 2 Pa. Cas. 23, 3 A 836; Snyder's Est., 18 Pa. Super. 462; Bickford's Est., 16 Pa. Super. 572; Myer's Est., 13 Pa. Super. 476; Hall's Est., 25 Pa. Dist. 253; Wilson's Est., 24 Pa. Dist. 1044; Fury's Est., 20 Pa. Dist. 264; Raher's Est., 19 Pa. Dist. 75; Hutchins' Est., 17 Pa. Dist. 648; Lynch's Est., 17 Pa. Dist. 374; Lewis' Est., 14 Pa. Dist. 422; Dalton's Est., 14 Pa. Dist. 406; Been's Est., 13 Pa. Dist. 695; Price's Est., 12 Pa. Dist. 693; Bickings' Est., 12 Pa. Dist. 257, 28 Pa. Co. 396; Poh's Est., 12 Pa. Dist. 160, 28 Pa. Co. 208; Bickings' Est., 12 Pa. Dist. 159, 28 Pa. Co. 299; Lehigh's Est., 11 Pa. Dist. 176; Houseman's Est., 11 Pa. Dist. 87, 26 Pa. Co. 477; Douglass' Est., 10 Pa. Dist. 478, 25 Pa. Co. 568; Brooke's Est., 10 Pa. Dist. 447, 25 Pa. Co. 416; Unruh's Est., 10 Pa. Dist. 293, 25 Pa. Co. 257, 15 YorkLegRec 23; Yung's Est., 9 Pa. Dist. 476 [aff 199 Pa. 35, 48 A 905]; Miller's Est., 7 Pa. Dist. 762; Martin's Est., 7 Pa. Dist. 408, 21 Pa. Co. 145; Miller's Est., 4 Pa. Dist. 407, 16 Pa. Co. 526; Stewart's Est., 3 Pa. Dist. 747, 15 Pa. Co. 380; Page's Est., 3 Pa. Dist. 212; Levy's Est., 3 Pa. Dist. 42, 14 Pa. Co. 169; Justice's Est., 33 Pa. Co. 61; Wright's Est., 25 Pa. Co. 594; Boswell's Est., 19 Pa. Co. 536; Walker's Est., 19 Pa. Co. 189; Kennedy's Est., 3 Pa. Dist. 795, 15 Pa. Co. 494; Simmons' Est., 12 Pa. Co. 139, 30 Wkly NC 503; White's Est., 12 Pa. Co. 93; Lee's Est., 9 Pa. Co. 655; Cassidy's Est., 6 Pa. Co. 627; Garwin's App., 2 AmLJ 253; John's Est., 1 Chest. Co. 311; Reese's Est., 10 Kulp 524; Wilbur's Est., 9 Kulp 327; Jamison's Est., 1 Kulp 146; In re Fitch, 8 Lack LegN 150; Beyerbach's Est., 18 Lanc LRev 381; Miller's Est., 5 LancLRev 169; Jones' Est., 2 LancLRev 389; Curry's Est., 1 LegGaz 484; Rostonski's Est., 7 North. Co. 214; Costigan's Est., 13 Phila. 264; Duff's Est., 13 Phila. 216; Shallcross' Est., 12 Phila. 158; Smith's Est., 12 Phila. 87; Frey's Est., 12 Phila. 15; In re Fleming, 32 PittsbLegJNS 439; Priestley's App., 24 WklyNC 305; Geiger's Est., 12 WklyNC 439; Bucknor's Est., 7 WklyNC 470; Charlton's App., 6 WklyNC 456; Ehrhart's Est., 17 YorkLegRec 137; Crone's Est., 14 YorkLegRec 89; Smith's Est., 12 YorkLegRec 178.

S. D.—In re Nelson, 26 S. D. 615, 129 NW 113.

Wash.—In re Johnston, 181 P 209.

67. Ala.—Seals v. Weldon, 121 Ala. 319, 25 S 1021; Baldwin v. Deming, 51 Ala. 553; Millsap v. Stanley, 50 Ala. 319.

Ark.—Hankins v. Layne, 48 Ark. 544, 3 SW 821; Riley v. Norman, 39 Ark. 158; Hordage v. Hordage, 1 SW 707.

Cal.—In re Cahalan, 70 Cal. 604, 12 P 427.

Del.—Larkin v. Simms, 18 Del. 543, 46 A 750.

Ga.—Wicker v. Howard, 126 Ga. 119, 54 SE 821.

Ind.—Graham v. Russell, 152 Ind. 186, 52 NE 806; Dillman v. Barber, 114 Ind. 403, 16 NE 825; Spicer v. Hockman, 72 Ind. 120; Reed v. Reed, 44 Ind. 429; Potter v. Smith, 36 Ind. 231; Beard v. Peru First Presb. Church, 15 Ind. 490; Clark v. Schindler, 43 Ind. A. 269, 87 NE 44.

Iowa.—In re Feldner, 167 Iowa 150, 149 NW 38; Patterson v. Bell, 25 Iowa 149.

La.—Decuir's Succ., 26 La. Ann. 222.

Mich.—Duryea v. Granger, 66 Mich. 593, 33 NW 730.

Miss.—Mayo v. Clancy, 57 Miss. 674.

Mo.—Phillips v. Broughton, 30 Mo. A. 148.

N. Y.—In re Henderson, 157 N. Y. 423, 52 NE 183 [aff 33 App. Div. 545, 53 NYS 957]; In re Tilden, 98 N. Y. 434; Monroe v. Turner, 114 App. Div. 634, 100 NYS 27 [aff 189 N. Y. 563 mem, 82 NE 1129 mem]; Matter of Von Glahn, 53 App. Div. 164, 65 NYS 865.

N. C.—Woody v. Brooks, 102 N. C. 334, 9 SE 294; Slaughter v. Cannon, 94 N. C. 189; Wilkerson v. Dunn, 52 N. C. 125.

Oh.—Crawford v. Zeigler, 84 Oh. St. 224, 95 NE 743; Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769.

Pa.—Borland's App., 234 Pa. 280, 83 A 110; Anderson's App., 102 Pa. 258; Kinter's App., 62 Pa. 318; Groff's App., 45 Pa. 379; Bagg's App., 43 Pa. 512, 82 AmD 583; Weiting v. Nissley, 6 Pa. 141; Bunting's App., 4 Watts & S. 469; Myers' Est., 13 Pa. Super. 476; Price's Est., 12 Pa. Dist. 693; Unruh's Est., 10 Pa. Dist. 293, 25 Pa. Co. 257, 15 YorkLegRec 23; Yung's Est., 9 Pa. Dist. 476 [aff 199 Pa. 35, 48 A 905]; Finley's Est., 8 Pa. Dist. 723 [aff 196 Pa. 140, 46 A 443]; Seager's Est., 6 Pa. Dist. 105; Hillborn's Est., 5 Pa. Dist. 265; Robins' Est., 4 Pa. Dist. 277, 16 Pa. Co. 375; Holt's Est., 28 Pa. Co. 268; Van Syckel's Est., 26 Pa. Co. 412; Creegan's Est., 9 Del. Co. 103; Hensler's Est., 17 LancLRev 257; Jones' Est., 11 PittsbLegJNS 375.

R. I.—Sherman v. Howes, 37 R. I. 260, 92 A 564.

S. C.—Roberts v. Johns, 24 S. C. 580.

Tenn.—Alvis v. Oglesby, 87 Tenn. 172, 10 SW 313.

Tex.—Dunson v. Payne, 44 Tex. 539.

Utah.—Moyes v. Agee, 178 P 753.

Va.—Nelson v. Kownslar, 79 Va. 468; Handly v. Snodgrass, 9 Leigh (36 Va.) 484.

[a] **Effect of statute.**—A statute prescribing a limitation of time for the opening of a settlement in the absence of, and without notice to, an interested person does not apply to a proceeding for equitable relief on the ground of fraud or mistake. Dorris v. Miller, 105 Iowa 564, 75 NW 482; Arnold v. Spates, 65 Iowa 570, 22 NW 680.

[b] **When statute not applicable.**—Ansley v. King, 35 Ala. 278.

68. Tindal v. McMillan, 33 Tex. 484.

[a] **The period does not run from** the time orders are made in the progress of administration. Tindal v. McMillan, 33 Tex. 484.

69. McGaughey v. Brown, 46 Ark. 25; Hanf v. Whittington, 42 Ark. 491.

[a] **As against the estate of a party then deceased,** the statute does not begin to run until an administrator of such estate has been appointed. Sorrels v. Trantham, 48 Ark. 386, 3 SW 198, 4 SW 281; Hanf v. Whittington, 42 Ark. 491.

70. Ariail v. Ariail, 29 S. C. 84, 7 SE 35.

[a] **Time does not run from time of partial settlement.**—Dickerson v. Smith, 17 S. C. 289.

71. Spallholz v. Sheldon, 148 App. Div. 573, 132 NYS 560.

72. Cal.—Bacon v. Bacon, 150 Cal. 477, 89 P 317.

Ill.—Starrett v. Keating, 61 Ill. A. 189.

Kan.—Pickens v. Campbell, 98 Kan. 518, 159 P 21.

Md.—Malkus v. Richardson, 124 Md. 224, 92 A 474.

Mich.—Maney v. Casserly, 134 Mich. 252, 96 NW 478.

N. J.—Hyer v. Morehouse, 20 N. J. L. 125; In re Van Wagoner, (Prerog.) 97 A 893.

N. Y.—In re Henderson, 157 N. Y. 423, 52 NE 183; Sipperly v. Baucus, 24 N. Y. 46.

Or.—Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634.

Pa.—Macpherson's Est., 24 Pa. Dist. 740.

[a] **"Constructive knowledge of the falsity of a statement** that real estate, the record title to which stood in an intestate at the time of his death, had not been sold by him, is not as a matter of law to be implied on the theory that it could have been discovered through inquiry from the purchasers." Pickens v. Campbell, 98 Kan. 518, 519, 159 P 21.

73. U. S.—Lupton v. Janney, 13 Pet. 381, 10 L. ed. 210 [aff 15 F. Cas. No. 8,607, 5 Cranch C. C. 474]; Hiller v. Ladd, 85 Fed. 703, 29 CCA 394.

Ala.—Clements v. Clements, 76 S 855; Barnett v. Tarrence, 23 Ala. 463.

Ark.—Washington v. Govan, 73 Ark. 612, 84 SW 792.

Cal.—Tynan v. Kerns, 119 Cal. 447, 61 P 693.

Ind.—Dickey v. Tyner, 85 Ind. 100.

Iowa.—In re Holderbaum, 82 Iowa 69, 47 NW 898.

Ky.—Skinner v. Skinner, 1 J. J. Marsh. 594.

La.—Watt's Succ., 122 La. 952, 48 S 335; Aronstein's Succ., 51 La. Ann. 1052, 25 S 932; Bobb's Succ., 41 La. Ann. 247, 5 S 757; Decuir's Succ., 26 La. Ann. 222.

Md.—Yearley v. Cockey, 68 Md. 174, 11 A 586; Ridenour v. Keller, 2 Gill 134.

Mass.—Davis v. Cowdin, 20 Pick. 510.

Mich.—Grece v. Helm, 91 Mich. 450, 51 NW 1106.

Nebr.—Shelby v. Creighton, 65 Nebr. 485, 91 NW 369, 101 AmSR 630.

N. H.—Child's App., 23 N. H. 225.

N. J.—In re Morris, 86 N. J. Eq. 161, 97 A 284; Wood v. Chetwood, 33 N. J. Eq. 9; In re Morris, 86 N. J. Eq. 161, 97 A 284.

N. Y.—Sipperly v. Baucus, 24 N. Y. 46; Matter of Cook, 68 Hun 280, 22 NYS 969; In re Deyo, 36 Hun 512 [aff 102 N. Y. 724, 7 NE 819, 1 Silv. A. 148]; In re Salisbury, 6 NYS 932; In re Waack, 5 NYS 522; Hart v.

has been held that there is no limitation of time for correcting a clerical error in a surrogate's decree.[74]

[§ 2496] **4. Who May Attack Settlement.** A final settlement of the account of a personal representative may, when sufficient grounds for an attack thereon exist,[75] be impeached by any person who is interested in the estate and is injuriously affected by the matters on which the claim for relief is predicated;[76] but cannot be attacked by any

Duffy, 2 Redf. Surr. 151; Redmond v. Ely, 2 Bradf. Surr. 175.

Oh.—Evans v. Evans, 31 Oh. Cir. Ct. 635 [aff 83 Oh. St. 482 mem, 94 NE 1106 mem]; Evans v. Evans, 13 Oh. Cir. Ct. N. S. 62; Pennock v. Miller, 1 Oh. Dec. (Reprint) 456, 10 WestLJ 85.

Or.—Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634.

Pa.—In re Macpherson, 260 Pa. 492, 103 A 887; In re Bailey, 241 Pa. 230, 88 A 428; Borland's App., 234 Pa. 280, 83 A 110; In re Michener, 225 Pa. 66, 73 A 1059; Young's Est., 166 Pa. 645, 31 A 373; Pennypacker's App., 14 Pa. 430; In re Mylin, 7 Watts 64; Deardorff's App., 6 Watts 159; Barr's Est., 43 Pa. Super. 540; Stetler's Est., 39 Pa. Super. 91; Small's Est., 23 Pa. Dist. 793; Michener's Est., 18 Pa. Dist. 236; Lewis' Est., 14 Pa. Dist. 422; Been's Est., 13 Pa. Dist. 695; Poh's Est., 12 Pa. Dist. 160, 28 Pa. Co. 208; Ellison's Est., 2 Pa. Dist. 521, 13 Pa. Co. 410.

S. C.—Pinson v. Puckett, 35 S. C. 178, 14 SE 393; Keitt v. Andrews, 25 S. C. Eq. 349.

Tenn.—Burton v. Dickinson, 3 Yerg. 112; Kernell v. Crutcher, (Ch. A.) 61 SW 1045.

Va.—Tidball v. Shenandoah Nat. Bank, 98 Va. 768, 37 SE 318; Green v. Thompson, 84 Va. 376, 5 SE 507; Bradley v. Bradley, 83 Va. 75, 1 SE 477; Gibboney v. Kent, 82 Va. 383, 4 SE 610; Hudson v. Hudson, 3 Rand. (24 Va.) 117.

Wash.—Bowen v. Hughes, 5 Wash. 442, 32 P 98.

W. Va.—Hays v. Freshwater, 47 W. Va. 217, 34 SE 831; Bland v. Stewart, 35 W. Va. 518, 14 SE 215.

[a] **What amounts to laches** depends upon the circumstances of each case. Richardson v. Billingslea, 69 Md. 407, 16 A 65.

[b] **Negligence as to mistake.—** The final settlement of an intestate estate will not be disturbed because of an overpayment by a debtor to the administrator, where the debtor has been negligent in allowing the mistake to be made, and has not shown reasonable diligence in seeking its correction after ascertaining it. Dickey v. Tyner, 85 Ind. 100.

[c] **A delay of a little over a month** before moving to vacate a decree does not constitute laches. Matter of Wicke, 74 App. Div. 221, 77 NYS 558; Matter of Walrath, 37 Misc. 696, 76 NYS 448, 3 Mills Surr. 37.

[d] **A delay of eight months** is not unreasonable. Froebrich v. Lane, 45 Or. 13, 76 P 351, 106 AmSR 634.

[e] **A delay of four years** in making application to open a settlement on the ground of mistake did not show laches, where there was no evidence that the mistake had been discovered within that time. Sipperly v. Baucus, 24 N. Y. 46.

[f] **A delay of nearly five years** is such laches as will bar a petition for review to rectify an alleged error in an account. Lewis' Est., 14 Pa. Dist. 422.

[g] **A delay of eight years** before the institution of a suit by legatees to surcharge and falsify the accounts of an executor is not sufficient ground for refusing relief, especially where one of the complainants was a female and under age when the settlement was in progress, although probably of full age when it was returned to the court of probate and recorded. Handly v. Snodgrass, 9 Leigh (36 Va.) 484.

[h] **A delay of twelve years** precludes relief. Littell v. Hackley, 126 Fed. 309, 61 CCA 295 [certiorari den 194 U. S. 635, 24 SCt 858, 48 L. ed. 1160]; Kelly's Est., 37 Pa. Super. 320.

[i] **Acquiescence for fifteen years** is sufficient to preclude the opening of a settlement which appears to have been voluntarily and intelligently made, although it may have been advantageous to a fiduciary. Pinson v. Puckett, 35 S. C. 178, 14 SE 393.

[j] **A lapse of eighteen years** may not prevent the correction of errors where no intervening rights will be prejudiced thereby. Shuster's Est., 26 Pa. Dist. 672.

[k] **A lapse of twenty years** (1) is sufficient to preclude relief. Washington v. Govan, 73 Ark. 612, 84 SW 792; Pennypacker's App., 14 Pa. 430. (2) After the lapse of such a time and the death of the parties a final account will not be reopened and revised, unless a very strong case of fraud is proved, or of clear accident or mistake. Taylor v. Benham, 5 How. (U. S.) 233, 12 L. ed. 130. (3) But a final account of twenty years' standing has been opened on the ground of fraud, where there had been no acquiescence, complainants having been prosecuting their claim in various forms during the whole time. Davis v. Cowdin, 20 Pick. (Mass.) 510.

[l] **Twenty-six years' delay** constitutes laches. Borland's App., 234 Pa. 280, 83 A 110.

[m] **Forty years' delay** precludes relief. Evans v. Evans, 31 Oh. Cir. Ct. 635 [aff 83 Oh. St. 482 mem, 94 NE 1106 mem].

74. In re Henderson, 157 N. Y. 423, 52 NE 183.

75. See supra §§ 2493, 2494.

76. Ala.—Morgan v. Gaiter, 182 Ala. 322, 62 S 731; Hall v. Pegram, 85 Ala. 522, 5 S 209, 6 S 612.

Ark.—Beckett v. Whittington, 92 Ark. 230, 122 SW 633.

Cal.—Noah's Est., 88 Cal. 468, 26 P 361.

Ga.—Seagraves v. W. E. Powell Co., 143 Ga. 572, 85 SE 760.

Ill.—Sargent v. Mundy, 194 Ill. A. 111.

Ind.—Spicer v. Hockman, 72 Ind. 120; Smith v. Miller, 21 Ind. A. 82, 51 NE 508.

Kan. — Pickens v. Campbell, 98 Kan. 518, 159 P 21.

Ky.—New Bell Jellico Coal Co. v. Stewart, 155 Ky. 415, 159 SW 962.

La.—Sallier v. Rosteet, 108 La. 378, 32 S 383; Woods' Succ., 36 La. Ann. 757; Beiger v. American Homestead Co., 1 La. A. (Orleans) 211.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 302.

Mo.—Goodman v. Griffith, 155 Mo. A. 574, 134 SW 1051; Crowley v. McCrary, 45 Mo. A. 350.

N. J.—Crombie v. Engle, 19 N. J. L. 82.

N. Y.—Spallholz v. Sheldon, 148 App. Div. 573, 132 NYS 560; Matter of Bodine, 119 App. Div. 493, 104 NYS 138.

N. C.—Murphy v. Harrison, 65 N. C. 246.

Oh.—Slagle v. Slagle, 3 Oh. Dec. (Reprint) 549.

Pa.—Eby's Est., 1 LancLRev 129.

S. D.—In re Nelson, 26 S. D. 615, 129 NW 113.

Tex.—Murphey v. Menard, 11 Tex. 673.

Va.—Smith v. Britton, 2 Patt. & H. 124.

Wash.—In re Johnston, 181 P 209.

"As a general proposition creditors or distributees are the only persons (except, perhaps, the sureties of the administrator in certain cases), who have any concern with the accounts or settlements of an administrator, and they alone possess the legal capacity to maintain actions to falsify such settlements." Voshage v. Voshage, 45 Mo. A. 172, 177.

[a] **A settlement may be attacked by:** (1) Heirs. Morgan v. Gaiter, 182 Ala. 322, 62 S 731; Beckett v. Whittington, 91 Ark. 230, 122 SW 633; Pickens v. Campbell, 98 Kan. 518, 159 P 21; In re Johnston, (Wash.) 181 P 209. (2) Legatees. In re Johnston, (Wash.) 181 P 209. (3) Distributees. Morgan v. Gaiter, 182 Ala. 322, 62 S 731; Beckett v. Whittington, 91 Ark. 230, 122 SW 633; New Bell Jellico Coal Co. v. Stewart, 155 Ky. 415, 159 SW 962; Voshage v. Voshage, 45 Mo. A. 172. (4) A cestui que trust, where the executor is also trustee under the will. James v. Withinton, 7 Mo. A. 575. (5) The widow of decedent. Hefflefinger v. George, 14 Tex. 569. (6) Creditors of decedent. Beckett v. Whittington, 92 Ark. 230, 122 SW 633; Seagraves v. W. E. Powell Co., 143 Ga. 572, 85 SE 760 (judgment creditor who had garnished representative); Voshage v. Voshage, 45 Mo. A. 172; Smith v. Britton, 2 Patt. & H. (Va.) 124 (may intervene in suit by legatees and devisees).

[b] **The guardian of infants interested** (1) in the estate may attack the settlement. Roll v. Stun, 46 SW 223, 20 KyL 661; Eby's Est., 1 LancLRev (Pa.) 129; In re Nelson, 26 S. D. 615, 129 NW 113. (2) Aliter as to the guardian of a minor whose interest does not begin until expiration of an existing life estate. Price's Est., 12 Pa. Dist. 693.

[c] **A domiciliary executor** may attack the settlement of an ancillary administrator. Hall v. Pegram, 85 Ala. 522, 5 S 209, 6 S 612.

[d] **Administrator de bonis non.—** A former administrator or his representatives may be called upon by a new administrator, by a notice or upon a rule, to show cause why his account should not be opened for fraud or mistake. Crombie v. Engle, 19 N. J. L. 82 [rev on other grounds 21 N. J. L. 614]. Contra Murphey v. Menard, 11 Tex. 673.

[e] **A surety of the representative** (1) is entitled to attack the final settlement. Williamson v. Howell, 4 Ala. 693 (but only where the distributees participated in the fraud complained of, or colluded with the representative); Pierce v. Maetzold, 126 Minn. 445, 148 NW 302; In re Bishop, 10 Pa. 469; Simmons' Est., 12 Pa. Co. 139, 30 WklyNC 503; Shallcross' Est., 12 Phila. (Pa.) 158. (2) A surety cannot sue to set aside a decree which was not induced by fraud. Bodine v. Williamson, 134 App. Div. 688, 119 NYS 500. (3) The court will not sustain an attack by a surety who was present at the audit of the representative's account, at which exceptions were dismissed by the court, where the facts alleged in the petition were denied. Bush's App., 102 Pa. 502.

[f] **Assignee for benefit of creditors.—** Where an executor, in violation of duty, has squandered funds of the estate, and, subsequent to the settlement of a partial account, makes an assignment for the benefit of creditors, and then files his final account as executor in the probate court, the assignee may on leave given appear in such court and ask the correction of errors and mistakes in the accounts of such executor. Slagle v. Slagle, 3 Oh. Dec. (Reprint) 549.

[g] **All creditors or heirs need not join.—** In a proceeding under the statute for the revision and correction of the account of a personal representative, it is not necessary that all creditors or heirs should join as

other person.[77] The representative cannot proceed to have a decree settling his accounts set aside for his own fraud,[78] nor can he move to correct a decree where the error complained of was due to his own fault.[79]

[§ 2497] **5. Parties.** It has been laid down generally that all persons whose interest will be affected by opening, vacating, or setting aside are proper parties to the proceedings by which this is sought;[80] and where the statute requires the personal representative to be made a party to proceedings to set aside the final settlement, and the personal representative is also an heir, joining him in his capacity as heir is not equivalent to making him a party as personal representative.[81] But it has also been held that a statute providing that no final settlement shall be made and approved by the court unless the heirs have been notified thereof in such manner as the court may direct does not require notice to the heirs of a motion by an executor to set aside an order approving a final settlement and to fix his fees as executor.[82] An administrator de bonis non is not a proper party to a proceeding to set aside the settlement of his predecessor.[83] In a suit to correct credits in an administrator's final settlement, where it is not sought to recover, money paid by the administrator from the person to whom it was paid, and he is not charged with fraud or conspiracy in the allowance of the claim, the person receiving such payment is not a necessary party.[84] Where it is sought to correct an erroneous statement in the report of an executor that a claim in favor of plaintiff was paid, and the executor is deceased, it is not necessary that his heirs or personal representatives should be made parties.[85]

[§ 2498] **6. Process.** It has been held that proceedings to vacate a decree settling an administrator's account may be initiated by order to show cause or notice of motion, citation being unnecessary.[86] The surety on an administrator's bond are entitled to notice of a proceeding to vacate a decree settling the administrator's account in voluntary proceedings.[87] Under a statute providing for service of process in like manner as summons in civil actions, and where writs, citations, and other process cannot be served in such manner in the state, that the probate court may, when necessary, order service by publication, the county court cannot order personal service on a nonresident minor in proceedings to vacate a judgment in probate proceedings, where no affidavit that he cannot be served in the state is on file.[88]

[§ 2499] **7. Pleadings—a. In General.** In proceedings to open, vacate, or set aside a settlement there should be a petition or complaint,[89] in which proper grounds for relief[90] must be alleged;[91] and it must also be alleged that complainant's rights have been adversely affected by such settlement.[92] If the proceeding is brought on statutory grounds, such allegations must be made as to bring the case within the provisions of the statute.[93] A repre-

parties; such a proceeding may be prosecuted by any one interested in the estate. Hefflefinger v. George, 14 Tex. 569; Reese v. Hicks, 13 Tex. 162.

[h] **Distinct rights.**—Where an ancestor bequeathed his entire estate to his wife, who was also his executrix, for life, the right of the executor of a remainderman to surcharge the settlement of the executrix for fraudulent misappropriation of the capital of the estate was entirely distinct from, and independent of, his right to proceed against the widow as life tenant. Wren v. Wren, 126 Ky. 704, 104 SW 737, 31 KyL 1096.

[i] **Where a creditor whose claim is rejected neglects to except** to the administrator's final account and the distribution and to contest the same, and the account is settled and a decree of distribution rendered, he cannot have the order and decree set aside because no money was paid into the probate court to cover his claim. Chandler v. Kootenai County Prob. Ct., 26 Ida. 173, 141 P 635.

77. Collins v. Warner, 32 Ark. 87; Dauphin's Succ., 112 La. 103, 36 S 287; Voshage v. Voshage, 45 Mo. A. 172. See also cases supra note 76.

[a] **A surety on a note given by the representative** for a debt of the estate cannot attack the settlement. Voshage v. Voshage, 45 Mo. A. 172.

[b] **The heirs or distributees of a legatee or distributee** cannot maintain a suit to surcharge the accounts of the administrator of the original decedent, as the original legatees or distributees, or, after their death, their personal representatives, are the proper parties plaintiff for that purpose. Hordage v. Hordage, (Ark.) 1 SW 707.

78. Matter of Isaac, 103 Misc. 191, 169 NYS 1070.

79. Carpenter v. Carpenter, (Ala.) 75 S 472.

80. Ark.—Reinhardt v. Gartrell, 33 Ark. 727.

Minn.—Pierce v. Matezold, 126 Minn. 445, 148 NW 302.

Miss.—Williams v. Williams, 43 Miss. 430.

Mo.—Dillon v. Bates, 39 Mo. 292.

N. C.—Murphy v. Harrison, 65 N. C. 246.

Pa.—Finn's Est., 19 Pa. Dist. 773; Audenried's Est., 31 Pa. Co. 198.

Va.—Turnbull v. Buford, 119 Va. 304, 89 SE 233.

W. Va.—Van Winkle v. Blackford, 33 W. Va. 573, 11 SE 26.

[a] **Distributees.**—In a suit in equity brought by one distributee against the administrator to set aside a settlement on the ground of fraud, all the distributees must be made parties either plaintiff or defendant. Dillon v. Bates, 39 Mo. 292.

[b] **Executor.**—If an executor refuses to bring an action to surcharge and falsify an account by which his testator's estate has been injured, and such action is brought by the legatees or next of kin, they should make the executor a party defendant. Murphy v. Harrison, 65 N. C. 246.

[c] **Sureties.**—The sureties of an administrator are proper parties to a bill to correct his accounts. Reinhardt v. Gartrell, 33 Ark. 727; Pierce v. Matezold, 126 Minn. 445, 148 NW 302; Cookus v. Peyton, 1 Gratt. (42 Va.) 431.

[d] **Specific legatee.**—In a suit to surcharge and falsify an ex parte settlement of a personal representative, the executor or residuary legatee cannot demur to the bill because a specific legatee was improperly made a codefendant. Seabright v. Seabright, 28 W. Va. 412.

81. Clark v. Schindler, 43 Ind. A. 269, 87 NE 44.

82. Griswold v. Smith, 221 Ill. 341, 77 NE 551; Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400].

83. Kerrin v. Roberson, 49 Mo. 252.

84. Morgan v. Gaiter, 182 Ala. 322, 62 S 731.

85. Harrell v. Seal, 121 Ind. 193, 22 NE 983.

86. Matter of Waters, 183 App. Div. 840, 171 NYS 897.

87. Blake v. National Surety Co., 184 App. Div. 57, 171 NYS 614.

88. Blake v. Mier, 71 Nebr. 191, 98 NW 701.

89. Turnbull v. Buford, 119 Va. 304, 89 SE 233.

90. See supra §§ 2493, 2494.

91. Ala.—Adams v. Walsh, 190 Ala. 516, 67 S 432; Martinez v. Meyers, 167 Ala. 456, 52 S 592.

Ark.—Bell v. Altheimer, 99 Ark. 529, 138 SW 993.

Ga.—Seagraves v. W. E. Powell Co., 143 Ga. 572, 85 SE 760.

Ind.—Clark v. Schindler, 43 Ind. A. 269, 87 NE 44; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

Mich.—In re Mills, 158 Mich. 504, 122 NW 1080.

Nebr.—Weeke v. Wortmann, 77 Nebr. 407, 109 NW 503.

N. Y.—Matter of Graham, 98 Misc. 518, 162 NYS 861 [aff 179 App. Div. 886, 165 NYS 1088]; Hart v. Duffy, 2 Redf. Surr. 151; Redmond v. Ely, 2 Bradf. Surr. 175.

Pa.—In re Rees, 246 Pa. 188, 92 A 126; Miller's Est., 4 Pa. Dist. 407, 16 Pa. Co. 526; Ehrhart's Est., 17 YorkLegRec 137.

Va.—Turnbull v. Buford, 119 Va. 304, 89 SE 233.

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[a] **Petition held sufficient.**—In re Mills, 158 Mich. 504, 122 NW 1080.

[b] **Complaint held insufficient.**—Adams v. Walsh, 190 Ala. 516, 67 S 432.

92. Spicer v. Hockman, 72 Ind. 120; Crowley v. McCrary, 45 Mo. A. 350.

[a] **Showing interest in estate.**—It must be alleged that complainant has such an interest in the estate as caused him to be injured by the mistake, fraud, or illegality complained of. Spicer v. Hockman, 72 Ind. 120; Smith v. Miller, 21 Ind. A. 82, 51 NE 508.

93. Ala.—Seals v. Weldon, 121 Ala. 319, 25 S 1021.

Ind.—Harter v. Songer, 138 Ind. 161, 37 NE 595; Shirley v. Thompson, 123 Ind. 454, 24 NE 253; Dickey v. Tyner, 85 Ind. 100; Lyon v. Roy, 54 Ind. 300; Clark v. Schindler, 43 Ind. A. 269, 87 NE 44; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130;

sentative seeking to set aside an account stated by the court must aver that he did not have notice and was not present.[94]

A superfluous allegation of fraud will not vitiate a complaint which is otherwise good.[95]

The capacity of a party who appears in court as the representative of another must be alleged,[96] although it need not be proved unless specifically denied.[97]

Where a creditor seeks relief by the opening or setting aside of a settlement, his petition must, it has been held, state facts which negative negligence on his part and excuse him from securing the allowance of his claim.[98]

[§ 2500] **b. Certainty and Particularity in Allegations.** Complainant's claim or title to relief should be stated with accuracy and clearness and with such certainty that defendant may be distinctly informed of the nature of the case which he is called on to meet, and matters essential to complainant's right to relief must appear not by inference, but by direct and unambiguous averments.[99] Accordingly, a bill or petition which contains only general charges of fraud, accident, or mistake, without specifying in what the fraud, accident, or mistake consists, is insufficient,[1] and in a proceeding

Jaap v. Digman, 8 Ind. A. 509, 36 NE 50.

Iowa.—Kows v. Mowery, 57 Iowa 20, 10 NW 283.

N. Y.—Matter of Patterson, 79 Hun 371, 29 NYS 451 [aff 146 N. Y. 327, 40 NE 990]; Matter of Graham, 98 Misc. 518, 162 NYS 861 [aff 179 App. Div. 886, 165 NYS 1088]; Hood v. Hood, 1 Dem. Surr. 392.

Pa.—Le Moyne's App., 104 Pa. 321.

S. D.—In re Nelson, 26 S. D. 615, 129 NW 113.

Tex.—Dunson v. Payne, 44 Tex. 539.

[a] **Under the Alabama statute** (1) a bill which seeks equitable relief against a probate decree on final settlement must not only clearly point out the errors complained of, but must show that complainant has thereby suffered injury. Seals v. Weldon, 121 Ala. 319, 25 S 1021; Waldrom v. Waldrom, 76 Ala. 285; Massey v. Modawell, 73 Ala. 421. (2) It is necessary to negative all fault or negligence on the part of complainant. Vincent v. Martin, 79 Ala. 540; Cawthorn v. Jones, 73 Ala. 82; Stoudenmire v. De Bardelaben, 72 Ala. 300; Lyne v. Wann, 72 Ala. 43; Humphreys v. Burleson, 72 Ala. 1; Bowden v. Perdue, 59 Ala. 409; Boswell v. Townsend, 57 Ala. 308; Otis v. Dargan, 53 Ala. 178; Robertson v. Walker, 51 Ala. 484.

[b] **Under the Indiana statute** (1) authorizing the filing of a petition by a person interested in an estate who did not appear at the final settlement, and was not personally summoned, to have the settlement set aside for fraud or mistake, the petition must show that the petitioner did not appear and was not personally summoned. Graham v. Russell, 152 Ind. 186, 52 NE 806; Crum v. Meeks, 128 Ind. 360, 27 NE 722; Williams v. Williams, 125 Ind. 156, 25 NE 176; Dillman v. Barber, 114 Ind. 403, 16 NE 825; Euler v. Euler, 55 Ind. A. 547, 102 NE 856; Rush v. Kelley, 34 Ind. A. 449, 73 NE 130. (2) Where, however, a public officer petitions to set aside a final settlement, in order that the property of the estate may be subject to the payment of delinquent taxes, such averments need not be made. Graham v. Russell, 152 Ind. 186, 52 NE 806.

[c] **Under the Pennsylvania statute** (1) it must be alleged that complainant had no notice of, and was not present at, the settlement. Le Moyne's App., 104 Pa. 321. See also Costigan's Est., 13 Phila. (Pa.) 264 (petition containing such allegations and pointing out errors sufficient). (2) It must also be alleged that the balance found to be due has not been actually paid and distributed. In re Bear, 162 Pa. 547, 29 A 856; Lehr's App., 98 Pa. 25; Cramp's App., 81 Pa. 90 [rev 8 Phila. 204]; Russell's App., 34 Pa. 258; Clothier's Est., 4 Pa. Co. 214, 20 WklyNC 379; Wistar's Est., 15 Phila. (Pa.) 563; Wainwright's Est., 37 LegInt (Pa.) 274.

[d] **South Dakota statute.**—A petition by adult heirs and on behalf of minor heirs to open a decree of the county court approving the final report of the executor and distributing the estate, to correct an error resulting from an erroneous allowance to the executor and his attorney, which purports to be a petition of persons interested in the estate, and which sets forth facts showing that the allowance is erroneous as a matter of law, and which avers the fact of the minority of heirs and presentation of the petition on their behalf, is, as to such heirs, a sufficient petition within a statute authorizing persons laboring under any legal disability, to move to reopen the account of executor before final distribution, the term "legal disability" including minority, although the minors have a guardian. In re Nelson, 26 S. D. 615, 129 NW 113.

94. Adams v. Walsh, 190 Ala. 516, 67 S 432.

95. Miller v. Steele, 64 Ind. 79.

96. Hatcher's Succ., 23 La. Ann. 136.

97. Hatcher's Succ., 23 La. Ann. 136.

98. Hazlett v. Burge, 22 Iowa 531.

99. Ala.—Watts v. Frazer, 80 Ala. 186; Duckworth v. Duckworth, 35 Ala. 70.

Ind.—Rush v. Kelley, 34 Ind. A. 449, 73 NE 130.

Nebr.—Weeke v. Wortmann, 77 Nebr. 407, 109 NW 503.

N. Y.—In re Finck, 171 NYS 988.

Pa.—Russell's App., 34 Pa. 258; Yeager's App., 34 Pa. 173; Kachlein's App., 5 Pa. 95; Snyder's Est., 18 Pa. Super. 462; Van Syckel's Est., 26 Pa. Co. 412; Hensler's Est., 18 LancLRev 317; Milligan's App., 34 LegInt 168; Frey's Est., 12 Phila. 15; Ehrhart's Est., 17 YorkLegRec 137.

S. C.—Fraser v. Hext, 21 S. C. Eq. 250; Murrel v. Murrel, 21 S. C. Eq. 148, 46 AmD 664.

Utah.—In re Raleigh, 48 Utah 128, 136, 158 P 705 [quot Cyc].

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[a] **Sufficient petitions.**—(1) Under a statute, authorizing the setting aside of an administrator's final settlement on a petition setting forth any illegality or mistake in such settlement or in the prior administration proceedings, a petition, filed by the widow, showing that the settlement was made without payment of her allowance, and averring that the approval of the administrator's final report and the decree of final settlement were procured by a fraudulent statement that the heirs had settled with the widow and paid her allowance, when in fact they had not done so, and further showing a taking of improper credit by the administrator, and the wrongful application of assets which should have been used in payment of the allowance, states sufficient grounds for setting aside the settlement. It is not necessary for the widow to allege that she has not lost or waived her right to the allowance. Rush v. Kelly, 34 Ind. A. 449, 73 NE 130. (2) Where a bill to vacate a probate decree for fraud alleged the investment of some of complainants' funds in certain stock and bonds and that respondent held the proceeds of the bonds and only accounted for the stock, and so framed her account as to fraudulently mislead the court and complainants into the belief that she was accounting for all that had been received as the result of the investment, and complainants were ignorant until after the settlement as to the bonds purchased with the stock, which respondent fraudulently concealed from her account and inventory on final settlement, it stated grounds for equitable relief. Martinez v. Meyers, 167 Ala. 456, 52 S 592. (3) A petition which alleged the death of decedent, and that plaintiffs were his only heirs, an agreement for distribution, the appointment of an administrator, and the distribution of the estate, the one plaintiff's mental weakness, and that defendant administrator, with intent to defraud him presented an agreement and represented to him that the wife of such defendant, and certain others, were heirs, and entitled to share therein, and that unless plaintiff signed such agreement the whole estate would be squandered, and that, if he would sign such agreement and have defendant appointed administrator, plaintiff would receive five hundred dollars more than he was legally entitled to, and that, misled by such false statements plaintiff signed a certain receipt on request of the defendant by which defendant said he would receive five hundred dollars more than he was entitled to, all of which was false, and that he in fact signed the receipt without any consideration, and that defendant knew plaintiff was mentally weak, and that the persons alleged were not heirs to the estate, and that plaintiff had no knowledge of such fraud until within six months before the beginning of suit to set aside settlement of estate and discharge of administrator, stated a cause of action for relief against an order of the probate court alleged to have been procured by fraud. Weeke v. Wortmann, 77 Nebr. 407, 109 NW 503.

[b] **An attack by sufficient allegations on an allowance** to an administrator of commissions to which he is not entitled according to the allegations of the bill is a sufficient specification of an improper charge in a bill to surcharge such settlement. Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[c] **Insufficient petition.** — An averment that on the hearing of the final report no proof was made to the court that the proper notice of such hearing had been given is not equivalent to an averment that such notice had not been given, and is insufficient to authorize a setting aside of the final settlement. Chase v. Beeson, 92 Ind. 61.

1. U. S.—Badger v. Badger, 2 F. Cas. No. 718, 2 Cliff. 137 [aff 2 Wall. 87, 17 L. ed. 836].

Ark.—Floyd v. Newton, 97 Ark. 459, 134 SW 934; McLeod v. Griffis, 51 Ark. 1, 8 SW 837; Mock v. Pleasants, 34 Ark. 63; Stone v. Stillwell, 23 Ark. 444; Ringgold v. Stone, 20 Ark. 526.

Ind.—Pollard v. Barkley, 117 Ind. 40, 17 NE 294; Chase v. Beeson, 92 Ind. 61; Reed v. Reed, 44 Ind. 429.

to surcharge and falsify, the bill or petition must specifically point out the errors, omissions, or false charges complained of.[2]

[§ 2501] **c. Amendment.** Where a demurrer to a bill by the sole heir and next of kin of a decedent to enjoin an impostor, who impersonated him on the final settlement, from collecting the amount decreed to be due to such heir, was sustained for want of equity, it was held proper to permit the bill to be amended so as to seek a correction of credits allowed the administrator upon the consent of the impostor.[3]

[§ 2502] **8. Evidence.** The burden rests upon the party seeking to open, vacate, or set aside the final settlement of the accounts of an executor or administrator, to show affirmatively the existence of adequate ground therefor.[4] The general rules with respect to competency, relevancy, and materiality of evidence[5] govern in determining the admissibility of the evidence offered;[6] and in order to warrant relief the proof must be clear, positive, and satisfactory.[7]

[§ 2503] **9. Hearing and Determination.** The representative should be afforded an opportunity of meeting the charges on which the proceeding is based.[8] The findings should be consistent with the pleadings.[9] Whether or not a decree settling the account of an executor or administrator shall be opened, vacated, or set aside is a matter which rests largely in the discretion of the court,[10] and the court may impose any reasonable condition on vacating the decree.[11]

Stay of proceedings. Where a distributee brought an action in the supreme court against the administrator to set aside an agreement of distribution as fraudulent, and subsequently there was a petition in the surrogate's court to set aside the decree settling the accounts of the administrator, based on such alleged fraudulent agreement, it was held that trial of such proceeding should be stayed until a decision of the action in the supreme court.[12]

[§ 2504] **10. Effect of Opening or Setting Aside —a. In General.** When the settlement of a personal representative is annulled by a court of competent jurisdiction, the rights and liabilities of the parties thereto are the same as if the settlement had never been made.[13] On a petition to open such a settlement and surcharge the account, it is proper so to open it as to correct errors on both sides;[14] and when a settlement is opened at the instance of

Kan.—Ladd v. Nystol, 63 Kan. 23, 64 P 985; Gafford v. Dickinson, 37 Kan. 287, 15 P 175.

N. J.—Hyer v. Morehouse, 20 N. J. L. 125. But compare Trimmer v. Adams, 18 N. J. Eq. 505 (petition to set aside account as illegally and improvidently allowed, and also to open it for mistake and fraud therein, need not specify in what the fraud or mistake consists or the items alleged to be affected thereby).

N. Y.—In re Finck, 171 NYS 988; In re Baity, 20 NYS 70, 2 Conn. Surr. 485.

2. Ga.—Shorter v. Hargroves, 11 Ga. 658.

Ky.—Terrell v. Rowland, 86 Ky. 67, 4 SW 825, 9 KyL 258; Smith v. Nuckols, 5 KyL 426; Crow v. Crow, 4 KyL 909.

Miss.—Miller v. Womack, Freem. 486.

Tenn.—Dodson v. Dodson, 6 Heisk. 110.

Utah.—In re Raleigh, 48 Utah 128, 136, 158 P 705 [quot Cyc].

Va.—Radford v. Fowlkes, 85 Va. 820, 8 SE 817; Green v. Thompson, 84 Va. 376, 5 SE 507; Corbin v. Mills, 19 Gratt. (60 Va.) 438; Newton v. Poole, 12 Leigh (39 Va.) 112; Garrett v. Carr, 3 Leigh (30 Va.) 407.

W. Va.—Seabright v. Seabright, 28 W. Va. 412.

[a] **Filing specifications of additional items.**—If plaintiff in proceedings in equity to surcharge and falsify an ex parte account rendered by an administrator does not wish to be confined before the commissioner to the items named in his bill, he should file specifications of additional items which he intends to attack. Seabright v. Seabright, 28 W. Va. 412.

[b] **There may be a waiver of this requirement** by going fully, without objection, into an item not specifically noticed in the bill. McGuire v. Wright, 18 W. Va. 507.

3. Morgan v. Gaiter, 182 Ala. 322, 62 S 731.

4. Ala.—Adams v. Walsh, 75 S 888; Cowan v. Jones, 27 Ala. 317.

Ark.—Stone v. Stillwell, 23 Ark. 444.

Ga.—Walker v. Wootten, 18 Ga. 119.

La.—Carroll v. Wooley, 24 La. Ann. 495.

Md.—Wilson v. Hilliard, 131 Md. 10, 101 A 603.

Nebr.—In re Greenwood, 83 Nebr. 429, 119 NW 671.

N. J.—In re Morris, 86 N. J. Eq. 161, 97 A 284.

Pa.—In re Macpherson, 269 Pa. 492, 103 A 887; Stetler's Est., 39 Pa. Super. 91; Philips' Est., 24 Pa. Dist. 716; Small's Est., 23 Pa. Dist. 793; Fury's Est., 20 Pa. Dist. 264; Troelsch's Est., 19 Pa. Dist. 566, 38 Pa. Co. 40; Thompson's Est., 19 Pa. Dist. 407; Bicking's Est., 12 Pa. Dist. 159, 28 Pa. Co. 299; Unruh's Est., 10 Pa. Dist. 293, 25 Pa. Co. 257, 15 York LegRec 23; Miller's Est., 7 Pa. Dist. 762; Gebbie's Est., 7 Pa. Dist. 675; Walker's Est., 41 Pa. Co. 14.

W. Va.—Fields v. Lawyer, 97 SE 597.

5. See Evidence 22 C. J. p 1.

6. Hall v. Santangelo, 178 Ala. 447, 60 S 168.

7. Ala.—Adams v. Walsh, 75 S 888; Morgan v. Gaiter, 182 Ala. 322, 62 S 731.

Ga.—Mobley v. Mobley, 9 Ga. 247.

Ind.—Ray v. Doughty, 4 Blackf. 115; Murdock v. Holland, 3 Blackf. 114.

Iowa.—Smith v. Buchanan, 96 NW 1086.

Ky.—Brown v. Wickliffe, 1 A. K. Marsh. 337.

La.—Watt's Succ., 122 La. 952, 48 S 335.

Md.—Wilson v. Hilliard, 131 Md. 10, 101 A 603.

Mo.—McLean v. Bergner, 80 Mo. 414; Picot v. Bates, 47 Mo. 390; Cooper v. Duncan, 58 Mo. A. 5; Phillips v. Broughton, 30 Mo. A. 148.

N. J.—Engle v. Crombie, 21 N. J. L. 614 [rev 19 N. J. L. 82]; Johnson v. Eicke, 12 N. J. L. 316.

N. Y.—Spallholz v. Sheldon, 158 App. Div. 367, 143 NYS 417 [aff 216 N. Y. 205, 111 NE 431, AnnCas1917C 1017]; Matter of Henry, 78 Misc. 319, 139 NYS 690; Matter of Haicht, 50 Misc. 238, 100 NYS 488, 5 Mills Surr. 376; In re Noe, 178 NYS 774; Matter of Boyle, 151 App. Div. 568, 136 NYS 96 [aff 208 N. Y. 545 mem. 101 NE 1095 mem]; Totten's Est., Tuck. Surr. 115.

Or.—Highland v. Tollisen, 75 Or. 578, 147 P 558; Johnson v. Savage, 50 Or. 294, 91 P 1082; In re Conant, 43 Or. 530, 73 P 1018.

Pa.—In re Finley, 196 Pa. 140, 46 A 443 [aff 8 Pa. Dist. 723]; Philips' Est., 24 Pa. Dist. 716.

S. C.—White v. Hewitt, 86 S. C. 576, 68 SE 820.

Ont.—Murray v. McKenzie, 23 Ont. L. 287, 2 OntWN 302, 785, 17 OntWR 603, 18 OntWR 747, 21 AnnCas 968.

[a] **Especially is this true where** several years have elapsed since confirmation of the account. Barr's Est., 43 Pa. Super. 540.

[b] **Representations showing fraud.**—It is competent to prove a fraud in procuring a judgment of discharge by proof of representations made by an administrator, upon which the court acted, that he had fully and faithfully settled the estate and executed his trust and by proof of facts which falsify those representations. Mobley v. Mobley, 9 Ga. 247.

8. Matter of Waters, 183 App. Div. 840, 171 NYS 897.

[a] **Reopening premature order.**—Where, on a petition to set aside a decree settling the account of an administrator on the ground of fraud in procurement of an agreement on which the decree was based, time for the administrator to file affidavits was extended by stipulation, and the decree was prematurely vacated because the attorneys had overlooked filing of the stipulation, the court should have reopened the order and allowed the administrator his day in court. Matter of Waters, 183 App. Div. 840, 171 NYS 897.

9. Smith v. Hauger, 150 Mo. 437, 51 SW 1052.

[a] **Improper finding.**—A finding that a final settlement by an executor was acquiesced in by a specific legatee, "under a misapprehension of fact," is erroneous, where the complaint seeking to have the settlement disregarded only claims that it was founded upon "a verbal agreement" between the legatee and the executor, which had not been lived up to. Smith v. Hauger, 150 Mo. 437, 51 SW 1052.

10. Thompson v. De Visser, 219 Mass. 40, 106 NE 548; In re Van Wagoner, (N. J. Prerog.) 97 A 893; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

11. Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

12. Matter of Waters, 183 App. Div. 840, 171 NYS 897.

13. Thacker v. Dunn, 26 La. Ann. 442; Lynch's Est., 17 Pa. Dist. 374; Macomber v. Macomber, (R. I.) 31 A 753; Leake v. Leake, 75 Va. 792.

[a] **Repayment by distributees** of the amount in excess of their rightful shares which they received pursuant to an erroneous decree of distribution, subsequently set aside, may be compelled. Lynch's Est., 17 Pa. Dist. 374.

14. Floyd v. Friester, 29 S. C. Eq. 248.

the personal representative to correct mistakes for his benefit, other mistakes inuring to the benefit of persons interested in the estate will be corrected also.[15] Where a decree settling the accounts of administrators improperly adjudges that a claim has been rejected and is barred by the statute of limitations, there is no occasion for opening the decree further than may be necessary to preserve funds for the payment of the claim, if any is established.[16] Where one of several persons interested in an estate institutes a proceeding to revise the account of the personal representative thereof, if successful, it inures to the benefit of all persons similarly interested.[17] But the fact that a decree discharging a personal representative is vacated as to one distributee against whom the statute of limitations had not run, because of disability, does not inure to the benefit of others not under any disability, since the rights of all the distributees are entirely separate.[18]

[§ 2505] **b. Distinction between Opening, and Surcharging and Falsifying.** When errors or mistakes only are shown to exist in an account the settlement will not be opened, as will be done where fraud or accident affecting the entire action of the probate court is shown; but the person alleging the error or mistake in the account will be permitted to surcharge and falsify it.[19] The distinction between opening an account and surcharging and falsifying it is that when an account is opened the whole of it becomes subject to review, while when it is merely surcharged and falsified the inquiry is limited to particular items alleged to have been improperly included or omitted, and in all other respects the account is left to stand as it is.[20]

[§ 2506] **11. Effect or Refusal to Open Accounting.** An order dismissing a petition to open the accounts of an executor and to allow a claim of the petitioner against decedent's estate does not affect the right of the petitioner to enforce his claim at law or in equity.[21]

[§ 2507] **12. Annual or Partial Settlements.** An annual or partial settlement, being usually ex parte and only prima facie correct,[22] is liable to be impeached, surcharged and falsified, or opened for correction either on a subsequent annual or partial settlement or upon the final settlement itself.[23] But as such settlements are conclusive as to matters contested and adjudicated thereon,[24] they can be opened or set aside as to such matters only in the same manner as final settlements.[25] The correction of mistakes in annual or partial settlements is some-

15. Gibbons v. Jones, 56 Ga. 297; Saxton v. Chamberlain, 6 Pick. (Mass.) 422.

16. Matter of Doig, 125 App. Div. 746, 110 NYS 93.

17. Charlton's App., 34 Pa. 473, 75 AmD 673; Martin's App., 33 Pa. 395; Bardsley's Est., 3 WklyNC (Pa.) 548; Hefflfinger v. George, 14 Tex. 569.

[a] **Creditors.**—Where the account of an administrator was surcharged, but there was no evidence of bad faith or gross neglect, the objecting creditor will not be entitled to the whole amount of the surcharge, but it will be divided among the other creditors. In re McPherran, 212 Pa. 425, 61 A 954.

18. Fitzsimmons v. Johnson, 90 Tenn. 416, 17 SW 100.

19. See cases infra note 20.

20. Ala.—Cowan v. Jones, 27 Ala. 317.

Ark.—McLeod v. Griffis, 51 Ark. 1, 8 SW 837.

Ga.—Shorter v. Hargroves, 11 Ga. 658.

Miss.—Foute v. McDonald, 27 Miss. 610; Neylans v. Burge, 22 Miss. 201; Searles v. Scott, 14 Sm. & M. 94.

Mo.—Bishop v. Chase, 156 Mo. 158, 56 SW 1080, 79 AmSR 515.

N. J.—Hyer v. Morehouse, 20 N. J. L. 125; Matter of Morris, 65 N. J. Eq. 599, 56 A 161; Trimmer v. Adams, 18 N. J. Eq. 505; Stevenson v. Phillips, 15 N. J. Eq. 236.

Pa.—Snyder's Est., 18 Pa. Super. 462; Hensler's Est., 18 LancLRev 317.

Ont.—In re Wilson, 15 Ont. L. 596, 11 OntWR 214.

"The distinction between opening an account, and surcharging and falsifying it, is important; because, when opened, the whole of it may be unraveled; but when permission is given merely to surcharge and falsify, the onus is upon the party who alleges mistakes to prove them. The account, prima facie, stands as correct; and if the party can show an omission for which he should have a credit, it is added (surcharged); or, if a wrong charge has been made against him, it is deducted, which is called a falsification." Cowan v. Jones, 27 Ala. 317, 325.

[a] **Where an executor's account is set aside as having been improvidently allowed,** it should be set aside in its entirety, and the parties allowed to contest every item of it. Trimmer v. Adams, 18 N. J. Eq. 505.

21. Houck v. Houck, 112 Md. 122, 76 A 581.

22. See supra §§ 2488, 2489.

23. Ala.—Tayloe v. Bush, 75 Ala. 432; Moore v. Lesueur, 33 Ala. 237; Smith v. Smith, 13 Ala. 329.

Colo.—Clemes v. Fox, 6 Colo. A. 377, 40 P 843.

Conn.—Clement's App., 49 Conn. 519; Mix's App., 35 Conn. 121, 95 AmD 222; Potwine's App., 31 Conn. 381.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41]; Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403; Blis v. Seaman, 165 Ill. 422, 46 NE 279; Bennett v. Hanifin, 87 Ill. 31; Long v. Thompson, 60 Ill. 27; Bond v. Lockwood, 33 Ill. 212; Ford v. Stuart First Nat. Bank, 100 Ill. A. 70 [rev on other grounds 201 Ill. 120, 66 NE 316]; Strauss v. Phillips, 91 Ill. A. 373 [aff 189 Ill. 9, 59 NE 560].

Iowa.—Dessaint v. Foster, 72 Iowa 639, 34 NW 454; Latham v. Myers, 57 Iowa 519, 10 NW 924; Cowins v. Toole, 36 Iowa 82; Clark v. Cress, 20 Iowa 50.

La.—In re Beecroft, 28 La. Ann. 824.

Me.—McKenzie v. Webber Hospital Assoc., 106 Me. 385, 76 A 704; Arnold v. Mower, 49 Me. 561; Coburn v. Loomis, 49 Me. 406.

Md.—Maynadier v. Armstrong, 98 Md. 175, 56 A 357; Geesey v. Geesey, 94 Md. 371, 51 A 36, 96 Md. 630, 54 A 616; Hoffman v. Armstrong, 90 Md. 123, 44 A 1012; Hoffman v. Hoffman, 88 Md. 60, 40 A 712; Martin v. Jones, 87 Md. 43, 39 A 102; Shafer v. Shafer, 85 Md. 554, 37 A 167; Gavin v. Carling, 55 Md. 530; Wilson v. McCarty, 55 Md. 277; Bantz v. Bantz, 52 Md. 686; In re Stratton, 46 Md. 551; Donaldson v. Raborg, 28 Md. 34; Scott v. Fox, 14 Md. 388; Edelen v. Edelen, 11 Md. 415.

Mass.—Stetson v. Bass, 9 Pick. 27; Stearns v. Stearns, 1 Pick. 157.

Miss.—Dement v. Heth, 45 Miss. 388; Crowder v. Shackelford, 35 Miss. 321; Harper v. Archer, 17 Miss. 71.

Mo.—North v. Priest, 81 Mo. 561; Julian v. Wrightman, 73 Mo. 569; Seymour v. Seymour, 67 Mo. 303; In re Davis, 62 Mo. 450; Sheetz v. Kirtley, 62 Mo. 417; Gamble v. Gibson, 59 Mo. 585; Springfield Grocer Co. v. Walton, 95 Mo. A. 526, 69 SW 477; McClelland v. McClelland, 42 Mo. A. 32.

Nev.—Lucich v. Medin, 3 Nev. 93, 93 AmD 376.

N. H.—Probate Judge v. Lane, 51 N. H. 342; Allen v. Hubbard, 8 N. H. 487.

N. J.—Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369.

Pa.—Ludlam's Est., 1 Pars. Eq. Cas. 116, 3 PaLJR 332, 5 PaLJ 276 [aff 13 Pa. 188].

R. I.—Sherman v. Chace, 9 R. I. 166.

S. C.—Gee v. Humphries, 28 S. C. 606, 5 SE 615.

Tex.—Ingraham v. Rogers, 2 Tex. 465; Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

Utah.—In re Raleigh, 48 Utah 128, 158 P 705.

[a] **The approval of annual exhibits** by the probate judge does not prevent a reëxamination as to items of expenses of administration. McShan v. Lewis, (Tex. Civ. A.) 76 SW 616.

[b] **Allowance of commissions.**—The orphans' court may open an intermediate settlement to correct an error in the allowance of excessive commissions. Jackson v. Reynolds, 39 N. J. Eq. 313 [rev 36 N. J. Eq. 515].

[c] **A statute limiting the time within which application may be made** to open up accounts settled in the absence of parties in interest has no application to mistake or fraud in the settlement of an administrator's intermediate account. Dorris v. Miller, 105 Iowa 564, 75 NW 482.

[d] **Revision of partial settlements under Texas statute.**—Birdwell v. Kauffman, 25 Tex. 189.

24. See supra § 2489.

25. Tasker's Est., 15 Pa. Dist. 166; In re Raleigh, 48 Utah 128, 158 P 705. See cases infra this note.

[a] **Correction for fraud or mistake.**—The probate court has the power and it is its duty upon the proof of fraud, accident, or mistake in the adjustment of any item in a former account to alter and correct it in such manner as to make it what it ought to be. Adams v. Adams, 21 Vt. 162.

[b] **When opening properly refused.**—(1) The court, in proceedings for the allowance of the third and final account of an administrator, properly refused to open the first and second accounts to falsify them as to the amounts allowed the administrator therein for taxes on real estate and for insurance. Kenyon v. Kenyon, 31 R. I. 270, 76 A 798. (2) If there is no apparent errors on the face of an ex parte settlement of a personal representative, and the answer in a suit to surcharge and fal-

times provided for by express statute.[26] An order of reference in proceedings in equity to surcharge and falsify an executor's account settled ex parte should be general in form.[27]

Question not considered. In an action by creditors of a decedent to have lands held by his widow, who was his administratrix, which were redeemed from mortgages by the use of general assets of the estate under order of the probate court, and sold by authority of the court, declared held in trust for their benefit, and seeking that the administration accounts be surcharged and falsified, the claim of the widow to certain credits as administratrix, which the probate court authorized her to take at some future settlement to be filed by her, and for which she had not asked credit in any settlement, will not be considered, her administration being still open.[28]

[§ 2508] **J. Review—1. In General.** The decrees and orders of probate courts rendered upon the settlements of personal representatives are ordinarily, like other decrees and orders, subject to review by appeal or writ of error,[29] although in the absence of any statute authorizing an appeal from such a judgment, the right of appeal has been denied.[30] In a proper case a writ of certiorari will lie to review such an order or decree.[31]

Where the chancery court assumes jurisdiction of the settlement of the account of a personal representative, its action is subject to review.[32]

[§ 2509] **2. Orders and Decrees Reviewable.** As a general rule only orders or decrees which are final are reviewable;[33] but an appeal is sometimes

sify such settlement denies all errors alleged in the bill, and makes no statements showing that there are no other errors in the settlement, and plaintiff fails to produce evidence establishing any error in the ex parte settlement, the court should not refer the cause to a commissioner, but should dismiss the bill. Seabright v. Seabright, 28 W. Va. 412.

26. Harrell v. Seal, 121 Ind. 193, 22 NE 983; Collins v. Tilton, 58 Ind. 374; Goodwin v. Goodwin, 48 Ind. 584; Sherry v. Sansberry, 3 Ind. 320; Murdock v. Holland, 3 Blackf. (Ind.) 114; Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 AmD 123; Allen v. Clark, 2 Blackf. (Ind.) 343; Brigham v. Morgan, 185 Mass. 27, 69 NE 418; Denholm v. McKay, 148 Mass. 434, 19 NE 551, 12 AmSR 574; Granger v. Bassett, 98 Mass. 462; Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716; Field v. Hitchcock, 14 Pick. (Mass.) 405; Stetson v. Bass, 9 Pick. (Mass.) 27; Watts v. Watts, 38 Oh. St. 480; Stayner's Case, 33 Oh. St. 481, 487; Campbell v. McCormick, 1 Oh. Cir. Ct. 504, 1 Oh. Cir. Dec. 281; Slagle v. Slagle, 3 Oh. Dec. (Reprint) 549.

27. Seabright v. Seabright, 28 W. Va. 412.

28. Salinger v. Black, 68 Ark. 449, 60 SW 229.

29. Ark.—Stricklin v. Galloway, 99 Ark. 56, 137 SW 804.

Cal.—In re Hall, 154 Cal. 257, 98 P 269; In re McDougald, 143 Cal. 476, 77 P 443.

Conn.—Atwater v. Barnes, 21 Conn. 237; Edmond v. Canfield, 8 Conn. 87; Goodrich v. Thompson, 4 Day 215.

Ida.—In re Coryell, 16 Ida. 201, 101 P 723.

Ill.—Peo. v. Kohlsaat, 168 Ill. 37, 48 NE 81 [aff 66 Ill. A. 505]; In re Pridmore, 187 Ill. A. 301.

Mass.—Moyer v. Bray, 227 Mass. 303, 116 NE 511.

Miss.—Freeman v. Rhodes, 11 Miss. 329.

Mo.—Taylor v. Bader, 117 Mo. A. 72, 98 SW 80.

Nebr.—Etmund v. Etmund, 83 Nebr. 151, 119 NW 239.

N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288; Strauss v. Costello, 29 N. D. 215, 150 NW 874.

Oh.—Jenney v. Walker, 80 Oh. St. 100, 88 NE 123.

Pa.—In re Dox, 227 Pa. 606, 76 A 318; In re Milliken, 227 Pa. 502, 76 A 248; Ruane's Est., 26 Pa. Dist. 320.

S. C.—Mitchel v. Connolly, 17 S. C. L. 203 [reviewing & lim Wallis v. Gill, 14 S. C. L. 475].

Tenn.—Gaines v. Eason, 130 Tenn. 86, 169 SW 309.

Tex.—Friend v. Boren, 43 Tex. Civ. A. 33, 95 SW 711.

[a] **To what court appeal taken.**—A party excepting to the accounts of an administrator need not, where the estate is solvent, appeal from the action of the clerk to the circuit or chancery court, but may appeal to the county court or, in Shelby county, to the probate court. Gaines v. Eason, 130 Tenn. 86, 169 SW 309.

[b] **Grounds for review as of right.**—An executor's account can be reviewed as a matter of right only for error on the face of the record, or for new matter that has arisen since the decree, and, in the discretion of the court, for after discovered evidence which could not have been procured before the decree by the exercise of due diligence. In re Dox, 227 Pa. 606, 76 A 318; In re Milliken, 227 Pa. 502, 76 A 248; Le Moyne's App., 104 Pa. 321; Green's App., 59 Pa. 235.

[c] **Where part of account continued for future consideration.**—Where the probate judge settles part of the account of an administrator and continues the remainder for future consideration, the judgment thus rendered does not settle the account as to matters continued, and an appeal will not lie by those interested in the matters continued. In re Coryell, 16 Ida. 201, 101 P 723.

[d] **The effect of an appeal** from an order allowing the account from an administrator is to suspend its operation until the appeal is decided. Moyer v. Bray, 227 Mass. 303, 116 NE 511.

Appeal in probate proceedings generally see Appeal and Error §§ 406–411.

30. Turner v. Johnson County Ct., 14 Bush (Ky.) 411; Denis v. Cordeviella, 4 Mart. (La.) 344.

[a] **The proceeding of a motion for a new trial** does not apply to a probate order settling the account of a personal representative. In re Franklin, 133 Cal. 584, 65 P 1081 [cit Sanderson's Est., 74 Cal. 199, 15 P 753; Herteman's Est., 73 Cal. 545, 15 P 121; Moore's Est., 72 Cal. 335, 13 P 880, and dist Leach v. Pierce, 93 Cal. 624, 29 P 238; Bauquier's Est., 88 Cal. 302, 26 P 178, 532].

31. Graham v. Abercrombie, 8 Ala. 552; State v. Mayhew, 9 N. J. L. 70; Friend v. Boren, 43 Tex. Civ. A. 33, 95 SW 711.

[a] **The remedy is available, although** a remedy by appeal also exists. Friend v. Boren, 43 Tex. Civ. A. 33, 95 SW 711.

[b] **That an administrator had paid out the entire estate, and been finallly discharged** by the county court, was no defense to a writ of certiorari to review such proceedings, and to compel a restatement of the administrator's account. Friend v. Boren, 43 Tex. Civ. A. 33, 95 SW 711.

Review of probate proceedings by certiorari generally see Certiorari § 92.

32. Filley v. Van Dyke, 75 N. J. Eq. 571, 72 A 943 [rev 74 N. J. Eq. 219, 69 A 200]. See also Equity §§ 871–936.

33. Ala.—Watt v. Watt, 37 Ala. 543.

Cal.—In re Kruger, 123 Cal. 391, 55 P 1056.

Colo.—Clemes v. Fox, 6 Colo. A. 377, 40 P 843.

Ida.—In re Coryell, 16 Ida. 201, 101 P 723.

Ill.—Snell v. Weldon, 162 Ill. A. 14; Van Sellar v. James, 113 Ill. A. 206.

Ind.—Stout v. Stout, (A.) 114 NE 473.

Kan.—In re Bigge, 52 Kan. 184, 34 P 782.

Ky.—Scott v. Kennedy, 12 B. Mon. 510; Hart v. Hart, 2 Bibb 609.

La.—Calloway's Succ., 49 La. Ann. 968, 22 S 225; State v. Judge Second Dist. Ct., 32 La. Ann. 300; Planchet's Succ., 29 La. Ann. 520; McLean's Succ., 5 La. Ann. 671.

Mass.—Cook v. Horton, 129 Mass. 527.

Mich.—Perrin v. Lepper, 72 Mich. 454, 40 NW 859.

Mo.—Branson v. Branson, 102 Mo. 613, 15 SW 74; Seymour v. Seymour, 67 Mo. 303.

Nev.—Bowman v. Bowman, 27 Nev. 413, 76 P 634.

N. J.—Cooley v. Vansyckle, 14 N. J. Eq. 496.

N. D.—Strauss v. Costello, 29 N. D. 215, 150 NW 874.

Pa.—Long's Est., 168 Pa. 341, 31 A 1093.

Utah.—Moyes v. Agee, 178 P 753.

Vt.—Adams v. Adams, 21 Vt. 162.

Wash.—In re Sour, 17 Wash. 675, 50 P 587.

[a] **The test of finality** is whether or not the action of the court so determined the matter in dispute that it is no longer open to contention. Clemes v. Fox, 6 Colo. A. 377, 40 P 843; Perrin v. Lepper, 72 Mich. 454, 40 NW 859.

[b] **Provision for future statement.**—A provision that the representative shall make a statement of receipts and expenses since the rendition of his account does not render the decree less final. Moyes v. Agee, (Utah) 178 P 753.

[c] **An appeal lies from:** (1) An order of the orphans' court disallowing the account of a previous administrator in a settlement with the administrator de bonis non. Shortridge v. Easley, 10 Ala. 520. (2) An order fixing the compensation of a personal representative. In re Sour, 17 Wash. 675, 50 P 587. See also Lamar v. Lamar, 118 Ga. 684, 45 SE 498 (representative may except to decree depriving him of commissions to which he is legally entitled). (3) An order directing a personal representative to pay a certain fee to his attorney. In re Kruger, 123 Cal. 391, 55 P 1056; In re Kasson, 119 Cal. 489, 51 P 706. (4) An order disallowing a claim by an administrator for money paid for a burial lot for decedent on objection of decedent's creditors. Clemes v. Fox, 6 Colo. A. 377, 40 P 843. (5) A determination as to the allowance to be made to the attorney of administrator for services in an action. Callender v. Callender, 82 SW 372, 26 KyL 705.

allowed from any order which affects a substantial right,[34] even though it is not final.[35] Usually the allowance of an annual or partial settlement is not regarded as a final decree or order from which an appeal can be taken,[36] although a different rule is sometimes established by statute.[37] No appeal lies from the refusal of the probate court to allow an account informally presented by a personal representative without a settlement in due form,[38] or from its refusal to make an order as to a matter entirely within its discretion.[39] It is usually held that an appeal will lie from an order or decree of the probate court setting aside,[40] or refusing to set aside,[41] a former decree rendered on the final settlement of an administration account, and from the denial of a motion made on the final accounting of a personal representative to direct him to pay counsel fees.[42]

An appeal may be taken from a part of a final order or judgment if the part whereby appellant is aggrieved is so far distinct and independent that it may be adjudicated on appeal without bringing up for review the entire order or judgment.[43] However, an appeal will not lie from a disallowance of certain items in an administrator's account, but must be taken from the order itself, so as to bring up the entire matter and permit a rehearing upon each and every item of the account.[44]

Order not appealable because of inadvertent omission. Where an item in an administrator's account is allowed by the court, but inadvertently omitted from its order, an appeal is not justified, since the order could no doubt be corrected by calling the court's attention to such omission.[45]

A void order may, it has been said, be appealable,[46] although a contrary view has also been expressed.[47]

[§ 2510] **3. Persons Entitled to Review—a. In General.** The general rules that any party aggrieved by a judgment or decree may appeal therefrom,[48] and that in a legal sense a party is aggrieved by a judgment or decree whenever it operates on his rights of property or bears directly upon his interest[49] apply in proceedings for the settlement of administration accounts;[50] and, conversely, one cannot appeal from a judgment or order rendered in such a proceeding unless he is, either as an individual or in a representative capacity, aggrieved thereby, in that it prejudicially affects his rights of property or pecuniary interests, or those of others for whom he is, with relation to such proceeding, the duly constituted representative.[51]

[d] **A decree cannot be regarded as final where** the true amount to be made by the execution thereon is to be determined by future inquiry. Tuggle v. Gilbert, 1 Duv. (Ky.) 340.

34. In re Gilbert, 104 N. Y. 200, 10 NE 148; Matter of Burnett, 15 NYSt 116.

35. In re Gilbert, 104 N. Y. 200, 10 NE 148; In re Halsey, 93 N. Y. 48.

36. Thompson v. Hunt, 22 Ala. 517; Goodwin v. Goodwin, 48 Ind. 584; North v. Priest, 81 Mo. 561; Baker v. Schoeneman, 41 Mo. 391; Picot v. O'Fallon, 35 Mo. 29, 86 AmD 134; Peper v. Bell, (Mo. A.) 218 SW 438; Owens v. Owens, 109 Va. 432, 63 SE 990.

[a] **Reason for rule.**—"Until surcharged and falsified in the manner indicated by statute, the ex parte settlement, although confirmed by the order of the court, is mere matter of evidence, and an order of this court affirming the order of the chancery court would not make the ex parte settlement any more final than it was before the appeal was taken. It could still be questioned by a bill to surcharge and falsify; so that an appeal from such an order would be barren of results." Owens v. Owens, 109 Va. 432, 434, 63 SE 990.

[b] **The remedy of one who objects** is by suit to surcharge the account. Owens v. Owens, 109 Va. 432, 63 SE 990.

37. In re Grant, 131 Cal. 426, 63 P 731; Burdick's Est., 112 Cal. 387, 44 P 734; In re Delaney, 110 Cal. 563, 42 P 981; Couts' Est., 87 Cal. 480, 25 P 685; Sanderson's Est., 74 Cal. 199, 15 P 753; Dean v. Santa Barbara County Super. Ct., 63 Cal. 473; Rhoads' App., 39 Pa. 186 [overr Light's App., 22 Pa. 445]; Ruane's Est., 26 Pa. Dist. 320.

[a] **In Alabama,** under an earlier statute, not now in force, an appeal from such a settlement was allowed. Thompson v. Hunt, 22 Ala. 517 [overr Stewart v. Price, 16 Ala. 40]; Savage v. Benham, 11 Ala. 49.

38. Trammell v. Trammell, 50 Ala. 39.

39. Moore v. Raggi, 32 N. J. Eq. 273.

40. Bruce v. Strickland, 47 Ala. 192; Davis v. Cowdin, 20 Pick. (Mass.) 510.

[a] **Contrary view.** — Cahalan's Est., 70 Cal. 604, 12 P 427 (an order setting aside a decree settling the final account of an executor, although not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account); In re Dean, 62 Cal. 613; In re Dunne, 53 Cal. 631.

41. Griswold v. Smith, 221 Ill. 341, 77 NE 551; Griswold v. Smith, 116 Ill. A. 223 [writ of error dism 214 Ill. 323, 73 NE 400]; Yakel v. Yakel, 96 Md. 240, 53 A 914; Githens v. Goodwin, 32 N. J. Eq. 286.

[a] **Order "without prejudice."**—Where a coexecutor filed a petition to set aside an order of the orphans' court on a final accounting of his coexecutors, entered without notice to petitioner within thirty days after such order, the fact that the court's order dismissing the petition was "without prejudice" did not preclude petitioner from appealing therefrom. Yakel v. Yakel, 96 Md. 240, 53 A 914.

[b] **Contrary rule.**—In re Spafford, 175 Cal. 52, 165 P 1; In re Cahill, 142 Cal. 628, 76 P 383; Wiard's Est., 83 Cal. 619, 24 P 45; Lutz's Est., 67 Cal. 457, 8 P 29; In re Calahan, 60 Cal. 232; In re Kelly, 31 Mont. 356, 78 P 579, 79 P 244.

42. Seaman v. Whitehead, 78 N. Y. 306.

43. Gunn v. Newcomer, (Kan. A.) 57 P 1052; St. Paul Trust Co. v. Kittson, 84 Minn. 493, 87 NW 1012.

44. Showers v. Morrill, 41 Mich. 700, 3 NW 193.

45. In re Byrne, 122 Cal. 260, 54 P 957, 1015.

46. Bullock's Est., 75 Cal. 419, 17 P 540.

47. In re Barker, 26 Mont. 279, 67 P 941.

48. See Appeal and Error § 466.

49. See Appeal and Error § 493.

50. Cal.—In re Ross, 182 P 303; In re Heaton, 73 P 185.

Del.—State v. Layton, 3 Del. 348.

Ind.—Taylor v. Burk, 91 Ind. 252; Reed v. Reed, 44 Ind. 429.

Kan.—Sarbach v. Maryland Fidelity, etc., Co., 99 Kan. 29, 160 P 990, 991, LRA1917B 1043 [quot Cyc].

La.—Hartigan's Succ., 51 La. Ann. 126, 24 S 794; Scott's Succ., 41 La. Ann. 668, 6 S 792.

Me.—Sturtevant v. Tallman, 27 Me. 78.

Mass.—Livermore v. Bemis, 2 Allen 394.

Mich.—Clifton v. Jackson Prob. Judge, 154 Mich. 488, 117 NW 1051; Fingleton v. Kent Cir. Judge, 116 Mich. 211, 74 NW 473; Grady v. Hughes, 64 Mich. 540, 31 NW 438.

Mont.—In re Barker, 26 Mont. 279, 67 P 941.

Nebr.—Gannon v. Phelan, 64 Nebr. 220, 89 NW 1028.

N. H.—Bryant v. Allen, 6 N. H. 116.

N. Y.—Matter of Sullivan, 84 App. Div. 51, 82 NYS 32.

Oh.—Trumpler v. Royer, 95 Oh. St. 194, 115 NE 1018.

Pa.—Justice's Est., 15 Pa. Dist. 342.

Tex.—Levy v. Moody, (Civ. A.) 87 SW 205.

Vt.—Barker v. Rogers, 2 Vt. 440.

[a] **A person with a contingent interest in realty** under the will may appeal from a decree of the probate court allowing the account of the executor, which will probably require a sale of such land. Paine v. Goodwin, 53 Me. 411.

[b] **A grantee of real estate from the residuary legatee** under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the judge of probate allowing the account. Blastow v. Harcy, 83 Me. 28, 21 A 179.

[c] **The assignee of land charged by will with the payment of a legacy** may appeal from a decree of the court of probate allowing the account of the executrix. Leavitt v. Wooster, 14 N. H. 550.

[d] **A city to whom taxes were due** by an administrator was "a creditor of or person interested in the estate," within the meaning of a statute providing that a creditor of or person interested in the estate or fund affected by decree or order of the surrogate, who was not a party to the special proceeding, but was entitled by law to be heard therein on his application, may intervene and appeal. Matter of Sullivan, 84 App. Div. 51, 82 NYS 32.

[e] **A revenue agent** has the right to appeal from a decision of the county court refusing to issue a rule requiring that an administrator amend an inventory to include property claimed by such agent to have been improperly omitted. Com. v. Bullock, 178 Ky. 729, 200 SW 45.

51. Cal.—Burdick's Est., 112 Cal. 387, 44 P 734, 5 Cal. Unrep. Cas. 6, 40 P 35.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

An estoppel to appeal may arise from the conduct of the party seeking to obtain a review.[52]

[§ 2511] **b. Legatees, Distributees, and Creditors.** Legatees or distributees,[53] or creditors of decedent,[54] when aggrieved by the order or decree rendered on the settlement of the representative's accounts, may appeal therefrom.

[§ 2512] **c. Personal Representatives.**[55] The right of a personal representative to appeal depends upon whether or not he is aggrieved by the judgment or decree.[56] He cannot appeal from a judgment which rejects a claim against the estate which he has not paid, or become personally liable to pay;[57] but where he has paid claims placed on his account, he has a direct interest in sustaining such payments and may appeal from a judgment adverse to their validity.[58] He may also appeal from a decree charging him, as he claims improperly, with funds as belonging to the estate,[59] or from an order modifying his report and ordering a distribution of the estate in a manner contended by him to be contrary to the will.[60]

The revocation of letters testamentary or of administration does not affect the right of the representative to appeal from an order settling his accounts.[61]

One who is coexecutor and legatee is in either capacity entitled to appeal from an order of the orphans' court passing a separate account of the other executor, in which the latter is allowed a large claim against the estate,[62] and a coexecutor who was also a residuary legatee, and who objected to the final account, has been held not deprived of his right to appeal from a judgment allowing the same, on the theory that he had participated in filing and procuring the allowance thereof.[63]

In what capacity appeal taken. In order that the representative may appeal in his representative capacity, the estate which he represents must be aggrieved by the order or decree appealed from, otherwise any appeal must be in his individual capacity.[64]

[§ 2513] **4. Presentation and Reservation in Lower Court of Grounds of Review.**[65] In order that a question may be passed upon by the appellate

La.—Barrett's Succ., 43 La. Ann. 61, 8 S 438.
Me.—Tuxbury's App., 67 Me. 267.
Mich.—Labar v. Nichols, 23 Mich. 310.
Mont.—State v. Eighth Judicial Dist. Ct., 26 Mont. 369, 68 P 856.
Nebr.—Merrick v. Kennedy, 46 Nebr. 264, 64 NW 989.
Tenn.—Glosson v. Glosson, 104 Tenn. 391, 58 SW 121.
Wis.—Gunn v. Green, 14 Wis. 316.

[a] **A surety on an administrator's bond** cannot appeal from a decree of the judge of probate settling the account of his principal. Tuxbury's App., 67 Me. 267.

[b] **A purchaser of land from an heir** before final settlement of the administration account has not such interest in the settlement as entitles him to appeal from an order directing the administrator to file the vouchers for moneys paid by him as stated in his final account, or from an order discharging him from further liability. Gunn v. Green, 14 Wis. 316.

52. In re Sherwood, 206 Pa. 465, 56 A 20.

[a] **Circumstances creating estoppel.**—Where a person interested in the estate attaches a formal statement under seal to an account filed in the orphans' court containing an item of distribution that he has examined the account and asks for its confirmation, he is estopped from appealing on the ground of an error in the item. In re Sherwood, 206 Pa. 465, 56 A 20.

53. Ala.—Merrill v. Jones, 2 Ala. 192.
Ark.—Stricklin v. Galloway, 99 Ark. 56, 137 SW 804.
Me.—Tillson v. Small, 80 Me. 90, 13 A 402.
Mass.—Pierce v. Gould, 143 Mass. 234, 9 NE 568; In re Lee, 18 Pick. 285.
Mich.—Labar v. Nichols, 23 Mich. 310.
Mo.—Danforth's Est., 66 Mo. A. 586.
N. H.—Mathes v. Bennett, 21 N. H. 188.
Wis.—In re Hyde, 157 Wis. 462, 145 NW 1079.

[a] **Heirs or next of kin.**—Where there is property of a testator not devised or bequeathed, his heirs or next of kin may appeal from the allowance of the executor's account. Smith v. Haynes, 111 Mass. 346.

[b] **The children of a deceased heir at law** of an intestate may appeal from a decree of the judge of probate by whom the account of the administrator of such intestate has been allowed. Mathes v. Bennett, 21 N. H. 188.

[c] **Distributee of residuary legatee.**—One who is entitled to a distributive share of the estate of a residuary legatee is not the proper party to appeal from a decree allowing the administration account of the executor of such legatee's devisor. Downing v. Porter, 9 Mass. 386.

[d] **All objecting distributees need not join.**—It is not necessary that all the distributees who filed objections to the final settlement of a personal representative should join in an appeal from the judgment rendered on that settlement. In re Swan, 54 Mo. A. 17. Contra Merrill v. Jones, 2 Ala. 192, 194 ("All the distributees in whose favor decrees are pronounced, should join in the writ of error").

54. Ala.—Pearson v. Darrington, 32 Ala. 227.
Kan.—Sarbach v. Maryland Fidelity, etc., Co., 99 Kan. 29, 160 P 990, LRA1917B 1043.
La.—Hartigan's Succ., 51 La. Ann. 126, 24 S 794; Lacroix's Succ., 29 La. Ann. 366; Cloney's Succ., 29 La. Ann. 327; Bellocq's Succ., 28 La. Ann. 154.
Me.—In re Swan, 115 Me. 501, 99 A 449.
Mo.—Taylor v. Bader, 117 Mo. A. 72, 98 SW 80.
N. Y.—Higbie v. Westlake, 14 N. Y. 281.
N. D.—Elton v. Lamb, 33 N. D. 388, 157 NW 288.
Tex.—Davenport v. Hervey, 30 Tex. 308.

[a] **Creditors made parties by order of court.**—Where the creditors of an estate in progress of settlement in chancery are required by an order of court to come in and prove their claims, they become quasi parties to the cause, and may appeal and assign error on account of the rejection of their claims; but the administrator, not being injured by such rejection, cannot complain of it on error. Pearson v. Darrington, 32 Ala. 227.

[b] **Receipt of dividends** by creditors under a decree does not deprive them of their right to appeal therefrom. Higbie v. Westlake, 14 N. Y. 281.

[c] **Person rendering services to representative not a creditor of estate.**—Burke v. Terry, 28 Conn. 414.

[d] **Furnishing material for use in business.**—One who furnished material for use in a business conducted by the representative for the estate is not entitled to appeal. In re De Rome, 175 Cal. 399, 165 P 919.

55. Appeals by personal representatives generally see Appeal and Error § 507.

56. Colo.—Tuckerman v. Currier, 54 Colo. 25, 129 P 210, AnnCas1914C 599.
Ill.—Teel v. Mills, 117 Ill. A. 97.
Ind.—Ansel v. Kyger, 60 Ind. A. 259, 110 NE 559, 561 [cit Cyc].
N. Y.—Matter of Heldmann, 151 App. Div. 234, 135 NYS 143; Matter of Hodgman, 69 Hun 484, 23 NYS 725 [aff 140 N. Y. 421, 35 NE 660]; Matter of Heldmann, 151 App. Div. 234, 135 NYS 143.
Pa.—Chew's App., 3 Grant 308; Wick's Est., 50 Pa. Super. 614.
Wis.—In re Hyde, 157 Wis. 462, 145 NW 1079.

[a] **When appealable interest exists.**—An executor has an interest to appeal whenever it is sought to wrest from him property belonging to the succession, or to impose a debt upon it which will diminish its assets in the fund to be distributed among the heirs or creditors; and his right to appeal exists independently of the heirs or creditors. Cassidy's Succ., 40 La. Ann. 827, 5 S 292.

[b] **An administrator de bonis non** may appeal from a decree of the judge of probate allowing the administration accounts of the original executor or administrator. Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716.

[c] **Right of representative's assignee for benefit of creditors to appeal.**—Slagle v. Slagle, 3 Oh. Dec. (Reprint) 549.

57. Hartigan's Succ., 51 La. Ann. 126, 24 S 794; Kellett v. Rathbun, 4 Paige (N. Y.) 102.

58. Heffner's Succ., 49 La. Ann. 407, 21 S 905.

59. In re Hall, 154 Cal. 527, 98 P 269.

60. In re Overton, 5 Ind. T. 334, 82 SW 766.

61. In re McPhee, 154 Cal. 385, 97 P 878.

62. Hesson v. Hesson, 14 Md. 8.

63. In re Hyde, 157 Wis. 462, 145 NW 1079.

64. Moore v. Ferguson, 163 Ind. 395, 72 NE 126; Ansel v. Kyger, 60 Ind. A. 259, 110 NE 559; Hartigan's Succ., 51 La. Ann. 126, 24 S 794; Mausberg's Succ., 37 La. Ann. 126; Payne v. Dejean, 32 La. Ann. 889; Lundy's Est., 3 C. Pl. (Pa.) 139. But compare Ames' Succ., 33 La. Ann. 1317 (executor, as distinguished from administrator, may appeal in his representative capacity from judgment against him in favor of succession).

65. See generally Appeal and Error § 580 et seq.

court it must, as a general rule, have been raised in the court below and an appropriate exception to the court's ruling thereon reserved.[66] It has been held, however, that in the final settlement of an estate the omission to make the personal representative of a deceased distributee a party may be taken advantage of on appeal, although no objection was made in the probate court,[67] and that, although an administrator makes no objection on the ground of defective notice before the clerk, he can do so on appeal to the superior court.[68] So also where appellant did not appear in the probate court, he may insist on the appeal on questions not raised or passed on in the probate court.[69] An exception to the final judgment approving an administrator's final report is not essential to the right to review it,[70] nor is it required that written objection be interposed to such report to preserve the right of review.[71] It has been held that as exceptions or objections could not be made before the orphans' court to the allowance of executor's commissions, which could not be paid prior to filing of the account, or to the allowance of proctor's fees made at court's settlement, such objections can be made for first time in an appellate court,[72] and that an administrator, who mistakenly accounted to the orphans' court for rents for decedent's realty, is not precluded from insisting, on appeal from an order of the orphans' court refusing to strike out exceptions filed to his accounting, upon his right to account in some tribunal whose decree will adequately protect him.[73]

[§ 2514] **5. Time for Instituting Proceeding.**[74] The appeal or other proceeding to review an order in accounting proceedings must be taken and perfected within the time prescribed by statute.[75] But the trial judge has sometimes a discretion to extend the time fixed by law if he deems that the circumstances require it,[76] and in some jurisdictions the statutes provide for relief in case of an excusable failure to appeal in time.[77] An objection to the timeliness of an appeal comes too late when made

66. Ala.—Schulhoefer v. Fulton, 82 S 446; Russell v. McPherson, 80 S 392; Forrester v. Forrester, 40 Ala. 557; Clack v. Clack, 20 Ala. 461; Long v. Easly, 13 Ala. 239; King v. Cabiness, 12 Ala. 598.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [aff 89 Ill. A. 41]; Elder v. Whittemore, 51 Ill. A. 662.

Ind.—Price v. Cavins, 50 Ind. 122.

Iowa.—In re Helming, 130 NW 903.

Ky.—Hiles v. Hiles, 82 SW 580, 26 KyL 824, 83 SW 615, 26 KyL 1264; Polly v. Covington, 10 KyL 361.

La.—Bertrand's Succ., 123 La. 784, 49 S 524; Peters' Succ., 114 La. 952, 38 S 690; Blakey's Succ., 12 Rob. 155.

Me.—In re Swan, 115 Me. 501, 99 A 449.

Mass.—Morse v. Meston, 152 Mass. 5, 24 NE 916.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318; In re McNamara, 166 Mich. 451, 132 NW 86.

N. J.—In re Atkinson, 86 N. J. Eq. 173, 98 A 269; In re Ramsey, 66 A 410; Trimmer v. Adams, 18 N. J. Eq. 505.

N. Y.—Matter of Hoffman, 136 App. Div. 516, 121 NYS 184 [rev 62 Misc. 600, 115 NYS 984]; Matter of Dunham, 94 Misc. 550, 160 NYS 217; Matter of Boyle, 151 App. Div. 568, 136 NYS 96 [aff 218 N. Y. 545, 101 NE 1095].

Okl.—In re McGannon, 50 Okl. 288, 150 P 1109.

Pa.—In re Rees, 246 Pa. 188, 92 A 126; Been's Est., 13 Pa. Dist. 695, 30 Pa. Co. 368; Poh's Est., 12 Pa. Dist. 160, 28 Pa. Co. 208; Bayle's Est., 12 Pa. Dist. 73, 28 Pa. Co. 125, 19 Montg. Co. 134; Clark's Est., 7 Pa. Dist. 9, 20 Pa. Co. 439; Price's Est., 29 Pa. Co. 449; Lowry's Est., 18 Pa. Co. 591.

S. C.—Brown v. Brown, 75 S. C. 25, 54 SE 838.

Tex.—Davenport v. Hervey, 30 Tex. 308.

Vt.—In re Hall, 70 Vt. 458, 41 A 508; Pelton v. Johnson, 52 Vt. 138.

Va.—Wills v. Dunn, 5 Gratt. (46 Va.) 384; Jones v. Watson, 3 Call (7 Va.) 253.

Wyo.—Rice v. Tilton, 14 Wyo. 101, 82 P 577.

[a] **Procuring rulings of court.**—It is the duty of a party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue. Deegan v. Von Glahn, 75 Hun 39, 26 NYS 989; Matter of Hesdra, 4 Misc. 37, 23 NYS 846, Pow. Surr. 103.

[b] **Special findings.**—A party cannot on appeal first object that the court below had no authority to make special findings. Swift v. Harley, 20 Ind. A. 614, 49 NE 1069.

[c] **Exceptions to be set for verbatim.**—Exceptions to an executor's account must be set forth in the assignments of error verbatim. In re Johnston, 222 Pa. 514, 71 A 1053.

[d] **A question which is not adjudicated** on an accounting is not properly the subject of an exception. Keisel's Est., 18 Pa. Dist. 124; Bradley's Est., 5 Pa. Co. 572.

67. McMullen v. Brazelton, 81 Ala. 442, 1 S 778.

68. Hester v. Lawrence, 102 N. C. 319, 8 SE 915.

69. Reed v. Whipplt, 140 Mich. 7, 103 NW 548.

[a] **The presence of appellant's attorney in the probate court** at the time of the hearing is immaterial, where no appearance was entered and no rights waived. Reed v. Whipple, 140 Mich. 7, 103 NW 548.

70. Crowe v. Morrison, 147 Ill. A. 107.

71. Crowe v. Morrison, 147 Ill. A. 107.

72. In re Steelman, (N. J. Prerog.) 99 A 612.

73. In re Struble, (N. J.) 101 A 177.

74. See generally Appeal and Error § 1032 et seq.

75. Ala.—Thomas v. Dumas, 30 Ala. 83; Binford v. Binford, 22 Ala. 682; Bohannan v. Watts, 14 Ala. 574.

Ark.—Stricklin v. Galloway, 99 Ark. 56, 137 SW 804.

Cal.—In re Franklin, 133 Cal. 584, 65 P 1081.

Ind.—Webb v. Simpson, 105 Ind. 327, 4 NE 900; Browning v. McCracken, 97 Ind. 279.

Iowa.—In re Denneny, 182 Iowa 362, 165 NW 1007.

Ky.—Chorn v. Chorn, 98 Ky. 627, 33 SW 1107, 17 KyL 1178.

La.—Farrell's Succ., 131 La. 719, 60 S 203; Calloway's Succ., 49 La. Ann. 968, 22 S 225.

N. Y.—Smith v. Van Kuren, 2 Barb. Ch. 473; Guild v. Peck, 3 NY LegObs 273, 11 Paige 475; Bronson v. Ward, 3 Paige 189.

Oh.—Falconer v. Martin, 66 Oh. St. 352, 64 NE 430.

Pa.—In re Milliken, 227 Pa. 502, 76 A 248; In re Sherwood, 206 Pa. 465, 56 A 20; Candor's App., 27 Pa. 119; Stetler's Est., 39 Pa. Super. 91; Wright's Est., 25 Pa. Co. 594.

Wis.—Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

[a] **Time of taking appeal as affecting review of evidence.**—The statute providing that, where an appeal is not taken within sixty days after the rendition of the judgment, the evidence upon which the decision rests cannot be reviewed does not apply to an order settling the account of a personal representative. Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479 [foll Rose's Est., 80 Cal. 166, 22 P 86, 3 Cal. Unrep. Cas. 50, 20 P 712].

[b] **An appeal by motion in open court** is improper except during the term at which the judgment was rendered; but if the appeal is thus taken at a subsequent term, and the appellee appears and files an answer, the defect will be cured, and the appeal maintained. Planchet's Succ., 29 La. Ann. 520.

[c] **Premature appeal.**—An appeal from an order settling the account of an administrator, taken before the order is entered in the minute book of the court, is premature and will be dismissed. Rose's Est., 72 Cal. 577, 14 P 369.

[d] **Appeal before final discharge.**—Under a statute, giving to one aggrieved by a decision of the circuit court in a matter growing out of the settlement of a decedent's estate the right to appeal, one aggrieved by the allowance of a personal representative's final account may appeal without waiting for his final discharge from the duties of his trust. Taylor v. Burk, 91 Ind. 252.

[e] **Time from which period runs.**—Chorn v. Chorn, 98 Ky. 627, 33 SW 1107, 17 KyL 1178; Boyd v. Boyd, 9 SW 842, 10 KyL 85; Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

[f] **A party cannot enlarge the statutory period** for appeal from a decree of distribution by filing a bill of review, where the objection was available at the original hearing. In re Sherwood, 206 Pa. 465, 56 A 20.

76. Calloway's Succ., 49 La. Ann. 968, 22 S 225.

77. Sanborn v. Mitchell, 94 Mich. 519, 54 NW 295; Holton v. Olcott, 58 N. H. 598; Matthews v. Fogg, 35 N. H. 289; In re Wilcomb, 26 N. H. 370; In re French, 17 N. H. 472.

[a] **A mistake either of law or of fact** may be sufficient. Parker's App., 15 N. H. 24.

[b] **A misapprehension as to the law concerning appeals** is a mistake warranting relief. Tilton v. Tilton, 35 N. H. 430.

[c] **Where appeal papers were mislaid** by the attorney after timely preparation, relief was afforded. Grout v. Cole, 57 N. H. 547.

[d] **It must be shown that injustice has been done** by the decree in order to warrant relief. Buffum v. Sparhawk, 20 N. H. 81.

[e] **No relief will be afforded:** (1) Where the settlement was agreed to. Ahearn v. Mann, 63 N. H. 330. (2) Where it appears that the decree would have to be affirmed. In re Rice, 58 N. H. 200.

after all the evidence has been taken, even though an untimely motion to dismiss the appeal had been made and denied.[78]

[§ 2515] **6. Requisites for Review.** The giving of notice to the proper parties is as a general rule an essential step in perfecting the appeal,[79] although it has been held otherwise where the appeal was taken during the term at which the final order settling the account was made and the statute did not require such notice to be given.[80] The filing of an appeal bond, when review is sought by appeal, is generally held to be necessary,[81] although a personal representative who takes an appeal is sometimes exempted from the necessity of giving a bond.[82] It has been held that, where the appeal has been perfected in the circuit court, the appellants, having filed their exceptions in the probate court, as required, within the time provided by statute, may renew such exceptions or amend the exceptions already filed in the circuit court.[83]

[§ 2516] **7. Parties.** It has been held that all persons interested in maintaining the judgment or order rendered upon the settlement of an administration account should be made parties to the appeal,[84] but it has also been asserted that only those who appeared in the proceeding or in some way made themselves parties of record are necessary parties to the appeal.[85] The personal representative is of course a necessary party.[86] Where the representative appeals as an individual from a judgment or order favorable to the estate but unfavorable to him, the estate should be made an appellee.[87]

[§ 2517] **8. Record.** The record must conform to the general requirements as to records on appeal[88] with respect to its contents generally,[89] the necessity

78. Carlin v. Carlin, (N. J.) 64 A 1018.

79. Cal.—In re Scott, 7 Cal. Unrep. Cas. 187, 77 P 446; In re McDougald, 143 Cal. 476, 77 P 443; In re Bullard, 114 Cal. 462, 46 P 297; In re Delaney, 110 Cal. 563, 42 P 981.
Iowa.—In re Denneny, 182 Iowa 362, 165 NW 1007.
La.—Romero's Succ., 25 La. Ann. 534.
Mich.—Casserly v. Casserly, 123 Mich. 44, 81 NW 930.
Nev.—Bowman v. Bowman, 27 Nev. 413, 76 P 634.
Wis.—Perkins v. Shadbolt, 44 Wis. 574.
See generally Appeal and Error § 1317 et seq.
[a] **To whom notice given.**—(1) It is only necessary for an executor to serve notice of appeal from an order settling his account on the persons who appeared and contested the account. In re Scott, 7 Cal. Unrep. Cas. 187, 77 P 446. (2) Where a creditor, whose claim had been allowed, did not make any appearance on the settlement of the executor's account, it was not necessary to serve him with a notice of appeal therefrom. In re Carpenter, 146 Cal. 661, 80 P 1072. (3) Where an executor was directed, by an order settling his account, to pay certain sums as compensation for legal services rendered to the executor, the attorneys rendering such services were not persons interested in the estate, nor proper parties to the proceeding for settlement of the executor's account, and hence it was not necessary to serve them with notice of an appeal from the order of settlement. In re Carpenter, 146 Cal. 661, 80 P 1072.
[b] **Sufficiency of notice.**—A notice of appeal stating that appellants appealed from an "order" allowing, settling, and affirming a final account of an administrator, also reciting the date of the entry of the document appealed from, and the amount of the attorney's fee fixed by the order, which was objected to, was sufficiently descriptive of the document and matter appealed from to meet the requirements of Comp. L. (1900) § 3041, authorizing an appeal from the "decision and decree" allowing a final account of an administrator. Bowman v. Bowman, 27 Nev. 413, 76 P 634.

80. In re Danforth, 66 Mo. A. 586.

81. Ga.—Adams v. Beall, 60 Ga. 325.
Ill.—Bennett v. Bennett, 282 Ill. 266, 118 NE 391 [rev 202 Ill. A. 364]; Peo. v. Kohlsaat, 168 Ill. 37, 48 NE 81 [aff 66 Ill. A. 505].
Ind.—In re Whisler, 56 Ind. A. 269, 105 NE 158.
Kan.—In re Baird, 102 Kan. 317, 169 P 1149.
La.—Fisher's Succ., 141 La. 183, 74 S 900.
Nebr.—Gannon v. Phelan, 64 Nebr. 220, 89 NW 1028.
N. Y.—In re Dumesnill, 47 N. Y. 677.
Oh.—Taylor v. McCullom, 8 Oh. Dec. (Reprint) 66, 5 CincLBul 414.
Pa.—Lafferty's Est., 6 Pa. Dist. 421.
Vt.—Lambert v. Merrill, 56 Vt. 464.
Wis.—Perkins v. Shadbolt, 44 Wis. 574.
See generally Appeal and Error § 1136 et seq.
[a] **Proper obligee.**—Gannon v. Phelan, 64 Nebr. 220, 89 NW 1028.
[b] **Amount of bond and amendment.**—In re Ziegler, 6 OhS&CP 54, 3 OhNP 307.
[c] **Application for leave to file after time limited therefor.**—In re Whisler, 56 Ind. A. 269, 105 NE 158.
[d] **Where both the representative and the opponent appeal** from the judgment rendered on opposition to the account, and the representative furnishes a bond, it is not necessary that the opponent should also furnish a bond. Fisher's Succ., 141 La. 189, 74 S 900.

82. Yearley v. Sharp, 96 Ind. 469; Taylor v. McCullom, 8 Oh. Dec. (Reprint) 66, 5 CincLBul 414; Hudgins v. Leggett, 84 Tex. 207, 19 SW 387; Kleinsmith v. Northcut, (Tex. Civ. A.) 56 SW 557.

83. Himes v. Sharp, 123 Ark. 61, 184 SW 431.

84. Farrell's Succ., 131 La. 719, 60 S 203; Forsyth's Succ., 20 La. Ann. 33; Broussard v. Robin, 13 La. Ann. 560; Perry's Succ., 4 La. Ann. 577; Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.
[a] **Appeal by creditor.**—A creditor of a solvent estate, appealing from a judgment homologating the final account of the administrator, on the ground that his claim against the estate has been rejected, properly omits as parties to the appeal the creditors whose claims have been allowed; but the heirs represented by a foreign consul have an interest in maintaining the judgment, and they must be cited through their representative. Meyer's Succ., 127 La. 505, 53 S 734.
[b] **Creditors interested in maintaining a judgment** homologating an account are necessary parties to an appeal therefrom. Farrell's Succ., 131 La. 719, 60 S 203.
[c] **Persons who have wrongfully possessed themselves of portions of the trust fund** may be brought in and appropriate redress afforded. Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.
[d] **Arranging parties.**—All persons adversely interested may be brought in and arranged as plaintiffs or defendants according to their actual attitude, as near as practicable. Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.
[e] **Right to appear for first time on appeal.**—Creditors, who did not object to the account of an executor in the probate court, nevertheless may take advantage of an order of the court in their favor, and appear for the first time on appeal to the circuit court. In re Keene, 202 Mich. 646, 168 NW 943.

85. In re McDougald, 143 Cal. 476, 77 P 443; Montgomery's Succ., 2 La. Ann. 469.
[a] **An order for the payment of a dividend** on an accounting by an administrator is not, strictly speaking, a part of the proceeding for the settlement of an account or of an adjudication respecting the claims reported therein, and hence persons to whom the dividends are payable do not thereby become parties to the accounting. In re McDougald, 143 Cal. 476, 77 P 443.
[b] **Absent creditors who never appeared** in the court below, nor claimed to be such, and who were placed on the acount of the representative for the protection of his own interest need not be made appellees, although their claims were opposed by the appellants. Montgomery's Succ., 2 La. Ann. 469.

86. Moore v. Ferguson, 163 Ind. 395, 72 NE 126.
[a] **An exceptor does not stand for or represent the estate** in such a manner as to be a sufficient appellee, and to dispense with the necessity of joining the administrator in an appeal from an order favorable to the estate. Moore v. Ferguson, 163 Ind. 395, 72 NE 126.

87. Moore v. Ferguson, 163 Ind. 395, 72 NE 126.

88. Himes v. Sharp, 123 Ark. 61, 184 SW 431; Hilton v. Morefield, 208 Ill. A. 66; In re Swan, 115 Me. 501, 99 A 449.
Record on appeal generally see Appeal and Error § 1611 et seq.

89. Ala.—Clack v. Clack, 20 Ala. 461.
Cal.—In re Thayer, 1 Cal. A 104, 81 P 658.
Del.—Johnson v. Johnson, 2 Del. 273.
Iowa.—In re Helming, 130 NW 903.
Mo.—Smith v. Brinkley, 151 Mo. A. 494, 132 SW 301.
Mont.—In re Ford, 29 Mont. 283, 74 P 735.
Or.—In re Osburn, 36 Or. 8, 58 P 521.
[a] **The judgment roll on an appeal** from an order settling the accounts of an executor consists of the petition and account and reports accompanying it, objections and exceptions thereto, findings of the court, and the order settling account. In re Thayer, 1 Cal. A. 104, 81 P 658; Laymance v. Utter, 1 Cal. A. 104, 81 P 658.
[b] **The record must show the in-**

for a bill of exceptions, case, or statement of facts,[90] and the necessity of bringing up evidence.[91] Where a partial transcript on appeal from the county court in a proceeding to settle an administrator's final account was filed in the district court within the statutory time, it was not error for the district court to allow a portion of the transcript in the same case which had been formerly filed in the district court to be attached thereto, and made a part thereof.[92] Where both the representative and the opponent appeal from the judgment rendered on opposition to the representative's account, and the representative files a transcript, it is not necessary that the opponent should also file a transcript.[93]

Amendment. Although the statute provides that the superior court on probate appeals may allow amendments to supply deficiencies or correct errors, where, on appeal from a decree allowing an administrator's account, appellant complained of the omission of statements of gain and loss on the inventory, the appeal could not be affected by the administrator filing an amended account containing the items with the superior court's permission, but without appellant's consent and without notice to him, appellant not being bound to apprehend the filing of the amended account and to look through the papers to find the items omitted from the original account.[94]

Settling case. A judge who prior to his appointment was a referee to determine the questions of fact on the judicial settlement on the account of an executor is disqualified from settling the case on review on appeal.[95]

[§ 2518] **9. Scope and Extent of Review—a. In General.** Appeals from courts of probate jurisdiction are generally regulated by statutory provisions peculiar thereto[96] on which depends in a measure the extent to which orders and decrees made upon the settlements of personal representatives will be reviewed.[97] The investigation is usually restricted to matters as to which it is alleged that the trial court erred,[98] and where an account has been dis-

terest or concern of the party who excepts to an administration account. Johnson v. Johnson, 2 Del. 273.

[c] **Representation of minors by guardian.**—Where the record shows that there are minor heirs, it must also show that they were represented at the settlement by a guardian or guardian ad litem. Clack v. Clack, 20 Ala. 461.

[d] **The petition and acount** filed by a personal representative in order to make a final settlement of his administration constitute a part of the record to be used on appeal, without being made so by a bill of exceptions. In re Isaacs, 30 Cal. 105.

[e] **Inventory.**—The filing of an account by a personal representative makes the inventory on which it is predicated a part of the record, and it is properly included in the transcript on appeal, although not offered in evidence. In re Osburn, 36 Or. 8, 58 P 521.

[f] **Sufficient showing that inventory was filed.**—Where the record on appeal from the final order settling the accounts of an administrator showed that an "inventory of the estate of decedent was presented to the court for examination," and that the administrator charged himself with his account current "to amount of inventory," it was sufficient to show that an inventory was filed. Hayes v. Hargus, 127 Ark. 22, 191 SW 408.

[g] **Matters to be excluded.**—The petition for letters, the order appointing the administrator, his bond, and the order of distribution, not being necessary parts of the administrator's report, are not a part of the record unless offered in evidence, and if included in the transcript on appeal will not be considered. In re Osburn, 36 Or. 8, 58 P 521.

90. Ala.—King v. Brown, 108 Ala. 68, 18 S 935; Long v. Easly, 13 Ala. 239.

Cal.—Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479; In re Thayer, 1 Cal. A. 104, 81 P 658.

Ind.—Cunningham v. Cunningham, 94 Ind. 557.

Ky.—Polly v. Covington, 10 KyL 361.

Mo.—Branson v. Branson, 102 Mo. 613, 15 SW 74.

Nebr.—Etmund v. Etmund, 83 Nebr. 151, 119 NW 239.

N. Y.—Matter of Nestell, 72 Misc. 331, 131 NYS 193 [aff 146 App. Div. 940 mem, 942 mem, 131 NYS 1131 mem].

Or.—In re Roach, 50 Or. 179, 92 P 118.

Pa.—In re Johnston, 222 Pa. 514, 71 A 1053.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

[a] **Assignments of error must run against the decree** and not against the opinion of the court. In re Johnston, 222 Pa. 514, 71 A 1053.

91. Ala.—Bendall v. Bendall, 24 Ala. 295, 60 AmD 469.

Cal.—In re Carpenter, 146 Cal. 661, 80 P 1072.

Ind.—Bristow v. McClelland, 122 Ind. 64, 22 NE 299; Brownlee v. Hare, 64 Ind. 311.

Ky.—May v. Walter, 149 Ky. 749, 149 SW 1014; Bowling v. Cobb, 6 B. Mon. 356.

La.—Short's Succ., 45 La. Ann. 1485, 14 S 184.

Miss.—Gray v. Harris, 43 Miss. 421.

Oh.—In re Raab, 16 Oh. St. 273.

Or.—Rostel v. Morat, 19 Or. 181, 23 P 900.

S. C.—Clark v. West, 20 S. C. Eq. 185.

Tex.—Wright v. Pate, 1 SW 661.

Utah.—In re Reed, 28 Utah 465, 79 P 1049.

Va.—Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582.

[a] **Showing evidence as to:** (1) Allowance of claim by court. Short's Succ., 45 La. Ann. 1485, 14 S 184. (2) Services of attorney. Bowling v. Cobb, 6 B. Mon. (Ky.) 356. (3) Allowance for services of clerk. Farneyhough v. Dickerson, 2 Rob. (41 Va.) 582. (4) Costs. In re Raab, 16 Oh. St. 273.

92. Etmund v. Etmund, 83 Nebr. 151, 119 NW 239.

93. Fisher's Succ., 141 La. 189, 74 S 900 ("The opponent's right to an amendment of the judgment in so far as it rejects the opposition to the account may be asserted by an answer to the appeal taken by the administrator").

94. Stillman v. Moore, 28 R. I. 548, 68 A 726.

95. Matter of Nestell, 72 Misc. 331, 131 NYS 193 [aff 146 App. Div. 940 mem, 942 mem, 131 NYS 1131 mem].

96. See Appeal and Error § 2650.

97. Cal.—In re Broome, 162 Cal. 258, 122 P 470; In re Wilson, 147 Cal. 108, 81 P 313.

Ga.—Lamar v. Lamar, 118 Ga. 684, 45 SE 498.

Ill.—Peterman v. U. S. Rubber Co., 221 Ill. 581, 77 NE 1108 [mod 119 Ill. A. 610].

Ind.—Reed v. Reed, 44 Ind. 429.

Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

Mich.—In re Miner, 201 Mich. 115, 166 NW 882; In re Thompson, 183 Mich. 618, 150 NW 318; In re Ward, 152 Mich. 218, 116 NW 23.

Minn.—Turner v. Fryberger, 99 Minn. 236, 108 NW 1118, 109 NW 229; Bradley v. Bradley, 97 Minn. 130, 106 NW 338.

Miss.—Owens v. Owens, 84 Miss. 673, 37 S 149.

Mo.—Roloson v. Riggs, 274 Mo. 522, 203 SW 973; In re Lutz, 181 Mo. A. 267, 170 SW 334; Cassity's App., 112 Mo. A. 714, 87 SW 595.

Mont.—State v. Second Judicial Dist. Ct., 34 Mont. 303, 87 P 614.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; In re Wilson, 83 Nebr. 252, 119 NW 522; Etmund v. Etmund, 83 Nebr. 151, 119 NW 239; Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

N. H.—Supreme Commandery U. O. G. C. v. Donaghey, 75 N. H. 197, 72 A 419.

N. J.—In re New Jersey Trust, etc., Co., 73 N. J. Eq. 628, 68 A 811; Luse v. Rarick, 34 N. J. Eq. 212; Stevenson v. Philips, 8 N. J. Eq. 593.

N. M.—Clancey v. Clancey, 7 N. M. 405, 37 P 1105, 38 P 168.

N. Y.—Matter of Heldmann, 151 App. Div. 234, 135 NYS 143; Matter of Warren, 148 App. Div. 525, 133 NYS 145; Matter of Mayer, 84 Hun 539, 32 NYS 850; Ross v. Ross, 6 Hun 80; Matter of Herborn, 189 App. Div. 319, 178 NYS 582.

N. C.—Ex p. Spencer, 95 N. C. 271.

Oh.—McMahon v. Ambach, 79 Oh. St. 445, 87 NE 1138; McMahon v. Ambach, 79 Oh. St. 103, 86 NE 512.

Pa.—Fury's Est., 38 Pa. Co. 429; Rowe's Est., 11 Kulp 36; Bierly's App., 33 LegInt 296.

Tex.—Rahm v. Bergstrom, (Civ. A.) 36 SW 494.

Wis.—In re Hyde, 157 Wis. 462, 145 NW 1079; Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778; Gunn v. Green, 14 Wis. 316.

98. Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; Morgan v. Morgan, 83 Ill. 196; Curts v. Brooks, 71 Ill. 125; In re Barnes, 197 Ill. A. 511 [aff Barnes v. Earle, 275 Ill. 381, 114 NE 168]; In re Teeple, 196 Ill. A. 378; Elder v. Whittemore, 51 Ill. A. 662; Wilkinson v. Ward, 42 Ill. A. 541.

La.—Willis' Succ., 109 La. 281, 33 S 314.

Mass.—Goff v. Britton, 182 Mass. 293, 65 NE 379; Cowden v. Jacobson, 165 Mass. 240, 43 NE 98; Harris v. Harris, 153 Mass. 439, 26 NE 1117; Boynton v. Dyer, 18 Pick. 1.

Mich.—In re Miner, 201 Mich. 115, 166 NW 882.

Mo.—Cassity's App., 112 Mo. A. 714, 87 SW 595.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316; In re Wilson, 83 Nebr. 252, 119 NW 522.

N. H.—Dodge v. Stickney, 60 N. H. 461; Caswell v. Hill, 47 N. H. 407; French v. Currier, 47 N. H. 88.

N. Y.—Bearse v. Brown, 167 App. Div. 415, 153 NYS 514.

[a] **The higher court cannot determine** the rights of the administrator or his attorney to compensation for services rendered after

allowed, the appellate court is not required to pass on all the items thereof.[99]

[§ 2519] **b. Presumptions in Support of Order or Decree.** The order or decree of which a review is sought is as a general rule presumed to be right, in the absence of any affirmative showing in the record to the contrary, and every reasonable presumption will be indulged in favor of the correctness of the proceedings below.[1] Accordingly the burden rests on appellant to show that the ruling complained of was incorrect.[2]

Presumption of proper action in the future. On appeal from an order settling the semiannual account of an executor and revoking his letters, it will be presumed, in the absence of anything in the orders on the subject, that upon a final settlement of the estate the proper compensation will be allowed to the executor for his services.[3]

[§ 2520] **c. Discretion of Lower Court.** Determinations of the lower court as to matters which are properly within its discretion will not be disturbed on appeal, except for manifest abuse of such discretion.[4] This rule is most frequently applied with respect to such matters as the compensation of the representative,[5] allowances for the services of attorneys[6] or commissioners,[7] and costs.[8]

[§ 2521] **d. Findings of Fact.** The general rules as to reviewing findings of fact, by appellate courts,[9] apply on review of the proceedings of courts of probate jurisdiction with respect to the accounting of personal representatives,[10] with respect to such matters as review of the verdict of a jury[11] or of findings of the lower court.[12] Accordingly findings of fact by the lower court may be accepted as conclusive[13] if there is any evidence to support them,[14] and, where based on conflicting evidence, will not be disturbed.[15] The appellate court may, however, in a proper case review both the law and the facts.[16]

the appeal from the order of the probate court. Turner v. Fryberger, 99 Minn. 236, 108 NW 1118, 109 NW 229.

99. Libby v. Jerrard, 117 Me. 303, 104 A 351.

1. Ala.—McAlpine v. Carre, 83 S 477; Adams v. Walsh, 190 Ala. 516, 67 S 432; Mims v. Mims, 39 Ala. 716.

Ark.—Hayes v. Hargus, 127 Ark. 22, 191 SW 408; Massey v. Doke, 123 Ark. 211, 185 SW 271.

Cal.—In re Aldersley, 174 Cal. 366, 163 P 206; In re Chapman, 158 Cal. 740, 112 P 302; In re Carpenter, 146 Cal. 661, 80 P 1072; In re Shively, 145 Cal. 400, 78 P 869; In re Weringer, 100 Cal. 345, 34 P 825.

Ga.—Hoshor v. Fitzpatrick, 146 Ga. 525, 91 SE 780.

Ill.—In re Barnes, 197 Ill. A. 511 [aff Barnes v. Earle, 275 Ill. 381, 114 NE 168].

Ind.—Spray v. Bertram, 165 Ind. 13, 74 NE 502; Richey v. Cleet, 46 Ind. A. 326, 92 NE 175.

Iowa.—In re Baumhover, 151 Iowa 146, 130 NW 817.

Kan.—Sarbach v. Maryland Fidelity, etc., Co., 99 Kan. 29, 160 P 990, 991, LRA1917B 1043 [cit Cyc]; Calnan v. Savidge, 68 Kan. 620, 75 P 1010.

Ky.—May v. Walter, 149 Ky. 749, 149 SW 1014; Vaugh v. Drye, 12 KyL 358; Smith v. Nuckols, 5 KyL 426, 12 Ky. Op. 366.

La.—St. Dizier's Succ., 132 La. 657, 61 S 727.

Me.—In re Swan, 115 Me. 501, 99 A 449.

Miss.—Scott v. Porter, 44 Miss. 364; Gray v. Harris, 43 Miss. 421.

Mo.—Browning v. Richardson, 186 Mo. 361, 85 SW 518; In re Whitlow, 184 Mo. A. 229, 167 SW 463.

Mont.—In re Courtney, 31 Mont. 625, 79 P 317.

Pa.—Robb's Appr., 41 Pa. 45; O'Brien's Est., 43 Pa. Super. 549; Walker's Est., 41 Pa. Co. 14.

Wash.—In re Alfstad, 27 Wash. 175, 67 P 593.

Wyo.—Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

[a] **It will be presumed:** (1) That all persons interested were duly notified of an application for the fixing of the fee of an attorney appointed to represent minor devisees and legatees, and that the order fixing such fee was not ex parte. In re Carpenter, 146 Cal. 661, 80 P 1072. (2) That a determination that the contestant was a creditor was correct. Tompkins v. Weeks, 26 Cal. 50. (3) That the evidence was sufficient to sustain the decision of the court. Mims v. Mims, 39 Ala. 716; Roundtree v. Snodgrass, 36 Ala. 185; In re Shively, 145 Cal. 400, 78 P 869. (4) That claims allowed by the probate court were valid. Vaugh v. Drye, 12 KyL 358. (5) That an allowance of credit to the representative for the payment of a certain sum as a demand against the estate was proper. Spray v. Bertram, 165 Ind. 13, 74 NE 502. (6) That an allowance of credit, on account of worthless notes held by the estate, was proper. May v. Walter, 149 Ky. 749, 149 SW 1014. (7) That the disallowance of certain items in the report was proper. In re Scott, 1 Cal. A. 740, 83 P 85. (8) That the action of the probate court as to the allowance made to the representative fully met the statutory requirements. In re Mason, 26 Wash. 259, 66 P 435.

2. Calnan v. Savidge, 68 Kan. 620, 75 P 1010; Brooke's Est., 10 Pa. Dist. 447, 25 Pa. Co. 416; Unruh's Est., 10 Pa. Dist. 293, 25 Pa. Co. 257, 15 YorkLegRec 23.

3. In re Courtney, 31 Mont. 625, 79 P 317.

4. Ark.—Ex p. Carter, 27 Ark. 532.

Cal.—In re Bottom, 156 Cal. 129, 103 P 849; In re Adams, 131 Cal. 415, 63 P 838.

Iowa.—Wheeler v. Long, 128 Iowa 643, 105 NW 161.

Ky.—Miller v. Simpson, 2 SW 171.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Md.—Beachley v. Bollinger, 119 Md. 151, 86 A 135.

Mich.—In re McNamara, 166 Mich. 451, 132 NW 86.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681; Scudder v. Ames, 142 Mo. 187, 43 SW 659.

N. J.—In re New Jersey Trust, etc., Deposit Co., 73 N. J. Eq. 628, 68 A 811; Moore v. Raggi, 32 N. J. Eq. 273.

N. Y.—In re Selleck, 11 N. Y. 284, 19 NE 66.

Or.—In re Holladay, 18 Or. 168, 22 P 750.

Pa.—St. Clair's App., 15 A 914; Fisher's Est., 65 Pa. Super. 297; Pollard's Est., 18 Pa. Dist. 636; Bickings' Est., 12 Pa. Dist. 159, 28 Pa. Co. 299.

Tex.—Jones v. Gilliam, (Civ. A.) 199 SW 694.

5. See supra § 2443.

6. Cal.—In re Adams, 131 Cal. 415, 63 P 838; In re Byrne, 122 Cal. 260, 54 P 957, 1015; In re Gasq, 42 Cal. 288; In re Richmond, 9 Cal. A. 413, 99 P 558.

Ky.—Miller v. Simpson, 2 SW 171.

La.—Barbin v. Couvillon, 122 La. 407, 47 S 498.

Mo.—Scudder v. Ames, 142 Mo. 187, 43 SW 659.

N. Y.—Hannahs v. Hannahs, 68 N. Y. 610.

Pa.—Good's Est., 150 Pa. 307, 24 A 623; Harbster's App., 125 Pa. 1, 17 A 204; Kalbfell's Est., 17 Pa. Super. 255; Knight's Est., 20 Pa. Dist. 788; Boyd's Est., 17 Pa. Dist. 393; Mutchmore's Est., 9 Pa. Dist. 702; Simon's Est., 9 Pa. Dist. 59.

7. Ex p. Carter, 27 Ark. 532.

8. In re Selleck, 111 N. Y. 284, 19 NE 66; In re Niles, 12 NYS 157.

9. See Appeal and Error § 2830 et seq.

10. In re Baumhover, 151 Iowa 146, 130 NW 817; In re Egan, (Mo. A.) 209 SW 989.

11. Doster v. Arnold, 60 Ga. 316; Fisk v. Cushman, 6 Cush. (Mass.) 20, 52 AmD 761.

12. Cal.—In re Broome, 162 Cal. 258, 122 P 470; In re Bottom, 156 Cal. 129, 103 P 849; In re Shively, 145 Cal. 400, 78 P 869.

Ind.—Cooper v. Williams, 109 Ind. 270, 9 NE 917.

Iowa.—In re Doore, 183 Iowa 152, 166 NW 763; In re Clark, 151 Iowa 511, 131 NW 700.

Kan.—Chapman v. Kennett, 94 Kan. 535, 146 P 1153.

Me.—Small v. Thompson, 92 Me. 539, 43 A 509; Manning v. Devereux, 81 Me. 560, 18 A 290.

Miss.—Price v. Mitchell, 18 Miss. 179.

Mo.—Judson v. Bennett, 233 Mo. 607, 136 SW 681.

Mont.—In re Ford, 29 Mont. 283, 74 P 735.

Nebr.—Wunder v. Crane, 100 Nebr. 446, 160 NW 892.

N. Y.—In re O'Brien, 145 N. Y. 379, 40 NE 18; Hovey v. Smith, 1 Barb. 372.

Pa.—In re Moore, 211 Pa. 338, 60 A 987; Barr's Est., 43 Pa. Super. 540; Fiscus' Est., 13 Pa. Super. 615; Thomson's Est., 30 Pa. Co. 129; Stotler v. McGary, 31 LegInt 373.

Wis.—Robinson v. Hodgkin, 99 Wis. 327, 74 NW 791.

13. Iowa.—Townsley v. Townsley, 167 Iowa 226, 149 NW 262; In re Baumhover, 151 Iowa 146, 130 NW 817.

Me.—In re Palmer, 110 Me. 441, 86 A 919.

Mich.—In re Thompson, 183 Mich. 618, 150 NW 318; Gee v. Hasbrouck, 128 Mich. 509, 87 NW 621.

Mo.—In re Egan, (A.) 209 SW 989.

N. C.—Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

Pa.—Boyle's Est., 62 Pa. Super. 467; Melville's Est., 25 Pa. Dist. 5.

Vt.—Clark v. Clark, 21 Vt. 490.

[a] **Referee's findings adopted by court conclusive.** — Lambertson v. Vann, 134 N. C. 108, 46 SE 10.

14. In re Palmer, 110 Me. 441, 86 A 919; In re Thompson, 183 Mich. 618, 150 NW 318.

15. Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479; In re Doore, 183 Iowa 152, 166 NW 763; In re Clark, 151 Iowa 511, 131 NW 700; Judson v. Bennett, 233 Mo. 607, 136 SW 681; Mayhew's Est., 155 Pa. 94, 25 A 1017.

16. Springfield Grocer Co. v. Wal-

[§ 2522] **e. Former Accounts.** It has been held that former accounts, from the allowance of which no appeal was taken, and the matters passed upon in them, are not subject to revision and readjustment upon an appeal from the allowance of a later account in which the same questions were not before the probate court for consideration,[17] and that the annual settlements of an administrator cannot be corrected on appeal from an order of distribution.[18] But it has also been held that mistakes in annual settlements may be corrected on appeal from a final settlement.[19]

[§ 2523] **10. Consolidation of Appeals.** In a proper case two appeals from a decree in an accounting proceeding may be consolidated.[20]

[§ 2524] **11. Hearing.** Under some statutes the appeal from orders or decrees in accounting proceedings goes to a court which, although of jurisdictions superior to that of probate jurisdiction, is not of purely appellate jurisdiction,[21] and the higher court tries the case de novo and renders such a decree or makes such an order as the court of probate jurisdiction should have rendered or made.[22] A jury trial in the appellate court is sometimes permitted.[23]

[§ 2525] **12. Determination and Disposition.**[24] The appellate court may dismiss the appeal,[25] or affirm,[26] modify,[27] or reverse[28] the order or decree appealed from, or itself make such order or render such decree as the court of probate jurisdiction should have made or rendered.[29] In a proper case the proceedings may be remanded to the lower court.[30] Where the appellate court has, on an appeal from a decree allowing an executor's account, sustained an exception to the effect that the account is not a proper one to be allowed because the executor did not charge himself either with the amount of the inventory of the estate or with the amount

ton, 95 Mo. A. 526, 69 SW 477; Ansley v. Richardson, 95 Mo. A. 332, 68 SW 609; In re Danforth, 66 Mo. A. 586; In re Meeker, 45 Mo. A. 186; Matter of Morris, 65 N. J. Eq. 699, 56 A 161 [dist Engle v. Crombie, 21 N. J. L. 614].

17. McLoon v. Spaulding, 62 Me. 315; Arnold v. Mower, 49 Me. 561; Coburn v. Loomis, 49 Me. 406; Sturtevant v. Tallman, 27 Me. 78; Priewe v. Priewe, (N. D.) 175 NW 732.

18. Peters v. Clendenin, 12 Mo. A. 521.

19. Williams v. Petticrew, 62 Mo. 460.

20. Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

[a] **Consolidation was proper where** the executor appealed from a decree allowing his account, and assigned as error the refusal to allow an amount claimed for extraordinary services performed by him, and a legatee also appealed and assigned as error the allowance of several sales and disbursements made by the executor, and an allowance of anything for extraordinary services, the legatee having waived a jury on all questions except that of compensation. Wisner v. Mabley, 70 Mich. 271, 38 NW 262.

21. Mich.—In re Sanborn, 109 Mich. 191, 67 NW 128; Walker v. Hull, 35 Mich. 488; Hall v. Grovier, 25 Mich. 428.

N. C.—Ex p. Spencer, 95 N. C. 271.

R. I.—McGinity v. McGinity, 19 R. I. 510, 34 A 1114.

Tex.—Houston v. Mayes, 77 Tex. 265, 13 SW 1036.

Wis.—Perkins v. Shadbolt, 44 Wis. 574.

22. Conn.—Reed v. Reed, 80 Conn. 401, 68 A 849.

Ill.—Barnes v. Earle, 275 Ill. 381, 114 NE 168 [aff 197 Ill. A. 511]; In re Roeske, 205 Ill. A. 366; Richardson v. Emberson, 96 Ill. A. 403.

Ind.—Hamlyn v. Nesbit, 37 Ind. 284.

Mich.—Reed v. Whipple, 140 Mich. 7, 103 NW 548.

Minn.—Turner v. Fryberger, 99 Minn. 236, 108 NW 1118, 109 NW 229.

Mo.—Seymour v. Seymour, 67 Mo. 303; In re Lutz, 181 Mo. A. 267, 170 SW 334; In re Boothe, 38 Mo. A. 456.

Or.—In re Plunkett, 33 Or. 414, 54 P 152.

R. I.—Carney v. Hawkins, 34 R. I. 297, 83 A 327.

Tex.—Levy v. Moody, (Civ. A.) 87 SW 205; Kalteyer v. Wipff, (Civ. A.) 49 SW 1055.

Vt.—Clark v. Clark, 21 Vt. 490.

Wis.—Cowie v. Strohmeyer, 150 Wis. 401, 136 NW 956, 137 NW 778.

[a] **Admissibility of evidence.**—Grovier v. Hall, 23 Mich. 7.

[b] **Sufficiency of evidence.**—Carney v. Hawkins, 34 R. I. 297, 83 A 327.

[c] **Compelling production of books, etc.**—(1) Where, on an appeal from an order of the probate court allowing the account of an administrator, appellant desired the administrator to produce books of account, he should have obtained a subpœna duces tecum or order to produce. Reed v. Whipple, 140 Mich. 7, 103 NW 548. (2) The executors could require the objector, who was in court and had possession of a note, the amount of which they claimed he owed the estate, to produce such note in evidence without filing an affidavit, and citing him. White v. Lewis, 201 Ill. A. 105.

23. Wisner v. Mabley, 70 Mich. 271, 38 NW 262; Ward v. Tinkham, 65 Mich. 695, 32 NW 901; Mower's App., 48 Mich. 441, 12 NW 646; Showers v. Morrill, 41 Mich. 700, 3 NW 193; Grovier v. Hall, 23 Mich. 7; In re Wilson, 97 Nebr. 780, 151 NW 316; In re Wilson, 83 Nebr. 252, 119 NW 522.

24. See Appeal and Error § 3093 et seq.

25. In re Heaton, (Cal.) 73 P 185; Morere's Succ., 117 La. 543, 42 S 132; Le Sage's Succ., 112 La. 857, 26 S 757; Romero's Succ., 25 La. Ann. 534; Sherman v. Chace, 9 R. I. 166.

[a] **When appeal not dismissed.**—Where the active assets to be distributed under a provisional account filed by the dative testamentary executor were less than the minimum jurisdiction of the supreme court, and it appeared from the pleadings and the evidence in the principal suit, made a part of the record of the appeal, that the succession interest was large, and the issues were not confined to the provisional account, but embraced questions relating to large amounts of the succession, the appeal will not be dismissed. Dauphin's Succ., 113 La. 208, 36 S 941.

[b] **No dismissal because appellant not aggrieved.**—An appeal by a special administrator from an order settling his account, and requiring him to pay the balance in his hands to another, will not be dismissed on the ground that appellant is not a "party aggrieved," since a determination that he was not aggrieved would amount to a determination of the merits of the appeal. In re Heaton, (Cal.) 73 P 185.

26. Ky.—Baldwin v. Barber, 148 Ky. 370, 146 SW 1124.

La.—St. Dizier's Succ., 132 La. 657, 61 S 727.

Mo.—Smith v. Brinkley, 151 Mo. A. 494, 132 SW 301.

N. Y.—In re Kellogg, 104 N. Y. 648, 10 NE 152, 1 Silv. A. 313 [aff 39 Hun 275]; Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63].

N. C.—Reeves v. McMillan, 101 N. C. 479, 7 SE 906.

Pa.—Hamilton's Est., 47 Pa. Super. 428.

[a] **Errors merely of form will not prevent affirmance.**—In re Phillips, 38 Mo. A. 509.

27. Cal.—In re Adams, 131 Cal. 415, 63 P 838.

D. C.—Howard v. Howard, 38 App. 575.

La.—Willis' Succ., 109 La. 281, 33 S 314.

Mass.—Newell v. West, 149 Mass. 520, 21 NE 954.

N. J.—Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569.

N. Y.—In re Kellogg, 104 N. Y. 648, 10 NE 152, 1 Silv. A. 313 [aff 39 Hun 275]; Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63].

N. D.—MacFadden v. Jenkins, 169 NW 151.

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156.

Pa.—Buck's Est., 47 Pa. Super. 518.

Va.—Cary v. Macon, 4 Call (8 Va.) 605.

[a] **Correction of errors.** — (1) When a decree allowing a final account is found upon appeal to be erroneous as to an item or items the appellate court may direct the decree to be corrected, and as corrected affirm it. In re Adams, 131 Cal. 415, 63 P 838. (2) Where a decree of a probate court allowing an administrator's account contains a manifest error in computation, such error will be corrected in the decree rendered in the supreme judicial court, although such error is not made one of the reasons for the appeal. Newell v. West, 149 Mass. 520, 21 NE 954. (3) Upon an appeal from the allowance of an administrator's account mistakes made in the account to the prejudice of the administrator may be corrected, although he did not appeal. Birkholm v. Wardell, 42 N. J. Eq. 337, 7 A 569.

28. In re More, 121 Cal. 635, 54 P 148; In re Runyon, 53 Cal. 196; Overstreet v. Potts, 4 Dana (Ky.) 138; In re Kellogg, 104 N. Y. 648, 10 NE 152, 1 Silv. A. 313 [aff 39 Hun 275]; Freeman v. Coit, 27 Hun 447 [aff 96 N. Y. 63].

29. See supra § 2524.

30. Cal.—In re Runyon, 53 Cal. 196.

Ky.—Overstreet v. Potts, 4 Dana 138.

Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302.

Nebr.—In re Wilson, 97 Nebr. 780, 151 NW 316.

Pa.—In re Litle, 244 Pa. 368, 90 A 733.

R. I.—Stillman v. Moore, 28 R. I. 548, 68 A 726.

[a] **Illustration.**—Where, on appeal from a decree dismissing exceptions to an administratrix's account, the evidence shows that, after taking over his wife's business, decedent borrowed from claimant at an

of the balance of the last account rendered by him and directed a reversal, it should not determine other questions involved in other exceptions.[31] On appeal from an order denying a petition to compel an executor to account, the only question for decision is whether the petitioner has an interest in the estate, and it is not necessary to determine the exact nature of such interest.[32] Errors which are not prejudicial are not ground for reversal.[33]

[§ 2526] **13. Operation and Effect of Decree.** The decree of the appellate court operates as a termination of the controversy involved in the appeal, and the account of the personal representative should be stated and a settlement made in accordance therewith.[34] A reversal on appeal of a decree finally settling the accounts of the representative renders such settlements inoperative,[35] while the dismissal of the appeal as to certain items of the account leaves the judgment of the court of probate jurisdiction as to such items, and binding upon the parties to the appeal.[36] A decree on appeal is not of course conclusive as to matters not passed on.[37]

[§ 2527] **K. Private Accounting and Settlement.** Where there are no creditors[38] or none whose debts are not paid,[39] legatees, distributees, and other persons entitled to the estate may enter into agreements among themselves,[40] or with the personal representative[41] as to the settlement of the estate, which will be sustained by the courts if they are

alleged usurious interest, but does not disclose what, if any, usurious interest was paid, the record will be remitted to ascertain the amount of such usurious interest and credit the estate therewith. In re Litle, 244 Pa. 368, 90 A 733.

[b] **Effect of issuance of remittitur.**—When the remittitur has been duly and regularly issued, without inadvertence, the supreme court loses jurisdiction of the cause, and has no power to recall it, except in a case of mistake, or of fraud or imposition practiced upon the court. Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479.

[c] **When unnecessary to remand.**—On appeal from a decree of the probate court adjudging that it has no jurisdiction to hear and determine an administrator's accounts after a distribution by agreement of the intestate's estate, the superior court, acting as an appellate court of probate, on reversing such decree may settle the administration account as fully as could be done by the probate court without remanding it to that court. Mathews' App., 72 Conn. 555, 45 A 170.

[d] **When not remanded.**—In proceedings for the settlement of the account of executors, where only the question of testatrix's daughter's accountability for advancements, undisputed in amount, is involved, the case will not be remanded for new trial because of error. Hayes v. Welling, 38 R. I. 553, 96 A 843 [rearg den 98 A 61].

31. Hayes v. Welling, (R. I.) 85 A 630 ("We cannot now proceed to decide the other questions involved in the other exceptions, if for no other reasons, because it would be to attempt to decide by way of anticipation questions which may or may not arise upon a proper and lawful accounting by the executors").

32. Bearse v. Brown, 167 App. Div. 415, 153 NYS 514.

33. Ala.—Russell v. McPherson, 80 S 392.

Cal.—In re Mathewson, 184 P 867.

Conn.—Canfield v. Bostwick, 21 Conn. 550.

Ga.—Adair v. St. Amand, 136 Ga. 1, 70 SE 578.

Ill.—Dunlap v. Savage, 196 Ill. A. 378.

Iowa.—In re Smith, 133 Iowa 142, 109 NW 196.

La.—Peters' Succ., 114 La. 952, 38 S 690.

Nebr.—Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

Pa.—In re Donnelly, 246 Pa. 308, 92 A 306.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Tex.—Stonebraker v. Friar, 70 Tex. 202, 7 SW 799.

[a] **Illustrations.**—(1) Where the effect of reversal, on an accounting without notice to one of the heirs, would be to remand the cause for a new accounting, and it appears that an accounting has actually been made upon full proof, and with all parties represented, the error will not be held prejudicial. Allen v. Shanks, 90 Tenn. 359, 16 SW 715. (2) An order overruling objections to the second report of an administratrix was not reversible because the proper balance was not carried over from the first into the second report, where the estate remained open so that the error might be corrected in the final report. In re Smith, 133 Iowa 142, 109 NW 196; Smith v. Smith, 133 Iowa 142, 109 NW 196.

34. Duhe's Succ., 42 La. Ann. 252, 7 S 327; State v. Judge Ouachita Parish Ct., 30 La. Ann. 183; Bradley v. Bradley, 97 Minn. 130, 106 NW 338; Wright v. Wright, 72 N. Y. 149; Matter of Guaranty Trust Co., 131 App. Div. 658, 116 NYS 147 [aff 195 N. Y. 611 mem, 89 NE 1101 mem]; Baggott v. Boulger, 9 N. Y. Super. 160; Cary v. Macon, 4 Call (8 Va.) 605.

[a] **Illustration.**—Where the decision of a surrogate rejecting certain claims is reversed on appeal, such claims should be allowed. Wright v. Wright, 72 N. Y. 149.

35. Appleton v. Marx, 62 Fed. 638, 10 CCA 555; Rose's Est., 66 Cal. 241, 5 P 220.

[a] **Application of rule.**—The reversal by the appellate court of a decree settling the account of an administrator sets aside such settlement and thereafter any person interested in the estate may appear in the lower court and file exceptions to the account. Rose's Est., 66 Cal. 241, 5 P 220.

36. Wilkinson v. Ward, 42 Ill. A. 541.

37. Young v. Cabell, 27 Gratt. (68 Va.) 761.

38. Hoff's Est., 7 Pa. Dist. 93.

39. Amis v. Cameron, 55 Ga. 449.

40. Ala.—Caldwell v. Caldwell, 183 Ala. 590, 62 S 951.

Ga.—Williams v. P. Williams Co., 122 Ga. 178, 50 SE 52, 106 AmSR 100; Hatcher v. Cade, 55 Ga. 359.

La.—Engelman v. Coco, 42 La. Ann. 923, 8 S 610.

Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328.

Mass.—Parker v. New England Trust Co., 215 Mass. 226, 102 NE 427.

Mich.—Lasley v. Preston, 132 Mich. 208, 93 NW 253.

N. H.—Wentworth v. Wentworth, 75 N. H. 547, 78 A 646.

Oh.—Mason v. Myer, Wright 641.

Pa.—Goodbread's Est., 24 Pa. Co. 427; Zacharias' Est., 2 Woodw. 149.

[a] **Where the sole heir to a succession and all the creditors** make an extrajudicial settlement of the succession and involve its affairs in confusion, the court will leave them where they have placed themselves and dismiss the suit for a settlement. Engelman v. Coco, 42 La. Ann. 923, 8 S 610.

[b] **Presumption as to settlement.**—Twenty years after the settlement of an estate in probate court pursuant to an agreement among the heirs, it will be presumed that the parties to the agreement appeared before the court, and that it was signed by a certain one of the heirs, or by some one authorized to sign for him and that all parties interested in the estate were parties to the agreement. Lasley v. Preston, 132 Mich. 208, 93 NW 253.

[c] **Representative a necessary party.**—A petition praying that the executor and trustee under a will be directed to adjust a controversy according to the terms of a compromise between the heirs of testator and cannot be maintained, where the executor and trustee, who by the terms of the compromise was to be eliminated as trustee, was not a party to the compromise, as expressly required by Rev. L. c 148 § 15. Parker v. New England Trust Co., 215 Mass. 226, 102 NE 427.

41. Ala.—Norwood v. Tyson, 138 Ala. 269, 36 S 370; Brazeale v. Brazeale, 9 Ala. 491.

D. C.—Patten v. Glover, 1 App. 466 [aff 165 U. S. 394, 17 SCt 411, 41 L. ed. 760].

Ill.—Starrett v. Brosseau, 110 Ill. A. 605 [aff 208 Ill. 408, 70 NE 354].

Iowa.—In re Mansfield, 80 Iowa 681, 46 NW 65.

Ky.—Petry v. Petry, 142 Ky. 564, 134 SW 922; White v. Staten, 10 KyL 726.

La.—Hodge v. Durnford, 13 La. 187.

Md.—Shafer v. Shafer, 85 Md. 554, 37 A 167; Hanson v. Worthington, 12 Md. 418.

Mich.—Eccard v. Brush, 48 Mich. 3, 11 NW 756.

N. H.—Wentworth v. Wentworth, 75 N. H. 547, 78 A 646.

N. Y.—Jacot v. Emmett, 11 Paige 142.

N. C.—Ives v. Sumner, 16 N. C. 338.

Oh.—Piatt v. Longworth, 27 Oh. St. 159.

Pa.—In re Hertzler, 192 Pa. 531, 43 A 1027; Barber's Est., 142 Pa. 476, 21 A 986; Shartel's App., 64 Pa. 25; Root's Est., 8 Pa. Dist. 223; Mershon's Est., 8 Pa. Dist. 154, 22 Pa. Co. 278; Justice's Est., 33 Pa. Co. 83; Riddle's Est., 18 Phila. 222.

S. C.—Reid v. Clark, 17 S. C. Eq. 343.

Va.—Kent v. Kent, 34 SE 32.

Ont.—Murray v. McKenzie, 23 Ont. L. 287, 2 OntWN 302, 17 OntWR 603, 2 OntWN 785, 18 OntWR 747, 21 Ann Cas 968.

[a] **Intention to settle.**—It must clearly appear from the acts of the parties that it was their intention to consider the estate settled and distributed, or to consider the personal representative discharged from further duty to them. Kells v. People's Trust Co., 82 App. Div. 548, 81 NYS 513.

[b] **The superior court has jurisdiction to determine whether** the legatees agreed to discharge the executor and to then divide the estate

open, fair, and honest, and the parties of full age and under no disability. But such an agreement is of course not binding upon one who is not a party to it.[42] As the result of an agreement entered into by the personal representative and persons interested in the settlement of the estate, he may be relieved from his duty to render an account,[43] unless such a result would contravene some statutory provision.[44] As a general rule a settlement out of court between an executor or administrator and the legatees or distributees cannot afterward be opened except in equity on the ground of fraud or mistake,[45] although it has been held that such a settlement is not conclusive upon the parties but is merely evidence for the consideration of the judge of probate in deciding whether a further settlement shall be ordered and the accounts examined.[46] Relief may be afforded on equitable grounds.[47] So the validity of a written agreement set up by a personal representative as a release from his duty to account and settle may be inquired into,[48] and it will be of no avail if obtained by misrepresentation or fraud,[49] or entered into under a mistake of fact.[50] A receipt, although reciting a settlement in full, may be open to explanation and is not necessarily conclusive upon legatees or distributees in a suit brought by them to compel an accounting.[51] An administrator who is cited to make a final settlement cannot protect himself by setting up a written agreement entered into between himself and the executors and

among themselves and to give effect to such agreement, since the title as between the beneficiaries depends on the agreement and not on decedent's will, except in so far as it is a part of the agreement. Wentworth v. Wentworth, 75 N. H. 547, 78 A 646.

[c] **A bond given by a legatee** to exonerate the executor is evidence of a settlement. Ives v. Sumner, 16 N. C. 338.

[d] **A release for money due parties as residuary legatees** does not release from liability for a specific legacy bequeathed in trust. Hanson v. Worthington, 12 Md. 418.

[e] **Heirs bound by settlement.—** Where the heirs and administratrix voluntarily and fairly settled the estate out of court, and ascertained the amount of the distributive share to which each heir was entitled, and one of the heirs was paid a greater part of his distributable share, the settlement was binding on him, although the other heirs left their shares in the hands of a third person as agent to keep and invest. Petry v. Petry, 142 Ky. 564, 134 SW 922.

[f] **However,** a private agreement made by some of the heirs at law, one of whom is administrator of the estate, which does not appear ever to have received the sanction of the probate court, cannot be considered a final settlement or a legal discharge of the administrator. Smilie v. Siler, 35 Ala. 88.

[g] **Private semiannual accountings are conclusive** on the question of the executor's right to additional compensation for services included therein where accompanied by a deduction of commissions and expenses and by releases from beneficiaries and approved by the court. Matter of Daly, 99 Misc. 203, 165 NYS 792 [mod on other grounds 180 App. Div. 307, 167 NYS 229].

42. Ala.—Norwood v. Tyson, 138 Ala. 269, 36 S 370; Smilie v. Siler, 35 Ala. 88; Powell v. Powell, 10 Ala. 900.

Ill.—Starrett v. Brosseau, 110 Ill. A. 605 [aff 208 Ill. 408, 70 NE 354].

Md.—Lawson v. Burgee, 131 Md. 436, 103 A 516.

Mo.—McCune v. McCune, 29 Mo. 117.

N. Y.—In re Pruyn, 141 N. Y. 544, 36 NE 595 [aff 76 Hun 128, 27 NYS 572]; Kells v. People's Trust Co., 82 App. Div. 548, 81 NYS 513.

Pa.—Clinton's Est., 8 Pa. Dist. 661, 23 Pa. Co. 209.

43. U. S.—Littell v. Hackley, 126 Fed. 309, 61 CCA 295.

Mass.—Fuller v. Wilbur, 170 Mass. 506, 49 NE 916.

N. Y.—In re Pruyn, 141 N. Y. 544, 36 NE 595 [aff 76 Hun 128, 27 NYS 572]; In re Wagner, 119 N. Y. 28, 23 NE 200 [aff 52 Hun 23, 4 NYS 761]; Monroe v. Turner, 114 App. Div. 634, 100 NYS 27 [aff 189 N. Y. 563 mem, 82 NE 1129 mem]; Matter of Hale, 6 App. Div. 411, 39 NYS 577.

Pa.—Hess v. Frankenfield, 106 Pa. 440; Weaver v. Roth, 105 Pa. 408; Walworth v. Abel, 52 Pa. 370; Baker's Est., 19 Pa. Dist. 134; Justice's Est., 15 Pa. Dist. 343; Mershon's Est., 8 Pa. Dist. 154, 22 Pa. Co. 278; Hoff's Est., 7 Pa. Dist. 93; Harlan's Est., 3 Pa. Dist. 809, 16 Pa. Co. 51, 1 Lack LegN 122; Armstrong's Est., 16 Montg. Co. 9; Gardiner's Est., 18 WklyNC 148.

Que.—Newton v. Seale, 4 Montr. Q. B. 158.

[a] **Agreement dispensing with account revocable.—**Fuller v. Wilbur, 170 Mass. 506, 49 NE 916.

[b] **Requisites of agreement necessary to bar proceeding to compel account.—**The surrogate's court will not be ousted of jurisdiction in matters of accounting between executors or administrators and those interested in the estates of deceased persons, unless there have been acts of the parties which clearly indicate an intention between the parties to consider the estates settled and distributed, or to consider the executors or administrators discharged from further duty to them. Kells v. People's Trust Co., 82 App. Div. 548, 81 NYS 513.

[c] **A release by the next of kin to the widow of the intestate** of the net income of the realty and personalty of the estate on condition that she relinquish all her right of dower, "the whole to be under the direction" of the administrator, does not affect the administrator's liability to account. Newport Prob. Ct. v. Hazard, 13 R. I. 1.

44. Dant v. Cooper, 123 Ky. 359, 96 SW 454, 29 KyL 778.

45. U. S.—Burnes v. Burnes, 137 Fed. 781, 70 CCA 357 [aff 132 Fed. 485, and certiorari den 199 U. S. 605, 26 SCt 746, 50 L. ed. 330]; Littell v. Hackley, 126 Fed. 309, 61 CCA 295 [certiorari den 194 U. S. 635, 24 SCt 858, 48 L. ed. 1160].

Ala.—Norwood v. Tyson, 138 Ala. 269, 36 S 370.

Cal.—In re Coursen, 6 Cal. Unrep. Cas. 756, 65 P 965.

D. C.—Batten v. Glover, 1 App. 466 [aff 165 U. S. 394, 17 SCt 411, 41 L. ed. 760].

Ga.—Gairdner v. Tate, 110 Ga. 456, 35 SE 697; Kidd v. Huff, 105 Ga. 209, 31 SE 430.

Ky.—Boughner v. Laughlin, 64 SW 856, 23 KyL 1166, 76 SW 519, 25 KyL 869.

Md.—Cummings v. Robinson, 95 Md. 759, 53 A 795; Jones v. Harbaugh, 93 Md. 269, 48 A 827.

Mass.—Forbes v. Allen, 166 Mass. 569, 44 NE 1065.

Mo.—Browning v. Richardson, 186 Mo. 361, 85 SW 518; State v. Stuart, 74 Mo. A. 182.

N. J.—Lutjen v. Lutjen, 64 N. J. Eq. 773, 53 A 625 [rev 63 N. J. Eq. 391, 51 A 790].

N. Y.—Monroe v. Mather-Lovelace, 189 N. Y. 563, 82 NE 1129; Thompson v. Thompson, 180 N. Y. 311, 73 NE 43 [rev 88 App. Div. 618 mem, 84 NYS 1148 mem, 70 App. Div. 242, 75 NYS 401]; In re Wagner, 119 N. Y. 28, 23 NE 200; Monroe v. Turner, 114 App. Div. 634, 100 NYS 27 [aff 189 N. Y. 563 mem, 82 NE 1129 mem]; Murphy v. Murphy, 44 App. Div. 456, 60 NYS 1069 [aff 167 N. Y. 604 mem, 60 NE 1116 mem]; Matter of Pruyn, 76 Hun 128, 27 NYS 572 [aff 141 N. Y. 544, 36 NE 595]; Matter of Franklin, 26 Misc. 107, 56 NYS 858, 1 Mills Surr. 7; Matter of Irvin, 24 Misc. 353, 53 NYS 715, 2 Gibb. Surr. 535.

N. C.—James v. Matthews, 40 N. C. 28.

Oh.—Piatt v. Longworth, 27 Oh. St. 159; In re Koehnken, 25 Oh. Cir. Ct. 245 [mod 11 OhS&CP 799, 8 OhNP 657].

Pa.—In re Young, 204 Pa. 32, 53 A 511; In re Brownfield, 193 Pa. 151, 44 A 246; In re Hertzler, 192 Pa. 531, 43 A 1027; Barber's Est., 142 Pa. 476, 21 A 986; Root's Est., 8 Pa. Dist. 223; Mershon's Est., 8 Pa. Dist. 154, 22 Pa. Co. 278; Hoff's Est., 7 Pa. Dist. 93; Armstrong's Est., 16 Montg. Co. 9; Shellenberger's Est., 17 YorkLeg Rec 130.

R. I.—Tillinghast v. Brown Univ., 25 R. I. 284, 55 A 758.

S. C.—Murrel v. Murrel, 21 S. C. Eq. 148, 49 AmD 664.

Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

Va.—Tate v. Jones, 98 Va. 544, 36 SE 984.

Wash.—Griffin v. Warburton, 23 Wash. 231, 62 P 765.

Wis.—Perkins v. Owen, 123 Wis. 238, 101 NW 415.

46. Francez's Succ., 49 La. Ann. 1732, 23 S 254; Clarke v. Clay, 31 N. H. 393 [dist Hibbard v. Kent, 15 N. H. 516; Giles v. Churchill, 5 N. H. 337].

47. U. S.—Cowen v. Adams, 78 Fed. 536, 24 CCA 198, 80 Fed. 448, 25 CCA 547 [aff 174 U. S. 800, 19 SCt 873, 43 L. ed. 1188 (aff 177 U. S. 471, 20 SCt 668, 44 L. ed. 851)].

Miss.—Swinney v. Cockrell, 38 S 360.

Mo.—State v. Stuart, 111 Mo. A. 478, 86 SW 471.

Oh.—Duhme v. Mehner, 18 Oh. Cir. Ct. 706, 6 Oh. Cir. Dec. 78.

Pa.—In re Fischer, 189 Pa. 179, 42 A 8, 43 WklyNC 436 [mod on other grounds 28 PittsbLegJNS 383]; Wehrle's Est., 205 Pa. 62, 54 A 511 [aff 32 PittsbLegJNS 233].

[a] **Laches** may bar relief. Lowry's Est., 33 Pa. Co. 404.

48. Harris v. Ely, 25 N. Y. 138.

49. Huddleston v. Henderson, 181 Ill. A. 176; Sanders v. Soutter, 126 N. Y. 193, 27 NE 263; In re Read, 41 Hun (N. Y.) 95; Fischer's Est., 28 PittsbLegJNS (Pa.) 383 [aff as to this point but mod on other grounds 198 Pa. 179, 42 A 8].

[a] **A surrogate has no jurisdiction** to pass upon the question whether a release was obtained by fraud. In re Wagner, 119 N. Y. 28, 23 NE 200 [foll Matter of Hodgman, 11 App. Div. 344, 42 NYS 1004 (aff 161 N. Y. 627 mem, 55 NE 1096 mem)].

50. Clinton's Est., 8 Pa. Dist. 661, 23 Pa. Co. 209; William's Est., 8 Pa. Dist. 125.

51. Ga.—Watts v. Baker, 78 Ga. 622, 3 SE 773.

legatees before letters of administration were granted to him, which would change the whole course of administration and keep the estate in process of administration for fifteen years.[52]

[§ 2528] **L. Costs and Expenses—1. In General.** The costs and expenses of accounting and settlement and of proceedings or actions necessitated thereby should be borne by the general estate when incurred in the just interests of the whole estate,[53] and when in the interest of the estate an audit of the account of a personal representative appears necessary, the costs of such audit will be charged to the estate.[54] The granting of costs or allowances is a matter of discretion of the court rather than of right,[55] and the award should be made to the parties and not to their attorneys.[56] Costs or allowances on an accounting have no place whatever in the account, as they must first be fixed and allowed by the court.[57] In an action to surcharge an administrator's settlement, defendants other than the administrator, who sought to recover nothing, and made no costs, and against whom no recovery was sought, should not be taxed or pay any costs.[58]

[§ 2529] **2. Counsel Fees and Expenses of Settlement.** An executor or administrator, who has properly performed the duties of his trust, is usually held to be entitled to his reasonable costs and expenses in connection with the settlement of his account,[59] including an allowance for fees of an at-

Md.—Lawson v. Burgee, 131 Md. 436, 103 A 516.
Mass.—Bard v. Wood, 3 Metc. 74.
N. Y.—Kellett v. Rathbun, 4 Paige 102.
Tex.—Hanlon v. Wheeler, (Civ. A.) 45 SW 821.

52. George v. Goldsby, 23 Ala. 326.

53. Ala.—Clark v. Knox, 70 Ala. 607, 45 AmD 93.
Cal.—In re Mullins, 47 Cal. 450.
Conn.—Taylor v. Mygatt, 26 Conn. 184.
Fla.—Sanderson v. Sanderson, 20 Fla. 292.
Ga.—Morgan v. Campbell, 133 Ga. 549, 66 SE 369.
Ky.—Platt v. Locke, 139 Ky. 72, 129 SW 329; Thirlwell v. Campbell, 11 Bush 163; Stoll v. Stoll, 7 KyL 289.
Mass.—Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.
N. J.—Craig v. Mansing, 8 N. J. Eq. 806.
N. Y.—Matter of Edelmeyer, 157 App. Div. 773, 142 NYS 726 [aff 210 N. Y. 552 mem, 104 NE 1129 mem]; Matter of Niles, 142 App. Div. 198, 126 NYS 1066; Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Matter of Murphy, 121 App. Div. 426, 106 NYS 183; Matter of Arkenburgh, 58 App. Div. 583, 69 NYS 125; Matter of Laramie, 2 Silv. Sup. 539, 6 NYS 175; Matter of Meeker, 9 Daly 556; Matter of Fitter, 100 Misc. 214, 165 NYS 406; Matter of Titus, 86 Misc. 375, 148 NYS 359; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Matter of Seigler, 49 Misc. 189, 98 NYS 929, 5 Mills Surr. 197; Gillespie v. Brooks, 2 Redf. Surr. 349.
Pa.—Potts' App., 3 Walk. 135; Guinane's Est., 5 Pa. Dist. 118, 17 Pa. Co. 438; Lafferty's Est., 5 Pa. Dist. 75, 17 Pa. Co. 401; Titlow's Est., 5 Pa. Dist. 40, 17 Pa. Co. 356; Ziegler's Est., 25 Pa. Co. 611, 18 LancLRev 393, 401; Rankin's Est., 5 Pa. Co. 603; Thomas' Est., 1 Dauph. Co. 381; Rowe's Est., 11 Kulp 32; Francis' Est., 5 Kulp 17, 21; In re Hensler, 18 LancLRev 317; In re Harlan, 1 Pa LJR 451, 3 PaLJ 116; McFarland's Est., 1 Phila. 378.
R. I.—Bowlin v. State Hospital Trust Co., 76 A 770.
Tex.—Richardson v. Kennedy, 74 Tex. 507, 12 SW 219.
Va.—Turnbull v. Buford, 119 Va. 304, 89 SE 233.

[a] **An allowance to a guardian ad litem** may be made out of the general fund. Hessig v. Hessig, 131 Ky. 514, 115 SW 748; In re O'Keeffe, 80 App. Div. 513, 81 NYS 118; In re Farmers' L. & T. Co., 49 App. Div. 1, 63 NYS 227; Matter of Robinson, 40 App. Div. 30, 57 NYS 523; Cunning v. Lockman, 3 Redf. Surr. (N. Y.) 273.

[b] **Rule applies to expenses of reference.**—Matter of Vandervoort, 11 NYS 764, 19 NYCivProc 355.

[c] **The expenses of settlement constitute a lien** on the entire estate and the lien is not divested by partition. In re Cary, 10 Kulp (Pa.) 227.

[d] **The cost of a copy of the testimony** taken at a hearing before the auditing judge is not to be borne by the estate but by the party desiring same. Tasker's Est., 15 Pa. Dist. 174.

[e] **Practice as to payment and allowance.**—(1) A personal representative is individually liable for expenses contracted by him in the settlement of the estate. Taylor v. Mygatt, 26 Conn. 184. (2) If he employs counsel it is the duty of such counsel to present his account for payment before the final accounting, and for the representative to fix upon the amount which is reasonable to be paid and pay it on his own responsibility, and have such payment allowed on his final accounting. Osborne v. McAlpine, 4 Redf. Surr. (N. Y.) 1.

[f] **Prerequisites to payment.**—Where the referee had not filed his report, and his fees and the fees of the stenographer had not been taxed, the surrogate's court had no authority to order the executor to pay such fees, without bills or affidavits from the referee or stenographer as to the amounts claimed. Matter of Dunn, 164 App. Div. 134, 149 NYS 530.

[g] **Amount.**—On a settlement of an executor's account, the surrogate cannot award costs and order allowances for any amount he may think would compensate a party, the power being derived wholly from Code Civ. Proc. §§ 2561, 2562, placing limitations thereon. Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

[h] **Amount of estate as affecting allowance.**—The amount of an estate within the meaning of a statute, providing that "costs other than actual expenses cannot be awarded to be paid out of an estate or fund which is less than one thousand dollars in amount or value," is not the balance left after the funeral expenses, etc., are paid, but the gross amount at the time of the decedent's death, with any increase up to the time of accounting. Chalker v. Chalker, 5 Redf. Surr. (N. Y.) 480.

[i] **Apportionment between corpus and income.**—It is proper to direct that one half of the expense of an intermediate accounting should be paid out of the body of the estate and the other half out of the income, the circumstances being such that the representative could not be charged personally with any part of the expense. Matter of Stevens, 47 Misc. 560, 95 NYS 1084, 5 Mills Surr. 39.

54. In re Heath, 52 N. J. Eq. 807, 33 A 46; Smith's App., 47 Pa. 424; Garman's Est., 32 Pa. Super. 494; Rankin's Est., 5 Pa. Co. 603; Griffiths' Est., 1 LackLegN (Pa.) 311; Bolich's Est., 2 LegRec (Pa.) 187, 2 YorkLegRec 160; Reed's Est., 4 Montg. Co. (Pa.) 173; Sheetz's Est., 2 Woodw. (Pa.) 407.

[a] **Amount of auditor's fee.**—Moffett's Est., 11 Phila. (Pa.) 109; Bradley's Est., 11 Phila. (Pa.) 87 (auditor claiming a fee agreed upon by parties must annex agreement to report); Benner's Est., 11 Phila. (Pa.) 6 (agreement of counsel fixing compensation of auditor must be in writing); Matter of Ward, 9 Phila. (Pa.) 332; Waugh's Est., 9 Phila. (Pa.) 329; In re Bewley, 35 Legint (Pa.) 120; In re Shirk, 8 LegGaz (Pa.) 11.

55. Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

[a] **When costs denied to representative.**—Where a trustee in bankruptcy of a partnership bank, of which decedent had been a member, wrongfully refused to deliver certain stock belonging to decedent to his executor, and such executor failed to ask for a postponement of a hearing on his final accounting until he could obtain possession of the stock and tender it as a credit in his account, and as a result of such failure an appeal was taken, and it is probable that, if such tender had been made, much if not all the ensuing litigation might have been saved, the executor will be denied costs on a determination in his favor of the question of his right to such credit. In re Choate, 165 Mich. 420, 131 NW 169.

56. Hessig v. Hessig, 131 Ky. 514, 115 SW 748; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

57. Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

[a] **Charges for counsel fees paid** on the accounting should be separately stated and accompanied with an affidavit showing conformity to the statute. Carroll v. Hughes, 5 Redf. Surr. (N. Y.) 337; Harward v. Hewlett, 5 Redf. Surr. (N. Y.) 330.

58. Evans v. McVey, 172 Ky. 1, 188 SW 1075.

59. Hawaii.—Matter of Alina, 13 Hawaii 388.
Ill.—Bachman v. Wilkins, 194 Ill. A. 232.
Ky.—Stratton v. Wilson, 170 Ky. 61, 185 SW 522, AnnCas1918B 917.
La.—Benton's Succ., 106 La. 494, 31 S 123, 59 LRA 135; Conery's Succ., 106 La. 50, 30 S 294.
Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302.
Minn.—Gilman v. Maxwell, 79 Minn. 377, 82 NW 669.
Mo.—Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406; Ansley v. Richardson, 95 Mo. A. 332, 68 SW 609.
N. J.—King v. Foerster, 61 N. J. Eq. 584, 47 A 505; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.
N. Y.—Matter of Garrabrant, 176 App. Div. 186, 162 NYS 544 [aff 220 N. Y. 773 mem, 116 NE 1046 mem]; Matter of Edelmeyer, 157 App. Div. 773, 142 NYS 26 [aff 210 N. Y. 552 mem, 104 NE 1129]; Matter of Arnton, 106 App. Div. 326, 94 NYS 471; Clock v. Chadeagne, 10 Hun 97; Matter of Higgins, 80 Misc. 609, 142 NYS 1029; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Matter of Pond, 42 Misc. 165, 85 NYS 1080, 4 Mills Surr. 124; Matter of

torney to assist him in preparing and settling the account.[60] The representative may be allowed counsel fees incurred by him in defending his final settlement against attacks thereon by persons interested in the estate,[61] although it has been held otherwise where the settlement was held improper,[62] or where the contest was improper and merely in the private interest of the representative.[63] The allowance should be made to the representative and not directly to the attorney.[64] The fact that the representative is surcharged has been held not to preclude an allowance to him of the costs of an audit which would have been necessary in any event.[65] Where unusual skill and labor is required in preparing an account, an allowance may be made a personal representative for the services of an accountant,[66] but ordinarily it is his duty to keep books showing the receipts and expenditures of the estate and to pre-

Brintnall, 40 Misc. 67, 81 NYS 250, 3 Mills Surr. 449; Matter of Foulds, 35 Misc. 171, 71 NYS 473, 2 Mills Surr. 252; Matter of Guldenkirch, 35 Misc. 123, 71 NYS 310; Matter of Schaefer, 34 Misc. 34, 69 NYS 489 [aff 65 App. Div. 378, 73 NYS 57 (aff 171 N. Y. 686 mem, 64 NE 1125 mem)]; Matter of Santos, 31 Misc. 76, 64 NYS 572, 1 Mills Surr. 507; Matter of Bush, 106 Misc. 227, 175 NYS 653; Matter of Varet, 106 Misc. 380, 174 NYS 623 [aff 188 App. Div. 955 mem; 176 NYS 924 mem]; Ray v. Van Hook, 9 How Pr 427; Matter of Van Kleeck, 20 NYS 85, 2 Conn. Surr. 14; Arthur v. Nelson, 1 Dem. Surr. 337; Campbell v. Purdy, 5 Redf. Surr. 434; Gillespie v. Brooks, 2 Redf. Surr. 349.

Oh.—Rote v. Warner, 17 Oh. Cir. Ct. 350, 9 Oh. Cir. Dec. 540.

Pa.—In re Hodgson, 158 Pa. 151, 27 A 878; Smith's App., 47 Pa. 424; Marley's Est., 18 Pa. Super. 303; Herter's Est., 18 Pa. Dist. 1026; Conway's Est., 10 Pa. Dist. 509, 18 LancLRev 129; Edenborn's Est., 10 Pa. Dist. 184; Ziegler's Est., 25 Pa. Co. 611, 18 LancLRev 393, 401; Hensler's Est., 18 LancLRev 317; Williams' Est., 8 Del. Co. 120; Rowe's Est., 11 Kulp 32; Benedict's Est., 4 LancLRev 99; Rambo's Est., 15 Montg. Co. 25; Reed's Est., 4 Montg. Co. 173.

[a] **Costs occasioned by errors of judgment** in making up the account, whereby it became necessary to file exceptions to the account and to have a hearing on the exceptions, will not be charged against the executor personally. Griffiths' Est., 1 LackLegN (Pa.) 311.

[b] **Stenographer's fees** (1) for services rendered in a proceeding for settlement are not, it seems, to be charged to an estate except by agreement of the persons entitled to the estate. Matter of Maritch, 29 Misc. 270, 61 NYS 237, 1 Mills Surr. 284. (2) Such fees may be allowed. Loring v. Wise, 226 Mass. 231, 115 NE 302. See also Du Bois v. Brown, 65 HowPr (N. Y.) 461, 1 Dem. Surr. 317 (where this view is intimated).

60. Ala.—Pryor v. Davis, 109 Ala. 117, 19 S 440; Pickens v. Pickens, 35 Ala. 442.

Ark.—Jacoway v. Hall, 67 Ark. 340, 55 SW 12.

Cal.—In re Casner, 1 Cal. A. 145, 81 P 991.

Conn.—Reed v. Reed, 80 Conn. 401, 68 A 849.

Fla.—Sanderson v. Sanderson, 20 Fla. 292.

Ill.—Whittemore v. Coleman, 239 Ill. 450, 88 NE 228; Giger v. Bishop, 231 Ill. 472, 83 NE 289; McDonald v. Peo., 222 Ill. 325, 78 NE 609.

Iowa.—In re Hamilton, 148 Iowa 127, 126 NW 776.

Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748; Seibert v. Bloomfield, 63 SW 584, 23 KyL 646; Crutcher v. Methodist Episcopal Church Bd. of Missions, 62 SW 895, 23 KyL 257.

La.—McNeely v. McNeely, 50 La. Ann. 823, 24 S 338; Smith v. Cheney, 1 Rob. 98.

Md.—Pleasants v. McKenney, 109 Md. 277, 71 A 955; Flater v. Weaver, 108 Md. 668, 71 A 309.

Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302; Forward v. Forward, 6 Allen 494.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068; Wolfort v. Reilly, 133 Mo. 463, 34 SW 847; Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457; Hill v. Evans, 114 Mo. A. 715, 91 SW 1022.

N. Y.—Hannahs v. Hannahs, 68 N. Y. 610; Matter of Arnton, 106 App. Div. 326, 94 NYS 471; Matter of Hodgeman, 69 Hun 484, 23 NYS 725 [aff 140 N. Y. 421, 35 NE 660]; Matter of Kenworthy, 63 Hun 165, 17 NYS 655; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Matter of Selleck, 1 NYSt 575 [rev on other grounds 111 N. Y. 284, 19 NE 66]. But see Willcox v. Smith, 26 Barb. 316 [appr Burtis v. Dodge, 1 Barb. Ch. 77] (decided prior to enactment of present statute).

N. C.—Kelly v. Odum, 139 N. C. 278, 51 SE 953.

Oh.—Trumpler v. Royer, 95 Oh. St. 194, 115 NE 1018; Madden v. McGillin, 24 Oh. Cir. Ct. N. S. 607; In re McAlpin, 8 OhS&CP 654; Chatfield v. Swing, 6 Oh. Dec. (Reprint) 666, 7 AmLRec 326.

Pa.—In re McManus, 214 Pa. 634, 63 A 1074; Pusey v. Clemson, 9 Serg. & R. 204; Marley's Est., 18 Pa. Super. 303; In re Greenwalt, 9 LancBar 50; Martin's Est., 15 Phila. 514; Rankin's Est., 9 WklyNC 407; Leow's Est., 6 WklyNC 333.

Tex.—Ackermann v. Ackermann, (Civ. A.) 99 SW 889.

Wash.—Snook v. Kennedy, 103 Wash. 390, 174 P 643.

[a] **Deductions for amounts previously paid attorneys** are proper. Fink's Succ., 19 La. Ann. 258.

[b] **Injunction to prevent settlement.**—Counsel fees paid by an administrator in resisting an injunction to prevent the settlement of his accounts will be allowed. Miller v. Simpson, (Ky.) 2 SW 171.

[c] **Settlement in equity.**—If a resort by an administrator to a court of equity for a settlement of his accounts is necessary, he is entitled to an allowance for reasonable counsel fees therein. Clark v. Knox, 70 Ala. 607, 45 AmR 93.

[d] **When a deceased representative's surety files his account,** counsel fees will not be allowed his representative. Haley's Est., 9 Pa. Dist. 116.

[e] **Action caused by representative's delay.**—The charge made by a personal representative for lawyer's fees for the preparation of his account will not be allowed when by his delay he has compelled the heirs to sue for its rendition. Bass v. Chambliss, 9 La. Ann. 376.

[f] **An attorney's fee for procuring letters** of administration cannot be allowed on settlement of the final account of the administrator. Bowman v. Bowman, 27 Nev. 413, 76 P 634.

[g] **No allowance for services in making up account.**—In re Steelman, (N. J. Prerog.) 99 A 612 [foll In re Ramsey, (N. J.) 66 A 410; In re Wolfe, 34 N. J. Eq. 223].

61. Ala.—Pinckard v. Pinckard, 24 Ala. 250.

Iowa.—McFarland v. Stewart, 109 Iowa 561, 80 NW 657.

Mass.—Loring v. Wise, 226 Mass. 231, 115 NE 302.

Mo.—Albert v. Sanford, 201 Mo. 117, 99 SW 1068; Jacobs v. Jacobs, 99 Mo. 427, 12 SW 457.

N. Y.—Matter of Varet, 105 Misc. 443, 173 NYS 559.

Pa.—In re Hodgson, 158 Pa. 151, 27 A 878; Fieser's Est., 15 Pa. Super. 447.

Tex.—Ackermann v. Ackermann, (Civ. A.) 99 SW 889.

[a] **Reason for rule.**—"If executors and administrators of estates who have faithfully discharged their duties, and, in the main, rendered a true account of their trust, are to be required at their own individual cost to defend their settlements, in protracted and expensive litigation, from every attack that may be made upon them, few responsible and competent persons will be found to take charge of estates for the modest compensation the law allows for the service." Jacobs v. Jacobs, 99 Mo. 427, 436, 12 SW 457.

[b] **When account partially sustained.**—(1) Where the final settlement of a personal representative is contested and some of the objections thereto are sustained and others disallowed, the personal representative is entitled to a reasonable allowance for attorney's fees for defending the settlement. Pinckard v. Pinckard, 24 Ala. 250; In re Meeker, 45 Mo. A. 186. (2) But he is not entitled to an allowance for attorney's fees for services rendered as to items which are successfully contested. Clark v. Eubank, 80 Ala. 584, 3 S 49.

[c] **On supplemental accounting,** the surrogate's court has no power to allow to executors counsel fees and disbursements incident to their upholding, on appeal by the legatees, the decree of the surrogate's court on their original accounting. Matter of Varet, 105 Misc. 443, 173 NYS 559 [foll Matter of McEchron, 55 App. Div. 147, 67 NYS 18].

62. Taylor v. Minor, 90 Ky. 544, 14 SW 544, 12 KyL 479; In re Whitlow, 184 Mo. A. 229, 167 SW 463.

[a] **The fact that some of the objections were sustained** is not a ground for denying credit for the fees of counsel, where other objections were disallowed. In re Meeker, 45 Mo. A. 186.

[b] **The fact that an administrator has been surcharged with interest** because he had kept the trust funds in his private bank does not preclude the allowance to him of the expenses of the accounting, where he had prepared his account in good faith and there was no concealment of facts. Walker v. Dow, 3 NYS 132, 6 Dem. Surr. 265.

63. Noble v. Jackson, 132 Ala. 230, 31 S 450; Pryor v. Davis, 109 Ala. 117, 19 S 440; Anderson v. Anderson, 37 Ala. 683; Taylor v. Minor, 90 Ky. 544, 14 SW 544, 12 KyL 479; Matter of Post, 30 Misc. 551, 64 NYS 369, 1 Mills Surr. 479; Overman v. Lanier, 157 N. C. 544, 73 SE 192.

64. McKee v. Soher, 138 Cal. 367, 71 P 438, 649; In re Kruger, 123 Cal. 391, 55 P 1056; Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479; Matter of Wright, 121 App. Div. 581, 106 NYS 369; Willcox v. Smith, 26 Barb. (N. Y.) 316; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Matter of Gates, 2 Redf. Surr. (N. Y.) 144; Vaughn v. Walsh, 122 Wis. 486, 100 NW 840.

[a] **Aliter** under early statute. Gunning v. Lockman, 3 Redf. Surr. (N. Y.) 273.

65. Merkel's Est., 131 Pa. 584, 18 A 931.

66. More's Est., 121 Cal. 609, 54 P 97; Harrison v. McAdam, 38 Misc. 18, 76 NYS 701; In re Greenwalt, 9 LancBar (Pa.) 50; Rankin's Est., 9 WklyNC (Pa.) 407; Henderson v. McIver, 3 Madd 275, 56 Reprint 510.

pare his account personally, without any allowance for assistance.[67]

The amount allowed for counsel fees in accounting proceedings, in accordance with the general rule on the subject,[68] must be reasonable.[69] With respect to costs, the representative cannot be allowed more than the statutory amount.[70]

An allowance of counsel fees may be refused where the services for which the allowance was claimed were unnecessary in connection with the performance of the duties of the representative,[71] or were made necessary because of some fault on the part of the representative,[72] where the services were solely for the benefit of the representative,[73] where the representative is himself an attorney and there is no proof that he did not prepare his own account,[74] or where it appears that a payment previously made to the attorney, and for which the representative has received credit, was in full settlement for all services rendered and to be rendered by the attorney in connection with the estate.[75]

[§ 2530] **3. Allowance or Assessment to Contestants.** Persons contesting the account of a representative may be taxed with a part or all of the costs of the proceeding where the decision is against them, if it appears that the contest was brought upon insufficient grounds;[76] but the costs of proceedings in which the contestant is successful, or which were brought in good faith and upon reasonable grounds, may be paid out of the estate.[77] Where a settlement of an account shows that the estate owes the representative more than he has been surcharged as the result of a contest, contestants

67. Kernan's Succ., 105 La. 592, 30 S 239; In re Wolfe, 34 N. J. Eq. 223; Rankin's Est., 9 WklyNC (Pa.) 407; Logan v. Logan, 6 S. C. Eq. 1.

68. See supra § 542.

69. Cal.—In re Aldersley, 174 Cal. 366, 163 P 206; Levinson's Est., 108 Cal. 450, 41 P 483, 42 P 479.

Ill.—Mumper v. Murphy, 212 Ill. A. 52; Bachman v. Wilkins, 194 Ill. A. 232.

Ky.—Girty v. Girty, 180 Ky. 786, 203 SW 730.

La.—Cahill v. Bianki, 134 La. 617, 64 S 488.

N. Y.—Matter of Martin, 124 App. Div. 793, 109 NYS 217; Matter of King, 122 App. Div. 354, 106 NYS 1073; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; In re Vena, 170 NYS 291; Halsey v. Van Amringe, 6 Paige 12.

Pa.—In re Myers, 253 Pa. 537, 98 A 694; Hulseman's Est., 18 Pa. Dist. 441; Taylor's Est., 3 Pa. Dist. 691; In re Greenwalt, 2 LehighValLR 246.

[a] **Where there is a fee bill,** the amount to be allowed as attorney's fees in settling an estate should be determined thereby rather than by the testimony of attorneys as to the value of the services rendered. Taylor's Est., 3 Pa. Dist. 691.

[b] **Statute fixing fees.**—Act March 22, 1905 (St. [1905] p 727 c 561), providing that executors shall be allowed for fees of their attorneys the same amounts as are allowed as compensation for executors for their own services, modifies the previous law on the subject, embodied in St. (1850) p 396 c 129 §§ 220, 222 (St. [1851] p 476 c 124 §§ 220, 222; Code Civ. Proc. §§ 1616, 1618), authorizing reasonable attorney's fees, etc., and provides a uniform standard, and is valid as providing for reasonable fees. In re Goodrich, 6 Cal. A. 730, 93 P 121.

[c] **Effect of statute.**—(1) In New York the statute authorizes the surrogate, upon rendering a decree, to allow certain costs to the personal representative, and in his discretion to allow in addition such a sum as he deems reasonable for the personal representative's counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial and necessarily occupied in preparing his account and otherwise preparing for the trial. Code Civ. Proc. §§ 2746, 2747. Seaman v. Whitehead, 78 N. Y. 306; Matter of O'Keeffe, 80 App. Div. 513, 81 NYS 118; Matter of Hogarty, 62 App. Div. 79, 70 NYS 839 [mod and aff 34 Misc. 610, 70 NYS 428]; Matter of Welling, 51 App. Div. 355, 64 NYS 1025, 53 App. Div. 639, 65 NYS 1060; Matter of Reeves, 48 Hun 606, 1 NYS 17, 21 AbbNCas 289; Matter of Van Kleeck, 20 NYS 85, 2 Conn. Surr. 14; Matter of Nockin, 15 NYSt 731; Matter of Collamer, 5 NYSt 196; Du Bois v. Brown, 65 HowPr (N. Y.) 461, 1 Dem. Surr. 317; Hall v. Campbell, 1 Dem. Surr. (N. Y.) 415; Stokes v. Dale, 1 Dem. Surr. (N. Y.) 260; Matter of Miles, 5 Redf. Surr. (N. Y.) 110; Osborne v. McAlpine, 4 Redf. Surr. (N. Y.) 1. (2) These provisions do not restrict the authority of the surrogate to allow as a credit upon representative's accounting, a sum in excess of the statutory limit, paid by him to his counsel for services in respect to accounting, where it appears that services beyond the ordinary preparation of the account or for trial were rendered and were necessary. Matter of Mitchell, 39 Misc. 120, 78 NYS 976, 12 NYAnnCas 146, 3 Mills Surr. 301; Matter of Smith, 1 NYS 88, 26 AbbNCas 56 [dist and expl In re Bailey, 47 Hun (N. Y.) 477; In re Clark, 36 Hun (N. Y.) 301; Willcox v. Smith, 26 Barb. (N. Y.) 316; Burtis v. Dodge, 1 Barb. Ch. (N. Y.) 77; Halsey v. Van Amringe, 6 Paige (N. Y.) 12; Hall v. Campbell, 1 Dem. Surr. (N. Y.) 415; Walton v. Howard, 1 Dem. Surr. (N. Y.) 103; Carroll v. Hughes, 5 Redf. Surr. (N. Y.) 337; Harvard v. Hewlett, 5 Redf. Surr. (N. Y.) 330; Matter of Miles, 5 Redf. Surr. (N. Y.) 110; Osborne v. McAlpin, 4 Redf. Surr. (N. Y.) 1].

70. Canfield v. Bostwick, 21 Conn. 550; Sherrell v. Shepard, 19 Fla. 300; Liddel v. McVickar, 11 N. J. L. 44, 19 AmD 369; Pursel v. Pursel, 14 N. J. Eq. 514; Cooley v. Vansyckle, 14 N. J. Eq. 496.

71. Kernan's Succ., 105 La. 592, 30 S 239; Matter of Gunther, 140 App. Div. 861, 125 NYS 702 [aff 202 N. Y. 613 mem, 96 NE 1115 mem]; In re McAlpin, 8 OhS&CP 654; Bracken's Est., 138 Pa. 104, 22 A 20.

[a] **Distribution.**—Where the account of an executor has been confirmed without exception, he holds the balance in his hands as a mere stakeholder, and the fees of his counsel for services before an auditor appointed to make final distribution are not chargeable on the fund. Bracken's Est., 138 Pa. 104, 22 A 20.

[b] **Undisputed matters.**—In the settlement of an administrator's account he is not entitled to the services of an attorney as to matters as to which the liability of the estate is not questioned or disputed by the heirs. In re McAlpin, 8 OhS&CP 654.

72. In re McFarland, 10 Mont. 586, 27 P 389; James v. Craighead, (Tex. Civ. A.) 69 SW 241.

[a] **Where an administrator on resigning failed to file a proper account,** and the one filed was rejected, he was not entitled to be allowed an attorney's fee for services in filing a new account and in representing him on a contest thereof. James v. Craighead, (Tex. Civ. A.) 69 SW 241.

73. In re Walsh, (N. J.) 74 A 563.

74. In re Flaacke, 64 A 1020 [aff 72 N. J. Eq. 944 mem, 73 A 1117 mem].

75. Peters v. Berkemeier, 128 Mo. A. 666, 107 SW 406.

76. Ala.—Jones v. Deyer, 16 Ala. 221.

Ga.—Morgan v. Campbell, 133 Ga. 549, 66 SE 369.

Ky.—Evans v. McVey, 172 Ky. 1, 188 SW 1075; Dills v. Auxier, 85 SW 743, 27 KyL 531; Beeler v. Hill, 5 Dana 37.

Mass.—Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

N. Y.—In re Adams, 166 N. Y. 623, 59 NE 1118 [aff 51 App. Div. 619, 64 NYS 591]; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

Pa.—Galloway's Est., 5 Pa. Super. 272; Stetler's Est., 17 Pa. Dist. 593; Frey's Est., 6 Pa. Co. 84; Funk's Est., 1 Pa. Co. 430; Gauff's Est., 2 Lehigh ValLR 245; Rambo's Est., 15 Montg. Co. 25.

S. C.—Chaplin v. Jenkins, 21 S. C. Eq. 96.

Ont.—O'Sullivan v. Harty, 10 Ont. A. 76, 11 Can. S. C. 322; Re Woodhall, 2 Ont. 456.

[a] **The costs of a frivolous appeal** by an heir in a proceeding to require a further accounting will be taxed against appellant, although the estate was inventoried upon a wrong theory. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

77. Ga.—Morgan v. Campbell, 133 Ga. 549, 66 SE 369.

Ky.—Hessig v. Hessig, 131 Ky. 514, 115 SW 748.

N. J.—In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686].

N. Y.—Matter of Van Vliet, 181 App. Div. 879, 169 NYS 367 [aff 224 N. Y. 572 mem, 120 NE 877 mem]; Matter of Corbin, 101 App. Div. 25, 91 NYS 797; Matter of Titus, 86 Misc. 375, 148 NYS 359 [rev on other grounds 170 App. Div. 764, 156 NYS 510]; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Goetschius' Est., 3 Misc. 155, 23 NYS 975, Pow. Surr. 379; Matter of Collamer, 5 NYSt 196; Gillespie v. Brooks, 2 Redf. Surr. 349.

Pa.—In re Hodgson, 158 Pa. 151, 27 A 878; Kennedy's Est., 8 Pa. Co. 376.

N. W. Terr.—Re Winters, 7 Terr. L. 250.

[a] **Where the contestants were partially successful** (1) in surcharging an account, the allowance of costs to the executor should be paid out of the estate, and not charged against them personally. Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559. (2) Where the heirs and distributees of an estate contested an administrator's right to commissions and credits, and were successful only in part, costs should be apportioned. Overman v. Lanier, 157 N. C. 544, 73 SE 192. (3) Plaintiffs will be adjudged to recover all costs they would be entitled to had they only sought to surcharge as to credits as to which they are successful, but

are not entitled to costs.[78] A creditor calling an administrator to an account cannot recover costs unless he obtains a dividend,[79] and counsel fees have been denied where the real purpose of a settlement suit was to collect the claim of a particular creditor.[80] The court may in its discretion in a proper case divide the costs between the contestants.[81] The allowance to a party interested only in a particular fund will be paid out of that fund.[82] Costs will not be awarded to one who is not a party to the proceeding for accounting.[83]

Attorney's fees. In a proper case a contestant may be allowed even for attorney's fees,[84] but the allowance can be made only to the parties, and not directly to the attorneys.[85] Where there is no contest, the fees of counsel appearing for legatees must be paid by their clients, and not in whole or part made a charge on the funds of the estate.[86]

[§ 2531] **4. Personal Liability of Executor or Administrator.** Costs and expenses of proceedings for accounting and settlement may be charged to the personal representative individually, when he has rendered it necessary that such costs and expenses should be incurred by his misconduct or negligence as to accounting or settling, or when on a contested settlement the finding is against him;[87] and he may also incur individual liability for the costs of a compulsory proceeding for accounting brought after undue delay on his part in accounting and settling.[88] The costs of an audit may be included in the costs which are charged to a personal representative individually.[89]

The representative should not be personally charged with any costs except such as have arisen from his wrongful acts.[90] He should not be charged where he has acted in good faith in the contest,[91] where he has been acquitted of dereliction of duty,[92] where the costs were made necessary by unsustained

they will not recover costs made in unsuccessful efforts to charge debits or disallow credits. Evans v. McVey, 172 Ky. 1, 188 SW 1075.

78. Matter of Eadie, 39 Misc. 117, 78 NYS 967, 3 Mills Surr. 299.

79. Griffith v. Beecher, 10 Barb. (N. Y.) 432.

80. Girty v. Girty, 180 Ky. 786, 203 SW 730.

81. Barry's Succ., 48 La. Ann. 1143, 20 S 656; Roloson v. Riggs, 274 Mo. 522, 203 SW 973; Overman v. Lanier, 157 N. C. 544, 73 SE 192; Pyle's Est., 2 Chest. Co. (Pa.) 569.

[a] **Auditor's fees apportioned.**—Pyle's Est., 2 Chest. Co. (Pa.) 569; Baily's Est., 2 Chest. Co. (Pa.) 568; McCann's Est., 2 Chest. Co. (Pa.) 235.

82. Matter of Barker, 186 App. Div. 317, 174 NYS 230.

83. Parker v. Parker, 99 Ala. 239, 13 S 520, 42 AmSR 48; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Matter of Reed, 12 NYSt 139.

84. Pepper v. Pepper, 98 SW 1069, 30 KyL 460; Taylor v. Minor, 90 Ky. 544, 14 SW 544, 12 KyL 479; Matter of Grattan, 78 N. J. Eq. 225, 78 A 813; In re Flaacke, 64 A 1020 [aff 72 N. J. Eq. 944 mem, 73 A 1117 mem]; In re Woolsey, 67 N. J. Eq. 574, 59 A 463 [rev on other grounds 68 N. J. Eq. 763, 62 A 686]; In re Slater, (N. J. Prerog.) 102 A 384; Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559; Kennedy's Est., 141 Pa. 479, 21 A 671.

[a] **When allowance refused.**—Where the funds belonging to an estate were in the hands of the court, an allowance of attorney's fees to an exceptant for services to the estate in objecting to the allowance of certain excessive commissions and payment of certain taxes and broker's charges was error. In re Harrison, 221 Pa. 508, 70 A 827.

85. Pepper v. Pepper, 98 SW 1039, 30 KyL 460; Matter of Bush, 106 Misc. 227, 175 NYS 653.

86. Matter of Kreidler, 68 Misc. 412, 124 NYS 628, 7 Mills Surr. 559.

87. Ala.—Smyley v. Reese, 53 Ala. 89, 25 AmR 598; Pearson v. Darrington, 32 Ala. 227.

Del.—In re Pennewell, 105 A 377.

Ill.—Marshall v. Coleman, 187 Ill. 556, 58 NE 628 [mod 89 Ill. A. 41].

La.—Hawkins' Succ., 139 La. 228, 71 S 492.

N. J.—King v. Foerster, 61 N. J. Eq. 584, 47 A 505; Aldridge v. McClelland, 36 N. J. Eq. 288 [aff 138 N. J. Eq. 279]; Pursel v. Pursel, 14 N. J. Eq. 514; In re Slater, (Prerog.) 102 A 384.

N. Y.—In re Holmes, 176 N. Y. 603, 68 NE 1118 [aff 79 App. Div. 264, 79 NYS 592]; In re Gabriel, 161 N. Y. 644, 57 NE 1110 [aff 44 App. Div. 623, 60 NYS 87]; In re Hobson, 131 N. Y. 575, 30 NE 63; Northrup v. Northrup, 92 App. Div. 5, 87 NYS 318; Matter of Matthewson, 8 App. Div. 8, 40 NYS 140; Willcox v. Smith, 26 Barb. 316; Griffith v. Beecher, 10 Barb. 432; Matter of Conklin, 20 NYS 59, 2 Conn. Surr. 176; In re Mull, 2 NYS 23; Matter of Harnett, 15 NYSt 725; Matter of Woodard, 13 NYSt 161; Ray v. Van Hook, 9 HowPr 427; Rogers v. Rogers, 3 Wend. 503, 20 AmD 716; Halsey v. Van Amringe, 6 Paige 12; Manning v. Manning, 1 Johns. Ch. 527; Christie's Est., Tuck. Surr. 81. But compare Shultz v. Pulver, 3 Paige 182 [aff 11 Wend. 361] (law prior to Revised Statutes).

Pa.—In re Parker, 64 Pa. 307; In re Spangler, 21 Pa. 335; Moss' Est., 4 Kulp 235; Sharp's Est., 5 LancLRev 176; Dolph's Est., 3 LuzLegReg 146; Fell's Est., 13 Phila. 289; Bradley's Est., 11 Phila. 87; In re Payne, 32 PittsbLegJNS 311; In re Schiehl, 29 PittsbLegJNS 38; Hoffman's Est., 15 YorkLegRec 114; In re Wirt, 11 York LegRec 145. But compare Sharp's Est., 5 LancLRev 176.

S. C.—Sherman v. Angel, 11 S. C. Eq. 26.

Wash.—In re Tachi, 90 Wash. 621, 156 P 833.

W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094.

Ont.—In re Honsberger, 10 Ont. 521.

Newfoundl.—Parker v. Simms, 5 Newfoundl. 37.

[a] **The cost of a special accounting on resignation** of the representative is properly charged to him personally. Matter of Lamb, 21 NYS 343.

[b] **Too frequent accounting** subjects the representative to payment of costs. Lafferty's Est., 19 Pa. Dist. 504.

[c] **Where an administrator has a personal interest in litigation** between himself and distributees upon the final settlement of the estate and a decision is made in favor of the distributees, the representative is personally liable for costs of the proceedings. Jones v. Deyer, 16 Ala. 221; Sherman v. Angel, 11 S. C. Eq. 26.

88. U. S.—Norman v. Storer, 18 F. Cas. No. 10,301, 1 Blatchf. 593.

Cal.—Moore's Est., 72 Cal. 335, 13 P 880.

Ky.—Ransdell v. Threlkeld, 4 Bush 347.

N. J.—Post v. Stevens, 13 N. J. Eq. 293.

N. Y.—Matter of Briggs, 31 Misc. 486, 65 NYS 660, 1 Mills Surr. 546; Goetschius' Est., 3 Misc. 155, 23 NYS 975, Pow. Surr. 379; Peltz v. Schultes, 20 NYS 336, 64 Hun 369, 19 NYS 637; Williams' Est., 2 NYS 669, 15 NYCiv Proc 270, 1 Conn. Surr. 99.

Oh.—In re Klumperink, 3 Oh. Dec. (Reprint) 344.

Pa.—Smith's Est., 57 Pa. Super. 544; Fox's Est., 5 Kulp 218; Stewart's Est., 12 Phila. 150.

[a] **Where account not demanded.**—The omission of executors to account over six months when no demand was made upon them for an account was not such an omission of an absolute or peremptory duty as would justify the imposition of the costs of an equity suit upon them. Myers v. Bryson, 158 Pa. 246, 27 A 986.

[b] **The executrix of a deceased executor** may not be personally charged with the costs of a proceeding to compel her to account as to the estate of which her testator was executor, she having received no property as executrix, and having been guilty of no misappropriation of funds and of no wrongdoing. Matter of Walton, 112 App. Div. 176, 98 NYS 42.

89. Dunford v. Weaver, 84 N. Y. 445 [aff 21 Hun 349] (under statute when accounting is compulsory); Barhite's App., 126 Pa. 404, 17 A 617; In re Price, 81 Pa. 263; McClintock's App., 71 Pa. 365; Martin's App., 23 Pa. 433; Sterrett's App., 2 Penr. & W. (Pa.) 419; Rufe's Est., 29 Pa. Co. 617; Matter of Givler, 6 Dauph. Co. (Pa.) 18; In re Gorgas, 4 LancBar (Pa.) Nov. 30, 1872; Spaise's Est., 21 LancLRev (Pa.) 185; In re Harlan, 1 PaLJR 451, 3 PaLJ 116; Robinson's Est., 5 Phila. (Pa.) 99; Smith's Est., 4 Phila. (Pa.) 377; Kleinfelter's App., 1 Pittsb. (Pa.) 376; Miller's Est., 16 WklyNC (Pa.) 115.

90. In re Heath, 58 Iowa 36, 11 NW 723; Matter of Niles, 142 App. Div. 198, 126 NYS 1066; Matter of Stevens, 47 Misc. 560, 95 NYS 1084, 5 Mills Surr. 39; Matter of Dougherty, 43 Misc. 469, 89 NYS 549, 4 Mills Surr. 272; Wells v. Disbrow, 20 NYS 518; In re Goehring, 263 Pa. 47, 106 A 60; Old's Est., 57 Pa. Super. 509; Shadle's Est., 30 Pa. Super. 160.

[a] **Wrongful act of coexecutor.**—An executor who is surcharged on account of misappropriation of funds by his coexecutor is entitled to have the costs of preparing an account paid from the estate. Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272. To same effect Matter of Wagner, 132 App. Div. 306, 117 NYS 53.

91. Matter of Garrabrant, 176 App. Div. 186, 162 NYS 544 [dism of app den 220 N. Y. 652 mem, 115 NE 1039 mem, and aff 220 N. Y. 773 mem, 116 NE 1046 mem]; Walker v. Dow, 3 NYS 132, 6 Dem. Surr. 265; In re Young, 204 Pa. 32, 53 A 511; Barclay's App., 2 Walk. (Pa.) 17.

92. Mass.—Loring v. Wise, 226

exceptions to the account,[93] or even it has been held, where the opposition to his account was only partly sustained.[94]

An apportionment of costs may, under certain circumstances, be proper.[95]

An attachment for costs awarded against the personal representative is sometimes allowed.[96]

[§ 2532] **5. Costs of Appeal from Accounting.** The allowance of costs to a personal representative on an appeal in proceedings for settlement of his account is sometimes held to be within the discretion of the court.[97] Representatives are personally liable for costs when they unsuccessfully appeal in their own interest from a settlement of their accounts,[98] or when an appeal results from their fault or misconduct,[99] and, conversely, on an appeal by the personal representative from an erroneous probate decree, made without any fault on his part, costs should be taxed against the estate.[1] Costs should not be taxed either for the representative or for the other party to the appeal when neither party was entirely in the right.[2] Where an executor holding funds of the testator in trust for a special purpose appeals from a decree relating to such funds, claiming no interest in them except as trustee, and the decree is affirmed in part and reversed in part, the questions being sufficiently important to authorize the appeal, costs should be taxed for the executor.[3] Counsel fees and expenses incurred in good faith in resisting appeals from orders auditing his account should be allowed the personal representative.[4] Where an administrator has appealed from an order commanding him to render an account, but after filing his bond he has abandoned the appeal, damages should not be granted for the frivolous appeal, as this would be to the detriment of the creditors and heirs of decedent, and not of the administrator.[5]

Allowing costs in advance of appeal. The court has no power to adjudge costs against the administrator which might accrue in the appellate courts, in anticipation of an appeal from its judgment.[6]

XVI. LIABILITY ON ADMINISTRATION BONDS[7]

[§ 2533] **A. Nature and Extent of Liability—1. In General.** The purpose of an administration bond is to secure creditors and next of kin from loss through the default or fraud of the administrator, and to furnish indemnity to the estate.[8] Where the bond is given with sureties, the principal and sureties are equally and primarily liable in case of a breach of its conditions.[9] The obligation of the sureties, however, rests solely in contract and they cannot be held liable contrary to or beyond the condition of the bond.[10] A bond which omits some condition required by statute, although binding in

Mass. 231, 115 NE 302.
Mont.—In re Williams, 55 Mont. 63, 173 P 790.
N. J.—King v. Foerster, 61 N. J. Eq. 584, 47 A 505.
Pa.—In re Goehring, 263 Pa. 47, 106 A 60.
Va.—Turnbull v. Buford, 119 Va. 304, 89 SE 233.

93. Fieser's Est., 15 Pa. Super. 447.

94. Conery's Succ., 106 La. 50, 30 S 294.

95. In re Morrison, 196 Pa. 80, 46 A 257; Smith's Est., 57 Pa. Super. 544.

[a] **Illustration.**—Costs of the audit of an administrator's account are properly apportioned where his failure to keep proper accounts made a reference necessary, and the audit was needlessly prolonged by the beneficiaries of the estate. In re Morrison, 196 Pa. 80, 46 A 257.

96. Patton's Est., 19 Pa. Super. 545; Hoffman's Est., 10 Pa. Super. 113; Lundy's Est., 3 C. Pl. (Pa.) 139.

97. Matthews v. Sheehan, 76 Conn. 654, 57 A 694, 100 AmSR 1017.

98. In re Flaacke, (Prerog.) 64 A 1020 [aff 72 N. J. Eq. 944 mem, 73 A 1117 mem]; Matter of Clinton, 12 App. Div. 132, 42 NYS 674; In re Tachi, 90 Wash. 621, 156 P 833.

99. Smith v. Scofield, 19 Conn. 533; Matter of Gunther, 140 App. Div. 861, 125 NYS 702 [aff 202 N. Y. 613 mem, 96 NE 1115 mem]; Matter of Perry, 131 App. Div. 284, 115 NYS 744; John's Est., 1 Chest. Co. (Pa.) 311; James v. Craighead, (Tex. Civ. A.) 69 SW 241.

1. Moody v. Hemphill, 71 Ala. 169; Smith v. Scofield, 19 Conn. 533; Gardner v. Moss, 123 Ky. 334, 96 SW 461, 29 KyL 759.

2. Phelps v. Slade, 10 Vt. 192; In re Wilson, etc., Trust Corp., 15 Ont. L. 596, 11 OntWR 214.

3. Marston v. Marston, 21 N. H. 491.

4. Rose's Est., 80 Cal. 166, 82 P 86; Matter of Varet, 106 Misc. 380, 174 NYS 623 [aff 188 App. Div. 955 mem, 176 NYS 924 mem].

5. Girouard v. Broussard, 28 La. Ann. 626.

6. Thomas v. Hawpe, 35 Tex. Civ. A. 311, 80 SW 129.

7. Necessity and furnishing of bond see supra §§ 189–230.

8. Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

9. U. S.—Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.
Ala.—McDowell v. Jones, 58 Ala. 25.
Conn.—Watfles v. Hyde, 9 Conn. 10.
Ga.—Sutton v. Flanders, 146 Ga. 290, 91 SE 50.
Ky.—Hobbs v. Middleton, 1 J. J. Marsh. 176.
Mass.—National Casket Co. v. Sweet, 221 Mass. 587, 109 NE 942; Lothrop v. Parke, 202 Mass. 104, 88 NE 666; Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.
Minn.—Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246.
Mo.—State v. Coste, 36 Mo. 437, 88 AmD 148.
Nev.—In re Delaney, 41 Nev. 384, 171 P 383, LRA1918D 1022.
N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 247.
N. Y.—Deobold v. Oppermann, 111 N. Y. 521, 19 NE 94, 7 AmSR 760, 2 LRA 644; Beckett v. Place, 12 Misc. 323, 33 NYS 634.
Okl.—Butts v. Larison, 170 P 500; Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698; Greer v. McNeal, 11 Okl. 519, 526, 69 P 891, 893.
Pa.—Calhoun's Est., 18 Pa. Dist. 1007.
Tex.—Wiseman v. Swain, (Civ. A.) 114 SW 145.

[a] **Until the principal fails in the performance of a duty** required of him by law the liability of the sureties is contingent, but it becomes absolute upon such failure. McDowell v. Jones, 58 Ala. 25. To same effect Palmer v. Pollock, 26 Minn. 433, 4 NW 1113.

[b] **Where no action can be sustained against the administrator,** none can be maintained against his sureties. State v. Coste, 36 Mo. 437, 88 AmD 148.

10. Ala.—McDowell v. Jones, 58 Ala. 25.
Ga.—Webster v. Thompson, 55 Ga. 431.
Ill.—Peo. v. Petrie, 191 Ill. 497, 61 NE 499, 85 AmSR 268 [aff 94 Ill. A. 652]; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345]; Salomon v. Peo., 89 Ill A. 374 [aff 191 Ill. 290, 61 NE 83].
Ind.—State v. Hood, 7 Blackf. 127.
Ky.—Warfield v. Brand, 13 Bush. 77; Carr v. Bob, 7 Dana 417; Arnold v. Babbit, 5 J. J. Marsh. 665; Fulcher v. Com., 3 J. J. Marsh. 592; Carrol v. Connet, 2 J. J. Marsh. 195; Baltzell v. Hall, 1 Litt. 97; Barbour v. Robertson, 1 Litt. 93.
La.—Chretien v. Bienvenu, 41 La. Ann. 728, 6 S 553.
Md.—Edes v. Garey, 46 Md. 24; Waters v. Riley, 2 Harr. & G. 305, 18 AmD 302.
Mich.—Robbins v. Burridge, 128 Mich. 25, 87 NW 93; Grady v. Hughes, 80 Mich. 184, 44 NW 1050.
Mo.—State v. Crooke, 129 Mo. A. 490, 107 SW 1104.
N. Y.—Baggott v. Boulger, 9 N. Y. Super. 160.
Oh.—Quinby v. Walker, 14 Oh. St. 193; State v. Cutting, 2 Oh. St. 1; McGovney v. State, 20 Oh. 93; Murphy v. Dorsey, 23 Oh. Cir. Ct. 157.
Pa.—Com. v. Magee, 24 Pa. Super. 329; Dayton's Est., 4 Kulp 451.
S. C.—Kennedy v. Adickes, 37 S. C. 174, 15 SE 922.
Va.—Reherd v. Long, 77 Va. 839.
W. Va.—Hooper v. Hooper, 32 W. Va. 526, 529, 9 SE 937.
"The liability of a surety in the bond of an administrator or executor is limited by the terms of its covenants, and cannot be extended by implication." Hooper v. Hooper, supra.

[a] **The nature of the sureties' liability is fixed by the terms of the bond** and not by the remedies which may be pursued for its enforcement. McDowell v. Jones, 58 Ala. 25.

[b] **The liability of the sureties cannot be changed** into another and different one from that expressed in the bond by any act of the other parties in interest. Webster v. Thompson, 55 Ga. 431; Weir v. Peo., 78 Ill. 192.

[c] **Presumption as to condition**—In the absence of contrary evidence it will be presumed that the bond of an executor was in the usual form

equity on the principal[11] is not binding on the sureties as to the omitted condition;[12] but the omission does not affect the liability of the sureties as to the conditions properly included.[13] It has been held that, where the requisites of the bond are fixed by statute, conditions contained in it which the law does not require are void.[14] The sureties are in general jointly and severally liable in solido to those interested in the estate.[15] A recital in an administrator's bond that it was given pursuant to an order of court at a specified date is conclusive on the surety.[16]

Necessity for consideration. The bond must, to be binding, have a sufficient consideration.[17]

Bond taken contrary to testator's request. If the court ignores a request of the testator that security is required only for the payment of a particular legacy and takes a bond in the usual form, it will be binding accordingly and the sureties will be liable for the faithful discharge of all the duties of the executor.[18]

Fixing a devastavit on the administrator does not release him from the obligation of his official bond;[19] it only establishes his accountability more clearly and makes it personal as well as fiduciary.[20]

Bond standing in lieu of undertaking on appeal. It is sometimes provided by statute when a personal representative who has given an official bond appeals from a judgment or order made in proceedings had in the estate of which he is executor or administrator, his official bond stands in the place of an undertaking on appeal.[21]

[§ 2534] **2. Liability as Affected by Sufficiency of Assets.** Under the usual tenor of an administration bond, the principal and his sureties are only bound to pay creditors, legatees, or heirs, according to assets which come to hand and the resources which arise in the course of an honest, prudent, and well advised administration.[22] But the bond to pay all debts and legacies sometimes given by an executor who is the residuary legatee[23] renders the executor and his sureties absolutely liable for such payment to the extent of the penalty, regardless of the amount or value of the estate.[24]

[§ 2535] **3. Effect of Statutory Penalty.** The usual effect of a statutory penalty is to add to the legal liability of the executor or administrator for maladministration, and not to exclude indemnity by action on the bond itself.[25]

[§ 2536] **4. Effect of Irregular or Invalid Issuance of Letters.** The fact that the issuance of the letters of administration was irregular or invalid does not as a rule affect the liability of either principal or sureties on the administration bond.[26] In such a case a bond may be upheld as a common-law bond,[27] and the sureties are estopped to question the regularity of the letters.[28]

[§ 2537] **5. Execution Induced by Fraud or Misrepresentation.** The liability of the sureties on an administration bond is not affected by the fact that they were induced to sign the bond through the fraud or misrepresentation of the principal, of

conditioned "for the faithful discharge by him of the duties of his trust." Reherd v. Long, 77 Va. 839.

[d] **A bond conditioned to "obey all orders of the surrogate"** touching the administration of the estate is more than a mere bond of indemnity and a right of action accrues against the sureties immediately on the refusal of the principal to comply with such an order. Baggott v. Boulger, 9 N. Y. Super. 160.

[e] **Where new or additional duties are required** of a public administrator by a statute passed after the execution of his bond the sureties are not liable for the performance of such new duties. State v. Cheaney, 52 Mo. A. 258.

[f] **The sureties are under no obligation to render an account** and before they can be held liable on their bond the liability of the principal must first be ascertained and established. Cadwallader v. Longley, 1 Disn. 497, 12 Oh. Dec. (Reprint) 756.

11. Baltzell v. Hall, 1 Litt. (Ky.) 97.

12. Baltzell v. Hall, 1 Litt. (Ky.) 97; Barbour v. Robertson, 1 Litt. (Ky.) 93; Small v. Com., 8 Pa. 101.

13. Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195.

14. Yost v. Ramey, 103 Va. 117, 48 SE 862.

15. Ball v. Hodge, 11 Rob. (La.) 390; Brown v. Gunning, 19 La. 462.

16. Elizalde v. Murphy, 163 Cal. 681, 126 P 978.

17. Tate v. Gate, 35 Ark. 289; Pierce v. Wallace, 48 Tex. 399.

18. Sharpe v. Rockwood, 78 Va. 24.

19. Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176.

20. Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176.

21. Matter of McDermott, 127 Cal. 450, 59 P 783.

22. National Casket Co. v. Sweet, 221 Mass. 587, 109 NE 942; State v. Cutting, 2 Oh. St. 1; Allen v. Graffius, 8 Watts (Pa.) 397.

23. See supra § 191.

24. Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

Kan.—Kreamer v. Kreamer, 52 Kan. 597, 35 P 214.

Me.—Cleaves v. Dockray, 67 Me. 118.

Md.—State v. Nicols, 10 Gill & J. 27; State v. Snowden, 7 Gill & J. 430.

Mass.—Colwell v. Alger, 5 Gray 67; Jones v. Richardson, 5 Metc. 247; Clarke v. Tufts, 5 Pick. 337; Stebbins v. Smith, 4 Pick. 97.

Mich.—Durfee v. Abbott, 50 Mich. 278, 15 NW 454; McElroy v. Hatheway, 44 Mich. 399, 6 NW 867; Hatheway v. Weeks, 34 Mich. 287.

N. H.—Morgan v. Dodge, 44 N. H. 255, 82 AmD 213.

R. I.—Central Falls Prob. Ct. v. Adams, 27 R. I. 97, 60 A 769, 8 Ann Cas 1028.

Wis.—Cole's Will, 52 Wis. 591, 9 NW 664.

Wyo.—Snyder v. State, 5 Wyo. 318, 40 P 441, 63 AmSR 60.

[a] **The reason** is that the signing of such a bond creates an estoppel to deny a sufficiency of assets. Stebbins v. Smith, 4 Pick. (Mass.) 97.

[b] **Debts covered.**—A bond given by an executor who is also the sole legatee, conditioned to "faithfully discharge all of the just debts and obligations" of the testator, covers the liability of the testator as surety on the bond of a public officer, including defaults by such officer after the testator's death, and after the executor had given bond. Snyder v. State, 5 Wyo. 318, 40 P 441, 63 AmSR 60.

[c] **In an action to recover a legacy** plaintiff need give no proof except the bond that the executor has assets sufficient in his hands. Jones v. Richardson, 5 Metc. (Mass.) 247.

[d] **Costs awarded out of the estate** to the contestants of the will are a debt within the meaning of the bond. Cole's Will, 52 Wis. 591, 9 NW 664.

[e] **A recovery for less than the full penalty** of the bond does not exhaust all remedies thereon. Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

[f] **A statute exempting the person and estate of an executor from execution** for the debts and legacies of his testator has no application to an action on a bond given by the executor as residuary legatee, conditioned to pay the debts and legacies of the testator. Central Falls Prob. Ct. v. Adams, 27 R. I. 97, 60 A 769, 8 AnnCas 1028.

25. State v. French, 60 Conn. 478, 23 A 153; Beall v. Terr., 1 N. M. 507.

26. Ala.—Plowman v. Henderson, 59 Ala. 559.

Cal.—Mitchell v. Hecker, 59 Cal. 558.

Ill.—Peo. v. Medart, 166 Ill. 348, 46 NE 1095.

Iowa.—Nash v. Sawyer, 114 Iowa 742, 87 NW 707.

Ky.—McChord v. Fisher, 13 B. Mon. 193.

Mass.—Cutler v. Dickinson, 8 Pick. 386.

N. Y.—Power v. Speckman, 126 N. Y. 354, 27 NE 474; Williams v. Kiernan, 25 Hun 355.

N. D.—Joy v. Elton, 9 N. D. 428, 83 NW 875.

Oh.—Hoffman v. Fleming, 66 Oh. Ct. 143, 64 NE 63.

Pa.—Shalter's App., 43 Pa. 83, 82 AmD 552; Foster v. Com., 35 Pa. 148; Zeigler v. Sprenkle, 7 Watts & S. 175.

Tenn.—State v. Anderson, 16 Lea 321.

Va.—Gibson v. Beckham, 16 Gratt. (57 Va.) 321.

[a] **Where administration is fraudulently procured** upon the estate of a person who is not dead, the sureties on the bond are liable for the acts of the administrator. Williams v. Kiernan, 25 Hun (N. Y.) 355.

[b] **Where a will is produced after administration is granted,** or a will on which letters issued is afterward set aside, the sureties are liable with their principal. Jones v. Jones, 14 B. Mon. (Ky.) 464; Hunt v. Hamilton, 9 Dana (Ky.) 90; Gibson v. Beckham, 16 Gratt. (57 Va.) 321.

27. McChord v. Fisher, 13 B. Mon. (Ky.) 193; Power v. Speckman, 126 N. Y. 354, 27 NE 474.

28. Ala.—Plowman v. Henderson, 59 Ala. 559.

Ill.—Peo. v. Medart, 166 Ill. 348, 46 NE 1095.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Nash v. Sawyer, 114 Iowa 742, 87 NW 707.

Ky.—Buckner v. Louisville, etc., R. Co., 120 Ky. 600, 87 SW 777, 27 KyL 1009.

which the beneficiaries of the estate in whose interest the liability is sought to be enforced are innocent;[29] but they will not be liable as to any beneficiary who participated in the fraud.[30]

[§ 2538] **6. Bonds of Corepresentatives.** The generally accepted view is that, where coexecutors or coadministrators unite in giving the same bond, they are jointly and severally liable, not only each as principal for his own acts, but also each as surety for the acts of his corepresentative,[31] unless the bond itself shows that they did not intend to become so bound;[32] but they are principals as to the joint sureties, and therefore they are bound to protect the sureties from the consequences of each other's acts.[33] In some states the rule is that, where corepresentatives execute a joint bond it is in effect the same as though each had given a separate bond with the same sureties, and they are jointly liable only for joint acts, neither being a surety for the separate acts of the other.[34] Where corepresentatives give separate bonds, they are separately and not jointly liable,[35] and the same rule applies to the sureties on such bonds[36] as between whom there is no right of contribution.[37]

Action by executor on bond. It has been held that, where two executors give a joint and several bond, an action may be had thereon against one of them and the sureties for the benefit of the other, who is also a legatee.[38]

[§ 2539] **7. Successive or Additional Bonds.** Where an executor or administrator is required to give a new or additional bond, the new bond ordinarily relates back and the sureties thereon become liable for breaches of condition prior to its execution,[39] the two sets of sureties being considered as parties to a common undertaking with reciprocal rights of contribution,[40] unless of course the giving of the new bond has had the effect of discharging

Mass.—Cutler v. Dickinson, 8 Pick. 386.
N. D.—Joy v. Elton, 9 N. D. 428, 83 NW 875.
Pa.—Shalter's App., 43 Pa. 83, 82 AmD 552; Foster v. Com., 35 Pa. 148.
Tenn.—State v. Anderson, 16 Lea 321.

29. Ga.—Brown v. Davenport, 76 Ga. 799.
Ky.—Sebastian v. Johnson, 2 Duv. 101.
La.—Reilly v. American Bonding Co., 138 La. 315, 322, 70 S 237 [cit Cyc].
Mass.—Fuller v. Dupont, 183 Mass. 596, 67 NE 662.
N. Y.—Casoni v. Jerome, 58 N. Y. 315.
Oh.—McGaughey v. Jacoby, 54 Oh. St. 487, 44 NE 231.
Or.—United Brethren First Church of Eugene v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353.
Pa.—Dayton's Est., 4 Kulp 451.

30. Maryland Fidelity, etc., Co. v. Moshier, 151 Fed. 806; Reilly v. American Bonding Co., 138 La. 315, 322, 70 S 237 [cit Cyc]; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Campbell v. Johnson, 41 Oh. St. 588.

31. U. S.—Liddердale v. Robinson, 12 Wheat. 594, 6 L. ed. 740 [aff 15 F. Cas. No. 8,337, 2 Brock. 159]; Green v. Hanberry, 10 F. Cas. No. 5,759, 2 Brock. 403.
Ala.—Jones v. Jones, 42 Ala. 218; Pearson v. Darrington, 32 Ala. 227; Williams v. Harrison, 19 Ala. 277; Little v. Heard, 16 Ala. 358; Little v. Knox, 15 Ala. 576, 50 AmD 145; Elliott v. Mayfield, 4 Ala. 417.
Conn.—Babcock v. Hubbard, 2 Conn. 536.
Ga.—Lancaster v. Lewis, 93 Ga. 727, 21 SE 155.
Ky.—Collins v. Carlisle, 7 B. Mon. 13; Anderson v. Miller, 6 J. J. Marsh. 568.
Md.—Clarke v. State, 6 Gill & J. 288, 26 AmD 576.
Mass.—Bassett v. Granger, 136 Mass. 174; Ames v. Armstrong, 106 Mass. 15; Brazier v. Clark, 5 Pick. 96.
Miss.—Jeffries v. Lawson, 39 Miss. 791.
Mo.—State v. Crooke, 129 Mo. A. 490, 107 SW 1104.
N. H.—Newton v. Newton, 53 N. H. 537.
N. C.—State v. Hyman, 72 N. C. 22.
Oh.—Seymour v. Stone, 2 Oh. Dec. (Reprint) 648, 4 WestLMonth 323 [overr Channel v. Stone, 2 Oh. Dec. (Reprint) 475, 3 WestLMonth 205] (joint and several bond).
Pa.—Boyd v. Boyd, 1 Watts 365; Speise's Est., 21 LancLRev 185.
R. I.—Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750, 105 AmSR 890, 63 LRA 235.
S. C.—Lucas v. Curry, 18 S. C. L. 403; Gayden v. Gayden, 16 S. C. Eq. 435; Wilks v. Davis, 9 S. C. Eq. 390.
Tenn.—Jamison v. Lillard, 12 Lea 690; Fulton v. Davidson, 3 Heisk. 614; Hughlett v. Hughlett, 5 Humphr. 453.
Vt.—Essex Dist. Prob. Ct. v. May, 52 Vt. 182; Sparhawk v. Buell, 9 Vt. 41.
Va.—Caskie v. Harrison, 76 Va. 85; Boyd v. Boyd, 3 Gratt. (44 Va.) 113; Morrow v. Peyton, 8 Leigh (35 Va.) 54.
W. Va.—Hooper v. Hooper, 29 W. Va. 276, 1 SE 280.

[a] **Even when the will exempts executors from giving sureties** on their bonds, if they execute a joint and several bond they are liable each for the other's acts. Ames v. Armstrong, 106 Mass. 15.

[b] **Where one of the coexecutors or coadministrators dies,** (1) the suretyship continues in force, on such a bond, as to acts of the survivor, unless proper steps are taken to have the bond made inoperative for future defaults. Stephens v. Taylor, 62 Ala. 269; Lancaster v. Lewis, 93 Ga. 727, 21 SE 155; Dobyns v. McGovern, 15 Mo. 662. (2) Where two executors gave a joint and several bond with sureties, and after the death of one the other committed waste, for which judgment was recovered on the bond and satisfied by the sureties, the latter had no right of action for indemnity or contribution against the heirs or representatives of the deceased executor. Brazier v. Clark, 5 Pick. (Mass.) 96.

[c] **Where one of two joint administrators is discharged** by order of court he is not liable on their joint bond for a subsequent default of the other administrator. Com. v. Smith, 4 Phila. (Pa.) 270.

[d] **The executors are jointly liable as principals to indemnify a surety** on the bond for a loss occasioned through the default of one of them. Dobyns v. McGovern, 15 Mo. 662.

32. Pearson v. Darrington, 32 Ala. 227; Elliott v. Mayfield, 4 Ala. 417. See also cases cited supra note 31.

33. Little v. Knox, 15 Ala. 576, 50 AmD 145; Dobyns v. McGovern, 15 Mo. 662; Hoell v. Blanchard, 4 S. C. Eq. 21; Hughlett v. Hughlett, 5 Humphr. (Tenn.) 453.

34. State v. Wyant, 67 Ind. 25 [overr Moore v. State, 49 Ind. 558; Braxton v. State, 25 Ind. 82]; Nanz v. Oakley, 120 N. Y. 84, 24 NE 306, 9 LRA 223 [rev 37 Hun 495].

35. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086 [transf den 83 P 1089]; McKim v. Aulbach, 130 Mass. 481, 39 AmSR 470; Hughlett v. Hughlett, 5 Humphr. (Tenn.) 453.

36. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086 [transf den 83 P 1089].

37. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086 [transf den 83 P 1089].

38. Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750, 105 AmSR 890, 63 LRA 235.

39. U. S.—Beard v. Roth, 35 Fed. 397.
Ark.—Dugger v. Wright, 51 Ark. 232, 11 SW 213, 14 AmSR 48.
Cal.—Elizalde v. Murphy, 163 Cal. 681, 126 P 978; Lacaste v. Splivalo, 64 Cal. 35, 30 P 571; Powell v. Powell, 48 Cal. 234.
Ill.—Pinkstaff v. Peo., 59 Ill. 148.
Iowa.—Banker's Surety Co. v. Wyman, 141 Iowa 574, 120 NW 116.
Kan.—Brown v. State, 23 Kan. 235.
Mass.—Com. v. Gould, 118 Mass. 300; Choate v. Arrington, 116 Mass. 552; Loring v. Bacon, 3 Cush. 465; Dawes v. Edes, 13 Mass. 177.
Mo.—Wolff v. Schæffer, 74 Mo. 154; State v. Berning, 74 Mo. 87.
N. Y.—Scofield v. Churchill, 72 N. Y. 565.
N. C.—Pickens v. Miller, 83 N. C. 543.
Oh.—Corrigan v. Foster, 51 Oh. St. 225, 37 NE 263; Foster v. Wise, 46 Oh. St. 20, 16 NE 687, 15 AmSR 542.
S. C.—Bobo v. Vaiden, 20 S. C. 271; Enicks v. Powell, 21 S. C. Eq. 196; Field v. Pelot, McMull. Eq. 369; Swindersine v. Miscally, 8 S. C. Eq. 304.
Tenn.—Morris v. Morris, 9 Heisk. 814.
Va.—Lingle v. Cook, 32 Gratt. (72 Va.) 262.
W. Va.—Perry v. Campbell, 10 W. Va. 228.
"The new bond or the obligation of the new sureties, relates back, and the two sets of sureties are jointly liable to the distributees and others for whose benefit they have contracted, for breaches committed prior to the second execution." Dugger v. Wright, 51 Ark. 232, 234, 11 SW 213, 14 AmSR 48.

[a] **It is not necessary to exhaust the first bond** before having recourse to the second. Pinkstaff v. Peo., 59 Ill. 148.

Property received or converted before execution of bond generally see infra § 2544.

40. Dugger v. Wright, 51 Ark. 232, 11 SW 213, 14 AmSR 48; Shrader v. Phillips, 1 Ky. Op. 513; State v. Fields, 53 Mo. 474; Central Banking, etc., Co. v. U. S. Fidelity, etc., Co., 73 W. Va. 197, 80 SE 121, 51 LRANS 797.

[a] **Proportion of contribution.**—Where new bonds are given by an administrator after he has previously given bond, the proportion of contribution between the sureties is determined by the penalties of the several bonds. Central Banking, etc., Co. v. U. S. Fidelity, etc., Co., 73 W. Va. 197, 80 SE 121, 51 LRANS 797.

the sureties on the former bond.[41] It has been held, however, that as between the two sets of sureties those on the second bond are primarily liable,[42] that the sureties on the second bond are not liable until the remedy on the first bond has been exhausted,[43] and also that the sureties on the first bond are primarily liable for a devastavit committed before the execution of the second bond.[44]

Where an additional bond is given specially for the sale of real estate, it has been held that the liability on the second bond is subsidiary to the original and that no action can be maintained thereon until the penalty of the original bond is exhausted and that securities on the original bond are not entitled to contribution;[45] but it has also been asserted that the two sets of sureties assume a common burden with mutual rights of contribution.[46]

[§ 2540] **8. Public Officer's Bond.**[47] The general bond of a public administrator renders the sureties thereon responsible for the faithful discharge of his duties in administering each and all of the estates which may be committed to him as public administrator;[48] and when a sheriff or other public officer acts ex officio as a public administrator, the sureties on his official bond are liable for all of his acts as administrator.[49] This is true even where a special administration bond has been required;[50] and the liability continues until the officer has been discharged as administrator, notwithstanding the fact that his original term of office has expired.[51]

Unauthorized appointment. The sureties on the bond of a county administrator are not liable for acts or defaults committed by him under an appointment as temporary administrator, for which appointment there is no authority by law.[52]

Where a public administrator succeeds himself in office and gives a new bond, the sureties thereon are not, it has been held, liable for his acts as administrator of an estate committed to his charge during his former term;[53] but there is also authority for the view that the second bond covers liability for a misappropriation of funds occurring during its life, although the funds came into the hands of the public administrator during the life of his previous bond.[54]

Administration in individual capacity. When administration does not devolve upon the officer by virtue of his office, but is granted to him as an individual, the sureties on his official bond are not liable for his acts or defaults as such administrator.[55]

[§ 2541] **9. Estoppel.** Sureties who voluntarily sign an administration bond and on the faith of whose security persons interested in the estate have relied and acted will be estopped to set up any defect or irregularity in the proceedings as a defense to their liability,[56] and they will also be estopped as against such persons from setting up any private agreement between themselves and the principal limiting or qualifying the nature of their liability.[57] So also where one's name has been signed as surety without his authority and after being informed of the fact he does not object, he cannot, after the administrator has committed waste, deny his liability.[58] But if all named as sureties in the bond do not sign the others may retract, although they must do so before the bond has been delivered and the judge, creditors, and administrator have acted on it.[59]

Beneficiaries and creditors. A beneficiary or creditor of the estate may by his conduct estop himself from enforcing any liability against the sureties;[60] but when no act or omission on the part of the sureties is induced by the failure of the legatees to object to the failure of an executrix to include certain property in the inventory the legatees are not estopped to claim that the property omitted was a part of the estate.[61]

[§ 2542] **10. Indemnity to Sureties.** It is sometimes provided by statute that, where a surety on an administration bond is in danger of loss on account of his suretyship, the principal may be required to furnish counter security for his protection,[62] and in case such security is not furnished the court may remove the executor or administrator

41. See infra § 2569.
42. Bobo v. Vaiden, 20 S. C. 271.
43. Lane v. State, 24 Ind. 421.
44. Corrigan v. Foster, 51 Oh. St. 225, 37 NE 263.
45. Salyers v. Ross, 15 Ind. 130.
46. Powell v. Powell, 48 Cal. 234.
47. Liabilities on official bonds generally see Officers [29 Cyc 1451].
48. Olsen v. Rich, 2 KyL 257; State v. Purdy, 67 Mo. 89.
[a] **In Alabama** the sureties on the bond of a general administrator under the act of 1859, relating to public administrators in Mobile county, were liable only as to estates committed to him during the term for which the bond was given, although the same person was reappointed; but this rule did not apply to bonds given under the code of 1876. Buckley v. McGuire, 58 Ala. 226.
49. Governor v. Gantt, 1 Stew. (Ala.) 388; Williams v. Collins, 1 B. Mon. (Ky.) 58.
[a] **Extent of liability.**—The liability of the sureties is limited by the law regulating the duties of ordinary administrators and applies only to such assets as he might rightfully receive as administrator. Heeter v. Jewell, 6 Bush (Ky.) 510.
50. Burnett v. Nesmith, 62 Ala. 261; State v. Watts, 23 Ark. 304.
51. State v. Watts, 23 Ark. 304; Dabney v. Smith, 5 Leigh (32 Va.) 13.
52. Bailey v. McAlpin, 121 Ga. 111, 48 SE 699.
53. O'Rourke v. Harper, 35 Mont. 346, 89 P 65.
54. State v. U. S. Fidelity, etc., Co., 188 Mo. A. 750, 176 SW 543; State v. Holman, 93 Mo. A. 611, 67 SW 747.
55. McNeil v. Smith, 55 Ga. 313.
56. Bloomfield v. Ash, 4 N. J. L. 361; Mundorff v. Wangler, 44 N. Y. Super. 495, 57 HowPr 372; Field v. Van Cott, 5 Daly (N. Y.) 308, 15 AbbPrNS 349; State v. Anderson, 16 Lea (Tenn.) 321; Franklin v. Depriest, 13 Gratt. (54 Va.) 257.
[a] **Where sureties sign a blank printed form** before it is filled in, they are estopped to deny liability with respect to money received by the representative on the faith of the bond. Patterson v. Tate, (Tenn.) 213 SW 981.
57. Berkey v. Judd, 34 Minn. 393, 26 NW 5; Wolff v. Schæffer, 74 Mo. 154.
58. State v. Hill, 50 Ark. 458, 8 SW 401.
59. Bryan v. Austin, 10 La. Ann. 612; Canal, etc., Co. v. Brown, 4 La. Ann. 545.
60. Diehl v. Miller, 56 Iowa 313, 9 NW 240; Thayer v. Finnegan, 134 Mass. 62, 45 AmR 285; Riggin v. Creath, 60 Oh. St. 114, 53 NE 1100; McMillon v. McMillon, 7 Lea (Tenn.) 78.
[a] **A distributee who voluntarily accepts the individual obligation of the representative** in payment of his distributive share is estopped, in case of its nonpayment, to maintain an action on the bond. Riggin v. Creath, 60 Oh. St. 114, 53 NE 1100.
61. Murray v. Kluck, 87 Wis. 566, 59 NW 137.
62. D. C.—In re McKnight, 1 App. 28.
Ga.—Girardey v. Dougherty, 18 Ga. 259 (court may grant relief "by counter security or otherwise," as shall seem just and equitable).
Ky.—Roope v. Rodes, 7 B. Mon. 109; Caldwell v. Hedges, 2 J. J. Marsh. 485; Horseley v. Hopkins, 2 J. J. Marsh. 53.
Md.—Wright v. Williams, 93 Md. 66, 48 A 397; March v. Fidelity, etc., Co., 79 Md. 309, 29 A 521; Brown v. Murdock, 16 Md. 521.
Miss.—Russell v. McDougall, 11 Miss. 234.
N. C.—Governor v. Gowan, 25 N. C. 342.
Pa.—Vogt's Est., 10 LancBar 71; Mullin's Est., 15 Phila. 613; Seitzinger's Est., 2 Woodw. 223.
[a] **Statute imperative.** — The statute providing that, under such circumstances, the court "may" require counter security is imperative. Sifford v. Morrison, 63 Md. 14.
[b] **Where duties are omitted at the suggestion of the sureties,** they are not entitled to counter security as a protection against liability for such omissions. Mullin's Est., 15 Phila. (Pa.) 613.
[c] **Additional security** may, if necessary, be demanded by sureties who have once obtained counter security, and the counter security may

from office,[63] or order the property delivered up to the surety.[64] In the absence of such provision an executor or administrator cannot be required to furnish counter security unless it has been contracted for,[65] although he may do so voluntarily,[66] in which case, however, the indemnity bond affords no greater protection than its conditions import.[67]

Where more than one bond has been given by the representative, the benefit of counter security taken by the sureties on one of the bonds operates for the benefit of the other sureties also, in the absence of an express agreement to the contrary.[68]

[§ 2543] **B. Property Covered—1. In General.** The sureties on the bond of an executor or administrator are responsible only for what might properly come into his hands as assets,[69] which as a general rule includes only such assets as have actually come into his possession or which he could have collected by the exercise of due diligence.[70] But for all property collected and not accounted for, or not collected by reason of want of due diligence, the bond is liable;[71] and this liability is not affected by the fact that assets to the amount of the penalty of the bond have been accounted for.[72]

[§ 2544] **2. Property Received or Converted before Execution of Bond.** As the bond covers the duty to make a just and proper final accounting as to all property received and acts done during the entire course of administration,[73] the general rule is that the sureties are liable for assets of the estate which their principal received before as well as after the execution of the bond, in case of the principal's conversion or maladministration in respect of such assets or failure to render due account thereof.[74] Nevertheless, it has been held that the surety cannot be held liable for the acts of his principal prior to the execution of the bond.[75]

[§ 2545] **3. Debts of Representative to Estate.** A debt due to the estate from an executor or administrator becomes assets of the estate[76] and is covered by the administration bond.[77] In some jurisdictions it is held that the sureties are liable for

also demand counter security of the executor or administrator. Caldwell v. Hedges, 2 J. J. Marsh. (Ky.) 485.

63. Roope v. Rodes, 7 B. Mon. (Ky.) 109.

64. In re McKnight 1 App. (D. C.) 28; Combs v. Church, 1 J. J. Marsh. (Ky.) 330; Scott v. Burch, 6 Harr. & J. (Md.) 67.

[a] **The surety does not become administrator** when the property is delivered into his hands, but he becomes responsible for its safekeeping. Combs v. Church, 1 J. J. Marsh. (Ky.) 330.

[b] **In case of misconduct of the surety** after the property is delivered to him by which a loss is sustained by the principal the remedy of the latter is an action on the case for the damage sustained. Scott v. Burch, 6 Harr. & J. (Md.) 67.

65. Delaney v. Tipton, 3 Hayw. (Tenn.) 14.

66. Potter v. Webb, 6 Me. 14; Boyle v. Boyle, 106 N. Y. 654, 12 NE 709.

[a] **Where one of two joint administrators voluntarily gives a mortgage to the sureties** on his bond for their protection, it will be construed as relating only to misconduct on the part of that administrator. Potter v. Webb, 6 Me. 14.

67. Boyle v. Boyle, 106 N. Y. 654, 12 NE 709.

[a] **Illustration. —** A voluntary counter indemnity bond for "any loss or expense . . . by reason of their suretyship" does not cover expenses voluntarily incurred by the sureties in seeking to be relieved from their suretyship. Boyle v. Boyle, 106 N. Y. 654 mem, 12 NE 709.

68. Wolff v. Schæffer, 74 Mo. 154; Wood v. Williams, 61 Mo. 63; Enicks v. Powell, 21 S. C. Eq. 196.

69. Ala.—Jackson v. Wilson, 117 Ala. 432, 23 S 521; Miller v. Gee, 4 Ala. 359.

Ill.—Goltra v. Peo., 53 Ill. 224.

Ky.—Heeter v. Jewell, 6 Bush 510; Carrol v. Connet, 2 J. J. Marsh. 195.

Mich.—Clark v. Fredenburg, 43 Mich. 263, 5 NW 306.

Mo.—Chouteau v. Hill, 2 Mo. 177.

Pa.—Heck's Est., 11 Montg. Co. 66.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554.

Tenn.—Patterson v. Tate, 213 SW 981.

Vt.—Lyon v. Osgood, 58 Vt. 707, 7 A 5.

Va.—Brown v. Glascock, 1 Rob. (40 Va.) 461.

[a] **Money recovered by an administrator as damages** for injuries resulting in the death of the intestate is assets of the estate for which the sureties on the bond are liable. Goltra v. Peo., 53 Ill. 224; Patterson v. Tate, (Tenn.) 213 SW 981; Glass v. Howell, 2 Lea (Tenn.) 50.

[b] **Money receipted for but not actually received.—**Where an administrator gave a receipt for money due the estate, the sureties were held liable for it, although the administrator did not actually receive it. Chouteau v. Hill, 2 Mo. 177.

[c] **The fact that the representative improperly charges himself** with property not properly receivable by him as assets of the estate will not render the sureties liable. Peo. v. Petrie, 191 Ill. 497, 61 NE 499, 85 AmSR 268 [aff 94 Ill. A. 652].

[d] **Where an administrator is released from paying a debt** of decedent by the statute of limitations the law does not donate to him assets equal to the amount of the debt, but other creditors or distributees are entitled to receive that much more, for the payment of which the sureties on the bond are liable. Smith v. Morgan, 4 KyL 829.

What constitutes assets of estate see supra §§ 317–372.

70. Wright v. Lang, 66 Ala. 389; Reilly v. American Bonding Co., 138 La. 315, 70 S 237; State v. Citizens' Trust, etc., Co., (W. Va.) 100 SE 685.

Debts of representative to estate see infra § 2545.

71. U. S.—Prince v. Towns, 33 Fed. 161.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Ky.—Simpson v. Melvin, 7 KyL 661.

La.—Reilly v. American Bonding Co., 138 La. 315, 70 S 237.

Mass.—Choate v. Arrington, 116 Mass. 552; Dawes v. Edes, 13 Mass. 177.

Mich.—Clark v. Fredenburg, 43 Mich. 263, 5 NW 306.

Mo.—Chouteau v. Hill, 2 Mo. 177; State v. Crooke, 129 Mo. A. 490, 107 SW 1104.

N. M.—Beall v. Terr., 1 N. M. 507.

N. C.—Lafferty v. Young, 125 N. C. 296, 34 SE 444; Morton v. Ashbee, 46 N. C. 312.

Okl.—Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698.

Tenn.—Patterson v. Tate, 213 SW 981.

Tex.—Batsell v. Richards, 80 Tex. 505, 16 SW 313; Maryland Fidelity, etc., Co. v. Texas Land, etc., Co., 40 Tex. Civ. A. 489, 90 SW 197.

Va.—Harvey v. Steptoe, 17 Gratt. (58 Va.) 289.

[a] **Money receipted for individually.—**The fact that an administrator gives his individual receipt for money of the estate received by him does not affect his representative liability therefor. Prince v. Towns, 33 Fed. 161.

[b] **Condition to "deliver" legacies.—**Where an administrator executed a bond conditioned on the faithful administration of the estate, and that he would deliver all the legacies contained and specified in the will, the word "deliver" will cover the general as well as the specific legacies. Murphy v. Carter, 23 Gratt. (64 Va.) 477.

[c] **Money ordered paid to administrator as such.—**Where, on the petition of the administrator, the county court orders funds paid over to him as such, neither he nor his sureties may thereafter deny that the funds were received in a fiduciary capacity. Boudinot v. Locust, 55 Okl. 662, 151 P 579; 155 P 698.

72. Probate Judge v. Heydock, 8 N. H. 491.

73. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

74. Ala.—May v. Kelly, 61 Ala. 489.

Ill.—McClure v. Peo., 19 Ill. A. 105.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Kan.—Brown v. State, 23 Kan. 235.

La.—Reilly v. American Bonding Co., 138 La. 315, 70 S 237; Goode v. Buford, 14 La. Ann. 102 [dist Parmele v. Brashae, 16 La. 72].

Mass.—Choate v. Arrington, 116 Mass. 552; Dawes v. Edes, 13 Mass. 177.

Mo.—State v. Jones, 82 Mo. 509; State v. Creusbauer, 68 Mo. 254; Sherwood v. Hill, 25 Mo. 391.

N. Y.—Scofield v. Churchill, 72 N. Y. 565; Gottsberger v. Taylor, 19 N. Y. 150; Schofield v. Hustis, 9 Hun 157 [aff 72 N. Y. 565].

Oh.—Foster v. Wise, 46 Oh. St. 20, 16 NE 687, 15 AmSR 542.

Okl.—Greer v. McNeal, 11 Okl. 519, 526, 69 P 891, 893.

Or.—Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Liability of sureties on new or additional bond for acts of principal prior to its execution see supra § 2539.

75. State v. Hood, 7 Blackf. (Ind.) 127, 128 ("The law is settled, that a surety cannot be made liable beyond his undertaking. Here the undertaking of the surety was altogether prospective. It had no reference to the past acts of the executrix, if there were any such acts").

76. See supra § 324.

77. U. S.—Wilson v. Rose, 30 F. Cas. No. 17,831, 3 Cranch C. C. 371; U. S. v. Rose, 27 F. Cas. No. 16,193, 2 Cranch C. C. 567.

Ala.—Wright v. Lang, 66 Ala. 389.

Cal.—Treweek v. Howard, 105 Cal. 434, 39 P 20.

the payment of the debt without regard to the principal's solvency or ability to pay,[78] but the more general view is that the liability of the sureties is the same as with regard to the debts of other persons,[79] and that they are not liable where the executor or administrator was at the time of his appointment and continued to be, throughout the entire time of administration, insolvent and unable to pay,[80] even though he has charged the debt in his account as available assets.[81] If, however, the executor or administrator, while solvent, fails to pay, the sureties will be liable in case he subsequently becomes insolvent,[82] and if, during the administration, the representative was able to pay part of the debt and failed to do so, the sureties are liable to that extent.[83] So also, where the representative was able to pay the debt but failed to do so, the sureties are responsible, notwithstanding he was technically insolvent by reason of his property being not subject to legal process.[84]

[§ 2546] **4. Property of Estate Purchased by Representative.**[85] If an executor or administrator becomes a purchaser at his own sale, the sureties on his official bond will be liable for the value of the property purchased,[86] notwithstanding the unauthorized purchase is ratified by the heirs.[87]

[§ 2547] **5. Property Not Assets of Estate.**[88] According to the weight of authority, where an executor or administrator receives property to which he is not legally entitled in the discharge of his duties as personal representative, his administration bond does not cover such property and his sureties are not liable in respect to it,[89] although it is in-

Ind.—State v. Gregory, 119 Ind. 503, 22 NE 1.

Md.—Kealhofer v. Emmert, 79 Md. 248, 29 A 68; Lambrecht v. State, 57 Md. 240.

Mass.—Lothrop v. Parke, 202 Mass. 104, 88 NE 666; Chapin v. Waters, 110 Mass. 195; Winship v. Bass, 12 Mass. 199.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907; Wilson v. Ruthrauff, 82 Mo. A. 435.

N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 347.

N. J.—Ordinary v. Kershaw, 14 N. J. Eq. 527; Harker v. Irick, 10 N. J. Eq. 269.

N. Y.—Baucus v. Barr, 45 Hun 582 [aff 107 N. Y. 624, 13 NE 939]; Keegan v. Smith, 33 Misc. 74, 67 NYS 281 [rev 31 Misc. 651, 64 NYS 1117, and rev on other grounds 60 App. Div. 168, 70 NYS 260 (aff 172 N. Y. 624 mem, 65 NE 1118 mem)]; Keegan v. Smith, 39 NYS 826, 25 NYCivProc 417 [aff 18 Misc. 749 mem, 42 NYS 1127 mem (aff 20 Misc. 305, 45 NYS 663 [rev on other grounds 24 App. Div. 25, 49 NYS 93])].

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156; McGaughey v. Jacoby, 54 Oh. St. 487, 44 NE 231; Campbell v. Johnson, 41 Oh. St. 588; Dorger v. Woodward, 27 Oh. Cir. Ct. 123; McCoy v. Allen, 9 Oh. Cir. Ct. 607, 6 Oh. Cir. Dec. 659; Perkins v. Scott, 9 Oh. Cir. Ct. 207, 6 Oh. Cir. Dec. 226.

Or.—In re Marks, 81 Or. 632, 160 P 540; United Brethren First Church of Eugene v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353.

Pa.—In re Piper, 15 Pa. 533.

Tenn.—Spurlock v. Earles, 8 Baxt. 437.

Va.—Edmunds v. Scott, 78 Va. 720.

[a] **If the surety of a defaulting representative is made his successor,** the surety's indebtedness on the bond is assets in his hands, with which he and his own sureties are chargeable, although the amount has not been fixed by account or by judgment or by a charge made by himself. Choate v. Thorndike, 138 Mass. 371.

78. Ala.—Wright v. Lang, 66 Ala. 389; Purdom v. Tipton, 9 Ala. 914.

Conn.—Davenport v. Richards, 16 Conn. 310.

Md.—Lambrecht v. State, 57 Md. 240.

Mass.—Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552; Chapin v. Waters, 110 Mass. 195; Leland v. Felton, 1 Allen 531; Mattoon v. Cowing, 13 Gray 387; Benchley v. Chapin, 10 Cush 173; Sigourney v. Wetherell, 6 Metc. 553; Ipswich Mfg. Co. v. Story, 5 Pick. 310; Kinney v. Ensign, 18 Pick. 236; Winship v. Bass, 12 Mass. 199; Stevens v. Gaylord, 11 Mass. 256.

N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 347.

Oh.—James v. West, 67 Oh. St. 28, 65 NE 156; McGaughey v. Jacoby, 54 Oh. St. 487, 44 NE 231; Cheney v. Powell, 20 Oh. Cir. Ct. 398, 11 Oh. Cir. Dec. 279. Contra McCoy v. Allen, 9 Oh. Cir. Ct. 607, 6 Oh. Cir. Dec. 659; Perkins v. Scott, 9 Oh. Cir. Ct. 207, 6 Oh. Cir. Dec. 226; Fox v. Keister, 9 OhS&CP 316, 6 OhNP 327.

Or.—In re Marks, 81 Or. 632, 160 P 540; United Brethren First Church of Eugene v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353.

S. C.—Charles v. Jacobs, 9 S. C. 295; Twitty v. Houser, 7 S. C. 153; Jacobs v. Woodside, 6 S. C. 490; Schnell v. Schroder, 8 S. C. Eq. 334.

[a] **Where an executor is a member of a firm which is indebted to the estate,** the sureties are liable for the debt, notwithstanding the firm and the executor were insolvent at the time of the testator's death. Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

[b] **There is no distinction between executors and administrators** in the application of the rule. James v. West, 67 Oh. St. 28, 65 NE 156.

79. Rahe v. Jobusch, 197 Ill. A. 200; McCarty v. Frazer, 62 Mo. 263; Wilson v. Ruthrauff, 82 Mo. A. 435; Rader v. Yeargin, 85 Tenn. 486, 3 SW 178; Spurlock v. Earles, 8 Baxt. (Tenn.) 437; Lyon v. Osgood, 58 Vt. 707, 7 A 5.

80. Cal.—In re Thomas, 140 Cal. 397, 73 P 1059; Sanchez v. Forster, 133 Cal. 614, 65 P 1077 [dist Treweek v. Howard, 105 Cal. 434, 39 P 20]; Matter of Walker, 125 Cal. 242, 57 P 991, 73 AmSR 40.

Ind.—State v. Gregory, 119 Ind. 503, 22 NE 1.

Iowa.—McEwen v. Fletcher, 164 Iowa 517, 146 NW 1, AnnCas1916D 637.

Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115; Buckel v. Smith, 82 SW 1001, 26 KyL 991.

Mich.—Sanders v. Dodge, 140 Mich. 236, 103 NW 597, 112 AmSR 399.

Mo.—McCarty v. Frazer, 62 Mo. 263; Scott v. Governor, 1 Mo. 686; Wilson v. Ruthrauff, 82 Mo. A. 435; Young v. Thrasher, 48 Mo. A. 327.

Nebr.—Howell v. Anderson, 66 Nebr. 575, 92 NW 760, 61 LRA 313.

N. J.—Harker v. Irick, 10 N. J. Eq. 269.

N. Y.—Gottsberger v. Smith, 19 N. Y. 150, 5 Duer 566; Baucus v. Barr, 45 Hun 582 [aff 107 N. Y. 624, 13 NE 939]; Matter of David, 44 Misc. 337, 89 NYS 927, 4 Mills Surr. 364; Keegan v. Smith, 33 Misc. 74, 67 NYS 281 [rev on other grounds 60 App. Div. 168, 70 NYS 260, and rev 31 Misc. 651, 64 NYS 1117, aff 172 N. Y. 624 mem, 65 NE 1118 mem]; Keegan v. Smith, 39 NYS 826, 25 NYCivProc 417 [aff 18 Misc. 749 mem, 42 NYS 1127 mem (aff 20 Misc. 305, 45 NYS 663 [rev on other grounds 24 App. Div. 25, 49 NYS 93])]; Burkhalter v. Norton, 3 Dem. Surr. 610.

N. C.—Moseley v. Johnson, 144 N. C. 274, 277, 56 SE 922, 929.

Pa.—In re Piper, 15 Pa. 533; Garber v. Com., 7 Pa. 265; Bard's Est., 13 Pa. Dist. 552, 21 LancLRev 81.

Tenn.—Rader v. Yeargin, 85 Tenn. 486, 3 SW 178.

Vt.—Lyon v. Osgood, 58 Vt. 707, 7 A 5.

W. Va.—State v. Citizens' Trust, etc., Co., 100 SE 685.

81. Lyon v. Osgood, 58 Vt. 707, 7 A 5.

82. Ind.—Condix v. Winslow, 106 Ind. 142, 5 NE 751.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907.

N. J.—Harker v. Irick, 10 N. J. Eq. 269.

Pa.—In re Piper, 15 Pa. 533.

Tenn.—Rader v. Yeargin, 85 Tenn. 486, 3 SW 178.

Vt.—Probate Ct. v. Merriam, 8 Vt. 234.

83. In re Thomas, 140 Cal. 397, 73 P 1059; Sanchez v. Forster, 133 Cal. 614, 65 P 1077.

84. Gay v. Grant, 101 N. C. 206, 8 SE 99, 106.

85. Right of representative to purchase at sale of property of the estate see supra §§ 656–662, 736, 1590–1596.

86. Todd v. Sparks, 10 La. Ann. 668; Gay v. Grant, 101 N. C. 206, 8 SE 99, 106.

87. Todd v. Sparks, 10 La. Ann. 668.

88. Proceeds of insurance see infra § 2554.

What constitutes assets see supra §§ 317–372.

89. Ala.—Campbell v. American Bonding Co., 172 Ala. 458, 55 S 306.

Fla.—Bradford v. Watson, 65 Fla. 461, 466, 62 S 484 [cit Cyc]; Pace v. Pace, 19 Fla. 438.

Ga.—Newton County Bank v. American Bonding Co., 141 Ga. 326, 80 SE 1003, 50 LRANS 1089; Johnson v. Hall, 101 Ga. 687, 29 SE 37.

Ill.—Peo. v. Petrie, 191 Ill. 497, 61 NE 499, 85 AmSR 268 [aff 94 Ill. A. 652].

Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115; Warfield v. Brand, 13 Bush 77; Campbell v. Sacray, 44 SW 980, 19 KyL 1912; Reynolds v. Nelson, 1 Ky. Op. 523.

Mo.—Orrick v. Vahey, 49 Mo. 428; State v. American Surety Co., 191 Mo. A. 191, 177 SW 1074.

N. H.—Perkins v. Perkins, 46 N. H. 110.

Oh.—Murphy v. Dorsey, 23 Oh. Cir. Ct. 157.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554 [pet to show cause and motion for rearg den 74 A 177].

[a] **Property held by a decedent in trust,** or in which he had merely a life interest, is not assets of the estate, and no action of the executor as to such property coming into his hands will render him or his sureties liable upon his administration bond. Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 AnnCas 554 [pet to show cause and motion for rearg den 74 A 177].

[b] **Property received by the representative by virtue of his appointment,** although it cannot be reckoned

cluded in the representative's report as assets.[90] But there is also authority for the view that the bond covers property which the representative has received and dealt with as assets, although not properly such.[91]

[§ 2548] **6. Foreign Assets.** The liability of the sureties on an executor's or administrator's bond is limited to such assets as rightfully come or ought to have come into his hands in the state of his appointment.[92] Therefore, while as to all assets which he has a right to receive and does receive, although coming from a foreign jurisdiction, the sureties on the bond will be liable,[93] they will not be liable for such assets which he receives without lawful authority.[94]

[§ 2549] **7. Equitable Assets.**[95] It has been asserted that as the obligation imposed by the bond of an executor or administrator is altogether legal, the sureties cannot be liable for any breach other than that of the legal duties embraced by the condition of the bond, and that hence the sureties are not liable for equitable assets coming into the hands of the representative;[96] but this rule has been practically abrogated by statutes requiring administration bonds to embrace all the duties and powers of the representative,[97] and it is further to be noted that as, at least in the United States, the distinction between legal and equitable assets is rarely enforced;[98] the doctrine under consideration has but little practical importance.

[§ 2550] **8. Proceeds of Sale of Realty—a. Under Order of Court.** The liability of sureties on the general bond of an executor or administrator for the proceeds of the sale of real estate that have come into his hands is governed by the conditions of the bond.[99] In some jurisdictions it is held that the ordinary conditions cover the proper administration of such proceeds,[1] and that if a special bond is required it is to be regarded merely as additional security.[2] In others the sureties on the general bond are not liable,[3] and a special bond must be given to cover such proceeds as a distinct liability.[4]

[§ 2551] **b. Under Testamentary Authority.** The liability of sureties for the proper administration of the proceeds of real estate, sold by an executor or administrator with the will annexed under a power or direction in the will, is determined largely by the conditions of the bond and the law in force at the time of its execution.[5] There is, however, a conflict of authority on this subject not reconcilable by reason of the differences in the form of the bonds considered in the several cases.[6] In some jurisdictions it is held that the sureties on the original bond will be liable,[7] but in others it is held that they

as general assets of the estate, is within the condition of the bond. Perkins v. Perkins, 46 N. H. 110 (arrears of pension).

90. Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554 [pet to show cause and motion for rearg den 74 A 177].

91. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449 (stating rule in Tennessee).

Cal.—Elizalde v. Murphy, 11 Cal. A. 32, 103 P 904.

Minn.—Vukmirovich v. Nickolich, 123 Minn. 165, 143 NW 255.

N. Y.—Matter of Hobson, 61 Hun 504, 16 NYS 371 [aff 131 N. Y. 575, 30 NE 631].

Tenn.—Clark v. Pence, 111 Tenn. 20, 76 SW 885. Contra Morris v. Morris, 9 Heisk. 814.

Tex.—Wiseman v. Swain, (Civ. A.) 114 SW 145.

92. Fletcher v. Sanders, 7 Dana (Ky.) 345. 32 AmD 96; Governor v. Williams, 25 N. C. 152, 38 AmD 712.

93. U. S.—Lovewell v. Schoolfield, 217 Fed. 689, 133 CCA 449 (rule in Tennessee).

Conn.—Strong v. White, 19 Conn. 238.

Fla.—Woodfin v. McNealy, 9 Fla. 256.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

N. H.—Probate Judge v. Heydock, 8 N. H. 491.

Va.—Andrews v. Avery, 14 Gratt. (55 Va.) 229, 73 AmD 355.

94. Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96; Smith v. Smyser, 2 KyL 440, 11 Ky. Op. 176.

Mo.—Cabanne v. Skinker, 56 Mo. 357.

N. C.—Governor v. Williams, 25 N. C. 152, 38 AmD 712.

Tenn.—Snodgrass v. Snodgrass, 1 Baxt. 157.

Vt.—Probate Ct. v. Matthews, 6 Vt. 269.

[a] **Domiciliary and ancillary administration.**—(1) The liabilities of sureties on the bonds of domiciliary and ancillary administrators vary according to the assets which the principals are lawfully entitled to receive. Fletcher v. Saunders, 7 Dana (Ky.) 345, 32 AmD 96; Governor v. Williams, 25 N. C. 152, 38 AmD 712. (2) The same rule applies to the sureties on the different bonds where the same person acts in both capacities. State v. Osborn, 71 Mo. 86; Probate Ct. v. Matthews, 6 Vt. 269.

95. Proceeds of sale of realty see also infra §§ 2550, 2551.

96. Heeter v. Jewell, 6 Bush (Ky.) 510; Speed v. Nelson, 8 B. Mon. (Ky.) 499; Clay v. Hart, 7 Dana (Ky.) 1; Barksdale v. Butler, 6 Lea (Tenn.) 450; Wall v. Allen, 4 Baxt. (Tenn.) 210; Harrison v. Henderson, 7 Heisk. (Tenn.) 315; Porter v. Moores, 4 Heisk. (Tenn.) 16; Lester v. Vick, 2 Heisk. (Tenn.) 476; Hughlett v. Hughlett, 5 Humphr. (Tenn.) 453.

97. Speed v. Nelson, 8 B. Mon. (Ky.) 499; Hughlett v. Hughlett, 5 Humphr. (Tenn.) 453.

98. See supra § 318.

99. Speed v. Nelson, 8 B. Mon. (Ky.) 499; Governor v. Chouteau, 1 Mo. 771; Com. v. Gilson, 8 Watts (Pa.) 214; Beales v. Com., 17 Serg. & R. (Pa.) 392.

1. Ala.—Pettit v. Pettit, 32 Ala. 288; Clarke v. West, 5 Ala. 117.

Cal.—Evans v. Gerken, 105 Cal. 311, 38 P 725.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Md.—Campbell v. State, 62 Md. 1. Aliter prior to the act of 1831. Cornish v. Willson, 6 Gill 299.

Mo.—Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365; Governor v. Chouteau, 1 Mo. 771.

N. C.—Lafferty v. Young, 125 N. C. 296, 34 SE 444; Reaves v. Davis, 99 N. C. 425, 6 SE 715.

Oh.—Wade v. Graham, 4 Oh. 126; Campbell v. English, Wright 119; Buckwalter v. Klein, 5 Oh. Dec. (Reprint) 55, 2 AmLRec 347; Kehnast v. Daum, 6 OhS&CP 401, 4 OhNP 366.

Va.—Reherd v. Long, 77 Va. 839. Aliter under earlier statute. Strother v. Hull, 23 Gratt. (73 Va.) 652.

2. Clarke v. West, 5 Ala. 117; Kehnast v. Daum, 6 OhS&CP 401, 4 OhNP 366.

3. Ill.—Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345].

Ind.—Reno v. Tyson, 24 Ind. 56; Worgang v. Clipp, 21 Ind. 119, 83 AmD 343. Contra Salyer v. State, 5 Ind. 202.

Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115; Speed v. Nelson, 8 B. Mon. 499; Stuart v. Hathaway, 4 KyL 438, 11 Ky. Op. 800.

Pa.—Com. v. Hilgert, 55 Pa. 236; Com. v. Gilson, 8 Watts 214; Beales v. Com., 17 Serg. & R. 392; Baldwin's Est., 1 Chest. Co. 315; Com. v. Winters, 4 WklyNC 346.

S. C.—Wiley v. Johnsey, 40 S. C. L. 355.

[a] **Proceeds in the hands of the court** are not covered by the general bond of the administrator. Reynolds v. Nelson, 1 Ky. Op. 523.

[b] **If an administrator makes an unauthorized sale** of real property under an order of court for the sale of personalty, the proceeds are not rightfully in his hands as administrator and the sureties on his bond are not liable. Young v. Peo., 35 Ill. A. 363.

[c] **Where an administrator confesses judgment** on which real estate of the intestate is sold for the payment of debts, the sureties on the bond are not liable. Reed v. Com., 11 Serg. & R. (Pa.) 441.

4. Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345]; Worgang v. Clipp, 21 Ind. 119, 83 AmD 343; Com. v. Hilgert, 55 Pa. 236.

Special bond on sale of realty see supra §§ 1562–1572.

5. White v. Ditson, 140 Mass. 351, 4 NE 606, 54 AmR 473; Newport Prob. Ct. v. Hazard, 13 R. I. 3; Reherd v. Long, 77 Va. 839.

[a] **If the devisees accept the proceeds** of the sale and approve the action of the executor and there are no creditors, the sureties are not liable, without regard to the power of the executor to sell. Homes v. O'Conner, 9 Tex. Civ. A. 454, 29 SW 236.

6. Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345]; White v. Ditson, 140 Mass. 351, 4 NE 606, 54 AmR 473.

7. Dix v. Morris, 66 Mo. 514 [aff 1 Mo. A. 93]; Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300]; Shalter's App., 43 Pa. 83, 82 AmD 552; Hartzell v. Com., 42 Pa. 453; Zeigler v. Sprenkle, 7 Watts & S. (Pa.) 175; Com. v. Forney, 3 Watts & S. (Pa.) 353; Wetherill v. Com., 1 Pa. Cas. 22, 1 A 185; Reherd v. Long, 77 Va. 839. Aliter under earlier statutes. Murphy v. Carter, 23 Gratt. (64 Va.) 477;

are not liable and that whenever real estate is to be sold by the personal representative a new bond should be given.[8] A distinction has been made between an express direction and a discretionary power to sell, it being held that the sureties on the general bond are liable where there is an express direction, but now where there is merely a discretionary power.[9]

[§ 2552] **9. Money Paid to Prevent Sale of Realty.** Money paid by devisees to prevent a sale of real estate for the payment of debts is assets for which the sureties on the bond are liable.[10]

[§ 2553] **10. Money Received on Appropriation of Property for Public Use.** Where real estate which an administrator has levied on to satisfy a debt due the estate is taken for public use after the time for redemption by the judgment debtor has expired, the sureties are liable for the money received therefor by the administrator.[11]

[§ 2554] **11. Proceeds of Insurance.** The proceeds of insurance on the life of decedent are not ordinarily assets of the estate or properly receivable by the representative in his representative capacity,[12] and if such proceeds are collected by him the sureties on his bond are not liable therefor.[13] The sureties are liable, however, where the representative is charged with the duty of collecting such proceeds and paying them over to the persons entitled thereto, although such proceeds are by statute exempt from the payment of debts,[14] and the same has been held to be true where the policy is payable to the personal representative of the insured, who has collected the proceeds in his representative capacity.[15] But it has also been held that as a life insurance policy payable to the executors, administrators, or assigns of a decedent is in law payable to his surviving widow and children, the sureties on the bond of the administratrix are not liable for the application of the insurance actually collected by her.[16] Sureties on the bond are not liable for the proceeds of fire insurance on buildings of the estate.[17]

[§ 2555] **12. Allowance to Decedent's Family.** The liability of the sureties on an administration bond for the amount of statutory exemptions in favor of the family of the decedent depends on the duties imposed by the statute on the executor or administrator with reference to the exemptions.[18] Where an allowance is made directly to the family, and provision is made for setting it apart without the intervention of the personal representative, who is charged with no duty in respect to it except to pay over or deliver it, if it is in his hands, his sureties are not liable if he fails to make such payment or delivery, or if he converts to his own use the money or property so set apart, although he may be liable personally.[19] But where the statute requires the executor or administrator to set aside and pay over or deliver the amount of money or the specific articles allowed, the sureties on his bond are liable for the nonperformance of such duty.[20]

[§ 2556] **13. Income, Interest, Rents, and Profits.** The sureties on an administration bond are liable, like the principal, for the income and profits which may accrue during the period of administration upon property for which he becomes responsible.[21]

Interest on assets, in the sense of accruing profit or income, and interest chargeable to the executor or administrator for use or misuse of the property in his hands, are usually covered by the administration bond, both as to principal and sureties.[22]

As to rents and profits from real estate, if the executor or administrator is made accountable therefor by statute, the sureties on the bond will be liable,[23] although this liability is not expressly set out in the bond;[24] and when real estate is devised to executors in trust to sell and invest the proceeds the sureties on the bond are liable for any rents

Burnett v. Harwell, 3 Leigh (30 Va.) 89; Jones v. Hobson, 2 Rand. (23 Va.) 483.

[a] **The bond is not liable for the proceeds of land sold in a foreign state** under a power conferred by the will where the will was not probated in that state. Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734.

[b] **Estoppel of sureties to deny testamentary authority to sell.**— American Surety Co. v. Quincey, (Va.) 99 SE 641.

8. Ill.—Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345].

Ky.—Speed v. Nelson, 8 B. Mon. 499.

Mass.—White v. Ditson, 140 Mass. 351, 4 NE 606, 54 AmR 473; Robinson v. Millard, 133 Mass. 236.

R. I.—Newport Prob. Ct. v. Hazard, 13 R. I. 3.

Tenn.—Hughlett v. Hughlett, 5 Humphr. 453.

[a] **Under a testamentary power to sell real estate for the purpose of reinvestment,** the executor acts as a trustee and the sureties on his administration bond are not liable. Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345].

9. Clay v. Hart, 7 Dana (Ky.) 1.

10. Fay v. Taylor, 2 Gray (Mass.) 154.

11. Phillips v. Rogers, 12 Metc. (Mass.) 405.

12. See supra § 356.

13. Nickals v. Stanley, 146 Cal. 724, 81 P 117; Pace v. Pace, 19 Fla. 438; Peo. v. Petrie, 191 Ill. 497, 61 NE 499, 85 AmSR 268 [aff 94 Ill. A. 652]; Murphy v. Dorsey, 23 Oh. Cir. Ct. 157.

14. Kelley v. Mann, 56 Iowa 625, 10 NW 211; State v. Anderson, 16 Lea (Tenn.) 321.

15. Conway v. Carter, 11 N. M. 419, 68 P 941.

16. Bradford v. Watson, 65 Fla. 461, 62 S 484.

17. Harrison v. Harrison, 4 Leigh (31 Va.) 371.

18. Allowances generally see supra §§ 758–874.

19. Rocco v. Cicalla, 12 Heisk. (Tenn.) 508; Morris v. Morris, 9 Heisk. (Tenn.) 814.

20. Com. v. Longenecker, 1 Chest. Co. (Pa.) 202.

21. Sanford v. Gilman, 44 Conn. 461; Hood v. Hood, 85 N. Y. 561; Watson v. Whitten, 37 S. C. Eq. 224.

22. Conn.—Sanford v. Gilman, 44 Conn. 461.

Ill.—McDonald v. Peo., 123 Ill. A. 346 [aff 222 Ill. 325, 78 NE 609].

Ky.—Clay v. Hart, 7 Dana 1.

Pa.—Shalter's App., 43 Pa. 83, 82 AmD 552.

S. C.—Chick v. Farr, 31 S. C. 463, 10 SE 176, 390.

Va.—Strother v. Hull, 23 Gratt. (64 Va.) 652.

[a] **Where an administrator lends money for more than the legal rate of interest,** the sureties are accountable for the amount of interest actually received, but as to money used by himself they are chargeable only with the legal rate of interest. Clay v. Hart, 7 Dana (Ky.) 1.

[b] **An administrator's bond is liable for interest on balances as they become due,** but not for interest on the aggregate sum of principal and interest found due on any former accounting. Chick v. Farr, 31 S. C. 463, 10 SE 176.

23. Ala.—May v. Kelly, 61 Ala. 489; James v. Faulk, 54 Ala. 184; Pearson v. Darrington, 32 Ala. 227.

Del.—State v. Waples, 5 Del. 257.

Ind.—Hankins v. Kimball, 57 Ind. 42; Reno v. Tyson, 24 Ind. 56; Worgang v. Clipp, 21 Ind. 119, 83 AmD 343.

Ky.—Wilson v. Unselt, 12 Bush 215.

Me.—Decker v. Decker, 74 Me. 465.

Md.—Cornish v. Willson, 6 Gill 299.

Mass.—Brooks v. Jackson, 125 Mass. 307.

N. J.—In re Givens, 34 N. J. Eq. 191.

Oh.—Griswold v. Frink, 22 Oh. St. 79; Wade v. Graham, 4 Oh. 126; Kehnast v. Daum, 6 OhS&CP 401, 4 OhNP 366.

Va.—Reherd v. Long, 77 Va. 839; Toler v. Toler, 2 Patt. & H. 71.

[a] **The word "rents" in the bond required by the Kentucky statute** applies to only such rents as decedent's death passed to his personal representative and not to his heirs, and does not render the sureties liable for rents collected under a lease made by an administrator after the decedent's death. Wilson v. Unselt, 12 Bush (Ky.) 215.

[b] **If the executor or administrator is removed from office,** the sureties on the bond will not be liable for rents subsequently collected by him. Brooks v. Jackson, 125 Mass. 307.

24. State v. Waples, 5 Del. 257.

collected from such property.[25] But in the absence of any such statutory or testamentary provision the rule in most jurisdictions is that, although the executor or administrator might be held personally liable to the heirs as trustee,[26] the sureties on his bond will not be liable,[27] and that whenever it becomes necessary for an executor or administrator to collect or receive the rents from real estate a new bond must be given.[28] There is, however, authority for the view that if the representative does in fact receive the rents and profits of realty, his bond stands as security therefor.[29]

[§ 2557] **14. Property Held in Capacity Other than as Executor or Administrator**[30]**—a. In General.** As a rule the official bond of the executor or administrator is not construed to cover his responsibility with respect to property held by him in some other and distinct capacity.[31] Where the representative also occupies some other character with regard to the estate, such as guardian or trustee, it will be presumed that the property in his hands is held in that capacity in which he ought to hold it.[32]

[§ 2558] **b. As Guardian.** The sureties on the bond of an executor or administrator are not liable for property held by him in the capacity of guardian of one of the heirs or distributees of the estate.[33] Upon the termination of the representative's duties as executor or administrator the property is transferred by operation of law into his hands as guardian and the sureties on the former bond are released from further liability,[34] but if the wards become of age and entitled to distribution before the amount for distribution is ascertained the administrator becomes indebted to them and not to himself as guardian, and the sureties on the administration bond are liable.[35] Where a guardian becomes the administrator of the estate of a deceased ward, the sureties on the administration bond become liable for the proper administration of all assets then on hand which he formerly held as guardian.[36]

[§ 2559] **c. As Trustee.** Where the same person is both executor and trustee under a will the sureties on his bond as executor are not liable for property held by him in the capacity of trustee,[37]

25. Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300].

26. Smith v. Bland, 7 B. Mon. (Ky.) 21.

27. Del.—State v. Brown, 2 Del. 5.

Ind.—State v. Barrett, 121 Ind. 92, 22 NE 969; Hankins v. Kimball, 57 Ind. 42; Rodman v. Rodman, 54 Ind. 444; Cullen v. State, 28 Ind. A. 335, 62 NE 759; Rogers v. State, 26 Ind. A. 144, 59 NE 334.

Ky.—U. S. Fidelity, etc., Co. v. Russell, 141 Ky. 601, 133 SW 572; Denton v. Crouch, 101 Ky. 386, 41 SW 277, 19 KyL 588; Wilson v. Unselt, 12 Bush 215; Heeter v. Jewell, 6 Bush 510; Speed v. Nelson, 8 B. Mon. 499; Smith v. Bland, 7 B. Mon. 21; McCampbell v. Gilbert, 6 J. J. Marsh. 592; Oldham v. Collins, 4 J. J. Marsh. 49; Slaughter v. Froman, 2 T. B. Mon. 95; Campbell v. Sacray, 44 SW 980, 19 KyL 1912; Eastin v. Hatchitt, 15 KyL 780; Stuart v. Hathaway, 4 KyL 438, 11 Ky. Op. 800; Williams v. Walters, 3 KyL 336.

Mass.—Forbes v. Keyes, 193 Mass. 38, 78 NE 733; Gibson v. Farley, 16 Mass. 280.

Mich. — Russell v. Wheeler, 129 Mich. 41, 88 NW 73.

Miss.—Rucker v. Dyer, 44 Miss. 591.

N. H.—Gregg v. Currier, 36 N. H. 200.

N. Y.—Matter of Woodworth, 3 NYSt 227, 5 Dem. Surr. 156.

Pa.—Com. v. Hilgert, 55 Pa. 236; Haslage v. Krugh, 25 Pa. 97; McCoy v. Scott, 2 Rawle 222, 19 AmD 640; Reed v. Com., 11 Serg. & R. 441.

R. I.—Hazard Prob. Ct. v. Hazard, 13 R. I. 3.

S. C.—Jennings v. Parr, 62 S. C. 306, 40 SE 683; Wiley v. Johnsey, 40 S. C. L. 355; Allen v. Burton, 26 S. C. L. 249.

Va.—Hutcherson v. Pigg, 8 Gratt. (49 Va.) 220; Burnett v. Harwell, 3 Leigh (30 Va.) 89.

[a] **For rents due decedent at his death** or collected on a contract made by him which passed into the hands of his personal representative, the sureties on the bond will be liable. Wilson v. Unselt, 12 Bush (Ky.) 215.

28. State v. Barrett, 121 Ind. 92, 22 NE 969.

29. Lewis v. Carson, 93 Mo. 587, 3 SW 483, 6 SW 365; Dix v. Morris, 66 Mo. 514 [aff 1 Mo. A. 93]; Gamble v. Gibson, 59 Mo. 585; Stong v. Wilkson, 14 Mo. 116; Maryland Fidelity, etc., Co. v. Texas Land, etc., Co., 40 Tex. Civ. A. 489, 90 SW 197.

30. Retention of property by principal in another capacity as discharging sureties see infra § 2571.

31. U. S.—Norman v. Buckner, 135 U. S. 500, 10 SCt 835, 34 L. ed. 252.

Ala.—Jackson v. Wilson, 117 Ala. 432, 23 S. 521.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117.

Conn.—Spencer v. Root, 2 Root 80.

Fla.—Pace v. Pace, 19 Fla. 438.

Ga.—Johnson v. Hall, 101 Ga. 687, 29 SE 37.

Ill.—Peo. v. Allen, 86 Ill. 166; Weir v. Peo., 78 Ill. 192; Peo. v. Petrie, 94 Ill. A. 652 [aff 191 Ill. 497, 61 NE 499, 85 AmSR 268].

Ky.—Flannery v. Givens, 52 SW 962, 21 KyL 705; Campbell v. Sacray, 44 SW 980, 19 KyL 1912; Shields v. Smith, 8 Bush 601; Clay v. Hart, 7 Dana 1.

Mass.—Forbes v. Allen, 166 Mass. 569, 44 NE 1065; Brooks v. Jackson, 125 Mass. 307.

Mo.—Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734; Fielder v. Rose, 61 Mo. A. 189.

N. H.—Perkins v. Perkins, 46 N. H. 110; Gregg v. Currier, 36 N. H. 200.

N. J.—Ordinary v. Lippincott, 10 N. J. L. 35.

N. Y.—Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

N. C.—Roper v. Burton, 107 N. C. 526, 12 SE 334; Fanshaw v. Fanshaw, 44 N. C. 166.

Oh.—Murphy v. Dorsey, 23 Oh. Cir. Ct. 157.

Pa.—Haley's Est., 9 Pa. Dist. 116; Com. v. Miller, 1 Pittsb. 51.

R. I.—Gould v. United Tract. Employes' Mut. Aid Assoc., 26 R. I. 142, 58 A 624.

Tenn.—Snodgrass v. Snodgrass, 1 Baxt. 157; Gambill v. Campbell, 12 Heisk. 737; Pardue v. Barnes, 7 Heisk. 356; Fulton v. Davidson, 3 Heisk. 614; Reeves v. Steele, 2 Head 647.

Va.—Andrews v. Avory, 14 Gratt. (55 Va.) 229, 73 AmD 355; Hutcherson v. Pigg, 8 Gratt(49 Va.) 220.

[a] **Where property is devised for life to the executor** and he wastes the property after payment of the debts his bondsmen are not liable. Fielder v. Rose, 61 Mo. A. 189.

32. Ft. Smith First Nat. Bank v. Thompson, 124 Ark. 161, 186 SW 826, 827 [quot Cyc]; Kirby v. State, 51 Md. 383; State v. Cheston, 51 Md. 352; Seegar v. State, 6 Harr. & J. (Md.) 162, 14 AmD 265; Porter v. Moores, 4 Heisk. (Tenn.) 16.

33. Bell v. Peo., 94 Ill. 230; Downes v. State, 3 Harr. & J. (Md.) 239; State v. Jordan, 3 Harr. & M. (Md.) 179; Williamson v. Lippincott, 10 N. J. L. 35; Allen v. Burton, 26 S. C. L. 249.

[a] **Where an administrator assumes without authority to act as guardian** under the impression that by virtue of his office as administrator he became the guardian of the wards of decedent, the sureties on his bond are not liable for property belonging to such wards of which he obtained possession. Williamson v. Lippincott, 10 N. J. L. 35.

34. State v. Cheston, 51 Md. 352; Watkins v. State, 2 Gill & J. (Md.) 220; Seegar v. State, 6 Harr. & J. (Md.) 162, 14 AmD 265; Ezell v. Hamilton, 4 Baxt. (Tenn.) 304; Reid v. Snobelen, 3 OntWR 656.

[a] **When transfer of liability takes place.**—After the time limited by law for the settlement of the estate the law will adjudge the ward's portion of the property to be held in the capacity of guardian whether a final account has been passed upon by the court or not. Watkins v. State, 2 Gill & J. (Md.) 220.

[b] **The settlement draws the line** between the two fiduciary relationships and fixes the liability of the sureties on the respective bonds. Ezell v. Hamilton, 4 Baxt. (Tenn.) 304.

35. Burnside v. Robertson, 28 S. C. 583, 6 SE 843.

36. Baker v. Wood, 42 Ala. 664.

37. Ala.—Perkins v. Lewis, 41 Ala. 649, 94 AmD 616.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117.

Fla.—Bradford v. Watson, 65 Fla. 461, 466, 62 S 484 [cit Cyc].

Ind.—Hinds v. Hinds, 85 Ind. 312.

Ky.—Givens v. Flannery, 105 Ky. 451, 49 SW 182, 20 KyL 1355; Warfield v. Brand, 13 Bush 77; Neely v. Merritt, 9 Bush 346; Sims v. Lively, 14 B. Mon. 433; Warren v. Benton, 3 KyL 332, 11 Ky. Op. 272.

Minn.—Martz v. McMahon, 114 Minn. 34, 129 NW 1049.

Mo.—State v. Tubb, 22 Mo. A. 91.

Oh.—Quinby v. Walker, 14 Oh. St. 193.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554.

[a] **Illustration.**—Where the testator held certain bonds in trust to collect and pay over the income to the beneficiaries, and on his death his executor took possession of the trust funds, although the will did not purport to make any disposition of them, and the beneficiaries acquiesced in this act of the executor and did not call on him to account until many years after the final settlement of his accounts as executor, the executor in taking posses-

unless they are made so by express statute.[38] It has been held, however, that where an executor, who is also named as trustee in the will, assumes the duties of trustee in the capacity of executor, his sureties cannot question the capacity in which he was acting,[39] and that if the executor fails to qualify as trustee, and deals with the trust estate as executor, the sureties on his administration bond are responsible for his acts.[40]

[§ 2560] **d. As Devisee Charged with Payment of Legacy.** Where an executor is also a devisee who takes the devise charged with the payment of a legacy, he is liable for such payment as devisee only, and his sureties are not liable.[41]

[§ 2561] **e. As Surviving Partner.** Where a surviving partner is appointed executor or administrator of his deceased copartner, partnership funds coming into his hands are presumed to be in the capacity of surviving partner, for which the sureties on his bond as executor or administrator will not be liable.[42] But by becoming executor or administrator he assumes the responsibility of collecting what is due by him to the estate as surviving partner,[43] and the sureties on his bond are liable for his failure to do so after such amount is ascertained,[44] or if he sells property of the estate for the payment of partnership debts while having partnership funds in his possession.[45] So also after the partnership affairs are wound up the interest of decedent is in the hands of his personal representative as such, and the bond must answer for his subsequent dealings therewith.[46]

[§ 2562] **C. Functions and Acts Covered.** The functions and acts covered by an administration bond and for which the sureties are liable embrace generally all the duties which the executor or administrator is called on to discharge in the course of the administration,[47] the rule being that whenever a representative does what the law prohibits or fails to exercise reasonable care and diligence in the endeavor to do what the law requires his bond stands as security for any damage resulting from such act or omission.[48] But the bond does not stand as security for acts which do not come within the scope of the official powers and duties of the executor or administrator,[49] breaches of merely personal

sion of the trust funds acted as trustee and not[3] as executor, and therefore the sureties on his bond were not liable for the misappropriation by him of such funds. Quinby v. Walker, 14 Oh. St. 193.

[b] **The sureties of an administrator with the will annexed** are not liable for the misapplication of funds turned over to him as trustee by order of the probate court. Barker v. Stanford, 53 Cal. 451; In re Quimby, 84 N. J. Eq. 1, 92 A 56.

[c] **Where a will directs an executor to invest the personal estate** and apply the income to certain purposes, there is not such a trust superadded to his duties as executor as to absolve the surety on his bond as executor from liability. Hall v. Cushing, 9 Pick. (Mass.) 395.

38. Porter v. Moores, 4 Heisk. (Tenn.) 16; Lester v. Vick, 2 Heisk. (Tenn.) 476.

[a] **Statutory change.**—The act of 1838 which made sureties on the bond of an executor liable for his acts as trustee is omitted from the code and they are now not so liable unless the bond is conditioned so as to cover this liability. Walker v. Potilla, 7 Lea (Tenn.) 449.

39. Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

40. Coates v. Lunt, 213 Mass. 401, 100 NE 829; Prior v. Talbot, 10 Cush. (Mass.) 1.

41. Conn.—Olmstead v. Brush, 27 Conn. 530.

Ky.—Smith v. Smith, 10 KyL 636.

Md.—State v. Hewlett, 48 Md. 138.

Mass.—Thayer v. Finnegan, 134 Mass. 62, 45 AmR 285.

N. H.—Leavitt v. Wooster, 14 N. H. 550.

Va.—Arrington v. Cheatham, 2 Rob. (41 Va.) 492.

But compare Towner v. Tooley, 38 Barb. (N. Y.) 598 (where the court appears to have entertained a different view).

42. Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 AmD 160.

43. Knowlton v. Chick, 56 Me. 228; Caskie v. Harrison, 76 Va. 85.

44. Knowlton v. Chick, 56 Me. 228.

[a] **Where there are no partnership debts** there should be an immediate transfer to the partner in his capacity of executor or administrator and the sureties on his bond will be liable accordingly. Caskie v. Harrison, 76 Va. 85.

45. Boyle v. Boyle, 4 B. Mon. (Ky.) 570.

46. Hooper v. Hooper, 32 W. Va. 526, 9 SE 937.

47. Ala.—Campbell v. American Bonding Co., 172 Ala. 458, 55 S 306; Clarke v. West, 5 Ala. 117.

Cal.—L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Ga.—Bailey v. McAlpin, 121 Ga. 111, 48 SE 699.

Ind.—Hinds v. Hinds, 85 Ind. 312; Worgang v. Clipp, 21 Ind. 119, 83 AmD 343.

Iowa.—Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 435; Tucker v. Stewart, 147 Iowa 294, 126 NW 183; Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Ky.—Givens v. Flannery, 105 Ky. 451, 49 SW 182, 20 KyL 1355; Warfield v. Brand, 13 Bush 77; Neely v. Merritt, 9 Bush 346; Speed v. Nelson, 8 B. Mon. 499; Clay v. Hart, 7 Dana 1.

Me.—Williams v. Cushing, 34 Me. 370; Groton v. Ruggles, 17 Me. 137.

Md.—Campbell v. State, 62 Md. 1.

Mass.—McIntire v. Mower, 204 Mass. 233, 90 NE 567; McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091.

Minn.—McAlpine v. Kratka, 98 Minn. 151, 107 NW 961.

Miss.—Davis v. Hoopes, 33 Miss. 173.

Mo.—State v. Anthony, 30 Mo. A. 638.

Nev.—McNabb v. Wixom, 7 Nev. 163.

N. H.—Gregg v. Currier, 36 N. H. 200; Leavitt v. Wooster, 14 N. H. 550.

N. J.—Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

N. Y.—Deobold v. Appermann, 111 N. Y. 531, 19 NE 94, 7 AmSR 760, 2 LRA 644; Matter of Gall, 42 App. Div. 255, 59 NYS 254; Beckett v. Place, 12 Misc. 323, 33 NYS 634.

N. C.—McLean v. McLean, 88 N. C. 394.

Oh.—Wade v. Graham, 4 Oh. 126.

Pa.—Com. v. McGovern, 4 Pa. Super. 598.

R. I.—Williams v. Starkweather, 28 R. I. 145, 66 A 67.

S. C.—Ordinary v. Bonner, 20 S. C. L. 468.

Vt.—Murdock v. Matthews, Brayt. 100.

Va.—Morrow v. Peyton, 8 Leigh (35 Va.) 54.

[a] **Payment of debts,** if there are sufficient assets, is within the condition of the bond. McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091.

[b] **An order for the payment of attorney's fees,** made pursuant to a statute authorizing the court to allow a claim for attorney's fees, is in effect a judgment against the estate and a failure of the administrator to discharge it renders the sureties liable. State v. Walsh, 67 Mo. A. 348.

[c] **Holding fund until death of life beneficiary.**—Where an administrator, on the distribution of the proceeds of real estate, was ordered by the court to retain the share of the widow during her life and pay her interest on it annually, and at her death to pay it to the persons entitled in remainder, the sureties were liable to the remaindermen, because the order did not impose any additional obligation on the administrator. Com. v. McGovern, 4 Pa. Super. 598.

[d] **A declaration of insolvency** of an estate does not ipso facto terminate the administrator's authority, and if no successor is appointed the sureties remain liable for his subsequent acts of administration. Clay v. Gurley, 62 Ala. 14.

[e] **Where the same person is administrator of two estates,** one of which is indebted to the other, and he wastes assets of the debtor estate which he was bound but failed to pay over to the creditor estate, his sureties for a due administration of the creditor estate are liable for such default and waste. Morrow v. Peyton, 8 Leigh (35 Va.) 54.

48. Campbell v. State, 62 Md. 1; State v. Farrar, 77 Mo. 175; McNabb v. Wixom, 7 Nev. 163; Cunningham v. Souza, 1 Redf. Surr. (N. Y.) 462.

[a] **"Due administration of the estate"** comprises the due payment of its obligations and the handing over of the balance to the persons entitled. Cunningham v. Souza, 1 Redf. Surr. (N. Y.) 462.

[b] **The sureties are liable for the fraud of the executor or administrator** in exercising the functions of his office as well as for his defaults, when it is prejudicial to the persons entitled to complain. Campbell v. State, 62 Md. 1.

[c] **Where a judgment in a replevin suit is rendered against an administrator,** the sureties on his bond are liable to the sureties on the replevin bond in case of his failure to comply with an order of court to return the property or its value. State v. Farrar, 77 Mo. 175; State v. Dailey, 7 Mo. A. 548.

49. U. S.—Norman v. Buckner, 135 U. S. 500, 10 SCt 835, 34 L. ed. 252.

Ala.—Campbell v. American Bonding Co., 172 Ala. 458, 55 S 306.

Ga.—Johnson v. Hall, 101 Ga. 687, 29 SE 37; Bird v. Mitchell, 101 Ga. 46, 28 SE 674.

Ky.—Campbell v. Sacray, 44 SW 980, 19 KyL 1912; Denton v. Crouch, 101 Ky. 386, 41 SW 277, 19 KyL 588; Warfield v. Brand, 13 Bush 77; McCampbell v. Gilbert, 6 J. J. Marsh. 592; Warren v. Benton, 3 KyL 332,

duties [50] or contracts,[51] or acts done with respect to the property of the estate in some other and distinct capacity,[52] unless the bond by its terms covers all the duties imposed by the will, in which event the sureties are liable for the exercise of testamentary trusts.[53] The bond does not ordinarily secure the payment of debts contracted by the executor or administrator in the settlement of the estate;[54] nor are the sureties ordinarily liable for the payment of costs awarded against the principal,[55] although it has been held that, where the bond is conditioned to obey all orders of the court touching the administration of the estate, and the court has jurisdiction to award costs either against the estate or against the representative, an order for the payment of costs is within the condition of the bond,[56] and that a bond to pay all debts and legacies of the testator, given by an executor who is sole legatee, must respond to costs awarded out of the estate to contestants of the will.[57]

Administration by agent of creditor. It has been held that, where the agent of a creditor of decedent takes out letters of administration pursuant to a power of attorney given him by his principal, the sureties on his bond are not liable to such creditor.[58]

[§ 2563] **D. Discharge of Sureties from Liability—1. In General.** A surety on an administration bond remains liable until the termination of the administration, unless he is sooner discharged from liability in some lawful manner.[59] As a general rule whatever operates to release the executor or administrator from liability also releases the sureties,[60] but the rule is subject to exception in cases where

11 Ky. Op. 272; Smith v. Smyser, 2 KyL 440, 11 Ky. Op. 176.

Me.—Nelson v. Woodbury, 1 Me. 251.

Mass.—Freeman v. Anderson, 11 Mass. 190.

Mich.—Russell v. Wheeler, 129 Mich. 41, 88 NW 73; Robbins v. Burridge, 128 Mich. 25, 87 NW 93.

Miss.—Nagle v. Ball, 71 Miss. 330, 13 S 929.

Mo.—Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734; Orrick v. Vahey, 49 Mo. 428; Fielder v. Rose, 61 Mo. A. R. 189.

N. H.—Gregg v. Currier, 36 N. H. 200.

N. J.—In re Quimby, 84 N. J. Eq. 1, 92 A 56; In re Givens, 34 N. J. Eq. 191.

Oh.—Riggin v. Creath, 60 Oh. St. 114, 53 NE 1100; Flickinger v. Saum, 40 Oh. St. 591; Curtis v. Farmers' Nat. Bank, 39 Oh. St. 579; Cheney v. Powell, 20 Oh. Cir. Ct. 398, 11 Oh. Cir. Dec. 279.

R. I.—Sarle v. Scituate Prob. Ct., 7 R. I. 270.

S. C.—Jennings v. Parr, 62 S. C. 306, 40 SE 683.

Tenn.—Carter v. Young, 9 Lea 210.

[a] **Delivery of the report of commissioners on an insolvent estate** is no part of the official duty of an administrator, and his failure to carry out an agreement to do so will not render the sureties liable. Nelson v. Woodbury, 1 Me. 251.

[b] **Deceptive and misleading conduct** by the administrator to induce creditors to defer filing their claims within the statutory period is not a breach of the bond. Nagle v. Ball, 71 Miss. 330, 13 S 929.

[c] **The sureties on the bond of an administrator pendente lite** are not liable for the acts of their principal where he assumes to act as a general administrator. Stevenson v. Wilcox, 16 S. C. 432.

[d] **A neglect to apply for leave to sell real estate,** the personal having been exhausted, is not a breach of the administrator's bond for which the sureties are liable. Freeman v. Anderson, 11 Mass. 190.

50. Ga.—James v. Little, 135 Ga. 672, 70 SE 251; Bird v. Mitchell, 101 Ga. 46, 28 SE 674.

Me.—Nelson v. Woodbury, 1 Me. 251.

Miss.—Davis v. Hoopes, 33 Miss. 173.

N. C.—McLean v. McLean, 88 N. C. 394.

Tenn.—Erwin v. Carroll, 1 Yerg. 145.

Va.—Childress v. Morris, 23 Gratt. (64 Va.) 802.

W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094.

51. Ala.—Campbell v. American Bonding Co., 172 Ala. 458, 55 S 306.

Ga.—James v. Little, 135 Ga. 672, 70 SE 251.

N. H.—Merrill v. Harris, 26 N. H. 142, 57 AmD 359.

N. C.—McLean v. McLean, 88 N. C. 394.

S. C.—Ordinary v. Bonner, 20 S. C. L. 468.

Tenn.—Erwin v. Carroll, 1 Yerg. 145.

Va.—Childress v. Morris, 23 Gratt. (64 Va.) 802.

W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094.

[a] **Agreements with distributees.**—Where the distributees of an estate agree with the administrator, who is also a distributee, to hold certain of the property and dispose of it at private sale for their mutual profit or loss, the surety is not liable for the nonperformance of such agreement by the administrator. Kennedy v. Adickes, 37 S. C. 174, 15 SE 922.

52. Ala.—Anderson v. McGowan, 42 Ala. 280; Perkins v. Lewis, 41 Ala. 649, 94 AmD 616.

Cal.—Barker v. Stanford, 53 Cal. 451.

Conn.—State v. Whitehouse, 75 Conn. 410, 53 A 897.

Ga.—Freeman v. Brown, 115 Ga. 23, 41 SE 385.

Ill.—Peo. v. Petrie, 191 Ill. 497, 61 NE 499, 85 AmSR 268 [aff 94 Ill. A. 652]; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev 78 Ill. A. 345].

Ind.—Hinds v. Hinds, 85 Ind. 312.

Kan.—Carr v. Catlin, 13 Kan. 393.

Ky.—Givens v. Flannery, 105 Ky. 451, 49 SW 182, 20 KyL 1355; Warfield v. Brand, 13 Bush 77; Warren v. Benton, 3 KyL 332, 11 Ky. Op. 272.

Mo.—Orrick v. Vahey, 49 Mo. 428; State v. Anthony, 30 Mo. A. 638.

N. C.—Roper v. Burton, 107 N. C. 526, 12 SE 334; Fanshaw v. Fanshaw, 44 N. C. 166.

S. C.—Kennedy v. Adickes, 37 S. C. 174, 15 SE 922.

Tenn.—Carter v. Young, 9 Lea 210.

Va.—Odell v. Howle, 77 Va. 361.

[a] **Carrying out personal trust in will.**—(1) The bond of an executor is not liable for the performance of provisions in the will in the nature of a personal trust. Armstrong v. Martin, 18 N. C. 397. (2) Where property was devised to executors, to hold as trustees for certain purposes, and on approval of the final account of the executors the court ordered them to hold the property in trust and administer it in accordance with the will, and the executors undertook to administer the trust without qualifying as testamentary trustees as required by statute, they continued to hold the property as executors and the sureties on their administration bonds were liable for a loss thereof. Davies' Est., 161 Wis. 598, 155 NW 152.

[b] **Management of decedent's business.**—(1) Where a testator by his will directs that the executors continue his business for a certain period for the benefit of the estate, they act in so doing not as executors but as trustees, and the sureties on the bond are not liable for any losses. Carter v. Young, 9 Lea (Tenn.) 210. (2) But if he permits them to conduct it for their own benefit, the fund invested to be returned and administered, it is a loan to them and remains a part of the estate for the return and proper administration of which the sureties are liable. State v. Wilmer, 65 Md. 178, 3 A 252.

[c] **Administrator acting as agent of heirs.**—The sureties of an administrator are not liable for his defaults as agent or trustee of the heirs in collecting the rents of real estate. Denton v. Crouch, 101 Ky. 386, 41 SW 277, 19 KyL 588.

[d] **An administrator who is ordered to apply a fund to the support of infants** does not act in the performance of that duty as administrator, because the court has no authority to make such order, and therefore his sureties are not liable if he converts the fund to his own use. State v. Anthony, 30 Mo. A. 638.

[e] **If the two offices are not clearly separable** the sureties on the administration bond will be liable for all the acts of their principal in dealing with the estate. Towne v. Ammidown, 20 Pick. (Mass.) 535; Dorr v. Wainwright, 13 Pick. (Mass.) 328; Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

53. State v. Wilmer, 65 Md. 178, 3 A 252; Prescott v. Pitts, 9 Mass. 376; Walker v. Potilla, 7 Lea (Tenn.) 449.

[a] **A condition to perform duties "enjoined by law"** does not include testamentary trusts. Carter v. Young, 9 Lea (Tenn.) 210.

54. Taylor v. Mygatt, 26 Conn. 184; Newton County Bank v. American Bonding Co., 141 Ga. 326, 80 SE 1003, 50 LRANS 1089; Baker v. Moor, 63 Me. 443; Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094.

[a] **For services rendered an executor** in settling the estate one can only recover against him individually and not upon his bond. Baker v. Moor, 63 Me. 443; Thompson v. Mann, 65 W. Va. 648, 64 SE 920.

55. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086 [transf den 83 P 1089]; Ferguson v. Cappeau, 6 Harr. & J. (Md.) 394.

56. Beckett v. Place, 12 Misc. 323, 33 NYS 634; West v. Crosby, 2 NY CityCt 305.

57. Cole's Will, 52 Wis. 591, 9 NW 664.

58. Moodie v. Penman, 3 S. C. Eq. 482.

59. American Surety Co. v. Gaskill, 85 Vt. 358, 82 A 218.

60. Ala.—McBroom v. Governor, 6 Port. 32.

the liability of the principal is extinguished by operation of law.[61] An alteration in the bond after its execution increasing the penal sum, made by the probate judge with the consent of the principal but without the knowledge of the sureties, releases the latter from liability thereon.[62] Whether the imposition of new or additional duties on a public administrator by a statute passed after the execution of his bond will release the sureties from their original liability will depend upon whether the performance of his original duties is materialy interfered with,[63] but in any case the sureties have no liability with respect to the new duties imposed.[64] The fact that upon the filing of his account the probate court discharged an administrator from all further liability on his bond as such administrator does not release him or his surety from liability for wrongfully or illegally distributing any part of the personal estate.[65] A formal release of a surety by one of the persons beneficially interested in the estate does not relieve such surety of his obligation to such person where it is shown to have been obtained by fraud and undue influence.[66]

[§ 2564] **2. Settlement and Discharge of Principal.** The final settlement of the accounts of an executor or administrator and his discharge ordinarily terminate the liability on the bond;[67] it has the force and effect of a judgment,[68] and precludes any action on the bond unless impeached and set aside in an appropriate proceeding.[69] An action on the bond is not, however, barred by a settlement and discharge which was procured by fraud;[70] and it has been held that the fact that an account purporting to be a final account has been settled in the probate court is no bar to an action on the bond for assets converted by the executor to his own use and not accounted for.[71] Where one of two administrators resigns, and the other is appointed sole administrator and gives a new bond, the sureties on the former bond which had been given jointly by both administrators are released.[72]

Settlement while suit pending. Where an administrator makes a settlement of his account while a suit by a creditor is pending against him, the debt in suit not being taken into account, such premature settlement and discharge will not relieve the sureties from liability on the bond.[73]

A conditional discharge of the representative on the final accounting does not release the sureties from liability until the conditions have been complied with.[74]

Where a representative is directed to retain certain funds to be paid over at a future date and he retains them in his representative capacity, the sureties are not discharged from their liability until the amount is finally paid over as directed.[75]

An allowance of a certain sum "retained to pay legacies," in the first account of an administrator is not an absolute credit or discharge of the legacies, but an admission of funds for their payment,[76] and an allowance in his second account "for sundry payments made, as stated in the last account," although with the consent of the legatees, does not discharge the obligation of the administrator's bond to pay the legacies according to the will.[77]

[§ 2565] **3. Death of Principal or Surety.** The death of an executor or administrator does not discharge his sureties from liability for his acts or defaults concerning the estate in his lifetime;[78] and it has been held that their liability extends even to the acts or defaults of the personal representative of the deceased executor or administrator with regard to the original estate,[79] although this has been

Ga.—Austin v. Raiford, 68 Ga. 201.
Ill.—Peo. v. White, 11 Ill. 341.
Ky.—Fore v. Fore, 1 Ky. Op. 498.
N. C.—Atkinson v. Farmer, 6 N. C. 291.

[a] **Satisfaction of execution against administrator.**—The sureties of an administrator are released from liability to a creditor by the sale of property under execution against the administrator, at which sale the creditor was the purchaser, and the return of the execution "satisfied," although the creditor loses the property purchased by reason of a superior title. Atkinson v. Farmer, 6 N. C. 291.

61. McBroom v. Governor, 6 Port. (Ala.) 32; Peo. v. White, 11 Ill. 341.

62. Howe v. Peabody, 2 Gray (Mass.) 556.

63. State v. Cheaney, 52 Mo. A. 258.

64. State v. Cheaney, 52 Mo. A. 258.

65. Harbeson v. Mellinger, 35 Oh. Cir. Ct. 195, 18 Oh. Cir. Ct. N. S. 504, 2 Oh. A. 75.

66. Riggs v. Gillespie, 241 Fed. 311, 154 CCA 171 [rev 229 Fed. 760].

67. U. S.—Alston v. Munford, 1 F. Cas. No. 267, 1 Brock. 266.
Ala.—Evans v. Evans, 76 S 95; Turner v. Cole, 24 Ala. 364.
Del.—In re Caldwell, 8 Del. Ch. 358, 68 A 525.
Ga.—Austin v. Raiford, 68 Ga. 201.
Ill.—Peo. v. Lott, 27 Ill. 215.
Kan.—Proctor v. Dicklow, 57 Kan. 119, 45 P 86; Smith v. Eureka Bank, 24 Kan. 528.
Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115; Hessey v. Hessey, 1 KyL 424, 10 Ky. Op. 902.
La.—Campbell's Succ., 132 La. 746, 61 S 777.
Mo.—State v. Gray, 106 Mo. 526, 17 SW 500; State v. Noll, (A.) 189 SW 582; State v. Anthony, 30 Mo. A. 638.
N. C.—Tulburt v. Hollar, 102 N. C. 406, 9 SE 430.
Oh.—State v. Moffitt, 33 Oh. Cir. Ct. 238; State v. Moffitt, 13 Oh. Cir. Ct. N. S. 152.
Pa.—Vandever's App., 42 Pa. 74.
Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.
R. I.—Sarle v. Scituate Prob. Ct., 7 R. I. 270.
S. C.—Simkins v. Cobb, 18 S. C. L. 60.
Va.—Myers v. Wade, 6 Rand. (27 Va.) 444.
W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094.

[a] **Executor or administrator acting in other capacities.**—(1) An administrator is discharged, and the sureties on the administration thereby released, where he has been appointed guardian of the distributees and charges himself in his guardianship accounts with the balance in his hands as administrator. Alston v. Munford, 1 F. Cas. No. 267, 1 Brock. 266; Vandever's App., 42 Pa. 74; Simkins v. Cobb, 18 S. C. L. 60; Myers v. Wade, 6 Rand. (27 Va.) 444. (2) Where an executrix, who is given a life estate in the personal property, has made a final settlement in the probate court and charged herself with her life estate, the condition of the bond is satisfied and the sureties are discharged. Sarle v. Scituate Prob. Ct., 7 R. I. 270.

[b] **Discharge is no release for improper distribution.**—Harbeson v. Mellinger, 35 Oh. Cir. Ct. 195, 18 Oh. Cir. Ct. N. S. 504, 2 Oh. A. 75.

68. See supra § 2482.

69. Proctor v. Dicklow, 57 Kan. 119, 45 P 86; Smith v. Eureka Bank, 24 Kan. 528; State v. Gray, 106 Mo. 526, 17 SW 500; Woodworth v. Woodworth, 70 Mo. 601.

[a] **Decree amounting to setting aside of discharge.**—A decree in a suit by decedent's lawful wife and heirs against his administratrix that the administration proceedings were fraudulent and that, so far as plaintiffs were concerned, all orders, decrees, and proceedings were of no force and effect, has the effect of setting aside a final decree of distribution and a discharge, so that suit may be successfully maintained against a surety on the administratrix's bond. Weyant v. Utah Sav., etc., Co., (Utah) 182 P 189.

70. Pollock v. Cox, 108 Ga. 430, 34 SE 213; Tucker v. Stewart, 147 Iowa 294, 126 NW 183.

71. Mighton v. Dawson, 38 Oh. St. 650.

72. Veach v. Rice, 131 U. S. 293, 9 SCt 730, 33 L. ed. 163.

73. Dean v. Portis, 11 Ala. 104.

74. Cosgrove v. U. S., 33 Ct. Cl. 167; U. S. Fidelity, etc., Co. v. Peo., 159 Ill. A. 35.

[a] **This rule applies where the discharge is made conditional upon** making certain payments and filing vouchers therefor. Cosgrove v. U. S., 33 Ct. Cl. 167.

75. McCloud v. Hewlett, 135 Cal. 361, 69 P 333; Betts v. Avery, 46 App. Div. 342, 61 NYS 525.

76. Fay v. Taylor, 2 Gray (Mass.) 154.

77. Fay v. Taylor, 2 Gray (Mass.) 154.

78. State v. Rottaken, 34 Ark. 144; American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116; Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008. See generally Principal and Surety [32 Cyc 83].

79. Cook v. Titcomb, 115 Me. 38, 97 A 133; O'Gorman v. Lindeke, 26 Minn. 93, 1 NW 841; Williams v.

denied.[80] The liability of a surety is not discharged by his own death but extends to defaults of the principal subsequently committed.[81]

Where corepresentatives have given a joint bond, the death of one of them does not release the sureties, but they remain responsible for the proper performance by the surviving representative of his duties in the administration of the estate.[82]

[§ 2566] **4. Release of Cosurety.** Under a statute declaring that a release of one joint debtor does not extinguish the obligation of any of the others, an order releasing a surety on an administrator's bond, on application of the heirs at law, does not release a cosurety, although the statute authorizes the release of a surety only on his own application.[83] It has been held that a release by one of the beneficiaries of one of the joint and several securities on the bond of the executor releases the other sureties only to the extent to which the released surety would have been liable upon the ultimate ascertainment of the sum to be paid by the solvent and responsible sureties to the beneficiary.[84]

[§ 2567] **5. Revocation of Letters; Resignation or Removal of Principal.** Where the letters of an executor or administrator are revoked or he is removed or resigns, the sureties are ordinarily released from liability as to the subsequent administration,[85] but they remain liable for all previous acts or defaults of the principal.[86]

Final settlement of a representative's account, on his resignation, like any other final settlement,[87] ends all liability on the bond,[88] but a settlement made by the representative at the time of his resignation, which does not close the business of the estate in his hands is not a final settlement which will have this result.[89]

If the representative is removed pending the settlement of his accounts, the probate court may still proceed with the settlement and hold his sureties liable for his failure to pay a decree thereafter entered.[90]

Failure to pay over to successor. Where an administrator who has resigned or been removed fails to pay over to his successor the funds of the estate in his hands, his bond is liable at the suit of the successor,[91] but not at the suit of a creditor.[92]

Where an order dismissing an administrator is rescinded and the administrator reinstated, the sureties continue bound.[93]

Coexecutors or coadministrators. Where the letters of one coexecutor or coadministrator are revoked, or one resigns and the sole administration devolves upon the other, the sureties on the joint bond continue liable for the subsequent acts of the other;[94] but where one coadministrator resigns and accounts to the other and is discharged and the other is reappointed under a new bond the sureties on the joint bond are discharged.[95]

A public administrator, although he resigns his office, continues the representative of estates committed to his hands before his resignation and the sureties on his bond remain liable for the discharge of his duties as to such estates.[96]

Reappointment of principal. The sureties of an administrator, who have been released by the resignation or removal of their principal, do not again become liable where he is reappointed and gives a new and different bond,[97] although it has been held that under such circumstances, if a balance is ascertained against the representative on the first administration, distributees may at their election receive against the sureties on either the first or second bond.[98]

[§ 2568] **6. Expiration of Term of Office or Time Limited for Administration.** Where the time for completing administration is expressly limited by statute,[99] the sureties are released from liability at the expiration of such period,[1] although if an executor sells property for notes not maturing until after the expiration of his appointment and fails to account for them, his sureties will be liable.[2]

Where special or temporary administration is granted, sureties on the administration bond are released when the reason of the grant ceases to exist.[3]

If a bond is conditioned to administer the estate according to the will, a further condition in the bond that it shall be administered within a certain time will not be construed as a release from liability as

State, 68 Miss. 680, 10 S 52, 24 AmSR 297.

[a] **Misapplication of estate of original representative.**—The sureties of an executor or administrator are not chargeable with a misapplication by his representative of the assets of his estate. Williams v. State, 68 Miss. 680, 10 S 52, 24 AmSR 297.

[b] **Failure to pay balance due estate.**—The failure of the personal representative of a deceased executor to pay over to the administrator de bonis non of the original testator's estate a balance decreed by the probate court to be due to such estate from the executor constitutes a breach of the executor's bond for which the sureties are liable. Cook v. Titcomb, 115 Me. 38, 41, 97 A 133 (there is no merit in a contention "that there was not, and could not be, any breach of the bond after the death of the executor, for which the sureties on his official bond can be held liable").

80. State v. Rottaken, 34 Ark. 144; Jones v. Hobson, 2 Rand. (23 Va.) 483.

81. Ala.—Hightower v. Moore, 46 Ala. 387.

Ark.—Hecht v. Skaggs, 53 Ark. 291, 13 SW 930, 22 AmSR 192.

Mo.—State v. Crooke, 129 Mo. A. 490, 107 SW 1104.

N. Y.—Mundorff v. Wangler, 44 N. Y. Super. 495, 57 HowPr 372; Stevens v. Stevens, 2 Dem. Surr. 469.

Pa.—White v. Com., 39 Pa. 167; Dickinson v. Calahan, 19 Pa. 227.

Tex.—Bergstroem v. State, 58 Tex. 92.

W. Va.—Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

Wyo.—Snyder v. State, 5 Wyo. 318, 40 P 441, 63 AmSR 60.

See generally Principal and Surety [32 Cyc 84, 85].

82. Stephens v. Taylor, 62 Ala. 269.

83. Elizalde v. Murphy, 146 Cal. 168, 79 P 866.

84. Gillespie v. Smith, 229 Fed. 760 [rev on other grounds 241 Fed. 311, 154 CCA 191].

85. Peo. v. Lott, 27 Ill. 215; Norton v. Wallace, 30 S. C. L. 507; Waterman v. Bigham, 20 S. C. L. 512; De Lane's Case, 4 S. C. L. 167; Lingle v. Cook, 32 Gratt. (73 Va.) 262.

86. Conn.—Foster v. Thomas, 21 Conn. 285.

Ill.—Peo. v. Lott, 27 Ill. 215.

Md.—State v. Blackistone, 2 Harr. & G. 139.

Pa.—Stewart v. Moody, 4 Watts 169.

S. C.—Norton v. Wallace, 30 S. C. L. 507; Waterman v. Bigham, 20 S. C. L. 512; Cureton v. Shelton, 14 S. C. L. 412.

Tex.—Brown v. Seaman, 65 Tex. 628.

[a] **Delivery by a resigning administrator to his successor of a purchaser's note** for a sale on credit which should have been for cash does not relieve the predecessor and his sureties from liability with respect to such sale. Foster v. Thomas, 21 Conn. 285.

87. See supra § 2564.

88. Tulburt v. Hollar, 102 N. C. 406, 9 SE 430.

89. Lang v. State, 67 Ind. 577; Parsons v. Milford, 67 Ind. 489.

90. Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315.

91. State v. Heinrichs, 82 Mo. 542.

92. State v. Heinrichs, 82 Mo. 542.

93. Collier v. Cross, 20 Ga. 1.

94. Davenport v. Reynolds, 6 Ill. A. 532; State v. Rucker, 59 Mo. 17.

95. Veach v. Rice, 131 U. S. 293, 9 SCt 730, 33 L. ed. 163.

96. Olsen v. Rich, 79 Ky. 244.

97. Steele v. Graves, 68 Ala. 17; Enicks v. Powell, 21 S. C. Eq. 196.

98. Modawell v. Hudson, 80 Ala. 265.

99. See supra § 252.

1. Brown v. Gunning, 19 La. 462; Rison v. Young, 7 Mart. N. S. (La.) 294; Jones v. Perkins, 8 Tex. 337; Flores v. Howth, 5 Tex. 329.

2. Verret v. Belanger, 6 La. Ann. 109.

3. State v. Craddock, 7 Harr. & J. (Md.) 40. See also American Surety Co. v. Gaskill, 85 Vt. 358, 82 A 218

to acts which it appears from the face of the will cannot be so performed.[4]

The authority of a public administrator as to unfinished business in his official custody continues after the expiration of his term of office[5] and the sureties on his bond remain liable.[6]

[§ 2569] **7. Giving New Bond.**[7] Whether the giving of a new bond will operate to discharge the sureties on a former bond is governed in some cases by the purpose of the new bond,[8] and in others by express statutory provisions.[9] It is often provided that the sureties on the former bond shall be discharged from any liability accruing after the giving of the new bond,[10] but liabilities already incurred are not affected.[11] As a rule, however, when not otherwise provided, a new or additional bond is merely cumulative and does not release the sureties on the first bond,[12] although the filing of the new bond is regarded as constituting an assent to an order of the court discharging the sureties on the old bond.[13] If the new bond is void, the sureties on the old bond are not released, although the new bond was intended as a substitute therefor.[14]

[§ 2570] **8. Giving Special Obligation for Payment of Distributive Share.** Where an executor or administrator under an agreement with a distributee gives the latter a special bond[15] or note[16] for the payment of his distributive share, the sureties on the original bond are discharged as to this amount.

[§ 2571] **9. Retention of Property by Principal in Another Capacity.** As previously stated the bond of an executor or administrator does not cover property held or acts done by him in some other and distinct capacity.[17] It follows that, where property of the estate is transferred to, and retained by, the representative in another capacity, the sureties on the administration bond are released from further liability with respect thereto.[18] They will not be released, however, unless a transfer has been made and a new liability incurred.[19] It is in some cases difficult to say when the transfer of possession from

(principle recognized, although facts rendered it not applicable).

4. Holbrook v. Bentley, 32 Conn. 502.

5. See infra § 2891.

6. In re Aveline, 53 Cal. 259.

7. Successive or additional bonds generally see supra § 2539.

8. Veach v. Rice, 131 U. S. 293, 9 SCt 730, 33 L. ed. 163; Atkinson v. Christian, 3 Gratt. (44 Va.) 448.

[a] **Purpose of bond.**—If the new bond is given as a new and different undertaking to be a substitute for the first, the original sureties will be discharged from further liability; but if given for the purpose of strengthening the existing security their liability will not be affected. Veach v. Rice, 131 U. S. 293, 9 SCt 730, 33 L. ed. 163.

9. Ala.—Jones v. Ritter, 56 Ala. 270.

Ark.—State v. Stroop, 22 Ark. 328.

Ill.—Peo. v. Curry, 59 Ill. 35.

Ky.—Pepper v. Donnelly, 87 Ky. 259, 8 SW 441, 10 KyL 140.

Miss.—Russell v. McDougall, 11 Miss. 234.

Mo.—Wood v. Williams, 61 Mo. 63.

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[a] **Illustrations.**—(1) Under the Alabama statute the sureties on the first bond are discharged from further liability when the second bond is given on their application, but not otherwise. Jones v. Ritter, 56 Ala. 270. (2) Under the Illinois statute of wills a new bond given under section 78 where the original security is insufficient does not release the former sureties. Peo. v. Curry, 59 Ill. 35. (3) But a new bond under section 79 for the protection of the sureties on the first and which the statute provides shall relate back to the grant of letters releases the former sureties from all liability both past and present. Peo. v. Lott, 27 Ill. 215.

10. U. S.—Beard v. Roth, 35 Fed. 397.

Ala.—May v. Kelly, 61 Ala. 489.

Ark.—State v. Stroop, 22 Ark. 328.

Ga.—Allen v. Allen, 16 Ga. A. 729, 86 SE 46.

Ky.—Pepper v. Donnelly, 87 Ky. 259, 8 SW 441, 10 KyL 140.

Miss.—Russell v. McDougall, 11 Miss. 234.

Mo.—Haskell v. Farrar, 56 Mo. 497.

Va.—Lingle v. Cook, 32 Gratt. (64 Va.) 262.

[a] **It will be presumed** in the absence of proof to the contrary that a default on the part of the administrator occurred after the execution of the second bond. Beard v. Roth, 35 Fed. 397; May v. Kelly, 61 Ala. 489; Phillips v. Brazel, 14 Ala. 746. Contra McMeekin v. Hudson, 34 S. C. L. 327.

[b] **The sureties on the bond of a public administrator** are not within the application of the statute providing for the release of sureties on an administrator's bond when a second bond is filed. State v. Wolff, 10 Mo. A. 95.

11. Ark.—State v. Stroop, 22 Ark. 328.

Ga.—Alexander v. Mercer, 7 Ga. 549.

Ky.—Pepper v. Donnelly, 87 Ky. 259, 8 SW 441, 10 KyL 140.

Mass.—McKim v. Bartlett, 129 Mass. 226.

Miss.—Russell v. McDougall, 11 Miss. 234.

Oh.—Corrigan v. Foster, 51 Oh. St. 225, 37 NE 263.

Tenn.—Morris v. Morris, 9 Heisk. 814.

[a] **When a new bond is given as a substitute** for the first the sureties on the first bond are discharged from all liability except only as to actions then pending on that bond. Russell v. McDougall, 11 Miss. 234.

[b] **Where the sureties on the first bond are released by order of the court** and a new bond given, the sureties on the second are primarily liable to the extent of their bond for all defaults whether before or after the execution of the second bond, and the sureties on the first are only liable for defaults occurring previously in case the second bond proves insufficient. Morris v. Morris, 9 Heisk. (Tenn.) 814.

[c] **A bill of discovery** may be maintained against the principal and both sets of sureties in order to ascertain the time of devastavit and charge each set of sureties according to their respective liabilities on their bonds. Alexander v. Mercer, 7 Ga. 549.

12. Cal.—Elizalde v. Murphy, 146 Cal. 168, 79 P 866; Lacoste v. Speivalo, 64 Cal. 35, 30 P 571.

Ill.—Pinkstaff v. Peo., 59 Ill. 148.

Iowa.—Bankers' Surety Co. v. Wyman, 141 Iowa 574, 120 NW 116.

Miss.—Ward v. State, 40 Miss. 108.

Mo.—State v. Berning, 74 Mo. 87; Haskell v. Farrar, 56 Mo. 497; State v. Fields, 53 Mo. 474; State v. Berning, 6 Mo. A. 105 [aff 74 Mo. 87].

N. C.—Pickens v. Miller, 83 N. C. 543.

W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.

[a] **Where the court requires a new bond on its own motion** and not on the application of the former sureties for relief, the former sureties are not discharged. Ward v. State, 40 Miss. 108.

[b] **If the second bond is not given for a statutory cause** the effect will be merely to add an additional security and the original bond will remain in full effect. Woods v. Williams, 61 Mo. 63.

13. Bankers' Surety Co. v. Wyman, 141 Iowa 574, 120 NW 116.

14. Elizalde v. Murphy, 146 Cal. 168, 79 P 866.

15. Com. v. Shryock, 15 Serg. & R. (Pa.) 69; Beckham v. Pride, 27 S. C. L. 78.

16. Hubbard v. Ewing, 4 Baxt. (Tenn.) 404. See also Hoge v. Vintroux, 21 W. Va. 1 (while it will be presumed that a note given a distributee is merely collateral security, if it is proved to have been given in payment of the claim the liability of the sureties will be discharged).

17. See supra §§ 2557–2562.

18. U. S.—Taylor v. Deblois, 23 F. Cas. No. 13,790, 4 Mason 131; Alston v. Munford, 1 F. Cas. No. 267, 1 Brock. 266.

Conn.—State v. Whitehouse, 80 Conn. 111, 67 A 503.

Ga.—Freeman v. Brown, 115 Ga. 23, 41 SE 385.

Ill.—Bell v. Peo., 94 Ill. 230.

Iowa.—Taylor v. McArthur, 87 Iowa 155, 54 NW 228.

Ky.—Adams v. Adams, 11 B. Mon. 77; Allen v. Kennedy, 8 SW 882, 10 KyL 336; Walker v. Spalding, 1 KyL 64, 10 Ky. Op. 620.

La.—Campbell's Succ., 132 La. 746, 61 S 777.

Md.—State v. Cheston, 51 Md. 352.

Mass.—Mattoon v. Cowing, 13 Gray 387.

Mo.—State v. Anthony, 30 Mo. A. 638.

N. Y.—Hood v. Hayward, 48 Hun 330, 1 NYS 566 [mod on other grounds 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 30 NYCivProc 47].

N. C.—Ruffin v. Harrison, 81 N. C. 208.

Pa.—Vandever's App., 42 Pa. 74.

R. I.—Sarle v. Scituate Prob. Ct., 7 R. I. 270.

S. C.—Crenshaw v. Crenshaw, 25 S. C. Eq. 14; Simkins v. Cobb, 18 S. C. L. 60.

Vt.—Story v. Hall, 86 Vt. 31, 83 A 653, 40 LRANS 1136, AnnCas1915B 1187.

Va.—Odell v. Howle, 77 Va. 361; Myers v. Wade, 6 Rand. (27 Va.) 444.

[a] **An order of court is not indispensable** to transfer the funds from one capacity to the other, but it is sufficient if the representative manifests an intention to treat the funds as transferred. Bell v. Peo., 94 Ill. 230.

19. Conn.—State v. Whitehouse, 80 Conn. 111, 67 A 503.

Del.—Burton v. Anderson, 5 Del. 221.

Mass.—Newcomb v. Williams, 9 Metc. 525.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

one capacity to another takes place;[20] but it is well settled that, where property has been received in one capacity, the change, in order to shift the responsibility of the sureties, must be evidenced by some overt act or express election to hold the property in the other capacity.[21] A transfer by operation of law may be presumed on the termination of the duties of the executor or administrator as such;[22] but the presumption is subject to rebuttal.[23]

[§ 2572] **10. Acts or Omissions or Persons Beneficially Interested in Estate.** The sureties are released by any conduct on the part of the persons interested in the estate or agreements between such persons and the representative by which the sureties' liability would be altered and increased.[24] The acquiescence of a distributee in a wrongful application of trust funds by an administrator releases the administrator and his sureties from lia-

N. C.—Clancy v. Carrington, 14 N. C. 529.

Oh.—Wilson v. Wilson, 17 Oh. St. 150, 91 AmD 125.

Wis.—Davies' Est., 161 Wis. 598, 155 NW 152.

[a] **A formal transfer is not essential,** but it is sufficient if the representative declares his election to hold the property in his other capacity. State v. Whitehouse, 75 Conn. 410, 53 A 897.

[b] **What will amount to a change of capacity** where the same persons are executors and trustees so as to exonerate the sureties on the executorship bond depends upon the circumstances of the particular case. Newcomb v. Williams, 9 Metc. (Mass.) 525.

[c] **The transfer must be clearly established** so as to leave no doubt of the liability of the substituted sureties before the original sureties will be released. Potter v. Ogden, 136 N. Y. 384, 33 NE 228 [aff 65 Hun 27, 19 NYS 594].

[d] **The administration sureties may compel** an administrator who is also guardian and has given bond in both capacities to transfer the liability by passing a guardianship account. Burton v. Anderson, 5 Del. 221.

[e] **Where the same person is administrator and also guardian** of the next of kin, his return of an account of his administration and acknowledging a balance due his ward is not a performance of the condition of his administration bond unless the money to pay the balance is identified and retained by the guardian as the property of the ward. Harrison v. Ward, 14 N. C. 417.

[f] **Where the court directs an executor to retain and invest** as trustee, according to the trusts of the will, a balance in his hands, but does not in terms discharge the trustee, the executor will be considered as holding the fund in the capacity of executor until it is invested as trustee, and the sureties on the executor's bond will be liable in case it is wasted instead of invested. Cluff v. Day, 124 N. Y. 195, 26 NE 306 [rev 55 N. Y. Super. 460].

[g] **An executor cannot transfer a mere liability** from one set of sureties to another by charging himself in one capacity with debts due from himself on account of a devastavit committed in the other, although where he has funds actually on hand he may fix the responsibility therefor by an express election as to the capacity in which they shall be held. Smith v. Gregory, 26 Gratt. (67 Va.) 248.

20. Scituate Prob. Ct. v. Angell, 14 R. I. 495.

21. U. S.—Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95.

Ala.—Perkins v. Moore, 16 Ala. 9.

D. C.—U. S. v. May, 15 D. C. 4.

Ill.—Bell v. Peo., 94 Ill. 230.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Ky.—Allen v. Kennedy, 8 SW 882, 10 KyL 336.

Me.—Briggs v. East Auburn Baptist Church, 8 A 257.

Md.—Watkins v. State, 2 Gill & J. 220; Seegar v. State, 6 Harr. & J. 162, 14 AmD 265.

Mass.—White v. Ditson, 140 Mass. 351, 4 NE 606, 54 AmR 473; Parker v. Sears, 117 Mass. 513.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

N. Y.—Betts v. Avery, 46 App. Div. 342, 61 NYS 525.

N. C.—Ruffin v. Harrison, 81 N. C. 208.

N. D.—Joy v. Elton, 9 N. D. 428, 83 NW 875.

Or.—Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Pa.—Com. v. Messinger, 237 Pa. 1, 85 A 26.

R. I.—Scituate Prob. Ct. v. Angell, 14 R. I. 495.

S. C.—Burnside v. Robertson, 28 S. C. 583, 6 SE 843.

Va.—Rixey v. Com., 99 SE 573, 575 [cit Cyc]; Swope v. Chambers, 2 Gratt. (43 Va.) 319.

W. Va.—Gilmer v. Baker, 24 W. Va. 72.

Wis.—Wallber v. Wilmanns, 116 Wis. 246, 93 NW 47.

[a] **All that is necessary to make the transfer** where substantial assets are in the hands of the fiduciary, or he is solvent and able to pay over his indebtedness in the one capacity to himself in the other capacity, is for him to make an election to hold it in the latter capacity and manifest such election by some act, admission, or declaration, and such election will bind the sureties on the bond given in the latter capacity. Gilmer v. Baker, 24 W. Va. 72.

[b] **Where approval of court necessary.**—Where a will gave the executor no express power to sell, nor any direction of a personal nature, but merely a general direction to set apart and safely invest such sum as would produce certain annuities, and he could only have exercised power and discretion under the court's supervision, and with the court's approval, the executor as such, or one subsequently appointed as administrator with the will annexed, was charged in his official capacity, and not as a personal trustee, to preserve the fund set apart to produce the annuities; and the sureties on the bond of an administrator, appointed after the refusal of the executor named to serve, were liable for such administrator's defalcation with respect thereto. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

22. U. S.—Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Taylor v. Deblois, 23 F. Cas. No. 13,790, 4 Mason 131.

Md.—Woolley v. Price, 86 Md. 176, 37 A 644; State v. Cheston, 51 Md. 352; Watkins v State, 2 Gill & J. 220; Seegar v. State, 6 Harr. & J. 162, 14 AmD 265.

N. C.—Ruffin v. Harrison, 81 N. C. 208.

Pa.—Com. v. Messinger, 237 Pa. 1, 7, 85 A 26 [quot Cyc].

Tenn.—Carroll v. Bosley, 6 Yerg. 220, 27 AmD 460.

[a] **When transfer presumed.**—(1) After the time limited by law for settlement of the estate has elapsed, a transfer of possession by operation of law will be presumed. Woolley v. Price, 86 Md. 176, 37 A 644; State v. Cheston, 51 Md. 352. (2) After the lapse of a year property of a decedent held by an executrix who is also guardian of the legatees will be presumed to have been transferred to herself as guardian and to be held by her in the latter capacity. Downes v. State, 3 Harr. & J. (Md.) 239.

23. Wilson v. Wilson, 17 Oh. St. 150, 91 AmD 125; Porter v. Moores, 4 Heisk. (Tenn.) 16; Story v. Hall, 86 Vt. 31, 83 A 653, 40 LRANS 1136, AnnCas1915B 1187.

24. Ala.—Pyke v. Searcy, 4 Port. 52.

Ga.—Collier v. Leonard, 59 Ga. 497.

Ill.—Rutter v. Hall, 31 Ill. A. 647.

La.—Hebert v. Hebert, 22 La. Ann. 308.

Mass.—Forbes v. Allen, 166 Mass. 569, 44 NE 1065.

Mich.—Ward v. Tinkham, 65 Mich. 695, 32 NW 901.

Mo.—Seitz v. Hill, 9 Mo. A. 122.

[a] **Agreement for improper use of funds.**—A secret agreement between the distributees and the administrator that the latter may use the funds of the estate in his private business will discharge the sureties from all liability to the distributees. Rutter v. Hall, 31 Ill. A. 647.

[b] **Extending time to pay debts.**—(1) The doctrine that a surety is released by an extension of time without his consent to the principal debtor does not apply so as to release the sureties of an administrator to whom a creditor of the estate gives time for the payment of his claim. Gillet v. Rachal, 9 Rob. (La.) 276. (2) Where an administrator de bonis non recovered a judgment on the bond of the first administrator and levied execution on the property of the principal and sureties who were then solvent, and afterward he withdrew the execution and took a deed of trust from the principal to secure the amount of the judgment, and the property covered by the deed of trust depreciated in value, and the principal and all the sureties except defendant became insolvent, the rule that a surety is released by extending the time of the payment of the debt without the consent of the surety was applicable and operated to release defendant. West v. Brison, 99 Mo. 684, 13 SW 95.

[c] **Taking executor's note for legacy after expiration of time for payment.**—A surety on the bond of an executor, who is also a residuary legatee, is released by the act of a legatee who, without the surety's assent or procurement, accepts the executor's note for the amount of the legacy after the time limited by the will for paying it has expired. Durfee v. Abbott, 50 Mich. 479, 15 NW 559.

[d] **The surety is not released** by a private agreement between the heirs, regulating the mode of partition of the estate and authorizing the curator to pay certain claims and verbal authority from the heirs to the curator to settle the affairs of the estate out of court. Perkins v. Cenas, 15 La. Ann. 60.

[e] **Coöperation of heirs with representative.**—The fact that the representative and the heirs agreed to resist the payment of certain claims and that the administrator with their consent held the assets pending the litigation and afterward wasted them and became insolvent will not discharge the sureties, since the heirs had a right to coöperate with the administrator in resisting the claims of creditors by all lawful means. McMahon v. Paris, 87 Ga. 660, 13 SE 572.

bility to such beneficiary;[25] and where the person injured by the default of the representative has the means of satisfying the claim in his hands, and voluntarily surrenders it, he thereby discharges the sureties to the extent of such means.[26] Laches in proceedings against the principal may also release the sureties.[27] A surety on an administrator's additional bond is not relieved from liability because of failure on the part of the beneficiaries promptly to notify him of their belief of the administrator's misconduct,[28] nor will failure of the next of kin to ascertain that an estate was being misappropriated by the first administrator defeat a suit on his bond by a second administrator.[29] Neither is the surety on an executor's bond discharged so far as a legatee is concerned by a suit brought against the legatee by a creditor, the appointment of a receiver, and an order directing the executor to pay the amount of the legacy to the receiver, where only a small portion of the legacy was paid and the receiver discharged.[30] An estoppel in pais does not arise in favor of the sureties on an administrator's bond when it appears that the heirs at law, after citing him to account for the proceeds of land sold by him at public sale, recovered the land in an action of ejectment brought against the purchaser at the sale, but subsequently lost possession thereof when it was subjected to the demands of a mortgage creditor of such purchaser, as against whom they were estopped from attacking the validity of the administrator's sale, because of their prior election to claim the proceeds of the land.[31] A release given by the beneficiaries to a surety, in order to be upheld, must be shown to be fair and reasonable, because the sureties stand in the same fiduciary relation to the beneficiaries as the principal does.[32]

[§ 2573] **11. Discharge by Order of Court**[33]**— a. Power to Grant Discharge.** The courts have been very generally invested, by statute, with power, in certain cases, to release the sureties on the bond of an executor or administrator from further liability,[34] the principal being required to furnish new security,[35] under penalty of having his letters revoked on failure to do so.[36] But the court cannot ordinarily release the sureties from any liabilities already incurred;[37] nor can it grant a valid release without making provision for the protection of the estate.[38] It is accordingly held that an order discharging the sureties is ineffectual until a sufficient new bond is given.[39] In the absence of statute the court is without authority to discharge a surety.[40]

The sureties on the bond of a public administrator may, it has been held, be discharged under a statute providing for the discharge of the sureties on the "bond given by any officer,"[41] but it has also been held that a county administrator is not a public officer within the purport of a statute relating to the discharge of the sureties on the bond of any "public officer."[42]

[§ 2574] **b. Proceedings.** The proceedings for

25. In re Koehnken, 27 Oh. Cir. Ct. 840.

26. Eddy v. Peo., 187 Ill. 304, 58 NE 397 [rev 88 Ill. A. 265].

27. Collier v. Leonard, 69 Ga. 311.

[a] **This rule applies** where judgment was erroneously taken against the principal as an individual when he was solvent, and he became insolvent before the judgment was amended; but, in order that this may release the sureties, it must appear that, at the time the judgment was rendered, there were assets of the estate in the hands of the principal as administrator. It will not do to show that there was sufficient property in the hands of the heirs and distributees to whom it had been turned over in the distribution; for the judgment, even if it had been rendered correctly, would only have bound the property of the intestate in the hands of the administrators to be administered. Collier v. Leonard, 69 Ga. 311.

28. Elizalde v. Murphy, 163 Cal. 681, 126 P 978.

29. Allen v. Puritan Trust Co., 211 Mass. 409, 97 NE 916, LRA1915C 518.

30. U. S. Fidelity, etc., Co. v. Peo., 159 Ill. A. 35 (the obligations of a bond are not discharged by reason of involuntary acts of the person indemnified).

31. Worthy v. Battle, 125 Ga. 415, 54 SE 667.

32. Baines v. Barnes, 64 Ala. 375.

33. Effect of order releasing one of several sureties see supra § 2566.

34. Ark.—Valcourt v. Sessions, 30 Ark. 515.

Cal.—Elizalde v. Murphy, 146 Cal. 168, 79 P 866.

Ill.—Clark v. American Surety Co., 171 Ill. 235, 49 NE 481.

Ind.—State v. Gregory, 88 Ind. 110; Lane v. State, 27 Ind. 108.

Ky.—Johnson v. Fuquay, 1 Dana 514.

La.—Campbell's Succ., 132 La. 746, 61 S 777; Boutte's Succ., 32 La. Ann. 556; Sanders v. Edwards, 29 La. Ann. 696.

Mass.—McKim v. Blake, 132 Mass. 343.

N. J.—Allen v. Sanders, 34 N. J. Eq. 203.

N. Y.—Matter of Sogaard, 39 Misc. 519, 80 NYS 379, 3 Mills Surr. 373; Bick v. Murphy, 2 Dem. Surr. 251; Shook v. Goddard, 2 Dem. Surr. 201; Stevens v. Stevens, 3 Redf. Surr. 507; Lewis v. Watson, 3 Redf. Surr. 43.

Oh.—Foster v. Wise, 46 Oh. St. 20, 16 NE 687, 15 AmSR 542; Bowenstine v. Sweet, 13 Oh. Cir. Ct. 239, 7 Oh. Cir. Dec. 498.

S. C.—Gilliam v. McJunkin, 2 S. C. 442; McKay v. Donald, 42 S. C. L. 331; Waterman v. Bigham, 20 S. C. L. 512; Trimmier v. Trail, 18 S. C. L. 480; Shelton v. Cureton, 14 S. C. L. 412; De Lane's Case, 4 S. C. L. 167.

Tenn.—Gower v. Shelton, 16 Lea 652; Morris v. Morris, 9 Heisk. 814; Polk v. Wisener, 2 Humphr. 520; Harrison v. Turbeville, 2 Humphr. 242.

[a] **The surety is entitled to be discharged** when all the requirements of the statute are complied with, and the court has no discretion to refuse a discharge. In re Kopp, 168 NYS 944.

[b] **The fact that the surety and his relatives are indebted to the estate** and intend to have a new administrator appointed with a view to avoiding payment does not affect the right of the surety to be released. Lewis v. Watson, 3 Redf. Surr. (N. Y.) 43.

[c] **Errors of judgment** of an administrator not amounting to malfeasance are not sufficient causes to authorize the release of one of his sureties from his bond. Sparrow's Succ., 39 La. Ann. 696, 2 S 501.

[d] **A deposit of assets** of the estate, for the purpose of reducing the bond, cannot be made with a surety company which is surety on the bond; and the refusal of the administrator to turn over the assets to such company does not furnish ground for an application by it to be released from the bond. Matter of Butts, 109 Misc. 348, 179 NYS 877.

35. Ark.—Valcourt v. Sessions, 30 Ark. 515.

Ind.—Lane v. State, 27 Ind. 108.

La.—Sanders v. Edwards, 29 La. Ann. 696.

N. J.—Allen v. Sanders, 34 N. J. Eq. 203.

N. Y.—Shook v. Goddard, 2 Dem. Surr. 201; Lewis v. Watson, 3 Redf. Surr. 43.

Oh.—Howenstine v. Sweet, 13 Oh. Cir. Ct. 239, 7 Oh. Cir. Dec. 498.

S. C.—Gilliam v. McJunkin, 2 S. C. 442; Owens v. Walker, 21 S. C. Eq. 289.

36. Ark.—Valcourt v. Sessions, 30 Ark. 515.

La.—Sanders v. Edwards, 29 La. Ann. 696.

N. J.—Allen v. Sanders, 34 N. J. Eq. 203.

N. Y.—Shook v. Goddard, 2 Dem. Surr. 201; Lewis v. Watson, 3 Redf. Surr. 43.

S. C.—Gilliam v. McJunkin, 2 S. C. 442.

37. Wiemann v. Mainegra, 112 La. 305, 36 S 358; McKim v. Blake, 132 Mass. 343; McMeekin v. Huson, 34 S. C. L. 327; Owens v. Walker, 21 S. C. Eq. 289; Waterman v. Bigham, 20 S. C. L. 512; Trimmier v. Trail, 18 S. C. L. 480.

[a] **Under the Tennessee statute** (1) the court may release the sureties from past as well as future liability (Polk v. Wisener, 2 Humphr. 520) (2) unless the second bond proves insufficient, in which case the released sureties will be responsible for past liabilities to the extent of such deficiency (Morris v. Morris, 9 Heisk. 814).

38. Gilliam v. McJunkin, 2 S. C. 442; Polk v. Wisener, 2 Humphr. (Tenn.) 520.

[a] **The court cannot give a money decree against the administrator** but must require a new bond or revoke the letters of administration. Gilliam v. McJunkin, 2 S. C. 442.

39. Howenstine v. Sweet, 13 Oh. Cir. Ct. 239, 7 Oh. Cir. Dec. 498.

40. Ala.—Carroll v. Moore, 7 Ala. 615.

Ill.—Clark v. American Surety Co., 171 Ill. 235, 49 NE 481.

N. Y.—Matter of Lawyers' Surety Co., 25 Misc. 136, 54 NYS 926, 2 Gibbs Surr. 576.

Pa.—Com. v. Rogers, 53 Pa. 470; Cowperthwaite's Est., 5 Pa. Co. 59, 20 WklyNC 504.

S. C.—Owens v. Walker, 21 S. C. Eq. 289.

Eng.—In re Stark, L. R. 1 P. & D. 76.

41. State v. Nolan, 99 Mo. 569, 12 SW 1047.

42. Mitchell v. Nelson, 49 Ala. 88.

obtaining a discharge from liability as surety by order of court are regulated by statutes,[43] the requirements of which must be complied with.[44] The facts necessary to confer jurisdiction should appear of record.[45] Where the probate judge accepts the resignation of an administrator, and orders the bond to be canceled on the appointment and qualification of a successor, and creditors appeal, other creditors and the widow and heirs of decedent are not necessary parties.[46]

[§ 2575] **E. Breach of Bond—1. In General.** As a general rule any default on the part of an executor or administrator in the performance of his official duties in administering the estate is a breach of the administration bond,[47] except where he has proceeded in good faith and the default is due to causes which he could not have prevented, in the exercise of due diligence,[48] or the error is merely technical and has not prejudiced the estate.[49] Where a husband eloped with woman and lived with her, under a fictitious name, until his death, when she secured her appointment as administratrix under the representation that she was his wife, and administered the estate under the fictitious name, thereby securing his property unknown to his lawful wife and children, and such wife and children thereafter secured a judgment against the administratrix because of these matters, it was held that a court of

43. Ill.—Clark v. American Surety Co., 171 Ill. 235, 49 NE 481.
La.—Campbell's Succ., 132 La. 746, 61 S 777.
N. J.—Allen v. Sanders, 34 N. J. Eq. 203.
N. Y.—Bick v. Murphy, 2 Dem. Surr. 251; Stevens v. Stevens, 3 Redf. Surr. 507.
S. C.—Gillman v. McJunkin, 2 S. C. 442.
Tenn.—Gower v. Shelton, 16 Lea 652; Harrison v. Turbeville, 2 Humphr. 242.

44. Ill.—Clark v. American Surety Co., 171 Ill. 235, 49 NE 481 [rev 66 Ill. A. 284].
Ind.—Lane v. State, 27 Ind. 108.
Mo.—In re Fulsome, (A.) 193 SW 618.
N. Y.—Bick v. Murphy, 2 Dem. Surr. 251.
Or.—Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.
Tenn.—Harrison v. Turbeville, 2 Humphr. 242.
W. Va.—Taylor v. Taylor, 66 W. Va. 238, 66 SE 690, 19 AnnCas 414.
[a] **The surety cannot be released on the application of the principal** but only where the petition for release is filed by himself. Clark v. American Surety Co., 171 Ill. 235, 49 NE 481 [rev 66 Ill. A. 284]; Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.
[b] **Joinder of applications.**—An application by persons interested in the estate to require a new bond cannot be united in the same proceeding with an application by sureties to be discharged from further liability. Bick v. Murphy, 2 Dem. Surr. (N. Y.) 251.
[c] **Personal service on a nonresident executor** is sufficient where the statute does not provide for substituted service. Stevens v. Stevens, 3 Redf. Surr. (N. Y.) 507.
[d] **If an administrator appears without notice** the failure to give notice is immaterial, the requirement being solely for his benefit. Harrison v. Turbeville, 2 Humphr. (Tenn.) 242.
[e] **Evidence of filing petition.**—Although a petition by a surety on an administrator's bond for an order releasing it from liability did not bear any file mark and the probate judge did not remember receiving it, the fact that it was afterward found among the papers of the estate was sufficient to show that the petition was filed with the probate court. In re Fulsome, (Mo. A.) 193 SW 618.
[f] **The application may be dismissed** if the sureties do not appear on the day set for the hearing. Allen v. Sanders, 34 N. J. Eq. 203.
[g] **A formal order of discharge is not necessary** where a proper application for a release has been made in response to which the administrator has filed a new bond which the court has approved. Lane v. State, 27 Ind. 108.
[h] **Insufficient entry.**—An entry in the minute book of the judge of the probate court, reading "Order releasing [a surety company] made, and the judgment of the court entered on June 2d, as heretofore set out" is incomplete, in that it does not show on what it was based. In re Fulsome, (Mo. A.) 193 SW 618.

45. Gower v. Shelton, 16 Lea (Tenn.) 652.

46. Broadway's Succ., 114 La. 492, 38 S 430.

47. Ala.—Fretwell v. McLemore, 52 Ala. 124.
Cal.—Willson v. Hernandez, 5 Cal. 437.
Conn.—Adams v. Spalding, 12 Conn. 350.
D. C.—U. S. v. Parker, 9 D. C. 444.
Hawaii.—Robinson v. Kaae, 22 Hawaii 403.
Ill.—Peo. v. Miller, 2 Ill. 83.
Ind.—Lindley v. State, 116 Ind. 235, 18 NE 45; Stanton v. State, 82 Ind. 463; State v. Scott, 12 Ind. 529; Harrah v. State, 38 Ind. A. 495, 76 NE 443, 77 NE 747.
Iowa.—Tucker v. Stewart, 147 Iowa 294, 126 NW 183.
Kan.—American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.
Ky.—Chaplin v. Simmons, 7 T. B. Mon. 337.
La.—Verret v. Belanger, 6 La. Ann. 109.
Mass.—Hall v. Cushing, 9 Pick. 395.
Mo.—State v. Taylor, 112 Mo. A. 585, 87 SW 7; State v. Taylor, 100 Mo. A. 481, 74 SW 1032.
Nev.—In re Delaney, 41 Nev. 384, 171 P 383, LRA1918D 1022.
N. H.—Glover v. Baker, 76 N. H. 393, 83 A 916; Probate Judge v. Heydock, 8 N. H. 491.
N. Y.—Peo. v. Dunlap, 13 Johns. 437.
Oh.—White v. Moe, 19 Oh. St. 37.
S. C.—Wiley v. Johnsey, 40 S. C. L. 355.
Tex.—Wiseman v. Swain, (Civ. A.) 114 SW 145.
Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189.
N. S.—Colford v. Compton, 39 N. S. 247.
[a] **A breach may be committed by:** (1) Disposing of assets of the estate without taking proper security. White v. Moe, 19 Oh. St. 37. (2) Making an unauthorized loan of funds of the estate. Johnston v. Maples, 49 Ill. 101. (3) Lending money of the estate without requiring security. Probate Judge v. Mathes, 60 N. H. 433. (4) Converting property belonging to a third person under the belief that it belongs to the estate. Wiseman v. Swain, (Tex. Civ. A.) 114 SW 145. (5) Failure, where assets are sold on credit under order of court, to take good, solvent notes in payment as directed by the court. State v. Taylor, 100 Mo. A. 481, 74 SW 1032. (6) Where an executor gave a specific legatee a certificate of deposit in payment of his legacy, and after the payment of debts distributed the balance of the estate among the residuary legatees who were not entitled to distribution until the specific legacy was paid in full, and the maker of the certificate became insolvent, the executor was guilty of a devastavit for which the legatee might maintain an action on the bond. Graffenreid v. Kundert, 34 Ill. A. 483.
[b] **Disobeying an order of the probate court** (1) may constitute a breach of the bond. Beckett v. Place, 12 Misc. 323, 33 NYS 634; Baggott v. Boulger, 9 N. Y. Super. 160. (2) The sureties may be liable, although the order not complied with was erroneous. Robinson v. Kaae, 22 Hawaii 403. (3) Refusal of an administrator to comply with a void decree of the probate court is not a breach of his bond. Willson v. Hernandez, 5 Cal. 437; Hancock v. Hubbard, 36 Mass. 167; Dawes v. Head, 3 Pick. (Mass.) 128. (4) The sureties are not liable for the amount of a fine imposed on the administrator for failure to answer a citation, where there has been no accounting and there was no proof of any sum due from the administrator to the estate. The order imposing the fine was not a determination of any amount due, but was a punishment for contempt. Loop v. Northup, 59 Hun 75, 13 NYS 144.
[c] **Failing to obey directions in the will** (1) may constitute a breach of the bond. Sanford v. Gilman, 44 Conn. 461; Heady v. State, 60 Ind. 316; Hall v. Cushing, 9 Pick. (Mass.) 395; Prescott v. Pitts, 9 Mass. 376. (2) Failing to invest funds for the benefit of infant legatees as directed by the will is a breach. U. S. v. Parker, 9 D. C. 444. (3) An executor who is charged with investment of a fund for a particular purpose does not relieve himself and his sureties from liability for the fund until the investment is actually made. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

48. Peo. v. White, 11 Ill. 341; Gay v. Grant, 101 N. C. 206, 8 SE 99, 106; Ordinary v. Corbett, 1 S. C. L. 328.
[a] **The nonperformance of an act rendered impossible** by an act of God or of an enemy is not a breach of the bond. Ordinary v. Corbett, 1 S. C. L. 328.
[b] **Where property is given up in good faith by the representative** to a surviving partner of decedent, on his claim of a right to dispose of it in closing the partnership, the sureties on the administration bond are not to be held responsible. Peo. v. White, 11 Ill. 341.

49. Gilbert v. Duncan, 65 Me. 469; State v. Schleiffarth, 9 Mo. A. 431.
[a] **Suffering a collusive judgment to be recovered** is not a breach of the condition to administer according to law "all the goods and chattels, rights and credits," of the decedent, where there is no personal property on which the execution can be levied, and it was levied on the real estate, because the heirs could not be dispossessed under such levy. Gilbert v. Duncan, 65 Me. 469.
Necessity for actual injury see infra § 2600.

equity could grant relief against the surety on the administration bond.[50]

Successive breaches. An administrator's bond is a continuing one commensurate in time with his duties, and each violation of it is a breach and furnishes a cause of action. The obligation on the bond continues so long as there remains any duty which an administrator is legally liable to perform, and there may be successive and distinct breaches of the bond growing out of the same transaction.[51]

[§ 2576] **2. Failure to Make and File Inventory.**[52] There is a breach of an administration bond where the executor or administrator fails to return a true and complete inventory,[53] or to make and file an inventory of the estate within the time required[54] either by law[55] or by the condition of the bond.[56]

[§ 2577] **3. Failure to Collect Assets.**[57] The failure to collect assets, so far as is possible by the exercise of good faith and due prudence and diligence on the part of the representative, is a breach of the bond;[58] but there is no breach because of a failure to collect which was not due to the fault of the representative, but to causes which he in the exercise of due diligence could not have prevented.[59]

[§ 2578] **4. Failure to Pay Allowance to Surviving Wife, Etc.** Where a special allowance to the surviving wife, husband, or children is provided for by statute,[60] a failure on the part of the executor or administrator to pay such allowance as the statute or order of court may direct has been held to be a breach of the bond,[61] although there is also authority for the contrary view.[62] It has been held that, as an order that an administrator retain a balance in his hands after settlement and apply it to the support of infant heirs is illegal, the sureties on the administration bond are not liable after such settlement and discharge in case the administrator converts the balance to his own use.[63]

50. Weyant v. Utah Sav., etc., Co., (Utah) 182 P 189.

51. Tucker v. Stewart, 147 Iowa 294, 126 NW 183.

52. Duty to make and file inventory see supra § 373.

53. Ala.—Edwards v. Gibbs, 11 Ala. 292.

Conn.—State v. French, 60 Conn. 478, 23 A 153; Williams v. Morehouse, 9 Conn. 470; Bisco v. Bishop, 1 Day 15.

Me.—Gilbert v. Duncan, 65 Me. 469; Bourne v. Stevenson, 58 Me. 499; Potter v. Titcomb, 10 Me. 53.

Mo.—Sherwood v. Hill, 25 Mo. 391; Wilson v. Ruthrauff, 82 Mo. A. 435.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189, 200 [cit Cyc].

Vt.—Wilson v. Keeler, 2 D. Chipm. 16.

Eng.—Greerside v. Benson, 3 Atk. 248, 26 Reprint 944; Canterbury v. House, Cowp. 140, 98 Reprint 1010, Lofft 622, 98 Reprint 832.

Ont.—Bell v. Mills, 25 U. C. Q. B. 508.

[a] **A breach may consist in:** (1) A failure to inventory money of the estate received before the granting of letters. Sherwood v. Hill, 25 Mo. 391. (2) A failure of the administrator to include a debt due from himself. Williams v. Morehouse, 9 Conn. 470. But compare State v. Gregory, 119 Ind. 503, 22 NE 1 (such failure is immaterial where no damage has resulted therefrom).

[b] **Lack of knowledge.**—(1) A failure to include property of which the representative has no knowledge is not a breach of the bond. Booth v. Patrick, 8 Conn. 106; State v. Scott, 12 Ind. 529. (2) An administrator does not commit a breach of his bond by his failure to inventory property which decedent had conveyed in fraud of his creditors, if he did not know that the conveyance was fraudulent. Scofield v. Lounsbury, 8 Conn. 109; Booth v. Patrick, 8 Conn. 106.

[c] **Where the selection of exemptions is not dependent upon the filing of an inventory,** the failure of an administrator to include in the inventory certain property the existence of which was known to the person claiming the exemption cannot be assigned by such person as a breach. Hardin v. Pulley, 79 Ala. 381.

[d] **Where an estate has been declared insolvent,** suit cannot be maintained against an executor upon his official bond, assigning as a breach that he has not made a full inventory of the assets. Edwards v. Gibbs, 11 Ala. 292.

[e] **Where the executor is the sole legatee** under the will, and there are no creditors, his failure to file an inventory within the time prescribed by law is a mere technical breach of the bond, and is cured by filing the inventory before an action is brought. McKim v. Harwood, 129 Mass. 75.

[f] **Administrator de bonis non.**—The failure of an administrator de bonis non to make an inventory of all the estate which was not administered by the original administrator is a breach of the condition of his administration bond for which an action lies. Wilson v. Keeler, 2 D. Chipm. (Vt.) 16.

54. Conn.—State v. French, 60 Conn. 478, 23 A 153; Moore v. Holmes, 32 Conn. 553; Blakeman v. Sherwood, 32 Conn. 324.

Ill.—Peo. v. Hunt, 89 Ill. 392.

Ind.—State v. Scott, 12 Ind. 529.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33; Bourne v. Stevenson, 58 Me. 499; Potter v. Titcomb, 11 Me. 167, 10 Me. 53.

Mass.—McIntire v. Parker, 195 Mass. 155, 80 NE 798; Forbes v. McHugh, 152 Mass. 412, 25 NE 622; Paine v. Gill, 13 Mass. 365; Dawes v. Edes, 13 Mass. 177; Dawes v. Boylston, 9 Mass. 357, 6 AmD 72; Boston v. Boylston, 4 Mass. 318.

Miss.—Edmundson v. Roberts, 3 Miss. 822.

Mo.—Sherwood v. Hill, 25 Mo. 391.

Oh.—Mighton v. Dawson, 38 Oh. St. 650.

Pa.—Com. v. Bryan, 8 Serg. & R. 128; In re Heenan, 15 Phila. 588.

Vt.—Probate Ct. v. Merriam, 8 Vt. 234.

Wis.—Ellis v. Johnson, 83 Wis. 394, 53 NW 691; Johannes v. Youngs, 45 Wis. 445.

[a] **No citation to file an inventory is necessary** in order to render a failure to file the same within the proper time a breach of bond. Gilbert v. Duncan, 65 Me. 469; Bourne v. Stevenson, 58 Me. 499; Potter v. Titcomb, 11 Me. 157, 10 Me 53; Com. v. Bryan, 8 Serg. & R. (Pa.) 128. Contra Hurlburt v. Wheeler, 40 N. H. 73 (dictum); Providence Municipal Ct. v. McCulla, 21 R. I. 273, 43 A 182 (under statute).

55. Conn.—State v. French, 60 Conn. 478, 23 A 153; Moore v. Holmes, 32 Conn. 553.

Me.—Potter v. Titcomb, 10 Me. 53.

Mass.—Forbes v. McHugh, 152 Mass. 412, 25 NE 622.

Pa.—Com. v. Bryan, 8 Serg. & R. 128.

Vt.—Wilson v. Keeler, 2 D. Chipm. 16.

Wis.—Ellis v. Johnson, 83 Wis. 394, 53 NW 691.

[a] **The failure of an executor who is sole legatee** to file an inventory within the time prescribed by law is a technical breach of the bond which, there being no creditors, is cured by filing the inventory before suit brought. McKim v. Harwood, 129 Mass. 75.

[b] **If no assets are received** by an executor within the time that he is required by law to return an inventory, and he afterward receives assets, he must then return an inventory, and failure to do so is a breach of his bond. Forbes v. McHugh, 152 Mass. 412, 25 NE 622.

56. Warren v. Powers, 5 Conn. 373; Bourne v. Stevenson, 58 Me. 499.

57. Duty to collect assets see supra § 423.

58. U. S.—Meeks v. Vassault, 16 F. Cas. No. 9,393, 3 Sawy. 206.

Conn.—Butler v. Sisson, 49 Conn. 580.

Ind.—State v. Gregory, 119 Ind. 503, 22 NE 1.

Ky.—Costigan v. Kraus, 158 Ky. 818, 166 SW 755, AnnCas1915D 115.

Md.—State v. Wilmer, 65 Md. 178, 3 A 252.

Mass.—McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

Mo.—Hellmann v. Wellenkamp, 71 Mo. 407; State v. Ruggles, 23 Mo. 339; Chouteau v. Hill, 2 Mo. 177.

N. M.—Beall v. Terr., 1 N. M. 507.

Pa.—Calhoun's Est., 18 Pa. Dist. 1007.

R. I.—West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

Tex.—Keowne v. Love, 65 Tex. 152.

Vt.—Lyon v. Osgood, 58 Vt. 707, 7 A 5.

Va.—Lacy v. Stamper, 27 Gratt. (68 Va.) 42.

[a] **An executor's failure to collect a debt due from himself,** he being solvent at the time of his appointment, is a breach of the bond, and he cannot on becoming insolvent return the debt as uncollectable so as to relieve his bondsman. State v. Gregory, 119 Ind. 503, 22 NE 1.

[b] **Where the administrator was the grantee of a fraudulent conveyance** by his intestate, he could not escape liability for breach of his bond by failure to institute proceedings for the recovery of the property, on the ground of ignorance of the fraud. McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

[c] **The appointment of a receiver to collect the assets** of the estate after the refusal of the executor to do so does not affect the liability of the sureties on the bond. State v. Wilmer, 65 Md. 178, 3 A 252.

59. Sanchez v. Forster, 133 Cal. 614, 65 P 1077; State v. Ruggles, 23 Mo. 339; Gay v. Grant, 105 N. C. 478, 10 SE 891, 11 SE 242, 101 N. C. 206, 8 SE 99, 106; State v. Brower, 93 N. C. 344; Syme v. Badger, 92 N. C. 706.

60. See supra §§ 759–874.

61. Braswell v. Brown, 112 Ga. 740, 38 SE 51; Choate v. Jacobs, 136 Mass. 297; Com. v. Longenecker, 1 Chest. Co. (Pa.) 202.

62. Rocco v. Cicalla, 12 Heisk. (Tenn.) 508.

63. State v. Anthony, 30 Mo. A. 638.

[§ 2579] **5. Failure or Refusal to Pay Claims—a. In General.** In England it has been held that the failure of an executor or administrator to pay claims against the estate is not a breach of the administration bond.[64] But in the United States these decisions have been expressly disapproved,[65] and it is well settled that a failure or refusal to pay claims which have been legally established, to the extent of the assets, is a breach of duty on the part of the executor or administrator for which an action on the administration bond may be maintained;[66] and in some jurisdictions an action on the bond by a creditor of the estate is expressly allowed by statute.[67]

Contested claim. A refusal to pay a claim which the executor has never admitted to be justly due and the validity of which has not been settled by a judgment is not a breach of the bond.[68]

Judgment on note of representative. An administrator cannot bind the estate by giving his negotiable note as administrator, and his refusal to pay a judgment recovered on such note after settlement in favor of an innocent holder is not a breach of his bond.[69]

If the estate is insolvent failure to pay a claim because of lack of assets is not a breach of the bond,[70] unless the representative has failed to take the steps provided by statute to establish insolvency or insufficiency of assets, in which event an action may be maintained on the bond notwithstanding a lack of assets,[71]

[§ 2580] **b. Claims Barred by Limitations or Failure to Present.** It is not a breach of the bond for an executor or administrator to refuse to pay a claim against the estate which is barred by the statute of limitations[72] or by failure of the claimant to present it within the time provided by statute.[73] Where, however, the bar of the statute is not absolute but provision is made for equitable relief under peculiar circumstances, and a claim not presented in time is approved by the administrator and allowed by the court, the failure to pay it is a breach of the bond for which the sureties will be liable.[74]

[§ 2581] **6. Wrongful Payment of Claims.** It is a breach of the bond wrongfully to pay claims to the detriment of creditors, distributees, or others interested in the estate,[75] as by paying claims for which the estate is not liable,[76] disregarding legal priorities among claimants where the assets are not sufficient to pay all in full,[77] or failing to make a pro rata distribution among claimants of the same

64. Wallis v. Pipon, Ambl. 183, 27 Reprint 124; Browne v. Canterbury, 1 Lutw. 882, 125 Reprint 480; Canterbury v. Wills, 1 Salk. 315, 91 Reprint 278.

[a] **The condition "to well and truly administer"** the estate, in a bond given under St. 22 Car. II, applies only to the bringing in of a true inventory and account and not to the payment of claims against the estate. Canterbury v. Wills, 1 Salk. 315, 91 Reprint 278.

65. Mass.—Coney v. Williams, 9 Mass. 114.

N. J.—Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396.

N. Y.—Peo. v. Dunlap, 13 Johns. 437.

N. C.—Washington v. Hunt, 12 N. C. 475.

S. C.—Lining v. Giles, 4 S. C. L. 530.

66. Ala.—Grimmet v. Henderson, 66 Ala. 521.

Ark.—Williamson v. Whittington, 4 SW 449.

Cal.—L. Harter Co. v. Geisel, 18 Cal. A. 282, 122 P 1094.

Conn.—Clark v. Mix, 15 Conn. 152; Willey v. Paulk, 6 Conn. 74; Warren v. Powers, 5 Conn. 373.

Ill.—Rahe v. Jobusch, 197 Ill. A. 200; Peo. v. Allen, 8 Ill. A. 17.

Ind.—Pence v. Makepeace, 75 Ind. 480; State v. Mason, 21 Ind. 171.

Iowa.—Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 435.

La.—Thompson v. American Surety Co., 144 La. 1097, 81 S 731; Parmele v. Brashear, 16 La. 72.

Mass.—McIntire v. Conlan, 223 Mass. 389, 111 NE 852; National Casket Co. v. Sweet, 221 Mass. 587, 109 NE 942; Coney v. Williams, 9 Mass. 114; Baylies v. Chace, 1 Pick. 230.

Minn.—Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246; Johanson v. Hoff, 70 Minn. 140, 72 NW 965; Huntsman v. Hooper, 32 Minn. 163, 20 NW 127.

Miss.—Cannon v. Cooper, 39 Miss. 784, 80 AmD 101.

Mo.—State v. James, 82 Mo. 509; State v. Creusbauer, 68 Mo. 254; State v. Walsh, 67 Mo. A. 348.

N. H.—Probate Judge v. Heydock, 8 N. H. 491; Probate Judge v. Locke, 6 N. H. 396.

N. J.—Hazen v. Durling, 2 N. J. Eq. 133 [dist Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396].

N. Y.—Thayer v. Clark, 4 Abb. Dec. 391 [aff 48 Barb. 243]; Hood v. Hayward, 48 Hun 330, 1 NYS 566 [mod on other grounds 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 20 NYCiv Proc 47]; Behrle v. Sherman, 23 N. Y. Super. 292; Peo. v. Dunlap, 13 Johns. 437.

N. C.—Washington v. Hunt, 12 N. C. 475.

Oh.—Smith v. Rhodes, 68 Oh. St. 500, 68 NE 7.

Pa.—Com. v. Kean, 19 Pa. Super. 576.

R. I.—Williams v. Starkweather, 28 R. I. 145, 66 A 67.

S. C.—Lining v. Giles, 5 S. C. L. 530.

Tex.—Gray v. McFarland, 29 Tex. 163.

Vt.—Murdock v. Matthews, Brayt. 100.

Wis.—Roberts v. Weadock, 98 Wis. 400, 74 NW 93.

[a] **A claim must be duly established** against the estate in order to render the refusal of the administrator to pay it a breach of his bond. McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091; St. Paul First Nat. Bank v. How, 28 Minn. 150, 9 NW 626; Probate Judge v. Couch, 59 N. H. 39; Probate Judge v. Locke, 6 N. H. 396.

[b] **A failure to pay attorney's fees** which have been allowed in the representative's expense account and ordered to be paid is a breach of the bond. Smith v. Rhodes, 68 Oh. St. 500, 68 NE 7.

[c] **Where the bond is conditioned to "obey all orders of the surrogate** touching the administration of the estate" a failure to pay a claim ordered by the surrogate to be paid is a breach of the bond. Scofield v. Churchill, 72 N. Y. 565 [aff 9 Hun 157]; Brewster v. Balch, 41 N. Y. Super. 63.

[d] **Although an administrator has been allowed credit for a claim** in his final settlement, yet if it appears that it was not in fact paid, he and his sureties are liable therefor on the bond. Williamson v. Whittington, (Ark.) 4 SW 449.

[e] **Where a discharge of a claim given through mistake,** which is discovered before the close of administration, the liability of the administrator in his official character, and thus of his surety, remains. Murdock v. Matthews, Brayt. (Vt.) 100.

[f] **The fact that the surety was not a party to the litigation** wherein a claim against the estate was allowed does not relieve him from liability for breach of the bond through refusal of the executors to pay the claim. Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246.

[g] **Even though there has been no misapplication** of the assets, the failure to pay debts is a breach of the bond. The mere retention of the assets by the administrator in his hands, when he should apply them to the payment of debts, constitutes a breach in law. Cannon v. Cooper, 39 Miss. 784, 80 AmD 101.

67. State v. Mason, 21 Ind. 171; Coney v. Williams, 9 Mass. 114; Berkey v. Judd, 31 Minn. 271, 17 NW 618.

68. Probate Judge v. Locke, 6 N. H. 396.

69. Curtis v. Farmers' Nat. Bank, 39 Oh. St. 579.

70. Barton v. White, 21 Pick. (Mass.) 58.

71. Grant v. Crowley, 217 Mass. 552, 105 NE 625; McIntire v. Parker, 195 Mass. 155, 80 NE 798.

72. Crabtree v. Graham, 81 Ga. 290, 6 SE 426; Robinson v. Hodge, 117 Mass. 222; Dawes v. Shed, 15 Mass. 6, 8 AmD 80.

[a] **Judgment for barred claim.**— (1) The failure of an administrator to pay a judgment recovered in an action commenced after the claim was barred by the statute of limitations, the administrator having neglected to plead it, is not a breach of the bond for which the sureties can be held liable, although the administrator may be personally liable on the judgment. Dawes v. Shed, 15 Mass. 6, 8 AmD 80. (2) The same is true where the representative pleaded the statute, but afterward abandoned the plea and suffered a judgment by default. Robinson v. Hodge, 117 Mass. 222.

73. Gookin v. Sanborn, 3 N. H. 491.

74. Weber v. Noth, 51 Iowa 375, 1 NW 652.

75. See cases infra notes 76–78.

Necessity for actual injury see infra § 2600.

76. Burruss v. Fisher, 23 Miss. 228; State v. Taylor, 100 Mo. A. 481, 74 SW 1032; Worthy v. Brower, 93 N. C. 344.

77. State v. Brown, 80 Ind. 425; State v. Mason, 21 Ind. 171; Master-

class;[78] and failure to resist payment of an unjust or unfounded claim against the estate is a breach of the bond, so far as the beneficiaries of the estate may suffer from the culpable negligence or bad faith of the representative in this respect.[79]

[§ 2582] **7. Failure to Sell Land for Payment of Debts.** It is not a breach of an ordinary administration bond for the executor or administrator to fail or refuse to apply for a license to sell land of the decedent for the payment of debts,[80] to fail to sell the lands when authorized to do so,[81] or, after having made a sale, to refuse to receive the purchase money and execute a deed to the purchaser for the land.[82]

[§ 2583] **8. Wrongful Sale of Land.** It is a breach of the administration bond for an executor or administrator by falsely representing the condition of the estate to obtain an order for the sale of land to pay debts and to make a sale thereunder when such sale is not necessary,[83] or to sell on credit instead of for cash;[84] but where a sale is made under a void decree, no title passes to the purchaser, and there is no injury for which an action on the bond can be maintained.[85]

Estoppel to complain. Where executors sold real estate without authority, and devisees, without any objection, received the proceeds, they were estopped to claim that such action on the part of the executors constituted a breach of their bond.[86]

[§ 2584] **9. Failure or Refusal to Pay Legacies.**[87] The failure or refusal of an executor or an administrator with the will annexed, having sufficient assets, to pay a legacy after it has become his legal duty to do so is a breach of the bond;[88] but until it has become his legal duty to make such payment his failure to do so is not a breach,[89] nor is the failure of an executor to pay from money in his hands legacies which were chargeable upon the testator's land a breach.[90]

Bond not conditioned to pay legacies. It has been held that if only an ordinary administration bond is given by an administrator with the will annexed, such bond containing no condition for the payment of legacies, a failure to pay legacies is not a breach.[91]

[§ 2585] **10. Failure or Refusal to Make Distribution.**[92] The failure or refusal of an administrator to pay over or distribute the estate as required by the decree of distribution is a breach of the administration bond;[93] but it is not a breach of the bond to refuse to make distribution before the amount for distribution and the persons entitled

son v. Cauble, 15 Ind. A. 515, 41 NE 477, 44 NE 377; State v. Taylor, 100 Mo. A. 481, 74 SW 1032; Worthy v. Brower, 93 N. C. 344.

78. Evans v. Taylor, 60 Tex. 422; Morrison v. Lavell, 81 Va. 519.

79. Smith v. Cuyler, 78 Ga. 654, 3 SE 406; Gold v. Bailey, 44 Ill. 491, 92 AmD 190; Parsons v. Mills, 1 Mass. 431.

80. Nelson v. Jaques, 1 Me. 139; Freeman v. Anderson, 11 Mass. 190; Hawkins v. Carpenter, 88 N. C. 403.

81. McClelland v. Bristow, 9 Ind. A. 543, 35 NE 197; State v. Smith, 68 Mo. 641.

82. Nelson v. Jacques, 1 Me. 139.

83. Bisco v. Bishop, 1 Day (Conn.) 15; Chapin v. Waters, 110 Mass. 195.

84. Foster v. Thomas, 21 Conn. 285.

85. Thayer v. Winchester, 133 Mass. 447.

Necessity for actual injury generally see infra § 2600.

86. Forbes v. Keyes, 193 Mass. 38, 78 NE 733.

87. **Duty to pay legacies** see supra § 1266.

88. Ala.—Perkins v. Moore, 16 Ala. 9.

Conn.—American Foreign Mission Comrs'. App., 27 Conn. 344; Adams v. Spaulding, 12 Conn. 350.

Ind.—Gould v. Steyer, 75 Ind. 50; Heady v. State, 60 Ind. 316.

Kan.—Kreamer v. Kreamer, 52 Kan. 597, 35 P 214.

Md.—Ruby v. State, 55 Md. 484; State v. Wilson, 38 Md. 338.

Mass.—Conant v. Stratton, 107 Mass. 474.

Mo.—State v. Babb, 77 Mo. A. 277.

N. H.—Probate Judge v. Emery, 6 N. H. 141.

N. C.—McLane v. Peoples, 20 N. C. 133; Peoples v. Peoples, 20 N. C. 9.

R. I.—Pawtucket Prob. Ct. v. Williams, 23 R. I. 515, 51 A 101.

Va.—Almond v. Mason, 9 Gratt. (50 Va.) 700; Thornton v. Fitzhugh, 4 Leigh (31 Va.) 209.

Eng.—Dobbs v. Brain, [1892] 2 Q. B. 207.

[a] **Where the executor has assented to** a legacy and has sufficient assets to pay it, his failure to pay it is a breach of the bond. Probate Judge v. Emery, 6 N. H. 141.

[b] **Failure to pay income to life legatee.**—The failure to pay to a life legatee the income of the personal estate as directed by the will is a breach of the condition of the bond "well and truly to administer" the estate. Sanford v. Gilman, 44 Conn. 461.

[c] **Where an executor died the day after the death of the life beneficiary** of the estate, there was no breach of his bond because he did not distribute the balance of the estate according to the will after the beneficiary's death. Cook v. Titcomb, 115 Me. 38, 97 A 133.

[d] **Improper payment by executor of executor.**—Where the executor of an executor does not pay the assets of the first estate to the legatees of the first testator, but distributes them among the legatees of the executor, his testator, the sureties of the first executor are responsible for the amount so distributed, but not until an effort has been made to recover the amount from the sureties of the second executor. Aylett v. King, 11 Leigh (38 Va.) 486.

89. Mass.—Ames v. Clarke, 106 Mass. 573.

Minn.—Huntsman v. Hooper, 32 Minn. 163, 20 NW 127.

Miss.—Jones v. Irvine, 23 Miss. 361.

N. H.—Probate Judge v. Kimball, 12 N. H. 165.

N. J.—Ordinary v. Barcalow, 36 N. J. L. 15.

Vt.—Probate Ct. v. Kimball, 42 Vt. 320.

[a] **Without any evidence of assent** by the executor or of any judgment against him or demand upon him for payment of the legacy, its nonpayment was not a breach of the condition of the bond. Probate Judge v. Kimball, 12 N. H. 165.

[b] **In the case of a residuary legacy,** the residuary balance cannot be known or ascertained until the final settlement of the executor's accounts, and until such settlement by the probate court and decree for payment no action can be maintained on the bond to recover the legacy. Jones v. Irvine, 23 Miss. 361.

[c] **An order or decree directing payment** must be made before a breach of the bond can be predicated on nonpayment. Huntsman v. Hooper, 32 Minn. 163, 20 NW 127 (under statute); Probate Ct. v. Kimball, 42 Vt. 320 (bond conditioned to pay such legacies "as shall be ordered and decreed to be paid by said court").

[d] **A settlement of accounts,** showing a balance in the representative's hands, is necessary before nonpayment of a legacy can be assigned as a breach. Ordinary v. Barcalow, 36 N. J. L. 15.

[e] **Where an annuity has been assigned** by a voidable assignment, the executor is not liable on his bond for refusing to pay it to the assignor so long as the assignment is not legally rescinded. Ames v. Clarke, 106 Mass. 573.

90. Gookin v. True, 3 N. H. 288.

91. Fulcher v. Com., 3 J. J. Marsh. (Ky.) 592.

92. **Duty to make distribution** see supra § 1266.

93. U. S.—U. S. v. Coxe, 18 How. 100, 15 L. ed. 299; Scruggs v. Scruggs, 105 Fed. 28.

Ark.—Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

Conn.—State v. Whitehouse, 80 Conn. 111, 67 A 503.

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; Rahe v. Jobusch, 197 Ill. A. 200; U. S. Fidelity, etc., Co. v. Peo., 159 Ill. A. 35.

Ind.—Stanton v. State, 82 Ind. 463.

Ky.—Wilson v. Unselt, 12 Bush 215; Com. v. Blanton, 2 B. Mon. 393; Jackson v. Bourbon Justices, 2 Bibb 292; Warren v. Benton, 3 KyL 332, 11 Ky. Op. 272.

Md.—Jenkins v. State, 76 Md. 255, 23 A 608, 790.

Mass.—Choate v. Jacobs, 136 Mass. 297.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

Minn.—State v. Ramsey County Prob. Ct., 84 Minn. 289, 87 NW 783; Ganser v. Ganser, 83 Minn. 199, 86 NW 18, 85 AmSR 461.

Miss.—Jones v. Irvine, 23 Miss. 361.

Mo.—Wolff v. Schaeffer, 4 Mo. A. 367 [aff 74 Mo. 154].

Mont.—Kirk v. Baker, 26 Mont. 190, 66 P 942.

Nebr.—Mortenson v. Bergthold, 64 Nebr. 208, 89 NW 742.

N. H.—Hurlburt v. Wheeler, 40 N. H. 73.

N. J.—Ordinary v. Smith, 15 N. J. L. 92.

N. C.—Settle v. Settle, 141 N. C. 553, 54 SE 445.

N. D.—Sjoli v. Hogenson, 19 N. D. 82, 85, 122 NW 1008 [cit Cyc].

S. C.—Burnside v. Robertson, 28 S. C. 583, 6 SE 843; Ordinary v. Martin, 3 S. C. L. 552.

Tex.—Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821.

Vt.—Probate Ct. v. Kimball, 42 Vt. 320; Probate Ct. v. Niles, 32 Vt. 775;

thereto have been ascertained and an order or decree for distribution made.[94] There is, however, a breach of the bond where the representative fails to apply for an order of distribution within a reasonable time after the settlement of his account,[95] and if a loss to the estate occurs through his neglect to do so his bond is liable therefor.[96]

Where a refunding bond is required,[97] it is not a breach of the administration bond to refuse distribution where such bond has not been given or tendered.[98]

If the bond contains no clause securing the interests of distributees, the sureties will not be liable for failure or refusal to distribute,[99] notwithstanding the bond is conditioned "to well and truly administer according to law."[1]

Failure or refusal to comply with a void decree of distribution is not a breach of the bond.[2]

On the death of an administrator no action can be maintained on his bond for not taking and distributing certain property belonging to the intestate's estate, because it passes to the administrator de bonis non by whom the settlement of the estate is to be completed.[3]

[§ 2586] **11. Conversion or Waste of Estate.** It is a breach of the bond for the principal to convert to his own use or waste the estate committed to him.[4] An administrator who, at the time of his appointment as guardian of minor distributees, is insolvent, and has previously converted the assets of the estate to his own use, cannot transfer the estate to himself as guardian so as to relieve the sureties on his administration bond of liability.[5] So also, the sureties of a representative in one state cannot escape liability for misappropriation of funds coming rightfully into his hands as such representative by the fact that he turned the funds over to himself as representative of the same estate under an appointment in another state, without the approval of the court, and without taxes having been paid as required by the statute of the first state.[6]

[§ 2587] **12. Failure to Account.** There is a breach of the bond where the executor or administrator fails to render accounts of his administration as required by law or by the conditions of his bond,[7] or where in making settlements for the pur-

Probate Judge v. Fillmore, 1 D. Chipm. 420.

Eng.—Canterbury v. Tappen, 8 B. & C. 151, 15 ECL 82, 108 Reprint 1000.

[a] **Where an administrator's account has been adjusted on appeal** and a balance ordered to be paid over, a failure to do so is a breach of the bond. Dawes v. Sweet, 14 Mass. 105.

[b] **Where the statutory provisions are not followed** in the settlement and distribution of the estate, the fact that the administrator proceeded under the instructions of the orphans' court will not prevent a liability on the bond to an excluded distributee. Shriver v. State, 65 Md. 278, 4 A 679.

[c] **If the distributee is an infant** and has no guardian, the nonpayment of the amount ascertained by the decree of the ordinary to be due on the distributive share is not a sufficient breach to sustain an action on the bond by a prochein ami. Mitchell v. Connolly, 17 S. C. L. 203.

[d] **Where a distributive share has been assigned,** payment to the heir, under order of court, instead of to the assignee, is not a breach of the bond. Peo. v. Rigdon, 204 Ill. A. 309.

94. Ferguson v. Carr, 85 Ark. 246, 107 SW 1177; Ordinary v. Smith, 15 N. J. L. 92; Ordinary v. Martin, 3 S. C. L. 552. See also cases supra note 93.

[a] **An order ascertaining the amount** of funds in the hands of an administrator, and directing him to pay the same into court for the benefit of the heirs, but not adjudging who are the legal distributees, is insufficient as a basis for an action on the administrator's bond for failure to make distribution. Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

95. Sanford v. Thorp, 45 Conn. 241; Rowland v. Isaacs, 15 Conn. 115; Providence Municipal Ct. v. McCulla, 21 R. I. 273, 43 A 182; West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

[a] **It is not necessary that the administrator should have been requested** by the distributees to make such application. Davenport v. Richards, 16 Conn. 310.

96. Sanford v. Thorp, 45 Conn. 241.

97. See supra §§ 1295–1304.

98. Judge Limestone County Ct. v. Coalter, 3 Stew. & P. (Ala.) 348; Kavanaugh v. Thacker, 2 Dana (Ky.) 137; Carmichael v. Browder, 4 Miss. 252.

99. Arnold v. Babbit, 5 J. J. Marsh. (Ky.) 665.

1. Barbour v. Robertson, 1 Litt. (Ky.) 93; Moore v. Waller, 1 A. K. Marsh. (Ky.) 488.

2. Hancock v. Hubbard, 19 Pick. (Mass.) 167.

3. Williams v. Britton, 33 N. C. 110.

4. Ala.—Dean v. Portis, 11 Ala. 104; Thomson v. Searcy, 6 Port. 393.

Colo.—Liddicoat v. Treglown, 6 Colo. 47.

Conn.—State v. Whitehouse, 75 Conn. 410, 53 A 897; Strong v. White, 19 Conn. 238.

Del.—Allen v. Leach, 7 Del. Ch. 232, 44 A 800.

Fla.—State v. Crawford, 23 Fla. 289, 2 S 371.

Ga.—Braswell v. Brown, 112 Ga. 740, 38 SE 51; Pollock v. Cox. 108 Ga. 430, 34 SE 213; Dowling v. Feeley, 72 Ga. 557; Giles v. Brown, 60 Ga. 658.

Ill.—Peo. v. White, 11 Ill. 341; Borders v. Peo., 31 Ill. A. 483.

Ind.—Parsons v. Milford, 67 Ind. 489; Nelson v. Corwin, 59 Ind. 489; Fuhrer v. State, 55 Ind. 150; Jeffersonville, etc., R. Co. v. Gent, 35 Ind. 39; Ferguson v. Dunn, 28 Ind. 58; Lane v. State, 24 Ind. 421; State v. Bennett, 24 Ind. 383; Robinson v. Skipworth, 23 Ind. 311; State v. Scott, 12 Ind. 529; Spencer v. Morgan, 5 Ind. 146; Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005.

Md.—State v. Dilley, 64 Md. 314, 1 A 612.

Mass.—Fuller v. Dupont, 183 Mass. 596, 67 NE 662; Hutchins v. State Bank, 12 Metc. 421.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9; Hatheway v. Sackett, 32 Mich. 97.

Miss.—Burruss v. Fisher, 23 Miss. 228; Edmundson v. Roberts, 3 Miss. 822.

Mo.—State v. Berning, 74 Mo. 87; State v. Flynn, 48 Mo. 413; State v. Drury, 36 Mo. 281; State v. U. S. Fidelity, etc., Co., 188 Mo. A. 705, 176 SW 543; State v. Taylor, 100 Mo. A. 481, 74 SW 1032.

N. H.—Probate Judge v. Mathes, 60 N. H. 433.

N. M.—Conway v. Carter, 11 N. M. 419, 68 P 941.

N. Y.—Potter v. Ogden, 136 N. Y. 384, 33 NE 228 [aff 65 Hun 27, 19 NYS 594]; Peo. v. Dunlap, 13 Johns. 437.

N. C. — Mahoney v. Stewart, 123 N. C. 106, 31 SE 384; Grant v. Edwards, 92 N. C. 442; Lansdell v. Winstead, 76 N. C. 366.

Oh.—Gutridge v. Vanatta, 27 Oh. St. 366.

Pa.—Com. v. Keil, 9 Phila. 140.

R. I.—West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

Tenn.—Summers v. Wilson, 2 Coldw. 469.

Tex.—Pierce v. Wallace, 48 Tex. 399.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189.

W. Va.—Thompson v. Nowlin, 51 W. Va. 346, 41 SE 178.

Wis.—Davies' Est., 161 Wis. 598, 155 NW 152.

[a] **Such waste or conversion may consist in** (1) the improvement of the real estate of an intestate with the funds of the estate. Byrd v. Governor, 2 Mo. 102. (2) If the executor permits his wife to appropriate to her own use money which belongs to the estate such appropriation becomes his own act and makes him chargeable for the money on his administration bond. Smith v. Jewett, 40 N. H. 513.

[b] **The fact that the representative takes security in his own name** for a debt due the estate will not, in the absence of fraud, render him liable for waste. Syme v. Badger, 92 N. C. 706.

[c] **The payment of taxes and insurance and expending of money in repairing real estate** by an administrator is not a breach of his bond, it being his duty in the preservation of the estate. State v. Taylor, 100 Mo. A. 481, 74 SW 1032.

[d] **A purchase by an administrator at his own sale** is not of itself a breach of the condition of his bond. Trimmier v. Trail, 18 S. C. L. 480.

[e] **The commission of waste or trespass by third persons,** with the consent of the administrator, upon the real estate will not constitute a breach of a condition to account for thrice the amount of waste and trespass committed with his consent after representation of insolvency, unless the estate has been represented insolvent to the judge of probate. Gilbert v. Duncan, 65 Me. 469.

5. State v. Whitehouse, 75 Conn. 410, 53 A 897.

6. American Surety Co. v. Quincey, (Va.) 99 SE 641.

7. Cal.—Slater v. McAvoy, 123 Cal. 437, 56 P 49.

Conn.—Warren v. Powers, 5 Conn. 373.

Ga.—Worthy v. Battle, 125 Ga. 415, 54 SE 667.

Ind.—Craven v. State, 50 Ind. A. 30, 97 NE 1021.

Iowa.—Clark v. Cress, 20 Iowa 50.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33;

pose of showing the condition of the estate he fails to render a true and accurate account.[8] But it has been held that a refusal to account for a particular sum of money, either on the ground that it was never received,[9] or was not received on account of the estate,[10] or has already been included in an account settled [11] is not a breach of the condition of the bond.

Where an executor is sole legatee and there are no creditors, a failure to file an account within the time required by law is merely a technical breach which is cured by filing the account before suit brought.[12]

A settlement after an action on the bond is instituted will not cure the breach nor bar the action.[13]

Waiver of breach. The breach is waived by the allowance of an account without exception after the time required for filing the account, but before an action has been brought on the bond;[14] but the breach is not waived by the action of the court in pronouncing unsatisfactory an account presented after the breach, and by a subsequent account on which no decree is rendered, although these are circumstances which may be evidence of a waiver.[15]

[§ 2588] **13. Failure to Turn Over Assets to Successor.** Failure of an executor or administrator to turn over assets of the estate to his successor in office on a revocation of his letters or his resignation or removal is a breach of the bond.[16] An executor's refusal to pay money into the probate court upon his resignation is not a breach of the bond, for it is the duty of the court in such cases to appoint a successor who alone is competent to receive the estate.[17]

[§ 2589] **F. Conclusiveness of Adjudications against Principal.** The generally accepted rule is that a judgment or decree against an executor or administrator is conclusive against the sureties on his bond,[18] although they were not parties to the

Webb v. Gross, 79 Me. 224, 9 A 612; Williams v. Esty, 36 Me. 243.

Mass.—McIntire v. Parker, 195 Mass. 155, 80 NE 798; McKim v. Haley, 173 Mass. 112, 53 NE 152; Fuller v. Wilbur, 170 Mass. 506, 49 NE 916; Forbes v. McHugh, 152 Mass. 412, 25 NE 622; McKim v. Bartlett, 129 Mass. 226; McKim v. Harwood, 129 Mass. 75; Bennett v. Russell, 2 Allen 537; White v. Swain, 3 Pick. 365; Coney v. Williams, 9 Mass. 114.

Minn.—McAlpine v. Kratka, 98 Minn. 151, 107 NW 961.

Mo.—Devore v. Pitman, 3 Mo. 179.

Nev.—McNab v. Wixom, 7 Nev. 163.

N. H.—Clarke v. Clay, 31 N. H. 393.

N. J.—Ordinary v. Barcalow, 36 N. J. L. 15; Ordinary v. Hart, 10 N. J. L. 65; In re Webster, 5 N. J. Eq. 89.

N. C.—State v. Davidson, 79 N. C. 423.

Oh.—Cadwallader v. Longley, 1 Disn. 497, 12 Oh. Dec. (Reprint) 756.

Pa.—Hartzell v. Com., 42 Pa. 453; Com. v. Bryan, 8 Serg. & R. 128.

R. I.—Westerly Prob. Ct. v. Potter, 22 R. I. 326, 47 A 889; West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844; Providence Municipal Ct. v. McElroy, 18 R. I. 749, 30 A 796; Providence Municipal Ct. v. Henry, 11 R. I. 563.

S. C.—Ordinary v. Mortimer, 38 S. C. L. 271.

Tenn.—Newsom v. Dickerson, Peck 285.

Vt.—Probate Ct. v. Bates, 10 Vt. 285; Matthews v. Page, Brayt. 106; Wilson v. Keeler, 2 D. Chipm. 16.

Wis.—Johannes v. Youngs, 45 Wis. 445.

Eng.—Canterbury v. Wills, 1 Salk. 315, 91 Reprint 278.

[a] **A settlement out of court,** between the heirs and the administrator of an estate, is not a compliance with the condition of the bond given to the judge of probate, to render an account when required in the probate court. Clarke v. Clay, 31 N. H. 393.

[b] **Where a final settlement is set aside and a new report ordered** to be filed within specified time, a breach occurs upon failure to file such report and pay over funds as ordered. Craven v. State, 50 Ind. A. 30, 97 NE 1021.

[c] **Where it does not appear that the delay was contumacious** or so continued as to work injury or that any good will be accomplished by a suit on the bond, it is not usual for the ordinary to direct it to be prosecuted, although it is lawful for him to do so. Lee's Case, 43 N. J. Eq. 172, 11 A 125.

[d] **The sureties are under no obligation to render an account,** and before they can be held liable the liability of their principal must be first ascertained and established. Cadwallader v. Longley, 1 Disn. 497, 12 Oh. Dec. (Reprint) 756.

[e] **Extent of injury.**—Where an executor fails to file his accounts within the time provided by the bond, an action on the bond can be maintained on behalf of a legatee, although he has sustained no injury other than the loss of the information which the inventory and accounts would have given him if filed. Forbes v. McHugh, 152 Mass. 412, 25 NE 622.

Citation or order to account and failure to comply therewith as condition precedent to action see infra § 2605.

8. Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396.

9. Probate Judge v. Briggs, 5 N. H. 66.

10. Probate Judge v. Briggs, 5 N. H. 66.

11. Probate Judge v. Briggs, 5 N. H. 66.

12. McKim v. Harwood, 129 Mass. 75.

13. Clark v. Cress, 20 Iowa 50; Wilson v. Keeler, 2 D. Chipm. (Vt.) 16.

14. Forbes v. Keyes, 193 Mass. 38, 78 NE 733; Loring v. Kendall, 1 Gray (Mass.) 305.

15. Gloucester Prob. Ct. v. Eddy, 8 R. I. 508.

16. U. S.—Hibberd v. Bailey, 129 Fed. 575, 64 CCA 143 [rev on other grounds 123 Fed. 185].

Cal.—Elizalde v. Murphy, 11 Cal. A. 32, 103 P 904.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

Ill.—Salomon v. Peo., 191 Ill. 290, 61 NE 83 [aff 89 Ill. A. 374].

Iowa.—Nash v. Sawyer, 114 Iowa 742, 87 NW 707.

Md.—State v. Smith, 64 Md. 101, 20 A 1037.

Minn.—Pierce v. Mætzold, 126 Minn. 445, 148 NW 302; McAlpine v. Kratka, 98 Minn. 151, 107 NW 961; Balch v. Hooper, 32 Minn. 158, 20 NW 124.

Miss.—Prosser v. Yerby, 2 Miss. 87.

Mo.—State v. Creusbauer, 68 Mo. 254.

N. H.—Prescott v. Farmer, 59 N. H. 90; Probate Judge v. Claggett, 36 N. H. 381, 72 AmD 314.

N. Y.—Gerould v. Wilson, 81 N. Y. 573 [aff 16 Hun 530]; Flanagan v. Maryland Fidelity, etc., Co., 32 Misc. 424, 66 NYS 544; Power v. Bermester, 12 NYS 25 [aff 126 N. Y. 354, 27 NE 474].

Oh.—Slagle v. Entrekin, 44 Oh. St. 637, 10 NE 675.

Okl.—Greer v. McNeal, 11 Okl. 519, 526, 69 P 891, 893.

Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.

Pa.—Hartzell v. Com., 42 Pa. 453.

Tenn.—Coleman v. Raynor, 3 Coldw. 25.

Tex.—Boulware v. Hendricks, 23 Tex. 667; Baldwin v. Dearborn, 21 Tex. 446.

[a] **A public administrator** is not liable upon his bond for a failure to pay over the assets of an estate to the administrators appointed by the probate court, until the court has adjusted his accounts and ordered him to pay over the balance in his hands. Baker v. State, 21 Ark. 405.

17. Willson v. Hernandez, 5 Cal. 437.

18. U. S.—Stovell v. Banks, 10 Wall. 583, 19 L. ed. 1033.

Ala.—Presley v. Weakley, 135 Ala. 517, 33 S 434, 93 AmSR 39; Street v. Henry, 124 Ala. 153, 27 S 411; Martin v. Tally, 72 Ala. 23; Jones v. Ritter, 56 Ala. 270; Cousins v. Jackson, 49 Ala. 236; Grace v. Martin, 47 Ala. 135; Ragland v. Calhoun, 36 Ala. 606; Kyle v. Mays, 22 Ala. 692; Perkins v. Moore, 16 Ala. 9; Williamson v. Howell, 4 Ala. 693.

Ark.—U. S. Fidelity, etc., Co. v. Hodgins, 123 Ark. 507, 185 SW 1092; Gorman v. Bonner, 80 Ark. 339, 97 SW 282; Briggs v. Manning, 80 Ark. 304, 97 SW 289; George v. Elms, 46 Ark. 260.

Cal.—Chaquette v. Ortet, 60 Cal. 594; Irwin v. Backus, 25 Cal. 214, 85 AmD 125.

Conn.—Willey v. Paulk, 6 Conn. 74; Goodrich v. Thompson, 4 Day 215.

D. C.—American Bonding, etc., Co. v. U. S., 23 App. 535.

Hawaii.—Robinson v. Kaae, 22 Hawaii 403, 410 [cit Cyc].

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346]; Peo. v. Huffman, 182 Ill. 390, 55 NE 981 [rev on other grounds 78 Ill. A. 345]; Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315 [aff 56 Ill. A. 346]; Frank v. Peo., 147 Ill. 105, 35 NE 530; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; Rahe v. Jobusch, 197 Ill. A. 200.

Ind.—Salver v. State, 5 Ind. 202; Governor v. Shelby, 2 Blackf. 26; Goodwin v. Wilson, 1 Blackf. 344.

Iowa.—Tucker v. Stewart, 147 Iowa 294, 126 NW 183; Carpenter v. U. S. Fidelity, etc., Co., 123 Iowa 209, 101 NW 404.

Kan.—Fincke v. Bundrick, 72 Kan. 182, 83 P 403, 4 LRANS 820.

Ky.—McCalla v. Patterson, 18 B. Mon. 201; Hobbs v. Middleton, 1 J. J. Marsh. 176; Frazer v. Frazer, 76 SW 13, 25 KyL 473; Kennedy v. Crawley, 1 KyL 346. Contra Stuart v. Hathaway, 4 KyL 438, 11 Ky. Op. 800.

Me.—Cook v. Titcomb, 115 Me. 38, 97 A 133; Probate Judge v. Quimby, 89 Me. 574, 36 A 1049; Bourne v. Todd, 63 Me. 427.

Md.—Jenkins v. State, 76 Md. 255, 23 A 608, 790.

Mass.—Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552; McKim v. Haley, 173 Mass. 112, 53 NE 152; Fuller v. Cushman, 170 Mass. 286, 49 NE 631;

proceedings,[19] and cannot be collaterally questioned by them in an action on the bond,[20] their only remedy being by way of appeal, writ of error, or application for a new trial,[21] or by a direct proceeding in equity.[22] Thus a judgment establishing a devastavit against the representative is conclusive against the sureties,[23] a judgment on final settlement in the probate court is conclusive as to the existence and amount of assets,[24] and a judgment or decree against the representative in favor of a creditor,

White v. Weatherbee, 126 Mass. 450; Chilson v. Adams, 6 Gray 364; Heard v. Lodge, 20 Pick. 53, 32 AmD 197.

Mich.—Holden v. Lathrop, 65 Mich. 652, 32 NW 879; Clark v. Fredenburg, 43 Mich. 263, 5 NW 306.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 302; Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246; Wood v. Myrick, 16 Minn. 494.

Mo.—State v. Goggin, 191 Mo. 482, 90 SW 379, 109 AmSR 826; State v. Kennedy, 163 Mo. 510, 63 SW 678; State v. Donegan, 83 Mo. 374; State v. Creusbauer, 68 Mo. 254; Dix v. Morris, 66 Mo. 514; State v. Holt, 27 Mo. 340, 72 AmD 273; State v. Donegan, 12 Mo. A. 190 [aff 83 Mo. 374]; State v. Richmond, 3 Mo. A. 572 mem.

Mont.—Kenck v. Parchen, 22 Mont. 519, 57 P 94, 74 AmSR 625; Botkin v. Kleinschmidt, 21 Mont. 1, 52 P 563, 69 AmSR 641.

N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 347.

N. J.—Ordinary v. Kershaw, 14 N. J. Eq. 527.

N. M.—Conway v. Carter, 11 N. M. 419, 68 P 941.

N. Y.—Power v. Speckman, 126 N. Y. 354, 27 NE 474 [aff 12 NYS 25]; Deobold v. Oppermann, 111 N. Y. 531, 19 NE 94, 7 AmSR 760, 2 LRA 644; Harrison v. Clark, 87 N. Y. 572; Geroud v. Wilson, 81 N. Y. 573 [aff 16 Hun 530]; Scofield v. Churchill, 72 N. Y. 565; Casoni v. Jerome, 58 N. Y. 315; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Keegan v. Smith, 60 App. Div. 168, 70 NYS 260 [rev 33 Misc. 74, 67 NYS 281 (rev 31 Misc. 651, 64 NYS 1117), and aff 172 N. Y. 624 mem, 65 NE 1118 mem]; Matter of Lawson, 42 App. Div. 377, 59 NYS 152; Matter of Gall, 42 App. Div. 255, 59 NYS 254; Martin v. Hann, 32 App. Div. 602, 53 NYS 186; McMahon v. Smith, 24 App. Div. 25, 49 NYS 93; Johnston v. Smith, 25 Hun 171; Thayer v. Clark, 48 Barb. 243 [aff 41 N. Y. 620]; Willcox v. Smith, 26 Barb. 316; Baggott v. Boulger, 9 N. Y. Super. 160; Field v. Van Cott, 5 Daly 308, 15 AbbPrNS 349; Haight v. Brisbin, 7 NYCivProc 152, 1 HowPrNS 199 [aff 36 Hun 579 (rev on other grounds 100 N. Y. 219, 3 NE 74)].

N. C.—Brown v. Pike, 74 N. C. 531.

N. D.—Sjoli v. Hogenson, 19 N. D. 82, 122 NW 1008; Joy v. Elton, 9 N. D. 428, 83 NW 875.

Oh.—Smith v. Rhodes, 68 Oh. St. 500, 68 NE 7.

Okl.—Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698; Shipman v. Brown, 36 Okl. 623, 130 P 603; Greer v. McNeal, 11 Okl. 519, 526, 69 P 891, 893.

Or.—United Brethren First Church of Eugene v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353; Thompson v. Dekum, 32 Or. 506, 52 P 517, 755; Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Pa.—Com. v. Ruhl, 199 Pa. Co. 40, 48 A 905; In re Yung, 199 Pa. 35, 48 A 692; Hartzell v. Com., 42 Pa. 453; Garber v. Com., 7 Pa. 265; Com. v. Wood, 14 Pa. Dist. 509.

S. C.—Boyd v. Caldwell, 38 S. C. L. 117; Norton v. Wallace, 31 S. C. L. 460; Bryan v. Blakeney, 23 S. C. L. 27; Lucas v. Guy, 18 S. C. L. 403; Chambers v. Patton, 17 S. C. L. 130; Lyles v. Robinson, 17 S. C. L. 25; Lyles v. Brown, 16 S. C. L. 31; Cureton v. Shelton, 14 S. C. L. 412; Lyles v. Caldwell, 14 S. C. L. 225.

Tex.—Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821; Wiseman v. Swain, (Civ. A.) 114 SW 145.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189; Ehrngren v. Gronlund, 19 Utah 411, 57 P 268.

Wis.—Wallber v. Wilmanns, 116 Wis. 246, 93 NW 47; Barney v. Babcock, 115 Wis. 409, 91 NW 982; Roberts v. Weadock, 98 Wis. 400, 74 NW 93; Meyer v. Barth, 97 Wis. 352, 72 NW 748, 65 AmSR 124; Holden v. Curry, 85 Wis. 504, 55 NW 965.

[a] **"The reason** for this holding, as stated by the courts, is that by his contract the surety puts himself in privity with the administrator, and being so in privity he is bound by any decree that the surrogate has jurisdiction to make." McMahon v. Smith, 24 App. Div. 25, 28, 49 NYS 93.

[b] **In the District of Columbia,** it has been considered unnecessary to determine whether a judgment against the principal was conclusive against the surety, it being at least prima facie evidence against him. American Bonding, etc., Co. v. U. S., 23 App. 535.

[c] **In South Carolina:** (1) Some cases hold such a judgment or decree to be not conclusive but prima facie evidence only. Kaminer v. Hope, 9 S. C. 253; Stewart v. McCully, 39 S. C. L. 80; Ordinary v. Carlile, 26 S. C. L. 100; Buckner v. Archer, 26 S. C. L. 85; Ordinary v. Condy, 20 S. C. L. 313; Simkins v. Cobb, 18 S. C. L. 60; Lyles v. Caldwell, 14 S. C. L. 225. (2) Other cases hold that such a decree is conclusive (Norton v. Wallace, 31 S. C. L. 460 [quot Norton v. Wallace, 30 S. C. L. 507]; Chambers v. Patton, 17 S. C. L. 130; Lyles v. Brown, 16 S. C. L. 31) and (3) subject to impeachment by the surety only on the ground of fraud or collusion (Boyd v. Caldwell, 38 S. C. L. 117.

[d] **The sureties on the official bond of a sheriff** who has been appointed administrator by virtue of his office of sheriff and has qualified and acted as such under said bond are, in the absence of fraud, concluded by a decree of a probate court against their principal in the final settlement of his accounts as such administrator. Ragland v. Calhoun, 36 Ala. 606.

[e] **Matters concluded.**—While the decree of the probate court on final settlement equally concludes the sureties and the principal as to matters of the account, it is otherwise as to the due execution of the bond or other defenses personal to the sureties. Martin v. Tally, 72 Ala. 23.

[f] **Account of second administrator.**—Under Rev. L. c 162 § 2, a decree on a second account presented by a second administrator was conclusive on the surety of the first administrator. Allen v. Puritan Trust Co., 211 Mass. 409, 97 NE 916, LRA 1915C 518.

[g] **There are some exceptions** to the rule that the sureties are bound by a judgment recovered against the principal, as where he fails to plead the statute of limitation or allows himself to be defaulted or the judgment is suffered collusively. McKim v. Haley, 173 Mass. 112, 53 NE 152.

[h] **Where the action was against the administrator personally** and on a cause of action for which the estate was not liable, the fact that judgment was by mistake entered against the administrator as representative will not make it conclusive against the sureties. Williams v. Hinkle, 15 Ala. 713.

19. Cal.—Irwin v. Backus, 25 Cal. 214, 85 AmD 125.

Hawaii.—Robinson v. Kaae, 22 Hawaii 403, 410 [cit Cyc].

Ill.—Ralston v. Wood, 15 Ill. 159, 58 AmD 604; American Bonding Co. v. Reid, 168 Ill. A. 646.

Md.—Jenkins v. State, 76 Md. 255, 23 A 608, 790.

N. Y.—Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525.

Okl.—Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698.

Pa.—In re Yung, 199 Pa. 35, 48 A 692.

Wis.—Meyer v. Barth, 97 Wis. 352, 72 NW 748, 65 AmSR 124.

20. U. S.—Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.

Ark.—U. S. Fidelity, etc., Co. v. Hodgins, 123 Ark. 507, 185 SW 1092.

Conn.—Goodrich v. Thompson, 4 Day 215.

Ga.—Sutton v. Flanders, 146 Ga. 290, 91 SE 50.

Ill.—Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315 [aff 56 Ill. A. 346].

Ind.—Craven v. State, 50 Ind. A. 30, 97 NE 1021.

Mass.—Allen v. Puritan Trust Co., 211 Mass. 409, 97 NE 916, LRA1915C 518; White v. Weatherbee, 126 Mass. 450.

Mich.—Holden v. Lathrop, 65 Mich. 652, 32 NW 879.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 302.

N. H.—Probate Judge v. Lee, 72 N. H. 247, 56 A 188.

N. J.—Ordinary v. Kershaw, 14 N. J. Eq. 527.

N. Y.—Peo. v. Downing, 6 N. Y. Super. 189; Field v. Van Cott, 5 Daly 308, 15 AbbPrNS 349.

N. D.—Joy v. Elton, 9 N. D. 428, 83 NW 875.

Okl.—Greer v. McNeal, 11 Okl. 519, 526, 69 P 891, 893.

Pa.—Garber v. Com., 7 Pa. 265.

Va.—Franklin v. Depriest, 13 Gratt. (54 Va.) 257.

21. Goodrich v. Thompson, 4 Day (Conn.) 215; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; Garber v. Com., 7 Pa. 265; Lyles v. Brown, 16 S. C. L. 31.

22. Ordinary v. Kershaw, 14 N. J. Eq. 527; Schnell v. Schroder, 8 S. C. Eq. 334.

23. Grimmet v. Henderson, 66 Ala. 521; Salyer v. State, 5 Ind. 202; Governor v. Shelby, 2 Blackf. (Ind.) 26; Lowe v. Carlisle, 33 S. C. 597, 11 SE 438.

[a] **In an action by creditors for nonpayment of claims** against the estate, a judgment establishing the fact that personal property sufficient to pay the claims has been wasted by the representative is conclusive as to the devastavit and is a bar to any order for the sale of lands for the payment of the same. Banks v. Speers, 103 Ala. 436, 16 S. 25.

[b] **Showing real amount of assets.**—Where it is provided by statute that in an action on the bond for a devastavit, an administrator may show the real amount of assets at the time the original judgment was rendered against him, the sureties should be allowed the same privilege, although not mentioned in the act. Fauntleroy v. Lyle, 5 T. B. Mon. (Ky.) 266.

24. U. S.—Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.

Ala.—Jones v. Ritter, 56 Ala. 270; Holley v. Acre, 23 Ala. 603; Kyle v. Mays, 22 Ala. 692; Watts v. Gayle, 20 Ala. 817.

Ark.—U. S. Fidelity, etc., Co. v. Hodgins, 123 Ark. 507, 185 SW 1092; George v. Elms, 46 Ark. 260.

Cal.—Biggins v. Raisch, 107 Cal. 210, 40 P 333; Treweek v. Howard, 105 Cal. 434, 39 P 20.

Conn.—Goodrich v. Thompson, 4 Day 215.

legatee, or distributee is conclusive as to the nature and validity of the claim,[25] although not of the existence or sufficiency of assets to pay the same.[26] The sureties cannot set up in an action on the bond any irregularities in the decree against the principal,[27] or in the proceedings on which it was based;[28] but they are not precluded from showing that the decree was obtained through fraud or collusion,[29] or that the court exceeded its jurisdiction.[30] In a few jurisdictions, however, it is held that a judgment or decree against the principal is not conclusive against the surety but only prima facie evidence;[31] and even where the general rule is recognized it is not inflexible.[32] Thus the general rule is held not to apply to sureties on the bond of a deceased executor or administrator where the decree is based upon a settlement made by his personal representative,[33] or by an administrator de bonis non,[34] or in cases where judgment is rendered against the representative after his authority as such has terminated,[35] or after the sureties have been discharged from liability.[36] So also it is held that in order that the surety of an administrator may be precluded by a judgment ascertaining the balance in his principal's hands, it must appear that he was a party to the action,[37] and that, where the statute requires sureties on an administrator's bond to be made parties to a voluntary accounting by

Ga.—Sutton v. Flanders, 146 Ga. 290, 91 SE 50.

Ill.—Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315 [aff 56 Ill. A. 346]; Housh v. Peo., 66 Ill. 178; Ralston v. Wood, 15 Ill. 159, 58 AmD 604; Rahe v. Jobusch, 197 Ill. A. 200.

Ky.—Clark v. Newman, 49 SW 310, 20 KyL 1339.

Me.—Cook v. Titcomb, 115 Me. 38, 97 A 133; Thurlough v. Chick, 59 Me. 395.

Mass.—Fuller v. Cushman, 170 Mass. 286, 49 NE 631.

Mich.—Clark v. Fredenburg, 43 Mich. 263, 5 NW 306.

Mo.—Dix v. Morris, 66 Mo. 514; Taylor v. Hunt, 34 Mo. 205; State v. Holt, 27 Mo. 340, 72 AmD 273; State v. Donegan, 12 Mo. A. 190 [aff 83 Mo. 374].

Mont.—Kenck v. Parchen, 22 Mont. 519, 57 P 94, 74 AmSR 625.

N. J.—Ordinary v. Kershaw, 14 N. J. Eq. 527.

N. Y.—Power v. Speckman, 126 N. Y. 354, 27 NE 474; Harrison v. Clark, 87 N. Y. 572; Kelly v. West, 80 N. Y. 139; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Power v. Bermester, 12 NYS 25 [aff 126 N. Y. 354, 27 NE 474].

Oh.—Slagle v. Entrekin, 44 Oh. St. 637, 10 NE 675; Perkins v. Scott, 9 Oh. Cir. Ct. 207, 6 Oh. Cir. Dec. 226. But compare Todd v. Lewis, 2 Handy 280, 12 Oh. Dec. (Reprint) 443, 444 (surety may show "that there was error or fraud in the settlement").

Okl.—Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698.

Or.—Thompson v. Dekum, 32 Or. 506, 52 P 517, 755; Bellinger v. Thompson, 26 Or. 320, 37 P 714, 40 P 229.

Pa.—Garber v. Com., 7 Pa. 265; Miles v. Com., 2 Walk. 64; Com. v. Wood, 14 Pa. Dist. 509; Com. v. Smith, 6 Pa. Dist. 416.

Tex.—Williams v. Robinson, 63 Tex. 576.

Wis.—Meyer v. Barth, 97 Wis. 352, 72 NW 748, 65 AmSR 124.

[a] **Annual accounts,** as distinguished from the final account and settlement, are prima facie evidence only. State v. Wilson, 51 Ind. 96; State v. Lankford, 55 Mo. 564.

[b] **Receipts in depreciated currency should be stated and explained** fully by administrators in their accounts that allowance may be made to them therefor on settlement; and if they do not they will not be allowed to show such matter in defense on their bonds after a decree charging them for the full amount. Bailey v. Dilworth, 10 Sm. & M. (Miss.) 404, 48 AmD 760.

25. Ala.—Watts v. Gayle, 20 Ala. 817; Lamkin v. Heyer, 19 Ala. 228.

Ill.—Peo. v. Stacy, 11 Ill. A. 506.

Ky.—McCalla v. Patterson, 18 B. Mon. 201; Hobbs v. Middleton, 1 J. J. Marsh. 176.

Mo.—State v. Berning, 74 Mo. 87.

N. H.—Probate Judge v. Tillotson, 6 N. H. 292; Probate Judge v. Robins, 5 N. H. 246.

N. Y.—Thayer v. Clark, 4 Abb. Dec. 391 [aff 48 Barb. 243].

N. C.—Brown v. Pike, 74 N. C. 531.

Pa.—Miller v. Com., 2 Pa. Cas. 152, 5 A 438.

S. C.—Chambers v. Patton, 17 S. C. L. 130.

[a] **The confession of a judgment for a claim which is barred** by the statute of limitations is not conclusive upon the sureties on the administrator's bond. Dawes v. Shed, 15 Mass. 6, 8 AmD 80.

[b] **An allowance of claims by commissioners** in favor of persons who are not judgment creditors may be contested by sureties in an action on the bond. Williams v. Fitch, 2 Root (Conn.) 520.

26. Woodall v. Wright, 142 Ala. 205, 37 S 846; Banks v. Speers, 97 Ala. 560, 11 S 841; Kearney v. Sascer, 37 Md. 264; Armistead v. Harramond, 11 N. C. 339.

[a] **A judgment by confession** is not conclusive but only prima facie evidence of a sufficiency of assets to pay the same. Kearney v. Sascer, 37 Md. 264; Iglehart v. State, 2 Gill & J. (Md.) 235.

[b] **Judgment not even prima facie evidence of assets.**—Vanhook v. Barnett, 15 N. C. 268 [foll McKellar v. Bowell, 11 N. C. 34] (where the judgment under consideration was confessed, but the principle was stated generally as applicable to any judgment).

[c] **Effect of statute.**—Under a statute providing that whatever would be admissible and competent to prove the debt against the principal shall, "in like manner," be admissible and competent against his sureties, a judgment against the principal is "conclusive against the surety, both of the debt and of assets sufficient to pay it." Brown v. Pike, 74 N. C. 531, 534 (recognizing that prior to the statute referred to a judgment against the principal was not evidence of assets against the surety).

27. Ark.—U. S. Fidelity, etc., Co. v. Hodgins, 123 Ark. 507, 185 SW 1092.

Cal.—McClellan v. Downey, 63 Cal. 520.

N. Y.—Harrison v. Clarke, 20 Hun 404; Baggott v. Boulgar, 9 N. Y. Super. 160.

Pa.—Garber v. Com., 7 Pa. 265.

S. C.—Lyles v. Robinson, 17 S. C. L. 25.

28. Ark.—Bonner v. Gorman, 71 Ark. 480, 77 SW 602.

Md.—Jenkins v. State, 76 Md. 255, 23 A 608, 790.

Mich.—Clark v. Fredenburg, 43 Mich. 263, 5 NW 306.

Minn.—Pierce v. Maetzold, 126 Minn. 445, 148 NW 302.

S. C.—Lyles v. Brown, 16 S. C. L. 31.

[a] **Fraud of court.**—The judgment of the probate court cannot, in an action against the sureties, be collaterally attacked on the ground of fraud on the part of the probate court. Bonner v. Gorman, 71 Ark. 480, 77 SW 602.

29. Ill.—Housh v. Peo., 66 Ill. 178; Ralston v. Wood, 15 Ill. 159, 58 AmD 604.

Me.—Burgess v. Young, 97 Me. 386, 54 A 910; Hayes v. Seaver, 7 Me. 237.

Mass.—McKim v. Haley, 173 Mass. 112, 53 NE 152; Heard v. Lodge, 20 Pick. 53, 32 AmD 197.

N. Y.—Harrison v. Clark, 87 N. Y. 572; Annett v. Terry, 35 N. Y. 256 [aff 25 N. Y. Super. 556, 28 HowPr 324]; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Peo. v. Townsend, 37 Barb. 520. Contra Peo. v. Downing, 6 N. Y. Super. 189.

Oh.—Todd v. Lewis, 2 Handy 280, 12 Oh. Dec. (Reprint) 443.

Okl.—Boudinot v. Locust, 55 Okl. 662, 151 P 579, 155 P 698.

But compare Norton v. Wallace, 31 S. C. L. 460 (in action at law sureties cannot show that decree in equity against principal was procured through fraud).

See also cases supra note 16.

30. State v. Drake, 52 Ark. 350, 12 SW 706; Browning v. Vanderhoven, 4 AbbNCas (N. Y.) 166, 55 HowPr 97; Buckner v. Archer, 26 S. C. L. 85.

31. U. S.—Gillespie v. Riggs, 253 Fed. 943, 165 CCA 385 (stating rule in West Virginia).

Ga.—Shipp v. McCowen, 147 Ga. 711, 95 SE 251; Brown v. Wiley, 107 Ga. 85, 32 SE 905; Bird v. Mitchell, 101 Ga. 46, 28 SE 674; Gibson v. Robinson, 90 Ga. 756, 16 SE 969, 35 Am SR 250; Bennett v. Graham, 71 Ga. 211; Dunagan v. Dunagan, 38 Ga. 554 (decree in equity).

La.—Wiemann v. Mainegra, 112 La. 305, 36 S 358; Ferguson v. Glaze, 12 La. Ann. 667; Verret v. Belanger, 6 La. Ann. 109; Canal, etc., Co. v. Brown, 4 La. Ann. 545.

Miss.—Lipscomb v. Postell, 38 Miss. 476, 77 AmD 651 [dist Singleton v. Garrett, 23 Miss. 195].

S. C.—See supra note 16 for conflict of authorities.

Tenn.—Barksdale v. Butler, 6 Lea 450; Gambill v. Campbell, 12 Heisk. 737; Young v. Hale, 11 Humphr, 303; Seat v. Cannon, 1 Humphr, 471.

Va.—Hobson v. Yancey, 2 Gratt. (43 Va.) 73; Craddock v. Turner, 6 Leigh (33 Va.) 116; Worsham v. McKenzie, 1 Hen. & M. (11 Va.) 342.

W. Va.—Thompson v. Mann, 65 W. Va. 648, 64 SE 920, 131 AmSR 987, 22 LRANS 1094; Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmD 826.

[a] **Existence of debt.**—Although a judgment against the principal is ordinarily only prima facie evidence against the sureties, yet a judgment establishing a creditor's debt is conclusive as to its existence, amount, and justness. Crim v. England, 46 W. Va. 480, 33 SE 310, 76 AmSR 826.

32. Burgess v. Young, 97 Me. 386, 54 A 910 ("While a judgment against an administrator is for the most purposes conclusive upon his sureties, if it be upon the merits, yet they are not in all cases concluded").

33. Street v. Henry, 124 Ala. 153, 27 S 411; Means v. Hicks, 65 Ala. 241; Stallworth v. Farnham, 64 Ala. 259; Gray v. Jenkins, 24 Ala. 516; Brooks v. Hope, 139 Mass. 351, 31 NE 728.

34. Crouch v. Edwards, 52 Ark. 499, 12 SW 1070; Reither v. Murdock, 135 Cal. 197, 67 P 784.

35. Bourne v. Todd, 63 Me. 427.

36. Rutter v. Hall, 31 Ill. A. 647.

37. Creutz v. Artsman, 8 KyL 422.

the administrator, a decree of the surrogate on such accounting directing payment of a specified amount by the administrator is not binding on the sureties, where they were not cited and did not appear in the proceeding.[38] Where a surety on an administrator's bond has died several years before any notice was given or judgment rendered against the principal on final settlement, and there was no administration of the estate of the deceased surety, a judgment rendered against the principal on the final settlement was held not conclusive against the surety's estate.[39]

[§ 2590] **G. Who May Enforce Liability on Bond—1. In General.** The general rule is that as an administration bond is intended for the benefit and protection of all persons interested in the administration of the estate and the proper application of its assets,[40] an action thereon may be maintained by any person so interested who has sustained an injury by any breach of its conditions.[41]

[§ 2591] **2. Heirs and Distributees.** An administration bond inures to the benefit of heirs and distributees,[42] and they may sue for any breach of condition by which they have been injured.[43] It has been considered that if the representative has died, resigned, or been removed, and the estate owes no debts, an heir or distributee may sue without the necessity of the appointment of an administrator de bonis non,[44] but there is also authority for the view that under such circumstances an action on the bond can be brought only by an administrator de bonis non.[45] Where there are creditors whose claims have not been paid, only an administrator de bonis non can sue on the bond of the former representative;[46] and if an administrator de bonis non has been actually appointed he is the proper person to enforce any liability on the bond even though there are no unpaid creditors.[47]

The widow or heir of a deceased heir cannot sue on the bond for such heir's distributive interest, but the action must be by the personal representative of the deceased heir.[48]

Where a distributee has assigned his interest, an action on the bond to recover the same should ordinarily be brought on the relation of the assignor to the use of the assignee,[49] but it has been held that the assignee is a "party aggrieved" within the meaning of a code provision permitting the party aggrieved to sue in his own name.[50]

[§ 2592] **3. Legatees and Devisees.** A legatee or devisee may sue on an administration bond where he has been injured by a breach of its condition.[51] In case the legatee or devisee is an infant the action should be brought by his next friend,[52] or by his lawfully authorized attorney.[53] In case of the death of a legatee or devisee his personal representative may bring an action on the bond of the executor.[54]

When action should be brought for benefit of estate. Where the breaches alleged consist of the executor's failure to return an inventory, and wasting and converting the assets to his own use, the action for such breaches should be brought for the benefit of the estate and not for the benefit of a particular legatee or distributee.[55]

The assignee of a decree for a legacy cannot sue

38. Cookman v. Stoddard, 132 App. Div. 485, 116 NYS 901 [aff 200 N. Y. 563 mem, 93 NE 1118 mem].

39. State v. Goggin, 191 Mo. 482, 90 SW 379, 109 AmSR 826.

40. Stewart v. Phenice, 65 Iowa 475, 22 NW 636; Rives v. Patty, 43 Miss. 338; Prosser v. Yerby, 2 Miss. 87; Crawford v. Com., 1 Watts (Pa.) 480.

[a] **In the case of intestacy without heirs or known kindred** the bond inures to the benefit of the state in the same manner as to the heirs in other cases. Crawford v. Com., 1 Watts (Pa.) 480.

[b] **Purchasers of property of the estate** are not immediately interested in the faithful administration of the estate, as are heirs and creditors, and cannot sue on the bond for a loss occasioned by the failure of the representative to comply with statutory requirements in making the sale. Longpre v. White, 6 La. 388.

41. Conn.—Blakeman v. Sherwood, 32 Conn. 324.

Ind.—Fuhrer v. State, 55 Ind. 150.

Iowa.—Stewart v. Phenice, 65 Iowa 475, 22 NW 636.

Ky.—Com. v. Barstow, 3 B. Mon. 290.

Me.—Hayes v. Briggs, 106 Me. 423, 76 A 905.

Md.—State v. Wilmer, 65 Md. 178, 3 A 252.

Mass.—Paine v. Gill, 13 Mass. 365.

Miss.—Rives v. Patty, 43 Miss. 338; Prosser v. Yerby, 2 Miss. 87.

Mo.—State v. Campbell, 10 Mo. 724.

Mont.—Terr. v. Cox, 3 Mont. 197.

N. C.—Murphy v. McKay, 28 N. C. 397.

S. C.—McCorkle v. Williams, 43 S. C. 66, 20 SE 744; Kaminer v. Hope, 9 S. C. 253.

Ont.—Stapf v. McCarrow, 35 U. C. Q. B. 22.

[a] **Where an administrator refuses to pay over money which has escheated** to the state and the court does not remove him and appoint a successor to proceed against him for its recovery, the attorney-general may sue on the administration bond. Fuhrer v. State, 55 Ind. 150.

[b] **A receiver appointed to collect assets** of the estate in danger of being lost by reason of the refusal of the executor to collect them may maintain a suit against the sureties of the executor in the name of the state for his failure to make such collection. State v. Wilmer, 65 Md. 178, 3 A 252.

[c] **The assignee of a decree against the administrator** may maintain a suit as relator on the administrator's bond. The commonwealth is technically plaintiff and the use is to the relator. Com. v. Barstow, 3 B. Mon. (Ky.) 290.

42. Ark.—Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

Conn.—Blakeman v. Sherwood, 32 Conn. 324.

La.—Goux v. Moucla, 30 La. Ann. 743.

Mo.—State v. Dickson, 213 Mo. 66, 111 SW 817.

Tex.—Ward v. Ward, 1 Tex. Unrep. Cas. 123; Houston F. & M. Ins. Co. v. Swain, (Civ. A.) 114 SW 149.

43. Conn.—Blakeman v. Sherwood, 32 Conn. 324.

Ga.—Williams v. Lancaster, 113 Ga. 1020, 39 SE 471.

Ind.—Owen v. State, 25 Ind. 371; State v. Bennett, 24 Ind. 383; State v. Mason, 21 Ind. 171.

Mo.—State v. Campbell, 10 Mo. 724.

S. C.—McCorkle v. Williams, 43 S. C. 66, 20 SE 744; Kaminer v. Hope, 9 S. C. 253.

Tenn.—Newsom v. Dickerson, Peck 285.

Tex.—Ward v. Ward, 1 Tex. Unrep. Cas. 123.

[a] **So far as a widow takes by descent** from her husband under the provisions of the statute, she takes as his heir, and therefore may maintain an action against an executor or administrator on his bond. State v. Mason, 21 Ind. 171.

[b] **The heirs must show an injury to them as such** in order to maintain an action on the bond, and if there are creditors an injury to the estate is prima facie an injury to the creditors and not to the heirs. Peveler v. Peveler, 54 Tex. 53; Remick v. Luter, 32 Tex. 797.

[c] **A guardian of infant distributees** may sue in the name of the state on an administrator's bond. State v. Campbell, 10 Mo. 724.

44. State v. Thornton, 56 Mo. 325; Fort v. Fitts, 66 Tex. 593, 1 SW 563; Ward v. Ward, 1 Tex. Unrep. Cas. 123.

45. Gilliam v. Watkins, 104 N. C. 180, 10 SE 183.

46. Peveler v. Peveler, 54 Tex. 53.

[a] **Where an administrator has left the state** and there are creditors whose claims are unpaid, an heir, in order to sue on the bond, must become administrator de bonis non and sue in that capacity. Remick v. Luter, 32 Tex. 797.

Right of administrator de bonis non generally see infra § 2594.

47. State v. Fulton, 35 Mo. 323.

48. George v. Elms, 46 Ark. 260.

49. Burch v. Clark, 32 N. C. 172.

50. Jacobs v. Bogart, 128 Ala. 678, 29 S 645.

51. Ark.—Ferguson v. Carr, 85 Ark. 246, 107 SW 1177.

Ill.—Graffenreid v. Kundert, 34 Ill. A. 483.

Ind.—Nelson v. Corwin, 59 Ind. 489; State v. Scott, 12 Ind. 529.

Mass.—Paine v. Gill, 13 Mass. 365. Aliter under statute. Newcomb v. Williams, 9 Metc. 525.

Oh.—Mighton v. Dawson, 38 Oh. St. 650.

[a] **A devisee having only a contingent estate** or a present interest defeasible upon a condition subsequent is not entitled to bring an action on the administration bond. Stevens v. Cole, 7 Cush (Mass.) 467.

52. Stevens v. Cole, 7 Cush (Mass.) 467.

53. Terr. v. Cox, 3 Mont. 197.

54. Nelson v. Corwin, 59 Ind. 489.

55. Dawson v. Dawson, 25 Oh. St. 443.

on the bond to recover the same, since a legacy is not assignable at law and such action can be maintained only on the relation of the person who has the legal right.[56]

[§ 2593] **4. Creditors.** A creditor of the estate may sue on the bond for a breach of its conditions by which he had been injured,[57] but one creditor cannot sue for his individual debt and recover for the full amount thereof to the prejudice of other creditors equally entitled.[58]

A creditor of an heir has no direct interest in the bond and is not entitled to sue thereon.[59]

[§ 2594] **5. Administrator De Bonis Non.** At common law an administrator de bonis non could not maintain an action on the bond of his predecessor,[60] the bond being considered as indemnity only to those interested in the estate as creditors, legatees, or distributees,[61] and such is apparently still the law in some jurisdictions.[62] In other jurisdictions, the administrator de bonis non may sue on the bond with respect to assets which were not administered by his predecessor,[63] but this is the limit of his right, and he cannot sue for other breaches, such as maladministration, waste, conversion, etc.[64] The generally accepted modern rule is, however, that the administrator de bonis non may sue for any breach of the bond of his predecessor,[65] and indeed it has been held that, where an administrator de bonis non has been appointed, his right to sue for a breach of the bond of the former representative excludes that of the heirs or creditors,[66] although if the administrator de bonis non refuses to sue, a creditor may bring an action, making the administrator de bonis non a party defendant.[67]

A public administrator who has succeeded to the rights of a special administrator and to whom the bond of the latter has been duly assigned for the purpose of prosecution may bring an action as public administrator upon the bond.[68]

[§ 2595] **6. Probate Court or Judge.** The probate court or judge cannot voluntarily move in the prosecution of probate bonds, since the prosecutor

56. Burnett v. Harwell, 3 Leigh (30 Va.) 89.

57. Ind.—Embree v. State, 85 Ind. 368; Moore v. State, 43 Ind. A. 387, 84 NE 161.

Minn.—Forepaugh v. Hoffman, 23 Minn. 295.

N. J.—In re Honnass, 14 N. J. Eq. 493.

N. Y.—Thayer v. Clark, 4 Abb. Dec. 391, 2 Keyes 620 note [aff 48 Barb. 243]; Matter of Gall, 47 App. Div. 490, 62 NYS 420; Peo. v. Dunlap, 13 Johns. 437.

Pa.—Com. v. Rice, 18 Pa. Dist. 880.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 AnnCas 554 [pet to show cause and motion for rearg den 74 A 177].

Tex.—Houston F. & M. Ins. Co. v. Swain, (Civ. A.) 114 SW 149; Frank v. De Lopez, 2 Tex. Civ. A. 245, 21 SW 279.

Va.—Franklin v. Depriest, 13 Gratt. (54 Va.) 257; Bush v. Beale, 1 Gratt. (42 Va.) 229.

Wis.—Johannes v. Youngs, 45 Wis. 445.

[a] **Creditors by decree** (1) as well as those by judgment are entitled to sue. Bush v. Beale, 1 Gratt. (42 Va.) 229. (2) A claim evidenced by a final decree in equity is a debt established by "judgment," within a statute giving judgment creditors a right of action on administration bonds. Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 AnnCas 554 [pet to show cause and motion for rearg den 74 A 177].

[b] **A creditor who has received a third person's note in payment** of his debt has no further claim on the estate which can entitle him to an action on the administrator's bond, although the maker of the note subsequently becomes insolvent. Rawson v. Piper, 34 Me. 98.

Right excluded by that of administrator de bonis non see infra § 2594.

58. Newcomb v. Wing, 3 Pick. (Mass.) 168; Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396; Meldram v. Maclure, 23 B. C. 176.

59. Fay v. Hunt, 5 Pick. (Mass.) 398.

60. U. S.—U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927.

Ark.—Brice v. Taylor, 51 Ark. 75, 9 SW 854; State v. Rottaken, 34 Ark. 144.

Ill.—Peo. v. Pacific Surety Co., 130 Ill. A. 502.

Ind.—State v. Gooding, 8 Blackf. 567.

Oh.—Blizzard v. Filler, 20 Oh. 479; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750.

61. U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927; Rives v. Patty, 43 Miss. 338; Prosser v. Yerby, 2 Miss. 87; Thomas v. Stanley, 4 Sneed (Tenn.) 411; Johnson v. Hogan, 37 Tex. 77.

62. U. S.—U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927; Beard v. Roth, 35 Fed. 397.

Ark.—Brice v. Taylor, 51 Ark. 75, 9 SW 854; State v. Rottaken, 34 Ark. 144. But compare State v. Ferguson, 8 Ark. 172 (action under statute for failure to account).

Ky.—Felts v. Brown, 7 J. J. Marsh. 147; Bradshaw v. Com., 3 J. J. Marsh. 632.

Md.—State v. Fidelity, etc., Co., 100 Md. 256, 59 A 735, 108 AmSR 410.

R. I.—Scituate Prob. Ct. v. Smith, 16 R. I. 444, 17 A 56.

Tenn.—Thomas v. Stanley, 4 Sneed 411.

63. Meservey v. Kalloch, 97 Me. 91, 53 A 876; Waterman v. Dockray, 78 Me. 139, 3 A 49; Prosser v. Yerby, 2 Miss. 87.

64. Meservey v. Kalloch, 97 Me. 91, 53 A 876; Waterman v. Dockray, 78 Me. 139, 3 A 49; Rives v. Patty, 43 Miss. 338; Prosser v. Yerby, 2 Miss. 87.

65. Cal.—Slater v. McAvoy, 123 Cal. 437, 56 P 49.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Giles v. Brown, 60 Ga. 658.

Ill.—Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315; Peo. v. Pacific Surety Co., 130 Ill. A. 502. But compare In re Richart, 58 Ill. A. 91 (which must be regarded as having been erroneously decided).

Ind.—Sheeks v. State, 156 Ind. 508, 60 NE 142; Duffy v. State, 115 Ind. 351, 17 NE 615; Myers v. State, 47 Ind. 293; State v. Porter, 9 Ind. 342.

Iowa.—Stewart v. Phenice, 65 Iowa 475, 22 NW 636.

Kan.—American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

Minn.—Vukmirovich v. Nickolich, 123 Minn. 165, 143 NW 255; Balch v. Hooper, 32 Minn. 158, 20 NW 124.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907; State v. Heinrichs, 82 Mo. 542; State v. Thornton, 56 Mo. 325; State v. Hunter, 15 Mo. 490.

N. H.—Prescott v. Farmer, 59 N. H. 90; Probate Judge v. Claggett, 36 N. H. 381, 72 AmD 314.

N. M.—Beall v. Terr., 1 N. M. 507.

N. Y.—Dunne v. American Surety Co., 43 App. Div. 91, 59 NYS 429; Dunne v. American Surety Co., 34 Misc. 584, 70 NYS 391; Flanagan v. Maryland Fidelity, etc., Co., 32 Misc. 424, 66 NYS 544.

N. C.—Neal v. Becknell, 85 N. C. 299; Lansdell v. Winstead, 76 N. C. 366.

Oh.—Foster v. Wise, 46 Oh. St. 20, 16 NE 687, 15 AmSR 542; O'Conner v. State, 18 Oh. 225; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750; Webb v. Roettinger, 12 Oh. Cir. Ct. 730, 4 Oh. Cir. Dec. 270.

Okl.—Shipman v. Brown, 36 Okl. 623, 130 P 603.

Or.—In re Murray, 56 Or. 132, 107 P 19.

Pa.—Com. v. Wood, 14 Pa. Dist. 509.

Tex.—Fort v. Fitts, 66 Tex. 593, 1 SW 563; Johnson v. Morris, 45 Tex. 463 [dist Johnson v. Hogan, 37 Tex. 77]; Martel v. Martel, 17 Tex. 391; Ward v. Ward, 1 Tex. Unrep. Cas. 123.

Va.—Allen v. Cunningham, 3 Leigh (30 Va.) 395.

Wis.—Golder v. Littlejohn, 23 Wis. 251.

[a] **The first departure from the common-law rule in Illinois** (1) was by a statute permitting the administrator de bonis non to sue on the bond of a former representative whose letters had been revoked, leaving the common-law rule unchanged in case of the death of the former representative. Marsh v. Peo., 15 Ill. 284 [foll Duffin v. Abbott, 48 Ill. 17 (overr Stose v. Peo., 25 Ill. 600)]. (2) But a later statute extended the right of the administrator de bonis non to cases where the former representative had died. Peo. v. Pacific Surety Co., 130 Ill. A. 502.

[b] **Where an administrator gave no notice of his appointment** as required by Code § 3304, so that it could not be said that the statutory period for filing claims, which commences to run by reason of the giving of the notice, had expired without claims being filed, and that hence the estate was not indebted, an administrator de bonis non appointed after the discharge of such administrator, being bound to preserve the assets of the estate to meet claims, was the proper party to sue the administrator and the sureties on his bond for funds for which the administrator did not account. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

66. State v. Cox, 45 Mo. 311; State v. Dulle, 45 Mo. 269; State v. Fulton, 35 Mo. 323; Gilliam v. Watkins, 104 N. C. 180, 10 SE 183; Tulburt v. Hollar, 102 N. C. 406, 9 SE 430; State Univ. v. Hughes, 90 N. C. 537; State v. Goodman, 72 N. C. 508; Ferebee v. Baxter, 34 N. C. 64; Spencer v. Moore, 33 N. C. 160, 53 AmD 401; Baldwin v. Johnston, 30 N. C. 381; Fort v. Fitts, 66 Tex. 593, 1 SW 563; Collins v. Warren, 63 Tex. 311; Peveler v. Peveler, 54 Tex. 53. See also supra § 2591.

67. Thornton v. Park, 61 Ga. 549; Wilson v. Pearson, 102 N. C. 290, 9 SE 707.

68. Dayton v. Johnson, 69 N. Y. 419.

or real plaintiff must be one who was or may have been injured by the alleged breaches of the condition.[69]

[§ 2596] **7. Corepresentative.** Where one corepresentative has died, resigned, or been removed from office, the other may sue on the former's bond for any breach committed by him, where they have given separate bonds,[70] or if they have given a joint and several bond he may, as the representative of the estate, sue on such bond,[71] notwithstanding any individual liability to the sureties on the bond for the acts of his corepresentative.[72] One corepresentative cannot of course sue on the bond for his own benefit where he is himself in default,[73] but it has been held that an innocent corepresentative who is also a legatee may sue on the bond for the default of the other, although by virtue of the bond both might be sued by a creditor or other legatee.[74]

[§ 2597] **8. Right of Principal to Enforce Liability of Sureties.** It has been said that an insolvent administrator may recover against his own sureties for the benefit of the creditors of the estate,[75] but he cannot of course sue on the bond to recover for his individual benefit.[76]

[§ 2598] **H. Nature and Form of Remedy—1. In General.** The usual method of enforcing the liability on an administration bond is by an action brought on the bond in a court of law,[77] although in some jurisdictions other forms of remedy are provided by statute,[78] and in others proceedings in equity are allowed in some cases.[79] A statutory remedy has been regarded as exclusive.[80]

Bond of county administrator. Persons interested in an estate vested in a county administrator who has not been required to give any other bond than as county administrator are entitled to the same remedies on such bond as the law affords to persons interested in any estate on the ordinary bond of the administrator.[81]

[§ 2599] **2. Summary Proceedings.** In Alabama it is provided by statute that a final decree of the orphans' court shall have the force and effect of a judgment,[82] and that, where execution is issued on such decree and returned "no property found," generally, or in part, execution may forthwith issue against the sureties.[83] This summary remedy fails as to any surety who dies before a final decree is rendered against the principal,[84] or before a return of no property is made,[85] and cannot be extended to his personal representative.[86] The facts essential to authorize the issuance of the execution must appear of record or the execution may be quashed on motion.[87] There are somewhat similar statutory provisions for summary proceedings to enforce the liability on the bond in a few of the other states.[88] A summary remedy on the bond has been regarded as cumulative.[89]

[§ 2600] **I. Actions on Administration Bond—1. Right of Action—a. Actual Injury Necessary.** No action for a mere technical breach of an administration bond can be maintained by or for the benefit of a person to whom no injury has resulted,[90] nor is an action on the bond maintainable

69. Williams v. Stoutz, 92 Ala. 516, 9 S 155; Perkins v. Moore, 16 Ala. 9; Randolph Dist. Prob. Ct. v. Brainard, 48 Vt. 620.

70. Burton v. Tunnell, 5 Del. 182.

71. State v. Wyant, 67 Ind. 25; Nanz v. Oakley, 120 N. Y. 84, 24 NE 306, 9 LRA 223 [rev 37 Hun 495]; Sperb v. McCoun, 110 N. Y. 605, 18 NE 441, 1 LRA 490; Boyle v. St. John, 28 Hun (N. Y.) 454; Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750, 105 AmSR 890, 63 LRA 235.

72. Sperb v. McCoun, 110 N. Y. 605, 18 NE 441, 1 LRA 490; Boyle v. St. John, 28 Hun (N. Y.) 454.

Liability of corepresentatives who have given joint bond for the acts of each other see supra § 2538.

73. Stephens v. Taylor, 62 Ala. 269; Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086; Edwards v. White, 12 Conn. 28; Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750.

74. Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750, 105 AmSR 890, 63 LRA 235.

75. Wolfinger v. Forsman, 6 Pa. 294.

76. Edwards v. White, 12 Conn. 28.

77. Ark.—Euper v. State, 85 Ark. 223, 107 SW 179; Moren v. McCown, 23 Ark. 93.

Ill.—Peo. v. Medart, 166 Ill. 348, 46 NE 1095 [aff 63 Ill. A. 111].

Md.—Edes v. Garey, 46 Md. 24.

Mich.—Hatheway v. Sackett, 32 Mich. 97.

Miss.—Halfacre v. Dobbins, 50 Miss. 766; Smith v. Everett, 50 Miss. 575; Buckingham v. Owen, 14 Miss. 502.

N. J.—Rorback v. Dorsheimer, 25 N. J. Eq. 516.

S. C.—Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643; Bague v. Blacklock, 2 S. C. Eq. 602.

Eng.—Bolton v. Powell, 14 Beav. 275, 51 Reprint 292.

78. See infra § 2599.

79. See infra § 2629.

80. Com. v. Magee, 224 Pa. 166, 73 A 346.

81. Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

82. Jenkins v. Gray, 18 Ala. 100; Thompson v. Bondurant, 15 Ala. 346, 50 AmD 136.

83. Berry v. Perry, 81 Ala. 103, 1 S 118; Martin v. Tally, 72 Ala. 23; Steele v. Graves, 68 Ala. 17; Hudson v. Modawell, 64 Ala. 481; Stallworth v. Farnham, 64 Ala. 259; McGehee v. Lomax, 49 Ala. 131; Payne v. Thompson, 48 Ala. 535; Grace v. Martin, 47 Ala. 135; Jewett v. Hoagland, 30 Ala. 716; Kirby v. Anders, 26 Ala. 466; Hanna v. Price, 23 Ala. 826; Poacher v. Weisinger, 20 Ala. 102; Little v. Heard, 16 Ala. 358; Jenkins v. Gray, 16 Ala. 100; Thompson v. Bondurant, 15 Ala. 346, 50 AmD 136; Cawthorn v. Knight, 11 Ala. 579.

[a] **In whose name execution issues.**—Execution does not issue in favor of the obligee, but the parties in whose favor the decree is rendered are entitled to executions in their own names against the sureties of defendant in the decree. Cawthorn v. Knight, 11 Ala. 579.

[b] **Execution against representative of deceased executor.**—A return of "no property" on an execution issued against the administrator of a deceased executor upon final settlement of his intestate's administration will not authorize the issuance of execution against the securities of the executor. Jenkins v. Gray, 16 Ala. 100.

[c] **Judgment obtained by administrator against his coadministrator.**—An administrator who as distributee of the estate obtains a decree and execution against his coadministrator for assets received and not accounted for cannot, on a return of "no property," have execution against the joint securities of himself and his coadministrator. Little v. Heard, 16 Ala. 358.

[d] **The official bond of a sheriff** becomes an administration bond when the administration of an estate is committed to him ex officio and his sureties are liable to an execution for his default, without a previous suit on the bond. Payne v. Thompson, 48 Ala. 535.

[e] **Premature issuance.**—A summary execution against the sureties issued before the return day of the execution against the administrator individually is voidable only, and a sale made thereunder would be valid until set aside. Steele v. Tutwiler, 68 Ala. 107.

84. Thompson v. Bondurant, 15 Ala. 346, 50 AmD 136.

85. Kirby v. Anders, 26 Ala. 466.

86. Kirby v. Anders, 26 Ala. 466.

87. Hanna v. Price, 23 Ala. 826; Poacher v. Weisinger, 20 Ala. 102; Little v. Heard, 16 Ala. 358; Thompson v. Bondurant, 15 Ala. 346, 50 AmD 136.

[a] **What must appear.**—To authorize the issuance of execution there must be: First, a decree of the orphans' court against the representative on final settlement of his account; second, an execution issued on such decree with return of "no property found" generally, or as to part; third, a bond by which the securities are bound for the representative's default. Hanna v. Price, 23 Ala. 826; Little v. Heard, 16 Ala. 358.

[b] **A writ of error will not lie** where execution has improperly issued, but the execution may be quashed. Watkins v. Bassett, 3 Ala. 707.

88. Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

Ill.—McDonald v. Peo., 123 Ill. A. 346 [aff 222 Ill. 325, 78 NE 609].

Iowa.—Rainwater v. Hummell, 79 Iowa 571, 44 NW 814; Hart v. Jewett, 17 Iowa 234; Wheelhouse v. Bryant, 13 Iowa 160.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907.

Pa.—Com. v. Magee, 224 Pa. 166, 73 A 346.

Tenn.—Patterson v. Tate, 213 SW 981. See Cooper v. Burton, 7 Baxt. 406.

89. State v. Morrison, 244 Mo. 193, 148 SW 907.

90. Ala.—Reynolds v. Reynolds, 11

for an act of the representative where the injury is remote and altogether in the nature of consequential damages.[91]

[§ 2601] **b. Conditions Precedent—(1) Establishing Liability of Estate.** Before a creditor, legatee, or distributee can sue on an administration bond to enforce payment of his claim against the estate, the liability of the estate must be established.[92] So a creditor cannot sue on the bond until his claim has been established by a judgment,[93] or has been ascertained and allowed by the probate court.[94] The fact that plaintiff, after securing an allowance of his claim in the federal court, applied to the probate court for an order directing the executors to pay the same did not affect his right to recover on the executors' bond for their refusal to pay the claim.[95] Where a legacy is specific, the amount definite and certain, and the liability of the obligors absolute according to the conditions of the bond, no allowance by the court is necessary as a condition precedent to an action on the bond for a failure to pay the same.[96] But it has been held that a distributee or

Ala. 1023; Dobbs v. Cockerham, 2 Port. 328.

Cal.—Weihe v. Statham, 67 Cal. 245, 7 P 673.

Conn.—State v. Smith, 52 Conn. 557; Olmstead v. Brush, 27 Conn. 530.

Ind.—State v. Gregory, 119 Ind. 503, 22 NE 1; Masterson v. Cauble, 15 Ind. A. 515, 41 NE 477, 44 NE 377.

La.—Rison v. Young, 7 Mart. N. S. 294.

Me.—Gilbert v. Duncan, 65 Me. 469.

Mo.—State v. Smith, 68 Mo. 641; State v. Tubb, 22 Mo. A. 91.

N. H.—Gookin v. Hoit, 3 N. H. 392.

N. C.—Worthy v. Brower, 93 N. C. 344.

Oh.—Tharp v. U. S. Fidelity, etc., Co., 21 Oh. Cir. Ct. N. S. 321, 35 Oh. Cir. Ct. 416, 2 Oh. A. 28.

S. C.—Mitchell v. Connolly, 17 S. C. L. 203.

[a] **The payment of debts in an order different from that provided** is not a breach of the bond unless a creditor of the estate or the estate has suffered by reason of such payment. Masterson v. Cauble, 15 Ind. A. 515, 41 NE 477, 44 NE 377.

[b] **The failure of an administrator to take refunding bonds** (1) on dividing property among the distributees, although technically a devastavit, will not render him and his sureties liable on his administration bond where deceased had ample other property to pay all his debts. Worthy v. Brower, 93 N. C. 344. (2) Where an administrator without having sufficient assets distributed slaves without taking refunding bonds, the fact that the slaves might have been lost by emancipation if the administrator had retained them constituted no defense to a suit on the bond. Morrison v. Lavell, 81 Va. 519.

[c] **Not even nominal damages can be recovered** where plaintiff has sustained no actual injury. Olmstead v. Brush, 27 Conn. 530. Contra Edwards v. White, 12 Conn. 28. Compare Forbes v. McHugh, 152 Mass. 412, 25 NE 622 (set out supra § 2587 note 7 [e]).

91. State v. Todd, 57 Mo. 217.

92. U. S.—Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Green v. Creighton, 23 How. 90, 16 L. ed. 419.

Ala.—Gilbreath v. Manning, 24 Ala. 418; Judge Benton County Ct. v. Price, 6 Ala. 36; Thomson v. Searcy, 6 Port. 393; Faulk v. Judge Monroe County Ct., 2 Port. 538; Judge Limestone County Ct. v. Coalter, 3 Stew. & P. 348; Judge Limestone County Ct. v. French, 3 Stew. & P. 263; Judge Madison County Ct. v. Looney, 2 Stew. & P. 70.

Ark.—State v. Roth, 47 Ark. 222, 1 SW 98; George v. Elms, 46 Ark. 260; Hall v. Brewer, 40 Ark. 433; Morton v. State, 25 Ark. 46; Baker v. State, 21 Ark. 405; Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; Porter v. State, 9 Ark. 226.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117; Weihe v. Statham, 67 Cal. 84, 7 P 143; Chaquette v. Ortet, 60 Cal. 594; Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

Colo.—Metz v. Peo., 6 Colo. A. 57, 40 P 51.

Dak.—Terr. v. Bramble, 2 Dak. 189, 5 NW 945.

Del.—State v. Waples, 5 Del. 257.

Ga.—Justices' Inferior Ct. v. Sloan, 7 Ga. 31.

Ill.—Biggs v. Postlewait, 1 Ill. 198.

Ind.—Eaton v. Benefield, 2 Blackf. 52.

Ky.—Craddock v. Browning, 114 Ky. 298, 70 SW 684, 24 KyL 1074.

La.—Hayes v. Dugas, 51 La. Ann. 447, 25 S 121.

Me.—Bourne v. Todd, 63 Me. 427; Williams v. Cushing, 34 Me. 370; Potter v. Titcomb, 7 Me. 302.

Md.—State v. Hart, 57 Md. 234; Dorsey v. State, 4 Gill & J. 471; Laidler v. State, 2 Harr. & G. 277; Seegar v. State, 5 Harr. & J. 488.

Mass.—Paine v. Moffit, 11 Pick. 496; Dawes v. Head, 3 Pick. 128.

Minn.—Huntsman v. Hooper, 32 Minn. 163, 20 NW 127; Waterman v. Millard, 22 Minn. 261; Wood v. Myrick, 16 Minn. 494.

Miss.—Dobbins v. Halfacre, 52 Miss. 561; Thornton v. Glover, 25 Miss. 132; Jones v. Irvine, 23 Miss. 361; Dinkins v. Bailey, 23 Miss. 284; Probate Judge v. Phipps, 6 Miss. 59.

N. H.—Probate Judge v. Couch, 59 N. H. 39.

N. J.—Ordinary v. Barcalow, 36 N. J. L. 15; Ordinary v. Smith, 15 N. J. L. 92.

N. Y.—Potter v. Ogden, 136 N. Y. 384, 33 NE 228; Haight v. Brisbin, 100 N. Y. 219, 3 NE 74; Hood v. Hood, 85 N. Y. 561; Garvey v. U. S. Fidelity, etc., Co., 77 App. Div. 391, 79 NYS 337; Peo. v. Corlies, 3 N. Y. Super. 228; Peo. v. Barnes, 12 Wend. 492; Carow v. Mowatt, 2 Edw. 57.

Oh.—Mighton v. Dawson, 38 Oh. St. 650; Douglas v. Day, 28 Oh. St. 175; Dawson v. Dawson, 25 Oh. St. 443; Gandolfo v. Walker, 15 Oh. St. 251; State v. Cutting, 2 Oh. St. 1; Treasurer v. Lennington, 7 Oh. 266; Pickaway Treasurer v. Hall, 3 Oh. 225; Cadwallader v. Longley, 1 Disn. 497, 12 Oh. Dec. (Reprint) 756.

Okl.—U. S. Fidelity, etc., Co. v. Clutter, 179 P 754, 757 [quot Cyc]; Pennington v. Newman, 36 Okl. 594, 596, 129 P 693 [quot Cyc].

Or.—Adams v. Petrain, 11 Or. 304, 3 P 163; Hamlin v. Kinney, 2 Or. 91.

Pa.—Boyd v. Com., 36 Pa. 355; Com. v. Stub, 11 Pa. 150, 51 AmD 515; Com v. Moltz, 10 Pa. 527, 51 AmD 499; Com. v. Fretz, 4 Pa. 344; Stewart v. Moody, 4 Watts 169; Com. v. Evans, 1 Watts 437; Com. v. Dill, 1 Phila. 556.

R. I.—Wilbour Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

S. C.—Wilbur v. Hutto, 25 S. C. 246; Jones v. Anderson, 15 S. C. L. 113.

[a] **Necessity of two prior judgments.**—(1) Some of the cases hold that it is necessary, after a judgment against an executor or administrator in his official capacity, to establish a devastavit, by means of a second suit and judgment de bonis propriis, before an action can be maintained against the sureties on the administration bond. Justices' Inferior Ct. v. Sloan, 7 Ga. 31; Wilbur v. Hutto, 25 S. C. 246; Hairston v. Hughes, 3 Munf. (17 Va.) 568; Catlett v. Carter, 2 Munf. (16 Va.) 24; Gordon v. Frederick Justices, 1 Munf. (15 Va.) 1; Braxton v. Winslow, 4 Call (8 Va.) 308. (2) In Kentucky there has been some fluctuation of judicial opinion on this point. Emmerson v. Herriford, 8 Bush 229; Young v. Duhme, 4 Metc. 239; Lee v. Waller, 3 Metc. 61; McCalla v. Patterson, 18 B. Mon. 201; Clarkson v. Com., 2 J. J. Marsh. 19; Clark v. Com., 5 T. B. Mon. 99. (3) In Virginia and West Virginia statutes have been passed dispensing with a second suit, and allowing action on the bond at once upon the return of an execution nulla bona. Thompson v. Mann, 53 W. Va. 432, 44 SE 246.

93. Ala.—Thomson v. Searcy, 6 Port. 393.

Ga.—Justices' Irwin County Inferior Ct. v. Sloan, 7 Ga. 31.

Ind.—Eaton v. Benefield, 2 Blackf. 52.

Ky.—Young v. Duhme, 4 Metc. 239; Lee v. Waller, 3 Metc. 61.

Miss.—Dinkins v. Bailey, 23 Miss. 284.

Mo.—State v. St. Gemme, 23 Mo. 344.

Okl.—U. S. Fidelity, etc., Co. v. Clutter, 179 P 754, 757 [quot Cyc].

R. I.—Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

S. C.—Jones v. Anderson, 15 S. C. L. 113.

[a] **A return of nulla bona** on an execution issued on the judgment is not essential. Young v. Duhme, 4 Metc. (Ky.) 239.

[b] **Contrary view.**—In re Honnass, 14 N. J. Eq. 493, 495 [expl In re Webster, 5 N. J. Eq. 89] ("All that can properly be required is that the creditor should show a prima facie case of indebtedness on the part of the estate, and of a forfeiture of the bond by the administrator").

94. Colo.—Metz v. Peo., 6 Colo. A. 57, 40 P 51.

Mich.—Blackmore v. Perkins, 95 Mich. 446, 54 NW 945.

Minn.—St. Paul First Nat. Bank v. How, 28 Minn. 150, 9 NW 626; Waterman v. Millard, 22 Minn. 261; Wood v. Myrick, 16 Minn. 494.

Mo.—State v. St. Gemme, 23 Mo. 344.

N. H.—Probate Judge v. Couch, 59 N. H. 39.

Okl.—U. S. Fidelity, etc., Co. v. Clutter, 179 P 754, 757 [quot Cyc]; Pennington v. Newman, 36 Okl. 594, 129 P 693.

R. I.—Providence Municipal Ct. v. Bostwick, 31 R. I. 550, 78 A 53; Providence Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.

[a] **Taking possession of partnership assets.**—Where the administrator of the individual estate of a member of a firm who dies intestate gives the further bond required by the statute and takes possession of the entire property of the partnership for the purpose of settling the partnership estate and thereafter converts such property to his own use, an action can be maintained against him and the sureties on such bond by any partnership creditor without any allowance of such creditor's claim in the probate court, or any settlement of the partnership affairs in such court. Carr v. Catlin, 13 Kan. 393.

95. Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246.

96. Kreamer v. Kreamer, 52 Kan. 597, 35 P 214.

residuary legatee cannot sue on the bond until the amount for distribution and the persons entitled thereto have been ascertained by the probate court,[97] although a contrary view has also been asserted.[98] Where defendants admit a breach of forfeiture of the bond, the objection that the legatee's demand was not reduced to certainty by a judgment of a court or otherwise cannot afterward be raised.[99]

[§ 2602] **(2) Final Settlement and Accounting —(a) Action by Legatee or Distributee.** The general rule is that no action on an administration bond can be maintained by a legatee or distributee for the nonpayment of his legacy or distributive share until after a final settlement and accounting in the probate court,[1] for the reason that until then the amount applicable to such payments and the persons entitled thereto are not definitely ascertained.[2] There are, however, cases in which this rule has been denied,[3] and it has also been held that, where no accounting can be had, as in the case of a representative who converts the assets of the estate to his own use and dies insolvent in a foreign jurisdiction, a court of equity will enforce the liability of the sureties without requiring an accounting.[4] Where a representative dies, absconds, or is beyond the jurisdiction of the court, the proper method in order to ascertain whether he is liable and to what extent so as to bind the sureties on his official bond is by a proceeding in the nature of a civil action wherein the sureties are made parties.[5] So also, it has been held that, in an equitable suit on the bond to recover legacies which were a charge upon real estate devised to the administrator with the will annexed who converted the personalty to his own use and died insolvent, the complaint charging that nothing remained of the estate of the testator or of the administrator which could be reached, an accounting was not necessary as the basis of equity jurisdiction.[6]

[§ 2603] **(b) Action by Creditor.** It has been held that a creditor cannot sue on the bond until after a final accounting and settlement;[7] but a contrary view has also been asserted,[8] and it has been laid down that a creditor may, before final settlement, sue on the bond for the nonpayment of a claim which has been judicially ascertained and ordered to be paid,[9] or to recover damages for acts of maladministration constituting a breach of the conditions of the bond,[10] and that if the principal has left the state and the court cannot get jurisdiction over him to compel an accounting an action may nevertheless be maintained against the sureties.[11]

[§ 2604] **(c) Action by Successor in Office.** A suit on the bond for failure to pay over assets of the estate to a successor in office may, it has been held, be maintained before final settlement;[12] but this has also been denied.[13]

[§ 2605] **(3) Citation to Account.** In some jurisdictions an action on the bond for a failure to account cannot be maintained until there has been a citation or order for an accounting and a failure to comply therewith,[14] but in others no citation or order is necessary.[15]

[§ 2606] **(4) Prior Judgment against Princi-**

97. Judge Madison County Ct. v. Looney, 2 Stew. & P. (Ala.) 70; Dobbins v. Halfacre, 52 Miss. 561; Thornton v. Glover, 25 Miss. 132; U. S. Fidelity, etc., Co. v. Clutter, (Okl.) 179 P 754, 757 [quot Cyc]; Pennington v. Newman, 36 Okl. 594, 129 P 693.

98. Probate Judge v. Lee, 72 N. H. 247, 56 A 188.

99. White v. Stanwood, 4 Pick. (Mass.) 380.

1. Ala.—Judge Limestone County Ct. v. Coalter, 3 Stew. & P. 348.

Ark.—Planters' Mut. Ins. Assoc. v. Harris, 96 Ark. 222, 131 SW 949.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117; Weihe v. Statham, 67 Cal. 84, 7 P 143.

Del.—State v. Waples, 5 Del. 257.

La.—Chapron v. Chapron, 41 La. Ann. 486, 6 S 810; Kemper v. Splane, 4 La. Ann. 486.

Miss.—Jones v. Irvine, 23 Miss. 361.

Mo.—Ridgway v. Kerfoot, 22 Mo. A. 661.

N. J.—O'Neil v. Freeman, 45 N. J. L. 208; Ordinary v. Barcalow, 36 N. J. L. 15.

Oh.—Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769; Pickaway Treasurer v. Hall, 3 Oh. 225.

Okl.—Pennington v. Newman, 36 Okl. 594, 129 P 693.

S. C.—Davant v. Pope, 40 S. C. L. 247; Ordinary v. McClure, 17 S. C. L. 7, 19 AmD 648.

Tex.—Buchanan v. Bilger, 64 Tex. 589.

[a] **A general finding of a balance** in the hands of the executor, and an order to distribute it, is not a sufficient foundation for the action; but the specific amount, if any, due to plaintiff, must have been first fixed by a court of competent jurisdiction, as provided by law. Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769.

[b] **Unless a distributee has tendered a refunding bond** he cannot sue until after final settlement. Judge Limestone County Ct. v. Coalter, 3 Stew. & P. (Ala.) 348.

2. Jones v. Irvine, 23 Miss. 361; O'Neil v. Freeman, 45 N. J. L. 208; Ordinary v. Barcalow, 36 N. J. L. 15.

3. Robinson v. Elam, 11 KyL 307; Probate Judge v. Lee, 72 N. H. 247, 56 A 188; Williams v. Hicks, 5 N. C. 437.

4. Bischoff v. Engel, 10 App. Div. 240, 41 NYS 815.

5. Reither v. Murdock, 135 Cal. 197, 67 P 784.

6. Towner v. Tooley, 38 Barb. (N. Y.) 598.

7. Com. v. Magee, 220 Pa. 201, 69 A 805; Easterling v. Thompson, 24 S. C. L. 346; Reed v. Hume, 25 Utah 248, 70 P 998; Marlboro Dist. Prob. Ct. v. Chapin, 31 Vt. 375.

[a] **A bond given on a sale of real estate,** to secure the proper application of the proceeds, is within the rule. Com. v. Magee, 220 Pa. 201, 69 A 805.

[b] **Deceased executor.**—Creditors cannot proceed against the sureties on the bond of a deceased executor without proceeding against the administrator de bonis non for an accounting. Easterling v. Thompson, 24 S. C. L. 346.

8. Bonny v. Brashear, 19 La. 383.

9. Rahe v. Jobusch, 197 Ill. A. 200; Parmlee v. Brashear, 11 La. 329; U. S. Fidelity, etc., Co. v. Clutter, (Okl.) 179 P 754.

10. Ford v. Kittredge, 28 La. Ann. 113; Parmele v. Brashear, 16 La. 72; Probate Judge v. Lee, 72 N. H. 247, 56 A 188.

[a] **Suit for waste.**—A creditor cannot sue on the bond for waste unless it appears that the administration is closed, or that there are no assets in the representative's hands, subject to the orders of the probate court, sufficient to pay the debts of the creditor who sues. Hall v. McGehee, 34 Tex. 386.

11. Scharmann v. Schoell, 23 App. Div. 398, 48 NYS 306.

12. State v. Flynn, 48 Mo. 413; State v. Porter, 9 Mo. 356; Douglas v. Day, 28 Oh. St. 175; Chapman v. Brite, 4 Tex. Civ. A. 506, 23 SW 514.

13. Statham v. Brooke, (Ark.) 215 SW 581; Hudson v. Barratt, 62 Kan. 137, 61 P 737; Adams v. Petrain, 11 Or. 304, 3 P 163.

14. Ala.—Judge Madison County Ct. v. Looney, 2 Stew. & P. 70.

Cal.—Ashurst v. Fountain, 67 Cal. 18, 6 P 849.

Me.—Gilbert v. Duncan, 65 Me. 469; Potter v. Cummings, 18 Me. 55; Potter v. Titcomb, 7 Me. 302; Butler v. Ricker, 6 Me. 268; Nelson v. Jaques, 1 Me. 139.

N. H.—Probate Judge v. Couch, 59 N. H. 39; Hurlburt v. Wheeler, 40 N. H. 73.

R. I.—Westerly Prob. Ct. v. Potter, 24 R. I. 274, 52 A 1085; Pawtucket Prob. Ct. v. Williams, 23 R. I. 515, 51 A 101; Providence Municipal Ct. v. McCulla, 21 R. I. 273, 43 A 182; West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844; Providence Municipal Ct. v. McElroy, 18 R. I. 749, 30 A 796; Providence Municipal Ct. v. Henry, 11 R. I. 563; Dunnell v. Providence Municipal Ct., 9 R. I. 189; Glocester Prob. Ct. v. Eddy, 8 R. I. 339.

Vt.—Georgia Dist. Prob. Ct. v. Vanduzer, 13 Vt. 135.

[a] **Insolvent estates** are not within the application of the rule. Webb v. Gross, 79 Me. 224, 9 A 612. Contra Georgia Dist. Prob. Ct. v. Vanduzer, 13 Vt. 135.

15. Mass.—Fuller v. Cushman, 170 Mass. 286, 49 NE 631; Richardson v. Oakman, 15 Gray 57.

N. C.—State v. Davidson, 79 N. C. 423.

Pa.—Com. v. Bryan, 8 Serg. & R. 128.

S. C.—Ordinary v. Hunt, 26 S. C. L. 380 [in effect overr Simkins v. Powers, 11 S. C. L. 213; Ordinary v. Williams, 10 S. C. L. 587; Lining v. Giles, 5 S. C. L. 530].

Eng.—Canterbury v. Wills, 1 Salk. 315, 91 Reprint 278.

pal.[16] In some jurisdictions it is held that an action cannot be brought on an administration bond until after a judgment against the principal establishing his liability,[17] but in others an action may be maintained on the bond in the first instance against both principal and sureties without a prior judgment against the representative alone.[18]

In equity, it is held that, even though the rule might be otherwise at law, the liability of sureties may be enforced without a prior judgment against the principal.[19] But a suit against the sureties alone to which neither the administrator nor his representative is made a party cannot be maintained without a prior judgment against the administrator,[20] except where such joinder is impossible and plaintiff unless allowed to proceed against the sureties alone would be left remediless.[21]

[§ 2607] **(5) Return of Execution against Principal.**

16. Establishing devastavit by separate suit against principal see infra § 2608.

17. U. S.—Kendall v. Creighton, 23 How 90, 16 L. ed. 419; U. S. v. Coxe, 18 How. 100, 15 L. ed. 299.

Ala.—Stakely v. Presbyterian Church Foreign Missions, 145 Ala. 379, 39 S 653; Presley v. Weakley, 135 Ala. 517, 33 S 434, 93 AmSR 39; May v. Kelly, 61 Ala. 489; Fretwell v. McLemore, 52 Ala. 124; Ward v. Yonge, 45 Ala. 474; Holley v. Acre, 23 Ala. 603; Kyle v. Mays, 22 Ala. 692; Perkins v. Moore, 16 Ala. 9; Judge Benton County Ct. v. Price, 6 Ala. 36; Moore v. Armstrong, 9 Port. 697; Thomson v. Searcy, 6 Port. 393; Faulk v. Judge Monroe County Ct., 2 Port. 538; Judge Limestone County Ct. v. Coalter, 3 Stew. & P. 348; Judge Limestone County Ct. v. French, 3 Stew. & P. 263; Judge Madison County Ct. v. Looney, 2 Stew. & P 70; Moore v. Chapman, 2 Stew. 466, 20 AmD 56.

Alaska. — Decker v. Decker, 3 Alaska 121.

Ark.—State v. Roth, 47 Ark. 222, 1 SW 98; George v. Elms, 46 Ark. 260; Hall v. Brewer, 40 Ark. 433; Morton v. State, 25 Ark. 46; Baker v. State, 21 Ark. 405; Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; Porter v. State, 9 Ark. 226.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117; Reither v. Murdock, 135 Cal. 197, 67 P 784; Weihe v. Statham, 67 Cal. 84, 7 P 143; Chaquette v. Ortet, 60 Cal. 594.

Dak.—Terr. v. Bramble, 2 Dak. 189, 5 NW 945.

Del.—State v. Waples, 5 Del. 257.

D. C.—American Bonding, etc., Co. v. U. S., 23 App. 535.

Ky.—Craddock v. Payton, 114 Ky. 298, 70 SW 684, 24 KyL 1074. Contra Clarkson v. Com., 2 J. J. Marsh. 19.

La.—Thompson v. American Surety Co., 144 La. 1097, 81 S 731; Ricks v. Gantt, 35 La. Ann. 920; Pickett v. Gilmer, 32 La. Ann. 991.

Me.—Drew v. Provost, 98 Me. 422, 57 A 587; Gilbert v. Duncan, 65 Me. 469; Bourne v. Todd, 63 Me. 427; Williams v. Cushing, 34 Me. 370; Potter v. Titcomb, 7 Me. 302; Butler v. Ricker, 6 Me. 268; Nelson v. Jaques, 1 Me. 139.

Md.—State v. Hart, 57 Md. 234; Dorsey v. State, 4 Gill & J. 471; Laidler v. State, 2 Harr. & G. 277; Seegar v. State, 5 Harr. & J. 488.

Mass.—McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091; Choate v. Jacobs, 136 Mass. 297; Paine v. Moffit, 11 Pick. 496; Coffin v. Jones, 5 Pick. 61; Dawes v. Head, 3 Pick. 128; Prescott v. Parker, 14 Mass. 429.

Mich.—Grady v. Hughes, 80 Mich. 184, 44 NW 1050.

Minn.—Huntsman v. Hooper, 32 Minn. 163, 20 NW 127; Waterman v. Millard, 22 Minn. 161; Wood v. Myrick, 16 Minn. 494.

Miss.—Dobbins v. Halfacre, 52 Miss. 561; Thornton v. Glover, 25 Miss. 132; Jones v. Irvine, 23 Miss. 361; Dinkins v. Bailey, 23 Miss. 284; Probate Judge v. Phipps, 6 Miss. 59.

N. H.—Probate Judge v. Couch, 59 N. H. 39; Hurlburt v. Wheeler, 40 N. H. 73.

N. J.—Ordinary v. Smith, 15 N. J. L. 92; Dickerson v. Robinson, 6 N. J. L. 195, 10 AmD 396.

Oh.—Dawson v. Dawson, 25 Oh. St. 443; Montgomery County Treasurer v. Kemp, 5 Oh. 240; Stewart v. Champaign County Treasurer, 4 Oh. 98; Pickaway v. Hall, 3 Oh. 225; Cadwallader v. Evans, 1 Disn. 497, 12 Oh. Dec. (Reprint) 811.

Or.—In re Herren, 40 Or. 90, 66 P 688; Adams v. Petrain, 11 Or. 304, 3 P 163; Hamlin v. Kinney, 2 Or. 91.

Pa.—Boyd v. Com., 36 Pa. 355; Com. v. Stub, 11 Pa. 150, 51 AmD 515; Com. v. Moltz, 10 Pa. 527, 51 AmD 499; Com. v. Fretz, 4 Pa. 344; Stewart v. Moody, 4 Watts 169; Com. v. Evans, 1 Watts 437; Com. v. Rice, 18 Pa. Dist. 880; Com. v. Dill, 1 Phila. 556.

R. I.—Williams v. Starkweather, 28 R. I. 145, 66 A 67.

S. C.—Burnside v. Robertson, 28 S. C. 583, 6 SE 843; Wilbur v. Hutto, 25 S. C. 246; Ross v. Pettus, 45 S. C. L. 543; Ordinary v. Mortimer, 38 S. C. L. 271; Jones v. Anderson, 15 S. C. L. 113; Simkins v. Powers, 11 S. C. L. 213; Ordinary v. Williams, 10 S. C. L. 587; Ordinary v. Martin, 3 S. C. L. 552; Hoell v. Blanchard, 4 S. C. Eq. 21; Bague v. Blacklock, 2 S. C. Eq. 602.

Utah.—Reed v. Hume, 25 Utah 248, 70 P 998.

Va.—Taylor v. Stewart, 5 Call (9 Va.) 520.

W. Va.—State v. Hudkins, 34 W. Va. 370, 12 SE 495.

Eng.—Canterbury v. Tappen, 8 B. & C. 151, 15 ECL 82, 108 Reprint 1000.

[a] **Finding of misconduct by probate court.**—An action upon an administrator's bond in which it is sought to recover for alleged misconduct of, or misappropriation of, property will not lie, until the probate court has found such misconduct or misappropriation to exist, and the administrator has refused or neglected to comply with the orders of the probate court made upon such findings. Decker v. Decker, 3 Alaska 121.

[b] **An action for the representative's failure to inventory** a claim of the estate against himself cannot be maintained until the claim has been established in the orphans' court. U. S. v. Rose, 27 F. Cas. No. 16,194, 3 Cranch C. C. 174.

[c] **An unauthorized judgment against the principal,** which is reversed on a devolutive appeal, will not support an action pending the delay for appeal against the sureties on an administrator's bond. Wiemann v. Mainegra, 112 La. 305, 36 S 358.

[d] **The reversal of a judgment in favor of an administrator** is sufficient to enable the party against whom the prior judgment was rendered to maintain an action on the bond to recover money paid in satisfaction of the judgment without obtaining any further judgment against the administrator. Smoot v. Bigstaff, 32 SW 410, 17 KyL 760.

[e] **A judgment against an administrator who has died** need not be revived against his personal representative in order to make it the basis of an action against the sureties of the first administrator. Pilcher v. Drennan, 51 Miss. 873.

[f] **The sureties on the administration bond of a sheriff** acting as administrator are only liable after a judgment fixing liability against him as administrator. Terr. v. Redding, 1 Fla. 242.

[g] **The rule does not apply where:** (1) The action is brought for the benefit of an administrator de bonis non. Fuller v. Dupont, 183 Mass. 596, 67 NE 662. (2) The representative has absconded, conceals himself, or resides without the jurisdiction of the court. Com. v. Wenrick, 8 Watts (Pa.) 159. To same effect Com. v. Rice, 18 Pa. Dist. 880. (3) A removed administrator has settled his administration account, and a balance has been ascertained to remain in his hands which he refuses to pay over. Franklin County Treasurer v. McElvain, 5 Oh. 200.

18. Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388 [foll Morgan v. West, 43 Ga. 275, overr Richardson v. Whitworth, 103 Ga. 741, 30 SE 573; Henderson v. Levy, 52 Ga. 35, and expl and dist Justices Inferior Ct. v. Sloan, 7 Ga. 31; Cameron v. Justices Inferior Ct., 1 Ga. 36]; Johnson v. Koockogey, 23 Ga. 183.

Ill.—McDonald v. Peo. 222 Ill. 325, 78 NE 609; Tucker v. Peo., 87 Ill. 76; Peo. v. Miller, 2 Ill. 83; Peo. v. Allen, 8 Ill. A. 17. Contra Biggs v. Postlewait, 1 Ill. 198.

Ind.—Heady v. State, 60 Ind. 316; State v. Johnson, 7 Blackf. 529. Contra Eaton v. Benefield, 2 Blackf. 52.

Mo.—State v. Grigsby, 92 Mo. 419, 5 SW 39; State v. Shelby, 75 Mo. 482; State v. Thornton, 56 Mo. 325; State v. Flynn, 48 Mo. 413; State v. Matson, 44 Mo. 305; State v. Morton, 18 Mo. 53; Oldham v. Trimble, 15 Mo. 225; State v. Porter, 9 Mo. 356; Governor v. Chouteau, 1 Mo. 731.

N. M.—Beall v. Terr., 1 N. M. 507.

N. Y.—Potter v. Ogden, 136 N. Y. 384, 33 NE 228; French v. Dauchy, 134 N. Y. 543, 31 NE 1041; Perkins v. Stimmel, 114 N. Y. 359, 21 NE 729, 11 AmSR 659; Haight v. Brisbin, 100 N. Y. 219, 3 NE 74; Hood v. Hood, 85 N. Y. 561; Garvey v. U. S. Fidelity, etc., Co., 77 App. Div. 391, 79 NYS 337; Scharmann v. Schoell, 38 App. Div. 528, 56 NYS 498; Bischoff v. Engel, 10 App. Div. 240, 41 NYS 815; Peo. v. Corlies, 3 N. Y. Super. 228; Peo. v. Barnes, 12 Wend. 492; Carow v. Mowatt, 2 Edw. 57.

N. C.—Bratton v. Davidson, 79 N. C. 423; Strickland v. Murphy, 52 N. C. 242 [dist Ferebee v. Baxter, 34 N. C. 64]; Chairman of Ct. v. Moore, 6 N. C. 22; Williams v. Hicks, 5 N. C. 437.

Tenn.—Newsom v. Dickerson, Peck 285.

Tex.—Francis v. Northcote, 6 Tex. 185.

Vt.—Probate Judge v. Fillmore, 1 D. Chipm. 420.

[a] **Where letters of administration have been revoked because of a failure to account,** a judicial determination of the administrator's liability by a decree of the court is not necessary to authorize an action on the bond. Fassbender v. American Surety Co., 66 Misc. 6, 122 NYS 442.

19. Moore v. Armstrong, 9 Port. (Ala.) 697; Moren v. McCowen, 23 Ark. 93; Clark v. Shelton, 16 Ark. 474; Alexander v. Mercer, 7 Ga. 549.

[a] **A bill in equity praying a discovery** of the amount and time of a devastavit in order to charge successive sets of sureties according to their respective liabilities may be maintained without first obtaining a judgment against the principal. Alexander v. Mercer, 7 Ga. 549.

20. Moren v. McCown, 23 Ark. 93; Glenn v. Conner, 5 S. C. Eq. 267.

21. Moore v. Armstrong, 9 Port. (Ala.) 697.

cipal. In some jurisdictions there must be not only a judgment against the representative but also an attempt to enforce the same against him before an action on the bond can be maintained,[22] but in others a judgment establishing the principal's liability is sufficient without the necessity of a return of execution against him unsatisfied.[23]

[§ 2608] **(6) Establishing Devastavit in Separate Suit against Principal.**[24] At common law no action could be brought on an administration bond for a devastavit until after the devastavit was established in a separate suit against the principal,[25] and such appears still to be the law in some jurisdictions.[26] In most jurisdictions, however, although in some of them the earlier decisions supported the common-law rule,[27] an action for a devastavit may now be brought on the bond in the first instance without the necessity of a previous suit against the principal.[28]

[§ 2609] **(7) Removal of Unfaithful Represen-**

22. D. C.—American Bonding, etc., Co. v. U. S., 23 App. 535.

La.—Thompson v. American Surety Co., 139 La. 888, 72 S 430.

N. Y.—Hood v. Hayward, 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 20 NYCivProc 47 [mod 48 Hun 330, 1 NYS 566].

Va.—Taylor v. Stewart, 5 Call (9 Va.) 520.

W. Va.—State v. Hudkins, 34 W. Va. 370, 12 SE 495.

[a] **In Louisiana** (1) an action on the bond against the sureties cannot be maintained "until the necessary steps shall have been taken to enforce payment against the principal." Ricks v. Gantt, 35 La. Ann. 920; Gaillard v. Bordelon, 35 La. Ann. 390; Pickett v. Gilmer, 32 La. Ann. 991; Lobit v. Castille, 13 La. Ann. 563; Wilson v. Murrell, 6 Rob. 68. (2) The "necessary steps" are suit, judgment, and execution (Hayes v. Dugas, 51 La. Ann. 447, 25 S 121; Ricks v. Gantt, 35 La. Ann. 920; Gaillard v. Bordelon, 35 La. Ann. 390; Nicholson v. Ogden, 6 La. Ann. 486), (3) unless the representative is insolvent (Lynch's Succ., 14 La. Ann. 235), (4) which fact, to take the case out of the general rule, must be judicially established (Gaillard v. Bordelon, 35 La. Ann. 390; Picket v. Gilmer, 32 La. Ann. 991). (5) If execution against the principal has been returned unsatisfied or his insolvency judicially established no further proceedings before suit on the bond are necessary. Ricks v. Gantt, 35 La. Ann. 920; Bougeat v. Adams, 11 La. Ann. 78. (6) Statutory proceedings by judgment creditors of the succession by which the representative's liability to creditors for funds belonging to the succession, and her insolvency, are established may justify a suit by creditors against her sureties. Thompson v. American Surety Co., 144 La. 1097, 81 S 731.

[b] **In Maryland** (1) it is provided by statute that no creditor can maintain an action against the administrator of his debtor upon his administration bond before a non est returned upon a capias ad respondendum against the administrator, or a fieri facias returned nulla bona or other apparent insolvency. State v. Moore, 108 Md. 636, 71 A 461; Seegar v. State, 5 Harr. & J. 488. (2) This statute was held to be in force in Washington county, D. C. U. S. v. Kennedy, 26 F. Cas. No. 15,520, 4 Cranch C. C. 592; U. S. v. Queen, 27 F. Cas. No. 16,109, 3 Cranch C. C. 420. (3) The act refers in express terms to creditors and does not apply to distributees or other classes of claimants. U. S. v. King, 8 D. C. 499.

[c] **Where the letters of an executor have been revoked,** an action on his bond may, under the New York statute, be maintained without the necessity of a return of execution unsatisfied. Hood v. Hayward, 124 N. Y. 1, 26 NE 331 [mod 48 Hun 330, 1 NYS 566].

[d] **Where compliance impossible.**—Where the statutory prerequisite of return of execution against the principal cannot from the nature of the case be complied with, the liability of the sureties on the bond may be enforced in a proceeding in equity. Haines v. Meyer, 25 Hun (N. Y.) 414.

[e] **Sufficiency of return.**—(1) A fieri facias on a judgment against an administrator returned "no unadministered or unencumbered effects found," etc., is a sufficient return of nulla bona to entitle plaintiff to an action on the administration bond. Allen v. Cunningham, 3 Leigh (30 Va.) 395. (2) Where a fieri facias against an administrator directs the sheriff to levy the amount of the goods, etc., of the deceased and of defendant, a return that "the defendant has no property upon which to levy this execution" does not show a devastavit. Beasley v. Mott, 46 S. C. L. 354. (3) The surety on an administrator's bond cannot object to the return of nulla bona on a writ of fieri facias against the principal on the ground that the sheriff made his return after the return day of the writ had passed. Soldini v. Hyams, 15 La. Ann. 551.

[f] **An execution against the administrator in his individual capacity,** on his failure to pay the judgment creditors of the succession out of the funds of the estate adjudged to be in his hands, is sufficient to authorize proceedings by a creditor against the surety on the administrator's bond. Christian v. Lassiter, 23 La. Ann. 573.

[g] **A return on the day after issuance** sufficiently satisfies the requirement. American Bonding, etc., Co. v. U. S., 23 App. (D. C.) 535.

23. Ward v. Yonge, 45 Ala. 474; Emmerson v. Herriford, 8 Bush. (Ky.) 229; Lee v. Waller, 3 Metc. (Ky.) 61; McCalla v. Patterson, 18 B. Mon. (Ky.) 201 [disappr Thomas v. Com., 3 J. J. Marsh. 121]; Smoot v. Bigstaff, 32 SW 410, 17 KyL 760; Hughes v. Gray, 1 Ky. Op. 1; Governor v. Choutear, 1 Mo. 771. Compare Judge Limestone County Ct. v. Coalter, 3 Stew. & P. (Ala.) 348, 350 ("If execution had been sued out, and returned nulla bona, it would have shown the default of the executor; and the securities might then have been resorted to, on the bond").

[a] **The principal need not be pushed to insolvency,** but a judgment at law or a decree of the orphans' court is all that is necessary as a prerequisite to a suit on the bond. Com. v. Stubb, 11 Pa. 150, 51 AmD 515; Com. v. Dill, 1 Phila. (Pa.) 556.

24. **Necessity for prior judgment against principal generally** see supra § 2606.

25. Peo. v. Miller, 2 Ill. 83; Carow v. Mowatt, 2 Edw. (N. Y.) 57; Terr. v. Bramble, 2 Dak. 189, 5 NW 945; Bacheldor v. Elliott, 1 Hen. & M. (11 Va.) 10.

[a] **Suits in equity** are generally subject to the same rule that a devastavit must first be fixed by a separate suit against the principal; yet, in special cases, where from some necessity a plaintiff is obliged to come into equity in the first instance, the court will, in order to prevent circuity of action, make the sureties parties to the suit. Carow v. Mowatt, 2 Edw. (N. Y.) 57; Bacheldor v. Elliott, 1 Hen. & M. (11 Va.) 10. Contra Rorback v. Dorsheimer, 25 N. J. Eq. 516.

26. U. S.—Gilpin v. Crandell, 10 F. Cas. No. 5,449, 2 Cranch C. C. 57; Gilpin v. Oxley, 10 F. Cas. No. 5,450, 1 Cranch C. C. 568; Young v. Mandeville, 30 F. Cas. No. 18,161, 2 Cranch C. C. 444.

Alaska.—Decker v. Decker, 3 Alaska 121.

Dak.—Terr. v. Bramble, 2 Dak. 189, 5 NW 945.

N. Y.—Haight v. Brisbin, 100 N. Y. 219, 3 NE 74 [rev 7 NYCivProc 152, 1 HowPrNS 199]; Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300].

Pa.—Com. v. Moltz, 10 Pa. 527, 51 AmD 499; Com. v. Fretz, 4 Pa. 344; Com. v. Evans, 1 Watts 437.

S. C.—Wilbur v. Hutto, 25 S. C. 246; Jones v. Anderson, 15 S. C. L. 113; Lining v. Gile, 7 S. C. L. 720.

[a] **The mode of establishing a devastavit** after the death of the representative is, under the present practice in New York, by the decree of the surrogate on the accounting of his successor, and this applies to bonds given before the enactment of the code. Potter v. Ogden, 136 N. Y. 384, 33 NE 228 [aff 65 Hun 27, 19 NYS 594].

[b] **What sufficient to show devastavit.**—A decree establishing the receipt of sufficient assets and a return of nulla bona on execution sufficiently establishes a devastavit and authorizes a suit on the bond. Ordinary v. Hunt, 26 S. C. L. 380; Ordinary v. Carlisle, 26 S. C. L. 100.

27. Ill.—Biggs v. Postlewait, 1 Ill. 198.

Ky.—Clark v. Com., 5 T. B. Mon. 99.

Miss.—Probate Judge v. Phipps, 6 Miss. 59.

Oh.—Montgomery County Treasurer v. Kemp, 5 Oh. 240; Stewart v. Champaign County Treasurer, 4 Oh. 98; Cadwallader v. Evans, 1 Disn. 497, 12 Oh. Dec. (Reprint) 811.

Va.—Hairston v. Hughes, 3 Munf. (17 Va.) 568; Catlett v. Carter, 2 Munf. (16 Va.) 24; Gordon v. Frederick Justices, 1 Munf. (15 Va.) 1; Turner v. Chinn. 1 Hen. & M. (11 Va.) 53; Bacheldor v. Elliott, 1 Hen. & M. (11 Va.) 10; Braxton v. Winslow, 4 Call (8 Va.) 308, 1 Wash. (1 Va.) 31; Call v. Ruffin, 1 Call (5 Va.) 333.

[a] **Where an administrator has died or been removed,** a creditor may establish his claim against the estate by an action against the administrator de bonis non and make this judgment the basis of a suit upon the bond of the original administrator for a devastavit committed by him. Pilcher v. Drennan, 51 Miss. 373.

[b] **A judgment against the administrator in chief** cannot be made the foundation of a suit against an administrator de bonis non and his surety for a devastavit, but he may be made liable to the extent of the assets in his hands by a revival of the judgment against him. Ruff v. Smith, 31 Miss. 59.

[c] **An action against the administrator alone** could be brought on the bond without a previous suit against him personally suggesting a devastavit. Mead v. Brooking, 3 Munf. (17 Va.) 548.

28. Ala.—Dean v. Portis, 11 Ala. 104; Thomson v. Searcy, 6 Port. 393.

Colo.—Howe v. Peo., 7 Colo. A. 535, 44 P 512.

Ga.—Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125; Bailey v. McAlpin, 122 Ga. 616, 50 SE 388 [foll Morgan v. West, 43 Ga. 275, overr Richardson v. Whitworth, 103 Ga. 741, 30 SE 573;

tative. Where an administrator has converted the funds of the estate, it is not necessary that he should have been actually removed from office in order that the distributees may be entitled to sue on the bond.[29]

[§ 2610] **(8) Order for Payment.** By the weight of authority there must be not only a final settlement,[30] but also an order of court directing payment to be made, and a failure to comply therewith, before a distributee,[31] a legatee,[32] a person entitled to allowance for support,[33] or a creditor [34] can bring an action on the bond for nonpayment of his claim, unless, in the case of a creditor, it is shown that there are sufficient assets to pay the claim and that it remains unpaid after demand.[35] But there is also authority for the view that a legatee,[36] distributee,[37] or creditor [38] may sue on the bond without any order expressly directing payment to him. It is usually considered that where a representative dies, resigns, or is removed, an order for the payment over of assets to a successor in office is not necessary to entitle the latter to sue on the bond of the former representative,[39] although there is also authority for the contrary view.[40]

[§ 2611] **(9) Demand.** Where an executor or administrator has failed to pay creditors, legatees, or distributees, it is held in most jurisdictions that no demand for payment is necessary in order to maintain an action on the bond.[41] In a few jurisdictions, however, a demand against the representative is necessary;[42] but no demand is necessary against the sureties,[43] even in jurisdictions where it

Henderson v. Levy, 52 Ga. 35, and expl and dist Justices Inferior Ct. v. Sloan, 7 Ga. 31; Cameron v. Justices Inferior Ct. 1 Ga. 36].

Ill.—Peo. v. Miller, 2 Ill. 83.

Ky.—Lee v. Waller, 3 Metc. 61; Clarkson v. Com., 2 J. J. Marsh. 19; Hobbs v. Middleton, 1 J. J. Marsh. 176.

Miss.—Dobbins v. Halfacre, 52 Miss. 561.

Mo.—Oldham v. Trimble, 15 Mo. 225; Governor v. Chouteau, 1 Mo. 731.

N. C.—Lewis v. Fagan, 13 N. C. 298.

Oh.—State v. Humphreys, 7 Oh. 223.

Tenn.—Newson v. Dickerson, Peck 285.

Tex.—Francis v. Northcote, 6 Tex. 185.

Va.—Bush v. Beale, 1 Gratt. (42 Va.) 229; Dabney v. Smith, 5 Leigh (32 Va.) 13; Allen v. Cunningham, 3 Leigh (30 Va.) 395.

Wis.—Wallber v. Wilmanns, 116 Wis. 246, 93 NE 47.

[a] **A suit in chancery** lies against an administrator and the sureties on his general administration bond, and upon a bond given by him for the faithful application of the proceeds of lands without alleging or first having established the devastavit. Whitfield v. Evans, 56 Miss. 488.

[b] **Where an administrator has been removed from office,** a suit for waste may be brought against him and the sureties on his administration bond on relation of his successor in office, without recovering a previous judgment against the administrator. State v. Johnson, 7 Blackf. (Ind.) 529.

[c] **A decree of unfaithful administration** is not necessary before suing on the bond. Providence Municipal Ct. v. Bostwick, 31 R. I. 550, 78 A 53.

29. Owen v. State, 25 Ind. 371.

30. See supra §§ 2602–2604.

31. U. S.—Alexander v. Bryan, 110 U. S. 414, 4 SCt 107, 28 L. ed. 195.

Ala.—Judge Limestone County Ct. v. French, 3 Stew. & P. 263.

Alaska. — Decker v. Decker, 3 Alaska 121.

Mass.—Choate v. Jacobs, 136 Mass. 297.

N. J.—Ordinary v. Barcalow, 36 N. J. L. 15.

R. I.—Providence Municipal Ct. v. Henry, 11 R. I. 563.

S. C.—Ross v. Pettus, 45 S. C. L. 543.

Tex.—Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821.

[a] **The administrator's failure to pay over rents** of real estate received by him to the heirs will not authorize an action on the bond where there has been no order of the court directing such payment. Choate v. Jacobs, 136 Mass. 297.

[b] **Sufficiency of order or decree.**—(1) The decree for payment must definitely ascertain the person or persons to whom the payment is to be made. Kyle v. Mays, 22 Ala. 673. (2) A decree merely ascertaining the aggregate amount due will not authorize a suit on the bond by one distributee to recover his share. Browder v. Faulkner, 82 Ala. 257, 3 S 30. (3) A decree, made at the instance of one distributee, is sufficient, if it merely finds that the administrator is indebted to his intestate's estate in a gross sum, and directs him to pay the amount to the parties who may be legally entitled thereto. Ordinary v. Mortimer, 38 S. C. L. 271.

[c] **A discharge of the representative is not necessary** but only that the amount for distribution should have been ascertained and ordered to be paid. Stewart v. Morrison, 81 Tex. 396, 17 SW 15, 26 AmSR 821.

32. Mich.—Hatheway v. Sackett, 32 Mich. 97.

Miss.—Jones v. Irvine, 23 Miss. 361.

N. H.—Probate Judge v. Adams, 49 N. H. 150.

N. Y.—Loop v. Northrup, 59 Hun 75, 13 NYS 144.

Oh.—Dawson v. Dawson, 25 Oh. St. 443.

Vt.—Probate Ct. v. Kimball, 42 Vt. 320.

[a] **Where an executor is also a residuary legatee** and has given bond to pay all debts and legacies, no order for payment is necessary. Hatheway v. Sackett, 32 Mich. 97.

[b] **Sufficiency of order.**—Where the probate court makes a judgment of the superior court the basis of its decree and orders the amount of the judgment paid, such order is equivalent to a finding by the probate court and an order for distribution. Gandolfo v. Walker, 15 Oh. St. 251.

33. Hamlin v. Kinney, 2 Or. 91.

34. Ark.—Hall v. Brewer, 40 Ark. 433.

Mo.—State v. Stafford, 73 Mo. 658; State v. Modrell, 15 Mo. 421.

N. H.—Probate Judge v. Couch, 59 N. H. 506.

N. Y.—Peo. v. Barnes, 12 Wend. 492.

Vt.—Manchester Dist. Prob. Ct. v. Kent, 49 Vt. 380; Marlboro Dist. Prob. Ct. v. Chapin, 31 Vt. 373.

[a] **In the settlement of an insolvent estate,** a creditor cannot sue on the bond until the report of the commissioners has been accepted by the court and an order for payment made. Probate Judge v. Couch, 59 N. H. 506.

35. State v. Shelby, 75 Mo. 482; Governor v. Chouteau, 1 Mo. 731; Wiley v. Johnsey, 40 S. C. L. 355.

36. Gould v. Steyer, 75 Ind. 50; Heady v. State, 60 Ind. 316; Ordinary v. Barcalow, 36 N. J. L. 15; Providence Municipal Ct. v. Henry, 11 R. I. 563.

37. State v. Matson, 44 Mo. 305.

38. Johanson v. Hoff, 70 Minn. 140, 72 NW 965 (under statute).

[a] **Formerly the rule was otherwise in Minnesota.** — Waterman v. Millard, 22 Minn. 261; Wood v. Myrick, 16 Minn. 494.

39. Toffler v. Kesinger, 80 Kan. 549, 102 P 1097; Balch v. Hooper, 32 Minn. 158, 20 NW 124; State v. Porter, 9 Mo. 356.

40. Peo. v. Corlies, 3 N. Y. Super. 228.

41. Ala.—Ward v. Yonge, 45 Ala. 474; Kyle v. Mays, 22 Ala. 692.

Conn.—Rowland v. Isaacs, 15 Conn. 115; Warren v. Powers, 5 Conn. 373.

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346]; Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315 [aff 56 Ill. A. 346]; Peo. v. Pacific Surety Co., 155 Ill. A. 586. But compare Peo. v. Admire, 39 Ill. 251 (demand necessary in action for devastavit).

Ind.—Pence v. Makepeace, 75 Ind. 480; Lane v. State, 27 Ind. 108. Contra State v. Bowden, 3 Ind. 504.

Mo.—State v. Crow, 8 Mo. A. 596.

N. Y.—Peo. v. Rowland, 5 Barb. 449.

N. C.—Hoover v. Berryhill, 84 N. C. 132; Pickens v. Miller, 83 N. C. 543.

Oh.—Henry v. Doyle, 82 Oh. St. 113, 91 NE 990, 137 AmSR 769. Contra State v. Cowles, 5 Oh. St. 87; McGovney v. State, 20 Oh. 93.

Tex.—Hill v. Escort, 38 Tex. Civ. A. 487, 86 SW 367.

[a] **If the demand is rendered impossible** by the death of the representative, his sureties cannot, in an action on the bond by the distributees, avail themselves of a failure to make the demand. Peo. v. Admire, 39 Ill. 251.

[b] **When an administrator resigns,** it is his duty to pay the money in his hands belonging to the estate into court, or to his successor, and no demand is necessary before suit is brought upon his bond by the administrator de bonis non. Lane v. State, 27 Ind. 108.

42. Rogers v. Mitchell, 1 Metc. (Ky.) 22; Forbes v. Keyes, 193 Mass. 38, 78 NE 733; McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091; Fuller v. Dupont, 183 Mass. 596, 67 NE 662; Paine v. Moffit, 11 Pick. (Mass.) 496; Paine v. Stone, 10 Pick. (Mass.) 75; Coffin v. Jones, 5 Pick. (Mass.) 61; Dawes v. Head, 3 Pick. (Mass.) 128; Prescott v. Parker, 14 Mass. 429; Lanier v. Irvine, 24 Minn. 116; Wood v. Myrick, 16 Minn. 494; Providence Municipal Ct. v. Henry, 11 R. I. 563 (action by him or distributee).

[a] **Debt of representative to estate.**—The surety on the bond of an executor indebted to the testator cannot set up in defense to his liability therefor that no demand was made for the payment of the debt, it being the duty of the executor to make the demand, and the executor not being permitted to say that he could make no demand on himself. Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

43. Rogers v. Mitchell, 1 Metc.

is necessary against the principal,[44] nor is a demand required before an action by an administrator de bonis non.[45]

[§ 2612] **(10) Tender of Refunding Bond.** The tender of a refunding bond by a distributee is not a condition precedent to a right of action on the administration bond,[46] but the question whether the want of such bond was an obstacle to the settlement of the estate is for the consideration of the jury.[47]

[§ 2613] **(11) Reformation of Bond from Which Amount of Penalty Omitted.** Although the amount of the penalty is omitted from an administration bond, an action may be brought and a recovery had thereon without reformation.[48]

[§ 2614] **(12) Leave to Sue—(a) Necessity.** As the general rule an order of court granting leave to sue is a necessary condition precedent to an action on the bond,[49] although in a few jurisdictions this is not required,[50] and even in those jurisdictions where it is necessary as a general rule circumstances may render it unnecessary,[51] and leave of court is usually not required where the action is brought by an administrator de bonis non.[52] The objection that leave to sue has not been obtained can be taken only by a special plea in abatement.[53]

[§ 2615] **(b) Application and Proceedings.** The proper course in procuring leave to sue upon an administration bond is to make a written application to the court asking for such authority,[54] which should be made by the person aggrieved by the breach of the bond complained of,[55] and should state the facts upon which the application is based[56] and the interest and claim of the applicant,[57] and be duly verified.[58] The application is ex parte in its character,[59] and it is not necessary to give the obligors notice thereof,[60] or to cite the representative to show cause why it should not be granted.[61] In some cases the applicant is required to give a bond for costs.[62] The granting of leave rests somewhat in the discretion of the court.[63] It is the duty of the probate judge to see that the bond is not prosecuted at the instance of a stranger, or for the purpose of vexation or oppression,[64] but beyond this the granting of leave is practically a matter of course.[65] It is sometimes required that the certificate of leave be filed in the county court.[66]

[§ 2616] **(c) Form and Effect of Order.** The order granting leave to sue must be in writing[67] and

(Ky.) 22; Wood v. Barstow, 10 Pick. (Mass.) 368; Elwell v. Prescott, 38 Wis. 274.

44. Rogers v. Mitchell, 1 Metc. (Ky.) 22; Wood v. Barstow, 10 Pick. (Mass.) 368.

45. Fuller v. Dupont, 183 Mass. 596, 67 NE 662.

46. Mayo v. Mayo, 9 N. C. 329. See also In re Green, 8 N. J. Eq. 550 (the question of the necessity of a refunding bond as a condition precedent to an action on the administration bond cannot be considered by the probate court on a petition for leave to sue).

47. Mayo v. Mayo, 9 N. C. 329.

48. McManus v. Harrigan, 41 Misc. 615, 85 NYS 220.

49. U. S.—Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292.

Me.—Bulfinch v. Waldoboro, 54 Me. 150; Groton v. Tallman, 27 Me. 68.

Mass.—McKim v. Roosa, 183 Mass. 510, 67 NE 651; Robbins v. Hayward, 16 Mass. 524.

Minn.—Lanier v. Irvine, 24 Minn. 116; Wood v. Myrick, 16 Minn. 494.

Miss.—Washburn v. Phillips, 14 Miss. 425.

N. H.—Prescott v. Farmer, 59 N. H. 90; Probate Judge v. Kimball, 12 N. H. 165; Probate Judge v. Tillotson, 6 N. H. 292.

N. J.—In re Green, 8 N. J. Eq. 550; In re Webster, 5 N. J. Eq. 89.

N. Y.—Prentiss v. Weatherly, 68 Hun 114, 22 NYS 680 [aff 144 N. Y. 707 mem, 39 NE 858 mem]; Hood v. Hayward, 48 Hun 330, 1 NYS 566 [mod on other grounds 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 20 NY CivProc 47]; Peo. v. Rowland, 5 Barb. 449; Scofield's Est., 3 NYCivProc 323; Scofield v. Adriance, 1 Dem. Surr. 196.

Oh.—Everett v. Waymire, 30 Oh. St. 308.

Vt.—Probate Ct. v. Sawyer, 59 Vt. 57, 7 A 281; Rutland Prob. Ct. v. Hull, 58 Vt. 306, 3 A 472.

Wis.—Johannes County Judge v. Youngs, 48 Wis. 101, 4 NW 32; Elwell v. Prescott, 38 Wis. 274.

[a] **Where claims not fixed.**—Leave to sue is necessary in cases where the claims of creditors or distributees have not been ascertained by judgment. Groton v. Tallman, 27 Me. 68.

50. State v. Wilson, 38 Md. 338; Bartels v. Gove, 4 Wash. 632, 30 P 675.

51. See cases infra this note.

[a] **Illustration.**—Where an administrator did not pay executions on judgments against the estate, nor show goods to satisfy them, and made no representation of insolvency, or its equivalent, creditors could sue on the bond without authority of the probate court. Harmon v. Sweet, 221 Mass. 587, 109 NE 942.

[b] **Residuary legatees** may sue without leave of court. Williams v. Cushing, 34 Me. 370.

[c] **Claim liquidated.**—Suit may be brought without an order of court by a creditor, legatee, or distributee, provided his claim has been first liquidated by allowance, judgment, or award. State v. Cutting, 2 Oh. St. 1.

52. Prescott v. Farmer, 59 N. H. 90; Hood v. Hayward, 48 Hun 330, 1 NYS 566 [mod on other grounds 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 20 NYCivProc 47]; Dunne v. American Surety Co., 34 Misc. 584, 70 NYS 391.

53. Prindle v. Holcomb, 45 Conn. 111; Johannes County Judge v. Youngs, 48 Wis. 101, 4 NW 32.

54. Fay v. Rogers, 2 Gray (Mass.) 175.

55. In re Northampton County Sav. Bank, 32 N. J. Eq. 689; In re Webster, 5 N. J. Eq. 89; In re Webster, 4 N. J. Eq. 558; Probate Ct. v. Sawyer, 59 Vt. 57, 7 A 281.

[a] **The father of an infant** interested in the estate of a deceased person, having himself no adverse interest therein, may petition the judge of probate, as the next friend of the infant, for leave to sue the administration bond. Stevens v. Cole, 7 Cush. (Mass.) 467.

[b] **Application by attorneys.**—Where application is made by attorneys in behalf of parties who have a cause of action, leave granted to the attorneys is sufficient leave to those whom they represent. Probate Ct. v. Sawyer, 59 Vt. 57, 7 A 281.

56. In re Webster, 4 N. J. Eq. 558; Roberts v. Weadock, 98 Wis. 400, 74 NW 93.

57. Probate Judge v. Tillotson, 6 N. H. 292.

58. In re Webster, 4 N. J. Eq. 558.

[a] **The want of verification** of the facts stated in a petition for leave to prosecute an administration bond is not sufficient ground for vacating the order for prosecution. In re Green, 8 N. J. Eq. 550.

59. Bennett v. Woodman, 116 Mass. 518; Richardson v. Oakman, 15 Gray (Mass.) 57; Washburn v. Phillips, 14 Miss. 425; Probate Judge v. Kimball, 12 N. H. 165; Wallber v. Wilmanns, 116 Wis. 246, 93 NW 47; Roberts v. Weadock, 98 Wis. 400, 74 NW 93; Elwell v. Prescott, 38 Wis. 274.

60. Bulfinch v. Waldoboro, 54 Me. 150; Fuller v. Cushman, 170 Mass. 286, 49 NE 631; Richardson v. Oakman, 15 Gray (Mass.) 57; Probate Judge v. Kimball, 12 N. H. 165; Roberts v. Weadock, 98 Wis. 400, 74 NW 93; Elwell v. Prescott, 38 Wis. 274.

61. Peo. v. Rowland, 5 Barb. (N. Y.) 449.

62. Dickerson v. Miller, 13 N. J. L. 3; Rutland Prob. Ct. v. Hull, 58 Vt. 306, 3 A 472.

[a] **To whom bond delivered.**—Dickerson v. Miller, 13 N. J. L. 3.

63. Probate Judge v. Kimball, 12 N. H. 165; In re Webster, 5 N. J. Eq. 89.

"So much so at least, that it cannot be assigned for error, nor made the subject of review in an appellate court." In re Webster, 4 N. J. Eq. 558, 559.

64. Lee's Case, 43 N. J. Eq. 172, 11 A 125; In re Honnass, 14 N. J. Eq. 493.

65. In re Honnass, 14 N. J. Eq. 493; Washburn v. Phillips, 14 Miss. 425.

66. Probate Ct. v. Niles, 32 Vt. 775 (the requirement that it be filed at the time the writ is returned need not be strictly complied with but it may in the discretion of the court be filed later).

67. Fay v. Rogers, 2 Gray (Mass.) 175.

[a] **If the decree bears date prior to the bringing of the action** evidence is not admissible at the trial to show that it was not reduced to writing till after the action was brought; the proper remedy is by an application to the judge of probate to amend the record. Richardson v. Hazleton, 101 Mass. 108.

[b] **An indorsement on a certified copy of the bond** that it appeared to the satisfaction of the court that the petitioner was a creditor of the estate and that the administrator had neglected to file an inventory or to render an account as required by law and that on the petitioner's request an action is authorized to be brought on the bond is a sufficiently formal

signed by the judge.[68] If not in conformity with the statute it may be amended by the court.[69] It has been held that the order granting leave to sue is conclusive in all collateral proceedings,[70] and its validity cannot be questioned in an action on the bond;[71] but it has also been asserted that defendants in such action are at liberty to show that there was no previous proceeding which authorized the surrogate to order the bond to be prosecuted.[72] The representative cannot appeal from an order authorizing an action to be brought on his bond.[73] After the commencement of an action on the bond, the probate court cannot effectively vacate its order granting leave to bring such action.[74]

[§ 2617] **2. Time to Sue—a. Premature Actions.** Subject to conditions precedent that must be complied with,[75] an action on an administration bond may be brought as soon as there has been a breach of its conditions.[76] A statute providing that an executor or administrator shall not be liable to any suit by a creditor until after the expiration of eighteen months from the date of his administration bond has been held not to apply to an action upon the bond seeking to enforce a personal liability of the representative for a breach of the duties of his trust.[77] The existence of a small unpaid allowance in favor of a creditor of a decedent's estate at the commencement of an action by the distributees for a breach of the administrator's bond does not render the action premature, where the allowance is paid by a distributee before the filing of the amended petition, in which all claim to reimbursement therefor is waived.[78] An action on the bond cannot be brought pending an appeal from the order on which the right of action is based,[79] but a mere right to appeal from the order does not suspend the right of action on the bond during the period allowed for taking such appeal.[80]

[§ 2618] **b. Limitations—(1) Period of Limitation.** Statutes limiting the time within which creditors of the estate must commence actions on their claims[81] do not apply to actions on an administration bond,[82] and the same has been held to be true with respect to general statutes of limitations;[83] but in a number of jurisdictions special statutes have been enacted limiting the time within which actions on administration bonds must be brought.[84] It has been held that such a statute applies to an action on the bond of a public administrator,[85] and that the lapse of the prescribed period will bar summary proceedings by way of citation and attachment as well as an action at law on the bond.[86]

[§ 2619] **(2) When Statute Begins to Run.** The period of limitations with respect to an action on an administration bond begins to run as soon as, but not until, a cause of action on the bond accrues.[87] In jurisdictions where such conditions precedent are essential to the commencement of an action on the bond,[88] the statute will not begin to run until there has been a judgment or order establishing plaintiff's claim as a liability of the estate,[89] a judicial ascertainment of the default of the princi-

authority. Johannes County v. Youngs, 48 Wis. 101, 4 NW 32.

68. Richardson v. Hazelton, 101 Mass. 108; Fay v. Rogers, 2 Gray (Mass.) 175.

69. Bennett v. Russell, 2 Allen (Mass.) 537.

70. Bennett v. Woodman, 116 Mass. 518; Ordinary v. Poulson, 43 N. J. L. 33; In re Webster, 4 N. J. Eq. 558; Wallber v. Wilmanns, 116 Wis. 246, 93 NW 47; Roberts v. Weadock, 98 Wis. 400, 74 NW 93.

71. Bennett v. Woodman, 116 Mass. 518; Richardson v. Hazelton, 101 Mass. 108; Ordinary v. Poulson, 43 N. J. L. 33; In re Webster, 4 N. J. Eq. 558; Peo. v. Downing, 6 N. Y. Super. 189; Peo. v. Falconer, 4 N. Y. Super. 81.

[a] **Fraud or collusion.**—Evidence tending to show that the order granting leave was obtained by fraud or collusion is inadmissible. Peo. v. Downing, 6 N. Y. Super. 189.

72. Peo. v. Corlies, 3 N. Y. Super. 228.

73. Bulfinch v. Waldoboro, 54 Me. 150.

74. Connecticut Mut. L. Ins. Co. v. Schurmeier, 125 Minn. 368, 147 NW 246.

75. See supra §§ 2600–2616.

76. Minor v. Mead, 3 Conn. 289; Greer v. State, 2 Oh. St. 574; Belt v. Cetti, 53 Tex. Civ. A. 102, 118 SW 241.

[a] **For failing to file an inventory** within the time specified in the conditions of the bond an action may be maintained as soon as that time expires and it is not necessary to wait for a final accounting. Minor v. Mead, 3 Conn. 289.

[b] **Oustanding debts** do not prevent suit on a bond given by a husband as administrator of the community estate. Belt v. Cetti, 53 Tex. Civ. A. 102, 118 SW 241.

77. Greer v. State, 2 Oh. St. 574 [dist Hammerle v. Kramer, 12 Oh. St. 252 (holding that such statute bars an action by a creditor against the representative and his sureties on an obligation of the decedent)].

78. State v. Dickson, 213 Mo. 66, 111 SW 817.

79. Wiren v. Nesbit, 85 Tex. 286, 20 SW 128.

80. Lesly v. Osborn, 31 S. C. L. 90.

81. See supra §§ 1925–1953.

82. Fuller v. Dupont, 183 Mass. 596, 67 NE 662; State v. Morrison, 244 Mo. 193, 148 SW 907.

83. Gold v. Bush, 4 Baxt. (Tenn.) 579; Georgia Dist. Prob. Ct. v. Chandler, 7 Vt. 111.

84. U. S.—Alexander v. Bryan, 110 U. S. 414, 4 SCt 107, 28 L. ed. 195.

Ala.—Stakely v. Presbyterian Church Foreign Missions, 145 Ala. 379, 39 S 653; Harrison v. Heflin, 54 Ala. 552.

Ark.—Hall v. Cole, 71 Ark. 601, 76 SW 1076.

Conn.—Edwards v. White, 12 Conn. 28.

Ga.—Whelchel v. Haynes, 148 Ga. 307, 96 SE 568.

Ky.—Hamilton v. Wright, 87 SW 1093, 27 KyL 1144; Craddock v. Payton, 114 Ky. 298, 70 SW 684, 24 KyL 1074; Hargis v. Sewell, 87 Ky. 63, 7 SW 557, 9 KyL 920.

Md.—State v. Boyd, 2 Gill & J. 365; State v. Wright, 4 Harr. & J. 148.

Mass.—Robinson v. Hodge, 117 Mass. 222; Wells v. Child, 12 Allen 330; Dawes v. Shed, 15 Mass. 6, 8 AmD 80.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907; Nelson v. Barnett, 123 Mo. 564, 27 SW 520; Martin v. Knapp, 45 Mo. 48; State v. Zorn, 138 Mo. A. 713, 119 SW 517; State v. Ennis, 79 Mo. A. 12.

N. C.—Gill v. Cooper, 111 N. C. 311, 16 SE 316; Brawley v. Brawley, 109 N. C. 524, 14 SE 73; Reaves v. Davis, 99 N. C. 425, 6 SE 715; Vaughan v. Hines, 87 N. C. 445.

Pa.—Com. v. Miller, 195 Pa. 230, 45 A 921.

Tex.—Martinez v. Gutierrez, (Civ. A.) 172 SW 766.

Va.—Turk v. Ritchie, 104 Va. 587, 52 SE 339; Morrison v. Lavell, 81 Va. 519; Sharpe v. Rockwood, 78 Va. 24; Leake v. Leake, 75 Va. 792; Tilson v. Davis, 32 Gratt. (73 Va.) 92; Franklin v. Depriest, 13 Gratt. (54 Va.) 257.

W. Va.—Hoge v. Vintroux, 21 W. Va. 1.

Wis.—McGonigal v. Colter, 32 Wis. 614.

[a] **The limitation prescribed by the Pennsylvania statute of April 4, 1797,** is not applicable to an original administration bond taken by the register, but only to an additional bond given by the executor or administrator by order of the orphans' court. Com. v. Miller, 195 Pa. 230, 45 A 921; Miltenberger v. Com., 14 Pa. 71; Com. v. Patterson, 8 Watts 515.

85. Ragland v. Calhoun, 36 Ala. 606; State v. Ennis, 79 Mo. A. 12.

[a] **Where a sheriff acts as public administrator** by virtue of his office of sheriff, the statute limiting actions on the official bonds of sheriffs does not apply. Ragland v. Calhoun, 36 Ala. 606.

86. Philips v. State, 5 Oh. St. 122, 64 AmD 635.

87. Ill.—Peo. v. Ochiltree, 48 Ill. A. 220; Frank v. Peo., 47 Ill. A. 248.

Ind.—Craven v. State, 50 Ind. A. 30, 97 NE 1021.

Minn.—Ganser v. Ganser, 83 Minn. 199, 86 NW 18, 85 AmSR 461.

Mo.—State v. Pratte, 8 Mo. 286, 40 AmD 140.

Wis.—McGonigal v. Colter, 32 Wis. 614.

See also cases supra § 2618 note 83.

88. See supra §§ 2601–2616.

89. Ala.—Martin v. Tally, 72 Ala. 23.

Ill.—Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315.

Ky.—Craddock v. Payton, 114 Ky. 298, 70 SW 684, 24 KyL 1074.

La.—Ricks v. Gantt, 35 La. Ann. 920.

Mo.—State v. St. Gemme, 23 Mo. 344.

Nebr.—Mortenson v. Bergthold, 64 Nebr. 208, 89 NW 742.

N. Y.—Betts v. Avery, 46 App. Div. 342, 61 NYS 525.

S. C.—Swindersine v. Miscally, 8 S. C. Eq. 304.

Va.—Robertson v. Gillenwaters, 85 Va. 116, 7 SE 371; Franklin v. Depriest, 13 Gratt. (54 Va.) 257.

pal,[90] a final accounting,[91] an order of payment of legacies,[92] or a demand for payment;[93] but it has been held that an order granting leave to sue, although essential, is no part of the cause of action but merely a step in the remedy, and that the statute will run notwithstanding failure to procure such an order.[94] For failing to include property in a report of assets, the statute begins from the filing of the report;[95] for converting property of the estate, from the date of conversion;[96] for failure to pay over assets to a successor in office, from the time of demand for payment;[97] for a failure to account, from the time when an accounting is demanded and refused;[98] and for failing to comply with an order of court, from the time limited in the order for such compliance.[99] A right of action in favor of an administrator de bonis non accrues on revocation of the letters of the former representative.[1]

[§ 2620] **c. Laches.** A plaintiff may be barred on the ground of laches from bringing an action on an administration bond,[2] and a presumption of payment or satisfaction arises after a lapse of twenty years from the accrual of the right.[3] It has been held, however, that laches short of the full period of limitation will not defeat an action on the bond,[4] and that, where an action is brought on an administrator's bond from which the amount of the penalty was omitted, and the complaint contains allegations authorizing either legal or equitable relief and demands for both, on proof entitling plaintiff to legal relief plaintiff may recover on the bond as a sealed instrument, although there has been such a lapse of time as would bar relief in equity by way of reformation.[5] Where the action is based on fraud of the representative, and is brought as soon as the fraud is discovered, laches cannot be imputed to plaintiff.[6]

[§ 2621] **3. Defenses—a. In General.** In an action on an administration bond the sureties are subrogated to all defenses which would have been available to the principal.[7] They may plead and prove any fact which would negative the liability of the principal,[8] and also any facts which would discharge them from liability,[9] regardless of what the liability of the principal alone might be;[10] but they cannot set up a defense which inures exclusively to the estate and not to the representative.[11] In an action for failure to pay a claim against the estate it is a good defense to show that plaintiff has in his possession[12] or has converted to his own use[13] sufficient funds of the estate to pay the claim, or that the person for whose benefit the action is brought has made a valid settlement of his claim with the representative.[14] A surety on an administration bond, who replaced a former surety, is entitled in a proceeding to charge the administrator with a devastavit, to show in defense that, if there was such a devastavit, it took place prior to the

90. Stakely v. Presbyterian Church Foreign Missions, 145 Ala. 379, 39 S 653; Eatman v. Eatman, 82 Ala. 223, 2 S 729; Bonner v. Young, 68 Ala. 35; Wright v. Lang, 66 Ala. 389; Jones v. Ritter, 56 Ala. 270; Fretwell v. McLemore, 52 Ala. 124.

91. Rives v. Flinn, 47 Ala. 481; Cole v. Hall, 85 Ark. 144, 107 SW 175; Hall v. Cole, 71 Ark. 601, 76 SW 1076; George v. Elms, 46 Ark. 260; Vaughan v. Hines, 87 N. C. 445; Colburn v. Holland, 35 S. C. Eq. 176; Pettus v. Clawson, 25 S. C. Eq. 92.

[a] **In case of the nonpayment of a residuary legacy,** if all prior claims have been satisfied, the time for contesting the will has expired, and there are assets solely applicable to the payment of the legacy, a right of action accrues and the statute begins to run, although there has been no final settlement or decree of distribution. State v. Grigsby, 92 Mo. 419, 5 SW 39.

[b] **Where an administrator dies before final settlement,** the statute does not begin to run from his death but from the decree of the court on the final settlement made by his representative. Williams v. State, 68 Miss. 680, 10 S 52, 24 AmSR 297.

92. Alexander v. Bryan, 110 U. S. 414, 4 SCt 107, 28 L. ed. 195 [aff 4 F. Cas. No. 2,064, 14 Woods 529]; George v. Elms, 46 Ark. 260; Mortenson v. Bergthold, 64 Nebr. 208, 89 NW 742.

[a] **A probate decree merely ascertaining the amount due** the legatee but making no valid order directing its payment will not start the running of the statute. Bryan v. Alexander, 4 F. Cas. No. 2,064, 14 Woods 529 [aff 110 U. S. 414, 4 SCt 107, 28 L. ed. 195].

[b] **Where the time for settlement and distribution is limited by statute** and the court neglects at the expiration of this period to make a decree of distribution, the statute of limitations begins from the time the right to compel a distribution accrues. Biddle v. Wendell, 37 Mich. 452.

93. Lanier v. Irvine, 24 Minn. 116; Wood v. Byrick, 16 Minn. 494.

[a] **Thirty days after refusal.**—Where a representative has failed to pay over money in pursuance of an order of court, the statute begins to run thirty days after refusal to pay on demand the amount ordered. Frank v. Peo., 147 Ill. 105, 35 NE 530 [aff 47 Ill. A. 248].

94. Ganser v. Ganser, 83 Minn. 199, 86 NW 18, 85 AmSR 461 [overr Lanier v. Irvine, 24 Minn. 116; Wood v. Myrick, 16 Minn. 494] (statute running from date of decree of distribution).

95. Peo. v. Ochiltree, 48 Ill. A. 220.

96. Carr v. Catlin, 13 Kan. 393.

97. Gill v. Cooper, 111 N. C. 311, 16 SE 316.

98. Stonestreet v. Frost, 123 N. C. 290, 31 SE 718.

99. Avery v. Miller, 81 Mich. 85, 45 NW 503.

1. State v. Morrison, 244 Mo. 193, 148 SW 907.

2. Rudolph v. Underwood, 88 Ga. 664, 16 SE 55; Tucker v. Stewart, 147 Iowa 294, 126 NW 183; Clark v. Chase, 101 Me. 270, 64 A 493.

3. Ala.—Harrison v. Heflin, 54 Ala. 552.

Me.—Potter v. Titcomb, 7 Me. 302.

N. C.—Thompson v. Nations, 112 N. C. 508, 17 SE 432.

Pa.—Diemer v. Sechrist, 1 Penr. & W. 419.

S. C.—Burnside v. Donnon, 34 S. C. 289, 13 SE 465.

[a] **The presumption begins to run** (1) not from the date of the bond but from the time when plaintiff is entitled to resort to it. Backestoss v. Com., 8 Watts (Pa.) 286. (2) The lapse of twenty years from the date of the bond raises no presumption of payment to the heirs where there has been no decree of distribution. Potter v. Titcomb, 7 Me. 302.

[b] **The presumption is not conclusive** but is subject to rebuttal. Miles v. Com., 2 Walk. (Pa.) 64; Burnside v. Donnon, 34 S. C. 289, 13 SE 465.

4. Poullain v. Brown, 80 Ga. 27, 5 SE 107; Tucker v. Stewart, 147 Iowa 294, 126 NW 183; Hagerty v. Mann, 56 Md. 522.

[a] **This rule has been applied** to an action for failure to pay money as directed by an order of court. Tucker v. Stewart, 147 Iowa 294, 126 NW 183.

[b] **Where plaintiff is obliged to come into equity** to enforce the liability on the bond he will not be required to sue within a shorter period than that prescribed by the statute of limitations, especially where the loss of his legal remedy was without his own fault. Hagerty v. Mann, 56 Md. 522.

5. McManus v. Harrigan, 41 Misc. 615, 85 NYS 220.

6. Weyant v. Utah Sav., etc., Co., (Utah) 182 P 189 (action by lawful wife and heirs on administration bond of woman with whom decedent had eloped and lived under assumed name, and who had secured decedent's property by taking out administration, as his wife, on his estate under the assumed name).

7. Baines v. Barnes, 64 Ala. 375; Fauntleroy v. Lyle, 5 T. B. Mon. (Ky.) 266; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525.

8. Bird v. Mitchell, 101 Ga. 46, 8 SE 674; State v. Jones, 131 Mo. 194, 33 SW 23; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525.

9. Bird v. Mitchell, 101 Ga. 46, 28 SE 674; Burgess v. Young, 97 Me. 386, 54 A 910; Matter of Grant, 122 App. Div. 602, 107 NYS 375.

[a] **The principal's failure to comply with a parol agreement with his sureties** made at the time of their signing his bond that he would furnish them with an indemnity bond and procure other sureties does not affect their liability and is no defense to the sureties when sued on the bond. State v. Modrel, 69 Mo. 152.

Discharge of sureties from liability see supra §§ 2563–2566.

10. Burgess v. Young, 97 Me. 386, 54 A 910.

11. Johnston's Succ., 1 La. Ann. 75.

12. King v. Johnson, 94 Ga. 665, 21 SE 895; Everett v. Waymire, 30 Oh. St. 308.

13. Bowen v. Groover, 77 Ga. 126.

14. Cheever v. Congdon, 34 Mich. 296.

time when he became a surety.[15] In an action by a distributee the surety can plead a settlement among heirs subsequent to the order of distribution as a satisfaction of such order and a defense for the surety against the administrator's alleged breach of bond by failing to pay amount to plaintiff as ordered.[16] It is no defense that in committing the breach complained of the representative acted under advice of counsel,[17] or that since the action was instituted he has been removed from office and a successor appointed[18] or, where the suit is brought for the general benefit, that the person on whose representation it was instituted will not be entitled to share in the recovery.[19] Neither is it a defense that exceptions to the account of the administrator, filed by a creditor of the estate, had been withdrawn by him in consideration of a part payment of his claim by the administrator,[20] or that the bond was not in fact executed before the probate judge as required by statute.[21] The fact that certain property of the estate is claimed by a third person is no defense to an action for failure to include it in the inventory.[22] In an action against the administrator of a surety on an administration bond, the fact that defendant has also been appointed administrator of the sole beneficiary under the will of the original decedent, and has assumed charge of the assets of the estate in that capacity, affords no reason why judgment should not be rendered against him in the capacity in which he is sued.[23] The bond being a continuing obligation, each breach of which furnishes a cause of action, the waiver of any number of breaches is no bar to an action for a subsequent breach.[24] In an action by the receiver in supplementary proceedings of a distributee, a defense cannot be predicated on alleged fraudulent acts of the administrator and the distributee, which are not shown to have resulted in a surcharge of the administrator's accounts, or to have occurred prior to the vesting of plaintiff's title.[25]

[§ 2622] **b. Want of Assets.** The want of assets is a good defense to an action on the bond for failure to pay claims against the estate,[26] unless the representative has had assets and his inability to pay the claim in question is due to his own neglect or misconduct;[27] but to entitle a representative to defend upon the ground of insufficiency of assets there must be an inventory filed and a settlement of his account in the probate court,[28] and in some jurisdictions the defense is not available unless prior to the action on the bond a representation of insolvency was made.[29]

[§ 2623] **c. Invalidity of Principal's Appointment.** Neither principal nor sureties can set up as a defense to their liability on the bond the invalidity of the appointment under which the principal has acted,[30] for not only is the grant of administration not subject to collateral attacks in an action on the bond,[31] but both principal and sureties are estopped from questioning the validity of the appointment[32] by the recitals of the bond,[33] its voluntary execution,[34] and the fact that the principal has acted thereunder and obtained possession of assets of the estate.[35] So also, where the bond executed by the sureties of an administrator was conditioned that the administrator would discharge and perform all trusts committed to him as administrator of the estate of a certain decedent, "who died testate," the sureties could not take advantage of the fact that the order and letters appointing the administrator inaccurately described him as administrator, instead of administrator with the will annexed.[36]

[§ 2624] **d. Performance of Conditions after Suit Commenced.** Performance of the conditions of the bond after commencement of the suit thereon will not bar the action,[37] but plaintiff is entitled to

15. Matter of Grant, 122 App. Div. 602, 107 NYS 375.

16. U. S. Fidelity, etc., Co. v. Hodgins, 123 Ark. 507, 185 SW 1092.

17. Bourne v. Stevenson, 58 Me. 499.

18. State v. Bloxom, 6 Del. 446.

19. Bennett v. Woodman, 116 Mass. 518.

20. Smith v. Rhodes, 68 Oh. St. 500, 68 NE 7.

21. State v. Morrison, 244 Mo. 193, 148 SW 907.

22. Bourne v. Stevenson, 58 Me. 499.

23. Worthy v. Battle, 125 Ga. 415, 54 SE 667.

24. Thayer v. Keyes, 136 Mass. 104.

25. Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525 (concealment of marriage of administratrix and distributee).

26. Ala.—Woodall v. Wright, 142 Ala. 205, 37 S 846.

Ga.—Walker v. Shannon, (A.) 93 SE 498.

Ind.—State v. White, 33 Ind. 298.

Me.—Burgess v. Young, 97 Me. 386, 54 A 910; Thurlough v. Kendall, 62 Me. 166.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942; McIntire v. Cottrell, 185 Mass. 178, 69 NE 1091; Coleman v. Hall, 12 Mass. 570.

[a] **Payment of preferred claims.**—It is a good defense to an action on the bond for failure to pay a claim of a creditor of the deceased that the estate was exhausted in paying preferred claims. Fuller v. Connolly, 142 Mass. 227, 7 NE 853 [foll Walker v. Hill, 17 Mass. 380; Shillaber v. Wyman, 15 Mass. 322; Coleman v. Hall, 12 Mass. 570, and disappr Newcomb v. Goss, 1 Metc. (Mass.) 333].

27. Outlaw v. Yell, 8 Ark. 345; Clement v. Hawkins, 96 Ga. 811, 22 SE 951; Woodward v. Fisher, 21 Miss. 303.

[a] **Want of assets at the time suit is instituted** is not alone a defense. Outlaw v. Yell, 8 Ark. 345.

[b] **That the estate was exhausted in paying debts** (1) is not a defense in an action for a distributive share unless it appears that the debts paid were lawful demands against the estate. Clement v. Hawkins, 96 Ga. 811, 22 SE 951. (2) As against a creditor, it is no defense that the estate was exhausted in paying claims entitled to priority unless such claims were duly exhibited and allowed. Outlaw v. Yell, 8 Ark. 345.

28. Grant v. Crowley, 217 Mass. 552, 105 NE 625; McKim v. Haley, 173 Mass. 112, 53 NE 152.

29. Phelps v. Swan, Kirby (Conn.) 428; Grant v. Crowley, 217 Mass. 552, 105 NE 625; McKim v. Roosa, 183 Mass. 510, 67 NE 651; Providence Municipal Ct. v. McElroy, 19 R. I. 712, 36 A 717.

[a] **A representation made after suit is instituted** is no bar, the remedy of defendants in such a case being to have the case continued until it is ascertained whether the proceedings under that representation will result in an adjudication of insolvency. McKim v. Roosa, 183 Mass. 510, 67 NE 651 [expl Newcomb v. Goss, 1 Metc. (Mass.) 333, and foll Harmon v. Sweet, 221 Mass. 587, 109 NE 942].

[b] **Failure to direct attention of court to insolvency.**—The fact that an administratrix reports the estate insolvent, where the matter does not appear to have been called to the court's attention, does not bar an action on her bond. Fuller v. Dupont, 183 Mass. 596, 67 NE 662.

30. Ala.—Kling v. Connell, 105 Ala. 590, 17 S 121, 53 AmSR 144; Burnett v. Nesmith, 62 Ala. 261; Plowman v. Henderson, 59 Ala. 559.

Ill.—Pritchett v. Peo., 6 Ill. 525.

Mass.—White v. Weatherbee, 126 Mass. 450.

N. J.—Bloomfield v. Ash, 4 N. J. L. 314.

N. Y.—Power v. Speckman, 126 N. Y. 354, 27 NE 474 [aff 12 NYS 25]; Peo. v. Falconer, 4 N. Y. Super. 81; Field v. Van Cott, 5 Daly 308, 15 AbbPrNS 349.

Pa.—Shalter's App., 43 Pa. 83, 82 AmD 552.

Tenn.—State v. Anderson, 16 Lea 321.

31. Pritchett v. Peo., 6 Ill. 525.

[a] **This rule is subject to exception** in cases where the letters were granted upon the estate of a person who was not in fact dead (see supra § 30), or where another representative has been already appointed, or where the record or papers in the case show a lack of jurisdiction. Nash v. Sawyer, 114 Iowa 742, 87 NW 707.

Collateral attack on appointment generally see supra § 247.

32. Nash v. Sawyer, 114 Iowa 742, 87 NW 707; Hoffman v. Fleming, 66 Oh. St. 143, 64 NE 63.

33. Plowman v. Henderson, 59 Ala. 559; Cutler v. Dickinson, 8 Pick. (Mass.) 386.

34. Peo. v. Falconer, 4 N. Y. Super. 81; Field v. Van Cott, 5 Daly (N. Y.) 308, 15 AbbPrNS 349.

35. Bloomfield v. Ash, 4 N. J. L. 314; Hoffman v. Fleming, 66 Oh. St. 143, 64 NE 63; State v. Anderson, 16 Lea (Tenn.) 321.

36. Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

37. State v. White, 33 Ind. 298; Clark v. Cress, 20 Iowa 50; Wilson v. Keeler, 2 D. Chipm. (Vt.) 16.

recover at least nominal damages for the breach committed.[38]

[§ 2625] **e. Limitations.**[39] The statute of limitations is a good defense to an action on an administration bond,[40] but it cannot be taken advantage of unless pleaded.[41] A representative is not precluded on the ground of being a trustee from pleading the statute,[42] nor does the principle which prevents the statute of limitations from running against the state apply to administration bonds given nominally to the state but really for the benefit of others.[43] The fact that a claim was barred at the time judgment was rendered thereon against the estate is no defense to an action on the bond for failure to pay the judgment.[44]

[§ 2626] **4. Set-Off and Counterclaim.** In an action on an administration bond assigning as breaches of the bond acts of misconduct on the part of the representative, the damages to be recovered are not necessarily liquidated and the action is not therefore one in which a set-off is allowable.[45] Furthermore since an action on the bond is against the obligors individually they cannot set off as against their personal liability an indebtedness of plaintiff to the estate,[46] nor can the sureties in an action against them set off a claim of the principal against the estate,[47] or against plaintiff.[48] It has been held, however, that in an action for failing to account for property of the estate received by a representative he may set up by way of counterclaim a claim of his own against the estate which has been duly allowed and is entitled to payment.[49] The sureties are not entitled to credit with respect to items for which the representative never made any claim in the probate court.[50]

[§ 2627] **5. Jurisdiction—a. In General.** Ordinarily, in the absence of statute,[51] or of special circumstances making equitable interference necessary,[52] courts of law have exclusive jurisdiction of actions to enforce the liability on administration bonds.[53] The particular court having jurisdiction varies as to its designation in the different states,[54] and as between different courts of the same state the amount claimed is sometimes the controlling element in determining which is entitled to take jurisdiction.[55] The courts of the state where administration was granted, where the assets are located, where the administrator resided at the time of decedent's death, and where the surety resides, have jurisdiction of an action on the bond, although the administrator resides in another state.[56] Where one was appointed administrator in one state of property of a nonresident decedent, and gave a bond to the state, to the use of persons interested, and thereupon removed the fund to another state, where he converted it, a suit was maintainable in the latter state on the bond in the name of the state to which the bond was given, to compel payment of the money so converted to such state, to be administered in accordance with its laws.[57]

[§ 2628] **b. Probate Courts.** Probate courts have no jurisdiction of actions on administration bonds,[58] except where such jurisdiction is conferred

38. Clark v. Cress, 20 Iowa 50.

39. See supra §§ 2618, 2619.

40. Peo. v. Ochiltree, 48 Ill. A. 220; State v. Pratte, 8 Mo. 286, 40 AmD 140.

[a] **If the liability is barred** which the bond was meant to secure, action on the bond to enforce that liability is barred also. Biddle v. Wendell, 37 Mich. 452.

41. Maddox v. State, 4 Harr. & J. (Md.) 539.

42. Peo. v. Ochiltree, 48 Ill. A. 220.

43. State v. Pratte, 8 Mo. 286, 40 AmD 140.

44. Christian v. Lassiter, 23 La. Ann. 573.

45. Wattles v. Hyde, 9 Conn. 10; State v. Modrill, 15 Mo. 421.

[a] **The remedy of a representative as to his labor and expenses** in the management of the estate is by settlement of his account with the court of probate, and set-off cannot be allowed in an action on his bond. Wattles v. Hyde, 9 Conn. 10.

46. Vastine v. Dinan, 42 Mo. 269; State v. Modrell, 15 Mo. 421; Probate Ct. v. Gale, 47 Vt. 473.

47. Vastine v. Dinan, 42 Mo. 269.

48. Norton v. Wallace, 31 S. C. L. 460.

49. State v. Barrett, 121 Ind. 92, 22 NE 969.

[a] **Disbursements** by an administrator, not embraced in his annual returns allowed by the ordinary, must be shown by him to be proper disbursements in order to take credit for them in an action upon his bond. Rudolph v. Underwood, 88 Ga. 664, 16 SE 55.

[b] **Where there has been no decree of distribution** determining the amount of his distributive share a representative cannot set up any claim therefor in an action on the bond. Vastine v. Dinan, 42 Mo. 269.

[c] **A claim for compensation is forfeited when the representative is removed** from office for maladministration, and therefore he cannot set up such claim in reduction of the damages in an action on the bond. Dryfoos v. Cullinan, 17 Kan. 452.

50. Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

51. See infra §§ 2628, 2629.

52. See infra § 2629.

53. Ill.—Peo. v. Medart, 166 Ill. 348, 46 NE 1095 [aff 63 Ill. A. 111].

Md.—Edes v. Garey, 46 Md. 24.

Mich.—Hatheway v. Sackett, 32 Mich. 97.

Miss.—Halfacre v. Dobbins, 50 Miss. 766; Smith v. Everett, 50 Miss. 575.

N. J.—Rorback v. Dorsheimer, 25 N. J. Eq. 516.

N. Y.—Hood v. Hood, 85 N. Y. 561 [rev 19 Hun 300]; Scharmann v. Schoell, 38 App. Div. 528, 56 NYS 498.

S. C.—Hoell v. Blanchard, 4 S. C. Eq. 21.

W. Va.—Thomson v. Mann, 53 W. Va. 432, 44 SE 246.

Eng.—Bolton v. Powell, 14 Beav. 275, 51 Reprint 292.

[a] **A bond which the probate judge was not authorized or required to take,** by virtue of his office, although good as a common-law bond, is not technically a probate bond, and an action thereon is not governed by the statutes regulating actions on probate bonds. Thomas v. White, 12 Mass. 367.

[b] **The death of an executor** does not affect the liability of his sureties as surviving obligors in an action at law, so as to give a court of equity jurisdiction of an action on the bond. Edes v. Garey, 46 Md. 24.

54. See cases infra this note.

[a] **District court.**—(1) Jenkins v. Shields, 36 Iowa 526; Wheelhouse v. Bryant, 13 Iowa 160; Brown v. Gunning, 16 La. 238; Ingram v. Stokes, 10 La. 26; Zander v. Pile, 8 La. 211; Elliott v. White, 5 La. 322. (2) A statutory provision for summary proceedings against the principal and sureties on the bond is not exclusive and does not affect the jurisdiction of the district court. Wheelhouse v. Bryant, 13 Iowa 160. (3) A statute providing that courts of probate shall have power to compel the representatives to account and pay over what they may be found to owe does not affect the jurisdiction of the district court to entertain an action on the bond for failure to make such payment. Brown v. Gunning, 16 La. 238.

[b] **Circuit court.**—State v. Shelby, 75 Mo. 482; State v. Rankin, 4 Mo. 426.

[c] **Superior court.**—State v. Berryhill, 84 N. C. 132.

[d] **Court of common pleas.**—Dawson v. Dawson, 25 Oh. St. 443; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750.

[e] **Alternative remedies in different courts.**—Rev. St. (1899) § 48 (St. Annct. [1906] p 352), authorizing the successor of an executor or administrator to compel a final settlement and enforce the judgment against the executor or administrator and his sureties, and § 54, authorizing the successor to sue the executor or administrator and his sureties or either in any court having jurisdiction of civil actions, when construed in the light of the history of the legislation, as enacted in Rev. St. (1825) p 98 § 20, give alternative remedies to the successor; and the remedy provided by § 48 must be obtained in the probate court, while the remedy under § 54 may be pursued in any court having jurisdiction of civil actions. State v. Zorn, 138 Mo. A. 713, 119 SW 517.

55. Brown v. Seaman, 65 Tex. 628.

[a] **The district court** has jurisdiction where the amount claimed is over five hundred dollars. Fort v. Fitts, 66 Tex. 593, 1 SW 563.

[b] **Where a scire facias is sued out** on a judgment rendered for the penalty of the bond, the amount of the penalty and not the amount of the damages sustained determines the jurisdiction. Hoit v. Bradley, 1 D. Chipm. (Vt.) 262.

56. Myers v. Martinez, 95 Miss. 104, 48 S 291.

57. Cutrer v. State, 98 Miss. 841, 54 S 434, 35 LRANS 333, AnnCas 1913B 344.

58. La.—Larue v. Van Horn, 25

by statute;[59] nor has a probate judge any jurisdiction to call the sureties to account for the conduct of their principal or to render any decree against them.[60]

[§ 2629] **c. Equity Jurisdiction.** Although the jurisdiction of equity to enforce liability on administration bonds has been unequivocally denied,[61] the generally prevailing view, in the United States, is that such liability may be enforced in equity.[62] The remedy in equity sometimes exists by virtue of statutory provisions,[63] but many of the decisions sustaining such jurisdiction are based merely on the ground that permitting the enforcement of the bond in equity prevents multiplicity of suits and circuity of action, where plaintiff was obliged to come into equity in the first instance.[64] It is also held that the liability may be enforced in equity where the remedy at law is inadequate or not available.[65]

[§ 2630] **6. Venue.** An action against an administrator and the sureties on his bond may be brought in the county of the residence of any of the parties, as the obligation of the principal and sureties on the bond is joint and several.[66] Where a bond is given in one state and the principal and sureties afterward become residents of another, a suit on the bond based on a decree rendered in the latter state may be brought in the courts of that state.[67]

[§ 2631] **7. Parties—a. Plaintiff.** The question in whose name an action on an administration bond should be instituted is largely regulated by statutes which vary considerably in their provisions.[68] Under some statutes the action should be brought in the name of the state [69] or people,[70] or of the governor,[71] ordinary,[72] or probate judge,[73] or the successor in office of such officer;[74] while under others the in-

La. Ann. 445; Hemken v. Ludewig, 12 Rob. 188.

Mo.—State v. Shelby, 75 Mo. 482; State v. Waters, 54 Mo. 112; State v. Maulsby, 53 Mo. 503.

Miss.—Washburn v. Phillips, 14 Miss. 425; Green v. Tunstall, 6 Miss. 638.

Oh.—Dawson v. Dawson, 25 Oh. St. 443.

Pa.—Maguire's Est., 12 Phila. 12.

59. Maryland Fidelity, etc., Co. v. Moshier, 151 Fed. 806; State v. Stafford, 73 Mo. 658; State v. Zorn, 138 Mo. A. 713, 119 SW 517.

[a] **Extent of jurisdiction.**—A surrogate in New York has jurisdiction to settle the accounts of administrators and to fix the amount of their liability to creditors or next of kin and also of their surety, provided such liability exists, but not to determine the validity of their bond as between the surety and the creditors or next of kin or any of them, which may be litigated and determined in any other court having jurisdiction of the subject matter and the parties. Maryland Fidelity, etc., Co. v. Moshier, 151 Fed. 806.

60. Ordinary v. Bonner, 20 S. C. L. 468; Ross v. Chambers, 17 S. C. L. 548; Schnell v. Schroder, 8 S. C. Eq. 334.

61. Rorback v. Dorsheimer, 25 N. J. Eq. 516; Bolton v. Powell, 14 Beav. 275, 51 Reprint 292.

[a] **In Mississippi prior to the code of 1871,** it was held that the liability on the bond could not be enforced in equity. Halfacre v. Dobbins, 50 Miss. 766; Smith v. Everett, 50 Miss. 575; Buckingham v. Owen, 14 Miss. 502.

62. U. S.—Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Kendall v. Creighton, 23 How. 90, 16 L. ed. 419; McLaughlin v. Potomac Bank, 7 How. 220, 12 L. ed. 675; Donohue v. Roberts, 1 Fed. 449, 1 McCrary 112.

Ala.—Keith v. McCord, 140 Ala. 402, 37 S 267; Dowty v. Hall, 83 Ala. 165, 3 S 315; Martin v. Ellerbe, 70 Ala. 326; Baines v. Barnes, 64 Ala. 375; Morris v. Morris, 58 Ala. 443.

Ark.—State v. Turner, 49 Ark. 311, 25 SW 302; Reinhardt v. Gartrell, 33 Ark. 727; Osborne v. Graham, 30 Ark. 66; Norton v. Miller, 25 Ark. 108; Moren v. McCown, 23 Ark. 93; Clark v. Shelton, 16 Ark. 474.

Cal.—Slater v. McAvoy, 123 Cal. 437, 56 P 49.

Ga.—Alexander v. Mercer, 7 Ga. 549.

Ill.—Peo. v. Lott, 27 Ill. 215.

Ind.—Anthony v. Negley, 2 Ind. 211; Persons v. Crane, 2 Ind. 157.

Kan.—Fincke v. Bundrick, 72 Kan. 182, 83 P 403, 4 LRANS 830; American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

Ky.—Lee v. Waller, 3 Metc. 61; Mitchell v. Miller, 6 Dana 79; Carrol v. Connet, 2 J. J. Marsh. 195; Moore v. Waller, 1 A. K. Marsh. 488.

Miss.—Jones v. Patty, 73 Miss. 179, 18 S 794; Clopton v. Haughton, 57 Miss. 787; Whitfield v. Evans, 56 Miss. 488; Buie v. Polock, 55 Miss. 309.

N. Y.—Haight v. Brisbin, 100 N. Y. 219, 3 NE 74; Hood v. Hood, 85 N. Y. 561; Dunne v. American Surety Co., 43 App. Div. 91, 59 NYS 429 [aff 34 Misc. 584, 74 NYS 391]; Scharmann v. Schoell, 23 App. Div. 398, 48 NYS 306 [aff 38 App. Div. 528, 56 NYS 498]; Bischoff v. Engel, 10 App. Div. 240, 41 NYS 815; Haines v. Meyer, 25 Hun 414; Onondaga Trust, etc., Co. v. Pratt, 25 Hun 23; Towner v. Tooley, 38 Barb. 598; Carow v. Mowatt, 2 Edw. 57.

S. C.—Taylor v. Taylor, 19 S. C. Eq. 123; O'Neall v. Herbert, 16 S. C. Eq. 495; McBee v. Crocker, 16 S. C. Eq. 485; Gayden v. Gayden, 16 S. C. Eq. 435 [disappr Teague v. Dendy, 7 S. C. Eq. 207, 16 AmD 643; Glenn v. Conner, 5 S. C. Eq. 267]; Knox v. Picket, 4 S. C. Eq. 92, 199.

Tenn.—Whitaker v. Whitaker, 12 Lea 393.

Utah.—Weyant v. Sav., etc., Co., 172 P 189.

Va.—Spottswood v. Dandridge, 4 Munf. (18 Va.) 289; Clarke v. Webb, 2 Hen. & M. (12 Va.) 8; Bacheldor v. Elliott, 1 Hen. & M. (11 Va.) 10.

W. Va.—Thomson v. Mann, 53 W. Va. 432, 44 SE 246; Thompson v. Nowlin, 51 W. Va. 346, 41 SE 178.

[a] **The leading case** on this subject is Carow v. Mowatt, 2 Edw. (N. Y.) 57.

[b] **"The jurisdiction of a court of equity to enforce the bond arises from** its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case." Kendall v. Creighton, 23 How. (U. S.) 90, 108, 16 L. ed. 418.

[c] **The federal courts** will exercise jurisdiction of a suit in equity against the principal and sureties, regardless of the doctrine of the state courts. Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Kendall v. Creighton, 23 How. (U. S.) 90, 16 L. ed. 419.

63. Anthony v. Negley, 2 Ind. 211; Persons v. Crane, 2 Ind. 157; Clopton v. Haughton, 57 Miss. 787; Whitfield v. Evans, 56 Miss. 488; Brunini v. Pera, 54 Miss. 649.

64. U. S.—Kendall v. Creighton, 23 How. 90, 16 L. ed. 419.

Ala.—Dowty v. Hall, 83 Ala. 165, 3 S 315; Gerald v. Miller, 21 Ala. 433; Moore v. Armstrong, 9 Port. 697.

Ark.—Moren v. McCown, 23 Ark. 93; Clark v. Shelton, 16 Ark. 474.

Ga.—Alexander v. Mercer, 7 Ga. 549.

Ky.—Moore v. Waller, 1 A. K. Marsh. 488.

S. C.—Taylor v. Taylor, 19 S. C. Eq. 123; McBee v. Crocker, 16 S. C. Eq. 485; Knox v. Picket, 4 S. C. Eq. 92, 199.

Va.—Clark v. Webb, 2 Hen. & M. (12 Va.) 8.

65. Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Peo. v. Lott, 27 Ill. 215; Onondaga Trust, etc., Co. v. Pratt, 25 Hun (N. Y.) 23; Carow v. Mowatt, 2 Edw. (N. Y.) 57; Spottswood v. Dandridge, 4 Munf. (18 Va.) 289.

66. Williams v. Lancaster, 113 Ga. 1020, 39 SE 471; Myers v. Martinez, 95 Miss. 104, 48 S 291.

67. Johnson v. Jackson, 56 Ga. 326, 21 AmR 285 (but the liability will be determined and enforced according to the law of the state where the bond was given).

68. Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 425.

69. State v. Shelby, 75 Mo. 482; Woodworth v. Woodworth, 70 Mo. 601; Sickles v. McManus, 26 Mo. 28; State v. Campbell, 10 Mo. 724; Brown v. McKee, 108 N. C. 387, 13 SE 8; Norman v. Walker, 101 N. C. 24, 7 SE 468.

[a] **It was formerly the law in Missouri** that the action must be brought in the name of (1) the governor (Spear v. Thompson, 1 Mo. 581) or (2) the probate judge (Oliver v. Crawford, 1 Mo. 263).

70. Peo. v. Stacey, 6 Ill. A. 521; Box v. Seaman, 2 Code Rep. 1.

71. Arkansas v. Ball, 1 F. Cas. No. 530, Hempst. 541; Hughes v. Gray, 1 Ky. Op. 1; Merrit v. Governor, 4 Yerg. (Tenn.) 489.

[a] **The name of the person occupying the office** and not the name of the office must be used. Arkansas v. Ball, 1 F. Cas. No. 530, Hempst. 541. Contra Merrit v. Governor, 4 Yerg. (Tenn.) 489.

72. Flanders v. Sutton, 143 Ga. 764, 85 SE 914; Halsted v. Fowler, 22 N. J. L. 48; Williamson v. Updike, 14 N. J. L. 270.

73. Smith v. Russell, 17 Conn. 105; Cook v. Titcomb, 115 Me. 38, 97 A 133; Buel v. Dickey, 9 Nebr. 285, 2 NW 884 (law prior to act of 1876); Prescott v. Farmer, 59 N. H. 90; Parker v. Colcord, 2 N. H. 36.

74. Phillips v. Governor, 2 Ark. 382; Smith v. Russell, 17 Conn. 105; Frye v. Crockett, 77 Me. 157; Hibbits v. Canada, 10 Yerg. (Tenn.) 465.

[a] **On an administration bond made payable to the governor and his successors,** any subsequent governor may maintain an action, and declare as the "successor" to the governor named in the bond; and he may allege that the bond was made "to the plaintiff." Phillips v. Governor, 2 Ark. 382.

[b] **If the succeeding judge is disqualified** by interest or position the action may be prosecuted in the name of the judge of an adjoining district. Smith v. Russell, 17 Conn. 105.

[c] **An action on a bond which does not conform to the statute** and is enforceable only as a common-law bond can be maintained only in the name of the officer to whom it was given or his personal representative, and not in the name of his successor.

jured person may sue in his own name,[75] or the action may be brought in the name of either the person injured or the nominal obligee for the use of such person.[76] Provision is sometimes made for an assignment of the bond by the probate judge to a person injured by a breach thereof, who may thereupon bring action,[77] or the judge of probate is authorized to instruct an administrator to bring suit on the bond.[78] Where the doctrine that an administrator de bonis non cannot sue on the bond of his predecessor is still adhered to,[79] it has been held that, where it appears, after the death of an executor, that he had committed a devastavit, the court of probate jurisdiction has power to appoint a trustee at the instance of the beneficiaries under the will to maintain a suit against the surety on the bond.[80] The name of the nominal plaintiff is a matter of form and not of substance and a mistake in that respect is not reached by a general demurrer.[81] A suit may be instituted on the relation of one creditor without joining the others as plaintiffs, but the judgment must be made to inure to the benefit of the estate generally and not to the individual creditor,[82] unless the estate is admitted to be solvent and sufficient to pay all its debts.[83] So also a suit by a legatee should be prosecuted for the benefit of all interested in the fund where there is an insufficiency of assets.[84] Where there are no creditors, a sole heir may sue on the bond of a deceased administrator without having an administrator de bonis non appointed and making him a party,[85] and the same rule has been held applicable to a suit by several distributees after the estate was fully administered.[86] After the amount due to each distributee is definitely ascertained, each has a separate right of action and may sue therefor without joining the others.[87] Distributees are not necessary parties plaintiff to a suit brought by an administrator de bonis non on the bond of his predecessor.[88] Where a particular right of action is given by statute to a particular class of claimants, other persons, although interested in the estate, are not necessary parties.[89] All persons interested in the subject of the action and in obtaining the relief demanded may join as plaintiffs.[90] So it has been held that several distributees may join in the same action,[91] at least where the action is brought before a final decree of distribution;[92] and the representative of a deceased legatee may join in an action with the other legatees.[93] Where a judgment has been rendered in favor of two persons against an administrator, and execution has been returned unsatisfied, the judgment creditors may join in an action against the sureties of the administrator, and the action will not be dismissed for improper joinder of plaintiffs, because, on appeal subsequently taken, it is held that the judgment relied on was unauthorized as to one of the parties.[94] A person interested in the administration of an estate vested in a county administrator may sue on the bond without joining as coplaintiffs persons interested in other estates, the administration of which has been vested in the county administrator, and who have grievances

Frye v. Crockett, 77 Me. 157; Cleaves v. Dockray, 67 Me. 118; Hibbits v. Canada, 10 Yerg. (Tenn.) 465.

75. Ala.—Jacobs v. Bogart, 128 Ala. 678, 29 S 645; Amason v. Nash, 24 Ala. 279.

Kan.—Hudson v. Barratt, 62 Kan. 137, 61 P 737.

Minn.—Lanier v. Irvine, 24 Minn. 116.

Nebr.—Buel v. Dickey, 9 Nebr. 285, 2 NW 884.

N. M.—Conway v. Carter, 11 N. M. 419, 68 P 941.

N. Y.—Williams v. Kiernan, 25 Hun 355; Rowe v. Parsons, 6 Hun 338; Baggott v. Boulger, 9 N. Y. Super. 160; Cridler v. Curry, 66 Barb. 336, 44 HowPr 345.

Oh.—Mighton v. Dawson, 38 Oh. St. 650.

Okl.—Shipman v. Brown, 36 Okl. 623, 130 P 603.

S. C.—McCorkle v. Williams, 43 S. C. 66, 20 SE 744; Kaminer v. Hope, 9 S. C. 253.

[a] **A succeeding administrator** is the real party in interest in an action on the bond of his predecessor for failing to pay over a balance in his hands, and the successor is entitled to maintain such action in his own name. Dayton v. Johnson, 69 N. Y. 419; Shipman v. Brown, 36 Okl. 623, 130 P 603.

[b] **Where a judgment against an administrator is assigned,** the assignee may maintain an action on the bond in his own name. Bamberger v. American Surety Co., 109 App. Div. 917 mem, 96 NYS 665 [aff 48 Misc. 221, 96 NYS 665].

[c] **The complaint may be amended** so as to substitute the real party in interest as plaintiff, where the action is improperly instituted in the name of the state. Hudson v. Barratt, 62 Kan. 137, 61 P 737.

76. Amason v. Nash, 24 Ala. 279; Flanders v. Sutton, 143 Ga. 764, 85 SE 914. See also cases infra this note.

[a] **In Minnesota** (1) under Gen. St. (1878) c 55 actions on probate bonds may be prosecuted "in the name of any person interested therein" whenever the judge of probate so directs. Balch v. Hooper, 32 Minn. 158, 20 NW 124. (2) Actions for refusing to obey orders of the probate judge are properly brought in the name of the probate judge. O'Gorman v. Lindeke, 26 Minn. 93, 1 NW 841.

[b] **In New York** (1) the action may be brought either in the name of the real party in interest (Williams v. Kiernan, 25 Hun 355; Rowe v. Parsons, 6 Hun 338; Cridler v. Curry, 44 HowPr 345) or (2) in the name of the people as trustee of an express trust (Peo. v. Struller, 16 Hun 234; Peo. v. Townsend, 37 Barb. 520; Peo. v. Laws, 4 AbbPr 292; Peo. v. Laws, 3 AbbPr 450).

[c] **In South Carolina** (1) the action was brought in the name of the county court judges prior to the act of 1799 and subsequently in the name of the ordinary. Hamilton v. Bostwick, 3 S. C. L. 221; Fairfield County Judges v. Phillips, 2 S. C. L. 519. (2) Under the present code the action may be brought by the party in interest in his own name (Kaminer v. Hope, 9 S. C. 253) or (3) in the name of the probate judge to whom the bond is payable (Johnson v. Dawkins, 20 S. C. 528).

77. Stapf v. McCarrow, 35 U. C. Q. B. 22.

78. Hayes v. Briggs, 106 Me. 423, 76 A 905 (Rev. St. [1903] c 74 § 6, making such provision, repealed Rev. St. [1883] c 72 § 16 authorizing the probate judge to empower any interested party to sue on the bond).

79. See supra § 2594.

80. State v. Fidelity, etc., Co., 100 Md. 256, 59 A 735, 108 AmSR 410.

81. Governor v. Davis, 9 Ala. 917.

82. Embree v. State, 85 Ind. 368; Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 435.

83. Bonny v. Brashear, 19 La. 383.

84. Towner v. Tooley, 38 Barb. (N. Y.) 598.

85. Glover v. Hill, 85 Ala. 41, 4 S 613.

86. Davis v. State, 118 Miss. 577, 79 S 764.

87. Bramley v. Forman, 15 Hun (N. Y.) 144; Hoover v. Berryhill, 84 N. C. 132.

88. Slaughter v. Froman, 2 T. B. Mon. (Ky.) 95; Dunne v. American Surety Co., 43 App. Div. 91, 59 NYS 429.

89. Bridges v. Maxwell, 34 Miss. 309.

[a] **Illustration.**—Under a statute authorizing the "heirs of the testator or intestate" to sue on the bond for the removal of property out of the state the widow is not a necessary party plaintiff. Bridges v. Maxwell, 34 Miss. 309.

90. Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 435; Pilcher v. Drennan, 51 Miss. 873; Probate Judge v. Tillotson, 6 N. H. 292; McCorkle v. Williams, 43 S. C. 66, 20 SE 744.

[a] **Persons interested may be made parties while the action is pending,** and any person who may have obtained an order for that purpose from the judge of probate may have his name indorsed upon the original writ after the cause is removed into the superior court. Probate Judge v. Tillotson, 6 N. H. 292.

[b] **An action in the name of the people** may be brought for the benefit of more than one person. Peo. v. Stacey, 6 Ill. A. 521.

91. Murphy v. McKay, 28 N. C. 397; McCorkle v. Williams, 43 S. C. 66, 20 SE 744. Contra Jackson v. Bourbon Justices, 2 Bibb (Ky.) 292.

[a] **Where either the probate judge or the party in interest may sue,** the probate judge and certain of the distributees may join in the same suit. McCorkle v. Williams, 43 S. C. 66, 20 SE 744.

92. State v. Thornton, 56 Mo. 325.

93. Maddox v. State, 4 Harr. & J. (Md.) 539.

94. Wiemann v. Mainegra, 112 La. 305, 36 S 358.

against him.[95] In action on an executor's bond for payment of claims against the estate, any error in failing to join other claimants named in the bond was obviated by their appearance and stipulation consenting to payment of plaintiff's claim and agreeing that, if their claims were finally allowed in excess of defendant's liability on the bond, they would accept the amount for which defendant was liable in full pro rata.[96]

[§ 2632] **b. Defendant.** Administration bonds are ordinarily joint and several, and either one or all of the obligors may be sued.[97] This was the rule at common law,[98] although it was necessary to treat the bond as either a joint or a several obligation and to bring the action either against one obligor or against all of the obligors jointly and not against any intermediate number.[99] This rule is now changed in some jurisdictions and plaintiff may at his option proceed against any number of the obligors.[1] So the principal may be sued without joining the sureties,[2] or the sureties may be sued without joining the principal[3] or the representative of a deceased principal;[4] or some of the sureties may be sued without joining the others.[5] The change in the common-law rule, however, applies only to actions at law and not where the liability is enforced in equity,[6] in which case all the obligors, or their representatives, who are able to respond to plaintiff, should be made parties.[7] The representative of a deceased principal or surety may be joined in an action on the bond against the surviving obligors,[8] and in a suit to correct a final settlement the sureties may be joined and their liability as to the amount found due enforced in the same proceeding.[9] It has been held that the sureties on two separate bonds given by the same principal may be joined in one action,[10] but this has been denied,[11] although in the same case it is held that a single summary proceeding may properly be brought against the sureties on both bonds.[12] Two successive administrators of the same estate and their respective sureties cannot be sued jointly on the separate bonds given by them.[13] A distributee who has been paid in full is not a necessary party to an action on the bond of the representative,[14] but it has been held that, in a suit in equity to enforce the liability of the sureties for the benefit of creditors, the devisees of the testator are necessary parties unless represented by an administrator de bonis non.[15] In an action on the bond of a deceased administrator by the personal representative of a distributee, in which it appears that the debts of the estate were paid, it is not necessary that the estate be represented by an administrator,[16] but the appointment of an administrator ad litem of the estate of the deceased administrator is proper.[17] A misjoinder of parties defendant can be taken advantage of only by those who should not have been made parties.[18]

[§ 2633] **8. Pleading—a. Declaration or Complaint—(1) In General.** The general requirement that the averments of a pleading must be clear and unequivocal[19] applies to the declaration or complaint in an action on an administration bond.[20] A petition which seeks to avoid the effect of a judgment discharging the administrator should allege facts showing that the discharge was obtained by fraud.[21] An administrator de bonis non, suing on the bond of his predecessor, must allege that the latter had in his hands unadministered assets or the proceeds of such as had been converted into money and kept separate from, and unmixed with, his own;[22] but it is not necessary that his complaint should allege the names of the creditors or the

95. Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

96. Tewksbury v. Title Guaranty, etc., Co., 180 Iowa 1350, 163 NW 435.

97. D. C.—Blagden v. U. S., 18 App. 370.

Ind.—State v. Bennett, 24 Ind. 383.

Me.—Cook v. Titcomb, 115 Me. 38, 97 A 133.

Minn.—O'Gorman v. Lindeke, 26 Minn. 93, 1 NW 841.

Mo.—Devore v. Pitman, 3 Mo. 182.

[a] **If one of the obligors dies after an action is instituted** against all of them, the action may proceed as if he had not been originally a defendant. Lanier v. Irvine, 24 Minn. 116.

98. State v. Bennett, 24 Ind. 383; O'Gorman v. Lindeke, 26 Minn. 93, 1 NW 841; Devore v. Pitman, 3 Mo. 179; Beall v. Terr., 1 N. M. 507.

99. Blackerby v. Holton, 5 Dana (Ky.) 520; Peo. v. Miller, 2 Ill. 83; Cridler v. Curry, 66 Barb. (N. Y.) 336, 44 HowPr 345; Field v. Van Cott, 5 Daly (N. Y.) 308, 15 AbbPr NS 349.

1. Cal.—Slater v. McAvoy, 123 Cal. 437, 56 P 49.

Colo.—McAllister v. Peo., 28 Colo. 156, 63 P 308.

Ill.—Curry v. Peo., 54 Ill. 263; Peo. v. Miller, 2 Ill. 83.

Ky.—Robinson v. Elam, 11 KyL 307.

N. Y.—Cridler v. Curry, 66 Barb. 336, 44 HowPr 345; Field v. Van Cott, 5 Daly 308, 15 AbbPrNS 349.

2. Keith v. McCord, 140 Ala. 402, 37 S 267; Robinson v. Elam, 11 KyL 307.

3. Colo.—McAllister v. Peo., 28 Colo. 156, 63 P 308.

La.—Bonny v. Brashear, 19 La. 383.

Miss.—Davis v. State, 118 Miss. 577, 79 S 764.

Mo.—Devore v. Pitman, 3 Mo. 182.

N. Y.—Field v. Van Cott, 15 AbbPr NS 349.

[a] **The action may be dismissed as to the principal** and continued as to the surety without discharging the latter from his liability. McAllister v. Peo., 28 Colo. 156, 63 P 308.

[b] **An absconding administrator** is not a necessary party defendant. Davis v. State, 118 Miss. 577, 79 S 764.

[c] **Where the principal is dead,** and his estate is unrepresented, an action may be maintained against the surety alone. American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116.

[d] **Unless there is a judgment against the representative** he must be made a defendant. Phelps v. Sawyer, 7 La. Ann. 551.

[e] **In Texas** (1) the statute requires that the principal shall be joined with the surety except in certain specified cases. Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87. (2) One of two joint principals and the sureties cannot be sued without joining the other principal. Farris v. Berry, 33 Tex. 701. (3) But the representative of a deceased obligor need not be joined in an action against the survivors. Stephenson v. McFaddin, 42 Tex. 322; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

4. Keith v. McCord, 140 Ala. 402, 37 S 267; American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116; Embree v. State, 85 Ind. 368; Flack v. Dawson, 69 N. C. 42.

5. Peo. v. Miller, 2 Ill. 83; State v. Bennett, 24 Ind. 383.

6. Peo. v. Lott, 27 Ill. 215.

7. Peo. v. Lott, 27 Ill. 215; Lee v. Waller, 3 Metc. 61; Towner v. Tooley, 38 Barb. (N. Y.) 598; Hutcherson v. Pigg, 8 Gratt. (49 Va.) 220.

[a] **Principal must be joined in a suit against sureties.**—Lee v. Waller, 3 Metc. (Ky.) 61.

[b] **The representative of a deceased obligor** must be joined in a suit against the survivors. Peo. v. Lott, 27 Ill. 215; Mitchell v. Miller, 6 Dana (Ky.) 79; Hutcherson v. Pigg, 8 Gratt. (49 Va.) 220.

[c] **If a deceased principal has no representative** the sureties may be sued alone. Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195. But compare Lee v. Street, 17 S. C. Eq. 373 (a representative should be appointed).

8. Embree v. State, 85 Ind. 368; Myers v. State, 47 Ind. 293; Braxton v. State, 25 Ind. 82; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750.

[a] **The common-law rule was otherwise.**—American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116; Braxton v. State, 25 Ind. 82; Chatfield v. Faran, 1 Disn. 488, 12 Oh. Dec. (Reprint) 750.

9. Donohue v. Roberts, 1 Fed. 449, 1 McCrary 112; Ponton v. Bellows, 22 Tex. 681.

10. Whitfield v. Evans, 56 Miss. 488.

11. Lewis v. Gambs, 6 Mo. A. 138.

12. Lewis v. Gambs, 6 Mo. A. 138.

13. Governor v. Hays, 3 Mo. 434.

14. Keith v. McCord, 140 Ala. 402, 37 S 267.

15. Peo. v. White, 11 Ill. 341.

16. Keith v. McCord, 140 Ala. 402, 37 S 267.

17. Keith v. McCord, 140 Ala. 402, 37 S 267.

18. Leggett v. Bennett, 48 Ala. 380.

19. See Pleading [31 Cyc 72].

20. Wall v. Pittman, 146 Ga. 274, 91 SE 55.

21. Knox v. Raynor, 146 Ga. 146, 90 SE 853 (petition held insufficient).

22. Yancy v. Yancy, 183 Ky. 512, 209 SW 858.

nature of their debts, or any breach other than the conversion of the estate by the former representative to his own use and his failure to pay the debts of the estate.[23]

[§ 2634] **(2) Allegations as to Particular Matters—(a) Plaintiff's Right to Sue.** The declaration must show in what right or capacity plaintiff sues,[24] the person for whose benefit the action is brought,[25] the nature of his interest or claim,[26] and that the prerequisites necessary to establish the same so as to authorize an action on the bond have been complied with.[27]

[§ 2635] **(b) Conditions Precedent.** Where there are certain conditions precedent which must be complied with before an action on the bond can be maintained,[28] the complaint must allege a compliance therewith in order to state a good cause of action.[29] So where such conditions are essential, it must be alleged that there has been a final accounting and settlement[30] or an order to account and a failure to comply therewith,[31] that plaintiff's claim has been established[32] either by the recovery of a judgment[33] or an allowance thereof,[34] that there has been an order for payment,[35] that there has been a demand and failure to comply therewith,[36] in an action for a devastavit that the de-

23. Giles v. Brown, 60 Ga. 658.

24. Ark.—Morton v. State, 25 Ark. 46; Phillips v. Governor, 2 Ark. 382.
Ind.—Eaton v. Benefield, 2 Blackf. 52.
Miss.—Probate Judge v. Johnson, 5 Miss. 680.
Mo.—State v. Matson, 38 Mo. 489.
N. Y.—Hauenstein v. Kull, 59 How Pr 24.
Va.—Cabell v. Hardwick, 1 Call (5 Va.) 345.
Wis.—Hooe v. Lockwood, 3 Pinn. 42.

[a] **Issuable averments necessary.**—The right of plaintiff to sue upon the cause of action stated in the petition must be set forth by averments so as to tender an issue. State v. Matson, 38 Mo. 489.

[b] **Place for allegation.**—It is proper that the character in which plaintiff sues should appear in the commencement of the declaration, although it is sufficient if it appears in the conclusion. Porter v. State, 9 Ark. 226.

[c] **The want of a proper statement in the caption** of the complaint as to the capacity in which plaintiff sues is not fatal where this is set out in the body of the complainant. State v. Bartlett, 68 Mo. 581.

[d] **An allegation of the assignment of the bond** is sufficient without stating that it was for the purpose of prosecution. The surrogate having no power under the statute to assign the bond for any other purpose, this fact will be presumed. Hauenstein v. Kull, 59 HowPr (N. Y.) 24.

25. Ala.—Governor v. Gantt, 1 Stew. 388.
Ark.—Porter v. State, 9 Ark. 226.
Conn.—Blakeman v. Sherwood, 32 Conn. 324. Aliter prior to act of 1848. Clark v. Mix, 15 Conn. 152; Clark v. Russell, 2 Day 112.
Ind.—Songer v. Manwaring, 1 Blackf. 251.
Miss.—Probate Judge v. Johnson, 5 Miss. 680.
Va.—Cabell v. Hardwick, 1 Call (5 Va.) 345.

[a] **The proper place** for stating at whose instance the action is instituted is at the beginning and not at the conclusion of the declaration. Porter v. State, 9 Ark. 226.

26. Ala.—Reid v. Nash, 23 Ala. 733.
Ark.—Morton v. State, 25 Ark. 46; State v. Ritter, 9 Ark. 244; Phillips v. Governor, 2 Ark. 382.
Ind.—Eaton v. Benefield, 2 Blackf. 52; Songer v. Manwaring, 1 Blackf. 251.
Ky.—Helm v. Donnelly, 5 KyL 517.
Miss.—Probate Judge v. Johnson, 5 Miss. 680.
Tex.—Frank v. De Lopez, 2 Tex. Civ. A. 245, 21 SW 279.
Wis.—Hooe v. Lockwood, 3 Pinn. 42, 3 Chandl. 41.

[a] **The allegation must be positive,** and in an action by a distributee the petition must allege that plaintiff is a distributee. It is not sufficient to state that in a proceeding to settle the administrator's accounts it has been adjudged that plaintiff is a distributee. Helm v. Donnelly, 5 KyL 517.

[b] **If the declaration merely shows the relator to be a creditor** of the estate, but does not allege that he had recovered a judgment against the estate or show the nature or amount of his demand, it is insufficient. Wright v. State, 8 Blackf. (Ind.) 385.

[c] **A creditor need not allege the class to which his claim belongs** where it is alleged that the assets were largely in excess of all liabilities and that they have been wasted by defendant. Frank v. De Lopez, 2 Tex. Civ. A. 245, 21 SW 279.

[d] **An allegation that judgment was rendered against the administrator as such** to be levied de bonis intestati is sufficient, and it is not necessary to allege that it was rendered on a debt which was a proper charge against the estate. Reid v. Nash, 23 Ala. 733.

[e] **Where the claim is alleged to have been allowed and approved,** it is not necessary to state the items of which it is composed. Frank v. De Lopez, 2 Tex. Civ. A. 245, 21 SW 279.

[f] **A statement that plaintiff is decedent's widow** and entitled under the statute to certain personal property of the estate which she had demanded of the administrator, the statement being filed with a copy of the bond as the cause of action, is sufficient, in a suit before a justice. Walker v. Prather, 3 Ind. 112.

[g] **Defective allegation cured by verdict.**—Beal v. State, 77 Ind. 231.

27. Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; State v. Cutting, 2 Oh. St. 1.
Establishing liability of estate see supra § 2601.
Prior judgment against principal see supra § 2606.

28. See supra §§ 2601–2616.

29. Ark.—Ark. Morton v. State, 25 Ark. 46; State v. Ritter, 9 Ark. 244; State v. Ferguson, 8 Ark. 172.
Colo.—Howe v. Peo., 7 Colo. A. 535, 44 P 512.
Ky.—Thomas v. Com., 3 J. J. Marsh. 121.
Md.—Dorsey v. Pannell, 4 Gill & J. 471.
Miss.—Probate Judge v. Thompson, 3 Miss. 808.
N. H.—Probate Judge v. Couch, 59 N. H. 39.
N. J.—Ordinary v. White, 43 N. J. L. 22.
R. I.—Pawtucket Prob. Ct. v. Williams, 23 R. I. 515, 51 A 101.

30. Probate Judge v. Thompson, 3 Miss. 808.

31. State v. Ferguson, 8 Ark. 172; Probate Judge v. Couch, 59 N. H. 39; Pawtucket Prob. Ct. v. Williams, 23 R. I. 515, 51 A 101; West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844; Glocester Prob. Ct. v. Eddy, 8 R. I. 339; Georgia Dist. Prob. Ct. v. Vanduzer, 13 Vt. 135.

32. Probate Judge v. Couch, 59 N. H. 39; Providence Municipal Ct. v. Bostwick, 31 R. I. 550, 78 A 53.

[a] **If the claim has been disallowed by the representative,** the complaint must show that it has been established according to law. Providence Municipal Ct. v. Bostwick, 31 R. I. 550, 78 A 53.

33. Ala.—Gilbreath v. Manning, 24 Ala. 418.
Ill.—Biggs v. Postlewait, 1 Ill. 198.
Ky.—Thomas v. Com., 3 J. J. Marsh. 121.
Md.—Dorsey v. State, 4 Gill & J. 471; Laidler v. State, 2 Harr. & G. 277; Seegar v. State, 5 Harr. & J. 488.
Miss.—Probate Judge v. Phipps, 6 Miss. 59.
Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.
S. C.—Wilbur v. Hutto, 25 S. C. 246.
Va.—Burnett v. Harwell, 3 Leigh (30 Va.) 89.

[a] **Averment of nonpayment.**—The declaration is fatally defective if it fails to aver the nonpayment of the judgment. Irvine v. Williams, 6 Dana (Ky.) 41.

34. Ala.—Gilbreath v. Manning, 24 Ala. 418; Kyle v. Mays, 22 Ala. 692; Perkins v. Moore, 16 Ala. 9.
Ark.—Morton v. State, 25 Ark. 46; Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; Porter v. State, 9 Ark. 226; State v. Ferguson, 8 Ark. 172; Outlaw v. Yell, 5 Ark. 468.
Md.—State v. Hart, 57 Md. 234.
Minn.—St. Paul First Nat. Bank v. How, 28 Minn. 150, 9 NW 626.
N. H.—Probate Judge v. Couch, 59 N. H. 39.
N. Y.—Hood v. Hood, 6 NYSt 684.
Oh.—State v. Cutting, 2 Oh. St. 1.
Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.
R. I.—Providence Municipal Ct. v. Wilbour, 23 R. I. 95, 49 A 488.
Vt.—Chittenden Dist. Prob. Ct. v. Saxton, 17 Vt. 623.

[a] **Where the executor is residuary legatee** and has given bond for the payment of all debts and legacies, the petition need not show a presentment of the claim to the executor. Stevens v. Hartley, 13 Oh. St. 525.

[b] **The grounds of the decree** need not be alleged. Field v. Van Cott, 5 Daly 308, 15 AbbPrNS 349.

35. Ala.—Gilbreath v. Manning, 24 Ala. 418.
Ark.—State v. Roth, 47 Ark. 222, 1 SW 98; Morton v. State, 25 Ark. 46; Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; State v. Ferguson, 8 Ark. 172.
Colo.—Howe v. Peo., 7 Colo. A. 535, 44 P 512.
Mo.—State v. Modrell, 15 Mo. 421.
N. H.—Probate Judge v. Couch, 59 N. H. 39.
Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.
Vt.—Chittenden Dist. Prob. Ct. v. Saxton, 17 Vt. 623; Georgia Dist. Prob. Ct. v. Vanduzer, 13 Vt. 135.

[a] **Averment held sufficient.**—The fact that an order was made to pay over money to a successor is sufficiently averred by alleging a refusal to pay over the money "in violation of the order of said court." Rutenic v. Hamakar, 40 Or. 444, 67 P 196.

36. Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; Stratton

vastavit has been established in a separate suit against the principal,[37] that a refunding bond has been tendered,[38] and that leave to sue has been obtained.[39] Where the statute authorizes an action on the bond of an administrator where execution has been returned unsatisfied on a judgment recovered against such administrator, and declares that, if the principal debtor is a resident of the state, the execution must have been issued to the county where he resides, a complaint on a judgment against an administrator is not objectionable for failure to allege that the administrator was a resident of the county to which the execution which was returned unsatisfied was issued.[40]

[§ 2636] **(c) Execution of Bond.** It must be alleged that defendants executed the bond on which the action is brought;[41] but it has been held not necessary to allege that the bond was approved, filed, and recorded.[42]

[§ 2637] **(d) Conditions of Bond.** In some states it is held to be unnecessary to set out the conditions of the bond in the declaration,[43] while in others it is held that, in order to state a cause of action against the sureties, the conditions of the bond must be set out,[44] and a mere allegation that the bond was conditioned according to law is insufficient.[45] Where more than one bond was given, and the action is on the second bond, the purpose of such bond must be stated in order to show for what acts the sureties are liable.[46]

[§ 2638] **(e) Breach of Conditions.** At common law it was not necessary for plaintiff to assign breaches in the declaration, but he might declare on the penalty and then make the assignment in the replication in case defendant should plead performance of the condition as a defense.[47] The modern practice, however, is to assign the breach in the declaration,[48] and plaintiff may assign any number of breaches.[49] The breach must be directly and positively averred,[50] the particular breach or breaches relied on being specifically stated,[51] together with the facts necessary to show the commission of the breach,[52] and that plaintiff has been injured thereby.[53] In other words a specific cause of action must be alleged with reasonable certainty and precision.[54] This, however, is all that good pleading requires,[55] and plaintiff need not anticipate

v. McCandless, 27 Kan. 296; State v. Cowles, 5 Oh. St. 87.

[a] **A general averment** that the administrator did not pay over the sum in his hands to the persons entitled thereto, "though often requested so to do," is sufficient on general demurrer. State v. Cowles, 5 Oh. St. 87.

[b] **Either a demand or an excuse for the omission** to make a demand must be averred. State v. Cowles, 5 Oh. St. 87; Woodson v. State, 17 Oh. 161.

37. Burnside v. Robertson, 28 S. C. 583, 6 SE 843; Wilbur v. Hutto, 25 S. C. 246.

38. Probate Judge v. Thompson, 3 Miss. 808; Ordinary v. White, 43 N. J. L. 22.

39. Meservey v. Kalloch, 97 Me. 91, 53 A 876; Waterman v. Dockray, 78 Me. 139, 3 A 49; Groton v. Tallman, 27 Me. 68; State v. Robinson, 57 Md. 486.

40. Bamberger v. American Surety Co., 48 Misc. 221, 96 NYS 665 [aff 109 App. Div. 917 mem, 96 NYS 665].

41. Blagden v. U. S., 18 App. (D. C.) 370; Kyle v. Mays, 22 Ala. 692; Evans v. Gerken, 105 Cal. 311, 38 P 725; Jeffree v. Walsh, 14 Nev. 143.

42. Evans v. Gerken, 105 Cal. 311, 38 P 725.

43. Davis v. Dickson, 2 Stew. (Ala.) 370 [overr Fuqua v. Stone, 1 Stew. (Ala.) 435]; Woodbridge v. Grant, 1 Root (Conn.) 173; Rice v. Thomson, 18 S. C. L. 339; Hill v. Escort, 38 Tex. Civ. A. 487, 86 SW 367.

[a] **As against a general demurrer** an allegation of execution and breach is sufficient, the averment of the execution of such bond carrying with it the prescribed condition. Hill v. Escort, 38 Tex. Civ. A. 487, 86 SW 367.

44. Mountjoy v. Pearce, 4 Metc. (Ky.) 97; Brewer v. Hill, 9 KyL 329; Whitfield v. Evans, 56 Miss. 488.

45. Whitfield v. Evans, 56 Miss. 488.

46. Lane v. State, 24 Ind. 421.

47. Davis v. Dickson, 2 Stew. (Ala.) 370 [overr Fuqua v. Stone, 1 Stew. (Ala.) 435]; Rice v. Thomson, 18 S. C. L. 339; Calhoun v. Lillard, 4 Hayw. (Tenn.) 56; Ward v. Fairfax Justices, 4 Munf. (18 Va.) 494.

[a] **An assignment of breaches must appear in some part of the record** in order to sustain the judgment. Ward v. Fairfax Justices, 4 Munf. (18 Va.) 494.

48. Phillips v. Governor, 2 Ark. 382; State v. Bowen, 45 Miss. 347; Calhoun v. Lillard, 4 Hayw. (Tenn.) 56; Ward v. Fairfax Justices, 4 Munf. (18 Va.) 494.

49. Phillips v. Governor, 2 Ark. 382; Hoover v. Berryhill, 84 N. C. 132; West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

[a] **At common law** only one breach could be assigned. West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844.

50. Phillips v. Governor, 2 Ark. 382; Fitch v. Lothrop, 1 Root (Conn.) 88.

51. Newsom v. Dickerson, Peck (Tenn.) 285.

[a] **A general averment that the administrator did not pay off debts** according to law is good. Ordinary v. Phillpot, 1 S. C. L. 462.

52. Ark.—Floyd v. Newton, 97 Ark. 459, 134 SW 934; Porter v. State, 9 Ark. 226; Phillips v. Governor, 2 Ark. 382.

Ind.—State v. Scott, 12 Ind. 529.

Kan.—Stratton v. McCandless, 27 Kan. 296.

Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858.

Mo.—State v. Lamm, (A.) 216 SW 332.

Oh.—State v. Cutting, 2 Oh. St. 1.

Vt.—Chittenden Dist. Prob. Ct. v. Saxton, 17 Vt. 623.

[a] **Illustration.**—In order properly to set up that payment of certain demands by the representative was unlawful, the complaint must allege that such demands had not been allowed as claims against the estate. State v. Lamm, (Mo. A.) 216 SW 332.

[b] **The receipt of sufficient assets** (1) must be alleged in order to show a breach of condition in failing to pay claims against the estate. Lee v. Waller, 3 Metc. (Ky.) 61; State v. Cutting, 2 Oh. St. 1; Chittenden Prob. Ct. v. Saxton, 17 Vt. 623. Contra Thomson v. Searcy, 6 Port. (Ala.) 393. (2) But a formal averment to this effect is not necessary where the fact appears from the other allegations. Hoggatt v. Montgomery, 7 Miss. 93.

[c] **A petition against the executor of a deceased executor** for breach by decedent of his bond as executor should allege that neither the deceased executor in his lifetime nor his executor since has performed the acts required by law or the order of the court nonperformance of which is alleged to constitute the breach. State v. Petticrew, 19 Mo. 373.

[d] **Complaints held insufficient.**—(1) A complaint alleging that an executor failed to inventory property of the estate is insufficient where it does not allege that he had knowledge of such property. State v. Scott, 12 Ind. 529. (2) A complaint alleging as breaches "failure to return a true inventory" and "unreasonable delay" in selling certain real estate without alleging in what respect the inventory was untrue or the delay unreasonable is too indefinite. Stratton v. McCandless, 27 Kan. 296. (3) Where a legacy was not to be paid until the legatee attained a certain age, a complaint in an action on the bond for failure to pay it which fails to allege that plaintiff has attained that age and that there are sufficient assets to pay the legacy is insufficient. Rogers v. State, 26 Ind. A. 144, 59 NE 334.

53. Weihe v. Statham, 67 Cal. 245, 7 P 673; Stratton v. McCandless, 27 Kan. 296.

54. Ark.—Phillips v. Governor, 2 Ark. 382.

Ga.—Wall v. Pittman, 146 Ga. 274, 91 SE 55; Knox v. Raynor, 146 Ga. 146, 90 SE 853.

Ind.—Nicholson v. Carr, 3 Blackf. 104.

Kan.—Stratton v. McCandless, 27 Kan. 296.

Ky.—Lee v. Waller, 3 Metc. 61.

Mass.—Paine v. Fox, 16 Mass. 129.

N. Y.—Mahoney v. Gunter, 10 AbbPr 431.

Tenn.—Newsom v. Dickerson, Peck 285.

Tex.—Collins v. Warren, 63 Tex. 311.

Vt.—Rutland Prob. Ct. v. Hull, 58 Vt. 306, 3 A 472.

[a] **Where plaintiff is interested in only a particular class of assets** a complaint alleging a devastavit must specify the particular class. Altheimer v. Hunter, 56 Ark. 159, 19 SW 496.

[b] **A complaint merely alleging the recovery of a judgment** against the administrator for a devastavit without stating that it has not been paid is fatally defective. Irvine v. Williams, 6 Dana (Ky.) 41.

[c] **A petition which fails to allege when a devastavit occurred** is demurrable, where, under the law then in force, if the devastavit occurred after its passage the action would not lie. Collins v. Warren, 63 Tex. 311.

[d] **In an action to charge an administrator for failing to account for money received,** it should be alleged that it was received before the account was rendered or that he has since been cited in and has not accounted. Paine v. Fox, 16 Mass. 129.

[e] **The authority of the surrogate to issue the letters** of administration must be alleged. Mahoney v. Gunter, 10 AbbPr (N. Y.) 431.

55. Ala.—Perkins v. Moore, 16 Ala. 9.

pate and negative matters of defense[56] or set out matters lying more properly within the knowledge of defendant.[57] Setting out the condition in the language of the bond and alleging its nonperformance has been held to be sufficient,[58] but in some cases merely negativing the condition is not sufficient to show a breach.[59] Although only one of several breaches relied on be properly assigned the complaint is good against a general demurrer.[60]

[§ 2639] **(3) Exhibits.** It is not necessary, unless required by statute or rule of court,[61] to file with the complaint a copy of the bond,[62] of the will,[63] of the order for payment made by the probate court,[64] or of the settlement made by the representative;[65] and even where a copy of the bond is required to be filed it does not become a part of the record for the purposes of pleading,[66] but is merely notice to defendant of the cause of action and will not cure a defective statement in the declaration.[67]

[§ 2640] **b. Plea or Answer—(1) In General.** The plea or answer must meet the allegations of the declaration or complaint,[68] and must answer the whole cause of action stated therein[69] by stating facts and not merely conclusions without the facts on which they are based.[70] A plea which neither controverts the allegations of the declaration nor presents any matter in avoidance of them is bad on demurrer,[71] as is also a plea which tenders an immaterial issue.[72] Where a settlement and accounting with the proper court is relied on as a defense, a copy or transcript of the records referred to

Cal.—Moody v. Pacific Surety Co., (A.) 182 P 802.
Conn.—Edwards v. White, 12 Conn. 28.
Ga.—Matthews v. Council, 96 Ga. 780, 22 SE 335.
Ill.—Peo. v. Rardin, 171 Ill. A. 226.
Ind.—Heady v. State, 60 Ind. 316.
Minn.—McAlpine v. Kratka, 98 Minn. 151, 107 NW 961.
Miss.—Whitfield v. Evans, 56 Miss. 488; Probate Judge v. Thompson, 3 Miss. 808.
Mo.—Finney v. State, 9 Mo. 632; State v. Stuart, 111 Mo. A. 478, 86 SW 471.
N. Y.—Peo. v. Falconer, 4 N. Y. Super. 81.
Oh.—Franklin County Treasurer v. McElvain, 5 Oh. 200.
R. I.—Providence Municipal Ct. v. McElroy, 18 R. I. 749, 30 A 796.
Tenn.—Calhoun v. Lillard, 4 Hayw. 56.
Ont.—Bell v. Mills, 25 U. C. Q. B. 508.

[a] **Illustrations of sufficient assignments of:** (1) Failure to file inventory. Edwards v. White, 12 Conn. 28. (2) Failure to render accounts. O'Connor v. State, 18 Oh. 225; Providence Municipal Ct. v. McElroy, 18 R. I. 749, 30 A 796. (3) Failure to pay claims of creditors. Moody v. Pacific Surety Co., (Cal. A.) 182 P 802; Matthews v. Council, 96 Ga. 780, 22 SE 335. (4) Failure to pay legacies. Perkins v. Moore, 16 Ala. 9; Heady v. State, 60 Ind. 316. (5) Commission of devastavit. Kyle v. Mays, 22 Ala. 692; State v. Bennett, 24 Ind. 383.

[b] **The declaration is sufficient** if it properly avers facts which, with the legal presumptions arising thereon, make a prima facie case; and a declaration which avers that the administrator was discharged and his letters revoked by the county court is sufficient without averring facts showing that the court had jurisdiction of the parties and of the subject matter. Peo. v. Lane, 36 Ill. A. 649.

[c] **The time when the representative received property** alleged to have been misappropriated, whether before or after the execution of the bond, is immaterial and need not be alleged. Owen v. State, 25 Ind. 371.

[d] **Where the disobedience of a decree of the surrogate is assigned** (1) as the breach, the complaint need not state the grounds of the decree (Field v. Van Cott, 5 Daly (N. Y.) 308, 15 AbbPrNS 349), (2) nor the steps preliminary to making it (Peo. v. Falconer, 4 N. Y. Super. 81).

56. Thomas v. Searcy, 6 Port. (Ala.) 393; Blagden v. U. S., 18 App. (D. C.) 370; Bischoff v. Engel, 10 App. Div. 240, 41 NYS 815.

[a] **Failure to explain the nonjoinder of certain parties plaintiff** does not affect the sufficiency of the cause of action alleged. Bischoff v. Engel, 10 App. Div. 240, 41 NYS 815.

57. Thomas v. Searcy, 6 Port. (Ala.) 393; Hoggatt v. Montgomery, 7 Miss. 93; Peo. v. Dunlap, 13 Johns. (N. Y.) 437; Ordinary v. Phillpot, 1 S. C. L. 462.

58. Ark.—Porter v. State, 9 Ark. 226.
Conn.—Clark v. Russell, 2 Day 112.
Miss.—Probate Judge v. Thompson, 3 Miss. 808.
N. J.—Ordinary v. Cooley, 30 N. J. L. 179.
Oh.—Gutridge v. Vanatta, 27 Oh. St. 366.
Tenn.—Carroll v. Foster, 3 Yerg. 468.

"A breach may be considered well assigned if it be in the words of the contract, either negatively or affirmatively, or in words coextensive with its legal import or effect." Phillips v. Governor, 2 Ark. 382, 389.

[a] **All the words of the condition need not be negatived** if it is stated in substance and a denial of the performance of that particular duty alleged. Probate Judge v. Thompson, 3 Miss. 808.

[b] **Where the bond does not follow the statutory form** the breach must be assigned according to the condition as expressed in the bond given, and if the nonperformance of duties not covered by the condition be added the assignment is bad. Ordinary v. Cooley, 30 N. J. L. 179.

59. Walker v. Hall, 1 Pick. (Mass.) 20; Probate Judge v. Lane, 6 N. H. 55; Probate Judge v. Tillotson, 5 N. H. 413.

[a] **In assigning an omission to render an inventory or account,** it is necessary to aver that some property came into the administrator's hands. Walker v. Hall, 1 Pick. (Mass.) 20; Probate Judge v. Tillotson, 5 N. H. 413.

60. Ind.—Whitehall v. State, 19 Ind. 27; State v. Scott, 12 Ind. 529.
Miss.—Probate Judge v. Thompson, 3 Miss. 808.
Mo.—State v. Campbell, 10 Mo. 724; State v. Porter, 9 Mo. 356.
R. I.—West Greenwich Prob. Ct. v. Carr, 20 R. I. 592, 40 A 844; Providence Municipal Ct. v. McElroy, 19 R. I. 712, 36 A 717.
Tenn.—Carroll v. Foster, 3 Yerg. 468; Newsom v. Dickerson, Peck. 285.

[a] **The proper remedy** in a case where the averment of one breach is defective is to move on the trial to exclude all evidence relating to that breach. State v. Porter, 9 Mo. 356.

61. Rice v. Thompson, 18 S. C. L. 339.

62. Gibson v. Robinson, 90 Ga. 756, 16 SE 969, 35 AmSR 250.

63. Braxton v. State, 25 Ind. 82.

64. Euper v. State, 85 Ark. 223, 107 SW 179.

65. State v. Bartlett, 68 Mo. 581.

66. Rice v. Thompson, 18 S. C. L. 339.

67. Rice v. Thompson, 18 S. C. L. 339.

68. Ark.—Outlaw v. Yell, 8 Ark. 345.
Ind.—State v. Tomlinson, 16 Ind. A. 662, 45 NE 1116, 59 AmSR 335.
Miss.—Cogan v. Duncan, 23 Miss. 274.
N. H.—Probate Judge v. Lane, 50 N. H. 556; Harris v. Davis, 1 N. H. 248.
Pa.—Com. v. Magee, 224 Pa. 168, 73 A 347.

[a] **A plea of nul tiel record** in an action not founded on a record but upon a misapplication or wasting of assets presents no issue on the substantial matter in controversy. Cogan v. Duncan, 23 Miss. 274.

[b] **In an action for failing to pay claims of creditors,** it is not sufficient to allege that the assets have not been wasted or misapplied, since a mere retention of the funds after it was the duty of the representative to pay the claims would constitute a breach of the bond. Cannon v. Cooper, 39 Miss. 784, 80 AmD 101.

69. Ark.—Gorman v. Bonner, 80 Ark. 339, 97 SW 282.
Ind.—State v. Tomlinson, 16 Ind. A. 662, 45 NE 1116, 59 AmSR 335.
Iowa.—Clark v. Cress, 20 Iowa 50.
N. H.—Harris v. Davis, 1 N. H. 248.
R. I.—Westerly Prob. Ct. v. Potter, 25 R. I. 204, 55 A 524.

[a] **It is not necessary that one plea should answer the whole declaration** or cause of action, it being only necessary that the whole matter of defense pleaded shall cover the whole complaint, and defendant may therefore plead several matters of defense in several pleas, and if all taken together form a sufficient answer to the whole matter of the complaint, the defense is complete. Probate Ct. v. Potter, 25 R. I. 204, 55 A 524.

70. Woodall v. Wright, 142 Ala. 205, 37 S 846; Reid v. Nash, 23 Ala. 733; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525.

71. Outlaw v. Yell, 8 Ark. 345; Cogan v. Duncan, 23 Miss. 274; Harris v. Davis, 1 N. H. 248.

72. Woodall v. Wright, 142 Ala. 205, 37 S 846; Byrd v. State, 15 Ark. 175; Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525; Westerly Prob. Ct. v. Potter, 25 R. I. 204, 55 A 524.

[a] **Plea properly stricken out as tendering immaterial issue.**—A decree recited in the declaration in debt on an executor's bond, by which it was adjudged that one of the persons for whose benefit the action was brought was interested in the estate, and entitled to have the executor return an inventory and account, was conclusive as to such person's interest on the date it was rendered, and all pleas setting up a prior extinguishment of such interest without denying the rendition of the decree tendered immaterial issues, and should be stricken out. Westerly Prob. Ct. v. Potter, 25 R. I.

should be filed with the answer.[73] Averments in the answer of a surety that after he signed the bond the name of another person, as surety, was added to the bond without his consent, are properly stricken from the answer, because such averments are inconsistent, and also because, in the absence of an allegation that the person whose name was added signed after delivery of the bond, the answer does not negative the presumption that the principal had implied authority to secure other sureties before delivery.[74] In a suit on the bond based on a judgment by the ordinary which the administrator refused to pay, the sheriff having returned nulla bona as to him, allegations of the answer that the usees of plaintiff were not the heirs of decedent and the sureties were not bound by the judgment were properly stricken.[75]

[§ 2641] **(2) Particular Pleas—(a) Performance.** A general plea of performance in an action on an administration bond where special breaches are assigned is bad on demurrer,[76] as in such case there should be a specific answer.[77] If, however, defendant traverses the specific breaches assigned affirming that he has in these particulars performed the conditions of the bond there is a good issue between the parties and the plea is sufficient.[78] Where the declaration does not assign a breach, defendant may plead performance and plaintiff must then assign breaches in his replication.[79]

[§ 2642] **(b) Release.** A plea puis darrein continuance setting up a release by one of the persons for whose benefit the suit is brought of all claims against defendants sets up a substantial defense as to the person named therein,[80] and waives all previous pleas as to such person's interest.[81]

[§ 2643] **(c) Plene Administravit.** Ordinarily plene administravit is not a good plea in an action on an administration bond,[82] although it is sometimes permitted by statute.[83] It may be pleaded by the sureties where by statute their liability is limited to the amount of the assets,[84] or by the principal where certain claimants are entitled to preference and after exhausting the assets in paying claims in the proper order he is sued for the nonpayment of a claim of an inferior class.[85] It is not a good plea where it does not answer the declaration or raise any material issue,[86] and where a judgment is rendered against the principal in an action suggesting a devastavit it is conclusive that he had assets and wasted them and neither he nor the sureties can thereafter plead plene administravit in an action on the bond.[87] A plea of plene administravit must state the time when the administrator was without assets to satisfy the demand in question and should allege that he did not have such assets at the time of the issuing of the original writ or at any time thereafter.[88] Where the plea of plene administravit is no longer in use, the facts necessary to show that the estate has been fully administered may be set up in the answer.[89]

[§ 2644] **(d) Want of Assets.** While, in an action on an administrator's bond, because of failure of the administrator to pay judgments rendered against him, the sureties have a legal right to plead a want of assets, a plea is defective which avers only a want of sufficient assets.[90]

[§ 2645] **(e) Nil Debet.** A plea of nil debet in an action on an administration bond where breaches are assigned is bad on demurrer,[91] the breaches assigned being in the nature of several causes of action to which defendant should respond;[92] but the plea is not a nullity, and if issue is taken thereon it is incumbent upon plaintiff to prove all the material allegations of his declaration except the execution of the bond.[93]

[§ 2646] **(f) Non Est Factum.** The plea of non est factum puts in issue only the execution of the bond,[94] which, however, includes delivery as well as signing.[95] It admits every other allegation in the declaration,[96] and is a waiver of any legal defense of which defendant could have availed himself under the condition.[97]

[§ 2647] **(g) Pleas in Abatement.** Where leave to sue is a condition precedent to suit on the bond, an objection that suit was brought without such leave can be taken only by a plea in abatement,[98] and if not so taken it will be deemed to be waived.[99] The fact that the action is brought by a married woman alone without joining her husband can be taken advantage of only by a plea in abatement.[1]

204, 55 A 524.

73. State v. Marshall, 20 Ind. 287.

74. State v. Morrison, 244 Mo. 193, 148 SW 907.

75. Sutton v. Flanders, 146 Ga. 290, 91 SE 50.

76. Ala.—Reid v. Nash, 23 Ala. 733.
Ark.—Byrd v. State, 15 Ark. 175.
Del.—State v. Short, 2 Harr. 152.
Ky.—Griffith v. Com., 1 Dana 270.
Md.—Shriver v. State, 65 Md. 278, 4 A 679.

77. Reid v. Nash, 23 Ala. 733; State v. Short, 2 Del. 152; Shriver v. State, 65 Md. 278, 4 A 679; Calhoun v. Lillard, 4 Hayw. (Tenn.) 56, 57.
"The plea of the defendant must state a special performance, showing when, where, and how he performed." Calhoun v. Lillard, supra.

78. Stewart v. McCully, 39 S. C. L. 80.

79. State v. Short, 2 Harr. (Del.) 152; Dawes v. Gooch, 8 Mass. 488; Stewart v. McCully, 5 Rich. (S. C.) 80.

80. Westerly Prob. Ct. v. Potter, 25 R. I. 204, 55 A 524.

81. Westerly Prob. Ct. v. Potter, 25 R. I. 204, 55 A 524.

82. Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Daviess v. Mead, 2 Bibb (Ky.) 397; Randolph v. Singleton, 12 Sm. & M. (Miss.) 439; Probate Judge v. Lane, 50 N. H. 556.

83. Amason v. Nash, 24 Ala. 279; Williams v. Hinkle, 15 Ala. 713; Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Com. v. Richardson, 8 B. Mon. (Ky.) 81; Griffith v. Com., 1 Dana (Ky.) 270; Randolph v. Singleton, 20 Miss. 439.
[a] **Sufficiency of plea.**—A plea of plene administravit is bad on demurrer if it does not allege that the assets were fully administered before suit brought. Reid v. Nash, 23 Ala. 733.

84. Ala.—Amason v. Nash, 24 Ala. 279; Williams v. Hinkle, 15 Ala. 713.
Fla.—State v. Crawford, 23 Fla. 289, 2 S 371.
Me.—Burgess v. Young, 97 Me. 386, 54 A 910.
Minn.—St. Paul First Nat. Bank v. How, 28 Minn. 150, 9 NW 626.
Tenn.—Calhoun v. Lillard, 4 Hayw. 56.
[a] **Where the plea is not pleaded by name,** in which case all material averments would have been considered as duly made, it must be alleged that the administration of the assets was made before the suit on the bond was instituted, and this notwithstanding the record states that the plea was taken "in short by consent." Reid v. Nash, 23 Ala. 733.

85. Randolph v. Singleton, 12 Sm. & M. (Miss.) 439.

86. Probate Judge v. Lane, 50 N. H. 556.

87. Goodwin v. Wilson, 1 Blackf. (Ind.) 344.

88. Iglehart v. State, 2 Gill & J. (Md.) 235.

89. McKim v. Haley, 173 Mass. 112, 53 NE 152.

90. Woodall v. Wright, 142 Ala. 205, 37 S 846.

91. U. S.—Alexander v. Bryan, 110 U. S. 414, 4 SCt 107, 28 L. ed. 195.
Ala.—Reid v. Nash, 23 Ala. 733.
Ind.—Kirkpatrick v. State, 3 Ind. 521.
Ky.—Griffith v. Com., 1 Dana 270.
Miss.—State v. Bowen, 45 Miss. 347.

92. State v. Bowen, 45 Miss. 347.

93. Kirkpatrick v. State, 3 Ind. 521.

94. Pritchett v. Peo., 6 Ill. 525; Peo. v. Rowland, 5 Barb. (N. Y.) 449.

95. Cully v. Peo., 73 Ill. A. 501.

96. Peo. v. Rowland, 5 Barb. (N. Y.) 449.

97. Rice v. Thomson, 2 Bailey (S. C.) 339.

98. Prindle v. Holcomb, 45 Conn. 111; Johannes County Judge v. Youngs, 48 Wis. 101, 4 NW 32.

99. Prindle v. Holcomb, 45 Conn. 111; Ross v. Chambliss, 5 La. Ann. 158.
[a] **Pleading to the merits** is a waiver of the right to object that conditions precedent were not complied with. Ross v. Chambliss, 5 La. Ann. 158.

1. Probate Ct. v. Sawyer, 59 Vt. 57, 7 A 281.

[§ 2648] **(3) Severance in Pleading.** In an action on the bond against both principal and sureties defendants need not plead jointly but may sever and each plead as many pleas as he may deem necessary to his defense.[2]

[§ 2649] **c. Affidavit of Defense.** An affidavit of defense, in an action against the surety on an administrator's bond, sixteen years after the audit of the administrator's account, averring that the surety is informed, believes, and expects to be able to prove that the claim for which the action is brought has been paid in full by the administrator, but that he cannot state the time, place, and manner of such settlement, because it was secretly had between plaintiff and the administrator, is sufficient under the rule that all that may be required of the surety is that his averments shall be as explicit and specific as the circumstances reasonably admit.[3]

[§ 2650] **d. Replication or Reply.** In modern practice breaches are usually assigned in the declaration and issue joined on the plea,[4] but if not and defendant pleads performance the specific breaches must be assigned in the replication.[5] Where defendant pleads performance the replication must state facts sufficient to show a breach of condition.[6] The replication in such cases performs the office of a declaration,[7] and there must be the same certainty of averment as would be necessary in the declaration.[8]

[§ 2651] **e. Rejoinder and Surrejoinder.** The rejoinder to be sufficient must answer the whole cause of action set out in the replication,[9] and must support the plea, any departure therefrom being ground for demurrer.[10] If plaintiff files a surrejoinder, it must conform to the replication, and if it sets up another and different breach from the one therein assigned it is bad for departure.[11]

[§ 2652] **f. Amendments.** Where the action must be instituted in the name of the state or other nominal plaintiff,[12] the complaint may be amended so as to substitute the proper nominal plaintiff where the action is improperly brought in the name of the real party in interest,[13] and if brought by the proper nominal plaintiff but for the benefit of the wrong person the record may be amended to show the real party in interest.[14] But any amendment must be consistent with the original pleading, and cannot be allowed where it would constitute a new suit against new parties.[15]

[§ 2653] **9. Issues, Proof, and Variance.** There can be no recovery except upon the issues raised by the pleadings.[16] The proof must establish the cause of action as alleged,[17] and must show a compliance with any conditions precedent essential to the maintenance of the action;[18] but all material averments in the declaration not denied or controverted by the plea are admitted, and plaintiff need not introduce proof of matters not put in issue by the pleadings.[19] Where, under the statute, the sureties cannot be sued without joining the administrator, save in certain excepted instances, and plaintiff, for the purpose of bringing the case within the exception, alleges that the administrator has absconded and removed from the state, which allegation is denied, it is incumbent on plaintiff to prove such allegation, failing in which he is not entitled to a verdict.[20] The proof must correspond to the allegations of the pleadings,[21] but an immaterial variance may be disregarded,[22] and will be considered as waived if not objected to on the trial.[23] Under the general issue defendant may show that the person on whose estate the letters of administration were granted was not in fact dead, and that the court was therefore without jurisdiction.[24] In a proceeding by an administrator de bonis non against the sureties on the bond of the former administratrix for an accounting of the property received by her, where the parties acquiesced in the theory of the trial that, although a distribution was prematurely made, it was made to the heir, and therefore the sureties should be held only for

2. Williams v. Hinkle, 15 Ala. 713.

3. Com. v. Magee, 224 Pa. 168, 73 A 347.

4. Calhoun v. Lillard, 4 Hayw. (Tenn.) 56.

5. State v. Short, 2 Del. 152.

6. Griffin v. Pratt, 3 Conn. 513.

[a] **Sufficient replications.**—(1) A replication to a plea of omnia performavit which states in detail sufficient facts to show that defendant was guilty of fraudulent conduct in the sale of property of the estate is sufficient. Probate Judge v. Lane, 50 N. H. 556. (2) In an action for failing to file an inventory a replication to a plea of special performance that the administrator did not exhibit an inventory and concluding to the country is good. Proprietary v. Gibbs, 1 Harr. & M. (Md.) 62.

7. State v. Gaither, 11 Gill & J. (Md.) 160.

8. Isaacs v. Stevens, 13 Conn. 499; State v. Gaither, 11 Gill & J. (Md.) 160.

[a] **Sufficiency.** — A replication showing the existence of a debt due from the intestate and that the administrator was insolvent would render the surety liable, unless he could prove that the estate had been duly administered. State v. Cox, 2 Harr. & G. (Md.) 379.

[b] **In an action by a creditor** for the nonpayment of his claim the replication must state the nature and character of the claim and not merely its amount. Isaacs v. Stevens, 13 Conn. 499.

9. Edwards v. White, 12 Conn. 28.

10. Warren v. Powers, 5 Conn. 373; State v. Hanson, 2 Harr. & G. (Md.) 437; Proprietary v. Cockshut, 1 Harr. & M. (Md.) 40; Probate Judge v. Lane, 50 N. H. 556; Lewis v. Spann, 30 S. C. L. 429; Ordinary v. Bracey, 1 Brev. (S. C.) 191.

[a] **After a plea of performance** a rejoinder of matters in excuse of nonperformance is a departure. Warren v. Powers, 5 Conn. 373.

11. Dawes v. Winship, 16 Mass. 291.

12. See supra § 2631.

13. State v. Shelby, 75 Mo. 482.

14. Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125; Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

[a] **Illustration.**—In an action on an administrator's bond brought in the name of the ordinary it was not error to allow an amendment to the petition adding the name of the widow and her minor children as usees. Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125.

15. Leggett v. Bennett, 48 Ala. 380.

16. Iowa.—Allen v. Corbett, 51 Iowa 703, 1 NW 771.

Md.—Edelen v. State, 4 Gill & J. 277.

Mo.—State v. Edwards, 78 Mo. 473.

N. Y.—Steinert v. Van Aken, 165 App. Div. 206, 150 NYS 525.

Tex.—Bergstroem v. State, 58 Tex. 92.

17. Miller v. Gee, 4 Ala. 359; Bergstroem v. State, 58 Tex. 92.

[a] **In an action against the sureties for a devastavit** (1) committed by their principal it is essential to show what amount of assets came into the hands of the executor or administrator (Miller v. Gee, 4 Ala. 359) (2) except where the amount is admitted by the pleadings (Hoggatt v. Montgomery, 6 How. (Miss.) 93).

18. Burgess v. State, 12 Gill & J. (Md.) 64; Behrle v. Sherman, 23 N. Y. Super. 292; State v. Hudkins, 34 W. Va. 370, 12 SE 495.

[a] **Assignment of bond to plaintiff must be proved.**—Burgess v. State, 12 Gill & J. (Md.) 64.

19. Peo. v. Gray, 72 Ill. 343; Glocester Prob. Ct. v. Eddy, 8 R. I. 508; Roberts v. Weadock, 98 Wis. 400, 74 NW 93.

20. Weaver v. Tuten, 138 Ga. 101, 74 SE 835.

21. Rogers v. Jones, 51 Ala. 353; State v. Short, 2 Harr. (Del.) 152; State v. Seabright, 15 W. Va. 590.

[a] **Illustration.**—Where a declaration alleges the recovery of a judgment de bonis testatoris against the executor, it is not supported by the introduction of a judgment against him de bonis propriis. State v. Seabright, 15 W. Va. 590.

22. Woodward v. Fisher, 11 Sm. & M. (Miss.) 303; Grant v. Rogers, 94 N. C. 755; Gabie v. Meilan, 4 N. C. 346.

23. Curry v. Peo., 54 Ill. 263.

24. Ross v. White, 29 N. C. 116.

Death as jurisdictional requisite see supra § 30.

the amount necessary to pay the debts and expenses of administration, there was a waiver by the administrator of an accounting of the whole estate.[25]

[§ 2654] **10. Evidence—a. Presumptions.** It will be presumed in an action on an administration bond that the representative has performed the duties of his office according to law,[26] that where sales were made on credit good security was taken,[27] and after a reasonable time that the amount was duly collected.[28] Where the representative acted in different capacities with regard to property of the estate it will be presumed to have been in his hands in that capacity in which it ought at the time to have been held,[29] and, where he received property of the estate under an agreement to take administration, it will be presumed that he retained possession thereof until after his appointment.[30] Where a representative is cited to file a final account it will be presumed, in an action for failing to obey the order, that accounts previously filed were not final, although they were so styled.[31] It will be presumed that the order requiring the bond was authorized,[32] and the possession and approval of such bond by the probate judge raises the presumption that it was duly executed and delivered,[33] although it has been held that there is no such presumption where there is a plea of non est factum and it is claimed that the signature of one of the sureties is forged.[34] In the absence of any allegation to the contrary it is to be presumed that, in making certain payments, the representative acted within his lawful authority.[35] Failure of an administrator to account when called upon to do so raises a presumption of misappropriation of assets.[36] It has been held that in an action on the bond to compel the administrator to account for and pay over the amount of a debt from himself to decedent, the lapse of twenty years from the date of the bond affords no ground for a presumption of payment to the heirs,[37] and no presumption arises that the debt was forgiven by decedent.[38] A defalcation by the representative is presumed to have occurred while the bond was in effect.[39]

[§ 2655] **b. Burden of Proof.** In an action on the bond to recover damages for any act of maladministration, the burden is upon plaintiff to prove the damages alleged,[40] and also to show that at the time of the alleged default the principal was acting in his representative capacity.[41] A distributee suing for the nonpayment of his distributive share has the burden of proving that he is a person entitled to distribution[42] and also that he is entitled to the particular amount which he claims.[43] One who sues as a creditor of the estate must show that there was an existing debt of the estate to him at the time when his action was commenced.[44] A claimant suing for the nonpayment of his claim must show a receipt of assets by the representative,[45] unless, the executor being the residuary legatee, the bond is conditioned to pay all debts and legacies.[46] Where receipt of assets is proved or admitted the burden is on defendant to show that the assets were properly disposed of.[47] Where a representative has failed to collect debts due the estate he has the burden of showing that the failure was unavoidable,[48] and also that he exercised due care and diligence in the attempt to collect.[49]

[§ 2656] **c. Admissibility.** In actions on administration bonds whatever is competent as evidence upon which to charge the principal is admissible against the sureties,[50] but as in other cases evidence is not admissible unless it tends to support or contradict some allegation of the pleadings,[51] and to prove or disprove the particular fact in issue,[52] and the best evidence of the particular fact in question must be produced.[53] Evidence of the receipt of sums of money as income from the per-

25. In re Murray, 56 Or. 132, 107 P 19.

26. Lockhart v. White, 18 Tex. 102.

27. Gordon v. Gibbs, 3 Sm. & M. (Miss.) 473; Lockhart v. White, 18 Tex. 102.

28. Gordon v. Gibbs, 3 Sm. & M. (Miss.) 473.

29. American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116; Kirby v. State, 51 Md. 383.

[a] **Where a surviving partner is administrator** of his deceased partner, it will be presumed that the surplus assets of the firm belonging to the administrator has been placed in his hands as such. American Surety Co. v. Wood, 2 Ga. A. 641, 58 SE 1116.

Discharge of surety by retention of property by principal in another capacity see supra § 2571.

Property held in capacity other than as executor or administrator not covered by bond see supra §§ 1895–1899.

30. Peo. v. Hascall, 22 N. Y. 188, 78 AmD 176.

31. Providence Municipal Ct. v. Henry, 11 R. I. 563.

32. Owen v. State, 25 Ind. 371.

33. Wright v. Lang, 66 Ala. 389.

34. State v. Morrison, 244 Mo. 193, 148 SW 907.

35. State v. Lamm, (Mo. A.) 216 SW 332.

36. Fassbender v. American Surety Co., 66 Misc. 6, 122 NYS 442.

37. Potter v. Titcomb, 7 Me. 302.

38. Potter v. Titcomb, 7 Me. 302.

39. State v. U. S. Fidelity, etc., Co., 188 Mo. A. 700, 176 SW 542.

40. Choate v. Arrington, 116 Mass. 552.

41. Cluff v. Day, 55 N. Y. Super. 460, 14 NYSt 729.

42. Shriver v. State, 65 Md. 278, 4 A 679.

43. Shriver v. State, 65 Md. 278, 4 A 679.

44. Johnson v. Huggins, 7 Ga. A. 553, 67 SE 217 ("An alleged creditor of an estate, suing upon the administrator's bond, must show a debt against the estate, as well as a devastavit by the administrator").

45. Wilson v. Slade, 2 Harr. & J. (Md.) 281; Morgan v. Slade, 2 Harr. & J. (Md.) 38.

46. State v. Snowden, 7 Gill & J. (Md.) 430; Colwell v. Alger, 5 Gray (Mass.) 67; Buel v. Dickey, 9 Nebr. 285, 2 NW 884.

[a] **Bond an admission of assets.**—The voluntary execution of a bond in this form is a conclusive admission of assets. Colwell v. Alger, 5 Gray (Mass.) 67.

47. Ala.—Miller v. Gee, 4 Ala. 359.

Ill.—Johnston v. Maples, 49 Ill. 101.

La.—Johnston's Succ., 1 La. Ann. 75.

Mass.—Choate v. Arrington, 116 Mass. 552.

N. Y.—Dayton v. Johnson, 69 N. Y. 419.

N. C.—State v. Golden, 90 SE 909.

[a] **In an action by a succeeding administrator against his precedessor** for failing to pay over a balance, where it is shown that such balance was in the hands of the preceding administrator, the presumption is that it was not paid over, and if it was paid to the successor in office the burden is upon defendant to prove this fact. Dayton v. Johnson, 69 N. Y. 419.

48. Gordon v. Gibbs, 3 Sm. & M. (Miss.) 473.

[a] **Where a representative fails to pay a debt due from himself** if he relies upon the inability to pay as a defense he has the burden of proving the fact. Keegan v. Smith, 60 App. Div. 168, 70 NYS 260 [aff 33 Misc. 74, 67 NYS 281, and aff 172 N. Y. 624 mem, 65 NE 1118 mem].

49. Peytavin's Succ., 7 Rob. (La.) 477.

50. Choate v. Arrington, 116 Mass. 552.

51. Peo. v. Hunter, 89 Ill. 392; Burch v. State, 4 Gill & J. (Md.) 444; State v. Pare, 28 Mo. A. 512.

52. McIntire v. Conlan, 223 Mass. 389, 111 NE 852; State v. Farmer, 54 Mo. 439; Scofield v. Churchill, 72 N. Y. 565; Taylor v. Smith, 1 Brev. (S. C.) 230.

[a] **In an action for failing to account** for certain property of the estate evidence as to whether certain claims against the estate were properly allowed is inadmissible. State v. Farmer, 54 Mo. 439.

[b] **Evidence as to the time of the receipt of assets** is properly excluded since the bond covers assets received before its execution. Scofield v. Churchill, 72 N. Y. 565.

53. Richardson v. Whitworth, 103 Ga. 741, 30 SE 573; Peo. v. Lott, 27 Ill. 215; Emory v. Thompson, 2 Harr. & J. (Md.) 244; Millers v. Catlett, 10 Gratt. (51 Va.) 477.

[a] **The best evidence as to the person to whom a legacy should be paid** is the will of the testator, and where this can be produced parol evidence is inadmissible. Millers v. Catlett, 10 Gratt. (51 Va.) 477.

[b] **A certified copy of the bond** is by statute admissible as evidence. Peo. v. Lott, 27 Ill. 215.

[c] **Where bonds are required to remain on file** in the office where

sonal estate and of any property which at any time has come or ought to have come into the representative's hands is admissible against both him and the sureties.[54] In an action for the nonpayment of a legacy the will of decedent is admissible as evidence of plaintiff's right of action,[55] and in an action for failure to pay the amount allowed for the support of minor heirs where defendants set up as a defense that no notice was given the representative to appear before the commissioners it is competent to show by parol, as evidence of a waiver of notice, that the representative was present and consented to or aided in the commissioner's report.[56] Where defendant pleads that the bond as originally executed was in a sum different from and smaller than that sued on, evidence is admissible to show that he knew the value of the estate and that the bond was required to be in double that value.[57]

The inventory and accounts filed by the representative are admissible to show for what property he and the sureties on the bond are liable,[58] but an account showing that the assets of the estate have been exhausted in payment of charges and preferred claims has been held not admissible,[59] unless allowed by the probate court.[60]

Value of property sold at unauthorized sale. Where an administrator has made an unauthorized sale of property of the estate, evidence of the price received is admissible to show the value of the property converted.[61] In an action for damages resulting from selling stock belonging to the estate at private sale without order of the probate court, defendant may show what the market value of the stock was up to the delivery to the purchaser and the exceptional circumstances under which it advanced and the conditions under which he agreed to sell it for the price received as evidence of his good faith, prudence, and skill in selling it.[62] In such a case evidence of individual offers to buy and sales of the stock, being admissible to show market value, is competent on the issue as to whether the administrator acted with prudence and skill,[63] but secret sales of corporate stock at extraordinary prices paid by rival interests seeking to obtain control of the corporation do not establish market value, and therefore evidence thereof is not competent.[64] The judgment and conduct of distributees in directing an administrator to sell stock belonging to the estate at private sale without order of the probate court may be considered in passing upon his prudence and skill in selling it.[65]

The representative's report of a sale is not conclusive as to the price but parol evidence is admissible to show the amount actually received.[66]

Payment, performance, or other exoneration. In an action against the sureties to recover the amount of a decree any evidence tending to show that plaintiff has received payment in whole or in part out of the assets of the estate of the principal debtor is admissible;[67] and, in an action on the bond of an administrator whose letters have been revoked, evidence of proper payments made by him and of losses of money by theft should be admitted in exoneration of his liability.[68] On a writ of scire facias, brought under a statute authorizing the court, on a suggestion of waste by a judgment creditor, to issue a writ of scire facias against the executor, because of a recovery of judgment against the executor, who had executed a bond conditioned for the payment of debts, and a return of execution unsatisfied, the executor may show that the assets of the estate were properly administered.[69]

Insolvency of estate. The representative's report of probable insolvency of the estate is not admissible unless supplemented by the report of the commissioner to determine solvency and the decree thereon.[70]

Insolvency of representative. Evidence that the executors were insolvent two and one-half years or more after they took charge of the estate is not admissible.[71]

Judgment or decree against principal. A judgment or decree against the principal is admissible in an action against the sureties.[72]

they are recorded a certified copy of the record is original evidence. Richardson v. Whitworth, 103 Ga. 741, 30 SE 573.

54. Beal v. State, 77 Ind. 231; Slaughter v. Froman, 2 T. B. Mon. (Ky.) 95; Choate v. Arrington, 116 Mass. 552; Governor v. Byrd, 2 Mo. 194.

[a] **Testimony as to the amount and kinds of property owned by decedent** just prior to his death is admissible as evidence of what went into the hands of the representative. Beal v. State, 77 Ind. 231.

[b] **Settlement after appointment of successor.**—Where an administrator has refused to give counter security and a successor has been appointed, a settlement made by the former after such appointment is admissible against him and his sureties. Slaughter v. Froman, 2 T. B. Mon. (Ky.) 95.

[c] **In an action for failure to render a true inventory and account** of the goods and chattels, rights and credits of the deceased evidence that the administratrix was seen in possession of money left with her by her husband prior to his death and money supposed to be his, brought to her by a person sent to ascertain the circumstances of his death, was properly admitted. Governor v. Byrd, 2 Mo. 194.

55. Ruby v. State, 55 Md. 484.

56. Butts v. Pugh, 54 Ga. 465.

57. Jackson v. Johnson, 67 Ga. 167.

58. Beal v. State, 77 Ind. 231; Warren v. Leonard, 115 Me. 323, 98 A 824; McIntire v. Conlan, 223 Mass. 389, 111 NE 852; Choate v. Arrington, 116 Mass. 552; State v. Kennedy, 163 Mo. 510, 63 SW 678; Lewis v. Gambs, 6 Mo. A. 138.

[a] **Reports of a representative, although never acted on by the court,** are admissible as admissions as to the disposition and management of the assets of the estate. Beal v. State, 77 Ind. 231.

[b] **Where a special bond is given for the sale of real estate** a general account, in which no separate and distinct account of the proceeds of the real estate and the disbursements made therefrom is made, is inadmissible in an action against the sureties on the real estate bond. Com. v. Hilgert, 55 Pa. 236.

59. McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

60. McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

61. State v. Scholl, 47 Mo. 84.

62. State v. Dickson, 213 Mo. 66, 111 SW 817.

63. State v. Dickson, 213 Mo. 66, 111 SW 817.

64. State v. Dickson, 213 Mo. 66, 111 SW 817.

65. State v. Dickson, 213 Mo. 66, 111 SW 817.

66. State v. Lindley, 98 Ind. 48.

67. Thompson v. Bailey, 5 Rich. (S. C.) 68; Gordon v. Clapp, 5 Vt. 129.

[a] **Receipts** showing payment to plaintiff by a former administrator are admissible in evidence and their effect cannot be defeated by showing waste by the former administrator. Gordon v. Clapp, 5 Vt. 129.

68. Annett v. Kerr, 2 Rob. (N. Y.) 556.

69. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

70. McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

71. State v. Morrison, 244 Mo. 193, 148 SW 907.

72. U. S.—McLaughlin v. Potomac Bank, 7 How. 220, 12 L. ed. 675.

Conn.—Willey v. Paulk, 6 Conn. 74.

Ga.—Weaver v. Tuten, 138 Ga. 101, 74 SE 835; Worthy v. Battle, 125 Ga. 415, 54 SE 667.

Kan.—Hefferlin v. Struckslager, 6 Kan. 166.

La.—Wiemann v. Mainegra, 112 La. 305, 36 S 358.

Md.—Ruby v. State, 55 Md. 484.

Miss.—Lipscomb v. Postell, 38 Miss. 476, 77 AmD 651; Woodward v. Fisher, 19 Miss. 303.

Okl.—Butts v. Larison, 170 P 500.

S. C.—Luscas v. Guy, 18 S. C. L. 403; Cureton v. Shelton, 14 S. C. L. 412; Lyles v. Caldwell, 14 S. C. L. 225.

[a] **A decree on a settlement by the representative of a deceased principal** to which the sureties were not parties is not admissible to show a liability of their principal for which they are responsible. Means v. Hicks,

[§ 2657] **d. Weight and Sufficiency.** The usual rules as to the weight and sufficiency of evidence[73] apply in an action on an administration bond.[74] The inventory filed by a representative, although not conclusive, is prima facie evidence of the assets received and their value,[75] but the return of appraisers where the representative has no right or opportunity to object to the return on the ground of a deficiency of assets is not evidence to charge him with assets,[76] unless by his conduct he has adopted the appraisement as his inventory.[77] The representative's accounts are prima facie evidence in an action on the bond.[78] Where the penalty of the bond is required to be fixed according to the appraisal of the estate, the sum expressed therein is prima facie evidence of the value of the property for which the representative is responsible.[79] Since the representative is lawfully in possession of the assets proof of the failure to pay a claim against the estate on demand is not sufficient to show conversion;[80] but a creditor who proves a debt against the estate and a devastavit or misapplication of assets is prima facie entitled to recover,[81] and need not show that there are no other assets from which his claim will ultimately be paid.[82] Proof of a sale of property the price of which was lost because insufficient security was taken is prima facie evidence of a devastavit.[83] The final settlement of a representative in which certain persons are designated as the heirs entitled to distribution is sufficient proof of the fact that the persons so named are heirs.[84] The effect of judgments and decrees against the principal as evidence against the sureties in an action on the bond has already been discussed.[85] At common law a judgment at law against the principal establishing a claim against the estate was an admission of assets sufficient to pay the same,[86] and a return of nulla bona on an execution issued thereon established a devastavit;[87] but in most jurisdictions the law is now otherwise and the judgment is not an admission of assets,[88] nor is the return of execution unsatisfied sufficient to establish a devastavit.[89] However, a return of nulla bona on an execution on a judgment against the representative in his capacity as such makes out a prima facie case for plaintiff suing on the bond,[90] and where an administrator's account shows a balance in his hands, a return of nulla bona is sufficient evidence of a devastavit.[91] So also proof of the solvency of a decedent's estate and of the sufficiency of assets in the hands of the administrator to pay a debt against the estate, with returns of "No property" on executions issued on a judgment against the administrator, to be levied out of the goods of the intestate, concludes the surety on the administrator's bond on the issue of devastavit vel non, and fixes the surety's liability for the debt.[92] Where the breach assigned is that the administrator failed to account for assets and converted the same to his own use, and the general issue is pleaded, proof merely that assets came to the hands of the administrator does not make out a prima facie case;[93] but evidence that the administrator received assets and after his removal failed and refused on demand to deliver them to his successor establishes a prima facie liability on the bond.[94] Where an administrator had converted the interest of certain nonresident minors in the estate prior to his being appointed as their guardian in a foreign jurisdiction, and in an action on his bond as administrator testified that he held the fund as administrator, his sworn account as guardian, not shown to have been allowed or acted on by the court, in which he charged himself with the interest of the minors as received from himself as administrator, was properly limited to its effect as contradicting his testimony that he still held the funds as administrator.[95] A showing that, shortly after withdrawing odd sums of money, the same sums were applied

65 Ala. 241. Contra Williams v. State, 68 Miss. 680, 10 S 52, 24 AmSR 297.

[b] **A judgment against an administrator reviving a dormant judgment** rendered against the intestate is evidence of assets. Ansley v. Glendenning, 52 Ga. 347, 56 Ga. 286.

[c] **In an action founded on a decree of the surrogate's court,** the decree is not admissible unless the record of the proceedings upon which the decree was based is produced to show that the surrogate had acquired jurisdiction. Nanz v. Oakley, 60 Hun 431, 15 NYS 1, 21 NYCivProc 71.

[d] **As against the administrators or a surety,** a judgment against the principal is not admissible. Nicholson v. Carr, 3 Blackf. (Ind.) 104.

[e] **In North Carolina** (1) a judgment against the principal is not admissible in evidence in an action against the sureties (Governor v. Carter, 25 N. C. 338; Washington County Ct. v. Harramond, 11 N. C. 339; Mecklenburg County Ct. v. Clark, 11 N. C. 43), and (2) conversely a judgment in his favor is not admissible in favor of the sureties (Governor v. Carter, 25 N. C. 338).

Conclusiveness against surety of judgment against principal see supra § 2589.

73. See Evidence §§ 1730–1806.

74. Ark.—Floyd v. Newton, 97 Ark. 459, 134 SW 934.

Cal.—Moody v. Pacific Surety Co., (A.) 182 P 802.

Ga.—Sutton v. Flanders, 146 Ga. 290, 91 SE 50.

Me.—Warren v. Leonard, 115 Me. 323, 98 A 824.

Mass.—Harmon v. Sweet, 221 Mass. 587, 109 NE 942; Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

N. Y.—Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

Utah.—Weyant v. Utah Sav., etc., Co., 182 P 189.

75. See supra § 383.

76. King v. Johnson, 94 Ga. 665, 21 SE 895.

77. Glover v. Hill, 85 Ala. 41, 4 S 613.

[a] **Sufficient adoption.** — Where an appraisement of the estate is made by commissioners and the representative makes it the basis of a petition for the sale of the property and does not return any other inventory, it is a sufficient adoption of the appraisement as his inventory to make it prima facie evidence against him and the sureties of the assets for which he is responsible. Glover v. Hill, 85 Ala. 41, 4 S 613.

78. Lane v. State, 27 Ind. 108; Ruby v. State, 55 Md. 484; Wetherill v. Com., 17 WklyNC (Pa.) 104.

[a] **Illustration.**—An account in which the administrator charged himself with the fund in question and an admitted default in not paying out the money in accordance with a decree of distribution based thereon are prima facie sufficient to establish a devastavit in an action against the sureties. Wetherill v. Com., 17 Wkly NC (Pa.) 104.

[b] **Not conclusive.** — Statements and admissions made by a representative in his settlements with the probate court may be overcome by proof of the actual facts. State v. Elliott, 157 Mo. 609, 57 SW 1087, 80 AmSR 643.

79. Eggleston v. Colfax, 4 Mart. N. S. (La.) 481.

80. Embree v. State, 85 Ind. 368.

81. Curry v. Peo., 54 Ill. 263; Wiley v. Johnsey, 40 S. C. L. 355; Ordinary v. Hunt, 26 S. C. L. 380.

82. Curry v. Peo., 54 Ill. 263.

83. Curry v. Peo., 54 Ill. 263.

84. Beal v. State, 77 Ind. 231.

85. See supra § 2589.

86. Lee v. Gardiner, 26 Miss. 521.

87. Worthy v. Battle, 125 Ga. 415, 54 SE 667; Lee v. Gardiner, 26 Miss. 521.

88. Outlaw v. Yell, 5 Ark. 468; Lee v. Gardiner, 26 Miss. 521.

89. Outlaw v. Yell, 5 Ark. 468; Beall v. Hutcheson, 131 Ga. 66, 61 SE 1125; King v. Johnson, 94 Ga. 665, 21 SE 895; O'Bannon v. Cord, 3 KyL 183; Lee v. Gardiner, 26 Miss. 521.

90. Worthy v. Battle, 125 Ga. 415, 54 SE 667; Walker v. Shannon, (Ga. A.) 93 SE 498.

[a] **A dormant judgment binding the estate,** with an entry of nulla bona made before dormancy, makes out a prima facie case in favor of one suing on the administration bond. Johnson v. Huggins, 7 Ga. A. 553, 67 SE 217.

91. Daniel v. Baldwin, 148 Ala. 292, 40 S 421; Givens v. Porteous, 1 McCord (S. C.) 379.

92. Daniel v. Baldwin, 148 Ala. 292, 40 S 421.

93. State v. Price, 17 Mo. 431.

94. Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

95. State v. Whitehouse, 80 Conn. 111, 67 A 503.

to the personal obligations of the executor, although he had coöbligors, justifies a finding that funds of the estate were used by the executor to pay his individual debts.[96]

[§ 2658] **11. Trial—a. Questions for Jury.** In an action of debt on an administration bond it is error to render final judgment without the intervention of a jury.[97] Where a representative may in his discretion make sales on credit, whether he has abused his discretion in so doing is a question of fact for the jury.[98] After verdict in an action upon a probate bond for the penal sum thereof, it is discretionary with the court, upon a hearing in equity, to fix the amount for which execution shall be awarded or to submit the question to a jury.[99]

[§ 2659] **b. Instructions.** In an action on an administration bond the court must correctly instruct the jury as to the nature of defendant's liability;[1] and where the court submits to the jury an erroneous and misleading test of defendant's liability, it is not necessary in order to entitle defendant to take advantage of the error that he should have discovered it and asked for further instructions.[2]

[§ 2660] **c. Verdict and Findings.** In an action for a devastavit, although the sureties can only be charged to the extent of the assets actually wasted, the verdict of the jury need not ascertain the exact amount of the devastavit,[3] but where defendant pleads plene administravit in an action for failing to pay a claim against the estate the verdict must find that defendant had assets sufficient to satisfy the demand or the value of the assets if they were not sufficient.[4] Where the proof is clear, a verdict may be directed.[5] A finding that the representative had not committed any willful breach of the bond is not inconsistent with a finding of breach by mismanagement and waste.[6]

[§ 2661] **d. Reference or Arbitration.** Where the bond is given to a judge of probate, he is merely a trustee of the bond for the benefit of the persons interested in the estate and he cannot submit their rights under it to reference or arbitration;[7] but where, in an action on the bond, it is admitted or proved that there came into the hands of the representative assets belonging to the estate it is proper to order a reference to take an account of his administration of the same,[8] unless some defense is interposed which bars the right to such account.[9]

[§ 2662] **12. Judgment.**[10] In some jurisdictions the rule is that for breach of an administration bond there can be only one judgment,[11] which judgment is for the whole penalty of the bond.[12] Such a judgment is not for the exclusive benefit of the person by whom the action is instituted,[13] but it stands as security for all who may be interested therein,[14] whether such persons were named in the original suit or not.[15] The judgment also stands as security for subsequent acts of maladministration.[16] In other jurisdictions the judgment need not be for the full penalty of the bond but only for the damages which the party suing has sustained,[17] and such a judgment will not bar another action on the bond, but suits may continue to be prosecuted thereon until the whole amount of the penalty is finally recovered.[18] Actions on the bond are not against the representative in his representative capacity and the judgment must be de bonis propriis.[19] In a proceeding by an administrator de bonis non against the sureties on the bond of the former administratrix to settle her account, it has been held error to direct a judgment against the sureties for the amount necessary to pay the debts of the es-

96. Story v. Hall, 86 Vt. 31, 83 A 653, 40 LRANS 1136 (where such sums as one thousand six hundred seventeen dollars and thirty one cents and one thousand three hundred sixty eight dollars and eighty seven cents were thus withdrawn and thus applied).

97. Amason v. Nash, 24 Ala. 279; Sutton v. Flanders, 146 Ga. 290, 91 SE 50; Little v. Duncan, 89 N. C. 416.

[a] **An administrator's plea of "fully administered and no assets,"** in an action on a bond found due and unpaid, must be disposed of by submitting an issue to a jury or by reference. Little v. Duncan, 89 N. C. 416.

98. Spence v. Dasher, 63 Ga. 430.

99. McIntire v. Conlan, 223 Mass. 389, 111 NE 852; Defriez v. Coffin, 155 Mass. 203, 29 NE 516.

1. Bergstroem v. State, 58 Tex. 92.

2. Bergstroem v. State, 58 Tex. 92.

3. Dean v. Portis, 11 Ala. 104; Miller v. Gee, 4 Ala. 359.

4. Booth v. Armstrong, 2 Wash. (2 Va.) 301.

[a] **Insufficient verdict.** — A verdict that "we of the jury find for the plaintiff the debt in the declaration mentioned" should be set aside as being uncertain and insufficient in not finding on the issue. Booth v. Armstrong, 2 Wash. (2 Va.) 301.

5. American Bonding, etc., Co. v. U. S., 23 App. (D. C.) 535; McIntire v. Conlan, 223 Mass. 389, 111 NE 852.

[a] **Illustration.** — In an action against the surety on an administrator's bond, based upon a decree establishing a debt due on a joint promissory note against the administrator of one of the makers and the surviving maker, proof by plaintiff that sufficient funds had come into the hands of the administrator, and that he had left the jurisdiction and taken up his residence elsewhere, is sufficient evidence of a breach of the condition of the administrator's bond to justify the direction of a verdict for plaintiff. American Bonding, etc., Co. v. U. S., 23 App. (D. C.) 535.

6. Fuller v. Dupont, 183 Mass. 596, 67 NE 662.

7. Paine v. Ball, 3 Mass. 235; Thomas v. Leach, 2 Mass. 152.

8. Neal v. Becknell, 85 N. C. 299.

9. Neal v. Becknell, 85 N. C. 299.

10. See generally Bonds § 235.

11. Probate Judge v. Lee, 72 N. H. 247, 56 A 188; Probate Judge v. Lane, 51 N. H. 342; Arrison v. Com., 1 Watts (Pa.) 374; Carl v. Com., 9 Serg. & R. (Pa.) 63.

[a] **The bond becomes merged in the first judgment** and no suit can be afterward maintained on the bond unless authorized by statute. Arrison v. Com., 1 Watts (Pa.) 374.

12. Ark.—Taylor v. State, 23 Ark. 225; Byrd v. State, 15 Ark. 175.

Mass.—Bennett v. Woodman, 116 Mass. 518; Glover v. Heath, 3 Mass. 252.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

Mo.—State v. Ruggles, 20 Mo. 99; State v. Lust, (A.) 197 SW 172.

N. H.—Probate Judge v. Lee, 72 N. H. 247, 56 A 188; Probate Judge v. Lane, 51 N. H. 342.

N. J.—Williamson v. Snook, 10 N. J. L. 65.

N. C.—Reaves v. Davis, 99 N. C. 425, 6 SE 715.

Pa.—Arrison v. Com., 1 Watts 374.

Vt.—Hoit v. Bradley, 1 D. Chipm. 262.

[a] **The proper form of judgment** (1) is for the penalty of the bond with a further judgment that plaintiff have execution for the damages assessed. Taylor v. State, 23 Ark. 225. (2) The judgment should be in favor of the commonwealth for the amount of the penalty and in favor of plaintiff in issue for the amount of damages assessed for the breach complained of. Miltenberger v. Com., 14 Pa. 71.

13. State v. Ruggles, 20 Mo. 99.

14. Potter v. Titcomb, 12 Me. 55; Conant v. Stratton, 107 Mass. 474; Probate Judge v. Lee, 72 N. H. 247, 56 A 188; Probate Judge v. Lane, 51 N. H. 342; Com. v. Kean, 19 Pa. Super. 576.

[a] **In an action by heirs** to establish their right to a share in the estate, defendants cannot seek a decree that other persons are not entitled to share in the estate as heirs. State v. Lust, (Mo. A.) 197 SW 172.

15. Potter v. Titcomb, 12 Me. 55; Com. v. Kean, 19 Pa. Super. 576.

16. Conant v. Stratton, 107 Mass. 474; Probate Judge v. Lane, 51 N. H. 342; Arrison v. Com., 1 Watts (Pa.) 374; Hoit v. Bradley, 1 D. Chipm. (Vt.) 262.

17. State v. French, 60 Conn. 478, 23 A 153; Rowland v. Isaacs, 15 Conn. 115; Irvine v. Wiley, 145 Ga. 867, 90 SE 69; Peo. v. Summers, 16 Ill. 173; O'Connor v. Such, 9 Bosw. (N. Y.) 318.

[a] **Apportionment of recovery.** — If the whole penalty is recovered the chancery court must apportion the recovery according to the rights of the parties. Jones v. Patty, 73 Miss. 179, 18 S 794.

18. Peo. v. Summers, 16 Ill. 173; Jones v. Patty, 73 Miss. 179, 18 S 794.

19. McNulty v. Marcus, 57 Ga. 507; Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195.

tate, the probate court not having general equitable jurisdiction with power to grant full relief, but only such as relates to the administration of the estate.[20]

Amendment. A judgment which is merely irregular and not void may be amended.[21]

The judgment becomes a lien upon the representative's land,[22] or upon land purchased by him with funds belonging to the estate and fraudulently conveyed.[23]

[§ 2663] **13. Execution and Enforcement of Judgment—a. In General.** In an action against principal and sureties, the sureties have a right to an order directing that execution be first levied on the property of the principal.[24] The recovery where suit is instituted for the general benefit is to be treated as assets of the estate and distributed accordingly.[25]

[§ 2664] **b. Judgment for Full Penalty of Bond.** Although judgment is entered for the full penalty of the bond execution does not issue for this amount, but only for the damages assessed for the breaches assigned.[26] Persons interested may be entitled to execution on the judgment, although their claims were not perfected at the time the suit was brought,[27] or even when the judgment was rendered,[28] and any person interested may sue out a scire facias and have execution thereon,[29] whether named in the original writ or not.[30] Where breaches occur subsequently to the rendition of the original judgment, persons injured thereby may sue out a scire facias on the judgment and have their damages assessed as in the original suit,[31] no other judgment being necessary than the usual one on a scire facias of an award of execution.[32] Unless required by statute the writ need not expressly state that plaintiff is an heir, creditor, or legatee, it being sufficient if it appears that he is a person interested in the bond or the judgment rendered thereon.[33] On a second scire facias to have a further execution of a judgment for the penalty of the bond a plea of payment of the penalty must show that such payment was pursuant to a decree of the probate court or a judgment at law or was otherwise compulsory against defendants.[34]

[§ 2665] **14. Damages—a. In General.** Whenever a breach of the conditions of the bond is shown the recovery of damages follows as a matter of course.[35] The measure of damages is the loss actually sustained by the breach complained of[36] unless otherwise provided by statute;[37] and where plaintiff shows a breach of condition but fails to show any special damages resulting therefrom, he can recover only nominal damages.[38] So, it has been held that only nominal damages are recoverable for a failure to account,[39] but it has also been considered that at least nominal damages can be recovered for such a breach,[40] and that a statutory penalty for failure to account is recoverable for by action on the bond.[41] Where property of the estate is lost through the neglect or misconduct of the representative, the measure of damages is the value of the property.[42] In an action for failing to include certain property in the inventory the rule of damages

20. In re Murray, 56 Or. 132, 107 P 19.

21. Pryor v. Leonard, 57 Ga. 136.

22. Arrison v. Com., 1 Watts (Pa.) 374.

23. Duffy v. State, 115 Ind. 351, 17 NE 615.

24. Prichard v. State, 34 Ind. 137.

25. Bennett v. Russell, 2 Allen (Mass.) 537; Newcomb v. Williams, 9 Metc. (Mass.) 525; Hood v. Haywood, 124 N. Y. 1, 26 NE 331; Com. v. Meyerhaven, 17 Phila. (Pa.) 108.

[a] **If the representative is not a proper person to receive this amount** for distribution and there is no co-representative, the court should remove him and appoint another, and may suspend entry of judgment for this purpose. Bennett v. Russell, 2 Allen (Mass.) 537.

[b] **Preferred claims** are entitled to the same preference in making such distribution as in the probate court. Com. v. Meyerhaven, 17 Phila. (Pa.) 108.

26. Warren v. Leonard, 115 Me. 323, 98 A 824; Arrison v. Com., 1 Watts (Pa.) 374.

27. Hooker v. Olmstead, 6 Pick. (Mass.) 481; Probate Judge v. Lane, 51 N. H. 342.

28. Probate Judge v. Lane, 51 N. H. 342.

29. Potter v. Titcomb, 12 Me. 55; Conant v. Stratton, 107 Mass. 474; Com. v. Strohecker, 9 Watts (Pa.) 479.

[a] **A second administrator de bonis non** may sue out a scire facias on a judgment recovered by a former administrator de bonis non in an action on the bond of the original administrator. Com. v. Strohecker, 9 Watts (Pa.) 479.

[b] **Where the heirs at law have been admitted to prosecute** an administrator's bond and have recovered judgment thereon for their share of the amount due, without a decree of distribution, the widow may sue out a scire facias to recover her share without first obtaining a decree of distribution in her favor. Potter v. Titcomb, 22 Me. 300.

30. Potter v. Titcomb, 12 Me. 55; Com. v. Kean, 19 Pa. Super. 576.

31. Conant v. Stratton, 107 Mass. 474; Probate Judge v. Lane, 51 N. H. 342; Arrison v. Com., 1 Watts (Pa.) 374; Hoit v. Bradley, 1 D. Chipm. (Vt.) 262.

32. Arrison v. Com., 1 Watts (Pa.) 374.

33. Potter v. Titcomb, 12 Me. 55.

34. Potter v. Webb, 5 Me. 330.

35. Rowland v. Isaacs, 15 Conn. 115.

36. Ark.—Scarborough v. State, 24 Ark. 20.

Conn.—State v. French, 60 Conn. 478, 23 A 153.

Ill.—McDonald v. Peo., 123 Ill. A. 346 [aff 222 Ill. 325, 78 NE 609].

Me.—Warren v. Leonard, 115 Me. 323, 98 A 824.

Mass.—McKim v. Bartlett, 129 Mass. 226.

Mo.—State v. Lust, (A.) 197 SW 172; State v. Taylor, 112 Mo. A. 585, 87 SW 7.

Nebr.—Brown v. Jacobs, 24 Nebr. 712, 40 NW 137.

N. J.—Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

N. Y.—Muller v. National Surety Co., 91 Misc. 544, 154 NYS 1096 [app den 171 App. Div. 930 mem, 155 NYS 1126 mem].

[a] **Illustration.**—Where an administrator was guilty of maladministration, had failed to require security on sales of assets, and had paid claims which had not been proved, and the estate was insolvent, a creditor in an action on the administrator's bond was only entitled to recover the difference between what he had received and what he should have received if there had been no breach of the bond. State v. Taylor, 112 Mo. A. 585, 87 SW 7.

[b] **A fair measure of damages for failure to render a final account** within the time required by law is, if the property was lying idle and unproductive, the interest thereon. McKim v. Bartlett, 129 Mass. 226.

[c] **The measure of damages for failure to make distribution** is fixed by the order of distribution, which settles and determines the amounts to which the distributees are entitled. McDonald v. Peo., 123 Ill. A. 346 [aff 222 Ill. 325, 78 NE 609].

[d] **The penalty is recoverable if necessary** to satisfy a breach of the bond. Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

[e] **When a bond is enforced as a common-law obligation** the obligors are not subject to the penal provisions of the statute, but are liable only for the actual damages sustained by the breach complained of. Cleaves v. Dockray, 67 Me. 118.

37. Bridges v. Maxwell, 34 Miss. 309.

[a] **Removal of property out of state.**—Under the statute giving a right of action on the bond to heirs where a representative has removed property of the estate out of the state, the recovery is not intended merely as compensation to the heirs but as a punishment to the representative, and plaintiff may recover the full value of the property regardless of the actual injury, together with any other damages actually sustained if in excess of that amount. Bridges v. Maxwell, 34 Miss. 309.

38. Ark.—Scarborough v. State, 24 Ark. 20.

Conn.—Edwards v. White, 12 Conn. 28.

Del.—State v. Bloxom, 6 Del. 446.

Ill.—Peo. v. Hunter, 89 Ill. 392.

Mo.—State v. Reinhardt, 31 Mo. 95.

39. Malboro Dist Prob. Ct. v. Chapin, 31 Vt. 373 (the amount plaintiff is entitled to receive out of the estate, or whether he is entitled to receive anything, cannot be known until the estate has been settled, and the amount of assets and claims and the expenses of administration ascertained, and as to these matters the jurisdiction of the probate court is exclusive).

40. Jenkens v. Shields, 36 Iowa 526; Clark v. Cress, 20 Iowa 50.

41. Lippert v. Lippert, 110 Iowa 550, 81 NW 777.

42. McKim v. Hibbard, 142 Mass. 422, 8 NE 152; State v. Berning, 6 Mo. A. 105 [aff 74 Mo. 87]; McNabb v. Wixom, 7 Nev. 163.

[a] **The liability of a surety for waste** is the value of the property

is a sum not exceeding the value of the property omitted,[43] and in an action for failing to pay creditors the damages are limited to the value of the assets which should be in the hands of the representative.[44] In an action of debt where judgment is rendered for the penalty of the bond the recovery is not limited to the damages laid in the declaration,[45] and, in assessing the damages after a breach has been established and judgment for the penalty rendered, matters may be considered in mitigation of the damages which would not amount to a legal defense to the breach.[46] The fact that the executor is a beneficiary under the will does not preclude a full recovery in an action on the bond by other beneficiaries, where no final order has been made settling or distributing the estate.[47]

The amount for which the sureties may be held liable is always measured by the liability of the principal.[48] The value of assets received, or which should have been collected in the exercise of proper diligence, is the utmost for which the sureties can be held liable,[49] and their liability is also subject to the limitation that it cannot exceed the penalty of the bond,[50] unless, in some jurisdictions, where the excess is due to a recovery of interest.[51] The sureties are not entitled to credit for attorney's fees, expenses, and for extraordinary services to which the administrator never made claim in the probate court, the sureties' right to subrogation with reference to such claims, if any, being enforceable only by petition in the probate court.[52]

Expenses incurred by reason of breach. The damages recoverable include not only the equivalent of assets lost but also the costs and reasonable attorneys' fees of the proceedings for the removal of the unfaithful or negligent administrator;[53] and it has been held that they include also attorneys' fees incurred and paid in the action on the bond itself,[54] although this has been denied.[55] The defendants cannot be held liable for the services and expenses of the new administrator in completing the settlement of the estate, such expenses not being damages caused by the neglect or maladministration of the former representative.[56] The right of a surviving executor to recover from the sureties of a deceased coexecutor funds of the estate received and unaccounted for by the coexecutor does not entitle the surviving executor to recover the costs of an action brought against him by the heir to compel him to make good the default of the coexecutor.[57]

[§ 2666] **b. Interest.** Interest is ordinarily allowable as an element of plaintiff's damages,[58] but only simple interest can be recovered.[59]

Interest in excess of penalty. As in the case of other bonds,[60] there is a divergence of opinion as to whether interest can be allowed in an action on an administration bond to an extent which increases the total recovery to a sum in excess of the penalty, such an allowance being held proper in some jurisdictions[61] while in others it is held that the

wasted, less the commissions that the executor or administrator would have earned but for the misconduct or neglect. McKim v. Hibbard, 142 Mass. 422, 8 NE 152.

43. Minor v. Mead, 3 Conn. 289.

[a] **A distributeee can recover:** (1) Only his proportionate share of the value of the property omitted. Ordinary v. Bracey, 2 S. C. L. 542. (2) The value of the whole property not inventoried. Blakeman v. Sherwood, 32 Conn. 324.

44. Reaves v. Davis, 99 N. C. 425, 6 SE 715.

[a] **A creditor can only recover for his distributive share** in a suit on the administrator's bond, unless he sues for assets not distributed but wasted. State v. Bowen, 45 Miss. 347.

[b] **Where a representative refuses to pay a judgment** which he has sufficient assets to pay, the rule of damages is the amount of the judgment. Washington v. Hunt, 12 N. C. 475.

[c] **Where the estate has been declared insolvent,** the rule of damages in an action by a creditor for the nonpayment of his claim will be the average allowed the creditors on the commissioners' report. Warren v. Powers, 5 Conn. 373.

45. Byrd v. State, 15 Ark. 175.

46. Probate Ct. v. Bates, 10 Vt. 285.

[a] **Illustration.**—In an action for failing to account for the proceeds of a sale the fact that a part of the proceeds actually went into the hands of an administrator de bonis non and was distributed to creditors might be considered and this amount deducted from the amount received and not accounted for. Probate Ct. v. Bates, 10 Vt. 285.

47. Wallber v. Wilmanns, 116 Wis. 246, 252, 93 NW 47 ("This being an action at law on the bond, the court could not usurp the functions of the county court, and make a distribution of the estate held by the executor").

48. Me.—Warren v. Leonard, 115 Me. 323, 98 A 824.

Mich.—Ward v. Tinkham, 65 Mich. 695, 32 NW 901.

Minn.—McAlpine v. Kratka, 98 Minn. 151, 107 NW 961.

Mo.—State v. Crooke, 129 Mo. A. 490, 107 SW 1104.

N. H.—Probate Judge v. Sulloway, 68 N. H. 511, 44 A 720, 73 AmSR 619, 49 LRA 347.

N. Y.—Harrison v. Clark, 87 N. Y. 572; Kelly v. West, 80 N. Y. 139; Casoni v. Jerome, 58 N. Y. 315; Beckett v. Place, 12 Misc. 323, 33 NYS 634.

Or.—United Brethren First Church v. Akin, 45 Or. 247, 77 P 748, 66 LRA 654, 2 AnnCas 353.

49. Williams v. Hinkle, 15 Ala. 713; Miller v. Gee, 4 Ala. 359; Thomson v. Searcy, 6 Port. (Ala.) 393; Outlaw v. Yell, 5 Ark. 468.

50. Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Warren v. Leonard, 115 Me. 323, 98 A 824; McAlpine v. Kratka, 98 Minn. 151, 107 NW 961; Zeigler v. Sprankle, 7 Watts & S. (Pa.) 175; Com. v. Forney, 3 Watts & S. (Pa.) 353.

51. See infra § 2662.

52. Elizalde v. Murphy, 4 Cal. A. 114, 87 P 245.

53. McIntire v. Mower, 204 Mass. 233, 90 NE 567; Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

54. Ordinary v. Connolly, 75 N. J. Eq. 521, 72 A 363, 138 AmSR 577.

55. McIntire v. Mower, 204 Mass. 233, 90 NE 567.

56. McIntire v. Mower, 204 Mass. 233, 90 NE 567.

57. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086.

58. Conn.—Huntington v. Mott, 1 Root 423.

Ill.—McDonald v. Peo., 222 Ill. 325, 78 NE 609 [aff 123 Ill. A. 346]; Peo. v. Pacific Surety Co., 155 Ill. A. 586.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Mass.—Fuller v. Dupont, 183 Mass. 596, 67 NE 662; Chapin v. Waters, 116 Mass. 140.

Mich.—Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907; State v. Welsh, 175 Mo. A. 303, 162 SW 637; State v. Berning, 6 Mo. A. 105 [aff 74 Mo. 87].

Nebr.—Bell v. Arndt, 24 Nebr. 261, 38 NW 750.

N. Y.—Hood v. Hayward, 124 N. Y. 1, 26 NE 331, 26 AbbNCas 271, 20 NY CivProc 47 [mod 48 Hun 330, 1 NYS 566].

N. C.—Washington v. Hunt, 12 N. C. 475.

Oh.—Webb v. Roetinger, 12 Oh. Cir. Ct. 730, 4 Oh. Cir. Dec. 270.

Or.—Rutenic v. Hamakar, 40 Or. 444, 67 P 196.

[a] **Where partial payments have been made** on a judgment against an executor or administrator and an action on the bond is brought for the nonpayment of the balance, the partial payments should be first applied to keep down the interest and the interest computed on the balance remaining after each payment. Fay v. Bradley, 1 Pick. (Mass.) 194.

[b] **In an action for failing to pay over a balance** to a successor in office, interest may be allowed from the time payment was demanded until the rendition of judgment. Webb v. Roetinger, 12 Oh. Cir. Ct. 730, 4 Oh. Cir. Dec. 270.

[c] **The fact that the complaint does not contain a demand for interest** does not preclude the court from awarding interest if the facts justify it. Rutenic v. Hamakar, 40 Or. 444, 67 P 196.

[d] **Necessity for demand.**—Plaintiff, suing to establish a right to a share of the estate, is not entitled to interest from the date of distribution, where distribution was made to other persons in the bona fide belief that they, and not plaintiff, were entitled to what was paid over, and plaintiff made no demand until the commencement of the action. State v. Lust, (Mo. A.) 197 SW 172.

59. McDonald v. Peo., 222 Ill. 325, 78 NE 609; Chapin v. Waters, 116 Mass. 140; Cranson v. Wilsey, 71 Mich. 356, 39 NW 9.

60. See Bonds § 244.

61. Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552; Probate Judge v. Heydock, 8 N. H. 491.

[a] **The reason for this rule** is that, where the whole penalty has be-

penalty of the bond is the utmost that can be recovered, even though this precludes a full allowance of interest.[62] Of course the judgment rendered in an action on the bond, like any other judgment,[63] bears interest, regardless of whether or not this increases the total liability beyond the penalty.[64]

[§ 2667] **15. Costs.**[65] In an action on the bond for the nonpayment of a judgment debt, the creditor is entitled to recover the costs of the action as a part of the damages.[66] It has been held that on dismissal of an action in the name of the people for the use of an administrator on the official bond of another administrator the entry of judgment for costs against plaintiffs was error.[67]

[§ 2668] **16. Appeal and Error.** In actions on administration bonds, the general principles relating to appeals in other civil actions [68] apply.[69] Under a statute authorizing any person aggrieved by a decree of the orphans' court to appeal, the sureties may appeal from a decree against the principal.[70] An order refusing leave to sue on an administration bond is a judicial decree from which the applicant may appeal,[71] but an order granting leave to sue, which may be made in an ex parte proceeding without any notice to the obligors in the bond,[72] does not determine any question as to their liability,[73] and hence they are not entitled to appeal therefrom.[74] Matters are not ordinarily assignable as error which were not objected to in the court below,[75] or which could have been taken advantage of by a plea in abatement;[76] and nothing which contradicts the record can be assigned as error.[77]

[§ 2669] **17. Equitable Relief against Judgment.** Where a representative having matters proper for a defense to an action on the bond neglects to make it, equity will not ordinarily relieve against the judgment;[78] nor are the mistakes or negligence of counsel in the conduct of a defense a sufficient ground for relief.[79] But where, in a suit on an administration bond for the benefit of distributees, two of whom were the administrators, judgment was recovered for the whole amount of the inventory against the executors of the surety alone, and on a bill to enjoin the judgment it appeared by an ex parte settlement of the administrators in the county court that a considerable part of the estate had been bona fide disbursed by them, and partly to some of the distributees, relief was granted, although no defense had been made at law.[80]

XVII. FOREIGN AND ANCILLARY ADMINISTRATION

[§ 2670] **A. Appointment—1. Foreign Appointment—a. In General.** The phrase "foreign representative" does not refer to the mere nonresidence of the individual holding the office but to the foreign origin of the representative character.[81] So if a representative appointed in one jurisdiction takes out ancillary letters of administration in another, he thereupon becomes a domestic representative within that jurisdiction.[82]

[§ 2671] **b. Extent of Authority Conferred.** Letters testamentary or of administration have no extraterritorial force and confer no authority upon the representative to administer upon property outside of the state or county of his appointment,[83]

come a debt which the obligors unjustly detain, the recovery may be for the entire amount of the penalty with interest thereon for the time so detained. Probate Judge v. Heydock, 8 N. H. 491.

[b] **Interest from the date of the writ,** on the penal sum of the bond, may be allowed. Bassett v. Maryland Fidelity, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

62. Moseley v. Johnson, 144 N. C. 257, 274, 56 SE 922 (under statute); Com. v. Meyerhaven, 17 Phila. (Pa.) 108.

63. See Interest [22 Cyc 1516].

64. Bassett v. Maryland, etc., Co., 184 Mass. 210, 68 NE 205, 100 AmSR 552.

65. See Costs 15 C. J. p 1.

66. McIntire v. Mower, 204 Mass. 233, 90 NE 567; McKim v. Haley, 173 Mass. 112, 53 NE 152.

[a] **Only taxable costs** are recoverable. McIntire v. Mower, 204 Mass. 233, 90 NE 567.

67. Peo. v. Cloud, 50 Ill. 439 (if the people were considered as plaintiffs a judgment for costs could not be rendered against them; while if the administrator was considered as plaintiff the judgment should not be against him personally but to be paid in due course of administration).

68. See Appeal and Error 3 C. J. p 256.

69. Cravens v. State, 46 Ind. A. 347, 92 NE 552.

[a] **Bond.**—An appeal from a judgment for an administrator de bonis non on a former administrator's bond is governed by Burns St. Annot. (1908) §§ 670, 672, applying to civil appeals generally, and not by §§ 2977 and 2978, relating to bonds on appeals in matters pertaining to decedents' estates. Cravens v. State, 46 Ind. A. 347, 92 NE 552.

70. Garber v. Com., 7 Pa. 265.

71. Robbins v. Hayward, 16 Mass. 524; Fay v. Rogers, 2 Gray (Mass.) 175.

72. See supra § 2615.

73. Hilton v. Briggs, 54 Mich. 265, 20 NW 47.

74. Bulfinch v. Waldoboro, 54 Me. 150; In re Jones, 8 Pick. (Mass.) 121.

75. Wetmore v. Plant, 5 Conn. 541; Deblanc v. Levasseur, 26 La. Ann. 541; Conway v. Carter, 11 N. M. 419, 68 P 941; In re Murray, 56 Or. 132, 107 P 19.

76. Wetmore v. Plant, 5 Conn. 541.

77. Wetmore v. Plant, 5 Conn. 541.

78. O'Keefe v. Rice, 1 Bailey Eq. (S. C.) 179.

79. O'Keefe v. Rice, 8 S. C. Eq. 179.

80. Wall v. Gressom, 4 Munf. (Va.) 110.

81. Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 20 NYCivProc 102, 12 LRA 237 [aff 53 Hun 394, 6 NYS 271, 17 NYCivProc 214]; Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NYAnnCas 56.

82. Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 20 NYCivProc 102, 12 LRA 237 [aff 53 Hun 394, 6 NYS 271, 17 NYCivProc 214]; Milner v. Hoag, 169 NYS 755.

83. U. S.—Overby v. Gordon, 177 U. S. 214, 20 SCt 603, 44 L. ed. 741 [aff 13 App. 392]; Lawrence v. Nelson, 143 U. S. 215, 12 SCt 440, 36 L. ed. 130; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553.

Ala.—Warrior Coal, etc., Co. v. Augusta Nat. Bank, 53 S 997; Barclift v. Treece, 77 Ala. 528.

Cal.—In re Rawitzer, 175 Cal. 585, 166 P 581; Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474.

Colo.—Corrigan v. Jones, 14 Colo. 311, 23 P 913.

Conn.—Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940; Perkins v. Stone, 18 Conn. 270; Riley v. Riley, 3 Day 74, 3 AmD 260.

D. C.—Plumb v. Bateman, 2 App. 156.

Ill.—Barber v. Keiser, 202 Ill. A. 377; Walker v. Welker, 55 Ill. A. 118.

Iowa.—In re Williams, 130 Iowa 553, 107 NW 608.

Kan.—Beiswanger v. Bangs, 72 Kan. 702, 83 P 1032; Albright v. Bangs, 72 Kan. 435, 83 P 1030, 115 AmSR 219; Denny v. Faulkner, 22 Kan. 89.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

La.—In re Lewis, 32 La. Ann. 385; Burbank v. Payne, 17 La. Ann. 15, 87 AmD 513; Henderson v. Rost, 15 La. Ann. 405; Lytle's Succ., 1 Rob. 268; McRae v. McRae, 11 La. 571; Chiapella v. Couprey, 8 La. 84; Lincoln v. Ball, 6 La. 685; Morris v. Thames, 8 Mart. N. S. 687; Deshon v. Jennings, 5 Mart. 568.

Me.—Nash v. Benari, 117 Me. 491, 105 A 107; Chadwick v. Stilphen, 105 Me. 242, 74 A 50; Brown v. Smith, 101 Me. 545, 64 A 915, 115 AmSR 339; Gilman v. Gilman, 54 Me. 453; Smith v. Guild, 34 Me. 443.

Mass.—Beaman v. Elliot, 10 Cush. 172; Campbell v. Sheldon, 13 Pick. 8.

Mich.—Colvin v. Jones, 194 Mich. 670, 161 NW 847; Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

Miss.—Rucks v. Taylor, 49 Miss. 552; Riley v. Moseley, 44 Miss. 37; Satterwhite v. Littlefield, 21 Miss. 302.

Mo.—Naylor v. Moffatt, 29 Mo. 126; Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 1119; Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

Nebr.—Burton v. Williams, 63 Nebr. 431, 88 NW 765; Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.

Nev.—Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

N. H.—Willard v. Hammond, 21 N. H. 382.

N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193; Marks v. Emigrant Industrial Sav. Bank, 122 App. Div. 661, 107 NYS 491; Brown v. Brown, 1 Barb. Ch. 189; Vroom v.

and in the absence of statute any recognition which the representative may receive outside of the jurisdiction of his appointment is due solely to the principle of comity,[84] and each state or country may extend or withhold such recognition according to its own pleasure and policy.[85] No state will recognize a foreign representative to the prejudice of its own citizens,[86] as where such recognition would conflict with the rights of local creditors[87] or a local administration;[88] but in the absence of such circumstances the tendency of the modern authorities is to recognize a foreign representative for many purposes,[89] although of course he will not be permitted through comity to exercise powers which he could not exercise in the state of his appointment.[90]

[§ 2672] **c. Statutory Provisions.** In a number of jurisdictions the statutes authorize a foreign representative to sue,[91] or be sued,[92] or upon complying with certain conditions to act as a local representative;[93] but any conditions provided for by these statutes must be substantially complied with before a foreign representative will be recognized.[94]

[§ 2673] **2. Ancillary Appointment—a. Ancillary and Domiciliary Appointment Distinguished.** The right of granting administration is not confined to the state or country in which decedent last dwelt, but it is very common and often necessary for administration to be taken out elsewhere.[95] Where different administrations are granted in different jurisdictions, that which is granted in the jurisdiction of decedent's last domicile is termed the principal or domiciliary administration, and any other administration granted in any other state or country is termed "ancillary,"[96] and this without

Van Horne, 10 Paige 549, 42 AmD 94; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340; Stewart v. O'Donnell, 2 Dem. Surr. 17; Matter of Jones, 3 Redf. Surr. 257.

N. C.—First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515; Grant v. Reese, 94 N. C. 720; Hyman v. Gaskins, 27 N. C. 267.

Pa.—Sayre v. Helme, 61 Pa. 299; Moore v. Fields, 42 Pa. 467; Hohweisner v. Kern, 3 LegChron 173; Hohweisner v. Kerr, 1 LegRec 202; Com. v. Ware, 6 Phila. 258.

Porto Rico.—Perez v. Aguerria, 1 Porto Rico Fed. 443.

S. C.—Burkhim v. Pinkhussohn, 58 S. C. 469, 36 SE 908; Stoddard v. Aiken, 57 S. C. 134, 35 SE 501; Stevenson v. Dunlap, 33 S. C. 350, 11 SE 1017; Tillman v. Walkup, 7 S. C. 60; Carmichael v. Ray, 30 S. C. L. 116; Reynolds v. Torrance, 4 S. C. L. 59.

Tenn.—State v. Fulton, (Ch. A.) 49 SW 297.

Tex.—Hare v. Pendleton, (Civ. A.) 214 SW 948; Atchison, etc., R. Co. v. Berkshire, (Civ. A.) 201 SW 1093; Lane v. Miller, etc., Lumber Co., (Civ. A.) 176 SW 100; Clarke v. Webster, (Civ. A.) 94 SW 1088.

Vt.—Vaughn v. Barret, 5 Vt. 333, 26 AmD 306; Lee v. Havens, Brayt. 93.

Wash.—State v Thurston County Super. Ct., 52 Wash. 149, 100 P 198; Barlow v. Coggan, 1 Wash. T. 257.

Eng.—Atkins v. Smith, 2 Atk. 63, 26 Reprint 436.

"It is a well settled principle of the common law that the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed." Brown v. Smith, 101 Me. 545, 547, 64 A. 915, 115 AmSR 339.

[a] **Where there are two domiciliary executors** and one of them is appointed ancillary executor in another state, the latter alone is executor in such state and the other executor has no authority therein. Chadwick v. Stilphen, 105 Me. 242, 74 A 50.

[b] **The filing and record of a copy of a foreign probated will** does not empower the executor to act as such in the state. Mason v. Rodriguez, 53 Tex. Civ. A. 445, 115 SW 868; Clarke v. Webster, (Tex. Civ. A.) 94 SW 1088.

84. U. S.—Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639.

Conn.—Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940.

Kan.—Denny v. Faulkner, 22 Kan. 89.

Mich.—Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

N. Y.—Thorburn v. Gates, 184 App. Div. 443, 171 NYS 568; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94.

N. C.—Hyman v. Gaskins, 27 N. C. 267.

85. Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. ed. 639; Thorburn v. Gates, 184 App. Div. 443, 171 NYS 568; Hyman v. Gaskins, 27 N. C. 267; Olney v. Angell, 5 R. I. 198, 73 AmD 62.

86. Du Val v. Marshall, 30 Ark. 230; First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515, 516 [quot Cyc]; Hyman v. Gaskins, 27 N. C. 267.

87. Broughton v. Bradley, 34 Ala. 694, 73 AmD 274; In re Viosca, 197 Pa. 280, 47 A 233, 51 LRA 876.

88. Du Val v. Marshall, 30 Ark. 230; Mansfield v. McFarland, 24 Pa. Co. 591.

89. Cal.—Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474.

Conn.—Marcy v. Marcy, 32 Conn. 308.

Mass.—Morrison v. Hass, 229 Mass. 514, 118 NE 893.

Minn.—Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618.

Tex.—Peacock v. Cummings, 34 Tex. Civ. A. 431, 78 SW 1002.

[a] **Designation of substituted trustee.**—A trust deed on property within the state, given to secure a note, provided that, if the trustee named therein should for any reason fail or refuse to act, the cestui que trust or the legal owner of the note might appoint a substitute, in writing. Both the trustee and the cestui que trust died in Kentucky, which was their domicile, and an administratrix was appointed by a Kentucky court to administer on their estates. It was held that the administratrix, as the legal holder of the note and deed of trust, had the right to designate a substitute trustee in Texas to sell the trust property, without having taken out letters of administration in the state. Peacock v. Cummings, 34 Tex. Civ. A. 431, 78 SW 1002.

Right to collect assets see infra § 2687.

Rights as to disposition and control of property of the estate see infra §§ 2688–2692.

Title of foreign representative see infra § 2685.

Right to sue see infra § 2702.

90. Limekiller v. Hannibal, etc., R. Co., 33 Kan. 83, 5 P 401, 52 AmR 523.

91. See infra §§ 2708–2710.

92. See infra § 2722.

93. La.—Wedderburn's Succ., 1 Rob. 263; State v. New Orleans Prob. Judge, 18 La. 570.

Mich.—Colvin v. Jones, 194 Mich. 670, 161 NW 847.

N. Y.—Bostwick v. Carr, 165 App. Div. 55, 151 NYS 74.

N. C.—Glascock v. Gray, 148 N. C. 346, 62 SE 433.

Wis.—McIntosh v. Marathon Land Co., 110 Wis. 296, 85 NW 976.

94. Ala.—Hatchett v. Berney, 65 Ala. 39.

Ind.—Lucas v. Tucker, 17 Ind. 41.

La.—Butler's Succ., 30 La. Ann. 887; Young's Succ., 21 La. Ann. 394; Dangerfield v. Thruston, 8 Mart. N. S. 232.

Miss.—City Sav., etc., Co. v. Branchieri, 111 Miss. 774, 72 S 196.

N. C.—Glascock v. Gray, 148 N. C. 346, 62 SE 433.

Tex.—Lane v. Miller, etc., Lumber Co., (Civ. A.) 176 SW 100; Mason v. Rodriguez, 53 Tex. Civ. A. 445, 115 SW 868.

[a] **A new bond must be given** (1) by a foreign executor. Withers' Succ., 45 La. Ann. 556, 12 S 875; Bodenheimer's Succ., 35 La. Ann. 1034; Young's Succ., 21 La. Ann. 394; Wedderburn's Succ., 1 Rob. (La.) 263; Glascock v. Gray, 148 N. C. 346, 62 SE 433. (2) But the failure to do so does not ipso facto vacate the trust. Withers' Succ., 45 La. Ann. 556, 12 S 875.

[b] **A new oath is not necessary** where the representative has already been sworn at the place of his appointment. Bodenheimer's Succ., 35 La. Ann. 1034; Wedderburn's Succ., 1 Rob. (La.) 263.

[c] **A statute validating** deeds of nonresident executors who failed to file the bond required by statute is not invalid as against heirs, because they have no vested rights except where their ancestor dies intestate. Vaught v. Williams, (N. C.) 97 SE 737.

95. Chadwick v. Stilphen, 105 Me. 242, 74 A 50; Stevens v. Gaylord, 11 Mass. 256; Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386; Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

96. U. S.—Borer v. Chapman, 119 U. S. 587, 7 SCt 342, 30 L. ed. 532; Baltimore, etc., R. Co. v. Evans, 188 Fed. 6, 110 CCA 156; Ingersoll v. Coram, 127 Fed. 418, 132 Fed. 168 [aff 133 Fed. 226, 66 CCA 280].

Ala.—Goodman v. Winter, 64 Ala. 410, 38 AmR 13; Fretwell v. McLemore, 52 Ala. 124; Childress v. Bennett, 10 Ala. 751, 44 AmD 503.

Ark.—Shegogg v. Perkins, 34 Ark. 117; Clark v. Holt, 16 Ark. 257.

Colo.—Corrigan v. Jones, 14 Colo. 311, 23 P 913.

Conn.—Hopkins' App., 77 Conn. 644, 60 A 657; Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385; Perkins v. Stone, 18 Conn. 270.

Ill.—Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 NE 815; Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403; Young v. Wittenmyre, 123 Ill. 303, 14 NE 869 [rev 22 Ill. A. 496]; Shephard v. Rhodes, 60 Ill. 301; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Ind.—McCord v. Thompson, 92 Ind. 565.

Iowa.—In re Williams, 130 Iowa 553, 107 NW 608; In re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218; Chamberlin v. Wilson, 45 Iowa 149.

regard to which is granted first.[97] The term "ancillary" serves only to distinguish one administration from the other,[98] and the ancillary administration is not dependent upon the domiciliary;[99] but each is distinct and separate,[1] and may properly be considered as a principal one with reference to the limits of its exclusive authority,[2] for the ancillary administrator becomes invested with the same powers and is subject to the same liability with respect to the assets within the jurisdiction of his appointment as other administrators,[3] although the ancillary administration is in a sense subordinate to that of the domicile.[4]

Where different persons are appointed executors in different states, each in respect to the property of the testator in that state, neither administration is in a proper sense ancillary to the other, because the executors in both states derive their title from the will and not from the letters issued to them.[5]

[§ 2674] **b. When Ancillary Appointment Proper —(1) In General.** An ancillary administration is proper whenever a person dies leaving, in a state or country other than that of his last domicile, property to be administered,[6] or which is in dan-

Kan.—Ames v. Citizens' Nat. Bank, 181 P 564; Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550; Greenwalt v. Bastian, 10 Kan. A. 101, 61 P 513.

Ky.—Adams v. Adams, 11 B. Mon. 77; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

Md.—Wright v. Gilbert, 51 Md. 146; Williams v. Williams, 5 Md. 467.

Mass.—Cheney v. Cheney, 214 Mass. 580, 101 NE 1091; Rackemann v. Taylor, 204 Mass. 394, 90 NE 552; Stevens v. Gaylord, 11 Mass. 256; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Fay v. Haven, 3 Metc. 109.

Mo.—Bealey v. Smith, 158 Mo. 515, 59 SW 984, 81 AmSR 317; Spradling v. Pipkin, 15 Mo. 118.

Nebr.—Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.

N. H.—Clark v. Clement, 33 N. H. 563.

N. J.—Pisano v. B. M. & J. F. Shanley Co., 66 N. J. L. 1, 48 A 618.

N. Y.—Matter of Cummings, 142 App. Div. 377, 127 NYS 109 [rev 63 Misc. 621, 118 NYS 684]; Matter of Hollins, 79 Misc. 200, 139 NYS 713 [aff 160 App. Div. 886 mem, 144 NYS 1121 mem]; Baldwin v. Rice, 44 Misc. 64, 89 NYS 738 [mod 100 App. Div. 241, 91 NYS 1086 (aff 183 N. Y. 55, 75 NE 1096 [reargden 184 N. Y. 523 mem, 76 NE 1088 mem])]; Matter of Newell, 38 Misc. 563, 77 NYS 1116, 3 Mills Surr. 246; O'Brien v. Baker, 34 Misc. 436, 69 NYS 1022 [aff 65 App. Div. 282, 72 NYS 1001]; Carroll v. Hughes, 5 Redf. Surr. 337; Churchill v. Prescott, 3 Bradf. Surr. 233.

N. C.—Plummer v. Brandon, 40 N. C. 190.

Oh.—Pedan v. Robb, 8 Oh. 227; Meswald v. Marks, 19 Oh. Cir. Ct. 605, 10 Oh. Cir. Dec. 355.

Pa.—In re Stokely, 19 Pa. 476.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Graveley v. Graveley, 25 S. C. 1, 60 AmR 478; Collins v. Bankhead, 32 S. C. L. 25; Tucker v. Condy, 31 S. C. Eq. 12.

Tex.—Green v. Rugely, 23 Tex. 539.

Wis.—Price v. Mace, 47 Wis. 23, 1 NW 336.

Eng.—Aspinwall v. Queen's Proctor, 2 Curt. Eccl. 241; Thornton v. Curling, 8 Sim. 310, 8 EngCh 310, 59 Reprint 123.

"When a person dies intestate, owning personal property in the country of his domicile as well as in a foreign country, administration is had in both countries. The administration taken out in the country in which intestate resided is called the domiciliary or principal administration. It is the duty of such an administrator to collect the assets of the estate, pay the debts, if any are due, and distribute the remainder among the distributees of the intestate. The administration in the foreign country is called auxiliary or ancillary, and the duty of such an administrator is to collect the assets of the estate, and pay the debts due by intestate, especially debts due to citizens of that country. Each country claims and exercises the right to see that debts due to its citizens are paid before the assets of the estate are taken out of its jurisdiction. After the debts are satisfied, the ancillary administrator, under the law of nations, resting upon comity and broad principles of justice, may transmit the residuum to the administrator of the domicile, to be there disposed of according to the law of the domicile." Jones v. Jones, 39 S. C. 247, 256, 17 SE 587, 802.

[a] **Appointment of same person in different states.**—Where a person is appointed as executor in one state, and afterward appointed administrator with will annexed in another state, he represents such estate in both jurisdictions and occupies the same position with reference to controversies by or against such estate, and in that respect is the same person in both states. Hilton v. Stewart, 15 Ida. 150, 96 P 579, 128 AmSR 48.

[b] **In Mississippi** the distinction between ancillary and principal administrations is abolished by a statute which provides that a nonresident's property in the state shall be distributed, after payment of debts, according to the statute of distributions. Partee v. Kortrecht, 54 Miss. 66; Carroll v. McPike, 53 Miss. 569.

97. Hopkins' App., 77 Conn. 644, 60 A 657; Stevens v. Gaylord, 11 Mass. 256; Crosby v. Charlestown, 78 N. H. 39, 95 A 1043; Green v. Rugely, 23 Tex. 539.

[a] **Probate of will of nonresident not an ancillary proceeding.** — Although Remington & B. Code § 1317 provides for the probate of foreign wills where a nonresident decedent has property in the state, such proceeding is not ancillary to administration taken in the state of the nonresident's domicile. Alaska Banking, etc., Co. v. Noyes, 64 Wash. 672, 117 P 492.

98. Fretwell v. McLemore, 52 Ala. 124.

99. U. S.—Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Fellows v. Lewis, 65 Ala. 343, 39 AmR 1; Fretwell v. McLemore, 52 Ala. 124.

Cal.—Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90.

Mass.—Rackemann v. Taylor, 204 Mass. 394, 90 NE 552.

Mich.—American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535.

N. Y.—Milner v. Hoag, 182 App. Div. 524, 169 NYS 755; Lockwood v. U. S. Steel Corp., 153 App. Div. 655, 659, 138 NYS 725 [rev on other grounds 209 N. Y. 375, 103 NE 697, LRA1915C 451 and cit Cyc].

S. C.—Graveley v. Graveley, 25 S. C. 1, 60 AmR 478.

Tenn.—Keaton v. Campbell, 2 Humphr. 224.

Wis.—Winter v. Winter, 101 Wis. 494, 77 NW 883.

1. Ala.—Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344; Fretwell v. McLemore, 52 Ala. 124.

Ind.—Bishop v. Ross, 56 Ind. A. 610, 103 NE 505, 506 [cit Cyc].

N. Y.—Dwane v. Miller, 89 Misc. 297, 152 NYS 1060.

N. C.—Grant v. Rogers, 94 N. C. 755.

R. I.—Egan v. Wirth, 26 R. I. 363, 58 A 987.

S. C.—Graveley v. Graveley, 25 S. C. 1, 60 AmR 478.

Tenn.—Keaton v. Campbell, 2 Humphr. 224.

Tex.—Hare v. Pendleton, (Civ. A.) 214 SW 948.

2. U. S.—Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Kan.—Cooper v. Ives, 62 Kan. 395, 63 P 434.

N. Y.—Matter of Cummings, 142 App. Div. 377, 127 NYS 109.

N. C.—Hyman v. Gaskins, 27 N. C. 267.

Pa.—Parker's Est., 6 Phila. 369.

Tenn.—Carr v. Lowe, 7 Heisk. 84; Keaton v. Campbell, 2 Humphr. 224.

3. State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454; State v. District Ct., 41 Mont. 357, 109 P 438; Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 NE 697, AnnCas 1915C 471; Smith v. New York City Second Nat. Bank, 169 N. Y. 467, 62 NE 577; Carr v. Lowe, 7 Heisk. (Tenn.) 84. See also Lees v. Wetmore, 58 Iowa 170, 12 NW 238.

4. Perkins v. Stone, 18 Conn. 270; Dickinson v. Ridgely, 188 Ill. A. 252 [aff 268 Ill. 105, 108 NE 1011]; Merrill v. New England Mut. L. Ins. Co., 103 Mass. 245, 4 AmR 548; Fay v. Haven, 3 Metc. (Mass.) 109; Dawes v. Head, 3 Pick. (Mass.) 128; Stevens v. Gaylord, 11 Mass. 256; Taylor v. Syme, 162 N. Y. 513, 57 NE 83, 31 NYCivProc 1 [rev on other grounds 17 App. Div. 517, 45 NYS 707]; Lockwood v. U. S. Steel Corp., 153 App. Div. 655, 138 NYS 725 [rev on other grounds 209 N. Y. 375, 103 NE 697, LRA1915C 451]; Matter of Hollins, 79 Misc. 200, 139 NYS 713 [aff 160 App. Div. 886 mem, 144 NYS 1121 mem]; Steele v. Connecticut Gen. L. Ins. Co., 31 App. Div. 389, 52 NYS 373 [aff 160 N. Y. 703 mem, 57 NE 1125 mem]; Coley's Est., 14 AbbPr (N. Y.) 461, 1 Redf. Surr. 405.

5. Sherman v. Page, 85 N. Y. 123; Matter of Mayer, 84 Misc. 9, 145 NYS 665.

6. U. S.—Thormann v. Frame, 176 U. S. 350, 20 SCt 446, 44 L. ed. 500; Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718; U. S. v. Tyndale, 116 Fed. 820, 54 CCA 324; Cincinnati, etc., R. Co. v. Thiebaud, 114 Fed. 918, 52 CCA 538; Coe Brass Mfg. Co. v. Savlik, 93 Fed. 519, 35 CCA 390.

Ala.—Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344; Watson v. Collins, 37 Ala. 587; Broughton v. Bradley, 34 Ala. 694, 73 AmD 474; Miller v. Jones, 26 Ala. 247.

Conn.—Lawrence's App., 49 Conn. 411.

Fla.—Epping v. Robinson, 21 Fla. 36; Blewitt v. Nicholson, 2 Fla. 200.

Ga.—Sprayberry v. Culberson, 32 Ga. 299.

Ill.—Bowles v. Rouse, 8 Ill. 409; Channel v. Capen, 46 Ill. A. 234 [aff sub nom. Cooper v. Beers, 143 Ill. 25, 33 NE 61].

Ind.—McCord v. Thompson, 92 Ind. 565; Jeffersonville R. Co. v. Swayne, 26 Ind. 477.

Iowa.—Murphy v. Creighton, 45 Iowa 179; Christy v. Vest, 36 Iowa 285.

Ky.—Louisville, etc., R. Co. v. Schumaker, 112 Ky. 431, 53 SW 12, 21 KyL 803 [reh den 108 Ky. 263, 56 SW 155, 21 KyL 1701]; Turner v. Louisville, etc., R. Co., 110 Ky. 879, 62 SW 1025, 23 KyL 340; Hyatt v. James, 8 Bush 9; Rutherford v.

ger of being wasted or lost,[7] or debts owing to him which must be collected by suit,[8] or where there are provisions of his will to be carried out with respect to property in such jurisdiction.[9] In most cases where a decedent leaves property in different jurisdictions, an ancillary administration is not only proper but necessary,[10] since the domiciliary letters have no extraterritorial force,[11] and the principal representative cannot, in the absence of statute, sue to collect assets outside of the jurisdiction of his appointment.[12] The chief object, however, of an ancillary administration is to collect and preserve local assets for the benefit of local creditors,[13] and it is sometimes considered that, if there are no local creditors, a grant of administration on the estate, situate within the state, of a nonresident decedent, must be deemed original and not ancillary.[14] Probate or establishment of a will in the foreign country, or probate thereof in the state or territory, where it was executed or where testator resided at the time of his death sometimes authorizes, under statute, the recording of the will and the foreign letters, and the issuance of ancillary letters.[15]

[§ 2675] **(2) Situs of Assets.** To authorize a grant of ancillary administration it must appear that there is property in the jurisdiction where the grant is applied for,[16] which at the time of the

Clark, 4 Bush 27; Thumb v. Gresham, 2 Metc. 306; Drake v. Vaughan, 6 J. J. Marsh. 143; Henderson v. Clarke, 4 Litt. 277; Embry v. Millar, 1 A. K. Marsh. 300, 10 AmD 732.

La.—Linton's Succ., 27 La. Ann. 351; De Roffignac's Succ., 21 La. Ann. 364; Burbank v. Payne, 17 La. Ann. 15, 87 AmD 513; Atkinson v. Rogers, 14 La. Ann. 633.

Md.—Grimes v. Talbert, 14 Md. 169; Corrie's Case, 2 Bland 488.

Mass.—Bliss v. Bliss, 221 Mass. 201, 109 NE 148, LRA1916A 889; Miller v. Blinn, 219 Mass. 266, 106 NE 985; Stevens v. Gaylord, 11 Mass. 256; Crosby v. Leavitt, 4 Allen 410.

Mich.—Colvin v. Jones, 194 Mich. 670, 161 NW 847.

Mo.—Wood v. Matthews, 73 Mo. 477; Spraddling v. Pipkin, 15 Mo. 118; Bartlett v. Hyde, 3 Mo. 490; Seneca v. Morrison, 200 Mo. A. 169, 204 SW 1119; Turner v. Campbell, 124 Mo. A. 133, 101 SW 119; Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

Nebr.—Spencer v. Wolfe, 49 Nebr. 8, 67 NW 858; Moore v. Moore, 33 Nebr. 509, 50 NW 443.

N. H.—Stearns v. Wright, 51 N. H. 600; Clark v. Clement, 33 N. H. 563.

N. J.—In re Bracher, 60 N. J. Eq. 350, 51 A 63; Pratt v. Douglas, 38 N. J. Eq. 516; Banta v. Moore, 15 N. J. Eq. 97.

N. Y.—De Coppet v. Cone, 199 N. Y. 56, 92 NE 411, 139 AmSR 844, 20 Ann Cas 841 [aff 132 App. Div. 928 mem, 117 NYS 1132 mem]; Spratt v. Syms, 104 App. Div. 232, 93 NYS 728; Maas v. German Sav. Bank, 73 App. Div. 524, 77 NYS 256 [aff 176 N. Y. 377, 68 NE 658, 98 AmSR 689, and rev 36 Misc. 154, 72 NYS 1068 (aff 35 Misc. 193, 71 NYS 483)]; Czech v. Bean, 35 Misc. 729, 72 NYS 402; Matter of Schoonmaker, 18 NYWklyDig 410; Goodrich v. Pendleton, 4 Johns. Ch. 549; Slatter v. Carroll, 2 Sandf. Ch. 573.

N. C.—First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515; Coleman v. Howell, 131 N. C. 125, 42 SE 555; Morefield v. Harris, 126 N. C. 626, 36 SE 125; Shields v. Union Cent. L. Ins. Co., 119 N. C. 380, 25 SE 951; Hyman v. Gaskins, 27 N. C. 267; Smith v. Munroe, 23 N. C. 345.

Pa.—Mansfield v. McFarland, 202 Pa. 173, 51 A 763.

Porto Rico.—Sanchez v. Nussa, 14 Porto Rico 430.

R. I.—Williams v. Ripley, 25 R. I. 510, 56 A 777.

Tex.—Simpson v. Knox, 1 Tex. Unrep. Cas. 569; Atchison, etc., R. Co. v. Berkshire, (Civ. A.) 201 SW 1093; Cooper v. Gulf, etc., R. Co., 41 Tex. Civ. A. 596, 93 SW 201.

Vt.—Churchill v. Boyden, 17 Vt. 319.

Wash.—State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198; Rader v. Stubblefield, 43 Wash. 334, 86 P 560, 10 AnnCas 20.

Wyo.—Bliler v. Boswell, 9 Wyo. 57, 59 P 798, 61 P 867.

Eng.—In re Butson, L. R. 9 Ir. 21; In re Fittock, 9 Jur. N. S. 311; Evans v. Burrell, 28 L. J. P. & M. 32.

N. B.—Trites v. Humphreys, 2 N. B. Eq. 1.

[a] **Probate court has authority to issue ancillary letters.**—Matter of Harwood, 104 Misc. 653, 172 NYS 296; In re Videgara, 168 NYS 586 [aff 170 NYS 874]; Atchison, etc., R. Co. v. Berkshire, (Tex. Civ. A.) 201 SW 1093.

[b] **An ancillary administrator de bonis non** is properly appointed where the public administrator of a county, representing an estate being administered in another state, secured a judgment against a debtor of the estate and after making final settlement was discharged. Wright v. Hetherlin, (Mo.) 209 SW 871.

7. Barrett v. Barrett, 170 Ky. 91, 185 SW 499; Becraft v. Lewis, 41 Mo. A. 546.

8. Brown v. Smith, 101 Me. 545, 64 A 915, 115 AmSR 339; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113; Becraft v. Lewis, 41 Mo. A. 546; Grant v. Rogers, 94 N. C. 755.

[a] **That the commonwealth is a debtor to a holder** of its bonds domiciled in a sister state and there dying gives jurisdiction to the courts of Massachusetts, for ancillary administration. Bliss v. Bliss, 221 Mass. 201, 109 NE 148, LRA1916A 889.

9. Jackson v. Jeffries, 3 A. K. Marsh. (Ky.) 309.

10. U. S.—Picquet v. Swan, 19 F. Cas. No. 11,132, 3 Mason 469.

Ala.—Bishop v. Lalouette, 67 Ala. 197; Miller v. Jones, 26 Ala. 247; Gayle v. Blackburn, 1 Stew. 429.

La.—Agee v. Brent, 132 La. 821, 61 S 837; Thomas' Succ., 35 La. Ann. 19; Burbank v. Payne, 17 La. Ann. 15, 87 AmD 513; Atkinson v. Rogers, 14 La. Ann. 633.

Me.—Brown v. Smith, 101 Me. 545, 64 A 915, 115 AmSR 339.

Mass.—Bliss v. Bliss, 221 Mass. 201, 109 NE 148, LRA1916A 889; Stevens v. Gaylord, 11 Mass. 256.

Mich.—Colvin v. Jones, 194 Mich. 670, 161 NW 847.

Mo.—Wright v. Hetherlin 209 SW 871; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; Becraft v. Lewis, 41 Mo. A. 546; State v. Moore, 18 Mo. A. 406.

N. J.—In re Post, (Prerog.) 104 A 652.

Tex.—Green v. Rugely, 23 Tex. 539.

11. See supra § 2671.

12. See infra § 2702.

13. Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90; McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492; Carpenter v. Commonwealth Trust Co., 161 Ill. A. 398; Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; Bostwick v. Carr, 165 App. Div. 55, 151 NYS 74; Matter of Gennert, 96 App. Div. 8, 89 NYS 37; Montgomery v. Boyd, 78 App. Div. 64, 79 NYS 879; Matter of Van Kleeck, 95 Misc. 40, 158 NYS 539; Moyer v. Weil, 1 Dem. Surr. (N. Y.) 71.

[a] **The only proper and feasible way for a creditor** in Illinois to reach property of his debtor in Illinois after the death of such debtor is to take out administration in Illinois. Carpenter v. Commonwealth Trust Co., 161 Ill. A. 398.

14. Spratt v. Syms, 104 App. Div. 232, 93 NYS 728; Matter of Gennert, 96 App. Div. 8, 89 NYS 37; Re Winnington, 1 NYCivProc 267; Hendrickson v. Ladd, 2 Dem. Surr. (N. Y.) 402.

15. Taylor v. Syme, 162 N. Y. 513, 57 NE 83 [rev 17 App. Div. 517, 45 NYS 707].

[a] **Registration** of a will in Canada, according to the requirements there, is not an admission to probate such as authorizes recording of the will and the issuance of ancillary letters. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1062 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem (aff 92 Misc. 324, 155 NYS 397)].

[b] **Facts amounting to establishment of will in France.**—Matter of Harwood, 104 Misc. 653, 172 NYS 296.

[c] **Effect of probate in state where ancillary letters applied for.**—Where a will executed in New York and a codicil executed in Michigan were admitted to probate in New York, and letters issued to the executor and, after his death, to administrators with the will annexed, and the will alone was admitted to probate in Michigan and letters of administration with the will annexed issued, the New York court denied the application of the Michigan administrator with the will annexed for ancillary letters of administration, saying: "Thus there are at present two administrations, one of the will and codicil in this county and one of the will only in the state of Michigan. In effect, the situation is the same as though two wills of the same testatrix, made at different dates, had been probated, one in Michigan and one here. . . . I do not think the framers of the Code contemplated a case like this. It is an anomalous situation. Ancillary letters would be inconsistent with and a contradiction of the will and codicil in force in this state. If not, they would mean nothing. The New York decree having precedence, no property in this state would be administered under the ancillary letters and thus the very purpose for which such letters are granted would fail. There are no debts of the estate unpaid in this state, and, if there were, they would be provided for under the principal administration now in force in this state. To grant them (ancillary letters) might conform to the letter of the Code but it would violate its spirit and be an idle ceremony. It would, indeed, be worse than that, for it would violate the legal adjudications made in regard to this very estate. Ancillary letters presuppose something which, in this case, does not exist, viz.: a superior or dominant administration in some other state." Matter of Eaton, 102 Misc. 370, 373, 377, 169 NYS 871 [aff 186 App. Div. 925 mem, 172 NYS 888 mem].

16. U. S.—McKinzie v. U. S., 34 Ct. Cl. 278.

application is unadministered,[17] and also that it is of such a character as may be denominated local assets, or such as has its situs for purposes of administration in that jurisdiction.[18] It is usually held that property brought into the jurisdiction after decedent's death is sufficient ground for granting ancillary administration, although he owned no property there at the time of his death,[19] but the circumstances or purposes under or for which the property was brought into the state are more or less influential, and sometimes furnish grounds for refusing to grant administration on such property,[20] and there is authority for the view that the bringing of property into the jurisdiction after the death of decedent is never sufficient to warrant ancillary administration.[21] After property has vested in a representative in one jurisdiction, its removal into another is no ground for granting ancillary administration there,[22] and the representative may sue in his own name for its recovery;[23] but where a debtor moves in another jurisdiction the debt becomes assets in that jurisdiction.[24] Ancillary administration may be granted, although decedent left only real property in the jurisdiction where the grant is applied for,[25] when by the local law the real property of decedents passes to their personal representatives, or there are local creditors who are entitled to have the land sold for payment of their debts;[26] but in the absence of such conditions the existence of real property within the

Cal.—In re Daughaday, 168 Cal. 63, 141 P 929.
Conn.—Beach's App., 76 Conn. 118, 55 A 596.
D. C.—In re Coit, 3 App. 246.
Ind.—McCord v. Thompson, 92 Ind. 565.
Me.—Shaw, Appellant, 81 Me. 207, 16 A 662.
Mass.—Vinton v. Sargent, 195 Mass. 133, 80 NE 826; Martin v. Gage, 147 Mass. 204, 17 NE 310.
N. Y.—Evans v. Schoonmaker, 2 Dem. Surr. 249.
Pa.—Schley's Est., 11 Phila. 139, 2 WklyNC 684.
Tex.—Cooper v. Gulf, etc., R. Co., 41 Tex. Civ. A. 596, 93 SW 201.

[a] **A claim against a resident of the county** in which the application is made is sufficient to support a grant of ancillary letters, even though it should subsequently be shown that such claim was invalid and incapable of enforcement. Sullivan v. Fosdick, 10 Hun (N. Y.) 173.

[b] **If it appears that all the property has been removed** or legally disposed of before the date of the application a grant of ancillary administration should be denied. Shaw, Appellant, 81 Me. 207, 16 A 662; Martin v. Gage, 147 Mass. 204, 17 NE 310.

17. Townsend v. Bell, 3 Dem. Surr. (N. Y.) 367.

[a] **Where the property of a testator has been vested in the devisee** by the probate court of the state where testator resided and where the will was probated, a part of the property situated in another state cannot be subjected to further administration proceedings therein. Slater v. Thompson, 255 Fed. 768.

18. D. C.—In re Coit, 3 App. 246.
Ind.—McCord v. Thompson, 92 Ind. 565.
Mass.—Bliss v. Bliss, 221 Mass. 201, 109 NE 148, LRA1916A 889.
Mo.—Hill v. Barton, 194 Mo. A. 325, 188 SW 1105.
N. Y.—Marks v. Emigrant Industrial Sav. Bank, 122 App. Div. 661, 107 NYS 491.
Pa.—Schley's Est., 11 Phila. 139, 2 WklyNC 684.

[a] **Situs of judgment debt.**—Where intestate, in his lifetime, recovered judgment against defendant in another state, after which defendant removed to Missouri, the situs of the debt evidenced by the judgment was in the county of defendant's residence in Missouri, and not where the judgment was recovered and recorded, authorizing ancillary administration on intestate's estate in such county for the purpose of collecting the judgment. Miller v. Hoover, 121 Mo. A. 568, 97 SW 210.

[b] **A decedent's beneficial interest in a royalty agreement** with a foreign mining corporation, pledged to secure his debt to a New Jersey corporation doing business in New York, the place of primary administration where the claim secured might be enforced, constitutes assets in New Jersey for the purpose of auxiliary administration. Wall v. American Smelting, etc., Co., (N. J.) 108 A 235.

Where particular assets deemed located generally see supra §§ 44–51.

19. Ala.—Robinson v. Robinson, 11 Ala. 947.
Ind.—McCord v. Thompson, 92 Ind. 565.
Iowa.—Christy v. West, 36 Iowa 285.
Me.—Saunders v. Weston, 74 Me. 85.
Mass.—Pinney v. McGregory, 102 Mass. 186.
Mo.—Miller v. Hoover, 121 Mo. A. 568, 97 SW 210.
N. H.—Stearns v. Wright, 51 N. H. 600.
N. Y.—In re Hughes, 95 N. Y. 55; Johnston v. Smith, 25 Hun 171; Kohler v. Knapp, 1 Bradf. Surr. 241.
N. C.—Morefield v. Harris, 126 N. C. 626, 36 SE 125.
Tex.—Green v. Rugely, 23 Tex. 539.
See generally supra § 42.

20. Christy v. Vest, 36 Iowa 285; Martin v. Gage, 147 Mass. 204, 17 NE 310; McCabe v. Lewis, 76 Mo. 296; Matter of McCabe, 84 App. Div. 145, 82 NYS 180 [aff 177 N. Y. 584 mem, 69 NE 1126 mem].

[a] **Illustrations.** — Ancillary administration cannot be founded on property brought into the state after the death of decedent: (1) If it was brought in merely for temporary purposes. Christy v. Vest, 36 Iowa 285; In re McCabe, 177 N. Y. 584, 69 NE 1126 [aff 84 App. Div. 145, 82 NYS 180]; Kohler v. Knapp, 1 Bradf. Surr. (N. Y.) 241. (2) If it was fraudulently brought in by the domiciliary representative. McCabe v. Lewis, 76 Mo. 296. (3) If it has been taken into possession by the domiciliary representative, and there is no other property belonging to decedent in the state. Martin v. Gage, 147 Mass. 204, 17 NE 310. (4) If it consists of a fund transmitted by the domiciliary representative to be paid over pursuant to the will. Sedgwick v. Ashburner, 1 Bradf. Surr. (N. Y.) 105. (5) If it was brought solely for the purpose of the appointment of an administrator to prosecute a negligence action against a foreign corporation on a cause of action arising in, and between, residents of another state. Hoes v. New York, etc., R. Co., 173 N. Y. 435, 66 NE 119 [rev 73 App. Div. 363, 77 NYS 117].

[b] **Funds in hands of domiciliary administrator's agent.**—An administrator appointed in Georgia, where decedent was domiciled, appointed an agent in Philadelphia to collect a claim against the United States government. After the claim had been collected, and before the proceeds had been paid over to the administrator, an application was made by the creditors of decedent in Pennsylvania for the appointment of a local administrator. It was held that the fund so received by the agent did not constitute assets in Pennsylvania on which administration could be granted, because the claim against the government was a local asset in the jurisdiction of decedent's domicile, and the mere fact that it had been paid by the government to the agent of the administrator in Pennsylvania, for the express purpose of remitting to the administrator the balance remaining after deducting the amount of the agent's compensation, did not invest it with any of the attributes of a Pennsylvania asset. Schley's Est., 11 Phila. (Pa.) 139, 2 WklyNC 684.

21. Drake v. Vaughan, 6 J. J. Marsh. (Ky.) 143; Embry v. Millar, 1 A. K. Marsh. (Ky.) 300, 10 AmD 732.

22. Ramey v. Green, 18 Ala. 771; Treadwell v. Rainey, 9 Ala. 590; Sawyer v. Seaver, 166 Mass. 447, 44 NE 505; Hill v. Barton, 194 Mo. A. 325, 188 SW 1105; Matter of McCabe, 84 App. Div. 145, 82 NYS 180 [aff 177 N. Y. 584 mem, 69 NE 1126 mem].

Title of domiciliary representative not divested by removal of property see infra § 2685.

23. Giddings v. Green, 48 Fed. 489; Crawford v. Graves, 15 La. Ann. 243; Beckham v. Wittkowski, 64 N. C. 464.

Actions by foreign representative generally see infra §§ 2702–2719.

24. Ky.—Barrett v. Barrett, 170 Ky. 91, 185 SW 499.
Me.—Saunders v. Weston, 74 Me. 85.
Mass.—Pinney v. McGregory, 102 Mass. 186.
N. H.—Stearns v. Wright, 51 N. H. 600.
N. Y.—Fox v. Carr, 16 Hun 434.

25. Ala.—Nicrosi v. Giuly, 85 Ala. 365, 5 S 156; Bishop v. Lalouette, 67 Ala. 197.
Cal.—Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90; In re Strong, 119 Cal. 663, 51 P 1078.
Ga.—Sprayberry v. Culberson, 32 Ga. 299.
Ill.—Bowles v. Rouse, 8 Ill. 409.
Ind.—Toledo, etc., R. Co. v. Reeves, 8 Ind. A. 667, 35 NE 199.
Iowa.—Little v. Sinnett, 7 Iowa 324.
Ky.—Rutherford v. Clark, 4 Bush 27.
Mass.—Cowden v. Jacobson, 165 Mass. 240, 43 NE 98; Prescott v. Durfee, 131 Mass. 477; Bowdoin v. Holland, 10 Cush. 17.
Minn.—Mowry v. McQueen, 80 Minn. 385, 83 NW 348.
Miss.—Partee v. Kortrecht, 54 Miss. 66.
Nebr.—Moore v. Moore, 33 Nebr. 509, 50 NW 443.
N. Y.—Spratt v. Syms, 104 App. Div. 232, 93 NYS 728; Matter of Gennert, 96 App. Div. 8, 89 NYS 37; Hart v. Coltrain, 19 Wend. 378; Slatter v. Carroll, 2 Sandf. Ch. 573.
Wash.—Hanford v. Davies, 1 Wash. 476, 25 P 329.
N. B.—Trites v. Humphreys, 2 N. B. Eq. 1.

26. See cases supra note 25.

[a] **Even though the estate is solvent** and an administrator has been appointed in the state where decedent resided, ancillary administration may be granted on the petition of a resident creditor in Massa-

jurisdiction is not sufficient.[27]

[§ 2676] **(3) Dependence on Domiciliary Appointment.** While ancillary administration is not generally granted until after a representative has been appointed in the place of decedent's domicile,[28] jurisdiction to grant ancillary letters is in no way dependent upon a prior domiciliary grant,[29] nor is it affected by the fact that a domiciliary grant has been made and that the foreign representative is by statute authorized to sue.[30]

[§ 2677] **c. Persons Entitled to Appointment.** Ancillary letters should ordinarily be granted to the domiciliary representative, if he applies therefor,[31] or to his nominee,[32] or attorney;[33] but in the absence of express statutory requirement the court may in its discretion appoint some other person,[34] and in some states the appointment of the domiciliary representative is precluded by statutes re-

chusetts, under the statute of that state, although decedent left only real property there. Prescott v. Durfee, 131 Mass. 477.

27. Spratt v. Syms, 104 App. Div. 232, 93 NYS 728.

28. Rackemann v. Taylor, 204 Mass. 394, 90 NE 552; Stevens v. Gaylord, 11 Mass. 256; Matter of Eaton, 102 Misc. 370, 169 NYS 871 [aff 186 App. Div. 925 mem, 172 NYS 888 mem]; Maguire's Est., 24 Pa. Dist. 47.

29. Ill.—Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 NE 815.

Ky.—Henderson v. Clarke, 4 Litt. 277.

Mass.—Pinney v. McGregory, 102 Mass. 186; Bowdoin v. Holland, 10 Cush 17; Stevens v. Gaylord, 11 Mass. 256.

Mo.—Wood v. Matthews, 73 Mo. 477; Spraddling v. Pipkin, 15 Mo. 118.

N. J.—In re Post, (Prerog.) 104 A 652.

N. Y.—Wise's Est., 2 NYCivProc 230 note; Langbein's Est., 2 NYCiv Proc 226, 1 Dem. Surr. 448.

N. C.—Hyman v. Gaskins, 27 N. C. 267.

Tex.—Green v. Rugely, 23 Tex. 539; Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

Vt.—Abbott v. Coburn, 28 Vt. 663, 67 AmD 735.

[a] **Probate of a will** (1) need not be made at the domicile before ancillary letters can be issued. Hyman v. Gaskins, 27 N. C. 267. (2) Aliter under statute. Re Winnington, 1 NYCivProc 267. And see supra § 2674.

30. Broughton v. Bradley, 34 Ala. 694, 73 AmD 474; Henderson v. Clark, 4 Litt. (Ky.) 277; Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343.

Right of foreign representative to sue see infra § 2708.

31. U. S.—Berney v. Drexel, 12 Fed. 393 [rev on other grounds 122 U. S. 241, 7 SCt 1200, 30 L. ed. 1219].

Ark.—Clark v. Holt, 16 Ark. 257.

Cal.—In re Meier, 165 Cal. 456, 132 P 764, 48 LRANS 858, AnnCas1914D 121; In re Brundage, 141 Cal. 538, 75 P 175; In re Bergin, 100 Cal. 376, 34 P 867.

Conn.—Lawrence's App., 49 Conn. 411; Hartford, etc., R. Co. v. Andrews, 36 Conn. 213.

Ill.—Shephard v. Rhodes, 60 Ill. 301.

Ind.—Reed v. Bishop, 51 Ind. A. 187, 97 NE 1023.

Iowa.—Knight v. Moline, etc., R. Co., 160 Iowa 160, 140 NW 839; In re Miller, 92 Iowa 741, 61 NW 229.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

La.—Henry's Succ., 115 La. 874, 40 S 253; State v. New Orleans Prob. Judge, 18 La. 570; State v. New Orleans Prob. Judge, 17 La. 486.

Me.—Chadwick v. Stilphen, 105 Me. 242, 74 A 50.

Md.—Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468.

Mass.—Pinney v. McGregory, 102 Mass. 186; In re Picquet, 5 Pick. 65.

Minn.—Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503; Bloor v. Myerscaugh, 45 Minn. 29, 47 NW 311.

N. J.—Wall v. American Smelting, etc., Co., 108 A 235.

N. Y.—Matter of Connell, 92 Misc. 324, 155 NYS 397 [aff 175 App. Div. 986 mem, 162 NYS 1114 mem]; Matter of Prevost, 89 Misc. 704, 153 NYS 1092; Matter of McShane, 73 Misc. 146, 132 NYS 470, 8 Mills Surr. 277; Baldwin v. Rice, 44 Misc. 64, 89 NYS 738 [mod 100 App. Div. 241, 91 NYS 1086 (aff 183 N. Y. 55, 75 NE 1096 [rearg den 184 N. Y. 523 mem, 76 NE 1088 mem])]; Gavin's Est., 2 NYS 670, 15 NYCivProc 390, 1 Conn. Surr. 117; Wise's Est., 2 NYCivProc 230 note; Lussen v. Timmerman, 4 Dem. Surr. 250; Hendrickson v. Ladd, 2 Dem. Surr. 402; Weed v. Waterbury, 5 Redf. Surr. 114.

Pa.—Mackin's Est., 14 Phila. 328, 11 WklyNC 207.

Tex.—Hare v. Pendleton, (Civ. A.) 214 SW 948.

Eng.—Doglioni v. Crispin, L. R. 1 H. L. 301; In re Meatyard, [1903] P. 125; In re Whitelegg, [1899] P. 267; In re Briesemann, [1894] P. 260; In re Black, 13 P. D. 5; In re Oldenburg, 9 P. D. 234; In re Hill, L. R. 2 P. & D. 89; In re Earl, L. R. 1 P. & D. 450; In re Beggia, 1 Add. Eccl. 340, 162 Reprint 119; In re Rogerson, 2 Curt. Eccl. 656; Viesca v. D'Aramburu, 2 Curt. Eccl. 277; In re Stewart, 1 Curt. Eccl. 904; In re Johnston, 4 Hagg. Eccl. 182, 162 Reprint 1413; In re Dormoy, 3 Hagg. Eccl. 767, 162 Reprint 1338; Enohin v. Wylie, 10 H. L. Cas. 1, 11 Reprint 924, 2 ERC 57; Laneuville v. Anderson, 6 Jur. N. S. 1260; In re Veiga, 32 L. J. P. & M. 9; In re Babin, 59 L. J. P. D. & Adm. 46; In re Bianchi, 8 L. T. Rep. N. S. 171; In re Morgan, 2 Rob. Eccl. 415; In re Henderson, 2 Rob. Eccl. 144; In re Federici, 1 Spinks 109.

Ont.—In re Medbury, 11 Ont. L. 429, 7 OntWR 890.

[a] **One of two domiciliary representatives** may be appointed. Chadwick v. Stilphen, 105 Me. 242, 74 A 50.

[b] **Refusal of domiciliary letters to one executor.**—Where a will devising real property in Minnesota and admitted to probate in a foreign country is allowed in the probate court of the proper county in Minnesota, it becomes the duty of the court to issue letters testamentary to a resident executor named in the will if duly qualified, although such letters were refused him by the court where the will was originally proved. Bloor v. Myerscaugh, 45 Minn. 29, 47 NW 311.

[c] **Provisional executor.**—Ancillary letters will be granted to a provisional executor, appointed by the proper court of the domicile of the deceased, but they will be limited for such time as the appointment by the court of domicile remains unrescinded and in force. In re Steigerwald, 10 Jur. N. S. 159.

[d] **Person not entitled to letters.**—An administrator with the will annexed appointed in Massachusetts, whose testatrix was the executrix and sole legatee of a will probated in Ireland, is not entitled to ancillary letters under the Irish will. Matter of McShane, 73 Misc. 146, 132 NYS 470, 8 Mills Surr. 277.

[e] **A local probate of the will, unknown to the executors,** cannot deprive them of their right, although the statute allows executors only twenty days after probate in which to qualify. Thompson v. Dodge, (Tex. Civ. A.) 210 SW 586, 592 ("It would be a legal farce and a solemn travesty of justice to hold that a party in Texas could, unknown to executors under a foreign will, have the will of their testate probated and afterwards prohibit them from administering the estate because barred by limitation. Courts will not lend themselves to the perpetration of such injustice").

32. In re Brundage, 141 Cal. 538, 75 P 175; Wise's Est., 2 NYCivProc 230 note.

[a] **Ancillary letters of administration with the will annexed.**—Under Code Civ. Proc. § 1379, providing that administration may be granted to a competent person, although not otherwise entitled to it, at the request of the person entitled, one may not be so appointed administrator with the will annexed in case of a foreign will, as against a resident son of testator, a beneficiary under the will, at the request of the nonresident executor, such executor being entitled only to letters testamentary and not to administration; nor at the request of nonresident children of testator, they being incompetent because of their nonresidence. In re Brundage, 141 Cal. 538, 75 P 175.

Right of nominee of person entitled to appointment generally see supra § 113.

33. Matter of Hanover, 3 Redf. Surr. (N. Y.) 91; St. Jurjo v. Dunscomb, 2 Bradf. Surr. (N. Y.) 105; In re Viosca, 197 Pa. 280, 47 A 233, 51 LRA 876 [aff 29 PittsbLegJNS 299]; Sanchez v. Nussa, 14 Porto Rico 430; In re Dost Aly Khan, 6 P. D. 6; In re Weaver, 36 L. J. P. & M. 41.

34. Cal.—In re Meier, 165 Cal. 456, 132 P 764, 48 LRANS 858, Ann Cas1914D 121; In re Harrison, 135 Cal. 7, 66 P 846; In re Richardson, 120 Cal. 344, 52 P 832; In re Murphy, Myr. Prob. 185.

Conn.—Murdoch v. Murdoch, 81 Conn. 681, 72 A 290, 129 AmSR 231.

Ind.—Reed v. Bishop, 51 Ind. A. 187, 97 NE 1023.

Minn.—Hardin v. Jamison, 60 Minn. 112, 61 NW 1018.

N. Y.—Lussen v. Timmenman, 4 Dem. Surr. 250.

Ont.—In re Medbury, 11 Ont. L. 429, 7 OntWR 890.

[a] **A resident creditor is preferred** to a foreign executor. Reed v. Bishop, 51 Ind. A. 187, 97 NE 1023.

[b] **The consent of the domiciliary representative** is necessary in New York, to authorize the appointment of any other person. Matter of McCauley, 49 Misc. 209, 99 NYS 238, 5 Mills Surr. 226.

[c] **A foreign trust company,** which is executor under a foreign will but has failed to make the secretary of state its attorney for the service of process, cannot be appointed ancillary executor. Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940.

[d] **Different probate system at domicile.**—In cases of wills of inhabitants of countries where the Anglo-American probate system does not prevail, where there is no executor, the custom of both English and American courts of probate has been to recognize the right of the heir or universal legatee to ancillary administration. Matter of Harwood, 104 Misc. 653, 172 NYS 296.

quiring that the person to whom letters are issued shall be a resident of the state.[35] In cases where no domiciliary letters have been granted, the ancillary letters will ordinarily be issued to the person who would be entitled thereto, under the local statutes, in case of domestic administration,[36] and if those entitled to preference do not apply, administration may be granted in the discretion of the court.[37] The domiciliary representative is under no legal obligation to take out ancillary letters,[38] but may renounce his right to the ancillary appointment,[39] and the court may appoint some other suitable person on his failure or refusal to act[40] or in case of his death.[41] An executor who resigns in the state of the domiciliary administration, without stating that he resigns in that state only, and whose subsequent acts show that he intends to have nothing to do with the estate, is not entitled to ancillary letters in another state.[42]

[§ 2678] **d. Time for Appointment.**[43] Statutes limiting the time for taking out original letters of administration[44] have been held to apply[45] and not to apply[46] to ancillary administration. Each case must be governed by its own facts and circumstances, and where the delay is sufficiently explained, the court may grant such letters at any time.[47] The right to ancillary letters may be renounced, however, by delay in making application therefor,[48] and where a person who would be entitled to ancillary letters fails to make application therefor until after the domiciliary representative has taken possession of and administered all the assets, he will be deemed to have waived his right to such administration.[49]

[§ 2679] **e. Proceedings for Appointment.** Ancillary administration is a special proceeding.[50] Proceedings for the appointment of an ancillary administrator are instituted by a petition[51] by a person entitled to appointment,[52] addressed to the probate court,[53] which should contain a statement of facts sufficient to show the jurisdiction of the court in the particular case,[54] and show the names and residences of creditors, or persons claiming as creditors, who reside within the state.[55] The petition should be verified.[56] Only creditors need be cited on an application to record a will of personal property executed by a nonresident and to issue ancillary letters testamentary thereon,[57] but decedent's next of kin may intervene and question the jurisdiction of the court to issue letters.[58] In the case of a testator who died while a resident of a foreign country, an ancillary appointment is made on behalf of the estate and the legatees, and not on behalf of the foreign executor, and cannot be conditioned on the foreign executor returning to the state money which he took therefrom.[59]

Copies of will and domiciliary letters. If decedent died testate, a copy of the judgment, decree, or order admitting the will to probate in the jurisdiction of the domicile should be presented,[60] together with an exemplified copy of the will.[61] If domiciliary letters have been issued, an exemplified

35. Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113; Burkhim v. Pinkhussohn, 58 S. C. 469, 36 SE 908.

36. Baldwin v. Rice, 44 Misc. 64, 89 NYS 738 [mod 100 App. Div. 241, 91 NYS 1086 (aff 183 N. Y. 55, 75 NE 1096 [rearg den 184 N. Y. 523 mem, 76 NE 1088 mem])]; Wise's Est., 2 NYCivProc 230 note; Heins' Est., 22 Pa. Super. 31; Re O'Brien, 3 Ont. 326. Compare Matter of Prevost, 89 Misc. 704, 153 NYS 1092, 1093 ("As no letters were issued in Peru, the ancillary letters must be directed to the person entitled to the possession of the personal property of the decedent in that country, unless another person applies therefor and files with his petition an instrument executed by the person so entitled, authorizing the petitioner to receive such ancillary letters").

Persons entitled to appointment generally see supra §§ 88–115.

37. Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468. See generally supra § 111.

38. Sanders v. Jones, 43 N. C. 246; But compare Helme v. Sanders, 10 N. C. 563 (an executor in North Carolina must take out letters testamentary in another state for the purpose of suing for a debt due there, if the interest of the estate requires it, and if he fails to do so he is guilty of a devastavit).

39. Keith v. Proctor, 114 Ala. 676, 21 S 502; Lawrence's App., 49 Conn. 411; Hooper v. Moore, 50 N. C. 130; Rice v. Tilton, 13 Wyo. 420, 80 P 828.

[a] **The renunciation need not be express or formal but** may be implied from silence and inaction. Keith v. Proctor, 114 Ala. 676, 21 S 502; Lawrence's App., 49 Conn. 411.

[b] **Unreasonable delay** may amount to renunciation. Rice v. Tilton, 13 Wyo. 420, 80 P 828.

Renunciation of right generally see supra § 137.

40. Ala.—Keith v. Proctor, 114 Ala. 676, 21 S 502.

Cal.—In re Bergin, 100 Cal. 376, 34 P 867.

Conn.—Lawrence's App., 49 Conn. 411.

Mo.—State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454.

N. J.—Wall v. American Smelting, etc., Co., 108 A 235.

Oh.—Bustard v. Dabney, 4 Oh. 68.

Pa.—Langton's Est., 14 WklyNC 46.

Wyo.—Rice v. Tilton, 13 Wyo. 420, 80 P 828.

[a] **Preferences.**—(1) In the absence of an application by the executors named in the will, letters must be granted "to a person interested in the will," who applies in preference to the public administrator. In re Bergin, 100 Cal. 376, 34 P 867. (2) As between persons equally entitled males must be preferred to females. In re Coan, 132 Cal. 401, 64 P 691.

[b] **When public administrator to be appointed.**—Where the executor named in a foreign will refuses to serve, the foreign dative testamentary executor cannot be appointed but the public administrator must be appointed. Taylor's Succ., 23 La. Ann. 22.

[c] **Notice to the domiciliary representative** is a prerequisite to the appointment of another person where the domiciliary representative has merely failed to apply for ancillary administration, but is not required where he has waived his right to such administration. Wall v. American Smelting, etc., Co., (N. J.) 108 A 235.

41. Jackson v. Jeffries, 3 A. K. Marsh. (Ky.) 309.

42. State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454.

43. May precede domiciliary appointment see supra § 2676.

44. See supra § 146.

45. Nelson v. Bridge, 98 Tex. 523, 86 SW 7 [crit Henry v. Roe, 83 Tex. 446, 18 SW 806].

46. McKee v. Simpson, 36 Fed. 248; Dolton v. Nelson, 7 F. Cas. No. 3,976, 3 Dill 469; Woodruff v. Shultz, 49 Iowa 430.

47. McKee v. Simpson, 36 Fed. 248; Keith v. Proctor, 114 Ala. 676, 21 S 502; Ives v. Jacksonville Nat. Bank, 28 Ill. A. 563.

[a] **Ancillary letters granted twelve years after decedent's death** are not invalid because of the lapse of time. McKee v. Simpson, 36 Fed. 248.

48. Keith v. Proctor, 114 Ala. 676, 21 S 502.

49. Marcy v. Marcy, 32 Conn. 308; Walker v. Allan Line SS. Co., 44 N. S. 410.

50. Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

51. Re Winnington, 1 NYCivProc 267.

52. Matter of Gennert, 96 App. Div. 8, 89 NYS 37.

53. Re Winnington, 1 NYCivProc 267.

54. Baldwin v. Rice, 183 N. Y. 55, 75 NE 1096; Langbein's Est., 2 NY CivProc 226, 1 Dem. Surr. 448.

[a] **The facts conferring jurisdiction must be stated directly,** and not left to inference. Winnington's Est., 1 NYCivProc 267.

55. Spratt v. Syms, 104 App. Div. 232, 93 NYS 728; Re Winnington, 1 NYCivProc 267.

[a] **Naming the firms to which creditors belong** instead of the creditors individually is insufficient. Thompson's Est., 1 NYCivProc 264.

56. Re Winnington, 1 NYCivProc 267.

57. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem].

58. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem]; Matter of Harwood, 104 Misc. 653, 172 NYS 296.

59. Matter of McCaffrey, 188 App. Div. 772, 177 NYS 414.

60. Re Thompson, 1 NYCivProc 264; Matter of Hudson, 5 Redf. Surr. (N. Y.) 333; First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515.

[a] **Affidavits insufficient.**—A motion to grant ancillary letters testamentary to one alleging that he is executor of a will duly probated in another state will not be granted on affidavits. Gavin's Est., 2 NYS 670, 15 NYCivProc 390, 1 Conn. Surr. 117.

61. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem]; Baldwin v.

copy thereof should be produced.[62]

Appeal. The domiciliary representative has such an interest as entitles him to appeal from a decree appointing an ancillary representative in another jurisdiction;[63] and other persons interested in the estate have the same right.[64]

[§ 2680] **f. Bond.** An ancillary representative is usually required by statute to give a bond in the jurisdiction where his letters are taken out,[65] but the failure to file a bond renders the letters voidable only and not void.[66]

[§ 2681] **g. Operation and Effect of Appointment.** An ancillary representative is an officer of the jurisdiction where he is appointed,[67] and has the same general powers as a domestic executor or administrator except in the disposing of decedent's real property for the payment of debts and funeral expenses.[68] The appointment is a decree in rem which is binding on decedent's next of kin,[69] and is conclusive of the right of the appointee to act as such.[70] Where an executor and trustee in one state is appointed ancillary executor in another state, such appointment does not give the court of the latter state jurisdiction over the executor in his capacity as trustee, but the management of the estate in that respect remains with the court by which the first appointment was made.[71] An erroneous statement in an application for letters of ancillary administration, not knowingly or willfully made, but based upon a misconception as to the effect of the laws of the state of the domicile of the decedent, does not render the ancillary appointment invalid.[72] The fact that there is nothing to warrant an order authorizing an ancillary administrator, appointed to collect debts, to take charge of real property in the state, renders such order subject to attack on motion, but the invalidity of the same has no effect on the grant of the letters.[73] The appointment of an ancillary representative cannot be collaterally attacked,[74] except on the ground of lack of jurisdiction,[75] but it has been considered that the question of the existence of facts making the appointment proper is a matter going to the jurisdiction to appoint.[76]

[§ 2682] **h. Revocation of Letters; Removal.** The court having power to grant ancillary letters has also the right to revoke such letters where they have been improvidently granted.[77] The letters may be revoked where they have been procured through fraud,[78] and, where general ancillary letters have been granted and it appears that decedent left a will, they may be revoked and letters with the will annexed issued;[79] but the probate of a foreign will does not of itself annul the ancillary letters previ-

Rice, 183 N. Y. 55, 75 NE 1096 [aff 100 App. Div. 241, 89 NYS 738, 91 NYS 1086 (rearg den 184 N. Y. 523 mem, 76 NE 1088 mem)]; Matter of Prevost, 89 Misc. 704, 153 NYS 1092; Re Winnington, 1 NYCivProc 267; Re Thompson, 1 NYCivProc 264; In re Levy, Tuck. Surr. (N. Y.) 20.

[a] **Proof of execution of will.**—A will of real estate must be shown to have been executed according to the laws of the state where the ancillary letters were applied for, but this is not necessary in case of a will of personal property. Langbein's Est., 2 NYCivProc 226, 1 Dem. Surr. 448.

[b] **Authentication held sufficient.**—Matter of McCaffrey, 188 App. Div. 772, 177 NYS 414.

62. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem]; Baldwin v. Rice, 183 N. Y. 55, 75 NE 1096; Re Winnington, 1 NYCivProc 267; Re Thompson, 1 NYCivProc 264.

63. Shaw, Appellant, 81 Me. 207, 16 A 662; Martin v. Gage, 147 Mass. 204, 17 NE 310; Smith v. Sherman, 4 Cush. (Mass.) 408; Graves v. Tilton, 63 N. H. 192.

[a] **The ground on which the right to appeal is based** (1) is that the principal representative should be allowed to contest burdening the estate with an unnecessary administration (Smith v. Sherman, 4 Cush. (Mass.) 408) or (2) having it intrusted to an improper person (Graves v. Tilton, 63 N. H. 192).

64. Shaw, Appellant, 81 Me. 207, 16 A 662 (the widow of decedent may appeal).

65. Ala.—Keith v. Proctor, 114 Ala. 676, 21 S 502.

La.—Withers' Succ., 45 La. Ann. 556, 12 S 875; Butler's Succ., 30 La. Ann. 887; Young's Succ., 21 La. Ann. 394.

Mo.—State v. Osborn, 71 Mo. 86.

N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.

N. Y.—In re Prout, 128 N. Y. 70, 27 NE 948, 13 LRA 104 [aff 12 NYS 64, 19 NYCivProc 435]; Govan's Est., 2 Misc. 291, 23 NYS 766, Pow. Surr. 387; Matter of Harwood, 104 Misc. 653, 172 NYS 296; Matter of Hanover, 3 Redf. Surr. 91.

N. C.—First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515.

Pa.—Troxell's Est., 13 Montg. Co. 68.

Vt.—Probate Ct. v. Matthews, 6 Vt. 269.

[a] **Amount of bond.**—The surrogate in fixing the amount of the bond of an ancillary administrator may ignore a disputed claim probably not enforceable. Matter of Musgrave, 5 Dem. Surr. (N. Y.) 427.

[b] **Ancillary bond covers only assets in ancillary jurisdiction.**—Lewis v. Grognard, 17 N. J. Eq. 425.

[c] **Assets brought from the decedent's domicil** into the ancillary jurisdiction are not covered by the ancillary bond. Probate Ct. v. Matthews, 6 Vt. 269.

[d] **The proceeds of foreign real estate** are not covered by the bond, although they are brought into the ancillary jurisdiction. State v. Osborn, 71 Mo. 86.

[e] **If an executor is relieved by the will from giving a bond** (1) no bond will be required where he takes out ancillary letters in another jurisdiction. Leatherwood v. Sullivan, 81 Ala. 458, 1 S 718. Contra Yerkes' Est., 8 Pa. Dist. 36. (2) Under the statute, if the will requests that no security is required ancillary letters may be issued without security if the representative has his usual place of business in the state, but in other cases a bond must be given. Van Wyck v. Van Wyck, 22 Hun (N. Y.) 9.

[f] **If an executor is a resident** he will not be required to give bond. Mackin's Est., 14 Phila. (Pa.) 328, 11 WklyNC 207.

66. Keith v. Proctor, 114 Ala. 676, 21 S 502; Leatherwood v. Sullivan, 81 Ala. 458, 1 S 718; Regan v. West, 115 Ill. 603, 4 NE 365; Withers' Succ., 45 La. Ann. 556, 12 S 875; Bradstreet v. Butterfield, 129 Mass. 339.

67. Milner v. Hoag, 182 App. Div. 524, 169 NYS 755.

[a] **A suspension of the powers of the executor,** in the state of testator's domicile, by reason of an appeal from the decree admitting the will to probate, does not suspend his powers under an ancillary appointment in another state. Milner v. Hoag, 182 App. Div. 524, 169 NYS 755.

68. Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 NE 697, LRA1915 C 471 [rev 153 App. Div. 655, 138 NYS 725].

69. In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem] (if the surrogate had jurisdiction).

70. Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940 (provided the court had jurisdiction); In re Videgaray, 168 NYS 586 [aff 170 NYS 874].

71. Joy v. Elton, 9 N. D. 428, 83 NW 875.

72. In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605.

73. Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

74. Emery v. Hildreth, 2 Gray (Mass.) 228.

75. Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940; In re Connell, 221 N. Y. 190, 729 mem, 116 NE 986, 117 NE 1065 mem [rev 175 App. Div. 986 mem, 162 NYS 1114 mem]; Taylor v. Syme, 162 N. Y. 513, 5 NE 83 [rev 17 App. Div. 517, 45 NYS 707, 26 NYCivProc 285].

76. Taylor v. Syme, 162 N. Y. 513, 57 NE 83; Baldwin v. Rice, 44 Misc. 64, 89 NYS 738 [mod 100 App. Div. 241, 91 NYS 1086 (aff 183 N. Y. 55, 75 NE 1096 [rearg den 184 N. Y. 523 mem, 76 NE 1088 mem])].

77. Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468; McKeown's Est., 10 Pa. Dist. 332.

78. Bradley v. Broughton, 34 Ala. 694, 73 AmD 474; Wernse v. Hall, 101 Ill. 423; Matter of McCaffrey, 188 App. Div. 772, 177 NYS 414; Mackin's Est., 14 Phila. (Pa.) 328, 11 WklyNC 207.

[a] **Circumstances not showing fraud.**—An omission of a petition for ancillary letters on the estate of a resident of a foreign country to state that an application for probate of the will had been made in this country did not constitute concealment of facts, so as to warrant revocation of letters, where the court had before it, at the time of granting such letters, a former appointment of petitioner as ancillary executor, reciting such fact. Matter of McCaffrey, 188 App. Div. 772, 177 NYS 414.

79. Bradley v. Broughton, 34 Ala. 694, 73 AmD 474; Clark v. Holt, 16 Ark. 257; Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468.

ously granted,[80] nor are ancillary letters of administration revoked by a subsequent grant of letters testamentary in the state of the testator's domicile.[81] An ancillary representative may also be removed for misconduct.[82] The power of the court to revoke ancillary letters is not arbitrary, but is a legal discretion to be exercised only upon a state of facts warranting it.[83] A petition for the removal of an ancillary representative can be presented only by a person interested in the estate,[84] and must make a specific allegation of facts showing sufficient cause for removal.[85] It has been held that the revocation of the domiciliary letters does not affect ancillary letters taken out in another jurisdiction,[86] although there is also authority for the contrary view where the domiciliary representative is also the ancillary representative.[87] It has also been held that where a domiciliary executor has also been appointed ancillary executor, his removal by the domiciliary court did not as a matter of law require the granting of an application for his removal as ancillary executor.[88]

[§ 2683] **3. Relation between Ancillary and Domiciliary Representatives.** There is no privity between administrators of the same estate appointed in different jurisdictions,[89] or between an executor in one jurisdiction and an ancillary administrator in another;[90] and a judgment against the one is no evidence against the other, for the purpose of affecting assets received by the latter under his administration,[91] and cannot be made the basis of

[a] **Until the will is admitted to probate** the general ancillary letters will not be revoked. Gavin's Est., 2 NYS 670, 15 NYCivProc 390, 1 Conn. Surr. 117.

80. Clark v. Holt, 16 Ark. 257.

81. Clark v. Holt, 16 Ark. 257.

82. In re Middleby, 242 Pa. 39, 88 A 773.

83. Iowa.—In re Miller, 92 Iowa 741, 61 NW 229.

Md.—Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468.

Mich.—White v. Spaulding, 50 Mich. 22, 14 NW 684.

N. Y.—Matter of Goetz, 120 App. Div. 70, 104 NYS 832; In re Connell, 138 NYS 389.

Pa.—Mackin's Est., 14 Phila. 328, 11 WklyNC 207.

[a] **Failure to qualify and give bond within the time prescribed** is not sufficient ground where the party has exercised reasonable diligence and gives a satisfactory explanation of the delay. In re Miller, 92 Iowa 741, 61 NW 229.

[b] **Nonresidence** is not ground for the removal of an ancillary administrator, where it is not shown to be actually prejudicial to the rights of those interested in the estate. White v. Spaulding, 50 Mich. 22, 14 NW 684.

[c] **Unauthorized probate of will.** —The surrogate is authorized to vacate ancillary administration based on the probate of a will in a foreign country of which decedent was not a resident. In re Connell, 138 NYS 389.

[d] **When revocation properly denied.**—Decedent dying in Germany, an administrator was appointed there, and alleged ancillary letters of administration were issued in New York to petitioner for the reduction to possession of a legacy due decedent under the will of her father, who died in that state, petitioner giving no bond. Subsequently respondent, decedent's sister, was granted letters of administration, and in an accounting proceeding, to which petitioner and respondent were parties, the legacy was awarded to her, petitioner taking no appeal from the decree. It was held that, the legacy being the only subject of administration within the jurisdiction of the court and petitioner having waived his right to it by failing to appeal from the decree awarding it to respondent, the supreme court would not interfere with a decree denying petitioner's application for the revocation of respondent's letters of administration. Matter of Schmid, 116 App. Div. 706, 102 NYS 80.

84. In re Lewis, 32 La. Ann. 385; White v. Spaulding, 50 Mich. 22, 14 NW 684; In re Connell, 138 NYS 389.

85. White v. Spaulding, 50 Mich. 22, 14 NW 684.

86. American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535; Huntington v. Moore, 1 N. M. 489.

[a] **A decree removing a foreign executor is not conclusive** on him or the court in a proceeding to remove him as ancillary administrator in another jurisdiction. American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535.

87. State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454; Matter of Gilleran, 50 Hun 399, 3 NYS 145, 15 NYCivProc 406.

88. American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535.

89. U. S.—McLean v. Meek, 18 How. 16, 15 L. ed. 277; Hill v. Tucker, 13 How. 458, 14 L. ed. 223; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Anderson v. Louisville, etc., R. Co., 210 Fed. 689, 127 CCA 277; Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553; Dent v. Ashley, 7 F. Cas. No. 3,809a, Hempst. 54.

Ala.—Johnston v. McKinnon, 129 Ala. 223, 29 S 696; Hatchett v. Berney, 65 Ala. 39.

Ark.—Turner v. Risor, 54 Ark. 33, 15 SW 13.

Cal.—Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

Colo.—Doss v. Stevens, 13 Colo. A. 535, 59 P 67.

Del.—De Paris v. Wilmington Trust Co., 104 A 691, 1 ALR 1352.

Ill.—Smith v. Goodrich, 167 Ill. 46, 47 NE 316; McGarvey v. Darnall, 134 Ill. 367, 25 NE 1005, 10 LRA 861 [aff 32 Ill. A. 226]; Rosenthal v. Renick, 44 Ill. 202; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Ind.—McCord v. Thompson, 92 Ind. 565; Slauter v. Chenowith, 7 Ind. 211.

Iowa.—Creswell v. Slack, 68 Iowa 110, 26 NW 42.

Me.—Nash v. Benari, 117 Me. 491, 105 A 107; Fowle v. Coe, 63 Me. 245.

Mass.—Merrill v. New England Mut. L. Ins. Co., 103 Mass. 245, 4 AmR 548; Ela v. Edwards, 13 Allen 48, 90 AmD 174; Low v. Bartlett, 8 Allen 259; Pond v. Makepeace, 2 Metc. 114.

Mich.—American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535.

Mo.—Corning First Nat. Bank v. Dowdy, 175 Mo. A. 478, 161 SW 859.

Mont.—Braithwaite v. Harvey, 14 Mont. 208, 36 P 38, 43 AmSR 625, 27 LRA 101.

Nebr.—Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.

Nev.—Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

N. H.—Leonard v. Putnam, 51 N. H. 247, 12 AmR 106; Taylor v. Barron, 35 N. H. 484; Goodall v. Marshall, 14 N. H. 161.

N. Y.—Dwane v. Miller, 89 Misc. 297, 152 NYS 1060.

Pa.—Brodie v. Bickley, 2 Rawle 431; Davis v. Heralds of Liberty, 39 Pa. Co. 399.

S. C.—Gravely v. Gravely, 25 S. C. 1, 60 AmR 478; King v. Clarke, 11 S. C. Eq. 611.

Tenn. — Keaton v. Campbell, 2 Humphr. 224; State v. Fulton, (Ch. A.) 49 SW 297.

Tex.—Cherry v. Speight, 28 Tex. 503; Jones v. Jones, 15 Tex. 463, 65 AmD 174; Clarke v. Webster, (Civ. A.) 94 SW 1088.

Wis.—Price v. Mace, 47 Wis. 23, 1 NW 336.

90. Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553; Bishop v. Ross, 56 Ind. A. 610, 103 NE 505; Low v. Bartlett, 8 Allen (Mass.) 259.

91. U. S.—Ingersoll v. Coram, 211 U. S. 335, 29 SCt 92, 53 L. ed. 208 [rev 148 Fed. 169, 78 CCA 303]; Brown v. Fletcher, 210 U. S. 82, 28 SCt 702, 52 L. ed. 966; Johnson v. Powers, 139 U. S. 156, 11 SCt 525, 35 L. ed. 112; McLean v. Meek, 18 How. 16, 15 L. ed. 277; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Ingersoll v. Coram, 127 Fed. 418. Contra Benker v. Meyer, 154 Fed. 290, 83 CCA 270.

Ala.—Johnston v. McKinnon, 129 Ala. 223, 29 S 696.

Ga.—Latine v. Clements, 3 Ga. 426.

Ill.—Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403; Smith v. Goodrich, 167 Ill. 46, 47 NE 316; McGarvey v. Darnall, 134 Ill. 367, 25 NE 1005, 10 LRA 861 [aff 32 Ill. A. 226]; Rosenthal v. Renick, 44 Ill. 202.

Ind.—Slauter v. Chenowith, 7 Ind. 211.

Iowa.—Croswell v. Slack, 68 Iowa 110, 26 NW 42.

Me.—Nash v. Benari, 117 Me. 491, 105 A 107.

Mass.—Merrill v. New England Mut. L. Ins. Co., 103 Mass. 245, 4 AmR 548; Ela v. Edwards, 13 Allen 48, 90 AmD 174; Low v. Bartlett, 8 Allen 259; Pond v. Makepeace, 2 Metc. 114.

Mich.—Brown v. Fletcher, 146 Mich. 401, 109 NW 686, 123 AmSR 233, 15 LRANS 632 [aff 210 U. S. 82, 28 SCt 702, 52 L. ed. 966].

Mo.—Corning First Nat. Bank v. Dowdy, 175 Mo. A. 478, 161 SW 859.

Mont.—Braithwaite v. Harvey, 14 Mont. 208, 36 P 38, 43 AmSR 625, 27 LRA 101.

Nev.—Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

Pa.—Brodie v. Bickley, 2 Rawle 431.

S. C.—King v. Clarke, 11 S. C. Eq. 611.

Tenn.—State v. Fulton, (Ch. A.) 49 SW 297.

Tex.—Carrigan v. Semple, 72 Tex. 306, 12 SW 178; Cherry v. Speight, 28 Tex. 503; Jones v. Jones, 15 Tex. 463, 65 AmD 174.

Wis.—Price v. Mace, 47 Wis. 23, 1 NW 336.

[a] **A distinction** (1) has been made between judgments recovered against ancillary administrators on claims filed after the death of the decedent, and judgments recovered in actions pending against decedent at the time of his death. Thus, where the same person was appointed administrator at the domicile of the decedent, and afterward in another state in which an action against decedent was at issue and pending at the time of his death, it was held that, inasmuch as the court had acquired jurisdiction of the sub-

an action against him.[92] It has been held that the rule applies even where the offices are held by the same person,[93] although this has been denied.[94]

Expenses of administration. Several administrations granted in different jurisdictions upon the same estate are each several and distinct, and have no common liability for expense incurred by each.[95]

Executors in different states are, as regards the creditors of the testator, in privity with each other, bearing to the creditors the same responsibilities as if there were only one executor.[96] And an administrator with the will annexed is, it is said, in legal contemplation, the executor of the will, so that there is the same privity between the executor of a will and an administrator with the will annexed in another jurisdiction, as exists between executors of the same will in different jurisdictions,[97] so that a judgment against the executor is enforceable against the administrator with the will annexed.[98]

[§ 2684] **B. Title to Assets—1. Ancillary Representative.** Immediately upon his appointment and qualification, an ancillary representative becomes vested with title to all the assets belonging to his decedent within the jurisdiction to his appointment,[99] and as to such assets his title is exclusive,[1] notwithstanding the evidence of his title may be in the hands of the domiciliary representative.[2] But the title of an ancillary representative extends only to the property which is within the jurisdiction of his appointment,[3] and which is properly assets for the purpose of administration in that jurisdiction,[4] and he has no authority whatever over assets situated elsewhere.[5]

[§ 2685] **2. Domiciliary Representative.** The general rule is that the title of a domiciliary representative extends to all of decedent's personal estate wherever situated,[6] although in some jurisdictions the title of the domiciliary representative is

ject matter of the suit, and had authority to revive the action against the administrator of the defendant and to hear and determine the rights of the parties, such judgment was conclusive as to the matters in issue, and that to require plaintiff, who had established his claim after tedious and expensive litigation in the ancillary jurisdiction, to go through the same process in the domiciliary jurisdiction would impose a burden on him not required by law. Creighton v. Murphy, 8 Nebr. 349, 1 NW 138. (2) But this distinction has been denied. Jones v. Jones, 15 Tex. 463, 465, 65 AmD 174 ("It is not perceived that it makes any difference that service was obtained upon the intestate in his lifetime, inasmuch as the suit was not prosecuted to judgment against him, but the judgment was recovered after his death, against an ancillary administrator appointed in that state, who represented the intestate only as to the assets within the jurisdiction where the appointment was conferred. The effect of the personal service upon the intestate died with the person, and the judgment recovered against the administrator had no other or greater effect than if it had been recovered in a suit originally instituted against him").

92. U. S.—Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337.
Ind.—Slauter v. Chenowith, 7 Ind. 211.
Me.—Nash v. Benari, 117 Me. 491, 105 A 107.
Mass.—Low v. Bartlett, 8 Allen 259.
Mont.—Braithwaite v. Harvey, 14 Mont. 208, 36 P 38, 43 AmSR 625, 27 LRA 101.
Nebr.—Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.
Pa.—Brodie v. Bickley, 2 Rawle 431.
Tex.—Carrigan v. Semple, 72 Tex. 306, 12 SW 178; Cherry v. Speight, 28 Tex. 503; Jones v. Jones, 15 Tex. 463, 65 AmD 174.

93. Ala.—Johnston v. McKinnon, 129 Ala. 223, 29 S 696.
Me.—Nash v. Benari, 117 Me. 491, 105 A 107.
Pa.—Brodie v. Bickley, 2 Rawle 431.
Tenn.—State v. Fulton, (Ch. A.) 49 SW 297.
Tex.—Clarke v. Webster, (Civ. A.) 94 SW 1088.

[a] **The privity must be official and not merely personal** to sustain such an action. Brodie v. Bickley, 2 Rawle (Pa.) 431.

94. Lomas v. Hilliard, 60 N. H. 148 [qualifying Taylor v. Barron, 35 N. H. 484].

95. Bishop v. Ross, 56 Ind. A. 610, 103 NE 505.

96. Goodall v. Tucker, 13 How. (U. S.) 469, 14 L. ed. 227; Hill v. Tucker, 13 How. (U. S.) 458, 14 L. ed. 223; Low v. Bartlett, 8 Allen (Mass.) 259; Creighton v. Murphy, 8 Nebr. 349, 1 NW 138; Com. v. Gregory, 261 Pa. 106, 104 A 562.

97. Latine v. Clements, 3 Ga. 426; Garland v. Garland, 84 Va. 181, 4 SE 334.

98. Garland v. Garland, 84 Va. 181, 4 SE 334.

99. Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Barclift v. Treece, 77 Ala. 528; Hatchett v. Berney, 65 Ala. 39.
Conn.—Riley v. Riley, 3 Day 74, 3 AmD 260.
Iowa.—Chamberlain v. Wilson, 45 Iowa 149.
Kan.—Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550.
Ky.—Cosby v. Gilchrist, 7 Dana 206; Moore v. Tanner, 5 T. B. Mon. 42, 27 AmD 35.
La.—Agee v. Brent, 132 La. 821, 61 S 837.
Mass.—Morrison v. Hass, 229 Mass. 514, 118 NE 893; Kennedy v. Hodges, 216 Mass. 112, 102 NE 432.
Mo.—State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454; Naylor v. Moffatt, 29 Mo. 126.
N. J.—Banta v. Moore, 15 N. J. Eq. 97.
N. Y.—Smith v. New York Second Nat. Bank, 169 N. Y. 467, 62 NE 577 [rev 52 App. Div. 631 mem, 65 NYS 1146 mem]; In re Videgaray, 168 NYS 586.
S. C.—Dial v. Gary, 14 S. C. 573, 37 AmR 737.
Vt.—Bullock v. Rogers, 16 Vt. 294; Vaughn v. Barret, 5 Vt. 333, 26 AmD 306; Lee v. Havens, Brayt. 93; Dodge v. Wetmore, Brayt. 92.

[a] **Real estate** in Louisiana belonging to a deceased nonresident constitutes a separate succession for the purpose of administration, the adjustment of claims, and of partition. Agee v. Brent, 132 La. 821, 61 S 837.

1. U. S.—New York L. Ins. Co. v. Smith, 67 Fed. 694, 14 CCA 635.
Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Barclift v. Treece, 77 Ala. 528.
Ky.—Cosby v. Gilchrist, 7 Dana 206.
Miss.—McIlvoy v. Alsop, 45 Miss. 365.
Mo.—Naylor v. Moffatt, 29 Mo. 126.
N. J.—Banta v. Moore, 15 N. J. Eq. 97.
N. Y.—Holyoke v. Union Mut. L. Ins. Co., 22 Hun 75 [aff 84 N. Y. 648]; In re Videgaray, 168 NYS 586 [aff 170 NYS 874].
Pa.—Willing v. Perot, 5 Rawle 264.

2. McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492; McIlvoy v. Alsop, 45 Miss. 365.

[a] **The domiciliary representative may be sued** by the ancillary representative for possession of such evidence of indebtedness if he comes into the jurisdiction of the latter's appointment. McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 56, 35 LRA 492.

3. D. C.—Willard v. Wood, 1 App. 44 [aff 164 U. S. 502, 17 SCt 176, 34 L. ed. 531].
Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].
Mich.—Spoon v. Baxter, 31 Mich. 279.
N. J.—Wall v. American Smelting, etc., Co., 107 A 63.
N. Y.—Matter of McCabe, 84 App. Div. 145, 82 NYS 180 [aff 177 N. Y. 584 mem, 69 NE 1126 mem].
S. C.—Cureton v. Mills, 13 S. C. 409, 36 AmR 700.

4. Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550; Miller v. Blinn, 219 Mass. 266, 106 NE 985; Crosby v. Charleston, 78 N. H. 39, 95 A 1043 [cit Cyc]; Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 SW 766.

[a] **Property vested in a devisee** by a court of decedent's domicile does not pass to the ancillary administrator. Slater v. Thompson, 255 Fed. 768.

[b] **A bill by an ancillary administrator to impress a trust** on property within the state will be dismissed where the proceedings are not necessary and are not instituted in good faith, the domiciliary administrator being able to sue and there being no bona fide creditors within the state. Wall v. American Smelting, etc., Co., (N. J.) 108 A 235 (where the court used the expression "auxiliary letters" instead of "ancillary letters").

5. D. C.—Willard v. Wood, 1 App. 44.
Me.—Brown v. Smith, 101 Me. 545, 64 A 915, 115 AmSR 339.
Mo.—Corning First Nat. Bank v. Dowdy, 175 Mo. A. 478, 161 SW 859.
N. J.—Wall v. American Smelting, etc., Co., 107 A 63.
N. C.—Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

6. U. S.—Wilkins v. Ellett, 9 Wall. 740, 19 L. ed. 586; McKinzie v. U. S., 34 Ct. Cl. 278.
Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].
Iowa.—Chamberlin v. Wilson, 45 Iowa 149.
Kan.—McLain v. Parker, 88 Kan. 873, 131 P 153 [cit Cyc].
Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22, LRA 1918D 666 [quot Cyc]; Fidelity Trust Co. v. Williams, 105 SW 952, 32 KyL 303.
Mass.—Morrison v. Hass, 229 Mass. 514, 118 NE 893.

held to be limited to assets within the jurisdiction.[7] The title of the domiciliary representative is not, however, commensurate with that of the owner while living.[8] It will not authorize the representative to sue outside of the jurisdiction of his appointment,[9] or to interfere in any way with an ancillary administration;[10] but when there is no local administration, it is a title which other jurisdictions will recognize through comity,[11] which debtors of the estate in other jurisdictions may recognize and will be protected in recognizing,[12] and which will give validity to many acts of administration in other jurisdictions which can be performed without recourse to the courts.[13] Property of the estate coming from a foreign jurisdiction into that of the domicile immediately vests in the domiciliary representative,[14] provided administration has not previously been taken out in such foreign jurisdiction,[15] and when title to property has once vested in the domiciliary representative, it is not divested by the property being sent into another jurisdiction.[16] When an ancillary representative is appointed, his title, as to assets within the jurisdiction of his appointment, supersedes that of the domiciliary representative,[17] but the latter's title revests, as to the residue transmitted to the domicile, on such transmission.[18]

[§ 2686] **C. Collection of Assets—1. Ancillary Representative.** It is the duty of an ancillary representative to collect all the assets of the estate within the jurisdiction of his appointment,[19] and his right to do so is superior to that of a foreign domiciliary representative,[20] even though the foreign representative is authorized by statute to sue in the jurisdiction,[21] for even where such statutes exist, it remains the universal policy to preserve local assets for the satisfaction in the first instance of local claims.[22] A voluntary payment to the domiciliary representative will not bar a suit brought by the ancillary representative to recover the same debt,[23]

Miss.—Klein v. French, 57 Miss. 662.
Mo.—State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454.
S. C.—Cureton v. Mills, 13 S. C. 409, 36 AmR 700.
Ont.—Young v. Cashion, 19 Ont. L. 491, 14 OntWR 717.

[a] **Note secured by mortgage.—** An administrator appointed in the jurisdiction where decedent resided, is entitled to the possession of a note which was the property of the decedent, notwithstanding the subsequent appointment of another administrator in the county in which is situated real estate mortgaged to secure the note. Chamberlin v. Wilson, 45 Iowa 149.

7. Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90; Crohn v. Clay County State Bank, 137 Mo. A. 712, 118 SW 498.
8. Cureton v. Mills, 13 S. C. 409, 36 AmR 700.
9. See infra § 2702.
10. U. S.—New York L. Ins. Co. v. Smith, 67 Fed. 694, 114 CCA 635.
Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 30.
Mass.—Tod v. Mitchell, 228 Mass. 541, 117 NE 899.
N. J.—Banta v. Moore, 15 N. J. Eq. 97.
Pa.—Willing v. Perot, 5 Rawle 264.
11. State v. Fulton, (Tenn. Ch. A.) 49 SW 297.
12. See infra § 2687.
13. Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618]; Klein v. French, 57 Miss. 662. See infra §§ 2687, 2688–2692.

[a] **Discharging mortgage. —** Re Green, 29 Ont. L. 103, 4 OntWN 1388, 13 DomLR 547.

14. Wells v. Miller, 45 Ill. 382; McCord v. Thompson, 92 Ind. 565; Collins v. Bankhead, 32 S. C. L. 25.
15. Wells v. Miller, 45 Ill. 382.
16. Crescent City Ice Co. v. Stafford, 6 F. Cas. No. 3,387, 3 Woods 94; Hill v. Barton, 194 Mo. A. 325, 188 SW 1105.
Situs of assets generally see supra § 2675.
17. State v. Holtcamp, 267 Mo. 412, 185 SW 201, AnnCas1918D 454.
Title of ancillary representative see supra § 2684.
18. See infra § 2700.
19. U. S.—Champlin v. Tilley, 5 F. Cas. No. 2,586, 3 Day 303.
Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Grimball v. Patton, 70 Ala. 626; Ex p. Grimball, 61 Ala. 598; Lockhart v. Cameron, 29 Ala. 355; Gardner v. Gantt, 19 Ala. 666; Welch v. Welch, 14 Ala. 76.
Ark.—Wolff v. Perkins, 51 Ark. 43, 9 SW 432; Green v. Byrne, 46 Ark. 453; Gibson v. Dowell, 42 Ark. 164; Shegogg v. Perkins, 34 Ark. 117.
Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492.
Conn.—Perkins v. Stone, 18 Conn. 270; Holcomb v. Phelps, 16 Conn. 127; Hobart v. Connecticut Turnp. Co., 15 Conn. 145; Perkins v. Williams, 2 Root 462.
Ill.—Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Young v. Wittenmyre, 123 Ill. 303, 14 NE 869.
Ind.—State v. Gregory, 88 Ind. 110.
Mass.—Fay v. Haven, 3 Metc. 109; Stevens v. Gaylord, 11 Mass. 256.
N. Y.—Fox v. Carr, 16 Hun 434.
N. C.—Shields v. Union Cent. L. Ins. Co., 119 N. C. 380, 25 SE 951.
S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.
Tenn.—Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 SW 766.

[a] **The ancillary representative must use due diligence** in collecting all the assets within the jurisdiction of his appointment, although there was another administrator first appointed in the state where the intestate was domiciled at his death. State v. Gregory, 88 Ind. 110.

[b] **If a foreign debtor voluntarily comes into the state** for a temporary purpose, he may be there sued by an ancillary administrator appointed therein, if such administrator acts without intent to defraud the principal administration and the debt has not been paid or sued on in the state where the debtor resides. Fox v. Carr, 16 Hun (N. Y.) 434. Compare Klein v. French, 57 Miss. 662 (payment to the ancillary representative is good only where the debtor lives in the same state).

[c] **Actions on life insurance policies.—**(1) Money due on a policy of life insurance is generally considered as a debt due in the state where the insurance company has its habitat, and is to be recovered by a personal representative there appointed. But where the insured was domiciled and died in another state, having the policy in his possession at the time of his death, and it came into the hands of the domiciliary representative, he may recover on it if there is an agent of the company appointed in that state under its laws to receive a service of process against the company. In such cases the principle that a simple contract debt follows the person of the debtor is not invaded, because the debtor, the insurance company, is present by its agent so that the policy is assets in that state. Sulz v. Mutual Reserve Fund L. Assoc., 145 N. Y. 563, 40 NE 242, 28 LRA 379. (2) Aliter, at least where there is no such agent in the foreign jurisdiction and the company is not doing business there. Re Ontario Mut. L. Assur. Co., 30 Ont. 666.

20. U. S.—New York L. Ins. Co. v. Smith, 67 Fed. 694, 14 CCA 635.
Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Barclift v. Treece, 77 Ala. 528; Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344.
Colo.—Doss v. Stevens, 13 Colo. A. 535, 59 P 67.
Kan.—Ames v. Citizens' Nat. Bank, 181 P 564.
Ky.—Cosby v. Gilchrist, 7 Dana 206.
Mass.—Merrill v. New England Mut. L. Ins. Co., 103 Mass. 245, 4 AmR 548.
Mo.—Naylor v. Moffatt, 29 Mo. 126.
N. J.—Banta v. Moore, 15 N. J. Eq. 97.
N. Y.—Stone v. Scripture, 4 Lans. 186.
N. C.—Shields v. Union Cent. L. Ins. Co., 119 N. C. 380, 25 SE 951; Sanders v. Jones, 43 N. C. 246.
Oh.—Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343.
Pa.—Willing v. Perot, 5 Rawle 264; Brooks v. Litchfield, 19 Pa. Dist. 40.
S. C.—Dial v. Gary, 14 S. C. 573, 37 AmR 737.

[a] **Debts due from the United States** are not local assets in the District of Columbia, and an ancillary representative appointed there has no absolute right to receive them but the government may pay the debt to either the ancillary or the principal administrator. Wyman v. Halstead, 109 U. S. 654, 3 SCt 417, 27 L. ed. 1068.

21. Walker v. Walker, 55 Ill. A. 118; Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343; Willing v. Perot, 5 Rawle (Pa.) 264.
Statutory authority of foreign representative to sue generally see infra §§ 2708–2710.
22. Colo.—Moore v. Ingram, 46 Colo. 204, 102 P 1070.
D. C.—Plumb v. Bateman, 2 App. 156.
Ill.—Coombs v. Carns, 236 Ill. 333, 339, 86 NE 245 [cit Cyc].
Pa.—Willing v. Perot, 5 Rawle 264.
Ont.—Young v. Cashion, 19 Ont. L. 491, 14 OntWR 717.

[a] **If there are no local creditors** and no other debts to collect except the claim sued on, the domiciliary representative may sue, and it is not error to refuse an application of an ancillary representative to be substituted as a party. Greenwalt v. Bastian, 10 Kan. A. 101, 61 P 513.

23. Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344; Walker v. Walker, 55 Ill. A. 118; Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

[a] **However,** where a creditor promised to pay his debt to a foreign domiciliary representative before he had notice that a local ancillary appointment had been made but paid

unless such payment was made prior to the appointment of the ancillary representative.[24] The ancillary representative, however, can collect only what is properly assets of his jurisdiction,[25] and statutes permitting a foreign representative to sue do not authorize him to sue for assets situated elsewhere,[26] nor will a voluntary payment to him by a debtor of another jurisdiction discharge the debt.[27] It has been held, however, that an ancillary administrator can, under a writ of foreign attachment founded on a simple contract debt, attach property within the state of a nonresident debtor to decedent.[28]

[§ 2687] **2. Domiciliary Representative.** Letters of administration extend only to the assets in the jurisdiction where the letters are granted,[29] and do not confer as a matter of right any authority to collect assets in another.[30] But since a foreign domiciliary representative has a title to assets wherever situated which may be recognized in the absence of local creditors or a local administration,[31] he may under such circumstances take possession of property of the estate if he can do so peaceably and without suit,[32] and his possession will be recognized as rightful and protected as fully as if he had taken out local letters of administration.[33] He may also collect a debt due to the estate if voluntarily paid,[34] before the issuance of ancillary letters in the jurisdiction where the debt has its situs,[35] and such payment is usually held to be

after such notice, the payment was held to be a good defense to an action by the ancillary representative. Weizell v. Cincinnati Sav. Inst., 1 Oh. Dec. (Reprint) 55, 1 WestLJ 393.

[b] **If there are no local creditors** a payment made to a foreign domiciliary representative is a good discharge of the debt, although an ancillary representative was appointed prior to such payment if the payment was made in good faith and without notice of the ancillary appointment. Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])].

24. See infra § 2687.

25. D. C.—Willard v. Wood, 1 App. 44 [aff 164 U. S. 502, 17 SCt 176, 34 L. ed. 531].

Ind.—McCord v. Thompson, 92 Ind. 565.

Mo.—Abbott v. Miller, 10 Mo. 141.

N. Y.—Morrisson v. Mutual L. Ins. Co., 57 Hun 97, 10 NYS 445.

Tenn.—Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 SW 766; Ellis v. Ellis, (Ch. A.) 54 SW 666.

[a] **Insurance taken out by a domiciliary representative** on property of the estate within his jurisdiction in a company located in another jurisdiction where the decedent left debts cannot be collected by an ancillary representative in the latter jurisdiction. Abbott v. Miller, 10 Mo. 141.

26. Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550.

27. Anonymous, 1 F. Cas. No. 431; Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550; Steele v. Connecticut Gen. L. Ins. Co., 31 App. Div. 389, 52 NYS 373 [rev 22 Misc. 249, 49 NYS 647 and aff 160 N. Y. 703 mem, 57 NE 1125 mem].

28. Schemel v. De Paris, 28 Del. 565, 96 A 30.

29. Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, LRA 1918D 666 [quot Cyc]; Riley v. Moseley, 44 Miss. 37; In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648; Wirgman v. Provident Life, etc., Co., 79 W. Va. 562, 92 SE 415.

30. U. S.—Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639.

Ill.—Volunteers of America v. Pierce, 267 Ill. 406, 108 NE 318.

Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, LRA 1918D 666 [quot Cyc]; Smith v. Smyser, 11 Ky. Op. 176.

Miss.—Satterwhite v. Littlefield, 21 Miss. 302.

N. J.—Banta v. Moore, 15 N. J. Eq. 97.

N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193.

Oh.—In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648.

Alta.—Re Dobson, 9 Alta. L. 493.

[a] **The court will not allow compensation** for collecting assets in another jurisdiction. Satterwhite v. Littlefield, 21 Miss. 302.

31. See supra § 2685.

32. Cal.—Union Trust Co. v. Pacific Tel., etc., Co., 31 Cal. A. 64, 159 P 820.

Conn.—Selleck v. Rusco, 46 Conn. 370.

Kan.—Denny v. Faulkner, 22 Kan. 89.

Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22, LRA 1918D 666 [quot Cyc]; Fidelity Trust Co. v. Williams, 105 SW 952, 32 KyL 303; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

Mass.—Martin v. Gage, 147 Mass. 204, 17 NE 310.

Minn.—Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193; Brown v. Brown, 1 Barb. Ch. 189; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94.

33. Denny v. Faulkner, 22 Kan. 89; Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22, LRA 1918D 666 [quot Cyc]; Martin v. Gage, 147 Mass. 204, 17 NE 310; Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

34. U. S.—Wyman v. U. S., 109 U. S. 654, 3 SCt 417, 27 L. ed. 1068; Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718, 9 Wall, 740, 19 L. ed. 586; U. S. v. Cox, 18 How. 100, 15 L. ed. 299; Brown v. Equitable L. Assur. Soc., 112 Fed. 845; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16; Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 384; Swatzel v. Arnold, 23 F. Cas. No. 13,682, 1 Woolw. 383.

Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492.

Conn.—Equitable Trust Co. v. Plume, 92 Conn. 649, 103 A 940; Selleck v. Rusco, 46 Conn. 370; Marcy v. Marcy, 32 Conn. 308; Slocum v. Sanford, 2 Conn. 533; Riley v. Riley, 3 Day 74, 3 AmD 260.

Iowa.—In re Williams, 130 Iowa 553, 107 NW 608; Bull v. Fuller, 78 Iowa 20, 42 NW 572, 16 AmSR 419.

Kan.—Denny v. Faulkner, 22 Kan. 89.

Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22 LRA 1918D 666 [quot Cyc]; Barnes v. Brashear, 2 B. Mon. 380; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96; Moore v. Tanner, 5 T. B. Mon. 42, 27 AmD 35.

La.—Thorman v. Broderick, 52 La. Ann. 1298, 27 S 735.

Me.—Smith v. Guild, 34 Me. 443.

Md.—Citizens' Nat. Bank v. Sharp, 53 Md. 521.

Mass.—Morrison v. Berkshire L. & T. Co., 229 Mass. 519, 118 NE 895; Gardiner v. Thorndike, 183 Mass. 81, 66 NE 633; Rand v. Hubbard, 4 Metc. 252; Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128.

Mich.—Reynolds v. McCullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

Minn.—Dexter v. Berge, 76 Minn. 216, 78 NW 1111; Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

Miss.—Klein v. French, 57 Miss. 662; Riley v. Moseley, 44 Miss. 37; Satterwhite v. Littlefield, 21 Miss. 302.

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618.

N. J.—Matter of Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 A 191; Babbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18.

N. Y.—Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 22 NE 572, 15 AmSR 494, 5 LRA 541 [aff 1 NYS 655]; Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298; Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193 [rev 4 Bradf. Surr. 268]; Steele v. Connecticut Gen. L. Ins. Co., 31 App. Div. 389, 52 NYS 373 [aff 160 N. Y. 703 mem, 57 NE 1125 mem]; Stone v. Scripture, 4 Lans. 186; Middlebrook v. Merchants' Bank, 41 Barb. 481, 18 AbbPr 109, 27 HowPr 474 [aff 3 Abb. Dec. 295, 3 Keyes 135]; Brown v. Brown, 1 Barb. Ch. 189; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94; Doolittle v. Lewis, 7 Johns. Ch. 45, 11 AmD 489; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340.

N. C.—Grant v. Reese, 94 N. C. 720; Nisbet v. Stewart, 19 N. C. 24.

N. D.—Joy v. Elton, 9 N. D. 428, 83 NW 875.

Pa.—Gray's App., 116 Pa. 256, 11 A 66, 70; Shakespeare v. Fidelity Ins., etc., Co., 97 Pa. 173.

R. I.—Egan v. Wirth, 26 R. I. 363, 58 A 987.

S. C.—Dial v. Gary, 14 S. C. 573, 37 AmR 737.

Va.—Com. v. Williams, 102 Va. 778, 47 SE 867, 1 AnnCas 434.

Eng.—Atkins v. Smith, 2 Atk. 63, 26 Reprint 436.

[a] **Reason for rule.**—"If residents of this State have in their possession property which belongs to a party domiciled abroad, or are indebted to him, they may of course recognize any valid title claimed under him, arising out of an act in pais, by testament or by succession upon intestacy, and may voluntarily deliver over the property or make payment of the debt. Our jurisdiction is not violated nor our tribunals in any respect contemned by such a transaction. Simply, our laws are not invoked because in the case supposed there is no occasion for their agency. If the property or money is thereupon taken by the new possessor into the foreign jurisdiction we have no further concern with the matter." Parsons v. Lyman, 20 N. Y. 103, 112, 18 HowPr 193.

35. Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Ferguson v. Morris, 67 Ala. 389; Hatchett v. Borney, 65 Ala. 39.

Ill.—Walker v. Welker, 55 Ill. A. 1189.

Kan.—Ames v. Citizens' Nat. Bank, 181 P 564.

Ky.—Barnes v. Brashear, 2 B. Mon. 380.

Md.—Citizens' Nat. Bank v. Sharp, 53 Md. 521.

Miss.—Klein v. French, 57 Miss. 662; McIlvoy v. Alsop, 45 Miss. 365.

a valid discharge of the debt,[36] and a protection against an action to collect the same debt by a domestic representative subsequently appointed,[37] although there is also authority for the contrary view.[38] Since debts due from the United States have no situs at the seat of government, they may be received by a domiciliary representative at any place where the government may choose to pay them.[39]

Where local suit on foreign debt possible. If a foreign debtor comes into the jurisdiction of the domiciliary representative, or owns property therein, the domiciliary representative may sue him there, notwithstanding the liability which may attach in consequence of an ancillary administration in the jurisdiction of the debtor's residence.[40] Not only has an executor or administrator the power in such cases to collect debts due from foreign debtors, but it is also held to be his duty to the extent of his conscious ability to do so, and the court of the domicile may compel him to account for willful neglect to perform that duty;[41] and he will be allowed the expenses of a bona fide but unsuccessful attempt to make the collection.[42]

[§ 2688] **D. Disposition of Property—1. Personal Property—a. In General.** Where a foreign domiciliary representative has taken possession of property of the estate, there being no local representative, he may sell it.[43] In such case the purchaser will acquire a title which through comity will be respected,[44] and he cannot be compelled to pay to an ancillary representative subsequently appointed any indebtedness on account of such purchase.[45] But a domiciliary representative cannot dispose of any property in another jurisdiction where a local administration is pending.[46]

[§ 2689] **b. Choses in Action—(1) In General.** Although a foreign representative cannot himself sue on a chose in action of his decedent,[47] his disability is a personal incapacity and not a defect of title,[48] and it is usually held that he may assign a chose in action so that the assignee may sue there-

Mo.—Bartlett v. Hyde, 3 Mo. 490. N. Y.—Parsons v. Lyman, 20 N. Y. 103; Stone v. Scripture, 4 Lans. 186; Middlebrook v. Merchants' Bank, 41 Barb. 481, 18 AbbPr 109, 27 How Pr 474 [aff 3 Abb. Dec. 295, 3 Keyes 135]; Brown v. Brown, 1 Barb. Ch. 189; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94.

[a] **"If a domestic administrator is appointed,** the foreign administrator has no authority to collect the debt, and a voluntary payment to him would be no bar to a subsequent suit brought by the domestic administrator to recover the same debt." Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 447, 52 AmR 344.

36. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718; U. S. v. Cox, 18 How. 100, 15 L. ed. 299; Owsley v. New York Cent. Trust Co., 186 Fed. 412; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16.

Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmR 66, 35 LRA 492.

Conn.—Selleck v. Rusco, 46 Conn. 370; Marcy v. Marcy, 32 Conn. 308.

Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Bull v. Fuller, 78 Iowa 20, 42 NW 572, 16 AmSR 419.

Kan.—Denny v. Faulkner, 22 Kan. 89.

Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22, LRA 1918D 666 [quot Cyc].

Md.—Citizens' Nat. Bank v. Sharp, 53 Md. 521.

Mich.—Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

Minn.—Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

Miss.—Klein v. French, 57 Miss. 662; Riley v. Moseley, 44 Miss. 37.

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618.

N. Y.—Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 22 NE 572, 15 AmSR 494, 5 LRA 541; Peterson v. Chemical Bank, 32 N. Y. 21, 29 How Pr 240, 88 AmD 298 [aff 25 N. Y. Super. 605, 27 HowPr 491]; Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94; Doolittle v. Lewis, 7 Johns. Ch. 45, 11 AmD 389; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340.

Pa.—Gray's App., 116 Pa. 256, 11 A 66, 70; Shakespeare v. Fidelity Ins., etc., Co., 97 Pa. 173; Baldwin's App., 81 Pa. 441. But compare Reeside v. Reeside, 6 Phila. 507 (decided under a statute expressly providing that no letters testamentary or of administration granted out of the state shall confer on the executor or administrator any of the powers of an executor or administrator in the state).

R. I.—Amsden v. Danielson, 18 R. I. 787, 31 A 4.

"It is settled that the principal or domiciliary administrator may receive voluntary payment from, and even sue, a debtor residing in a foreign jurisdiction, if he shall voluntarily come within the State in which he is appointed. . . . It is also settled that, where there are no debts in the jurisdiction where a foreign debtor resides, and no ancillary administrator has been granted there, the principal administrator may, in such foreign State, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be afterwards appointed. . . . And it is further settled that, if the principal administrator have possession of a note payable to his intestate or bearer, he may, as the lawful holder and bearer of such note, sue on it in a foreign jurisdiction." Klein v. French, 57 Miss. 662, 669.

[a] **A collusive payment** made to a foreign representative appointed after the institution of suit by the local representative does not discharge the debt and is no bar to the action. Amsden v. Danielson, 18 R. I. 787, 31 A 4.

[b] **Release of mortgages.**—As incidental to the authority of the domiciliary representative to receive voluntary payments, he may satisfy and release mortgages of land in foreign jurisdictions. Peo. v. Fitzgerald, 29 AbbNCas 471, 21 NYS 911; Baldwin's App., 81 Pa. 441. Contra In re Thorpe, 15 Grant Ch. (U. C.) 76.

[c] **Payment before compliance with statutory requirements** for filing certified copy of representative's appointment affords no protection. City Sav., etc., Co. v. Branchieri, 111 Miss. 774, 72 S 196.

37. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718.

Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Bull v. Fuller, 78 Iowa 20, 42 NW 572, 16 AmSR 419.

Kan.—Ames v. Citizens' Nat. Bank, 181 P 564.

Ky.—Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, 22, LRA 1918D 666 [quot Cyc].

Md.—Citizens Nat. Bank v. Sharp, 53 Md. 521.

[a] **Compliance with statutory prerequisites.**—Where a foreign representative is authorized by statute to sue upon complying with certain conditions, the same conditions must be complied with before he can receive a voluntary payment; and if they are not complied with, payment to him will not bar an action by a local representative subsequently appointed. Ferguson v. Morris, 67 Ala. 389; Hatchett v. Berney, 65 Ala. 39.

38. Crohn v. Clay County State Bank, 137 Mo. A. 712, 118 SW 498; Young v. O'Neal, 3 Sneed (Tenn.) 55; Swancy v. Scott, 8 Humphr. (Tenn.) 327; In re Joyslin, 76 Vt. 88, 56 A 281; Abbott v. Coburn, 28 Vt. 663, 67 AmD 735; Bullock v. Rogers, 16 Vt. 294; Vaughn v. Barret, 5 Vt. 333, 26 AmD 306.

39. Wyman v. U. S., 109 U. S. 654, 3 SCt 417, 27 L. ed. 1068; U. S. v. Cox, 18 How. (U. S.) 100, 15 L. ed. 299; Compton v. Borderland Coal Co., 179 Ky. 695, 201 SW 20, LRA1918D 666.

40. U. S.—Brown v. Equitable L. Assur. Soc., 112 Fed. 845.

Ala.—Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344.

Me.—Saunders v. Weston, 74 Me. 85.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])].

R. I.—Amsden v. Danielson, 18 R. I. 787, 31 A 4, 19 R. I. 533, 35 A 70.

Tenn.—St. John v. Hodges, 9 Baxt. 334.

41. In re Ortiz, 86 Cal. 306, 24 P 1034, 21 AmSR 44; Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; Schultz v. Pulver, 11 Wend. (N. Y.) 361 [aff 3 Paige 182]; Bowman v. Carr, 5 Lea (Tenn.) 571; St. John v. Hodges, 9 Baxt. (Tenn.) 334.

42. Bowman v. Carr, 5 Lea. (Tenn.) 571.

43. Union Trust Co. v. Pacific Tel., etc., Co., 31 Cal. A. 64, 159 P 820; Martin v. Gage, 147 Mass. 204, 17 NE 310; Hutchins v. State Bank, 12 Metc. (Mass.) 421.

44. Peterson v. Chemical Bank, 29 HowPr (N. Y.) 240.

45. Paramore's Est., 15 NYSt 449.

46. Du Val v. Marshall, 30 Ark. 230.

[a] **The assignment of a judgment** by a foreign representative under such circumstances is void. Du Val v. Marshall, 30 Ark. 230.

47. See infra § 2702.

48. Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344; Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298 [aff 25 N. Y. Super. 605, 27 HowPr 491].

on in his own name,[49] provided the statutes of the state where the action is brought permit the assignee of a chose in action to sue in his own name.[50] The right so to assign choses in action has, however, been denied.[51]

[§ 2690] **(2) Bills and Notes.** In some jurisdictions it is held that a representative appointed in one jurisdiction cannot indorse and transfer bills and notes payable in another so as to give the indorsee a right of action thereon.[52] But the weight of authority supports the view that while as a general rule a foreign representative cannot himself sue,[53] the disability is not a defect of title but a mere personal incapacity;[54] and if he has the note or other negotiable instrument in his possession he may indorse and transfer it so as to give the indorsee the right to sue thereon.[55] It seems, however, that such a transfer would not be sustained where it would operate to the prejudice of local creditors or conflict with a local administration.[56]

[§ 2691] **c. Corporate Stock.** It is usually held that a domiciliary representative may assign shares of stock in a foreign corporation belonging to the estate,[57] and no local grant of administration is necessary to compel a transfer on the books of the corporation.[58] But where there is ancillary administration in the state of the domicile of a corporation, a foreign domiciliary representative of a deceased stockholder cannot, it has been held, transfer the stock, even though the certificates are in his possession.[59]

[§ 2692] **d. Real Property.** A representative cannot by virtue of his appointment in one state or country make a conveyance of land of his decedent situated in another,[60] or assign a mortgage on land

49. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718, 9 Wall. 740, 19 L. ed. 586; Harper v. Butler, 2 Pet. 239, 7 L. ed. 410.

Ala.—Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344.

Cal.—Graham v. Oviatt, 58 Cal. 428; Brown v. San Francisco Gaslight Co., 58 Cal. 426; Low v. Burrows, 12 Cal. 181.

Iowa.—Campbell v. Brown, 64 Iowa 425, 20 NW 745, 52 AmR 446.

Ky.—Cope v. Daniel, 9 Dana 415.

Mass.—Hutchins v. State Bank, 12 Metc. 421.

Mich. — Seventh-Day Adventists' Gen. Conference Assoc. v. Michigan Sanitarium, etc., Assoc., 166 Mich. 504, 132 NW 94 [expl Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386 (foll McIntire v. Conrad, 93 Mich. 526, 53 NW 829)].

Minn.—Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41.

Miss.—Owen v. Moody, 29 Miss. 79; Andrews v. Carr, 26 Miss. 577.

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618 [overr Thompson v. Wilson, 2 N. H. 291].

N. J.—Matter of Cape May, etc., Nav. Co., 51 N. J. L. 78, 16 A 191.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; In re Waite, 99 N. Y. 433, 2 NE 440; Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298 [aff 25 N. Y. Super. 605, 27 HowPr 491]; Middlebrook v. Merchants' Bank, 3 Abb. Dec. 295, 3 Keyes 135 [aff 41 Barb. 481, 18 Abb Pr 109, 27 HowPr 474]; Guy v. Craighead, 6 App. Div. 463, 39 NYS 688; Smith v. Tiffany, 16 Hun 552; Robinson v. Crandall, 9 Wend. 425.

N. C.—Riddick v. Moore, 65 N. C. 382; Grace v. Hannah, 51 N. C. 94; Leake v. Gilchrist, 13 N. C. 73.

Pa.—Harris v. Hall, 11 Pa. Co. 53 [aff 148 Pa. 345, 23 A 971].

Tenn.—St. John v. Hodges, 9 Baxt. 334; Swancy v. Scott, 9 Humphr. 327.

Tex.—Solinsky v. Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 SW 1050; Abercrombie v. Stillman, 77 Tex. 589, 14 SW 196; Keller v. Alexander, 24 Tex. Civ. A. 186, 58 SW 637.

Utah.—Camp v. Simon, 23 Utah 56, 63 P 332.

Wash.—Waldo v. Milroy, 19 Wash. 156, 52 P 1012; Munson v. Exchange Nat. Bank, 19 Wash. 125, 127, 52 P 1011.

Eng.—Trimbey v. Vignier, 1 Bing. N. Cas. 151, 27 ECL 584, 131 Reprint 1075; Huthwaite v. Phaire, 1 M. & G. 159, 39 ECL 696, 133 Reprint 288.

Ont.—Hard v. Palmer, 20 U. C. Q. B. 208, 21 U. C. Q. B. 49.

"The rule that an assignee of an administrator appointed in one state may bring an action in another is so generally settled and recognized that it is needless to cite many authorities." Munson v. Exchange Nat. Bank, supra.

50. Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 2 L. ed. 718; Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298 [aff 25 N. Y. Super. 605, 27 HowPr 491].

51. Ark.—Du Val v. Marshall, 30 Ark. 230.

Me.—Wyman v. Porter, 108 Me. 110, 79 A 371; Stearns v. Burnham, 5 Me. 261, 17 AmD 228.

Mo.—In re Ames, 52 Mo. 290; McCarty v. Hall, 13 Mo. 480.

S. C.—Heyward v. Williams, 57 S. C. 235, 35 S. C. 503; Dial v. Gary, 24 S. C. 572; Dial v. Tappan, 20 S. C. 167; Dial v. Gary, 14 S. C. 573, 37 AmR 737.

Vt.—Bullock v. Rogers, 16 Vt. 294; Lee v. Havens, Brayt. 93.

[a] **The reason** is that such transfer would be an indirect mode of allowing the withdrawal of the effects or credits of a decedent found in the state which might be necessary for satisfying debts due from the decedent to domestic creditors. Stearns v. Burnham, 5 Me. 261, 17 AmD 228; McCarty v. Hall, 13 Mo. 480.

52. Stearns v. Burnham, 5 Me. 261, 17 AmD 228; McCarty v. Hall, 13 Mo. 480; Dial v. Gary, 14 S. C. 573, 37 AmR 737; Lee v. Havens, Brayt. (Vt.) 93.

53. Riddick v. Moore, 65 N. C. 382; Leake v. Gilchrist, 13 N. C. 73; Solinsky v. Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 SW 1050.

When representative may sue see infra § 2706.

54. Gove v. Gove, 64 N. H. 503, 15 A 121; Solinsky v. Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 SW 1050.

55. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718; Harper v. Butler, 2 Pet. 239, 7 L. ed. 410.

Iowa.—Campbell v. Brown, 64 Iowa 425, 20 NW 745, 52 AmR 446.

Mass.—Rand v. Hubbard, 4 Metc. 252.

Mich.—Seventh-Day Adventists' Gen. Conference Assoc. v. Michigan Sanitarium, etc., Assoc., 166 Mich. 504, 132 NW 94 [expl Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386 (foll McIntire v. Conrad, 93 Mich. 526, 53 NW 829)].

Miss.—Owen v. Moody, 29 Miss. 79; Andrews v. Carr, 26 Miss. 577.

N. H.—Gove v. Gove, 64 N. H. 503, 15 A 121 [overr Thompson v. Wilson, 2 N. H. 291].

N. Y.—Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298.

N. C.—Riddick v. Moore, 65 N. C. 382; Grace v. Hannah, 51 N. C. 94; Leake v. Gilchrist, 13 N. C. 73.

R. I.—Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 108, 2 AmSR 881.

Tex.—Solinsky v. Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 SW 1050; Abercrombie v. Stillman, 77 Tex. 589, 14 SW 196; Keller v. Alexander, 24 Tex. Civ. A. 186, 58 SW 637.

Ont.—Hard v. Palmer, 20 U. C. Q. B. 208.

"The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and he may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name." Wilkins v. Ellett, 108 U. S. 256, 259, 2 SCt 641, 27 L. ed. 718.

56. Gove v. Gove, 64 N. H. 503, 15 A 121.

57. U. S.—Lecouturier v. Ickelheimer, 205 Fed. 682.

Cal.—Brown v. San Francisco Gaslight Co., 58 Cal. 426.

Mass.—Hutchins v. State Bank, 12 Metc. 421.

Miss.—Jane v. Martinez, 104 Miss. 208, 61 S 177.

N. H.—Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618.

N. Y.—Middlebrook v. Merchants' Bank, 3 Abb. Dec. 295, 3 Keyes 135 [aff 41 Barb. 481, 18 AbbPr 109, 27 HowPr 474 (aff 14 AbbPr 462 note, 24 HowPr 267)].

Pa.—Alfonso's App., 70 Pa. 347; Grimes v. Pennsylvania R. Co., 7 Pa. Dist. 417 [aff 189 Pa. 619, 42 A 303, 69 AmSR 830]; Williams v. Pennsylvania R. Co., 9 Phila. 298; Hobbs v. Western Nat. Bank, 8 WklyNC 131.

Wash.—Way v. International Portland Cement Co., 100 Wash. 182, 170 P 553.

58. Brown v. San Francisco Gaslight Co., 58 Cal. 426; Luce v. Manchester, etc., R. Co., 63 N. H. 588, 3 A 618; Middlebrook v. Merchants' Bank, 3 Abb. Dec. (N. Y.) 295, 3 Keyes 135 [aff 41 Barb. 481, 18 Abb Pr 109, 27 HowPr 474 (aff 24 HowPr 267)]; Way v. International Portland Cement Co., 100 Wash. 182, 170 P 553.

59. Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90 [dist Brown v. San Francisco Gaslight Co., 58 Cal. 426].

60. U. S.—Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873.

Kan.—Niquette v. Green, 81 Kan. 569, 106 P 270.

Ky.—Simpson v. Hawkins, 1 Dana 303.

Mass.—Cutter v. Davenport, 1 Pick. 81, 11 AmD 149.

Mich.—Sheldon v. Rice, 30 Mich. 296, 18 AmR 136.

situated in another state or country,[61] although it has been held that he may assign a promissory note which is in his possession and that a mortgage given as security for the note will pass as an incidence thereto.[62] The representative may, however, without taking out letters where the land is situated execute a power of sale contained in a mortgage on such land,[63] since in such case his authority is not derived from the probate court of another state but from the contract of the parties.[64] For a similar reason[65] a foreign executor may, without taking out local letters of administration, make a sale of land under a power contained in the will.[66] It is necessary, however, that the will should be proved and recorded in the jurisdiction where the land is situated;[67] but such probate may be made after the date of the conveyance and will relate back and render it valid,[68] provided no rights of third persons have intervened.[69]

[§ 2693] **E. Sales under Order of Court**[70]**—1. When Authorized.** The courts of one state or country have no jurisdiction to order a sale of a decedent's realty situated in another,[71] and an order procured by a representative in the jurisdiction of his appointment confers upon him no authority to sell land outside of that jurisdiction.[72] Neither, in the absence of statute, can a representative appointed in one jurisdiction maintain in another a proceeding for the sale of land situated in that jurisdiction.[73] There are, however, in some states statutes providing that a foreign executor may be permitted by order of court to make a sale of land where no local representative has been appointed,[74] but statutes merely permitting a foreign representative to sue do not authorize such a proceeding.[75] An order may be made authorizing an ancillary representative to sell lands located in his own jurisdiction where there is an insufficiency of assets to pay debts;[76] and it has been held that to authorize such a sale it is not necessary to show that

N. C.—Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548 [cit Cyc].

Tex.—League v. Williamson, 33 Tex. Civ. A. 647, 77 SW 435.

[a] **A lease of land** belonging to the estate of a nonresident decedent cannot be made by a foreign representative. Potter v. Bassett, 35 Mo. A. 417; Crockett v. Althouse, 35 Mo. A. 404.

61. Simpson v. Hawkins, 1 Dana (Ky.) 303; Wyman v. Porter, 108 Me. 110, 79 A 371; Brown v. Smith, 101 Me. 545, 64 A 915, 115 AmSR 339 [cit Cyc]; Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 AmD 149; Reynolds v. McMullen, 55 Mich 568, 22 NW 41, 54 AmR 386.

[a] **The law which governs** the title to and disposition of land is always that of the place where the land is situated. Simpson v. Hawkins, 1 Dana (Ky.) 303; Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 AmD 149.

62. Solinsky v. Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 SW 1050.

63. Holcombe v. Richards, 38 Minn. 38, 35 NW 714; Averill v. Taylor, 5 HowPr (N. Y.) 476, CodeRep NS 213; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 AmD 389; Thurber v. Carpenter, 18 R. I. 782, 31 A 5; Hayes v. Frey, 54 Wis. 503, 11 NW 695.

64. Holcombe v. Richards, 38 Minn. 38, 35 NW 714; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 AmD 389; Thurber v. Carpenter, 18 R. I. 782, 31 A 5.

65. Green v. Alden, 92 Me. 177, 42 A 358; Crusoe v. Butler, 36 Miss. 150; Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503; Pollock v. Hooley, 67 Hun 370, 22 NYS 215; Bromley v. Miller, 2 Thomps. & C. (N. Y.) 575.

66. U. S.—Moore v. Petty, 135 Fed. 668, 68 CCA 306 [certiorari den 197 U. S. 623, 25 SCt 800, 49 L. ed. 911].

Ark.—Apperson v. Bolton, 29 Ark. 418.

Cal.—Brown v. San Francisco Gaslight Co., 58 Cal. 426.

Ill.—Pennsylvania Co. v. Bauerle, 143 Ill. 459, 33 NE 166.

Iowa.—Dorsey v. Banks, 88 Iowa 595, 55 NW 574.

Kan.—Niquette v. Green, 81 Kan. 569, 106 P 270; Calloway v. Cooley, 50 Kan. 743, 32 P 372.

Ky.—Rutherford v. Clark, 4 Bush 27; Jackson v. Jeffries, 3 A. K. Marsh. 309.

Me.—Green v. Alden, 92 Me. 177, 42 A 358.

Md.—Smith v. Montgomery, 75 Md. 138, 23 A 145.

Mass.—Hutchins v. State Bank, 12 Metc. 421.

Minn.—Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503.

Miss.—Crusoe v. Butler, 36 Miss. 150; Andrews v. Carr, 26 Miss. 577.

N. J.—Smith v. Abbott, 79 N. J. Eq. 117, 81 A 115.

N. Y.—Pollock v. Hooley, 67 Hun 370, 22 NYS 215; Bromley v. Miller, 2 Thomps. & C. 575.

N. C.—Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

Oh.—Wills v. Cowper, 2 Oh. 124, 3 Oh. 486.

Pa.—Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 A 62.

Wis.—Illinois Steel Co. v. Witsotski, 146 Wis. 572, 131 NW 848; Illinois Steel Co. v. Konkel, 146 Wis. 556, 131 NW 842.

[a] **Only the executor named in the will** (1) can execute the power of sale, and, if he declines to serve an administrator with the will annexed appointed in his place, cannot do so. Wills v. Cowper, 2 Oh. 124, 3 Oh. 486. To same effect In re Carter, (N. J.) 88 A 1084; Smith v. Abbott, 79 N. J. Eq. 117, 81 A 115. Contra Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 A 62. (2) Administrators with the will annexed are sometimes authorized by statute to exercise a power of sale contained in the will. Calloway v. Cooley, 50 Kan. 743, 32 P 372. See generally infra § 2779.

[b] **A foreign corporation** which is executor cannot make a conveyance of land under a power in the will unless it has complied with the requirements necessary to enable it to do business in the state where the land is situated. Pennsylvania L. Ins., etc., Co. v. Bauerle, 143 Ill. 459, 33 NE 166.

[c] **Ratification of sale.**—Statutes requiring domestic executors to report their sales of land for ratification to the court from which they obtained letters do not apply to a sale made by a foreign executor under a direction in the will. Smith v. Montgomery, 75 Md. 138, 23 A 145.

67. U. S.—Secrist v. Green, 3 Wall. 744, 18 L. ed. 153.

Ark.—Apperson v. Bolton, 29 Ark. 418.

Ind.—Lucas v. Tucker, 17 Ind. 41.

Kan.—Niquette v. Green, 81 Kan. 569, 106 P 270.

Ky.—Rutherford v. Clark, 4 Bush 27; Jackson v. Jeffries, 3 A. K. Marsh. 309.

Md.—Norment v. Brydon, 44 Md. 112.

Miss.—Crusoe v. Butler, 36 Miss. 150; Andrews v. Carr, 26 Miss. 577.

N. J.—In re Devine, 62 N. J. Eq. 703, 49 A 138.

N. C.—Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

Tex.—Simpson v. Foster, 46 Tex. 618.

Wis.—McIntosh v. Marathon Land Co., 110 Wis. 296, 85 NW 976.

[a] **The reason for this requirement** is that a conveyance of real estate must be made according to the law of the place where it is situated. Crusoe v. Butler, 36 Miss. 150. To same effect Lucas v. Tucker, 17 Ind. 41.

[b] **Contract to convey.**—A foreign executor, with testamentary powers to sell real estate, may make a valid contract to convey before the will has been admitted to record. All that Gen. St. (1901) § 2953 requires is that the will shall be of record at the time of the conveyance. Niquette v. Green, 81 Kan. 569, 106 P 270.

68. U. S.—Brooks v. McComb, 38 Fed. 317.

Iowa.—Dorsey v. Banks, 88 Iowa 595, 55 NW 574; Smith v. Callaghan, 66 Iowa 552, 24 NW 50.

Ky.—Allison v. Cooke, 106 Ky. 763, 51 SW 593, 21 KyL 434.

Me.—Green v. Alden, 92 Me. 177, 42 A 358.

Minn.—Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503.

Miss.—Crusoe v. Butler, 36 Miss. 150.

Mo.—Seneca Bank v. Morrison, 200 Mo. A. 169, 204 SW 1119.

N. C.—Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

69. Brooks v. McComb, 38 Fed. 317; Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

70. See generally supra §§ 1438–1741.

71. Seldner v. Katz, 96 Md. 212, 53 A 931; Brown v. Edson, 23 Vt. 435.

72. Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873; Sheldon v. Rice, 30 Mich. 296, 18 AmR 136; Nowler v. Coit, 1 Oh. 519, 13 AmD 640; Brown v. Edson, 23 Vt. 435.

73. McAnulty v. McClay, 16 Nebr. 418, 20 NW 266.

74. Ind.—Bailey v. Rinker, 146 Ind. 129, 45 NE 38; Stafford v. Davidson, 47 Ind. 319; Rapp v. Matthias, 35 Ind. 332.

Kan.—Thomas v. Williams, 80 Kan. 632, 103 P 772, 25 LRANS 1304. Higgins v. Reed, 48 Kan. 272, 29 P 389.

Minn.—Mowry v. McQueen, 80 Minn. 385, 83 NW 348.

N. H.—Gardiner v. Carter, 74 N. H. 507, 69 A 939.

N. J.—In re Devine, 62 N. J. Eq. 703, 49 A 138.

Wis.—McIntosh v. Marathon Land Co., 110 Wis. 296, 85 NW 976.

[a] **A delay of six years** by a foreign executor in petitioning for a sale of land to pay debts is not unreasonable, where occasioned by the pendency of litigation conducted in good faith to determine the validity and amount of such indebtedness. Thomas v. Williams, 80 Kan. 632, 103 P 772, 25 LRANS 1304.

75. McAnulty v. McClay, 16 Nebr. 418, 20 NW 266.

76. U. S.—Comstock v. Crawford, 3 Wall. 369, 18 L. ed. 34.

the personal estate at the domicile has been exhausted,[77] although there is also authority for the view that such a sale should not be ordered unless it appears that the creditors in the exercise of due diligence have been unable to obtain payment from the principal representative.[78] The court may also make an order for the sale by an ancillary representative of lands which decedent has by his will directed to be sold.[79]

[§ 2694] **2. Application and Proceedings.** Where application is made for an order for the sale of land by an ancillary representative to pay debts, the petition must show that the situation exists which authorizes the proceeding,[80] namely, that claims have been regularly presented and allowed in the jurisdiction where the application is made,[81] and that the personal estate is insufficient to pay them.[82] Where the application is made for the sale of lands in the ancillary jurisdiction, to pay claims allowed in the domiciliary jurisdiction, the time within which the application must be made will be governed by the law of the domicile where the claims were allowed,[83] which in the absence of evidence to the contrary will be presumed to be the same as in the jurisdiction where the application is made.[84] Notice of the application must be given if required by statute, unless waived by the parties entitled thereto.[85] The statutes authorizing a foreign representative to apply for an order of sale[86] provide what the petition must show, and these requirements must be complied with.[87] A new bond need not be required of the foreign representative if the amount of the bond already given is sufficient to cover the proceeds of the sale.[88]

[§ 2695] **F. Presentation and Allowance of Claims**[89]**—1. Presentation.** While it is the right of all creditors to present their claims to the domiciliary representative,[90] creditors who reside in the jurisdiction where ancillary administration has been granted may present their claims to the ancillary representative,[91] the effect of which presentation, when properly made, is fully to protect the rights of the creditors with respect to such part of the estate as is within such jurisdiction.[92] In a few jurisdictions it is held that only local creditors can prove their claims in the ancillary jurisdiction;[93] but the general rule is that nonresidents as well as residents may prove their claims in the ancillary jurisdiction,[94] leaving the question of payment to be dealt with afterward when the solvency or insolvency of the whole estate is to be considered.[95]

[§ 2696] **2. Effect of Allowance or Disallowance.** The fact that a claim has been presented and allowed[96] or disallowed[97] in the jurisdiction of the domiciliary administration is no bar to its allowance in the ancillary jurisdiction; and conversely

Conn.—Lawrence's App., 49 Conn. 411.

Ill.—Hobson v. Payne, 45 Ill. 158.

Mass.—Cowden v. Jacobson, 165 Mass. 240, 43 NE 98.

N. D.—Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

[a] **Proof of a debt in the domiciliary administration** is sufficient to support an application in the ancillary administration for leave to sell the land and transmit the proceeds to the domiciliary administration to pay debts. Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

[b] **A bill in chancery cannot be maintained by creditors** to subject lands to the payment of debts where there is no ancillary representative if a representative can be appointed. Partee v. Kortrecht, 54 Miss. 66.

[c] **Sale cannot be collaterally attacked.**—Cowden v. Jacobson, 165 Mass. 240, 43 NE 98.

77. Lawrence's App., 49 Conn. 411; Rosenthal v. Renick, 44 Ill. 202.

78. Livermore v. Haven, 23 Pick. (Mass.) 116.

79. Massey's Succ., 46 La. Ann. 126, 15 S 6.

80. Hobson v. Payne, 45 Ill. 158.

81. Hobson v. Payne, 45 Ill. 158.

82. Comstock v. Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34 (unless otherwise provided by statute, a general statement to this effect is sufficient to give the court jurisdiction, without specifying all the debts and property of the decedent, and any further particularity necessary to guide the court in making the order may be obtained upon the hearing of the application).

83. Hadley v. Gregory, 57 Iowa 157, 10 NW 319.

84. Hadley v. Gregory, 57 Iowa 157, 10 NW 319.

85. Bacon v. Chase, 83 Iowa 521, 50 NW 23.

86. See supra § 2693.

87. Rapp v. Matthias, 35 Ind. 332.

88. Rapp v. Matthias, 35 Ind. 332; Higgins v. Reed, 48 Kan. 272, 29 P 389.

89. See generally supra §§ 937–1078.

90. State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609; Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

91. U. S.—Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553.

Mich.—More v. Luther, 153 Mich. 206, 116 NW 986, 18 LRANS 149.

Minn.—State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609.

N. D.—Dow v. Lillie, 26 N. D. 512, 144 NW 1082, LRA1915D 754.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

Wis.—Davis v. Davis, 137 Wis. 640, 119 NW 334.

[a] **Presentation must be within time allowed by statute of state in which presentation made.**—Davis v. Davis, 137 Wis. 640, 119 NW 334.

[b] **Prior presentation in domicile of decedent.**—That a claim has been presented and allowed in the state in which decedent resided, or that claimant holds security therefor, is not ground for refusing to allow it in the state in which claimant lives, where the condition of the estate in the former state is not shown. State v. Rock County Prob. Ct., 67 Minn. 51, 69 NW 609.

[c] **Failure to present in domicile of decedent.**—A claim against a decedent's estate in the hands of the administrator with the will annexed in one state is not barred because it was not presented and has become barred against the estate of decedent in the hands of the domiciliary executors of the same will in another state. Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553.

92. More v. Luther, 153 Mich. 206, 116 NW 986, 18 LRANS 149.

93. Shegogg v. Perkins, 34 Ark. 117; In re Middleby, 254 Pa. 328, 98 A 889; In re Middleby, 249 Pa. 203, 94 A 820, LRA1915F 1041; Barry's App., 88 Pa. 131; Warrington's Est., 7 Pa. Dist. 712; Hicks v. Clark, 41 Vt. 183; Prentiss v. Van Ness, 31 Vt. 95. Aliter prior to statutory change. Churchill v. Boyden, 17 Vt. 319.

[a] **Change of residence.**—The fact that a creditor who resided at decedent's domicile at the time the debt was contracted has since become a resident of the ancillary jurisdiction does not make him a local creditor or change the operation of the rule. Warrington's Est., 7 Pa. Dist. 712.

[b] **Where the estate is insolvent** both at the domicile and in the state where ancillary administration is had, nonresident creditors may participate in the distribution pari passu with resident creditors. Fox's Est., 15 Pa. Dist. 470.

94. Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Miner v. Austin, 45 Iowa 221, 24 AmR 763.

Ky.—Gray v. Lewis, 3 KyL 234.

Md.—De Sobry v. De Laistre, 2 Harr. & J. 191, 3 AmD 555.

Miss.—Carroll v. McPike, 53 Miss. 569.

N. H.—Taylor v. Barron, 35 N. H. 484; Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

Wis.—Davis v. Davis, 137 Wis. 640, 119 NW 334.

Ont.—Milne v. Moore, 24 Ont. 456.

[a] **An exclusion of creditors of other states is prohibited by the constitution** of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

[b] **Legal services rendered** in a proceeding to probate a will in Oklahoma, or in resisting the contest of the probate of the will interposed by decedent's heirs, cannot be made a charge in favor of the attorney against the estate in the hands of a Texas administrator, at least until the Oklahoma executor, through whom the attorney seeks to go against the Texas administrator by right of subrogation, has become invested with the credentials provided by the statute specifying conditions to the right of a foreign executor to apply and receive letters testamentary in Texas. Hare v. Pendleton, (Tex. Civ. A.) 214 SW 948.

95. Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

96. Fellows v. Lewis, 65 Ala. 343, 39 AmR 1; State v. Rock County Probate Ct., 67 Minn. 51, 69 NW 609, 908.

97. Wilson v. Hartford F. Ins. Co., 164 Fed. 817, 90 CCA 593, 19 LRANS 553; Taylor v. Barron, 35 N. H. 484; Goodall v. Marshall, 14 N. H. 161.

an allowance of a claim by a court of one jurisdiction is not conclusive upon a personal representative in another jurisdiction,[98] or even evidence in such jurisdiction of the debt on which the claim was based.[99]

[§ 2697] **G. Payment of Claims[1]—1. In General.** It is the duty of an ancillary representative after collecting the assets within the jurisdiction of his appointment to apply the same to the payment of the claims of local creditors,[2] and in some states also to the payment of claims of nonresident creditors who prove their claims in the ancillary jurisdiction, regard being had to the solvency or insolvency of the estate as a whole,[3] although there is also some authority for the view that an ancillary representative may pay only resident creditors.[4] In the payment of claims he is governed exclusively by the law of the jurisdiction in which he was appointed,[5] without regard to the domicile of decedent or of his creditors,[6] or the lex loci contractus.[7]

[§ 2698] **2. Local Creditors.** While the chief object of an ancillary administration is the protection of local creditors,[8] and no transmission of assets will be made until they have received at least their pro rata share,[9] it cannot be made the means of giving such creditors any superior rights in case the estate as a whole is insolvent,[10] it being the general policy of the law that in such cases all the property applicable to the payment of the debts should be distributed among creditors pro rata according to the classification of their claims without regard to where the assets may be found or the creditors reside.[11] It follows that if the estate as a whole is solvent, the ancillary representative may proceed to pay the claims of local creditors in full,[12] but if it is not, local creditors are entitled to receive only such an amount as represents their pro rata share of the whole estate,[13] although they are entitled to receive that amount from the ancillary representative who need not transmit the assets in his hands to the domiciliary representative but may retain them until the amount to which each claimant is entitled is ascertained.[14]

[§ 2699] **3. Foreign Creditors.** A creditor who has received a part payment of his claim in the ancillary jurisdiction will not be allowed to share

98. Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732; Strauss v. Phillips, 91 Ill. A. 373 [aff 189 Ill. 9, 59 NE 560]; Dickinson v. Seaver, 44 Mich. 624, 7 NW 182; In re Eaton, 108 Misc. 590, 178 NYS 825.

99. Ala.—Johnston v. McKinnon, 129 Ala. 223, 29 S 696.

Cal.—Richards v. Blaisdell, 12 Cal. A. 101, 106 P 732.

Ill.—Strauss v. Phillips, 189 Ill. 9, 59 NE 560 [aff 91 Ill. A. 373]; Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204]; Smith v. Goodrich, 167 Ill. 46, 47 NE 316; Carter v. Pierce, 114 Ill. A. 589; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Creswell v. Slack, 68 Iowa 110, 26 NW 42.

Mass.—Ela v. Edwards, 13 Allen 48, 90 AmD 174.

Wis.—Fields v. Mundy, 106 Wis. 383, 82 NW 343, 80 AmSR 39.

1. See generally supra §§ 1151–1265.

2. Ala.—Jones v. Drewry, 72 Ala. 311.

Ark.—Wolff v. Perkins, 51 Ark. 43, 9 SW 432; Green v. Byrne, 46 Ark. 453; Gibson v. Dowell, 42 Ark. 164; Shegogg v. Perkins, 34 Ark. 117.

Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492.

Ill.—Coombs v. Carne, 236 Ill. 333, 86 NE 245; Young v. Wittenmyre, 123 Ill. 303, 14 NE 869; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Ashton v. Miles, 49 Iowa 564.

Mass.—Tod v. Mitchell, 228 Mass. 541, 117 NE 899; Newell v. Peaslee, 151 Mass. 601, 25 NE 26; Fay v. Haven, 3 Metc. 109; Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128; Stevens v. Gaylord, 11 Mass. 256; Richards v. Dutch, 8 Mass. 506.

Mich.—Bedell v. Clark, 171 Mich. 486, 137 NW 627.

Mo.—Spraddling v. Pipkin, 14 Mo. 118.

N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.

N. Y.—Smith v. New York Second Nat. Bank, 70 Hun 357, 24 NYS 419 (court may order ancillary representative to pay local creditors).

N. D.—Dow v. Lillie, 26 N. D. 512, 519, 144 NW 1082, LRA1915D 754 [cit Cyc].

Pa.—Com v. Gregory, 261 Pa. 106, 104 A 562; Parker's App., 61 Pa. 478; Dent's App., 22 Pa. 514; In re Stokely, 19 Pa. 476; Mothland v. Wireman, 3 Penr. & W. 185, 33 AmD 71.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

[a] **Voluntary payments from foreign debtors** of the estate cannot be applied to the domestic indebtedness of decedent so as to exclude foreign creditors. Jones v. Jones, 39 S. C. 247, 17 SE 587, 802.

3. U. S.—Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Fellows v. Lewis, 65 Ala. 343, 39 AmR 1.

Ill.—Rosenthal v. Renick, 44 Ill. 202; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Iowa.—Miner v. Austin, 45 Iowa 221, 24 AmR 763.

Md.—De Cobry v. De Laistre, 2 Harr. & J. 191, 3 AmD 535.

Mass.—Davis v. Estey, 8 Pick. 475; Dawes v. Head, 3 Pick. 128.

N. H.—Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

N. Y.—Cummings v. Banks, 2 Barb. 602.

Tenn.—Hays v. Cecil, 16 Lea 160; Bird v. Key, 8 Baxt. 366.

Eng.—In re Klœbe, 28 Ch. D. 175; Reynolds v. Lewis, 29 L. J. Ch. 296.

Ont.—Milne v. Moore, 24 Ont. 456.

4. Lewis v. Rutherford, 71 Ark. 218, 72 SW 373; Green v. Byrne, 46 Ark. 453; Gibson v. Dowell, 42 Ark. 164; Shegogg v. Perkins, 34 Ark. 117; Williamson v. Furbush, 31 Ark. 539; Barry's App., 88 Pa. 131; Warrington's Est., 7 Pa. Dist. 712; Churchill v. Boyden, 17 Vt. 319; Hunt v. Fay, 7 Vt. 170.

5. U. S.—McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Smith v. Union Bank, 5 Pet. 518, 8 L. ed. 212 [aff 24 F. Cas. No. 14,362, 4 Cranch C. C. 21]; Harrison v. Sterry, 5 Cranch 289, 3 L. ed. 104.

Ala.—Jones v. Drewly, 72 Ala. 311; Kennedy v. Kennedy, 8 Ala. 391.

Ga.—McGhee v. Polk, 24 Ga. 406.

Ky.—Warren v. Hall, 6 Dana 450.

La.—Mary's Succ., 2 Rob. 438; Olivier v. Townes, 2 Mart. N. S. 93.

Md.—De Sobry v. De Laistre, 2 Harr. & J. 191, 3 AmD 535.

Mass.—Dawes v. Head, 3 Pick. 128.

Miss.—Jane v. Martinez, 104 Miss. 208, 61 S 177.

N. H.—Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

N. J.—Varnum v. Camp, 13 N. J. L. 326, 25 AmD 476.

N. Y.—Holmes v. Remsen, 20 Johns. 229, 11 AmD 269; Churchill v. Prescott, 3 Bradf. Surr. 233; St. Jurjo v. Dunscomb, 2 Bradf. Surr. 105; Isham v. Gibbons, 1 Bradf. Surr. 69.

N. C.—Moye v. May, 43 N. C. 131, 54 N. C. 844.

Pa.—In re Miller, 3 Rawle 312, 24 AmD 345.

S. C.—Dial v. Gary, 14 S. C. 579, 37 AmR 737.

Eng.—Partington v. Atty.-Gen., L. R. 4 H. L. 100; In re Klœbe, 28 Ch. D. 175.

6. See cases supra preceding note.

7. Smith v. Union Bank, 5 Pet. (U. S.) 518, 8 L. ed. 212 [aff 24 F. Cas. No. 14,362, 4 Cranch C. C. 21]; Harrison v. Sterry, 5 Cranch (U. S.) 289, 3 L. ed. 104; Pardo v. Bingham, L. R. 6 Eq. 485.

8. Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492.

Ill.—Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Mich.—More v. Luther, 153 Mich. 206, 214, 116 NW 986, 989, 18 LRANS 149 [cit Cyc].

Utah.—In re Campbell, 173 P 688.

Wash.—In re Bell, 70 Wash. 498, 127 P 100.

9. Ark.—Lewis v. Rutherford, 71 Ark. 218, 72 SW 373.

Ga.—Mitchell v. Cox, 28 Ga. 32.

Mass.—Putnam v. Middleborough, 209 Mass. 456, 95 NE 749; Davis v. Estey, 8 Pick. 475.

Pa.—In re Middleby, 249 Pa. 203, 94 A 820, LRA1915F 1041.

Utah.—In re Campbell, 173 P 688.

Transmission of residue to domicile see infra § 2700.

10. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Dawes v. Head, 3 Pick. (Mass.) 128.

[a] **Illustration.**—Creditors in the ancillary jurisdiction, when seeking to share in the assets in the domiciliary jurisdiction, must credit their claims with dividends received in the ancillary jurisdiction, so that they will receive altogether only their proper pro rata share of the entire estate. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618.

11. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Davis v. Estey, 8 Pick. (Mass.) 475; Dawes v. Head, 3 Pick. (Mass.) 128; Lawrence v. Elmendorf, 5 Barb. (N. Y.) 73; Mothland v. Wireman, 3 Penr. & W. (Pa.) 185, 33 AmD 71; Warrington's Est., 7 Pa. Dist. 712.

[a] **The true principle** which should govern in all cases of double administration is so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic. Lawrence v. Elmendorf, 5 Barb. (N. Y.) 73.

12. Miner v. Austin, 45 Iowa 221, 24 AmR 763; Churchill v. Boyden, 17 Vt. 319.

13. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Davis v. Estey, 8 Pick. (Mass.) 475; Churchill v. Boyden, 17 Vt. 319.

14. Mitchell v. Cox, 28 Ga. 32; Dawes v. Head, 3 Pick. (Mass.) 128.

equally with other creditors of the same class at the domicile until after they have received the same proportionate amount as he has recovered in the ancillary jurisdiction;[15] but if he has received a full payment in the ancillary jurisdiction, he cannot be compelled to refund any part thereof for distribution among other creditors of the domicile where the principal estate is insolvent.[16] The law of the ancillary jurisdiction governs all questions as to the payment of claims in that jurisdiction,[17] and in the case of claims of nonresidents it will not recognize and enforce priorities provided for by the laws of other states to the prejudice of its own citizens.[18] Of course a creditor cannot obtain payment of his claim in both jurisdictions, or, by presenting it in both, obtain more than his pro rata share in case the assets are not sufficient to pay all in full;[19] and if there is any property in the state or country where the creditor resides, which is applicable only to the claims of local creditors, he should exhaust his remedies there before seeking satisfaction in another jurisdiction.[20]

[§ 2700] **H. Transmission of Residue to Domicile.** As a general rule assets remaining in the hands of an ancillary representative after paying the claims of local creditors [21] will be transferred to the jurisdiction of the domicile of the decedent for distribution.[22] This rule, however, is not absolute or inflexible, but the transfer will or will not be made as the court may deem proper in the exercise of a sound judicial discretion according to the circumstances of the particular case.[23] In the

15. Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270].

16. Schneller v. Vance, 8 La. 506, 28 AmD 140.

17. See supra § 2697.

18. Smith v. Union Bank, 5 Pet. (U. S.) 518, 8 L. ed. 212 [aff 24 F. Cas. No. 14,362, 4 Cranch C. C. 21]; Goodall v. Marshall, 11 N. H. 88, 35 AmD 472; Moye v. May, 43 N. C. 131, 54 N. C. 84.

[a] **Assets removed from domicile.**—Where assets belonging to the domicile have been removed into the ancillary jurisdiction and there is no domiciliary representative to whom they can be transmitted, the ancillary representative in paying claims should to the extent of such assets regard the priorities provided for by the law of the domicile. Rowland's Est., 1 NYSt 308.

19. Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618]; Warrington's Est., 7 Pa. Dist. 712; Hays v. Cecil, 16 Lea (Tenn.) 160; In re Kloebe, 28 Ch. D. 175.

20. Wright v. Nutt, 3 Bro. Ch. 326, 29 Reprint 562; Peters v. Erving, 3 Bro. Ch. 54, 29 Reprint 405.

[a] **Where a creditor was not informed** of the existence of property in the country of his residence, laches cannot be imputed to him and he cannot be restrained by injunction from prosecuting his claim elsewhere. Peters v. Erving, 3 Bro. Ch. 54, 29 Reprint 405.

21. La.—Mourain v. Poydras, 6 La. Ann. 151; Gravillon v. Richard, 13 La. 293, 33 AmD 563.

Md.—Wright v. Gilbert, 51 Md. 146.

Mass.—Newell v. Peaslee, 151 Mass. 601, 25 NE 26.

Mich.—Bedell v. Clark, 171 Mich. 486, 137 NW 627.

N. Y.—Hopper v. Hopper, 125 N. Y. 400, 26 NE 557, 12 LRA 237; Smith v. New York Second Nat. Bank, 70 Hun 357, 24 NYS 419.

Pa.—Barry's App., 88 Pa. 131; Parker's App., 61 Pa. 478; Dent's App., 22 Pa. 514; Thomas's Est., 8 Pa. Dist. 385; Del Valle's App., 3 Cent. Rep. 163 [aff 17 WklyNC 30].

Eng.—In re De Penny, [1891] 2 Ch. 63.

[a] **Final settlement in ancillary jurisdiction.**—The residuum is transmissible to the country of the original administration only when a final account has been settled in the proper tribunal of the ancillary administration, on the equitable principles adopted by its own law in the application and distribution of the assets found within its jurisdiction. Eames v. Hacon, 18 Ch. D. 347 [aff 16 Ch. D. 407].

[b] **Until expiration of the time fixed for presentation** of claims, it cannot be determined that there are no local unpaid creditors. Newell v. Peaslee, 151 Mass. 601, 25 NE 26.

[c] **An executor has no right to immediate payment or delivery** of property in the hands of an ancillary executor, it being only that remaining after the completion of the ancillary administration that comes to the principal executor. Putnam v. Middleborough, 209 Mass. 456, 95 NE 749.

[d] **Where losses have occurred through maladministration** of the ancillary representative, which have been ordered to be made good, local creditors should be paid and the balance transmitted to the domicile. Com. v. Gregory, 261 Pa. 106, 104 A 562.

[e] **A suit by a foreign creditor** does not make him a domestic creditor so as to be entitled to payment before transmission to the domicile. In re Middleby, 254 Pa. 328, 98 A 889, 249 Pa 203, 94 A 820, LRA 1915F 1041.

[f] **An inheritance tax** provided for by the law of the ancillary administration should be provided for before transmission is ordered. State v. District Ct. (Mont.) 109 P 438; Matter of Hollins, 79 Misc. 200, 139 NYS 713.

22. U. S.—Watkins v. Eaton, 173 Fed. 133 [aff 183 Fed. 384, 105 CCA 604]; Swatzel v. Arnold, 23 F. Cas. No. 13,682, Woolw. 383.

Ala.—Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Hall v. Pegram, 85 Ala. 522, 5 S 209, 6 S 612; Wright v. Phillips, 56 Ala. 69; Fretwell v. McLemore, 52 Ala. 124; Worthy v. Lyon, 18 Ala. 784; Childress v. Bennett, 10 Ala. 751, 44 AmD 503.

Ark.—Wolff v. Perkins, 51 Ark. 43, 9 SW 432; Green v. Byrne, 46 Ark. 453; Gibson v. Dowell, 42 Ark. 164; Shegogg v. Perkins, 34 Ark. 117; Williamson v. Furbush. 31 Ark. 539.

Cal.—Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90.

Colo.—Moore v. Ingram, 46 Colo. 204, 102 P 1070; Doss v. Stevens, 13 Colo. A. 535, 59 P 67.

Conn.—Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385; Perkins v. Stone, 18 Conn. 270.

Ga.—Mitchell v. Cox, 28 Ga. 32; Sanford v. Thompson, 18 Ga. 554.

Ill.—Ramsay v. Ramsay, 196 Ill. 179, 63 NE 618 [aff 97 Ill. A. 270]; Young v. Wittenmyre, 123 Ill. 303, 14 NE 869 [rev 22 Ill. A. 496]; Dickson v. Fisher, 211 Ill. A. 45.

Ind.—Warren v. Hofer, 13 Ind. 167; McClerry v. Matson, 2 Ind. 79.

Iowa.—In re Sanford, 175 NW 506; Re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218.

Kan.—Ames v. Citizens' Nat. Bank, 181 P 564.

Ky.—Fletcher v. Sandfers, 7 Dana 345, 32 AmD 96.

La.—Gaines' Succ., 46 La. Ann. 252, 14 S 602, 49 AmSR 324; Mourain v. Poydras, 6 La. Ann. 151; Gravillon v. Richard, 13 La. 293, 33 AmD 563.

Md.—Wright v. Gilbert, 51 Md. 146; Williams v. Williams, 5 Md. 467.

Mass.—Davis v. Estey, 8 Pick. 475; Richards v. Dutch, 8 Mass. 506.

Mich.—Bedell v. Clark, 171 Mich. 486, 137 NW 627.

Mo.—Spraddling v. Pipkin, 15 Mo. 118; Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

N. H.—Todd v. Todd, 78 N. H. 386. 103 A 17.

N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 12 LRA 237; Matter of Dunn, 39 App. Div. 510, 57 NYS 444; Cummings v. Banks, 2 Barb. 602; Matter of Conkling, 15 NYSt 748; Trimble v. Dzieduzyiki, 57 HowPr 208; Clark v. Butler, 4 Dem. Surr. 378; Carroll v. Hughes, 5 Redf. Surr. 337.

N. D.—Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA 1915D 754 [quot Cyc]; Joy v. Elton, 9 N. D. 428, 83 NW 875.

Oh.—Meswald v. Marks, 19 Oh. Cir. Ct. 605, 10 Oh. Cir. Dec. 355; Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343.

Pa.—Com. v. Gregory, 261 Pa. 106, 104 A 562; In re Middleby, 254 Pa. 328, 98 A 889; In re Skeer, 249 Pa. 288, 95 A 96; In re Middleby, 249 Pa. 203, 94 A 820, LRA1915F 1041; Barry's App., 88 Pa. 131; Parker's App., 61 Pa. 478, 6 Phila. 369; In re Stokely, 19 Pa. 476; Mothland v. Wireman, 3 Penr. & W. 185, 33 AmD 71; Walters' Est., 19 Pa. Dist. 293; Fox's Est., 15 Pa. Dist. 470; Warrington's Est., 7 Pa. Dist. 712; Dooley's Est., 36 Pa. Co. 114; Robb's Est., 4 Pa. Co. 337; Troxell's Est., 15 Montg. Co. 29; Ehrhart's Est., 17 YorkLegRec 137.

S. C.—Hamilton v. Levy, 41 S. C. 374, 19 SE 610.

Tenn.—Carr v. Lowe, 7 Heisk. 84.

Vt.—Probate Ct. v. Kimbal, 42 Vt. 320; Porter v. Heydock, 6 Vt. 374.

Eng.—In re De Penny, [1891] 2 Ch. 63; Eames v. Hacon, 18 Ch. D. 347 [aff 16 Ch. D. 407]; Enhin v. Wylie, 10 H. L. Cas. 1, 11 Reprint 924, 2 ERC 57.

Ont.—Re Law, 34 Ont. L. 222, 8 OntWN 550.

[a] **The transfer can be made only upon a bill filed** for that purpose to which all the persons interested must be made parties. Carr v. Lowe, 7 Heisk. (Tenn.) 84.

[b] **Agency for domiciliary representative.**—Where the ancillary administrator is also agent for the domiciliary administrator, and he files his account stating that he has obeyed an order of court for transmission of assets to the domiciliary administrator, but actually holds such assets, he will be presumed to hold them as agent of the domiciliary administrator and not as ancillary administrator. In re Skeer, 249 Pa. 288, 95 A 96.

[c] **Contrary rule under statute.**—Partee v. Kortrecht, 54 Miss. 66.

23. U. S.—Watkins v. Eaton, 173 Fed. 133, 138 [aff 183 Fed. 384, 105

absence of special circumstances making a local distribution proper the general rule of transmission to the domicile should prevail,[24] since the distribution, wherever made, must be according to the law of decedent's domicile,[25] and comity requires that it should be accorded to that jurisdiction;[26] but the court may, even in cases where a transmission of the residue is proper, refuse to order it until the domiciliary representative has given a sufficient bond to secure its proper administration.[27] While there is no question as to the authority of the court in the ancillary jurisdiction to order a residue of assets in that jurisdiction transmitted to the domiciliary representative,[28] the court of one jurisdiction has no authority over the representative of the other to compel him to bring in such assets whether it is the court of the domiciliary [29] or of the ancillary [30] jurisdiction.

As to the proceeds of real estate which still retain the character of that species of property, the general rule in regard to transmitting assets to the domicile of decedent does not ordinarily apply, be-

CCA 604, and cit Cyc]; Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Wright v. Phillips, 56 Ala. 69; Fretwell v. McLemore, 52 Ala. 124; Cochran v. Martin, 47 Ala. 525.

Cal.—In re Campbell, 173 P 688, 691 [cit Cyc]; In re Lathrop, 165 Cal. 243, 131 P 752.

Conn.—Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385.

Ill.—Peo. v. Kellogg, 268 Ill. 489, 500, 109 NE 304 [cit Cyc].

Iowa.—In re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218.

Kan.—Pickens v. Campbell, 98 Kan. 518, 159 P 21, 23 [cit Cyc].

Ky.—Dorsey v. Dorsey, 5 J. J. Marsh. 280, 22 AmD 33.

La.—Gaines' Succ., 46 La. Ann. 252, 14 S 602, 49 AmSR 324; Mourain v. Poydras, 6 La. Ann. 151; Gravillon v. Richard, 13 La. 293, 33 AmD 563.

Md.—Dalrymple v. Gamble, 66 Md. 298, 7 A 683, 8 A 468; Williams v. Williams, 5 Md. 467; Cassilly v. Meyer, 4 Md. 1.

Mass.—Welch v. Adams, 152 Mass. 74, 25 NE 34, 9 LRA 244; Newell v. Peaslee, 151 Mass. 601, 25 NE 26; Emery v. Batchelder, 132 Mass. 452.

Mich.—Bedell v. Clark, 171 Mich. 486, 137 NW 627.

Miss.—Partee v. Kortrecht, 54 Miss. 66.

Mo.—Spraddling v. Pipkin, 15 Mo. 118.

N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; In re Hughes, 95 N. Y. 55; Despard v. Churchill, 53 N. Y. 192; Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193; Fox v. Carr, 16 Hun 434; Matter of Braithwaite, 19 AbbNCas 113; Trimble v. Dzieduzyiki, 57 HowPr 213.

N. C.—Carmichael v. Ray, 40 N. C. 365.

N. D.—Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA1915D 754 [quot Cyc].

Oh.—Swearingen v. Morris, 14 Oh. St. 424.

Pa.—In re Bertin, 245 Pa. 256, 91 A 669, LRA1915A 431; Parker's App., 61 Pa. 478; In re Adlum, 22 Pa. 514; Guier v. O'Daniel, 1 Binn. 349 note a; Weaver's Est., 4 Pa. Dist. 260; Irey's Est., 11 WklyNC 207.

Tenn.—Carr v. Lowe, 7 Heisk. 84.

Vt.—Porter v. Heydock, 6 Vt. 374.

Va.—Moses v. Hart, 25 Gratt. (66 Va.) 795.

Wash.—Rader v. Stubblefield, 43 Wash. 334, 349, 86 P 560, 10 AnnCas 20 [quot Cyc].

W. Va.—McClung v. Sieg, 54 W. Va. 467, 46 SE 210, 66 LRA 884.

[a] **The question is not one of jurisdiction** but of judicial discretion under the circumstances of the particular case. Wright v. Phillips, 56 Ala. 69; Dammert v. Osborn, 65 Hun 585, 20 NYS 474; Matter of Braithwaite, 19 AbbNCas (N. Y.) 113.

[b] **The court will have regard to** the rights, not only of the citizens of its own state but of all parties in interest. Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385.

[c] **If there are unpaid debts** (1) in the jurisdiction of the domiciliary administration which are chargeable on the assets according to the law of the domicile, they should be transmitted. Fretwell v. McLemore, 52 Ala. 124; Troxell's Est., 15 Montg. Co. (Pa.) 29. (2) But unless it is affirmatively shown that there are such debts it will be presumed that none exist. In re Hughes, 95 N. Y. 55.

[d] **If there is no resident heir, legatee, or distributee** claiming the fund, it should be transmitted to the forum domicilii, on the application of the principal administrator, taking the necessary steps to prevent the waste or misapplication of the fund. Childress v. Bennett, 10 Ala. 751, 44 AmD 503; Barry's App., 88 Pa. 131.

[e] **Where there are creditors or distributees at the domicile,** transmission is proper. Fretwell v. McLemore, 52 Ala. 124; In re Gable, 79 Iowa 178, 44 NW 352, 9 LRA 218; Spraddling v. Pipkin, 15 Mo. 118.

[f] **Where the validity of will is disputed** and must be made the subject of litigation and decided according to the law of the domicile, the residue of assets should be transmitted. Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193; Matter of Dunn, 39 App. Div. 510, 57 NYS 444; Ruebsam's Est., 26 WklyNC (Pa.) 311.

[g] **Disputed construction of will.**—Where there is a difference of opinion between the probate courts of the two jurisdictions as to the construction of the will, which has been probated in both, the property should be remitted to the jurisdiction of domicile. Watkins v. Eaton, 173 Fed. 133 [aff 183 Fed. 384, 105 CCA 604].

[h] **After the ancillary representative has filed his final account** and been discharged and the fund in his hands awarded to the domiciliary representative, the court has no longer any jurisdiction to order it retained. Mingle's Est., 4 Pa. Co. 493. To same effect Emery v. Batchelder, 132 Mass. 452 (where same person was domiciliary and ancillary representative).

[i] **Compelling domiciliary representative to sue ancillary representative for residue.**—Even if the surrogate's court has authority, under the New York statute which empowers surrogates to direct and control the conduct of executors and administrators, to compel the domiciliary representative of a decedent to take legal proceedings to compel the ancillary representative in another state to pay over the residue remaining in his hands after the payment of debts in such foreign state, it is still a matter of discretion with the surrogate's court to make such an order, and the executor is not bound to institute a proceeding to recover the residue without an order to that effect. Sherman v. Page, 85 N. Y. 123.

24. Ala.—Wright v. Phillips, 56 Ala. 69.

Ill.—Young v. Wittenmyre, 123 Ill. 303, 14 NE 869.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

La.—Gravillon v. Richard, 13 La. 293, 33 AmD 563.

Md.—Williams v. Williams, 5 Md. 467.

Mass.—Putnam v. Middleborough, 209 Mass. 456, 95 NE 749; Fay v. Haven, 3 Metc. 109; Jennison v. Hapgood, 10 Pick. 77; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72.

Mo.—Spraddling v. Pipkin, 15 Mo. 118.

N. Y.—Brown v. Brown, 1 Barb. Ch. 189.

N. D.—Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA1915D 754 [quot Cyc].

Oh.—Swearingen v. Morris, 14 Oh. St. 424.

Pa.—In re Middleby, 254 Pa. 328, 98 A 889; In re Middleby, 249 Pa. 203, 94 A 820, LRA1915F 1041.

S. C.—Hamilton v. Levy, 41 S. C. 374, 19 SE 610.

Tex.—Simpson v. Knox, 1 Tex. Unrep. Cas. 569.

Vt.—Probate Ct. v. Kimball, 42 Vt. 320.

"It has been settled in this Court, that the lex domicilii, and not the lex loci rei sitæ, must govern in the distribution of the personal estate of a deceased person among his heirs or legatees, where he dies testate or intestate. And this distribution is to be made under the authority of the court within whose jurisdiction the deceased had his domicil, it not being competent for a court granting an auxiliary administration to order a distribution of the estate among the heirs and legatees." Jennison v. Hapgood, 10 Pick. (Mass.) 77, 100.

[a] **As a general question of expediency,** it seems that persons having claims in the character of legatees or distributees should be compelled to resort to the courts of the country where decedent was domiciled, and where the personal representatives of such estate were appointed. Brown v. Brown, 1 Barb. Ch. (N. Y.) 189.

[b] **Youth and inexperience of the person who will have control** after transmission do not warrant a surrogate in refusing to order a transmission of the residue. Matter of Conkling, 15 NYSt 748.

25. See Descent and Distribution § 8.

26. Wright v. Phillips, 56 Ala. 69; Gravillon v. Richard, 13 La. 293, 33 AmD 563; Spraddling v. Pipkin, 15 Mo. 118; Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA1915D 754 [quot Cyc].

27. Carroll v. Hughes, 5 Redf. Surr. (N. Y.) 337; Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA1915D 754 [quot Cyc]; Yerkes' Est., 8 Pa. Dist. 36; Omohundro's Est., 12 LancBar (Pa.) 139; Hamilton v. Levy, 41 S. C. 374, 19 SE 610.

[a] **While the court of the ancillary jurisdiction cannot require** the domiciliary representative to give a bond, it may order the assets to be retained unless such a bond is given. Hamilton v. Levy, 41 S. C. 374, 19 SE 610.

28. Childress v. Bennett, 10 Ala. 751, 44 AmD 503; Gravillon v. Richard, 13 La. 293, 33 AmD 563; Bedell v. Clark, 171 Mich. 486, 137 NW 627; Dow v. Lillie, 26 N. D. 512, 529, 144 NW 1082, LRA1915D 754.

29. Lewis v. Grognard, 17 N. J. Eq. 425; Dow v. Lillie, 26 N. D. 512, 529, 144 NW 1082, LRA1915D 754.

30. Dow v. Lillie, 26 N. D. 512, 519, 529, 144 NW 1082, LRA1915D 754 [quot Cyc]; Freeman's App., 68 Pa. 151.

cause the right of succession to real estate is governed by the lex loci rei sitæ.[31]

[§ 2701] **I. Distribution in Ancillary Jurisdiction.** The court may in its discretion order that the residue of assets remaining in the hands of an ancillary representative after paying the claims of local creditors be retained and distributed by him instead of being transmitted to the principal representative,[32] and in a number of cases it has been held that under the circumstances of the particular case a retention of the assets was proper.[33] But since the distribution of, and succession to, personal property, wherever situated, is governed by the laws of the state or country where the owner had his domicile at the time of his death,[34] the distribution when made by the ancillary representative must be according to the law of the domicile.[35]

An error in distribution in the ancillary jurisdiction and those entitled to distribution apply for payment in the ancillary jurisdiction. Weaver's Est., 4 Pa. Dist. 260. (3) Where there are no special reasons for transmission and a local distribution would avoid expense and delay. Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381; Fretwell v. McLemore, 52 Ala. 124; Cassilly v. Meyer, 4 Md. 1; Matter of Braithwaite, 19 AbbNCas (N. Y.) 113; Welles' Est., 161 Pa. 218, 28 A 1116, 1117; In re Adlum, 22 Pa. 514; Irey's Est., 11 WklyNC (Pa.) 207.

[b] **Local distributees should be protected** as far as can be done without injustice to others interested, and assets may be retained in the ancillary jurisdiction for distribution to them until it appears whether any transmission to the domicile will be necessary. Yerkes' Est., 8 Pa. Dist. 36.

[c] **Fund awarded by decree of court of domicile.**—Where a fund in the hands of an ancillary administrator has been awarded by a decree rendered under the laws of decedent's domicile, such decree is conclusive in the ancillary jurisdiction, and the fund may be paid over there, without transmitting it to the place of domicile. Suarez v. New York, 2 Sandf. Ch. (N. Y.) 173.

[d] **The claim of the domiciliary administrator for commissions** is not alone a sufficient ground for transmitting the estate to the domicile, but such claim may be presented in the ancillary jurisdiction. Dent's App., 22 Pa. 514; Adlum's Est., 6 Phila. (Pa.) 347.

34. See Descent and Distribution § 8.

35. U. S.—Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Dixon v. Ramsay, 3 Cranch 319, 2 L. ed. 453; Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Equitable L. Assur. Soc. v. Vogel, 76 Ala. 441, 52 AmR 344; Wright v. Phillips, 56 Ala. 69; Brock v. Frank, 51 Ala. 85; Treadwell v. Rainey, 9 Ala. 590; Williamson v. Branch Bank, 7 Ala. 906, 42 AmD 617.

Ark.—Hewitt v. Cox, 55 Ark. 225, 15 SW 1026, 17 SW 873.

Cal.—Murphy v. Crouse, 135 Cal. 14, 66 P 971, 87 AmSR 90; Apple's Est., 66 Cal. 432, 6 P 7.

Colo.—Falke v. Terry, 32 Colo. 85, 75 P 425.

Conn.—Lawrence v. Kitteridge, 21 Conn. 577, 56 AmD 385; Holcomb v. Phelps, 16 Conn. 127.

Ga.—Grote v. Pace, 71 Ga. 231.

Ill.—Cooper v. Beers, 143 Ill. 25, 33 NE 61; Russell v. Madden, 95 Ill. 485; Dickinson v. Ridgely, 188 Ill. A. 252 [aff 263 Ill. 105, 108 NE 1011]; Ramsay v. Ramsay, 97 Ill. A. 270 [aff 196 Ill. 179, 63 NE 618].

Ind.—Thieband v. Sebastian, 10 Ind. 454.

Kan.—Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550.

Ky.—Townes v. Durbin, 3 Metc. 352, 77 AmD 176; Atchison v. Lindsey, 6 B. Mon. 86, 43 AmD 153; Dorsey v. Dorsey, 5 J. J. Marsh. 280, 22 AmD 33; Embry v. Millar, 1 A. K. Marsh. 300, 10 AmD 732.

La.—In re Lewis, 32 La. Ann. 385; Packwood's Succ., 9 Rob. 438, 41 AmD 341; Olivier v. Townes, 2 Mart. N. S. 93.

Me.—Potter v. Titcomb, 22 Me. 302.

Md.—Brewer v. Cox, 18 A 864; Noonan v. Kemp, 34 Md. 73, 6 AmR 307; De Sobry v. De Laistre, 2 Harr. & J. 191, 3 AmD 555.

Mass.—Stevens v. Gaylord, 11 Mass. 256; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Richards v. Dutch, 8 Mass. 506; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173.

Miss.—Garland v. Rowan, 10 Miss. 617.

Mo.—Locke v. McPherson, 163 Mo. 493, 63 SW 726, 85 AmSR 546, 52 LRA 420; Spraddling v. Pipkin, 15 Mo. 118.

N. H.—Goodall v. Marshall, 11 N. H. 88, 35 AmD 472.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068 [aff 35 Misc. 193, 71 NYS 483])]; In re Hughes, 95 N. Y. 55; Matter of Dunn, 39 App. Div. 510, 57 NYS 444; Matter of Barandon, 41 Misc. 380, 84 NYS 937, 4 Mills Surr. 59; Matter of Braithwaite, 19 AbbNCas 113; Ordronaux v. Helie, 3 Sandf. Ch. 512; Suarez v. New York, 2 Sandf. Ch. 173; Churchill v. Prescott, 3 Bradf. Surr. 233; St. Jurjo v. Dunscomb, 2 Bradf. Surr. 105.

N. C.—Cade v. Davis, 96 N. C. 139, 2 SE 225; Grant v. Reese, 94 N. C. 720; Jones v. Gerock, 59 N. C. 190; Carmichael v. Ray, 40 N. C. 365.

Oh.—Swearingen v. Morris, 14 Oh. St. 424.

Pa.—In re Bertin, 245 Pa. 256, 91 A 669, LRA1915A 431; Welles' Est., 161 Pa. 218, 28 A 1116, 1117; In re Page, 75 Pa. 87; In re Adlum, 22 Pa. 514; Desesbats v. Berquier, 1 Binn. 336, 2 AmD 448; Rittenhouse's Est., 8 Pa. Dist. 700; Ehrhart's Est., 18 YorkLegRec 134, 17 YorkLegRec 137.

S. C.—Graveley v. Graveley, 25 S. C. 1, 60 AmR 478; Cureton v. Mills, 13 S. C. 409, 36 AmR 700; Tucker v. Condy, 31 S. C. Eq. 12.

Tenn.—Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 SW 766; Thurman v. Shelton, 18 Tenn. 383.

Wash.—Rader v. Stubblefield, 43 Wash. 334, 86 P 560, 10 AnnCas 20 [quot Cyc].

Eng.—Stirling-Maxwell v. Cartwright, 9 Ch. D. 173, 11 Ch. D. 522; Burn v. Cole, Ambl. 415, 27 Reprint 277; Pipon v. Pipon, Ambl. 25, 27 Reprint 14; Reynolds v. Kortright, 18 Beav. 417, 52 Reprint 164; Bruce v. Bruce, 2 B. & P. 229 note a, 126 Reprint 1251, 6 Bro. P. C. 566, 2 Reprint 1271; Hog v. Lashley, 6 Bro. P. C. 577, 2 Reprint 1278; Potter v. Brown, 5 East 124, 102 Reprint 1016; Philips v. Hunter, 2 H. Bl. 402, 126 Reprint 618; Sill v. Worswick, 1 H. Bl. 665, 126 Reprint 379; Enohin v. Wylie, 10 H. L. Cas. 1, 11 Reprint 924, 2 ERC 57; Price v. Dewhurst, 4 Myl. & C. 76, 18 EngCh 76, 41 Reprint 30; Thornton v. Curling, 8 Sim. 310, 8 EngCh 310, 59 Reprint 123; Hunter v. Potts, 4 T. R. 182, 100 Reprint 962; Somerville v. Somerville, 5 Ves. Jr. 750, 31 Reprint 839, 9 ERC 730; Bempde v. Johnstone, 3 Ves. Jr. 198, 30 Reprint 967; Thorne v. Watkins, 2 Ves. 35, 28 Reprint 24.

[a] **If an ancillary representative disregards the law of the domicile** in making distribution the fact that he has rendered a final accounting of his administration is no bar to an action to compel him to make a

31. Smith v. Smith, 174 Ill. 52, 50 NE 1083, 43 LRA 403 [aff 63 Ill. A. 534]; Irey's Est., 11 WklyNC (Pa.) 207.

Law governing descent of real property see Descent and Distribution § 7.

32. U. S.—Thomas Kay Woolen Mill Co. v. Sprague, 259 Fed. 338; Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Wright v. Phillips, 56 Ala. 69; Fretwell v. McLemore, 52 Ala. 124; Cochran v. Martin, 47 Ala. 525.

Ark.—Gibson v. Dowell, 42 Ark. 164.

La.—Gaine's Succ., 46 La. Ann. 252, 14 S 602, 49 AmSR 324.

Md.—Williams v. Williams, 5 Md. 467; Cassilly v. Meyer, 4 Md. 1.

N. Y.—Matter of Dunn, 39 App. Div. 510, 57 NYS 444; Suarez v. New York, 2 Sandf. Ch. 173.

N. C.—Grant v. Reese, 94 N. C. 720; Jones v. Gerock, 59 N. C. 190; Carmichael v. Ray, 40 N. C. 365.

Pa.—In re Bertin, 245 Pa. 256, 91 A 669, LRA1915A 431; Welles' Est., 161 Pa. 218, 28 A 1116, 1117; Parker's App., 61 Pa. 478; Yerkes' Est., 8 Pa. Dist. 36; Parker's Est., 1 LegGaz 15; Adlum's Est., 6 Phila. 347; Ehrhart's Est., 18 YorkLegRec 134, 17 YorkLeg Rec 137.

Tenn.—Gilchrist v. Cannon, 1 Coldw. 581.

Tex.—Hare v. Pendleton, (Civ. A.) 214 SW 948.

Utah.—In re Campbell, 173 P 688.

Vt.—Whalley v. Lawrence, 108 A 387.

Eng.—Bruce v. Bruce, 2 B. & P. 229, note a, 126 Reprint 1251, 6 Bro. P. C. 566, 2 Reprint 1271; Somerville v. Somerville, 5 Ves. Jr. 750, 31 Reprint 839; Bempde v. Johnstone, 3 Ves. Jr. 198, 30 Reprint 967.

33. U. S.—Harvey v. Richards, 11 F. Cas. No. 6,184, 1 Mason 381.

Ala.—Fretwell v. McLemore, 52 Ala. 124.

Cal.—In re Campbell, 173 P 688, 691 [cit Cyc].

La.—Gaines' Succ., 46 La. Ann. 252, 14 S 602, 49 AmSR 324.

Md.—Cassilly v. Meyer, 4 Md. 1.

N. Y.—In re Hughes, 95 N. Y. 55; Matter of Braithwaite, 19 AbbN Cas 113; Suarez v. New York, 2 Sandf. Ch. 173.

N. C.—Jones v. Gerock, 59 N. C. 190.

Pa.—In re Bertin, 245 Pa. 256, 91 A 669, LRA1915A 431; Welles' Est., 161 Pa. 218, 28 A 1116, 1117; Parker's App., 61 Pa. 478; In re Adlum, 22 Pa. 514; Del Valle's App., 2 Pa. Cas. 270, 5 A 441 [aff 17 WklyNC 30]; Weaver's Est., 4 Pa. Dist. 260; Irey's Est., 11 WklyNC 207.

Wash.—Rader v. Stubblefield, 43 Wash. 334, 349, 86 P 560, 10 AnnCas 20 [quot Cyc].

Ont.—Young v. Cashion, 19 Ont. L. 491, 14 OntWR 717.

[a] **A retention is proper:** (1) Where it appears that those entitled to distribution are within the ancillary jurisdiction and that there are no unpaid claims at the domicile. Fretwell v. McLemore, 52 Ala. 124; Cassilly v. Meyer, 4 Md. 1; In re Hughes, 95 N. Y. 55; Jones v. Gerock, 59 N. C. 190; Welles' Est., 161 Pa. 218, 28 A 1116, 1117; Parker's App., 61 Pa. 478; In re Adlum, 22 Pa. 514; Colvin's Est., 9 PittsbLegJNS (Pa.) 149. (2) Where no administration has been taken out at the domicile

tion may be corrected on distribution in the domicile by requiring distributees who have received more than they were entitled to to account for the excess.[36]

[§ 2702] **J. Actions by Foreign Representatives —1. Right of Action—a. General Rule as to Actions in Representative Capacity.** It is well settled that, unless such right is given to him by statute,[37] an executor or administrator cannot sue in his representative capacity in any state or country other than that in which his letters testamentary or administration were granted.[38] While this follows

proper distribution. Swearingen v. Morris, 14 Oh. St. 424.

[b] **Where the place of decedent's domicile is in dispute,** the question as to who shall make the distribution must be decided by the court having jurisdiction of the subject matter, and the validity of a distribution made under such a decision cannot be question by the courts of other jurisdictions. Holcomb v. Phelps, 16 Conn. 127.

[c] **Deduction of a succession tax** is proper where bequests are subject to such tax in the principal place of administration. Matter of Hollins, 79 Misc. 200, 139 NYS 713 [aff 160 App. Div. 886 mem, 144 NYS 1121 mem].

36. Dickinson v. Ridgely, 188 Ill. A. 252 [aff 268 Ill. 105, 108 NE 1011].

37. See infra § 2708.

38. U. S.—Johnson v. Powers, 139 U. S. 156, 11 SCt 525, 35 L. ed. 112; Wilkins v. Ellett, 9 Wall. 740, 19 L. ed. 586; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402; Kerr v. Moon, 9 Wheat. 565, 6 L. ed. 161; Lewis v. McFarland, 9 Cranch 151, 3 L. ed. 687; Dixon v. Ramsay, 3 Cranch 319, 2 L. ed. 453 [aff 7 F. Cas. No. 3,932, 1 Cranch C. C. 472]; Fenwick v. Sears, 1 Cranch 259, 2 L. ed. 101; Klug v. Martinsburg Power Co., 229 Fed. 861; Mattison v. Boston, etc., R. Co., 205 Fed. 821; St. Bernard v. Shane, 201 Fed. 453 [rev on other grounds 220 Fed. 852, 135 CCA 399]; Watkins v. Eaton, 183 Fed. 384, 105 CCA 604 [aff 173 Fed. 133]; Moore v. Kraft, 179 Fed. 685, 103 CCA 231; In re Kingsley, 160 Fed. 275; Brooks v. Southern Pac. Co., 148 Fed. 986 [aff 207 U. S. 463, 28 SCt 141, 52 L. ed. 297]; Beaumont v. Beaumont, 144 Fed. 288; Graham v. Lybrand, 142 Fed. 109, 73 CCA 333; Leahy v. Haworth, 141 Fed. 850, 73 CCA 84, 4 LRANS 657; Courtney v. Pradt, 135 Fed. 818 [aff 160 Fed. 561, 87 CCA 463 (app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398)]; Moore v. Petty, 135 Fed. 668, 68 CCA 306 [certiorari den 197 U. S. 623, 25 SCt 800, 49 L. ed. 911]; Maysville St. R., etc., Co. v. Marvin, 59 Fed. 91, 8 CCA 21; Black v. Henry G. Allen Co., 42 Fed. 618, 9 LRA 433; Duchess d'Auxy v. Porter, 41 Fed. 68; Mills v. Knapp, 39 Fed. 592; Allen v. Fairbanks, 36 Fed. 402; Eells v. Holder, 12 Fed. 668, 2 McCrary 622; Bartlett v. Rogers, 2 F. Cas. No. 1,079, 3 Sawy. 62; Blydenburgh v. Lowry, 3 F. Cas. No. 1,582, 4 Cranch C. C. 368; Brownson v. Wallace, 4 F. Cas. No. 2,042, 4 Blatchf. 465; Caldwell v. Harding, 4 F. Cas. No. 2,301, 5 Blatchf. 501, 4 F. Cas. No. 2,302, 1 Lowell 326; Champlin v. Tilley, 5 F. Cas. No. 2,586, Brunn. Coll. Cas. 71, 3 Day (Conn.) 303; Mellus v. Thompson, 16 F. Cas. No. 9,405, 1 Cliff. 125; Picquet v Swan, 19 F. Cas. No. 11,132, 3 Mason 469; Swatzel v. Arnold, 23 F. Cas. No. 13,682, Woolw. 383; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16; Wood v. Gold, 30 F. Cas. No. 17,947, 4 McLean 577; Cosgrove v. U. S., 33 Ct. Cl. 167.

Ala.—Warrior Coal, etc., Co. v. Augusta Nat. Bank, 53 S 997; Campbell v. Hughes, 155 Ala. 591, 47 S 45; Campbell v. Hughes, 144 Ala. 393, 42 S 42; Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Hatchett v. Bernely, 65 Ala. 39; Broughton v. Bradley, 34 Ala. 694, 73 AmD 474; Harrison v. Mahorner, 14 Ala. 829; Gayle v. Blackburn, 1 Stew. 429.

Ark.—Fairchild v. Hagel, 54 Ark. 61, 14 SW 1102; Gibson v. Ponder, 40 Ark. 195; Clark v. Holt, 16 Ark. 257.

Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492; Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474; Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423; Lewis v. Adams, 8 P 619, 2 Cal. Unrep. Cas. 615 [aff in banc 7 P 779].

Conn. — Hobart v. Connecticut Turnp. Co., 15 Conn. 145; Riley v. Riley, 3 Day 74, 3 AmD 260; Perkins v. Williams, 2 Root 462. Contra Nicole v. Mumford, Kirby 270.

Del.—St. James' Church v. Walker, 1 Del. Ch. 284.

D. C.—Bryan v. Curtis, 30 App. 234; U. S. v. Wyman, 13 D. C. 368.

Fla.—Sloan v. Sloan, 21 Fla. 589.

Ga.—Brookman v. Rennolds, 148 Ga. 721, 98 SE 543; Taylor v. McKee, 121 Ga. 223, 48 SE 943; Thomas v. Morrisett, 76 Ga. 384; Buck v. Johnson, 67 Ga. 82; Mansfield v. Turpin, 32 Ga. 260; Southwestern R. Co. v. Paulk, 24 Ga. 356.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Peo. v. Peck, 4 Ill. 118.

Ind.—Naylor v. Moody, 2 Blackf. 247, 3 Blackf. 92.

Iowa.—Knight v. Moline, etc., R. Co., 160 Iowa 160, 140 NW 839; Sparks v. National Masonic Acc. Assoc., 100 Iowa 458, 69 NW 678; McClure v. Bates, 12 Iowa 77; Karrick v. Pratt, 4 Greene 144.

Ky.—Palm v. Howard, 102 SW 267, 31 KyL 316; McClellan v. Troendle, 99 SW 329, 30 KyL 611; Louisville, etc., R. Co. v. Brantley, 96 Ky. 297, 28 SW 477, 16 Ky. 691, 49 AmSR 291; Marrett v. Babb, 91 Ky. 88, 15 SW 4, 12 KyL 652; Taylor v. Pennsylvania Co., 78 Ky. 348, 39 AmR 244; Conner v. Paul, 12 Bush 144; Adams v. Adams, 11 B. Mon. 77; Loval v. Johnson, 9 B. Mon. 556; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96; Moore v. Tanner, 5 T. B. Mon. 42, 17 AmD 35.

La.—Agee v. Brent, 132 La. 821, 61 S 837; Butler's Succ., 30 La. Ann. 887; Mason v. Nutt, 19 La. Ann. 41; McRae v. McRae, 11 La. 571.

Me.—Brown v. Nourse, 55 Me. 230, 92 AmD 583.

Md.—Citizens' Nat. Bank v. Sharp, 53 Md. 521; Wright v. Gilbert, 51 Md. 146; Barton v. Higgins, 41 Md. 539; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Ratrie v. Wheeler, 6 Harr. & J. 94.

Mass.—Bliss v. Bliss, 221 Mass. 201, 109 NE 148, LRA1916A 889; Cassidy v. Shimmin, 122 Mass. 406; Beaman v. Elliot, 10 Cush. 172; Pond v. Makepeace, 2 Metc. 114; Cutter v. Davenport, 1 Pick. 81, 11 AmD 149; Langdon v. Potter, 11 Mass. 313; Stevens v. Gaylord, 11 Mass. 256; Borden v. Borden, 5 Mass. 67, 4 AmD 32; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173.

Mich.—Vickery v. Beir, 16 Mich. 50; Thayer v. Lane, Walk. 200.

Minn.—Pott v. Pennington, 16 Minn. 509.

Miss.—Klein v. French, 57 Miss. 662; Rucks v. Taylor, 49 Miss. 552; Riley v. Mosely, 44 Miss. 37; Boyd v. Lambeth, 24 Miss. 433; Kilpatrick v. Bush, 23 Miss. 199.

Mo.—Emmons v. Gordon, 140 Mo. 490, 41 SW 998, 62 AmSR 734; Gregory v. McCormick, 120 Mo. 657, 25 SW 565; May v. Burk, 80 Mo. 675; Cabanne v. Skinker, 56 Mo. 357; Morton v. Hatch, 54 Mo. 408; Naylor v. Moffatt, 29 Mo. 126; Crohn v. Clay County State Bank, 137 Mo. A. 712, 118 SW 498; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025; Wolf v. Sun Ins. Co., 75 Mo. A. 306.

Nebr.—Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.

Nev.—Price v. Ward, 25 Nev. 203, 58 P 849, 46 LRA 459.

N. H.—Sabin v. Gilman, 1 N. H. 193; Carpenter v. Wild, Smith 365.

N. J.—Babbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18; Porter v. Trall, 30 N. J. Eq. 106; Lewis v. Grognard, 17 N. J. Eq. 425; Pelletreau v. Rathbone, 1 N. J. Eq. 331.

N. Y.—Maas v. German Sav. Bank, 176 N. Y. 377, 68 NE 658, 98 AmSR 689 [aff 73 App. Div. 524, 77 NYS 256 (rev 36 Misc. 154, 72 NYS 1068, 35 Misc. 193, 71 NYS 483)]; Taylor v. Syme, 162 N. Y. 513, 57 NE 83, 31 NYCivProc 1; In re Fitch, 160 N. Y. 87, 54 NE 701, 30 NYCivProc 1 [aff 39 App. Div. 609, 57 NYS 786]; Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 12 LRA 237; Palmer v. Phœnix Mut. L. Ins. Co., 84 N. Y. 63; In re Butler, 38 N. Y. 397; Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298, 28 HowPr 240; Mallory v. Virginia Hot Springs Co., 157 App. Div. 253, 141 NYS 961; Newton v. Jay, 107 App. Div. 457, 95 NYS 413, 35 NYCivProc 89; Downey v. Owen, 98 App. Div. 411, 90 NYS 280; Hoes v. New York, etc., R. Co., 73 App. Div. 363, 77 NYS 117 [rev on other grounds 173 N. Y. 435, 66 NE 119]; Steele v. Connecticut Gen. L. Ins. Co., 31 App. Div. 389, 52 NYS 373 [aff 160 N. Y. 703 mem, 57 NE 1125 mem]; Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NYAnnCas 56; Collins v. Steuart, 2 App. Div. 271, 37 NYS 891; Holyoke v. Union Mut. L. Ins. Co., 22 Hun 75 [aff 84 N. Y. 648]; In re Webb, 11 Hun 124; Middlebrook v. Merchants' Bank, 41 Barb. 481, 18 AbbPr 109, 27 HowPr 474 [aff 14 AbbPr 462 note, 24 How Pr 267, and aff 3 Abb. Dec. 295, 3 Keyes 135]; Metcalf v. Clark, 41 Barb. 45; Smith v. Webb, 1 Barb. 230; Farrington v. American L. & T. Co., 9 NYS 433, 18 NYCivProc 135; Warren v. Eddy, 13 AbbPr 28; Chapman v. Fish, 6 Hill 554; Robinson v. Crandall, 9 Wend. 425; Lawrence v. Lawrence, 3 Barb. Ch. 71; Brown v. Brown, 1 Barb. Ch. 189; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94; McNamara v. Dwyer, 7 Paige 239; Doolittle v. Lewis, 7 Johns. Ch. 45, 11 AmD 389; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340; Morrell v. Dickey, 1 Johns. Ch. 153; Brown v. Brown, 4 Edw. 343; Stewart v. O'Donnell, 2 Dem. Surr. 17; Matter of Jones, 3 Redf. Surr. 257.

N. C.—Morefield v. Harris, 126 N. C. 626, 36 SE 125; Brookshire v. Dubose, 55 N. C. 276; Carmichael v. Ray, 40 N. C. 365; Plummer v. Brandon, 40 N. C. 190; Hyman v. Gaskins, 27 N. C. 267; Lee v. Gause, 24 N. C. 440; Leake v. Gilchrist, 13 N. C. 73; Helme v. Sanders, 10 N. C. 563; Anonymous, 2 N. C. 355; Butts v. Price, 1 N. C. 289.

Oh.—In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648.

Pa.—Mansfield v. McFarland, 202 Pa. 173, 51 A 763; In re Viosca, 197 Pa. 280, 47 A 233, 51 LRA 876 [aff 29 PittsbLegJNS 299]; Sayre v. Helme, 61 Pa. 299 [overr McCullough v. Young, 1 Binn. 63, 4 Dall. 292, 1 L. ed. 838 (foll Glassell v. Wilson, 10 F. Cas. No. 5,477, 4 Wash. C. C. 59)]; Moore v. Fields, 42 Pa. 467; Græme v. Harris, 1 Dall. 456, 1 L. ed. 221; Mansfield v. McFarland, 24 Pa. Co. 591; Com. v. Ware, 6 Phila. 258.

naturally from the principle that letters of administration granted in one jurisdiction have no extra-territorial force,[39] and the rule is enforced even though there are no local creditors,[40] it is frequently stated that the rule is also based upon the principle that to allow a foreign representative to sue might be the means of exhausting or diverting local assets to the injury or inconvenience of local creditors.[41] Under this rule a foreign representative cannot maintain a special proceeding,[42] dismiss an appeal taken by decedent and pending at the time of his death,[43] or sue jointly with a local representative;[44] nor do statutes, providing that if a party dies pending an action the cause of which will survive, his personal representative may take upon himself the prosecution of the action, apply to a foreign representative in jurisdictions where a foreign representative is not authorized by statute to sue.[45]

By taking out ancillary letters a foreign representative becomes a domestic representative and entitled to sue.[46] In equity it is a settled rule that, where a foreign executor or administrator brings a suit without first obtaining ancillary letters in the jurisdiction in which he sues, a grant of letters subsequently obtained is sufficient to sustain the suit, if no objection on account of his incapacity had been taken; and if such objection had been taken, he could aver the subsequent grant of letters by an amended bill, and proceed with the suit the same as if he had been duly qualified at the commencement.[47] A similar rule has been applied in actions at law,[48] although there is also authority for the view that an action at law commenced by a foreign executor or administrator before obtaining ancillary letters cannot be sustained by a subsequent grant.[49]

[§ 2703] **b. Actions on Claims Not Subjects of**

Porto Rico.—Perez v. Aguerria, 1 Porto Rico Fed. 443.

R. I.—Conley v. Huntoon, 37 R. I. 343, 92 A 865.

S. C.—In re Mayo, 60 S. C. 401, 38 SE 634, 54 LRA 660; Heyward v. Williams, 57 S. C. 235, 35 SE 503; Stoddard v. Aiken, 57 S. C. 134, 35 SE 501; Dial v. Tappan, 20 S. C. 167; Thornton v. Dean, 19 S. C. 583, 45 AmR 796; Patterson v. Pagan, 18 S. C. 584; Tillman v. Walkup, 7 S. C. 60; Kirkpatrick v. Taylor, 44 S. C. L. 393; Collins v. Bankhead, 32 S. C. L. 25; Conover v. Chapman, 18 S. C. L. 436; King v. Clarke, 11 S. C. Eq. 611; Reynolds v. Torrance, 4 S. C. L. 59; Cockleton v. Davidson, 3 S. C. L. 15.

Tenn.—Campbell v. Hubbard, 11 Lea 6; Young v. O'Neal, 3 Sneed 55; Swancy v. Scott, 9 Humphr. 327; Sparks v. White, 7 Humphr. 86; Allsup v. Allsup, 10 Yerg. 283.

Tex.—Terrell v. Crane, 55 Tex. 81; Moseby v. Burrow, 52 Tex. 396; Simpson v. Foster, 46 Tex. 618; Davis v. Phillips, 32 Tex. 564; Green v. Rugely, 23 Tex. 539; Baber v. Houston Nat. Exch. Bank, (Civ. A.) 218 SW 156; Baber v. Galbraith, (Civ. A.) 186 SW 345; Pecos, etc., R. Co. v. Porter, (Civ. A.) 183 SW 98; Hynes v. Winston, (Civ. A.) 54 SW 1069; Summerhill v. McAlexander, 1 Tex. A. Civ. Cas. § 584.

Vt.—Church v. Church, 78 Vt. 360, 63 A 228; Abbott v. Coburn, 28 Vt. 663, 67 AmD 735; Anonymous, Brayt. 103; Dodge v. Wetmore, Brayt. 92.

Va.—Fugate v. Moore, 86 Va. 1045, 11 SE 1063, 19 AmSR 926; Dickinson v. McCraw, 4 Rand. (25 Va.) 158.

Wash.—In re Goss, 73 Wash. 330, 132 P 409.

W. Va.—Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 SE 90.

Wis.—Smith v. Peckham, 39 Wis. 414; Moir v. Dodson, 14 Wis. 279; Johnson v. Wilson, 1 Pinn. 65.

Eng.—In re Commercial Bank Corp., L. R. 5 Ch. 314; Whyte v. Rose, 3 Q. B. 493, 43 ECL 832, 114 Reprint 596; Vanquelin v. Bouard, 15 C. B. N. S. 341, 109 ECL 341, 143 Reprint 817; Carter's Case, Godb. 33, 78 Reprint 21; Atty.-Gen. v. Bouwens, 4 M. & W. 193, 150 Reprint 1390; Tyler v. Bell, 2 Myl. & C. 89, 14 EngCh 89, 40 Reprint 575, 1 Keen 826, 15 Eng Ch 826, 48 Reprint 525; Tourton v. Flower, 3 P. Wms. 369, 24 Reprint 1105; Atty.-Gen. v. Cockerell, 1 Price 165, 145 Reprint 1365; McMahon v. Rawlings, 16 Sim. 429, 39 EngCh 429, 60 Reprint 940; Lee v. Bank of England, 8 Ves. Jr. 44, 32 Reprint 267.

Ont.—White v. Hunter, 1 U. C. Q. B. 452.

[a] **Rule applicable to executors as well as administrators.**—Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. ed. 757; Scott v. Negro London, 3 Cranch (U. S.) 324, 2 L. ed. 455; Dixon v. Ramsay, 3 Cranch (U. S.) 319, 2 L. ed. 453; Moore v. Petty, 135 Fed. (U. S.) 668, 68 CCA 306 [certiorari den 197 U. S. 623, 25 SCt 800, 49 L. ed. 911]; Swatzel v. Arnold, 23 F. Cas. No. 13,682, Woolw. 383; Hobart v. Connecticut Turnp. Co., 15 Conn. 145; Champlin v. Tilley, 5 F. Cas. No. 2,586, 3 Day (Conn.) 303; Riley v. Riley, 3 Day (Conn.) 74, 3 AmD 260; Patterson v. Pagan, 18 S. C. 584. Contra Stevens v. Smart, 4 N. C. 83.

[b] **Representative cannot sue in federal court sitting in another state.**—Johnson v. Powers, 139 U. S. 156, 11 SCt 525, 35 L. ed. 112; Vaughan v. Northrup, 15 Pet. (U. S.) 1, 10 L. ed. 639; Duchesse d'Auxy v. Porter, 41 Fed. 68; Brownson v. Wallace, 4 F. Cas. No. 2,042, 4 Blatchf. 465; Mellus v. Thompson, 16 F. Cas. No. 9,405, 1 Cliff. 125.

[c] **The disability is not a want of title** but a personal incapacity of the foreign representative to sue. Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718; Louisville, etc., R. Co. v. Brantley, 96 Ky. 297, 28 SW 477, 16 KyL 91, 49 AmSR 299; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; In re Butler, 38 N. Y. 397; Smith v. Peckham, 39 Wis. 414. See also supra §§ 2689, 2690.

[d] **Where a state is divided** after letters of administration are granted, the representative cannot thereafter sue in the part constituting the new jurisdiction. Fenwick v. Sears, 1 Cranch (U. S.) 259, 2 L. ed. 101.

[e] **An action of ejectment** cannot be maintained by a foreign executor without proving the will and taking out local letters of administration. Sims v. Hodges, 65 Miss. 211, 3 S 457.

[f] **A suit to revoke an ancillary appointment** cannot be maintained by a foreign representative. In re Lewis, 32 La. Ann. 385.

39. See supra § 2671.

40. Putnam v. Pitney, 45 Minn. 242, 47 NW 790, 11 LRA 41; Taylor v. Syme, 162 N. Y. 513, 57 NE 83, 31 NYCivProc 1.

41. Kan.—Manley v. Mayer, 68 Kan. 377, 75 P 550, 1 AnnCas 825.

Mo.—Miller v. Hoover, 121 Mo. A. 568, 97 SW 210.

N. Y.—Doolittle v. Lewis, 7 Johns. Ch. 45, 11 AmD 389.

N. C.—Leake v. Gilchrist, 13 N. C. 73, 85.

Pa.—Sayre v. Helme, 61 Pa. 299.

Tex.—Terrell v. Crane, 55 Tex. 81. "The rule of law which prevents an administrator appointed in another State from maintaining actions in his representative capacity, in our Courts, is founded in reason, justice and good policy. It is also founded on reasons of a technical character; but the great object of the rule is, to prevent the assets being drawn out of our State, to the injury and inconvenience of domestic creditors, our own citizens, who may have contracted with the intestate, on the faith of those assets." Leake v. Gilchrist, supra.

42. Stewart v. O'Donnell, 2 Dem. Surr. (N. Y.) 17.

43. Warren v. Eddy, 13 AbbPr (N. Y.) 28.

44. Chadwick v. Stilphen, 105 Me. 242, 74 A 50; Lee v. Gause, 24 N. C. 440; Dickinson v. McCraw, 4 Rand. (25 Va.) 158.

45. Kropff v. Poth, 19 Fed. 200; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173; Vickery v. Beir, 16 Mich. 50.

[a] **Reason for rule.**—"It would be anomalous to allow a person to continue a suit which he is not authorized to begin." Kropff v. Poth, 19 Fed. 200, 201.

46. Dodge v. North Hudson, 188 Fed. 489; Wilmington Trust Co. v. De Paris, 28 Del. 565, 96 A 30; Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 12 LRA 237 [aff 53 Hun 394, 6 NYS 271, 17 NYCivProc 214].

47. U. S.—Black v. Henry G. Allen Co., 42 Fed. 618, 9 LRA 433; Giddings v. Green, 48 Fed. 489, 4 Hughes 446; Swatzel v. Arnold, 23 F. Cas. No. 13,682, 1 Woolw. 383.

Ala.—Erwin v. Hill, 51 Ala. 580.

Mich.—Gray v. Franks, 86 Mich. 382, 49 NW 130.

N. J.—Pelletreau v. Rathbone, 1 N. J. Eq. 331.

N. Y.—Buck v. Buck, 11 Paige 170; Goodrich v. Pendleton, 4 Johns. Ch. 549; Osgood v. Franklin, 2 Johns. Ch. 1, 7 AmD 513 [aff 14 Johns. 527].

"The incapacity of the foreign administrator not being radical, so as to entirely deprive him of power to proceed with his cause, the fact of his taking out letters in this State, was matter which he might aver by amendment, and maintain his suit thereon." Swatzel v. Arnold, 23 F. Cas. No. 13,682, 1 Woolw. 383, 389.

"He has an interest in the subject-matter, although he has no standing in court, and for that reason may support his suit, in order to defend his right, by authority afterwards acquired." Black v. Henry G. Allen Co., 42 Fed. 618, 625, 9 LRA 433.

48. Dodge v. North Hudson, 188 Fed. 489; Leahy v. Haworth, 141 Fed. 850, 73 CCA 84, 4 LRANS 657; Hodges v. Kimball, 91 Fed. 845, 34 CCA 103 [rev 87 Fed. 545]; McAleer v. Clay County, 38 Fed. 707; Dearborn v. Mathes, 128 Mass. 194; Henry v. Roe, 83 Tex. 446, 18 SW 806; Smith v. Peckham, 39 Wis. 414.

49. Wright v. Gilbert, 51 Md. 146; Jackson v. Scanland, 65 Miss. 481, 4 S 552; Mitchell v. Long, 1 N. B. 76.

Local Administration. A foreign representative may sue to collect a claim where, under the law of the state where the action must be brought, the claim could not be made the subject of local administration,[50] since in such cases the reasons for the rule prohibiting suits by foreign representatives do not apply.[51]

[§ 2704] **c. Actions in Personal Capacity Generally.** The rule that a representative cannot sue outside of the jurisdiction of his appointment applies only to actions which he must bring in his representative capacity and not where he sues as an individual.[52] If the cause of action is one which did not accrue to decedent in his lifetime but to the representative after the former's death, the representative may sue thereon in his own name,[53] and the fact that in such an action he styles himself as representative will not defeat the action but the designation may be disregarded as surplusage.[54] A foreign representative may sue in his own name on a contract made by himself with defendant,[55] to recover on an obligation executed or indorsed to him for money owing to the estate,[56] to foreclose a mortgage given to him as representative,[57] to recover damages for the infringement of a patent issued to him for an invention of decedent,[58] to recover from the principal obligor the amount of a debt for which decedent was surety and which the representative has paid,[59] to recover property of the estate to which he is personally entitled as a legatee[60] or title to which he has acquired by purchase from other legatees,[61] or to recover lands the title to which is vested in him by the will,[62] as in case of a devise to him in trust.[63] He may also sue to recover assets of the estate, title to which has vested in him as representative, but which have been removed from the state in which he was appointed,[64] or assets which an ancillary administrator has been ordered by the court to pay over to him.[65]

[§ 2705] **d. Actions on Judgments.** Where a representative has recovered a judgment in an action brought by him in his representative capacity in the jurisdiction of his appointment, he may sue thereon in his own name in another jurisdiction.[66] The reason for this rule is that such an action is

50. Doud v. Wolf, 1 Pittsb. (Pa.) 107.

51. Purple v. Whithed, 49 Vt. 187.

52. U. S.—Moore v. Kraft, 179 Fed. 685, 687, 103 CCA 231 [cit Cyc]; Graham v. Lybrand, 142 Fed. 109, 73 CCA 333; Moore v. Petty, 135 Fed. 668, 68 CCA 306 [certiorari den 197 U. S. 623, 25 SCt 800, 49 L. ed. 911]; Brown v. Equitable Life Assur. Soc., 112 Fed. 845; Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16; Griswold v. Central Vermont R. Co., 9 Fed. 797, 20 Blatchf. 212.

Cal.—Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474; Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423.

Ky.—Steitler v. Helenbush, 61 SW 701, 23 KyL 174.

Me.—Barrett v. Barrett, 8 Me. 346.

Miss.—Klein v. French, 57 Miss. 662; Rucks v. Taylor, 49 Miss. 552.

Mo.—Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410; Morton v. Hatch, 54 Mo. 408; Abbott v. Miller, 10 Mo. 141; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; State v. Kaime, 4 Mo. A. 479.

Nev.—Rogers v. Hatch, 8 Nev. 35.

N. J.—Morse v. King, 73 N. J. L. 548, 63 A 986, 118 AmSR 702; Green v. Heritage, 63 N. J. L. 455, 43 A 698 [rev on other grounds 64 N. J. L. 567, 46 A 634].

N. Y.—Petersen v. Chemical Bank, 32 N. Y. 21, 88 AmD 298, 29 HowPr 240; Nichols v. Smith, 7 Hun 580; Smith v. Webb, 1 Barb. 230; Robinson v. Crandall, 9 Wend. 425; Lawrence v. Lawrence, 3 Barb. Ch. 71.

N. C.—Beckham v. Wittkowski, 64 N. C. 464; Brookshire v. Dubose, 55 N. C. 276; Lee v. Gause, 24 N. C. 440.

Pa.—Moore v. Fields, 42 Pa. 467.

Tex.—Summerhill v. McAlexander, 1 Tex. A. Civ. Cas. § 584.

[a] **Although the right is derived under a foreign will,** if the representative sues in his own right no local administration need be taken out. Trecothick v. Austin, 24 F. Cas. No. 14,164, 4 Mason 16.

53. Moore v. Petty, 135 Fed. 668, 68 CCA 306 [certiorari den 197 U. S. 623, 25 SCt 800, 49 L. ed. 911]; Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474; Barrett v. Barrett, 8 Me. 346; Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71.

54. U. S.—Moore v. Kraft, 179 Fed. 685, 687, 103 CCA 231 [cit Cyc]; Moore v. Petty, 135 Fed. 668, 68 CCA 306 [certiorari den 197 U. S. 623, 22 SCt 800, 49 L. ed. 911]; Newberry v. Robinson, 36 Fed. 841.

Cal.—Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423.

Md.—Barton v. Higgins, 41 Md. 539.

Mass.—Talmage v. Chapel, 16 Mass. 71.

Miss.—Trotter v. White, 18 Miss. 607.

Mo.—State v. Kaime, 4 Mo. A. 479.

Tenn.—Page v. Cravens, 3 Head 383.

Tex.—Davis v. Phillips, 32 Tex. 564.

55. Barrett v. Barrett, 8 Me. 346; Wolf v. Sun Ins. Co., 75 Mo. A. 306; Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71.

56. Cal.—Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474.

Ind.—McCord v. Thompson, 92 Ind. 565.

Miss.—Trotter v. White, 18 Miss. 607.

N. J.—Morse v. King, 73 N. J. L. 548, 63 A 986, 118 AmSR 702.

N. Y.—Bright v. Currie, 7 N. Y. Super. 433, 10 NYLegObs 104.

[a] **Insurance policy assigned to administrator.**—Wolf v. Sun Ins. Co., 75 Mo. A. 306.

Actions on bills and notes see infra § 2706.

57. Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474; Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71; Tyler v. Charleston Rice Milling Co., 32 S. C. 598, 10 SE 1067.

58. Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 2 Hughes 492; Woodworth v. Hall, 30 F. Cas. No. 18,017, 1 Woodb. & M. 254; Smith v. Mercer, 3 PaLJR 444, 5 PaLJ 529; Connor v. New York, etc., R. Co., 28 R. I. 560, 68 A 481, 18 LRANS 1252, 13 AnnCas 1033.

59. Williams v. Moore, 9 Pick. 432; Mowry v. Adams, 14 Mass. 327.

60. U. S.—Lewis v. McFarland, 9 Cranch 151, 3 L. ed. 687.

Ky.—Chapman v. Headley, 4 SW 189, 8 KyL 957.

Mo.—Morton v. Hatch, 54 Mo. 408.

N. Y.—Smith v. Webb, 1 Barb. 230.

Eng.—McMahon v. Rawlings, 16 Sim. 429, 39 EngCh 429, 60 Reprint 940.

61. Smith v. Webb, 1 Barb. (N. Y.) 230.

62. Chapman v. Headley, 4 SW 189, 8 KyL 957.

63. Lewis v. McFarland, 9 Cranch (U. S.) 151, 3 L. ed. 687.

64. U. S.—Giddings v. Green, 48 Fed. 489.

Ark.—Clark v. Holt, 16 Ark. 257.

Ky.—Emerson v. Staton, 3 T. B. Mon. 116; Embry v. Millar, 1 A. K. Marsh. 300, 10 AmD 732.

La.—Crawford v. Graves, 15 La. Ann. 243; Wingate v. Wheat, 6 La. Ann. 238.

Miss.—Kilpatrick v. Bush, 23 Miss. 199.

Mo.—Miller v. Hoover, 121 Mo. A. 568, 97 SW 210.

N. C.—Beckham v. Wittkowski, 64 N. C. 464.

Tenn.—Keaton v. Campbell, 2 Humphr. 224.

[a] **Property removed from state before grant of administration.**—Where property of the estate has been removed to a foreign jurisdiction, the administrator may sue for it therein, in his own name and on his own legal title, although the removal was made before the letters of administration were granted. Plummer v. Brandon, 40 N. C. 190.

[b] **This principle does not apply where** the representative himself wrongfully removes the property from the jurisdiction where it properly belongs, since by so doing he forfeits his title thereto. Kilpatrick v. Bush, 23 Miss. 199.

65. State v. Kaime, 4 Mo. A. 479.

66. U. S.—Wilkins v. Ellett, 108 U. S. 256, 2 SCt 641, 27 L. ed. 718; Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315; Moore v. Kraft, 179 Fed. 685, 103 CCA 231; Brown v. Equitable L. Assur. Soc., 112 Fed. 845; Newberry v. Robinson, 36 Fed. 841.

Ala.—Green v. Foley, 2 Stew. & P. 441.

Ariz.—Arizona Cattle Co. v. Huber, 4 Ariz. 69, 33 P 555.

Ark.—McCarthy v. Troll, 90 Ark. 199, 118 SW 416.

Cal.—McCully v. Cooper, 114 Cal. 258, 46 P 82, 55 AmSR 66, 35 LRA 492; Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423.

Del.—De Paris v. Wilmington Trust Co., 104 A 691, 697, 1 ALR 1352 [cit Cyc].

Iowa.—Greasons v. Davis, 9 Iowa 219.

Ky.—Wayland v. Porterfield, 1 Metc. 638.

Md.—Barton v. Higgins, 41 Md. 539.

Mass.—Talmage v. Chapel, 16 Mass. 71.

Miss.—Rucks v. Taylor, 49 Miss. 552.

Mo.—Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410; Hall v. Harrison, 21 Mo. 227, 64 AmD 225; Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; State v. Kaime, 4 Mo. A. 479.

Nev.—Rogers v. Hatch, 8 Nev. 35.

N. J.—Green v. Heritage, 63 N. J. L. 455, 43 A 698 [rev on other grounds 64 N. J. L. 567, 46 A 634].

N. Y.—Newton v. Jay, 107 App. Div. 457, 95 NYS 413, 35 NYCivProc 89; Nichols v. Smith, 7 Hun 580;

brought by the representative in his personal capacity,[67] and indeed he is the only one could bring such an action, for an ancillary administrator, not being a party or privy to the judgment could not of course sue upon it.[68] It follows that the appointment of an ancillary representative does not preclude an action on the judgment by the foreign representative.[69]

A judgment in favor of decedent stands on a different basis, and the personal representative cannot sue thereon without taking out letters in the state where the action is to be brought.[70]

A foreign administrator de bonis non cannot sue on a judgment rendered in favor of his predecessor in the administration.[71]

[§ 2706] **e. Actions on Bills and Notes.** A foreign representative may sue in his own name on a negotiable bill or note belonging to his decedent's estate if it is payable to the bearer,[72] or if it is payable to the order of decedent and indorsed by him in blank,[73] or where the note matures after the death of decedent;[74] and the judgment recovered will be a bar to any subsequent proceeding against defendant on the note.[75] The action, however, is subject to any defense originally open to the promisor,[76] and as the note is the property of the estate, any proper claim which defendant has against the estate may be presented as a set-off in the action in the same manner as through the action were brought by plaintiff as representative.[77]

If the note is not negotiable or is made payable to the order of the payee and not indorsed an action thereon can be brought by the representative only in his representative capacity, and after taking out ancillary letters.[78]

A negotiable instrument payable to the representative in his official capacity may be the basis of an action by the representative anywhere;[79] and the same principle applies where an instrument is assigned to the representative in his capacity as such.[80]

Under a statute authorizing assignees to sue in their own names, an executor or administrator may assign a note to himself individually, and then sue on it in his individual name in any jurisdiction.[81]

Sending out of state for collection. Even if the executor or administrator cannot sue in a foreign jurisdiction on a note held by decedent, yet where he has acquired possession of it he becomes entitled to its control and proceeds, and he does not lose his right by sending it for collection to the state of the maker's residence, although ancillary administration has been granted there, and he may sue in such state to recover the proceeds of the note.[82]

[§ 2707] **f. Actions for Death.** The right of a foreign executor or administrator to sue for the death of his decedent depends on the terms of the statute giving a right of recovery and on whether or not such recovery constitutes assets of the estate.[83]

[§ 2708] **g. Statutory Authority to Sue in Representative Capacity—(1) In General.** In a number of jurisdictions the right to sue has been conferred on foreign representatives by statute.[84] Un-

Bright v. Currie, 7 N. Y. Super. 433, 10 NYLegObs 104; Lawrence v. Lawrence, 3 Barb. Ch. 71.

Pa.—Hare v. O'Brien, 233 Pa. 330, 82 A 475, 39 LRANS 430, AnnCas 1913B 624; Shakespeare v. Fidelity Ins., etc., Co., 97 Pa. 173; Moore v. Fields, 42 Pa. 467; Bloch v. Murphy, 21 Pa. Dist. 44.

Tenn.—Page v. Cravens, 3 Head 383.

Tex.—Cherry v. Speight, 28 Tex. 503.

Eng.—Crawford v. Whittal, Dougl. 4 note 1; Bonafous v. Walker, 2 T. R. 127, 100 Reprint 69.

"The law is that, after an administrator or receiver recovers judgment in the right of the deceased or insolvent, he may in his own right sue upon the new debt wherever he finds the debtor, and the addition of his title in the declaration is mere description which is rejected as surplusage." Moore v. Kraft, 179 Fed. 685, 686, 103 CCA 231.

[a] **Judgment for costs.**—A foreign administrator sued in the state of his appointment who prevails in the action and recovers judgment for costs may sue in another state on such judgment without filing an exemplified copy of his letters of administration. Green v. Heritage, 63 N. J. L. 455, 43 A 698 [rev on other grounds 64 N. J. L. 567, 46 A 634].

[b] **A representative who is made a party to a judgment recovered by decedent under statutes,** providing that he may be made a party and sue thereon in his own name, may sue in another jurisdiction in the same manner as if the judgment had been recovered by him personally. Greasons v. Davis, 9 Iowa 219.

[c] **If the foreign representative dies pending suit** on the judgment the action may be revived in the name of his representative. Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410.

[d] **Old cases overruled.**—"The old cases, in which it was holden that an administrator could not sue in his own right upon a judgment recovered by him as administrator, are overruled, and it is now settled that he may do so." Hall v. Harrison, 21 Mo. 227, 64 AmD 225.

67. Ala.—Green v. Foley, 2 Stew. & P. 441.

Cal.—Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423.

Md.—Barton v. Higgins, 41 Md. 539.

Mo.—Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410.

N. Y.—Newton v. Jay, 107 App. Div. 457, 95 NYS 413, 35 NYCivProc 89.

68. Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423; Talmage v. Chapel, 16 Mass. 71; Bloch v. Murphy, 21 Pa. Dist. 44; Davis v. Heralds of Liberty, 39 Pa. Co. 399.

69. Hare v. O'Brien, 233 Pa. 330, 82 A 475, 39 LRANS 430, AnnCas 1913B 624.

70. Miller v. Hoover, 121 Mo. A. 568, 97 SW 210; Summerhill v. McAlexander, 1 Tex. A. Civ. Cas § 584.

71. Davis v. Phillips, 32 Tex. 564.

72. U. S.—Griswold v. Central Vermont R. Co., 9 Fed. 797, 20 Blatchf. 212.

Me.—Gage v. Johnson, 20 Me. 437; Barrett v. Barrett, 8 Me. 353; Stearns v. Burnham, 5 Me. 261, 17 AmD 228.

Md.—Lucas v. Byrne, 35 Md. 485.

Mich.—Knapp v. Lee, 42 Mich. 41, 3 NW 244.

N. H.—Thompson v. Wilson, 2 N. H. 291.

N. J.—Mackintosh v. Gibbs, 79 N. J. L. 40, 74 A 708 [aff 81 N. J. L. 577, 80 A 554, AnnCas1912D 163].

N. Y.—Patchen v. Wilson, 4 Hill 57; Robinson v. Crandall, 9 Wend. 425.

Wis.—Sanford v. McCreedy, 28 Wis. 103.

Eng.—McNeilage v. Holloway, 1 B. & Ald. 218, 106 Reprint 80.

[a] **The reason for the rule** is that when the note comes lawfully into the representative's possession by virtue of his authority as the personal representative of decedent, he becomes the bearer, and may sue on it in his individual name. Griswold v. Central Vermont R. Co., 9 Fed. 797, 20 Blatchf. 212.

[b] **Contrary view.**—Kirkpatrick v. Taylor, 44 S. C. L. 393.

73. Gage v. Johnson, 20 Me. 437; Barrett v. Barrett, 8 Me. 353; Knapp v. Lee, 42 Mich. 41, 3 NW 244; Robinson v. Crandall, 9 Wend. (N. Y.) 425.

74. Giddings v. Green, 48 Fed. 489.

75. Knapp v. Lee, 42 Mich. 41, 3 NW 244.

76. Barrett v. Barrett, 8 Me. 353.

77. Knapp v. Lee, 42 Mich. 41, 3 NW 244; Young v. Cashion, 19 Ont. L. 491, 14 OntWR 717.

78. Knapp v. Lee, 42 Mich. 41, 3 NW 244.

79. McCord v. Thompson, 92 Ind. 565; Trotter v. White, 18 Miss. 607; Tittman v. Thornton, 107 Mo. 500, 17 SW 979, 16 LRA 410; Tyer v. Charleston Rice Milling Co., 32 S. C. 598, 10 SE 1067.

80. Rucks v. Taylor, 49 Miss. 552.

81. Lucas v. Byrne, 35 Md. 485.

82. Chamberlin v. Wilson, 45 Iowa 149.

83. See Death § 117.

84. U. S.—Stewart v. Griffith, 217 U. S. 323, 30 SCt 528, 54 L. ed. 782, 19 AnnCas 639 [aff 31 App. (D. C.) 29] (District of Columbia statute); Overby v. Gordon, 177 U. S. 214, 20 SCt 603, 44 L. ed. 741 [aff 13 App. (D. C.) 392]; Hayes v. Pratt, 147 U. S. 557, 13 SCt 503, 37 L. ed. 279; Lawrence v. Nelson, 143 U. S. 222, 12 SCt 440, 36 L. ed. 130 (Arkansas statute); U. S. v. Cox, 18 How. 103, 15 L. ed. 299 (District of Columbia statute); Kane v. Paul, 14 Pet. 33, 10 L. ed. 341; Cordingly v. Kennedy, 239 Fed. 645, 152 CCA 479; Provident Life, etc., Co. v. Fletcher, 237 Fed. 104 [aff 258 Fed. 584]; In re Kingsley, 160 Fed. 275; Beaumont v. Beaumont, 144 Fed. 288 (New Jersey statute); Leahy v. Haworth, 141 Fed. 850, 73 CCA 84, 4 LRANS 657 (Nebraska statute); Williams v. Camden Interstate R. Co., 138 Fed.

der these statutes a foreign representative may sue out an execution on a judgment rendered in favor of decedent in his lifetime,[85] or may prosecute an action commenced by decedent where the cause of action survives and no local representative has been appointed;[86] but such statutes do not confer upon foreign representatives any greater power in reference to property of the estate than is conferred by their letters of administration,[87] and do not authorize them to maintain any suit which they would not be authorized to bring in the court of the state where they were appointed.[88] Where under the statutes the right to sue is not general, it can be exercised only under the conditions[89] and with regard to the particular causes of action specified;[90] but a general right of action applies to actions for torts as well as those arising out of contract.[91] Statutes authorizing foreign representatives to sue do not oust the jurisdiction of probate courts to appoint ancillary representatives,[92] who when appointed have the superior right to sue in the jurisdiction of their appointment;[93] and such an appointment made after an action is instituted by a foreign representative may present a good defense to a further maintenance of the action,[94] although this is not invariably true,[95] and a substitution of the local ancillary representative is sometimes provided for.[96] In some states the statutes expressly restrict the right of a foreign representative to sue to cases where no local representative has been appointed.[97] Where there is no local representative, the right of a foreign domiciliary representative to

571 [aff 140 Fed. 985, 72 CCA 680] (Ohio statute); Cincinnati, etc., R. Co. v. Thiebaud, 114 Fed. 918, 52 CCA 538 (Ohio statute); Popp v. Cincinnati, etc., R. Co., 96 Fed. 465; Maysville St. R., etc., Co. v. Marvin, 59 Fed. 91, 8 CCA 21; Cheney v. Stone, 29 Fed. 885; Price v. Morris, 19 F. Cas. No. 11,414, 5 McLean 4 (Ohio statute); Blydenburgh v. Lowry, 3 F. Cas. No. 1,582, 4 Cranch C. C. 368; Eells v. Holder, 12 Fed. 668, 2 McCrary 622; Swatzel v. Arnold, 23 F. Cas. No. 13,682, Woolw. 383.

Ala.—Campbell v. Hughes, 144 Ala. 393, 42 S 42; Harris v. Moore, 72 Ala. 507; Hatchett v. Berney, 65 Ala. 39; Bell v. Nichols, 38 Ala. 678; Manly v. Turnipseed, 37 Ala. 522; Broughton v. Bradley, 34 Ala. 694, 73 AmD 474; Carr v. Wyley, 23 Ala. 821; Harrison v. Mahorner, 14 Ala. 829; Cloud v. Golightly, 5 Ala. 653.

Ark.—St. Louis, etc., R. Co. v. Cleere, 76 Ark. 377, 88 SW 995; Fairchild v. Hagel, 54 Ark. 61, 14 SW 1102; Clark v. Holt, 16 Ark. 257; Newton v. Cocke, 10 Ark. 169.

Colo.—Clark v. Tindolph, 185 P 648.

Del.—Fidelity Ins., etc., Co. v. Niven, 10 Del. 416.

D. C.—Weaver v. Baltimore, etc., R. Co., 21 D. C. 499; Western Union Tel. Co. v. Lipscomb, 22 App. 104.

Fla.—Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 S 637; Gordon v. Clarke, 10 Fla. 179; Sullivan v. Honacker, 6 Fla. 372; Blewitt v. Nicholson, 2 Fla. 200.

Ga.—Taylor v. McKee, 121 Ga. 223, 48 SE 943; Patterson v. Blanchard, 98 Ga. 518, 25 SE 572; Isbell v. Blanchard, 94 Ga. 678, 21 SE 720; Russell v. Hubbard, 76 Ga. 618; Thomas v. Morrisett, 76 Ga. 384; South Carolina R. Co. v. Nix, 68 Ga. 572; Mechanics', etc., Bank v. Harrison, 68 Ga. 463; Buck v. Johnson, 67 Ga. 82; Mansfield v. Turpin, 32 Ga. 260; Averitt v. Pope, 30 Ga. 660; Southwestern R. Co. v. Paulk, 24 Ga. 356; Swift v. Swift, 13 Ga. 140.

Ill.—Decker v. Patton, 120 Ill. 464, 11 NE 897 [aff 20 Ill. A. 210]; Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, 44 AmR 791 [aff 10 Ill. A. 404]; Hickox v. Frank, 102 Ill. 660; Bonnell v. Holt, 89 Ill. 71; Keefer v. Mason, 36 Ill. 406; Collins v. Ayers, 13 Ill. 358; Chicago Transit Co. v. Campbell, 110 Ill. A. 366; Walker v. Walker, 55 Ill. A. 118.

Ind.—Memphis, etc., Packet Co. v. Pikey, 142 Ind. 304, 40 NE 527; Thomasson v. Brown, 43 Ind. 203; Jeffersonville R. Co. v. Hendricks, 41 Ind. 48, 26 Ind. 228; Matlock v. Powell, 14 Ind. 378; Naylor v. Moody, 2 Blackf. 247.

Iowa.—Karrick v. Pratt, 4 Greene 144.

Kan.—Moore v. Jordan, 36 Kan. 271, 59 AmR 550, 13 P 337; Dunlap v. McFarland, 25 Kan. 488; Denny v. Faulkner, 22 Kan. 89; Ravenscraft v. Pratt, 22 Kan. 20; Cady v. Bard, 21 Kan. 667; Kansas Pac. R. Co. v. Cutter, 16 Kan. 568; Greenwalt v. Bastian, 10 Kan. A. 101, 61 P 513; Donifelser v. Heyl, 7 Kan. A. 606, 52 P 468.

Ky.—Swift v. Donahue, 104 Ky. 137, 46 SW 683, 20 KyL 446; Louisville, etc., R. Co. v. Brantley, 96 Ky. 297, 28 SW 477, 16 KyL 691, 49 AmSR 291; Marrett v. Babb, 91 Ky. 88, 15 SW 4, 12 KyL 652; Loval v. Johnson, 9 B. Mon. 556; Thomas v. White, 3 Litt. 177, 14 AmD 56; Huling v. Fort, 2 Litt. 193.

Md.—Wright v. Gilbert, 51 Md. 146; Mangum v. Webster, 7 Gill 78.

Minn.—Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503; Fogle v. Schaeffer, 23 Minn. 304; Fetz v. Clark, 7 Minn. 217.

Miss.—Sims v. Hodges, 65 Miss. 211, 3 S 457; Hope v. Hurt, 59 Miss. 174.

Nebr.—Bethel v. Pawnee County, 95 Nebr. 203, 145 NW 363; Jackson v. Phillips, 57 Nebr. 189, 77 NW 683; McAnulty v. McClay, 16 Nebr. 418, 20 NW 266.

N. Y.—Bostwick v. Carr, 165 App. Div. 55, 151 NYS 74.

Oh.—Work v. Massie, 6 Oh. 503; Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343; In re McCreight, 9 OhS&CP 454, 6 OhNP 481.

Okl.—Vinson v. Davis, 183 P 902.

S. D.—Germantown Trust Co. v. Whitney, 19 S. D. 108, 102 NW 304.

Tenn.—Smith v. Mabry, 7 Yerg. 26.

Wis.—Murray v. Norwood, 77 Wis. 405, 46 NW 499; Smith v. Peckham, 39 Wis. 414.

[a] **Corporation as administrator.**—The statute applies whether the person appointed is a corporation or a natural person. Germantown Trust Co. v. Whitney, 19 S. D. 108, 102 NW 304.

[b] **An action in a federal court** may be maintained by a foreign representative who has complied with the requirements of the statute of the state where the court sits. Provident Life, etc., Co. v. Fletcher, 258 Fed. 583 [aff 237 Fed. 104, and foll Beaumont v. Beaumont, 144 Fed. 288].

[c] **Repealed statute.**—In Tennessee the act of 1809 authorizing foreign representatives to sue (see Smith v. Mabry, 7 Yerg. 26) was repealed by the act of 1840. Williams v. Saunders, 5 Coldw. (Tenn.) 60.

85. Keefer v. Mason, 36 Ill. 406.

86. Noonan v. Bradley, 12 Wall. (U. S.) 121, 20 L. ed. 279.

87. Fairchild v. Hagel, 54 Ark. 61, 14 SW 1102; Jones v. Cliett, 114 Ga. 673, 40 SE 719; Pott v. Pennington, 16 Minn. 509; Sims v. Walden, 65 Miss. 211, 3 S 457.

[a] **Where special letters of administration are presented** in an action by a foreign administrator limiting his powers to specific property, they will not be extended beyond his letters. Taylor v. McKee, 121 Ga. 223, 48 SE 943.

88. Clark v. Holt, 16 Ark. 257; Jones v. Cliett, 114 Ga. 673, 40 SE 719; Moore v. Jordan, 36 Kan. 271, 13 P 337, 59 AmR 550.

89. Southwestern R. Co. v. Paulk, 24 Ga. 356; Knight v. Moline, etc., R. Co., 160 Iowa 160, 140 NW 839; Bethel v. Pawnee County, 95 Nebr. 203, 145 NW 363.

90. Brooks v. Southern Pac. Co., 148 Fed. 986 [aff 207 U. S. 463, 28 SCt 141, 52 L. ed. 297]; Maysville St. R., etc., Co. v. Marvin, 59 Fed. 91, 8 CCA 21; Louisville, etc., R. Co. v. Brantley, 96 Ky. 297, 28 SW 477, 16 KyL 691, 49 AmSR 291; Marrett v. Babb, 91 Ky. 88, 15 SW 4, 12 KyL 652; McAnulty v. McClay, 16 Nebr. 418, 20 NW 266; Colburn v. Latham, 32 S. D. 310, 143 NW 278.

[a] **Action relating to real estate.**—A foreign administrator cannot, under Prob. Code § 253, authorizing him to maintain actions in the state, maintain one to determine an adverse claim to real estate, one to maintain such an action, under Code Civ. Proc. § 675, being required to have an interest in the real estate, and Prob. Code § 253, vesting in an administrator an interest in the real estate belonging to the estate, not applying to foreign administrators. Colburn v. Latham, 32 S. D. 310, 143 NW 278.

91. Campbell v. Hughes, 144 Ala. 393, 42 S 42; Averitt v. Pope, 30 Ga. 660.

92. Broughton v. Bradley, 34 Ala. 694, 73 AmD 474; Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343; Brown v. Wright, 4 Yerg. (Tenn.) 57.

93. Ala.—Kennedy v. Kennedy, 8 Ala. 391.

Ga.—Smith v. Cuyler, 78 Ga. 654, 3 SE 406.

Ill.—Walker v. Walker, 55 Ill. A. 118.

Ky.—Conner v. Paul, 12 Bush 144.

Oh.—Purcell v. Heinberger, 3 Oh. Dec. (Reprint) 343.

[a] **Where a debtor has been appointed a representative,** he may plead his appointment in bar of an action brought by the foreign representative to collect the debt. Kennedy v. Kennedy, 8 Ala. 391.

94. Broughton v. Bradley, 34 Ala. 694, 73 AmD 474.

95. Campbell v. Hughes, 144 Ala. 393, 42 S 42.

[a] **In Alabama,** under Code (1896) § 359, authorizing foreign administrators complying with its provisions to maintain suits and recover property in the state, and § 360, providing that no suits brought by a foreign administrator shall be barred by the grant of letters of administration in the state, although the administrator appointed in the state may intervene, a foreign administrator complying with § 359 may sue to foreclose a mortgage on land in Alabama after the appointment of an administrator there. Campbell v. Hughes, 144 Ala. 393, 42 S 42.

96. Walker v. Welker, 55 Ill. A. 118 (proceeds of judgment are assets in hands of local representative).

97. Ark.—Gibson v. Ponder, 40 Ark. 195.

Ga.—Taylor v. McKee, 121 Ga. 223, 48 SE 943; Patterson v. Blanchard 98 Ga. 518, 25 SE 572

sue is superior to that of a foreign ancillary representative.[98]

If the foreign representative dies pending an action instituted by him, the action abates, and an administrator de bonis non cannot be substituted as a party.[99] But the administrator de bonis non may bring a new action.[1]

[§ 2709] **(2) Conditions of Exercise of Right—(a) Filing Letters Testamentary or of Administration.** Some of the statutes authorizing foreign representatives to sue make no distinction between such representatives and those appointed under their own laws;[2] but under others the foreign representative is required to file his original letters testamentary or of administration or an authenticated copy thereof in some court of the state where the action is brought.[3] This requirement, however, is merely to furnish evidence of plaintiff's representative character,[4] and may be complied with after the suit is instituted,[5] unless the statute expressly provides that such letters shall be filed before commencing the action.[6]

[§ 2710] **(b) Bond.** Under some of the statutes a foreign executor or administrator bringing an action in a state court is required to give a bond,[7] in some cases a bond for costs being required,[8] and in others the requirement being that before judgment can be rendered the executor or administrator must give a bond for the proper administration of the amount recovered.[9] The requirement of a bond may

Ill.—Walker v. Welker, 55 Ill. A. 118.

Kan.—Greenwalt v. Bastian, 10 Kan. A. 101, 61 P 513.

Ky.—Conner v. Paul, 12 Bush 144.

[a] **If the cause of action accrued to the foreign representative in his personal capacity** he may sue thereon notwithstanding a local representative has been appointed. Smith v. Cuyler, 78 Ga. 654, 3 SE 406.

98. Harrison v. Mahorner, 14 Ala. 829.

99. Isbell v. Blanchard, 94 Ga. 678, 21 SE 720; Jones v. Lamar, 77 Ga. 149.

1. Patterson v. Blanchard, 98 Ga. 518, 25 SE 572.

2. Fairchild v. Hagel, 54 Ark. 61, 14 SW 1102; Weaver v. Baltimore, etc., R. Co., 21 D. C. 499; Mangun v. Webster, 7 Gill (Md.) 78.

[a] **In Indiana** (1) it was formerly required, as a condition precedent to an action by a foreign representative, that his letters be recorded in the circuit court of the county in which the action is commenced. Naylor v. Moody, 2 Blackf. 247. (2) But a later statute dispensed with such condition precedent, and provided merely, as a rule of evidence, that when the authority of the representative was questioned a duly authenticated copy of his letters should be sufficient evidence of such authority. Upton v. Adams, 27 Ind. 432; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Jelly v. Stevens, 4 Ind. 510.

3. U. S.—Hayes v. Pratt, 147 U. S. 557, 13 SCt 503, 37 L. ed. 279; U. S. v. Cox, 18 How. 103, 15 L. ed. 299 (District of Columbia statute); Kane v. Paul, 14 Pet. 33, 10 L. ed. 341 [aff 3 F. Cas. No. 10,843, 5 Cranch C. C. 549] (District of Columbia statute); Cordingly v. Kennedy, 239 Fed. 645, 152 CCA 479; Lecouturier v. Ickelheimer, 205 Fed. 683 (New York statute); Beaumont v. Beaumont, 144 Fed. 288 (New Jersey statute).

Ala.—Campbell v. Hughes, 155 Ala. 591, 47 S 45; Campbell v. Hughes, 144 Ala. 393, 42 S 42; Harris v. Moore, 72 Ala. 507; Ferguson v. Morris, 67 Ala. 389; Hatchett v. Berney, 65 Ala. 39.

Colo.—Clark v. Tindolph, 185 P 648.

D. C.—Weaver v. Baltimore, etc., R. Co., 21 D. C. 499.

Fla.—Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 S 637; Sullivan v. Honacker, 6 Fla. 372.

Ga.—Jones v. Cliett, 114 Ga. 673, 40 SE 719; Russell v. Hubbard, 76 Ga. 618; Thomas v. Morrisett, 76 Ga. 384; Mechanics', etc., Bank v. Harrison, 68 Ga. 463; Buck v. Johnson, 67 Ga. 82; Turner v. Linam, 55 Ga. 253; Mansfield v. Turpin, 32 Ga. 260; Averitt v. Pope, 30 Ga. 660.

Ill.—Collins v. Ayers, 13 Ill. 358; Walker v. Welker, 55 Ill. A. 118.

Iowa.—Knight v. Moline, etc., R. Co., 160 Iowa 160, 140 NW 839; Karrick v. Pratt, 4 Greene 144.

Ky.—Smith v. Roach, 7 B. Mon. 17.

Md.—Mangun v. Webster, 7 Gill 78.

Minn.—Babcock v. Collins, 60 Minn. 73, 61 NW 1020, 51 AmSR 503; Fogle v. Schaeffer, 23 Minn. 304; Pott v. Pennington, 16 Minn. 509.

Miss.—Sims v. Hodges, 65 Miss. 211, 3 S 457; Hope v. Hurt, 59 Miss. 174.

N. J.—Morse v. King, 73 N. J. L. 548, 63 A 986, 118 AmSR 702; Buecker v. Carr, 60 N. J. Eq. 300, 47 A 34.

Wis.—Murray v. Norwood, 77 Wis. 405, 46 NW 499; Smith v. Peckham, 39 Wis. 414.

[a] **Propriety of requirement.**—"It is but an act of comity for the state to open its courts, so as to allow one clothed with power from a foreign authority to enter to assert the rights of his testator or intestate; having done so, it is not an unreasonable rule that she should require such foreign representative to produce properly authenticated evidence of the character in which he appears, for the safety and protection of its own citizens." Buck v. Johnson, 67 Ga. 82, 84.

[b] **Mode of authentication.**—If the statute is silent as to the mode of proof, the letters of a foreign executor or administrator must be authenticated in accordance with the federal statutes providing for the proof in one state of the records of the courts of other states. Hope v. Hurt, 59 Miss. 174.

[c] **Place of filing.**—The letters may be filed, under the statute, "in any county court in this state," and they need not be filed in the county in which the action is brought or in which the decedent left property. Murray v. Norwood, 77 Wis. 405, 408, 46 NW 499.

[d] **Unauthenticated copy without effect.**—Campbell v. Hughes, 155 Ala. 591, 47 S 45.

[e] **Effect of lack of authentication.**—That foreign letters of administration are not authenticated as required by N. Y. Dec. Est. § 45, to entitle the administrator to sue under N. Y. Code Civ. Proc. § 1836a, is ground for staying the suit, but not for dismissal. Lecouturier v. Ickelheimer, 205 Fed. 682.

[f] **Such requirement does not apply to** an action to enforce a contract made directly with the foreign executor. Morse v. King, 73 N. J. L. 548, 63 A 986, 118 AmSR 702.

4. Cordingly v. Kennedy, 239 Fed. 645, 152 CCA 479; Campbell v. Hughes, 155 Ala. 591, 47 S 45; Morgan v. Ownbey, (Del.) 100 A 411, 416 [cit Cyc]; Smith v. Peckham, 39 Wis. 414.

5. U. S.—Kane v. Paul, 14 Pet. 33, 10 L. ed. 341 [aff 3 F. Cas. No. 10,843, 5 Cranch C. C. 549]; Lecouturier v. Ickelheimer, 205 Fed. 683 (within twenty days under New York statute).

Ala.—Campbell v. Hughes, 155 Ala. 591, 47 S 45; Campbell v. Hughes, 144 Ala. 393, 42 S 42; Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Harris v. Moore, 72 Ala. 507; Hatchett v. Berney, 65 Ala. 39; Bell v. Nichols, 38 Ala. 678; Manly v. Turnipseed, 37 Ala. 522; Cloud v. Golightly, 5 Ala. 653.

Del.—Fidelity Ins., etc., Co. v. Niven, 10 Del. 416, 1 AmSR 150.

D. C.—Weaver v. Baltimore, etc., R. Co., 21 D. C. 499.

Fla.—Provident Life, etc., Co. v. Fletcher, 258 Fed. 583 [aff 237 Fed. 104, and foll Lecouturier v. Ickelheimer, 205 Fed. 683].

Ga.—Taylor v. McKee, 121 Ga. 223, 48 SE 943; Russell v Hubbard, 76 Ga. 618; South Carolina R. Co. v. Nix, 68 Ga. 572; Mechanics', etc., Bank v. Harrison, 68 Ga. 463; Buck v. Johnson, 67 Ga. 82; Turner v. Linam, 55 Ga. 253; Mansfield v. Turpin, 32 Ga. 260; Southwestern R. Co. v. Paulk, 24 Ga. 356; Swift v. Swift, 13 Ga. 140.

Ill.—Whitney v. Bohlen, 157 Ill. 571, 42 NE 162.

Ind.—Upton v. Adams, 27 Ind. 432; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Matlock v. Powell, 14 Ind. 378; Jelly v. Stevens, 4 Ind. 510; Naylor v. Moody, 2 Blackf. 247, 3 Blackf. 92.

Ky.—Wayland v. Porterfield, 1 Metc. 638; Loval v. Johnson, 9 B. Mon. 556; Smith v. Roach, 7 B. Mon. 17.

Mich. Gray v. Franks, 86 Mich. 382, 49 NW 130.

N. J.—Buecker v. Carr, 60 N. J. Eq. 300, 47 A 34.

Wis.—Smith v. Peckham, 39 Wis. 414.

Ont.—Johnston v. Guarantee, etc., Ins. Co., 17 Ont. L. 462, 11 OntWR 363, 12 OntWR 980.

[a] **Probate of the foreign will of a deceased mortgagee** may be made after a suit to foreclose has been commenced by his executor. Gray v. Franks, 86 Mich. 382, 49 NW 130.

6. Beaumont v. Beaumont, 144 Fed. 288; Fogle v. Schaeffer, 23 Minn. 304.

7. Cordingly v. Kennedy, 239 Fed. 645, 152 CCE 479; Harris v. Moore, 72 Ala. 507; McClellan v. Troendle, 99 SW 329, 30 KyL 611; Steitler v. Helenbush, 61 SW 701, 23 KyL 174; Swift v. Donahue, 104 Ky. 137, 46 SW 683, 20 KyL 446; Northwestern Mut. L. Ins. Co. v. Lowry, 13 KyL 205.

8. Newton v. Cocke, 10 Ark. 169; Walker v. Welker, 55 Ill. A. 118; Swift v. Donahue, 104 Ky. 137, 46 SW 683, 20 KyL 446.

[a] **Failure to file bond for costs should be pleaded in abatement.**—Newton v. Cocke, 10 Ark. 169.

9. Maysville St. R., etc., Co. v. Marvin, 59 Fed. 91, 8 CCA 21; Grayson v. Robertson, 122 Ala. 330, 25 S 229, 82 AmSR 80; Hatchett v. Berney, 65 Ala. 39; Fidelity Inc., etc., Co. v. Niven, 10 Del. 416, 1 AmSR 150; Wayland v. Porterfield, 1 Metc. (Ky.) 638; Adams v. Adams, 11 B. Mon. (Ky.) 77; Loval v. Johnson, 9 B. Mon. (Ky.) 556.

be waived,[10] and is waived by a failure to raise any objection based on the failure to furnish the bond.[11]

[§ 2711] **2. Waiver of Objection as to Incapacity.** One who is sued by a foreign executor or administrator may waive the objection that plaintiff has not capacity to sue[12] or has not complied with conditions on which his statutory right to sue depends.[13] It is usually considered that the objection is waived by failure to take it at the proper time and in the proper manner,[14] although it has been said that even if defendant has failed to raise the objection in any form by his pleading, it is still available to him on motion in arrest of judgment, or on error, if the record discloses the defect.[15]

[§ 2712] **3. Limitations.**[16] Where a foreign representative is authorized by statute to sue without taking out ancillary letters of administration, the statute of limitations begins to run against the right of action from the date of his foreign appointment,[17] but where ancillary letters must be taken out, the statute does not begin to run until the date of the ancillary appointment.[18] A foreign administrator should not be allowed to sue where the statute of limitations has run against a local administrator.[19]

[§ 2713] **4. Defenses.** In an action by a foreign representative on a cause of action accruing to decedent in his lifetime defendant is entitled to the same rights of defense as if the action had been instituted under local letters of administration.[20]

[§ 2714] **5. Parties.**[21] A domestic representative need not be made a party to an action brought by a representative appointed in another state, where the foreign representative is authorized by statute to sue;[22] and where a foreign representative takes out ancillary letters and brings an action in the ancillary jurisdiction, it is not necessary to make a foreign corepresentative who did not also take out ancillary letters a party.[23]

[§ 2715] **6. Pleading**[24]**—a. Declaration or Complaint.** Where foreign representatives are authorized by statute to sue, such actions are subject to the same rules of pleading as actions brought by domestic representatives.[25] Letters of administration may be pleaded with a profert where the representative is plaintiff,[26] and where a profert is made the effect is the same as if the letters were set out in the declaration and it is not necessary to aver in what state they were granted.[27] A complaint of a foreign executor is not demurrable because it does not set out a copy of the exemplification of his official bond and letters testamentary, where he has actually filed a duly authenticated copy of his appointment.[28] Where a foreign executor takes out ancillary letters and sues as an ancillary representative, it is sufficient for him to allege his ancillary appointment without alleging that the will has been admitted to probate.[29]

Where a foreign representative sues in his personal capacity,[30] and the facts alleged show that the action is sustainable in such capacity,[31] an averment of his official character may be rejected as surplusage.[32]

[a] **Where the representative sues in his personal capacity,** this bond is not required. Steitler v. Hellenbush, 61 SW 701, 23 KyL 174; Wayland v. Porterfield, 1 Metc. (Ky.) 638.

10. Thomas v. Green County, 159 Fed. 339, 89 CCA 405 [aff 211 U. S. 598, 29 SCt 168, 53 L. ed. 343]; Swift v. Donahue, 104 Ky. 137, 46 SW 683, 20 KyL 446.

11. Swift v. Donahue, 104 Ky. 137, 46 SW 683, 20 KyL 446.

12. Palm v. Howard, 102 SW 267, 1199, 31 KyL 316, 814.

13. Berlin v. Sheffield Coal, etc., Co., 124 Ala. 322, 26 S 933; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; Pope v. Waugh, 94 Minn. 502, 103 NW 500.

14. U. S.—Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Hodges v. Kimball, 91 Fed. 845, 34 CCA 103; McAleer v. Clay County, 38 Fed. 707; Champlin v. Tilley, 5 F. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

Ala.—Johnson v. Kyser, 127 Ala. 309, 27 S 784; Berlin v. Sheffield Coal, etc., Co., 124 Ala. 322, 26 S 933; Cloud v. Golightly, 5 Ala. 653.

Conn.—James v. Morgan, 36 Conn. 348.

Fla.—Sullivan v. Honacker, 6 Fla. 372.

Ill.—Collins v. Ayers, 13 Ill. 358; Dye v. Gritton, 29 Ill. A. 54.

Iowa.—Sparks v. National Masonic Acc. Assoc., 100 Iowa 458, 69 NW 678; McClure v. Bates, 12 Iowa 77.

Ky.—Palm v. Howard, 102 SW 267, 31 KyL 316; Louisville, etc., R. Co. v. Brantley, 96 Ky. 297, 28 SW 477, 16 KyL 691, 49 AmSR 291; Northwestern Mut. L. Ins. Co. v. Lowry, 20 SW 607, 14 KyL 600, 13 KyL 205.

La.—Bertron v. Stuart, 43 La. Ann. 1171, 10 S 295; Wingate v. Wheat, 6 La. Ann. 238.

Md.—Sasscer v. Young, 6 Gill & J. 243.

Mass.—Dearborn v. Mathes, 128 Mass. 194; Langdon v. Potter, 11 Mass. 313.

Minn.—Pope v. Waugh, 94 Minn. 502, 103 NW 500.

Mo.—Gregory v. McCormick, 120 Mo. 657, 25 SW 565; May v. Burk, 80 Mo. 675; Wright v. Wayland, (A.) 188 SW 928 [cit Cyc]; Sommer v. Franklin Bank, 108 Mo. A. 490, 83 SW 1025.

N. Y.—Robbins v. Wells, 24 N. Y. Super. 666, 18 AbbPr 191, 26 HowPr 15.

S. C.—Patterson v. Pagan, 18 S. C. 584.

Wis.—Smith v. Peckham, 39 Wis. 414; Sanford v. McCreedy, 28 Wis. 103; Johnson v. Wilson, 1 Pinn. 65.

[a] **This is true, even though** the failure to raise the objection within the proper time was due to the fact that defendant supposed that plaintiff had taken out ancillary letters, if by the exercise of ordinary diligence he might have ascertained the fact in due time. James v. Morgan, 36 Conn. 348.

[b] **On appeal** it will be presumed that plaintiff was duly authorized to sue, where no objection was made on the trial. Bertron v. Stuart, 43 La. Ann. 1171, 10 S 295.

[c] **After the jury is sworn** it is too late to move to dismiss the suit of a nonresident executor because he has not filed his letters testamentary. Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52.

Manner of pleading objection see infra § 2716.

15. Vickery v. Beir, 16 Mich. 50.

16. See generally Limitations of Actions [25 Cyc 963].

17. Bell v. Nichols, 38 Ala. 678; Manly v. Turnipseed, 37 Ala. 522.

18. Hobart v. Connecticut Turnp. Co., 15 Conn. 145.

19. Walker v. Allan Line SS. Co., 44 N. S. 410.

20. Russell v. Hubbard, 76 Ga. 618.

21. See generally Parties [30 Cyc 1].

22. Isbill v. Blanchard, 94 Ga. 678, 21 SE 720.

23. Lawrence v. Townsend, 88 N. Y. 24.

24. See generally Pleading [31 Cyc 1].

25. Collins v. Ayers, 13 Ill. 358; Newton v. Jay, 107 App. Div. 457, 95 NYS 413, 35 NYCivProc 89.

[a] **Sufficient complaint in action on mortgage.**—The complaint of foreign executors, in a suit to enforce a mortgage lien, shows ownership in them as trustees of the debt sued on, without setting out the will of their testator, it alleging that a debt and the mortgage securing it were assigned to their testator; that after his death they, as his executors, recovered judgment against the mortgagors, establishing their liability and the extent thereof; that by virtue of the provisions of the will the mortgage, security, claim, and judgment became part of the residuary estate, which passed to them as trustees; and that the claim, judgment, and mortgage are now owned by them as trustees. Newton v. Jay, 107 App. Div. 457, 95 NYS 413, 35 NYCivProc 89.

Pleading in actions by or against representatives generally see supra §§ 2065–2161.

26. Collins v. Ayers, 13 Ill. 358.

27. Carr v. Wyley, 23 Ala. 821.

28. Cordingly v. Kennedy, 239 Fed. 645, 152 CCA 479.

29. Leland v. Manning, 4 Hun (N. Y.) 7.

30. See supra §§ 2704–2706.

31. See Brownson v. Wallace, 4 F. Cas. No. 2,042, 4 Blatchf. 465 (where a foreign administrator sued in his official character upon a promissory note, but there were no facts alleged which would sustain the action in his individual capacity, although the circumstances were such that the court thought he could have recovered in that capacity under proper pleadings, and on demurrer it was found that he had no right to sue in his official character, and the demurrer was sustained).

32. U. S.—Newberry v. Robinson, 36 Fed. 841.

Cal.—Lewis v. Adams, 70 Cal. 403, 11 P 833, 59 AmR 423.

Md.—Barton v. Higgins, 41 Md. 539.

Mass.—Talmage v. Chapel, 16 Mass. 71.

Miss.—Trotter v. White, 18 Miss. 607.

Mo.—State v. Kaime, 4 Mo. A. 479.

[§ 2716] **b. Plea or Answer.** Where foreign representatives are not authorized to sue, the fact that plaintiff is a foreign representative should ordinarily be pleaded in abatement,[33] and if not so pleaded will be waived;[34] but if the fact appears upon the face of the complaint the objection may be taken by demurrer,[35] and will be waived if not so taken.[36] Accordingly, a motion to dismiss a suit because plaintiff was appointed administrator in another state is too late after a plea on the merits.[37] In equity it has been held that, where the bill sets forth affirmatively, as the foundation of the right to sue, a foreign grant of letters, the objection may be raised at the hearing on the merits, under an answer denying all the allegations of the bill, but not specifically referring to plaintiff's incapacity to sue.[38] Where a foreign representative is authorized to sue, his right to do so can be questioned only by a plea under oath denying his representative capacity;[39] but defendant may by demanding oyer of the letters and demurring to the declaration to take advantage of any material variance between the letters produced and the statement of them in the declaration.[40] Where a foreign representative may or may not sue according to the circumstances of the case, a plea that he is a foreign representative is deficient unless it also shows that the facts were such that he was not authorized to sue.[41] If plaintiff's representative capacity is not questioned and the only objection is that he has not complied with some statutory requirement this fact should be pleaded in abatement,[42] unless specially pleaded, the objection is waived.[43]

[§ 2717] **7. Proof of Representative Capacity.** The representative must prove his representative capacity at the trial if it has been put in issue by defendant,[44] but otherwise such proof is not necessary.[45] After the filing of an exemplification of letters of administration of a foreign administrator, such exemplification is admissible in evidence,[46] although not accompanied by an exemplification of the proceedings appointing plaintiff administrator.[47] It is sometimes provided by statute that a duly authenticated copy of the foreign letters is sufficient proof.[48] In the absence of statute the fact is sufficiently established by the production of plaintiff's foreign letters,[49] or of a certified copy of the record of the probate court and a certificate of the probate judge to the effect that such letters were issued.[50] Where a court of a sister state had power, on discharge of a public administrator, to substitute another as administrator, an order of substitution is conclusive in suit by the substituted administrator.[51]

[§ 2718] **8. Judgment.** A statute providing that no judgment in favor of a foreign executor or administrator shall be rendered until the foreign representative shall first have given ten days published notice of the pendency of the action is for the benefit of those who hold adversary interests, more particularly local creditors, and can be invoked only by those whose rights might be affected by the omission.[52] A failure to give such notice is not a jurisdictional defect but a mere irregularity, and cannot be made a ground of attack on the judgment by a defendant who was duly served with process and contested the action on the merits.[53]

[§ 2719] **9. Review.**[54] If an issue as to the right of a foreign executor or administrator to sue has been raised in the trial court and determined in favor of plaintiff, it is questionable whether the judgment is reversible on the ground of plaintiff's lack of capacity to sue.[55]

[§ 2720] **K. Actions against Foreign Representatives—1. Liability to Suit—a. In Representative Capacity—(1) General Rule.** The general rule is that an executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction,[56] nor can an action pending against decedent at the time of his

S. C.—Jerkowski v. Marco, 56 S. C. 241, 34 SE 386.
Tenn.—Page v. Cravens, 3 Head 383.
Tex.—Davis v. Phillips, 32 Tex. 564.
Eng.—Crawford v. Whittal, Doug. 4 note 1.

33. McAleer v. Clay County, 38 Fed. 707; Johnson v. Wilson, 1 Pinn. (Wis.) 65.

34. McAleer v. Clay County, 38 Fed. 707; Johnson v. Wilson, 1 Pinn. (Wis.) 65.

35. U. S.—Duchess d'Auxy v. Porter, 41 Fed. 68.
Ky.—Palm v. Howard, 102 SW 267, 31 KyL 316.
Mich.—Vickery v. Beir, 16 Mich. 50.
Minn.—Pope v. Waugh, 94 Minn. 502, 103 NW 500.
Mo.—Gregory v. McCormick, 120 Mo. 657, 25 SW 565.
N. Y.—Robbins v. Wells, 24 N. Y. Super. 666, 18 AbbPr 191, 26 HowPr 15; Farrington v. American L. & T. Co., 9 NYSuppl 433, 18 NYCivProc 135.
Wis.—Moir v. Dodson, 14 Wis. 279.

36. Gregory v. McCormick, 120 Mo. 657, 21 SW 565; Robbins v. Wells, 24 N. Y. Super. 666, 18 AbbPr 191, 26 HowPr 15.

37. McGrew v. Browder, 2 Mart. N. S. (La.) 17.

38. Mills v. Knapp, 39 Fed. 592.

39. Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Matlock v. Powell, 14 Ind. 378; Hope v. Hurt, 59 Miss. 174.

[a] **Allegation of removal from state of appointment.**—In a suit prosecuted by an administrator appointed in Arkansas, an answer alleging his removal from Arkansas to Oklahoma after his appointment, but not alleging any order by the appointing court vacating or revoking his letters, did not make an issue on his capacity to maintain an action in Oklahoma. Chicago, etc., R. Co. v. Forrester, (Okl.) 177 P 593.

40. Collins v. Ayers, 13 Ill. 358.

41. Church v. Church, 78 Vt. 360, 63 A 228.

42. Smith v. Peckham, 39 Wis. 414.

[a] **A plea under oath is not necessary** where the only objection is that he has not filed an authenticated copy of his foreign appointment. Hope v. Hunt, 59 Miss. 174.

43. Berlin v. Sheffield Coal, etc., Co., 124 Ala. 322, 26 S 933; Pope v. Waugh, 94 Minn. 502, 103 NW 500.

44. McCarthy v. Troll, 90 Ark. 199, 118 SW 416; Collins v. Ayers, 13 Ill. 358; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228.

45. Union R., etc., Co. v. Shacklet, 119 Ill. 232, 10 NE 896; Chicago Legal News Co. v. Browne, 103 Ill. 317; Collins v. Ayers, 13 Ill. 358; Dye v. Gritton, 29 Ill. A. 54; Upton v. Adams, 27 Ind. 432; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Matlock v. Powell, 14 Ind. 378; Jelly v. Stevens, 4 Ind. 510.

46. Taylor v. McKee, 121 Ga. 223, 48 SE 943.

47. Taylor v. McKee, 121 Ga. 223, 48 SE 943.

48. Collins v. Ayers, 13 Ill. 358; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Jelly v. Stevens, 4 Ind. 510; Mangun v. Webster, 7 Gill (Md.) 78.

49. Cheney v. Stone, 29 Fed. 885.

50. Carmichael v. Saint, 16 Ark. 28. So also Smith v. Mabry, 7 Yerg. (Tenn.) 26 (copy and certificates sufficient under statute).

51. McCarthy v. Troll, 90 Ark. 199, 118 SW 416.

52. Cordingly v. Kennedy, 239 Fed. 645, 152 CCA 479.

53. Cordingly v. Kennedy, 229 Fed. 645, 152 CCA 479.

54. **In actions by or against executors or administrators generally** see supra §§ 2258–2267.

55. Smith v. Peckham, 39 Wis. 414.

56. U. S.—Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Lackner v. McKechney, 252 Fed. 403, 164 CCA 327; Thorburn v. Gates, 225 Fed. 613; Courtney v. Pradt, 160 Fed. 561, 87 CCA 463 [app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398]; Courtney v. Pradt, 135 Fed. 818 [aff 160 Fed. 561, 87 CCA 463 (app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398)]; Skiff v. White, 127 Fed. 175; Wilson v. Smith, 126 Fed. 916, 61 CCA 446 [aff 117 Fed. 707]; Filer, etc., Co. v. Rainey, 120 Fed. 718; Lewis v. Parrish, 115 Fed. 285, 53 CCA 77; Scruggs v. Scruggs, 105 Fed. 28; Security Ins. Co. v. Taylor, 21 F. Cas. No. 12,607, 2 Biss. 446; Mellus v. Thompson, 16 F. Cas. No. 9,405, 1 Cliff. 125; Caldwell v. Harding, 4 F. Cas. No. 2,301 5 Blatchf. 501; Dent v. Ashley, 7 F. Cas. No. 3,809a, Hempst. 54; Bryan

death be revived against a foreign representative of his estate.[57]

Personal service of process on a foreign executor or administrator within the state where an action is brought does not confer upon the courts of such state jurisdiction to entertain the action.[58]

Consent to be sued. It has been held that a foreign executor or administrator may waive his exemption from liability to suit,[59] but there is also authority for the view that a foreign representative cannot even voluntarily submit a suit against him in his representative capacity,[60] and if he does so a judgment rendered against him will not bind the estate,[61] or estop him from disputing the claim on which the action is brought when sued thereon in his own jurisdiction.[62]

v. McGee, 4 F. Cas. No. 2,066, 2 Wash. C. C. 337.

Ala.—Warrior Coal, etc., Co. v. Augusta Nat. Bank, 53 S 997; Jefferson v. Beall, 117 Ala. 436, 23 S 44, 67 AmSR 177; Hatchett v. Berney, 65 Ala. 39.

Ark.—Greer v. Ferguson, 56 Ark. 324, 19 SW 966; Clopton v. Booker, 27 Ark. 482.

Colo.—Falke v. Terry, 32 Colo. 85, 75 P 425.

Conn.—Russell v. Hooker, 67 Conn. 24, 34 A 711, 35 LRA 495; Hedenberg v. Hedenberg, 46 Conn. 30, 33 AmR 10; Holcomb v. Phelps, 16 Conn. 127.

D. C.—Jordan v. Landram, 35 App. 89; Bryan v. Curtis, 30 App. 234; Plumb v. Bateman, 2 App. 156; U. S. v. Wyman, 13 D. C. 368 [rev on other grounds 109 U. S. 654, 3 SCt 417, 27 L. ed. 1068].

Fla.—Sloan v. Sloan, 21 Fla. 589; Crolly v. Clark, 20 Fla. 849; Gordon v. Clarke, 10 Fla. 179.

Ga.—Jackson v. Johnson, 34 Ga. 511, 89 AmD 263; Davis v. Smith, 5 Ga. 274, 48 AmD 279.

Ill.—Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Barber v. Keiser, 202 Ill. A. 377 [writ of error dism 279 Ill. 287, 116 NE 706].

Iowa.—Snyder v. Hochstetler, 88 Iowa 621, 55 NW 573.

Ky.—McClellan v. Troendle, 99 SW 329, 30 KyL 611; Baker v. Smith, 3 Metc. 264; Fletcher v. Sanders, 7 Dana 345, 32 AmD 96; Curle v. Moor, 1 Dana 445.

Mass.—De Veer v. Pierson, 222 Mass. 167, 110 NE 154; Beaman v. Elliot, 10 Cush. 172; Norton v. Palmer, 7 Cush. 523; Fay v. Haven, 3 Metc. 109; Campbell v. Sheldon, 13 Pick. 8; Borden v. Borden, 5 Mass. 67, 4 AmD 32; Goodwin v. Jones, 3 Mass. 514, 3 AmD 173.

Miss.—Cutrer v. Tennessee, 98 Miss. 841, 54 S 434, 35 LRANS 333, AnnCas1913B 344; Riley v. Moseley, 44 Miss. 37; Boyd v. Lambeth, 24 Miss. 433; Winter v. Winter, Walk. 211.

Mo.—Rentschler v. Jamison, 6 Mo. A. 135.

Nebr.—Burton v. Williams, 63 Nebr. 431, 88 NW 765; Creighton v. Murphy, 8 Nebr. 349, 1 NW 138.

N. J.—Durie v. Blauvelt, 49 N. J. L. 114, 6 A 312; Babbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18; Holzer v. Thomas, 69 N. J. Eq. 515, 61 A 154; Cocks v. Varney, 42 N. J. Eq. 514, 8 A 722; Van Gieson v. Banta, 40 N. J. Eq. 14; Van Dyke v. Van Dyke, 36 N. J. Eq. 521 [aff 38 N. J. Eq. 280]; Porter v. Trail, 30 N. J. Eq. 106; Brownlee v. Lockwood, 20 N. J. Eq. 239.

N. Y.—Holmes v. Camp, 219 N. Y. 359, 114 NE 841; Bergmann v. Lord, 194 N. Y. 70, 86 NE 828 [aff 122 App. Div. 921 mem, 107 NYS 1121 mem]; Hopper v. Hopper, 125 N. Y. 400, 26 NE 457, 12 LRA 237 [aff 53 Hun 394, 6 NYS 271, 17 NYCivProc 214, and rev 3 NYS 640]; Lyon v. Park, 111 N. Y. 350, 18 NE 863, 16 NYCivProc 109 [aff 55 N. Y. Super. 539]; Williams v. Fischlein, 144 App. Div. 244, 129 NYS 129; Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NY AnnCas 56; Murphy v. Hall, 38 Hun 528; Field v. Gibson, 20 Hun 274; In re Webb, 11 Hun 124; Metcalf v. Clark, 41 Barb. 45; Vermilya v. Beatty, 6 Barb. 429; Kanter v. Peyser, 51 N. Y. Super. 441; Fischer v. Fischer, 50 N. Y. Super. 74; Ferguson v. Harrison, 27 Misc. 380, 58 NYS 850; Williams v. Fischlein, 144 App. Div. 244, 129 NYS 129; Hankinson v. Page, 3 HowPrNS 323.

N. C.—Davidson County First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515; Brookshire v. Dubose, 55 N. C. 276.

Oh.—Pedan v. Robb, 8 Oh. 227; Netting v. Strickland, 18 Oh. Cir. Ct. 136, 9 Oh. Cir. Dec. 841.

S. C.—Garden v. Hunt, 15 S. C. Eq. 42.

Tenn.—Campbell v. Hubbard, 11 Lea 6; Beeler v. Dunn, 3 Head 87, 75 AmD 761; Young v. O'Neal, 3 Sneed 55; Swancy v. Scott, 9 Humphry. 327; Sparks v. White, 7 Humphr. 86; George v. Lee, 6 Humphr. 61; Allsup v. Allsup, 10 Yerg. 283; State v. Fulton, (Ch.) 49 SW 297.

Tex.—Baber v. Houston Nat. Exch. Bank, (Civ. A.) 218 SW 156; Baber v. Galbraith, (Civ. A.) 186 SW 345.

Va.—Fugate v. Moore, 86 Va. 1045, 11 SE 1063, 19 AmSR 926.

Wash.—In re Goss, 73 Wash. 330, 132 P 409.

W. Va.—Oney v. Ferguson, 41 W. Va. 568, 23 SE 710; Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 SE 90.

Eng.—Flood v. Patterson, 29 Beav. 295, 54 Reprint 640; Silver v. Stein, 1 Drew. 295, 9 EngL&Eq 216, 61 Reprint 465; Lowe v. Farlie, 2 Madd. 101, 56 Reprint 272; Logan v. Fairlie, 2 Sim. & St. 284, 1 EngCh 284, 57 Reprint 355, 1 Myl. & C. 59, 13 EngCh 59, 40 Reprint 298; Jauncy v. Sealey, 1 Vern. Ch. 397, 23 Reprint 541.

"The remedy against a foreign administrator, in his representative character, to charge the assets of his intestate for a debt or liability of the decedent, is governed by the law of the jurisdiction where he was appointed, and must be pursued in the legal tribunals of the state or county where the decedent resided at the time of his death, and where administration was granted." Lyon v. Park, 111 N. Y. 350, 18 NE 863.

"Neither the common law, the law of nations, nor the statutes of this state permit a suit to be maintained in our courts against an executor or administrator who has obtained his letters testamentary or of administration from the courts of another state." Sloan v. Sloan, 21 Fla. 589.

[a] **Federal courts** sitting in one state apply the general rule as to suits against representatives appointed in another state. Filer, etc., Co. v. Rainey, 120 Fed. 718; Caldwell v. Harding, 4 F. Cas. No. 2,301, 5 Blatchf. 501, 4 F. Cas. No. 2,302, 1 Lowell 326.

[b] **Even local creditors cannot sue** a foreign administrator, although he voluntarily moves his residence into the jurisdiction and brings foreign assets with him. Bryan v. McGee, 4 F. Cas. No. 2,066, 2 Wash. C. C. 337.

[c] **Representative forcibly brought into state.**—A court cannot acquire jurisdiction of a foreign executor by forcibly bringing him into a suit instituted in the state. Warrior Coal, etc., Co. v. Augusta Nat. Bank, (Ala.) 53 S 997.

[d] **A judgment** rendered against a foreign administrator is of no force in the state of his appointment. Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].

[e] **The filing of a foreign will** in the state does not render the executor named therein liable to be sued as such. Clark v. Webster, (Tex. Civ. A.) 94 SW 1088.

[f] **Enforcement of judgment against ancillary administrator.**—Where an ancillary administrator's powers were limited by statute of the state of appointment to the defense of a suit against the intestate, the creditor on recovering judgment was not entitled to proceed on the judgment against the domiciliary administrator in another state. Corning First Nat. Bank v. Dowdy, 175 Mo. A. 478, 161 SW 859.

[g] **In Pennsylvania** the rule is "that a foreign executor within the jurisdiction of our courts is liable to suit by a resident creditor of his decedent, and such suit will be sustained unless it trenches unduly on the jurisdiction of another court already attached, or would expose parties subject to such jurisdiction to inequitable burdens." Laughlin v. Solomon, 180 Pa. 177, 183, 36 A 704, 57 AmSR 603 [rev 5 Pa. Dist. 282, and appr Mothland v. Wireman, 3 Penr. & W. 185, 33 AmD 71]; Brodie v. Bickley, 2 Rawle 431; Evans v. Tatem, 9 Serg. & R. 252, 11 AmD 717; Swearinger v. Pendleton, 4 Serg. & R. 389 [expl Magraw v. Irwin, 87 Pa. 139, and foll Warren Timber Co. v. Percy, 20 Pa. Dist. 430; Yeakel v. Brands, 9 Pa. Dist. 49].

57. McGrath v. Weiller, 98 App. Div. 291, 90 NYS 420; Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NYAnnCas 56; In re Webb, 11 Hun (N. Y.) 124; Lampton v. Nichols, 2 Cinc. Super. (Oh.) 55; Conley v. Huntoon, 37 R. I. 343, 92 A 865.

58. Scruggs v. Scruggs, 105 Fed. 28; Security Ins. Co. v. Taylor, 21 F. Cas. No. 12,607, 2 Biss. 446; Rentschler v. Jamison, 6 Mo. A. 135; Muller v. Leeds, 52 N. J. L. 366, 19 A 261.

Where representative liable to suit see infra § 2725.

59. U. S.—Lackner v. McKechney, 252 Fed. 403, 164 CCA 327.

Ky.—Palm v. Howard, 102 SW 267, 31 KyL 316; Moss v. Rowland, 3 Bush 505; Davis v. Connelly, 4 B. Mon. 136.

N. J.—Babbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18; Newark Sav. Inst. v. Jones, 35 N. J. Eq. 406.

Oh.—Netting v. Strickland, 18 Oh. Cir. Ct. 136, 9 Oh. Cir. Dec. 841.

Tenn.—Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 SW 766.

60. Ala.—Jefferson v. Beall, 117 Ala. 436, 23 S 44, 67 AmSR 177.

Ark.—Greer v. Ferguson, 56 Ark. 324, 19 SW 966.

Fla.—Sloan v. Sloan, 21 Fla. 589.

Ill.—Judy v. Kelley, 11 Ill. 211, 50 AmD 455.

Mont.—Braithwaite v. Harvey, 14 Mont. 208, 36 P 38, 43 AmSR 625, 27 LRA 101.

N. Y.—Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NYAnn Cas 56.

Wash.—In re Goss, 73 Wash. 330, 132 P 409.

[a] **On the death of a defendant pendente lite** his representative appointed in another state cannot appear and defend the action. Greer v. Ferguson, 56 Ark. 324; Flandrow v. Hammond, 13 App. Div. 325, 43 NYS 143, 4 NYAnnCas 56.

61. Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095; Judy v. Kelley, 11 Ill. 211, 50 AmD 455; Barber v. Keiser, 202 Ill. A. 377 [writ of error dism 279 Ill. 287, 116 NE 706].

62. Braithwaite v. Harvey, 14 Mont. 208, 36 P 38, 43 AmSR 625, 27 LRA 101.

[§ 2721] **(2) Exceptions to Rule.** Exceptions to the rule that a foreign representative cannot be sued have been made in a number of cases, but these exceptions are not universally recognized.[63] Practically all the cases have been suits in equity where peculiar circumstances were involved,[64] and which were permitted upon the ground of their necessity to prevent a failure of justice.[65] The proper rule has been said to be that an action at law should never be allowed to recover a mere money demand,[66] and that suits in equity should be allowed only when necessary to prevent a complete failure of justice.[67] Such suits have been allowed where a foreign representative came into another jurisdiction and took possession of assets belonging to that jurisdiction,[68] or brought with him assets from another jurisdiction,[69] or where he left the jurisdiction of his appointment and became a resident of another jurisdiction.[70] Where a representative appointed in one jurisdiction moves into another, taking with him assets of the foreign appointment, a bill in equity will lie in the latter jurisdiction to compel him to account for such assets to the persons lawfully entitled thereto,[71] where but for the interference of a court of equity there would manifestly be a failure of justice.[72] In such cases, however, he is not held to account as executor or administrator but as a trustee for those entitled to the effects in his hands,[73] and, to authorize such a proceeding, it must appear that he has assets within the jurisdiction of the court,[74] and that he is accountable to the complaining party as a trustee un-

63. Judy v. Kelley, 11 Ill. 211, 214, 50 AmD 455 ("It may be doubted, whether these decisions can be supported on principle or authority").

64. U. S.—Courtney v. Pradt, 135 Fed. 818 [aff 160 Fed. 561, 87 CCA 463 (app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398)].

Ala.—Colbert v. Daniel, 32 Ala. 314; Julian v. Reynolds, 8 Ala. 680; Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617; Calhoun v. King, 5 Ala. 523.

Ark.—Clopton v. Booker, 27 Ark. 482.

Colo.—Falke v. Terry, 32 Colo. 85, 75 P 425.

Ga.—Lake v. Hardee, 57 Ga. 459.

Ill.—Fryrear v. Lawrence, 10 Ill.325.

Iowa.—Gates v. McClenahan, 124 Iowa 593, 100 NW 479.

Ky.—Finley v. Keinningham, 79 SW 236, 25 KyL 1955; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315; Keiningham v. Keiningham, 71 SW 497, 24 KyL 1330; Baker v. Smith, 3 Metc. 264; Manion v. Titsworth, 18 B. Mon. 582; Atchison v. Lindsey, 6 B. Mon. 86, 43 AmD 153; Curle v. Moor, 1 Dana 445; Dorsey v. Dorsey, 5 J. J. Marsh. 280, 22 AmD 33.

La.—Atkinson v. Rogers, 14 La. Ann. 633.

N. J.—Babbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18; Holzer v. Thomas, (Ch.) 61 A 154.

N. Y.—De Coppet v. Cone, 199 N. Y. 56, 92 NE 411, 139 AmSR 844, 20 AnnCas 841; Bergmann v. Lord, 194 N. Y. 70, 86 NE 828; Montgomery v. Boyd, 78 App. Div. 64, 79 NYS 879; Collins v. Stuart, 2 App. Div. 271, 37 NYS 891; Brown v. Knapp, 17 Hun 160 [rev on another point 79 N. Y. 136]; Gulick v. Gulick, 33 Barb. 92, 21 HowPr 22; Montalvan v. Clover, 32 Barb. 190; Price v. Brown, 10 Abb NCas 67, 60 HowPr 511; Marshall v. Bresler, 1 HowPrNS 217; Field v. Gibson, 56 HowPr 232 [aff 20 Hun 274]; Metcalf v. Clark, 41 Barb. 45; Brown v. Brown, 1 Barb. Ch. 189 [aff 4 Edw. 343]; McNamara v. Dwyer, 7 Paige 239, 32 AmD 627; Slatter v. Carroll, 2 Sandf. Ch. 573.

S. C.—Graveley v. Graveley, 20 S. C. 93.

Tenn.—Beeler v. Dunn, 3 Head 87, 75 AmD 761; Sparks v. White, 7 Humphr. 86; Allsup v. Allsup, 10 Yerg. 283.

Va.—Powell v. Stratton, 11 Gratt. (52 Va.) 792; Tunstall v. Pollard, 11 Leigh (38 Va.) 1 [overr dictum to the contrary in Pugh v. Jones, 6 Leigh (33 Va.) 299].

Eng.—Hervey v. Fitzpatrick, 1 Kay 421, 69 Reprint 178; Anderson v. Caunter, 2 Myl. & K. 763, 7 EngCh 763, 39 Reprint 1136.

[a] **Where a representative has purchased lands** in a jurisdiction other than that of his appointment, he may be sued there to compel him to disclose with what funds he purchased them and to declare whether he holds them as trustee and for what uses and trusts. Clopton v. Booker, 27 Ark. 482.

[b] **Possession under invalid testamentary disposition.**—Where land is in possession of a foreign representative under a testamentary disposition which is invalid according to the laws of the state where the land is situated, the heirs may sue the foreign representative for its possession. Atkinson v. Rogers, 14 La. Ann. 633.

[c] **An action at law cannot be maintained** against a foreign administrator who has not qualified in the state. The remedy, if any, is by bill in chancery. Courtney v. Pradt, 135 Fed. 818 [aff 160 Fed. 561, 87 CCA 463 (app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398)]; Curle v. Moor, 1 Dana (Ky.) 445.

65. Colbert v. Daniel, 32 Ala. 314; Holmes v. Camp, 219 N. Y. 359, 14 NE 841 [rev 159 NYS 1119 mem]; Bergmann v. Lord, 194 N. Y. 70, 86 NE 828 [aff 122 App. Div. 921 mem, 107 NYS 1121 mem]; Montgomery v. Boyd, 78 App. Div. 64, 79 NYS 879; McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 AmD 627.

66. Falke v. Terry, 32 Colo. 85, 75 P 425; Cutrer v. Tennessee, 98 Miss. 841, 54 S 434, 35 LRANS 333, Ann Cas1913B 344; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Field v. Gibson, 56 HowPr (N. Y.) 232, 233 [aff 20 Hun 274].

"When it is sought to recover a money judgment only against a foreign executor, the creditor should be remitted to the forum which has jurisdiction over him in his representative character." Field v. Gibson, supra.

67. Lewis v. Parrish, 115 Fed. 285, 53 CCA 77; Julian v. Reynolds, 11 Ala. 960; Collins v. Steuart, 2 App. Div. 271, 37 NYS 891; Kanter v. Peyser, 51 N. Y. Super. 441; Brown v. Brown, 1 Barb. Ch. (N. Y.) 189; Brown v. Brown, 4 Edw. (N. Y.) 343; Graveley v. Graveley, 20 S. C. 93.

68. Hedenberg v. Hedenberg, 46 Conn. 30, 33 AmR 10; Marcy v. Marcy, 32 Conn. 308; Keiningham v. Keiningham, 71 SW 497, 24 KyL 1330; Callanan v. Keenan, 158 App. Div. 84, 142 NYS 561; Montgomery v. Boyd, 78 App. Div. 64, 79 NYS 879.

[a] **Even a creditor may sue** the foreign representative as to such property. Marcy v. Marcy, 32 Conn. 308.

[b] **Foreclosure of lien on assets within state.**—Callanan v. Keenan, 158 App. Div. 84, 142 NYS 561; Piper v. Hayward, 71 Misc. 41, 127 NYS 240.

69. Colbert v. Daniel, 32 Ala. 314 [crit Worthy v. Lyon, 18 Ala. 784]; Julian v. Reynolds, 8 Ala. 680; Williamson v. Mobile Branch Bank, 7 Ala. 906, 42 AmD 617; Holzer v. Thomas, 69 N. J. Eq. 515, 61 A 154; In re Webb, 11 Hun (N. Y.) 124; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Gulick v. Gulick, 33 Barb. (N. Y.) 92, 21 HowPr 22; Price v. Brown, 10 AbbNCas (N. Y.) 67, 60 HowPr 511; Marshall v. Bresler, 1 HowPrNS (N. Y.) 217; Field v. Gibson, 56 HowPr (N. Y.) 232 [aff 20 Hun 274]; Brown v. Brown, 1 Barb. Ch. (N. Y.) 189 [aff 4 Edw. 343]; McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 AmD 627; Dillard v. Harris, 2 Tenn. Ch. 196.

[a] **The leading case in America** is McNamara v. Dwyer, 7 Paige (N. Y.) 239, 241 (where the court said that the opposite rule "would lead to the conclusion that cases must frequently exist in which there would be a total failure of justice," because, as a general rule, executors are not required to give security, and even in the case of an administrator who has given security to account, the remedy to compel them to account in the state where the administration is pending might be unavailing in consequence of the insolvency of his sureties).

[b] **A suit to prevent waste** of property brought by a foreign representative from another jurisdiction may be maintained by a distributee. Calhoun v. King, 5 Ala. 523.

[c] **A bill to compel distribution** of property brought in from another jurisdiction may be maintained by a distributee entitled thereto. Julian v. Reynolds, 8 Ala. 680.

[d] **A creditor cannot sue** to subject such property, which properly belongs to another jurisdiction, to the payment of his claim. Hedenberg v. Hedenberg, 46 Conn. 30, 33 AmR 10.

[e] **If no assets are brought in** by the foreign representative he cannot be sued. Falke v. Terry, 32 Colo. 85, 75 P 425; Olney v. Ferguson, 41 W. Va. 568, 23 SE 710.

70. Courtney v. Pradt, 160 Fed. 561, 87 CCA 463 [app dism 196 U. S. 89, 25 SCt 208, 49 L. ed. 398]; Colbert v. Daniel, 32 Ala. 314; Manion v. Titsworth, 18 B. Mon. (Ky.) 582; Keiningham v. Keiningham, 71 SW 497, 24 KyL 1330.

[a] **A creditor** is not entitled to sue under such circumstances. Baker v. Smith, 3 Metc. (Ky.) 264.

71. Ala.—Colbert v. Daniel, 32 Ala. 314.

Ky.—Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315.

N. J.—Rennie v. Crombie, 12 N. J. Eq. 457.

N. Y.—Marshall v. Bresler, 1 How PrNS 217; McNamara v. Dwyer, 7 Paige 239, 32 AmD 627; Ordronaux v. Helie, 3 Sandf. Ch. 512.

Tenn.—Beeler v. Dunn, 3 Head 87, 75 AmD 761; Dillard v. Harris, 2 Tenn. Ch. 196.

72. Colbert v. Daniel, 32 Ala. 314; Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315.

73. Lewis v. Parrish, 115 Fed. 285, 53 CCA 77; Beeler v. Dunn, 3 Head (Tenn.) 8, 75 AmD 761; Dillard v. Harris, 2 Tenn. Ch. 196.

74. Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

der a will or as a trustee ex maleficio.[75] In cases where a suit against a foreign representative is allowed the nature and extent of his liability will be governed by the laws of the jurisdiction of his appointment,[76] at least to the extent of the assets belonging to that jurisdiction.[77]

[§ 2722] **(3) Statutory Liability.** In a few jurisdictions actions against foreign representatives have been expressly authorized by statute.[78]

Statutes allowing foreign representatives to sue do not authorize them to be sued,[79] but do authorize them to appear and assert any affirmative right in favor of the estate, although in so doing they must in form appear as defendants.[80]

[§ 2723] **b. In Other Capacities.** The rule prohibiting suits against a foreign representative applies only where he is proceeded against in his representative capacity,[81] and he may be sued on any contract which he has himself made.[82] He may also be sued as a trustee,[83] or where he has rendered himself liable as an executor de son tort.[84]

[§ 2724] **2. Parties.** In cases where a suit against a foreign representative can be maintained, if such a suit is brought by a legatee or distributee to recover property of the estate to which he is entitled, all the distributees or legatees who are interested therein should be made parties,[85] and any person claiming an interest in the property in question is a proper party.[86] In a suit against a foreign executor it is not necessary to make those who were named as coexecutors but who never proved the will parties.[87]

[§ 2725] **3. Process.** Where a foreign representative is liable to be sued in the courts of the state, personal service of a summons made upon him while sojourning in the state is good.[88]

[§ 2726] **4. Appearance.** Under a statute declaring that in an action against two or more executors, representing the same decedent, all are to be considered as one person, and those who are first served with process or first appear must answer, a general appearance by one of two foreign executors, sued jointly, is sufficient to bind both of them.[89]

[§ 2727] **5. Pleading.** In an attachment suit against foreign executors to recover for services performed by plaintiff for defendants' testatrix, a plea to the jurisdiction is not fatally lacking in cer-

75. Lewis v. Parrish, 115 Fed. 285, 53 CCA 77; Marcy v. Marcy, 32 Conn. 308; Campbell v. Tousey, 7 Cow. (N. Y.) 64; Dillard v. Harris, 2 Tenn. Ch. 196.

76. Falke v. Terry, 32 Colo. 85, 75 P 425; Hoskins v. Sheddon, 70 Ga. 528; Johnson v. Jackson, 56 Ga. 326, 21 AmR 285; Manion v. Titsworth, 18 B. Mon. (Ky.) 582; McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 AmD 627.

77. McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 AmD 627.

78. U. S.—Thorburn v. Gates, 230 Fed. 922 (New York statute); Thorburn v. Gates, 225 Fed. 613 (New York statute).

Ind.—Lewis v. Reed, 11 Ind. 239.

Kan.—Manley v. Mayer, 68 Kan. 377, 75 P 550, 1 AnnCas 825; Cady v. Bard, 21 Kan. 667; Donifelser v. Heyl, 7 Kan. A. 606, 52 P 468.

N. Y.—Holmes v. Camp, 219 N. Y. 359, 114 NE 841 [rev 159 NYS 1119]; Thorburn v. Gates, 103 Misc. 292, 171 NYS 198 [aff 171 NYS 568]; Dodge v. Holbrook, 107 Misc. 257, 176 NYS 562; Thorburn v. Gates, 103 Misc. 292, 171 NYS 198 [aff 171 NYS 568].

Oh.—Williams v. Welton, 28 Oh. St. 451; Swearingen v. Morris, 14 Oh. St. 424; Adams v. Adams, 7 Oh. St. 83; Netting v. Strickland, 18 Oh. Cir. Ct. 136, 9 Oh. Cir. Dec. 841; In re McCreight, 9 OhS&CP 454, 6 OhNP 481; Craig v. Toledo, etc., R. Co., 3 OhS&CP 146, 2 OhNP 64.

[a] **Such statutes are constitutional.**—Craig v. Toledo, etc., R. Co., 3 OhS&CP 146, 2 OhNP 64.

[b] **In Georgia** it is held that under the constitutional provision giving to the superior courts of the state jurisdiction of all civil cases, and extending such jurisdiction to all persons who reside in the limits of the state, whether citizens, denizens, or temporary sojourners, a foreign executor or administrator may be sued there by creditors, or brought to an account by legatees or distributees. The provisions of the law, it is said, are general, and include executors and administrators as well as all other persons. If they come within the jurisdiction or limits of the state they may be sued in any county of the state in which they happen to be at the time when sued. The policy of the state is to furnish her own people a remedy to cover their rights in her own courts, without compelling them to go into a foreign jurisdiction to obtain their lawful and just claims. Johnson v. Jackson, 56 Ga. 326, 21 AmR 285.

[c] **In Minnesota** it is held that the statute which provides that "all actions which are pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same," authorizes the substitution of a foreign administrator as defendant, if a domestic administrator has not been appointed. The word "administrator" in the statute is said to be general and to apply to foreign as well as domestic administrators. Brown v. Brown, 35 Minn. 191, 192, 28 NW 238. But see Kropff v. Poth, 19 Fed. 200 (where the opposite conclusion was reached under a provision of the Revised Statutes of the United States, similar to the Minnesota statute).

79. U. S.—Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639 [aff 28 F. Cas. No. 16,899, 5 Cranch C. C. 496].

Ark.—Greer v. Ferguson, 56 Ark. 324, 19 SW 966.

D. C.—Bryan v. Curtis, 30 App. 234.

Fla.—Sloan v. Sloan, 21 Fla. 589; Gordon v. Clarke, 10 Fla. 179.

Mo.—Corning First Nat. Bank v. Dowdy, 175 Mo. A. 478, 161 SW 859.

Nebr.—Burton v. Williams, 63 Nebr. 431, 88 NW 765.

Oh.—Pedan v. Robb, 8 Oh. 227.

Tenn.—Allsup v. Allsup, 10 Yerg. 283.

80. Decker v. Patton, 20 Ill. A. 210 [aff 120 Ill. 464, 11 NE 897]; Hamilton v. Taylor, 2 Cinc. Super. (Oh.) 402.

"It would be a very narrow construction of the statute we now have, to hold that, under its provisions, a foreign executor can appear in the courts of this State only in those proceedings where he is in form the plaintiff, or the one who originates and sets such proceedings on foot. Numberless cases arise, both at law and in equity, where a party who is in form a defendant, is called upon to defend, protect and even prosecute affirmative rights and claims which are the subjects of the litigation. We see no reason for holding that a foreign executor may not, under the statute, appear in court in any form in which it may become necessary for him to appear in order to properly prosecute or enforce any of the claims of the estate of his testator. If so, he may often appear as a defendant. Take the ordinary case of the foreclosure of a mortgage by a foreign executor. There he may file his bill and obtain his decree for a foreclosure and a sale of the mortgaged premises, and if upon the entry of the decree the mortgagor should sue out a writ of error to have the cause removed to an appellate court, would any lawyer say that the complainant below would not be a proper defendant to the writ? Nor would the case be different where the testator dies after the decree and before the issuance of the writ of error. It is true the present proceeding is a bill to redeem rather than a bill for a foreclosure, but the presence of the mortgagee or her legal representative is just as essential to the collection of the mortgage, as it would have been if the bill had been for a foreclosure. The executors are here for the purpose of enforcing a claim of the estate of their testator, and we think they may fairly be held to be parties within the provisions of section 42 of the statute." Decker v. Patton, 20 Ill. A. 210, 215 [aff 120 Ill. 464, 11 NE 897].

81. Taylor v. Benham, 5 How. (U. S.) 233, 12 L. ed. 130; Lewis v. McCabe, 6 Mo. A. 600; Johnson v. Wallis, 112 N. Y. 230, 19 NE 653, 8 AmSR 742, 2 LRA 828 [aff 41 Hun 420].

82. Gates v. McClenahan, 124 Iowa 593, 100 NW 479; Johnson v. Wallis, 112 N. Y. 230, 19 NE 653, 8 AmSR 742, 2 LRA 828 [aff 41 Hun 420].

[a] **Employment of attorneys.**—Where nonresidents, appointed executors of a foreign will, employed complainants as their attorneys to recover land in Iowa devised by the will, complainants were entitled to maintain a suit in equity against such executors in Iowa, and enforce an equitable lien on the land for their fees, without first exhausting their legal remedies against the executors. Gates v. McClenahan, 124 Iowa 593, 100 NW 479.

83. Atchison v. Lindsey, 6 B. Mon. (Ky.) 86, 43 AmD 153; Marshall v. Bresler, 1 HowPrNS (N. Y.) 217; Patton v. Overton, 8 Humphr. (Tenn.) 192; Allsup v. Allsup, 10 Yerg. (Tenn.) 283.

84. Densler v. Edwards, 5 Ala. 31; Campbell v. Tousey, 7 Cow. (N. Y.) 64. Aliter since abolition of Metcalf v. Clark, 41 Barb. (N. Y.) 45.

85. Colbert v. Daniel, 32 Ala. 314; Julian v. Reynolds, 8 Ala. 680; Newark Sav. Inst. v. Jones, 35 N. J. Eq. 406.

86. Gulick v. Gulick, 33 Barb. (N. Y.) 92.

87. Newark Sav. Inst. v. Jones, 35 N. J. Eq. 406.

88. Thorburn v. Gates, 103 Misc. 292, 171 NYS 198 [aff 171 NYS 568]; Warren Timber Co. v. Percy, 20 Pa. Dist. 430.

89. Montgomery v. Boyd, 78 App. Div. 64, 79 NYS 879.

tainty where it alleges the defendants' citizenship and residence in another state; that they are executors of the testatrix, named under an order of the proper court of a named county, in that state; that neither of them was ever appointed executor by any court of the state in which the action is brought; that they are suable only in the state of their appointment; and that their accounts as executors are still open and unsettled.[90]

[§ 2728] **L. Accounting**[91]**—1. In General.** A representative appointed in one jurisdiction cannot be required to account for his administration under that appointment by the courts of any other jurisdiction,[92] and where different administrations are granted in different states, each administration must be settled where it is granted and each representative is accountable only in the courts of the state of his appointment.[93] Where there is no ancillary representative and a foreign domiciliary representative takes possession of assets or receives debts voluntarily paid, he is accountable only to the court of the domicile where he was appointed,[94] and even if he subsequently takes out ancillary letters in the jurisdiction where such assets were collected he cannot be held to account there except as to assets collected after his ancillary appointment.[95] Assets collected in a jurisdiction where no administration was granted should be accounted for at the domicile.[96] The domiciliary representative may be surcharged for a loss resulting from his negligent failure to take steps to secure from the ancillary representative payments which the latter, on his accounting, was directed to make to the domiciliary representative.[97]

The place for final accounting and settlement of executors is in the forum of original administration, and not that of ancillary administration.[98]

In equity a foreign executor or administrator, who comes within the jurisdiction of the court, may be compelled to account for assets within the state where otherwise there would manifestly be a failure of justice or a lack of any effective remedy.[99] Under such circumstances it is said that the representative is held to account, not in the character of executor or administrator, but as a trustee for those who are entitled to the assets in his hands.[1]

90. Jordan v. Landram, 35 App. (D. C.) 89.

91. **Accounting generally** see supra §§ 2299-2532.

92. U. S.—Stacy v. Trasher, 6 How. 44, 12 L. ed. 337; Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

Ala.—Kennedy v. Kennedy, 8 Ala. 391.

Ark.—Clopton v. Booker, 27 Ark. 482.

Conn.—Strong v. White, 19 Conn. 238; Hubbard v Hinkley. 1 Root 413; Storer v. Hinkly. 1 Root 182.

Ga.—McGehee v. Polk. 24 Ga. 406; Latine v. Clements. 3 Ga. 426.

Ill.—Elting v. Biggsville First Nat. Bank, 173 Ill. 368, 50 NE 1095 [aff 68 Ill. A. 204].

Ind.—Slauter v. Chenowith, 7 Ind. 211.

Iowa.—Snyder v. Hochstetler, 88 Iowa 621, 55 NW 573.

Mass.—Low v. Bartlett, 8 Allen 259; Chase v. Chase, 2 Allen 101; Morrill v. Morrill, 1 Allen 132; Norton v. Palmer, 7 Cush. 523; Fay v. Haven, 3 Metc. 109; Campbell v. Sheldon, 13 Pick. 8; Jennison v. Hapgood, 10 Pick. 77; Hooker v. Olmstead, 6 Pick. 481; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Richards v. Dutch, 8 Mass. 506; Selectmen v. Boylston, 2 Mass. 384.

Mich.—Woodruff v. Young, 43 Mich. 548, 6 NW 85.

Miss.—Bell v. Suddeth, 10 Miss. 532.

N. H.—Heydock's App., 7 N. H. 496.

N. J.—Cocks v. Varney, 42 N. J. Eq. 514, 8 A 722; Brownlee v. Lockwood, 20 N. J. Eq. 239; Banta v. Moore, 15 N. J. Eq. 97.

N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193 [aff 28 Barb. 564, and rev 4 Bradf. Surr. 268]; Vermilya v. Beatty, 6 Barb. 429; Lawrence v. Elmendorf, 5 Barb. 73; Brackett v. Seavey, 131 NYS 664; Coley's Est., 14 AbbPr 461, 1 Redf. Surr. 405; Brown v. Brown, 4 Edw. 343; Black v. Wookman, 5 Redf. Surr. 363; Kohler v. Knapp, 1 Bradf. Surr. 241; Sedgwick v. Ashburner, 1 Bradf. Surr. 105.

N. C.—Grant v.Reese, 94 N. C. 720.

Oh.—In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648; Adams v. Adams, 7 Oh. St. 83.

Pa.—Musselman's App., 101 Pa. 165.

R. I.—Egan v. Wirth, 26 R. I. 363, 58 A 987.

S. C.—Cureton v. Mills, 13 S. C. 409, 36 AmR 700; King v. Clarke, 11 S. C. Eq. 611.

Tenn.—Gilchrist v. Cannon, 1 Coldw. 581; Beeler v. Dunn, 3 Head 87, 75 AmD 761; George v. Lee, 6 Humphr. 61; Keaton v. Campbell, 2 Humphr. 224; Allsup v. Allsup, 10 Yerg. 283.

Vt.—In re Hall, 70 Vt. 458, 41 A 508; Jennison v. Hapgood, 2 Aik. 31.

Wash.—McCoy v. Ayers, 2 Wash. T. 307, 5 P 843.

W. Va.—Oney v. Ferguson, 41 W. Va. 568, 23 SE 710.

Eng.—Bond v. Graham, 1 Hare 482, 23 EngCh 482, 66 Reprint 1121; Price v. Dewhurst, 4 Myl. & C. 76. 18 Eng Ch 74, 41 Reprint 30; Tyler v. Bell, 2 Myl. & C. 89, 14 EngCh 89, 40 Reprint 575, 1 Keen 826, 15 EngCh 826, 48 Reprint 525.

Ont.—Jessup v. Simpson, 14 U. C. Q. B. 213.

[a] **The rule applies even though** the beneficiaries have been unable to obtain an account in the jurisdiction where the representative was appointed. Van Dyke v. Van Dyke, 36 N. J. Eq. 521 [aff 38 N. J. Eq. 280].

93. Equitable L. Assur. Soc v. Vogel, 76 Ala. 441, 52 AmR 344; Hubbard v. Hinkley. 1 Root (Conn.) 413; Lewis v. Grognard, 17 N. J. Eq. 425; In re Rees, 246 Pa. 188, 92 A 126.

[a] **Effect of settlement in another state.**—A judgment confirming the account of an ancillary administrator is not res judicata against the domiciliary representative. Van v. Calcasieu Trust, etc., Bank, (Tex. Civ. A.) 204 SW 1062.

Where same person is ancillary and domiciliary representative see infra §§ 2730, 2731.

94. U. S.—Wyman v. Halstead, 109 U. S. 654, 3 SCt 417, 27 L. ed. 1068; Wilkins v. Ellett, 108 U. S. 258, 2 SCt 641, 27 L. ed. 718; Vaughan v. Northrop, 28 F. Cas. No. 16,899, 5 Cranch C. C. 496 [aff 1 Pet. 1, 10 L. ed. 639]; Pratt v. Northam, 19 F. Cas. No. 11,376, 5 Mason 95; Van Bokkelen v. Cook, 28 F. Cas. No. 16,831, 5 Sawy. 587.

Cal.—Fox v. Tay, 89 Cal. 339, 24 P 855, 26 P 897, 23 AmSR 474.

Conn.—Strong v. White, 19 Conn. 238.

Ga.—McNamara v. McNamara, 62 Ga. 200.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

Mo.—McPike v. McPike, 111 Mo. 216, 20 SW 12.

N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193 [aff 28 Barb. 564, and rev 4 Bradf. Surr. 268]; Coley's Est., 14 AbbPr 461, 1 Redf. Surr. 405; Sherwood v. Wooster, 11 Paige 441; Doolittle v. Lewis, 7 Johns. Ch. 45, 11 AmD 389; Black v. Woodman, 5 Redf. Surr. 363.

N. C.—Grant v. Reese, 94 N. C. 720.

Pa.—Gray's App., 116 Pa. 256, 11 A 66, 70; English's Est, 16 WklyNC 511.

W. Va.—Hooper v. Hooper, 29 W. Va. 276, 1 SE 280.

[a] **The court of the domiciliary administration may require** the representative to account with respect to moneys or credits situated outside of the state. Reed v. Hollister, (Cal. A.) 186 P 819.

95. Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193 [aff 28 Barb. 564, and rev 4 Bradf. Surr. 268]; Coley's Est., 14 AbbPr (N. Y.) 461, 1 Redf. Surr. 405.

96. Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.

97. In re Skeer, 249 Pa. 288, 95 A 96.

98. Dickinson v. Belden, 268 Ill. 105, 108 NE 1011; Bedell v. Clark, 171 Mich. 486, 137 NW 627.

99. U. S.—Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

Ga.—Lake v. Hardee, 57 Ga. 459.

Ky.—Hussey v. Sargent, 116 Ky. 53, 75 SW 211, 25 KyL 315.

Miss.—Bell v. Suddeth, 10 Miss. 532.

N. J.—Rabbitt v. Fidelity Trust Co., 70 N. J. Eq. 651, 63 A 18; Holzer v. Thomas, 69 N. J. Eq. 515, 61 A 154; Brownlee v. Lockwood, 20 N. J. Eq. 239.

N. Y.—Field v. Gibson, 20 Hun 274 [aff 56 HowPr 233]; In re Webb, 11 Hun 124; Montalvan v. Clover, 32 Barb. 190; Price v. Brown, 10 Abb NCas 67, 60 HowPr 514; Marshall v. Bresler, 1 HowPrNS 217; Brown v. Brown, 1 Barb. Ch. 189 [aff 4 Edw. 343]; McNamara v. Dwyer, 7 Paige 239, 32 AmD 627; Morrell v. Dickey, 1 Johns. Ch. 153; Ordronaux v. Helie, 3 Sandf. Ch. 512.

S. C.—Moore v. Hood, 30 S. C. Eq. 311, 70 AmD 210.

Tenn.—Whittaker v. Whittaker, 10 Lea 93; Beeler v. Dunn, 3 Head 87, 75 AmD 761; Patton v. Overton, 8 Humphr. 192; Dillard v. Harris, 2 Tenn. Ch. 196.

Va.—Powell v. Stratton, 11 Gratt. (51 Va.) 792; Tunstall v. Pollard, 11 Leigh (38 Va.) 1.

[a] **The rule applies where** no bond had been given by an executor or where the sureties on the administration bond have become insolvent. McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 AmD 627.

1. U. S.—Lewis v. Parrish, 115 Fed. 285, 53 CCA 77.

Ky.—Atchison v. Lindsey, 6 B. Mon. 86, 43 AmD 153.

[§ 2729] **2. By Ancillary Representative.** It is the duty of an ancillary representative to render an account of his ancillary administration to the proper court of the jurisdiction in which he was appointed,[2] and it is no excuse for his failure to do so that he sent the assets collected by him to the representative of the domicile and that they were there accounted for.[3]

Issues in proceeding for accounting. The question arising out of a contention that decedent had his domicile in the state cannot be litigated in a proceeding for an accounting by an ancillary administrator.[4]

Authority of court. At the accounting of an ancillary representative the probate court is vested with authority to consider only the subject matter of the property taken by him under the ancillary letters, and to make a decree disposing of such property, and none other.[5]

Allowances to ancillary representative. Where an ancillary administrator expends money for court costs and attorney's fees in good faith in an honest effort to preserve a part of the assets, he may recover for such expenses if for any sufficient reason the claim is settled by a reasonable compromise,[6] although the action and the compromise were not previously authorized by the county court.[7]

When commission refused. Where an ancillary executor unnecessarily, and without authority from the court by which he was appointed, takes the estate to another state for distribution, and there asks and obtains a maximum commission for a minimum of labor, and the estate is closed in the ancillary jurisdiction without any claim on his part for commissions, he is not, on a bill for an accounting in the ancillary jurisdiction, entitled to commissions.[8]

If there are no creditors in the ancillary jurisdiction the assets may be paid over to the representative of the domicile, and if there accounted for the ancillary representative will not be required to account.[9]

[§ 2730] **3. Where Same Person Is Ancillary and Domiciliary Representative—a. How Accounts Rendered.** Where the same person is both principal and ancillary representative, he must account for his ancillary administration in the jurisdiction of the ancillary appointment,[10] and must also render a general accounting at the domicile.[11] A settlement in one jurisdiction does not relieve the representative of the obligation to account in the other.[12] The assets belonging to each jurisdiction are to be separately accounted for,[13] and the representative cannot be compelled to account in the ancillary jurisdiction for assets of the domicile,[14] or at the domicile for assets of the ancillary jurisdiction,[15] except such as remain in his hands after payment of all creditors in the ancillary jurisdiction.[16] If assets found in the ancillary jurisdiction are brought by the representative within the domiciliary jurisdiction he must account for them in the latter jurisdiction.[17] If in one settlement the representative through mistake charges himself with assets which he did not in fact receive he may be allowed credit therefor on his other settlement.[18] A credit taken in the accounting at the domicile must be excluded from the account of the ancillary administration.[19]

[§ 2731] **b. Conclusiveness of Different Accountings.** Where accountings are had in different jurisdictions, the judgment on the accounting in one jurisdiction is conclusive upon the courts of the other as to all matters adjudicated which were within the jurisdiction of the court,[20] but in so far as one settlement includes assets belonging to the other jurisdiction the judgment is not conclusive,[21] and will not relieve the representative from accounting for such assets where they properly belong.[22]

XVIII. ADMINISTRATORS DE BONIS NON

[§ 2732] **A. Appointment and Qualification—1. In General.** In case the office of an executor or administrator becomes vacant before the estate is completely settled there is a new appointment by

N. J.—Brownlee v. Lockwood, 20 N. J. Eq. 239.
N. Y.—Alger v. Alger, 31 Hun 471.
Tenn.—Whittaker v. Whittaker, 10 Lea 93; Beeler v. Dunn, 3 Head 87, 75 AmD 761; Patton v. Overton, 8 Humphr. 192; Dillard v. Harris, 2 Tenn. Ch. 196.
Va.—Tunstall v. Pollard, 11 Leigh (38 Va.) 1.

2. Mylin's Est., 18 Phila. (Pa.) 65; Carr v. Lowe, 7 Heisk. (Tenn.) 84; Whalley v. Lawrence, (Vt.) 108 A 387.

Where same person is ancillary and domiciliary representative see infra §§ 2730, 2731.

3. Mylin's Est., 18 Phila. (Pa.) 65; Carr v. Lowe, 7 Heisk. (Tenn.) 84.

4. Bedell v. Clark, 171 Mich. 486, 137 NW 627.

5. Joy v. Elton, 9 N. D. 428, 83 NW 875.

6. In re Bush, 89 Nebr. 334, 131 NW 602.

7. In re Bush, 89 Nebr. 334, 131 NW 602.

8. Porter v. Long, 136 Mich. 150, 98 NW 990, 4 AnnCas 177.

9. Thomas' Est., 8 Pa. Dist. 385.

10. Mass.—Jennison v. Hapgood, 10 Pick. 77.
N. Y.—Duffy v. Smith, 1 Dem. Surr. 202.
Oh.—In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648 [aff 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605].
Pa.—Parker's Est., 6 Phila. 369.
Vt.—Porter v. Heydock, 6 Vt. 374.

[a] **He cannot relieve himself of this duty** by accounting for his whole administration at the domicile. Duffy v. Smith, 1 Dem. Surr. (N. Y.) 202.

[b] **The pendency of proceedings at the domicile** for an accounting there is no bar to requiring an ancillary accounting as the accountings affect different assets. Parker's Est., 6 Phila. (Pa.) 369; Jennison v. Hapgood, 2 Aik. (Vt.) 31.

11. Clark v. Blackington, 110 Mass. 369; In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff 68 Oh. St. 58, 67 NE 156, 96 AmSR 648].

[a] **Any residue remaining in the representative's hands after the ancillary accounting** must be accounted for at the domicile. Clark v. Blackington, 110 Pick. 369; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

12. Grant v. Rogers, 94 N. C. 755; Grant v. Reese, 94 N. C. 720.

13. Conn.—Hubbard v. Hinkley, 1 Root 413.
Mass.—Tod v. Mitchell, 228 Mass. 541, 117 NE 899.
N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.
N. Y.—Parsons v. Lyman, 20 N. Y. 103, 18 HowPr 193.
Pa.—Baldwin's App., 81 Pa. 441.

14. Fay v. Haven, 3 Metc. 109; Campbell v. Sheldon, 13 Pick. 8; Dawes v. Boylston, 9 Mass. 337, 6 AmD 72; Richards v. Dutch, 8 Mass. 506; Selectmen v. Boylston, 2 Mass. 384; Hamilton v. Carrington, 41 S. C. 385, 19 SE 616.

15. Conn.—Hubbard v. Hinkley, 1 Root 413.
Mass.—Jennison v. Hapgood, 10 Pick. 77; Hooker v. Olmstead, 6 Pick. 481.
N. J.—Lewis v. Grognard, 17 N. J. Eq. 425.
N. Y.—Coley's Est., 14 AbbPr 461, 1 Redf. Surr. 405.
N. C.—Grant v. Reese, 94 N. C. 720.
Oh.—In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff 68 Oh. St. 58, 67 NE 156, 96 AmSR 648].
Pa.—Rizer's Est., 11 WklyNC 563.

16. In re Ortiz, 86 Cal. 306, 24 P 1034, 21 AmSR 44; Stevens v. Gaylord, 11 Mass. 256; In re Stokely, 19 Pa. 476.

17. Cureton v. Mills, 13 S. C. 409, 36 AmR 700.

18. Jones v. Warren, 70 Miss. 227, 14 S 25.

19. Yerkes' Est., 8 Pa. Dist. 36.

20. Mass.—Clark v. Blackington, 110 Mass. 369; Jennison v. Hapgood, 10 Pick. 77.
Nebr.—Tunnicliff v. Fox, 68 Nebr. 811, 94 NW 1032.
N. Y.—Churchill v. Prescott, 3 Bradf. Surr. 233.
Oh.—In re Crawford, 68 Oh. St. 58, 67 NE 156, 96 AmSR 648 [aff 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605].
Pa.—Stockham's Est., 7 Pa. Co. 321.
Tenn.—Whittaker v. Whittaker, 10 Lea 93; George v. Lee, 6 Humphr. 61; Allsup v. Allsup, 10 Yerg. 283.

21. Clark v. Blackington, 110 Mass. 369; Duffy v. Smith, 1 Dem. Surr. (N. Y.) 202.

22. Baldwin's App., 81 Pa. 441.

the court to complete the settlement of the estate, the appointee in such case being termed an administrator "de bonis non,"[23] or in case he represents a testate estate "de bonis non with the will annexed," or "cum testamento annexo."[24] Every administrator after the first is an administrator de bonis non in fact, even though the record may not show it,[25] and consequently a grant of general administration, where a grant de bonis non would have been proper, is not void, but has only the effect of an excess of power.[26]

Where original administration wrongful. On the death of an administrator whose appointment as such was wrongfully obtained, the court should grant to the person entitled thereto letters of original administration and not of administration de bonis non.[27]

[§ 2733] **2. Nature of Office and Source of Title.** An administrator de bonis non is an administrator appointed to finish the business already commenced,[28] but he derives his title from decedent and not from his predecessor in office.[29] He, and not the widow or the distributees of the estate, is the new personal representative of decedent.[30]

[§ 2734] **3. Elements Bearing on Necessity or Propriety of Appointment—a. Previous Grant of Letters.** Succession to a vacancy in the office being essential to the validity of a grant of administration de bonis non, it is necessary that there should have been a previous grant of letters.[31]

[§ 2735] **b. Vacancy in Office.** The appointment of an administrator de bonis non is proper where the original executor or administrator has died,[32] become insane,[33] disappeared,[34] become bankrupt and absconded,[35] resigned,[36] or been removed,[37]

23. U. S.—Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292.
Ala.—Sims v. Waters, 65 Ala. 442; Clemens v. Walker, 40 Ala. 189, 198.
Ark.—Barkman v. Duncan, 10 Ark. 465.
Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.
Ga.—Jepson v. Martin, 116 Ga. 772, 43 SE 75.
Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.
Md.—Neal v. Charlton, 52 Md. 495; Scott v. Fox, 14 Md. 388.
Mass.—Chapin v. Hastings, 2 Pick. 361.
Miss.—Hendricks v. Snodgrass, 1 Miss. 86.
Mo.—Scott v. Crews, 72 Mo. 261.
Nebr.—Prusa v. Everett, 78 Nebr. 251, 113 NW 571, 78 Nebr. 250, 110 NW 568.
N. J.—Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.
N. Y.—In re Lynas, 175 NYS 733.
Oh.—Chamberlain v. Stecher, 78 Oh. St. 271, 85 NE 526.
Pa.—Parkin v. Safe Deposit Bank, 54 Pa. Super. 54; Tucker v. Horner, 10 Phila. 122.
W. Va.—Brown v. Brown, 72 W. Va. 648, 78 SE 1040, 47 LRANS 995.
Eng.—In re Hammond, 6 P. D. 104.
[a] **"The term 'administrator de bonis non'** . . . is frequently used by the courts and by attorneys with reference to an administrator appointed in the place of a former administrator or executor." Prusa v. Everett, 78 Nebr. 250, 254, 113 NW 571, 78 Nebr. 250, 110 NW 568.
[b] **This title is an abbreviation** of "de bonis non administratis" which means of the goods not administered. Black L. D.
[c] **Grant may be limited to particular interest.**—In re Hammond, 6 P. D. 104; In re Burdett, 1 P. D. 427.
[d] **More than one administrator de bonis non** may be appointed when such action is deemed proper by court. Copeland v. Shapley, 214 Mass. 132, 100 NE 1080.
[e] **The giving of a bond by an executrix** who is also residuary legatee is not a substitute for the presence of the legal representative to complete the settlement of the estate, and is no ground for refusing to appoint an administrator de bonis non, nor for removal after such appointment. Chamberlain v. Stecher, 78 Oh. St. 271, 85 NE 526.
[f] **A substituted administrator** is sometimes provided for by statute in cases where an appointment de bonis non would otherwise be proper. Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.

24. Clemens v. Walker, 40 Ala. 189; Conklin v. Egerton, 21 Wend. (N. Y.) 430 [aff 25 Wend. 224]; Hart's Est., 11 Pa. Dist. 783, 28 Pa. Co. 126; Tucker v. Horner, 10 Phila. (Pa.) 122.

25. U. S.—Veach v. Rice, 131 U. S. 293, 9 SCt 730, 33 L. ed. 163.
Ala.—Ex p. Maxwell, 37 Ala. 362, 79 AmD 62; Moseley v. Mastin, 37 Ala. 216.
Ariz.—Otero v. Otero, 11 Ariz. 260, 267, 90 P 601.
Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858.
Tex.—Grande v. Herrera, 15 Tex. 533.
Vt.—Steen v. Bennett, 24 Vt. 303.
"The administrator was in fact acting under a second appointment, and, although not so designated, was an administrator de bonis non." Otero v. Otero, supra.
[a] **Words stricken from order.**—An administrator appointed on removal of the first administrators, because of failure to settle their accounts, was an administrator de bonis non, although the words "de bonis non" were stricken from order of appointment. Yancy v. Yancy, 183 Ky. 512, 209 SW 858.

26. Moseley v. Mastin, 37 Ala. 216; Steen v. Bennett, 24 Vt. 303.
"An administration de bonis non is proper to be granted when a vacancy occurs in the administration in chief. Code § 111. After an administration of the latter character, there cannot, strictly speaking, be another administration in chief, and it is not proper for the court to appoint an administrator generally. The appointment should in terms be restricted to the character of an administrator de bonis non. But, the appointment of a second administrator, without such restriction, does not, on that account, render the second appointment void in toto. The authority of an administrator de bonis non is that of an administrator in chief, lessened in consequence of the previous administration, and if letters apparently in chief are issued, when they should be de bonis non, and without qualifying or limiting the grant of administration, the grant, not being void, has only the effect of an excess of power." Sands v. Hickey, 135 Ala. 322, 327, 33 S 827.

27. In re Lynas, 175 NYS 733.
[a] **The reason** is that the petitioners "would not be entitled to continue an administration improperly and unlawfully commenced. . . . The court will not authorize a continuance of that wrongful administration by appointing the petitioners as his successors." In re Lynas, 175 NYS 733, 734.

28. Hinton v. Bland, 81 Va. 588.

29. U. S.—Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292.
Ala.—Weeks v. Love, 19 Ala. 25.
Conn.—In re American Bd. of Comrs. for Foreign Missions, 27 Conn. 344.
Ga.—Echols v. Barrett, 6 Ga. 443.
Me.—Waterman v. Dockray, 78 Me. 139, 3 A 49.
Mass.—Blake v. Dexter, 12 Cush. 559.
Eng.—Catherwood v. Chabaud, 1 B. & C. 150, 8 ECL 65, 107 Reprint 56.

30. Smith v. Billing, 22 F. Cas. No. 13,014, 3 Cranch C. C. 355.

31. In re Lynas, 175 NYS 733; Chase v. Ross, 36 Wis. 267.

32. Ark.—Finn v. Hempstead, 24 Ark. 111.
Ga.—Jepson v. Martin, 116 Ga. 772, 43 SE 75.
Miss.—Hendricks v. Snodgrass, 1 Miss. 86.
Mo.—Byers v. Weeks, 105 Mo. A. 72, 79 SW 485.
N. C.—Merrill v. Merrill, 92 N. C. 657.
[a] **Pendency of proceeding to test validity of will.**—Where, in consequence of the death of an executor, there is no legal representative of an estate, the probate court may grant letters of administration de bonis non, even while an appeal from a proceeding to test the validity of the will is pending. Finn v. Hempstead, 24 Ark. 111.
[b] **The filing of a notice by the public administrator** that he has taken charge of the estate, which notice is contrary to the fact, does not preclude the appointment of an administrator de bonis non. State v. Holtcamp, 273 Mo. 124, 200 SW 294.
Right of representatives of deceased executors and administrators see infra § 2868.

33. McCrapie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

34. In re Loveday, [1900] P. 154; In re Colclough, [1902] 2 Ir. 499.
[a] **Illustration.**—Where the administrator, after partly administering the estate, left his home, and although several years had elapsed, no trace of him could be discovered, the court revoked the grant made to him, and made a grant of administration de bonis non to another. In re Covell, 15 P. D. 8.

35. Brattle v. Gustin, 1 Root (Conn.) 425.

36. In re Thompson, 183 Mich. 618, 150 NW 318; Byers v. Weeks, 105 Mo. A. 72, 79 SW 485; Roy v. Whitaker, 92 Tex. 346, 48 SW 892, 49 SW 367.
[a] **Formal acceptance of resignation not necessary.**—The probate court may appoint an administrator de bonis non, although the administrator's account has not been adjusted, and the court has not formally accepted his resignation and discharged him. In re Thompson, 183 Mich. 618, 150 NW 318.
[b] **Where an independent executor resigns,** the court has jurisdiction to appoint an administrator de bonis non in his place. Roy v. Whitaker, 92 Tex. 346, 48 SW 892, 49 SW 367.

37. McDowell v. Jones, 58 Ala. 25; Newcomb v. Williams, 9 Metc. 525;

or where the original letters have been revoked;[38] and where the marriage of an executrix or an administratrix extinguishes her authority[39] an appointment de bonis non is proper.[40] But in order to warrant such appointment, it is absolutely essential that the previous incumbency should have actually ended,[41] and if there is no vacancy, the appointment is void for lack of jurisdiction.[42]

Where the original grant was of joint letters to two or more administration de bonis non cannot be granted so long as a single survivor of the original appointees remains in office.[43]

[§ 2736] **c. Incomplete Administration.** The appointment of an administrator de bonis non is proper where a vacancy occurs before full settlement and distribution of the estate,[44] and it is essential to the power of the court to make such an appointment that the administration of the estate should be incomplete;[45] or in other words that there should be unadministered assets belonging to the

Cole v. Shaw, 134 Mich. 499, 96 NW 573.

[a] **Suit on bond of executor.**—When an executor, who is unfit to be such, is sued on his administration bond, in a case in which execution is to issue without expressing that it is for the use of any particular person, the judge of probate should remove him and appoint an administrator de bonis non with the will annexed, who will be entitled to the money received on such execution. Newcomb v. Williams, 9 Metc. (Mass.) 525.

[b] **Effect of appeal from removal.**—It is proper to overrule a motion to stay proceedings to appoint an administrator de bonis non until an appeal from the decree removing the former administrator can be determined. Hayden v. Keown, (Mass.) 122 NE 264.

[c] **If the order removing the original administrator is void,** a grant of letters of administration de bonis non is void also. McDowell v. Jones, 58 Ala. 25. To same effect Godwin v. Hooper, 45 Ala. 613.

38. Landford v. Dunklin, 71 Ala. 594; Byers v. Weeks, 105 Mo. A. 72, 79 SW 485; Bailey v. Scott, 13 Wis. 618.

[a] **Formal entry of revocation not necessary.**—If sufficient facts appear of record to justify the revocation of letters previously issued, the absence of any formal entry of the revocation does not invalidate the appointment de bonis non. Bailey v. Scott, 13 Wis. 618.

[b] **Public administrator—Expiration of term of office.**—Where a grant of letters to the sheriff virtute officii expires with the termination of his term of office, an order of revocation is not necessary to create a vacancy, and therefore a grant de bonis non may be made after the expiration of his term of office, without any formal order of revocation. Landford v. Dunklin, 71 Ala. 594.

39. See supra § 263.

40. Oakes v. Buckley, 49 Wis. 592, 6 NW 321.

41. U. S.—Griffith v. Frazier, 8 Cranch 9, 3 L. ed. 471.

Ala.—Sands v. Hickey, 135 Ala. 322, 33 S 827; Beasley v. Howell, 117 Ala. 499, 33 S 989; Allen v. Kellam, 69 Ala. 442; Sims v. Waters, 65 Ala. 442; McDowell v. Jones, 58 Ala. 25; Hooper v. Scarborough, 57 Ala. 510; Nelson v. Boynton, 54 Ala. 368; Cogburn v. McQueen, 46 Ala. 551; Gray v. Cruise, 36 Ala. 559; Rambo v. Wyatt, 32 Ala. 363, 70 AmD 544; Matthews v. Douthitt, 27 Ala. 273, 62 AmD 765.

Cal.—Pina's Est., 112 Cal. 14, 44 P 332; In re Hamilton, 34 Cal. 464; Haynes v. Meeks, 20 Cal. 288.

Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Ga.—Justices Inferior Ct. v. Selman, 6 Ga. 432.

Ill.—Kinney v. Keplinger, 172 Ill. 449, 50 NE 131 [rev 71 Ill. A. 334]; Munroe v. Peo., 102 Ill. 406.

Ind.—Landers v. Stone, 45 Ind. 404.

Ky.—Creath v. Brent, 3 Dana 129; White v. Brown, 7 T. B. Mon. 446.

Mo.—Macey v. Stark, 116 Mo. 481, 21 SW 1088.

Pa.—Hart's Est., 11 Pa. Dist. 783, 28 Pa. Co. 126.

S. C.—Ex p. Crafts, 28 S. C. 281, 5 SE 718; Petigru v. Ferguson, 27 S. C. Eq. 378.

Tex.—Brockenborough v. Melton, 55 Tex. 493.

"It cannot be denied that the administrator de bonis non of an estate cannot be appointed by the probate court, unless there is a vacancy in the administration, and in case of a second appointment without such vacancy, the latter appointment will be void. . . . It is essential, therefore, to the validity of a second grant, that the first should have terminated." Sands v. Hickey, 135 Ala. 322, 325, 33 S 827.

[a] **Appointment of previous incumbent.**—Where application for letters de bonis non showed that the applicant had been the former administrator, but did not show that he had been discharged, his appointment as administrator de bonis non was not void, as such appointment and qualification thereunder was a relinquishment or resignation of the former letters. Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48 (where the application showed that the applicant had rendered his final accounts which had been approved, but did not show his discharge, the appointment was not void, as the rendition of final account was not inconsistent with the presumption of resignation or removal).

42. Hickey v. Stallworth, 143 Ala. 535, 39 S 267, 111 AmSR 57, 5 AnnCas 496; Morgan v. Casey, 73 Ala. 222; Bean v. Chapman, 73 Ala. 140; Allen v. Kellam, 69 Ala. 442; Gray v. Cruise, 36 Ala. 559; Matthews v. Douthitt, 27 Ala. 273, 62 AmD 765.

[a] **Good cause for making a vacancy is insufficient.** — Hooper v. Scarborough, 57 Ala. 510.

43. Hooper v. Scarborough, 57 Ala. 510; State v. Green, 65 Mo. 528; Lewis v. Brooks, 6 Yerg. (Tenn.) 167; Hudson v. Hudson, Cas. t. Talb. 127, 25 Reprint 700; Arnold v. Blencowe, 1 Cox Ch. 426, 29 Reprint 1233; Adams v. Buckland, 2 Vern. Ch. 514, 23 Reprint 929. But compare Packer v. Owens, 164 Pa. 185, 30 A 314 (where one of two executors died and an administrator de bonis non was appointed in his place, and the court, without deciding upon the propriety of issuing the letters de bonis non, held that their issuance did not vacate the letters testamentary of the surviving executor).

44. U. S.—Birdsall v. Delaware, etc., Co., 244 Fed. 594.

Ariz.—Otero v. Otero, 11 Ariz. 260, 90 P 601.

Conn.—Brattle v. Converse, 1 Root 174.

Ind.—Barnett v. Vanmeter, 7 Ind. A. 45, 33 NE 666.

Iowa.—Crossan v. McCrary, 37 Iowa 684.

La.—Miguez v. Delcambre, 118 La. 1062, 43 S 703.

Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121; Alexander v. Stewart, 8 Gill & J. 226.

Mass.—Cushman v. Albee, 183 Mass. 108, 66 NE 590.

Mich.—Spring v. Perkins, 156 Mich. 327, 120 NW 807.

Minn.—Wilkinson v. Winne, 15 Minn. 159.

Mo.—Pullis v. Pullis, 127 Mo. A. 294, 105 SW 275.

N. C.—Taylor v. Brooks, 20 N. C. 273.

Oh.—Chamberlain v. Stecher, 78 Oh. St. 271, 85 NE 526.

Pa.—In re Miller, 216 Pa. 247, 65 A 681; Hart's Est., 11 Pa. Dist. 783, 28 Pa. Co. 126.

Tex.—Frost v. Frost, 45 Tex. 324; Baker v. De Zavalla, 1 Tex. Unrep. Cas. 621; Adams v. Richardson, 5 Tex. Civ. A. 439, 27 SW 29.

Wis.—In re Durkee, 164 Wis. 41, 159 NW 555; Oakes v. Buckley, 49 Wis. 592, 6 NW 321.

[a] **Thus** (1) when the sole executor or sole administrator with will annexed, whose functions have ceased, has not completed the administration of the estate, as where he has not paid all the legacies, satisfied all the lawful claims, and delivered over the balance in his hand to the residuary legatees or other persons entitled thereto, an administrator de bonis non with the will annexed may be rightfully appointed. Brattle v. Converse, 1 Root (Conn.) 174; Alexander v. Stewart, 8 Gill & J. (Md.) 226. (2) The old common law may have stopped somewhat short of this conclusion, but according to the tenor of modern legislation the prevailing rule is substantially as stated. Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

[b] **Where personal property remains undisposed of** after the decedent's debts have been paid and the property has been delivered by the executor to a testamentary trustee, an administrator de bonis non is necessary, since an estate must be pending for settlement in the probate court before that court, which alone can decide the question, can determine who are the distributees. Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

[c] **Compliance with collateral Inheritance Tax Law.**—Where by a will there passes to one not related to the testator personalty and real estate in the state, and such legatee and devisee is appointed sole executrix, and after acceptance of the trust resigns without compliance with the duties enjoined by the collateral Inheritance Tax Law, it is the duty of the probate court to appoint an administrator de bonis non with the will annexed to comply with such statute, and complete the settlement of the estate. Chamberlain v. Stecher, 78 Oh. St. 271, 85 NE 526.

[d] **Remedy of creditor.**—When claims in favor of an estate have never come into the hands of the administrator, and have not been administered, an unpaid creditor's remedy, after final settlement, is under the statute which provides for an administrator de bonis non. Postal v. Kreps, 23 Ind. A. 101, 54 NE 816.

[e] **Administration of partnership estate.**—On the death of a surviving partner before completing partnership administration, the probate court may keep the administration of his individual estate separate by appointing an administrator de bonis non as to the partnership estate. State v. Hubbard, 199 Mo. A. 137, 203 SW 250.

45. U. S.—Birdsall v. Delaware, etc., Co., 244 Fed. 594.

Ala.—Hickey v. Stallworth, 143 Ala. 535, 39 S 267, 111 AmSR 57, 5 AnnCas 496.

Cal.—In re Yorba, 176 Cal. 166, 167 P 854; O'Brien v. Nelson, 164 Cal. 573, 129 P 985.

Ga.—Desverges v. Desverges, 31 Ga. 753.

estate.[46] Prima facie proof of unadministered assets is, however, all that is required.[47] An administrator de bonis non may be appointed to give good title to specific assets,[48] or in a case where the predecessor has advanced from his own funds without opportunity to reimburse himself.[49] But a personal trust conferred under a will upon the executrix after settling the estate is not in case of a vacancy following such settlement to go de bonis non.[50]

Effect of discharge of original representative. It is usually held that the approval of the final report of an executor or administrator and his discharge is not conclusive that the estate has been wholly settled so as to preclude the appointment of an administrator de bonis non,[51] but there is also au-

Hawaii.—Long v. Holt, 18 Hawaii 290.

Ind.—Croxton v. Renner, 103 Ind. 223, 2 NE 601; Pate v. Moore, 79 Ind. 20.

Md.—Meyers v. Baltimore Safe-Deposit, etc., Co., 73 Md. 413, 21 A 58; Wilcoxon v. Reese, 63 Md. 542.

Mich.—Owen v. Ward, 127 Mich. 693, 87 NW 70.

Mo.—Byers v. Weeks, 105 Mo. A. 72, 79 SW 485.

N. H.—Haven v. Haven, 69 N. H. 204, 39 A 972.

N. Y.—In re Lynas, 175 NYS 733.

Oh.—In re Hess, 4 OhS&CP 413; In re Herckelrath, 1 OhS&CP 696.

Pa.—Ruddy's Est., 37 Pa. Super. 533.

Tex.—Turner v. Wallace, 99 Tex. 543, 92 SW 31; Kimmons v. Abraham, (Civ. A.) 176 SW 671.

Wis.—Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[a] **Illustrations.**—(1) Where the surviving partner failed to administer the partnership estate, and the deceased partner's estate had been administered, and the administrator had made final settlement and received his discharge, the office of administrator was functus officio, and an administrator de bonis non could not be appointed to administer the partnership estate. Byers v. Weeks, 105 Mo. A. 72, 79 SW 485. (2) Where ancestral portraits are bequeathed to certain male descendants as tenants in common, which portraits were not inventoried, or mentioned in the executors' final account, administration de bonis non will not be granted at the suit of one of such tenants, as such administrator would not be entitled to possession as against the tenants, and hence could accomplish nothing. Haven v. Haven, 69 N. H. 204, 39 A 972.

[b] **Where an estate has been practically settled,** although irregularly, administration de bonis non will not be granted when not requested by someone having an interest in the estate. Mercer v. Pike, 58 N. H. 286.

[c] **Carrying on decedent's business.**—Power to carry on a testator's business, given by will to his executor, is attached to the person, and not to the office, and on the executor's death an administrator de bonis non cannot be appointed to continue it. Best's Est., 22 LancLRev (Pa.) 6.

[d] **Order not showing complete administration.**—Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[e] **Effect of lapse of time.**—After the expiration of ten years all claims against an estate are presumed to be fully satisfied and settled, so that, in a proceeding to collect royalties on a coal lease due the estate, administration de bonis non is not necessary, although the estate is not shown to be fully administered. Birdsall v. Delaware, etc., Co., 244 Fed. 594.

46. U. S.—De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457.

Ala.—Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190.

Cal.—In re Yorba, 126 Cal. 166, 167 P 854.

Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Ga.—McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

Ky.—Enlow v. Bethel College, 67 SW 989, 24 KyL 31.

La.—Miguez v. Delcambre, 118 La. 1062, 43 S 703.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

Md.—Sydnor v. Graves, 119 Md. 321, 86 A 341; Scott v. Fox, 14 Md. 388.

Mass.—Chapin v. Hastings, 2 Pick. 361.

Mich.—Owen v. Ward, 127 Mich. 693, 87 NW 70; In re Mallary, 127 Mich. 119, 86 NW 541, 89 NW 348.

Miss.—Forniquet v. Forstall, 34 Miss. 87.

Nebr.—Howell v. Anderson, 66 Nebr. 575, 92 NW 760, 61 LRA 313.

N. H.—Haven v. Haven, 69 N. H. 204, 39 A 972.

N. Y.—Matter of Bedford, 130 App. Div. 642, 115 NYS 472.

Tex.—Cochran v. Thompson, 18 Tex. 652.

Wash.—Griffin v. Warburton, 23 Wash. 231, 62 P 765.

Wis.—Filbey v. Carrier, 45 Wis. 469.

Eng.—Cubbidge v. Boatwright, 1 Russ. 549, 46 EngCh 489, 38 Reprint 212.

"As the very words themselves import, such an administration is called in only where there is specific property of the deceased remaining unadministered. He then takes it as the immediate successor of the deceased, and never as succeeding a prior executor or administrator, for with such prior executor or administrator he has no privity whatever—not even enough to bring suit in his own name on a judgment rendered in the name of such prior executor or administrator." American Bd. of Comrs. for Foreign Missions' App., 27 Conn. 344, 353.

[a] **Property of the estate retained by an executor** and not included in his inventory and settlement constitutes unadministered assets. Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

[b] **Real estate** descends directly to the heirs or devisees, and is not unadministered assets when the estate is not indebted. Griffin v. Warburton, 23 Wash. 231, 62 P 765.

[c] **Leaseholds** inventoried but not accounted for or distributed will support a grant of administration de bonis non. Neal v. Charlton, 52 Md. 495.

[d] **Conversion into money** of all the assets is not ground for refusing to appoint an administrator de bonis non. De Valengin v. Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457; Donaldson v. Raborg, 26 Md. 312.

[e] **Property sold by an executor or administrator for his own use,** in collusion with the purchaser, will be regarded in equity as unadministered. Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190; Forniquet v. Forstall, 34 Miss. 87; Cochran v. Thompson, 18 Tex. 652; Cubbidge v. Boatwright, 1 Russ. 549, 46 EngCh 489, 38 Reprint 212.

[f] **A demand for the use and occupation of land** is not unadministered assets, where it was not necessary for the payment of debts, and the administrator did not have possession of the land. Filbey v. Carrier, 45 Wis. 469.

[g] **Value of assets.**—In Massachusetts administration de bonis non will not be granted unless there are unadministered assets exceeding twenty dollars. Pinney v. McGregory, 102 Mass. 186; Chapin v. Hastings, 2 Pick. 361.

[h] **Showing of interest of estate.**—Where the uncontroverted evidence was that the administratrix's intestate was in possession of the land at his death, and that she paid some of the purchase money, taking deed to herself as administratrix, and causing her dower to be laid off, and later procuring deeds to herself from some of the heirs of her intestate, after which she was adjudged insane, there was sufficient showing of interest in the estate to make it proper to appoint an administrator de bonis non. McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

[i] **Doubtful claim.**—A grant of letters should not be denied to a person entitled thereto because "the only matter open upon which this administration can operate is a small claim of doubtful value." Wagner's Est., 59 Pa. Super. 353, 355 ("If the administrator d. b. n. has confidence enough in his ability to collect the claim and is willing to run the risk there is no harm done. If he fails the other heirs cannot be asked to pay the cost of the experiment").

47. Ga.—McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

Ind.—Postal v. Kreps, 23 Ind. A. 101, 54 NE 816.

Md.—Scott v. Fox, 14 Md. 388.

Mich.—Owen v. Ward, 127 Mich. 693, 87 NW 70.

N. Y.—Pumpelly v. Tinkham, 23 Barb. 321.

[a] **Prima facie showing of assets necessary.**—Owen v. Ward, 127 Mich. 693, 87 NW 70.

48. Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

Md.—Kirby v. State, 51 Md. 383; Alexander v. Stewart, 8 Gill & J. 226.

Mo.—Grayson v. Weddle, 63 Mo. 523.

Tex.—Adams v. Richardson, 5 Tex. Civ. A. 439, 27 SW 29.

Va.—Hinton v. Bland, 81 Va. 588.

[a] **To execute deed.**—An administrator de bonis non may be appointed to execute a deed of land sold under order of the court by the original administrator who died without conveying it to the purchaser. Adams v. Richardson, 5 Tex. Civ. A. 439, 27 SW 29. But compare Long v. Joplin Min., etc., Co., 68 Mo. 422 (an administrator de bonis non cannot be appointed to execute a deed which his predecessor had neglected to execute).

[b] **To correct deed of original administrator.**—An administrator de bonis non will not be appointed after the discharge of the original administrator merely to correct a mistake in a deed made by the original administrator. Grayson v. Weddle, 63 Mo. 523.

49. Munroe v. Holmes, 13 Allen (Mass.) 109.

50. Hinson v. Williamson, 74 Ala. 180; Enlow v. Bethel College, 67 SW 989, 24 KyL 31.

51. Ill.—Atherton v. Hughes, 156 Ill. A. 215 [rev on other grounds 249 Ill. 317, 94 NE 546]; Tillson v. Ward, 46 Ill. A. 179.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

Mich.—Cole v. Shaw, 134 Mich. 499, 96 NW 573.

thority for the view that after an estate has been adjudged finally settled and the administrator discharged, letters of administration de bonis non cannot issue upon the same estate while the final settlement remains unrevoked and in force.[52]

Assets subsequently discovered. An appointment de bonis non is proper when assets of the estate are newly discovered after the former executor or administrator has been discharged,[53] even though the original representative was discharged in consequence of his inability to discover assets.[54]

The existence of claims against the estate is not necessary to warrant an appointment,[55] but the fact that allowed claims have not been paid in full, and there remains property unsold, is sufficient to give the court jurisdiction to appoint an administrator de bonis non,[56] although the first executor or administrator has made a final settlement,[57] and there is no personal estate unadministered.[58]

Protection of the rights of legatees or distributees may give occasion for the appointment,[59] and it is very generally held proper to appoint an admin-

Mo.—Howell v. Jump, 140 Mo. 441, 41 SW 976.

Tex.—Wallace v. Turner, (Civ. A.) 89 SW 432 [aff 99 Tex. 543, 92 SW 31].

Wis.—Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[a] **The approval of the final account** of an administrator is not an adjudication that he has turned into the estate all the assets belonging to it, but, without setting a final settlement aside, an administrator de bonis non may be appointed to take charge of any assets omitted from the former administration. Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

[b] **Discharge without notice.**—Where an executrix, who was residuary legatee, obtained her discharge without filing or publishing notice of the hearing of her application, and no notice thereof was given to a legatee whose legacy the executrix had failed to pay, such discharge was no bar to the legatee's right to the appointment of an administrator de bonis non. Cole v. Shaw, 134 Mich. 499, 96 NW 573.

[c] **Where an executor was also trustee** under the will, an order allowing and settling his final account except as to the trust, and as to that adjudging the amount of the trust fund in his hands, and releasing him from all liability as executor on his paying such sum to those entitled thereto, and concluding that as to such sum the bond remained in force until the further order of the court, did not discharge the executor and deprive the court of jurisdiction to appoint an administrator de bonis non. Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[d] **Closing of estate.**—(1) In Texas, where the court discharged an administrator and closed the estate, it was held the court had no power, after expiration of the term, to appoint an administrator de bonis non. Wallace v. Turner, (Civ. A.) 89 SW 432 [aff 99 Tex. 543, 92 SW 31]. (2) But a final order discharging administrators absolutely was held insufficient to negative the power of the probate court to appoint an administrator de bonis non, where there was nothing to show that the estate had been finally closed. Waterman Lumber, etc., Co. v. Robins, (Tex. Civ. A.) 159 SW 360 [aff as to this point but rev on other grounds 206 SW 825].

[e] **In Indiana** (1) the rule stated in the text was established by the act of March 5, 1891. Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255; Wahl v. Schierling, 11 Ind. A. 696, 39 NE 533; Barnett v. Vanmeter, 7 Ind. A. 45, 33 NE 666. (2) Prior to this statute letters of administration de bonis non could not be granted as long as the final settlement remained in force. Croxton v. Renner, 103 Ind. 223, 2 NE 601; Vestal v. Allen, 94 Ind. 268; Pate v. Moore, 79 Ind. 20. (3) Even before the passage of the statute, a grant de bonis non was not precluded by the entry of an order discharging the original administrator, but continuing the administration as to matters embraced in exceptions to the report. Green v. Brown, 8 Ind. A. 110, 33 NE 979. (4) Nor was such a grant precluded by the discharge of the administrator because he could find no assets, since, in that event, there could be no final settlement. Langsdale v. Woollen, 120 Ind. 78, 21 NE 541.

52. Hickey v. Stallworth, 143 Ala. 535, 39 S 267, 111 AmSR 57, 5 AnnCas 496 [foll early Indiana cases cited in preceding note].

53. U. S.—Birdsall v. Delaware, etc., Co., 244 Fed. 594.

Cal.—Shiels v. Nathan, 12 Cal. A. 604, 108 P 34.

Ill.—Stickel v. Crane, 189 Ill. 211, 59 NE 595.

Ind.—Wahl v. Schierling, 11 Ind. A. 696, 39 NE 533.

Mo.—Ratliff v. Magee, 165 Mo. 461, 65 SW 713.

[a] **Homestead not newly discovered assets.**—(1) Although a deed of homestead by a husband to his wife which is void to the extent of one thousand dollars in value because she did not join is not attached until after the discharge of the executrix, the one thousand dollar homestead is not subsequently discovered assets so as to require an administration de bonis non and the intervention of such an administrator in a suit by the heir attacking the deed. Stickel v. Crane, 189 Ill. 211, 59 NE 595. (2) An administrator de bonis non cannot be appointed to sell the estate in remainder in the homestead, there having been no assets "discovered." Derge v. Hill, 103 Mo. A. 281, 77 SW 105.

[b] **Retroactive effect of statute.**—The act of March 5, 1891 (Rev. St. [1894] § 2395), providing that on a showing that an administrator has been finally discharged, that no administration is pending, and that there are assets within the jurisdiction of the state which have not been but should be administered, a court of probate having jurisdiction may on the application of any unpaid creditor or legatee or of anyone entitled to share in the estate appoint an administrator de bonis non with the powers of an administrator, applies to estates administered upon and in which final reports had been made and approved before the passage of the act. Wahl v. Schierling, 11 Ind. A. 696, 39 NE 533.

54. Langsdale v. Woollen, 99 Ind. 575.

55. Francisco v. Wingfield, 161 Mo. 542, 61 SW 842; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

56. Conn.—Brattle v. Converse, 1 Root 174.

Ga.—Carr v. Berry, 116 Ga. 372, 42 SE 726.

Ky.—Enlow v. Bethel College, 67 SW 989, 24 KyL 31.

Mass.—Chapin v. Hastings, 2 Pick. 361.

Mo.—Howell v. Jump, 140 Mo. 441, 41 SW 976.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

Tex.—Corley v. Goll, 8 Tex. Civ. A. 184, 27 SW 819.

[a] **The fact that the estate has been distributed** to the heirs will not affect the right to administration de bonis non when there are debts unpaid. Brattle v. Converse, 1 Root (Conn.) 174.

[b] **Averment of debts.**—A recital in an order appointing an administrator de bonis non, that the former administrator had died "without closing the business of the estate," implies the existence of debts. Corley v. Goll, 8 Tex. Civ. A. 184, 27 SW 819.

[c] **A legacy is not a debt** within the meaning of a statute authorizing a grant of administration de bonis non, where there are "debts due from the deceased person unpaid." Chapin v. Hastings, 2 Pick. (Mass.) 361.

[d] **Where no valid subsisting claims are shown** against the estate on an application for administration de bonis non by a person claiming to be a creditor, letters should be refused. Chandler v. Hudson, 11 Tex. 32.

[e] **When appointment improper.**—Where an estate was administered, with the exception of a claim of sixty-six dollars and sixty-six cents, and final settlement made in 1895, and more than enough property distributed among the heirs to pay the remaining claim, the probate court was not justified in appointing an administrator de bonis non in 1901. Turner v. Wallace, 99 Tex. 543, 92 SW 31 [aff (Civ. A.) 89 SW 432].

57. Howell v. Jump, 140 Mo. 441, 41 SW 976.

58. Brattle v. Gustin, 1 Root (Conn.) 425; Atherton v. Hughes, 249 Ill. 317, 94 NE 546; Bancroft v. Andrews, 6 Cush. (Mass.) 493; State v. Farmer, 54 Mo. 439.

[a] **Additional realty becoming subject to sale.**—Where, after the death of an administrator without settlement of the estate and while claims against the estate remain unpaid, additional realty becomes liable to sale by reason of the death of the widow of decedent, it is the duty of the county court to appoint an administrator de bonis non to complete the settlement of the estate. Atherton v. Hughes, 249 Ill. 317, 94 NE 546.

59. Ga.—McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

Ky.—Enlow v. Bethel College, 67 SW 989, 24 KyL 31.

Md.—Alexander v. Stewart, 8 Gill & J. 226.

Mass.—Cushman v. Albee, 183 Mass. 108, 66 NE 590.

Mich.—Cole v. Shaw, 134 Mich. 499, 96 NW 573; Buss v. Buss, 75 Mich. 163, 42 NW 688.

Mo.—Byerly v. Donlin, 72 Mo. 270; Scott v. Crews, 72 Mo. 261.

N. J.—Boulton v. Scott, 3 N. J. Eq. 231.

[a] **Illustration.**—Where an executrix who was residuary legatee gave a residuary legatee's bond, and was thereafter discharged and the bond canceled without a legacy bequeathed to plaintiff having been paid, and such executrix retained the estate in her hands, plaintiff was entitled to the appointment of an administrator de bonis non. Cole v. Shaw, 134 Mich. 499, 96 NW 573.

[b] **Where the final settlement of a deceased administrator was set aside** by the court, the appointment of an administrator de bonis non was proper. Byerly v. Donlin, 72 Mo. 270.

[c] **Appointment to execute power of sale for distribution.**—An administrator de bonis non is properly appointed to carry out the terms of a will providing for a sale and distribution of real estate after the

istrator de bonis non, although nothing remains to be done except to distribute the estate;[60] but on the other hand it has been held that, where the only office of administration would be distribution, and there is but one distributee,[61] or a distribution can be effected without resort to administration,[62] the estate will not be subjected to the unnecessary costs and expenses of an administration de bonis non.[63] A right of action which survives for the benefit of the estate may suffice for the appointment of an administrator de bonis non,[64] and so also may a lawful claim with right of action against the predecessor.[65]

Appointment to conduct litigation. Where, after the death of a general administrator who has not fully administered, litigation arises respecting the validity of a will, the new appointees for such a litigation should be designated as de bonis non.[66] Administration de bonis non may also be granted for bringing a suit to recover assets which the predecessor refused to prosecute,[67] or where the predecessor had reported debts as desperate which prove collectable, or had turned over as belonging elsewhere personalty which proves recoverable for the estate.[68] So also a pending action in the name of the original administrator is unadministered assets authorizing an appointment.[69] But where an administrator fully administered and filed a final account, and, after the approval of such account, misappropriated money and absconded, the distributees were entitled to sue on his bond, and the appointment of an administrator de bonis non was not necessary.[70]

[§ 2737] **4. Right to Appointment.** The general rule is that persons are entitled to administration de bonis non in the same order as they would have been entitled to an original grant in case of intestacy or to letters with the will annexed in case there is a will.[71] Accordingly, the right follows the interest in the estate,[72] and next of kin are entitled

death of a life beneficiary. Cushman v. Albee, 183 Mass. 108, 66 NE 590.

60. Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Ky.—Enlow v. Bethel College, 67 SW 989, 24 KyL 31; Carrol v. Connet, 2 J. J. Marsh. 195.

Md.—Donaldson v. Raborg, 26 Md. 312; Alexander v. Stewart, 8 Gill & J. 226; Haslett v. Glenn, 7 Harr. & J. 17; Salisbury v. Black, 6 Harr. & J. 293, 14 AmD 279.

Mo.—Scott v. Crews, 72 Mo. 261.

N. Y.—Dickinson v. Colonial Trust Co., 33 Misc. 668, 68 NYS 909.

N. C.—Taylor v. Brooks, 20 N. C. 273.

R. I.—Stillman v. Westerly Prob. Ct., 72 A 417.

"The administration of a dead man's estate is never complete until all the assets have been turned over to those rightfully entitled to them." Bristol Sav. Bank v. Holley, 77 Conn. 225, 227, 58 A 691.

[a] **It is only through an administrator de bonis non** that choses in action remaining unsold and unadministered at an executor's death can be transferred to the residuary legatee. Stillman v. Westerly Prob. Ct., (R. I.) 72 A 417.

61. Glover v. Hill, 85 Ala. 41, 4 S 613.

62. Ala.—Keith v. McCord, 140 Ala. 402, 37 S 267; Bromberg v. Sands, 127 Ala. 411, 30 S 510; Glover v. Hill, 85 Ala. 41, 4 S 613. Contra Ex p. Jordan, 145 Ala. 658, 39 S 618 (as the statute is imperative that letters of administration de bonis non must be issued on the death of the administrator in chief, the probate court, on a proper application, cannot refuse letters to the person entitled thereto merely because the heirs might distribute the estate among themselves).

Colo.—Austin v. Snider, 17 Colo. A. 182, 68 P 125.

Ga.—Akin v. Akin, 78 Ga. 24, 1 SE 267.

Mass.—State St. Trust Co. v. Morris, 218 Mass. 429, 105 NE 992.

Mo.—Pullis v. Pullis, 127 Mo. A. 294, 105 SW 275.

Wis.—Hinn v. Gersten, 122 Wis. 222, 99 NW 338.

[a] **Distribution by trustee.**—Where the executor of a will creating a trust filed his final account and died, an administrator de bonis non is not necessary; and, there being no known creditors, the trustee may distribute the trust fund in accordance with the will. State St. Trust Co. v. Morris, 218 Mass. 429, 105 NE 992.

[b] **Property divided by agreement of beneficiaries.**—Where the widow of a testator under the will and an agreement between the beneficiaries of the estate, approved by the probate court, is vested with a life interest in so much of a designated fund as shall be necessary for her comfortable support and maintenance, and that which shall remain at her death is assigned to the heirs at law, no administrative functions remain to be performed relative to such property. Hinn v. Gersten, 122 Wis. 222, 99 NW 338.

63. See cases supra notes 61, 62.

[a] **Lapse of time and other circumstances** may raise a presumption that all debts against an estate are either barred or paid and that the remaining assets belong to the distributee, and in such a case the court is indisposed to reopen the estate by an appointment de bonis non. In re Hubbard, 185 Mass. 22, 69 NE 349; Derge v. Hill, 103 Mo. A. 281, 77 SW 105; San Roman v. Watson, 54 Tex. 254; Frost v. Frost, 45 Tex. 324; Gilleland v. Drake, 36 Tex. 676; Murphy v. Menard, 14 Tex. 62.

64. Mallory's App., 62 Conn. 218, 25 A 109; Merkle v. Bennington, 68 Mich. 133, 35 NW 846; Hayward v. Place, 4 Dem. Surr. (N. Y.) 487; Wagner's Est., 59 Pa. Super. 353.

[a] **Whether claims if collected will render estate solvent need not be considered.**—Mallory's App., 62 Conn. 218, 25 A 109.

65. Newcomb v. Williams, 9 Metc. (Mass.) 525; Scott v. Crews, 72 Mo. 261; In re Nesmith, 1 NYS 343.

66. Clemens v. Walker, 40 Ala. 189; Finn v. Hempstead, 24 Ark. 111.

67. Tillson v. Ward, 46 Ill. A. 179; Merkle v. Bennington, 68 Mich. 133, 35 NW 846.

[a] **Illustration.**—If an executor refuses to bring an action for negligence causing the death of the testator, and procures his discharge, administration de bonis non may be granted for the purpose of bringing such action. Merkle v. Bennington Tp., 68 Mich. 133, 35 NW 846.

68. Mallory's App., 62 Conn. 218, 25 A 109; Adams v. Internal Impr. Fund, 37 Fla. 266, 20 S 266; Hinton v. Bland, 81 Va. 588.

[a] **Illustration.** — Unpaid claims in favor of the estate authorize the appointment of an administrator de bonis non, where they were duly inventoried as part of the estate, and accounted for only by an entry on a list of choses in action filed with the administration account, "Refuses to pay because of inability," and it afterward appears that such claims are collectable. The approval of such an entry does not constitute a credit to the executor but merely amounts to a ruling that the claims were uncollectable. Mallory's App., 62 Conn. 218, 221, 25 A 109.

69. Hayward v. Place, 4 Dem. Surr. (N. Y.) 487.

70. Davis v. State, 118 Miss. 577, 79 S 764.

71. Ala.—Burke v. Mutch, 66 Ala. 568.

Conn.—Mallory's App., 62 Conn. 218, 25 A 109.

Ga.—McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073; Jones v. Whitehead, 66 Ga. 290.

Md.—Wilcoxon v. Reese, 63 Md. 542; Kearney v. Turner, 28 Md. 408; Thomas v. Knighton, 23 Md. 318, 87 AmD 571.

Mich.—Buss v. Buss, 75 Mich. 163, 42 NW 688.

Mo.—State v. Holtcamp, 273 Mo. 124, 200 SW 294; Pullis v. Pullis, 127 Mo. A. 294, 105 SW 275.

N. J.—Donahay v. Hall, 45 N. J. Eq. 720, 18 A 163.

N. Y.—Bradley v. Bradley, 3 Redf. Surr. 512.

N. C.—In re Jones, 98 SE 827.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Pa.—Hart's Est., 11 Pa. Dist. 783, 28 Pa. Co. 126; Padelford's Est., 7 Pa. Dist. 711.

R. I.—Emsley v. Young, 19 R. I. 65, 31 A 692.

Va.—Ex p. Clarke, 2 Va. Cas. (4 Va.) 230.

Eng.—In re Johnson, L. R. 7 Ir. 1.

N. B.—Matter of Forester, 37 N. B. 209.

[a] **Second appointment of person having equal right with appointee.**—Where an executor has been removed from office and an administrator de bonis non has been substituted in his place, another person having an equal claim with the one substituted cannot come in at a subsequent term and be allowed administration, the power of the court over the subject matter having ceased. Ex p. Clarke, 2 Va. Cas. 230.

[b] **Under "special circumstances" the usual priority may be disregarded.**—In re Grundy, L. R. 1 P. & D. 459.

[c] **Grant to administrator of deceased executor.**—Where an executor died after proving the will, leaving part of the estate unadministered, administration de bonis non was granted to his administrator, the persons entitled to priority being abroad and difficult to be found. In re Hicks, 39 L. J. P. & M. 27.

Right to appointment as:

Administrator with the will annexed see infra §§ 2758–2772.

General administrator see supra §§ 88–115.

72. Ga.—Clay v. Jackson, 2 T. U. P. Charlt. 71.

Mass.—Phillips v. Phillips, 230 Mass. 14, 119 NE 190.

Mich.—Cole v. Shaw, 134 Mich. 499, 96 NW 573.

R. I.—Emsley v. Young, 19 R. I. 65, 31 A 692.

to appointment in case of intestacy,[73] while the residuary legatee is usually preferred in case there is a will,[74] although under some circumstances a grant may be made to a specified legatee without citing the residuary legatee.[75] In the case of administration granted to the surviving spouse, especially when granted for his or her own benefit, followed by the death of the latter, administration de bonis non ordinarily goes by the interest as between kindred of the wife and husband, and hence the representatives of the spouse who survived are as a rule preferred[76] unless others have really the beneficial interest.[77]

Creditors are entitled to consideration[78] especially where the estate is insolvent or in desperate condition.[79]

Discretion of court. As between persons having an equal right to appointment the choice lies in the discretion of the court.[80]

Possession of qualifications. The person appointed must of course be qualified to act.[81]

Renunciation. It has been held that a renunciation of the right to letters de bonis non cannot be retracted,[82] and that an executrix who has renounced has no preferential right to be appointed administratrix de bonis non with the will annexed after the death of the administratrix with the will annexed;[83] but it has also been held that the right to administration de bonis non is not lost by renouncing the right to original administration.[84]

[§ 2738] **5. Jurisdiction.** The court which granted the original letters testamentary or of administration and holds supervision of the estate has alone the right to grant administration de bonis non.[85] The courts of probate in Nova Scotia have all the jurisdiction formerly exercised by the ecclesiastical courts in England, and this includes the right of granting administration de bonis non.[86]

[§ 2739] **6. Time for Application.** As a general rule a broad period is usually allowed for granting administration de bonis non, according as the opportunity to realize something for the estate may present itself;[87] nor does even the statutory limit to original administration bar by inference the grant

Tenn.—In re Wooten, 114 Tenn. 289, 85 SW 1105.

Va.—Hendren v. Colgin, 4 Munf. (18 Va.) 231; Cutchin v. Wilkinson, 1 Call. (5 Va.) 3.

Eng.—In re Pountney, 4 Hagg. Eccl. 289, 162 Reprint 1452; Fielder v. Hanger, 3 Hagg. Eccl. 769, 162 Reprint 1339; In re Middleton, 2 Hagg. Eccl. 60, 162 Reprint 785; Almes v. Almes, 2 Hagg. Eccl. appendix 155, 162 Reprint 1047; Savage v. Blythe, 2 Hagg. Eccl. appendix 150, 162 Reprint 1044.

[a] **One having an interest in the property or favored by those having such an interest** is entitled to preference over next of kin having no interest. Word v. Shofner, 1 Tenn. Civ. A. 401.

[b] **Insanity of administrator.**—As between the guardian of the property of an insane administrator and the son of the intestate, the latter is entitled to letters of administration de bonis non. McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

73. Donahay v. Hall, 45 N. J. Eq. 720, 18 A 163; Cardale v. Harvey, 1 Lee Eccl. 177, 161 Reprint 66; Matter of Forester, 37 N. B. 209.

[a] **Situation at time of death of intestate governs.**—The next of kin entitled to administration de bonis non are those who were such at the death of intestate. Cardale v. Harvey, 1 Lee Eccl. 177, 161 Reprint 66.

[b] **Contrary rule under statute.**—Where the statute provides that administration de bonis non may be granted to "any suitable person," the widow and next of kin are not entitled to preference. Russell v. Hoar, 3 Metc. (Mass.) 187.

74. Mallory's App., 62 Conn. 218, 25 A 109; Bradley v. Bradley, 3 Redf. Surr. (N. Y.) 512; In re Ward, 1 Redf. Surr. (N. Y.) 254; In re Loftus, 10 Jur. N. S. 324.

[a] **If the residuary legatees are minors** their guardian is entitled to administration de bonis non with the will annexed for their benefit, although they had been nominated as executors of the will and residuary legatees in trust, and as such had renounced probate of administration with the will annexed. In re Loftus, 10 Jur. N. S. 324.

[b] **Where the residuary legatee is a bankrupt,** administration de bonis non with the will annexed may be granted to his assignee in bankruptcy. Downward v. Dickinson, 10 Jur. N. S. 1084.

[c] **If the executor is also residuary legatee** and dies intestate before fully administering the estate, administration de bonis non will be granted to his personal representatives, and not to the next of kin of the testator. Isted v. Stanley, 3 Dyer 372a, 73 Reprint 834.

75. In re King, 8 P. D. 162.

[a] **Illustration.**—Such a course was proper where the residuary legatee resided abroad, and had no beneficial interest, there being no residue. In re Wilde, 13 P. D. 1.

76. Ga.—Bryan v. Rooks, 25 Ga. 622, 71 AmD 194.

N. Y.—Matter of Briasco, 69 Misc. 278, 126 NYS 1001, 2 NYCivProcNS 266, 7 Mills Surr. 589; In re Strutzkober, 14 NYS 501; Whitaker v. Whitaker, 6 Johns. 112; Matter of Harvey, 3 Redf. Surr. 214.

N. C.—Patterson v. High, 43 N. C. 52.

Va.—Hendren v. Colgin, 4 Munf. (18 Va.) 231; Cutchin v. Wilkinson, 1 Call (5 Va.) 3.

Eng.—Fielder v. Hanger, 3 Hagg. Eccl. 769, 162 Reprint 1339.

[a] **Executor of surviving husband.**—Upon the death of a husband, who survived his wife and administered upon her estate, it seems that his executor is entitled to be administrator de bonis non of the wife, in preference to his residuary legatee. Hendren v. Colgin, 4 Munf. (18 Va.) 231.

77. In re Lynas, 175 NYS 733; In re Friedleben, 103 Misc. 558, 171 NYS 761 [aff 172 NYS 892 mem]; Lockwood v. Stockholm, 11 Paige 87; Barnes' Est., 18 Pa. Dist. 550. See also cases supra note 76.

78. Brattle v. Converse, 1 Root (Conn.) 174; Deans v. Wilcoxon, 25 Fla. 980, 7 S 163; Hunt v. Holden, 2 Mass. 168.

[a] **One who furnished the widow of the testator with necessaries** is not a creditor of the testator so as to entitle him to administration de bonis non. Hunt v. Holden, 2 Mass. 168.

79. Ala.—Long v. Easly, 13 Ala. 239.

Ill.—Tillson v. Ward, 46 Ill. A. 179.

Md.—McGuire v. Rogers, 71 Md. 587, 18 A 888.

N. Y.—Spinning's Will, Tuck. Surr. 78.

N. C.—Cutlar v. Quince, 3 N. C. 60.

Pa.—Coyle's Est., 16 Phila. 350.

80. Bowie v. Bowie, 73 Md. 232, 20 A 916; Wagner's Est., 59 Pa. Super. 353.

[a] **The same is true as to nominees** of such persons. Matter of Muhlenburg, 4 Phila. (Pa.) 192 (a joint grant made to two such nominees).

81. In re Brown, 204 Ill. A. 596; In re Marks, 81 Or. 632, 160 P 540; McDevitt's Est., 9 Pa. Dist. 474.

[a] **A nonresident** of the state cannot be appointed administrator de bonis non. McDevitt's Est., 9 Pa. Dist. 474.

[b] **Appointment upheld.**—If it appears that the applicant is the owner of considerable real estate, sustains a good reputation among his neighbors, and is the only person who has any thought that some assets may be gotten together, the court will not review the discretion of the register of wills in appointing him, although there is some evidence that there was not the best feeling between the applicant and the other heirs. Wagner's Est., 59 Pa. Super. 353.

[c] **The administratrix of the estate of a decedent's widow** is not disqualified, by reason of such office held by her, for appointment as administratrix de bonis non of decedent's estate, where there is an unpaid balance of the widow's award or such administratrix is herself an heir of decedent. In re Brown, 204 Ill. A. 596.

[d] **The surety of a former administrator** is not necessarily disqualified from acting as administrator de bonis non because of potential interest which may thereafter appear. In re Marks, 81 Or. 632, 160 P 540.

82. Stockdale v. Conaway, 14 Md. 99, 74 AmD 515.

83. Thornton v. Winston, 4 Leigh (31 Va.) 152.

84. Pendleton v. Pendleton, 14 Miss. 448 (so holding in the case of a widow).

85. Ala.—Lunsford v. Lunsford, 122 Ala. 242, 25 S 171; Beasley v. Howell, 117 Ala. 499, 22 S 989.

Ill.—Peo. v. White, 11 Ill. 341.

Ky.—Burnett v. Meadows, 7 B. Mon. 277, 46 AmD 517; Pawling v. Speed, 5 T. B. Mon. 580.

Mo.—Byerly v. Donlin, 72 Mo. 270.

Oh.—Miller v. Miller, 34 Oh. Cir. Ct. 43.

Vt.—Clapp v. Beardsley, 1 Vt. 151.

Va.—Ex p. Lyons, 2 Leigh (29 Va.) 761.

Wis.—In re Durkee, 164 Wis. 41, 159 NW 555.

[a] **Change in district boundaries.**—An administration de bonis non granted by the probate court of a district other than the one in which administration was first granted, but to which the town where the deceased resided had been attached by a later statute, is not void but only voidable on appeal. Clapp v. Beardsley, 1 Vt. 151.

86. Cunningham's Est., 31 N. S. 264.

87. McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

[a] **Where dower estate not ter-**

of letters de bonis non.[88] It has been held, however, that a statute limiting the time within which administration may be granted does apply to administrators de bonis non.[89] An application for the appointment of an administrator de bonis non may be defeated by laches,[90] and as a general rule an administrator de bonis non cannot be appointed on the ground that there are debts of decedent remaining unpaid, if payment may be presumed from lapse of time, or if the debts are barred by the statute of limitations,[91] unless the administrator has power to waive the bar.[92]

[§ 2740] **7. Proceedings for Appointment.** As a general rule it may be laid down that the rules governing proceedings for the appointment of an administrator de bonis non are substantially the same as obtain in proceedings for the appointment of an ordinary administrator.[93] It has been held, however, that, where letters of administration are revoked as being informally or illegally granted, new letters may be granted to the same person, or, it seems, to any other, without a new application.[94] Ordinarily, before a grant to a person not primarily entitled thereto, there should be a summons or legal notice to persons having a prior right to the appointment,[95] although such an appointment without notice is sometimes valid by reason of statutory provisions.[96] The fact that an administrator de bonis non was appointed on the petition of the attorney of a party, and not on the petition of one authorized to make or file such a petition, does not render the appointment void or even so improvident as to require annulment thereof.[97] A trustee receiving property of an estate under a judgment of a competent court which is still in force and unappealed from is such an interested party as to be entitled to contest a grant of administration de bonis non.[98]

Application or petition. It has been held not essential to the validity of the appointment of such an administrator that the necessity therefor should appear on the face of the application for letters;[99] but on the other hand a failure of the petition to show such necessity has been regarded as fatal.[1] An objection based on mere informalities must be seasonably made in order to be available.[2] The allegations of a petition, which are denied by the answer, cannot be accepted as proof authorizing an appointment.[3]

Hearing and decree. The court should not try title to property or determine questions of estoppel or other collateral points in such a proceeding.[4] A necessary decision in connection with the previous grant of letters that decedent was a resident of the county is conclusive on an application for the appointment of an administrator de bonis non.[5] An appointment made prior to the day fixed in the order and notice of a hearing for the appointment is

minated.—An application for an administration de bonis non was not barred by laches, where the dower estate of the widow had not yet terminated. McCranie v. Hutchinson, 139 Ga. 792, 77 SE 1064, 45 LRANS 1073.

88. Iowa.—Crossan v. McCrary, 37 Iowa 684.

Me.—In re Holmes, 33 Me. 577.

Md.—Neal v. Charlton, 52 Md. 495.

Mass.—Bancroft v. Andrews, 6 Cush. 493; Kempton v. Swift, 2 Metc. 70.

Tex.—Williams v. Howard, 10 Tex. Civ. A. 527, 31 SW 835; Adams v. Richardson, 5 Tex. Civ. A. 439, 27 SW 29.

[a] **Illustration.** — The probate court having had jurisdiction to make an appointment of an original administrator, more than twenty years after decedent's death, to administer on a certain fund, it had jurisdiction, on his death without having administered thereon, to appoint an administrator de bonis non. Dallinger v. Morse, 208 Mass. 501, 94 NE 701, AnnCas1912A 982.

89. Gallatin Turnp. Co. v. Puryear, 116 Tenn. 122, 92 SW 763.

90. Russell v. Gold, (Mo. A.) 195 SW 757.

91. Mass.—In re Hubbard, 185 Mass. 22, 69 NE 349.

Mo.—Russell v. Gold, (A.) 195 SW 757; Derge v. Hill, 103 Mo. A. 281, 77 SW 105.

N. C.—Fisher v. Ballard, 164 N. C. 326, 80 SE 239.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

Tex.—Murphy v. Menard, 14 Tex. 62; Chandler v. Hudson, 11 Tex. 32.

[a] **Letting in dormant judgment.**—Even though an estate had not been fully administered by the original administrator, it was too late, after the lapse of twelve years, for the probate court to appoint an administrator de bonis non for the purpose of letting in a dormant judgment obtained against the original administrator shortly after he had been discharged, where there were no equities intervening. McGreal v. Jones, 36 Tex. 673.

92. Ray v. Strickland, 89 Ga. 840, 16 SE 90.

Power of representative to waive bar of limitations see supra §§ 907–911.

93. See supra §§ 187–2892.

94. Delany v. Noble, 3 N. J. Eq. 559.

95. Wilcoxon v. Reese, 63 Md. 542; Thomas v. Knighton, 23 Md. 318, 87 AmD 571.

[a] **Notice of resignation of former incumbent.**—The statute requiring notice to distributees or legatees of a surrender of his trust by an executor or administrator as a condition precedent to a valid settlement with the court of the administration account of the person resigning is not inconsistent with the right of the court to accept a resignation and appoint a successor at once, requiring the outgoing executor or administrator to give notice and make settlement, until which he remains liable on his bond, and hence the appointment of an administrator de bonis non with the will annexed, without notice to the legatees of the surrender of his trust by the executor, is not void. Sivley v. Summers, 57 Miss. 712.

[b] **Right of creditor.**—Under the code the largest creditor is not required to be notified or summoned before administration is granted to a stranger, although he is entitled to administration if he applies for it and the law fixes no time within which he must assert his claim, nor is the court required to wait any time for him to do so. Consequently this is a matter left to the discretion of the court, and while as a general rule it is proper for the orphans' court to give some reasonable time for creditors and other persons who are not required to be notified to assert their claim, there may be cases where the security of the estate and the rights of creditors require immediate action, and of this the orphans' court is the best judge. Hence the court has a right if it sees proper to appoint an administrator de bonis non on the same day that original letters of administration are revoked. McGuire v. Rogers, 71 Md. 587, 18 A 888.

96. Jenks v. Allen, 151 Wis. 625, 139 NW 433. But compare Hubbard v. Chicago, etc., R. Co., 104 Wis. 160, 80 NW 454, 76 AmSR 855 (decided under earlier statute).

97. Ashurst v. Union Bank, etc., Co., (Ala.) 76 S 917.

98. San Roman v. Watson, 54 Tex. 254.

99. Williams v. Verne, 68 Tex. 414, 4 SW 548 (holding further that even if this were necessary an application alleging that a certain person had been appointed and qualified as administrator of the estate and had died before winding up was sufficient).

1. Clark v. Schindler, 43 Ind. A. 269, 87 NE 44; Ruddy's Est., 37 Pa. Super. 533.

[a] **Illustrations.**—(1) A petition for the appointment of an administrator de bonis non which fails to allege that there are assets within the jurisdiction of the state which had not been and should be administered, or to describe property not accounted for in the final order is insufficient. Clark v. Schindler, 43 Ind. A. 269, 87 NE 44. (2) A petition for the appointment of an administrator de bonis non with the will annexed in order to charge a money legacy on land devised to another is properly dismissed where it does not allege that any assets of the estate had been discovered after the executor filed his account, nor that the estate had not been fully administered, nor that there were any moneys, goods, or assets remaining in his hands due to and belonging to the testator's estate, nor that any promises had been made to him in his representative character upon which an action would lie, nor that any judgment obtained by, or in the name of, the executor remained unsatisfied. Ruddy's Est., 37 Pa. Super. 533 (in disposing of such a petition the court may consider the nature of the legacy and pass upon the question whether it was a charge of the land devised).

2. Moore v. Willamette Transp., etc., Co., 7 Or. 359.

3. Matter of Bedford, 130 App. Div. 642, 115 NYS 472.

4. Mallory's App., 62 Conn. 218, 25 A 109.

5. In re Durkee, 164 Wis. 41; 159 NW 555.

void.[6] A decree appointing an administrator de bonis non is not invalid because it was signed by the judge of probate in his law office instead of in the probate office.[7]

Appeal. An administrator who has been removed is not aggrieved by the decree appointing his successor so as to be entitled to appeal therefrom;[8] but a purchaser of the reversionary interest in land of a deceased insolvent person, which has been assigned to his widow as dower, may appeal from a decree appointing an administrator de bonis non,[9] and the widow may appeal from the appointment of the person selected by her children rather than the person selected by her.[10]

[§ 2741] **8. Operation and Effect of Appointment.** The appointment of an administrator de bonis non is presumed to be valid in the absence of a contrary showing,[11] and is conclusive of his authority until set aside or annulled by a direct proceeding for that purpose.[12] The validity of the appointment is not affected by informality in the proceedings,[13] and the appointment is not subject to collateral attack,[14] where the record does not, on its face, disclose want of jurisdiction,[15] or unless there was no vacancy at the time of the appointment, in which case the appointment is void.[16] If the appointment is void the appointee is not even administrator de facto.[17] The unwise exercise of a legal discretion vested in the court as to whether an administrator de bonis non should be appointed cannot vacate the appointment,[18] nor will the appointment of an administrator to succeed an executor removed for good cause be disturbed, where the appointment is satisfactory to one entitled to more than four fifths of the estate.[19]

[§ 2742] **9. Bond.** An administrator de bonis non must give a bond[20] the same as any other administrator,[21] but the amount of such bond is to be determined according to the portion of the estate which remains unadministered.[22]

[§ 2743] **B. Assets to Be Administered—1. In General.** The common-law rule is that an administrator de bonis non administers only upon the assets which have not been administered by his pre-

6. Kammerer v. Morlock, 125 Mich. 320, 84 NW 319 (appointment made four days earlier than date fixed).

7. Newell v. Delorme, 109 Me. 421, 86 A 361 (the two offices being in different cities in the same county).

8. Hayden v. Keown, (Mass.) 122 NE 264.

[a] **This is true, although** the removed administrator is an unsecured creditor of the estate, or attorney for certain nonresident legatees in connection with other matters. Hayden v. Keown, (Mass.) 122 NE 264.

9. Bancroft v. Andrews, 6 Cush. (Mass.) 493.

10. Hilliard v. McDaniels, 48 Vt. 122 (where the widow, whose authority as administratrix was terminated by her remarriage, sought the appointment of her husband).

11. Ala.—Ashurst v. Union Bank, etc., Co., 76 S 917; Peavy v. Griffin, 152 Ala. 256, 44 S 400; Smith v. Alexander, 148 Ala. 554, 42 S 29; Sands v. Hickey, 135 Ala. 322, 33 S 827; Henley v. Johnston, 134 Ala. 646, 32 S 1009, 92 AmSR 48; Morgan v. Casey, 73 Ala. 222; Bean v. Chapman, 73 Ala. 140; Allen v. Kellam, 69 Ala. 442; Sims v. Waters, 65 Ala. 442; Chappell v. Doe, 49 Ala. 153; Russell v. Erwin, 41 Ala. 292; Clemens v. Wilson, 40 Ala. 219; Gray v. Cruisé, 36 Ala. 559; Ikelheimer v. Chapman, 32 Ala. 676; Lyon v. Odom, 31 Ala. 234.

Ga.—Jepson v. Martin, 116 Ga. 772, 43 SE 75.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255; Barnett v. Vanmeter, 7 Ind. A. 45, 33 NE 66.

Ky.—Warfield v. Brand, 13 Bush 77.

La.—Miguez v. Delcambre, 118 La. 1062, 43 S 703.

Miss.—Gray v. Harris, 43 Miss. 421.

Mo.—Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

Tex.—Willis v. Ferguson, 59 Tex. 172.

Vt.—Steen v. Bennett, 24 Vt. 303.

Wis.—Oakes v. Buckley, 49 Wis. 592, 6 NW 321.

[a] **Presumption of vacancy.**—(1) "It must be presumed, in the absence of an affirmative showing to the contrary, that there was a vacancy in the administration by resignation or removal of the former administrator to sustain the order of the court in granting the letters." Henley v. Johnston, 134 Ala. 646, 650, 32 S 1009, 92 AmSR 48. To same effect Ashurst v. Union Bank, etc., Co., (Ala.) 76 S 917; Peavy v. Griffin, 152 Ala. 256, 44 S 400; Allen v. Kellam, 69 Ala. 442. (2) But such presumption cannot prevail on a collateral attack where there is evidence which shows affirmatively that the administration was not vacant. Allen v. Kellam, 69 Ala. 442.

[b] **Presumption as to unadministered assets.**—The appointment of an administrator de bonis non raises the presumption that the estate had not been fully administered, although an order was made approving the final account of the original administrator. Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

12. Thomas v. Waters, 122 Ill. A. 434; Weaver v. Meyer, 32 Ind. A. 587, 70 NE 409.

[a] **Illustration.**—In proceedings by an heir for the appointment of an administrator de bonis non, the widow appeared and objected to the appointment, denying that the applicant was an heir, and alleging that the estate had been fully administered. On trial the findings were for the applicant, and an administrator was appointed. It was held that, in an action by him for property of the estate, which the widow had conveyed to the defendants to conceal it, the record of these proceedings was conclusive on defendants, they being in privity with the widow. Weaver v. Meyer, 32 Ind. A. 587, 70 NE 409.

13. Russell v. Erwin, 41 Ala. 292; Bailey v. Scott, 13 Wis. 618.

14. Ala.—Smith v. Alexander, 148 Ala. 554, 42 S 29.

Ill.—Thomas v. Waters, 122 Ill. A. 434.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255; Barnett v. Vanmeter, 7 Ind. A. 45, 33 NE 666.

Mass.—Dallinger v. Morse, 208 Mass. 501, 94 NE 701, AnnCas1912A 982.

Mich.—Ormsbee v. Piper, 123 Mich. 265, 82 NW 36.

Oh.—Ewalt v. Ames, 6 Oh. A. 374.

Tex.—Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

Wis.—Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[a] **Illustrations.**—(1) The authority of an administrator de bonis non cannot be challenged by demurrer to the evidence in a proceeding instituted by him (Thomas v. Waters, 122 Ill. A. 434), or (2) in a proceeding by him for an examination of a person suspected of having fraudulently conveyed away certain of decedent's real estate (Dickey v. Taft, 175 Mass. 4, 55 NE 318). (3) So also when a county court had jurisdiction of the subject matter in appointing an administrator de bonis non, the circuit court could not declare the order of appointment void in a collateral proceeding against a surety on the administrator's bond on the ground that there was no authority in law for the appointment. Barney v. Babcock, 115 Wis. 409, 91 NW 982.

[b] **Attack held collateral.**—Where, on a petition by an administrator de bonis non to sell the lands of decedent, grantees of decedent intervened and moved to dismiss the application on the ground that when the applicant was appointed there was a qualified administrator in chief, the proceedings to remove such administrator having been without jurisdiction, the attack on the appointment of the administrator de bonis non was a collateral one. Smith v. Alexander, 148 Ala. 554, 42 S 29.

[c] **Where an administrator de bonis non is an administrator de facto,** the regularity of his appointment cannot be questioned in a collateral proceeding. Frothingham v. Petty, 197 Ill. 418, 64 NE 270.

15. Wright v. Hetherlin, (Mo.) 209 SW 871; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

16. Hickey v. Stallworth, 143 Ala. 535, 539, 39 S 267, 111 AmSR 57, 5 AnnCas 496; Morgan v. Casey, 73 Ala. 222; Allen v. Kellam, 69 Ala. 442; Gray v. Cruise, 36 Ala. 559; Matthews v. Douthitt, 27 Ala. 273, 62 AmD 765.

"The probate court is a court of general jurisdiction in the matters committed to it, and in the absence of proof it will be presumed that the jurisdictional facts existed, yet its jurisdiction is confined to the matters committed to it by statutes, and, if it affirmatively appear that the jurisdictional facts did not exist, its decrees will be declared void, even collaterally." Hickey v. Stallworth, supra.

Necessity for vacancy see supra § 2735.

17. Hooper v. Scarborough, 57 Ala. 510.

18. Frost v. Frost, 45 Tex. 324.

19. In re Rice, 158 Mich. 53, 122 NW 212.

20. Morrow v. Peyton, 8 Leigh (35 Va.) 54; In re Oakey, [1896] P. 7; Rous v. Noble, 2 Vern. Ch. 249, 23 Reprint 761.

21. See supra § 194.

22. Matter of Nesmith, 15 NYSt 436, 6 Dem. Surr. 323; In re Oakey, [1896] P. 7; In re James, 21 L. T. Rep. N. S. 730.

[a] **Where part of the estate has been embezzled** by a former administrator, bond may be taken for the present value of the estate. In re Halliwell, 10 P. D. 198.

[b] **Consideration of unpaid legacy.**—In fixing the penalty of the bond of an administrator, cum testamento

decessor, and conversely is not entitled to assets which have been administered wholly or in part.[23] In some jurisdictions, however, the common-law rule has been changed by statutes under which an administrator de bonis non is entitled to administer upon all the assets in the hands of his predecessor;[24] and accordingly an administrator de bonis non takes the estate where his predecessor left it and his administration is a continuation of that commenced by the former representative.[25]

[§ 2744] **2. What Constitutes Unadministered Assets.** Unadministered assets which go to the administrator de bonis non consist of the goods, effects, and credits which belonged to decedent at

annexo, appointed in the place of an administrator to whom letters were granted before the probate of the will, regard should be had to the amount of an unpaid legacy, although the estate had been distributed by the first administrator. Matter of Nesmith, 15 NYSt 436, 6 Dem. Surr. 333.

23. U. S.—Wilson v. Arrick, 112 U. S. 83, 5 SCt 75, 28 L. ed. 617, 11 D. C. 228; U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Birdsall v. Delaware, etc., Co., 244 Fed. 594; Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221 [rev on other grounds 228 U. S. 346, 33 SCt 550, 57 L. ed. 867].

Ala.—Eubank v. Clark, 78 Ala. 73; Martin v. Ellerbe, 70 Ala. 326; Graves v. Flowers, 51 Ala. 402, 23 AmR 552; Whitworth v. Oliver, 39 Ala. 286; Abney v. Pickett, 21 Ala. 739; Weeks v. Love, 19 Ala. 25; Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190; King v. Smith, 15 Ala. 264; Price v. Simmons, 13 Ala. 749; Nolly v. Wilkins, 11 Ala. 872; Kelly v. Kelly, 9 Ala. 908, 44 AmD 469; Willis v. Willis, 9 Ala. 330; Harbin v. Levi, 6 Ala. 399; King v. Griffin, 6 Ala. 387; Judge Benton County Ct. v. Price, 6 Ala. 36; Caller v. Boykin, Minor 206; Chamberlain v. Bates, 2 Port. 550, 27 AmD 667; King v. Green, 2 Stew. 133, 19 AmD 46.

Ark.—Hemphill v. Hamilton, 11 Ark. 425.

Conn.—American Bd. Comrs.' App., 27 Conn. 344.

D. C.—U. S. v. Ames, 11 D. C. 278 [aff 109 U. S. 258, 3 SCt 277, 27 L. ed. 927].

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163; Gregory v. Harrison, 4 Fla. 56.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Gilbert v. Hardwick, 11 Ga. 599; Echols v. Barrett, 6 Ga. 443; Oglesby v. Gilmore, 5 Ga. 56; Paschal v. Davis, 3 Ga. 256; Thomas v. Hardwick, 1 Ga. 78.

Ill.—Frier v. Lowe, 232 Ill. 622, 83 NE 1083; Kinney v. Keplinger, 172 Ill. 449, 50 NE 131 [rev 71 Ill. A. 334]; Hanifan v. Needles, 108 Ill. 403; Stose v. Peo., 25 Ill. 600; Short v. Johnson, 25 Ill. 489; Newhall v. Turney, 14 Ill. 338; Rowan v. Kirkpatrick, 14 Ill. 1.

Ind.—Lucas v. Donaldson, 117 Ind. 139, 19 NE 758; State v. Gooding, 8 Blackf. 567; Young v. Kimball, 8 Blackf. 167; Ferguson v. Sweeney, 6 Blackf. 547; Anthony v. McCall, 3 Blackf. 86; Weaver v. Meyer, 32 Ind. A. 587, 70 NE 409; Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005.

Iowa.—Stewart v. Phenice, 65 Iowa 475, 22 NW 636; Shawhan v. Loffer, 24 Iowa 217.

Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858; Clark v. Farmers' Nat. Bank, 124 Ky. 563, 99 SW 674, 30 KyL 738; Cox v. Shelby County Trust Co., 80 SW 789, 26 KyL 50; Karn v. Seaton, 62 SW 737, 23 KyL 101; Warfield v. Brand, 13 Bush 77; Bellomy v. Bellomy, 3 Bush 109; Felts v. Brown, 7 J. J. Marsh. 147; Oldham v. Collins, 4 J. J. Marsh. 49; Bradshaw v. Com., 3 J. J. Marsh. 632; Carrol v. Connet, 2 J. J. Marsh. 195; Slaughter v. Froman, 5 T. B. Mon. 19, 17 AmD 33; Graves v. Downey, 3 T. B. Mon. 353; Floyd v. Breckenridge, 4 Bibb. 14.

Me.—Meservey v. Kalloch, 97 Me. 91, 53 A 876; Small v. Thompson, 92 Me. 539, 43 A 509; Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33; Waterman v. Dockray, 78 Me. 139, 3 A 49.

Md.—State v. Fidelity, etc., Co., 100 Md. 256, 59 A 735, 108 AmSR 410; Baker v. Bowie, 74 Md. 467, 22 A 133; State v. Hart, 57 Md. 234; Stewart v. Baltimore Firemen's Ins. Co., 53 Md. 564; Donaldson v. Raborg, 26 Md. 312, 28 Md. 34; Lemmon v. Hall, 20 Md. 168; Johnson v. Farmer's Bank, 11 Md. 412; West v. Chappell, 5 Gill 228; Gardner v. Simmes, 1 Gill 425; Alexander v. Stewart, 8 Gill & J. 226; Hagthorp v. Neale, 7 Gill & J. 13, 26 AmD 594; Sibley v. Williams, 3 Gill & J. 52; Hagthorp v. Hook, 1 Gill & J. 270.

Mass.—Blake v. Dexter, 12 Cush. 559; Weeks v. Gibbs, 9 Mass. 74.

Miss.—Dement v. Heth, 45 Miss. 388; Rives v. Patty, 43 Miss. 338; Andrews v. Brumfield, 32 Miss. 107; Searles v. Scott, 22 Miss. 94; Morse v. Clayton, 21 Miss. 373; Stubblefield v. McRaven, 13 Miss. 130, 43 AmD 502; Davis v. Brandon, 2 Miss. 154; Probate Judge v. Green, 2 Miss 146; Prosser v. Yerby, 2 Miss. 87; Kelsey v. Smith, 2 Miss. 68.

Mo.—State v. Dulle, 45 Mo. 269; State v. Hunter, 15 Mo. 490; Harney v. Dutcher, 15 Mo. 89, 55 AmD 131; Gamble v. Hamilton, 7 Mo. 469.

N. J.—Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156; Bradway v. Holmes, 50 N. J. Eq. 311, 25 A 196; Carrick v. Carrick, 23 N. J. Eq. 364; Brownlee v. Lockwood, 20 N. J. Eq. 239.

N. Y.—Walton v. Walton, 4 Abb. Dec. 512, 1 Keyes 15, 2 AbbPrNS 428; Matter of Manhardt, 17 App. Div. 1, 44 NYS 836 [aff 16 Misc. 522, 40 NYS 206]; Caulkins v. Bolton, 31 Hun 458 [aff 98 N. Y. 511]; McMahon v. Allen, 4 E. D. Smith 519; Homans v. New York L. Ins. Co., 55 Misc. 574, 106 NYS 929; Luers v. Brunges, 56 HowPr 282; Colt v. Lasnier, 9 Cow. 320.

N. C.—Carson v. Duffy, 55 N. C. 507.

Oh.—Curtis v. Lynch, 19 Oh. St. 392; Tracy v. Card, 2 Oh. St. 431; Blizzard v. Filler, 20 Oh. 479.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Pa.—Miller v. Com., 111 Pa. 321, 2 A 492; Carter v. Trueman, 7 Pa. 315; Com. v. Strohecker, 9 Watts 479; Kendall v. Lee, 2 Penr. & W. 482; Thomas v. Riegel, 5 Rawle 266; Potts v. Smith, 3 Rawle 361, 24 AmD 359; Com. v. Wood, 14 Pa. Dist. 509; Gressle's Est., 29 Pa. Co. 97, 21 Lanc LRev 73.

R. I.—Scituate Prob. Ct. v. Smith, 16 R. I. 444, 17 A 56.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024; Villard v. Robert, 18 S. C. Eq. 393; Smith v. Carrere, 18 S. C. Eq. 123; Miller v. Alexander, 10 S. C. Eq. 25.

Tenn.—Thomas v. Stanley, 4 Sneed 411; Stott v. Alexander, 2 Sneed 650; Smith v. Pearce, 2 Swan 127; Bell v. Speight, 11 Humphr. 451; Shackelford v. Runyan, 7 Humphr. 141.

Tex.—Williams v. Verne, 68 Tex. 414, 4 SW 548; Todd v. Willis, 66 Tex. 704, 1 SW 803; Johnson v. Morris, 45 Tex. 463; Brown v. Franklin, 44 Tex. 559; Johnson v. Hogan, 37 Tex. 77; Grant v. McKinney, 36 Tex. 62; Boulware v. Hendricks, 23 Tex. 667; Baldwin v. Dearborn, 21 Tex. 446; Cochran v. Thompson, 18 Tex. 652; Martel v. Martel, 17 Tex. 391; Murphey v. Menard, 11 Tex. 673.

Utah.—Reed v. Hume, 25 Utah 248, 70 P 998.

Vt.—Merriam v. Hemmenway, 26 Vt. 565.

Va.—Cheatham v. Burfoot, 9 Leigh (36 Va.) 580; Coleman v. McMurdo, 5 Rand. (26 Va.) 51.

W. Va.—Downey v. Kearney, 81 W. Va. 422, 94 SE 509; McCreery v. Bluefield First Nat. Bank, 55 W. Va. 663, 47 SE 890.

Eng.—Lloyd v. Stoddart, Ambl. 152, 27 Reprint 100; Catherwood v. Chabaud, 1 B. & C. 150, 8 ECL 65, 107 Reprint 56; Packman's Case, 6 Coke 18b, 77 Reprint 281; Langford v. Mahoney, 4 Dr. & War. 81; Elliott v. Kemp, 7 M. & W. 306, 151 Reprint 783; Atty.-Gen. v. Hooker, 2 P. Wms. 340, 24 Reprint 756; Wankford v. Wankford, 1 Salk. 299, 91 Reprint 265; Jenkins v. Plume, 1 Salk. 207, 91 Reprint 184; Barker v. Talcott, 1 Vern. Ch. 473, 23 Reprint 600.

[a] **An administrator de bonis non cannot be surcharged** (1) because he did not recover assets which the previous administrator had administered. Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156. (2) Nor is he liable for any accounts or notes included in the inventory returned by the former administrator, unless it is shown that he collected or could have collected them by the exercise of due care and proper diligence. Adkins v. Hutchings, 79 Ga. 260, 4 SE 887.

24. Ellyson v. Lord, 124 Iowa 125, 99 NW 582; State v. Fulton, 35 Mo. 323; State v. Hunter, 15 Mo. 490; State v. Porter, 9 Mo. 356; Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Stair v. York Nat. Bank, 55 Pa. 364, 93 AmD 759; Carter v. Trueman, 7 Pa. 315; Weld v. McClure, 9 Watts (Pa.) 495; Drenkle v. Sharman, 9 Watts (Pa.) 485; Com. v. Wood, 14 Pa. Dist. 509.

[a] **Accounting to administrator de bonis non.**—"Some states have made it the duty of an administrator who has been displaced to account to the administrator de bonis non." Michigan Trust Co. v. Ferry, 228 U. S. 346, 33 SCt 550, 57 L. ed. 867 [foll Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292].

[b] **A substituted administrator,** as distinguished from an administrator de bonis non, is entitled to the entire personal estate which is undistributed. Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.

25. Ala.—Russell v. Erwin, 41 Ala. 292.

Ark.—State v. Murray, 8 Ark. 199.

Conn.—Ives v. Beecher, 75 Conn. 153, 52 A 746; Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204; Mansfield v. Lynch, 59 Conn. 320, 22 A 313, 12 LRA 285.

Ky.—Fletcher v. Sanders, 7 Dana 345, 32 AmD 96.

Mass.—National Bank v. Stanton, 116 Mass. 435; Brown v. Pendergast, 7 Allen 427.

Nebr.—Trumble v. Williams, 18 Nebr. 144, 24 NW 716; Burlington, etc., R. Co. v. Crockett, 17 Nebr. 570, 24 NW 219.

N. Y.—Slocum v. English, 62 N. Y. 494; Matter of Kingsland, 60 Hun 116, 14 NYS 495 [aff 133 N. Y. 170, 30 NE 845]; Dale v. Roosevelt, 8 Cow. 333.

N. C.—Thompson v. Badham, 70 N. C. 141.

Oh.—Bray v. Darby, 82 Oh. St. 47, 91 NE 861.

the time of his death and which remain in specie, unaltered or unconverted by any act of the former representative.[26]

Administration may be presumed from lapse of time.[27]

[§ 2745] **3. Particular Classes of Assets—a.**

Pa.—Meiser v. Eckhart, 19 Pa. 201; Com. v. Strohecker, 9 Watts 479.

Tenn.—Brasfield v. Cardwell, 7 Lea 252.

26. U. S.—U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Michigan Trust Co. v. Ferry, 175 Fed. 667, 681, 99 CCA 221 [rev on other grounds 228 U. S. 346, 33 SCt 550, 57 L. ed. 867]; Calder v. Pyfer, 4 F. Cas. No. 2,299, 2 Cranch C. C. 430.

Ala.—Martin v. Ellerbe, 70 Ala. 326; Abney v. Pickett, 21 Ala. 739; Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190; Nolly v. Wilkins, 11 Ala. 872; Willis v. Willis, 9 Ala. 721; King v. Griffin, 6 Ala. 387; Judge Benton County Ct. v. Price, 6 Ala. 36.

Fla.—Adams v. Internal Impr. Fund, 37 Fla. 266, 20 S 266.

Ga.—Gilbert v. Hardwick, 11 Ga. 599; Oglesby v. Gilmore, 5 Ga. 56; Paschall v. Davis, 3 Ga. 256.

Ill.—Short v. Johnson, 25 Ill. 489; In re Richart, 58 Ill. A. 91.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

Kan.—Galloway v. Freeburg, 97 Kan. 765, 156 P 766.

Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858; Clark v. Farmers' Nat. Bank, 124 Ky. 563, 99 SW 674, 40 KyL 738; Saffran v. Kennedy, 7 J. J. Marsh. 188; Oldham v. Collins, 4 J. J. Marsh. 49; Bradshaw v. Com., 3 J. J. Marsh. 632; Carrol v. Connet, 2 J. J. Marsh. 195; Slaughter v. Froman, 5 T. B. Mon. 19, 17 AmD 33; Graves v. Downey, 3 T. B. Mon. 353.

Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 A 328; Meservey v. Kalloch, 97 Me. 91, 53 A 876; Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

Md.—Sydnor v. Graves, 119 Md. 321, 86 A 341; State v. Fidelity, etc., Co., 100 Md. 256, 59 A 735, 108 AmSR 410; Baker v. Bowie, 74 Md. 467, 22 A 133; Stewart v. Baltimore Firemen's Ins. Co., 53 Md. 564; Neale v. Hagthrop, 3 Bland 551.

Mass.—Minot v. Purrington, 190 Mass. 336, 77 NE 630.

Miss.—Byrd v. Holloway, 14 Miss. 323; Prosser v. Yerby, 2 Miss. 87.

Mo.—Harney v. Dutcher, 15 Mo. 89, 55 AmD 131.

N. J.—Roy v. Squier, 61 N. J. Eq. 182, 48 A 233; Parker v. Stevens, 61 N. J. Eq. 163, 47 A 573; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156; Thiefes v. Mason, 55 N. J. Eq. 456, 37 A 455; Carrick v. Carrick, 23 N. J. Eq. 364; Brownlee v. Lockwood, 20 N. J. Eq. 239.

N. C.—Quince v. Nixon, 51 N. C. 289.

Pa.—In re Bell, 230 Pa. 359, 79 A 644; Potts v. Smith, 3 Rawle 361, 24 AmD 359; Gressle's Est., 29 Pa. Co. 97, 21 LancLRev 73.

S. C.—Villard v. Robert, 20 S. C. Eq. 393; Miller v. Alexander, 10 S. C. Eq. 25.

Tenn.—Cheek v. Wheatley, 3 Sneed 484; Bell v. Speight, 11 Humphr. 451.

Utah.—Reed v. Hume, 25 Utah 248, 70 P 998.

Va.—Clarke v. Wells, 6 Gratt. (47 Va.) 475.

Wash.—Denton v. Schneider, 80 Wash. 506, 142 P 9.

W. Va.—Morris v. Westerman, 79 W. Va. 509, 92 SE 567; McCreery v. Bluefield First Nat. Bank, 55 W. Va. 663, 47 SE 890.

Eng.—In re Hall, 1 Hagg. Eccl. 139, 162 Reprint 535; Atty.-Gen. v. Hooker, 2 P. Wms. 338, 24 Reprint 756; Wankford v. Wankford, 1 Salk. 299, 91 Reprint 265.

[a] **The word "administer,"** when applied to the disposition of the assets of a decedent's estate, is equivalent to "alter," "change," or "convert." The change or alteration of the goods necessary to amount to an administration of them by one administrator, so that they would be beyond the reach and control of the succeeding administrator de bonis non, is not a change in specie but a change in the property of the goods. Adams v. Internal Impr. Fund, 37 Fla. 266, 20 S 266.

[b] **Money.**—Where the personal estate consists of money and mortgages which have been reduced to money, money not disbursed as directed by will or probate court is "unadministered assets," to which the succeeding administrator is entitled on death of the predecessor. Galloway v. Freeburg, 97 Kan. 765, 156 P 766.

[c] **Money deposited in a bank** to the credit of decedent as executor passed to the administrator de bonis non of the estate of which decedent was executor, and not to the executor's administrator. Clark v. Farmers' Nat. Bank, 124 Ky. 563, 99 SW 674, 30 KyL 738.

[d] **A sale of property** (1) is a conversion and the administrator de bonis non cannot at common law sue for the proceeds. Calder v. Pyfer, 4 F. Cas. No. 2,299, 2 Cranch C. C. 430; Gilbert v. Hardwick, 11 Ga. 599; Clarke v. Wells, 6 Gratt. (47 Va.) 475. (2) But in equity the proceeds of the sale may be treated as unadministered assets. Clarke v. Wells, 6 Gratt. (47 Va.) 475.

[e] **Administration by executrix who is also residuary legatee.**—Where an executrix, who is also residuary legatee, pays the legacies, practically all the debts, and converts a portion of the estate to her own use, the estate is so far administered by her as that an administrator de bonis non of the testator is entitled to receive from her executor only such of the estate as she had not collected or appropriated at her death. Baker v. Bowie, 74 Md. 467, 22 A 133.

[f] **Where a widow who was administratrix conveyed** (1) property to a trustee for herself and the next of kin, this was an act of administration preventing the administrator de bonis non from recovering the property. Quince v. Nixon, 51 N. C. 289. (2) But under similar circumstances if the widow and executrix dies before any expressed or implied acceptance of the legacy, the property is unadministered and goes to the administrator de bonis non. Floyd v. Breckenridge, 4 Bibb (Ky.) 14.

[g] **Property lawfully distributed** among the persons entitled is not unadministered assets. Griffin v. Warburton, 23 Wash. 231, 62 P 765.

[h] **Property delivered to life tenant.**—Where a personal chattel is bequeathed to one for life, with no limitation over, the reversion vests, as in other cases of intestacy, in the next of kin, and a distribution and delivery to the tenant for life is a complete act of administration and distribution to the next of kin, and hence an administrator de bonis non cannot recover such property as unadministered effects belonging to the estate of the testator. Andrews v. Brumfield, 32 Miss. 107. To same effect Bates v. Woolfolk, 5 Ga. 329.

[i] **When an executor has turned over to the testamentary trustee** the property mentioned in a will, and made final settlement, his office ceases, so that his resignation and the subsequent appointment of the trustee as administrator de bonis non gives the latter no authority, not otherwise possessed, to convey any part of the trust estate. Cox v. Shelby County Trust Co., 80 SW 789, 26 KyL 50.

[j] **Assets must be distinguishable as such.**—An administrator de bonis non cannot maintain an action against the estate of his predecessor for money wrongfully received by him prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

[k] **Property purchased with decedent's money.**—Where stock was purchased with money belonging to a decedent, the fact that the stock was not in existence at the time of his death does not rob it of its character of an unadministered asset. Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

[l] **Improper credit.**—If an executor, on settling an account of his testator, allows credit for a check, this is not such an administration of this part of the assets as will preclude an administrator de bonis non from maintaining an action to recover the amount of the check, which he proves to be a forgery. State Bank v. Haldeman, 1 Penr. & W. (Pa.) 161.

[m] **An unauthorized transfer** of a note belonging to the estate, by the representative, under such circumstances that it amounts to paying his own debt with the property of the estate, is not an administration, and the administrator de bonis non is entitled to the note and to recover thereon. Cowgill v. Linnville, 20 Mo. A. 138.

[n] **Statute not changing common-law rule.**—The act of April 9, 1897, amending the act of March 27, 1874 (Gen. St. p 1425), by authorizing every administrator de bonis non with the will annexed to demand of the executor of a deceased executor all the "unadministered" assets of the first testator, does not change the common-law rule that such administrator can only administer such personalty as remains in specie in the form in which it existed at the death of deceased. Roy v. Squier, 61 N. J. Eq. 182, 48 A 233.

[o] **Assets held unadministered.**—A will provided that the income of one fourth of testator's residuary estate should be paid to the children of testator's deceased son, and that if any of such children died without issue the share of the deceased child should go to the survivors. On the death of the son's children, the one fourth of the residue was to be distributed among the son's grandchildren, taking by representation, and receiving their shares as they attained their majority. One of the testator's granddaughters died, leaving a husband and a son, who died about a year later. An administrator of the son's estate was appointed, and nearly twenty-eight years later, and after the death of the administrator as well as the husband, a petition was filed asking for directions as to the distribution of a portion of the fund. It was held that on the final distribution of the remainder of the fund the court had the power to correct errors made by the trustees in distributing other portions of the fund, and in making such corrections it was not necessary to appoint an administrator de bonis non of the deceased great-grandchild; but the administrator de bonis non with the will annexed of the father was entitled to receive the share due to the great-grandchild's estate. Minot v. Purrington, 190 Mass. 336, 77 NE 630.

27. Desverges v. Desverges, 31 Ga. 753; Breckinridge v. Waters, 4 Dana (Ky.) 620.

[a] **Illustration.**—When a division of an estate of an intestate was made by the distributees, who were all sui juris at the time, and

Notes and Bonds. The common-law rule is that an administrator de bonis non cannot take possession of, collect, or sue on a bond, note, or other evidence of indebtedness running to his predecessor as such.[28] In equity the administrator de bonis non was held entitled to the proceeds of such a note or bond, although not to the possession of the instrument itself.[29] In a number of states the common-law rule has been departed from, sometimes by reason of statutory provisions, and the present rule is that the administrator de bonis non may take possession of, collect, and sue on such obligations,[30] although notes for which the former representative has accounted in his settlement cannot be recovered by the administrator de bonis non.[31]

[§ 2746] **b. Money and Balances Due from Predecessor.** A specific sum of money set apart as cash for the estate, and identifiable, may be claimed by the administrator de bonis non,[32] but at common law money not so specifically set apart, such as a balance due from the former representative, the result of his administration, is not, in the absence of statute, unadministered assets, and the administrator de bonis non is not entitled to such funds.[33] In many jurisdictions, however, statutes exist whereby an administrator de bonis non is entitled to and

twenty-seven years have elapsed, an administration will be presumed in a suit by an administrator de bonis non to recover of one of the distributees the portion allotted him. Desverges v. Desverges, 31 Ga. 753.

28. U. S.—Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292.

Ky.—Saffran v. Kennedy, 7 J. J. Marsh. 188. But see infra note 30.

Mo.—Harney v. Dutcher, 15 Mo. 89, 55 AmD 131.

N. J.—Roy v. Squier, 61 N. J. Eq. 182, 48 A 233.

N. Y.—Matter of Manhardt, 17 App. Div. 1, 44 NYS 836 [aff 16 Misc. 522, 40 NYS 206]; Caulkins v. Bolton, 31 Hun 458 [aff 98 N. Y. 511].

Pa.—Kendall v. Lee, 2 Penr. & W. 482. But see infra note 30.

S. C.—Williams v. Seabrook, 14 S. C. L. 371; Miller v. Alexander, 10 S. C. Eq. 25. But see infra note 30.

Vt.—Nason v. Potter, 6 Vt. 28.

Eng.—Barker v. Talcot, 1 Vern. Ch. 473, 23 Reprint 600.

[a] **Illustration.**—A note belonging to the estate, but made payable to the executrix, is an administered asset, and does not pass to an administrator de bonis non with the will annexed, appointed to administer on unadministered assets. Roy v. Squier, 61 N. J. Eq. 182, 48 A 233.

[b] **Consent to payment to administrator de bonis non.**—Where executors took a note to themselves as such for the effects, and were then removed by the probate court, and an administrator de bonis non appointed who took a new note to himself for the amount, which was paid, the presentment by the survivor of the first executors of his account for allowance to the probate court, claiming the amount of the debt as a credit, was prima facie evidence of consent to the payment to the administrator de bonis non. Nason v. Potter, 6 Vt. 28.

29. Burrus v. Roulhac, 2 Bush (Ky.) 39; Williams v. Seabrook, 14 S. C. L. 371; Miller v. Alexander, 10 S. C. Eq. 25.

[a] **When immediate distribution proper.**—A petition by the administrator de bonis non may properly be refused and immediate distribution awarded of the proceeds of a note if they are not needed to pay debts. Bellamy v. Bellamy, 3 Bush (Ky.) 109.

30. Ala.—Barron v. Vandvert, 13 Ala. 232; Spence v. Rutledge, 11 Ala. 590; Caller v. Boykin, Minor 206; White v. Beard, 5 Port. 94, 30 AmD 552.

Ind.—Sheets v. Pabody, 6 Blackf. 120, 38 AmD 132.

Ky.—Clark v. Farmers' Nat. Bank, 124 Ky. 563, 99 SW 674, 30 KyL 738; Burrus v. Roulhac, 2 Bush 39; Maraman v. Trunnell, 3 Metc. 146, 77 AmD 167.

Miss.—Morse v. Clayton, 21 Miss. 373.

N. C.—Eure v. Eure, 14 N. C. 206; Cutlar v. Quince, 3 N. C. 60.

Pa.—Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Little v. Walton, 23 Pa. 164; Carter v. Trueman, 7 Pa. 315.

S. C.—Redfearn v. Craig, 57 S. C. 534, 35 SE 1024.

Tenn.—Abingdon v. Tyler, 6 Coldw. 502.

Tex.—Williams v. Verne, 68 Tex. 414, 4 SW 548; Miller v. Jasper, 10 Tex. 513.

Va.—Clarke v. Wells, 6 Gratt. (47 Va.) 475; Heffernan v. Grymes, 2 Leigh (29 Va.) 512.

[a] **Bond and mortgage to former administrator.**—An administrator de bonis non was vested with the title to a bond and mortgage taken by the former administrator to secure money of the estate lent out by him, although the obligations ran to "M., administrator," and not to "M., as administrator." Redfearn v. Craig, 57 S. C. 534, 35 SE 1024.

[b] **Where administration de bonis non is committed to a sheriff,** which administration goes into the hands of his deputy, the latter is chargeable with the amount of bonds taken by the first administrator, and payable to him as such, and after his death delivered by his personal representative to such deputy as unadministered assets. Tyler v. Nelson, 14 Gratt. (55 Va.) 214.

31. Searles v. Scott, 22 Miss. 94; Smith v. Waugh, 84 Va. 806, 6 SE 132.

Effect of transactions of predecessor generally see infra § 2755.

32. U. S.—Blydenburgh v. Lowry, 3 F. Cas. No. 1,582, 4 Cranch C. C. 368.

Kan.—Galloway v. Freeburg, 97 Kan. 765, 156 P 766.

Md.—Smithers v. Hooper, 23 Md. 273; Lemmon v. Hall, 20 Md. 168 (statute).

N. Y.—Matter of Manhardt, 17 App. Div. 1, 44 NYS 836 [aff 16 Misc. 522, 40 NYS 206].

N. C.—Hackney v. Steadman, 46 N. C. 207.

Pa.—Stair v. York Nat. Bank, 55 Pa. 364, 93 AmD 759.

Va.—Clarke v. Wells, 6 Gratt, (47 Va.) 475.

[a] **Moneys deposited.**—(1) The administrator de bonis non is entitled to a fund on deposit which can be identified as the money of decedent. Matter of Manhardt, 17 App. Div. 1, 44 NYS 836 [aff 16 Misc. 522, 40 NYS 206]; Hackney v. Steadman, 46 N. C. 207; Stair v. York Nat. Bank, 55 Pa. 364, 93 AmD 759. (2) But in the absence of proof as to what portion of a bank deposit in the name of a deceased executor belongs to his decedent's estate and what portion belongs to the estate of the executor, as charges for expenditures and commissions, the administrator de bonis non cannot draw out such deposit in gross, he being entitled only to the balance due his decedent's estate. Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616. (3) An administrator de bonis non may not recover a deposit made by decedent if the first administrator has withdrawn a portion and surrendered the certificate. Brooks v. Mastin, 69 Mo. 58. (4) Where a bank account was, after the depositor's death, continued in his name by his administrator, who occasionally made deposits of money derived from the estate, it was held that if such balance was a part of the assets of the estate of the original decedent, and his deceased administrator did not distribute the same nor finally settle the estate, then it was an unadministered asset of the original decedent. Getty v. Long, 82 Md. 643, 33 A 639.

[b] **The proceeds of a sale** of decedent's property go to the administrator de bonis non, where such proceeds have been kept intact. Meservey v. Kalloch, 97 Me. 91, 53 A 876; Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

[c] **Money recovered on the bond of the former representative** constitutes assets for the administrator de bonis non. Peo. v. Corlies, 1 Sandf. (N. Y.) 228.

[d] **Moneys collected in another state.**—An administrator de bonis non in one state is not entitled to moneys collected by the administrator in another state. Dorsey v. Dorsey, 5 J. J. Marsh. (Ky.) 280, 22 AmD 33.

33. U. S.—Wilson v. Arrick, 112 U. S. 83, 5 SCt 75, 28 L. ed. 617; U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927.

Ala.—Whitworth v. Oliver, 39 Ala. 286; Price v. Simmons, 13 Ala. 749; Nolly v. Wilkins, 11 Ala. 872; Willis v. Willis, 9 Ala. 721; Judge Benton County Ct. v. Price, 6 Ala. 36.

Ark.—Brice v. Taylor, 51 Ark. 75, 9 SW 854.

D. C.—U. S. v. Ames, 11 D. C. 278.

Ga.—Gilbert v. Hardwick, 11 Ga. 599.

Ky.—Saffran v. Kennedy, 7 J. J. Marsh. 188; Dorsey v. Dorsey, 5 J. J. Marsh. 280, 22 AmD 33; Oldham v. Collins, 4 J. J. Marsh. 49; Bradshaw v. Com., 3 J. J. Marsh. 632.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

Md.—Gardner v. Simmes, 1 Gill 425.

Miss.—Dement v. Heth, 45 Miss. 388; Sloan v. Johnson, 22 Miss. 47.

N. J.—Bradway v. Holmes, 50 N. J. Eq. 311, 25 A 196; Carrick v. Carrick, 23 N. J. Eq. 364; Brownlee v. Lockwood, 20 N. J. Eq. 239. Aliter as to a substituted administrator. McDonald v. O'Connell, 39 N. J. L. 317.

Pa.—Carter v. Trueman, 7 Pa. 315; Com. v. Strohecker, 9 Watts 479; Thomas v. Riegel, 5 Rawle 266; Potts v. Smith, 3 Rawle 361, 24 AmD 359.

Vt.—Curtis v. Curtis, 13 Vt. 517.

Va.—Smith v. Waugh, 84 Va. 806, 6 SE 132; Coleman v. McMurdo, 5 Rand. (26 Va.) 51.

Eng.—Packman's Case, 6 Coke 18b, 77 Reprint 281; Wankford v. Wankford, 1 Salk. 299, 91 Reprint 265.

But compare Miller v. Alexander, 10 S. C. Eq. 25 (administrator de bonis non entitled to balance due from his predecessor, as being only partially administered assets).

[a] **Money collected by an agent or attorney of the former administrator** is deemed at common law to be an administered asset, which the administrator de bonis non cannot recover from the agent or attorney. Wilson v. Arrick, 112 U. S. 83,

may recover the balance due from his predecessor to the estate.[34] Under some statutes it is essential that the account of the former administrator be first settled before the administrator de bonis non can maintain a suit for the balance,[35] but a prior accounting is sometimes held not necessary.[36] An order of the probate court directing payment to the administrator de bonis non is sometimes a prerequisite to his right of recovery.[37] When a prior executor or administrator, after his discharge from office, collects money for the estate, it may be treated as money had and received to the use of the administrator de bonis non, who may sue the former representative in assumpsit.[38]

Debt from original representative to decedent. An administrator de bonis non may recover of the original representative a debt due from him to the decedent in his lifetime,[39] unless the debt as such has been extinguished by some act of the former representative by which his indebtedness was acknowledged, as returning it in the inventory.[40]

Where an administrator is dismissed and adjudged to pay interest and damages, these amounts are payable to his successor in office and not to the creditor who procured his dismissal.[41]

[§ 2747] **c. Property Illegally or Fraudulently Sold or Transferred.** A sale, transfer, or payment made without authority passes no title and does not constitute an administration.[42] Therefore an administrator de bonis non may pursue assets so disposed of.[43] Not only may this be done where the

5 SCt 75, 28 L. ed. 617; Sloan v. Johnson, 22 Miss. 47. Contra Blydenburgh v. Lowry, 3 F. Cas. No. 1,582, 4 Cranch C. C. 368.

[b] **Where balance voluntarily paid.**—If the balance due from the administrator in chief is voluntarily rendered by him to the probate court on his final settlement, it becomes assets of the estate when paid into the hands of his successor for which he and his sureties are liable. Whitworth v. Oliver, 39 Ala. 286; Brice v. Taylor, 51 Ark. 75, 9 SW 854.

[c] **When it becomes necessary to remit to the probate court** for administration a balance recovered in another tribunal from an executor or administrator in chief, it must be paid to the administrator de bonis non as assets of the estate. Brice v. Taylor, 51 Ark. 75, 9 SW 584.

[d] **When fund ready for distribution.**—If it can be ascertained from the records of the probate court that the fund is ripe for distribution, nothing is in the way of an order to that effect in the tribunal where it is recovered, and it is then unnecessary to encumber it with costs and delay by remitting it to the probate court. Brice v. Taylor, 51 Ark. 75, 9 SW 854; Gray v. Harris, 43 Miss. 421.

[e] **A judgment** rendered in favor of an administrator de bonis non, before the passage of a statute giving him the right to sue, was absolutely void. Hanna v. Price, 23 Ala. 826.

34. U. S.—Michigan Trust Co. v. Ferry, 228 U. S. 346, 33 SCt 550, 57 L. ed. 867 (rule in Michigan); De Valengin v. Duffy, 14 Pet. 282, 10 L. ed. 457; Hibberd v. Bailey, 129 Fed. 575, 64 CCA 143.

Ala.—Wood v. Sullens, 44 Ala. 686; Whitworth v. Oliver, 39 Ala. 286; Long v. Easly, 13 Ala. 239.

Conn.—Bristol Sav. Bank v. Holley, 77 Conn. 225, 58 A 691; Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Fla.—Adams v. Internal Impr. Fund, 37 Fla. 266, 20 S 266; Gregory v. Harrison, 4 Fla. 56.

Ill.—Nevitt v. Woodburn, 160 Ill. 203, 43 NE 385, 52 AmSR 315.

Ind.—Duffy v. State, 115 Ind. 351, 17 NE 615.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Stewart v. Phenice, 65 Iowa 475, 22 NW 636 [dist Kelley v. Mann, 56 Iowa 625, 10 NW 211].

Kan.—Musick v. Beebe, 17 Kan. 47.

Me.—Hodge v. Hodge, 90 Me. 505, 38 A 535, 60 AmSR 285, 40 LRA 33.

Md.—Getty v. Long, 82 Md. 643, 33 A 639; Donaldson v. Raborg, 26 Md. 312; Lemmon v. Hall, 20 Md. 168; Sibley v. Williams, 3 Gill & J. 52.

Mass.—Foster v. Bailey, 157 Mass. 160, 31 NE 771; Minot v. Norcross, 143 Mass. 326, 9 NE 662; Marvel v. Babbitt, 143 Mass. 226, 9 NE 566; Sewall v. Patch, 132 Mass. 326; Buttrick v. King, 7 Metc. 20; Wiggin v. Swett, 6 Metc. 194, 39 AmD 716.

Minn.—Balch v. Hooper, 32 Minn. 158, 20 NW 124; Palmer v. Pollock, 26 Minn. 433, 4 NW 1113.

Miss.—Dement v. Heth, 45 Miss. 388.

Mo.—Booker v. Armstrong, 93 Mo. 49, 4 SW 727; State v. Heinrichs, 82 Mo. 542; Morehouse v. Ware, 78 Mo. 100; State v. King, 76 Mo. 510; Seymour v. Seymour, 67 Mo. 303; Wickham v. Page, 49 Mo. 526; State v. Dulle, 45 Mo. 269; Vastine v. Dinan, 42 Mo. 269; State v. Fulton, 35 Mo. 323; State v. Hunter, 15 Mo. 490; State v. Zorn, 138 Mo. A. 713, 119 SW 517; Cowgill v. Linnville, 20 Mo. A. Bolton v. Whitmore, 12 Mo. A. 581.

N. J.—Aldridge v. McClelland, 34 N. J. Eq. 237.

N. Y.—Casoni v. Jerome, 58 N. Y. 315; Walton v. Walton, 4 Abb. Dec. 512, 1 Keyes 15, 2 AbbPrNS 428; Yale v. Baker, 2 Hun 468, 5 Thomps. & C. 10; Dunne v. American Surety Co., 34 Misc. 584, 70 NYS 391.

N. C.—Mann v. Baker, 142 N. C. 235, 55 SE 102; Grant v. Reese, 94 N. C. 720; Ham v. Kornegay, 85 N. C. 119; Lansdell v. Winstead, 76 N. C. 366; Goodman v. Goodman, 72 N. C. 508; Latta v. Russ, 53 N. C. 111; Morton v. Ashbee, 46 N. C. 312; State v. Britton, 33 N. C. 110; State v. Johnston, 30 N. C. 381; Taylor v. Brooks, 20 N. C. 273.

Oh.—Slagle v. Entrekin, 44 Oh. St. 637, 10 NE 675; Douglas v. Day, 28 Oh. St. 175; Curtis v. Lynch, 19 Oh. St. 392; Tracy v. Card, 2 Oh. St. 431; Blizzard v. Filler, 20 Oh. 479; O'Connor v. State, 18 Oh. 225; Hercklerath v. Van Nes, 1 OhS&CP 263, 31 CincL Bul 35.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Pa.—Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Little v. Walton, 23 Pa. 164; Carter v. Trueman, 7 Pa. 315 [aff 3 PaLJR 101, 4 PaLJ 462]; Weld v. McClure, 9 Watts 495; Drenkle v. Sharman, 9 Watts 485; Com. v. Strohecker, 9 Watts 479; Com. v. Wood, 14 Pa. Dist. 509; Schlecht's Est., 2 Brewst. 337; Pierce's Est., 11 Montg. Co. 110; Montgomery's Est., 7 Phila. 504; Croyell v. Blackfan, 1 Pittsb. 327.

S. C.—Villard v. Robert, 18 S. C. Eq. 393; Miller v. Alexander, 10 S. C. Eq. 25.

Tex.—Todd v. Willis, 66 Tex. 704, 1 SW 803; Boulware v. Hendricks, 23 Tex. 667; Murphey v. Menard, 11 Tex. 673, 14 Tex. 62; Mott v. Ruenbuhl, 1 Tex. A. Civ. Cas. § 599.

[a] **Ordering payment of balance, although action on bond barred.**—The court may order a balance remaining in the hands of the first administrator to be paid over, although an action on his bond is barred by the statute of limitations. Donaldson v. Raborg, 26 Md. 312.

[b] **Except under statute** there can be no action. Blizzard v. Filler, 20 Oh. 479.

[c] **Where there are no debts** (1) a balance found due from the former administrator on an accounting should be ordered paid to the distributees, and not to the administrator de bonis non. Dement v. Heth, 45 Miss. 388; Gray v. Harris, 43 Miss. 421. (2) But this does not seem in accordance with the general line of authorities. Duffy v. State, 115 Ind. 351, 17 NE 615; Miller v. Alexander, 10 S. C. Eq. 25. (3) The Pennsylvania statute of 1834, authorizing an administrator de bonis non to sue the former administrator for a balance in his hands, applies to cases where the account was settled before the passage of the act, and regardless of the existence of outstanding debts. Carter v. Trueman, 7 Pa. 315 [aff 3 PaLJR 101, 4 PaLJ 462]. To same effect New Jersey Mut. L. Ins. Co. v. Corbin, 12 Phila. 257.

[d] **As to moneys which cannot be identified** as the specific property of the estate the administrator de bonis non has no preference and stands as a general creditor. Gamble v. Hamilton, 7 Mo. 469.

[e] **Right of administrator de bonis non exclusive.**—Ordinarily the right of the administrator de bonis non to the unadministered assets is exclusive of the legatees, next of kin, and creditors. Smith v. Billings, 23 F. Cas. No. 13,014, 3 Cranch C. C. 355; Little v. Walton, 23 Pa. 164; Connelly's App., 1 Grant (Pa.) 366; Com. v. Strohecker, 9 Watts (Pa.) 479; Lee v. Wright, 1 Rawle (Pa.) 149; Hart's Est., 12 Pa. Dist. 47; New Jersey Mut. L. Ins. Co. v. Corbin, 12 Phila. (Pa.) 257; Montgomery's Est., 7 Phila. (Pa.) 504.

[f] **In Louisiana** the second administrator may call upon the succession of the first for a general accounting, but cannot sue for a money judgment. Granger v. Reid, 36 La. Ann. 845.

35. Foster v. Bailey, 157 Mass. 160, 31 NE 771; In re Wagner, 227 Pa. 460, 76 A 215; Esher v. Fulmer, 2 Miles (Pa.) 463; Ingraham v. Cox, 1 Pars. Eq. Cas. 70, 1 PaLJR 464, 3 PaLJ 128; Matter of Bradley, 9 Phila. (Pa.) 327; King v. Devoe, 6 Phila. (Pa.) 551; Ewing v. Lewis, 1 Phila. (Pa.) 112.

36. Douglas v. Day, 28 Oh. St. 175.

37. State v. Robinson, 57 Md. 486; State v. Hart, 57 Md. 234.

38. Salter v. Cain, 7 Ala. 478.

39. Kelsey v. Smith, 2 Miss. 68; Utterback v. Cooper, 28 Gratt. (69 Va.) 233.

40. Kelsey v. Smith, 2 Miss. 68.

41. Lobit v. Castille, 14 La. Ann. 779.

42. See cases infra this section.

43. Reed v. Reeves, 13 Bush (Ky.) 447; Carter v. Trueman, 7 Pa. 315 [aff 3 PaLJRep 101, 4 PaLJ 462].

[a] **Illustration.**—Where an executor assigned a note belonging to the estate in payment of a gambling debt due from him to the assignee, the assignment was void, and did not defeat the right of the administrator de bonis non thereto. Reed v. Reeves, 13 Bush. (Ky.) 447.

sale or transfer is contrary to law,[44] but also where it is fraudulent, in which case the administrator de bonis non may avoid it,[45] unless the persons interested in the estate have ratified it.[46] It has been held that the administrator de bonis non may ratify an improper sale by his predecessor and elect to take the proceeds,[47] but there is also authority for the view that the right to ratify an illegal sale of land belongs solely to the heirs,[48] and therefore the administrator de bonis non cannot ratify such a sale nor sue his predecessor for the proceeds.[49] It has been held that the statute of limitations does not begin to run against an action by an administrator de bonis non to recover property wrongfully sold by his predecessor until the appointment of the administrator de bonis non,[50] but it has also been asserted that the possession of the purchaser is adverse to the original administrator, and the statute runs from the time of delivery of possession.[51] The declarations of the former administrator as to the validity of the sale are not admissible to support the action.[52]

[§ 2748] **d. Liability of Former Representative for Waste or Conversion.** At the common law an administrator de bonis non has no right of action against his predecessor for a devastavit by him committed, such right belonging to creditors and distributees alone;[53] but in many jurisdictions statutes have conferred upon the administrator de bonis non powers sufficient to sustain an action by him

[b] **Payment of an unfounded claim in good faith,** the administrator and claimant both believing it to be valid, will not ground an action by the administrator de bonis non to recover it back. Mayhew v. Stone, 26 Can. S. C. 58.

[c] **Payments by way of distribution** (1) but not in fact made to the next of kin do not protect the former administrator from a suit by the administrator de bonis non for the sums so paid. Carter v. Trueman, 7 Pa. 315 [aff 3 PaLJR 101, 4 PaLJ 462]. (2) But payments to certain distributees of more than their share of the estate distributed by the former administrator will not ground an action by the administrator de bonis non if the shares can be equalized in future distributions. Patterson v. Bell, 25 Iowa 149. (3) Where distribution has been made under a void decree to the prejudice of creditors, the administrator de bonis non is entitled to payment by the former administrator only to the extent necessary properly to settle the estate. Browne v. Doolittle, 151 Mass. 595, 25 NE 23.

[d] **Where a payment is made under advice of counsel** but under a mistake of law, the amount paid does not constitute an unadministered asset for which the administrator de bonis non has a right of action. Mayhew v. Stone, 26 Can. S. C. 58.

44. Ala.—McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Hopper v. Steele, 18 Ala. 828.

Ga.—Paschal v. Davis, 3 Ga. 256.

Miss.—Forniquet v. Forstall, 34 Miss. 87; Hull v. Clark, 22 Miss. 187; Byrd v. Holloway, 14 Miss. 323.

Mo.—Cowgill v. Linnville, 20 Mo. A. 138.

Vt.—Green v. Sargent, 23 Vt. 466, 56 AmD 88.

45. Ala.—McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Gantt v. Phillips, 23 Ala. 275; Swink v. Snodgrass, 17 Ala. 653, 52 AmD 190.

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163.

Ind.—Duffy v. State, 115 Ind. 351, 17 NE 615; Talbott v. Dennis, 1 Ind. 471.

Miss.—Searles v. Scott, 22 Miss. 94; Scott v. Searles, 15 Miss. 498, 45 AmD 317.

N. C.—Hendrick v. Gidney, 114 N. C. 543, 19 SE 598.

Tenn.—Bell v. Speight, 11 Humphr. 451.

Tex.—Williams v. Verne, 68 Tex. 414, 4 SW 548; Todd v. Willis, 66 Tex. 704, 1 SW 803 [expl Brown v. Franklin, 44 Tex. 559; McDonald v. Alford, 32 Tex. 35]; Giddings v. Steele, 28 Tex. 732, 91 AmD 336; Pearson v. Murditt, 26 Tex. 157, 80 AmD 649; Cochran v. Thompson, 18 Tex. 652; Burdett v. Silsbee, 15 Tex. 604; De Witt v. Miller, 9 Tex. 239; Evans v. Oakley, 2 Tex. 182.

Va.—Heffernan v. Grymes, 2 Leigh (29 Va.) 512.

Eng.—Cubbidge v. Boatwright, 1 Russ. 549, 46 EngCh 489, 38 Reprint 212.

[a] **"Collusion between the administrator and ostensible purchaser** is an essential element to deprive the sale of its effect as an administration and leave the asset unadministered and subject to the power of the administrator de bonis non." Deans v. Wilcoxon, 25 Fla. 980, 1050, 7 S 163.

[b] **Recovery in equity.**—Fraud and collusion would entitle the administrator de bonis non to recover in equity. Bell v. Speight, 11 Humphr. (Tenn.) 451. But see Creek v. Wheatley, 3 Sneed (Tenn.) 484 (where a recovery at law was denied).

[c] **In South Carolina** (1) where the administrator has the right to dispose of property belonging to the estate, the fact that a disposition is made with fraudulent motives and in collusion with the purchaser will not entitle the administrator de bonis non to follow the property into the hands of the purchaser, such right being possessed by the legatees and creditors only. Knobeloch v. Germania Sav. Bank, 43 S. C. 233, 21 SE 13; Steele v. Atkinson, 14 S. C. 154, 37 AmR 728; Johnston v. Lewis, 14 S. C. Eq. 40, 33 AmD 74. (2) But where actual fraud is practiced on the administrator, whereby he is induced to dispose of property belonging to the estate, it seems that the administrator de bonis non may follow the property into the hands of the purchaser. Steele v. Atkinson, 14 S. C. 154, 37 AmR 728; Johnston v. Lewis, 14 S. C. Eq. 40, 33 AmD 74.

[d] **Confirmation of the sale** (1) or transfer by the probate court has been held not to make it such an administration as will defeat the title of the administrator de bonis non. Giddings v. Steele, 28 Tex. 732, 91 AmD 336; Pearson v. Burditt, 26 Tex. 157, 80 AmD 649; Cochran v. Thompson, 18 Tex. 652; Burdett v. Silsbee, 15 Tex. 604; De Witt v. Miller, 9 Tex. 239; Evans v. Oakley, 2 Tex. 182. (2) But later decisions are to the contrary effect. Brown v. Franklin, 44 Tex. 559; McDonald v. Alford, 32 Tex. 35.

46. McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Elliott v. Mobile Branch Bank, 20 Ala. 345; Kavanaugh v. Thompson, 16 Ala. 817.

[a] **Requisites of ratification.**—The receipt by the distributees of property bought with the proceeds of the illegal sale was not a ratification unless such distributees were of lawful age at the time they received the property and knew with what funds it was bought. McArthur v. Carrie, 32 Ala. 75, 70 AmD 529.

47. Wales v. Newbould, 9 Mich. 45.

48. Woods v. Legg, 91 Ala. 511, 8 S 342.

49. Woods v. Legg, 91 Ala. 511, 8 S 342.

50. Hopper v. Steele, 18 Ala. 828.

51. Paschal v. Davis, 3 Ga. 256.

52. McArthur v. Carrie, 32 Ala. 75, 70 AmD 529.

53. U. S.—U. S. v. Walker, 109 U. S. 258, 3 SCt 277, 27 L. ed. 927; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 CCA 221 [rev on other grounds 228 U. S. 346, 33 SCt 550, 57 L. ed. 867]; Beard v. Roth, 35 Fed. 397.

Ala.—Waring v. Lewis, 53 Ala. 615; Lyon v. Odom, 31 Ala. 234; Nolly v. Wilkins, 11 Ala. 872; Willis v. Willis, 9 Ala. 721; Judge Benton County Ct. v. Price, 6 Ala. 36; Draughon v. French, 4 Port. 352; Chamberlain v. Bates, 2 Port. 550, 27 AmD 667.

Ark.—Brice v. Taylor, 51 Ark. 75, 9 SW 854; Green v. Byrne, 46 Ark. 453; Gibson v. Ponder, 40 Ark. 195; Ludlow v. Flournoy, 34 Ark. 451; State v. Rottaken, 34 Ark. 144; Finn v. Hempstead, 24 Ark. 111.

Conn.—American Bd. Commrs. App., 27 Conn. 344.

Fla.—Deans v. Wilcoxon, 25 Fla. 980, 7 S 163; Gregory v. Harrison, 4 Fla. 56.

Ga.—Goodwynne v. Bellerby, 116 Ga. 901, 43 SE 275; Knight v. Lasseter, 16 Ga. 151; Oglesby v. Gilmore, 5 Ga. 56; Paschal v. Davis, 3 Ga. 256; Thomas v. Hardwick, 1 Ga. 78.

Ill.—Stose v. Peo., 25 Ill. 600; Short v. Johnson, 25 Ill. 489; Newhall v. Turney, 14 Ill. 338; Rowan v. Kirkpatrick, 14 Ill. 1.

Ind.—Lucas v. Donaldson, 117 Ind. 139, 19 NE 758; Kemp v. Smith, 7 Ind. 471; Graham v. State, 7 Ind. 470, 65 AmD 745; State v. Gooding, 8 Blackf. 567; Young v. Kimball, 8 Blackf. 167; Anthony v. McCall, 3 Blackf. 86; Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005.

Ky.—Yancy v. Yancy, 183 Ky. 512, 209 SW 858; Yager v. Commonwealth Bank, 125 Ky. 177, 100 SW 848, 30 KyL 1287; Karn v. Seaton, 62 SW 737, 23 KyL 101; Warfield v. Brand, 13 Bush 77; Felts v. Brown, 7 J. J. Marsh. 147; Oldham v. Collins, 4 J. J. Marsh. 49.

Me.—Meservey v. Kallach, 97 Me. 91, 53 A 876.

Md.—Sydnor v. Graves, 119 Md. 321, 86 A 341; State v. Fidelity, etc., Co., 100 Md. 256, 59 A 735, 108 AmSR 410; Baker v. Bowie, 74 Md. 467, 22 A 133; Hagthorp v. Hook, 1 Gill & J. 270.

Miss.—Rives v. Patty, 43 Miss. 338; Forniquet v. Forstall, 34 Miss. 87; Searles v. Scott, 22 Miss. 94; Byrd v. Holloway, 14 Miss. 323; Stubblefield v. McRaven, 13 Miss. 130, 43 AmD 502; Miller v. Helm, 10 Miss. 687; Prosser v. Leatherman, 5 Miss. 237, 34 AmD 121; Probate Judge v. Green, 2 Miss. 146; Prosser v. Yerby, 2 Miss. 87; Kelsey v. Smith, 2 Miss. 68.

Mo.—Gamble v. Hamilton, 7 Mo. 469.

N. J.—Roy v. Squier, 61 N. J. Eq. 182, 48 A 233; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156; Thiefes v. Mason, 55 N. J. Eq. 456, 37 A 455; Carrick v. Carrick, 23 N. J. Eq. 364; Brownlee v. Lockwood, 20 N. J. Eq. 239.

Oh.—Douglas v. Day, 28 Oh. St. 175; O'Conner v. State, 18 Oh. 225; McCoy v. Gilmore, 7 Oh. 268.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Pa.—Kendall v. Lee, 2 Penr. & W.

against his predecessor for waste or conversion of the assets.[54] Such right of action is, however, purely statutory, and must be pursued and confined within the terms of the statute.[55]

[§ 2749] **e. Realty.** An administrator de bonis non in general succeeds to such interests and rights in and concerning realty as devolved upon his predecessor.[56] Thus he is entitled to administer upon land purchased by his predecessor with funds of the estate,[57] and he may collect the purchase money of

482; Potts v. Smith, 3 Rawle 361, 24 AmD 359; Allen v. Irwin, 1 Serg. & R. 549.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554; Scituate Prob. Ct. v. Smith, 16 R. I. 444, 17 A 46.

S. C.—Smith v. Carrere, 18 S. C. Eq. 123; Johnston v. Lewis, 14 S. C. Eq. 40, 33 AmD 74.

Tenn.—Thomas v. Stanley, 4 Sneed 411; Cheek v. Wheatley, 3 Sneed 484; Stott v. Alexander, 2 Sneed 650.

Tex.—Brown v. Franklin, 44 Tex. 559; Johnson v. Hogan, 37 Tex. 77; McDonald v. Alford, 32 Tex. 35; Murphey v. Menard, 11 Tex. 673; Ward v. Ward, 1 Tex. Unrep. Cas. 123.

Utah.—Reed v. Hume, 25 Utah 248, 70 P 998.

Vt.—Curtis v. Curtis, 13 Vt. 517.

Va.—Cheatham v. Burfoot, 9 Leigh (36 Va.) 580; Coleman v. McMurdo, 5 Rand. (26 Va.) 51.

W. Va.—Downey v. Kearney, 81 W. Va. 442, 94 SE 509; Brown v. Brown, 72 W. Va. 648, 78 SE 1040, 47 LRANS 995.

Eng.—Packman's Case, 3 Coke 18b, 77 Reprint 281; Wankford v. Wankford, 1 Salk. 299, 91 Reprint 265.

[a] **Reason for rule.**—"The cases regard any portion of the estate which the former administrator has appropriated to his own use, ceasing to keep it apart from his individual estate, as administered, whether the appropriation was right or not." Scituate Prob. Ct. v. Smith, 16 R. I. 444, 17 A 56.

[b] **Administrator de bonis non may not sue for waste committed by administrator of predecessor.**—Ferguson v. Sweeney, 6 Blackf. (Ind.) 547.

[c] **A public administrator** may sue his predecessor in office. He is not an administrator de bonis non. State v. Watts, 23 Ark. 304.

[d] **When the predecessor acted under a void appointment,** the legal administrator may sue him. O'Bannon v. Cord, 3 KyL 183.

[e] **Where all but one of several coexecutors resign and the remaining executor gives a new bond,** he is in effect an administrator de bonis non administratis and can sue his former associates only for unadministered assets, and hence cannot surcharge ex parte settlements made by them or charge them with a devastavit. Brown v. Brown, 72 W. Va. 648, 78 SE 1040, 47 LRANS 995.

54. Ala.—Eubank v. Clark, 78 Ala. 73; Martin v. Ellerbe, 70 Ala. 326; Whitworth v. Oliver, 39 Ala. 286.

Cal.—Horton v. Jack, 4 Cal. Unrep. Cas. 758, 37 P 652.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Goodwynne v. Bellerby, 116 Ga. 901, 43 SE 275; Knight v. Lasseter, 16 Ga. 151; Oglesby v. Gilmore, 5 Ga. 56.

Ind.—Lucas v. Donaldson, 117 Ind. 139, 19 NE 758; Duffy v. State, 115 Ind. 351, 17 NE 615; Day v. Worland, 92 Ind. 75; Myers v. State, 47 Ind. 293; State v. Porter, 9 Ind. 342; Graham v. State, 7 Ind. 470, 65 AmD 745; Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Kan.—American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

La.—Granger v. Reid, 36 La. Ann. 845.

Mass.—Rhines v. Wentworth, 209 Mass. 585, 95 NE 951.

Minn.—Palmer v. Pollock, 26 Minn. 433, 4 NW 1113.

Miss.—Forniquet v. Forstall, 34 Miss. 87.

Mo.—Van Bibber v. Julian, 81 Mo. 618; Morehouse v. Ware, 78 Mo. 100; State v. Farmer, 54 Mo. 439; State v. Morton, 18 Mo. 53; State v. Campbell, 10 Mo. 724.

N. J.—Parker v. Stevens, 61 N. J. Eq. 163, 47 A 573.

N. Y.—Dunne v. American Surety Co., 43 App. Div. 91, 59 NYS 429; Dunne v. American Surety Co., 34 Misc. 584, 70 NYS 391; Flanagan v. Fidelity, etc., Co., 32 Misc. 424, 66 NYS 544.

N. C.—Brittain v. Dickson, 104 N. C. 547, 10 SE 701; Grant v. Reese, 94 N. C. 720; Hardy v. Miles, 91 N. C. 131; Badger v. Jones, 66 N. C. 305; Ferebee v. Baxter, 34 N. C. 64; Cannon v. Jenkins, 16 N. C. 422.

Oh.—Hercklerath v. Van Nes, 1 Oh S&CP 263, 31 CincLBul 35.

Or.—Gatch v. Simpson, 40 Or. 90, 66 P 688.

Pa.—Lewis v. Ewing, 18 Pa. 313; Drenkle v. Sharman, 9 Watts 485; Hill's Est., 32 Pa. Super. 508; Parrish v. Brooks, 4 Brewst. 154.

S. C.—Foster v. Brown, 17 S. C. L. 221, 19 AmD 672.

Tenn.—Whitaker v. Whitaker, 12 Lea 393; Shackelford v. Runyan, 7 Humphr. 141.

Tex.—Grothaus v. White, 72 Tex. 124, 11 SW 1032; Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75; Martel v. Martel, 17 Tex. 391; Francis v. Northcote, 6 Tex. 185; Strickland v. Sandmeyer, 21 Tex. Civ. A. 351, 52 SW 87.

Wash.—Denton v. Schneider, 80 Wash. 506, 142 P 9.

[a] **Trover** (1) will lie by an administrator de bonis non against his predecessor for goods converted. Foster v. Brown, 17 S. C. L. 221, 19 AmD 672. (2) Trover will lie only when the goods can be specifically distinguished. Stott v. Alexander, 2 Sneed (Tenn.) 650.

[b] **When suit improper.**—An administrator de bonis non cannot sue a former administrator for negligence in the collection of claims, where the only party whom the administrator de bonis non represents has already received all to which he is entitled. Shurteleff v. Ferry, 138 Mass. 259.

[c] **Omission to charge assets.**—Since an administrator de bonis non may properly omit to charge himself, as administrator, with a claim for assets, alleged to have been converted by the former executor, so long as the money is withheld and the executor's right thereto in doubt and the will unconstrued, his failure to charge himself with such claim does not estop him to sue therefor. Denton v. Schneider, 80 Wash. 506, 142 P 9.

55. Ala.—Nolly v. Wilkins, 11 Ala. 872.

Ill.—Marsh v. Peo., 11 Ill. 284.

Ind.—Lucas v. Donaldson, 117 Ind. 139, 19 NE 738.

Kan.—American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

Me.—Meservey v. Kalloch, 97 Me. 91, 53 A 876.

N. J.—McDonald v. O'Connell, 39 N. J. L. 317; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

Oh.—Jones v. Willis, 66 Oh. St. 114, 63 NE 605; Douglas v. Day, 28 Oh. St. 175; Curtis v. Lynch, 19 Oh. St. 392; Blizzard v. Filler, 20 Oh. 479; Montgomery v. Goepper, 7 Oh. Dec. (Reprint) 581, 4 CincLBul 67.

R. I.—Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 Ann Cas 554 [pet to show cause and motion for rearg den 30 R. I. 193, 74 A 177].

Tex.—Murphey v. Menard, 14 Tex. 62, 11 Tex. 673.

Va.—Helsey v. Craig, 33 Gratt. (74 Va.) 716.

[a] **Illustrations.**—Under various statutes, it has been held: (1) That the right to sue exists only when the estate is insolvent. Willis v. Willis, 9 Ala. 721. (2) That only a substituted administrator, and not an administrator de bonis non, can sue. McDonald v. O'Connell, 39 N. J. L. 317. (3) That the action lies only against an administrator who has been removed and not against the personal representative of a deceased administrator. Duffin v. Abbott, 48 Ill. 17; Stose v. Peo., 25 Ill. 600; Short v. Johnson, 25 Ill. 489; Marsh v. Peo., 15 Ill. 284; Tracy v. Card, 2 Oh. St. 431; Hercklerath v. Van Nes, 1 OhS&CP 263, 31 CincLBul 35. (4) That a curator, but not an administrator, may be sued. Helsey v. Craig, 33 Gratt. (74 Va.) 716. (5) That the action must be upon the bond of the former administrator. Sheeks v. State, 156 Ind. 508, 60 NE 142; Lucas v. Donaldson, 117 Ind. 139, 19 NE 758; Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255; Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005; American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775; Jones v. Willis, 66 Oh. St. 114, 63 NE 605; Entrekin v. Slagle, 3 Oh. Dec. (Reprint) 550; Pawtucket Prob. Ct. v. Williams, 30 R. I. 144, 73 A 382, 19 AnnCas 554 [pet to show cause and rearg den 30 R. I. 193, 74 A 177]. Contra Murphey v. Menard, 14 Tex. 62 [expl 11 Tex. 673]. (6) That an administrator who was excused from giving a bond may be sued. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

[b] **The right is not conferred by** a statute giving the right to sue to "person interested personally, or in any official capacity." Meservey v. Kalloch, 97 Me. 91, 53 A 876.

56. Myers v. Forbes, 74 Md. 355, 22 A 410; Kline v. Moulton, 11 Mich. 370; Carson v. Duffy, 55 N. C. 507; Yellow Creek Coal Co. v. Hogan, 41 Pa. Co. 138.

[a] **Right to possession and rents and profits.**—An administrator de bonis non succeeds to the statutory rights of the administrator to hold possession of the land and receive the rents and profits, and such right cannot be aliened by the administrator so as to prevent the administrator de bonis non from recovering possession. Kline v. Moulton, 11 Mich. 370.

[b] **After twenty years' acquiescence** it will be presumed that a sale of land by heirs was consented to by the then administrator, and the administrator de bonis non cannot assert a right thereto. Breckinridge v. Waters, 4 Dana (Ky.) 620.

[c] **When no debts remain unpaid,** the title vests in the heirs. Ward v. Ward, 1 Tex. Unrep. Cas. 123.

[d] **Execution sale.**—(1) An administrator de bonis non may recover from his predecessor the surplus proceeds of real estate sold on execution and paid to the predecessor. Carter v. Trueman, 7 Pa. 315 [aff 3 Pa. LJR 101, 4 PaLJ 462]. (2) Contra Alexander v. Wolfe, 88 N. C. 398.

[e] **The homestead** is not to be administered by the administrator where it vests in the surviving spouse or children under the statute. Kimmons v. Abraham, (Tex. Civ. A.) 176 SW 671.

[f] **Interest as devisee and testamentary trustee.**—The administrator de bonis non takes no right in land held by the former administrator as devisee and trustee under the will and not as administrator. Carson v. Duffy, 55 N. C. 507. To similar effect Myers v. Forbes, 74 Md. 355, 22 A 410.

57. Haynes v. Bessellieu, 25 Ark. 499; Tiernan's Est., 14 PittsbLegJ (Pa.) 185.

land sold by his predecessor[58] or decedent,[59] and it has been held that he may maintain a suit to set aside an illegal sale made by his predecessor when necessary in order to subject the land to the payment of debts,[60] although this has been denied.[61] A mortgage taken by an administrator in his own name may after his death be enforced only by his own representative,[62] but one taken by an executor to himself as such and to his successors passes to the administrator de bonis non.[63] The appointment of an administrator de bonis non does not start anew the period during which land may be sold for the payment of debts, and the limitation in that respect continues to run as under the previous administration.[64]

[§ 2750] **C. Powers and Duties**[65]**—1. In General.** So far as concerns the assets to which an administrator de bonis non is entitled he represents the estate[66] and has all the powers and responsibilities of a general administrator.[67] That is to say that all the powers and duties of the preceding executor or administrator vest in the administrator de bonis non for the purpose of enabling him to complete the administration,[68] unless his powers are limited by statute.[69] The advice of the court may be sought and obtained by an administrator de bonis non in difficult and doubtful matters.[70]

[§ 2751] **2. Collection of Assets—a. In General.** It is the duty of the administrator de bonis non to take possession of unadministered effects of decedent,[71] within a reasonable time,[72] and to this end he may maintain any action necessary or proper for the recovery of such assets.[73] So far as the statute confers on him the right to assets or demands against his predecessor,[74] he may maintain actions against his predecessor or his personal representative for their enforcement.[75] It is not, however, the duty of an administrator de bonis non to cause a re-

58. Hudgens v. Cameron, 50 Ala. 379; Hefferman v. Grymes, 2 Leigh (29 Va.) 512.

[a] **Interest on moneys obtained from a sale of real estate** and wrongfully retained by the administrator belongs to the administrator de bonis non. Smithers v. Hooper, 23 Md. 273.

59. White v. Beard, 5 Port. (Ala.) 94, 30 AmD 552 (where decedent had made the sale and the former administrator had taken a note for the price).

60. Seabrook v. Brady, 47 Ga. 650; Forniquet v. Forstall, 34 Miss. 87.

61. Brown v. Franklin, 44 Tex. 559.

62. Caulkins v. Bolton, 98 N. Y. 511.

63. Luers v. Brunges, 56 HowPr (N. Y.) 282.

64. Waters v. Crossen, 41 Iowa 261; McCrary v. Tasker, 41 Iowa 255; Slocum v. English, 62 N. Y. 494; Matter of Kingsland, 60 Hun 116, 14 NYS 495 [aff 133 N. Y. 170, 30 NE 845].

65. Duty to return inventory see supra § 375.

Right to require predecessor to account see supra § 2311.

66. Smith v. Billing, 22 F. Cas. No. 13,014, 3 Cranch C. C. 355; Lobit v. Castille, 14 La. Ann. 779; Barlow v. Nelson, 157 Mass. 395, 32 NE 359; Grant v. Bell, 87 N. C. 34.

[a] **A dismissed administrator must settle with his successor,** and not with the creditor provoking his dismissal. Lobit v. Castille, 14 La. Ann. 779.

[b] **Suit for conversion.**—The administrator de bonis non and not the legatee should sue for a conversion of the assets by strangers after the death of the administrator. Barlow v. Nelson, 157 Mass. 395, 32 NE 359.

67. Ala.—Moseley v. Mastin, 37 Ala. 216.

Ind.—Ormes v. Brown, 22 Ind. A. 569, 52 NE 1005.

Ky.—Williams v. Collins, 1 B. Mon. 58.

Me.—Walker v. Follett, 105 Me. 201, 73 A 1092.

Nebr.—Prusa v. Everett, 78 Nebr. 251, 113 NW 571, 78 Nebr. 250, 110 NW 568.

N. Y.—Whitlock v. Bowery Sav. Bank, 36 Hun 460; McMahon v. Allen, 4 E. D. Smith 519.

N. C.—Alexander v. Wolfe, 88 N. C. 398.

Tenn.—Shackelford v. Runyan, 7 Humphr. 141.

"The authority of an administrator in chief, lessened in consequence of the previous administration." Moseley v. Mastin, 37 Ala. 216, 219.

68. Conn.—Bristol Sav. Bank v. Holley, 77 Conn. 225, 58 A 691; Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Goodwynne v. Bellerby, 116 Ga. 901, 43 SE 275.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Stewart v. Phenice, 65 Iowa 475, 22 NW 636; Shawhan v. Loffer, 24 Iowa 217.

Kan.—American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

Mo.—In re Schooler, 73 Mo. A. 301.

Nebr.—Prusa v. Everett, 78 Nebr. 251, 113 NW 571; Trumble v. Williams, 18 Nebr. 144, 24 NW 716.

N. Y.—Dunne v. American Surety Co., 43 App. Div. 91, 59 NYS 429; Dunne v. American Surety Co., 34 Misc. 584, 70 NYS 391.

N. C.—Brittain v. Dickson, 104 N. C. 547, 10 SE 701.

Or.—Herren's Est., 40 Or. 90, 66 P 688.

Tenn.—Coleman v. Raynor, 3 Coldw. 25; Shackelford v. Runyan, 7 Humphr. 141.

W. Va.—Thompson v. Nowlin, 51 W. Va. 346, 41 SE 178.

[a] **Where lands are devised to an executor in trust,** an administrator de bonis non with the will annexed does not take the legal title thereto. Kelsey v. McTigue, 171 App. Div. 877, 157 NYS 730.

69. Croxton v. Renner, 103 Ind. 223, 2 NE 601; Stewart v. Phenice, 65 Iowa 475, 22 NW 636.

70. Sellers v. Sellers, 35 Ala. 235; Hartson v. Elden, 58 N. J. Eq. 478, 44 A 156.

Supervision and guidance of courts generally see supra § 393.

71. Ala.—Whitworth v. Oliver, 39 Ala. 286.

Ill.—Frier v. Lowe, 232 Ill. 622, 83 NE 1083.

Md.—Alexander v. Stewart, 8 Gill & J. 226.

Pa.—Com. v. Wood, 14 Pa. Dist. 509; Beeler's Est., 6 Pa. Co. 380.

S. C.—Enicks v. Powell, 19 S. C. Eq. 196.

[a] **Issue of letters de bonis non to original administrator.**—Where letters of administration have been revoked, and other letters granted to the same person on a new bond, the funds in his hands as administrator are transferred to him as administrator de bonis non. Enick v. Powell, 19 S. C. Eq. 196.

72. Whitworth v. Oliver, 39 Ala. 286.

73. Conn.—Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

Ind.—Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

Kan.—Galloway v. Freebury, 97 Kan. 765, 156 P 766.

Me.—Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA1915E 840, AnnCas1917E 1.

Mass.—Cunningham v. Davis, 175 Mass. 213, 56 NE 2.

Miss.—Murphy v. Clark, 9 Miss. 221.

N. Y.—Homans v. New York L. Ins. Co., 55 Misc. 574, 106 NYS 929.

N. C.—Grant v. Bell, 87 N. C. 34.

Oh.—Jelke v Goldsmith, 52 Oh. St. 499, 40 NE 167, 49 AmSR 730.

Pa.—Lea v. Hopkins, 7 Pa. 385; Parkin v. Safe Deposit Bank, 54 Pa. Super. 54; Com. v. Wood, 14 Pa. Dist. 509.

Tex.—Evans v. Oakley, 2 Tex. 182.

Wash.—Griffith v. James, 91 Wash. 607, 158 P 251.

[a] **An action for conversion** of the assets should be brought by the administrator de bonis non. Barlow v. Nelson, 157 Mass. 395, 32 NE 359 [dist Rich v. Rich, 113 Mass. 197; Hall v. Burgess, 5 Gray (Mass.) 12]; Minott v. Norcross, 143 Mass. 326, 9 NE 662; Sewall v. Patch, 132 Mass. 326; Varnum v. Meserve, 8 Allen (Mass.) 158; Buttrick v. King, 7 Metc. (Mass.) 20; Lawrence v. Wright, 23 Pick. (Mass.) 128.

[b] **Forcible entry and detainer.**—An administrator de bonis non is entitled to the benefit of a statute permitting a personal representative to maintain forcible entry and detainer to obtain possession of premises mortgaged to the decedent. Cunningham v. Davis, 175 Mass. 213, 56 NE 2.

[c] **Recovery of pledged property.**—Where an intestate pledged property to secure the payment of borrowed money, an action to recover such property should have been brought by the administrator de bonis non, and not by the heirs. Evans v. Oakley, 2 Tex. 182.

[d] **Amendment of pleading.**—Where an administrator de bonis non sues on a note given for property sold by his predecessor, and on the trial it appears that the note was made payable to the former representative individually, plaintiff should be permitted to amend his complaint so as to sue for the value of the property. Barnes v. Barnes, 109 Miss. 273, 68 S 248.

[e] **A plea in abatement** is the only method of questioning the right of an administrator de bonis non to sue. Michigan Trust Co. v. Probasco, 29 Ind. A. 109, 63 NE 255.

74. See supra § 2744.

75. U. S.—Beall v. New Mexico, 16 Wall. 535, 31 L. ed. 292.

Ark.—Wilson v. Hinton, 63 Ark. 145, 38 SW 38.

Kan.—Galloway v. Freebury, 97 Kan. 765, 156 P 766; American Surety Co. v. Piatt, 67 Kan. 294, 72 P 775.

Miss.—Kelsey v. Smith, 2 Miss. 68.

Mo.—State v. Morrison, 244 Mo. 193, 148 SW 907.

N. J.—Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.

N. Y.—Clapp v. Meserole, 1 Abb. Dec. 362, 1 Keyes 281, 27 HowPr 600 note.

Okl.—Shipman v. Brown, 130 P 603.

Pa.—Lewis v. Ewing, 18 Pa. 313; Carter v. Trueman, 7 Pa. 315; Weld v. McClure, 9 Watts 495.

S. C.—Miller v. Alexander, 10 S. C. Eq. 25.

examination of his predecessor's accounts.[76] In some states statutes provide for a summary order from the probate court requiring assets in the predecessor's hands to be delivered to the administrator de bonis non.[77] The right of the administrator de bonis non to the assets cannot be defeated by the sole distributee paying the debts of the estate, and taking possession of the property.[78]

[§ 2752] **b. Judgments in Favor of Predecessor.** At common law an administrator de bonis non could not enforce a judgment recovered by his predecessor during his administration,[79] but could maintain a new action on the debt.[80] Provision is, however, sometimes made by statute for enforcement by the administrator de bonis non of a judgment recovered by his predecessor.[81] Where the administrator de bonis non is entitled to enforce the judgment by execution, he is also entitled to supplementary and ancillary remedies.[82] The administrator de bonis non is a necessary party to a bill to enforce a decree to which his predecessor was a party.[83]

[§ 2753] **3. Distribution.** After payment of debts and expenses of administration, it is the duty of the administrator de bonis non to distribute the estate to the persons entitled thereto.[84]

[§ 2754] **D. Liabilities.** The administrator de bonis non is not chargeable generally with all the undistributed assets of the estate, but only with such as came into his hands, or would have come into his hands had he used good faith and reasonable diligence.[85] The inventory and settlement in court of the former administrator do not bind, even presumptively, the administrator de bonis non as to

Va.—Utterback v. Cooper, 28 Gratt. (69 Va.) 233.

[a] **Enforcement of surrogate's decree.**—An administrator de bonis non may maintain an action to enforce a surrogate's decree made on an acounting. Clapp v. Meserole, 1 AbbDec (N. Y.) 362, 1 Keyes 281, 27 HowPr 600 note.

[b] **Debt due from former representative.** — An administrator de bonis non may recover from the former administrator a debt due from him to the decedent. Kelsey v. Smith, 2 Miss. 68; Utterback v. Cooper, 28 Gratt. (69 Va.) 233.

[c] **Action on bond not the only remedy.**—Galloway v. Freeburg, 97 Kan. 765, 156 P 766.

[d] **An action against the sureties** of the former representative for the recovery of assets may be maintained. Com. v. Wood, 14 Pa. Dist. 509.

[e] **Suit for property received as statutory trustee.**—Where the husband has been appointed administrator of his wife, but her estate is not taken and held by him as such, and no actual administration on her estate is had, the administrator appointed for her estate on the death of the husband may sue his administrator for the wife's personalty received by the husband as statutory trustee. Connecticut Trust, etc., Co. v. Security Co., 67 Conn. 438, 35 A 343 (holding further that the fact that the wife's administrator delayed for eighteen months after the husband's death before applying for his letters of administration did not constitute laches barring his recovery from the husband's administrator of the wife's personalty, the delay having resulted in no injury).

[f] **The administrator de bonis non may set off** a liability of his predecessor to the estate when sued for the distributive share of such predecessor. Beeler's Est., 6 Pa. Co. 380.

[g] **The account of the former administrator** showing an indebtedness to the estate is prima facie evidence in favor of the administrator de bonis non. Wilson v. Hinton, 63 Ark. 145, 35 SW 358.

[h] **Where the appointment of an administrator de bonis non is void** for a failure to comply with the law in removing the former administrator, a judgment of the probate court against the former administrator and in favor of the administrator de bonis non is unauthorized and void. Goodwin v. Hooper, 45 Ala. 613.

76. Yale v. Baker, 2 Hun (N. Y.) 468, 5 Thomps. & C. 10; Brown v. Franklin, 44 Tex. 559.

[a] **Duty to participate in accounting.**—In Alabama it is the duty of an administrator de bonis non to participate in the accounting of his predecessor, and he is liable for assets in the latter's hands. Taylor v. Benham, 5 How. (U. S.) 233, 12 L. ed. 130; Waler v. Ray, 48 Ala. 468; Whitworth v. Oliver, 39 Ala. 286.

77. State v. Hart, 57 Md. 234; Foster v. Bailey, 157 Mass. 160, 31 NE 771; Wickham v. Page, 49 Mo. 526; Miller v. Jasper, 10 Tex. 513 (summary method of recovering papers belonging to the estate).

78. Kelly v. Kelly, 9 Ala. 908, 44 AmD 469.

79. Alsop v. Mather, 8 Conn. 584, 21 AmD 703; Grout v. Chamberlin, 4 Mass. 611, 613; Allen v. Irwin, 1 Serg. & R. (Pa.) 549; Turner v. Davies, 2 Saund. 148, 85 Reprint 884; Yaites v. Gough, Yelv. 33, 80 Reprint 24.

[a] **Where the administrator de bonis non requires such protection** because of the insolvency of the former administrator's sureties and the existence of a balance against him, it seems that the court will order the judgment entered to the use of the administrator de bonis non, but not in the absence of such circumstances. Magruder's Case, 16 F. Cas. No. 8,962, 2 Cranch C. C. 626.

80. Grout v. Chamberlin, 4 Mass. 613; Smith v. Pearce, 2 Swan (Tenn.) 127; Dykes v. Woodhouse, 3 Rand (24 Va.) 287. See also cases supra note 80.

[a] **This would seem contrary to** the strict rule of the common law by which the administrator de bonis non took only assets remaining in specie unaltered by any act of the former administrator. See supra § 2743.

81. Ala.—Duncan v. Hargrove, 18 Ala. 77; Warren v. Rist, 16 Ala. 686.

N. C.—Ellison v. Andrews, 34 N. C. 188.

Pa.—Meiser v. Eckhart, 19 Pa. 201; Lea v. Hopkins, 7 Pa. 385.

Vt.—Hunt v. Payne, 29 Vt. 176.

Eng.—Underhill v. Devereux, 2 Saund. 71, 85 Reprint 715.

[a] **Payment to the representative of the former administrator** after notice given by the administrator de bonis non before letters issued is no protection to the judgment debtor. Meiser v. Eckhart, 19 Pa. 201.

[b] **A judgment by default** is not within the equity of the statute. Clerk v. Withers, 1 Salk. 332, 91 Reprint 286, 2 Ld. Raym. 1072, 92 Reprint 211, 6 Mod. 290, 87 Reprint 1030, 11 Mod. 35, 88 Reprint 866.

82. Talbott v. Dennis, Smith (Ind.) 357; Shell v. Boyd, 32 S. C. 359, 11 SE 205.

[a] **An administrator de bonis non may maintain:** (1) A bill to set aside a fraudulent conveyance and satisfy the judgment from the land. Shell v. Boyd, 32 S. C. 359, 11 SE 205. (2) A bill to set aside the satisfaction of a decree. Talbott v. Dennis, Smith (Ind.) 357.

83. Griffin v. Spence, 69 Ala. 393.

84. Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204; Alexander v Stewart, 8 Gill & J (Md.) 226.

[a] **Where personal property had been delivered to a testamentary trustee** when it was in fact intestate, the administrator de bonis non should recover it and distribute it to the persons rightfully entitled thereto. Chamberlin's App., 70 Conn. 363, 39 A 734, 41 LRA 204.

[b] **Commissions of former administrator.**—The administrator de bonis non is not bound to pay commissions allowed to the former administrator unless there is an order of court or a demand of payment, and he will be discharged from liability if he distributes the estate under such circumstances, without paying such commissions. Patton v. Patton, 32 Miss. 331.

85. Ala.—Weeks v. Love, 19 Ala. 25.

Ill.—Peo. v. Allen, 25 Ill. A. 657.

La.—New Orleans Gaslight, etc., Co. v. Webb, 2 La. Ann. 526.

Md.—Smithers v. Hooper, 23 Md. 273.

Mo.—State v. Ruggler, 23 Mo. 339.

N. Y.—In re Place, 1 Redf. Surr. 276, 7 NYLegObs 217.

N. C.—Roper v. Burton, 107 N. C. 526, 12 SE 334.

Pa.—In re Bell, 230 Pa. 359, 79 A 644.

Tex.—Higgs v. Garrison, (Civ. A.) 27 SW 34.

[a] **He is not chargeable with** moneys collected by his predecessor, for which parties in interest have their remedy against such predecessor or his representatives, or with the value of chattels in the use of which a life estate is given by the will, as to which the persons in remainder have their remedy by requiring security. Matter of Place, 7 NYLegObs 217, 1 Redf. Surr. 276.

[b] **Presumption as to receipt of proceeds of sale by predecessor.**—When, on the sale of property by an administrator, part of the price is due before and part after the appointment of his successor, the latter is presumed to have received the proceeds, and, in order to escape liability, must show as a special defense his inability to collect from his precedessor the portion in his hands. New Orleans Gaslight, etc., Co. v. Webb, 2 La. Ann. 526.

[c] **Money paid by mistake.**—Where a general administrator, through mistake, pays to an administrator de bonis non money which was not an asset of the estate, the administrator de bonis non is not liable as such for the money so paid. Weeks v. Love, 19 Ala. 25; Sellers v. Smith, 11 Ala. 264; Houston v. Frazer, 8 Ala. 81.

[d] **Successive administrations by same persons.**—(1) Where the original administrator was superseded by another, but later again invested with the trust, he must account for all assets received by him on his first administration, and not delivered to his immediate successor. Willis v. Willis, 16 Ala. 652. (2) Where letters of administration have been revoked and other letters granted to the same person, he holds the bonds in his hands under the first letters as administrator de bonis non. Enicks v. Powell, 19 S. C. Eq. 196.

[e] **A sheriff to whom special ad-**

assets coming into his hands,[86] but a settlement between the administrator de bonis non and his predecessor is prima facie correct.[87] The administrator de bonis non is not responsible for the failure to realize moneys insecurely invested by his predecessor and thereby lost.[88] His liability is for his own acts,[89] and he cannot be called to account for the maladministration of his predecessor.[90] The measure of duty on the part of an administrator de bonis non is the exercise of good faith and ordinary care and diligence, and he is liable for failure to reach that standard but not beyond.[91] He cannot be charged with assets which he failed to realize because of excusable ignorance of their existence,[92] but he is required to exercise ordinary diligence both in discovering and in obtaining possession of assets, without special demand or request so to do,[93] and may be charged with the resulting loss to the estate if he fails to collect assets within a reasonable time.[94] Where the administrator de bonis non has no knowledge of the pendency of an action against his predecessor, and he is not made a party to such action within the statutory period after his appointment within which actions against an administrator must be brought, and no new assets come into his hands, the action cannot thereafter be revived against him.[95]

[§ 2755] **E. Effect of Contracts and Transactions of Predecessor.** At common law there was no privity between an administrator de bonis non and his predecessor,[96] as the administrator de bonis non took the unadministered assets as the representative of decedent and not as the representative of the former executor or administrator,[97] and his rights and duties concerned only assets not administered at all by the predecessor, and his administration was therefore practically independent of his predecessor's acts.[98] But the effect of the modern extensions of the rights of the administrator de bonis non is to bind him by all acts of his predecessor lawfully performed within the scope of his duties.[99] He is not, however, bound by acts of his

ministration is granted is chargeable in the same manner as an administrator de bonis non, and upon his bond as sheriff, with moneys received upon notes given to the former administrator. Williams v. Collins, 1 B. Mon. (Ky.) 58.

[f] **Surety on former administrator's bond succeeding.**—Where the surety on the first administrator's bond was made administrator de bonis non, and the former administrator held assets in excess of the penalty of the bond, the administrator de bonis non was required to charge himself with the entire penalty. Jacobs v. Morrow, 21 Nebr. 233, 31 NW 739.

86. Saffran v. Kennedy, 7 J. J. Marsh. (Ky.) 188; Solomons v. Krusheedt, 3 Dem. Surr. (N. Y.) 307; Grant v. Reese, 94 N. C. 720.

Operation and effect of inventory generally see supra § 383.

87. Grant v. Reese, 94 N. C. 720.

88. Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 AmD 528; In re Bell, 226 Pa. 535, 75 A 727; Bentley's Est., 15 WklyNC (Pa.) 160.

[a] **Loan by predecessor.**—An administrator de bonis non will not be surcharged with a loss of a loan made by the sole executrix who preceded him and with which he had nothing to do. In re Bell, 226 Pa. 533, 75 A 727.

89. Alsop v. Mather, 8 Conn. 584, 21 AmD 703; Gonzalez v. Del Rosario, 7 Philippine 140.

[a] **Payment of decree against predecessor.**—An administrator de bonis non is not liable for the payment of a decree obtained against his predecessor for acts performed by the predecessor. Alsop v. Mather, 8 Conn. 584, 21 AmD 703.

[b] **The liability for taxes assessed against an administrator** is a liability of the estate, and is not personal to the administrator, and it devolves upon his successor. San Francisco v. Pennie, 93 Cal. 465, 29 P 66.

90. Ill.—Bliss v. Seaman, 165 Ill. 422, 46 NE 279.

Md.—Smithers v. Hooper, 23 Md. 273.

N. J.—Brownlee v. Lockwood, 20 N. J. Eq. 239.

Pa.—In re Small, 5 Pa. 258.

Tenn.—Cheek v. Wheatley, 3 Sneed 484.

91. U. S.—Taylor v. Benham, 5 How. 233, 12 L. ed. 130.

Ala.—Eubank v. Clark, 78 Ala. 73; Waller v. Ray, 48 Ala. 468; Whitworth v. Oliver, 39 Ala. 286; Wilkinson v. Hunter, 37 Ala. 268.

Ga.—Bowers v. Grimes, 45 Ga. 616.

Mo.—State v. Ruggles, 23 Mo. 339.

N. C.—Roper v. Burton, 107 N. C. 526, 12 SE 334; Grant v. Reese, 94 N. C. 720.

Tex.—Higgs v. Garrison, (Civ. A.) 27 SW 34.

[a] **Payments received as creditor from predecessor.**—It is error to charge an administrator de bonis non with moneys paid to him as a creditor of the estate by a former administrator, without proof that they were improperly paid. Daughdrill v. Daughdrill, 108 Ala. 321, 19 S 185.

92. State v. Ruggles, 23 Mo. 339.

93. Grant v. Reese, 94 N. C. 720.

[a] **Sale by predecessor for distribution.**—An administrator de bonis non is liable for moneys actually received upon notes taken by his predecessor at sales made not for administration, but for distribution, but he is not liable for a failure to collect such notes. Roper v. Burton, 107 N. C. 526, 12 SE 334.

94. Lidderdale v. Robinson, 12 Wheat. (U. S.) 594, 6 L. ed. 740 [aff 15 F. Cas. No. 8,337, 2 Brock. 159]; Whitworth v. Oliver, 39 Ala. 286.

95. Waterman v. Soliday, 231 Mass. 422, 121 NE 155.

96. Ala.—Martin v. Ellerbe, 70 Ala. 326; Graves v. Flowers, 51 Ala. 402, 23 AmR 552.

Conn.—In re American Bd. of Comrs. for Foreign Missions, 27 Conn. 344; Alsop v. Mather, 8 Conn. 584, 21 AmD 703.

Mass.—Grout v. Chamberlin, 4 Mass. 611.

Miss.—Ruff v. Smith, 31 Miss. 59; Duncan v. Watson, 28 Miss. 187.

Pa.—In re Small, 5 Pa. 258; Allen v. Irwin, 1 Serg. & R. 549.

Eng.—Yaites v. Gough, Yelv. 33, 80 Reprint 24.

[a] **A judgment against an executor** is, as to the succeeding administrator de bonis non, res inter alios acta, and is neither binding on him nor admissible as evidence against him. Brothers v. Gunnels, 110 Ala. 436, 18 S 3; Graves v. Flowers, 51 Ala. 402, 23 AmR 552; Rogers v. Grannis, 20 Ala. 247; McLaughlin v. Nelms, 9 Ala. 925; Wilson v. Auld, 8 Ala. 842; Alsop v. Mather, 8 Conn. 584, 21 AmD 703; Ruff v. Smith, 31 Miss. 59.

[b] **Garnishment.**—An administrator de bonis non is bound by garnishment proceedings against his predecessor. Simonds v. Harris, 92 Ind. 505.

97. Ala.—Weeks v. Love, 19 Ala. 25.

Conn.—In re American Bd. of Comrs. for Foreign Missions, 27 Conn. 344.

Me.—Waterman v. Dockray, 78 Me. 139, 3 A 49.

Md.—State v. Wright, 4 Harr. & J. 148.

Miss.—Sloan v. Johnson, 22 Miss. 47.

Tenn.—Bell v. Speight, 11 Humphr. 451.

Eng.—Catherwood v. Chabaud, 1 B. & C. 150, 8 ECL 65, 107 Reprint 56.

[a] **"By the common law, the two administrations were separate, distinct, independent** of each other. The one was not the mere successor to, or continuation of the other. Each was, of itself, an immediate, full administration. The administrator in chief, by the terms of the grant to him, was clothed with title to, and the duty and authority of administering, all the goods and chattels, rights and credits, which were of the testator or intestate at the time of his death. The administrator de bonis non, by the terms of the grant to him, was confined, limited in authority to the goods and chattels, rights and credits of the testator or intestate, which were unadministered—it was de bonis non administratis. The import of the terms of the respective grants clearly indicates the distinction between them, and, so far as regards the administrator de bonis non, directs attention as to what act of the administrator in chief, or what was done while his authority was of force, within the line of his duty, was an administration." Martin v. Ellerbe, 70 Ala. 326, 339.

98. See supra § 2743.

99. Ala.—Martin v. Ellerbe, 70 Ala. 326; Pharis v. Leachman, 20 Ala. 662; Starks v. Keenan, 5 Ala. 590.

Ark.—Marlatt v. Scantland, 19 Ark. 443.

Kan.—Young v. Scott, 59 Kan. 621, 54 P 670.

Md.—Hagthorp v. Neale, 7 Gill & J. 13, 26 AmD 594.

Miss.—Duncan v. Watson, 28 Miss. 187.

N. Y.—Whitlock v. Bowery Sav. Bank, 36 Hun 460.

N. C.—Badger v. Jones, 66 N. C. 305.

Oh.—Bray v. Darby, 82 Oh. St. 47, 91 NE 861.

S. C.—Johnston v. Lewis, 14 S. C. Eq. 40, 33 AmD 74; Nettles v. Elkins, 7 S. C. Eq. 182.

Va.—Coleman v. McMurdo, 5 Rand. (26 Va.) 51.

W. Va.—Thompson v. Nowlin, 51 W. Va. 346, 41 SE 178.

"In many respects the acts of the administrator, within the sphere of his duty and power, are obligatory upon his successor, so far as to charge the estate. They bind the administrator de bonis non, because the estate came to his hands charged with them by acts of the administrator which he might legitimately do in the management of the estate

predecessor which were fraudulent[1] or illegal.[2] It is usually held that an administrator de bonis non may enforce by action a contract of his predecessor which the latter might have sued on in his representative capacity,[3] although this has been denied.[4] While by the common law the administrator could bind only himself and not the estate by obligations created by him,[5] now such obligations created on behalf of the estate can usually be enforced against an administrator de bonis non to the extent of the available assets in his hands.[6]

[§ 2756] **F. Administrators De Bonis Non with the Will Annexed.** In the case of an administrator de bonis non with the will annexed, any question arising out of his de bonis non character or based upon the fact that there has been a prior administration is governed by the same rules as though he was an ordinary administrator de bonis non,[7] while in his capacity as administrator with the will annexed he stands upon the same footing as any other administrator with the will annexed as to the powers which he may exercise and the duties which devolve upon him.[8]

XIX. ADMINISTRATORS WITH THE WILL ANNEXED

[§ 2757] **A. Appointment—1. When Necessary or Proper.** Where a decedent has left a will but such will does not nominate any executors, or none of the persons named as executors can or will act as such, the court appoints a person to perform the necessary duties connected with the settlement of the estate, and such appointee is termed an administrator "with the will annexed," or "cum testamento annexo."[9] Such an appointment is also proper where the person nominated as executor is

while in his hands. If this were not so, the admission of the payment of a debt due the estate, or the execution of a receipt therefor, which is but another form of admitting payment by the administrator, would not bind the estate in the hands of his successor; and the administrator would be capable of doing no act, however legitimate, to the management of the estate, and in whatever good faith done, that could create a liability upon the estate, or continue one already existing. Under this rule, if the intestate, in his lifetime, had contracted to pay a sum of money by a stated time, upon a third person performing a certain act, and the intestate died before the time appointed, and the other party complied with his contract by the day, the admission by the administrator that the other party had complied, would not be sufficient to give him the benefit of the contract against the estate. Such a principle, if carried out, would produce the greatest inconvenience to estates, if it would not make the administration of them impracticable. We take it to be clear, that an administrator may make admissions which will bind the estate, provided he acts in good faith and with due regard to the best interests of the estate, and in a matter necessarily connected with its administration." Duncan v. Watson, 28 Miss. 187, 206.

[a] **A settlement by the original administrator** cannot be impeached by the administrator de bonis non on the ground that a just debt paid had not been previously allowed by the probate court. Young v. Scott, 59 Kan. 621, 54 P 670.

[b] **Estoppel.**—The administrator de bonis non may not assert a claim which the administrator was estopped from asserting. Whitlock v. Bowery Sav. Bank, 36 Hun (N. Y.) 460.

[c] **Assets improperly included in administration.**—An administrator de bonis non is liable for assets of a partnership of which the decedent was a member which the former administrator took into his possession and administered into the estate. Marlatt v. Scantland, 19 Ark. 443.

1. Carr v. Illinois Cent. R. Co., 180 Ala. 159, 60 S 277, 43 LRANS 634; Martin v. Ellerbe, 70 Ala. 326.

2. Ala.—Masterson v. Pullen, 62 Ala. 145.
Ga.—Sellars v. Cheney, 70 Ga. 790.
Ill.—Walbridge v. Day, 31 Ill. 379, 83 AmD 227.
Me.—Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA1915E 840, AnnCas1917E 1.
N. C.—Badger v. Jones, 66 N. C. 305.
Tenn.—Bell v. Speight, 11 Humphr. 451.

[a] **Illustration.**—An administrator de bonis non is not estopped from claiming property by the fact that the former administrator concurred in an illegal execution sale thereof. Sellars v. Cheney, 70 Ga. 790; Bell v. Speight, 11 Humphr. (Tenn.) 451.

[b] **An administrator de bonis non may enforce notes which his predecessor has surrendered,** when this is necessary to pay debts. Masterson v. Pullen, 62 Ala. 145.

[c] **An administrator de bonis non may buy in the title of heirs** to property wrongfully sold by the administrator and claim it as against the purchasers at the sale. Walbridge v. Day, 31 Ill. 379, 83 AmD 227.

3. Ark.—Hemphill v. Hamilton, 11 Ark. 425.
N. J.—Parker v. Fay, 61 N. J. Eq. 167, 47 A 499.
Pa.—Stair v. York Nat. Bank, 55 Pa. 364, 93 AmD 759.
R. I.—McGuinness v. Whalen, 17 R. I. 619, 24 A 44; Moseley v. Rendell, L. R. 6 Q. B. 338.
Eng.—Hirst v. Smith, 7 T. R. 182, 101 Reprint 921.

[a] **Administrator de bonis non may declare upon promise as made to first administrator.** — Hirst v. Smith, 7 T. R. 182, 101 Reprint 921.

4. Ross v. Sutton, 17 S. C. L. 126, 19 AmD 660.

5. Savage v. Benham, 11 Ala. 49; Tyson v. Walston, 83 N. C. 90; McBeth v. Smith, 5 S. C. L. 511; Pearce v. Smith, 4 S. C. L. 360, 4 AmD 588.

[a] **Note.**—An administrator de bonis non is not liable for a note given by the former administrator. Mellen v. West, 5 Oh. Cir. Ct. 89, 3 Oh. Cir. Dec. 46.

[b] **Costs.**—An administrator de bonis non is not bound for the costs of a capias ad satisfaciendum sued out by his predecessor and discontinued. Hampton v. Cooper, 33 N. C. 580.

6. Ark.—Bell v. Welch, 38 Ark. 139.
Ga.—Habersham v. Huguenin, R. M. Charlt. 376.
Iowa.—Shawhan v. Loffer, 24 Iowa 217.
Md.—In re Young, 3 Md. Ch. 461.
Tex.—Cock v. Carson, 38 Tex. 284.
Wash.—Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 P 593, LRA 1917E 966.
Eng.—In re Watson, 53 L. J. Ch. 305.

[a] **An administrator de bonis non cannot repudiate his predecessor's contract** without compensating the party injured. Cock v. Carson, 38 Tex. 284.

[b] **If an administrator agrees to sell** a chattel interest in real estate and dies before the agreement is completed, the administrator de bonis non stands in such privity of estate that he will be compelled to perform the agreement. Hirst v. Smith, 7 T. R. 182, 101 Reprint 921; Cubbidge v. Boatwright, 1 Russ. 549, 46 EngCh 489, 38 Reprint 212.

[c] **Attorney's fees.** — Fees for services rendered as an attorney in connection with the estate may be collected from the administrator de bonis non. Bell v. Welch, 38 Ark. 139; In re Young, 3 Md. Ch. 461; In re Watson, 53 L. J. Ch. 305.

[d] **Failure of predecessor to include claim in account.**—In an action against an administrator de bonis non on a claim for an expense properly incurred by the former administrator in the management of the estate, it is not material that the former administrator failed to include the expense or the claim in his final account rendered to his successor, since the creditor could not compel him to do so except on a hearing after rejection of the claim. Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 P 593, LRA1917E 966.

7. Pinney v. Barnes, 17 Conn. 420. See supra §§ 2743–2755.

8. Ill.—Nicoll v. Scott, 99 Ill. 529.
Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.
Me.—Knight v. Loomis, 30 Me. 204.
Mass.—Blake v. Dexter, 12 Cush. 559.
Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40; King v. Talbert, 36 Miss. 367; Bartlett v. Sutherland, 24 Miss. 395.
N. C.—Grant v. Reese, 94 N. C. 720. See infra §§ 2777–2779.

9. U. S.—In re Lucker, 8 Mill. Rev. 151, 152 [cit Cyc].
Ala.—Ward v. Oates, 43 Ala. 515.
Cal.—In re Munroe, 161 Cal. 10, 118 P 242, AnnCas1913B 116; Garber's Est., 74 Cal. 338, 16 P 233; In re McCullough, Myr. Prob. 76.
Ind.—Diedrich v. Way, (A.) 119 NE 223.
Iowa.—Cable v. Cable, 76 Iowa 163, 40 NW 700.
Ky.—Adams v. Readnour, 134 Ky. 230, 120 SW 279, 20 AnnCas 833; Peebles v. Watts, 9 Dana 102, 3 AmD 531.
La.—Rice's Suc., 21 La. Ann. 614; Girod v. Girod, 18 La. 394.
Md.—Wheeler v. Stifler, 82 Md. 648, 3 A 434.
Mass.—Stebbins v. Lathrop, 4 Pick. 33.
Miss.—Cox v. Cox, 16 Miss. 292; Vick v. Vicksburg, 2 Miss. 379, 31 AmD 167.
N. H.—Leavitt v. Leavitt, 65 N. H. 102, 18 A 920.
N. J.—In re Maxwell, 3 N. J. Eq. 611.
N. Y.—Matter of Maccaffil, 57 Misc. 264, 107 NYS 1115, 6 Mills Surr. 293 [aff 127 App. Div. 21, 111 NYS 315]; In re Depau, Tuck Surr. 290.
N. C.—Suttle v. Turner, 53 N. C. 403; Springs v. Erwin, 28 N. C. 27.
Pa.—In re Miller, 216 Pa. 257, 65 A 681; Paul's Est., 26 Pa. Dist. 1011; Coleman's Est., 3 Pa. Dist. 558, 15 Pa. Co. 252.
S. C.—Smith v. Wingo, 24 S. C. L. 287.
Tenn.—Hardin v. Hassell, 118 Tenn.

incompetent or unfit for appointment,[10] or dies without having applied for letters testamentary,[11] or where an executor who has qualified dies,[12] resigns,[13] or is removed[14] before the estate is completely administered, in which case the grant is of administration de bonis non with the will annexed.[15] Administration with the will annexed should not be granted unless the exigency is made apparent;[16] and executors named, if alive and competent, should have full opportunity to take or renounce the trust.[17] It is also necessary that there should be a valid will,[18] which has been duly admitted to probate,[19] but where there is such a will, any grant of administration must be with the will annexed.[20] There must of course be assets to be administered by the appointee as administrator.[21]

143, 100 SW 720; Drane v. Bayliss, 1 Humphr. 174; Baldwin v. Buford, 4 Yerg. 16.

Tex.—In re Grant, 93 Tex. 68, 53 SW 372.

Va.—Smith v. Lurty, 107 Va. 548, 59 SE 403; Thompson v. Meek, 7 Leigh (34 Va.) 419.

W. Va.—Elliott v. Blue, 74 W. Va. 209, 81 SE 982.

Wis.—Batchelder v. Batchelder, 20 Wis. 452; Finch v. Houghton, 19 Wis. 149.

Eng.—In re Pryse, [1904] P. 301; In re Crawshay, [1893] P. 108; In re Alston, [1892] P. 142; In re Palmer, L. R. 11 Ir. 1; In re Jordan, L. R. 1 P. & D. 555; In re Sawtell, 31 L. J. P. & M. 65; In re Arms, 71 L. T. Rep. N. S. 699; In re Thompson, 67 L. T. Rep. N. S. 357; In re Cozens, 16 L. T. Rep. N. S. 208.

[a] **Appointment of "trustees."**—Where the will after giving all of the testator's property to a son concluded with the appointment of two persons named as "trustees," the persons named as trustees were not executors, and administration with the will annexed was granted. In re Cozens, 16 L. T. Rep. N. S. 208.

[b] **Consent of executor not sufficient.**—If the will appointed an executor, the court will not, on the executor's consent, grant administration with the will annexed, but it can do so only on the executor's renunciation of probate, or after a citation has been served on him and he has failed to appear within the prescribed time. Garrard v. Garrard, L. R. 2 P. & D. 238.

[c] **Where the testator withdraws administration from the county court** as he has a right to do under the statutes (see infra § 2895) he cannot delegate the power to nominate an executor to succeed the executor named in the will and keep his estate under the administration of such successor free from the control of the county court, but upon the death of the executor or executors named in the will an administrator de bonis non with the will annexed is properly appointed and the estate administered under the orders of the court, notwithstanding a provision in the will that if the executors fail to qualify or die after qualification the probate court shall appoint one or more executors with the will annexed, in which case the independent character of the administration shall be maintained. In re Grant, 93 Tex. 68, 53 SW 372.

[d] **Dative testamentary executor.**—Under Civ. Code (1900) arts 1678, 1679, if a testator has omitted to name a testamentary executor or if the one named refuses to accept, a person is appointed by the court to execute the will and such appointee is termed the "dative testamentary executor." In so far, however, as there are distinctions between executors and administrators such appointee appears to belong more properly to the latter class. Gusman's Succ., 35 La. Ann. 404.

[e] **Letters should be granted in proper jurisdiction for probating will.**—In re Eyster, 5 Watts (Pa.) 132.

[f] **Temporary incapacity of the executor,** by reason of illness, does not require the issuance of letters of administration with the will annexed. Under such circumstances it is proper to grant temporary letters to a residuary legatee. In re Ponsonby, [1895] P. 287.

10. Matter of Maccaffil, 57 Misc. 264, 107 NYS 1115, 6 Mills Surr. 293 [aff 127 App. Div. 21, 111 NYS 315]; Chase v. Ross, 36 Wis. 267; In re Campion, [1900] P. 13; In re Massey, [1899] P. 270.

[a] **Illustration.**—Administration with the will annexed was properly granted, where the executor had become bankrupt and left the country. In re Cooper, L. R. 2 P. & D. 21.

[b] **The marriage of a sole executrix** extinguishes her authority as such under the statute, and authorizes the appointment of an administrator with the will annexed. Chase v. Ross, 36 Wis. 267.

11. In re McDonald, 118 Cal. 277, 50 P 399.

12. Sands v. Hickey, 135 Ala. 322, 33 S 827; Matter of Pierson, 58 Misc. 94, 110 NYS 476, 6 Mills Surr. 341.

[a] **Illustration.**—Where a widow was the sole executrix of her husband's will under which she took the property for life, with the right to use as much as she wished, on her death without having disposed of the entire estate, letters of administration with the will annexed should issue. Matter of Pierson, 58 Misc. 94, 110 NYS 476, 6 Mills Surr. 341.

Right of representative of deceased executor or administrator see infra § 2868.

13. Sands v. Hickey, 135 Ala. 322, 33 S 827.

14. Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527; Sands v. Hickey, 135 Ala. 322, 33 S 827.

15. Administrator de bonis non see supra §§ 2732–2741.

16. U. S.—Kane v. Paul, 14 Pet. 33, 10 L. ed. 341.

Ga.—Printup v. Patton, 91 Ga. 422, 18 SE 311.

Ky.—Adams v. Readnour, 134 Ky. 230, 120 SW 279, 20 AnnCas 833.

N. M.—Miera v. Akers, 184 P 817.

W. Va.—Elliott v. Blue, 74 W. Va. 209, 81 SE 982.

Eng.—In re Butler, [1898] P. 9.

[a] **Previous qualification of executor.**—(1) The appointment of an administrator with the will annexed is not necessarily void because an executor had previously been duly qualified and letters testamentary issued to him, for the executor may have resigned or have been removed before the administrator was appointed. Printup v. Patton, 91 Ga. 422, 18 SE 311. (2) But such an appointment while an executor properly appointed and qualified is in office is absolutely void. Kane v. Paul, 14 Pet. (U. S.) 33, 10 L. ed. 311.

17. Wheeler v. Stifler, 82 Md. 648, 33 A 434; In re Miller, 216 Pa. 247, 256, 65 A 681; Baldwin v. Buford, 4 Yerg. (Tenn.) 16; Thompson v. Meek, 7 Leigh (34 Va.) 419.

"Until the executor named in the will has refused or renounced the trust, the register has no authority to grant letters with the will annexed." In re Miller, supra.

18. In re Barton, 52 Cal. 538; In re Bouyssou, 3 Cal. A. 39, 84 P 460; Coleman's Est., 2 Pa. Dist. 206, 13 Pa. Co. 81; In re Kavanaugh, 7 Mill. Rev. 151; In re Greig, L. R. 1 P. & D. 72; Podmore v. Whatton, 10 Jur. N. S. 756; Hanson v. Shepherd, 17 L. T. Rep. N. S. 123.

[a] **If the will is invalid under the law of the testator's domicile** letters of administration with the will annexed will not be granted. Coleman's Est., 2 Pa. Dist. 206, 13 Pa. Co. 81.

[b] **Lost will.**—(1) Administration with the will annexed was granted, although the will could not be found, and the only evidence of it was a codicil containing independent dispositions and referring to the will. In re Greig, L. R. 1 P. & D. 72. (2) Administration with the will annexed as contained in a draft was granted, where the court was satisfied that the person who had taken out the original letters had suppressed or destroyed the will. Podmore v. Whatton, 10 Jur. N. S. 756.

[c] **Where the competency of the testator was doubtful,** the court refused, on motion, to grant letters as in the case of intestacy, but made a grant with the will annexed. Hanson v. Shepherd, 17 L. T. Rep. N. S. 123.

Effect of testacy or intestacy apparent after action based on contrary supposition see supra § 261.

19. In re Bouyssou, 3 Cal. A. 39, 84 P 460; Snelling v. Galvin, 174 Ky. 688, 192 SW 625; Smith v. Lurty, 107 Va. 548, 59 SE 403; Chase v. Ross, 36 Wis. 267.

[a] **Where the court refuses to admit a will to probate,** it cannot appoint an administrator with the will annexed. In re Bouyssou, 3 Cal. A. 39, 84 P 460.

[b] **Pending an appeal from probate** of the will administration with the will annexed cannot properly be granted. In re Fisher, 15 Wis. 511.

[c] **Subsequent probate of the will,** without a new appointment of the administrator, will not validate a sale made before such probate by one appointed administrator with the will annexed before probate. Snelling v. Galvin, 174 Ky. 688, 182 SW 625.

20. Ewing v. Sneed, 5 J. J. Marsh. (Ky.) 459.

[a] **Foreign will.**—After a will made in another state has been recorded in the court of appeals an appointment of an administrator without the will annexed is void. Ewing v. Sneed, 5 J. J. Marsh. (Ky.) 459.

[b] **Failure of order to specify.**—Even though an order of the county court appointing an administrator and showing his qualification did not contain the words "with the will annexed," this was the legal effect of the appointment where his bond contained those words and showed that it was given by him as administrator with the will annexed. Betty v. Petrie, 138 Ky. 426, 128 SW 320.

21. Ariz.—In re Anderson, 18 Ariz. 266, 158 P 457.

Ga.—Smith v. Moore, 129 Ga. 644, 59 SE 915.

La.—Glancey's Succ., 114 La. 766, 38 S 554.

N. Y.—Matter of Nesmith, 48 Hun 621, 1 NYS 343.

Tex.—McClelland v. McClelland, 46 Tex. Civ. A. 26, 101 SW 1171.

Eng.—In re Lock, 24 Wkly Rep. 281.

[a] **Illustration.**—Where a widow, as survivor in community, held in usufruct all the property of the succession, and there were no debts, except some court costs which the attorney of the succession promised to pay, and there was but one legacy which had been paid owing to the fact that the legatee lived with the widow, and was unwilling that it should be paid before the death of

[§ 2758] **2. Persons Entitled to Appointment—a. Statutory Regulation.** The selection of an administrator with the will annexed, like that of an ordinary administrator, is largely regulated by statutes prescribing the order in which particular persons shall be entitled to preference.[22] Under some statutes the same order prevails as in case of intestacy,[23] but the more usual governing principle is that the person most beneficially interested under the will shall have the preference, and as a general rule to cover the cases not specially provided for the person having the right to the estate ought to have the right of administration,[24] and the grant will be generally made to the person having the largest interest.[25]

[§ 2759] **b. Right of Particular Persons or Classes of Persons—(1) Legatees—(a) In General.** As a general rule the right of administration with the will annexed belongs to legatees under the will,[26] and an erroneous description of a legatee will not defeat his right in this respect, if it appears that he was in fact the person intended.[27] So also one who is a legatee, although not named in the will, is entitled to apply for letters of administration with the will annexed.[28] Where the will directed that the share of a legatee should be paid to her in monthly installments, the balance remaining at her death to go to her children, one of such children was entitled to letters of administration, although his application was opposed by the legatee, where the legatee did not ask for the issuance of letters to her,[29] although it has been held that, where the statute gives the right of administration to "distributees," a legatee or devisee has no preferential right to be appointed administrator with the will annexed[30] or to designate another for such appointment.[31]

[§ 2760] **(b) Residuary Legatee.** As a general rule the residuary legatee is preferred in the appointment of an administrator with the will annexed,[32] and this is especially true where the residuary legatee is the widow.[33] Where the will is silent as to the appointment of an administrator with the will annexed, the appointment is left to the discretion of the court.[34]

---

the widow, the appointment of a dative testamentary executor was properly denied. Glancey's Succ., 114 La. 766, 38 S 554.

[b] **Where estate fully administered except for trust.**—Where a will created a spendthrift trust and vested the legal title to the property in the executor as trustee, and the executor died after having fully administered the estate, in so far as his duties as executor were concerned, the county court had no jurisdiction to appoint an administrator with the will annexed, but the further administration of the trust should be accomplished through a trustee to be appointed by the district court. McClelland v. McClelland, 46 Tex. Civ. A. 26, 101 SW 1171.

[c] **Where testator devised all his property to his wife,** and she survived him and died, her duly appointed administrator was the proper party to caveat an application by the next of kin of her deceased husband for letters cum testamento, as there was no reversionary interest which the applicants would have had the right to administer. Smith v. Moore, 129 Ga. 644, 59 SE 915.

22. Ala.—Sands v. Hickey, 135 Ala. 322, 33 S 827.

Cal.—In re Engle, 124 Cal. 292, 56 P 1022.

Ky.—Phillips v. Hundley, 135 Ky. 269, 122 SW 147; Adams v. Readnour, 134 Ky. 230, 120 SW 279, 20 AnnCas 833; Hamilton v. Williams, 133 Ky. 558, 118 SW 358, 21 LRANS 975.

Mich.—American Missionary Assoc. v. Hall, 138 Mich. 247, 101 NW 535.

Mo.—Stevens v. Larwill, 110 Mo. A. 140, 84 SW 113.

N. Y.—Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518 mem, 94 NE 1099 mem]; Matter of Brown, 60 Misc. 628, 113 NYS 937, 6 Mills Surr. 573; Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224; In re Clute, 37 Misc. 710, 76 NYS 456; Matter of Haug, 29 Misc. 36, 60 NYS 382, 1 Mills Surr. 250; Matter of Beakes, 5 Dem. Surr. 128; Quintard v. Morgan, 4 Dem. Surr. 168; In re Ward, 1 Redf. Surr. 254.

N. C.—In re Jones, 98 SE 827.

Va.—Smith v. Lurty, 107 Va. 548, 59 SE 403.

[a] **"Person interested" entitled as against public administrator.**—Under a statute authorizing administration of a foreign will when produced by the executor or other person interested in the will, letters must, in the absence of a petition by the executor, be granted to a "person interested" applying therefor, to the exclusion of the public administrator. In re Engle, 124 Cal. 292, 56 P 1022.

[b] **In the case of a testate nonresident,** if the executor neglects or refuses to act in the state where property is located, the appointment of the administrator with the will annexed should be left wholly to the discretion of the judge of probate the same as the appointment of the administrator in the case of a nonresident intestate. In such case the statute providing that "when a person living out of a state shall die intestate, leaving property within the state, administration may be granted in any district where the estate or some part thereof shall be, to such person as the court shall see fit" governs, and not the statute providing that "upon the refusal of an executor to accept the trust or give a bond the court shall commit administration of the estate with the will annexed to the widow or next of kin of the deceased, and may cite them to appear before it, and upon their refusal, or neglect of appearance, or incapacity, may grant administration to one of the principal creditors, or on their refusal to such other person as the court shall think fit;" for the latter statute is a rule for the guidance of the probate court only in confiding administration upon the estates of deceased residents. Lawrence's App., 49 Conn. 411, 420.

23. Ala.—Ward v. Oates, 43 Ala. 515.

Cal.—In re Winbigler, 166 Cal. 434, 137 P 1; In re McDonald, 118 Cal. 277, 50 P 399; Garber's Est., 74 Cal. 338, 16 P 233.

Ky.—Adams v. Readnour, 134 Ky. 230, 120 SW 279, 20 AnnCas 833.

N. C.—In re Meyers, 113 N. C. 545, 18 SE 689.

Va.—Smith v. Lurty, 107 Va. 548, 59 SE 403.

[a] **Removal of appointee not primarily entitled.**—The statute providing that when letters of administration have been granted to any person other than the surviving wife, child, etc., of the intestate any one of them may obtain the revocation of letters and become entitled to the administration, is expressly limited to the estates of those who died intestate, and does not apply to letters of administration with the will annexed. Li Po Tai's Est., 4 Cal. Unrep. Cas. 966, 39 P 30.

[b] **The statute applies to the probate of foreign wills,** where the controversy as to who shall administer is between persons interested in the will. In re Coan, 132 Cal. 401, 64 P 691.

[c] **Some interest in the estate is necessary** to entitle one to letters. In re Cristes, 155 Cal. 392, 101 P 316 (child who takes under will preferred to widow who takes nothing).

Persons entitled to appointment as administrator generally see supra §§ 87–141.

24. Long v. Huggins, 72 Ga. 776; Horskins v. Morel, T. U. P. Charlt. (Ga.) 69; Cole v. Jordan, 20 Ga. A. 302, 93 SE 33; Matter of Sheldon, 118 App. Div. 488, 103 NYS 518; Matter of Faile, 89 Misc. 682, 152 NYS 463; In re Clute, 37 Misc. 710, 76 NYS 456; Smith v. Wingo, 24 S. C. L. 287; In re Homan, 9 P. D. 61; In re Westropp, 5 Jur. N. S. 1318; In re Pile, 31 L. J. P. & M. 40; In re Bailey, 30 L. J. P. & M. 190.

[a] **Policy of statute.**—"Section 2643 of the Code, which provides for granting letters with the will annexed, is plainly based upon the principle that he who has the interest in the estate which most needs protection from waste, extravagance and incompetency shall be first entitled to control and manage such estate, and, therefore, the residuary legatee is given the prior right to administer. When experience showed that often an infant was a residuary legatee, such right was extended by the amendment of 1901 to his general guardian, thereby again indicating the intention of the Legislature to protect in such appointment, a vested interest. Next in order of priority is the principal or specified legatee, and also by the amendment of 1901 the general guardian of an infant principal or specified legatee, following the principle that he who has an interest to protect should be in a position to furnish it protection. It will also be noticed that it was not the greatest money interest that was recognized, for often the general legatees have a greater money value in their interests than have the residuary legatees in the careful management of the estate since usually expenses and losses fall solely upon the residuary estate, or if there be no such estate, then upon the estate given to the general legatees." Matter of Goggin, 43 Misc. 233, 234, 88 NYS 557, 4 Mills Surr. 224.

25. Horskins v. Morel, T. U. P. Charlt. (Ga.) 69; In re Homan, 9 P. D. 61; Sawbridge v. Hill, L. R. 2 P. & D. 219.

26. Matter of Browne, 3 NYS 279, 1 Conn. Surr. 163; In re Bailey, 30 L. J. P. & M. 190.

[a] **Beneficiary of trust.**—Where testator devised his real estate equally to his seven children, and to a trustee for the eighth for life, with remainder over to his issue, the beneficiary was entitled equally with the other children to be appointed administrator. In re Treadwell, 37 Misc. 584, 75 NYS 1058, 3 Mills Surr. 5.

27. In re Hooper, 13 L. T. Rep. N. S. 445.

28. Wood's Est., 17 NYS 354, 27 AbbNCas 329 (where a bequest was made to M and others and the issue of such as should be dead and application was made by a child of M after his death).

29. In re Davis, 175 Cal. 198, 165 P 525.

30. Smith v. Lurty, 107 Va. 548, 59 SE 403.

31. Smith v. Lurty, 107 Va. 548, 59 SE 403.

pointment before all other persons.[32] Even though the estate is such that the residuary legatee is not likely to have a residue, or by the terms of the will he must hold that residue with limitations, the presumption of the testator's favor upholds his claim to be considered first,[33] and where a person is not only sole residuary legatee but sole beneficiary under the will, his claim for appointment where an executor is wanting becomes still stronger.[34]

A mere trustee of the residue has been held not entitled to appointment, for in that case the cestui que trust should be preferred as the real beneficiary,[35] but in other cases a residuary legatee in trust has been held entitled to appointment.[36]

Right of remainderman. Where the residuary estate was bequeathed in trust for the benefit of the testator's widow during her life or widowhood with remainder over, it was held that letters of administration with the will annexed should be granted to the remaindermen, and not to the widow.[37]

[§ 2761] **(c) Principal or Specified Legatee.** Subject to the prior right of the residuary legatee, the right of administration with the will annexed is sometimes given by statute to a principal or specified legatee.[38]

[§ 2762] **(2) Surviving Spouse.** Under some statutes the surviving husband or widow has the first right,[39] but as a general rule the right of the surviving spouse is subsequent to that of persons interested under the will.[40] It has been held that the widow of the testator was entitled to appointment, although a nonresident, as against one whose right to remuneration for his services as an "agent" had not yet become fixed, and whose status had not yet become that of a "creditor" of the deceased.[41]

[§ 2763] **(3) Next of Kin.** The next of kin of a testator, especially if they have a beneficial interest in the estate or if the will contains no clear disposition of the residue, have a right to administration with the will annexed, which right is usually

32. Md.—McCaughy v. Byrne, 115 Md. 85, 80 A 653.
Miss.—Jordan v. Ball, 44 Miss. 194.
N. H.—Leavitt v. Leavitt, 65 N. H. 102, 18 A 920.
N. J.—Woodruff v. Snoover, 45 A 980; In re Booraem, 55 N. J. Eq. 759, 37 A 727; In re Kirkpatrick, 22 N. J. Eq. 463.
N. Y.—Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224; Matter of Ferguson, 41 Misc. 465, 84 NYS 1102, 4 Mills Surr. 75; In re Clute, 37 Misc. 710, 76 NYS 456; Matter of Milhau, 28 Misc. 366, 59 NYS 910, 1 Mills Surr. 184; Matter of Place, 4 NYSt 533 [aff 105 N. Y. 629 mem]; Bradley v. Bradley, 3 Redf. Surr. 512; Spinning's Est., Tuck. Surr. 78.
Pa.—In re Padelford, 189 Pa. 634, 42 A 287; Barnes' Est., 18 Pa. Dist. 550; Brockbank's Est., 17 Pa. Dist. 1031, 35 Pa. Co. 697; Elliott's Est., 2 Pa. Dist. 382, 12 Pa. Co. 410; Gunton's Est., 3 Kulp 34; Robert's Est., 3 Montg. Co. 212.
Eng.—In re Campion, [1900] P. 13; In re McAuliffe, [1895] P. 290; Hawke v. Wedderburne, L. R. 1 P. & D. 594; In re Scarborough, 6 Jur. N. S. 1166; Presant v. Goodwin, 6 Jur. N. S. 404; In re Goodyar, 4 Jur. N. S. 1243; Cubbon v. Steele, 30 L. J. P. & M. 192; In re Ludlow, 27 L. J. P. & M. 7; In re Arms, 71 L. T. Rep. N. S. 699; In re Shepherd, 41 L. T. Rep. N. S. 530; Jones v. Beytagh, 3 Phillim. 635, 161 Reprint 1438; Atkinson v. Barnard, 2 Phillim. 316, 161 Reprint 1156; Atkinson v. Barnard, 2 Phillim. 317, 161 Reprint 1156; Thomas v. Butler, 1 Vent. 219, 86 Reprint 146.
[a] **"The purpose of the statute** in preferring a residuary legatee as administrator is obviously because such person will ordinarily be interested in an economical administration of the estate." Matter of Lasak, 8 NYS 740, 742 [aff 121 N. Y. 706 mem, 24 NE 1100 mem, and quoi Matter of Goggin, 43 Misc. 233, 88 NYS 557; Matter of Clute, 37 Misc. 710, 76 NYS 456].
[b] **Upon the death of a sole executor** the residuary legatee is first entitled to letters, as against the widow, in like manner as if the executor had renounced. Bradley v. Bradley, 3 Redf. Surr. (N. Y.) 512.
[c] **Where there are several residuary legatees** (1) any one or more of them may be appointed as the courts may see fit. McCaughy v. Byrne, 115 Md. 85, 80 A 653; Matter of Powell, 5 Dem. Surr. (N. Y.) 281; Matter of Beakes, 5 Dem. Surr. (N. Y.) 128. (2) Where one residuary legatee refuses to act, the other should be appointed. Matter of Place, 4 NYSt 533 [aff 105 N. Y. 629 mem].
[d] **Who is the residuary legatee.**—(1) Where a will creates a residuary estate and places it in trust for the wife of the testator during her life or until her marriage and after her decease or marriage gives the residuary estate to other persons, such persons are the residuary legatees and not the widow. Matter of Drowne, 3 NYS 279, 1 Conn. Surr. 163. (2) A person who, in addition to a bequest of the residue of the estate after the death of another, was given a remainder in a specific part of the estate is a "residuary legatee." McCaughy v. Byrne, 115 Md. 85, 80 A 653. (3) A bequest of "the residue of my things," after specific bequests of plate, furniture, etc., the last specific bequest being one of £30, does not entitle the legatee to letters as residuary legatee. In re Ludlow, 27 L. J. P. & M. 7.
[e] **Where a convent is residuary legatee,** letters of administration with the will annexed will be granted to the superior of the convent. In re McAuliffe, [1895] P. 290.

33. Mallory's App., 62 Conn. 218, 25 A 109; Hutchinson v. Lambert, 3 Add. Eccl. 27, 162 Reprint 391; Atkinson v. Barnard, 2 Phillm. 316, 161 Reprint 1156.

34. Horskins v. Morel, T. U. P. Charlt. (Ga.) 69; Robert's Est., 3 Montg. Co. (Pa.) 212; In re Campion, [1900] P. 13; In re Crawshay, [1893] P. 108.

35. Girod v. Girod, 18 La. 394; In re Thompson, 33 Barb. (N. Y.) 334; Matter of Roux, 5 Dem. Surr. (N. Y.) 523; In re Ditchfield, L. R. 2 P. & D. 152.
[a] **Beneficiary of trust for life.**—A person whose share in the residuary estate is directed by the will to be held in trust for him during his life is only a beneficiary of a trust, and not a legatee, within the meaning of the statute giving a preference in administration of an estate with the will annexed to a legatee. Matter of Ferguson, 41 Misc. 465, 84 NYS 1102, 4 Mills Surr. 75.

36. In re Palmer, L. R. 11 Ir. 1; Hutchinson v. Lambert, 3 Add. Eccl. 27, 162 Reprint 391; In re Goodyar, 4 Jur. N. S. 1243; In re Ford, 23 L. T. Rep. N. S. 323.
[a] **Where a testator assigned his property in trust,** to take effect on his death, for his widow and children, the court, in favor of the intention, would pass over the widow and grant administration to the trustee. In re Cosnahan, L. R. 1 P. & D. 183.

37. Matter of Drowne, 3 NYS 279, 1 Conn. Surr. 163.

38. Matter of Blauvelt, 72 Misc. 287, 131 NYS 111, 8 Mills Surr. 144; In re Clute, 37 Misc. 710, 76 NYS 456; Matter of Milhau, 28 Misc. 366, 59 NYS 910, 1 Mills Surr. 184.
[a] **The word "principal"** as used in the statute is not used as a synonym for "chief" or "most important," but has the force and effect rather of the word "general" and is meant to be descriptive of all legatees who are neither specific nor residuary. Morgan's Est., 8 NY CivProc 77.
[b] **Preferences.**—Where a testator devised his entire estate "as provided by the laws in case of intestacy" and the legatees entitled thereunder are of the same grade and character, no one of them has any absolute legal right as such to be chosen in preference to any other as administrator with the will annexed, although the one having the greatest interest has a superior claim to the appointment. Morgan's Est., 8 NYCivProc 77.
[c] **General legatee entitled to preference over trust company.**—Matter of Milhau, 28 Misc. 366, 59 NYS 910, 1 Mills Surr. 184.

39. U. S.—In re Lucker, 8 Mill. Rev. 151.
Cal.—In re Randall, 177 Cal. 363, 170 P 835.
Ky.—Louisville Trust Co. v. Bingham, 178 Ky. 573, 199 SW 58.
Md.—Brodie v. Mitchell, 85 Md. 516, 37 A 169.
N. C.—In re Meyers, 113 N. C. 545, 18 SE 689.
Va.—Smith v. Lurty, 107 Va. 548, 59 SE 403.

40. Cluett v. Mattice, 43 Barb. (N. Y.) 417; In re Bailey, 30 L. J. P. & M. 190. See also supra §§ 2758–2761.
[a] **Under the New York code** (1) the surviving spouse and the next of kin are placed on an equality with reference to the right to administration with the will annexed, their right coming after that of legatees. Bradley v. Bradley, 3 Redf. Surr. 512. (2) But the widow is entitled to preference over the guardian of an infant next of kin, who is not a residuary or specified legatee. Cluett v. Mattice, 43 Barb. 417.
[b] **Preference of trustee under will.**—In a case where testatrix had been deserted by her husband fifteen years prior to her death and had not heard of or from him after such desertion, the court passed over the husband without citation of any kind and granted administration with the will annexed to the son of the testatrix who by the will was nominated trustee and manager of certain property which represented substantially the whole estate of testatrix. In re Shoosmith, [1894] P. 23.

41. Henry's Succ., 115 La. 874, 40 S 253.

subsequent to that of legatees or the surviving spouse but prior to that of any creditor or stranger.[42]

[§ 2764] **(4) Creditors.** In some jurisdictions a creditor may be appointed, his right being, however, subsequent to that of all the classes previously discussed.[43] A claimant under a contract with executors is not a creditor of the estate in such sense as to entitle him to appointment.[44]

[§ 2765] **(5) Strangers.** In case no person belonging to any one of the classes before mentioned applies for or is willing to take administration with the will annexed the court may appoint some other suitable person.[45] Provision is sometimes made by statute for the appointment of a person or persons not entitled to share in the estate, upon the written consent of the persons who are entitled to share therein.[46]

[§ 2766] **(6) Representative of Person Entitled.** The right to administration with the will annexed has been held to pass to the assignee of the person entitled,[47] or in case of such person's death to his personal representative,[48] and where the person entitled is a minor, administration should, it has been held, be granted to his guardian,[49] or if such person is a lunatic, letters are properly granted to his committee.[50] Letters have also been granted to the attorney of the person entitled,[51] and it has also been regarded as proper to issue letters to the attorney of a foreign executor [52] or a married woman who was named as sole executrix but whose husband objected to her acting in that capacity.[53] In England it has been held that, when a corporation aggregate is named as executor, administration with the will annexed will be granted to its syndic.[54]

42. Cal.—In re Winbigler, 166 Cal. 434, 137 P 1.
Mass.—Stebbins v. Lathrop, 4 Pick. 33.
N. Y.—In re Thompson, 33 Barb. 334; Matter of Brown, 60 Misc. 628, 113 NYS 937, 6 Mills Surr. 573; Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224; Kircheis v. Scheig, 3 Redf. Surr. 277.
N. C.—Little v. Berry, 94 N. C. 433.
Pa.—Job's Est., 23 Pa. Super. 611.
Wis.—Finch v. Houghton, 19 Wis. 149.
Eng.—In re Alston, [1892] P. 142; In re Aston, 6 P. D. 203; In re Jordan, L. R. 1 P. & D. 555; In re Rhoades, L. R. 1 P. & D. 119; Kooystra v. Buyskes, 3 Phillim. 531, 161 Reprint 1406.

[a] **Necessity for interest under will.**—Under Code Civ. Proc. § 1365, the heir at law of a decedent, who made a will disposing of his entire estate but appointing no executor, is not entitled to letters of administration with the will annexed unless he takes some part of the testator's personal estate under the will. In re Winbigler, 166 Cal. 434, 137 P 1.

[b] **Right to share in unbequeathed assets.**—The provision of Code Civ. Proc. § 2643 for granting administration with the will annexed to the next of kin must be limited to such of the next of kin as are entitled to share in the unbequeathed assets of the estate, and who are therefore persons interested therein, and a person having no such right is to be excluded. Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224.

[c] **A nephew whose father died subsequent to the deceased** was not next of kin to deceased, and hence was not entitled to letters as against the executor of a sole legatee under decedent's will. Matter of Haug, 29 Misc. 36, 60 NYS 382, 1 Mills Surr. 250.

[d] **Illegitimate child of spinster.**—In England a grant of letters with the will annexed on the estate of a spinster is properly made to her illegitimate daughter, where the latter is entitled to the property under the terms of the will. Frogley's Est., [1905] P. 137.

[e] **Where the sole legatee died,** letters of administration which had been issued to sisters of the half blood of the testatrix who were her only next of kin could not be revoked on the petition of one claiming under the will of the sole legatee. Kircheis v. Scheig, 3 Redf. Surr. (N. Y.) 277.

43. In re Clute, 37 Misc. 710, 76 NYS 456.

44. Fowler v. Walter, 1 Dem. Surr. (N. Y.) 240.

45. Holtz v. Mercantile Trust, etc., Co., 53 Ind. A. 194, 100 NE 398; Matter of Sheldon, 118 App. Div. 488, 103 NYS 518; In re Neave, 9 Serg. & R. (Pa.) 186; In re Butler, [1898] P. 9.

[a] **Necessity for showing citation or renunciation of persons having prior right.**—Since, under the express provisions of the statute, a stranger to an estate cannot be appointed administrator with the will annexed without the citation or renunciation of all the legatees, next of kin, heirs, devisees, and creditors, a petition for the appointment of an administrator with the will annexed, failing to show that there was no person entitled to letters of administration prior in right to the person appointed, or that such person prior in right was cited or had renounced such right, it nowhere appearing what relationship the person for whom letters were prayed sustained to the estate of the deceased, was insufficient. Matter of Sheldon, 118 App. Div. 488, 103 NYS 518.

46. Matter of Faile, 89 Misc. 682, 152 NYS 463.

[a] **Effect of consent.**—Where all the residuary legatees joined in a consent to the issuance of letters to one of the residuary legatees and two other persons not entitled to share in the estate, and the legatee designated for appointment died before letters were issued, the consent did not authorize the issuance of letters to the other persons designated for appointment therein. Matter of Faile, 89 Misc. 682, 152 NYS 463.

47. In re Rankin, 164 Cal. 138, 127 P 1034; In re Clute, 37 Misc. 710, 76 NYS 456; In re Campion, [1900] P. 13.

[a] **The reason of the rule** is that "section 2643 does not give the right to administer to persons as persons as does section 2660, but it gives it to the persons named because of their property rights and interests in order that vested rights may be protected." In re Clute, 37 Misc. 710, 715, 76 NYS 456.

[b] **Assignment transfers interest.**—An assignment by a sole legatee, who was mother of testator, of a part of her interest as "heir at law" transfers an interest in the property conveyed by the will, and renders the assignee a person interested in the will entitled to petition for the issuance to himself of letters of administration. In re Rankin, 164 Cal. 138, 127 P 1034 (under Code Civ. Proc. § 1323, a resident to whom the sole beneficiary under a foreign will had assigned sums of money due her as beneficiary is a person interested under the will, and hence, as against the public administrator, entitled to letters of administration with the will annexed).

[c] **Contrary view.**—Where executors who were sole legatees renounced and assigned their interest, the assignee was not entitled to letters of administration in priority to the public administrator. In re Moran, 176 Cal. 216, 168 P 18.

48. Ga.—Smith v. Moore, 129 Ga. 644, 59 SE 915; Clay v. Jackson, T. U. P. Charlt. 71.
N. J.—Woodruff v. Snoover, 45 A 980; In re Booraem, 55 N. J. Eq. 759, 37 A 727.
N. Y.—Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224. But compare In re Brown, 11 NYS 785, 19 NYCivProc 278, 2 Conn. Surr. 386 (where a residuary legatee survives the testator but dies before the will is admitted to probate, letters will not be issued to his personal representatives, but the right to administration will pass to the next class named in the statute).
Pa.—Barnes' Est., 18 Pa. Dist. 550.
Va.—Hendren v. Colgin, 4 Munf. (18 Va.) 231; Cutchin v. Wilkinson, 1 Call (5 Va.) 3.
Eng.—Sidebottom v. Sidebottom, L. R. 2 P. & D. 365.

[a] **Death of testator and residuary legatee by same catastrophe.**—Where the testator and residuary legatee both perish in the same catastrophe, and there is nothing to show who was the survivor, the legacy does not take effect, and the personal representative of the legatee is not entitled to administration with the will annexed. In re Carmichael, 32 L. J. P. & M. 70.

49. Gusman's Succ., 36 La. Ann. 299; Woodruff v. Snoover, (N. J.) 45 A 980; Matter of Goggin, 43 Misc. 233, 88 NYS 557, 4 Mills Surr. 224; Matter of Milhau, 28 Misc. 366, 59 NYS 910, 1 Mills Surr. 184; Matter of Lasak, 8 NYS 740 [aff 121 N. Y. 706 mem, 24 NE 1100 mem]; Matter of Tyler, 19 NYSt 897, 6 Dem. Surr. 48; Blanck v. Morrison, 3 HowPrNS 58, 4 Dem. Surr. 297; In re See, 4 P. D. 86.

[a] **"The purpose of the statute** in preferring a residuary legatee as administrator is obviously because such person will ordinarily be interested in an economical administration of the estate; and when the residuary legatee is a minor the same reasons suggest the appointment be given to the guardian as provided by the statute." Matter of Lasak, 8 NYS 740, 742 [aff 121 N. Y. 706 mem, 24 NE 1100 mem].

[b] **A trust company which is the guardian** of the sole residuary legatee is not entitled to letters of administration with the will annexed in preference to a general legatee under the will. Matter of Milhau, 28 Misc. 366, 59 NYS 910, 1 Mills Surr. 184.

50. In re Scarlett, 27 L. T. Rep. N. S. 215.

51. Rice's Succ., 21 La. Ann. 614; Russell v. Hartt, 87 N. Y. 19.

[a] **An attorney to collect a legacy has a sufficient interest** in the estate of the testator to entitle him to be appointed dative testamentary executor. Rice's Succ., 21 La. Ann. 614.

52. St. Jurjo v. Dunscomb, 2 Bradf. Surr. (N. Y.) 105; In re Bayard, 1 Rob. Eccl. 768.

53. Clerke v. Clerke, 6 P. D. 103.
Common-law requirement of assent of husband see supra § 67.

54. In re Darke, 29 L. J. P. & M. 71.

The husband of a person beneficially interested in the estate is not entitled as a matter of right to administration with the will annexed.[55]

[§ 2767] **(7) Nominee of Person Entitled.** In some jurisdictions the right of the person entitled to administration with the will annexed to nominate a person to act as such administrator in his stead has been sustained,[56] and it has also been held that a person having a prior right to be appointed administrator with the will annexed may have another person appointed with him as his coadministrator, even though such person is a stranger.[57]

[§ 2768] **(8) Person Named in Will as Executor.** Under some circumstances a person nominated as executor by the will may be unwilling or unable to act as such and yet may serve as administrator with the will annexed.[58]

[§ 2769] **(9) Nominee of Executor.** It has been held that an executor cannot nominate a person for appointment with the will annexed,[59] especially where such an appointment becomes necessary because the executor has been removed,[60] but it has also been considered that it is proper to appoint the nominee of an executor who has renounced.[61]

[§ 2770] **(10) Effect of Opposing Probate or Contesting Construction of Will.** The right to letters of administration with the will annexed is not lost by opposing probate of the will,[62] and, a fortiori, a legatee does not lose his right because he is the contestant in a proceeding involving the construction of the will and the ascertainment of the amount to which the several legatees are entitled.[63]

[§ 2771] **(11) Preferences.** The preferences which are recognized in the appointment of ordinary administrators[64] obtain where there are several persons equally entitled to administration with the will annexed,[65] although the will, or even the testator's expressed wish as between persons having equal rights, may also conclude the choice in case of doubt.[66]

The public administrator may, it has been held, be selected by the court in preference to persons interested in the estate, although the court is under no duty to appoint him.[67]

[§ 2772] **c. Effect of Appointment of Wrong Person.** The appointment as administrator with the will annexed of a person other than the one entitled to, and asking for, such appointment is not void for want of jurisdiction, but only erroneous.[68]

[§ 2773] **3. Competency.** With reference to the eligibility and qualifications of persons for the office of administrators with the will annexed, the rules are practically the same as with respect to ordinary administrators,[69] and a person who would have been ineligible for appointment as administra-

55. In re Ellmaker, 4 Watts (Pa.) 34; In re Williams, 17 L. T. Rep. N. S. 518.

56. Hawaii.—Matter of Porter, 1 Hawaii 297.

Ky.—Louisville Trust Co. v. Bingham, 178 Ky. 573, 199 SW 58.

N. C.—In re Jones, 98 SE 827.

Pa.—In re Padelford, 189 Pa. 634, 42 A 287; Job's Est., 23 Pa. Super. 611; Brockbank's Est., 17 Pa. Dist. 1031, 35 Pa. Co. 697.

Va.—Tompkins v. Poff, 120 Va. 162, 90 SE 630.

Eng.—In re Campion, [1900] P. 13.

[a] **A nonresident legatee** should be given an opportunity to nominate an administrator. In re Padelford, 189 Pa. 634, 42 A 287.

[b] **The right is not absolute,** but the suggestions of those interested should be considered. Elliott's Est., 12 Pa. Co. 410.

[c] **The appointment of a coadministrator** with the nominee of the sole resident beneficiary is not authorized by the fact that the estate aggregates between fifty and one hundred million dollars, where the nominee is one of the largest and strongest trust companies in the state. Louisville Trust Co. v. Bingham, 178 Ky. 573, 199 SW 58.

[d] **The nominee of an assignee** of the residuary legatee has been appointed. In re Campion, [1900] P. 13.

[e] **The nominee of the guardian** of infant residuary legatees should be appointed. Gunton's Est., 3 Kulp (Pa.) 34.

[f] **Where several are equally entitled** (1) one of them who desires the appointment is entitled thereto in preference to a stranger whom others desire to act. Williams' App., 7 Pa. 259 (where letters which had been granted to the nominee of the executor were revoked and administration granted to one of the children of the deceased, although some of the other children did not wish the appointee removed). (2) This is especially true where the person desiring to act is entitled to a larger share of the estate than other members of the same class. In re Jones, (N. C.) 98 SE 827.

[g] **Contrary rule.**—The right of administration cannot be delegated. Brodie v. Mitchell, 85 Md. 516, 37 A 169; Georgetown College v. Browne, 34 Md. 450.

57. Steele v. Leopold, 135 App. Div. 247, 120 NYS 569 [mod on other grounds 201 N. Y. 518 mem, 94 NE 1099 mem]; Matter of Moehring, 24 Misc. 418, 53 NYS 730, 2 Gibb. Surr. 540; Morgan's Est., 8 NYCivProc 77, 2 HowPrNS 194; In re Meyers, 113 N. C. 545, 18 SE 689.

58. Ky.—Briscoe v. Wickliffe, 6 Dana 157.

Mo.—Murphy v. Murphy, 24 Mo. 526.

N. J.—In re Kirkpatrick, 22 N. J. Eq. 463.

N. Y.—Quintard v. Morgan, 4 Dem. Surr. 168.

Eng.—In re Blisset, 44 L. T. Rep. N. S. 816.

[a] **Such appointment may be made:** (1) Where the person named as executor could not act as such because he was an attesting witness to the will. Murphy v. Murphy, 24 Mo. 526. (2) Where a surviving husband and universal legatee renounced the executorship and afterward probated the will. In re Blisset, 44 L. T. Rep. N. S. 816.

[b] **One may decline to be sole executor** and yet be appointed jointly with some other person as administrator with the will annexed. Briscoe v. Wickliffe, 6 Dana (Ky.) 157; Quintard v. Morgan, 4 Dem. Surr. (N. Y.) 168.

59. Garber's Est., 74 Cal. 338, 16 P 233.

60. In re Dolenty, 53 Mont. 33, 161 P 524.

61. Coleman's Est., 3 Pa. Dist. 558, 15 Pa. Co. 252.

62. Stebbins v. Lathrop, 4 Pick. (Mass.) 33.

63. Morgan's Est., 8 NYCivProc 77, 2 HowPrNS 194.

64. See supra § 103.

65. Bernard's Succ., 3 La. Ann. 565; Matter of Drowne, 3 NYS 279, 1 Conn. Surr. 163; Williams' App., 7 Pa. 259.

[a] **Thus** (1) males will ordinarily be preferred to females. Wood's Est., 17 NYS 354, 27 AbbNCas 329, Pow. Surr. 25; Matter of Drowne, 3 NYS 279, 1 Conn. Surr. 163; Williams' App., 7 Pa. 259. (2) Where some of the legatees are infants, any claim that might be made by their guardian is secondary to the claim of an adult legatee legally qualified. Morgan's Est., 8 NYCivProc 77, 2 HowPr NS 194.

[b] **Discretion of court.**—Where there are two or more persons equally entitled to the appointment, the selection rests in the discretion of the court. Huie's Succ., 23 La. Ann. 401; Bernard's Succ., 3 La. Ann. 565.

66. Womack v. Watson, 4 KyL 907; Matter of Powell, 5 Dem. Surr. (N. Y.) 281; Quintard v. Morgan, 4 Dem. Surr. (N. Y.) 168; Groves' Est., 2 Del. Co. (Pa.) 64.

[a] **Reversal of grant already made.**—While an expressed wish of decedent that a certain person should settle up her estate would be strong ground to sustain the appointment of such person or to secure it pending a question of discretion before the register, it is not of any weight to reverse a grant of letters already made to a fit person of the right class. Groves' Est., 2 Del. Co. (Pa.) 64.

67. Brinckwirth v. Troll, 266 Mo. 473, 181 SW 403, AnnCas1918B 1056.

68. Phillips v. Hundley, 135 Ky. 269, 122 SW 147 (such appointment can be reviewed only by an appeal from the county court to the circuit court within sixty days of the order, and not by appeal from an order denying a motion made at a subsequent term to set aside such appointment and appoint the one entitled).

69. See supra §§ 116–136.

[a] **A charitable corporation** is not eligible. Brockbank's Est., 17 Pa. Dist. 1031, 35 Pa. Co. 697.

[b] **A married woman** may be appointed dative testamentary executrix with the consent of her husband. Cordeviolle's Succ., 24 La. Ann. 47.

[c] **Adverse interest.**—Where a testator leaves a will without naming an executor and it appears that in his lifetime he had begun a suit against his daughter which suit was pending at his death, it is improper to appoint the daughter as administratrix with the will annexed. Job's Est., 23 Pa. Super. 611.

[d] **Hostility, litigation, and assertion of adverse title.**—Although the statute gave the widow a prior right, it was proper to refuse to appoint her, where she was very hostile to, and not upon speaking terms

tor, if decedent had died intestate, cannot be appointed administrator with the will annexed.[70]

[§ 2774] **4. Renunciation.** The right to administration with the will annexed may of course be renounced;[71] but the right is not lost by recognizing the prior right of another.[72] It has been held that a renunciation cannot be withdrawn without the consent of the surrogate,[73] but the fact that a person who is entitled to administer generally renounced that right when it was supposed that decedent had died intestate does not deprive him of the right to administration with the will annexed, upon the subsequent discovery of a will and renunciation by the executor.[74]

[§ 2775] **5. Proceedings for Appointment.**[75] A proceeding for the appointment of an administrator with the will annexed is entirely distinct from the proceeding of the admission of a will to probate.[76] With respect to the time within which such a proceeding should be brought it has been held that a statute limiting the time for the probate of wills governs, rather than a statute limiting the time for administration on intestate estates.[77] A written petition for probate of the will is not necessary to give the court jurisdiction to appoint an administrator with the will annexed,[78] but where a foreign will has been probated in another state, it must be produced before the surrogate in a county where the testator left real estate in order to warrant a grant of original letters of administration with the will annexed.[79]

Notice of the application for letters must be given to persons having a right prior to the applicant,[80] but persons having no prior right need not be cited,[81] and an appointment of one of several equally entitled without notice to the others has been held valid.[82] It has been held that the failure of an executor to qualify at the proper time does not justify the appointment of an administrator with the will annexed until after the executor has been cited to appear and show cause why he should not accept or decline the trust.[83]

A caveat to a petition for appointment as administrator with the will annexed of a person claiming to be next of kin and beneficially interested is insufficient and should be stricken out where it fails to allege that the petitioner is neither next of kin nor beneficially interested.[84]

The record should show cause for granting administration with the will annexed;[85] but where a court of probate receives proof of a will and admits it to record, and six months afterward grants administration with the will annexed, the failure to state in the record that the executor named in the will had renounced does not make the grant of administration absolutely void.[86] The omission of the words "with the will annexed" from an order appointing an administrator on the same day that a will was admitted to probate does not invalidate the order.[87]

Appeal. An appeal from an order appointing administrators with the will annexed is not an equitable action.[88] A person originally appointed executor by a will but whose name was afterward stricken out by direction of the testator has not a sufficient interest to warrant the issuing of a supersedeas at his request to reverse an order appointing an administrator with the will annexed in default of executors.[89]

[§ 2776] **6. Bond.** An administrator with the will annexed is required to give a bond,[90] the same

with, the principal devisee and legatee, was litigating with the curator of the estate, and was asserting title to property which testator attempted to dispose of by his will. Smith v. Lurty, 107 Va. 548, 59 SE 403.

[e] **Where husband of legatee engaged in contest with estate.**—The fact that a demand against the husband of a residuary legatee had been put in suit and resulted in a judgment in his favor from which the personal representatives had appealed is no objection to appointing the residuary legatee administratrix with the will annexed. Matter of Place, 4 NYSt 533.

[f] **Person against whom suit by testator pending at time of death.**—Where it appears that in his lifetime testator had begun a suit against his daughter, which suit was pending at his death, it is improper for the court to appoint the daughter as administrator cum testamento annexo. In such a case one of the other heirs, or, if all the other heirs have renounced, a person nominated by such heirs, should be appointed. Job's Est., 23 Pa. Super. 611.

[g] **The fact that one is hostile to the terms of a will, and sets up an adverse claim,** does not render him incompetent to act as administrator with will annexed, his bond as administrator affording protection to the persons interested. Rice v. Tilton, 13 Wyo. 420, 80 P 828.

70. Garber's Est., 74 Cal. 338, 16 P 233.

71. Brodie v. Mitchell, 85 Md. 516, 37 A 169.

72. Smith v. Lurty, 107 Va. 548, 59 SE 403 (where an executor declined to act, testator's brothers and sister did not waive their right to qualify as administrators or to designate another by recognizing the prior right of testator's widow to qualify, if the court thought she was a suitable person, and, on her being denied the appointment, it was proper to appoint one designated by the brothers and sister).

73. In re Clute, 37 Misc. 710, 76 NYS 456 (where the sole legatee under a will, who is primarily entitled to administer, has executed a renunciation, and assigned all her interest in the estate, for a substantial consideration, she will not be allowed to withdraw the renunciation and apply for letters).

74. Brodie v. Mitchell, 85 Md. 516, 37 A 169 (renunciation by widow).

75. For general rules governing proceedings for appointment of all representatives see supra §§ 143–187.

76. Bouyssou's Est., 1 Cal. A. 657, 82 P 1066 (where there was nothing in a bill of exceptions to indicate that the appointment of appellant as administrator did not proceed upon a record separate from that for the probate of the will, or that it was in any respect dependent on the order denying probate of the will, an order granting a motion "to vacate order refusing probate to the will and appointing administrator" should be construed distributively and regarded as severally applicable to the former orders).

77. Lawrence's App., 49 Conn. 411.

78. Seery v. Murray, 107 Iowa 384, 77 NW 1058.

79. Spratt v. Syms, 104 App. Div. 232, 93 NYS 728.

80. Pfarr v. Belmont, 39 La. Ann. 294, 1 S 681; Brodie v. Mitchell, 85 Md. 516, 37 A 169.

[a] **A contingent appointment** of a dative executor on the condition that public notices shall be given and that it be not opposed is of no avail where, after the advertisements have been published, although the application has not been opposed, the appointment is not confirmed by a subsequent formal decree conferring by a subsequent formal decree conferring it on the petitioner. Pfarr v. Belmont, 39 La. Ann. 294, 1 S 681.

81. In re Treadwell, 37 Misc. 584, 75 NYS 1058, 3 Mills Surr. 5; Wood's Est., 17 NYS 354, 27 AbbNCas 329, Pow. Surr. 25.

82. In re Treadwell, 37 Misc. 584, 75 NYS 1058, 3 Mills Surr. 5 (where testator by a will devised his real estate equally to his seven children, and to a trustee for the eighth for life, with remainder over to his issue, the beneficiary is equally entitled with the other children to be appointed as an administrator; and an appointment, without notice to the others, of such beneficiary, is valid).

83. Adams v. Readnour, 134 Ky. 230, 120 SW 279, 20 AnnCas 833.

84. Cole v. Jordan, 20 Ga. A. 302, 93 SE 33.

85. Peebles v. Watts, 9 Dana (Ky.) 102, 33 AmD 531; Van Giessen v. Bridgford, 83 N. Y. 348.

86. Thompson v. Meek, 7 Leigh (34 Va.) 419.

87. Young v. Chesapeake, etc., R. Co., (Ky.) 125 SW 241.

88. Louisville Trust Co. v. Bingham, 178 Ky. 573, 199 SW 58 (transfer of cause to equity docket properly refused).

89. Sayre v. Grymes, 1 Hen. & M. (11 Va.) 404.

90. La.—Girod v. Girod, 18 La. 394.

N. Y.—Ex p. Brown, 2 Bradf. Surr. 22.

Pa.—Small v. Com., 8 Pa. 101; Com. v. Forney, 3 Watts & S. 353.

Tex.—Langley v. Harris, 23 Tex. 564.

Va.—Frazier v. Frazier, 2 Leigh 642.

Eng.—Rous v. Noble, 2 Vern. Ch. 249, 23 Reprint 761.

[a] **A testamentary exemption of the executor** from furnishing security cannot operate for the benefit of an administrator with the will annexed. Com. v. Forney, 3 Watts & S. (Pa.) 353; Langley v. Harris, 23 Tex. 564; Fairfax v. Fairfax, 7 Gratt. (48 Va.) 36.

as any other administrator.[91] Such a bond should be in the same form as the bond of a general administrator, with a provision for the payment of legacies added,[92] and where the special duties imposed on the executor by the will devolve on an administrator de bonis non with the will annexed, the bond of such an administrator must be commensurate with the powers and trusts contained in the will.[93] It has been held, however, that the bond of an adminstrator with the will annexed, in the ordinary form required of a general administrator, may be upheld,[94] although there is also authority for the view that such a bond is not sufficient.[95]

[§ 2777] **B. Powers and Duties—1. In General.** As a general rule an administrator with the will annexed possesses the same rights and powers, and is subject to the same duties and liabilities as though he had been nominated executor by the will.[96] He may collect assets and pay debts,[97] sue or be sued,[98]

91. See infra § 194.

92. Casoni v. Jerome, 58 N. Y. 315; Hartzell v. Com., 42 Pa. 453; Frazier v. Frazier, 2 Leigh (29 Va.) 642; In re Brackenbury, 2 P. D. 272; Folkes v. Docminique, Str. 1137, 93 Reprint 1085.

[a] **Unless the bond conforms** to the requirements of the will, legatees may lose the right to sue on it. Small v. Com., 8 Pa. 101; Frazier v. Frazier, 2 Leigh (29 Va.) 642.

93. Hartzell v. Com., 42 Pa. 453.

94. N. H.—Probate Judge v. Claggett, 36 N. H. 381, 72 AmD 314.

N. M.—Bull v. Bal, 17 N. M. 466, 130 P 251.

N. Y.—Casoni v. Jerome, 58 N. Y. 315.

Oh.—Newberger v. Finney, 17 Oh. Cir. Ct. 215, 9 Oh. Cir. Dec. 720.

Pa.—Com. v. Miller, 195 Pa. 230, 45 A 921.

[a] **Illustration.**—The bond of an administrator de bonis non expressed to be "with the will annexed" and with conditions to make a true inventory, administer according to law, account, and pay over the balance to the person appointed by the decree of the orphans' court is valid, although in other respects in the form of an ordinary administration bond except that the clauses relating to collateral inheritances and surrendering the letters in case a will shall be found are omitted. Hartzell v. Com., 42 Pa. 453.

95. Fulcher v. Com., 3 J. J. Marsh. (Ky.) 592; Morrow v. Peyton, 8 Leigh (35 Va.) 54; Frazier v. Frazier, 2 Leigh (29 Va.) 642.

96. U. S.—Quinton v. Neville, 152 Fed. 879, 81 CCA 673.

Ala.—Ralls v. Johnston, 75 S 926; Henderson v. Simmons, 33 Ala. 291, 70 AmD 590; Lucas v. Doe, 4 Ala. 679.

Cal.—Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89; In re Li Po Tai, 39 P 30.

Conn.—Pratt v. Stewart, 49 Conn. 339.

D. C.—McIntire v. McIntire, 14 App. 337 [aff 192 U. S. 116, 24 SCt 196, 48 L. ed. 369].

Ill.—Penn v. Fogler, 182 Ill. 76, 55 NE 192 [rev on other grounds 77 Ill. A. 365]; Butler v. Bocock, 160 Ill. A. 501.

Ind.—Davis v. Hoover, 112 Ind. 423, 14 NE 468; Landers v. Stone, 45 Ind. 404.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582; Hodgin v. Toler, 70 Iowa 21, 30 NW 1, 59 AmR 435; Lees v. Wetmore, 58 Iowa 170, 12 NW 238; Shawhan v. Loffer, 24 Iowa 217.

Ky.—Schlickman v. Dusing, 180 Ky. 506, 203 SW 295; Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264; Evans v. Evans, 134 Ky. 637, 121 SW 619; De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663; Peebles v. Watts, 9 Dana 102, 33 AmD 531; Simpson v. Hawkins, 1 Dana 303; Jackson v. Jeffries, 1 A. K. Marsh. 88; Harding v. Weisiger, 109 SW 890, 33 KyL 170.

Mass.—Tarbel v. Jewett, 129 Mass. 457; Blake v. Dexter, 12 Cush. 559; Farwell v. Jacobs, 4 Mass. 634.

Mich.—Clifton v. Keeler, 158 Mich. 615, 123 NW 22.

Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40; Kelly v. Davis, 37 Miss. 76; King v. Talbert, 36 Miss. 367; Bartlett v. Sutherland, 24 Miss. 395.

Nebr.—Koopman v. Carroll, 50 Nebr. 824, 70 NW 395; Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

N. J.—Hoagland v. Cooper, 65 N. J. Eq. 407, 56 A 705.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362 [rev 108 App. Div. 360, 95 NYS 1122]; Merritt v. Merritt, 161 N. Y. 634, 57 NE 1117 [aff 32 App. Div. 442, 53 NYS 127]; Bain v. Matteson, 54 N. Y. 663; Peterson v. Chemical Bank, 32 N. Y. 21, 88 AmD 298, 29 HowPr 240; McGarry v. McMahon, 124 App. Div. 607, 109 NYS 61; Simmons v. Taylor, 19 App. Div. 499, 46 NYS 730; In re Baker, 26 Hun 626; Bowers v. Emerson, 14 Barb. 652; Dominick v. Michael, 6 N. Y. Super. 374; McMahon v. Allen, 4 E. D. Smith 519; Matter of Kick, 11 NYSt 688; Luers v. Brunges, 56 HowPr 282; Conklin v. Egerton, 21 Wend. 430 [aff 25 Wend. 224].

N. C.—Saunders v. Saunders, 108 N. C. 327, 12 SE 909; Creech v. Grainger, 106 N. C. 213, 10 SE 1032; Syme v. Broughton, 86 N. C. 153.

Pa.—Sears v. Scranton Trust Co., 228 Pa. 126, 77 A 423, 20 AnnCas 1145; Evans v. Chew, 71 Pa. 47; Ross v. Barclay, 18 Pa. 179, 55 AmD 616; Cornell v. Green, 10 Serg. & R. 14; Hart's Est., 12 Pa. Dist. 47.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

R. I.—Belcher v. Branch, 11 R. I. 226.

S. C.—Robinson v. Ostendorff, 38 S. C. 66, 16 SE 371.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720; Lewis v. Woodfolk, 2 Baxt. 25; Harrison v. Henderson, 7 Heisk. 315; Perry v. Gill, 2 Humphr. 218.

Tex.—Moore v. Minerva, 17 Tex. 20.

Va.—McCall v. Peachy, 3 Munf. (17 Va.) 288; Archer v. Saddler, 2 Hen. & M. (12 Va.) 370.

Wis.—In re Besley, 18 Wis. 451.

Eng.—Wyman v. Carter, L. R. 12 Eq. 309.

[a] **Personal property given to a trustee** by the will must be protected and preserved by the administrator with the will annexed until a trustee is appointed. Casperson v. Dunn, 42 N. J. Eq. 87, 6 A 488.

[b] **Administration according to will.**—Although an order of the county court appointing an administrator and showing his qualification did not contain the words "with the will annexed," where his bond contained those words and showed that it was given by him as administrator with the will annexed, such was the legal effect of his appointment, and, even if it had not been expressed in the bond where the will was in existence, and had been duly probated, the estate devised had to be administered according to the will, and not as in a case of intestacy. Betty v. Petrie, 138 Ky. 426, 128 SW 320.

[c] **Chargeable with notice of contents of will.**—An administrator with the will annexed is chargeable with notice of the contents of the will, although it is in a particular as to which the will has no direct legal effect. Moore v. Minerva, 17 Tex. 20.

[d] **A power given to the executor to invest** funds of the estate passes to the administrator with the will annexed. Hall v. Cushing, 9 Pick. (Mass.) 395; Robinson v. Ostendorff, 38 S. C. 66, 16 SE 371.

[e] **When no executor is appointed** by a will by which property is given to the executor in trust, the administrator with the will annexed becomes a trustee for the trusts declared in the will, as much as if he had been named executor. Jones v. Jones, 17 N. C. 387.

[f] **A foreign administrator with the will annexed** does not succeed to the powers and duties of the executor in the state in which he seeks to exercise such powers unless reappointed by a competent court of such state. Simpson v. Hawkins, 1 Dana (Ky.) 303; Jackson v. Jeffries, 1 A. K. Marsh. (Ky.) 88.

[g] **Foreign wills.**—Code § 2351, relating to probate of foreign wills, and the powers of executors thereunder, confers no power upon an administrator with the will annexed. Hodgin v. Toler, 70 Iowa 21, 30 NW 1, 59 AmR 435.

[h] **Will appointing independent executor.**—An administrator with the will annexed under a will which appointed an independent executor cannot exercise the powers of such executor. Roy v. Whitaker, 92 Tex. 346, 48 SW 892, 49 SW 367.

97. Drury v. Natick, 10 Allen (Mass.) 169; Sullivan v. Fosdick, 10 Hun (N. Y.) 173; Matter of Dunn, 63 Misc. 179, 118 NYS 560, 7 Mills Surr. 174; Scott v. Monks, 16 R. I. 225, 14 A 860.

[a] **This is true even though** the will directs trustees to perform these duties. Drury v. Natick, 10 Allen (Mass.) 169.

[b] **He may pay legal expenses** and reasonable fees incurred in having the will probated. Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.

98. U. S.—Quinton v. Neville, 152 Fed. 879, 81 CCA 673.

Ill.—Butler v. Bocock, 160 Ill. A. 501.

Ky.—De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663.

N. Y.—Varnum v. Taylor, 59 Hun 554, 14 NYS 242.

N. C.—Syme v. Broughton, 86 N. C. 153.

Pa.—Power v. Grogan, 232 Pa. 387, 81 A 416.

Tex.—Wisdom v. Wilson, 59 Tex. Civ. A. 593, 127 SW 1128.

[a] **He may sue for possession of land** (1) belonging to the estate (De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663; Power v. Grogan, 232 Pa. 387, 81 A 416), (2) but not unless he holds the legal title (O'Connell v. Dougherty, 32 Cal. 458; Emeric v. Penniman, 26 Cal. 119), or (3) has statutory power to do so (Cornell v. Green, 10 Serg. & R. (Pa.) 14; Scott v. Monks, 16 R. I. 225, 14 A 860).

[b] **May intervene.** — Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 CCA 527.

[c] **May defend suit to revoke probate.**—Butler v. Bocock, 160 Ill. A. 501.

[d] **May sue to cancel deed.**—Wisdom v. Wilson, 59 Tex. Civ. A. 593, 127 SW 1128.

or sell property to pay debts by leave of court.[99] But he cannot exercise any powers which the executor named in the will could not have exercised.[1]

Property subject to administration with the will annexed. Administration with the will annexed, according to the weight of authority, extends to the entire personal estate of the testator, and is not limited to that portion which has been disposed of by the will,[2] although it has been held to be so limited.[3]

[§ 2778] **2. Exercise of Discretionary Powers Generally.**[4] Where the will gives to the executor named therein discretionary powers and imposes on him duties involving personal trust and confidence, and which do not ordinarily come within the scope of administrative functions, such powers and duties do not pass to or devolve on an administrator with the will annexed,[5] although such administrator is by statute or a decree of court, expressly invested with all the rights and powers of and subjected to the same duties as an executor named in the will,[6] unless it clearly appears from the will that the testator intended to confer the powers and duties upon the executor merely virtute officii, and that they should be exercised in any event.[7]

An application for the appointment of a trustee to carry out the provisions of the will, which do not devolve upon an administrator with the will annexed, may be made by such administrator to a court of equity.[8]

[§ 2779] **3. Exercise of Testamentary Power of Sale.** As a general rule a power of selling real estate conferred by will upon a named executor is one of personal trust and confidence which cannot be exercised by an administrator with the will annexed.[9] But it is otherwise where the will clearly

99. Syme v. Broughton, 86 N. C. 153.

1. Henderson v. Simmons, 33 Ala. 291, 70 AmD 590; Matter of Blow, 11 NYS 193, 2 Conn. Surr. 360; Gay v. Grant, 101 N. C. 206, 8 SE 99, 106; Irwin v. Toronto Gen. Trusts Co., 24 Ont. A. 484.

[a] **He cannot pay out money by way of compromise.**—Henderson v. Simmons, 33 Ala. 291, 70 AmD 590.

[b] **No control over rent of real estate.**—Matter of Dunn, 63 Misc. 179, 118 NYS 560, 7 Mills Surr. 174; Matter of Blow, 11 NYS 193, 2 Conn. Surr. 360.

[c] **Cannot compromise dower** by assigning portions of real estate. Irwin v. Toronto Gen. Trusts Co., 24 Ont. A. 484.

2. Landers v. Stone, 45 Ind. 404; Sullivan v. Fosdick, 10 Hun (N. Y.) 173; Ex p. Brown, 2 Bradf. Surr. (N. Y.) 22; Parris v. Cobb, 26 S. C. Eq. 450.

3. Dean v. Biggers, 27 Ga. 73; Ashburn v. Ashburn, 16 Ga. 213; Harper v. Smith, 9 Ga. 461.

4. Discretionary power of sale see infra § 2779.

5. U. S.—Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621.

Ala.—Ralls v. Johnson, 75 S 926; Hinson v. Williamson, 74 Ala. 180; Anderson v. McGowan, 42 Ala. 280.

Ga.—Brannon v. G. Ober, etc., Co., 106 Ga. 168, 32 SE 16.

Ill.—Penn v. Folger, 182 Ill. 76, 55 NE 192 [rev on other grounds 77 Ill. A. 365]; Butler v. Bocock, 160 Ill. A. 501; Perrine v. Reed, 155 Ill. A. 213; Peo. v. Petrie, 94 Ill. A. 652 [aff 191 Ill. 497, 61 NE 499, 85 AmSR 268].

Ind.—Rubottom v. Morrow, 24 Ind. 202, 87 AmD 324.

Iowa.—Ellyson v. Lord, 124 Iowa 125, 99 NW 582.

Ky.—Schlickman v. Dusing, 180 Ky. 506, 203 SW 295; Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264; Warfield v. Brand, 13 Bush 77; Gulley v. Prather, 7 Bush 167; Enlow v. Bethel College, 67 SW 989, 24 KyL 31.

Me.—Knight v. Loomis, 30 Me. 204.

Md.—Gambell v. Trippe, 75 Md. 252, 23 A 461, 15 LRA 235, 32 AmSR 388.

Mass.—Farwell v. Jacobs, 4 Mass. 634.

Miss.—Murdock v. Murdock, 97 Miss. 690, 63 S 684; Cohea v. Johnson, 69 Miss. 46, 13 S 40.

N. J.—Brush v. Young, 28 N. J. L. 237; In re Quimby, 84 N. J. Eq. 1, 92 A 56; Stoutenburgh v. Moore, 37 N. J. Eq. 63 [aff 38 N. J. Eq. 281]; Lindsley v. Personette, 35 N. J. Eq. 355.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362 [rev 108 App. Div. 360, 95 NYS 1122]; Merritt v. Merritt, 161 N. Y. 634, 57 NE 1117 [aff 32 App. Div. 442, 53 NYS 127]; Mott v. Ackerman, 92 N. Y. 539; Bain v. Matteson, 54 N. Y. 663; McGarry v. McMahon, 124 App. Div. 607, 109 NYS 61; Horsfield v. Black, 40 App. Div. 264, 57 NYS 1006; Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Conklin v. Egerton, 21 Wend. 430 [aff 25 Wend. 224]; De Peyster v. Clendining, 8 Paige 295 [aff 26 Wend. 21].

N. C.—Creech v. Grainger, 106 N. C. 213, 10 SE 1032; Newsom v. Newsom, 38 N. C. 411.

Pa.—Gehr v. McDowell, 206 Pa. 100, 55 A 851; Maus v. Maus, 80 Pa. 194; Waters v. Margerum, 60 Pa. 39; Ross v. Barclay, 18 Pa. 179, 55 AmD 616; Ebert's App., 9 Watts 300; Hart's Est., 12 Pa. Dist. 47; Snyder's Est., 9 Pa. Dist. 128; Sanders' Est., 5 Kulp 521; Dunn's Est., 13 Phila. 395 [aff 10 WklyNC 313]; Hepburn's Est., 8 Phila. 206.

R. I.—State Hospital Trust Co. v. Pitcher, 16 R. I. 349, 16 A 141; Belcher v. Branch, 11 R. I. 226.

S. C.—Johnson v. Henegan, 11 S. C. 93.

Tenn.—Harrison v. Henderson, 7 Heisk. 315; Armstrong v. Park, 9 Humphr. 195.

Tex.—Frisby v. Withers, 61 Tex. 134; Vardeman v. Ross, 36 Tex. 111; Tippett v. Mize, 30 Tex. 361, 94 AmD 313.

Wis.—In re Besley, 18 Wis. 451.

Eng.—Lambert v. Rendle, 3 New Rep. 247.

[a] **A personal trust to provide for the widow,** charged upon the executor by the will, does not devolve upon the administrator with the will annexed. Lindsley v. Personette, 35 N. J. Eq. 355. Contra Sander's Est., 5 Kulp (Pa.) 521.

[b] **A discretionary power to carry on decedent's business** does not pass to an administrator with the will annexed. Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264; Creech v. Grainger, 106 N. C. 213; Best's Est., 22 LancLRev (Pa.) 6; Best's Est., 14 Pa. Dist. 307. But see Palmer v. Moore, 82 Ga. 177, 8 SE 180, 14 AmSR 147 (set out infra second note following).

[c] **Management of trust property without authority** by an administrator with the will annexed constitutes him a trustee de son tort. Penn v. Fogler, 182 Ill. 76, 55 NE 192 [rev on other grounds 77 Ill. A. 365].

6. Ill.—Penn v. Fogler, 182 Ill. 76, 55 NE 192 [rev on other grounds 77 Ill. A. 365].

Iowa.—Hodgin v. Toler, 70 Iowa 21, 30 NW 1, 59 AmR 435.

Ky.—Schlickman v. Dusing, 180 Ky. 506, 203 SW 295.

N. C.—Creech v. Grainger, 106 N. C. 213, 10 SE 1032.

Tenn.—Harrison v. Henderson, 7 Heisk. 315.

Wis.—In re Besley, 18 Wis. 451.

7. U. S.—Ingle v. Jones, 9 Wall. 486, 19 L. ed. 601.

Ga.—Palmer v. Moore, 82 Ga. 177, 8 SE 180, 14 AmSR 147.

Ill.—Wenner v. Thornton, 98 Ill. 156.

Mass.—Blake v. Dexter, 12 Cush. 559.

Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40.

N. J.—Drummond v. Jones, 44 N. J. Eq. 53, 13 A 611.

N. Y.—Varnum v. Taylor, 59 Hun 554, 14 NYS 242; In re Baker, 26 Hun 626.

N. C.—Creech v. Grainger, 106 N. C. 213, 10 SE 1032; Jones v. Jones, 17 N. C. 387.

Pa.—Evans v. Chew, 71 Pa. 47; Olwine's App., 4 Watts & S. 492; Sander's Est., 5 Kulp 521.

R. I.—Belcher v. Branch, 11 R. I. 226.

[a] **Illustrations.**—(1) A direction to invest a specified sum "upon bond and mortgage of real estate, or such stocks as they may regard safe and permanent," evinces no intention to repose any such special trust and confidence as will disable an administrator with the will annexed from fully administering the trust. Matter of Post, 9 NYS 449, 2 Conn. Surr. 243 [mod on other grounds 14 NYS 205]. (2) A direction to keep the estate together and carry on farming operations implies a limited power in the executor to incur debts on the credit of the estate for supplies, etc., which power passes to an administrator with the will annexed, unless it is manifestly confided to the executor as a personal trust. Palmer v. Moore, 82 Ga. 177, 8 SE 180, 14 AmSR 147.

[b] **The court will not presume** that a testator, conferring on his executor unlimited authority in the management of the estate, intended that the authority should be exercised by any one else, unless the will, fairly construed, is susceptible of no other interpretation. Schlickman v. Citizens' Nat. Bank, 139 Ky. 268, 129 SW 823, 29 LRANS 264.

8. Penn v. Fogler, 182 Ill. 76, 55 NE 192 [rev on other grounds 77 Ill. A. 365]; Mulligan v. Lambe, 178 Ill. 130, 52 NE 1052.

9. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.

Ala.—Snow v. Bray, 73 S 542; Anderson v. McGowan, 42 Ala. 280; Posey v. Conaway, 10 Ala. 811; Lucas v. Doe, 4 Ala. 679.

Cal.—Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89.

Del.—Chandler v. Delaplaine, 4 Del. Ch. 503; Lockwood v. Stradley, 1 Del. Ch. 298, 12 AmD 97.

Ill.—Frackelton v. Masters, 249 Ill. 30, 94 NE 124; Bigelow v. Cady, 171 Ill. 229, 48 NE 974, 63 AmSR 230; Nicoll v. Scott, 99 Ill. 529; Hall v. Irwin, 7 Ill. 176; Mostoller v. Gove, 188 Ill. A. 215; Perrine v. Reed, 155 Ill. A. 213.

Iowa.—Hodgin v. Toler, 70 Iowa 21, 30 NW 1, 59 AmR 435.

Ky.—Schlickman v. Dusing, 180

evinces an intention to confer the power upon the executor virtute officii, and not as involving any personal discretion,[10] and in some jurisdictions power is conferred by statute on an administrator with the will annexed to make a sale which the will directs to be made for administrative purposes, or to pay legacies or make distribution.[11]

An application for the appointment of a trustee

Ky. 506, 203 SW 295; Brown v. Hobson, 3 A. K. Marsh. 380, 13 AmD 187.

Mass.—Greenough v. Welles, 10 Cush. 571; Dunbar v. Tainter, 7 Cush. 574; Tainter v. Clark, 13 Metc. 220; Larned v. Bridge, 17 Pick. 339.

Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40; Montgomery v. Milliken, Sm. & M. Ch. 495.

Mo.—Compton v. McMahan, 19 Mo. A. 494.

N. J.—McDonald v. King, 1 N. J. L. 494; Casselman v. McCooley, 73 N. J. Eq. 253, 67 A 436; Varick v. Smith, 67 N. J. Eq. 1, 58 A 168; Naundorf v. Schumann, 41 N. J. Eq. 14, 2 A 609; Stoutenburgh v. Moore, 37 N. J. Eq. 63 [aff 38 N. J. Eq. 281]; Lanning v. Sisters of St. Francis, 35 N. J. Eq. 392; Chambers v. Tulane, 9 N. J. Eq. 146.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362 [rev 108 App. Div. 360, 95 NYS 1122]; Cocke v. Platt, 98 N. Y. 35 [aff 51 N. Y. Super. 55]; Dunning v. Ocean Nat. Bank, 61 N. Y. 497, 19 AmR 293 [aff 6 Lans. 296]; Roome v. Philips, 27 N. Y. 357; McGarry v. McMahon, 124 App. Div. 607, 109 NYS 61; Horsfield v. Black, 40 App. Div. 264, 57 NYS 1006; Simmons v. Taylor, 19 App. Div. 499, 46 NYS 730; Dominick v. Michael, 6 N. Y. Super. 374; Scott v. Douglas, 39 Misc. 555, 80 NYS 354; Fay v. Taylor, 31 Misc. 32, 63 NYS 572; Conklin v. Egerton, 21 Wend. 430 [aff 25 Wend. 224]; Gilchrist v. Rea, 9 Paige 66.

N. C.—Gay v. Grant, 101 N. C. 206, 8 SE 99, 106; Ferebee v. Procter, 19 N. C. 439.

Oh.—Wills v. Cowper, 2 Oh. 124.

Pa.—Gehr v. McDowell, 206 Pa. 100, 55 A 851; Evans v. Chew, 71 Pa. 47; Waters v. Margerum, 60 Pa. 39; Ross v. Barclay, 18 Pa. 179, 55 AmD 616; Moody v. Fulmer, 3 Grant 17; Moody v. Vandyke, 4 Binn. 31, 5 AmD 385; Hohein v. Rote, 24 Pa. Dist. 709.

Tenn.—McElroy v. McElroy, 110 Tenn. 137, 73 SW 105.

Tex.—Tippett v. Mize, 30 Tex. 361, 94 AmD 313.

Eng.—In re Clay, 16 Ch. D. 3.

"It is a general and well settled rule, both of law and equity, that a power given by will to the executor to sell and convey land, is to be considered as a personal trust. In contemplation of law, the power is given in consequence of the confidence which the testator had in the judgment, discretion and integrity of the executor, and the execution of that power cannot, by the executor, be delegated to any other person. 3 East 410; 4 John. Ch. R. 368; 2 Sch. and Lef. 330. It would be absurd to suppose that the confidence which the testator had in the knowledge and integrity of his executor, and which induced him to confide to such executor the power of selling and conveying his lands, could extend to unknown persons." Wills v. Cowper, 2 Oh. 124, 127.

[a] **Illustration.**—A direction in a will that real estate be sold and the proceeds divided among certain legatees does not authorize an administrator with the will annexed to treat the estate as personal property and sell it under the doctrine of equitable conversion. McElroy v. McElroy, 110 Tenn. 137, 73 SW 105.

[b] **Such power cannot be exercised without:** (1) An order of court. Ross v. Horney, 139 Ill. A. 513; Penn v. Fogler, 77 Ill. A. 365 [rev on other grounds 182 Ill. 76, 55 NE 192]; Watson v. Fletcher, 7 Gratt. (48 Va.) 1. (2) The advice and consent of the chancellor. Armstrong v. Parks, 9 Humphr. (Tenn.) 195.

[c] **Power to divide the estate** given to the executor does not authorize an administrator with the will annexed to sell the land. Montague v. Carneal, 1 A. K. Marsh. (Ky.) 351; McDowell v. White, 68 N. C. 65.

10. U. S.—Smith v. McIntyre, 95 Fed. 585, 37 CCA 177.

Cal.—Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89.

Conn.—Pratt v. Stewart, 49 Conn. 339.

Del.—Ocheltree v. McDaniel, 21 Del. 288, 63 A 687.

Ga.—Evans v. Paris, 148 Ga. 44, 95 SE 682.

Iowa.—Feaster v. Fagan, 135 Iowa 633, 113 NW 479.

Ky.—Rutherford v. Clark, 4 Bush 27.

Md.—Venable v. Mercantile Trust, etc., Co., 74 Md. 187, 21 A 704.

Mass.—May v. Brewster, 187 Mass. 524, 73 NE 546.

Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40; King v. Talbert, 36 Miss. 367.

Mo.—Francisco v. Wingfield, 161 Mo. 542, 61 SW 842; Cannon v. Unknown Heirs, 174 Mo. A. 84, 157 SW 860.

Nebr.—In re Manning, 85 Nebr. 60, 122 NW 711, 83 Nebr. 417, 119 NW 672; Koopman v. Carroll, 50 Nebr. 824, 70 NW 395; Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

N. H.—Rollins v. Rice, 59 N. H. 493.

N. J.—Joralemon v. Van Riper, 44 N. J. Eq. 299, 14 A 479; Drummond v. Jones, 44 N. J. Eq. 53, 13 A 611; Giberson v. Giberson, 43 N. J. Eq. 116, 10 A 403.

N. Y.—Royce v. Adams, 123 N. Y. 402, 25 NE 386, 57 Hun 415, 10 NYS 821; Mott v. Ackerman, 92 N. Y. 539; Kelsey v. MacTigue, 171 App. Div. 877, 157 NYS 730; Williams v. Williams, 152 App. Div. 323, 136 NYS 990; McGarry v. McMahon, 124 App. Div. 607, 109 NYS 61; Ayers v. Courvoisier, 101 App. Div. 97, 91 NYS 549; Merritt v. Merritt, 32 App. Div. 442, 53 NYS 127 [aff 161 N. Y. 634 mem, 57 NE 1117 mem]; Carpenter v. Bonner, 26 App. Div. 462, 50 NYS 298; Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83; Fish v. Coster, 28 Hun 64 [aff 92 N. Y. 627]; Bingham v. Jones, 25 Hun 6; Smith v. Bush, 59 Misc. 648, 111 NYS 428; Scott v. Douglas, 39 Misc. 555, 80 NYS 354; Campbell v. Jennings, 22 Misc. 406, 50 NYS 278; Matter of Kick, 11 NYSt 688.

Pa.—Tarrance v. Reuther, 185 Pa. 279, 39 A 956; Potts v. Breneman, 182 Pa. 295, 37 A 1002; Jackman v. Delafield, 85 Pa. 381; Lantz v. Boyer, 81 Pa. 325; Maus v. Maus, 80 Pa. 194; Evans v. Chew, 71 Pa. 47; Ross v. Barclay, 18 Pa. 179, 55 AmD 616; Still's Est., 2 Pa. Dist. 105, 12 Pa. Co. 379; Kline's Est., 2 LegChron 137; Tarrence v. Reuther, 13 Montg. Co. 162; Dorff's App., 10 WklyNC 335.

R. I.—In re Adams, 32 R. I. 41, 78 A 524.

S. C.—Mordecai v. Schirmer, 38 S. C. 294, 16 SE 889.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720; McElroy v. McElroy, 110 Tenn. 137, 73 SW 105.

[a] **Illustration.**—Where the will authorizes a sale of land by any person legally qualified to administer the estate, an administrator with the will annexed may sell without a license from the probate court. Rollins v. Rice, 59 N. H. 493.

[b] **The fact that an appraisal is directed to precede the sale** does not make the power of sale discretionary and so not exercisable by an administrator with the will annexed. Clifford v. Morrell, 22 App. Div. 470, 48 NYS 83.

[c] **The trend of decision** now is to construe powers vested in an executor as held virtute officii, when it is possible to do so. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89.

11. U. S.—Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91 [aff 19 F. Cas. Nos. 11,028, 11,029].

Ala.—Watson v. Martin, 75 Ala. 506; Brock v. Frank, 51 Ala. 85; Anderson v. McGowan, 45 Ala. 462 [overr Anderson v. McGowan, 42 Ala. 280].

Cal.—Kidwell v. Brummagim, 32 Cal. 436.

Del.—Ferris v. Ferris, 98 A 215; Security, etc., Deposit Co. v. Ward, 93 A 385; In re Security Trust, etc., Co., 92 A 244; Ocheltree v. McDaniel, 21 Del. 288, 63 A 687; Curran v. Ruth, 4 Del. Ch. 27.

Ga.—Evans v. Paris, 148 Ga. 44, 95 SE 682.

Ill.—Nicoll v. Scott, 99 Ill. 529.

Ind.—Davis v. Hoover, 112 Ind. 423, 14 NE 468.

Ky.—Sauer v. Taylor, 184 Ky. 609, 212 SW 583; Hanna v. Prewitt, 153 Ky. 310, 155 SW 726; Dunevant v. Radford, 140 Ky. 433, 131 SW 185, 140 AmSR 392; Evans v. Evans, 134 Ky. 637, 121 SW 619; De Haven v. De Haven, 104 Ky. 41, 46 SW 215, 47 SW 597, 20 KyL 663; Shields v. Smith, 8 Bush 601; Gulley v. Prather, 7 Bush 167; Rutherford v. Clark, 4 Bush 27; Owens v. Cowan, 7 B. Mon. 152; Steele v. Moxley, 9 Dana 137; Peebles v. Watts, 9 Dana 102, 33 AmD 531.

Md.—Murray v. Conley, 124 Md. 218, 92 A 476; Bay v. Posner, 78 Md. 42, 26 A 1084; Venable v. Mercantile Trust, etc., Co., 74 Md. 187, 21 A 704; Keplinger v. Maccubbin, 58 Md. 203.

Mass.—Farwell v. Jacobs, 4 Mass. 634.

Mich.—Green v. Russell, 103 Mich. 638, 61 NW 885.

Miss.—Cohea v. Johnson, 69 Miss. 46, 13 S 40; Sandifer v. Grantham, 62 Miss. 412.

Mo.—Francisco v. Wingfield, 161 Mo. 542, 61 SW 842; Evans v. Blackiston, 66 Mo. 437; Dilworth v. Rice, 48 Mo. 124; In re Rickenbaugh, 42 Mo. A. 328; Compton v. McMahan, 19 Mo. A. 494.

Nebr.—Koopman v. Carroll, 50 Nebr. 824, 70 NW 395; Schroeder v. Wilcox, 39 Nebr. 136, 57 NW 1031.

N. J.—Cranstoun v. Westendorf, 108 A 776; Varick v. Smith, 67 N. J. Eq. 1, 58 A 168; Ker v. Banta, 71 N. J. Eq. 49, 63 A 550; In re Devine, 62 N. J. Eq. 703, 49 A 138; Howell v. Sebring, 14 N. J. Eq. 84.

N. M.—Bull v. Bal, 17 N. M. 466, 130 P 251.

N. Y.—Coann v. Culver, 188 N. Y. 9, 80 NE 362; Mott v. Ackerman, 92 N. Y. 539; McGarry v. McMahon, 124 App. Div. 607, 109 NYS 61; Scott v. Douglas, 39 Misc. 555, 80 NYS 354; Campbell v. Jennings, 22 Misc. 406, 50 NYS 278; Williams v. Williams, 152 App. Div. 323, 136 NYS 990 [aff 208 N. Y. 32, 101 NE 853, 46 LRANS 719]; Matter of Kick, 11 NYSt 688.

N. C.—Creech v. Grainger, 106 N. C. 213, 10 SE 1032; Gay v. Grant, 101 N. C. 206, 8 SE 99, 106; Council v. Averett, 95 N. C. 131; Vaughan v. Farmer, 90 N. C. 607; Smith v. McCrary, 38 N. C. 204; Hester v. Hester, 37 N. C. 330.

Oh.—Elstner v. Fife, 32 Oh. St. 358.

Pa.—Gehr v. McDowell, 206 Pa. 100, 55 A 851; Tarrance v. Reuther, 185 Pa. 279, 39 A 956 [aff 13 Montg. Co. 162]; Potts v. Breneman, 182 Pa. 295, 37 A 1002; Jackman v. Delafield,

to sell and make distribution may be made by an administrator with the will annexed to a court of equity where the terms of the will cannot be carried out without converting the land into money.[12]

Where an administrator with the will annexed purchased, at judicial sale, property in which the testator had owned an interest, and took title in himself as administrator, a subsequent sale by him was not a sale under the will.[13]

XX. TEMPORARY OR SPECIAL ADMINISTRATORS

[§ 2780] **A. In General.** Administration limited to a certain time, to certain specific effects of decedent, or to the performance of some particular acts, may be granted in various appropriate instances.[14] The power to make such appointments is

85 Pa. 381; Lantz v. Boyer, 81 Pa. 325; Maus v. Maus, 80 Pa. 194; Evans v. Chew, 71 Pa. 47 [aff 8 Phila. 103]; Waters v. Margerum, 60 Pa. 39; Keefer v. Schwartz, 47 Pa. 503; Shalter's App., 43 Pa. 83, 82 AmD 552; Royer v. Meixel, 19 Pa. 240; Ross v. Barclay, 18 Pa. 179, 55 AmD 616; Hassinger's App., 10 Pa. 454; Moody v. Fulmer, 3 Grant 17; Olwine's App., 4 Watts & S. 492; Hart's Est., 12 Pa. Dist. 47; Hart's Est., 11 Pa. Dist. 783, 28 Pa. Co. 126; Snyder's Est., 9 Pa. Dist. 128; Still's Est., 2 Pa. Dist. 105, 12 Pa. Co. 379, 31 WklyNC 252; Meredith's Est., 1 Pars. Eq. Cas. 433; Kline's Est., 2 LegChron 137; Livingood v. Heffner, 21 WklyNC 148.

R. I.—Stoughton v. Liscomb, 39 R. I. 489, 98 A 183; In re Adams, 32 R. I. 41, 78 A 524; Bailey v. Brown, 9 R. I. 79.

S. C.—Robinson v. Ostendorff, 38 S. C. 66, 16 SE 371; Drayton v. Grimke, 8 S. C. Eq. 392.

Tenn.—Hardin v. Hassell, 118 Tenn. 143, 100 SW 720; McElroy v. McElroy, 110 Tenn. 137, 73 SW 105; Blakemore v. Kimmons, 8 Baxt. 470; Green v. Davidson, 4 Baxt. 488; Harrison v. Henderson, 7 Heisk. 315.

Va.—Miller v. Jones, 9 Gratt. (50 Va.) 584; Brown v. Armistead, 6 Rand. (27 Va.) 594.

[a] **Such a statute applies even though:** (1) The power to sell conferred by the will was discretionary. Gulley v. Prather, 7 Bush (Ky.) 167. (2) The sale was directed to be made for reinvestment. Robinson v. Ostendorff, 38 S. C. 66, 16 SE 371. (3) The will was probated prior to the enactment of the statute. Blakemore v. Kimmons, 8 Baxt. (Tenn.) 470.

[b] **Requisites of valid sale.**—Under the act of April 6, 1888, an administrator de bonis non with the will annexed may make sale of the realty of the testator if the will conferred power upon the executors named therein to make such sale. In re Devine, 62 N. J. Eq. 703, 49 A 138; Griggs v. Veghte, 47 N. J. Eq. 179, 19 A 867. But the power of such administrator is declared by this act not to be valid until the terms of sale shall have been submitted to the orphans' court of the county in which the lands proposed to be sold lie and approved by such court. The jurisdiction of the orphans' court to approve or disapprove of the terms of a sale can only be invoked by one who exhibits by proof a right to make sale, if the will has conferred power of sale upon the executors named therein. If the will is one probated within the state, the application must show that he has been duly appointed administrator with the will annexed by some court having jurisdiction to make such appointment. If the will is a foreign one, it must appear that the applicant has been appointed with the will annexed, and also that he has taken such proceedings within the state as will give him a right to act in New Jersey. In a proceeding under this statute the court has no authority to consider or adjudicate upon a claim that the lands descended to testator's heirs at law or were specifically devised by his will and were not within the power of sale conferred by the will, for if the administrator had no authority to sell under the will, an order of the orphans' court under this statute would not confer it upon him. In re Devine, 62 N. J. Eq. 703, 49 A 138.

[c] **A foreign administrator with the will annexed** cannot sell lands under a statutory provision in the state where the lands are situated. Steele v. Moxley, 9 Dana (Ky.) 137; Brown v. Hobson, 3 A. K. Marsh. (Ky.) 380, 13 AmD 187.

[d] **A power of sale to carry out a collateral trust** cannot be exercised by an administrator with the will annexed, even under such statutes. Crouse v. Peterson, 130 Cal. 169, 62 P 475, 615, 80 AmSR 89; Nicoll v. Scott, 99 Ill. 529; Hegeman v. Roome, 70 N. J. Eq. 562, 62 A 392; Varick v. Smith, 67 N. J. Eq. 1, 58 A 168; Gehr v. McDowell, 206 Pa. 100, 55 A 851; Evans v. Chew, 71 Pa. 47; Waters v. Margerum, 60 Pa. 39; Harrison v. Henderson, 7 Heisk. (Tenn.) 315.

[e] **An implied power** to sell land resulting from a charge of legacies thereon cannot be exercised by an administrator with the will annexed under such a statute. Stoughton v. Liscomb, 39 R. I. 489, 98 A 183.

[f] **Where no donee of power named.**—Where a will contains the direction for the sale of land, but provides for no executor or donor of power to sell, a sale can only be made through the court of chancery; hence a sale by the administrator with the will annexed is void, the statute providing that administrators with the will annexed shall have the same power as the executor had by the will, having no application to a will which provides for no executor. McElroy v. McElroy, 110 Tenn. 137, 73 SW 105.

12. Kolb v. Landes, 277 Ill. 440, 115 NE 539; Frackelton v. Masters, 249 Ill. 30, 94 NE 124; Penn v. Folger, 182 Ill. 76, 55 NE 192; Mulligan v. Lambe, 178 Ill. 130, 52 NE 1052; Stoff v. McGinn, 178 Ill. 46, 52 NE 1048; Wenner v. Thornton, 98 Ill. 156.

13. Schlickman v. Dusing, 180 Ky. 506, 203 SW 295.

14. Ala.—Breeding v. Breeding, 128 Ala. 412, 30 S 881; Clemens v. Walker, 40 Ala. 189.

Cal.—In re Chadbourne, 14 Cal. A. 481, 112 P 472.

D. C.—Guthrie v. Welch, 24 App. 562.

Ga.—Babson v. McEachin, 147 Ga. 143, 93 SE 292; Irvine v. Wiley, 145 Ga. 867, 90 SE 69; Dekle v. McLeod, 144 Ga. 289, 86 SE 1082; Dean v. Biggers, 27 Ga. 73.

Ill.—Phillips v. Duckett, 112 Ill. A. 587.

Iowa.—In re Ellenberger, 171 Iowa 225, 153 NW 1036.

La.—De Flechier's Succ., 1 La. Ann. 20.

Md.—Friedenwald v. Burke, 122 Md. 156, 89 A 424 [cit Cyc].

Minn.—Jones v. Minnesota Transfer R. Co., 108 Minn. 129, 121 NW 606.

Miss.—Browning v. Watkins, 18 Misc. 482.

N. Y.—Martin v. Dry Dock, etc., R. Co., 92 N. Y. 70; In re Durban, 175 App. Div. 688, 160 NYS 945 [aff 220 N. Y. 589 mem, 115 NE 589 mem]; In re Curtis, 175 NYS 285.

Porto Rico.—Iturrino v. Iturrino, 24 Porto Rico 71; Sanchez v. Calderon, 19 Porto Rico 1046.

Tenn.—Jordan v. Polk, 1 Sneed 430; McNairy v. Bell, 6 Yerg. 302.

Tex.—Alexander v. Barfield, 6 Tex. 400; Gulf, etc., R. Co. v. Cooper, (Civ. A.) 191 SW 579; Ball v. Ball, (Civ. A.) 45 SW 605.

W. Va.—Butcher v. Kunst, 65 W. Va. 384, 64 SE 967.

Eng.—In re Hammond, 6 P. D. 104.

"Such appointment seems to have been originally assumed by probate courts as a matter of necessity. With us it has long been sanctioned by law." Guthrie v. Welch, 24 App. (D. C.) 562, 567.

"No sound reason exists why the surrogate, in the exercise of his authority, should not limit the application of the letters issued by him. We think it rests with him to say, in the exercise of his discretion, what powers should be conferred upon an administrator, and so long as he does not exceed the authority vested in him by law there is no valid ground for assuming that the letters issued by him are unauthorized; he has kept himself within the letter and the spirit of the statute, already cited, which authorizes him 'to direct and control.' In this case he merely allowed the administratrix to institute the first step to be taken for the collection of a claim which existed against the defendant. The law does not prevent or forbid him from issuing letters in the form which he followed; he therein limited the power of the administratrix instead of extending it." Martin v. Dry Dock, etc., R. Co., 92 N. Y. 70, 75.

[a] **Where no application for administration in chief is pending,** temporary letters cannot be granted. Dock's Est., 7 NYCivProc 237, 3 Dem. Surr. 55.

[b] **Qualified appointment.**—Where a supposed deceased had not been heard of for about six years and ten months, and there was no other evidence of death, and a grant of administration was required for use in certain chancery proceedings, the court gave the applicant leave to swear that the death had occurred on the date the alleged deceased was last heard of, but directed that the grant should, except in so far as it might be required in the chancery division, remain in the registry until the expiration of seven years from that date. In re Winstone, [1898] P. 143.

[c] **Errors in temporary administration proceedings.**—Errors and irregularities in a judgment rendered in a temporary administration cannot be corrected in the permanent administration, as they are distinct proceedings and a judgment in one cannot be collaterally attacked in the other. Ball v. Ball, (Tex. Civ. A.) 45 SW 605.

[d] **Estoppel to object to appointment.**—Where parties interested in the estate fail to move to set aside the appointment of a temporary administrator in apt time, they cannot claim that the appointment was not properly made. Stone v. Haskins, 97 Ill. A. 3.

[e] **Modification of order of appointment.**—The powers conferred on an administrator by an order granting limited letters may be modified by a subsequent order. Molloy's Est., 2 NYCivProc 15, 1 Dem. Surr. 421.

inherent in courts of probate jurisdiction,[15] and its exercise in a particular case is generally a matter of discretion,[16] although it has been considered that a limited grant should not be made unless strong reason therefor is given,[17] and it is of course necessary to the valid exercise of such power that there should be no executor or administrator capable of acting.[18] A fortiori a special administrator cannot be appointed where there is a regularly appointed administrator acting.[19]

[§ 2781] **B. Classes—1. Durante Minoritate.** Where the person entitled by precedence to administration or the executor named in a will is an infant, the court may appoint an administrator to serve until such person attains his majority, who is termed an administrator durante minoritate or durante minore ætate.[20] It has been held that if several executors are named and one of them is of full age and capacity, administration during minority need not be granted, because the person of full age may serve, notwithstanding the nonage of the others,[21] but in other cases it has been considered proper to grant such administration because of the minority of one of several executors[22] or persons equally entitled to administration.[23]

[§ 2782] **2. Durante Absentia.** If the executor appointed by a will, or the person entitled to the administration of a decedent's estate, is temporarily out of the country, it may be necessary that an administrator be appointed to act during his absence, and such an appointee is termed an administrator durante absentia.[24] This species of administration was granted at common law only before probate or grant of original letters of administration;[25] but in England the power of the court has been extended so far as to authorize a limited grant of administration whenever the convenience of the estate may require it.[26] The person entitled may qualify on his return[27] unless, after an unreasonable absence, he finds upon his return that the estate has been fully settled.[28]

[§ 2783] **3. Pendente Lite.** In case litigation arises over the right to administration or the probate of the will, an administrator may be appointed to take charge of the estate while such contest is pending and, until its termination, the appointee being termed an administrator pendente lite,[29] and the appointment may be made where the contest

15. McArthur v. Scott, 113 U. S. 340, 399, 5 SCt 652, 28 L. ed. 1015 [quot Friedenwald v. Burke, 122 Md. 156, 89 A 424] ("Courts vested with the jurisdiction of granting letters testamentary and of administration have the inherent power of granting a limited administration, whenever it is necessary for the purposes of justice").

16. Day v. Bullen, 226 Ill. 72, 80 NE 739; Grece v. Helm, 91 Mich. 450, 51 NE 1106; Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261; McGregor v. Buel, 24 N. Y. 166; In re Chase, 32 Hun (N. Y.) 318; Hicks v. Hicks, 12 Barb. (N. Y.) 322; Matter of Ashmore, 48 Misc. 312, 96 NYS 772, 35 NYCiv Proc 268, 5 Mills Surr. 130; Mootrie v. Hunt, 4 Bradf. Surr. (N. Y.) 173.

[a] **Such appointment will not be reviewed on appeal** unless the discretion of the lower court was abused. Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261.

17. Emerick v. Hileman, 177 Ill. 368, 52 NE 311; Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219; In re Watts, 29 L. J. P. & M. 108; In re Somerset, L. R. 1 P. & D. 350.

[a] **Circumstances under which appointment not necessary or proper.**—(1) Where an administrator during the lifetime of the intestate made payments on his note, held by the intestate, which were not indorsed on the note, the county court is not obliged to appoint an administrator pro tempore, as provided by Rev. St. c 3 § 72, in order to arrive at a settlement with the administrator, the payments made being in no sense a claim against the estate. Emerick v. Hileman, 177 Ill. 368, 52 NE 311 [aff 71 Ill. A. 512]. (2) Under Hurd Rev. St. (1905) c 3 § 11, which authorizes the appointment of an administrator where there is great delay in admitting the will to probate, § 17 which provides that on the granting of letters testamentary the power of the administrator to collect shall cease, and § 72 which authorizes the appointment of an administrator pro tempore to defend for the estate when the executor has filed a claim against the estate, where an executor claimed that certain shares of stock belonging to testator had been transferred to him by testator, and a legatee claimed that the stock had been converted by the executor, there was no authority for appointing a special administrator to sue the executrix to recover assets. Day v. Bullen, 226 Ill. 72, 80 NE 739 [aff 127 Ill. A. 155]. (3) Where the estate of a decedent was in community, and consisted of cash in bank and of an interest in a partnership business in possession of the surviving partner, who was proceeding to wind up the firm affairs, the probate court could not by the appointment of a temporary administratrix authorize her to take possession of partnership assets or interfere with the right of the surviving partner to wind up the partnership business. Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219.

18. U. S.—Newman v. Schwerin, 61 Fed. 865, 10 CCA 129.

Ark.—Grace v. Neel, 41 Ark. 165.

Cal.—Schroeder v. San Mateo County Super. Ct., 70 Cal. 343, 11 P 651.

Iowa.—Pickering v. Weiting, 47 Iowa 242.

N. Y.—Matter of Judson, 92 Misc. 136, 156 NYS 270.

N. C.—In re Palmer, 117 N. C. 133, 23 SE 104.

Wyo.—Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

[a] **After letters testamentary have been duly issued** the court has no power to appoint a special or temporary administrator, unless the executor is first suspended or removed. Schroeder v. San Mateo County Super. Ct., 70 Cal. 343, 11 P 651; Pickering v. Weiting, 47 Iowa 242; In re Palmer, 117 N. C. 133, 23 SE 104.

[b] **Estoppel to object.**—Where a special administrator was appointed with the consent and in the presence of the original administratrix who was the only party interested, and represented in herself and as guardian all the heirs of the estate, the rights of creditors not being involved, she could not complain of the appointment of such administrator on the ground that there was no vacancy in the administration, as she had never been removed from the office of administratrix. Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

19. Powell v. Jackson, 60 Ind. A. 597, 111 NE 208.

20. Miss.—Pitcher v. Armat, 6 Miss. 288; Collins v. Spears, 1 Miss. 310.

Mo.—State v. Guinotte, 156 Mo. 513, 57 SW 281, 50 LRA 787.

N. H.—Taylor v. Barron, 35 N. H. 484.

N. J.—In re Russell, 64 N. J. Eq. 313, 53 A 169.

N. C.—Wallis v. Wallis, 60 N. C. 78; Ritchie v. McAuslin, 2 N. C. 220.

Pa.—In re Ellmaker, 4 Watts 34; Riegel's App., 2 Pa. Cas. 58, 4 A 173.

Eng.—In re Cope, 16 Ch. D. 49; In re Burgess, 9 Jur. N. S. 553; In re Thomas, 28 L. T. Rep. N. S. 677; Foxwist v. Tremain, 1 Mod. 47, 86 Reprint 721.

[a] **The authority of an administrator durante minoritate** is limited in point of time to the minority of the person, but there is no other limit. In re Cope, 16 Ch. D. 4.

21. Pigot's Case, Brownl. & G. 46, 123 Reprint 655.

22. Colborne v. Wright, 2 Lev. 239, 83 Reprint 537 (where one of the executors is an infant and cannot prove the will, administration durante sua minoritate may be granted to the other).

23. Cartright's Case, 1 Freem. 258 (where four persons being equally entitled to administration, and only one of them being of age, the court granted administration durante minore ætate to the mother of the other three as guardian).

24. U. S.—Griffith v. Frazier, 8 Cranch 9, 3 L. ed. 471.

Mo.—State v. Guinotte, 156 Mo. 513, 57 SW 281, 50 LRA 787; In re Estes, 65 Mo. A. 38.

N. Y.—Crandall v. Shaw, 2 Redf. Surr. 100.

N. C.—Ritchie v. McAuslin, 2 N. C. 220.

Pa.—Willing v. Perot, 5 Rawle 264.

Porto Rico.—Rossner v. Colon, 11 Porto Rico 53.

Eng.—In re Suarez, [1897] P. 82; In re Ruddy, L. R. 2 P. & D. 330; In re Hampson, L. R. 1 P. & D. 1; In re Lee, [1898] 2 Ir. R. 81; Slater v. May, 2 Ld. Raym. 1071, 92 Reprint 210; In re Lewis, 29 L. J. P. & M. 94; In re Richardson, 35 L. T. Rep. N. S. 767; Clare's Case [cit Major v. Peck, 1 Lutw. 338, 342, 125 Reprint 179].

25. Griffith v. Frazier, 8 Cranch (U. S.) 9, 3 L. ed. 471.

26. In re Ruddy, L. R. 2 P. & D. 330; In re Jenkins, 44 J. P. 801; In re Richardson, 35 L. T. Rep. N. S. 767.

27. In re Estes, 65 Mo. A. 38; Rainsford v. Taynton, 7 Ves. Jr. 460, 32 Reprint 186.

28. Nicholson's Succ., 5 La. Ann. 358.

29. Ala.—McDonnell v. Farrow, 132 Ala. 227, 31 S 475; Breeding v.

arose after the death of a general administrator as well as in other cases.[30] The power of a probate court to appoint such an administrator is not limited to cases where the contest is pending in that court, but may be exercised, although the proceeding is in another court.[31] Where a decree for the probate of a will has been reversed, the surrogate has jurisdiction to appoint a temporary administrator and may make such an appointment, although letters testamentary had been issued at the time of the probate,[32] and an administrator pendente lite may in a proper case be appointed pending an appeal from

Breeding, 128 Ala. 412, 30 S 881; Clemens v. Walker, 40 Ala. 189.

Ark.—Turley v. Evins, 109 Ark. 115, 158 SW 1080; Steen v. Springfield, 91 Ark. 73, 120 SW 408; Wade v. Bridges, 24 Ark. 569.

Cal.—In re Edwards, 154 Cal. 91, 97 P 23; Wood's Est., 94 Cal. 566, 29 P 1108; In re Moore, 86 Cal. 72, 24 P 846.

Ga.—Dekle v. McLeod, 144 Ga. 289, 86 SE 1082; Walker v. Dougherty, 14 Ga. 653.

Ill.—Day v. Bullen, 226 Ill. 72, 80 NE 739.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.

Iowa.—In re Ellenberger, 171 Iowa 225, 153 NW 1036.

Md.—Friedenwald v. Burke, 122 Md. 156, 89 A 424; Lewis v. Logan, 120 Md. 329, 87 A 750; Harrison v. Clark, 95 Md. 308, 52 A 514; Munnikhuysen v. Magraw, 35 Md. 280.

Mich.—Grece v. Heim, 91 Mich. 450, 51 NW 1106; Peo. v. Wayne Prob. Judge, 39 Mich. 302.

Mo.—Johnson v. Brewn, 210 SW 55; Diehr v. Dean, 187 SW 602; State v. Imel, 243 Mo. 180, 147 SW 989; Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499; State v. Guinotte, 156 Mo. 513, 57 SW 281, 50 LRA 787; Lamb v. Helm, 56 Mo. 420; Achor v. Sullenger, 137 Mo. A. 372, 117 SW 1191.

Mont.—Quinn v. Quinn, 22 Mont. 403, 56 P 824.

N. J.—Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295].

N. Y.—Matter of Leland, 175 App. Div. 58, 161 NYS 320; Hicks v. Hicks, 12 Barb. 322; Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982, 8 Mills Surr. 223; Matter of Hilton, 29 Misc. 532, 61 NYS 1073, 1 Mills Surr. 337; Matter of Eddy, 10 Misc. 211, 31 NYS 423, 1 Gibb. Surr. 163; In re Kennedy, 186 App. Div. 19, 174 NYS 95; In re Leland, 160 NYS 521 [rev on other grounds 161 NYS 320]; Lawrence v. Parsons, 27 HowPr 26; West v. Mapes, 14 NYWklyDig 92.

N. C.—Slade v. Washburn, 25 N. C. 557.

Oh.—In re Crawford, 21 Oh. Cir. Ct. 554, 11 Oh. Cir. Dec. 605 [aff on other grounds 68 Oh. St. 58, 67 NE 156, 96 AmSR 648].

Pa.—In re Ellmaker, 4 Watts 34; Maguire's Est., 24 Pa. Dist. 47; Wickersham's Est., 4 LegGaz 331.

Tenn.—Crozier v. Goodwin, 1 Lea 368.

Tex.—Huth v. Huth, (Civ. A.) 187 SW 523.

Eng.—In re Dawes, L. R. 2 P. & D. 147; Wills v. Rich, 2 Atk. 285, 26 Reprint 575; In re Morgan, 16 Jur. 20, 3 EngL&Eq 581; Bellew v. Bellew, 11 Jur. N. S. 588; Smyth v. Smyth, 3 Keb. 54, 84 Reprint 591; Maskeline v. Harrison, 2 Lee Eccl. 258, 161 Reprint 333; Robins' Case, Moore K. B. 636, 72 Reprint 807; Walker v. Woollaston, 2 P. Wms. 576, 24 Reprint 868; Ball v. Oliver, 2 Ves. & B. 96, 35 Reprint 255.

Man.—Tellier v. Schilemans, 17 Man. 303, 5 WestLR 467; Tellier v. Schilemans, 16 Man. 430.

[a] **"The chief reason** for granting an administration pendente lite is to collect and preserve the estate until by the determination of a pending controversy it shall be decided whether the decedent left a valid will so that the Orphans' Court may know who is entitled to administer the estate. Until that controversy is finally determined the necessity for the administrator pendente lite continues and in the absence of any provision in the statute to the contrary it must be presumed that the law intends that he shall remain in office. A decedent can have but one valid will and even though a number of papers are produced in the Orphans' Court at the same time each purporting to be his will the controversy as to which if any of the papers in fact constitutes his valid and effectual will is after all but a single controversy and is not ended until all the papers are declared void or some one or several of them taken together are held to constitute his will." Harrison v. Clark, 95 Md. 308, 312, 52 A 514.

[b] **Appointment must be special.**—The appointment of a general administrator while a contest as to a will is pending is void, as exceeding the power of the court, and cannot therefore be supported as a grant of administration pendente lite. Slade v. Washburn, 325 N. C. 557.

[c] **Necessity must be shown** in order to warrant the appointment of an administrator pendente lite. In re Morrissey, (N. J. Prerog.) 107 A 70; Tellier v. Schilemans, 17 Man. 303, 5 WestLR 467 [foll Horrell v. Witts, L. R. 1 P. & D. 103].

[d] **There must be a contest** as to the right to the administration or the executorship in order to authorize the appointment of an administrator pendente lite. It is not sufficient that the persons entitled delay taking out letters. Munnikhuysen v. Magraw, 57 Md. 172; South Brooklyn Saw-Mill Co. v. Dock, 3 Dem. Surr. (N. Y.) 55.

[e] **Existence of litigation sufficient.**—(1) An administrator pendente lite will be appointed where a bona fide suit is pending, irrespective of the property being in any particular danger. In such case the court follows the practice of the court of chancery in appointing receivers. Bellew v. Bellew, 11 Jur. N. S. 588. (2) Contra In re Marsh, (N. J. Prerog.) 55 A 299 ("The intervention of the court by the appointment of an administrator pendente lite, which will occasion expense to the estate, ought not . . . to take place, unless there is some reasonable ground to apprehend that, if no such appointment be made, there will be loss to the estate").

[f] **Controversy as to right to general or limited probate.**—An administrator pendente lite may be appointed where the litigation is on the question whether the executors named in the will are entitled to a limited or general grant of probate. In re Dawes, L. R. 2 P. & D. 147.

[g] **Contest of codicil not affecting appointment of executor.**—If the contest is in regard to the validity of a codicil which does not affect the appointment of the executors, the court will not appoint an administrator pendente lite. Mortimer v. Paull, L. R. 2 P. & D. 85.

[h] **Will disposing of real estate only.**—Such an appointment is not authorized by the fact that there is a contest as to the probate of a will which disposes of real estate alone. Tooker v. Bell, 1 Dem. Surr. (N. Y.) 52.

[i] **Appointment in respect to partnership property.**—Where the estate of decedent consists of a share of a business which he was carrying on in partnership at the time of his death, and which was continued by the surviving partner, an administrator pendente lite will not be appointed against the wish of the surviving partner, unless he is dealing improperly with the business. Horrell v. Witts, L. R. 1 P. & D. 103.

[j] **Appointment not prejudicial to heirs.**—Although in a will contest the original petition named as defendants only the named legatees, instead of all heirs, a temporary appointment was not prejudicial to the executor, also a legatee, an amended petition making all the heirs parties being subsequently filed. Achor v. Sullenger, 137 Mo. A. 372, 117 SW 1191.

[k] **When appointment unnecessary.**—(1) No appointment pendente lite should be made after the general administrator has fully settled the estate, or where it otherwise appears that there is no occasion for such administration. Elwell v. Universalist Church, 63 Tex. 220; Fisk v. Norvel, 9 Tex. 13, 58 AmD 128. (2) An estate should not be subjected to the cost and encumbrance of such an administration when a rightful and regular executor or administrator whose appointment is not questioned can discharge the duties of the office during the emergency, but the consent of the contesting parties to the special appointment pendente lite obviates objections of this character. Patton's App., 31 Pa. 465; Mortimer v. Paull, L. R. 2 P. & D. 85. (3) Where, on an appeal from a decree removing an executor, it appears that the estate consists of securities and cash deposited in a bank, and that an order made by the lower court restraining the removed executor from disposing of the estate during the pendency of the proceedings has not been appealed from, and there is no claim that the estate has been diminished in value since the appeal was taken, the prerogative court will not appoint an administrator pendente lite on a motion based on the misconduct for which the executor was removed. In re Marsh, (N. J. Prerog.) 55 A 299. (4) Where a will names no executor and merely devises real estate, a controversy over the probate thereof does not warrant the appointment of a temporary administrator or receiver under a statute providing for a temporary appointment "where delay necessarily occurs in the granting letters testamentary or of general administration." Tooker v. Bell, 1 Dem. Surr. (N. Y.) 52.

[l] **Administration pro tempore.**—A comparatively early statute in Texas provided for the appointment of an administrator under the designation of an administrator pro tempore for substantially the same purposes and with like powers and limitations of an administrator pendente lite. Giddings v. Steele, 28 Tex. 732, 91 AmD 336; Fisk v. Norvel, 9 Tex. 12, 58 AmD 128.

30. Ala.—Clemens v. Walker, 40 Ala. 189; Robinson v. Robinson, 11 Ala. 947; Watson v. Bothwell, 11 Ala. 650.

Ga.—Dean v. Biggers, 27 Ga. 73; Walker v. Dougherty, 14 Ga. 653.

N. C.—Springs v. Erwin, 28 N. C. 27; Slade v. Washburn, 25 N. C. 557; Pratt v. Kitterell, 15 N. C. 168.

Tenn.—Jordan v. Polk, 1 Sneed 430.

Eng.—In re Morgan, 16 Jur. 20, 9 EngL&Eq 581; Ball v. Oliver, 2 Ves. & B. 96, 35 Reprint 255.

31. State v. Moehlenkamp, 133 Mo. 134, 34 SW 468; Rogers v. Dively, 51 Mo. 193; Matter of Blair, 60 Hun 523, 15 NYS 212.

32. Matter of Hopkins, 41 Misc. 83, 83 NYS 890, 3 Mills Surr. 589 [aff 93 App. Div. 618, 87 NYS 793].

a decree removing an executor.[33]

Appointment pending contest of will. It was formerly considered that an appointment pendente lite could not be made where the litigation was with respect to a will, because the power to grant letters of administration was strictly limited to ascertained cases of intestacy.[34] But this strictness was afterward relaxed because of the necessity that there should be a temporary keeper of the goods of decedent while the controversy lasted, and it was finally settled that the power to make such an appointment extended to cases involving a contest of a will as well as to cases of intestacy.[35] It has been held that the probate court has jurisdiction to suspend an executor and appoint a temporary administrator pending a contest of the will;[36] but the more general view is that the power to make such an appointment is limited to cases where a contest over the will arises before probate, and cannot be exercised where a will which has been admitted to probate is subsequently contested,[37] or pending an appeal from the probate of a will.[38] It has also been held improper to appoint the executor special administrator pending an appeal from a judgment setting aside the will.[39]

After the estate has been finally settled by a general administrator no appointment of an administrator pendente lite can be made.[40]

Limited appointment. Where the necessity for the appointment of an administrator pendente lite is shown as to a portion of the estate only, an appointment limited to such portion should be made.[41]

The reversal of a decree admitting a will to probate, thus terminating the authority of the executor, does not revive the appointment of an administration to whom temporary letters pending the contest of the will were issued.[42]

[§ 2784] **4. Ad Litem.** A special administrator is sometimes appointed for the sole purpose of supplying a necessary party to an action to which decedent was, or his estate is, a necessary party, and the administrator so appointed is termed an administrator ad litem,[43] but the power to appoint such administrators should be strictly construed and exercised only in cases of necessity.[44] Such an appointment is authorized if the administration is vacant or the representative is disqualified,[45] and where the regular administrator is interested adversely to the estate, it is the duty of the court under some statutes to appoint an administrator ad litem,[46] but ordinarily such an administrator will not be appointed where there is a general administrator.

33. In re Marsh, (N. J. Prerog.) 55 A 299.

34. Slade v. Washburn, 25 N. C. 557; Frederick v. Hook, Carth. 153, 90 Reprint 694; Smyth v. Smyth, 3 Keb. 54, 84 Reprint 591; Robins' Case, Moore K. B. 636, 72 Reprint 807.

35. State v. Moehlenkamp, 133 Mo. 134, 34 SW 468; Lamb v. Helm, 56 Mo. 420; Matter of Eddy, 10 Misc. 211, 31 NYS 423, 1 Gibb. Surr. 163; Lawrence v. Parsons, 27 HowPr (N. Y.) 26; Slade v. Washburn, 25 N. C. 557; Wills v. Rich, 2 Atk. 285, 26 Reprint 575; Maskeline v. Harrison, 2 Lee Eccl. 258, 161 Reprint 333; Walker v. Woollaston, 2 P. Wms. 576, 24 Reprint 868.

[a] **"It was not until after much controversy** and some conflicting decisions, that it was settled that such an administration could be granted pending a controversy about a will." Satterwhite v. Carson, 25 N. C. 549, 552.

36. State v. Moehlenkamp, 133 Mo. 134, 34 SW 468; Lamb v. Helm, 56 Mo. 420; Rogers v. Dively, 51 Mo. 193.

37. Steen v. Springfield, 91 Ark. 73, 120 SW 408; McClure v. Allphin, 41 SW 1, 19 KyL 576; Worthington v. Worthington, 35 SW 113, 18 KyL 62; Grill v. O'Dell, 111 Md. 64, 73 A 876; Munnikhuysen v. Magraw, 35 Md. 280.

[a] **Consent of executor to appointment.**—The statute does not authorize the appointment of an administrator after the will is admitted to probate, even though the executor, pending the admission of the will to probate, consented to the appointment of an administrator. Turley v. Evins, 109 Ark. 115, 158 SW 1080.

38. McClure v. Allphin, 41 SW 1, 19 KyL 576 (where the executor had qualified).

39. Hartley v. Lord, 38 Wash. 432, 80 P 554.

40. Fisk v. Norvel, 9 Tex. 13, 58 AmD 128.

41. Tellier v. Schilemans, 17 Man. 303, 5 WestLR 467.

42. In re Durban, 175 App. Div. 688, 160 NYS 945 [aff 220 N. Y. 589 mem, 115 NE 1038 mem].

43. U. S.—McArthur v. Scott, 113 U. S. 340, 5 SCt 652, 28 L. ed. 1015.

Ala.—Keith v. McCord, 140 Ala. 402, 37 S 267; Ex p. Baker, 118 Ala. 185, 23 S 996; Page v. Bartlett, 101 Ala. 193, 13 S 768; Clark v. Knox, 70 Ala. 607, 45 AmR 93; Malone v. Hill, 68 Ala. 225.

Ark.—Mangum v. Cooper, 28 Ark. 253; Wade v. Bridges, 24 Ark. 569.

Ind.—Guernsey v. Pennington, 33 Ind. A. 119, 70 NE 1008; Trent v. Edmonds, 32 Ind. A. 432, 70 NE 169.

Mich.—In re Nugent, 77 Mich. 500, 43 NW 889.

N. J.—In re Lothrop, 33 N. J. Eq. 246.

N. Y.—Martin v. Dry Dock, etc., R. Co., 92 N. Y. 70, 16 NYWklyDig 398 [aff 27 Hun 53, 14 NYWklyDig 251]; Kirwin v. Malone, 45 App. Div. 93, 61 NYS 844; Matter of Belotti, 87 Misc. 81, 150 NYS 421.

Tenn.—McKamy v. McNabb, 97 Tenn. 236, 36 SW 1091; Denning v. Todd, 91 Tenn. 422, 19 SW 228; McNairy v. Bell, 6 Yerg. 302.

Tex.—Callahan v. Houston, 78 Tex. 494, 14 SW 1027; Gulf, etc., R. Co. v. Cooper, (Civ. A.) 191 SW 579.

Eng.—In re Hesse, 1 Hagg. Eccl. 93, 162 Reprint 518.

Ont.—Rodger v. Moran, 28 Ont. 275; Fairfield v. Ross, 4 Ont. L. 534, 1 OntWR 631; Hunter v. Boyd, 3 Ont. L. 183; Re Tobin, 6 Ont. Pr. 40, 9 CanLJ 191.

[a] **Character of action.**—The appointment is limited to rights of action given by special provision of law, and is not authorized in case of an ordinary claim or debt due decedent. Mallon's Est., 13 NYCiv Proc 205.

[b] **Recovery of land.**—An administrator may be appointed for the purpose of prosecuting an action for the recovery of land. Callahan v. Houston, 78 Tex. 494, 14 SW 1027.

[c] **Effect of judgment.**—If such an administrator becomes a party to the litigation, the estate is legally represented, and a judgment will be binding on a general administrator. McKamy v. McNabb, 97 Tenn. 236, 36 SW 1091.

44. Poole v. Daughdrill, 129 Ala. 208, 30 S 579; Hunter v. Boyd, 3 Ont. L. 183, 1 OntWR 79, 2 OntWR 724, 22 CanLTOccNotes 50; Trites v. Humphreys, 2 N. B. Eq. 1.

[a] **Instances where appointment refused.**—(1) An administrator ad litem for a deceased heir is not proper in a proceeding to sell real estate to pay debts. When, after inheriting, one of the heirs dies, there is no abeyance, but title to his interest, although undivided, is immediately transmitted to his heirs, who are the necessary parties. Poole v. Daughdrill, 129 Ala. 208, 30 S 579. (2) The appointment cannot be made in an action brought without right or title, as where the sole next of kin, no personal representative having been appointed, sues to set aside a transfer by decedent of his personal property, on the ground of undue influence, want of consideration, and fraud. Such a suit involves general administration. Fairfield v. Ross, 4 Ont. L. 534. To same effect Trites v. Humphreys, 2 N. B. Eq. 1 (action by creditors). (3) A statute providing that an action for a tort committed by a person in his lifetime may be maintained against his executors or administrators does not include such administrators. Hunter v. Boyd, 3 Ont. L. 183.

45. U. S.—Newman v. Schwerin, 61 Fed. 865, 10 CCA 129.

Ala.—Keith v. McCord, 140 Ala. 402, 37 S 267; Malone v. Hill, 68 Ala. 225; Ex p. Lyon, 60 Ala. 650.

Ark.—Grace v. Neel, 41 Ark. 165.

Tenn.—Denning v. Todd, 91 Tenn. 422, 19 SW 228.

Eng.—In re Williams, 31 L. J. P. & M. 40.

[a] **Thus,** letters of administration limited to the purpose of suing for the negligence by which the intestate's death was caused were granted to her mother, where her husband was abroad and not expected to return until after the period limited for bringing such action. In re Williams, 31 L. J. P. & M. 40.

46. U. S.—Public Serv. Electric Co. v. Post, 257 Fed. 933.

Ala.—Ex p. Baker, 118 Ala. 185, 23 S 996.

Ill.—Heinrich v. Harrigan, 288 Ill. 170, 123 NE 309.

Ind.—Nation v. Green, (A.) 114 NE 895.

Mo.—Grimes v. Reynolds, 94 Mo. A. 576, 68 SW 588 [aff 184 Mo. 679, 83 SW 1132].

Tenn.—Denning v. Todd, 91 Tenn. 422, 19 SW 228.

[a] **Foundation of representative's claim.**—N. Y. Code Civ. Proc. § 2559 et seq, authorizing appointment of an administrator with limited letters, "where a right of action is granted to an executor or administrator by special provision of law," is not limited to cases where the right of action is given by the law

istrator.[47] It has been held that since there can be but a single administration of the affairs of an estate, a special administrator cannot be appointed to litigate a question of title with the executor, who has put himself into a position in which he cannot represent the estate and at the same time assert title in himself adversely to the estate.[48] An administrator ad litem will not be appointed where all the parties interested in the final settlement of the estate are before the court.[49]

The term administrator ad prosequendam has been applied to an administrator appointed to prosecute an action for the death of decedent,[50] or to represent the estate of a deceased mortgagee in a foreclosure suit brought by a prior mortgagee.[51]

[§ 2785] **5. Ad Colligendum.**[52] Administration is sometimes granted for the sole purpose of collecting and preserving the goods of the decedent, and such a grant is termed "ad colligendum" or more properly "ad colligendum bona defuncti."[53] It has been held that, when there are neither kindred nor creditors, this class of administration only is authorized.[54] The administrator ad colligendum is the mere agent or officer of the court and may be compelled at any time to give way to an administrator in chief;[55] and he is not such a representative of the estate as to require claims to be presented to him in order to avoid the statute of nonclaim.[56] While grants ad colligendum, in the absence of a statute to the contrary, are applicable to personal estate only, a statute directing that, where a person dies possessed of real estate, the heir at law shall be equally entitled to administration with the next of kin makes such grants applicable to real estate.[57]

[§ 2786] **6. Other Temporary or Special Appointments.** Various other occasions may arise for requiring a temporary administrator; as where the testator appoints a person to be his executor at the expiration of five years,[58] or the representative duly appointed has become disabled by sickness or temporarily insane.[59] So also an administrator may be appointed to act until a will is presented and proved,[60] especially where the will is left in some distant place,[61] or has been lost.[62] A temporary appointment is also proper where delay necessarily incurs in the granting of letters testamentary or of administration,[63] or a limited grant of administration may be made in order to effectuate some particular purpose.[64]

of New York. Public Serv. Electric Co. v. Post, 257 Fed. 933.

[b] **Claim to property.**—An appointment of an administrator pro tempore is unnecessary where executor claims property as his own in opposition to the estate he represents, Administration Act § 72, authorizing such appointment only where the administrator or executor files an out-and-out claim against the estate. Heinrich v. Harrigan, 288 Ill. 170, 123 NE 309.

[c] **A temporary administrator may be appointed to sue the administrator** as an individual and prosecute the suit to final judgment. Phillips v. Duckett, 112 Ill. A. 587; Stone v. Haskins, 97 Ill. A. 3; Emerick v. Hileman, 71 Ill. A. 512 [aff 177 Ill. 368, 52 NE 311]; May v. Leighty, 36 Ill. A. 17.

[d] **An appointment to defend against a general administrator's claim** against the estate is proper. Grimes v. Reynolds, 94 Mo. A. 576, 68 SW 588 [aff 184 Mo. 679]; Goodman v. Griffith, 135 Mo. A. 574, 134 SW 1051.

[e] **Claim of dower by administratrix.**—Where decedent's widow who was also his administratrix sued in both capacities to enforce an alleged equitable conversion by a contract concerning certain land in which defendant was interested, and also asking for dower out of the proceeds, it was held that while there was no antagonistic interest between the widow and the administratrix, so far as enforcing the conversion was concerned, which would increase the personal assets of the estate, her claim for dower was antagonistic to her position as administratrix, and hence an administrator ad litem should be appointed. Flomerfelt v. Siglin, 155 Ala. 633, 47 S 106, 130 AmSR 67.

47. Grace v. Neel, 41 Ark. 165.

48. In re Dolenty, 53 Mont. 33, 161 P 524.

49. Ex p. Baker, 118 Ala. 185, 23 S 996.

50. In re Post, (N. J. Prerog.) 104 A 652.

51. In re Lothrop, 33 N. J. Eq. 246.

52. Collectors see infra § 2893.

53. Ala.—Flora v. Mennice, 12 Ala. 836.

D. C.—Guthrie v. Welch, 24 App. 562.

Ga.—Dean v. Biggers, 27 Ga. 73.

Ill.—Wener v. Freilich, 268 Ill. 58, 108 NE 711; Peo. v. Salomon, 184 Ill. 490, 56 NE 815; In re Wincox, 85 Ill. A. 613 [aff 186 Ill. 445, 57 NE 1073].

Mass.—Sargent v. Sargent, 168 Mass. 420, 47 NE 121.

N. Y.—Lawrence v. Parsons, 27 HowPr 26; Crandall v. Shaw, 2 Redf. Surr. 100; Mootrie v. Hunt, 4 Bradf. Surr. 173.

Tenn.—McNairy v. Bell, 6 Yerg. 302.

Eng.—In re Bolton, [1899] P. 186; In re Schwerdtfeger, 1 P. D. 424; In re Stewart, L. R. 1 P. & D. 727; In re Clarkington, 8 Jur. N. S. 84; In re Wyckoff, 9 Jur. N. S. 84; In re Tepper, 25 L. T. Rep. N. S. 853.

[a] **French spoliation claim.**—The probate court can appoint an administrator for the sole purpose of collecting and receiving a claim under the French Spoliation Act, although the fund will not be general assets of the estate of the intestate or liable for his debts but will belong to particular persons who by law or contract with decedent will be entitled thereto. Sargent v. Sargent, 168 Mass. 421, 47 NE 121.

[b] **Where a sole next of kin refuses** to take administration, the court, on cause shown, will decree letters ad colligendum limited according to the special circumstances of the case. In re Radnall, 2 Add. Eccl. 232, 162 Reprint 278.

54. Thompson v. Buckner, 11 S. C. Eq. 499.

55. Flora v. Mennice, 12 Ala. 836.

56. Erwin v. Mobile Branch Bank, 14 Ala. 307.

57. In re Roberts, [1898] P. 149.

58. Godolph, pt. 2 c 30 § 5.

59. In re Ponsonby, [1895] P. 287; In re Espinasse, L. R. 3 Ir. 185; In re Milnes, 3 Add. Eccl. 55, 162 Reprint 401; In re Phillip, 2 Add. Eccl. 335, 162 Reprint 316; In re Southmead, 3 Curt. Eccl. 28; In re Joseph, 1 Curt. Eccl. 907; In re Binckes, 1 Curt. Eccl. 286; Ex p. Evelyn, 2 Myl. & K. 3, 7 EngCh 3, 39 Reprint 846, 2 ERC 119; In re Crump, 3 Phillim. 497, 161 Reprint 1396; Hills v. Mills, 1 Salk. 36, 91 Reprint 37; In re Burrell, 1 Swab. & Tr. 46.

[a] **If one of several executors or administrators becomes insane,** the usual practice is to revoke the letters already granted and grant new letters to such as may be competent. In re Phillips, 2 Add. Eccl. 336, 162 Reprint 316; In re Marshall, 1 Curt. Eccl. 297; In re Newton, 3 Curt. Eccl. 428.

[b] **Inquisition of lunacy not necessary.**—"It is the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed. The Court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it requires sureties in double the amount of the property, and such sureties must justify." Ex p. Evelyn, 2 Myl. & K. 34, 7 EngCh 3, 39 Reprint 846, 2 ERC 119.

60. Sager v. Mead, 164 Pa. 125, 30 A 284.

61. In re Metcalfe, 1 Add. Eccl. 343, 162 Reprint 121 (where decedent stated a few days before his death that he had made his will while in India and had left the will there, and temporary administration was granted on the ground that a long interval must elapse before the will could be forwarded from India, during which time it was important that there should be some one to protect and manage the property).

62. In re Campbell, 2 Hagg. Eccl. 555, 162 Reprint 955 (where it was shown that there was a will in existence after the testator's death, and the will could not be found and its contents were unknown, temporary administration was granted until the original could be found and brought in for probate).

63. Ill.—Schenk v. Schenk, 80 Ill. A. 612.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.

Iowa.—Pickering v. Weiting, 47 Iowa 242.

N. J.—Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295].

N. Y.—Matter of Chittenden, 76 Misc. 92, 136 NYS 953, 9 Mills Surr. 126; Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982, 8 Mills Surr. 223; Tooker v. Bell, 1 Dem. Surr. 52; Crandall v. Shaw, 2 Redf. Surr. 100.

Wash.—Hartley v. Lord, 38 Wash. 432, 80 P 554.

"When from any cause general administration cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased." Pickering v. Weiting, 47 Iowa 242, 244.

64. In re Drinkwater, 31 L. J. P. D. & Adm. 93.

[a] **Illustration.**—Where a son

[§ 2787] 7. **Special Administration under Statutes.** Under modern policy, and more especially as the result of legislation in various American states, the enumerated occasions for temporary or limited grants lose much of their force, inasmuch as the appointment of a special or temporary administrator wherever an emergency arises which calls for such appointment is distinctly provided for.[65] Such an appointment may, however, be made only in the cases and under the circumstances provided for by the statute.[66]

[§ 2788] **C. Selection.** In a few jurisdictions the right to special administration is in the same persons as would be entitled to general letters testamentary or of administration, or administration with the will annexed,[67] but in the absence of statute no such rule prevails,[68] nor is the selection limited to those entitled to ordinary administration.[69] In any event, where selection is permitted, the choice is a matter to be controlled by the sound discretion of the court in view of the situation,[70] aided by the consent and confidence of those who may be interested in the estate or in the permanent appointment.[71]

Where there is a conflict of interests, a disinterested person should be appointed temporary administrator,[72] and not one of the litigants.[73]

Where a will is contested, the person therein named as executor may, according to some authorities, be appointed temporary administrator,[74] but

who was entitled to the whole personal estate of the deceased father wrote from a foreign country to a cousin in England, giving him directions as to securing the amount of the property and transmitting a sum of money to him, an administration was granted to the cousin limited to carrying into effect the directions contained in such letter. In re Drinkwater, 31 L. J. P. D. & Adm. 93.

[b] **Purpose not calling for grant.**—Where a woman died in France leaving personal estate of her own in England, and it was alleged that by the law of France her husband, from whom she had eloped, could not establish his claim to her property, without a grant from the court of probate, the court had no jurisdiction to make a limited grant to enable him to establish his claim in the courts of France. In re Tucker, 34 L. J. P. & M. 29.

65. Ala.—Ex p. Lyon, 60 Ala. 650.

Ark.—Lanier v. Shonyo, 133 Ark. 396, 201 SW 108.

Cal.—Schroeder v. San Mateo County Super. Ct., 70 Cal. 343, 11 P 651; Scott v. San Francisco Super. Ct., 30 Cal. A. 793, 159 P 225; In re Chadbourne, 14 Cal. A. 481, 112 P 472.

Ga.—Irvine v. Wiley, 145 Ga. 867, 90 SE 69.

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 654; Powell v. Jackson, 60 Ind. A. 597, 111 NE 208.

Iowa.—In re Ellenberger, 171 Iowa 225, 153 NW 1036; Pickering v. Weiting, 47 Iowa 242.

La.—Rogers v. Beiller, 3 Mart. 665.

Mich.—Peo. v. Wayne Prob. Judge, 39 Mich. 302.

Minn.—Jones v. Minnesota Transfer R. Co., 108 Minn. 129, 121 NW 606.

Miss.—Boyd v. Swing, 38 Miss. 182.

Mo.—Johnson v. Brewn, 210 SW 55; Lamb v. Helm, 56 Mo. 420.

Nebr.—Keegan v. Welch, 83 Nebr. 166, 119 NW 252.

N. Y.—Matter of Belotti, 87 Misc. 81, 150 NYS 421; In re Curtis, 175 NYS 285; Tooker v. Bell, 1 Dem. Surr. 52.

Porto Rico.—Sanchez v. Calderon, 19 Porto Rico 1046; Rossner v. Colon, 11 Porto Rico 53.

R. I.—Sarle v. Scituate Prob. Ct., 7 R. I. 270.

Vt.—Slafter v. Savage, 89 Vt. 352, 95 A 790.

[a] **"A special administrator is a representative of a decedent,** appointed by the probate court to care for and preserve his estate until an executor or general administrator is appointed. R. L. 1905, § 3703." Jones v. Minnesota Transfer R. Co., 108 Minn. 129, 130, 121 NW 606.

[b] **Where executors were stayed from exercising their functions** by an appeal from a decree establishing will, the surrogate could either issue restrictive letters to the executors or issue new letters of temporary administration. Matter of Kennedy, 186 App. Div. 19, 174 NYS 95.

[c] **The reversal of a decree admitting a will to probate,** with a direction for jury trial on the issue of revocation, was such a delay as authorized the appointment of a temporary administrator. Matter of Hopkins, 95 App. Div. 57, 87 NYS 793 [aff 41 Misc. 83, 83 NYS 890].

[d] **Necessity for renting property.**—The appointment of a special administrator was authorized where the delay due to the three weeks' publication of notice of the petition for probate of the will would seriously interfere with the renting of a farm, and might deprive the estate of the entire income therefrom for the year. Keegan v. Welch, 83 Nebr. 166, 119 NW 252.

[e] **No such officer as "provisional administrator"** is known to the law of Louisiana, but, if such an officer is appointed by the court pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court. Clark's Succ., 30 La. Ann. 801.

66. Powell v. Jackson, 60 Ind. A. 597, 111 NE 208; Matter of Judson, 92 Misc. 136, 156 NYS 270; Matter of Hill, 43 Misc. 583, 89 NYS 552, 4 Mills Surr. 338.

67. Dahlgren v. Santa Cruz County Super. Ct., 8 Cal. A. 622, 97 P 681; Lewis v. Logan, 120 Md. 329, 87 A 750; Harrison v. Clark, 95 Md. 308, 52 A 514; Renshaw v. Williams, 75 Md. 498, 23 A 905; In re Williams, 55 Mont. 63, 173 P 790; State v. Second Judicial Dist. Ct., 34 Mont. 226, 85 P 1022; In re Ming, 15 Mont. 79, 38 P 228; State v. Judge Second Judicial Dist. Ct., 10 Mont. 401, 25 P 1053.

[a] **Appointment of the public administrator** to the exclusion of the person nominated as executor violates the statute providing that the court shall give preference as in the case of general administration. State v. Second Judicial Dist. Ct., 34 Mont. 226, 85 P 1022.

[b] **The court does not exceed its jurisdiction by appointing a stranger** on his petition therefor, notwithstanding the petition of a daughter and heir at law and devisee and legatee of decedent for her appointment, and certiorari does not lie to review the order. Dahlgren v. Santa Cruz County Super. Ct., 8 Cal. A. 622, 98 P 681.

[c] **The statutory right to letters is not renounced** by signing and filing a petition consenting to the probate of the will and asking for the appointment of the executors therein named. McIntire v. Worthington, 68 Md. 203, 12 A 251.

[d] **Effect of renunciation.**—Under a statute providing for the appointment of an administrator pendente lite where a will is contested, if the person who would be entitled to administer by law in case of intestacy renounces the right, the right passes to the next of kin and the court may in its discretion appoint such next of kin in preference to the executor and the largest legatee named in the will. Lewis v. Logan, 120 Md. 329, 87 A 750.

68. Wener v. Freilich, 268 Ill. 58, 108 NE 711 [aff 188 Ill. A. 577]; Lamb v. Helm, 56 Mo. 420.

69. Matter of Plath, 56 Hun 223, 9 NYS 251; Patteson v. Hunter, 30 L. J. P. & M. 272.

[a] **Any one possessing the necessary qualifications** may be appointed special administrator. Matter of Plath, 56 Hun 223, 9 NYS 251.

70. D. C.—Guthrie v. Welch, 24 App. 562.

Md.—Harrison v. Clark, 95 Md. 308, 52 A 514; Cain v. Warford, 3 Md. 454; Hanna v. Munn, 3 Md. 230.

Mo.—Lamb v. Helm, 56 Mo. 420.

Mont.—State v. Judge Second Judicial Dist. Ct., 10 Mont. 401, 25 P 1053.

N. J.—In re Davenport, 66 N. J. Eq. 300, 56 A 295 [aff 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261].

N. Y.—Matter of Durban, 175 App. Div. 688, 160 NYS 945 [aff 220 N. Y. 589 mem, 115 NE 1038 mem]; Matter of Plath, 56 Hun 223, 9 NYS 251.

N. C.—Pratt v. Kitterell, 15 N. C. 168.

Pa.—Winpenny's Est., 5 LegGaz 140.

Porto Rico.—Sanchez v. Calderon, 19 Porto Rico 1046.

Tenn.—McClanahan v. McClanahan, 12 Heisk. 379.

Eng.—In re Stewart, L. R. 3 P. & D. 244; In re Burchmore, L. R. 3 P. & D. 139.

[a] **Greater interest.**—Where two brothers applied for administration pendente lite while there was a dispute as to which of two wills of decedent was entitled to probate, and one brother was named as executor in both wills, and the other brother was entitled to the residue under both wills, letters were granted to the latter, as having the greater interest in the estate. Winpenny's Est., 5 LegGaz (Pa.) 140.

[b] **Consideration of provisions of will.**—The court is not at liberty to look at the particular provisions of the will for the purpose of weighing equitable or moral rights of the beneficiaries. In re Shonts, 178 NYS 762 [rev on other grounds 229 N. Y. 374, 128 NE 225].

71. Guthrie v. Welch, 24 App. (D. C.) 562.

72. Iowa.—In re Ellenberger, 171 Iowa 225, 153 NW 1036.

N. J.—Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295]; Dietz v. Dietz, 38 N. J. Eq. 483.

N. Y.—Matter of Eddy, 10 Misc. 211, 31 NYS 423, 1 Gibb. Surr. 163; In re Shonts, 178 NYS 762 [rev on other grounds 229 N. Y. 374, 128 NE 225]; Mootrie v. Hunt, 4 Bradf. Surr. 173.

Pa.—In re Ellmaker, 4 Watts 34.

Eng.—Young v. Brown, 1 Hagg. Eccl. 53, 162 Reprint 504; Stratton v. Stratton, 2 Lee Eccl. 49, 161 Reprint 260.

73. In re Ellenberger, 171 Iowa 225, 153 NW 1036; Mootrie v. Hunt, 4 Bradf. Surr. (N. Y.) 173; Hartley v. Lord, 38 Wash. 432, 80 P 554.

74. Renshaw v. Williams, 75 Md.

whether it is proper to appoint the executor is a question which must be decided in each case according to the peculiar facts and circumstances presented.[75] It has been considered that the executor should not be appointed as against the objection of the contestants of the will,[76] or where he has an interest in any degree hostile to the estate,[77] nor should an executor who is charged with undue influence in procuring the execution of the will be appointed.[78] Indeed the view has been expressed that in case of a will contest the executor should not be appointed at all,[79] the proper person to receive the temporary appointment being the one who would be entitled to administer in case of intestacy.[80]

In case of administration durante minoritate the usual practice is to appoint the guardian of the person entitled,[81] but the court is not required in all cases to appoint the guardian,[82] the selection of an administrator durante minoritate, as in other cases of special or temporary administration, being in the discretion of the court.[83]

[§ 2789] **D. Proceedings for Appointment**[84]—**1. Jurisdiction.** Ordinarily, a special or temporary administrator should be appointed by the court having authority to grant letters testamentary or of general administration,[85] and the power of appointment cannot be exercised by a court to which an appeal or writ of error has been taken in proceedings contesting the will.[86] Under a statute authorizing the appointment of administrators ad litem in probate and chancery courts, and other courts having chancery jurisdiction, such appointments may not be made by law courts,[87] except in cases of equitable cognizance,[88] or by appellate courts.[89] The court in which an action to set aside a will is pending has sometimes, under statute, power to appoint an administrator pendente lite.[90] It has been held that, where a party dies pending a suit, the court in which the suit is pending has power to appoint a special administrator to conduct or defend the case,[91] but this has also been denied.[92]

Jurisdiction must appear. It has been held that the facts giving jurisdiction to a county court under a statute regulating its power to appoint curators must be made to appear,[93] and in the absence of such facts it is not error for a circuit court to render judgment on appeal holding an order of the county court appointing a curator to be void.[94]

[§ 2790] **2. Who May Move for Appointment.** Any person interested in the estate may apply for the appointment of a temporary or special admin-

498, 23 A 905; Matter of Ashmore, 48 Misc. 312, 96 NYS 772, 35 NYCivProc 268, 5 Mills Surr. 130; In re Bankard, 19 NYWklyDig 452; Wright v. Rogers, L. R. 2 P. & D. 179.

[a] **The reason** for such an appointment is that "other things being equal, it is certainly advisable to save the estate the large increased expense which would result from the selection of any other person than one of those named as executor." Jones v. Hamersley, 2 Dem. Surr. (N. Y.) 286, 288. To same effect Haas v. Childs, 4 Dem. Surr. (N. Y.) 137; In re Bankard, 19 NYWklyDig 452.

[b] **Where two wills not passing real estate named different executors,** and the probate of each was contested, it was proper to appoint as administrators pendente lite the executor named in the last will and the husband of decedent's legatee, whose appointment was requested by the persons entitled to administration if there had been an intestacy. Harrison v. Clark, 95 Md. 308, 52 A 514.

75. Jones v. Hamersley, 2 Dem. Surr. (N. Y.) 286.

"Whether the Surrogate should appoint, as the temporary administrator of a decedent's estate, one who is named as executor in a disputed will, or some other person, must be decided, in each case that presents itself, upon its own particular facts and circumstances. I have sometimes adopted the one course, and sometimes the other, in cases which have been submitted for my determination." Jones v. Hamersley, 2 Dem. Surr. (N. Y.) 286, 288.

76. Howard v. Dougherty, 3 Redf. Surr. (N. Y.) 535.

77. Moesbyll's Est., 3 NYMonthL Bul 80; Costello's Est., 1 NYMonthL Bul 16; Howard v. Dougherty, 3 Redf. Surr. (N. Y.) 535; Crandall v. Shaw, 2 Redf. Surr. (N. Y.) 100; Winpenny's Est., 5 LegGaz (Pa.) 140.

78. In re Wanninger, 3 NYS 137; Haas v. Childs, 4 Dem. Surr. (N. Y.) 137; Cornwell v. Cornwell, 1 Dem. Surr. (N. Y.) 1.

[a] **A fortiori,** the person named as executor should not be appointed where, in addition to the charge of undue influence, it appears that he has had large unsettled transactions with the estate and that his relations with certain members of the testator's families have been unfriendly. Matter of Sterns, 9 NYS 748, 2 Conn. Surr. 272.

[b] **Rule subject to exceptions.**—The rule which would ordinarily require the court to refuse to appoint an executor the temporary administrator of the estate of a decedent whom he is charged with having unduly influenced in the execution of a will is not so absolute and inflexible as to admit of no exception. Matter of Hilton, 29 Misc. 532, 61 NYS 1073, 1 Mills Surr. 337.

[c] **Where the allegations of improper influence are general and conjectural** and the majority of persons interested both numerically and in amount of interest desire the appointment of the executor as special administrator pending the contest, and it is to the interest of the estate so to appoint him, he should be appointed. Matter of Hilton, 29 Misc. 532, 61 NYS 1073, 1 Mills Surr. 337. To same effect Haas v. Childs, 4 Dem. Surr. (N. Y.) 137 (vague and uncertain allegations).

79. Hartley v. Lord, 38 Wash. 432, 80 P 554 (holding that an executor petitioning for the probate of the will is a "party" within the terms of a statute providing that "the judge may in his discretion, appoint a special administrator (other than one of the parties)," when, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, and incompetent to receive the appointment).

80. Hoar's App., 18 WklyNC (Pa.) 503.

81. Woodruff v. Snoover, (N. J. Prerog.) 45 A 980; Blanck v. Morrison, 4 Dem. Surr. (N. Y.) 297, 3 How PrNS 58; John v. Bradbury, L. R. 1 P. & D. 245; In re Sartoris, 1 Curt. Eccl. 910; Brotherton v. Hellier, 2 Lee Eccl. 131, 161 Reprint 289; In re Weir, 31 L. J. P. & M. 88; In re Orleans, 1 Swab. & Tr. 253.

82. Havers v. Havers, Barn. Ch. 22, 27 Reprint 538; In re Ewing, 1 Hagg. Eccl. 381, 162 Reprint 619; Appleby v. Appleby, 1 Lee Eccl. 135, 161 Reprint 50; West v. Willby, 3 Phillim. 374, 161 Reprint 1357.

83. Pitcher v. Armat, 6 Miss. 288; Briers v. Goddard, Hob. 250, 80 Reprint 396; West v. Willby, 3 Phillim. 374, 161 Reprint 1357; Thomas v. Butler, 1 Vent. 217, 86 Reprint 146.

84. General rules governing proceedings for appointment of all representatives see supra §§ 143–187.

85. Ark.—Steen v. Springfield, 91 Ark. 73, 120 SW 408.

Ga.—Irvine v. Wiley, 145 Ga. 867, 90 SE 69.

Nebr.—Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

N. J.—In re Post, (Prerog.) 104 A 652 [foll Loptrop's Case, 33 N. J. Eq. 246].

N. Y.—Matter of Blair, 60 Hun 523, 15 NYS 212.

Oh.—Sanker v. Mattison, 20 Oh. Cir. Ct. 229, 11 Oh. Cir. Ct. 229, 11 Oh. Cir. Dec. 125.

[a] **Power of surrogate after transfer of cause.**—Where proceedings for the probate of a will have been transferred by the surrogate to the court of common pleas under a statute authorizing such transfer for the purpose of trying by jury issues of fact arising therein, the surrogate's court, while the proceeding is pending in the common pleas, is not deprived of the power to appoint a temporary administrator in order to preserve the estate. Matter of Blair, 60 Hun 523, 15 NYS 212.

[b] **Where decedent was a nonresident,** jurisdiction to appoint an administrator ad prosequendam is in the ordinary. In re Post, (N. J. Prerog.) 104 A 652 [foll Loptrop's Case, 33 N. J. Eq. 246].

[c] **Nature of act.**—The action of the ordinary in appointing a temporary administrator is merely clerical. Irvine v. Wiley, 145 Ga. 867, 90 SE 69.

86. Steen v. Springfield, 91 Ark. 73, 120 SW 408; Sanker v. Mattison, 20 Oh. Cir. Ct. 229, 11 Oh. Cir. Dec. 125.

87. Ragio v. Collins, 101 Tenn. 662, 49 SW 750.

88. Ragio v. Collins, 101 Tenn. 662, 49 SW 750.

89. Ragio v. Collins, 101 Tenn. 662, 49 SW 750.

90. Tellier v. Schilemans, 16 Man. 430, 5 WestLR 261.

[a] **This power may be exercised by** a judge in chambers, but the referee in chambers has no power to make such an appointment. Tellier v. Schilemans, 16 Man. 430, 5 WestLR 261.

91. Wolffe v. Eberlein, 74 Ala. 99, 49 AmR 809; Mangum v. Cooper, 28 Ark. 253; Wade v. Bridges, 24 Ark. 569; McNairy v. Bell, 6 Yerg. (Tenn.) 302.

92. Chartier v. Plaquemines Police Jury, 9 La. Ann. 42; Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

93. McClure v. Allphin, 41 SW 1, 19 KyL 576.

94. McClure v. Allphin, 41 SW 1, 19 KyL 576.

istrator,[95] or the court may make such an appointment on its own motion [96] or even on the application of a person not a party to the controversy.[97]

[§ 2791] **3. Time for Application.** An application for the appointment of a temporary or special administrator pending proceedings for the revocation of letters testamentary is premature,[98] and the filing of a petition for appointment of an administrator pendente lite when no will has been lodged for probate,[99] or when one has been lodged and no citations have been issued,[1] and before the court has taken action in the matter of probate,[2] is a nullity.

[§ 2792] **4. Notice.** It has been held not necessary that there be notice of the proceedings for appointment of a temporary or special administrator,[3] and also that, where a petition has been filed for the probate of a will, the proponent alone is entitled to notice where no other person has appeared in the proceeding.[4]

[§ 2793] **5. Petition.** It is usually considered necessary that there should be a petition for the appointment of a temporary or special administrator,[5] and an order appointing a special administrator and purporting to be made in a formal proceeding on a written application is outside the court's jurisdiction, where no application was on file, although the petitioners for general letters had orally requested the appointment.[6] But there is also authority for the view that a petition is not necessary.[7] An application alleging that decedent left a will which petitioner does not believe is his last will, and that there is another alleged will which has not been offered for probate, without explaining such delinquency, is not sufficient to call for the appointment of a temporary administrator.[8] A petition alleging that according to the information and belief of the petitioner decedent left no valid will is insufficient unless it alleges the source of the information and the grounds of the belief.[9]

[§ 2794] **6. Evidence.** The death of the alleged decedent must be shown,[10] but much weaker proof is sufficient to raise the presumption of the death of an absentee on an application for the appointment of a temporary administrator to collect, than would be required if appointment of a permanent administrator was sought.[11]

[§ 2795] **7. Order and Entry or Filing Thereof.** Under some statutes an order appointing a special administrator may be made either by the court [12] or by a judge in chambers.[13] The order should not contain provisions which are merely declaratory of the law [14] or which relate to the compensation of the administrator.[15] Where the order recites sufficient grounds for the appointment of a temporary administrator, it is not affected by a further recital of reasons not sufficient to justify the appointment.[16] A statute providing that appointment of a special administrator may be made at any time and must be made by entry upon the minutes of the court specifying the powers to be exercised by him has been held not mandatory as to the entry of a minute order,[17] so that the appointment was complete when the order was signed, and failure of the clerk to enter it on the minutes would not invalidate it.[18] Where a petition stated facts authorizing the granting of full letters, but merely prayer for temporary administration, and the decree granted temporary administration to plaintiff, and full letters were issued thereon, the error, if any, was corrected by a nunc pro tunc order, amending the first order, and ratifying all proceedings taken under it.[19] Where an order appointing an administrator ad prosequendum, with the petition, was handed to the proctor obtaining it for filing, his destruction thereof before filing could not operate as a vacation of the order.[20]

[§ 2796] **8. Appeal.** It has been held that an appeal will lie from an order appointing [21] or refusing to appoint [22] a temporary or special administrator; but there is also authority for the view that an order appointing a special administrator

95. Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295]; Matter of Chittenden, 76 Misc. 92, 136 NYS 953, 9 Mills Surr. 126.

[a] **Thus,** under Code Civ. Proc. § 2670, the surrogate may in his discretion grant letters of temporary administration on the petition of a creditor or person interested in the estate. Matter of Chittenden, 76 Misc. 92, 136 NYS 953, 9 Mills Surr. 126.

96. Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295].

97. Tichborne v. Tichborne, L. R. 1 P. & D. 730.

98. Sohn's Est., 1 NYCivProc 373.

99. In re Morrissey, (N. J. Prerog.) 107 A 70.

1. In re Morrissey, (N. J. Prerof.) 107 A 70.

2. In re Morrissey, (N. J. Prerog.) 107 A 70.

3. Raine v. Lawlor, 1 Cal. A. 483, 82 P 688; Daugherty v. Daugherty, 131 Md. 489, 102 A 749; Keegan v. Welch, 89 Nebr. 166, 119 NW 252; Matter of Chittenden, 76 Misc. 92, 136 NYS 953, 9 Mills Surr. 126.

[a] **Presence of persons entitled to administration.**—Appointment of an administrator pendente lite need not be shown to have been on notice to those of the class entitled to administer, where one of them was present when the will was exhibited for probate, and another when the appointment was made. Daugherty v. Daugherty, 131 Md. 489, 102 A 749.

[b] **Where attorneys who have appeared are without the county,** the surrogate may dispense without any notice to them. Matter of Durban, 175 App. Div. 688, 160 NYS 945 [aff 220 N. Y. 589 mem, 115 NE 1038 mem].

4. Matter of Ashmore, 48 Misc. 312, 96 NYS 772, 35 NYCivProc 268, 5 Mills Surr. 130.

5. Bombolis v. Minneapolis, etc., R. Co., 128 Minn. 112, 150 NW 385 [aff 241 U. S. 211, 36 SCt 595, 60 L. ed. 961, LRA1917A 86]; Sanchez v. Calderon, 19 Porto Rico 1046.

[a] **Appointment without petition a nullity.**—Bombolis v. Minneapolis, etc., R. Co., 128 Minn. 112, 150 NW 385 [aff 241 U. S. 211, 36 SCt 595, 60 L. ed. 961, LRA1917A 86].

6. Scott v. San Francisco Super. Ct., 30 Cal. A. 793, 159 P 225.

7. Breeding v. Breeding, 128 Ala. 412, 30 S. 881 (consequently the fact that a petition did not show sufficient grounds for the issue of letters of special administration in the contest of a will was immaterial).

8. In re Jussila, 172 NYS 170.

9. Sanchez v. Calderon, 19 Porto Rico 1046.

10. In re Paulsen, 35 Cal. 654, 170 P 855.

11. Czech v. Bean, 35 Misc. 729, 72 NYS 402.

12. Raine v. Lawlor, 1 Cal. A. 483, 82 P 688.

13. Raine v. Lawlor, 1 Cal. A. 483, 82 P 688.

14. Matter of Eno, 92 Misc. 658, 660, 157 NYS 491 (a provision "which authorized the temporary administrators to take possession of the personal property should also be struck out, as it is merely declaratory of the law").

15. Matter of Eno, 92 Misc. 658, 157 NYS 491 (where appointment is conditional upon the administrator consenting to serve without compensation, "his consent to this condition should be filed in this court before the order is signed. The order should not contain a provision directing that he serve without compensation").

16. Simmons v. Campbell, (Tex. Civ. A.) 213 SW 338.

17. McNeil v. Morgan, 157 Cal. 373, 108 P 69.

18. McNeil v. Morgan, 157 Cal. 373, 108 P 69.

19. White v. Emigrant Industrial Sav. Bank, 146 App. Div. 591, 131 NYS 311 [aff 205 N. Y. 571 mem, 98 NE 1119 mem].

20. In re State, (N. J. Prerog.) 91 A 801.

21. Steen v. Springfield, 91 Ark. 73, 120 SW 408; In re Davenport, 66 N. J. Eq. 300, 56 A 295 [aff 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261].

[a] **Grounds of appeal.**—An appeal will not lie because an administrator pendente lite is objectionable to either party, or because of the amount of bond required to be given by the court, but only where there is a wrongful exercise of the power of appointment. In re Davenport, 66 N. J. Eq. 300, 56 A 295 [aff 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261].

22. Long v. Richardson, 26 Tex. Civ. A. 197, 62 SW 964.

is not appealable.[23] Where two persons, each presenting a will and objecting to the will presented by the other, each applied for the appointment of an administrator pendente lite, and the court appointed a disinterested person not related to either petitioner, neither petitioner was "a party aggrieved" by the order, entitled to appeal.[24] Where a decree expressing the necessity for and appointing an administrator pendente lite of a decedent's estate is not appealed from in the time required by law, an appeal from a subsequent decree appointing another, and fixing the amount of security to be given, and also reciting the former decree, and declination of the first appointee to serve, does not call in question the necessity for the appointment of such administrator.[25] An appeal from the granting of special letters did not affect the court's jurisdiction over a special administration of the estate previously instituted, so as to invalidate an order made therein.[26]

[§ 2797] **E. Bond.** A temporary or special administrator is required to give bond[27] the same as any other administrator.[28] However, on a grant of limited administration a bond is sometimes taken in a merely nominal penal sum;[29] and a special administrator is sometimes permitted to deposit the personalty in court and thus have his bond reduced.[30]

[§ 2798] **F. Setting Aside Appointment.** On the filing of a formal will, with petition for probate, after the designation of the widow as temporary administratrix in proceedings based on intestacy, in which no letters have been issued, the surrogate's court has inherent power to vacate the designation and stay the proceedings until the issue of testacy is determined,[31] and is bound to do so on its own motion without any petition.[32] A motion to set aside an appointment of a temporary or special administrator may be made by any of the parties interested in the estate,[33] and their failure to move will estop them from claiming that the appointment was not properly made.[34]

[§ 2799] **G. Duration and Termination of Authority.** The appointment of a temporary or special administrator normally continues effective until permanent letters are granted,[35] and the recipient of such letters qualifies.[36] His powers are determined when the reason for his appointment ceases to exist and a general administrator is appointed or an executor qualified;[37] or, where an appointment is made for a limited period, or until the happening of some event, the power of the appointee ceases with the expiration of such period or the occurrence of such event.[38] In such case it is usually considered by the courts that a formal order of removal or revocation of the letters is not necessary,[39] although the letters are often revoked under such circumstances.[40]

Administration durante minoritate terminates when the minor or any one of several minors during whose minority the grant was made attains majority,[41] but the death of one of several minors

23. In re Paulsen, 35 Cal. A. 654, 170 P 855.

24. Dietz v. Dietz, 38 N. J. Eq. 483.

25. In re Davenport, 66 N. J. Eq. 300, 56 A 295 [aff 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261].

26. In re Heaton, 142 Cal. 116, 75 P 662.

27. In re Colvin, 3 Md. Ch. 278; Bloomfield v. Ash, 4 N. J. L. 314; Cunningham v. New York, 141 NYS 1000; Sanchez v. Calderon, 19 Porto Rico 1046.

28. See supra § 194.

29. In re Bowlby, 45 L. J. P. D. & Adm. 100.

30. In re Lewis, 28 N. J. Eq. 234.

31. In re Shonts, 178 NYS 762 [aff 229 N. Y. 374, 128 NE 225].

32. In re Shonts, 178 NYS 762 [rev on other grounds 229 N. Y. 374, 128 NE 225].

33. Stone v. Haskins, 97 Ill. A. 3.

34. Stone v. Haskins, 97 Ill. A. 3.

35. Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Dekle v. McLeod, 144 Ga. 289, 86 SE 1082.

[a] **Changing appointment.**—"The general right to appoint a temporary administrator does not include the right to oust one and appoint another on ex parte order, on mere presentation of a petition." Dekle v. McLeod, 144 Ga. 289, 290, 86 SE 1082 [foll Anderson v. Seifert, 112 Ga. 912, 38 SE 346].

[b] **An appeal from the appointment of a permanent administrator** leaves the temporary administrator to act as such. Dekle v. McLeod, 144 Ga. 289, 86 SE 1082 [foll Gresham v. Pyron, 17 Ga. 263].

36. In re Fisher, 15 Wis. 511 (if the special or temporary administrator is afterward appointed general administrator, his powers as special or temporary administrator continue until he qualifies as a general administrator).

37. U. S.—Yeaton v. Lynn, 5 Pet. 224, 8 L. ed. 105.

Ala.—Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Clemens v. Walker, 40 Ala. 189; Farrow v. Bragg, 30 Ala. 261; Flora v. Mennice, 12 Ala. 836.

Cal.—In re Chadbourne, 14 Cal. A. 481, 112 P 472.

Ill.—Day v. Bullen, 226 Ill. 72, 80 NE 739.

Ind.—Hayes v. Hayes, 75 Ind. 395.

Iowa.—In re Ellenberger, 171 Iowa 225, 153 NW 1036; Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198.

La.—Hook v. Richardson, 4 La. 569 (holding that as the heirs present have a preference in the administration over everyone, the powers of a curator unadvisedly appointed cease when they present themselves).

Md.—Ex p. Worthington, 54 Md. 359; State v. Williams, 9 Gill 172.

Minn.—Richmond v. Campbell, 71 Minn. 453, 73 NW 1099.

Mo.—State v. Imel, 243 Mo. 180, 147 SW 989; In re Estes, 65 Mo. A. 38.

Mont.—In re Williams, 55 Mont. 63, 173 P 790.

Nebr.—Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

N. J.—Cole v. Wooden, 18 N. J. L. 15; Woolley v. Pemberton, 41 N. J. Eq. 394, 5 A 139.

N. Y.—Matter of Kennedy, 186 App. Div. 19, 174 NYS 95; Matter of Grant, 132 App. Div. 739, 116 NYS 767, 1152; Matter of Choate, 105 App. Div. 356, 94 NYS 176; Matter of Dayton, 100 Misc. 632, 166 NYS 951 [aff 182 App. Div. 886 mem, 168 NYS 1106 mem]; Matter of Kennedy, 186 App. Div. 19, 174 NYS 95; In re Neil, 184 App. Div. 507, 172 NYS 79; In re Lewis, 17 NY WklyDig 311 (collector); Matter of Eisner, 5 Dem. Surr. 383.

N. C.—Cowles v. Hayes, 71 N. C. 230; Wallis v. Wallis, 60 N. C. 78.

Pa.—Riegel's App., 2 Pa. Cas. 58, 4 A 173.

Philippine.—McMicking v. Sy Conbieng, 21 Philippine 211.

Tex.—Hall v. Davison, (Civ. A.) 176 SW 642; Goldstein v. Susholtz, 46 Tex. Civ. A. 582, 105 SW 219; Ball v. Ball, (Civ. A.) 45 SW 605.

[a] **Pending an appeal** (1) from the grant of permanent letters the special administrator may exercise his authority. Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Gresham v. Pyron, 17 Ga. 263; Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436]. (2) The same is true pending an appeal from the probate of an alleged will. American Surety Co. v. Gaskill, 85 Vt. 358, 82 A 218. But compare Hayes v. Hayes, 75 Ind. 395 (after judgment against validity of will general administrator should be appointed, although an appeal has been taken).

[b] **When the special administrator becomes executor,** his powers as special administrator cease. Hastings v. Tousey, 123 App. Div. 480, 108 NYS 526.

38. Ball v. Ball, (Tex. Civ. A.) 45 SW 605; Willis v. Pinkard, 21 Tex. Civ. A. 423, 52 SW 626; Conron v. Clarkson, 3 Ch. Chamb. (U. C.) 368.

39. Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Matter of Neil, 184 App. Div. 507, 172 NYS 79; In re Lewis, 17 NYWklyDig 311; Matter of Eisner, 5 Dem. Surr. (N. Y.) 383.

"Even if plaintiff as temporary administrator had original authority to commence this action, the court should not have proceeded to render judgment, for it appeared upon the trial and was conceded by both parties that plaintiff had then been appointed executor of the estate. Whatever authority he may have had as temporary administrator was ipso facto extinguished upon his appointment as executor, and this without any formal revocation of his letters of temporary administration. Hence, whether he had or had not original authority to bring the action, he had no authority to continue it or capacity to take a decree." Hastings v. Tousey, 123 App. Div. 480, 482, 108 NYS 526.

40. Morgan v. Dodge, 44 N. H. 255, 82 AmD 213; Kittredge v. Folsom, 8 N. H. 98; Howell v. Metcalfe, 2 Add. Eccl. 348, 162 Reprint 321; In re Metcalfe, 1 Add. Eccl. 343, 162 Reprint 121; In re Newton, 3 Curt. Eccl. 428; In re Campbell, 2 Hagg. Eccl. 555, 162 Reprint 955; Slater v. May, 2 Ld. Raym. 1071, 92 Reprint 210, 1 Salk. 42, 91 Reprint 42; Freke v. Thomas, 1 Ld. Raym. 667, 91 Reprint 1344, 1 Salk. 39, 91 Reprint 40; Pipon v. Wallis, 1 Lee Eccl. 402, 161 Reprint 148; Offley v. Best, 1 Sid. 370, 82 Reprint 1163; Rainsford v. Taynton, 7 Ves. Jr. 460, 32 Reprint 186.

41. In re Cope, 16 Ch. D. 49; Tay-

during whose minority administration was granted does not terminate the administration.[42]

The powers of an administrator durante absentia usually terminate on the return or death of the executor or person entitled to administer.[43]

Administrator pendente lite. Upon the termination of the litigation, there is no further need of the services of an administrator pendente lite and his authority ceases.[44] But when an appeal is taken after judgment entered, the administration pendente lite continues or revives,[45] and where the appeal relates to the validity of an alleged will the authority of the administrator continues until the final result is certified to the probate court.[46]

An administrator ad colligendum is liable to be superseded at any time,[47] and his authority necessarily terminates on the appointment of an executor,[48] or the issuing of letters of administration with the will annexed to another person.[49]

[§ 2800] **H. Powers, Duties, and Liabilities—1. Administrators Durante Minoritate.** An administrator durante minoritate has, during the minority of the executor, the same authority as an ordinary administrator.[50] He may exercise a power of sale given by a testator to his executors if such power could be exercised by an administrator with the will annexed,[51] and has the power to assent to a legacy if there are assets for the payment of debts.[52] He has the same authority as an ordinary executor or administrator to retain for his own debt,[53] and he has a further right to retain for a debt due the infant executor.[54] Under the old practice scire facias might issue against the executor, upon his reaching majority, upon a judgment obtained against the administrator durante minoritate.[55] The administrator durante minoritate is liable for a devastavit to the executor who qualifies after coming of age.[56]

[§ 2801] **2. Administrators Durante Absentia.** An administrator durante absentia is such a legal representative as to be empowered to assign a leasehold of decedent.[57] The authority of an administrator durante absentia does not become void upon the death of the absent executor but only voidable.[58] A suit begun durante absentia does not

lor v. Watts, Freem. K. B. 425, 89 Reprint 316; Freke v. Thomas, 1 Ld. Raym. 667, 91 Reprint 1344.

42. Anonymous, Brownl. & G. 47, 123 Reprint 656; Jones v. Strafford, 3 P. Wms. 79, 24 Reprint 977.

43. In re Estes, 65 Mo. A. 38; In re Cassidy, 4 Hagg. Eccl. 360, 162 Reprint 1477.

[a] **Removal of administrator.—** When an absent executor returns to the state, an administrator who was appointed to act during his absence may be removed, although the letters do not show that they were granted pursuant to such statute. In re Estes, 65 Mo. A. 38.

[b] **The death of the absent executor** does not ipso facto render the authority of the administrator durante absentia void, but renders it voidable only. Rainsford v. Taynton, 7 Ves. Jr. 460, 32 Reprint 186.

44. Md.—Baldwin v. Mitchell, 86 Md. 379, 38 A 775.

Mo.—State v. Imel, 243 Mo. 180, 147 SW 989; RoBards v. Lamb, 89 Mo. 303, 1 SW 222.

N. J.—Cole v. Wooden, 18 N. J. L. 15, 20; Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295].

Pa.—In re Ellmaker, 4 Watts 34.

Eng.—Wieland v. Bird, [1894] P. 262.

"The very title, 'administrators pendente lite,' carries with it its own explanation." Cole v. Wooden, supra.

[a] **Notice in court of settlement not necessary.—**RoBards v. Lamb, 89 Mo. 303, 1 SW 222.

[b] **Contest over two wills propounded.—**Under a statute providing for letters of administration pendente lite where a will is contested, and that the grant of letters testamentary or of administration shall revoke a previous grant of letters pendente lite, where two wills were offered for probate, and both contested, letters of administration pendente lite issued before the trial of the contest over the last will were not revoked by the mere termination of that contest, but the administrators were entitled to serve, unless removed for cause, until the issuance of letters testamentary or of administration at the conclusion of the controversy over the other will. Harrison v. Clark, 95 Md. 308, 52 A 514 (holding further that the court was not required, on the termination of the first contest, to appoint as administrator pendente lite the executor named under the other will, to enable him to use the assets of the estate to defend the caveat thereto).

[c] **Revocation of letters.—**Letters of administration granted pendente lite will not be revoked until the termination of the suit. Robinson's Est., 12 Phila. (Pa.) 14.

45. Ill.—Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436].

Md.—Offut v. Gott, 12 Gill & J. 385.

Mich.—Peo. v. Wayne Prob. Judge, 39 Mich. 302.

Mo.—State v. Guinotte, 156 Mo. 513, 518, 57 SW 281, 50 LRA 787; Diehr v. Dean, (A.) 187 SW 602.

N. J.—Brown v. Ryder, 42 N. J. Eq. 356, 7 A 568.

N. Y.—Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982, 8 Mills Surr. 223.

R. I.—Sarle v. Scituate Prob. Ct., 7 R. I. 270.

Eng.—Taylor v. Taylor, 6 P. D. 29.

"If it be error to revoke the appointment of an administrator pendente lite while the executor remains a minor, or while he remains absent from the State, it must be equally error to revoke such appointment while the contest over the will is still in progress. No reason can be urged why revocation of letters granted during minority or absence should not occur during those periods, 'during the time of such contest.' In the old law, the words were 'during such contest.' [R. S. Laws of 1825, p. 94, sec. 6.] At the revision of 1835, the words 'at the time of' were added (R. S. 1935, p. 42, sec. 9), as if to give emphasis to the other words of the section by those which were subsequently added. The administrator thus appointed 'during the time of such contest,' is commonly called an administrator pendente lite, which means an administrator 'during litigation.' . . . Now, 'lis' means 'a suit, action, controversy or dispute,' And 'dispute is a conflict or contest.' 'Controversy is a disputed question; a suit at law.' And 'lis pendens' is 'a pending suit.' . . . So that, so long as the lis continues pendens, so long does the administrator appointed during litigation, remain a provisional administrator. And the pendens of the lis is not disturbed nor in any manner affected by the fact of an appeal taken from the circuit court to this court. [Real Estate Sav. Inst. v. Collonious, 63 Mo. 290; Gilman v. Hamilton, 16 Ill. 225; Krug v. Davis, 101 Ind. 75.] The litigation or contest still goes on; and the power of the temporary administrator still remains unaffected by the varying fortunes or vicissitudes of the pending controversy." State v. Guinotte, supra.

[a] **Thus** such an administrator is properly appointed or continued in office pending: (1) An appeal in a will contest. State v. Imel, 243 Mo. 180, 147 SW 989; Matter of Cavanaugh, 72 Misc. 584, 131 NYS 982. (2) An appeal from the appointment of an administrator. Peo. v. Wayne Prob. Judge, 39 Mich. 302. (3) An appeal of a general appointee on the question of bonds, etc. Peo. v. Wayne Prob. Judge, 39 Mich. 302; Sarle v. Scituate Prob. Ct., 7 R. I. 270.

46. Diehr v. Dean, (Mo. A.) 187 SW 602.

47. Flora v. Mennice, 12 Ala. 836.

48. Matter of Grant, 132 App. Div. 739, 116 NYS 767, 1152.

49. In re Lewis, 17 NYWklyDig 311; Matter of Eisner, 5 Dem. Surr. (N. Y.) 383.

50. In re Cope, 16 Ch. D. 49; Monsell v. Armstrong, L. R. 14 Eq. 423; In re Thompson, [1896] 1 Ir. 356; Fotherby v. Pate, 3 Atk. 603, 26 Reprint 1148; Lawson v. Crofts, 1 Sid. 57, 82 Reprint 967.

[a] **"The limit to his administration** is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator; he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him." In re Cope, 16 Ch. D. 49, 52.

[b] **Power to sell.—**An administrator durante minoritate had, during the minority of the executor, the power to sell the estate if necessary in course of administration. In re Thompson, [1896] 1 Ir. 356. Contra Re Robinson, L. R. 13 Ir. 429.

51. Monsell v. Armstrong, L. R. 14 Eq. 423.

Exercise by administrator with the will annexed of power of sale see supra § 2779.

52. I Williams Ex. (7th Am. ed) P 583.

53. Briers v. Goddard, Hob. 250, 80 Reprint 396; Roskelley v. Godolphin, T. Raym. 483, 83 Reprint 252.

54. Franks v. Cooper, 4 Ves. Jr. 763, 31 Reprint 394.

55. Sparke v. Crofts, 1 Ld. Raym. 265, 91 Reprint 1073.

56. Herndon v. Pratt, 59 N. C. 327.

[a] **Laches of executor.—**Where the executor abstained for ten years from bringing suit his cause of action was presumed to have been satisfied, released, or abandoned, so that persons having a contingent interest in remainder which was injured by the devastavit must look to the executor and not to the administrator durante minoritate or the sureties on his administration bond. Herndon v. Pratt, 59 N. C. 327.

57. Webb v. Kirby, 7 De G. M. & G. 376, 56 EngCh 290, 44 Reprint 147.

58. Taynton v. Hannay, 3 B. & P.

fall to the ground upon the return of the executor,[59] but goes on, the executor being made a party in the usual course.[60]

[§ 2802] **3. Administrators Pendente Lite.** An administrator pendente lite has been said to be not properly the representative of decedent, as is the general administrator, but rather an appointee or officer of the court,[61] his office closely resembling that of a receiver in chancery.[62] His duties were originally merely to collect the effects,[63] file an inventory,[64] and hold and care for the property of the estate until the pending suit terminated;[65] but in the more modern practice he sometimes has the right to pay debts of the estate,[66] and may even sell the effects of the estate where a sound discretion warrants such action.[67] It is also held that in case it appears that there is not sufficient personalty to pay debts, he may apply to the court for, and obtain authority to take possession of real estate and collect the rents thereof.[68] Indeed so far as administration, as distinct from distribution, is concerned, an administrator pendente lite has, under modern practice, the same rights and duties as an ordinary administrator,[69] and all lawful acts done by him are binding on the estate.[70] His authority does not, however, extend to the payment of legacies or making distribution of the estate.[71] Inasmuch as it is his duty to collect the effects of the estate, he is entitled to the possession of decedent's personalty,[72] and may maintain an action to recover a debt due the estate,[73] or any other action necessary to protect and preserve the estate.[74] He has also been held entitled to bring ejectment against any person, whether the heir or next of kin or any other person whatsoever, who keeps possession of the testator's real or leasehold estate,[75] but this can be done only under special circumstances, for an administrator pendente lite has no more rights with respect to the real estate than a regular administrator would have.[76] An administrator pendente lite is not liable for interest on money in his hands during pendency of the contest,[77] or at least he should be allowed to keep a reasonable sum to meet contingencies, without being subject to the liability for interest on the sum retained.[78] If, however, he makes use of money of the estate he should be charged interest.[79] If proceedings are begun against the administrator pendente lite, they will be continued against the proper representative of decedent when the duties of the administrator

26, 127 Reprint 16 (construing 38 Geo. III c 87).

59. Rainsford v. Taynton, 7 Ves. Jr. 460, 32 Reprint 186.

60. Rainsford v. Taynton, 7 Ves. Jr. 460, 32 Reprint 186.

61. Hawaii.—Matter of Lutted, 22 Hawaii 712, 713 [quot Cyc].

N. J.—Davenport v. Davenport, 68 N. J. Eq. 611, 60 A 379, 6 AnnCas 261 [aff 66 N. J. Eq. 300, 56 A 295].

Pa.—In re Ellmaker, 4 Watts 34; Winpenny's Est., 11 Phila. 20; Webb's Est., 20 WklyNC 275.

S. C.—Kaminer v. Hope, 9 S. C. 253.

Tenn.—Houston v. Houston, 3 Humphr. 652.

Eng.—Stanley v. Bernes, 1 Hagg. Eccl. 221, 162 Reprint 564.

62. Guthrie v. Welch, 24 App. (D. C.) 562; Matter of Lutted, 22 Hawaii 712, 713 [quot Cyc]; Lamb v. Helm, 56 Mo. 420. See also In re Toleman, [1897] 1 Ch. 866 (holding, however, that under Prob. Act [1857] § 70, the position of administrator and of receiver did not correspond and that the administrator pendente lite could be sued without leave of court).

[a] **Limitations.**—Expressions to the effect that the office of an administrator pendente lite is more like that of a receiver than of a general administrator, must be understood in the light of the facts under consideration in the particular case. They are not authority for clothing such temporary administrator with the powers of a chancery receiver, or conferring equity jurisdiction on the probate court. An administrator pendente lite is not authorized to wind up and distribute the estate, but to collect it and hold it, making disbursements, if the court so orders; but he is, to all intents and purposes, for the time being, the administrator of the estate, having no greater powers than a regular administrator has and no more comprehensive title. Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

63. Guthrie v. Welch, 24 App. (D. C.) 562; Baldwin v. Mitchell, 86 Md. 379, 38 A 775; In re Colvin, 3 Md. Ch. 278; In re Ellmaker, 4 Watts (Pa.) 34; Perrett's Est., 14 Pa. Super. 611; Gallivan v. Evans, 1 Ball. & B. 191; Goodrich v. Jones, 2 Curt. Eccl. 453; Adair v. Shaw, 1 Sch. & Lef. 243.

64. In re Ellmaker, 4 Watts (Pa.) 34.

65. Md.—Baldwin v. Mitchell, 86 Md. 379, 38 A 775; In re Colvin, 3 Md. Ch. 278.

Mo.—In re Soulard, 141 Mo. 642, 43 SW 617.

N. Y.—Cohn v. Bartlett, 169 NYS 604.

Pa.—In re Ellmaker, 4 Watts 34; Clemens' Est., 21 Pa. Dist. 175.

Tenn.—Houston v. Houston, 3 Humphr. 652.

Vt.—Probate Ct. v. Dodge, 87 Vt. 133, 88 A 529.

[a] **An administrator pendente lite may contract for storage** of property of the estate pending a contest of the will. Neill's Est., 20 Pa. Dist. 590.

[b] **The administrator may take charge of and rent land** belonging to the estate and affected by the will. In re Soulard, 141 Mo. 642, 43 SW 617.

[c] **Payment of annuity.**—In appointing an administrator pendente lite the court cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees who is also one of the next of kin. Whittle v. Keats, 35 L. J. P. & M. 54.

66. Baldwin v. Mitchell, 86 Md. 379, 38 A 775; Thomson v. Tracy, 60 N. Y. 174; In re Ellmaker, 4 Watts (Pa.) 34; Webb's Est., 20 WklyNC (Pa.) 275.

[a] **Interest on claim.**—Demand on an administrator pendente lite for allowance of a claim against the estate starts interest running upon the amount due. Ryans v. Hospes, 167 Mo. 342, 67 SW 285.

[b] **Expenses for establishment of the will** cannot be credited in his account. Dietrich's App., 2 Watts (Pa.) 332.

67. Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643.

68. Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

69. Bruning v. Golden, 159 Ind. 199, 64 NE 657; Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

70. Patton's App., 31 Pa. 465.

71. Md.—Baldwin v. Mitchell, 86 Md. 379, 38 A 775.

N. J.—Benson v. Wolf, 43 N. J. L. 78; Fluck v. Lake, 54 N. J. Eq. 638, 35 A 643.

N. Y.—Matter of Gihon, 27 Misc. 626, 59 NYS 494, 1 Mills Surr. 59.

Pa.—In re Loughran, 257 Pa. 534, 101 A 817; In re Ellmaker, 4 Watts 34; Com. v. Mateer, 16 Serg. & R. 416; Wiley's Est., 8 Pa. Dist. 419, 22 Pa. Co. 547; Winpenny's Est., 11 Phila. 20.

S. C.—Stevenson v. Wilcox, 16 S. C. 432; Kaminer v. Hope, 9 S. C. 253.

Tenn.—Houston v. Houston, 3 Humphr. 652.

Eng.—Gallivan v. Evans, 1 Ball. & B. 191; Adair v. Shaw, 1 Sch. & Lef. 243.

[a] **If he pays a legacy in good faith,** he will be allowed therefor on his accounting. Adair v. Shaw, 1 Sch. & Lef. 243.

72. Cain v. Warford, 7 Md. 282; In re Loughran, 257 Pa. 534, 101 A 817.

73. Ga.—Ewing v. Moses, 50 Ga. 264.

Md.—In re Colvin, 3 Md. Ch. 278.

Mo.—Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

N. C.—Syme v. Broughton, 86 N. C. 153.

S. C.—Kaminer v. Hope, 18 S. C. 561.

Eng.—Walker v. Woollaston, 2 P. Wms. 576, 24 Reprint 868.

"The leading case upon the subject, which has been repeatedly recognized since, is the case of Walker v. Woollaston, 2 P. Wms. 576, 24 Reprint 868, in which the doctrine above stated was distinctly laid down, and in the argument of counsel in that case, which seems to have been adopted by the court, but which is too long to be transcribed here, it is conclusively shown to be fully supported both by reason and authority, and absolutely necessary to effect the objects of such a limited administration." Kaminer v. Hope, 18 S. C. 561, 574.

74. Iowa.—Sullivan v. Nicoulin, 113 Iowa 76, 84 NW 978.

Me.—Libby v. Cobb, 76 Me. 471.

Md.—In re Colvin, 3 Md. Ch. 278.

Pa.—Logan's Est., 21 Pa. Co. 455.

S. C.—Kaminer v. Hope, 18 S. C. 561.

Eng.—Walker v. Woollaston, 2 P. Wms. 576, 24 Reprint 868; Ball v. Oliver, 2 Ves. & B. 96, 35 Reprint 255; Knight v. Duplessis, 1 Ves. 324, 27 Reprint 1059.

[a] **Specific performance.**—An administrator pendente lite may institute a proceeding in the orphans' court for specific performance of a contract. Logan's Est., 21 Pa. Co. 455.

75. In re Colvin, 3 Md. Ch. 278. But see infra § 2805.

76. Union Trust Co. v. Soderer, 171 Mo. 675, 72 SW 499.

77. Com. v. Mateer, 16 Serg. & R. (Pa.) 416; Gallivan v. Evans, 1 Ball & B. 191.

78. Dietrich's App., 2 Watts (Pa.) 332. See infra § 2805.

79. Com. v. Mateer, 16 Serg. & R. (Pa.) 416.

pendente lite have come to an end.[80] When the account of the administrator pendente lite is settled,[81] the proper practice is to award the fund belonging to the estate to the general administrator.[82]

[§ 2803] **4. Administrators Ad Litem.** An administrator ad litem has been held not entitled to maintain an action to set aside a tax sale of land which belonged to decedent at the time of his death.[83]

[§ 2804] **5. Administrators Ad Colligendum.**[84] An administrator to collect has no power to receive payment of a note due to the estate before maturity,[85] nor has he authority, independently of the order appointing him, to pay out money of the estate for any purpose.[86] He is not a representative of decedent so as to be liable to an action for the nonperformance of decedent's contracts,[87] nor, it has been held, can a replevin suit be brought against such an administrator.[88]

[§ 2805] **6. Special Administrators under Modern Practice—a. In General.** The duties of special or temporary administrators under modern practice are generally to collect and preserve the property and to hand over the assets to the general representative when appointed or qualified,[89] and beyond this their powers do not extend,[90] being strictly limited to those prescribed by statute.[91] Sometimes the temporary administrator has only such powers as the court grants him upon appointment.[92] So long as the special administrator remains in office his control over the estate is exclusive.[93] A special administrator appointed pending the contested probate of a will may settle and be discharged without giving previous notice of the contemplated settlement.[94] A proceeding by a temporary administrator for a judicial settlement of his accounts abates upon his death.[95]

[§ 2806] **b. Rights and Powers as to Realty.** Ordinarily, a special administrator has no right to the possession or control of decedent's realty,[96] and has no power to mortgage[97] or lease[98] the realty,

80. In re Toleman, [1897] 1 Ch. 866.

81. See Matter of Haag, 100 Misc. 249, 166 NYS 621 [rev 183 App. Div. 888 mem, 169 NYS 1096 mem] (the administrator should have an opportunity to have his accounts judicially settled and made binding on all parties by judicial decree before being required to deliver property to the executor).

82. Matter of Philp, 29 Misc. 263, 61 NYS 241, 1 Mills Surr. 276; Wiley's Est., 8 Pa. Dist. 419, 22 Pa. Co. 547.

83. Rodgers v. Moran, 28 Ont. 275.

84. **Collectors** see infra § 2894.

85. In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613].

86. In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613] (order fixing amount of widow's award does not authorize payment by administrator to collect).

87. Nashville, etc., Turnp. Co. v. Harris, 8 Humphr. (Tenn.) 558 (although any equity growing out of the liability sought to be enforced by the special administrator may be set up against him, yet an equity arising upon an independent cause of action cannot be set off).

88. Slatts v. Bernstein, 209 Ill. A. 545.

89. U. S.—Jennings v. Smith, 232 Fed. 921 [rev on other grounds 238 Fed. 48, 151 CCA 124].

Ala.—Wolffe v. Eberlein, 74 Ala. 99, 49 AmR 809; Underhill v. Mobile Fire Dept. Ins. Co., 67 Ala. 45; Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Erwin v. Mobile Branch Bank, 14 Ala. 307; Flora v. Mennice, 12 Ala. 836.

Cal.—Henry v. Nevada County Super. Ct., 93 Cal. 569, 29 P 230.

Ga.—Johnson v. Brady, 24 Ga. 131.

Ill.—In re Wincox, 85 Ill. A. 613 [aff 186 Ill. 445, 57 NE 1073].

Ind.—Tomlinson v. Wright, 12 Ind. A. 292, 39 NE 884.

Iowa.—Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198; Masterson v. Brown, 51 Iowa 442, 1 NW 791.

La.—Self v. Morris, 7 Rob. 24.

Mich.—Zimmer v. Saier, 155 Mich. 388, 119 NW 433, 130 AmSR 575.

Miss.—Henderson v. Clarke, 27 Miss. 436.

Mont.—In re Williams, 55 Mont. 63, 173 P 790; In re Dolenty, 53 Mont. 33, 161 P 524; In re Ford, 29 Mont. 283, 74 P 735; State v. Second Judicial Dist. Ct., 18 Mont. 481, 46 P 259.

N. Y.—Baskin v. Baskin, 4 Lans. 90; In re Parish, 29 Barb. 627, 8 Abb Pr 336; Matter of Eno, 92 Misc. 658, 157 NYS 491; Riegelman v. Riegelman, 4 Redf. Surr. 492; Gottsberger v. Smith, 2 Bradf. Surr. 86.

Wash.—Ward v. Magaha, 71 Wash. 679, 682, 129 P 395 [cit Cyc].

Eng.—In re Radnall, 2 Add. Eccl. 232, 162 Reprint 278.

[a] **A special administrator appointed with reference to a particular pending suit** has the same power of collecting and preserving the assets that a general administrator has. Underhill v. Mobile Fire Dept. Ins. Co., 67 Ala. 45.

[b] **Obtaining aid of equity.**—The temporary administrator of a deceased insolvent who was indebted on accounts as administrator and whose estate was further complicated should obtain from a court of equity authority to keep the estate of the decedent unmolested in his hands until general administration can be granted and all conflicting claims against the estate investigated. Johnson v. Brady, 24 Ga. 131.

[c] **An administrator appointed to act during the heir's delay** for deliberating has the same powers and is subject to the same duties and liabilities as the curator of a vacant estate. Self v. Morris, 7 Rob. (La.) 24.

90. In re Dolenty, 53 Mont. 33, 161 P 524; Hastings v. Tousey, 123 App. Div. 480, 108 NYS 526. See also cases supra note 89.

"The powers of a special administrator are of a special and limited character." Rauen v. Prudential Ins. Co., 129 Iowa 725, 744, 106 NW 198.

"The powers of a special administrator are specifically defined and limited by statute. They are to collect the goods, chattels, and credits of the deceased, care for, gather, and secure crops, preserve all of the property of the deceased, and he may commence and maintain actions in his administrative capacity for that purpose (G. S. 1894, § 4484); but beyond this a special administrator has no authority to make contracts that will interfere or prejudice the duties or powers of the general administrator to be thereafter appointed, or incumber the rights and privileges of the heirs or beneficiaries (Larson v. Johnson, 72 Minn. 441, 75 NW 699)." McAlpine v. Kratka, 92 Minn. 411, 413, 100 NW 233.

[a] **Carrying on business.** — A statute providing that an administrator may exercise his discretion in continuing the business of his intestate does not apply to temporary administrators. Irvine v. Wiley, 145 Ga. 867, 90 SE 69.

[b] **No power to enter into agreed case.**—A special administrator has no authority to enter into an agreed case in relation to money or property which he has in his hands. State v. Tomlinson, 16 Ind. A. 662, 45 NE 1116, 59 AmSR 335; Tomlinson v. Wright, 12 Ind. A. 292, 39 NE 280.

[c] **A temporary administrator has no authority to distribute** an estate, but only to preserve it. In re Ostromislensky, 180 NYS 267.

91. Slatts v. Bernstein, 209 Ill. A. 545; In re Williams, 55 Mont. 63, 173 P 790.

92. Dull v. Drake, 68 Tex. 205, 4 SW 364; Stewart v. Poinbeouf, (Tex. Civ. A.) 201 SW 1025; Huth v Huth, (Tex. Civ. A.) 187 SW 523; Willis v. Pinkard, 21 Tex. Civ. A. 423, 52 SW 626; Germania L. Ins. Co. v. Peetz, (Tex. Civ. A.) 47 SW 687.

[a] **Illustration.**—Where the administrator was appointed to "take charge of and care for" the estate, he could not, on levy of execution upon goods alleged to be part of the estate, file a claimant's oath and bond and enter into litigation in behalf of the estate. Willis v. Pinkard, 21 Tex. Civ. A. 423, 52 SW 626.

[b] **Where the power conferred by the appointment does not appear,** it may be assumed in the absence of anything showing necessity for greater authority that the appointee was simply clothed with the usual powers of a temporary administrator. In re Chapman, (Tex. Civ. A.) 213 SW 989.

93. Murphy v. Nett, 51 Mont. 82, 149 P 713, LRA1915E 797; In re Curtis, 178 NYS 286; In re Curtis, 175 NYS 288.

[a] **Pendency of an application to revoke** the letters of a temporary administrator does not deprive him of the right to possession of assets. In re Curtis, 175 NYS 288.

94. RoBards v. Lamb, 89 Mo. 303, 1 SW 222 [aff 127 U. S. 58, 8 SCt 1031, 32 L. ed. 60].

95. Matter of Steencken, 51 App. Div. 417, 64 NYS 660.

96. Union Trust Co. v. Soderer, 171 Mo. 675, 681, 72 SW 499 [dist and lim In re Soulard, 141 Mo. 642, 43 SW 617].

97. Duryea v. Mackey, 151 N. Y. 204, 45 NE 458.

98. Lee v. Lee, 74 N. C. 79; Allar Co. v. Roeser, (Tex. Civ. A.) 217 SW 442.

[a] **Effect of statute.**—Authority to lease real estate is not given by a statute which declares that the powers of a special administrator are to "collect the personal property, take possession and receive the rents and profits of the real property, preserve and secure the debts, and collect the debts and credits of the decedent." Lee v. Lee, 74 N. C. 70, 72.

[b] **Effect of order of appointment.**—Where the order of appointment of temporary administrators recited that the application therefor

or to sue to recover decedent's real property [99] or to set aside a fraudulent conveyance made by decedent.[1] Power to take possession of and manage the realty is, however, sometimes conferred on special administrators by statute [2] or order of the court of probate jurisdiction.[3]

[§ 2807] **c. Compromise of Claims.** That a special administrator has power to compromise claims existing in favor of the estate has been both asserted [4] and denied.[5]

[§ 2808] **d. Investments and Deposits.** A special administrator has no authority to invest any money of the estate in his hands.[6] He should deposit the money, except such an amount as may be necessary to defray current expenses,[7] with some solvent bank or trust company which will refund the money on demand.[8] He should try to obtain interest on the money of the estate,[9] and will be charged with interest which he might have realized where he has failed so to do through neglect.[10] If the special administrator receives any profits from funds of the estate by virtue of his office, such profits belong to the heirs and must be included in his final account.[11]

[§ 2809] **e. Expenditures.** Under some statutes a special administrator has no authority, independent of his order of appointment, to pay out money of the estate for any purpose,[12] and is not entitled to an allowance for expenditures made without authority.[13] Under an authority to make reasonable expenditures, an item of expense must be shown to have been made in the exercise of prudence,[14] and it is not sufficient to show that the special administrator incurred the expense in good faith for what he believed was for the best interest of the estate.[15] Where the court makes an allowance of fees to the attorney of the special administrator in a suit defended by him, the administrator cannot be allowed for a payment to the attorney's clerk for work which was part of the strict legal duty of the attorney.[16] Where the statute authorizes a special administrator to take charge of decedent's real estate, he is entitled to an allowance in his account for expenses incurred in the management of the property.[17]

[§ 2810] **f. Payment of Family Allowance.** A special administrator appointed pending proceedings for the removal of the general administrator, the estate being solvent, may be directed to pay the amount which has become due the widow, under an order directing the payment to her of a certain sum for a family allowance.[18]

[§ 2811] **g. Claims against Estate; Sales to Pay Debts.** In the absence of statutory authority, special administrators have no power to allow [19] or

was made so that an oil lease might be executed, but did not confer power to execute such a lease, the administrator had no such power. Allar Co. v. Roeser, (Tex. Civ. A.) 217 SW 442 (order attempting to confirm lease held void).

99. Babson v. McEachin, 147 Ga. 143, 93 SE 292; Doris v. Story, 122 Ga. 611, 50 SE 348; Banks v. Walker, 112 Ga. 542, 37 SE 866 [dist Barfield v. Hartley, 108 Ga. 435, 33 SE 1010]. See also Spears v. Fendig, (Ga.) 99 SE 706 (cannot sue to establish trust in land, recover for conversion of trust fund, and in addition set up title to trust property in decedent).

1. Larson v. Johnson, 72 Minn. 441, 75 NW 699.

2. Lufkin v. Jakeman, 188 Mass. 528, 74 NE 933.

[a] **Property belonging to the estate under a resulting trust** should be taken charge of by the special administrator under such a statute. Lufkin v. Jakeman, 188 Mass. 528, 72 NE 933.

3. Union Trust Co. v. Soderer, 171 Mo. 675, 681, 72 SW 499 [dist and lim In re Soulard, 141 Mo. 642, 43 SW 617]; In re Cutter, 172 NYS 293.

[a] **Extent of right.** — Authority from the court to a temporary administrator to take possession of real property and receive rents and profits confers on him no title or right other than the right to such possession as is necessary to enable him to collect revenues. Cohn v. Bartlett, 182 App. Div. 245, 169 NYS 304.

4. Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198 (under statute); Grece v. Helm, 91 Mich. 450, 51 NW 1106.

[a] **Where a claim for damages in litigation is the only asset** of the estate, there being no money to meet the expenses of the suit, the administrator is not bound to continue it, but may compromise with defendant. Grece v. Helm, 91 Mich. 450, 51 NW 1106.

5. Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198; Tomlinson v. Wright, 12 Ind. A. 292, 39 NE 884; Germania L. Ins. Co. v. Peetz, (Tex. Civ. A.) 47 SW 687.

[a] **Claim on life insurance policy.** —A special administrator has no authority to compromise a claim on a policy of insurance on the decedent's life. Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198.

6. Peo. v. Salomon, 184 Ill. 490, 56 NE 815; In re Williams, 55 Mont. 63, 173 P 790; Baskin v. Baskin, 4 Lans. (N. Y.) 90; Matter of Gihon, 27 Misc. 626, 59 NYS 494, 1 Mills Surr. 59.

7. Harrington v. Libby, 6 Daly (N. Y.) 259.

[a] **It is proper for him to retain in his hands a reasonable sum** to defray current expenses, upon which sum he should not be charged interest. Harrington v. Libby, 6 Daly (N. Y.) 259.

8. Baskin v. Baskin, 4 Lans. (N. Y.) 90; Matter of Philp, 29 Misc. 263, 61 NYS 241, 1 Mills Surr. 276.

[a] **A deposit payable only after a certain time** is a loan, for the failure to pay which by the depositary the administrator is liable. Baskin v. Baskin, 4 Lans. (N. Y.) 90.

[b] **Deposit with an incorporated trust company** is required by Code Civ. Proc. § 2678, if the administrator was appointed by the surrogate of the county of New York. See Livermore v. Wortman, 25 Hun (N. Y.) 341.

9. Harrington v. Libbey, 6 Daly (N. Y.) 259.

10. Harrington v. Libby, 6 Daly (N. Y.) 259; Matter of Philp, 29 Misc. 263, 61 NYS 241, 1 Mills Surr. 276.

[a] **If he retains the money in his possession** instead of depositing it as required by law, he will be charged interest at the rate a trust company would have paid unless it appears that he has used the money or made profit on it. Livermore v. Wortman, 25 Hun (N. Y.) 341.

11. In re Williams, 55 Mont. 63, 173 P 790.

12. Sackett's Est., 78 Cal. 300, 20 P 863; In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613]; McAlpine v. Kratka, 92 Minn. 411, 100 NW 233.

[a] **Redemption of land from taxes.** —A special administrator cannot, without the authority of the probate court and a showing of necessity, in order to secure the personal estate, include in his account money paid to redeem land from taxes. McAlpine v. Kratka, 92 Minn. 411, 100 NW 233.

[b] **The power of the surrogate's court to authorize payments** by a temporary administrator is limited by Code Civ. Proc. § 2597, under which the court in a contested probate proceeding cannot authorize payment by a temporary administrator of the referee's fees and other expenses of an examination before trial of testator's son. In re Suydam, 160 NYS 219.

13. In re Bell, 145 Cal. 646, 79 P 358; In re Ford, 29 Mont. 283, 74 P 735; Jenkins v. Shaffer, 19 NYSt 900, 6 Dem. Surr. 59.

[a] **No allowance can be made for** expenditures: (1) In the appointment of appraisers. In re Ford, 29 Mont. 283, 74 P 735. (2) In having made an examination of a mine, in which the estate held stock, for the purpose of ascertaining its value. In re Bell, 145 Cal. 646, 79 P 358. (3) In employing real estate and other agents to secure purchasers for property of a debtor of the estate, although such expenditures made in good faith, and resulting in benefit to the estate. In re Bell, 145 Cal. 646, 79 P 358. (4) In paying a surety company for becoming the surety on his official bond. Jenkins v. Shaffer, 19 NYSt 900, 6 Dem. Surr. 59. (5) For railroad fare and expenses in journeying from another state, where he lives, for the purpose of procuring his appointment. In re Emerson, 175 Cal. 724, 167 P 149. (6) In going to another state to withdraw moneys there belonging to the estate, where he did not show a necessity for the trip. In re Emerson, 175 Cal. 724, 167 P 149. (7) In publishing notice to creditors. In re Ford, 29 Mont. 283, 74 P 735. (8) For a detective to watch the executors, who had been removed at the suit of the special administrator, because they had not turned over all the papers, and he believed them dishonest, they having never refused to produce any paper when asked. In re Bell, 145 Cal. 646, 79 P 358.

14. Powell v. Foster, 71 Vt. 160, 44 A 96.

15. Powell v. Foster, 71 Vt. 160, 44 A 96.

16. In re Bell, 145 Cal. 646, 79 P 358 (engrossing bill of exceptions).

17. Lufkin v. Jakeman, 188 Mass. 528, 74 NE 933.

18. In re Welch, 106 Cal. 427, 39 P 805.

19. Erwin v. Mobile Branch Bank, 14 Ala. 307; Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198; Pickering v. Weiting, 47 Iowa 242; Ward v. Magaha, 71 Wash. 679, 129 P 395.

reject[20] claims against the estate, nor have they any authority to pay debts[21] or to sell property for their payment.[22] But under the statutes of some states the court may in a proper case direct the special or temporary administrator to pay the debts of the estate,[23] and to sell property for their payment.[24] However, even in those jurisdictions where the court has this power, it is limited to the occasions for which provision is made in the statute.[25]

Submission to arbitration. A special administrator has no power to submit a claim against the estate to arbitration.[26]

Appointment to report on claim of general representative. There is sometimes recognized a practice of appointing a special administrator to examine into and report on a claim of the general representative against the estate, and return his findings into court.[27] The allowance of such a claim, by the special administrator, when approved by the court, is attended with the same presumptions as a judgment and can be attacked only in the same manner as a judgment.[28] It is, of course, error for the special administrator to allow the general administrator an amount in excess of what he has claimed.[29]

[§ 2812] **h. Actions.** A special administrator generally has the authority to bring suit for the protection or preservation of the estate,[30] but the scope and extent of his power in this respect must

20. Ward v. Magaha, 71 Wash. 679, 129 P 395.

21. Ala.—Erwin v. Mobile Branch Bank, 14 Ala. 307.

Cal.—Henry v. Nevada County Super. Ct., 93 Cal. 569, 29 P 230.

Ga.—Funderburk v. Gorham, 46 Ga. 296.

Ill.—Wener v. Freilich, 268 Ill. 58, 108 NE 711; In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613].

Ind.—State v. Tomlinson, 16 Ind. A. 662, 45 NE 1116, 59 AmSR 335.

Iowa.—Pickering v. Weiting, 47 Iowa 242.

La.—Supple's Succ., 23 La. Ann. 24.

Minn.—Richmond v. Campbell, 71 Minn. 453, 73 NW 1099.

Miss.—Henderson v. Clarke, 27 Miss. 436.

Mont.—In re Ford, 29 Mont. 283, 74 P 735; State v. Second Judicial Dist. Ct., 18 Mont. 481, 46 P 259.

N. Y.—Swan v. Brown, 158 App. Div. 568, 143 NYS 910; In re Parish, 29 Barb. 627, 8 AbbPr 336; Matter of Aaron, 5 Dem. Surr. 362; Berdell v. Schell, 2 Dem. Surr. 292; Riegelman v. Riegelman, 4 Redf. Surr. 492; Matter of Cogswell, 4 Redf. Surr. 241; Matter of Haskett, 3 Redf. Surr. 165.

Tex.—James v. Craighead, (Civ. A.) 69 SW 241.

Wash.—Ward v. Magaha, 71 Wash. 679, 129 P 395.

"He is not bound to pay claims against the estate represented by him, nor can he legally do so unless authorized by the surrogate." Swan v. Brown, 158 App. Div. 568, 569, 143 NYS 910.

[a] **Taxes** paid for the redemption of land cannot be included in the account. McAlpine v. Kratka, 92 Minn. 411, 100 NW 233.

[b] **If a special administrator pay a note** which had been given by him for property purchased for the benefit of the estate and appropriated and used for the benefit thereof, he may claim the right to be reimbursed out of the property of the estate on a proper case made; but the holder of the note cannot look to the estate for the payment of the note unless the special administrator is insolvent. Funderburk v. Gorham, 46 Ga. 296.

[c] **The court cannot order** payment of a claim by a temporary administrator. Swan v. Brown, 158 App. Div. 568, 143 NYS 910.

22. Cal.—In re Bell, 145 Cal. 646, 79 P 358.

Ill.—In re Wincox, 186 Ill. 445, 57 NE 1073 [aff 85 Ill. A. 613].

Iowa.—Long v. Burnett, 13 Iowa 28, 81 AmD 420 [appr Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198].

La.—Supple's Succ., 23 La. Ann. 24.

Miss.—Henderson v. Clarke, 27 Miss. 436.

N. Y.—Matter of Gihon, 27 Misc. 626, 59 NYS 494, 1 Mills Surr. 59; In re Grant, 49 NYS 574, 27 NYCivProc 21.

Tex.—Robinson v. Martel, 11 Tex. 149; Cruse v. O'Gwin, 48 Tex. Civ. A. 48, 106 SW 757.

[a] **The court has no authority to order** a sale of real estate on the petition of a special administrator, and a sale under an order so procured is void. Long v. Burnett, 13 Iowa 28, 81 AmD 420 [app Raeun v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198].

23. Hamersley's Est., 15 AbbNCas (N. Y.) 187, 3 Dem. Surr. 285.

[a] **Counsel fees.**—When a temporary administrator applies for an order to pay his counsel for legal services a certain specified sum, it is the better practice, although the statute would justify the order asked for, to permit the administrator to withdraw from deposit funds not exceeding an amount specified, and afford him an opportunity to exercise his own discretion as to a reasonable amount to be paid to counsel, subject to an accounting, and that an order should be granted accordingly. Stokes v. Dale, 1 Dem. Surr. (N. Y.) 260.

24. Matter of Gihon, 27 Misc. 626, 59 NYS 494, 1 Mills Surr. 59; In re Kean, 178 NYS 60; In re Cutter, 172 NYS 293.

25. Kruse v. Fricke, 2 Dem. Surr. (N. Y.) 264; Matter of Haskett, 3 Redf. Surr. (N. Y.) 165.

[a] **Limit of power.**—No power exists to order the temporary administrator to pay for the attendance of experts to testify in proceedings for the probate of the will upon the question of the testator's sanity. Kruse v. Fricke, 2 Dem. Surr. (N. Y.) 264.

[b] **Costs of probate proceedings.**—The surrogate is without authority to direct a temporary administrator of a decedent's estate to pay thereout any sum as costs of a special proceeding instituted to procure probate of the will. Matter of Aaron, 5 Dem. Surr. (N. Y.) 362. To same effect Henry v. Nevada County Super. Co., 93 Cal. 569, 29 P 230.

[c] **That the administrator exceeded the amount allowed for repairs** is not a ground for disallowing the excess, provided the expenditure was reasonable and necessary to keep property in repair. Moore's Est., 88 Cal. 1, 25 P 915.

26. Sullivan v. Nicoulin, 113 Iowa 76, 84 NW 978 [appr Rauen v. Prudential Ins. Co., 129 Iowa 725, 106 NW 198].

27. See cases infra notes 28, 29.

28. In re Pennock, 122 Iowa 622, 98 NW 480.

[a] **Such allowance cannot be attacked by** exceptions to the final report of the general representative. In re Pennock, 122 Iowa 622, 98 NW 480.

29. Rabbett v. Connolly, 153 Iowa 607, 133 NW 1060.

30. U. S.—Old Dominion Trust Co. v. Oxford First Nat. Bank, 260 Fed. 22 [rev 252 Fed. 613].

Ala.—Briarfield Iron Works Co. v. Foster, 54 Ala. 622; Erwin v. Mobile Branch Bank, 14 Ala. 307.

Cal.—Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 P 330; Forde v. Exempt F. Co., 50 Cal. 299.

Ga.—Irvine v. Wiley, 145 Ga. 867, 90 SE 69; Neal v. Boykin, 129 Ga. 676, 59 SE 912, 121 AmSR 237; Louisville, etc., R. Co. v. Chaffin, 84 Ga. 519, 11 SE 891; Wheelus v. Long, 73 Ga. 110; Ewing v. Moses, 50 Ga. 264.

Ill.—Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436].

Ind.—Bruning v. Golden, 159 Ind. 199, 64 NE 657.

Iowa.—Masterson v. Brown, 51 Iowa 442, 1 NW 791.

Me.—Libby v. Cobb, 76 Me. 471.

Miss.—Henderson v. Clarke, 27 Miss. 436.

N. Y.—White v. Emigrant Industrial Sav. Bank, 146 App. Div. 591, 131 NYS 311 [aff 205 N. Y. 571 mem, 98 NE 1119 mem]; Hastings v. Tousey, 123 App. Div. 480, 108 NYS 526; McMahon v. Allen, 4 E. D. Smith 519; In re Kean, 178 NYS 60; Delafield v. Parish, 4 Bradf. Surr. 24, 26; In re Christy, Tuck. Surr. 24.

Tex.—Callahan v. Houston, 78 Tex. 494, 14 SW 1027.

Vt.—Slafter v. Savage, 89 Vt. 352, 95 A 790.

Wis.—Swan v. Norvell, 107 Wis. 625, 83 NW 934.

"In respect to suits he [the special administrator] stands on the same footing as all other administrators, and he is the judge of the propriety of his own cause of action, subject only to his liability when the administration is terminated, and the accounts are settled before the Surrogate. If he fail to institute suits at the instance of parties in interest, upon the offer of sufficient indemnity against costs, he may be held accountable for the loss resulting from his refusal. The authority he receives consists in 'special letters of administration, authorizing the preservation and collection of the goods of the deceased,' and the statute expressly declares that he shall have power 'to collect the goods, chattels, personal estate, and debts of the deceased, and to secure the same at such reasonable expense as the Surrogate shall allow, and for these purposes he may maintain suits as administrator.' The law therefore empowers him to bring suits 'as administrator,' and this too of his own motion, and without being compelled in the first place to ask the permission of the Surrogate." Delafield v. Parish, supra.

[a] **He may maintain a bill in equity to redeem land** of the estate from a mortgage, if the right to redeem might be barred by foreclosure before a general administrator would be qualified. Libby v. Cobb, 76 Me. 471.

[b] **He may institute a suit in chancery for the appointment of a receiver** of property in which the estate is interested, to protect the property from destruction or removal beyond his reach. Briarfield Iron Works Co. v. Foster, 54 Ala. 622.

[c] **An equitable petition to prevent insolvent persons from wasting assets** of the estate in their possession may be maintained by a temporary administrator of one who had been an heir at law of another dece-

be ascertained from the statute from which he derives his authority.[31] So under a statute which gives a temporary administrator the power to sue for the collection of debts or personal property of decedent, the temporary administrator cannot institute and maintain an action to recover land alleged to belong to the estate.[32] If the temporary administrator, without authority to institute a suit, begins an action, no subsequent order of the court authorizing the suit can make his act valid,[33] nor can the petition be amended by substituting the general administrator.[34] A special administrator to collect and hold the estate cannot employ himself, or any other attorney, in a contest over decedent's will.[35] A special administrator has power to defend actions against the estate.[36] Such an administrator may be sued by persons beneficially interested in the estate,[37] but an action against him by a creditor of the estate is sometimes precluded by statute.[38]

[§ 2813] **i. Effect of Appointment of General Representative.** While the authority of a special or temporary administrator ceases on the issuance of general letters testamentary or of administration,[39] his bond does not, ipso facto, become functus officio,[40] and the sureties thereon are liable for his subsequent acts with relation to the estate.[41] The general representative succeeds to all the rights of the special administrator,[42] who must, on the settlement of his account, pay any balance in his hands to the general representative.[43] If the general administrator sues for property in possession of the former special administrator, the latter may show that the property does not in fact belong to the estate and that the possession belongs to him in capacity of guardian.[44]

XXI. COEXECUTORS AND COADMINISTRATORS

[§ 2814] **A. In General.** It has been laid down that all other things being equal a sole administration is preferred to a joint one;[45] but where the estate is large, or from any cause an intricate and perplexing one to settle, the appointment of two or more administrators may be wise and preferable; hence, in American practice at least, the court may exercise a liberal discretion in this respect, even though interested parties should oppose.[46] When a person entitled to administration of an estate so desires, he may have another competent person associated with him in the office,[47] and such asso-

dent. Pollock v. Cox, 108 Ga. 430, 34 SE 213.

[d] **Action to recover damages for conversion of assets.**—Power to take charge of and preserve the estate and to collect all debts and outstandings owing to it confers no authority to sue for damages for a conversion of assets. William J. Lemp Brewing Co. v. La Rose, 20 Tex. Civ. A. 575, 50 SW 460.

[e] **May prosecute appeal.**—Mayer v. Schneider, 112 Ill. A. 628 [aff 212 Ill. 286, 72 NE 436].

[f] **Authority from court.**—Under a statute providing that the probate court shall "define' the powers" of temporary administrators appointed by it, and declaring that they shall have only such powers as are specifically committed to them, a probate court may authorize a husband, as temporary administrator of his wife's property, to prosecute an action already begun by the husband and wife to recover land belonging to her separate estate. Callahan v. Houston, 78 Tex. 494, 14 SW 1027.

[g] **Cannot sue outside of state of appointment.**—Old Dominion Trust Co. v. Oxford First Nat. Bank, 252 Fed. 613.

31. Neal v. Boykin, 129 Ga. 676, 59 SE 912, 121 AmSR 237; Larson v. Johnson, 72 Minn. 441, 75 NW 699; Willis v. Pinkard, 21 Tex. Civ. A. 423, 52 SW 626.

[a] **Illustrations.**—(1) A statute authorizing the special administrator to maintain actions for the purpose of collecting goods, chattels, and credits, or actions which will aid him in caring for, gathering, or securing crops, or in preserving the property, does not authorize him to maintain an action in his official capacity to set aside a deed made, executed, and delivered to a third person by a decedent in his lifetime. Larson v. Johnson, 72 Minn. 441, 75 NW 699. (2) Nor does such a statute authorize him to sue for and recover goods and chattels which have been fraudulently conveyed by decedent in his lifetime, although the assets of the estate may be insufficient to pay the debts. Richmond v. Campbell, 71 Minn. 453, 73 NW 1099.

[b] **Such an administrator cannot institute an equity suit** to set aside a foreign administration in a jurisdiction of which decedent was a nonresident for fraud. Neal v. Boykin, 129 Ga. 676, 59 SE 912, 121 AmSR 237.

[c] **Protection of real estate.**—A temporary administrator may enjoin a railroad company from unlawfully seizing a portion of the estate for a right of way, although he cannot recover damages for what has already been done. Chattanooga, etc., R. Co. v. Morrison, 140 Ga. 769, 79 SE 903.

32. Ward v. McDonald, 135 Ga. 515, 69 SE 817; Doris v. Story, 122 Ga. 611, 50 SE 348; Banks v. Walker, 112 Ga. 542, 37 SE 866; Union Trust Co. v. Kirchberg, 174 Mich. 161, 140 NW 464.

33. Willis v. Pinkard, 21 Tex. Civ. A. 423, 52 SW 626.

34. Ward v. McDonald, 135 Ga. 515, 69 SE 817.

35. Zimmer v. Saier, 155 Mich. 388, 119 NW 433, 130 AmSR 575.

36. Ga.—Barfield v. Hartley, 108 Ga. 435, 33 SE 1010.

Iowa.—Masterson v. Brown, 51 Iowa 442, 1 NW 791.

Mich.—McNamara v. Michigan Trust Co., 148 Mich. 346, 111 NW 1066.

Nebr.—Cadman v. Richards, 13 Nebr. 383, 14 NW 159.

N. Y.—Getty v. Amelung, 7 AlbLJ 415.

[a] **Necessary implication of power.**—(1) Power given by statute to "commence and maintain suits as an administrator" includes, by necessary inference, the power to appear and defend an action against the estate. Cadman v. Richards, 13 Nebr. 383, 14 NW 159. (2) It also includes power to be substituted as defendant in place of decedent in an action the cause of which survives. Getty v. Amelung, 7 AlbLJ (N. Y.) 415.

[b] **Upon the trial of a case made upon an affidavit of illegality,** it is not only the right but the duty of the temporary administrator, affiant, the affidavit having been made to arrest the progress of an execution against the estate, to represent the interests of the estate. Barfield v. Hartley, 108 Ga. 435, 33 SE 1010.

[c] **May prosecute appeal.**—McNamara v. Michigan Trust Co., 148 Mich. 346, 111 NW 1066.

37. Meagher v. Kimball, 220 Mass. 32, 107 NE 431.

38. Meagher v. Kimball, 220 Mass. 32, 107 NE 431.

39. See supra § 2799.

40. Matter of Eisner, 5 Dem. Surr. (N. Y.) 383.

41. American Surety Co. v. Gaskill, 85 Vt. 358, 82 A 218.

42. Cowles v. Hayes, 71 N. C. 230.

43. Matter of Philp, 29 Misc. 263, 61 NYS 241, 1 Mills Surr. 276.

44. Burnett v. Roberts, 15 N. C. 81; Yarborough v. Harris, 14 N. C. 40.

45. Brubaker's App., 98 Pa. 21; In re Newbold, L. R. 1 P. 285; Coppin v. Dillon, 4 Hagg. Eccl. 361, 162 Reprint 1478; Bell v. Timiswood, 2 Phillim. 22, 161 Reprint 1066.

46. Ind.—Shrum v. Naugle, 22 Ind. A. 98, 53 NE 243.

Md.—Kailer v. Kailer, 92 Md. 147, 48 A 712; Thomas v. Knighton, 23 Md. 318, 87 AmD 871.

Mass.—Copeland v. Shapley, 214 Mass. 132, 100 NE 1080.

Miss.—Jordan v. Ball, 44 Miss. 194.

N. Y.—In re Williams, Tuck Surr. 8.

N. C.—In re Meyer, 113 N. C. 545, 18 SE 689.

Tenn.—Phillips v. Green, 4 Heisk. 350.

Wyo.—Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

[a] **More than one administrator de bonis non** may be appointed when such action is deemed proper by the court. Copeland v. Shapley, 214 Mass. 132, 100 NE 1080.

[b] **Discretion to refuse.**—An order denying the joint petition of a widow and a son of deceased to appoint the son coadministrator with the widow will not be disturbed on appeal in the absence of evidence that the trial court abused its discretion. Shrum v. Naugle, 22 Ind. A. 98, 53 NE 243.

47. Cal.—In re Kirtland, 16 Cal. 161.

D. C.—Williams v. Williams, 24 App. 214.

Miss.—Jordan v. Ball, 44 Miss. 194.

N. Y.—In re Root, 5 NYLegObs 449, 1 Redf. Surr. 257.

Tenn.—Johnson v. Molsbee, 5 Lea 444; Phillips v. Green, 4 Heisk. 350.

Wyo.—Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

Eng.—In re Thacker, [1900] P. 15; In re Grundy, L. R. 1 P. & D. 459.

[a] **Purpose of associate appointment.**—The object of the statute, authorizing the appointment of some competent person, at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of those more competent. In re Kirtland, 16 Cal. 161.

[b] **Testate estate.**—The right to an associate appointment is not limited to cases of intestacy, but a person who is legally entitled to letters of administration with the will

ciate need not be selected from the class next entitled to the administration, nor is their consent necessary;[48] but it is only with the consent of the person entitled to administer that the appointment can be made.[49] It has been held that the probate court has no power to appoint a coexecutor while its decree appointing an executor stands,[50] but the court has appointed an additional administrator against the protest of one already appointed.[51] An executor and an administrator cannot be joined,[52] and hence the appointment of an administrator as the associate of an executor is void.[53]

Judicial trustee. In England the chancery court is empowered by statute to appoint a judicial trustee to act with an executor or administrator.[54]

[§ 2815] **B. Authority—1. In General.** With respect to the representation and management of their decedent's estate, coexecutors[55] and coadministrators[56] are regarded in law as one person, and consequently the acts of one of them in relation to the regular administration of the estate are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property.[57] A distinction between the two classes of representatives has been drawn, to the effect that, although each executor represents the testator, all the administrators represent the intestate, and hence a single administrator cannot bind his associates,[58] but this distinction has not been followed generally.[59] So also some cases hold that, where assets or funds arising from the disposal thereof are in the joint custody of the representatives, their action with relation thereto must be joint,[60] while other cases do not recognize such a rule,[61] and it has also been held that without regard to the authority of a coexecutor to act individually, acquiescence of the

annexed may have another person joined with him, although such other person is not in his own right entitled to letters. Matter of Moehring, 24 Misc. 418, 53 NYS 750, 2 Gibb. Surr. 540.

[c] **Designation of character of appointment.**—The fact that a person appointed as associate administrator is misnamed "special administrator" will not vitiate the appointment. Lethbridge v. Lauder, 13 Wyo. 9, 76 P 682.

[d] **Contrary view.**—The register of wills cannot "unite a stranger with the widow in the administration, where there are next of kin competent to act." Gause's Est., 1 Chest. Co. (Pa.) 105 [foll Able's Est., 1 Leg Gaz (Pa.) 420].

48. Shropshire v. Withers, 5 J. J. Marsh. (Ky.) 210.

[a] **Selection of associate to exclusion of relatives.**—Only a person entitled to administer has the right to complain that another is associated with him in the office of administrator. Buckner v. Louisville, etc., R. Co., 120 Ky. 600, 87 SW 777, 27 KyL 1009.

49. Williams v. Williams, 24 App. (D. C.) 214; Shrum v. Naugle, 22 Ind. A. 98, 53 NE 243; Peters v. Public Admr., 1 Bradf. Surr. (N. Y.) 200, 207; Lethbridge v. Lauder, 13 Wyo. 18, 76 P 682.

"Such a thing was never heard of, as the Court forcing upon a party entitled, a joint administration against his consent." Peters v. Public Admr., 1 Bradf. Surr. (N. Y.) 200, 207.

[a] **Consent not revocable.**—After a widow has consented to join a stranger with her in the administration, she cannot revoke the consent. Williams' Est., Tuck. Surr. (N. Y.) 8.

50. Cogswell v. Hall, 183 Mass. 575, 67 NE 638; Briggs v. Westerly Prob. Ct., 23 R. I. 125, 50 A 335.

51. Read v. Howe, 13 Iowa 50.

52. Terry's App., 67 Conn. 181, 34 A 1032.

53. Terry's App., 67 Conn. 181, 34 A 1032.

[a] **The death of one of two executors** before the death of the testator does not authorize a court of probate to appoint an administrator with the will annexed to act with the surviving executor, and such appointment is without jurisdiction and void. Terry's App., 67 Conn. 181, 34 A 1032.

54. In re Ratcliff, [1898] 2 Ch. 352.

55. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402.

Ala.—Scruggs v. Driver, 31 Ala. 274.

Ga.—Wilkerson v. Wootten, 28 Ga. 568.

Ind.—Alerding v. Allison, 170 Ind. 252, 83 NE 1006, 127 AmSR 363 [aff (A.) 82 NE 934].

La.—Clark v. Farrar, 3 Mart. 247.

Md.—Crothers v. Crothers, 121 Md. 114, 88 A 114.

Miss.—Bodley v. McKinney, 17 Miss. 339.

N. J.—New York Mut. L. Ins. Co. v. Sturges, 33 N. J. Eq. 328.

N. Y.—Barry v. Lambert, 98 N. Y. 300, 50 AmR 677; Matter of Rossell, 126 App. Div. 607, 110 NYS 706, 121 App. Div. 381, 105 NYS 1098; Matter of Dorland, 100 Misc. 236, 166 NYS 616; Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff 150 NYS 776]; Douglass v. Satterlee, 11 Johns. 16.

Pa.—Borhek's Est., 5 Pa. Dist. 297.

S. C.—Chapman v. Charleston, 30 S. C. 549, 9 SE 591, 3 LRA 311.

Eng.—Charlton v. Durham, L. R. 4 Ch. 433 [aff 38 L. J. Ch. 183]; Owen v. Owen, 1 Atk. 494, 26 Reprint 313; Smith v. Everett, 27 Beav. 446, 54 Reprint 175; Simpson v. Gutteridge, 1 Madd. 609, 56 Reprint 224; Ex p. Rigby, 19 Ves. Jr. 463, 34 Reprint 588; Jacomb v. Harwood, 2 Ves. 265, 28 Reprint 172.

Ont.—Bruce County Corp. v. Cromar, 22 U. C. Q. B. 321.

56. U. S.—Boudereau v. Montgomery, 3 F. Cas. No. 1,694, 4 Wash. C. C. 186.

Ala.—Scruggs v. Driver, 31 Ala. 274.

Del.—Lank v. Kinder, 4 Del. 457.

Ga.—Scruggs v. Gibson, 40 Ga. 511.

Ind.—Herald v. Harper, 8 Blackf. 170.

Ky.—Hord v. Lee, 4 T. B. Mon. 36.

N. Y.—Matter of Bradley, 25 Misc. 261, 54 NYS 555, 2 Gibb. Surr. 597 [aff 42 App. Div. 301, 59 NYS 105]; Murray v. Blatchford, 1 Wend. 583, 19 AmD 537; Douglass v. Satterlee, 11 Johns. 16.

Pa.—Reber v. Gilson, 1 Pa. 54.

S. C.—Gage v. Johnson, 12 S. C. L. 492.

Tex.—Dean v. Duffield, 8 Tex. 235, 58 AmD 108.

Eng.—Willand v. Fenn, 2 Selw. 767 [cit Jacomb v. Harwood, 2 Ves. 265, 267, 28 Reprint 172].

57. Aldering v. Allison, 170 Ind. 252, 83 NE 1006, 127 AmSR 363; Matter of Waterman, 112 App. Div. 313, 98 NYS 583 [app dism 186 N. Y. 534 mem, 78 NE 1114 mem]; Dean v. Duffield, 8 Tex. 235, 58 AmD 108. See also cases supra notes 55, 56.

[a] **Not bound to transact business in presence of attorney of coexecutor.**—Where testator appointed three executors, one of whom was his daughter, the other two were not bound to transact business pertaining to the estate in the presence of the daughter's son, who was her personal attorney, and who made himself obnoxious to such executors. Matter of Waterman, 112 App. Div. 313, 98 NYS 583 [app dism 186 N. Y. 534 mem, 78 NE 1114 mem].

[b] **When acts of one not binding on the other.**—A testator by his will appointed an executor and executrix, and the executrix was given a life interest in the testator's property with remainder to the executor. Among the assets was a mortgage, which was left to the possession of the executrix. She pressed the mortgagor for payment, and he told her that in order to raise the money, he would have to be intrusted with the title deeds, which she accordingly sent him. The mortgagor used the title deeds to obtain money from a bank, but did not pay off the mortgage, and after the death of the executrix it was found that the mortgagor had returned to her only the mortgage deed and not the title deeds. It was held that the acts of the executrix could not affect the rights of the executor and that he was entitled to priority over the bank with respect to the mortgage debt, out of the assets of the mortgagor. In re Ingham, [1893] 1 Ch. 352.

58. Jordan v. Spiers, 113 N. C. 344, 18 SE 327; Gordon v. Finlay, 10 N. C. 239; Mangrum v. Simms, 4 N. C. 160; Hudson v. Hudson, 1 Atk. 460, 26 Reprint 292.

59. Ind.—Herald v. Harper, 8 Blackf. 170.

Ky.—Hord v. Lee, 4 T. B. Mon. 36.

N. Y.—Jeroms v. Jeroms, 18 Barb. 24; Murray v. Blatchford, 1 Wend. 583, 19 AmD 537; James v. Hackley, 16 Johns. 273.

N. C.—Jordan v. Spiers, 113 N. C. 344, 18 SE 327; Gordon v. Finlay, 10 N. C. 239.

S. C.—Gage v. Johnson, 12 S. C. L. 492; O'Neall v. Herbert, 16 S. C. Eq. 495.

Tex.—Dean v. Duffield, 8 Tex. 235, 58 AmD 108.

Eng.—Jacomb v. Harwood, 2 Ves. 267, 28 Reprint 172.

60. Ark.—Clark v. Gramling, 54 Ark. 525, 16 SW 475.

Ky.—Sanders v. Blain, 6 J. J. Marsh. 446, 22 AmD 86; Bagby v. Hudson, 11 KyL 581.

Mass.—Smith v. Whiting, 9 Mass. 334.

N. C.—Johnson v. Mangum, 65 N. C. 146.

Eng.—Barton v. North Staffordshire R. Co., 38 Ch. D. 458; Owen v. Owen, 1 Atk. 495, 26 Reprint 313.

[a] **A note to the representatives jointly** (1) cannot be transferred by one. Smith v. Whiting, 9 Mass. 334; Johnson v. Mangum, 65 N. C. 146. (2) Nor can the maker be released by one. Clark v. Gramling, 54 Ark. 525, 16 SW 475.

61. Peo. v. Miner, 37 Barb. (N. Y.) 466, 23 HowPr 223; Bogert v. Hertell, 4 Hill (N. Y.) 492 [rev 9 Paige 52 (mod 3 Edw. 20)]; Fesmire v. Shannon, 143 Pa. 201, 22 A 898 [dist De Haven v. Williams, 80 Pa. 480, 21 AmR 107]; D'Invilliers v. Abbott, 4 WklyNC (Pa.) 124; Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 108, 2 AmSR 881.

other executors in similar acts may protect the person dealing with him.[62] Again it has been laid down that the rule that one executor may act for all is limited to acts of a ministerial nature and that all must concur in acts involving the exercise of judgment.[63] An executor has no power, by virtue of his office, to sign the name of his coexecutor,[64] nor can such power be delegated to him by his coexecutor;[65] but it has been held that one administrator may ratify the act of another administrator in signing his name.[66]

The fact that the will provides for salaries for some of the executors but not for others does not evidence an intent that the executors to whom salaries are given shall have the principal charge and control of the estate, or that their decisions shall be controlling where differences arise between them and their associates.[67]

[§ 2816] **2. Executors Acting as Trustees.** As a general rule executors, although clothed with an ultimate duty to act as trustees, are not, until they so act, compelled to act jointly as is the case of trustees generally;[68] but special duties imposed by the will may be such as to demand joint or majority action,[69] and the rule that one may act for all does not apply to any acts which are done as trustee rather than as executor.[70]

[§ 2817] **3. Collection of Assets.** Each executor[71] or administrator[72] has the right to receive all debts due the estate or other assets which may come into his hands and may discharge the debtors.

Effect of bar against one representative. The right to enforce claims due the estate is joint to the extent that a bar as against one representative is a bar as against all.[73]

[§ 2818] **4. Custody of Assets.** Generally speaking the rights of coexecutors or coadministrators to the custody and control of assets belonging to the estate are equal,[74] and the possession of one is regarded as the possession of all,[75] unless the one who has actual possession holds it under a claim of individual ownership.[76] One representative has no right to prevent his associates from collecting the assets of the estate or holding them in their possession for the purposes of administration,[77] unless in case of mismanagement or of existing or impending insolvency, when a representative may be enjoined from acting further and compelled to restore the assets in his hands,[78] or a receiver may be appointed,[79] who may act with the remaining solvent executors if they consent; otherwise there should be an appointment generally.[80] Contracts between executors as the custody of assets may be sustained,[81] and when the will gives to one executor full possession and control of the assets the other executor is not entitled to the joint custody thereof.[82] The surrogate has sometimes, under statute, power to compel moneys of the estate to be deposited to the joint credit of coexecutors.[83]

[§ 2819] **5. Custody of Books and Papers.** The title of coexecutors to books and papers is equal; each is entitled to inspect and to know what they

62. Child v. Thorley, 16 Ch. D. 151.

63. Matter of Ringler, 70 Misc. 576, 127 NYS 934.

[a] **An application for the dissolution of a corporation,** in which the bulk of a testator's estate was invested, is not a mere ministerial act, which one executor can perform without the concurrence of the others. Matter of Ringler, 70 Misc. 576, 127 NYS 934.

64. Matter of Ringler, 70 Misc. 576, 127 NYS 934.

65. Matter of Ringler, 70 Misc. 576, 127 NYS 934.

66. Vandeventer v. Florida Sav. Bank, 162 Mo. A. 34, 141 SW 900.

[a] **Facts showing ratification.**—The act of one administrator in signing the name of his coadministrator to the assignment of a note executed to the coadministrators as such is ratified where the nonsigning administrator, with knowledge of the assignment, uses the proceeds in the final settlement of the estate. Vandeventer v. Florida Sav. Bank, 162 Mo. A. 34, 141 SW 900.

67. Nester v. Nester, 68 Misc. 207, 118 NYS 1009, 124 NYS 974.

68. Bogert v. Hertell, 4 Hill (N. Y.) 492; Fesmire v. Shannon, 143 Pa. 201, 22 A 898.

69. Ala.—Werborn v. Austin, 77 Ala. 381.

Ill.—Dingman v. Boyle, 285 Ill. 144, 120 NE 487.

Miss.—Port Gibson Bank v. Baugh, 17 Miss. 290.

N. J.—Holcomb v. Coryell, 11 N. J. Eq. 476; Holcomb v. Holcomb, 11 N. J. Eq. 281.

Pa.—Benezet v. Hess, 63 Pa. Super. 408.

70. Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 SE 439; Denne v. Judge, 11 East 288, 103 Reprint 1014.

71. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402.

Hawaii.—Matter of Gill, 2 Hawaii 681.

Ky.—Bagby v. Hudson, 11 KyL 581.

Me.—Gilman v. Healy, 55 Me. 120.

Md.—Mitchell v. Williamson, 6 Md. 210.

N. J.—Duncan v. Davison, 40 N. J. Eq. 535, 5 A 93.

N. Y.—Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 NYS 612 [aff 64 NYS 742 (aff 176 N. Y. 551 mem, 68 NE 1114 mem)]; In re Watson, 148 NYS 902 [aff 150 NYS 776].

N. C.—Hoke v. Fleming, 32 N. C. 263.

Pa.—Devling v. Little, 26 Pa. 502.

R. I.—Stone v. Union Sav. Bank, 13 R. I. 25.

S. C.—Hyatt v. McBurney, 18 S. C. 199.

Va.—Mills v. Mills, 28 Gratt. (69 Va.) 422.

Eng.—Charlton v. Durham, L. R. 4 Ch. 433 [aff 38 L. J. Ch. 183]; Ex p. Shakeshaft, 3 Bro. Ch. 198, 29 Reprint 488.

Ont.—Ewart v. Dryden, 13 Grant Ch. (U. C.) 50.

[a] **Sum paid to extinguish rent.**—It is not necessary that all the executors should join in the receipt of a gross sum paid under the terms of a lease to extinguish the rent. Mills v. Mills, 28 Gratt. (69 Va.) 442.

[b] **A note payable to one executor** which belongs to the estate may be enforced by the coexecutors without indorsement to them. Leland v. Manning, 4 Hun (N. Y.) 7.

[c] **A mortgage given to two executors jointly** may be discharged by either on payment to him of the mortgage debt. Peo. v. Keyser, 28 N. Y. 226, 84 AmD 338.

[d] **A mortgage given by an executor to his coexecutor** to secure a debt due from the mortgagor to the testator cannot be discharged by the mortgagor acting as sole surviving executor, because, as between the parties to the mortgage, the debt was the individual debts of the mortgagor to the mortgagee. Beaty v. Shaw, 14 Ont. A. 600 [dism app 13 Ont. 21].

[e] **A direction by one executor to a debtor** of the estate not to pay the other executors cannot prevent them from recovering the debt by action. Strever v. Feltman, 1 Thomps. & C. (N. Y.) 277.

72. Ga.—Scruggs v. Gibson, 40 Ga. 511.

Ky.—Bryan v. Thompson, 7 J. J. Marsh. 586.

Me.—Shaw v. Berry, 35 Me. 279, 58 AmD 702.

N. Y.—Murray v. Blatchford, 1 Wend. 583, 19 AmD 537.

S. C.—Gage v. Johnson, 12 S. C. L. 492.

Vt.—Gleason v. Lillie, 1 Aik. 28.

[a] **Distraint for rent** may issue on the affidavit of one administrator. Scruggs v. Gibson, 40 Ga. 511.

73. Turner v. Debell, 2 A. K. Marsh. (Ky.) 383.

74. Edmonds v. Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402; Matter of Rossell, 126 App. Div. 607, 110 NYS 706; Gates v. Whetstone, 8 S. C. 244, 28 AmR 284; Cumming v. Landed Banking, etc., Co., 19 Ont. A. 447.

75. Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff 150 NYS 776].

76. Matter of Watson, 86 Misc. 588, 148 NYS 902 [aff 150 NYS 776].

77. Hall v. Carter, 8 Ga. 388; Sanford v. Sanford, 45 N. Y. 723; Burt v. Burt, 41 N. Y. 46.

78. Wood v. Brown, 34 N. Y. 337; Elmendorf v. Lansing, 4 Johns. Ch. (N. Y.) 562.

79. Jenkins v. Jenkins, 1 Paige (N. Y.) 243; Middleton v. Dodswell, 13 Ves. Jr. 266, 33 Reprint 294.

Appointment of receivers generally see infra § 2893.

80. Jenkins v. Jenkins, 1 Paige (N. Y.) 243.

81. Berry v. Tart, 19 S. C. L. 4.

82. Matter of Trelease, 115 App. Div. 654, 100 NYS 1051.

[a] **Exclusive possession and control is given by** a provision of the will to one executrix, the income of the personalty for life, with the right to use the principal, if she needs it. Matter of Trelease, 115 App. Div. 654, 100 NYS 1051.

83. In re Hoagland, 51 App. Div. 347, 64 NYS 920 [aff 164 N. Y. 573 mem, 58 NE 1088 mem]; Matter of Eisner, 6 App. Div. 563, 39 NYS 718; Matter of Adler, 60 Hun 481, 15 NYS 227; Chambers v. Cruikshank, 5 Dem. Surr. (N. Y.) 414 [aff 19 AbbNCas 413].

[a] **Limitation of power.**—The

contain,[84] but a majority may agree in whose manual custody they shall be.[85]

[§ 2820] **6. Sale and Transfer or Assignment of Assets**[86]**—a. In General.** As a general rule one of two or more executors possesses the power of selling and disposing of the personal assets of the estate as fully as if all join in the act of transfer;[87] and the same has been held to be true of administrators,[88] although this has been denied.[89]

[§ 2821] **b. Indorsement and Transfer of Negotiable Instruments.** One coexecutor[90] or coadministrator[91] may assign a note made payable to decedent. It has been held necessary that all the representatives should join in the transfer of an obligation taken to the representatives jointly,[92] but there would seem to be no reason for such a requirement where the obligation is in fact an asset of the estate, and it has accordingly been held that such an obligation may be transferred by a single representative.[93]

[§ 2822] **7. Allowance and Payment of Claims.** The authority of one of several representatives to allow a claim against the estate has already been discussed.[94] As a general rule payment by one of two or more joint executors has the effect of a payment by all.[95] Where, however, a claim is opposed and the executors make different pleas, the court should proceed upon the plea which is most favorable to the estate.[96] One of several executors may retain assets in satisfaction of his own claim against the estate where there is no fraud.[97]

[§ 2823] **8. Contracts.** Since, as the rule is generally stated, a coexecutor or coadministrator cannot act singly with regard to those acts which may affect the personal responsibility of his corepresentative,[98] he cannot, by his individual act, create a debt against the estate[99] or make a new contract with respect thereto so as to bind his associates.[1] One representative may, however, ratify a contract of another with reference to the administration of the estate.[2]

Contract of sale. Where the will has conferred on two executors the power to sell the testator's real estate, one of the executors cannot bind the other by agreeing to a change in the terms of a contract of sale.[3]

New promise. The power of one of several representatives to make a valid new promise to pay a

surrogate can direct and control the conduct of executors only in the manner prescribed by statute. He cannot compel one executor to transfer to the other funds of the estate for the purpose of paying counsel. Thompson v. Mott, 1 Dem. Surr. (N. Y.) 32.

84. Matter of Stein, 33 Misc. 542, 68 NYS 933, 2 Mills Surr. 100.

[a] **Proceeding for inspection.**—An application for an order directing a coexecutor to permit inspection of books and papers by an associate is not a special proceeding which must be commenced by citation, but a remedy is afforded under the section of the statutes conferring on the surrogate authority to give directions when two or more coexecutors disagree respecting the custody of the property of the estate. Matter of Stein, 33 Misc. 542, 68 NYS 933, 2 Mills Surr. 100.

85. Bronson v. Bronson, 48 How Pr (N. Y.) 481.

86. Lease see infra § 2832.

Sale and conveyance of real property see infra § 2831.

87. Ill.—Dwight v. Newell, 15 Ill. 333.

Mass.—George v. Baker, 3 Allen 326 note.

N. J.—New York Mut. L. Ins. Co. v. Sturges, 33 N. J. Eq. 328.

N. Y.—Pearse v. National Lead Co., 147 NYS 989; Bogert v. Hertell, 4 Hill 492 [rev 9 Paige 52]; Wheeler v. Wheeler, 9 Cow. 34.

Pa.—Chalfont v. Johnston, 3 Yeates 16.

Ont.—Cumming v. Landed Banking, etc., Co., 19 Ont. A. 447.

[a] **An assignment of a mortgage,** the property of the estate, may be made by one executor. George v. Baker, 3 Allen (Mass.) 326 note.

[b] **Sale to coexecutor.** — The power of one executor to dispose of the assets independently of his coexecutors does not authorize him to sell to a coexecutor. Case v. Abeel, 1 Paige (N. Y.) 393.

[c] **Corporate stock** registered in the joint names of the executors forms an exception to the rule stated in the text, such a case being governed by the peculiar rules fixing the liability of a corporation with regard to the transfer of its stock. Barton v. North Staffordshire R. Co., 38 Ch. D. 458 (where a coexecutor transferred stock registered in the names of himself and his coexecutor by forging the signature of his associate, the innocent executor might bring an action against him and the corporation which made the transfer on its books).

88. Beecher v. Buckingham, 18 Conn. 110, 44 AmD 580; Vandeventer v. Florida Sav. Bank, 162 Mo. A. 34, 141 SW 900.

89. Gordon v. Finlay, 10 N. C. 239.

90. Dwight v. Newell, 15 Ill. 333; Smith v. Whiting, 9 Mass. 334; Wheeler v. Wheeler, 9 Cow. (N. Y.) 34; Geddes v. Simpson, 2 S. C. L. 533.

91. Sanders v. Blain, 6 J. J. Marsh. (Ky.) 446, 22 AmD 86; Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 108, 2 AmSR 881; Mosely v. Graydon, 35 S. C. L. 7.

Ark.—Clark v. Gramling, 54 Ark. 525, 16 SW 475.

Ky.—Sanders v. Blain, 6 J. J. Marsh. 446, 22 AmD 86.

Mass.—Smith v. Whiting, 9 Mass. 334.

N. Y.—Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383.

N. C.—Johnson v. Mangum, 65 N. C. 146.

93. Bogert v. Hertell, 4 Hill (N. Y.) 492 [rev 9 Paige 52]; Mackay v. St. Mary's Church, 15 R. I. 121, 23 A 108, 2 AmSR 881.

[a] **Proceeds of realty.**—One executor has authority to transfer a bond and mortgage given the executors as proceeds of conversion of realty. Bogert v. Hertell, 4 Hill (N. Y.) 492 [rev 9 Paige 52].

94. See supra § 1038.

95. Haskell v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452.

96. Haskel v. Manson, 200 Mass. 599, 86 NE 937, 128 AmSR 452; Midgley v. Midgley, [1893] 3 Ch. 282.

97. Jacomb v. Harwood, 2 Ves. 265, 28 Reprint 172.

98. Scruggs v. Driver, 31 Ala. 274.

99. Scruggs v. Driver, 31 Ala. 274; Wilson v. Mason, 158 Ill. 304, 42 NE 134, 49 AmSR 162; Union Bank v. Sullivan, 214 N. Y. 332, 108 NE 558 [rev 161 App. Div. 884 mem, 145 NYS 1148 mem]; Cayuga County Bank v. Bennett, 5 Hill (N. Y.) 236; McIntire v. Morris, 14 Wend. (N. Y.) 90; Forsyth v. Ganson, 5 Wend. (N. Y.) 558, 21 AmD 241; Hammon v. Huntley, 4 Cow. (N. Y.) 493; James v. Hackley, 16 Johns. (N. Y.) 273; Hall v. Boyd, 6 Pa. 267; Benezet v. Hess, 63 Pa. Super. 408.

[a] **Borrowing for the benefit of estate** must be with consent of the coexecutor, which cannot be presumed from the purpose of the loan. Bryan v. Stewart, 83 N. Y. 270.

[b] **Execution of notes.**—One of several executors acting alone cannot bind the estate by making or indorsing notes, even though in renewal of notes made by testator. Bailey v. Spofford, 14 Hun (N. Y.) 86.

[c] **Contracts for services** (1) made by an executor are not binding on the estate. Freeman v. Brunswick, 14 WklyNC (Pa.) 327. (2) But they may be binding inter sese. Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 NYS 612 [aff 49 App. Div. 636 mem, 64 NYS 742 (176 N. Y. 551 mem, 68 NE 1114 mem)] (an attorney for one of two executors, who collected money belonging to the estate, is entitled thereto, as against the coexecutor, where he had performed services for the estate in excess of the amount collected, and had claimed a lien on the sum collected, and thereafter the executor at whose request he had rendered his services agreed that he should retain it and apply it on account of such services).

[d] **Contracts to purchase property** by one of two joint executors without the concurrence of his coexecutor are not binding on the estate. Scruggs v. Driver, 31 Ala. 274; Wilson v. Mason, 158 Ill. 304, 42 NE 134, 49 AmSR 162.

[e] **An agreement terminating a lease** may be made by one of several administrators if he believes continuance to be injurious to the estate, and such agreement being entered on the lease and bond securing rent binds the estate, and may be enforced by an action of debt on the bond against all the administrators. Reber v. Gilson, 1 Pa. 54.

1. In re Ruetschlin, 245 Pa. 473, 91 A 857; Turner v. Hardey, 9 M. & W. 770, 152 Reprint 326.

2. Ward v. Koenig, 106 Md. 433, 67 A 236.

[a] **Illustration.**—Where one of two administrators employed counsel to foreclose a mortgage for the estate, and, although the other administrator took no part in the authorization, it appeared that he was aware of the employment of counsel, and did not disclaim their services, the facts showed that counsel were duly authorized to represent the estate. Ward v. Koenig, 106 Md. 433, 67 A 236.

3. Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867.

Sale and conveyance of real property generally see infra § 2831.

debt barred by the statute of limitations has already been discussed.[4]

[§ 2824] **9. Deposits.** Where a deposit has been made by the executors to their joint account, one cannot make a valid check thereon or receipt therefor.[5]

[§ 2825] **10. Investments.** When a power of investment is conferred on the executors by the will, they become subject to the rule applicable to trustees requiring joint action.[6] But the rule that payment of a debt due the estate may be made to one of several executors[7] applies to payment of a mortgage held by executors as trustees under the will.[8]

[§ 2826] **11. Admissions.** The effect of admissions by one representative as against his associates and the estate is discussed in another article.[9]

[§ 2827] **12. Compositions and Compromises.** It is usually considered that each representative has, as incident to the right to collect,[10] the right to compound or compromise debts or causes of action belonging to the estate,[11] although the existence of such right has been denied.[12]

[§ 2828] **13. Releases.** The power to collect assets of the estate[13] confers on a single representative the power to release an obligation evidencing or securing a debt to the estate;[14] this power has been held to extend to cases where the obligation has been taken to the representatives jointly,[15] although this has been denied.[16] A single representative cannot, however, release a security except on payment,[17] or release a promise made to an associate individually.[18]

[§ 2829] **14. Submission to Arbitration.** One of several representatives may submit to arbitration a matter which would have been properly submitted had he been the sole representative.[19]

[§ 2830] **15. Confession of Judgment.** Although it was held at one time that one of several executors or administrators could bind the others by a confession of judgment,[20] the contrary rule is now well established.[21]

[§ 2831] **16. Sale and Conveyance of Real Property.** At common law a mere naked power of sale as distinguished from a power coupled with an interest could not be exercised by less than the entire number of executors named in the will.[22] This rule was modified by statute as to cases in which a portion of the executors refused to qualify and act,[23] and as so modified was adopted as a portion of the common law of the United States.[24] Accordingly, the general rule in the United States now is that a power of sale, unless expressly restricted, may be exercised by the representatives who qualify or survive,[25] and the same rule obtains

4. See supra § 909.

5. De Haven v. Williams, 80 Pa. 480, 21 AmR 107. See also Allen v. Louisiana Nat. Bank, 50 La. Ann. 366, 23 S 360 (this could not be done over the positive protest of a coexecutor); In re Toronto Bank, 8 OntWR 323, 325 (where three executors made the deposit, and the bank, having been notified by one executor not to pay out any moneys except on the order of all three, refused to pay out money on the order of two, and moved for an interpleader order, which was granted, the court saying: "If the parties are willing, the money can be retained by the bank as if it was in Court. Probably the three executors will be able to adjust their difficulties and to agree in the management of the estate without any further litigation").

6. Wilson v. Mason, 158 Ill. 304, 42 NE 134, 49 AmSR 162 [aff 57 Ill. A. 325]; Holcomb v. Coryell, 11 N. J. Eq. 476; Holcomb v. Holcomb, 11 N. J. Eq. 281.

7. See supra § 2817.

8. Fesmire v. Shannon, 143 Pa. 201, 22 A 898.

9. See Evidence § 486.

10. See supra § 2817.

11. Me.—Gilman v. Healy, 55 Me. 120.

Miss.—Gulledge v. Berry, 31 Miss. 346.

N. Y.—Peo. v. Miner, 37 Barb. 466, 23 HowPr 223; Murray v. Blatchford, 1 Wend. 583, 19 AmD 537; Wheeler v. Wheeler, 9 Cow. 34.

Pa.—Grace v. Sutton, 5 Watts 540.

Wis.—Weir v. Mosher, 19 Wis. 311.

Eng.—Smith v. Everett, 27 Beav. 446, 54 Reprint 175; Herbert v. Pigott, 2 Cromp. & M. 384, 149 Reprint 809.

12. Jordan v. Spiers, 113 N. C. 344, 18 SE 327; Mangrum v. Simms, 4 N. C. 160.

[a] **Effect of attempt.**—Since one of several administrators had no authority to compromise a judgment for damages and extend the time of payment, an agreement by him attempting to do so did not operate to discharge a surety on a bond given for the payment of such damages. Jordan v. Spiers, 113 N. C. 344, 18 SE 327.

[b] **Ratification** by one of two administrators of an agreement by the other administrator to compromise a claim due the estate is not shown where his only positive act was the repudiation thereof by a reply to a supplemental answer setting it up. Jordan v. Spiers, 113 N. C. 344, 18 SE 327.

13. See supra § 2817.

14. U. S.—Boudereau v. Montgomery, 3 F. Cas. No. 1,694, 4 Wash. C. C. 186.

Ind.—Herald v. Harper, 8 Blackf. 170.

Ky.—Bryan v. Thompson, 7 J. J. Marsh. 586.

Me.—Gilman v. Healy, 55 Me. 120; Shaw v. Berry, 35 Me. 279, 58 AmD 702.

N. J.—Shreve v. Joyce, 36 N. J. L. 44, 13 AmR 417.

N. Y.—Murray v. Blatchford, 1 Wend. 583, 19 AmD 537; Stuyvesant v. Hall, 2 Barb. Ch. 151.

N. C.—Hoke v. Fleming, 32 N. C. 263.

Pa.—Devling v. Little, 26 Pa. 502.

S. C.—Hyatt v. McBurney, 18 S. C. 199; Gage v. Johnson, 12 S. C. L. 492.

Wis.—Weir v. Mosher, 19 Wis. 311.

Eng.—Herbert v. Pigott, 2 Cromp. & M. 384, 149 Reprint 809; Jacomb v. Harwood, 2 Ves. 265, 28 Reprint 172 (either an executor or an administrator has this power). Compare Hudson v. Hudson, 1 Atk. 460, 26 Reprint 292 (an executor has such power but an administrator has not).

[a] **One representative may release a portion** of the premises included in a mortgage. Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151.

15. Peo. v. Miner, 37 Barb. (N. Y.) 466, 23 HowPr 223 [rev 32 Barb. 612]; Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 NYS 612 [aff 64 NYS 742 (aff 176 N. Y. 551 mem, 68 NE 1114 mem)]; Fesmire v. Shannon, 143 Pa. 201, 22 A 898; Garrett's Est., 23 Pa. Dist. 713; De Invilliers v. Abbott, 12 Phila. (Pa.) 462, 4 WklyNC 124.

16. Pearce v. Savage, 51 Me. 410.

17. Clark v. Gramling, 54 Ark. 525, 16 SW 475; Stuart v. Abbott, 9 Gratt. (50 Va.) 252. But see New York Mut. L. Ins. Co. v. Sturges, 33 N. J. Eq. 328 (a single executor intrusted with the active management of the estate may agree to postpone the lien of a mortgage held by the estate).

[a] **Note to all administrators jointly.**—One administrator cannot release the maker of a note payable to the administrators jointly for less than the amount due. Clark v. Gramling, 54 Ark. 525, 16 SW 475.

18. Gleason v. Lillie, 1 Aik. (Vt.) 28.

19. Lank v. Kinder, 4 Del. 457; McIntire v. Morris, 14 Wend. (N. Y.) 90; Grace v. Sutton, 5 Watts (Pa.) 540.

20. Hargthorpe v. Milforth, Cro. Eliz. 318, 78 Reprint 568; Simpson v. Guttridge, 1 Madd. 609, 56 Reprint 224; Lepard v. Vernon, 2 Ves. & B. 51, 35 Reprint 237.

21. N. Y.—Forsyth v. Ganson, 5 Wend. 558, 21 AmD 241; Hammon v. Huntley, 4 Cow. 493.

Pa.—Hall v. Boyd, 6 Pa. 267; Heisler v. Knipe, 1 Browne 319; Karl v. Black, 2 Pittsb. 19.

Vt.—Nason v. Smalley, 8 Vt. 118.

Eng.—Elwell v. Quash, 1 Str. 20, 93 Reprint 358; Lepard v. Vernon, 2 Ves. & B. 51, 35 Reprint 237.

Ont.—Commercial Bank v. Woodruff, 21 U. C. Q. B. 602.

[a] **Where a debt has become barred by limitations,** one representative cannot bind the others by confessing a judgment therefor. Hall v. Boyd, 6 Pa. 267.

22. Holcomb v. Coryell, 11 N. J. Eq. 476; Holcomb v. Holcomb, 11 N. J. Eq. 281; Sharpsteen v. Tillou, 3 Cow. (N. Y.) 651; Ferre v. American Bd. Comrs., 53 Vt. 162.

[a] **Where a testator authorized his executors or a majority of them to sell** and convey the land, a deed made by less than a majority did not pass the title at law. Carmichael v. Elmendorf, 4 Bibb. (Ky.) 484.

[b] **Where no appointment is made** by the will as to who is to execute a power of sale, a purchaser from the surviving executor acquires a good title, and such sale will be held valid. Lloyd v. Taylor, 1 Yeates (Pa.) 422, 2 Dall. 223, 1 L. ed. 357.

[c] **An executor who has renounced his office may unite** with another who has not done so in the execution of a joint discretionary trust. Robinson v. Redman, 2 Duv. (Ky.) 82.

23. St. 21 Hen. VIII c 4.

24. Clinefelter v. Ayres, 16 Ill. 329.

25. U. S.—Wilson v. Snow, 228 U. S. 217, 33 SCt 487, 57 L. ed. 807.

in Canada.[26] In some jurisdictions the renunciation of executors who fail to act must be formal and of record to enable the other executor to convey,[27] but in others it may be established as any other fact.[28] All who have qualified must join in conveying,[29] unless, as is sometimes the case, the statute permits a sale and conveyance to be made by less than the full number.[30] On the refusal of a coexecutor to join in a proper sale by his associate he may be compelled by the court to do so.[31] A contract of sale by less than the full number may be ratified by those who did not join therein.[32] A coexecutor may dispose of what personal interest he possesses in the estate without the consent of his associates.[33] A deed made by one administrator under order of court, and reciting payment of the purchase money, may be sufficient to convey an equitable title, although a coadministrator did not join therein.[34]

[§ 2832] 17. **Leases.** One executor[35] or administrator[36] may assign a lease. But a statutory requirement of majority action by corepresentatives

Ala.—Leavens v. Butler, 8 Port. 380.

Fla.—Stewart v. Mathews, 19 Fla. 752.

Ga.—Wolfe v. Hines, 93 Ga. 329, 20 SE 322.

Ill.—Wardwell v. McDowell, 31 Ill. 364; Pahlman v. Smith, 23 Ill. 448.

Ky.—Varble v. Collins, 168 Ky. 247, 181 SW 1115, AnnCas1916D 448; Ross v. Clore, 3 Dana 189; Muldrow v. Fox, 2 Dana 74; Anderson v. Turner, 3 A. K. Marsh. 131; Wooldridge v. Watkins, 3 Bibb. 349.

Mich.—Herrick v. Carpenter, 92 Mich. 440, 52 NW 747.

Miss.—Bartlett v. Sutherland, 24 Miss. 395; Bodley v. McKinney, 17 Miss. 339.

Mo.—Armor v. Frey, 253 Mo. 447, 450, 465, 161 SW 829 [quot Cyc]; Phillips v. Stewart, 59 Mo. 491.

N. J.—Rutherford Land, etc., Co. v. Sanntrock, (Ch.) 44 A 938; Weimer v. Fath, 43 N. J. L. 1; Corlies v. Little, 14 N. J. L. 373; Denton v. Clark, 36 N. J. Eq. 534.

N. M.—Smith v. Steen, 20 N. M. 436, 444, 150 P 927 [cit Cyc].

N. Y.—Striker v. Daly, 175 App. Div. 620, 162 NYS 527 [aff 223 N. Y. 468, 119 NE 882]; Heiferman v. Scholder, 134 App. Div. 579, 119 NYS 520; Correll v. Lauterbach, 12 App. Div. 531, 42 NYS 143 [aff 159 N. Y. 553 mem, 54 NE 1089 mem]; Meakings v. Cromwell, 4 N. Y. Super. 512, 8 NYLegObs 140 [aff 5 N. Y. 136]; Striker v. Mehrtens, 109 Misc. 220, 179 NYS 460 [aff 181 NYS 956 mem]; Roseboom v. Mosher, 2 Den. 61; Jackson v. Ferris, 15 Johns. 346; Bunner v. Storm, 1 Sandf. Ch. 357.

N. C.—Smith v. McCrary, 38 N. C. 204; Wood v. Sparks, 18 N. C. 389.

Oh.—Collier v. Grimesey, 36 Oh. St. 17; Taylor v. Galloway, 1 Oh. 232, 13 AmD 605.

Pa.—Heron v. Hoffner, 3 Rawle 393; Taylor v. Adams, 2 Serg. & R. 534, 7 AmD 665; Zebach v. Smith, 3 Binn. 69, 5 AmD 352.

R. I.—Wood v. Hammond, 16 R. I. 98, 17 A 324, 18 A 198.

S. C.—Jennings v. Teague, 14 S. C. 229; Uldrick v. Simpson, 1 S. C. 283; Chanet v. Villeponteaux, 14 S. C. L. 29; Britton v. Lewis, 29 S. C. Eq. 271.

Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 SW 1017; Fitzgerald v. Standish, 102 Tenn. 383, 52 SW 294; Robertson v. Gaines, 2 Humphr. 367.

Tex.—Johnson v. Bowden, 43 Tex. 670; McCown v. Terrell, 9 Tex. Civ. A. 66, 29 SW 484.

Va.—Shepherd v. Darling, 120 Va. 586, 91 SE 737; Davis v. Christian, 15 Gratt. (56 Va.) 11; Geddy v. Butler, 3 Munf. (17 Va.) 345.

[a] **A power coupled with an interest** may be exercised by a surviving executor. Wilson v. Snow, 228 U. S. 217, 33 SCt 487, 57 L. ed. 807 (so holding where the power to sell was coupled with the active and continuing duty of managing the property, making disposition thereof, and changing the investments for the benefit of the testator's family).

[b] **A discretionary power** (1) may be exercised by the representatives who qualify or survive. Houss v. Raymond, 3 Hun (N. Y.) 44, 5 Thomps. & C. 58; Davis v. Christian, 15 Gratt. (56 Va.) 11. (2) Contra Tarver v. Haines, 55 Ala. 503; Smith v. Moore, 6 Dana (Ky.) 417; Muldrow v. Fox, 2 Dana (Ky.) 74; Bartlett v. Sutherland, 24 Miss. 395.

[c] **Will requiring both to act.**—Where a testator appointed his wife executrix of his will and empowered her, "in conjunction" with his other executor, to sell the property in case of necessity, the widow could not exercise the power of sale after the death of the other executor. Dolan v. Brown, 81 N. J. Eq. 262, 86 A 935.

[d] **Will not restricting power.**—A provision in a will giving full power to the executors "and to a majority of them, and to a majority of the survivors of them," does not indicate an intention of the testator against allowing a sole executor who qualified to sell. Coykendall v. Rutherford, 2 N. J. Eq. 360.

[e] **A statute of a seceding state** attempting to authorize resident executors to convey without joinder of those resident in nonseceding states does not validate a sale made under its sanction. Lipse v. Spears, 88 Fed. 952.

26. In re Koch, 25 Ont. 262.

27. Clinefelter v. Ayres, 16 Ill. 329; Neel v. Beach, 92 Pa. 221; Heron v. Hoffner, 3 Rawle (Pa.) 393.

28. Roseboom v. Mosher, 2 Den. (N. Y.) 61; Wood v. Sparks, 18 N. C. 389; Robertson v. Gaines, 2 Humphr. (Tenn.) 367; Eskridge v. Patterson, 78 Tex. 417, 14 SW 1000.

[a] **A neglect to qualify is prima facie evidence** of refusal to act and will validate a sale by the acting executor. Robertson v. Gaines, 2 Humphr. (Tenn.) 367.

[b] **Formal renunciation need not be established.**—Wood v. Sparks, 18 N. C. 389.

[c] **A presumption of renunciation** by an executor may arise from acquiescence of heirs and lapse of time. Eskridge v. Patterson, 78 Tex. 417, 14 SW 1000.

29. Ga.—Daugharty v. Drawdy, 134 Ga. 650, 68 SE 472; Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359; Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 SE 439.

Ill.—Dingman v. Boyle, 285 Ill. 144, 120 NE 487 [rev 209 Ill. A. 311]; Wilson v. Mason, 158 Ill. 304, 42 NE 134, 49 AmSR 162 [aff 57 Ill. A. 325].

Ky.—Smith v. Shackleford, 9 Dana 452.

Mo.—Armor v. Frey, 253 Mo. 447, 161 SW 829.

N. J.—Holcomb v. Holcomb, 11 N. J. Eq. 281.

N. Y.—Marsh v. Consumers' Park Brewing Co., 220 N. Y. 205, 115 NE 513 [rev 162 App. Div. 256, 147 NYS 695]; Brown v. Doherty, 93 App. Div. 190, 87 NYS 563 [aff 185 N. Y. 383, 78 NE 147, 113 AmSR 915]; Mohn v. King, 41 App. Div. 611, 58 NYS 97.

N. C.—Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867; Wassom v. King, 19 N. C. 262.

Oh.—Fleischman v. Shoemaker, 2 Oh. Cir. Ct. 152, 1 Oh. Cir. Dec. 415.

Pa.—In re Simmons, 254 Pa. 231, 98 A 871; Kling v. Hummer, 2 Penr. & W. 349; Benezet v. Hess, 63 Pa. Super. 408.

Tex.—Hart v. Rust, 46 Tex. 556; Dean v. Furrh, 58 Tex. Civ. A. 495, 124 SW 431.

Va.—Nelson v. Carrington, 4 Munf. (18 Va.) 332, 6 AmD 519; McRae v. Farrow, 4 Hen. & M. (14 Va.) 444.

Eng.—Sneesby v. Thorne, 7 De G. M. & G. 399, 56 EngCh 309, 44 Reprint 156.

[a] **The rule applies, although** one executor has moved from the county of the administration to another county of the state and has ceased to participate actively in the management of the estate, such executor having neither resigned nor been removed. Glynn County Bd. of Education v. Day, 128 Ga. 156, 57 SE 359. To similar effect Weeks v. Hosch Lumber Co., 133 Ga. 472, 66 SE 168, 134 AmSR 213.

[b] **Mistake.**—A contract of sale of realty entered into by one executor under a mistaken belief that his coexecutor acquiesces therein will not be specifically enforced. Sneesby v. Thorne, 7 De G. M. & G. 399, 56 EngCh 309, 44 Reprint 156.

[c] **Executors who have qualified in a foreign state** need not join the sole resident qualified executor in a sale of realty within the state. Correll v. Lauterbach, 12 App. Div. 531, 42 NYS 143 [aff 159 N. Y. 553 mem, 54 NE 1089 mem].

[d] **A sale to executors themselves** over the dissent of a coexecutor cannot be sustained. Holcomb v. Holcomb, 11 N. J. Eq. 281.

30. Carroll v. Stewart, 38 S. C. L. 200; Stockdale v. McKown, 10 S. C. L. 41.

[a] **Requirement of majority.**—Under a statute making it lawful for the executors of a will "or the majority of such executors as shall qualify" in certain cases to sell and convey the lands of their testator, one of two executors cannot sell and convey. Carroll v. Stewart, 38 S. C. L. 200.

31. In re Simmons, 254 Pa. 231, 98 A 871; Love v. Love, 3 Hayw. (Tenn.) 13.

32. Nelson v. Carrington, 4 Munf. (18 Va.) 332, 6 AmD 519 (if a written agreement for a sale of land by executors is signed by the purchaser and one only of two acting executors the other may by his conduct so assent to the sale as to make it his own act, as by delivering possession and the like).

33. Hite v. Shrader, 3 Litt. (Ky.) 444; Ex p. Sheffield Union Banking Co., 13 L. T. Rep. N. S. 477.

[a] **Effect of conveyance.**—Where a power to convey either jointly or separately is conferred on the executor, a conveyance by one only, while operative to transfer his interest, does not transfer the interest of the others unless made in pursuance of the authority given by the will. Hite v. Shrader, 3 Litt. (Ky.) 444.

34. Harrison v. McMurray, 71 Tex. 122, 8 SW 612 (so holding but deciding the deed to be of importance only as establishing the boundaries of a tract to which title might be claimed by adverse possession).

35. Simpson v. Gutteridge, 1 Madd. 609, 56 Reprint 224.

36. Lewis v. Ringo, 3 A. K. Marsh. (Ky.) 247.

is applicable to their execution of a lease.[37]

[§ 2833] **18. Mortgage or Pledge—a. Personal Property.** The power of individual disposition of decedent's personalty empowers a representative to pledge the assets of the estate for the payment of its debts,[38] and although a pledge has been collusive, for the payment of the representative's individual obligation, yet, where the assets have passed to an innocent purchaser, they cannot be recovered from him without reimbursing him.[39]

[§ 2834] **b. Real Property.** A testamentary power to mortgage real estate must be exercised in pursuance of its terms;[40] but an executor may act individually with regard to his ultimate beneficial interest.[41]

[§ 2835] **19. Assent to Legacies.** One of several coexecutors may assent to legacies so as to bind the others.[42] Where an executrix was given, by the will, the right to decide whether or not conditions on which a legacy was to be paid had been complied with, the fact that she and her coexecutor wasted the estate did not disqualify her to determine that the legatee was entitled to receive the legacy, so that its payment might be enforced against her coexecutor.[43]

[§ 2836] **C. Liabilities—1. In General.** As a general rule the liability of an executor or administrator extends only to the assets actually received by him,[44] and he is not liable for the acts or omissions of his corepresentatives.[45] Accordingly a coexecutor or coadministrator who has not had possession of the assets of the estate, and who has not

Transfer or assignment of assets generally see supra § 2820.

37. Utah L. & T. Co. v. Garbutt, 6 Utah 342, 23 P 758 (under statutes requiring the majority action of coexecutors, and also requiring a written authority to authorize an agent to execute a lease for more than one year, such a lease cannot be executed by a single executor without a written authorization from his associates).

38. Wheeler v. Wheeler, 9 Cow. (N. Y.) 34 (one of several executors may assign a note belonging to the estate of the testator as collateral security for a judgment obtained against the estate, and his act will bind his coexecutors).

39. Bailie v. Kinchley, 52 Ga. 487; Wood's App., 92 Pa. 379, 37 AmR 694.

[a] **The rule applies, although** certificates of stock pledged showed on their face that title came from the executor. Wood's App., 92 Pa. 379, 37 AmR 694.

[b] **Authority "to sell, exchange, or otherwise dispose of** any portion or all of my estate," is broad enough to empower the executors to raise money by pledging notes of the estate to a reasonable amount as collateral security, and if such money is advanced to one executor in good faith, the other cannot, without repayment, maintain trover for the notes, although the money was not used for the benefit of the estate. Bailie v. Kinchley, 52 Ga. 487.

40. Port Gibson Bank v. Baugh, 17 Miss. 290 (where testator conferred a power to mortgage and also directed that the executors should exercise their powers jointly, an individual executor could not bind the estate by the execution of a note and mortgage).

41. Ex p. Sheffield Union Banking Co., 13 L. T. Rep. N. S. 477 (one of two executors who has a beneficial interest in property may create a good equitable mortgage of such interest by depositing the title deeds relating thereto and signing a memorandum of deposit, although he makes the deposit without the consent of his coexecutor).

42. State v. Bates, 38 S. C. 326, 17 SE 28; Cole v. Miles, 10 Hare 179, 44 EngCh 174, 68 Reprint 889.

43. Sternberg v. Wolf, (N. J. Ch.) 100 A 333.

44. U. S.—U. S. Bank v. Beverley, 1 How. 134, 11 L. ed. 75; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Hawaii.—Matter of Gill, 2 Hawaii 681.

Ky.—Grundy v. Drye, 104 Ky. 825, 48 SW 155, 49 SW 469, 20 KyL 970, 1337; Young v. Wickliffe, 7 Dana 447.

N. J.—Bechtold v. Read, (Ch.) 28 A 264; Young v. Schelly, (Ch.) 21 A 1049; Bellerjeau v. Kotts, 4 N. J. L. 415; King v. Foerster, 61 N. J. Eq. 584, 47 A 505.

N. Y.—Matter of Wagner, 132 App. Div. 306, 117 NYS 53; White v. Bullock, 20 Barb. 91 [rev on other grounds 4 Abb. Dec. 578, 15 HowPr 102].

N. C.—Brotten v. Bateman, 17 N. C. 115, 22 AmD 732.

Pa.—Ripple's Est., 9 Kulp 66.

S. C.—Gates v. Whetstone, 8 S. C. 244, 28 AmR 284.

Tenn.—Adams v. Gleaves, 10 Lea 367.

Can.—Darling v. Brown, 2 Can. S. C. 26, 21 LCJur 125.

Ont.—Boys' Home v. Lewis, 5 Ont WR 39.

Que.—Miller v. Coleman, 25 LCJur 196.

[a] **Where separate custody of assets is not established,** the representatives will be charged equally, as (1) where the accounts are kept so loosely that it cannot be determined in whose hands the particular assets are (Brotten v. Bateman, 17 N. C. 115, 22 AmD 732), or (2) where it does not appear how much of the purchase money each executor who joined in a conveyance received (Bechtold v. Read, (N. J. Ch.) 28 A 264).

[b] **A receipt given to a coexecutor** and certified by the ordinary for the whole estate of the testator is conclusive as between the executor and the legatees in the absence of fraud. Edmonds v. Crenshaw, 5 S. C. Eq. 224.

[c] **Question for jury.**—Whether or not one executor can be made liable for a devastavit committed by another depends upon facts which must be submitted to a jury, as to his exercise of executorial authority over the assets wasted, his aid in their acquisition or disposal, etc. Young v. Wickliffe, 7 Dana (Ky.) 447.

[d] **Under the Louisiana code** executors are liable jointly and severally for the property subject to the executorship. Doriocourt v. Jacobs, 1 La. Ann. 214; Baldwin v. Carleton, 11 Rob. (La.) 109. See also St. Andre v. Rachal, 3 La. Ann. 574 (administrators who qualify jointly and whose duties are not severed are liable in solido for the proceeds of property coming into their hands. Where one seeks to escape liability, he must show that the dilapidation of the funds received was not the result of his neglect of duty).

45. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Ala.—Knight v. Haynie, 74 Ala. 542; Hinson v. Williamson, 74 Ala. 180; Royall v. McKenzie, 25 Ala. 363; Taylor v. Roberts, 3 Ala. 83.

Del.—State v. Belin, 5 Del. 400; Conner v. McIlvaine, 4 Del. Ch. 30.

Ga.—Roberts v. Thomas, 32 Ga. 31; Kerr v. Waters, 19 Ga. 136; Hall v. Carter, 8 Ga. 388; Cameron v. Justices Richmond County Inferior Ct., 1 Ga. 36, 44 AmD 636.

Ind.—Davis v. Walford, 2 Ind. 88; Ray v. Doughty, 4 Blackf. 115; Call v. Ewing, 1 Blackf. 301.

Ky.—Walker v. Walker, 88 Ky. 615, 11 SW 718, 11 KyL 80; Young v. Wickliffe, 7 Dana 447; Roach v. Hubbard, Litt. Sel. Cas. 235; Lawrence v. Lawrence, Litt. Sel. Cas. 123; Heath v. Allin, 1 A. K. Marsh. 442; Moore v. Tandy, 3 Bibb. 97.

Md.—Latrobe v. Tiernan, 2 Md. Ch. 474.

Mass.—Ames v. Armstrong, 106 Mass. 15; Newcomb v. Williams, 9 Metc. 525; Brazier v. Clark, 5 Pick. 96.

Mich.—Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

Miss.—Fonte v. Horton, 36 Miss. 350; Gaultney v. Nolan, 33 Miss. 569; Noland v. Calvit, 20 Miss. 273.

N. J.—King v. Foerster, 61 N. J. Eq. 584, 47 A 505; Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; Tichenor v. Tichenor, 43 N. J. Eq. 163, 10 A 867 [aff 45 N. J. Eq. 303, 17 A 631]; English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem]; Duncan v. Davison, 40 N. J. Eq. 535, 5 A 93; Fisher v. Skillman, 18 N. J. Eq. 229; Fennimore v. Fennimore, 3 N. J. Eq. 292.

N. Y.—Farmers' L. & T. Co. v. Pendleton, 179 N. Y. 486, 72 NE 508 [rev 90 App. Div. 607 mem, 85 NYS 1130 mem (aff 37 Misc. 256, 75 NYS 294)]; In re Blauvelt, 131 N. Y. 249, 30 NE 194; Nanz v. Oakley, 120 N. Y. 84, 24 NE 306, 9 LRA 223; Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665 [rev 28 Hun 184]; Wood v. Brown, 34 N. Y. 337; Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Palmer v. Ward, 91 App. Div. 449, 86 NYS 990; Matter of Prevost, 87 App. Div. 86, 84 NYS 29; Matter of Hoagland, 79 App. Div. 56, 79 NYS 1080; Matter of Barrett, 58 App. Div. 45, 68 NYS 589; Matter of Adams, 51 App. Div. 619 mem, 64 NYS 591 [mod 30 Misc. 184, 61 NYS 751 and aff 166 N. Y. 623 mem, 59 NE 1118 mem]; Matter of Smith, 46 App. Div. 318, 61 NYS 716 [aff 166 N. Y. 620 mem, 59 NE 1130 mem]; White v. Bullock, 20 Barb. 91 [rev on other points 4 Abb. Dec. 578, 15 HowPr 102]; Mesick v. Mesick, 7 Barb. 120; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Matter of Johnson, 42 Misc. 651, 87 NYS 733, 4 Mills Surr. 211; Matter of Hunt, 38 Misc. 613, 78 NYS 105, 3 Mills Surr. 253 [rev on other grounds 88 App. Div. 52, 84 NYS 790]; In re Goetschius, 2 Misc. 278, 23 NYS 970, Pow. Surr. 371; Matter of Adams, 51 App. Div. 619 mem, 64 NYS 591 [mod 30 Misc. 184, 61 NYS 751]; Matter of Demarest, 9 NYS 292, 1 Conn. Surr. 200; Williams v. Holden, 4 Wend. 223; Manahan v. Gibbons, 19 Johns. 427; Douglas v. Satterlee, 11 Johns. 16; Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383; Monell v. Monell, 5 Johns. Ch. 283, 9 AmD 298; Banks v. Wilkes, 3 Sandf. Ch. 99; Matter of Demarest, 9 NYS 292, 1 Conn. Surr. 200; Lacey v. Davis, 5 Redf. Surr. 301.

N. C.—Kerr v. Kirkpatrick, 43 N. C. 137; Williams v. Maitland, 36 N. C. 92; Ochiltree v. Wright, 21 N. C. 336; Worth v. McAden, 21 N. C. 199; Brotten v. Bateman, 17 N. C. 115, 22 AmD 732; Clark v. Cotton, 17 N. C. 51.

Pa.—In re Starr, 190 Pa. 162, 42 A

concurred in or negligently permitted a devastavit by his associates, is not liable therefor.[46] The representative is of course liable for his own acts,[47] or those of his corepresentatives in which he concurs[48] or acquiesces,[49] or to which he assents.[50]

Admissions of liability for the acts of an associate are binding in the absence of any evidence showing that they were founded in mistake.[51]

[§ 2837] **2. As Dependent on Nature of Bond.** When representatives give a joint bond, they are responsible each for the acts of the other,[52] but this does not change the rule as to the accountability of the representatives in the first instance[53] or inter sese.[54]

530; Myer v. Myer, 187 Pa. 247, 41 A 24; Wilson's App., 115 Pa. 95, 9 A 473; Irwin's App., 35 Pa. 294; Stell's App., 10 Pa. 149; Hall v. Boyd, 6 Pa. 267; Boyd v. Boyd, 1 Watts 365; Buck's Est., 47 Pa. Super. 518; Graham's Est., 8 Pa. Dist. 479, 22 Pa. Co. 540; Mueller's Est., 8 Pa. Dist. 70 [aff 190 Pa. 601, 42 A 1021]; Ripple's Est., 9 Kulp 66, 112; Maffet's Est., 7 Kulp 153; Swift's Est., 6 North. Co. 105.

R. I.—Providence Municipal Ct. v. Whaley, 25 R. I. 289, 55 A 750, 105 AmSR 890, 63 LRA 235.

S. C.—Tompkins v. Tompkins, 18 S. C. 1; Anderson v. Earle, 9 S. C. 460; Gates v. Whetstone, 8 S. C. 244, 28 AmR 284; Bailey v. Boyce, 26 S. C. Eq. 187; Clarke v. Jenkins, 24 S. C. Eq. 318; Atcheson v. Robertson, 24 S. C. Eq. 132, 55 AmD 634; O'Neall v. Herbert, 16 S. C. Eq. 495; Gayden v. Gayden, 16 S. C. Eq. 435; Massey v. Cureton, 15 S. C. Eq. 181; Knox v. Picket, 4 S. C. Eq. 199; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

Tenn.—Hays v. Hays, 3 Tenn. Ch. 88. But compare Boring v. Jobe, (Ch. A.) 53 SW 763 (corepresentatives are jointly liable for a devastavit for one of them, although the one who receives the assets and is guilty is primarily liable).

Tex.—Eisenstadt Mfg. Co. v. Copeland, (Civ. A.) 149 SW 713.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Va.—McCormick v. Wright, 79 Va. 524; Boyd v. Boyd, 3 Gratt. (44 Va.) 113.

Wash.—In re Hagerty, 105 Wash. 547, 178 P 644.

W. Va.—Hart v. Hart, 31 W. Va. 688, 8 SE 562.

Eng.—In re Gasquoine, [1894] 1 Ch. 470; Fox v. Waters, 12 A. & E. 43, 40 ECL 32, 113 Reprint 727; Toplis v. Hurrell, 19 Beav. 423, 52 Reprint 414; Dix v. Burford, 19 Beav. 409, 52 Reprint 408; Williams v. Nixon, 2 Beav. 472, 17 EngCh 472, 48 Reprint 1264; Littlehales v. Gascoyne, 3 Bro. Ch. 73, 29 Reprint 416, 2 ERC 172; Nation v. Tozer, 1 C. M. & R. 172, 149 Reprint 1041; Hensloe's Case, 9 Coke 36b, 77 Reprint 784; Hargthorpe v. Milford, Cro. Eliz. 318, 78 Reprint 568; James v. Frearson, 1 Y. & C. 370, 20 EngCh 370, 62 Reprint 929.

Can.—Darling v. Brown, 2 Can. S. C. 26, 21 LCJur 125.

Ont.—Re Crowter, 10 Ont. 159; King v. Hilton, 29 Grant Ch. (U. C.) 381; Bacon v. Shier, 16 Grant Ch. (U. C.) 485.

Que.—Miller v. Coleman, 25 LCJur 196.

[a] **Misrepresentation.**—An executor is not personally liable for a misrepresentation made by his coexecutor in selling property of the estate. Heath v. Allin, 1 A. K. Marsh. (Ky.) 442.

[b] **Executors who are also trustees.**—The rule stated in the text applies where the trustees are also executors. Ormiston v. Olcott, 84 N. Y. 339 [rev 22 Hun 270, and overr Bates v. Underhill, 3 Redf. Surr. (N. Y.) 365].

[c] **The fact that an executor is also a legatee** does not impose on him any liability for negligence of his coexecutor in which he did not concur. Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

46. U. S.—U. S. Bank v. Beverley, 1 How. 134, 11 L. ed. 75; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Ala.—Fleming v. Walker, 152 Ala. 386, 44 S 536, 126 AmSR 46; Langley v. Langley, 121 Ala. 70, 25 S 707; Turner v. Wilkins, 56 Ala. 173.

Del.—State v. Belin, 5 Del. 400.

Ga.—Kerr v. Waters, 19 Ga. 136; Hall v. Carter, 8 Ga. 388; Cameron v. Justices Richmond County Inferior Ct., 1 Ga. 36, 44 AmD 636.

Ind.—Davis v. Walford, 2 Ind. 88.

Ky.—Grundy v. Drye, 104 Ky. 825, 48 SW 155, 49 SW 469, 20 KyL 970, 1337; Roach v. Hubbard, Litt. Sel. Cas. 235; Lawrence v. Lawrence, Litt. Sel. Cas. 123; Moore v. Tandy, 3 Bibb 97.

N. J.—Van Pelt v. Veghte, 14 N. J. L. 207; Fennimore v. Fennimore, 2 N. J. Eq. 292.

N. Y.—Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665 [rev 28 Hun 184]; Croft v. Williams, 88 N. Y. 384; Matter of Hoagland, 79 App. Div. 56, 79 NYS 1080; Matter of Peck, 31 App. Div. 407, 52 NYS 1028 [app dism 161 N. Y. 655 mem, 57 NE 1119 mem]; Meldon v. Devlin, 31 App. Div. 146, 53 NYS 172 [aff 167 N. Y. 573 mem, 60 NE 1116 mem]; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Matter of Hunt, 38 Misc. 613, 78 NYS 105, 3 Mills Surr. 253 [rev on other grounds 88 App. Div. 52, 84 NYS 790]; Matter of Hall, 14 NYSt 540; Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383; Matter of Hall, 5 Dem. Surr. 42 [aff 14 NYSt 540]; Cocks v. Barlow, 5 Redf. Surr. 406.

N. C.—Kerr v. Kirkpatrick, 43 N. C. 137; Williams v. Maitland, 36 N. C. 92; Worth v. McAden, 21 N. C. 199; Clarke v. Cotton, 17 N. C. 51.

Pa.—Bickley's Est., 13 Pa. Dist. 323; Sinkler's Est., 10 Pa. Dist. 399, 25 Pa. Co. 417; Graham's Est., 8 Pa. Dist. 479, 22 Pa. Co. 540.

S. C.—Anderson v. Earle, 9 S. C. 460; Gates v. Whetstone, 8 S. C. 244, 28 AmR 284; Clarke v. Jenkins, 24 S. C. Eq. 318; Atcheson v. Robertson, 24 S. C. Eq. 132, 55 AmD 634; O'Neall v. Herbert, 16 S. C. Eq. 495; Knox v. Picket, 4 S. C. Eq. 92; Lenoir v. Winn, 4 S. C. Eq. 65, 6 AmD 597.

Tenn.—Fulton v. Davidson, 3 Heisk. 614.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Va.—Boyd v. Boyd, 3 Gratt (44 Va.) 113; Myrick v. Adams, 4 Munf. (18 Va.) 366.

Wash.—In re Hagerty, 105 Wash. 547, 178 P 644.

Eng.—Lowe v. Shields, [1902] 1 Ir. 320; Littlehales v. Gascoyne, 3 Bro. Ch. 73, 29 Reprint 416, 2 ERC 172; Hargthorpe v. Milforth, Cro. Eliz. 318, 78 Reprint 568.

[a] **Rule applies although delinquent representative a minor.**—Ray v. Doughty, 4 Blackf. (Ind.) 115.

47. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402.

Cal.—In re Sanderson, 2 Cal. Unrep. Cas. 750, 13 P 497; Abila v. Burnett, 33 Cal. 658.

Ill.—Crain v. Kennedy, 85 Ill. 340.

Ind.—Call v. Ewing, 1 Blackf. 301.

Ky.—McCampbell v. Gilbert, 6 J. J. Marsh. 592.

N. J.—Van Pelt v. Veghte, 14 N. J. L. 207.

N. Y.—Matter of Wagner, 132 App. Div. 306, 117 NYS 63; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Williams v. Holden, 4 Wend. 223; Douglas v. Satterlee, 11 Johns. 16.

Va.—Templeman v. Fauntleroy, 3 Rand. (24 Va.) 434.

Que.—Hoffman v. Pfeiffer, 7 Que. L. 125.

48. Mass.—Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

N. J.—Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085.

N. Y.—Bruen v. Gillet, 115 N. Y. 10, 21 NE 676, 12 AmSR 764, 4 LRA 529; Croft v. Williams, 88 N. Y. 384; Adair v. Brimmer, 74 N. Y. 539; Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

N. C.—Hauser v. Lehman, 37 N. C. 594; Brotten v. Bateman, 17 N. C. 115, 22 AmD 732.

Pa.—In re Irvine, 203 Pa. 602, 53 A 502; Geiger's App., 1 Mon. 547, 16 A 851; Auer's Est., 14 Pa. Dist. 273, 31 Pa. Co. 77.

S. C.—Williams v. Mower, 29 S. C. 332, 7 SE 505; Atcheson v. Robertson, 24 S. C. Eq. 132, 55 AmD 634; Mathews v. Mathews, 16 S. C. Eq. 410; Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72; Waring v. Purcell, 10 S. C. Eq. 193.

Tenn.—Hughlett v. Hughlett, 5 Humphr. 453; Deaderick v. Cantrell, 10 Yerg. 263, 31 AmD 576.

Wash.—In re Hagerty, 105 Wash. 547, 178 P 644.

[a] **Facts showing concurrence.**—Where executors expended funds of the estate in securing purchasers for city lots belonging to the estate and advancing money to the purchasers for building purposes, and the mortgages which were taken to secure the price and advances ran to one of the executors, and it was understood between them that when the executor named as mortgagee should qualify as testamentary trustee he was to receive the mortgages as part of the trust fund, and both the executors had joined in making drafts and checks used in the transaction, and when the securities were turned over to the trustee by the executors the mortgages were treated as having been in their hands as executors, there was no merit in a contention that the investments in question were made by the executor to whom the mortgages ran, and not by both the executors as such. Brigham v. Morgan, 185 Mass. 27, 69 NE 418.

[b] **Where coexecutors joined in a sale** of the land of the testator and the proceeds thereof came to the hands of one with the assent of the other and they joined in a settlement with the purchaser they were equally liable to legatees, etc., for the price of the land. Hauser v. Lehman, 37 N. C. 594.

[c] **Signing of joint checks** may impose liability. Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

[d] **Accounts kept in the joint names of executors** will not impose liability on all in the absence of evidence of concurrence in the receipts or payments of the active executor. Clarke v. Jenkins, 24 S. C. Eq. 318.

49. U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod 221 Ill. 581, 77 NE 1108]; Sovereign v. Sovereign, 15 Grant Ch. (U. C.) 559.

50. Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

51. Jeffries v. Lawson, 39 Miss. 791.

52. See supra § 2538.

[a] **A devastavit must have been established.** — Cameron v. Justices Richmond County Inferior Ct., 1 Ga. 36, 44 AmD 636.

53. O'Neall v. Herbert, 16 S. C. Eq. 495; Gayden v. Gayden, 16 S. C. Eq. 435; Wilks v. Davis, 9 S. C. Eq. 390.

54. Slaughter v. Froman, 5 T. B. Mon. (Ky.) 19, 17 AmD 33; McDivitt v. McDivitt, 4 Watts (Pa.) 384.

[§ 2838] **3. Putting Associate in Possession of Assets.** An executor or administrator who, having assets of the estate in his hand, turns the same over to his corepresentative,[55] or who by his own acts enables his corepresentative to obtain possession of the assets of the estate,[56] is liable for the misapplication of such assets by his corepresentative, although he may have acted in good faith,[57] unless there was a good and sufficient reason for his acts,[58] or the will authorized the associate to take exclusive possession of the assets,[59] or provided that no liability should attach because of payments by an executor to a coexecutor.[60] It has been held that creditors only, and not legatees, can hold an executor liable for surrendering assets to his associate,[61] but there is also authority for the view that there is no distinction between the liability to creditors and the liability to legatees arising out of such surrender.[62]

[§ 2839] **4. Permitting Possession of Assets by**

[a] **An administrator cannot maintain an action against his coadministrator** on a bond by which they are jointly and severally bound. McDivitt v. McDivitt, 4 Watts (Pa.) 384.

[b] **Distributive share of representative.**—The sureties of a widow administratrix and her coadministrator are not liable for her distributive share of the chattels collected and converted by her coadministrator, but the latter alone is liable to her. Slaughter v. Froman, 5 T. B. Mon. (Ky.) 19, 17 AmD 33.

55. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402.

Cal.—Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264; Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086.

Hawaii.—Matter of Gill, 2 Hawaii 681.

N. Y.—In re Niles, 113 N. Y. 547, 21 NE 687; Adair v. Brimmer, 74 N. Y. 539; Matter of Hunt, 88 App. Div. 52, 84 NYS 790 [rev 38 Misc. 613, 78 NYS 105]; Thompson v. Hicks, 1 App. Div. 275, 37 NYS 340; Mesick v. Mesick, 7 Barb. 120; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Matter of Johnson, 42 Misc. 651, 87 NYS 733, 4 Mills Surr. 211; In re Brown, 16 AbbPrNS 457; Dixon v. Storm, 5 Redf. Surr. 419.

Pa.—Sterrett's App., 2 Penr. & W. 419; Power's Est., 15 Phila. 539.

S. C.—Johnson v. Johnson, 11 S. C. Eq. 277, 29 AmD 72.

Tenn.—Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

Vt.—Sparhawk v. Buell, 9 Vt. 41.

Eng.—Candler v. Tillett, 22 Beav. 257, 52 Reprint 1106; Townsend v. Barber, Dick. 356, 21 Reprint 307; Lees v. Sanderson, 4 Sim. 28, 6 Eng Ch 28, 58 Reprint 12.

Newfoundl.—Dearin v. Kough, 6 Newfoundl. 154.

[a] **Sufficiency of delivery to impose liability.**—(1) Under a statute providing that an executor shall not be charged with moneys receipted for by his coexecutor, unless shown to have come into his hands, where two executors went together to a bank and caused the decedent's deposit to be equally divided, and one half credited to one and the other half to the other, and neither afterward had possession of the other's half, one was not liable for the other's defalcation. Nettman v. Schramm, 23 Iowa 521 (court equally divided). (2) It is sufficient to impose liability that an executor to whom a bag of coin was handed in the presence of his associates should hand it to a coexecutor. Langford v. Gascoyne, 11 Ves. Jr. 333, 32 Reprint 1116.

[b] **Division of assets** consisting of bonds, notes, and accounts for the purpose of collecting and disbursement will not impose joint liability. Kerr v. Kirkpatrick, 43 N. C. 137.

[c] **Merely formal acts,** such as the indorsement to an associate of negotiable instruments payable to the representatives jointly, will not impose liability. Paulding v. Sharkey, 88 N. Y. 432 [aff 21 Hun 276]; Palmer v. Ward, 91 App. Div. 449, 86 NYS 990; Matter of Provost, 87 App. Div. 86, 84 NYS 29; Hovey v. Blakeman, 4 Ves. Jr. 596, 31 Reprint 306.

56. U. S.—Edmonds v. Crenshaw, 14 Pet. 166, 10 L. ed. 402; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Ala.—Knight v. Haynie, 74 Ala. 542.

Ga.—Whiddon v. Williams, 98 Ga. 310, 24 SE 437; Head v. Bridges, 67 Ga. 227; Hall v. Carter, 8 Ga. 388.

Ind.—Ray v. Doughty, 4 Blackf. 115.

Ky.—Grundy v. Drye, 104 Ky. 825, 48 SW 155, 49 SW 469, 20 KyL 970, 1337.

Md.—Wayman v. Jones, 4 Md. Ch. 500.

Miss.—Gaultney v. Nolan, 33 Miss. 569.

N. J.—Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem]; Fisher v. Skillman, 18 N. J. Eq. 229; Schenck v. Schenck, 16 N. J. Eq. 174.

N. Y.—Matter of Deyo, 102 N. Y. 724, 7 NE 819; Croft v. Williams, 88 N. Y. 384 [mod 23 Hun 102]; Adair v. Brimmer, 74 N. Y. 539; Matter of Provost, 87 App. Div. 86, 84 NYS 29; Meldon v. Devlin, 31 App. Div. 146, 53 NYS 172 [aff 167 N. Y. 573 mem, 60 NE 1116 mem]; In re Storm, 28 Hun 499; Mesick v. Mesick, 7 Barb. 120; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Matter of Johnson, 42 Misc. 651, 87 NYS 733, 4 Mills Surr. 211; Douglass v. Satterlee, 11 Johns. 16; Clark v. Clark, 8 Paige 153, 35 AmD 676; Sutherland v. Brush, 7 Johns. Ch. 17, 11 AmD 383; Monell v. Monell, 5 Johns. Ch. 283, 9 AmD 298; Wyckoff v. Van Siclen, 3 Dem. Surr. 75; Dixon v. Storm, 5 Redf. Surr. 419; Lacey v. Davis, 5 Redf. Surr. 301.

N. C.—Williams v. Maitland, 36 N. C. 92.

Pa.—Bickley's Est., 13 Pa. Dist. 323; Matter of Evans, 2 Ashm. 470.

S. C.—Gates v. Whetstone, 8 S. C. 244, 28 AmR 284.

Tenn.—Deaderick v. Cantrell, 10 Yerg. 263, 31 AmD 576.

Eng.—Lowe v. Shields, [1902] 1 Ir. R. 320; Stearns v. Mills, 4 B. & Ad. 657, 24 ECL 289, 110 Reprint 603; Cowell v. Catcombe, 27 Beav. 568, 54 Reprint 225; Gibbins v. Taylor, 22 Beav. 344, 52 Reprint 1140; Candler v. Tillett, 22 Beav. 257, 52 Reprint 1106; Williams v. Nixon, 2 Beav. 472, 17 EngCh 472, 48 Reprint 1264; Sadler v. Hobbs, 2 Bro. Ch. 114, 28 Reprint 66; Townsend v. Barber, 1 Dick. 356, 21 Reprint 307; Lander v. Weston, 3 Drew. 389, 61 Reprint 951; Garner v. Moore, 3 Drew. 277, 61 Reprint 909; Crosse v. Smith, 7 East 246, 103 Reprint 94; Selby v. Bowie, 4 Gifford 300, 66 Reprint 720; Phillipson v. Gatty, 7 Hare 516, 27 EngCh 516, 68 Reprint 213; Mendes v. Guedalla, 2 Johns & H. 259, 70 Reprint 1054; Riky v. Kemmis, Ll. & G. t. S. 101, 11 EngCh 99; Terrell v. Matthews, 1 Macn. & G. 434 note, 47 EngCh 348, 41 Reprint 1333; Macpherson v. Macpherson, 1 Macq. 243; Underwood v. Stevens, 1 Meriv. 712, 35 Reprint 833; Aplyn v. Brewer, Prec. Ch. 173, 24 Reprint 84; Doyle v. Blake, 2 Sch. & Lef. 229; Langford v. Gascoyne, 11 Ves. 335, 32 Reprint 1116; Brice v. Stokes, 11 Ves. Jr. 319, 32 Reprint 1111; Shipbrook v. Hinchinbrook, 11 Ves. Jr. 252, 32 Reprint 1085, 16 Ves. Jr. 477, 33 Reprint 1066; Chambers v. Minchin, 7 Ves. Jr. 186, 32 Reprint 76; Broadhurst v. Balguy, 1 Y. & C. 16, 20 EngCh 15, 62 Reprint 771.

Ont.—McCarter v. McCarter, 7 Ont. 243.

57. In re Storm, 28 Hun (N. Y.) 499; Croft v. Williams, 23 Hun 102 [mod on other grounds 88 N. Y. 384]; Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Sterrett's App., 2 Penr. & W. (Pa.) 419; Langford v. Gascoyne, 11 Ves. Jr. 333, 32 Reprint 1116.

58. Cal.—Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264.

Ga.—Mosley v. Floyd, 31 Ga. 564.

N. J.—King v. Foerster, 61 N. J. Eq. 584, 47 A 505.

N. Y.—Paulding v. Sharkey, 88 N. Y. 432 [aff 21 Hun 276].

Pa.—Sterrett's App., 2 Penr. & W. 419.

Eng.—In re Gasquoine, [1894] 1 Ch. 470.

[a] **Illustration.**—One executor is safe in joining in the sale of stock or other property and permitting another executor to receive the proceeds if the sale was necessary for the payment of debts or legacies. Paulding v. Sharkey, 88 N. Y. 432 [aff 21 Hun 276]; Hovey v. Blakeman, 4 Ves. Jr. 596, 31 Reprint 306; Terrell v. Matthews, 1 Macn. & G. 434 note, 47 EngCh 348, 41 Reprint 1333.

[b] **Representative not assuming to act.**—If the representative sought to be charged had not undertaken any of the duties or assumed any of the powers of the office, he is not liable for assets delivered to the acting representative. King v. Foerster, 61 N. J. Eq. 584, 47 A 505; Matter of Hoagland, 79 App. Div. 56, 79 NYS 1080; Matter of Hunt, 38 Misc. 613, 78 NYS 105, 3 Mills Surr. 253 [rev on other grounds 88 App. Div. 52, 84 NYS 790; Balchen v. Scott, 2 Ves. Jr. 678, 30 Reprint 838].

[c] **Inability to act** by reason of sickness, imprisonment, etc., is a circumstance which will render it not only appropriate, but necessary, to make a tranfer of the assets of an estate by an executor to his coexecutor in good circumstances and credit. Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264; Hine v. Hine, 118 App. Div. 585, 103 NYS 535; Sterrett's App., 2 Penr. & W. (Pa.) 419.

[d] **Payment of individual debt to corepresentative.**—An executor who purchases a farm originally belonging to the estate, and who pays his coexecutor the balance of the purchase price still due on the estate, is not liable for his coexecutor's misappropriation of the payments, it appearing that when he made the payments the executor had no reason to suspect his coexecutor's honesty or financial responsibility. Matter of Demarest, 9 NYS 292, 1 Conn. Surr. 200. To same effect Mosley v. Floyd, 31 Ga. 564.

59. Van Pelt v. Veghte, 14 N. J. L. 207. But compare Newcomb v. Williams, 9 Metc. (Mass.) 525 (where the estate passed into the joint possession of both executors, and they rendered a joint account, but the residue of the estate, after the payment of debts, remained in the hands of one of them, they remained jointly liable, although the will provided that the executor by whom the residue was retined should take immediate possession of the estate as trustee for the legatees).

60. Wilkins v. Hogg, 3 Giffard 116, 66 Reprint 346 [foll Pass v. Dundas, 43 L. T. Rep. N. S. 655].

61. In re Verner, 6 Watts (Pa.) 250; Brown's App., 1 Dall. (Pa.) 311, 1 L. ed. 152.

62. Johnson v. Johnson, 11 S. C.

Associate. A wrong done or a duty omitted by the person sought to be charged must lie at the foundation of liability of one representative for the acts or omissions of his associate.[63] It follows that a passive acquiescence in the possession of assets by an associate will not impose liability for his misapplication,[64] unless the corepresentative had reason to suspect that it would occur [65] or was negligent in failing to discover it.[66] But where assets are actually in joint control or possession, one of the corepresentatives cannot avoid responsibility for their proper application by turning them over to the sole control of the other,[67] unless the latter is entitled to possession as distributee or trustee.[68] In no event can one executor or administrator be under any liability with respect to assets received by his associate in some capacity other than that of executor or administrator.[69]

[§ 2840] **5. Permitting Breach of Trust by Associate.** Although in general one executor or administrator is not bound to exercise supervision over another,[70] he must use vigilance to protect the funds if the circumstances are such as to create a doubt as to their safety,[71] and he is responsible for a loss resulting from the waste or maladministration of his corepresentative where he could have prevented it, and by his negligence failed to do so.[72] It has been held to be no excuse that he was apparently justified in relying on the integrity of his associate,[73] even although the testator induced the reposal of confidence.[74]

[§ 2841] **6. Insolvency of Corepresentative.** The insolvency of an associate does not impose liability on an executor who has not had possession of the assets,[75] unless, after discovery of the insolvency or danger thereof, he has permitted the associate to retain the fund.[76]

[§ 2842] **7. Effect of Joint Receipt.** The rule at common law was that, where executors or administrators gave a joint receipt for money, all

Eq. 277, 29 AmD 72.

63. Walker v. Walker, 88 Ky. 615, 11 SW 718, 11 KyL 80; MacDonald v. Hanna, 100 Mich. 412, 59 NW 171; Croft v. Williams, 88 N. Y. 384; Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Matter of Demarest, 9 NYS 292, 1 Conn. Surr. 200.

[a] **An executor who took no part in the administration** of the estate and who by the will was not to do so unless the testator's widow (the executrix) remarried, was not liable for a misappropriation of its funds by her and was not bound on her remarriage to demand from her the administration of the trust. MacDonald v. Hanna, 100 Mich. 412, 58 NW 171.

[b] **Where the will intrusted the greater portion of the assets to one executor,** he being required to carry on decedent's business, his coexecutors were not liable for losses occasioned by his mismanagement where they were guilty of no fraud, and had no reason to believe that he was wasting or misappropriating the assets. Walker v. Walker, 88 Ky. 615, 11 SW 718, 11 KyL 80.

64. N. J.—English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem].

N. Y.—Cocks v. Haviland, 124 N. Y. 426, 26 NE 976 [dist Earle v. Earle, 93 N. Y. 104]; Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665; Remington v. Walker, 99 N. Y. 626, 1 NE 305; Croft v. Williams, 88 N. Y. 384 [mod 23 Hun 102]; Matter of Provost, 87 App. Div. 86, 84 NYS 29; Matter of Hoagland, 79 App. Div. 56, 79 NYS 1080; Matter of Johnson, 42 Misc. 651, 87 NYS 733, 4 Mills Surr. 211; Wright v. Dugan, 15 AbbNCas 107; Matter of Cocks, 9 NYS 462, 1 Conn. Surr. 347; Taylor v. Shuit, 4 Dem. Surr. 528.

N. C.—Worth v. McAden, 21 N. C. 199.

Pa.—Sterrett's App., 2 Penr. & W. 419.

Tenn.—Latham v. Blakemore, 4 Heisk. 276.

Eng.—Stearn v. Mills, 4 B. & Ad. 657, 24 ECL 289, 110 Reprint 603; Langford v. Gascoyne, 11 Ves. Jr. 333, 32 Reprint 1116.

Ont.—Re Crowter, 10 Ont. 159.

[a] **Illustration.** — An executor who does not know that the assets received by his coexecutor are not applied acording to the trusts of the will or in a due course of administration is not liable for waste or misapplication when he had reason to believe that the heirs acquiesced in his decision not to act in the settlement of the estate. English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem].

65. Cocks v. Haviland, 124 N. Y. 426, 26 NE 976 [rev 57 Hun 592 mem, 9 NYS 872 mem]; Matter of Hoagland, 79 App. Div. 56, 79 NYS 1080; Matter of Johnson, 42 Misc. 651, 87 NYS 733, 4 Mills Surr. 211; Myer v. Myer, 187 Pa. 247, 41 A 24; Irwin's App., 35 Pa. 294; Sterrett's App., 2 Penr. & W. (Pa.) 419; Robinson's Est., 7 Phila. (Pa.) 61.

66. Matter of Adams, 51 App. Div. 619 mem, 64 NYS 591 mem [mod 30 Misc. 184, 61 NYS 751, and aff 166 N. Y. 623 mem, 59 NE 1118 mem]; Matter of Hunt, 38 Misc. 613, 78 NYS 105, 3 Mills Surr. 253 [rev on other grounds 88 App. Div. 52, 84 NYS 790].

67. See supra § 2838.

68. Heppenstall's Est., 144 Pa. 259, 22 A 860; Anderson v. Earle, 9 S. C. 460.

69. Young v. Wickliffe, 7 Dana (Ky.) 447; Carlile's App., 38 Pa. 259; Scholey v. Walton, 12 M. & W. 510, 152 Reprint 1299; Percy v. Norman, 4 Newfoundl. 360.

[a] **Illustration.**—Where a testator directed the sale of his land, and one third of the proceeds to be invested, the interest to be paid to his widow, or to his executors for her use, the receipt of such interest by the executors raised a personal liability to the widow, and the executor receiving the interest was alone liable. Geddis v. Irvine, 5 Pa. 508.

[b] **Receipt as agent of heir or legatee.**—If one of a number of executors after paying an heir or legatee his share or legacy becomes his agent or bailee, and receives the share or legacy so paid to hold for any purpose, the estate of his testator is discharged, and his coexecutors are not liable for his embezzlement or other default. Soley's Est., 11 Phila. (Pa.) 144. To same effect Percy v. Norman, 4 Newfoundl. 360.

70. Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Matter of Hall, 14 NYSt 540; Kerr v. Kirkpatrick, 43 N. C. 137.

71. Earle v. Earle, 93 N. Y. 104.

[a] **Illustrations.**—(1) An executor would be liable for a loss resulting from the use of funds of the estate in business by his coexecutor even though he had not actual knowledge of such use, where he could have ascertained the fact by making due inquiries. Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665 [rev 28 Hun 184]. (2) A business man familiar with the values of property and accustomed to making investments is not justified in leaving the entire management of the estate in the hands of his coexecutrix without supervision or inquiry, she being a woman unacquainted with business and whose time is occupied with domestic duties. Earle v. Earle, 93 N. Y. 104.

[b] **Delay in failing to compel investment** by a corepresentative to whom funds have been delivered until after judicial proceedings, and with knowledge of the irresponsibility of the associate, will impose liability. Thompson v. Hicks, 1 App. Div. 275, 37 NYS 340.

72. Cal.—Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264; Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086.

Ga.—Whiddon v. Williams, 98 Ga. 310, 24 SE 437; Head v. Bridges, 67 Ga. 227.

Hawaii.—Matter of Gill, 2 Hawaii 681.

Ill.—U. S. Rubber Co. v. Peterman, 119 Ill. A. 610 [mod on other grounds 221 Ill. 581, 77 NE 1108].

Kan.—Insley v. Shire, 54 Kan. 793, 39 P 713, 45 AmSR 308.

Mich.—Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296.

Miss.—Gaultney v. Nolan, 33 Miss. 569.

N. J.—In re Ramsey, (Prerog.) 66 A 410; English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem]; Smith v. Pettigrew, 34 N. J. Eq. 216; Fisher v. Skillman, 18 N. J. Eq. 229.

N. Y.—In re Niles, 113 N. Y. 547, 21 NE 687; Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665 [rev 28 Hun 184]; Earle v. Earle, 93 N. Y. 104; Croft v. Williams, 88 N. Y. 384; Adair v. Brimmer, 74 N. Y. 539; Matter of Wagner, 132 App. Div. 306, 117 NYS 53; Matter of Peck, 31 App. Div. 407, 52 NYS 1028 [app dism 161 N. Y. 655 mem, 57 NE 1119 mem]; Cocks v. Haviland, 57 Hun 592, 9 NYS 872; In re Brown, 16 AbbPrNS 457; Johnson v. Corbett, 11 Paige 265; Clark v. Clark, 8 Paige 152, 35 AmD 676; Lacey v. Davis, 5 Redf. Surr. 301; Matter of Macdonald, 4 Redf. Surr. 321.

N. C.—Worth v. McAden, 21 N. C. 199.

Pa.—Bickley's Est., 13 Pa. Dist. 323; Cressman's Est., 2 Phila. 76.

Eng.—Williams v. Nixon, 2 Beav. 472, 17 EngCh 472, 48 Reprint 1264.

73. Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086; Cheever v. Ellis, 144 Mich. 477, 108 NW 390, 11 LRANS 296; Bates v. Underhill, 3 Redf. Surr. (N. Y.) 365.

74. Dover v. Denne, 3 Ont. L. 664. To same effect Cressman's Est., 2 Phila. (Pa.) 76.

75. Brown's App., 1 Dall. (U. S.) 311, 1 L. ed. 152; Clarke v. Cotton, 17 N. C. 51; Churchill v. Hobson, 1 P. Wms. 241, 24 Reprint 370.

76. Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264; Smith v. Pettigrew, 34 N. J. Eq. 216.

were answerable therefor, even though as a matter of fact only one received it, the joint receipt being held conclusive of joint liability.[77] But the present rule is that a joint receipt is only a prima facie evidence of joint possession and any of the representatives joining therein may avoid liability by showing that he joined merely as a matter of form and that the money was never actually in his possession or under his control.[78] Even the early cases made a distinction between creditors and legatees, holding coexecutors uniting in a receipt liable only to the former.[79]

[§ 2843] **8. Effect of Joint Inventory.** A joint inventory obligatory upon all the executors does not of itself show assets in the hands of either of the executors so as to charge them, without more;[80] nor does it prove a joint possession of the evidences of debt due to decedent, but leaves the actual possession in the one or the other, or in both, open to proof.[81]

[§ 2844] **9. Effect of Release of Corepresentative.** The persons solely interested in the acts of the representatives may of course release their liability,[82] but since the duties of corepresentatives with regard to the estate impose a several liability, a discharge of one will not release the rest.[83]

[§ 2845] **10. Contracts—a. In General.** An executor or administrator is individually liable on contracts made by him without his associates,[84] and one of two executors is not made personally liable by the promise of the other executor, unless in case of a devastavit.[85]

[§ 2846] **b. Services.** Joint contracts for services impose joint personal liability.[86]

[§ 2847] **11. Deposits.** A representative who deposits funds in a bank of which his associate is president, and which is at the time in good standing, is not liable where it fails before certain distributees have cashed checks made payable to them, although they have had opportunity to do so.[87] Failure to examine the bank account of the acting executor for two years is not in itself culpable negligence.[87½]

[§ 2848] **12. Investments.** Where one representative knows or has the means of knowing of irregular investments by an associate, he is liable therefor in the absence of fraud or misrepresentation of his associate with knowledge of which he is not chargeable;[88] and where, instead of investing a fund as directed by the will, the executors divided between themselves without security, each is liable for a loss of any part of the bond.[89] So also where executors who are charged with the duty to invest a fund in order to secure an annuity pay the fund to one of their number and make no effort to seek an investment, all are liable for a loss thereof.[90] Where the executors cannot agree as to investments directed to be made by the will, they should apply to the proper court for instructions within a reasonable time.[91] Where an executor has been intrusted with the entire charge of an investment, his coexecutors cannot hold an instrument taken by him, either on his private account or in his representative capacity, free from the taint of usurious interest which he has reserved to himself.[92]

[§ 2849] **13. Loans.** A representative is not responsible for a loan made by his associates without his knowledge where he is not shown to have been negligent with relation thereto.[93]

[§ 2850] **14. Fraud.** Fraud by an associate with which the representative is not connected and which

77. Leigh v. Barry, Ambl. 219 note, 27 Reprint 145, 3 Atk. 583, 26 Reprint 1136; Sadler v. Hobbs, 2 Bro. Ch. 114, 29 Reprint 66; Underwood v. Stevens, 1 Meriv. 712, 35 Reprint 833; Churchill v. Hobson, 1 P. Wms. 241, 24 Reprint 370; Fellows v. Mitchell, 1 P. Wms. 81, 83 note, 24 Reprint 302; Neal v. Hanbury, Prec. Ch. 173, 24 Reprint 83; Doyle v. Blake, 2 Sch. & Lef. 229; Joy v. Campbell, 1 Sch. & Lef. 328; Walker v. Symonds, 3 Swanst. 1, 36 Reprint 751; Murrell v. Cox, 2 Vern. Ch. 570, 23 Reprint 971; Langford v. Gascoyne, 11 Ves. Jr. 333, 32 Reprint 1116; Brice v. Stokes, 11 Ves. Jr. 324, 32 Reprint 1111; Brice v. Stokes, 11 Ves. Jr. 319, 32 Reprint 1111; Shipbrook v. Hinchinbrook, 11 Ves. Jr. 252, 32 Reprint 1085, 16 Ves. Jr. 477, 33 Reprint 1066; Chambers v. Minchin, 7 Ves. Jr. 186, 32 Reprint 76; Moses v. Levi, 3 Y. & C. Exch. 359, 160 Reprint 741.

78. Ala.—Stewart v. Conner, 9 Ala. 803.

Ga.—Hall v. Carter, 8 Ga. 388.

Mass.—McKim v. Aulbach, 130 Mass. 481, 39 AmR 470.

N. Y.—Matter of Provost, 87 App. Div. 86, 84 NYS 29; Monell v. Monell, 5 Johns. Ch. 283, 9 AmD 298.

N. C.—Ochiltree v. Wright, 21 N. C. 336.

Pa.—Wilson's App., 115 Pa 95, 9 A 473; McNair's App., 4 Rawle 148; Hess' Est., 2 Phila. 243.

Eng.—Scurfield v. Howes, 3 Bro. Ch. 90, 29 Reprint 425; Westly v. Clarke, 1 Dick. 329, 21 Reprint 295, 1 Eden 356, 28 Reprint 723; Hovey v. Blakeman, 4 Ves. Jr. 596, 31 Reprint 306.

[a] **A joint release of a mortgage,** signed by two executors, is only prima facie evidence that the money derived therefrom came into the possession or under the control of both, and may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form. McKim v. Aulbach, 130 Mass. 481, 39 AmR 470; Wilmerding v. McKesson, 28 Hun 184 [rev on other grounds 103 N. Y. 329, 8 NE 665].

79. Hall v. Carter, 8 Ga. 388; Brown's App., 1 Dall. (Pa.) 310, 1 L. ed. 152; Gibbs v. Herring, Prec. Ch. 49, 24 Reprint 25; Shipbrook v. Hinchinbrook, 16 Ves. Jr. 477, 33 Reprint 1066; Price v. Stokes, 11 Ves. Jr. 324, 32 Reprint 1111.

80. Hall v. Carter, 8 Ga. 388; Ochiltree v. Wright, 21 N. C. 336.

81. Hall v. Carter, 8 Ga. 388; Graham v. Davidson, 22 N. C. 155; Auer's Est., 14 Pa. Dist. 273, 31 Pa. Co. 77.

82. In re Pruyn, 141 N. Y. 544, 36 NE 595; In re Wagner, 119 N. Y. 28, 23 NE 200; Tillinghast v. Brown Univ., 25 R. I. 284, 55 A 758; Murrel v. Murrel, 21 S. C. Eq. 148, 49 AmD 664.

[a] **Sufficiency of release.**—(1) Where the settlement of a joint account by two executors showed a balance in their hands, division of the balance equally between them and acceptance by each of the legatees of half the interest due on the balance does not sever the joint liability. Ducommun's App., 17 Pa. 268. (2) The fact that the money and sole management of the estate was turned over to one executor, with the concurrence of one having a power of attorney to collect moneys due nonresident beneficiaries of the estate, in no way relieves the coexecutor from responsibility. Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264.

83. Sanderson's Est., 74 Cal. 199, 15 P 753; Piatt v. Longworth, 27 Oh. St. 159.

[a] **A suit by heirs against administrators** to recover for a breach of trust in conspiring together to sell lands of the estate, which they severally acquired in separate portions, each for his own benefit, under the sale, is several as well as joint, and is not barred as to one of the administrators by a settlement with the other. Piatt v. Longworth, 27 Oh. St. 159.

84. Shreve v. Joyce, 36 N. J. L. 44, 13 AmR 417; Freeman v. Brunswick, 14 WklyNC (Pa.) 327; Eisenstadt Mfg. Co. v. Copeland, (Tex. Civ. A.) 149 SW 713.

85. Shreve v. Joyce, 36 N. J. L. 44, 13 AmR 417.

86. Long v. Rodman, 58 Ind. 58; Mygatt v. Wilcox, 45 N. Y. 306, 6 AmR 90.

[a] **Administrators who retained an attorney** (1) to attend for them in proceedings against them on a final acounting before the surrogate are jointly liable to such attorney, although their interests upon the distribution are different. Mygatt v. Wilcox, 45 N. Y. 306, 6 AmR 90. (2) Where one of several coexecutors, with the knowledge and consent of the others, employs an attorney, without a special agreement with him to look to the estate alone for payment, they all become personally liable for the value of his services. Long v. Rodman, 58 Ind. 58.

87. Maffet's Est., 7 Kulp (Pa.) 153.

87½. Irwin's App., 35 Pa. 294.

88. In re Niles, 113 N. Y. 547, 21 NE 687; Matter of Peck, 31 App. Div. 407, 52 NYS 1028 [app dism 161 N. Y. 655 mem, 57 NE 1119 mem]; Lacey v. Davis, 5 Redf. Surr. (N. Y.) 301.

89. Weldy's App., 102 Pa. 454.

90. Thompson v. Hicks, 1 App. Div. 275, 37 NYS 340.

91. Holcombe v. Holcombe, 13 N. J. Eq. 413.

92. O'Neil v. Cleveland, 30 N. J. Eq. 273.

93. Cocks v. Barlow, 5 Redf. Surr.

he has not permitted does not impose liability.[94]

[§ 2851] **15. Interest on Funds of Estate.** Representatives permitting a devastavit may be charged with interest,[95] although in some cases they may be excused by reason of having acted in good faith.[96] A disagreement as to the manner of investment will not prevent an executor from being charged with interest where he made no application to the court for directions.[97]

[§ 2852] **16. Individual Interest in Transactions.** The corepresentatives should not purchase property of the estate from themselves either directly or indirectly,[98] unless upon full disclosure and with the consent of all persons in interest,[99] and they are liable to the estate for any profits made by such transactions.[1] A sale to one of their number is, however, usually regarded as merely voidable.[2]

Contracts made with the acting executor by executors who have not qualified may be sustained in the absence of fraud.[3]

[§ 2853] **17. Collection of Assets.** As a general rule one executor or administrator is under no liability with respect to the collection of assets by his corepresentative;[4] but it has been held that, where all the executors joined in the assignment of a bond and mortgage and acknowledgment of the receipt therefor, but allowed one of their number to complete the transaction, in doing which he repaid a large portion of the purchase money received, they were all accountable for the loss.[5] Where assets are doubtful, the representatives should schedule them as such in their inventory to avoid responsibility for their collection,[6] although failure to do so will not impose liability in the absence of negligence in collection.[7]

[§ 2854] **18. Negligence of Bad Faith.** Representatives are jointly liable for losses to the estate from their concurrent negligence or bad faith;[8] and one who seeks to avoid liability for a loss must plead his nonconcurrence in the acts from which the loss

(N. Y.) 406; Lacey v. Davis, 5 Redf. Surr. (N. Y.) 301.

94. Heath v. Allin, 1 A. K. Marsh. (Ky.) 442 (fraud in sale of assets).

95. Matter of Dougherty, 43 Misc. 468, 89 NYS 549, 4 Mills Surr. 272; Whitney v. Phœnix, 4 Redf. Surr. (N. Y.) 180; Bates v. Underhill, 3 Redf. Surr. (N. Y.) 365; Gilbert's App., 78 Pa. 266.

[a] **Where one of three administrators mingled funds** of the estate with his own and used them in his own business, the administrators were chargeable with interest on the funds of the estate thus treated. Gilbert's App., 78 Pa. 266; Brown's Est., 11 Phila. (Pa.) 127.

96. In re Wyckoff, 3 Dem. Surr. (N. Y.) 75.

97. Holcombe v. Holcombe, 13 N. J. Eq. 413.

98. Candler v. Clarke, 90 Ga. 550, 16 SE 645; Inman v. Foster, 69 Ga. 385; Colgate v. Colgate, 23 N. J. Eq. 372; Gordon v. Finlay, 10 N. C. 239.

[a] **An agreement to sell realty to a partnership** of which the executor's associates are members is voidable at the option of the beneficiaries of the estate. Colgate v. Colgate, 23 N. J. Eq. 372.

99. Mosley v. Floyd, 31 Ga. 564.

[a] **When the heirs, legatees, or distributees permit** an executor to purchase property belonging to the estate and sold by his coexecutor, the former is not liable for money paid to the coexecutor upon notes given for the purchase money and which is subsequently wasted by such coexecutor. Mosley v. Floyd, 31 Ga. 564.

1. Inman v. Foster, 69 Ga. 385; Bechtold v. Read, (N. J. Ch.) 32 A 694.

[a] **Representative who made profit primarily liable.**—Where executors convey property of testator so that one of them makes a profit, the one receiving the profit is primarily liable therefor, and if it cannot be collected of him the others will be required to respond. Bechtold v. Read, (N. J. Ch.) 32 A 694.

[b] **Circumstances not releasing from liability.**—Where three executors buy land of the estate, two of them cannot discharge themselves of liability to the beneficiary by showing that the other, who was the beneficiary's trustee, was allowed for the beneficiary the amount of purchase money he was to pay, and gave his receipt for that amount as paid to the beneficiary. Inman v. Foster, 69 Ga. 385.

2. Colgate v. Colgate, 23 N. J. Eq. 372; Geyer v. Snyder, 140 N. Y. 394, 35 NE 784 [aff 69 Hun 115, 23 NYS 200, and in effect overr Case v. Abeel, 1 Paige 393]; Gilbert's App., 78 Pa. 266.

[a] **A sale of partnership property** to the surviving partner who is also an administrator at a price less than the value is voidable at the election of any party in interest, and all the administrators are chargeable with the actual value. That they acted in good faith and under the advice of counsel does not justify the transaction. Gilbert's App., 78 Pa. 266.

3. Bowden v. Pierce, 73 Cal. 459, 14 P 302, 15 P 64.

4. Hall v. Carter, 8 Ga. 388; Fennimore v. Fennimore, 3 N. J. Eq. 292; Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17, 11 AmD 383; Tompkins v. Tompkins, 18 S. C. 1.

[a] **Where one executor misappropriates** the proceeds of a joint sale, the other is not chargeable with the loss, he not having himself been in any way in fault. Tompkins v. Tompkins, 18 S. C. 1.

[b] **Where there is a joint return of an inventory of debts** made by executors, and the possession of the debts is in one, and he, through negligence, without participation by the others, fails to collect them, he is solely liable for such devastavit. Hall v. Carter, 8 Ga. 388.

5. Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085.

6. Metz's App., 11 Serg. & R. (Pa.) 204.

7. Barclay v. Morrison, 16 Serg. & R. (Pa.) 129.

8. Ala.—Hinson v. Williamson, 74 Ala. 180.

Cal.—Bermingham v. Wilcox, 120 Cal. 467, 52 P 822; Osborn's Est., 87 Cal. 1, 25 P 157, 11 LRA 264.

Ga.—Whiddon v. Williams, 98 Ga. 310, 24 SE 437; Head v. Bridges, 67 Ga. 227.

Ky.—Grundy v. Dyre, 104 Ky. 825, 48 SW 155, 49 SW 469, 20 KyL 970, 1337; Walker v. Walker, 88 Ky. 615, 11 SW 718, 11 KyL 80; Heath v. Allin, 1 A. K. Marsh. 442.

Md.—Wayman v. Jones, 4 Md. Ch. 500.

Mass.—Blake v. Pegram, 109 Mass. 541.

Miss.—Fonte v. Horton, 36 Miss. 350.

N. J.—In re Ramsey, (Prerog.) 66 A 410; Bechtold v. Read, 49 N. J. Eq. 111, 22 A 1085; Smith v. Pettigrew, 34 N. J. Eq. 216; Blackwell v. Blackwell, 29 N. J. 576; Holcombe v. Holcombe, 13 N. J. Eq. 413.

N. Y.—In re Niles, 113 N. Y. 547, 21 NE 687; Wilmerding v. McKesson, 103 N. Y. 329, 8 NE 665; Earle v. Earle, 93 N. Y. 104; Croft v. Williams, 88 N. Y. 384 [mod 23 Hun 102]; Adair v. Brimmer, 74 N. Y. 539; Wood v. Brown, 34 N. Y. 337; Matter of Peck, 31 App. Div. 407, 52 NYS 1028 [app dism 161 N. Y. 655 mem, 57 NE 1119 mem]; Thompson v. Hicks, 1 App. Div. 275, 37 NYS 340; In re Goetschius, 2 Misc. 278, 23 NYS 970, Pow. Surr. 371; In re Brown, 16 AbbPrNS 457; Johnson v. Corbett, 11 Paige 265; Clark v. Clark, 8 Paige 152, 35 AmD 676; Matter of Cozzens, 15 NYS 771, 2 Conn. Surr. 622; Whitney v. Phœnix, 4 Redf. Surr. 180; Bates v. Underhill, 3 Redf. Surr. 365.

N. C.—Kincade v. Conley, 64 N. C. 387; Hauser v. Lehman, 37 N. C. 594; Brotten v. Bateman, 17 N. C. 115, 22 AmD 732.

Pa.—In re Irvine, 203 Pa. 602, 53 A 502; In re Strong, 160 Pa. 13, 28 A 480; Weldy's App., 102 Pa. 454; Gilbert's App., 78 Pa. 266; Irwin's App., 35 Pa. 294; Weigand's App., 28 Pa. 471; Hengst's App., 24 Pa. 413; Sinkler's Est., 10 Pa. Dist. 399, 25 Pa. Co. 417; Lobingrer v. Mechling, 2 AmLJ 257; Power's Est., 15 Phila. 539; Brown's Est., 11 Phila. 127; Hess' Est., 2 Phila. 243; Cressman's Est., 2 Phila. 76.

S. C.—Williams v. Mower, 29 S. C. 332, 7 SE 505; McDowall v. McDowall, 8 S. C. Eq. 324.

Tenn.—Thomas v. Scruggs, 10 Yerg. 400; Hays v. Hays, 3 Tenn. Ch. 88.

Va.—McCormick v. Wright, 79 Va. 524; Caskie v. Harrison, 76 Va. 85; Carter v. Cutting, 5 Munf. (19 Va.) 223.

Eng.—Horton v. Brocklehurst, 29 Beav. 504, 54 Reprint 723; Egbert v. Butter, 21 Beav. 560, 52 Reprint 976; Lincoln v. Wright, 4 Beav. 427, 49 Reprint 404; Williams v. Nixon, 2 Beav. 472, 17 EngCh 472, 48 Reprint 1264; Booth v. Booth, 1 Beav. 125, 17 EngCh 125, 48 Reprint 886; Mendes v. Guendolla, 2 Johns. & H. 259, 70 Reprint 1054; Style v. Guy, 1 Macn. & G. 422, 47 EngCh 339, 41 Reprint 1328.

Ont.—Archer v. Severn, 13 Ont. 316 [dist In re Crowter, 10 Ont. 159]; Sovereign v. Sovereign, 15 Grant Ch. (U. C.) 559; McPhadden v. Bacon, 13 Grant Ch. (U. C.) 591.

[a] **Illustration.**—Executors who allow the widow and executrix to value her dower right too high and retain the amount, and to buy personal property of the estate at too low a price, are liable to make good to the estate the sum it thus lost. Blackwell v. Blackwell, 29 N. J. Eq. 576.

[b] **Permitting coexecutor to use funds.**—Executors are liable for the devastavit of a coexecutor where they permitted him to use in his business a fund which the testator directed to be paid to a trustee, and united with him in resisting suits by

arose.[9] A representative, in the exercise of a sound discretion, may, it seems, redeem assets wrongfully disposed of by his associate instead of bringing an action therefor.[10]

[§ 2855] **19. Debts Due from Associate to Estate.** As a general rule a representative is not bound to collect debts owing by his associates to the estate;[11] but such an obligation may arise by reason of the particular provisions of the will,[12] and notwithstanding coexecutors are equally entitled to the possession of the funds of the estate, a note given by one to the other for a debt due to the estate may be upon a sufficient consideration.[13] Where the administrator would have been liable on his bond for the debt of an associate, he may be compelled to account therefor.[14]

[§ 2856] **20. Liabilities Inter Sese and Contribution.** As between himself and his associates each representative is responsible for his own acts of maladministration,[15] but this responsibility may be varied or released by contracts inter sese.[16]

Contribution may be enforced by a representative who has discharged more than his proportion of a joint liability.[17]

[§ 2857] **21. Subrogation.** Where one representative has been compelled to make good a loss resulting from the default of a corepresentative, he is entitled to be subrogated to all rights which the estate [18] or the persons beneficially interested therein [19] had against the corepresentative because of his misconduct. But subrogation to the rights of an executor as legatee cannot be permitted where the interest of the legatee has passed to an innocent third person by foreclosure of a mortgage executed by the legatee.[20]

[§ 2858] **22. Accounting and Liability Thereon** [21]**—a. Accounting by Corepresentatives.** An accounting by corepresentatives is in general subject to the same rules as govern accountings by sole representatives, save as to rights and liabilities inter sese arising out of their relations.[22] The liability of an executor for the acts or negligence of

the cestui que trust to get the money out of their hands. Grundy v. Drye, 104 Ky. 825, 48 SW 155, 49 SW 469, 20 KyL 970, 1337.

[c] **Use of funds in executor's business.**—Where two executors use funds of the estate in their partnership business, they are both liable for the whole amount thereof, and not merely each for his pro rata share. In re Goetschius, 2 Misc. 278, 23 NYS 970, Pow. Surr. 371.

[d] **An administratrix, who signed joint checks** with her coadministrator, thereby permitting him to draw on their joint account as administrators, whereby he obtained money which he misappropriated, but which he falsely represented to her was to be used in paying debts of the estate, is jointly liable with him therefor. Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

[e] **Where an executor signed checks in blank,** and thereby enabled his coexecutor to draw and misappropriate the funds of the estate, he was chargeable with the amount misappropriated. In re Ramsey, (N. J. Prerog.) 66 A 410.

[f] **Repayment of advances by associate.**—Where an executor allows his coexecutor to apply the assets of the estate in full payment of his own advances, instead of pro rata with other creditors, he is equally liable. McCormick v. Wright, 79 Va. 524.

[g] **Negligence is not chargeable where** the executor made inquiries of his coexecutor, who was reputed to be wealthy, as to whether the fund in the hands of the coexecutor had been invested, as directed by the will, and was informed that it had been so invested. Matter of Cocks, 9 NYS 462, 1 Conn. Surr. 347.

9. Kincade v. Conley, 64 N. C. 387.

10. Wright v. Dugan, 15 AbbNCas (N. Y.) 107.

11. Tichenor v. Tichenor, 43 N. J. Eq. 163, 10 A 867 [aff 45 N. J. Eq. 303, 17 A 631]; Clarke v. Cotton, 17 N. C. 51.

[a] **Where an executor occupies real estate belonging to the estate, under an agreement** with his coexecutor, at a monthly rental, and the occupant fails to acount for the rent, the coexecutor is not responsible for such rent, there being nothing to show that the occupant was irresponsible, or that the rent was not safe in his hands. Tichenor v. Tichenor, 43 N. J. Eq. 163, 10 A 867 [aff 45 N. J. Eq. 303, 17 A 631].

12. Weigand's App., 29 Pa. 471.

[a] **Illustration.**—Where an obligation of one of the executors to decedent is set apart by the will as a trust fund and the executors are directed to secure it, they are jointly liable for a failure to do so. Weigand's App., 28 Pa. 471.

13. Deloach v. Youmans, 37 S. C. L. 278; Berry v. Tart, 19 S. C. L. 4.

[a] **Purchase money note.**—One executor is entitled to recover against the other on a note given by him for the purchase price of property belonging to the estate and sold to him before he qualified as executor. Deloach v. Youmans, 37 S. C. L. 278.

[b] **In order to avoid such a note** defendant must show that he was in advance to the estate and plaintiff had the funds in his hands. Berry v. Tart, 19 S. C. L. 4.

14. Dorger v. Woodward, 27 Oh. Cir. Ct. 123; Beckley's App., 3 Pa. 425.

15. Jordy's Succ., 5 La. Ann. 37; Fisher v. Skillman, 18 N. J. Eq. 229; Marshall's Est., 17 PittsbLegJNS (Pa.) 382; Massey v. Cureton, 15 S. C. Eq. 181; Knox v. Picket, 4 S. C. Eq. 92.

[a] **Where all are equally in the wrong,** the loss will be divided equally among them. Fisher v. Skillman, 18 N. J. Eq. 229.

16. Jones v. Ward, 10 Yerg. (Tenn.) 160.

[a] **Construction and effect of agreements.**—(1) A bond given by an administratrix who received the assets from her coadministrator to indemnify him in case she should fail to pay certain claims of third persons against the estate, or any claims that might be brought against him as administrator, creates no new personal obligation to pay the debts beyond the available assets of the estate, and he can only allege a breach after his liability growing out of the administration of the estate has been ascertained. Pittman v. Myrick, 16 Fla. 692. (2) An agreement between three coadministrators that certain notes made by their intestate, on which one of the administrators was indorser, should be paid in full, with the understanding that if, upon a final settlement of the estate, the assets should prove insufficient for that purpose, the indorsing administrator should make good the deficiency, is binding on the indorsing administrator. Kilgore v. Moore, 30 S. C. L. 192.

[b] **A mortgage** on his own land given by one executor to himself and his associate does not exonerate him from liability for delinquencies when nothing is realized from the property conveyed. Storms v. Quackenbush, 34 N. J. Eq. 201.

17. Ga.—Huey v. Stewart, 69 Ga. 768.

Pa.—Miller's App., 127 Pa. 95, 17 A 866.

S. C.—Wilks v. Davis, 9 S. C. Eq. 390.

Vt.—Marsh v. Harrington, 18 Vt. 150.

Newfoundl.—Norman v. Gushue, 4 Newfoundl. 29.

[a] **Money awarded to an executor on an assignment of his coexecutor for creditors,** to reimburse him for money paid on a balance due the estate by both executors, is not assets of the estate, but of the executor to whom it is paid. Miller's App., 127 Pa. 95, 17 A 866.

[b] **Contribution by solvent associates.**—Where two of four joint executors become insolvent, and one of the remaining two is compelled by a decree to pay for property, which without fault on his part has been seized by one of the insolvent executors, he may recover from the other solvent executor one half the amount so paid by him, together with all expenses incurred by him in defending the suit in which the decision was made. Marsh v. Harrington, 18 Vt. 150.

[c] **Payment must be alleged** in a bill for contribution. Huey v. Stewart, 69 Ga. 768.

Contribution generally see Contribution 13 C. J. p 820.

18. Drake v. Paige, 127 N. Y. 562, 28 NE 407.

19. Reber v. Gundy, 13 Fed. 53.

Subrogation generally see Subrogation [37 Cyc 361].

20. Drake v. Paige, 127 N. Y. 562, 28 NE 407. But compare Clapp v. Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes 281, 27 HowPr 600 (legatees who are also executors cannot, by assigning the legacy, give the assignee a right to enforce payment discharged from abatement for advances, or for assets misapplied, or debts due from them to the estate).

21. Compensation of corepresentatives see supra § 2427.

Duty of corepresentatives to account see supra §§ 2310–2315.

22. U. S.—Green v. Hanbury, 10 F. Cas. No. 5,759, 2 Brock 403.

Ala.—Waldrop v. Pearson, 42 Ala. 636.

Ga.—Groover v. Ash, 132 Ga. 371, 64 SE 323, 131 AmSR 201, 22 LRANS 1119.

La.—Baldwin v. Carleton, 15 La. 394.

N. Y.—Matter of Barrett, 58 App. Div. 45, 68 NYS 589.

Pa.—Bickley's Est., 13 Pa. Dist. 323; Grayham's Est., 31 Pa. Co. 217.

Ont.—Cunnington v. Cunnington, 2 Ont. L. 511.

[a] **Parties.**—Where a coadministrator, against whom a balance is reported, is not before the court, he is not bound, and the administrator who is before the court cannot be charged with the amount in such proceeding. Green v. Hanberry, 10 F. Cas. No. 5,759, 2 Brock. 403.

a coexecutor will not be determined on a citation to file an account.[23]

[§ 2859] **b. Accounting as between Corepresentatives.** While in some cases doubt has been expressed as to the authority of a representative to compel his associates to account,[24] it would seem to be the general rule that he may do so in equity,[25] equally where he is a creditor[26] or legatee,[27] and in some states the right has been established by statutes which also provide as to procedure.[28] The amount for which each representative is liable may be determined on a joint accounting.[29]

[§ 2860] **c. Liability on Joint or Several Settlement of Account.** While the settlement of a joint account is sometimes held to fix a joint liability for the amount found due thereunder,[30] the better rule apparently is that such settlement is not conclusive as to individual liability but may be rebutted by evidence showing with what amounts each representative should properly be charged.[31] Where accountings are separate, liabilities merely consequent upon joint possession of assets do not attach,[32] but where a joint liability of coexecutors or coadministrators in fact exists, it cannot be discharged as to one or more of such representatives by means of making separate accountings.[33]

[§ 2861] **D. Acting Executor or Administrator —1. In General.** As has been noted in many of the duties of administration the representative may act severally and with regard to such duties the question of whether associates act or qualify becomes immaterial.[34] Where a power has been given to several executors, but only one of them acts as such, the others having resigned, he alone can exercise the power.[35]

[§ 2862] **2. Mutual Agreements or Arrangements.** A corepresentative cannot by contract absolve his associate or associates from their responsibility to the estate for its proper administration,[36] nor can the associates by a division of their duties

[b] **As to funds converted by a coexecutor,** an executor is accountable in the probate court as if never so converted. Baldwin v. Carleton, 15 La. 394.

[c] **Where an administrator is charged,** on his final settlement, with a note payable to his coadministrator and himself, the equitable title thereto, entitling him to sue thereon in his name alone, is vested in him. Waldrop v. Pearson, 42 Ala. 636.

[d] **Laches** may bar the right to force a compulsory accounting. Matter of Barrett, 58 App. Div. 45, 68 NYS 589.

[e] **The administrator of a deceased executor** must be made a party before a distribution of assets or decree as to costs may be made, where the deceased executor was also a legatee and the assets are insufficient to pay all legacies in full, although in his absence the accounts of the survivor may be adjusted. Matter of Koch, 33 Misc. 672, 68 NYS 938, 2 Mills 46.

Accounting by representatives generally see supra §§ 2299–2532.

23. O'Neil's Est., 12 WklyNC (Pa.) 463.

24. Hendricks v. Thornton, 45 Ala. 299; Clarke v. Cotton, 17 N. C. 51.

25. Hawaii—Matter of Enos, 18 Hawaii 542.

Ky.—Chamberlain v. Chamberlain, 16 SW 456, 13 KyL 151.

N. Y.—Peters v. Smith, 60 Misc. 203, 111 NYS 842.

N. C.—Moffit v. Moffit, 36 N. C. 124.

Oh.—Stiver v. Stiver, 8 Oh. 217.

Pa.—In re McManus, 212 Pa. 267, 61 A 892; Chew's App., 3 Grant 294.

S. C.—Wright v. Wright, 2 S. C. Eq. 242.

Tex.—Davis v. Thorn, 6 Tex. 482.

[a] **In Maryland** the rule appears to be otherwise. Sloan v. Sloan, 117 Md. 141, 83 A 38; Whiting v. Whiting, 64 Md. 157, 20 A 1030 [foll Beall v. Hilliary, 1 Md. 186, 54 AmD 649] (a representative cannot maintain a bill in equity against his corepresentative to compel the latter to account for and pay over money alleged to be due from him to the estate).

26. King v. Shackleford, 13 Ala. 435.

27. Wright v. Wright, 2 S. C. Eq. 242.

28. Beach v. Norton, 9 Conn. 182; Ludlow v. Ludlow, 4 N. J. L. 189; Wood v. Brown, 34 N. Y. 337; Buchan v. Rintoul, 10 Hun 183 [aff 70 N. Y. 1]; In re Watson, 148 NYS 902 [aff 150 NYS 776]; In re Rumsey, 18 NYS 402; In re Hodgman, 10 NYS 491; Smith v. Lawrence, 11 Paige (N. Y.) 206.

29. White v. Bullock, 20 Barb. (N. Y.) 91. See also cases infra this note.

[a] **Where an administrator assumes to pay a claim by giving his note** therefor as administrator, without purporting to bind his coadministrator, the liability is not imposed on the coadministrator, although the maker of the note is personally liable, and it should be allowed the maker on an accounting. Boyer v. Marshall, 5 NYSt 431.

[b] **Credits** may be given an executor chargeable with funds misappropriated by a coexecutor of such amounts as the coexecutor would have received under the will, but not for payments made to the estate by the coexecutor after a time when the first executor was not chargeable for misappropriations, such later payments being properly applied to later misappropriations. Adair v. Brimmer, 95 N. Y. 35.

[c] **The joint account may be surcharged** with the amount of the indebtedness of one of the representatives to the estate. In re Maloney, 11 PittsbLegJ (Pa.) 341.

[d] **Presumptions on accounting.** —When a joint account has been passed by two coexecutors in which are included assets jointly held and assets charged to the executors severally and there is no evidence showing specifically how the several items of the assets charged were disposed of, it is proper to apply what are the most natural and reasonable presumptions with respect to the order of application as between different classes of assets. These presumptions seem to be: First, that, the debts being credited as if paid by both executors, the payments were made with asset jointly held so far as these may go; second, that as to the application of assets charged to the executors severally, inasmuch as both are equally credited with the payment of the debts and held assets at the time it is presumable that each contributed equally to such payment. Conner v. McIlvaine, 4 Del. Ch. 30.

[e] **The decree on such accounting is conclusive** between the executors as to the amounts received and paid out by each, and cannot be contradicted by the sworn accounts of the executors, produced by them upon the accounting. White v. Bullock, 20 Barb. (N. Y.) 91.

30. Hengst's App., 24 Pa. 413; Ducommun's App., 17 Pa. 268; Sprenkle's App., 1 Walk. (Pa.) 365; Metz's App., 11 Serg. & R. (Pa.) 204; Bitler's Est., 1 LegRec (Pa.) 221; Buerkle's Est., 11 PittsbLegJNS (Pa.) 398.

[a] **The rule is not applicable** where the accounting, although purporting to be joint, is in fact separate. English v. Newell, 42 N. J. Eq. 76, 6 A 505 [aff 43 N. J. Eq. 295 mem, 14 A 811 mem]; Beatty v. Cory Universalist Soc., 41 N. J. Eq. 563, 7 A 338 (both decided when the rule in New Jersey was as stated in the text. For present rule see infra note 31).

[b] **However** (1) executors, uniting in an account, are not liable for uncollected securities for which credit is taken therein; and if securities are taken in their name, and collected by one of them, the other is not liable to the legatees therefor in absence of proof of culpable negligence. Lightcap's App., 95 Pa. 455. (2) While the filing of a joint account is an admission of joint liability for the balance, such joint liability is not a continuing obligation which remains fixed and established as a judicial decree and without regard to subsequent circumstances. Young's App., 99 Pa. 74.

31. Conner v. McIlvaine, 4 Del. Ch. 30; Effinger v. Richards, 35 Misc. 540; Gaultney v. Nolan, 33 Miss. 569; Weyman v. Thompson, 52 N. J. Eq. 263, 29 A 685, 30 A 249 [rev 50 N. J. Eq. 8, 25 A 205, and overr Tehan v. Maloy, 45 N. J. Eq. 68, 16 A 686; Suydam v. Bastedo, 40 N. J. Eq. 433, 2 A 808; Schenck v. Schenck, 16 N. J. Eq. 174; Laroe v. Douglass, 13 N. J. Eq. 308; Fennimore v. Fennimore, 3 N. J. Eq. 292]; Wilson v. Fisher, 5 N. J. Eq. 493; Goble v. Andruss, 2 N. J. Eq. 66.

[a] **Admissions** of possession of assets or investments in joint accounts establish prima facie liability. Glacius v. Fogel, 88 N. Y. 434 [aff 25 Hun 227]; Lacey v. Davis, 4 Redf. Surr. (N. Y.) 402.

32. Merselis v. Mead, 7 N. J. Eq. 557; Irwin's App., 35 Pa. 294; Davis' App., 23 Pa. 206; Rife v. Galbreath, 3 Penr. & W. (Pa.) 204.

33. Hinson v. Williamson, 74 Ala. 180; Fonte v. Horton, 36 Miss. 350; Hess' Est., 2 Phila. (Pa.) 243.

[a] **Where executors, in settling an account, charge themselves jointly,** they cannot, after a lapse of six years, settle another account in which they are charged separately so as to discharge some of them as to creditors. McCoy v. Porter, 15 Serg. & R. (Pa.) 57.

34. See supra §§ 2815–2835.

35. Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem].

36. Wilson v. Lineberger, 94 N. C. 641, 55 AmR 628; Lees v. Sanderson, 4 Sim. 28, 6 EngCh 28, 58 Reprint 12.

[a] **Rule as to sureties.**—Sureties may consent to become liable for the joint administration of two administrators under an arrangement that one of them shall do no more than sign all papers presented to her by

apportion their responsibilities,[37] although power to do formal or ministerial acts may be delegated.[38] Where the will nominated three executors and empowered them to act jointly and severally, one of them might sue under a power of attorney from the other two.[39]

[§ 2863] **3. Failure or Refusal to Qualify.** A failure or refusal of some of the persons named as executors to qualify will not prevent the others from acting[40] unless there is an express testamentary provision to that effect.[41] Where only one of two foreign executors has taken out letters in the state, he may sue for a debt due the estate in his own name alone without naming the other executor as a party.[42]

[§ 2864] **4. Resignation, Removal, Discharge, Etc.** The accepted resignation or the removal of a representative casts the burden of the administration on those who remain,[43] and the retiring representative is not responsible for their further acts.[44] In case one of the representatives has become bankrupt, or wasted or misapplied the assets, or dissipated them through misconduct or negligence, a receiver may be appointed.[45] One of several corepresentatives may be discharged,[46] but such discharge will not be granted where an action against the representatives, connected with the estate, is pending.[47]

[§ 2865] **E. Surviving Executor or Administrator—1. In General.** Where the administration of an estate is granted to several and one dies, the entire authority and control remain with the survivors.[48] And where several executors are nominated in the will, and one dies before the testator or before qualification, the others are entitled to qualify.[49] The surviving executor is personally liable to the personal representative of a deceased coexecutor for compensation for filing accounts as demanded by him.[50]

[§ 2866] **2. Collection of Assets.** The surviving representative is entitled to collect and hold the custody of the assets of the estate,[51] and may sue

the other, and if they do so she cannot be held in default as to them for acting accordingly. Palmer v. Ward, 91 App. Div. 449, 86 NYS 990.

37. Fonte v. Horton, 36 Miss. 350; In re Irvine, 203 Pa. 602, 53 A 502; Allen v. Shanks, 90 Tenn. 359, 16 SW 715.

[a] **Illustration. —** If executors agree that certain things shall be done by one in the name of both, both are responsible. Fonte v. Horton, 36 Miss. 350.

38. Roe v. Smith, 42 Misc. 89, 85 NYS 527 [aff 97 App. Div. 633 mem, 89 NYS 1115 mem].

[a] **Illustration.—**Where two executors were authorized by will to sell the lands of the estate as trustees, a written, unsealed agreement, purporting to be that of such executors, signed by one only of them, who had been authorized by the other executor to act for him in signing the contract, was enforceable. Roe v. Smith, 42 Misc. 89, 85 NYS 527 [aff 97 App. Div. 633 mem, 89 NYS 1115 mem].

39. Paterno v. Solis, 15 Philippine 153.

40. U. S.—Goodyear v. Providence Rubber Co., 10 F. Cas. No. 5,583, 2 Cliff. 351.

Ky.—Muldrow v. Fox, 2 Dana 74.

La.—Clark v. Farrar, 3 Mart. 247.

Mass.—Treadwell v. Cordis, 5 Gray 341.

Mich.—Alexander v. Rice, 52 Mich. 451, 18 NW 214.

N. Y.—Striker v. Daly, 175 App. Div. 620, 162 NYS 527 [aff 223 N. Y. 468, 119 NE 882]; Steinhardt v. Cunningham, 55 Hun 375, 8 NYS 627.

[a] **A peremptory direction to testator's executors** as executors should be construed as meaning those who undertake the office and act as executors. Muldrow v. Fox, 2 Dana (Ky.) 74.

[b] **Trust powers** necessary to the settlement of the estate may be exercised by the executors who qualify. Treadwell v. Cordis, 5 Gray (Mass.) 341; Steinhardt v. Cunningham, 55 Hun 375, 8 NYS 627 [aff 130 N. Y. 292, 29 NE 100].

[c] **Representatives who qualify may sue in behalf of estate.—**(1) Goodyear v. Providence Rubber Co., 10 F. Cas. No. 5,583, 2 Cliff. 351; Clark v. Farrar, 3 Mart. (La.) 247; Alexander v. Rice, 52 Mich. 451, 18 NW 214; Thompson v. Graham, 1 Paige (N. Y.) 384. (2) The executor who refuses to accept the trust may, if necessary, be brought before the court by making him a party defendant. Thompson v. Graham, 1 Paige (N. Y.) 384.

41. See cases supra note 40.

42. Lawrence v. Lawrence, 3 Barb. Ch. (N. Y.) 71.

43. Ala.—Green v. Foley, 2 Stew. & P. 441.

Del.—State v. Tunnell, 5 Del. 182.

Ill.—Marsh v. Peo., 15 Ill. 284.

Miss.—Columbus Banking, etc., Co. v. Humphries, 64 Miss. 258, 1 S 232.

N. Y.—In re McDonald, 211 N. Y. 272, 105 NE 407; Matter of McDonald, 160 App. Div. 86, 145 NYS 267; Cushman v. Cushman, 116 App. Div. 763, 102 NYS 258 [aff 191 N. Y. 505 mem, 84 NE 1112 mem]; Matter of Crossman, 20 HowPr 350.

[a] **Marriage of an executrix** may by statute terminate her authority and enable a coexecutor to act alone. Urban v. Hopkins, 17 Iowa 105. See generally supra § 263.

[b] **Actions may be brought in the name of the continuing representative** (1) it being averred that the associates have been removed. Green v. Foley, 2 Stew. & P. (Ala.) 441. (2) On the removal of an administrator the coadministrator, being entitled to recover all the assets, may sue for them on the administration bond. State v. Tunnell, 5 Del. 182.

[c] **The title to a note made to two executors jointly,** upon the settlement and discharge of one, vests in the other, and he may maintain an action upon it in his own name, although the executors gave separate bonds, and each administered separately from the other, and the note was taken by the executor discharged, in the transactions of his separate administration. Grinstead v. Fonte, 32 Miss. 120.

44. Marsh v. Peo., 15 Ill. 284; Bostick v. Elliott, 3 Head (Tenn.) 507.

[a] **Where executors resign after a devastavit by a coexecutor,** they are not primarily liable for the amount of the devastavit where the continuing executor pays to the estate more than he was liable for when they resigned, although upon his final accounting he fails to account for the entire estate. Bostick v. Elliott, 3 Head (Tenn.) 507.

45. Jenkins v. Jenkins, 1 Paige (N. Y.) 243; Fraser v. Charleston, 19 S. C. 384; Middleton v. Dodswell, 13 Ves. Jr. 266, 33 Reprint 294.

[a] **Acting with remaining representative.—**A receiver will be appointed to act with a solvent executor if he consents, and if he does not consent there will be a reference to a master to appoint a receiver generally. Jenkins v. Jenkins, 1 Paige (N. Y.) 243.

[b] **Termination of receivership.—**Where an executor qualifies after a misapplication of the assets by a coexecutor, and subsequently a receiver is appointed without objection, the court will not, on the death of the executor who was guilty of the misapplication, restore the management of the estate to the coexecutor. Fraser v. Charleston, 19 S. C. 384.

Appointment of receivers generally see infra § 2893.

46. McNeal v. Holbrook, 25 Pa. 189; Gready's Est., 14 Phila. (Pa.) 259.

47. Blumenthal's Est., 20 Pa. Dist. 265.

48. U. S.—Hayes v. Pratt, 147 U. S. 557, 13 SCt 503, 37 L. ed. 279.

Fla.—Hart v. Smith, 17 Fla. 767.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

N. Y.—In re Trask, 49 NYS 825, 27 NYCivProc 7.

N. C.—McDowell v. Clark, 68 N. C. 117.

Pa.—Chew's App., 3 Grant 294.

Tenn.—Lewis v. Brooks, 6 Yerg. 167.

Tex.—Saul v. Frame, 3 Tex. Civ. A. 596, 22 SW 984.

Va.—Shepherd v. Darling, 120 Va. 586, 91 SE 737.

Wis.—Illinois Steel Co. v. Konkel, 146 Wis. 556, 131 NW 842.

Eng.—Flanders v. Clark, 3 Atk. 509, 26 Reprint 1093, 1 Ves. 9, 27 Reprint 857; Balwyn v. Johnson, 3 Bro. Ch. 455, 29 Reprint 640; Hudson v. Hudson, Cas. t. Talb. 127, 25 Reprint 700, 2 ERC 135; Moodie v. Bainbridge, 6 Madd. 107, 56 Reprint 1032; Adams v. Buckland, 2 Vern. Ch. 514, 23 Reprint 929.

Alta.—Re Roneche, 1 Alta. L. 255.

[a] **Discretionary powers** given to "executors" by official designation only, not expressly joint, survive. Viele v. Keeler, 129 N. Y. 190, 29 NE 78 [rev 13 NYS 196]; Danaher v. Hildebrand, 72 Misc. 240, 131 NYS 127; Davis v. Christian, 15 Gratt. (56 Va.) 11; Illinois Steel Co. v. Witsotski, 146 Wis. 572, 131 NW 848; Illinois Steel Co. v. Konkel, 146 Wis. 556, 131 NW 842.

[b] **Judgment against coexecutor.—**In equity the remaining executor can demand the enforcement of a decree against the late coexecutor. Chew's App., 3 Grant (Pa.) 294.

[c] **Possession of vouchers.—**The representatives of a deceased executor will not be required to surrender to the surviving executor satisfied mortgages and insurance policies and receipts which were in the possession of their decedent, for such documents may be necessary to enable them to file an account of their decedent as executor, and may be required as vouchers for payments made by such executors. Thomas' Est., 22 Pa. Co. 513.

49. Burks v. Beall, 77 Ga. 271, 3 SE 155; Anderson v. Stockdale, 62 Tex. 54. See generally supra § 59.

50. Crothers v. Crothers, 123 Md. 603, 91 A 691.

51. U. S.—Cook v. Cook, 34 Fed. 249.

Ala.—Waters v. Creagh, Minor 128.

to recover them from the representatives of his deceased associate,[52] unless the latter has so mingled the assets with his own property that they can no longer be distinguished, in which case the right of recovery for the devastavit is in the persons entitled to the fund and not in the surviving representative for their benefit.[53]

[§ 2867] **3. Debts Due from Deceased Representative.** The estate of a deceased representative is to be charged with the assets which were in his hands,[54] and the survivor should present a claim therefor.[55] The estate of a deceased representative is liable only for those acts of administration which occurred during his lifetime.[56]

XXII. REPRESENTATIVES OF DECEASED EXECUTORS OR ADMINISTRATORS

[§ 2868] **A. In General.** At common law the executor of a deceased executor succeeds as executor of the will of the first testator,[57] and the right of representation may be thus transmitted indefinitely, so long as the chain is not broken by intestacy;[58] but the deceased executor's administrator does not so succeed, nor does a deceased administrator's executor or administrator succeed to the administration of the estate of the original intestate.[59] In the United States the common-law rule has been followed in a few of the states;[60] but the general rule is that the personal representative of a deceased executor or administrator cannot, as such, administer on the estate of the first testator

Ky.—Weathers v. Ray, 4 Dana 474.
N. Y.—Shook v. Shook, 19 Barb. 653; Matter of Aymar, 5 Dem. Surr. 428.
Pa.—Packer v. Owens, 164 Pa. 185, 30 A 314.
Tex.—Wood v. Evans, 43 Tex. 175.

[a] **A surviving executor has an exclusive right** to the possession of the property, and, if he is insolvent, an application for relief must be made by the cestui que trust, and not by strangers, such as are the executors of a coexecutor. Shook v. Shook, 19 Barb. (N. Y.) 653.

[b] **Note to representatives jointly.**—(1) A surviving administrator may maintain a suit in his representative capacity to recover on a promissory note executed to him jointly with his coadministrator. Wood v. Evans, 43 Tex. 175. (2) Where a note is made to two executors, not described as such, after the death of one of them his executor cannot join with the survivor in an action thereon. Waters v. Creagh, Minor (Ala.) 128.

[c] **Settlement by representative of deceased representative.**—Where an action pending on a note of the estate by two administrators is, on the decease of one, settled by his representatives, and money received by them from the debtor under the settlement, the surviving representative has an election to affirm the settlement and pursue the representatives of his associate, or disaffirm it and hold the original debtor still liable. Weathers v. Ray, 4 Dana (Ky.) 474.

[d] **Satisfaction of judgment.**—Where joint executors recover judgment on a mortgage due their testator, and one of them dies, the survivor has the right to receive payment and satisfy the judgment. Packer v. Owens, 164 Pa. 185, 30 A 314.

[e] **Where executors who are also sole legatees effect a settlement with a debtor** of the estate and take his notes in their individual names, for which they sign a release of the indebtedness as executors, and one of the notes is afterward repudiated by the maker, an action on the portion of the debt represented by it may be brought in the name of an executor who survives for the use of the administrator of the deceased executor payee, and it need not be authorized by the surviving executor where he makes no complaint as to the use of his name. Saeger v. Runk, 148 Pa. 77, 23 A 1006.

[f] **The refusal of a coadministrator to proceed against the estate of a deceased associate,** to recover for a devastavit, was not in itself a sufficient ground for a federal court to remove the matter from the surviving administrator's hands, in advance of any action by the surrogate court of the state. Cook v. Cook, 34 Fed. 249.

52. Cal.—Hewlett v. Beede, 2 Cal. A. 561, 83 P 1086.
Ky.—Lawrence v. Lawrence, Litt. Sel. Cas. 123.
Md.—Crothers v. Crothers, 121 Md. 114, 88 A 114.
N. Y.—Matter of Scudder, 21 Misc. 179, 47 NYS 101, 2 Gibb. Surr. 233.
Tex.—Davis v. Thorn, 6 Tex. 482.

[a] **The surviving administrator's individual liability** to contribute with the deceased administrator upon their joint bond as administrators cannot be determined in a proceeding by the survivor against the legal representatives of her coadministrator to recover funds belonging to the estate. Matter of Scudder, 21 Misc. 179, 47 NYS 101, 2 Gibb. Surr. 233.

53. Lawrence v. Lawrence, Litt. Sel. Cas. (Ky.) 123; Rorke v. McConville, 4 Redf. Surr. (N. Y.) 291; Bowen v. Miller, 5 PaLJ 270; Matter of McWilliams, 5 PaLJ 265.

54. Wise v. Murphy, 5 Redf. Surr. (N. Y.) 365; Quince v. Quince, 5 N. C. 160; Adams v. Gleaves, 10 Lea (Tenn.) 367; Carter v. Cutting, 5 Munf. (19 Va.) 223.

[a] **Survivor not primarily liable.**—Where a coadministrator dies with funds in his hands belonging to certain legatees, and his estate is solvent, the surviving coadministrator is not liable to account for the funds in the first instance, but recourse should be had to the executor of the deceased administrator and to the sureties on the executor's bond. Adams v. Gleaves, 10 Lea (Tenn.) 367.

[b] **Where one representative dies before the other qualifies.**—Where of two executors nominated by will one qualifies and misapplies the assets, and after his death the other qualifies, the latter is not responsible for the misapplication of the funds by the first executor; but the estate of the first executor being solvent, it is the duty of the second executor to collect from it the amount which should have come to his hands as assets of the testator, and for his failure to do so he is liable. Wise v. Murphy, 5 Redf. Surr. (N. Y.) 365.

[c] **Where both representatives dead.**—Where one executor has paid over assets to a coexecutor, and both have died, an administrator de bonis non must join the representatives of both in a suit on account of the estate in order to avoid circuity of action. Quince v. Quince, 5 N. C. 160.

55. Smith's Est., 108 Cal. 115, 40 P 1037; Matter of Fry, 79 Misc. 180, 140 NYS 592; Hanbest's Est., 3 Wkly NC (Pa.) 520.

[a] **Time for presentation of claim.**—A claim for such funds in the possession of a deceased executor should be presented by testator's surviving executor when the account of decedent as testator's executor is filed in court by decedent's administrator, and the presentation of the claim before that time is premature, Hanbest's Est., 3 WklyNC (Pa.) 520.

[b] **Effect of failure to present claim.**—Where J, an executor and legatee who received moneys of the estate, died, and W, surviving executor, presented no claim against his estate for the same, the court cannot, on the death of W, after the time for presenting claims against the estate of J had expired, deduct upon distribution the amount collected by J out of the share due his estate. Smith's Est., 108 Cal. 115, 40 P 1037.

56. Conner v. McIlvaine, 4 Del. Ch. 30; Towne v. Ammidown, 20 Pick. (Mass.) 535; Brazier v. Clark, 5 Pick. (Mass.) 96; Young's App., 99 Pa. 74.

57. Grimes v. Pennsylvania R. Co., 21 Pa. Co. 169; Brooke v. Haymes, L. R. 6 Eq. 25; In re Reid, [1896] P. 129; Barr v. Carter, 2 Cox Ch. 429, 30 Reprint 199; In re Delacour, Ir. R. 9 Eq. 86; Barker v. Railton, 6 Jur. 549; Fowler v. Richards, 5 Russ. 39, 5 EngCh 39, 38 Reprint 941; Jossaume v. Abbot, 15 Sim. 127, 38 Eng Ch 127, 60 Reprint 565; Jernegan v. Baxter, 5 Sim. 568, 9 EngCh 568, 58 Reprint 452.

[a] **Probate of will essential.**—Where the executor dies before probate of the will, his executor cannot prove it, but administration with the will annexed must be granted to the residuary legatee, if any, or to the next of kin. Day v. Chatfield, 1 Vern. Ch. 200, 23 Reprint 412. See also Wilcocks v. Doughty, L. R. 29 Ir. 17.

58. In re Reid, [1896] P. 129; In re Grant, 1 P. D. 435.

[a] **The chain of executorship is not continued** by the appointment of an executor by a married woman in the will made under a power. In re Hughes, 4 Swab. & Tr. 209.

59. In re Bridger, 4 P. D. 77; In re Martin, 8 Jur. N. S. 1134; Twyford v. Trail, 7 Sim. 92, 8 EngCh 92, 58 Reprint 771.

60. White School House v. Post, 31 Conn. 240; Hart v. Smith, 20 Fla. 58; Jepson v. Martin, 116 Ga. 772, 43 SE 75; Windsor v. Bell, 61 Ga. 671; Arline v. Miller, 22 Ga. 330; Burch v. Burch, 19 Ga. 174; Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195; Dean v. Dean, 7 T. B. Mon. (Ky.) 304.

[a] **An administrator of an administrator cannot** in that capacity recover a demand due the first intestate. Sebre v. Eve, 1 A. K. Marsh. (Ky.) 402.

[b] **Recovery on note running to executor.**—Where an executor loans money of the estate and takes a note therefor, so expressed as to place the legal interest in the obligation in himself personally and dies, his successor in the administration of the estate cannot sue at law upon the obligation under Civ. Code (1895) § 4939, requiring an action on a contract to be brought in the name of the party in whom the legal interest

or intestate, but that an administrator de bonis non should be appointed,[61] and the same rule has been laid down in Canada.[62] However, where all the assets have been collected and all claims against the estate paid, and nothing remains to be done save distribution, this may be made, it has been held, by the personal representative of the deceased executor or administrator, without incurring the expense and delay which would result from appointment of an administrator de bonis non.[63]

[§ 2869] **B. Duties and Liabilities—1. In General.** It is the duty of the representative of a deceased executor or administrator to settle the administration accounts of his decedent,[64] and to surrender the unadministered assets of the original decedent's estate to the survivor in the original administration or to the administrator de bonis non when appointed,[65] or to pay the same into court,[66] although it is held that he can be compelled to deliver over such property only as has come into his possession or under his control.[67]

An action to recover assets of the original estate in such contract is vested; but the suit should be in the name of the personal representative of the deceased executor. Kennedy v. Gelders, 7 Ga. A. 241, 66 SE 620.

61. Cal.—Sanford v. Bergin, 156 Cal. 43, 103 P 333; Burke v. Maguire, 154 Cal. 456, 98 P 21; Chevassus v. Burr, 134 Cal. 434, 66 P 568; Wetzler v. Fitch, 52 Cal. 638.

Ill.—Kinney v. Keplinger, 172 Ill. 449, 50 NE 131 [rev 71 Ill. A. 334].

La.—Gallia's Succ., 130 La. 867, 58 S 691.

Me.—Prescott v. Moss, 64 Me. 422.

Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121; Alexander v. Stewart, 8 Gill & J. 226; Haslett v. Glenn, 7 Harr. & J. 17; Salisbury v. Black, 6 Harr. & J. 293, 14 AmD 279; West v. Hall, 3 Harr. & J. 221.

Mass.—Rhines v. Wentworth, 209 Mass. 585, 95 NE 951; Foster v. Bailey, 157 Mass. 160, 31 NE 771; Tallon v. Tallon, 156 Mass. 313, 31 NE 287; Brooks v. Rice, 131 Mass. 408.

Mich.—Robbins v. Burridge, 128 Mich. 25, 87 NW 93; Perrin v. Lepper, 49 Mich. 347, 13 NW 768.

Miss.—Miller v. Womack, Freem. 486.

Mo.—State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97.

N. J.—Howell v. Steelman, 81 N. J. Eq. 212, 86 A 399; Garret v. Stilwell, 10 N. J. Eq. 313.

N. Y.—In re Hayden, 204 N. Y. 330, 97 NE 718; In re Moehring, 154 N. Y. 423, 48 NE 818; Matter of Collyer, 124 App. Div. 16, 108 NYS 600 [aff 120 App. Div. 894 mem, 105 NYS 1111 mem]; Matter of Duncan, 181 App. Div. 91, 168 NYS 289; Volhard v. Volhard, 119 App. Div. 266, 104 NYS 578; Matter of Driskel, 100 App. Div. 171, 91 NYS 273; Shook v. Shook, 19 Barb. 653; Auburn Theological Seminary v. Cole, 18 Barb. 360; Rositzke v. Meyer, 95 Misc. 356, 159 NYS 464 [aff 176 App. Div. 193, 162 NYS 613]; Matter of McShane, 73 Misc. 146, 132 NYS 470, 8 Mills Surr. 277; Matter of Ingraham, 60 Misc. 44, 112 NYS 763, 6 Mills Surr. 496; Matter of Fox, 104 Misc. 43, 171 NYS 986; In re Duncan, 168 NYS 289; Foster v. Wilber, 1 Paige 537; Matter of Allen, 2 Dem. Surr. 203; Kilburn v. See, 1 Dem. Surr. 353; Fosdick v. Delafield, 2 Redf. Surr. 392.

N. C.—Duke v. Ferebee, 52 N. C. 10; Ferebee v. Baxter, 34 N. C. 64; Conrad v. Dalton, 14 N. C. 251.

Pa.—In re Wagner, 227 Pa. 460, 76 A 215; Grimes v. Pennsylvania R. Co., 189 Pa. 619, 42 A 303, 69 AmSR 830 [aff 7 Pa. Dist. 417]; Taylor's Est., 24 Pa. Dist. 388, 43 Pa. Co. 587.

R. I.—McGuinness v. Whalen, 17 R. I. 619, 24 A 44.

S. C.—Reeves v. Tappan, 21 S. C. 1; Easterly v. Thompson, 24 S. C. L. 346.

Wis.—Reed v. Wilson, 73 Wis. 497, 41 NW 716.

[a] **Administrators of an administrator are liable only to** the administrator de bonis non of a former estate, and are not liable to the distributees. Miller v. Womack, Freem. (Miss.) 486.

[b] **An accounting must be had** before the administrator de bonis non can compel delivery of the assets of the estate to him by the representative of the former executor or administrator. In re Wagner, 227 Pa. 460, 76 A 215.

62. National Trust Co. v. Proulx, 20 Man. 137; Re Cunningham, 31 N. S. 264.

63. In re Garman, 211 Pa. 264, 60 A 720.

64. Ark.—Wilson v. Hinton, 63 Ark. 145, 38 SW 338.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

Mass.—Rhines v. Wentworth, 209 Mass. 585, 95 NE 951.

N. Y.—In re Hayden, 204 N. Y. 330, 97 NE 718; In re Moehring, 154 N. Y. 423, 48 NE 818; Matter of Hallenbeck, 119 App. Div. 757, 104 NYS 568 [mod on other grounds 195 N. Y. 143, 88 NE 16, 133 AmSR 782]; Matter of Lesser, 119 App. Div. 507, 104 NYS 213; Mount v. Mount, 68 App. Div. 144, 74 NYS 148 [rev 35 Misc. 62, 71 NYS 199]; Budd v. Hardenbergh, 36 Misc. 90, 72 NYS 537; In re Trask, 49 NYS 825, 27 NYCivProc 7; Matter of Ranney, 66 HowPr 291, 2 Dem. Surr. 327; Murray v. Vanderpoel, 2 Dem. Surr. 311; Spencer v. Popham, 5 Redf. Surr. 425; Wood v. Crooke, 5 Redf. Surr. 381.

Oh.—Jones v. Willis, 72 Oh. St. 189, 74 NE 166.

Pa.—Graham's Est., 14 Pa. Dist. 5, 18 YorkLegRec 147; Gressle's Est., 29 Pa. Co. 97, 21 LancLRev 73.

Ont.—Cunnington v. Cunnington, 2 Ont. L. 511.

[a] **An account is essential** for the purpose of determining the amount due to beneficiaries and as a basis of proceedings by them against the sureties of the deceased representative or otherwise to compel payment. Matter of Irvin, 68 App. Div. 158, 74 NYS 443.

[b] **It is only on settlement of the account** of the original representative that his personal representative can be held liable for assets not accounted for by his decedent. Rhines v. Wentworth, 209 Mass. 585, 95 NE 951.

[c] **Right of legatees to sue for accounting.**—"The deceased executor having given no bond and having died before any account was due or filed, it became the duty of his administrator to so administer upon the estate of the deceased executor, as to provide for the satisfaction of the amount charged against his estate by the probate court, and on his neglect or refusal to act in the premises, and it appears that all the testator's debts have been paid, the legatees under said will may bring and maintain an action against the estate of the deceased executor, for an account and to recover the amounts due them under the will." Jones v. Wills, 72 Oh. St. 189, 190, 74 NE 166.

[d] **Compensation** for filing such account cannot be allowed from the original estate to the representative of the deceased representative. Crothers v. Crothers, 123 Md. 603, 91 A 691.

[e] **A contrary view** has been asserted in Texas. McClellan v. Mangum, 33 Tex. Civ. A. 193, 75 NW 840.

65. Ill.—Kinney v. Keplinger, 172 Ill. 449, 50 NE 131 [rev 71 Ill. A. 334].

Ind.—Ray v. Doughty, 4 Blackf. 115.

Md.—Crothers v. Crothers, 123 Md. 603, 91 A 691.

N. Y.—In re Duncan, 168 NYS 289; Fithian's Est., 5 NYSt 375.

N. C.—Ferebee v. Baxter, 34 N. C. 64.

Pa.—Marshall v. Hoff, 1 Watts 440.

S. C.—Davis v. Wright, 20 S. C. L. 560.

Tenn.—Williams v. McClung, 6 Heisk. 443.

Va.—Stark v. Lipscomb, 29 Gratt. (70 Va.) 322; Burnley v. Duke, 2 Rob. (41 Va.) 102.

[a] **Protection in payment.** — Where the administrator of an administrator pays over to the administrator de bonis non of the first estate assets converted by his intestate, with the assent of the parties entitled to recover them of him, and under a decree of a court of competent jurisdiction, he is thereby completely protected in such payments. Burnley v. Duke, 2 Rob. (41 Va.) 102.

[b] **Holding check.**—Where the executrix of a deceased administrator holds a fifteen-year-old check made by her testator as administrator, she may be compelled to pay over to the proper claimant thereof, not merely the check, but the money it calls for, if she has so much of the assets of the estate administered by her testator, since the acceptance of the check only would discharge the executrix without assuring the payment of the money represented by it. Matter of Collyer, 124 App. Div. 16, 108 NYS 600 [aff 120 App. Div. 894 mem, 105 NYS 1111 mem].

[c] **Proper deductions.**—(1) Where an administratrix died before settling the estate, payment of funeral expenses of the intestate and attorney's services in procuring letters of administration by her executrix was not an act of administration on the intestate's estate, but was a payment by the executrix of the debts of her testatrix, which, when approved by the surrogate, the executrix was entitled to deduct from the moneys due by the testatrix to the estate of the intestate. Matter of McDonough, 132 App. Div. 614, 117 NYS 258. (2) Where the executrix of the administratrix paid certain debts for which the administratrix would have been entitled to credit, it was immaterial that the executrix procured the funds from the intestate's bank account. Matter of McDonough, 132 App. Div. 614, 117 NYS 258.

[d] **Where no administrator de bonis non with the will annexed has been appointed,** the executor of a deceased executor may properly pay over assets of the original testator, which were in the hands of his decedent, to a receiver of the estate which his decedent represented, although his decedent had been ordered to distribute it to creditors. In re Duncan, 168 NYS 289.

66. In re Moehring, 154 N. Y. 423, 48 NE 818. See also New York cases supra note 64.

67. In re Hayden, 204 N. Y. 330, 97 NE 718 [rev 146 App. Div. 891 mem, 130 NYS 1114 mem, and rearg den 204 N. Y. 688 mem, 98 NE 1104 mem]; Montross v. Wheeler, 4 Lans. (N. Y.) 99; Fithian's Est., 5 NYSt 375; Nolde's Est., 27 Pa. Super. 413.

[a] **Illustration.**—Where an ad-

from the representative of a deceased representative should be brought by the administrator de bonis non of the original estate,[68] and cannot ordinarily be brought by heirs, distributees, or legatees,[69] although under exceptional circumstances these may be permitted to recover assets.[70] If the original representative has, without authority, collected rents accruing after decedent's death and has died without accounting therefor, his personal representative may be held accountable therefor in a suit by the heir.[71]

For waste and misappropriation by a deceased personal representative, his own estate may be made to respond by appropriate proceedings against his personal representative,[72] which should be brought by creditors or distributees, and cannot be brought by an administrator de bonis non unless such power is given to him by statute.[73]

Interest cannot be charged against the successor of an executor or administrator for the time during which there is no representative of the original estate authorized to receive the assets.[74]

Trust funds. Where an executor, whose duty was to settle an estate and to hold the residue in trust, dies after discharging all duties of administration, his executors are entitled to hold the trust funds until a trust is appointed for the purpose.[75]

Judgment binding on foreign representative of deceased representative. Where a foreign executor of a deceased administrator had notice of an action by the administrator de bonis non, against the surety on the deceased administrator's bond, to recover a sum converted by the deceased administrator, and the executor selected the counsel representing the surety, he was bound by a judgment against the surety.[76]

[§ 2870] **2. Lien on, and Retention of, Assets for Settlement.** In some jurisdictions a lien on assets of the original decedent for charges and outlays on behalf of the original representative is allowed for the benefit of his own estate, and should be enforced by his representative;[77] and the latter cannot be compelled to turn over the estate to the administrator de bonis non of the original estate until he has effected a settlement of his own decedent's estate.[78]

[§ 2871] **3. Participation in Administration.** Where the common-law rule of succession of executors has been departed from,[79] and where intestacy has intervened,[80] the representative of a deceased executor or administrator cannot collect or sue on assets of the first estate, or proceed with its general administration,[81] beyond clearing up such personal liability as may have been incurred by his own de-

ministrator has been awarded half the fund in his hands as one of decedent's next of kin, and it appears that the award included sums which the administrator had already distributed to himself, the administrator of the administrator will not be surcharged with the whole amount of the award, but will be responsible for that portion of it only which actually came into his hands. Nolde's Est., 27 Pa. Super. 413.

68. Ark.—Finn v. Hempstead, 24 Ark. 111.
Md.—Lawson v. Burgee, 121 Md. 203, 88 A 121.
N. J.—Boulton v. Scott, 3 N. J. Eq. 231.
Oh.—Piatt v. St. Clair, 5 Oh. 555.
Pa.—Gilliland v. Bredin, 63 Pa. 393; Drenkle v. Sharman, 9 Watts 485; Trueman v. Trueman, 3 PaLJR 101, 4 PaLJ 462.

69. See cases supra note 68.

[a] **An administrator of the executor is not accountable to legatees** for the payment of legacies. Boulton v. Scott, 3 N. J. Eq. 231.

[b] **However,** (1) in Smith v. Moore, 4 N. J. Eq. 485 [aff 5 N. J. Eq. 649], the personal representative of an executor was compelled to account to a legatee of the original testator in due course of the administration for the assets which came into his hands; and (2) in Young v. Schelly, (N. J. Ch.) 21 A 1049, a legatee was allowed to maintain a bill against the personal representative of the deceased executor for an order to sell lands which were made subject to the legacy. But in the latter case an administrator de bonis non with the will annexed was appointed pending the action and brought before the court, and in neither case was any question raised as to the right to bring the suit.

70. Felton v. Sawyer, 41 N. H. 202; Clawson v. Riley, 34 N. J. Eq. 348; Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Buchan v. James, 17 S. C. Eq. 375.

[a] **A legatee whose share has been converted by the deceased executor** to his own use may recover directly of the executor's personal representative. Clawson v. Riley, 34 N. J. Eq. 348; Tucker v. Green, 5 N. J. Eq. 380; Auburn Theological Seminary v. Kellogg, 16 N. Y. 83.

[b] **If a deceased executor held funds as trustee** under the will and died without accounting to the beneficial legatee, his personal representative is liable directly to the legatee. Felton v. Sawyer, 41 N. H. 202; Auburn Theological Seminary v. Kellogg, 16 N. Y. 83; Goodyear v. Bloodgood, 1 Barb. Ch. (N. Y.) 617.

[c] **Where other matters presumed settled.**—The next of kin of an intestate may maintain a suit against the representative of the deceased administrator and his estate, without an administration de bonis non, where from the lapse of time, after the death of the administrator, all other concerns of the estate may be presumed to be settled. Buchan v. James, 17 S. C. Eq. 375.

71. Wathen v. Glass, 54 Miss. 382.

72. U. S.—Coates v. Muse, 5 F. Cas. No. 2,917, 1 Brock. 539.
Ala.—Draughon v. French, 4 Port. 352.
Ark.—Finn v. Hempstead, 24 Ark. 111.
Fla.—Brockenbrough v. Campbell, 5 Fla. 83.
Ga.—Windsor v. Bell, 61 Ga. 671; Arline v. Miller, 22 Ga. 330; Welman v. Armour, R. M. Charlt. 6.
Ill.—Newhall v. Turney, 14 Ill. 338.
Ky.—Barbour v. Robertson, 1 Litt. 93.
Md.—Sibley v. Williams, 3 Gill & J. 52.
Mo.—Dobyns v. McGovern, 15 Mo. 662.
N. J.—Crane v. Howell, 35 N. J. Eq. 374; Moore v. Smith, 5 N. J. Eq. 649.
N. Y.—Price v. Brown, 10 AbbNCas 67, 60 HowPr 511; Foster v. Wilber, 1 Paige 537.
N. C.—Morton v. Ashbee, 46 N. C. 312; Conrad v. Dalton, 14 N. C. 251.
Or.—Gatch v. Simpson, 40 Or. 90, 66 P 688.
Pa.—Bickley's Est., 14 Pa. Dist. 150.
Philippine.—Catalan v. Conde, 20 Philippine 198.
S. C.—Trescot v. Trescot, 12 S. C. L. 417.
Va.—Allen v. Cunningham, 3 Leigh (30 Va.) 395.
"In no case which I can conceive is the administrator of the executor or the executor of the administrator liable at law to the actions of creditors of the first testator or intestate. Where the executor or administrator becomes fixed with assets, it is then his own debt, and his executor or administrator is liable. Property or debts, in compensation for a devastavit, may, in equity, afford ground of relief to creditors, legatees and distributees upon a proper case." Conrad v. Dalton, 14 N. C. 251.

[a] **A foreign executor of a deceased executor** may be compelled to account, to the extent of the assets in his hands, for the misconduct and breach of trust of his decedent. Price v. Brown, 10 AbbNCas (N. Y.) 67, 60 HowPr 511.

[b] **Liability to sureties on original representative's bond.**—The representative of a deceased administrator is responsible to the sureties on the administration bond for what they have been compelled to pay on account of a defalcation. Dobyns v. McGovern, 15 Mo. 662.

[c] **Remedy in equity only.**—(1) The rule at common law was that no action would lie against his representative, because a devastavit was regarded as a tort. Taliferro v. Bassett, 3 Ala. 670; Draughon v. French, 4 Port. (Ala.) 352; Anthony v. McCall, 3 Blackf. (Ind.) 86; Griffith v. Beasley, 10 Yerg. (Tenn.) 434. (2) The only remedy in such case was in equity. Draughon v. French, 4 Port. (Ala.) 352; Schenck v. Schenck, 16 N. J. Eq. 174; Moore v. Smith, 5 N. J. Eq. 649 [aff 4 N. J. Eq. 485].

73. See supra § 2748.

74. Davis v. Wright, 20 S. C. L. 560.

75. Boyd v. Immegart, 91 SW 1132, 29 KyL 20.

76. Matter of McCauley, 49 Misc. 209, 99 NYS 238, 5 Mills Surr. 226.

77. Ray v. Doughty, 4 Blackf. (Ind.) 115; Foster v. Bailey, 157 Mass. 160, 31 NE 771; Munroe v. Holmes, 13 Allen (Mass.) 109, 9 Allen 244; Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Brown's App., 62 Pa. 17; Pendergrass v. Pendergrass, 26 S. C. 19, 1 SE 45.

78. Foster v. Bailey, 157 Mass. 160, 31 NE 771; Baldwin v. Dalton, 168 Mo. 20, 67 SW 599; Sibbs v. Philadelphia Sav. Fund Soc., 153 Pa. 345, 25 A 1119.

79. See supra § 2868.

80. See supra § 2868.

81. Ala.—Dempsey v. Stapleton, 46 Ala. 383.

cedent,[82] and realizing upon what should enter properly into a final account and settlement on his part so as to clear his own decedent's estate from further liability for the trust.[83] So far as the expense of settlement of a deceased administrator's account is made necessary by his improper conduct, it falls upon his estate, but otherwise it may be charged in the account.[84]

XXIII. PUBLIC ADMINISTRATORS

[§ 2872] **A. In General.** In a number of states the statutes provide for the appointment or election of an officer known as a public administrator, to whom is committed the administration of the estates of decedents under certain circumstances, usually where there is no relative within the jurisdiction who is competent or willing to take out letters of administration.[85]

[§ 2873] **B. Appointment or Election and Tenure.** The public administrator is sometimes elected,[86] and sometimes appointed by the court of probate jurisdiction.[87] Where the court, by oversight, failed to elect a public administrator at the term when the term of office of the prior incumbent expired, it was proper to elect at a subsequent term of court, the duty being a continuing one.[88] It has been held that one who is appointed to the office of public administrator at any time during an unexpired term of that office is entitled to hold it, in virtue of such appointment, only to the end of the unexpired term,[89] but under a statute providing for an appointment for a specified number of years, but not indicating the beginning or end of the term, it has been held that a public administrator appointed to fill a vacancy holds for the full term of years specified and not merely for the remainder of the term of his predecessor.[90] Under a statute providing that each probate judge shall appoint a general administrator in his county, whose office shall expire at the end of the term of the appointing judge, unless the succeeding judge shall continue him in office, where a judge who had appointed

Cal.—Burke v. McGuire, 154 Cal. 456, 98 P 21.
Mich.—Robbins v. Burridge, 128 Mich. 25, 87 NW 93.
Mo.—Harney v. Dutcher, 15 Mo. 89, 55 AmD 131.
N. J.—Chambers v. Tulane, 9 N. J. Eq. 146.
N. Y.—In re Hayden, 204 N. Y. 330, 97 NE 718; Matter of Collyer, 124 App. Div. 16, 108 NYS 600; Matter of Fox, 104 Misc. 43, 171 NYS 986; In re Duncan, 168 NYS 289; Smith's Est., 17 AbbNCas 78, 4 Dem. Surr. 223; Renaud v. Conselyea, 7 AbbPr 105, 5 AbbPr 346; Campbell v. Bowne, 5 Paige 34; Gaffney v. Public Admr., 17 AbbNCas 78, 4 Dem. Surr. 223; Stewart v. O'Donnell, 2 Dem. Surr. 17.
N. C.—Ballinger v. Cureton, 104 N. C. 474, 10 SE 664.
Pa.—Stair v. York Nat. Bank, 55 Pa. 364, 93 AmD 759; Brooks v. Smyser, 48 Pa. 86; Com. v. Mears, 5 Leg &InsR 67; Tucker v Horner, 10 Phila. 122.
Va.—Hinton v. Bland, 81 Va. 588; Allen v. Cunningham, 3 Leigh (30 Va.) 395.
Man.—National Trust Co. v. Proulx, 20 Man. 137.

[a] **An action on a note** executed to the original executor as such cannot be brought by his personal representative. Ballinger v. Cureton, 104 N. C. 474, 10 SE 664.

[b] **Power to sell** given by a will to the executor is not transmitted to his executor. Chambers v. Tulane, 9 N. J. Eq. 146.

82. Ala.—Dempsey v. Stapleton, 46 Ala. 383.
Ga.—Worrill v. Taylor, 27 Ga. 398.
N. C.—Jarratt v. Lynch, 106 N. C. 422, 11 SE 261; Irvin v. Hughes, 82 N. C. 210.
Oh.—McCoy v. Gilmore, 7 Oh. 268.
Pa.—Sibbs v. Philadelphia Sav. Fund Soc., 153 Pa. 345, 25 A 1119; Marshall v. Hoff, 1 Watts 440.
Vt.—Crampton v. Seymour, 67 Vt. 393, 31 A 889; Bottam v. Morton, Brayt. 108.
Va.—Turnbull v. Claibornes, 3 Leigh (30 Va.) 392.

83. U. S.—Daly v. James, 8 Wheat. 495, 5 L. ed. 670.
Miss.—Prestige v. Pendleton, 28 Miss. 379.
Mo.—Cook v. Holmes, 29 Mo. 61, 77 AmD 548.
N. Y.—Matter of Collyer, 124 App. Div. 16, 108 NYS 600.
N. C.—Lancaster v. McBryde, 27 N. C. 421; Alston v. Jackson, 26 N. C. 49.
Pa.—Sibbs v. Philadelphia Sav. Fund Soc., 153 Pa. 345, 25 A 1119; Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Marshall v. Hoff, 1 Watts 440; Williamson's Est., 6 Wkly NC 452.
S. C.—Williams v. Seabrook, 14 S. C. L. 371.

[a] **Where a promissory note is made to an administrator** in his representative character and he dies, a suit thereon may be properly brought in the name of his executor. Cook v. Holmes, 29 Mo. 61, 77 AmD 548.

[b] **Recovery from coexecutor.**—Where two coexecutors died, the executor of the one who died last might recover from the executor of the one who died first a bond belonging to the estate of the first testator. Lancaster v. McBryde, 27 N. C. 421.

84. Walworth v. Bartholomew, 76 Vt. 1, 56 A 101.

85. Ala.—McGuire v. Buckley, 58 Ala. 120; Russell v. Irwin, 41 Ala. 292.
Cal.—Los Angeles County v. Kellover, 7 Cal. 215, 68 AmD 237; In re Morgan, 53 Cal. 243; Beckett v. Selover, 7 Cal. 215, 68 AmD 237; In re Graves, 8 Cal. A. 254, 96 P 792.
Ga.—Bailey v. McAlpin, 121 Ga. 111, 48 SE 699.
Ida.—In re Rice, 12 Ida. 305, 85 P 1109.
Ill.—Strong v. Dignan, 207 Ill. 385, 69 NE 909, 99 AmSR 225; Langworthy v. Baker, 23 Ill. 484; Bocock v. Leet, 210 Ill. A. 402; Krome v. Halbert, 183 Ill. A. 551 [aff 263 Ill. 172, 104 NE 1066]; Savage v. Luther, 165 Ill. A. 1; Petteys v. Hutchings, 154 Ill. A. 101.
La.—Hoffman v. Hunter, 127 La. 673, 53 S 903; Townsend's Succ., 36 La. Ann. 535.
Mo.—Troll v. St. Louis Third Nat. Bank, 211 SW 545; Adams v. Larrimore, 51 Mo. 130; State v. McDonald, 38 Mo. 529; Callahan v. Griswold, 9 Mo. 784; Hollingsworth v. Jeffries, 121 Mo. A. 666, 97 SW 632.
N. Y.—Peo. v. Prendergast, 167 App. Div. 140, 152 NYS 938; Matter of Davenport, 142 App. Div. 41, 126 NYS 693; Matter of McMullen, 85 Misc. 661, 148 NYS 1092; Matter of Kroog, 84 Misc. 676, 147 NYS 887; Douglass v. New York, 56 HowPr 178; Public Admr. v. Watts, 1 Paige 347.
N. C.—Wootten v. Smith, 145 N. C. 476, 59 SE 649; Taylor v. Biddle, 71 N. C. 1.
S. D.—In re McClellan, 27 S. D. 109, 129 NW 1037, AnnCas1913C 1029.
Tenn.—State v. Anderson, 16 Lea 32.
Wis.—Welsh v. Manwaring, 120 Wis. 377, 98 NW 214.
Ont.—Reg. v. Bonnar, 24 Ont. A. 220.

"The right to administer is not a natural right in anyone, but resides first in the State, and the State may in certain cases, as where no relatives are within its jurisdiction, place the administration in the hands of its own officer, the public administrator." In re McWhirter, 235 Ill. 607, 612, 85 NE 918.

[a] **Purposes of statutes.**—"The statutes relative to the office of the public administrator were not enacted for the benefit of that official, or to enable him or his counsel and friends to obtain commissions, fees, and costs, but they are remedial statutes, intended to supply something needed for the efficient administration of successions in which the parties in interest are not upon the spot." Bossu's Succ., (La.) 38 S 878, 879 [foll Withers' Succ., 45 La. Ann. 556, 12 S 875; Burnside's Succ., 34 La. Ann. 728].

[b] **Commitment to public administrator pending contest.**—(1) An estate will be committed to the public administrator pending a contest as to the right to the administration, and in such case he has only the powers of a provisional administrator. Supple's Succ., 23 La. Ann. 24. (2) But he cannot be appointed provisionally pending a contest, if he is himself an applicant for letters. Miller's Succ., 27 La. Ann. 574.

[c] **Partnership estate.**—The interest of a deceased partner in the partnership effects may be committed to the public administrator. Headlee v. Cloud, 51 Mo. 301.

[d] **Administration de bonis non** may be committed to the public administrator. Ketchum v. Morrell, 2 NYLegObs 58.

[e] **The county treasurer** is ex officio public administrator in Idaho. In re Rice, 12 Ida. 305, 85 P 1109.

[f] **In South Dakota** "no statute authorizes a public administrator or other representative of the state to act as administrator even in the absence of claimants to the estate." In re McClellan, 27 S. D. 109, 118, 129 NW 1037, 1040, AnnCas 1913C 1029.

86. State v. Anderson, 16 Lea (Tenn.) 321.

[a] **In case of vacancy** the county court fills the vacancy for the unexpired term. State v. Anderson, 16 Lea (Tenn.) 321.

87. Daly v. Mallory, 123 Ala. 170, 26 S 217; Russell v. Erwin, 41 Ala. 292.

88. State v. Anderson, 16 Lea (Tenn.) 321.

89. State v. Parker, 30 La. Ann. 1182.

90. Boynton v. Heartt, 158 N. C. 488, 74 SE 470, AnnCas1913D 616.

a general administrator was reëlected at the end of his term and neither appointed any other person as general administrator nor made nor entered any formal order continuing the previous incumbent, but continued to treat him as the continuing administrator, and committed the administration of estates to him as such, there was a sufficient continuance of the incumbent, notwithstanding a statute making it the duty of the probate judge to keep minutes of all his official acts and proceedings, and to record them in books, and there was no hiatus in the administrator's tenure of office.[91]

[§ 2874]. **C. Eligibility.** It has been held that a corporation authorized by statute to act as guardian, executor, or administrator, may be appointed to the office of public administrator.[92]

[§ 2875] **D. Source of Authority.** A public administrator, in taking charge of the estate upon which letters of administration have been issued to him, is a public officer acting by virtue of his office, and not merely by virtue of the letters issued to him by the court.[93]

[§ 2876] **E. Status.** The public administrator holds the same relation to each individual estate committed to his charge that a private administrator would,[94] being liable to the same extent and amenable to the same remedies.[95]

[§ 2877] **F. Temporary or Permanent Appointment.** The statutes with relation to public administrators sometimes authorize committing the estate to his charge only until those to whom the statute gives the right to administer apply for letters,[96] while, under other statutes, when letters are issued to the public administrator, he qualifies as permanent administrator of the estate.[97]

[§ 2878] **G. Right to Administer—1. In General.** The right of a public administrator is purely statutory and he has no right to administer except in the cases enumerated in the statute.[98] The existence of assets of decedent within the state is usually a prerequisite to the right of the public administrator to administer thereon,[99] and under some statutes the public administrator is authorized to take charge of and administer on an estate only when property of the estate was in his county at the time of decedent's death.[1] The court is not limited, however, in appointing the public administrator to take charge of an estate, to the estate of such persons as die within his county, but he is competent to administer upon the estate within his county of any decedent, irrespective of the place of death.[2] The existence of debts within the state is not essential to the rights of the public administrator to administer on an estate.[3] In a number of states the public administrator is entitled to take charge of an estate only when no persons entitled are present or apply for letters,[4] and it has even been held that the public administrator has no right to take out letters where nonresident heirs have an attorney in fact within the jurisdiction,[5] but if

91. Dale v. Mallory, 123 Ala. 170, 26 S 217.

92. Louisville, etc., R. Co. v. Herndon, 126 Ky. 589, 599, 104 SW 732, 31 KyL 1059 ("It appears from the petition, and is not controverted, that appellee was duly organized under the statutes of 1903 of Kentucky. By section 606 of the statutes, it is provided that it may be appointed and act as guardian, executor, or administrator; and, by section 611, its capital stock shall be taken and considered as the only security required for the faithful performance of its duties, and no other security shall be required, unless the court or officer in or before whom the bond is executed, or some party in interest, demand it. Under these sections of the statutes, it is clear that it can receive specific appointments as guardian, executor, or administrator, and in our opinion there is no reason why it could not be appointed as public administrator. It is true that the statutes [section 3903] say that the court shall appoint some discreet, fit person to act as administrator, etc. In Thompson on Corporations, section 11, 5689, the word 'person' is construed as including a corporation, and by section 457 of the Kentucky statutes of 1903, it is expressly provided that the word 'person' may extend and be applied to corporations. Under these authorities, the county court had the right to appoint appellee as public administrator").

93. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

94. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861; Olsen v. Rich, 2 KyL 257; Brinckwirth v. Troll, 266 Mo. 473, 181 SW 403, Ann Cas1918B 1056; Tymon v. Cromwell, 2 Dem. Surr. (N. Y.) 650.

95. Ala.—McLaughlin v. Nelms, 9 Ala. 925; Governor v. Davis, 9 Ala. 917; Governor v. Gantt, 1 Stew. 388.
Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.
Mo.—State v. Ennis, 79 Mo. A. 12.
Tenn.—Thornton v. Loague, 95 Tenn. 93, 31 SW 986.
W. Va.—Brewer v. Hutton, 45 W. Va. 106, 30 SE 81, 72 AmSR 804.

96. Welsh v. Manwaring, 120 Wis. 377, 98 NW 214.

97. Bailey v. McAlpin, 121 Ga. 111, 48 SE 699.

98. In re Landgraf, 183 Mo. A. 251, 168 SW 268.

99. American Car, etc., Co. v. Anderson, 211 Fed. 301, 127 CCA 587; Richardson v. Busch, 198 Mo. 174, 95 SW 894, 115 AmSR 472.

[a] **The word "papers"** in Rev. St. (1899) § 292 (laws of administration), declaring it to be the duty of a public administrator to take into his charge and custody the estates of all deceased persons "in the following cases: . . . When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same," refers to papers constituting the assets or a part of the assets of the estate, that is, papers in which there is a property value. De la Vergne v. Richardson, 198 Mo. 189, 95 SW 898; Richardson v. Busch, 198 Mo. 174, 184, 95 SW 894, 115 AmSR 472.

[b] **Certificates of stock in foreign corporations** are not assets for the purposes of administration. De la Vergne v. Richardson, 198 Mo. 189, 95 SW 898; Richardson v. Busch, 198 Mo. 174, 95 SW 894, 115 AmSR 472.

[c] **Cause of action for death.**—Where an employee was killed, leaving a mother, brothers, and sister unknown to the public administrator, and no attempt was made to enforce a claim for wrongful death until a fourth of the time limited therefor had expired, the public administrator was authorized to take charge of the estate. American Car, etc., Co. v. Anderson, 211 Fed. 301, 127 CCA 587.

1. U. S. v. Tyndale, 116 Fed. 820, 54 CCA 324; In re Davis, 149 Cal. 485, 87 P 17; McCabe v. Lewis, 76 Mo. 296.

[a] **Assets in custody of United States court.**—Unclaimed assets of a decedent, which are in the custody of a United States district court, are within the purview of a statute providing that the public administrator in each county shall administer on the estate of persons who die leaving property to be administered and not leaving a known husband, widow, or heir in the commonwealth. U. S. v. Tyndale, 116 Fed. 820, 54 CCA 324 (while congress might properly provide that money found on a dead body floating on the high seas, to which no claim is made by heirs or personal representatives, should be paid into the federal treasury, yet, in the absence of legislation, money so found and brought into the custody of a United States district court on the libel of salvors is properly ordered paid over, after allowance of salvage, to the state statutory public administrator, especially when with a reservation of any rights of the federal government therein).

[b] **Where a nonresident died, leaving property in two or more counties,** the public administrator of the county first filing a petition in the superior court for administration of the estate is entitled to appointment, precluding a court of another county from taking jurisdiction. In re Davis, 149 Cal. 485, 87 P 17.

2. In re Richardson, 120 Cal. 344, 52 P 832; In re Hickman, 101 Cal. 609, 36 P 118.

3. Richardson v. Busch, 198 Mo. 174, 95 SW 894, 115 AmSR 472.

4. Bailey v. McAlpin, 121 Ga. 111, 48 SE 699; Underwood v. Underwood, 111 Ky. 966, 65 SW 130, 23 KyL 1287; Smith's Succ., 40 La. Ann. 105, 3 S 539; Bougere's Succ., 30 La. Ann. 422; Daigle's Succ., 27 La. Ann. 524; Gee's Succ., 26 La. Ann. 666.

[a] **Where the heir is in possession,** administration cannot be committed to the public administrator. Miller's Succ., 28 La. Ann. 574.

[b] **Temporary absence** (1) from the state of the surviving wife or heirs of the deceased gives the public administrator no right to administer his succession. Longuefosse's Succ., 34 La. Ann. 583. (2) The heir is entitled to the appointment if present in time to oppose the appointment of the public administrator, although absent at the time of the latter's application for administration. White's Succ., 45 La. Ann. 632, 12 S 758.

5. In re Lelaire, 9 B. C. 429 (where the court also considered the fact

the next of kin is legally disqualified the public administrator is entitled to take charge,[6] and mere delay by the persons entitled in applying for administration is sometimes, under statute, a sufficient ground for committing administration to the public administrator.[7] The right of a public administrator is sometimes confined to cases of intestacy, it being left to the discretion of the court whether it will commit the administration of a testate estate to this official.[8] The fact that the public administrator is a creditor or holds a demand against the estate does not disqualify him,[9] and administration may be committed to the public administrator, although decedent expressed a wish that another person should settle the estate.[10]

Collateral attack. The public administrator's right to administer the estate cannot be collaterally attacked,[11] nor can the question whether the person appointed was the public administrator be raised in a collateral proceeding.[12]

[§ 2879] **2. Order of Preference.** The order of preference of the public administrator as against other persons having or claiming the right to administer is a matter which is regulated by local statutes differing in some particulars in the various jurisdictions.[13] As a general rule, however, his right is subsequent to that of persons beneficially interested in the estate,[14] but prior to that of kindred having no beneficial interest.[15] The guardian of incompetent kindred may be preferred to the public

that there was no evidence that the deceased had any debts or any substantial personal property, although he died possessed of considerable real estate within the province subject to a mortgage).

6. In re Muersing, 103 Cal. 585, 37 P 520; Public Admr. v. Watts, 1 Paige (N. Y.) 382; Matter of Blank, 2 Redf. Surr. (N. Y.) 443.

7. Garrison v. Cox, 95 N. C. 353; Hill v. Alspaugh, 72 N. C. 402; Jinkins v. Sapp, 48 N. C. 510.

8. In re Nunan, Myr. Prob. (Cal.) 238; In re Yee Yun, Myr. Prob. (Cal.) 181.

[a] **Will naming no executor.**—A person who dies leaving a will wherein no executor is named, does not die intestate so as to give the public administrator the right to letters upon his estate. In re Barton, 52 Cal. 538 [foll In re Von Buncken, 120 Cal. 343, 53 P 819].

[b] **Where the executrix named is incompetent,** letters may be issued to the public administrator. In re Munroe, 161 Cal. 10, 118 P 242, Ann Cas1913B 1161.

[c] **Revocation of probate.** — The public administrator of the county of decedent's residence is entitled to appointment upon the revocation of probate of an alleged will, although the revocation proceedings were transferred to another county. In re Graves, 8 Cal. A. 254, 96 P 792.

9. In re Muersing, 103 Cal. 585, 37 P 520.

[a] **Application for letters as creditor.** — A public administrator who is also a creditor does not by applying for letters in his individual capacity as creditor waive his right to make a subsequent application in his official capacity. McKinnon's Est., 64 Cal. 226, 30 P 437.

10. In re Morgan, 53 Cal. 243.

11. In re Strong, 119 Cal. 663, 51 P 1078; Cox v. Kansas, 86 Kan. 298, 120 P 553; Troll v. St. Louis Third Nat. Bank, (Mo.) 211 SW 545; Vermillion v. Le Clare, 89 Mo. A. 55.

[a] **The rule is not applicable to** a proceeding by an administrator to recover stock in a foreign corporation owned by the decedent and the certificates for which were held by defendant, who did not deny authority of plaintiff to sue for property of the estate in Missouri, but denied that the stock in the corporation ever was in Missouri. Richardson v. Busch, 189 Mo. 174, 95 SW 894, 115 AmSR 472.

12. Simmons v. Saul, 138 U. S. 439, 11 SCt 369, 34 L. ed. 1054; McNitt v. Turner, 16 Wall. (U. S.) 352, 21 L. ed. 351; Comstock v. Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34.

13. Cal.—In re Graff, 169 Cal. 250, 146 P 657; Matter of Healy, 122 Cal. 162, 54 P 736.

La.—Taylor's Succ., 23 La. Ann. 22.

Mo.—Brinckwirth v. Troll, 266 Mo. 473, 181 SW 403, AnnCas1918B 1056.

N. Y.—In re Goddard, 94 N. Y. 544, 1 Dem. Surr. 430; Matter of McMullen, 85 Misc. 661, 148 NYS 1092.

N. C.—Boynton v. Heartt, 158 N. C. 488, 74 SE 470, AnnCas1913D 616.

[a] **Foreign administrator.** — An administrator with the will annexed appointed according to the laws of another state cannot be appointed dative testamentary executor to administer property of the succession situated in Louisiana, but in such case the public administrator for the parish where the property belonging to the succession is situated must be appointed to administer it. Taylor's Succ., 23 La. Ann. 22.

[b] **Where an appointment has been made** under Rev. St. § 8, authorizing the court under certain circumstances to grant letters to any person who may be deemed suitable, before the public administrator has taken charge of the estate, the appointee cannot be removed on the ground that the public administrator's right to administer is superior; for the purpose of the statute relating to public administrators is merely to provide a bonded officer who shall take charge of the estates of decedent in cases where they are liable to be wasted by reason of the fact of no executor qualifying or no administrator being appointed under the general law, and it is auxiliary to the general law relating to administration and was intended merely to supply its deficiency in the particular named and not to repeal or supplant any of its provisions. Tittman v. Edwards, 27 Mo. A. 492 (where the court said further that, if the public administrator had taken charge of the estate, it would not be a proper exercise of power for the probate court subsequently to appoint an administrator under the statute in question).

14. Cal.—In re Rankin, 164 Cal. 138, 127 P 1034; In re Engle, 124 Cal. 292, 56 P 1022.

Ill.—Langworthy v. Baker, 23 Ill. 484; Krome v. Halbert, 183 Ill. A. 551 [aff 263 Ill. 172, 104 NE 1066]; Petteys v. Hutchings, 154 Ill. A. 101.

Mich.—Reynolds v. McMullen, 55 Mich. 568, 22 NW 41, 54 AmR 386.

Mont.—State v. Second Judicial Dist. Ct., 34 Mont. 226, 85 P 1022.

N. Y.—Matter of Kroog, 84 Misc. 676, 147 NYS 887; Public Admr. v. Peters, 1 Bradf. Surr. 100.

N. C.—In re Bailey, 141 N. C. 193, 53 SE 844.

Wis.—Welsh v. Manwaring, 120 Wis. 377, 98 NW 214.

"The public administrator has no right to enter into a controversy with the heirs at law of an intestate to prevent their securing their preference to administer or to nominate, nor should he be permitted to resort to any technicality to prevent a resident heir from obtaining administration or nominating an administrator during the sixty days succeeding the death of the intestate. It was not intended by the statute to give the public administrator a foothold from which to wrest the administration from the heirs at law." Savage v. Luther, 165 Ill. A. 1, 11.

[a] **"It is the policy of the statute** to grant to the next of kin who are entitled to share in a decedent's estate the right to administer on the same, on the theory that those to whom the estate belonged would be most interested in the proper management of the same. This policy of the statute is very forcibly expressed in In re Goddard, 94 N. Y. 544, by Chief Justice Ruger, in the following language: 'The equity of allowing persons entitled to take by distribution the estate of the deceased person to select the agency by which such distribution should be made is so manifest that it ought not to be refused to them except in a case where its impropriety is clear and unmistakable.'" In re Hudson, 37 Misc. 539, 540, 75 NYS 1053, 2 Mills Surr. 576.

[b] **A resident devisee under a will probated abroad** is preferred to the public administrator. In re Bergin, 100 Cal. 376, 34 P 867.

[c] **Administration pendente lite.** —On an application for the appointment of a special administrator pending contest of a will, the appointment of the public administrator over the protest of testatrix's widow, who was testatrix's legatee, devisee, and executrix, was a violation of the statute declaring that in case of the appointment of a special administrator, the court shall give preference to the person entitled to letters testamentary or of administration. State v. Second Judicial Dist. Ct., 34 Mont. 226, 85 P 1022.

[d] **If a will is set aside** more than sixty days after the death of the testator, the public administrator is not entitled to the administration, but such right reposes in the next of kin as provided by the statute. Petteys v. Hutchings, 154 Ill. A. 101.

[e] **Application by next of kin after time allowed therefor.**—Under a statute providing that letters of administration shall be granted to the persons entitled thereto and applying for the same, in the order named, and that the public administrator shall apply for and obtain letters of administration when six months have elapsed from the death of decedent, and no letters have been applied for, and issued to any person, the next of kin, having applied for such letters before appointment of the public administrator, although not till after expiration of the six months, is entitled thereto. In re Bailey, 141 N. C. 193, 53 SE 844.

[f] **A judgment, rendered after public notice,** regularly appointing a public administrator as administrator of an apparently vacant estate will not be reversed on appeal because of subsequent evidence tending to show the existence of heirs. St. Hubert's Succ., 36 La. Ann. 388.

15. In re Beer, 178 Cal. 54, 171 P 1062; In re Wakefield, 136 Cal. 110, 68 P 499; Matter of Hagan, 78 Misc. 322, 139 NYS 463; Matter of Lowenstein, 29 Misc. 722, 62 NYS 819, 1 Mills Surr. 364; Public Admr. v. Watts, 1 Paige (N. Y.) 347; Public Admr. v. Peters, 1 Bradf. Surr. (N. Y.) 100.

administrator,[16] but it has been held that the nominee of the next of kin is not, as a matter of right, entitled to administration in preference to the public administrator,[17] especially where the next of kin is incompetent.[18] On the other hand, however, it has been held that the nominee of a nonresident widow should be preferred,[19] and that the public administrator is not entitled to administer on the estate of a nonresident, where one of the nonresident's heirs at law who was a bona fide resident nominated another,[20] and preference is sometimes given to the nominee of persons entitled,[21] where the latter are residents.[22] The public administrator is usually entitled to administration in preference to creditors,[23] although this rule is not universal.[24] The public administrator is also entitled to preference over strangers.[25] It has been considered that the attorney in fact of an heir who applies for administration and tenders the requisite security is properly appointed in preference to the public administrator, especially if the heir is present;[26] but there is also authority for the view that the public administrator had a right to administration with the will annexed in preference to the attorney in fact of a disqualified next of kin, except where the will was made by a testator dying domiciled abroad, and was proved by exemplification of a foreign probate.[27]

Discretion of court. As between the public administrator and another person applying for administration the choice sometimes rests in the discretion of the court,[28] and the public administrator may, in the discretion of the court, be preferred to a trust company authorized by statute to administer, because an individual will be preferred to a corporation.[29]

[§ 2880] **H. Duty to Administer.** A public administrator cannot refuse to enter upon or to continue the administration of an estate which by law he should administer, but may be compelled to act.[30] A probate judge may be compelled by mandamus to make an order compelling the public administrator

[a] **Illustration.**—The public administrator is preferred to the brother of a decedent who left a father in Ireland, but no wife, issue, or descendants, the brother not being entitled to a distributive share. Matter of Gilchrist, 79 App. Div. 637 mem, 80 NYS 1135 mem [aff 37 Misc. 543, 544, 75 NYS 1055] ("Section 2669 of the Code distinctly provides that the public administrator shall have prior right if there is no next of kin entitled to a distributive share of the estate, who are competent and willing to serve. The petitioner herein, not being entitled to a distributive share of his brother's estate has, therefore, no rights herein as against the public administrator. The cases quoted by the petitioner herein evidently relate to the public administrator in New York county, where the statute is different, and which have, no doubt, misled him into making this application. There is certainly no good and sufficient reason why a different rule should be applied by the Legislature in favor of a public administrator in this county, differing from that of New York county, and there is no good, practical reason why a public official should be preferred to a blood relative in the administration of the affairs of a decedent's estate, but the statute upon this matter is express, and I am constrained to follow the same, and the remedy should be with the Legislature, and not with the court").

[b] **Persons entitled to "succeed" to property.**—Under a statute giving the brothers of a decedent "when they are entitled to succeed to his personal estate, or some portion thereof," a right of administration prior to that of the public administrator, the brothers are not entitled to priority where the deceased died leaving her mother as her sole heir at law and the mother thereafter died leaving a will bequeathing her property to her two sons, for in such case the brothers do not "succeed" to the decedent's estate. In re Wakefield, 136 Cal. 110, 68 P 499.

[c] **In case of illegitimacy** the public administrator is preferred. Ferrie v. Public Admr., 3 Bradf. Surr. (N. Y.) 249.

[d] **Administration de bonis non.**—Where a father, who was the sole next of kin of his deceased daughter, died after taking out letters of administration on her estate, letters must be granted to the public administrator as against the right of either intestate's brother, or a creditor, or the father's widow and administratrix. Matter of Hagan, 78 Misc. 322, 139 NYS 463.

16. In re McLaughlin, 103 Cal. 429, 37 P 410; In re Hudson, 37 Misc. 539, 75 NYS 1053, 2 Mills Surr. 576.

[a] **General and local statutes.**—Where under a general act the guardian of the next of kin would be entitled to administer, but under a later local act the right is conferred upon the public administrator, the latter is entitled to letters. Speckles v. Public Admr., 1 Dem. Surr. (N. Y.) 475.

[b] **Contrary view.**—The public administrator is preferred to the tutor of a minor legatee under universal title. Bossu's Succ., 115 La. 13, 38 S 878.

17. In re Morgan, 53 Cal. 243.

[a] **Invocation of discretion.**—An unauthorized nomination for appointment as administrator serves to invoke the discretion of the court, which may, in the exercise of that discretion, appoint the person nominated to the exclusion of the public administrator. In re Harrison, 135 Cal. 7, 66 P 846.

18. In re Muersing, 103 Cal. 585, 37 P 520; Matter of Garber, 74 Cal. 338, 16 P 233; Hyde's Est., 64 Cal. 228, 30 P 804; In re Kelly, 57 Cal. 81; In re Morgan, 53 Cal. 243; Public Admr. v. Watts, 1 Paige (N. Y.) 382; Sutton v. Public Admr., 4 Dem. Surr. (N. Y.) 33; Matter of Blank, 2 Redf. Surr. (N. Y.) 443.

19. In re Cotter, Myr. Prob. (Cal.) 179.

20. Krome v. Halbert, 263 Ill. 172, 104 NE 1066 [aff 183 Ill. A. 551].

21. In re Watson, 31 Mont. 438, 78 P 702.

22. Bundy v. Wilkins, 183 Ill. A. 560; Krome v. Halbert, 183 Ill. A. 551 [aff 263 Ill. 172, 104 NE 1066].

23. In re Wise, 175 Cal. 196, 165 P 531; Hyde's Est., 64 Cal. 228, 30 P 804; McKinnon's Est., 64 Cal. 226, 30 P 437; Coffey v. Mann, 200 Ill. A. 143; Matter of Hagan, 78 Misc. 322, 139 NYS 463; Matter of Morel, 103 Misc. 555, 171 NYS 759; Matter of Blank, 2 Redf. Surr. (N. Y.) 443; Public Admr. v. Peters, 1 Bradf. Surr. (N. Y.) 100; Re Morton, 5 Terr. L. 409.

[a] **The reason of the rule** is "that it would be better for such estates to have some competent public official act in preference to a creditor who would manifestly be interested to the extent of his claim only." In re Hudson, 37 Misc. 539, 540, 75 NYS 1053, 2 Mills Surr. 576.

[b] **This rule applies where** decedent was: (1) A nonresident. Coffey v. Mann, 200 Ill. A. 143. (2) An alien, leaving no resident next of kin. Matter of Morel, 103 Misc. 555, 171 NYS 759.

[c] **Special circumstances must exist to change rule.**—In the absence of an application by a person entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest to show by special circumstances that such grant is in the interests of the estate; otherwise the grant should be made to the public administrator for the district. Re Morton, 5 Terr. L. 409.

[d] **Wishes of creditors.**—Where there is a contest between the public administrator and a creditor as to which shall administer, and other creditors request the court to appoint the public administrator, it is within the discretionary power of the court to appoint him. In re Doak, 46 Cal. 573.

[e] **Formerly** in California creditors were entitled to preference. In re Doak, 46 Cal. 573.

24. Rosenthal v. Prussing, 108 Ill. 128; Langworthy v. Baker, 23 Ill. 484.

25. In re Moran, 176 Cal. 216, 168 P 18; In re Wise, 175 Cal. 196, 165 P 531; In re Ghio, 157 Cal. 552, 108 P 516, 137 AmSR 145, 37 LRANS 549; Hyde's Est., 64 Cal. 228, 30 P 804; Matter of Printup, 121 App. Div. 322, 106 NYS 74; Public Admr. v. Peters, 1 Bradf. Surr. (N. Y.) 100.

[a] **Stranger not joined with persons having right.**—A person nominated in the petition for appointment as administrator, not being of the next of kin, or a creditor of decedent, is not entitled to appointment in preference to the county treasurer who is the public administrator without being joined with others who have a right to such appointment prior to the public administrator. Matter of Printup, 121 App. Div. 322, 106 NYS 74.

26. Henry's Succ., 31 La. Ann. 555.

27. Matter of Blank, 2 Redf. Surr. (N. Y.) 443.

28. In re Yee Yun, Myr. Prob. (Cal.) 181 (where applications were made by the public administrator and by a Chinaman who did not intend to reside permanently in the state, and did not speak English, letters should be issued to the public administrator).

29. In re Goddard, 94 N. Y. 544, 1 Dem. Surr. 430.

30. State v. Kennedy, 73 Mo. A. 384.

to administer an estate.[31]

[§ 2881] **I. Appointment to Take Charge of Particular Estates—1. Necessity for.** As a general rule a public administrator is not, merely by virtue of his office, entitled to take charge of and administer estates,[32] but it is necessary that he should be appointed administrator by the court and receive letters of administration.[33] In some jurisdictions, however, the public administrator may act without an order of court where the estate is in danger of loss or damage,[34] although under such circumstances the public administrator's determination is not final on the question of his authority to take charge of the estate, but the final determination is for the probate court,[35] and the authority arising from mere official position is sometimes of a merely temporary character, holding only until regular letters of administration are procured.[36]

[§ 2882] **2. Jurisdiction.** In appointing the public administrator to administer any particular estate the court exercises the same jurisdiction that it does in the grant of letters in ordinary cases.[37] Where a public administrator made application to be appointed administrator of a vacant estate, it was error to refuse to take any judicial action in relation to the application merely because a person representing himself to be the brother and heir of the deceased had appeared praying to be appointed administrator, but the application of the public administrator should have been filed and after due notice given tried contradictorily with the application of any other person and the rights of all parties settled by a judicial decree.[38]

[§ 2883] **3. Time for Appointment.** In some states the public administrator cannot apply for administration or be appointed to the trust until the lapse of a specified time after the death of decedent,[39] and even apart from statute it has been held error to appoint the public administrator upon the petition of creditors filed nine days after the death where no emergency existed.[40]

[§ 2884] **4. Petition or Application.** The appointment of the public administrator to take charge of a particular estate is ordinarily based upon a petition duly filed,[41] but an appointment is not rendered void by the omission of the application to set out a jurisdictional fact which actually exists.[42]

[§ 2885] **5. Notice.** As a general rule notice of an application for the appointment of the public administrator must be given to those interested in the estate or having a prior right to administer thereon;[43] but some statutes permit an appointment without notice,[44] and even where the statute requires notice, it has been held that the granting of

31. Brennan v. Harris, 20 Ala. 185.

32. Williamson v. Furbush, 31 Ark. 539; In re Hamilton, 34 Cal. 464; Wilson v. Dibble, 16 Fla. 782.

33. Cal.—Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861; In re Hamilton, 34 Cal. 464; Beckett v. Selover, 7 Cal. 215, 68 AmD 237.

Fla.—Davis v. Shuler, 14 Fla. 438.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

Ill.—Langworthy v. Baker, 23 Ill. 484; Thomas v. Adams, 10 Ill. 319.

La.—Miller's Succ., 27 La. Ann. 574.

Miss.—Sandifer v. Mackey, 3 S 570.

Mo.—Hollingsworth v. Jeffries, 121 Mo. A. 666, 97 SW 632.

N. Y.—Miller v. Franklin Bank, 1 Paige 444.

Tenn.—State v. Anderson, 16 Lea 321.

[a] **Presumption of appointment.**—In the absence of evidence to the contrary it will be presumed that a public administrator taking charge of an estate procured letters of appointment as required by statute. State v. Woody, 20 Mont. 413, 51 P 975.

[b] **Estoppel to deny authority.**—If a public administrator receives assets under an order of court directing him to administer, he is estopped afterward to deny that he is administrator, although no letters were issued to him. Thompson v. Bondurant, 15 Ala. 346, 50 AmD 136.

34. Williamson v. Furbush, 31 Ark. 539; Richardson v. Busch, 198 Mo. 174, 95 SW 894, 115 AmSR 472; Adams v. Larrimore, 51 Mo. 130; In re Hill, 102 Mo. A. 617, 77 SW 110.

[a] **Administrator acts independently of order of court.**—Under a statute making it the duty of the public administrator to take charge of the estate of deceased persons in certain specified cases, the public administrator, in taking charge of such estates, acts independently of any order of the probate court. Leeper v. Taylor, 111 Mo. 312, 19 SW 955.

[b] **Notice of taking charge.**—Where the statute requires the public administrator immediately upon taking charge of an estate, except where he acts under the order of court, for the purpose of administering it, to file a notice of the fact in the office of the clerk having probate jurisdiction, the public administrator's omission to file the notice would not render the whole administration void, especially in view of a provision in the statute that failure to file the notice shall subject the public administrator to a penalty. Adams v. Larrimore, 51 Mo. 130.

[c] **Effect of order denying administration.**—Although the statute authorizes the public administrator to enter upon his duties by the mere filing of a notice with the clerk of the probate court, an order of the probate court denying administration upon the estate of claimant's deceased wife and awarding him possession is binding until set aside, and the administrator is not entitled to custody upon the mere filing of a schedule. Nelson v. Troll, 173 Mo. A. 51, 156 SW 16.

[d] **Collateral attack.**—The relation of a public administrator to the estate, when he has taken charge of it under the statute, on his own motion, and filed the required notice, is no more subject to collateral attack than if he had taken charge of it by order of the probate court, or under letters of administration. Vermillion v. Le Clare, 89 Mo. A. 55 [dist McCabe v. Lewis, 76 Mo. 296; Lewis v. McCabe, 76 Mo. 307].

35. McCabe v. Lewis, 76 Mo. 296.

36. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861 (while the public administrator may in some cases act wholly by virtue of his office, he must, with all convenient dispatch after thus acting, produce letters of administration thereon in like manner and on like proceedings as letters of administration are issued to other persons).

37. State v. Anderson, 16 Lea (Tenn.) 321.

38. State v. Plaquemines Parish Judge, 25 La. Ann. 329.

39. Jackson v. Asher Coal Co., 153 Ky. 547, 156 SW 136; Underwood v. Underwood, 111 Ky. 966, 65 SW 130, 23 KyL 1287; Varnell v. Loague, 9 Lea (Tenn.) 158.

40. Savage v. Luther, 165 Ill. A. 1 (in the event of the existence of an emergency administration to collect should be granted).

41. In re Hamilton, 34 Cal. 464.

42. Cox v. Kansas City, 86 Kan. 298, 120 P 553.

43. Bailey v. McAlpin, 121 Ga. 111, 48 SE 699; Hollingsworth v. Jeffries, 121 Mo. A. 666, 97 SW 632; Proctor v. Wanmaker, 1 Barb. Ch. (N. Y.) 302.

[a] **Notice to a relative not entitled to share in the estate** (1) is unnecessary, although such person's claim to administration is superior to that of the public administrator. Matter of Brewster, 5 Dem. Surr. (N. Y.) 259. (2) Uncles and aunts of an intestate must be cited before a grant of letters to the public administrator, although they are not entitled to share in the estate. Matter of Lowenstein, 29 Misc. 722, 62 NYS 819, 1 Mills Surr. 364.

[b] **Notice to attorney-general.**—A statute providing that, where the surrogate cannot ascertain whether decedent left any person entitled to his estate, a citation must be issued to all creditors of and persons interested in the estate, and to the attorney-general, requiring them to show cause why administration should not be granted to the petitioner, does not, where the surrogate is satisfied that there are persons entitled to succeed to the estate and that they do not live within the state, entitle the attorney-general to notice of proceedings for the issuance of letters of administration to the public administrator, where decedent leaves assets in the county, and does not leave a widow, descendant, or next of kin residing in the state. Matter of Davenport, 142 App. Div. 41, 126 NYS 693.

[c] **Where no order was made on the day named** in the citation and notice, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further without either due service of another citation or a voluntary appearance of the widow and next of kin, and an order made on a day subsequent granting the public administrator's application for appointment without such notice or appearance was void. In re Page, 107 N. Y. 266, 14 NE 193.

44. Jordan v. Chicago, etc., R. Co., 125 Wis. 581, 587, 104 NW 803, 110 AmSR 865, 1 LRANS 885, 4 AnnCas 1113 (under a statute providing that in certain cases "the county court having jurisdiction . . . shall, upon its own motion or upon the application of the public admin-

letters without notice is not improvident.[45] On the other hand, however, the requirement of notice has been held jurisdictional.[46]

[§ 2886] **6. Order.** An order reciting an applicant's former appointment as "general administrator of the county," and then directing that "special letters on the estate of the decedent issue to him," shows a grant of general, and not limited, letters, the word "special" being used in contradistinction to "general" or county administrator.[47]

[§ 2887] **7. Effect of Appointment.** After an administration has been closed by the transfer of the property to the universal legatee, the appointment of the public administrator does not have the effect of bringing the property back into the succession.[48]

[§ 2888] **J. Proof of Authority.** The authority of a public administrator is properly proved by a copy of the record of his appointment;[49] but it has been held that, in the absence of evidence to the contrary, it will be presumed that a public administrator taking charge of an estate procured letters of appointment as required by statute.[50]

[§ 2889] **K. Official Oath.** The general official oath of a public administrator is held to cover the administration of all estates committed to him in his official capacity, so that he is not required to take an oath with respect to each particular estate.[51]

[§ 2890] **L. Official Bond.** As a general rule the official bond of a public administrator covers estates committed to his care and he is not required to give further security,[52] although the court may exact it when deemed necessary,[53] and the same rule applies with respect to the official bond of an officer who is ex officio public administrator.[54] Where one was public guardian by virtue of being public administrator, and at the termination of his office a new bond was given for him as guardian and curator "in his private capacity," such bond was not an "additional" bond to guarantee the faithful performance of his duty as public administrator.[55]

Where a public administrator was reëlected to the office, and qualified therefor, he became his own successor as representative of an estate administered by him during his first term, and there was no necessity of a special order of the probate court, after his reëlection, to take charge of such estate, in order to charge him and his sureties for his second term of office.[56]

[§ 2891] **M. Effect of Termination of Office.** Under the statutes of some jurisdictions a public administrator to whom the administration of an estate has been committed during his term of office has the right to continue in charge of the estate after his term of office expires and his successor is elected and qualified,[57] but upon his resignation and the appointment of his successor his functions cease and he should settle and turn over the assets to his successor.[58] A public administrator, by filing his application to administer an estate, does not acquire a vested right to administer, and to the fees pertaining thereto, as against his successor acquiring the office before an appointment is made.[59]

istrator . . . grant administration of such estate," the appointment may properly be made without notice).

45. Hollingsworth v. Jeffries, 121 Mo. A. 666, 97 SW 632 (where a nonresident died intestate, leaving property in a county and as his only heir a resident of the state, but neither the public administrator of the county where the property was situated, nor the probate court had knowledge of such fact, the granting of letters to the public administrator was not improvident, although no citation was issued as provided by statute).

46. Hartley v. Glover, 56 S. C. 69, 33 SE 796.

47. Jones v. Ritter, 56 Ala. 270.

48. Casey v. Abraham, 113 La. 581, 37 S 484.

49. Davis v. Shuler, 14 Fla. 438; Littleton v. Christy, 11 Mo. 390.

50. State v. Woody, 20 Mont. 413, 51 P 975.

51. Healy v. Lassen County Super. Ct., 127 Cal. 659, 60 P 428; Beckett v. Selover, 7 Cal. 215, 68 AmD 237.

52. Buckley v. McGuire, 58 Ala. 226; Healy v. Lassen County Super. Ct., 127 Cal. 659, 60 P 428; Beckett v. Selover, 7 Cal. 215, 68 AmD 237; State v. Purdy, 67 Mo. 89.

[a] **In some states public administrators have the option** to furnish a separate bond for every estate under their charge, or a general official bond for faithful administration of all estates on which administration is granted to them. In either case the conditions are appropriate to the functions of the office. Buckley v. McGuire, 58 Ala. 226; State v. Purdy, 67 Mo. 89.

53. Healy v. Lassen County Super. Ct., 127 Cal. 659, 60 P 428.

[a] **On sale of real estate.**—The statute provides that the court may require a further bond of the public administrator. Healy v. Lassen County Super. Ct., 127 Cal. 659, 60 P 428.

54. Ala.—Daly v. Mallory, 123 Ala. 170, 26 S 217; Payne v. Thompson, 48 Ala. 535; Governor v. Davis, 9 Ala. 917.

Cal.—Nickals v. Stanley, 146 Cal. 724, 81 P 117; Healy v. Lassen County Super. Ct., 127 Cal. 659, 60 P 428.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388.

Ill. — Brink's Express Co. v. O'Donnell, 88 Ill. A. 459.

Ky.—Scarce v. Page, 12 B. Mon. 311.

Miss.—Cocke v. Finley, 29 Miss. 127.

[a] **Clerk of court as administrator.**—A statute providing that where one is appointed administrator without being required to give bond, one interested in the estate may require the administrator to give bond, applies to a clerk of the superior court, who has been appointed administrator and has given no bond as such. Duggan v. Lamar, 106 Ga. 855, 33 SE 43.

55. State v. Hardy, 200 Mo. A. 405, 206 SW 904.

56. State v. Kennedy, 163 Mo. 510, 63 SW 678.

57. Ala.—Eubank v. Clark, 78 Ala. 73; King v. Griffin, 6 Ala. 387.

Cal.—In re Aveline, 53 Cal. 259; Rogers v. Hoberlein, 11 Cal. 120.

Ga.—Bailey v. McAlpin, 122 Ga. 616, 50 SE 388; Beale v. Hall, 22 Ga. 431.

Ind.—Seybold v. Rehwald, 177 Ind. 301, 95 NE 235.

Ky.—Olsen v. Rich, 2 KyL 257.

La.—Cabrol's Succ., 28 La. Ann. 602.

Miss.—Hull v. Neal, 27 Miss. 424.

Mo.—State v. Kennedy, 163 Mo. 510, 63 SW 678; Warren v. Carter, 92 Mo. 288, 5 SW 42; Garner v. Tucker, 61 Mo. 427; State v. Holman, 93 Mo. A. 611, 67 SW 747; State v. Kennedy, 73 Mo. A. 384.

Mont.—In re Craigie, 24 Mont. 37, 60 P 495.

N. C.—Wootten v. Smith, 145 N. C. 476, 59 SE 649.

S. C.—Levi v. Huggins, 48 S. C. L. 166.

Tenn.—Thornton v. Loague, 95 Tenn. 93, 31 SW 986.

Va.—Tunstall v. Withers, 86 Va. 892, 11 SE 565; Dabney v. Smith, 5 Leigh (32 Va.) 13.

[a] **The public administrator retains his official character** while acting under letters of appointment so far as the particular estate is concerned, even though his term of office has expired. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

[b] **Compensation of public administrator acting after expiration of term.**—Under a statute making the office of public administrator a salaried office and declaring that the salary shall be in full compensation for all services, the administrator is not entitled to extra compensation for services rendered in the administration of estates after the expiration of his term of office. Los Angeles County v. Kellogg, 146 Cal. 590, 80 P 861.

58. State v. Kennedy, 163 Mo. 510, 63 SW 678; State v. Kennedy, 73 Mo. A. 384.

[a] **Construction of statute.**—The word "resigns," in a statute providing that, when the public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the course of law, has reference to his office as public administrator, and not his appointment by the probate court to take charge of any particular estate; and hence, on his resignation, accepted by the governor, and his successor having been appointed, he becomes incapacitated to administer estates in his hands. State v. Kennedy, 163 Mo. 510, 63 SW 678.

59. Landford v. Dunklin, 71 Ala. 594; In re Pingree, 100 Cal. 78, 34 P 521; Wilson v. Wiltz, 32 La. Ann. 688; State v. Woody, 20 Mont. 413, 51 P 975.

[§ 2892] **N. Administration by Other Public Officials.** In states or counties where there is no public administrator the administration of vacant estates is frequently committed to some other public officer, such as the sheriff or clerk of the court.[60] But a coroner has no right, by virtue of his office, to ask to be appointed as administrator of a person found dead within his jurisdiction.[61]

XXIV. COLLECTORS AND RECEIVERS

[§ 2893] **A. Appointment.** The appointment of collectors to have custody and charge of the estate of a decedent until general letters testamentary or of administration can issue is sometimes provided for.[62] At one time it was the practice in England for the court of chancery to appoint a receiver while litigation was pending, although the ecclesiastical court by granting an administration pendente lite might have provided for the collection of the effects of the estate,[63] but now under the statutes[64] the court of chancery will not appoint a receiver when an administrator pendente lite has been appointed by the court of probate.[65] In the United States, under certain circumstances and upon a proper showing being made, the court of probate may appoint a receiver for the estate, who usually corresponds to a sort of special administrator.[66] But where the probate court has ample power to care for an estate by compelling the administrator to account, a receiver need not be appointed.[67]

[§ 2894] **B. Powers, Duties, and Liabilities.** A collector cannot be sued for a debt of decedent.[68] When a receiver is appointed he does not represent the legatees,[69] but the property passes into the possession of the court.[70] The receiver may be

60. U. S.—Ex p. Ringgold, 20 F. Cas. No. 11,841, 3 Cranch C. C. 86.
Ark.—Williamson v. Furbush, 31 Ark. 539; State v. Watts, 23 Ark. 304.
Fla.—Wilson v. Dibble, 16 Fla. 782; Davis v. Shuler, 14 Fla. 438.
Ga.—McNeil v. Smith, 55 Ga. 313; Johnston v. Tatum, 20 Ga. 775.
Ida.—In re Rice, 12 Ida. 305, 85 P 1109.
Ky.—Scarce v. Page, 12 B. Mon. 311; Hammon v. Pearl, 6 T. B. Mon. 410.
La.—Hoffman v. Hunter, 127 La. 673, 53 S 903.
Miss.—Cocke v. Finley, 29 Miss. 127.
N. Y.—Ex p. Emigration Comrs., 1 Bradf. Surr. 259.
Pa.—Jakey's Est., 3 Pa. Dist. 750, 15 Pa. Co. 377, 35 WklyNC 476.
S. C.—Hartley v. Glover, 56 S. C. 69, 33 SE 796.
S. D.—Smith v. Terry Peak Miners' Union, 16 S. D. 631, 94 NW 694.
Va.—Hutcheson v. Priddy, 12 Gratt. 85.
W. Va.—Bridgman v. Bridgman, 30 W. Va. 212, 3 SE 580.
[a] **County treasurer.**—In re Rice, 12 Ida. 305, 85 P 1109; In re Ward, 6 NYLegObs 111, 1 Redf. Surr. 254.
[b] **Deputy escheator.** — Jakey's Est., 3 Pa. Dist. 750, 15 Pa. Co. 377, 35 WklyNC 476.
[c] **District attorney.**—The statute providing for the summary administration of small successions by the district attorney is not restricted by its terms or purpose to vacant successions. Hoffman v. Hunter, 127 La. 673, 53 S 903.
[d] **District marshal.** — Under a statute, providing that if all executors shall refuse, or in case of intestacy if no person applies for administration, the general court, or other court having jurisdiction of probate, shall order the sheriff or other officer of the county to take the estate in his possession and make sale thereof for the payment of debts, the orphans' court of the county of Alexandria had no authority to order the marshal of the District of Columbia to administer the estate of any deceased person, he not being a county or corporation officer, but the officer of the whole district. Ex p. Ringgold, 20 F. Cas. No. 11,841, 3 Cranch C. C. (U. S.) 86.
[e] **County judge ex officio public administrator.**—Under a statute providing that, when a person dies leaving no estate, except personal property of trifling value, the judge of the county court shall take charge of the estate personally, or by some person he may appoint, and pay out of it the burial and other expenses, and set apart to the widow and minor children, if any, the residue, the responsibility of gathering and distributing such property is on the judge, and a person appointed by him to take physical possession of the property is a mere custodian, and has not legal capacity to sue to recover assets. Smith v. Terry Peak Miners' Union, 16 S. D. 631, 94 NW 694.
[f] **Powers of commissioners of emigration** in cases where the minor children of alien passengers have become orphans by their parents or last surviving parent dying on their passage to the port of New York. Ex p. Emigration Comrs., 1 Bradf. Surr. (N. Y.) 259.
[g] **Clerk may be forced to act.**—Johnston v. Tatum, 20 Ga. 775.
[h] **Where commitment to sheriff proper.**—In vacation, more than three months after the death of the decedent, two of the distributees, who were nonresidents of the state, applied to the clerk of the county court to be appointed administrators of the decedent's estate. They were appointed and executed the bond. The clerk under the statute reported his action to the county court at its next term, at which a resident distributee appeared and filed objections to the confirmation of the appointment, and then applied himself to be appointed. The court refused to confirm the nonresident applicants, and on motion of the latter committed the estate to the sheriff of the county for administration. On appeal the order was affirmed as correct. Bridgman v. Bridgman, 30 W. Va. 212, 3 SE 580.
[i] **Expiration of term.**—A sheriff to whom the estate of a decedent is committed is not administrator and is not responsible for the due administration of the estate after his office of sheriff expires. Cocke v. Harrison, 3 Rand. (24 Va.) 494.
[j] **Where decedent left no property,** administration cannot be vested in the clerk of the superior court. Lowery v. Powell, 109 Ga. 192, 34 SE 296.

61. Jones v. Harbaugh, 93 Md. 269, 48 A 827.

62. Berry, etc., Co. v. Dante, 43 App. (D. C.) 110; Crandall v. Shaw, 2 Redf. Surr. (N. Y.) 100; Mootrie v. Hunt, 4 Bradf. Surr. (N. Y.) 173.

63. Blackett v. Blackett, 24 L. T. Rep. N. S. 276; King v. King, 6 Ves. Jr. 172, 31 Reprint 997.

64. Judicature Act, 20 & 21 Vict. c 77 §§ 70, 71; Prob. Act (1857).

65. Veret v. Duprez, L. R. 6 Eq. 329; In re Parker, 54 L. J. Ch. 694.

66. Me.—Boynton v. Payrow, 67 Me. 587.
N. J.—Price v. Price, 23 N. J. Eq. 428.
S. C.—Harmon v. Wagener, 33 S. C. 487, 12 SE 98.
Tenn.—Weakley v. Woodard, 2 Tenn. Ch. A. 586.
Tex.—Long v. Richardson, 26 Tex. Civ. A. 197, 62 SW 964.
Va.—Harman v. McMullin, 85 Va. 187, 7 SE 349.
[a] **Such an appointment is proper** (1) in cases of waste, misappropriation, or mismanagement by the executor. Price v. Price, 23 N. J. Eq. 428; Harmon v. Wagener, 33 S. C. 487, 12 SE 98. (2) Where one since deceased delivered a savings bank book to a third person as security for a debt, and his administratrix does not within the time fixed by the court tender the amount of the pledge, with interest to the date of the tender and costs of process, it is proper for the court to appoint an officer to receive the amount of the deposit and make proper disposition thereof. Boynton v. Payrow, 67 Me. 587. (3) The appointment of a receiver is the proper remedy where it appears that the administrator has been removed and the sheriff appointed administrator de bonis non, that the administered assets will not pay the debts, and that the remaining assets will have to be drawn on, which being once administered, the administrator de bonis non could not receive and hold. Harman v. McMullin, 85 Va. 187, 7 SE 349.
[b] **Suggestion of insolvency not necessary.**—Creditors do not need to suggest in the county court the insolvency of the estate upon filing a bill in chancery for a receiver to preserve the goods until the appointment of an administrator, distribution, etc. Weakley v. Woodard, 2 Tenn. Ch. A. 586.
[c] **Exclusive possession by one of two executors.**—The mere fact that one of two joint executors maintains exclusive possession of the securities belonging to the estate, and refuses to deliver them, or any of them, to his coexecutor, there being no evidence of maladministration, or that the interests of the estate are endangered, is not sufficient ground for removing the securities of the estate from the custody of such executor, and transferring them to a special receiver. Burt v. Burt, 41 N. Y. 46.
[d] **Where the application is based upon the incompetency of the executrix,** her resignation and the appointment of an administrator de bonis non by the probate court will defeat the application. Lunsford v. Lunsford, 122 Ala. 242, 25 S 171.

67. Sylvester v. Willson, 2 Alaska 325.

68. Dante v. Miniggio, 46 App. (D. C.) 162 [foll Dante v. Hutchins, 46 App. (D. C.) 170]; Berry, etc., Co. v. Dante, 43 App. (D. C.) 110.

69. Fraser v. Charleston, 13 S. C. 533.

70. Spalding v. Com., 88 Ky. 135, 10 SW 420, 10 KyL 714; Fraser v. Charleston, 11 S. C. 486.
[a] **Leave of court to sue.**—Before suit can be brought against a receiver, leave of the court by which he was appointed must be obtained. Spalding v. Com., 88 Ky. 135, 10 SW 420, 10 KyL 714.

required to list and pay taxes upon the property of which he has charge.[71]

XXV. INDEPENDENT EXECUTORS

[§ 2895] **A. Administration Independent of Control of Courts.** In Texas[72] and Washington[73] the statutes authorize administration independent of the control of courts of probate jurisdiction, where the testator has clearly[74] indicated by his will that such is his desire,[75] and the persons taking under the will have assented,[76] and, if required to do so, have given bond to pay the debts of the estate.[77] A will containing such provisions is termed a "non-intervention will,"[78] and the executor named therein is termed an "independent executor,"[79] and need not qualify by taking an oath;[80] but is qualified to act from the time when the will appointing him is admitted to probate.[81]

Only an executor named in the will can act under a provision for independent administration. If no executor is named or if the persons named as executors die or refuse to act, the testamentary provision for independent administration fails and the estate must be administered in the usual manner.[82] So also when an independent executor resigns or is removed, the court of probate jurisdiction has authority to appoint an administrator de bonis non and the administration then proceeds in the usual manner.[83]

Insolvency of the estate does not preclude an independent administration in a suitable case, under a statute general in its terms;[84] and although this species of administration is sometimes limited by statute to solvent estates,[85] such a statute does not take away the right to independent administration of the estate of a testator who died prior to its enactment.[86]

In the absence of statute a testator cannot withdraw administration of his estate from the control of the courts,[87] although a power of an executor to take charge of the assets of the testator's estate, and execute the provisions of the will without administration, in the absence of objection by creditors, has been recognized.[88]

[§ 2896] **B. Powers and Liabilities in General.** An independent executor has the same powers as any other executor or administrator,[89] and may do without an order of court any act which an ordi-

71. Spalding v. Com., 88 Ky. 135, 10 SW 420, 10 KyL 714.

72. Hill v. Barton, 194 Mo. A. 325, 188 SW 1105; Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev on other grounds (Civ. A.) 40 SW 54]; Smithwick v. Kelly, 79 Tex. 564, 15 SW 486; Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75; Todd v. Willis, 66 Tex. 704, 1 SW 803; Lumpkin v. Smith, 62 Tex. 249; Hogue v. Sims, 9 Tex. 546; Lacy v. Williams, 8 Tex. 182; McIntyre v. Chappell, 4 Tex. 187; Lovenskiold v. Nueces Hotel Co., (Tex. Civ. A.) 208 SW 759; Beckham v. Beckham, (Tex. Civ. A.) 202 SW 517; Hall v. Davison, (Tex. Civ. A.) 176 SW 642; McMahan v. McMahan, (Tex. Civ. A.) 175 SW 157; Mattingly v. Kelly, (Tex. Civ. A.) 124 SW 483; King v. Battaglia, 38 Tex. Civ. A. 28, 84 SW 839; Glover v. Coit, 36 Tex. Civ. A. 104, 81 SW 136; Epperson v. Reeves, 35 Tex. Civ. A. 167, 79 SW 845; Nelson v. Lyster, 32 Tex. Civ. A. 356, 74 SW 54; Wells v. Houston, (Tex. Civ. A.) 56 SW 233; Carleton v. Hausler, 20 Tex. Civ. A. 275, 49 SW 118; Freeman v. Tinsley, (Tex. Civ. A.) 40 SW 835.

73. Schubach v. Redelsheimer, 92 Wash. 124, 158 P 739; In re Hanson, 87 Wash. 113, 151 P 264; Bayer v. Bayer, 83 Wash. 430, 145 P 433; Fulmer v. Gable, 73 Wash. 684, 132 P 641; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253; Moore v. Kirkman, 19 Wash. 605, 54 P 24; Miller v. Borst, 11 Wash. 260, 39 P 662; Newport v. Newport, 5 Wash. 114, 31 P 428.

[a] **Such statutes should be liberally construed.**—Fulmer v. Gable, 73 Wash. 684, 132 P 641.

74. McMahan v. McMahan, (Tex. Civ. A.) 175 SW 157; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

[a] **A provision that the executor shall not be required to account** to any court or person renders the will essentially a "nonintervention will." In re Hanson, 87 Wash. 113, 151 P 264.

[b] **Express words or necessary implication required.**—An intention of a testator to dispense with administration must be evidenced by express words or by necessary implication. Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

[c] **A doubt as to the construction** of the will must be resolved in favor of the supervisory jurisdiction of the courts and against independent administration. McMahan v. McMahan, (Tex. Civ. A.) 175 SW 157; Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181.

[d] **A provision relieving the executors from giving bond** does not authorize an inference that it was the intention of the testator to remove the administration of his estate from the control of the probate court. Smithwick v. Kelly, 79 Tex. 564, 15 SW 486; Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; Gray v. Russell, 41 Tex. Civ. A. 526, 91 SW 235; Glover v. Coit, 36 Tex. Civ. A. 104, 81 SW 136.

[e] **A provision giving the executor authority to sell** (1) all or any part of the estate for a specific purpose does not make him an independent executor. Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181. (2) The same is true of a provision authorizing the executor to sell and convey certain land. Allen v. Reilly, 62 Tex. Civ. A. 624, 131 SW 1152.

[f] **A will containing provisions requiring action by the probate court** does not create an independent administration, even though it shows an intention to do this in most respects. Hughes v. Mulanax, 105 Tex. 576, 153 SW 299.

75. Smithwick v. Kelly, 79 Tex. 564, 15 SW 486; Hogue v. Sims, 9 Tex. 546; Henderson v. Van Hook, 25 Tex. Suppl. 453; Berry v. Hindman, 61 Tex. Civ. A. 291, 129 SW 1181; Epperson v. Reeves, 35 Tex. Civ. A. 167, 79 SW 845.

[a] **The will is to be liberally construed** so as to confer on the executor powers requisite to prevent the taking of the estate into court, where the will is specific with regard to the testator's intention that there shall be no administration in court. Cooper v. Horner, 62 Tex. 356.

[b] **Such a provision "does not** deprive the probate court of jurisdiction to annul a provision of the will, or to require the executor to give bond while he continues to act." McAdams v. Wilson, (Tex. Civ. A.) 164 SW 59, 61.

76. Hogue v. Sims, 9 Tex. 546; Henderson v. Van Hook, 25 Tex. Suppl. 453.

77. Rummels v. Kownslar, 27 Tex. 528; Hogue v. Sims, 9 Tex. 546; Henderson v. Van Hook, 25 Tex. Suppl. 453.

[a] **Jurisdiction of the probate court is presumed** where administration is had therein notwithstanding a provision in the will for independent administration, where the record is silent as to whether the heirs gave bond to pay the testator's debts to the extent of the estate as required by statute on the application of creditors. Wood v. Mistretta, 20 Tex. Civ. A. 236, 49 SW 236, 50 SW 135.

[b] **In case the heirs and legatees do not elect to make the will effectual** by giving a bond, the estate is to be settled as in other cases. Hogue v. Sims, 9 Tex. 546.

78. In re Hanson, 87 Wash. 113, 151 P 264; In re Macdonald, 29 Wash. 422, 69 P 1111.

79. Hall v. Davison, (Tex. Civ. A.) 176 SW 642; Ellis v. Mabry, 25 Tex. Civ. A. 164, 60 SW 571.

80. Pepper v. Walling, (Tex. Civ. A.) 195 SW 892; Connellee v. Roberts, 1 Tex. Civ. A. 363, 23 SW 187.

[a] **The right to act is not waived** by failure to file an oath previous to an application by a third person for the appointment of an administrator. Pepper v. Walling, (Tex. Civ. A.) 195 SW 892.

81. Coleman v. Texas Produce Co., (Tex. Civ. A.) 204 SW 382.

[a] **The court has no discretion with respect to the fitness** of the person designated by the testator. Pepper v. Walling, (Tex. Civ. A.) 195 SW 892.

82. In re Grant, 93 Tex. 68, 53 SW 372; Roy v. Whitaker, 92 Tex. 346, 48 SW 892, 49 SW 367.

83. Roy v. Whitaker, 92 Tex. 346, 48 SW 892, 48 SW 367; Todd v. Willis, 66 Tex. 704, 1 SW 803; Bell v. Farmers', etc., Nat. Bank, 33 Tex. Civ. A. 408, 76 SW 798.

84. Shackleford v. Gates, 35 Tex. 781; State v. King County Super. Ct., 21 Wash. 186, 57 P 337.

85. Fulmer v. Gable, 73 Wash. 684, 132 P 641; Shufeldt v. Hughes, 55 Wash. 246, 104 P 253; Strand v. Stewart, 51 Wash. 685, 99 P 1027.

86. State v. King County Super. Ct., 21 Wash. 186, 57 P 337.

87. In re Reilly, 200 Pa. 288, 49 A 939 [rev on other grounds 6 North. Co. 385].

88. U. S. Trust Co. v. National Sav., etc., Co., 37 App. (D. C.) 296; McLean v. Wade, 53 Pa. 146.

89. Carlton v. Goebler, 94 Tex. 93, 58 SW 829; McDonough v. Cross, 40 Tex. 251; Ellis v. Howard Smith Co., 35 Tex. Civ. A. 566, 80 SW 633; Epperson v. Reeves, 35 Tex. Civ. A. 167, 79 SW 845; Hall v. Reese, 24 Tex. Civ. A. 221, 58 SW 974; New-

nary administrator could perform under authority of such an order.[90] He has the same time within which to administer as is allowed to any other representative.[91] He cannot delegate discretionary powers.[92] He may incur reasonable expenses in the management of the estate,[93] and is not responsible for errors in judgment where he has exercised a reasonable discretion.[94] Title to the property of the testator passes to the executor as trustee,[95] and he has the right to determine the proper time for distribution,[96] but he cannot give away the interests of the beneficiaries in property given to them by the will.[97]

[§ 2897] **C. Sale of Property.** An independent executor may sell the property of the estate for the payment of the debts of the estate or the discharge of any other trust which is directly or exclusively committed to him by the will,[98] and a statute requiring executors in all cases to report sales of real estate to the superior court and giving the court power to set aside or confirm such sale has been held not inconsistent with a power given independent executors by another statute to make sales without reports.[99] Where the executor has only an implied power of sale the purchaser must show that the sale was authorized by the facts,[1] but such proof is unnecessary in case of an express power.[2] The rule of caveat emptor applies to a purchaser from an independent executor,[3] but the purchaser is not bound to see that a proper disposition is made of the proceeds of sale.[4]

[§ 2898] **D. Presentation of Claims.** General statutory provisions with reference to the publication of notice to creditors to present their claims,[5] and the presentation of claims against the estate of decedent[6] do not apply where the estate is administered by an independent executor; and the presentation of a claim, and its approval by such an executor, do not give it any priority over the claims of other creditors which have not been presented.[7] It is sometimes provided by statute, however, that an independent executor must publish notice to creditors to present their claims and that claims must be presented within a certain time after publication of such notice.[8]

[§ 2899] **E. Actions.** An action may be brought

port v. Newport, 5 Wash. 114, 31 P 428.

[a] **In case of joint executors** (1) those surviving or remaining after failure of others to qualify may exercise the powers granted by the will (Johnson v. Bowden, 43 Tex. 670), (2) especially where the will provides that, in case one of the executors named refuses to act, the other shall not be required to give bond (Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54]).

[b] **Community property** of the testator and his deceased wife may be administered by an independent executor under a will empowering him to manage the estate of the testator. Carlton v. Goebler, 94 Tex. 93, 58 SW 829.

Authority and duties of executors and administrators generally see supra §§ 386–401.

90. Carlton v. Goebler, 94 Tex. 93, 58 SW 829; Beckham v. Beckham, (Tex. Civ. A.) 202 SW 517; Ellis v. Howard Smith Co., 35 Tex. Civ. A. 566, 80 SW 633; Stevenson v. Roberts, 25 Tex. Civ. A. 577, 64 SW 230; In re Macdonald, 29 Wash. 422, 69 P 1111.

[a] **A testamentary provision, directing the executors to file annual reports** with the county court showing the condition of the estate, did not restrict the executors' power or give the court supervision over their acts, especially where there was an express statement that the purpose of the filing was that it might be seen by creditors and heirs, and that testator did not contemplate that it should be audited by the court, and the acts of the executors approved or disapproved. Epperson v. Reeves, 35 Tex. Civ. A. 167, 79 SW 845.

[b] **The fact that an independent executrix applied to the court for leave to sell** deceased's interest in a partnership, and to be discharged from her trust, did not conclusively show that the estate was either managed or settled under the supervision of the court. In re Macdonald, 29 Wash. 422, 69 P 1111.

91. Bishop v. Locke, 92 Wash. 90, 158 P 997.

92. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

[a] **A discretionary power to sell land is exercised when** the executor determines to sell particular land in small tracts, authorizes an attorney in fact to negotiate sales and subdivide to suit purchasers, and considers the sales made by such agent to be advantageous to the estate and assents thereto as they are made, the facts concerning them being reported to him from time to time as the business progresses, although the deeds are executed by the attorney in fact. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

93. Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

94. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75.

95. State v. King County Super. Ct., 21 Wash. 186, 57 P 337.

96. Parks v. Knox, 61 Tex. Civ. A. 493, 130 SW 203; Bishop v. Locke, 92 Wash 90, 158 P 997.

97. Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441.

98. McDonough v. Cross, 40 Tex. 251; Baker v. Hamblen, (Tex. Civ. A.) 83 SW 467; Fulmer v. Gable, 73 Wash. 684, 132 P 641.

[a] **An implied power of sale** for that purpose may arise from: (1) A testamentary direction to pay debts. Carleton v. Hausler, 20 Tex. Civ. A. 275, 49 SW 118. (2) The mere existence of debts. Masterson v. Stevens, (Tex. Civ. A.) 37 SW 364.

[b] **Proper exercise of power.**— When authorized to sell personalty, and from the proceeds to pay debts, taxes, and expenses of the support and education of testator's children, the executor may contract to give a person procuring the location of an unlocated land certificate belonging to the estate one half the land located. Murrell v. Wright, 78 Tex. 519, 15 SW 156.

[c] **An implication of power to sell is not excluded by** a provision that the executor shall "manage" the testator's estate "to the best advantage for the benefit of" his creditors. Carlton v. Goebler, 94 Tex. 93, 58 SW 829 [dist Blanton v. Mayes, 58 Tex. 422].

[d] **A sale may be made to pay** taxes due and accruing, together with money borrowed to pay them. Blanton v. Mayes, 72 Tex. 417, 10 SW 452.

[e] **Executor may sell community property to pay community debts.**— Carlton v. Goebler, 94 Tex. 93, 58 SW 829.

[f] **A sale may not be made to pay:** (1) A mere claim of the executor unsupported by evidence. Freeman v. Tinsley, (Tex. Civ. A.) 40 SW 835. (2) A liability arising from the testator's unexecuted parol agreement to convey land. Masterson v. Stevens, (Tex. Civ. A.) 37 SW 364.

[g] **Where no inventory has been filed,** a purchaser from the executor will be protected, heirs and creditors having for a long time failed to assert their rights to secure its filing. Cooper v. Horner, 62 Tex. 356; Willis v. Ferguson, 46 Tex. 496.

[h] **Termination of power.** — A provision that after payment of debts and the sale of so much of the estate as shall be necessary for the support and education of the children the remainder shall be divided when an older child attains his majority does not terminate the executor's power of sale on the arrival of such child at his majority. Hallum v. Silliman, 78 Tex. 347, 14 SW 797.

[i] **A conveyance by the purchaser at an unauthorized sale** to his wife in consideration of an antecedent debt and the assumption of a community debt does not constitute the wife a bona fide purchaser for value without notice. Freeman v. Tinsley, (Tex. Civ. A. 1897) 40 SW 835.

[j] **The court cannot authorize sales by the executor,** after it has found that the estate is solvent and that therefore a provision of the will for independent administration can take effect. Fulmer v. Gable, 73 Wash. 684, 132 P 641.

99. Provident L. & T. Co. v. Mills, 91 Fed. 435 (construing Washington statute).

1. Haring v. Shelton, 103 Tex. 10, 122 SW 13; Freeman v. Tinsley, (Tex. Civ. A.) 40 SW 835.

2. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

[a] **In such case the burden of proof is on the heirs** claiming the land, as against bona fide purchasers and grantees of the executors, to show that there were no debts when the deeds were made. Terrell v. McCown, 91 Tex. 231, 43 SW 2 [rev (Civ. A.) 40 SW 54].

3. Roberts v. Holland, 63 Tex. Civ. A. 587, 134 SW 810.

4. Blanton v. Mayes, 72 Tex. 417, 10 SW 452; Cooper v. Horner, 62 Tex. 356.

5. In re Macdonald, 29 Wash. 422, 69 P 1111; Moore v. Kirkman, 19 Wash. 605, 54 P 24.

6. Smyth v. Caswell, 65 Tex. 379; Bell v. Farmers', etc., Nat. Bank, 33 Tex. Civ. A. 408, 76 SW 798; In re Macdonald, 29 Wash. 422, 69 P 1111. See also In re Smith, 43 Or. 595, 73 P 336, 75 P 133 (construing the Washington statute and holding that notice given would not operate to bar a claim not presented within a year).

[a] **Verification** of the claim by affidavit is unnecessary. Pleasants v. Davidson, 34 Tex. 459.

7. Taylor v. Davidson, (Tex. Civ. A.) 120 SW 1018.

8. Foley v. McDonnell, 48 Wash. 272, 93 P 321.

against an independent executor on a claim against the estate,[9] at any time before the estate is fully administered,[10] without prior presentation of the claim as against the estate,[11] provided the prerequisites to independent administration have been complied with.[12] The pleadings need not aver that the executor has assets of the estate in his hands,[13] and a general averment that defendant is the qualified and acting executor authorizes proof that he is an independent executor, and will support an award of execution against him as such.[14] An allegation in one part of a complaint that a person named as executor has executed a note and mortgage will be read with an allegation that he has executed and performed all the terms and conditions of the will, and it will be presumed that such execution was within the administrator's power where it further appears that there was to be an independent administration.[15] In proceedings to foreclose a mortgage executed by an independent executor, an allegation that the will authorized the executor to administer upon the estate without intervention, order, or advice of any court is sufficient to show that letters testamentary were not required in the settlement of the estate.[16] The facts that the estate is insolvent, that there are other debts or grades of indebtedness superior to plaintiff's, and that the only property left by decedent is exempt to defendant as widow, constitute no defense, and do not preclude the recovery of judgment.[17] A judgment against the executor in a federal court in an action to enforce the testator's personal liability on corporate stock is enforceable as is any other claim against the estate,[18] and since the probate court is without power, except such as is especially conferred on it by statute, to control the administration of estate under nonintervention wills, a purported discharge of the executor will not prevent the enforcement of a judgment against him where he has funds of the estate in his hands.[19] Where a widow, administering the estate of her deceased husband not as the survivor of a community, but as independent executrix under his will, caused a business belonging to the estate to be incorporated, it was proper, in a suit by heirs against her to recover property, both real and personal, alleged to have been withheld from the assets of the estate, to adjudge to the heirs their share of the capital stock in the corporation.[20] In a collateral action the question of whether a judgment was such as to authorize execution to issue against the property of the estate in the hands of the executor may be determined by an examination of the pleadings or evidence thereof.[21]

[§ 2900] **F. Compensation.** A statute providing for the compensation of executors whose compensation has not been fixed by the will applies to independent executors.[22] An extra allowance to such an executor has been held to be a matter to be determined by the court,[23] but this view is opposed to an earlier decision that the court has no authority to allow an independent executor extra compensation for his services.[24]

[§ 2901] **G. Protection of Estate in Case of Misconduct.** It is sometimes provided by statute that if an independent executor fails to execute the trust faithfully and to take care and protect the interests of all persons taking under the will, it shall be the duty of the court, on petition of any creditor or heir, or person on behalf of minor heirs, to cite the executor before it and have the trust faithfully executed,[25] by requiring the independent executor to take out letters testamentary and administer the estate in the ordinary manner,[26] or by removing him,[27] in which event an administrator de bonis non should be appointed.[28] The persons interested may compel an accounting on the executor's removal,[29] but the court is bound to take notice of the proceedings already had by the independent executor and shown in his report.[30]

[§ 2902] **H. Abandonment of Office.** Where an independent executor took the oath required by

[a] **Time for publication.**—An executor claiming the right to administer the estate as directed by the will without the intervention of the probate court is not required to delay the publication until after an adjudication of solvency. Strand v. Stewart, 51 Wash. 685, 99 P 1027.

9. Hart v. McDade, 61 Tex. 208; Lewis v. Nichols, 38 Tex. 54; McKie v. Simpkins, 1 Tex. A. Civ. Cas. § 278.

10. Lang v. Light, 54 Tex. Civ. A. 497, 117 SW 1038.

[a] **After the executor has delivered the property to the devisees,** free from any claim of his for the purposes of administration, it cannot be contended that it remains in his hands so as to be subject to execution against him on a judgment against him in his representative capacity, although in the proper discharge of his duty he should have retained it in his hands for the payment of debts; and where the executor has sold land belonging to the estate and taken notes in payment in such amounts as represent the individual shares of the devisees and delivered such notes to the devisees, the land cannot subsequently be sold on execution on a judgment obtained against the executor by a creditor of the estate. McDonough v. Cross, 40 Tex. 251. But see Baker v. Beach, 85 Fed. (U. S.) 836 (holding that the widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, could not, on the ground that the estate was fully settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control).

11. Rogers v. Harrison, 44 Tex. 169; In re Macdonald, 29 Wash. 422, 69 P 1111; Moore v. Kirkman, 19 Wash. 605, 54 P 24.

12. Carroll v. Carroll, 20 Tex. 731.

[a] **Bond must have been given by the devisees** showing an election to take advantage of the provision of the will removing the administration from the control of the court in order that a suit may be maintained against the executors or the heirs and legatees in possession of the estate. Carroll v. Carroll, 20 Tex. 731; Hogue v. Sims, 9 Tex. 546.

13. Pleasants v. Davidson, 34 Tex. 459.

14. Ellis v. Mabry, 25 Tex. Civ. A. 164, 60 SW 571.

15. Miller v. Borst, 11 Wash. 260, 39 P 662.

16. Miller v. Borst, 11 Wash. 260, 39 P 662.

17. Hartz v. Hausser, (Tex. Civ. A.) 90 SW 63.

18. In re Macdonald, 29 Wash. 422, 69 P 1111.

19. In re McDonald, 29 Wash. 422, 69 P 1111.

20. Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441.

21. Croom v. Winston, 18 Tex. Civ. A. 1, 43 SW 1072.

22. Shufeldt v. Hughes, 55 Wash. 246, 104 P 253.

23. Japhet v. Pullen, 63 Tex. Civ. A. 157, 133 SW 441 (an allowance to an independent executrix, in addition to one half of the commissions prescribed by law for collections and disbursements, of two thousand dollars for supervision of her husband's estate for about twenty years, was ample, where the supervision was purely nominal).

24. Lumpkin v. Smith, 62 Tex. 249.

25. State v. Pierce County Super. Ct., 21 Wash. 575, 59 P 483.

[a] **A creditor of an heir** does not come within such a statute. State v. Pierce County Super. Ct., 21 Wash. 575, 59 P 483.

26. Newport v. Newport, 5 Wash. 114, 31 P 428.

27. In re Hooper, 76 Wash. 72, 135 P 813.

[a] **Facts insufficient to warrant removal.**—Bishop v. Locke, 92 Wash. 90, 158 P 997.

28. See supra § 2895.

[a] **The administrator de bonis non may bring an action:** (1) Against his predecessor for property of the estate, for which the latter has not accounted. Dwyer v. Kalteyer, 68 Tex. 554, 5 SW 75. (2) To set aside a sale upon the ground that it was fraudulently made to enable the executors to acquire title in themselves. Todd v. Willis, 66 Tex. 704, 1 SW 803.

29. Murrell v. Wright, 78 Tex. 519, 15 SW 156.

30. Bell v. Farmers', etc., Nat. Bank, 33 Tex. Civ. A. 408, 76 SW 798.

law of executors, but failed to take possession of any of the property of the estate, to give bond, or in any way to act as such executor, and was contesting the will, it was held that he had abandoned his executorship and the appointment of an administrator was proper.[31]

XXVI. EXECUTORS DE SON TORT

[§ 2903] **A. Definition and Nature of Office.** An executor de son tort is a person who without authority intermeddles with the estate of a decedent and does such acts as properly belong to the office of an executor or administrator,[32] and thereby becomes a sort of quasi executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled.[33] The designation is inapt in that it applies the term "executor" to intestate as well as testate estates, and also in that it gives to a person who has merely incurred a certain liability by reason of his intermeddling an official title corresponding with that of a duly appointed representative,[34] and in many states the so-called office of executor de son tort has been abolished by statute, or is considered inconsistent with the prevalent system of administration.[35] The abolition of the fiction of the office does not, however, relieve the wrongdoer from liability for his unauthorized intermeddling,[36] but affects only the right to enforce such liability.[37]

[§ 2904] **B. How Office or Liability Assumed—1. Intermeddling in General.** A person makes himself chargeable as executor de son tort by acts of such a character as indicate that he is possessed of authority to administer upon the estate.[38] So, if a debtor or a stranger takes the goods of a decedent or in any way intermeddles with them, injuriously to the interests of the estate, he becomes an executor de son tort and is chargeable accordingly,[39] and persons who aid and abet or take part

31. Huth v. Huth, (Tex. Civ. A.) 187 SW 523.

32. Ark.—Barasien v. Odum, 17 Ark. 122.

Cal.—Pryor v. Downey, 50 Cal. 388, 19 AmR 656.

Ga.—Allen v. Hurst, 120 Ga. 763, 48 SE 341; Willingham v. Rushing, 105 Ga. 72, 31 SE 130; Morrow v. Cloud, 77 Ga. 114.

Ill.—Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [rev 138 Ill. A. 361] (quot Cyc).

Me.—Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA 1915E 840, AnnCas1917E 1; Hinds v. Jones, 48 Me. 348.

Minn.—Noon v. Finnegan, 29 Minn. 418, 13 NW 197.

N. H.—Ela v. Ela, 70 N. H. 163, 47 A 414; Brown v. Leavitt, 26 N. H. 493.

N. J.—Minck v. Walker, 81 N. J. Eq. 112, 88 A 378.

N. Y.—Mills v. Mills, 115 N. Y. 80, 21 NE 714; Matter of Richardson, 8 Misc. 140, 29 NYS 1079, 1 Gibb. Surr. 57.

N. C.—Barnard v. Gregory, 14 N. C. 223.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.

Pa.—Bradley v. Com., 31 Pa. 522.

S. C.—Ex p. Davega, 31 S. C. 413, 10 SE 72; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

Tenn.—Alexander v. Kelso, 1 Baxt. 5.

Vt.—In re Mitchell, 74 Vt. 186, 52 A 523.

W. Va.—Morris v. Joseph, 1 W. Va. 256, 91 AmD 386.

Eng.—Atty.-Gen. v. New York Breweries Co., [1898] 1 Q. B. 205 [allowing app [1897] 1 Q. B. 738, and aff [1899] A. C. 62].

Ont.—Dey v. McGill, 10 Ont. L. 408, 6 OntWR 329; Young v. Purvis, 11 Ont. 597; Merchants' Bank v. Monteith, 10 Ont. Pr. 467; Hunter v. Wallace, 13 U. C. Q. B. 385; Haacke v. Gordon, 6 U. C. Q. B. 424.

[a] **A person acting under void letters** of administration may be chargeable as an executor de son tort. Bradley v. Com., 31 Pa. 522.

33. Pryor v. Downey, 50 Cal. 388, 19 AmR 656; Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [quot Cyc]; Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA 1915E 840, AnnCas1917E 1 [quot Cyc].

34. See Schouler Ex. § 184.

[a] **The term "administrator de son tort"** is inaccurate. No such person is recognized by law; and where a person is sued in that capacity, it will be presumed that the action was so brought through oversight or ignorance, and that an executor de son tort was intended. Hutchinson v. Fulghum, 4 Heisk. (Tenn.) 550.

35. Ala.—Winfrey v. Clarke, 107 Ala. 355, 18 S 141; Draughon v. French, 4 Port. 352.

Ark.—Rust v. Witherington, 17 Ark. 129; Barasien v. Odum, 17 Ark. 122.

Cal.—Bowden v. Pierce, 73 Cal. 459, 14 P 302, 15 P 64; Pryor v. Downey, 50 Cal. 388, 19 AmR 656; In re Hamilton, 34 Cal. 464; Valencia v. Bernal, 26 Cal. 328.

Kan.—Fox v. Van Norman, 11 Kan. 214.

La.—Carl v. Poelman, 12 La. Ann. 344; Walworth v. Ballard, 12 La. Ann. 245.

Mich.—Gilkey v. Hamilton, 22 Mich. 283.

Minn.—Noon v. Finnegan, 29 Minn. 418, 13 NW 497.

Mo.—Rozelle v. Harmon, 103 Mo. 339, 15 SW 432, 12 LRA 187; Rozelle v. Harmon, 29 Mo. A. 569.

N. Y.—Field v. Gibson, 20 Hun 274; Metcalf v. Clark, 41 Barb. 45; Ferguson v. Harrison, 27 Misc. 380, 58 NYS 850; Matter of Richardson, 2 Misc. 288, 23 NYS 978, Pow. Surr. 384; Babcock v. Booth, 2 Hill 181, 38 AmD 578; Brown v. Brown, 1 Barb. Ch. 189.

Oh.—Benjamin v. Le Baron, 15 Oh. 517; Dixon v. Cassell, 5 Oh. 533.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325; Rutherford v. Thompson, 14 Or. 236, 12 P 382.

Tex.—Vela v. Guerra, 75 Tex. 595, 12 SW 1127; Green v. Rugely, 23 Tex. 539; Hunt v. Butterworth, 21 Tex. 133, 73 AmD 223; Ansley v. Baker, 14 Tex. 607, 65 AmD 136.

Vt.—Roys v. Roys, 13 Vt. 543.

36. Slate v. Henkle, 45 Or. 430, 78 P 325; Rutherford v. Thompson, 14 Or. 236, 12 P 382.

37. See infra § 2920.

38. U. S.—Jennings v. Smith, 232 Fed. 921 [rev on other grounds 238 Fed. 48, 151 CCA 124].

Conn.—Selleck v. Rusco, 46 Conn. 370.

Ga.—Morrow v. Cloud, 77 Ga. 114.

Ky.—Davis v. Connelly, 4 B. Mon. 136.

Me.—Hinds v. Jones, 48 Me. 348.

Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622.

S. C.—Givens v. Higgins, 15 S. C. L. 286, 17 AmD 742.

Ont.—Haacke v. Gordon, 6 U. C. Q. B. 424.

[a] **Test of liability.**—"The acts by which a person may make himself chargeable as executor in his own wrong, are acts of such a character as to indicate that he is possessed of authority to administer upon the estate. 'The material fact to be found is ,that the party has intruded into the office of executor, and this may be inferred from such acts as are lawful for an executor alone to do, such as collecting, releasing and paying debts, or any other acts evincing a claim of right to dispose of the effects of the deceased.'" Selleck v. Rusco, 46 Conn. 370, 372.

[b] **Filing will for record.**—Where the person in whose possession the decedent had left a will filed it and had it recorded by the ordinary, but did not take out letters of administration with the will annexed or procure any legal authority to administer on the estate, he became executor de son tort. Morrow v. Cloud, 77 Ga. 114.

[c] **By answering as executor** to any action brought against himself, or by pleading any other plea than ne unques executor, a person may make himself an executor de son tort. Davis v. Connelly, 4 B. Mon. (Ky.) 136; Haacke v. Gordon, 6 U. C. Q. B. 424. But compare State v. Rogers, 1 Harr. (Del.) 120 (where one of two executors named in a will did not qualify, the fact that he appeared with the executor who had qualified and moved to quash a scire facias issued against both as executors was not evidence that he was an executor de son tort).

39. U. S.—Jennings v. Smith, 232 Fed. 921 [rev on other grounds 238 Fed. 48, 151 CCA 124].

Ala.—Ward v. Bevill, 10 Ala. 197, 44 AmD 478; Densler v. Edwards, 5 Ala. 31.

Conn.—Bennett v. Ives, 30 Conn. 329; Bacon v. Parker, 12 Conn. 212.

Del.—Wilson v. Hudson, 4 Harr. 168; State v. Rogers, 1 Del. 120, note a.

Ga.—Wilson v. Hall, 67 Ga. 53.

Ind.—Wilson v. Davis, 37 Ind. 141.

Ky.—Hopkins v. Towns, 4 B. Mon. 124, 39 AmD 497; Gentry v. Jones, 6 J. J. Marsh. 148; Brown v. Durbin, 5 J. J. Marsh. 170; Johnston v. Duncan, 3 Litt. 163, 14 AmD 54.

Me.—Clark v. Pishon, 31 Me. 503.

Md.—Hagthorp v. Hook, 1 Gill & J. 270.

Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

Mo.—Swift v. Martin, 19 Mo. A. 488.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622.

N. J.—McGill v. O'Connell, 33 N. J. Eq. 256.

N. C.—Turner v. Child, 12 N. C. 331, 17 AmD 555.

S. C.—Ex p. Davega, 31 S. C. 413, 10 SE 72; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775; Givens v. Higgins, 15 S. C. L. 286, 17 AmD 742; Howell v. Smith, 13 S. C. L. 516.

Tenn.—Alexander v. Kelso, 1 Baxt. 5; Killebrew v. Murphy, 3 Heisk. 546.

Vt.—Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.

in the intermeddling,[40] or who are in collusion with the intermeddler,[41] may also be held liable.

Intermeddling may consist in collecting or taking possession of the assets,[42] selling the property of the estate,[43] paying out money of the estate, in settlement of debts or otherwise,[44] or any acts which are of the character which usually evince a legal control,[45] such as using the property as one's own,[46] wasting it,[47] carrying on decedent's business,[48] or undertaking to distribute decedent's property under a trust fraudulently created by him.[49] It is necessary, however, to constitute such intermeddling as will make one an executor de son tort, that he should take possession or some control of decedent's property,[50] and where this element is lacking, the mere performance of acts which are of such nature as an executor or administrator would do cannot make one chargeable as executor de son tort.[51]

One who acts as administrator under void letters of administration becomes an executor de son tort,[52] but an administrator whose letters are revoked on discovery of a will cannot be treated as an executor de son tort.[53]

Intermeddling with real estate will not constitute a person executor de son tort.[54] But as a mortgage is personalty and goes to the administrator of the

Eng.—Hobby v. Ruell, 1 C. & K. 716, 47 ECL 716; Edwards v. Harben, 2 T. R. 587, 100 Reprint 315.

N. B.—Powell v. Wathen, 10 N. B. 258.

Ont.—Jessup v. Simpson, 14 U. C. Q. B. 213.

[a] **A person to whose order money belonging to an estate is paid** before an administrator is appointed is accountable therefor, although the money or the avails of it never came to his actual use. Clark v. Pishon, 31 Me. 503.

[b] **Levy of distress warrant.—**A distress warrant abates by the death of the tenant before its execution, and if it is subsequently levied and the goods sold the landlord subjects himself to the liabilities of an executor de son tort. Salvo v. Schmidt, 29 S. C. L. 512.

40. Scoville v. Post, 3 Edw. (N. Y.) 216.

41. Scoville v. Post, 3 Edw. (N. Y.) 216.

42. Colo.—Ebbinger v. Wightman, 15 Colo. A. 439.

Ga.—Howland v. Dews, R. M. Charlt. 383.

Ill.—Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185 [aff 98 Ill. A. 509].

Iowa.—Murphy v. Murphy, 80 Iowa 740, 45 NW 914.

Ky.—Johnston v. Duncan, 3 Litt. 163, 14 AmD 54.

Md.—Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Neale v. Hagthrop, 3 Bland 551.

Mass.—Root v. Geiger, 97 Mass. 178.

Miss.—Perkins v. Sturdivant, 4 S 555.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622.

N. Y.—Campbell v. Tousey, 7 Cow. 64; Scoville v. Post, 3 Edw. 216.

N. C.—Turner v. Child, 12 N. C. 331, 17 AmD 555.

S. C.—Ex p. Davega, 31 S. C. 413, 10 SE 72; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775; Howell v. Smith, 13 S. C. L. 516.

Tenn.—Caruthers v. Moore, 1 Tenn. Cas. 60.

Eng.—Samuel v. Morris, 6 C. & P. 620, 25 ECL 606.

[a] **Taking possession in accordance with wishes of decedent.—**Taking possession of the estate and attempting to administer it, although in accordance with the wishes of the deceased, constitutes the intermeddler an executor de son tort. Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185 [aff 98 Ill. A. 509].

[b] **Merely continuing to retain possession,** after decedent's death, of property rightfully obtained does not constitute one an executor de son tort. McAfee v. Montgomery, 21 Ind. A. 196, 57 NE 957.

[c] **Foreign assets.—**(1) A person who without authority takes possession of assets in one state and takes them into another is chargeable as executor de son tort in the state into which he takes them. Hopkins v. Towns, 4 B. Mon. (Ky.) 124, 39 AmD 497; Emery v. Berry, 28 N. H. 473, 61 AmD 622; Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86. (2) But where property left in Belgium by the decedent, an Englishman residing there, was taken into possession by his brother as next of kin under the law of Belgium, by which a person so taking possession of a decedent's property is considered to have admitted assets as between himself and creditors of the decedent, the brother did not become an executor de son tort in England. Beavan v. Hastings, 2 Kay & J. 724, 69 Reprint 973.

43. Ala.—Upchurch v. Norsworthy, 15 Ala. 705.

Del.—Wilson v. Hudson, 4 Del. 168.

Ky.—Gentry v. Jones, 6 J. J. Marsh. 148.

Nebr.—Lenderink v. Sawyer, 92 Nebr. 587, 138 NW 744, AnnCas1914A 261, LRA1915D 948.

N. C.—Turner v. Child, 12 N. C. 331, 17 AmD 555.

S. C.—Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

Eng.—Reade's Case, 5 Coke 33b, 77 Reprint 103; Padget v. Priest, 2 T. R. 97, 100 Reprint 53.

[a] **A coroner selling personal property of a decedent to pay funeral expenses,** at the request of relatives, is at most an executor de son tort; and, since the administrator would be bound to pay the funeral expenses, he cannot complain because the coroner paid them. Lenderink v. Sawyer, 92 Nebr. 587, 138 NW 744, Ann Cas1914A 261, LRA1915D 948.

[b] **An agent in possession of his principal's goods for the purpose of selling** them may sell after the principal's death and reimburse himself for advances made on account of the goods, and he does not thereby become an executor de son tort. Debesse v. Napier, 12 S. C. L. 106, 10 AmD 658.

44. Conn.—Bennett v. Ives, 30 Conn. 329; Bacon v. Parker, 12 Conn. 212.

Miss.—Gay v. Lemle, 32 Miss. 309.

N. H.—Leach v. Pillsbury, 15 N. H. 137.

N. Y.—Scoville v. Post, 3 Edw. 216.

S. C.—Jones v. Jones, 39 S. C. 247, 17 SE 587, 802; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775; Howell v. Smith, 13 S. C. L. 516.

Vt.—Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.

[a] **Payment of legacies.—**If a person who is neither executor nor administrator assumes to pay legacies given by decedent's will, he becomes an executor de son tort. Bacon v. Parker, 12 Conn. 212.

[b] **Payment of decedent's debts with one's own money** will not render one liable as an executor de son tort. Carter v. Robbins, 42 S. C. L. 29.

45. Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

46. Bacon v. Parker, 12 Conn. 212; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

47. Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

48. Kelley v. Kelley, 84 Fed. 420; Perkins v. Sturdivant, (Miss.) 4 S 555; Keith v. Perks, 4 N. B. 552; Hooper v. Summersett, Wightw. 16, 145 Reprint 1157.

[a] **The wife of a trader** who continues after his death to keep the house open and sell goods left therein at his decease, is made thereby an executrix de son tort. Keith v. Perks, 4 N. B. 552.

[b] **The husband of an executrix** has been charged as executor de son tort where he carried on the trade of the testatrix, although he and his wife, who was a daughter of the testatrix, were living in the testatrix's house, and the will was afterward proved by the executrix. Hooper v. Summersett, Wightw. 16, 145 Reprint 1157.

49. Rudd v. Rudd, (Ky.) 214 SW 791.

50. Holden v. Farmers', etc., Bank, 77 N. H. 535, 93 A 1040, LRA1915E 309, AnnCas1917E 23; Barnard v. Gregory, 14 N. C. 223; Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139; Beavan v. Hastings, 2 Kay & J. 724, 69 Reprint 973.

[a] **Asserting fraudulent claim.—**A person who neither intermeddles with the estate of the deceased, nor holds any of it in his hands, but only sets up a claim against the estate, is not an executor de son tort, although the claim may be a fraudulent one, and although he forbids a sale as a claimant and thereby causes the property to sell for a less price. Barnard v. Gregory, 14 N. C. 223.

[b] **Invasion of property rights.—**One is not liable as an executor de son tort unless the acts done by him would have rendered him liable as for an invasion of property rights in case of individual ownership. Holden v. Farmers', etc., Nat. Bank, 77 N. H. 535, 93 A 1040, LRA1915E 309, AnnCas1917E 23.

[c] **One who takes property belonging to himself** through a purchase from decedent before his death is not an intermeddler. Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139.

51. Carter v. Robbins, 42 S. C. L. 29; Morris v. Lowe, 97 Tenn. 243, 36 SW 1098.

52. Bradley v. Com., 31 Pa. 522; Anonymous, Dyer 256a, 73 Reprint 567.

53. Coyle's Est., 43 Pa. Co. 290.

54. Conn.—King v. Lyman, 1 Root 104.

Ga.—Johnson v. Johnson, 80 Ga. 260, 5 SE 629.

Iowa.—Claussen v. Lafrenz, 4 Greene 224.

Me.—Morrill v. Morrill, 13 Me. 415.

Mass.—Mitchel v. Lunt, 4 Mass. 654.

N. H.—Ela v. Ela, 70 N. H. 163, 47 A 414.

N. J.—Minck v. Walker, 81 N. J. Eq. 112, 88 A 378.

"No intermeddling with the real estate of the deceased will make the defendant an executor de son tort." King v. Lyman, 1 Root (Conn.) 103, 104.

[a] **If the heir takes possession** of the lands of the deceased and sells them he is not liable as executor de son tort. Johnson v. Johnson, 80 Ga. 260, 5 SE 629.

mortgagee, the heirs of a mortgagee who enter the mortgaged premises to foreclose and take the rents and profits thereof are intermeddlers with the personal property of the estate of the deceased and executors in their own wrong and are liable for the amounts they have received.[55]

[§ 2905] **2. Acts Done in Good Faith or under Color of Right.** In order for a person's acts to charge him as an executor de son tort, they must show an intention on his part to take upon himself the exercise of those duties which appertain to the office of the legal representative alone.[56] If it clearly appears that the person sought to be charged was merely acting in good faith in attempting to protect his own rights, or under color of authority, he will not as a general rule be charged as executor de son tort.[57] Thus a person will not be charged as executor de son tort where he comes into possession of assets lawfully or with the consent of the rightful administrator,[58] or takes or retains possession of property under color of title in good faith believing his right to be superior to that of the lawful administrator, although his title proves indefensible.[59] But even though one has some color of authority to intermeddle with the goods of a decedent, he becomes executor de son tort if he exceeds his authority,[60] and a wrongful retention of property of the estate may make one an executor de son tort, although his original possession was lawful.[61]

[§ 2906] **3. Acts of Kindness and Charity.** In order to establish the liability of an executor de son tort the intermeddling must be of an illegal character.[62] Mere acts of kindness and charity, such as directing the funeral, the payment of funeral expenses, protecting the estate from loss or waste by locking up the goods, feeding the stock, and the like, providing for children, and other acts of a similar character, do not render one chargeable as executor de son tort.[63] But the exemption from liability extends only to acts of this character,[64] and one who takes over the entire estate for arrangement and distribution, including everything in substance that an administrator would be bound to do, may be charged as executor de son tort.[65]

55. Haskins v. Hawkes, 108 Mass. 379.

56. See cases infra this section.

57. Ga.—Willingham v. Rushing, 105 Ga. 72, 31 SE 130.

La.—Miguez v. Delcambre, 125 La. 176, 51 S 108.

Mo.—In re Berger, 152 Mo. A. 663, 671, 133 SW 96 [cit Cyc].

N. H.—Holden v. Farmers', etc., Nat. Bank, 77 N. H. 535, 93 A 1040, LRA1915E 309, AnnCas1917E 23.

N. C.—Turner v. Child, 12 N. C. 25, 17 AmD 555 [dist Padget v. Priest, 2 T. R. 97, 100 Reprint 53].

[a] **Completion of act properly begun.**—Where a person sold property as an agent and after the death of his principal collected the proceeds he was not an executor de son tort, for the collection of the money had reference to the agency and was the completion of an act proper and lawful in its commencement. Turner v. Child, 12 N. C. 25, 17 AmD 555 [dist Padget v. Priest, 2 T. R. 97, 100 Reprint 53].

58. Gibson v. Draffin, 77 SW 928, 25 KyL 1332; Boring v. Jobe, (Tenn. Ch. A.) 53 SW 763.

59. Ala.—Ward v. Bevill, 10 Ala. 197, 44 AmD 478; Densler v. Edwards, 5 Ala. 31.

Conn.—Selleck v. Rusco, 46 Conn. 370.

Ga.—Willingham v. Rushing, 105 Ga. 72, 31 SE 130.

Ill.—Kenny v. Keplinger, 89 Ill. A. 570.

Iowa.—Claussen v. Lafrenz, 4 Greene 224.

Me.—Smith v. Porter, 35 Me. 287.

Mo.—In re Berger, 152 Mo. A. 663, 133 SW 96.

N. C.—Turner v. Child, 12 N. C. 25, 17 AmD 555.

Pa.—Brown v. Brown, 1 Pa. C. Pl. 8.

S. C.—Cook v. Sanders, 49 S. C. L. 413, 94 AmD 139.

Tenn.—Morris v. Lowe, 97 Tenn. 243, 36 SW 1098.

Eng.—Femings v. Jarrat, 1 Esp. 335.

Ont.—Merchants' Bank v. Monteith, 10 Ont. Pr. 467.

[a] **An assignee for the benefit of the creditors** who accepted the trust went into possession of the goods and sold them, some before and some after the testator's death, and applied the proceeds to the debts mentioned in the assignment, all in good faith and without fraud, cannot be charged as executor de son tort of the deceased assignor, although the deed of assignment was void for want of a proper affidavit as to the list of creditors, etc. Chattanooga Stove Co. v. Adams, 81 Ga. 319, 6 SE 695.

[b] **A widow who takes possession** (1) of and claims property bailed to her late husband as belonging to herself and does not claim as administratrix and pays her husband's debts out of her own property is not an administratrix de son tort. Morris v. Lowe, 97 Tenn. 243, 36 SW 1098. (2) So also a widow who takes property of her deceased husband under a claim of statutory exemption does not become liable as executrix de son tort. Frierson v. Wesberry, 45 S. C. L. 353.

[c] **An administrator** who takes charge of personalty in possession of his decedent at the time of deatn and does acts proper for its management and preservation is not liable as an executor de son tort, although the property reverted to the estate of another person on the death of his decedent. Kenny v. Keplinger, 89 Ill. A. 570.

60. Wiley v. Truett, 12 Ga. 588; Ex p. Davega, 31 S. C. 413, 10 SE 72.

[a] **Illustration.**—The attorney of persons who held a mortgage on the entire property of decedent may be held to be executor de son tort as to the excess of the property which remains after satisfying the mortgage debt, even granting that he had authority to seize the property for the purpose of making satisfaction. Ex p. Davega, 31 S. C. 413, 10 SE 72.

61. Root v. Geiger, 97 Mass. 178; Clarke v. Goodrum, 61 Miss. 731; Seally v. Powis, Hurl. & W. 2.

62. Brown v. Sullivan, 22 Ind. 359, 85 AmD 421.

63. Ala.—Sewell v. Sewell, 74 S 343.

Conn.—Bennett v. Ives, 30 Conn. 329; Bacon v. Parker, 12 Conn. 212.

Ill.—Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185.

Ind.—Brown v. Sullivan, 22 Ind. 359, 85 AmD 421.

Md.—Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452.

Mass.—Pettengill v. Abbott, 167 Mass. 307, 45 NE 748; Perkins v. Ladd, 114 Mass. 420, 19 AmSR 374.

Mo.—Graves v. Poage, 17 Mo. 91.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622.

R. I.—O'Reilly v. Kelly, 22 R. I. 151, 46 A 681, 84 AmSR 833, 50 LRA 483.

Vt.—Blodgett v. Converse, 60 Vt. 410, 15 A 109.

Eng.—Peters v. Leeder, 47 L. J. Q. B. 573; Camden v. Fletcher, 4 M. & W. 378, 150 Reprint 1475.

Ont.—Pickering v. Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 Ont WR 697, AnnCas1912A 530.

"There are other acts equivocal in their character, and such as are ordinarily performed by an executor, which, when explained, as they may always be, will appear to be mere acts of kindness and charity, and such as will not subject a stranger to the actions of creditors; such as locking up and preserving the goods, ordering the funeral obsequies, making a schedule of assets, feeding the cattle, repairing the houses, etc. All these, and perhaps many other acts, may be necessary for the comfort of the family and the preservation of the estate, before a will can be found and proved, and before administration can, with propriety, be commenced." Bacon v. Parker, 12 Conn. 212, 216.

[a] **"Giving directions for the funeral** is only an act of charity, and will not make a man executor. God forbid, it should; for then the deceased could not be buried by any one from the apprehension of being involved as executor." Harrison v. Rowley, 4 Ves. Jr. 212, 216, 31 Reprint 110.

[b] **The widow** may, before letters granted, pay from the estate the ordinary funeral expenses and the reasonable price of a burial lot. Pettengill v. Abbott, 167 Mass. 307, 45 NE 748.

[c] **If the estate is insufficient to pay the funeral expenses** in full, a debtor of the estate who applies the whole amount of the debt to the payment in full of one item of the funeral expenses, leaving the balance unpaid, becomes liable as executor de son tort to the persons holding claims against the estate for the unpaid items, to the extent of their prorata shares of the sums paid out. Bennett v. Ives, 30 Conn. 329.

[d] **A contrary view** as to the effect of defraying funeral expenses out of the assets of the estate was expressed in Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.

64. Rohn v. Rohn, 204 Ill. 184, 190, 68 NE 369, 98 AmSR 185 ("The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, as we understand it, are limited to such acts as directing a funeral, payment of funeral expenses and the preservation of the estate from loss or waste, and the like").

65. Bennett v. Ives, 30 Conn. 329; Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185.

[a] **In a wild and unsettled region** where there is no organized civil government a greater latitude may be allowed as to acts which may be performed without subjecting one to liability as executor de son tort than would be the case in a regularly organized community. Graves v. Poage, 17 Mo. 91.

[§ 2907] **4. Possession of Property Transferred to Holder by Decedent.** One cannot be charged as an executor de son tort because of his possession of property sold to him by the decedent, where the sale was a bona fide one, coupled with an actual transfer of possession,[66] or where the property sold was exempt from execution in the hands of decedent.[67] But it is very generally considered that one who holds property under a gift or transfer which is void as against the creditors of the deceased donor or seller, may, so far as the defrauded creditors are concerned, be regarded as an executor de son tort,[68] although the contrary view has been asserted.[69] An assignee for the benefit of creditors does not become an executor de son tort because of acts done in good faith under the assignment after the death of the assignor, although the assignment was void because it was not executed in accordance with the requirements of law.[70]

[§ 2908] **5. Acts of Foreign Executor or Administrator.** It has been held that an executor or administrator appointed or qualified in one state may be held liable as executor de son tort if he assumes possession or control of the assets of decedent in another state or country in which letters have not been issued to him,[71] but this has been denied on the ground that such representative is not a stranger to the property and cannot be an intermeddler.[72] Where an administrator collects assets in the state where administration was granted, and takes them into another state, he cannot be regarded as an executor de son tort in such other state.[73]

[§ 2909] **6. Acts Done as Agent or Servant of Another—a. Of Decedent.** An agent who continues to act under his agency after the death of his principal may be held liable as an executor de son tort of the principal,[74] unless his agency is coupled with an interest in the goods in his possession as agent, and he acts to protect himself,[75] and the same rule applies to a subagent who continues to act after having been notified by the agent that the agency has terminated by the death of the principal.[76]

[§ 2910] **b. Of Rightful Executor.** One cannot be charged as executor de son tort because of acts done as agent for the rightful executor,[77] even though such acts are done before the will has been proved;[78] but it is otherwise as to acts of such an agent done after the death of the executor whose agent he was.[79]

[§ 2911] **c. Of Distributees.** One who acts as agent of the distributees in connection with the property of the estate does not thereby become an executor de son tort, where there are no creditors of the estate.[80]

[§ 2912] **d. Of Executor De Son Tort.** It has been held that one cannot be charged as an executor de son tort because of acts done by him as a mere agent or servant of an intermeddler,[81] at least, where he was not cognizant of the unlawfulness of what was being done,[82] where the acts were of such nature that they would not have rendered the principal liable had he performed them himself,[83] or where the acts done as agent are legalized by a subsequent grant of administration to the principal.[84] But on the other hand there is authority for the view that acts done as the agent or servant of an executor de son tort may render the actor himself liable as an executor de son tort,[85] and he cannot relieve himself of liability as such by delivering the assets received by him to his princi-

66. O'Reilly v. Hendricks, 10 Miss. 388 [dist Edwards v. Harben, 2 T. R. 587, 100 Reprint 315]; Mills v. Mills, 115 N. Y. 80, 21 NE 714; Debesse v. Napier, 12 S. C. L. 106, 10 AmD 658.

67. Winchester v. Gaddy, 72 N. C. 115; Frierson v. Wesberry, 45 S. C. L. 353.

68. Ala.—Simonton v. McLane, 25 Ala. 353; Watts v. Gayle, 20 Ala. 817; Densler v. Edwards, 5 Ala. 31.

Ga.—Gleaton v. Lewis, 24 Ga. 209; Clayton v. Tucker, 20 Ga. 452; Trippe v. Ward, 2 Ga. 304; Howland v. Dews, R. M. Charlt. 383. But see infra note 69.

Ky.—Hopkins v. Towns, 4 B. Mon. 124, 39 AmD 497.

Me.—Allen v. Kimball, 15 Me. 116.

Md.—Baumgartner v. Haas, 68 Md. 32, 11 A 588; Dorsey v. Smithson, 6 Harr. & J. 61.

Miss.—Ellis v. McGee, 63 Miss. 168; Garner v. Lyles, 35 Miss. 176.

N. Y.—Babcock v. Booth, 2 Hill 181, 38 AmD 578; Osborne v. Moss, 7 Johns. 161, 5 AmD 252.

N. C.—Sturdivant v. Davis, 31 N. C. 365; Bailey v. Miller, 27 N. C. 444, 44 AmD 47; McMorine v. Storey, 20 N. C. 83; Bayner v. Robertson, 14 N. C. 439; Norfleet v. Ridick, 14 N. C. 221, 22 AmD 717.

Pa.—Stockton v. Wilson, 3 Penr. & W. 129; Crunkleton v. Wilson, 1 Browne 361.

S. C.—Tucker v. Williams, 23 S. C. L. 329, 31 AmD 561; Anderson v. Belcher, 1 Hill 246, 26 AmD 174.

Tenn.—Cobb v. Lanier, 4 Hayw. 297; Russel v. Lanier, 4 Hayw. 289.

Eng.—Edwards v. Harben, 2 T. R. 587, 100 Reprint 315; Hawes v. Loader, Yelv. 196, 80 Reprint 129.

[a] **Fraudulent conveyance in another state.**—A widow who has possession of property under color of a fraudulent conveyance from her deceased husband may be held to be executrix de son tort in the state whither she has brought the property. Hopkins v. Towns, 4 B. Mon. (Ky.) 124, 39 AmD 497.

[b] **A voluntary grantee disposing of property in the lifetime of the grantor** does not become an executor de son tort after the death of the grantor. Morrill v. Morrill, 13 Me. 415.

69. King v. Lyman, 1 Root (Conn.) 104.

"A purchase of land made by a son from his insolvent mother, to defraud her creditors, and his reduction of the land to possession before or after her death, and a subsequent sale of the same, would not fix him with the character of executor de son tort, nor tend to do so." Johnson v. Johnson, 80 Ga. 260, 261, 5 SE 629.

70. Chattanooga Stove Co. v. Adams, 81 Ga. 319, 6 SE 695.

71. Campbell v. Sheldon, 13 Pick. (Mass.) 8; Campbell v. Tousey, 7 Cow. (N. Y.) 64; Atty-Gen. v. New York Breweries Co., [1898] 1 Q. B. 205 [allowing app [1897] 1 Q. B. 738, and aff [1899] A. C. 62].

[a] **Charging estate.**—Although a person may be liable in such cases to be charged as executor de son tort, it does not follow that the creditors can, through such an executor, charge or bind the estate of the deceased. Campbell v. Sheldon, 13 Pick. (Mass.) 8.

72. Marcy v. Marcy, 32 Conn. 308 [crit Campbell v. Tousey, 7 Cow. (N. Y.) 64].

73. Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

74. White v. Mann, 26 Me. 361; Padget v. Priest, 2 T. R. 97, 100 Reprint 53.

[a] **Continuing to hold property.**—Where an agent received for collection notes which did not fall due until after the payee's death, and he merely continued to hold them, no demand for them being made on him by the administrator appointed in the domicile of the state, he was not liable as an executor de son tort, although the maker of the note became insolvent while he held it. Darr v. Darr, 59 Iowa 81, 12 NW 765.

75. Willingham v. Rushing, 105 Ga. 72, 31 SE 130 (sale by factor who had made advances).

76. Turner v. Child, 12 N. C. 133, 17 AmD 555.

77. Sykes v. Sykes, L. R. 5 C. P. 113; Sharland v. Mildon, 5 Hare 469, 26 EngCh 469, 67 Reprint 997; Cottle v. Aldrich, 4 M. & S. 175, 105 Reprint 799, 1 Stark. 37, 2 ECL 24; Hall v. Elliot, 1 Peake N. P. 86.

78. Sykes v. Sykes, L. R. 5 C. P. 113.

79. Cottle v. Aldrich, 4 M. & S. 175, 105 Reprint 799, 1 Stark. 37, 2 ECL 24.

80. Outlaw v. Farmer, 71 N. C. 31.

81. Rahn v. Rahn, 98 Ill. A. 509 [aff 204 Ill. 184, 68 NE 369, 98 AmSR 185]; Magner v. Ryan, 19 Mo. 196; Givens v. Higgins, 15 S. C. L. 286, 17 AmD 742.

82. Givens v. Higgins, 15 S. C. L. 286, 17 AmD 742.

83. Brown v. Sullivan, 22 Ind. 359, 85 AmD 421; Perkins v. Ladd, 114 Mass. 420, 19 AmR 374.

84. Bryant v. Helton, 66 Ga. 477; Hill v. Curtis, L. R. 1 Eq. 90; Sharland v. Mildon, 5 Hare 469, 26 EngCh 469, 67 Reprint 997.

85. Stevenson v. Valentine, 27 Nebr. 338, 43 NW 107; Atty.-Gen. v. New York Breweries Co., [1898] 1 Q. B. 205 [allowing app [1897] 1 Q. B. 738, and aff [1899] A. C. 62]; Sharland v. Mildon, 5 Hare 469, 26 EngCh 469, 67 Reprint 997; Armstrong v. Armstrong, 44 U. C. Q. B. 615.

pal.[86]

[§ 2913] **7. Acts of Surviving Spouse, Heirs, or Devisees.** The acts of a surviving spouse, heir, or devisee of the decedent, done in good faith, are treated with indulgence, especially if the estate gains advantage rather than disadvantage therefrom, and the assets are duly accounted for;[87] but acts done in bad faith, injurious to the interests of the estate or with proceeds unaccounted for, may subject one to liability as executor de son tort, notwithstanding the relationship borne to decedent.[88]

[§ 2914] **8. Dealings with Executor De Son Tort.** An innocent purchaser of property from the executor de son tort cannot be held to the liability of his vendor;[89] and there is authority for the doctrine that even a purchaser from an executor de son tort with notice of his vendor's lack of authority does not thereby become himself an executor de son tort and chargeable as such as if he had directly intermeddled with the property,[90] although a contrary view has been asserted.[91] A creditor of the estate who obtains payment of his debt from an executor de son tort does not thereby become himself an executor de son tort.[92]

[§ 2915] **9. Administration on Estate of Executor De Son Tort.** That a person who administers upon the estate of an executor de son tort thereby makes himself liable as executor de son tort of the original decedent has been both asserted[93] and denied.[94]

[§ 2916] **10. Intermeddling with Partnership Assets.** One who intermeddles with the assets of a partnership after the death of a member of the firm is usually held liable to account to the surviving partner,[95] and hence cannot be properly regarded as an executor de son tort of the deceased partner.[96] Where a plaintiff filed a bill for an account against defendant as executor de son tort of his deceased partner, as well as in his character of surviving partner, it was held that defendant, having answered, must answer fully in both capacities.[97]

[§ 2917] **11. Effect of Existence of Rightful Representative.** As a general rule an intermeddling with decedent's goods will not make one liable as an executor de son tort in a suit by creditors if there is an executor or administrator already appointed, for in such case the intermeddler is accountable to the lawful representative.[98] If, however, acts have been performed for which a person

86. Stevenson v. Valentine, 27 Nebr. 338, 43 NW 107; In re Lovett, 3 Ch. D. 198; Sharland v. Mildon, 5 Hare 469, 26 EngCh 469, 67 Reprint 997.

[a] **The reason** is that the only way in which an executor de son tort can purge himself is by delivering the property to the rightful executor or administrator before he is sued as executor de son tort. Hill v. Curtis, L. R. 1 Eq. 90; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 747; Padget v. Priest, 2 T. R. 97, 100 Reprint 53.

87. Ala.—Ward v. Bevill, 10 Ala. 197, 44 AmD 478.

Cal.—Valencia v. Bernal, 26 Cal. 328.

Conn.—Bogue v. Watrous, 59 Conn. 247, 22 A 31; Taylor v. Moore, 47 Conn. 278.

Ga.—Johnson v. Johnson, 80 Ga. 260, 5 SE 629; Barron v. Burney, 38 Ga. 264; Semmes v. Porter, Dudl. 167.

Ind.—Chandler v. Davidson, 6 Blackf. 367; Brown v. Benight, 3 Blackf. 39, 23 AmD 373.

Ky.—Risk v. Risk, 9 SW 712, 10 KyL 566.

La.—Miguez v. Delcambre, 125 La. 176, 51 S 108; Dusfreme v. Aime, 4 La. 164.

Md.—Sindall v. Campbell, 7 Gill 66.

Mass.—Pettengill v. Abbott, 167 Mass. 307, 45 NE 748.

Mo.—Lich v. Bernicker, 34 Mo. 93; Magner v. Ryan, 19 Mo. 196.

N. Y.—Ginochio v. Porcella, 3 Bradf. Surr. 277.

N. C.—Outlaw v. Farmer, 71 N. C. 31.

S. C.—Frierson v. Wesberry, 45 S. C. L. 353; Givens v. Higgins, 15 S. C. L. 286, 17 AmD 742.

Tenn.—Morris v. Lowe, 97 Tenn. 243, 36 SW 1098; Miller v. Birdsong, 7 Baxt. 531; Boring v. Jobe, (Ch. A.) 53 SW 763.

Tex.—Green v. Rugely, 23 Tex. 539; Manchester v. Bursey, 41 Tex. Civ. A. 271, 91 SW 817.

Vt.—Blodgett v. Converse, 60 Vt. 410, 15 A 109.

[a] **A widow may maintain trover** for personal property belonging to the estate of her deceased husband of which she had possession several years after his death when no letters of administration had been granted on his estate. Brown v. Beason, 24 Ala. 466.

[b] **Gift of wearing apparel.**—Where decedent left no property but his wearing apparel, and his widow gave this away, after paying from her own means more than its value in satisfaction of the expenses of his last sickness and burial, she was not liable as an executrix de son tort. Taylor v. Moore, 47 Conn. 278.

[c] **If a widow hires out a slave belonging to the estate** of her deceased husband, before administration granted, and the bailee returns it at the expiration of the term in as good condition as when he received it, he is not liable in trover to an administrator subsequently appointed for the value of the slave and interest. Williams v. Crum, 27 Ala. 468.

88. Ga.—Bryant v. Helton, 66 Ga. 477; Semmes v. Porter, Dudl. 167.

Ill.—Truett v. Cummons, 6 Ill. A. 73.

Ind.—Wilson v. Davis, 37 Ind. 141; Leach v. Prebster, 35 Ind. 415; Hawkins v. Johnson, 4 Blackf. 21.

Iowa.—Madison v. Shockley, 41 Iowa 451; Schaffner v. Grutzmacher, 6 Iowa 137.

La.—Badillo v. Tio, 6 La. Ann. 129.

Me.—White v. Mann, 26 Me. 361.

Miss.—Wilbourn v. Wilbourn, 48 Miss. 38.

Mo.—Rougtell v. Strode, 126 Mo. A. 348, 103 SW 510.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622.

N. J.—McGill v. O'Connell, 33 N. J. Eq. 256.

Pa.—Crunkleton v. Wilson, 1 Browne 361.

S. C.—Hubble v. Fogartie, 37 S. C. L. 413. 45 AmD 775; Haigood v. Wells, 10 S. C. Eq. 59.

Vt.—Walton v. Hall, 66 Vt. 455, 29 A 803.

89. Ga.—Wiley v. Truett, 12 Ga. 588.

S. C.—Nesbit v. Taylor, 24 S. C. L. 296; Johnson v. Gaither, 16 S. C. L. 6.

Tenn. — Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86. But see Brown v. Bibb, 2 Coldw. 434 (where the court said, obiter, that the alienees of an executrix de son tort were in no better position than their vendor).

Eng.—Paull v. Simpson, 9 Q. B. 365, 58 ECL 365, 115 Reprint 1313; Hill v. Curtis, L. R. 1 Eq. 90; Dickenson v. Naul, 4 B. & Ad. 638, 24 ECL 281, 109 Reprint 596; Tomlin v. Beck, Turn. & R. 438, 12 EngCh 438, 37 Reprint 1169 [dist from a dictum of Lord Cottenham in Carmichael v. Carmichael, 2 Phil. 101, 22 EngCh 101, 41 Reprint 880].

Ont.—Pickering v. Thompson, 24 Ont. L. 378, 3 OntWN 1361, 19 Ont WR 697, AnnCas1912A 530.

[a] **A purchaser is not bound to inquire into an executor's title;** if there is an appearance of title, it is sufficient. A stranger therefore who sees one acting as executor may fairly presume that there is a will in which the person acting with apparent authority is appointed executor. Johnson v. Gaither, 16 S. C. L. 6.

90. Smith v. Porter, 34 Me. 287; Nesbit v. Taylor, 24 S. C. L. 296; Paull v. Simpson, 9 Q. B. 365, 58 ECL 365, 115 Reprint 1313; Hill v. Curtis, L. R. 1 Eq. 90.

91. Mitchell v. Kirk, 3 Sneed (Tenn.) 319; Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86; Hill v. Curtis, L. R. 1 Eq. 90.

92. Hursell v. Bird, 65 L. T. Rep. N. S. 709.

93. McMorine v. Storey, 20 N. C. 83, 34 AmD 374.

94. Alfriend v. Daniel, 48 Ga. 154.

95. See Partnership [30 Cyc 629].

96. Hunt v. Drane, 32 Miss. 243. To like effect Palmer v. Maxwell, 11 Nebr. 598, 10 NW 524.

97. Leigh v. Birch, 9 Jur. N. S. 1265.

98. Ala.—Ward x. Bevill, 10 Ala. 197, 44 AmD 478.

Conn.—Bacon v. Parker, 12 Conn. 212.

Ga.—Willingham v. Rushing, 105 Ga. 72, 31 SE 130; Howland v. Dews, R. M. Charlt. 383.

N. C.—Francis v. Welch, 33 N. C. 215; McMorine v. Storey, 20 N. C. 83; Norfleet v. Riddick, 14 N. C. 221, 22 AmD 717; Turner v. Child, 12 N. C. 25, 17 AmD 555.

Vt.—Clark v. Peck, 79 Vt. 275, 65 A 14.

Eng.—Reade's Case, 5 Coke 33b, 77 Reprint 103; Anonymous, 1 Salk. 313, 91 Reprint 276; Fooler v. Cooke, 1 Salk. 297, 91 Reprint 263.

Ont.—Armstrong v. Armstrong, 44 U. C. Q. B. 615.

[a] **To this rule there are exceptions.**—(1) Thus, where a stranger takes decedent's goods, and, claiming to be executor, pays or receives debts or pays legacies or otherwise does those acts which none but an executor can do, in which case he becomes executor de son tort, although there is a rightful executor, or administration has been duly granted. Ward v. Bevill, 10 Ala. 197, 44 AmD 478; State v. Rogers, 1 Del. 120 note a; Howland v. Dews, R. M. Charlt. (Ga.) 383; Foster v. Nowlin, 4 Mo. 18; Anonymous, 1 Salk. 313, 91 Reprint 276. (2) So also if a

cannot be responsible to the rightful administrator but which have interfered with the estate to the injury of creditors alone, he may still be liable as executor de son tort.[99] Thus, a fraudulent grantee of the decedent may be held as executor de son tort at the suit of creditors, in jurisdictions where an action to set aside the transfer could not be brought by the executor or administrator.[1] The fact that there is a lawful representative in one state does not prevent an intermeddler in another state being held liable as an executor de son tort,[2] although it has been considered that one who acts in one state with the consent of the executor in another state ought not to be held liable.[3]

[§ 2918] **C. Rights and Liabilities—1. In General.**[4] An executor de son tort is subject to all the liabilities of an ordinary executor or administrator without being entitled to any of his privileges,[5] but although he cannot obtain any personal advantage from his intermeddling, he can use proper means to protect the assets of the estate.[6] In his dealings with respect to the estate, he is held to such diligence as prudent men ordinarily bestow on their own affairs.[7] Accordingly it has been held that, where his negligence in failing to collect securities at maturity causes a loss to the estate, he is liable for such loss,[8] although there is also authority for the view that he cannot enforce the collection of notes due the estate and therefore cannot be sued for a failure to do so.[9] Where defendant, who undertook to administer without authority, obtained from plaintiff, who was entitled to share in the estate, an unfair settlement, because of failure to make a full and fair report of the property of the estate, the settlement should be deemed fraudulent, although defendant sincerely believed that plaintiff had no rights.[10]

Estoppel to deny representative character. Persons who presume without authority to administer an estate and who claim fully to have administered are estopped, in a proceeding for an accounting, from denying their representative character or their liability to account accordingly.[11]

Intermeddling in another state. Where one has intermeddled in an estate in one state by taking possession of its property as an administrator might, he can be compelled, on making an appearance in court in another state, the creditors not interfering, to account to the heirs.[12]

The death of an executor de son tort does not relieve his estate of liability for his intermeddling during his lifetime.[13]

Where there are two executors de son tort, one of them cannot be held liable for a loss resulting from the negligence of the other in which he did not participate,[14] although he may be held liable for the acts of the other which he authorized or directed.[15]

An executor de son tort of a duly constituted executor is liable at common law in respect of the debts of the original testator.[16]

An executor de son tort of an executor de son tort has been held to represent the first testator,[17] and where property was held by the first testator in trust the statute of limitations does not begin to run in respect to such property in favor of the executor de son tort of the person who was executor de son tort of the first testator, until he has termi-

person gets the goods of a decedent into his hands before administration is granted he remains chargeable as executor de son tort afterward, unless he delivers the goods to the rightful administrator before an action is brought. Ward v. Bevill, 10 Ala. 197, 44 AmD 478; Howland v. Dews, R. M. Charlt. (Ga.) 383; Reade's Case, 5 Coke 33b, 77 Reprint 103; Anonymous, 1 Salk. 313, 91 Reprint 276.

99. Simonton v. McLane, 25 Ala. 353; Turner v. Child, 12 N. C. 25, 17 AmD 555. See also cases infra note 1.

[a] **In cases of collusion** between the rightful representative and a third person, where there is nothing to prevent the former from being held liable, the doctrine stated in the text has no application. Simonton v. McLane, 25 Ala. 353.

1. Ala.—Simonton v. McLane, 25 Ala. 353; Marler v. Marler, 6 Ala. 367; Densler v. Edwards, 5 Ala. 31.

Ga.—Gleaton v. Lewis, 24 Ga. 209; Clayton v. Tucker, 20 Ga. 452; Howland v. Dews, R. M. Charlt. 383.

Ky.—Hopkins v. Towns, 4 B. Mon. 124, 39 AmD 497; Warren v. Hall, 6 Dana 450.

Me.—Allen v. Kimball, 15 Me. 116.

Md.—Dorsey v. Smithson, 6 Harr. & J. 61.

Miss.—Garner v. Lyles, 35 Miss. 176.

Mo.—Foster v. Nowlin, 4 Mo. 18.

N. Y.—Osborne v. Moss, 7 Johns. 161, 5 AmD 252.

N. C.—Sturdivant v. Davis, 31 N. C. 365; McMorine v. Storey, 20 N. C. 83; Norfleet v. Riddick, 14 N. C. 221, 22 AmD 717; Turner v. Child, 12 N. C. 25, 17 AmD 555.

Pa.—Crunkleton v. Wilson, 1 Browne 361.

S. C.—Tucker v. Williams, 23 S. C. L. 329, 31 AmD 561.

Va.—Shields v. Anderson, 3 Leigh 729; Chamberlayne v. Temple, 2 Rand. 384, 14 AmD 786.

2. Hopkins v. Towns, 4 B. Mon. (Ky.) 124, 39 AmD 497; Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

3. Selleck v. Rusco, 46 Conn. 370; Nisbet v. Stewart, 19 N. C. 24.

[a] **Delivering property to foreign administrator.**—Where a citizen of one state dies in another state, the person in whose house he died cannot be held liable as an executor de son tort in a suit by a creditor living in the state of decedent's domicile, by reason of his taking possession of money which the decedent had with him at the time of his death and paying it over, without notice of the creditor's claim, to the administrator in the state of decedent's domicile. Nisbet v. Stewart, 19 N. C. 24.

4. Right of retainer see supra § 1194.

5. Grace v. Seibert, 235 Ill. 190, 85 NE 308, 22 LRANS 301 [rev 138 Ill. A. 361]; Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185 [aff 98 Ill. A. 509]; Broholm v. Anderson, 178 Ill. A. 623; Rudd v. Rudd, (Ky.) 214 SW 791; Slate v. Henkle, 45 Or. 430, 78 P 325; Oxenham v. Clapp, 2 B. & Ad. 309, 22 ECL 135, 109 Reprint 1158; Carmichael v. Carmichael, 2 Phil. 101, 22 EngCh 101, 41 Reprint 880.

[a] **Liability for probate duty.**—An executor de son tort is as liable to pay probate duty on assets of a testator which he has administered as he would have been had he been named in the will. Atty.-Gen. v. New York Breweries Co., [1898] 1 Q. B. 205 [rev allowing app [1897] 1 Q. B. 738, and aff [1899] A. C. 62].

[b] **Liability for loss resulting to estate.**—An executor de son tort is liable for the amount of securities lost through his negligence in failing to collect at maturity. Rohn v. Rohn, 117 Ill. A. 512.

[c] **A liability to care for old and disabled slaves** imposed upon the owner or his personal representative by statute is not a liability to which an executor de son tort is subjected. Hyde County v. Silverthorn, 28 N. C. 356.

6. McIntire v. Carson, 9 N. C. 544; Pardell v. Bartolome, 23 Philippine 450.

[a] **He can plead the statute of limitations** as to a claim against the estate. McIntire v. Carson, 9 N. C. 544.

7. Rohn v. Rohn, 117 Ill. A. 512; Rohn v. Rohn, 98 Ill. A. 509.

8. Rohn v. Rohn, 117 Ill. A. 512.

9. Guild v. Young, (Tenn. Ch. A.) 62 SW 404.

10. Skahan v. Heading, (Iowa) 169 NW 324 (defendant chargeable with at least legal interest on amount withheld).

11. Broholm v. Anderson, 178 Ill. A. 623; Damouth v. Klock, 29 Mich. 289; Weaver v. Williams, 75 Miss. 945, 23 S 649.

12. Baldridge v. Evans, 131 Iowa 204, 164 NW 333 (not relieved by delay of heirs and hardship of situation).

13. Alfriend v. Daniel, 48 Ga. 154; Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 349, 105 A 308; Swift v. Martin, 19 Mo. A. 488.

"There would seem to be no doubt that the executor or administrator of an executor de son tort can be called to account in equity as executor or administrator of his decedent." Safe Deposit, etc., Co. v. Coyle, supra.

14. Rohn v. Rohn, 117 Ill. A. 512.

15. In re Ryan, [1897] 1 Ir. 513.

[a] **This liability is not limited** to the value or amount of goods or money actually received by him. In re Ryan, [1897] 1 Ir. 513.

16. Meyrick v. Anderson, 14 Q. B. 719, 68 ECL 719, 117 Reprint 277.

17. Dawson v. Callaway, 18 Ga. 573. See also supra § 2868.

nated the relation by converting the trust property to his own use.[18] An executor of an executor de son tort is not liable for a breach of contract committed by the original testator, although the executor de son tort had actually possessed himself of the property in respect to which the contract was made.[19]

Statutory penalty. The rule of strict construction is applied to statutes providing a penalty for intermeddling with the estate of a decedent.[20]

Criminal liability for intermeddling with the estate of a decedent is sometimes imposed by statute.[21]

[§ 2919] **2. Extent of Liability.** An executor de son tort is liable for the value of the property taken and used by him,[22] but can be charged only with what actually came into his hands,[23] unless, as is sometimes the case, a greater liability is imposed by statute.[24]

Interest. An executor de son tort is liable for interest from the time he took possession of the assets [25] at the highest legal rate.[26]

[§ 2920] **3. Who May Enforce Liability.** The lawful executor or administrator is as a general rule the proper person to enforce the liability of an executor de son tort.[27] At common law an executor de son tort may also be sued by creditors of decedent;[28] and it is held by some authorities that legatees or next of kin of decedent may enforce liability of an executor de son tort,[29] although the more generally accepted view is that they have no such right,[30] at least, while there are unpaid debts

18. Dawson v. Callaway, 18 Ga. 573.

19. Wilson v. Hodson, L. R. 7 Exch. 84.

20. Allen v. Allen, 144 Ga. 687, 87 SE 891; Currie v. Currie, 90 N. C. 553.

[a] **Illustrations.**—(1) A person who merely takes possession of the property of a decedent, but does not actually enter upon the administration of the estate, is not liable to a statutory penalty provided for persons who enter upon the administration of an estate without first having obtained letters therefor. Currie v. Currie, 90 N. C. 553. (2) The double liability imposed by statute for converting personalty of a deceased person is in the nature of a penalty for conversion after death of the owner, and does not apply where the conversion was during his lifetime. Allen v. Allen, 144 Ga. 687, 87 SE 891.

21. Carl v. Poelman, 12 La. Ann. 344; Walworth v. Ballard, 12 La. Ann. 245.

22. U. S.—Baysand v. Lovering, 2 F. Cas. No. 1,147, 1 Cranch C. C. 206.
Del.—Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.
Ill.—Broholm v. Anderson, 178 Ill. A. 623.
Ky.—Steel v. Steel, 4 J. J. Marsh. 231.
Mass.—Root v. Geiger, 97 Mass. 178.
S. C.—Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139; Leach v. House, 17 S. C. L. 42.

[a] **The appraised value** of household goods furnishes the measure of liability. Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.

[b] **Note.**—One who takes a note good and collectable at the time of the owner's death and holds it as executor de son tort and neglects to collect it until the maker becomes insolvent is liable to the rightful administrator for the amount of the note; but if the note is worthless at the time of the owner's death, the executor de son tort is liable only for the nondelivery of the note. Root v. Geiger, 97 Mass. 178.

[c] **Rent of land.**—A person appointed executor who has received the rent of land devised to be sold, but refuses the appointment as executor, is responsible to the administrator with the will annexed for such rents. Steel v. Steel, 4 J. J. Marsh. (Ky.) 231.

[d] **Where a creditor becomes executor de son tort** of his debtor, the value of the debtor's assets illegally taken into the creditor's hands are regarded as a payment pro tanto of the debt. Finnell v. Meaux, 3 Bush (Ky.) 449.

[e] **Delivering of specific articles.**—Where a testator devised furniture to his wife for life, remainder to a son who died, and subsequently the wife died leaving the furniture in the house of another son who on coming of age took possession of the house, he was not to be charged in money for the furniture, but he might deliver it long after taking possession to the representative of his deceased brother. Cary v. Macon, 4 Call (8 Va.) 605.

23. U. S.—Baysand v. Lovering, 2 F. Cas. No. 1,147, 1 Cranch C. C. 206; Roggenkamp v. Roggenkamp, 68 Fed. 605; Pulliam v. Pulliam, 10 Fed. 53.
Ala.—Berry v. Ferguson, 58 Ala. 314.
Ark.—Barasien v. Odum, 17 Ark. 122.
Conn.—Olmsted v. Clark, 30 Conn. 108.
Ill.—Truett v. Cummons, 6 Ill. A. 73.
Iowa.—Elder v. Littler, 15 Iowa 65.
Ky.—McKenzie v. Pendleton, 1 Bush 164; Brown v. Durbin, 5 J. J. Marsh. 170.
Md.—Glenn v. Smith, 2 Gill. & J. 493, 20 AmD 452.
Mass.—Weeks v. Gibbs, 9 Mass. 74; Mitchel v. Lunt, 4 Mass. 654.
Miss.—Gay v. Lemle, 32 Miss. 309; Hill v. Henderson, 21 Miss. 688.
Mo.—Swift v. Martin, 19 Mo. A. 488.
N. H.—Bellows v. Goodall, 32 N. H. 97; Neal v. Baker, 2 N. H. 477.
Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.
Pa.—Roumfort v. McAlarney, 82 Pa. 193; Stockton v. Wilson, 3 Penr. & W. 129; Nass v. Vanswearingen, 7 Serg. & R. 196.
S. C.—Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139; Kinard v. Young, 19 S. C. Eq. 247; Leach x. House, 17 S. C. L. 42.
Tex.—Lockhart v. White, 18 Tex. 102.
Eng.—Oxenham v. Clapp, 2 B. & Ad. 309, 22 ECL 135, 109 Reprint 1158; Yardley v. Arnold, C. & M. 434, 41 ECL 239, 10 M. & W. 141, 152 Reprint 416; Mountford v. Gibson, 4 East 441, 102 Reprint 900; Keble v. Osbaston, Hob. 49, 80 Reprint 198; Parten v. Baseden, 1 Mod. 213, 86 Reprint 836; Anonymous, 1 Salk. 313, 91 Reprint 276; Lowry v. Fulton, 9 Sim. 104, 16 EngCh 104, 59 Reprint 298; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 742, 2 H. Bl. 18, 126 Reprint 405; Hooper v. Summerseti, Wightw. 16, 145 Reprint 1157.

24. U. S.—Jennings v. Smith, 232 Fed. 921 [rev on other grounds 238 Fed. 48, 151 CCA 124].
Ga.—Allen v. Hurst, 120 Ga. 763, 48 SE 341; Willingham v. Rushing, 105 Reprint 72, 31 SE 130; Alfriend v. Daniel, 48 Ga. 154; Penick Supply Co. v. Anderson, (A.) 97 SE 889.
Ind.—Wilson v. Davis, 37 Ind. 141; Leach v. Prebster, 35 Ind. 415.
N. H.—Davis v. Davis, 72 N. H. 326, 56 A 747; Bellows v. Goodall, 32 N. H. 97; Pickering v. Coleman, 12 N. H. 148; Neal v. Baker, 2 N. H. 477.
Wis.—Dixon v. Sheridan, 125 Wis. 60, 103 NW 239.

25. Kinard v. Young, 19 S. C. Eq. 247.

26. Walton v. Hall, 66 Vt. 455, 29 A 803.

27. U. S.—Roggenkamp v. Roggenkamp, 68 Fed. 605, 15 CCA 600 (Nebraska statute).
Ala.—Abernathy v. Bankhead, 71 Ala. 190.
Del.—Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663.
Ind.—McCoy v. Payne, 68 Ind. 327.
Ky.—Steel v. Steel, 4 J. J. Marsh. 231; O'Bannor v. Cord, 1 KyL 398.
Me.—Snow v. Snow, 49 Me. 159.
Md.—Hagthorp v. Hook, 1 Gill & J. 270.
Mass.—Root v. Geiger, 97 Mass. 178.
N. Y.—Muir v. Leake, etc., Orphan House, 3 Barb. Ch. 477.
Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.
Pa.—Stockton v. Wilson, 3 Penr. & W. 129; Piening's Est., 15 Wkly NC 384.
Tenn.—David v. Bell, Peck. 135.
Vt.—Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628.
Ont.—Bartram v. Wagner, 10 Ont WR 41.

28. Ala.—Densler v. Edwards, 5 Ala. 31.
Colo.—Ebbinger v. Wightman, 15 Colo. A. 439, 62 P 963.
Ga.—Allen v. Hurst, 120 Ga. 763, 48 SE 341.
Ind.—Ferguson v. Barnes, 58 Ind. 169.
Iowa.—Elder v. Littler, 15 Iowa 65.
Ky.—McKenize v. Pendleton, 1 Bush 164.
Mass.—Mitchel v. Lunt, 4 Mass. 654.
Miss.—Wilbourn v. Wilbourn, 48 Miss. 38.
N. Y.—Lockwood v. Stockholm, 11 Paige 87.
N. C.—Morrison v. Smith, 44 N. C. 399.
Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.
Pa.—Power's Est., 14 Phila. 289, 10 WklyNC 208.
Wis.—Merrill v. Comstock, 154 Wis. 434, 143 NW 313.
Eng.—In re Lovett, 3 Ch. D. 198; Coote v. Whittington, L. R. 16 Eq. 534; Webster v. Webster, 10 Ves. Jr. 93, 32 Reprint 778.
Ont.—Cook v. Dodds, 6 Ont. L. 608, 2 OntWR 936.

[a] **A creditor must show that he suffered a loss** by reason of the acts of the executor de son tort, in order to support an order at common law to enforce the liability of the intermeddler. Merrill v. Comstock, 154 Wis. 434, 143 NW 313.

[b] **Creditor should sue for benefit of all.**—When an action is instituted by a creditor, it should not be for his sold benefit, but for the benefit of all the creditors. Ferguson v. Barnes, 58 Ind. 169.

29. Lee v. Gibbons, 14 Serg. & R. (Pa.) 105; Hansford v. Elliott, 9 Leigh (36 Va.) 79.

30. Ferguson v. Barnes, 58 Ind.

of decedent.[31] Under modern statutes in a number of states the liability of an executor de son tort can be enforced only by the personal representative of decedent,[32] but the right to enforce such liability has also been conferred by statute on heirs and legatees.[33]

An estoppel to enforce liability as executor de son tort may arise from having requested[34] or consented to[35] the acts which are claimed to have constituted intermeddling.

[§ 2921] **4. Effect of Delivery of Assets to Rightful Representative.** An executor de son tort may avoid liability by turning over to the rightful representative, before an action is brought against him, all the assets which had come into his hands;[36] but he cannot relieve himself by delivering over the effects to the rightful executor or administrator after an action has been brought.[37]

[§ 2922] **D. Effect of Acts—1. How Far Binding on Lawful Representative.** The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound to perform in the due course of administration,[38] but not by any other acts of the intermeddler.[39]

With respect to the statute of limitations an executor de son tort cannot, by a payment, acknowledgment, or any other act, interrupt the running of the statute or waive the bar thereof, as against the rightful representative,[40] although he may by such acts render himself personally answerable for the debt.[41]

[§ 2923] **2. Sales.** A purchaser from an executor de son tort gets no better title than his vendor had and therefore such a purchase, although bona fide, is no defense as against the rightful administrator seeking to recover in trespass or trover.[42] Nevertheless a bona fide purchaser at a public sale acquires at least a possession and a right of possession which he can maintain against all the world

169; Muir v. Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; Haley v. Thames, 30 S. C. 270, 9 SE 110; Guild v. Young, (Tenn. Ch. A.) 62 SW 404.

[a] **The proper course for heirs to pursue** is to procure the appointment of an administrator and have a suit instituted in his name. Muir v. Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; Farley v. Farley, 12 S. C. L. 506.

[b] **Distributees cannot without administration** charge their codistributees as executors de son tort in the court of probate. Haley v. Thames, 30 S. C. 270, 9 SE 110.

31. Leach v. Pillsbury, 15 N. H. 137; Muir v. Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; Slate v. Henkle, 45 Or. 430, 78 P 325; Lee v. Wright, 1 Rawle (Pa.) 149; Lee v. Gibbons, 14 Serg. & R. (Pa.) 105.

[a] **Where creditors do not interfere,** the heirs can compel an accounting. Baldridge v. Evans, 181 Iowa 204, 164 NW 333.

32. Ala.—Winfrey v. Clarke, 107 Ala. 355, 18 S 141 [overr Cameron v. Cameron, 82 Ala. 392, 3 S 148; Dunlap v. Newman, 47 Ala. 429].

Ark.—Rust v. Witherington, 17 Ark. 129; Barasien v. Odum, 17 Ark. 122.

Ind.—McCoy v. Payne, 68 Ind. 327.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325; Rutherford v. Thompson, 14 Or. 236, 12 P 382.

Wis.—Merrill v. Comstock, 154 Wis. 434, 143 NW 313.

Ont.—Armstrong v. Armstrong, 44 U. C. Q. B. 615.

33. Bryant v. Helton, 66 Ga. 477; Davis v. Davis, 56 Ga. 37.

[a] **An action to set aside a fraudulent sale** made by decedent, during his lifetime, to the executor de son tort, cannot be maintained by heirs at law. Davis v. Davis, 56 Ga. 37.

34. Pereda v. Rodriguez, 3 Porto Rico 176.

35. Beck v. Born, 5 La. A. (Orleans) 111.

36. Oxenham v. Clapp, 2 B. & Ad. 309, 22 ECL 135, 109 Reprint 1158; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 747, 2 H. Bl. 18, 126 Reprint 405; Crookshank v. Macfarlane, 7 N. B. 544.

[a] **A fraudulent donee** who has become liable to creditors as executor de son tort cannot discharge himself by delivery of the thing given to one who afterward obtains letters of administration, because such administrator is not chargeable with the value of the property as assets, by reason of the transfer made by the intestate. Morrison v. Smith, 44 N. C. 399.

37. Rahn v. Rahn, 98 Ill. A. 509 [aff 204 Ill. 184, 68 NE 369, 98 AmSR 185]; Slate v. Henkle, 45 Or. 430, 78 P 325; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 747, 2 H. Bl. 18, 126 Reprint 405.

38. Ga.—Burke v. Huff, 103 Ga. 598, 30 SE 546.

Me. — Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA 1915E 640, AnnCas1917E 1.

Nebr.—Lenderink v. Sawyer, 92 Nebr. 587, 590, 138 NW 744, AnnCas 1914A 261, LRA1915D 948 [cit Cyc].

N. H.—Giles v. Churchill, 5 N. H. 337.

N. C.—Outlaw v. Farmer, 71 N. C. 31.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.

Pa.—Cooper v. Eyrich, 41 Wkly NC 370.

S. C.—McElveen v. Adams, 108 S. C. 437, 94 SE 733; Coulter's Case, 5 Coke 30a, 77 Reprint 98.

Eng.—Thomson v. Harding, 2 E. & B. 630, 75 ECL 630, 118 Reprint 904; Morgan v. Thomas, 8 Exch. 302, 155 Reprint 1362; Buckley v. Barber, 6 Exch. 164, 155 Reprint 498; Graysbrook v. Fox, Plowd. 275, 75 Reprint 419.

Ont.—Bain v. McIntire, 17 U. C. C. P. 500.

[a] **A proper payment to a creditor** (1) of the estate will bind the true representative. Slate v. Henkle, 45 Or. 430, 78 P 325; Cooper v. Eyrich, 41 WklyNC (Pa.) 370; Thomson v. Harding, 2 E. & B. 630, 75 ECL 630, 118 Reprint 904; Parker v. Kett, 1 Ld. Raym. 658, 91 Reprint 1338; Baker v. Berisford, 1 Sid. 76, 82 Reprint 979. (2) Where the heirs of an intestate agreed to administer his estate without letters of administration and one of them paid a creditor of the deceased in goods belonging to the estate, and afterward another of the heirs was appointed administrator, he could not maintain trover against the creditor for the goods he had received, having previously assented to the act. Giles v. Churchill, 5 N. H. 337. (3) If one occupying a position of executor de son tort pays just debts of the estate, he is entitled to deduct the same from a verdict against himself and in favor of the executor. McElveen v. Adams, 108 S. C. 437, 94 SE 733.

[b] **The lawful representative can ratify** and make valid by relation all those acts of the executor de son tort which would have been valid had he been the lawful administrator. Outlaw v. Farmer, 71 N. C. 31.

39. Me.—Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA 1915E 840, AnnCas1917E 1.

Mo.—Barr v. Cubbage, 52 Mo. 404.

Pa.—Fahy's Est., 10 Pa. Dist. 399, 25 Pa. Co. 448.

W. Va.—Caperton v. Ballard, 4 W. Va. 420.

Eng.—Buckley v. Barber, 6 Exch. 164, 155 Reprint 498.

[a] **The lawful representative cannot be compelled to perform contracts** made by persons with an executor de son tort of the same estate. Barr v. Cubbage, 52 Mo. 404.

[b] **An executor de son tort cannot make a settlement** by accord and satisfaction of a debt or demand due the estate of a decedent so as to bind the rightful executor or those legally authorized to receive payment or to make such settlement. Caperton v. Ballard, 4 W. Va. 420.

40. Cook v. Dodds, 6 Ont. L. 608, 2 OntWR 936; Grant v. McDonald, 8 Grant Ch. (U. C.) 468.

41. Cook v. Dodds, 6 Ont. L. 608, 2 OntWR 936.

42. Ala.—Carpenter v. Going, 20 Ala. 587.

Del.—Wilson v. Hudson, 4 Harr. 168.

Ga.—Wiley v. Truett, 12 Ga. 588; Wylly v. King, Ga. Dec. Pt. II 7.

Md.—Rockwell v. Young, 60 Md. 563.

Mass.—Campbell v. Sheldon, 13 Pick. 8.

N. H.—Giles v. Churchill, 5 N. H. 337.

N. J.—Lippincott v. Shivers, 86 N. J. Eq. 409, 99 A 109 [aff 86 N. J. Eq. 59, 97 A 269].

N. C.—Hostler v. Scull, 3 N. C. 179.

Eng.—Mountford v. Gibson, 4 East 441, 102 Reprint 900.

[a] **That the executor de son tort afterward paid debts** (1) of the estate does not make the sale valid so as to pass title to a purchaser with notice. Roumfort v. McAlarney, 82 Pa. 193. (2) If an executor de son tort takes property and pays debts with it, the rightful executor cannot disturb the purchaser, because if he could recover, the property would have to be disposed of to pay the debts. Hostler v. Scull, 3 N. C. 179. To same effect Pickering v. Thompson, 24 Ont. L. 378, 2 OntWN 1361, 19 OntWR 697, AnnCas 1912A 530.

[b] **A creditor who receives goods in payment** (1) of his debts from an executor de son tort cannot protect his possession against an action of trover by the lawful administrator. Mountford v. Gibson, 4 East 441, 102 Reprint 900. (2) A sale by an executor de son tort of goods of the estate to a creditor of the estate, in payment of his claim, would give him a good title. Rockwell v. Young, 60 Md. 563.

except the rightful administrator,[43] and as against him the purchaser acquires an actual possession of which he cannot be lawfully deprived except by suit.[44] A purchaser on credit from an executor de son tort can defend against an action by the vendor for the price by showing that he has paid a part thereof to the legally appointed administrator on demand and given his note to the administrator for the balance.[45]

[§ 2924] **3. Effect of Subsequent Issue of Letters to Executors De Son Tort.** The fact that a person named as executor or entitled to administer upon an estate has, by intermeddling, rendered himself executor de son tort does not preclude him from subsequently taking out letters testamentary or of administration.[46] When he does take out such letters, they relate back so as to validate all acts previously done by him in the interest of the estate,[47] but previous acts which were to the prejudice of the estate are not validated.[48] A payment to the executor de son tort binds the estate, if he is subsequently granted letters;[49] and it has been held that a judgment against an executor de son tort will be valid against him after he has regularly administered and will bind the estate unless fraud or collusion is shown.[50]

Contracts made by an executor de son tort before letters testamentary or of administration were issued to him may thereafter be ratified by him either expressly[51] or impliedly,[52] and when ratified may be enforced.[53] But it has also been held that it may repudiate an agreement previously made by him.[54]

A person who is sued as executor de son tort cannot defeat the action by taking out letters pending the suit.[55]

Nature of liability. Where one who has wrongfully converted personalty of an unrepresented estate is appointed and qualifies as administrator, he cannot be held liable, as executor de son tort, for prior conduct, but becomes liable for proper administration of the estate as administrator.[56]

[§ 2925] **E. Actions and Remedies—1. Right of Action—a. By Executor De Son Tort.** It is usually held that an administrator de son tort cannot as such bring any action,[57] although it has

43. Woolfork v. Sullivan, 23 Ala. 548, 48 AmD 305.

44. Woolfolk v. Sullivan, 23 Ala. 548, 48 AmD 305.

45. Rockwell v. Young, 60 Md. 563.

46. Bingham v. Crenshaw, 34 Ala. 683; Carnochan v. Abrahams, T. U. P. Charlt. (Ga.) 196.

47. Ala.—Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55; Ward v. Bevill, 10 Ala. 197, 44 AmD 478.

Conn.—Olmsted v. Clark, 30 Conn. 108.

Ga.—Allen v. Allen, 144 Ga. 687, 87 SE 891; Carnochan v. Abrahams, T. U. P. Charlt. 196.

Ill.—Fowler v. Cohen, 212 Ill. A. 317; McClure v. Peo., 19 Ill. A. 105; Moore v. Wright, 4 Ill. A. 443.

Mass.—Hatch v. Proctor, 102 Mass. 351; Alvord v. Marsh, 12 Allen 603; Andrew v. Gallison, 15 Mass. 326, note; Shillaber v. Wyman, 15 Mass. 322.

Mo.—Magner v. Ryan, 19 Mo. 196.

N. H.—Emery v. Berry, 28 N. H. 473, 61 AmD 622; Clements v. Swain, 2 N. H. 475.

N. Y.—Ingram v. Young, 1 Hun 487, 3 Thomps. & C. 491; In re Faulkner, 7 Hill 181; Priest v. Watkins, 2 Hill 225, 38 AmD 584; Rattoon v. Overacker, 8 Johns. 126; Vroom v. Van Horne, 10 Paige 549, 42 AmD 94; Farrell's Est., Tuck. Surr. 110.

Or.—Casto v. Murray, 47 Or. 57, 81 P 388, 883.

Pa.—Sellers v. Licht, 21 Pa. 98.

S. C.—Witt v. Elmore, 18 S. C. L. 595; Walker v. May, 11 S. C. Eq. 22.

Tex.—Lockhart v. White, 18 Tex. 102.

Eng.—Vaughan v. Browne, Andr. 328, 95 Reprint 419, Str. 1106, 93 Reprint 1061; Baker v. Beresford, 1 Keb. 285, 83 Reprint 949; Williamson v. Norwitch, Style 337, 82 Reprint 757; Curtis v. Vernon, 3 T. R. 587, 100 Reprint 747, 2 H. Bl. 18, 126 Reprint 405; Pyne v. Woolland, 2 Vent. 179, 86 Reprint 380.

[a] **Proper acts may be ratified after appointment.**—Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA1915E 840, AnnCas1917E 1.

[b] **Retainer of individual debts.**—An executor de son tort may retain for a debt due him from the decedent, when he obtains a lawful grant to himself of letters of administration. Williamson v. Norwitch, Style 337, 82 Reprint 757; Pyne v. Woolland, 2 Vent. 180, 86 Reprint 380.

[c] **Where an executor de son tort advertised land for sale,** and was subsequently appointed administrator of the real estate, he could be restrained from selling the land, where at the time of the proposed sale the property had become vested in the heirs by the operation of the Devolution of Estates Act. Dyer v. Grove, 2 Ont. L. 754.

[d] **On the other hand** it has been held that the fact that the executor de son tort subsequently administered the estate did not give title to a person who bought from him before he was a rightful administrator. Wilson v. Hudson, 4 Del. 168, 169 ("It seems to be settled, that acts done by an administrator de son tort, will not bind the same person as rightful executor; any more than they would bind a third person who should become administrator. . . . If it were otherwise it would be in the power of any creditor, combining with the widow, as in this case, though all by the act becoming administrators de son tort, to administer the goods and defraud other creditors. The only safe rule is to hold that such sale does not change the property, and that the person afterwards becoming lawful administrator, can recover it"). See also Doe v. Glenn, 1 A. & E. 49, 28 ECL 48, 110 Reprint 1126, infra note 54.

48. Haselden v. Whitesides, 33 S. C. L. 353; Morgan v. Thomas, 8 Exch. 302, 155 Reprint 1362; Cook v. Dodds, 6 Ont. L. 608, 2 OntWR 936.

[a] **Effect of promise to pay debts on statute of limitation.**—The promise of an executor de son tort to pay a debt of decedent will not bind him and prevent the bar of the statute of limitations to a suit for the debt brought against him afterward as the rightful administrator. Haselden v. Whitesides, 33 S. C. L. 353.

[b] **Payment without allowance by court.**—Under a statute providing that on every settlement the administrator shall show that every claim for which disbursements have been made has been allowed by the court, an intermeddler who pays debts of decedent without such an allowance, and who is subsequently appointed administrator, is not entitled, over the objections of the heirs, to credit in his final settlement for the debts so paid, even though it is admitted by the heirs that such debts were valid and would have been allowed by the court if presented and proved according to law. Dockery v. Sparks, 170 Mo. A. 651, 157 SW 365.

49. Pinkham v. Grant, 78 Me. 158, 3 A 179; Wilson v. Wilson, 54 Mo. 213; Priest v. Watkins, 2 Hill (N. Y.) 225, 38 AmD 584.

[a] **Payment on forged order.**—Where a bank paid funds of a decedent to a certain person, on an order forged by such person, who used the funds for his own property, this is not a payment to an executor de son tort such as protected the bank on the person to whom payment was made being subsequently appointed administrator. Walker v. Portland Sav. Bank, 113 Me. 353, 93 A 1025, LRA1915E 840, AnnCas1917E 1 ("In other words, payment to one who seeks it, not as a representative of the estate, but as an individual with pretended rights against the estate, which induce the payment, is not legalized as to the party making the payment by a subsequent appointment of the wrongdoer as administrator").

50. Walker v. May, 20 S. C. L. 22.

51. Hatch v. Proctor, 102 Mass. 351.

52. Sellers v. Licht, 21 Pa. 98.

53. Hatch v. Proctor, 102 Mass. 351; Sellers v. Licht, 21 Pa. 98.

54. Doe v. Glenn, 1 A. & E. 49, 28 ECL 48, 110 Reprint 1126 (agreement to surrender a term of years vested in testate).

55. Rahn v. Rahn, 98 Ill. A. 509 [aff 204 Ill. 184, 68 NE 369, 98 AmSR 185]; Rattoon v. Overacker, 8 Johns. (N. Y.) 126; Vaughan v. Browne, Andr. 328, 95 Reprint 419, 2 Str. 1106, 93 Reprint 1061; Vernon v. Curtis, 2 H. Bl. 18, 126 Reprint 405, 3 T. R. 587, 100 Reprint 747.

56. Allen v. Allen, 144 Ga. 687, 87 SE 891.

57. Cal.—De la Guerra v. Packard, 17 Cal. 182.

Ill.—Broholm v. Anderson, 178 Ill. A. 623. But compare Fowler v. Cohen, 212 Ill. A. 317, 319 ("Plaintiff in error was an administrator de son tort, and such an administrator may institute an action at law," citing several cases, none of which support this proposition).

Mass.—Campbell v. Sheldon, 13 Pick 8.

N. C.—Francis v. Welsh, 33 N. C. 215.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.

Pa.—Lee v. Wright, 1 Rawle 149.

Tenn.—Gadsby v. Donelson, 10 Yerg. 371.

Ont.—Cameron v. Cameron, 23 U. C. C. P. 289.

[a] **Cannot recover payments in excess of assets received.**—Although the amount of the payments made by an executor de son tort in discharge of the debts of a decedent is in excess of the assets received by him, he cannot recover from the representative of the decedent whose

also been asserted that he has a sufficient title to maintain an action against a mere wrongdoer for the seizure of a chattel.[58] An intermeddler who has been fraudulently induced by another to part with money belonging to the estate may sue in his individual capacity for the wrong done him.[59]

[§ 2926] **b. Against Executor De Son Tort.** An executor de son tort may be sued generally as executor,[60] or specifically as executor de son tort.[61]

[§ 2927] **2. Nature and Form of Action—a. In General.** It has been held in Canada that the court cannot, in the same proceeding, brought by a creditor of the decedent, adjudge that defendant is an executor de son tort and also give judgment against him as such for the amount claimed by plaintiff.[62] Under the Georgia statute the nature of a suit against an executor de son tort is limited to a personal action against wrongdoer, and is not directed against the estate itself, but is merely for double the value of property illegally possessed or converted, and cannot properly be brought on the original obligation.[63]

[§ 2928] **b. Action at Law.** The rightful administrator may pursue the executor de son tort in a court of law either by trespass for unlawfully taking the goods of the intestate,[64] or by trover for their conversion;[65] and debt has been held a proper form of action by a creditor in certain cases.[66] An action against an executor de son tort by a creditor has been held to be founded on contract and not on tort,[67] and it has also been held that if a person sells the goods of an estate before administration is granted and receives the money therefor, an administrator subsequently appointed may sue him in trover for conversion,[68] or waive the tort and bring assumpsit for money had and received.[69]

[§ 2929] **c. Suit in Equity.** The rule that a creditor may come into a court of chancery against a personal representative has been recognized as applying to an executor de son tort,[70] although the contrary view has also been asserted,[71] on the ground that there is a plain and adequate remedy at law.[72] If the person sought to be charged as executor de son tort holds the property in question under a fraudulent conveyance, the remedy in equity for the creditor is particularly proper, for the rightful representative is bound by decedent's fraud.[73] Bills in chancery against executors de son tort by rightful personal representatives,[74] and by heirs and distributees[75] have also been sustained.

[§ 2930] **d. Probate Proceedings.** An executor de son tort cannot be cited to account in a probate court.[76]

[§ 2931] **3. Conditions Precedent.** In Louisiana it was formerly necessary that a person who had taken unauthorized possession of the effects of a vacant succession or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted and convicted for such action, before a creditor of the succession could institute a suit to hold such person liable for a debt due him by the succession;[77] but this requirement no longer obtains.[78]

[§ 2932] **4. Time to Sue and Limitations.** A statute protecting personal representatives from suit until after the expiration of a certain time does not apply to executors de son tort, but they may be sued immediately after intermeddling.[79] An action may be brought against an executor de son tort, if a cause of action existed against his decedent, at any time until the action is barred by the lapse of the statutory time after a lawful grant of administration.[80] Where the relationship of decedent to another was such that the statute of limitations would not run in decedent's favor, it will not run in favor of his executor de son tort.[81]

[§ 2933] **5. Defenses.** Although an executor de son tort cannot by his own wrongful act acquire any benefit,[82] yet he is protected in all acts not for his own benefit which a rightful executor might do,[83] and accordingly he may show that he has applied either the whole amount or some part of the assets that came into his hands to the purposes to which it would have been the duty of a rightful executor or administrator to apply it.[84] Where a creditor of a deceased grantor brings a bill in

debts he paid. De la Guerra v. Packard, 17 Cal. 182.

[b] **A bill in equity** cannot be brought against the rightful administrator by an executor de son tort to recover payments made by him for the benefit of the estate in the rightful course of administration. Slate v. Henkle, 45 Or. 430, 78 P 325.

58. Oughton v. Seppings, 1 B. & Ad. 241, 20 ECL 470, 109 Reprint 776.

59. Broholm v. Anderson, 178 Ill. A. 623.

60. Allen v. Hurst, 120 Ga. 763, 48 SE 341 (stating practice prevailing prior to the code).

61. Allen v. Hurst, 120 Ga. 763, 48 SE 341; Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 AmD 252; Commonwealth v. Gregory, 261 Pa. 106, 104 A 562.

[a] **The proper course for a creditor who takes out administration** on the estate of his debtor who made a fraudulent conveyance is to sue the fraudulent purchaser as executor de son tort. He cannot seize the property in the purchaser's hands. Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 AmD 252.

62. Dey v. McGill, 10 Ont. L. 408, 6 OntWR 329.

63. Penick Supply Co. v. Anderson, (Ga. A.) 97 SE 889.

64. Rockwell v. Saunders, 19 Barb. (N. Y.) 473.

65. Upchurch v. Norsworthy, 15 Ala. 705; Peet v. Nalle, 30 La. Ann. 949; Rockwell v. Saunders, 19 Barb. (N. Y.) 473.

66. Norfolk v. Gantt, 2 Harr. & J. (Md.) 435; Bellows v. Goodall, 32 N. H. 97.

67. Martin v. Hand, 11 R. I. 306.

68. Upchurch v. Norsworthy, 15 Ala. 705.

69. Upchurch v. Norworthy, 15 Ala. 705.

70. Ala.—Watts v. Gayle, 20 Ala. 817.

Ky.—Gentry v. Jones, 6 J. J. Marsh. 148.

Md.—Safe Deposit, etc., Co. v. Coyle, 133 Md. 343, 105 A 308; Baumgartner v. Haas, 68 Md. 32, 11 A 588; Bentley v. Cowman, 6 Gill & J. 152.

Tenn.—Russel v. Lanier, 4 Hayw. 289.

Va.—Hansford v. Elliott, 9 Leigh (36 Va.) 79.

Eng.—Newland v. Champion, 1 Ves. 105, 27 Reprint 920.

[a] **Creditor's right of election.**—A creditor may either go into equity or pursue his remedy at law, and a bill in equity is proper both to ascertain the debt and to prove the fraud and to have a decree for satisfaction. Russel v. Lanier, 4 Hayw. (Tenn.) 289.

71. Pleasants v. Glasscock, Sm. & M. Ch. (Miss.) 17; Fahy's Est., 10 Pa. Dist. 399, 25 Pa. Co. 448; Ansley v. Baker, 14 Tex. 607, 65 AmD 136.

72. Pleasants v. Glasscock, Sm. & M. Ch (Miss.) 17.

73. Watts v. Gayle, 20 Ala. 817; Ellis v. McGee, 63 Miss. 168; Garner v. Lyles, 35 Miss. 176.

74. Thorn v. Tyler, 3 Blackf. (Ind.) 504 (under statute providing that intermeddler might be pursued either at law or in equity by creditors or other persons injured); Seay v. Schue, 83 Va. 838, 3 SE 801.

75. Bryant v. Peters, 3 Ala. 160; Farve v. Graves, 12 Miss. 707.

76. Huff's Est., 15 Serg. & R. (Pa.) 39; Power's Est., 14 Phila. (Pa.) 289, 10 WklyNC 208.

77. Carl v. Poleman, 12 La. Ann. 344; Walworth v. Ballard, 12 La. Ann. 245; McMasters v. Place, 8 La. Ann. 431.

78. Peet v. Nalle, 30 La. Ann. 949.

79. Chambers v. Davison, 19 S. C. L. 50.

80. Baldridge v. Evans, 181 Iowa 204, 164 NW 333; Brown v. Leavitt, 26 N. H. 493.

81. Dawson v. Callaway, 18 Ga. 573.

82. See supra § 2918.

83. Brown v. Walter, 58 Ala. 310; Risk v. Risk, 9 SW 712, 10 KyL 566; Lenderink v. Sawyer, 92 Nebr. 587, 590, 138 NW 744, AnnCas1914A 261, LRA1915D 948 [cit Cyc].

84. McElveen v. Adams, 108 S. C. 437, 94 SE 733. See infra § 2934.

equity against a fraudulent or voluntary grantee on the theory that he is an executor de son tort, defendant may set up any defense which might be made by the decedent himself, if living, or by his rightful personal representative.[85] If one without authority sells the goods of an estate and receives the money therefor, it is no defense to an action for its recovery, instituted against him by the administrator, that the sale was void, and vested no title in the purchaser.[86] In an action by decedent's widow as his administratrix to recover against defendant for the conversion of property of the estate, defendant may show that he acted under the direction of the widow, before her appointment as administratrix and that he used the proceeds of the property in payment of debts of the estate.[87] But where at the death of an intestate one present took possession of the cash on hand with a view to its safekeeping, it was held that an action for money had and received would lie by the administrator, although he was present at the time of the taking of the money and made no objection.[88]

[§ 2934] **6. Set-Off.** Since a set-off to a debt is allowed simply to avoid a cross action, an executor de son tort cannot, in an action by a creditor, set off a debt due from such creditor to decedent.[89] The amount expended by an executor de son tort in paying the just debts of decedent may be set off against his liability for intermeddling,[90] but it is incumbent upon him to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative,[91] and he will be allowed no set-off or credit if the debts which he has discharged were not legal claims against the estate.[92] Payments to creditors in excess of their pro rata shares will protect the executor de son tort only to the extent of the amount which such creditors should have received.[93] The executor de son tort is not entitled to any set-off by reason of the application of assets to his own claim against decedent,[94] or to the payment of a legacy given him by the will.[95] In an action by the distributees, the statutory allowance paid to the widow may be set off.[96]

[§ 2935] **7. Venue.** An executor de son tort is liable to be sued in any jurisdiction where he is found with property of decedent.[97]

[§ 2936] **8. Parties.** It has been held that a bill cannot be maintained by distributees against an executor de son tort who has sold property of decedent, to have an account and obtain a decree for the proceeds, unless the rightful personal representative is a party plaintiff or defendant.[98] A laborer may, however, enforce his lien on crops in the hands of a wrongdoer after the death of his employer, without bringing in the personal representation of such employer.[99] The distributees are not necessary parties to a bill by a creditor against an executor de son tort who is a fraudulent purchaser.[1] If there is a lawful executor, he and the executor de son tort may be joined in an action by a creditor.[2] An executor de son tort is not a proper party defendant to a bill for relief against a judgment at law in favor of decedent.[3] On the death of a defendant in an action of debt a summons may issue to his executor de son tort to appear and defend the action, if there is no legal

[a] **In trover** by a lawful executor or administrator against an executor de son tort, defendant cannot show in defense that he has paid debts to the amount of the value of goods in his possession at the time of the action. He can defend on that ground only as to the goods which he has sold. Hardy v. Thomas, 23 Miss. 544, 57 AmD 152.

[b] **If the estate is insolvent,** it is no defense to an executor de son tort that he has paid debts to double the amount of assets received by him. Neal v. Baker, 2 N. H. 477.

85. Means v. Hicks, 65 Ala. 241.

86. Upchurch v. Norsworthy, 15 Ala. 705.

87. Rutherford v. Thompson, 14 Or. 236, 12 P 382.

88. Sebring v. Keith, 20 S. C. L. 340.

89. Cameron v. Cameron, 23 U. C. C. P. 289.

90. U. S.—Roggenkamp v. Roggenkamp, 68 Fed. 605, 15 CCA 600.

Ill.—McConnell v. McConnell, 94 Ill. 295; Rahn v. Rahn, 98 Ill. A. 509 [aff 204 Ill. 184, 68 NE 369, 98 AmSR 185].

Ind.—Reagan v. Long, 21 Ind. 264.

Ky.—McMeekin v. Hynes, 80 Ky. 343, 4 KyL 177.

La.—Hewes v. Baxter, 48 La. Ann. 1303, 20 S 701, 36 LRA 531.

Me.—Tobey v. Miller, 54 Me. 480.

Md.—Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452.

Mass.—Carey v. Guillow, 105 Mass. 18, 7 AmR 494; Weeks v. Gibbs, 9 Mass. 74.

Miss.—Gay v. Lemle, 32 Miss. 309.

Nebr.—Lenderink v. Sawyer, 92 Nebr. 587, 138 NW 744, AnnCas1914A 261, LRA1915D 948.

N. J.—Tuite v. Tuite, 72 N. J. Eq. 740, 66 A 1090; McMonigle v. McMonigle, 42 N. J. Eq. 64, 6 A 314.

Or.—Slate v. Henkle, 45 Or. 430, 78 P 325.

Pa.—Meigan v. McDonald, 10 Watts 287; Saam v. Saam, 4 Watts 432; Cooper v. Eyrich, 41 WklyNC 370.

S. C.—Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139. Contra Howell v. Smith, 13 S. C. L. 516.

Tenn.—Winn v. Slaughter, 5 Heisk. 191.

Wis.—Merrill v. Comstock, 154 Wis. 434, 143 NW 313.

Eng.—Hobby v. Ruell, 1 C. & K. 716, 47 ECL 716; Yardley v. Arnold, C. & M. 434, 41 ECL 239, 10 M. & W. 141, 152 Reprint 416; Mountford v. Gibson, 4 East 441, 102 Reprint 900; McCarthy v. Donovan, 13 Ir. C. L. 195; Icely v. Grew, 6 N. & M. 467, 36 ECL 645.

[a] **Statutes abolishing the office** and making the person who intermeddles liable to the personal representative of the estate and to him only do not take away this right. Slate v. Henkle, 45 Or. 430, 78 P 325.

[b] **In Georgia since the adoption of the code,** debts voluntarily paid by an executor de son tort cannot be set off in an action by a distributee. Bryant v. Helton, 66 Ga. 477.

91. Bennett v. Ives, 30 Conn. 329; Snow v. Snow, 49 Me. 159; Gay v. Lemle, 32 Miss. 309; Lenderink v. Sawyer, 92 Nebr. 587, 138 NW 744, AnnCas1914A 261, LRA1915D 948.

92. Spruance v. Darlington, 7 Del. Ch. 111, 30 A 663; Holeton v. Thayer, 89 Ill. A. 184; Crispin v. Winkleman, 57 Iowa 523, 10 NW 919; Weaver v. Williams, 75 Miss. 945, 23 S 649.

93. Bennett v. Ives, 30 Conn. 329; Gay v. Lemle, 32 Miss. 309.

94. Cal.—De La Guerra v. Packard, 17 Cal. 182.

Ky.—McMeekin v. Hynes, 80 Ky. 343.

Md.—Baumgartner v. Haas, 68 Md. 32, 11 A 588; Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452; Strike's Case, 1 Bland 57.

Mass.—Carey v. Guillow, 105 Mass. 18, 7 AmR 494.

N. H.—Brown v. Leavitt, 26 N. H. 493.

N. C.—Turner v. Child, 12 N. C. 133, 17 AmD 555.

S. C.—Cook v. Sanders, 49 S. C. L. 63, 94 AmD 139; Leach v. House, 17 S. C. L. 42; Kinard v. Young, 19 S. C. Eq. 247.

Tenn.—Hutchinson v. Fulghum, 4 Heisk. 550; Sharp v. Caldwell, 7 Humphr. 415; Partee v. Caughran, 9 Yerg. 460.

Va.—Shields v. Anderson, 3 Leigh (30 Va.) 729.

Eng.—Ayre v. Ayre, 1 Ch. Cas. 33, 22 Reprint 680; Coulter's Case, 5 Coke 30a, 77 Reprint 98; Prince v. Rowson, 1 Mod. 208, 86 Reprint 832; Baker v. Berisford, 1 Sid. 76, 82 Reprint 979; Vaughan v. Browne, Andr. 328, 95 Reprint 419, 2 Str. 1106, 93 Reprint 1061; Picard v. Brown, 6 T. R. 550, 101 Reprint 697; Alexander v. Lane, Yelv. 137, 80 Reprint 92.

95. Wilbourn v. Wilbourn, 48 Miss. 38.

96. Bryant v. Helton, 66 Ga. 477; Barron v. Burney, 38 Ga. 264; Crispin v. Winkleman, 57 Iowa 523, 10 NE 919.

97. Hopkins v. Towns, 4 B. Mon. (Ky.) 124, 39 AmD 497; Foster v. Nowlin, 4 Mo. 18.

[a] **Although defendant took the property into another state through her agent,** not in person, she was liable precisely to the same extent as if she had gone to the other jurisdiction herself and brought the property to the state of the forum. Hopkins v. Towns, 4 B. Mon. (Ky.) 124, 39 AmD 497.

98. Nease v. Capehart, 8 W. Va. 95.

99. Pugh v. Baker, 127 N. C. 2, 37 SE 82.

1. Watts v. Gayle, 20 Ala. 817.

2. Stockton v. Wilson, 3 Penr. & W. (Pa.) 129; Chaplin v. Hopkins, 20 S. C. Eq. 182.

3. Pemberton v. Riddle, 5 T. B. Mon. (Ky.) 401.

executor or administrator.[4]

[§ 2937] **9. Pleading—a. Complaint, Declaration, or Petition.** The rule as usually laid down in an action against an executor de son tort the complaint or declaration should charge him as executor generally,[5] but it has also been held sufficient for a creditor of decedent, suing the executor de son tort, to allege his intermeddling without lawful appointment and possession of decedent's goods, and pray for judgment.[6] A complaint not alleging that defendant came into possession of decedent's property unlawfully, or showing that he was an intermeddler in the estate, is insufficient to charge him as an executor de son tort,[7] but in an action by distributees it is not necessary to allege that no debts are due by the estate.[8] The complaint of a creditor should allege as nearly as possible the amount of decedent's money or property in the hands of defendant,[9] and affirmatively show that decedent's creditors were entitled to have the property go into the hands of an administrator.[10] A petition alleging that decedent left property in possession of a certain person as depositary, that such person assumed the control and management of the property until he surrendered the same to another person, and that such other person continued in control and management until he turned over the property to a third person who voluntarily assumed the management of the same, states a cause of action against the last custodian of the property only in the absence of an allegation that he is insolvent or unable to respond to any judgment which may be rendered against him.[11]

In a suit for a penalty under a statute which provides that no person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under a prescribed penalty, the complaint must state that defendant entered on the administration of the estate without obtaining letters.[12]

An amendment of the complaint, to conform to the evidence, which does not substantially change the claim or present any new issue, will be allowed.[13]

[§ 2938] **b. Plea or Answer.** One sued as executor de son tort may plead ne unques executor,[14] plene administravit,[15] plene administravit præter,[16] or non assumpsit.[17] Two or more of these pleas may be joined,[18] and the statute of limitations may be pleaded along with the other pleas.[19] The pleading of other pleas in addition to ne unques executor is not an admission by defendant that he is liable as executor of his own wrong.[20] Where one who has been executor de son tort takes out letters of administration and is afterward sued as executor de son tort he may plead in abatement that he is administrator and not executor,[21] but where one who has been sued as executor de son tort takes out administration pending suit he cannot plead in abatement that he is administrator and not executor.[22] The application of the assets to the payment of debts is merely matter of defense;[23] it cannot be pleaded in bar of an action by the lawful representative,[24] nor is it necessary that it should be set up as a counterclaim.[25] A plea to an action by a creditor that, since the institution of the suit, an administrator had been appointed is bad unless it contains an averment that the assets in defendant's hands had been delivered to the administrator either before or after the institution of the action.[26] A plea in abatement comes too late after the cause has been tried on defendant's plea of the general issue and the facts have been found by the court and when a legal judgment is impending.[27]

4. Norfolk v. Gantt, 2 Harr. & J. (Md.) 435.

5. Ga.—Shotwell v. Rowell, 30 Ga. 557.
Ill.—Moore v. Wright, 4 Ill. A. 443.
Ky.—Brown v. Durbin, 5 J. J. Marsh. 170.
Me.—Sawyer v. Thayer, 70 Me. 340; Lee v. Chase, 58 Me. 432.
Miss.—Pleasants v. Glasscock, Sm. & M. Ch. 17.
N. H.—Brown v. Leavitt, 26 N. H. 493.
N. Y.—Campbell v. Tousey, 7 Cow. 64.
Pa.—Stockton v. Wilson, 3 Penr. & W. 129.
S. C.—Gregory v. Forrester, 12 S. C. L. 318.
Utah—Hailey First Nat. Bank v. Lewis, 12 Utah 84, 41 P 712.
Vt.—Shaw v. Hallihan, 46 Vt. 389, 14 AmR 628; Buckminster v. Ingham, Brayt. 116.
Eng.—Meyrick v. Anderson, 14 Q. B. 719, 68 ECL 719, 117 Reprint 277.
See also Ebbinger v. Wightman, 15 Colo. A. 439, 62 P 963 (where the court recognized that the rule is usually laid down as stated, although it approved a different practice).

6. Ebbinger v. Wightman, 15 Colo. A. 439, 62 P 963; Allen v. Hurst, 120 Ga. 763, 48 SE 341.

7. McAfee v. Montgomery, 21 Ind. A. 196, 51 NE 957; In re Lovett, 3 Ch. D. 198.

8. Allen v. Hurst, 120 Ga. 763, 48 SE 341.

9. Ebbinger v. Wightman, 15 Colo. A. 439, 62 P 963.

10. Kahn v. Tinder, 77 Ind. 147; Goff v. Cook, 73 Ind. 351.

11. Tricou v. Macheca Real Est., etc., Co., 131 La. 122, 59 S 36.

12. Currie v. Currie, 90 N. C. 553.

13. Askew v. Singletary, 11 Ga. A. 727, 76 SE 98; Sipe v. Sipe, 14 Ind. 477.
[a] **Illustration.**—Where the complaint of a rightful administrator against an intermeddler laid the wrongful acts on a day certain, which was after the date of plaintiff's letters of administration, an amendment by substituting a day before the letters were granted was properly allowed. Sipe v. Sipe, 14 Ind. 477.

14. Ala.—Simonton v. McLane, 25 Ala. 353.
Conn.—King v. Lyman, 1 Root 104.
Ga.—Johnson v. Johnson, 80 Ga. 260, 5 SE 629.
S. C.—Greenville, etc., R. Co. v. Joyce, 42 S. C. L. 117.
Tenn.—Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.
[a] **However,** where defendant pleaded non assumpsit and the statute of limitations, it was too late at the trial for him to contend that he was not rightful executor, but executor de son tort. Greenville, etc., R. Co. v. Joyce, 42 S. C. L. 117.

15. Conn.—Bennett v. Ives, 30 Conn. 329; Olmsted v. Clark, 30 Conn. 108.
Del.—State v. Rogers, 1 Del. 120.
Md.—Glenn v. Smith, 2 Gill & J. 493, 20 AmD 452.
Miss.—Hill v. Henderson, 21 Miss. 688.
N. C.—Turner v. Child, 12 N. C. 133, 17 AmD 555; McIntire v. Carson, 9 N. C. 544.
S. C.—Leach v. House, 17 S. C. L. 42.
[a] **When pleadable.**—Plene administravit may be pleaded in a suit by a creditor but not in a suit by the lawful representative. Glenn v. Smith, 2 Gill & J. (Md.) 493, 20 AmD 452.
[b] **In the statutory action for intermeddling** with a decedent's goods, if the charge that defendant intermeddled is true he is liable, and a plea of payment of debts is therefore not a proper answer. Collier v. Jones, 86 Ind. 342.

16. Hubble v. Fogartie, 37 S. C. L. 411, 45 AmD 775.

17. Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.

18. See cases infra this note.
[a] **Defendant may join:** (1) Ne unques executor and plene administravit. State v. Rogers, 1 Del. 120; McIntire v. Carson, 9 N. C. 544; Hailey First Nat. Bank v. Lewis, 12 Utah 84, 41 P 712. (2) Ne unques executor and non assumpsit. Brodnax v. Brown, Dudl. (Ga.) 202; Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775. (3) Ne unques executor, plene administravit, and non assumpsit. Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.

19. McIntire v. Carson, 9 N. C. 544.

20. Alexander v. Kelso, 1 Baxt. (Tenn.) 5.

21. Clements v. Swain, 2 N. H. 475; Rattoon v. Overacker, 8 Johns. (N. Y.) 126.

22. Clements v. Swain, 2 N. H. 475.

23. Merrill v. Comstock, 154 Wis. 434, 143 NW 313; Whitehall v. Squire, Carth. 104, 90 Reprint 664.

24. Whitehall v. Squire, Carth. 104, 90 Reprint 664; Elworthy v. Sandford, 3 H. & C. 330, 159 Reprint 558.

25. Merrill v. Comstock, 154 Wis. 434, 143 NW 313.

26. McMeekin v. Hynes, 4 KyL 177.

27. Tweedy v. Bennett, 31 Conn. 276.

[§ 2939] **10. Evidence.** An executor de son tort who asserts in defense the payment of debts of decedent has the burden of showing the existence and validity of such debts as enforceable claims against the estate.[28] Evidence is admissible to show that a defendant is an executor de son tort, although it is not so charged in the pleadings.[29] Payment of legitimate expenses may be shown.[30] In an action against a person alleged to be the fraudulent purchaser of decedent and therefore his executor de son tort, a statement made by the vendor after the sale of the property and while it still remained in his possession that the property was his is admissible.[31] Records of judgments against decedent at the time he made the alleged fraudulent sale are admissible to show his indebtedness at the time.[32] Although a defendant sued as executor de son tort may give in evidence under the general issue payments of decedent's debts, yet his book of original entries is inadmissible to prove the payment of the debts.[33] Evidence to charge a person as executor de son tort need not be sufficient to warrant a conviction of felony.[34]

[§ 2940] **11. Trial.** Whether a person is an executor de son tort is partly a question of law and partly a question of fact.[35] The court determines what state of facts will constitute a person executor of his own wrong,[36] and the jury determines whether such facts exist in the particular case.[37]

[§ 2941] **12. Verdict.** When defendant pleads plene administravit and the issue is determined against him, the verdict should find how much property came into his hands, how much he lawfully administered, how much remains, and its value.[38]

[§ 2942] **13. Judgment.** In an action against an executor de son tort on a debt of decedent, the proper judgment at common law was that plaintiff recover the debt and costs to be levied of decedent's assets if defendant has so much, but if not, then of defendant's own goods.[39] But a distinction has been made, based on the plea interposed, to the effect that if defendant pleads ne unques executor and the issue is determined against him, he should be charged with the whole debt de bonis propriis,[40] while if he pleads plene administravit, he should be charged only with the assets that came into his hands.[41] Statutes sometimes preclude any judgment against the administrator de bonis non in such form as to impose on him a liability in excess of the value of the assets received by him[42] or such value with an added penalty of a certain percentage thereof.[43] It is sufficient that the judgment is entered and execution issued against defendant as executor and not as executor de son tort.[44] Judgment should be given to plaintiff for the full amount of his debt, although the estate is insolvent.[45]

Judgment by default should not be rendered against an executor de son tort as garnishee for the debt of a distributee, where it does not appear that there has been a settlement, which alone can determine whether anything will be coming to the distributee.[46]

[§ 2943] **14. Execution.** A judgment against an executor de son tort gives the party obtaining it no right to have an execution against the lands of decedent,[47] for the lands are not in legal contemplation the estate of decedent in defendant's hands.[48] It is a good plea in bar of execution that defendant has taken letters of administration before the suing out of the scire facias, that the estate is insolvent, and that a decree of distribution has been passed in the probate court;[49] but defendant cannot plead to the scire facias that he never intermeddled with the estate.[50]

For individual debt. Goods of a decedent in the possession of an executor de son tort are not subject to be seized for the latter's individual debts.[51]

28. Holeton v. Thayer, 89 Ill. A. 184.

29. Harper v. West, 11 F. Cas. No. 6,093, 1 Cranch C. C. (U. S.) 192.

30. Sewell v. Sewell, (Ala.) 74 S 343.

31. Foster v. Nowlin, 4 Mo. 18 (the statement was good evidence to show the nature of the possession of the goods and that inasmuch as it was offered after defendant had proved a previous statement by the vendor that the property was not his, but belonged to defendant, it was admissible as rebutting evidence).

32. Foster v. Nowlin, 4 Mo. 18.

33. Saam v. Saam, 4 Watts (Pa.) 432.

34. Israel v. King, 69 N. C. 373.

35. Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86; Haacke v. Gordon, 6 U. C. Q. B. 424.

36. Ill.—Rohn v. Rohn, 204 Ill. 184, 68 NE 369, 98 AmSR 185.

Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

S. C.—Hubble v. Fogartie, 3 Rich. 413, 45 AmD 775.

Tenn.—Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.

Eng.—Padget v. Priest, 2 T. R. 97, 100 Reprint 53.

Ont.—Haacke v. Gordon, 6 U. C. Q. B. 424.

37. Ala.—Ward v. Bevill, 10 Ala. 197, 44 AmD 478.

Ky.—Brown v. Durbin, 5 J. J. Marsh. 170.

Pa.—Brown v. Brown, 1 Pa. C. Pl. 8.

S. C.—Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

Tenn.—Caruthers v. Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.

Eng.—Padget v. Priest, 2 T. R. 97, 100 Reprint 53; Haacke v. Gordon, 6 U. C. Q. B. 424.

[a] **The bona fides of one's taking or retaining property under color of right,** believing his right to be superior to that of a lawful representative, is a question of fact for the jury, and not a question of law for the court. Ward v. Bevill, 10 Ala. 197, 44 AmD 478; Brown v. Durbin, 5 J. J. Marsh. (Ky.) 170; Brown v. Brown, 1 Pa. C. Pl. 8.

38. Foster v. Nowlin, 4 Mo. 18.

39. U. S.—Peters v. Breckenridge, 19 F. Cas. No. 11,030, 2 Cranch C. C. 578.

Ind.—Hawkins v. Johnson, 4 Blackf. 21.

N. J.—Parker v. Thompson, 30 N. J. L. 311.

S. C.—Hubbell v. Fogartie, 19 S. C. L. 167, 26 AmD 163; Chaplin v. Hopkins, 22 S. C. Eq. 182.

Tenn.—Hutchinson v. Fulghum, 4 Heisk. 550.

40. U. S.—Peters v. Breckenridge, 19 F. Cas. No. 11,030, 2 Cranch C. C. 518.

Ark.—Rust v. Witherington, 17 Ark. 129.

Del.—State v. Larkin, 1 Del. 121 note a.

N. Y.—Campbell v. Tousey, 7 Cow. 64.

S. C.—Hubble v. Fogartie, 37 S. C. L. 413, 45 AmD 775.

41. State v. Larkin, 1 Del. 121 note a.

42. Hill v. Henderson, 21 Miss. 688.

43. Goff v. Cook, 73 Ind. 351; McCoy v. Payne, 68 Ind. 327.

44. Barasien v. Odum, 17 Ark. 122; Shotwell v. Rowell, 30 Ga. 557; Hill v. Henderson, 21 Miss. 688.

45. Tweedy v. Bennett, 31 Conn. 276.

46. Grider v. Phœnix Brewing Co., 7 KyL 593.

47. Mitchel v. Lunt, 4 Mass. 654; Nass v. Vanswearingen, 10 Serg. & R. (Pa.) 144, 7 Serg. & R. 192; Warren v. Raymond, 17 S. C. 163; Wrathwell v. Bates, 15 U. C. Q. B. 391; McDade v. Dafoe, 15 U. C. Q. B. 386; Graham v. Nelson, 6 U. C. C. P. 280.

[a] **The sale of a reversion in a term of years** under a fieri facias on a judgment against an executor de son tort is a valid sale as against a rightful administrator. Bain v. McIntyre, 17 U. C. C. P. 500.

48. Mitchel v. Lunt, 4 Mass. 654.

49. Schillaber v. Wyman, 15 Mass. 322.

50. Green v. Dewit, 1 Root (Conn.) 183.

51. Grant v. Williams, 28 N. C. 341.

***EXECUTORSHIP EXPENSES.** Testamentary expenses;[1] expenses incident to the proper performance of the duty of the executor in the same way as testamentary expenses are, neither more nor less.[2]

EXECUTORY.[3] That which remains to be carried into operation or effect; incomplete; depending upon a future performance or event.[4]

EXECUTORY PROCESS. In Louisiana, a term applied to an order of seizure and sale when a mortgage imports a confession of judgment.[5] It is a summary proceeding, and issues without citation to the adverse party,[6] being said to be, in substance, a decree of foreclosure and sale.[7]

EXECUTRIX.[8]

EXEDOS or **EXIDOS.**[9]

EXEMPLA ILLUSTRANT, NON RESTRINGUNT, LEGEM.[10]

EXEMPLA NON RESTINGUNT REGULAM, SED LOQUUNTUR DE CASIBUS CREBRIORIBUS.[11]

EXEMPLARY.[12] Such as may serve for a warning to others; such as may deter from wrongdoing.[13]

EXEMPLIFICATION.[14] When used in a legal sense the word means a copy or transcript attested to be correct by the seal of an officer having custody of the original;[15] a copy accompanied by a certificate of the proceedings necessary to be taken in order to authorize the same to be entered of record;[16] a perfect copy of a record or office book, so far as relates to the matter in question.[17]

EXEMPLI GRATIA. Literally "For the purpose of example."[18]

EXEMPT.[19] The term is not a technical one but is a plain English word.[20]

As a noun. A person who is free from any charge, burden, or duty;[21] not liable to, etc.;[22] one who is excused from duty.[23]

As a verb. To excuse;[24] to clear;[25] to free;[26] to free from obligation;[27] to grant immunity to;[28] to release;[29] to relieve from some requisition, etc., to which others are subject;[30] to take out of or from, and in its ordinary signification to free from, not be subject to any service or burden to which others are made liable;[31] to except or excuse from some burdensome condition or obligation or the operation of some law to which others are subject.[32]

Exempted. Free;[33] free, clear, or released as from some liability, restriction, or burden affecting other persons;[34] not liable;[35] not subject to;[36] precluded from being chargeable;[37] released from some liability which others are subject to.[38] In military circles, the word is sometimes used in the sense of "discharged" or "relieved from."[39]

---

1. Sharp v. Lush, 10 Ch. D. 468, 470.

2. Sharp v. Lush, 10 Ch. D. 468, 470. See generally Executors and Administrators §§ 515–558, 2283–2296; Wills [40 Cyc 1361 et seq].

3. Executory:
Consideration see Contracts § 167.
Contract see Contracts § 11; Sales [35 Cyc 27]; Vendor and Purchaser [39 Cyc 1299].
Contract of sale see Sales [35 Cyc 27].
Devise see Wills [40 Cyc 1644].
Remainder see Continued Remainders 13 C. J. p 117; Estates §§ 195–232; Wills [40 Cyc 1664].
Trust see Trusts [39 Cyc 28, 195].

4. Black L. D.

5. Marin v. Lalley, 17 Wall. (U. S.) 14, 17, 21 L. ed. 596. See Garland Code (La.) § 98.

6. Harrod v. Voorhies, 16 La. 254, 256.

7. Marin v. Lalley, 17 Wall. (U. S.) 14, 17, 21 L. ed. 596.

8. See Executors and Administrators § 2 et seq.

9. See Ejido 19 C. J. p 1255.

10. A maxim meaning "Examples illustrate the law; do not restrict it." Adams Gloss.

11. A maxim meaning "Examples do not restrict the rule, but speak of the cases which most frequently occur." Trayner Leg. Max.

[a] **Applied in:** Wilson v. Merry, L. R. 1 H. L. Sc. 326, 332.

12. Exemplary damages see Damages §§ 18, 268–298.

13. Century D.

14. See also Authentication 6 C. J. p 863; Certification 11 C. J. p 78; Copy 13 C. J. p 933; Evidence §§ 935–1026, 1138–1163.

15. Webster D. [quot Pineland Club v. Robert, 171 Fed. 341, 344, 96 CCA 233].

[a] **"Exemplified copy"** is a duplicate or transcript of the records or proceedings duly authenticated under the seal of a court, and duly certified to by the custodian of such records and proceedings. In re Box, 127 Wis. 264, 106 NW 1063, 1065.

16. Pineland Club v. Robert, 171 Fed. 341, 345, 96 CCA 233.

17. Bouvier L. D. [quot Dickinson v. Chesapeake, etc., R. Co., 7 W. Va. 390, 412].

18. Black L. D.

[a] **Often abbreviated** "ex gr." or "e. g." Black L. D.

19. See generally Exemptions 25 C. J. p 1.

"Detail" distinguished see Detail 18 C. J. p 977 note 34 [a].

20. In re Bradshaw, 60 N. C. 379, 381.

21. In re Strawbridge, 39 Ala. 367, 379.

22. In re Strawbridge, 39 Ala. 367, 379.

23. Glassinger v. State, 24 Oh. St. 206, 207 [cit Bouvier L. D.].

24. Glassinger v. State, 24 Oh. St. 206, 207.

[a] **"Disqualify" distinguished.**— The exemption of an elector from service upon a jury is not a disqualification, but a personal privilege which he may waive; and if he does so, parties have no ground of complaint. State v. Stunkle, 41 Kan. 456, 459, 21 P 675 ("To exempt is not to disqualify. Exemption is the personal privilege of the party exempted, with which no one else has any concern").

25. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

26. Century D. [quot Jones v. Wells, 83 Misc. 508, 511, 145 NYS 601]; Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

27. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

28. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

29. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

[a] **"Limit" distinguished.** — "To be 'exempt' implies an absolute release from, while to 'limit' implies a restriction as to amount or a restricting within certain bounds." Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113. To same effect Jones v. Wells, 83 Misc. 508, 145 NYS 601.

30. Burrill L. D. [quot Church Charity Foundation v. Peo., 6 Dem. Surr. 154, 156, 11 NYSt 704].

31. In re Bradshaw, 60 N. C. 379, 381.

32. Century D. [quot Jones v. Wells, 83 Misc. 508, 511, 145 NYS 601].

33. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

34. Century D. [quot Jones v. Wells, 83 Misc. 508, 511, 145 NYS 601].

35. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

36. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

37. Rex v. Leeds, etc., Canal Co., 5 East 325, 331, 102 Reprint 1095 (per Ellenborough, C. J.).

38. Webster D. [quot Baum v. Long Island R. Co., 58 Misc. 34, 43, 108 NYS 1113].

39. In re Bradshaw, 60 N. C. 379, 381.

---

*By William Mortimer Crowther (Executorship Expenses—Exempt inclusive except the Spanish Words and Phrases).

3 8198 309 316 196
THE UNIVERSITY OF ILLINOIS AT CHICAGO

THIS BOOK IS FOR USE
ONLY IN THE LIBRARY
IT DOES NOT CIRCULATE